

THE AMERICANIZATION OF WHISTLEBLOWING?
A LEGAL-ECONOMIC COMPARISON OF WHISTLEBLOWING
REGULATION IN THE U.S. AND GERMANY AGAINST THE BACKDROP
OF THE NEW EU WHISTLEBLOWING DIRECTIVE

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ABSTRACT

While it is only a side-issue in Germany, whistleblowing may well be considered a common phenomenon in the U.S.. Why is that? This article provides an answer to this question by unraveling the different cultures associated with whistleblowing. This article will attempt to answer the question of whether a legal system employs whistleblowers, first, depends on the different understanding of the employer/employee relationship, and, second, on the respective system's approach of how the law is in principle enforced. Is it a rather loose and foreseeable relationship, or does it have the appearance of permanency entailing relatively strong ancillary obligations? Is the law preponderantly enforced by authorities or do private persons play an important role as well? With respect to the latter, it is far from surprising that from the perspective of the U.S. legal system this question has to be answered in the affirmative while Germany is traditionally reluctant in capitalizing private persons for public ends.

However, with regard to Germany, this approach is subject to a change coming both from within the German legal system, and from the outside. The increasing influence of the E.U. on Germany has especially begun to elicit changes in the traditional employment relationship, introducing a public policy dimension and thereby an element of private law enforcement. In that respect, by juxtaposing the IRS and SEC whistleblower programs, as well as the new E.U. Whistleblowing Directive, this article demonstrates the transition that the existing German legal system is undergoing. After the analysis in this article, it will become safe to say that the German approach will not merely result in a copy-paste of the "American model." Beyond that, a new economic theory—the belief model—is used to explain when and why the law changes people's behavior. This gives room for

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a both convergence of law and economics and the concept of legal transplants, and for insightful recommendations for both the U.S. and the prospective German whistleblowing framework.

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I. INTRODUCTION

*La Bocca di Leone*¹—the lion’s mouth—was a marble statue of a lion’s head embedded in walls in medieval Venice. Like the name might indicate, the mouths of the lions were open just to the extent that a letter could be thrown in. Indeed, this was their original purpose. However, it was not designed to function like mailboxes. Instead, whenever a citizen of Venice detected an infringement, she could file a grievance. After the grievance was filed, a “trial” in the form of a public hearing took place. If the accusation proved to be correct, the wrongdoer was draconically punished. However, if the allegation turned out to be false, it was not the accused who was punished, but rather the accuser. The latter would receive the same punishment that the accused would have received if the allegation would have been true. From a modern, legal comparative perspective, this pattern evokes at least the following thoughts: what law enforcement strategy can be attributed to this approach? What role did citizens generally play in that enforcement framework? Enriched by economic thoughts, did this system provide suitable incentives so that people inform authorities?

Beside these basic thoughts, what else is there to conclude from old Venice? Obviously, whistleblowing—*viz.*, providing nonpublic information about a potential violation of the law to authorities or the public—is far older than one might have expected. Additionally, the idea of capitalizing private persons as law enforcers is not exclusively a feature of Common Law Systems, although the Kings of England in the thirteenth century had brought this concept to both frequent use and dubious popularity.² In medieval

¹ See VENICE RECONSIDERED: THE HISTORY AND CIVILIZATION OF AN ITALIAN CITY-STATE 1297-1797 395 (John Martin & David Romano eds., 2000) (historic background).

² See Note, *The History and Development of Qui Tam*, 1972 WASH. U. L. Q. 81, 83-91 (1972) (discussing the English historic background and purpose of qui tam actions); Pamela H. Bucy, *Information as a Commodity in the Regulatory World*, 39 HOUS. L. REV. 905, 909-17 (2002); Sharon Finegan, *The False Claims Act and Corporate Criminal Liability: Qui Tam Actions, Corporate Integrity Agreements and the Overlap of Criminal and Civil Law*, 111 PENN ST. L.

England, eventually, the strict distinction between the king's interest and "merely" private interest began to blur. Thus, some of the king's interests became that of public interest, and private persons were granted the opportunity to bring a claim on behalf of the king directed towards the general well-being in the royal courts. These *qui tam*³ actions enabled private parties to especially enforce penal laws—*viz.*, the king's interests. In modern economic terminology, the alignment of interests between private accuser and public interest was further promoted by the issue that accuser received a share of the imposed penalty. However, by the same token, this strong incentive gave ample room for abuse. Collusions between accuser and accused to the detriment of the king became a common phenomenon that led to severe restrictions on the possibility to bring *qui tam* actions and, eventually, to their abolishment in 1951.⁴ But this is not the end of the story. The reason why the need for *qui tam* actions both emerged and diminished is still of relevance today: the rise of *qui tam* actions can be attributed to the lack of an effective public enforcement system. Private initiative was regarded as a necessary supplement to public law enforcement entities. However, this purpose already answers the question of why *qui tam* actions eventually declined: as the effectiveness of authorities rose, the need to use private initiative diminished.

What has changed in the twenty-first century in comparison to rural life in medieval England and why has the use of private initiative in law enforcement matters ceased to lose their relevance today? The answer to this question can be attributed to the deep change that crime and wrongdoing have underwent.⁵ This applies in particular to white-collar crimes as well as infringements in anonymous markets. With respect to the latter, especially regarding securities markets, the complexity of economic wrongdoing proved to increase with the rise of complexity in general. By the same token, the costs for authorities to detect harm and investigate wrongdoing skyrocketed. Against this backdrop, what could be more natural than capitalizing private

REV. 625, 639-40 (2007); James B. Jr. Helmer, *False Claims Act: Incentivizing Integrity for 150 Years for Rogues, Privateers, Parasites and Patriots*, 81 U. CIN. L. REV. 1261, 1262-63 (2013); Jeremy Johnston, *Putting an End to False Claims Act Hush Money: An Agency-Approval Approach to Qui Tam Prefiling Releases*, 68 VAND. L. REV. 1163, 1167-69 (2015); Linda J. Stengle, *Rewarding Integrity: The Struggle to Protect Decentralized Fraud Enforcement through the Public Disclosure Bar of the False Claims Act*, 33 DEL. J. CORP. L. 471, 476-77 (2008).

³ *Qui Tam Action Definition*, BLACK'S LAW DICTIONARY (11th ed., 2019) (Qui tam is the abbreviation for "*qui tam pro domino rege quam pro se ipso in hac parte sequitur*" that means "who as well for the king as for himself sues in this matter.").

⁴ Common Informers Act of 1951, 14 & 15 Geo. 6, c. 39 (Eng.); see Bucy, *supra* note 2, at 913-15.

⁵ See Bucy, *supra* note 2, at 919-28; Ben Depoorter & Jef De Mot, *Whistle Blowing: An Economic Analysis of the False Claims Act*, 14 SUP. CT. ECON. REV. 135, 138 (2006); Theo Nyrreröd & Giancarlo Spagnolo, *Myths and Numbers on Whistleblower rewards*, 15 REGUL. & GOVERNANCE 82-97 (2021).

initiatives to supplement public enforcement efforts?⁶ Authorities will virtually never be adequately equipped to detect all pertinent infringements and punish the respective wrongdoers. Beyond that, authorities heavily depend on governmental funding. This is accompanied by the phenomenon designated as regulatory capture.⁷ Both were implemented to overcome these aforementioned deficits and to effectively deter prospective wrongdoers, making use of private initiative seems inevitable.⁸

Thus, the “pact” between authorities and private persons in the area of securities market fraud in a broader sense began to take shape. In light of “famous” whistleblowers like Sherron Watkins and Cynthia Cooper,⁹ both “Time Person[s] of the Year” in 2002,¹⁰ it became apparent to a broad audience that public agencies, to at least some extent, could rely on information provided by private parties supplementing law enforcement efforts. But the beginning of the millennium proved to be just the beginning of a time of major financial scandals. Just before the collapse of the market due to the financial crisis of 2007/08, financial analyst Harry Markopolos provided the U.S. Securities and Exchange Commission (“SEC”) with

⁶ Cf. Shawn Marie Boyne, *Financial Incentives and Truth-Telling: The Growth of Whistle-Blowing Legislation in the United States*, in *WHISTLEBLOWING - A COMPARATIVE STUDY* 283 (Gregor Thüsing & Gerrit Forst eds., 2016); Rüdiger Krause, *Duty to Loyalty, Fundamental Rights, and Public Policy: German Whistleblowing Law Between Conflicting Values*, in *WHISTLEBLOWING - A COMPARATIVE STUDY* (Gregor Thüsing & Gerrit Forst eds., 2016); 16 *WHISTLEBLOWING - A COMPARATIVE STUDY* (Gregor Thüsing & Gerrit Forst eds., 2016); Pamela H. Bucy, *Private Justice*, 76 S. CALIF. L. REV. 1, 32-33 (2002); 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, 1143 (1999); Yehonatan Givati, *A Theory of Whistleblower Rewards*, 45 J. LEGAL STUD. 43, 48-50 (2016); Michael M. Krauss, Julie R. Landy & Jeremy R. Harrell, *For Whom the Whistle Blows: The Role of Private Enforcement in Dodd-Frank's Regulatory Framework*, 8 U. ST. THOMAS J. L. & PUB. POL'Y 194, 199 (2014); Mary Kreiner Ramirez, *Whistling past the Graveyard: Dodd-Frank Whistleblower Programs Dodge Bullets Fighting Financial Crime*, 50 LOY. U. CHI. L. J. 617, 622 (2019); Matthias Schmidt, “Whistle Blowing” Regulation and Accounting Standards Enforcement in Germany and Europe—An Economic Perspective, 25 INT'L REV. L. & ECON. 143, 147 (2005); Stengle, *supra* note 2, at 472.

⁷ See *infra* Part III.C.

⁸ Cf. Bucy, *supra* note 6, at 40-41; Bucy, *supra* note 2, at 13.

⁹ Both Sherron Watkins' and Cynthia Cooper's investigations led significantly to the discovery of the major accounting scandals of Enron and WorldCom. See Bucy, *supra* note 2, at 942-43; Bucy, *supra* note 6, at 9-11; Dave Ebersole, *Blowing the Whistle on the Dodd-Frank Whistleblower Provisions*, 6 OHIO ST. ENTREPRENEURIAL BUS. L.J. 123, 131-32 (2011); Julie Jones, *Give a Little Whistle: The Need for a More Broad Interpretation of the Whistleblower Exception to the Employment-at-Will Doctrine*, 34 TEX. TECH. L. REV. 1133, 1135-36, 1158-59 (2003); Matt A. Vega, *Beyond Incentives: Making Corporate Whistleblowing Moral in the New Era of Dodd-Frank Act Bounty Hunting*, 45 CONN. L. REV. 483, 494-96 (2012), for discussion about Enron. See Jones, at 1135, 1157-58, for discussion about WorldCom.

¹⁰ See *The Whistleblowers: 2002*, TIME, http://content.time.com/time/specials/packages/article/0,28804,2019712_2019710_2019677,00.html (last visited August 14, 2020).

relevant information unveiling Bernie Madoff's Ponzi scheme, which surprisingly was completely ignored.¹¹

From a European perspective, these incidents, as well as others, encouraged legislatures both in the U.S. and in Europe to refine their whistleblowing frameworks and to adopt a general whistleblower protection regime, respectively. In particular, the company and tax scandals that became known under the keywords Siemens,¹² Volkswagen,¹³ Lux Leaks,¹⁴ and Panama Papers,¹⁵ have to be highlighted. The U.S., as well as the European Union ("E.U."), were mainly driven by general enforcement deficits that, *inter alia*, also came to light in answering the questions of how to punish the misconduct of individuals who worked in big corporations. As, in this respect, the burden of proof lies with the state, the phrase "too big to jail" attained notorious popularity.¹⁶ One remedy of how to get inside information was, more or less, quickly identified: capitalization of whistleblowers.¹⁷

However, the starting points between the two legal systems—the U.S. and Germany, and the E.U., respectively—could not be further away. The U.S. acted swiftly by first radically reforming the whistleblowing program of the Internal Revenue Service ("IRS"), and then the whistleblowing program of the SEC. In doing so, the U.S. could profit from their rich experience capitalizing private initiatives for law enforcement and thereby for public ends. In this regard, particular emphasis was put on the incentive framework. In reminiscence of the Federal False Claims Act ("FCA") enacted by Congress in 1863, both the IRS and the SEC whistleblower protection frameworks were equipped with powerful bounty programs. Therefore, blowing the whistle may lead to a decent amount of wealth. In this respect, the particular case of Bradely Birkenfeld attracted attention. In this case,

¹¹ See SEC, INVESTIGATION OF FAILURE OF THE SEC TO UNCOVER BERNARD MADOFF'S PONZI SCHEME (2009), <https://www.sec.gov/files/oig-509.pdf>.

¹² Ebersole, *supra* note 9, at 171-73. Siemens' slush fund system also had implications for the U.S. as possible violations of the Foreign Corrupt Practices Act became apparent. *Id.*

¹³ See Guilbert Gates, Jack Ewing, Karl Russell & Derek Watkins, *How Volkswagen's 'Defeat Devices' Worked*, N.Y. TIMES (Mar. 16, 2017), <https://www.nytimes.com/interactive/2015/business/international/vw-diesel-emissions-scandal-explained.html> (last visited August 14, 2020).

¹⁴ See *Luxembourg Leaks: Global Companies' Secrets Exposed*, INT'L CONSORTIUM OF INVESTIGATE JOURNALISTS, <https://www.icij.org/investigations/luxembourg-leaks/> (last visited August 14, 2020).

¹⁵ See *A Torrential Leak*, THE ECONOMIST (Apr. 9, 2016), <https://www.economist.com/international/2016/04/09/a-torrential-leak> (last visited August 14, 2020).

¹⁶ See U.S. HOUSE OF REPRESENTATIVES, TOO BIG TO JAIL: INSIDE THE OBAMA JUSTICE DEPARTMENT'S DECISION NOT TO HOLD WALL STREET ACCOUNTABLE (2016), https://financialservices.house.gov/UploadedFiles/07072016_oi_tbtj_sr.pdf.

¹⁷ Cf. Amy Deen Westbrook, *Cash for Your Conscience: Do Whistleblower Incentives Improve Enforcement of the Foreign Corrupt Practices Act*, 75 WASH. & LEE L. REV. 1097, 1112-17, 1147 (2018); Vega, *supra* note 9, at 489.

Birkenfeld's information, which was provided to the IRS, revealed an enormous tax fraud mainly committed by UBS. In return he received a whistleblowing award of \$104 million in September 2012.¹⁸ This did not remain the only case where it is quite warranted to say that blowing the whistle paid off. Eric Ben-Artzi reporting false asset evaluations by Deutsche Bank to the SEC,¹⁹ and Sanford Wadler providing information on possible violations of the Foreign Corrupt Practices Act to the SEC²⁰ are just two more examples that can be seen as a *pars pro toto* of how private persons are incentivized to come forward with inside information and thereby capitalizing private initiatives for public ends.

However, the traditional view that Germany holds towards whistleblowing starkly contrasts with the endorsing U.S. approach since the concept of whistleblowing was associated with a negative connotation. Employers were entitled to promptly dismiss employees who reported possible malpractices of the employer to authorities. The very strict German Termination Protection Law did not help whistleblowers in this regard because informing authorities was generally regarded as a severe breach of employment contract. However, this traditional approach is subject to a change coming both from within, and outside of, the German system. With respect to the former, the German Constitutional Court ("BVerfG") established a constitutional *de minimis* protection for whistleblowers in 2001. With respect to the latter, the traditional German approach is under attack from two different institutions. First, the European Court of Human Rights ("ECHR") in its 2011 judgment brought in the whistleblower's right to freedom of expression into the discourse. Second, the adoption of the EU Whistleblowing Directive ("Whistleblowing Directive") in late 2019²¹ is, apart from that, very likely to initiate a change of the legal-cultural attitude towards whistleblowing as well. Against this backdrop, it is not surprising that the idea of rewarding whistleblowers is far from being endorsed, although a growing number of scholars are postulating exactly this.²² However, the fact

¹⁸ See, e.g., *Bradley Birkenfeld*, NAT'L WHISTLEBLOWER CTR., <https://www.whistleblowers.org/members/bradley-birkenfeld/> (last visited August 14, 2020); see also Ashlin Aldinger, *A Race to the IRS: Are Snitches and Criminals the New Business Model*, 51 HOUS. L. REV. 913, 914-17 (2014); Ebersole, *supra* note 9, at 131; Nyrreröd & Spagnolo, *supra* note 5, at 4; Dennis J. Ventry Jr., *Not Just Whistling Dixie: The Case for Tax Whistleblowers in the States*, 59 VILL. L. REV. 425, 425-27 (2014).

¹⁹ See *Deutsche Whistleblower Ben Artzi Moves On After Spurning Award*, FIN. TIMES, <https://www.ft.com/content/4994d118-65ea-11e6-a08a-c7ac04ef00aa> (last visited August 14, 2020).

²⁰ See, e.g., Chelsea Hutchison, *Considerations for Corporate Counsel in the Age of the Whistleblower*, 41 J. LEGAL PRO. 125, 131 (2016); Westbrook, *supra* note 17, at 1137-38.

²¹ Directive 2019/1937 of the European Parliament and of the Council of 23 October 2019 on the Protection of Persons Who Report Breaches of Union Law, 2019 O.J. (L 305/17) [hereinafter Whistleblowing Directive].

²² See *infra* Part VI.B.

that Germany is under pressure in this regard can hardly be denied. Therefore, given the long experience that the U.S. has with whistleblowing and the omnipresent influence of the U.S. legal system in general,²³ what would be more natural than to mimic the American model?

This article attempts to do the following. First, by juxtaposing the history of U.S. and German whistleblowing, the different legal cultures of the two countries come to light. This applies not only to whistleblowing, but also to the employment relationship and its underlying economic-historical background, as well as to the question of how the law is generally enforced. That puts one in a position to see why the underlying concepts of whistleblowing of the U.S. and Germany are fundamentally different and, therefore, why it is unwarranted to speak of a mere imitation of the American system. Thus, a “strong” Americanization thesis,²⁴ which states that due to the overall dominance of the U.S. in numerous fields other legal systems are beginning to resemble its U.S. equivalent, cannot be upheld. Instead, one has to take into account the transformation that the institution of ‘whistleblowing’ is undergoing when implemented in the German legal system. Although one has to admit that the incorporation of a general whistleblower protection framework may prompt at least some transformations in the receiving legal system, it is quite safe to say that a “complete” change is not likely about to occur. Besides, an economic perspective is applied as well. With regard to comparing institutions of two different legal systems, apart from a numerical comparison,²⁵ using law and economics is anything but common.²⁶ In contrast to other articles primarily from the field of economics,²⁷ the analysis in this article will not only result in a model-based analysis of single factors relevant for a person’s decision as to when to blow the whistle thereby using standard economic theory. Apart from that, law and economics is intertwined with the comparative law concept of legal transplants,²⁸ and thereby with comparative law theory in general. In doing so, a new economic theory (the so-called belief

²³ See ROLF STÜRNER, Festschrift für Kurt Rebmann zum 65. Geburtstag 842-44, 857-58 (Heinz Eyrich et al. eds., 1989) (Ger.); Wolfgang Wiegand, *The Reception of American Law in Europe*, 39 AM. J. COMP. L. 229, 231-35 (1991).

²⁴ Cf. STÜRNER, *supra* note 23, at 844-54 (Ger.); Wiegand, *supra* note 23, at 236-46.

²⁵ See Rafael La Porta et al., *What Works in Securities Laws?*, 61 J. FIN. 1 (2006). But see Christoph A. Kern, *In der Zange der Zahlen: Rechtsvergleichung und wissenschaftlicher Zeitgeist [Gripped by Numbers: Comparative Law and scientific Zeitgeist]*, 116 ZEITSCHRIFT FÜR VERGLEICHENDE RECHTSWISSENSCHAFT [ZVGLRWISS] 419, 434-37 (2017) (Ger.); Mathias Siems, *Comparative Law* 146-87 (2014).

²⁶ See, e.g., Florian Faust, *The Oxford Handbook of Comparative Law* 826-51 (Mathias Reimann & Reinhard Zimmermann eds., 2nd ed. 2019); Ugo Mattei, *Efficiency in Legal Transplants: An Essay in Comparative Law and Economics*, 14 INT’L REV. L. & ECON. 3 (1994); Pierre Legrand, *Econocentrism*, 59 U. TORONTO L. J. 215 (2009) (very critical towards using law and economics in a legal comparative context).

²⁷ See Givati, *supra* note 6.

²⁸ See *infra* Part IV.C.

model) is applied, thereby combining the standard economic model with elements of game theory. Eventually, this article will then build a bridge between law and economics and comparative law theory.

Lastly, some important caveats have to be made. With regard to the U.S., this article focuses only on the IRS and the SEC whistleblower programs, although reference is made to the FCA. With regard to Germany, apart from the Whistleblowing Directive, the way towards a minimum court-based whistleblower protection framework is depicted, whereas special statutes on whistleblowing are omitted. Furthermore, this article deals with whistleblowing as an instrument of private law enforcement. That means that whistleblowing as an instrument of corporate governance²⁹ is not discussed. ‘Political whistleblowing,’ meaning passing on information from governmental sources to the media, and the public, respectively, does also not take part in the conducted analysis.

Part II starts with the legal-historical background of the current whistleblowing regulations in the U.S., and in Germany and the E.U., respectively. Part III elucidates the different views of the two legal systems towards whistleblowing. Before coming to an examination of the concrete whistleblowing provisions, Part IV outlines the basic incentive structure and benefits of whistleblowing, thereby making use of standard economic theory. Part IV also introduces and brings together the belief-model and the concept

²⁹ See, e.g., Holger Fleischer, *Zukunftsfragen der Corporate Governance in Deutschland und Europa: Aufsichtsräte, institutionelle Investoren, Proxy Advisors und Whistleblowers* [Future Issues of Corporate Governance in Germany and Europe: Supervisory Boards, Institutional Investors, Proxy Advisors and Whistleblowers], 40 ZEITSCHRIFT FÜR UNTERNEHMENS- UND GESELLSCHAFTSRECHT [ZGR] 155, 175-80 (2011) (Ger.); Holger Fleischer & Klaus Ulrich Schmolke, *Whistleblowing und Corporate Governance: Zur Hinweisgeberverantwortung von Vorstandsmitgliedern und Wirtschaftsanwälten* [Whistleblowing and Corporate Governance: the Obligation for Board Members and Business Lawyers to blow the Whistle], 66 WERTPAPIERMITTEILUNGEN ZEITSCHRIFT FÜR WIRTSCHAFT- UND BANKRECHT [WM] 1013-18 (2012) (Ger.); Klaus J. Hopt, *Interne Untersuchungen, Whistleblowing und externes Monitoring* [Internal Investigations, Whistleblowing and External Monitoring], 49 ZEITSCHRIFT FÜR UNTERNEHMENS- UND GESELLSCHAFTSRECHT [ZGR] 373, 381-82, 388-90 (2020) (Ger.); Simon Gerdemann & Gerald Spindler, *Die Europäische Whistleblower-Richtlinie und ihre Folgen für das deutsche Gesellschaftsrecht* [The European Whistleblower Directive and its Consequences for German Corporate Law], 41 ZEITSCHRIFT FÜR WIRTSCHAFTSRECHT [ZIP] 1896, 1903-1906 (2020) (Ger.); Philipp Maume & Lars Haffke, *Whistleblowing als Teil der Unternehmenscompliance – Rechtlicher Rahmen und Best Practice* [Whistleblowing as Part of Corporate Compliance – Legal Framework and Best Practice], 37 ZEITSCHRIFT FÜR WIRTSCHAFTSRECHT [ZIP] 199, 201-205 (2016) (Ger.); Klaus Ulrich Schmolke, *Whistleblowing als Regelungsaufgabe* [Whistleblowing as Regulatory Task], 48 ZEITSCHRIFT FÜR UNTERNEHMENS- UND GESELLSCHAFTSRECHT [ZGR] 876, 899-900 (2019) (Ger.); Gregor Thüsing & Johannes Fütterer, *GESELLSCHAFTSRECHT IN DER DISKUSSION 2017 25-37* (Gesellschaftsrechtliche Vereinigung ed., 2018) (Ger.), for discussion about whistleblowing and corporate governance in Germany. See, e.g., Aldinger, *supra* note 18, at 918-19; Geoffrey Christopher Rapp, *False Claims, Not Securities Fraud: Towards Corporate Governance by Whistleblowers*, 15 NEXUS 55 (2009), for a discussion about whistleblowing and corporate governance in the U.S.

of legal transplants. In Part V, a micro-comparison of whistleblowing provisions of the U.S., and in Germany and the E.U., respectively, is undertaken. Part VI then conducts an analysis highlighting the persisting differences between the two legal systems and, building on these findings, shows further developments and expressing recommendations for an implementation that harmoniously fits into the preexisting legal framework.

II. BACKGROUND OF WHISTLEBLOWING REGULATION

A. U.S.: Whistleblowing Regulations from the FCA to the Present

In the U.S., numerous statutes dealing with whistleblower protection on both the state and the federal levels exist. Thus, a large number of states have adopted whistleblowing statutes offering protection to different degrees.³⁰ However, as indicated, this article focuses on two special programs only: the SEC and the IRS whistleblowing programs. In order to get deeper look into both of the aforementioned programs, the origin of U.S. whistleblowing regulation is elucidated: the FCA of 1863.³¹

1. The Origin of U.S. Whistleblowing Regulation: the FCA

Before discussing the FCA, it has to be mentioned that prior to the foundation of the nation in the late eighteenth century, English statutory *qui tam* provisions were “transported” to the later independent colonies.³² Additionally, even before the federal government came up with its legislative proposals several states had already enacted statutory *qui tam* actions.³³ Surprisingly, the courts in the “new world” were very reluctant to create *qui tam* actions; and common law *qui tam* suits remained non-existent.³⁴

The whistleblowing model that is attributed to be the archetype of U.S. whistleblowing regulation emerged by default rather than by design.³⁵

³⁰ See, e.g., Norman D. Bishara, Elletta Sangrey Callahan & Terry Morehead Dworkin, *The Mouth of Truth*, 10 N.Y.U. J. L. & BUS. 37, 52-55 (2013). BOYNE, *supra* note 6, at 306-07; Frank J. Cavico, *Private Sector Whistleblowing and the Employment-at-Will Doctrine: A Comparative Legal, Ethical, and Pragmatic Analysis*, 45 S. TEX. L. REV. 543, 552-89 (2004); Jones, *supra* note 9, at 1141-42; Westbrook, *supra* note 17, at 1119.

³¹ Act to Prevent and Punish Frauds Upon the Government of the United States of 1863, H.R. 67, 37th Cong. § 4 (1863).

³² Helmer, *supra* note 2, at 1263; Note, *supra* note 2, at 91-93.

³³ Helmer, *supra* note 2, at 1263; Johnston, *supra* note 2, at 1168; Note, *supra* note 2, at 94-97.

³⁴ Note, *supra* note 2, at 94.

³⁵ See Christopher M. Alexion, *Open the Door, Not the Floodgates: Controlling Qui Tam Litigation under the False Claims Act*, 69 WASH. & LEE L. REV. 365, 371 (2012); Bucy, *supra* note 6, at 43-44; Jones, *supra* note 9, at 1140; Finegan, *supra* note 2, at 641; Helmer, *supra* note 2, at 1264-67; Johnston, *supra* note 2, at 1169-70; Patricia Meador & Elizabeth S. Warren, *The False Claims Act: A Civil War Relic Evolves into a Modern Weapon*, 65 TENN. L. REV. 455, 458

During the American Civil War, the federal government gradually began to buy war material on short notice instead of making use of public procurement. These “emergency purchases” entailed staggering prizes that resulted from collusions between sellers and corrupt government officials. Albeit the fact that both fraud and corruption against the federal government was criminalized, this seemed to be a pretty “safe” business model because the probability of detection was rather minimal. This was due to two reasons. First, the interests between fraudulent sellers and corrupt government officials were perfectly aligned. None of them had any incentive to “blow the other up” as both actors highly profited from this kind of behavior. Second, the federal government lacked sufficient resources to fine all of the respective government officials, thereby failing to come anywhere close to successfully deter such illicit behavior.

To address these points, authorities putting them in a position to effectively counter fraud were not strengthened. Instead, with the enactment of the FCA, the role of law enforcement was rather passed on to private persons. As described by others, the FCA “use[s] a rogue to catch a rogue.”³⁶ But how did this work? By introducing *qui tam* actions. Thus, private persons (designated as “relators”) who notice fraud were entitled to initiate a lawsuit on behalf of the government against contractors allegedly filing false or fraudulent claims to the detriment of the federal government.³⁷ The relator does not even have to be personally injured or otherwise affected by the defendant’s illicit behavior.³⁸ The complaint then has to be filed *in camera* and is for a period of 60 days neither disclosed to defendant nor to the public.³⁹ During this period, it is up to the government to check the validity of the complaint. The government could then either take over the lawsuit,⁴⁰ decline to take action, or decide to dismiss the action.⁴¹ With respect to the latter, the government enjoys a great amount of discretion; the standard of review is very favorable to the government.⁴² If the government remains idle, the relator

(1998); Stengle, *supra* note 2, at 478; Ventry, *supra* note 18, at 434 (discussing the historic background that led Congress to the adoption of the False Claims Act).

³⁶ Alexion, *supra* note 35, at 371 (citing CONG. GLOBE, 37th Cong., 3d Sess. 955-56 (1863)).

³⁷ 31 U.S.C. §§ 3729(a), 3730(b) (2010); see Vermont Agency of Natural Resources v. U.S. ex rel. Stevens, 529 U.S. 765, 773 (2000) (technically speaking, the federal government as the injured party is then deemed to have assigned its right to sue to the private plaintiff).

³⁸ Vermont Agency of Natural Resources, 529 U.S. 765, 773-74.

³⁹ 31 U.S.C. § 3730(b)(2) (2010).

⁴⁰ 31 U.S.C. § 3730(b)(4)(A), (c)(1)-(2) (2010).

⁴¹ 31 U.S.C. § 3730(b)(2), (c)(2)(A) (2010).

⁴² 31 U.S.C. § 3730(c)(2) (2010); see also Bucy, *supra* note 6, at 53; 70-74; Depoorter & De Mot, *supra* note 5, at 143-45; Patrick A. II Barthle, *Whistling Rogues: A Comparative Analysis of the Dodd-Frank Whistleblower Bounty Program*, 69 WASH. & LEE L. REV. 1201, 1221-23 (2012).

obtains full control over the lawsuit.⁴³ However, it should be noted that initially the federal government did not have these powers.⁴⁴

The deterrence effect on potential fraudsters proved to be quite significant, which seems to have lost nothing of its meaning today.⁴⁵ This was due to several reasons. Thus, fraudsters were initially liable for double the government's damage. Additionally, fraudsters were also subject to civil penalties of \$2,000 for each submitted false claim. But Congress did not leave it at that. FCA's characteristic feature were its bounty provisions. Thus, relators were initially entitled to 50 percent of the recovered sum.⁴⁶ Details of the incentive structure did of course vary over time and were subject to changes. However, the basic incentive structure remained the same. In the course of the 1986's amendments, a relator's percentage was reduced. Nowadays, a relator is entitled to 15 to 25 percent or, if the government refuses to intervene, 25 to 30 percent of the recovered sum or settlement.⁴⁷ Reasonable attorney's fees are also comprised.⁴⁸ Furthermore, the amount of liability fraudsters must bear has been increased to a minimum amount of \$5,000 and to a maximum amount of \$10,000, and the amount the government receives has increased to three times the damages suffered.⁴⁹ Lastly, the amendments of 1986 led to the incorporation of so-called 'adjunct statutes'—*viz.*, whistleblower protection provisions in a larger statutory act. The latter provides protectoral remedies to employees who are exposed to retaliatory measures by their employers.⁵⁰

Prima facie, the just described incentive structure has to lead to a perfect alignment between the interests of the government and the relator. On one hand, the government saves valuable resources that otherwise had to be spent on enforcement matters. On the other hand, although the burden of expensive law enforcement was passed on to relators, the prospect of a high reward was likely to overcome that initial disincentive. However, as already indicated, private law enforcement is prone to abuse. With the proclamation

⁴³ See 31 U.S.C. § 3730(c)(3) (2010).

⁴⁴ See Meador & Warren, *supra* note 35, at 459.

⁴⁵ See Aldinger, *supra* note 18, at 922-923; Justin Blount & Spencer Markel, *The End of the Internal Compliance World as we Know it, or an Enhancement of the Effectiveness of Securities Law Enforcement – Bounty Hunting under the Dodd-Frank Act's Whistleblower Provisions*, 17 FORDHAM J. CORP. & FIN. L. 1023, 1029-30 (2012); BOYNE, *supra* note 6, at 285; Ferziger & Currell, *supra* note 6, at 1169-70; Terry Morehead Dworkin, *Sox and Whistleblowing*, 105 MICH. L. REV. 1757, 1769 (2007); Helmer, *supra* note 2, at 1281-82; Jones, *supra* note 9, at 1140; Ramirez, *supra* note 6, at 664; Rapp, *supra* note 29, at 62; Stengle, *supra* note 2, at 471-72; Westbrook, *supra* note 17, at 1149.

⁴⁶ See Helmer, *supra* note 2, at 1265-66; Johnston, *supra* note 2, at 1170; Meador & Warren, *supra* note 35, at 459.

⁴⁷ 31 U.S.C. § 3730(d)(1), (2) (2010).

⁴⁸ *Id.*

⁴⁹ 31 U.S.C. § 3729(a)(1)(G) (2009).

⁵⁰ 31 U.S.C. § 3730(h) (2009).

of the New Deal in the 1930s, it was not only spending of the government that sharply increased but also the filing of fraudulent claims.⁵¹ This led to a revival of *qui tam* actions under the FCA. However, in these times, *qui tam* actions were not associated with a positive, but rather a negative, connotation. Even the term “parasitic litigation” evolved. But how come the positive image altered? Capitalizing private persons as law enforcers primarily makes sense when relators bring illicit behavior to light that is unknown to authorities. If the government is already in the possession of respective information or has even brought charges against the potential fraudster, the need for actions by private persons dramatically decreases—at least from Congress’ perspective.⁵² But this is exactly what happened. In that regard, the case *United States ex rel. Marcus v. Hess*⁵³ is considered to be the perfect example of the unnecessary use of *qui tam* actions.⁵⁴ In this case, Marcus received his information not from independent investigations, but rather from a publicly available indictment. However, the Supreme Court reasoned that the plain meaning of the FCA did not contain any limiting qualifications regarding where the relator obtained his information.⁵⁵ Thus, copying indictments and refileing them as civil actions became a “popular sport.”⁵⁶ The same was true with respect to congressional investigations that were already publicly available.⁵⁷ These practices were put to an end by the 1943 amendments. *Qui tam* actions that were based on information that were already in the possession of the government were precluded.⁵⁸ Furthermore, the limiting qualification “in the possession” of the government was broadly construed creating an enormous obstacle for prospective *qui tam* relators.⁵⁹ As a result, the filing of *qui tam* actions greatly declined and the FCA’s *qui tam* instrument began to lie dormant.⁶⁰

⁵¹ Alexion, *supra* note 35, at 371; Meador & Warren, *supra* note 35, at 459.

⁵² See Alexion, *supra* note 35, at 374; Bucy, *supra* note 6, at 47 (citing PAMELA H. BUCY, WHITE COLLAR CRIME, CASES AND MATERIALS 725-26 (1998)); Ferziger & Currell, *supra* note 6, at 1148.

⁵³ U.S. ex rel. Marcus v. Hess, 317 U.S. 537 (1943).

⁵⁴ Alexion, *supra* note 35, at 371-72; Helmer, *supra* note 2, at 1267-68; Johnston, *supra* note 2, at 1171; Stengle, *supra* note 2, at 478-79.

⁵⁵ *Hess*, 317 U.S. at 546.

⁵⁶ Cf. U.S. ex rel. Findley v. FPC-Boron Employees' Club, 105 F.3d 675, 679-680 (D.C. Cir. 1997); see also Alexion, *supra* note 35, at 374; Ferziger & Currell, *supra* note 6, at 1147.

⁵⁷ *Id.*

⁵⁸ See U.S. ex rel. Stinson v. Prudential Ins. Co., 944 F.2d 1149, 1153 (3d Cir. 1991).

⁵⁹ See, e.g., U.S. ex rel. Wisconsin v. Dean, 729 F.2d 1100, 1105-06 (7th Cir. 1984); see also Alexion, *supra* note 35, at 374-77.

⁶⁰ Cf. Note, *supra* note 2, at 99-101; Barthle, *supra* note 42, at 1219; Bucy, *supra* note 6, at 45, 48 (citing Steve France, *The Private War on Pentagon Fraud*, 76 ABA J. 46, 47 (Mar. 1990)); Dworkin, *supra* note 45, at 1769; Finegan, *supra* note 2, at 642; Ferziger & Currell, *supra* note 6, at 1148; Helmer, *supra* note 2, at 1270-71; Johnston, *supra* note 2, at 1173; Nyrreröd & Spagnolo, *supra* note 5, at 3; Stengle, *supra* note 2, at 479.

The FCA's further development parallels the aforementioned occurrences. In the wake of rising military expenditures in the 1980s, filing of fraudulent claims increased proportionally to the growth of governmental spending.⁶¹ Both authorities and private persons were unable to effectively respond. While the former lacked adequate resources, the latter, due to the 1943 amendments, were *de facto* deprived of "their" law enforcement tool. Remedy was provided in 1986 by the "original source" exception.⁶² Through the "original source" exception, courts have jurisdiction over an action even if the information is already public and the government already has knowledge of the alleged misconduct, provided that the relator "is an original source of the information."⁶³ Although this intended broadening of the ambit of FCA's *qui tam* provisions led to further ambiguities due to different court interpretation,⁶⁴ *qui tam* actions again skyrocketed since the amendments of 1986.⁶⁵ The adoption of the Patient Protection and Affordable Care Act ("PPAC") in 2010 forms the last chapter of FCA's *qui tam* provisions, *inter alia*, concretizing the "original source" definition.⁶⁶

2. The IRS Whistleblower Program of 2006

Although FCA's *qui tam* provisions are denominated as the archetype of legislation eliciting private persons to come forward with non-public information, special whistleblowing programs have coined the legal landscape ever since. One of the U.S. whistleblowing programs that was inspired by FCA's concept is the IRS Whistleblower/Informant Program ("IRS Program").⁶⁷ Contrary as the heading might indicate, the origins of the IRS Program can be traced back to over 150 years ago. Legislative provisions that authorized the Secretary of Treasury to pay bounty awards to individuals who provided information about ongoing tax fraud have been in existence since

⁶¹ Alexion, *supra* note 35, at 378-79; Helmer, *supra* note 2, at 1271-73; Johnston, *supra* note 2, at 1173; Stengle, *supra* note 2, at 479-80.

⁶² 31 U.S.C. § 3730(e)(4)(A)(iii) (2010).

⁶³ *Id.*

⁶⁴ See Alexion, *supra* note 35, at 379-95; Helmer, *supra* note 2, at 1277-78; Meador & Warren, *supra* note 35, at 462-66, 474-83; Stengle, *supra* note 2, at 481-96.

⁶⁵ See, e.g., Alexion, *supra* note 35, at 404 (citing U.S. DEP'T OF JUSTICE, FRAUD STATISTICS-OVERVIEW, OCTOBER 1, 1987 - SEPTEMBER 30, 2010 (2011), www.justice.gov/civil/docsforms/CFRAUDSFCASStatistics.pdf); Barthle, *supra* note 42, at 1225; Bucy, *supra* note 6, at 48 (citing Letter from the U.S. Department of Justice to Author, FOIA Request 145-FOI-6072 (Oct. 30, 2001)); Dworkin, *supra* note 45, at 1769; Helmer, *supra* note 2, at 1275-76; Stengle, *supra* note 2, at 481.

⁶⁶ 31 U.S.C. § 3730(e)(4)(B) (2010).

⁶⁷ Cf. Blount & Markel, *supra* note 45, at 1030; Helmer, *supra* note 2, at 1262; Michelle M. Kwon, *Whistling Dixie about the IRS Whistleblower Program Thanks to the IRC Confidentiality Restrictions*, 29 VA. TAX REV. 447, 457 (2010).

March 1867.⁶⁸ However, this program proved to be relatively unsuccessful.⁶⁹ The reasons are quickly compiled: no central body for the reception of information existed, payment of monetary awards was subject to IRS's discretion only, virtually no efficient judicial review existed, and, lastly, the program was not advertised.⁷⁰ Against this backdrop, it is far from surprising that monetary awards were only rarely granted.⁷¹

Albeit these rather obvious deficits, it was not until 2006 that the IRS Program was subjected to a reform.⁷² The impetus came from a report that designated the administrative structure of the IRS Program as deficient: it was, *inter alia*, too decentralized and, therefore, not properly equipped for the effective combat of tax evasion.⁷³ The reaction and, thus, the structural reforms were quite significant. First, the internal structure was improved, which entailed the creation of a central Whistleblower Office, and the restrictive approach in not soliciting for information was repealed.⁷⁴ Second, the incentive structure of the IRS Program was refined; monetary awards are no longer in the sole discretion of the IRS.⁷⁵ In addition, IRS's award decisions can now be appealed to the U.S. Tax Court.⁷⁶ However, an action forcing the IRS to investigate cannot be brought. When the IRS decides to remain idle, no remedy is available.⁷⁷ This illustrates that the IRS Program is not an equivalent to the *qui tam* provisions of the FCA in a strict sense. However, focusing on the general function of providing authorities with non-public information and thereby capitalizing private persons for law enforcement ends is basically in line with FCA's purpose.

Although the reform of the IRS Program is predominantly endorsed,⁷⁸ critical voices argue that its financial awards are too high.⁷⁹ The

⁶⁸ See Act of Mar. 2, 1867, ch. 169, § 7, 14 Stat. 471, 473; *History of the Whistleblower/Informant Program*, IRS <https://www.irs.gov/compliance/history-of-the-whistleblower-informant-program> (last visited August 13, 2020).

⁶⁹ Aldinger, *supra* note 18, at 923; Barthle, *supra* note 60, at 1213; Kwon, *supra* note 67, at 451; see Ferziger & Currell, *supra* note 6, at 1144, 1165 (discussing a positive assessment).

⁷⁰ Aldinger, *supra* note 18, at 923-25; Dworkin, *supra* note 45, at 1771; Kwon, *supra* note 67, at 451-55.

⁷¹ See, e.g., Aldinger, *supra* note 18, at 924-25; Dworkin, *supra* note 45, at 1771.

⁷² H.R. Res. 6111, 109th Cong. § 406 (2006) (codified as amended at I.R.C. § 7623); INTERNAL REVENUE SERV., WHISTLEBLOWER PROGRAM FISCAL YEAR 2018 4 (2018), https://www.irs.gov/pub/whistleblower/fy18_wo_annual_report_final.pdf [hereinafter IRS WHISTLEBLOWER PROGRAM 2018 REPORT].

⁷³ U.S. TREASURY INSPECTOR GEN. FOR TAX ADMIN., THE INFORMANTS' REWARDS PROGRAM NEEDS MORE CENTRALIZED MANAGEMENT OVERSIGHT (2006), <http://www.tax-whistleblower.com/resources/200630092fr.pdf>.

⁷⁴ Aldinger, *supra* note 18, at 925-26; Kwon, *supra* note 67, at 456.

⁷⁵ See 26 U.S.C. § 7623(b)(1) (2019).

⁷⁶ 26 U.S.C. § 7623(b)(4) (2019).

⁷⁷ Aldinger, *supra* note 18, at 929, 931; Kwon, *supra* note 67, at 459.

⁷⁸ See Ventry, *supra* note 18, at 491 ("the federal tax whistleblower program is a success story").

⁷⁹ See Aldinger, *supra* note 18, at 917, 935-40, 942.

incentive of high financial awards may elicit too many low-quality tips and, therefore, produce more (administrative) costs than benefits.⁸⁰ However, the statistics can be interpreted in both directions. For instance, in 2018 alone the IRS received over 12,000 tips that led to a collection of taxes of over \$1.441 billion.⁸¹ From those tips, 217 whistleblowers received over \$312 million in total.⁸² From a positive perspective, the average whistleblower award is about \$1.437 million, but from a negative perspective, the percentage of whistleblowers who received an award is below 2 percent.⁸³

3. The SEC Whistleblower Program of 2010

The U.S.' most recent whistleblowing program discussed in this article is a reaction to enforcement deficits that occurred in the aftermath of the financial crisis of 2007 and,⁸⁴ therefore, an advancement of the whistleblower program of the Sarbanes-Oxley Act of 2002 ("SOX").⁸⁵ The latter was, *inter alia*, also a reaction to a major turmoil on the financial markets, in particular triggered by the accounting scandals of Enron, and WorldCom.⁸⁶ Congress responded with a large scale reform, focusing mainly on improving reporting companies' disclosure, and corporate governance. Thus, the "corporate governance package" obliges companies to, first, establish an audit committee that, second, has to establish internal channels for complaints about financial and accounting irregularities.⁸⁷ But Congress did not leave it at that. Section 806 of SOX grants some level of protection for employees who internally report suspicious activities—thus, a federal whistleblower protection framework for employees of reporting companies was brought into being.⁸⁸ However, despite this euphoric statement SOX's whistleblowing regime is subject to heavy criticism.⁸⁹ In sum, its protection

⁸⁰ See Aldinger, *supra* note 18, at 928-29; see also discussion *infra* Part VI.A.

⁸¹ IRS WHISTLEBLOWER PROGRAM 2018 REPORT, *supra* note 72, at 9-10.

⁸² *Id.* at 9.

⁸³ See discussion *infra* Parts IV.A.2., VI.A

⁸⁴ See generally discussion *supra* Part I.

⁸⁵ Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, 116 Stat. 745 (2002); see generally Roberta Romano, *The Sarbanes-Oxley Act and the Making of Quack Corporate Governance*, 114 YALE L. J. 1521 (2005) (critical assessment).

⁸⁶ *Cf. supra* Part I.

⁸⁷ 15 U.S.C. §§ 78j-1(m)(4) (2010).

⁸⁸ 18 U.S.C. § 1514A (2010).

⁸⁹ Blount & Markel, *supra* note 45, at 1033; BOYNE, *supra* note 6, at 292-94; Dworkin, *supra* note 45, at 1764-67; Ronald H. Filler & Jerry W. Markham, *Whistleblowers - A Case Study in the Regulatory Cycle for Financial Services*, 12 BROOK. J. CORP. FIN. & COM. L. 311, 330 (2018); Helen Huang, *Protecting Internal Reporters after Digital Realty Trust, Inc. v. Somers*, 38 REV. BANKING & FIN. L. 429, 438-41 (2019); Ramirez, *supra* note 6, at 634; 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, 82-84 (2012).

is considered as weak and insufficient, giving whistleblowers merely an “illusion of protection.”⁹⁰

Generally, the same assessment was also made of the SEC’s predecessor whistleblower program,⁹¹ here designated as the ‘Insider Trading Whistleblower Program’.⁹² From its inauguration in 1988 and until its substitution with the current program in 2010, only five awards out of a total of \$160,000 were granted.⁹³ The reasons for its failure of success are comparable with those stated against the former IRS program:⁹⁴ the SEC enjoyed virtually unlimited discretion whether to pay an award. In addition, the former whistleblower program was anything but well-advertised and, therefore, barely known. Against this backdrop, it is far from surprising that it failed to reveal the Madoff scandal.⁹⁵

When Congress was preparing its response to safeguard the financial system, light also fell on the SEC’s deficient whistleblower program. In order to reach the overall goal of promoting financial stability, establishing an efficient whistleblower program deemed to be necessary. Thus, Section 922 of the Dodd-Frank Wall Street Reform and Consumer Protection Act (“Dodd-Frank”), which inserted Section 21F in the Securities Exchange Act of 1934, was adopted.⁹⁶ Dodd-Frank, apart from outlining the general framework of the whistleblowing program, also conferred rulemaking authority to the SEC, thereby enabling the SEC to shape the program to its practical needs. The SEC did so in August 2011 when its final rules became effective.⁹⁷ When taking a closer look at the current SEC whistleblower program (“SEC Program”), one can see the similarities with its role model, the IRS Program:⁹⁸ First, institutional improvements by establishing a central whistleblower office

⁹⁰ Dworkin, *supra* note 45, at 1764.

⁹¹ See Blount & Markel, *supra* note 45, at 1031; Westbrook, *supra* note 17, at 1151 (with respect to the name).

⁹² Blount & Markel, *supra* note 45, at 1031; Ebersole, *supra* note 9, at 125; Yuval Feldman & Orly Lobel, *The Incentives Matrix: The Comparative Effectiveness of Rewards, Liabilities, Duties, and Protections for Reporting Illegality*, 88 TEX. L. REV. 1151, 1170 (2010); Ferziger & Currell, *supra* note 6, at 1144; Geoffrey Christopher Rapp, *Beyond Protection: Invigorating Incentives for Sarbanes-Oxley Corporate and Securities Fraud Whistleblowers*, 87 B.U. L. REV. 91, 117-18 (2007); Ramirez, *supra* note 6, at 642; Rapp, *supra* note 89, at 130-31; Vega, *supra* note 9, at 498; Westbrook, *supra* note 17, at 1152.

⁹³ Rapp, *supra* note 89, at 130 (citing Michael Mann et al., *Enforcement Initiatives*, 1867 PLI/CoRP 479, 487 (2011)).

⁹⁴ See Blount & Markel, *supra* note 45, at 1031-32; Feldman & Lobel, *supra* note 92, at 1170-71; Nyrreröd & Spagnolo, *supra* note 5, at 10; Ramirez, *supra* note 6, at 642; Rapp, *supra* note 89, at 130-31; Vega, *supra* note 9, at 498.

⁹⁵ See discussion *supra* Part I.

⁹⁶ Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1376, 1841-49 (2010).

⁹⁷ Ramirez, *supra* note 6, at 631.

⁹⁸ Blount & Markel, *supra* note 45, at 1034; Ramirez, *supra* note 6, at 628.

(“Office of the Whistleblower”).⁹⁹ Second, the introduction of mandatory financial awards was also instituted.¹⁰⁰ In contrast to the IRS Program, but in line with the SOX whistleblowing regime, anti-retaliation provisions were included in the SEC Program.¹⁰¹ In other regards, however, the reforms have largely paralleled the IRS Program. Notably, the SEC can neither be forced to investigate nor to impose civil penalties against its supervised corporations. Besides, Congress had refrained from enacting a *qui tam* action into preexisting securities statutes.

When it comes to an initial assessment of the SEC Program, the situation is quite similar to the IRS program. The SEC is especially eager to stress its success, although critical voices exist.¹⁰² These critics gained momentum,¹⁰³ in particular, after the Supreme Court decision in *Digital Realty Trust v. Somers*.¹⁰⁴

The available data also gives ammunition for both positions. In 2018 alone, the SEC received close to 5,200 tips and, eventually, awarded \$168 million to thirteen informants.¹⁰⁵ Furthermore, in 2018, two individuals were awarded the largest-ever whistleblower awards by the SEC, sharing close to \$50 million.¹⁰⁶ Thus, one could say as the average whistleblower award in 2018 is close to \$13 million, thereby demonstrating that the incentive to blow the whistle is enormous. However, since only thirteen tipsters out of 5,200 received an award, the percentage of whistleblowers who actually gained an award was pretty low.¹⁰⁷

B. Germany: Whistleblowing Regulation Before the EU Whistleblowing Directive

In sharp contrast with the U.S., well-known whistleblowing programs are missing in Germany. However, dispersed rules and case law exist. This

⁹⁹ See 15 U.S.C. § 78u-7(d) (2010); see also Krauss, Landy & Harrell, *supra* note 6, at 200; Ramirez, *supra* note 6, at 630-31.

¹⁰⁰ See *infra* Part V.A.6. However, certain other criteria have to be met as well.

¹⁰¹ 15 U.S.C. § 78u-6(h)(1) (2010).

¹⁰² See, e.g., Jane A. Norberg, *What Would We Do Without Them: Whistleblowers In The Era Of Sarbanes-Oxley and Dodd Frank*, 23 FORDHAM J. CORP. & FIN. L. 386 (2018); U.S. SECURITIES AND EXCHANGE COMMISSION, 2019 ANNUAL REPORT TO CONGRESS: WHISTLEBLOWER PROGRAM, 1-3 (2019). But see Barthle, *supra* note 42, at 1203; Ebersole, *supra* note 12, at 135; Krauss, Landy & Harrell, *supra* note 6, at 195; Vega, *supra* note 9, at 486-87.

¹⁰³ See *infra* Part VI.A.

¹⁰⁴ *Digit. Realty Tr., Inc. v. Somers*, 138 S. Ct. 767 (2018).

¹⁰⁵ U.S. SEC. AND EXCH. COMM'N, 2018 ANNUAL REPORT TO CONGRESS: WHISTLEBLOWER PROGRAM 9, 20 (2018), <https://www.sec.gov/files/sec-2018-annual-report-whistleblower-program.pdf> [hereinafter SEC WHISTLEBLOWER PROGRAM 2018 REPORT].

¹⁰⁶ *Id.* at 10.

¹⁰⁷ See *infra* Part IV.A.1.

applies even though the Whistleblowing Directive has already entered into force.¹⁰⁸ As a directive, pursuant to Article 288(3) of the Treaty on the Functioning of the European Union (2009), in general, it is binding only on Member States. In order to become binding on private persons as well, a directive has to be implemented in national law. In this regard, the Whistleblowing Directive gives its Member States time to do so until December 2021.¹⁰⁹

In place of the legislature, the courts initially addressed with the phenomenon of whistleblowing.¹¹⁰ Subject matter virtually always consisted of dismissal procedures in which the employee sought remedy against her dismissal. Courts were initially very reluctant to provide any protection at all and, instead, stressed the preponderant interests of the respective employer. However, as already indicated, this standpoint is subject to change coming from both within the German legal system, as well as from the outside.

1. A Short History of Whistleblowing and Its Gradual Change of Perspective

German courts have dealt with whistleblowing for the past one hundred years. Cases in which employees reported misconduct of employers to authorities are commonly traced back to 1901.¹¹¹ After the foundation of the German Federal Republic in 1949, it took about ten years until the German Federal Labor Court (“BAG”) was invoked by a whistleblower who sought protection against his dismissal.¹¹² In this first major judgment on whistleblowing, an employee, who was working as a forwarding agent, was terminated because he reported an offence against his employer. Additionally, the employee had been under the imminent risk of *de facto* being forced to collaborate in respective wrongdoings. When one compares the outcome of this case with U.S. cases that had relied on the public policy exception, and

¹⁰⁸ Whistleblowing Directive, *supra* note 21, art. 28.

¹⁰⁹ *Id.* art. 26(1).

¹¹⁰ However, apart from court decisions, also genuine German whistleblowing provisions, although heavily dispersed, exist that have no EU background. In this respect, one may highlight statutes dealing with employees reporting that they may have been placed at a disadvantage, and reports on potential fraud to public healthcare providers. See Betriebsverfassungsgesetz [BetrVG] [Works Constitution Act] § 84, https://www.gesetze-im-internet.de/englisch_betrvg/index.html (Ger.), with respect to the former. See Sozialgesetzbuch Fünftes Buch [SGB V] [Social Security Code 5] §§ 81a, 197a, https://www.gesetze-im-internet.de/sgb_5/ (Ger.), with respect to the latter.

¹¹¹ Krause, *supra* note 6, at 156 (citing Königliches Landgericht I zu Berlin [Berlin Royal Regional Court] Apr. 3, 1901, Blätter für Rechtspflege im Bereich des Kammergerichts in Sachen der freiwilligen Gerichtsbarkeit in Kosten-, Stempel- und Strafsachen [KGBL] 121 (1901) (Ger.)).

¹¹² Bundesarbeitsgericht [BAG] [Federal Labor Court] Feb. 5, 1959, Neue Juristische Wochenschrift [NJW] 44 (1961) (Ger.).

thereby deciding in favor of the employee,¹¹³ the outcome of this case is striking. Although the allegations proved to be true, the BAG upheld employee's termination.¹¹⁴ The court placed heavy emphasis on the issue that the employee simply could have refused to work when the imminent danger of committing a crime would have materialized.¹¹⁵ But by not doing so, the court concluded that the interests of the employer of being left unoffended by authorities outweighed the interest of the employee; by reporting the offense, the employer got in an "uncomfortable situation."¹¹⁶

The aforementioned judgment has not been a singularity. This harsh approach has also been adopted by lower courts. For instance, the Regional Labor Court of Baden-Württemberg upheld the termination of a welder who, after unsuccessfully reporting to his supervisor that he suffered health problems while melding plastic-coated sheet steels, contacted the local health department.¹¹⁷ Subsequently, after his labor union was brought into the case, the "complaint" was forwarded to the respective supervisory authority by the labor union, which, after coming to the knowledge of the employer, led to the dismissal of the employee. According to the court, reasonable self-help was feasible and, therefore, by reporting to the authorities, the employee substantially violated his obligation to pay respect to the rights and interests of the employer.¹¹⁸ The interests of the latter, who suffered heavy consequences due to the employee's report, were disproportionately impaired while the employee enjoyed only modest benefits.¹¹⁹ Hence, the court reasoned that a continuing collaboration based on mutual trust was no longer possible.¹²⁰ However, one has to highlight that there were indeed cases that courts have decided in favor of the employee, although they were rare. For example, the court had granted a remedy for a radiation protection commissioner of a private nuclear research center against a dismissal; he had first reported safety issues to his employer and then to the supervisory authority after no action was taken by the employer.¹²¹

It was not until 2001 that the aforementioned jurisprudence was subject to a first major change. Interestingly, the impetus did not come from the labor courts themselves, but the German Constitutional Court

¹¹³ See *infra* Part III.B.

¹¹⁴ NJW 45 (1961) (Ger.).

¹¹⁵ *Id.*

¹¹⁶ *Id.*

¹¹⁷ Landesarbeitsgericht Baden-Württemberg [Regional Labor Court of Baden-Württemberg] Oct. 20, 1976, Entscheidungen zum Arbeitsrecht [EZA] Kündigungsschutzgesetz § 1 Verhaltensbedingte Kündigung No. 8, 31 (Ger.).

¹¹⁸ EZA 33-34 (1976) (Ger.).

¹¹⁹ EZA 34 (1976) (Ger.).

¹²⁰ *Id.*

¹²¹ Bundesarbeitsgericht [BAG] [Federal Labor Court] Dec. 14, 1972, Arbeitsrechtliche Praxis [AP] Kündigungsschutzgesetz § 1 Verhaltensbedingte Kündigung No. 8 (Ger.).

(“BVerfG”).¹²² The case involved an employee’s constitutional complaint which alleged a dismissal that purportedly violated his fundamental rights. In particular, the employee was dismissed because of “voluntarily” giving disfavoring testimonies in a criminal investigation against his employer. In addition, upon request, he provided the criminal prosecution authorities with documents that he had collected while being a works council without informing his employer. After the prosecutor decided not to investigate further, the employee was dismissed, and the termination was upheld by lower courts. However, the BVerfG reversed and found that lower courts’ decisions violated the employee’s fundamental rights.¹²³ In this regard, it has to be mentioned that after the famous Lüth-judgment of the BVerfG,¹²⁴ fundamental rights also have effects on purely private relationships.¹²⁵ In sum, the fundamental freedoms of the German Constitution express universal values that may especially influence the interpretation of so-called general clauses.¹²⁶ In particular, cases in dismissal procedures requires that the employer must generally prove a “just cause” or a “compelling reason”¹²⁷ in order to uphold the termination.¹²⁸

With regard to the case at bar, the BVerfG found that by giving testimony in a criminal investigation, the employee did nothing more than exercising a civic right guaranteed by the constitutional principle of the rule of law.¹²⁹ This applies irrespectively whether employee was forced to give testimony or voluntarily contacted the criminal prosecution authorities.¹³⁰ Assisting criminal prosecuting authorities in the ordinary course of business constitute an essential element of a functioning criminal justice.¹³¹ Therefore, in the balancing of interests between the parties, the employer and employee, there has to be a special emphasis on the aforementioned “civic right” in

¹²² Bundesverfassungsrecht [BVerfG] [Federal Constitutional Court] July 2, 2001, *Neue Juristische Wochenschrift* [NJW] 3474 (2001) (Ger.).

¹²³ NJW 3475-76 (2001) (Ger.).

¹²⁴ BVerfG [Federal Constitutional Court] Jan. 15, 1958, *Entscheidungen des Bundesverfassungsgerichts* [BVerfGE] 7, 19 (Ger.).

¹²⁵ See CHRISTOF KERWER, *SUBSIDIARITÄT – SICHERHEIT – SOLIDARITÄT – FESTGABE FÜR FRANZ-LUDWIG KNEMEYER ZUM 75. GEBURTSTAG* 583-84 (Eric Hilgendorf & Frank Eckert eds., 2012) (Ger.); Krause, *supra* note 6, at 163; SIMONA KREIS, *WHISTLEBLOWING ALS BEITRAG ZUR RECHTSDURCHSETZUNG* 67-68 (2017) (Ger.); Michael Müller, *Whistleblowing – Ein Kündigungsgrund? [Whistleblowing – a cause for dismissal?]*, 8 *NEUE ZEITSCHRIFT FÜR ARBEITSRECHT* [NZA] 424, 429-31 (2002) (Ger.) (with respect to employment law).

¹²⁶ See JOHN P. DAWSON, *ORACLES OF THE LAW* 461-79 (1968); Gunther Teubner, *Legal Irritants: Good Faith in British Law or How Unifying Law Ends up in New Divergences*, 61 *MOD. L. REV.* 11, 20 (1998) (discussing the meaning and function, respectively, of general clauses in German law).

¹²⁷ Krause, *supra* note 6, at 162; Müller, *supra* note 125, at 431.

¹²⁸ Krause, *supra* note 6, at 163.

¹²⁹ NJW 3475-76 (2001) (Ger.).

¹³⁰ *Id.*

¹³¹ NJW 3475 (2001) (Ger.).

dismissal procedures. This entails that, in principle, a termination cannot be upheld even if the employee's allegations turn out to be false as long as the employee did not act in good faith.¹³²

In the aftermath of the BVerfG's decision, the BAG took the opportunity to "concretize" the BVerfG's reasoning in 2003.¹³³ However, the BAG did not repeal its traditional balancing approach, but rather simply included the interests highlighted by the BVerfG in its standard of review. As a result, when it comes to a whistleblower dismissal, both the interest of the employer—mainly, to generally collaborate only with "trustworthy" employees who promote the interests of the business and keep harm away from the company—and the interest of the employee—under special consideration of her fundamental right to freedom of expression—and "civic" rights, respectively, have to be balanced.¹³⁴ Accordingly, the employee has to take into account the rights and interests of the employer, whose interests also enjoy constitutional protection.¹³⁵ Hence, the filing of criminal charges may not constitute a disproportionate reaction to the alleged misconduct of employer.¹³⁶ In this regard, two criteria are stressed. First, the employee's motivation is dispositive. She has to act in good faith or, in other words, not with the intent to cause damage to her employer.¹³⁷ Second, in principle, the employee is obliged to internally clarify the issue before reporting to authorities.¹³⁸ However, this does not, *inter alia*, apply when internal clarification cannot reasonably be expected.¹³⁹ In a nutshell, according to that BAG ruling, reporting criminal charges to authorities while acting in good faith does not offer protection against termination *per se*—it is just one factor within the balancing of interests.

2. Change of Perspective Continued: Impulses From the Outside

The development of the court-based whistleblowing framework did anything but come to a halt in 2003. However, what has altered was the institution giving the respective impetus. In this regard, two new "players" emerged: the European Court of Human Rights ("ECHR") and the E.U.

¹³² NJW 3476 (2001) (Ger.).

¹³³ Bundesarbeitsgericht [BAG] [Federal Labor Court] July 3, 2003, *Neue Juristische Wochenschrift* [NJW] 1547 (2004) (Ger.).

¹³⁴ NJW 1549 (2004) (Ger.). In this regard, also the employee's right to freedom of expression is (shortly) mentioned by the court. However, it has to be mentioned that according to the court anonymous whistleblowing does not fall into the scope of the right to freedom to expression as guaranteed by the German Constitution.

¹³⁵ *Id.*; see also KERWER, *supra* note 125, at 584; Krause, *supra* note 6, at 165; KREIS, *supra* note 125, at 68-69.

¹³⁶ NJW 1547, 1549 (2004) (Ger.).

¹³⁷ *Id.*

¹³⁸ NJW 1549-50 (2004) (Ger.).

¹³⁹ *Id.*

a. *The ECHR and the Heinisch-judgment*

The Heinisch-judgment of the ECHR¹⁴⁰ continues the gradual change of perspective. This case dealt with a geriatric nurse named Brigitte Heinisch working at a company predominantly owned by the German state of Berlin. In the course of her work, she reported several times to her employer that the personnel were overworked and, therefore, could not adequately fulfill their duties. Additionally, nursing services could not be properly documented. Substantial deficits in these care services and documentation were also identified by an examination conducted by a health insurance association. While the employer remained idle, Mrs. Heinisch consulted a lawyer who asked Mrs. Heinisch's employer to remedy the reported shortcomings. The employer, however, rejected the accusations. In reaction to the employer's conduct, Mrs. Heinisch reported an offense accusing her employer of fraud of a particularly serious nature since the employer advertised high quality nursing services that have not been performed. However, in the investigation proceedings, Mrs. Heinisch was unable to substantiate her accusations. Therefore, prosecution authorities decided not to further investigate. When the employer subsequently found out that it was Mrs. Heinisch who contacted prosecution authorities, she was dismissed at once.

Although the court granted Mrs. Heinisch's remedy against the termination at first instance, the appellate court reversed.¹⁴¹ Unable to find success at both the BAG and the BVerfG, Mrs. Heinisch filed a complaint with the ECHR. In contrast to most of the German courts, the ECHR granted Mrs. Heinisch protection.¹⁴² In particular, the ECHR found that by upholding the termination, German courts had failed to adequately pay respect to the employee's right to freedom of expression—the latter is expressly guaranteed by Article 10 of the European Charter of Human Rights.¹⁴³ In its further reasoning, the ECHR provided very concrete criteria that must be balanced against each other in a “whistleblower termination proceeding.” The ECHR emphasized that, first, the employee has to search internal clarification.¹⁴⁴ Directly reporting to authorities or the media, in general, does not entitle an employee to protection.¹⁴⁵ In this regard, the findings of the ECHR were more or less in line with the BAG's criteria. The innovation, however, came with the criteria introduced by the ECHR. In the balancing of interests, courts from now on also have to pay attention to the interest of the public—*viz.*, such as whether the potential misconduct alleged can be identified as being in the

¹⁴⁰ Heinisch v. Germany, App. No. 28274/08 (July 21, 2011), <http://hudoc.echr.coe.int/eng?i=001-105777>.

¹⁴¹ *Id.* ¶ 27.

¹⁴² *Id.* ¶ 93.

¹⁴³ *Id.* ¶¶ 94-95.

¹⁴⁴ *Id.* ¶ 65.

¹⁴⁵ *Cf. id.*

public interest.¹⁴⁶ Applying the aforementioned criteria to the case at bar, the ECHR reasoned that the disclosed information on potential deficits in state-owned nursing homes was in the public interest.¹⁴⁷ Accordingly, although the disclosed information might have had a significant impact on both the employer's reputation and its business prospects, the public interest on the respective information outweighed the interests of the entrepreneur.¹⁴⁸

When one recalls the BVerfG decision,¹⁴⁹ *prima facie*, one might be of the opinion that the innovations caused by the ECHR are rather moderate. By emphasizing the "civic right" to report an offense, and thereby promoting the functioning of the criminal justice system, the public interest, one could argue, has already become an integral part of "whistleblower dismissal procedure." However, the ECHR goes much further than the BVerfG. First, the reasoning of the BVerfG is more limited when it comes to the public interest, as it only deals with the functioning of the criminal justice system. The ruling of the ECHR goes beyond this, highlighting the interest of the general public that the respective information is revealed. Second, although the BAG mentioned that aforementioned "civic right," it did not seem to play much of a special role in the balancing of interests.¹⁵⁰ This was partly changed by a BAG judgment in 2016, which took up the ECHR's criteria.¹⁵¹ Accordingly, the BAG found that, among other factors, that both the "public interest in disclosure of the information", and the employee's right to freedom of expression have to be taken into account.¹⁵² The question whether thereby the BAG fully complied with ECHR's ruling remains open.

b. The EU and Its Way Towards a General Whistleblower Protection Framework

Before the Whistleblowing Directive entered into force, the statutes dealing with whistleblowing were heavily dispersed. Whistleblowing regulation was sector-specific. However, it is warranted to say that, for a supranational entity with only limited legislative powers, one indeed finds a quite decent number of provisions. This is especially true for E.U.'s financial framework.

To start, the Capital Requirements Directive IV ("CRD IV")¹⁵³ first obliges banks to establish internal reporting channels that provide employees

¹⁴⁶ *Id.* ¶¶ 66, 68.

¹⁴⁷ *Id.* ¶ 71.

¹⁴⁸ *Id.* ¶¶ 88-90.

¹⁴⁹ *See supra* Part II.B.1.

¹⁵⁰ *See* NJW 1547, 1549-50 (2004) (Ger.).

¹⁵¹ Bundesarbeitsgericht [BAG] [Federal Labor Court] Dec. 15, 2016, *Neue Zeitschrift für Arbeitsrecht* [NZA] 703 (2017) (Ger.).

¹⁵² NZA 704 (2017) (Ger.).

¹⁵³ Directive 2013/36/EU, of the European Parliament and of the Council of 26 June 2013 on Access to the Activity of Credit Institutions and the Prudential Supervision of Credit Institutions

with the opportunity to report breaches of the E.U.'s banking law.¹⁵⁴ Second, banking supervisory authorities have to be open for reports on potential breaches of E.U.'s banking law, while guaranteeing confidentiality to prospective whistleblowers.¹⁵⁵ Additionally, appropriate protection provisions for bank employees against retaliation have to be established by Member States.¹⁵⁶ Similar statutes exist in the E.U.'s securities market framework. As such, investment firms have to implement an internal reporting system for potential breaches with the Market Abuse Regulation.¹⁵⁷ This obligation for private companies is accompanied by reporting offices that have to be set up by financial supervisory authorities.¹⁵⁸ Lastly, this twofold structure can also be found in the E.U.'s anti-money laundering provisions.¹⁵⁹

Apart from the financial framework, the E.U. cartel leniency program can also be attributed to the E.U.'s dispersed whistleblowing provisions. Infringements of E.U. cartel law can result in very severe civil penalties.¹⁶⁰ In order to elicit cartel members to snitch, the company that hands over the evidence, which reveals the identity of the cartel, to the E.U. Commission enjoys either total immunity or a significant reduction of the impending civil penalty.¹⁶¹ However, although this program has proved to be very successful, its scope is even more limited than the aforementioned whistleblowing programs. Only companies breaking out of the cartel are granted benefits, whereas employees who report potential violations of E.U. antitrust law are left without any protection.¹⁶²

and Investment Firms, Amending Directive 2002/87/EC and Repealing Directives 2006/48/EC and 2006/49/EC, 2013 O.J. (L 176) 338 [hereinafter CRD IV].

¹⁵⁴ *Id.* art. 71(3).

¹⁵⁵ *Id.* art. 71(1)-(2); see also Alexander Eufinger, *Arbeits- und strafrechtlicher Schutz von Whistleblowern im Kapitalmarktrecht [Labor and criminal law protection of whistleblowers in securities law]*, 70 WERTPAPIER-MITTEILUNGEN ZEITSCHRIFT FÜR WIRTSCHAFT- UND BANKRECHT [WM] 2336, 2338-41 (2016) (Ger.).

¹⁵⁶ CRD IV, *supra* note 153, art. 71(2)(b).

¹⁵⁷ See Regulation (EU) No 596/2014 of the European Parliament and of the Council of 16 April 2014 on Market Abuse (market abuse regulation) and repealing Directive 2003/6/EC of the European Parliament and of the Council and Commission Directives 2003/124/EC, 2003/125/EC and 2004/72/EC, 2014 O.J. (L 173) 1, art. 32.

¹⁵⁸ CRD IV, *supra* note 153, art. 71(2)(b).

¹⁵⁹ Directive (EU) 2015/849, of the European Parliament and of the Council of 20 May 2015 on the Prevention of the Use of the Financial System for the Purposes of Money Laundering or Terrorist Financing, Amending Regulation (EU) No 648/2012 of the European Parliament and of the Council, and Repealing Directive 2005/60/EC of the European Parliament and of the Council and Commission Directive 2006/70/EC, 2015 O.J. (L 141) 73, 110, art. 61.

¹⁶⁰ See *Cartel Statistics of the European Commission 2016-2020*, EUROPEAN COMM'N (Aug. 11, 2020), <http://ec.europa.eu/competition/cartels/statistics/statistics.pdf>.

¹⁶¹ See *Cartels*, EUROPEAN COMM'N, <https://ec.europa.eu/competition/cartels/leniency/leniency.html> (last visited Aug. 14, 2020).

¹⁶² *Id.* With respect to EU whistleblowing statutes, it is usually also pointed to the Work Place Security Directive. See Council Directive 89/391/EEC of 12 June 1989 on the Introduction of Measures to Encourage Improvements in the Safety and Health of Workers at Work, 1989 O.J.

However, this piecemeal regulation of whistleblowing is about to change. Although the aforementioned rules remain in force, as *leges speciales* having priority over the rules in the new directive,¹⁶³ a coherent general protection framework for whistleblowers finally comes into being with the E.U. Whistleblowing Directive. But it has been quite a long way. Beginning in the early 2010s and, therefore, in the aftermath of the financial crisis of 2007, *inter alia*, the European Commission began to put the topic ‘whistleblowing’ on its agenda. Apart from the financial crisis, scandals like the Panama Papers, Luxleaks, and Cambridge Analytica formed a major part of the realization that whistleblowing can lead to effective detection of infringements.¹⁶⁴ This was accompanied by the observation that the regulation of whistleblowing is dispersed at both on E.U. level and among Member States, and, hence, the protection of such informants seemed to be insufficient.¹⁶⁵ Additionally, the European Commission came to the realization that whistleblowers face high risks that likely have a chilling effect on potential whistleblowers.¹⁶⁶ Against this backdrop, the enactment of a uniform whistleblower protection framework seemed like anything but an unreasonable conclusion.

However, in spite of these incidents, resistance against a general protection framework still existed, *inter alia*, from Germany; this resistance gave its very best to impede any legislative acts that pointed in such a direction.¹⁶⁷ Against this backdrop, it is far from surprising that the driving force of a whistleblower protection framework has not solely been the E.U. Commission, but the European Parliament. With two resolutions both dating back to 2017, the European Parliament asked the European Commission to develop a legislative proposal on the protection of whistleblowers.¹⁶⁸ Thus, it took until April 2018 for a proposal of the desired directive to be published

(L 183) 1. The Directive’s Article 11(6) protects employees who report shortcomings in workplace security issues to authorities, provided that internal clarification and remedy, respectively, fails.

¹⁶³ Whistleblowing Directive, *supra* note 21, art. 3(1).

¹⁶⁴ See *Factsheet on Whistleblower Protection*, EUROPEAN COMM’N (2018), https://ec.europa.eu/info/sites/info/files/placeholder_11.pdf [hereinafter *EC Factsheet on Whistleblower Protection*]; Whistleblowing Directive, *supra* note 21, at recital 6.

¹⁶⁵ *Commission Proposal for a Directive of the European Parliament and of the Council on the Protection of Persons Reporting on Breaches of Union Law*, at 1-2, COM (2018) 218 final (Apr. 23, 2018) [hereinafter *EC Proposal for a Whistleblowing Directive*].

¹⁶⁶ EC Factsheet on Whistleblower Protection, *supra* note 164; see also *infra* Part IV.A.1.

¹⁶⁷ *Interinstitutional File: 2018/0106 (COD)*, COUNCIL OF THE EU (Oct. 11, 2019), <https://data.consilium.europa.eu/doc/document/ST-13039-2019-INIT/en/pdf>. One only has to look at the outcome of the voting on the Whistleblowing Directive at the Council of the European Union.

¹⁶⁸ See 2018 O.J. (L 2018/C 252/07); EUROPEAN PARLIAMENT, LEGITIMATE MEASURES TO PROTECT WHISTLE-BLOWERS ACTING IN THE PUBLIC INTEREST (Oct. 24, 2017), https://www.europarl.europa.eu/doceo/document/TA-8-2017-0402_EN.pdf.

by the European Commission.¹⁶⁹ As this proposal did not meet the expectations of the European Parliament, the ‘dialogue procedure’ was initiated. In particular, it was heavily disputed whether an employee has to use internal channels first, or whether she can instantly report to the authorities, or even the media.¹⁷⁰ Due to political pressure, a strict mandatory internal reporting requirement could not be upheld.¹⁷¹ After reaching a respective agreement, the directive was adopted by the European Parliament in April 2019¹⁷² and, eventually, after adoption by the Council of the European Union¹⁷³ published in EU’s official journal in late-November 2019.¹⁷⁴ As the whistleblower protection framework comes in the shape of a directive, it has yet to be implemented by the Member States. The latter will have time to do so until December 2021.¹⁷⁵

III. WHISTLEBLOWING: A DISCUSSION ABOUT LEGAL CULTURES

Before this section compares the different legal cultures associated with the phenomenon of ‘whistleblowing,’ one additional step has to be performed. The different attitudes towards whistleblowing are not only reflected in statutes and respective court decisions. Additionally, both American and German cultures are deeply shaped by their conceptions of employment contracts. This becomes obvious when one, first, has a look at the content of the employment relationship, and second, when one compares the differences in termination law. For this reason, this section starts with elucidating what it means to enter into an employment contract in Germany. This section then discusses how the U.S. perspective is depicted with a special focus on the employment at-will doctrine, concludes with a comparison of the

¹⁶⁹ See EC Proposal for a Whistleblowing Directive, *supra* note 165.

¹⁷⁰ See *EU-Wide Protection and Support for Whistleblowers*, EUROPEAN PARLIAMENT (Nov. 11, 2018), <https://www.europarl.europa.eu/news/en/press-room/20181120IPR19504/eu-wide-protection-and-support-for-whistle-blowers>; *Better Protection of Whistleblowers: Council Adopts Its Position*, COUNCIL OF THE EU, (Jan. 25, 2019), <https://www.consilium.europa.eu/en/press/press-releases/2019/01/25/better-protection-of-whistleblowers-council-adopts-its-position/>.

¹⁷¹ See *First EU-wide Protection for Whistle-blowers Agreed*, EUROPEAN PARLIAMENT (Mar. 12, 2019), <https://www.europarl.europa.eu/news/en/press-room/20190311IPR31055/first-eu-wide-protection-for-whistle-blowers-agreed>; Whistleblowing Directive, *supra* note 21, art. 7(2).

¹⁷² See *Protecting Whistle-blowers: New EU-wide Rules Approved*, EUROPEAN PARLIAMENT (Apr. 16, 2019), <https://www.europarl.europa.eu/news/en/press-room/20190410IPR37529/protecting-whistle-blowers-new-eu-wide-rules-approved>.

¹⁷³ See *Better Protection of Whistle-blowers: New EU-wide Rules to Kick in 2021*, EUROPEAN COUNCIL OF THE EU, (Oct. 7, 2019), <https://www.consilium.europa.eu/en/press/press-releases/2019/10/07/better-protection-of-whistle-blowers-new-eu-wide-rules-to-kick-in-in-2021/>.

¹⁷⁴ Whistleblowing Directive, *supra* note 21.

¹⁷⁵ Whistleblowing Directive, *supra* note 21, art. 26(1).

different legal cultures, and addresses the question of whether the German system has begun to resemble its U.S. equivalent.

A. Germany's Special Understanding of Employment Relationships

In the course of the history of German employment law, Germany predominantly did not follow the classical Roman law approach. The characteristic of the latter was a very down-to-earth perspective. Employment relationships were simply regarded as an exchange of work and wage or, in other words, as a purely economic relationship devoid of any substantial personal connections.¹⁷⁶ Additional elements like the existence of ancillary obligations did not play any significant role.¹⁷⁷ However, German legal tradition did not share such a concept. Instead, by making reliance to Germanic roots, the idea of an employment contract as a “personal communitarian relationship” (“personenrechtliches Gemeinschaftsverhältnis”) evolved.¹⁷⁸ Rather than reducing the employment contract to a purely economic circumstance, the traditional approach stressed the personal relationship between the employee and the employer.¹⁷⁹ Accordingly, an employment contract was shaped by mutual trust and loyalty.¹⁸⁰ Although this concept seemed to be reasonable until the nineteenth century, where labor was predominantly performed on “small” farms and businesses had a manageable number of employees, this approach began to look outdated in the upcoming era of industrialization. The assumption of a personal relationship as the basis of every employment contract in a factory with masses of employees was criticized as unworldly.¹⁸¹ Surprisingly, however, the understanding of the employment contract as a personal relationship survived and, subsequently, by decision of the Imperial Federal Court, found entrance in German legal practice after the entry into force of the Civil Code in 1900.¹⁸²

The characterization of the employment relationship as a “personal communitarian relationship” was upheld during the reign of the National Socialist and after the Second World War.¹⁸³ After the foundation of the

¹⁷⁶ Müller, *supra* note 125, at 427; cf. KREIS, *supra* note 125, at 51.

¹⁷⁷ *Id.*

¹⁷⁸ KERWER, *supra* note 125, at 583; Krause, *supra* note 6, at 163; SPIROS SIMITIS, EIN RICHTER, EIN BÜRGER, EIN CHRIST – FESTSCHRIFT FÜR HELMUT SIMON 335 (Willy Brandt et al. eds., 1987) (Ger.).

¹⁷⁹ Müller, *supra* note 125, at 427-28 (Ger.); KREIS, *supra* note 125, at 51 (Ger.); SIMITIS, *supra* note 178, at 332-33 (Ger.).

¹⁸⁰ KERWER, *supra* note 125, at 583 (Ger.); Krause, *supra* note 6, at 163; Müller, *supra* note 125, at 428 (Ger.); KREIS, *supra* note 125, at 51 (Ger.); SIMITIS, *supra* note 178, at 332-35.

¹⁸¹ Cf. Müller, *supra* note 125, at 428.

¹⁸² Müller, *supra* note 125, at 428; SIMITIS, *supra* note 178, at 332.

¹⁸³ Cf. Krause, *supra* note 6, at 163; Müller, *supra* note 125, at 428-29 (Ger.); SIMITIS, *supra* note 178, at 332.

Federal German Republic, the traditional understanding of employment relationships served as a means to import fundamental and especially social rights.¹⁸⁴ However, criticism that was brought forward against this concept at the end of the nineteenth century gained a new momentum. Eventually, beginning in the 1970s, the traditional view began to disappear.¹⁸⁵ Surprisingly, although the concept of an employment relationship as a “personal communitarian relationship” ceased to exist, the scope of employees’ ancillary duties remained virtually untouched and traits of this understanding are still visible today.¹⁸⁶ However, it must also be mentioned that the basis of ancillary duties has altered. Henceforth, its roots are traced back to the all-pervasive principle in German Private Law:¹⁸⁷ the principle of “good faith” (“Treu und Glauben”).¹⁸⁸ With respect to employment contracts, this general duty is concretized by special provisions (e.g., that the employee generally has to render the services in person).¹⁸⁹ Additionally, ancillary duties have been shaped by the courts. Thus, both the employer and the employee are bound by a duty of loyalty.¹⁹⁰ Therefore, each party must take account of the rights and interests of the other party.¹⁹¹ In particular, the employee generally has to prevent employer from harm.¹⁹² Furthermore, every employee is obliged to confidentiality.¹⁹³ In principle, internal matters

¹⁸⁴ Müller, *supra* note 125, at 428; SIMITIS, *supra* note 178, at 334.

¹⁸⁵ Müller, *supra* note 125, at 428.

¹⁸⁶ Krause, *supra* note 6, at 163; Müller, *supra* note 125, at 437.

¹⁸⁷ Bürgerliches Gesetzbuch [BGB] [Civil Code] § 241(2), https://www.gesetze-im-internet.de/englisch_bgb/ (Ger.); see generally DAWSON, *supra* note 126. Nowadays the basis of ancillary duties is located in the BGB. However, a change in the legal situation did thereby not occur.

¹⁸⁸ KERWER, *supra* note 125, at 583; Müller, *supra* note 125, at 435-36; SIMITIS, *supra* note 178, at 334.

¹⁸⁹ Bürgerliches Gesetzbuch [BGB] [Civil Code] § 613, https://www.gesetze-im-internet.de/englisch_bgb/ (Ger.).

¹⁹⁰ See generally BGB § 241(2), *supra* note 187; see also Eufinger, *supra* note 155, at 2337 (discussing employment law); MICHAEL KORT, Festschrift für Peter Kreutz zum 70. Geburtstag 249 (Günther Hönn et al. eds., 2010) (Ger.); Krause, *supra* note 6, at 163-67, 173; KREIS, *supra* note 125, at 5; SIMITIS, *supra* note 178, at 335; ULRICH PREIS, ERFURTER KOMMENTAR ZUM ARBEITSRECHT Bürgerliches Gesetzbuch § 611a No. 615, 707 (Rudi Müller Glöge et al. eds., 20th ed. 2020) (Ger.).

¹⁹¹ KREIS, *supra* note 125, at 51 (Ger.); PREIS, *supra* note 190, at Bürgerliches Gesetzbuch § 611a No. 615, 707 (Ger.).

¹⁹² Thomas Granetzny & Melena Krause, *Was kostet ein gutes Gewissen? – Förderung von Whistleblowing durch Prämien nach US-Vorbild? [What does a clear Conscience cost? – Promotion of Whistleblowing through U.S. awards?]*, 13 CORPORATE COMPLIANCE ZEITSCHRIFT [CCZ] 29, 30 (2020) (Ger.); Müller, *supra* note 125, at 429; KREIS, *supra* note 125, at 67; PREIS, *supra* note 190, at Bürgerliches Gesetzbuch § 611a No. 709 (Ger.); SIMITIS, *supra* note 178, at 332-33; but see KERWER, *supra* note 125, at 583.

¹⁹³ Andrei Király, *Der rechtliche Schutz von Whistleblowern [Legal Protection of Whistleblowers]*, 44 ZEITSCHRIFT FÜR RECHTSPOLITIK [ZRP] 146 (2011) (Ger.); Krause, *supra* note 6, at 164-65; KREIS, *supra* note 125, at 52; Müller, *supra* note 125, at 427, 429 (Ger.); THERESA PFEIFLE, FINANZIELLE ANREIZE FÜR WHISTLEBLOWER IM KAPITALMARKTRECHT

have to be kept “secret” from the public.¹⁹⁴ But the duty of loyalty is not a unilateral obligation. For instance, since the entry into force of the Civil Code, the employer is subject to the duty to undertake protective measures so that its employees are protected against danger to life and limb.¹⁹⁵

From a socio-economic background, this relatively strong binding between the employer and the employee can be explained against the backdrop of long-lasting employment relationships.¹⁹⁶ Traditionally, the typical employee would stay at the same workplace where she started her career until her retirement.¹⁹⁷ This is additionally safeguarded by the relatively strong termination protection laws.¹⁹⁸ In order to lay off an employee, termination has to be either socially justified, meaning a just cause has to be given, or, with respect to a termination without notice, given with a compelling reason.¹⁹⁹ In this regard, it is almost unnecessary to say that the aforementioned requirements are strictly construed by courts.²⁰⁰ This is accompanied by a strong position of labor unions playing an important part in shaping the employer-employee relationship.²⁰¹ Labor unions even enjoy a protected status within corporations on different levels.²⁰² As a “trade-off,” labor unions are also obliged to a duty of loyalty towards the employer.²⁰³

Against this backdrop, it is far from surprising that mutual trust and loyalty from both sides are needed. This entails a quasi-intimate relationship between the employer and the employee that has to be protected against “foreign interference.” The employer and the employee form one group of

70-71 (2016); PREIS, *supra* note 190, at Bürgerliches Gesetzbuch § 611a No. 710-19 (Ger.); Lena Rudkowski, *Kernprobleme einer gesetzlichen Regelung zum Schutz von Whistleblowern* [Core Problems of a Whistleblower Protection Regulation], 6 CORPORATE COMPLIANCE ZEITSCHRIFT [CCZ] 204, 205 (2013) (Ger.).

¹⁹⁴ Király, *supra* note 193, at 146 (Ger.); Krause, *supra* note 6, at 163, 165; Müller, *supra* note 125, at 427, 429; PREIS, *supra* note 190, at Bürgerliches Gesetzbuch § 611a No. 710-14 (Ger.); PFEIFLE, *supra* note 193, at 70; SIMITIS, *supra* note 178, at 335 (Ger.).

¹⁹⁵ Bürgerliches Gesetzbuch [BGB] [Civil Code] § 618(1), https://www.gesetze-im-internet.de/englisch_bgb/ (Ger.).

¹⁹⁶ Teubner, *supra* note 126, at 25; *see also* Krause, *supra* note 6, at 163.

¹⁹⁷ Cf. ROLAND HEFENDEHL, GRUNDLAGEN DES STRAF- UND STRAFVERFAHRENSRECHTS – FESTSCHRIFT FÜR KNUT AMELUNG ZUM 70. GEBURTSTAG 635 (Martin Böse & Detlev Sternberg-Lieben eds., 2009) (Ger.); Müller, *supra* note 125, at 424-25.

¹⁹⁸ Cf. Teubner, *supra* note 126, at 25-26; Heinz Josef Willemsen, *Kündigungsschutz - vom Ritual zur Rationalität - Gedanken zu einer grundlegenden Reform* [Protection against Dismissal – from Ritual to Rationality – Thoughts of a fundamental Reform], 53 NEUE JURISTISCHE WOCHENSCHRIFT [NJW] 2279 (2000) (Ger.).

¹⁹⁹ Krause, *supra* note 6, at 162; Müller, *supra* note 125, at 431.

²⁰⁰ Cf. HARTMUT OETKER, ERFURTER KOMMENTAR ZUM ARBEITSRECHT Kündigungsschutzgesetz § 1 No. 61-97 (Rudi Müller Glöge et al. eds., 20th ed. 2020) (Ger.); Willemsen, *supra* note 198 (Ger.).

²⁰¹ Teubner, *supra* note 126, at 26.

²⁰² *Id.*

²⁰³ *Id.*

society that is opposed to the state.²⁰⁴ The aforementioned leads to two conclusions.

First, following the traditional view, state and society are separated so that distinct spheres of information exist: one of the state and one of the private sector, in which an exchange of information normally does not occur.²⁰⁵ This is additionally supported by the negative historical experience with denunciation. In Germany, first, Nazi-Germany's "Secret State Police" ("Geheime Staatspolizei") and, second, the "Ministry of State Security" ("Ministerium für Staatssicherheit") of the German Democratic Republic, used tips from the population to suppress and prosecute political enemies and dissidents, respectively.²⁰⁶ Unsurprisingly, whistleblowing tends to be perceived as denunciation and, is therefore associated with a negative connotation.²⁰⁷ Thus, internal matters in general, even if they constitute a breach of law, generally have to be kept secret.²⁰⁸ Both the protection of business secrets and the company's reputation are seen as important elements that are subject to protection by German and E.U. law.²⁰⁹

²⁰⁴ See Krause, *supra* note 6, at 158; Müller, *supra* note 125, at 426.

²⁰⁵ Cf. Krause, *supra* note 6, at 158; Müller, *supra* note 125, at 426; see generally HANS HEINRICH RUPP, HANDBUCH DES STAATSRECHTS § 31 (Josef Isensee & Paul Kirchhof eds., 3d ed. 2005) (Ger.).

²⁰⁶ Christoph Buchert, *Der Irrweg der EU-Kommission – Zur Überlegung über die Einführung einer staatlichen Whistleblower-Prämie* [The EU Commission's Aberration – On the Consideration of the Introduction of a Whistleblower Award], 6 CORPORATE COMPLIANCE ZEITSCHRIFT [CCZ], 144, 147 (2013) (Ger.); Fleischer, *supra* note 29, at 177; Holger Fleischer & Klaus Ulrich Schmolke, *Finanzielle Anreize für Whistleblower im Europäischen Kapitalmarktrecht? Rechtspolitische Überlegungen zur Reform des Marktmissbrauchsregimes* [Financial Incentives for Whistleblowers in European Capital Market Law? Legal policy Considerations on the Reform of the Market Abuse Regime] 15 NEUE ZEITSCHRIFT FÜR GESELLSCHAFTSRECHT [NZG] 361, 364 (2012); Gerrit Forst, *Whistleblowing im internationalen Vergleich – Was kann Deutschland von seinen Nachbarn lernen?* [Whistleblowing in international comparison - What can Germany learn from its neighbours?], 6 EUROPÄISCHE ZEITSCHRIFT FÜR ARBEITSRECHT [EuZA] 37, 43 (2013) (Ger.); Granetzny & Krause, *supra* note 192, at 30; Krause, *supra* note 6, at 157-58; PFEIFLE, *supra* note 193, at 68-69; Schmolke, *supra* note 29, at 884-85.

²⁰⁷ See, e.g., Buchert, *supra* note 206, at 145; Forst, *supra* note 206, at 43; Granetzny & Krause, *supra* note 192, at 30, 32; KERWER, *supra* note 125, at 581-82; Krause, *supra* note 6, at 157-58; Thilo Mahnhold, "Global Whistle" oder "deutsche Pfeife" – Whistleblowing-Systeme im Jurisdiktionskonflikt ["Global Whistle" or "German Whistle" – Whistleblowing systems in jurisdictional conflicts], 25 NEUE ZEITSCHRIFT FÜR ARBEITSRECHT [NZA] 737 (2008) (Ger.); Müller, *supra* note 125, at 425 (Ger.); Schmolke, *supra* note 29, at 878.

²⁰⁸ Gerdemann & Spindler, *supra* note 29, at 1897-900; Király, *supra* note 193, at 146; Krause, *supra* note 6, at 163-65; Müller, *supra* note 125, at 429; see also KREIS, *supra* note 125, at 118-19.

²⁰⁹ See, e.g., Buchert, *supra* note 206, at 148; Granetzny & Krause, *supra* note 192, at 32-33; KERWER, *supra* note 125, at 584; KREIS, *supra* note 125, at 53-66, 117-18; PFEIFLE, *supra* note 193, at 53-55; Schmolke, *supra* note 29, at 897-99; Laura Schmitt, *Geheimnisschutz und Whistleblowing: Aktuelle Rechtslage und Überlegungen zur Umsetzung in Deutschland* [Protection of Business Secrets and Whistleblowing: Current Legal Situation and thoughts for Implementation in Germany], 37 NEUE ZEITSCHRIFT FÜR ARBEITSRECHT-BEILAGE [NZA-

Second, because the state is traditionally perceived as an antagonist to society, the interest in maintaining a harmonious relationship between the employer and the employee is considered of special importance.²¹⁰ Employers principally enjoy the legally recognized interest to collaborate only with trustworthy employees who do not provide information to authorities and thus do not break out of the “intimate bond.”²¹¹ From a legal point of view, this entails that principally every disclosure of information is to be qualified as a breach of duty of loyalty.²¹² Therefore, in principle, employees blowing the whistle can be subject to both criminal and civil sanctions, such as the termination of the employment contract or even to be held liable for damages.²¹³ However, as already elucidated, the “usual” subject matter of a whistleblower case is a termination proceeding.²¹⁴

B. The U.S. ' Market Driven Approach of Employment Relationships

From a comparative law perspective, the roots of U.S. legal culture with respect to employment relationships are deeply connected with the employment at-will doctrine. The latter functions as a default rule dealing with the employment contract's duration, stating that when the parties failed to expressly determine the contract's duration, both the employer and the employee are entitled to termination at any time; both do not have to provide

BEILAGE] 50-57 (2020) (Ger.); *see also* Directive (EU) 2016/943 of the European Parliament and of the Council of June 8, 2016, Protection of Undisclosed Know-How and Business Information (Trade Secrets) Against Their Unlawful Acquisition, Use and Disclosure, 2016 O.J. (L 157) 1.

²¹⁰ Fleischer, *supra* note 29, at 177; KORT, *supra* note 190, at 250; Krause, *supra* note 6, at 158, 163 (Ger.); Müller, *supra* note 125, at 427; *cf.* Fleischer & Schmolke, *supra* note 206, at 364; KREIS, *supra* note 125, at 97-99, 119-20; SIMITIS, *supra* note 178, at 337 (Ger.); Teubner, *supra* note 126, at 25-26.

²¹¹ *See* Bundesarbeitsgericht [BAG] [Federal Labor Court] July 3, 2003, Neue Juristische Wochenschrift [NJW] 1547, 1549 (2004) (Ger.).

²¹² *See* Reichsarbeitsgericht [RAG] [German Imperial Labor Court] Nov. 1, 1930, Entscheidungen des Reichsarbeitsgericht [RAG] 10, 464 (Ger.); *see also* Bundesarbeitsgericht [BAG] [Federal Labor Court] Feb. 5, 1959, Neue Juristische Wochenschrift [NJW] 45 (1961) (Ger.).

²¹³ *See, e.g.*, Dieter Deiseroth & Peter Derleder, *Whistleblower und Denunziatoren* [*Whistleblower and Denunciators*], 41 ZEITSCHRIFT FÜR RECHTSPOLITIK [ZRP] 248, 251 (2008) (Ger.); Krause, *supra* note 6, at 164-65; Eufinger, *supra* note 155, at 2337-38 (Ger.); Granetzny & Krause, *supra* note 192, at 30, 32-33 (Ger.); PREIS, *supra* note 190, at Bürgerliches Gesetzbuch § 611a No. 719 (Ger.); PFEIFLE, *supra* note 193, at 48-55; Rudkowski, *supra* note 193, at 209.

²¹⁴ *See supra* Part II.B.1.

any reason nor face the risk of being held liable.²¹⁵ In other words, as famously laid down by the Tennessee Supreme Court in 1884:²¹⁶

“[Employers] may dismiss their employees at-will, be they many or few, for good cause, for no cause or even for cause morally wrong, without thereby being guilty of legal wrong.”

Surprisingly, the origin of the employment at-will doctrine is anything but clear. However, one thing is safe to say: it was not brought from England to its former colonies as England followed the annual hiring rule.²¹⁷ The annual hiring rule’s essence is that employment contracts with an indefinite duration are considered as concluded for one year.²¹⁸ In spite of the significant influence of English law on the “new” world, this rule was never really utilized in the new world.²¹⁹ Furthermore, it is even purported that, at least with respect to New York, the annual hiring rule was never followed at all.²²⁰ Thus, many theories evolved around the emergence of employment at-will. Has it been “invented” by treatise writer Horace Wood in 1877? Was it introduced by the courts to promote a favorable climate for entrepreneurs, or was it due to institutional characteristics within the judicial decision-making process? These are just a few of the many commonly given explanations.²²¹ However, it is beyond the scope of this article to answer these questions.

²¹⁵ Chad A. Atkins, *The Whistleblower Exception to the At-Will Employment Doctrine: An Economic Analysis of Environmental Policy Enforcement*, 70 DENV. U. L. REV. 537, 539 (1993); Cavico, *supra* note 30, at 550-51; David Culp, *Whistleblowers: Corporate Anarchists or Heroes? Towards a Judicial Perspective*, 13 HOFSTRA LAB. L. J. 109, 116 (1995); Jay M. Feinman, *The Development of the Employment at Will Rule*, 20 AM. J. LEGAL HIST. 118 (1976); Klaus H. Jander & Manuel Lorenz, *Kündigungsschutz im amerikanischen Arbeitsrecht-Das Ende der Employee-at-Will Doktrin [Dismissal protection in U.S. employment law-the demise of the employment at-will doctrine]*, 43 RECHT DER ARBEIT [RDA] 97, 98 (1990) (Ger.); Jones, *supra* note 9, at 1142; Andrew P. Morriss, *Exploding Myths: An Empirical and Economic Reassessment of the Rise of Employment At-Will*, 59 MO. L. REV. 679, 680 (1994); Kenneth R. Swift, *The Public Policy Exception to Employment at-Will: Time to Retire a Noble Warrior*, 61 MERCER L. REV. 551, 552-53 (2010).

²¹⁶ *Payne v. W. & Atl. R. Co.*, 81 Tenn. 507, 519-20 (1884), *overruled in part by* *Hutton v. Watters*, 132 Tenn. 527, 179 S.W. 134 (1915)

²¹⁷ See Deborah A. Ballam, *The Development of the Employment at Will Rule Revisited: A Challenge to Its Origins as Based in the Development of Advanced Capitalism*, 13 HOFSTRA LAB. L.J. 75, 86-87 (1995); Feinman, *supra* note 215, at 119-22; Jander & Lorenz, *supra* note 215, at 98 (Ger.); Jones, *supra* note 9, at 1142; Note, *Protecting Employees at Will against Wrongful Discharge: The Public Policy Exception*, 96 HARV. L. REV. 1931, 1933 (1983).

²¹⁸ Ballam, *supra* note 217, at 83-84; Feinman, *supra* note 215, at 120; Note, *supra* note 217, at 1933.

²¹⁹ Cf. Ballam, *supra* note 217, at 86-94; Morriss, *supra* note 215, at 706.

²²⁰ Ballam, *supra* note 217, at 86-87, 97-98.

²²¹ See, e.g., Atkins, *supra* note 215, at 540; Ballam, *supra* note 217, at 79-86, 104; Feinman, *supra* note 215, at 129-35; Morriss, *supra* note 215, at 681-83, 689-96; Swift, *supra* note 215, at 553.

Instead, the following analysis focuses on the economic and historical circumstances starting with the founding of the nation.

Especially in contrast to England, the differences between the two economies were staggering. In England, workers were available in large quantities.²²² Therefore, labor was cheap and wages were low. A rise in status and even the purchase of real property was virtually impossible for most of the population.²²³ For this reason, social concerns surfaced. An abundance of low-paid employees who could easily lose their job put pressure on the community.²²⁴ Programs similar to social welfare programs had already existed during these times, so the higher unemployment rate was, the higher the financial burden was for the public sector. Thus, the annual hiring rule was, to some extent, also due to social concerns.²²⁵ By providing termination protection for one year, pressure was taken off public coffers. Against this backdrop, annual hiring functioned as an instrument to both ameliorate poverty, as well as to save scarce public resources.

The U.S. was confronted with problems, but of different ones. In contrast to England, workers were urgently required.²²⁶ Therefore, labor was relatively expensive, and wages were relatively high. Significant financial pressure on communities virtually did not occur as employees who were laid off could easily find other jobs.²²⁷ Additionally, because of relatively high wages and an abundance of cheap land, workers could easily fend for themselves and secure their livelihoods.²²⁸ With these preconditions, one could even argue that employment at-will initially served both the interests of employers and employees. Employees welcomed this concept of flexibility because it prevented them from being stuck in “unattractive” jobs.²²⁹ Employers endorsed employment at-will because it provided them with the maximum amount of control; this also enabled them to quickly adapt to economic fluctuations.²³⁰ This especially gained in importance when industrial labor began to rise. Factory employment was linked to general economic conditions and heavily depended on demand for respective products, so frequent lay-offs became pervasive.²³¹ Additionally, delegation of control to mid-level employees working in widespread locations, triggered

²²² Ballam, *supra* note 217, at 105.

²²³ *Cf.* Ballam, *supra* note 217, at 105-06.

²²⁴ Ballam, *supra* note 217, at 105-06.

²²⁵ *Cf.* Ballam, *supra* note 217, at 105-06; Feinman, *supra* note 215, at 120, 134.

²²⁶ Ballam, *supra* note 217, at 90, 106.

²²⁷ Ballam, *supra* note 217, at 106.

²²⁸ Ballam, *supra* note 217, at 106; *see also* Morriss, *supra* note 215, at 748.

²²⁹ *Cf.* Ballam, *supra* note 217, at 90, 106; Jones, *supra* note 9, at 1143.

²³⁰ *Cf.* Ballam, *supra* note 217, at 96, 106; Feinman, *supra* note 215, at 132-34; Jones, *supra* note 9, at 1143; Morriss, *supra* note 215, at 682.

²³¹ Ballam, *supra* note 217, at 98; Feinman, *supra* note 215, at 134. *See also* Jones, *supra* note 9, at 1143; Morriss, *supra* note 215, at 747, 751; Note, *supra* note 217, at 1933; Swift, *supra* note 215, at 554-55.

by the boom in the west, entailed an increase of responsibility and began to slowly shape the world of work.²³² So to speak, employment at-will provided employers with a powerful instrument of control, safeguarding their investment at risk and, by the same token, deterred employees from abusing this freedom.

Although a supposedly significant number of employees are still subject to employment at-will, this does not apply for all.²³³ This is due to several factors. Employment at-will only comes into play when the parties failed to make a respective agreement amongst themselves. That has been done extensively by labor unions for its members.²³⁴ Furthermore, especially since the 1970s, employment at-will has been restricted by numerous means. Some of these restrictions came from the legislator, *inter alia*, in the form of termination protection laws,²³⁵ but the most important limitation was developed by courts via the public policy exception.

The relevant leading case, dealing with whistleblowing, where the public policy exception gave its debut, is *Petermann v. International Brotherhood of Teamsters*.²³⁶ In *Petermann*, an employee was laid-off because he did not follow his employer's request to provide false testimony before a legislative investigative committee. Although the court principally acknowledged the employer's right to dismiss employees at-will, the court denied the employer that possibility at the case at bar.²³⁷ By upholding the termination, the court reasoned that employees could be forced to commit illegal acts that are injurious to the public as the public good.²³⁸ Surprisingly, the court did grant the plaintiff protection, but not because of the violation of personal rights. Instead, by focusing on the potential detriments for society, the court clearly laid out the function of the public policy exception: it is an instrument to ensure that employers comply with the law—*viz.*, a means to end.²³⁹ This understanding has been developed further in subsequent cases.²⁴⁰

²³² Cf. Feinman, *supra* note 215, at 132; Morriss, *supra* note 215, at 696, 749-50.

²³³ Cf. Jander & Lorenz, *supra* note 215, at 98 (Ger.); Note, *supra* note 217, at 1934.

²³⁴ Jander & Lorenz, *supra* note 215, at 98 (Ger.); Note, *supra* note 217, at 1934; CLYDE W. SUMMERS, ZUR AUTONOMIE DES INDIVIDUUMS-LIBER AMICORUM SPIROS SIMITIS 429-35 (Dieter Simon & Manfred Weiss eds., 2000).

²³⁵ See, e.g., Jander & Lorenz, *supra* note 215, at 106-08 (Ger.); Note, *supra* note 217, at 1934; SUMMERS, *supra* note 234, at 415; Swift, *supra* note 215, at 563-65.

²³⁶ *Petermann v. Int'l Bhd. of Teamsters Chauffeurs, Warehousemen & Helpers of Am.*, Loc. 396, 174 Cal. App. 2d 184 (1959).

²³⁷ *Id.* at 27.

²³⁸ *Id.*

²³⁹ Cavico, *supra* note 30, at 594, 598; SUMMERS, *supra* note 234, at 420; cf. Atkins, *supra* note 215, at 539, 544; Bucy, *supra* note 2, at 936; Culp, *supra* note 215, at 129, 134; Jander & Lorenz, *supra* note 215, at 103; Jones, *supra* note 9, at 1138, 1146-48; Swift, *supra* note 215, at 556, 580.

²⁴⁰ See, e.g., Atkins, *supra* note 215, at 546-47; Cavico, *supra* note 30, at 595; Culp, *supra* note 215, at 123-31; Jander & Lorenz, *supra* note 215, at 103-104; Jones, *supra* note 9, at 1148-54;

However, the basic concept remains the same. In order to be successful, the employee must show that her discharge violates a public interest; solely private interests are of no further significance.²⁴¹

Having the aforementioned factors in mind, how can the employment relationship in the U.S. be characterized from a comparative law perspective? To start with, a strong managerial prerogative can be ascertained. The freedom to lead an enterprise as one pleases, independent from governmental regulations, is given great importance.²⁴² With regard to employment relationships, that statement is best exemplified by the default rule that makes it possible to lay off people at-will. Therefore, it is warranted to say that, as a tendency, the legal climate favors the employer over the employee.²⁴³ Furthermore, the “regulation” of the relationship between the employer and the employee is, to a significant extent, left to market forces.²⁴⁴ In contrast to the ‘Rhineland capitalism’²⁴⁵ shaping the German economic landscape, the labor market can be characterized as deregulated. An effective statutory employee representation within the company is virtually missing.²⁴⁶ The same applies, *mutatis mutandis*, to dismissal protection statutes.²⁴⁷ In sum, the U.S. system is described as a “commitment to individual enterprise and free markets.”²⁴⁸ The only issue that may outweigh entrepreneurial freedom is the protection of the public as manifested by the public policy exception.

Against this backdrop, it is far from surprising that, as a tendency, employment relationships are not being considered as lasting “forever” and until retirement, respectively. Frequent job changes are anything but uncommon and, therefore, are not considered as seeming shady.²⁴⁹ Additionally, U.S. employment law is far less familiar with the concept of

Note, *supra* note 217, at 1937; SUMMERS, *supra* note 234, at 418-22; Swift, *supra* note 215, at 558-63.

²⁴¹ Cf. Jones, *supra* note 9, at 1145; Morriss, *supra* note 215, at 689; Note, *supra* note 217, at 1947-50; SUMMERS, *supra* note 234, at 420-22.

²⁴² Cf. Feinman, *supra* note 215, at 124-25.

²⁴³ Cf. Atkins, *supra* note 215, at 540; Feinman, *supra* note 215, at 133-35; Jones, *supra* note 9, at 1143; Jander & Lorenz, *supra* note 215, at 98; Morriss, *supra* note 215, at 690-92; Note, *supra* note 217, at 1933; SUMMERS, *supra* note 234, at 414-15, 422.

²⁴⁴ Alexander Bruns, *Einheitlicher kollektiver Rechtsschutz in Europa? [Uniform collective redress mechanism in Europe?]*, 125 ZEITSCHRIFT FÜR ZIVILPROZESS [ZZP] 399, 403 (2012) (Ger.); Teubner, *supra* note 126, at 26; ROLF STÜRNER, MARKT UND WETTBEWERB ÜBER ALLES? 36-38 (2007) (Ger.); cf. SUMMERS, *supra* note 234, at 414-15.

²⁴⁵ See Teubner, *supra* note 126, at 25.

²⁴⁶ Bruns, *supra* note 244, at 403 (Ger.); Teubner, *supra* note 126, at 26-27; STÜRNER, *supra* note 244, at 34 (Ger.).

²⁴⁷ Cf. Atkins, *supra* note 215, at 545; Teubner, *supra* note 126, at 26-27, 29; see also discussion *supra* Part III.B.

²⁴⁸ Roger C. Cramton, *The Lawyer as Whistleblower: Confidentiality and the Government Lawyer*, 5 GEO. J. LEGAL ETHICS 291, 306 (1991); see also STÜRNER, *supra* note 244, at 38-40.

²⁴⁹ Cf. Bucy, *supra* note 2, at 966; Müller, *supra* note 125, at 425 (Ger.); Teubner, *supra* note 126, at 29.

relatively strong ancillary duties of loyalties, like one finds them in Germany. From a functional perspective, one could say that the threat of being dismissed due to employment at-will fulfills an equivalent function as the principle of “good faith” in German law—safeguarding employer’s control over her company.²⁵⁰ Hence, in the U.S., from a legal perspective, the employment relationship is way closer to a mere sale of labor than a “personal” relationship between the employer and the employee.²⁵¹ The exercising of fundamental rights²⁵² is usually not associated with employment relationships.²⁵³

Lastly, what can be deduced from the aforesaid with respect to whistleblowing? As employment relationships in the U.S., generally speaking, lack relatively strong duties of loyalty, whistleblowing by employees is more likely to happen. That could also be attached to the fact that the bond between employer and employee is not that close. As employees are more likely have to frequent job changes, the connection to their respective employers diminishes. In contrast to Germany, employees tend to not feel that closely connected to their current employers, too, so that the psychological threshold to blow the whistle and thereby “denouncing” employers is lower.²⁵⁴ This is accompanied by the issue that the legal system’s self-portrait does not necessarily consider both parties as a “team” opposed to the state. On the contrary, as shown by the history of the FCA, private persons have been capitalized for law enforcement and thereby for public purposes.²⁵⁵ Whistleblowing is not absolutely associated with a negative connotation. Although society’s attitude towards whistleblowers is still subject to ongoing controversies,²⁵⁶ with the naming of three whistleblowers as persons of the year in 2002, blowing the whistle has finally begun to evoke positive associations.²⁵⁷ In this regard, whistleblowing serves as an instrument of law enforcement and, hence, the individual whistleblower acts as a monitor in the interest of the public. The recent reforms of whistleblower programs²⁵⁸ also seem to strengthen such conclusions.

²⁵⁰ Cf. Teubner, *supra* note 126, at 25-26.

²⁵¹ SUMMERS, *supra* note 234, at 415.

²⁵² This is, of course, also due to the fact that according to U.S. law constitutional rights do not apply in a dispute between private parties. *See* Brentwood Acad. v. Tenn. Secondary School Athletic Ass’n et al., 531 U.S. 288, 315 (2001) (Thomas, J., dissenting) (with reference to the state actor doctrine).

²⁵³ SUMMERS, *supra* note 234, at 435.

²⁵⁴ Müller, *supra* note 125, at 425.

²⁵⁵ *See supra* Part II.A.1.

²⁵⁶ Cf. Aldinger, *supra* note 18, at 932; Ferziger & Currell, *supra* note 6, at 1142, 1191-92; Jones, *supra* note 9, at 1136-37, 1154-55; Kwon, *supra* note 67, at 449; Filler & Markham, *supra* note 89, at 332; Vega, *supra* note 9, at 491-92; Westbrook, *supra* note 17, at 1140.

²⁵⁷ *See, e.g.*, Dworkin, *supra* note 45, at 1758; Feldman & Lobel, *supra* note 92, at 1159; Vega, *supra* note 9, at 490, 492-97.

²⁵⁸ *See supra* Parts II.A.2, II.A.3.

C. Beginning of a General, Unilateral Convergence?

With the history and development of whistleblowing in mind, can one really purport that the German legal system is beginning to resemble its American equivalent? To start, it is evidently to ascertain that the roots of both systems are fundamentally different. In this regard, two basic reasons can be provided.

The first reason has partly already been outlined above.²⁵⁹ In contrast to the U.S., employment contracts in Germany are characterized by a relatively strong obligation of each party to take the rights and interests of the other party into account. The existence of such duties can be explained against the backdrop of long-term cooperative relationships between employers and employees. Traditionally, job changes were anything but frequent, and from a legal point of view, this promoted a “team spirit” between employers and employees as opposed to the state. As power normally comes with responsibility, the fact that employees are being subject to a duty of loyalty enables their employers to maintain control and deter moral hazard.²⁶⁰ Unsurprisingly, whistleblowing is difficult in such an environment. Because of the aforementioned “team spirit”, initially, the interest of the employer to remain unoffended by authorities generally prevailed. Legally, this is expressed by the circumstance that traditionally saw each incident of whistleblowing as a violation of the duty of loyalty.

In stark contrast stands the U.S. experience. However, one has to concede that whistleblowers have always been under attack from different sides.²⁶¹ Mostly, the public view had shifted towards the disapproval of whistleblowing when the frequent “abuse” of whistleblowing programs came to light.²⁶² Conversely, whistleblowers were heavily endorsed when political and corporate scandals were omnipresent.²⁶³ With the reform of both the IRS and the SEC Programs, the overall image of whistleblowers now seems, finally, to have moved in the positive.²⁶⁴ Apart from other reasons to be shown,²⁶⁵ from a legal perspective, the non-existence of relatively strong ancillary duties and the more frequent occurrence of job changes make whistleblowing more likely. This might also be due to a greater skepticism towards institutions in general²⁶⁶ that might cause employees to not

²⁵⁹ Cf. *supra* Part III.A.

²⁶⁰ Cf. Teubner, *supra* note 126, at 25-26.

²⁶¹ Cf. Jones, *supra* note 9, at 1136-37; Kwon, *supra* note 67, at 449; Filler & Markham, *supra* note 89, at 332; Vega, *supra* note 9, at 491-92.

²⁶² See *supra* Part II.A.1.

²⁶³ Cf. Rapp, *supra* note 92, at 94-95.

²⁶⁴ Cf., e.g., Feldman & Lobel, *supra* note 92, at 1159; Fleischer, *supra* note 29, at 177; Vega, *supra* note 9, at 490, 492-96; Ventry, *supra* note 18, at 492.

²⁶⁵ See discussion *infra* Part III.C.

²⁶⁶ See BOYNE, *supra* note 6, at 282-83; Bucy, *supra* note 2, at 965-66; Bruns, *supra* note 244, at 403; PAUL D. CARRINGTON, BITBURGER GESPRÄCHE: JAHRBUCH 2003 33 (Stiftung

automatically help to cover up the potential misconduct of their employers. The state and society have never really been considered as antagonists as private law enforcement, and thereby private initiatives for the public good have always been cornerstones of the U.S. self-portrait.²⁶⁷ Besides taking into account the existence of employment at-will, it might also be easier for employees who are dismissed for blowing the whistle to reestablish and start new careers because of the immense scale of the American economy.²⁶⁸

The second reason is more directed at the fundamental structure of the legal system: is the law primarily and to a considerable extent, respectively, enforced by private persons or by public institutions?²⁶⁹ Admittedly, with the IRS and SEC Programs, it is an agency that enforces the law at the end. However, this cannot distract from the fact that it is still the whistleblower's tip that informs authorities of the potential misconduct, thereby initiating the public enforcement procedure. Against this backdrop, it is warranted to classify the active use of whistleblowers (e.g., by soliciting and offering high awards) as a kind of private law enforcement.²⁷⁰

In Germany, the law is, to a very large extent, enforced by authorities.²⁷¹ According to the self-portrait of that legal system, it is first and foremost up to the state to collect information about potential wrongdoings and, subsequently, to take respective enforcement actions.²⁷² Therefore, a relatively tight net of authorities supervises private parties when it is deemed to be necessary. If the respective authority detects a violation of law, it will normally interfere by imposing sanctions against the wrongdoer. Against this backdrop, one could argue that the use of whistleblowers and, hence, of private parties, is unnecessary since authorities are gathering information on their own. This might additionally explain why there was seen no need both

Gesellschaft für Rechtspolitik et al. eds., 2003); Jones, *supra* note 9, at 1141; Christoph Kern, *Private Law Enforcement versus Public Law Enforcement*, 12 ZEITSCHRIFT FÜR ZIVILPROZESS INTERNATIONAL [ZZPINT] 351, 372 (2007); STÜRNER, *supra* note 244, at 34.

²⁶⁷ See, e.g., CARRINGTON, *supra* note 266, at 33, 38; Kern, *supra* note 266, at 372; see *supra* note 269 (with respect to the term "private law enforcement"); cf. Stengle, *supra* note 2, at 496-99.

²⁶⁸ See Bucy, *supra* note 2, at 966.

²⁶⁹ See generally Gary S. Becker & George J. Stigler, *Law Enforcement, Malfeasance, and Compensation of Enforcers*, 3 J. LEGAL STUD. 1 (Jan. 1974); Kern, *supra* note 266, at 356-59; William M. Landes & Richard A. Posner, *The Private Enforcement of Law*, 4 J. LEGAL STUD. 1 (1975); Bucy, *supra* note 6, at 4-8; HEFENDEHL, *supra* note 197, at 641-42 (Ger.) (with respect to the dichotomy between private and public law enforcement).

²⁷⁰ This seems to be also the view of Bishara. See Bishara et al., *supra* note 30, at 103; Ferziger & Currell, *supra* note 6, at 1143; Vega, *supra* note 9, at 516.

²⁷¹ Kern, *supra* note 266, at 360, 374-76; STÜRNER, *supra* note 244, at 283-84.

²⁷² Cf. Kern, *supra* note 266, at 372. Admittedly, powerful agencies and thereby public law enforcement, of course, exist in the U.S. as well. A perfect example is the SEC. However, in comparison to the German system, the U.S. relies much more on private law enforcement. See *id.* at 372-74.

to come forward with whistleblowing protection laws and to put the topic of ‘whistleblowing’ on the agenda in the first place.

In the U.S., relatively heavy emphasis is put on a system of private law enforcement.²⁷³ In such a system, it is up to private parties, to a large extent, to detect violations of law and to subsequently “fine” wrongdoers. However, the latter is, of course, not done via imposing sanctions. Instead, a party that detects a violation of law sues the wrongdoer and is likely to receive a generous amount of money from the defendant.²⁷⁴ In this regard, the probability of being sued and thereafter being subject to a high financial award function serves as the deterring element for potential wrongdoers.²⁷⁵ For this reason, potential wrongdoers might refrain from a prospective violation of law.

From a historical point of view, placing a strong focus on private law enforcement can easily be explained. The U.S. was a relatively young nation devoid of a tight net of public institutions, making it impossible to effectively punish and deter potential wrongdoers.²⁷⁶ Therefore, the incentivization of private parties by several means, such as instruments of punitive damages or monetary awards when blowing the whistle, deemed to be a necessary instrument in the law enforcement process. Additionally, in the U.S., skepticism and mistrust vis-à-vis state power and, therefore, authorities, is traditionally higher than in continental Europe.²⁷⁷ Historically, based on the negative experiences suffered from the “old” European regimes of those who have escaped to the U.S., nowadays, there is, generally speaking, the fear that public agencies are captured by political groups that exploit them for their own goals.²⁷⁸ In this regard, private parties enforcing the law are perceived as impartial and thereby functioning as a counter instrument to potentially biased authorities.²⁷⁹ In sum, whistleblowing in such a system is virtually an additional building block of the private law enforcement framework.

Given these very different historical and legal preconditions, is it nevertheless warranted to say that the German whistleblowing system is more and more beginning to resemble the American system? From a starting point,

²⁷³ CARRINGTON, *supra* note 266, at 33-34, 60; Kern, *supra* note 266, at 372; *cf.* Schmidt, *supra* note 6, at 157.

²⁷⁴ CARRINGTON, *supra* note 266, at 34; Kern, *supra* note 266, at 372-74.

²⁷⁵ CARRINGTON, *supra* note 266, at 45; Kern, *supra* note 266, at 357.

²⁷⁶ Bruns, *supra* note 244, at 403 (Ger.); Bucy, *supra* note 2, at 910; Finegan, *supra* note 2, at 628-29, 639; Note, *supra* note 2, at 101; Stengle, *supra* note 2, at 478; *cf.* Helmer, *supra* note 2, at 1267; Johnston, *supra* note 2, at 1169.

²⁷⁷ *Cf.* BOYNE, *supra* note 6, at 282-83; Bucy, *supra* note 2, at 965-66; Bruns, *supra* note 244, at 403; CARRINGTON, *supra* note 266, at 33; Kern, *supra* note 266, at 372; STÜRNER, *supra* note 244, at 34.

²⁷⁸ See Bucy, *supra* note 6, at 32-33; CARRINGTON, *supra* note 266, at 46-47; Kern, *supra* note 266, at 361; Rapp, *supra* note 89, at 138-139; *cf.* Helmer, *supra* note 2, at 1275; Ramirez, *supra* note 6, at 622, 655, 665; Rapp, *supra* note 92, at 127-28 (with respect to regulatory capture).

²⁷⁹ *Cf. id.*

it is hard to deny that the German system is gradually subject to change. As more legal rules are constantly adopted and more areas are being permeated by law, authorities have slowly begun to lack capacity to detect and punish all of the potential wrongdoers. The deficits of a system of pure public law enforcement had become apparent.²⁸⁰ Therefore, the E.U. especially begins—restricted to certain areas of law—to implement a mixed enforcement system that also makes use of private initiatives.²⁸¹ From the perspective of the E.U., establishing an efficient whistleblower protection framework perfectly fits into this development. However, with regard to Germany, movements in such a direction can also be ascertained in areas that are subject only to national law. Enacting collective redress mechanisms to provide remedies against misleading statements of listed companies is just one example.²⁸²

But does this mean that the German approach towards whistleblowing is really beginning to gradually resemble the U.S. understanding? *Prima facie*, one might be inclined to answer the question in the affirmative. Taking a closer look and bearing in mind the fundamental structure of both the employment relationship and the enforcement system, this question has to be answered in the negative. However, against the backdrop of the EU Whistleblowing Directive, one has to admit that its implementation may prompt a deeper transformation in the German legal system than one might anticipate. Apart from that, it is quite safe to say that a “complete” change of the legal system characterized by public law enforcement is nevertheless not very likely to occur. In this regard, it is more warranted to say that the E.U. Whistleblowing Directive brings additional private enforcement elements to the German system.

But why has the aforementioned question been answered in the negative? The answer lies in the different understanding that both legal systems have about whistleblowing. In Germany, even according to the most recent court decisions, blowing the whistle is predominantly not considered

²⁸⁰ In this respect, see the examples *supra* Part I; see also PFEIFLE, *supra* note 193, at 59-61 (Ger.); Klaus Ulrich Schmolke & Verena Utikal, *Whistleblowing: Incentives and situational determinants*, FRIEDRICH-ALEXANDER UNIVERSITY ERLANGEN-NUREMBERG, INSTITUTE FOR ECONOMICS (2016); cf. Bucy, *supra* note 2, at 916-17, 940-42; Ferziger & Currell, *supra* note 6, at 1186; Schmidt, *supra* note 6, at 144.

²⁸¹ One can even trace back this “shift” to 1963 where the European Court of Justice gradually began to employ private parties as watchdogs whether Member States comply with EU law. See *Van Gend & Loos v. Netherlands Inland Revenue Administration*, 1963 E.C.R. 2, 13 (“The vigilance of individuals concerned to protect their rights amounts to an effective supervision in addition to the supervision entrusted by Articles 169 and 170 to the diligence of the Commission and of the Member States”); see also Christian Heinze, *Der kartelldeliktische Schadensersatzanspruch nach der Richtlinie 2014/104/EU – Baustein oder Fremdkörper im europäischen Haftungsrecht? [Antitrust Action for Damages under Directive 2014/104/EU – Cornerstone or Alien Element in European Liability Law?]*, 28 ZEITSCHRIFT FÜR EUROPÄISCHES PRIVATRECHT [ZEUP] 281 (2020) (Ger.); Kern, *supra* note 266, at 376-78.

²⁸² See Bruns, *supra* note 244, at 414-15 (Ger.).

to be an instrument of law enforcement, but rather an exercise of fundamental rights. It is not a means to an end. Instead, it is an end in itself. Although newer court judgments are, *mutatis mutandis*, eager to stress the “public interest in disclosure of the information,” a whistleblower termination procedure primarily deals with the balancing of the employer’s and the employee’s interests: *viz.*, entrepreneurial freedom versus the right to freedom of expression.²⁸³ This highlights that whistleblowers are not considered to be defenders of the public good but are merely defending their own rights. It is just a case between two private parties arguing about the scope of their personal rights. Public policy considerations play only a minor role at best; a broader, law enforcement perspective is barely adopted. That is in line with the aforementioned traditional concept of law enforcement and may explain courts’ emphasis on whistleblowers’ motives. Law is enforced by authorities, not by private persons. Whether the EU Whistleblowing Directive alters this approach remains to be seen.

In the U.S., it is completely the other way round. Fundamental rights do not seem to play any role in employment relationships. Instead, the employer enjoys nearly full discretion with respect to decisions affecting the employment relationship. However, the employer’s entrepreneurial power is outweighed by the public interest in safeguarding compliance with the law. In this regard, the public policy exception restricts the employer’s right to control. But the ambit of the public policy exemption is relatively narrow. Most importantly, it is only applicable when the termination violates a public, rather than a private, interest.²⁸⁴ In other words, the public policy exception only exists to protect the public; courts focus on the benefits for society that the relevant conduct of the whistleblower may entail. This reveals the legal system’s attitude towards whistleblowing: it is purely functional. Referring to the system’s preference for private law enforcement, the issue of whistleblowing can be perfectly incorporated the picture of capitalizing private persons for public ends. This may also explain why whistleblowers’ motives are virtually irrelevant. In sum, whistleblowing in the U.S. is not associated with the exercise of personal rights, but rather serves as a functional equivalent to what is preponderantly fulfilled by authorities in a public law enforcement regime: policing private companies. Lastly, it is anything but highly probable that the E.U. Whistleblowing Directive will deeply transform the German legal system towards a predominantly private law enforcement regime seems.

²⁸³ See *supra* Part II.B.1.

²⁸⁴ See discussion *supra* Part III.B.

IV. THE LAW AND ECONOMICS OF WHISTLEBLOWING: TIME FOR A CONVERGENCE

After elaborating the legal cultural framework, this section will discuss the aforementioned convergence of the normative and the economic “world” with respect to comparative law theory. In this regard, a threefold approach is followed. First, the standard economic model is outlined and subsequently applied whereby the incentive structure and societal benefits of whistleblowing are revealed. This is due to several reasons. Thus, the later discussed belief model partly refers to mainstream economics. Furthermore, in order to fully comprehend the U.S. discussion about the IRS and SEC Programs, it is virtually necessary to deal with standard economic theory. In spite of all the criticisms, the standard economic model is still dominating, which might also be due to the fact that an encompassing alternative model does not currently exist. Lastly, as economic thinking is pervasive in the U.S. legal system, elucidating mainstream economics gives vital insights in the *mentalité* of this legal culture. Second, this section introduces the belief model with special emphasis on the question of how the law influences people’s behavior. Third and lastly, I will address the closure of the gap between the economic and legal approach. More specifically, against the backdrop of the belief model, I will converge and discuss why, in general, successful implementation of laws may fail, and how to avoid these failures, and the theory of legal transplants.²⁸⁵ From an economic standpoint, the novelty is that the question of when it is warranted to speak of a successful legal transplantation is no longer left to standard economic theory. Instead, the belief model gives room for a more nuanced understanding of the movability of legal ideas.

A. *The Standard Economic Model*

1. Basics and Concretizations

The questions for this and the following section have already been indicated above: when is it likely that individuals blow the whistle and, on a more abstract level, why and when people follow the law? Here, these questions shall be answered by using mainstream economic theory—*viz.*, the neoclassical model is applied.²⁸⁶ Simply put, it is assumed that people are selfish profit maximizers who always act rational.²⁸⁷ Against this backdrop, people comply with the law because of the fear of being punished and thereby

²⁸⁵ See discussion *infra* Part IV.C.

²⁸⁶ See, e.g., Gary S. Becker, *Crime and Punishment: An Economic Approach*, 76 J. POL. ECON. 169 (1968); Becker & Stigler, *supra* note 269, at 1; Richard A. Posner, *An Economic Theory of the Criminal Law*, 85 COLUM. L. REV. 1193 (1985).

²⁸⁷ *Cf. id.*

avoiding monetary losses.²⁸⁸ In this regard, the fine functions like a prize.²⁸⁹ In other words, people who choose to disobey the law may do that but have to take a price into account.²⁹⁰ This entails the forecast that if the profits gained out of the infringement succeed the prospective fine, people do not adjust to new legal situations. However, especially in the past few decades, the neoclassical model has been subject to heavy criticism.²⁹¹ For instance, it has been critically remarked that this model is completely devoid of any moral categories and the assumption of rationality is labeled as a fallacy. Lastly, the standard economic model would lack of inner coherence.²⁹² Then, surprisingly, the aforementioned assumptions are not applied to law enforcers. Instead, the implicit image prevails that they act like machines mechanically enforcing the law.

However, it is well beyond the scope of this article to adequately address these purported shortcomings. That has been extensively done elsewhere.²⁹³ At this point, it is sufficient to acknowledge these deficits and hence to exercise caution when drawing conclusions. Therefore, it is more warranted to speak of an economic interpretation than of an economic analysis. The term ‘interpretation’ better expresses the uncertainty that comes with model-based economic reasoning and thereby debunks the myth of the purported mathematical unequivocalness, which is commonly associated with law and economics.

With these caveats in mind, one has to admit that this model cannot be fully applied to the constellation given here. When it comes to whistleblowing, it is not about deciding whether or not to disobey the law in order to gain an advantage. Rather, it is about what circumstances have to be given so that individuals will blow the whistle. In this regard, the choice between to blow or not blow the whistle can be expressed in the following formula.²⁹⁴ People will blow the whistle if the potential (p) gain (G) exceeds the expected (e) costs (C):

$$p * G > e * C$$

Starting with the potential factors that will raise the costs, one first has to point out the potential negative implications for the employee’s future

²⁸⁸ *Id.*

²⁸⁹ See, e.g., KAUSHIK BASU, *THE REPUBLIC OF BELIEFS: A NEW APPROACH TO LAW AND ECONOMICS* 22 (2018).

²⁹⁰ *Id.*

²⁹¹ See, e.g., Russell B. Korobkin & Thomas S. Ulen, *Law and Behavioral Science: Removing the Rationality Assumption from Law and Economics*, 88 CALIF. L. REV. 1051 (2000).

²⁹² BASU, *supra* note 289, at 36.

²⁹³ See, e.g., *supra* note 291, at 1053.

²⁹⁴ See also Feldman & Lobel, *supra* note 92, at 1183; Ferziger & Currell, *supra* note 6, at 1172; Givati, *supra* note 6, at 53; Rapp, *supra* note 92, at 112; Schmidt, *supra* note 6, at 152; Schmolke, *supra* note 29, at 912; cf. Depoorter & De Mot, *supra* note 5, at 154.

career.²⁹⁵ In particular, employees may face disadvantages in the shape of dismissal and even blacklisting for an entire industry branch. Just for the sake of completeness, blowing the whistle may also lead to the employer's implosion.²⁹⁶ Additionally, apart from those harsh consequences, retaliatory measures like relocation or demotion also have to be taken into account.²⁹⁷ Furthermore, these job-related issues might entail non-pecuniary disadvantages, too. Social ostracism by (former) colleagues and even health related issues may occur.²⁹⁸

From an economic understanding, with the employment constellation in mind, the whistleblower can be characterized as an undiversified investor.²⁹⁹ Typically, she has only one job—*viz.*, she cannot diversify her human investment among different employers—and, therefore, is likely to be risk-averse. In other words, there is a fundamental disincentive to blow the whistle. Against this backdrop, the employee whistleblower has to be insulated from potential disadvantages so that the aforementioned formula turns out to be positive.

It would be intuitive to financially reward whistleblowers as a remedy.³⁰⁰ Indeed, paying whistleblowers a fixed percentage of the recovered sum nowadays belongs to the standard repertoire of both IRS and the SEC Programs.³⁰¹ However, in particular in the U.S., the usefulness of monetary rewards is subject to an ongoing debate. Thus, it is questioned whether

²⁹⁵ See, e.g., Aldinger, *supra* note 18, at 916; Bishara et al., *supra* note 30, at 97-98; Bucy, *supra* note 2, at 952-54; Bucy, *supra* note 6, at 61-62; Culp, *supra* note 215, at 112-13; Depoorter & De Mot, *supra* note 5, at 159; Feldman & Lobel, *supra* note 92, at 1158; Ferziger & Currell, *supra* note 6, at 1173-74; Fleischer, *supra* note 29, at 178; Fleischer & Schmolke, *supra* note 206, at 361; Givati, *supra* note 6, at 44; Granetzny & Krause, *supra* note 192, at 30; Jones, *supra* note 9, at 1137, 1159; PFEIFLE, *supra* note 193, at 75-77; Ramirez, *supra* note 6, at 620; Rapp, *supra* note 89, at 113-14; Rapp, *supra* note 92, at 95, 124-25; Schmolke & Utikal, *supra* note 280, at 2, 26; Ventry, *supra* note 18, at 466; Westbrook, *supra* note 17, at 1118, 1123.

²⁹⁶ Rapp, *supra* note 92, at 95, 119.

²⁹⁷ Bucy, *supra* note 6, at 62.

²⁹⁸ Aldinger, *supra* note 18, at 916; Bishara et al., *supra* note 30, at 97-98; Buchert, *supra* note 206, at 145 (Ger.); Bucy, *supra* note 2, at 948-52, 955-58; Bucy, *supra* note 6, at 61-62; Culp, *supra* note 215, at 112-14; Feldman & Lobel, *supra* note 92, at 1158; Ferziger & Currell, *supra* note 6, at 1173, 1175; Givati, *supra* note 6, at 44; Huang, *supra* note 89, at 450-52; Jones, *supra* note 9, at 1159-60; Schmolke & Utikal, *supra* note 280, at 2; Rapp, *supra* note 89, at 116-17; Rapp, *supra* note 92, at 95-96, 119-22; Ventry, *supra* note 18, at 466.

²⁹⁹ Rapp, *supra* note 92, at 119.

³⁰⁰ Another possibility would be to fine insiders who refrained from blowing the whistle. However, the reason why such an approach is not discussed here is simple. The probability of detection is extremely low. Capitalizing whistleblowers is precisely done because the state lacks respective information. That might explain why the strategy of fining is not employed by any legislature of the two legal systems discussed here. See Schmolke, *supra* note 29, at 904-05; Schmolke & Utikal, *supra* note 280, at 25, for a discussion about this approach.

³⁰¹ Bishara et al., *supra* note 30, at 93-95; Bucy, *supra* note 2, at 970-72; Dworkin, *supra* note 45, at 1769-71; Rapp, *supra* note 89, at 121-23; Ventry, *supra* note 18, at 484 (defending this strategy).

financial rewards makes whistleblowing more likely and whether (high) monetary incentives have a negative impact on the quality of tips.³⁰² The specific design of the two whistleblowing programs is also subject to criticism. In particular, whistleblower awards are considered as too high creating “perverse incentive[s].”³⁰³ Lastly, it is purported that *inter alia* monetary rewards distort the relationship between internal and external whistleblowing, which typically is to the detriment of internal compliance systems.³⁰⁴ However, it is beyond the scope of this article to provide answers to all these issues raised. Given the particular salience of monetary rewards to both the ongoing debate in the U.S. and Germany, a discussion on this topic is postponed to a later section.³⁰⁵

Besides the difficult question of monetary incentives, one issue may also shift the balance towards blowing the whistle: anti-retaliation provisions.³⁰⁶ If whistleblowers are protected against disciplinary measures of their employers, the expected costs should theoretically be zero. However, although this conclusion might *prima facie* be sound, several concerns cannot easily be eliminated. First, there is uncertainty around whether or not the whistleblower actually falls under the scope of the whistleblower protection provisions. Legal ambiguities may cause the application of these provisions to be less likely. Second, the effectiveness of the protective provisions is of a major concern. Burdensome and slow-working judicial procedures can turn out to be real impediments. In sum, these findings can be expressed in the following formula: the more uncertain it is that the protection provisions effectively apply, the less likely it is that a whistle is blown.

However, all of these uncertainties can, at least theoretically, be avoided by providing the possibility of anonymous whistleblowing. If a whistleblower’s identity is not disclosed, retaliatory measures cannot be deployed, too. Although this may sound good in theory, various concerns have

³⁰² Cf., e.g., Aldinger, *supra* note 18, at 928-29; Buchert, *supra* note 206, at 148-49; Ferziger & Currell, *supra* note 6, at 1152, 1198-99; Fleischer & Schmolke, *supra* note 206, at 364 (Ger.); Schmolke, *supra* note 29, at 914 (Ger.).

³⁰³ Aldinger, *supra* note 18, at 936-37; Depoorter & De Mot, *supra* note 5, at 137; cf. Ebersole, *supra* note 9, at 128, 142; Ferziger & Currell, *supra* note 6, at 1198-99; Ramirez, *supra* note 6, at 646; Vega, *supra* note 9, at 512.

³⁰⁴ Aldinger, *supra* note 18, at 938-41; Buchert, *supra* note 206, at 147; Ebersole, *supra* note 9, at 137-40; Fleischer, *supra* note 29, at 177-78 (Ger.); Granetzny & Krause, *supra* note 192, at 32; cf. Barthle, *supra* note 42, at 1245; Bishara et al., *supra* note 30, at 76; Fleischer & Schmolke, *supra* note 206, at 364 (Ger.); PFEIFLE, *supra* note 193, at 146-51; Rachel S. Taylor, *A Cultural Revolution: The Demise of Corporate Culture through the Whistleblower Bounty Provisions of the Dodd-Frank Act*, 15 TRANSACTIONS: TENN. J. BUS. L. 69, 82-83 (2013); Vega, *supra* note 9, at 513, 516.

³⁰⁵ See discussion *infra* Part VI.A.-B.

³⁰⁶ See, e.g., Aldinger, *supra* note 18, at 942; Feldman & Lobel, *supra* note 92, at 1160-61; Ferziger & Currell, *supra* note 6, at 1174; Dworkin, *supra* note 45, at 1768.

to be highlighted. First, complete anonymity is difficult to uphold.³⁰⁷ It often may be the case that the information revealed by the whistleblower is so specific that it may be feasible to find out who could be the informant. At least a limited group of “suspects” should easily be identified. Furthermore, anonymity makes follow-ups more difficult if not impossible. Therefore, authorities and internal departments, respectively, might often forego further enforcement activities. Lastly, critics from Germany, especially, purport that anonymous whistleblowing incentivizes low-quality and frivolous tips since whistleblowers can hide behind a cloak of anonymity, where they do not have to fear any consequences at all.³⁰⁸

2. The Pros and Cons of Whistleblowing

As uncertain as the standard economic model is with regard to the question of when the whistle is blown, it is also unclear, from a model-based assessment, whether whistleblowing entails benefits for society. However, a specification has to be made in this respect. That whistleblowing is detrimental to the public good is not common ground (anymore).³⁰⁹ Instead, the debate has shifted to the concrete design of whistleblowing programs. The structure of the latter could indeed produce a greater number of costs that exceed the potential benefits.³¹⁰

Against this backdrop, promoters of whistleblowing first and foremost emphasize that whistleblowing deters wrongdoers.³¹¹ If prospective perpetrators have to take the possibility of whistleblowing into account, the likelihood of detection and thereby the incentive to comply with the law increases *ex-ante*. This conclusion can also be enriched by a game-theoretic thought. If I have to reckon with whistleblowers when I violate the law, and other people have to take into account that I might blow the whistle if they do not comply with the law, there may be less infringements.

Apart from that, benefits for the law enforcement procedure are stressed. Authorities are provided with information on wrongdoings from either what they theoretically could have obtained themselves, but at much

³⁰⁷ Forst, *supra* note 206, at 72 (Ger.); Dworkin, *supra* note 45, at 1772; Király, *supra* note 193, at 147; Thüsing & Forst, *supra* note 6, at 17.

³⁰⁸ Cf. Forst, *supra* note 206, at 72-73; HEFENDEHL, *supra* note 197, at 630; Király, *supra* note 193, at 147; Krause, *supra* note 6, at 169; Mahnhold, *supra* note 207, at 739-40; Schmolke, *supra* note 29, at 909; Thüsing & Forst, *supra* note 6, at 17; *see also* Cavico, *supra* note 30, at 641.

³⁰⁹ Cf. Ferziger & Currell, *supra* note 6, at 1191-92.

³¹⁰ *See* Ferziger & Currell, *supra* note 6, at 1152, 1158; Nyrreröd & Spagnolo, *supra* note 5, at 6-7; Schmolke, *supra* note 29, at 879, 892 (Ger.); *see also* discussion *infra* Part IV.A.2.

³¹¹ PFEIFLE, *supra* note 193, at 135-36; Ramirez, *supra* note 6, at 620; Jones, *supra* note 9, at 1137, 1163; Kwon, *supra* note 67, at 502; Rapp, *supra* note 89, at 108; Schmidt, *supra* note 6, at 147; *cf.* Bishara et al., *supra* note 30, at 88; Nyrreröd & Spagnolo, *supra* note 5, at 7-9; Schmolke, *supra* note 29, at 918; Ventry, *supra* note 18, at 474-75.

higher costs, or what they might not even have found out themselves.³¹² In a world without whistleblowing, the lack of information would entail an enforcement deficit that has to be avoided. Therefore, aside from an expected increase of enforcement and an increased deterrence effect, capitalizing whistleblowers produces less costs than investigations conducted by authorities only. In this regard, it is warranted to classify whistleblowers as the cheapest provider of information. Especially in work-related contexts, employee whistleblowers typically belong to the first group of persons who detect infringements.³¹³ Additionally, as they inevitably get in contact with potential misconduct, no further investigation costs accrue. But not only benefits in the public enforcement procedure are put forward. With regard to internal programs, a well-functioning whistleblowing regime is said to improve “long-term organizational effectiveness.”³¹⁴

However, as already indicated, things are unfortunately not as unambiguous as expected. Especially with regard to administrative costs, the aforementioned benefit-hypothesis is questioned. In general, in order to obtain a positive result for society, the costs for authorities should not exceed the benefits. Thus, in order to effectively manage the received tips, resources are inevitably required to sort out the good tips from the bad ones.³¹⁵ Furthermore, authorities typically have to conduct further investigation to verify the information that entails additional costs.³¹⁶ This *inter alia* would apply when whistleblowers are “overprotected” or have the chance to obtain large rewards.³¹⁷ The latter, especially, might have the potential to produce “perverse incentives.” Prospective whistleblowers might either be incentivized to rapidly provide information to authorities in order to be the only one eligible for a reward and thereby to just give it a try, or to wait so

³¹² Bucy, *supra* note 6, at 59; Ferziger & Currell, *supra* note 6, at 1159; PFEIFLE, *supra* note 193, at 134; *cf.* Bucy, *supra* note 2, at 940-41; 944; Fleischer, *supra* note 29, at 178; Nyneröd & Spagnolo, *supra* note 5, at 8; Ventry, *supra* note 18, at 467, 469.

³¹³ See Aldinger, *supra* note 18, at 938; Bucy, *supra* note 2, at 940-41; Depoorter & De Mot, *supra* note 5, at 138; Fleischer, *supra* note 29, at 178; Fleischer & Schmolke, *supra* note 206, at 363; PFEIFLE, *supra* note 193, at 134; Rapp, *supra* note 89, at 108-09; Rapp, *supra* note 92, at 135; Schmidt, *supra* note 6, at 144.

³¹⁴ Marcia P. Miceli, Janet P. Near & Charles R. Schwenk, *Who Blows the Whistle and Why*, 45 *INDUS. & LAB. REL. REV.*, 113 (1991); *cf.* Aldinger, *supra* note 18, at 938-39; Ebersole, *supra* note 9, at 139-40; Schmidt, *supra* note 6, at 161-64; Schmolke, *supra* note 29, at 888.

³¹⁵ See Bucy, *supra* note 2, at 967; Ferziger & Currell, *supra* note 6, at 1155, 1158-59, 1171, 1185; Fleischer & Schmolke, *supra* note 206, at 364 (Ger.); Ramirez, *supra* note 6, at 645.

³¹⁶ *Cf.* Aldinger, *supra* note 18, at 937-38; Barthle, *supra* note 42, at 1233; Bucy, *supra* note 2, at 967; Bucy, *supra* note 6, at 64; Ebersole, *supra* note 9, at 140-41; Ferziger & Currell, *supra* note 6, at 1158-59, 1185; PFEIFLE, *supra* note 193, at 140 (Ger.); Schmolke, *supra* note 29, at 914, 916 (Ger.); Vega, *supra* note 9, at 523.

³¹⁷ See Aldinger, *supra* note 18, at 942; Ebersole, *supra* note 9, at 135-36; 141-42; Feldman & Lobel, *supra* note 92, at 1177; Ferziger & Currell, *supra* note 6, at 1152; *cf.* Eufinger, *supra* note 155, at 2341; Givati, *supra* note 6, at 44-45.

that the potential fine, and thereby the award amount, will increase.³¹⁸ Both are detrimental to society. The former is likely to burden authorities with low-quality tips as whistleblowers are likely to forego verification of the respective information, while the latter increases the damage to society as wrongdoing should be stopped at the earliest possible point.³¹⁹ For the sake of completeness, and against the beneficial character of whistleblowing in general, critics from Germany object that an atmosphere of mistrust is created might be detrimental to the working atmosphere and, eventually, the productivity of the company.³²⁰

Verifying all the aforementioned points is anything but an easy undertaking. Whether a small increase in high quality claims due to an alleged “over-incentivization” or the benefits resulting from the deterrent effects of whistleblowing on potential wrongdoers may offset the increased administrative costs seem to be impossible. However, one conclusion can be drawn: in order to reach a net-positive outcome, the concrete design of the respective whistleblowing regime matters. Thus, tipsters providing information without any hard evidence should principally be deterred. Furthermore, whistleblowers should not be encouraged to wait to come forward when they have sufficient information. If the fulfillment of these “design conditions” can ultimately be verified by using standard economic theory alone is, however, to be highly doubted. By now, it is recognized that a whistleblower’s motives are far more complex than a simple cost-benefit analyses. Other aspects like altruism and non-pecuniary elements matter too.³²¹

B. *The Alternative Economic Approach: The Belief Model*

The standard economic model as to why people comply with the law has attracted numerous critics from different sides. However, not many

³¹⁸ Cf. Aldinger, *supra* note 18, at 942; Blount & Markel, *supra* note 45, at 1041-42; Barthle, *supra* note 42, at 1232; Buchert, *supra* note 206, at 149; Depoorter & De Mot, *supra* note 5, at 156-158; 160; Ebersole, *supra* note 9, at 151; Feldman & Lobel, *supra* note 92, at 1203; Ferziger & Currell, *supra* note 6, at 1151; Fleischer, *supra* note 29, at 177; Fleischer & Schmolke, *supra* note 206, at 364, 367; PFEIFLE, *supra* note 193, at 137-45 (Ger.); Rapp, *supra* note 89, at 93-94; Taylor, *supra* note 304, at 86.

³¹⁹ Cf. Aldinger, *supra* note 18, at 937; Depoorter & De Mot, *supra* note 5, at 158; 160; Ferziger & Currell, *supra* note 6, at 1151; PFEIFLE, *supra* note 193, at 137-45 (Ger.).

³²⁰ Cf. Granetzny & Krause, *supra* note 192, at 32; Roland Hefendehl, *Außerstrafrechtliche und strafrechtliche Instrumentarien zur Eindämmung der Wirtschaftskriminalität [Non-Criminal and Criminal Instruments to curb White-Collar Crime]*, 119 ZEITSCHRIFT FÜR DIE GESAMTE STRAFRECHTSWISSENSCHAFT [ZSTW] 816, 842 (2007) (Ger.); Müller, *supra* note 125, at 427; PFEIFLE, *supra* note 193, at 152-53; Schmidt, *supra* note 6, at 158.

³²¹ See Aldinger, *supra* note 18, at 934-35; Bishara et al., *supra* note 30, at 60; Buchert, *supra* note 206, at 146; James Dungan et al., *The psychology of whistleblowing*, 6 CURRENT OP. PSYCH. 129 (2015); HEFENDEHL, *supra* note 197, at 624, 632; Miceli, Near & Schwenk, *supra* note 314, at 125-26; Rapp, *supra* note 89, at 109-11.

objections have managed to confront the traditional model with an alternative approach. Undertaking the latter was done by Kaushik Basu in particular.³²² His model, inspired by game theory, considerably reflects the thought of backward induction to an extent.³²³ As a starting point, it is assumed that law is nothing more than the expression of the inner attitude of how people behave. In other words, successful law forms people's belief about what other people will do. It is kind of a prediction as to what will happen in certain situations—*viz.*, the legal system can be characterized as a predictive signaling system.³²⁴ Therefore, people comply with the law because they expect other people to do the same, and these other people comply with the law because they expect that those people comply with the law as well. If, eventually, all behave in the predicted way, this condition is labeled as the (Nash) equilibrium. The latter is combined with the term 'focal point,' describing a successful law that helps people to predict the behavior of others. When consulting the law, people find out what other people will likely do, and expect them to take such action.³²⁵ Instead of focusing on external events like reward and fine, the belief model puts emphasis on the social pressure that is created between human beings. The insertion of such a dimension in the economic discourse causes two things. First, it demonetizes the debate. The prediction of human behavior is more complex than simply conducting a cost-benefit analysis. Second, by demonetizing this process, the door is open for, *inter alia*, moral aspects thereby contributing to the enrichment of the debate.

But what does this mean for the constellation discussed here? And, on a more abstract level, what does the adoption of a new law under this model entail? Initially, the belief model acknowledges that any result that can be traced back to a change of the legal situation could have happened without the law.³²⁶ This implies that, contrary to the standard economic model, that as soon as the new law is repealed, people are not necessarily expected to go back to their old behavior.³²⁷

Then, following this model, what does a new law do? A successful law sets a new focal point and thereby shifts society to a new equilibrium.³²⁸ People will comply with the new law because they expect other people to do the same and *vice versa*. In other words, a new law alters peoples' expectations about the behavior of other people. Against this backdrop, it is far from surprising that the adoption of a new law may even influence people's

³²² BASU, *supra* note 289.

³²³ *Id.* at 26-33; *see* BASU, *supra* note 289, at 38-69 (discussion of the belief model).

³²⁴ *See also* LAURENCE CLAUS, LAW'S EVOLUTION AND HUMAN UNDERSTANDING 4-8 (2012).

³²⁵ BASU, *supra* note 289, at 15; *cf. id.* at 3.

³²⁶ BASU, *supra* note 289, at 49.

³²⁷ *Id.* at 108-10 (criticizing the standard economic model because the fine and thereby the incentive to behave in a certain way disappear).

³²⁸ *Id.* at 47-55.

behavior without providing both further enforcement mechanisms and incentives, respectively.³²⁹

Applying this model to the *status quo* of whistleblowing in the U.S. and Germany, one might come to the result that the former society is in an equilibrium in which, as a tendency, the whistle is blown. On the contrary, German society is “trapped” in an equilibrium in which information, as a tendency, is not reported to the authorities. Going one step further, one might even come to the conclusion that in the U.S., people would blow the whistle even if no pertinent whistleblowing laws exist. Cautiously said, the latter could also apply when no financial rewards are granted, or the amount would be drastically reduced.³³⁰ Such an outcome can be explained against the backdrop that the willingness of people to blow the whistle is correlated to the belief that others will do so as well. As the U.S. legal culture is familiar with whistleblowing as an instrument serving the public interest for over 150 years,³³¹ one could reason that the “command” to blow the whistle is, at least partly, embedded in people’s mind. On the contrary, Germany’s legal culture is, as a tendency, suspicious of whistleblowers.³³² Against this backdrop of the belief model, the goal of the Whistleblowing Directive is therefore already established. By creating a general whistleblowing framework, it is intended to shift human behavior towards a condition and to deflect society to a new equilibrium, respectively, in which blowing the whistle is regarded as a normal, expected behavior.

C. *The Convergence of the Belief Model and Legal Transplants*

In view of the above, there is one significant point is still missing. No answers were given to the question about what requirements have to be fulfilled so that the law actually changes human behavior. According to the belief model, it is not a self-fulfilling prophecy that every law is capable of doing so.³³³ Instead, certain rather abstract criteria have to be met. However, this section does not only deal with the application of these criteria, but, rather, it does more. As the belief model gives ample room for taking into account all kind of different aspects, this section combines the belief model and, thereby, law and economics in a broader sense with comparative law theory.

³²⁹ BASU, *supra* note 289, at 49-55, 86-89; *see also* Feldman & Lobel, *supra* note 92, at 1184-85; Cass R. Sunstein, *On the Expressive Function of Law*, 144 U. PA. L. REV. 2021, 2025-33 (1996).

³³⁰ *See* discussion *infra* Part VI.A.

³³¹ *See* discussion *supra* Part II.A.1.

³³² *See* discussion *supra* Parts II.B.1., III.A.

³³³ *See* BASU, *supra* note 289, at 55-63.

With regard to the latter, the concept of legal transplants³³⁴ inevitably comes to mind because it is at least partially warranted to say that with respect to whistleblowing a new legal idea is imported by Germany.

However, before it comes to the question of convergence, some remarks with regard to legal transplants have to be made. The question, if such a legal institution actually exists, is subject to an ongoing debate. Thus, from a legal cultural background, the concept of legal transplants is negated.³³⁵ It is especially objected that even if rules from the so-called borrowing legal system are implemented one to one into the legal system of the so-called receiving state, it would be inappropriate to characterize this process as legal transplantation. In continuation of Montesquieu, one could thus say,³³⁶ it is brought forward that laws are so closely interwoven with the intangible terms, (legal) culture, and (legal) *mentalité*, respectively, so that it could not simply be decoupled from its (non-)legal environment. Although legal rules may formally converge, the deep structure of each legal system would always keep its uniqueness. Thus, a transplantation of rules could only happen on the surface of a legal system. Rules would then still be viewed out of the perspective of the receiving system, but never in a way in which the respective rules would be viewed in the borrowing system. Therefore, the imported rules would always be perceived as “something else.”

It is beyond the scope of this article to adopt a “full” position as to the existence of legal transplants. However, for the following analysis a few things must be noted. For the purpose of this article, the debate seems more of a question of definition than one of an insurmountable problem. Admittedly, the term “legal transplant” may be misleading as it might convey a cut and paste notion, failing to highlight the transformation that legal ideas undergo when a transfer between two legal systems occurs. Therefore, it has been framed elsewhere as “legal translation” to better pay tribute to the changes happening to the legal idea in the implementation process.³³⁷ However, the mere fact that legal ideas are transferred between legal systems cannot be denied.³³⁸ That the present study is doing more than what has been

³³⁴ The concept of ‘legal transplants’ is commonly attributed to Alan Watson. ALAN WATSON, *LEGAL TRANSPLANTS: AN APPROACH TO COMPARATIVE LAW* (1st ed., 1974). *But see* O. Kahn-Freund, *On Uses and Misuses of Comparative Law*, 37 *MOD. L. REV.* 1 (1974).

³³⁵ *Cf.* Pierre Legrand, *European Legal Systems Are Not Converging*, 45 *INT’L & COMP. L.Q.* 52 (1996); Pierre Legrand, *The Impossibility of Legal Transplants*, 4 *MAASTRICHT J. EUR. & COMP. L.* 111 (1997); Pierre Legrand, *Antivonbar*, 1 *J. COMP. L.* 13 (2006); *see also* Richard L. Abel, *Law as Lag: Inertia as a Social Theory of Law*, 80 *MICH. L. REV.* 785 (1982).

³³⁶ *See* Kahn-Freund, *supra* note 334, at 6-10.

³³⁷ Maximo Langer, *From Legal Transplants to Legal Translations: The Globalization of Plea Bargaining and the Americanization Thesis in Criminal Procedure*, 45 *HARV. INT’L L.J.* 1, 29-35 (2004); *see also* STÜRNER, *supra* note 23, at 852-54 (Ger.).

³³⁸ *See supra* Part I, for a discussion referencing debate on Americanization); *see also* Teubner, *supra* note 126, at 15.

described elsewhere as a “juxtaposition plus” of different statutes³³⁹ has already become clear. Against this backdrop, the process of transplantation resembles more of a continuum in which different degrees of transferability exist.³⁴⁰ Hence, only circumstances in which the legal thought is deeply linked to unique features of the borrowing legal system, so that it significantly “irritates” the receiving legal system, may cause “true” problems. However, that a “complete” change of German legal culture is likely to occur has already been negated above. Instead, substantial differences between the original and implemented legal idea continue to persist.³⁴¹ In this regard, the Whistleblowing Directive is more like a Trojan horse bringing additional private enforcement elements to the German system, but leaving the fundamental enforcement concept untouched.

After having provided an approach to the concept of legal transplants, what are the different criteria that a law has to fulfill so that it is actually capable of changing human behavior and thereby creating a new focal point? In this regard, three aspects are stated.³⁴² The first is closely linked to the standard economic model and thus can be characterized as the basic requirement. If the legislature virtually ignores the very fundamental assumptions of mainstream economics—*viz.*, the rational profit-maximizing human being—for both citizens and agents of the state, it is very unlikely that the law will have any significant impact.³⁴³ Although it may not be wholly denied that the standard economic theory, with its focus on efficiency, may play a role in the decision of the receiving legal system as to what legal ideas are to be imported,³⁴⁴ it is not of much help for the analysis in his section. Apart from problems on how to definitely measure efficiency,³⁴⁵ different conclusions about what the efficient conditions are virtually inevitably drawn. Aside from these concerns, economic efficiency cannot be the only criterion that will explain when a transfer is successful and how it can be achieved, respectively. Anything else is likely to result in a copy-and-paste process with the sole reference to economic efficiency. Instead, it has to be acknowledged that different solutions of legal systems facing equivalent problems are neutral from an efficiency point of view.

For the sake of stringency, the second and third reasons are to be discussed together. In sum, the successful implementation of the law is likely to fail if it is either ambiguous or it fails make evident what constitutes the

³³⁹ See Gunter Frankenberg, *Critical Comparisons: Re-thinking Comparative Law*, 26 HARV. INT'L. L. J. 411, 427, 429-34 (1985).

³⁴⁰ See also Forst, *supra* note 206, at 59; *cf.* Kahn-Freund, *supra* note 334, at 6.

³⁴¹ See discussion *supra* Part III.C.

³⁴² See BASU, *supra* note 289, at 56-58.

³⁴³ BASU, *supra* note 289, at 56-57.

³⁴⁴ See Mattei, *supra* note 26, at 8, 16.

³⁴⁵ See discussion *supra* Part IV.A.1.

new focal point.³⁴⁶ Especially with respect to the latter, it has to be avoided that the signal sent by the new law is interpreted differently.³⁴⁷ This can, *inter alia*, be prevented by employing additional measures that help to ensure that the new law's content becomes salient.³⁴⁸ In this regard, making people cognizant of the changes by publicity or other means are mentioned.³⁴⁹ Furthermore, the new law should not enter into a competition with preexisting focal points that are shaped by long-lasting customs.³⁵⁰

These thoughts can be perfectly brought together with the presently applied understanding of legal transplants. To ensure that the sending of different and confusing signals does not occur, a harmonious integration in the preexisting legal framework has to be pursued. The creation of a condition that is described elsewhere as a "legal irritant,"³⁵¹ which would require additional profound changes in the receiving system, must be forestalled. Additionally, fundamental and cognitive structures that are deeply embedded in peoples' mind are unlikely to change when a new law is introduced. Thus, if a harmonious integration is performed, meaning that the new law is both compatible with basic structures and does not demand deep changes of the receiving legal system, it is likely that the new law will successfully influence peoples' behavior and thereby deflect society to a new equilibrium. Otherwise, people may not be capable of accurately interpreting the signals, and thus will be left in an unclear state.

But, what are fundamental and basic structures, respectively, of a legal system? In this regard, references are made to both the general political power structure and with the different forms of capitalistic models.³⁵² None of these aspects seem to be directly pertinent here, so another factor forming the basic structure of a legal system has to be identified. Thus, the issue as to how a law, in principle, is enforced can be deemed as such a factor.³⁵³ Is it preponderantly up to the authorities to enforce the law or do private persons play a, more or less, significant role? That can also be transferred to the employer-employee relationship. Is it just substantially shaped by the interests of the parties and thus kept free from general public concerns, or is this relationship also capitalized for public ends?

³⁴⁶ BASU, *supra* note 289, at 57-58.

³⁴⁷ *Id.* at 58.

³⁴⁸ *Id.* at 60, 63; *see also* Feldman & Lobel, *supra* note 92, at 1185.

³⁴⁹ BASU, *supra* note 289, at 60.

³⁵⁰ *Id.* at 61-62.

³⁵¹ Teubner, *supra* note 126, at 12.

³⁵² Kahn-Freund, *supra* note 334, at 8-13, 17-20; Teubner, *supra* note 126, at 24-27.

³⁵³ *Cf.* CARRINGTON, *supra* note 266, at 40-41; Kern, *supra* note 266, at 378. The major importance of an enforcement structure for the respective legal culture has already been indicated *supra* Part III.C.

V. EXAMINING THE WHISTLEBLOWING PROGRAMS IN DETAIL

After having elaborated on the historical and normative background of the legal-cultural attitude in the U.S. and Germany towards whistleblowing, one objective still remains open. The above conducted macro-comparison is now followed by a micro-comparison of certain significant variables, with, on the one hand, the IRS and SEC Programs, which are dealt together, and, on the other hand, the rules outlined in the E.U. Whistleblowing Directive. In the next part, general recommendations are made against the backdrop of the findings of the previous sections. In this respect, a harmonious integration in the preexisting legal framework should be achieved. Besides recommendations, recent trends and developments are also highlighted for both the U.S. and the German legal systems, thereby making use of the insights of the belief model, too.

A. *U.S.: IRS and SEC Programs*

1. Personal Scope

The personal scope of both of the whistleblowing programs is not explicitly specified. The only restriction laid down in the provisions is the requirement that the whistleblower must be an individual; legal entities are excluded.³⁵⁴ Rather, both the personal scope and the material scope are interconnected as the latter implicitly defines the personal scope, too. This entails a very broad personal scope. It comprises of every individual who had provided information about a possible violation of the federal securities law and the federal tax law, respectively, to the SEC or to the IRS.³⁵⁵

2. Material Scope

As already indicated, the material scope of both whistleblower programs is, most likely due to constitutional reasons, connected with the objective of each agency; the information has to deal with a (possible) violation of federal securities law and federal tax law, respectively.³⁵⁶ With respect to the latter, the violation must have led to an underpayment of taxes.³⁵⁷

³⁵⁴ 17 C.F.R. § 240.21F-2(a)(2) (2020); 26 U.S.C. § 7623(b)(1) (2019).

³⁵⁵ *Cf.* 15 U.S.C. § 78u-6(a)(6) (2010); 17 C.F.R. § 240.21F-2(a)(1) (2020); 26 U.S.C. § 7623(a) (2019).

³⁵⁶ 15 U.S.C. § 78u-6(a)(6) (2010); 17 C.F.R. § 240.21F-2(a)(1) (2020); 26 U.S.C. § 7623(a) (2019).

³⁵⁷ 26 U.S.C. § 7623(a)(1) (2019).

3. Confidentiality of the Whistleblower's Identity

The protection of the confidentiality of the informant who chooses to disclose information to the SEC and the IRS, respectively, can be described as close to “absolute.” Information, which could be reasonably expected to reveal the identity of a whistleblower, shall, in principle, not be disclosed.³⁵⁸ According to the IRS, the anonymity of each whistleblower will be protected with all possible means.³⁵⁹ With regard to the SEC, one has to highlight the exemptions for when the identity may be revealed are very narrow.³⁶⁰ This is supported by the fact that there has been no leakage of information about whistleblowers with respect to the SEC whistleblower program.³⁶¹ Furthermore, the SEC allows anonymous whistleblowing if, *inter alia*, the whistleblower is represented by an attorney.³⁶² However, the whistleblower must disclose her identity when she is filing a claim for a whistleblower award.³⁶³

4. Internal Reporting Channels

Both whistleblower programs are neither directly familiar with the requirement for whistleblowers to initially make use of internal reporting channels before informing the SEC and the IRS, respectively. They also do not impose an obligation on companies to establish such channels. However, with respect to the SEC Program, one has to stress that the financial reward may be reduced if the information is directly shared with the SEC.³⁶⁴ On the contrary, the reward is likely to be increased if internal channels have been used.³⁶⁵ Additionally, if the whistleblower chooses to provide the information to an internal department and, within 120 days, submits the same information to the SEC, the whistleblower is deemed to have provided the information to the SEC when she applied to internal channels.³⁶⁶ This look-back period of 120 days is of particular importance for the award procedure.³⁶⁷ Lastly, if the information is reported through internal channels and the company thereafter chooses to provide this information to the SEC, the information is regarded as

³⁵⁸ 15 U.S.C. § 78u-6(h)(2)(A) (2010); 17 C.F.R. § 240.21F-7(a) (2020); INTERNAL REVENUE SERV., WHISTLEBLOWER PROGRAM FISCAL YEAR 8 (2018); *cf.* Ferziger & Currell, *supra* note 6, at 1157-58.

³⁵⁹ *Confidentiality and Disclosure for Whistleblowers*, INTERNAL REVENUE SERV., <https://www.irs.gov/compliance/confidentiality-and-disclosure-for-whistleblowers> (last visited Aug. 7, 2020).

³⁶⁰ *See generally* Ramirez, *supra* note 6, at 627; *cf.* 17 C.F.R. § 240.21F-7(a)(1)-(3) (2020);

³⁶¹ *See, e.g.*, Westbrook, *supra* note 17, at 1102.

³⁶² 17 C.F.R. § 240.21F-7(b)(1) (2020).

³⁶³ 17 C.F.R. § 240.21F-7(b)(3), § 240.21F-10(c) (2020).

³⁶⁴ 17 C.F.R. § 240.21F-6(b)(3) (2020).

³⁶⁵ *See* 17 C.F.R. § 240.21F-6(a)(4), (b)(3) (2020).

³⁶⁶ 17 C.F.R. § 240.21F-4(b)(7) (2020).

³⁶⁷ *See infra* Part V.A.6.

being reported by the whistleblower.³⁶⁸ The whistleblower then does not lose her award eligibility.

Against this backdrop, it is warranted to say that, at least by the SEC, an indirect obligation for whistleblowers to use internal reporting channels first is established. This does also apply to companies that have an obligation to set up internal channels. Keeping this in mind, two remarks have to be made. As already indicated above, SOX listed corporations are obliged to implement internal reporting channels.³⁶⁹ Furthermore, the Federal Sentencing Guidelines also indirectly require companies to establish a compliance system. In this regard, the fine on companies may be reduced if an effective compliance program has been put in place.³⁷⁰ Against this backdrop, the current structure set up by the SEC is eager to avoid a frustration of the aforementioned provision and guidelines, respectively.³⁷¹

5. Protection Against Retaliation

Both whistleblowing programs offer provisions protecting whistleblower employees against retaliation. First, under both programs, employers are prohibited from discharging, demoting, suspending, threatening, and harassing, directly or indirectly, or in any other manner discriminating against whistleblowers.³⁷² Second, if a whistleblower is faced with one of the aforementioned retaliations, she may file a claim directed at (i) restitution of the status quo ante, (ii) 200 percent of the amount of back pay, and (iii) compensation for so-called lost benefits that comprise, *inter alia*, litigation costs.³⁷³ In this respect, employees facing a retaliatory measure can bring an action in federal courts within three and six years, respectively.³⁷⁴ Additionally, the SEC may take actions against employers who employ retaliatory measures against whistleblowers on its own initiative.³⁷⁵

Importantly, the anti-retaliation provisions apply whether or not the whistleblower satisfies the requirements to qualify for an award.³⁷⁶ However, one criterion has to be met. The whistleblower must reasonably believe that

³⁶⁸ 17 C.F.R. § 240.21F-4(c)(3) (2020).

³⁶⁹ 15 U.S.C. § 78j-1(m)(4) (2010).

³⁷⁰ See, e.g., Bishara et al., *supra* note 30, at 51; Blount & Markel, *supra* note 45, at 1040; Elletta Sangrey Callahan & Terry Morehead Dworkin, *The State of State Whistleblower Protection*, 38 AM. BUS. L.J. 99, 103 (2000); Finegan, *supra* note 2, at 655-56; Schmidt, *supra* note 6, at 154, 161; Vega, *supra* note 9, at 518.

³⁷¹ Vega, *supra* note 9, at 518-19; see generally Ramirez, *supra* note 6, at 636; cf. 17 C.F.R. § 240.21F-6(b)(3).

³⁷² 15 U.S.C. § 78u-6(h)(1)(A) (2010); 26 U.S.C. § 7623(d)(1) (2020).

³⁷³ 15 U.S.C. § 78u-6(h)(1)(C) (2010); 26 U.S.C. § 7623(d)(3)(B) (2020).

³⁷⁴ 15 U.S.C. § 78u-6(h)(1)(B)(i) (2010); see 15 U.S.C. § 78u-6F(h)(1)(B)(iii) (2020) (with respect to the question what statute of limitations apply).

³⁷⁵ See Ramirez, *supra* note 6, at 627 (stating that the SEC relies on 17 C.F.R. § 240.21F-2 (2021)); see also Filler & Markham, *supra* note 89, at 316.

³⁷⁶ 17 C.F.R. § 240.21F-2(d)(3) (2020).

the information she is reporting relates to a possible violation of respective laws.³⁷⁷ However, apart from these rather positive aspects, one important caveat has to be highlighted. With respect to the SEC program, according to the Supreme Court decision *Digital Reality Trust v. Somers*,³⁷⁸ it is now clear that whistleblowers only enjoy protection if they (also) directly report to the SEC.³⁷⁹ A discussion on the implications of that decision on the SEC program, however, is left to the next part.³⁸⁰

6. Financial Awards

As already indicated, the heart of both of the whistleblower programs is the prospect of financial awards. This is due to the broader scope of the protection the provisions offer, compared to the provisions that determine award eligibility. Keeping this in mind, the award system gives room for important refinements of both whistleblowing programs. To start, whistleblowers, in general, qualify for such an award if they voluntarily provide either of the two agencies with “original information” that lead to a successful enforcement action.³⁸¹ With respect to the SEC Program, the SEC must obtain sanctions totaling more than \$1 million.³⁸² With respect to the IRS Program, the taxes and penalties collected by the IRS have to exceed \$2 million, and the annual gross income of the wrongdoer must exceed \$200,000.³⁸³ Furthermore, with respect to the SEC Program, a differentiated system exists in determining who is and who is not, respectively, excluded from an award in the first place. Thus, the aforementioned term “original information” comprises of both information derived from independent knowledge or from independent analysis.³⁸⁴ Lastly, in some circumstances whistleblowers are nevertheless excluded from awards (e.g., if the information is obtained from legal representation or if they are compliance officer).³⁸⁵

The next major “refinement tools” are the criteria for determining the amount of the award. In this regard, there are also slight differences between the two programs. Both programs offer a minimum reward that is either at least ten percent (SEC) or fifteen percent (IRS) of the monetary sanctions the

³⁷⁷ 17 C.F.R. § 240.21F-2(d)(1)(ii) (2020); 26 U.S.C. § 7623(d)(1)(A) (2019).

³⁷⁸ *Digit. Realty Tr., Inc. v. Somers*, 138 S. Ct. 767 (2018).

³⁷⁹ *Id.* at 777-78.

³⁸⁰ See discussion *infra* Part VI.A.

³⁸¹ 15 U.S.C. § 78u-6(b)(1) (2010); 17 C.F.R. § 240.21F-3(a)(1)-(3) (2020); *cf.* 26 U.S.C. § 7623(b)(2)(A) (2019).

³⁸² 17 C.F.R. § 240.21F-3(a)(4) (2020).

³⁸³ 26 U.S.C. § 7623(b)(5) (2019).

³⁸⁴ 17 C.F.R. § 240.21F-4(b)(1)(i) (2020).

³⁸⁵ *Id.* § 240.21F-4(b)(4)(i)-(iii).

respective agency is able to collect.³⁸⁶ With respect to the maximum percentage offered, both programs leave it at 30 percent.³⁸⁷ Within this range, the determination of the amount of an award is subject to the discretion of the agencies.³⁸⁸ With respect to the SEC, a refined system of criteria is provided. For instance, the quality of the information and the degree of assistance provided by whistleblowers are likely to increase the award.³⁸⁹ Additionally, the interest of the SEC in deterring future violations of the respective securities is also a factor that influences the amount of the award.³⁹⁰ However, apart from the whistleblower's missing participation in internal reporting channels, personal involvement is also likely to decrease the potential amount of an award.³⁹¹ Interestingly, for the IRS, participation in the wrongdoing seems not to be an issue that warrants a (drastic) decrease of the amount of awards.³⁹² Surprisingly, against the backdrop of *Digital Realty*,³⁹³ the SEC has not (yet)³⁹⁴ changed its rules so that the factor "participation in Internal Compliance Systems" is still an issue that is likely to increase the award.³⁹⁵ Moreover, not making use of internal channels is a criterion that may actually decrease the award,³⁹⁶ although whistleblowers are then not protected.

B. Germany and the New E.U. Whistleblowing Directive

1. Personal Scope

In contrast to its U.S. equivalents, the personal scope is explicitly defined: it applies to "persons working in the private or public sector who acquired information on breaches in a work-related context."³⁹⁷ The latter term refers to current or past work activities through which persons have obtained information on respective breaches.³⁹⁸ Although the Whistleblowing Directive is *prima facie* tailored to employee whistleblowers, its personal scope, however, is very broad. For instance, "persons working under the supervision and direction of contractors, subcontractors, and suppliers" also

³⁸⁶ 15 U.S.C. § 78u-6(b)(1)(A) (2010); 17 C.F.R. § 240.21F-5(b) (2020); 26 U.S.C. § 7623(b)(1) (2019).

³⁸⁷ 15 U.S.C. § 78u-6(b)(1)(B) (2010); 17 C.F.R. § 240.21F-5(b) (2020); 26 U.S.C. § 7623(b)(1) (2019).

³⁸⁸ 15 U.S.C. § 78u-6(c)(1)(A) (2010); 17 C.F.R. § 240.21F-5(a) (2020); 26 U.S.C. § 7623(b)(1) (2019).

³⁸⁹ 15 U.S.C. § 78u-6(c)(1)(B)(i)(I)-(II) (2010), (II); 17 C.F.R. § 240.21F-6(a)(1)-(2) (2020).

³⁹⁰ 15 U.S.C. § 78u-6(c)(1)(B)(i)(III) (2010); 17 C.F.R. § 240.21F-6(a)(3) (2020).

³⁹¹ 17 C.F.R. § 240.21F-6(b)(1), (3) (2020).

³⁹² See Birkenfeld, *supra* note 18.

³⁹³ *Digit. Realty Tr., Inc. v. Somers*, 138 S. Ct. 767 (2018).

³⁹⁴ SEC WHISTLEBLOWER PROGRAM 2018 REPORT, *supra* note 105.

³⁹⁵ 17 C.F.R. § 240.21F-6(a)(4) (2020).

³⁹⁶ 17 C.F.R. § 240.21F-6(b)(3) (2020).

³⁹⁷ Whistleblowing Directive, *supra* note 21, art. 4(1).

³⁹⁸ *Id.* art. 5(9).

enjoy protection.³⁹⁹ It can be concluded that all persons fall into the scope if they acquired information by virtue of their professional activities.

2. Material Scope

The material scope is, to a certain extent, comparable with the two U.S. programs. It is limited to (potential) violations of a large variety of different E.U. law.⁴⁰⁰ The limitation on the personal scope is, of course, due to the restrictions of the E.U.'s lawmaking power. It has only limited competences. However, Member States are free to extend the scope to violations of non-E.U. law. Against the backdrop that it is difficult to determine if the potential breach is related to E.U. or to national law, a 'broad implementation' by Member States extending the scope to violations of national law is to be desirably.

3. Confidentiality of the Whistleblower

From the wording of the respective provisions, the level of confidentiality appears to be as comprehensive as with the two U.S. whistleblowing regimes. In principle, a whistleblower's identity shall not be disclosed to anyone beyond the authorized staff members competent to receive reports.⁴⁰¹ Her identity may only be disclosed where it is deemed to be necessary and proportionate both under E.U. and national law in the course of investigations by national authorities or judicial proceedings.⁴⁰² With respect to the latter, "appropriate safeguards" shall apply and, normally, the whistleblower is to be informed that her identity is about to be revealed.⁴⁰³

Interestingly, it is expressly left to the Member States to decide whether to implement anonymous reporting channels.⁴⁰⁴ This applies for both internal channels, as well as authorities competent to receive tips.⁴⁰⁵

4. Internal Reporting Channels

When it comes to internal reporting, it has to be differentiated between two issues that are addressed by the Whistleblowing Directive. First, legal entities have to establish internal reporting channels if they have at least

³⁹⁹ *Id.* art. 4(1)(d).

⁴⁰⁰ *See id.* art. 2(1); *id.* annex 1; *id.* art. (5)(2); *id.* art. 5(1)(ii). The term "breaches" meaning violations of EU law is broadly defined. *Id.* It also comprises "means acts or omissions that defeat the object or the purpose of the rules in the Union acts and areas falling within the material scope" of that directive. *Id.*

⁴⁰¹ *Id.* art. 16(1); *see also id.* art. 9(1)(a).

⁴⁰² *Id.* art. 16(2).

⁴⁰³ *Id.* art. 16(3).

⁴⁰⁴ *Id.* art. 6(2).

⁴⁰⁵ *Id.*

fifty employees.⁴⁰⁶ However, under certain conditions, Member States may also oblige companies with fewer than fifty employees to set up a reporting structure.⁴⁰⁷ Furthermore, certain minimum criteria that the internal system has to fulfill are laid down in the directive, too.⁴⁰⁸

Second, with regard to the question of whether internal reporting channels have to be used first, the directive gives anything but a precise answer. On the one hand, the directive indicates that it may be fully up to the whistleblower to decide whether she wants to report internally before applying to authorities or not.⁴⁰⁹ On the other hand, the directive says that Member States “shall encourage reporting through internal reporting channels before reporting through external reporting channels,” provided that the issue can be “effectively” handled internally, and the risk of being subject to retaliatory measures is minimal.⁴¹⁰ This soft formulation can be explained against the backdrop of the legislative history. Thus, it was mandatory to use internal channels first to get protection under the proposal of the Commission.⁴¹¹

After heavy criticism from the European Parliament, this strict hierarchy was repealed and the current wording was introduced.⁴¹² However, what Member States should make out of this is anything but clear, especially against the backdrop that companies in principle have to establish internal reporting channels. Simply modifying the pre-existing legal situation in which whistleblowers in general have to use internal channels first is, especially against the backdrop of the legislative history and the clear wording of Article 10 of the Whistleblowing Directive, is very likely not in line with the directive; although by such an implementation, Germany’s initial concerns against the Whistleblowing Directive could be taken into account.⁴¹³ How the German legislator reconciles a whistleblower’s choice of where to report, as well as the effectiveness of internal reporting channels remains to be seen. The next section outlines one possible solution.⁴¹⁴

⁴⁰⁶ *Id.* art. 8(1); *id.* art. (3). However, one has to add that legal entities can make use of external service provider that operate the internal reporting channels. *Id.* art. 8(5).

⁴⁰⁷ *Id.* art. 8(7).

⁴⁰⁸ *See id.* art. 8(2); *id.* art. 8(5); *id.* art. 9.

⁴⁰⁹ *See id.* art. 6(1)(b); *id.* art. 10. This is particularly made clear by Article 10 in the Whistleblowing Directive, which states that whistleblowers “shall report information on breaches [...] or by directly reporting through external reporting channels.” *Id.* art. 10.

⁴¹⁰ *Id.* art. 7(2).

⁴¹¹ *See* discussion *supra* Part II.B.2.b.

⁴¹² *Id.*

⁴¹³ *Id.*

⁴¹⁴ *See infra* Part VI.B.

5. Protection Against Retaliation

Like its U.S. equivalents, the directive comes with protection provisions, too. In this regard, a twofold system is established. First, “any form of retaliation” is prohibited, irrespective of whether the whistleblower reported internally or directly to authorities.⁴¹⁵ This is accompanied with a large list, which is not exhaustive, substantiating the abstract term of retaliatory measures.⁴¹⁶ Second, Member States are obliged to implement so-called measures of support and measures for protection against retaliation.⁴¹⁷ The former term refers to instruments like legal aid, meaning financial assistance, when legal proceedings are conducted.⁴¹⁸ The term “measures for protection of retaliation” obliges, on an abstract level, Member States to create effective remedies and, thereby, to ensure that persons are effectively protected against retaliation.⁴¹⁹ For instance, whistleblowers shall not be subject to liability.⁴²⁰ Additionally, in proceedings in which the whistleblower asserts a detriment in conjunction with blowing the whistle, it shall be presumed that the detriment was made in retaliation for the reporting—*viz.*, a shift of burden of proof has to be implemented.⁴²¹

However, all the aforementioned protection provisions are subject to the basic ‘good faith’ requirement. Whistleblowers only fall under the protection of the directive if they had reasonable grounds to believe that the “information on breaches reported was true at the time of reporting, and that such information fell within the scope of this Directive.”⁴²² However, the effectiveness of this provision naturally depends on how it is construed by courts. This applies in particular with respect to the “second requirement.” It is not always easy to determine whether the information falls into the scope of the Whistleblowing Directive and whether the whistleblower has reasonable ground to belief that. Therefore, a ‘broad implementation’ should be pursued for this reason, too.⁴²³

For the sake of completeness, it should be mentioned that protection is, at least in theory, also granted when the information is neither reported internally nor to authorities, but rather to the general public.⁴²⁴ However, the

⁴¹⁵ Whistleblowing Directive, *supra* note 21, art. 19; *id.* art. 10; *id.* art.6(1)(b).

⁴¹⁶ *Id.*

⁴¹⁷ *Id.* art. 20-21.

⁴¹⁸ *Id.* art. 20(2). However, it has to be highlighted that member states are not obliged to do so as, in this respect, the directive uses the word “may.” *Id.*

⁴¹⁹ *Id.* art. 21(1).

⁴²⁰ *See id.* art. 21(2).

⁴²¹ *Id.* art. 21(5).

⁴²² *Id.* art. 6(1)(a); *see also id.* recital 33.

⁴²³ *See supra* Part V.B.2.

⁴²⁴ Whistleblowing Directive, *supra* note 21, art. 15(1).

threshold is extremely high—it has virtually to be *ultima ratio*⁴²⁵—so that the respective provision is negligible.

6. Financial Awards

Unlike both U.S. programs, the Whistleblowing Directive is silent on financial awards. Member States are therefore not obliged to set up respective whistleblowing award programs. However, just because the Whistleblowing Directive is silent in this respect, it cannot be concluded that it is prohibited for Member States to do so. The next section discusses whether this would be advisable for Germany.⁴²⁶

VI. ANALYSIS

A. *The IRS and SEC Programs Examined: Path Dependency and Possible Future Developments*

How then can the findings of the previous part be characterized against the backdrop of the respective legal culture? The first answer is that both programs are in line with both the historic development of whistleblowing in the U.S. and the fundamental structure of the legal system. The IRS and the SEC Programs are nothing more than the continuation of the use of private persons for public ends. It is not primarily about the individual whistleblower herself, but about authorities gathering useful information. Thus, virtually everybody in the financial sector and those who experiences tax fraud are to be capitalized for law enforcement purposes. Furthermore, by applying the standard economic model, the incentive to blow the whistle is high, whereby an alignment of interests between authorities and whistleblowers is established. The former gains “valuable” inside information in a less costly manner than by having to investigate it themselves—*viz.*, the information disadvantage of public entities is reduced—whereas the latter enjoy the prospect on tremendous awards. Additionally, the possible costs for whistleblowers are reduced by providing the possibility to report anonymously. Even if whistleblowers chose to share their identity with authorities, the prospective costs could nevertheless likely be lower than the potential gains. The strict confidentiality that is assured by authorities and the anti-retaliation provisions might point in such a direction.

From a historical standpoint, both programs can be considered as a further development of the FCA. The U.S. is familiar with using private initiatives for public ends since the very beginning. However, private law enforcement is prone to abuse, too. This can, at least partially, be addressed

⁴²⁵ *Cf. id.*

⁴²⁶ *See infra* Part VI.B.

with a specific design of the private enforcement framework. More specifically, an intermediary can be put between the informant and the alleged wrongdoer. That is done by both of the programs. It is only up to the IRS and the SEC to take law enforcement actions. Whistleblowers can neither force authorities to investigate, nor can they force authorities to impose sanctions on wrongdoers. This enables authorities to exercise control over the enforcement procedure, thereby putting them in a position to ensure that the public, rather than merely private, interests are furthered. However, transferring power to the authorities also entails problems. Thus, in the words of a promoter of private law enforcement, one may say that the watchdog role of private persons is disproportionately curtailed and, thereby, ample room for regulatory capture is provided.⁴²⁷ Apart from these issues, which relate more to the role that private law enforcement plays in general in the legal system, more serious shortcomings coming from both the inside and the outside might likely come to light.

The first concern is partially self-made. As beneficial the prospect of a high award might be, it might also lead to other negative effects. By just applying basic economic theory, the higher the prospective rewards are, the higher the incentive is for people to get a piece from that pie.⁴²⁸ By keeping these quite “extreme” sums in mind, it is hard to deny that this model entails a risk to significantly elicit low quality tips that might cause additional administrative costs.⁴²⁹ Although it is virtually impossible to provide data to unambiguously demonstrate that, there is information on website of the IRS Program. On the website, it indicates that the IRS “is looking for solid information, not an “educated guess” or “unsupported speculation.”⁴³⁰ Against this backdrop it is anything but unlikely that if the IRS program would work perfectly well, there would not be a need for such statements. With respect to the SEC Program, one does not find such kind of statements. The SEC initially seemed to be better equipped with handling information

⁴²⁷ See Bucy, *supra* note 6, at 73.

⁴²⁸ Feldman & Lobel, *supra* note 92, at 1180; Fleischer, *supra* note 29, at 177; Ferziger & Currell, *supra* note 6, at 1152; Granetzny & Krause, *supra* note 192, at 36; see SEC WHISTLEBLOWER PROGRAM 2018 REPORT, *supra* note 105. In this respect, one also has to mention the dramatic increase of tips submitted to the SEC: from slightly over 3,000 in 2012 to over 5,000 in 2018. *Id.*

⁴²⁹ See Aldinger, *supra* note 18, at 936-40, 942; Blount & Markel, *supra* note 45, at 1041-42; Ebersole, *supra* note 9, at 128, 135-36; Ramirez, *supra* note 6, at 646-47; cf. Eufinger, *supra* note 155, at 2341; Ferziger & Currell, *supra* note 6, at 1152; Fleischer & Schmolke, *supra* note 206, at 364; Granetzny & Krause, *supra* note 192, at 36; Nyrreröd & Spagnolo, *supra* note 5, at 6; PFEIFLE, *supra* note 193, at 137-38; Schmolke, *supra* note 29, at 914; Thüsing & Forst, *supra* note 6, at 29.

⁴³⁰ See IRS, WHISTLEBLOWER - INFORMANT AWARD, <https://www.irs.gov/compliance/whistleblower-informant-award>.

overload,⁴³¹ but as funding issues have risen,⁴³² it is not clear if the aforementioned statement can be upheld. This concern may also be illustrated by the increase of the average time that it takes for the SEC to make a decision in rewarding a whistleblower. With respect to the IRS Program, although whistleblowers may have to wait up to six years,⁴³³ and up to four year waiting time at the SEC Program⁴³⁴ is also anything but short. Perjury as the consequence to providing false information to both IRS and SEC⁴³⁵ seems not to be much help either.

The second concern is of an external nature. Since the *Digital Realty* decision,⁴³⁶ voices have begun to gain momentum, asserting frictions of the SEC Program's policy with internal compliance systems.⁴³⁷ The *Digital Realty* holding might lead not only to an undermining of both internal channels, but also to an undermining of the respective legislative provisions of SOX. The decision might also significantly inhibit the effectiveness of the SEC Program. Because whistleblowers reporting internally are no longer protected by the SEC Program, it is not unlikely that more of them might begin to directly apply to the SEC. Therefore, the ability of internal programs to detect and counter wrongdoing might decrease, as well as incentive for employers to enhance their compliance programs.⁴³⁸ That is especially troublesome as internal solutions tend to be faster, and cheaper in remedying infringements.⁴³⁹ Additionally, tips that could have easily been handled internally might now increasingly be directly reported to the SEC, thereby

⁴³¹ See IRS WHISTLEBLOWER PROGRAM 2018 REPORT, *supra* note 72, 5, 10 (thirty-six full time employees had to deal with over 12,000 tips in 2018 alone, whereas at the SEC, twenty-one full time employees had to just deal with over 5,000 tips in 2018); SEC WHISTLEBLOWER PROGRAM 2018 REPORT, *supra* note 105, at 6, 20; *see also* Aldinger, *supra* note 18, at 922; Krauss, Landy & Harrell, *supra* note 6, at 196; Schmidt, *supra* note 6, at 147; Schmolke, *supra* note 29, at 917.

⁴³² Ramirez, *supra* note 6, at 648-53; *see also* Rapp, *supra* note 89, at 136; *cf.* Westbrook, *supra* note 17, at 1166; Vega, *supra* note 9, at 523.

⁴³³ Nyneröd & Spagnolo, *supra* note 5, at 9; *cf. also* Aldinger, *supra* note 18, at 915; Blount & Markel, *supra* note 45, at 1030; Ebersole, *supra* note 9, at 133; Kwon, *supra* note 67, at 473; Ventry, *supra* note 18, at 461, 495-96.

⁴³⁴ Ramirez, *supra* note 6, at 646 (citing Dave Michaels, *SEC Whistleblower Payouts Slow Amid Deluge of Reward Seekers*, WALL ST. J. (Aug. 5, 2018, 9:00 AM), <https://www.wsj.com/articles/sec-whistleblower-payouts-slowamid-deluge-of-reward-seekers-I533474001>).

⁴³⁵ 17 C.F.R. § 240.21F-9(b)-(c) (2020); 26 U.S.C. § 7623(b)(6)(C) (2019).

⁴³⁶ *Digit. Realty Tr., Inc. v. Somers*, 138 S. Ct. 767 (2018).

⁴³⁷ *See, e.g.*, Filler & Markham, *supra* note 89, at 318; Huang, *supra* note 89, at 458; Ramirez, *supra* note 6, at 635-38.

⁴³⁸ *Cf.* Barthle, *supra* note 42, at 1250; Ebersole, *supra* note 9, at 137; Krauss, Landy & Harrell, *supra* note 6, at 220; Ramirez, *supra* note 6, at 636-37; Schmidt, *supra* note 6, at 162; Taylor, *supra* note 304, at 82-86; Vega, *supra* note 9, at 516, 520.

⁴³⁹ Aldinger, *supra* note 18, at 938-41; Barthle, *supra* note 42, at 1249; Ebersole, *supra* note 9, at 137; Dworkin, *supra* note 45, at 1760; Huang, *supra* note 89, at 445-46; Krause, *supra* note 6, at 170; Krauss, Landy & Harrell, *supra* note 6, at 220; Ramirez, *supra* note 6, at 636; Schmolke, *supra* note 29, at 907-08.

entailing further administrative costs.⁴⁴⁰ In this regard, the “screening function” of an internal control system would at least partially be given away. This is in particular problematic because the “screening function” is especially useful in whistleblowing systems with award programs. Assistance by private entities in sorting out frivolous tips is virtually a necessity for the proper functioning of the program thereby mitigating administrative costs. Lastly, the imminent danger of retaliatory measures can adequately be addressed by both anti-retaliation provisions, as well as the possibility to report anonymously. Unfortunately, as the Supreme Court based its decision directly on the legislative provision, that issue cannot be solely addressed by the SEC. This also applies to funding issues.

It is always difficult to draw direct conclusions, *a fortiori* in a comparative law setting. However, one insight can be provided by making reference to the belief model. As already mentioned, one could well assume that blowing the whistle is deeply rooted in U.S. (legal) culture, and thereby forms peoples’ beliefs. If one factor incentivizing whistleblowing (e.g., the prospect on financial awards) is reduced, it is not that likely that whistleblowing will virtually disappear. Blowing the whistle is, at least from a comparative law perspective, still deeply imbedded in peoples’ mind. Reducing the amount of financial awards might not make whistleblowing go away, but it might deter such tipsters who speculate with low quality tips on financial awards, thereby preventing extreme abuses of whistleblowing programs. Against the backdrop of the strong whistleblowing culture in the U.S., one could even argue that the amount of awards could be significantly reduced. The likelihood that whistleblowers only apply to authorities when there is a “real” case at hand might then increase. However, it has to be made clear that by doing so, this does not intend to remove the positive connotation of whistleblowing that generally is reflected by both programs; rather it is just a correction measure. Against this backdrop, the further development of both programs amidst facing more obstacles of different natures remain to be seen.

B. Examining the Upcoming Changes in the German Legal System: A Discussion of More Than Financial Incentives

A coherent whistleblower protection framework is about to come—but through more of a revolution or an evolution? Furthermore, how can a more or less harmonious integration in the preexisting legal framework be reached? When having a look at the personal scope, one might be inclined to, *prima facie*, speak more of an evolution rather than a revolution. The Whistleblowing Directive is primary tailored to employees, which is pretty consistent with the preexisting legal situation. The aforementioned finding

⁴⁴⁰ Aldinger, *supra* note 18, at 937-39; Barthle, *supra* note 42, at 1251; Ebersole, *supra* note 9, at 137; Krauss, Landy & Harrell, *supra* note 6, at 220; *cf.* Ramirez, *supra* note 6, at 636-37.

might also be shared when one considers the internal reporting framework. Although a strict hierarchy between internal and external reporting ceases to exist, internal reporting should nevertheless be “encouraged.”

As the preexisting legal situation generally requires internal before external reporting, the changes caused by the directive appear to be more a gradual further development of the *status quo*.

However, this argument can also simply be turned around. As a result, it is more warranted to speak of a revolution. The personal scope is not just limited to employees. One can even say that the “employee requirement” has been overcome. Instead, the focus is on the usefulness of the information for law enforcement purposes.⁴⁴¹ Furthermore, the prerogative of internal reporting as an expression of taking the employer’s interest into account is virtually repealed. Although it is not clear what the German legislator will make out of this, the principle of balancing of interests undertaken by courts can no longer be upheld. After the Whistleblowing Directive has been implemented, the requirements laid down by the BAG, which have to be met in order to obtain protection, no longer apply. The protection provisions of the directive are not familiar with any balancing of interests between the employer and the employee. Instead, it is at least partly warranted to say that the directive incorporates a public policy dimension into the employment relationship that cannot be downplayed by other criteria anymore. Factors like an employee’s motivation and an employer’s interest to keep internal things internal are then irrelevant. In this regard, the whistleblower is finally transferred into a means of law enforcement, although the persisting view regarding whistleblowing as the exercising of fundamental rights is not likely to disappear.

Although stipulation of mandatory internal reporting is no longer possible, one issue of high salience remains: should a financial award program be introduced?⁴⁴² From a comparative perspective, one can start the discussion by wondering what functions financial awards play in the U.S. In this regard, the connection with private law enforcement becomes obvious. In order to successfully capitalize private persons for the greater good, respective incentives are indispensable. Against this backdrop, it is far from surprising that punitive damages can be traced back to a long-lasting tradition.⁴⁴³ In a

⁴⁴¹ See Whistleblowing Directive, *supra* note 21, art. 1 (“The purpose of this Directive is to enhance the enforcement of Union law and policies [...]”).

⁴⁴² Fleischer & Schmolke, *supra* note 206, at 364-66; PFEIFLE, *supra* note 193, at 211-12 (Ger.); Schmolke, *supra* note 29, at 919 (Ger.) (in favor of introducing a whistleblower award program in Germany); Buchert, *supra* note 206, at 149; KREIS, *supra* note 125, at 211-12 (critical with respect to the question whether a financial award program should be introduced).

⁴⁴³ CARRINGTON, *supra* note 266, at 44-49; ANTHONY J. SEBOK, PUNITIVE DAMAGES: COMMON LAW AND CIVIL LAW PERSPECTIVES 159-69 (2009); see Melvin M. Sr. Belli, *Punitive Damages: Their History, Their Use and Their Worth in Present-Day Society*, 49 UMKC L. REV.

country with relatively low basic social service, in comparison to the German welfare model, it may even be warranted to say that high monetary awards serve as a necessary functional equivalent.⁴⁴⁴ This might also explain why, as it is purported, U.S. civil legal culture places a relatively high emphasis on monetary aspects.⁴⁴⁵ However, it shall not be left unmentioned that both the high amounts of punitive damages and whistleblower awards are subject to ongoing criticism.⁴⁴⁶

Besides these issues, what are its other functions? First, it is stated that high sums work as compensation to potential detriments suffered for having blown the whistle.⁴⁴⁷ However, whether this argument can nowadays still be upheld is anything but clear. As anti-retaliation provisions exist in the IRS and the SEC Programs, the need for “extreme” sums is not that acute as it might have been in previous times. Second, financial awards play a critical role in attracting skilled attorneys.⁴⁴⁸ As contingent fees are very common, the financial interests between whistleblowers and attorneys are perfectly aligned. The higher the awards, the more attorneys are likely to gain.

With regard to Germany, however, it is well warranted to ascertain that these functions are fulfilled by other means and that such problems are not that omnipresent as they are in the U.S. When the Whistleblowing Directive is implemented, a comprehensive protection framework comes into being at the latest. Additionally, Germany is known for having a relatively high standard of basic social services. Unemployment and other incidents of social hardship can be cushioned with respective governmental programs. Furthermore, the system of attorney remuneration is significantly different than in the U.S. For example, in Germany, contingent fees are virtually non-existent, and even partly forbidden.⁴⁴⁹ In this regard, attorneys are precisely

1, 4-5 (1980); *see also* JULIANA MÖRSDORF-SCHULTE, FUNKTION UND DOGMATIK US-AMERIKANISCHER PUNITIVE DAMAGES 127-57 (1999) (Ger.) (case history).

⁴⁴⁴ STÜRNER, *supra* note 23, at 859; SEBOK, *supra* note 443, at 171-73; *see* CARRINGTON, *supra* note 266, at 44-45; *cf.* Kern, *supra* note 266, at 372-73.

⁴⁴⁵ *Cf.* Bucy, *supra* note 2, at 966.

⁴⁴⁶ *See, e.g.,* Belli, *supra* note 443, at 7-8; Depoorter & De Mot, *supra* note 5, at 137; Ferziger & Currell, *supra* note 6, at 1197-99; SEBOK, *supra* note 443, at 169-71.

⁴⁴⁷ Rapp, *supra* note 29, at 61; *cf.* Aldinger, *supra* note 18, at 942; Bucy, *supra* note 2, at 959-62; Givati, *supra* note 6, at 57; Ramirez, *supra* note 6, at 668; Rapp, *supra* note 89, at 119, 142; Rapp, *supra* note 92, at 113; Vega, *supra* note 9, at 513.

⁴⁴⁸ *See* Bucy, *supra* note 2, at 971-72; *see also* Rapp, *supra* note 89, at 121; *see also* Bucy, *supra* note 6, at 58; *see also* Westbrook, *supra* note 17, at 1161-62. *Cf.* Barthle, *supra* note 42, at 1228-29.

⁴⁴⁹ Bundesrechtsanwaltsordnung [BRAO] [Federal Lawyer’s Act] Aug. 1, 1959, BGBl III at 1403, § 49b(2), <https://www.gesetze-im-internet.de/brao/>; Rechtsanwaltsvergütungsgesetz [RVG] [Lawyer’s Remuneration Act], May 5, 2004, BGBl I, at 718, § 4a, https://www.gesetze-im-internet.de/englisch_rvg/index.html (Ger.); *see* Alexander Bruns, *Das Verbot der quota litis und die erfolgshonorierte Prozeßfinanzierung* [The Prohibition of quota litis and Litigation Funding based on Contingent Fee], 55 JURISTENZEITUNG [JZ] 232, 233-40 (2000) (Ger.).

insulated from the outcome of the case. However, there are additional reasons why an award system might not cause the same effects like in the U.S. The amount of fines imposed on companies is radically lower than in the U.S.; nonmonetary sanctions are not even included.⁴⁵⁰ To provide a few insights, the average fine imposed by the German Federal Financial Supervisory Authority, or “Bundesanstalt für Finanzdienstleistungsaufsicht” (“BaFin”), with respect to securities supervision from 2012 to 2015, was about €26,500.⁴⁵¹ However, one has to add that in recent years, the average fine has constantly increased; in 2017 it increased to approximately €59,000,⁴⁵² in 2018 it increased to approximately €62,000,⁴⁵³ and it reached approximately €97,000⁴⁵⁴ in 2019. In spite of this gradual increase, the SEC’s average civil penalties still far outpace the German figures. From 2011 to 2015, the SEC’s average monetary sanctions were \$11.4 million in civil proceedings and \$5.2 million in administrative proceedings.⁴⁵⁵ Against this backdrop, it is far from surprising that whistleblower awards are “so high.” Instead, it is to be highly doubted whether, in the German system, a whistleblower award comprising 10 to 30 percent of the proceeds would adequately compensate whistleblowers for potential detriments, like a dismissal, and attract big law firms. It is also to be doubted that with such an award, tipsters that have high quality information are further incentivized to come forward. In this regard, the time needed to process a respective award can also not be ignored. Only in certain cartel matters do fines reach an equivalent amount.⁴⁵⁶ In this respect, it has to

⁴⁵⁰ Cf. J. LANGBEIN, *COMPARATIVE CRIMINAL PROCEDURE: GERMANY* 59 (1977). This seems to be the case with regard to length of sentencing, too.

⁴⁵¹ BUNDESANSTALT FÜR FINANZDIENSTLEISTUNGS AUFSICHT [BaFin] [Federal Financial Supervisory Authority], JAHRESBERICHT 2012 207 (2013) (Ger.), https://www.bafin.de/SharedDocs/Downloads/DE/Jahresbericht/dl_jb_2012.pdf?__blob=publicationFile&v=2; *id.*, JAHRESBERICHT 2013 189 (2014) (Ger.), https://www.bafin.de/SharedDocs/Downloads/DE/Jahresbericht/dl_jb_2013.pdf?__blob=publicationFile&v=2; *id.*, JAHRESBERICHT 2014 239 (2015) (Ger.), https://www.bafin.de/SharedDocs/Downloads/DE/Jahresbericht/dl_jb_2014.pdf?__blob=publicationFile&v=3; *id.*, JAHRESBERICHT 2015 256 (2016) (Ger.), https://www.bafin.de/SharedDocs/Downloads/DE/Jahresbericht/dl_jb_2015.pdf?__blob=publicationFile&v=13.

⁴⁵² *Id.*, JAHRESBERICHT 2017 153 (2018) (Ger.), https://www.bafin.de/SharedDocs/Downloads/DE/Jahresbericht/dl_jb_2017.pdf?__blob=publicationFile&v=9.

⁴⁵³ *Id.*, JAHRESBERICHT 2018 151 (2019) (Ger.), https://www.bafin.de/SharedDocs/Downloads/DE/Jahresbericht/dl_jb_2018.pdf?__blob=publicationFile&v=6.

⁴⁵⁴ *Id.*, JAHRESBERICHT 2019 41, 113 (2020), https://www.bafin.de/SharedDocs/Downloads/DE/Jahresbericht/dl_jb_2019.pdf?__blob=publicationFile&v=7 (Ger.).

⁴⁵⁵ See Stephen J. Choi & A. C. Pritchard, *The SEC’s Shift to Administrative Proceedings: An Empirical Assessment*, 34 YALE J. ON REG. 1, 21 (2017).

⁴⁵⁶ See Consolidated Version of the Treaty on the Functioning of the European Union, 2008 O.J. (C 115) 47 art. 101 (1) [hereinafter *TFEU*].

be highlighted that E.U. law only applies if there is a restriction of competition that is likely to have an adverse effect on trade between Member States, and not just on national or regional effects.⁴⁵⁷ Apart from that, such relatively “high” fines are only imposed by the E.U. Commission, not by its Member States. Thus, given the potential impacts of violations, the cartel practice by the European Commission, in this regard, cannot directly function as a role model for its Member States.⁴⁵⁸

Moreover, as repeatedly stressed, a financial award system does not come for nothing. Additionally, it is not simply about introducing an award system or not; rather, it is about how it should look like. In other words, aside from having to devise a sophisticated design, a financial award program may impose additional costs on authorities and entail other problems, too. Problems that German authorities might lack experience with will arise; the handling of bounties is virtually non-existent in the German legal culture. Dealing with multiple informants who are eligible for awards in the same matter, and the issue regarding what, when, and under what conditions these informants are to be paid, are new to the German legal landscape. Furthermore, crowding out effects—*viz.*, the moral dimension of the action is diluted because of the presence of awards⁴⁵⁹—would then have to be taken into account. This could, in particular, apply to the constellation in Germany as awards are, at least in comparison with the U.S., relatively low. Especially with regard to tax evasion, a recent empirical study indicates that the moral need to blow the whistle is less apparent than in other settings.⁴⁶⁰ Offering “low” awards in constellations that have no great ethical significance might then even be counterproductive.⁴⁶¹ Instead, either a high award has to be promised, which might then overcome whistleblowers’ reluctance, or the moral dimension of reporting should be highlighted.⁴⁶² Although every empirical study cannot fully be transferred to reality, *a fortiori* not in a comparative law environment, it at least evinces a path besides financial incentivizing that can be embarked. This is also supported by another empirical study demonstrating that whistleblowing happens even if no awards are granted, too.⁴⁶³

Therefore, instead of simply introducing a financial award program and virtually copying the American model, thereby also importing its problems, a focus should be put on nonmonetary factors “incentivizing” whistleblowers. By referring to the belief model, the moral dimension of

⁴⁵⁷ *Id.*

⁴⁵⁸ *Contra* Fleischer & Schmolke, *supra* note 206, at 365; Nyrreröd & Spagnolo, *supra* note 5, at 11; Schmolke, *supra* note 29, at 918-19 (Ger.).

⁴⁵⁹ Feldman & Lobel, *supra* note 92, at 1175.

⁴⁶⁰ *See id.* at 1204.

⁴⁶¹ *Id.* at 1155, 1194; *see also* Schmolke & Utikal, *supra* note 280, at 18-19, 25-26.

⁴⁶² Feldman & Lobel, *supra* note 92, at 1195, 1204; *see also* Rapp, *supra* note 92, at 113.

⁴⁶³ Schmolke & Utikal, *supra* note 280, at 17.

blowing the whistle should be emphasized and a particular behavior could be made salient. This could, in particular, be undertaken by making whistleblowing programs known to the general public and thereby promoting a positive image of the phenomenon of whistleblowing.⁴⁶⁴ In the end, it is all about peoples' beliefs. Economically speaking, the fact of not blowing the whistle may then function as an exogenously imposed fine. Following this approach, people then might want to mitigate their regret because they do not want to look away. If the introduction of the whistleblowing regime actually succeeds in shaping peoples' views, thereby signaling social desirability, further incentives are unnecessary and might even be counterproductive in promoting a harmonious integration in the preexisting legal framework. With respect to the latter, one could even go so far as to question the social acceptance of (large) financial awards.

The insights of the belief model could also be used to successfully handle the Whistleblowing Directive's ambiguity with regard to the relationship between internal and external reporting. The former could be made salient, provided that both the interests of the whistleblower and of law enforcement are not seriously curtailed, whereby an important signal of social desirability is conveyed to the people. By doing so, it could be argued that the legal relationship between the employer and the employee is more kept intact because it gives room for taking the employer's interest into account. As internal reporting is more in line with the preexisting legal framework, thereby comprising a balancing of interests between the employer and the employee, such an approach is also more likely to be accepted.

Lastly, besides avoiding legal uncertainties in the course of the implementation procedure, one additional insight of the comparison could prove to be fruitful for the future German model. The reluctance towards anonymous reporting can, at least to some extent, be alleviated by introducing an attorney requirement. Connecting anonymous reporting with the obligation to mandate an attorney could potentially counter abuses and would allow for follow-ups. Attorneys might then function as gatekeepers wiping out frivolous tips. Against the backdrop that attorneys in Germany, besides being subject to a fixed statutory fee system, are strongly obliged to administration of justice,⁴⁶⁵ making use of attorneys in whistleblowing matters is all the more warranted.

⁴⁶⁴ See Schmolke & Utikal, *supra* note 280, at 25; cf. Miceli, Near & Schwenk, *supra* note 314, at 119.

⁴⁶⁵ See Bundesrechtsanwaltsordnung [BRAO] [Federal Lawyer's Act] Aug. 1, 1959, BGBl III at 1403, § 1, <https://www.gesetze-im-internet.de/brao/> (Ger.) ("The attorney is an independent body of administration of justice").

VII. CONCLUSION

Given the different backgrounds of the two compared legal systems, it is warranted to say that establishing a whistleblowing framework is not an all-or-nothing game. There is not just one whistleblowing regime, not even within the U.S. By going deeper into the structure of both legal systems, it becomes obvious that the question of whether to capitalize whistleblowers is preponderantly linked to the general enforcement framework. The U.S. has a long and rich experience using whistleblowers to overcome public enforcement deficits. In this regard, whistleblowing smoothly integrates into the existing private law enforcement framework. However, as it has been mentioned, not everything works perfectly. Irritating court decisions and budgetary constraints are just a few of the challenges the current whistleblower programs are facing. With respect to Germany, a different picture is to be drawn. Other legal structures and economic-historical conditions in both the employment relationship and the enforcement regime highlight the differences between the two legal systems.

Although whistleblowing is about to play a more prominent role in the German system, it is far from resembling the American model. Public law enforcement is still the dominant model, and the discussion of financial awards is a purely theoretical one. In this regard, it should again be stressed that financial award programs come with their own problems and costs. Whether all of these issues can be countered by a sophisticated design is to be highly doubted, given the relatively little experience with bounty programs on a huge scale.⁴⁶⁶ Instead of importing all these troubles, playing the “moral card” should be pursued. The focus should be put on fostering intrinsic rather than extrinsic motives. Promoting a positive image of whistleblowing, and thereby making this behavior salient, avoids potential frictions that a financial award program may entail. With regard to the relationship between internal and external reporting, comparable thoughts can be used. In stressing the need to generally report internally before applying to authorities, the legal relationship between the employer and the employee is not too disrupted. It is more likely to constitute a harmonious integration and, thereby, successfully alter peoples’ behavior by keeping hands off financial awards and by emphasizing the benefits of internal reporting.

In the end, the discussion on whistleblowing is nothing more than a debate about legal cultures. The basic questions that have to be taken into consideration are how the law is being enforced in general and how the typical employment relationship in the respective legal system look like. Keeping these issues in mind, it is far from surprising that the American whistleblowing model is only partially advanced. Additionally, the discussion

⁴⁶⁶ *Contra* Fleischer & Schmolke, *supra* note 206, at 364-65 (Ger.); PFEIFLE, *supra* note 193, at 156 (Ger.); Schmolke, *supra* note 29, at 919 (Ger.).

on Americanization cannot simply be reduced to the question on whether or not a financial award system should be introduced, although this topic may currently be omnipresent.⁴⁶⁷ However, one aspect cannot be denied: the implementation of the Whistleblowing Directive is likely to alter the German system in a certain way. This is not only illustrated by the fact that a distinct public policy dimension is incorporated into the employment relationship, but rather that additional private enforcement elements are brought into the preexisting enforcement framework. Whether the changes will result smoothly or entail frictions remains to be seen.

⁴⁶⁷ See, e.g., Fleischer & Schmolke, *supra* note 206, at 364-66; PFEIFLE, *supra* note 193, at 211-12; Schmolke, *supra* note 29, at 919 (in favor of introducing a whistleblower award program in Germany); Buchert, *supra* note 206, at 149; KREIS, *supra* note 125, at 211-12.