

# Whither Whistleblowing? Bounty Regimes, Regulatory Context, and the Challenge of Optimal Design

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*Whistleblower bounty schemes that pay individuals a cash “bounty” for surfacing information about illegal conduct have rapidly gained public and scholarly attention, fueling calls to install a bounty approach across numerous regulatory areas, from workplace safety, environmental protection, and civil rights to political corruption, immigration, and antitrust. Yet despite the enthusiasm, bounty regimes have remained confined to the fraud context (procurement, securities, tax). This Article uses this fact as a jumping off point and, looking across the regulatory state, aims to answer some basic questions about bounty regimes that have thus far eluded sustained scholarly attention: What features of a given regulatory area make it more or less conducive to a bounty approach? Given this, how might existing bounty regimes be revised? And if bounty regimes were to break out of the fraud area, where might they most profitably spread? It offers some initial answers to these questions by constructing a simple framework that shows how two features of the regulatory environment — the directness of the harm to be regulated and the determinacy of the legal mandate to be implemented — structure the choice among competing bounty approaches. These aspects of regulatory context, I argue, map onto the two most vexing challenges facing regulatory architects weighing a bounty mechanism or choosing among competing designs: optimizing*

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*the quantity and quality of information revelation and maintaining public control over the elaboration of legal mandates. The framework brings into relief some of the fault-lines in the growing scholarly debate about the optimal use and design of bounty schemes, including the choice between a simple cash-for-information scheme and a more elaborate qui tam scheme in which whistleblowers are vested with independent enforcement authority via a private right of action. It also yields a rough regulatory roadmap showing where existing bounty schemes might be revised and also the areas to which a bounty approach might be usefully exported.*

## INTRODUCTION

The future seems bright for whistleblower reward schemes that pay individuals a cash “bounty” for surfacing information about illegal conduct. In the United States, *qui tam* lawsuits under the False Claims Act (FCA) are flourishing.<sup>1</sup> The Internal Revenue Service (IRS)’s bounty program is showing signs of life since its 2006 revision,<sup>2</sup> as is the fortified bounty scheme Congress enacted as part of its Dodd-Frank overhaul of financial and securities regulation.<sup>3</sup> And

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- 1 False Claims Act, 31 U.S.C. §§ 3729-3733 (2006). For statistics on the FCA regime’s rapid growth, see David Freeman Engstrom, *Harnessing the Private Attorney General: Evidence from Qui Tam Litigation*, 112 COLUM. L. REV. 1244 (2012) [hereinafter Engstrom, *Harnessing*]; David Freeman Engstrom, *Private Enforcement’s Pathways: Lessons from Qui Tam Litigation*, 115 COLUM. L. REV. (forthcoming 2014) [hereinafter Engstrom, *Pathways*]. For more details on the current structure of the regime, see *infra* notes 20-22 and accompanying text.
  - 2 See IRS WHISTLEBLOWER OFFICE, FISCAL YEAR 2012 REPORT TO THE CONGRESS ON THE USE OF SECTION 7623, at 17 (2012), available at [http://www.irs.gov/pub/whistleblower/2012%20IRS%20Annual%20Whistleblower%20Report%20to%20Congress\\_mvww.pdf](http://www.irs.gov/pub/whistleblower/2012%20IRS%20Annual%20Whistleblower%20Report%20to%20Congress_mvww.pdf) (noting whistleblower payouts of \$125,000,000 after a four-year span during which payouts did not exceed \$23,000,000); see also U.S. GOV’T ACCOUNTABILITY OFFICE, TAX WHISTLEBLOWERS: INCOMPLETE DATA HINDERS IRS’S ABILITY TO MANAGE CLAIM PROCESSING TIME AND ENHANCE EXTERNAL COMMUNICATION 3-4 (2011) (describing 2006 changes).
  - 3 See U.S. SECURITIES & EXCHANGE COMM’N, ANNUAL REPORT ON THE DODD-FRANK WHISTLEBLOWER PROGRAM, FISCAL YEAR 2012, at 11 (2012), available at <http://www.sec.gov/about/offices/owb/annual-report-2012.pdf> (noting 3001 tips during fiscal year 2012); Press Release, U.S. Securities & Exchange Comm’n, SEC Issues First Whistleblower Program Award (Aug. 21, 2012), available at <http://www.sec.gov/news/press/2012/2012-162.htm> (noting first award under scheme). Other signs of life include a \$296,000,000 fine in an action regarding mortgage-

political conditions in the United States, and beyond, seem ripe for further expansion as a new era of fiscal austerity drives the legislative search for privatized, off-budget regulatory tools. Add to this mounting scholarly calls to deploy bounty schemes across a wide range of regulatory areas — from workplace safety,<sup>4</sup> environmental protection,<sup>5</sup> and civil rights<sup>6</sup> to political corruption,<sup>7</sup> immigration,<sup>8</sup> and antitrust<sup>9</sup> — and the table seems set for a major shift in regulatory approach.

Yet lurking beneath the admiring rhetoric is a stark reality: whistleblower reward schemes have rarely traveled beyond the fraud context. True, an oddball

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backed securities that was apparently initiated by a whistleblower tip. See U.S. Securities & Exchange Comm'n, Litigation Release No. 22533 (Nov. 16, 2012), available at <http://www.sec.gov/litigation/litreleases/2012/lr22533.htm> (noting award); *Award Claims Page*, U.S. SECURITIES & EXCHANGE COMM'N, <http://sec.gov/about/offices/owb/owb-awards.shtml> (last visited Feb. 5, 2014) (noting whistleblower award in connection with case). For more details on the current structure of the regime, see *infra* notes 16-19 and accompanying text.

- 4 See Jarod S. Gonzalez, *A Pot of Gold at the End of the Rainbow: An Economic Incentives-Based Approach to OSHA Whistleblowing*, 14 EMP. RTS. & EMP. POL'Y J. 325 (2010).
- 5 See Pamela H. Bucy, *Private Justice*, 76 S. CAL. L. REV. 1, 52-53, 72 (2002); Jill E. Fisch, *Class Action Reform, Qui Tam, and the Role of the Plaintiff*, 60 LAW & CONTEMP. PROBS. 167 (1997); Barton H. Thompson, Jr., *The Continuing Innovation of Citizen Enforcement*, 2000 U. ILL. L. REV. 185, 205-06.
- 6 See Jan P. Mensz, *Citizen Police: Using the Qui Tam Provision of the False Claims Act to Promote Racial and Economic Integration in Housing*, 43 U. MICH. J.L. REFORM 1137 (2010); cf. Myriam Gilles, *Reinventing Structural Reform Litigation: Deputizing Private Citizens in the Enforcement of Civil Rights*, 100 COLUM. L. REV. 1384 (2000) (advocating a “deputation” approach to civil rights enforcement actions seeking equitable relief).
- 7 See Aaron R. Petty, *How Qui Tam Actions Could Fight Public Corruption*, 39 U. MICH. J.L. REFORM 851, 852 (2006).
- 8 See Jeffrey Manns, *Private Monitoring of Gatekeepers: The Case of Immigration Enforcement*, 2006 U. ILL. L. REV. 887, 931.
- 9 See Thomas C. Crumplar, *An Alternative To Public and Victim Enforcement of the Federal Securities and Antitrust Laws: Citizen Enforcement*, 13 HARV. J. LEGIS. 76 (1975); William E. Kovacic, *Bounties as Inducements to Identify Cartels*, in EUROPEAN COMPETITION LAW ANNUAL 2006: ENFORCEMENT OF PROHIBITION OF CARTELS 571 (Claus-Dieter Ehlermann & Isabell Ananasiu eds., 2007); William E. Kovacic, *Private Monitoring and Antitrust Enforcement: Paying Informants to Reveal Cartels*, 69 GEO. WASH. L. REV. 766 (2001); Kevin R. Sullivan, Kate Ball & Sarah Klebolt, *The Potential Impact of Adding a Whistleblower Rewards Provision to ACPERA*, 11 ANTITRUST SOURCE 1 (2011).

trio of countries that includes South Korea, the United Kingdom, and Hungary recently installed bounty schemes in the antitrust context.<sup>10</sup> But the broader point holds, particularly in the United States: bounty schemes are largely limited to procurement, tax, and securities fraud.<sup>11</sup> Despite the academic buzz, whistleblowing's reach, it seems, has largely exceeded its grasp.

Why have bounty regimes remained confined to the fraud context? More broadly, what attributes of a given substantive regulatory area make it more or less conducive to a bounty approach? And if bounty regimes *were* to break out of the fraud area, where might they most profitably spread? This Article offers an initial attempt to answer these questions. It does so by constructing a simple framework that shows how two core features of the regulatory environment — the “directness” of the harm to be regulated and the determinacy of the legal mandate to be implemented — structure the choice among competing bounty-regime approaches. These two aspects of regulatory context, I argue, map onto the two most vexing challenges facing regulatory architects weighing a bounty mechanism or choosing among competing designs: optimizing the quantity and quality of information revelation (labeled the “Goldilocks problem” in what follows) and maintaining public, democratically accountable control over the elaboration of legal mandates.

This conceptual framework yields a pair of payoffs. First, it brings into better relief some of the fault-lines in growing scholarly debate about the optimal design of bounty schemes, particularly the choice between a simple cash-for-information scheme (e.g., the Dodd-Frank regime) and a more elaborate *qui tam* scheme in which whistleblowers are vested with independent enforcement authority via a private right of action (e.g., the FCA regime).<sup>12</sup>

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10 See Sullivan, Ball & Klebolt, *supra* note 9, at 1 (providing details of each country's regime).

11 Trivial exceptions include statutory bounties for information regarding violations of U.S. customs laws, *see* Tariff Act of 1930, 19 U.S.C. § 1619(a) (1930), as well as *qui tam*-like provisions authorizing private suits for violations of Native American protection laws, *see* Act June 30, 1834, 25 U.S.C. § 201 (1834), and prohibitions on arming vessels against a “friendly nation,” Act June 5, 1794, 18 U.S.C. § 962 (1794). A more frequently invoked exception, though one whose days may be numbered, is the False Marking Act. *See* 35 U.S.C. § 292 (2011); *see also* Unique Product Solutions, Ltd. v. Hy-Grade Valve, Inc., No. 5:10-CV-1912, 2011 WL 924341 (N.D. Ohio, Mar. 14, 2011) (striking down False Marking Act as unconstitutional).

12 *See, e.g.*, Patrick A. Barthle II, Note, *Whistling Rogues: A Comparative Analysis of the Dodd-Frank Whistleblower Program*, 69 WASH. & LEE L. REV. 1201 (2012) (comparing the two schemes); Anthony J. Casey & Anthony Nibblett, *Noise Reduction: The Screening Value of Qui Tam*, WASH. U. L. REV. (forthcoming)

A substantial law review literature engages in within-regime evaluation of bounty schemes, separately weighing the pros and cons of a bounty approach in the Dodd-Frank, FCA, or other regulatory context.<sup>13</sup> And a further literature abstracts from regulatory context entirely in modeling the incentive effects of whistleblower rewards and protections on reporting behavior.<sup>14</sup> But there exists no synthetic effort to think comparatively — *across* regulatory areas — as a way to gain analytic leverage on questions of optimal institutional design.<sup>15</sup> The result is a cramped understanding of the possibilities and limits of bounty regimes and a failure to assimilate accrued insights about how such regimes work (or don't work) in ways that are useful to regulatory architects. Looking across regulatory contexts, rather than working within a single context or working down from abstract insights about the incentive effects of competing designs, thus offers a new way into the debate over the optimal structure of bounty regimes.

Second, the framework yields a rough prescriptive roadmap of the regulatory state in terms of where existing bounty schemes might be revised and also the regulatory areas to which a bounty approach might be usefully exported. For instance, the framework suggests that regulatory designers working within the fraud context may have gotten things exactly backwards: the FCA should be downgraded to a simple, cash-for-information bounty system, while the

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2014) (same); Geoffrey Christopher Rapp, *Mutiny by the Bounties? The Attempt to Reform Wall Street by the New Whistleblower Provisions of the Dodd-Frank Act*, 2012 BYU L. REV. 73, 78-79 (2012) (same); Michael Neal, *Securities Whistleblowing Under Dodd-Frank: Neglecting the Power of "Enterprising Privateers" in Favor of the "Slow-Going Public Vessel,"* 15 LEWIS & CLARK L. REV. 1107 (2011) (same).

13 See, e.g., Bucy, *supra* note 5; Engstrom, *Harnessing*, *supra* note 1; Engstrom, *Pathways*, *supra* note 1; Amanda Rose, *Better Bounty Hunting: How the SEC's New Whistleblower Program Changes the Securities Fraud Class Action Debate*, 108 NW. U. L. REV. (forthcoming 2014).

14 See, e.g., Robert M. Bowen et al., *Whistle-Blowing: Target Firm Characteristics and Economic Consequences*, 85 ACCT. REV. 1239, 1242 (2010); Alexander Dyck et al., *Who Blows the Whistle on Corporate Fraud?*, 65 J. FIN. 2213 (2010); Yuval Feldman & Orly Lobel, *The Incentives Matrix: The Comparative Effectiveness of Rewards, Liabilities, Duties, and Protections for Reporting Illegality*, 88 TEX. L. REV. 1151, 1161 (2010); Marsha J. Ferziger & Daniel G. Currell, *Snitching for Dollars: The Economics and Public Policy of Federal Civil Bounty Programs*, 1999 U. ILL. L. REV. 1141, 1144.

15 A partial exception here is Feldman & Lobel, *supra* note 14, which briefly explore how the psychology of social enforcement might affect the viability of a bounty approach across different policy contexts.

current tax bounty regime could be usefully expanded into full-scale *qui tam* systems. And moving beyond the fraud context, a bounty approach may well prove *least* effective in the workplace safety context as against other regulatory areas that regularly draw bounty-oriented reform proposals. To that extent, this Article offers a counterpoint to the hopeful thrust of a conference devoted to exploring “new approaches” to safety and health regulation. Policymakers, it turns out, should tread carefully in moving bounty regimes beyond fraud.

The rest of this Article unfolds as follows. Part I offers an overview of whistleblower bounty regimes and catalogues a range of competing design features. Part II reviews existing theory and evidence on the challenges and tradeoffs regulatory architects face in choosing among those design features. Part III then uses Part II’s insights to develop a simple framework that yields some tentative claims about the optimal use and design of bounty regimes across a range of regulatory areas.

## I. FLAVORS OF WHISTLEBLOWER BOUNTY REGIMES

Whistleblower bounty regimes pay individuals who surface information about misconduct a derivative payout — that is, a cash award separate from any compensable harm the individual has suffered. Beyond this core commonality, however, bounty regimes are a varied bunch. Table 1 offers a rough cut at a typology by summarizing six design dimensions along which bounty regimes differ. These include: (i) the bounty amount; (ii) the degree of regulator discretion in determining that amount and the actor (agency or court) who wields such discretion; (iii) whether a whistleblower can exercise independent enforcement authority and, if so, the degree to which public regulators exercise residual control over conduct of that authority; (iv) retaliation protections, including sanctions for retaliatory acts or guaranteed anonymity; (v) limitations on whistleblower standing, including carve-outs excluding particular whistleblower types (counsel, organizational outsiders) from participation; and (vi) filing prerequisites, including the requirement that a whistleblower first report wrongdoing internally before making an external report to a regulator.

**Table 1: Bounty Regimes at a Glance**

Design Dimensions	Real-World Examples	
	Dodd-Frank Bounty Regime	Qui Tam Provisions of False Claims Act
Bounty Amount	10-30% of sanctions exceeding one million dollars	15-25% of recovery where DoJ intervenes; 25-30% where DoJ declines to join
Degree of Regulator Discretion in Making or Calculating Awards	Tipper guaranteed at least 10%; but SEC retains unappealable discretion to set amount within statutory bounds	“Relator” guaranteed at least 15%; court determines ultimate bounty amount
Whether Whistleblower Wields Independent Enforcement Authority, and Degree of Residual Public Control Over Private Enforcement Actions	No — SEC alone decides whether to pursue enforcement action	Yes — but DoJ with full gatekeeper powers to control or terminate private actions
Retaliation Protections	Anti-retaliation private right of action; anonymity guarantee where represented by counsel	Anti-retaliation private right of action, but no anonymity guarantee
Limits on Whistleblower Eligibility	Yes — excludes government agency employees and tipsters who obtained info pursuant to legal or accounting engagement or as part of internal compliance process; information must be “original” (i.e., derived from whistleblower’s “independent knowledge or analysis”)	“Relator” must be “original source” of information upon which fraud claim based where previously “publicly disclosed”
Filing Prerequisites	Tipster must first make internal report	None

Table 1 also compares two real-world examples to show how some of these design features fit together. First, the recently expanded Dodd-Frank bounty scheme provides cash for information by guaranteeing a whistleblower an automatic reward of ten to thirty percent of any monetary sanctions in excess of one million dollars resulting from a successful Securities and Exchange Commission (SEC)-initiated judicial or administrative action.<sup>16</sup> But the SEC retains near-total control over the rest of the system, exercising full discretion whether to initiate an enforcement action in the first place and in calculating the ultimate bounty amount so long as within statutory bounds.<sup>17</sup> Finally, whistleblowers enjoy robust anti-retaliation protections, including a private right of action in federal court<sup>18</sup> and an assurance of anonymity if represented by counsel.<sup>19</sup>

By contrast, the FCA's *qui tam* system entitles whistleblowers to a bounty of fifteen to thirty percent of any recovery and gives them a private right of action to pursue claims even where the government refuses to join and co-prosecute the action.<sup>20</sup> But the United States Department of Justice (DoJ) exercises substantial residual control over private enforcement efforts through the power to control or terminate private actions and veto private settlements, even though courts determine the ultimate bounty payout.<sup>21</sup> Finally, the FCA

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16 See Dodd-Frank Wall Street Reform and Consumer Protection Act, 15 U.S.C. § 78u-6(b)(1) (2010).

17 *Id.* §§ 78u-6(c)(1)(A), 6(f). This differs from the SEC bounty regime in its prior guise, which made bounty awards entirely discretionary on the part of the SEC. The resulting uncertainty among would-be informants helps explain why the system generated so few tips. See Ferziger & Currell, *supra* note 14, at 1144. The same is true of the IRS's whistleblower program, which likewise started out as a discretionary scheme in which the Service retained full control over awards. See *History of the Whistleblower/Informant Program*, IRS, <http://www.irs.gov/uac/History-of-the-Whistleblower-Informant-Program> (last updated Mar. 7, 2013).

18 See 15 U.S.C. § 78u-6(h)(1)(C).

19 See *id.* § 78u-6(d)(2); 17 C.F.R. §§ 240.21F-7(b)(1), 240.21F-9(c) (2013).

20 See False Claims Act, 31 U.S.C. § 3730(b)-(d) (2006).

21 See *id.* §§ 3730(c)(2)(B)-(C) (termination and settlement authority); *id.* § 3730(b)(1) (veto over private settlements); *id.* §§ 3730(c)(1), 3730(c)(2)(C) (intervention and control authority). See generally David Freeman Engstrom, *Public Regulation of Private Enforcement: Empirical Analysis of DOJ Oversight of Qui Tam Litigation Under the False Claims Act*, 107 NW. U. L. REV. 1689 (2013) [hereinafter Engstrom, *Public Regulation*] (cataloguing DoJ's oversight powers under the FCA). For a general overview of ways agencies might be given control rights over private litigation efforts, see David Freeman Engstrom, *Agencies as Litigation Gatekeepers*, 123 YALE L.J. 616 (2013) [hereinafter Engstrom, *Gatekeepers*].

offers whistleblowers substantial retaliation protections, including a private right of action, but it does not protect whistleblowers' anonymity.<sup>22</sup>

## II. BOUNTY REGIMES AND THE CHALLENGE OF OPTIMAL DESIGN

In evaluating the above menu of design options, academic inquiry has tended to proceed down either of two paths. One is to mix and match design features in an effort to meet what might be called the "Goldilocks" challenge: optimizing the quantity and quality of tips. The other is to consider the complex efficiency/control tradeoffs that inhere in the choice between a simple cash-for-information bounty scheme and a *qui tam* regime in which whistleblowers enjoy a private right of action. This Part considers each of these design challenges in turn.

### A. The Goldilocks Challenge

Meeting the Goldilocks challenge is no easy task. A basic rational-choice perspective tells us that whistleblowers gamble the personal and professional cost of reporting misconduct against potential payouts. Where rewards are too low or uncertain or retaliation protections too anemic, the system will not generate enough tips.<sup>23</sup> Providing too many incentives or protections, however, risks overloading the system, overwhelming an agency tasked with sifting good and bad tips.<sup>24</sup> Importantly, the concern here is not just higher administrative or other transaction costs that push the social cost of enforcement beyond its benefit. Rather, it is a deeper, and paradoxical, one. A budget-constrained agency that receives additional tips must either ignore some of them, perhaps using a triage approach to focus efforts on a subset of tips, or else allocate fewer investigative resources to each, thus degrading the accuracy of its screening efforts. The perverse result is that by reducing the certainty with which wrongdoing is detected and thus the probability that any given malfeasor will be made to internalize the costs of its misconduct, *more* whistleblowing may actually yield *less* overall deterrence.<sup>25</sup>

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22 See 31 U.S.C. § 3730(h).

23 See Ferziger & Currell, *supra* note 14, at 1172.

24 *Id.*

25 See Casey & Niblett, *supra* note 12, at 36; see also Louis Kaplow & Steven Shavell, *Accuracy in the Determination of Liability*, 37 J.L. & ECON. 1 (1994) (advancing a theory for why lower adjudicatory accuracy, whether false positives or false negatives, lowers deterrent effects). Note, however, two caveats to the claim that more whistleblowing yields less deterrence. First, the theory that additional tips will yield lower deterrence rests on an assumption that there

If this were the entirety of the design challenge, then the task of optimizing bounty regimes would merely resemble perennial debate within tort, antitrust, or other litigation contexts as to what level of damages (single, multiple, punitive) will achieve desired levels of deterrence.<sup>26</sup> But note a further aspect of the Goldilocks challenge that is unique to the whistleblower context and further complicates design efforts: knowing when different design features are substitutes and when they are not.

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is a point at which additional tips will *decrease* the likelihood that a firm's misconduct will be accurately identified and sanctioned more than they *increase* the probability that the firm's misconduct is the subject of a tip at all. This is a plausible but by no means ironclad assumption. Second, from a social planner perspective, the more important concern here may be the social optimality of the deterrence additional tips yield. This is because additional tips may, by reducing the accuracy of an agency's decision to enforce, create social loss by deterring socially productive (i.e., legal) activity, offsetting welfare gains from deterred misconduct. Note that the various steps in the above analysis become still more complicated when we allow the agency to allocate its scarce resources between investigatory and enforcement effort, or when an agency receives some portion of the monetary fines it imposes. More formal theoretical work might attempt to model such dynamics.

Yet while Casey and Niblett insightfully connect tip volume, sanction certainty, and deterrence, some of their other claims about the optimal design of bounty regimes are more open to question. Of particular note is their argument that a *qui tam* system will yield systematically better information than a cash-for-information approach because the costs of reporting misconduct, and not just the benefits of doing so, are contingent upon success via the FCA's reverse fee-shift for frivolous claims. See Casey & Niblett, *supra* note 12, at 45. But it is important to note that loss-contingent costs are not inherent to the FCA's *qui tam* structure: one could just as easily authorize an agency-levied sanction for frivolous tips in a cash-for-information system. Nor, as Casey and Niblett suggest in passing, does a *qui tam* regime's deployment of plaintiff-side counsel necessarily deliver higher-quality information. Casey & Niblett, *supra* note 12, at 43. Indeed, whistleblowers in both regime types have strong incentives to engage in careful pre-filing inquiry to distinguish their tips from the pack or avoid pouring valuable resources into hopeless cases, and they will often employ counsel to do so. This may explain why the FCA *qui tam* and securities plaintiff's bars have flooded the Dodd-Frank cash-for-information scheme and become central to its operation. Rose, *supra* note 13, at 48.

26 See, e.g., ROBERT A. KAGAN, ADVERSARIAL LEGALISM: THE AMERICAN WAY OF LAW 141-44 (2001) (rehearsing the debate whether tort law over- or under-deters); Steven C. Salop & Lawrence J. White, *Treble Damages Reform: Implications of the Georgetown Project*, 55 ANTITRUST L.J. 73, 93 (1986) (same for antitrust).

One version of this challenge extends from heterogeneity within whistleblower ranks and what might be called the paradox of organizational position. Whistleblowers higher up in the managerial hierarchy tend to have better information about wrongdoing compared to underlings because of their more synoptic organizational view.<sup>27</sup> But higher-ups may also be more likely to possess firm- or industry-specific skills, which may also make them more sensitive to retaliation protection (including anonymity guarantees) than lower-level employees.<sup>28</sup> This is an important possibility, for it suggests that regulatory architects may be able to coax more high-quality tips into the system by strengthening retaliation protections rather than by raising bounties. Here, the broader challenge for regulatory designers is identifying when different design features (higher or lower bounties, stronger or weaker retaliation protections) will do the same work in generating a desired quantity and quality of tips and when they will in fact generate an entirely different tip stream.

A second version of this substitutability challenge arises from an emerging literature exploring the complex interaction of material and moral incentives to report wrongdoing. Of particular concern is the possibility that material rewards will “crowd out” moralistic motivation to surface information about misconduct, particularly where bounties are relatively small.<sup>29</sup> This crowd-out effect can set what amounts to a lower-bound on the efficient bounty level;

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27 See, e.g., Terance D. Miethe & Joyce Rothschild, *Whistleblowing and the Control of Organizational Misconduct*, 64 SOC. INQUIRY 322, 332 (1994) (noting that managers are “in more pivotal positions to directly observe or be informed about organizational wrongdoing”); see also Engstrom, *Harnessing*, *supra* note 1, at 1296 (reporting findings that “managerial” *qui tam* relators are more likely to succeed in FCA cases than “line-level” relators).

28 See Bucy, *supra* note 5, at 62 (noting that higher-ups may “incur a greater professional risk by coming forward than do employees whose skill and corporate position are more fungible”).

29 The hypothesized mechanism here is that offering bounties reduces the moral valence of the misconduct by commodifying the system. This might be especially true where bounties are low, which both commodifies the system and at the same time signals that the misconduct is not severe enough to warrant a substantial payout. See Feldman & Lobel, *supra* note 14, at 1155 (reporting experimental findings that low monetary incentives “crowd out, or suppress, internal moral motivation”). For the classic economics analysis, see RICHARD M. TITMUS, *THE GIFT RELATIONSHIP: FROM HUMAN BLOOD TO SOCIAL POLICY* (1971); see also Carl Mellstrom & Magnus Johannesson, *Crowding Out in Blood Donation: Was Titmuss Right?*, 6 J. EUR. ECON. ASS’N 845 (2008) (offering an updated and more skeptical view).

offering rewards below this level will produce no net increase in tip volume or quality and at greater cost to the government or, worse, a net *decrease* in revealed information.<sup>30</sup> Here again, bounties and retaliation protections — though both shape the whistleblower cost-benefit calculus — may not be perfect substitutes. Indeed, in whistleblower regimes where the crowd-out risk is great, fortifying retaliation protections may draw more information into the system than raising bounties. Put more starkly, the best way to achieve an optimal amount of information revelation in some regulatory regimes may be not to offer bounties at all.<sup>31</sup>

## B. The Efficiency/Control Tradeoff

A second line of scholarly inquiry illuminates the complex efficiency and control tradeoffs posed by the choice between a simple cash-for-information bounty scheme and a *qui tam* regime granting whistleblowers a private right of action. At least part of the theoretical template here tracks an older debate about the choice between public and private enforcement.<sup>32</sup> Thus, a *qui tam* approach may prove superior to a cash-for-information approach because of private-sector efficiencies in the conduct of enforcement actions<sup>33</sup> or in mobilizing and demobilizing enforcement capacity in response to shifts in the amount of actionable misconduct.<sup>34</sup> And yet, a cash-for-information approach may prove superior where public enforcers leverage scale economies

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30 Feldman & Lobel, *supra* note 14, at 1194 (noting that reporting levels were “even lower than situations where no incentive was present” where survey respondents were offered a low reward and had a low perception of the misconduct’s severity).

31 A final possibility related to the Goldilocks challenge is that the ethics-based calculus of moralistic whistleblowers will generate systematically better or worse information about misconduct than the instrumental calculus of materialistic whistleblowers. Future work might assess this possibility and tease out its design implications.

32 For comprehensive surveys of the literature, see A. Mitchell Polinsky & Steven Shavell, *Public Enforcement of Law*, in *CRIMINAL LAW AND ECONOMICS* 1, 55 (N. Garoupa ed., 2009); Reza Rajabiun, *Private Enforcement of Law*, in *CRIMINAL LAW AND ECONOMICS*, *supra*, at 60.

33 *See, e.g.*, Richard B. Stewart & Cass R. Sunstein, *Public Programs and Private Rights*, 95 *HARV. L. REV.* 1193, 1298 (1992) (noting that public agencies suffer from “diseconomies of scale, given multiple layers of decision and review”).

34 For example, scholars have long argued that the propensity to commit fraud varies with the business cycle. *See, e.g.*, Paul Povel et al., *Booms, Busts, and Fraud*, 20 *REV. FIN. STUD.* 1219, 1219-20 (2007).

that decentralized *qui tam* litigants cannot,<sup>35</sup> or because profit-motivated private enforcers engage in wasteful and duplicative enforcement efforts by piggybacking on public enforcers or each other.<sup>36</sup> Viewed through this narrow efficiency lens, the choice between a cash-for-information and a *qui tam* approach will turn at least in part on an empirical judgment as to which can generate a chosen level of enforcement effort — and, with it, a desired quantum of deterrence — at lower social cost.

The standard theoretical template is less well-developed, however, when it comes to the control side of the equation. Champions of a *qui tam* bounty approach often parrot the more general claim that private enforcement helps counter agency “capture” by providing a parallel, politically insulated mode of enforcement.<sup>37</sup> But this overlooks the fact that *qui tam* bounty regimes — both actual and proposed — typically include at least some degree of public control over the conduct of private enforcement efforts, including (as noted previously) the ability of public prosecutors to take over and steer those efforts or even terminate them outright.<sup>38</sup> As a result, the extent to which *qui tam* enforcement can serve a salutary anti-capture or agency-forcing role will turn on the amount of public control that is injected back into the system. Indeed, a *qui tam* provision coupled with strong public control over private enforcement efforts may merely relocate the point in the regulatory process at which capture occurs.

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35 See, e.g., A. Mitchell Polinsky & Steven Shavell, *The Economic Theory of Public Enforcement of Law*, 38 J. ECON. LITERATURE 45, 46 (2000) (noting the inability of private enforcers to develop enforcement-aiding information systems, which are akin to “natural monopolies”).

36 Another core claim in the law and economics literature is that public enforcement is more efficient because public enforcers can economize on enforcement costs by imposing maximally high sanctions on relatively few violators, while upping payouts available to private enforcers merely induces ever greater private investment in enforcement. See William M. Landes & Richard A. Posner, *The Private Enforcement of Law*, 4 J. LEGAL STUD. 1, 15 (1975) (offering seminal analysis of this point). However, the real-world force of this point is limited given political and constitutional constraints on imposing maximal damages. See Engstrom, *Gatekeepers*, *supra* note 21, at 13 n.40.

37 See, e.g., William E. Kovacic, *Whistleblower Bounty Lawsuits as Monitoring Devices in Government Contracting*, 29 LOY. L.A. L. REV. 1799, 1824 (1996) (noting the anti-capture role of a *qui tam* mechanism). For recent thinking on the capture concept, see PREVENTING CAPTURE: SPECIAL INTEREST INFLUENCE IN REGULATION, AND HOW TO LIMIT IT (Daniel Carpenter & David Moss eds., 2013).

38 See *supra* notes 20-22 and accompanying text.

More importantly, much existing commentary, by fixating on the capture concept, tends to miss a more pedestrian set of bureaucratic pathologies that can just as readily cause the system to deviate from the theoretical enforcement ideal. Thus, we might worry that a politically conscious agency charged with sifting good and bad tips will seek to burnish its reputation and curry favor with legislative overseers by pursuing a mix of high-value, marquee cases and low-value, easy-to-win cases, leaving a swath of under-deterred misconduct in between.<sup>39</sup> Here, the addition of a *qui tam* mechanism can serve as a salutary “failsafe” mode of enforcement that fills in what would, in a cash-for-information regime, remain socially inefficient gaps in regulatory effort.<sup>40</sup>

And yet, the potential anti-capture and gap-filling advantages of a *qui tam* mechanism can also come at a substantial cost. For instance, the public bureaucracy literature also predicts that an enforcement agency vested with gatekeeper powers will sub-optimally use its power to terminate *qui tam* enforcement actions. The main reason is that a politically conscious agency may prefer to put its scarce resources toward affirmative enforcement efforts that demonstrate its competency and value to political overseers — for instance, by joining meritorious *qui tam* actions — rather than wasting energy on reactive case-screening efforts that do not produce tangible litigation successes.<sup>41</sup> As a result, even an agency vested with absolute control over *qui tam* enforcement efforts will admit claims to the system that it would not itself pursue in a cash-for-information regime.

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39 See Engstrom, *Public Regulation*, *supra* note 21. Note that imperfect managerial control over careerist line-level prosecutors who conduct case-screening might produce a similar pattern. *Id.*

40 See John C. Coffee, Jr., *Rescuing the Private Attorney General: Why the Model of the Lawyer as Bounty Hunter Is Not Working*, 42 MD. L. REV. 215, 215 (1983) (using the “failsafe” locution).

41 See Engstrom, *Public Regulation*, *supra* note 21. A further reason is that a gatekeeper agency does not fully internalize the costs of unsuccessful enforcement actions because it can shift the cost of terminating cases, both reputational and actual, to the courts. See Dayna B. Mathew, *The Moral Hazard Problem with Privatization of Public Enforcement: The Case of Pharmaceutical Fraud*, 40 U. MICH. J.L. REFORM 281 (2007) (framing the issue as a moral hazard problem and arguing that the availability of private enforcement “causes public prosecutors to reduce the care that typically controls their exercise of prosecutorial discretion”); see also Justin Fox & Matthew C. Stephenson, *Judicial Review as a Response to Political Posturing*, 105 AM. POL. SCI. REV. 397 (2011) (describing an analogous “bailout effect” in the constitutional law context whereby “judicial review may rescue elected officials from the consequences of ill-advised policies”).

This is critical, for the private enforcement actions that the gatekeeper agency neither joins nor terminates can yield two types of agency costs. One type of cost is well-known and once more tracks the classic debate about the choice between public and private enforcement. In particular, profit-motivated *qui tam* enforcers will, untempered by prosecutorial discretion, target misconduct even where the social cost of enforcement exceeds any benefit, yielding wasteful over-deterrence and unnecessary expenditure of social resources.<sup>42</sup>

But a further agency cost that has attracted less scholarly attention is the threat private *qui tam* enforcement poses to macro-level, public control over the elaboration of legal mandates.<sup>43</sup> More specifically, theory and evidence suggest that entrepreneurial *qui tam* enforcers will relentlessly press law's boundaries, exploiting regulatory ambiguities in industry-wide lawsuits, rather than targeting patently illegal wrongdoing that public-minded prosecutors would reject.<sup>44</sup> And because courts, agencies, and even the legislature itself can only imperfectly police these efforts, *qui tam* regimes may, relative to cash-for-information regimes, exhibit substantial statutory "drift" away from legislative purposes over time. The presence of a *qui tam* mechanism can thus drive the law down pathways it would not travel if enforcement was left in purely public hands.<sup>45</sup>

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42 See generally Steven Shavell, *The Fundamental Divergence Between the Private and the Social Motive to Use the Legal System*, 26 J. LEGAL STUD. 575 (1997) (modeling this dynamic).

43 For a fuller-dress version of the necessarily brief analysis that follows, including the mechanisms through which private actors are able to remake the regulatory landscape outside public control and the resulting deviation from the evolutionary path that a legal mandate would travel down in the absence of private enforcement, see Engstrom, *Pathways*, *supra* note 1.

44 See *id.* at 16.

45 One possible mechanism here is, as noted, the limited will and capacity of courts, agencies, and the legislature to police deviations from legislative purposes. See *id.* Another is that litigation outcomes can reshape the interest-group environment by giving early litigation losers powerful incentives to work politically to ensure that their competitors are subject to the same liability. As a concrete example, had Walmart, contrary to reality, suffered a large judgment in *Walmart v. Dukes*, 131 S. Ct. 2541 (2011), the company would have faced powerful incentives to make sure that its big-box-store competitors were similarly subject to large-scale class actions asserting discrimination via excessive managerial discretion. *Walmart*, 131 S. Ct. 2541. The result is what political scientists and economists would call an increasing returns process in which early litigation outcomes, by incrementally remaking the political landscape, can push legal mandates along evolutionary paths that are different from those the law would follow in the absence of a private enforcement role. As noted above, interested readers can

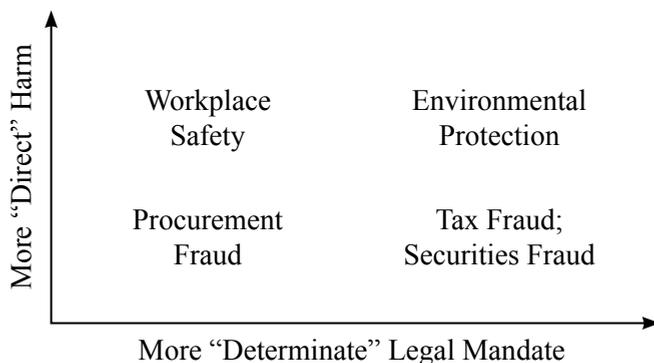
A fuller account of these various dynamics helps bring the institutional design challenges facing regulatory architects considering bounty regimes into clearer focus. In particular, the design of bounty regimes is plagued by two sets of agency costs. The first set of agency costs is public and politics-based: for instance, the risk that purely public enforcement, as in a cash-for-information regime, will yield socially inefficient regulatory gaps because of regulatory capture and other bureaucratic pathologies. The second set of agency costs is private and profit-based: the risk of overzealous enforcement and statutory drift where profit-motivated private enforcers with independent enforcement authority are subject to imperfect public control. The result is an explicit, and intractable, set of design tradeoffs. Indeed, a *qui tam* approach can serve a salutary gap-filling and anti-capture role, thus mitigating public-side agency costs. But the inclusion of a private *qui tam* enforcement mechanism also admits more, and more marginal, enforcement actions into the system, thus surrendering a degree of public control over the elaboration of legal mandates. Faced with this basic set of tradeoffs, the best regulatory architects can hope to achieve is jointly minimizing the agency costs on either side of the public-private divide.

### III. BOUNTY REGIMES, REGULATORY CONTEXT, AND A REFORM ROADMAP

The previous Parts offered an overview of bounty approaches and sketched the core challenges and tradeoffs regulatory architects face in choosing among competing designs. This Part aims to bridge these insights to regulatory reality by connecting them to discrete features of the regulatory contexts most often implicated in debates over the optimal design of bounty regimes. To be sure, an exercise of this sort carries risks. Carving up the regulatory state too abstractly will not yield cogent insights, either by eliding key differences across regulatory areas or inviting insoluble disputes about whether a given regulatory area in fact exhibits this or that feature. At the same time, categorizing regulatory contexts in a way that is too granular or multifaceted will not produce any generalizable insights at all. The challenge, then, is to identify features of the regulatory environment that permit useful generalizations across substantive policy areas without arriving at a mushy, “context matters” conclusion.

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find a fuller rehearsal of this theory, as well as concrete examples drawn from the FCA context, in Engstrom, *Pathways*, *supra* note 1.

**Figure 1: Bounty Regimes and Regulatory Context**

With these concerns in mind, this Part conducts the analysis around Figure 1's stylized two-by-two grid, designed to distinguish two core features of the regulatory contexts where bounty regimes are already in place (tax, securities, procurement fraud) or that most frequently draw bounty-oriented reform proposals (environmental protection, workplace safety). One axis of the grid captures the extent to which the harm to be regulated is more or less direct. The other axis captures whether the legal mandate to be implemented is more or less determinate. The remainder of this Part explains why these axes matter, defends the grid's salience as an organizing framework, and offers a reform roadmap charting the regulatory areas where existing bounty regimes might be revised or where a bounty approach might be usefully added.

### A. Direct Versus Indirect Harm and the Perils of Commodification

An initial question that regulatory architects considering revising or installing a bounty regime might ask is the degree to which the harm to be regulated takes a "direct" form — that is, affects a relatively small number of identifiable people based on characteristics unique to the group.<sup>46</sup> Workplace safety harms offer the archetypal example. Indeed, some of the more common workplace safety harms — unprotected falls, exposure to toxins, machinery accidents<sup>47</sup> — fit the bill almost perfectly, as they tend to afflict employees, or a subset

46 Note that this tracks at least one interpretation of the Supreme Court's distinction between rulemaking and adjudication for determining when Due Process protections attach. *See Bimetallic Inv. Co. v. State Bd. of Equalization*, 239 U.S. 441, 445-46 (1915); *Londoner v. City of Denver*, 210 U.S. 373, 385 (1908).

47 These harms relate directly to three of the entries in the Occupational Safety and Health Administration (OSHA)'s 2011 list of the "most frequently cited

of employees, at a particular entity or facility operated by that entity. At the other end of the “directness” spectrum sit the various types of fraud where bounty regimes are currently concentrated: tax, securities, and procurement. Here, the harm is highly diffuse and evenly distributed among a large, and largely anonymous, group of people. This is plainly the case with tax and procurement fraud, which harms all taxpayers. Yet it is also arguably true as to securities fraud, where the principal harms — investor losses, costlier capital, decreased liquidity — are widely felt in a world of diversified stock ownership and pervasive consumer loans.

“Directness” matters to the optimal design of bounty regimes in two ways. First, would-be whistleblowers may themselves be in harm’s way. Second, and more importantly, the degree of directness is likely to correlate, at least in a rough way, with the level of moral disapprobation the misconduct attracts. A pair of insights follow, both deriving from Part II’s analysis and together suggesting that policymakers should be cautious in using a bounty mechanism to elicit information about misconduct causing more direct harms.

First, in regimes regulating more direct harms, there may already be sufficient underlying incentive for whistleblowers to report misconduct causing more direct types of harm, either because would-be whistleblowers themselves stand to suffer direct harm as a result of the targeted misconduct or because they feel morally obligated to report wrongdoing. In such regimes, offering bounties may merely increase the programmatic cost to the government without producing any measurable uptick in whistleblower reports.

A second reason for caution stems from the crowd-out effect described previously. Particularly in low-reward situations, offering bounties may increase tips from whistleblowers for whom internal, moralistic motivation alone will not induce action, but the resulting commodification of the system may dampen the ethical motivations of those who would report wrongdoing even without a bounty offering, thus offsetting any rise in new, externally motivated tips.<sup>48</sup> Here, offering bounties may leave regulators no better off in terms of the quantity or quality of the tips they receive, but at a higher programmatic cost — and may even leave them *worse* off if the decline in internally motivated reports exceeds the rise in externally motivated ones.<sup>49</sup>

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standards.” See *Top 10 Most Frequently Cited Standards*, U.S. DEP’T OF LABOR, [http://www.osha.gov/Top\\_Ten\\_Standards.html](http://www.osha.gov/Top_Ten_Standards.html) (last visited Feb. 10, 2014).

48 See *supra* notes 29-31 and accompanying text.

49 Note here that the crowd-out risk may vary with the degree to which the harm in question is directed at the whistleblowers themselves, since a whistleblower who is in harm’s way is unlikely to evince a lower self-interested motivation to report wrongdoing as a result of available bounties. One might worry far more

Scarce agency resources may thus be better spent ensuring that anti-retaliation protections are fully binding, or whistleblower anonymity fully protected, rather than risking dampening moralistic incentives or paying bounties to whistleblowers who would surface information in any event.<sup>50</sup>

By contrast, large bounties may be the only way to generate a productive level of tips regarding misconduct causing indirect harms, such as securities, tax, or procurement fraud.<sup>51</sup> Lower moral disapprobation in these areas means that regulators cannot rely on an underlying moralistic proclivity to report wrongdoing.<sup>52</sup> Nor is there a substantial risk of crowd-out, as there is little moralistic motivation to report wrongdoing in the first place.

To be sure, these conclusions are not beyond criticism. Some may object to the allocation of specific substantive regulatory areas across the “More Direct” or “Less Direct” axis. A clear wildcard here is environmental protection, where harms can be more localized (a limited upriver release of toxins affecting a single small community) or more generalized (high-stack air pollution affecting an entire city or state). Reasonable minds might disagree about the degree to which moral disapprobation — and with it, the underlying propensity of whistleblowers to report wrongdoing on the basis of moralistic motivation alone — will vary, if at all, across pollution types. If environmental protection does not cohere as a single regulatory category, then perhaps policymakers could consider the nature of the harm to be targeted in making bounties selectively available.

Similarly, it is important to acknowledge possible objections to the “directness” concept itself. The version of “direct” used herein is keyed to the number and identifiability of victims as a proxy for moral disapprobation.

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about crowd-out among, say, managers or factory forepersons who observe direct harms to an identifiable group of employees but are not themselves in harm’s way. This also helps underscore the broader point that the effect of “directness” on reporting behavior will vary with the precise position whistleblowers occupy in relationship to the harm, not just whether the harm affects an identifiable group of people. Future theoretical or empirical work might attempt to account for this difference.

50 Note that regulators might reduce the crowd-out risk by creating a formal and well-publicized means by which moralistic reporters can donate any bounties earned to charity.

51 See Feldman & Lobel, *supra* note 14, at 1204 (noting that “high monetary awards” may be appropriate and necessary “when the goal is to incentivize reports in contexts that evoke less moral outrage, such as tax evasion”).

52 *Id.* at 1202 (“When the ethical significance attached to the reporting act is absent, the level of monetary compensation offered through the regulatory system is decisive.”).

But there are other framings that might have equal or greater descriptive and prescriptive power. As just one example, moral disapprobation might also correlate with whether the harms at issue take physical or “paper” forms.<sup>53</sup> Note, however, that this alternative framing would still serve to distinguish between types of fraud on the one hand and workplace safety or environmental protection on the other, leaving the main conclusions offered herein unchanged.<sup>54</sup>

Finally, the above analysis of the design implications of the directness of the harm would plainly benefit from more thinking about the dynamics of the workplace and the social and collective action problems therein. It is possible, for instance, that employees in workplaces posing physical risks perceive themselves as earning a risk premium, and safety regulation as a wage depressant.<sup>55</sup> To that extent, the complex relationship between material and moral motivations in the above analysis may not transfer from the experimental context in which it has been detected to real-world workplaces, particularly high-hazard ones. Further theoretical and empirical work could consider these possibilities in order to more carefully specify the conditions under which we might expect crowd-out.

## **B. Legal (In)Determinacy and the Problem of Public Control**

A second type of question regulatory architects should ask in considering whether to install a bounty regime concerns the determinacy of the legal mandate to be implemented. What is meant here is not just determinacy in the legal-philosophical sense as to whether legal language admits of objectively correct answers to legal questions or, to use a more concrete formulation, whether a legal mandate is comprised mostly of rule-like legal commands or

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53 A useful illustration of this intuition is the tendency in tort law to consider misconduct causing physical injury to be more reprehensible than purely economic harm. *See, e.g.*, *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 576-77 (1996) (defining reprehensibility for purposes of calculating punitive damages based on whether the harm was “purely economic in nature”).

54 Similarly, one could imagine a version of directness that is keyed to the observability of the harm by victims — for instance, workplace accidents as against workplace toxins. This would capture the possibility that even a distinct class of victims may not know they are being harmed and so would not serve as a dependable source of tips.

55 *See* W. KIP VISCUSI, *RATIONAL RISK POLICY* 46-47 (1998) (reviewing empirical evidence that workers in high-hazard jobs demand a wage premium); Peter Dorman & Paul Hagstrom, *Wage Compensation for Dangerous Work Revisited*, 52 *INDUS. & LAB. REL. REV.* 116 (1998) (same).

more flexible, standard-like directives.<sup>56</sup> Rather, the term is also designed to capture determinacy in a related but subtly different, delegation-related sense: the degree to which the legal mandates that make up a regulatory regime are relatively bounded in their application or instead are characterized by “open texture” that permits adaptation to new fact situations or regulatory contexts.<sup>57</sup> Put another way, determinacy as used here aims to capture whether the statute provides, in a classic formulation, a “horizon of open possibilities.”<sup>58</sup>

A pair of concrete examples will help illustrate, both drawn from regulatory contexts featured in Figure 1. To begin, tax law is relatively determinate in both senses of the term as used herein. For instance, compared to other regulatory areas, the Internal Revenue Code is arguably comprised of a high proportion of rule-like commands.<sup>59</sup> Moreover, these rules exist within a self-contained regulatory space; they have little or no application beyond payment of individual or corporate income tax.<sup>60</sup>

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56 See, e.g., KENT GREENAWALT, *LAW AND OBJECTIVITY* (1992); Ken Kress, *Legal Indeterminacy*, 77 CALIF. L. REV. 283 (1989).

57 On the difference between legal “ambiguity,” “vagueness,” and “open texture,” see Michael S. Moore, *The Semantics of Judging*, 54 S. CAL. L. REV. 151, 181-88, 193-202 (1981).

58 See *id.* at 201 (citing Friedrich Waismann, *Verifiability*, XIX PROCEEDINGS ARISTOTELIAN SOC’Y, SUPP. VOL. 123 (1945)).

59 See John A. Miller, *Indeterminacy, Complexity & Fairness*, 68 WASH. L. REV. 1, 28, 56-57, 62 (1993) (rehearsing the debate about how one might measure tax law’s determinacy and then concluding that tax law is “generally determinate” compared to other regulatory areas because of its length, detail, and rule-like nature). Of course, one can find examples that seem at odds with this conclusion: some of the more high-profile recent enforcement battles in the tax context concerned tax-shelter strategies that technically “worked” under the tax code’s more rule-like provisions but arguably violated judge-made anti-avoidance doctrines. See Sarah B. Lawsky, *Probably? Understanding Tax Law’s Uncertainty*, 157 U. PA. L. REV. 1017, 1032-34 (2009) (discussing these doctrines in the tax shelter context); David A. Weisbach, *An Economic Analysis of Anti-Tax-Avoidance Doctrines*, 4 AM. L. & ECON. REV. 88 (2002) (offering a more generalized account). Another example is the open-ended “arm’s length transaction” standard that governs multinational corporations’ use of transfer pricing to minimize tax liability by allocating income among tax jurisdictions. See, e.g., Ilan Ben Shalom, *Rethinking the Source of the Arm’s-Length Transfer Pricing Problem*, 32 VA. TAX REV. 425 (2013) (describing the “inherent vagueness” of the prevailing arm’s-length standard and suggesting its requirements “cannot be met, verified, or consistently enforced”).

60 See Miller, *supra* note 59, at 56-57 (noting that tax regulation is, relative to other regulatory areas, a “closed system”).

At the opposite end of the determinacy spectrum is the FCA's open-textured prohibition on presenting "a false or fraudulent claim for payment or approval" to the government.<sup>61</sup> As the Supreme Court has noted, this language, which goes undefined in the statute, was consciously designed by Congress to "reach[] beyond 'claims' which might be legally enforced, to all fraudulent attempts to cause the Government to pay out sums of money."<sup>62</sup> The result has been a continuing stream of interpretive controversies, among them whether the statute applies equally to "legally" as opposed to "factually" false claims<sup>63</sup> and whether liability depends on a finding of materiality (that is, whether the government would have paid on the claim had it known of the fraud).<sup>64</sup> Just as importantly, the FCA is also relatively unbounded insofar as its antifraud mandate applies to any federal program or expenditure, thus cutting across numerous regulatory areas, from healthcare, oil and gas royalties, and defense procurement to cyclist Lance Armstrong's apparently false certification that he did not use performance drugs during his team's sponsorship by the United States Postal Service.<sup>65</sup> Perhaps unsurprising given the FCA's unbounded and sprawling nature, *qui tam* enforcement efforts have drawn regular criticism for colonizing other regulatory regimes for which Congress did not provide a private right of action.<sup>66</sup>

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61 False Claims Act, 31 U.S.C. § 3729(a)(1)(A) (2006).

62 *United States v. Neifert-White Co.*, 290 U.S. 228, 233 (1968).

63 *See generally* Gregory Klass & Michael Holt, *Implied Certification Under the False Claims Act*, 41 PUB. CONT. L.J. 1, 7 (2011) (explaining and comparing "factually" and "legally" false claims).

64 *See* 31 U.S.C. § 3729(b)(4) (setting forth the current "materiality" standard as "having a natural tendency to influence, or be capable of influencing, the payment or receipt of money or property"). *See generally* John T. Boese, *The Past, Present, and Future of "Materiality" Under the False Claims Act*, 3 ST. LOUIS U. J. HEALTH L. & POL'Y 291 (2010) (noting judicial struggles over how to implement a materiality requirement).

65 *See* Engstrom, *Harnessing*, *supra* note 1, at 1271 (describing breadth of FCA cases); Juliet Macur, *Government Joins Suit Against Armstrong*, N.Y. TIMES, Feb. 22, 2013, at D1 (describing Armstrong case).

66 *See, e.g.*, Lisa Michelle Phelps, *Calling Off the Bounty Hunters: Discrediting the Use of Alleged Anti-Kickback Violations to Support Civil False Claim Actions*, 51 VAND. L. REV. 1003, 1027-28 (1998) (criticizing use of FCA as a "statutory vehicle" for enforcing federal anti-kickback statutes despite Congress's failure to provide a private right of action). *See generally* Gregory T. Jaeger & Jonathan L. Dieneshaus, *Fractious Fraud Fights*, LEGAL TIMES, Oct. 21, 1996, at S32 (explaining that the increase in FCA cases has "spawned new theories of liability, many of which stretch the boundaries of the FCA beyond its logical jurisdictional limits").

The degree of legal determinacy matters to the optimal design of bounty regimes for two reasons. As an initial matter, greater indeterminacy may, by reducing the certainty of payouts, operate to reduce tip volume.<sup>67</sup> It follows that the cost to government of a bounty approach may be greater in a less determinate regulatory area than in a more determinate one because the government may have to pay higher bounties in order to generate a productive level of information. This may alter the legislative calculus by lowering returns to a bounty approach compared to other regulatory approaches. More significantly, and following more directly from Part II's analysis, legal indeterminacy correlates with the risk that private enforcers vested with a *qui tam* private right of action will drive the elaboration of legal mandates in democratically unaccountable directions.<sup>68</sup> This is because greater indeterminacy will also translate into a larger interpretive space within which private actors can maneuver in their efforts to exploit regulatory ambiguities and drive the elaboration of legal mandates beyond the control of legislative or administrative overseers.

To be sure, and as with the directness concept set forth previously, the determinacy concept advanced here is not without potential problems. In reality, many regulatory areas contain a mix of more and less determinate regulatory commands, making characterization of the overall degree of determinacy a difficult task. One reason is that some regulatory problems do not lend themselves to rule-like commands at all. Rather, many knotty regulatory problems across a wide range of policy areas bottom out at an indeterminate legal standard (e.g., tax law's business purpose doctrine) because rule-like formulations would merely invite gamesmanship by providing a template to regulated parties for how to insulate their conduct from attack.

Politics can also yield indeterminacy, with workplace safety regulation serving as a common example.<sup>69</sup> For instance, large segments of American

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67 Note that the effect of uncertainty on tip volume will depend on whether the uncertainty is symmetric or skewed (or, alternatively put, whether it is "mean-preserving") and also on the degree of risk aversion of whistleblowers. For seminal analysis along these lines, see John E. Calfee & Richard Craswell, *Some Effects of Uncertainty on Compliance with Legal Standards*, 70 VA. L. REV. 965 (1984); and Richard Craswell & John E. Calfee, *Deterrence and Uncertain Legal Standards*, 2 J.L. ECON. & ORG. 279 (1986). The effect of legal uncertainty on tip volume will also depend on the response of regulatory targets, who may systematically over- or under-comply with an uncertain legal mandate, thus shaping the amount of actionable conduct that can yield reportable information in the first place. See Craswell & Calfee, *supra*, at 282.

68 See *supra* notes 44-45 and accompanying text.

69 See, e.g., Orly Lobel, *Interlocking Regulatory and Industrial Relations: The Governance of Workplace Safety*, 57 ADMIN. L. REV. 1071 (2005) ("Although

workplace safety regulation — rules governing cranes and derricks offer a representative example<sup>70</sup> — resemble the tax code in their use of narrow-gauge, rule-like formulations. However, a significant proportion of enforcement activity, particularly as to emerging workplace risks, is instead keyed to the “general duty” clause of the Occupational Safety and Health Act (OSH Act), a statutory catch-all provision designed to address risks not covered by a specific Occupational Safety and Health Administration (OSHA) rule.<sup>71</sup> Indeed, this describes much enforcement activity targeting ergonomics risks, which has proceeded under the OSH Act’s “general duty” clause both before and after congressional invalidation, in 2001, of OSHA-promulgated regulations setting out a more specific set of ergonomics-related mandates in the face of vigorous industry objections.<sup>72</sup>

The more general point is that no regulatory area is perfectly determinate or indeterminate, and any regime will be comprised of a mix of more and less determinate commands. To that extent, it may only be possible to gauge a given regulatory area’s degree of legal determinacy as a central tendency, perhaps in the form of a rough ratio of more determinate commands to less determinate ones. Given this, it is also possible that in some regulatory areas a subdivision approach, under which legislators or agencies exercising delegated authority delimit some of a regime’s regulatory commands as bounty-eligible, will dominate an approach providing for bounties across the

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some areas have too many detailed rules that do not reflect current production processes, other areas are dangerously under-regulated, with no standard to direct industry behavior.”).

70 Safety and Health Regulations for Construction, 29 C.F.R. § 1926.550 (2010).

71 *See* Occupational Safety and Health Act, 29 U.S.C. § 654(a)(1) (2013) (empowering OSHA to issue citations and penalties when a workplace is not “free from recognized hazards that are causing or are likely to cause death or serious physical harm to his employees”).

72 For the ergonomics rule prior to congressional invalidation, see Ergonomics Program, 65 Fed. Reg. 68,262 (Nov. 14, 2000). For a pre-invalidation example of using the general duty clause to regulate ergonomic hazards, see *Sec’y of Labor v. Pepperidge Farm, Inc.*, 17 O.S.H. Cas. (BNA) 1993 (OSHRC 1997). For a post-invalidation announcement of OSHA’s effort to use the general duty clause to regulate ergonomic hazards, see OSHA, News Release, OSHA Announces Comprehensive Plan to Reduce Ergonomic Injuries (Apr. 2, 2002), available at [https://www.osha.gov/pls/oshaweb/owadisp.show\\_document?p\\_id=1230&p\\_table=NEWS\\_RELEASES](https://www.osha.gov/pls/oshaweb/owadisp.show_document?p_id=1230&p_table=NEWS_RELEASES).

board.<sup>73</sup> I return to this possibility below in assessing optimal bounty design in particular policy areas.

### C. Toward a Reform Roadmap

Armed with these insights, we can begin to work out from the limited exposition of key concepts offered above and venture some tentative, mid-level generalizations about the regulatory areas where bounty regimes will work well or less well, while also making some area-specific recommendations regarding optimal design.

#### 1. Rethinking Bounties in the Antifraud Context

An initial set of insights comes from the fraud context where existing bounty regimes are currently concentrated. In particular, the above analysis suggests that regulatory architects may have gotten things precisely backwards in their choice among competing bounty designs. The FCA, with its open-textured, antifraud mandate, could be profitably downgraded to a cash-for-information regime. Doing so would eliminate concern about privately driven legal innovation, statutory drift, and the FCA's tendency to colonize other regulatory mandates.<sup>74</sup>

Of course, such a move might also generate costs. Downgrading the regime would forfeit the private-sector efficiencies the current *qui tam* structure achieves, particularly the ability of an increasingly sophisticated relator's bar to mobilize or demobilize enforcement capacity as FCA enforcement opportunities ebb and flow.<sup>75</sup> Other potential costs, however, seem less concerning. For instance, it is unclear that moving to a cash-for-information approach would materially alter capture dynamics. The plaintiff's bar, including the securities class action bar and also an increasingly sophisticated *qui tam* relator's bar, quickly moved into the Dodd-Frank cash-for-information regime upon its creation, taking advantage of the statute's promise of whistleblower anonymity

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73 See William E. Kovacic, *The Civil False Claims Act as a Deterrent to Participation in Government Procurement Markets*, 6 SUP. CT. ECON. REV. 201, 237 (1998) (advocating delimiting "categories of conduct that *qui tam* relators can attack" in the FCA context); Matthew C. Stephenson, *Public Regulation of Private Enforcement: The Case for Expanding the Role of Administrative Agencies*, 91 VA. L. REV. 93, 107 (2005) (arguing more generally for agency authority "to create and delimit private rights of action").

74 See *supra* note 71 and accompanying text.

75 See *supra* note 34 and accompanying text.

when represented by counsel.<sup>76</sup> There is thus good reason to believe that the current relator's bar would remain similarly active in a downgraded FCA regime and could counter capture by, to use a standard formulation, pulling "fire alarms" to alert legislators where DoJ was dispensing regulatory favors via its gatekeeper decisions.<sup>77</sup> Nor, this suggests, would downgrading the current FCA regime deprive the system of salutary forms of innovation by diminishing the ingenuity the relator's bar currently supplies in piecing together new and ever more sophisticated frauds that have escaped regulators' attention. Indeed, much of the value the relator's bar adds to the current FCA regime comes pre-filing or during efforts to persuade DoJ to join the case, not in post-filing litigation.<sup>78</sup>

By contrast, the current cash-for-information tax regime could be profitably upgraded to a *qui tam* regime — mirroring a call among some tax scholars as well as New York State's recent extension of its FCA to the tax area.<sup>79</sup> Given the tax code's greater legal determinacy compared to the FCA's open-ended antifraud mandate, a *qui tam* approach would bring with it some of private enforcement's benefits (private sector efficiencies, a possible anti-capture and gap-filling role) but carry less risk of statutory drift as a result of privately driven legal innovation. Indeed, *qui tam* actions targeting tax cheats might have a somewhat more workaday flavor compared to the interstitial, pan-industry regulatory cast of some of the more recent high-profile *qui tam* actions in the FCA context.<sup>80</sup> And, if regulatory designers were concerned about privately driven drift in the tax-shelter, transfer-pricing, or other less determinate sub-areas, they could merely denote these as bounty-ineligible.

## 2. *The Case of Workplace Safety*

Beyond the fraud area, some of the framework's more interesting insights return us to workplace safety. In many ways, workplace safety regulation

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76 See *supra* note 25.

77 Matthew McCubbins & Thomas Schwartz, *Congressional Oversight Overlooked: Police Patrols Versus Fire Alarms*, 28 AM. J. POL. SCI. 165, 167-79 (1984).

78 Cf. Engstrom, *Public Regulation*, *supra* note 21, at 1712-13, 1742-43 (noting the high success rate among cases DoJ joins and finding evidence that this is attributable to DoJ's case-screening capacity).

79 See New York False Claims Act, N.Y. State Fin. Law § 189 (extending state FCA to tax area); Dennis J. Ventry, Jr., *Whistleblowers and Qui Tam for Tax*, 61 TAX LAW. 357 (2008).

80 See *supra* note 44 and accompanying text.

seems well-suited to a bounty approach. OSHA's drastic underfunding<sup>81</sup> — both cause and consequence of its broader bureaucratic dysfunction<sup>82</sup> — means that regulated entities are subject to a vanishingly small risk of inspection.<sup>83</sup> A well-designed bounty regime thus holds the promise of surfacing information about safety violations that the current under-resourced inspection regime does not.

There is also at least some reason to believe that a *qui tam* approach, as opposed to a cash-for-information approach, would be preferred. For instance, evidence suggests that OSHA's selection of inspection targets is designed to generate a regularized flow of detected violations, to the detriment of low-probability, catastrophic hazards or harms with long latency periods.<sup>84</sup> As in the securities fraud area, a *qui tam* approach could thus play a gap-filling, "failsafe" role, prosecuting workplace violations that would serve the public interest but do not align with OSHA's politically-inflected enforcement approach.

Yet the analysis to this point also provides grounds for skepticism about the utility of a bounty approach in general or a *qui tam* approach in particular.

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81 OSHA's budget, always small relative to its bailiwick, has declined substantially since the 1980s once adjusted for inflation. See Sidney A. Shapiro, *Substantive Reform, Judicial Review, and Agency Resources: OSHA as a Case Study*, 49 ADMIN. L. REV. 645, 646 (1997).

82 See EUGENE BARDACH & ROBERT A. KAGAN, GOING BY THE BOOK: THE PROBLEM OF REGULATORY REASONABLENESS 28 (1982) (noting that OSHA had had "no positive effect or a very small one on workplace accident rates"); THOMAS O. MCGARITY & SIDNEY A. SHAPIRO, WORKERS AT RISK: THE FAILED PROMISE OF OCCUPATIONAL SAFETY AND HEALTH ADMINISTRATION 34 (1993) (offering a similarly skeptical assessment).

83 See, e.g., Lobel, *supra* note 69, at 1084 (collecting studies showing that OSHA manages to investigate only a small fraction of workplace deaths despite the fact that it overwhelmingly finds violation-linked deaths when it does); David Weil, *Assessing OSHA Performance: New Evidence from the Construction Industry*, 20 J. POL'Y ANALYSIS & MGMT. 651, 654-55 (2001) (determining a construction site's annual probability of inspection to be 0.039%); Kip Viscusi, *Reforming OSHA Regulation of Workplace Risks*, in REGULATORY REFORM: WHAT ACTUALLY HAPPENED 234, 259 (Leonard W. Weiss & Michael W. Klass eds., 1986) (determining that a firm has a roughly one in 200 chance of being inspected in any given year).

84 See GREGORY A. HUBER, THE CRAFT OF BUREAUCRATIC NEUTRALITY: INTERESTS AND INFLUENCE IN GOVERNMENTAL REGULATION OF OCCUPATIONAL SAFETY 82, 229 (2007). A further claim is that inspection and penalty quotas motivate inspectors to target relatively low-level violations. *Id.* at 80; see also Darryl K. Brown, *Street Crime, Corporate Crime, and the Contingency of Criminal Liability*, 149 U. PA. L. REV. 1295, 1303 (2001).

To begin, several features of the workplace safety area fuel the conclusion that any bounty approach would be problematic. One is the “directness” of workplace safety harms, suggesting there may already be substantial underlying incentives to report violations.<sup>85</sup> As a result, offering bounties in the workplace safety context may, as noted previously, merely increase the government’s programmatic costs without producing any measurable uptick in useable whistleblower reports.<sup>86</sup> Worse, bounties may crowd out internal, moralistic incentives to report, yielding little increase in useful information or even *fewer* overall reports. Finally, the likely efficacy of a bounty regime seems limited by a feature of the current regime that has thus far escaped mention: the OSH Act caps fines at \$70,000 per violation, meaning that available bounties, even if whistleblowers were awarded much or all of the fine, would be relatively small, sharply limiting the willingness of whistleblowers to risk the personal and professional costs that accompany blowing the whistle.<sup>87</sup> Short of a congressional overhaul stiffening available penalties, more robust OSHA enforcement of retaliation protections may be the primary way to increase tip flow.

A full-scale *qui tam* approach seems even more problematic, despite some recent calls,<sup>88</sup> and for many of the same reasons undergirding the above arguments for downgrading the FCA to a cash-for-information scheme. In particular, the open-textured nature of existing enforcement activity under the OSH Act’s general duty clause, particularly enforcement efforts targeting emerging workplace hazards in the ergonomics area, suggests that moving to a *qui tam* approach would pose a substantial risk of statutory drift and unaccountable, privately driven legal innovation at the regulatory frontier. As

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85 This possibility draws support from the substantial number of retaliation claims handled by OSHA’s Whistleblower Office, suggesting a high volume of underlying tips. *See, e.g.*, GOV’T ACCOUNTABILITY OFFICE, WHISTLEBLOWER PROTECTION: SUSTAINED MANAGEMENT ATTENTION NEEDED TO ADDRESS LONG-STANDING PROGRAM WEAKNESSES 42 (2010) (noting roughly 1500 retaliation complaints relating to the OSH Act in 2009).

86 *See supra* note 54 and accompanying text.

87 OSHA’s own website suggests that there have been only twenty-four fines above \$3,000,000 since 1987. *See Top Enforcement Cases Based on Total Issued Penalty*, U.S. DEP’T OF LABOR, [http://www.osha.gov/dep/enforcement/top\\_cases.html](http://www.osha.gov/dep/enforcement/top_cases.html) (last visited Feb. 10, 2014). To offer more perspective, OSHA reported that, in 2010, its inspections led to 164 “proposed” fines of \$100,000 or more. *See OSHA Enforcement: Committed to Safe and Healthful Workplaces*, U.S. DEP’T OF LABOR, [http://www.osha.gov/dep/2010\\_enforcement\\_summary.html](http://www.osha.gov/dep/2010_enforcement_summary.html) (last visited Feb. 10, 2014).

88 *See, e.g.*, Gonzalez, *supra* note 4.

a result, regulators considering a *qui tam* approach — perhaps coupled with a substantial increase in fine amounts — but concerned about statutory drift and legislative fidelity over time should consider enumerating *ex ante* certain areas of enforcement as *qui tam*-eligible or granting OSHA the authority to delimit the *qui tam* private rights of action in formulating its broader enforcement strategy.

## CONCLUSION

Whistleblower bounty schemes are perennially proposed as a desirable way to fortify regulatory regimes across a range of policy contexts, from workplace safety, environmental protection, and civil rights to political corruption, immigration, and antitrust. Yet for all the scholarly enthusiasm, precious few proposals have paused to consider which characteristics of a given regulatory context make it more or less conducive to a bounty approach. Looking across regulatory areas, this Article has sought to make headway on that question. It has done so by developing a simple framework designed to show how two core features of a given regulatory context, including the directness of the harm and the determinacy of the legal mandate, structure the choice among competing bounty designs or the decision whether to deploy a bounty approach at all. The resulting analysis hopefully offers a useful starting point for further theoretical and empirical exploration bridging what we know about bounty regimes to regulatory reality in the effort to achieve a more productive, healthier, and safer society.

