PUBLIC ENFORCEMENT OF PRIVATE RIGHTS

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I. INTRODUCTION

Private law refers to "[t]he body of law dealing with private persons and their property and relationships." Private laws include property laws, contract laws, and tort laws, among others. They generally involve situations in which two private entities (individuals or corporations) enter into a voluntary (e.g., contract laws) or involuntary (e.g., tort laws) relationship. While by definition they do not involve governmental entities, governmental entities regularly intervene in these private affairs.

Adding a third party complicates any negotiation and creates inefficiencies. First, additional parties increase the transaction and negotiation costs because that additional party also needs to agree to the terms. Second, multiple parties on the same side of the table can create conflicts of interest. Governmental agencies, whether federal or state, enforce private laws to restore aggrieved parties to where they would have been but for the injury. Governmental agencies may also elect to deter wrongful behaviors.2

In spite of these issues, governmental entities have a role to play to improve social welfare. Previous scholars have attempted to determine when the government should intervene in private disputes.3 This Article looks at how the government should intervene in private affairs. Specifically, this Article argues that private actions should not complement public actions, but instead, public actions should complement private actions.

Recent research has focused on governmental intervention when the government works as an aggregator of claims.4 But governmental

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1 Private law, Black’s Law Dictionary (9th ed. 2009).
4 See, e.g., Margaret H. Lemos, Aggregate Litigation Goes Public: Representative
agencies also act as subsidizers of suits. Whether the government acts as an aggregator or a subsidizer, it often approaches the problem in the same way. But the approaches should differ. This Article compares both of the government’s roles and shows that while they have similar features, both require different tools.

Public enforcement of private rights will likely increase in the near future. Legal changes such as recent class action Supreme Court decisions, detailed below, make purely private actions more difficult and create opportunities for the public actor to step in and enforce private rights. Economic shocks, such as the financial crisis, have created more need and incentive for the government to intervene in private laws. For instance, more individuals may lose their jobs and believe their firing was based on discrimination.

Therefore, this Article argues that an optimal level of enforcement requires public and private actors to act together. But changes must be made. Inefficiencies arise mostly out of ill-defined control over litigation. This ill-defined control creates costs, including dual investigations and races to courts, lack of monitoring and reporting, and agency problems. Procedures, however, can be changed to curb such inefficiencies. Federal courts have advocated for and put in place procedures to improve judicial efficiencies.

While these problems are not unique to the relationship between the government and private claim holder, the government can solve these issues through unique solutions such as grants, subsidies, litigation vouchers, prize inducements, attorneys’ fees, or even simple procedures and cooperation. This Article presents ways in which some of the

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5 See *infra* notes 129-36 and accompanying text.

6 See generally *Fed. R. Civ. P.* § 13 (stating that federal courts require compulsory counterclaims and reject piecemeal appeals); Mohawk Ind., Inc. v. Carpenter, 558 U.S. 100 (2009) (holding that a decision requiring disclosure of a client’s privileged information is not immediately reviewable because it leads to piecemeal appeals and “[e]ffective appellate review can be had by other means.”).
inefficiencies can be averted.

This Article advocates for more efficiency when the government advocates on behalf of private individuals. It takes a welfare economic approach in which public enforcement of private rights involves three actors—society, lawbreakers, and victims—and the government can encourage efficiencies to maximize welfare now and in the future. This Article analyzes different sets of circumstances under which the government ought to control the suits and those under which the government ought to step back. It proceeds through case studies of housing, employment, antitrust, and environmental laws, but the lessons apply also to security and consumer protection laws, among others.7

Part I revisits the introductory remarks. In general, this Article assumes that transaction costs are so high that settlement is impossible.8 In other words, suing is an inexpensive way to negotiate when other alternatives are too expensive. Some suits may or may not be privately efficient and/or socially efficient. A suit is privately efficient if a private plaintiff recovers more in damages than he expends in litigation costs. If the added values of suit, such as deterrence, outweigh the suit costs, including the government born costs, it becomes socially efficient.

Part II describes the conflicts that can arise when a governmental entity enforces the rights of an aggrieved individual because the two entities have diverging goals. These conflicts translate into a struggle over the direction of suits. From a general welfare standpoint, the overlaps9 of the public and private enforcement lead to

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7 For a discussion of the various overlaps between public and private enforcement, see Clopton, *supra* note 4 (discussing antitrust, securities law, civil rights, labor, employment, housing, the Employee Retirement Income Securities Act, racketeering, influenced and corrupt organizations, and the Muhammad Ali Boxing Reform Act, among others).

8 This assumption should be contrasted with Steven Shavell’s analysis in *The Fundamental Divergence between the Private and the Social Motive to Use the Legal System*, 26 J. LEGAL STUD. 575 (1997) [Shavell henceforth], where Shavell discusses the inefficiencies of the legal system because private plaintiffs do not consider the entire social cost. *Id.* at 595.

9 Further overlaps are not addressed here: public enforcement may fall victim to federal and state overlap or multiple agency overlap. *See, e.g.*, Margaret H. Lemos,
inefficiencies that can be linked to too much enforcement\textsuperscript{10} and the identity of the enforcer.\textsuperscript{11} The Article explains how the struggle of control is manifested in two ways: a struggle over the damages and a struggle over the decision to settle.

Public entities serve two purposes in enforcing private rights: they aggregate private claims and finance private claims. Part III focuses on the role of public entities as aggregators of private claims. The Supreme Court’s decision in \textit{Mississippi ex rel. Hood v. AU Optronics Corp.} has elicited a number of reactions regarding this role.\textsuperscript{12} In this opinion, the Court asserted that “a suit filed by a State as the sole plaintiff [does not] constitute[] a ‘mass action’ under [the Class Action Fairness Act of 2005] where it includes a claim for restitution based on injuries suffered by the State’s citizens.”\textsuperscript{13} The Court emphasized that state public actions differ from mass actions because public actions need not have named plaintiffs.\textsuperscript{14} These types of actions differ on various other points, which are further investigated in Part III. However, they usually involve substantial damages that incentivize a private right holder to overcome transaction costs. This Article argues that governmental entities should complement private actions when right holders do not or cannot act, instead of behaving under the same incentives as private actors, such as by focusing on large payoffs.

Part IV focuses on the role of public entities as financiers of private claims. In many respects, this role resembles the more debated

\begin{quote}
\textit{State Enforcement of Federal Law}, 86 N.Y.U. L. REV. 698 (2011); see also Jason Marisam, \textit{Duplicative Delegations}, 63 ADMIN. L. REV. 181 (2011) (discussing problems that arise when agencies overlap or when both the state and federal government have jurisdiction or when the federal government delegates enforcement to the state).
\end{quote}

\textsuperscript{10} For a discussion of the enforcement level see Shavell, \textit{supra} note 8 at 576. This Article, however, does not argue that the public and private enforcement ought to be centralized: dual enforcement can serve a purpose if enforcement is suboptimal, and hence dual enforcement, indirectly increases the cost of lawbreaking for the lawbreakers who are pursued.

\textsuperscript{11} For a discussion of the effect of the enforcement type on the enforcement level, see Clopton, \textit{supra} note 4.

\textsuperscript{12} 134 S. Ct. 736 (2014).

\textsuperscript{13} \textit{Id.} at 739.

\textsuperscript{14} \textit{Id.} at 746.
governmental role as a claim aggregator but receives less attention. This Section compares the aggregator and financier roles. Government agencies play a crucial part in enforcing these laws since the private sector offers few substitutes. But the selection process that governmental agencies must put in place to filter the cases needs to help right holders in overcoming the information asymmetries between themselves and the enforcing agency. Subsidizing suits incentivizes aggrieved individuals to complain, but these individuals can struggle to make their case.

Part V concludes by offering the lessons learned from the four previous case studies. First, avoiding inefficiencies should be one of the public enforcer's goals to the same degree as overdeterrence. Part V explains how conflicts of interests arise and when the government should take control or delegate control. Second, case selection remains the most important step for the private entity that enforces private rights, and private right of actions should have the option to bring a suit, and the public enforcer should complement these private actions.

II. PUBLIC AND PRIVATE ENFORCEMENT AND THE GOALS OF PRIVATE LAWS

Governmental entities value deterrence whereas deterrence constitutes a positive externality of private enforcement. Focusing on deterrence may come at the detriment of advancing other priorities. This Section describes the goals of the public enforcer and the private enforcer, how they diverge, and how this divergence creates a struggle over who should control the case.

Every time an individual interacts with society, he or she can abide by or break the law. Under traditional welfare economics assumptions, rational individuals break the law if (and when) it maximizes their expected utility function. This expected utility function depends on the litigation probability, on the probability that a court makes or imposes a punishment, and on the expected punishment.15

16 Id. at 55-56.
Lawbreaking impacts victims and imposes a cost on society. To redress these impacts, society enforces laws through governmental actions or through aggrieved right holder actions, or both. The enforcer must decide between enforcing the law and ignoring the injury. A rational enforcer maximizes his expected utility taking into consideration the costs, the probability of success, and the benefits of enforcement. These considerations differ between governmental actors\(^1\) and private victims. This Section investigates these differences.

A. Incentives and Deterrence

Welfare economics assumes that the government acts like a benevolent social planner: it enforces laws in order to maximize societal welfare. The government can act with reparative or proactive aims to maximize welfare. Reparative actions take the form of restorations and retributions. First, restoration\(^1\) transfers wealth from the lawbreaker to the victim to compensate for the wrongdoing.\(^2\) Restoration attempts to make the victim whole or restore the victim to where he or she would be\(^2\) had it not been for the lawbreaker’s action. Because restoration amounts to a wealth transfer, it does not increase social welfare \textit{ex post}.\(^2\) Rather, it makes the lawbreaker internalize the

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\(^1\) This Article ignores the agency problems associated with the relationship between a governmental enforcer and its employees. \textit{See}, \textit{e.g.}, Adam S. Zimmerman, \textit{Mass Settlement Rivalries}, 82 \textit{U. Cin. L. Rev.} 381, 392 (2013) (arguing that “[p]olitically ambitious attorneys general may prioritize a rapid resolution and big headlines at the expense of victims’ different interests in compensation”); Lemos, \textit{supra} note 9 (arguing that state agents have private incentives that differ from state incentives and that the differences can lead to inefficient enforcement of federal laws).

\(^2\) Louis Kaplow & Steven Shavell, \textit{Fairness Versus Welfare}, 114 \textit{Harv. L. Rev.} 961, 1228 n.659 (2001) (“Yet another theory concerning law enforcement is that punishment is not justified; instead, it is proper for the criminal to make restitution to the victim . . . [which] has much in common with the theory of corrective justice.”) [hereinafter Kaplow].

\(^3\) See \textit{id.} at 1092-95.

\(^4\) \textit{Id.} at 1259 (“[T]he notion that punishment should be proportional to the gravity of an offense does make sense as a crude proxy principle if the purpose of the legal system is to promote individuals’ well-being.”). The authors imply that the enforcement of laws by matching the harm of the victim to the penalty of the offense will not necessarily maximize welfare. \textit{Id.}

\(^5\) \textit{Id.} at 1298-99.
cost of his actions. This internalization has positive externalities (e.g., deterrence). Second, retribution is the "[p]unishment imposed as repayment or revenge for the offense committed." Retribution makes the lawbreaker internalize the cost of his actions without necessarily making the victim whole: if a lawbreaker imposes costs on society, society will impose costs on him. Both restoration and retribution involve elements of justice or fairness for past actions and have deep proactive implications.

Proactive actions take the form of incapacitation, rehabilitation, and deterrence as they are forward looking. Incapacitation means that a lawbreaker is incarcerated because he is believed to constitute a recidivism risk or has formed a lawbreaking habit. Incapacitation is required to prevent future crimes because the expected costs of future crimes outweigh the current incarceration costs. Based upon the same principles, rehabilitation focuses on the lawbreaker's ability to change its lawbreaking preferences (i.e., utility function) through education.

22 Retribution, BLACK'S LAW DICTIONARY (9th ed. 2009).
23 See Kaplow, supra note 18, at 1228-36.
24 The benevolent social planner may also pursue fairness. Fairness does not necessarily contradict welfare economics but requires that it models a utility function of the victim or other members of society that depends on the punishment or the suffering of the lawbreaker. Utility interdependencies are common—such as the utility function of parents depending on the wellbeing of their children; however, these utility functions may lead to comparing the utility increase of one individual with respect to the utility decrease of the next, which is cardinally impossible. Therefore, this discussion focuses on more measurable social welfare analysis.
25 Incapacitation punishes lawbreakers from crimes they have not committed yet. Both rest upon the assumption that individuals who committed a crime have a tendency to commit other crimes in the future, but recidivism and habit formation are two different concepts: recidivism is based on the fact that a lawbreaker will make the same rational decision in the future if faced with the same choices; whereas habit formation is based on the fact that the utility function of the lawbreaker is affected by his or her previous experiences. For a better explanation of habit formation, see Itzhak Gilboa and David Schmeidler, Case-Based Decision Theory, 110 QUARTERLY J. ECON. 605 (1995) (discussing how actions are based on past experience and actors tend to repeat the same actions once they reach a certain level of satisfaction).
26 Kaplow, supra note 18, at 1226.
27 Id. at 1259.
28 This education teaches the lawbreaker that nonbreaching of the law is more rewarding than the alternative or makes lawbreaking less rewarding. This education
While still future oriented, deterrence aims at reducing “the commission of harmful acts through the threat of sanctions.” Deterrence helps decrease future harmful crimes through specific or general deterrence. Past enforcement affects the lawbreaker’s belief regarding the probability of punishment and intensity of punishment in the future. Deterrence may result from reparative and proactive actions. For example, restoration forces a lawbreaker to internalize the injury to his victim and can deter future actions to commit another injury. A government agency can also deter lawbreaking by clarifying the law.

In the private law context, governmental actions remedy wrongdoing in three principal ways: injunctions, civil penalties, and public compensation. An injunction is a proactive remedy that helps deter future lawbreaking by clarifying the rules.

Civil penalties are a form of retribution. From an efficiency standpoint, civil penalties do not improve welfare because they transfer wealth from the lawbreaker to the social planner. The social planner also wastes resources when imposing these costs on the lawbreaker. Civil penalties do, however, indirectly help deter future actions.

Public compensations help restore victims after they are wronged to the utility level they would have reached if not for the lawbreaking. More importantly, they also force the lawbreaker to may take many forms such as teaching a trade or simply readjusting the lawbreakers’ beliefs with regard to the cost and benefits of lawbreaking.

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29 Kaplow, supra note 18, at 1226.
30 See Walter Woon, Crime and Punishment: The Problems of Sentencing, 27 SING. L. REV. 1 (2009) (discussing how specific deterrence signals to a particular lawbreaker that he will be punished in the future and general deterrence signals to all future lawbreakers that they will be punished for committing the same act).
31 Kaplow, supra note 18, at 1259.
32 Shavell, supra note 8, at 578. “[T]he social benefits of trial . . . are associated with, among other factors, the deterrence created by information gained from trial and public exposure of defendant misbehavior.” ld.
33 Cox, supra note 4.
34 Incapacitation and rehabilitation rarely occur in the enforcement of private laws but remain options if the lawbreaker does not fulfill his obligations under injunction, civil penalties, and public compensation.
internalize the cost of lawbreaking, which deters inefficient future lawbreaking—much like civil penalties.

Deterrence may, however, be suboptimal because enforcement is costly and hence incomplete. To reach an optimal deterrence level, enforcement remedies must account for all costs and factors such as the likelihood of detection, enforcement, and success: a lawbreaker must internalize the costs of his actions, which must be augmented to account for all these factors. In other words, public compensation alone may not be sufficient to reach the optimal level of deterrence. The next Section discusses private enforcement of private rights.

**B. Conflicting Incentives**

Aggrieved individuals pursue different goals when enforcing their rights. A rational victim enforces his or her rights when the benefits of enforcing this right outweigh its costs (e.g., litigation costs, transaction costs, etc.). Private parties generally can obtain an injunction or compensatory damages, or both. They can also advance the goals of specific deterrence through an injunction and restitution through compensatory damages.

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35 See generally A. Mitchell Polinsky and Steven Shavell, *Enforcement Costs and the Optimal Magnitude and Probability of Fines*, 35 J. L. & ECON. 133 (1992) (presenting a model where the “optimal fine equals the harm, properly inflated for the chance of not being detected, plus the variable enforcement cost of imposing the fine”).

36 For instance, Shavell, *supra* note 8 discusses how when no insurance system exists, the legal system acts to compensate, and how victims will sue as long as the expected recovery from litigation is greater than the expected cost of litigation. *Id.* at 595.

37 In certain situations, the private party may also obtain punitive damages or a multiple of its damages because of suboptimal enforcement levels. Examples of these situations are investigated in more details below.

38 Retribution does not advance a privately rational actor that only incorporates his own wellbeing into his utility function because the private actor does not get any benefit of it. Some private enforcers may have a utility function that incorporates other’s happiness level in their own utility function (e.g., the lawbreaker’s); these utility functions that depend on others’ function fall outside the scope of this Article. For more details, see Frank B. Cross, *In Praise of Irrational Plaintiffs*, 86 CORNELL L. REV. 1 (2000) (arguing that alteration to the traditional classical economic model lead to better prediction of plaintiff’s behavior and such alterations include vindictiveness, vengeance, and fairness).
Besides a deterring injunction, a private actor wishing to deter lawbreakers has other mechanisms at his or her disposal. To deter lawbreaking, private individuals might prefer nonlegal means because of the costs and delays associated with litigation.\(^3^9\) For instance, a trespass victim can fence his or her property to prevent another entry, a breach-of-contract victim can refuse to enter into another agreement with the contract breaker, or the victim can damage a lawbreaker’s reputation. Therefore, litigation can prove a very inefficient way for a right holder to deter lawbreakers even though aggrieved individuals have fewer alternatives to recoup their losses than through suing lawbreakers.

Through litigation, private parties may inadvertently deter other potential lawbreakers, thus creating general deterrence. Deterrence is a positive externality of private enforcement that private parties do not fully internalize. Since they do not internalize these benefits, aggrieved individuals may end up taking actions that conflict with maximizing social welfare and the public agent’s deterrence goals. For instance, assume that a lawbreaker injures a right holder in the amount of $100. Litigation costs are negligible and a secret settlement would yield $75 while a trial would yield $100 in compensation with a 60% chance of recovery. The trial may deter another lawbreaker in the future if the lawbreaker is found liable. If the private victim enforces her private right, she essentially must decide between $75 from a settlement or $60 in expected compensation.\(^4^0\) If a benevolent social planner enforces its private right, the governmental agent decides between -$100 from

\(^{3^9}\) Using the example of international law:

International law involves a panoply of informal as well as formal enforcement mechanisms. Actors can impose it informally through retaliation, reward, reputational adjustment, and norm internalization, both directly and with the aid of third-party tribunals enlisted to pronounce on the merits of a dispute. International law also can operate formally, through adjudication by organs that can hear disputes brought by non-state actors and that have the capacity to impose sanctions directly.


\(^{4^0}\) Expected public compensation is the product of the compensation (100) times the success probability at trial (60%): 100 x 60% = 60. The first injured is assumed not to be the injured of the second lawbreaker.
settling and -$40 thanks to the expected deterrence effect. In this case, a rational social planner maximizes welfare by going to trial whereas a victim prefers settlement because it maximizes her expected compensation.

Since private and public actors value deterrence differently, they approach enforcement different. A social planner and private individuals can differ on the question whether to sue: a privately efficient suit may not provide sufficient social welfare benefits to justify a social planner taking the case and vice versa. Thus, social planners and private individuals often make different decisions regarding the amount of damages to request, whether to settle, and whether to appeal. The right enforcers usually make these decisions because they have control over the suit. When a social planner is the right enforcer, it may not maximize the right holder’s welfare because it can internalize the deterrence effects and maximizes social welfare.

Depending on policymakers’ goals, they may make different choices regarding the assignment of authority to enforce these rights. If policymakers decide to have one enforcer, selecting the correct enforcer becomes crucial and will depend on various conditions. Some scholars have argued that the choice should depend on who has better control over the evidence or information, and the law ought to be designed to reflect this control. This single-enforcer right ensures that

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41 The private settlement of $75 is a transfer from one member of society to another, as such it is not a social benefit. However, since the settlement is secret, the second lawbreaker is never deterred, commits the injury, and costs society $100.

42 The deterrence effect only works if the first lawbreaker is found responsible (60% of the time); the rest of the time, when the first lawbreaker is not held responsible, the second lawbreaker will still injure society for $100, such that the expected injury of a trial is -$100 x 40% = -$40. The deterrence factor of the trial is $60. The trial has an opportunity cost equal to the avoided injury. 

43 In The Problem of Social Cost, 3 J. L. & Econ. 1 (1960), Coase argued that a social planner must create the laws that decrease transaction costs and lead to the efficient outcome: a social planner must weigh the costs and benefits of every activity and adopt an appropriate remedy. Id. at 7-11.

44 See Steven Shavell, The Optimal Structure of Law Enforcement, 36 J. L. & Econ. 255, 266-70 (1993) (arguing that information access impacts who should enforce the right because it impacts the incentive to monitor and report infractions and uses the example of safety regulations, tort, criminal, and tax laws).
enforcers do not waste resources duplicating litigation efforts and racing to court.\textsuperscript{45}

Besides granting enforcement authority to one entity, policymakers may increase social welfare by granting both parties overlapping authority.\textsuperscript{46} Giving authority to both entities increases the likelihood of enforcement and hence the likelihood of reaching optimal levels of enforcement.\textsuperscript{47} Inefficiencies arise not from overlapping authorities but from overlapping enforcement and filings.\textsuperscript{48}

To avoid inefficient enforcement and to harvest the deterrence benefit of dual enforcement, both entities should be able to enforce the same claims. The rules, however, must address these situations in which both entities wish to exercise their respective authority. Preclusion rules address overlapping claims, and the current preclusion rules have worked in both directions—and in no direction. Private claims have precluded public claims, public claims have precluded private claims, and both types of claims have proceeded sequentially.

\textsuperscript{45} Some other inefficiencies can arise because private entities do not internalize the cost of litigating and hence they may over enforce their rights when it is not otherwise socially optimal. See generally Steven Shavell, The Social Versus the Private Incentive to Bring Suit in a Costly Legal System, 11 J. LEGAL STUD. 333 (1981) (standing for the proposition that judicial economy is better served by avoiding duplicative litigation).

\textsuperscript{46} In some cases, the chances came over time through trials and errors. For certain private rights, the government had sole authority to enforce these rights, and the policymakers added a private right of action in order to increase the enforcement level. See generally Garry A. Gabison, Limited Solution to a Dangerous Problem: The Future of the Oil Pollution Act, 18 Ocean & Coastal L. J. 223 (2012) (discussing the origin of the Clean Water Act and the Oil Pollution Act and the evolution from limiting to allowing private parties to recover) [hereinafter Gabison, \textit{Oil Pollution Act}]; Garry A. Gabison, The Problems with the Private Enforcement of CERCLA: an Empirical Analysis, 7 GEO. WASH. J. ENERGY & ENVTL. L. 189 (2016) (discussing the evolution of CERCLA public and private rights of action) [hereinafter Gabison, \textit{CERCLA}].

\textsuperscript{47} Id.

\textsuperscript{48} See Clopton, supra note 4 (discussing the distinction between redundancy of authority and redundancy of claims and emphasizing that managing the redundancy of claims remains the central issue, while claim redundancy can also lead to more social optimal outcomes).
and simultaneously.\footnote{See Cox, supra note 4 (discussing that preclusion is not a universal rule and has worked in either direction). These rules are discussed in more details below when discussing specific examples. See infra Part II.C.} If both claims go forward, inefficiencies arise. If only one claim goes forward, the interest of the other party may not be properly represented.

Another option is to grant both entities the authority to enforce private rights. But when both entities wish to exercise their authority, they must consolidate and cooperate. The question remains: when interests diverge and conflicts arise, which enforcer makes the final decision over the direction of a case? If both entities cannot agree because of the high transaction costs, then control should be granted to the entity that values the enforcement right the most.\footnote{Coase, supra note 43, discusses property rights; however, whoever enforces a claim has a form of a property right (or option) to enforce its claim. Id. at 5-6.} The remaining conversation focuses on the situation in which both entities can enforce a private right.

\section*{C. Control and Beneficiary}

Once he suffers an injury, a right holder can elect to enforce his claim or inform the public enforcer of the breach and request its help. The public enforcer may also observe the breach and decide to act independently. In the first case, the private individual enforces his own claim and thus retains control of the claim, the litigation, and the settlement decision. The private enforcer will aim at maximizing his litigation returns.

In the second case, the private individual enlists the help of a public agent because he cannot enforce his own claim for various reasons. First, budget constraints may prevent the private individual from enforcing his claim. Thus, if a public agency enforces the claim and collects compensation on behalf of the right holder, it finances his claim. Second, transaction costs may prevent private individuals from enforcing their private rights. For instance, a lawbreaker can injure each right holder by an amount so small that he or she does not have an individual incentive to sue, but if all right holders combine their claims, it would be efficient to sue. If the public agent takes on the claim, it
Gabison serves as an aggregator of claims. In either case, the public agent enforces a claim that benefits the victim or victims. But as the enforcing entity, the public agent retains control over decisions regarding the suit. The public enforcer can decide to set a different level of control over the enforcement.

Table 1 shows the control level along a continuum: going from the public entity being an agent of the right holder, exercising no (real) control over the suit; to the public entity enforcing the private right, which ends up benefiting private actors, and keeping full control over the suit.

Table 1: Spectrum of the Relationship between Private Victim and Public Enforcer

<table>
<thead>
<tr>
<th>Public Enforcer Level of Control</th>
<th>Agent of the Private Party</th>
<th>Requires Input From and Coordination With a Private Party</th>
<th>Independent Enforcer</th>
</tr>
</thead>
<tbody>
<tr>
<td>No Control</td>
<td></td>
<td>Some Control</td>
<td>Full Control</td>
</tr>
</tbody>
</table>

A public agent may struggle to select a control level that incentivizes the right holder to cooperate and advance other goals such as deterrence. If the public agent exercises too much control, victims may not seek its help, and a number of crimes may go unpunished, and hence undeterred. If it exercises too little control, the public agent may underdeter, perhaps by settling too fast, because its deterrence goals yield to the private party’s compensation goals.

Separating beneficiaries from decision makers mirrors the traditional agency problem. The traditional solution suggests

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51 See generally Eugene F. Fama & Michael C. Jensen, Separation of Ownership and Control, 26 J. L. & ECON. 301 (1983) (discussing the issues associated with control,
realigning misaligned incentives and doing so requires different approaches depending on the case. For instance, in certain circumstances allowing the right holder to receive the punitive damages that the public enforcer collected realigns incentives because it provides the right holder with more incentives to come forth while letting the public enforcer apply a level of deterrence the right holder may not have selected.52

Alternatively, to avoid any agency problem, the public agent could create an enforcement system in which it would auction the right to enforce all claims. In a number of respects, the right to enforce a claim resembles a property right.53 As such, the holder of the right may wish to use it, benefit from it, assign it, or sell it to private attorneys.54 In an efficient market and at equilibrium, private attorneys bid up to the expected value of claims. This system, much like the private enforcement by victims, will not maximize deterrence and social welfare. But the public agent also has the option to bid and take on the socially efficient cases that are not privately efficient.

Governmental entities have usually opted to retain full control of all claims. In doing so, they perform two tasks: first, they aggregate multiple small claims to file one large suit; and second, they finance smaller single claims. The next Section focuses on situations in which the public agent aggregates multiple claims to file large public suits.

III. AGGREGATOR OF CLAIMS

This Section focuses on the function of the public enforcer as an aggregator of smaller claims to form a mass action. Some claims are

which makes the decision, from separating ownership, which bears the consequences of decisions because transaction costs lead to incomplete contracts). 52 Allowing the collecting of punitive damages may also overincentivize right holders to come forward. Right holders should be allowed to collect punitive damages when they underreport injuries that cannot be more efficiently deterred without court involvement. Such an example is discussed in Section IV where immigrant workers cannot warn future immigrant workers about the working conditions in a given company and have no private incentive to enforce their right.

54 Id. at 21-22.
not privately efficient to bring individually, but they can become privately and publically efficient when aggregated with like claims. Since class and mass actions and public enforcement with numerous victims involve the aggregation and the litigation of multiple claims simultaneously, both types of actions have been compared.\textsuperscript{55} This Section examines the similarities and differences between private class actions and public actions that aim at compensating a large right-holder base.

When the government acts as an aggregator of claims, it competes with potential class actions. This competition can lead to inefficiencies such as races to the courts. This Section investigates these efficiencies through two case studies. First, it examines how state attorneys general enforce federal antitrust laws and seek compensation in multivictim claims and how these attorneys have been incentivized to race to the courts. Second, it looks at how the federal government has enforced one specific environmental law and has exercised its first option to sue.

\textbf{A. Coordinating to Decrease the Transaction Costs of Multi-Claim Litigations}

When private enforcers cannot rely on informal enforcement methods (e.g., a one-shot game such as pollution), litigation might become the best enforcement method. But because litigation is lengthy and expensive, some private rights remain unenforced and lawbreakers are inefficiently deterred. For instance, some lawbreakings may injure a large number of victims but each one only for a small amount. Assume a polluter injures 1,000 victims for $10 each. If it costs $300 to sue and obtain restitution, then no individual is rationally incentivized to enforce his or her right.\textsuperscript{56} Since the right will go unenforced, the polluter will not internalize the costs of his action; hence, the polluter exercises an inefficient care and activity level. However, if all the victims coordinate and share the cost of enforcement, each would recover $9.70.\textsuperscript{57}

\textsuperscript{55} See, e.g., \textit{supra} note 4.

\textsuperscript{56} If an individual enforces his right, he would pay $300 to recover $10 or in other words, lose $290.

\textsuperscript{57} This result assumes perfect compensation of $10 and an individual litigation cost
Victims can coordinate by bringing class actions and mass actions. To do so, aggrieved right holders can use different legal apparatus, which have evolved over the years. In the federal system, right holders can form a class action under Rule 23 of the Federal Rules of Civil Procedure and the U.S. Class Action Fairness Act of 2005 ("CAFA"). In 1966, amendments to Rule 23 of the Federal Rules of Civil Procedure became effective and facilitated group litigation. Rule 23 requires four elements: (1) numerosity; (2) commonality; (3) typicality; and (4) adequate representation. All these elements have been subject to interpretation. Aggrieved right holders can also use state-law equivalents to Rule 23.

Class actions improve efficiencies through economies of scale: class actions make the legal system more efficient because they decrease the number of litigated cases. Class actions also increase social welfare because they permit victims to bring socially efficient cases that are not individually rational.

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61 FED. R. CIV. P. 23(a)(1) (requiring that "the class is so numerous that joinder of all members is impracticable").
62 FED. R. CIV. P. 23(a)(2) (requiring that "there are questions of law or fact common to the class").
63 FED. R. CIV. P. 23(a)(3) (requiring that "the claims or defenses of the representative parties are typical of the claims or defenses of the class").
64 FED. R. CIV. P. 23(a)(4) (requiring that "the representative parties will fairly and adequately protect the interests of the class").
67 The analysis in this Article generally assumes that if a defendant does not pay the full damages he caused, he will not properly internalize all the costs of his action and will break the law more often than socially efficient. In a world with imperfect enforcement, the defendant would need to internalize the cost enhanced by the chance of enforcement. Assuming that such level exists, anything below this level of damages will lead to inefficient breach.
Class actions may, however, not maximize social welfare. Attorney’s fees in class actions are traditionally paid using a contingency fee system. In this system, claimholders auction off the attorney’s fees to the lowest bidder and keep the rest of the compensation. Since the attorneys only receive a portion of the compensation, their interests are not fully aligned with those of the beneficiary. Thus, representation suffers from an agency problem where attorneys may not seek the maximum compensation but recommend a resolution that maximizes their return but not that of the class.

Class actions do not guarantee either that all claims are litigated together: class actions do not prevent dual private enforcement. For instance, class action attorneys have reportedly kept “nationwide or multi-state class actions in state courts whose judges have reputations for readily certifying classes and approving settlements without regard to class member interests.” Competing class actions inefficiently exploit the legal system and can harm plaintiffs’ interests. The agency problem between victims and attorneys worsens when attorneys file competing class actions because these attorneys have an incentive to hold reverse auctions. A reverse auction occurs when different attorneys file competing class actions and race to settle the case with the defendant in order to ensure they are the ones to collect the attorney’s fees.

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68 Attorneys are rewarded for their service only if they win.


70 See generally Albert Choi, Allocating Settlement Authority under a Contingent-Fee Arrangement, 32 J. LEGAL STUD. 585 (2003) (modeling the issues associated with contingency fees).

71 The agency problem that contingency fees create is beyond the scope of this Article. For further discussion of this issue, see Jonathan R. Macey & Geoffrey P. Miller, The Plaintiffs’ Attorney’s Role in Class Action and Derivative Litigation: Economic Analysis and Recommendations for Reform, 58 U. CHI. L. REV. 1 (1991).


In 2005, Congress passed CAFA to "permit the fair and efficient resolution of legitimate claims of numerous parties by allowing the claims to be aggregated into a single action against a defendant that has allegedly caused harm.\textsuperscript{74} CAFA requires that "the matter in controversy exceeds the sum or value of $5,000,000" or involve sufficient diversity.\textsuperscript{75} CAFA gave defendant attorneys the option to remove the case to federal court to avoid multiple litigations.\textsuperscript{76} Through CAFA, Congress attempted to address some abuses of previous class actions\textsuperscript{77} and enhance efficiency.

The class action efficiencies may, however, never be garnered if transaction costs (e.g., the costs to identify, organize, and coordinate aggrieved right holders) prevent enforcement coordination altogether. Governmental enforcers who wish to deter inefficient lawbreaking will want to step in and enforce these individually-irrational-but-socially-rational private rights. A public agent can either compensate victims and seek restitution from lawbreakers\textsuperscript{78} or seek restitution for the victims from the lawbreaker.\textsuperscript{79}

\textsuperscript{75} 28 U.S.C. § 1332 (d)(2) (2012) states that:
The district courts shall have original jurisdiction of any civil action in which the matter in controversy exceeds the sum or value of $5,000,000, exclusive of interest and costs, and is a class action in which—(A) any member of a class of plaintiffs is a citizen of a State different from any defendant; (B) any member of a class of plaintiffs is a foreign state or a citizen or subject of a foreign state and any defendant is a citizen of a State; or (C) any member of a class of plaintiffs is a citizen of a State and any defendant is a foreign state or a citizen or subject of a foreign state.
\textsuperscript{76} Id.
\textsuperscript{77} Congress cites the "abuses of the class action device that have . . . harmed class members with legitimate claims and defendants that have acted responsibly[,] adversely affected interstate commerce[,] and . . . undermined public respect for our judicial system"). See supra note 74.
\textsuperscript{78} This compensation occurs frequently in the criminal system. For example, section 19.2-305.1 of the Virginia Code allows for restitution when the crime resulted in property damage or property loss. See generally Victim Restitution in the Criminal Process: A Procedural Analysis, 97 HARV. L. REV. 931 (1984) (discussing the use of restitution in the criminal system). However, this system exists in other private laws. See, e.g., infra Section III.C.
\textsuperscript{79} Governmental actors have created funds and distributed these funds to victims in
Governmental entities have brought these type of suits under the common law doctrine of *parens patriae* or under explicit statutory provisions allowing them to obtain compensation for victims. In these suits, governmental actors do not act as the victims' agent but act as their own agent with their own interests in mind. In fact, these actors failed in all three respects of the traditional agent relationship, namely that the agent and principal agree to the relationship, the agent acts on the principal's behalf, and that the agent acts under the principal's control.

First, aggrieved right holders do not explicitly consent to the agency relationship. The governmental entity may not have identified who the victims were when raising such a large suit; it may not have even known the class size. Second, aggrieved right holders may have no control over the governmental suit since they may not even be aware

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See *Cox*, supra note 4 at 2322 (discussing that "Government enforcers rely on one of three types of legal authority to obtain public compensation: (1) statutory injunctive authority; (2) express statutory authority; or (3) *parens patriae* authority.")

RESTATEMENT (THIRD) OF AGENCY § 1.01 (AM. LAW INST. 2006) (noting that "Agency is the fiduciary relationship that arises when one person (a 'principal') manifests assent to another person (an 'agent') that the agent shall act on the principal's behalf and subject to the principal's control, and the agent manifests assent or otherwise consents so to act.").


The Supreme Court states that CAFA does not apply to public actions because they differ from class actions as the plaintiffs are unnamed, and the task should not be left to courts to estimate the size of the class and amount in controversy when dealing with such public aggregated actions. *Id.* at 738, 740.

How is a district court to identify the unnamed parties whose claims in a given case are for less than $75,000? . . . Even if it could identify every such person, how would it ascertain the amount in controversy for each individual claim? . . . We think it unlikely that Congress intended that federal district courts engage in these unwieldy inquiries.

*Id.* at 743-44.
of the suit.

Third, even if consent could be considered implied through electoral choice, the right holders' interests are not fully represented and the governmental entity does not act on behalf of the right holders. Since the governmental entity does not know the size of the class, it can only estimate, and it may easily underestimate the damages. Thus, the filing governmental entity champions the interests of society at large rather than the victims' interests.

Moreover, multiple governmental entities may race to the courts or bring multiple suits. A governmental entity that obtains relief may be able to retain some of the proceeds and gain reputational goodwill. Therefore, different agencies may attempt to "poach lucrative enforcement opportunities from other agencies with overlapping jurisdiction." Thus, an entity may try to advance its own interest before acting on behalf of society.

84 Id. at 741-42.
85 Examples of agency actions enforcing private rights are numerous. Adam S. Zimmerman, supra note 79, at 528, 533, 537 discusses funds created by the Securities and Exchange Commission following money laundering or Ponzi schemes, the Federal Trade Commission following false advertisements, and the Food and Drug Administration following issues with defective drugs.
86 See Margaret H. Lemos et al., For-Profit Public Enforcement, 127 HARV. L. REV. 853, 901-03 (2014).
87 Id. at 870 ("Moreover, it is increasingly common for federal and (especially) state law to permit public enforcers to retain a portion of the money recovered through civil judgments or negotiated settlements . . . [and] money collected through enforcement may often offset, rather than supplement, legislative appropriations.").
88 Id. at 877 ("Enforcers have audiences other than potential defendants. First, agencies are concerned about their reputations internally, among their own employees . . . [as well as] high win rates, large penalties may help boost morale . . . Agencies also must consider external audiences, such as legislatures, executive officials, and judges.").
89 Id. at 902.
90 Zimmerman, supra note 79, at 510 (explaining that since governmental employees are paid salaries, they do not imply the same inefficiencies discussed with a reserve auction or work on contingency fees; hence, they may more appropriately defend the victims' interest; however, because the governmental attorney may seek other employment in the future, it may advance their own reputation).
For these reasons, governmental suits may not fully deter the lawbreaker’s actions because these lawbreakers do not fully internalize the cost of their activities. Moreover, these suits may not avoid inefficient races to the courts or dual enforcement. In other words, because the governmental entity fails to act as the victims’ agent, such suits seeking compensation for citizens may not maximize social welfare after all.

By no means are private class actions or governmental public actions perfect. They both exhibit similar inefficiencies. The next Section investigates some of these inefficiencies and further highlights the differences between these two types of actions in light of antitrust and environmental laws.

B. State Enforcement of the Antitrust Laws

Antitrust laws are enforced by private individuals, the Federal Trade Commission (“FTC”) and the Department of Justice (“DOJ”) at the federal level, and state attorneys general at the state level. These

91 Zimmerman, supra note 79, at 539-40, n.21 (explaining that these suits create some deterrence but they do not fully deter activities; see also Richard R.W. Brooks, The Efficient Performance Hypothesis, 116 YALE L. J. 568, 581 (2006) (discussing how internalizing the costs and benefits of a contract breach leads to the efficient breach and efficient performance and how this conversation can be extrapolated to most breakings of private laws).

92 In some states, the attorney general has appointed a “special counsel” and delegated the enforcement of private rights to firms on a contingency basis; however, private firms aggravate the situation because they introduce another agent, which then responds to the government. See, e.g., Julie E. Steiner, Should ‘Substitute’ Private Attorneys General Enforce Public Environmental Actions? Balancing the Costs and Benefits of the Contingency Fee Environmental Special Counsel Arrangement, 51 SANTA CLARA L. REV. 853 (2011) (discussing the problems associated with special counsel at the state level in the environmental context and arguing that while this system helps reach the optimal deterrence level, it can be improved through governmental monitoring). These special counsel bring their own private interest and work on a contingency fee, which brings the same problem as previously discussed. Id.


entities enforce the Sherman Act\textsuperscript{96} and the Clayton Act.\textsuperscript{97} Even though some states also have their own antitrust laws,\textsuperscript{98} this Section focuses on state enforcement of federal antitrust laws.

The overlap of public and private antitrust enforcement has garnered criticisms;\textsuperscript{99} none the least because allegedly harmed competitors may use these laws to strategically harm competitors, hence making them counterproductive.\textsuperscript{100} One such example can be found in a case in which Amazon, after losing a battle with book publishers, complained to the FTC about the publishers’ demands.\textsuperscript{101} This complaint triggered an investigation.\textsuperscript{102} Following the investigation, Apple and five publishers\textsuperscript{103} were accused of breaching antitrust laws.\textsuperscript{104}

This case also illustrates the overlapping authority of private and public entities to enforce these private laws.\textsuperscript{105} In August 2011, a class action lawsuit was filed on behalf of e-book purchasers,\textsuperscript{106} which was

\textsuperscript{102} \textit{Id.}
\textsuperscript{104} \textit{Id.}
\textsuperscript{105} Purchasing a product such as a book amounts to an implicit contract.
\textsuperscript{106} See, e.g., Alison Flood, \textit{Apple and major publishers face lawsuit over ebook ‘price fixing’}, THE GUARDIAN (Aug. 11, 2011, 10:37 AM), \url{http://www.theguardian}
later consolidated with various class actions in New York. In April 2012, the DOJ joined the pending litigation. Texas and fifteen other states also filed a similar complaint against Apple, Penguin, MacMillan, and Simon & Schuster in the U.S. District Court for the Western District of Texas “as parens patriae on behalf of consumers.” They were later joined by other states and territories and consolidated with the other suits in New York.

Three of the publishers immediately settled. In 2014 Apple and its co-conspirator were found guilty of per se breach of the antitrust laws during a bench trial. They appealed, but in the meantime, the class action was approved and settled pending the appeal. Between the settlements with publishers and Apple, the class collected almost twice the alleged damages, which is still lower than the

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108 Id. at 679.
109 Id. at 680.
112 Id. at 694.
116 Court Affirms Potential $450 Million Settlement with Apple in E-books Price-Fixing Class-Action Lawsuit, HAGENS BERMAN (Feb. 17, 2016), https://www.hbsslaw.com/cases/e-books-antitrust-litigation/pressrelease/e-books-antitrust-litigation-court-
potential treble damages.

Some critics have focused on potential overdeterrence from the tripling of damages. However, recidivism evidence in cartel enforcement seems to suggest that lawbreakers are underdeterred from committing antitrust violations. Therefore, combined private follow-on ("coattailing") or public follow-on suits may help reach an optimal deterrence level. An argument could be made that even if one can use antitrust laws to harm competitors, competition may benefit by overdeterrence anticompetitive behavior in the first place. This question, however, is beyond the scope of this Article.

In this e-book case, the parens patriae enforcement of antitrust law at the state level relied on a federal statute that grants the attorney general the power to bring an action to obtain public compensation. The procedures involved occur when a state attorney general’s enforcement of the antitrust laws on behalf of a natural person living in that state resemble the civil class-action procedures: the state


117 Assuming that lawbreakers are rational, recidivism suggests that they profit from lawbreaking and are not properly deterred. If the enforcement rate is below the inverted multiplication rate, the lawbreakers are not properly deterred: because damages are tripled, rational recidivists must pay in damages less than a third of earnings from lawbreaking in order to rationally continue to cartelize. See, e.g., John M. Connor, Recidivism Revealed: Private International Cartels 1991-2009, 6 COMPETITION POL’Y INT’L 101 (2010); John M. Connor & Robert H. Lande, Cartels as rational business strategy: Crime pays, 34 CARDOZO L. REV. 427, 455 (2012).

118 Private coattailing is common and one study found that “of the 52 international cartels that were fined by the DOJ during 1990-2005, 100% were followed up with private damages actions.” John M. Connor, Private Recoveries in International Cartel Cases Worldwide: What Do the Data Show? 11 (Am. Antitrust Inst., Working Paper No. 12-03, 2012), http://dx.doi.org/10.2139/ssrn.2165431.

119 This situation is rarer and discussed in more detail when looking at environmental law. In the e-book Apple case, the public cases followed the private cases; it is unclear whether the public investigation preceded the private investigation.

120 Cox, supra note 4. “The less rigorous requirements for proving damages and more flexible notice and review procedures represent a legislative choice to establish an alternative public scheme to private class actions for certain antitrust violations.” Id. at 2330.
attorney general must provide notice through publication;\textsuperscript{121} the victims may elect to opt out of the state attorney general’s action;\textsuperscript{122} if they do not opt out, future claims are precluded against the defendant;\textsuperscript{123} and settlement must be approved by the court.\textsuperscript{124}

In essence, public enforcement by a state attorney general provides a natural experiment as to whether applying class action type requirements to public actions would improve their efficiency.\textsuperscript{125} An indicator of whether state attorneys general sufficiently serve the interest of victims and advance deterrence goals could look at the opt out rate and follow-on class actions. However, it may be difficult to separate the revealed preferences of opting out from the class action attorneys’ incentives to push their own interests from opting out to receive better compensation than under a mass action.

In the e-book case, since the class was certified for twenty-three states and territories, the class precluded the respective state attorneys from advancing their claims, and only thirty-three of the fifty-six filing attorneys general could move forward.\textsuperscript{126} Both sets of attorneys negotiated the same settlement, making it impossible to attribute results to either public or private enforcement.\textsuperscript{127} Furthermore, the thirty-three attorneys general remained involved in the litigation against Apple, with

\begin{itemize}
\item \textsuperscript{122} Id. at § 15c(b)(2).
\item \textsuperscript{123} Id. at § 15c(b)(3).
\item \textsuperscript{124} Id. at § 15c(c).
\item \textsuperscript{125} Lemos, supra note 9. “One way to address the formal and functional problems with parens patriae actions would be to subject such suits to some of the procedural requirements that govern damages class actions—at least when those suits seek to terminate individual claims for damages or other monetary relief.” Id. at 542-43.
\item \textsuperscript{126} See In re Elec. Books Antitrust Litig., No. 11-MD-02293, 2014 WL 1282293 (S.D.N.Y 2014) (granting motion for class certification). Discussing the “sixteen states” that originally filed in April 2012; “all of the states of the Union except for Minnesota, as well as the District of Columbia and five U.S. territories and possessions [who] settled their claims against Hachette, HarperCollins, and Simon & Schuster by a settlement agreement” in June 2012; “[t]he litigating States and class plaintiffs [who] entered into settlement agreements with the remaining Publishers” later in 2013; and thirty-three states and U.S. territories that remain plaintiffs in the States’ Action in March 2014. Id. at 1, 6.
\item \textsuperscript{127} Id. at 6-7.
\end{itemize}
the DOJ leading the charge.\footnote{Id.}

These public/private enforcements exemplify an efficient approach to judicial consolidation that insures all cases reside in one court and in front of one judge; nonetheless, the system encourages a race to the court because the state attorneys or the class action attorneys wish to collect the residual fees or attorney's fees, respectively. Therefore, this rent-seeking behavior decreases social welfare overall.

Future reliance on public enforcement to obtain private restitution may increase as the Supreme Court has made consumer class certification more complicated.\footnote{See John Campbell, Unprotected Class: Five Decisions, Five Justices, and Wholesale Change to Class Action Law, 13 Wyo. L. Rev. 463, 481-84 (2013) (discussing the Supreme Court ruling that affects class actions and arguing that classes are more difficult to form). See generally Tyson Foods, Inc. v. Bouaphakeo, 136 S. Ct. 1036 (2015) (providing further implications for class actions).} For instance, in \textit{Wal-Mart v. Dukes},\footnote{Wal-Mart Stores, Inc. v. Dukes, 131 S. Ct. 2541, 2547, 2560-61 (2011).} the Supreme Court ruled that 1.5 million female employee claims against Wal-Mart for alleged discrimination against women could not be heard as a class because the current class did not present sufficient commonality of questions of law or fact. More importantly, the Court held that the class was required to present a theory that explained a common cause of all their injuries because they failed to show that a common policy led to the disparate effect.\footnote{Id. at 2555.} In \textit{Comcast Corp. v. Behrend},\footnote{Comcast Corp. v. Behrend, 133 S. Ct. 1426, 1430 (2013).} cable consumers in the Philadelphia region claimed that Comcast illegally eliminated competition and raised prices. The Court held that the class needed to prove individual injuries and that merely proving the class was injured was not sufficient for certification.\footnote{Id. at 1436-37.} These requirements, among others, are making it harder to form classes\footnote{Michael Selmi, Theorizing Systemic Disparate Treatment Law: After Wal-Mart v. Dukes, 32 Berkeley J. Emp. & Lab. L. 477, 479 (2011) ("It is not yet clear what impact the Court's \textit{Wal-Mart} decision will have but it is likely to make certification of a nationwide class far more difficult.").} and put more of an onus on state attorneys and federal enforcers.
In particular, some types of private enforcement of antitrust laws may even become impossible. In *AT&T Mobility v. Concepcion*,\(^{135}\) the Supreme Court ruled that a class action arbitration clause in a boilerplate customer agreement is enforceable. In *American Express Co. v. Italian Colors Restaurant*,\(^{136}\) the Court further ruled that this class action arbitration waiver is enforceable despite cost consideration for victims. In other words, the Court made individual irrational, socially efficient class actions impossible when victims signed a contract. Since public entities did not adhere to these contracts, they were not bound by the class action arbitration waivers.

In other words, the Supreme Court has made public actions not only a potent way to enforce multivictim infractions, but the only way to bring some individually irrational, socially efficient litigations following a breach of certain private rights. The following Section provides an example of public enforcement of private rights at the federal level in the environmental context.

**C. The Federal Enforcement of the Comprehensive Environmental Response, Compensation, and Liability Act**

Congress passed the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA")\(^{137}\) in response to the Love Canal incident.\(^{138}\) Through CERCLA, Congress created a fund (Superfund) that is used to clean spills.\(^{139}\) The fund can then be replenished through litigation.\(^{140}\) CERCLA can also be used for the government to agree with a polluter to a cleanup or compel a cleanup

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140 See H.R. Rep. No. 96-1016(II), at 6151 (1980). CERCLA aims to "provide authorities to respond to releases of hazardous waste . . ., to establish a Hazardous Waste Response Fund . . ., to establish prohibitions and requirements concerning inactive hazardous waste sites, [and] to provide for liability of persons responsible for releases of hazardous waste at such sites." *Id.* at 6151, 6153.
through injunctive relief.\textsuperscript{141}

The Environmental Protection Agency ("EPA") has enforced CERCLA since its installment.\textsuperscript{142} Soon after it was passed, CERCLA was amended\textsuperscript{143} and private parties were allowed to enforce CERCLA.\textsuperscript{144} Private parties could recover for damages to their property and enjoin lawbreakers to clean up.\textsuperscript{145} But having two causes of action opened the door to two suits and inefficiencies. To address

\textsuperscript{141} The EPA has three procedures to enforce CERCLA: (1) an out-of-court settlement where the lawbreaker agrees to perform the remedial investigation and feasibility study; (2) a unilateral administrative order that the EPA can issue following a determination of an imminent danger to "the public health or welfare or the environment" (42 U.S.C. § 9606(a) (2016)); and (3) unilateral EPA cleanup followed by a suit to recover the costs (42 U.S.C. § 9606(b) (1986)). See, e.g., Jerome M. Organ, Superfund and the Settlement Decision: Reflections on the Relationship Between Equity and Efficiency, 62 GEO. WASH. L. REV. 1043, 1056-57 (1993).


\textsuperscript{144} 42 U.S.C. § 9659 (2016).

\textsuperscript{145} See 42 U.S.C. § 9607(a)(4)(B) (2002). Congress allowed the recovery of "any other necessary costs of response incurred by any other person consistent with the national contingency plan." \textit{Id}. Under this clause, private parties have filed numerous suits, and in United States v. Atlantic Research Corp., 551 U.S. 128, 140-41 (2007), the Supreme Court unanimously confirmed that Congress empowered all private parties, whether victims of spills or affected potential responsible parties, the authority to bring private actions in order to recover cleanup costs from potential responsible parties.
this problem, CERCLA requires that private plaintiffs notify the EPA sixty days prior to filing a suit.\footnote{42 U.S.C. § 9659(d)(1) (2016).} The EPA can then elect to file the suit or to let the private party file the suit.\footnote{Id. at § 9659(d)(2).} In effect, this gave the EPA a first right of refusal or first option to exercise their authority.\footnote{Id. at § 9659(d).}

A welfare-maximizing public agent should only use its first right of refusal (i.e., intervene) when it increases social welfare at the margin: when the marginal benefit of intervening is greater than the marginal cost. If the public agent attempts to maximize the level of enforcement, it will only file suits when private parties have not notified them of a suit. This strategy, however, does not mean that the public agent maximizes social welfare. When the public agent exercises its option, private individuals are precluded from filing an action; but they may join the suits. Hence, a utility maximizing private party will only join the suit when the marginal benefits of joining outweigh the marginal costs.

A look at litigation data shows that the public and private interests have been so misaligned as to justify a joinder in only a few suits. Between 1994 and 2007, the public and private enforcers have shared enforcement duties:\footnote{In a 2009 report, the U.S. Government Accountability Office studied the EPA’s decision to sue. \textit{U.S. ACCOUNTABILITY OFFICE, SUPERFUND LITIGATION HAS DECREASED AND EPA NEEDS BETTER INFORMATION ON SITE CLEANUP AND COST ISSUES TO ESTIMATE FUTURE PROGRAM FUNDING REQUIREMENTS 20} (2009), http://www.gao.gov/new.items/d09656.pdf [hereinafter GAO]. The data utilized here was obtained through a Freedom of Information Act request.} governmental entities filed almost as many suits as private ones (49\% versus 51\%); however, public-agent enforcement has increased over the years as the EPA brought 51\% of all CERCLA suits brought in 1994, and this ratio increased to 77\% in 2007.\footnote{Id. at 39.} The data reveals that in only about 5\% of cases, two types of plaintiffs were joined in a suit.\footnote{Id. at 40-41. The two types compared are governmental and nongovernmental; some suits may have more than one governmental plaintiff such as state and federal. Id.}
This observation tends to support the notion that public suits are substitutes for private suits: private individuals do not find the need to join to have their interests represented. They are, however, not perfect substitutes; for instance, the public enforcer can also impose fines, which are not at the disposal of a private enforcer.

Each party wants to pursue its own goals, but each is also marginally incentivized to pursue the goals of the other because it may wish to avoid having the other party join or intervene in the suit. Having multiple enforcers will increase the transaction costs and may make resolution more difficult. Since the EPA has the option to sue first, the EPA implicitly wants to make the victims as whole as possible to avoid having them join the suit, which can occur if these private parties believe their interests are not adequately represented.

In other words, joinder rules should give incentive at the margin to the enforcing party to marginally advance the goal of the nonenforcing party in order to avoid additional transaction costs. For instance, if the public entity decides to exercise its first option, it will attempt to get enough restitution for the private party to disincentivize them from joining the suit. Using the previous example of 1,000

152 A more in depth statistical analysis shows that public and private suits are more substitutes than complements. Gabison, CERCLA supra note 46. Other studies have found similar results in other environmental law enforcement. See generally Christian Langpap & Jay P. Shimshack, Private Citizen Suits and Public Enforcement: Substitutes or Complements? 59 J. ENVT'L. ECON. & MGMT. 235 (2010) (estimating the impact private suits has on the public enforcement of the Clear Water Act and finding that private suits increase the probability of regulatory inspection but decreases the likelihood of regulatory sanctions and fines).


154 This depends upon the identity of the enforcers. The presence of the EPA as a plaintiff increases the likelihood of settlement; the presence of other governmental entities increases this likelihood or has no impact depending upon who else is present in the suit; similarly, the presence of private parties decreases or has no impact on this likelihood. Gabison, CERCLA supra note 46.

155 This proposition rests on the assumption that the lead/filing counsel remains the party carrying the bulk of the enforcement cost whereas the joining party only contributes marginally to the suit. If the joining party becomes the lead party, the original filing party may have incentive to underperform, to incentivize intervention, and free ride on the joining party. The low rate of joinder does not support this evidence.
injured for $10 and $300 in private litigation fees, if the public agent gets $9,700 in compensation, the private parties are indifferent between (1) bringing a class action suit and paying $300 in litigation fees, and (2) having the public party bring the suit and get $9,700 in public compensation. Any value below $9,700 means that the private parties prefer to bring a class action suit, join the suit, and pay $300 in litigation fees in order to attempt getting the whole $10,000.\footnote{This assumes that the public litigation fees are not taken out of the compensation because those are paid regardless of enforcement. A joinder may be less expensive if plaintiffs are willing to coordinate.}

This result assumes that the attorney’s fees are unchanging with respect to the type of representation (joinder, sole plaintiff, multiple plaintiffs, or class action). If class action attorneys are assumed to prefer a contingency fee of 25%, then the indifference value drops to $7,500 (the maximum amount they get regardless of who sues); anything below this threat value incentivizes the private victims to file a joint claim. Even at the indifference value, the defendant prefers to settle: if the defendant settles with the government, it pays $7,500; if the defendant goes to court with both, then it pays $10,000. Having two parties leads to two plaintiff-litigation costs, which are generally higher and thus create inefficiencies.

The governmental right of first refusal impacts the “inefficiency ranges,” where two suits are filed. Since the government can settle for lower values than a private party would accept, the defendant does not internalize all of the damages; hence the defendant is not fully deterred, which leads to inefficient care and activity levels. The right of first refusal has deep efficiency consequences: while the public agent in this case may wish to compensate private individuals, it remains bound by budget constraints and may settle at higher rates and for lower values than is socially efficient.

Furthermore, this right of first refusal/first option to sue has other inefficiency implications. Refusing to exercise a first option sends a negative message. Since the EPA elects the cases it pursues based on

\footnote{The underlying assumption is that if a party sues, lawbreakers will be found guilty.}
the strength of the evidence, among other criteria,\textsuperscript{158} if the EPA does not take a case, it signals that the evidence is weak. Hence, it makes the case more difficult for private individuals and can indirectly increase the litigation cost because the defendant will likely be more willing to fight the case in court.\textsuperscript{159} In other words, this procedure increases the litigation costs and makes an efficient settlement less likely for private individuals.\textsuperscript{160}

The e-book case exemplifies cases in which private enforcement precludes some claims from public enforcers, and vice versa. This preclusion encourages inefficiencies such as a race to the court and dual investigation costs. The CERCLA discussion exemplifies a situation where the statutes and procedures gave an option to the public enforcer. This option can lead to an inefficient level of enforcement because it discourages a potential second suit that would ensure that the lawbreaker internalizes all the costs of his actions.\textsuperscript{161}

\section*{IV. Financing Suits}

When the government aggregates claims to compensate aggrieved right holders, it attempts to overcome large transaction costs of coordinating small claims. It also indirectly finances their claim and their recovery. This role as a financer of claims exists independently of the role of aggregating claims. This Section focuses on this function of the government when it enforces private claims but does not necessarily aggregate multiple individual claims.

In its role as financier of suits, the government defends the private rights of victims who cannot afford to fend for themselves. This governmental role exhibits some of the same issues discussed when the government acts as an aggregator of claims. Principally, in both cases, the government pursues its own goals, which leads to conflicts.

The conversation in this Section makes two assumptions: (1),

\begin{footnotesize}
\begin{itemize}
    \item \textsuperscript{158} See GAO, \textit{supra} note 149, at 33-34.
    \item \textsuperscript{159} See Gabison, \textit{CERCLA supra} note 46.
    \item \textsuperscript{160} Id.
    \item \textsuperscript{161} See Clopton, \textit{supra} note 4, at 291-94 (discussing the advantages of overlapping enforcement, dual authority, as well as dual litigation).
\end{itemize}
\end{footnotesize}
the suits are still assumed to be privately efficient to file in that the benefits outweigh the costs; (2) private victims do not file a suit because they are assumed to not have sufficient funds to do so. Furthermore, a contingency fee does not provide enough of an incentive for attorneys to take on their cases (i.e., a third of the benefits do not outweigh the costs). For instance, if a contract-breach victim could recover $1000 for a suit that cost $750 to bring, a contingency fee attorney would need to charge 75% of the damages if he can guarantee a win; but the fee rate will end up being higher if the attorney cannot guarantee such a win because he must rationally compensate his losing cases with his winning cases.

Under these assumptions, inefficient dual representation cannot occur. In this financing role, the issue centers on whether the governmental entity provides adequate representation because of the misaligned interests.

A. Protection of the Ones with Budget Constraints

Rights are only as good as their enforcement. Regardless, a number of rights remain unenforced, even when it is socially efficient to bring a suit. A suit may not be privately efficient to bring because the victims cannot internalize the benefits of the suit; but positive externalities can justify the same suit as a socially efficient suit. For instance, a contract-breach victim suffers $1000 from the suit. The right holder may recoup $500 from a suit, but the cost of the suit is $600. A rational victim would never sue. If the lawbreaker recidivates, he also causes $1000 in damages and receives $300 in benefits from breaking the right holder’s right. If sued by the first victim, the lawbreaker will be deterred and stop breaking the law. Since he is not sued, the lawbreaker ends up recidivating and costing society $1000, which could have been avoided by spending the $600 in the first place. A social planner would be willing to pay the $600 the first time to avoid $1000 in injury:162 the first suit is socially but not privately efficient.

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162 A similar scenario was presented above discussing outcome decisions between settling and going to court. This scenario also differs from the previous Section’s discussion where the injuries were simultaneously inflicted and hence recidivism was not a factor. Here, the injuries are sequential. The first victim cannot agree with the potential second victim of a breach that has not yet been committed. This is a form of
A suit may be privately efficient to bring, but a rational right holder may not be able to bring this suit because of liquidity constraints. In the previous example, a contract-breach victim may recoup $1000 from a suit; however, the cost of the suit is $750, which must be paid up front. This suit is privately efficient to bring; however, a indigent victim may not be able to secure a loan to sue.\(^{163}\)

In both of these examples, the right holder does not enforce his right because he cannot internalize the benefits of their actions and because of budget constraints. If a victim cannot efficiently enforce his or her rights, the lawbreakers will not internalize the cost of their activities and they will inefficiently break the law. Inefficient law breaking takes two forms: level of activity and level of care. An inefficient activity level occurs when lawbreakers break the law more often than socially efficient. An inefficient care level occurs when lawbreakers do not put enough effort into not breaking the law.

To address this problem, government entities have acted to enforce some private rights.\(^{164}\) These private right enforcements usually either involve lawbreakers, who can become repeat players and should be properly deterred, or involve indigent victims, who cannot afford to bring socially efficient suits. In both cases, the government finances some suits to ensure that some lawbreakers will be held accountable and that their victims will be compensated; however, governmental entities that finance private claims cannot finance all claims because they also

\(^{163}\) Lenders may not want to extend a loan to a victim with poor credit or who is judgment proof. The suits would have to have a high chance of success: if the suits have a success rate lower than 75%, then the loan would not be rational because in expected terms, the suits bring in 75% x $1000 = $750, which is the cost of the suit. In expected terms, a lawyer would need to charge a 100% contingency fee as well.

\(^{164}\) E.g., Michael Selmi, The Value of the EEOC: Reexamining the Agency’s Role in Employment Discrimination Law, 57 OHIO ST. J. L. 1 (1996). Michael Selmi argues that the Equal Employment Opportunity Commission (“EEOC”)—which enforces employment discrimination based upon Title VII of the Civil Rights Act of 1964 (race, color, religion, sex, national origin, and discrimination), the Americans with Disabilities Act (discrimination based on disability), and the Age Discrimination in Employment Act (age discrimination)—selects to pursue meritorious suits of less than $10,000 and argues that these suits would not be brought up by the private bar. Id. at 3. He discusses the fact that the EEOC needs not wait for claims to be brought to its attention to file claims but often do. Id. at 52.
experience their own budget constraints.

Because of the government’s budget constraints, problems arise during the claim-selection process and the claim-enforcement process. The financing governmental entity must decide which claims to finance, to what extent to pursue the selected claims, and which to leave unenforced. Which procedures are used depends on the laws being enforced.

Contrary to cases in which the government entity is a claim aggregator, victims must usually request the help of the entity acting as claim financier. Some governmental entities investigate all claims brought to them and select which valid claims to pursue. Some agencies wait for the victims to bring enough evidence to pursue a claim.

Procedures vary extensively but, generally, to ensure that their case is selected, victims must overcome certain information asymmetries: the victims hold the evidence and need to convince the governmental entity to pursue claims based on this evidence. On the opposite side, the public enforcer must investigate enough claims and enforce enough infractions to encourage victims to voluntarily keep reporting lawbreakers.

165 In some cases, the agency may investigate on its own volition. Id. at 52.
166 For instance, the EEOC investigates discrimination claims and decides which to pursue based upon its investigation. See infra Section C.
167 See infra Section B.
168 See generally Shavell, supra note 3 (discussing the importance of placing the enforcement in the hands of the right individual with the easier access to evidence).
169 To overcome this issue, procedures may require that the victim reports a lawbreaking to the agency before it can bring its own suit. For instance, to ensure that victims report infractions, a private victim of employment discrimination needs a letter from the EEOC before it brings a discrimination suit in federal court. A private victim files a claim with the EEOC, which then exercises a first option—similar to the one described when discussing CERCLA in Section II.C. The EEOC has 180 days to investigate a complaint brought by a victim; they can decide to initiate a settlement between the parties; if it fails to bring a suit on behalf of the victim or emit a right-to-sue letter to the victim, only then can the victim sue on their own behalf. This mandatory reporting ensures that the agency screens claims before they go to court but raises issues about cooperation. For more discussion about procedures and the argument about whether a victim must cooperate before being granted and using the
After the claim-selection process, the representation process often misaligns victim and government incentives. Once it elects to finance a claim, a public agent can elect among an arsenal of ways to finance claims: trial voucher, subsidy, acting as the victim's attorney, or suing on behalf of the victim (Table 2). Table 2 supplements this information by adding the financial methods and showing how different forms of financing are attached to different levels of control:

<table>
<thead>
<tr>
<th>Agent of the Private Party</th>
<th>Requires Input from and Coordination with the Private Party</th>
<th>Independent Enforcer</th>
</tr>
</thead>
<tbody>
<tr>
<td>Public Enforcer</td>
<td>No Control</td>
<td>Some Control</td>
</tr>
<tr>
<td>Level of Control</td>
<td>===&gt;</td>
<td>Full Control</td>
</tr>
<tr>
<td>Example of Financing Methods</td>
<td>Trial Voucher</td>
<td>Conditional Subsidies</td>
</tr>
<tr>
<td></td>
<td></td>
<td>Providing Attorney</td>
</tr>
</tbody>
</table>

In many cases, a public entity deploys its own lawyers to enforce these rights, steps into the victim's shoes, and acts on behalf of the victim. This creates a traditional agency problem and conflict-of-right-to-sue letter, see, e.g., Laura M. Hyer, *Is Cooperation with the EEOC an Implied Requirement for Exhaustion of Administrative Remedies?*, 98 *Iowa L. Rev.* 1351, 1355-57 (2013). This issue is beyond the scope of this Article but offers some insight into other inefficiencies associated with these procedures.

170 For instance, the EEOC can bring a suit on behalf of the aggrieved party but: under the procedural structure created by the 1972 amendments, the EEOC does not function simply as a vehicle for conducting litigation on behalf of private parties; it is a federal administrative agency charged with the responsibility of investigating claims of employment discrimination and settling disputes, if possible, in an informal, noncoercive fashion. *Occidental Life Ins. Co. of Cal. v. EEOC*, 432 U.S. 355, 368 (1977).
interest issues.\textsuperscript{171}

When the government uses its own lawyers to investigate and sue, it raises the question: who is the true client?\textsuperscript{172} The identity of the true client impacts the strategy. For instance, if the government is the client, the government may put deterrence before compensation; or if the victim is the client, it will usually put compensation before deterrence.\textsuperscript{173} In other words, a governmental entity that enforces a private party's rights may prefer a different outcome and remedies than the private right holder.

In terms of outcome, right holders should prefer to go to trial instead of settling because they may not recoup full compensation in a settlement. Furthermore, since the right holder does not pay for the litigation costs, it has no incentive to settle for less.\textsuperscript{174}

A governmental entity that favors deterrence could also be expected to prefer trials because settlement may reduce any deterrence effect;\textsuperscript{175} however, this relationship is not clear. On the one hand,

\textsuperscript{171} See generally George M. Cohen, \textit{When Law and Economics Met Professional Responsibility}, 67 FORDHAM L. REV. 273 (1998) (discussing the traditional agency problems, which are based upon the separation of ownership and control and which exist during a legal representation where the self-interest of the lawyer may differ from the self-interest of the client leading to suboptimal results).

\textsuperscript{172} This question has been answered in detail for the case of insurance attorneys. See, e.g., Charles Silver & Kent Syverud, \textit{The Professional Responsibilities of Insurance Defense Lawyers}, 45 DUKE L. J. 255, 264 (1995) (discussing the issues associated with insurance financing the insured counsels). In the case of governmental representation, complainants may see that the attorney handling the case is directly employed by the government; however, these issues will be investigated again in Section V.C. If any ambiguity arises, it is the attorney's role to clarify to the complainant that the government is his or her employer.

\textsuperscript{173} There are a few cases of specific deterrence in which the victims may wish to deter the lawbreaker to act against him in the future as well. For simplicity, this kind of situation is not considered.

\textsuperscript{174} The right holder may elect to settle for other nonfinancial reasons such as emotional exhaustion; but for simplicity, these other reasons are assumed to be negligible.

\textsuperscript{175} \textit{Steven Shavell, Foundations of Economic Analysis of Law} 412 (Harv. Uni. Press 2004). The author discusses the desirability of settlement versus trials and considers the theoretical effects of deterrence. \textit{Id.} at 411-15. He argues that governmental entities and private actors may have different preferences for settling
winning fewer, more complicated cases may increase deterrence more than settling a lot of easier cases because tried cases receive more publicity than settlements—particularly if the settlement involves a nondisclosure agreement. On the other hand, the government may wish to maximize the number of claims it pursues to maximize the number of lawbreakers who internalize some costs of their activities. Lawbreakers should be more deterred by knowing that they have a higher chance of being held responsible for their actions. This strategy also helps society reach a socially efficient lawbreaking level. In reality, governmental agencies have often opted for the settling strategy; they tend to settle more cases than do private individuals.

because, for instance, governmental actors internalize the trial cost to society, which private actors ignore. Id. at 411-12. But he also argues that settlement may lead to inefficient information dissemination. Id. at 414.

See Theodore J. St Antoine, Mandatory Employment Arbitration: Keeping It Fair, Keeping It Lawful, 60 CASE W. RES. L. REV. 629, 636-41 (2009). “Some sizable, well-publicized jury verdicts could do considerably more, it is said, to deter workplace discrimination than any number of smaller, confidential arbitration awards.” Id. at 634. However, the relationship between trial publicity and complexity seems unclear.

The publicity is affected by the size of the compensation more than whether the case goes to trial. However, the trial’s public setting lends itself to more media reporting.

Carl J. Dahlman, The Problem of Externality, J. L. & ECON. 141, 141-42 (1979) (discussing the need to make actors internalize all the cost of their activities to reach a level efficient level of activity).

In Johannes Rincke & Christian Traxler, Deterrence through Word of Mouth 2-11 (CESifo Working Paper Series No. 2549 2009), http://ssrn.com/abstract=1347956 (last visited June 14, 2015), the authors estimated the deterrence effect of enforcement for television tax in Austria and find a relationship between the level of enforcement and the deterrence effect.

Because enforcement is costly, the socially efficient lawbreaking level will be positive. See generally Gary S. Becker, Crime and Punishment: An Economic Approach, 76 J. POL. ECON. 169 (1968) (building a model of enforcement and level of lawbreaking activity).

See, e.g., Selmi, supra note 164, at 22. The author discusses that the EEOC outperforms the private bar in settlement rate and success rate at trial; Theodore Eisenberg & Henry Farber, The Government as Litigant: Further Tests of the Case Selection Model, 5 AM. L. & ECON. REV. 94, 118-22 (2003) (investigating the impact of the plaintiff’s identity on trial and win rate for employment discrimination cases and finding that the government has a lower trial rate but a higher win rate); Gabison,
In terms of remedies, a governmental entity would be expected to seek greater damages because greater damages create more deterrence, but when the government pursues a strategy in which it settles more cases, it should recoup lower individual damages. In the past, governmental entities have settled more often and settled for less than private individuals. Under these circumstances, none of the lawbreakers fully internalize their activity costs to society; thus, they will pursue a suboptimal level of activities and take a suboptimal level of care. And none of the right holders are made whole but instead carry a part of lawbreakers’ activity costs. This settling strategy conflicts with each right holder’s individually rational objective.

Since the government acts on behalf of the right holder, the government has two clients with two different interests: society and the right holder. The government will struggle to balance these multiple interests when they diverge. Generally, when the governmental entity steps into the victim’s shoes, it retains full control over the suit because it assumes the place of the victim. And when it retains such control, it may pursue actions that the victim may not favor. The next Section discusses the selection process using the example of the Virginia Department of Labor and Industry (“DOLI”). The following Section also discusses the enforcement process employed by the Department of Housing and Urban Development (“HUD”) and the DOLI.

B. The Virginia DOLI’s Selection Process of the Virginia Payment of Wage Act Cases

This Section focuses on the selection of appropriate cases using a state agency as an example. As a social planner, the government should attempt to maximize societal welfare with respect to its budget constraints. Trial selection becomes important: the governmental entity must balance pursuing more claims to maximize compensatory damages and selecting claims according to their deterrence effect.

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*CERCLA supra* note 46 (discussing that the EPA settles more CERCLA complaints).


183 See, e.g., Selmi, *supra* note 164, at 22 (comparing the EEOC to the private bar).
At the state level, the DOLI enforces the Virginia Payment of Wage Act. Under this Act, when an employer breaches the employee’s rights by failing to pay the employee due wages, an employee can file a complaint with the DOLI for unpaid wages.

Afflicted employees can enforce their private rights using the common law instead of this Act. Besides litigation costs, afflicted employees may prefer that the government enforces their rights because private parties have fewer remedies available than the government. The government can additionally request civil penalties and criminal charges. These other remedies can help a plaintiff reach a faster resolution because these remedies can be used as leverage.

Right holders and governmental enforcers may differ in their appreciation as to which suit should be pursued. When the governmental enforcer decides not to pursue a claim, the right holder may be left without remedies. For instance, in Mar v. Malveaux, Mar (the plaintiff) worked for a construction corporation. After not being paid his wages, he filed a claim with the DOLI for unpaid wages pursuant to the Virginia Payment of Wage Act. The DOLI’s commissioner used his discretion and decided to not pursue the claim. The right holder decided to file a suit against the commissioner based upon the theory that the commissioner had limited statutory discretion. The court of appeal held that the agency had full discretion as to which claims to pursue and that this discretion was not subject to judicial review.

This case offers an example of a selection process that can seem

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184 VA. CODE ANN. § 40.1-29 (2009).
185 Id. at § 40.1-29(F).
189 Id.
190 Id. at 736, 738.
191 Id. at 737-38.
192 Id. at 739.
opaque, highly discretionary, and lacking in ways for the right holder to appeal. Since the governmental enforcer selects the suits it wishes to pursue, the government may select easier cases\(^{193}\) that are presented to them in the way they wish to pursue it. But aggrieved individuals may not know how to present their case.

This information asymmetry was evident in this case. The aggrieved worker could not overcome the misinformation to convince the agency to take on his case. The DOLI claimed that the claim did not go forward because the aggrieved employee did not present sufficient evidence to support the claim.\(^{194}\) The aggrieved employee claimed that he brought evidence to the DOLI’s attention and wanted the DOLI to issue subpoenas to gather more of the said evidence.\(^{195}\) When the alleged lawbreaking company responded, it claimed that it did not have a record of these employees.\(^{196}\) However, if the employees were not paid, it would make sense that they would not appear in their record, which put into question whether enough evidence was gathered.

Aggrieved workers must weigh whether to go to the DOLI: on the one hand, the DOLI has an administrative process that could

\(^{193}\) For example, the antitrust governmental enforcement exhibits this characteristic:

\[\text{[The DOJ’s] record of overwhelming success suggests the government pursues only very strong cases. Note, for example, that for the years 1992 to 2008, the DOJ filed 699 cases and won 645 cases. This would appear to translate to a winning rate of over 92%. ... Such a high success rate demonstrates that the DOJ does not like to lose. ... It may well be appropriate for the government to bring litigation only if it is very confident it will win. But that comes at a cost. The DOJ appears much more willing to tolerate a false negative (a failure to prosecute a violation of the antitrust laws) than a false positive (litigating a case when in fact there was no violation). In other words, it appears the DOJ chooses not to pursue litigation in many meritorious cases, perhaps at least in part because it lacks the necessary resources.}\]


\(^{195}\) *Id.*

lengthen the recovery time; on the other hand, the DOLI has more remedies to leverage against lawbreakers. Individuals who elect to go through the DOLI are likely to be individuals who cannot afford to bring the suits themselves. In this case, the plaintiff was represented by legal aid in his appeal. As such, he must have qualified as indigent to be able to access their services, and he likely never brought a follow-on suit for breach of contract. This further illustrates that individuals going through the DOLI are likely to be indigents. Indigent workers are left with only one option: bring the claim to the DOLI and hope that the DOLI picks up the claim, and if the DOLI does not take the claim, the indigent worker will never recover for the work done.

What is further interesting about this case is that the plaintiff was one of seven claimants making the same claim of unpaid wages, from the same company, and for the same construction job. Thus, the alleged lawbreaker seems to be a recidivist. The DOLI elected to believe one company over seven workers. These workers were left with one less way to enforce their claims, and likely had no way to get any compensation. From a deterrence standpoint, this suit probably constitutes the kind of suit that governmental entities wish to pursue: specific deterrence of an alleged recidivist; general deterrence of an industry practice.

In general, evidence supports the proposition that workers are often misinformed about their rights under an at-will contract.

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197 The court further questions the purpose of the Wage Payment Act. Malveaux, 732 S.E.2d at 735-36. It asserts that it establishes how “employers pay wages to employees” and as such is a “regulatory not a remedial statute . . . for the benefit of employees.” Id. at 738. This assertion in dicta seems to contradict the fact that the Act has unique remedies such as fines and criminal penalties.

198 Id. at 734.

199 Id. at 735. The DOLI states that it was “unable to verify that the claimants identified above were employees of Velasquez Constructors Corp. as they have alleged.” Id. (emphasis added). The court cites the letter sent by the DOLI attached as evidence. The evidence presented in the notice of appeal shows seven individuals filed claims with the DOLI about the same companies (exhibit H & G) and shows which constructions jobs they worked on (exhibit F). Id.

200 See generally Pauline T. Kim, Bargaining With Imperfect Information: A Study of Worker Perceptions of Legal Protection in an At-will World, 83 CORNELL L. REV. 105 (1997) (discussing a survey showing that at-will workers misunderstand their legal protection afforded by the law).
Construction work is done in a very informal setting where workers are picked up on a daily basis at a street corner and paid according to their labor. In certain situations, some claimants may be so worried about their legal status that they do not wish to bring a claim to the attention of a governmental agency.\textsuperscript{201}

The selection process of the governmental entity that enforces private rights should be made transparent. Aggrieved individuals should be granted the same due process as are granted to the alleged lawbreakers\textsuperscript{202} and should be allowed to present their cases to the proper administrative agency to help bridge the information asymmetries. They should also be allowed to answer any evidence provided by the alleged lawbreaker. Only giving due process to alleged lawbreakers skews the process in their favor—particularly when governmental entities are granted high level of deference.\textsuperscript{203}

\textbf{C. Discrimination in HUD}

The government often relies on private individuals to bring action and deter socially inefficient activities. Creating the proper incentive to bring claims can be difficult. The selection process can distort incentives and lead to undesirable effects. The following


\textsuperscript{202} See \textit{Mar v. Malveaux}, 732 S.E.2d 733, 739-40 (Va. Ct. App. 2012) (asserting that “it is the employer who is subject to government action under the Wage Payment Act, and thus in need of due process protection.” As such, the right holder does not have the same due process as the alleged lawbreaker and cannot request a hearing to have the agency enforce its right.).

\textsuperscript{203} For instance, in the Virginia Wage Payment Act, the DOLI retains a lot of discretion to go forward with a claim. Virginia courts hold that because of their specialized knowledge, agencies enjoy a lot of deference. State Bd. of Health v. Godfrey, 290 S.E.2d 875, 882 (Va. 1982). The Supreme Court of Virginia stated that “[t]here is a presumption that these public officials acted correctly, and there is no evidence to the contrary.” \textit{Id}. In this case, an agency employee was found to be biased in his actions and statements and even though this bias was improper, it did not affect his fact-finding duties. \textit{Id}. at 879-82. The plaintiff needed to prove both (1) bias actions and (2) bias effects to show an agency impropriety. Therefore, a private actor will struggle to get a state agency to act under an impropriety theory.
housing discrimination example raises issues of incentive distorting practices.

Title VIII of the Civil Rights Act of 1968, commonly known as the Fair Housing Act (“FHA”) and later amended by the Fair Housing Amendments Act of 1988,204 prohibits “discrimination in the sale, rental, or financing of housing.”205 HUD has the “authority and responsibility for administering [the FHA],”206 but HUD cannot enforce the Act on its own. Instead, the DOJ brings actions under this Act.207

Under this Act, an aggrieved individual brings a claim to HUD.208 HUD notifies the alleged lawbreaker209 and then attempts to bring about an administrative agreement between the parties while investigating the claims.210 HUD can also authorize the DOJ to “commence and maintain[] a civil action on behalf of the aggrieved person.”211 The FHA and its 1988 amendments are “unique among federal statutes in mandating that a complainant’s suit be brought by the government automatically upon a finding of reasonable cause and in authorizing government suits for substantial money damages.”212

Once the DOJ commences an action, the “aggrieved person . . . may intervene as of right in that civil action”—using its own attorney. This right of intervention highlights that HUD (nor the DOJ) is not the aggrieved person’s attorney and that HUD may follow a course of action that the aggrieved person disfavors.

If HUD does not authorize an action, the aggrieved individual can bring his own action. As a matter of fact, the aggrieved individual may bring a claim without having to wait for the entire HUD

204 42 U.S.C § 3601 (2016).
207 Id. at § 3614(a)-(d).
208 Id. at § 3610(a).
209 id.
210 Id. at § 3610(b).
211 Id. at § 3612(o)(1).
administrative process to conclude.\textsuperscript{214} To file a private suit, an aggrieved individual must also use his own attorney. Since the private individual does not need HUD's authorization to file a suit, HUD may miss opportunities to advance its own societal-welfare-improving agenda. To avoid this issue, the DOJ (and HUD) can intervene in civil cases if the case "is of general public importance."\textsuperscript{215}

Having the opportunity to intervene in a case negates some of the inefficiencies previously discussed such as the race to file first and dual enforcement. In the case of the FHA, the private rights seem to have been underenforced even with these two causes of action:\textsuperscript{216} the private bar remains underincentivized,\textsuperscript{217} and the public agency relies on complaints to reach it instead of doing its own investigations.\textsuperscript{218}

To encourage the private bar, the 1988 amendments offered the possibility of awarding winning plaintiffs attorney's fees\textsuperscript{219} and uncapped punitive damages.\textsuperscript{220} Attorney's fees may not provide enough motivation for aggrieved parties to bring claims because aggrieved individual must still front the cost of litigation in the hope that if they win, they will be able to recover.\textsuperscript{221} Attorneys intervening in a case

\textsuperscript{214} Id. at § 3613.
\textsuperscript{215} Id. at § 3614(e).
\textsuperscript{216} Olatunde Johnson, The Last Plank: Rethinking Public and Private Power to Advance Fair Housing, 13 U. PA. J. CONST. L. 1191, 1207-09 (2010) (explaining that the public and private enforcement of the FHA remains weak).
\textsuperscript{217} Id. at 1209.
\textsuperscript{218} Michael H. Schill, Implementing the Federal Fair Housing Act: The Adjudication of Complaints, in FRAGILE RIGHTS WITHIN CITIES 143, 168-69 (John Goering ed., 2007) (using an empirical investigation to show that "[b]etween 1989 and 2003, fewer than 1,800 complaints (or 3 percent) received reasonable-cause findings" by HUD and advanced to federal courts and arguing that enforcement and penalties are too low to reach a socially efficient deterrence, thus arguing in favour of HUD focusing its attention on systemic investigation and prosecution of discrimination instead of waiting for complaints to reach the agency).
\textsuperscript{219} 42 U.S.C. § 3614(c)(2).
\textsuperscript{220} Id. at § 3613(c).
\textsuperscript{221} Kathleen C. Engel, Moving Up the Residential Hierarchy: A Remedy for an Old Injury Arising from Housing Discrimination, 77 WASH U. L.Q. 1153, 1188-91 (1999) (arguing that under the FHA, litigation costs are high and win rates are low, so much so that attorneys "will be reluctant to take housing discrimination claims on a contingency basis").
must also be able to justify their fees, which makes fee recovery difficult as well.\textsuperscript{222} Punitive damages may have been more effective in inducing more suits,\textsuperscript{223} but the damages remain low\textsuperscript{224} and underincentivizing.

Since the public agency waits for complaints, the complaints that reach HUD likely suffer from some auto-selection biases. Aggrieved individuals who go to HUD for help are likely to be low-income individuals with budget constraints who cannot pay these attorney’s fees upfront.\textsuperscript{225} These indigent right holders may struggle on their own through the HUD system: between 1996 and 2003 only around five percent of all completed investigations lead to the finding of reasonable cause to go forward to an administrative law judge or to a federal district court.\textsuperscript{226}

Understanding this low rate of success seems a cornerstone in understanding how to achieve higher enforcement of housing discrimination laws. While it is possible that HUD may attract a large number of nonmeritorious claims because it must wait for complainants to bring complaints, discrimination is also a difficult crime to prove: even if aggrieved individuals believe they were discriminated against,

\textsuperscript{222} Id. at 1191.
\textsuperscript{223} Margaret H. Lemos, \textit{Special Incentives to Sue}, 95 MINN. L. REV. 782, 801-04 (2010) (discussing the impact of uncapping punitive damages in FHA cases following the 1988 amendments and finding that the number of suits has tripled eight years following this removal but arguing that the amendments also made other changes, which makes the causal relationship between punitive damages and increased suit filing hard to make).
\textsuperscript{224} Schill, \textit{supra} note 218, at 169 (finding that administrative procedures lead to damages under $2,000 on average, whereas judicial actions lead to damages under $10,000).
\textsuperscript{225} According to a survey of 161 complainants, 87% never hired an attorney during any stage of the process. Id. at 159.
\textsuperscript{226} U.S. GOV’T ACCOUNTABILITY OFF., GAO-04-063, \textit{FAIR HOUSING: OPPORTUNITIES TO IMPROVE HUD’S OVERSIGHT AND MANAGEMENT OF THE ENFORCEMENT PROCESS} 34 (2004) (finding that a “determination of reasonable cause accounted for the smallest share of outcomes, around 5 percent of all completed investigations” for complaints filed between 1996 and 2003 to the Fair Housing and Equal Opportunity (HUD’s enforcing branch for the FHA) and Fair Housing Assistance Program agencies located around the country that intake discrimination complaints and conduct related investigations).
the lawbreaker has better information about the intent of his action since its actions may have many explanations. Furthermore, aggrieved individuals must bring sufficient evidence to prove a claim, and they can struggle to defeat the information asymmetries between what they experience and what they present to HUD.

The fact that victims cannot prove discrimination does not mean they were not harmed. HUD leaves a number of aggrieved individuals without remedy or compensation for harm suffered because the harmed individuals cannot properly prove their individual harm and overcome information asymmetries. To fill this enforcement gap, a number of private groups have emerged to enforce the FHA; however, much like HUD, these groups can focus on issues with societal goals in mind. Specifically, these fair housing groups often receive governmental funding; thus, these organizations may focus on goals

\[227\text{ See generally Texas Dep’t of Hous. and Cmty. Affairs v. Inclusive Communities Project, Inc., 135 S. Ct. 2507 (2015) (finding with the plaintiff when Inclusive Communities Project brought a suit against the City of Dallas and its representatives based upon a disparate impact theory. Inclusive Communities Project is a Texas based nonprofit corporation that assists low-income families in obtaining affordable housing and receives governmental assistance as part of a consent decree in Walker v. Department of Housing and Urban Development, CA 3-85-1210-R (N.D. Tex., J. Buchmeyer)). Disparate impact theory looks at the effect of a law or policy and finds unlawful a law or policy that did not have a discriminatory purpose but ends up having a discriminatory effect; as such, to make a prima facie case, the plaintiff must present statistical evidence of the impact: impact at the societal level. Id. It remains unclear whether other types of evidence can help a prima facie case:}

\[A plaintiff who fails to allege facts at the pleading stage or produce statistical evidence demonstrating a causal connection cannot make out a prima facie case of disparate impact. For instance, a plaintiff challenging the decision of a private developer to construct a new building in one location rather than another will not easily be able to show this is a policy causing a disparate impact because such a one-time decision may not be a policy at all.\]

\[Texas Dept. of Hous., 135 S. Ct. at 2523.\]

\[228\text{ These groups depend on external funding and as such may focus on cases that attract more funding through more publicity.}\]

\[229\text{ See, e.g., FY2014 Fair Housing Initiatives Program Grant Recipient Summaries, http://portal.hud.gov/hudportal/documents/huddoc?id=FHIP2014GrantSum.pdf (finding HUD, through its Fair Housing Initiatives Program grants, provided up to $500,000 to organizations that advance fair housing goals such as fair housing enforcement activities).}\]
similar to the government’s goals in order to obtain funding.\textsuperscript{230} Subsidizing groups instead of individuals can create similar, but not often measured, biases.

Finally, HUD may be doing itself a disfavor and attracting the wrong cases: its funnel selection process endogenously impacts the incentives of aggrieved individuals to report discrimination claims. Even though they do not pay for HUD/DOJ attorney’s fees, aggrieved individuals invest time and resources in order to bring claims to HUD. But these individuals have little chance of success, and if they succeed, they receive low damages.\textsuperscript{231} Therefore, the aggrieved individuals who bring claims must be motivated by factors other than expected economic gains (e.g., retribution). These non-damage motivated suits could correlate with cases that are harder to prove, which would explain the low success rate of HUD complaints.

The HUD selection process has left numerous valid claims unchecked. Underdeterrence starts with underenforcement. Even the selected cases offer little in deterrence because of their corresponding low damages. The inefficiencies in this case do not stem from overlitigation, but from underlitigation. The administrative selection process needs to further balance overlitigation and underlitigation. This selection process has, in many ways, substituted for the litigation process; but, because they leave some individuals without a day in court, these aggrieved right holders may perceive them as less fair.

In both examples, the victims have the opportunity to enforce their own private rights or seek enforcement from a governmental agency. Individuals who opt to go to governmental agencies reveal something about themselves: they might be misinformed about their right,\textsuperscript{232} or they might be experiencing a budget constraint. An opaque or too-stringent selection process leaves victims frustrated\textsuperscript{233} or without

\textsuperscript{230} Note that this funding is often insufficient: these organizations must complement these fundings through other sources such as donations.

\textsuperscript{231} See Schill, supra note 218.

\textsuperscript{232} According to a survey of 161 complainants, 37\% did not know that they could file directly in court. Schill, supra note 218, at 159.

\textsuperscript{233} An aggrieved individual who went through the governmental process may not wish to further go through a judicial process because of the emotional toll that it takes on the aggrieved individual.
recourse. The agencies must find the right balance to ensure that victims have an incentive to keep enforcing their rights or seek help if they cannot. The next Section analyzes this issue and other issues raised by these examples of public enforcement of private rights.

V. LESSONS LEARNED

These examples show that governmental agencies that enforce private rights often provide attorneys to the victims and may also offer an administrative procedural system. For instance, aggrieved individuals under FHA have such an option. The first conflict over how to handle the case may rest with the decision to follow an administrative process or go straight to court. Public enforcers have control over the administrative route. These proceedings are often shorter because they do not have to go through crowded dockets. They are also often cheaper because they do not require the same staff and proceedings as courts. However, because these proceedings are often considered biased and are often appealed, they may simply increase enforcement costs without providing many efficiency benefits.

The discussion that follows focuses on the nonprocedural route and argues that there is much room for improving efficiency. These two types of enforcement of private rights attempt to fix judicial inefficiencies: transaction costs in the form of high coordination costs or high borrowing costs. But they may also end up making things worse. This Section draws some lessons from the examples provided above.

A. The Goal of Enforcement: Society v. the Individual

Public enforcers and private enforcers have different goals. Private victims pursue their private interests, which are most often restitution, while public enforcers want to deter harmful behaviors. While these interests can overlap, they do not always. Resolving these

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234 For instance, in Is Antitrust Too Complicated for Generalist Judges? The Impact of Economic Complexity and Judicial Training on Appeals, 54 J. L. & ECON. 1 (2011), Michael Baye and Joshua Wright find that the Federal Trade Commission administration has an appeal rate of 91.78% (Table 2) and discusses in footnote 18 that this high rate is likely due to the lack of independence.
conflicts of interests becomes central to decreasing some of the large judicial costs that society bears.\textsuperscript{235}

Since governmental entities, in this discussion, bear the litigation costs and the court costs,\textsuperscript{236} an argument could be made that they should direct the societal goals of enforcement; however, pursuing only deterrence can have detrimental effects.

First, deterrence through litigation can lead a public enforcer to bring suits that are neither privately nor socially efficient. If the social planner wishes to specifically deter lawbreakers, in certain settings, private actors are better equipped to enforce breaches in nonlitigious ways. For instance, an employee may use a tit-for-tat strategy: if the employer does not pay the employee, the employee will refuse to work the next period. If the employer has transactional or other training costs for replacing the employee, the employer may stand to lose multiple production periods and may not find it rational to breach their contract. The retaliation can go beyond the aggrieved employee because he may also give the employer a bad reputation in the worker community.

However, deterrence through litigation can be the only solution when lawbreakers may still profit because right holders cannot communicate or bargain intertemporally. For instance, migrant workers who arrive and depart every period may not be able to give an employer a bad reputation to the next crop of workers.

Second, focusing on deterrence can distort the incentives of aggrieved individuals to cooperate with the public enforcer. For instance, the DOLI and HUD exemplify cases where the government

\textsuperscript{235} For instance, in 2003, the judicial and legal expenditures increased to $143 billion, a 321\% increase per capita since 1982. KRISTEN A. HUGHES, JUSTICE EXPENDITURE AND EMPLOYMENT IN THE UNITED STATES, 2003 2 (Apr. 2006), http://bjs.ojp.usdoj.gov/content/pub/pdf/jeus03.pdf. This cost does not include the detection cost (including on policing) and the correction costs (including on incarceration). Altogether, these costs raise the bill to $185 billion or about 1.8\% of GDP. \textit{Id.} at 3.

\textsuperscript{236} See Shavell, \textit{supra} note 3 discusses that private actors are overlitigating because they do not carry the full cost of their litigation: they do not carry the cost of the justice system. However, even private litigation can have deterrence effects that the private actors do not internalize, which can lead to over- or underdeterring. Because they do not internalize all these costs and externalities, Shavell argues that the level of litigation is not likely to be efficient.
must cooperate with aggrieved individuals because the aggrieved individuals are often in a better place to know whether they have suffered an injury. In order to cooperate, the governmental agency must also align some of its incentives with the private incentive, namely it must obtain sufficient compensation for aggrieved individuals to incentivize them to keep cooperating.

This is not to say that deterrence is not a laudable goal in and of itself, but it should not be the sole focus of governmental agency enforcing private rights. Bringing more suits in general should lead to more lawbreakers internalizing the costs of their activities and should thus lead to more deterrence. Governmental agencies should also pursue more suits where they recoup higher damages—only for the right holder.

Governmental entities must balance their deterrence goals with the incentives of other participants. Moving toward an efficient outcome may require making inefficient actions. This includes pursuing suits only for the purpose of compensation with little deterrence effects. These inefficient actions are particularly important when the government acts as a financier of claims and requires the cooperation of right holders. The next Section discusses some inefficiencies that can be addressed.

B. Selecting the Right Cases

Governmental entities have limited resources. They cannot pursue all cases. They must focus their attention on avoiding inefficiencies.

The first inefficiency they can control is dual investigation. Dual investigation occurs when two entities have the same incentive to investigate a claim. For instance, in the CERCLA case, the “EPA places a higher priority on cases in which it hopes to recover more than $200,000.”237 These types of large-ticket suits already attract the private bar.238 For large litigations, private enforcers are more likely to

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237 GAO report, supra note 149, at 32.
238 Some governmental agencies focus on large claims. These agencies may find that these suits offer more deterrence because large claims are publicized and therefore offer more deterrence; however, to a social planner, it should not matter whether
overcome the transaction costs of organizing larger claims and coordinating them into a class action. Similarly, private actors will also be more likely to overcome liquidity constraints for these large civil suits because they will attract the financial backing of large law firms working on contingency fees. Consequently, larger claims are likely to be enforced regardless of whether a social planner intervenes.

When the agency focuses on claims that are privately efficient, they may duplicate the private efforts, waste resources, and encourage a race to the courts. Therefore, social welfare would benefit the governmental agency focusing on other selection criteria or on goals other than large claims.

Private individuals, in most cases, can detect whether they have been harmed. They may still fail, however, to collect the adequate evidence necessary to prove a case. A governmental agency might deploy more resources to detect harmful activities; but it should deploy its resources and expertise in building better cases. Cooperation may be necessary and the agency must ensure that it provides enough incentive to private aggrieved right holders to come forth.

The second inefficiency they can control is dual enforcement. To ensure they do not enforce a claim that a private individual wants to enforce, the government must focus on claims where harmed individuals cannot bring the claims because courts do not permit these individuals to enforce their claims.

The first example comes from the role of the government as an aggregator of claims. Contingency lawyers will have enough incentive to bring these claims, but because of certain jurisdictional limitations, they may not be able to bring these claims, and the government should step in. For instance, in *American Express Co. v. Italian Colors Restaurant*, the plaintiffs signed contracts with American Express. In the contract, they agreed that there “shall be no right or authority for
deterrence comes from its actions or the actions of others. Issues arise because of agency problems where governmental employees may have another incentive to pursue large claim such as career advancement. For a discussion of this argument and these issues, see Margaret H. Lemos & Max Minzner, *For-profit public enforcement*, 127 HARV. L. REV. 853 (2014).

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239 133 S. Ct. 2304, 2308 (2013).
any Claims to be arbitrated on a class action basis; yet, they filed a class action claiming violation of the antitrust laws. The Court ruled that the Federal Arbitration Act does not permit the invalidation of a contractual waiver. In this case, the arbitration process (even less burdensome than going to court) was not privately efficient for individual right holders and their individual claims; hence, they tried to organize the only way they could—through a class action.

Contrary to private contractors, the DOJ enforces the antitrust claims but does not sign any of these contracts. Therefore, the DOJ is not bound by these arbitration clauses or the Federal Arbitration Act and can still bring actions against lawbreakers. The onus falls on the governmental agency to enforce these wide-impact low-value claims. Society at large would benefit from the government aggregating these low-value claims that private individuals cannot bring because of contractual restrictions.

Dual enforcement can also be avoided through a first option, which is a form of preclusion before the claim even reaches the courts. The first option should, however, always be in favor of the

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240 Id.
241 Id.
242 Id. at 2317-20.
243 While the American Express case happens to deal with antitrust laws, the ruling over the Federal Arbitration Act applies to any contract and can involve other laws such as consumer protection statutes, etc. See The Enforcers, FED. TRADE COMM., https://www.ftc.gov/tips-advice/competition-guidance/guide-antitrust-laws/enforcers (last visited Dec. 11, 2016) (stating that both the FTC and the Federal Arbitration Act enforce federal antitrust laws).
244 In an amicus brief, the DOJ argued in favor of the class action and stated that private actions were an important supplement to public actions. Amicus Brief for Respondents at 1, Am. Express Co. v. Italian Colors Rest., 133 S. Ct. 594 (2012) (No. 12-133), 2013 WL 367051, at 1.
245 These contracts are boilerplate, and contractors like the restaurants in American Express or telecom consumers in AT&T Mobility LLC v. Concepcion, 563 U.S. 333 (2011) cannot negotiate the terms. Even a knowledgeable consumer who would take the time to read the contract would find itself without an alternative: sign the contract as is or refuse services.
246 Claim preclusion, BLACK'S LAW DICTIONARY (10th ed. 2014). Preclusion serves the same purpose; however, because preclusion encourages a race to the court, a first option seems pareto superior because the option falls with the same individuals, and the second entity does not have the incentive to expend resources investigating.
private enforcement: the private party wanting to file a claim should notify the enforcing agency and move forward with the claim. CERCLA provides an example of where right holders must notify the agency before they can bring a case. The government should accept the notification and provide the private party with feedback because the governmental entity, as a repeat player, has more experience and expertise judging the strength of cases. For instance, the governmental entity could within sixty days of the notification send a confirmation of notification accompanied with advice based on a three-level grading: proceed with the suit and remain in contact with the agency for support; proceed with care and inform us of the outcome; or insufficient evidence to make a recommendation.247

Placing the first option with the private individual does not mean that private suits are more efficient than public suits; it may well be the contrary. Private suits offer advantages over public suits (e.g., unchanging with political changes or innovative strategies) but they also have some disadvantages (e.g., overzealous enforcement or no social check).248 This first option would avoid the negative effect linked to signaling the strength of a case. Second, it avoids dual enforcement; and single enforcement is arguably pareto superior to having a dual enforcement in most cases.249 Next, the government entity could use the freed-up resources by relying on private enforcement to reach optimal deterrence. As a social planner, if it believes that private enforcement has already reached the optimal level of deterrence and is over-deterring, it need not further invest into deterring. If, however, it believes that the private actor is underdeterring, it can elect to keep deterring through further enforcement.

247 42 U.S.C. § 9659 (d)(1). These chances would not even require legislative actions in some cases. In the CERCLA case, the regulation specifies that the EPA must be informed before filing; it does not specify how the EPA selects cases it wishes to pursue, and governmental agencies are often afforded deference in their policy making under Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1984).
248 Stephenson, supra note 3, at 106-20 (comparing public and private suits and the advantages and disadvantages that private suits offer over public suits).
249 As discussed before, some lawbreaking, such as cartelization, may be underdeterred, and dual enforcement could be pareto superior; but the underlying assumption is that the governmental resource freed by not pursuing a claim already taken on by private parties can be reallocated enforcing another claim.
Similarly, an agency should authorize a follow-on private action only if it believes that the private action will help further deter lawbreakers. While this has not been addressed in this Article, dual enforcement of the same case may be efficient in rare circumstances. For instance, if lawbreaking is hard to detect or hard to prove, then having two entities collecting from one lawbreaker increases his or her expected cost of lawbreaking and decreases his or her expected returns; however, this added cost of lawbreaking can be accomplished through punitive damages and does not require two litigations. Antitrust enforcement exemplifies this issue and explains the logic behind treble damages; yet follow-on litigation remains common in antitrust suits.\footnote{This discussion ignores the issue of federal vs. state enforcement and potential dual enforcement. For instance, see the discussion in Richard A. Posner, \textit{Federalism and the Enforcement of Antitrust Laws by State Attorneys General}, \textit{2 GEO. J. L. \& PUB. POL'Y}, 5, 9-12 (2004) (arguing that state enforcement of federal antitrust laws lead to socially inefficient enforcement).}

Finally, to avoid dual enforcement, the court could also institute compulsory joinder. For instance, the private claims can be made compulsory when the public enforcer files claims that rest upon the same facts.\footnote{Compulsory counterclaims are already enforced under \textit{FED. R. CIV. P. § 13}. This would call for a similar rule but may require notice of the victims if they are not aware of the suit.} This system would require the public enforcer to contact the victims;\footnote{Contacting victims when the public enforcer aggregates claims may prove difficult, but these issues are similar to class action notices and could be administered by the court.} this requirement exists under the Federal Rules of Civil Procedure.\footnote{\textit{FED. R. CIV. P. § 23(c)}.} If avoiding two suits is impossible, allowing both cases to run in the same court can also save resources.\footnote{The logic is that judges acquire an expertise about case issues and could use this expertise to resolve the case faster. The judges may struggle to distinguish the evidence presented in each case and suffer bias from one case to the next; however, follow-on suits offer this very issue, and judicial inconsistency is less likely to occur if the case is presented in front of the same court.}

The third inefficiency they can focus on is enforcing activities that are underlitigated: the enforcing agency should bring claims that harmed individuals would not bring because they are not privately efficient. Since these claims are underlitigated, lawbreakers are also
likely to be underdeterred. In the pursuit of deterrence, focusing on these underlitigated will have overdeterrence and underdeterrence effects, but the overall effect on deterrence may well be worth the expense.

When the government acts as a financer of claims, it targets these underlitigated claims. In this role, the enforcing governmental entity needs to balance between encouraging harmed individuals to report injuries and discouraging rent-seeking individuals from making false claims. If the agency gives too much incentive to sue, aggrieved individuals may inefficiently report claims and bring many nonmeritorious claims. If it gives too little incentive, individuals with certain idiosyncrasies may bring too many nonenforceable claims. As discussed, HUD shows an example where the stringent selection system may have encouraged individuals with idiosyncratic reasons to complain but bring too little evidence.

To reach this balance, the enforcing agency must become more transparent in its selection process: right holders are often confused or unaware of their own rights, whereas agencies often seem capricious from the outside. The government must select claims according to clear and set principals, it must help the aggrieved individual in filing claims and explaining the evidence required, and it must clearly explain why a case was not selected. The DOLI shows an example where the opaque selection system left individuals frustrated, creating further litigations.

Once the governmental agency has set its goal and selected cases, it must elect how it enforces cases. Filing the case in court has large upsides because it can control the narrative and how the case evolves; however, delegating this task allows also for a more flexible, and possibly more efficient, enforcement.

C. Tug-of-War Over Who Controls the Suit

The question of control arises because the beneficiary of the suit and the entity controlling the suit are distinct. First, if a governmental agency and a right holder can both enforce a private law, the

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255 "[I]t may be desirable for the state to encourage litigation even when total litigation costs exceed the amount at issue." Shavell, supra note 8, at 584.
government should always retain a right of intervention. Under the previous conversation, since the government had previously received a notice from the private enforcer, the government is aware that a suit is occurring.\footnote{For example, CERCLA requires that private citizens notify the EPA 60 days before filing a suit. Codified in 42 U.S.C § 9659 (d)(1) (2012).} If the government believes that the private individual’s representation is deficient because, for instance, it does not sufficiently deter bad action, then the government should be able to intervene. Similarly, private victims should always have a right to intervene in public actions initiated by the government or filed on their behalf. In the case of the FHA, private parties already have this right but, as discussed, may not be able to exercise it.\footnote{Gaetke, supra note 212, at 372.}

Having a say in the process ensures that both parties can advance their own goals—within limits. At this point, the court should decide who controls the suit if the private and public entities cannot agree. As a guideline, the court should attempt to reconcile its deterrence and restitution goals with each other. Courts may not be better equipped than governmental entities to decide what goals to advance. But when the entities disagree, courts have an opportunity to maximize social welfare by encouraging a compromise. Courts have a role to play.

Furthermore, since private parties know that a public agency can intervene, they have an incentive to pursue some goals similar to the governmental goals in order to ensure they do not lose control of the suit. The threat of intervention helps ensure that the nonenforcing party has its goals represented; in other words, this helps realign the misaligned incentives.

Second, if the government finances a claim, it must clearly explain what level of control it will retain.\footnote{Id. at 358-68. In their paper, Gaetke and Schwemm discuss the issues raised by the public enforcement of the FHA from an ethical point of view. They describe four possible models of legal representation when the government enforces private rights: (1) the two-client model, where the attorney advances both the interest of the private actors and the public benevolent social planner and must terminate the relationship when conflict of interests arise in-between clients; (2) one-client, third-party payer model, where the attorney represents the private actor but is being paid by the social} The government can elect
different means of financing in order to reach its deterrence goals. 

Table 2 identifies three financing methods and correlates them with three control levels: (1) the government provides its own attorney to the right holder; (2) the government provides subsidies to a group who then enforce claims (conditional subsidies); and (3) the government provides grants to right holders who then enforce their claims (trial vouchers).

When the government provides (1) its attorneys, it retains control of the suits and the right holder becomes a third-party beneficiary. As such, the attorney represents the interest of the social planner and advances its goals while benefiting the private actor.

When the government provides (2 & 3) funding, it becomes a third-party payer and relinquishes control over the suit. But, arguably, even if the government relinquishes control, the types of cases filed and the goals advanced remains similar.

First, when the government provides (2) grants to enforcement groups, it avoids having to review individual cases. Instead, it selects groups according to their enforcement methods. These groups have an incentive to behave like governmental agencies because their funding depends on it. Even without exercising direct control, the repeated relationship incentivizes these groups to follow a strategy and selection biases similar to the subsidizing governmental agency. For instance, these groups focus on claims that attract publicity because these grants are usually insufficient for their functioning and they must receive donations to survive. In other words, this model (2) is a decentralized version of model (1) where the agent of the enforcing agency has limited control.

planner after consensual agreement; (3) one-client, third-party beneficiary, where the attorney represents the interest of the social planner, while benefiting the private actor; (4) shifting model, where the attorney represents both actors and shifts his representation as the case goes forward instead of terminating the relationship as the conflicts arise. Id. The authors recommend the last model for the FHA cases because it accomplishes the goal of Congress. Id. at 368.

259 Id. at 363-64.
260 Id. at 362-63.
261 The limited control comes from the repeated relationship. If a group does not behave or follow governmental guidelines, it will not receive funding in the next period. Right holders who receive trial vouchers do not suffer from this issue because
Second, when the government provides grants or trial vouchers to (3) right holders,\textsuperscript{262} it distorts the right holder’s incentive to sue because he receives the benefits of enforcement without assuming the costs. Since the governmental agency cannot finance all claims because of its own budget constraints, it will have to perform selection process similar to model (1). Through the selection process, the governmental agency can indirectly affect the enforcement goals. The FHA offers an example of situations in which the government deployed a mix of strategy (1) and (2), whereas the DOLI offers an example where the government uses strategy (3).

Regardless of the financing method, the selection process is central to all models. In selecting the cases (or groups), the governmental agency also directs the discourse and deterrence impact.\textsuperscript{263} Once the selection is made, model (1) is more efficient than model (3) only if the centralized governmental agency offers efficiencies of scale.\textsuperscript{264} Therefore, when the government finances claims, it should retain control over the claim and operate under model (1) only if it can resolve and enforce these claims more efficiently.

Subsidies allow the social planner to select the socially efficient suits, but they avoid the problem of double suits associated with the control issue. While this selection is another form of control, some claims merit more enforcement because indigent victims cannot afford to finance litigation nor do they have the proper incentive to even report


\textsuperscript{263} Agencies like the DOLI are offered much deference; therefore, selecting cases with a larger deterrence factor among meritorious cases would not raise impropriety issues.

\textsuperscript{264} Nicholas S. Zeppos, \textit{Department of Justice Litigation: Externalizing Costs and Searching for Subsidies}, 61 L. & CONTEMPORARY PROBLEMS 171, 187-88 (1998) (discussing the screening function of the DOJ and each agency, which “reduces caseload, ensures [to the federal judiciary] a constant stream of intellectually challenging and important cases, and warrants that issues were vetted and that only important and serious arguments are pressed, thus allowing the court to conserve precious resources”).
lawbreakings. Another form of subsidy is attorney’s fees; the next Section delves more on this question when it investigates remedies.

D. Remedy the Private Incentive of Governmental Enforcement

Since the governmental agency bears the risk of the litigation, an argument could be made that it should garner the benefits. This has been true in a number of cases brought by state attorneys general. When the state attorney general acts as an aggregator of a claim under parens patriae, unclaimed settlement or judgment damages collected on behalf of state residents go to the “charities designated by the state attorney general, although the court may award attorney’s fees to him.”265 These peculiarities distort the attorney general’s incentive to file mass-claim actions266 and race to the court to file before private class actions. These ought to be remedied in two ways: in both private and public mass torts, the residuals should go into a trust and the court should decide if they go to a charity;267 and attorneys general should not be granted attorney’s fees since they are performing a social good with large externalities (e.g., deterrence of future activities) for the whole population. Granting attorney’s fees to attorneys general transfers the enforcement costs on the injured population whereas the whole population benefits.268

Beyond the residual issue in mass actions, public and private actors should have access to similar remedies. In many circumstances, public enforcers of private rights have access to more remedies than private enforcer. For instance, the DOLI can impose penalties that are not accessible to private individuals. From an efficiency standpoint, this difference can lead to underdeterrence: since detection and enforcement are not perfect, remedies must be adjusted beyond the actual injury to reach a level that induces the efficient level of

266 Id.
267 Regardless of who files the claim first, the court will end up removing some of the incentive to race to the courts.
268 Since the attorney’s fees will come from the damages collected, the awarding of attorney’s fees forced the right holder to internalize the cost of litigation whereas they do not fully internalize the benefits. Therefore, it leads to inefficient level of enforcement.
lawbreaking.

From a deterrence standpoint, efficiency will be reached regardless of whom collects the fines and punitive damages; nonetheless, whether the punitive damages go to the right holder or to society (public treasury) impacts the race to the court. If the punitive damages go to the claim filer, then both entities will race to the court. If the punitive damages go to the claim holder, then they have no reason to race to the court. Similarly, if the punitive damages go to society, then they have no reason to race to the courts—but private right holders may have fewer incentives to file as well.

Which party should collect the damages is case specific and will depend on the level of enforcement, which depends on the likelihoods of detection, of proving a claim, of success, etc.: if claims are underdeterred, it should go to the right holder; if they are overdeterred, it should go to society. It should, however, not incentivize claim filing; hence, it should not go to the claim filer. For instance, in the FHA case, private enforcers can collect punitive damages.269 These damages have seemingly increased the enforcement level, which remains below the reported lawbreaking level.270 In antitrust cases, plaintiffs can collect treble damages.271 Policymakers can use punitive damages or a multiplier to reach an efficient enforcement level.

Issues of the race to the court also arise if a public enforcer can collect penalties, but private party enforcers cannot. In the case of the CERCLA, private plaintiffs cannot collect penalties;272 nor can they collect penalties in the common law contract claims akin to the Virginia

269 Gaetke supra note 212 at 333, 336-37.
270 42 U.S.C. § 3614(a)-(d).
271 MAYER BROWN, LLP, UNITED STATES, IN GLOBAL COMPETITION REVIEW, PRIVATE ANTITRUST LITIGATION IN 27 JURISDICTIONS WORLDWIDE 149, 153 (2008), https://www.mayerbrown.com/Files/Publication/c0cdef54-78a0-40a8-ab1f-d6ae2900f8b5/Presentation/PublicationAttachment/d872f581-6dc8-45fc-ae67-47c16d4739af/ART_PRIVATE_ANTITRUST_LIT2008.pdf.
272 See, e.g., Pakootas v. Teck Cominco Metals, Ltd., 646 F.3d 1214, 1221 (9th Cir. 2011) (holding that private parties did not have a claim to the penalties and "[t]he penalties are not [the private parties'] hammer to wield. The penalties are the EPA's hammer.").
However, public agencies can. Deterrence, hence, depends on who files the suit. If an agency believes lawbreaking is underdeterred, they may end up filing a follow-on suit for penalties or simply race to the court if they are precluded.

This distinction is at odds with using private enforcement to reach efficient law-breaking levels: private right holders may need additional incentives to enforce their rights legally (instead of using potentially dangerous self-help). Public agencies should not need these punitive-damages incentives since enforcing these lawbreakings is part of their duties and they already remunerated for their enforcement efforts.

Penalties are also leveraged by public enforcers to yield faster results (e.g., settling). Encouraging fast resolution for a public agent but not for private right holder seems inefficient; thus, both types of enforcer should have access to the same remedies. Policymakers may not trust right holders because they perceive them as overenforcing their rights and do not want to further incentivize them to sue. Arguably, this issue can be resolved by redirecting the penalties to society: the deterrence factor of penalties would still function, and private individuals would not be overincentivized. Having different remedies for different enforcers leads to inconsistent law enforcement and particularly inconsistent deterrence effects.

Kamlar Corp. v. Haley, 299 S.E.2d 514, 521 (Va. 1983) (holding punitive damages cannot be awarded under a breach of contract unless an independent willful tort can be proven). Under certain theories, the plaintiff may be able to recover punitive damages. See, e.g., Nedrich v. Jones, 429 S.E.2d 201, 206 (Va. 1993) (holding that an award of treble damages may be appropriate in a suit for conspiracy to procure breach of employment contract under Va. Code §§ 18.2-499 & -500 if the plaintiff is able to show intent to injure others in their business).

These follow-on suits seem less likely to be brought by public agents in certain situation. For instance, Langpap et al., supra note 152 notes that the EPA, a public agent, did not follow private suits after private suits enforced Clean Water Act violations.

Overenforcing occurs when private actors enforce their rights beyond the optimal level of enforcement. Private actors use the courts’ time, but these courts are subsidized by society; thus, private actors do not internalize the full cost of enforcing their rights and hence they may overenforce their rights if the benefits (such as deterrence) do not outweigh the costs.
Whether attorney's fees for private actions should be included as a remedy also depends on the overall enforcement level; hence, it should be decided depending on a case-by-case basis. However, it should be consistent. In the DOLI case, the public agent can collect attorney's fees, whereas private individuals who file a claim under breach of contract cannot collect attorney's fees. In this case, the DOLI does not actually finance claims but provides the attorney's fees upfront. It seems inconsistent that the agency can recover, but private right holders cannot. And this leads to inconsistent deterrence as well.

In general, the legislative body should grant these same remedies. Overdeterrence may occur, but it may be less socially inefficient than underdeterrence. The judicial body still has the final say on remedies and can adjust them to avoid abuse and harassment and tame overdeterrence.

The discussion in this Section does not address criminal penalties such as imprisonment. For instance, the DOLI can bring criminal charges when attempting to recover unpaid wages. Criminal charges are beyond the scope of this Article.

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276 Whether attorney's fees lead to further efficiency depends on numerous factors. They generally increase the deterrence level and the incentive settlement; but depending on the deterrence starting point, they can move the enforcement level toward the optimal level or away from it. See, e.g., the discussion in Lemos, supra note 223.

277 “The general rule in this Commonwealth is that in the absence of a statute or contract to the contrary, a court may not award attorney's fees to the prevailing party.” Prospect Development Co. v. Bershad, 515 S.E.2d 291, 300 (Va. 1999). Since the DOLI case involved a breach of contract for a contract at will, the plaintiff did not have a contract awarding attorney's fees nor did he have a statute that allows such fees.

278 The DOLI acts as a bank for cases “without interest” and the guarantor of fees. If the case is successful, they recover. If it is not successful, they lose the attorney's fees.

279 Under a retributive approach to public law, “[T]he magnitude of punishment should fit the crime, which is to say that punishment should be proportional to the gravity of the offense.” Kaplow, supra note 18, at 1234.


281 Fines are similar to punitive damages and imprisonment could be construed as
E. Outcome Decision and When to Stop

This Section only looks at the decision to go to court or settle; the appeal decision raises similar question but is beyond the scope of this Article. Conflicts arise over the decision of whether to settle and whether to appeal a case. Who controls the suits controls the remedies and the outcome. The diverging goals can lead to diverging remedy requests and outcome choices: "the complainant’s interest in maximizing the monetary portion of an award or settlement might conflict with the government’s preference for creating favorable precedents or for structural injunctive relief aimed at insuring [non-lawbreaking] in the future."\(^{282}\)

As such, in-court requested damages or out-of-court settlement compensations might fall below what a private actor wants. When private actors do not receive full restoration, they may want to enforce the law themselves, which leads to inefficient dual enforcement.\(^{283}\) Conflicts (and potential dual enforcements) arise when the right holders do not participate meaningfully in the proceedings.\(^{284}\)

Functioning in silos leads to inefficiencies. Private right holders and public agencies need to communicate better. First, in-court requests

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loss of income. Having the private actor enforcing public law has occurred until the passage of the Judiciary Act and still does in a number of situations. Thus, it could be construed that aggrieved right holders could also request criminal charges with their own restitution. For more discussion on the topic, see also Michael P. Vandenbergh, The Private Life of Public Law, 105 COLUM. L. REV. 2029 (2005).

\(^{282}\) Gaetke, supra note 212 at 351.

\(^{283}\) For example, several years ago, the FTC collected $19 million for consumers shortly before a private class action settled with the same defendant for $26 million, for the same alleged harm. Because the award duplicated the remedy made available in private litigation, the reviewing court offset the entire FTC award, but only after the FTC had committed substantial public resources to the litigation. Zimmerman, supra note 79, at 535-36 [internal citations omitted].

\(^{284}\) See Adam S. Zimmerman & David M. Jaros, The Criminal Class Action, 159 U. PA. L. REV. 1385, 1417 (2011) (comparing class actions and large criminal restitution funds brokered by prosecutors and agencies and arguing that agencies “lack the rules to (1) coordinate relief with other kinds of lawsuits, (2) afford victims a meaningful right to participate in their own redress, (3) ensure judges police potential conflicts of interest, and (4) provide guidelines for distributing the award”).
of damages are usually set at the injury level, but the public enforcer may underestimate these damages because they are not required to follow the same procedures as class actions and may underestimate the class size.\textsuperscript{285} Second, settlements, as a compromise between parties, usually fall below the actual injury. Private right holders and governmental agencies can disagree on the appropriate level of discounting to avoid litigation.

On the one hand, private right holders may wish to settle a case quickly and receive some compensation, but the public agent may not wish to follow this route. Settlements may not properly deter future lawbreakers because settlements are often private. Thus, "the government generally disfavors confidentiality provisions in settlement agreements, while aggrieved persons may prefer not to see a favorable monetary settlement lost over such an issue."\textsuperscript{286} Therefore, the social planner may continue litigating a case when the victims would have preferred to settle quickly if the key to settling is its confidentiality.

On the other hand, the social planner experiences budget constraints and must decide how far to push each case. An agency has an incentive to get a quick resolution of as many cases as possible to maximize the number of lawbreakers who internalize at least some of the costs of their actions.\textsuperscript{287} But to settle a large number of claims, the government may settle for less,\textsuperscript{288} and the private individual may not agree to the low-settlement offer and would rather prefer to go to court.\textsuperscript{289}

\textsuperscript{285} During agency settlement, "[n]o attempt is made to identify divergent interests in the award, much less encourage counsel to represent parties according to different subclasses." Thus the agencies "may miss an important opportunity to calculate damages, identify different interests, and force wrongdoers to accurately account for the harm they cause." Zimmerman, supra note 79, at 547-48.
\textsuperscript{286} Gaetke, supra note 212, at 352.
\textsuperscript{287} This selection is not mutually exclusive for pursuing larger claims as discussed previously. For instance, the EPA seems to select easier cases and settle more cases than private right holders; the large majority of the cases it settles arrive with an agreed upon settlement. See Gabison, CERCLA supra note 46.
\textsuperscript{288} See the discussion on FHA and see Selmi, supra note 164.
\textsuperscript{289} Other nonfinancial reasons can also explain why right holders prefer going to court. For instance, victims want to testify and have their day in court in order to get closure.
The various incentives involved during settlement can also inadvertently raise the likelihood of dual litigation. Settlements are an important part of the system and more efficient than trials. As such, settlements should be encouraged without creating further inefficiencies.

The involvement of agencies in trial is important for efficiency grounds. Since agencies have more funds than most private individuals and these agencies can live on forever, they do not experience an end-game problem when it comes to negotiations. Agencies have an “overpowering leverage . . . in negotiations.” This leverage will enable more judicially efficient and rapid resolutions.

When the public enforcer acts as an aggregator of claims, dual enforcement will become even more likely: private individuals have sufficient private incentives to bring a suit; and if they are not satisfied with the damages collected, they can follow-on with a private suit while benefiting from the ground work already done. In this respect, governmental settlements can lead to overdeterrence because of the low-received damages.

When the public enforcer acts as a financier, it has even more

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290 “[T]he most important justification for society’s having established the legal apparatus for the holding of trials is, paradoxically, not actually to have trials occur. Rather, it is to provide victims with the threat necessary to induce settlements.” Shavell, supra note 8, at 607.

291 For instance, Michael Baye and Joshua Wright used data of “every reported decision in which an administrative law judge or federal district court judge published a ruling on the merits of a substantive antitrust claim between 1996 and 2006.” Michael Baye & Joshua Wright, Is Antitrust Too Complicated for Generalist Judges? The Impact of Economic Complexity and Judicial Training on Appeals, 54 J. L. & ECON. 1, 6, 10 (2011). They found that “cases in which the DOJ is a plaintiff are appealed 41.64 percent of the time, while only 26.44 percent of decisions involving private-party plaintiff are appealed.” Id. While their dataset may present a selection bias, it shows that public plaintiffs are more patient than their private counterpart.

292 Zimmerman, supra note 79, at 541-42.

293 As discussed previously, this leverage is also enhanced because public agents have access to a broader artillery of remedies. For example, the FTC can collect damages from their enforcement of the Sherman Act (15 U.S.C. §§ 1-7) and pursue employees who “engage in any combination or conspiracy hereby,” and upon conviction, one of the remedies the FTC may request is “imprisonment not exceeding 10 years.” 15 U.S.C. § 1 (2004).
incentives to settle quickly to avoid litigation costs. Settlement falls short of the actual injury; victims are usually not able to sue; and lawbreakers do not fully internalize the cost of their actions. In other words, lawbreakers are underdeterred, and public enforcement of private rights does not reach either its compensation nor deterrence goals.

Settlements ought to be handled with care. One way to ensure that settlements lead to optimal deterrence and avoid incentivizing dual enforcement could be to follow, for instance, the Antitrust Procedures and Penalties Act. The Act sets procedures that must be followed during the settlement of civil antitrust suits. Amongst these procedures, the government must post a notice of settlement to inform the public, and courts must review the settlement to ensure that it is in the public interest. This review remains limited but can be used to avoid dual enforcement to ensure that the right holders’ interests are represented. During the review, the court should encourage right holders to come forth and hold a hearing to ensure that the damages and remedies sought are appropriate.

This Section highlights the need to encourage right holders to participate. Even if the governmental agency retains control of the suit, it has an interest to ensure that it optimally deters lawbreaking and does not overly compromise in its settlements. Speed of resolution should not prevent the lawbreakers who are held accountable from internalizing (more) than the cost of his action.

While right holders can sue in the instances discussed, the government intervenes because indigents have been the target of lawbreakers. Indigents make an easy target because they cannot enforce their rights.


Id. at § 16 (b).

Id. at § 16 (e) (1).

“Congress intended the Tunney Act to prevent judicial rubber stamping of proposed Government consent decrees, but the court’s role in making the public interest determination is nonetheless limited.” U.S. v. Apple, Inc., 889 F. Supp. 2d 623, 631 (S.D.N.Y. 2012) (internal quotations omitted). “The role of the court is not to determine whether the decree results in the array of rights and liabilities ‘that will best serve society, but only to ensure that the resulting settlement is within the reaches of the public interest.’” Id. (quoting U.S. v. Keyspan Corp., 763 F. Supp. 2d 633, 637 (S.D.N.Y. 2011)) (emphasis in original).

Because detection, enforcement, etc., are costly, the level of lawbreaking will be
VI. CONCLUSION

This Article argues that the government plays a role in enforcing private rights. This role, however, can be improved. The government has acted as an aggregate of private claims and as a financier of private claims. In both situations, government actions have led to some inefficiencies. This Article argues that some of these inefficiencies are present and looks at the current enforcement of four private rights to make suggestions as to how to reach higher efficiency levels.

In pursuit of enforcement, the social planner must detect the crime and then enforce the crime. Hence, to reach its goals, the social planner can either affect detection or affect punishment. Thus, a benevolent social planner must ensure that the marginal benefit of detection is also equal to the marginal benefit of punishment. On the other hand, private actors do not have a problem of detection, as they know when they get injured, so they will want to maximize their remedies. But they must also be given some incentives to report the incident: the marginal cost of reporting must be equal to the marginal benefits.

When the public enforcer takes the lead on enforcing a private right, it can decide who to sue, whether to settle, and what relief to seek. While governmental agencies have a bigger arsenal of remedies from which to pick, they always need the right holder to cooperate at some point—if nothing else, to ensure that they adequately reach their deterrence goal. This Article attempts to provide ways in which policymakers are already limiting the inefficiencies of dual enforcement. And their use should be broadened.

This Article attempts to survey the problem based upon simplistic assumptions. In reality, the public enforcer may not be entirely a benevolent social planner. The public enforcer may want to get a head start on a suit as parens patriae in order to obtain the disgorgement (or at least its residues as the damages are often not fully claimed).

The reliance on the government to enforce private rights may positive. To reach the efficient level of lawbreaking, the lawbreaker must be deterred beyond the injury they caused.
increase in the future. Class actions are becoming more difficult to form and leave more room for *parens patriae* suits to operate without preclusions. While governmental agencies have different purposes than private individuals, assuring the latter’s cooperation through following a certification process similar to class action suits can only improve the process.

The economic crisis has already elevated the problem of the government as a financer of private actions. Underdeterrence with regard to housing and wage rights leave governmental agencies with both enforcement and deterrence duties, but the public enforcer should give more of a voice to the victims when acting as a financier. This problem may reoccur with business cycles as people have fewer funds to spare on litigation. It may also worsen as the class gap increases. Future research will have to expand more on these issues.