

SOX, STATUTORY INTERPRETATION, AND THE SEVENTH  
AMENDMENT:  
SARBANES-OXLEY ACT WHISTLEBLOWER CLAIMS AND JURY  
TRIALS

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“Maintenance of the jury as a fact-finding body is of such importance and occupies so firm a place in our history and jurisprudence that any seeming curtailment of the right to a jury trial should be scrutinized with the utmost care.” *Dimick v. Schiedt*, 239 U.S. 474, 486 (1935).

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## I. INTRODUCTION

Corporate fraud and greed led to the downfall of two major multinational corporations, Enron and WorldCom, in the early part of the twenty-first century.<sup>1</sup> The corporate scandals caught the attention of the general public, corporations, Wall Street, and Congress like few scandals ever have.<sup>2</sup> The primary victims of the scandals—company employees, investors, and pensioners—suffered greatly from the companies’ deceptive practices and ultimate collapses.<sup>3</sup> The investigations into the debacles revealed that certain employees in these companies had identified the fraudulent practices that ultimately led to their destruction.<sup>4</sup> Yet, these employees were discouraged from reporting the practices due to a lack of legal protection for whistleblowers.<sup>5</sup> The few corporate insiders who risked their careers in an attempt to correct the fraudulent practices, Cynthia Cooper and Sherron Watkins, were hailed as heroes by Time Magazine in 2002.<sup>6</sup> Congress, recognizing the outcry from the general public, acted swiftly to provide comprehensive federal protection for corporate employees who report corporate fraud by enacting the Public Company Reform and Investor Protection Act of 2002, commonly known as the Sarbanes-Oxley Act.<sup>7</sup> On July 30, 2002, President Bush signed the Sarbanes-Oxley Act into law.<sup>8</sup> The Act aimed to destroy the “corporate code of silence” that was aided by the lack of comprehensive legal protection for corporate whistleblowers.<sup>9</sup>

The Act contains four key whistleblower-protection provisions. First, Section 806 of the Corporate and Criminal Fraud Accountability Act of 2002, Title VIII of the Sarbanes-Oxley Act of 2002 [hereinafter SOX] contains a traditional civil anti-retaliation provision. Covered employers, which include publicly traded corporations, their contractors, subcontractors, and agents, are prohibited from retaliating against employees who report suspected corporate fraud or Securities and Exchange Commission (SEC) violations.<sup>10</sup> The civil protections are limited to employees of publicly traded

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<sup>1</sup> STEPHEN M. KOHN, MICHAEL D. KOHN, AND DAVID K. COLAPINTO, *WHISTLEBLOWER LAW: A GUIDE TO LEGAL PROTECTIONS FOR CORPORATE EMPLOYEES* xi (2004).

<sup>2</sup> *See, e.g.,* McGarrity v. Berlin Metals, Inc., 774 N.E.2d 71, 74 (Ind. Ct. App. 2002) (“With the sole exception of the war on terrorism, no issue dominates current thought more than the corporate and accountancy ethical scandals which have rocked our country.”).

<sup>3</sup> KOHN, *supra* note 1, at xii.

<sup>4</sup> *Id.*

<sup>5</sup> *Id.* Although a variety of federal and state laws provide protection for certain types of whistleblowers, neither Texas state law nor federal law protected the whistleblowers of Enron and WorldCom.

<sup>6</sup> *Persons of the Year 2002*, TIME, Dec. 22, 2002.

<sup>7</sup> Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, 116 Stat. 745 (2002).

<sup>8</sup> 2002 U.S.C.C.A.N. 543 (July 30, 2002).

<sup>9</sup> KOHN, *supra* note 1, at xiii.

<sup>10</sup> SOX Act § 806; 18 U.S.C. § 1514A(a). Section 806 of the SOX Act was originally drafted by the Senate Judiciary Committee as Section 806 of the Corporate and Criminal Fraud Accountability Act of 2002. KOHN, *supra* note 1, at 4. The corporate whistleblower provision, which the Senate Judiciary Committee passed unanimously, was incorporated into the final version of the Sarbanes-Oxley Act by way of the Leahy-McCain Amendment. KOHN, *supra* note 1, at 4. The Senate adopted the amendment on July 25, 2002. *See* 148 Cong. Rec. S7357-58 (daily ed. July 25, 2002). Senator Patrick Leahy was the principal sponsor of the corporate whistleblower law. KOHN, *supra* note 1, at 4. Section 1514A states:

companies.<sup>11</sup> Second, in addition to civil liability, the Act criminalizes retaliation against employee whistleblowers. Under the amended obstruction of justice statute, any person who “knowingly, with the intent to retaliate, takes any action harmful to any person, including interference with the lawful employment or livelihood of any person, for providing to a law enforcement officer any truthful information relating to the commission or possible commission of any Federal offense” is subject to a fine and/or imprisonment.<sup>12</sup> Third, retaliation against corporate whistleblowers who complain to auditing committees concerning questionable accounting practices is prohibited.<sup>13</sup> Finally, attorneys who practice before the Securities and Exchange Commission are now mandatory whistleblowers.<sup>14</sup>

The heart of the Sarbanes-Oxley whistleblower protection provisions is the anti-retaliation provision contained in Section 806 of the Act. Section 806 adopts a two-track enforcement system that is unique in employment discrimination law. The first track of the system is similar to the administrative procedures available under whistleblower provisions of other federal statutes, such as the Aviation Investment and Reform Act for the 21st Century, the Pipeline Safety Improvement Act, the Clean Air Act, the Energy Reorganization Act, the Solid Waste Disposal Act, and the Whistleblower Protection

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(a) Whistleblower Protection For Employees of Publicly Traded Companies.—No company with a class of securities registered under section 12 of the Securities Exchange Act of 1934 (15 U.S.C. 78l), or that is required to file reports under section 15(d) of the Securities Exchange Act of 1934 (15 U.S.C. 78o(d)), or any officer, employee, contractor, subcontractor, or agent of such company, may discharge, demote, suspend, threaten, harass, or in any other manner discriminate against an employee in the terms and conditions of employment because of any lawful act done by the employee—

(1) to provide information, cause information to be provided, or otherwise assist in an investigation regarding any conduct which the employee reasonably believes constitutes a violation of section 1341, 1343, 1344, or 1348, any rule or regulation of the Securities and Exchange Commission, or any provision of Federal law relating to fraud against shareholders, when the information or assistance is provided to or the investigation is conducted by---

(A) a Federal regulatory or law enforcement agency;

(B) any Member of Congress or any committee of Congress; or

(C) an person with supervisory authority over the employee (or any such other person working for the employer who has the authority to investigate, discover, or terminate misconduct; or

(2) to file, cause to be filed, testify, participate in, or otherwise assist in a proceeding filed or about to be filed (with any knowledge of the employer) relating to an alleged violation of section 1341, 1343, 1344, or 1348, any rule or regulation of the Securities and Exchange Commission, or any provision of Federal law relating to fraud against shareholders.

<sup>11</sup> 18 U.S.C. § 1514A(a); 148 Cong. Rec. S7418-01 (daily ed. July 26, 2002) (statement of Senator Leahy) (“[Section 806] would provide whistleblower protection to employees of publicly traded companies.”).

<sup>12</sup> 18 U.S.C. § 1513(e).

<sup>13</sup> KOHN, *supra* note 1, at xiii.

<sup>14</sup> Section 307 of the Act puts mandatory reporting obligations on attorneys who practice before the SEC. Attorneys who represent issuers must report evidence of a material breach of securities law or breach of fiduciary duty or similar violations by the company or agent thereof to appropriate company officers, committees, and/or the board of directors.

Act.<sup>15</sup> The corporate whistleblower can file an administrative complaint with the Occupational Safety & Health Administration.<sup>16</sup> An OSHA investigator will investigate the complaint and make findings.<sup>17</sup> Objections to the findings can be filed with the Chief Administrative Law Judge, U.S. Department of Labor.<sup>18</sup> Administrative hearings are conducted by an Administrative Law Judge in accordance with the rules of practice and procedure for administrative hearings before the Office of Administrative Law Judges.<sup>19</sup> The Administrative Law Judge's decision can be appealed to the Administrative Review Board (acting on behalf of the Secretary of Labor).<sup>20</sup> Judicial review of the Administrative Review Board's decision is available in the appropriate federal court of appeals.<sup>21</sup>

Unlike the other federal whistleblower statutes, however, the SOX whistleblower provision has a second track. The option exists for a SOX complainant to take his or her case to federal court if the Secretary of Labor has not issued a final decision on the administrative complaint “within 180 days of the filing of the complaint and there is no showing that such delay is due to the bad faith of the complainant.”<sup>22</sup> The whistleblower provision gives claimants in that situation the right to bring “an action at law or equity for de novo review” in the appropriate federal district court, no matter the amount in controversy.<sup>23</sup> In short, so long as the claimant litigates the case for at least 180 days within the Department of Labor [hereinafter DOL] without engaging in any “bad faith” conduct to delay the DOL proceedings and does not receive a final ruling within the 180-day period, the claimant can refile his or her case in federal district court. One

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<sup>15</sup> See 49 U.S.C. § 42121 (AIR 21 Act); 49 U.S.C. § 60129 (Pipeline Safety Act); 42 U.S.C. § 7622 (Clean Air Act); 42 U.S.C. § 5851 (ERA); 42 U.S.C. § 6971 (SWDA); 5 U.S.C. § 1221(a) (WPA).

<sup>16</sup> See 18 U.S.C. § 1514A(b)(1)(A) (complaint filed with Secretary of the Department of Labor). The Secretary delegated to the Assistant Secretary of OSHA the responsibility to receive and investigate SOX complaints. Secretary's Order, 5-2002, 67 Fed. Reg. 65008 (Oct. 22, 2002).

<sup>17</sup> The rules and regulations concerning the SOX administrative procedure generally follow the rules and procedures set forth in the employee protection provisions of the AIR 21 Act, which Congress enacted to protect airline employees from retaliation by air carriers because of protected whistleblowing activities. See 18 U.S.C. § 1514A(b)(2)(A) and 49 U.S.C. § 42121(b). OSHA has promulgated regulations that govern procedures and time frames for handling discrimination complaints under Title VIII of Sarbanes-Oxley. See 69 Fed. Reg. 62104 (Aug. 24, 2004). See also 29 C.F.R. § 1980.103 (Filing of discrimination complaint); § 1980.104 (Investigation); § 1980.105 (Issuance of findings and preliminary orders).

<sup>18</sup> See 29 C.F.R. § 1980.106(a).

<sup>19</sup> *Id.* at § 1980.107.

<sup>20</sup> *Id.* at § 1980.110.

<sup>21</sup> See 18 U.S.C. § 1514A(b)(2)(A) and 49 U.S.C. § 42121(b)(4)(A). (“Any person adversely affected or aggrieved by a [final order issued by the Secretary of the Department of Labor] may obtain review of the order in the United States Court of Appeals for the circuit in which the violation, with respect to which the order was issued, allegedly occurred or the circuit in which the complainant resided on the date of such violation.”).

<sup>22</sup> See 18 U.S.C. § 1514A(b)(1)(B) (“A person who alleges discharge or any other discrimination by any person in violation of subsection (a) may seek relief under subsection (c), by . . . if the Secretary has not issued a final decision within 180 days of the filing of the complaint and there is no showing that such delay is due to the bad faith of the claimant, bringing an action at law or equity for de novo review in the appropriate district court of the United States, which shall have jurisdiction over such an action without regard to the amount in controversy.”).

<sup>23</sup> *Id.*

commentator states that Congress provided the refile right because prior claims administered by the DOL under other federal whistleblower laws had tended to languish within the DOL for years.<sup>24</sup> The federal court escape clause allows claimants to bypass that particular problem.<sup>25</sup>

Although SOX provides for a private right of action to be brought in federal court under the above-described conditions, the statute does not explicitly state whether such an action can be tried to a jury.<sup>26</sup> Senator Patrick Leahy, the principal sponsor and author of the SOX whistleblower provision, introduced legislative history that indicates Congress intended to provide the right to a jury trial.<sup>27</sup> But the lack of an explicit guarantee in the statute casts doubt on whether federal courts will uniformly interpret the statute or the Seventh Amendment to the U.S. Constitution to guarantee the right to a jury trial. A federal district court in Texas has already interpreted the statute as failing to provide the right to a jury trial. The Texas court concluded that the Seventh Amendment does not guarantee the right to a jury trial because the statutory remedies are limited to equitable relief.<sup>28</sup> Other federal district courts have noted the issue as one of first impression, but postponed a ruling on the question.<sup>29</sup> If the first few examples are any indication of what is to come, the federal courts will undoubtedly struggle with the jury-trial issue in SOX, just as they have with other federal employment discrimination statutes that do not explicitly provide the right to a jury trial.<sup>30</sup>

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<sup>24</sup> KOHN, *supra* note 1, at 8.

<sup>25</sup> *Id.* at 9.

<sup>26</sup> Compare 18 U.S.C. § 1514A(b)(1)(B) (right to bring SOX whistleblower action at law or equity for de novo review in the appropriate district court) with 42 U.S.C. § 1981a(c) (“If a complaining party [Title VII plaintiff] seeks compensatory or punitive damages under this section, any party may demand a trial by jury.”).

<sup>27</sup> 148 CONG. REC. S7420 (daily ed. July 26, 2002) (“Only if there is not final agency decision within 180 days of the complaint (and such delay is not shown to be due to the bad faith of the claimant) may he or she bring a de novo case in federal court with a jury trial available (See United States Constitution, Amendment VII; Title 42 U.S.C. § 1983).

<sup>28</sup> See *Murray v. TXU Corp.*, 2005 U.S. Dist. LEXIS 10945, 2005 WL 135644, 86 Empl. Prac. Dec. (CCH), P41, 981 (N.D. Tex. June 7, 2005).

<sup>29</sup> See *Fraser v. Fiduciary Trust Co. Int’l*, 417 F. Supp. 2d 310, 325 (S.D.N.Y. 2006); *Hanna v. WCI Communities, Inc.*, 348 F. Supp. 2d 1332, 1334 (S.D. Fla. 2004).

<sup>30</sup> See *Lorrillard v. Pons*, 434 U.S. 575 (1978) (finding statutory right to jury trial in a private civil action for lost wages under the Age Discrimination in Employment Act even though the ADEA contains no provision expressly granting a right to jury trial); *Lebow v. American Trans Air, Inc.*, 86 F.3d 661 (7th Cir. 1996) (Seventh Amendment guarantees right to jury trial to employee suing his employer under the Railway Labor Act for discharging him because of his union-related activities); *Waldrop v. Southern Company Services, Inc.*, 24 F.3d 152 (11th Cir. 1994) (jury trial is constitutionally required under Section 504 of the Rehabilitation Act); *Hill v. Winn-Dixie Stores, Inc.*, 934 F.2d 1518 (11th Cir. 1991) (Jury Systems Improvement Act – jury-duty discrimination statute – provides a right to jury trial under the Seventh Amendment); *Spinelli v. Gaughan*, 12 F.3d 853 (9th Cir. 1993) (jury trial unavailable for Employee Retirement Income Security Act § 510 claim); *Troy v. City of Hampton*, 756 F.2d 1000 (4th Cir. 1985) (no constitutional right to a jury trial in action for reinstatement and lost wages under the Veterans Reemployment Rights Act); *Johnson v. Georgia Highway Express, Inc.*, 417 F.2d 1122, 1125 (5th Cir. 1969) (pre-1991 Civil Rights Act case holding that a jury trial is not required in a Title VII action for reinstatement and backpay); *cf.* *Curtis v. Loether*, 415 U.S. 189 (1974) (damages suit under § 812 of the Civil Rights of 1968 is an action to enforce “legal rights” and thus Seventh Amendment preserved the

This article addresses three interrelated questions. Part II of the article considers whether the statutory language in SOX should be interpreted to imply the right to a jury trial, thus avoiding the Seventh Amendment question. Assuming the statute cannot be interpreted to imply the right to a jury trial, Part III of the article considers whether the right to a jury trial on the SOX whistleblower action is guaranteed by the Seventh Amendment. Part IV adds some concluding remarks. In a nutshell, the following paragraph summarizes the argument.

Congress provided SOX whistleblowers with a private right of action that allows them to bring an *action at law* to seek legal relief in the form of backpay and special damages, such as mental anguish damages, as well as an *action at equity* to seek reinstatement, a clearly equitable remedy, if the 180-day DOL decision deadline is not met. As a matter of statutory interpretation, the statutory structure, statutory language, and legislative history indicate the jury-trial right applies in situations where the relief sought includes backpay or non-pecuniary damages. Judicial interpretation implying the right to a jury trial is sensible and avoids a direct confrontation with the Seventh Amendment. If the Seventh Amendment is squarely confronted, however, the result is the same. SOX whistleblowers who seek backpay and other special damages have the constitutional right to a trial by jury because in doing so they are seeking to enforce legal rights to legal relief. Backpay under SOX is a quintessential legal remedy. As a practical matter, SOX whistleblower actions should routinely be tried to juries even when SOX plaintiffs seek reinstatement in conjunction with legal relief.<sup>31</sup>

## II. THE STATUTORY QUESTION: MEANING AND INTERPRETATION

### A. The Aftermath of Ambiguity

Congress knows how to explicitly provide the right to a jury trial for a federal cause of action when it so desires. The textbook example of an explicit statutory jury-trial guarantee in the employment discrimination area is the 1991 Civil Rights Act (CRA), which amended Title VII of the Civil Rights Act of 1964.<sup>32</sup> Section 102 of the CRA amended Title VII to provide for the recovery of compensatory and punitive damages in intentional discrimination cases.<sup>33</sup> The CRA defined the term “compensatory damages” through inclusion and exclusion. By way of inclusion, “compensatory damages” includes “future pecuniary losses, emotional pain, suffering, inconvenience, mental anguish, loss of enjoyment of life, and other non-pecuniary losses.”<sup>34</sup> By way of exclusion, “backpay, interest on backpay, or any other type of relief authorized under section 706(g) of the Civil Rights Act of 1964” are excluded from the realm of

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litigant’s right to a jury trial). *See also* Robert L. Strayer, II, Note, *Asserting the Seventh Amendment: An Argument for the Right to a Jury Trial When Only Back Pay is Sought Under the Americans with Disabilities Act*, 52 VAND. L. REV. 795 (1999) (arguing that Seventh Amendment preserves right to jury on ADA backpay claims); Denise Drake Clemow & Lisa Hund Lattan, *ERISA Section 510 Claims: No Right to a Jury Trial Can Be Found*, 73 NEB. L. REV. 756 (1994) (no constitutional right to jury trial on ERISA § 510 claims because remedies provided by Congress are only equitable).

<sup>31</sup> *See, e.g.*, *Dairy Queen v. Wood*, 369 U.S. 469 (1962).

<sup>32</sup> *See* Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071 (1991).

<sup>33</sup> CRA § 102; 42 U.S.C. § 1981a(a)(1).

<sup>34</sup> 42 U.S.C. § 1981a(b)(3).

“compensatory damages.”<sup>35</sup> The CRA states that “[i]f a complaining party seeks compensatory or punitive damages . . . *any party may demand a trial by jury.*” (emphasis added).<sup>36</sup>

In contrast to amended Title VII, SOX contains no explicit statutory right to a jury trial. SOX enables the corporate whistleblower to bring “an action at law or equity for de novo review” in federal district court, assuming the administrative requirement is satisfied.<sup>37</sup> It also contains a remedial provision, which provides that a prevailing employee is entitled to all make-whole relief.<sup>38</sup> Make-whole relief includes three categories of what Congress characterizes as compensatory damages: reinstatement, back pay, and special damages. The remedial provision, 18 U.S.C. § 1514A(c) states:

REMEDIES.

(1) IN GENERAL.—An employee prevailing in any action under subsection (b)(1) shall be entitled to all relief necessary to make the employee whole.

(2) COMPENSATORY DAMAGES.—Relief for any action under paragraph (1) shall include—

(A) reinstatement with the same seniority status that the employee would have had, but for the discrimination.

(B) the amount of back pay, with interest; and

(C) compensation for any special damages sustained as a result of the discrimination, including litigation costs, expert witness fees, and reasonable attorney fees.

In terms of the plain language of the statute, the characterization of the action as being available “at law or equity for de novo review” and the remedial provision is the sum of the evidence on Congressional intent. Does the absence of a specific guarantee in the plain language of the statute mean that jury trials are to be denied to SOX plaintiffs? Not necessarily. Ambiguity in the statute, in this instance, does not preclude an interpretation that implies the right to a jury trial.

The legal academic literature is replete with articles addressing particular statutory construction methodologies.<sup>39</sup> Some articles address whether one foundational theory of statutory interpretation is better than another.<sup>40</sup> This article does not stake any particular claim as to whether one statutory construction methodology is preferable to another or whether the various methodologies can be neatly separated. However, various interpretive techniques will be used in addressing whether the right to a jury trial should

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<sup>35</sup> *Id.* at § 1981a(b)(2).

<sup>36</sup> *Id.* at § 1981a(c)(1).

<sup>37</sup> 18 U.S.C. § 1514A(b)(1)(B).

<sup>38</sup> 18 U.S.C. § 1514A(c)(1).

<sup>39</sup> See John F. Manning, *What Divides Textualists from Purposivists*, 106 COLUM. L. REV. 70 (2006); Caleb Nelson, *What is Textualism*, 91 VA. L. REV. 347 (2005); Stanley Fish, *Symposium: What is Legal Interpretation? There is No Textualist Position*, 42 SAN DIEGO L. REV. 629 (2005); William N. Eskridge, Jr. & Philip F. Frickey, *Statutory Interpretation as Practical Reasoning*, 42 STAN. L. REV. 321 (1990).

<sup>40</sup> *Id.*

be implied. In such a difficult interpretive puzzle as this one, the advice from Chief Justice Marshall is particularly apt—“where the mind labours to discover the design of the legislature, it seizes everything from which aid can be derived.”<sup>41</sup>

## B. Statutory Construction

It is an often-stated principle that a statute should be construed to avoid raising a serious constitutional question, if possible.<sup>42</sup> The SOX language, structure, legislative history, as well as its purpose, indicate that it is plausible that Congress intended to grant the right to a jury trial on SOX claims that seek legal, as opposed to equitable, relief. Judicial adoption of such an interpretation is favored in order to avoid the thorny constitutional question.<sup>43</sup>

### 1. Supreme Court Precedent

The United States Supreme Court has expressed a reluctance to imply a right to a jury trial when the statute itself makes no mention of jury trials or even juries for that matter. In *City of Monterey v. Del Monte Dunes at Monterey*, the Court refused to construe Section 1983 to imply a right to jury trial merely because the statute authorizes a party who has been deprived of a federal right under the color of state law to seek relief through “an action at law, suit in equity, or other proper proceeding for redress.”<sup>44</sup> The phrase “action at law,” standing alone, does not necessarily implicate the right to a jury trial.<sup>45</sup>

In *Feltner v. Columbia Pictures Television*, the Court held, consistent with federal court of appeals decisions, that Section 504(c) of the Copyright Act cannot be interpreted to imply the right to a jury trial.<sup>46</sup> Section 504(c) permits the recovery of “statutory damages,” which the court assesses in a just amount.<sup>47</sup> In this context, the term “court”

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<sup>41</sup> *United States v. Fisher*, 2 Cranch 358, 386 (U.S. 1805).

<sup>42</sup> The statutory question should be considered before the constitutional question because it is a “cardinal principle” that courts must “first ascertain whether a construction of the statute is fairly possible by which the constitutional question may be avoided.” *City of Monterey v. Del Monte Dunes at Monterey*, 526 U.S. 687, 707 (1999); *Feltner v. Columbia Pictures Television, Inc.*, 523 U.S. 340, 345 (1998) (quoting *Tull v. United States*, 481 U.S. 412, 417, n.3 (1987); accord *Lorillard*, 434 U.S. at 577. On occasion, however, the Supreme Court has been willing to forego extended consideration of the statutory question when two conditions are satisfied: (i) the wording and construction of the statute permit plausible arguments on both sides of the jury-trial issue; and (ii) the necessity for jury trial is so clearly settled by prior Seventh Amendment decisions that it would be futile to spend time on the statutory issue. *Curtis*, 415 U.S. at 192 and n.6.

<sup>43</sup> “Where a statute is susceptible of two constructions, by one of which grave and doubtful questions arise and by the other of which such questions are avoided, our duty is to adopt the latter.” *United States ex re. Attorney General v. Delaware & Hudson Co.*, 213 U.S. 366 (1909). For criticism of this canon, see Richard A. Posner, *Statutory Interpretation – in the Classroom and in the Courtroom*, 50 U. CHI. L. REV. 800, 815-17 (1983).

<sup>44</sup> *City of Monterey*, 526 U.S. at 707-08.

<sup>45</sup> *Id.*

<sup>46</sup> *Feltner*, 523 U.S. at 345.

<sup>47</sup> In pertinent part, 17 U.S.C. § 504(c) provides:  
STATUTORY DAMAGES –

meant judge, not jury.<sup>48</sup> The Court contrasted the remedies provisions of the Copyright Act that use the term “court” in contexts that confer authority on the judge with Section 504(b) of the Act.<sup>49</sup> Section 504(b) does not use the word “court” in addressing awards of actual damages and profits.<sup>50</sup> The Court stated that actual damages and profits are generally thought to constitute legal relief and intimated that entitlement to a jury trial exists for copyright actions that seek actual damages.<sup>51</sup>

In *Granfinanciera, S.A. v. Nordberg*, the Court considered a bankruptcy case in which a Chapter 11 bankruptcy trustee sued various corporations to avoid allegedly fraudulent transfers and recover damages.<sup>52</sup> The corporations based their claim to a jury trial entirely on the Seventh Amendment.<sup>53</sup> The Court agreed with the corporations’ position that the 1982 version of 28 U.S.C. § 1411, a statutory provision for jury trials in bankruptcy proceedings, did not provide a statutory entitlement to a jury trial.<sup>54</sup> The Court characterized § 1411 as “notoriously ambiguous” and noted that the confused legislative history of § 1411 had “puzzled commentators.”<sup>55</sup>

In *Lorillard v. Pons*, the Court implied the statutory right to a jury trial in private ADEA actions for lost wages.<sup>56</sup> The relevant statutory language authorized individuals to bring actions for “legal or equitable relief” and “the court . . . to grant such legal or equitable relief as may be appropriate.”<sup>57</sup> The Court’s decision rested on two factors. First, the statute used the term “legal relief,” which the court determined to be a “term of art.”<sup>58</sup> The Seventh Amendment entitlement to a jury trial on claims for legal relief is historic and well-known, thus raising the inference that Congress used the term “legal” with the intent to provide for a jury trial.<sup>59</sup> Second, the ADEA’s remedial provisions were expressly to be enforced in accordance with the Fair Labor Standards Act of 1938, which had been uniformly interpreted to provide a right to a jury trial on unpaid wage

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(1) Except as provided by clause (2) of this subsection, the copyright owner may elect, at any time before final judgment is rendered, to recover, instead of actual damages and profits, an award of statutory damages for all infringements involved in the action, with respect to any one work, . . . in a sum of not less than \$500 or more than \$20,000 as the court considers just . . .”

(2) In a case where the copyright owner sustains the burden of proving, and the court finds, that infringement was committed willfully, the court [in] its discretion may increase the award of statutory damages to a sum of not more than \$100,000. In a case where the infringer sustains the burden of proving, and the court finds, that infringement was committed willfully, the court [in] its discretion may increase the award of statutory damages to a sum of not more than \$100,000. In a case where the infringer sustains the burden of proving, and the court finds, that such infringer was not aware and had no reason to believe that his or her acts constituted an infringement of copyright, the court in its discretion may reduce the award of statutory damages to a sum of not less than \$200.

<sup>48</sup> *Feltner*, 523 U.S. at 346.

<sup>49</sup> *Id.*

<sup>50</sup> *Id.*

<sup>51</sup> *Id.*

<sup>52</sup> 492 U.S. 33 (1989).

<sup>53</sup> *Id.* at 40.

<sup>54</sup> *Id.* at 40, n.3.

<sup>55</sup> *Id.*

<sup>56</sup> 434 U.S. 575, 577 (1978).

<sup>57</sup> *Id.* at 583. *See also* 29 U.S.C. § 626(b)-(c).

<sup>58</sup> *Id.* at 583.

<sup>59</sup> *Id.*

claims by private actors.<sup>60</sup> As the Court stated, “[w]hen Congress adopts a new law incorporating sections of a prior law, Congress normally can be presumed to have had knowledge of the interpretation given to the incorporated law, at least insofar as it affects the new statute.”<sup>61</sup> The Court presumed that Congress intended the FLSA right to jury trial to apply in the ADEA context.<sup>62</sup>

## 2. *SOX Statutory Structure, Statutory Language, and Legislative History*

The statutory language in the civil action provision and the remedial provision should be interpreted to imply the right to a jury trial. The civil action provision authorizes a SOX plaintiff to bring an “action at law . . . for de novo review.”<sup>63</sup> The term “action at law” is synonymous with a jury trial.<sup>64</sup> The term “de novo review” in this statute could be interpreted to mean a de novo jury trial. The remedial provision authorizes the recovery of monetary damages as compensation, which constitutes legal relief.<sup>65</sup> Legal relief has traditionally been associated with entitlement to a jury trial.<sup>66</sup>

### a. *The SOX Civil Action Provision*

The statute authorizes a SOX plaintiff to bring an “action at law or equity for de novo review” in federal district court.<sup>67</sup> *City of Monterey* teaches that the use of the phrase “action at law” does not necessarily imply the right to a jury trial, but its use in SOX is certainly a point to consider in determining whether to imply such a right in that actions at law are synonymous with jury trials. Nonetheless, what about the fact that the statute authorizes an “action in equity” and calls for “de novo review”? Equity suits are not tried to juries<sup>68</sup> and it would seem at first blush that “de novo review” entails a judge making a decision, not a jury making a decision.

With regard to the statutory authorization to bring an equity action, perhaps Congress contemplated that some SOX plaintiffs would bring a federal court action seeking reinstatement as his or her only remedy, *i.e.*, no damages, however unlikely that would be. In such a scenario, the action would be in equity because reinstatement is an equitable remedy and thus no jury right applies.<sup>69</sup> In the typical SOX action, however, the plaintiff will seek reinstatement, back pay, and perhaps reputational and mental anguish damages, which presumably would be a SOX action at law because legal relief in the form of monetary damages is sought.<sup>70</sup> Because an action at law seeking monetary damages is the quintessential jury claim, it would appear as though Congress intended for

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<sup>60</sup> *Id.* at 580-81.

<sup>61</sup> *Id.* at 581.

<sup>62</sup> *Id.*

<sup>63</sup> *See supra* note 22.

<sup>64</sup> *See infra* note 101.

<sup>65</sup> *See infra* note 110.

<sup>66</sup> *See infra* note 110.

<sup>67</sup> *See supra* note 22.

<sup>68</sup> *See infra* notes 101 and 102.

<sup>69</sup> *See infra* notes 101, 102, and 116.

<sup>70</sup> *See infra* note 110.

these types of claims to be tried to juries, depending on what Congress meant by the term “de novo review.”

The following subparts examine what Congress likely meant by “de novo review” and whether “de novo review” can be conducted by a jury. The conclusion is that Congress intended for juries to hear a trial *de novo* if a plaintiff brings a SOX action at law.

*i. De novo review means de novo trial*

*De novo* review is a legal term whose meaning varies with the circumstances. Literally, *de novo* means “[a]new; afresh; a second time.”<sup>71</sup> The use of the term “*de novo* review” that immediately comes to mind is in reference to appellate review of a trial court’s legal decisions, such as whether the trial court’s jury instructions misstated the law or whether the trial court properly granted summary judgment.<sup>72</sup> *De novo* review, in this context, does not involve the taking of additional evidence. It is not a trial *de novo*.

Historically, however, the term “*de novo* review” had its origins in equity cases, which appellate courts tried anew.<sup>73</sup> In the ancient English chancery system, *de novo* review of the chancellor’s decision “took the form of a trial *de novo* complete with the taking of testimony and other evidence.”<sup>74</sup> In this country, review in equity cases gradually moved from a complete trial *de novo* to simply appellate review of the record.<sup>75</sup> Today, in state jurisdictions that have chancery courts, the appeal of an equity case generally involves the appellate court reviewing *de novo* the factual findings and legal conclusions made by the chancellor based on the record made in the chancery court.<sup>76</sup> Some level of deference is generally given to the chancellor’s factual findings nowadays because oral testimony is allowed in equity trials.<sup>77</sup> Historically, only written testimony was permitted in equity cases.<sup>78</sup>

Notwithstanding the watered-down version of *de novo* review in modern-day equity cases, *de novo* review generally entails at the very least “an independent

<sup>71</sup> BLACK’S LAW DICTIONARY (6th ed. 1990).

<sup>72</sup> See *Wall Data v. Los Angeles County Sheriff’s Dept.*, 447 F.3d 769, 784 (9th Cir. 2006) (appellate court reviews jury instructions *de novo* to determine instructions misstate the law); *U.S. v. Darif*, 446 F.3d 701, 709 (7th Cir. 2006) (same); *Crigger v. Fahnestock and Co., Inc.*, 443 F.3d 230, 235 (2d Cir. 2006) (same); *Scaife v. Cook County*, 446 F.3d 735, 738-39 (7th Cir. 2006) (appellate court reviews the district court’s grant of summary judgment *de novo*, viewing the facts and drawing all inferences in the light most favorable to the nonmoving party).

<sup>73</sup> See *Waddill v. Anchor Hocking, Inc.*, 78 P.3d 570, 573 (Or. Ct. App. 2003).

<sup>74</sup> See Kelly Kunsch, *Standard of Review (State and Federal): A Primer*, 18 SEATTLE UNIV. L. R. 11, 16 (1994).

<sup>75</sup> *Id.* at 16-18.

<sup>76</sup> See *Arkansas Presbytery v. Hudson*, 40 S.W.3d 301, 305 (Ark. 2001); *Hylar v. Garner*, 548 N.W.2d 864, 870 (Iowa 1996).

<sup>77</sup> See *Hudson*, 40 S.W.3d at 305; Kunsch, *supra* note 74, at 17-18.

<sup>78</sup> See Kunsch, *supra* note 74, at 17-18.

determination of the issues.”<sup>79</sup> In other words, deference is not paid to the previous entity that made a particular decision, whether the entity is a trial court or an administrative agency. The more difficult question is whether the “independent determination” is to be based strictly on the record developed by the prior entity, or whether the entity engaging in the *de novo* review can make a determination based on additional evidence that is generated in the new proceeding. The term *de novo* review is used both ways.<sup>80</sup> Under some federal statutes and laws, *de novo* review does not involve the taking of additional evidence and is confined to the record developed below.<sup>81</sup> In other federal statutes, *de novo* review involves the reviewing entity considering new or additional evidence or conducting a complete trial *de novo*.<sup>82</sup> For SOX purposes, does “de novo review” mean independent fact-finding based solely on what is in the administrative record, or does “de novo review” involve a complete trial *de novo* in which additional evidence that is generated in the civil action itself is considered?

<sup>79</sup> See *United States v. First City Nat’l Bank of Houston*, 386 U.S. 361, 368 (1967) (*de novo* review means the court should make an independent determination of the issues); *Heggy v. Heggy*, 944 F.2d 1190, 1192 (9th Cir. 1990) (“De novo review means we make an independent determination of the issues.”);

<sup>80</sup> See 2 STEVEN ALAN CHILDRESS & MARTHA S. DAVIS, *FEDERAL STANDARDS OF REVIEW* § 15.02 (3d. ed. 1999). See also 5 B. MEZINES, J. STEIN, & J. GRUFF, *ADMINISTRATIVE LAW* § 51.04 (rev. ed. 1985) (court engaged in *de novo* review is not confined to the administrative record, but may pursue whatever further inquiry it finds necessary or proper to the exercise of court’s independent judgment).

<sup>81</sup> In an ERISA benefits denial case in which the standard of review is *de novo*, the district court is confined to the administrative record that was before the Plan Administrator. See *Perry v. Simplicity Engineering*, 900 F.2d 963, 966 (6th Cir. 1990). The Federal Magistrates Act, 28 U.S.C. § 636(b)(1)(B), provides for *de novo* district court review of a magistrate’s recommendations on pretrial motions. The *de novo* review is based on the evidentiary record before the magistrate. See *United States v. Raddatz*, 447 U.S. 667 (1980).

<sup>82</sup> The Privacy Act, 5 U.S.C. § 552a(g), provides a civil action in federal district court to any individual who desires to challenge an agency’s determination not to amend the individual’s record. “In such a case the court shall determine the matter *de novo*.” *Id.* § 552a(g)(2)(A) (emphasis added). The “*de novo*” review in the Privacy Act is not limited to or constricted by the administrative record. See *Doe v. United States of America*, 821 F.2d 694, 698 (D.C. Cir. 1987). The Federal Administrative Procedures Act, 5 U.S.C. § 706(2)(F), provides that a reviewing court shall “hold unlawful and set aside agency action, findings, and conclusions found to be unwarranted by the facts to the extent that the facts are subject to *trial de novo* by the reviewing court.” (emphasis added). The courts have universally interpreted this provision as establishing a *de novo* review standard. In *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 415 (1971), the Supreme Court referred to § 706(2)(F) as providing for *de novo* review, but confined the *de novo* review of agency actions to two circumstances. The Court stated:

*De novo* review of whether the Secretary’s decision was “unwarranted by the facts” is authorized by § 706(2)(F) in only two circumstances. First, such *de novo* review is authorized when the action is adjudicatory in nature and the agency factfinding procedures are inadequate. And, there may be independent judicial factfinding when issues that were not before the agency are raised in a proceeding to enforce non-adjudicatory agency action.

Subsequent cases have revealed that the *Overton Park* decision makes it difficult to convince a court that *de novo* review is authorized under § 706(2)(F). However, it is understood that *de novo* review under the APA permits the consideration of extrinsic evidence outside the administrative record and allows the plaintiff to put on his own case through new testimony and documentary evidence. See *Camp v. Pitts*, 411 U.S. 138, 142 (U.S. 1973); *FTC v. U.S. Roofing Corp.*, 853 F.2d 458, 461 n.5 (6th Cir. 1988); *Stewart v. Potts*, 126 F. Supp. 2d 428, 434 (S.D. Tex. 2000); *La Plaza Defense League v. Kemp*, 742 F. Supp. 792, 799 (S.D.N.Y. 1990); *Cronkhite v. Kemp*, 741 F. Supp. 828, 829-30 (E.D. Wash. 1990); Edward C. Fritz, *Broadening Judicial Review Under the National Forest Management Act*, 3 WISC. ENVTL. L. J. 27, 35 (1996).

“De novo review” in SOX means a full *de novo* trial, in which the finder of fact makes an independent determination of liability and damages based on evidence generated and introduced in the federal court case, for several reasons. First, the SOX legislative history reveals that the use of the word “review” in the statute is not meant to signify that the federal-court factfinder is limited by any administrative record. The legislative history states that the SOX claimant may bring a “de novo case in federal court with a jury trial available.”<sup>83</sup> (emphasis added). The key word in the history is “case.” The legal definition of “case” is “a civil or criminal proceeding, action, suit, or controversy at law or in equity.”<sup>84</sup> In essence, Congress used the term “de novo review” in federal court to say that a claimant could bring an entirely new suit in federal court. Nothing in statute or the legislative history indicates that this new case must be limited to the administrative record before the Department of Labor. Congress did not expressly indicate that de novo review was to be confined to the administrative record; nor did it use the term “substantial evidence,” a term of art which is universally understood to mean review limited to the administrative record.<sup>85</sup>

Second, interpreting “de novo review” in SOX to mean “limited to the administrative record” makes no sense because in most SOX actions brought in federal district court there is little, if any, agency record to review. In general, SOX complainants who choose to file suit in district court do so before the administrative law judge holds an administrative hearing.<sup>86</sup> In those situations, the only relevant administrative document that the fact-finder could possibly “review” is an OSHA preliminary order.<sup>87</sup> The OSHA investigator’s preliminary written findings are based on a brief, initial investigation and only go so far as to state “whether or not there is reasonable cause to believe that the named person has discriminated against the complainant in violation of the Act.”<sup>88</sup> The OSHA preliminary findings are not made after a trial-court like hearing in which both parties have a fair opportunity to present their case.<sup>89</sup> A trial-court like hearing only occurs after the preliminary order is appealed to an administrative law judge.<sup>90</sup> In sum, it belies any sense to think Congress intended

<sup>83</sup> See supra note 27.

<sup>84</sup> BLACK’S LAW DICTIONARY (8th ed. 2004).

<sup>85</sup> See *Chandler v. Roudebush*, 425 U.S. 840, 862 n.37 (“In most instances, of course, where Congress intends review to be confined to the administrative record, it so indicates, either expressly or by use of a term like ‘substantial evidence’ which has ‘become a term of art to describe the basis on which an administrative record is to be judged by a reviewing court.’”) (internal citations omitted).

<sup>86</sup> See Procedures for the Handling of Discrimination Complaints under Section 806 of the Corporate and Criminal Fraud Accountability Act of 2002, Title VIII of the Sarbanes-Oxley Act of 2002, 69 Fed. Reg. 52,104, 52112 (2004) (codified at 29 C.F.R. pt. 1980).

<sup>87</sup> *Hanna*, 348 F. Supp. 2d at 1326-1331. The OSHA preliminary order cannot become a “final decision,” and hence not reviewable in a de novo case, unless the SOX complainant fails to object to the preliminary order within 30 days of receiving the OSHA findings. See 49 U.S.C. § 42121(b)(2)A); 29 C.F.R. § 1980.106(a), (b)(2). If a SOX plaintiff sues in federal district court within 30 days of receiving the OSHA findings, the preliminary order should not be a “final decision.” If a SOX plaintiff sues in federal district court more than 30 days after receiving the OSHA findings, presumably he would have needed to have objected to the findings at the administrative level in order to proceed with the de novo suit. See *Hanna*, 348 F. Supp. 2d at 1325-30.

<sup>88</sup> *Hanna*, 348 F. Supp. 2d at 1331; 29 C.F.R. § 1980.104.

<sup>89</sup> *Id.*

<sup>90</sup> 29 C.F.R. § 1980.107.

for SOX plaintiffs, who sue in federal district court after the 180-day deadline passes and who, to that point, have only received a preliminary finding from OSHA, to be limited to arguing in their “de novo federal court case” whether the OSHA investigator correctly determined if a SOX violation occurred, given that the OSHA investigator has only conducted a brief investigation, no trial-court like hearing has yet to be conducted, and the preliminary “reasonable cause” finding is not even a finding as to whether or not a violation in fact occurred.

Despite the fact that in most SOX actions in federal district court there is little, if any, agency record to review, the statute opens up the possibility that some SOX actions in federal district court will be brought after a substantial agency record has been developed. The statute permits complaints to bring an action in district court for de novo review if there has been no final decision of the Secretary within 180 days of the filing of the administrative complaint and there is no delay due to the complainant’s bad faith.<sup>91</sup> For example, under the literal language of the statute, if an administrative law judge makes a decision 300 days after the administrative complaint is filed that the employer did not violate SOX, the complainant could then appeal the administrative finding to the Administrative Review Board. While the ARB appeal is being conducted, the complainant could then bring suit in federal district court because there has been no “final decision” within 180 days. Similarly, assume the complainant fully litigates the case through the administrative scheme and receives a “final decision” from the Administrative Review Board 500 days after the administrative complaint was filed. The complainant then bring suit in federal district court because the “final decision” of the Secretary did not occur within 180 days of the filing of the administrative complaint.<sup>92</sup> In both of these scenarios, the federal court fact-finder would have a substantial agency record and findings to review.

It is questionable whether the courts will interpret the statute to allow SOX plaintiffs who have had their day in court at the administrative level, through an ALJ hearing and/or ARB appeal, to bring a *de novo* case in federal district court. The Department of Labor takes the position that federal courts should apply collateral estoppel and res judicata principles if a complainant brings a SOX action in federal district court following extensive administrative litigation that has resulted in a decision by an administrative law judge or the ARB.<sup>93</sup> Such principles would be applied to preclude those suits on the basis that Congress did not intend for SOX plaintiffs to get a second bite at the apple, so to speak.

The Department of Labor believes it would be “a waste of the resource of the parties, the Department, and the courts for complainants to pursue duplicative

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<sup>91</sup> 18 U.S.C. § 1514A(b)(1)(B); 29 C.F.R. § 1980.114

<sup>92</sup> 69 Fed. Reg. 52104, 52111 (2004) (“This statutory structure creates the possibility that a complainant will have litigated a claim before the agency, will receive a decision from an administrative law judge, and will then file a complaint in Federal court while the case is pending on review by the Board. The Act might even be interpreted to allow a complainant to bring an action in Federal court after receiving a final decision from the Board, if that decision was issued more than 180 days after the filing of the complaint.”).

<sup>93</sup> 69 Fed. Reg. 52104, 52111 (2004).

litigation.”<sup>94</sup> The Department’s position regarding duplicative litigation after extensive administrative adjudication is certainly understandable on efficiency grounds. Moreover, the allowance of a federal district court suit after a full and complete administrative adjudication would appear to be somewhat at odds with the appellate judicial review procedures allowed under SOX after a full administrative adjudication.<sup>95</sup> However, SOX would not be the first federal employment discrimination statute to be interpreted to allow complainants to fully litigate an administrative complaint and subsequently pursue a *de novo* case in federal court. Federal employees are able to pursue a full administrative adjudication of their Title VII discrimination claims.<sup>96</sup> A federal employee who is displeased with the final decision of the Equal Employment Opportunity Agency may bring a *de novo* civil action in federal district court.<sup>97</sup> *De novo* review for federal employees asserting Title VII claims in federal district court involves a *de novo* trial in which there must be judicial findings concerning liability and remedy based on the evidence introduced in the federal court case, which is not limited to the evidence from the administrative record.<sup>98</sup> In other words, there is a new trial on the entire case on both questions of fact and issues of law conducted as if there had been no administrative trial in the first instance.<sup>99</sup> If a second bite at the apple is allowed in SOX, as it is for federal employees under Title VII, the plain language of the SOX statute and its legislative history indicate that *de novo* review entails a *de novo* trial in which the fact-finder is not limited to consideration of either the administrative record or the administrative findings.

A SOX action in federal district court involves a *de novo* trial on the entire case on both questions of fact and issues of law. The *de novo* trial is conducted as if there had been no administrative proceeding in the first place. The fact-finder is not limited to considerations of the administrative record or the findings of the Department of Labor. The parties should have discovery rights and the ability to introduce a variety of evidence according to the Federal Rules of Civil Procedure and Federal Rules of Evidence, just as they would have if they had filed a typical Title VII action or any other civil action. “*De novo* review” in SOX means *de novo* trial.

ii. *De novo* review allows for a *de novo* jury trial

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<sup>94</sup> *Id.*

<sup>95</sup> See 18 U.S.C. § 1514A(b)(2)(A); 49 U.S.C. § 42121(b)(4)(A); 29 C.F.R. § 1980.112(a).

<sup>96</sup> See 42 U.S.C. § 2000e-16(b).

<sup>97</sup> See 42 U.S.C. § 2000e-16(c); *Chandler v. Roudebush*, 425 U.S. 840 (1976).

<sup>98</sup> See *Chandler*, 425 U.S. at 843-62; *Morris v. Rumsfeld*, 420 F.3d 287, 292 (3d Cir. 2006) (a *de novo* trial under § 2000e-16(c) requires the court to decide the issues essential to the plaintiff’s claims, including liability, without deferring to any prior administrative adjudication); *Scott v. Johanns*, 409 F.3d 466, 471-72 (D.C. Cir. 2005) (“Under Title VII, federal employees who secure a final administrative disposition finding discrimination and ordering relief have a choice: they may either accept the disposition and its award, or file a civil action, trying *de novo* both liability and remedy. They may not, however, seek *de novo* review of just the remedial award.”); *Timmons v. White*, 314 F.3d 1229, 1232-38 (10th Cir. 2003) (plaintiff who brings a *de novo* action under 2000e-16(c) is not entitled to limit review to the issue of remedy only; § 2000e-16(c) action requires independent judicial determination of liability and remedy through a trial *de novo* not confined to the administrative record or administrative findings).

<sup>99</sup> See *Timmons*, 314 F.3d at 1233-34.

De novo review in SOX means *de novo* trial. That is, a new trial on the entire case in which a fresh, independent determination concerning liability and remedy is made. The determination is not limited to or constricted by the administrative record; nor is any deference due the Department of Labor’s conclusions. The next question becomes whether a judge, as opposed to a jury, must make the independent determination. The statute is not clear on this point. The statute does not say that a jury conducts the *de novo* review; nor does it say that the federal judge conducts the *de novo* review. Yet it is likely that Congress intended for *de novo* jury trials.

The main reason why the statute should be interpreted to allow a jury to conduct the *de novo* review, *i.e.*, make factual findings concerning liability and remedial relief, is the legislative history states provides that the whistleblower may bring a “*de novo* case in federal court with a *jury trial* available.”<sup>100</sup> (emphasis added). This is some evidence of Congressional intent. Second, although an understandable knee-jerk reaction would be to associate *de novo* review with decision-making by a judge, as opposed to a jury, it would be unwise to do so here given the fact that the statute specifically allows for the SOX action to be brought at law. Actions at law were typically tried to juries.<sup>101</sup> In contrast, the chancellor acted as the trier of fact and decision-maker on all issues in an action in equity; the equity courts did not grant jury trials.<sup>102</sup> Finally, there are numerous examples of statutes in which a legislature has provided for a *de novo* jury trial. Thus, it would not be ground-breaking for Congress to have intended for a *de novo* jury trial in SOX. In the criminal law context, for example, Tennessee has a two-tiered trial system for juveniles in which a juvenile defendant may opt for a bench trial in the juvenile court.<sup>103</sup> After a bench trial, the defendant may opt to appeal to the circuit court for a *de novo* jury trial.<sup>104</sup> Massachusetts had a similar type of optional *de novo* jury trial system until 1996.<sup>105</sup> In 1970, five states provided a bench trial for misdemeanors from which the defendant could seek *de novo* review by a jury.<sup>106</sup> In the civil law context, Congress provided for a *de novo* jury trial on the amount of an administrative penalty issued by the Secretary of the Interior under the Federal Coal Mine Health and Safety Act of 1969.<sup>107</sup> It has also provided for a *de novo* jury trial in civil actions brought by federal employees under the 1972 amendments to Title VII, which were previously discussed.<sup>108</sup> The jury

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<sup>100</sup> See *supra* note 27.

<sup>101</sup> 1 DAN B. DOBBS, LAW OF REMEDIES, § 2.6(1), at 149 (2d ed. 1993) (“Equity courts did not grant jury trials; law courts did.”).

<sup>102</sup> 1 DAN B. DOBBS, LAW OF REMEDIES, § 2.6(2), at 153 (“The old separate courts of equity did not afford jury trial as of right. The chancellor acted as trier of fact as well as decision-maker on issues of conscience or rules.”).

<sup>103</sup> See *U.S. v. Turner*, 438 F.3d 67, 68-69 (1st Cir. 2006).

<sup>104</sup> *Id.*

<sup>105</sup> See *Johnson v. Mahoney*, 424 F.3d 83, 85 (1st Cir. 2005).

<sup>106</sup> See *Williams v. Florida*, 399 U.S. 78, 137, 141-43 (Harlan, J., dissenting).

<sup>107</sup> See *National Independent Coal Operators’ Ass’n v. Kleppe*, 423 U.S. 388, 393 (1976); Federal Coal Mine Health and Safety Act of 1969, Pub. L. No. 91-173, § 109(a)(4), 83 Stat. 742 (1969).

<sup>108</sup> See 42 U.S.C. § 2000e-16(c); 42 U.S.C. § 1981a(a)(1), (c)(1); *West v. Gibson*, 527 U.S. 212, 221, 227 (1999) (jury trial provision in 1981a(c) applies to complaining party who sues under 2000e-16(c) and seeks compensatory damages).

trial right applies to federal employees who sue in court under § 2000e-16(c) because of the 1991 Civil Rights Act.<sup>109</sup>

*b. The SOX Remedial Provision*

Congress provided in the SOX statute for make-whole relief, which includes “compensatory damages” and “special damages.” A nuanced look at the statute reveals that “compensatory” and “special” damages include monetary damages. Monetary damages that compensate a party for his or her loss are generally viewed as legal relief.<sup>110</sup> Therefore, *Feltner* and *Lorrillard*, cases which focus on the Congressional use of “terms of art” that connote legal relief, instruct the SOX interpretation.

The statutory language is curious. The statute generally provides that the prevailing SOX employee “shall be entitled to all relief necessary to make the employee whole.” The reference in § 1514A(c)(1) to “make-whole” relief does not necessarily take a side as to whether the relief available is legal, equitable, or both.<sup>111</sup> But the description in § 1514A(c)(2) to reinstatement, back pay, and special damages as being “compensatory damages” makes one pause.<sup>112</sup> Compensatory damages are traditionally a legal remedy, but the statute is befuddling if it truly means what it says.<sup>113</sup> Back pay could perhaps be viewed as compensatory damages and thus legal relief, which Part III of the article explains.<sup>114</sup> Special damages in the SOX context, if interpreted to include non-pecuniary damages such as emotional distress, mental anguish, and reputational damages, are also appropriately characterized as “compensatory damages.”<sup>115</sup> Such damages would clearly be legal relief. But reinstatement cannot be characterized as compensatory damages. The remedy of reinstatement has uniformly been viewed as injunctive relief and therefore equitable in nature.<sup>116</sup>

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<sup>109</sup> *Id.*

<sup>110</sup> See *Mertens v. Hewitt Assocs.*, 508 U.S. 248, 255 (1993) (“Money damages are, of course, the classic form of *legal relief*.”); *City of Monterey*, 526 U.S. at 710-11 (“The Court has recognized that compensation is a purpose ‘traditionally associated with legal relief.’”) (quoting *Feltner*, 523 U.S. at 352); *Woodell v. International Brotherhood of Elec. Workers, Local 71*, 502 U.S. 93, 97 (1991) (“Generally, an award of money damages was the *traditional* form of relief offered in the courts of law.”); 1 JAMES WM. MOORE, ET AL., *MOORE’S FEDERAL PRACTICE* § 2.06[1][c] (2006) (if a claim seeks only monetary damages, the claim will usually be legal and the parties entitled to a jury trial because monetary damages were the traditional form of relief offered in the courts of law); 1 John N. Pomeroy, *A Treatise on Equity Jurisprudence* § 237d (5th ed. 1941) (“The award of mere compensatory damages, which are almost always unliquidated, is a remedy peculiarly belonging to the province of the law courts, requiring the aid of a jury in their assessment, and inappropriate to the judicial functions and position of a chancellor.”).

<sup>111</sup> Compare *Rogers v. Hartford Accident Life & Ins. Co.*, 167 F.3d 933, 944 (5th Cir. 1999) (“make whole relief” is actually compensatory, i.e., legal, relief not recoverable under ERISA § 502(a)(3)) with *Squires v. Bonser*, 54 F.3d 168, 172-73 (3d Cir. 1995) (reinstatement, an equitable remedy, advances the policy goals of make-whole relief and deterrence in a way in which money damages cannot).

<sup>112</sup> See 18 U.S.C. § 1514A(c)(2), *supra* note 39.

<sup>113</sup> See *supra* note 110.

<sup>114</sup> See *infra* Part III.A.2.b.

<sup>115</sup> KOHN, *supra* note 1 at 108.

<sup>116</sup> See 1 DAN B. DOBBS, *LAW OF REMEDIES* § 1.2, at 11 (2d ed. 1993), 2 DOBBS, *LAW OF REMEDIES* § 6.10(5) at 226 (reinstatement is an equitable remedy as it is basically injunctive relief and the injunction was historically an equitable remedy); *Great-West Life & Annuity Ins. Co. v. Knudson*, 534 U.S. 204, 211

The answer to this seeming conundrum entails an understanding of the whistleblower provisions in two federal statutes: the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century (AIR21) and the False Claims Act (FCA).<sup>117</sup> The AIR21 whistleblower protection provision prohibits an air carrier from discharging or otherwise discriminating against any employee with respect to compensation, terms, conditions, or privileges of employment because the employee provided to the employer or Federal Government information relating to any violation or alleged violation of any order, regulation, or standard of the Federal Aviation Administration or any other provision of Federal law relating to air carrier safety.<sup>118</sup> The FCA whistleblower protection provision protects employees who report that their employers have submitted fraudulent bills to the United States Government.<sup>119</sup>

The remedial parts of both the AIR21 whistleblower provision and the FCA whistleblower provision are crucial to understanding the remedial portion of the SOX whistleblower provision.<sup>120</sup> The SOX statute provides that DOL administrative proceedings under Sarbanes-Oxley will be governed by the “rules and procedures” of

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n.1 (2002) (injunction is an inherently equitable remedy); *Lorillard*, 434 U.S. at 583 n.11 (“judgments compelling employment, reinstatement, or promotion are equitable.”).

<sup>117</sup> See 49 U.S.C. § 42121 (AIR21); 31 U.S.C. § 3730(h) (FCA).

<sup>118</sup> 49 U.S.C. § 42121(a) provides:

DISCRIMINATION AGAINST AIRLINE EMPLOYEES. No air carrier or contractor or subcontractor of an air carrier may discharge an employee or otherwise discriminate against an employee with respect to compensation, terms, conditions, or privileges of employment because the employee (or any person acting pursuant to a request of the employee)

(1) provided, caused to be provided, or is about to provide (with any knowledge of the employer) or cause to be provided to the employer or Federal Government information relating to any violation or alleged violation of any order, regulation, or standard of the Federal Aviation Administration or any other provision of Federal Law relating to air carrier safety under this subtitle or any other law of the United States;

(2) has filed, caused to be filed, or is about to file (with any knowledge of the employer) or cause to be filed a proceeding relating to any violation or alleged violation of any order, regulation, or standard of the Federal Aviation Administration or any other provision of Federal law relating to air carrier safety under this subtitle or any other law of the United States;

(3) testified or is about to testify in such a proceeding; or

(4) assisted or participated or is about to assist or participate in such a proceeding.

<sup>119</sup> The False Claims Act penalizes contractors who submit fraudulent bills to the United States. 31 U.S.C. §§ 3729-3731. Private individuals can file *qui tam* actions under the Act, and, if successful, take a part of the recovery as a reward for their service. See *Neal v. Honeywell*, 191 F.3d 827, 829 (7<sup>th</sup> Cir. 1999). “*Qui tam*” is an abbreviation of the Latin phrase “*qui tam pro domino rege quam pro si ipso in hac parte sequitur*” meaning “Who sues on behalf of the King as well as for himself.” A *qui tam* action is brought by an informer, under a statute (here the False Claims Act) which establishes a penalty for the commission of a certain act (here submitting fraudulent bills to the federal government), and provides that the same shall be recoverable in a civil action, part of the penalty to go to the person who brings such action and the remainder to the government or some other institution. It is called a “*qui tam* action” because the plaintiff states that he sues *as well* for the government as for himself. BLACK’S LAW DICTIONARY 867 (Abridged 6th ed. 1991). In addition to providing the right to file a *qui tam* action, the Act also contains a whistleblower-protection provision, which prohibits retaliation against employees who turn in their employers for violating the Act. 31 U.S.C. § 3730(h).

<sup>120</sup> See 49 U.S.C. § 42121(b)(3)(B) (AIR21 whistleblower remedies provision); 31 U.S.C. § 3730(h) (FCA whistleblower remedies provision).

AIR21, 49 U.S.C. § 42121(b).<sup>121</sup> Section 42121(b)(3)(B) details the remedies available to a prevailing AIR21 complainant by stating that if a violation occurs, the Secretary of Labor shall order the air carrier to “(i) take affirmative action to abate the violation, (ii) reinstate the complainant to his or her position together with compensation (including backpay) and restore the terms, conditions, and privileges associated with his or her employment; and (iii) provide compensatory damages to the complainant.” (emphasis added).<sup>122</sup> Although compensatory damages are often viewed in the law as encompassing both pecuniary and non-pecuniary damages<sup>123</sup>, the AIR21 whistleblower statute views “compensatory damages” as primarily non-pecuniary, separate and apart from pecuniary damages such as backpay.<sup>124</sup> Indeed, this is not surprising given the fact that the AIR21 remedial provision was modeled, to some extent, off of other federal whistleblower remedial provisions, such as the one in the Energy Reorganization Act.<sup>125</sup> It is established law that “compensatory damages” are available under the ERA whistleblower provision and other environmental whistleblower statutes and that “compensatory damages” under these statutes means non-pecuniary damages, which include recovery for mental anguish, emotional distress, pain and suffering, humiliation, loss of professional reputation, etc.<sup>126</sup> The law in this area was clear at the time Congress enacted Sarbanes-Oxley in July 2002.<sup>127</sup> Although there was little administrative case law on the interpretation of “compensatory damages” under AIR21 at the time SOX was enacted, there is no reason to believe that the term “compensatory damages” in AIR21 means anything other than what it means under the ERA and other whistleblower statutes administered by OSHA. Indeed, six months after SOX’s enactment, an Administrative

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<sup>121</sup> See 18 U.S.C. § 1514A(b)(2)(A) (“IN GENERAL. – An action under paragraph (1)(A) shall be governed under the rules and procedures set forth in section 42121(b) of title 49, United States Code.”). A person who alleges retaliation in violation of SOX may seek relief by “filing a complaint with the Secretary of Labor.” 18 U.S.C. § 1514A(1)(a).

<sup>122</sup> 49 U.S.C. § 42121(b)(3)(B).

<sup>123</sup> See RESTATEMENT (SECOND) OF TORTS § 903 (1979) (“Compensatory damages are the damages awarded to a person as compensation, indemnity, or restitution for harm sustained by him.”). Compensatory damages are divided into two categories: pecuniary and non-pecuniary. *Id.* at §§ 905 and 906. Non-pecuniary compensatory damages include compensation for bodily harm and emotional distress, and are awarded without proof of pecuniary loss. *Id.* at § 905.

<sup>124</sup> *Lawson v. United Airlines, Inc.*, 2002-AIR-6 (ALJ Dec. 20, 2002) (compensatory damages under AIR21 statute may be awarded for emotional pain and suffering, mental anguish, embarrassment, and humiliation).

<sup>125</sup> See *e.g.*, Procedures for the Handling of Discrimination Complaints under Section 519 of the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century, 67 Fed. Reg. 15454 (April 1, 2002) (interim final rule) (in drafting regulations governing AIR21, Assistant Secretary of OSHA gave consideration to the whistleblower regulations of the ERA, when appropriate).

<sup>126</sup> *Hobby v. Georgia Power Co.*, ARB No. 98-166 at 31-35, ALJ No. 1990-ERA-30 (ARB Feb. 9, 2001), affirmed Case No. 01-10916 (11th Cir. 2002) (awarding \$250,000 in compensatory damages for emotional distress and damage to professional reputation); *Van der Meer v. Western Kentucky University*, ARB No. 97-078, ALJ No. 1995-ERA-38 (ARB Apr. 20, 1998) (awarding \$40,000 in compensatory damages for public humiliation); *Creekmore v. ABB Power Systems Energy Services, Inc.*, No. 93-ERA-24 (Feb. 14, 1996) (awarding \$40,000 in compensatory damages for emotional pain and suffering); *Trueblood v. Von Roll America, Inc.*, 2002-WPC-3 to 6, 2003-WP-1 (ALJ Mar. 26, 2003) (awarding \$50,000 in compensatory damages for mental anguish, anxiety, and damage to career aspirations); *Michaud v. BSP Transport, Inc.* ARB No. 97-113, ALJ Case No. 95-STA-29 (ARB Oct. 9, 1997).

<sup>127</sup> *Id.*

Law Judge ruled perfunctorily in an AIR21 case that the AIR21 statute contemplated the possible award of compensatory damages, which included awards for emotional pain and suffering, mental anguish, embarrassment, and humiliation.<sup>128</sup> In short, it would not be too much of a stretch to conclude that SOX remedies include compensatory damages, meaning recovery for non-pecuniary loss, in order to align with AIR21 and ERA law.<sup>129</sup>

The devil’s advocate, however, will point out that the SOX whistleblower statute does not explicitly adopt the AIR21 “rules and procedures” for SOX federal court actions.<sup>130</sup> Indeed, that would have made little sense because the adoption of AIR21 “rules and procedures” is designed to align SOX administrative proceedings with AIR21 administrative proceedings on procedural issues.<sup>131</sup> And, in any event, the statutory reference to AIR21 “rules and procedures” should in no way be interpreted to incorporate AIR21 remedies. “Rules and procedures” are not remedies, despite the fact that the literal language of the statute incorporates all of § 42121(b).<sup>132</sup> Moreover, the statute specifically states that the remedies available in SOX administrative actions and SOX federal court actions are provided in the SOX remedial provision.<sup>133</sup> If Congress intended to explicitly incorporate the AIR21 remedies, it could easily have done so and there would have then been no need for an independent SOX remedial provision. These are all fair points and might be enough, without more, to shoot down the interpretation posited. But, in point of fact, the legislative history bolsters the view that courts should imply the right to a jury trial.

It appears that Congress considered compensatory damages as a distinct remedy, separate and apart from reinstatement and backpay, even though the explicit statutory language would say otherwise. The Section-by-Section analysis of Section 806 states that “[§ 1514A(c)] governs remedies and provides for the reinstatement of the whistleblower, back pay, *and compensatory damages to make a victim whole*, including reasonable attorney fees and costs, as remedies if the claimant prevails.” (emphasis added).<sup>134</sup> The examples of compensatory damages referenced do not specifically include damages for mental anguish, emotional distress, reputational injury, and the like, but the use of the phrase “to make a victim whole” certainly provides fodder for such an

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<sup>128</sup> See *supra* note 126.

<sup>129</sup> Sarbanes-Oxley follows the AIR21 requirement that a complaint will be dismissed if it fails to make a prima facie showing that protected behavior or conduct was a contributing factor in the unfavorable personnel decision alleged in the complaint. The “contributing factor” language is identical to language in the employee protection provisions of ERA and AIR21 and thus should be interpreted pursuant to established interpretations of the phrase under ERA case law. See Procedures for the Handling of Discrimination Complaints Under Section 806 of the Corporate and Criminal Fraud Accountability Act of 2002, Title VIII of the Sarbanes-Oxley Act of 2002, 69 Fed. Reg. 52104, 52106-107 (Aug. 24, 2004) (final rule)

<sup>130</sup> See 18 U.S.C. § 1514A(b)(2).

<sup>131</sup> See *supra* note 17.

<sup>132</sup> Recall that AIR21 remedies are located in 49 U.S.C. § 42121(b)(3)(B).

<sup>133</sup> See 18 U.S.C. § 1514A(b)(1) and (c).

<sup>134</sup> See 148 CONG. REC. S7418 (daily ed. July 26, 2002); CORPORATE FRAUD RESPONSIBILITY: A LEGISLATIVE HISTORY OF THE SARBANES-OXLEY ACT OF 2002, Vol. 3, Doc. No. 85, Corporate and Criminal Fraud Accountability Act of 2002, Senate Report No. 107-146, 13-14 (William Manz ed., William S. Hein & Co., Inc. 2003).

interpretation of the statute.<sup>135</sup> If Congress viewed compensatory damages, backpay, and reinstatement as separate remedies, it becomes easier to see why Senator Leahy stated in the legislative history that jury trials are available in SOX actions. Congress could rightfully have considered backpay and non-pecuniary damages, like reputational and mental anguish damages, to be legal relief in which the Seventh Amendment right to jury trial would attach.<sup>136</sup>

The legislative history inquiry would be more determinative if it included more than just Senator Leahy’s statement about the jury trial guarantee and the statement about the remedial provision in the Section-by-Section analysis, but those two pieces of information appear to be the only legislative history clues. There is nothing else in the legislative history that would either support or contradict the idea that Congress intended to guarantee the right to a jury trial.

If one accepts the argument that Congress adopted the AIR21/ERA interpretation of “compensatory damages” to include reputational and mental anguish damages, which the legislative history seems to support, it would follow that Congress also intended to provide for legal relief.<sup>137</sup> For those unwilling to make that stretch, a more satisfying interpretation is available through comparing the SOX whistleblower provision with the FCA whistleblower provision.

It is a well-known principle of statutory construction that when a federal statute is almost identical to another previously enacted federal statute, the judicial interpretation of language from the prior federal act is persuasive evidence as to the meaning of terms in the later statute, even if the later statute makes no reference to the original statute.<sup>138</sup>

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<sup>135</sup> *Id.*

<sup>136</sup> Culling the legislative history of a statute for signs of intended Congressional meaning, especially when the legislative history is sparse, is a challenging task. The interpreter who takes such a route should remind himself of the possible unreliability of such history and the fact that the exercise is something of a construct because a collective entity cannot have an “intent.” Nelson, *supra* note 39 at 362. But it is nonetheless a useful exercise in the present case. The SOX statute uses remedial terms of art that are intended to convey a particular legal meaning. The meaning can be derived from the way in which the law of remedies tends to define those particular words. But the interpreter must be open to evidence that Congress attached a specific meaning to a particular term, especially when that evidence supports an interpretation that is consistent with remedies law. *See e.g.*, Eskridge & Frickey, *supra* note 39 at 356 (“the original expectations of the Congress that enacted the statute . . . are important in a democracy where the legislature is the primary source of lawmaking . . . . The most authoritative historical evidence is the legislative history of the statute, because it is a contemporary record made by the enacting legislators. In some instances, the legislative history may provide an example or suggest an application that squarely fits within a subsequent interpretive problem.”).

<sup>137</sup> Eskridge & Frickey, *supra* note 39 at 355 (noting that textual analysis of a statute sometimes involves looking “to similar provisions in other statutes, especially those regulating similar things.”).

<sup>138</sup> 2B NORMAN J. SINGER, SUTHERLAND ON STATUTORY CONSTRUCTION, § 52.02 (The fact that a federal statute is almost a literal copy of another federal statute is persuasive evidence of a reenactment of that statute and it is therefore proper to the decision construing the statutory language of the original statute. It is not necessary for the statutes to be identical in order for the rule to apply. As an example, cases construing the Railroad Revitalization & Regulatory Reform Act are relevant to analyze the Federal Motor Carrier Act.).

This concept is related somewhat to the doctrine that related statutes should be read in *pari materia*.<sup>139</sup>

The SOX whistleblower statute and FCA whistleblower statute attack similar evils, both statutes protect employees from retaliation for reporting fraud. SOX prohibits retaliation for reporting corporate fraud; the FCA prohibits retaliation for reporting governmental fraud. Therefore, it would not be surprising if the remedial provisions of both these statutes were similar. In fact, they are almost identical.<sup>140</sup> The fact that Congress appears to have lifted the remedial language in the FCA statute and placed it on the SOX statute should lead to the conclusion that Congress intended FCA whistleblower case law to govern the meaning of remedial terms in the SOX statute and the right to a jury trial.<sup>141</sup> If that is the case, Congressional intent to provide the opportunity for SOX plaintiffs to seek legal relief in the form of non-pecuniary damages and obtain a jury trial becomes evident.

Both SOX and the FCA allow for the recovery of “compensation for any special damages sustained as a result of the discrimination.” Prior to the passage of SOX, the federal courts of appeals had uniformly interpreted “special damages” in the FCA retaliation context to include damages for emotional distress on the ground that back pay and reinstatement are the usual consequences of the FCA retaliation violation, while emotional distress damages are the unusual consequence of such a violation, and thus are special damages according to the established common-law meaning of “special

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<sup>139</sup> *Id.* at § 51.03 (in determining whether a statute should be read in *pari materia*, the guiding principle is that if it is natural and reasonable to think that the understanding of members of the legislature be influenced by another statute, then a court called on to construe the act in question should allow itself to be similarly influenced).

<sup>140</sup> Compare the SOX remedial language, *see supra* Part II.A., with the FCA remedial language. The FCA remedial provision, 31 U.S.C. § 3730(h) states: “[a]ny employee who is discharged . . . shall be entitled to all relief necessary to make the employee whole. Such relief shall include reinstatement with the same seniority status such employee would have had but for the discrimination, 2 times the amount of backpay, interest on the backpay, and compensation for any special damages sustained as a result of the discrimination, including litigation costs and reasonable attorneys’ fees.” The primary difference between SOX and the FCA is that the FCA provides for double back pay. The SOX legislative history demonstrates that S. 2010, Corporate and Criminal Fraud Accountability Act of 2002, as introduced to the Senate on March 12, 2002, contained the double back pay remedy. See CORPORATE FRAUD RESPONSIBILITY: A LEGISLATIVE HISTORY OF THE SARBANES-OXLEY ACT OF 2002, Vol. 3., Doc. No. 78 S., 2010, Corporate and Criminal Fraud Accountability Act of 2002, as introduced, 10 (William Manz ed., William S. Hein Co., Inc. 2003). Section 806 of the Sarbanes-Oxley Act tracked almost exactly the provisions of S. 2010. See 148 CONG. REC. S7418 (daily ed. July 26, 2002). Section 806, as enacted, does not contain a double back pay remedy. See 18 U.S.C. § 1514A(c)(2)(B). SOX also specifically allows for the recovery of expert witness fees. *Id.* at § 1514A(c)(2)(C). The FCA does not specifically list expert witness fees as a form of special damages. See 31 U.S.C. § 3730(h). Neither SOX nor the FCA contain a punitive damages remedy, although punitive damages were a part of the SOX remedial structure in S.2010, as introduced. See CORPORATE FRAUD RESPONSIBILITY, Vol. 3, No. 78, at 10-11.

<sup>141</sup> Felix Frankfurter, *Some Reflections on the Reading of Statutes*, 47 COLUM. L. REV. 527, 537 (1947) (“Words of art bring their art with them. They bear the meaning of their habitat . . . . And if a word is obviously transplanted from another legal source, whether the common law *or other legislation*, it brings the old soil with it.”) (emphasis added).

damages.”<sup>142</sup> None of the appellate courts had ruled against the recovery of emotional distress damages on the basis that emotional distress damages are not “special damages” under the FCA because they are not listed in the statute as an example of special damages.<sup>143</sup> The limited case law indicates that FCA retaliation cases have been tried to juries.<sup>144</sup> Because FCA whistleblower plaintiffs are entitled to a jury trial, SOX whistleblower plaintiffs should have the same right. Implying the right to jury trial in SOX actions would also be consistent with court decisions that have implied the right to a jury trial in other federal anti-discrimination statutes that provide for lost wages and other damages.<sup>145</sup>

Finally, consider the question from Judge Posner’s “imaginative reconstruction” perspective.<sup>146</sup> Imaginative reconstruction is an interpretive technique that requires a judge to “think his way as best he can into the minds of the enacting legislators and imagine how they would have wanted the statute applied to case at bar.”<sup>147</sup> Imaginative reconstruction is typically associated with intentionalists, but not all commentators believe that textualists repudiate the concept.<sup>148</sup> Professor Nelson argues that textualists use imaginative reconstruction when deciding severability of a statute, deciding how to conform a statute to dubious precedent a court is not prepared to overrule, criticizing the use of imaginative reconstruction in particular cases, and interpreting certain ambiguous statutes.<sup>149</sup> While commentators may disagree as to the propriety of the technique, I believe it aids in deducing this interpretive puzzle.<sup>150</sup>

In addition to the typical items that have already been surveyed—Supreme Court precedent, statutory structure, contemporary statutes on related enactments, and legislative history, the imaginative reconstructionist looks at the values and attitudes of the period in which the legislation was enacted and considerations drawn from a broadly based conception of the public interest.<sup>151</sup> The SOX whistleblower statute was enacted in the wake of corporate scandals that left investors and pensioners penniless when the house of cards built by Enron and WorldCom tumbled down. Congress chose to provide a judicial remedy to future discharged corporate whistleblowers—not merely an administrative remedy. The public has a stake in holding corporations to account when

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<sup>142</sup> See *Hammond v. Northland Counseling Center, Inc.*, 218 F.3d 886, 893 (8th Cir. 2000); *Neal v. Honeywell*, 191 F.3d 827, 832 (7th Cir. 1999).

<sup>143</sup> *Id.*

<sup>144</sup> See *Neal*, 191 F.3d at 829; *Wilkins v. St. Louis Housing Authority*, 198 F. Supp. 2d 1080, 1082-1085 (E.D. Mo. 2001).

<sup>145</sup> See *Frizzell v. Southwest Motor Freight*, 154 F.3d 641, 642-44 (6th Cir. 1998) (jury right implied in FMLA).

<sup>146</sup> Posner, *supra* note 43 at 817.

<sup>147</sup> *Id.*

<sup>148</sup> Nelson, *supra* note 39 at 403-04.

<sup>149</sup> *Id.* at 403-13.

<sup>150</sup> The seminal example of imaginative reconstruction is Judge Learned Hand’s opinion in *Fishgold v. Sullivan Drydock & Repair Corporation*, 154 F.2d 785 (2d Cir. 1946). Judge Hand used imaginative reconstruction to decide whether a veterans reemployment right provided in a federal statute should be construed narrowly or broadly based in part on the public circumstances at the time of the enactment. *Id.* at 788-89. Judge Hand used imaginative reconstruction because the statutory language was ambiguous. I advocate imaginative reconstruction because the statutory language in SOX is similarly befuddling.

<sup>151</sup> Posner, *supra* note 43 at 818-20.

whistleblowers are penalized for reporting corporate fraud because it wants to preempt an Enron replay. Against that background it is likely that Congress would have wanted the public to have some role in making findings concerning corporations who punish employees for reporting corporate fraud.<sup>152</sup> The jury, a cross-section of the community that speaks for the general public, is the logical choice to serve as the conduit of the public interest in this area of public concern. Part III of this article will elaborate on the role of the jury in SOX whistleblower actions.

The remedial parts of the AIR21 whistleblower provision and the FCA whistleblower provision, along with the SOX legislative history, reveal that the SOX remedial provision's reference to reinstatement as "compensatory damages" is simply a mistake. Congress believed that reinstatement, back pay, and compensatory/special damages were three separate remedies. "Special damages" and "compensatory damages" were interchangeable terms used by Congress primarily to enforce the notion that non-pecuniary damages—emotional distress, mental anguish, and reputational damages, for example—are allowable under SOX, just as they are in AIR21 and FCA whistleblower cases. Viewing SOX remedies in this light, Senator Leahy's reference in the legislative history to the right to a jury trial in SOX actions is understandable. Congress provided SOX whistleblowers with an action at law to pursue legal relief in the form of non-pecuniary damages and back pay. Congress had no need to explicitly provide a jury trial right in the statute itself because the Seventh Amendment guaranteed the right in cases where the SOX plaintiff requested legal relief. Accordingly, courts may imply a statutory right to a jury trial in cases where SOX plaintiffs seek non-pecuniary damages. Such an interpretation coincides with the statutory purpose and is consistent with the relevant precedent concerning implying the right to a jury trial in a statute.

### III. THE CONSTITUTIONAL QUESTION: SOX AND THE SEVENTH AMENDMENT

If the federal courts decline to imply the right to a jury trial from the SOX whistleblower statute, they must grapple with the constitutional question: whether the Seventh Amendment to the United States Constitution guarantees the right to a jury trial for SOX cases brought in federal court. The answer to this question, according to Supreme Court precedent, turns on whether the nature of the SOX action is best viewed as an action at law or one in equity and whether the nature of the relief provided by the SOX statute is legal or equitable. The vast majority of practitioners, scholars, and judges lack a detailed knowledge of the historical divide between law and equity. Delaware is an example of a jurisdiction that maintains the historical distinction between law and equity, but it is the exception to the rule.<sup>153</sup> Most attorneys operate in civil procedure systems that have merged law and equity entirely. The federal civil procedure system, of course, is the prime example. With the adoption of the Rules Enabling Act in 1934 and

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<sup>152</sup> See, e.g., *Fishgold*, 154 F.2d at 788-89 ("Against that background [situation that existed in September 1940 as to whether the United States would send troops overseas to war] it is not likely that a proposal would then have been accepted which gave industrial priority, regardless of their length of employment, to unmarried men—for the most part under thirty—over men in the thirties, forties, or fifties, who had wives and children dependent upon them.").

<sup>153</sup> See *Weston Inves. v. Domtar Indus.*, 832 A.2d 1253 (Del. 2002) ("Delaware proudly guards the historic and important distinction between legal and equitable jurisdiction.").

Federal Rule of Civil Procedure 2 in 1938, the merger of law and equity in the federal system became complete.<sup>154</sup> Although memories of the divided bench have faded, the distinction between law and equity is of considerable practical importance in determining whether the right to a jury trial exists on a statutory cause of action that does not expressly or impliedly grant a jury-trial right.<sup>155</sup>

The jury trial clause of the Seventh Amendment states: “In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved.”<sup>156</sup> The Supreme Court has stated that the Seventh Amendment right to a jury trial covers more than traditional common-law actions that existed in 1791.<sup>157</sup> The right also applies to newly-enacted federal statutes that create legal rights and remedies.<sup>158</sup> An early Supreme Court case, *Parsons v. Bedford*, interpreted the Framers’ use of the term “common law” to include all suits in which “legal rights were to be ascertained and determined, in contradistinction to those where equitable rights alone were administered.”<sup>159</sup> The *Parsons* court presumed the amendment to embrace all suits “which are not of equity and admiralty jurisdiction, whatever might be the peculiar form which they may assume to settle legal rights.”<sup>160</sup> More recently, the Court stated that the applicability of the constitutional right to jury trial in actions enforcing statutory rights, if the statute creates legal rights and remedies, enforceable in an action for damages in the ordinary courts of law, is a matter “too obvious to be doubted.”<sup>161</sup>

Nonetheless, Congress maintains the power “to take some causes of action outside the scope of the Seventh Amendment by providing for their enforcement through a statutory proceeding or in a specialized court.”<sup>162</sup> In *National Labor Relations Board v. Jones & Laughlin Steel Corporation*, for example, the Board ordered a steel company to reinstate employees and pay back wages for engaging in unfair labor practices.<sup>163</sup> The steel company argued that it was constitutionally entitled to a jury trial, instead of a Board determination, because the lost wages award was equivalent to a monetary judgment.<sup>164</sup> The Court labeled the suit a “statutory proceeding” and, as such, not subject to the Seventh Amendment requirements.<sup>165</sup> Subsequent cases, which refined the *Jones & Laughlin* holding, revealed that the Seventh Amendment is not applicable to

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<sup>154</sup> See 28 U.S.C. § 2072; FED. R. CIV. P. 2 (“There shall be one form of action to be known as ‘civil action.’). The creation of one form of action – the “civil action” – merged the systems of law and equity and eliminated the practice of having a “law side” and an “equity side,” each “side” having its own particular rules and procedures. 1 JAMES WM. MOORE ET AL., MOORE’S FEDERAL PRACTICE § 2.02[2][a] (3d ed. 1997).

<sup>155</sup> See 1 MOORE’S FEDERAL PRACTICE § 2.06[1][A] (1997).

<sup>156</sup> U.S. Const., Amend. VII.

<sup>157</sup> 9 CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE & PROCEDURE § 2302.2 (2d ed. 1994).

<sup>158</sup> 1 MOORE’S FEDERAL PRACTICE § 2.06[1][b] (1997).

<sup>159</sup> 3 Pet. (28 U.S.) 433, 446-447 (1833).

<sup>160</sup> *Id.*

<sup>161</sup> Curtis, 415 U.S. at 192-193 (1974), quoting *Rogers v. Loether*, 467 F.2d 1110, 1114 (7th Cir. 1972).

<sup>162</sup> 9 WRIGHT & MILLER, FEDERAL PRACTICE & PROCEDURE § 2302.2.

<sup>163</sup> 301 U.S. 1 (1937).

<sup>164</sup> *Id.* at 48.

<sup>165</sup> *Id.*

administrative proceedings, at least when so-called “public rights” are concerned, due to the incompatibility between administrative adjudication and jury trials.<sup>166</sup> Similarly, the Seventh Amendment is not implicated when Congress limits enforcement of statutory rights to specialized, non-Article III courts, such as bankruptcy courts.<sup>167</sup>

Under current Supreme Court case law, the SOX whistleblowers that remain in the SOX administrative scheme and do not opt out to federal court are not protected by the Seventh Amendment. An Administrative Law Judge will hear those cases; no jury will be involved at the administrative level. However, the Seventh Amendment right is implicated for the SOX whistleblowers that leave the administrative process for search of greener pastures in federal court. For those whistleblowers, whether the right to a jury trial exists depends on whether the SOX action resolves legal rights.<sup>168</sup> This entails a two-part analysis—the so-called “historical test.” First, one must compare the SOX action to 18th-century actions brought in the courts of law and equity in England to determine whether it is more analogous to legal forms of action existing at that time, or to equitable forms. Second, one must examine the nature of the relief sought, the remedies, to determine whether the relief is most appropriately viewed as legal or equitable.<sup>169</sup> Due to the inherent difficulties in divining a precise historical analogue, the second part of the test is generally viewed as the most important.<sup>170</sup> If the SOX action is an action at law, one must also consider which particular issues in the case must be tried by a jury in order to preserve the substance of the common-law right as it existed in 1791.<sup>171</sup>

### A. The Historical Approach

The historical test traces its roots back to Justice Story’s 1812 circuit opinion in *United States v. Wonson*.<sup>172</sup> In *Wonson*, Justice Story held that in order to determine in which civil cases the Seventh Amendment jury right applies, courts must look to the English common law.<sup>173</sup> Justice Story later expounded in the *Parsons* case that “suits at common law” referred to suits in which legal rights were to be ascertained and

<sup>166</sup> *Tull v. United States*, 481 U.S. 412, 418, n.4 (1987); *Atlas Roofing Co. v. Occupational Safety & Health Review Comm’n*, 430 U.S. 442, 460-61 (1977); *Pernell v. Southall Realty*, 416 U.S. 363, 383 (1974).

<sup>167</sup> *See Katchen v. Landy*, 382 U.S. 323, 336-337 (1966); *but see Granfinanciera, S.A. v. Nordberg*, 492 U.S. at 64 (fraudulent conveyance action in bankruptcy court subject to Seventh Amendment right to jury trial).

<sup>168</sup> *Chauffeurs, Teamsters, & Helpers Local No. 391 v. Terry*, 494 U.S. 558, 565 (1990).

<sup>169</sup> *Id.*; 1 MOORE’S FEDERAL PRACTICE § 2.06[1][c] (1997).

<sup>170</sup> *Tull v. United States*, 481 U.S. 412, 421 (1987); 1 MOORE’S FEDERAL PRACTICE § 2.06[1][c] n. 12 (collecting cases).

<sup>171</sup> *City of Monterey v. Del Monte Dunes*, 526 U.S. 687, 708, 718 (1999).

<sup>172</sup> 128 F. Cas. 745 (C.C.D. Mass. 1812) (No. 16,750).

<sup>173</sup> *Id.* at 750 (“Beyond all question, the common law here alluded to . . . is the common law of England, the grand reservoir of all our jurisprudence. It cannot be necessary . . . to expound the grounds of this opinion, because they must be obvious to every person acquainted with the history of the law.”).

determined, as opposed to equitable rights.<sup>174</sup> These two cases served as the foundation for the traditional Seventh Amendment analysis employed by the Supreme Court.<sup>175</sup>

Various commentators have criticized the traditional Seventh Amendment approach. Charles Wolfram, the leading Seventh Amendment scholar, argued that the historical materials do not support the historical test's allegiance to the English common law and concluded that the historical test is inconsistent with the "traditions of principled constitutionalism that have guided the Supreme Court in the interpretation of other commands of the Bill of Rights."<sup>176</sup> Kenneth Klein labeled the historical test a two hundred year old myth and analogized the historical test to the parable of the emperor's clothes.<sup>177</sup> Klein claimed that no historical materials support the view that the Seventh Amendment's reference to common law referred to English common law.<sup>178</sup> Akhil Reed Amar opined that the Supreme Court's historical test is not the best reading of the amendment.<sup>179</sup> Stanton Krauss bluntly stated that the Supreme Court's understanding of the Seventh Amendment is based on nineteenth century revisionist history.<sup>180</sup> He concluded that Justice Story's interpretation of the jury trial clause in *Wonson and Parsons* was not based on the clause's text and history, but on the result that Story preferred.<sup>181</sup> Each of these commentators—Wolfram, Klein, Amar, and Krauss—suggest various alternative approaches to the Seventh Amendment.<sup>182</sup>

In spite of the criticism, the historical test's vitality has remained relatively constant over the last one hundred plus years and it appears unlikely that the test will be abandoned altogether by the Court.<sup>183</sup> Therefore, the remainder of the article focuses

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<sup>174</sup> 28 U.S. 433, 447 (1830).

<sup>175</sup> See, e.g., Rachael E. Schwartz, "Everything Depends on How You Draw the Lines": *An Alternative Interpretation of the Seventh Amendment*, 6 SETON HALL CONST. L. J. 599, 600-02 (1996).

<sup>176</sup> Charles W. Wolfram, *The Constitutional History of the Seventh Amendment*, 57 MINN. L. REV. 639, 721, 731 (1973).

<sup>177</sup> Kenneth S. Klein, *The Myth of How to Interpret the Seventh Amendment Right to a Civil Jury Trial*, 53 OHIO ST. L. J. 1005 (1992).

<sup>178</sup> *Id.* at 1022 ("There is no recorded legislative history suggesting that the phrase "common law" referred to the common law of England. Nor is support found in the records of the state debates, the Federalist papers, or the writings of the commentators of the time.").

<sup>179</sup> Akhil Reed Amar, *The Bill of Rights: Creation and Reconstruction*, 89-90 (1998).

<sup>180</sup> Stanton D. Krauss, *Commentary on Akhil Reed Amar's the Bill of Rights: Creation and Reconstruction The Original Understanding of the Seventh Amendment Right to Jury Trial*, 33 U. RICH. L. REV. 407, 460, 475 (1999) ("Whatever its precise scope, the interpretation of the Jury Trial Clause that Justice Story propounded in *Parsons*, which he claimed to reflect the original understanding of its Creators, was pure ipse dixit. Worse yet, it seems clearly to have been wrong.").

<sup>181</sup> *Id.* at 478.

<sup>182</sup> See *infra* Part III.B.2.

<sup>183</sup> In *City of Monterey v. Del Monte Dunes*, 526 U.S. 687 (1999), the Supreme Court reaffirmed the historical test in a regulatory takings claim brought under Section 1983. In deciding the Seventh Amendment question, the Court looked at whether the claims brought under Section 1983 were analogous to common law claims that provided legal relief. *Id.* at 708-11. The majority held that the § 1983 suit in question sought legal relief and therefore constituted an action at law within the meaning of the Seventh Amendment. *Id.* at 709-11. The majority then considered whether particular issues in the § 1983 suit were proper for determination by the jury under the Seventh Amendment. Justice Kennedy, writing for the majority, stated that history dictated whether particular issues in actions at law had to be tried by a jury, but noted that "[w]here history does not provide a clear answer, we look to precedent and functional

primarily on whether the Seventh Amendment guarantees the jury trial right on SOX actions under the historical test. My application of the SOX remedial scheme to the historical test shows that the Seventh Amendment does guarantee a jury trial in certain SOX actions. And, when the jury right attaches, the jury's primary role concerns making the factual determination as to whether the plaintiff has proven the elements of a SOX action and assessing damages. However, in light of the academic commentary criticizing the historical test, this part also applies the SOX action to various alternative approaches of the Seventh Amendment. The article ends by elaborating on the importance of the jury right in SOX actions.

### 1. *Nature of the Right*

The first part of the historical test is to compare the SOX claim to historical legal forms of action and complaints in equity available in England circa 1791 in order to determine whether it is more analogous to legal forms of action existing at that time or to complaints appropriate at equity.<sup>184</sup> The answer to the first part of the test is not crystal clear in large measure because a SOX action could encompass both legal and equitable issues.<sup>185</sup> Indeed, Congress specifically provided for a complainant to bring the action at law or equity.<sup>186</sup> But in broad terms a SOX action is best characterized as an action at law.

A SOX whistleblower claim provides a remedy to an employee of a publicly-traded company who reports corporate fraud either externally or internally and suffers an adverse employment action because of the report.<sup>187</sup> Such an action has no exact counterpart in 18th-century England. Indeed, there were relatively few publicly-traded companies in 18th-century England.<sup>188</sup> The few publicly-traded companies that existed

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considerations.” *Id.* at 718. The “functional consideration” in *Del Monte Dunes* was whether the issues in question were predominantly factual. Because the issue in the Section 1983 action at law was predominantly a factual one, and factual issues are usually allocated to juries, the Court determined that the issue in question should go to the jury. *Id.* at 719-721. Although somewhat hazy, *Del Monte Dunes* indicates that “functional considerations” might in some circumstances be a part of the Seventh Amendment analysis. *Markman v. Westview Instruments, Inc.*, 517 U.S. 370 (1996), a patent case, could also be interpreted to stand for the proposition that function and process considerations play some part in a Seventh Amendment analysis, although *Markman* seems to view “functional considerations” differently than *Del Monte Dunes*. Regardless, at least one commentator opines that neither *Markman* nor *Del Monte Dunes* suggest any “radical change” to the traditional Seventh Amendment historical test. Margaret L. Moses, *What the Jury Must Hear: The Supreme Court's Evolving Seventh Amendment Jurisprudence*, 68 GEO. WASH. L. REV. 183, 256 (2000). To the extent the Supreme Court is open to expanding its Seventh Amendment analysis to include functional considerations, however the Court defines that term, the tea leaves do not show that the Court intends to do away with the traditional approach altogether.

<sup>184</sup> Terry, *supra* note 123 at 565.

<sup>185</sup> *Id.* at 570 (employees action against Union for breach of duty of fair representation encompassed both legal and equitable issue and thus left the Court “in equipoise as to whether [employees]” were entitled to a jury trial under the Seventh Amendment.

<sup>186</sup> 18 U.S.C. § 1514A(b)(1)(B).

<sup>187</sup> 18 U.S.C. § 1514A(a)-(b).

<sup>188</sup> Daniel M. Klerman and Paul G. Mahoney, *The Value of Judicial Independence: Evidence from 18th Century England* at 6, University of Southern California Law School, Law and Economics Working Papers Series, Berkeley Electronic Press, <http://law.bepress.com/usclwps/art24> (2005).

were strongly tied to the government of England and are substantially different from modern publicly-traded companies.<sup>189</sup> Although no exact counterpart exists, English common law courts heard breach of contract, tort, and *qui tam* claims. A SOX whistleblower claim is essentially a specialized wrongful termination suit analogous to a breach of contract, tort, or *qui tam* claim that would likely have been brought in an English common law court and tried to a jury in the late 1700's.

The modern American employment at-will rule—that a worker can be fired at any time for a good reason, bad reason, or no reason at all—did not carry the day in 18th-century England.<sup>190</sup> The English rule at that time presumed annual, fixed-term employment.<sup>191</sup> The English rule, as expounded by William Blackstone<sup>192</sup>, had its origins in feudal-era laws such as the Statute of Labourers which were designed to deal with labor shortages and deadly epidemics such as the plague.<sup>193</sup> The Statute of Labourers prohibited a servant from leaving employment before the end of a term, but also prohibited the master from discharging the servant before the end of a term absent reasonable cause.<sup>194</sup> Although the Statute of Labourers was later repealed, the presumption in favor of annual term employment with job protection for servants remained a part of English law throughout the 18th-century.<sup>195</sup> Wrongful discharge claims brought by English servants circa 1791 were viewed as common-law breach of contract actions and tried by juries in common-law courts such as the King's Bench and

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<sup>189</sup> *Id.* at 27-28.

<sup>190</sup> See *Montgomery County Hosp. Dist. v. Brown*, 965 S.W.2d 501, 502 (Tex. 1998) (“For well over a century, the general rule in this State [Texas], as in most American jurisdictions, has been that absent a specific agreement to the contrary, employment may be terminated by the employer or the employee at will, for good cause, bad cause, or no cause at all.”). The at-will rule did not appear as a staple of American employment law until the late nineteenth/early twentieth century and appears to have been spurred by Horace Wood’s 1877 treatise on master servant relations, H. WOOD, *MASTER AND SERVANT* § 134 (1877), which provided:

With us the rule is inflexible, that a general or indefinite hiring is prima facie a hiring at will, and if the servant seeks to make it out a yearly hiring, the burden is on him to establish it by proof. A hiring at so much a day, week, month or year, no time being specified, is an indefinite hiring, and no presumption attaches that it was for a day even, but only at the rate fixed for whatever time the party may serve.

<sup>191</sup> See *The King v. Inhabitants of Hampreston*, 101 Eng. Rep. 116 (K.B. 1793); Timothy J. Heinsz, *The Assault on the Employment at Will Doctrine: Management Considerations*, 48 MO. L. REV. 855, 859 (1983).

<sup>192</sup> 1 William Blackstone, *Commentaries* 413 (1765).

If the hiring be general without any particular time limited, the law construes it to be a hiring for a year; upon a principle of natural equity, that the servant shall serve, and the master shall maintain him, throughout all the revolutions of the respective seasons, as well when there is work to be done as when there is not.

<sup>193</sup> RICHARD CARLSON, *EMPLOYMENT LAW* 651 (2005).

<sup>194</sup> See Statute of Labourers, 23 Edw. III, c.1 (1349), Statute of Labourers, 5 Eliz. I, c.4 (1562); Jay M. Feinman, *The Development of the Employment at Will Rule*, 20 AM. J. LEGAL HIST. 118, 120 (1976); Heinsz, *supra* note 191 at 859.

<sup>195</sup> See Heinsz *supra* note 191 at 859 (“In the eighteenth and nineteenth centuries, the English rule provided that unless expressed to the contrary, a term of employment was presumed to be for one year.”); 25 Halsbury’s *Laws of England* 480-81 (3d ed. 1958).

Common Pleas.<sup>196</sup> Because an improper employment discharge in 18th-century England would have been viewed as a breach of contract claim remediable by the English common law, a SOX whistleblower action, which at its core is a wrongful discharge claim for implied breach of contract, is analogous to a common-law breach of employment contract claim and thus an action at law in which the right to jury trial is preserved by the Seventh Amendment.<sup>197</sup>

Another apt analogy is to tort law. *Curtis v. Loether* and *Del Monte Dunes* affirm the general principle that a federal statutory claim that allows for monetary damages upon the violation of an imposed legal duty—just like SOX—sounds in tort, and thus a plaintiff asserting such a claim is entitled to a jury trial.<sup>198</sup> The *Curtis* case concerned a suit for violations of the fair housing provisions of Title VIII of the Civil Rights Act of 1968, a race discrimination statute.<sup>199</sup> The *Del Monte Dunes* case involved a § 1983 action for deprivation of property.<sup>200</sup> In both cases, the Court explained why the statutory causes of action were best characterized as tort claims and made clear that a tort action seeking monetary damages, although provided for by statute and not the common law, is generally a “suit at common law” for which the Seventh Amendment guarantees a jury trial.<sup>201</sup>

The *Curtis* Court stated that a Title VIII damages action sounds in tort because “the statute merely defines a new legal duty, and authorizes the courts to compensate a plaintiff for the injury caused by the defendant’s wrongful breach.”<sup>202</sup> The *Del Monte Dunes* Court concluded that a § 1983 action fits within both the historical and modern definition of a tort claim in that “torts are remedies for invasions of certain rights, such as the rights to personal security, personal liberty, and property . . .” and are “designed to

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<sup>196</sup> See E. ALLEN FARNSWORTH, CONTRACTS, §§ 1.5, 11.2 (2d ed. 1990) (breach of contract actions were typically tried at common law in eighteenth-century England); *Lebow v. American Trans Air, Inc.*, 86 F.3d 661 (7th Cir. 1996) (“Employment by contract was the rule in eighteenth-century England, so an improper discharge would have been viewed as a [common-law] breach of contract action.”); *accord* *Stonehill College v. Massachusetts Commission Against Discrimination*, 808 N.E.2d 205, 214 n.15 (Mass. 2004); *Magnan v. Anaconda Indus., Inc.*, 479 A.2d 781 (Conn. 1984). Examples of wrongful discharge cases heard by English juries in common-law courts include *Fawcett v. Cash*, 110 Eng. Rep. 1026 (K.B. 1834) and *Beeston v. Collyer*, 4 Bing. 309, [1824-1834] All E.R. 292 (C.P. 1827).

<sup>197</sup> See, e.g., *Lebow v. American Trans Air, Inc.*, 86 F.3d 661, 669 (7th Cir. 1996) (wrongful discharge claim for engaging in union activities under Railway Labor Act analogous to common-law breach of contract action); *Waldrop v. Southern Co. Services, Inc.*, 24 F.3d 152, 156 (11th Cir. 1994) (unlawful discharge claim under Rehabilitation Act analogous to common-law breach of contract action); *Hill v. Winn-Dixie Stores, Inc.*, 934 F.2d 1518, 1524 (11th Cir. 1991) (constructive discharge claim under Jury System Improvements Act analogous to common-law breach of contract action); *Smith v. Barton*, 914 F.2d 1330, 1337 (9th Cir. 1990), cert. denied, 501 U.S. 1217 (1991) (unlawful discharge claim under Rehabilitation Act is closely analogous to breach of express or implied employment contract claim); *Rogers v. Exxon Research & Engineering Corp.*, 550 F.2d 834, 838 (3d Cir. 1977) (ADEA suit for back wages is essentially a “routine contract action” in which the Seventh Amendment guarantees a jury trial).

<sup>198</sup> *Curtis v. Loether*, 415 U.S. 189 (1974); *City of Monterrey v. Del Monte Dunes at Monterrey, LTD*, 526 U.S. 687 (1999).

<sup>199</sup> *Curtis*, 415 U.S. at 189-90.

<sup>200</sup> *Del Monte Dunes*, 526 U.S. at 693.

<sup>201</sup> *Curtis*, 415 U.S. at 195-98; *Del Monte Dunes*, 526 U.S. at 707-33.

<sup>202</sup> *Curtis*, 415 U.S. at 196.

provide compensation for injuries arising from the violation of legal duties.”<sup>203</sup> Both Courts indicated that a statutory tort action for money damages is an action for which the jury right attaches because tort claims for money damages were triable to juries at common law.<sup>204</sup> Other Supreme Court and federal appellate court cases also reflect this interpretation of the Seventh Amendment.<sup>205</sup> Because SOX essentially defines a new legal duty—publicly-traded companies cannot legally fire employees who report covered corporate fraud—and provides monetary compensation for injury caused by such a violation—a SOX plaintiff is entitled to back pay and special damages upon proof of a violation, a SOX action sounds in tort and the jury-trial entitlement applies.

The final analogy, one which has instinctive intuitive appeal, is to *qui tam* actions available in eighteenth century-England. During that period of time, the King’s Bench, an English common law court, had jurisdiction over common law writs of debt.<sup>206</sup> Some of these writs of debt concerned *qui tam* actions—statutory causes of action by informers to recover statutorily imposed penalties.<sup>207</sup> Apparently, English law had a statute similar to the False Claims Act, which allowed an informer to recover penalties on behalf of himself and the King for spotting and blowing the whistle on some sort of illegal activity.<sup>208</sup> Such claims were tried at common law, presumably to juries.<sup>209</sup> The analogy of the SOX action to these *qui tam* actions, which were brought as writs of debt at common law, is particularly well-founded. The English *qui tam* actions compensated informers for reporting illegal activity.<sup>210</sup> The SOX action protects the jobs of employees who report illegal activity and ultimately provides make-whole relief to those who suffer an adverse employment action for making such a report.<sup>211</sup>

The clearest eighteenth-century analogy to the SOX action is the *qui tam* action tried in the King’s Bench courts. However, the historical evidence also supports the view that the modern-day SOX action is closely comparable to common-law breach of contract and tort actions, which were primarily tried to juries. In any event, each one of these

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<sup>203</sup> *Del Monte Dunes*, 526 U.S. at 727 (Scalia, J., concurring).

<sup>204</sup> *Curtis*, 415 U.S. at 195 n.10; *Del Montes Dunes*, 526 U.S. at 715-19 (plurality), 727-731 (Scalia, J., concurring).

<sup>205</sup> *See Pernell v. Southall Realty*, 416 U.S. 363, 370 (1974) (“This Court has long assumed that . . . actions for damages to a person or property . . . are actions at law triable to a jury”); *Ross v. Bernhard*, 396 U.S. 531, 533 (1970) (“The Seventh Amendment . . . entitles the parties to a jury trial in actions for damages to a person or property . . .”); *see e.g.*, *Lebow v. American Trans Air, Inc.*, 86 F.3d 661, 669 (7th Cir. 1996) (unlawful discharge suit under Railway Labor Act is comparable to common-law tort action); *Pandazides v. Virginia Board of Education*, 13 F.3d 823, 829 (4th Cir. 1994) (Rehabilitation Act is essentially a form of statutory tort).

<sup>206</sup> Douglas King, Comment, *Complex Civil Litigation and the Seventh Amendment Right to a Jury Trial*, 51 U. CHI. L. REV. 581, 598-99 (1984).

<sup>207</sup> *Id.* at 599.

<sup>208</sup> *Id.*

<sup>209</sup> Examples of *qui tam* cases heard in King’s Bench include *Shipman v. Henbest*, 4 T.R. 109, 100 Eng. Rep. 921 (K.B. 1790) (illicit sale of leather); *Brooke v. Milliken*, 3 T.R. 509, 100 Eng. Rep. 705 K.B. 1789) (illicit sale of imported reprints of books originally written and published in the United Kingdom). *See King supra* note 161 at n.100.

<sup>210</sup> *Id.* at 599.

<sup>211</sup> 18 U.S.C. § 1514A.

close analogies supports the contention that the Seventh Amendment preserves the right to jury trial on SOX whistleblower claims.

## 2. *The Nature of the Remedy*

The second part of the historical test focuses on the nature of the relief sought.<sup>212</sup> Is the SOX relief sought legal or equitable in nature? In other words, harkening back to the days of the divided bench, would the SOX remedies generally have been sought in the courts of law or in the courts of equity?<sup>213</sup> In order to make such a determination, it is necessary to list the possible available remedies in a SOX action. The SOX remedial scheme is designed to “make whole” the prevailing corporate whistleblower.<sup>214</sup> The “make whole” relief includes reinstatement, back pay, special damages.<sup>215</sup>

The historical and conceptual evidence demonstrates that whereas reinstatement is an equitable remedy, back pay and special damages are legal remedies. Thus, in a SOX case in federal court in which a plaintiff sues for reinstatement, back pay, and special damages, the Seventh Amendment guarantees a jury trial because the plaintiff has asserted claims to legal remedies, back pay and special damages, even though an equitable remedy, reinstatement, is also asserted. The fact that the right to equitable relief in the form of reinstatement is claimed does not vitiate the application of the jury right. In *Dairy Queen v. Wood*, the Court ruled that when there are two remedies asserted in a case, one legal and one equitable, a jury trial is required as long as the right to the remedies turns on common issues of fact.<sup>216</sup> The Court embraced the concept of a constitutionally-required jury trial on all factual issues presented by claims for legal relief, even if those issues also concerned claims for equitable relief and the equitable relief dominates the legal relief.<sup>217</sup> The following part of the article elaborates on why SOX reinstatement is an equitable remedy, why SOX back pay and special damages are legal remedies, and why the Seventh Amendment guarantees a jury trial in SOX whistleblower actions that seek back pay and special damages.

### a. *SOX Reinstatement*

Relatively little time need be spent on the question of the reinstatement remedy, the answer of which has been alluded to in Part II.B. of the article. Professor Dobbs

<sup>212</sup> See *supra* note 169.

<sup>213</sup> *Tull v. United States*, 481 U.S. 412, 417-418 (1987) (citations omitted).

<sup>214</sup> 18 U.S.C. § 1514A(c)(1) (“An employee prevailing in [a SOX action] shall be entitled to all relief necessary to make the employee whole.”); KOHN, *supra* note 1 at 102 (“The heart of a SOX damage award is a ‘make whole’ remedy. . . . Under the SOX, the ‘make whole’ remedy authorizes a court to award all relief necessary to make an employee ‘whole.’”).

<sup>215</sup> 18 U.S.C. § 1514A(c)(2); KOHN, *supra* note 1 at 102.

<sup>216</sup> 369 U.S. 469 (1962); 2 DAN B. DOBBS, *LAW OF REMEDIES* § 6.10(5) at 225 (2d ed. 1993).

<sup>217</sup> “[O]nly under the most imperative circumstances, circumstances which in view of the flexible procedures of the Federal Rules we cannot now anticipate, can the right to a jury trial of legal issues be lost through prior determination of equitable claims.’ That holding, of course, applies whether the trial judge chooses to characterize the legal issues presented as ‘incidental’ to equitable issues or not.” *Dairy Queen v. Wood*, 369 U.S. 469, 472-73 (1962) (internal citations omitted).

perfunctorily noted that reinstatement is “essentially injunctive relief.”<sup>218</sup> Indeed, SOX suits in federal court to enforce preliminary reinstatement orders by the Department of Labor have been brought as suits for injunctive relief.<sup>219</sup> It seems beyond dispute that the injunction is the quintessential equitable remedy from a historical standpoint.<sup>220</sup> Moreover, the Supreme Court has made “clear that judgments compelling employment, reinstatement, or promotion are equitable.”<sup>221</sup> Accordingly, the nature of the SOX reinstatement remedy is best characterized as an equitable one that historically was available in the courts of equity.

*b. SOX Back Pay*

The characterization of monetary remedies for Seventh Amendment purposes and for determining statutory authorization of relief has confounded the Supreme Court, the federal courts, and commentators for many years.<sup>222</sup> In particular, the back pay remedy’s characterization has proven to confuse too many courts in too many contexts.<sup>223</sup> But the confusion is unnecessary in the SOX context. The SOX back pay remedy is simply a part of monetary compensation, *i.e.*, a damages award, and is thus in the nature of legal relief.<sup>224</sup> To explain why this is so requires a description of what SOX back pay comprises, an analysis of the nature of back pay and its history, an historical comparison of the SOX back pay remedy to other remedies at law, a refresher on the law of restitution, and an avoidance of Title VII cases which incorrectly characterize back pay as equitable.

SOX back pay is a substantial part of the SOX “make whole” remedial scheme.<sup>225</sup> Its purpose is to restore the whistleblower to the same position he would have been in but for the illegal discharge or other illegal adverse employment action.<sup>226</sup> It is measured by the difference between the actual earnings the whistleblower made from the time he first lost wages due to the illegal discharge to the date of judgment and those he would have earned absent the illegal discharge.<sup>227</sup> Stated differently, a SOX back pay award should include all the compensation the whistleblower would have received but for the illegal firing—lost wages, raises, overtime compensation, bonuses, vacation pay, and retirement

<sup>218</sup> 2 DOBBS, LAW OF REMEDIES § 6.10(5) at 226 (2d. ed. 1993).

<sup>219</sup> See *Bechtel v. Competitive Technologies, Inc.*, 2006 U.S. App. LEXIS 10926, 24 I.E.R. Cas. (BNA) 641 (2d Cir. 2006); *Welch v. Cardinal Bankshares Corp.*, 407 F. Supp. 2d 773 (W.D. Va. 2006).

<sup>220</sup> See *supra* note 116.

<sup>221</sup> See *supra* note 116.

<sup>222</sup> See Colleen P. Murphy, *Misclassifying Monetary Restitution*, 55 S.M.U. L. REV. 1577, 1607-28 (2002).

<sup>223</sup> *Id.* at 1628-35.

<sup>224</sup> See *supra* note 110.

<sup>225</sup> KOHN, *supra* note 1 at 106 (“reinstatement and back pay are usually the two most significant elements of a [SOX] ‘make whole’ remedy”).

<sup>226</sup> *Id.* at 105, quoting the basic black letter law concerning the calculation of whistleblower back pay from *Hobby v. Georgia Power Co.*, ALJ No. 1990-ERA-30, Recommended Decision and Order of ALJ, at 57 (internal citations omitted).

<sup>227</sup> *Id.* at 106. See *e.g.*, ABIGAIL MODJESKA, EMPLOYMENT DISCRIMINATION LAW § 12.09 at 28 (3d ed. 1993) (“The backpay period normally covers the entire period during which plaintiff was precluded from performing his or her job by the employer’s wrongful employment action, excluding periods during which plaintiff would not have been earning wages.”); *Welborn v. Reynolds Metal Co.*, 868 F.2d 389 (11th Cir. 1989); *Walsdorf v. Board of Commissioners*, 857 F.2d 1047 (5th Cir. 1988).

benefits.<sup>228</sup> SOX back pay truly is compensation in the form of damages. A SOX back pay award is ultimately reflected in a money judgment.

Back pay did not exist as a common-law remedy.<sup>229</sup> However, back pay is a standard remedy in many employment discrimination and whistleblower statutes.<sup>230</sup> It is remedially similar to a contract claim for past wages due that would have been brought in a law court.<sup>231</sup> Most importantly, SOX backpay is a form of compensatory damages because the award is measured by *the whistleblower's loss as opposed to the employer's gain*.<sup>232</sup> Any remedy, like back pay, that is in the nature of compensatory damages is a legal remedy.<sup>233</sup>

A SOX back pay claim cannot fairly be categorized as restitutionary and thus equitable because back pay neither aims to prevent an employer's unjust enrichment nor does it restore "in kind" a specific thing to the whistleblower.<sup>234</sup> Without question some

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<sup>228</sup> See RICHARD CARLSON, *EMPLOYMENT LAW* 992 (2005); *Gutzwiller v. Fenik*, 860 F.2d 1317, 1333 (6th Cir. 1988); *Cox v. American Cast Iron Pipe Co.*, 784 F.2d 1546, 1562 (11th Cir. 1986), *cert. denied*, 479 U.S. 883 (1986).

<sup>229</sup> See *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 48 (1937); *Millsap v. McDonnell Douglas Corp.*, 368 F.3d 1246, 1252 (10th Cir. 2004).

<sup>230</sup> See 42 U.S.C. § 2000e-5(g)(1) (upon a Title VII violation, the court may "order such affirmative action as may be appropriate, which may include, but is not limited to, reinstatement or hiring of employees with or without back pay . . . , or any other equitable relief as the court deems appropriate."); 5 U.S.C. § 1221(g)(1)(A) (under the Whistleblower Protection Act, a federal employee who is entitled to corrective action under the WPA is to be "placed, as nearly as possible, in the position the individual would have been in had the prohibited personnel practice not occurred." The individual is also entitled to "back pay and related benefits.").

<sup>231</sup> 2 HENRY H. PERRITT, JR., *EMPLOYEE DISMISSAL LAW AND PRACTICE*, § 9.46 at 363-65 (4th ed. 1998); 2 DOBBS, *LAW OF REMEDIES* § 6.10(5) at 226 (2d ed. 1993) ("Back pay claims do not differ remedially from the personal injury claim for lost wages, or the contract claim for past wages due[.];" *Smith v. Diffe Ford-Lincoln-Mercury, Inc.*, 298 F.3d 955, 964 (10th Cir. 2002).

<sup>232</sup> See *Strayer supra* note 30 at 825 ("With back pay, employees receive compensation for wages they would have earned if they had been employed and also fringe benefits. . . . Back pay is not wrongfully withheld wages; rather, it is damages for an employer's breach of a duty it owed to an employee."); 2 DOBBS, *LAW OF REMEDIES* § 6.10(5) at 227 n.15 (2d ed. 1993) ("Back pay might be considered restitutionary if it were measured by the defendant's gain rather than the plaintiff's loss, that is, if it were aimed at preventing unjust enrichment. But that is not the case; it is aimed at compensation and measured by the plaintiff's loss."); *Millsap*, 368 F.3d at 1253 ("Backpay is compensatory because the award is measured by an employee's loss rather than an employer's gain.").

<sup>233</sup> See *supra* note 110; *Murphy supra* note 222 at 1633 ("The back pay remedy is more appropriately characterized as damages for plaintiffs losses and thus legal relief."); *Waldrop*, 24 F.3d at 158 ("it has long been the general rule that back wages are legal relief in the nature of compensatory damages."); 2 DOBBS, *LAW OF REMEDIES*, § 6.10(5) at 226 (2d ed. 1993) (back pay is an ordinary damages claim, close to an exemplar of a claim at law); 1 DAN B. DOBBS, *LAW OF REMEDIES* § 1.1-1.2 at 3, 11 (2d ed. 1993) ("The damages remedy is a money remedy aimed at making good the plaintiff's losses. . . . The damages remedy was historically a legal remedy."); 1 ARTHUR G. SEDGWICK & JOSEPH H. BEALE, *A TREATISE ON THE MEASURE OF DAMAGES*, § 3 at 3 (1920) ("equity . . . gives specific relief by decreeing the very thing to be done which was agreed to be done . . . But, as a general rule, it refrains from awarding pecuniary reparation for damage sustained.").

<sup>234</sup> The term "restitution" is generally viewed to mean recovery based on and measured by a defendant's unjust enrichment, see *RESTATEMENT OF RESTITUTION* § 1 comments a, d (1937); 1 GEORGE E. PALMER, *THE LAW OF RESTITUTION* § 2.10 at 140 (1978), and/or restoration in kind of a specific thing. See 1 DOBBS

courts in employment discrimination suits have been led down the primrose path and have labeled back pay as restitutionary simply because back pay's purpose is to restore the plaintiff to the original position he would have been in but for the wrongful employment decision.<sup>235</sup> But, as many restitution scholars and courts have noted, that sort of an understanding of restitution is wrong because it destroys any conceptual distinction between compensatory damages and restitution.<sup>236</sup> Moreover, even if a restitution characterization was appropriate, which it is not, that still would not render SOX back pay as equitable.<sup>237</sup> Historically, restitution claims for money were asserted primarily in the courts of law, not the courts of equity, through the writ of assumpsit and standardized under the law of quasi-contract, a distinct species of common-law obligation.<sup>238</sup> Back pay, at the very most, is a restitution claim for money which is best characterized as legal restitution, not equitable restitution.<sup>239</sup>

Federal court decisions concerning the characterization of Title VII back pay for Seventh Amendment purposes should not be heeded in the SOX back pay context for various reasons. Although the Supreme Court has never specifically ruled on whether back pay under Title VII is legal or equitable for jury trial purposes<sup>240</sup>, the lower federal courts have routinely held that a jury trial is not guaranteed when a plaintiff seeks back

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LAW OF REMEDIES, § 4.1(1) at 551 (2d ed. 1993); *see also* Douglas Laycock, *The Scope and Significance of Restitution*, 67 TEX. L. REV. 1277, 1278-82 (1979). The Supreme Court is open to characterizing monetary damages as equitable in cases where the damages are viewed as restitutionary—*i.e.*, damages are being used to prevent unjust enrichment. *See* Terry, 494 U.S. at 570-71; Tull, 481 U.S. at 424, Curtis, 415 U.S. at 197. In Terry, the Court ruled that backpay in a breach of contract action against a union for violating a duty of fair representation did not qualify as restitutionary because it did not seek to prevent unjust enrichment on the part of the union. Terry, 494 U.S. at 570-71 (“The backpay sought by respondents is not money wrongfully held by the Union, but wages and benefits they would have received from McLean had the Union processed the employers’ grievances properly. Such relief is not restitutionary.”).

<sup>235</sup> *See, e.g.*, Schwartz v. Gregori, 45 F.3d 1017, 1022 (6th Cir. 1995) (backpay is restitutionary in that it “operates to restore to the plaintiff that to which she would have enjoyed but for the employer’s illegal retaliation.”).

<sup>236</sup> Murphy *supra* note 222 at 1632; Laycock *supra* note 234 at 1282-83. *See also* In re Acushnet River & New Bedford Harbor, 712 F. Sup. 994, 1002 (D. Mass. 1989) (“Were the Court to accept the argument that a monetary award is restitutionary simply because it returns a party to pre-injury status, little would be left in the realm of compensatory damages.”).

<sup>237</sup> *See* 2 DOBBS, LAW OF REMEDIES, § 6.10(5) at 227 (2d ed. 1993) (“[I]t is said that back pay is not legal after all, but is equitable because it is restitutionary. This point appears to be doubly wrong, since a claim does not become equitable by being restitutionary.”).

<sup>238</sup> *See* Murphy *supra* note 222 at 1632 (“[M]ost restitutionary claims for money were asserted in the law courts.”); 1 DOBBS, LAW OF REMEDIES, § 1.2, 11, § 4.1(1), 556, § 4.2, 570-586 (2d ed. 1993) (“Restitution claims for money are usually ‘claims at law’”); 2 DOBBS, LAW OF REMEDIES, § 6.10(5), 227 n.15 (2d ed. 1993) (“Restitution claims at law include *all* the quasi-contract claims based on assumpsit, such as those based on common counts like *money had and received* and *quantum meruit*.”); FREDERIC WOODWARD, THE LAW OF QUASI-CONTRACTS, § 2, 2-4 (1913); Moses v. MacFerlan, 2 Burr. 1005, 97 Eng. Rep. 676 (K.B. 1760).

<sup>239</sup> *See, e.g.*, Sereboff v. Mid Atlantic Medical Services, Inc., 126 S. C. 1869 (2006); Great-West Life & Annuity Ins. Co. v. Knudson, 534 U.S. 204 (2002) (distinguishing between restitutionary relief available at law and restitutionary relief available in equity).

<sup>240</sup> *See* Murphy *supra* note 222 at 1629 (“in cases between Terry and Great-West, the Supreme Court has expressly stated that it has not yet decided whether back pay under Title VII is legal or equitable for jury trial purposes.”)

pay under Title VII.<sup>241</sup> Many of these courts rationalized that the specific language in Title VII’s remedial provision<sup>242</sup> demonstrated that Congress considered back pay as equitable under Title VII in that back pay was just an “integral part of the statutory equitable remedy” or “only incidental” to equitable relief provided by the statute.<sup>243</sup> The notion that Title VII back pay is equitable was argued to be supported by the historical equitable clean-up doctrine—that is in certain cases when the Chancellor issued an equitable remedy, such as an injunction, he could award money if it was incidental to the equitable remedy.<sup>244</sup> Some courts also intimated that Title VII back pay was an equitable remedy because the Title VII remedial language arguably provided discretion to the courts as to the availability of back pay.<sup>245</sup>

The Title VII back pay rationalization has no business guiding future courts concerning the characterization of SOX back pay for several reasons. First, the Seventh Amendment historical analysis would be of little use if courts give a blank check to Congress to characterize remedies in such a way as to defeat the protections of the Seventh Amendment.<sup>246</sup> If the Title VII cases are followed, Congress could label any sort of remedy an equitable remedy, even if it is undisputed that the remedy was historically a legal remedy, and thus bypass the Seventh Amendment. Second, and in any event, the SOX remedial provision is vastly different from the Title VII. In no way does the language reflect Congressional determination that back pay is equitable.<sup>247</sup> To the contrary, back pay is labeled as a part of compensatory damages.<sup>248</sup> Third, for good

<sup>241</sup> See 2 DOBBS, LAW OF REMEDIES, § 6(10)5, 226 n.10 (2d. ed. 1993) (listing courts of appeals cases rejecting jury trials on Title VII claims).

<sup>242</sup> See *supra* note 230.

<sup>243</sup> See Stephen F. Lazor, *Comment, Jury Trial in Employment Discrimination Cases—Constitutionally Mandated?*, 53 TEX. L. REV. 483, 485, 500 (1974); *Johnson v. Georgia Highway Express, Inc.*, 417 F.2d 1122, 1125 (5th Cir. 1969).

<sup>244</sup> See 1 POMEROY, *supra* note 110 §§ 231-242 (describing when equitable-clean up doctrine applied); 1 DOBBS, LAW OF REMEDIES, § 2.6(4), 169, § 2.7, 180 (2d. ed. 1993) (discussing equitable clean-up doctrine), A. Leo Levin, *Equitable Clean-Up and the Jury: A Suggested Orientation*, U PA. L. REV. 320, 320-31 (1951) (same); *Harkless v. Sweeney Independent Sch. Dist.*, 427 F.2d 319, 324 (5th Cir. 1970) (back pay is an integral part of the remedy of injunctive reinstatement and so no jury right attaches).

<sup>245</sup> See 2 DOBBS, LAW OF REMEDIES, § 6.10(5), 228 (2d. ed. 1993); *Albamarle Paper Co. v. Moody*, 422 U.S. 405, 442-43 (1975) (Rehnquist, J., concurring).

<sup>246</sup> Concerning his suggestion that the historical test is not the best reading of the Seventh Amendment, Professor Akhil Reed Amar argues that the core of the Seventh Amendment was directed at the states, not Congress, in part, because “a Congress bent on evading civil juries could draft statutes sounding in equity, not law.” AMAR, *supra* note 179 at 92. Amar’s insight—that the jury right could be malleable based on Congressional labeling—is certainly a concern. If the historical test is to have any bite whatsoever, however, courts must be sensitive to unhistorical Congressional labeling intended to defeat the jury right, even if the rationale underlying the Congressional action could be viewed as beneficent. For example, fear of jury prejudice after the passage of Title VII has been viewed as a pragmatic reason why the courts refused to grant jury trials in Title VII cases. See Lazor *supra* note 243 at 506-07.

<sup>247</sup> The SOX statute lists reinstatement, back pay, and special damages under compensatory damages, but the legislative history indicates that reinstatement, back pay, and compensatory damages, i.e., non-economic damages, are separate remedies. Although the statute lists reinstatement under compensatory damages, reinstate is clearly an equitable remedy. The statute does not specifically state whether back pay is legal or equitable.

<sup>248</sup> See 18 U.S.C. § 1514A(c)(2). Once again, although the statute list back pay under compensatory damages, the legislative history indicates that back pay and compensatory damages are separate remedies.

reason, the idea that the equitable clean-up doctrine can be used to prevent a truly legal claim from being tried to a jury has been soundly rejected by the Supreme Court due to the merger of law and equity in the federal courts.<sup>249</sup> Stretched to its outermost limits, the equitable clean-up doctrine would gobble up all cases in which legal and equitable remedies are asserted in the same action, even when the legal and equitable remedies are independent and equally important to the plaintiff, which severely encroaches on the jury trial guarantee.<sup>250</sup> Finally, the suggestion that the discretionary nature of a remedy due to Congressional action makes it “equitable” in the sense that the remedy could only have been brought in the courts of equity is unpersuasive.<sup>251</sup> While it is true that the hallmark of equity is the discretion given to the Chancellor, this general principle hardly means Congress should have the power to take a legal remedy and make it equitable by imbuing the remedy with discretion.<sup>252</sup> Regardless, Congress did not imbue the SOX back pay remedy with such discretion. If a plaintiff proves unlawful retaliation and lost wages, he is entitled to back pay.<sup>253</sup>

*c. SOX Special Damages*

SOX provides “compensation for any special damages sustained as a result of the discrimination, including litigation costs, expert witness fees, and reasonable attorney’s fees.”<sup>254</sup> The “special damages” relief falls under the heading of “COMPENSATORY DAMAGES.”<sup>255</sup> Part II.B. argues that the terms “compensatory damages” and “special damages” in the SOX remedial provision should be interpreted to include damages to reputation, emotional distress damages, and other non-pecuniary damages. The argument sprung from an analysis of other federal whistleblower laws—AIR 21, ERA, and the FCA, each of which allow for recovery of the pecuniary and non-pecuniary damages

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<sup>249</sup> *Beacon Theaters, Inc. v. Westover*, 359 U.S. 500 (1959); *Dairy Queen, Inc. v. Wood*, 369 U.S. 469, 470-73 (1962); *Setser v. Novack Investment Co.*, 638 F.2d 1137, 1141 (8th Cir. 1981), *opinion vacated on other grounds, cert. denied*, 454 U.S. 1064 (1981) (“the judicial analysis that has construed backpay as incidental to reinstatement appears to be the theoretical equivalent of the repudiated ‘clean-up’ doctrine in equity.”).

<sup>250</sup> SOX reinstatement and back pay are listed as separate kinds of the overall relief of “Compensatory Damages” and thus are not intertwined for Seventh Amendment purposes. The statute states that a prevailing plaintiff “shall” be entitled to reinstatement, back pay, and special damages upon a violation. It appears conceivable that in any one SOX action not all remedies will be available. However, reinstatement, or at least front pay, and back pay appear to be “automatic” remedies in almost all SOX actions in which the complainant or plaintiff prevails. See KOHN, *supra* note 1 at 104-05. It looks as though many SOX cases will arise in which the potential back pay award is extremely large and as such will be hard to view as “incidental” to the reinstatement remedy. See BUREAU OF NATIONAL AFFAIRS (BNA), INC., *Split Second Circuit Rejects Enforcement By Court of Preliminary SOX Reinstatement*, DAILY LABOR REPORT, No. 86, May 4, 2006, Page AA-1 (OSHA investigatory issued a preliminary reinstatement order as well as approximately \$350,000 to complainant for losses and costs resulting from the wrongful termination).

<sup>251</sup> See 2 DOBBS, *LAW OF REMEDIES*, § 6.10(5), 228 (2d ed. 1993).

<sup>252</sup> See Doug Rendleman, *Chapters of the Civil Jury*, 65 KY. L. J. 769, 775-76 (1977) (stating that conditioning the right to a jury trial on whether a monetary remedy is discretionary is a “novel and aberrant” view and should be discarded).

<sup>253</sup> See *supra* Part II.A..

<sup>254</sup> *Id.*

<sup>255</sup> *Id.*

listed above under the umbrella of either “compensatory” or “special” damages.<sup>256</sup> The argument is consistent with the common law meaning of “special damages,”<sup>257</sup> which Congress is presumed to have intended,<sup>258</sup> and SOX’s stated policy to provide “make whole” relief to prevailing whistleblowers.<sup>259</sup> Thus, special and compensatory damages in the form of emotional distress damages and reputational damages are available under SOX. These damages qualify as legal relief, not equitable relief, because they traditionally have been associated with the law courts and determined by juries.<sup>260</sup>

The nature of the SOX action and remedial provision demonstrate that the Seventh Amendment preserves the right to jury trial on certain SOX claims. The SOX action is most analogous to historical forms of action that were brought in the law courts.<sup>261</sup> The SOX remedies are split between legal and equitable remedies. SOX reinstatement is an equitable remedy.<sup>262</sup> SOX back pay, emotional distress damages, reputational damages, and other compensatory/special damages are legal remedies.<sup>263</sup> Thus, when a SOX plaintiff asserts in his original complaint in federal court that he seeks reinstatement, back pay, and special damages for emotional distress, or merely reinstatement and back pay, the action asserts legal remedies such that the right to a jury trial attaches as to all issues concerning the legal remedies even though an equitable issue is also present in the form of a request for injunctive relief.<sup>264</sup> The following describes the functions of the judge and the jury in this scenario.

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<sup>256</sup> See *supra* Part II.B.

<sup>257</sup> General damages are those that naturally flow from the civil violation in question. In contrast, special damages are those that, although flowing from the wrong, are unusual for the type of claim in question. See 2 JAMES WM. MOORE, ET AL., MOORE’S FEDERAL PRACTICE § 9.08[1][a] (1997); *Avita v. Metropolitan Club of Chicago*, 49 F.3d 1219, 1226 (7th Cir. 1995); CHARLES MCORMICK, HANDBOOK ON THE LAW OF DAMAGES, § 8, 33 (1935). Fed. R. Civ. P. 9(g) requires a plaintiff to specifically plead “special damages.” In the SOX context, lost wages in the form of back pay are general damages because they are normal in wrongful discharge cases, emotional distress damages and reputational damages are special damages because they are not the run-of-the-mill damages in wrongful discharge cases.

<sup>258</sup> It is a longstanding principle of statutory construction that Congress intends to adopt the common-law definition of a statutory term unless otherwise stated. See *United States v. Wells*, 519 U.S. 482, 491 (1997); *United States v. Shabani*, 513 U.S. 10, 13 (1994); *Nationwide Mut. Ins. Co. v. Darden*, 503 U.S. 318, 322 (1992); *Morisette v. United States*, 342 U.S. 246, 263 (1952); *Bohac v. Dep’t of Agriculture*, 239 F.3d 1334, 1339 (Fed. Cir. 2001).

<sup>259</sup> Compensatory damages are intended to make the injured party completely whole. See KOHN, *supra* note 1 at 108. In wrongful discharge/whistleblower cases, compensatory damages have included compensation for “emotional distress, pain and suffering, mental anguish, lost future earnings capacity . . . harassment, humiliation, loss of professional reputation, ostracism.” *Id.* See also HENRY H. PERITT, JR., EMPLOYEE DISMISSAL LAW AND PRACTICE, § 5.33, 319 (2nd ed. 1987) (“courts have awarded compensatory damages for the tort of wrongful dismissal which include lost earnings, lost future earnings, expenses of finding a new job, and mental anguish.”); *Hanna v. WCI Communities, Inc.*, 348 F. Supp. 2d 1332, 1334 (S.D. Fla. 2004) (damages for reputational injury available under SOX).

<sup>260</sup> See *supra* note 110.

<sup>261</sup> See *supra* Part III.A.1.

<sup>262</sup> See *supra* Part III.A.2.a.

<sup>263</sup> See *supra* Part III.A.2.b.-c.

<sup>264</sup> See WRIGHT & MILLER *supra* note 112 § 2308, 82.

The Supreme Court now has made it wholly clear that a claim that otherwise would be triable to a jury must be so tried even though it may be thought “incidental” to a claim for

### 3. *Allocating the Functions of Judge and Jury*

The fact that the jury right attaches to a SOX action in federal district court does not mean that the jury will hear every issue that may arise in the case.<sup>265</sup> The *Del Monte Dunes* and *Markman* cases elaborate on how to determine which issues must go to the jury in order to preserve the substance of the jury right.<sup>266</sup> The preference is to once again engage in a historical analysis, comparing the modern issue to an analogous issue that existed in 1791 when history is clear as to whom decided the older issue—the judge or jury.<sup>267</sup> However, if history does not supply an answer, existing precedent and functional considerations guide the determination.<sup>268</sup> In the absence of an exact historical analogue, the key to determining which SOX issues go to the judge and which go to the jury is to focus on the distinction between fact questions and legal questions.<sup>269</sup> In general, the Seventh Amendment desires to ensure that juries decide questions of fact and judges decide questions of law.<sup>270</sup>

An historical analysis sheds some light on which SOX issues must be decided by the jury to preserve the substance of the Seventh Amendment right. English juries in the late 18th-century assessed both economic and, at times, non-economic damages because damages assessments were primarily fact-based determinations.<sup>271</sup> Accordingly, the amount of back pay, reputational damages, and mental anguish damages in a SOX action ought to be determined by a jury. The SOX liability questions, however, have no exact counterparts and therefore a historical analysis concerning these issues is more difficult.

In general, the SOX action is analogous to breach of implied contract, tort, and *qui tam* claims<sup>272</sup>, which were brought in the English common law courts, but the

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an injunction. The order of trial must be arranged so that any issues common to the legal claim and the claim for an injunction are tried to a jury at the outset, with the court thereafter resolving any purely equitable issues in the case.

<sup>265</sup> *Del Monte*, 526 U.S. at 731 (Scalia, J., concurring) (“To say that the respondents had the right to a jury trial on their § 1983 claim is not to say that they were entitled to have the jury decide every issue. The precise scope of the jury’s function is the second Seventh Amendment issue before us here . . .”).

<sup>266</sup> *Del Monte Dunes*, 526 U.S. at 718-23, 731-32; *Markman*, 517 U.S. at 377-91.

<sup>267</sup> *Del Monte Dunes*, 526 U.S. at 718; *Markman*, 517 U.S. at 378.

<sup>268</sup> *Del Monte Dunes*, 526 U.S. at 718; *Markman*, 517 U.S. at 384.

<sup>269</sup> *Del Monte Dunes*, 526 U.S. at 720 (“In actions at law predominantly factual issues are in most cases allocated to the jury”); *Id.* at 731 (Scalia, J., concurring) (favoring a methodology, which, if history does not supply an answer, recognizes the historical preference for juries to make factual determinations and for judges to decide legal questions)

<sup>270</sup> See *Baltimore & Carolina Line, Inc. v. Redman*, 295 U.S. 654, 657 (Seventh Amendment aims “to retain the common-law distinction between the province of the court and that of the jury, whereby, in the absence of express or implied consent to the contrary, issues of law are to be resolved by the court and issues of fact are to be determined by the jury . . .”). See also *Walker v. New Mexico & So. Pac. R. Co.*, 165 U.S. 593, 596 (1897); *Gasoline Products Co. v. Champlin Refining Co.*, 283 U.S. 494, 497-99 (1931); *Dimick v. Schiedt*, 293 U.S. 474, 476, 485-86 (1935).

<sup>271</sup> See Colleen P. Murphy, *Determining Compensation: The Tension Between Legislative Power and Jury Authority*, 74 TEX. L. REV. 345, 360 (1995); Clinton W. Francis, *The Structure of Judicial Administration and the Development of Contract Law in Seventeenth-Century England*, 83 COLUM. L. REV. 35, 64 (1983); George T. Washington, *Damages in Contract at Common Law*, 47 LAW Q. REV. 345, 354-56, 364-66 (1931); *Scott v. Sheperd*, 95 Eng. Rep. 1124 (K.B. 1773).

<sup>272</sup> See *supra* Part III.A.1.

elements of a SOX claim—protected conduct, employer knowledge of protected conduct, adverse personnel action, and causation<sup>273</sup>—are not easily identifiable with elements of the old common law forms of action that were precursors to modern-day contract and tort claims. Moreover, even when a possible historical tort or contract counterpart to a SOX liability question exists, it is often difficult to discern whether the historical issue was one for the jury or the judge at English common law. For example, while causation in modern-day negligence law and causation in SOX might be viewed as similar concepts, the concept of causation in the common law actions of trespass and case was decidedly different from a present-day understanding of causation.<sup>274</sup> At English common law, causation was essentially a question of directness—“whether the defendant had directly done the harm.”<sup>275</sup> It seems likely that as a practical matter English juries considered questions of “directness” in trespass and case<sup>276</sup>, especially given the practice of confining jury questions to a single question of fact<sup>277</sup> and the oftentimes lack of a clear separation between fact and law<sup>278</sup>, however, the historical evidence suggests that the test of directness had become a rule of law by the last quarter of the eighteenth century.<sup>279</sup> Perhaps the closest historical analogue to a SOX issue is whether an English *qui tam* plaintiff reported illegal activity.<sup>280</sup> This issue is similar to the protected conduct inquiry under SOX. It is likely that an English jury decided whether the *qui tam* plaintiff reported illegal activity in a *qui tam* action brought as a writ of debt, which would tend to indicate that the SOX protected activity issue is a jury question.<sup>281</sup>

The historical inquiry, while useful, does not provide a clear answer as to which SOX issues must be tried to the jury. Therefore, my eyes also turn toward the characterization of various issues as either legal or factual under current whistleblower and employment discrimination laws and the policy reasons why a jury, as opposed to a judge, should decide a particular SOX issue.<sup>282</sup> This pragmatic search indicates that SOX issues can in most cases be properly delineated as either legal questions for the judge or factual questions for the jury.

The SOX employee protection provision prohibits a covered employer from discriminating against a covered employee for providing information or assisting in investigations concerning fraud against shareholders.<sup>283</sup> SOX actions are governed by the legal burdens of proof established in the AIR 21 Act.<sup>284</sup> As previously alluded, a SOX plaintiff must prove by a preponderance of the evidence that: (1) he engaged in

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<sup>273</sup> See *infra* Part III.A.3.

<sup>274</sup> See S.F.C. MILSOM, HISTORICAL FOUNDATIONS OF THE COMMON LAW, 392-400 (2d ed. 1981)

<sup>275</sup> *Id.* at 395.

<sup>276</sup> *Id.* at 396-97.

<sup>277</sup> See Francis, *supra* note 271 at 68-73.

<sup>278</sup> See Washington, *supra* note 271 at 346.

<sup>279</sup> See MILSOM, *supra* note 274 at 397.

<sup>280</sup> See *supra* Part III.A.1.

<sup>281</sup> See *supra* note 198.

<sup>282</sup> *Id.* at 384 (when the historical analysis yields no discernible conclusion, consider precedent, the relative interpretive skills of judges and juries, and the statutory policies that should be furthered by the allocation in determining whether to allocate an issue to the judge or jury for Seventh Amendment purposes).

<sup>283</sup> See *supra* note 11.

<sup>284</sup> 49 U.S.C. § 42121 (West 2005); 18 U.S.C. § 1514A(b)(2)(C).

protected conduct; (2) the employer knew he engaged in protected conduct; (2) he suffered an unfavorable personnel action; and (4) the protected conduct was a contributing factor in the unfavorable action.<sup>285</sup> An employer can avoid liability by demonstrating by clear and convincing evidence that it would have taken the same unfavorable personnel action in the absence of the protected conduct.<sup>286</sup> These four elements and the employer's affirmative defense are the heart of a SOX action. They are primarily factual issues to be decided by a jury. In contrast, there are numerous issues in a SOX action that are essentially legal questions that must be resolved by a judge. The jury has no role to play in deciding such questions.

*a. SOX Questions of Law*

In part due to the unique two-tiered enforcement system established by the statute, administrative law judges, administrative appeals judges, and federal judges confront challenging legal questions under the SOX statute. These include, but are not limited to, jurisdictional questions, coverage questions, procedural questions, evidentiary questions, and constitutional questions.<sup>287</sup> For example, judges have ruled on whether the statute operates retroactively<sup>288</sup>, the effect of filing a SOX complaint in federal district court on the jurisdiction of the administrative law judge in the administrative proceeding<sup>289</sup>, whether the statute applies extraterritorially<sup>290</sup>, whether a non-publicly traded subsidiary of a publicly traded parent company is a covered employer<sup>291</sup>, the applicability of the attorney-client privilege in a particular case<sup>292</sup>, the propriety of economic reinstatement or front pay in lieu of reinstatement<sup>293</sup>, and whether the right to jury trial is guaranteed by the statute or Constitution.<sup>294</sup> These are just a sample of the legal questions that have already been addressed by judges. Judges will have to rule on many more legal questions in the future. As a general principle, the interpretive questions posed by the statute concerning jurisdiction, coverage, procedure, and evidence are legal questions to be resolved by judges.<sup>295</sup> The Seventh Amendment does not have any impact on these questions.

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<sup>285</sup> 49 U.S.C. § 42121(a)-(b)(2)(B)(iii)-(iv); *Collins v. Beazer Homes*, 334 F. Supp. 2d 1365, 1375 (N.D. Ga. 2004); *Reddy v. Medquist, Inc.*, ARB No. 04-123, ALJ No. 2004-SOX-35, slip op. at 7 (ARB September 30, 2005); *Getman v. Southwest Securities, Inc.*, ARB No. 04-059, ALJ No. 2003-SOX-8, slip op. at 8 (ARB July 29, 2005);

<sup>286</sup> *Id.*

<sup>287</sup> Sarbanes-Oxley Act (SOX) Whistleblower Digest, U.S. Department of Labor, Office of Administrative Law Judges, available online at <http://www.oalj.gov>.

<sup>288</sup> *McIntyre v. Merrill, Lynch, Pierce, Fenner & Smith, Inc.*, 2003-SOX-23, slip op. at 7 (ALJ Jan. 16, 2004).

<sup>289</sup> *Stone v. Duke Energy Corp.*, 432 F.3d 320, 323 (4th Cir. 2005).

<sup>290</sup> *Carnero v. Boston Scientific Corp.*, 433 F.3d 1, 7-18 (1st Cir. 2005).

<sup>291</sup> *Bothwell v. American Income Life*, 2005-SOX-57 (ALJ Sept. 19, 2005).

<sup>292</sup> *Welch v. Cardinal Bankshares Corp.*, 2003-SOX-15, slip op. at 2 (ALJ Aug. 15, 2003).

<sup>293</sup> *Welch v. Cardinal Bankshares Corp.*, ARB No. 06-062, ALJ No. 2003-SOX-15 (ARB June 9, 2006).

<sup>294</sup> *Murray v. TXU Corp.*, 2005 U.S. Dist. LEXIS 10945, 2005 WL 135644, 86 Empl. Prac. Dec. (CCH), P41, 981 (N.D. Tex. 2005).

<sup>295</sup> Professor Kirgis, an outstanding scholar, has recently examined the aspect of Seventh Amendment jurisprudence of concern in Part III.A.3 of this article: how to allocate particular questions to the judge or jury in a case where the right to jury trial exists. See Paul F. Kirgis, *The Right to a Jury Decision on*

b. *SOX Questions of Fact and Mixed Questions of Fact and Law*

In contrast, whether the elements of a SOX action have been proven by a preponderance of the evidence and damages determinations are generally fact questions for the jury.<sup>296</sup> With respect to the SOX elements, the way in which statutory elements in other areas of employment law have been characterized by courts is insightful. Federal employment retaliation law, whistleblower statutes, and First Amendment retaliation law correctly treat causation and the employer’s knowledge of protected conduct as factual issues for the jury if sufficient evidence is presented on these elements.<sup>297</sup>

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*Questions of Fact Under the Seventh Amendment*, 64 OHIO ST. L. J. 1125 (2003). Professor Kirgis argues that the fact-law distinction should guide courts in determining the questions that must go to the jury and proposes an inferential analysis for distinguishing “fact” questions that must go to the jury from other questions that should be decided by the judge. *Id.* at 1130. Under this test, “[a] question of fact is one that requires for its answer inductive inferences about the transactions or occurrences in dispute.” *Id.* at 1158. In contrast, a question of law calls “for either deductive inferences or inductive inferences leading to conclusions beyond the transactions or occurrences in dispute.” *Id.* at 1130. I will examine Kirgis’ inferential test, which I find illuminating, later in this article.

Kirgis’ inferential account of the fact-law distinction correctly presupposes that most decisions made during the litigation process are simply outside the realm of the jury even though those decisions require the decision-maker, i.e., the judge, to make certain “factual” findings. *Id.* at 1145-46. Kirgis describes this as the judicial screening function and defines a screening decision as any decision that entails “regulating the actions of the parties to ensure that the adjudicative process unfolds in a way that comports with systemic norms.” *Id.* at 1146. He notes that “judicial screening” questions are often referred to by courts as questions of “law,” but that such description is a “matter of convention rather than as a counterpoint to decisions of ‘fact.’” *Id.* There are three basic types of judicial screening questions which are outside the province of the jury: (1) questions addressing the propriety of the chosen forum (*e.g.*, jurisdictional questions); (2) questions about what data/information can be considered by the decision-maker (*e.g.*, evidentiary questions); and (3) questions about whether a particular question can be posed to the decision-maker (*e.g.*, the propriety of submitting a proposed jury question). *Id.* at 1147-1153.

The SOX questions concerning jurisdiction, coverage, procedure, and evidence, which are set forth above, fit within the judicial screening function described by Professor Kirgis and may not be decided by a jury.

<sup>296</sup> The Seventh Amendment does not prevent the use of procedural devices such as a motion for summary judgment or a motion for judgment as a matter of law to dismiss SOX actions which do not have sufficient evidentiary proof on each SOX element. *See e.g.*, *Baltimore & Carolina*, 295 U.S. 654, 656-60 (U.S. 1935) (sufficiency of the evidence is a question of law for the court). As in other federal employment retaliation/discrimination cases, whether a SOX case gets to the jury depends on the quality and amount of evidence introduced during the summary judgment stage and/or during trial, even if, as a general proposition, the determination as to whether a SOX plaintiff proved an element of his cause of action is a factual determination. A determination by a judge that a case can only be decided one way does not violate the Seventh Amendment. *See e.g.*, *Hill v. City of Scranton*, 411 F.3d 118, 127 (3d Cir. 2005); Kirgis, *supra* note 239, at 1151-52; Ellen E. Seward, *The Seventh Amendment and the Alchemy of Fact and Law*, 33 SETON HALL L. REV. 573, 592-632 (2003).

<sup>297</sup> *See King v. Preferred Technical Group*, 166 F.3d 887, 894 (7th Cir. 1999) (fact question for jury existed on whether employer terminated plaintiff’s employment for legitimate, non-retaliatory reason or because of plaintiff’s use of FMLA leave); *Bechtel Construction Co. v. Secretary of Labor*, 50 F.3d 926, 933 (11th Cir. 1995) (the Secretary of Labor’s determination as to whether an ERA-whistleblower was fired for engaging in protected activity or for legitimate, non-discriminatory reason is an adjudicative, factual finding that must be supported by substantial evidence); *Curinga v. City of Clairton*, 357 F.3d 305, 310 (3d Cir. 2004) (whether constitutionally protected speech was a motivating factor in the discharge is a question of fact); *Gordon v. New York City Bd. of Educ.*, 232 F.3d 111, (2d Cir. 2002) (“A jury, however,

Retaliation cases conflict on whether the protected conduct inquiry is a question of fact or law. Most courts interpret the “opposition” clause of the Title VII retaliation provision to require the employee to demonstrate that he had a “reasonable belief” that the employer engaged in unlawful employment practices in order to prove protected conduct.<sup>298</sup> The employee’s “reasonable belief” is viewed objectively, but the plaintiff does not have to prove that the opposed conduct in fact violated Title VII.<sup>299</sup> The “reasonable belief” standard appears to provide considerable room for a fact-finder to make a determination as to whether an employee engaged in protected conduct under Title VII, but many courts view whether actions constitute protected conduct under Title VII as questions of law.<sup>300</sup> Similarly, in First Amendment retaliation claims, whether speech is constitutionally protected is uniformly regarded as a question of law for the court.<sup>301</sup>

Recent Supreme Court authority suggests that the adverse employment action element under Title VII is best viewed as a question of fact. The scope of the adverse employment action element of Title VII retaliation law has varied widely among the circuits until recently.<sup>302</sup> In *Burlington Northern and Santa Fe Railway Company v. White*, the Court held that the Title VII retaliation provision covers only those employer actions that would have been “materially adverse” to a reasonable employee or job

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can find [Title VII] retaliation even if the [corporate] agent denies direct knowledge of a plaintiff’s protected activities, for example, so long as the jury finds that the circumstances evidence knowledge of the protected activities or the jury concludes that an agent is acting explicitly or implicit upon the order of a superior who has the requisite knowledge.”); *Clements v. Airport Authority of Washoe County*, 69 F.3d 321, 334 (9th Cir. 1995) (conflicting evidence raised fact issue sufficient to deny summary judgment as to whether decision-maker knew of employee’s First Amendment protected whistle-blowing activity).

<sup>298</sup> See *Payne v. McLemore’s Wholesale & Retail Stores*, 654 F.2d 1130, 1140 (5th Cir. 1981).

<sup>299</sup> See *Byers v. The Dallas Morning News, Inc.*, 209 F.3d 419, 428 (5th Cir. 2000).

<sup>300</sup> Compare *George v. Southwestern Bell Telephone Co.*, 2005 U.S. Dist. LEXIS 31195, \*11 (N.D. Tex. December 5, 2005) (plaintiff’s summary-judgment evidence was sufficient for a jury to find that the plaintiff reasonable believed the complained of conduct was unlawful and thus a fact issue existed as to whether opposition constituted protected activity) with *Barnes v. Small*, 840 F.3d 972, 976 (D.C. Cir. 1988) (protected activity determination is a question of law because it is largely based on an interpretation of Title VII); *Broderick v. Donaldson*, 338 F. Supp. 2d 30, 41 (D.D.C. 2004) (“the determination as to whether the memorandum is protected activity is a question of law because it relies on an interpretation of Title VII”); *Carter-Obayuwana v. Howard University*, 764 A.2d 779, 790 (D.C. 2001) (“[w]hether actions by an employee constitute protected activity [under Title VII] is a question of law”). See also *Bechtel Construction Co. v. Secretary of Labor*, 50 F.3d 926, 931 (11<sup>th</sup> Cir. 1995) (whether general inquiries regarding safety constitute protected activity under whistleblower protection provisions of the Energy Reorganization Act is a question of law to be reviewed on a de novo basis); *Heckmann v. Detroit Chief of Police*, 705 N.W.2d 689, 698 (Mich. Ct. App. 2005) (whether plaintiff engaged in protected activity under Michigan Whistleblower Protection Act presents a question of law).

<sup>301</sup> See *Curinga v. City of Clairton*, 357 F.3d 305, 310 (3d Cir. 2004); *Horstkoetter v. Dep’t of Public Safety*, 159 F.3d 1265, 1271 (10th Cir. 1998); *Orange v. District of Columbia*, 59 F.3d 1267, 1272 (D.C. Cir. 1995); *Hatcher v. Board of Public Education*, 809 F.2d 1546, 1556 (11th Cir. 1987).

<sup>302</sup> See *Burlington Northern and Santa Fe Railway Co. v. White*, 548 U.S. \_\_, \_\_ (2006); Joel A. Kravetz, *Deterrence v. Material Harm: Finding the Appropriate Standard to Define an “Adverse Action” in Retaliation Claims Brought Under the Applicable Equal Employment Opportunity Statutes*, 4 U. PA. J. LAB. & EMP. L. 315, 321-55 (2001-2002); Melissa A. Essary and Terence D. Friedman, *Retaliation Claims Under Title VII, the ADEA, and the ADA: Untouchable Employees, Uncertain Employers, Unresolved Courts*, 63 MO. L. REV. 115, 134-139 (1998).

applicant.<sup>303</sup> The Court upheld a jury’s verdict that a reassignment to more onerous job duties and a 37-day suspension without pay constituted retaliation under this standard.<sup>304</sup> The *White* Court’s opinion contemplates that it is for the fact-finder, *i.e.*, the jury, to determine whether an employer’s actions constitute retaliation when sufficient evidence exists for a reasonable jury to conclude that the employer’s action would be materially adverse to a reasonable employee.

The SOX elements should generally be viewed as factual determinations to be made by a SOX jury. Like Title VII law, the causation and employer’s knowledge of protected conduct elements in SOX actions are pure factual determinations to be made by a jury when conflicting evidence is presented by employee and employer.<sup>305</sup> The characterization of the SOX protected conduct element is trickier. It is similar to the Title VII protected conduct element in that a SOX plaintiff need only prove he had a “reasonable belief” that he engaged in protected activity.<sup>306</sup> However, it is more appropriate for a juror to determine whether someone “reasonably believed” the employer committed a Title VII violation than whether someone “reasonably believed” the employer violated securities laws or other laws that protected fraud against shareholders. Both determinations require an understanding of what actions in fact may violate the law (or at least what actions could conceivably fall within the scope of those laws) and to some degree involve considerations of credibility.<sup>307</sup> The credibility

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<sup>303</sup> *White*, 548 U.S. at \_\_\_ .

<sup>304</sup> *White*, 548 U.S. at \_\_\_ .

<sup>305</sup> Under Professor Kirgis’ inferential test for determining a question of fact as distinguished from a question of law, when a question involves inductive inferences it is a question of fact that must be resolved by the jury under the Seventh Amendment. My characterization of the causation and employer’s knowledge of protected conduct elements as questions of fact to be resolved by the jury is consistent with Kirgis’ description of the basic types of factual conclusions jurors in circumstances that require inductive reasoning. Kirgis states:

At least for purposes of adjudication, inductive reasoning may be used to reach conclusions of three basic types: that an event or condition in the past or present probably has occurred or is occurring; that an event or condition in the future probably will occur; or that a hypothetical event or condition probably would occur given some postulated set of circumstances, a type of reasoning known as the counterfactual conditional. The phrase “events or conditions” in these formulations is intended to encompass virtually all phenomena in the world, including the identity of things or persons, the occurrence of physical events or human acts, mental states, and *relations of cause and effect*. Kirgis, *supra* note 295 at 1155 (emphasis added).

Whether (and at what time) an employer knew that an employee engaged in activity alleged to be SOX-protected activity falls within Kirgis’ first type of inductive-reasoning conclusions because it concerns a determination regarding an actual historical event or condition derived from inferences and the judgment of witnesses’ credibility. *Id.* at 1155. Whether an employee’s SOX-protected activity was a contributing factor in the adverse employment action suffered by the employee, and/or whether the employer would have taken the same employment action regardless of the protected activity is a causation question of the third type described by Kirgis because it requires a probabilistic inference based on the circumstances surrounding the employee’s employment situation and the actual personnel decision. *Id.* at 1157 (“In their focus on the likely course of events, both questions of but-for cause and questions of proximate cause require probabilistic inferences about hypothetical conditions in the world—the events that were most likely to happen given the state of the world prior to the injury.”).

<sup>306</sup> *Reddy v. Medquist, Inc.*, ARB No. 04-123, ALJ No. 2004-SOX-35, slip op. at 8 (ARB Sept. 30, 2005).

<sup>307</sup> *See e.g.*, *Tuttle v. Johnson Controls Battery Division*, 2004-SOX-76, slip op. at 3-4 (ALJ Jan. 3, 2005) (employee’s claim that he reasonably believed the employer violated one of the laws or regulations

judgments, however, are dependent on one’s knowledge of what could possibly violate or impact the underlying substantive law—Title VII or the various federal laws prohibiting fraud against shareholders. It could be argued that the protected conduct determination is better suited to the common-sense of the jury if it is believed that the jury intuitively understands or can be quickly educated on the fundamental tenets of Title VII antidiscrimination law.<sup>308</sup> But, given the complexities of the mail fraud, wire fraud, radio fraud, TV fraud, bank fraud, and securities fraud statutes, as well as other federal laws relating to fraud against shareholders, it would seem as though in most cases a trained specialist, the judge, would be the better actor to determine whether particular employee actions constitute protected activity under SOX.<sup>309</sup> The policy-oriented and complexity aspects of whether a SOX plaintiff engaged in protected conduct indicates the protected conduct determination is best viewed as mixed question of fact and law to be resolved by a jury or judge depending on the individual circumstances of the particular case at hand, but typically by the judge.<sup>310</sup>

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enumerated in SOX whistleblower statute must be scrutinized under both subjective and objective standards).

<sup>308</sup> See, e.g., *Markman*, 517 U.S. 389-90.

<sup>309</sup> Professor Kirgis’ article elaborates on the difficulties courts and commentators have encountered in determining whether questions of reasonableness are questions of fact for the jury or questions of law for the judge. He explains that such determination varies with the type of reasonableness question at issue. For example, the question of negligence in a civil case has historically been viewed as one for the jury. In contrast, in malicious prosecution cases, the question whether a person had a “reasonable belief” that another committed a crime is reserved for the judge. Kirgis, *supra* note 295, at 1162-70. Kirgis reconciles this apparent discrepancy through the lens of his inferential account of the fact-law distinction by noting that determining reasonableness in a negligence case involves making inductive inferences about the nature of the defendant’s conduct, whereas determining whether a person had a reasonable belief in the guilt of another does not require such inferences. *Id.* at 1169 (“A decision maker tasked with making that decision [whether a person had a reasonable belief that another committed a crime] needs nothing but his own sense of how to characterize events in the world. The decision maker simply compares the apparent conduct of the accused with the decision maker’s storehouse of knowledge about what constitutes apparent criminal conduct.”).

The question of whether an employee had a “reasonable belief” that his employer violated any federal law concerning fraud against shareholders is similar to the malicious prosecution question in that it does not involve any inductive inferences. Once it is determined what the alleged SOX-protected plaintiff complained about, it is simply up to the decision maker to compare the alleged fraudulent conduct with the decision maker’s “storehouse of knowledge” about what could conceivably constitute fraud against shareholders under the various federal laws. Due to the complexities of these federal fraud laws, a federal judge is likely better equipped than a juror to make such a decision.

<sup>310</sup> Compare *Getman v. Southwest Securities, Inc.*, ARB No. 04-059, ALJ No. 2003-SOX-8, slip op. at 9 (ARB July 29, 2005) (whether equity research analyst’s “refusal” to raise her stock rating during a review committee meeting constituted protected activity is a legal question) and *Harvey v. Home Depot USA, Inc.*, ARB Nos. 04-114 and 115, ALJ Nos. 04-SOX-20 and 04-SOX-36, USDOL/OALJ REPORTER at 14 (ARB June 2, 2006) (dismissing SOX action for failure to state a claim on which relief can be granted because complainant’s letters sent to the company’s Board of Directors and Executives, which informed management about questionable personnel practices, corporate expenditures with which the employee disagreed, and possible FMLA and FLSA violations, did not constitute SOX-protected activity) with *Reddy v. Medquist, Inc.*, ARB No. 04-123, ALJ No. 2004-SOX-35, slip op. at 7-8 (ARB Sept. 30, 2005) (ALJ’s finding that complainant did not engage in protected activity is conclusive if supported by substantial evidence) and *Collins*, 334 F. Supp. 2d at 1377, 1380 (upon employer’s motion for summary judgment, the court found that genuine issue of material fact existed as to whether SOX plaintiff engaged in protected

The characterization of the SOX adverse employment action is nuanced as well. The adverse employment action determination lies somewhere between the pure factual determination of the causation element and the mixed question of fact and law determination of the protected conduct element. It is an open question how “unfavorable” the employment action must be to fall within the scope of the SOX anti-retaliation provision. Does the “materially adverse” standard from *White* govern, or should either a broader or stricter standard control?<sup>311</sup> Regardless of the standard adopted, the determination as to whether this SOX element is proven by a preponderance of the evidence should generally be one for the jury. Jurors should, of course, be charged on the proper standard, whatever it may be, and judges must reign in juries whose collective imaginations go beyond the pale.<sup>312</sup> But jurors, many of who are either employees or employers, know how the world works and they typically possess the requisite common sense and experience to differentiate the trivial employer action from the employer action that would dissuade a reasonable employee from complaining about corporate fraud. In most cases, that sort of a determination should be a factual one for the jury, not a legal one for the judge.

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activity and stated that reasonable jurors could find by a preponderance of the evidence that SOX plaintiff engaged in protected activity).

<sup>311</sup> The SOX statute states that an employer may not “discharge, demote, suspend, threaten, harass or *in any other manner discriminate* against an employee in the terms and conditions of employment because of any lawful act done by the employee.” 18 U.S.C. § 1514A(a) (emphasis added). *See also* 29 C.F.R. § 1980.102(a). Like the Title VII anti-retaliation provision in 42 U.S.C. §2000e-3(a), the scope of the adverse employment action part of the SOX statute depends on the interpretation of the term “discriminate.” The Office of Administrative Law Judges (OALJ) Sarbanes-Oxley Act Whistleblower Digest already contains several contradictory opinions from administrative law judges concerning the scope of the SOX adverse employment action element. *Halloum v. Intel Corp.*, 2003-SOX-7, slip. op. at 10 (ALJ Mar. 4, 2004) adopts a “reasonably likely to deter employees from making a protected disclosure” standard, advocating a test for unfavorable employment action that encompasses more than simply economic actions. *Hendrix v. American Airlines*, 2004-AIR-10, 2004-SOX-23 (ALJ Dec. 9, 2004) similarly applies an expansive definition of adverse action based on whistleblower law, concluding that placement on a lay-off list amounts to an adverse employment action even though the person’s name was removed from the list before the lay-offs came to fruition and thus the person suffered no tangible job consequence. In contrast, *Dolan v. EMC Corporation*, 2004-SOX-1, slip. op. at 3 (ALJ Mar. 24, 2004) holds that a SOX adverse employment action must have some tangible job consequence and unfavorable performance evaluations, absent tangible job consequences, do not rise to the level of an adverse employment action. The ALJ ruled in *Dolan* that the complainant’s negative performance evaluation was not an adverse employment action because it did not result in a lower salary, jeopardize job security, or cause any tangible job detriment. The *Halloum*, *Hendrix*, and *Dolan* decisions were decided prior to the Supreme Court’s decision in *Burlington Northern and Santa Fe Railroad v. White*.

<sup>312</sup> *See e.g., Justices Wrestle With Appropriate Standard in Argument Regarding Title VII Retaliation*, Daily Lab. Rep. (BNA) No. 74, at AA-1 (April 18, 2006) (Justice Scalia questioned Sheila White’s attorney, Donald A. Donati, during oral argument in the *Burlington Northern and Santa Fe Railroad v. White* case about whether a broad standard for adverse employment actions would lead to trivial claims ending up before a jury and stated that “juries can have amazing imaginations.”); *Erickson v. United States Environmental Protection Agency*, ARB No. 03-002, ALJ No. 1999-CAA-2, USDOL/OALJ REPORTER at 25 (ARB May 31, 2006) (co-worker “shunning” that has no tangible job consequences is not an adverse employment action as a matter of law).

## B. Alternative Approaches

The historical test remains ensconced in Seventh Amendment jurisprudence, but, over the years, courts and commentators have advocated for various exceptions and alternative approaches to the traditional Seventh Amendment analysis.<sup>313</sup> The complexity exception, the notion that a purely functional approach to Seventh Amendment analysis should replace the historical test, and the view that the extent of the right to jury trial in civil cases in federal cases is left entirely to the discretion of Congress warrant some explanation.<sup>314</sup> Treatment of the SOX right to jury trial question under these approaches is considered, but the question of whether the stated exception or alternative approaches should replace the traditional historical test is beyond the scope of this article and will not be dealt with in any comprehensive fashion. However, a vision of the jury as the constitutional actor that can best vindicate the community's sense of justice should influence how we view whether the Seventh Amendment guarantees the right to jury trial on SOX claims.

### 1. *The Complexity Exception and Functional Approach*

Some commentators argue that the Seventh Amendment right to a jury trial in civil cases is severely proscribed in complex cases.<sup>315</sup> Although considerable debate exists as to what constitutes a complex case<sup>316</sup>, commentators in favor of a complexity exception to the Seventh Amendment have summarized various characteristics of a trial that should play a part in considering whether a case is too complex to be heard by a jury. They include the operative details and nature of the trial (number of parties, probable length of trial, the amount of evidence and corresponding exhibits to be introduced into the record), the nature of the evidence to be proposed at trial (the degree to which the average juror can realistically understand any sophisticated evidence presented in the case), and the difficulty in understanding any complex substantive law relevant to the case.<sup>317</sup> Of those proponents of a complexity exception, some favor the exception on the ground that the English common law and American colonial law took complex cases out of the hands of jurors<sup>318</sup>, others favor the exception on due process grounds<sup>319</sup>, a few

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<sup>313</sup> See *supra* Part III.A.

<sup>314</sup> The state-law incorporation approach advocated by Akhil Reed Amar in *The Bill of Rights: Creation and Reconstruction*, 89-90 (1998) and examined by Charles Wolfram in *The Constitutional History of the Seventh Amendment*, 57 MINN. L. REV. 639, 712-18, 732-34 (1973) is another alternative approach that appears to have some historical support, but also appears to raise numerous practical problems if ever adopted by the Court. As applied to the SOX action, the right to jury trial in a SOX case under this approach would depend on the law [with respect to jury trials] of the forum state in which the federal-court SOX action is brought. No attempt is made to analyze the SOX jury right in each of the 50 states under this approach.

<sup>315</sup> See *infra* notes 316-320.

<sup>316</sup> See Jay Tidmarsh, *Unattainable Justice: The Form of Complex Litigation and the Limits of Judicial Power*, 60 GEO. WASH. L. REV. 1683, 1754-1803 (1992).

<sup>317</sup> See Joseph A. Miron, Jr., Note, *The Constitutionality of a Complexity Exception to the Seventh Amendment*, 73 CHI.-KENT L. REV. 865, 883-84 (1998); Jeffrey Oakes, *The Right to Strike the Jury Trial Demand in Complex Litigation*, 34 U MIAMI L. REV. 243, 290-293 (1980).

<sup>318</sup> See Lord Patrick Devlin, *Equity, Due Process and the Seventh Amendment: A Commentary on the Zenith Case*, 81 MICH. L. REV. 1571, 1637-38 (1983) and *Jury Trial of Complex Cases: English Practice at the Time of the Seventh Amendment*, 80 COLUM. L. REV. 43, 44, 107 (1980); James S. Campbell and

make arguments based purely on pragmatic reasons.<sup>320</sup> Many of these proponents interpret Supreme Court cases over the past forty years as opening the door to a complexity exception.<sup>321</sup> On the other hand, opponents of a complexity exception vigorously disagree that history supports a complexity exception<sup>322</sup>, argue that empirical data does not support the view that jurors are incompetent to understand complex legal issues<sup>323</sup>, claim that procedural and judicial management improvements should allay any due process concerns<sup>324</sup>, and posit that jealous preservation of the jury right must be maintained because the jury implements important public policies, complexity notwithstanding.<sup>325</sup>

Even if the complexity exception is constitutional, SOX actions do not fit within the exception. In general, the number of parties involved in a SOX action is small (typically one plaintiff and one defendant), the length of trial time should be relatively short, and the evidence presented should be understandable to jurors if the attorneys present the case in a straightforward manner. Moreover, it would be unwise to say that SOX actions are categorically complex merely because they often involve complaints

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Nicholas Le Poidevin, *Complex Cases and Jury Trials: A Reply to Professor Arnold*, 28 U. PA. L. REV. 965, 966 (1980); *see also* Douglas King, Comment: Complex Civil Litigation and the Seventh Amendment Right to a Jury Trial, 51 U. CHI. L. REV. 581, 613 (1984) (complex cases were not possible in English common law).

<sup>319</sup> *See* Joseph C. Wilkinson, Jr., Frank D. Zielinski, and George M. Curtiss, III, *A Bicentennial Transition: Modern Alternatives to Seventh Amendment Jury Trial in Complex Cases*, 37 U. KAN. L. REV. 61, 90-95, 104 (1988); Oakes, *supra* note 317, at 298.

<sup>320</sup> *See* Patrick Lynch, *The Case for Striking Jury Demands in Complex Antitrust Litigation*, 1 REV. LITIG. 3 (1980) (“The jury is as inappropriate to some antitrust cases today as the wild west gunfighter is to modern Abilene. Judges who insist that the jury is right for all times and all cases make the same mistake we see portrayed [in television stories involving the magnificent, aging performer who refuses to acknowledge his or her limitations].”).

<sup>321</sup> *See* Miron, *supra* note 317, at 886.

<sup>322</sup> *See* Morris S. Arnold, *A Historical Inquiry into the Right to Trial by Jury in Complex Civil Litigation*, 128 U. PA. L. REV. 829, 830 (1980).

<sup>323</sup> *See* Maxwell M. Blecher and Howard F. Daniels, *In Defense of Juries in Complex Antitrust Litigation*, 1 REV. LITIG. 47, 74-78 (1980). Empirical studies and scholarly interpretations of those studies are mixed as to how well jurors fare in complex cases. *See* Margaret Moses, *The Jury-Trial Right in the UCC: On a Slippery Slope*, 54 SMU L. REV. 561, 593-94 (2001) (“With respect to a jury’s handling of technical or complex issues, a number of studies have concluded that juries handle complex issues well, and that there is no reason to believe that judges fare better in the face of complexity than jurors.”); Joe S. Cecil, Valerie P. Hans, and Elizabeth C. Wiggins, *Citizen Comprehension of Difficult Issues: Lessons from Civil Jury Trials*, 40 AM. U. L. REV. 727, 764 (1991) (“Thus, the overall picture of the jury that emerges from the available data indicates that juries are capable of deciding even very complex cases, especially if procedures to enhance jury competence are used.”); Franklin Strier, *The Educated Jury: A Proposal for Complex Litigation*, 47 DEPAUL L. REV. 49, 55 (1997) (“Several studies buttress the contention of lay jury incompetence in complex cases.”).

<sup>324</sup> *See* Lisa S. Meyer, Note, *Taking the “Complexity” Out of Complex Litigation: Preserving the Right to Jury Trial*, 28 VAL. U. L. REV. 337, 360-71 (1993); Steven I. Friedland, *The Competency and Responsibility of Jurors in Deciding Cases*, 85 NW. U. L. REV. 190, 220 (1990); James L. Flannery, Note, *Complex Civil Litigation: Reconciling the Demands of Due Process with the Right to Trial by Jury*, U. PITT. L. REV. 693, 694 (1981); Blecher and Daniels, *supra* note 323, at 88-91.

<sup>325</sup> *See* Maxwell M. Blecher and Candace E. Carlo, *Toward More Effective Handling of Complex Antitrust Cases*, 1980 UTAH L. REV. 727, 744 (1980); Blecher and Daniels, *supra* note 323, at 78-87.

about sophisticated securities regulation and accounting practices. The question is not whether SOX actions are complex in the abstract; it is whether the particular issue the jury must decide is over its collective head.<sup>326</sup>

Considerable complexity could arise in determining whether a plaintiff engaged in SOX-protected activity. But, the protected-activity issue, as previously mentioned, should be resolved by the judge because it is a question of law on the basis of the fact-law distinction. A SOX jury's main role as the fact finder is to resolve the issue of causation, which it is qualified to do because a SOX causation determination entails making probabilistic assessments grounded on real-world experience. The causation determination in a SOX case boils down to determining whether the SOX-protected activity was a "motivating factor" or "contributing factor" in the adverse employment action.<sup>327</sup> The resolution of the causation question in a particular SOX case may be difficult because the evidence conflicts, but it is not "complex" in the sense that the issue is so technical in nature that it is beyond the comprehension of twelve ordinary citizens. This type of causation determination is made by juries in other employment discrimination and whistleblower cases all the time.<sup>328</sup>

Closely related to the complexity exception is the notion that jury trial actions should be separated from nonjury trial actions under the Seventh Amendment based on the relative abilities of judges and juries. In *Ross v. Bernhard*, for example, the Court spoke for the first time of the "practical abilities and limitations of juries" as a conceivable criterion for constitutionally distinguishing a case that must go to the jury under the Seventh Amendment from a case that need not go to the jury.<sup>329</sup> Subsequent cases revealed that the Court was not prepared to replace the traditional historical test with a purely functional approach.<sup>330</sup> The Court's reluctance to adopt an "explicitly functional approach to the seventh amendment question" is not surprising given the

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<sup>326</sup> See Wilkinson, *supra* note 319, at 84 ("The inquiry [under the complexity exception] is not whether a case is too complex for a jury because it fits a particular category, like securities regulation or antitrust law, but whether particular issues in the case are so technical in nature that they are beyond the reasoned and comprehending decision-making power of the jury.").

<sup>327</sup> See Collins, 334 F. Supp. 2d at 1378-80; Halloum v. Intel Corp., ARB No. 04-068, ALJ No. 2003-SOX-7, USDOL/OALJ REPORTER at 7-8 (ARB Jan. 31, 2006).

<sup>328</sup> See Carter v. Diamondback Golf Club, Inc., 2006 U.S. Dist. LEXIS 3739, \*23, 97 Fair Empl. Prac. Cas. (BNA) 1086 (M.D. Fla. 2006) (in mixed-motive religious discrimination case under Title VII, circumstantial evidence raised a genuine issue of material fact on causation such that the jury must determine whether illegitimate reasons motivated the employer to terminate the plaintiff's employment); EEOC v. International House of Pancakes, 411 F. Supp. 2d 709, 716 (E.D. Mich. 2006) (in age discrimination case under the ADEA, sufficient evidence existed for a reasonable jury to conclude that restaurant's stated reason for ending waitress's employment relationship was a pretext for age discrimination); Robinson v. Hilton Hospitality, Inc., 2006 U.S. Dist. LEXIS 11469, \*33-36, 11 Wage & Hour Cas. 2d (BNA) 447 (S.D. Ohio 2006) (in FMLA-retaliation case, genuine issue of material fact raised on whether employer terminated employee for requesting FMLA leave; causation to be determined by jury); *Former County Employee Wins \$4.75 Million in Potential First Verdict under Arizona Law*, Daily Lab. Report (BNA) No. 199, at A-1 (Oct. 17, 2005) (jury returns a multi-million dollar verdict in retaliation claim under Arizona whistleblower law).

<sup>329</sup> *Ross v. Bernhard*, 396 U.S. 531, 538 n.10 (1970).

<sup>330</sup> See *Chauffeurs, Teamsters & Helpers Local No. 391 v. Terry*, 494 U.S. 558, 565 n.4 (1990); *Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33, 42 n.4 (1989).

difficulties inherent with such an approach. Scholars have pointed out several problems with a purely functional approach.<sup>331</sup> First, a functional approach has no direct historical support.<sup>332</sup> Second, disagreement exists concerning the particular functions a jury is best able to perform and the types of cases a jury is best suited to hear.<sup>333</sup> Third, a functional approach would provide federal judges with extraordinary discretion to determine whether a jury hears a particular case, which is inconsistent with the Framers’ conception of the jury trial right as a strong civilian check on the power of the judge.<sup>334</sup>

Despite the fact that an explicitly functional approach has not been adopted by the Court, the *Markman* and *Del Monte Dunes* decisions indicate that the Court, in the absence of historical information, is willing to consider the relative abilities and limitations of the judge and jury in determining whether, in an action in which the right to jury trial attaches, a particular issue within the action should go to the jury.<sup>335</sup> In making such a determination, the Court has indicated that it will be guided by the jury’s primary role as a fact finder.<sup>336</sup>

For the above-mentioned reasons, it is very unlikely that the Court will delete the historical test in favor of a purely functional approach. If the Court does adopt a purely functional approach, which attempts to separate types of cases that must be tried to the jury from types of cases that need not be tried to the jury, the SOX whistleblower action should be the type of case that is tried to a jury because juries have the requisite skills to determine whether an employee was fired for whistleblowing. Similarly, if the status quo remains in force, the Seventh Amendment requires a jury to make factual findings on most of the elements of a SOX action.<sup>337</sup>

## 2. *Congressional Control of Jury Trials on Statutory Claims*

Various scholars, including Stanton Krauss, Rachael Schwartz, and Kenneth Klein, reject the historical test of the Seventh Amendment and conclude that, at least with respect to federal laws created by statute, no jury right exists under the Seventh Amendment unless Congress specifically provides for a jury right in the statute itself.<sup>338</sup>

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<sup>331</sup> See Moses, *supra* note 183, at 239; Wolfram, *supra* note 176 at 644.

<sup>332</sup> Wolfram, *supra* note 176, at 718.

<sup>333</sup> *Id.* at 644.

<sup>334</sup> Moses, *supra* note 183, at 239; Wolfram, *supra* note 176, at 644.

<sup>335</sup> See *supra* note 183.

<sup>336</sup> *Id.*

<sup>337</sup> See *supra* Part III.A.3.

<sup>338</sup> See Krauss, *supra* note 180, at 483 (“In sum, the theory that the Jury Trial Clause gave Congress plenary authority to determine the extent of the right to civil jury trial in the federal courts comports with all of the early historical evidence. . . . that theory should be considered the original understanding of the Seventh Amendment right to jury trial.”); Schwartz, *supra* note 175, at 629-30 (“The alternative interpretation places the judgment as to when specific types of civil cases are best tried by juries in the hands of Congress. This interpretation not only accords with the expressed intentions of the Framers (demonstrated by contemporary writings), but also provides a far more workable standard for the courts to apply. . . .”); and Klein, *supra* note 177, at 1036 (“The Seventh Amendment can be read as the simple instruction that it is: If a legislature creates, by statute, a legal right which heretofore did not exist, the legislature can determine whether trial of that right should be to a jury, but in all other instances a litigant has an absolute right to a jury trial in a civil case in federal court.”).

In essence, they contend that the Seventh Amendment does no more than state that the Constitution does not prohibit jury trials, note that jury trials make sense in some civil cases, and specify that Congress has plenary power to decide in which situations a right to jury trial should be preserved.<sup>339</sup> In an era in which Congress has federalized much of what was previously a part of the common law and created new legal rights that would have been developed in the past through the common law, the Seventh Amendment’s role as a protector of the fundamental importance of the jury in civil cases in federal court will be abrogated, if their view is correct. Thus, such an approach, which would represent a paradigm shift in Seventh Amendment jurisprudence, should be scrutinized with the utmost care. If, however, these scholars are correct, there is no right to jury trial in a SOX federal-court action because Congress did not specifically provide for a jury right. The interpretation of SOX that implies a right to jury trial is unpersuasive if this alternative view of the Seventh Amendment ever carries the day. In that brave new world, Congress must specifically provide for a jury trial right in the statute for such a right to exist. It did not do so in the SOX statute.

### 3. *A Historical Vision of the Jury and its applicability to SOX*

Scholars have suggested an array of approaches to interpreting and applying the Seventh Amendment to civil claims in federal court.<sup>340</sup> Each of these approaches has various arguments that can be made both for and against.<sup>341</sup> Yet, in evaluating whether the right to jury trial on a SOX whistleblower action in federal court is constitutionally protected, I cannot help but intuitively gravitate to the historical vision of the jury that is outlined in current Sixth Amendment jurisprudence. This vision “focuses on the centrality of the institution of the jury in our system of government of the people, by the people, and for the people” and acts as “a means by which ordinary people can exercise governmental power to vindicate the community’s sense of right.”<sup>342</sup> Like Vikram David Amar, I wonder if the Sixth Amendment view of the jury should also guide our understanding of the Seventh Amendment.<sup>343</sup> Might the Framers who meant to ensure that a twelve-member jury, not a lone judge, stand as a bulwark against governmental tyranny, have also wanted that same institution to judge the whistleblower claims of those who stand up to corporate wrongdoing? If so, we, as twenty-first century Americans, might also consider whether any parallels exist between the community interest in having a criminal jury determine the guilt or innocence of those Enron executives accused of criminal law violations and the community interest in having a civil jury determine whether a whistleblower was fired for engaging in SOX-protected activity. To my mind, in this era of the “vanishing civil jury trial,” the fundamental importance of the civil jury

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<sup>339</sup> See *supra* note 338.

<sup>340</sup> *Id.*

<sup>341</sup> *Id.*

<sup>342</sup> See Vikram David Amar, *Implementing an Historical Vision of the Jury in an Age of Administrative Factfinding and Sentencing Guidelines*, 47 S. TEX. L. REV. 291, 293 (2005) (“The basic constitutional vision underlying the *Booker/Blakely/Apprendi* line of cases focuses on the centrality of the institution of the jury in our system of government of the people, by the people, and for the people.”).

<sup>343</sup> *Id.* at 297 (“In other words, although the *Apprendi* line relies on jury rights under the Sixth Amendment, ought not the vision of the jury it reflects inform our understanding of the Seventh Amendment, which covers civil juries in federal courts as well?”).

as a constitutional actor has never been more critical.<sup>344</sup> Whether SOX whistleblower claims in federal courts are to be tried to juries is something in which all of us, as citizens, have a stake. I would rather see this historical vision of the jury, as opposed to a strict convenience and efficiency consideration, influence the constitutional decision.

#### IV. CONCLUSION

The structure, language, and purpose of the Sarbanes-Oxley Act whistleblower provision indicate that courts should imply the right to a jury trial as a matter of statutory interpretation. In addition, the Seventh Amendment guarantees the right to a jury trial under the static historical test applied by the Supreme Court because a SOX action is analogous to an English common-law action and SOX damages remedies are legal in nature. In general, the jury in a SOX case in federal court should make factual findings on the elements of a SOX action, the causation element in particular, and damages. The judge in a SOX case will resolve the other issues in the case, which constitute questions of law.

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<sup>344</sup> See, e.g., Justice Nathan L. Hecht, *The Vanishing Civil Jury Trial: Trends in Texas Courts and an Uncertain Future*, 47 S. TEX. L. REV. 163 (2005) (documenting the “steady, steep, decades-long decline” in the number of jury trials in Texas courts).