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FOR-PROFIT PUBLIC ENFORCEMENT

Margaret H. Lemos and Max Minzner

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Margaret H. Lemos and Max Minzner***

This Article investigates an important yet undertheorized phenomenon: financial incentives in public enforcement. Each year, public enforcers assess billions of dollars in penalties and other financial sanctions for violations of state and federal law. Why? If the awards in question were the result of private lawsuits, the answer would be obvious. We expect that private enforcers — the victims of law violations and their fee-seeking attorneys — will attempt to maximize financial recoveries. Record recoveries come as no surprise in private class actions, for example. But dollar signs are harder to explain in the context of public enforcement. Unlike private attorneys who are paid a percentage of the recovery, public enforcers are paid by salary. They have no direct financial stake in successful enforcement efforts. We assume that public enforcers pursue financial awards only for their deterrent value, not for the benefits that such recoveries can bring the enforcement agency itself.

Or do they? Contrary to the conventional wisdom on the division between public and private enforcement, this Article argues that public enforcers often seek large monetary awards for self-interested reasons divorced from the public interest in deterrence. The incentives are strongest when enforcement agencies are permitted to retain all or some of the proceeds of enforcement — an institutional arrangement that is common at the state level and beginning to crop up in federal law. Yet even when public enforcers must turn over their winnings to the general treasury, they may have reputational incentives to focus their efforts on measurable units like dollars earned. Financially motivated public enforcers are likely to behave more like private enforcers than is commonly appreciated: they will undertake more enforcement actions, focus on maximizing financial recoveries rather than securing injunctive relief, and compete with other would-be enforcers for lucrative cases. Those effects will often be undesirable, particularly in circumstances where the risk of overenforcement is high. But financial incentives might provide a valuable spur to action for agencies that currently are performing well below optimal levels. Policymakers recognize as much when they seek to boost private enforcement by promising prevailing plaintiffs supracompensatory damages. We show that financial incentives can serve a similar purpose in the public sphere, offering policymakers an additional tool for calibrating the level of public enforcement.

INTRODUCTION

Law enforcement is a big business. Public enforcers at both the state and federal levels bring in billions of dollars each year as the result of settlements and court judgments. In Fiscal Year (FY) 2011, for example, the Securities and Exchange Commission (SEC) reported

* Professor, Duke University School of Law.
** Professor, University of New Mexico School of Law. The authors thank Eric Biber, Rick Bierschbach, David Freeman Engstrom, Eric Gerding, Alex Reinert, Reed Shuldiner, Kevin Stack, and Alex Stein for helpful comments on earlier drafts. Douglas Dreier, and Jane Bahnson of the Duke Law Library, provided invaluable research assistance.

total recoveries of $2.8 billion;[1] in FY 2012, the Departments of Justice (DOJ) and Health and Human Services (HHS) together recovered $3 billion in health care fraud actions;[2] the Commodity Futures Trading Commission (CFTC) imposed more than $900 million in financial sanctions;[3] and the Environmental Protection Agency (EPA) imposed civil and criminal penalties totaling $252 million.[4] State attorneys general banded together to negotiate a $25 billion settlement with the nation's leading mortgage-servicing banks.[5] Individual attorneys general have also boasted of millions of dollars in additional recoveries for their states and citizens.[6]

What motivates public enforcers to pursue large financial recoveries? If the recoveries in question were the result of private lawsuits, the answer would be obvious. We expect private enforcers to maximize monetary recoveries, in order to return as much money as possible to victims and — perhaps especially — to enlarge the fee for private counsel. Because we assume that private enforcement is financially motivated, dollar signs do not surprise us. We would be

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1 U.S. SEC. & EXCH. COMM'N, IN BRIEF: FY 2013 CONGRESSIONAL JUSTIFICATION 1 (2012), *available at* http://www.sec.gov/about/secfy13congbudgjust.pdf.

2 Press Release, Dep't of Justice, Acting Associate Attorney General Tony West Speaks at Pen and Pad Briefing Announcing Record Civil FY 2012 Recoveries (Dec. 4, 2012), *available at* http://www.justice.gov/iso/opa/asg/speeches/2012/asg-speech-1212041.html (describing a collaboration between the DOJ and HHS called "the Health Care Fraud and Enforcement Action Team, or 'HEAT,'" which "led to [the recovery of] $3 billion in health care fraud actions under the False Claims Act in FY 2012 — a record for a single year").

3 COMMODITY FUTURES TRADING COMM'N, ANNUAL PERFORMANCE REPORT: FISCAL YEAR 2012, at 49 (2013), *available at* http://www.cftc.gov/ucm/groups/public/@aboutcftc/documents/file/2012apr.pdf.

4 *Enforcement Annual Results for Fiscal Year 2012*, ENVTL. PROTECTION AGENCY, http://www2.epa.gov/enforcement/enforcement-annual-results-fiscal-year-2012 (last visited Nov. 24, 2013).

5 PHILIP A. LEHMAN, N.C. DEP'T OF JUSTICE, NATIONAL MORTGAGE SETTLEMENT: EXECUTIVE SUMMARY OF MULTISTATE/FEDERAL SETTLEMENT OF FORECLOSURE MISCONDUCT CLAIMS 1, *available at* http://portal.hud.gov/hudportal/documents/huddoc?id=natlsetexecsum%282%29.pdf.

6 *See, e.g.*, MIKE DEWINE, OHIO ATT'Y GEN., ANNUAL REPORT 26 (2012), *available at* http://www.ohioattorneygeneral.gov/OhioAttorneyGeneral/files/d1/d1ec99e5-5f0a-442d-85f0-248d01026439.pdf (reporting recoveries of $14.5 million in settlements involving off-label marketing of pharmaceutical drugs); Letter from Lisa Madigan, Ill. Att'y Gen., to Tim Mapes, Clerk of the Ill. House of Representatives (Feb. 1, 2013), *available at* http://illinoisattorneygeneral.gov/publications/annualrpt_ga/revenue/REPORT_TO_ILLINOIS_HOUSE_2012.pdf (reporting total collections of $570,925,134.84 by the Illinois Attorney General's Office in calendar year 2012); *see also* MARTHA COAKLEY, MASS. ATT'Y GEN., REPORT OF THE ATTORNEY GENERAL FOR FISCAL YEAR 2011, at 7 (2011), *available at* http://www.mass.gov/ago/docs/ourorganization/fy11-annual-report.pdf ("In Fiscal Year 2011, our Office was able to secure more than $400 million in recoveries and savings based on a budget of $37 million. That is a return on investment by the Commonwealth of approximately 10 to one."); JOHN R. KROGER, OR. ATT'Y GEN., ATTORNEY GENERAL'S ANNUAL REPORT 5 (2012), *available at* http://www.doj.state.or.us/about/pdf/annual_report_2011.pdf (reporting recoveries of $2,715,000 in antitrust and securities cases, and $8,493,508 in health care fraud cases in 2011).

troubled by astronomical judgments if we thought that they represent random blows, like lightning strikes,[7] or that they create a windfall culture and discourage socially beneficial behavior.[8] Or we would applaud them if we believed that they compensate victims for harm and deter further wrongdoing. Either way, we have both a theory by which to understand financial recoveries in private cases and a vocabulary for making normative assessments.

We lack similar tools for assessing financial incentives in public enforcement because we assume that such incentives do not exist. Indeed, financial incentives (or the lack thereof) mark one of the conventional dividing lines between private and public enforcement.[9] Private enforcers — typically victims and their fee-seeking counsel — are out for money; public enforcers — typically salaried government attorneys — are not. Public enforcers pursue financial penalties, to be sure, but we assume that they value money only as an instrument of public policy. On this view, monetary penalties are simply another tool in the government's enforcement toolkit, along with imprisonment, injunctive relief, and other forms of compensatory and punitive relief. Thus, under this line of reasoning we should take for granted that agencies seek monetary recoveries to deter wrongdoers and strip away their gains, not to reap the benefits that such recoveries can bring the enforcement agencies themselves.

This Article challenges the conventional wisdom on financial incentives in public enforcement. We show that both federal and state agencies have self-interested reasons to maximize financial recoveries, even though their employees are paid by salary and do not profit financially from successful enforcement. The most obvious incentive comes from institutional arrangements that allow enforcement agencies to retain a portion of any financial awards they win.[10] Such arrangements are common at the state level and are beginning to crop up in federal law as well. Yet they have received virtually no attention in the literature on public enforcement, even as they complicate familiar assumptions about the division between public and private enforcement.

Even in cases when public enforcers must turn over any monetary recoveries to the general treasury, we suggest that agencies may have

[7] *See* Robert J. Rhee, *A Financial Economic Theory of Punitive Damages*, 111 MICH. L. REV. 33, 35 (2012) (likening punitive damages awards to lightning strikes); Stephen D. Sugarman, *Doing Away with Tort Law*, 73 CALIF. L. REV. 555, 567 (1985) (same).

[8] *See* John H. Beisner et al., *Class Action "Cops": Public Servants or Private Entrepreneurs?*, 57 STAN. L. REV. 1441, 1444–51 (2005) (summarizing critiques of expanding private class actions).

[9] *See infra* Part I, pp. 858–63.

[10] *See infra* section II.A.1, pp. 864–75.

reputational interests in maximizing financial awards.[11] Money has two significant advantages over other forms of relief: it is easy to understand and easy to quantify and compare. An agency can easily trumpet a "record" financial judgment.[12] It is far more difficult for public enforcers to convey the importance or the scale of injunctive remedies. The difficulty is compounded when the public policy payoff of nonmonetary relief is uncertain and will be realized, if at all, in future years. Particularly when agencies face public scrutiny and increased oversight from Congress, they may have strong incentives to focus their efforts on performance measures — such as dollars collected — that send a clear signal and permit comparisons over time and across agencies.

If public enforcers have both direct and reputational incentives to seek large financial recoveries, does it matter? We argue that financial incentives are likely to affect public enforcement in several ways.[13] Financially motivated agencies are apt to initiate more enforcement actions, reduce their focus on nonmonetary remedies, and compete with one another for enforcement dollars. Notably, each of these effects brings public enforcement closer to the private model — and highlights dangers that are widely recognized in that context. For example, critics of private enforcement have long argued that avaricious plaintiffs and attorneys may be tempted to overenforce and may emphasize financial recoveries in lieu of more meaningful injunctive relief. We show that the same risks exist on the public side of the line.

But to say that for-profit public enforcement is risky is not necessarily to condemn it in all contexts. As students of private enforcement know so well, financial incentives can provide a much-needed spur to action in circumstances where enforcement levels are inappro-

[11] *See infra* section II.A.2, pp. 875–86.

[12] *See, e.g.*, Press Release, Fed. Trade Comm'n, Google Will Pay $22.5 Million to Settle FTC Charges it Misrepresented Privacy Assurances to Users of Apple's Safari Internet Browser (Aug. 9, 2012), *available at* http://ftc.gov/opa/2012/08/google.shtm (describing a $22.5 million dollar penalty imposed on Google by the Federal Trade Commission (FTC), the largest fine in the FTC's history for violation of a Commission order); Press Release, Office of the Comptroller of the Currency, OCC Assesses $500 Million Civil Money Penalty Against HSBC Bank USA, N.A. (Dec. 11, 2012), *available at* http://occ.gov/news-issuances/news-releases/2012/nr-occ-2012-173.html (reporting record-setting $500 million sanction levied against HSBC Bank by the Office of the Comptroller of the Currency); Press Release, U.S. Commodity Futures Trading Comm'n, CFTC Orders Barclays to Pay $200 Million Penalty for Attempted Manipulation of and False Reporting Concerning LIBOR and Euribor Benchmark Interest Rates (June 27, 2012), *available at* http://www.cftc.gov/PressRoom/PressReleases/pr6289-12 (reporting $200 million civil penalty imposed by the CFTC on Barclays Bank); *Scotts Miracle-Gro Company Settlement*, U.S. ENVTL. PROT. AGENCY (Sept. 7, 2012), http://www.epa.gov/compliance/resources/cases/civil/fifra/scottsmiraclegro.html (reporting $6,050,000 civil penalty assessed by the EPA against Scotts Miracle-Gro, the largest civil penalty ever assessed under the Federal Insecticide, Fungicide, and Rodenticide Act).

[13] *See infra* section III.A, pp. 895–903.

priately low. Congress recognizes as much when it encourages private enforcement by offering supracompensatory damages to successful plaintiffs. Similar tools could be used to jump-start stalled public enforcement.[14] They have been ignored to date, however, on the assumption that financially motivated public enforcement is a misnomer.

This Article proceeds in three parts. Part I reviews the conventional wisdom on public and private enforcement. Part II explains why it would be a mistake to assume that salaried government attorneys have no self-interest in maximizing financial recoveries. Part III describes the effects of financial incentives on public enforcement and assesses the costs and benefits. A brief conclusion follows.

I. FINANCIAL INCENTIVES IN PUBLIC AND PRIVATE ENFORCEMENT

In 1974, Professors Gary Becker and George Stigler published a provocative article advocating the privatization of law enforcement.[15] Central to Becker and Stigler's thesis is the fact that public and private enforcers are compensated in different ways. Public enforcers are paid a flat salary, whereas private enforcers profit directly from enforcement. Because the public enforcer's expected gain from enforcement is much lower than the violator's expected loss, Becker and Stigler argued that the public enforcer is susceptible to bribes. The violator can offer to pay the enforcer some sum below the expected penalty in exchange for dropping the enforcement.[16] The deal would benefit both parties. The public enforcer would turn a profit, and the violator would avoid paying for the full extent of the harm he caused and thus would not be deterred from further misconduct. Such bribes are not possible in a system of private enforcement, however, where enforcers (victims or their agents) typically stand to gain the same amount as the perpetrator stands to lose.[17]

In the years since Becker and Stigler's article was published, a rich theoretical literature on the differences between public and private enforcement has developed. Building on Becker and Stigler's claim that public enforcement may be subject to corruption, commentators have exposed various other ways that public enforcement may skew away

[14] *See infra* section III.B, pp. 903–12.

[15] *See* Gary S. Becker & George J. Stigler, *Law Enforcement, Malfeasance, and Compensation of Enforcers*, 3 J. LEGAL STUD. 1, 14 (1974).

[16] *See id.* at 5.

[17] *Id.* at 14 ("The amount of victim enforcement would be optimal if successful enforcers were paid the amount that they had suffered in damages, excluding their enforcement costs, divided by the probability that they are successful . . . . If this amount were levied in fines against convicted violators, so that, in effect, violators compensated victims, the gain to victims from enforcement would be the same as the punishment to violators; hence these enforcers could not be corrupted.").

from the public interest. Politicians may undermine enforcement efforts by replacing key personnel or cutting budgets,[18] and limited resources may prevent public enforcers from uncovering and pursuing violations.[19] Public enforcement agencies may be captured by the very firms they should be targeting.[20] Individual government attorneys may pull their punches in enforcement because they hope to secure a job in the regulated industry[21] or may avoid difficult cases in favor of those that are easy to win.[22] Alternatively, public enforcement may sometimes be overzealous, particularly when politicians react to well-publicized scandals.[23]

Notice what is missing from this picture: financial incentives. Commentators continue to work from the premise that public enforcers, because they are paid by salary, have no direct financial stake in the success of litigation. The financial disinterest of public enforcers has no obvious normative valence. Depending on the circumstances and one's view of optimal enforcement, the absence of a profit motive may be a good thing (allowing public enforcers to withstand the temptation to go after every colorable violation)[24] or a bad thing (depriving enforcers of a much-needed incentive to pursue vigorous enforcement).[25] But it is a constant in the positive account of public enforcement.

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[18] *See* Kenneth W. Dam, *Class Actions: Efficiency, Compensation, Deterrence, and Conflict of Interest*, 4 J. LEGAL STUD. 47, 67 (1975) ("[W]hen the budget is determined by the political process, there is no reason to believe that the rate of enforcement would be economically optimal."); *see also* Amanda M. Rose, *Reforming Securities Litigation Reform: Restructuring the Relationship Between Public and Private Enforcement of Rule 10b-5*, 108 COLUM. L. REV. 1301, 1341 (2008) (arguing that the SEC "is subject to political whims (particularly with respect to its budget)").

[19] *See* Richard B. Stewart & Cass R. Sunstein, *Public Programs and Private Rights*, 95 HARV. L. REV. 1193, 1214 (1982) ("Public enforcement is . . . frequently inadequate because of budget constraints . . . .").

[20] On the capture concept generally, see STEVEN P. CROLEY, REGULATION AND PUBLIC INTERESTS: THE POSSIBILITY OF GOOD REGULATORY GOVERNMENT 14–25 (2008); and PREVENTING REGULATORY CAPTURE (Daniel Carpenter & David A. Moss eds., 2014).

[21] *See infra* note 163 and accompanying text (describing and critiquing the "revolving door" theory of government attorney behavior).

[22] *See* RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW 637–38 (6th ed. 2003) (explaining that agencies will prefer to pursue cases that are "relatively unimportant to the defendant," *id.* at 637, and therefore cheaper and easier to win); Michael Selmi, *Public vs. Private Enforcement of Civil Rights: The Case of Housing and Employment*, 45 UCLA L. REV. 1401, 1404 (1998) (arguing that public enforcers opt "to concentrate [their] efforts on small, routine [civil rights] cases").

[23] *See* A.C. Pritchard, *The SEC at 70: Time for Retirement?*, 80 NOTRE DAME L. REV. 1073, 1076 (2005) (identifying a "cyclical pattern of neglect and hysterical overreaction" in the actions of Congress and the SEC).

[24] *See* William M. Landes & Richard A. Posner, *The Private Enforcement of Law*, 4 J. LEGAL STUD. 1, 39 (1975) (discussing importance of "discretionary nonenforcement").

[25] *See* Selmi, *supra* note 22, at 1443 (arguing that federal civil rights agencies are weak enforcers in part because they have no financial stake in the outcomes of their cases).

The conventional wisdom on private enforcement could not be more different. Personal financial incentives lie at the heart of well-known critiques of private enforcement, beginning with Professor William Landes and then-Professor Richard Posner's response to Becker and Stigler. Landes and Posner argue that private enforcement will lead to overenforcement whenever the available penalty exceeds the harm — for example, where multiple or punitive damages are available.[26] Policymakers might adopt high penalties as a way to economize on the resources devoted to enforcement; by raising the penalty and lowering the level of enforcement (and thus the probability that any violator will be sanctioned), policymakers can obtain the same level of deterrence at lower cost. But a higher penalty will induce financially motivated private enforcers to devote *more* resources to enforcement, potentially resulting in overenforcement.[27]

That critique is generalized in Professor Steven Shavell's seminal article, *The Fundamental Divergence Between the Private and the Social Motive to Use the Legal System.*[28] As his title suggests, Shavell focuses on the divergence between private litigants' decisions to bring suit — which typically are fueled by a desire for compensation or other relief — and the social interest in deterring unwanted behavior. There is no necessary connection between the compensatory and the deterrent value of enforcement. Thus, Shavell convincingly shows, an enforcement scheme driven by the self-interested decisions of private parties can result in either over- or underdeterrence.[29]

Other commentators have applied the insights from the theoretical literature to particular areas of law, arguing that financially motivated private litigation is producing too little or too much enforcement. Complaints about profit-maximizing private enforcement are common in debates over class actions, for example. Critics contend that greedy class counsel are lining their pockets at the expense of blameless de-

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[26] Landes & Posner, *supra* note 24, at 15.

[27] *Id.* (emphasizing that the same problem does not arise in public enforcement because "public enforcer[s are] not constrained to act as . . . private profit maximizer[s]"). For an argument outlining the ways in which procedural and evidentiary structures may prevent overenforcement, see Richard A. Bierschbach & Alex Stein, *Overenforcement*, 93 GEO. L.J. 1743 (2005).

[28] Steven Shavell, *The Fundamental Divergence Between the Private and the Social Motive to Use the Legal System*, 26 J. LEGAL STUD. 575 (1997).

[29] *Id.* at 578 ("[I]t could be that the plaintiff's benefit from suit exceeds the social deterrent benefit (suppose that damages are high but that deterrence is slight because there is little injurers can do to reduce harm). Or it could be that the plaintiff's return from suit is less than its deterrent effect (suppose that damages would be small but that deterrence would be significant because injurers can exercise cheap and effective precautions)."); *see also* A. Mitchell Polinsky, *Private Versus Public Enforcement of Fines*, 9 J. LEGAL STUD. 105 (1980) (arguing that in many cases financially motivated private enforcement will result in underdeterrence, particularly where the external damage from the violation is large and enforcement costs are high).

fendants and clueless class members,[30] while supporters insist that our best hope of deterring widespread corporate wrongdoing is to harness the financial incentives of entrepreneurial private attorneys.[31] Both sides of the debate seek to make sense of the relationship between public and private enforcement. Some argue that private enforcement should take a back seat to public enforcement, on the ground that the latter can avoid the financial distortions that define the former.[32] Others argue that private enforcement is a critical supplement to public enforcement, precisely because public enforcers lack a strong personal interest in maximizing penalties — and thus, deterrence.[33] Again, the collective assumption is that, when it comes to money, the incentives of public and private enforcers are starkly different. Public enforcers are motivated by politics, not profits; they "care" about financial recoveries only to the extent that monetary awards translate into justice.[34]

The widespread assumption that public and private enforcers can be distinguished by their interest (or disinterest) in monetary rewards

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[30] *See, e.g.*, John C. Coffee Jr., *Rethinking the Class Action: A Policy Primer on Reform*, 62 IND. L.J. 625, 633 (1987) ("The existence of high agency costs implies the likelihood of 'opportunistic behavior.' . . . At its simplest, the classic form of opportunism in class actions is the 'sweetheart' settlement, namely one in which the plaintiff's attorney trades a high fee award for a low recovery."); John C. Coffee, Jr., *Understanding the Plaintiff's Attorney: The Implications of Economic Theory for Private Enforcement of Law Through Class and Derivative Actions*, 86 COLUM. L. REV. 669, 686–90 (1986) (using economic analysis to demonstrate why class counsel's focus on fees may lead to premature settlements when counsel will receive a percentage of the total recovery); William B. Rubenstein, *On What a "Private Attorney General" Is — And Why It Matters*, 57 VAND. L. REV. 2129, 2162–63 (2004) (noting the "virtual mantra of the class action literature," *id.* at 2162, that "class actions are characterized by a rent-seeking entrepreneur pursuing her own interests with little oversight by her principals," *id.* at 2162–63). An opposing (but equally critical) line of scholarship emphasizes concerns that class actions will compel blameless defendants to settle frivolous suits in order to avoid the costs of litigation or the risk of crushing liability. *See* Milton Handler, *The Shift from Substantive to Procedural Innovations in Antitrust Suits — The Twenty-Third Annual Antitrust Review*, 71 COLUM. L. REV. 1, 9 (1971) (coining the term "legalized blackmail" to describe class settlements induced by "the threat of unmanageable and expensive litigation"). *See generally* Charles Silver, *"We're Scared to Death": Class Certification and Blackmail*, 78 N.Y.U. L. REV. 1357 (2003) (describing and critiquing claims of excessive settlement pressure in class actions).

[31] *See generally* Myriam Gilles & Gary B. Friedman, *Exploding the Class Action Agency Costs Myth: The Social Utility of Entrepreneurial Lawyers*, 155 U. PA. L. REV. 103 (2006).

[32] *See* Rose, *supra* note 18, at 1301 (arguing that public enforcers should screen putative securities class actions because private "'bounty hunter' enforcement of an overbroad law, like Rule 10b-5, may lead to overdeterrence and stymie governmental efforts to set effective enforcement policy").

[33] *See* John C. Coffee, Jr., *Rescuing the Private Attorney General: Why the Model of the Lawyer as Bounty Hunter Is Not Working*, 42 MD. L. REV. 215, 220 (1983) ("In theory, the private attorney general is induced by the profit motive to seek out cases that otherwise might go undetected.").

[34] *See* Rubenstein, *supra* note 30, at 2139 ("[P]ublic attorneys work for the public and are paid a salary to do so. The amount of time they invest in an issue, the amount of sanction they recover, or the amount of harm they deter, has no bearing on their fee. Their priorities, the uses of their billable hours, are generally determined by politics, not money.").

is particularly striking in light of the fact that, not too long ago, public enforcers often were compensated in ways that were tied directly to their enforcement efforts. Tax collectors retained some of the taxes they collected, customs agents profited directly from the duties they collected, and prosecutors were paid per conviction.[35] Most U.S. jurisdictions abandoned such payment schemes by the turn of the twentieth century, due in large part to concerns that bounty-based public enforcement would result in the same kind of overzealousness — a failure to exercise appropriate prosecutorial discretion — that we have come to expect from private enforcement.[36] This historical episode, while largely forgotten,[37] served to cement the tradition of fixed salaries for public employees, "mak[ing] the absence of the profit motive a defining feature of government."[38]

In the pages that follow, we show that this supposed distinction between public and private enforcement is not as sharp as it first appears. Indeed, the line between the two categories of enforcement already has begun to blur in the face of a growing recognition that public enforcement often serves a function traditionally associated with private litigation: compensating victims.[39] Complicating matters further, public and private enforcers increasingly work to-

[35] *See, e.g.*, Tracey L. Meares, *Rewards for Good Behavior: Influencing Prosecutorial Discretion and Conduct with Financial Incentives*, 64 FORDHAM L. REV. 851, 880–81, 880 n.114 (1995) ("State prosecutors commonly collected conviction fees payable according to statutory schedules." *Id.* at 880–81.). *See generally* NICHOLAS R. PARRILLO, AGAINST THE PROFIT MOTIVE: THE SALARY REVOLUTION IN AMERICAN GOVERNMENT, 1780–1940, at 125–254 (2013).

[36] *See* PARRILLO, *supra* note 35, at 125–254 (describing transition from bounties to salaries). As Parrillo explains, "officers' profit motive discouraged them from making the kind of subjective and discretionary decisions *not* to enforce the law that were (and are) necessary to sand off the hard edges of modern state power so it can win acceptance by the population." *Id.* at 4. Parrillo also details a different kind of problem with for-profit public enforcement:

> The effective implementation of legislative will depended (and still depends) on a large degree of mass voluntary cooperation by the affected individuals, and bounties turned out to undermine such cooperation. The officer's monetary incentive to impose sanctions on laypersons placed him in such an adversarial position toward them as to vitiate their trust in government and elicit from them a mirror-image adversarial response.

Id.

[37] *See id.* at 4 ("That American government made a transition from profit-seeking toward salaries is a story largely untold and unknown.").

[38] *Id.* at 1.

[39] For a discussion of victim compensation by one particular federal agency, see Verity Winship, *Fair Funds and the SEC's Compensation of Injured Investors*, 60 FLA. L. REV. 1103, 1110–23 (2008) (describing efforts by the SEC to distribute financial recoveries to injured individuals). The federal government's move toward victim compensation is not limited to the SEC. *See* Adam S. Zimmerman, *Distributing Justice*, 86 N.Y.U. L. REV. 500, 533–39 (2011) (describing equivalent powers vested in the FTC and the Food and Drug Administration). For a discussion of victim compensation by state attorneys general, see Margaret H. Lemos, *Aggregate Litigation Goes Public: Representative Suits by State Attorneys General*, 126 HARV. L. REV. 486, 492–511 (2012) (discussing representative suits by state attorneys general that serve roles similar to damages class actions).

gether, as where public and private attorneys join forces to pursue a common foe,[40] or where public enforcement agencies rely on private contingency-fee lawyers to litigate their cases.[41] There is reason to suspect that public enforcement changes in subtle ways when public enforcers are asked to pursue one of the core goals of private enforcement or to work closely with others who are focused on maximizing financial recoveries. The argument here is different: regardless of whether monetary recoveries will be used to compensate victims or deter future wrongdoing (or both), public enforcers have self-interested reasons to maximize financial awards.

II. FOR-PROFIT PUBLIC ENFORCEMENT

The conventional wisdom holds that public enforcers lack direct incentives to maximize financial recoveries because — unlike private litigants and lawyers — government attorneys and agency personnel are paid by salary and cannot turn lucrative litigation into personal profit. As this Part demonstrates, the conventional view is missing an important part of the picture. It is true that public enforcers do not profit from successful litigation in the sense of taking home a percentage of awards, as private lawyers might. Nevertheless, the institutional structures in which many public enforcers work provide ample incentives for salaried government employees to prioritize and maximize financial recoveries. First, in many cases, the institutions of public enforcement are permitted to retain all or part of the proceeds of enforcement. Second, even where the relevant agency or office must turn over any awards to the general treasury, public enforcers seeking reputational rewards have good reason to focus on easily quantifiable, revenue-producing financial recoveries.

For ease of exposition, this Part begins by discussing those incentives at the institutional level — that is, at the level of an enforcement agency or office — treating an agency as a unitary actor. We later ex-

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[40] *See* Lemos, *supra* note 39, at 499 & n.54 (discussing joint enforcement actions by state attorneys general and private class counsel). In many regulatory settings, moreover, public and private enforcers operate side by side, armed with parallel authority to go after the same offenders separately — and sometimes together. As Professor David Engstrom observes: "[A]lthough much of the existing theoretical literature treats public and private enforcement as pure substitutes and a binary choice . . . [,] 'many of our most consequential regulatory regimes have evolved . . . into hybrids of public and private enforcement in which multiple enforcers . . . operate and interact within complex ecologies of enforcement.'" David Freeman Engstrom, *Public Regulation of Private Enforcement: Empirical Analysis of DOJ Oversight of* Qui Tam *Litigation Under the False Claims Act*, 107 NW. U. L. REV. (forthcoming 2013) (manuscript at 61) (quoting David Freeman Engstrom, *Agencies as Litigation Gatekeepers*, 123 YALE L.J. (forthcoming 2013) (manuscript at 5)).

[41] *See* Margaret H. Lemos, *State Enforcement of Federal Law*, 86 N.Y.U. L. REV. 698, 735–36 (2011).

pand the discussion to address the reality that any public enforcement agency is a "they," not an "it."[42] In the latter half of this Part, we examine the reasons why agency personnel, from political appointees at the top to careerists and short-term employees at the "street level," might themselves have incentives to maximize financial recoveries.

A. Institutional Incentives

1. Revolving Funds. — The default rule under both state and federal law is that the proceeds of public enforcement belong to the public fisc rather than to the agency or official responsible for the action. That rule is codified in the federal Miscellaneous Receipts Act[43] (MRA), which states (subject to certain enumerated exceptions) that "an official or agent of the Government receiving money for the Government from any source shall deposit the money in the Treasury as soon as practicable without deduction for any charge or claim."[44] Virtually every state has a comparable rule.[45]

Notwithstanding the MRA and its state counterparts, some public enforcers are authorized by statute to retain a portion of the money recovered through enforcement, whether as a result of settlement or judgment. For example, the Health Insurance Portability and Accountability Act of 1996[46] (HIPAA) created a revolving fund called the Health Care Fraud and Abuse Control Account.[47] The Account is funded, in part, by the proceeds of public enforcement, including criminal fines and forfeited assets recovered in cases involving federal health care offenses and civil penalties and assessments imposed in

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[42] *Cf.* Kenneth A. Shepsle, *Congress Is a "They," Not an "It": Legislative Intent as Oxymoron*, 12 INT'L REV. L. & ECON. 239, 254 (1992) ("[T]his brief paper . . . provides insight into the meaninglessness of the concept of 'legislative intent.' Individuals have intentions and purpose and motives; collections of individuals do not. To pretend otherwise is fanciful.").

[43] 31 U.S.C. § 3302(b) (2006).

[44] *Id.*

[45] *See, e.g.*, ALASKA STAT. § 37.10.060 (2012) ("All fees and receipts received by the Department of Revenue from any source shall be deposited in the state treasury at least once each month . . . ."); GA. CODE ANN. § 45-12-92 (1990) ("All departments, agencies, and budget units charged with the duty of collecting taxes, fees, assessments, or other moneys . . . shall pay all revenues collected by them into the state treasury on a monthly basis . . . ." *Id.* § 45-12-92(a)); IND. CODE § 4-6-2-4 (2013) ("It shall be the duty of the attorney-general to . . . pay over to the proper officer all money collected at the end of each month . . . ."); *id.* § 4-8.1-2-6 ("Before moneys may be deposited in the state treasury, the treasurer of state must receive from the person or agency making the deposit a report of collections due the state treasury . . . ."); KAN. STAT. ANN. § 75-706 (1989 & Supp. 2012) ("All moneys received by the attorney general belonging to this state shall be remitted to the state treasurer . . . [who] shall deposit the entire amount in the state treasury to the credit of the state general fund.").

[46] Pub. L. No. 104-191, 110 Stat. 1936 (codified as amended in scattered sections of the U.S. Code).

[47] 42 U.S.C. § 1395i(k) (2006 & Supp. V 2011).

health care cases, including Social Security and False Claims Act[48] cases.[49] The funds are used by federal agencies to support further enforcement of health care–related federal law.[50] The legislative history of the HIPAA contains no serious debate over the revolving fund, revealing only bland references to the fund as a "stable funding source" that will "provide[] increased resources"[51] for the relevant agencies, facilitating staff increases and other measures to aid "the fight against health care fraud and abuse."[52]

More recently, the American Jobs Creation Act of 2004[53] authorized the Internal Revenue Service (IRS) to employ private collection agencies (PCAs) to recover certain types of unpaid taxes.[54] The Act provides that the IRS may use up to twenty-five percent of the recovered funds to compensate the PCAs, and may use another twenty-five percent to support its own "collection enforcement activities."[55] The idea of using PCAs to collect unpaid taxes was proposed by the Bush Administration as a means of raising revenue without raising taxes or further stretching the resources of the beleaguered IRS.[56] It was extremely controversial,[57] and Congress held further hearings in 2007 to address ongoing complaints about the program.[58] By contrast, the provision permitting the IRS to retain a portion of the proceeds to fund its own enforcement has generated hardly a peep of public protest.[59]

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[48] 31 U.S.C. §§ 3729–3731 (2006 & Supp. V 2011).

[49] *See* 42 U.S.C. § 1395i(k)(2)(C).

[50] *Id.* § 1395i(k)(3). The relevant agencies are HHS, the DOJ, and the Federal Bureau of Investigation.

[51] KATHLEEN S. SWENDIMAN & JENNIFER O'SULLIVAN, CONG. RESEARCH SERV., 97-895 A, HEALTH CARE FRAUD: A BRIEF SUMMARY OF LAW AND FEDERAL ANTI-FRAUD ACTIVITIES 11 (1997).

[52] Thomas W. Brunner & Kirk J. Nahra, Wiley, Rein & Fielding, The Anti-Fraud Implications of the Clinton Health Care Proposal, *in Deceit that Sickens America: Health Care Fraud and Its Innocent Victims: Hearing Before the Subcomm. on Crime & Criminal Justice of the H. Comm. on the Judiciary*, 103d Cong. 105, 109 (1994).

[53] Pub. L. No. 108-357, 118 Stat. 1418 (codified as amended in scattered sections of 26 U.S.C.).

[54] 26 U.S.C. § 6306 (2006).

[55] *Id.* § 6306(c)(1).

[56] *See Use of Private Collection Agencies to Improve IRS Debt Collection: Hearing Before the Subcomm. on Oversight of the H. Comm. on Ways and Means*, 108th Cong. 4 (2003) (statement of Rep. Amo Houghton, Chairman, Subcomm. on Oversight) ("[T]he IRS estimates that $78 billion of the total inventory of outstanding tax liabilities is potentially collectable. The IRS has determined also that it lacks the resources, however, to pursue much of the unpaid taxes.").

[57] *See* Jeffrey B. Tate, *Debt and Taxes: A Look at the IRS Private Debt Collection Program*, 116 TAX NOTES 583 (2007) ("The use of PCAs has been highly controversial.").

[58] *See The Internal Revenue Service's Use of Private Debt Collection Companies to Collect Federal Income Taxes: Hearing Before the H. Comm. on Ways and Means*, 110th Cong. (2007).

[59] The provision in question was part of a substitute bill proposed by Senator John McCain; it appeared in the version of the bill passed by the Senate, but there was no equivalent in the House version. The Senate provision was retained in the bill voted out of the conference committee, but

Revolving funds are even more common at the state level, where state attorneys general often are allowed to "eat what [they] kill."[60] For example, many states permit the office of the attorney general to retain a specified percentage of the damages and civil penalties obtained through enforcement of state and federal antitrust laws,[61] and many others have similar provisions linked to the enforcement of state consumer protection, false claims, and related statutes.[62] Other states

there is no meaningful discussion in the conference report. *See* H.R. REP. NO. 108-755, at 742 (2004) ("The conference agreement follows the House bill, with the addition of two provisions from the Senate amendment: (1) the conference agreement provides that up to 25 percent of amount collected may be used for IRS collection enforcement activities; and (2) the conference agreement requires Treasury to provide a biennial report to Congress. The conferees expect that, consistent with best management practices and sound tax administration principles, the Secretary will utilize this new debt collection provision to the maximum extent feasible."). One article, generally critical of the use of PCAs for tax collection, devotes only three sentences to the provision permitting the IRS to retain a portion of the funds. *See* Tate, *supra* note 57, at 591 ("Further, the private collection program improperly distorts the incentives of the IRS. Although the IRS is normally not permitted to retain any of the funds it collects for its own budget, the code authorizes the IRS to retain up to 25 percent of the amount collected under the program . . . . Therefore, the IRS will have a greater incentive to use PCAs to collect unpaid taxes than to use IRS personnel, even if using IRS employees would be less costly.").

[60] PETER J. BRANN, COLUMBIA LAW SCH. STATE ATT'Y GEN. PROJECT, STATE ATTORNEYS GENERAL CONSUMER PROTECTION UNDER A NEW ADMINISTRATION: NEW OPPORTUNITIES AND NEW CHALLENGES 5 (2008) (internal quotation marks omitted), *available at* http://www.law.columbia.edu/null?&exclusive=filemgr.download&file_id=55833&rtcontentdispositi. Revolving funds in the states are not just common; they are longstanding. For example, Oregon established an antitrust revolving fund for the attorney general in 1965, and expanded it into a more general-purpose fund in 1993. OR. REV. STAT. § 180.095 (2011) (Department of Justice Protection and Education Revolving Account); *see also* OFFICE OF THE SEC'Y OF STATE, OREGON DEPARTMENT OF JUSTICE ADMINISTRATIVE OVERVIEW 9–10 (2007), *available at* http://arcweb.sos.state.or.us/doc/recmgmt/sched/special/state/overview/20060011dojadov.pdf (including a chronology of Oregon's changes to the fund).

[61] *See, e.g.*, ARIZ. REV. STAT. ANN. § 41-191.01 (2013) (depositing greater of ten percent of antitrust recoveries or actual amount expended into revolving fund); CAL. BUS. & PROF. CODE § 16750(f) (West 2008) (capping the deposit at the greater of ten percent of antitrust recoveries plus attorneys' fees or actual amount expended into revolving fund); KAN. STAT. ANN. § 75-715 (1996 & Supp. 2012) (depositing twenty percent of antitrust recoveries into revolving fund); MO. REV. STAT. § 416.081 (2000) (paying ten percent of antitrust recoveries into revolving fund for the payment of all costs and expenses incurred by the attorney general in investigating, prosecuting, or enforcing state or federal laws relating to antitrust, trade regulation, restraint of trade, or price-fixing activities); NEV. REV. STAT. § 598A.260 (2011) (depositing all attorneys' fees and costs and fifty percent of all recoveries from enforcement of statutes pertaining to unfair trade practices into the "Attorney General's Special Fund" to be used for payment of the expenses of enforcement, *id.* § 598A.260(1)(A)); N.J. STAT. ANN. § 56:9-19 (West 2012) (creating revolving fund from proceeds of antitrust enforcement under state or federal law, to be used for further antitrust enforcement); OHIO REV. CODE ANN. § 109.82 (LexisNexis 2007) (depositing ten percent of antitrust recoveries plus fees and costs into revolving fund); WASH. REV. CODE § 43.10.215 (2012) (transferring antitrust fees and funds transferred to revolving fund pursuant to court order or judgment in antitrust actions; attorney general may expend funds for costs associated with antitrust enforcement).

[62] *See, e.g.*, ARK. CODE ANN. § 4-88-202 (2011) (creating supplemental civil penalties ($10,000 for each violation) for deceptive trade practices committed against elder or disabled persons, and providing that those penalties "shall be . . . placed into the Elder and Disabled Victims Fund, a

have established all-purpose revolving funds for the support of the office of the attorney general, which are funded by the proceeds of *any* civil litigation conducted by the attorney general and may be used for the performance of any of the powers or duties of the office.[63] Such civil enforcement provisions have flown almost entirely under the academic radar, even as commentators have heaped critical attention on similar provisions governing the forfeiture of assets in criminal law.

special fund created in the State Treasury and administered by the Attorney General for the investigation and prosecution of deceptive acts against elder and disabled persons and for consumer education initiatives"); CAL. BUS. & PROF. CODE § 17206(c)–(d) (West 2008 & Supp. 2013) (providing that funds recovered by attorney general through consumer protection litigation must be used to further enforce consumer protection law); CAL. GOV'T CODE § 12652(g)(1) (West 2011 & Supp. 2013) (providing that thirty-three percent of funds recovered by the attorney general through false claims litigation shall be used to support ongoing investigation and prosecution of false claims); KAN. STAT. ANN. § 75-7508(c) (providing that ten percent of any recovery is deposited in false claims litigation revolving funds and can then be used to hire staff and otherwise fund enforcement efforts, including the retainer of counsel outside the attorney general's office); LA. REV. STAT. ANN. 46:440.1 (2010) (providing that "all monies received by the state pursuant to a civil award granted or settlement under the provisions of this Part, except for the amount to make the medical assistance programs whole, shall be deposited into" the Medical Assistance Programs Fraud Detection Fund, with fifty percent allocated to the Medicaid Fraud Control Unit within the office of the attorney general and fifty percent allocated to the Department of Health and Hospitals to be used solely for Medicaid fraud detection); N.J. STAT. ANN. § 2A:32C-7(c) (West 2000 & Supp. 2013) ("The Attorney General shall receive a fixed 10% of the proceeds in any action or settlement of the claim that it brings, which shall be deposited in the 'False Claims Prosecution Fund' established in section 13 of this act and shall only be used to support its ongoing investigation and prosecution of false claims pursuant to the provisions of this act." (footnote omitted)); *id.* § 2A:32C-13 (establishing the False Claims Prosecution Fund and providing for ten percent of false claims recoveries to be deposited there, *id.* § 2A:32C-13(a), as well as "25% of the State share of monies recovered from actions related to false or fraudulent Medicaid claims brought pursuant to this act in the 'Medicaid Fraud Control Fund,'" *id.* § 2A:32C-13(b), established by N.J. STAT. ANN. § 30:4D-62 (West 1997 & Supp. 2013)); N.D. CENT. CODE § 54-12-18 (2008) (providing that all civil penalties collected by the attorney general regarding any consumer protection or antitrust matter shall be deposited into the Attorney General Refund Fund, which may be used, among other purposes, "[t]o pay costs, expenses, and attorney's fees and salaries incurred in the operation of the consumer protection division," *id.* § 54-12-18(4)); TENN. CODE ANN. § 4-18-104(g) (2011) (providing that the office of the attorney general shall receive thirty-three percent of the proceeds of the action or settlement of non-Medicaid false claims cases, which "shall be used to support its ongoing investigation and prosecution of false claims," *id.* § 4-18-104(g)(1)(A)); *see also* BRANN, *supra* note 60, at 5 ("In some States, the consumer protection division [of the attorney general's office] is funded, often to a significant extent, by recoveries obtained by the division . . . .").

[63] *See, e.g.*, ALA. CODE § 36-15-4.2 (2001 & Supp. 2013) (all civil recoveries); OHIO REV. CODE ANN. § 109.081 (LexisNexis 2007) (up to eleven percent of any civil recovery); *see also* LA. REV. STAT. ANN. § 49:259 (2012) (instructing the treasurer to pay into the DOJ Legal Support Fund a portion of the proceeds recovered by the attorney general in civil litigation on behalf of the state, so long as the balance of the fund does not exceed ten million dollars, to be used for "defraying the costs of expert witnesses, consultants, contract legal counsel, technology, specialized employee training and education, and public education initiatives," *id.* § 49:259(C)).

Asset forfeiture has a long historical pedigree, predating the American Revolution,[64] but it expanded dramatically with a series of statutory changes beginning in 1970. In that year, Congress passed two major forfeiture provisions. First, as part of the Organized Crime Control Act of 1970,[65] the Racketeer Influenced and Corrupt Organizations Act[66] (RICO) authorized forfeiture of any interest acquired or maintained by a criminal defendant as a result of a RICO violation.[67] Second, Congress adopted the Comprehensive Drug Abuse Prevention and Control Act of 1970[68] and created a forfeiture provision in cases involving narcotics.[69] The scope of forfeiture was initially limited. Only the seized drugs, manufacturing equipment, and items used to transport narcotics were eligible. However, Congress expanded the list of forfeitable items through the late 1970s into the mid-1980s. The list of forfeitable property now includes vehicles and real property used in a narcotics crime as well as the proceeds of narcotics activities.[70] Comparable provisions exist at the state level, permitting forfeiture of the property and money used in criminal activity.[71]

Of equal importance, in 1984 Congress amended federal law to permit the DOJ to retain control of the proceeds of asset forfeiture rather than turning them over to the general treasury pursuant to the MRA. The Senate Report on the 1984 amendments indicates that legislators were dissatisfied "that Federal law enforcement agencies had not aggressively pursued forfeiture"[72] and saw the creation of a revolving fund as a way to encourage more robust use of the expanding statutory provisions for asset forfeiture.[73]

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[64] *See generally* Donald J. Boudreaux & A.C. Pritchard, *Civil Forfeiture and the War on Drugs: Lessons from Economics and History*, 33 SAN DIEGO L. REV. 79, 93 (1996) (outlining history of forfeiture).

[65] Pub. L. No. 91-452, 84 Stat. 992 (codified in scattered sections of 28 U.S.C.).

[66] 18 U.S.C. §§ 1961–1968 (2012).

[67] *Id.* § 1963(a); *see* Russello v. United States, 464 U.S. 16 (1983) (describing purpose of the RICO forfeiture provisions).

[68] 21 U.S.C. §§ 801–971 (2012).

[69] *Id.* § 881.

[70] In the Psychotropic Substances Act of 1978, Pub. L. No. 95-633, 92 Stat. 3768 (codified in scattered sections of 21 U.S.C.), Congress authorized the forfeitures of proceeds traceable to narcotics transactions, 21 U.S.C. § 881(a)(6). Six years later, the statute was amended to include real property. Pub. L. No. 98-473, tit. II, § 306, 98 Stat. 1837, 2050 (1984) (codified at 21 U.S.C. § 881(a)(7)). *See generally* Eric Blumenson & Eva Nilsen, *Policing for Profit: The Drug War's Hidden Economic Agenda*, 65 U. CHI. L. REV. 35, 44–45 (1998) (describing statutory changes).

[71] *See generally* DEE R. EDGEWORTH, ASSET FORFEITURE: PRACTICE AND PROCEDURE IN STATE AND FEDERAL COURTS (2d ed. 2008).

[72] S. REP. NO. 98-225, at 191 (1983).

[73] *Id.* at 216 ("Presently, when any amounts are realized by the United States from the forfeiture of drug-related assets, these amounts must be deposited in the general fund of the Treasury. Therefore, they are not available to defray the expenses of forfeiture in those cases where the expenses associated with the forfeiture of a particular piece of property exceed the amount realized by the sale of the property.").

The amendments worked: the amounts forfeited are significant and growing. In 1985, the DOJ's Asset Forfeiture Fund saw deposits of only $27 million.[74] From 2003 to 2011, annual revenues to the Fund increased from $500 million to $1.8 billion.[75] The DOJ is authorized by law to use the forfeited funds for a variety of law enforcement purposes.[76] State forfeiture laws frequently have similar provisions that dedicate forfeited funds to law enforcement use rather than requiring that the money be turned over for general public use.[77]

Commentary on the current statutory schema for asset forfeiture is overwhelmingly critical, as scholars argue that allowing law enforcement to retain the forfeited assets creates perverse incentives for enforcers to pursue the most valuable assets rather than the most dangerous criminals.[78] For example, purchasers of narcotics are likely to possess cash that can be seized, forfeited, and converted to law enforcement use. Sellers, on the other hand, are likely to possess the drugs themselves. While the drugs can be forfeited, law enforcement cannot reap any economic benefit from the seizure. As a result, forfeiture provisions may increase the relative share of drug arrests that involve buyers and reduce the fraction that target sellers.[79]

More generally, critics argue that the criminal asset-forfeiture provisions encourage law enforcement to shift investigatory resources toward cases with forfeitable assets and away from cases that are less likely to be lucrative. The primary consequence, in these commenta-

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[74] Eric Moores, Note, *Reforming the Civil Asset Forfeiture Act*, 51 ARIZ. L. REV. 777, 783 (2009).

[75] U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-12-736, JUSTICE ASSETS FORFEITURE FUND: TRANSPARENCY OF BALANCES AND CONTROLS OVER EQUITABLE SHARING SHOULD BE IMPROVED 11 (2012), *available at* www.gao.gov/assets/600/592349.pdf.

[76] 28 U.S.C. § 524(c)(1) (2006 & Supp. V 2011) (describing permitted uses). In practice, perhaps the most significant use comes through "equitable sharing" of seized assets with state and local law enforcement. When joint state-federal investigations lead to forfeiture, the Asset Forfeiture Fund turns over some or all of the seized funds to the nonfederal partner in the investigation. *Id.* Even in purely state and local investigations, states may request that federal officials "adopt" the case if it involves property that can be forfeited federally. Such adoptions may occur, for example, if federal forfeiture provisions are more favorable to law enforcement than the comparable state law. In such cases, the bulk of the forfeited funds are returned to the state or local authority and the Asset Forfeiture Fund retains only a small portion. U.S. DEP'T OF JUSTICE, GUIDE TO EQUITABLE SHARING FOR STATE AND LOCAL LAW ENFORCEMENT AGENCIES 12 (2009), *available at* http://www.justice.gov/usao/ri/projects/esguidelines.pdf.

[77] For a (perhaps dated) fifty-state survey, see Blumenson & Nilsen, *supra* note 70, at 52 n.66 (identifying the share of forfeited funds retained by law enforcement in each state as of 1998). For a more recent look, see Marian R. Williams, Research Note, *Civil Asset Forfeiture: Where Does the Money Go?*, 27 CRIM. JUST. REV. 321, 321 (2002) ("[A] vast majority of states (88 percent) as well as the federal government explicitly allow law enforcement agencies to benefit from the 'war on drugs' by keeping the proceeds from civil asset forfeitures.").

[78] *See, e.g.*, Blumenson & Nilsen, *supra* note 70, at 66; Boudreaux & Pritchard, *supra* note 64, at 89.

[79] *See* Blumenson & Nilsen, *supra* note 70, at 67.

tors' view, is that police are induced to focus more on narcotics cases and less on other types of crimes.[80] Thus, critics contend that the asset-forfeiture provisions serve to expand and perpetuate the so-called "War on Drugs," by giving law enforcement a direct stake in the legal status quo and preventing level-headed assessments of policy alternatives.[81]

The problems with asset forfeiture are real; we discuss them in more detail in Part III. The important point for present purposes is that such problems extend well beyond the narrow swath of criminal law enforcement on which commentators have focused. Although virtually all of the scholarship on asset forfeiture centers on drug policy, statutory provisions authorizing public enforcers to retain forfeited assets appear in many other contexts — both civil and criminal — that have escaped notice thus far. For example, federal law provides that the proceeds of any civil forfeiture carried out by the U.S. Postal Service shall be deposited in a Postal Service Fund that the Service may use to cover any expenses it incurs in carrying out its functions, including law enforcement.[82] The Department of the Treasury has a similar revolving fund, which is populated by "seizures and forfeitures made pursuant to any law . . . enforced or administered by the Department of the Treasury or the United States Coast Guard."[83] And the DOJ Asset Forfeiture Fund consists of "all amounts from the forfeiture of property under *any* law enforced or administered by the Department of Justice."[84]

Moreover, it is increasingly common for federal and (especially) state law to permit public enforcers to retain a portion of the money recovered through civil judgments or negotiated settlements. Just as asset forfeiture provisions create incentives for enforcers to maximize forfeitures, such enforcement-funded revolving funds create incentives for enforcers to maximize financial recoveries. At least since William Niskanen's seminal 1971 book,[85] scholars have recognized that agency heads often seek to maximize their institutions' budgets — or at least the "discretionary" portion of the budget, representing "the difference between the total budget and the minimum cost of producing the out-

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[80] *See* Boudreaux & Pritchard, *supra* note 64, at 90.

[81] *See* John L. Worrall, *Addicted to the Drug War: The Role of Civil Asset Forfeiture as a Budgetary Necessity in Contemporary Law Enforcement*, 29 J. CRIM. JUST. 171, 182–83 (2001).

[82] 39 U.S.C. § 2003 (2006); *see also id.* § 404(a)(7) (providing that the Postal Service may deposit into the revolving fund one-half of "all penalties and forfeitures imposed for violations of law affecting the Postal Service, its revenues, or property").

[83] 31 U.S.C. § 9703(a) (2006).

[84] 28 U.S.C. § 524(c)(4)(A) (2006 & Supp. V 2011) (emphasis added).

[85] WILLIAM A. NISKANEN, JR., OFFICE OF MGMT. & BUDGET, BUREAUCRACY AND REPRESENTATIVE GOVERNMENT (1971).

put expected by" the agency's legislative and executive overseers.[86] Agency officials, so the theory goes, care about "salary, perquisites of the office, public reputation, power, patronage, output of the bureau, ease of making changes, and ease of managing the bureau" — all of which depend in some respect on the size of the agency's budget.[87] Lower-level agency employees share their bosses' interest in budget maximization because the benefits of a larger budget trickle down to them in the form of enhanced career opportunities.[88]

Enforcement-funded revolving funds and the like will tend to enhance the budgets for public enforcers in one of two ways. First and most obviously, the proceeds of enforcement may supplement any monies appropriated to the agency by the legislature, increasing the overall resources available to the agency. Indeed, some revolving-fund provisions specify that the fund cannot be used to replace or supplant appropriations from the legislature.[89] Even in the face of such a statutory prohibition, however, one might suspect that budgeting authorities would consider any funds already available to public enforcers when setting their budgets for coming years. There is some evidence that state and local budget authorities cut appropriations in response to law enforcement seizures of valuable forfeitable assets.[90] And some revolving-fund provisions make the interdependence of legislative appropriations and enforcement recoveries explicit.[91]

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[86] William A. Niskanen, *A Reflection on* Bureaucracy and Representative Government, *in* THE BUDGET-MAXIMIZING BUREAUCRAT: APPRAISALS AND EVIDENCE 13, 18 (André Blais & Stéphane Dion eds., 1991).

[87] NISKANEN, *supra* note 85, at 38.

[88] *Id.* at 40.

[89] *See, e.g.*, LA. REV. STAT. ANN. § 49:259 (2012) (creating DOJ Legal Support Fund, comprising up to $10 million of "proceeds recovered by the attorney general on behalf of the state from court judgments, settlements, fines, fees, forfeitures and penalties," *id.* § 49:259(A), and providing that "[m]onies appropriated from the fund shall be used to supplement the Department of Justice budget and shall in no way be used to displace, replace, or supplant appropriations from the state general fund for operations of the Department of Justice below the level of state general fund appropriations for that department in the current fiscal year," *id.* § 49:259(C)).

[90] *See* Katherine Baicker & Mireille Jacobson, *Finders Keepers: Forfeiture Laws, Policing Incentives, and Local Budgets*, 91 J. PUB. ECON. 2113, 2135 (2007) (reporting that budget authorities cut appropriations in response to law enforcement seizures and that law enforcement increases forfeiture activity as a result).

[91] For example, the Alabama Attorney General enjoys the use of a "special fund," ALA. CODE § 36-15-4.2(a) (2001 & Supp. 2013), comprising money collected by the Attorney General in certain cases "as a result of any fees, fines, restitution, forfeitures, penalties, costs, interest, or judgments collected pursuant to any civil litigation," *id.* § 36-15-4.2(b). The authorizing statute earmarks the funds:

> for the use of the office of the Attorney General in the fiscal year in which the sums are received in a total cumulative amount of 50 percent of the sum allocated to the office of the Attorney General from the State General Fund for that fiscal year and may retain and carryover up to 125 percent of the sum allocated to the office of the Attorney General from the State General Fund to the next fiscal year, which shall be taken into account by the Legislature in future appropriations.

Regardless of the text of the relevant statutes, therefore, money collected through enforcement may often offset, rather than supplement, legislative appropriations. But that reality does not remove enforcers' maximizing incentives. On the contrary, it may tend to make law enforcement even more dependent on asset forfeitures and other remunerative forms of enforcement. Not surprisingly, surveys of state and local law enforcement agencies suggest that agencies view themselves as at least partially dependent on income from asset forfeiture,[92] and empirical research shows that enforcers increase forfeiture activity in response to cuts in legislative appropriations.[93]

The intuitions behind those findings are simple. Like all individuals and institutions, agencies become accustomed to a certain budget level — a "standard of living," so to speak. In order to formulate their annual budget requests, agencies have to make predictions about their activities and needs in the coming fiscal year. For agencies with access to revolving funds, such forecasts may involve assumptions about how much money the agency will collect through enforcement. If an agency fails to meet the projected benchmarks, it may be left with a budget shortfall — even if the legislative appropriation remains unchanged.[94] The situation becomes even more stark if a legislative appropriation decreases (or was inadequate to begin with). Suppose that an agency's budget for enforcement in year one is ten, consisting of seven from the legislature and three from enforcement. And suppose that the legislature cuts its appropriation to six for year two. The agency likely will try to increase its enforcement proceeds to four, in order to maintain its current levels of staffing, salaries, and so on. Thus, even if enforcement-funded revolving funds lead to *decreases* in legislative

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Id.

[92] *See* Worrall, *supra* note 81, at 182; Sarah Henry, *The Thin Green Line*, CAL. LAW., Sept. 1994, at 46, 52 (quoting an official in the San Diego County Sheriff's Department as stating that asset forfeiture funds are "the only thing that has kept the department going since the state's budgetary crisis started three years ago" (quoting Dan Greenblat, Special Assistant to the Sheriff) (internal quotation mark omitted)); Sean P. Murphy, *More Dealer Forfeits Being Used to Fight Drugs*, BOSTON GLOBE, Nov. 12, 1990, at 21 (noting that the four-person forfeiture unit at the U.S. Attorney's Office in Boston realized a net gain of $6 million in 1989, and quoting Middlesex County District Attorney Scott Harshbarger as stating that $750,000 taken from drug dealers in 1989 helped the county avoid layoffs in the face of a $1.1 million cut in state funding).

[93] *See* Baicker & Jacobson, *supra* note 90, at 2135.

[94] *See* United States v. James Daniel Good Real Prop., 510 U.S. 43, 56 n.2 (1993) ("The extent of the Government's financial stake in drug forfeiture is apparent from a 1990 memo, in which the Attorney General urged the United States Attorneys to increase the volume of forfeitures in order to meet the Department of Justice's annual budget target: . . . 'Failure to achieve the $470 million projection would expose the Department's forfeiture program to criticism and undermine confidence in our budget projections. Every effort must be made to increase forfeiture income during the remaining three months of [fiscal year] 1990.'" (alteration in original) (quoting U.S. Dep't of Justice, *Administrative Issues*, 38 U.S. ATT'Y BULL. 163, 180 (1990))).

appropriations, they may encourage more aggressive enforcement going forward.[95]

Second, a legislature is likely to allocate more money to an agency if it does not have to "pay for" the entire amount. Consider two hypothetical scenarios: In one, all of the funds for an agency's annual budget must be appropriated from the general treasury, and thus traded off against competing uses. In the second scenario, only half of the agency's budget will come from the treasury; the other half is already in the agency's possession. It stands to reason that the legislators will more readily agree to a higher budget in the second scenario, because fewer budgetary tradeoffs need to be made.[96]

Finally and most generally, enforcement-funded revolving funds may lead to higher budgets if the collecting agencies are favorably perceived as "paying for [themselves]."[97] Legislators are likely to take a rosy view of agencies that are able to produce results while demanding less money through appropriations. Such agencies will appear as valuable partners rather than drags on the public fisc. And when agencies bring in as much money as is spent on them, that may encourage

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[95] The discussion here focuses on the incentives of public *enforcers*. We bracket the question of whether agencies whose missions are dominated by goals other than enforcement will share the same rosy vision of a revolving fund that is earmarked for enforcement purposes — particularly if the success of such a fund prompts cuts in appropriated funds that might have been devoted to other uses. We note, however, that such a scenario seems unlikely in light of the fact that agencies typically itemize their budget requests to a certain extent (for example, *X* for enforcement efforts, *Y* for prevention efforts, and so forth). *See, e.g.*, U.S. CONSUMER PROD. SAFETY COMM'N, 2013 PERFORMANCE BUDGET REQUEST 3–4 (2012); U.S. SEC. & EXCH. COMM'N, *supra* note 1, at 51.

[96] It bears emphasis that neither of these points depends on the enforcement agency retaining full (or even partial) control over the proceeds of enforcement; it is enough that those proceeds are in a special fund earmarked for the agency, even if they are controlled by the legislature. *See, e.g.*, FLA. STAT. § 16.53 (2012) (creating a "Legal Affairs Revolving Trust Fund" that is populated with the proceeds of antitrust, false claims act, and RICO enforcement by the Attorney General and controlled by the state legislature — which can appropriate funds from the trust "for the purpose of funding investigation, prosecution, and enforcement by the Attorney General of the provisions of the Racketeer Influenced and Corrupt Organization Act, the Florida Deceptive and Unfair Trade Practices Act, the Florida False Claims Act, or state or federal antitrust laws," *id.* § 16.53(1) — and providing that "[a]ny moneys remaining in the fund at the end of any fiscal year in excess of 3 times the amount of the combined budgets for the antitrust and racketeering sections of the Attorney General's office for the forthcoming fiscal year shall be transferred to the General Revenue Fund unallocated," *id.* § 16.53(7)); IDAHO CODE ANN. § 48-606(5) (2008) ("All penalties, costs and fees recovered by the attorney general shall be remitted to the consumer protection fund . . . . Moneys in the fund may be expended pursuant to legislative appropriation and shall be used for the furtherance of the attorney general's duties and activities under this chapter. At the beginning of each fiscal year, those moneys in the consumer protection fund which exceed the current year's appropriation plus any residual encumbrances made against prior years' appropriations by fifty percent (50%) or more shall be transferred to the general fund.").

[97] Ralph H. Folsom, *State Antitrust Remedies: Lessons from the Laboratories*, 35 ANTITRUST BULL. 941, 958 (1990) ("Public antitrust enforcement at the state and local levels is often perceived as 'paying for itself.' In many instances this is quite literally true.").

legislators to spend more — just as one devotes more money to investments with healthy returns.

Not surprisingly, agencies take pains to convey to Congress — and to the public — the amounts deposited into any enforcement-funded revolving funds. For example, HHS and the DOJ issue joint annual reports to Congress on the amount of money collected in health care fraud cases and proceedings. Since the creation of the revolving fund in 1996, enforcement agencies have deposited between $480 million (in 1998)[98] and $4.2 *billion* (in 2012)[99] each year into the Control Account. Most years have seen deposits of over $1 billion. The annual reports highlight the numbers, and — more recently — calculate and emphasize the "Return-on-Investment (ROI)" of the Health Care Fraud and Abuse Control Program, which created the fund. The 2011 report boasts that the Program has returned $5.10 for every $1.00 expended on it.[100] In 2012, the agencies reported that "for every dollar spent on health care-related fraud and abuse investigations in the last three years, the government recovered $7.90."[101]

Similarly, the Department of the Treasury makes annual reports to Congress about its Forfeiture Fund, which — as the name suggests — consists of forfeitures made pursuant to all but two laws enforced by the Department of the Treasury or the U.S. Coast Guard and may be used for specified law enforcement purposes.[102] The Department's 2013 Congressional Budget Justification reports that the Fund:

> received close to $1 billion in forfeitures and recoveries in FY 2011 and is projected to have another year of robust collections in FY 2012. The success of Treasury's asset forfeiture program allows the Department to make priority investments in law enforcement and national security, without requesting additional resources from taxpayers. Further, it enables Treasury to contribute to deficit reduction with a proposed permanent cancellation of $830 million from the Forfeiture Fund's unobligated balances.[103]

Such reports of financial recoveries are likely to be music to the ears of budgeting authorities, particularly in times of financial difficul-

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[98] DEP'T OF HEALTH & HUMAN SERVS. & DEP'T OF JUSTICE, HEALTH CARE FRAUD AND ABUSE CONTROL PROGRAM: ANNUAL REPORT FOR FY 1998, at 2 (1999).

[99] DEP'T OF HEALTH & HUMAN SERVS. & DEP'T OF JUSTICE, HEALTH CARE FRAUD AND ABUSE CONTROL PROGRAM: ANNUAL REPORT FOR FISCAL YEAR 2012, at 1 (2013).

[100] DEP'T OF HEALTH & HUMAN SERVS. & DEP'T OF JUSTICE, HEALTH CARE FRAUD AND ABUSE CONTROL PROGRAM: ANNUAL REPORT FOR FISCAL YEAR 2011, at 8 (2012).

[101] Press Release, U.S. Dep't of Health & Human Servs., Departments of Justice and Health and Human Services Announce Record-Breaking Recoveries Resulting from Joint Efforts to Combat Health Care Fraud (Feb. 11, 2013), *available at* http://www.hhs.gov/news/press/2013pres/02/20130211a.html.

[102] 31 U.S.C. § 9703(a) (2006 & Supp. V 2011).

[103] U.S. DEP'T OF THE TREASURY, FY 2013 BUDGET-IN-BRIEF: EXECUTIVE SUMMARY 6 (2013), *available at* http://www.treasury.gov/about/budget-performance/budget-in-brief/Documents/1.%20Executive%20Summary%20final.pdf.

ty and governmental belt-tightening. Public enforcement programs that generate more money for government — and for taxpayers — than they cost will appeal not only to legislators who support the substance of the underlying program and hope for strong enforcement, but also to those who wish to minimize government spending or free up funds for other initiatives. This dynamic is most obvious when the proceeds from enforcement go directly to the agency itself (thus requiring a smaller legislative appropriation) or are earmarked specifically for the agency in the general treasury. Importantly, however, it extends to agencies that must turn over their "winnings" to the general treasury pursuant to the MRA and its state counterparts. We turn to that broader point next.

2. *Reputational Rewards.* — In addition to the direct financial incentives discussed in the previous section, agencies have reputational incentives to maximize the dollars imposed as financial sanctions. Agencies that reap large financial recoveries can develop reputations as strong and effective enforcers, and such reputations are often valuable. This section first outlines why agencies might choose to emphasize penalty size as a measure of enforcement quality and why external observers might accept such a metric. Next, we describe when and why agencies might care about their enforcement reputations. Finally, we explain why a focus on reputation helps makes sense of a puzzling pattern in public enforcement: the tendency of many agencies to *announce* large financial recoveries while failing to *collect* them.

Agencies that want to demonstrate enforcement effectiveness confront a difficult challenge. A core goal of enforcement is to prevent violations. In order to measure prevention directly, however, agencies would have to count the number of violators deterred. Such an approach would require measuring events that did not happen — a daunting task, to say the least. Indirect measures have equally serious problems. For example, an increase in the number of violations observed by enforcement authorities (such as those reflected in the Federal Bureau of Investigation Uniform Crime Reports) could either be a success story or a clear example of failure: Perhaps improved investigative techniques or increased trust of enforcement authorities made it possible to detect a greater fraction of violations — an indication of effective enforcement. But it is equally possible that enforcers simply failed in their deterrence mission.

The problem runs deeper still, because preventing violations is not agencies' sole objective. In some principal-agent contexts, the principal has a relatively straightforward task: set an appropriate goal for the agent and craft incentives and monitoring rules to ensure the agent achieves the goal. In other contexts, however, agents are tasked with multiple heterogeneous goals. Enforcement programs are a clear example of multiple goals in the agency context. Not only do most public enforcers have a variety of goals other than enforcement, but effective enforcement also requires careful case selection and calibration of penalties to avoid both under- and overdeterrence and to ensure efficient use of investigatory resources. It is easier to measure success at some of these goals than at others. For example, the sanctions imposed are usually publicly disclosed; the amount of effort devoted to investigation is frequently obscure.

A substantial literature has developed on the incentives that actors face when they choose among potential goals, some of which are easy to measure and others of which are more difficult. All other things being equal, the more easily measured task will receive more emphasis and will be performed at a higher level.[104] Effort placed toward the more easily measured result will produce more apparent successes while work toward other tasks will frequently be lost in the noise. Similarly, *not* working toward the measurable goals will produce clear evidence of failure, while a lack of effort toward the other tasks will not.

As applied to public enforcement, the upshot is that agencies seeking to build reputations as effective enforcers will tend to emphasize easily measurable accomplishments rather than more amorphous forms of success.[105] As other commentators have observed, agencies have strong incentives to focus on quantifiable objectives like win rates and the number of enforcement actions initiated in a given time period.[106] Financial recoveries offer similar rewards to would-be reputation builders. First, the amounts are simple to measure. Financial penalties are clear and indisputable because they are stated in dollars. Penalties also are easily comparable. The size of penalties imposed by one agency can be contrasted to the size of penalties imposed by another agency (or by the same agency in different years). This trait of penalties takes on particular importance because other potential measures of enforcement effectiveness are not so easy to quantify. Finally, agencies

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[104] *See generally* Eric Biber, *Too Many Things to Do: How to Deal with the Dysfunctions of Multiple-Goal Agencies*, 33 HARV. ENVTL. L. REV. 1, 12 n.30 (2009) (collecting citations); Bengt Holmstrom & Paul Milgrom, *Multitask Principal-Agent Analyses: Incentive Contracts, Asset Ownership, and Job Design*, 7 J.L. ECON. & ORG. (SPECIAL ISSUE) 24, 31–33 (1991).

[105] *See* Jonathan R. Macey, *The Distorting Incentives Facing the U.S. Securities and Exchange Commission*, 33 HARV. J.L. & PUB. POL'Y 639, 639 (2010) ("[T]he SEC tends to pursue high profile matters, to change its priorities frequently in accordance with public opinion, and perhaps most significantly, to pursue readily observable objectives, often at the expense of more important but less observable objectives. . . . This inclination to value only what can be easily measured has not served the SEC well.").

[106] *See, e.g.*, *id.* at 644–45 (noting the SEC's reliance on case filings and fines collected as success measures in the face of criticism); Daniel S. Medwed, *The Zeal Deal: Prosecutorial Resistance to Post-Conviction Claims of Innocence*, 84 B.U. L. REV. 125, 135 (2004) ("[C]iting office-wide conviction rates is a tangible means for district attorneys to tout their performance to government authorities; offices may use conviction statistics as leverage in budget negotiations, trumpeting their records of success to support demands for greater resources.").

possess all of the relevant data on civil penalties. Agencies are apt to lean toward civil penalties and other numbers that, compared to other measures, do not require additional data collection.

Unlike win rates and enforcement counts, moreover, financial recoveries purport to convey information about the size or importance of the agency's enforcement program. As we detail below, public enforcers often are criticized for prioritizing small and simple cases while ignoring bigger and more significant violations. Penalty amounts are — at best — an imperfect metric for gauging the importance of any given case. Nevertheless, high recoveries (either in a single case or in the aggregate) can make an enforcement program *appear* effective. An agency that is trying to cultivate a reputation as an effective enforcer may therefore find special value in financial awards.

Why would an agency desire such a reputation? Part of the reason is endogenous to enforcement: general deterrence depends on potential violators believing that a regulatory response is likely. Yet a reputation for effective enforcement is valuable to agencies for other reasons as well.[107] Enforcers have audiences other than potential defendants. First, agencies are concerned about their reputations internally, among their own employees. Employees working as part of an enforcement program who believe the program is effective and successful are likely to have higher job satisfaction and feel more engaged in serving the mission of the agency than are employees without such convictions.[108] As do high win rates, large penalties may help boost morale.

Agencies also must consider external audiences, such as legislatures, executive officials, and judges.[109] Here the value of a strong enforcement record is more complicated. On the one hand, agencies with strong enforcement reputations might develop more autonomy from oversight while agencies with weak reputations are more likely to have

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[107] For a short, general introduction to the literature on the role of agency reputation, see generally Daniel P. Carpenter & George A. Krause, Theory to Practice, *Reputation and Public Administration*, 72 PUB. ADMIN. REV. 26 (2012).

[108] *See generally, e.g.*, Barbara S. Romzek, Public Service Motivation, *Employee Investment and Commitment: The Ties that Bind*, 50 PUB. ADMIN. REV. 374 (1990); Yuan Ting, *Determinants of Job Satisfaction of Federal Government Employees*, 26 PUB. PERSONNEL MGMT. 313 (1997); Bradley E. Wright, Essay on Work Motivation and the Workplace, *Public Service and Motivation: Does Mission Matter?*, 67 PUB. ADMIN. REV. 54 (2007); Bradley E. Wright & Sanjay K. Pandey, *Public Service Motivation and the Assumption of Person-Organization Fit: Testing the Mediating Effect of Value Congruence*, 40 ADMIN. & SOC'Y 502 (2008).

[109] Agencies often need judicial approval for settlement agreements, for example. Judges may demand less justification from agencies that have developed reputations as committed enforcers. *Compare* Lemos, *supra* note 39, at 503–04, 504 n.73 (describing how judges tend to defer to state attorneys general when asked to approve state settlements), *with* Edward Wyatt, *Judge Rejects an S.E.C. Deal with Citigroup*, N.Y. TIMES, Nov. 29, 2011, at A1 ("Taking a broad swipe at the Securities and Exchange Commission's practice of allowing companies to settle cases without admitting that they had done anything wrong, a federal judge on Monday rejected a $285 million settlement between Citigroup and the agency.").

their choices second-guessed.[110] Agencies that are perceived as successful also may reap important budgetary rewards.[111]

On the other hand, vigorous enforcement may not always be desirable from the perspective of an agency's political overseers. Law enforcement is not an unalloyed good — its value depends on one's views on a host of policy questions, including the wisdom and efficacy of the law in question, the social costs of enforcement, and so on. Enforcement, in other words, is political.[112] A reputation for strong enforcement can thus be a benefit or a burden, depending on the direction of the political winds.

Complicating matters further, the political valence of strong enforcement differs from issue to issue. At the state level, for example, Republican and Democratic attorneys general alike take pains to publicize their enforcement records, but they often emphasize different issue areas.[113] Accordingly, it makes no sense to ask whether a reputation for effective enforcement will endear enforcers to their political overseers; the operative question is *enforcement of what*, and the answer will vary across agencies.

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[110] For works establishing that agencies with better reputations earn more autonomy, see DANIEL P. CARPENTER, THE FORGING OF BUREAUCRATIC AUTONOMY (2001); Jason A. MacDonald, *Limitation Riders and Congressional Influence over Bureaucratic Policy Decisions*, 104 AM. POL. SCI. REV. 766, 780–81 (2010); Jason A. MacDonald & William W. Franko Jr., *Bureaucratic Capacity and Bureaucratic Discretion: Does Congress Tie Policy Authority to Performance?*, 35 AM. POL. RES. 790 (2007); and Patrick S. Roberts, *FEMA and the Prospects for Reputation-Based Autonomy*, 20 STUD. AM. POL. DEV. 57, 81–83 (2006) (tracing the relationship over time between FEMA's institutional reputation and the autonomy it was granted).

[111] *See, e.g.*, Amy Deen Westbrook, *Enthusiastic Enforcement*, *Informal Legislation: The Unruly Expansion of the Foreign Corrupt Practices Act*, 45 GA. L. REV. 489, 560 (2011) ("[I]n the 1990s . . . the EPA and the DOJ focused on environmental enforcement, measuring success on the basis of convictions and penalties. The agencies then used those statistics to obtain a larger budget and hire more prosecutors." (footnote omitted)).

[112] There is a substantial, if inconclusive, literature examining the effects of political influence on agency outputs, including enforcement choices. *See generally* Charles R. Shipan, *Regulatory Regimes, Agency Actions, and the Conditional Nature of Congressional Influence*, 98 AM. POL. SCI. REV. 467, 467–68 (2004) (collecting studies); David B. Spence, *Administrative Law and Agency Policymaking: Rethinking the Positive Theory of Political Control*, 14 YALE J. ON REG. 407, 412–15, 414 n.28 (1997) (same). For articles focused on the role of politics in agency enforcement, see, for example, Mark J. Moran & Barry R. Weingast, Paper, *Congress as the Source of Regulatory Decisions: The Case of the Federal Trade Commission*, 72 AM. ECON. REV. 109, 111–12 (1982) (tracing the relationship between the composition of Congress and FTC policy); and Mary Olson, *Substitution in Regulatory Agencies: FDA Enforcement Alternatives*, 12 J.L. ECON. & ORG. 376, 377 (1996). For studies focused specifically on the effects of executive politics on agency enforcement, see Terry M. Moe, *Regulatory Performance and Presidential Administration*, 26 AM. J. POL. SCI. 197, 197–98 (1982) (finding variation in enforcement efforts of National Labor Relations Board, FTC, and SEC based on presidential administration in office); and B. Dan Wood & Richard W. Waterman, *The Dynamics of Political Control of the Bureaucracy*, 85 AM. POL. SCI. REV. 801, 823–24 (1991) (finding significant executive influence on the behavior of seven agencies, especially those situated within an executive department).

[113] *See* Lemos, *supra* note 41, at 729–30, 730 n.145.

The value of a strong enforcement record also will vary across time, for at least two independent reasons. The first is obvious: political majorities are subject to change, so an enforcement record that gratifies today's oversight committee may antagonize tomorrow's. The second reason has to do with public scrutiny. When the public is paying attention, legislatures and executive officials are likely to press for stronger enforcement and reward agencies that carry out their wishes. But the public is not always paying attention. Enforcement is often invisible to those who benefit from it — in public choice terms, enforcement typically works to the advantage of the "inattentive public[]."[114] By contrast, the targets of enforcement are always paying attention to their regulators, even when the agencies do not make the news, and these targeted parties can place pressure on Congress and the executive branch to reduce the focus on enforcement.[115] The main source of this political pressure shifts if public scrutiny is suddenly directed toward an agency's enforcement practices — in the wake of a well-publicized failure, for example. For relatively high-profile agencies, public scrutiny is more common than not (though it rises and falls depending on the salience of the agency's activities). At the federal level, for example, the DOJ and, to a lesser degree, the SEC both receive some level of press attention even in ordinary times and frequently see the spotlight turned on their enforcement programs.[116] The same is largely true of state attorneys general, most of whom are popularly elected.[117] Other enforcement agencies are outside of the public eye most of the time, and only a major catastrophe draws attention. As a result, we might expect that higher-profile agencies will of-

[114] R. DOUGLAS ARNOLD, THE LOGIC OF CONGRESSIONAL ACTION 68 (1990); *see also id.* at 64–71 (discussing the difference between "attentive" and "inattentive" publics and noting that the former tend to be more effective in influencing legislators).

[115] In the case of state attorneys general, the pressure is likely to be even more direct. *See* Lemos, *supra* note 41, at 728–29 (discussing the risk that elected state attorneys general may be influenced by firms that would otherwise be the targets of enforcement).

[116] Empirical studies show an interesting shift in SEC enforcement practices following the highly publicized "collapse of Enron, WorldCom, and other subsequent corporate disasters." James D. Cox & Randall S. Thomas with Dana Kiku, *Public and Private Enforcement of the Securities Laws: Have Things Changed Since Enron?*, 80 NOTRE DAME L. REV. 893, 895 (2005). Pre-Enron, the SEC "was most concerned with fraud at companies experiencing financial distress, probably because of the greater likelihood that investors at those companies would suffer permanent and irreversible losses. It could also reflect a potential preference by the SEC to choose weak opponents." *Id.* at 905. Post-Enron, the SEC appears to have shifted its focus to "seeking out frauds at companies where investors may have suffered larger losses, especially if they [we]re smaller firms. . . . [Among other factors,] public concern about fraudulent practices at the largest corporations could well have provided impetus for the SEC's enforcement staff to involve itself with more 'high profile' cases than it otherwise would have engaged." *Id.* at 906.

[117] *See* William P. Marshall, Essay, *Break Up the Presidency? Governors, State Attorneys General, and Lessons from the Divided Executive*, 115 YALE L.J. 2446, 2448 n.3 (2006) (explaining that forty-three states provide for popular election of attorneys general).

ten (perhaps always) want to cultivate reputations as strong enforcers, while other agencies will seek to advertise their effectiveness if, and only if, the public is paying attention.

These observations suggest that public enforcers have reputational incentives to prioritize financial recoveries, particularly during times of public scrutiny. It should come as no surprise then, that agencies commonly seek press coverage based on the large size of their financial enforcement judgments. In 2011 and 2012, for example, the SEC issued nineteen press releases announcing the resolution of enforcement actions.[118] All nineteen mention the financial penalties that the de-

[118] The 2011 and 2012 SEC press releases are available at *Press Release Archives 2011*, U.S. SEC. & EXCH. COMM'N, http://www.sec.gov/news/press/pressarchive/2011press.shtml (last visited Nov. 24, 2013); and *Press Releases*, U.S. SEC. & EXCH. COMM'N, http://www.sec.gov/news/press/pressarchive/2012press.shtml (last visited Nov. 24, 2013). The nineteen releases are: Press Release, U.S. Sec. & Exch. Comm'n, Attorney, Wall Street Trader, and Middleman Settle SEC Charges in $32 Million Insider Trading Case (Apr. 25, 2012), *available at* http://www.sec.gov/news/press/2012/2012-77.htm; Press Release, U.S. Sec. & Exch. Comm'n, BP to Pay $525 Million Penalty to Settle SEC Charges of Securities Fraud During Deepwater Horizon Oil Spill (Nov. 15, 2012), *available at* http://www.sec.gov/news/press/2012/2012-231.htm; Press Release, U.S. Sec. & Exch. Comm'n, Citigroup to Pay $285 Million to Settle SEC Charges for Misleading Investors About CDO Tied to Housing Market (Oct. 19, 2011), *available at* http://www.sec.gov/news/press/2011/2011-214.htm; Press Release, U.S. Sec. & Exch. Comm'n, Former Banco Santander Analyst Agrees to Settle Insider Trading Charges (Apr. 25, 2011), *available at* http://www.sec.gov/news/press/2011/2011-98.htm; Press Release, U.S. Sec. & Exch. Comm'n, Former CEO to Return $2.8 Million in Bonuses and Stock Profits Received During CSK Auto Accounting Fraud (Nov. 15, 2011), *available at* http://www.sec.gov/news/press/2011/2011-243.htm; Press Release, U.S. Sec. & Exch. Comm'n, H&R Block Subsidiary Agrees to Pay $28.2 Million to Settle SEC Charges Related to Subprime Mortgage Investments (Apr. 24, 2012), *available at* http://www.sec.gov/News/PressRelease/Detail/PressRelease/1365171488676; Press Release, U.S. Sec. & Exch. Comm'n, Hedge Fund Manager to Pay $44 Million for Illegal Trading in Chinese Bank Stocks (Dec. 12, 2012), *available at* http://www.sec.gov/news/press/2012/2012-264.htm; Press Release, U.S. Sec. & Exch. Comm'n, Hong Kong Firm to Pay $14 Million to Settle Insider Trading Charges (Oct. 18, 2012), *available at* http://www.sec.gov/news/press/2012/2012-212.htm; Press Release, U.S. Sec. & Exch. Comm'n, J.P. Morgan to Pay $153.6 Million to Settle SEC Charges of Misleading Investors in CDO Tied to U.S. Housing Market (June 21, 2011), *available at* http://www.sec.gov/news/press/2011/2011-131.htm; Press Release, U.S. Sec. & Exch. Comm'n, Judge Orders Plastics Executive to Pay $49.5 Million in SEC Case (Dec. 22, 2011), *available at* http://www.sec.gov/news/press/2011/2011-275.htm; Press Release, U.S. Sec. & Exch. Comm'n, MassMutual to Pay $1.625 Million After SEC Investigation Highlights Prior Insufficient Disclosures About Annuity Product (Nov. 15, 2012), *available at* http://www.sec.gov/news/press/2012/2012-230.htm; Press Release, U.S. Sec. & Exch. Comm'n, Morgan Keegan to Pay $200 Million to Settle Fraud Charges Related to Subprime Mortgage-Backed Securities (June 22, 2011), *available at* http://www.sec.gov/news/press/2011/2011-132.htm; Press Release, U.S. Sec. & Exch. Comm'n, N.Y.-Based Investment Advisory Firm and Founder Settle SEC Charges for Fraudulent Management of CDOS (Sept. 7, 2012), *available at* http://www.sec.gov/news/press/2012/2012-184.htm; Press Release, U.S. Sec. & Exch. Comm'n, OppenheimerFunds to Pay $35 Million to Settle SEC Charges for Misleading Statements During Financial Crisis (June 6, 2012), *available at* http://www.sec.gov/news/press/2012/2012-110.htm; Press Release, U.S. Sec. & Exch. Comm'n, SEC Obtains Settlement with CEO to Recover Compensation and Stock Profits He Received During Company's Fraud (Mar. 3, 2011), *available at* http://www.sec.gov/news/press/2011/2011-61.htm; Press Release, U.S. Sec. & Exch. Comm'n, SEC Sanctions Two Investment Advisers for Impeding Examinations (Nov. 20, 2012), *available at* http://www.sec.gov/news/press/2012/2012-238.htm; Press Release, U.S. Sec. & Exch.

fendant was required to pay. In fourteen of the nineteen releases, the headline includes the penalty's dollar value, suggesting that the agency viewed this fact as one of the key items that it hoped would be mentioned in any press coverage.

In addition to individual actions, the SEC also attempts to draw attention to the aggregate total of its enforcement settlements. On its website, the agency maintains a set of "Key Statistics" on SEC enforcement related to the financial crisis, such as the number of individuals criminally charged and the more than $2.88 billion secured in "Total Penalties, Disgorgement, and Other Monetary Relief."[119]

Agencies do not just publicize the size of enforcement awards generically; they also emphasize them in a targeted manner. Federal agencies tout their enforcement successes to the most important decisionmaker, Congress, and do so in the budget context, perhaps the most significant consideration for agencies. Most federal agencies submit annual budget requests to Congress, which requires them to select which budget increases to pursue and which agency actions to highlight. Total penalties assessed are frequently emphasized in the discussions of agency enforcement programs. For example, the CFTC has included that statistic since at least 2008.[120] Similarly, in its FY

Comm'n, Short Selling Brothers Agree to Pay $14.5 Million to Settle SEC Charges (July 17, 2012), *available at* http://www.sec.gov/news/press/2012/2012-137.htm; Press Release, U.S. Sec. & Exch. Comm'n, Tenaris to Pay $5.4 Million in SEC's First-Ever Deferred Prosecution Agreement (May 17, 2011), *available at* http://www.sec.gov/news/press/2011/2011-112.htm; and Press Release, U.S. Sec. & Exch. Comm'n, Three Former Directors at Military Body Armor Supplier Settle SEC Charges (Nov. 10, 2011), *available at* http://www.sec.gov/news/press/2011/2011-238.htm.

[119] *SEC Enforcement Actions: Key Statistics (Through November 7, 2013)*, U.S. SEC. & EXCH. COMM'N, http://www.sec.gov/spotlight/enf-actions-fc.shtml#keyStatistics (last modified Nov. 7, 2013). As of November 24, 2013, the front page of the SEC website read "Financial Crisis Enforcement Actions: The SEC has charged more than 160 firms and individuals, and secured $2.8 billion for investors." U.S. SEC. & EXCH. COMM'N, http://www.sec.gov (last visited Nov. 24, 2013).

[120] CFTC budget requests are available on its website. For the current year budget request, see COMMODITY FUTURES TRADING COMM'N, PRESIDENT'S BUDGET AND PERFORMANCE PLAN: FISCAL YEAR 2014 (2013), *available at* http://www.cftc.gov/ucm/groups/public/@newsroom/documents/file/cftcbudget2014.pdf. For historical budget requests, see *CFTC Historical Reports*, U.S. COMMODITY FUTURES TRADING COMM'N, http://www.cftc.gov/About/CFTCReports/cftcreports_historical (last visited Nov. 24, 2013). For specific references to the total amounts collected, see COMMODITY FUTURES TRADING COMM'N, PRESIDENT'S BUDGET AND PERFORMANCE PLAN: FISCAL YEAR 2013, at 20 (2012), *available at* http://www.cftc.gov/ucm/groups/public/@newsroom/documents/file/cftcbudget2013.pdf ("From FY 2002 to date, orders for more than $3 billion in civil monetary penalties, restitution and disgorgement have been imposed in Commission cases."); COMMODITY FUTURES TRADING COMM'N, PRESIDENT'S BUDGET AND PERFORMANCE PLAN: FISCAL YEAR 2012, at 18–19 (2011), *available at* http://www.cftc.gov/ucm/groups/public/@newsroom/documents/file/cftcbudget2012.pdf (total penalties assessed over the previous five years broken down by substantive category); COMMODITY FUTURES TRADING COMM'N, PRESIDENT'S BUDGET AND PERFORMANCE PLAN: FISCAL YEAR 2011, at 14–15 (2010), *available at* http://www.cftc.gov/ucm/groups/public/@newsroom/documents/file/cftcbudget2011.pdf (total penalties assessed since 2001 broken down by substantive category);

2013 budget request, the SEC led with its enforcement activity. The first agency success story on the initial page of the executive summary notes that the SEC "[f]iled 735 enforcement actions — more than ever filed in a single year in SEC history. The SEC was better able to discover and stop illegal activity earlier and obtained more than $2.8 billion in penalties and disgorgement ordered in FY 2011."[121] The agency included similar language in the executive summary of the previous year's budget request,[122] although it had emphasized such statistics inconsistently in earlier years.[123]

Of course, not all agencies emphasize the total dollars assessed in their budget requests. Whether they do so may be, in part, a function of the level of public scrutiny on their enforcement programs. Agencies ordinarily out of the public eye appear to be concerned about their enforcement reputations immediately following enforcement failures. For example, both the Mine Safety and Health Administration (MSHA)[124] and the Pipeline and Hazardous Materials Safety Admin-

COMMODITY FUTURES TRADING COMM'N, FY 2010 PRESIDENT'S BUDGET AND PERFORMANCE PLAN 9–10 (2009), *available at* http://www.cftc.gov/ucm/groups/public/@aboutcftc/documents/file/2010budgetperf.pdf (same); COMMODITY FUTURES TRADING COMM'N, THE FY 2009 PRESIDENT'S BUDGET & PERFORMANCE PLAN 5–6 (2008), *available at* http://www.cftc.gov/ucm/groups/public/@aboutcftc/documents/file/2009budgetperf.pdf (same); and COMMODITY FUTURES TRADING COMM'N, FY 2008 PRESIDENT'S BUDGET AND PERFORMANCE PLAN 5 (2007), *available at* http://www.cftc.gov/ucm/groups/public/@aboutcftc/documents/file/2008budgetperf.pdf (same).

[121] U.S. SEC. & EXCH. COMM'N, *supra* note 1, at 1.

[122] *See* U.S. SEC. & EXCH. COMM'N, IN BRIEF: FY 2012 CONGRESSIONAL JUSTIFICATION 1 (2011), *available at* http://www.sec.gov/about/secfy12congbudgjust.pdf ("In addition, in FY 2010, the SEC returned $2.2 billion to harmed investors, twice the agency's budget for that year.").

[123] The SEC provides eight years of budget requests on its website. In addition to the requests for FY 2013 and FY 2012 referenced in the main text, the agency highlighted its recoveries in its budget requests for FY 2006 and FY 2007. *See* U.S. SEC. & EXCH. COMM'N, IN BRIEF: FISCAL 2006 CONGRESSIONAL BUDGET REQUEST 8 (2005), *available at* http://www.sec.gov/about/secfy06budgetreq.pdf ("Over $3.5 billion in disgorgement and penalties has thus far been designated for return to harmed investors using Fair Funds created under the Sarbanes-Oxley Act."); U.S. SEC. & EXCH. COMM'N, IN BRIEF: FISCAL 2007 CONGRESSIONAL BUDGET REQUEST 7 (2006), *available at* http://www.sec.gov/about/secfy07budgetreq.pdf ("The Commission prevailed in the great majority of the enforcement actions decided by district courts or administrative law judges, and a total of more than $3 billion in disgorgement and penalties was ordered in SEC enforcement cases."). In the remaining four years (that is, the budget requests for FY 2008–2011), the agency made no reference to the total penalties collected.

[124] *See* U.S. DEP'T OF LABOR, FY 2013 CONGRESSIONAL BUDGET JUSTIFICATION: MINE SAFETY AND HEALTH ADMINISTRATION 64 (2012), *available at* http://www.dol.gov/dol/budget/2013/pdf/cbj-2013-v2-13.pdf ("MSHA assessed not less than 157,000 violations totaling $146,000,000 in FY 2011."); *see also* U.S. DEP'T OF LABOR, FY 2012 CONGRESSIONAL BUDGET JUSTIFICATION: MINE SAFETY AND HEALTH ADMINISTRATION 54 (2011), *available at* http://www.dol.gov/dol/budget/2012/PDF/CBJ-2012-V2-12.pdf (providing similar data for the previous fiscal year).

istration (PHMSA)[125] gave penalty totals as a reason to enhance the agency budget for FY 2013. Both agencies have had recent dramatic catastrophes within their regulatory areas that have led to increased public scrutiny on their enforcement programs. In April 2010, the Upper Big Branch mine collapse killed twenty-nine workers and led to substantial public criticism of MSHA.[126] Similarly, PHMSA faced scrutiny for the September 2010 and April 2011 pipeline explosions in California and Pennsylvania, which killed thirteen people total, as well as for the July 2010 pipeline leak near Marshall, Michigan, which caused $800 million in damage.[127] Notably, similar agencies without recent high-profile disasters were silent on their penalty totals. For example, PHMSA is overseen by the Department of Transportation (DOT), and other agencies with civil penalty authority that fall under the DOT umbrella did not focus on their civil penalty totals in their most recent budget requests.[128] MSHA's sister agency, the Occupational Health and Safety Administration, also made no mention of penalty amounts.[129] This pattern is consistent with the hypothesis that agencies' incentive to build reputations as strong enforcers — and to use financial recoveries to substantiate their claims of vigorous action — is variable and depends on the level of public attention directed at the agencies' enforcement programs.

Here we confront a seeming puzzle, however. Even when agencies publicly emphasize the dollar value of settlements and court awards, there is mounting evidence that they often fail to *collect* the money in question. Professors Ezra Ross and Martin Pritikin recently surveyed a wide range of enforcement agencies to determine collection rates for

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[125] *See* U.S. DEP'T OF TRANSP., BUDGET ESTIMATES: FISCAL YEAR 2013: PIPELINE AND HAZARDOUS MATERIALS SAFETY ADMINISTRATION 45 (2012), *available at* http://www.phmsa.dot.gov/staticfiles/PHMSA/DownloadableFiles/FY%202013%20PHMSA%20BUDGET.pdf ("In 2009, we proposed a total of $6.4 million in civil penalties, the second highest yearly total in agency history ($8.7 million proposed in 2008).").

[126] J. DAVITT MCATEER ET AL., UPPER BIG BRANCH: THE APRIL 5, 2010 EXPLOSION: A FAILURE OF BASIC COAL MINE SAFETY PRACTICES 4 (2011), *available at* http://www.nttc.edu/programs&projects/minesafety/disasterinvestigations/upperbigbranch/UpperBigBranchReport.pdf (noting collapse); *id.* at 77 (noting critique of MSHA).

[127] Aaron Cooper & Chris Boyette, *Feds: Operator Knew of Pipeline Problems Years Before Michigan Oil Spill*, CNN (Jul. 11, 2012, 9:54 AM), http://www.cnn.com/2012/07/10/us/michigan-oil-spill-ntsb-findings/index.html.

[128] *See, e.g.*, *FY2013 Budget Estimates*, U.S. DEP'T OF TRANSP., http://www.dot.gov/mission/budget/fy2013-budget-estimates (last updated Mar. 7, 2012) (providing links for the FY 2013 budget estimate reports for the Federal Aviation Administration, Federal Motor Carrier Safety Administration, Federal Railroad Administration, and Surface Transportation Board).

[129] *See* U.S. DEP'T OF LABOR, FY 2013 CONGRESSIONAL BUDGET JUSTIFICATION: OCCUPATIONAL SAFETY AND HEALTH ADMINISTRATION (2012), *available at* http://www.dol.gov/dol/budget/2013/PDF/CBJ-2013-V2-12.pdf.

fines and civil penalties.[130] They conclude that agencies systemically fail to collect the fines and penalties they impose.[131] While agencies frequently kept incomplete data on their collection efforts, Ross and Pritikin were able to establish upper limits on the collections of numerous agencies. They found that many had collection rates in the single digits.[132] The problem is not limited to civil enforcement: Ross and Pritikin estimate that substantially less than half of the amount imposed as criminal fines at the state and federal levels is ever collected[133] and that the actual number may be much lower. They note that the DOJ collected only about 4% of the fines imposed in federal criminal cases between 2000 and 2002 and that the number declined to 3.3% in 2006.[134]

Collection problems extend beyond agencies with weak enforcement programs or judgment-proof defendants. Collections are low even at the CFTC and the SEC. These federal agencies are well funded, and their enforcement programs have the strongest reputations. They frequently target their enforcement actions against large defendants with deep pockets. As a result, the agencies impose penalties that rarely bankrupt defendants. Despite all of these advantages, the weaknesses of penalty collection at these agencies have led to multiple investigations and reports by the Government Accountability Office (GAO) starting in 1998.[135] Even after this scrutiny from the GAO, collection rates remained relatively low. In 2003, the GAO found that the SEC had levied over $480 million in penalties between 1997 and 2002

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[130] Ezra Ross & Martin Pritikin, *The Collection Gap: Underenforcement of Corporate and White-Collar Fines and Penalties*, 29 YALE L. & POL'Y REV. 453, 468 (2011).

[131] *Id.*

[132] *Id.* at 475 (5% collection rate for the Office of Surface Mining from 1986 to 1988 and from 1997 to 2000; no greater than 7.4% collection rate for worker safety fines by the California Department of Industrial Relations from 2004 to 2006). Furthermore, agencies with collection rates that look relatively high compared to their counterparts sometimes achieve these figures by excluding debts from the calculation. For example, U.S. Customs and Border Protection collected 31% of its assessments from 1997 to 2000 but only reached that figure by writing off substantial portions of the debt assessed. Including those write-offs, the collection rate for Customs fell to below 3%. *Id.* at 477.

[133] *Id.* at 474–75.

[134] *Id.* at 477.

[135] *See* U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-05-670, SEC AND CFTC PENALTIES: CONTINUED PROGRESS MADE IN COLLECTION EFFORTS, BUT GREATER SEC MANAGEMENT ATTENTION IS NEEDED (2005) [hereinafter U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-05-670]; U.S. GEN. ACCOUNTING OFFICE, GAO-03-795, SEC AND CFTC FINES FOLLOW-UP: COLLECTION PROGRAMS ARE IMPROVING, BUT FURTHER STEPS ARE WARRANTED (2003) [hereinafter U.S. GEN. ACCOUNTING OFFICE, GAO-03-795]; U.S. GEN. ACCOUNTING OFFICE, GAO-01-900, SEC AND CFTC: MOST FINES COLLECTED, BUT IMPROVEMENTS NEEDED IN THE USE OF TREASURY'S COLLECTION SERVICE (2001); U.S. GEN. ACCOUNTING OFFICE, GAO/GGD-99-8, MONEY PENALTIES: SECURITIES AND FUTURES REGULATORS COLLECT MANY FINES BUT NEED TO BETTER USE INDUSTRYWIDE DATA (1998).

but had collected only 40% of that amount, just over $190 million.[136] The CFTC had a comparable success rate. By 2003, it had collected 45% of the fine amounts imposed between 1997 and 2002.[137] In 2005, the CFTC reported a similar total, collecting 46% of the fine amounts levied between September 2002 and the end of 2004.[138] The SEC improved to a 79% collection rate during that time period,[139] but SEC staff were careful to note that the collection rate was high because the agency had targeted especially well-funded defendants.[140]

This pattern of high publicity surrounding penalty imposition but limited efforts to collect is hard to square with a pure deterrence theory of enforcement. Economic theories of deterrence assume that punishment is imposed, not just announced. A deterrence strategy works by raising the costs of violations, and uncollected penalties do not directly affect costs. Granted, publicity certainly can contribute to deterrence because it can help communicate to potential violators that misconduct will be punished. In a world of imperfect information, would-be violators might be deterred by reports of crippling sanctions, unaware that little or no money ever changed hands. Conceivably, then, an agency might conclude that it could achieve effective deterrence without wasting resources on collections. The EPA has sought to defend its low collection rates along these lines. The EPA resists calls to publicize its collections, explaining that it regards "reporting of assessed penalties alone to be of greater deterrent value than reporting both assessed and collected penalties."[141] As Ross and Pritikin explain, however, such an approach "is naïve, because it assumes that firms will not obtain information regarding collections if it is not publicly reported. Firms, particularly those within an industry, communicate; and the attorneys who represent them are repeat players who gain knowledge and expertise regarding how an agency is likely to treat violators."[142]

Low collection rates also might be defended on the ground that successful enforcement actions may impose meaningful costs on viola-

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[136] *See* U.S. GEN. ACCOUNTING OFFICE, GAO-03-795, *supra* note 135, at 39.

[137] *See id.* at 42. The CFTC figures show dramatic year-by-year variation. As of December 2002, the agency collected ninety percent of the amount of the fines imposed in 1998 but only two percent of the amount imposed in 2000. *Id.*

[138] *See* U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-05-670, *supra* note 135, at 42.

[139] *See id.* at 23.

[140] *Id.*

[141] Letter from Granta Y. Nakayama, Assistant Adm'r for Enforcement & Compliance Assurance, U.S. Envtl. Prot. Agency, to David C. Maurer, Acting Dir., Natural Res. and Env't, U.S. Gov't Accountability Office (Sept. 11, 2008), *in* U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-08-1111R, ENVIRONMENTAL ENFORCEMENT: EPA NEEDS TO IMPROVE THE ACCURACY AND TRANSPARENCY OF MEASURES USED TO REPORT ON PROGRAM EFFECTIVENESS 15, 16 (2008).

[142] Ross & Pritikin, *supra* note 130, at 480.

tors even if they never turn over any money to the relevant agency. For example, there is evidence that the mere fact of certain kinds of enforcement actions may cause the stock value of defendant firms to crater. And both corporate and individual defendants may incur reputational losses as a result of being targeted by public enforcers.[143] Agencies seeking to optimize deterrence might well take such indirect costs into account when setting penalties — or perhaps when deciding whether to devote resources to collection. Nevertheless, we would not expect deterrence-focused agencies to leave quite as much money on the table as the Ross-Pritikin study suggests.

By contrast, a reputation-based theory of enforcement can at least partially explain the observed behavior. Agencies can appear effective through large, highly visible penalty assessments. Collection of judgments, though, can be relatively difficult, and the failure to put the work into finding the money usually goes unnoticed. Agencies that must turn over the proceeds of enforcement to the general treasury are not financially harmed by a lack of collection: such agencies build their reputations up front and do not lose them when the penalties go uncollected.[144]

It bears emphasis that all of the agencies in the Ross-Pritikin study were subject to the MRA or state equivalents: rather than keeping the spoils of enforcement for themselves, they were required to remit their winnings to the general treasury. Matters are different for agencies that are permitted to retain all or some of their enforcement proceeds in a revolving fund or the like. Those agencies *are* harmed — quite directly — by a lack of collection. Thus, we would expect revolving-fund agencies to do better than their counterparts at collecting the money they win through enforcement.[145]

B. Individual Incentives

Agencies are not monoliths. In the end, agency actions are the actions of individuals. We have argued that agencies, as institutions,

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[143] *See* Richard A. Bierschbach & Alex Stein, *Overenforcement*, 93 GEO. L.J. 1743, 1763–64 (2005) (describing spillover effects of enforcement on stock price and reputation).

[144] In this respect, agencies' reputational incentives diverge sharply from the more direct financial incentives of private enforcers. Private enforcers care about collecting judgments, not just announcing them. In contrast, while agencies might prefer collections, they might sometimes settle for reputational benefits.

[145] Together, HHS and the DOJ reported collection rates ranging from sixty percent to over one hundred percent during the life of the Control Account revolving fund. (Annual reports on the Health Care Fraud and Abuse Control Program are available at *Health Care Fraud and Abuse Control Program Report*, U.S. DEP'T OF HEALTH & HUM. SERVICES, http://oig.hhs.gov/reports-and-publications/hcfac/index.asp (last visited Nov. 24, 2013).) We hesitate to place too much stock in these numbers without more information about how they are calculated, but the available data are at least suggestive of a fairly robust collection program.

have self-interested incentives to emphasize monetary penalties in enforcement actions. To what extent do those incentives translate to the enforcement decisions made by individual employees?

Recall the theory of the "budget-maximizing bureaucrat" described in section II.A: high-level agency officials seek to maximize an agency's discretionary budget so as to reap the resulting benefits of increased salary, reputation, power, ease of management, and so on. Lower-level employees have similar interests — so the argument goes — because the benefits of a larger budget trickle down the organizational hierarchy in the form of enhanced career opportunities and other perquisites.[146] If correct, this theory would provide an easy answer to the question of individual employee incentives, at least for agencies that are permitted to retain all or some of the proceeds of enforcement. There is scattered evidence of enforcement employees, particularly at the state and local level, reaping quite direct and personal benefits from asset forfeiture.[147] To take just one example, a prosecutor in Somerset County, New Jersey, reportedly used $6000 out of forfeiture funds to pay for a corporate membership in a private tennis and health club for the benefit of his seventeen assistant prosecutors and fifty detectives.[148] But outside some relatively extreme instances of funds being diverted from enforcement to personal use, there is reason to doubt the trickle-down benefits of budget growth.[149] While efforts to verify Niskanen's budget-maximization theory have provided "ample evidence that bureaucrats systematically request larger budgets," there is less evidence that tangible awards like salary increases and promotions follow from expanding budgets.[150] Moreover, even if

[146] *See supra* notes 85–88 and accompanying text.

[147] *See* Susan R. Klein, *Civil In Rem Forfeiture and Double Jeopardy*, 82 IOWA L. REV. 183, 219 & n.149 (1996) ("The restriction of the property to 'law enforcement purposes' apparently has not prevented agents and departments from enjoying their newfound riches for personal amusement." *Id.* at 219 (quoting Nkechi Taifa, *Civil Forfeiture vs. Civil Liberties*, 39 N.Y.L. SCH. L. REV. 95, 108 (1994))); *see also* Taifa, *supra*, at 108 (detailing abuses of money distributed from DOJ Asset Forfeiture Fund to local law enforcement agencies, including money disbursed to the Philadelphia Police Department that was spent on new air conditioning; a new Corvette turned over to Warren County, New Jersey, that was used by the Chief Assistant Prosecutor; funds disbursed to Suffolk County, New York, that were used by the District Attorney to repair his personal car (which had also been obtained by forfeiture) and to buy a watch for a secretary and chairs for the office; and $1.3 million disbursed to the Lakewood, Colorado, police department that was used on Christmas parties, amusement park tickets, and a banquet to honor officers).

[148] Jon Nordheimer, *Seizure of Assets by an Aggressive Drug Fighter Raises Eyebrows*, N.Y. TIMES, Aug. 2, 1992, § 1, at 37.

[149] *See* Daryl J. Levinson, *Empire-Building Government in Constitutional Law*, 118 HARV. L. REV. 915, 932 (2005) ("[T]he relationship between a larger agency budget and higher salaries or cushier working conditions is empirically tenuous.").

[150] André Blais & Stéphane Dion, *Conclusion: Are Bureaucrats Budget Maximizers?*, *in* THE BUDGET-MAXIMIZING BUREAUCRAT, *supra* note 86, at 355, 355 (emphasis omitted); *see also id.* at 355–57.

it were clear that the agency's interest in a bigger budget were shared throughout the ranks of employees, we would still need to consider whether — and how — the institution's *reputational* interests are internalized by individual employees.

A more promising way of approaching the inquiry into the incentives of public enforcement attorneys is as one instance of the general principal-agent problem for organizational employees.[151] Agency employees, like other workers in the public and private sectors, usually want to succeed at their jobs. Success typically results from furthering the objectives of the larger organization. If the agency sees financial recoveries as a core goal, we should assume that enforcement lawyers are going to pursue that goal for the same reasons that lawyers want to conduct good depositions, write persuasive briefs, and show up on time for court. Employees care about these goals because of hard incentives, such as bonuses and termination, or soft pressures, like self-motivation and peer pressure.

Here too, however, matters are more complicated than they first appear. The constraints on public employees differ from those on employees in the private sector. Government employees face weaker incentives compared to employees of other organizations because both the downside threat of termination and the upside promise of additional compensation are reduced. As a result, the principal-agent problem for public employees may be increased — though, as we explore below, the effect on the direction of penalties is unclear.

The difference in the incentives for public employees as compared to the private sector employees is widely recognized. Both the carrots and sticks are more limited. Government lawyers are relatively unlikely to be fired compared to their counterparts at private law firms. Public sector enforcement lawyers are frequently union members with the protections that come from negotiated collective bargaining agreements.[152] By contrast, union membership among lawyers at private firms is rare to nonexistent.[153] On the other hand, compensation of

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[151] *See, e.g.*, Avinash Dixit, *Incentives and Organizations in the Public Sector: An Interpretative Review*, 37 J. HUM. RESOURCES 696, 697 (2002).

[152] At the SEC, enforcement staff, as well as other agency employees, are represented by the National Treasury Employees Union Chapter 293. *See* NTEU CHAPTER 293, http://www.secunion.org (last visited Nov. 24, 2013). Enforcement staff also serve key roles in management of the Union, taking roles as officers and members of the executive board. *See Executive Board Directory*, NTEU CHAPTER 293, http://www.secunion.org/directory-executive-board (last visited Nov. 24, 2013); *Officers Directory*, NTEU CHAPTER 293, http://www.secunion.org/directory-officers (last visited Nov. 24, 2013).

[153] Nonsupervisory attorneys (including many associates) might generally be eligible to unionize, but it is uncommon for private sector lawyers to take such an action. *See* Mitchell H. Rubinstein, *Attorney Labor Unions*, N.Y. ST. B.A. J., Jan. 2007, at 23, 27 ("While there is surprisingly little NLRB precedent with regard to attorneys, they are no different from other employees in the area of unionizing activity.").

public sector enforcement lawyers stops growing at levels substantially below those of private sector attorneys. Federal employees on the General Schedule, the most common compensation structure in the federal system, generally cap out their compensation when they reach Grade 15/Step 10. Even with the locality adjustment, the maximum salary for lawyers working in Washington, D.C., is currently $155,500 and has been frozen at that level since 2010.[154] This maximum base salary is slightly lower than the $160,000 starting compensation for first-year associates at the nation's largest law firms.[155]

These factors and other considerations have led to the recognition that public employees have "low powered" incentives compared to private employees.[156] Positive or negative outcomes for public employers are less likely to produce positive or negative outcomes for their employees personally. As a result, employees may engage in activities other than those desired by the principal. These other activities have been usefully divided into three categories.[157] Public employees might *shirk* and focus on leisure rather than work. They might *drift* and emphasize their own preferences rather than agency goals. Finally, they might get *captured* and execute the desires of a third party.

Problems of shirking, drift, and capture manifest in different ways for different types of enforcement lawyers.[158] Aside from the political employees who serve at high levels and are closely connected to the goals of the agency, enforcement lawyers can be subdivided into two categories: career attorneys seeking a long-term career in the public sector and noncareer attorneys who plan to leave for the private sector

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[154] *See Salary Table 2013-DCB*, U.S. OFFICE OF PERSONNEL MGMT. (Jan. 2013), http://www.opm.gov/policy-data-oversight/pay-leave/salaries-wages/2013/general-schedule/dcb.pdf.

[155] *See* Catherine Rampell, *The Toppling of Top-Tier Lawyer Jobs*, N.Y. TIMES (July 16, 2012, 10:00 AM), http://economix.blogs.nytimes.com/2012/07/16/the-toppling-of-top-tier-lawyer-jobs ("Across the board, big law firms have been offering starting salaries of exactly $160,000 since 2007.").

[156] *See* Jean Tirole, *The Internal Organization of Government*, 46 OXFORD ECON. PAPERS 1, 6 (1994).

[157] *See* Mathew D. McCubbins, Roger G. Noll & Barry R. Weingast, *Administrative Procedures as Instruments of Political Control*, 3 J.L. ECON. & ORG. 243, 247 (1987).

[158] In addition to the constraints discussed in the main text, lawyers face an additional constraint — they have ethical obligations not present for other employees. The identity of a government lawyer's client determines whether these constraints are legally binding. For those who see the agency itself as the client, maximizing penalties in accordance with the agency's wishes is generally consistent with a lawyer's ethical obligations. In contrast, if government lawyers have some independent obligation to serve the public interest, not merely the agency's wishes, penalties might theoretically grow so large as to cross some ethical threshold. *See* Steven K. Berenson, *Public Lawyers, Private Values: Can, Should, and Will Government Lawyers Serve the Public Interest?*, 41 B.C. L. REV. 789, 794–95 (2000); Note, *Rethinking the Professional Responsibilities of Federal Agency Lawyers*, 115 HARV. L. REV. 1170, 1176–78 (2002). *See generally* Geoffrey P. Miller, Essay, *Government Lawyers' Ethics in a System of Checks and Balances*, 54 U. CHI. L. REV. 1293 (1987). Whether or not these ethical constraints might impose some constraints on enforcement lawyers in their penalty determinations in the abstract, there is little evidence that they do so in practice.

after a short period of time.[159] For the careerists, the primary concern is that they might shirk, choosing to avoid the hardest cases. At first blush, a preference for easy cases may seem to run counter to an agency's incentives to line its coffers or build its reputation with financial recoveries. But, the theory goes, cases seeking large recoveries are likely to be more complicated, more time-intensive, and more controversial. Thus, for enforcement lawyers who do not intend to move on, simple cases with small penalties may be more attractive than riskier cases with potentially larger rewards.[160]

On closer inspection, however, career attorneys' presumed preference for easy cases may not clash with their employers' goal to recover large financial penalties. As an initial matter, one should not be too quick to assume that large penalties always signal particularly difficult or controversial cases. Huge recoveries plainly require cases that are "big" in a certain sense, but the difficulty of any given case may have more to do with the novelty of the legal theories and the defendant's incentives to fight the requested relief than with the sheer size of the monetary award. As we describe in the next Part, defendants (particularly those with deep pockets) may be all too happy to settle for large financial penalties if doing so allows them to put an end to government scrutiny and avoid intrusive injunctive remedies. A large recovery may be fairly easy for a government attorney to win if the government's legal theory is strong and the sanction represents a drop in the bucket of the defendant's total resources.

More importantly — and even assuming a perfect correlation between case stakes and case difficulty — the institutional incentives described in the preceding sections do not necessarily require agencies to take on big, difficult cases rather than focus on smaller and easier targets. We elaborate on this point in Part III, but the intuition is straightforward. Agencies with revolving funds will seek to fill the funds up to any statutory caps. Easy cases may serve that purpose just as well as hard ones. A series of relatively small recoveries can yield the same total as one big case, yet demand fewer agency resources and promise a more certain payoff. Indeed, when the likelihood of success and the costs of litigation are taken into account, the expected value of a series of small cases may in fact be higher than the value of a standalone blockbuster.[161]

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[159] Selmi, *supra* note 22, at 1442.

[160] *See id.* at 1444–45 (noting this pressure toward easy cases on career attorneys).

[161] *See* Richard A. Posner, *The Behavior of Administrative Agencies*, 1 J. LEGAL STUD. 305, 311 (1972) (modeling agency enforcement to show that "under plausible assumptions concerning the characteristics of the agency's cases a perfectly rational, utility-maximizing administrative agency will devote a 'disproportionate' amount of its resources to relatively minor cases").

Similar points hold for agencies that are concerned primarily with building strong enforcement reputations. A press release or report to Congress touting a single record-high recovery may be no more effective than a report describing record *total* recoveries. For example, Professor John Coffee has argued that the SEC's apparent preference for small cases, and its concomitant failure to "bring fewer cases [and] litigat[e] them more intensively," can best be explained by two factors:

> The SEC does not want anyone to escape scot-free without any sanction (which would be politically embarrassing); and the SEC needs to show Congress that it is doing more, bringing more cases and obtaining greater aggregate penalties, in order to obtain a larger budget. Although this policy does result in larger aggregate sanctions being levied . . . , few may be deterred by individually modest penalties.[162]

In short, agencies can use high dollar amounts — either in individual cases or in total — to make their enforcement programs appear effective to outsiders, even if observers with full information would recognize that the relevant cases are not particularly difficult or significant, or that the financial penalties represent a fraction of the total harm. We have argued that monetary awards are easy to quantify and to compare to like awards, but it is far more difficult for agency outsiders to gauge whether financial payouts are in fact meaningful sanctions. Thus, even if career attorneys in public enforcement agencies have personal incentives to focus on relatively easy cases, those incentives may be largely consistent with the financial and reputational goals of the agencies as a whole.

For noncareer attorneys, capture and drift are more likely than shirking. If short-term employees are going to deviate from agency goals, it will be to maximize their employability and compensation in the private sector after their government service ends. Here too, the effects on financial recoveries are hard to predict. Lawyers interested in enhancing their future employability can pursue a variety of strategies, with very different consequences for the financial bottom line. First, employees might seek to curry favor with regulated entities by reducing penalties in the hope that lenient treatment now might produce paybacks in the future. This approach would obviously undermine agency efforts to maximize penalties. Yet this strategy has obvious potential drawbacks for the noncareer attorney as well. The

[162] John C. Coffee, Jr., *Is the SEC's Bark Worse Than Its Bite?*, NAT'L L.J., July 9, 2012, at 10, 10; *see also* John C. Coffee Jr., *SEC Enforcement: What Has Gone Wrong?*, NAT'L L.J., Dec. 3, 2012, at 23, 23 ("[T]he SEC needs to be able to use objective metrics to justify its request for budget increases. By bringing many actions and settling them cheaply, it can point to an increase in the aggregate penalties collected, even if the median penalty is at the same time decreasing. This may impress Congress, but from a deterrence perspective, it is similar to issuing modest parking tickets for major frauds.").

regulated entity has no incentive to deliver once the lawyer has left the public sector, and the corrupt nature of the bargain makes credible, binding commitments difficult to arrange in advance. The firm might as well accept the benefit from the employee but later hire the most valuable person for the job.[163]

As a result, lawyers are more likely to maximize their desirability directly. The impact of these efforts on penalties depends on the form the efforts take. One approach for enforcement lawyers is simply to build litigation skills. Lawyers who have initiated many investigations, taken multiple depositions, and tried a variety of cases in the public sector are more attractive to firms later on. This effect may push enforcement lawyers toward small, easy cases that move fast — but that result is not certain.[164] After all, cases that are small and easy are likely to be resolved early through settlements. If government attorneys wish to build trial experience, they may prefer larger, more difficult cases with novel legal theories, which are relatively more likely to be litigated.[165] As a result, the skill-oriented incentives of noncareer employees may push penalties either up or down. On the one hand, if they believe future employers want lawyers with experience on the largest cases that might go to trial, government attorneys may pursue high penalties. On the other hand, if employers primarily value experience with depositions and focus less on trial work, noncareerists may emphasize smaller cases with lower penalties. Importantly, either strategy may serve the institution's own self-interest, if recoveries in a string of smaller cases yield roughly the same total as those from a few big cases.

Enforcement lawyers have another incentive that may align their behavior with the agency incentives we have identified: reputation. As discussed in the previous section, agencies may seek to bolster their in-

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[163] Yeon-Koo Che, *Revolving Doors and the Optimal Tolerance for Agency Collusion*, 26 RAND J. ECON. 378, 389 (1995) ("Without a binding assurance, it may not be certain that the firm will, *ex post*, prefer the regulator who exerted the most favor rather than the one most qualified for a particular job."). For a recent survey of the literature on this issue, see Ernesto Dal Bó, *Regulatory Capture: A Review*, 22 OXFORD REV. ECON. POL'Y 203, 215 (2006).

[164] *Compare* Selmi, *supra* note 22, at 1445–46 (arguing that noncareer lawyers underlitigate for experiential reasons), *with* Jonathan R. Macey & Geoffrey P. Miller, *Reflections on Professional Responsibility in a Regulatory State*, 63 GEO. WASH. L. REV. 1105, 1117 (1995) (arguing that agency lawyers overlitigate for the same reasons), *and* Nicholas S. Zeppos, *Department of Justice Litigation: Externalizing Costs and Searching for Subsidies*, LAW & CONTEMP. PROBS., Spring 1998, at 171, 173–74 (1998) (arguing that the DOJ uses the promise of litigation experience to overcome compensation weaknesses).

[165] *See* George L. Priest & Benjamin Klein, *The Selection of Disputes for Litigation*, 13 J. LEGAL STUD. 1, 4–6 (1984) (providing a general model of cases that settle and cases that are litigated); Steven Shavell, *Any Frequency of Plaintiff Victory at Trial Is Possible*, 25 J. LEGAL STUD. 493, 493–94 (1996) (explaining that cases are less likely to settle and more likely to go to trial when the parties disagree on the likely outcome).

stitutional reputations for enforcement effectiveness through large (or more precisely, large-sounding) penalties, either in individual cases or in the aggregate. These same pressures, for the same reasons, exist for employees as well. Individual lawyers may seek to develop a public reputation for effective enforcement, and emphasizing monetary awards is a straightforward way to do so. Just as agencies focus on financial rewards because they are easy to measure and easy to compare,[166] individual lawyers may do the same because other measures of their competence are difficult to evaluate.[167] In other words, agency attorneys may believe that the best sort of "winning" record is one that begins with a dollar sign and ends with a long series of zeroes.[168] A reputation for strong enforcement is initially valuable internally, but when the lawyer leaves the public sector, it is also useful for attracting clients.[169]

Finally, there is reason to believe that a strong enforcement program will lead to more job creation in private firms that defend against the relevant government actions. In the criminal law context, for example, there is evidence that increasing the potential punishment for particular types of criminal activity increases the income of the defense bar in that field. Research shows that the increased use of criminal penalties for white-collar violations since the 1980s may have enhanced the demand for former prosecutors to work in defense firms,[170] creating more job opportunities for lawyers with that experience and raising their billing rates. The parallels to the civil enforcement context are obvious. The more robust the enforcement program, the more lucrative the job prospects for former enforcement lawyers. Here too, agency and individual incentives align. Like the institutions in which they work, public employees who anticipate a short stint in the government followed by private-sector employment may have personal in-

[166] *See supra* section II.A.2, pp. 875–86.

[167] *Cf.* Tirole, *supra* note 156, at 4–5.

[168] *Cf.* Ed deHaan et al., *Does the Revolving Door Affect the SEC's Enforcement Outcomes?* 25–26 (Am. Accounting Ass'n, 2012 Annual Meeting Paper), *available at* http://aaahq.org/newsroom/RajgopalDeHaanKediaKoh.pdf (finding stronger enforcement efforts against fraudulent financial reporting, measured by the fraction of losses collected as damages, the likelihood of criminal proceedings, and the likelihood of naming the CEO as a defendant, by SEC attorneys who later leave to join law firms specializing in the defense of clients charged by the SEC relative to SEC attorneys who leave for other ventures).

[169] A similar point is often made in the context of criminal enforcement. Prosecutors who have a reputation for bringing large cases are likely to find an easier path to a desirable post-prosecutorial career, whether it is on the bench, in elected office, or as a member of the defense bar. *See* Richard T. Boylan, *What Do Prosecutors Maximize? Evidence from the Careers of U.S. Attorneys*, 7 AM. L. & ECON. REV. 379, 396 (2005); Larry E. Ribstein, *Agents Prosecuting Agents*, 7 J.L. ECON. & POL'Y 617, 630–31 (2011).

[170] *See* Ribstein, *supra* note 169, at 631.

centives to make the relevant enforcement program appear strong to the public and, more importantly, to potential future employers.[171]

The discussion in this section has assessed the incentives of agency employees generally, without distinguishing among different agencies, or between enforcement at the federal and state levels. There is, of course, a great deal of heterogeneity among public enforcers, and teasing out the effects of these various incentives in specific agencies demands a focused and context-specific investigation into the circumstances, culture, and norms of each individual organization.[172] Our goal here is different: rather than seeking to prove that financial incentives are at play in any given public enforcement agency, we offer a theory to explain why such incentives are worthy of attention and

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[171] As is true of enforcement agencies themselves, the reputational incentives of agency employees likely vary across agencies and over time. As the previous section explained, the reputational pressures on agencies to seek high penalties are greatest at times of high public scrutiny and are reduced when the public is not paying attention. The same results occur for individuals. An individual lawyer's reputation for aggressive enforcement is more valuable when scrutiny is high rather than low. When agencies are bringing large cases, individual lawyers can benefit more by being involved in those cases because the exit options are more valuable. Additionally, these same pressures are likely to change the mix between noncareer and career attorneys in the agency. When private sector opportunities are more lucrative, lawyers previously committed to public service may have a change of heart. Public scrutiny thus has a positive relationship with agency incentives to regulate: larger penalties become more attractive to both the organization and its employees.

[172] This section has focused solely on formal incentives of public employees. In addition to these pressures, we know that organizational norms and culture play a key role in shaping employee behavior and can often induce employees to act contrary to their self-interest. *See, e.g.*, Tom R. Tyler, *Promoting Employee Policy Adherence and Rule Following in Work Settings: The Value of Self-Regulatory Approaches*, 70 BROOK. L. REV. 1287 (2005). These general results apply to enforcement organizations. *See* Barbara E. Armacost, *Organizational Culture and Police Misconduct*, 72 GEO. WASH. L. REV. 453, 493–507 (2004) (describing the effects of organizational culture on individual behavior in the context of police brutality); Kay L. Levine & Ronald F. Wright, Criminal Law, *Prosecution in 3-D*, 102 J. CRIM. L. & CRIMINOLOGY 1119, 1146–70 (2012). The exact role of an individual agency's culture and norms in the way enforcers levy financial penalties is context-specific and difficult to predict. However, we can make two general statements. First, incentives matter more when norms are weaker. *See* Clemens Kroneberg et al., *The Interplay of Moral Norms and Instrumental Incentives in Crime Causation*, 48 CRIMINOLOGY 259, 283 (2010) (concluding that individuals who have not internalized moral norms are far more likely to consider the instrumental incentives of crime). As a result, older enforcement programs with stronger institutional norms, such as the SEC, are likely to feel the pressures of the incentives described in this section less than agencies with newer enforcement powers, such as the Consumer Financial Protection Bureau. Second, an individual is more likely to comply with norms and rules that are consistent with her internal sense of right and wrong. *See* TOM R. TYLER, WHY PEOPLE OBEY THE LAW (2006). There is evidence that individuals emphasize retributive factors when asked to determine punishment and that, in turn, agencies also emphasize retribution in penalty-setting. Max Minzner, *Why Agencies Punish*, 53 WM. & MARY L. REV. 853, 862–63, 903 (2012). This evidence would suggest that agencies are likely to be able to induce employees to seek financial penalties more easily when punishing the target violation is consistent with retributive theories. For example, agencies should be able to achieve large penalties more easily in cases involving a scienter requirement than in strict liability cases. *See id.* at 888 (describing the importance of the role of mens rea in penalty determinations).

more targeted study. Our theory suggests that, in many cases, the individuals responsible for public enforcement will share their employers' institutional interest in building the agencies' budget or the agencies' reputation through financial penalties.

III. COSTS AND BENEFITS

We have sought to show that agencies and their employees have self-interested reasons — independent of the public interest in deterring violators and compensating victims — to pursue large monetary judgments. We have called those incentives "financial incentives" for ease of exposition, though the previous Part should make clear that the motivations differ in important ways from the more direct financial interests of fee-seeking private attorneys. This Part considers the consequences, positive and negative, of financially motivated public enforcement. The incentives we have described are likely to cause agencies to adjust their enforcement practices in several ways. Financially motivated agencies are apt to initiate more enforcement actions, reduce their focus on nonmonetary remedies, and compete with one another for enforcement dollars.

Depending on other aspects of the enforcement calculus, financial incentives can either improve or weaken the functioning of public enforcement. For example, in cases where we expect that agencies are doing far too little enforcement across the board, financial incentives may produce welcome agency action. In cases where agencies are doing too much — and particularly where they already tend to overemphasize monetary recoveries — financial incentives can exacerbate problems that already exist. However, we can make more confident assessments when it comes to making a selection between public and private enforcers: The presence of financial incentives pushes public enforcement in the same direction as private enforcement. Both are likely to seek out the same types of targets and emphasize the same types of cases. As a result, when agencies face financial incentives, many of the perceived weaknesses of private enforcement compared to public enforcement are reduced.

A. How Financial Incentives Affect Public Enforcement

1. More Enforcement. — The most obvious consequence of creating financial motivations is that they — like any other motivation — may spur action. Agencies and other public enforcers may find themselves more interested in starting investigations and undertaking enforcement if they have a financial stake in the outcome. The possibility of a financial or reputational payoff increases the expected benefits of enforcement, thereby tilting the scales in favor of action and against inaction.

This straightforward point has clear parallels to the literature on private enforcement. It has long been assumed that private litigants and their attorneys will initiate enforcement actions if (and only if) the expected benefits outweigh the expected costs.[173] For private enforcers, the benefits of enforcement typically are *private* benefits: damages and/or injunctive relief that will benefit the plaintiff(s) personally.[174] The same is true for private attorneys, most of whom will take a case only if the expected hourly or contingent fee exceeds the opportunity costs of foregoing other work.[175] It follows that raising the expected financial benefits of enforcement should — and apparently does — increase the number of private enforcement actions.[176] For example, in the 1991 amendments to Title VII of the Civil Rights Act of 1964,[177] Congress increased the monetary damages available to plaintiffs in employment discrimination suits.[178] Multiple studies have shown that private Title VII litigation in federal court increased sharply, nearly tripling in frequency, following the 1991 amendments.[179] Similar

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[173] *See, e.g.*, Steven Shavell, *Suit, Settlement, and Trial: A Theoretical Analysis Under Alternative Methods for the Allocation of Legal Costs*, 11 J. LEGAL STUD. 55, 58 (1982) ("[U]nder the American system, the plaintiff will bring suit if and only if his expected judgment would be at least as large as his legal costs." (emphasis omitted)).

[174] Shavell, *supra* note 28, at 578. Note that advocacy groups complicate this picture. Groups like the American Civil Liberties Union frequently initiate litigation in order to benefit specific sectors of society or to effect social change. In such litigation, these groups can be seen as pursuing a mix of private and public benefits. *See generally* Howard M. Erichson, *Doing Good, Doing Well*, 57 VAND. L. REV. 2087 (2004) (describing public interest lawyering).

[175] Public interest lawyers face slightly different incentives since they may be willing to bear net private costs to obtain public benefits. However, financial recoveries often still matter for counsel seeking structural reform, and private benefits can provoke public interest litigation. *See* 42 U.S.C. § 1988(b) (2006) (providing for attorneys' fees in certain civil rights actions).

[176] *See* Margaret H. Lemos, *Special Incentives to Sue*, 95 MINN. L. REV. 782, 796–805 (2011) (discussing theoretical and empirical literatures on the effects of damage enhancements on the rate of private enforcement).

[177] 42 U.S.C. §§ 2000e to 2000e-17 (2006 & Supp. V 2011).

[178] *See id.* § 1981a(b)(3).

[179] *See* Kevin M. Clermont & Stewart J. Schwab, General Essay, *Employment Discrimination Plaintiffs in Federal Court: From Bad to Worse?*, 3 HARV. L. & POL'Y REV. 103, 116 (2009) (reporting, based on data provided by the Administrative Office of the Federal Courts (AO), that "employment discrimination cases exploded from 8303 cases terminated in 1991 to 23,722 cases terminated in 1998, a 286% increase," and attributing the change to, among other factors, the increase in available damages); Sean Farhang, *Congressional Mobilization of Private Litigants: Evidence from the Civil Rights Act of 1991*, 6 J. EMPIRICAL LEGAL STUD. 1, 17 (2009) (finding a dramatic rise in the number of Title VII claims filed with the Equal Employment Opportunity Commission after 1991); Selmi, *supra* note 22, at 1435–36 (studying the AO data and reporting that employment discrimination litigation more than doubled between 1991 and 1994); Laura Beth Nielsen et al., *Uncertain Justice: Litigating Claims of Employment Discrimination in the Contemporary United States* 13–14, 41 fig.1 (Am. Bar Found. Research Paper Series, No. 08-04, 2008), *available at* http://ssrn.com/abstract=1093313 (studying files from a random sample of 2100 employment discrimination cases and finding that employment discrimination litigation nearly tripled between 1992 and 1997, and that the increase was due in part to increased filings by Title VII claimants); *see also* Sean Farhang & Douglas M. Spencer, Economic Incentives for Attorney

spikes in private enforcement have occurred following the passage of other statutes that have been amended to increase the private benefits of bringing suit.[180]

The cost-benefit calculus is more complicated in the public sphere, because agencies and other public enforcers are expected to take into account the public benefits of enforcement, including the deterrent value of a successful action.[181] Public enforcers also should consider the broader costs of enforcement, including the burdens on the court system and the defendant(s) as well as their own time and expense.[182] The relative breadth of the public enforcer's cost-benefit calculus is one of the key features thought to distinguish public from private enforcement. For example, commentators critical of private enforcement argue that, unlike their private counterparts, public enforcers can be expected to forego enforcement actions that promise large financial rewards but little deterrent payoff or that impose high systemic costs.[183] Other commentators, more pessimistic about the promise of public enforcement, worry that agencies will fail to internalize the full public benefits of rigorous enforcement and thus may forego promising enforcement opportunities that avaricious private litigants and lawyers would pursue.[184]

Representation in Civil Rights Litigation 37–38 (Jan. 30, 2013) (unpublished manuscript), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1882245 (reporting that the 1991 amendments substantially increased the probability that Title VII plaintiffs would be represented by counsel).

[180] For example, in 1988, Congress amended the Fair Housing Act to remove an existing cap on punitive damages. *See* Fair Housing Amendments Act of 1988, Pub. L. No. 100-430, § 813(c), 102 Stat. 1619, 1633–34 (codified at 42 U.S.C. § 3613(c) (2006)). The rate of private litigation under the Act increased mildly by 1990, and by 1996 had increased by "nearly 200% over the 1990 level of activity." Selmi, *supra* note 22, at 1419; *see also id.* at 1418–19. The False Claims Act offers another example. The Act contains a qui tam provision that permits a private citizen with evidence of fraud against the United States to bring a civil action against the wrongdoer on behalf of the government. In 1986, Congress amended the False Claims Act to make it easier, and significantly more lucrative, for private citizens to sue. Not surprisingly, the number of qui tam cases received by the DOJ shot up after the 1986 amendments. *See* Pamela H. Bucy, *Private Justice*, 76 S. CAL. L. REV. 1, 48 (2002) (reporting that, while the DOJ received approximately six qui tam cases each year prior to 1986, 3326 actions were filed between the effective date of the 1986 amendments and October 30, 2000); Christina Orsini Broderick, Note, *Qui Tam Provisions and the Public Interest: An Empirical Analysis*, 107 COLUM. L. REV. 949, 955 (2007) (reporting that 4704 qui tam cases were filed between 1986 and 2004, resulting in $8.4 billion in recovery for the government).

[181] *See* Rose, *supra* note 18, at 1329 (discussing how the public enforcer can adjust its enforcement scheme in order to achieve optimal levels of deterrence).

[182] Dam, *supra* note 18, at 67; Lemos, *supra* note 41, at 705.

[183] *See, e.g.*, Amanda M. Rose, *The Multienforcer Approach to Securities Fraud Deterrence: A Critical Analysis*, 158 U. PA. L. REV. 2173, 2201–03 (2010).

[184] *See, e.g.*, Selmi, *supra* note 22, at 1443 ("Attorneys who have no particular stake in the outcome and who are not dependent on their reputation to attract future clients are less likely to spend time bargaining to extract the maximum amount from the defendant, unless the attorneys are truly motivated by a passion for civil rights.").

The reality of financially motivated public enforcement complicates this distinction between public and private enforcement. When an agency is permitted to retain all or part of the proceeds of enforcement, it has an interest — a "private" interest, so to speak — in the outcome of the case. Even if the agency carefully considers the public interest in the enforcement and continues to weigh all the costs, the conclusion of its cost-benefit analysis may be different given the new interest on the scale. Importantly, the difference will always run in the same direction: in favor of action. Revolving funds and other institutional arrangements that allow agencies to share directly in the spoils of enforcement increase the benefits of enforcement from the agency's perspective while leaving the costs unchanged. All else equal, therefore, we should expect to see more enforcement from agencies and state attorneys general who "eat what [they] kill."[185]

As discussed in the previous Part, even where agencies must turn over their "winnings" to the state or federal treasury, they may have reputational incentives to maximize dollar amounts. Just as private attorneys may count the reputational payoffs of successful lawsuits among the expected benefits, agencies may factor the reputational boost of big recoveries into their own cost-benefit analyses. Such reputational interests are unlikely to weigh as heavily in the overall calculus as the more direct financial incentives created by revolving funds, but the marginal effect is the same: to increase the perceived benefits of action relative to inaction.

2. *Selection of Remedies.* — Financial incentives also affect the remedies that agencies seek. Enforcement actions can result in a mix of financial penalties and injunctive relief, and the optimal mix is case-dependent. All else equal, financial incentives are likely to shift the focus of enforcement actions toward monetary penalties and away from other types of relief.

In this tradeoff, public enforcers again look like private enforcers. Private attorneys — including class action counsel — face incentives to emphasize financial rewards over equitable remedies whenever they

[185] BRANN, *supra* note 60, at 5 (internal quotation marks omitted). We are not aware of any empirical studies testing the effects of revolving funds and the like on public enforcers' decisions to initiate actions to enforce state and/or federal law. In the asset-forfeiture context, however, the available evidence is consistent with the intuition that agencies will be more eager to engage in enforcement that has the potential to line their coffers. *See supra* notes 74–77 and accompanying text (discussing rise in asset forfeitures following amendments to federal law that permitted the relevant enforcement agencies to retain the assets). For an interesting study of the contrast between public enforcement and financially motivated private enforcement, see Eric Helland & Alexander Tabarrok, *The Fugitive: Evidence on Public Versus Private Law Enforcement from Bail Jumping*, 47 J.L. & ECON. 93 (2004) (comparing efforts of police and private bail bondsmen to find felons who jump bail and bring them to trial, and finding "strong evidence that bounty hunters are highly effective at recapturing defendants who attempt to flee justice — considerably more so than the public police," *id.* at 109).

are compensated with a fraction of the judgment or settlement fund rather than on an hourly rate or flat fee.[186] The larger the financial recovery, the larger the attorney's fee. The interests of the plaintiff's bar are aligned with the interests of defendants in this respect. In many cases, defendants would rather pay a bigger penalty than suffer an injunction that "will end their ability to continue the lucrative but unlawful practice"[187] or otherwise upset their business model. Counsel can therefore trade the removal of the threat of injunctive relief for a higher damages award and a commensurate increase in fees.[188]

In agencies where financial incentives are present, we should expect to see the same patterns. Public enforcers may emphasize monetary penalties while reducing their reliance on injunctive relief. For their part, defendants in government actions — as in private suits — may prefer to pay financial awards if the alternative is to engage in lengthy remediation or submit to other forms of injunctive relief. Even hefty financial penalties may amount to a proverbial slap on the wrist for well-heeled defendants.[189]

Financial penalties also have the advantage of certainty and closure. Remediation efforts and injunctive relief can extend long into the future and the eventual cost is often unclear at the outset. Moreover, injunctive remedies can be intrusive, changing the way the defendant does business or organizes itself. Such changes may have significant effects on the defendant's behavior going forward — and defendants may be keen to avoid them for precisely that reason.

An example of this transition from injunctive to financial remedies has occurred in the wetlands remediation context.[190] State and federal

[186] *See* Frances Kahn Zemans, *Fee Shifting and the Implementation of Public Policy*, LAW & CONTEMP. PROBS., Winter 1984, at 187, 188 (1984) ("[U]nlike large monetary claims that may be pursued on a contingency fee basis, suits seeking equitable relief of even a very serious nature are inhibited by the anticipated high legal fees.").

[187] Gilles & Friedman, *supra* note 31, at 161.

[188] *See id.* at 160–61 ("[P]laintiffs may sue for injunctive relief and damages and then collude with the defendant to settle the case for damages only. In many cases, defendants will pay dearly for this privilege because the injunction is what concerns them most . . . ." (footnote omitted)).

[189] This criticism has been directed recently even at agencies imposing some of the largest penalty amounts. *See, e.g.*, Gretchen Morgenson, *Making Them Pay (and Confess)*, N.Y. TIMES, Jan. 27, 2013, at BU1 (criticizing SEC enforcement practices); Kate Sheppard, *Is the BP Criminal Settlement Enough?*, MOTHER JONES (Nov. 15, 2012, 12:55 PM), www.motherjones.com/blue-marble/2012/11/bp-criminal-settlement-enough (reporting critiques by Public Citizen of the $4.5 billion settlement with BP over the Deepwater Horizon spill based on the government's unwillingness to pursue nonmonetary penalties such as barring the company from obtaining government contracts); *see also* Lemos, *supra* note 39, at 526 (discussing complaints that the February 2012 $25 billion multistate mortgage settlement with the federal government amounts to a slap on the wrist given the scope of the wrongdoing and the resulting harm).

[190] *See generally* Royal C. Gardner, *Money for Nothing? The Rise of Wetland Fee Mitigation*, 19 VA. ENVTL. L.J. 1 (2000) (discussing the growth of fee mitigation in the wetlands-preservation context and its associated problems).

environmental agencies regulate development projects that affect wetlands. When developers seek approval for projects that degrade wetlands, they commonly have been required to mitigate the effects of their projects by restoring, preserving, or otherwise benefiting wetlands elsewhere.[191] This obligation is effectively injunctive in nature; developers need to engage in specific mitigation tasks to satisfy their obligation and earn the right to continue development. However, environmental agencies have begun to accept financial payments in lieu of mitigation efforts. In these fee mitigation schemes, developers pay a fixed sum to the regulatory agency and are relieved of the obligation to mitigate. The payments may (or may not) end up being devoted to wetland protection.[192]

The fact that regulated entities may be only too happy to pay hefty penalties to buy their freedom from government oversight likely strengthens enforcers' own incentives to emphasize financial recoveries over injunctive remedies. Agreeing to financial penalties may facilitate settlement, allowing agencies to minimize the costs of enforcement while maximizing the immediate benefits to the agency itself. This effect is likely to be strongest where public enforcers are permitted to retain a portion of any financial recovery, but it should extend to situations where enforcers have reputational incentives to emphasize measurable variables (like dollar amounts) over more subtle and speculative policy improvements from prospective relief.[193]

Indeed, in some cases financial incentives may not only affect agencies' preferences among enforcement options, but may push public enforcers to favor *enforcement as such* over other regulatory alternatives. Agencies often (though not always) have a range of regulatory

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[191] *See id.* at 1. For a general introduction to the wetlands compensatory mitigation program, see *Compensatory Mitigation*, U.S. ENVTL. PROTECTION AGENCY, http://water.epa.gov/lawsregs/guidance/wetlands/wetlandsmitigation_index.cfm (last updated Sept. 11, 2013).

[192] *See* Gardner, *supra* note 190, at 4.

[193] A related set of incentives contributed to the creation of the much-publicized SEC practice of allowing the targets of enforcement to settle without admitting responsibility. *See generally* Samuel W. Buell, *Liability and Admissions of Wrongdoing in Public Enforcement of Law*, 82 U. CIN. L. REV. (forthcoming 2013), *available at* http://scholarship.law.duke.edu/faculty_scholarship/2856 (describing and criticizing this SEC practice). The express purpose of this practice was to induce fast settlements and avoid lengthy trials on the theory that the potential exposure in subsequent private civil actions from an admission of liability at the SEC enforcement stage would be too great for the defendant to risk. *See Examining the Settlement Practices of U.S. Financial Regulators: Hearing Before the H. Comm. on Fin. Servs.,* 112th Cong. 79 (2012) (statement of Robert Khuzami, Director, Division of Enforcement, U.S. Securities and Exchange Commission) ("The reality is that many companies likely would refuse to settle cases if they were required to affirmatively admit unlawful conduct or facts related to that conduct. This is because such admissions would not only expose them to additional lawsuits by private litigants seeking damages, but would also risk a 'collateral estoppel' effect in such lawsuits."). Both trials and admissions of wrongdoing have value to the public, however, and the SEC policy reflected a choice to minimize those values in favor of other agency goals. *See* Buell, *supra* (manuscript at 10, 14).

options that work to stop violations before they can occur. They can deny entities the right to enter an industry in the first place or order them to shut down activities when appropriate.[194] In some cases, agencies may be able to choose between devoting resources either to ex ante investigation and prevention, or to ex post enforcement and sanction.[195] Agencies focused on financial recoveries may, on balance, downplay preventative remedies and focus more on remunerative sanctions. More broadly, agencies that derive significant funding from enforcement may focus on enforcement at the expense of other tasks, such as developing new regulations.

Unlike the other consequences we discuss in this section, this preference for ex post sanctions over ex ante prevention does not have an obvious parallel in the private sphere. Because private enforcement tends overwhelmingly to be victim driven, it contains a built-in corrective to the temptation to allow harm to occur so that enforcement may follow. In such cases, in order to reap the financial rewards of enforcement, the putative plaintiff would have to permit violations of law to be inflicted *on her* — that is, she would have to permit herself to be harmed, or the harm to be prolonged, in order to maximize the recovery.[196] In the public sphere, by contrast, the harm in question will not befall the enforcing agency, but the public at large. Financial incentives therefore drive a wedge between the agency's interest in maximizing recoveries and the public's interest in minimizing harm.

3. Competition. — Finally, financial motivations can lead to competition for dollars among would-be enforcers. If agencies seek to

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194 For example, the SEC requires a range of licenses and registration in order to participate in a variety of activities in the securities industry. Revoking these licenses and barring enforcement targets from working in the industry is one of the enforcement tools available to the agency. *See, e.g.*, Steadman v. SEC, 450 U.S. 91, 94 (1981) (a case arising from the SEC's decision to bar a mutual fund manager from associating with investment advisers or companies). Similarly, the Nuclear Regulatory Commission (NRC) authorizes the opening of power plants and has the authority to shut them down in cases of safety concerns. *See* 42 U.S.C. §§ 2232, 2236 (2006) (authorizing the NRC to grant and revoke licenses). Similarly, licenses are required for many individual employees at power plants and the NRC can revoke those as well. *See* 10 C.F.R. § 55.3 (2013) (mandating operator licenses); *id.* § 55.61 (revocation of operator licenses).

195 *Cf.* Landes & Posner, *supra* note 24, at 26 (raising concerns that private enforcers who are paid per offender convicted would have incentives to wait until crimes were committed rather than apprehend offenders at the attempt stage, "since the penalty for the completed crime will presumably be heavier than the penalty for the attempt"). For a discussion of the tradeoffs between ex ante prevention and ex post sanction, see generally Steven Shavell, *The Optimal Structure of Law Enforcement*, 36 J.L. & ECON. 255, 257–58, 261–65 (1993).

196 In some circumstances such behavior may well be rational, and we have doctrines to address those cases, like the doctrine that the victims of contract breach must mitigate their damages. *But cf.* Gideon Parchomovsky & Alex Stein, Essay, *The Distortionary Effect of Evidence on Primary Behavior*, 124 HARV. L. REV. 518, 519–21 (2010) (arguing that the need to collect evidence encourages enforcers of all types to let harm continue so that they can substantiate their claims, a situation that cannot be easily addressed by adopting any particular legal doctrine).

maximize their recoveries, a viable strategy is to poach lucrative enforcement opportunities from other agencies with overlapping jurisdiction. Interenforcer competition is likely to be particularly intractable when it is zero-sum, given defendants' limited resources and restrictions on duplicative recoveries.[197]

These conflicts can occur between agencies whose jurisdictions overlap either horizontally or vertically. At the federal level, for example, the CFTC and the SEC famously have had horizontal jurisdictional conflicts on a range of topics.[198] However, competition and turf battles are not limited to the financial sector and occur across federal regulatory agencies.[199] Vertical competition occurs when federal and state regulators chase the same enforcement targets. Under then–Attorney General Eliot Spitzer, for example, the New York Attorney General's Office frequently pursued enforcement actions falling within the jurisdiction of federal regulators.[200] Following the 2008 financial crisis, other state attorneys general aggressively pursued actions related to mortgage fraud in tandem with federal regulators.[201]

Financial incentives might also increase the potential for competition and conflict between public and private enforcers. As public enforcers have taken on responsibility for compensating victims of state and federal law violations, they have begun to fill roles traditionally served by private counsel and by class actions. It is not uncommon for state attorneys general, for example, to pursue large-scale representative actions that bear striking resemblances to damages class actions.[202] One consequence is increasing competition between state and private counsel over who will represent the relevant groups of injured citizens. Public enforcers enjoy an edge in those battles, because some courts tend to presume that government attorneys will better represent

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[197] Financial penalties are often, but not always, zero-sum in nature. Non–zero sum enforcement is particularly common where agencies have different (and exclusive) remedies available to them. For example, the DOJ has a monopoly on criminal penalties: agencies can refer cases to the DOJ but cannot independently seek to incarcerate a defendant or impose criminal fines. Neal Devins & Michael Herz, *The Uneasy Case for Department of Justice Control of Federal Litigation*, 5 U. PA. J. CONST. L. 558, 561–62 (2003).

[198] *See* John C. Coffee, Jr., *Competition Versus Consolidation: The Significance of Organizational Structure in Financial and Securities Regulation*, 50 BUS. LAW. 447, 460–61 (1995); Edward J. Kane, *Regulatory Structure in Futures Markets: Jurisdictional Competition Between the SEC, the CFTC, and Other Agencies*, 4 J. FUTURES MKTS. 367, 375–76 (1984).

[199] *See, e.g.*, Timothy M. Hammonds, *It Is Time to Designate a Single Food Safety Agency*, 59 FOOD & DRUG L.J. 427, 430 (2004) (discussing competition for authority and budget allocations among the federal agencies with jurisdiction over food safety); J.B. Ruhl & James Salzman, *Climate Change, Dead Zones, and Massive Problems in the Administrative State: A Guide for Whittling Away*, 98 CALIF. L. REV. 59, 70 (2010).

[200] *See* Lemos, *supra* note 41, at 725–27 (discussing actions by Attorney General Spitzer within the jurisdiction of the SEC).

[201] *See* LEHMAN, *supra* note 5.

[202] *See* Lemos, *supra* note 39, at 492–500.

the interests of their states' citizens — in part because they believe that those attorneys lack any direct financial interest in the case.[203]

Once again, the notion that financially motivated enforcers will compete for dollars has obvious parallels to commentary on private enforcement. Private counsel naturally struggle to represent plaintiffs with lucrative claims. That basic insight is captured in the image of the so-called "ambulance chaser," who rushes to a victim's bedside so that he can beat out other attorneys. Though the imagery is less vivid, interattorney competition is perhaps most stark in the context of class actions, as would-be class counsel compete for the honor of representing the class and collecting a portion of the winnings. Public enforcers may have nonfinancial reasons for competition, such as a desire to increase the relative clout of their institutions. But as in the private sphere, financial incentives are likely to enhance those incentives.

B. Assessing the Incentives: Is For-Profit Public Enforcement Desirable?

We have argued that, on balance, financially motivated public enforcement means more public enforcement; that such enforcement will tend to focus on maximizing financial recoveries rather than securing injunctive relief and, thus, often will target deep-pocketed defendants; and that financial incentives may induce agencies into competition with other potential enforcers, both public and private. The question remains whether these effects are positive or negative. It is impossible to answer that question in the abstract, and — we suggest — a mistake to try. Whether financially motivated public enforcement is something to be celebrated or mourned depends on one's view of the optimal level of public enforcement, as well as an appraisal of the likely performance of the relevant agency with and without financial incentives. Moreover, the answer surely will differ across agencies, given different statutory contexts, institutional structures, resources, personnel, cultures, and so on. We have sought to show that financial incentives bring public enforcement closer to the private-enforcement model than is commonly appreciated. Just as one's view of the propriety of private enforcement depends on a mix of subjective policy judgment and context-specific empirical fact, so too must one's assessment of whether financial incentives are a feature or a bug in the public sphere.

The important point for present purposes is that the financial incentives described in Part II are in no sense inevitable or invariable. Instead, they are properly understood as tools with which policymakers can calibrate the desired intensity of enforcement. This point is

[203] *See id.* at 506–07.

well understood in the context of private enforcement. For example, Congress frequently uses financial incentives to encourage private enforcement in areas where there is reason to believe that enforcement levels will be suboptimal. An empirical study revealed approximately one hundred federal statutes that promise putative plaintiffs damages beyond their actual losses, either in the form of a multiplier (for example, double or treble damages) or punitive damages.[204] The obvious purpose of such provisions is to harness the financial incentives of private litigants in service of the enforcement of federal law.[205]

Despite policymakers' strategic manipulation of private enforcers' financial incentives, the same strategies have been overlooked in the public sphere — perhaps on the view that the very notion of financially motivated public enforcement is oxymoronic. Congress does sometimes ratchet up federal agencies' enforcement tools, authorizing them to collect ever-larger amounts in civil penalties.[206] Yet those changes tend to be made without meaningful attention to the agencies' incentives to *use* the new powers in an effective way.

Consider, in this regard, the Consumer Product Safety Commission (CPSC), which is tasked with protecting the public from hazardous consumer products through safety standards, product recalls, regulation, and enforcement.[207] As one commentator has observed, the history of the CPSC has been one of "massive regulatory failure."[208] By 2007, limited resources, industry capture, and vacant Commission seats had left the CPSC "an agency in distress."[209] Recalls fell in number and were slow and incomplete when they happened.[210] "Fines

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[204] *See* SEAN FARHANG, THE LITIGATION STATE 66 (2010); *see also* Lemos, *supra* note 176, at 791–92 (describing damages enhancements in multiple federal statutes).

[205] *See* Lemos, *supra* note 176, at 793–95 (discussing legislative histories of suit-boosting statutes).

[206] *See, e.g.*, Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, § 105, 116 Stat. 745, 759–64 (codified at 15 U.S.C. § 7215 (2012)) (giving the SEC new authority to impose substantial civil penalties for violations by public accounting firms); Pipeline Safety, Regulatory Certainty, and Job Creation Act of 2011, Pub. L. No. 112-90, § 2, 125 Stat. 1904, 1905–06 (2012) (codified in scattered sections of 49 U.S.C.) (amending 49 U.S.C. § 60122 (2006 & Supp. V 2011), and doubling the maximum civil penalty the PHMSA can impose from $100,000 to $200,000 per day per violation).

[207] *See Who We Are — What We Do for You*, U.S. CONSUMER PRODUCT SAFETY COMMISSION, http://www.cpsc.gov/Safety-Education/Safety-Guides/General-Information/Who-We-Are---What-We-Do-for-You (last visited Nov. 24, 2013).

[208] Amy Widman, *Advancing Federalism Concerns in Administrative Law Through a Revitalization of State Enforcement Powers: A Case Study of the Consumer Product Safety and Improvement Act of 2008*, 29 YALE L. & POL'Y REV. 165, 184 (2010).

[209] *Oversight of the Consumer Product Safety Commission: Product Safety in the Holiday Season: Hearing Before the Subcomm. on Consumer Prot., Prod. Safety, & Ins. of the S. Comm. on Commerce, Sci., & Transp.*, 111th Cong. 2 (2010) (statement of Sen. Mark Pryor, Chairman, Subcomm. on Consumer Protection, Product Safety, and Insurance).

[210] *See* Widman, *supra* note 208, at 181–83 (discussing inadequate recalls of deadly cribs and other child-safety devices); *see also* KIDS IN DANGER, TOXIC TOYS AND FAULTY CRIBS: AN EXAMINATION OF CHILDREN'S PRODUCT RECALLS IN 2008, RECALL EFFECTIVENESS AT

were virtually nonexistent, even for companies with repeated recalls."[211] Congress intervened with the Consumer Product Safety Improvement Act of 2008[212] (CPSIA), which sought to improve the CPSC's performance in various ways, including by strengthening enforcement. Among other changes, the Act raised the amounts the CPSC could recover in civil penalties from $5000 to $100,000 per violation, and raised the maximum penalties per violator from $1.25 million to $15 million.[213] Civil penalties spiked in the wake of the CPSIA — jumping from $3.675 million in 2008[214] to $9.8 million in 2009[215] — but then leveled off at an average of $4.938 million over the next three years.[216] Given that maximum penalties increased nearly fifteen-fold under the CPSIA, the fact that annual penalties have not even regularly doubled suggests that the agency is not using its expanded authority as aggressively as it might.

Would a financially motivated CPSC mean stronger enforcement? We recognize, of course, that beefing up public enforcement is not an uncontroversial goal. If (as many believe) the CPSC's mission is fundamentally misguided, then the less the agency does, the better. Nevertheless, for purposes of discussion we assume that public enforcement of federal consumer protection law is desirable, at least up to a certain level, and that current enforcement remains well below that level. The interesting question, in our view, is whether financial incentives might provide an institutional counterweight to existing disincentives to action. We argue that the answer is a qualified yes. The qualifications are important, however, and highlight the potential pitfalls of engineering public enforcement in a way that emphasizes financial incentives.

CPSC AND THE IMPLICATIONS FOR CHILD SAFETY 10–12 (2009), *available at* http://www.kidsindanger.org/docs/reports/ToxicToysFaultyCribsReport.pdf (discussing the relative ineffectiveness of CPSC recalls).

[211] Widman, *supra* note 208, at 183–84.

[212] Pub. L. No. 110-314, 122 Stat. 3016 (codified in scattered sections of 15 U.S.C.).

[213] 15 U.S.C. § 2069 (2012).

[214] U.S. CONSUMER PROD. SAFETY COMM'N, 2008 PERFORMANCE AND ACCOUNTABILITY REPORT: SAVING LIVES AND KEEPING FAMILIES SAFE 12 (2008), *available at* http://www.cpsc.gov/PageFiles/122535/2008par.pdf.

[215] U.S. CONSUMER PROD. SAFETY COMM'N, 2009 PERFORMANCE AND ACCOUNTABILITY REPORT: SAVING LIVES AND KEEPING FAMILIES SAFE 13 (2009), *available at* http://www.cpsc.gov/PageFiles/122532/2009par.pdf.

[216] *See* U.S. CONSUMER PROD. SAFETY COMM'N, 2010 PERFORMANCE AND ACCOUNTABILITY REPORT 14 (2010) (reporting $3.9 million in civil penalties ordered); U.S. CONSUMER PROD. SAFETY COMM'N, 2011 PERFORMANCE AND ACCOUNTABILITY REPORT 7–8 (2011) (reporting $3.26 million in civil penalties ordered); U.S. CONSUMER PROD. SAFETY COMM'N, 2012 PERFORMANCE AND ACCOUNTABILITY REPORT 6 (2012) (reporting $7.654 million in civil penalties ordered). All performance reports are available at *Budget and Performance*, U.S. CONSUMER PRODUCT SAFETY COMMISSION, http://www.cpsc.gov/en/About-CPSC/Agency-Reports/Performance-and-Budget (last visited Nov. 24, 2013).

Although the specific causes of the CPSC's lackluster enforcement are not clear, commentators have identified various factors that may produce suboptimal levels of public enforcement generally. For example, Professor Michael Selmi has compared public and private enforcement of federal civil rights law and has found that public enforcers pursue smaller cases and recover lower awards than the private bar.[217] The relevant agencies litigate primarily on behalf of private claimants, so any money they recover goes to the victims of discrimination. As Selmi observes, the agencies' own lack of financial incentives helps explain their lackluster enforcement.[218] That problem may be intractable in agencies that represent private interests, but the CPSC is different: like most public enforcers, it has authority to seek civil penalties to protect the public interest in law compliance.[219]

It would be possible, therefore, for Congress to tweak the institutional structure in order to increase the CPSC's own incentive for action.[220] For example, Congress could create a revolving fund, similar to the Health Care Fraud and Abuse Control Account described in Part II, which would be funded by the proceeds of enforcement and used to support further enforcement-related activity. The effect of such a fund would depend on agency leadership — on the extent to which agency heads encourage attorneys to prioritize gains for the fund and reward those who produce the largest gains. But, as we argued in the previous Part, agency leadership typically will have ample incentives to maximize any dedicated funding source. Thus, one might expect that the CPSC would ramp up enforcement efforts, going after bigger winnings, if the agency itself could benefit from the proceeds.

A revolving fund also could address another recurring cause of agency underenforcement: lack of resources. Rather than depending on legislative largesse on an annual basis, an agency with an enforcement-funded revolving fund can — depending on how the fund is structured — essentially support itself.[221] Moreover, a dedicated

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217 *See* Selmi, *supra* note 22, at 1404.

218 *See id.* at 1443.

219 15 U.S.C. § 2069 (2012) (authorizing the CPSC to impose civil penalties).

220 Whether current or future members of Congress would *want* to do so is a different question, which highlights the inevitable overlap between questions of institutional design and questions of policy. Legislators and interest groups that oppose strong federal interventions in the consumer safety field ought to be averse to the creation of an enforcement-funded revolving fund, and proponents of stronger federal enforcement should support it.

221 Some funds require annual appropriations from the legislature; others do not. The IRS, for example, is authorized by statute to retain, and use, twenty-five percent of the funds collected by PCAs, without any need for additional appropriations. *See* 26 U.S.C. § 6306(c) (2006). For examples of funds requiring annual legislative appropriations or approval, see IDAHO CODE ANN. § 48-606(5) (2008) ("All penalties, costs and fees recovered by the attorney general shall be remitted to the consumer protection fund . . . . Moneys in the fund may be expended pursuant to legislative appropriation and shall be used for the furtherance of the attorney general's duties and ac-

funding source may work to expand the agency's budget over time, by persuading legislators that the agency is a good investment, or simply by shifting the burden of legislative inertia to favor the agency.[222]

Whether financial incentives would induce an agency like the CPSC to focus on the most *important* cases — those that pack the biggest deterrent punch — is a more difficult question. Money is, at best, an imperfect proxy for importance. To be sure, more damages imply more harm, and thus more serious (or at least widespread) wrongdoing. But the relative question is critical: more than what? Given asymmetric information, it is difficult for outsiders to gauge whether public enforcers are going after the right cases, and even harder to determine whether agencies are eking out meaningful penalties from the targets they choose. Agencies have far more information about potential enforcement targets than do their overseers in the political branches and the general public, including potential future employers of agency attorneys. To the extent that agencies prefer relatively easy targets over difficult ones, they may be tempted to use high-value monetary recoveries to make unimportant cases seem important to those who lack full information — or to string together a series of modest recoveries to create an impressive-sounding total. Even where agencies do pursue big targets, they may agree to awards that sound large to the uninitiated but that represent a drop in the bucket of the defendant's overall resources.[223] Indeed, we have suggested that one of the reputational advantages of large financial recoveries is that big recoveries *sound* good, even if they amount to little more than a slap on the wrist or address a problem of marginal importance. That reputational benefit inures only to the agency, however; from the public's perspective, it can be a cost.

tivities under this chapter."); and N.J. STAT. ANN. § 56:9-19 (West 2012) (providing that the attorney general's antitrust revolving fund may be used for paying expenses related to antitrust enforcement "provided, however, that the expenditure of such additional sums shall first be approved by the Director of the Division of Budget and Accounting and the Legislative Budget and Finance Director in the same manner as transfers of appropriations are approved").

[222] *See supra* note 97 and accompanying text.

[223] For example, federal regulators often recover enormous penalties — totaling in the billions — from drug companies for off-label marketing in violation of the Federal Food, Drug, and Cosmetic Act, ch. 675, 52 Stat. 1040 (1938) (codified as amended in scattered sections of 21 U.S.C.). *See* David Evans, *Pfizer Broke the Law by Promoting Drugs for Unapproved Uses*, BLOOMBERG (Nov. 9, 2009, 12:01 AM), http://www.bloomberg.com/apps/news?pid=newsarchive&sid=a4yV1nYxCGoA (reporting that between 2004 and 2009, seven drug companies paid a total of $7 billion in fines and penalties to state and federal enforcers for promoting off-label uses of their products). Although the penalties are unquestionably large, they represent a small fraction of the relevant companies' annual earnings. *See id.* ("The total of $2.75 billion Pfizer has paid in off-label penalties since 2004 is a little more than 1 percent of the company's revenue of $245 billion from 2004 to 2008.").

The more direct financial incentives created by revolving funds might work better to align the agency's interest with the public's interest in well-targeted enforcement efforts. Revolving funds can mitigate the tendency to favor easy resolutions by giving the agency a direct, self-interested reason to maximize recoveries. If the agency chooses to dole out a slap on the wrist, or to pursue small problems over big ones, the agency itself will lose out.

But here too the fix is far from perfect. First, as commentators have argued in the context of private enforcement, attorneys must weigh the possible benefits of each suit or decision to settle against the associated costs.[224] Such costs include both direct costs and the opportunity costs of other suits foregone. The same is true of public enforcers. If they hope to line their coffers, agencies may do better going after a series of quick wins rather than sinking vast resources into netting the one big fish. Bigger fish, after all, may be harder to catch. Larger and better-funded defendants may be better able to fight a government action, and important cases are often complicated and unwieldy. If the big case is harder to win, its expected benefits may be lower — and its costs higher — than those of a series of small, easy cases.

Second, even where public enforcers are permitted to eat what they kill, few (if any) revolving funds take the form of an "all you can eat" buffet. Instead, such funds are capped, either by reference to the agency's overall budget, or by a fixed dollar amount. For example, the revolving fund created by HIPAA specifies the amount each of the relevant agencies can draw from the fund each year.[225] On their face, those limits operate as caps on outputs of the agencies. In practice, they may also function as effective caps on inputs, because agencies have relatively weak incentives to go after judgments they will not be permitted to keep. Yet even a capped revolving fund could provide a helpful impetus for an agency like the CPSC, which currently collects so little in enforcement. In 2012, for example, the CPSC reported to Congress that it had obtained "$7.654 million in civil penalties through out-of-court settlements."[226] That same year, it requested a budget of $122.425 million — suggesting that there is ample room for enforce-

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224 *See* Christopher R. Leslie, *A Market-Based Approach to Coupon Settlements in Antitrust and Consumer Class Action Litigation*, 49 UCLA L. REV. 991, 1042 (2002) ("The self-interested attorney seeks to maximize the return on her involvement in the litigation while minimizing the resources expended.").

225 42 U.S.C. § 1395i(k) (2006 & Supp. V 2011).

226 U.S. CONSUMER PROD. SAFETY COMM'N, 2012 PERFORMANCE AND ACCOUNTABILITY REPORT, *supra* note 216, at 6.

ment to support the agency's function without swelling its budget well beyond current levels.[227]

It might be tempting to suppose that interenforcer competition would provide an additional remedy to public underenforcement. As we explained in the previous section, agencies that derive significant funding from enforcement may have incentives to poach lucrative enforcement opportunities from other would-be enforcers. One might dismiss such competition as wasteful, but it might in some circumstances be beneficial for all the reasons that competition is preferable to monopoly.[228] If ineffective enforcers lose out to more efficient and effective ones, perhaps competition will push underperforming agencies to improve their practices.

Again, however, there are significant problems. First, in some instances of competition, one side holds a trump card. For example, although federal law often authorizes enforcement by both state and federal actors, it expresses a clear preference in favor of federal enforcement. Typically, state enforcers must "notify the relevant federal agency in advance of filing a complaint," must permit the federal enforcer to intervene in the case, and cannot pursue violations that already are the subject of a pending federal enforcement action.[229] As noted in the previous section, state attorneys general also might compete with private litigants — and particularly private class actions —

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[227] U.S. CONSUMER PROD. SAFETY COMM'N, 2013 PERFORMANCE BUDGET REQUEST 1 (2012). The SEC provides a useful counterpoint. The SEC is routinely criticized for favoring wrist slaps over deterrent punches. *See, e.g.*, Morgenson, *supra* note 189 (arguing that frequent SEC settlements that permit companies and individuals to resolve cases without admitting wrongdoing "can be little more than a wrist slap — and certainly do not qualify as punishment," and that "[m]ost financial penalties end up being paid for by the company's shareholders or its insurance policies," which is "not much of a deterrent"). Without careful and creative tailoring, however, a revolving fund is unlikely to improve matters. The SEC's budget justification for FY 2013 reports that the agency obtained judgments of "$2.8 billion in penalties and disgorgement ordered in FY 2011," and requests a budget of $1.566 billion. U.S. SEC. & EXCH. COMM'N, *supra* note 1, at 1; *see also id.* at 2. Given that the agency already recovers far more money than it uses, any dedicated funding source would likely be capped well below the level of current recoveries and would therefore do little, if anything, to enhance the SEC's incentive to maximize recoveries.

This problem is significant, but not intractable. First, it is worth noting that one possible advantage of an enforcement-funded revolving fund is that it would enhance the SEC's incentive to *collect* judgments. *See supra* note 185 and accompanying text. Second, it would be possible to structure a fund such that the SEC would benefit even from recoveries far above its projected budget. After all, there is no theoretical bar to an entirely uncapped fund. More realistically, a fund could be structured such that the SEC would be permitted to retain a certain percentage of recoveries — say, ten percent — or to retain all recoveries over a certain threshold — say, $1.5 billion. Neither formulation is terribly complicated, and both would give the SEC a financial incentive to collect as much money as possible.

[228] *Cf.* Lemos, *supra* note 41, at 748–49 (describing benefits of state-federal competition in enforcement of federal law).

[229] *Id.* at 708 (describing statutory limitations on state enforcement of federal law).

for representation of the state's citizens. Here states hold the advantage, as courts tend to conclude that representative litigation by state attorneys general represents a "superior" mode of adjudicating aggregate claims and to deny class certification on that basis.[230] In both instances, the competition is resolved by fiat rather than by performance, leaving little reason to believe that the winner of the battle (federal enforcers in the first instance, states in the second) would have imposed more effective sanctions than the loser.

In other instances, interenforcer competition is resolved in a way that seems designed to reward weak enforcers over strong ones. This problem is familiar in class actions, where private attorneys compete with one another to be first to reach a settlement with the defendant, which will then serve as the basis for a settlement-only class certification. The problems with such a system should be obvious: although the warring attorneys purport to represent the interests of the plaintiff class, they have strong personal incentives to agree to a suboptimal class settlement so that they can collect a handsome fee as class counsel. For defendants, such a "reverse auction" among plaintiffs' counsel is pure gravy, as it allows them to choose the lowest bidder.[231]

Similar problems can infect public enforcement. For example, where representative suits by state attorneys general are permitted to preclude subsequent private actions involving the same harms, defendants may hope to inspire a bidding war between public and private enforcers, where the lowest bidder gets the settlement. The gambit may not work, of course. One would hope that state attorneys general are less likely than private counsel to sell their citizens' interests on the cheap, both because government attorneys are charged with promoting the public interest and because their expected financial gain is significantly smaller and less direct than that of contingency-fee class counsel. The point here is a relative one. To the extent financial incentives prompt competition among would-be enforcers, that competition may produce less overall enforcement, not more.

Financial incentives, in short, are a blunt tool. They may provide a valuable spur to action for agencies (like the CPSC, perhaps) that currently are performing well below optimal levels of enforcement. Here again, the comparison to private enforcement is apt. Commentators have described private enforcement as "a form of auto-pilot enforcement [that runs] via market incentives, [and] that will be difficult for future legislative majorities . . . to subvert."[232] The same is true of financial incentives in public enforcement. A revolving fund like the

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[230] *See* Lemos, *supra* note 39, at 505.

[231] John C. Coffee, Jr., *Class Action Accountability: Reconciling Exit, Voice, and Loyalty in Representative Litigation*, 100 COLUM. L. REV. 370, 392 (2000).

[232] FARHANG, *supra* note 204, at 5.

one created by HIPAA, or the hypothetical CPSC fund discussed throughout this section, can rev up an idle agency and set it in motion. But such incentives provide an engine, not a rudder: they encourage movement without providing much direction. The impetus still may be useful if action is what is needed — but it can be dangerous, and downright counterproductive, in circumstances where carefully calibrated enforcement is critical.[233]

Indeed, the discussion here has not yet touched on what is perhaps the most problematic aspect of financial incentives: their tendency to push agencies toward financial rather than injunctive relief. Financial penalties can produce meaningful deterrence in appropriate cases. But in some circumstances the most effective remedies are nonmonetary. Precisely because private enforcement tends to be financially motivated, private parties cannot be expected to obtain those injunctive remedies. When it comes to forward-looking relief, public enforcers hold the clear advantage. That advantage is lost, however, if public enforcement moves too close to the private model.[234]

This problem is serious, but it is not invariable. Injunctive relief is not a critical component of every enforcement scheme, and not all injunctive remedies are created equal. Consider, again, the CPSC. The agency has a two-pronged approach to ensuring that hazardous consumer products are removed from stores and homes as quickly as possible. The first prong is injunctive in nature: product recalls, which are almost always the product of negotiation and voluntary action by the responsible firm.[235] The second prong of the agency's strategy is monetary: civil penalties for companies that knowingly fail to report potentially hazardous products.[236] If financial incentives caused the CPSC to focus on civil penalties to the detriment of product recalls, the policy consequences would be regrettable indeed. Nevertheless, there is reason for optimism in this example. Unlike other forms of intrusive, ongoing injunctive relief, a recall is a one-shot event. Moreover, it will typically be in the defendant's best interest to remove a

[233] *Cf.* Lemos, *supra* note 41, at 754 (cautioning that it may be undesirable to permit states to enforce federal law "in areas where the optimal level of enforcement lies somewhere below maximum enforcement," particularly where "the relevant liability rule is written in broad terms, capturing conduct that law makers 'did not in fact want to forbid'" (quoting Landes & Posner, *supra* note 24, at 38)).

[234] *Cf.* Stephen Paul Mahinka & Kathleen M. Sanzo, *Multistate Antitrust and Consumer Protection Investigations: Practical Concerns*, 63 ANTITRUST L.J. 213, 233–34 (1994) (arguing that, in antitrust enforcement proceedings, state attorneys general (whose offices often retain a portion of the proceeds of enforcement) "focus[] . . . on recovery of civil penalties and administrative costs," *id.* at 233, more than their federal counterparts (which must turn over any recoveries to the general treasury)).

[235] *See* U.S. CONSUMER PROD. SAFETY COMM'N, 2012 PERFORMANCE AND ACCOUNTABILITY REPORT, *supra* note 216, at 77.

[236] *Id.*

hazardous product from the marketplace, since continuing sales will likely expand the firm's liability exposure. Finally, recalls — like dollars — are easily quantified and measured. The CPSC reports the number of recalls and related information each year,[237] and — again like financial recoveries — those figures lend themselves to easy comparisons with prior years.[238] The upshot is that the CPSC should have ample incentives to continue to concentrate on recalls, and both the agency's overseers in Congress and public watchdog groups should have ample tools to monitor the agency's performance. These factors ameliorate the concern that a revolving fund or similar financial incentive would provoke a shift away from recalls in favor of civil penalties.

We can now return to the question with which we began this section: can financial incentives provide an institutional counterweight to disincentives for public enforcement? We have sought to show that the answer is yes. But, as we suggested at the outset and have emphasized throughout this discussion, that "yes" comes with heavy qualifications. Financial incentives cannot cure many of the problems that ail underperforming agencies, and in many cases they will cause more harm than good. Indeed, one of our primary goals in this Article has been to sound a warning about the effects of revolving funds and similar institutional structures. Such funds are commonplace at the state level, and have begun to crop up in federal law as well. Yet there is no evidence that policymakers have considered the full costs and benefits of arrangements that allow public enforcers to fund themselves. We have sketched those costs and benefits here, but — by design — our discussion has been general and theoretical rather than context-specific and empirical. We hope that future work will fill in the picture of financially motivated public enforcement.

CONCLUSION

Financial incentives blur the line between public and private enforcement. Agencies and their attorneys have reasons, unrelated to deterrence, to attempt to maximize the dollars collected through enforcement. The profit-maximizing incentive is strongest when the institution in question is permitted to retain the proceeds of enforcement. But even when public enforcers must turn over their winnings to the general treasury, they may have reputational incentives to focus their efforts on measurable units like dollars earned.

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[237] *See, e.g.*, *id.* ("In 2011, CPSC staff completed 405 recalls (100 percent voluntary), involving millions of consumer product units that either violated mandatory standards or were defective and presented a substantial risk of injury to the public.").

[238] *See id.* at 83 (tracking, in numerical terms, the timeliness of recall responses from 2007 to 2012).

We have argued that financially motivated public enforcers will tend to behave more like private enforcers. That behavior is not necessarily a bad thing, but it highlights the need for more careful thinking about the circumstances under which financial incentives can add value to public enforcement, and when their costs exceed their benefits. Small pockets of experimentation can be seen, particularly at the state and local level. For example, in the mid-1980s New York City experimented with a Speedy Disposition Program, which used financial incentives to encourage District Attorneys' offices in the city's five boroughs to reduce the number of older felony cases on their dockets and the number of long-term detainees in pretrial detention facilities.[239] Like the revolving funds described here, the Program offered cash incentives not to individual prosecutors, but to the prosecuting offices themselves.[240] The results of the experiment were mixed, with notable improvements made in Manhattan, for example, but none in Brooklyn and Queens.[241] Examples like this program illustrate the potential for financial incentives to improve the functioning of public enforcement. At the same time, however, they remind us how much we have to learn about how such incentives work in practice, particularly when they are directed at institutions rather than individuals.

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[239] *See* Meares, *supra* note 35, at 859–60 (describing the Program). *See generally* THOMAS W. CHURCH & MILTON HEUMANN, SPEEDY DISPOSITION: MONETARY INCENTIVES AND POLICY REFORM IN CRIMINAL COURTS (1992).

[240] *See* CHURCH & HEUMANN, *supra* note 239, at 29.

[241] *See id.* at 69–75.