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## Should Agencies Enforce?

Max Minzner

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## Article

# Should Agencies Enforce?

Max Minzner<sup>†</sup>

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## INTRODUCTION

Administrative enforcement, especially the use of large civil penalties, is on the upswing. In recent years, administrative agencies have imposed historically large civil penalties on an agency-by-agency basis. In January 2014, as part of the resolu-

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tion of the Madoff scandal, J.P. Morgan Chase paid \$461 million to the Financial Crimes Enforcement Network, a record for that agency.<sup>1</sup> In June 2012, Barclays Bank agreed to pay a \$200 million civil penalty to the Commodity Futures Trading Commission (CFTC) for interest rate manipulation, the largest penalty imposed in CFTC history.<sup>2</sup> Just weeks before, the Office of Foreign Asset Control of the Department of Treasury imposed a record \$619 million dollar penalty on ING Bank in connection with a joint investigation with the Department of Justice relating to transactions with Cuban and Iranian clients.<sup>3</sup> Another branch of the Department of Treasury, the Office of the Comptroller of Currency, levied its largest penalty in its history in December 2012, a \$500 million dollar sanction against HSBC Bank for violations of the Bank Secrecy Act.<sup>4</sup>

The frequency of these cases is striking. The dollar figures are big and the number of cases large, but the breadth of agencies involved is equally significant. We see many different agencies bringing enforcement actions. This is the result of a key structural choice in federal civil enforcement. In general, at the federal level, regulatory enforcement is decentralized and spread across specialist agencies. Enforcement power is delegated to a range of administrative agencies with subject matter expertise. The Securities and Exchange Commission (SEC), the Commodity Futures Trading Commission (CFTC), the Nuclear Regulatory Commission (NRC), and the Office of Foreign Asset Control (among many others) all have enforcement arms fo-

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1. See JPMorgan Chase Bank, N.A., No. 2014-1 (Dep't of Treasury Jan. 7, 2014) (assessing civil penalty), available at [http://www.fincen.gov/news\\_room/ea/files/JPMorgan\\_ASSESSMENT\\_01072014.pdf](http://www.fincen.gov/news_room/ea/files/JPMorgan_ASSESSMENT_01072014.pdf). The payment was part of a broader global settlement with the Department of Justice and other regulators. See Dan Fitzpatrick, *J.P. Morgan Settles Its Madoff Tab*, WALL ST. J. (Jan. 7, 2014), <http://www.wsj.com/articles/SB10001424052702304887104579306323011059460>.

2. See *CFTC Orders Barclays To Pay \$200 Million Penalty for Attempted Manipulation of and False Reporting Concerning LIBOR and Euribor Benchmark Interest Rates*, U.S. COMMODITY FUTURE TRADING COMMISSION (June 27, 2012), <http://www.cftc.gov/PressRoom/PressReleases/pr6289-12>; see also *Barclays To Pay Largest Fine in CFTC History*, CBS NEWS (June 27, 2012), <http://www.cbsnews.com/news/barclays-to-pay-largest-civil-fine-in-cftc-history>.

3. *ING Bank N.V. Agrees To Forfeit \$619 Million for Illegal Transactions with Cuban and Iranian Entities*, U.S. DEPARTMENT JUST. (June 12, 2012), <http://www.justice.gov/opa/pr/2012/June/12-crm-742.html>.

4. *OCC Assesses \$500 Million Civil Money Penalty Against HSBC Bank USA, N.A.*, U.S. DEPARTMENT TREASURY (Dec. 11, 2012), <http://www2.occ.gov/news-issuances/news-releases/2012/nr-occ-2012-173.html>.

cused on the agency's regulatory subject matter.<sup>5</sup>

Why structure enforcement this way, with the power to bring cases divided among many agencies focused on different industries? The standard answer is that we assume expert agencies are the entities best suited to enforce in their regulatory domains. Agencies draft the regulations and are staffed with industry experts. Academics, judges, and Congress see enforcement as deeply entangled with the agency's other missions. Expertise in enforcement follows from the agency's other capacities. We assume that subject matter expertise will ensure the appropriate enforcement of statutes. Because, for example, the SEC has specialized knowledge about the securities industry, the standard view is this expertise gives it the ability to identify and investigate the right violations, bring the correct enforcement actions, and extract the appropriate penalties.

This assumed superiority of specialized enforcement has gone largely unexamined. This silence is rather surprising, because criminal enforcement has taken a very different approach. Federal criminal enforcement is centralized in a generalist agency. The DOJ retains a monopoly on criminal prosecutions regardless of the substantive area regulated by the statute. Cases ranging from narcotics and violent crime to criminal antitrust and securities fraud are charged, litigated, and settled by a single unified agency.<sup>6</sup> Furthermore, the DOJ is charged with enforcement as its central mission, largely to the exclusion of other tasks.<sup>7</sup> Unlike regulatory agencies, DOJ

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5. See *2015 OFAC Recent Actions*, U.S. DEPARTMENT TREASURY, <http://www.treasury.gov/resource-center/sanctions/OFAC-Enforcement/Pages/OFAC-Recent-Actions.aspx> (last updated Feb. 17, 2015); *Division of Enforcement*, U.S. SEC. & EXCHANGE COMMISSION, <http://www.sec.gov/enforce> (last modified Mar. 18, 2014); *Enforcement*, U.S. COMMODITY FUTURES TRADING COMMISSION, <http://www.cftc.gov/lawregulation/enforcement/index.htm> (last visited Apr. 20, 2015); *Enforcement*, U.S. NUCLEAR REG. COMMISSION, <http://www.nrc.gov/about-nrc/regulatory/enforcement.html> (last updated Oct. 20, 2014).

6. See, e.g., U.S. Attorney's Office, S. Dist. of N.Y., *Criminal Division*, U.S. DEPARTMENT JUST., <http://www.justice.gov/usao/nys/criminal.html> (last visited Apr. 20, 2015). United States Attorney's Offices, the primary litigating units of the Department of Justice, are geographically decentralized, which can lead to subject-matter specialization. For instance, the United States Attorney's Office for the Southern District of New York has a particular expertise in securities cases. Despite this role that geography plays in enforcement, enforcement policy is set and controlled centrally in the United States Department of Justice in Washington, D.C., and all of the offices have the capacity to prosecute a range of substantive crimes.

7. The Department's mission statement reflects this focus: To enforce the law and defend the interests of the United States according to the law; to ensure public safety against threats foreign and domestic; to provide federal

neither drafts the substantive criminal statutes it enforces nor issues interpretations of those statutes that have the force of law.<sup>8</sup>

This Article challenges the claim that specialization is always superior. First, I demonstrate that enforcement itself is an area of expertise not wholly intertwined with subject matter expertise. Part I introduces the assumption by scholars, Congress, and the judiciary that agencies will be expert in enforcement because of their specialized knowledge, but as Part II demonstrates, core enforcement questions about how to investigate cases and which violations to charge are frequently independent of the substantive regulatory area. Agencies that make these decisions well are apt to be able to do so in different areas of law. As a result, the value of specialized knowledge about an industry trades off against specialized knowledge about enforcement.

Part III explores the structural consequences of specialization. In addition to costs and benefits based on knowledge, specialized enforcement brings structural strengths and weaknesses. Part III initially outlines two challenges faced by specialized enforcers that generalist agencies are more likely to avoid. First, specialists are more vulnerable to political pressure. In ordinary times, regulatory capture can produce underenforcement. Following major enforcement failures, though, the political salience of enforcement switches and overenforcement can result. Second, specialized enforcement inevitably suffers from a silo effect. The agency can only control the direct consequences of its own enforcement action, while the enforcement target considers all of the potential effects. These collateral effects include the possibility of subsequent civil litigation and enforcement actions by other regulators. This silo effect distorts the outcomes of specialized enforcement.

These weaknesses have countervailing benefits. A central goal of any enforcement regime is norm reinforcement—agencies want to build norms of compliance within firms. Agencies that are closer to the substantive regulatory area are bet-

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leadership in preventing and controlling crime; to seek just punishment for those guilty of unlawful behavior; and to ensure fair and impartial administration of justice for all Americans. *About DOJ*, U.S. DEPARTMENT JUST., <http://www.justice.gov/about/about.html> (last visited Apr. 20, 2015).

8. For an argument in favor of an alternative approach, see Dan M. Kahan, *Is Chevron Relevant to Federal Criminal Law?*, 110 HARV. L. REV. 469, 488–92 (1996) (arguing for a delegation of interpretive power to the Department of Justice).

ter situated to learn these norms and help them develop. Specialist enforcement agencies also have more options than generalists. Within the structure of specialized agencies, enforcement authorities are under the supervision of the rule-making authority. As a result, agencies have a choice of mechanisms to alter the behavior of regulated entities. They can change the substantive rule or bring an enforcement action.

These costs and benefits mean that specialist enforcement is likely to be superior in some cases but not in others. In particular, Part IV argues that we need to approach specialized enforcement carefully. First, Congress now follows a default rule. New regulatory agencies, like the Consumer Finance Protection Bureau, get civil enforcement authority as part of their statutory authorization with little thought. A careful tradeoff of the costs and benefits, though, suggest that agency enforcement should only be specialized so far. For some agencies, like the SEC and the CFTC, a merger of the enforcement arms might produce significant returns. Second, the judicial branch needs to think about comparative deference. The judiciary strongly defers to agency enforcement choices based on an assumption of expertise. The costs and benefits of specialization, though, suggest that deference should be weaker as agencies become more specialized. Finally, agencies themselves need to closely coordinate their enforcement efforts, both in individual cases and at the level of policy, in order to allow the strengths of specialized enforcement to show through while overcoming its weaknesses.

### I. THE STRUCTURAL CHOICE OF AGENCY ENFORCEMENT

Agency structure affects regulatory outcomes. This basic concept has a long pedigree in the political science literature<sup>9</sup> and is now widely recognized in the legal literature as well. Scholars have started to consider the questions of the size and scope of agencies, whether authority should be centralized or decentralized, and the costs and benefits of overlapping agency authority.<sup>10</sup> The enforcement function is no exception. How ad-

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9. See, e.g., Steven J. Balla, *Administrative Procedures and Political Control of the Bureaucracy*, 92 AM. POL. SCI. REV. 663, 664 (1998); Matthew D. McCubbins, Roger G. Noll & Barry R. Weingast, *Structure and Process, Politics and Policy: Administrative Arrangements and the Political Control of Agencies*, 75 VA. L. REV. 431, 481 (1989); Mathew D. McCubbins, Roger G. Noll & Barry R. Weingast, *Administrative Procedures As Instruments of Political Control*, 3 J.L. ECON. & ORG. 243, 273–74 (1987).

10. See, e.g., Jody Freeman & Jim Rossi, *Agency Coordination in Shared Regulatory Space*, 125 HARV. L. REV. 1133, 1138 (2012); Anne Joseph

ministrative agency enforcement should be structured is beginning to receive considerable academic attention.

A key debate has focused on *who* should enforce. How many enforcers should be given the responsibility for policing and preventing violations? One option is centralized enforcement. A single administrative agency, such as the SEC, can be given an enforcement monopoly, and alternative enforcers, such as private class action lawyers, can be excluded. Alternatively, enforcement might be decentralized. Multiple federal enforcers could have the authority to bring enforcement actions. State enforcers, such as Attorneys General and private class action attorneys, can join and supplement the enforcement effort.<sup>11</sup>

These arguments typically focus on the relative risk of overenforcement and underenforcement. Advocates of centralization, starting with Professor William Landes and Richard Posner, emphasize the problems of overenforcement and overdeterrence.<sup>12</sup> In a world of decentralized enforcement, regulatory targets face the possibility of repetitive investigations, either simultaneous or sequential, seeking to punish the same violation. Multiple enforcement actions by state or federal regulators (or a private class action following a public enforcement action) will produce multiple sanctions. Without careful coordination, these multiple sanctions might well exceed the optimal level of punishment for a given violation. In this way, decentralization can produce overpunishment and overdeterrence. Centralizing enforcement in a single federal administrative agency prevents this outcome.

On the other hand, decentralization advocates emphasize the mechanism of regulatory capture. Regulated entities, of course, often work to influence and gain control over their regulator. In the enforcement arena, this pressure from capture pushes public enforcers in the direction of less enforcement. If

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O'Connell, *The Architecture of Smart Intelligence: Structuring and Overseeing Agencies in the Post-9/11 World*, 94 CAL. L. REV. 1655, 1674 (2006).

11. Margaret H. Lemos, *State Enforcement of Federal Law*, 86 N.Y.U. L. REV. 698, 699–704 (2011); Amanda M. Rose, *State Enforcement of National Policy: A Contextual Approach (with Evidence from the Securities Realm)*, 97 MINN. L. REV. 1343, 1366 (2013).

12. William M. Landes & Richard A. Posner, *The Private Enforcement of Law*, 4 J. LEGAL STUD. 1, 15–16 (1975). For more recent discussions, see James J. Park, *Rules, Principles, and Competition To Enforce the Securities Laws*, 100 CAL. L. REV. 115, 121–22 (2012) (describing the relevant literature on competitive enforcement and over and underdeterrence), and Amanda M. Rose, *The Multienforcer Approach to Securities Fraud Deterrence: A Critical Analysis*, 158 U. PA. L. REV. 2173, 2200–03 (2010).

enforcement is centralized in a single federal agency, capture can produce underenforcement and underdeterrence. Additional enforcers can counteract capture by bringing their resources to bear and competing with the primary public enforcer.<sup>13</sup> Decentralization thus allows other entities to supplement the enforcement efforts of the primary administrative agency.<sup>14</sup>

Notice what is missing from this debate—the possibility that federal agencies should not enforce at all. Even scholars recognizing the complexity of the centralization/decentralization debate tend to assume that a specialized federal enforcer is inevitable.<sup>15</sup> The right model may be one where enforcement authority is consolidated in a single enforcer but one that specializes in enforcement itself to the exclusion of other tasks. Rather than spread enforcement authority across multiple potential actors, or combine enforcement goals with other agency goals, we should consider a third option. An agency that treats enforcement as its primary and exclusive task should be viewed a viable structural choice.

Perhaps the absence of this option in the literature should not be a surprise. When setting out the doctrines that govern administrative enforcement, Congress and the Supreme Court have repeatedly started with a key assumption that has shaped the law. Both the legislature and the judicial branch assume that agencies will be expert in enforcement because they are expert in their statutes, their industries, and their regulatory scheme. This belief has heavily influenced both the initial Congressional authorization of agency enforcement and the subsequent judicial review of its use.

At the front end, Congress makes the first choice. It decides whether to grant agencies the power to enforce the statutes they administer. Most famously, it seriously considered the question of whether to give the Equal Employment Opportunity Commission (EEOC) enforcement authority. As initially structured, the EEOC lacked the ability to bring enforcement actions.<sup>16</sup> As part of the Equal Employment Opportunity Act of

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13. See Rachel E. Barkow, *Insulating Agencies: Avoiding Capture Through Institutional Design*, 89 TEX. L. REV. 15, 58 (2010); see also Lemos, *supra* note 11, at 717–20.

14. For a recent introduction to the general debate over centralized and decentralized enforcement, see Rose, *supra* note 11, at 1351–59.

15. See *id.* at 1359 (identifying the context-specific value of overlapping enforcement); Park, *supra* note 12, at 172–78 (recognizing that value of multiple enforcers depends on the legal rule at issue).

16. See Anne Noel Occhialino & Daniel Vail, *Why The EEOC (Still) Matters*, 22 HOFSTRA LAB. & EMP. L.J. 671, 672–74 (2005).



1972, Congress expanded its powers and gave it the ability to bring actions directly against employers.<sup>17</sup>

The legislative history supported this grant of enforcement authority largely based on the expertise of the agency in the subject of its regulatory jurisdiction: employment discrimination. Congress authorized the agency to seek cease-and-desist orders because of the complex nature of discrimination in individual employment environments.<sup>18</sup> Similarly, it transferred the authority to bring pattern and practice cases from the DOJ to the EEOC because the agency “has access to the most current statistical computations and analyses regarding employment patterns and has the most extensive expertise in dealing with employment discrimination.”<sup>19</sup> The EEOC’s expert understanding of discrimination was also an important basis for giving it enforcement authority over its sister federal agencies.<sup>20</sup>

In addition to shaping the initial choice about design, the response of the judicial branch to agency enforcement choices relies on this presumed connection between agency mission and enforcement expertise. Most significantly, the federal courts have held that key agency enforcement choices are largely non-reviewable. This deference rests on the same assumption. Courts see enforcement decisions as arising out of the agency’s specialized knowledge and understanding of its regulatory system. Take, for example, the decision not to bring an enforcement action. In *Heckler v. Chaney*, the Court held that it would generally not review agency decisions not to enforce since that decision “often involves a complicated balancing of a number of factors which are peculiarly within [the agency’s] expertise.”<sup>21</sup> Because the Court believed that the questions relevant to the non-enforcement decision were deeply linked to other agency choices, the expertise of the agency deserved deference.<sup>22</sup>

Other components of agency enforcement receive similar

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17. *Id.* at 677; see 42 U.S.C. § 2000e-5(f)(1) (2012) (authorizing a civil action).

18. See H.R. REP. NO. 92-238, at 8 (1971) (“It is increasingly obvious that the entire area of employment discrimination is one whose resolution requires not only expert assistance, but also the technical perception that a problem exists in the first place, and that the system complained of is unlawful.”).

19. *Id.* at 14.

20. *Id.* at 25 (“Because the Equal Employment Opportunity Commission is the expert agency in the field of employment discrimination and because it is an independent agency removed from the administration of Federal employment, it is the most logical place for the enforcement power to be vested.”).

21. *Heckler v. Chaney*, 470 U.S. 821, 831 (1985).

22. *Id.* at 831–32.

treatment for the same reason. The Supreme Court defers to agency choices about remedies and penalties. Agency penalty decisions receive a very deferential standard on later judicial review because “the relation of remedy to policy is peculiarly a matter for administrative competence.”<sup>23</sup> Similarly, the United States Court of Appeals for the District of Columbia Circuit strongly defers to agency decisions to settle enforcement actions. Such “judgments—arising from considerations of resource allocation, agency priorities, and costs of alternatives—are well within the agency’s expertise and discretion.”<sup>24</sup> At virtually every stage of administrative enforcement, agencies have broad and largely unconstrained authority because courts and Congress assume that their expertise in their subject matter and regulatory mission makes them experts in enforcing their statutes and rules.

## II. ENFORCEMENT AS A SPECIALIZATION

Are Congress and the courts correct? Does enforcement expertise follow from the other components of agency expertise? Not always. This Part argues that many enforcement questions are general in nature, not specialized. Regardless of the subject matter of the action, repeated issues arise in enforcement actions. Agencies that focus on enforcement, rather than simply have enforcement as one task of many, are likely to do better in answering these questions.

Each Section in this Part looks at connected issues involving charging decisions and enforcement discretion. Section A considers the choice about which potential defendants are charged with a particular focus on corporate charging decisions. Civil regulatory enforcers commonly need to choose whether to charge the individuals who actually committed the violation, the corporation where they worked, or both. Section B examines the exercise of discretion in the remedy sought once the charging decision is made. Enforcers need to decide which cases need a large penalty and which deserve a more modest sanction. Section C focuses on the opposite of penalties—benefits conferred on individuals as part of the enforcement process. Enforcers must choose how to protect whistleblowers, appropriately reduce charges for cooperators involved in the violation, and reward others who provide information.

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23. *Butz v. Glover Livestock Comm’n Co.*, 411 U.S. 182, 185 (1973) (citations omitted) (internal quotation marks omitted).

24. *Ass’n of Irrigated Residents v. Env’tl. Prot. Agency*, 494 F.3d 1027, 1032 (D.C. Cir. 2007).

For each of these three areas, I make two points. First, while each choice involves considering some subject-specific information, a large component of the agency's decision is subject matter independent. These three areas involve considerations requiring expertise in enforcement, not just in the regulatory subject matter. As a result, we face a tradeoff. We should expect generalist enforcers to be better at the general questions and specialized enforcers to be better at the subject-specific questions.

Second, successful enforcement policies in all three areas require communication with the regulated community. Regulatory targets need to know not only what conduct will be penalized, but also to what extent. Potential witnesses need to know what will happen to them if they come forward. As a theoretical matter, we should expect a generalist enforcer to be better at establishing and communicating policies on these matters. Indeed, in practice, in each area, the DOJ has clear policies in place for handling criminal cases, while agencies frequently do not. In each of these areas, at best, federal agencies frequently reinvent the wheel. At worst, they never invent it in the first place.

#### A. PROSECUTORIAL DISCRETION: WHO?

Enforcers must first decide the scope of liability. This initial charging decision requires a choice about which defendants to pursue and which defendants to ignore. As a practical matter, every enforcement agency sees more violations than it can charge, so some potential defendants will be allowed to escape.<sup>25</sup> These decisions are perhaps the classic example of prosecutorial discretion by public enforcers. This choice belongs to the enforcement agency alone. Both in the civil and criminal context, decisions not to charge are effectively unreviewable.<sup>26</sup>

This initial charging decision certainly has subject-specific attributes. A common consideration in this choice is the severity of the violation. Enforcers generally wish to pursue serious violations while allowing more minor or technical misconduct to

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25. See, e.g., *Town of Newton v. Rumery*, 480 U.S. 386, 396 (1987) (“[Prosecutors] must decide how best to allocate the scarce resources of a criminal justice system that simply cannot accommodate the litigation of every serious criminal charge.”).

26. *Heckler*, 470 U.S. at 831 (discussing civil regulatory enforcement); *United States v. Batchelder*, 442 U.S. 114, 123–25 (1979) (discussing criminal enforcement).

go unpunished.<sup>27</sup> Safety regulators, for obvious reasons, usually prioritize especially risky conduct for enforcement action while taking less aggressive action against activities that impose lower risks. This discretionary choice requires expert knowledge of the field of operation. For instance, experts in mine safety are necessary to determine which types of conduct impose substantial risk to the health of miners and which types of violations are less likely to cause harm.<sup>28</sup>

Despite these subject-specific aspects of enforcement, other major components of the exercise of charging discretion are more general. For example, state and federal administrative agencies often sanction corporations for regulatory violations. Corporate misconduct invariably can be traced to employee misconduct.<sup>29</sup> Some individual always caused the violation through either action or omission.

This structural feature of corporations poses a hard question for enforcers: Who should be punished? Enforcers usually have options. They can charge the company with a violation, or they can charge the individual, or they can charge both.

There is a large literature on the merits of charging corporations for violations. As a general matter, corporations are responsible for both civil and criminal actions of their employees as a matter of *respondeat superior*.<sup>30</sup> This basic rule has certainly been widely criticized.<sup>31</sup> To the extent that punishment is retributive in nature, justifying corporate penalties raises complicated questions. Determining whether the corporation had the necessary *mens rea* is a difficult endeavor. Is the entity charged with the mental state of all employees or merely upper management? Similarly, retributive punishment is often justified

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27. See generally Max Minzner, *Why Agencies Punish*, 53 WM. & MARY L. REV. 853, 880–87 (2012) (describing the role of violation severity in agency penalty calculations).

28. The Mine Safety and Health Administration uses risk of harm as a central input into penalty determinations. See 30 C.F.R. § 100.3(e) (2014).

29. See *United States v. Paccione*, 949 F.2d 1183, 1200 (2d Cir. 1991). See generally RESTATEMENT (THIRD) OF AGENCY § 1.01 cmt. c (2006) (discussing agency relationships).

30. See, e.g., *N.Y. Cent. & Hudson River R.R. Co. v. United States*, 212 U.S. 481, 494–95 (1909) (discussing criminal liability); RESTATEMENT (THIRD) OF AGENCY § 7.03 cmt. c (discussing tort liability).

31. See John C. Coffee, Jr., “No Soul To Damn: No Body To Kick”: *An Unscandalized Inquiry into the Problem of Corporate Punishment*, 79 MICH. L. REV. 386, 447–48 (1981); V.S. Khanna, *Corporate Criminal Liability: What Purpose Does It Serve?*, 109 HARV. L. REV. 1477, 1493–94 (1996); see also Brent Fisse, *Reconstructing Corporate Criminal Law: Deterrence, Retribution, Fault, and Sanctions*, 56 S. CAL. L. REV. 1141, 1180–83 (1983).

on the basis that it reinforces social norms of compliance. If blameworthy violations are punished, regulated entities will make more of an effort to comply with the law. In the corporate context, though, punishment can and does occur even when the violation expressly transgressed corporate policy.<sup>32</sup>

Similar and equally difficult questions arise if penalties are designed to deter. For example, the division between ownership and control in the corporate context means that the stockholders effectively bear the punishment for any violation, even though they do not make the choice to violate the rule and may have taken steps to prevent it.<sup>33</sup> Corporate penalties may induce aggressive compliance programs to avoid violations and punishment, but they might not. Internal investigations may unearth misconduct the government would never find. In a strict vicarious liability regime where companies are held liable for the violations they uncover, companies may prefer to turn a blind eye rather than look closely at their own practices.<sup>34</sup> On the other hand, for all but the smallest penalties, charging individuals may be unrealistic.<sup>35</sup> Only the corporate defendant can pay the price necessary to internalize the costs imposed.

The difficult questions of corporate liability extend beyond a simple binary decision to charge or not. Very frequently, the threat of corporate charges becomes an enforcement tool to move investigations forward and obtain other concessions from the corporation.<sup>36</sup> Potential corporate defendants have strong incentives to cooperate with the government to avoid charges against the entity. At the initial stage, this cooperation often takes the form of an internal investigation, the results of which are provided to the government to assist in its efforts to target individual employees.<sup>37</sup> Later on, the corporation may enter into agreements to defer prosecution in exchange for hiring moni-

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32. See Samuel W. Buell, *The Blaming Function of Entity Criminal Liability*, 81 IND. L.J. 473, 526–27 (2006).

33. See, e.g., Albert W. Alschuler, *Two Ways To Think About the Punishment of Corporations*, 46 AM. CRIM. L. REV. 1359, 1367 (2009); John Hasnas, *The Centenary of a Mistake: One Hundred Years of Corporate Criminal Liability*, 46 AM. CRIM. L. REV. 1329, 1339 (2009).

34. See Jennifer Arlen, *The Potentially Perverse Effects of Corporate Criminal Liability*, 23 J. LEGAL STUD. 833, 836 (1994).

35. See Jennifer Arlen & Reinier Kraakman, *Controlling Corporate Misconduct: An Analysis of Corporate Liability Regimes*, 72 N.Y.U. L. REV. 687, 695 & n.21 (1997).

36. Lisa Kern Griffin, *Inside Out Enforcement*, in PROSECUTORS IN THE BOARDROOM 110, 110–11 (Anthony Barkow & Rachel Barkow eds., 2011).

37. See Samuel W. Buell, *Criminal Procedure Within the Firm*, 59 STAN. L. REV. 1613, 1630–33 (2007).

tors to ensure future compliance or to engage in other structural reforms.<sup>38</sup>

These are powerful tools for the government but are highly controversial. At the investigatory stage, prosecutors can insert themselves in the employer-employee relationship in significant ways. While the government cannot force employees to speak, employers can compel statements on the threat of termination.<sup>39</sup> Similarly, deferred prosecution arrangements put the government between corporations and their shareholders. External monitors strip away some of the control traditionally held by the equity owners of corporations.

These questions about corporate liability are hard—they have no easy answers. They do have a common characteristic, though. They are largely independent of the subject matter of the enforcement action.<sup>40</sup> Whether the enforcement action involves the SEC or the Pipeline and Hazardous Materials Safety Administration, the appropriate apportionment of penalties between individuals and the company will not depend exclusively on the intricacies of the securities or pipeline industries. In both cases, either the corporate mental state problem is too great to justify punishment or the blaming function of penalties successfully reinforces the right norms. Additionally, whether and when the threat of corporate charges can be used to investigate or obtain compliance does not turn on the substance of the violation. At the core, these corporate charging questions are general enforcement issues and are largely independent of the subject matter.

Because these issues are general in nature, we should expect a generalist agency to have policies in place to handle them. Indeed, the DOJ has set out charging guidelines for corporate prosecutions. In 1999, Deputy Attorney General Eric Holder promulgated the first set of guidelines outlining when federal prosecutors should bring charges against corporations for misconduct committed by their employees.<sup>41</sup> The corpora-

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38. Lisa Kern Griffin, *Compelled Cooperation and the New Corporate Criminal Procedure*, 82 N.Y.U. L. REV. 311, 323 (2007); Peter Spivack & Sujit Raman, *Regulating the 'New Regulators': Current Trends in Deferred Prosecution Agreements*, 45 AM. CRIM. L. REV. 159, 166–67 (2008).

39. Buell, *supra* note 37, at 1634.

40. Cindy R. Alexander & Mark A. Cohen, *The Causes of Corporate Crime*, in PROSECUTORS IN THE BOARDROOM, *supra* note 36, at 12 (recognizing that the basic law and economics framework of corporate enforcement “applies across the wide array of offenses for which corporations may be held accountable”).

41. Memorandum from Eric Holder, Deputy Att’y Gen., U.S. Dep’t of Jus-

tion's compliance program played a key role in determining whether the corporation would be charged, as did the corporate response to the investigation and cooperation with law enforcement.<sup>42</sup> Over the last fifteen years, the DOJ has frequently updated and modified its approach to respond to problems and reflect changes in policy priorities.<sup>43</sup>

In contrast, agency approaches to this decision are far less clear. Agencies rarely have clearly established policies explaining when they will charge the organization, when they will charge the individual, or when they will charge both. Consider the SEC, frequently seen as one of the most effective and well-run federal enforcement agencies. The SEC has not clearly explained when it will charge individuals and when it will charge corporations. Not surprisingly, this lack of clarity produces uncertainty about the agency's policy.<sup>44</sup>

Moreover, the empirical evidence on the SEC's actual practice suggests that there may not be consistency in the agency's choices. Individuals are frequently charged,<sup>45</sup> but in cases involving the largest entities and most significant violations, the agency is far more likely to rely on corporate charges.<sup>46</sup> The new Chair of the SEC has suggested that enforcement may be shift-

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tice, to U.S. Attorneys, Bringing Criminal Charges Against Corporations (June 16, 1999), *available at* <http://www.justice.gov/criminal/fraud/documents/reports/1999/charging-corps.PDF>.

42. *Id.*

43. Current DOJ policy is incorporated in the United States Attorneys' Manual. U.S. DEPT OF JUSTICE, UNITED STATES ATTORNEYS' MANUAL 9-28.000 (2014), *available at* <http://www.justice.gov/opa/documents/corp-charging-guidelines.pdf>.

44. See Michael Klausner & Jason Hegland, *SEC Practice in Targeting and Penalizing Individual Defendants* (Sept. 3, 2013), <https://blogs.law.harvard.edu/corpgov/2013/09/03/sec-practice-in-targeting-and-penalizing-individual-defendants> ("[I]t seems that commentators assume that the practice in question is the predominant practice of the SEC—for example, the SEC predominantly goes after the corporation rather than individuals, or the SEC predominantly goes after low level employees rather than the corporation.").

45. *Id.* ("[O]nly 7 percent of cases involved no individual defendants. Focusing solely on cases involving at least one fraud count, only 4 percent of cases involved no individual defendants. In the remainder of cases, the SEC named either individual defendants only or it named both the corporation and individual defendants.").

46. Stavros Gadinis, *The SEC and the Financial Industry: Evidence from Enforcement Against Broker-Dealers*, 67 BUS. LAW. 679, 700–01 (2012). Cases involving larger firms certainly may involve different types of violations and different evidentiary issues, yet "violation types and lack of adequate evidence . . . do not fully account for the extensive use of these actions by the SEC." *Id.* at 701.

ing toward more actions against individuals.<sup>47</sup> Of course, these statements do not provide the level of guidance or clarity present in a formal policy. They also do not provide a commitment of direction beyond the Chair's tenure in office.

At this point in the charging process, then, specialized enforcement comes with costs and benefits. Specialists have an advantage at the specialized components of enforcement, including identifying the severity of the violation and whether it should to be punished or ignored. Generalists have an advantage at the generalist aspects of enforcement, such as whether to charge the corporation, the individuals, or both. These advantages reflect a tradeoff, suggesting that neither structural choice is always preferable in reaching the optimal initial charging decision.

#### B. PROSECUTORIAL DISCRETION: HOW MUCH?

Once enforcers select among the potential defendants and decide that some penalty should be sought, they must turn to the question of how much punishment. What will be the ultimate outcome of the enforcement action? Unlike the initial charging decision, this choice does not belong simply to the enforcement agency. Enforcers retain substantial influence, but other actors play a role. In cases that are brought in district court, like most criminal cases and many civil enforcement actions, the district judge generally determines the penalty imposed. Even in cases that proceed purely administratively, the agency as a whole decides the ultimate penalty, not the enforcement branch. Finally (and most importantly), the vast majority of enforcement actions end in settlement, so the ultimate penalty involves a negotiation between the government and the defendant. Of course, these settlement negotiations occur with an eye toward the likely result if the case is fully litigated.<sup>48</sup>

In this second stage of enforcement discretion, other play-

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47. Mary Jo White, Chairwoman, SEC Exec. Comm., Deploying the Full Enforcement Arsenal, Speech to the Council of Institutional Investors (Sept. 26, 2013), available at <http://www.sec.gov/News/Speech/Detail/Speech/1370539841202> ("I have made it clear that the staff should look hard to see whether a case against individuals can be brought. I want to be sure we are looking first at the individual conduct and working out to the entity, rather than starting with the entity as a whole and working in. It is a subtle shift, but one that could bring more individuals into enforcement cases.").

48. See, e.g., Keith N. Hylton, *Asymmetric Information and the Selection of Disputes for Litigation*, 22 J. LEGAL STUD. 187, 190 (1993); Robert H. Mnookin & Lewis Kornhauser, *Bargaining in the Shadow of the Law: The Case of Divorce*, 88 YALE L.J. 950 (1979); Kathryn E. Spier, *The Dynamics of Pretrial Negotiation*, 59 REV. ECON. STUD. 93, 95–102 (1992).



ers may have a voice, but the public enforcer usually has the loudest one. A district judge rarely will set a penalty higher than the one proposed by the government. Similarly, settlement negotiations will end up at a point between the outcomes the parties see as most desirable. The penalty will be lower than the government's preferred outcome but higher than the defendant's. As a result, even at this stage, the enforcer can effectively set an upper limit on the ultimate penalty. If a civil enforcement agency seeks a \$15 million civil penalty, that figure will provide a cap on the recovery. The case will certainly be resolved, at trial or by settlement, for that amount or something less.

As is true for the initial charging decision, the enforcement agency needs to decide how much punishment to seek. The agency needs a mechanism to calculate its penalty position. In cases involving a term of years or a financial penalty, the agency needs to decide on a number. Is this a \$15 million case or a \$50 million case? Even if the ultimate resolution will be injunctive in nature, the agency needs to decide how harsh an injunction to seek. Will the target be barred from the industry temporarily or permanently? In the language of the criminal law, enforcement agencies need theories of punishment.

Agencies have a range of theories to select from. For example, they might primarily focus on deterrence. If so, penalties should be imposed in a manner sensitive to the economic effects of violations. Pure deterrence theories assume regulated entities are rational, wealth-maximizing, and comply with regulation only when the penalties for violations are sufficiently large. Compliance occurs if the expected punishment exceeds the gain from the violation.<sup>49</sup> In this framework, enforcers can set the penalties either to require the violator to internalize the costs caused by the violation<sup>50</sup> or deter it completely.<sup>51</sup> These approaches require the enforcer to think carefully about the probability that the violation will be detected and punished, the harm or gain produced by the misconduct, and (for corporate defendants) the extent of compliance efforts.<sup>52</sup>

Alternatively, enforcers might not be interested in deter-

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49. See Minzner, *supra* note 27, at 860.

50. Gary Becker, *Crime and Punishment: An Economic Approach*, 76 J. POL. ECON. 169, 190–93 (1968).

51. Minzner, *supra* note 27, at 860–61.

52. See *id.* at 859. See generally Jennifer Arlen & Reinier Kraakman, *Controlling Corporate Misconduct: An Analysis of Corporate Liability Regimes*, 72 N.Y.U. L. REV. 687 (1997).

rence at all. Enforcers might care about retribution instead. Penalties set with an eye toward retribution take very different inputs than those calculating purely on a deterrence basis. The probability of detection, for example, drops out of the penalty calculation entirely.<sup>53</sup> While retributivists might care about harm and gain, the central concern of retributive theories is the mental state of the defendant.<sup>54</sup> Penalties increase with more culpable mental states and decline or disappear when the defendant's state of mind is less blameworthy. Defendants who intentionally cause harm deserve more punishment than those doing so inadvertently.<sup>55</sup> Penalty policies for retributive enforcers require a close analysis of gradations in a defendant's state of mind and an adjustment to reflect those differences.

Of course, these goals are not exclusive. Agencies might care about some mix of retribution and deterrence. There is no easy answer about which of these theories should drive criminal or civil enforcement. However, both the decisions about theories of punishment and the implementation of those theories are generalist enforcement functions. To a significant degree, they do not depend on the regulatory subject matter.

Consider fraud enforcement as an example. A wide range of agencies can bring actions in cases involving violators defrauding victims.<sup>56</sup> Certainly many aspects of fraud enforcement require significant subject matter expertise. Fraud in the securities industry can be quite different than fraud targeting Medicaid. However, the penalty calculation in every fraud case requires the enforcement agency to return to the same general questions. Is this a case about deterrence where the probability of detection should play a central role? Is it a case about retribution, where the mental state of the defendant is the primary consideration? To what extent should gain or loss drive the ultimate punishment?

Unsurprisingly, these questions largely have answers for the Department of Justice. As a result of the combined effect of internal DOJ policy and the United States Sentencing Guidelines, penalty calculations are largely transparent. Assistant

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53. See Richard A. Posner, *Retribution and Related Concepts of Punishment*, 9 J. LEGAL STUD. 71, 73–74, 83 (1980) (noting the rejection of detection probability in retributive theories of punishment).

54. See LARRY ALEXANDER & KIMBERLY KESSLER FERZAN, *CRIME AND CULPABILITY: A THEORY OF CRIMINAL LAW* 171 (2009); MICHAEL S. MOORE, *PLACING BLAME: A GENERAL THEORY OF THE CRIMINAL LAW* 104 (1997).

55. MOORE, *supra* note 54, at 192.

56. Darryl K. Brown, *The Distribution of Fraud Enforcement*, 28 CARDOZO L. REV. 1593, 1593 (2007).

United States Attorneys are mandated to indict defendants for the most serious offense consistent with the evidence, defined as the offense that produces the highest sentence under the United States Sentencing Guidelines.<sup>57</sup> Similarly, when offering a plea either before or after indicting a case, the DOJ ordinarily requires defendants to plead guilty to the most serious provable offense.<sup>58</sup> The calculation under the United States Sentencing Guidelines then produces a relatively narrow range of potential punishment.<sup>59</sup>

In contrast, the penalty calculations within specialist agencies are often opaque. Administrative agencies frequently provide no guidance on the method used to calculate civil penalties. A generic reference to statutory considerations may appear in the penalty calculation, but the agency provides no clarity about the underlying process.<sup>60</sup> Even worse, there is some evidence that agency penalty calculations are at odds with their stated purposes. Elsewhere I examined the penalty policies at the Federal Communications Commission, the Office of Foreign Assets Control, the Nuclear Regulatory Commission, and the Mine Safety and Health Administration (MSHA).<sup>61</sup> Each of the agencies has stated that its primary purpose in imposing penalties is deterrence, rejecting retribution as a rationale. However, for each agency, the factors considered in the penalty process are strongly consistent with a retributive rationale but are inconsistent with deterrence-based theories of punishment.<sup>62</sup>

Like the discretionary decision about who to punish, the question of how much punishment is appropriate is not a purely specialized task. It certainly depends in part on detailed information about the regulated industry. Specialized agencies have a significant advantage at this component of the punishment calculus. However, the relative significance of different theories of punishment in the enforcement process, and the mechanism used to convert those theories into practice, is a question about enforcement generally. Since these skills are in tension, we again see a tradeoff in the value of specialist and generalist enforcement.

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57. UNITED STATES ATTORNEYS' MANUAL, *supra* note 43, at 9-27.300.

58. *Id.* at 9-27.330 (preindictment pleas); *id.* at 9-27.430 (postindictment pleas).

59. In fraud cases, the gain to the violator or the loss to the victim is the primary determinant of the ultimate penalty. *See* U.S. SENTENCING GUIDELINES MANUAL § 2B1.1 (2014).

60. Minzner, *supra* note 27, at 864–65.

61. *Id.* at 866–67.

62. *Id.* at 869–77.

## C. REWARDS, WHISTLEBLOWERS, AND COOPERATORS

Effective enforcement requires information. In practice, the best information about violations belongs to those closest to the misconduct.<sup>63</sup> For individual violators, the people best positioned to provide testimony are friends, neighbors, and co-conspirators. In the corporate context, employees, both those involved in the violation and those nearby, are invaluable to effective enforcers.

As a result, enforcement agencies are often faced with the difficult decision of whether and how to provide the appropriate incentives to expose this information. One approach is to impose a cost on those who conceal the information. For example, the 2002 Sarbanes-Oxley Act created affirmative reporting obligations for high-level corporate executives.<sup>64</sup> For these individuals, concealing evidence of securities fraud can lead to individual liability. Similarly, mandatory reporting statutes in the context of abuse have become common. Individuals who fail to disclose evidence of abuse of children (or other vulnerable victims) can be criminally prosecuted or held liable in a civil action.<sup>65</sup>

Alternatively, enforcement authorities can try to provide affirmative benefits to those who decide to come forward. Perhaps the most common form that this benefit takes is protection from third-party consequences, usually from an employer. Whistleblowers who provide information about corporate misconduct are often protected from termination or other negative employment consequences as a result of the information they provide.<sup>66</sup> In the securities industry, Sarbanes-Oxley provides this protection for those who provide information, enforced with both criminal and civil consequences for individuals who retaliate against whistle-blowers.<sup>67</sup> The protection is common in other industries as well.<sup>68</sup>

In addition to this incentive, enforcement agencies can provide benefits directly to individuals providing information.

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63. See generally Miriam Hechler Baer, *Cooperation's Cost*, 88 WASH. U. L. REV. 903 (2011) (describing the use of cooperating criminal defendants by prosecutors).

64. 17 C.F.R. § 205.3 (2014).

65. See generally Yuval Feldman & Orly Lobel, *The Incentives Matrix: The Comparative Effectiveness of Rewards, Liabilities, Duties, and Protections for Reporting Illegality*, 88 TEX. L. REV. 1151, 1163 (2010) (outlining these and other examples).

66. *Id.* at 1161–63.

67. *Id.* at 1161.

68. *Id.*

In its simplest form, this benefit consists of monetary compensation for information. Enforcement agencies can pay people to talk. The DOJ has statutory authorization to make such payments<sup>69</sup> and frequently uses it. The Drug Enforcement Administration alone has thousands of informants on its payroll at any given time.<sup>70</sup> Similar programs exist in the world of civil enforcement. For instance, starting in 2006, the Internal Revenue Service can now pay informants up to thirty percent of the taxes collected as a result of the information provided.<sup>71</sup>

Aside from money, enforcers can trade their discretion. Where individual charges are possible, the enforcement agency can reduce or eliminate the liability in exchange for the information. This type of bargain is extremely common in criminal cases. The most formalized and best-documented structure occurs in the federal system. Criminal cooperators plead guilty to a cooperation agreement and provide information to the prosecutors about the criminal conduct of others.<sup>72</sup> In return, the government makes a motion to the district judge authorizing a reduction of the sentence<sup>73</sup> below the level prescribed by the United States Sentencing Guidelines as well as below any otherwise applicable mandatory minimum sentence. Such motions are made in a significant fraction of federal criminal prosecutions and are particularly common in narcotics cases.<sup>74</sup> In the corporate context, the DOJ considers cooperation in its decision about whether to charge the entity in addition to the individuals.<sup>75</sup>

More informally, prosecutors can drop charges completely or never even initiate a case in exchange for information. In the corporate context, the DOJ operates a longstanding policy of immunity from antitrust prosecutions for the first entity to re-

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69. See, e.g., 21 U.S.C. § 886(a) (2012).

70. U.S. DEP'T OF JUSTICE, OFFICE OF THE INSPECTOR GEN., AUDIT DIV., THE DRUG ENFORCEMENT ADMINISTRATION'S PAYMENTS TO CONFIDENTIAL SOURCES (2005), available at <http://www.justice.gov/oig/reports/DEA/a05/final.pdf> ("According to the DEA, it has approximately 4,000 active confidential sources at any one time.")

71. I.R.C. § 7623(b)(1) (2006).

72. See generally Max Minzner, *Detecting Lies Using Demeanor, Bias, and Context*, 29 CARDOZO L. REV. 2557, 2573 (2008) (describing the cooperation process).

73. U.S. SENTENCING GUIDELINES MANUAL, *supra* note 59, § 5K1.1.

74. See BUREAU OF JUSTICE STATISTICS, SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS, tbl.5.36 (2010) (substantial assistance departures made in 11.5% of cases overall; 24.6% of drug trafficking cases).

75. See UNITED STATES ATTORNEYS' MANUAL, *supra* note 43, at 9-28.700.

port a violation.<sup>76</sup> This “first-in-the-door” rule allows the initial company providing information to escape charges entirely. Police themselves may never even bring the case to the attention of a prosecutor, releasing a suspect in the field as a result of evidence provided at the time of arrest.<sup>77</sup> Data on these more informal arrangements are much more difficult to collect for obvious reasons, but the information that is available suggests they are very common. Notably, the overwhelming majority of search warrant applications reflect a reliance on informant information.<sup>78</sup>

Whether compensated in leniency or in money, informants are a high risk/high reward proposition for enforcement agencies. On the benefit side, informants bring enormous value to the enforcement process.<sup>79</sup> They allow high-level individuals to be targeted who have shielded themselves from other forms of incriminating evidence. Equally important, the simple prospect that coconspirators may eventually speak to law enforcement reduces trust in criminal organizations. As a result, the initial formation of agreements to violate the law becomes less likely.<sup>80</sup>

However, cooperators also present real dangers. Recruiting the wrong cooperators or inadequately vetting their claims can produce disaster. Law enforcement runs the risk of both overly generous reductions for the cooperator and the possibility of relying on false testimony.<sup>81</sup> The second concern, of course, is the most significant danger that comes with the use of testimony of criminal witnesses promised leniency. Enforcement agencies always run the risk that a witness will derive the benefits of cooperation through perjured testimony.<sup>82</sup>

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76. See SCOTT D. HAMMOND, DEPT OF JUSTICE, FREQUENTLY ASKED QUESTIONS REGARDING THE ANTITRUST DIVISION'S LENIENCY PROGRAM AND MODEL LENIENCY LETTERS (NOVEMBER 19, 2008) at 5, available at <http://www.justice.gov/atr/public/criminal/239583.pdf>.

77. See Alexandra Natapoff, *Snitching: The Institutional and Communal Consequences*, 73 U. CIN. L. REV. 645, 659 (2004).

78. *Id.* at 657.

79. Richard A. Bierschbach & Stephanos Bibas, *Notice-and-Comment Sentencing*, 97 MINN. L. REV. 1, 59–60 (2012). See generally Baer, *supra* note 63, at 920–30.

80. Bierschbach & Bibas, *supra* note 79, at 59; see also Neal Kumar Katyal, *Conspiracy Theory*, 112 YALE L.J. 1307, 1340 (2003).

81. See ALEXANDRA NATAPOFF, SNITCHING: CRIMINAL INFORMANTS AND THE EROSION OF AMERICAN JUSTICE 33, 70–76 (2009); Ellen Yaroshefsky, *Cooperation with Federal Prosecutors: Experiences of Truth Telling and Embellishment*, 68 FORDHAM L. REV. 917, 952–53 (1999).

82. See NATAPOFF, *supra* note 81, at 70–72.

These risks are real, but can be minimized.<sup>83</sup> Undetected perjury is more likely in some situations than others. For example, jailhouse informants who claim to have had post-arrest conversations with the defendants pose a far greater risk of perjury than cooperators working undercover who are recording conversations with potential targets.<sup>84</sup> Similarly, a deep understanding of the value of corroboration as a mechanism of lie detection significantly reduces the dangers of cooperation agreements.<sup>85</sup>

A generalist enforcement agency has the advantage of repeatedly handling cooperators, developing both the expertise in lie detection and the policy structures that help guide its use effectively. In contrast, specialized agencies are likely to use them far less often. This relative lack of experience increases the probability of bad outcomes when agencies do begin to rely on their information.

In practice, cooperating witnesses were traditionally largely unused by agencies. Unlike the DOJ, administrative agencies generally do not have standard cooperation agreements, although some agencies do have whistleblower policies that provide greater or lesser degrees of protection for individuals providing information.<sup>86</sup> As a result, administrative agencies historically likely missed out on the value of informant testimony in building strong regulatory investigations. There is some evidence of agencies suffering in this respect. For example, the SEC had multiple opportunities to detect the Madoff fraud at a much earlier stage based on information provided by a financial analyst who had determined that Madoff's returns were impossible.<sup>87</sup> The SEC struggled to handle the information in part because it came from an unusual or unexpected source.<sup>88</sup> Other agencies have had similar problems effectively integrating and taking advantage of this type of information.<sup>89</sup>

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83. Baer, *supra* note 63, at 932, 941–42 (describing techniques that prosecutors use to reduce cooperator lies).

84. *Id.* at 942 (discussing the value of undercover work in corroborating a cooperator's claim).

85. See Minzner, *supra* note 72, at 2572–73.

86. See, e.g., 15 U.S.C. § 78u-6(h)(1) (2012) (providing statutory protection for IRS whistleblowers).

87. For a short, readable account of the SEC handling of the whistleblower information, see Donald C. Langevoort, *The SEC and the Madoff Scandal, Three Narratives in Search of a Story*, 2009 MICH. ST. L. REV. 899, 900.

88. See *id.* at 909–10.

89. See Mariano-Florention Cuéllar, *The Institutional Logic of Preventive Crime*, in PROSECUTORS IN THE BOARDROOM, *supra* note 36, at 137 (describing FDA use of informants in tobacco investigations including reliance on the

More recently, agencies have begun to move in the direction of paying bounties to individuals that provide information that produces recoveries. The IRS has had a long-standing bounty program but dramatically expanded and reshaped it in 2006.<sup>90</sup> As part of the Dodd-Frank legislation, Congress authorized payments to whistleblowers and the SEC adopted implementing regulations in 2011.<sup>91</sup> The Center for Medicaid and Medicare Services, a branch of the Department of Health and Human Services, has proposed a similar bounty program that would make payments in cases involving health care fraud.<sup>92</sup> To the extent that agencies are now beginning to rely on this type of information, they will face the opposite problem. They will run the risk of false testimony and (potentially) damaged investigations.

Like the other aspects of enforcement discussed in this section, the evaluation of information from informants and the creation of appropriate incentives have specialist and generalist elements. Doing these tasks well involves drawing on both industry-specific knowledge and generalist enforcement capacity. As a result, specialized enforcement comes with tradeoffs that must be managed.

### III. SPECIALIZED ENFORCEMENT: STRUCTURAL WEAKNESSES & STRENGTHS

Thus far, I have focused on the experiential tradeoff resulting from the choice between specialist and generalist enforcement. This Part considers the consequences of the structural choice of specialized enforcement. I initially consider two weaknesses that arise when enforcement is specialized and fragmented. First, specialized enforcement varies in aggressiveness in response to shifts in public scrutiny. Because agency enforcement usually receives little attention, regulatory capture can lead specialized enforcers to be less aggressive than a generalist agency. However, after a catastrophe, specialist enforcers face pressure to do something, leading to more aggres-

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skills of criminal investigators in handling informants).

90. See Franziska Hertel, Note, *Qui Tam for Tax?: Lessons from the States*, 113 COLUM. L. REV. 1897, 1908–09 (2013) (describing the IRS program).

91. See 15 U.S.C. § 78u-6 (2012) (authorizing payments of awards to whistleblowers); 17 C.F.R. §§ 240.21F-1 to 240.21F-17 (2014) (implementing regulations for whistleblower incentives and protections).

92. See Medicare Program; Requirements for the Medicare Incentive Reward Program and Provider Enrollment, 78 Fed. Reg. 25013, 25016 (Apr. 29, 2013) (to be codified at 42 C.F.R. pts. 405, 420, 424, and 498).



sive enforcement than a generalist agency. Second, agencies can only control their own enforcement program but regulated entities must consider the actions of all potential enforcers. This difference in focus between enforcer and target produces negative consequences for specialized enforcers.

The last two Sections consider the corresponding structural benefits of specialized enforcement. Specialist enforcers have an advantage because they have access to the other tools of administrative regulation. Generalist enforcers are limited because their choice is restricted to individual, case-by-case decisions to proceed with an enforcement action or refrain from charging. Agencies, though, bring a wide variety of other tools to the enforcement calculus—they can modify the substantive law, alter the enforcement process itself, and draw on other agency experts to implement enforcement injunctions and consent decrees. Finally, specialist enforcers are better able to respond and alter compliance norms that already exist in regulated entities. Because agency enforcers are close to the regulated industry, norm discovery, evaluation, and alteration are all easier for specialists when compared to generalists.

#### A. THE CYCLICAL NATURE OF SPECIALIZED ENFORCEMENT

Most of the time, agency enforcement occurs outside of the view of the public. The actions of most federal regulatory agencies are invisible in ordinary times. Enforcement is no exception. However, two important groups are always paying attention to agency enforcement and can influence its direction. First, the community regulated by the agency keeps a close eye on agency enforcement at all times—they pay the penalties that the agency imposes. This regulated community can easily affect enforcement choices (or other agency decisions) through its influence over Congressional oversight, activity that falls under the broad label of regulatory capture. Second, the agency itself and its employees are always aware of the enforcement choices and naturally have influence on the direction of agency enforcement. At times of low public scrutiny, actions by these two groups can pressure agencies toward underenforcement.

Capture has become recognized<sup>93</sup> as one of the central impediments to optimal policy regimes. The core insight of capture theory is a straightforward application of the principal-

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93. See, e.g., Nicholas Bagley & Richard L. Revesz, *Centralized Organization of the Regulatory State*, 106 COLUM. L. REV. 1260, 1284 (2006) (“Sometime in the middle of last century, ‘capture theory’ became the dominant paradigm of bureaucratic behavior.”).

agent problem. If the public is the principal, acting through the government as its agent, capture occurs when the agent stops seeking to serve the goals of the principal and instead pursues the ends of a third party.<sup>94</sup> For administrative agencies, the key third parties are regulated entities—agencies get captured when they become controlled by those industries they regulate.

All government structures can be threatened by capture but federal administrative agencies are particularly vulnerable.<sup>95</sup> They regulate highly organized sectors of the economy with deep pockets. As a result, regulated entities have the capacity to resist unfavorable agency actions both directly and indirectly. For example, regulated entities are well positioned to directly influence agency rulemaking both initially, at the point when they are written through the notice-and-comment process,<sup>96</sup> and later, through court challenges to the rules that the agency adopts.<sup>97</sup> Regulated entities can have at least as

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94. For a recent overview of capture theory, see generally Daniel Carpenter & David A. Moss, *Introduction to PREVENTING REGULATORY CAPTURE: SPECIAL INTEREST INFLUENCE AND HOW TO LIMIT IT* 1–22 (Daniel Carpenter & David A. Moss eds., 2012). Foundational articles on capture as a principal-agent problem include Matthew McCubbins, Roger Noll, & Barry Weingast, *Administrative Procedures As Instruments of Political Control*, 3 J. L. ECON. & ORG. 243 (1987), and Jean Tirole, *Hierarchies and Bureaucracies: On the Role of Collusion in Organizations*, 2 J.L. ECON. & ORG. 181 (1986).

95. Barkow, *supra* note 13, at 22–23 (identifying features of agencies that make capture a particularly serious problem).

96. In the pre-Internet era, large entities that were repeat players with the agency consistently dominated the commenting process. See generally Cary Coglianese, *Citizen Participation in Rulemaking: Past, Present, and Future*, 55 DUKE L.J. 943, 949–952 (2006). More recently, some studies have noted that in some individual rulemakings, the majority of comments filed come from the public. See Mariano-Florentino Cuéllar, *Rethinking Regulatory Democracy*, 57 ADMIN. L. REV. 411, 414 (2005); David C. Nixon et al., *With Friends Like These: Rule-Making Comment Submissions to the Securities and Exchange Commission*, 12 J. PUB. ADMIN. RES. & THEORY 59, 64 (2002). However, a careful review by Professor Coglianese suggests that those rulemakings appear to be outliers. Coglianese, *supra*, at 964. Of course, the volume of comments does not necessarily measure their impact. There is at least some empirical evidence, though, that comments play a significant role in shaping policy. See Susan Webb Yackee, *Sweet-Talking the Fourth Branch: The Influence of Interest Group Comments on Federal Agency Rulemaking*, 16 J. PUB. ADMIN. RES. & THEORY 103, 105 (2006); Jason Webb Yackee & Susan Webb Yackee, *A Bias Towards Business? Assessing Interest Group Influence on the U.S. Bureaucracy*, 68 J. POL. 128, 128 (2006).

97. Judicial review has traditionally been viewed as a central mechanism preventing agency capture, but more recent scholarship has called that assumption into question. Wendy Wagner, *Revisiting the Impact of Judicial Review on Agency Rulemakings: An Empirical Investigation*, 53 WM. & MARY L. REV. 1717, 1726–29 (2012) (reviewing literature on the changing perception of the roles of courts in preventing agency capture). While the evidence is mixed,

much impact indirectly, through campaign donations and other forms of political influence over the Congressional committees that approve budgets, conduct hearings, and otherwise oversee agency activities.<sup>98</sup>

The capture problem can appear in virtually any type of agency action. However, the particular difficulties that capture presents to the enforcement function of administrative agencies have only recently begun to receive significant academic attention.<sup>99</sup> Applying general results about capture, though, suggests that capture is apt to be an especially serious problem with certain types of agency activities.

First, capture concerns are greater when the costs of agency actions are localized but the benefits are spread widely. The theoretical literature on agency capture demonstrates that capture concerns are most severe when the public benefits from regulatory activity are diffuse while private costs are concentrated on a limited number of firms.<sup>100</sup> Those firms have the incentive and the ability to coordinate their actions to resist the administrative action while the beneficiaries have neither the ability nor the desire to fight hard in support.

Second, the risk of capture depends on agency scope: whether an agency regulates a single industry or a more diverse community of entities.<sup>101</sup> Agencies regulating a narrow industry are at greater risk than agencies with broader portfolios. The securities industry naturally has substantial influence over the SEC and the mining industry plays a substantial role in shaping the actions of the MSHA. However, agencies that regulate multiple industries avoid single-industry capture because the diverse constituencies do not all push in the same di-

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litigation may further capture as much as restrain it. *See id.* at 1786–89. At the very least, industry participants are well-placed to play a key role in any court challenges either on offense or defense.

98. *See generally, e.g.*, Jonathan R. Macey, *Organizational Design and the Political Control of Administrative Agencies*, 8 J.L. ECON. & ORG. 93 (1992); Matthew D. McCubbins et al., *Administrative Procedures As Instruments of Political Control*, 3 J.L. ECON. & ORG. 243 (1987); Barry R. Weingast & William J. Marshall, *The Industrial Organization of Congress*, 96 J. POL. ECON. 132 (1988).

99. *See* Barkow, *supra* note 13, at 22; Lemos, *supra* note 11, at 717; Rose, *supra* note 12, at 2200.

100. *See generally* THE POLITICS OF REGULATION 367–70 (James Q. Wilson ed., 1980); MANCUR OLSON, THE LOGIC OF COLLECTIVE ACTION: PUBLIC GOODS AND THE THEORY OF GROUPS 1–3 (1965).

101. Jonathan Macey has called this issue the “most fundamental choice of agency design.” Macey, *supra* note 98, at 93; *see also* Barkow, *supra* note 13, at 50.

rection.<sup>102</sup>

Combining these two features suggests important results for specialist enforcement. First, even compared to other agency actions, the costs of enforcement actions are especially concentrated and the benefits especially diffuse. The consequences of enforcement fall on the target alone while the beneficiaries are the public at large. Similarly, the target of specialized enforcement will naturally come from the regulated community and will be able to exploit the vulnerability of the specialized agency. As a result, when the public is not paying much attention, specialist enforcement agencies face substantial pressure to undercharge, undersettle, and undercollect in enforcement actions.

These pressures in times of limited public attention are reduced for generalist agencies. Agencies that just enforce and target entities in different industries may face the pressure of capture, but it is far more difficult to bring to bear. The lack of a concentrated industry to work through Congress protects generalist enforcement agencies. Moreover, generalist enforcers always receive some level of public scrutiny. The generalist enforcers at the state and federal level, Attorneys General and the Department of Justice, are frequently in the news.<sup>103</sup> As a result, the pressure from regulated entities is far less likely to guide their enforcement programs.

These dynamics reverse when attention turns to enforcement. In ordinary times, capture is a problem producing downward pressure on agency enforcement because of limited public attention. In extraordinary times, the opposite is true. Agency enforcement sometimes becomes highly visible. Following a dramatic enforcement failure, such as the Deepwater Horizon oil spill<sup>104</sup> or the Upper Big Branch mine collapse,<sup>105</sup> the salience of enforcement changes. In those cases, historically invisible agencies like the Minerals Management Service or the MSHA,

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102. See Macey, *supra* note 98, at 99.

103. See Margaret H. Lemos & Max Minzner, *For-Profit Public Enforcement*, 127 HARV. L. REV. 853, 879 (2014) (noting that the Department of Justice and state Attorneys General, along with the SEC, are always in the public eye).

104. NAT'L COMM'N ON THE BP DEEPWATER HORIZON OIL SPILL & OFFSHORE DRILLING, DEEP WATER: THE GULF OIL DISASTER AND THE FUTURE OF OFFSHORE DRILLING 87 (2011), *available at* <http://gpo.gov/fdsys/pkg/GPO-OILCOMMISSION.pdf> (describing the explosion and spill).

105. GOVERNOR'S INDEP. INVESTIGATION PANEL, UPPER BIG BRANCH: THE APRIL 5, 2010 EXPLOSION: A FAILURE OF BASIC COAL MINE SAFETY PRACTICES 4 (2011), *available at* <http://npr.org/documents/2011/may/giip-massey-report.pdf> (describing the mine collapse).

receive substantial public scrutiny.<sup>106</sup> Congressional attention follows public attention. Because the public becomes interested in enforcement, Congress does as well. Committee hearings investigating agency enforcement practices are a common response to disasters.<sup>107</sup>

This scrutiny reverses the pressure on enforcement at specialist agencies. While specialists are likely to underenforce compared to generalists during times of low visibility, the opposite effect should occur during times of high visibility. External and internal forces will push specialist agencies in the direction of enforcement in times of high scrutiny. Indeed, that dynamic is frequently observed. Agencies become far more interested in building their reputation as aggressive enforcers in the wake of a serious tragedy. For example, many agencies promote their enforcement results in their Congressional budget requests.<sup>108</sup> However, while high-profile agencies like the SEC and the CFTC generally engage in this self-promotion in all circumstances, lower profile agencies only draw attention to their enforcement successes after a major disaster.<sup>109</sup> Specialized agencies care about appearing aggressive, but only when the public is focused on enforcement.<sup>110</sup>

Similar effects happen even in high profile agencies. High profile events have frequently pushed the SEC to enforce in areas previously left untouched.<sup>111</sup> The agency recently received substantial attention relating to its enforcement in the area of options backdating. In these cases, employees received stock options with the dates retroactively assigned to make them

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106. NAT'L COMM'N ON THE BP DEEPWATER HORIZON OIL SPILL & OFFSHORE DRILLING, *supra* note 104 at 68 (describing Minerals Management Service failings); GOVERNOR'S INDEP. INVESTIGATION PANEL, *supra* note 105, at 77 (describing critiques of the Mine Safety and Health Administration).

107. See, e.g., Ian Urbina, *Authorities Vow To Close Mines Found To Be Unsafe*, N.Y. TIMES, Apr. 28, 2010, at A16 (describing Congressional hearings on the Mine Safety and Health Administration and the Big Branch mine collapse); Susan Saulny, *Finger-Pointing, but Few Answers at Hearings on Drilling*, N.Y. TIMES, May 12, 2010, at A14 (describing the Congressional hearings on the Deepwater Horizon disaster).

108. Lemos & Minzner, *supra* note 103, at 882–83.

109. *Id.* at 882.

110. *Id.* at 883 (“[A]gencies’ incentive to build reputations as strong enforcers . . . is variable and depends on the level of public attention directed at the agencies’ enforcement programs.”).

111. See Stephen J. Choi & A.C. Pritchard, *Behavioral Economics and the SEC*, 56 STAN. L. REV. 1, 26 (2003); Stephen J. Choi et al., *Scandal Enforcement at the SEC: The Arc of the Option Backdating Investigations*, 15 AM. L. & ECON. REV. 542, 546 (2013).

more valuable at the time they were granted.<sup>112</sup> This area did not receive much press coverage until a flurry of stories was published in 2006. This surge of attention produced, predictably, a surge in enforcement actions.<sup>113</sup> A recent empirical study, though, suggests that this was far from an optimal response, producing enforcement actions that were progressively weaker over time.<sup>114</sup> These results suggest that the SEC, like all specialized agencies, is subject to political pressures that drive an overreaction to enforcement failures.<sup>115</sup>

This combination of high and low public visibility of agency activities leads to a boom and bust cycle of enforcement for specialized agencies—agencies underenforce on a given issue most of the time, but can overreact after a significant catastrophe. Generalist enforcement agencies are not immune to these pressures, of course. Scrutiny following an enforcement failure can induce a response at the DOJ as well. However, it is more shielded from these effects. At specialized agencies, the highs are higher and the lows are lower. The combination of capture and limited public scrutiny put more downward pressure on specialized enforcement. Similarly, when salience shifts, the upward response is greater.

#### B. SPECIALIZED ENFORCEMENT AND THE SILO EFFECT

In a world of specialized enforcement, overlapping jurisdiction is inevitable.<sup>116</sup> Multiple agencies frequently regulate the same entity. As a result, that entity reacts to the incentives created by multiple enforcement divisions. Nuclear power plants, for example, respond to several masters. The NRC initially licenses power plant activities and generally oversees their safe operation.<sup>117</sup> However, the Environmental Protection Agency (EPA), with state and local authorities, regulates many of the environmental aspects of power plant operations.<sup>118</sup> This

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112. See Choi et al., *supra* note 111, at 543.

113. *Id.* at 546–47.

114. *Id.* at 575.

115. *Id.* at 546 (“The SEC’s response to option backdating suggests that it is not immune to the political imperative to ‘do something.’”).

116. See Jacob E. Gersen, *Overlapping and Underlapping Jurisdiction in Administrative Law*, 2006 SUP. CT. REV. 201, 208 (“[S]tatutes that parcel out authority or jurisdiction to multiple agencies may be the norm, rather than an exception.”).

117. See *generally* Domestic Licensing of Production and Utilization Facilities, 10 C.F.R. § 50 (2014) (providing for NRC regulation of the construction and operation of power plants).

118. See *generally* Environmental Radiation Protection Standards for Nu-

joint regulation means that the actions of any regulator can constrain the power plant's activities. Consider the Oyster Creek Generating Station in New Jersey, the oldest nuclear power plant in the United States.<sup>119</sup> In 2009, the NRC extended the plant's license for an additional twenty years despite public opposition.<sup>120</sup> However, Exelon, the owner of the plant announced in 2010 that the plant would be retired in 2019, ten years early, blaming environmental regulations enforced by the New Jersey Department of Environmental Protection.<sup>121</sup>

Oyster Creek is simply one example of a general phenomenon. Simultaneous regulation of the same entity is common. For example, entities in the energy industry often own nuclear plants regulated by the NRC and coal plants overseen by the EPA. If the company is public, the SEC will regulate its securities filing. Such entities have choices to make. Because compliance budgets are not unlimited, companies need to decide where to focus their attention. Quite naturally, large penalties will get the most attention and the greatest efforts at compliance.

To the extent that specialized agencies set penalties optimally, these efforts are desirable. When Enforcer A consistently imposes larger penalties than Enforcer B, those penalties might show that Enforcer A consistently identifies more serious violations. Nevertheless, we know that this tends not to be true. In *Predictably Incoherent Judgments*,<sup>122</sup> Cass Sunstein, Daniel Kahneman, David Schkade, and Ilana Ritov demonstrated that agency punishments are internally consistent but externally incoherent. Specialized agencies scale their penalties against other penalties for violations enforced by the same agency but not against penalties imposed by other regulators. Consider the penalties imposed by the Occupational Safety & Health Administration and those imposed by the Fish and Wildlife Service. The penalties for illegally importing wildlife

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clear Power Operations, 40 C.F.R. § 190 (2014) (outlining EPA regulation of radiation exposure from power plants).

119. The plant came online in 1969 operating under a forty-year license issued by the Nuclear Regulatory Commission. See *Oyster Creek Generating Station*, EXELON, <http://www.exeloncorp.com/PowerPlants/oystercreek/Pages/profile.aspx> (last visited Apr. 20, 2015).

120. See Press Release, NRC Renews Operating License for Oyster Creek Nuclear Power Plant for an Additional 20 Years (April 8, 2009), available at <http://pbadupws.nrc.gov/docs/ML0909/ML090980482.pdf>.

121. See Matthew L. Wald, *Oyster Creek Reactor To Be Closed by 2019*, N.Y. TIMES, Dec. 9, 2010, at A44 (describing agreement to close plant).

122. Cass R. Sunstein et al., *Predictably Incoherent Judgments*, 54 STAN. L. REV. 1153 (2002).

are substantially larger than those imposed for serious workplace safety violations.<sup>123</sup>

As a result, the fact that large penalties draw significant compliance efforts can be distortionary. Regulated entities will focus their efforts on the agency imposing the largest penalties even when those penalties do not reflect the most serious violation. A generalist enforcement agency, of course, could end up with inconsistent penalties across the various violations it enforces, but the simple fact that a single body oversees the enforcement efforts reduces the problem. Because enforcement agencies do frequently scale penalties appropriately internally, the distortion is reduced.

So far the analysis has assumed only that the regulated entity is identical. These problems are compounded when two enforcers can punish not only the same entity, but also the same conduct. Misconduct by a defendant does not necessarily stay neatly within the lines draw by statute. As a result, a single violation might face charges from multiple enforcers. The enforcement actions might be contemporaneous. For example, simultaneous enforcement is common in securities cases, where the DOJ and the SEC pursue actions against a defendant at the same time.<sup>124</sup> Alternatively, defendants might face sequential enforcement. In such cases, the resolution of an enforcement action might produce collateral consequences outside the jurisdiction of the original enforcer. Certain administrative enforcement actions (such as a range of EPA Clean Water Act and Clean Air Act cases) can lead to debarment.<sup>125</sup> Notably, violators are either temporarily or permanently precluded from en-

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123. *Id.* at 1190.

124. The Rajat Gupta insider trading case provides a recent example of the interaction between SEC and DOJ investigations. The SEC initially filed charges on its own against Gupta administratively in March of 2011 but then abandoned the case in August. See Peter Lattman, *S.E.C. Drops Proceeding Against Rajat Gupta*, N.Y. TIMES (Aug. 4, 2011), <http://dealbook.nytimes.com/2011/08/04s-e-c-drops-administrative-proceeding-against-gupta>. It then recharged the case in district court once Gupta was indicted criminally. See *SEC Files Insider Trading Charges Against Rajat Gupta*, U.S. SEC. & EXCHANGE COMMISSION (Oct. 26, 2011), <http://www.sec.gov/news/press/2011/2011-223.htm>. Gupta was eventually convicted in June 2012. See Peter Lattman & Azam Ahmed, *Ex-Goldman Director Convicted of Passing Secrets to Hedge Fund*, N.Y. TIMES, June 16, 2012, at A1.

125. Criminal convictions lead to automatic debarment while the EPA has discretionary debarment authority for other forms of misconduct. See generally Justin M. Davidson, Comment, *Polluting Without Consequence: How BP and Other Large Government Contractors Evade Suspension and Debarment for Environmental Crime and Misconduct*, 29 PACE ENVTL. L. REV. 257, 261–63 (2011) (describing debarment authority).



tering into *any* federal contract, not just contracts with the agency imposing debarment.<sup>126</sup> All federal agencies must enforce the debarment order.

Both sequential and simultaneous enforcement actions can cross other enforcement boundaries as well. State, federal and private enforcement often punish the same conduct.<sup>127</sup> Securities class actions are often filed after SEC investigations.<sup>128</sup> Enforcement by other agencies produces similar outcomes.<sup>129</sup>

Naturally, enforcement targets tend to be indifferent between the direct and collateral consequences of an enforcement action. A \$10 million payment to the EPA that leads to the violator losing out on a series of federal procurement contracts worth \$50 million over five years is likely to be less attractive than a one-time \$25 million payment that does not lead to debarment. Enforcement targets will always see cases holistically, aggregating the direct and collateral costs in determining how to proceed.<sup>130</sup>

In comparison, enforcement agencies cannot take a holistic approach. Almost by definition, only the direct consequences of an agency enforcement action are within its control. The collateral consequences lie outside its jurisdiction. This mismatch between the defendant's concerns and the agency's capacities has a significant impact on settlement negotiations. Standard models of settlement recognize that parties in agency enforcement

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126. See 2 C.F.R. § 180 (2014) (outlining procedures to enforce cross-agency debarment).

127. The \$25 billion dollar settlement in February 2012 between states, the federal government and large banks providing mortgage services is simply one of many recent examples of joint federal-state enforcement actions. See Margaret H. Lemos, *Aggregate Litigation Goes Public: Representative Suits By State Attorneys General*, 126 HARV. L. REV. 486, 526 (2012). States often also have authorization to enforce federal law directly, but generally cannot do so when a federal enforcement action is pending. See Lemos, *supra* note 11, at 709.

128. See Myriam Gilles & Gary B. Friedman, *Exploding the Class Action Agency Costs Myth: The Social Utility of Entrepreneurial Lawyers*, 155 U. PA. L. REV. 103, 156 (2006); 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, 225 (1983).

129. See Gilles & Friedman, *supra* note 128, at 131 (describing class actions after Federal Trade Commission enforcement activity).

130. Not surprisingly, members of the enforcement defense bar explicitly advise their clients to consider all of the collateral consequences when negotiating an enforcement settlement. See Carmen Lawrence et al., *Seeing Beyond the Deal: The Collateral Consequences of SEC Settlements*, INV. LAWYER, Nov. 2011, at 1, available at <http://www.hb.betterregulation.com/external/Seeing%20Beyond%20the%20Deal%20The%20Collateral%20Consequences%20of%20SEC%20Settlements.pdf>.

actions will negotiate in light of the probability of a government victory at trial or hearing and the likely consequences of that victory.<sup>131</sup> For example, assuming perfect information on both sides, if the parties place a seventy-five percent likelihood on a pro-government outcome at trial and expect an average \$20 million penalty to be imposed if the government wins, the case will likely settle earlier for about \$15 million.

Collateral consequences alter this calculus. If settlements and government trial victories both lead to follow-on enforcement actions by others, a pretrial resolution may become impossible. As a general matter, agencies can, for example, increase or decrease the settlement amount but cannot offer immunity from future civil suits. However, if the defendant loses at trial, issue preclusion may work to its detriment in later lawsuits.<sup>132</sup> Similarly, admissions of wrongdoing in a settlement agreement may be admissible into evidence.<sup>133</sup> In cases where the likely costs of future civil litigation are low, a reduction in the penalty may be sufficient to mitigate this collateral consequence and induce a settlement. However, where the collateral consequences are severe, penalty reductions will not be enough. Even if the agency reduces the direct impact of the enforcement action to zero and imposes no penalty in the settlement, the threat of subsequent civil suits may prevent a resolution. Consider the example above, where the parties expect a seventy-five percent chance of a government win at trial leading to an average penalty of \$20 million. If the future civil actions resulting from a settlement will cost the target only \$5 million on average, the enforcement agency will be able to reduce the settlement amount to \$10 million and still induce the target to take the offer. If, however, the lawsuits resulting from settlement will produce \$500 million in average liability, even a settlement offer of zero will be declined.<sup>134</sup> The target will certainly

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131. See, e.g., Steven Shavell, *Any Frequency of Plaintiff Victory at Trial Is Possible*, 25 J. LEGAL STUD. 493, 495–96 (1996); George L. Priest & Benjamin Klein, *The Selection of Disputes for Litigation*, 13 J. LEGAL STUD. 1 (1984).

132. See *Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 330–31 (1979) (nonmutual issue preclusion after SEC enforcement action); Max Minzner, *Saving Stare Decisis: Preclusion, Precedent, and Procedural Due Process*, 2010 BYU L. REV. 597, 598.

133. The Federal Rules of Evidence, as well as parallel state evidence codes, make such statements generally admissible. See FED. R. EVID. 801(d)(2).

134. At least in the enforcement context, it is common that the potential future consequences are far greater than the immediate penalty. See Gilles & Friedman, *supra* note 128, at 157–58 & n.204 (“The SEC, FTC, and DOJ all know that the real financial wallop, in most instances, will come from the pri-

prefer to roll the dice and go to trial.<sup>135</sup>

In theory, then, the existence of alternate enforcement actions might produce more trials. As a result, specialized enforcers should settle less often than generalists. In practice, enforcement agencies work with targets to alter their settlement practices to reduce or eliminate these spillover effects. Settlements are structured to reduce or eliminate the secondary effects that would occur after trial. These effects are easiest to see in the situations where the collateral consequences are greatest. For example, criminal defendants who are not United States citizens frequently care far more about the potential immigration consequences of their conviction than the prison sentence.<sup>136</sup> As a result, plea negotiations for noncitizens often turn on whether the prosecutor and defense attorney can reach a resolution that involves a guilty plea only to offenses that do not lead to deportation.<sup>137</sup> As a result, the specialization of enforcement, i.e. the separation between the criminal and immigration enforcement functions, means that defendants plead guilty to different crimes than they would if a single generalist enforcer controlled both functions.<sup>138</sup>

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vate class actions that follow their investigations.”).

135. In reality, the calculation is more complicated than presented in this stylized example. For instance, civil suits are likely to occur whether or not the defendant settles with the agency and, as a result, the key question is the marginal impact of the settlement on the outcome of the civil case.

136. Especially for adult defendants who entered the country years earlier, the consequences of deportation and the resulting separation from home and family can matter far more than the length of incarceration. See *Padilla v. Kentucky*, 559 U.S. 356, 364 (2010) (recognizing that deportation is “sometimes the most important part . . . of the penalty that may be imposed on noncitizen[s]”).

137. Indeed, the Supreme Court’s recent decision in *Padilla* presumes that the plea process will involve negotiating around these immigration consequences. The Court held that defendants who are misinformed about immigration consequences may bring an ineffective assistance claim, noting that defense counsel “may be able to plea bargain creatively with the prosecutor in order to craft a conviction and sentence that reduce the likelihood of deportation, as by avoiding a conviction for an offense that automatically triggers the removal consequence.” *Id.* at 373. For an analysis of whether such negotiations are likely in practice, see Darryl K. Brown, *Why Padilla Doesn’t Matter (Much)*, 58 UCLA L. REV. 1393, 1399 (2011).

138. Giving state prosecutors control over deportation consequences is both unrealistic and (perhaps) unconstitutional. However, even in federal criminal cases, criminal and immigration enforcement are separate. The Department of Justice, acting either directly or through a United States Attorney, negotiates the resolution of the criminal case and the Department of Homeland Security handles any later immigration consequences. Deportation is not an issue open to negotiation in the criminal case. See *Agreements in Connection with Criminal Proceedings or Investigations, Promising Non-Deportation or Other Immi-*

The same phenomenon occurs in civil enforcement. The SEC has adjusted its enforcement approach to generate settlements in cases where the potential collateral consequences might otherwise force cases to trial. Targets of SEC investigations are very frequently concerned about the possibility of civil lawsuits predicated on the same conduct at issue in the enforcement action. These lawsuits can lead to exposure far greater than the penalties imposed by the agency.<sup>139</sup> In response, the SEC (along with other agencies) adopted a long-standing practice permitting enforcement targets not to admit liability when settling enforcement actions.<sup>140</sup> Instead, settlement agreements state that targets neither admit nor deny the allegations. The express purpose of this policy is to permit settlements that, in theory, will not directly lead to exposure in private actions.<sup>141</sup> While the lawsuit can still be filed, the settlement itself will not be useful to the plaintiffs. If the SEC could extinguish private claims through the public investigation, this settlement policy would be unnecessary. Companies could admit liability without fear of future consequences. Here again the specialization of enforcement, i.e. the split between public and private, means that enforcement actions are resolved differently than they would in a universe with a generalist enforcer.

These different outcomes have costs. Admissions of wrongdoing have both intrinsic and extrinsic value. They bring closure, induce introspection and remorse in defendants, and bring procedural and legitimacy benefits to enforcement systems.<sup>142</sup> Requiring an admission of liability helps prevent the conviction of the innocent by requiring defendants to describe

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gration Benefits, 28 C.F.R. § 0.197 (2014) (explaining that immigration officials are not bound by promises in plea agreements).

139. See John C. Coffee, Jr., *Reforming the Securities Class Action: An Essay on Deterrence and Its Implementation*, 106 COLUM. L. REV. 1534, 1542–43 (2006); Gilles & Friedman, *supra* note 128, at 157–58.

140. Samuel W. Buell, *Liability and Admissions of Wrongdoing in Public Enforcement of Law*, 82 U. CIN. L. REV. 505 (2013) (describing SEC practice).

141. See *Examining the Settlement Practices of U.S. Financial Regulators: Hearing Before the Comm. on Fin. Servs.*, 112 Cong. 83 (2012) (testimony of Robert Khuzami, Director, Division of Enforcement, U.S. Securities and Exchange Commission), available at <http://www.sec.gov/news/testimony/2012/ts051712rk.htm> (“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.”).

142. Buell, *supra* note 140, at 513 (describing these values served by admissions).

under oath what they did.<sup>143</sup> It also helps ensure public confidence by avoiding an outcome in which defendants repeatedly deny conduct they are punished for.<sup>144</sup> The SEC's "neither admit nor deny" approach sacrifices these benefits. Similarly, it is not at all hard to imagine criminal defendants pleading guilty to a crime they did not commit to avoid the deportation consequences of their actual offense.<sup>145</sup>

These costs will occur in every enforcement structure where a single agency does not control all of the consequences of an enforcement action. Following Dodd-Frank, the SEC imposed new reporting requirements on publicly traded companies that operate mines.<sup>146</sup> Starting in 2012, these companies were required to disclose certain categories of MSHA sanctions to investors.<sup>147</sup> It is too soon to see the impact of this requirement. However, assuming mining companies expect these disclosures to have a significant negative impact on stock prices, this SEC requirement will alter the MSHA penalty negotiation process. The MSHA cannot exempt mining companies from the SEC obligation but it can, in theory, structure settlements to avoid the triggering conditions.

These costs may be worth paying. As discussed in the next Part, there is value in specialization in enforcement as well. There are strong arguments for not placing the obligation to enforce securities regulation and mine safety in the same agency. Additionally, permitting public enforcers to directly preclude private lawsuits creates serious implementation problems.<sup>148</sup>

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143. The central purpose of Federal Rule of Criminal Procedure 11, which requires the court to determine that there is a factual basis for a guilty plea, is to prevent pleas by innocent defendants. *See* FED. R. CRIM. P. 11 advisory committee's note. This requirement is frequently met by requiring a defendant to testify to the facts necessary to make out the elements of the crime. Buell, *supra* note 140, at 508–09.

144. *Id.* at 513.

145. It is widely understood that innocent defendants may have the incentive to plead guilty if the costs of going to trial are sufficiently high. *See, e.g.*, Josh Bowers, *Punishing the Innocent*, 156 U. PA. L. REV. 1117, 1120 & n.5 (2008) (citing additional sources).

146. *See* Mine Safety Disclosure, Exchange Act Releases Nos. 33-9286, 34-66019 (Jan. 27, 2012), available at <http://www.sec.gov/rules/final/2011/33-9286.pdf> (codified at 17 C.F.R. § 229).

147. *Id.*

148. Unlike many other agencies, EPA enforcement actions can be barred by state enforcement actions and either state or EPA enforcement can preclude private causes of action. *See* Jeffrey G. Miller, *Theme and Variations in Statutory Preclusions Against Successive Environmental Enforcement Actions by EPA Citizens Part One: Statutory Bars in Citizen Suit Provisions*, 28 HARV. ENVTL. L. REV. 401, 403 (2004). This structure has created complicated prob-

This analysis simply identifies a new cost of fragmented enforcement in a world of collateral consequences. Unlike a specialist agency, a generalist enforcer can directly offer holistic resolution of all of the potential consequences of the defendant's conduct. Specialized enforcers will always be forced to modify their enforcement practices in potentially costly ways to achieve a similar result.

### C. SPECIALIZED ENFORCEMENT AND AGENCY ALTERNATIVES

The previous two Sections have explored the structural weaknesses that come from placing enforcement authority in a single, specialized agency. Specialized agencies, of course, have countervailing strengths that in many cases make up for these weaknesses. In particular, specialist enforcement occurs in an agency staffed by subject matter experts that also possesses other regulatory powers. At each stage of the enforcement process, the agency can use its industry knowledge or structural flexibility to improve, augment, or substitute for a typical enforcement action.

Consider first the decision to bring an enforcement action in the first place. A generalist enforcer confronted with misconduct has essentially two options. It can charge conduct and seek a penalty or it can decline to prosecute. Of course, an enforcement action might take one of many forms. For example, the DOJ initially proceeded against some medical marijuana facilities civilly, seeking an injunction against their ongoing operation, rather than indicting the corporation or the individuals.<sup>149</sup> By its very nature, though, an agency that just enforces has no other options—it can enforce or not, but it can do nothing else.

Specialist agencies, though, have options. Agencies that decide not to enforce need not sit on their hands entirely. Most importantly, most agencies can proceed by rulemaking. Agencies do not have to respond to misconduct by regulated entities by seeking sanctions or imposing an order on an individual market participant. Instead, the agency can promulgate a broadly applicable rule that binds everyone. This ability to proceed by adjudication or rulemaking is a core structural feature of the modern administrative agency and the discretionary na-

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lems of interpretation and implementation. See Matthew D. Zinn, *Policing Environmental Regulatory Enforcement: Cooperation, Capture, and Citizen Suits*, 21 STAN. ENVTL. L.J. 81, 154 (2002).

149. See *United States v. Oakland Cannabis Buyers Coop.*, 532 U.S. 483 (2001) (upholding such injunctive relief).

ture of the decision is central to administrative law.<sup>150</sup>

This flexibility provides specialized agencies a particular advantage in the context of the decision not to enforce. Agencies that do not want to punish particular actions can communicate that decision in a legally binding manner. They can alter the substantive law and commit themselves to the non-enforcement choice. By issuing a rule clarifying that certain types of behavior are permissible, the agency will be legally bound to follow that rule unless and until the regulation is changed.

Generalist enforcers certainly use nonenforcement as a tool as well. For example, the Obama Administration recently announced several areas of both civil and criminal law where it will not enforce statutory provisions. The DOJ has indicated that it will not bring certain categories of marijuana prosecutions in states that have legalized the drug<sup>151</sup> and will use its non-enforcement authority to delay the implementation of provisions of the Affordable Care Act.<sup>152</sup> Policy-based nonenforcement is bipartisan and occurred under the Bush Administration as well.<sup>153</sup>

However, unlike specialized agencies with rule-making power, a generalist enforcer cannot commit to a position. Whenever the DOJ issues enforcement guidance, it is non-binding. The DOJ lacks rule-making power and is free to abandon its commitment not to prosecute certain categories of cases.<sup>154</sup> This inability to bind can be a serious weakness. When public actors cannot credibly commit to a course of conduct,

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150. See *Sec. & Exch. Comm'n v. Chenery Corp.*, 332 U.S. 194, 203 (1947) (“[T]he choice made between proceeding by general rule or by individual, ad hoc litigation is one that lies primarily in the informed discretion of the administrative agency.”).

151. See Memorandum from James M. Cole, Deputy Attorney Gen., to all U.S. Attorneys, Guidance Regarding Marijuana Enforcement (Aug. 13, 2013), available at <http://www.justice.gov/iso/opa/resources/3052013829132756857467.pdf>.

152. See Letter from Gary Cohen, Dir., Ctrs. For Medicare & Medicaid Servs., Ctr. for Consumer Info. & Ins. Oversight, to Insurance Commissioners (Nov. 14, 2013), available at <http://www.cms.gov/CCIIO/Resources/Letters/Downloads/commissioner-letter-11-14-2013.pdf>. These examples are drawn from Zachary S. Price, *Enforcement Discretion and Executive Duty*, 67 VAND. L. REV. 671, 673 (2014).

153. Price, *supra* note 152, at 674; Daniel T. Deacon, Note, *Deregulation Through Nonenforcement*, 85 N.Y.U. L. REV. 795, 807–816 (2010) (providing examples from the Bush Administration).

154. See Joseph Stiglitz, *Distinguished Lecture on Economics in Government: The Private Uses of Public Interest: Incentives and Institutions*, J. ECON. PERSP., Spring 1998, at 9–10.

they are unable to use policy to shape behavior past the immediate present.<sup>155</sup> If an agency wants to use nonenforcement to alter conduct in the industry it regulates, it needs to commit to it as a policy. Because generalist agencies cannot do this credibly, they will always be at a disadvantage in this realm compared to specialized agencies.

Not only can agencies modify the substantive law, they can adjust the enforcement process itself. Consider the example of restitution. Providing restitution for victims of misconduct is certainly an important goal of an enforcement process. Resolving restitution claims as part of the enforcement action serves independent enforcement values such as remorse and contrition.<sup>156</sup> More prosaically, it ensures that the public enforcement action does not render a defendant judgment-proof in the face of pending restitution claims.<sup>157</sup>

Despite these benefits, restitution fits uneasily into the structure of public enforcement and presents both theoretical and practical challenges. A victim may hope that a public enforcement lawyer will seek to represent his or her interests adequately, but victims have no guarantee that the restitution claims will be resolved to their satisfaction. A fundamental tenant of public enforcement is that the state, not the victim, is the prosecuting party. From the violator's standpoint, a restitution order cannot provide one of the central goals of any defendant—a final resolution of the claims that bars relitigation over the same injury. Because the victim is not a party, *res judicata* does not preclude a future lawsuit.<sup>158</sup>

These problems are significant in cases involving a single defendant and a single victim, but are amplified when an injury is caused by multiple actors or falls on multiple victims. The former problem rose to the level of the Supreme Court in *Paroline v. United States*.<sup>159</sup> *Paroline* considers the scope of res-

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155. See, e.g., *id.* (describing the problems arising from the inability of the government to make credible commitments).

156. See Stephanos Bibas & Richard A. Bierschbach, *Integrating Remorse and Apology Into Criminal Procedure*, 114 YALE L.J. 85, 89–90 (2004) (describing value of the remorse and apology in the criminal process).

157. For example, in federal prosecutions, the court cannot impose a fine that would reduce the funds available for restitution. 18 U.S.C. § 3572(b) (2012) (“[T]he court shall impose a fine or other monetary penalty only to the extent that such fine or penalty will not impair the ability of the defendant to make restitution.”).

158. While the restitution order is not preclusive in its own right, the federal restitution system provides that restitution amounts can be adjusted to reflect any later recovery of compensatory damages. See *id.* § 3664(j)(2).

159. 134 S. Ct. 1710 (2014) (holding restitution was proper to the extent



titution orders in child pornography cases. Can child victims recover for all injuries from any defendant? Or does the federal statute authorizing restitution in these cases limit the recovery from each individual defendant to his or her proportional contribution to the harm?<sup>160</sup>

While the question in *Paroline* turns on a question of statutory interpretation, the core complication is the product of generalist enforcement. Whatever the appropriate structure of restitution, reaching the outcome in criminal litigation with a generalist agency will be difficult, if not impossible. The optimal resolution in cases like *Paroline* is a binding order to pay restitution (in some amount) directed at all of those responsible for the creation and distribution of the child pornography. Enforcement actions, though, only reach identified violations by known violators. The DOJ lacks the capacity to initiate an action joining the appropriate defendants in a single simultaneous action that can produce a binding restitution order. Because all it does is enforce, the optimal outcome is beyond the reach of the generalist agency.

The problem of multiple victims raises similar issues. Administrative agencies now frequently attempt to generate pools of money as part of enforcement process in order to compensate victims. While this practice has a significant historical pedigree,<sup>161</sup> it has taken on particular importance in the last decade. The funds generated by agencies have grown dramatically in size.<sup>162</sup> These funds, of course, mirror class actions in both their goals and their overall structure. Class actions, though, come with strong procedural protections to ensure representation of the interests of absent plaintiffs.<sup>163</sup> Agency restitution funds

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that the defendant's particular offense proximately caused the victim's losses).

160. 18 U.S.C. § 2259(b)(1) ("The order of restitution under this section shall direct the defendant to pay the victim (through the appropriate court mechanism) the full amount of the victim's losses as determined by the court.").

161. Adam S. Zimmerman, *Distributing Justice*, 86 N.Y.U. L. REV. 500, 518–21 (2011) (describing the history of agency restitution efforts).

162. *Id.* at 527 (estimating that three agencies alone collected \$10 billion in restitution between 2001 and 2011); see also Urska Velikonja, *Public Compensation for Private Harm: Evidence from the SEC's Fair Fund Distributions*, 67 STAN. L. REV. 331, 350–59 (2014) (describing the extensive nature of the compensation provided by the SEC fair funds distributions).

163. For example, courts must investigate the adequacy of the named plaintiffs to represent the class, FED. R. CIV. P. 23(a), and review and approve any settlement before it is implemented to ensure that "it is fair, reasonable, and adequate." FED. R. CIV. P. 23(e)(2).

frequently lack these structural protections.<sup>164</sup> From the defendant's perspective, the preclusive consequences of these funds are unclear. While agencies can require victims to waive the right to sue if they decide to collect from the restitution fund,<sup>165</sup> absent such a waiver, defendants may be subject to double recovery.<sup>166</sup>

Both types of restitution efforts are essential to effective enforcement regimes. A specialist agency with rule-making power is far better situated to handle these efforts than a generalist "enforcement-only" agency. Rule-making is a key tool in making these restitution efforts effective. Because the rule-making process that can bind stakeholders beyond the defendant immediately involved in the enforcement action, it provides administrative agencies the capacity to reach far superior resolutions in restitution actions. For absent victims, an agency can provide the procedural protections necessary to ensure a fair and adequate outcome.<sup>167</sup> For absent violators, the agency can impose restitution obligations even if they are unknown. Because a generalist enforcement agency cannot augment the enforcement process in this way, restitution will always be more complex.<sup>168</sup>

Finally, agencies can draw on their specialized knowledge at the end of the enforcement process and beyond. Financial penalties are a common outcome of public enforcement. However, they are not the only possibility. Both administrative agencies and the DOJ frequently seek and obtain remedies that are injunctive in nature either in lieu of or in addition to financial penalties.<sup>169</sup> Along with injunctive relief imposed involuntarily after litigation, entities frequently agree to implement reforms when they settle enforcement actions. In 1982, such a consent decree resolved the antitrust litigation brought by the DOJ

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164. Zimmerman, *supra* note 161, at 546–47 (criticizing agency funds for these weaknesses); *see also* Lemos, *supra* note 127, at 511 (discussing similar issues in actions brought by state attorneys general).

165. *Gen. Tel. Co. v. EEOC*, 446 U.S. 318, 333 (1980) (authorizing such waivers).

166. Zimmerman, *supra* note 161, at 544 (“[C]ourts lack criteria for evaluating the preclusive effect, if any, of a large agency settlement.”).

167. *Id.* at 563–68 (arguing for negotiated rulemaking as a mechanism to reach the appropriate outcome).

168. Of course, the fact that a specialized agency can take these steps does not make it inevitable that it will do so. *See generally* Zimmerman, *supra* note 161, at 539–53 (identifying the weaknesses in agency settlement funds in practice).

169. *See* Lemos & Minzner, *supra* note 103, at 898–99 (discussing the choice between penalties and injunctive remedies).

against AT&T and required the divestiture of the business operations providing local telephone service.<sup>170</sup> More recently, the DOJ resolved antitrust claims against Microsoft using a comparable consent decree.<sup>171</sup> Similar outcomes are a common resolution of agency enforcement actions as well.<sup>172</sup>

Ensuring compliance with consent decrees is well understood to be very difficult.<sup>173</sup> While the court and the plaintiff have a role in overseeing the efforts to comply, both are relatively poorly situated to monitor the behavior of the target of the consent decree and identify violations. Even under the best of circumstances, outsiders will struggle to understand the behavior occurring within the firm. Judges and enforcers often lack both the time and the technical expertise to become familiar enough with the enterprise to effectively enforce consent decrees in a timely fashion.<sup>174</sup>

As significant as these problems can be when the case is resolved by a court-ordered consent decree, they are exacerbated when the resolution occurs without court supervision. One of the most significant recent changes in corporate criminal prosecutions at the federal level has been the rise in the use of deferred prosecution agreements. Rather than indict a company, federal prosecutors now routinely extract agreements from the entity to engage in structural reform to ensure future compliance.<sup>175</sup> Similar in practice to a consent decree, these contractu-

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170. See *United States v. AT&T*, 552 F. Supp. 131 (D.D.C. 1982) (approving consent decree).

171. See *United States v. Microsoft Corp.*, 231 F. Supp. 2d 144 (D.D.C. 2002) (approving consent decree). These cases are not unusual. Consent decrees end the substantial majority of antitrust actions. See Jed Goldfarb, Note, *Keeping Rufo in Its Cell: The Modification of Antitrust Consent Decrees After Rufo v. Inmates Of Suffolk County Jail*, 72 N.Y.U. L. REV. 625, 662 n.224 (1997) (collecting data on frequency of antitrust consent decrees).

172. See Vikramaditya Khanna & Timothy L. Dickinson, *The Corporate Monitor: The New Corporate Czar?*, 105 MICH. L. REV. 1713, 1714–20 (2007).

173. See, e.g., Eric A. Rosand, *Consent Decrees in Welfare Litigation: Obstacles to Compliance*, 28 COLUM. J.L. & SOC. PROBS. 83, 123–34 (1994) (providing case studies on the difficulties of compliance).

174. “[M]onitoring compliance with long-term injunctions or consent decrees . . . can be a full-time job for the court.” Shira Scheindlin, *We Need Help: The Increasing Use of Special Masters in Federal Court*, 58 DEPAUL L. REV. 479, 482 (2009).

175. See generally Jennifer Arlen, *Removing Prosecutors from the Boardroom: Limiting Prosecutorial Discretion To Impose Structural Reforms*, in PROSECUTORS IN THE BOARDROOM, *supra* note 36, at 62, 64–76; Richard A. Epstein, *Deferred Prosecution Agreements on Trial: Lessons from the Law of Unconstitutional Conditions*, in PROSECUTORS IN THE BOARDROOM, *supra* note 36, at 38, 38–39 (comparing deferred prosecution agreements to other coercive litigation).

al agreements provide the government the ability to reshape and alter the conduct of the entity in exchange for the promise not to bring charges.

These mechanisms to resolve enforcement actions have tremendous value, but are a clear example where specialized enforcement agencies are likely to excel when compared to a generalist enforcer. Ensuring compliance requires detailed knowledge specific to a particular firm and industry. An administrative agency has the non-lawyer technical staff with the expertise to conduct these tasks. Moreover, enforcing these agreements is quite similar to traditional agency regulation through rulemaking but is very different from the actions that lie at the core competency of a generalist enforcer.

In the eyes of some scholars, the weaknesses of a generalist enforcer in setting up structural reforms are so great that these types of agreements should be restricted solely to the use of civil regulators.<sup>176</sup> Certainly the use of these agreements has revealed some serious weaknesses in the approach of generalist enforcers. For example, one common mechanism to ensure consent decrees are enforced appropriately is the appointment of a monitor with both the time and expertise to oversee compliance.<sup>177</sup> However, the DOJ routinely puts in place enforcers who are not industry experts but are often lawyers.<sup>178</sup> As discussed in the next Section, consultation between regulatory agencies and generalist enforcers can alleviate some of these problems. In practice, the extent of the consultation is an open question.<sup>179</sup>

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176. Arlen, *supra* note 175, at 81 (“[F]ederal civil regulators with authority over the firm generally are in the best position to determine both whether to impose any structural reform on a firm and, if so, which reforms should be imposed.”).

177. Griffin, *supra* note 36, at 119 (“About half of all DPAs also include monitoring provisions that effectively install government representatives within corporations to review and evaluate internal controls.”). Monitors are also used in the civil regulatory context. See Khanna & Dickinson, *supra* note 172, at 1722 (“[U]sing monitors is not isolated to one particular area of regulation but rather seems to be used with increasing frequency in a number of areas. Thus, the SEC, the DOJ, the IRS, and others have all used monitors.”); Jennifer O’Hare, *The Use of the Corporate Monitor in SEC Enforcement Actions*, 1 BROOKLYN J. CORP. FIN. & COM. L. 89, 94–102 (2006) (describing the role of the court-appointed corporate monitor in the SEC enforcement action against WorldCom).

178. Griffin, *supra* note 36, at 120 (“In practice, however, many monitors are former prosecutors, regulators, or retired judges. . . . Of the forty monitors appointed since 2000, thirty are former government officials.”).

179. Rachel E. Barkow, *The Prosecutor As Regulatory Agency*, in PROSECUTORS IN THE BOARDROOM, *supra* note 36, at 177, 179–97 (describing the effectiveness of consultation with regulators in both state and federal prosecutions).

Whether these critics are right, both the theory and the practice suggest that monitoring and implementing these types of agreements are likely to be done better by a specialized enforcer. Either as a deferred prosecution agreement without court involvement, or as a consent decree with judicial oversight, specialists have the expertise and the capacity to make these arrangements work. Generalist enforcers, in turn, are more likely to struggle.

#### D. SPECIALIZED ENFORCEMENT AND NORMS OF BEHAVIOR

Specialized agencies bring another significant advantage to the enforcement process. Enforcement lawyers are closer to the agency's industry experts. In generalist enforcement agencies, lawyers live with lawyers. In specialist agencies, lawyers live with other people: economists, engineers, and scientists. Agencies are largely staffed with non-lawyer subject matter experts. Not only do agency enforcement lawyers work closely with these non-lawyers, they work closely with industry participants as well. In regulatory agencies, the move from government to industry (and back) is common and well known. Enforcement lawyers are frequently closely acquainted with those on the other side of the revolving door.<sup>180</sup>

This close contact with both government-side and industry experts has important implications for one of the key tasks of an enforcement agency: responding to the compliance norms that exist within an industry. Standard theories of criminal law compliance, such as those discussed in Part II, assume that compliance is purely instrumental. Compliance occurs as the result of the threat of punishment.<sup>181</sup> However, enforcement scholars have now broadly accepted the notion that social norms play a key role in producing compliance with legal rules.<sup>182</sup> Simple notions of deterrence do not solely explain why actors follow the law. While some comply out of fear of punishment, many others follow the rules out of a sense that it is the right thing to do.<sup>183</sup>

Enforcers need to respond to these compliance norms both

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180. See David Zaring, *Against Being Against the Revolving Door*, 2013 U. ILL. L. REV. 507, 547.

181. See Tracey L. Meares et al., *Updating the Study of Punishment*, 56 STAN. L. REV. 1171, 1193-94 (2004).

182. See TOM R. TYLER, *WHY PEOPLE OBEY THE LAW* 3-7 (1990); Paul H. Robinson & John M. Darley, *The Utility of Desert*, 91 NW. U. L. REV. 453, 468 (1997).

183. See IAN AYRES & JOHN BRAITHWAITE, *RESPONSIVE REGULATION: TRANSCENDING THE DEREGULATION DEBATE* 20-27 (1992).

substantively and procedurally. On the substantive side, enforcement actions focused on conduct that violates industry norms can reinforce the norm and use the existence of the norm to achieve compliance easily.<sup>184</sup> In contrast, actions that punish conduct that technically violates the law but is broadly viewed as acceptable can undermine the legitimacy of both the enforcer and the norm itself.<sup>185</sup> While the norms themselves shape the conduct, the actions of the enforcer can either reinforce or undermine them.

Similarly, this literature suggests that how the enforcer conducts actions procedurally matters a great deal in reinforcing norms and achieving compliance.<sup>186</sup> Regardless of the substantive outcome, the response to the enforcement action depends to a large degree on how the action is handled procedurally.<sup>187</sup> Enforcers who are seen as consistently treating targets fairly, with respect and without bias, build a reputation for legitimacy.<sup>188</sup> Legitimacy, in turn, is a key determinant in whether enforcement actions generate compliance.<sup>189</sup> Enforcement activity perceived as handled fairly builds the reputation of the enforcer and produces compliance norms while the opposite is true for actions that are seen as unfair and illegitimate.

As a result, enforcers need to identify the norms that exist in the communities they regulate, decide the quality of those norms, and select appropriate mechanisms to modify them. At each stage in this process—norm discovery, evaluation, and alteration—specialist agencies have an advantage. First, they are better able to learn and understand the norms that are currently in place. Especially in complex regulatory environments, generalist lawyers may struggle to understand the behavioral norms that govern conduct. Industry experts are the ones best able to figure out the norms that exist. Indeed, the DOJ has recognized that it is likely to need help in this area. The United

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184. See PAUL H. ROBINSON, *DISTRIBUTIVE PRINCIPLES OF CRIMINAL LAW* 186–87 (2008).

185. See *id.*

186. See Meares et al., *supra* note 181, at 1194–95 (describing this literature). Of course, this literature emphasizes the response of individuals, not firms, to norm creation and adjustment. However, even when regulations are aimed at firms, individuals make the ultimate compliance decisions.

187. See Tom R. Tyler & E. Allan Lind, *A Relational Model of Authority in Groups*, 25 *ADVANCES EXPERIMENTAL SOC. PSYCHOL.* 115, 160–62 (1992).

188. *Id.* at 162.

189. See Meares, *supra* note 181, at 1195 (“Empirical work is quite persuasive that these legitimacy factors matter more to compliance than instrumental factors, such as sanctions imposed by authorities on individuals who fail to follow the law or private rules.”).

States Attorneys' Manual encourages prosecutors to consult with industry experts in determining the adequacy of corporate compliance policies.<sup>190</sup> Specialized regulatory agencies already have these experts in the building.

Second, specialists are better able to determine when the norms that are in place are inadequate.<sup>191</sup> A norm of noncompliance can be incredibly destructive to a system of enforcement. Tax enforcement, for example, becomes extremely difficult in a system where a significant fraction of taxpayers do not comply voluntarily.<sup>192</sup> In the context of safety enforcement, lax industry norms may permit dangerous conduct to continue. However, a lack of compliance with a rule might suggest something quite different—the regulatory requirement might be inadequate and misguided and the industry norm may produce a safer or more appropriate outcome. Enforcement lawyers need to be able to distinguish between situations where risky conduct is considered acceptable and adjust norms to prevent it and, in turn, those situations where the norm is correct and the regulation should be changed.

Finally, once norms are identified and determined to be inadequate, specialized agencies are better positioned to respond. Punishment for noncompliance is, of course, one mechanism to achieve this end and reinforce norms of compliance.<sup>193</sup> As discussed in the previous section, for a generalist enforcer, punishment is the primary, if not exclusive, tool. Administrative agencies, can take a more flexible approach, though, to alter norms. For example, the Nuclear Regulatory Commission has a complicated and nuanced enforcement process.<sup>194</sup> NRC actions involve a multi-step process where the agency gathers input in public forums from industry participants, including the target.

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190. See UNITED STATES ATTORNEYS' MANUAL, *supra* note 43, 9-28.800 ("Many corporations operate in complex regulatory environments outside the normal experience of criminal prosecutors. Accordingly, prosecutors should consult with relevant federal and state agencies with the expertise to evaluate the adequacy of a program's design and implementation.").

191. See Eric A. Posner, *Law, Economics, and Inefficient Norms*, 144 U. Pa. L. REV. 1697, 1705 (1996) (noting the possible danger of incorrect or inefficient norms).

192. Leandra Lederman & Ted Sichelman, *Enforcement As Substance in Tax Compliance*, 70 WASH. & LEE L. REV. 1679, 1740 (2013); Dan M. Kahan, *The Logic of Reciprocity: Trust, Collective Action, and Law*, 102 MICH. L. REV. 71, 81 (2003).

193. See Robinson & Darley, *supra* note 182, at 470.

194. U.S. NUCLEAR REGULATORY COMM'N, NRC ENFORCEMENT POLICY 24-26 (2011), available at <http://pbadupws.nrc.gov/docs/ML0934/ML093480037.pdf>.

In addition, it frequently involves case resolutions that impose alternative sanctions, such as naming particular employees as engaged in misconduct even if no punishment is imposed. This process has value in altering industry compliance norms. It is an option for a specialist agency dedicated for a specific industry but is essentially unavailable to a generalist agency that simply focuses on enforcement.

#### IV. THE CONSEQUENCES OF THE ENFORCEMENT TRADEOFF

I have sought to demonstrate that we cannot assume that agencies will enforce well solely because they are experts in their regulatory domains. Because enforcement itself is an expertise that requires both general and specific knowledge, specialized agencies may be better or worse at enforcement compared to a generalist enforcer. In addition, the decision to lodge enforcement authority in a specialized agency has structural consequences, which can be either positive or negative.

How should institutional actors—Congressional, judicial, and administrative—respond to these tradeoffs? I argue that they attempt to maximize the strengths of specialized enforcement while reducing its weaknesses. At the initial stage, when Congress establishes an agency, the decision to grant enforcement authority should not follow automatically as a matter of course. For certain types of violations, federal enforcement authority should live in a generalist agency. Moreover, when Congress creates an agency with enforcement authority, that agency should specialize only to the point where the benefits outweigh the costs, but no further.

The judiciary, in turn, should avoid assuming that all enforcement choices should receive identical deference. Agencies vary in their enforcement capacity and judicial deference across the enforcement choices of agencies should vary as well. Similarly, within a given agency, different decisions that now are labeled “enforcement” should be treated differently. Decisions that are closely tied to the agency expertise and regulatory mission should receive significant deference, while those that are more generalist enforcement choices should receive less.

Enforcement agencies themselves should also recognize their relative strengths and weaknesses in making choices about collaboration and coordination. Different enforcement agencies can work together to use the advantages of one agency to compensate for the shortcomings of others. While this type of coordination now frequently happens on the level of individual



cases, agencies need to take the next step and coordinate on the policy level as well.

#### A. CONSEQUENCES FOR CONGRESS: STRUCTURING AGENCIES

For Congress, the relative value of generalist and specialist enforcement needs to be considered when agencies are initially established. Enforcement authority should be specialized to the extent that the value of expertise in the subject matter overcomes the loss of general enforcement knowledge, but no further.

Where enforcement tasks are truly subject matter specific, industry expertise may overshadow enforcement expertise. The NRC's enforcement of engineering safety standards in the nuclear industry is intimately intertwined with the agency's regulatory policy choices. The agency draws heavily on internal experts with a deep knowledge of nuclear power plant operations.<sup>195</sup> In addition, the types of violations that occur in the industry are fundamentally different than those pursued in other enforcement environments.<sup>196</sup> Placing enforcement of these standards in a generalist enforcement agency would almost certainly be a mistake. However, even in this case, specialization has its costs. NRC enforcement has struggled with its treatment of whistleblowers<sup>197</sup> and with the level of influence exercised by regulated entities over the enforcement process.<sup>198</sup> As discussed above, these are predictable consequences of enforcement specialization.<sup>199</sup>

In contrast, though, other agencies enforce similar standards in closely related industries. Take, for example, the enforcement arms of the SEC and the Commodity Futures Trad-

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195. The investigation leading to the Oyster Creek renewal discussed in the previous section shows the extent of NRC reliance on staff experts. The agency considered a broad range of submissions including a nearly 900 page safety report on the operation of the plant, drawing on a wide range of staff experts. See U.S. NUCLEAR REGULATORY COMM'N, SAFETY EVALUATION REPORT (2006), available at <http://pbadupws.nrc.gov/docs/ML0623/ML062300330.pdf>.

196. Nuclear power plants are a common example of a "tightly coupled" system where a series of small failures can interact in surprising and unexpected ways, producing catastrophic results. See CHARLES PERROW, NORMAL ACCIDENTS: LIVING WITH HIGH RISK TECHNOLOGIES 32-61 (1999) (using power plant operations as a case study of this type of system).

197. CHARLES PERROW, THE NEXT CATASTROPHE: REDUCING OUR VULNERABILITIES TO NATURAL, INDUSTRIAL, AND TERRORIST DISASTERS 160-63 (2007) (discussing NRC treatment of whistleblowers).

198. *Id.* at 168-70 (discussing capture of the enforcement function).

199. See *supra* Parts II.C and III.A.

ing Commission. The SEC enforces statutes that are designed to ensure fairness in the securities markets and prevent fraud.<sup>200</sup> The CFTC enforces similar statutes aimed at regulating the commodities markets and preventing fraud.<sup>201</sup> These enforcement missions have similar legal foundations and are designed to serve similar purposes in protecting the markets and participants.<sup>202</sup>

Moreover, these markets are similar to each other but different from others. Both agencies essentially regulate the same types of transactions.<sup>203</sup> For example, the types of fraud that occur in the marketing of commodities and securities often look similar. In both markets, customers can be deceived by false claims about the future value (or the simple existence) of the product. However, enforcement in both markets exists within a complex regulatory scheme. SEC and CFTC enforcement actions frequently rely heavily on similar expert testimony, especially from economists, drawn from other portions of the agency.<sup>204</sup>

While there are differences in the securities and commodities markets, the differences probably do not justify dividing these enforcement tasks across these agencies. As a result, this Article provides additional support for a commonly proposed merger—joining together financial regulatory agencies.<sup>205</sup> Merging the SEC and the CFTC has been frequently suggested<sup>206</sup>

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200. See Securities Act of 1933, 15 U.S.C. §§ 77a–77aa (2012).

201. See Commodity Exchange Act of 1936, 7 U.S.C. §§ 1–27f (2012).

202. The similarity between the agencies' goals is apparent in their mission statements. Compare *The Investor's Advocate*, U.S. SEC. & EXCHANGE COMMISSION (June 10, 2013), <http://www.sec.gov/about/whatwedo.shtml> (mission is “to protect investors, maintain fair, orderly, and efficient markets, and facilitate capital formation”), with *CFTC Mission Statement*, U.S. COMMODITY FUTURES TRADING COMMISSION, <http://www.cftc.gov/reports/strategicplan/2015/2015strategicplan01.html> (last visited Apr. 20, 2015) (describing its mission, which is to “protect market users and the public from fraud, manipulation, abusive practices and systemic risk related to derivatives that are subject to the Commodity Exchange Act, and to foster open, competitive, and financially sound markets”).

203. See Brett McDonnell, *Don't Panic! Defending Cowardly Interventions During and After a Financial Crisis*, 116 PENN. ST. L. REV. 1, 68–69 (2011) (“The differences between [the SEC's and CFTC's] subject areas are merely historical; in essence, both agencies regulate securities trading.”).

204. See Joseph W. Yockey, *Choosing Governance in the FCPA Reform Debate*, 38 J. CORP. L. 325, 374 (2013) (noting use of agency experts, including economists, to supplement enforcement expertise).

205. See Stavros Gadinis, *From Independence to Politics in Financial Regulation*, 101 CAL. L. REV. 327, 365 (2013) (discussing domestic and international merger proposals).

206. See, e.g., Jerry W. Markham, *Merging the SEC and CFTC—A Clash of*

and reached the point of a formal proposal by the Department of the Treasury.<sup>207</sup> The analysis above suggests that the enforcement consequences of the merger could be quite beneficial.

Revising the structure of existing agencies is a difficult task,<sup>208</sup> of course, but the creation of new enforcement authority is not rare. The newly established Consumer Financial Protection Bureau (CFPB) is just one agency that has recently been given authorization to enforce.<sup>209</sup> It provides a clear example of an agency struggling to overcome the costs of specialized enforcement. As discussed above in Part III, new enforcement agencies are required to revisit issues that have already received significant attention in older, more generalist enforcement contexts. With respect to prosecutorial discretion, agencies need to decide which defendants to charge and which defendants to let go.<sup>210</sup> When agencies charge defendants, they need to decide an appropriate penalty.<sup>211</sup> As they conduct investigations, they need to provide appropriate incentives to informants, cooperators, and whistleblowers.<sup>212</sup>

To date, the CFPB has had mixed success on these fronts. To its credit, the CFPB quickly established a policy relating to prosecutorial discretion. In the middle of 2013, the agency promulgated a guidance document on the factors that will affect its exercise of enforcement discretion.<sup>213</sup> At the highest level, these include the severity of the violation, the harm, and the party's prior conduct.<sup>214</sup> Usefully, the agency has made clear

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*Cultures*, 78 U. CIN. L. REV. 537, 572 n.195, 573 (2009) (discussing proposals); Mark Frederick Hoffman, Note, *Decreasing the Costs of Jurisdictional Gridlock: Merger of the Securities and Exchange Commission and the Commodity Futures Trading Commission*, 28 U. MICH. J.L. REFORM 681 (1995); John D. Benson, Comment, *Ending the Turf Wars: Support For a CFTC/SEC Consolidation*, 36 VILL. L. REV. 1175 (1991).

207. U.S. DEP'T OF THE TREASURY, BLUEPRINT FOR A MODERNIZED FINANCIAL REGULATORY STRUCTURE 115 (2008) (discussing preparing "for a potential merger of the CFTC and the SEC").

208. See Freeman & Rossi, *supra* note 10, at 1151–53 (discussing the difficulties of consolidating and restructuring existing agencies).

209. See generally 12 U.S.C. § 5562 (2012) (granting the CFPB enforcement authority).

210. See *supra* Part II.A.

211. See *supra* Part II.B.

212. See *supra* Part II.C.

213. See *CFPB Bulletin 2013-06*, CONSUMER FIN. PROTECTION BUREAU (June 25, 2013), [http://files.consumerfinance.gov/f/201306\\_cfpb\\_bulletin\\_responsible-conduct.pdf](http://files.consumerfinance.gov/f/201306_cfpb_bulletin_responsible-conduct.pdf).

214. *Id.* at 1 (noting the importance of "(1) the nature, extent, and severity of the violations identified; (2) the actual or potential harm from those violations; (3) whether there is a history of past violations; and (4) a party's effec-

that penalty reductions are available for what it calls “responsible conduct,” a combination of compliance-oriented responses to violations that include identifying the violation internally, reporting it to the government, cooperating with any investigation, and remediating any harm.<sup>215</sup> These are the correct considerations for compliance efforts by violators and an early, clear statement of their importance is the correct approach for an enforcement agency.

Other components of the enforcement process, though, are weaker. The CFPB policy designed to develop insider information is brief and limited.<sup>216</sup> It elicits information from members of the public including current and former employees of violators or their competitors.<sup>217</sup> It does not, though, explain how the agency will treat those insiders and others. Will they be subject to administrative or criminal enforcement actions if they disclose their own misconduct? Will they be protected from third-party sanctions?<sup>218</sup> Will the agency provide financial rewards for information? A more detailed and forthcoming policy would provide useful guidance for those potentially motivated to come forward.

Similarly, the CFPB has not clearly explained how it reaches a final penalty amount. Consider the agency’s first major enforcement action against a payday lender—a November 2013 settlement with Cash America.<sup>219</sup> Cash America agreed to pay \$5 million in penalties and \$14 million in refunds. The set-

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tiveness in addressing violations”).

215. *Id.* (obtaining reduced penalties is possible in cases where parties “proactively self-police for potential violations, promptly self-report to the Bureau when it identifies potential violations, quickly and completely remediate the harm resulting from violations, and affirmatively cooperate with any Bureau investigation above and beyond what is required.”).

216. See *CFPB Bulletin 2011-05 (Enforcement and Fair Lending)*, CONSUMER FIN. PROTECTION BUREAU (Dec. 15, 2011), [http://files.consumerfinance.gov/f/2011/12/CFPB\\_Enforcement\\_Bulletin\\_12-15-11.pdf](http://files.consumerfinance.gov/f/2011/12/CFPB_Enforcement_Bulletin_12-15-11.pdf).

217. *Id.* at 1 (seeking information from “current or former employees of potential violators, contractors, vendors, and competitor companies”).

218. The policy includes generic references to statutory whistleblower protections in Dodd-Frank and the possibility of enforcement by the Secretary of Labor. *Id.* However, it does not indicate whether the CFPB will use treatment of whistleblowers as a consideration in its own enforcement actions.

219. The settlement resolved multiple alleged violations, including claims that the payday lender engaged in robo-signing practices, violated regulations on loans to servicemembers, and obstructed the investigation. See *Consumer Financial Protection Bureau Takes Action Against Payday Lender For Robo-Signing*, CONSUMER FIN. PROTECTION BUREAU (Nov. 20, 2013), <http://www.consumerfinance.gov/newsroom/consumer-financial-protection-bureau-takes-action-against-payday-lender-for-robo-signing>.

tlement, though, provides no justification for the penalty amount.<sup>220</sup> Instead, it simply indicates that it takes “into account the factors set forth” in the governing statute,<sup>221</sup> “including the substantial redress provided to consumers and Respondent’s cooperation . . . .”<sup>222</sup> The Bureau gave no explanation why this was a case requiring a \$5 million civil penalty rather than a \$1 million, \$10 million, or \$50 million case.

As discussed above,<sup>223</sup> clarity in the penalty process is especially important in the context of regulatory overlap. The CFPB regulates entities that also face aggressive, large penalties from other enforcement bodies. For instance, along with the SEC and others, the CFPB jointly regulates large financial institutions, like J.P. Morgan Chase. In fact, in September 2013, the CFPB entered into a consent decree with Chase for violations relating to its credit card operations.<sup>224</sup> The action was significant—Chase was required to pay a \$20 million civil penalty and provide an estimated \$309 million in refunds to consumers.<sup>225</sup> On the same day, though, Chase also entered into a consent decree with the SEC involving activities by traders fraudulently overvaluing investments to conceal losses.<sup>226</sup> This action produced a total penalty of \$920 million to various regulators, including a \$200 million penalty to the SEC.<sup>227</sup>

It is certainly unusual to see two large, simultaneous, un-

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220. See Consent Order, Cash Am. Int’l, Inc., No. 2013-CFPB-0008 (Nov. 20, 2013), available at [http://files.consumerfinance.gov/f/201311\\_cfpb\\_cashamerica\\_consent-order.pdf](http://files.consumerfinance.gov/f/201311_cfpb_cashamerica_consent-order.pdf).

221. *Id.* at 14. Federal Statute, 12 U.S.C. § 5565(c) (2012), requires the Bureau to consider the size of financial resources and good faith of the person charged, the gravity of the violation or failure to pay, the severity of the risk to or losses of the consumer, the history of previous violations, and such other matters as justice may require.

222. See Consent Order, *supra* note 220, at 14.

223. See *supra* Part III.B.

224. See Consent Order, JP Morgan Chase Bank, N.A., No. 2013-CFPB-0007 (Sept. 19, 2013), available at [http://files.consumerfinance.gov/f/201309\\_cfpb\\_jpmc\\_consent-order.pdf](http://files.consumerfinance.gov/f/201309_cfpb_jpmc_consent-order.pdf).

225. *CFPB Orders Chase and JPMorgan Chase To Pay \$309 Million Refund for Illegal Credit Card Practices*, CONSUMER FIN. PROTECTION BUREAU (Sept. 29, 2013), <http://www.consumerfinance.gov/newsroom/cfpb-orders-chase-and-jpmorgan-chase-to-pay-309-million-refund-for-illegal-credit-card-practices/>.

226. Order Instituting Cease-and-Desist Proceedings, Exchange Act Release No. 70,458, 107 SEC Docket 4 (Sept. 19, 2013), available at <http://www.sec.gov/litigation/admin/2013/34-70458.pdf>.

227. See *JPMorgan Chase Agrees To Pay \$200 Million and Admits Wrongdoing To Settle SEC Charges*, U.S. SEC. & EXCHANGE COMMISSION (Sept. 19, 2013), <http://www.sec.gov/News/PressRelease/Detail/PressRelease/1370539819965>.

related enforcement actions against the same entity, but the overall issue is common. How will the CFPB set its penalties compared to those imposed by the SEC (and vice versa)? While Chase clearly would prefer to avoid either penalty, it necessarily must focus on the much larger SEC action. Because the enforcement agencies are separate, though, there is no guarantee of comparability. One option, discussed below, is agency coordination. An equally viable alternative, though, is penalty clarity. Both agencies should explain which cases require a \$200 million penalty and which cases deserve a \$20 million sanction.

The CFPB is a new agency and of course it will develop a pattern of penalties as time passes. Eventually this history will provide guidance to the entities it regulates. In the interim, though, we see a version of regulatory uncertainty—enforcement uncertainty. The decision to create a new enforcement agency, rather than vest enforcement responsibility in an existing body, inevitably creates these transition costs. Newly created enforcement agencies need to learn lessons and develop policies about enforcement, tasks that have already been accomplished in other agencies. These costs may be worth paying, but Congress should not incur them casually.

#### B. CONSEQUENCES FOR COURTS: COMPARATIVE DEFERENCE

The comparative strengths and weaknesses of specialized enforcement provide lessons for the courts as well. In particular, they should shape the judicial decision about setting the level of deference to agency enforcement choices. The case law on enforcement deference has frequently invoked two equalities. First, the Supreme Court has expressed a notion of equal deference across enforcement agencies. If the DOJ would receive deference in a particular realm of criminal enforcement, the Court will defer to civil administrative agencies on the same grounds. For example, *Heckler* refused to closely scrutinize the decision not to bring an enforcement action.<sup>228</sup> In doing so, the Supreme Court explicitly compared the choice not to enforce to the decision of the executive not to indict in a criminal case, “a decision which has long been regarded as the special province of the Executive Branch.”<sup>229</sup> Similarly, in *Marshall v. Jerrico*, the Supreme Court accepted an administrative structure where civil enforcement agencies received a financial incentive from increasing civil penalty recoveries.<sup>230</sup> Because

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228. *Heckler v. Chaney*, 470 U.S. 821, 838 (1985).

229. *Id.* at 832.

230. *Marshall v. Jerrico, Inc.*, 446 U.S. 238, 248 (1980).

comparable incentives did not contaminate criminal prosecutions, the Court applied equal deference to civil enforcement.<sup>231</sup>

Second, courts have also applied notions of equality across different components of the enforcement process. *Heckler* establishes strong deference to the decision not to initiate enforcement actions. Similarly strong deference applies when an administrative agency decides to abandon an action and withdraw a claim that a regulated entity violated the law.<sup>232</sup> With respect to the penalty imposed, the Court defers to the agency not only in terms of its size,<sup>233</sup> but also in terms of its timing.<sup>234</sup> The Court gives roughly equal (and strong) deference to all of these aspects of the enforcement process.

With respect to judicial deference to agency enforcement, the relative strengths and weaknesses of generalist and specialist enforcement suggest that both of these equalities are misguided. Rather than equal deference, courts should look to a model of *comparative* deference. Different agencies and different enforcement choices should receive different levels of deference. If deference is based on agency expertise at enforcement, courts should treat the deference given to a generalist enforcer, such as the Department of Justice, as the outer boundary of the deference given to the enforcement decisions of administrative agencies. Similarly, greater deference should be given agency decisions that are more specialized and more closely tied to the agency's regulatory mission.

As an initial example, consider claims of selective prosecution. As a general matter, federal prosecutions are virtually immune to these arguments.<sup>235</sup> The Supreme Court has effectively limited the defense to cases where the defendant can demonstrate that the government initiated the prosecution for

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231. *Id.*

232. *Cuyahoga Valley R.R. Co. v. Transp. Union*, 474 U.S. 3, 6 (1985); *see also Ass'n of Irrigated Residents v. EPA*, 494 F.3d 1027, 1032–33 (D.C. Cir. 2007) (deferring to decision to settle enforcement action because decision to settle are “judgments—arising from considerations of resource allocation, agency priorities, and costs of alternatives—[that] are well within the agency’s expertise and discretion”).

233. *Butz v. Glover Livestock Comm’n Co.*, 411 U.S. 182, 185–86 (1973).

234. *Moog Indust. v. FTC*, 355 U.S. 411, 413–14 (1958) (deciding that an order should apply immediately to a given entity is within agency discretion).

235. *See, e.g., United States v. Armstrong*, 517 U.S. 456, 463 (1996) (“Our cases delineating the necessary elements to prove a claim of selective prosecution have taken great pains to explain that the standard is a demanding one.”); *Wayte v. United States*, 470 U.S. 598, 607 (1985) (“In our criminal justice system, the Government retains ‘broad discretion’ as to whom to prosecute.”).

constitutionally prohibited reasons, such as race or religion.<sup>236</sup> Despite its criminal law foundation, the reasons for this deference resonate strongly with administrative law doctrine. The Supreme Court has assumed that federal prosecutors are particularly well suited (and judges are particularly poorly placed) to engage in the tradeoffs necessary to making charging decisions.<sup>237</sup> As a result, the Supreme Court has assigned a “presumption of regularity” to federal indictments that is ordinarily not subject to selective prosecution challenges.<sup>238</sup>

The Courts of Appeals have applied a principle of equal deference to administrative enforcement actions. These criminal law foundations rejecting selective prosecution claims have applied with the same strength when agencies bring civil enforcement claims.<sup>239</sup> The arguments outlined in Part III, though, suggest that more scrutiny is likely to be appropriate in the administrative context. Administrative investigations are more likely to be shaped by the process of regulatory capture. Lack of public scrutiny produces underenforcement in ordinary times, while the opposite occurs in the wake of a regulatory failure. Because specialized agency enforcement is more subject to pressures from the political branches, more judicial scrutiny is likely to be warranted. Selective enforcement claims are more likely to have merit when the process of making those charging decisions is more vulnerable.

Similarly, with respect to investigative choices, agencies should receive at least as much review as the DOJ. The decision to provide a favorable resolution to witnesses who assist in a prosecution receives some scrutiny now, largely through disclosure requirements. The government is required to reveal exculpatory information to the defense, including information relating to benefits provided to witnesses.<sup>240</sup> It is unclear whether

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236. *Oyler v. Boles*, 368 U. S. 448, 456 (1962).

237. *Wayte*, 470 U.S. at 607 (“This broad discretion rests largely on the recognition that the decision to prosecute is particularly ill-suited to judicial review. Such factors as the strength of the case, the prosecution’s general deterrence value, the Government’s enforcement priorities, and the case’s relationship to the Government’s overall enforcement plan are not readily susceptible to the kind of analysis the courts are competent to undertake.”).

238. *Armstrong*, 517 U.S. at 464.

239. See, e.g., *Martex Farms, S.E. v. EPA*, 559 F.3d 29, 32–33 (1st Cir. 2009) (applying criminal law principles to reject selective prosecution arguments in EPA enforcement action); *Fog Cutter Capital Grp. Inc. v. SEC*, 474 F.3d 822, 826–27 (D.C. Cir. 2007) (applying *Armstrong* in SEC action); *United States v. Sage Pharm., Inc.*, 210 F.3d 475, 480 (5th Cir. 2000) (applying *Armstrong* in FDA enforcement action).

240. Criminal defendants are entitled to any information that is favorable



these constitutional disclosure requirements extend to civil enforcement cases.<sup>241</sup> As a matter of policy, though, they should. To the extent that agencies provide benefits to witnesses, courts should provide at least as much scrutiny to them as they would in the case of a criminal prosecution.

Finally, agency settlements should receive at least as much scrutiny as criminal plea agreements. Admittedly, the review of plea agreements in the criminal context is limited. However, it is still greater than the scrutiny courts give to agency enforcement settlements.<sup>242</sup> If agencies can be seen, on average, as less capable at generalist enforcement functions than the DOJ, the deference to this pure enforcement choice should also be less. This approach would suggest that courts have the deference calculus backwards—agency settlements need more scrutiny than a plea bargain with comparable consequences.

To be sure, there are many other reasons for courts to defer (or not) to enforcement choices. The specialized expertise that enforcement agencies bring to the table is only one consideration in setting the appropriate level of scrutiny that courts should apply. At the very least, the higher stakes in criminal prosecutions as compared to civil regulatory enforcement should affect the level of judicial deference. To the extent, though, that a rule of deference is based on the specialized enforcement skill of the charging agency, specialized enforcers and generalist enforcers should not be treated as identical. Instead, the deference to the generalist enforcer should place an outer boundary on the deference given to other agencies.

In turn, courts should defer *more* to enforcement choices by administrative agencies that are closely tied to their regulatory mission. In many cases, actions labeled as “enforcement” decisions really are substantive regulatory decisions. For example, compare the foundational cases of *Butz v. Glover Livestock*<sup>243</sup> and *Moog v. Federal Trade Commission*.<sup>244</sup> *Butz*, discussed

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to the accused. *Brady v. Maryland*, 373 U.S. 83, 87 (1963). This protection extends to information that relates to the credibility of government witnesses. *Giglio v. United States*, 405 U.S. 150, 154–55 (1972).

241. See *Mister Disc. Stockbrokers v. SEC*, 768 F.2d 875, 878 (7th Cir. 1985) (refusing to apply *Brady* in securities enforcement action); *NLRB v. Nueva Eng'g, Inc.*, 761 F.2d 961, 969 (4th Cir. 1985) (holding *Brady* unavailable in NLRB actions).

242. Federal Rule of Criminal Procedure 11 requires a detailed process for accepting a guilty plea, including establishing that a factual basis for the plea exists. See FED. R. CRIM. P. 11(b). No comparable requirement exists for most civil enforcement settlements.

243. *Butz v. Glover Livestock Comm'n Co.*, 411 U.S. 182 (1973).

244. *Moog Indus. v. FTC*, 355 U.S. 411 (1958).

above,<sup>245</sup> set a strong standard of deference to agency penalty choices. Courts will provide only very limited review of the sanction imposed for administrative violations.<sup>246</sup> In *Moog*, the Court confronted a request to review an agency's decision to delay (or not) an order enjoining an anticompetitive practice.<sup>247</sup> The target of the order argued that the practice was widespread in the industry and sought to postpone its imposition until other market participants were subject to the same requirement.<sup>248</sup> The Court rejected this argument and deferred to the agency decision.<sup>249</sup>

In light of the discussion in Part III, *Moog* is likely correct. The decision to impose a requirement on only one entity or the entire market is not a mere generalist enforcement choice. It is deeply intertwined with the agency's specialized mission. At the core, it is a decision whether to engage in policymaking by rule or adjudication.<sup>250</sup> As a result, deference to the agency decision is appropriate here. The decision draws on specialized agency knowledge, not broad "enforcement" capabilities.

In contrast, the deference to penalty choices is more complex. The order at issue in *Butz* itself was effectively injunctive in nature—the agency imposed a cease-and-desist order on the violator, required him to keep accurate records, and suspended him from the industry for a brief period.<sup>251</sup> This decision fits naturally in the type of remedy where we should expect specialized agencies to shine. It draws on industry expertise, not generic enforcement knowledge.

That deference, though, has not been limited to orders that are injunctive in nature. Numerous courts of appeals have extended *Butz* to civil penalties.<sup>252</sup> This decision is much more difficult to defend. Penalty calculation involves significant generalist enforcement expertise. Specialized, industry-specific knowledge matters far less when the sanction is the equivalent of a fine rather than a compliance order.<sup>253</sup> As a result, courts

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245. See *supra* Section I.A.

246. *Butz*, 411 U.S. at 185–87.

247. 355 U.S. at 413.

248. *Id.*

249. *Id.*

250. *SEC v. Chenery Corp.*, 332 U.S. 194, 203 (1947).

251. 411 U.S. at 184.

252. See, e.g., *VanCook v. SEC*, 653 F.3d 130, 143–44 (2d Cir. 2011) (applying *Butz* to SEC penalty); *Vidiksis v. EPA*, 612 F.3d 1150, 1154 (11th Cir. 2010) (EPA penalty); *Sultan Chemists, Inc. v. EPA*, 281 F.3d 73, 83 (3d Cir. 2002) (same).

253. See *supra* Section III.C.

should defer less when the sanction is monetary.

None of this analysis answers the ultimate question about the absolute level of judicial discretion in the enforcement context. Others have certainly argued persuasively that *Heckler*, for example, sets the bar of judicial review too low.<sup>254</sup> This may well be correct—understanding that specialized enforcement has strengths and weaknesses compared to generalist enforcers does not identify the right level of deference to agency enforcement decisions in the abstract. Nor does it predict the appropriate level of deference to enforcement choices compared to other agency decisions. Instead, it suggests the appropriate *relative* level of deference within the universe of enforcement choices. Enforcement choices made by specialized agencies within their area of expertise should receive more deference than choices by those same agencies that require enforcement knowledge more generally. Similarly, for enforcement choices that are outside that realm and are more general in nature, courts should defer less to agencies than to a generalist enforcer.

### C. CONSEQUENCES FOR AGENCIES: COLLABORATIVE ENFORCEMENT

Perhaps the most important normative response to the current structure of agency enforcement is the most straightforward. Enforcers need to collaborate and coordinate enforcement actions. Other scholars have strongly advocated for coordination of enforcement functions in specific contexts.<sup>255</sup> The costs and benefits outlined in the sections above support and

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254. Soon after *Heckler* came down, Cass Sunstein advocated for permitting challenges to nonenforcement decisions based on certain identified grounds: constitutionally impermissible factors; absence of jurisdiction; statutorily irrelevant factors; patterns of nonenforcement; refusals to enforce; and failures to initiate rulemakings. Cass R. Sunstein, *Reviewing Agency Inaction After Heckler v. Chaney*, 52 U. CHI. L. REV. 653, 675–83 (1985). More recent critiques have proposed even more searching review of inaction. See Ashutosh Bhagwat, *Three-Branch Monte*, 72 NOTRE DAME L. REV. 157, 182 (1996) (arguing for a *Chenery*-style review requiring an agency to state its reasons); Lisa Schultz Bressman, *Judicial Review of Agency Inaction: An Arbitrariness Approach*, 79 N.Y.U. L. REV. 1657, 1686 (2004) (advocating arbitrariness review); Glen Staszewski, *The Federal Inaction Commission*, 59 EMORY L.J. 369, 372 (2009) (advocating for an administrative agency response).

255. See, e.g., Anthony S. Barkow & Rachel E. Barkow, *Conclusion*, in PROSECUTORS IN THE BOARDROOM, *supra* note 36, at 249, 250–52 (emphasizing the value of cross-enforcer coordination in the deferred prosecution context); Zimmerman, *supra* note 161, at 556–57 (noting that agency enforcement actions should be responsive to private class action litigations); *Id.* at 557 n.283 (identifying others making similar arguments).

extend these recommendations. The relative weaknesses of specialized and generalist enforcers can be largely eliminated when paired with the corresponding strengths of their counterparts.

At the charging stage, joint enforcement actions between enforcement agencies can leverage the expertise of the generalist enforcer in allocating responsibility between individuals and corporations. It also takes advantage of the industry expertise of the specialist. By ensuring that specialized enforcers have input at the charging stage, all enforcement agencies can avoid undermining valuable industry norms of compliance. Similarly, expert agency input can help target enforcement actions in areas where those norms need to be strengthened.

Joint resolutions have similar benefits. A global resolution by multiple enforcers can reduce or eliminate the silo effect described above. By simultaneously concluding charges brought by multiple agencies, the incentives of the target of the enforcement action and the public enforcers are brought into alignment. Consequences that would otherwise be collateral to the action become direct and, as a result, are subject to negotiation between the defendant and the agencies. Similarly, the problems of scaling penalties are reduced. If all enforcers obtain their penalties simultaneously, they are far more likely to be set in coordination with one another. Finally, if a specialist agency is involved in the resolution of the enforcement action, it will have the opportunity to participate in any settlement requiring ongoing monitoring. As discussed above, there are strong reasons to believe that specialist agencies are much better positioned to monitor ongoing conduct than a generalist enforcer.

Despite these benefits, enforcement coordination is far from inevitable. As the Supreme Court has recognized, public enforcement can be competitive.<sup>256</sup> Federal agencies compete horizontally for enforcement targets—most famously, the SEC and the CFTC have had jurisdictional clashes.<sup>257</sup> Federal and state agencies compete vertically as they chase similar enforcement actions. This competition is especially fierce when

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256. *Johnson v. United States*, 333 U.S. 10, 14 (1948) (justifying magistrate's involvement in the probable cause process given "the often competitive enterprise of ferreting out crime").

257. See Lemos & Minzner, *supra* note 103, at 902 (discussing the difference between horizontal and vertical enforcement and collecting sources on SEC/CFTC competition).

the dollars involved are large.<sup>258</sup>

In practice, enforcement coordination does occur and is frequently successful. Major enforcement actions now often involve simultaneous resolution by multiple agencies. As one example, the September 2013 fraud settlement described above led to not only a \$200 million civil penalty for the SEC, but a total of \$920 million in penalties to federal and international regulators.<sup>259</sup> These case-by-case collaborations are increasingly common and extremely valuable.<sup>260</sup>

Enforcement agencies, though, are less likely to take the important second step and collaborate across *enforcement regimes*. Collaboration mostly happens in individual actions and on an *ad hoc* basis.<sup>261</sup> Equally important, though, agencies need to coordinate at the policy level. Return again to the example of penalty calculation. Penalty coordination is extremely important in individual cases, but conveying the appropriate message to regulated entities requires more. Systems of penalties need coordination as well. However, for many agencies, this level of cross-agency communication is impossible, because they have not taken the first step of clearly identifying their method for calculating penalties in the agency itself. External coordination cannot precede internal coordination.

Similar questions arise with cooperators, informants, and whistleblowers. To the extent that potential cooperators provide information disclosing their own misconduct, they need to know how that disclosure will affect liability in all enforcement regimes, not merely the one maintained by the agency first receiving the information. As is true with penalty calculations, though, agencies that have not yet reached an internal decision how to handle cooperators cannot engage in cross-agency collaboration on their treatment.<sup>262</sup>

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258. *Id.* (describing the effect of financial incentives on enforcement competition).

259. *See supra* note 227. The other regulators involved were the U.K. Financial Conduct Authority, the Federal Reserve, and the Office of the Comptroller of the Currency. *Id.*

260. Brandon L. Garrett, *Collaborative Organizational Prosecution*, in PROSECUTORS IN THE BOARDROOM, *supra* note 36, at 154, 155 (“[P]rosecutors and regulators collaborate in joint adjudication. What has been little recognized is that many federal organizational prosecution agreements were negotiated jointly with regulatory agencies.”).

261. *Id.* (noting the problem and arguing for greater policy coordination across agencies).

262. In some cases, agencies have tried to coordinate their whistleblower programs. For example, the SEC and the CFTC have made significant efforts to make the programs comparable. Of course, defense counsel have quickly

Finally, enforcement regimes should not just be coordinated with each other enforcement regime. As described above,<sup>263</sup> one of the key advantages of specialized agency enforcement is the availability of other agency tools to achieve regulatory goals, either instead of or in addition to enforcement actions. Regulatory agencies need to use these tools respond to the problems identified by enforcement actions, either the agency's own investigations or those brought by a generalist enforcer like the DOJ. Through substantive law promulgated in rules, the specialist agency can respond to enforcement problems with non-enforcement solutions.

### CONCLUSION

Should agencies enforce? Certainly. Agency enforcement authority is not just desirable, it is now inevitable. This Article demonstrates, though, that it is not an unmixed blessing. Specialized enforcement produces costs along with its benefits. Effective enforcement in complicated industries requires mastery of two areas. Agencies must develop both generalist enforcement capacity and industry-specific knowledge. Specialized agencies start with an advantage in the second step, but at the expense of the first. Agencies also bring structural strengths and weaknesses to the enforcement process. Regulatory capture of the enforcement process becomes more serious as the agency focus narrows. Furthermore, specialized agencies lack the capacity to see enforcement actions through the eyes of the target. They compensate, though, with a greater knowledge of the industry norms and by bringing other components of the administrative process to bear on violations. Institutional actors—Congress, the courts, and agencies themselves—need to consider these strengths and weaknesses as they respond to and shape the agency enforcement process.

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identified and focused on the gaps between the programs. *See, e.g.*, Thomas W. White et al., *CFTC and SEC Whistleblower Bounties: Largely Similar but Important Differences Remain*, WILMERHALE (Aug. 22, 2011), <http://www.wilmerhale.com/pages/publicationsandnewsdetail.aspx?NewsPubId=94288>.

263. *See supra* Section III.C.