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Making Whistleblowers Whole

Jennifer M. Pacella*

If ever there was a time in history in which whistleblowers have taken center stage, it has been the past two years. From COVID-19 to Trump's first impeachment trial, whistleblowers have played a vital role in bringing to light information otherwise impossible to obtain. While the value that whistleblowers bring to government, organizations, and society has always been immeasurable, it is still the case that whistleblowers ultimately suffer a disastrous fate. They have made the decision to speak out against wrongdoing, often risking their jobs, livelihoods, and ability to thrive in their respective industry due to harassment, demotion, exclusion, or termination. As a result, the emotional harm that they naturally suffer is significant. In some cases, it even leads to depression, suicide, and other devastating consequences. Yet one of the most prominent federal whistleblower programs today—the Securities and Exchange Commission's (SEC) whistleblower provisions under the Dodd-Frank Act—is an anomaly in numerous respects. It is one of the only federal whistleblower programs that fails to offer non-economic, emotional damages as a remedial provision. After examining personal accounts of whistleblower experiences, this Article will conduct a comparative analysis of the damages available under the SEC's whistleblower program of the Dodd-Frank Act as compared to several other notable whistleblowing statutes, some of which are also within the domain of the investment markets. This Article will then propose a theoretical basis in support of emotional damages for whistleblowers by both incorporating deterrence theory under economic principles in tort law and undergoing a "rights vs. remedies" analysis that considers the substantive and procedural considerations of ensuring that whistleblowers, in their pursuit of justice against their retaliators, are truly made whole.

* Jennifer M. Pacella is an Associate Professor of Business Law and Ethics at Indiana University, Kelley School of Business. Prior to this academic appointment, she was a faculty member in the Department of Law of the City University of New York's Zicklin School of Business at Baruch College. Professor Pacella is a business law subject matter expert specializing in organizational governance, whistleblowing law, and compliance. The author is grateful to the Business Law and Ethics Department at the Kelley School of Business and the participants of the 2021 Mid-Atlantic Academy of Legal Studies in Business conference for their helpful comments on an earlier draft of this article.

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INTRODUCTION

As we collectively look back on the historic trials and tribulations of the past two years, numerous examples of whistleblowers leading the fight for truth, public awareness, justice, health, and safety stand at the forefront. Through COVID-19's seemingly endless impacts on our lives and on society, whistleblowers have been critical in revealing invaluable information not only about the virus itself, its spread, inadequate medical care, and poor governmental responses,¹ but also revelations of wrongdoing by fraudsters seeking to take financial advantage of people during their most vulnerable time.² It was also a whistleblower who provided the very information that led to Trump's first presidential impeachment trial, resulting in an extraordinary revelation of details that impeached the third president in

1. Samantha Feinstein, *COVID-19: The Largest Attack on Whistleblowers in the World*, GOVT ACCOUNTABILITY PROJECT (Apr. 8, 2020), <https://whistleblower.org/blog/covid-19-the-largest-attack-on-whistleblowers-in-the-world/> [https://perma.cc/RK8E-RVB5].

2. Katanga Johnson, *SEC Pursues Coronavirus Fraudsters with Help from Whistleblowers*, INS. J. (May 27, 2020), <https://www.insurancejournal.com/news/national/2020/05/27/569931.htm> [https://perma.cc/6UKE-JDTC]; Mark Worth, Opinion, *Whistleblower Rewards in the Age of COVID-19*, WHISTLEBLOWER NETWORK NEWS (May 27, 2020), <https://www.whistleblowersblog.org/2020/05/articles/opinion/whistleblower-rewards-in-the-age-of-covid-19/> [https://perma.cc/S2VU-RY4F] (quoting CANADIAN COVID-19 ACCOUNTABILITY GRP., PROTECTING WHISTLEBLOWERS AND INCREASING TRANSPARENCY IN CANADA IN THE AGE OF COVID-19, at 4, 12 (2020), <https://whistleblowersblogfullservice.lexblogplatformthree.com/wp-content/uploads/sites/904/2020/05/CCAG-Canadian-Whistleblowing-and-Transparency-Proposal.pdf> [https://perma.cc/FZD6-8LRX]).

U.S. history.³ Recipients of this information have reacted largely the same way to whistleblowers—by retaliating against them. This phenomenon has historically described the unfortunate reality of how most whistleblowers are treated.⁴ The most common retaliatory acts against these whistleblowers have comprised such actions as revealing one’s identity despite promises of anonymity, termination from employment, demotion, harassment, discrimination, death threats, and many other dreadful actions, all of which are evidence of how poorly whistleblowers are commonly treated in various contexts and industries.⁵

There can be no doubt that any of these forms of retaliation or the myriad other ways in which retaliation against whistleblowers can be manifested results in a negative emotional response for the whistleblower. Retaliation is meant to harm, and harm it does. Countless whistleblowing studies provide intricate details as to the severely detrimental emotional effects that result from whistleblowers acting in good faith to improve their workplaces, seek justice, or alert persons in positions of power to dangerous and concerning circumstances, only to then face retaliation for doing so.⁶ While emotional distress is a natural and logical effect of having lived through retaliation, one of the most influential and notable pieces of federal whistleblowing legislation does not recognize it as a harm remediable by law. The SEC-administered whistleblower program of the Dodd-Frank Wall Street Reform and Consumer Protection Act (SEC Whistleblower Program), enacted by Congress in 2010, fails to provide non-pecuniary, emotional damages to whistleblowers as a remedial provision under the statute.⁷ While the statute provides the remedies of reinstatement of employment (however unlikely it is that a whistleblower will want to return to the very workplace where they experienced retaliation), back pay, and

3. See Michael J. Klarman, *The Supreme Court, 2019 Term—Foreword: The Degradation of American Democracy—And the Court*, 134 HARV. L. REV. 1, 39 (2020) (discussing Trump’s “repeated attacks on the [Ukraine] whistleblower”); Julian E. Barnes, Michael S. Schmidt, Adam Goldman & Katie Benner, *White House Knew of Whistle-Blower’s Allegations Soon After Trump’s Call With Ukraine Leader*, N.Y. TIMES, (Nov. 26, 2019), <https://www.nytimes.com/2019/09/26/us/politics/who-is-whistleblower.html> [<https://perma.cc/4FUW-UUQ2>]; Kevin Liptak, Paul LeBlanc & Olanma Mang, *Whistleblower Timeline: Team Trump Contacts and Ukraine*, CNN (Nov. 13, 2019, 7:53 PM), <https://www.cnn.com/2019/09/20/politics/whistleblower-timeline-ukraine-team-trump/index.html> [<https://perma.cc/EY6A-QQXQ>]; Brian Stelter, *Trump Attacks Whistleblower in Tweetstorm Full of Rants and Conspiracies*, CNN (Dec. 28, 2019, 9:43 PM), <https://www.cnn.com/2019/12/28/politics/trump-ukraine-whistleblower-twitter/index.html> [<https://perma.cc/JN57-RB5Z>].

4. Feinstein, *supra* note 1.

5. See *id.* (discussing the various forms of retaliation experienced by coronavirus whistleblowers); see also Yelena Dzhanova, *President Trump Faces Backlash After Retweeting Post Revealing Supposed Whistleblower’s Name*, CNBC (Dec. 30, 2019, 12:38 PM), <https://www.cnn.com/2019/12/30/trump-faces-backlash-after-retweet-revealing-alleged-whistleblower.html> [<https://perma.cc/2E7D-RJLV>] (discussing the repercussions and risk of retaliation by Trump from his attempts to out the whistleblower whose report led to his first impeachment).

6. See *infra* Section I.A.

7. See 15 U.S.C. § 78u-6(h).

attorneys' fees,⁸ its failure to make any provision for emotional damages is a true anomaly in the context of federal whistleblowing programs across the board.

This Article is the very first scholarly piece to examine this glaring deviation and to propose in depth the theoretical and practical arguments that support making all whistleblowers whole through the remedy of emotional damages. This Article will analyze the remedies available under the SEC Whistleblower Program, as compared to a number of other comparable federal whistleblowing statutes that do provide emotional damages to whistleblowers who seek recourse and are successful in their statutory retaliation claims. The whistleblower program of the Commodity Futures Trading Commission (CFTC Whistleblower Program) will also be highlighted as one of the most notable points of legislative comparison, as the CFTC is an agency closely related in scope and mission to that of the SEC and whose whistleblower program, enacted under the very same statute—Dodd-Frank—is nearly identical in all other aspects to that of the SEC, except that its remedies do include emotional damages.⁹

This Article will proceed in three parts. Part I will examine the various types of retaliation that whistleblowers traditionally experience and will highlight personal, real-world examples of the emotional trauma that so often accompanies retaliation. This Section will also explore the origins of granting emotional damages as a remedy generally and the ways in which judicial interpretations have generally supported these damages as a viable and natural solution to make whistleblowers whole. Part II will compare the remedial provisions of the SEC Whistleblower Program to those of the CFTC, of the Sarbanes-Oxley Act (SOX), and of the False Claims Act (FCA)—all of which are comparable to the former in use, popularity, and mission.¹⁰ This Section will analyze the full universe of remedial provisions under these programs, both statutorily and judicially, and will argue that emotional damages are intended to capture the very essence of the type of harm that whistleblowers have suffered due to retaliatory actions. This Section will also draw novel comparisons between the SEC Whistleblower Program and Title VII of the Civil Rights Act of 1964 (Title VII), a statute that, since 1991, has provided not only compensatory emotional damages to victims of discrimination and sexual harassment but also punitive damages.¹¹ The various striking similarities between whistleblowers and

8. *Id.*; Joan Corbo, Note, *Kraus v. New Rochelle Hosp. Medical Ctr.: Are Whistleblowers Finally Getting the Protection They Need?*, 12 HOFSTRA LAB. L.J. 141, 157 n.113 (1994) (noting an example of a “tension filled and acrimonious atmosphere” at the time of a whistleblower’s departure and “that it was highly unlikely that a harmonious working relationship” would occur if the whistleblower were reinstated); *see also* James W. Hubbell, *Retaliatory Discharge and the Economics of Deterrence*, 60 U. COLO. L. REV. 91, 118 (1989) (“[R]einstatement will usually be a poor remedy for retaliatory discharge actions. From the whistleblowing employee’s standpoint, the reinstatement remedy means that the best outcome will usually be worse than the consequences of remaining silent.”).

9. *See infra* Section II.A.

10. *See infra* Part II.

11. *See* 42 U.S.C. § 1981a(a)(1), (3).

victims seeking relief under Title VII will be analyzed, thereby providing further scholarly support for why corporate whistleblowers under Dodd-Frank should be subject to no fewer protections.

Part III will propose reform by providing theoretical and practical support for why emotional damages should be a remedy in all whistleblower protection statutes, specifically by analyzing and incorporating economic theories of deterrence in tort law as support for this argument. This Section will also draw comparisons between acts of negligence in tort law and retaliatory acts against whistleblowers that both acknowledge their differences and similarities and also recognize the fundamentally similar goals of providing remedies to victims of undesirable actions, especially in the workplace, to deter such actions.¹² While incorporating principles from the disciplines of social psychology and criminology, this Section will conduct a rights versus remedies analysis supporting the argument that emotional damages as a remedial provision instinctively stem from the underlying right to be free from intrusion and retaliation.¹³ Finally, this Section will refute counterarguments suggesting that the availability of bounty rewards under statutes like that of the SEC Whistleblower Program, intended to incentivize whistleblowers to come forward,¹⁴ may compensate for the lack of emotional damages. While focusing on the ways in which the underlying public policy and legislative history of bounty reward programs are distinct from the objectives of providing an adequate statutory remedial structure for whistleblowers, this Article will conclude with robust support for how recognition of the emotional pain that whistleblowers have suffered is the only vehicle for attempting to ensure that they are truly made whole.

I. EMOTIONAL DISTRESS DAMAGES

A. *The Experiences of Whistleblowers*

Employers and other retaliators commonly inflict serious reprisals against whistleblowers that often include denigration, intimidation, marginalization, blacklisting, punitive transfers or removal of responsibilities, and professional or personal threats, resulting in an overwhelming range of negative emotional consequences for the whistleblower, including fear, guilt, belittling, social ostracism, and even risks to one's own life.¹⁵ Existing qualitative research reveals that

12. See *infra* Part III.

13. *Id.*

14. *Id.*

15. See Orly Lobel, *Citizenship, Organizational Citizenship, and the Laws of Overlapping Obligations*, 97 CALIF. L. REV. 433, 486–87 (2009) (discussing the various emotional harms that whistleblowers commonly suffer); Neil Schonert, Comment, *A Fistful of Dollars: Bounty Hunting Under the Dodd-Frank Act's Whistleblower Provisions*, 36 S. ILL. U. L.J. 159, 169 (2011) (discussing the severe effects of retaliation on whistleblowers); Christopher Wiener, Note, *Blowing the Whistle on Van Asdale: Analysis and Recommendations*, 62 HASTINGS L.J. 531, 548 (2010) (describing instances of retaliation against whistleblowers); Roomy Khan, *Whistleblower: Warrior*,

whistleblowers widely experience extremely negative consequences on an ongoing basis that overlap into other areas of the whistleblower's personal life, including serious problems with spouses, partners, and children, often leading to family turmoil, divorce, and, in some cases, suicide.¹⁶ A recent multi-comparative, cross-sectional study examined the extent to which whistleblowers suffer mentally more than “normal” groups like people who are physically “healthy” and population-based samples of matched controls, compared to those who are known to be more at risk for mental health problems, such as cancer patients or those with mental or physical disabilities.¹⁷ The results of this study reveal an astounding fact—that whistleblowers are significantly more at risk for experiencing serious mental health problems and poor physical health than the matched controls, the physically “healthy” groups, and those with disabilities.¹⁸ When compared to each of these groups, whistleblowers are more likely to experience the following according to percentage: severe to very severe anxiety (46.1%), depression (53.8%), interpersonal sensitivity and distrust (50.0%), and sleeping problems (51.9%).¹⁹ Additional studies have echoed these exact findings, as the majority of whistleblowers have expressed that they suffered workplace harassment, physical deterioration, and negative emotional consequences including depression, isolation, powerlessness, anger, and anxiety.²⁰

Whistleblowers suffer regardless of whether they have made an internal or an external report. Those who report externally (to the government), as opposed to those who report internally (to superiors), are not without a significant risk of emotional strain. Studies have revealed that the time, secrecy, and duration of subsequent cooperation with the government, for example, results in long-enduring pressure, frustration, and anxiety due to the slow pace of the investigation and

Saboteur or Snitch?, FORBES, (July 5, 2018, 1:03 PM), <https://www.forbes.com/sites/roomykan/2018/07/05/whistleblower-warrior-saboteur-or-snitch/#6302dfc46362> [https://perma.cc/83EV-YWWR].

16. Peter G. van der Velden, Mauro Pecoraro, Mijke S. Houwerzijl & Erik van der Meulen, *Mental Health Problems Among Whistleblowers: A Comparative Study*, 122 PSYCH. REPS. 632, 633 (2019) (citing various studies of whistleblowers); see also Miriam A. Cherry, *Whistling in the Dark? Corporate Fraud, Whistleblowers, and the Implications of the Sarbanes-Oxley Act for Employment Law*, 79 WASH. L. REV. 1029, 1031 n.4 (2004) (citing a study showing that eighty-two percent of whistleblowers experienced harassment and sixty percent were fired, which led to instances of depression and suicide (citing David Culp, *Whistleblowers: Corporate Anarchists or Heroes? Towards a Judicial Perspective*, 13 HOFSTRA LAB. L.J. 109, 113 (1995))).

17. van der Velden, Pecoraro, Houwerzijl & van der Meulen, *supra* note 16, at 636–40.

18. *Id.* at 636.

19. *Id.* at 636–37.

20. Pamela H. Bucy, *Games and Stories: Game Theory and the Civil False Claims Act*, 31 FLA. ST. U. L. REV. 603, 645 n.208 (2004) (citing Clyde H. Farnsworth, *Survey of Whistle Blowers Finds Retaliation but Few Regrets*, N.Y. TIMES, Feb. 22, 1987, at 22); see also Pamela H. Bucy, *Moral Messengers: Delegating Prosecutorial Power*, 59 SMU L. REV. 321, 331 n.54 (2006) (noting various surveys of whistleblowers that demonstrate the “hardship and retribution” that they have suffered).

common lack of transparency when cooperating directly with prosecutors.²¹ From a purely emotional, non-physical standpoint, another study found that ninety-four percent of whistleblowers reported that they suffered from stress-induced emotional suffering due to identifying and reporting misconduct in the workplace, with the most frequently experienced emotions being anger, anxiety, and disillusionment.²² Such emotions most commonly resulted from increased conflict with coworkers who were unsympathetic to or dismissive of the concerns (and who were also once friends), thereby leading to personal problems for whistleblowers that often escalated to tarnish their own familial relationships, especially in instances where the colleagues were also friends of the whistleblower's spouse or family members.²³ Increased sadness is also an extremely widespread result of whistleblowing, resulting in whistleblowers commonly reporting that they have broken down and cried easily when thinking about their experience, thus resulting in feelings of listlessness, social and emotional withdrawal, and a general loss of satisfaction with life.²⁴

There are numerous accounts of whistleblowers who have felt so ostracized, belittled, or depressed that they have taken their own life. Chris Kirkpatrick was a clinical psychologist for a U.S. Department of Veteran Affairs hospital who blew the whistle on the over-prescription of opiate medication to patients, ultimately leading to the hospital inflicting severe retaliation against him. This retaliation included imposing disciplinary action against him and ultimately firing him, which was the very day that he killed himself.²⁵ In addition to the emotional suffering Kirkpatrick experienced from retaliation, his whistleblowing also led to an additional strain at work as he attempted to manage his already heavy caseload and faced a physical threat from a patient.²⁶ His death ultimately led to the enactment of a new federal law, the Dr. Chris Kirkpatrick Whistleblower Protection Act of

21. Sheelah Kolhatkar, *The Personal Toll of Whistle-Blowing*, NEW YORKER (Jan. 28, 2019), <https://www.newyorker.com/magazine/2019/02/04/the-personal-toll-of-whistle-blowing> [<https://perma.cc/W3XT-4PKY>]; see also 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 Provision*, 17 FORDHAM J. CORP. & FIN. L. 1023, 1041 (2012) (discussing the difficulties whistleblowers experience during government cooperation).

22. Sally McDonald & Kathy Ahern, *Physical and Emotional Effects of Whistleblowing*, 40 J. PSYCHOSOCIAL NURSING & MENTAL HEALTH SERVS., no. 1, 2002, at 14, 19.

23. *Id.* Such negative emotions also commonly result from the stress-induced repercussions of whistleblowing, which are also commonly experienced.

24. *Id.*; see also Evan J. Ballan, Note, *Protecting Whistleblowing (and Not Just Whistleblowers)*, 116 MICH. L. REV. 475, 488 (2017) (discussing the “stressful and grueling” effects of whistleblowing).

25. Mehreen Rasheed, *A VA Doctor's Suicide Results in New Whistleblower Protections*, KATZ, MARSHALL & BANKS, LLP (Feb. 22, 2018), <https://www.kmblegal.com/whistleblower-blog/va-doctors-suicide-results-new-whistleblower-protections> [<https://perma.cc/G6VE-JEC5>]; see also Stephen M. Kohn, Opinion, *Congress Remembers a Whistleblower—And Helps Every Federal Worker*, HILL: CONG. BLOG (July 3, 2017, 4:00 PM), <https://thehill.com/blogs/congress-blog/politics/340546-congress-remembers-a-whistleblower-and-helps-every-federal> [<https://perma.cc/CRT2-P322>].

26. Rasheed, *supra* note 25.

2017, which strengthens whistleblower protections for federal employees who report on fraud, waste, or abuse in the federal government.²⁷

After reporting serious ethical and legal violations of the outside counsel, another whistleblower, who happens to be an attorney, Joseph Rose, attempted to escalate his concerns to the board of directors of a cooperative after the CEO had ignored him.²⁸ Rose was then denied access to the board and, instead, fired a few days later.²⁹ Over the course of the next three years, he was subpoenaed to testify before various Senate committees for information related to the violations, all while being actively harassed by his former employer.³⁰ As is sadly often the case, his reputation as a whistleblower led to his inability to obtain new employment thereafter, ultimately leading to his wife, who was in poor health, needing to return to work to support their five children, a move of the family to a smaller house due to financial problems, and regular meals that consisted of “bread and beans.”³¹

Anthony Menendez, a corporate whistleblower and former director of accounting research and training at Halliburton, a global energy products and service company, raised concerns with his colleagues that some of the company’s accounting practices did not conform with generally accepted accounting principles.³² Menendez provided his supervisor with a strong, written memorandum outlining these concerns, who then told him he was not a “team player” and refused to further meet with him, which led Menendez ultimately to file a confidential report to the SEC.³³ Menendez continued to try to resolve the issue internally with colleagues.³⁴ While the SEC did not reveal Menendez’s identity, it did initiate an investigation into the company that allowed Menendez’s colleagues to surmise that he had been the one to make the report, causing them to circulate an email to Menendez’s direct work group (and Menendez himself) that he had blown the whistle to the SEC, thereby “horrifying” Menendez, who described this day as “one of the worst in his life.”³⁵ The aftermath of this revelation led to the inevitable result

27. See Dr. Chris Kirkpatrick Whistleblower Protection Act of 2017, Pub. L. No. 115-73, 131 Stat. 1235–42; see also Todd W. Shaw, Recent Developments, *When Text and Policy Conflict: Internal Whistleblowing Under the Shadow of Dodd-Frank*, 70 ADMIN. L. REV. 673, 707–08 (2018) (discussing the development of this legislation).

28. Pamela H. Bucy, *Information as a Commodity in the Regulatory World*, 39 HOUS. L. REV. 905, 948–49 (2002).

29. *Id.*

30. *Id.*

31. *Id.*; see also Leora F. Eisenstadt & Jennifer M. Pacella, *Whistleblowers Need Not Apply*, 55 AM. BUS. L.J. 665, 667 (2018) (discussing the common fate of whistleblowers being unable to obtain subsequent employment); Gideon Mark, *Recanting Confidential Witnesses in Securities Litigation*, 45 LOY. U. CHI. L.J. 575, 597 (2014) (noting that most whistleblowers never work in their fields of expertise again).

32. *Halliburton, Inc. v. Admin. Rev. Bd.*, 771 F.3d 254, 256 (5th Cir. 2014) (per curiam).

33. *Id.*

34. *Id.*; see also Dick Carozza, *He Fought Halliburton and Won*, FRAUD MAG. (May/June 2016), <https://www.fraud-magazine.com/article.aspx?id=4294992668> [<https://perma.cc/EBZ4-EMF9>].

35. *Halliburton*, 771 F.3d at 256.

of colleagues ostracizing him, avoiding him, and stripping him of his regular work duties, thereby leading to Menendez, normally a “perennial optimist[,]” to become panicked fighting for “[his] livelihood, [his] family, [and his] credibility” due to what felt like “a death sentence for [his] future,” and causing him to suffer severe emotional distress.³⁶ While Menendez was ultimately successful in pursuing a retaliation action against Halliburton, his emotional suffering left a lasting impact: “I changed a lot. It was almost 10 years where everything was in question. Everything was in question. Wondering what would people think of you and fighting the enormous powers of a company which could really weaken a soul and tear apart a family or marriage.”³⁷

These accounts of severe negative treatment against whistleblowers are unfortunately so widespread due to the long-standing societal and organizational perception of whistleblowers as disloyal and the bearers of bad news, which has historically caused recipients of the information to label whistleblowers with pejorative descriptions such as snitches, rats, or traitors.³⁸ Common views have likened whistleblowers to disgruntled employees who have an “axe to grind” with their organizations or are trying to “get back” at their employers for some act of aggrievement— “[t]his paradigm usually pits the conscience of one individual against the power and resources of a large organization.”³⁹ Therefore, the power dynamic is seriously unbalanced and leaves whistleblowers as extremely vulnerable parties.

These highly negative perceptions of whistleblowers tend to be even worse in the corporate and financial context. Various interviews and studies of whistleblowers on Wall Street have revealed a fairly consistent level of disinterest among powerful financial institutions as to responding to employees who raise concerns of possible violations of the law or other types of misconduct, which is

36. Jesse Eisinger, *The Whistleblower's Tale: How an Accountant Took on Halliburton*, PROPUBLICA (Apr. 21, 2015, 9:00 AM), <https://www.propublica.org/article/the-whistleblowers-tale-how-an-accountant-took-on-halliburton> [<https://perma.cc/JQT3-EUF9>].

37. *Id.*

38. See Naseem Faqih, Note, *Choosing Which Rule to Break First: An In-House Attorney Whistleblower's Choices After Discovering a Possible Federal Securities Law Violation*, 82 FORDHAM L. REV. 3341, 3351 (2014) (noting the traditional view of whistleblowers as “lowlifes who betray a sacred trust largely for personal gain” (internal alterations omitted) (quoting Yuval Feldman & Orly Lobel, *The Incentives Matrix: The Comparative Effectiveness of Rewards, Liabilities, Duties, and Protections for Reporting Illegality*, 88 TEX. L. REV. 1151, 1159 (2010))); Feldman & Lobel, *supra*, at 1158 (discussing societal views of whistleblowers); Jennifer M. Pacella, *Bounties for Bad Behavior: Rewarding Culpable Whistleblowers Under the Dodd-Frank Act and Internal Revenue Code*, 17 U. PA. J. BUS. L. 345, 346–47 (2015) (discussing the existence of common negative perceptions of whistleblowers).

39. Cherry, *supra* note 16, at 1052; see also Jonathan Macey, *Getting the Word Out About Fraud: A Theoretical Analysis of Whistleblowing and Insider Trading*, 105 MICH. L. REV. 1899, 1914 (2007) (noting the “disgruntled employee” perception of whistleblowing).

largely due to the existence of hostile, non-transparent, or silent workplace cultures usually descriptive of large institutions.⁴⁰

It is a phenomenon that exists within large institutions that have significant power—Wall Street, government, among them. There is this overwhelming rigidity in organizations that makes them hesitant to believe. When money is involved, the powers are very, very significant. Those people who pushback on Wall Street are often made to pay a penalty. They're fired. They're blackballed.⁴¹

In recent years, however, public portrayals of whistleblowers have helped to slowly shift to a more accepting societal stance of viewing whistleblowers as courageous, valuable sources of information who protect organizations and the public interest from wrongdoing, abuse of power, and unethical behavior.⁴² Given the fact that most whistleblowers make a personal choice to report on wrongdoing, rather than being forced to do so to minimize their own liability, and face an enormous cost for doing so, regulators and employers must recognize that information of the caliber and type that only an inside whistleblower can provide is costly—“[i]f the regulatory world is not willing to pay for such information, it will not get it.”⁴³ These costs should include coverage of one of the most natural and inevitable results of blowing the whistle—emotional suffering.

B. *The Origins of Emotional Distress Damages*

Damages for emotional pain and suffering began to be recognized in late eighteenth Anglo-American law, gaining wider acceptance as a remedy in personal injury cases in the nineteenth century and significantly increasing after the Second World War.⁴⁴ It is believed that more effective trial techniques to obtain larger

40. William D. Cohan, *William D Cohan on Wall Street Whistleblowers*, FIN. TIMES (May 30, 2014), <https://www.ft.com/content/ce216134-e6c7-11e3-9a20-00144feabdc0> [<https://perma.cc/12Q2-7B5C>].

41. *Id.* (quoting Eliot Spitzer, former Governor & Att’y Gen. of N.Y.).

42. See, e.g., Geneva Campbell, Comment, *Snitch or Savior? How the Modern Cultural Acceptance of Pharmaceutical Company Employee External Whistleblowing is Reflected in Dodd-Frank and the Affordable Care Act*, 15 U. PA. J. BUS. L. 565, 571–75 (2013) (discussing the recent increase in acceptance of whistleblowers); Feldman & Lobel, *supra* note 38, at 1159 (“In the past, popular culture has generally portrayed whistle-blowers as ‘lowlife[s] who betray[] a sacred trust largely for personal gain.’ In recent years, however, the act of whistle-blowing has been reshaped in the media as a heroic act that can bring deeply corrupt practices to a halt.” (citing TERANCE D. MIETHE, WHISTLEBLOWING AT WORK: TOUGH CHOICES IN EXPOSING FRAUD, WASTE, AND ABUSE ON THE JOB 12 (1999))); Matt A. Vega, *Beyond Incentives: Making Corporate Whistleblowing Moral in the New Era of Dodd-Frank Act “Bounty Hunting,”* 45 CONN. L. REV. 483, 491–92 (2012) (noting that the public perception of whistleblowers has transformed from “morally suspect” to heroic).

43. Bucy, *supra* note 28, at 948; see also Aleksandra Lamontanaro, Note, *Bounty Hunters for Algorithmic Cartels: An Old Solution for a New Problem*, 30 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 1259, 1308–09 (2020) (discussing the ability of whistleblowers to “educate” the authorities about valuable, inside information).

44. Joseph H. King, Jr., *Pain and Suffering, Noneconomic Damages, and the Goals of Tort Law*, 57 SMU L. REV. 163, 170 (2004); see also Philip L. Merkel, *Pain and Suffering Damages at*

awards and a widespread awareness of larger verdicts affecting what jurors considered appropriate recovery levels led to this increase.⁴⁵ Emotional distress damages have a very long history in personal injury tort cases, where they have historically been deemed compensatory damages.⁴⁶ As behavioral sciences over history began to show various ways that mental suffering could manifest itself, the law, largely through appellate courts, facilitated the development of these damages, demonstrating an increasing willingness to recognize the debilitating and devastating effects of mental suffering as being distinct from physical injury but similarly eligible for compensation.⁴⁷

“The various forms of mental suffering are as numberless as the capacities of the human soul for torturing itself,” thereby covering an extensive panoply of various forms of mental harm, including fright over the event that caused the suffering, anxiety about one’s current and future health and earning potential, and fear.⁴⁸ Given these devastating effects on one’s well-being, courts became acutely aware of the fact that compensatory damages for emotional distress could help compensate the victim for any lifestyle changes they have experienced as a result of the injury or event, even if they could not exactly replace dollar amounts lost from a pecuniary standpoint.⁴⁹ This was largely based on the acknowledgment that the mental harm suffered may long exceed a physical one and leads to feelings of anxiety, depression, humiliation, or “gloomy forebodings” given the loss of one’s career and livelihood over time.⁵⁰ Not only does mental suffering clearly create negative psychological effects, it also produces adverse physical effects that cause additional suffering. Over the years, legal scholars and practitioners have continued to widely cite medical findings and psychological research as justifications for

Mid-Twentieth Century: A Retrospective View of the Problem and the Legal Academy’s First Responses, 34 CAP. U. L. REV. 545, 548–49 (2006) (discussing the origins of pain and suffering damages).

45. King, *supra* note 44 (“The American Trial Lawyers Association is credited with a major role in the development and refinement of these trial techniques that has spurred the growth in damages for pain and suffering. And, apparently these damages have continued to mushroom in size.” (first citing JEFFREY O’CONNELL & RITA S. SIMON, PAYMENT FOR PAIN AND SUFFERING 4 (1972); and then citing Victor E. Schwartz & Leah Lorber, *Twisting the Purpose of Pain and Suffering Awards: Turning Compensation into “Punishment,”* 54 S.C. L. REV. 47, 64–68 (2002)); see also Calvert Magruder, *Mental and Emotional Disturbance in the Law of Torts*, 49 HARV. L. REV. 1033, 1033 (1936) (discussing the role of juries in determining such damages).

46. Merkel, *supra* note 44, at 548.

47. *Id.* at 554 (“To mean anything[, mental suffering] must include the numerous forms and phases which mental suffering may take, which will vary in every case with the nervous temperament of the individual, his ability to stand shock, his financial condition in life, whether dependent on his own labor or not, the nature of his injuries, whether permanent or temporary, disfiguring and humiliating, and so through a long category, the enumeration of which it is unnecessary here even to attempt.” (quoting *Merrill v. L.A. Gas & Elec. Co.*, 111 P. 534, 540 (Cal. 1910)).

48. *Id.* (citing CHARLES T. MCCORMICK, HANDBOOK ON THE LAW OF DAMAGES 316 (1935)).

49. *Id.*

50. *Ryan v. Oakland Gas, Light & Heat Co.*, 130 P. 693, 698 (Cal. Ct. App. 1913).

providing emotional distress damages.⁵¹ “Medical science has long recognized that not only fright and shock, but also anxiety, grief, rage and shame, are in themselves ‘physical’ injuries, producing well marked changes in the body, and symptoms of major importance which are readily visible to the professional eye.”⁵²

As it pertains to whistleblowers specifically, the susceptibility to emotional distress is even more pronounced than a personal injury tort given the fact that the derogatory behavior so typically descriptive of retaliation, which is intentional, prompts a natural response of a wide range of intensely negative feelings.⁵³ In light of this reality, early studies of whistleblowers and the statutes that protect them have revealed that employees would be strongly discouraged from blowing the whistle on workplace issues of concern if the statute in question failed to provide punitive and emotional injury damages, since this gap would not “adequately compensate the employee for the risks taken in reporting suspected wrongdoing.”⁵⁴ Therefore, the assurance to whistleblowers that they will fully be made whole in the event of retaliation is a crucial factor in determining whether they will decide to come forward and share the type of information that would otherwise be so difficult to obtain. Such assurances are even more important when the whistleblower is internal, or coming forward with information to a supervisor, manager, director, or via some other mode of escalating information within their respective places of employment.⁵⁵ Internal whistleblowers experience even more pronounced disincentives to reporting that external whistleblowers reporting outside of the organization are often able to avoid, given that, often, the former are sharing

51. See Laura J. Bradley, Case Note, *Bain v. Wells*, 936 S.W.2d 618 (Tenn. 1997), 65 TENN. L. REV. 293, 298 (1997) (noting that medical and psychological research “continue[s] to validate the harmful effects of emotional distress,” thereby providing support for courts to award damages for emotional injury alone); William L. Prosser, *Intentional Infliction of Mental Suffering: A New Tort*, 37 MICH. L. REV. 874, 876 (1939) (citing medical research supporting findings of emotional distress); Richard S. Saver, *Medical Research and Intangible Harm*, 74 U. CIN. L. REV. 941, 966 (2006) (discussing the causal links between emotional distress and infliction of derogatory behavior).

52. Merkel, *supra* note 44, at 557 (citing Prosser, *supra* note 51); see also Saver, *supra* note 51, at 967 (noting that intentional infliction of emotional distress claims do not require a finding of physical harm on the part of the plaintiff to recover).

53. See *supra* Section I.A.

54. Terry Morehead Dworkin, *SOX and Whistleblowing*, 105 MICH. L. REV. 1757, 1763 (2007); see also James Fanto, *Whistleblowing and the Public Director: Countering Corporate Inner Circles*, 83 OR. L. REV. 435, 440 (2004) (“The whistleblowers, who have the company’s interests most at heart, are rarely forgiven . . . and they spend their lives in misery, shunned by employers.” (citing Elletta Sangrey Callahan & Terry Morehead Dworkin, *Who Blows the Whistle to the Media, and Why: Organizational Characteristics of Media Whistleblowers*, 32 AM. BUS. L.J. 151, 166–67 (1994))); Jisoo Kim, Comment, *Confessions of a Whistleblower: The Need to Reform the Whistleblower Provision of the Sarbanes-Oxley Act*, 43 J. MARSHALL L. REV. 241, 256 (2009) (noting such studies).

55. See Pamela H. Bucy, *Private Justice*, 76 S. CAL. L. REV. 1, 61 (2002) (“It is difficult emotionally, personally, intellectually and professionally to come forward and blow the whistle on one’s employer, colleagues and friends.”); Jennifer M. Pacella, *Inside or Out? The Dodd-Frank Whistleblower Program’s Antiretaliation Protections for Internal Reporting*, 86 TEMP. L. REV. 721, 754 (2014).

difficult and damaging information with their colleagues and friends.⁵⁶ While the risks for retaliation are often greater for internal whistleblowers, the information that they provide is even more crucial to the well-being of the organization, as it allows the entity to address problems in early stages, as well as to avoid potential investigations, fines, litigation, and expenses.⁵⁷ In light of these considerations, all whistleblowers, and especially those on an internal level, should be ensured that they will be truly made whole in the event of retaliation. It is, thus, truly surprising that one of the most notable federal whistleblowing programs of the twenty-first century—that of the SEC’s Dodd-Frank whistleblower program—fails to compensate whistleblowers for the most fundamental type of harm they suffer: emotional pain and suffering.

II. COMPARISON TO MAJOR FEDERAL WHISTLEBLOWING STATUTES

A. SEC vs. CFTC Whistleblowing Provisions of the Dodd-Frank Act

In July of 2010, Congress enacted the Dodd-Frank Act in the wake of the 2008 economic crisis. The legislation introduced over four hundred new rules and mandates to significantly increase regulation over financial institutions, avoid similar future economic failures, and better protect taxpayers, investors, and whistleblowers.⁵⁸ Section 922 of Dodd-Frank amends the Securities Exchange Act of 1934 by including a new section, 21F, “Securities Whistleblower Incentives and Protection,” which creates a comprehensive whistleblower program barring employers from retaliating against individuals blowing the whistle on violations of the securities laws or rules and regulations under the SEC’s jurisdiction.⁵⁹ Congress delegated to the SEC rulemaking authority to issue regulations implementing Dodd-Frank’s whistleblower provisions, which the SEC promulgated in 2011.⁶⁰

Under the statute, whistleblowers are eligible for both retaliation protections and a bounty reward, and the two components operate independently of one another. The statute’s retaliation provisions are more pronounced than its

56. Pacella, *supra* note 55; *see also* Bucy, *supra* note 55 (discussing how whistleblowing can “lead[] to an employer’s demise, colleagues’ and friends’ imprisonment or loss of employment, payment of large penalties and attorneys’ fees, and shame for all”).

57. Marc Edelman & Jennifer M. Pacella, *Vaulted into Victims: Preventing Further Sexual Abuse in U.S. Olympic Sports Through Unionization and Improved Governance*, 61 ARIZ. L. REV. 463, 488 (2019); *see also* Elletta Sangrey Callahan, Terry Morehead Dworkin, Timothy L. Fort & Cindy A. Schipani, *Integrating Trends in Whistleblowing and Corporate Governance: Promoting Organizational Effectiveness, Societal Responsibility, and Employee Empowerment*, 40 AM. BUS. L.J. 177, 195–96 (2002) (discussing the various organizational benefits of internal whistleblowing).

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

59. Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, § 922(a), 124 Stat. 1376, 1841 (2010) (codified as amended at 15 U.S.C. § 78u-6).

60. 15 U.S.C. § 78u-6(j); Securities Whistleblower Incentives and Protections, 76 Fed. Reg. 34300 (June 13, 2011) (codified at 17 C.F.R. pts. 240–49).

predecessors, barring employers from retaliating against whistleblowers when they provide information to the SEC about a securities violation and providing whistleblowers who experience retaliation an extensive statute of limitations of six years to seek redress from their employers.⁶¹ Dodd-Frank's bounty model requires the SEC to pay whistleblowers an award between ten and thirty percent of the total monetary sanctions collected in an action for which the whistleblower voluntarily has brought forth "original information."⁶² It is within the discretion of the SEC to decide which percentage it will grant to whistleblowers for their bounties, depending upon the significance of the information that they have provided and their level of assistance in the process.⁶³ To date, the bounty provisions of the SEC Whistleblower Program has been incredibly successful, having received more than 52,400 whistleblower tips since the program's inception and having grown approximately 300% from fiscal year 2012, the first year for which the SEC had full-year data, to fiscal year 2021.⁶⁴ The SEC Whistleblower Program was viewed as a tremendous achievement for whistleblowers at the time of the statute's enactment, as it seemingly improved upon legal protections for whistleblowers previously available in the securities context.⁶⁵ As time has elapsed, however, Dodd-Frank's limited statutory language has been thoroughly interpreted by courts, consistently finding that the statute's reach in protecting whistleblowers is actually not as extensive as initially believed.⁶⁶ One glaring example of that is the lack of any redress for emotional damages. Subsection (h) of the SEC Whistleblower Program contains

61. 15 U.S.C. § 78u-6(h)(1)(A), (B); *see also* Jennifer M. Pacella, *Conflicted Counselors: Retaliation Protections for Attorney-Whistleblowers in an Inconsistent Regulatory Regime*, 33 YALE J. ON REG. 491, 495 (2016) (discussing the strength of the statute's whistleblower protections).

62. 17 C.F.R. § 240.21F-5(b) (2020). "Original" information is (i) derived from independent knowledge or independent analysis; (ii) not already known to the SEC from another source; (iii) not exclusively derived from an allegation made in a judicial or administrative hearing or governmental report or investigation; and (iv) provided to the SEC for the first time after July 21, 2010 (Dodd-Frank's enactment). 15 U.S.C. § 78u-6(a)(3).

63. 17 C.F.R. § 240.21F-5(a).

64. WHISTLEBLOWER PROGRAM, U.S. SEC. & EXCH. COMM'N, 2021 ANNUAL REPORT TO CONGRESS: WHISTLEBLOWER PROGRAM 28 (2021), <https://www.sec.gov/files/owb-2021-annual-report.pdf> [<https://perma.cc/4JKW-W6BX>].

65. Sara L. Reid & Serena B. David, *The Evolution of the SEC Whistleblower: From Sarbanes-Oxley to Dodd-Frank*, 129 BANKING L.J. 907, 909 (2012) (discussing the Dodd-Frank whistleblower program as attempting to improve prior programs). *See generally* Richard Moberly, *Sarbanes-Oxley's Whistleblower Provisions: Ten Years Later*, 64 S.C. L. REV. 1 (2012) (discussing the shortcomings of the Sarbanes-Oxley whistleblower program, the predecessor to the Dodd-Frank SEC Whistleblower program in the securities context).

66. For example, the statute's limited definition of "whistleblower" has resulted in the Supreme Court's determination that the retaliation protections of Dodd-Frank protect only external whistleblowers, or those who report directly to the SEC rather than those reporting internally, based on the definition of "whistleblower" as an individual who reports to the SEC. *See* Digit. Realty Tr., Inc. v. Somers, 138 S. Ct. 767, 772–73 (2018). The Supreme Court's decision resolved a circuit split on this very question, disagreeing with the district court's position that the meaning of "whistleblower" is ambiguous enough to warrant Chevron deference to the SEC's interpretation of the statute, which views internal whistleblowers as protected under Dodd-Frank. *Id.* at 776–77.

language prohibiting employers from retaliating against whistleblowers in any form, including inflicting actions such as discharge, demotion, suspension, threats, harassment, or discrimination.⁶⁷ This prohibition on retaliation is enforced through a cause of action that the whistleblower may bring against the retaliator directly in federal court.⁶⁸ If successful, the whistleblower is entitled to relief that includes the following: “(i) reinstatement with the same seniority status that the individual would have had, but for the discrimination; (ii) [two] times the amount of back pay otherwise owed to the individual, with interest; and (iii) compensation for litigation costs, expert witness fees, and reasonable attorneys’ fees.”⁶⁹

As is visible through this plain statutory language, the available relief is not that of a “make-whole” remedy that would compensate the whistleblower for non-pecuniary losses. Non-pecuniary losses include emotional pain and suffering, mental anguish, or loss of enjoyment of life, all of which are very common consequences for those who have blown the whistle and consequently suffered retaliation.⁷⁰ Case law interpreting Dodd-Frank is equally as clear that emotional damages would be precluded as statutory relief, as various courts have denied whistleblowers the remedy of emotional damages while also acknowledging that whistleblowers would need to turn to another statute, like the Sarbanes-Oxley Act, to be granted such damages.⁷¹ By failing to provide emotional damages, the SEC Whistleblower Program is really an outlier when compared to the overall regulatory landscape of federal whistleblower protections. Perhaps one of the most surprising comparisons is to the SEC’s very own counterpart, the Commodity Futures Trading Commission (CFTC), which provides a whistleblower protection program that is nearly identical to the SEC’s provisions in all respects, except that it provides emotional damages.⁷²

Section 748 of Dodd-Frank, where the CFTC provisions are housed, sets forth a whistleblower protection and incentives program for whistleblower tips that concern suspected violations of the federal commodities and futures law, which are under the purview of the CFTC as the governing administrative agency for this

67. 15 U.S.C. § 78u-6(h).

68. *Id.* at § 78u-6(h)(1)(B)(i).

69. *Id.* at § 78u-6(h)(1)(C).

70. *See, e.g.,* Slatin v. Stanford Rsch. Inst., 590 F.2d 1292, 1294 (4th Cir. 1979); Equal Emp. Opportunity Comm’n v. Deloitte & Touche, LLP, No. 97CIV6484, 2000 WL 1024700, at *7 (S.D.N.Y. July 25, 2000).

71. *See, e.g.,* Feldman-Boland v. Stanley, 15cv6698, 2016 WL 3826285, at *6 (S.D.N.Y. July 13, 2016) (“Thus, if damages for emotional distress are required to make an employee whole, they are not precluded by SOX. Moreover, while Dodd-Frank does not permit emotional damages, it does permit ‘litigation costs, expert witness fees and reasonable attorneys’ fees.’” (quoting 15 U.S.C. § 78u-6(h)(1)(C))); Dressler v. Lime Energy, No. 14-cv-07060, 2015 WL 4773326, at *13 (D.N.J. Aug. 13, 2015) (“Sarbanes-Oxley provides successful plaintiffs with types of monetary damages not available under the Dodd-Frank Act, such as those for noneconomic harms including emotional distress and reputational harm.”).

72. *See* 7 U.S.C. § 26(h).

arena, while the SEC's domain is securities law violations.⁷³ Just as the SEC was granted authority to promulgate regulations interpreting the SEC Whistleblower Program for possible securities law violations, Congress did the same for the CFTC to create regulations for the statute's whistleblower provisions in the commodities arena, which, just like the SEC, provides for a CFTC "Whistleblower Office" to manage whistleblower tips and complaints that pertain to possible violations of the laws governing futures and commodities.⁷⁴ The SEC and CFTC whistleblower provisions of Dodd-Frank are identically worded in every aspect except a few notable variations. For example, both define "whistleblower" in the same way—as any individual, or two or more individuals acting jointly, who provide information to the CFTC or SEC, respectively.⁷⁵ Both provide an identical bounty reward program aimed at incentivizing whistleblowers to come forward, each of which contain the very same eligibility criteria, award percentages, and procedures for obtaining a bounty.⁷⁶ In addition, the anti-retaliation provisions of the two programs align in that employers are prohibited from "discharg[ing], demot[ing], suspend[ing], threaten[ing], harass[ing], . . . or discriminat[ing] against" a whistleblower in any direct or indirect way, which, if violated, allows whistleblowers a cause of action against employers in federal district court.⁷⁷

There is only one area in which the two programs significantly differ: the remedial provisions of the CFTC whistleblower program compensate for "*special damages* sustained as a result of the discharge or discrimination."⁷⁸ While both the CFTC and SEC programs provide whistleblowers the remedies of reinstatement of employment, back pay, and compensation for "litigation costs, expert witness fees, and reasonable attorneys' fees," the CFTC's inclusion of special damages presents an astoundingly larger universe of relief to whistleblowers.⁷⁹ It is well-established

73. See Joel D. Hesch, *Breaking the Siege: Restoring Equity and Statutory Intent to the Process of Determining Qui Tam Relator Awards Under the False Claims Act*, 29 T.M. COOLEY L. REV. 217, 261 (2012) (noting that the SEC and CFTC whistleblower programs are "substantially similar"). Compare 15 U.S.C. § 78u-6, with 7 U.S.C. § 26. See also Mary Kreiner Ramirez, *Whistling Past the Graveyard: Dodd-Frank Whistleblower Programs Dodge Bullets Fighting Financial Crime*, 50 LOY. U. CHI. L.J. 617, 623–24 (2019) (discussing the CFTC whistleblower program).

74. See Whistleblower Rules, 17 C.F.R. § 165 (2020).

75. 7 U.S.C. § 26(a)(7).

76. *Id.* at § 26(b). The only significant difference between the CFTC and SEC whistleblower programs is that the bounty reward program is funded through the "Commodity Futures Trading Commission Customer Protection Fund" as opposed to the "Securities and Exchange Commission Investor Protection Fund." Both are established U.S. Treasury funds that are designated to provide award payments to whistleblowers. See 15 U.S.C. § 78u-6(g).

77. 7 U.S.C. § 26(h). One notable difference between the CFTC and SEC retaliation provisions is the statute of limitations, as the CFTC program provides for two years after the date on which the retaliation is committed compared to the SEC program, which grants six years. Compare 7 U.S.C. § 26(h), with 15 U.S.C. § 78u-6(h).

78. 7 U.S.C. § 26(h)(1)(C) (emphasis added).

79. Compare 7 U.S.C. § 26(h)(1)(C), with 15 U.S.C. § 78u-6(h)(1)(C). One other difference is that the SEC program provides double back pay while the CFTC program provides single back pay. See 15 U.S.C. § 78u-6(h)(1)(C).

law that special damages can encompass emotional distress caused by an employer's retaliatory conduct, as numerous cases have provided this remedy when retaliation was inflicted upon an employee or a whistleblower.⁸⁰ Given the almost word-for-word similarities between the two programs and the steady convergence of the two agencies' missions over the years, the SEC whistleblower program's lack of coverage for emotional damages is especially striking.

Since the enactment of Dodd-Frank, the CFTC and SEC have increasingly sought to harmonize their respective programs and missions to promote efficiency in rulemaking and regulatory oversight and to improve the sharing of information between the two agencies.⁸¹ As former SEC Chair Jay Clayton has expressed, “[t]oday’s interrelated markets demand that the SEC and CFTC work together to provide a coherent and coordinated approach to regulation.”⁸² That coordination has been especially visible in the context of whistleblower protections. In 2017, the CFTC unanimously approved amendments to the CFTC’s whistleblower rules to mirror the rules of the SEC program.⁸³ These amendments have allowed the CFTC, enforcement authority, in addition to the whistleblower, to bring an action against employers who retaliate against whistleblowers and also ban employers who impede whistleblowers by requiring them to sign an employer’s confidentiality, pre-dispute arbitration, or other similar agreements aimed at silencing current or past employees—all of which are actions that the SEC Whistleblower Program currently contains.⁸⁴

80. See, e.g., *Hammond v. Northland Counseling Ctr., Inc.*, 218 F.3d 886, 893 (8th Cir. 2000); *Neal v. Honeywell, Inc.*, 995 F. Supp. 889, 896 (N.D. Ill. 1998).

81. See, e.g., Press Release, U.S. Sec. & Exch. Comm’n, SEC and CFTC Announce Approval of New MOU (June 28, 2018), <https://www.sec.gov/news/press-release/2018-114> [<https://perma.cc/PV6A-X265>] (discussing the approval by the SEC and CFTC of a memorandum of understanding to help ensure “continued coordination and information sharing between the two agencies”) [hereinafter *Harmonization Press Release*]; *Key Differences Between the CFTC and SEC Final Business Conduct Standards and Related Cross-Border Requirements*, WILMERHALE (May 26, 2016), <https://www.wilmerhale.com/en/insights/client-alerts/2015-05-26-dodd-frank-implementation-update> [<https://perma.cc/5CZX-PS5K>] (discussing SEC intent to harmonize rules with parallel CFTC requirements as it pertains to swap dealers and other swap participants); Elisse Walter, Chairman, U.S. Sec. & Exch. Comm’n, Regulation of Cross-Border OTC Derivatives Activities: Finding the Middle Ground, Speech at American Bar Association Spring Meeting (Apr. 6, 2013), <https://www.sec.gov/news/speech/2013-spch040613ebwhm> [<https://perma.cc/X62H-RDG3>] (noting the distinct yet similar duties granted to the CFTC and the SEC under Dodd-Frank).

82. Harmonization Press Release, *supra* note 81.

83. Press Release, Commodity Futures Trading Comm’n, CFTC Strengthens Anti-Retaliation Protections for Whistleblowers and Enhances the Award Claims Review Process (May 22, 2017), <https://www.cftc.gov/PressRoom/PressReleases/7559-17> [<https://perma.cc/7SCT-5CN9>].

84. 17 C.F.R. § 165.19(b) (2020) (“No person may take any action to impede an individual from communicating directly with the Commission’s staff about a possible violation of the Commodity Exchange Act, including by enforcing, or threatening to enforce, a confidentiality agreement or predispute arbitration agreement with respect to such communications.”); Press Release, Commodity Futures Trading Comm’n, *supra* note 83.

The CFTC whistleblower program is also steadily rising to the same level of popularity as that of the SEC as it pertains to bounty rewards for whistleblowers. Known for several years to lag behind as “the quiet sibling” of the SEC’s whistleblower program, the CFTC’s whistleblower bounty program has suddenly reached award levels that are nearly four times higher than the total amount that the CFTC has paid out to whistleblowers since the inception of Dodd-Frank.⁸⁵ As more and more individuals realize the potential personal and organizational benefits of reporting to the CFTC, the program continues to rise, allowing whistleblowers an outlet to report on a wide variety of issues that have implicated concerns of market manipulation, false reporting, virtual currency trading, Ponzi schemes, and more.⁸⁶ In the CFTC’s 2021 annual report to Congress on the whistleblower program, the CFTC reported six whistleblower awards during fiscal year 2021 totaling more than \$3 million and noted that the agency has granted a total of over \$123 million in awards since its inception, while CFTC-ordered total sanctions associated with those awards have now exceeded the \$1 billion level.⁸⁷ In 2018, the CFTC reported a 63% increase in the number of whistleblower tips received since the prior year, which it believed resulted from the agency’s continuing outreach and education efforts, and as of September 30, 2021, the CFTC’s whistleblower program website received a record of approximately 300,000 page views.⁸⁸ Such initiatives are aimed at ensuring that financial institutions and other players in commodities markets become increasingly aware of the importance of internal reporting, handling whistleblower tips effectively, and preventing retaliation against whistleblowers.⁸⁹

85. Erika Kelton, *Why Wall Street Should Worry About the CFTC Whistleblower Program*, FORBES (Nov. 30, 2017, 6:32 PM), <https://www.forbes.com/sites/erikakelton/2017/11/30/wall-street-pay-attention-cftc-whistleblowers-will-reap-45m-in-2018/#5970ea3cb478> [<https://perma.cc/R8P8-MTRZ>] (noting a 70% increase in whistleblower tips from 2016 to 2017).

86. *Id.*

87. WHISTLEBLOWER PROGRAM & CUSTOMER EDUC. INITIATIVES, COMMODITY FUTURES TRADING COMM’N, 2021 ANNUAL REPORT, at 3 (2021), https://www.whistleblower.gov/sites/whistleblower/files/2021-10/FY21%20Customer%20Protection%20Fund%20Annual%20Report%20to%20Congress_0.pdf [<https://perma.cc/78PS-RHT7>].

88. *Id.* at 8; COMMODITY FUTURES TRADING COMM’N, ANNUAL REPORT ON THE WHISTLEBLOWER PROGRAM & CUSTOMER EDUCATION INITIATIVES, at 2–4 (2019), <https://whistleblower.gov/sites/whistleblower/files/2019-10/FY19%20Annual%20Whistleblower%20Report%20to%20Congress%20Final.pdf> [<https://perma.cc/3XCG-854W>]; *see also* Mary Jane Wilmoth, *CFTC Whistleblower Program Pays Over \$75 Million to Dodd Frank Whistleblowers in 2018*, KOHN, KOHN & COLAPINTO LLP (Nov. 2, 2018), <https://www.kkc.com/blog/cftc-whistleblower-program-pays-over-75-million-to-dodd-frank-whistleblowers-in-2018/> [<https://perma.cc/LD33-MTKB>]; Jason Zuckerman & Matthew Stock, *CFTC Whistleblower Program Paid \$100M to Whistleblowers*, ZUCKERMAN L.: WHISTLEBLOWER PROTECTION L. & SEC WHISTLEBLOWER AWARDS BLOG (Nov. 4, 2019), <https://www.zuckermanlaw.com/cftc-whistleblower-reward-program/> [<https://perma.cc/H7LM-NQ45>].

89. Douglas K. Yatter, Yvette D. Valdez & J. Ashley Weeks, *Evolution of the CFTC’s Whistleblower Program*, PROGRAM ON CORP. COMPLIANCE & ENF’T (Sept. 11, 2016), https://wp.nyu.edu/compliance_enforcement/2016/09/11/evolution-of-the-cftcs-whistleblower-program/ [<https://perma.cc/6W6Z-MMQ6>]; *see* Press Release, U.S. Sec. & Exch. Comm’n, SEC Awards

These numbers are increasingly on par with those of the SEC whistleblower program, which in total has now awarded over \$1 billion to 207 whistleblowers since issuing its first award in 2012.⁹⁰ Given the existing similarities and ever-growing harmonization between the SEC and CFTC whistleblower programs, the existence and availability of emotional damages as a remedy under the CFTC program and not under the SEC program is a notable anomaly. This deviation is especially more pronounced when compared to the several other federal whistleblowing programs that recognize emotional damages as a vehicle for making whistleblowers whole.

B. Other Notable Whistleblowing Statutes

1. Sarbanes-Oxley Act

In 2002, Congress enacted the Sarbanes-Oxley Act (SOX) to enhance government oversight of corporate bodies and establish internal processes for avoiding future financial scandals like Enron, WorldCom, and Tyco.⁹¹ Section 806 of the statute includes a whistleblower protection program, which prohibits public companies, or any “officer, employee, contractor, subcontractor, or agent” thereof, from retaliating against employee-whistleblowers, which includes the same actions that are barred under Dodd-Frank—demotion, suspension, threats, harassment, discrimination, and the like.⁹² Under SOX, retaliation is prohibited against any whistleblower who reports, either internally within their organization or externally to third parties, on possible violations of the securities laws or those coming under the SEC’s jurisdiction.⁹³ If whistleblowers are retaliated against in violation of this statute, their relief comes in the form of an administrative remedy requiring the whistleblower to file a complaint with the Occupational Safety and Health Administration (OSHA) of the Department of Labor, which investigates the claim and, if substantiated, makes whistleblowers eligible for various forms of relief.⁹⁴ The

Record Payout of Nearly \$50 Million to Whistleblower (June 4, 2020), <https://www.sec.gov/news/press-release/2020-126> [<https://perma.cc/VVM9-4B2D>].

90. Press Release, U.S. Sec. & Exch. Comm’n, SEC Surpasses \$1 Billion in Awards to Whistleblowers with Two Awards Totaling \$114 Million (Sept. 15, 2021), <https://www.sec.gov/news/press-release/2021-177> [<https://perma.cc/MV84-NW9F>].

91. See Seletha R. Butler, “Financial Expert”: *A Subtle Blow to the Pool and Current Pipeline of Women on Corporate Boards*, 14 GEO. J. GENDER & LAW 1, 3, 11 (2013) (discussing the goals in enacting SOX, which were aimed at increasing transparency to investors and improving the audit function in public companies); see also Kelli A. Alces, *Moving Toward A Federal Law of Corporate Governance in Bankruptcy*, 31 S. ILL. U. L.J. 621, 636 (2007) (noting the congressional goals of SOX were to “prevent another Enron”); John P. Fagnoli, Note, *The JOBS Act: Investor Protection, Capital Formation, and Employment in an Increasingly Political Economy*, 8 BROOK. J. CORP. FIN. & COM. L. 134, 150 (2013) (highlighting that SOX was passed to protect investors by improving accountability of corporate disclosures).

92. 18 U.S.C. § 1514A.

93. *Id.*

94. *Id.*

language of SOX states that whistleblowers “shall be entitled to all relief necessary to make the employee whole,” and then enumerates “reinstatement with the same seniority status that the employee would have had, but for the discrimination; the amount of back pay, with interest; and compensation for any *special damages* sustained as a result of the discrimination, including litigation costs, expert witness fees, and reasonable attorney fees.”⁹⁵

Judicial interpretations of SOX have confirmed that the types of relief listed here, such as reinstatement of employment, back pay, and litigation costs, were not intended to constitute an “exhaustive list” of all the types of relief available to successful claimants, given the “make-whole” language of the statute, which allows for whistleblowers to receive non-economic damages for emotional pain and suffering, including embarrassment, mental anguish, and humiliation.⁹⁶ The “make-whole” provision in this language is evident, and case law has been consistent in holding that whistleblowers may recover emotional damages under SOX.⁹⁷ As one federal circuit court held, “[t]here will be times when the primary harm will be noneconomic. In these instances, the Department of Labor observes, ‘non-pecuniary compensatory relief, such as emotional distress damages, may be the only remedy that would make the complainant whole.’”⁹⁸

Anthony Menendez, the Halliburton whistleblower discussed earlier in Section II.A., pursued redress through SOX for his retaliation, which resulted in a favorable decision of the Administrative Review Board of the Department of Labor granting him \$30,000 for the emotional distress and reputational harm that he suffered.⁹⁹ On appeal, the Fifth Circuit affirmed this decision, holding that SOX’s plain text provides for non-economic, compensatory damages: “SOX affords ‘all relief necessary to make the employee whole’ and we think Congress meant what it said. ‘All means all.’”¹⁰⁰ The simple logic is that if employees suffer emotional harm as a result of the actionable retaliation, they can only be made whole through the receipt of emotional damages. The Fourth Circuit also has notable precedent in this arena. In *Jones v. Southpeak Interactive Corp.*, the court highlighted the availability of emotional damages under SOX given its make-whole provisions: “[t]hrough the case before us centers on a termination of employment, we note that the Sarbanes-Oxley Act whistleblower protection provisions proscribe a wide range of retaliatory actions, including threats and harassment . . . [t]here will be times when the primary harm will be noneconomic.”¹⁰¹ Therefore, there has never been any question that

95. *Id.* at § 1514A(c) (emphasis added).

96. *See Lockheed Martin Corp. v. Admin. Rev. Bd.*, 717 F.3d 1121, 1138 (10th Cir. 2013).

97. *See Jones v. Southpeak Interactive Corp. of Del.*, 777 F.3d 658, 672 (4th Cir. 2015); *Halliburton, Inc. v. Admin. Review Bd.*, 771 F.3d 254, 266 (5th Cir. 2014) (per curiam); *Lockheed*, 717 F.3d at 1121.

98. *Jones*, 777 F.3d at 672.

99. *Halliburton*, 771 F.3d at 254.

100. *Id.* at 266.

101. 777 F.3d at 665.

SOX, a statute that just like Dodd-Frank, exists within the domain of the securities laws and protects whistleblowers who report on possible violations in the corporate arena, provides remedial support that captures emotional harm.

2. *False Claims Act*

The *qui tam* program of the False Claims Act (FCA) is one of the longest-standing whistleblower programs in U.S. history and allows private citizen whistleblowers, known as “relators,” to bring civil actions against individuals who defraud the U.S. government through the submission of false claims for payment or by using false statements to decrease an obligation to pay money to the government.¹⁰² The relator initiates the action in federal court in the name of the U.S. Government, which then has sixty days to intervene in the lawsuit.¹⁰³ If there is no governmental intervention, the relator may proceed alone with the lawsuit, which, if successful, results in the relator receiving a bounty reward comprising a percentage of the proceeds collected in the action.¹⁰⁴ The objective of the FCA is to empower individuals, especially those on the inside who possess valuable information about their organizations and workplaces, to come forward to hold fraudsters of government funds and billing practices liable.¹⁰⁵ The FCA provides retaliation protections for relators who are “discharged, demoted, suspended, threatened, harassed, or in any other manner discriminated against in the terms and conditions of employment” because they have brought forth an action under the statute.¹⁰⁶ The relief that they are entitled to if successful “shall include reinstatement with the same seniority status that employee, contractor, or agent would have had but for the discrimination, two times the amount of back pay, interest on the back pay, and compensation for any special damages sustained as a result of the discrimination, including litigation costs and reasonable attorneys’ fees.”¹⁰⁷ Importantly, the first sentence of the section covering “relief from retaliatory actions” includes a make-whole provision, as it states that any “employee,

102. 31 U.S.C. § 3730(b).

103. *Id.*

104. *Id.*

105. James B. Helmer, Jr., *False Claims Act: Incentivizing Integrity for 150 Years for Rogues, Privateers, Parasites, and Patriots*, 81 U. CIN. L. REV. 1261, 1262 (2013); see also Daniel K. Tarullo, *The Limits of Institutional Design: Implementing the OECD Anti-Bribery Convention*, 44 VA. J. INT’L L. 665, 689 (2004) (noting the significant value of such information, as wrongdoing often “takes place in the shadows [and] may never be visible to anyone but the immediate actors”); Kary Klismet, Note, *Quo Vadis, “Qui Tam”? The Future of Private False Claims Act Suits Against States After Vermont Agency of Natural Resources v. United States ex rel. Stevens*, 87 IOWA L. REV. 283, 292–93 (2001) (noting that the False Claims Act also serves to hold states that defraud the federal government accountable for various actions, including federal grant programs).

106. 31 U.S.C. § 3730(h).

107. *Id.*

contractor, or agent shall be entitled to all relief necessary to make that employee, contractor, or agent whole, if that employee [is retaliated against].”¹⁰⁸

Similar to SOX, case law interpreting the FCA supports providing aggrieved whistleblowers emotional damages as a statutory remedy. In a Seventh Circuit case, the court focused on the reference to “special damages” in the FCA’s remedial language, which especially supports providing emotional damages, acknowledging that special damages cover that “which is the natural, but not the necessary, consequence of the act complained of.”¹⁰⁹ As it pertains to whistleblowing, remedies like reinstatement or back pay are “necessary” consequences that stem from compensating an individual due to an unlawful loss of income from employment and one’s own livelihood, while compensation for emotional harm, such as suffering from ostracism, extended depression, threats, and general upheaval in life, as the plaintiff had suffered in this case, are all “natural” consequences stemming from retaliation.¹¹⁰ As such, these harms are unquestionably eligible for compensation under the law. Subsequent case law interpreting the FCA’s remedial provisions has supported this premise and has also, as in SOX, relied on the statute’s clear “make-whole” provision as allowing emotional damages to fit squarely within this category.¹¹¹

C. Parallels Between Employment Discrimination & Whistleblowing

Another important area of comparison involves the retaliation protections of the historic anti-discrimination, employment-related statute, Title VII of the Civil Rights Act of 1964 (Title VII).¹¹² Title VII protects against workplace discrimination on the basis on race, color, religion, sex, sexual orientation, and national origin.¹¹³ The statute makes it illegal for employers to retaliate against those who complain about discrimination, oppose discriminatory conduct, or participate in an investigation or proceeding under the statute.¹¹⁴

108. *Id.*

109. *Neal v. Honeywell Inc.*, 191 F.3d 827, 832 (7th Cir. 1999) (quoting *Roberts v. Graham*, 73 U.S. (6 Wall.) 578, 579 (1867)).

110. *Id.*

111. *See, e.g., Hammond v. Northland Counseling Ctr., Inc.*, 218 F.3d 886, 893 (8th Cir. 2000) (“Providing compensation for [emotional] harms comports with the statute’s requirement that a whistleblowing employee ‘be entitled to all relief necessary to make the employee whole.’” (quoting 31 U.S.C. § 3730(h))); *see also Brandon v. Anesthesia & Pain Mgmt. Assocs.*, 277 F.3d 936, 944 (7th Cir. 2002) (supporting the premise that emotional damages fits within the special damages provision of the statute).

112. 42 U.S.C. § 2000e-2(a)(1)–(2).

113. *Id.*

114. The language of the statute makes it unlawful for an employer to “discriminate against any of his employees or applicants for employment . . . because he has opposed any practice made an unlawful employment practice by this subchapter, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter.” *Id.* at § 2000e-3(a).

Numerous parallels may be drawn between victims of discrimination and whistleblowers who are retaliated against, especially when considering the public policy objectives behind a civil rights law like Title VII and how it compares to legislation like the SEC's whistleblower program under Dodd-Frank. The underlying purpose of an employment discrimination law like Title VII is to provide remedial support for victims of discrimination and to prevent workplace discrimination generally through an established agency, the Equal Employment Opportunity Commission (EEOC), to facilitate the process. The statute's anti-retaliation provisions are solely aimed at ensuring access to statutory remedial mechanisms.¹¹⁵ “[Title VII’s] proponents envisioned the problem of discrimination as a broad public problem . . . that required enforcement by a strong administrative agency.”¹¹⁶ To achieve these goals, Title VII authorizes private lawsuits by victims of discrimination, and permits the EEOC to bring suits against employers who violate the statute.¹¹⁷

The underlying statutory objectives of Dodd-Frank have numerous similarities to those of Title VII, as both statutes are largely based on promoting broad notions of fair treatment of employees and deterring instances of wrongdoing, all to enhance public policy goals of fair treatment and bringing unlawful behavior to light.¹¹⁸ The SEC has determined that whistleblowing tips about possible violations of the securities laws are among the most powerful mechanisms for uncovering information that otherwise would never have been available to the agency. In a similar way, the EEOC is heavily dependent on victims of discrimination to report instances of unlawful employment practices so that the agency can investigate and impose sanctions and put a stop to such practices.¹¹⁹

Title VII is explicit in its grant of emotional damages to victims of discrimination. The 1991 Civil Rights Act (1991 Act) amended Title VII to add to

115. Eisenstadt & Pacella, *supra* note 31, at 706–07 (quoting Lisa M. Durham Taylor, *Adding Subjective Fuel to the Vague-Standard Fire: A Proposal for Congressional Intervention After Burlington Northern & Santa Fe Railway Co. v. White*, 9 U. PA. J. LAB. & EMP. L. 533, 548–49 (2007)); see also Kenneth R. Davis, *Wheel of Fortune: A Critique of the “Manifest Imbalance” Requirement for Race-Conscious Affirmative Action Under Title VII*, 43 GA. L. REV. 993, 999 (2009) (stating that the primary objective of Title VII is to eliminate discrimination against protected classes, both from the effects of past and present discriminatory practices); Anita T. Klein, Note, *Ford Motor Company v. EEOC: A Setback for Victims of Discrimination*, 44 U. PITT. L. REV. 707, 708 (1983) (noting that the “dual objective” of Title VII is to eliminate discrimination and fully compensate victims).

116. Eisenstadt & Pacella, *supra* note 31, at 707 (citing Julie C. Suk, *Procedural Path Dependence: Discrimination and the Civil-Criminal Divide*, 85 WASH. U. L. REV. 1315, 1351 (2008)); see also Marjorie H. Gordon, Case Note, *Kremer v. Chemical Construction Corporation: Eviscerating Title VII*, 17 SUFFOLK U. L. REV. 987, 991–92 (1983) (noting the important role of the EEOC in interpreting and enforcing the statute).

117. 42 U.S.C. § 2000e-5(a)–(k) (discussing the enforcement powers of the EEOC under Title VII); *Id.* at § 2000e-5(f)(1) (authorizing suits by both the EEOC and private individuals to enforce the statute).

118. Eisenstadt & Pacella, *supra* note 31, at 705–09.

119. *Id.* at 707–08.

the statute a non-pecuniary compensatory damages relief provision.¹²⁰ Section 1981a of the 1991 Act allows a victim of discrimination and retaliation the right to recover both compensatory and punitive damages.¹²¹ Punitive damages are available if the party complaining of discrimination or retaliation demonstrates that the employer engaged in discriminatory practices “with malice or with reckless indifference to the federally protected rights of an aggrieved individual.”¹²² Compensatory damages awarded under this section are intended to make the victim whole; while such damages are subject to monetary limits,¹²³ they cast a very wide range with respect to what they cover, by providing relief for “future pecuniary losses, emotional pain, suffering, inconvenience, mental anguish, loss of enjoyment of life, and other nonpecuniary losses.”¹²⁴

The legislative history of the 1991 Act amendments to Title VII provide important insights as to the reasoning and logic behind generally providing emotional damages to victims of retaliation. The inclusion of such damages was largely based on three major objectives: that of ensuring that victims are entitled to “make-whole” relief, which is the only kind of relief deemed adequate in such situations; ensuring that employees are empowered and need not stay silent in the face of employer injustice; and deterring employers from discriminating and retaliating against vulnerable parties.¹²⁵

As for the first objective, legislators widely acknowledged the devastating effects of discrimination and retaliation, including debilitating injury to career, to one’s mental, physical, and emotional health, and to dignity and self-respect, as well as the ways in which previously existing remedies had proven inadequate to fully compensate victims for these harms.¹²⁶ Providing this type of remedy also ensured that remedial support for victims of employment discrimination and retaliation

120. 42 U.S.C. § 1981a. In addition to Title VII, the Age Discrimination in Employment Act shares the “make whole” provision that exists in Title VII to compensate victims of age discrimination for their emotional and psychological losses. 29 U.S.C. § 621–634; *Slatin v. Stanford Rsch. Inst.*, 590 F.2d 1292, 1294 (4th Cir. 1979).

121. 42 U.S.C. § 1981a.

122. *Id.* at § 1981a(b)(1).

123. The statutory limits for compensatory damages are explained under the statute as follows: The sum of the amount of compensatory damages awarded under this section . . . shall not exceed, for each complaining party—(A) in the case of a respondent who has more than 14 and fewer than 101 employees in each of 20 or more calendar weeks in the current or preceding calendar year, \$50,000; (B) in the case of a respondent who has more than 100 and fewer than 201 employees in each of 20 or more calendar weeks in the current or preceding calendar year, \$100,000; and (C) in the case of a respondent who has more than 200 and fewer than 501 employees in each of 20 or more calendar weeks in the current or preceding calendar year, \$200,000; and (D) in the case of a respondent who has more than 500 employees in each of 20 or more calendar weeks in the current or preceding calendar year, \$300,000.

Id. at § 1981a(b)(3).

124. *Id.*

125. *See id.*; *infra* notes 126–38.

126. *See* 137 CONG. REC. 30,640 (1991); 136 CONG. REC. 16,703 (1990).

would be in line with the support already available for victims of intentional racial discrimination under Section 1981 of the Civil Rights Act of 1866, thereby recognizing the need to provide ample protections for women, who are commonly the victims of sex discrimination.¹²⁷ “Sexism and religious bigotry are no less offensive than racism. Women and religious minorities are not second-class citizens; they do not deserve second-class remedies.”¹²⁸ The 1991 Act’s legislative history consistently noted that existing remedies had proven “woefully inadequate” to make victims whole, specifically due to the fact that they could not previously recover for emotional trauma and mental suffering directly caused by discrimination and retaliation.¹²⁹ Several examples of actual cases were cited, describing in vivid detail the various types of significant emotional suffering resulting from instances of gender and racial discrimination, thereby resulting in little to no motivation for a plaintiff to bring forth any claims against the employer when “the best that [the victim] can hope for is an order to her supervisor and to her employer to treat her with the dignity she deserves.”¹³⁰

The statute’s second objective to discourage employees from remaining silent after witnessing or experiencing discrimination and retaliation was also echoed across the legislative history. Lawmakers discussed the ways in which weak remedial support discourages victims of discrimination and retaliation from coming forward, given that, until that time, only back pay was available as a remedy and that victims had a great deal to lose if coming forward for that remedy alone.¹³¹ Lawmakers also viewed emotional damages as a mechanism for imposing accountability on employers.¹³² “What we have is an information problem, and, to be sure, I’m sure there are some employers out there who are cold to the information, and we need to create effective remedies and procedures against those employers.”¹³³ Various pieces of the legislative history noted that the number one reason people do not

127. 136 CONG. REC. 16,703 (1990); *see also* 136 CONG. REC. 17,656 (1990).

128. 136 CONG. REC. 16,703 (1990).

129. *Hearings on H.R. 4000, The Civil Rights Act of 1990—Vol. 1: Joint Hearings Before the H. Comm. on Educ. & Lab. & the Subcomm. on Civ. & Const. Rts. of the H. Comm. on the Judiciary*, 101st Cong. 277–78 (1990) (statement of Rep. Craig James, Member, H. Comm. on the Judiciary).

130. *Id.* at 278–79 (citing *Mitchell v. OsAir, Inc.*, 629 F. Supp. 636, 643 (N.D. Ohio 1986)). This piece of legislative history cites the following cases as support for inadequate remedies: *Brooms v. Regal Tube Co.*, 881 F.2d 412 (7th Cir. 1989) (describing how a victim of sexual harassment suffered extensive emotional trauma only to receive no compensation), *overruled in part by Saxton v. Am. Tel. & Tel. Co.*, 10 F.3d 526, 534 & n.13 (7th Cir. 1993); *Derr v. Gulf Oil Corp.*, 796 F.2d 340, 341–42 (10th Cir. 1986) (describing another victim who recovered nothing even after being successful in a Title VII case for retaliation).

131. *Women and the Workplace: The Glass Ceiling: Hearing Before the Subcomm. On Emp. & Productivity of the S. Comm. On Lab. & Hum. Res.*, 102d Cong. 63 (1991) (statements of Eleanor Cutrie Smeal, President, The Feminist Majority Foundation and Sen. Paul Simon).

132. *Id.*

133. *Hearings on H.R. 4000, The Civil Rights Act of 1990—Vol. 2: Joint Hearings Before the H. Comm. on Educ. & Lab. & the Subcomm. on Civ. & Const. Rts. of the H. Comm. On the Judiciary*, 101st Cong. 630 (1990) (statement of Glen D. Nager Partner, Jones, Day, Reavis & Pogue).

come forward to report employer wrongdoing is fear of retaliation, loss of privacy, the lack of adequate reporting structures, and ample protections in the event of retaliation.¹³⁴ All too commonly, employees believe that coming forward is synonymous with being labeled as “oversensitive” or “troublemakers” by their colleagues and superiors, thereby worrying about the potential negative effects on their career advancement.¹³⁵ Not only did Congress acknowledge that adequate “make-whole” remedies encourage employees to report, it also viewed them as encouraging citizens to “act as private attorneys general to enforce the statute.”¹³⁶

Dovetailing into the third objective of the amendments to Title VII, the ultimate goal of deterring employers from discriminating and retaliating against vulnerable parties was one of the strongest focal points of the legislative history and in line with the underlying fundamental goal of Title VII.¹³⁷ Legislators found too commonly that “[e]mployers can condone or perpetrate discrimination knowing that, even if they are found guilty of discrimination, the price tag on such unlawful practices is very small indeed,” as existing remedies were inadequate to make victims whole.¹³⁸ Rather, by knowing that they would need to answer to employees whom they discriminate and retaliate against with potentially thousands or hundreds of thousands of dollars, employers should have much stronger motivation to avoid this wrongful behavior in the first instance.¹³⁹ It was noted that the existence of both compensatory and punitive damages helps end discrimination and retaliation altogether: “[y]ou get caught once and you have to pay up, you think twice about it.”¹⁴⁰ This kind of accountability ensures that the employer is made aware of the various costs of the wrongdoing, not just financially but also reputationally, as litigation to vindicate rights is obviously a very costly, time-consuming, and public process.¹⁴¹

When compared to so many of its counterparts, the SEC whistleblower program of Dodd-Frank stands out as strongly lacking in one of the most fundamental areas of redress for whistleblowers. The absence of remedial support for emotional harm prompts the need for deeper inquiry as to the theoretical bases

134. *Hearings on H.R. 1, The Civil Rights Act of 1991: Hearings Before the H. Comm. on Educ. & Lab.*, 102d Cong. 168–170 (1991) (statement of Freada Klein, Klein Associates).

135. *Id.* at 169.

136. H.R. REP. NO. 102-40 pt. 1, at 65 (1991).

137. *Hearing on H.R. 4000, supra* note 129, at 280 (statement of Rep. Craig James, Member, H. Comm. on the Judiciary) (noting that the two main goals of Title VII are to eliminate the effects of past discrimination and to prevent further discrimination and retaliation (citing *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 418 (1975))).

138. *Id.*

139. *Id.*; *see also* H.R. REP. NO. 101-644, pt. 1, at 18 (1990) (“Only [compensatory] damages make victims of intentional discrimination whole for physical and emotional injury resulting therefrom, and effectively deter future acts of discrimination.”)

140. *Hearings on HR 4000, supra* note 133), at 64 (statement of Nancy Kreiter Rsch. Dir., Women Employed Institute).

141. *Id.*

that support this type of remedy generally, an examination of the underlying goals of the remedy, and an analysis as to the rights that are enforced when emotional damages are provided. This analysis, which follows, speaks to the very core of what the whistleblower has actually been denied as a victim of retaliation.

III. SUPPORT FOR EMOTIONAL DAMAGES IN WHISTLEBLOWING STATUTES

A. Reliance on Economic Theories of Deterrence in Tort Law

Providing remedial support for emotional harm has a strong basis in tort law,¹⁴² a field that offers many justifications for and parallels to the context of whistleblowing. Two main theories justify granting emotional damages: the first is one of corrective justice, which centers on placing the costs on the wrongdoer for having created negative effects and suffering for others, who have no fault in causing their own emotional harm.¹⁴³ The second theory, which is especially on point for whistleblowers who have suffered retaliation, is based on the concept of deterrence, supported by the belief that optimal deterrence requires those who inflict wrongful or harmful behavior on others to bear the full social costs of their conduct, whatever those “costs” may be.¹⁴⁴ There are strong economic underpinnings behind the deterrence theory in this context. Deterrence rationale focuses on the conduct of the alleged wrongdoer, as opposed to the injury of the harmed party, and the need to create disincentives for potential wrongdoers to commit acts that would harm others.¹⁴⁵ The basic premise of deterrence theory is to have wrongdoers internalize the costs of the injuries that they create, thereby leading to better cost/benefit analyses for wrongdoers who are contemplating

142. Kyle Logue & Ronen Avraham, *Redistributing Optimally: Of Tax Rules, Legal Rules, and Insurance*, 56 TAX L. REV. 157, 228–29 (2003); see also Michael Ariens, *A Judge in Full: Wallace Jefferson of Texas*, 75 ALB. L. REV. 2151, 2196 (2012) (noting the role of tort law in interpreting rewards of emotional damages).

143. See *id.*; see also Richard A. Posner, *The Concept of Corrective Justice in Recent Theories of Tort Law*, 10 J. LEGAL STUD. 187 (1981) (discussing how the corrective justice theory remedies situations in which one party has an unfair advantage over the other).

144. See Logue & Avraham, *supra* note 142, at 228; see also *Memphis Cmty. Sch. Dist. v. Stachura*, 477 U.S. 299, 307 (1986) (holding that deterrence, considered compensatory damages, is “grounded in determinations of plaintiffs’ actual losses”); *Goad v. Macon Cnty.*, 730 F. Supp. 1425, 1431 (M.D. Tenn. 1989) (discussing the compensatory nature of damages that serve both as a deterrent to unlawful conduct and as compensation for injuries, thereby making “the actor less inclined to perform the conduct”); WILLIAM M. LANDES & RICHARD A. POSNER, *THE ECONOMIC STRUCTURE OF TORT LAW* 186–87 (1987).

145. David W. Leebron, *Final Moments: Damages for Pain and Suffering Prior to Death*, 64 N.Y.U. L. REV. 256, 271–72 (1989); see also Attilio M. Costabel, *Children of A Lesser Jones: Punitive Damages in Unseaworthiness*, 28 ST. THOMAS L. REV. 26, 41 (2015) (noting the origins of deterrence theory as aimed at creating disincentives to cause injury to others); Benjamin Shmueli, *Legal Pluralism in Tort Law Theory: Balancing Instrumental Theories and Corrective Justice*, 48 U. MICH. J.L. REFORM 745, 751 (2015) (discussing the rationales behind deterrence theory).

decisions that may cause injuries or harms.¹⁴⁶ In this way, the cost of injuries is shifted “from the victim to the activity that caused them.”¹⁴⁷ Given that the idea is to place the full spectrum of social costs on wrongdoers for their conduct, such costs must cover all of the anticipated damages that would stem from such conduct.¹⁴⁸

Deterrence theory, as a whole, adopts an *ex ante*, rather than an *ex post*, approach—it is preventative in the sense that it gives future actors an actual incentive to either be more cautious in their interactions with others or to avoid the problematic behavior altogether, lest they be subject to being held financially responsible for their actions.¹⁴⁹ The *ex ante* approach of economic deterrence theory focuses heavily on the assumption that individuals or entities make decisions in advance about whether to engage in certain activities by weighing the costs and benefits, but they too commonly consider only the costs they will have to incur, as opposed to the costs imputed to others.¹⁵⁰ Unless a legal rule exists that imposes damages on wrongful actors, then any costs incurred by others will not be considered by the person actually contemplating an action and will remain simply externalities.¹⁵¹ In this way, compensatory damages “can force [individuals and employees] to take into account and internalize externalities when they decide whether or how to act.”¹⁵² Also, the types of “costs” inflicted on others should be broadly interpreted. While tort law often involves conduct that results in actual physical harm or property damage to a person, the need to avoid causing this harm

146. Leebron, *supra* note 145, at 272; *see also* GUIDO CALABRESI, *THE COST OF ACCIDENTS: A LEGAL AND ECONOMIC ANALYSIS* (1970) (discussing the rationale behind deterrence theory).

147. Leebron, *supra* note 145, at 272 (noting also that the deterrence theory “prices goods for which there is, and in many cases is permitted, no market”).

148. Ronen Avraham, *Putting a Price on Pain-and-Suffering Damages: A Critique of the Current Approaches and a Preliminary Proposal for Change*, 100 NW. U. L. REV. 87, 88 (2006).

149. *See* John C.P. Goldberg, *Twentieth-Century Tort Theory*, 91 GEO. L.J. 513, 544–45 (2003) (noting that economic deterrence theory perspectives of tort law “promote overall social welfare by deterring accidents in the future”); *see also* Sheila B. Scheuerman, *The Consumer Fraud Class Action: Reining in Abuse by Requiring Plaintiffs to Allege Reliance as an Essential Element*, 43 HARV. J. ON LEGIS. 1, 32 (2006) (noting the *ex ante* nature of deterrence theory).

150. Goldberg, *supra* note 149; *see also* Daniel E. Walters, *Animal Agriculture Liability for Climatic Nuisance: A Path Forward for Climate Change Litigation?*, 44 COLUM. J. ENV'T L. 299, 336 (2019) (“[T]he deterrence theory of torts is premised on the hope that exposure to liability will encourage potential defendants to avoid harms *ex ante* by taking adequate precautions.” (citing Thomas C. Galligan, Jr., *Deterrence: The Legitimate Function of the Public Tort*, 58 WASH. & LEE L. REV. 1019 (2001))).

151. Goldberg, *supra* note 149, at 545.

152. *Id.* (using the example of a person who owns a pig farm that is adjacent to a residential neighborhood—such person will increase the number of pigs on the farm until the point at which the cost to him/her of adding one more pig is equal to the benefit that stems from having that pig). “Absent some legal rule addressing [his/her] conduct, the owner will not include among [his/her] costs those imposed on neighbors who experience a loss in quality of life as the presence of foul odors and noise increases with the swine population.” *Id.* Once the pig farmer is subject to a rule requiring him/her to compensate neighbors for creating a nuisance, he/she “may well conclude that [he/she] should keep fewer of them”). *Id.*

to others has a deeper and more widely applicable underpinning. This central need concerns people's interests in maintaining their own personal space against disruptions or intrusions by other individuals.¹⁵³

Claims for intentional and negligent infliction of emotional distress are not vindications of a right to happiness. Rather, they are rooted in the notion that one takes a significant hit in one's ability to live well when placed in the sort of oppressively difficult situation that is sufficient to cause an ordinarily constituted person to fall apart.¹⁵⁴

As is expressed here, individuals who claim that they have been victims of emotional distress are not doing so because they feel they have an unfettered right to undisturbed happiness. Such persons are merely asking for the ability to live and work without the infliction of emotional pain. In the context of retaliation against whistleblowers, deterrence theory is squarely on point and presents an even stronger case than that of tort law in providing emotional damages as a remedy. While tort law, especially in a negligence scenario, is commonly comprised of behavior that, while unreasonable, is unintentional,¹⁵⁵ persons who inflict retaliation against whistleblowers have a clear intent to do so. There can be no denying that retaliatory acts are intentional, as opposed to being accidental or the result of careless behavior.¹⁵⁶ Such is the case because all of the actions commonly described as retaliation under the law, including harassment, threats, discrimination, demotion, suspension, or discharge, inherently involve an intent to harm or cause a negative effect on the recipient of such actions.¹⁵⁷ "Intent is implicit in retaliation. Taking an-eye-for-an-eye cannot be accidental or inadvertent conduct."¹⁵⁸

While deterrence theory in the traditional tort context aims to prompt actors to internalize the costs associated with both preventing and causing accidents,¹⁵⁹ the theory as it pertains to deterring intentional, retaliatory behavior towards whistleblowers is even more compelling. Retaliation law is also unquestionably clear that the injured party's protected activity—in this context, whistleblowing—must have contributed to, or followed closely in time from, the employer's alleged adverse

153. John C.P. Goldberg & Benjamin C. Zipursky, *Torts as Wrongs*, 88 TEX. L. REV. 917, 938–39 (2010).

154. *Id.* at 939.

155. Anthony Vale & Joanna Cline, *Stigma and Property Contamination—Damnum Absque Injuria*, 33 TORT & INS. L.J. 835, 844 (1998) ("The standard for liability in negligence is not one of intent but one of acting reasonably: a defendant is negligent when it fails 'to do what the reasonable person would do "under the same or similar circumstances."'") (citations omitted).

156. *See* *Tademe v. Saint Cloud State Univ.*, 328 F.3d 982, 992 (8th Cir. 2003); *Thorn v. Amalgamated Transit Union*, 305 F.3d 826, 831 (8th Cir. 2002) (each requiring a material adverse effect on employment to constitute retaliation).

157. *See* *York v. City of Wichita Falls*, 944 F.2d. 236, 239 (5th Cir. 1991).

158. *Id.*

159. Goldberg, *supra* note 149, at 545.

action against the injured party.¹⁶⁰ For a whistleblower, emotional distress is a fundamental and natural consequence or “cost” of the employer’s adverse action or retaliatory act. It is expected and reasonable that actions uniformly barred in various whistleblowing statutes and defined as retaliation would lead to negative emotional and mental consequences. Thus, the various social costs that are ultimately shifted to the wrongdoer for their actions would encompass damages of this very nature, simply as logical consequences that follow from the retaliation.

In the field of social psychology and criminology, the act of retaliation is considered to be a form of workplace deviance largely reflecting an emotional reaction to workplace conditions or occurrences.¹⁶¹ Workplace deviance is defined as behavior that negatively impacts the well-being of organizations and their members by violating organizational norms.¹⁶² These actions unquestionably comprise behavior that, as a whole, should be deterred, especially in light of the various organizational benefits that whistleblowers bring to their places of employment. Whistleblowers help their workplaces avoid potentially negative press and possible litigation by offering an opportunity to address concerns and correct wrongdoing in a timely manner, often well before they escalate into unmanageable problems.¹⁶³ In addition, there are numerous public policy benefits to whistleblowing. Whistleblowers, who are usually in the unique position of being insiders, provide information that has countless societal benefits and is often the sole way to bring to light instances of fraud, wrongdoing, and other bad behavior.¹⁶⁴ In addition, whistleblowing, especially on an internal level, encourages organizational self-regulation and ethical practices. “[S]uch benefits can only be realized through ‘credible and enforceable promises of non-retaliation.’”¹⁶⁵

It is unquestionably the case that a whistleblower will be more likely to come forward if they are reassured of the promise of retaliation protections, which, as discussed, is particularly true when whistleblowers are reporting on an internal

160. See, e.g., *Frost v. BNSF Ry. Co.*, 914 F.3d 1189, 1196 (9th Cir. 2019); *Alexander v. Bd. of Educ. of City Sch. Dist. of N.Y.*, 107 F. Supp. 3d 323, 331 (S.D.N.Y. 2015); *Mugavero v. Arms Acres, Inc.*, 680 F. Supp. 2d 544, 560 (S.D.N.Y. 2010); *Bell v. Ga.-Pac. Corp.*, 390 F. Supp. 2d 1182, 1187 (M.D. Fla. 2005).

161. Rebecca Machalak & Neal M. Ashkanasy, *Emotions and Deviance, in* DEVIANT AND CRIMINAL BEHAVIOR IN THE WORKPLACE at 19, 23 (Steven M. Elias, ed. 2013).

162. William Brice & Deborah E. Rupp, *The Psychology of Workplace Deviant & Criminal Behavior*, 105 J. CRIM. L. & CRIMINOLOGY 533, 534–35 (2015) (reviewing DEVIANT AND CRIMINAL BEHAVIOR IN THE WORKPLACE (Steven M. Elias, Ed. 2013)).

163. Jennifer M. Pacella, *The Cybersecurity Threat: Compliance and the Role of Whistleblowers*, 11 BROOK. J. CORP. FIN. & COM. L. 39, 45–46 (2016); see also Norman D. Bishara, Elletta Sangrey Callahan & Terry Morehead Dworkin, *The Mouth of Truth*, 10 N.Y.U. J.L. & BUS. 37, 88 (2013) (discussing the various benefits of early internal whistleblowing).

164. See Martin H. Malin, *Protecting the Whistleblower from Retaliatory Discharge*, 16 U. MICH. J.L. REFORM 277, 277–78 (1983) (discussing the various societal benefits to whistleblowing); Richard Moberly, *Protecting Whistleblowers by Contract*, 79 U. COLO. L. REV. 975, 1006–08 (2008) (“[M]ore whistleblowing from insider employees provides a substantial public benefit.”).

165. Eisenstadt & Pacella, *supra* note 31, at 674 (citing Moberly, *supra* note 164, at 1007–11).

level.¹⁶⁶ The importance of clear and effective promises against retaliation are even more important today in the aftermath of the monumental *Digital Realty v. Somers* Supreme Court decision of 2018. *Digital Realty* creates significant concerns for employers that whistleblowers in the securities context will bypass internal reporting channels and report externally so that they are assured of retaliation protections.¹⁶⁷ In this case, the Court resolved a circuit split to hold that whistleblowers who report internally are not protected from retaliation under the Dodd-Frank Act—to be eligible for protection under the statute, whistleblowers had to have been retaliated against for reports they made directly to the SEC.¹⁶⁸ This case focused on the definition of “whistleblower” in the statute as one who makes a report to the SEC and applied a plain meaning to the wording of the statutory language despite what appears to be a clear ambiguity on the face of the statute.¹⁶⁹ The definition of “whistleblower” is used later in the statute to state that a “whistleblower” is protected from retaliation when “making disclosures that are required or protected” under specified federal laws, including SOX, which is a statute that protects internal whistleblowers.¹⁷⁰ The Court did not acknowledge this ambiguity and instead opined that the whistleblower definition of Dodd-Frank plainly “describes who is eligible for protection.”¹⁷¹ The effects of this decision and the current statutory language of Dodd-Frank are likely to thwart internal reporting within organizations, especially among those with cultures of silence or that are unwelcoming to dissenting views. In such environments, the whistleblower is likely to avoid internal reports altogether. As such, it is all the more important that employers make internal messages of protection against retaliation as clear as possible and, in doing so, ensure that they will be adequately deterred from any retaliatory behavior.

B. Rights vs. Remedies Analysis

Further justification for the inclusion of emotional damages as a remedy for whistleblowers may be found in the rules of general statutory construction, which shed light on the intended objectives of Dodd-Frank and the importance of analyzing the relationship between rights and remedies. Because whistleblower statutes are generally deemed to constitute remedial legislation,¹⁷² the SEC

166. See Pacella, *supra* note 55, at 751 (discussing the importance of minimizing the fear of retaliation for whistleblowers to prompt them to come forward); 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, 113 (“In considering the decision whether or not to blow the whistle . . . most individuals will be less likely to [do so] if the perceived costs are high.”).

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

168. *Id.* at 780–82.

169. *Id.* at 779–82.

170. *Id.* at 776–78; see also 15 U.S.C. § 78u-6(h)(1)(A).

171. *Digit. Realty Tr., Inc.*, 138 S. Ct. at 777 (emphasis omitted).

172. See *Donlon v. Montgomery Cnty. Pub. Schs.*, 188 A.3d 949, 967–68 (Md. 2018); *Lippman v. Ethicon, Inc.*, 119 A.3d 215, 224 (N.J. 2015); *Baileys v. Pa. Tpk. Comm’n*, 181 A.3d 324, 333 (Pa. 2018).

whistleblower program of Dodd-Frank may aptly be described as such and therefore must be “liberally construed” to give effect to the legislature’s intent.¹⁷³ Courts that evaluate whistleblower statutes have determined that they qualify as remedial legislation because their underlying legislative intent or purpose is to “enhance openness in government and compel the government’s compliance with the law by protecting those who inform authorities of wrongdoing.”¹⁷⁴ When a statute is deemed remedial legislation, its remedial provisions gain heightened importance, as courts have consistently construed remedial legislation in favor of the remedy provided by law *or those entitled to the benefits of the statute*.¹⁷⁵ This is the case given the fact that there are “remedial,” “beneficent,” or “humanitarian” objectives and purposes behind the statute generally, which are specifically intended to benefit or protect certain groups of individuals who have been disadvantaged or harmed in some manner.¹⁷⁶

The legislative intent of Dodd-Frank, as it pertains to whistleblowers specifically, supports important public policy and humanitarian interests of protecting not only whistleblowers, but also the general public, investors, and others who could be substantially harmed by the wrongdoing that the whistleblower has revealed. The statute’s legislative history highlights the importance of “motiv[at]ing] those with inside knowledge to come forward to assist the Government to identify and prosecute persons who have violated securities laws and recover money for victims of financial fraud.”¹⁷⁷ The legislative history also highlights that whistleblower tips are thirteen times more effective than other methods of fraud detection like external auditing (which have only about a four percent success rate in uncovering fraud) and, therefore, are a much needed resource for society.¹⁷⁸

Starting from the premise that Dodd-Frank constitutes remedial legislation and the statute’s legislative intent was to adequately protect and incentivize whistleblowers to come forward, the remedy of emotional damages should be considered as a critical mechanism to achieve the full objective of the statute. This notion is supported by various theories that place emphasis on the indistinguishability between rights and remedies, which is a discussion that is extremely on point in the whistleblower context. For example, the “unified right

173. *Eastman v. Farmers Ins. Co.*, 423 P.3d 431, 435 (Idaho 2018) (citing *Hill v. Am. Fam. Mut. Ins. Co.*, 249 P.3d 812, 819 (Idaho 2011)).

174. *Bailets*, 181 A.3d at 333 (quoting *O’Rourke v. Commonwealth*, 778 A.2d 1194, 1202 (Pa. 2001)).

175. *Hansen v. Robert Half Int’l, Inc.*, 813 N.W.2d 906, 916 (Minn. 2012).

176. *See Atchison, Topeka & Santa Fe Ry. Co. v. Buell*, 480 U.S. 557, 562 (1987); *Jefferson Cnty. Pharm. Ass’n v. Abbott Lab’ys*, 460 U.S. 150, 159 (1983); *Tcherepnin v. Knight*, 389 U.S. 332, 336 (1967); *United States v. Zacks*, 375 U.S. 59, 67 (1963); *Cosmopolitan Shipping Co. v. McAllister*, 337 U.S. 783, 788 (1949); *Urie v. Thompson*, 337 U.S. 163, 180 (1949); *A.H. Phillips, Inc. v. Walling*, 324 U.S. 490, 493, (1945); *McGowan v. Sec’y of the Dep’t of Health & Hum. Servs.*, 31 Fed. Cl. 734, 740 (1994).

177. S. REP. NO. 111-176, at 110–11 (2010).

178. *Id.*

theory” identifies a particular remedy and the underlying substantive interest behind it as “two parts of a unified whole; the definitional right is the inert skeletal matter and the remedial right is the life-giving operative matter.”¹⁷⁹ This theory distinguishes itself from the older “rights essentialism” theory that views a remedy as a secondary, procedural right to the primary, substantive right, whereby a court would first identify a “pure right” with intrinsic value that is articulated in some source of law and then find that remedies are contingent upon that right.¹⁸⁰

In the whistleblowing context, an individual’s right not to be retaliated against constitutes the underlying foundational basis for the actual right that is defined under the statute. The SEC’s Dodd-Frank whistleblower provisions clearly articulate this right. The statute includes a clear prohibition against retaliation, which is incumbent upon employers, as subsection (h) states: “No employer may discharge, demote, suspend, threaten, harass, directly or indirectly, or in any other manner discriminate against, a whistleblower in the terms and conditions of employment because of any lawful act done by the whistleblower [in providing information].”¹⁸¹ This bar against adverse employment actions carries with it an inherent promise not to inflict behavior upon a whistleblower that very clearly would have negative emotional consequences. For example, it is logical and reasonable to conclude that an action like threatening or harassing a person can only cause detrimental mental or emotional consequences of some kind for the target, as opposed to a physical response like a broken bone, a twisted ankle, the need for stitches, or any other of the myriad of injuries that commonly result from negligence actions. While these negligence-related physical injuries may also result in some emotional distress to the injured party, their physical effects are an immediate and recognizable form of tangible harm. When actions like threats, harassment, or other forms of retaliation happen to a whistleblower, the only harm that is likely to emerge is emotional. Unless physical retaliation is inflicted against a whistleblower (which may well occur), there is no recognizable, actual physical harm that would result.

Against this backdrop, it is clear to see how a remedial right that provides relief for emotional damages serves as “the life-giving operative matter”¹⁸² that enforces the right not to retaliate against a whistleblower. Without such damages, there is no adequate way to directly compensate aggrieved parties for the exact type of detrimental effects they have suffered, as the other remedies that are

179. Tracy A. Thomas, *Congress’ Section 5 Power and Remedial Rights*, 34 U.C. DAVIS L. REV. 673, 677 (2001).

180. Daryl J. Levinson, *Rights Essentialism and Remedial Equilibration*, 99 COLUM. L. REV. 857, 924 (1999); see also Margaux J. Hall & David C. Weiss, *Human Rights and Remedial Equilibration: Equilibrating Socio-Economic Rights*, 36 BROOK. J. INT’L L. 453, 457–58, 460 (2011) (critiquing the overly simplistic theory of rights essentialism in the human rights law context); Mary “Kati” Haupt, *Workers’ Compensation Law & the Remedial Waiver*, 21 BARRY L. REV. 217, 227–28 (2016) (noting that rights essentialism “is not the most accurate model”).

181. 15 U.S.C. § 78u-6(h).

182. Thomas, *supra* note 179, at 677–78.

currently available under Dodd-Frank, including reinstatement of employment, back pay, and litigation costs, do not squarely pinpoint the applicable “damage” to the whistleblower.

When considering emotional damages, or, in the broader sense, non-pecuniary harms like pain and suffering, the notion of “commensurability” is also an important factor. This is especially relevant in non-constitutional law contexts where a court defines rules about what comprises a breach of contract or a tort and which type of remedies are warranted for that breach or tort. In both instances, the two decisions are based on the same types of considerations that equally apply to both rights and remedies.¹⁸³ While the actual considerations of commensurability may vary—whether they take the form of an economic efficiency, corrective justice, or insurance against risk analysis—they equally apply to both a right and a remedy.¹⁸⁴ For example, an economic analysis of commensurability might view negligence in terms of the creation of incentives to take efficient precautions and then use these same terms to support setting damages at the level of actual harm caused, while a corrective justice torts theorist might view negligence liability in terms of fault and use these same terms to support setting damages at a level that “restores the victim to her rightful position.”¹⁸⁵ In this way, rights and remedies may be said to be commensurable—“[c]ommensurability makes thinking back and forth between rights and remedies easy, if not inevitable, because they take the form of a common currency that can be assessed along a single metric.”¹⁸⁶

This analysis is also very relevant to whistleblowing, especially in the context of whistleblowing statutes like Dodd-Frank, in which a court will decide whether an employer’s behavior has constituted retaliation per the language of the statute and then make a determination as to what remedy, whether reinstatement of employment or back pay, would be justified for that retaliation. A court undergoing this analysis may find that the prohibition of retaliatory termination of employment against whistleblowers is a mechanism to facilitate the public policy objectives of Dodd-Frank in valuing people who bring information about wrongdoing to light. At the same time, a court may use those same terms to explain why reinstatement of the whistleblower’s employment might fail to amply return that person to the

183. Levinson, *supra* note 180, at 931–32. This is the case even if there may be less agreement on what those considerations may be, whether they are “functional concerns related to economic efficiency, moral concerns related to keeping promises or corrective justice, or distributional concerns related to insuring against risk But whatever considerations are in play, they are equally applicable to right and remedy.” *Id.* at 931.

184. *Id.*

185. *Id.*

186. *Id.* at 931–32, 931 n.317 (analyzing how the situation is different in a constitutional law analysis, especially given the “regime of judicial review” that applies in that discipline). “This helps explain why Lon Fuller’s decision to put the remedies chapter of his contracts casebook first was regarded as clever. The discussion that follows suggests that pulling this trick with a constitutional casebook would be considered not clever, but blasphemous.” *Id.* at 931 n.317.

position they would have been in had their information been valued, and instead grant the whistleblower emotional damages.

The wrinkle with commensurability in an emotional pain and suffering analysis is that compensation in this context may be non-commodified, or incapable of being equated into dollars, as opposed to commodified notions of compensation, where one's harm, including losses like hospital costs or damage to property, are more easily equated with a particular dollar value.¹⁸⁷ In the latter context, "the victim's interest in being free of injury [is] the same as money or a fungible commodity she possessed."¹⁸⁸ Despite this difficulty, there are other reasonable means by which to approach this analysis. For one, requiring the retaliating employer to pay the aggrieved whistleblower for emotional damages is one way to acknowledge that the employer has actually committed wrongdoing and, thus, shall be called upon to provide redress to the whistleblower, as redress evidences that the aggrieved party's rights are being taken seriously.¹⁸⁹ In such instances, redress is "accomplished by affirming that some action is required to symbolize public respect for the existence of certain rights and public recognition of the transgressor's fault in disrespecting those rights."¹⁹⁰ In simple terms, when emotional harm has ensued, there is often no other means besides a monetary payment to ensure some form of justice for the situation. Money, of course, is of value to nearly everyone, especially in the business or organizational context where concerns of profits, reduction of costs, and economic efficiency are often at the forefront of daily decision-making. Given that our society places a high value on money, a justification for it in the context of emotional distress is that it can serve as a means to recognize both economic and non-economic losses—money is "weighty" enough to do so.¹⁹¹

Courts have widely justified non-economic damages on the basis that the notion of compensation here rests on the "legal fiction" that monetary damages can provide some form of compensation for a victim's harm.¹⁹²

We accept this fiction, knowing that although money will neither ease the pain nor restore the victim's abilities, this device is as close as the law can come in its effort to right the wrong. We have no hope of evaluating what has been lost, but a monetary award may provide a measure of solace for the condition created.¹⁹³

The provision of emotional damages serves as a form of consolation and has a "symbolic purpose" to express that society has acknowledged the aggrieved party's

187. Margaret Jane Radin, *Compensation and Commensurability*, 43 DUKE L.J. 56, 56, 59 (1993).

188. *Id.*

189. *Id.* at 61 (acknowledging the difference between redress and restitution).

190. *Id.*

191. *Id.* at 74 (citing Louis L. Jaffe, *Damages for Personal Injury: The Impact of Insurance*, 18 LAW & CONTEMP. PROBS. 219, 224 (1953)).

192. *Id.* at 71 (quoting *McDougald v. Garber*, 536 N.E.2d 372, 374–75 (N.Y. 1989)).

193. *McDougald*, 536 N.E.2d at 375.

right to integrity.¹⁹⁴ Thus, it is widely acknowledged that while it is nearly impossible to compensate an aggrieved or injured party with anything other than money, compensation for emotional suffering, which could never fully be replaced by money, has some other purpose in making the victim whole—“[t]he object of such compensation is to enable the injured person to obtain a substitute source of satisfaction or pleasure (where some ‘amenity’ has been lost), or alternatively to comfort the victim or provide him or her with solace for what has happened (as in the case of pain and suffering).”¹⁹⁵

In the case of whistleblowing, individuals who have been retaliated against have lost more than what is tangible and what can be measured in identifiable, quantitative terms like a loss of employment, back pay, or attorney’s fees. Given that the type of retaliation most often inflicted upon whistleblowers is psychological—manifesting itself as harassment, threats, or discriminatory or exclusionary behavior, whether explicit or subtle—the only feasible way to compensate an individual who has suffered from these actions is to provide some sort of solace or consolation that could only come in the form of monetary damages.

C. Are Bounties Intended to Replace Emotional Damages?

Finally, it is conceivable that one counterargument to granting emotional damages in the SEC Whistleblower Program is that the statute already provides bounty rewards, which one could argue would suffice to properly compensate an aggrieved whistleblower. This position may be reasonably refuted.

As discussed earlier, the Dodd-Frank whistleblower program provides for a bounty model aimed at incentivizing whistleblowers to come forward to report information about suspected violations of the law or other wrongdoing. Under this program, the SEC pays whistleblowers an award between ten and thirty percent of the total monetary sanctions collected in an action.¹⁹⁶ It is important to note that the Dodd-Frank whistleblower program was designed largely after that of the False Claims Act, which as discussed earlier, is one of the longest-standing federal whistleblower programs and often considered the “gold standard” for such programs.¹⁹⁷ As was also discussed, the False Claims Act whistleblower program

194. Lars Noah, *Comfortably Numb: Medicalizing (and Mitigating) Pain-and-Suffering Damages*, 42 U. MICH. J.L. REFORM 431, 440 (2009) (citing relevant case law supporting this premise); Alexandra B. Klass, *Punitive Damages and Valuing Harm*, 92 MINN. L. REV. 83, 137 (2007) (expressing the same).

195. PETER CANE & JAMES GOUDKAMP, *ATTYAH’S ACCIDENTS, COMPENSATION AND THE LAW* 394 (9 ed. 2018).

196. 17 C.F.R. § 240.21F-5(b) (2020). “Original” information is “(i) [d]erived from . . . independent knowledge or independent analysis; (ii) [n]ot already known to the [SEC] from [another] source . . . ; (iii) [n]ot exclusively derived from an allegation made in a judicial or administrative hearing [or] governmental report . . . or investigation . . . ; and (iv) [p]rovided to the [SEC] for the first time after July 21, 2010 [Dodd-Frank’s enactment].” 17 C.F.R. § 240.21F-4(b)(1).

197. Rapp, *supra* note 166, at 76; *see also* Pacella, *supra* note 38 (discussing the ways the SEC Dodd-Frank whistleblower program was modeled after that of the False Claims Act).

provides “make-whole” retaliation protections, thereby granting whistleblowers relief for the emotional pain and suffering they have experienced.¹⁹⁸ At the same time, the statute also provides bounty rewards to relators who blow the whistle pursuant to the statute and are successful in their claims. Such bounties are within a certain percentile range depending on the extent to which the whistleblower substantially contributed to the prosecution of the action.¹⁹⁹

The FCA originated during Civil War times when numerous accounts of misappropriation of money by government suppliers of the war effort were being reported that financially hurt the federal government.²⁰⁰ The FCA, premised on the notion that it takes “a rogue to catch a rogue,” was enacted to prevent and punish frauds against the U.S. government, which would come to light solely due to an insider’s information.²⁰¹ “The overriding theme of the [FCA] is virtually to deputize an army of insiders to uncover, inform, and pursue those government contractors who knowingly cheat in their agreements with the government.”²⁰² Legislators realized the inherent difficulties of obtaining information from insiders or participants who would have very little to gain from reporting those with whom they worked and acknowledged that such persons would be more likely to provide this critical information if financially rewarded to do so. In this way, the whistleblower is able to undergo a cost-benefit analysis of coming forward versus remaining silent.²⁰³

The SEC Whistleblower Program follows this very same logic. The legislative history of Dodd-Frank focused heavily on the new inclusion of a bounty program for whistleblowers, which was motivated by legislators’ citing of statistics demonstrating the government’s dire need for the type of information that only whistleblowers can provide.²⁰⁴ In support of the bounty program to incentivize

198. 31 U.S.C. § 3730(h).

199. 31 U.S.C. § 3730(d)(1).

200. These rogue government suppliers “accepted almost every offer and paid almost any price for [war] commodities, regardless of character, quality or quantity For sugar [the government] often got sand; for coffee, rye; for leather, something no better than brown paper; for sound horses and mules, spavined beasts and dying donkeys.” Michael Neal, Note, *Securities Whistleblowing Under Dodd-Frank: Neglecting the Power of “Enterprising Privateers” in Favor of the “Slow-Going Public Vessel,”* 15 LEWIS & CLARK L. REV. 1107, 1110 (2011) (citing CLAIRE M. SYLVIA, *THE FALSE CLAIMS ACT: FRAUD AGAINST THE GOVERNMENT* § 2:6, at 42–43 (2010)).

201. Helmer, *supra* note 105, at 1266 (citing CONG. GLOBE, 37th Cong., 3d Sess. 956 (1863) (statement of Sen. Howard)).

202. *Id.* at 1262.

203. See, e.g., J. Randy Beck, *The False Claims Act and the English Eradication of Qui Tam Legislation*, 78 N.C. L. REV. 539, 563 (2000); Terry Morehead Dworkin & Elletta Sangrey Callahan, *Employee Disclosures to the Media: When Is a “Source” a “Source”?*, 15 HASTINGS COMM’NS & ENT. L.J. 357, 368–69 (1993); see also Geoffrey Christopher Rapp, *States of Pay: Emerging Trends in State Whistleblower Bounty Schemes*, 54 S. TEX. L. REV. 53, 59 (2012) (“Someone with information about fraud, absent bounties, faces a set of values-related or ethical pressures to blow the whistle, a set of values-related or ethical pressures to remain silent, as well as a set of economic or pecuniary pressures to remain silent.”).

204. See S. REP. NO. 111-176, at 110–11 (2010).

whistleblowers, legislators cited statistics detailing that whistleblower tips have detected approximately fifty-four percent of fraud within public companies, compared to around four percent that is typically detected by the SEC and external auditors on their own.²⁰⁵ Specifically, legislators acknowledged that whistleblowers “often face the difficult choice between telling the truth and the risk of committing ‘career suicide,’” and that “the critical component of the [bounty] [p]rogram is the minimum payout that any individual could look towards in determining whether to take the enormous risk of blowing the whistle in calling attention to fraud.”²⁰⁶ Despite all of these similarities in the respective bounty programs, the FCA provides emotional damages while the SEC Whistleblower Program does not.

Further, Dodd-Frank’s legislative history reveals that the long-standing tax whistleblowing program of the Internal Revenue Service (IRS) also served as a model for the existing SEC whistleblower program, particularly the 2006 amendments to this program.²⁰⁷ Like the FCA, the IRS has been rewarding those who provide the agency with tips about tax violations since 1867, under legislation authorizing the agency to pay discretionary sums “as deem[ed] necessary for detecting and bringing to trial and punishment persons guilty of violating the internal revenue laws or conniving at the same.”²⁰⁸ In 2006, this program was amended after the Treasury Inspector General for Tax Administration conducted an audit pursuant to a congressional request, which revealed underutilization, a lack of clarity as to the defined incentives of whistleblowers, and administrative inefficiency.²⁰⁹ The 2006 amendments established a new centralized IRS location, the Whistleblower Office, to receive and administer whistleblower tips and determine reward amounts while implementing a mandatory, rather than discretionary, bounty reward model, rewarding tax whistleblowers with at least fifteen percent but not more than thirty percent of the collected proceeds from any administrative or judicial action that the IRS has taken based on the whistleblower’s information.²¹⁰

205. *Id.* at 110 (noting that whistleblower tips are thirteen times more effective than these measures).

206. *Id.*

207. *See id.* at 111.

208. IRS WHISTLEBLOWER PROGRAM, U.S. DEP’T OF THE TREASURY, PUB. NO. 5241, FISCAL YEAR 2010 REPORT TO THE CONGRESS ON THE USE OF SECTION 7623 (2011), <https://www.irs.gov/pub/irs-prior/p5241-2011.pdf> [<https://perma.cc/QXU8-EMZH>].

209. *See* Karie Davis-Nozemack & Sarah Webber, *Paying the IRS Whistleblower: A Critical Analysis of Collected Proceeds*, 32 VA. TAX REV. 77, 84–85 (2012) (describing the history of the IRS whistleblower program); *see also* Pacella, *supra* note 38, at 352.

210. Tax Relief and Health Care Act of 2006, Pub. L. No. 109-432, § 406(b)(1), 120 Stat. 2922, 2958. To qualify for a bounty, the whistleblower must have provided information relating to a business tax noncompliance matter “in which the tax, penalties, interest, additions to tax, and additional amounts in dispute exceed \$2,000,000,” and, if the information relates to an individual taxpayer’s noncompliance, a bounty is available if that individual’s gross income exceeds \$200,000 for at least one of the applicable tax years. *Id.* at §406(b)(5), 120 Stat. at 2959.

The rationale for these awards is the very same as that of other federal programs—that individuals with knowledge of wrongdoing or violations of the law need external motivation to come forward given the significant personal risks and costs they face for doing so.²¹¹ Thus, the legislative purpose and rationale behind bounty reward programs is centered on creating *incentives* to report, especially in light of the government’s desperate need for this information, which is often impossible to obtain from any other source. In this way, the legislative goals of bounty reward programs are distinguishable from those associated with a retaliation program, as the latter aims to compensate the whistleblower for the various losses that they have incurred. In this way, the underlying policy objectives between a bounty reward program and a retaliation program are very distinct.

In addition, the concept of deterrence is essential to retaliation protection. Deterrence is focused heavily on the notion that organizations and their constituents undergo cost-benefit analyses to make decisions about the costs that they, as opposed to others, will face, and will only be prompted to internalize what they may view as externalities if legal rules would hold them accountable.²¹² In the case of retaliation against whistleblowers, these arguments are precisely on point—if employers know they will be responsible for any emotional pain and suffering inflicted on the whistleblower, they should possess no reason for doing exactly that.

CONCLUSION

In recent years, the power of whistleblowers has led to historic, monumental revelations that have shed light on corruption, deceit, public health issues, and concerns for societal well-being. While there have been several other points in history yielding the name “the year of the whistleblower,”²¹³ it seems that each year that passes merits this title even more than the last. Over the last eighteen months, whistleblowers have played hugely significant roles in revealing some of the most newsworthy and important developments in society.²¹⁴ Despite their contributions, retaliation against them still remains the norm. This Article has explored the

211. Pacella, *supra* note 38, at 367.

212. *See supra* Section III.A.

213. Paul H. Dawes & Anita Pancholi, *Responding to the Bell of the Whistle: Practical Advice for Investigating Claims of Whistleblowers and Preventing Retaliation Suits Under Sarbanes-Oxley*, SEC. LITIG. REP., Feb. 2006, at 9, 9 (noting that the media dubbed 2002 as “the year of the whistleblower”); Monte K. Hurst & Virginia E. Simms, *Protected Whistleblower or Ungrateful Whiner: What’s the Law, How to Manage?*, 32 CORP. COUNS. REV., Nov. 2013, at 63, 64 (noting 2013 as such); Terence Healy, *2014—The Year of the Whistleblower*, FORBES (Jan. 8, 2014, 4:54 PM), <http://www.forbes.com/sites/theemploymentbeat/2014/01/08/2014-the-year-of-the-whistleblower> [<https://perma.cc/S9GK-QREK>] (noting 2014 as such).

214. *See supra* Introduction.

personal experiences of whistleblowers, highlighting the myriad ways that they suffer emotional harm that, in some cases, has even claimed their own lives.²¹⁵

Despite the severe emotional harm that most whistleblowers suffer, the SEC Whistleblower Program fails to grant aggrieved whistleblowers any non-pecuniary, emotional damages, thereby standing out as an anomaly against various other federal whistleblowing statutes that are comparable in objective, mission, protections, and statutory aim.²¹⁶ This absence of protections is especially surprising when compared to the whistleblower program of the CFTC, an agency that is substantially similar to the SEC in its overall mission and protective scope and that has, in recent years, become increasingly harmonized with the SEC.²¹⁷

This Article has proposed, from both a theoretical and practical perspective, various arguments that support providing emotional damages to whistleblowers as a remedial provision in all statutes that offer them retaliation protections, especially that of the SEC Whistleblower Program. Such arguments consist of drawing parallels between economic theories of deterrence in tort law and whistleblowing law; incorporating principles borrowed from the fields of social psychology and criminology; and undergoing an analysis of the theories that compare and contrast rights and remedies,²¹⁸ thereby concluding with the premise that compensating whistleblowers for the emotional harm that they so naturally and inevitably suffer is the only true way that they may be made whole.

215. *See supra* Section I.A.

216. *See supra* Part II.

217. *See supra* Section II.A.

218. *See supra* Part III.