

# FOREWORD

## Overseeing Agency Enforcement

Rachel E. Barkow\*

### ABSTRACT

*A big part of what agencies do—indeed, the core of their executive power—is law enforcement. Whether it is a statute or an agency regulation, agencies make sure that individuals and entities comply with the law. In the case of some agencies, such as prosecutors’ offices or police departments, all they do is law enforcement; they do not possess rulemaking or judicial powers. Even for agencies that possess an array of powers, including rulemaking, enforcement is typically a core part of successfully achieving their statutory mission. Agency authorizing statutes typically give the agency broad discretion to set enforcement policies and prioritize the cases they will target.*

*As a matter of administrative law doctrine, however, enforcement discretion plays a lesser role. To be sure, when agencies bring enforcement actions against a party, courts will review the agency to verify the agency is complying with the law and not exceeding its authority. But enforcement discretion is far broader than a decision to move ahead against a party.*

*Most aspects of agency enforcement policy generally escape judicial review. A decision not to enforce is presumptively unreviewable, as is an agency’s decision not to monitor those it is charged with regulating. Courts*

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\* Segal Family Professor of Regulatory Law and Policy and Faculty Director, Center on the Administration of Criminal Law, NYU School of Law. I am grateful to Bradford Clark, Neal Devins, Philip Hamburger, Emily Hammond, Alan Meese, Kevin Stack, and participants at the William & Mary Law School faculty workshop for helpful comments on earlier drafts. Thanks to Sonya Chung, Tyler Domino, Hillary Smith, and Ariel Spierer for excellent research assistance and the Filomen D’Agostino and Max E. Greenberg Faculty Research Fund at NYU for its generous support of this project.

*tend to steer clear of second-guessing an agency's selection of which actors to target and which to ignore. The judiciary takes a similarly hands-off approach to an agency's broader plans for how it will proceed with enforcement, changes in its nonbinding enforcement policies, or how it will allocate funds from a lump-sum appropriation for enforcement needs.*

*One might think that because these critical enforcement policy calls do not face judicial review, other oversight mechanisms should take on greater importance. But all too often, enforcement oversight outside the courts gets insufficient attention as well. This Foreword to the Annual Review of Administrative Law in The George Washington Law Review shines a spotlight on enforcement discretion as a standalone problem of agency oversight and begins to catalog approaches for overseeing it.*

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## INTRODUCTION

The fundamental executive power of an agency is law enforcement. Agencies make sure that individuals and entities comply with the law, whether it is contained in a statute or regulation. The typical authorizing statute vests an agency with broad discretion to set enforcement policies, prioritize its cases, and pick and choose from among possible targets. Despite the centrality of enforcement to agency practice, enforcement discretion receives relatively little attention. Most aspects of agency enforcement policy generally escape judicial review. Political oversight is limited as well. This Foreword to the *Annual Review of Administrative Law* in *The George Washington Law Review* shines a spotlight on enforcement discretion as a stand-

alone problem of agency oversight and begins to catalog approaches for overseeing it.

A big part of what agencies do—indeed, the core of their executive power—is law enforcement. Whether it is a statute or an agency regulation, agencies make sure that individuals and entities comply with the law. In the case of some agencies, such as prosecutors' offices or police departments, all they do is law enforcement; they do not possess rulemaking or judicial powers. Even for agencies that possess an array of powers, including rulemaking, enforcement is typically a core part of successfully achieving their statutory mission.<sup>1</sup> Agency-authorizing statutes typically give the agency broad discretion to set enforcement policies and prioritize the cases they will target.<sup>2</sup>

As a matter of administrative law doctrine, however, enforcement discretion and policy plays a lesser role.<sup>3</sup> To be sure, when agencies bring enforcement actions against a party, courts will review the agency to verify that the agency is complying with the law and not exceeding its authority. But enforcement discretion is far broader than a decision to move ahead against a party.

Most aspects of agency enforcement policy generally escape judicial review.<sup>4</sup> A decision not to enforce is presumptively unreviewable

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<sup>1</sup> For example, the Securities and Exchange Commission ("SEC") proclaims on its website that "[f]irst and foremost, the SEC is a law enforcement agency." *How Investigations Work*, U.S. SEC. & EXCH. COMM'N, <https://www.sec.gov/News/Article/Detail/Article/1356125787012> [<https://perma.cc/JMT3-RBP2>] (last updated July 15, 2013). The Environmental Protection Agency ("EPA") states that "[e]nforcing environmental laws is a central part of EPA's Strategic Plan to protect human health and the environment." *Enforcement Basic Information*, U.S. ENVTL. PROT. AGENCY, <http://www2.epa.gov/enforcement/enforcement-basic-information> [<https://perma.cc/BJ7G-E9S3>] (last updated July 14, 2016). The Federal Communications Commission's Enforcement Bureau's "mission is to investigate and respond quickly to potential unlawful conduct." *Enforcement*, FED. COMM. COMM'N, <https://www.fcc.gov/enforcement> [<https://perma.cc/Z5V3-FV7V>] (last visited Aug. 7, 2016).

<sup>2</sup> See Kate Andrias, *The President's Enforcement Power*, 88 N.Y.U. L. REV. 1031, 1044 (2013); Elizabeth Magill, *Foreword: Agency Self-Regulation*, 77 GEO. WASH. L. REV. 859, 901 (2009) ("It is often the case that . . . an agency has a great deal of discretion about which violators it will pursue."). Occasionally, legislatures are more specific in offering guidance on priorities or how they want funds allocated for enforcement, but that tends to be the exception rather than the rule.

<sup>3</sup> Commentators have criticized the fact that the Administrative Procedure Act ("APA") focuses predominantly on the regulation of rulemaking and adjudicative hearings and largely ignores other forms of administrative action. See Edward Rubin, *It's Time to Make the Administrative Procedure Act Administrative*, 89 CORNELL L. REV. 95, 106–09 (2003); William H. Simon, *The Organizational Premises of Administrative Law*, 78 LAW & CONTEMP. PROBS. 61, 70–71 (2015).

<sup>4</sup> Mariano-Florentino Cuellar, *Auditing Executive Discretion*, 82 NOTRE DAME L. REV. 227, 229–30, 229 n.2 (2006) (noting that "the hallmark of many executive decisions often proves to be nearly unfettered discretion" because judicial "review remains either unavailable or fairly

under *Heckler v. Chaney*,<sup>5</sup> as is an agency's decision not to monitor those it is charged with regulating.<sup>6</sup> Courts tend to steer clear of second-guessing an agency's selection of which actors to target and which to ignore.<sup>7</sup> The judiciary takes a similarly hands-off approach to reviewing an agency's broader plans for how it will proceed with enforcement,<sup>8</sup> changes in its nonbinding enforcement policies,<sup>9</sup> or how it will allocate funds from a lump-sum appropriation for enforcement needs.<sup>10</sup> Likewise, the agency's choice of where to file an enforcement action is often one that gets great deference.<sup>11</sup> An agency's decision whether to provide guidance or rules for its frontline enforcers is also

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cursory for a massive range of discretionary decisions involving national security, foreign policy, immigration, domestic regulatory enforcement, public benefits, and investigation or prosecution"); Glen Staszewski, *The Federal Inaction Commission*, 59 EMORY L.J. 369, 370 (2009) ("[F]ederal courts are often reluctant to conduct meaningful judicial review of agency inaction."). Cass Sunstein argues that the willingness of courts to review agency action but not inaction skews the administrative process. Cass R. Sunstein, *What's Standing After Lujan? Of Citizen Suits, "Injuries," and Article III*, 91 MICH. L. REV. 163, 184–86, 195–96 (1992).

<sup>5</sup> *Heckler v. Chaney*, 470 U.S. 821, 832–33 (1985).

<sup>6</sup> *Madison-Hughes v. Shalala*, 80 F.3d 1121, 1125 (6th Cir. 1996) ("The mechanism by and extent to which HHS 'monitors' as well as 'enforces' compliance fall squarely within the agency's exercise of discretion." (quoting *Gillis v. U.S. Dep't of Health & Human Services*, 759 F.2d 565, 576 (6th Cir. 1985))); Simon, *supra* note 3, at 75 (noting that "courts tend to treat monitoring decisions as unreviewable"). It may also be difficult to find an individual with standing to bring an action for nonenforcement. See *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 578 (1992) (concluding that an environmental group lacked standing to challenge the Secretary of Interior's decision not to enforce a provision of the Endangered Species Act outside the United States); *Allen v. Wright*, 468 U.S. 737, 739–40 (1984) (holding that plaintiffs challenging the IRS's failure to deny tax-exempt status to a racially segregated school lacked standing).

<sup>7</sup> Cuellar, *supra* note 4, at 230 (providing as one example the fact that "Labor Department officials decide what plants to inspect for occupational safety violations with little or no external review").

<sup>8</sup> See, e.g., *Norton v. S. Utah Wilderness All.*, 542 U.S. 55, 64, 67 (2004) (rejecting a challenge that would require an agency to implement a plan because it would inappropriately inject the courts into the agency's "day-to-day" management and holding that challenges "can proceed only where a plaintiff asserts that an agency failed to take a *discrete* agency action that it is *required to take*"); Gillian E. Metzger, *The Constitutional Duty to Supervise*, 124 YALE L.J. 1836, 1872 (2015) (noting that administrative law doctrine "forestall[s] challenges to systemic nonenforcement and agency inaction").

<sup>9</sup> See Andrias, *supra* note 2, at 1043 (noting that changes to enforcement policies face "significantly fewer procedural requirements" and such changes "typically do[ ] not need to provide notice-and-comment procedures or present its enforcement policy decisions to an administrative tribunal or court"). A change in enforcement policy may, however, raise due process and notice questions as applied to a particular party. *Id.* at 1043 n.34.

<sup>10</sup> See *Lincoln v. Vigil*, 508 U.S. 182, 193 (1993) (refusing to review the agency's decision about how to allocate funds and likening that choice to the decision not to enforce that was held unreviewable in *Heckler v. Chaney*).

<sup>11</sup> See *Chau v. SEC*, 72 F. Supp. 3d 417, 436 (S.D.N.Y. 2014) ("Congress has provided the SEC with two tracks on which it may litigate certain cases. Which of those paths to choose is a matter of enforcement policy squarely within the SEC's province.").

one that is largely left to the agency's discretion alone, without interference from the courts.<sup>12</sup>

One might think that because these critical enforcement policy calls do not face judicial review, other oversight mechanisms should take on greater importance.<sup>13</sup> But all too often, enforcement oversight outside the courts gets insufficient attention as well.<sup>14</sup> Scholars and policymakers pay attention to political oversight of agencies in general, and some of that oversight covers enforcement discretion (or could cover it).<sup>15</sup> Certainly agency appointments have a big impact on enforcement efforts.<sup>16</sup> But other forms of political control pose unique problems for enforcement oversight. For example, while legislative oversight hearings and contacts between individual members of

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<sup>12</sup> See Simon, *supra* note 3, at 75, 75 n.54 (observing the view that "it is a matter of agency discretion whether to 'canalize the discretion of its subordinate officers' through rules, rather than leaving them to relatively ungoverned ad hoc decisions" but also citing cases where courts ordered the promulgation of rules or guidance). If the agency does opt to provide guidance to its employees, there may be a question about whether that guidance is effectively a legislative rule that must be adopted through notice-and-comment. See David L. Franklin, *Legislative Rules, Nonlegislative Rules, and the Perils of the Short Cut*, 120 YALE L.J. 276, 282–85 (2010) (discussing the caselaw on the line between legislative and nonlegislative rules).

<sup>13</sup> See, e.g., Cuellar, *supra* note 4, at 236 (noting "the importance of recognizing the inherent limitations of traditional judicial review as a means of managing government discretion" and "the value of envisioning new institutional designs to manage discretion more effectively"); Simon, *supra* note 3, at 63 (noting the limits of canonical administrative law doctrine and advocating for a greater focus on performance-based assessments of agencies that takes into account modern organizational theory).

<sup>14</sup> Part of the reason for the lack of attention is that enforcement oversight is largely a matter of agency design, as Part I explains, and agency design questions as a general matter tend to receive insufficient attention. As David Hyman and William Kovacic note in a recent article, "agency design has long been the Rodney Dangerfield of administrative law: it gets no respect." David A. Hyman & William E. Kovacic, *Why Who Does What Matters: Governmental Design and Agency Performance*, 82 GEO. WASH. L. REV. 1446, 1516 (2014). There are, however, some excellent recent scholarly treatments of enforcement discretion and how to police it through mechanisms outside traditional judicial review. See, e.g., Andrias, *supra* note 2, at 1033–36 (arguing for greater scholarly attention to presidential review of agency enforcement and suggesting possible avenues for reform); Cuellar, *supra* note 4, at 230–32 (observing the enormous scope of executive discretion that escapes judicial review and proposing systematic audits of samples of discretionary decisions).

<sup>15</sup> For example, Kate Andrias has explained that presidential review of agency decisions could be expanded to cover enforcement policies. Andrias, *supra* note 2, at 1083–84, 1103–07 (noting benefits associated with the "creat[ion of] a new office within the EOP dedicated to problems of regulatory compliance, or adding responsibilities to an existing office"). This is a prime example of why enforcement should be considered separately, however, because the current framework is ill-suited for the nature of enforcement and requires modifications. See *id.* at 1076–77 (making the case for reforms).

<sup>16</sup> See generally B. DAN WOOD & RICHARD W. WATERMAN, *BUREAUCRATIC DYNAMICS: THE ROLE OF BUREAUCRACY IN A DEMOCRACY* (1994) (noting how changes in administration affect enforcement numbers).

Congress and agencies can influence an agency's general policy approach, political actors cannot use hearings or outreach to prompt specific enforcement actions without raising constitutional questions of due process.<sup>17</sup> Nor do legislators pay much attention to overall patterns of enforcement discretion.<sup>18</sup>

Similarly, although agencies often respond to changes in their budgets, fiscal actions may have unintended consequences on the enforcement front: while a tighter budget may stop an agency from pursuing a particular course, it does not necessarily curb enforcement discretion. Indeed, a tighter budget often means more enforcement discretion because the agency cannot go after all violators without enough funding.<sup>19</sup> This is not to say these mechanisms will not help police enforcement; rather, it is to emphasize that they may not be

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17 Staszewski, *supra* note 4, at 405 n.141 (“Due process concerns could arise from congressional efforts to pressure agencies to undertake enforcement action against specific regulated entities.”); see Archie Parnell, *Congressional Interference in Agency Enforcement: The IRS Experience*, 89 YALE L.J. 1360, 1368 n.55 (1980) (citing cases finding congressional interference to violate due process). For examples of courts wrestling with the line between permissible and impermissible pressure, see, e.g., *Aera Energy LLC v. Salazar*, 642 F.3d 212, 220–21 (D.C. Cir. 2011) (noting that “political pressure invalidates agency action only when it shapes, in whole or in part, the judgment of the ultimate agency decisionmaker,” that “judicial evaluation of pressure must focus on the *nexus* between the pressure and the actual decisionmaker rather than on the pressure alone,” and that agencies may cure tainted decisions and that a full administrative record is useful in dispelling doubts) (quoting *ATX, Inc. v. U.S. Dep’t of Transp.*, 41 F.3d 1522, 1528 (D.C. Cir. 1994)); *Mallinkrodt LLC v. Littell*, 616 F. Supp. 2d 128, 149 (D. Me. 2009) (listing cases involving congressional interference); *United States v. Mardis*, 670 F. Supp. 2d 696, 702 (W.D. Tenn. 2009) (“Generally, informal legislative pressuring of the executive for certain action—particularly from a lone legislator—does not itself result in any assumption of executive power or in legislative domination of the executive. In some circumstances, namely quasi-judicial proceedings before administrative agencies, pressure from congressmen and senators violates the due process rights of the parties involved.”), *aff’d on other grounds*, 600 F.3d 693 (6th Cir. 2010); *Schaghticoke Tribal Nation v. Kempthorne*, 587 F. Supp. 2d 389, 410, 412 (D. Conn. 2008) (explaining “[w]here Congressional hearings do not call the actual decision maker to testify on a pending decision . . . the hearing does not amount to improper influence” and ultimately concluding that “political influence did not enter the decisionmaker’s ‘calculus of consideration,’” to an extent creating a due process violation), *aff’d*, No. 08-4735-cv, 2009 U.S. App. LEXIS 24130 (2d Cir. Oct. 19, 2009) (per curiam); *Esso Std. Oil Co. v. Freytes*, 467 F. Supp. 2d 156, 167 (D.P.R. 2006) (“The issuance of the Report by the Senate Committee during the ongoing proceedings against Esso presents an impermissible appearance of legislative pressure on the adjudicative process.”), *aff’d*, 522 F.3d 136 (1st Cir. 2008).

18 Cuellar, *supra* note 4, at 296 (“[M]ost legislative oversight activity has virtually nothing to do with systematically auditing targeted discretion.”).

19 See William J. Stuntz, *The Political Constitution of Criminal Justice*, 119 HARV. L. REV. 780, 784 (2006) (explaining that budget pressures push law enforcement to “focus too much attention on the crimes of the poor and too little on the crimes of the middle class”).

enough or might need to be modified to best address enforcement as a subset of agency action.<sup>20</sup>

Presidential oversight might also have less of an influence. There is no centralized review of enforcement policies that mirrors the scrutiny the Office of Information and Regulatory Affairs gives to regulations.<sup>21</sup> And while presidential directives can bring about policy changes,<sup>22</sup> the hardest change to effectuate is in the minds of the frontline law enforcement officials at agencies.<sup>23</sup>

Perhaps no area of agency enforcement illustrates this better than criminal law. Police officers and prosecutors possess enormous discretion over whom to stop, arrest, and charge—and for what. Courts largely sit on the sidelines. Decisions not to arrest or charge are essentially unreviewable,<sup>24</sup> and questions of selective prosecution are similarly hard to get before a court.<sup>25</sup> Indeed, given the high rates of

<sup>20</sup> Some mechanisms of oversight, such as the appointment of individuals with particular points of view, are just as likely to influence enforcement policies as the agency's broader rulemaking agenda without requiring modification. Though even in that context, potential nominees could be questioned specifically about their overall enforcement agenda and how they plan to monitor enforcement efforts at the agency.

<sup>21</sup> See Andrias, *supra* note 2, at 1055 (noting that compared to the oversight of rulemaking, oversight of enforcement “has been comparatively sporadic, episodic, and informal”).

<sup>22</sup> See Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245, 2290, 2299–2302 (2001) (explaining how the President can influence agency behavior through directives and informal mechanisms such as speeches and the use of the President's bully pulpit).

<sup>23</sup> See, e.g., Stephen Lee, *Monitoring Immigration Enforcement*, 53 ARIZ. L. REV. 1089, 1093 (2011) (noting that President Obama has made great efforts to change immigration enforcement policy so that it focuses on the interests of unauthorized workers but that “there are plenty of signs that DHS officials, who are steeped in a work culture geared toward law-and-order methods of regulation, have resisted the President's entreaty to consider the labor consequences of their enforcement decisions”); *id.* at 1108–09 (observing how immigration agency officials have resisted presidential directives and noting the “skepticism, resentment, and resistance within ICE's low-level workforce”); *id.* at 1109 n.74 (citing a news article recounting complaints about the enforcement guidelines from the immigration agents' union because the guidelines “take away officers' discretion and establish a system that mandates that the nation's most fundamental immigration laws are not enforced”) (citation omitted).

<sup>24</sup> See, e.g., *Inmates of Attica Corr. Facility v. Rockefeller*, 477 F.2d 375, 379 (2d Cir. 1973) (noting that federal courts have “uniformly refrained from overturning . . . discretionary decisions of federal prosecuting authorities not to prosecute persons”).

<sup>25</sup> See *United States v. Armstrong*, 517 U.S. 456, 463–64 (1996) (noting the “demanding” standard for proving selective prosecution and further observing “that the showing necessary to obtain discovery should itself be a significant barrier to the litigation of insubstantial claims”); William J. Stuntz, *Bordenkircher v. Hayes: The Rise of Plea Bargaining and the Decline of the Rule of Law* 23 (Harv. Pub. L., Working Paper No. 120, 2005), [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=854284](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=854284); see also William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505, 581, 581 n.271 (2001); Stuntz, *Constitution of Criminal Justice*, *supra* note 19, at 843.

pleas—hovering near ninety-five percent in most places<sup>26</sup>—the criminal enforcement process exists almost entirely outside the courts, even when charges are brought.

Few other oversight mechanisms pick up the slack. Political actors have done little to analyze or investigate this process. On the contrary, given the politics of crime, which tend to favor severity and expansion, political overseers have tended to give law enforcement agencies even more discretion by creating more and broader overlapping offenses, allowing them to choose what charges to bring in a given case from a menu of options.<sup>27</sup> Political actors have also increased punishments for crimes, which likewise creates more enforcement discretion because it gives prosecutors greater leverage to threaten charges with longer sentences in order to extract a plea to an offense with a lesser sentence.<sup>28</sup> This dynamic allows prosecutors to avoid trials and judicial oversight. And when criminal law budgets get contracted, enforcement discretion increases as law enforcement officers have even less funding to cover all the crimes that take place within a jurisdiction, so their selection decisions take on even greater importance.

At the federal level, even when the President wants to bring about changes, he faces resistance from line attorneys. For example, while the Department of Justice (“DOJ”) issues various charging memos to its prosecuting attorneys, compliance with those memos varies dramatically from district to district. Recently, when the Department, through the Attorney General, urged legislative reforms to mandatory minimum sentencing laws, an organization of Assistant United States Attorneys sent a letter to Congress objecting to those reforms because they would, in their opinion, diminish their ability to enforce the law.<sup>29</sup>

Our criminal justice system is a massive regulatory undertaking (one that makes the United States the world leader in incarceration

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<sup>26</sup> See Erica Goode, *Stronger Hand for Judges in the ‘Bazaar’ of Plea Deals*, N.Y. TIMES, Mar. 22, 2012, at A12 (showing rate of ninety-seven percent in the federal system and ninety-four percent in the states).

<sup>27</sup> Rachel E. Barkow, *Institutional Design and the Policing of Prosecutors: Lessons from Administrative Law*, 61 STAN. L. REV. 869, 874–75 (2009) (describing the expanse of federal criminal law).

<sup>28</sup> Barkow, *Policing of Prosecutors*, *supra* note 27, at 876–79.

<sup>29</sup> Letter from Robert Gay Guthrie, President, Nat’l Ass’n of Assistant U.S. Att’y’s, to Patrick Leahy, Chairman, & Charles Grassley, Ranking Member, Senate Comm. on the Judiciary (Jan. 31, 2014) (on file at <http://www.naausa.org/2013/images/docs/MandMinSentencingLegOppose013114.pdf>).

and criminal justice supervision, and that has a disproportionate effect on the poor and people of color), and yet it undergoes very little scrutiny or oversight because it is a system produced by a collection of enforcement decisions that themselves face almost no oversight.<sup>30</sup> There is no general review of the policies or allocation of resources. There is virtually no evaluation of which cases are charged and why, nor is much attention paid to how cases get selected.

While criminal justice presents perhaps one of the starkest cases, it is not unique in reflecting how enforcement discretion operates in administrative law more generally. For instance, a lack of sufficient resources to bring enforcement actions against anywhere close to all violators gives immigration officials similarly broad discretion to set immigration policy.<sup>31</sup> Like criminal prosecutors, regulatory agencies such as the Securities and Exchange Commission (“SEC”) threaten enforcement actions and sanctions to extract settlements that keep cases outside of judicial review and, in turn, give greater power to their enforcement arms. Throughout the federal system, agencies often use enforcement and adjudication (as opposed to rulemaking) to set norms,<sup>32</sup> and there is reason to worry that agencies may misuse their discretion.<sup>33</sup>

The aim of this Foreword to the *Annual Review of Administrative Law* in *The George Washington Law Review* is to shine a spotlight on enforcement discretion as a standalone problem of agency oversight and to begin to catalog approaches for addressing it.<sup>34</sup> Because they

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<sup>30</sup> Rachel E. Barkow, *The Criminal Regulatory State*, in *A THEORY OF CRIMINAL JUSTICE: LAW AND SOCIOLOGY IN CONVERSATION* (Sharon Dolovich & Alexandra Natapoff eds., 2015).

<sup>31</sup> See, e.g., Adam B. Cox & Cristina M. Rodriguez, *The President and Immigration Law Redux*, 125 *YALE L.J.* 104, 147–48 (2015) (discussing resource constraints); Lee, *supra* note 23, at 1097 (observing that when Congress passed the Immigration Reform and Control Act of 1986 to target employers in violation of immigration laws, “it would have been impossible for the INS to audit even a significant minority of U.S. employers” thus “requir[ing] the INS to make hard choices among a variety of potential enforcement targets”).

<sup>32</sup> For a discussion of the pros and cons of policymaking by rulemaking versus adjudication/enforcement, see M. Elizabeth Magill, *Agency Choice of Policymaking Form*, 71 *U. CHI. L. REV.* 1383, 1386–98 (2004); David L. Shapiro, *The Choice of Rulemaking or Adjudication in the Development of Administrative Policymaking*, 78 *HARV. L. REV.* 921, 954–58 (1965); see also *SEC v. Chenery Corp.*, 332 U.S. 194, 217–18 (1947) (Jackson, J., dissenting) (arguing that agencies should make changes in policy through rules).

<sup>33</sup> Cuellar, *supra* note 4, at 308 (observing “the presence of compelling reasons to think that executive branch officials will have a relentless tendency to frequently misuse [enforcement] discretion”).

<sup>34</sup> I do not consider here the option of imposing judicial review over agency decisions not to bring enforcement actions because of the many difficulties courts and scholars have identified with that avenue and because there appears to be no sign of the doctrine changing in light of those problems. See Lisa Schultz Bressman, *Judicial Review of Agency Inaction: An Arbitrari-*

are the most economically and politically significant (and to keep this piece at a manageable length), the focus will be on federal agencies, though many of the same models will work to check state level enforcement agencies.

Part I begins by considering how one could design an agency in the first instance to provide checks against over- or underenforcement or inappropriate selective enforcement. Part II turns to the question of how to improve ongoing oversight of agency enforcement by the courts and political overseers. Part III focuses specifically on the role of private actors in overseeing agency enforcement and how those actors can be deployed to monitor and shape agency policies.

The possible avenues pursued here are not intended to be exhaustive. There may be other institutional mechanisms well-suited to a particular area of law. Rather, the aim is to begin to consider some of the major design options that can be used to create more effective monitoring of agency enforcement and to reiterate the importance of the project.

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*ness Approach*, 79 N.Y.U. L. REV. 1657, 1696, 1709 (2004) (advocating for judicial review of specific failures to enforce the law but conceding that “courts cannot ask agencies to consider every possible policy choice” and therefore agreeing with the outcome in *Norton v. Southern Utah Wilderness Alliance*); Cuellar, *supra* note 4, at 241 (“It borders on madness for courts (or legislatures) to allow protracted litigation whenever a party is aggrieved by its decision to enforce legal mandates in a manner other than how the litigant believes the agency should.”); Ronald M. Levin, *Understanding Unreviewability in Administrative Law*, 74 MINN. L. REV. 689, 716 (1990) (“Even many observers who favor a narrow application of *Chaney* concede that the managerial nature of agencies’ decisions about how they can best deploy scarce resources warrants considerable solicitude from the courts during judicial review.”); Cass R. Sunstein, *Reviewing Agency Inaction After Heckler v. Chaney*, 52 U. CHI. L. REV. 653, 672–74, 682–83 (1985) (criticizing the current framework for reviewing agency inaction but nevertheless rejecting the idea that plaintiffs should be able to raise general claims of arbitrariness in enforcement because it would intrude on administrative priority setting). If Congress is able to identify specific enforcement criteria in advance, however, that would allow for judicial review. *See Heckler v. Chaney*, 470 U.S. 821, 823–33 (1985); *Dunlop v. Bachowski*, 421 U.S. 560, 595–96 (1975).

I also do not address changes to substantive law. The content of substantive law defines the boundaries of enforcement discretion, so obviously that is a primary means of control. For example, to really address prosecutorial discretion in criminal cases requires substantive changes, such as the elimination of mandatory minimums. But it is not possible to consider the ideal content of substantive law for every administrative area. Instead, this Article assumes a given set of substantive laws and asks what can be done as a matter of institutional design to place greater oversight on agency enforcement. In this sense, I take inspiration from a past Foreword by Elizabeth Magill. *See Magill, supra* note 2, at 903 (arguing that we should look “much more closely” at institutions and institutional design in administrative law).

## I. DESIGNING AGENCIES WITH ENFORCEMENT IN MIND

When agencies are initially created, there are critical institutional design decisions to be made. Will it be a multimember commission or headed by one individual? How will it obtain its operating budget? Will it have the power to promulgate binding rules? The list of key decisions to make is a long one. And in making those decisions, policymakers must have an eye on their primary goals for the agency. If a concern is insulating the agency from capture, i.e., undue influence from the parties the agency is supposed to be regulating, that may suggest one set of design choices.<sup>35</sup> If a main concern is curbing aggressive government interference with private ordering, that may suggest different decisions.

So what are some of the key design choices if the concern is with enforcement discretion? Here, too, it is important to ask what the greatest risks to the agency are because the nature of the risk will dictate different design choices.<sup>36</sup> Given the interest group and political pressures, is the greater risk likely to be over- or underenforcement? And, even if the risks do not noticeably tilt in one direction or another, there are other design mechanisms that can be used to police enforcement discretion and make sure it is not used improperly to selectively target particular actors or groups based on inappropriate factors.

### A. Underenforcement

Start with a situation where the main concern is one of underenforcement, or the worry that the agency might be reluctant to go after regulated entities.<sup>37</sup> This is likely to be the dominant issue when the politics are lopsided and the regulated entities have greater resources and organization to fight agency efforts and to seek relief from political overseers.<sup>38</sup> For example, one area where this has been

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<sup>35</sup> See generally Rachel E. Barkow, *Insulating Agencies: Avoiding Capture Through Institutional Design*, 89 TEX. L. REV. 15, 26–64 (2010) (exploring features of agency design that can help control against capture).

<sup>36</sup> Robert Kagan notes that the goal of the agency should be welfare-maximizing, “focus[ing] its energies where it can do the most good, guided by a sense of what is legally, technologically, economically, and politically possible.” Robert A. Kagan, *Editor’s Introduction: Understanding Regulatory Enforcement*, 11 LAW & POL’Y 89, 93 (1989).

<sup>37</sup> As commentators have observed, current doctrine does a better job checking affirmative agency action than addressing “excessive agency inaction.” Brett McDonnell & Daniel Schwarcz, *Regulatory Contrarians*, 89 N.C. L. REV. 1629, 1646 (2011).

<sup>38</sup> See Nicholas Bagley & Richard L. Revesz, *Centralized Oversight of the Regulatory State*, 106 COLUM. L. REV. 1260, 1287–90 (2006) (explaining that agencies are more likely to under-

alleged is the regulation of financial entities to protect consumer interests. Because financial firms are so well-financed and organized, concerns have often been raised that regulators have not been enforcing the laws against financial entities as robustly as they should.<sup>39</sup> Similar problems may exist in other contexts involving consumer protection,<sup>40</sup> the regulation of public health and safety,<sup>41</sup> and the environment.<sup>42</sup>

This problem is essentially a variant of a concern with agency capture—the idea that the agency will not be as vigorous as it should be with regulated entities because those entities wield disproportionate political power.<sup>43</sup> Because the problems come from a common cause, many of the solutions apply whether the worry is the production of weak substantive regulations or that whatever rules are passed will be underenforced.<sup>44</sup> For example, giving the agency an independent funding source can help avoid situations where the agency feels the need to pull its punches on either substantive regulations or enforcement efforts because of threats by its political overseers to its budget.<sup>45</sup> Similarly, requiring the President to appoint individuals

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regulate than overregulate because regulated entities have superior resources and organization than public interest groups).

<sup>39</sup> See Michael C. Nissim-Sabata, Note, *Capturing this Watchdog? The Consumer Financial Protection Bureau Keeping the Special Interests Out of Its House*, 40 W. ST. U. L. REV. 1, 13–14 (2012) (explaining how the banking industry is able to organize and “take advantage” of the comment period for the Consumer Financial Protection Bureau). See generally Brad Miller, *The Challenges of Regulatory Enforcement*, in AN UNFINISHED MISSION: MAKING WALL STREET WORK FOR US 75, 76 (2013), [http://rooseveltinstitute.org/sites/all/files/Unfinished\\_Mission\\_Miller\\_Regulatory\\_Enforcement.pdf](http://rooseveltinstitute.org/sites/all/files/Unfinished_Mission_Miller_Regulatory_Enforcement.pdf) (observing the way in which financial firms influenced agency enforcement by using political influence to curb funding).

<sup>40</sup> Barkow, *Insulating Agencies*, *supra* note 35, at 65 (noting that “[a]gencies charged with protecting consumers have a difficult task because the industries they are charged with regulating are typically far more powerful and well financed than the consumers whose interests they are charged with protecting”).

<sup>41</sup> See, e.g., Dorit Rubinstein Reiss, *The Benefits of Capture*, 47 WAKE FOREST L. REV. 569, 591 (2012) (noting “one study suggest[ing] that, because of industry influence, the Food Safety and Inspection Service in the United States Department of Agriculture (“USDA”) had done nothing in relation to E. Coli-contaminated meat for over a decade” and then ultimately promulgated a weak rule after intense industry pressure).

<sup>42</sup> Bagley & Revesz, *supra* note 38, at 1287–88 (noting the advantage of industry over pro-environment groups).

<sup>43</sup> A recent work defines agency capture as “the result or process by which regulation, in law or application, is consistently or repeatedly directed away from the public interest and toward the interests of the regulated industry, by the intent and action of the industry itself.” PREVENTING REGULATORY CAPTURE: SPECIAL INTEREST INFLUENCE AND HOW TO LIMIT IT 13 (Daniel Carpenter & David A. Moss eds., 2014).

<sup>44</sup> For a detailed analysis of how to design an agency to insulate it from capture, see Barkow, *Insulating Agencies*, *supra* note 35.

<sup>45</sup> For example, a former Chair of the SEC has noted that the agency was constantly

with specified qualifications instead of just focusing on partisanship can also help alleviate political pressures because the appointee will have a substantive base of knowledge on which to assess political arguments. If the agency is responsible for enforcing regulations against drugmakers, for instance, it may be helpful to require that the head have medical and scientific expertise that may make it more likely that objective factors will be fully considered in enforcement decisions.<sup>46</sup>

The scope of the agency's responsibilities is another area of agency design that can address concerns with capture and under-enforcement. When the agency is given its responsibilities, designers should take care that the agency is not charged with pursuing conflicting goals, something that can undermine its substantive policymaking and enforcement decisions.<sup>47</sup>

In addition to these general features, which transcend enforcement and affect all of the agency's responsibilities, there are other design features that specifically address the potential for underenforcement. Whenever an agency is established, there is a question of whether it will have exclusive authority to enforce the laws it administers or if other actors will share in that responsibility. When the greatest risk of agency misallocation of resources is that the agency will underenforce, creating a statutory scheme that vests more than one agency with enforcement authority can help mitigate that risk. Multiple agencies effectively means "more cops on the beat to ensure that an agency's rules or a statute's requirements are taken seriously."<sup>48</sup> And because those agencies may have different priorities and political pressures, that may increase the likelihood that one of them will have the right incentives to move forward,<sup>49</sup> assuming that one cannot veto the actions of the other. To be sure, duplication can

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threatened with budget cuts if it behaved too aggressively in the eyes of its congressional overseers. *Id.* at 22–23.

<sup>46</sup> *Id.* at 47.

<sup>47</sup> See, e.g., ALICE BUCK, U.S. DEP'T OF ENERGY, *THE ATOMIC ENERGY COMMISSION* 18–19 (1983) (describing the split of the Atomic Energy Commission due to conflicting agency missions of safety enforcement and development); BARKOW, *Insulating Agencies*, *supra* note 35, at 50 (arguing that "a key danger to avoid is giving a single agency conflicting responsibilities"); LEE, *supra* note 23, at 1111 (noting the view among some that service functions should be separated from enforcement functions in the immigration context so that enforcement is not compromised); BENJAMIN W. MINTZ, *Administrative Separation of Functions: OSHA and the NLRB*, 47 CATH. U.L. REV. 877, 912 (1998) (discussing the benefit of institutional separation of adjudication and enforcement in the Occupational Safety and Health Administration ("OSHA") for fairness and efficiency).

<sup>48</sup> BARKOW, *Insulating Agencies*, *supra* note 35, at 55.

<sup>49</sup> See, e.g., JACOB E. GERSEN, *Designing Agencies*, in *RESEARCH HANDBOOK ON PUBLIC CHOICE AND PUBLIC LAW* 333, 352 (Daniel A. Farber & Joseph O'Connell eds., 2010)

mean that an agency is not as vigilant as it otherwise would be when it is solely accountable for how a law is enforced.<sup>50</sup> But that problem can be addressed by giving primary responsibility to one of the agencies and making sure that the agencies are held to certain metrics that incentivize them to take action.<sup>51</sup>

Another way to buttress enforcement is to allow enforcement responsibility to be shared with state-level actors, typically the state's attorney general.<sup>52</sup> As with the multiple federal agency enforcement model, allowing state enforcers to bring actions helps push against underenforcement because it puts more resources on the side of enforcement and adds an actor that may have different political incentives.<sup>53</sup> There are ample examples from many areas of substantive law where state enforcers have filled gaps left by federal enforcement agencies.<sup>54</sup> This, then, is another design choice that can be used to address concerns with underenforcement.

Design choices specific to enforcement are not limited to the number of agencies that should have responsibility. If, for political or coordination reasons, it does not make sense to have more than one agency charged with enforcement, there are ways to design responsibility within a single agency that can make it more or less prone to over- or underenforcement.

For example, some agencies, like the SEC, are set up to require approval by the agency itself before an enforcement action can be brought or penalties imposed. The SEC commissioners themselves vote on enforcement actions and the imposition of penalties.<sup>55</sup> This could be a valuable checking mechanism if the worry is that those working for an agency will be overly zealous in pursuing its mission. But if the greater risk is one of underenforcement, this kind of approval process can exacerbate the risks. The SEC has long been criticized for being captured by powerful financial interests, and this

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(“[R]edundancy or overlap can prevent capture of agencies because an interest group must bear greater costs to capture several agencies instead of just one.”).

<sup>50</sup> Barkow, *Insulating Agencies*, *supra* note 35, at 56.

<sup>51</sup> See *infra* text accompanying notes 199–207.

<sup>52</sup> Barkow, *Insulating Agencies*, *supra* note 35, at 56.

<sup>53</sup> See *id.* at 56–58.

<sup>54</sup> See *id.* at 57–58 (listing examples).

<sup>55</sup> SEC, DIVISION OF ENFORCEMENT, ENFORCEMENT MANUAL § 2.5.2 (June 4, 2015) (“[T]he Commission will consider the recommendation [of the Enforcement Division] and vote on whether to approve or reject the recommendation.”). The Commission can—and has—however, delegated the initial decision authority of whether to start a formal investigation to the Director of Enforcement, while giving the target of that investigation the right to appeal the Director's order to the full Commission. 17 C.F.R. §§ 202.5(a), (c) (2015).

voting mechanism provides another avenue for those interests to pursue in their quest to hinder the agency's efforts. Even if the career enforcement staff wants to move forward, the targets can try to convince the political appointees who head the agency—and who will be more sensitive to political pressures in general—not to move forward or to proceed with lesser charges or penalties.<sup>56</sup>

Policymakers worried about underenforcement by the agency can also set up the agency to give private actors a greater role. This can mean often-commented upon mechanisms like whistleblower provisions or authorization for private actors to act as “private attorney generals” by bringing citizen suits.<sup>57</sup> But it can also mean more novel design choices, such as the creation of ombudsmen<sup>58</sup> or citizen oversight boards.<sup>59</sup>

### B. Overenforcement

For some agencies, the danger is the opposite one: overenforcement. These agencies may have the incentive to push too far because the political dynamics favor excess. Or these agencies may develop a kind of tunnel vision that prevents them from seeing the downsides to their enforcement policies. Overenforcement could either mean going after more targets than is in the public interest or seeking excessive punishments from those who are targeted, even if the overall number of cases is not in itself excessive.

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<sup>56</sup> The relationship between the internal review process and the agency's enforcement efforts was not lost on Mary Schapiro when she came on as SEC Chair in 2009. One of the changes she announced—in response to concerns that the previous process tended to underenforce—was to streamline the process for SEC approval to open investigations and issue subpoenas by allowing one commissioner to sign off for the entire Commission, and to eliminate a previously piloted practice that had required a “special set of approvals from the Commission in cases involving civil monetary penalties for public companies as punishment for securities fraud.” Floyd Norris, *Unleashing Enforcement*, N.Y. TIMES: ECONOMIX (Feb. 6, 2009, 3:25 PM), <http://economix.blogs.nytimes.com/2009/02/06/unleashing-enforcement/> (reproducing portions of Schapiro's announcement); see also Magill, *supra* note 2, at 869 (“This ‘streamlined’ process is intended to, and no doubt will, have an effect on the pattern of the SEC's enforcement actions, just as the process it replaced was intended to, and no doubt did, have an effect on those patterns.”).

<sup>57</sup> See *infra* text accompanying notes 243–67.

<sup>58</sup> See McDonnell & Schwarcz, *supra* note 37, at 1654–56 (noting how ombudsmen can help address agency inaction).

<sup>59</sup> Part III will discuss these options in greater detail because these mechanisms are not limited in value to situations where the concern is underenforcement. Greater citizen involvement is a way to address a range of enforcement issues, so it will be considered separately, but is flagged here because one of its uses is the policing of underenforcement.

An area that exemplifies this dynamic is criminal enforcement. As Bill Stuntz persuasively demonstrated, the politics of criminal law in the last several decades has taken a “pathological” turn toward severity.<sup>60</sup> The legislative and executive branches share incentives to make criminal laws broader and sentences more severe.<sup>61</sup> Political actors have these leanings because the interest groups in criminal law are overwhelmingly tilted toward severity and the public is easily motivated to support harsher measures by using sensational criminal law stories to drive the debate.<sup>62</sup> Of particular note, those responsible for enforcing criminal laws—police and prosecutors—are themselves active and powerful political players who routinely push for legislation to increase their powers.<sup>63</sup> For example, prosecutors have led the charge in pushing for increased sentences and mandatory minimums because of the bargaining leverage it gives them to obtain guilty pleas and cooperation without having to do the hard work of investigations and trials.<sup>64</sup>

While the forces for more criminal laws and harsher punishments have been strong, those on the other side have been comparatively weak. Unlike the targets of most civil regulatory schemes—well-organized and well-financed industries—the targets of criminal law enforcement tend to be poor and lack the organization and resources necessary to do much to fight back.<sup>65</sup> It is only when broader interest

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<sup>60</sup> See generally Stuntz, *The Pathological Politics of Criminal Law*, *supra* note 25.

<sup>61</sup> *Id.* at 534 (“[E]lected legislators and elected prosecutors are natural allies. Both need to please voters in order to survive, and for both, pleasing voters means essentially the same thing: punishing people voters want to see punished.”).

<sup>62</sup> Rachel E. Barkow, *Administering Crime*, 52 UCLA L. REV. 715, 723–32 (2005).

<sup>63</sup> KRISTIAN WILLIAMS, OUR ENEMIES IN BLUE: POLICE AND POWER IN AMERICA 139 (2004) (“Few changes in public safety or security policies can be made without the tacit approval of the police unions, and the officers’ associations are routinely consulted on changes in the criminal code, or in city policies that might indirectly affect police work.”); Barkow, *Administering Crime*, *supra* note 62, at 728–29, 728 n.25 (giving examples of prosecutorial lobbying).

<sup>64</sup> Barkow, *Administering Crime*, *supra* note 62, at 728 n.25. A recent example is the opposition of the National Association of Assistant U.S. Attorneys to prevent legislation that would reduce mandatory minimum sentences because of the effect it would have on prosecutors’ ability to obtain pleas and cooperation. Sari Horwitz, *Some Prosecutors Fighting Effort to Eliminate Mandatory Minimum Prison Sentences*, WASH. POST (Mar. 13, 2014), [https://www.washingtonpost.com/world/national-security/some-prosecutors-fighting-effort-to-eliminate-mandatory-minimum-prison-sentences/2014/03/13/f5426fc2-a60f-11e3-a5fa-55f0c77bf39c\\_story.html](https://www.washingtonpost.com/world/national-security/some-prosecutors-fighting-effort-to-eliminate-mandatory-minimum-prison-sentences/2014/03/13/f5426fc2-a60f-11e3-a5fa-55f0c77bf39c_story.html); see also Barkow, *Policing of Prosecutors*, *supra* note 27, at 879–83 (explaining this dynamic and the result that, “[w]ith his or her power to choose from a range of federal criminal laws, to exercise significant leverage over defendants to obtain pleas and cooperation, and to control the sentence or sentencing range through charging decisions, the prosecutor combines enforcement and adjudicative power”).

<sup>65</sup> Barkow, *Administering Crime*, *supra* note 62, at 724–26.

groups—such as those against government spending or in favor of limited government or racial equality—take an interest in criminal law reform that the politics starts to move away from being so one-sided.<sup>66</sup> But even where that has occurred, the reforms have been limited.<sup>67</sup> As a result, the laws on the books are sweeping, overlapping, and give criminal prosecutors tremendous power. The scope of our criminal justice system—with more than two million people incarcerated, more than seven million under criminal justice supervision, and one in three adults walking around with criminal records<sup>68</sup>—shows that the general tilt has been toward overenforcement.<sup>69</sup>

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<sup>66</sup> *Id.* at 726–27.

<sup>67</sup> For the most part, the political successes for criminal law reform have been limited to some alternative approaches to nonviolent drug offenders. See John Pfaff, Opinion, *For True Penal Reform, Focus on the Violent Offenders*, WASH. POST (July 26, 2015), [https://www.washingtonpost.com/opinions/for-true-penal-reform-focus-on-the-violent-offenders/2015/07/26/1340ad4c-3208-11e5-97ae-30a30cca95d7\\_story.html](https://www.washingtonpost.com/opinions/for-true-penal-reform-focus-on-the-violent-offenders/2015/07/26/1340ad4c-3208-11e5-97ae-30a30cca95d7_story.html) (“Almost all the reform proposals we have seen focus exclusively on scaling back punishments for drug and other nonviolent crimes.”). For example, the Smarter Sentencing Act of 2015, S. 502, 114th Cong. (2015), introduced by Mike Lee (R-UT) and Dick Durbin (D-IL) is the closest the Senate has come to a reform of the mandatory-minimum regime, but even if passed, it seems clear that any reforms will not reach those “who are considered dangerous either because they deployed a weapon in a crime or have a history of violence” and instead it will cover “[a] narrow subset of nonviolent drug offenders.” Lauren Fox, *Chuck Grassley’s Closer Than Ever to Giving in on Mandatory-Minimum Reform*, NAT’L J. (July 28, 2015), <http://www.nationaljournal.com/s/71107/chuck-grassleys-closer-than-ever-giving-mandatory-minimum-reform>. Similarly, while the Department of Justice has supported various reforms, it has largely targeted its efforts to nonviolent drug offenders. See, e.g., *Hearing on Proposed Amendments to the Federal Sentencing Guidelines Before the U.S. Sentencing Comm’n* (Mar. 17, 2010) (statement of Tristram J. Coffin, U.S. Att’y, Dist. of Vt.) (“The Department [of Justice] . . . supports the evidence-based limit of [alternatives to incarceration, such as entry into drug courts] to low-level drug offenders who commit a nonviolent drug offense . . .”).

<sup>68</sup> LAUREN E. GLAZE & DANIELLE KAEBLE, U.S. DEP’T OF JUSTICE, CORRECTIONAL POPULATIONS IN THE UNITED STATES 1–2 (2013), <http://www.bjs.gov/content/pub/pdf/cpus13.pdf>; SENTENCING PROJECT, HALF IN TEN, AMERICANS WITH CRIMINAL RECORDS 1 (“[B]etween 70 million and 100 million—or as many as one in three Americans—have some type of criminal record.”). For more on the sweep of criminal records, see generally JAMES B. JACOBS, *THE ETERNAL CRIMINAL RECORD* (2015).

<sup>69</sup> There may be some areas of criminal law where the risk is one of underenforcement. Some critics, for example, have highlighted white-collar crime and domestic violence as areas where not enough enforcement is taking place. See, e.g., Alexandra Natapoff, *Underenforcement*, 75 FORDHAM L. REV. 1715, 1716 n.8 (“It has long been suggested that white-collar crime and environmental crimes are underenforced and under-punished.”) (citations omitted); Ezra Ross & Martin Pritikin, *The Collection Gap: Underenforcement of Corporate and White-Collar Fines and Penalties*, 29 YALE L. & POL’Y REV. 453, 456 (2011) (suggesting that regulators fail to effectively follow through with enforcement of corporate and white-collar criminals, leading to “a fundamental disconnect” between the penalty imposed and the penalty actually paid in these cases); *id.* at 1739–40 (citing domestic violence as an “example of how underenforcement can become publicly recognized—and challenged—as a form of social disadvantage and dismissal”). But the general pattern is one that has brought together people from the left and the right sides

Immigration exhibits a comparable dynamic that offers substantial political benefits for overbroad laws with harsh penalties, yet few rewards for those supporting reforms of those laws or a reduction in penalties.<sup>70</sup> In the space where criminal law and immigration intersect, i.e., policies addressing immigrants who commit crimes, the politics are particularly imbalanced, with few powerful interests pushing against excessive enforcement or punishment.<sup>71</sup>

In environments such as these, the political process tends to produce sweeping substantive laws authorizing harsh penalties that law enforcement agents can use against an enormous population of potential targets.<sup>72</sup> The question is how to address the risk of overenforcement in this climate.

It might seem counterintuitive, but some of the design mechanisms for underenforcement might be helpful here as well, even though the concern is the opposite one. That is because, to the extent that overenforcement results from political dysfunctions, design choices that effectively mitigate immediate political pressures may be

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of the political spectrum to agree that we have an overcriminalization and overenforcement problem. See Ellen S. Podgor, *Overcriminalization: New Approaches to a Growing Problem*, 102 J. CRIM. L. & CRIMINOLOGY 529, 534 (“Perhaps what has been the most impressive aspect of this movement [to stop overcriminalization] is that it has no political or ideological colors. Its voice comes from the left, the right, Democrats, Republicans, and provides the strongest coalitions that one could possibly expect.”); see also *Over-criminalization of Conduct/Over-Federalization of Criminal Law: Hearing Before the Subcomm. on Crime, Terrorism, and Homeland Sec. of the H. Comm. on the Judiciary*, 111th Cong. 10 (2009) (prepared statement of Richard Thornburgh, Former U.S. Att’y Gen.) (“The problem of overcriminalization is truly one of those issues upon which a wide variety of constituencies can agree . . . .”); Adam Liptak, *Right and Left Join to Take on U.S. in Criminal Justice Cases*, N.Y. TIMES, Nov. 24, 2009, at A1 (quoting Norman L. Reimer, Executive Director of the National Association of Criminal Defense Lawyers, who said: “It’s a remarkable phenomenon. . . . The left and the right have bent to the point where they are now in agreement on many issues. In the area of criminal justice, the whole idea of less government, less intrusion, less regulation has taken hold.”).

<sup>70</sup> Adam B. Cox & Cristina M. Rodriguez, *The President and Immigration Law*, 119 YALE L.J. 458, 529 (2009) (“Congress might accrue political benefits from making immigration law on the books ever harsher and bear few of the political costs associated with immigration enforcement efforts that portions of the public might see as excessive . . . .”); Kevin R. Johnson, *An Essay on Immigration Politics, Popular Democracy, and California’s Proposition 187: The Political Relevance and Legal Irrelevance of Race*, 70 WASH. L. REV. 629, 636 (1995) (observing that “[h]arsh immigration policies historically have been proposed by those searching for answers to the particular political, social, and economic woes of the day” and that those proposals have met only “token resistance” because the immigrant lobby is relatively weak).

<sup>71</sup> See, e.g., Allegra M. McLeod, *The U.S. Criminal-Immigration Convergence and Its Possible Undoing*, 49 AM. CRIM. L. REV. 105, 130 (2012) (noting that the intersection of criminal law and immigration “is associated with unnecessary forms of incarceration and excessive harshness”).

<sup>72</sup> See, e.g., *id.* at 136.

similarly beneficial. Here, too, requiring that the President appoint agency heads with substantive expertise may help to mitigate partisan pressures because individuals with relevant expertise may have a greater body of substantive knowledge from which to draw. Even greater citizen oversight may be beneficial in this context as well, if there are segments of the public who care greatly about these issues and who might need an avenue beyond democratic politics to get their voices heard.<sup>73</sup>

While some design mechanisms could work to curb the problems of either over- or underenforcement because of their insulating effect, other design choices decidedly work in one direction. For example, having an agency pay attention to multiple values and goals is a bad idea if one is worried about underenforcement, but it might help the agency to curb overenforcement if consideration of those additional values emphasizes factors that help to limit agency excess. For example, if the worry is that the DOJ will overenforce the criminal laws because of the politics of criminal law, statutes could require the agency to take actions to reduce prison overcrowding or to lower the proportion of its budget that goes to the Bureau of Prisons. Having that as a competing goal could help rein in the agency's largely unchecked impulses to bring charges.<sup>74</sup>

Similarly, while having other federal agencies and the states enforce alongside an agency is a good idea when the problem is likely to be underenforcement, augmenting the number of entities that can bring enforcement actions exacerbates overenforcement problems.<sup>75</sup> Likewise, expanding an agency's budget or giving it an independent stream of funds might not help if the worry is one of overenforcement. The agency may use that money to pursue even more cases than

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<sup>73</sup> Part III will explore this kind of citizen involvement further and use the example of policing.

<sup>74</sup> See Patti B. Saris, *A Generational Shift for Federal Drug Sentences*, 52 AM. CRIM. L. REV. 1, 9 (2015) (noting that the recent decline in the federal prison population is "likely due in part to the fact that the Department of Justice, facing budget constraints, is prosecuting fewer cases" in the first place).

<sup>75</sup> When the worry is overenforcement, a better way in which other agencies could helpfully get involved could be by requiring them to sign off on enforcement actions. For example, Congress may decide not to give an agency independent litigation authority and instead might require that those decisions be made elsewhere. For a general discussion of agency litigation authority, see Neal Devins & Michael Herz, *The Battle That Never Was: Congress, the White House and Agency Litigation Authority*, 61 LAW & CONTEMP. PROBS. 205 (1998); Michael Herz & Neal Devins, *The Consequences of DOJ Control of Litigation on Agencies' Programs*, 52 ADMIN. L. REV. 1345 (2000).

would be appropriate.<sup>76</sup> Limiting the agency's budget might not help with overenforcement either, though, if the enforcement agency tries to save resources by avoiding costly processes and tries to use threats and leverage to bargain its way to desired results.<sup>77</sup> Tinkering with an agency's budget thus tends to be a poor tool for addressing overenforcement.

A more direct way to manage overenforcement than altering the agency's budget is to insist on certain internal requirements at the agency before enforcement can be brought. Whereas internal checks like commission votes to authorize enforcement actions can exacerbate tendencies toward underenforcement, they can serve as valuable correctives when the worry is that line attorneys may go too far in how they proceed under overbroad laws. Mandating high levels of approval—either at the agency head level or from high-level supervisors—before enforcement actions are brought can be critically important in areas where line agents have tools to go too far.<sup>78</sup>

It is also important to make sure that line agents are not able to make what are, in effect, final determinations by coercing settlements and pleas out of parties who fear even worse outcomes if cases were to proceed to trial. In these circumstances, the “bargaining” is itself the adjudication because the line attorney is making the final determination of what to do unless some other actor within the agency provides a check.<sup>79</sup> A fear of this type of dynamic is behind the requirement in the Administrative Procedure Act (“APA”)<sup>80</sup> that those who investigate a case be separated from those who adjudicate it.<sup>81</sup> The idea is that the person who brings the enforcement action should not also be

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<sup>76</sup> See *supra* notes 69–70 and accompanying text.

<sup>77</sup> See Barkow, *Policing of Prosecutors*, *supra* note 27, at 882–83 (describing the power of the prosecutor to “exercise significant leverage over defendants to obtain pleas and cooperation”).

<sup>78</sup> For instance, the Department of Justice requires high-level approvals before a capital case can be brought. U.S. DEP’T OF JUSTICE, UNITED STATES ATTORNEYS’ MANUAL 9–10.000, <http://www.justice.gov/usam/usam-9-10000-capital-crimes> (describing the process to seek the death penalty in a federal case, including requiring approval of the Attorney General). The review process at OSHA provides another example of this kind of high-level agency review. See GREGORY A. HUBER, THE CRAFT OF BUREAUCRATIC NEUTRALITY: INTERESTS AND INFLUENCE IN GOVERNMENTAL REGULATION OF OCCUPATIONAL SAFETY 51–57 (2007) (discussing internal decisionmaking structure at OSHA, including a review by the regional office of all “violations that may be prosecuted criminally, or if the value of the proposed penalties in a case is likely to exceed \$100,000”).

<sup>79</sup> Barkow, *Policing of Prosecutors*, *supra* note 27, at 882–83.

<sup>80</sup> Administrative Procedure Act, Pub. L. No. 79-404, 60 Stat. 237 (1946) (codified as amended in scattered sections of 5 U.S.C. (2012)).

<sup>81</sup> *Id.* § 554(d).

the final judge of what should happen to the target. While the APA's separation requirement addresses formal adjudications, it does not address situations where there is no technical adjudication at all because the enforcement agent extracts a plea or settlement agreement. But those situations present the same risk of line attorney bias based on what he or she has learned in the investigation, and from the "will to win" that can develop in that role.<sup>82</sup> It is thus just as important in those instances to have someone at the agency who was not involved in the investigation make sure that the plea or settlement is appropriate. I have explained in greater detail why this is a useful model for dividing responsibility in federal prosecutors' offices,<sup>83</sup> but the idea behind it would apply more broadly to all instances where bargaining leverage gives a line attorney or law enforcement officer at an agency the final say in how things come out.<sup>84</sup>

To be sure, even having someone else at the agency who was not involved with the initial enforcement decision sign off on a settlement is not an ideal protection. There is a real concern that everyone at the agency shares the same sense of mission, and therefore there will be a temptation by others to rubber stamp the work of colleagues.<sup>85</sup> The outcry over the SEC's recent decision to bring more of its enforcement actions to internal administrative law judges ("ALJs") instead of federal courts stems in large part from a worry about this kind of dynamic.<sup>86</sup> Critics are worried that ALJs, although ostensibly independent, lack the same independence as Article III judges. In addition, because appeals from ALJ decisions go to the SEC's commissioners, who are also responsible for approving the enforcement action in the first instance, the commissioners may also have a bias. Critics have expressed concern that this system puts the SEC in a position to "decid[e] guilt and met[e] out punishment against the people it prosecutes."<sup>87</sup>

This is hardly a new critique. For decades, similar criticism has been leveled at the Federal Trade Commission ("FTC") for following

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<sup>82</sup> Barkow, *Policing of Prosecutors*, *supra* note 27, at 891 (citation omitted).

<sup>83</sup> *Id.* at 895–906.

<sup>84</sup> The SEC requires Commission approval of settlements, but if the division does not think the settlement should be approved, the offer is not presented to the Commission unless the party making the offer requests it. SEC, RULES OF PRACTICE, R. 240(c)(3) (2006); *see also* ENFORCEMENT MANUAL, *supra* note 55, § 2.5.1 (noting that Commission approval of settlements is required).

<sup>85</sup> Barkow, *Policing of Prosecutors*, *supra* note 27, at 902–04.

<sup>86</sup> *See infra* notes 149–58.

<sup>87</sup> Russell G. Ryan, *The SEC as Prosecutor and Judge*, WALL ST. J. (Aug. 4, 2014), <http://www.wsj.com/articles/russell-g-ryan-the-sec-as-prosecutor-and-judge-1407195362>.

the same model of having its commissioners vote on the issuance of a complaint but then also taking appeals from decisions by ALJs.<sup>88</sup> The concern is that agencies using this model may be too aggressive in their enforcement actions because adequate checks do not exist. So while this model of enforcement, which requires high-level approval of the enforcement action by the commission itself, offers more protections against overenforcement than one in which the agency heads play no role in the initial decision whether to bring the action, it still leaves much to be desired in the way of protections.<sup>89</sup>

For that reason, agency designers might want to consider further measures that would involve more independent sources keeping an eye on the agency's enforcement decisions. This could include having a designated independent unit within the agency or one outside of it that makes sure the agency is considering certain factors.<sup>90</sup> Or it could mean insisting that the agency establish guidelines that outside actors can use to assess the agency's performance. There are also ways to make sure the agency faces more judicial and political oversight. Because these tools target more than just overenforcement, they are considered separately in the remaining sections.

### C. *Selective Enforcement*

In addition to worries about over- or underenforcement, there is a separate question of selective enforcement. Even if the agency is not inclined to be either too aggressive or too lax in how it enforces the law as a general matter, it may nonetheless behave improperly if the targets it selects for enforcement are disproportionately singled out in ways that are unwarranted under the legal standards.<sup>91</sup> In crim-

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<sup>88</sup> See, e.g., Philip Elman, *Administrative Reform of the Federal Trade Commission*, 59 GEO. L.J. 777, 810–11 (1971); Richard A. Posner, *The Federal Trade Commission*, 37 U. CHI. L. REV. 47, 53 (1969).

<sup>89</sup> Empirical research offers support for the criticisms. For instance, an analysis of FTC decisions shows that “commissioners are more likely to vote for administrative complaints if they were members of the Commission that chose to prosecute those cases.” Malcolm B. Coate & Andrew N. Kleit, *Does it Matter that the Prosecutor is Also the Judge? The Administrative Complaint Process at the Federal Trade Commission*, 19 MANAGERIAL & DECISION ECON. 1, 7 (1998).

<sup>90</sup> See *infra* text accompanying notes 100–06.

<sup>91</sup> “If the agency chooses to pursue one class of violators instead of others, that places a burden on those who are pursued, and, if the two classes compete with one another, the agency’s action provides a relative benefit to those who are not pursued.” Magill, *supra* note 2, at 901. While selective prosecution claims can be raised in court, the bar for succeeding on them is a high one, particularly when the agency can explain that it makes difficult selection decisions based on resource constraints, the overall strength of the case, and the government’s enforcement priorities. See *Engquist v. Or. Dep’t of Agric.*, 553 U.S. 591, 601 (2008) (finding that a person claiming selective prosecution must demonstrate that he or she was “intentionally treated

inal law, for instance, many have raised concerns about selective prosecution that targets people of color because of wide racial disparities in the populations charged with certain offenses. The most commonly cited example involves drug prosecutions, where usage rates between white and black people are comparable, but black people are disproportionately prosecuted.<sup>92</sup> In other contexts, the worry could be targeting political opponents or individuals based on ideological differences<sup>93</sup> or those with deep pockets.<sup>94</sup> Whatever the inappropriate targeting factor, the key is to identify ways of checking against this sort of selection bias.

### 1. *Bias Monitoring Units*

One way to guard against selective prosecution is to make sure that the agency is sensitive to the biases that may come into play in its decisionmaking. A mechanism for doing this is to create an office or entity within the agency itself that polices those concerns. For instance, if the concern is with racial bias, the agency can be designed initially to have an office within the agency that looks out for just those forms of bias in the agency's policies and enforcement patterns.

Margo Schlanger recently highlighted this approach of establishing a dedicated office within an agency to make sure certain values get

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differently from others similarly situated and that there is no rational basis for the difference in treatment") (citation omitted); *Reno v. Am.-Arab Anti-Discrimination Comm.*, 525 U.S. 471, 490 (1999) (noting among the legitimate reasons for treating cases differently: "the strength of the case, the prosecution's general deterrence value, the Government's enforcement priorities, and the case's relationship to the Government's overall enforcement plan") (citation omitted).

<sup>92</sup> AM. CIVIL LIBERTIES UNION, *THE WAR ON MARIJUANA IN BLACK AND WHITE* 4 (June 2013), <https://www.aclu.org/files/assets/aclu-thewaronmarijuana-rel2.pdf> ("[O]n average, a black person is 3.73 times more likely to be arrested for marijuana possession than a white person, even though Blacks and whites use marijuana at similar rates."); SENTENCING PROJECT, *REPORT OF THE SENTENCING PROJECT TO THE UNITED NATIONS HUMAN RIGHTS COMMITTEE: REGARDING RACIAL DISPARITIES IN THE UNITED STATES CRIMINAL JUSTICE SYSTEM* 4 (Aug. 2013) (highlighting disparities between youth and adult drug activity and arrest rates based on race).

<sup>93</sup> For a recent example of this involving the IRS's greater focus on conservative groups, see, e.g., Alex Altman, *The Real IRS Scandal*, TIME (May 14, 2013), <http://swampland.time.com/2013/05/14/the-real-irs-scandal/>; Zachary A Goldfarb & Karen Tumulty, *IRS Admits Targeting Conservatives for Tax Scrutiny in 2012 Election*, WASH. POST (May 10, 2013), [http://www.washingtonpost.com/business/economy/irs-admits-targeting-conservatives-for-tax-scrutiny-in-2012-election/2013/05/10/3b6a0ada-b987-11e2-92f3-f291801936b8\\_story.html](http://www.washingtonpost.com/business/economy/irs-admits-targeting-conservatives-for-tax-scrutiny-in-2012-election/2013/05/10/3b6a0ada-b987-11e2-92f3-f291801936b8_story.html).

<sup>94</sup> Sonia A. Steinway, *SEC "Monetary Penalties Speak Very Loudly," But What Do They Say? A Critical Analysis of the SEC's New Enforcement Approach*, 124 YALE L.J. 209, 224 (2014) (noting that "empirical evidence suggests that the SEC targets 'deep pockets' for whom large-dollar fines will not induce insolvency").

sufficient attention.<sup>95</sup> Professor Schlanger offers as a case study the Department of Homeland Security (“DHS”) Office for Civil Rights and Civil Liberties (“CRCL”), which Congress established to “oversee DHS compliance with constitutional, statutory, regulatory, policy, and other requirements relating to the civil rights and civil liberties of individuals affected by the programs and activities of the Department.”<sup>96</sup> Among other things, the CRCL reviews DHS policies and procedures “to ensure that the protection of civil rights and civil liberties is appropriately incorporated into Department programs and activities”<sup>97</sup> and investigates civil rights complaints made against the agency, including claims of racial profiling.<sup>98</sup>

These units need not be limited to questions of civil rights and liberties. They can pay attention to any issue that prompts concern. Professor Schlanger notes that the Department of Energy has an Office of Economic Impact and Diversity and the Internal Revenue Service has an Office of the Taxpayer Advocate.<sup>99</sup> Many state utility agencies also have consumer protection advocates within them to protect those interests.<sup>100</sup>

The idea is to create a body charged with protecting those interests that may otherwise be overlooked by the agency itself in pursuing its main regulatory mission.<sup>101</sup> The form this office takes can vary. Professor Schlanger notes these units can have the authority to resolve complaints or a lesser power of making recommendations, depending on legislative preference.<sup>102</sup> Obviously they have more power to protect against abuses if they possess more than advisory authority. But even if their charge is only to make recommendations or reports, they can have an impact by calling attention to an issue and potentially rallying interested groups and political overseers that may share that interest.<sup>103</sup>

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<sup>95</sup> See generally Margo Schlanger, *Offices of Goodness: Influence Without Authority in Federal Agencies*, 36 CARDOZO L. REV. 53 (2014).

<sup>96</sup> *Id.* at 62 (quoting 6 U.S.C. § 345(a)(4) (2012)).

<sup>97</sup> *Id.* (quoting 6 U.S.C. § 345(a)(3) (2012)).

<sup>98</sup> *Id.* (quoting 6 U.S.C. § 345(a)(1) (2012)).

<sup>99</sup> *Id.* at 65.

<sup>100</sup> Darryl G. Stein, *Perilous Proxies: Issues of Scale for Consumer Representation in Agency Proceedings*, 67 N.Y.U. ANN. SURV. AM. L. 513, 520–24 (2012).

<sup>101</sup> For a discussion of how an agency with conflicting responsibilities may focus more on industry needs than the public interest, see Barkow, *Insulating Agencies*, *supra* note 35, at 50–51.

<sup>102</sup> See Schlanger, *supra* note 95, at 85 (contrasting the CRCL’s limited authority to make recommendations with the power of the U.S. Department of Agriculture’s civil rights office’s authority to order the agency to take corrective actions).

<sup>103</sup> Schlanger calls this “boundary spanning.” *Id.* at 100, 105.

While this monitoring task can be performed by a unit established within the agency, it need not be. In fact, in some cases, it may be preferable to lodge that function with another agency. Scholars have highlighted the benefits of interagency monitoring when the monitoring agency has a commitment to the value being monitored and the target agency has a different primary mission.<sup>104</sup> There are many examples of agencies neglecting one of their statutorily imposed missions because it conflicted with a different mission that creates greater political pressures on the agency. For example, while the Forest Service's initial goal was to promote timber production, it was later charged with other tasks such as wildlife protection.<sup>105</sup> Those missions often came in conflict, and when they did, the agency tended to side with the powerful economic interests representing the timber industry.<sup>106</sup> The Federal Energy Regulatory Commission has faced a similar conflict between its primary statutory mission of promoting hydropower and its duty under other laws to protect the environment—and it, too, has tended to resolve those conflicts in favor of industry.<sup>107</sup> Or, to take another illustration, many financial regulatory agencies have a charge to ensure the safety and soundness of financial institutions while also protecting consumer interests. Because financial firms have greater lobbying power than organizations representing consumer interests, these agencies have tended to side with the financial industry whenever its claims are at odds with consumer interests.<sup>108</sup> Time and again we see agencies exhibiting a preference for the “mission that its political overseers [will] take the greater interest in.”<sup>109</sup>

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<sup>104</sup> See, e.g., Barkow, *Insulating Agencies*, *supra* note 35, at 50 (noting that “a key danger to avoid is giving a single agency conflicting responsibilities that require the agency to further the goals of industry at the same time that it is responsible for a general public-interest mission”); Eric Biber, *Too Many Things to Do: How to Deal with the Dysfunctions of Multiple-Goal Agencies*, 33 HARV. ENVTL. L. REV. 1, 7–9 (2009) (providing examples of interagency regulation); J.R. DeShazo & Jody Freeman, *Public Agencies as Lobbyists*, 105 COLUM. L. REV. 2217, 2282 (2005) (describing the benefit of having an environmental agency monitor FERC because of FERC's weakness in considering environmental concerns); Lee, *supra* note 23, at 1094 (arguing that one solution to a lack of regulatory enforcement of workplace violations in settings with unauthorized workers is to set up a system of interagency monitoring where a labor agency is charged with monitoring immigration officials “to ensure that immigration officials account for the labor consequences of their enforcement decisions”).

<sup>105</sup> Biber, *supra* note 104, at 17–20.

<sup>106</sup> *Id.*

<sup>107</sup> DeShazo & Freeman, *supra* note 104, at 2219–20.

<sup>108</sup> Rachel E. Barkow, *Prosecutorial Administration: Prosecutor Bias and the Department of Justice*, 99 VA. L. REV. 271, 309 (2013).

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

If, however, another agency is charged with monitoring the enforcement agency to make sure otherwise neglected interests get appropriate attention, that can help push back against the enforcement agency's leanings. If the enforcement agency must consult with a monitoring agency, the monitoring agency can present a viewpoint that might otherwise be lost in the enforcement agency's decisionmaking structure.<sup>110</sup> A monitoring agency can be given an even more robust role if it is also vested with enforcement authority or can veto decisions of the other agency. Whether this structure makes sense will depend on whether the benefits of this arrangement—checking against bias and airing all views—outweigh the costs of having to coordinate between multiple agencies and resolving turf battles.<sup>111</sup>

Whether the body responsible for monitoring the potentially neglected interest is housed within the enforcement agency or outside it at another agency, the goal behind this kind of design is to create an entity that has an incentive to pursue a particular value in order to force that target agency “to confront [its] blind spots and biases” and to “justify an action that they would otherwise never think to explain.”<sup>112</sup>

## 2. *Enforcement Guidelines*

Another possible strategy for combatting selective enforcement is to require the agency to make clear the criteria it will use to make enforcement decisions.<sup>113</sup> When the criteria are established specifically and clearly in advance, it makes it less likely that the agency will depart from those benchmarks for inappropriate reasons.<sup>114</sup>

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<sup>110</sup> Barkow, *Insulating Agencies*, *supra* note 35, at 52 (“Consultation may bring more experts into the process and improve decision making by presenting competing viewpoints.”).

<sup>111</sup> *See id.* at 53.

<sup>112</sup> *See Lee*, *supra* note 23, at 1117.

<sup>113</sup> Lisa Bressman refers to this as “standard setting—that agencies supply standards controlling the exercise of their authority across all cases.” Bressman, *supra* note 34, at 1690. For arguments in favor of guidelines for criminal law enforcement, see PRESIDENT’S COMM’N ON LAW ENF’T & ADMIN. OF CRIMINAL JUSTICE, *THE CHALLENGE OF CRIME IN A FREE SOCIETY* 134 (1967); Ronald F. Wright, *Sentencing Commissions as Provocateurs of Prosecutorial Self-Regulation*, 105 COLUM. L. REV. 1010, 1013 (2005) (“Prosecutorial guidelines can produce more visible and consistent decisions within offices . . .”).

<sup>114</sup> *See Bressman*, *supra* note 34, at 1693 (arguing that insisting on standard setting will “prevent, or at least minimize, corrupting influences from pervading administrative enforcement decisionmaking”); Jessica Mantel, *Procedural Safeguards for Agency Guidance: A Source of Legitimacy for the Administrative State*, 61 ADMIN. L. REV. 343, 393 (2009) (noting that guidance documents “provide an effective means by which agencies can ensure more accurate, consistent, and predictable decisions by agency personnel”); Peter L. Strauss, *The Rulemaking Continuum*, 41 DUKE L.J. 1463, 1483 (1992) (pointing out that “the affected public . . . will almost certainly

Agencies have an incentive to do this even in the absence of a requirement,<sup>115</sup> as evidenced by the sheer volume of enforcement guidelines they have promulgated.<sup>116</sup> This is particularly true when the heads of the agencies want to control the discretion of line officers within the agency to get them to comply with agency policy.<sup>117</sup> In the absence of specific guidelines and directives, those line officers may use their discretion in ways that conflict with the agency's broader goals.<sup>118</sup>

Immigration offers a case in point. When President Obama wanted to offer a reprieve from deportation for certain individuals who came to the United States as children, his initial strategy was to announce a new policy (through the Director of Immigration and Customs Enforcement)<sup>119</sup> and leave it to the discretion of enforcement officers to implement on a case-by-case basis.<sup>120</sup> Thus, the initial guidance provided a list of factors for line officers to consider as a matter of discretion in deciding how to target their limited resources and placed an emphasis on targeting those who committed crimes, but made removing people who had longstanding ties to the United States a low enforcement priority.

The generality of the directive—with the many factors it listed for consideration—and its advisory nature left line officers with ample discretion. Those line officers, in turn, used that discretion largely to carry on as they had been doing even before the President announced the shift. One year after the new policy was announced, few people

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prefer a state of affairs in which such instructions are publicly given and may be relied upon—that is, the lower-level bureaucrats are to follow them, and higher levels are to depart from them only with an explanation”).

<sup>115</sup> Magill, *supra* note 2, at 886 (explaining why agencies need to control authority that has been delegated within an agency); *id.* at 866 n.9 (citing several examples of cases and articles discussing enforcement guidelines).

<sup>116</sup> Nina A. Mendelson, *Regulatory Beneficiaries and Informal Agency Policymaking*, 92 CORNELL L. REV. 397, 398 (2007) (observing the greater number of guidance documents than legislative rules).

<sup>117</sup> Magill, *supra* note 2, at 886.

<sup>118</sup> *Id.*

<sup>119</sup> The President made clear that even though the memorandum stating the policy was issued from the head of Immigration and Customs Enforcement, the memo was “[u]nder the President’s direction.” Cecilia Muñoz, *Immigration Update: Maximizing Public Safety and Better Focusing Resources*, WHITE HOUSE BLOG (Aug. 18, 2011, 2:00 PM), <https://www.whitehouse.gov/blog/2011/08/18/immigration-update-maximizing-public-safety-and-better-focusing-resources>.

<sup>120</sup> Memorandum from John Morton, Dir., U.S. Immigration and Customs Enf’t, on Exercising Prosecutorial Discretion Consistent with the Civil Immigration Enforcement Priorities of the Agency for the Apprehension, Detention, and Removal of Aliens (June 17, 2011), <http://www.ice.gov/doclib/secure-communities/pdf/prosecutorial-discretion-memo.pdf>.

had been spared deportation as a result, leaving the perception “that line officials were resisting implementation of the President’s policy.”<sup>121</sup>

To get better compliance internally, the Secretary of Homeland Security announced a new policy of “deferred action” for young people who came to the United States as children.<sup>122</sup> Unlike the previous memo, which listed a variety of factors that would make a case low priority, this memo was targeted specifically to young people who came to the United States as children and offered five specific qualifications they had to meet.<sup>123</sup> If they met those qualifications, the memo instructed line officers to “exercise their discretion, on an individual basis” to give them relief from deportation. So while the memo still spoke in terms of the officer’s discretion to act on a case-by-case basis, the specificity of what the officer was supposed to consider aimed to limit how that discretion would be exercised. In other words, even though the line officer was supposed to act case-by-case, the factors made clear just how each case should come out.<sup>124</sup>

While this approach has the virtue of giving the agency head greater control over its agents, it comes with costs. The first is that the more specific the agency gets, the more it runs the risk that a reviewing court will deem the agency’s action to be a legislative rule that must be promulgated through notice-and-comment rulemaking because it effectively binds the agency to follow certain criteria, even if it

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<sup>121</sup> Andrias, *supra* note 2, at 1074.

<sup>122</sup> *Id.*

<sup>123</sup> In particular, an individual had to have arrived in the United States before the age of sixteen, have continuously lived in the United States for at least five years, be currently attending school or have received an honorable discharge from military service, have a clean criminal record other than minor infractions, and not be over the age of thirty. See Memorandum from Janet Napolitano, Sec’y, U.S. Dep’t of Homeland Sec., on Exercising Prosecutorial Discretion with Respect to Individuals Who Came to the United States as Children (June 15, 2012), <http://www.dhs.gov/xlibrary/assets/s1-exercising-prosecutorial-discretion-individuals-who-came-to-us-as-children.pdf>.

<sup>124</sup> This same strategy was adopted by the Administration when it announced its expanded deferred action program that included more individuals who came to the United States as children and expanded the program to include parents of citizens and lawful permanent residents. The memo again provided detailed and specific factors for an individual to be considered eligible but then added that, although “immigration officers will be provided with specific eligibility criteria for deferred action . . . the ultimate judgment as to whether an immigrant is granted deferred action will be determined on a case-by-case basis.” See Memorandum from Jeh Charles Johnson, Sec’y, U.S. Dep’t of Homeland Sec., Exercising Prosecutorial Discretion with Respect to Individuals Who Came to the United States as Children and with Respect to Certain Individuals Who Are the Parents of U.S. Citizens or Permanent Residents (Nov. 20, 2014), [http://www.dhs.gov/sites/default/files/publications/14\\_1120\\_memo\\_deferred\\_action.pdf](http://www.dhs.gov/sites/default/files/publications/14_1120_memo_deferred_action.pdf).

speaks in the language of discretion.<sup>125</sup> While many commentators endorse some type of notice-and-comment procedure for significant guidance documents,<sup>126</sup> that process uses significant agency resources, delays implementation, and can ossify agency policies.<sup>127</sup> As a consequence, “agencies reasonably may decide to forgo issuing guidance materials if the cost of producing these materials increases.”<sup>128</sup>

A second potential issue with greater enforcement guidance is that, in some contexts, it may not be possible to outline all the potentially relevant variables in advance given the complexity of human behavior.<sup>129</sup> A classic example of this dilemma can be seen in the creation of sentencing guidelines to bind the discretionary decisions of judges. The idea behind this model was to prevent arbitrary factors

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<sup>125</sup> See *Texas v. United States*, 787 F.3d 733, 762–65 (5th Cir. 2015), *aff’d by an equally divided Court*, No. 15-674 (U.S. June 23, 2016) (per curiam). As Elizabeth Magill summarizes, “[t]here is no self-evident answer to what counts as ‘binding,’ and there is frustrating ambiguity about which measures a court will deem ‘binding.’” Magill, *supra* note 2, at 878. If the rule is deemed to be binding, the agency must follow it. *Id.* at 873–74, 874 n.44, 877 (describing this principle, often referred to as the *Accardi* principle, and sometimes also called the Arizona Grocery principle).

<sup>126</sup> See, e.g., Am. Bar Ass’n, *Annual Report Including Proceedings of the Fifty-Eighth Annual Meeting*, 118 A.B.A. ANN. REP. 6, 57 (1993) (endorsing a requirement that, “[b]efore an agency adopts a nonlegislative rule that is likely to have significant impact on the public, the agency provide an opportunity for members of the public to comment on the proposed rule and to recommend alternative policies or interpretations, provided that it is practical to do so”); Michael Asimow, *Nonlegislative Rulemaking and Regulatory Reform*, 1985 DUKE L.J. 381, 421–422 (urging more participation by the public post-adoption of the guidance); Stephen M. Johnson, *Good Guidance, Good Grief!*, 72 MO. L. REV. 695, 697 (2007) (advocating an APA amendment to require notice-and-comment on guidance). For an argument against notice-and-comment process for guidance documents, see Peter L. Strauss, *supra* note 114, 1488–89.

<sup>127</sup> See William S. Jordan, III, *Ossification Revisited: Does Arbitrary and Capricious Review Significantly Interfere with Agency Ability to Achieve Regulatory Goals Through Informal Rulemaking?*, 94 NW. UNIV. L. REV. 393 (2000); Thomas O. McGarity, *The Courts and the Ossification of Rulemaking: A Response to Professor Seidenfeld*, 75 TEX. L. REV. 525 (1997); Thomas O. McGarity, *Some Thoughts on “Deossifying” the Rulemaking Process*, 41 DUKE L.J. 1385 (1992); Richard J. Pierce, Jr., *Seven Ways to Deossify Agency Rulemaking*, 47 ADMIN. L. REV. 59 (1995); Mark Seidenfeld, *Demystifying Deossification: Rethinking Recent Proposals to Modify Judicial Review of Notice and Comment Rulemaking*, 75 TEX. L. REV. 483 (1997); Paul R. Verkuil, *Comment: Rulemaking Ossification—A Modest Proposal*, 47 ADMIN. L. REV. 453 (1995).

<sup>128</sup> Mantel, *supra* note 114, at 394.

<sup>129</sup> Barkow, *Policing of Prosecutors*, *supra* note 27, at 912 (“[P]utting every relevant detail into [sentencing] guidelines is a difficult if not impossible task given the complexity of fact scenarios involved in criminal behavior.”); Michael Herz, *Structures of Environmental Criminal Enforcement*, 7 FORDHAM ENVTL. L.J. 679, 689 (1996) (“The author of the guideline cannot think of everything.”); Mantel, *supra* note 114, at 351 (“[B]ecause agencies operate in a world of imperfect information where they cannot anticipate all scenarios that may arise in the course of implementing a statutory and regulatory scheme, an agency cannot define and set forth in its legislative rules every nuance of its policies.”).

from influencing judicial decisionmaking and to guard against unwarranted disparities.<sup>130</sup> Critics pointed out, however, that in many guideline regimes, relevant factors got lost in the quest to objectify and quantify everything that is relevant.<sup>131</sup>

A third difficulty with requiring guidelines is that the agency may not want to reveal explicitly its considerations out of fear that doing so will minimize deterrence.<sup>132</sup> If the agency announces that it will focus on one kind of case, it runs the risk of sending a message that all other types of cases are likely to get a free pass. The Obama Administration wanted to send such a message in the immigration context to people who had arrived in the United States as children, but there may be other scenarios where the agency does not want to send a signal that some people will be spared enforcement. For example, it may be true that prosecutors will only target their limited resources to drug cases involving a certain quantity, but they may nevertheless want to deter trafficking at lower quantities as well. They thus may prefer not to announce that below a certain threshold, cases will not be charged. That is, it may well be that the agency wants to deter conduct across a range of cases even if its limited resources may not make those cases a priority.

This latter concern about deterrence, coupled with politics that lean toward severity, might mean that insisting on guidance in some areas to deal with selective enforcement might end up creating a different problem of overenforcement. That has been a concern in the area of criminal law.<sup>133</sup>

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130 KATE STITH & JOSÉ A. CABRANES, FEAR OF JUDGING: SENTENCING GUIDELINES IN THE FEDERAL COURTS 2 (1998) (noting the motivation behind federal sentencing guidelines as eliminating unwarranted disparities).

131 See *id.* at 5 (arguing that the federal sentencing guidelines “often seem to sacrifice comprehensibility and common sense on the altar of pseudo-scientific uniformity”); see also MICHAEL TONRY, SENTENCING MATTERS 134 (1996); Albert W. Alschuler, *The Failure of Sentencing Guidelines: A Plea for Less Aggregation*, 58 U. CHI. L. REV. 901, 915–34 (1991); Daniel J. Freed, *Federal Sentencing in the Wake of Guidelines: Unacceptable Limits on the Discretion of Sentencers*, 101 YALE L.J. 1681, 1708, 1730–40 (1992); Marc Miller, *Rehabilitating the Federal Sentencing Guidelines*, 78 JUDICATURE 180, 183 (1995); Charles J. Ogletree, Jr., *The Death of Discretion? Reflections on the Federal Sentencing Guidelines*, 101 HARV. L. REV. 1938, 1953–54 (1988); Stephen J. Schulhofer, *Assessing the Federal Sentencing Process: The Problem Is Uniformity, Not Disparity*, 29 AM. CRIM. L. REV. 833, 851–70 (1992).

132 Barkow, *Policing of Prosecutors*, *supra* note 27, at 912 (noting that publishing guidelines can negatively affect deterrence); Robert L. Rabin, *Agency Criminal Referrals in the Federal System: An Empirical Study of Prosecutorial Discretion*, 24 STAN. L. REV. 1036, 1076 (1972).

133 Barkow, *Policing of Prosecutors*, *supra* note 27, at 912 (“[T]he problem with making prosecutorial decisions more transparent is that the politics of crime might push those guidelines in a decidedly antidefendant direction.”); Wright, *supra* note 113, at 1013 (observing that “con-

For all these reasons, enforcement guidelines may not always be an appropriate option for addressing selective enforcement worries. They may not be sufficiently specific to be constraining or the costs of having them might be too great. The more specific they are, the more likely it is that they must go through notice-and-comment procedures. If that becomes a necessity, it makes it less likely that the agency will adopt such guidelines on its own volition. In that case, the legislature would have to insist that the agency do so in the authorizing legislation.

But in making that determination, the legislature would have to decide whether or not such procedural hurdles are worth the delay, expense, and ossification that comes from the notice-and-comment process. If it is not possible to specify all the relevant variables or to state them with sufficient specificity, or if the hit to deterrence is too great given the nature of the problem, it may not be worth the additional procedural costs.

## II. IMPROVING EXISTING ENFORCEMENT OVERSIGHT

So far we have considered how the initial design of an agency can take into account concerns of under-, over-, and selective-enforcement. This Part considers what can be done after the agency is initially established. No matter how an agency is originally set up, there is an additional issue of how its ongoing enforcement decisions will be monitored and checked by other government actors.<sup>134</sup> This Part begins in Section A by considering the role of judicial review. The aim here is not to address whether judicial review can be expanded,<sup>135</sup> but rather how to limit the agency's ability to evade the system of judicial review that currently exists. Section B then turns to political oversight of agency enforcement and ways it can be improved.

### A. *Limiting Evasion of Judicial Review*

Whether an agency is prone to over- or underenforcement or is completely neutral, it is likely to have an incentive to avoid oversight. The agency presumably believes its enforcement policies and actions make sense, so any oversight risks hampering those efforts or using agency resources for the oversight proceedings.

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sistent rules for prosecutors might only give us more equal injustice for all, hamstringing prosecutors who might occasionally offer more favorable terms to some defendants").

<sup>134</sup> For an argument that political supervision is not merely wise but may be constitutionally required, see Metzger, *supra* note 8, 1874–912.

<sup>135</sup> See *supra* note 34.

This dynamic is not limited to situations in which agencies want to avoid well-resourced entities fighting back. It is going to be a broader temptation for all agencies because it makes it easier for the agency to achieve whatever goals it has set for itself without facing any impediments. Thus, even when the agency proceeds against relatively powerless individuals (such as criminal defendants with limited resources) and the underlying politics pose a greater risk of over-enforcement rather than underenforcement, the agency may still seek to proceed in a way that avoids oversight and makes it easier for the agency to achieve its results while using the fewest resources. That is because every agency faces resource constraints.<sup>136</sup>

While avoiding oversight will appeal to all agencies, the incentives will be greatest for agencies short on resources that rely on ex post detection of violations and sanctions to encourage ex ante compliance with rules. As Robert Kagan explains, agencies supervising ex post regulatory programs face the difficulty of having to monitor untold numbers of potential violators spread across the country.<sup>137</sup> Given resource constraints, inevitably the agency will lack sufficient numbers of inspectors and investigators to uncover all the violations and to ensure that entities continue to comply with the law.<sup>138</sup>

Because of the burden agencies face in these ex post regulatory regimes, legislators often try to find ways to make operating easier for agencies without giving the agency more resources.<sup>139</sup> Thus, statutory schemes turn instead to other shortcuts for the agency.<sup>140</sup> These include things like streamlining the adjudicatory process the agency can use to obtain sanctions, authorizing greater penalties for violations to give the agency greater bargaining power to extract settlements, and making it easier for the agency to find noncompliance by requiring the regulated entities to maintain better records or file reports.<sup>141</sup>

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<sup>136</sup> See, e.g., David L. Markell & Robert L. Glicksman, *A Holistic Look at Agency Enforcement*, 93 N.C. L. REV. 1, 52 (2014) (noting that declining resources and increased responsibilities at EPA “may impair EPA’s enforcement capacity”).

<sup>137</sup> Kagan, *supra* note 36, at 96–97.

<sup>138</sup> *Id.*

<sup>139</sup> Professor Kagan notes that “[m]ost regulatory agencies feel chronically understaffed and underbudgeted in relation to their caseload.” Kagan, *supra* note 36, at 110. The lack of resources may result from the fact that “politicians pass stringent-sounding laws to placate the electorate and then, as political attention fades, underfund the regulators to placate the capitalists.” *Id.* Alternatively, a tight budget may “reflect[ ] the gap between aspirations and resources that pervade all human institutions . . . .” *Id.*

<sup>140</sup> *Id.* at 97.

<sup>141</sup> *Id.*

There are numerous examples of this dynamic throughout the regulatory state. Consider first the above-mentioned recent initiative at the SEC to make greater use of an internal adjudicatory process as opposed to going to federal court to obtain significant sanctions against violators of the securities laws.<sup>142</sup> Congress extended the SEC's ability to use this power in the Dodd-Frank Wall Street Reform and Consumer Protection Act ("Dodd-Frank Act").<sup>143</sup> Previously, the SEC could seek monetary penalties through its administrative process only against parties it directly regulates, such as dealers and investment advisors.<sup>144</sup> The Dodd-Frank Act broadened the agency's authority to use the internal adjudicative process to get monetary penalties from anyone who violates the securities laws,<sup>145</sup> and further expanded the law to provide for penalties for any violation, not just willful violations.<sup>146</sup>

The SEC responded to this new authority in June 2014 by doubling its ALJ staff and making public announcements that it was going to opt for its administrative process "more and more in the future."<sup>147</sup> The SEC touted the administrative process for being more efficient and having more sophisticated judges, and it also mentioned that threatening its use promoted settlements.<sup>148</sup> It is not surprising that those threats have this effect; when the SEC files cases internally before its ALJs, its win rate is significantly higher. From October 2010 to March 2015, the agency won ninety percent of the cases before agency ALJs versus a win rate of sixty-nine percent in the federal courts.<sup>149</sup>

The Commodity Futures Trading Commission ("CFTC") has similarly announced that it will start bringing some of its cases against

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<sup>142</sup> See *supra* text accompanying notes 86–87.

<sup>143</sup> Dodd-Frank Wall Street Reform and Consumer Protection (Dodd-Frank) Act § 929P(a), 15 U.S.C.A. §§ 77h-1, 78u-2, 80a-9, 80b-3 (2012).

<sup>144</sup> Bennett Rawicki, *The Dodd-Frank Act and SEC Enforcement—The Significant Expansions and Remaining Limitations on the SEC's Enforcement Scope and Arsenal*, 41 SEC. REG. L.J. 35, 42 (2013).

<sup>145</sup> See Dodd-Frank Act § 929P(a), 15 U.S.C.A. §§ 77h-1, 78u-2, 80a-9, 80b-3.

<sup>146</sup> See *id.* § 929P(a); see also Rawicki, *supra* note 144, at 43–44 (noting this expansion means that "unintentional mistakes in SEC filings can now trigger monetary liability").

<sup>147</sup> Nicholas M. Berg et al., *SEC's Continued Use of Administrative Forum Irks Critics, Raises Sticky Constitutional Questions*, BLOOMBERG BNA CORP. L. & ACCOUNTABILITY REP., Dec. 19, 2014, at 2.

<sup>148</sup> *Id.*

<sup>149</sup> Jean Eaglesham, *SEC Ex-Enforcement Chief Calls for Reforms to In-House Judges*, WALL ST. J. (May 12, 2015, 6:53 PM), <http://www.wsj.com/articles/sec-ex-enforcement-chief-calls-for-reforms-to-in-house-judges-1431471223>.

brokers and trading firms to ALJs instead of federal courts.<sup>150</sup> In doing so, the CFTC made clear that the “overwhelming reason for this change is resources.”<sup>151</sup> Bringing cases before an ALJ is cheaper and faster,<sup>152</sup> and thus makes it easier for the agency to achieve its goals without the courts standing in the way.

While using these administrative mechanisms is more efficient and can help resource-starved agencies,<sup>153</sup> this shortcut in process compromises the judiciary’s ability to oversee agency enforcement practices.<sup>154</sup> As one former SEC official noted, when the agency opts to pursue actions in administrative proceedings, “the commission is akin to the prosecutor and then, in an appeal, the judge in the same case.”<sup>155</sup> That same conflict is not present when the agency has to present its case to a federal district court judge who plays no role in the decision to bring the enforcement action. Moreover, even though the administrative ruling can be appealed to federal court, the agency’s view of the facts will receive deference on appeal,<sup>156</sup> so the taint of the agency’s potentially biased view of the case does not face a robust check. In addition, appellate review of federal district court rulings on matters of law is *de novo*, whereas agency rulings on legal questions get *Chevron* deference.<sup>157</sup> Judge Rakoff has argued that this difference “hinders the balanced development of the securities laws.”<sup>158</sup>

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<sup>150</sup> *Id.*

<sup>151</sup> Jean Eaglesham, *CFTC Turns Toward Administrative Judges*, WALL ST. J. (Nov. 9, 2014, 5:49 PM), <http://www.wsj.com/articles/cftc-turns-toward-administrative-judges-1415573398> (quoting Aitan Goelman, CFTC Enforcement Chief).

<sup>152</sup> *Id.*

<sup>153</sup> The SEC received this expanded authority to use ALJs at the same time that its budget was coming up short to implement all the changes in the Dodd-Frank Act. See Rawicki, *supra* note 144, at 62 (noting that Congress’s budget for the SEC in 2011 was “only thirty-nine percent of the increase recommended by the Dodd-Frank Act to implement the Act’s changes”).

<sup>154</sup> Critics have also noted that the internal process disadvantages defendants because, as compared to a federal court proceeding, they lose the right to a jury trial, have more limited discovery, must prepare their case on an accelerated schedule, and face evidence that does not comply with hearsay rules. Rawicki, *supra* note 144, at 44–46.

<sup>155</sup> Jean Eaglesham, *SEC Wins with In-House Judges*, WALL ST. J. (May 6, 2015, 10:30 PM), <http://www.wsj.com/articles/sec-wins-with-in-house-judges-1430965803> (quoting Bradley Bondi, former counsel to two former SEC commissioners).

<sup>156</sup> Securities and Exchange Act § 25(a)(4), 15 U.S.C.A. § 78y(4) (findings of fact are conclusive if supported by substantial evidence).

<sup>157</sup> Jed S. Rakoff, Judge, U.S. Dist. Court for the S. Dist. of N.Y., Keynote Address at the PLI Securities Regulation Institute, *Is the SEC Becoming A Law Unto Itself?*, at 7 (Nov. 5, 2014), <https://securitiesdiary.files.wordpress.com/2014/11/rakoff-pli-speech.pdf>.

<sup>158</sup> *Id.*

Whether the efficiency gains of internal agency adjudication are worth the shortcomings of judicial review, the question itself assumes there is judicial review of some kind. But in most cases, agency adjudication does not get even deferential judicial review because the regulated party opts to settle and avoid the costs of trying to win within a framework relatively favorable to the agency.<sup>159</sup> The settlement context is thus the most worrisome from the perspective of combined agency powers.

And yet, agencies encourage settlements at every turn by threatening more severe sanctions and outcomes if parties opt to litigate charges against them to induce pleas and settlements.

This is, as noted, the overwhelming norm in criminal cases, where the oversight of a trial is a rarity. Time and again prosecutors point out that pleas are necessary for the system to function. The Supreme Court accepted threats of much longer sentences if a defendant opts for trial precisely because it viewed pleas as necessary for the criminal justice system to work given the enormous resource constraints.<sup>160</sup> Prosecutors have taken this Supreme Court authorization and run with it. Federal prosecutors, for example, routinely threaten sentences three times longer if a defendant opts to go to trial.<sup>161</sup> More than ninety-seven percent of federal criminal defendants opt to plead guilty to avoid that kind of trial penalty.<sup>162</sup> The rates of pleas are even higher for corporations who face criminal charges.<sup>163</sup> To avoid criminal charges and the potentially devastating collateral consequences they bring, corporate defendants accept any number of regulatory conditions from federal prosecutors.<sup>164</sup>

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<sup>159</sup> Samuel W. Buell, *Liability and Admissions of Wrongdoing in Public Enforcement of Law*, 82 U. CIN. L. REV. 505, 505–06 (2013) (noting that “very few” of the SEC enforcement actions resulted in trials); Rawicki, *supra* note 144, at 60 (noting the SEC brings roughly seven hundred actions each year and one percent of them go to trial or before an ALJ); Steinway, *supra* note 94, at 228 (noting most public companies opt to settle to avoid the “the uncertainty of pending litigation”).

<sup>160</sup> *Bordenkircher v. Hayes*, 434 U.S. 357, 363 (1978).

<sup>161</sup> See Barkow, *Policing of Prosecutors*, *supra* note 27, at 881; HUMAN RIGHTS WATCH, US: FORCED GUILTY PLEAS IN DRUG CASES (Dec. 5, 2013, 12:00 AM), <https://www.hrw.org/news/2013/12/05/us-forced-guilty-pleas-drug-cases>; see also Erik Eckholm, *Prosecutors Draw Fire for Sentences Called Harsh*, N.Y. TIMES, Dec. 6, 2013, at A19.

<sup>162</sup> U.S. Sentencing Comm’n, *2014 Sourcebook of Federal Sentencing Statistics*, Fig. C, <http://www.ussc.gov/sites/default/files/pdf/research-and-publications/annual-reports-and-sourcebooks/2014/FigureC.pdf>.

<sup>163</sup> Buell, *supra* note 159, at 505.

<sup>164</sup> See generally Richard A. Epstein, *Deferred Prosecution Agreements on Trial: Lessons from the Law of Unconstitutional Conditions*, in PROSECUTORS IN THE BOARDROOM: USING CRIMINAL LAW TO REGULATE CORPORATE CONDUCT 38, 41–42 (Anthony S. Barkow & Rachel

But it is not just the criminal sphere where this kind of leverage operates. Civil regulatory agencies also seek to avoid judicial review where possible. As noted, SEC enforcement actions rarely go to trial, in part because of the favorable ALJ process the SEC can use and in part because, even in cases brought in federal court, parties get a better deal if they settle. For their part, regulated entities settle because admitting liability in a public enforcement action opens the door for additional liability in private class-action litigation, so they will concede to a great deal to avoid having a case that settles their liability.<sup>165</sup> For its part, the SEC is willing to settle to conserve its enforcement resources and avoid expensive, time-consuming trials. The SEC's calculus is that "the public is better served by a broader and shallower enforcement practice than a narrower and deeper one."<sup>166</sup> In other words, the SEC would rather get a greater number of smaller judgments than fewer cases where liability is established and penalties are higher. But the result is a process that operates largely in the shadows, without judicial oversight, leading many to "worry that there is no meaningful check on the SEC's process of imposing liability on regulated actors."<sup>167</sup>

One can see a similar dynamic at other agencies, such as the Antitrust Division and the FTC, where most of their recent civil antitrust cases have been resolved by consent decree.<sup>168</sup> Here, too, the motivation for settlement has been efficiency and preserving limited agency resources.<sup>169</sup>

The FCC's practice is similar, with the agency using its enforcement authority to achieve regulatory goals that would otherwise require notice-and-comment rulemaking and face judicial review. Because communications companies need operating licenses from the FCC and must get new licenses if they merge, the agency is often able to extract major concessions from companies in exchange for agreeing to any merger. The agency thus often insists that merging companies agree to new substantive requirements that the agency would other-

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E. Barkow eds., 2011) (detailing the kinds of regulatory demands prosecutors make in exchange for offering nonprosecution and deferred prosecution agreements).

<sup>165</sup> See Buell, *supra* note 159, at 518.

<sup>166</sup> *Id.*

<sup>167</sup> *Id.* at 516.

<sup>168</sup> Douglas H. Ginsburg & Joshua D. Wright, *Antitrust Settlements: The Culture of Consent*, in 1 WILLIAM E. KOVACIC: AN ANTITRUST TRIBUTE 177, 180 (Nicolas Charbit et al. eds., 2012) (noting that "both the FTC and the Antitrust Division have settled more than 90 percent of the civil cases they have brought in the last twenty years").

<sup>169</sup> *Id.* at 178.

wise need to promulgate in rules. The result is that the agency achieves the substantive regime it wants without ever facing court oversight because the companies “voluntarily” agree to substantive changes in order to receive their license approvals.<sup>170</sup>

Agencies may also avoid scrutiny by agreeing to such small settlements with a regulated party that it is not worth it for the regulated entity to challenge them—less because of the liability risk the regulated entity runs if cases go to court, but more because the litigation costs of the challenge would be even greater than the costs of the settlement. This is a pervasive problem in misdemeanor court, where individuals often plead guilty to avoid staying in jail pending a trial or having to keep returning to court for appearances that interfere with an individual’s ability to maintain employment. There are also examples in the civil regulatory sphere. For instance, the Occupational Safety and Health Administration issues abatement orders and citations when it believes working environments are unsafe.<sup>171</sup> While those orders are sometimes challenged, oftentimes companies opt to pay the typically small fines associated with those orders rather than go through the expense of a challenge.<sup>172</sup>

All these dynamics save agency resources. But measures that allow the agency to bypass federal court oversight or make adjudications of disputes with the agency more costly than settling take away critical accountability checks on the agency’s exercise of enforcement power. Investigators at the agency may not probe as deeply into a case destined for settlement instead of trial.<sup>173</sup> The agency may seek

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<sup>170</sup> Rachel E. Barkow & Peter W. Huber, *A Tale of Two Agencies: A Comparative Analysis of FCC and DOJ Review of Telecommunications Mergers*, 2000 U. CHI. LEGAL F. 29, 69–71. A similar dynamic occurs with respect to agency guidance documents. Many parties opt to follow what is in the guidelines instead of taking the risk of disobeying them and losing in an enforcement proceeding. The risks of going to court are just too great in many cases. For instance, if an individual or company wants to risk disobeying a Federal Aviation Administration (“FAA”) guideline, the FAA may temporarily seize the individual’s or company’s aircraft or suspend its license while the proceeding is pending. Mantel, *supra* note 114, at 344, 352–53 (“In addition to the costs of mounting a legal challenge, failure to comply with agencies’ guidance may have immediate adverse consequences for regulated entities and applicants, such as imposition of sanctions, disapproval of an application, or revocation of prior government approvals.”). The effect of guidance documents will be greatest in these situations where the agencies hold “gatekeeping power” because the agency controls a license that the regulated entity depends upon for its business to operate. Connor N. Raso, Note, *Strategic or Sincere? Analyzing Agency Use of Guidance Documents*, 119 YALE L. J. 782, 803 (2010).

<sup>171</sup> Cuellar, *supra* note 4, at 247.

<sup>172</sup> *Id.*

<sup>173</sup> Ginsburg & Wright, *supra* note 168, at 180 (“[A] degree of laxity if not sloppiness may

concessions that serve interests only tangentially related to the enforcement action and that are not fully vetted.<sup>174</sup>

Given that these mechanisms save limited resources, what, if anything, can be done to curb their use? To be sure, this is not a dynamic that can be stopped. But there are two possible ways to minimize its effects. To begin, if the reason the agency is turning to these measures in the first place is a desire to maximize enforcement efforts given a lack of resources—and that seems to be the primary motivation given by agencies for these approaches—one set of solutions might look to other ways to facilitate the agency in its enforcement efforts.

Assuming it is not possible to give the agency more enforcement resources, or that any increase would be insufficient to dampen the incentives to avoid oversight, one approach is to make it easier for the agency to maximize the resources it does have by facilitating the agency's ability to monitor regulated entities. Deterrence relies on detection and sanctions, so this approach would place more emphasis on detection to ease the pressure to impose sanctions. In particular, imposing reporting and record-keeping obligations on regulated entities might be a better way to aid the agency in its monitoring obligations in light of insufficient monitoring and inspection resources.<sup>175</sup> These reporting obligations can be buttressed by allowing private whistleblowers to obtain rewards when they can demonstrate that a regulated entity falsely claimed compliance.<sup>176</sup>

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come to infect an agency's investigations that are heading inevitably toward resolution by consent.”).

174 For example, a deferred prosecution agreement (“DPA”) with Bristol-Myers Squibb for a securities law violation required the corporation to endow an ethics chair at Seton Hall Law School, and a settlement with Wal-Mart over a stampede included grants of \$1.5 million to Nassau County's Youth Board and of \$300,000 to United Way's Youth Build Program. Epstein, *supra* note 164, at 41; *see also* Ginsburg & Wright, *supra* note 168, at 181 (noting terms in recent antitrust settlements that are not related to competition but instead serve some other interest of the enforcement agency).

175 Kagan, *supra* note 36, at 97 (“[S]ome regulatory statutes deliberately enhance *ex post* regulators' legal power” by “requir[ing] enterprises to maintain records of compliance-related actions (log-books, emissions levels), or send periodical reports to the agency, ‘proving’ compliance.”).

176 One must be careful to make sure the reward is commensurate with the violation, but when properly calibrated, these relator suits can help guard against false certifications. *Cf.* David Engstrom, *Harnessing the Private Attorney General: Evidence from Qui Tam Litigation*, 112 COLUM. L. REV. 1244, 1284 (2012) (noting that qui tam suits today often consist of “‘certification’ claims. . . . in which a relator alleges that a federal funding recipient falsely made an express or implied certification of compliance with a separate statutory or regulatory command as a condition of receiving federal funds, rendering ‘false’ any claim made for that funding”).

The second strategy would be to focus on getting more oversight of settlements that otherwise escape judicial notice. Although courts have typically played a limited role in reviewing settlements between agencies and the entities that they regulate,<sup>177</sup> some judges have slowly begun to depart from these traditional norms in recent years and those efforts might provide a template for modest judicial oversight.<sup>178</sup> For instance, Judge Gleeson recently set out a framework for court oversight of deferred prosecution agreements (“DPAs”) between the government and corporations.<sup>179</sup> Judge Gleeson invoked the supervisory power of the federal courts in concluding that it is appropriate for judges to make sure that DPAs do not “transgress[ ] the bounds of lawfulness or propriety as to warrant judicial intervention to protect the integrity of the Court.”<sup>180</sup> This doctrinal opening would allow judges to check terms in those agreements that interfere with a party’s constitutional rights<sup>181</sup> or that bear no relationship to the violation.<sup>182</sup> It would also allow the court to evaluate the qualifications of a monitor of the agreement if one is being used.<sup>183</sup>

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<sup>177</sup> See, e.g., Daniel A. Farber & Annie Joseph O’Connell, *The Lost World of Administrative Law*, 92 TEX. L. REV. 1137, 1173 (2014) (noting that at least one federal court of appeals, the D.C. Circuit, treats agency settlements as “unreviewable” under *Heckler v. Chaney*, whereas other courts have not definitively addressed the issue). But see Dustin Plotnick, *Agency Settlement Reviewability*, 82 FORDHAM L. REV. 1367, 1405 (arguing that agency settlements constitute a “‘blind spot’ within the APA” and, as they are more akin to agency actions, should be presumptively reviewable).

<sup>178</sup> See Binyamin Appelbaum, *U.S. Judges Sound Off on Bank Settlements*, N.Y. TIMES (Aug. 23, 2010), <http://www.nytimes.com/2010/08/24/business/24judges.html> (“The [recent] scoldings from the bench are a striking departure from a long tradition of judicial deference to settlements formulated by federal agencies, reflecting broad disenchantment not just with Wall Street, but with its government overseers.”).

<sup>179</sup> See, e.g., *United States v. HSBC Bank USA*, No. 12-CR-763, 2013 WL 3306161, at \*7 (E.D.N.Y. July 1, 2013) (Judge Gleeson approving the proposed DPA between the government and HSBC, but maintaining that “approval is subject to a continued monitoring of its execution and implementation”).

<sup>180</sup> *Id.* at \*6.

<sup>181</sup> *Id.* (observing that recent agreements have insisted on cooperation that has been alleged to violate a company’s attorney-client privilege or the Fifth or Sixth Amendment rights of its employees and that it is appropriate for the court to guard against that in its supervisory role).

<sup>182</sup> Judge Gleeson offers as an example a remedial provision that requires the company to fund an endowed chair at the prosecutor’s alma mater, *id.* at \*6, a provision that was in a DPA negotiated between Bristol-Myers Squibb and Chris Christie when he was the United States Attorney in New Jersey. Epstein, *supra* note 164, at 41.

<sup>183</sup> *HSBC Bank USA*, 2013 WL 3306161, at \*6. The D.C. Circuit recently rejected an effort by a district judge to review the terms of a DPA under his authority to decide a motion to exclude time under the Speedy Trial Act. *United States v. Fokker Servs.*, B.V., 818 F.3d 733, 741 (2016). The D.C. Circuit did not decide, however, whether a court would have authority to reject a DPA because it contained illegal or unethical provisions. *Id.* at 747.

Judge Rakoff sought to find a similar opening for judicial review when he initially rejected proposed settlements between the SEC and major financial institutions, arguing that the agency needed to provide more evidence to support its decisions to settle.<sup>184</sup> On appeal of one of Judge Rakoff's decisions, the Second Circuit agreed that a district court must "determine whether the proposed consent decree is fair and reasonable" and make sure it is not disserving the public interest.<sup>185</sup> But it went on to caution that "[a]bsent a substantial basis in the record for concluding that the proposed consent decree does not meet these requirements, the district court is required to enter the order"<sup>186</sup> and its "primary focus" should be to check for procedural irregularities, "taking care not to infringe on the SEC's discretionary authority to settle on a particular set of terms."<sup>187</sup> The Second Circuit also admonished that "[i]t is not within the district court's purview" to require the agency to establish the truth of the allegations against the settling party.<sup>188</sup> While the Second Circuit made clear that the review

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<sup>184</sup> *E.g.*, SEC v. Citigroup Glob. Mkts. Inc., 827 F. Supp. 2d 328, 332 (S.D.N.Y. 2011), *vacated*, 752 F.3d 285 (2014) (rejecting the proposal, including a \$285 million sanction, because it was not fair, reasonable, adequate, or in the public interest, especially in light of the lack of evidentiary support presented to the court); SEC v. Bank of Am. Corp., 653 F. Supp. 2d 507, 508–09 (S.D.N.Y. 2009) (rejecting the \$33 million proposal for similar reasons). Judge Rakoff ultimately approved both settlements after the Second Circuit reversed his decisions rejecting the settlements. *See* SEC v. Citigroup Glob. Mkts. Inc., 34 F. Supp. 3d 379, 380 (S.D.N.Y. 2014) (expressing concern that subsequent "settlements reached by governmental regulatory bodies and enforced by the judiciary's contempt powers will in practice be subject to no meaningful oversight whatsoever"); SEC v. Bank of Am. Corp., Nos. 09 Civ. 6829(JSR), 10 Civ. 0215(JSR), 2010 WL 624581, at \*15 (S.D.N.Y. Feb. 22, 2010) (approving the proposal "while shaking [his] head"). Judge Rakoff is not alone in his efforts to more closely scrutinize the terms that result after the SEC decides to settle with a major bank. For example, in August 2010, Judge Huvelle of the U.S. District Court of the District of Columbia first rejected the proposed agreement between the SEC and Citigroup, then required additional information be provided, and ultimately approved a settlement only after it was modified. In addition, actors outside of the judiciary have also attempted to challenge agencies' decisions to settle, and to bring such agreements into the boundaries of judicial review. *See, e.g.*, Better Mkts., Inc. v. U.S. Dep't of Justice, 83 F. Supp. 3d 250, 253 (D.D.C. 2015) (unsuccessfully challenging the \$13 billion settlement between the government and JPMorgan Chase). *But see* Ben Protess, *Lawsuit Challenges Government's Deal with JPMorgan Chase*, N.Y. TIMES, Feb. 10, 2014, at B3 (finding that Better Markets' lawsuit "could provide a backdoor route for subjecting the deal to judicial scrutiny").

<sup>185</sup> *Citigroup Glob. Mkts. Inc.*, 752 F.3d at 294.

<sup>186</sup> *Id.* The court noted that this inquiry requires the court to make sure of the legality of the decree, see if the terms are clear, ensure that the decree resolves the claims in the complaint, and guard against any collusion or corruption. *Id.* at 294–95. But the Second Circuit noted that these were minimum requirements, presumably allowing courts to look for other problems. *See id.* at 295 ("Consent decrees vary, and depending on the decree a district court may need to make additional inquiry to ensure that the consent decree is fair and reasonable.").

<sup>187</sup> *Id.* at 295.

<sup>188</sup> *Id.*

of a district court is limited and highly deferential, it nevertheless agreed that there is some basis for judicial inquiry in cases requesting approvals of consent decrees.

In addition, while current doctrine provides only a limited window for review, Congress could opt to provide a more robust framework for judicial oversight if it believes the current approach is too meager. It could, for example, follow the model laid out in the Tunney Act,<sup>189</sup> which allows the public to comment on a proposed settlement of a civil antitrust action before the court approves it.<sup>190</sup> Similarly, Congress could demand that settlements be accompanied by explanations that would be reviewed by courts under an arbitrary and capricious standard, or some similar framework. This could allow courts to check disparate treatment if the agency is unable to explain why it treats similarly situated actors differently with respect to settlement terms. Congress could also provide greater guidance on the types of penalties and sanctions the agency can seek to obtain instead of leaving those determinations largely to agency discretion.

Just as plea bargaining is the norm in criminal cases, settlements are the dominant approach in civil regulatory actions.<sup>191</sup> So, to have real judicial oversight of what agencies are doing with their enforcement powers, a new framework of limited judicial review of these settlements may be required. Whether it looks like the model announced by Judge Gleeson or something more robust promulgated by Congress, the idea is to find a way to prevent agencies from shutting out the courts entirely.

### *B. Improving Political Oversight*

Courts are not the only government overseers of agency enforcement. The President and Congress play a role as well. And just as agencies might want to escape oversight by courts, they might also prefer to avoid the watchful eye of political overseers. This Section thus considers what can be done to improve political checks on enforcement.

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<sup>189</sup> Antitrust Procedures and Penalties (Tunney) Act, 15 U.S.C. § 16 (2012).

<sup>190</sup> For a brief overview of the procedures, see DEP'T OF JUSTICE, U.S. v. MICROSOFT, INFORMATION ON THE SETTLEMENT (Nov. 2015), <http://www.justice.gov/atr/usdoj-antitrust-division-us-v-microsoft-corporation-information-settlement#tunney>.

<sup>191</sup> See Plotnick, *supra* note 177, at 1370 ("The issue of settlement reviewability is especially important because settlements now resolve the vast majority of agency enforcement actions."); see also Farber & O'Connell, *supra* note 177, at 1172 (finding, for example, that settlements account for ninety percent of the SEC's and eighty percent of the Equal Employment Opportunity Commission's enforcement actions).

Part I already discussed some agency design features that enhance oversight by political actors because they create “fire alarm” mechanisms to bring enforcement issues to the attention of those overseers.<sup>192</sup> For instance, having other agencies—whether state or federal—enforcing laws creates opportunities for those agencies to call attention to matters that may be being overlooked. Similarly, giving authority to a designated unit within an agency to watch for certain biases will also mean more alarms are sounded when the agency exercises its discretion in a manner that raises concerns. Part III will likewise address the role that the public can play in sounding alarms when agencies veer off course in enforcement practices.

But the classic framework for political oversight of agencies highlighted “police patrol” as well as “fire alarm” mechanisms,<sup>193</sup> and it is the police patrol aspect of oversight that this Part focuses on. What can be done to help political overseers when they act proactively as the roving cops looking for trouble at the agency? Section 1 begins by asking what it is the political overseers should be looking for. Specifically, it raises the important, but often overlooked, issue of the metrics by which agencies should be judged. This issue is important because agencies will adjust their enforcement policies to score well on whatever metric is being used to assess them. Section 2 then considers how to make those metrics more visible to the political overseers on patrol.

### 1. *Focusing on Metrics*

If you tell an agency official that his or her budget or career advancement hinges on a particular outcome measure, the official will have an incentive to focus on that measure. Thus, if a police officer is

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<sup>192</sup> See Mark Seidenfeld, *A Civic Republican Justification for the Bureaucratic State*, 105 HARV. L. REV. 1511, 1525 (1992) (noting that Congress reacts to requests from constituents); Matthew C. Sullivan, *CFIUS and Congress Reconsidered: Fire Alarms, Police Patrols, and a New Oversight Regime*, 17 WILLAMETTE J. INT’L L. & DISP. RESOL. 199, 203–04 (2009) (citing Mathew D. McCubbins & Thomas Schwartz, *Congressional Oversight Overlooked: Police Patrols Versus Fire Alarms*, 28 AM. J. POL. SCI. 165 (1984)) (“Congress relies on interested third parties (typically, citizens, organizations, firms, or interest groups) who claim to have identified some regulatory problem and alert either members of Congress or other government officials. . . . This approach . . . requires less vigilance by members and their staff, while still allowing them to respond—and appear responsive—to matters that constituents and potential supporters raise.”).

<sup>193</sup> Matthew D. McCubbins & Thomas Schwartz, *Congressional Oversight Overlooked: Police Patrols Versus Fire Alarms*, 28 AM. J. POL. SCI. 165, 166 (1984) (comparing proactive monitoring as police patrol and contrasting it with fire alarm oversight where Congress relies on third parties to monitor agency behavior and sound an alarm to Congress when the agency is behaving in ways the third parties do not like).

told that he or she is going to be measured by the number of tickets issued, the officer will likely seek to increase the number of tickets. If they are told instead that they are going to be measured by citizen review of their behavior, they may focus instead on how they interact with members of the public. And if they are going to be assessed based on crime rates in their precinct, they will try to get those rates down—either by fighting crime in the most effective way they know how or, less appealingly, by fudging the statistics that are reported.

This is not just true of police officers but of all enforcement agents. Civil agencies are also judged based on particular metrics.<sup>194</sup> It could be the number of enforcement actions that are brought or fines obtained.<sup>195</sup> Or the agency might be assessed based on whether it achieved a broader goal, like improving air quality or public health.<sup>196</sup>

The reality, however, is that many statutory schemes pay very little attention to measures of success. Statutes often speak in broad terms about the agency's mission and goals.<sup>197</sup> The agency should serve “the public interest” or “promote the public health.”<sup>198</sup> The agency is thus left to figure out what political overseers really care about when they are assessing the agency's performance.

In the absence of guidance to the contrary, in order to demonstrate success and progress, an agency will choose to pursue its more easily measured goals rather than those that are harder to quantify.<sup>199</sup>

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<sup>194</sup> See Urska Velikonja, *Reporting Agency Performance: Behind the SEC's Enforcement Statistics*, 101 CORNELL L. REV. 901, 911 (2016).

<sup>195</sup> See *id.* at 909, 909 n.35.

<sup>196</sup> See *id.* at 916.

<sup>197</sup> See, e.g., 15 U.S.C. § 2051(b) (2012) (establishing the Consumer Product Safety Commission for the purposes of consumer safety and protection against “unreasonable risk of injury”).

<sup>198</sup> See, e.g., 21 U.S.C. § 393(b)(1) (2012); UTAH ADMIN. CODE r. 63A-1-102 (West, Westlaw through 2015 First Special Session).

<sup>199</sup> Barkow, *Prosecutorial Administration*, *supra* note 108, at 309–10; see also Biber, *supra* note 104, at 12–13 (finding that agencies will “systematically overperform on easily measured goals” while they “systematically face an incentive to underachieve on the conflicting, difficult-to-measure goals”). Numerous agencies face this dilemma, and often end up choosing to pursue the goals that can be more readily measured and therefore, at least in theory, are more readily achieved. See, e.g., Barkow, *Prosecutorial Administration*, *supra* note 108, at 310 (noting that when faced with the competing goals of developing affordable housing and promoting racial desegregation, the Department of Housing and Urban Development allocated its resources to affordable housing since that was “more easily measured and immediately visible”); Biber, *supra* note 104, at 17 (noting that the FBI had historically pursued bank robberies and kidnappings, rather than crimes involving drug distribution and organized crime, because, when compared with drug crimes and organized crime, bank robberies and kidnappings were easier to investigate and prosecute).

This dilemma is seen in all types of agencies. For instance, when Congress first created the Forest Service, its primary objective was to produce timber.<sup>200</sup> However, this initial mandate was soon expanded, and eventually the Forest Service was directed to pursue a wide variety of goals, from maintaining wildlife diversity to protecting the aesthetic values of the land.<sup>201</sup> Regardless of an explicit authorization from Congress to protect the environment, increased timber production was consistently favored and implemented.<sup>202</sup> Eric Biber attributes this agency decision to the fact that timber harvests are easy to measure, whereas environmental beauty is not.<sup>203</sup>

In the absence of emphasizing specific metrics for the agency to report or goals for it to try to meet, dysfunctions in the political process start to take on outsized roles. For instance, a banking oversight committee may care mainly about how financial firms are doing because those firms make big campaign donations and can complain if they are dissatisfied with an agency's enforcement practices. If Congress wants to counteract this dynamic, it could insist on reporting measures for the agency that emphasize other things. For instance, it could insist that the agency report on consumer protection measures. To be sure, this will not stop the financial firms from getting congressional attention. But the agency reports might draw attention from other sources—such as the media or watchdog groups—that can help influence the agency's efforts.

A recent report by the Brennan Center provides another example of how an emphasis on metrics could work.<sup>204</sup> The report suggests reforms that would link federal prosecutors' budgets to the accomplishment of the "twin goals of reducing crime *and* reducing mass incarceration."<sup>205</sup> By explicitly outlining the goals to be pursued, the ways to achieve them, and the benefits that will be reaped through success, the Brennan Center aims to shift law enforcement behavior.<sup>206</sup>

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<sup>200</sup> See Biber, *supra* note 104, at 17.

<sup>201</sup> See *id.* at 18.

<sup>202</sup> See *id.* at 25–26 (explaining how the Forest Service “focused on the particular targets that were most easily measured” rather than the objectives that were technically difficult to calculate or necessarily required subjective judgments).

<sup>203</sup> *Id.* at 27 (“Given the large number of goals that are difficult or impossible to measure, and the need to provide incentives and rewards to employees, it is understandable that the [Forest] Service ended up focusing on timber production . . .”).

<sup>204</sup> LAUREN-BROOKE EISEN ET AL., BRENNAN CTR. FOR JUSTICE, *FEDERAL PROSECUTION FOR THE 21ST CENTURY* (2014).

<sup>205</sup> *Id.* at 14.

<sup>206</sup> The report outlines three core priorities (reducing violence and serious crime, reducing

The task here is not to argue for what the right metric should be for any given agency—a daunting task, to say the least—but to show how critical metrics are in changing enforcement behavior. Put another way, the critical takeaway is that what gets measured is what will count for the agency, which will, in turn, influence the agency's enforcement goals.<sup>207</sup> Thus, for institutional design and monitoring purposes, a great deal more attention should be paid at the outset to how the agency will be assessed.

Thus when Congress thinks about designing agencies, it should spend more time thinking about the kind of metrics it wants to receive from the agency and how those metrics will, in turn, influence the political environment and ultimately the enforcement decisions of the agency. The metrics that Congress emphasizes will assist Congress in its police patrol role and also assist third parties who perform fire alarm oversight because it will call attention to the factors that matter most in assessing agency performance.

## 2. *Enhanced Reporting and Auditing*

It is not enough to establish the right metrics; it is just as important that they be easily accessible.<sup>208</sup> So how can political overseers—Congress and the President—improve their policing powers? The key is to get agencies to better publicize their enforcement practices and the relevant metrics.

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prison populations, and reducing recidivism) and three additional priorities (reducing pretrial detention, reducing public corruption, and increasing coordination). *Id.* at 3. For each priority, the report explains precisely how to measure success. For instance, to determine progress with the goal of reducing violence and serious crime, federal prosecutors are directed to measure: the change in the violent crime rate; the percent of violent crime cases on the district's docket, as compared with the previous year; the percent of serious crime cases on the district's docket, as compared with the previous year; and the percent of community members who report feeling safe (although this last measure is deemed optional). *Id.* at 21.

<sup>207</sup> As the Brennan Center for Justice put it in its report, "what gets measured gets done." *Id.* at 14 ("Setting clear, quantifiable goals for success can encourage agencies and individuals to use their discretion to achieve priorities."); see also Eric H. Holder, Jr., *Eric Holder's Keynote Address: Shifting Law Enforcement Goals to Reduce Mass Incarceration*, BRENNAN CTR. FOR JUSTICE (Sept. 23, 2014), <https://www.brennancenter.org/analysis/keynote-address-shifting-law-enforcement-goals-to-reduce-mass-incarceration> (praising the Brennan Center approach to developing new metrics by which to determine success in the overarching goals of reducing violence, incarceration, and recidivism, and recognizing that "what gets measured is what gets funded and what gets funded is what gets done").

<sup>208</sup> See Gillian E. Metzger, *The Interdependent Relationship Between Internal and External Separation of Powers*, 59 EMORY L.J. 423, 444–45 (2009) ("Congress needs information to conduct meaningful oversight of the Executive Branch.").

Congress planted the seeds for this in the Government Performance and Results Act of 1993,<sup>209</sup> which requires federal agencies to prepare a strategic plan that includes the agency's short- and long-term goals and a performance plan that outlines the progress the agency hopes to make in the coming year.<sup>210</sup> The agency is also charged with providing performance indicators so that its success can be monitored.<sup>211</sup> In addition, the agency has to provide a program performance report on how it did the previous year in terms of achieving its goals.<sup>212</sup> While critics contend this legislation has not been effective in practice because agencies have "adopt[ed] vague and undemanding goals and metrics," reformers suggest that this could be an effective oversight tool.<sup>213</sup> If Congress were to specify clearer metrics and insist on better reporting, it would have an easier time keeping track of agency performance.

The President can also prompt better agency reporting and transparency with respect to enforcement. In 2011 President Obama issued an executive order directing federal executive agencies and departments to make information about regulatory compliance and enforcement available in a form that is "accessible, downloadable, and searchable online."<sup>214</sup> While President Obama did not ask for particular metrics or benchmarks from any agency or even establish a formal oversight mechanism for presidential oversight, he emphasized that transparency and accessibility were critical for holding agencies accountable and promoting more consistent enforcement.<sup>215</sup> Agencies such as the Department of Labor,<sup>216</sup> the Food and Drug Administra-

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209 Government Performance and Results Act ("GPRA") of 1993, Pub. L. No. 103-62 (codified at 31 U.S.C. §§ 1101 et seq. (2012)).

210 *See id.*

211 *See id.*

212 *See id.*

213 Simon, *supra* note 3, at 85, 85 n.83. William Simon notes that there has been less interest by presidential administrations in improving compliance with the GPRA than in beefing up the cost-benefit analysis that agencies submit to the Office of Information and Regulatory Affairs ("OIRA"). *See id.* at 85 n.83. That contrast reflects another difference between enforcement and rulemaking. OIRA review focuses on regulations but leaves enforcement largely unsupervised at the presidential level.

214 Presidential Memorandum on Regulatory Compliance, 76 Fed. Reg. 3825, 3825-26 (Jan. 18, 2011).

215 Andrias, *supra* note 2, at 1068.

216 The Department of Labor ("DOL") has "made substantial strides toward engaging the public through disclosure of enforcement data." Jeremy Blasi, Note, *Using Compliance Transparency to Combat Wage Theft*, 20 GEO. J. ON POVERTY L. & POL'Y 95, 111 (2012). More specifically, in October 2011, the DOL created the "informACTION App Challenge," culminating in an iPhone app that combined Yelp reviews of hotels, motels, restaurants, and retail stores with labor rights inspection data, thereby making otherwise difficult-to-obtain information about in-

tion,<sup>217</sup> and the Food Safety and Inspection Service<sup>218</sup> responded by developing measures that increase disclosure and enable data sharing.

Kate Andrias has persuasively argued that presidential oversight should go further and that Presidents should consider requiring agencies to submit for presidential review regular reports outlining their enforcement priorities and highlighting any regional disparities.<sup>219</sup> The President could also scrutinize more closely an agency's guidance documents. President Bush, for example, insisted that executive agencies submit significance guidance to the Office of Information and Regulatory Affairs ("OIRA") for review.<sup>220</sup>

Despite their best efforts, though, political actors will struggle to police agencies on their own given their competing demands. Another possible avenue for improved political oversight of agency enforcement by political actors is to make greater use of the inspector general ("IG") model.<sup>221</sup> Just about every federal agency has an in-

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spection and compliance in the labor industry readily accessible. *Id.* at 111–12. To further the underlying ideas behind this effort, in May 2015, the DOL requested \$2.6 million and fifteen employees to form a new Office of Labor Compliance, which would "facilitate cross-agency sharing of enforcement data and information to improve the targeting of enforcement and compliance assistance efforts." Judith E. Kramer & Daria H. Hafner, *President's Budget Reflects Administration's Labor and Employment Priorities*, HR HERO LINE (May 1, 2015, 5:00 AM), <http://www.hrhero.com/hl/articles/2015/05/01/presidents-budget-reflects-administrations-labor-and-employment-priorities/>.

<sup>217</sup> In response to President Obama's Memorandum, the Food and Drug Administration ("FDA") released eight draft proposals in October 2011, entitled *Food and Drug Administration Transparency Initiative: Draft Proposals for Public Comment to Increase Transparency by Promoting Greater Access to the Agency's Compliance and Enforcement Data*, attempting to make the FDA's compliance and enforcement data more accessible, user-friendly, and transparent. Press Release, U.S. Food & Drug Admin., *FDA: New Transparency Report Outlines Proposals for Enforcement Data, for Public Comment* (Oct. 3, 2011), <http://www.fda.gov/NewsEvents/Newsroom/PressAnnouncements/ucm274201.htm>. In October 2014, the FDA continued its efforts when it released a new online tool, the FDA data dashboard, which provides downloadable access to a wide range of data and related trends in an "easy-to-read graphical format." Douglas Stearn, *New Data Dashboard Tool Shares FDA's Inspection, Compliance and Recall Data*, FDA VOICE (Oct. 2, 2014), <http://blogs.fda.gov/fdavoices/index.php/2014/10/new-data-dashboard-tool-shares-fdas-inspection-compliance-and-recall-data/>.

<sup>218</sup> In January 2015, the Food Safety and Inspection Service ("FSIS") announced a new proposal that was designed to help "shar[e] data on federally inspected meat and poultry establishments with the public." FSIS, *Establishment-Specific Data Release Strategic Plan*, 80 Fed. Reg. 2092 (Jan. 15, 2015).

<sup>219</sup> Andrias, *supra* note 2, at 1105.

<sup>220</sup> Exec. Order No. 13,422, 3 C.F.R. § 191, 191–93 (2007).

<sup>221</sup> The General Accounting Office ("GAO") could also perform more oversight for Congress, as it gives the Comptroller General the authority "to investigate all matters related to the receipt, disbursement, and use of public money." 31 U.S.C. § 712(1) (2012). Other agency experts and watchdogs can pursue this function as well. See McDonnell & Schwarcz, *supra* note 37, at 1646–68 (labeling watchdogs "tasked with studying and identifying deficiencies and potential

spector general responsible for overseeing the agency's operations.<sup>222</sup> Most of these IGs have a statutory charge to audit and investigate agencies for fraud, waste, mismanagement, and abuse.<sup>223</sup> Their statutory purpose is to "promote economy, efficiency, and effectiveness."<sup>224</sup> If Congress wants to engage in police patrol oversight, IGs are the closest thing they have to beat cops.<sup>225</sup> Indeed, they are ideally situated for this kind of proactive monitoring because they are housed within an agency, thus making them "more sensitive than courts or Congress to nuanced forms of legal evasion."<sup>226</sup>

But while the statutory authorizations typically give IGs the authority to engage in inquiries about how an agency exercises its discretion,<sup>227</sup> most IGs do not currently audit agencies for that purpose.<sup>228</sup>

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improvements in the regulatory process" "regulatory contrarian[s]" and exploring the different guises they may take); Metzger, *supra* note 208, at 444–45 (noting that "[i]nternal agency experts and watchdogs are important sources of . . . information" for political overseers).

<sup>222</sup> William S. Fields, *The Enigma of Bureaucratic Accountability*, 43 CATH. U.L. REV. 505, 505–06 (1994) (reviewing PAUL C. LIGHT, *MONITORING GOVERNMENT—INSPECTORS GENERAL AND THE SEARCH FOR ACCOUNTABILITY* (1993)) (observing that "virtually every federal agency" has an IG, with a total of sixty-one IGs having been established by 1989).

<sup>223</sup> See Inspector General Act of 1978, § 4(a), 5 U.S.C. app. 3 (2012).

<sup>224</sup> *Id.* § 2(2).

<sup>225</sup> They have various institutional design protections to help them in this task. When the President submits budget requests for IGs, those requests must include any "statement from an IG who concludes that the budget request for the office would substantially inhibit IG performance . . ." Shirin Sinnar, *Protecting Rights from Within? Inspectors General and National Security Oversight*, 65 STAN. L. REV. 1027, 1035 (2013). They also report directly to Congress as well as their agencies and are entitled to independent counsel. *Id.* at 1034–35. While most IGs must allow the agency an opportunity to remove sensitive information from any report to Congress before the report is turned in, see Mary-Rose Papandrea, *Leaker Traitor Whistleblower Spy: National Security Leaks and the First Amendment*, 94 B.U. L. REV. 449, 473 (2014), some IGs, like the Special Inspector General for the Troubled Asset Relief Program, can submit reports directly to Congress without first obtaining comments from the agency. Aaron R. Sims, Note, *SIGTARP and the Executive-Legislative Clash: Confronting a Bowsher Issue with an Eye Toward Preserving the Separation of Powers During Future Crisis Legislation*, 68 WASH. & LEE L. REV. 375, 389–90, 389 n.57 (2011). In addition, IGs have access to an agency's documents and records. *Obstructing Oversight: Concerns from Inspectors General: Hearing Before the H. Comm. on Oversight and Gov't Reform*, 113th Cong. 1 (2014) (statement of Michael E. Horowitz, Inspector General, U.S. Dep't of Justice) (arguing that section 6(a) of the Inspector General Act of 1978 gives IGs this authority and disagreeing with a DOJ permission that the DOJ IG needs to seek permission from the agency before getting access to grand jury and certain other materials). They may "also benefit from conventions of independence" that prevent their agencies from trying to interfere with their work. Daphna Renan, *Pooling Powers*, 115 COLUM. L. REV. 211, 290 n.386 (2015).

<sup>226</sup> Renan, *supra* note 225, at 289.

<sup>227</sup> Cuellar, *supra* note 4, at 256 ("Inspectors General have the legal power to investigate how federal officials use their targeted discretion."); *id.* at 292 (noting that IGs have broad mandates that could include the review of executive discretion).

<sup>228</sup> *Id.* at 293 n.221 (studying 400 IG and GAO reports issued over a five-year period and

Instead, they have tended to focus on how agencies spend their money or look for blatant examples of improper behavior by staff.<sup>229</sup>

Some observers think that should change and that IGs should spend more time monitoring enforcement discretion and the agency's overall performance.<sup>230</sup> This could be done by auditing a sample, as Mariano-Florentino Cuellar persuasively advocates,<sup>231</sup> or by taking a broad look at overall patterns and the kind of outcomes they produce, checking for things like racial discrimination or other disconcerting patterns.<sup>232</sup> One way to attain the latter goal is to encourage better

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finding that fewer than two percent of them included audits of executive discretion). IGs will, however, investigate charges that particular instances of enforcement or nonenforcement involved an abuse of power. See, e.g., Dan W. Reicher, *Conflicts of Interest in Inspector General, Justice Department, and Special Prosecutor Investigations of Agency Heads*, 35 STAN. L. REV. 975, 986, 986 n.53 (1983) (describing an investigation by an IG of the EPA Administrator of allegations that the Administrator promised not to bring an enforcement action against a company if it violated the Clean Air Act).

<sup>229</sup> See Diane M. Hartmus, *Inspection and Oversight in the Federal Courts: Creating an Office of Inspector General*, 35 CAL. W. L. REV. 243, 250 (1999) (noting that a common criticism of IGs is their failure to promote efficient and effective service); Neal Kumar Katyal, *Internal Separation of Powers: Checking Today's Most Dangerous Branch from Within*, 115 YALE L.J. 2314, 2328–89 (2006) (noting that IGs focus on mismanagement and fraud and not on the development of agency policy); McDonnell & Schwarcz, *supra* note 37, at 1662 (noting the primary purpose of IGs is to detect fraud and abuse and not to impact substantive agency policy).

<sup>230</sup> Fields, *supra* note 222, at 521 (recounting Paul Light's recommendation that "Inspectors General utilize more of their resources to conduct performance evaluations"). Others point out that IG evaluations of agency programs—to see whether they are achieving their desired results or are sufficiently efficient—are worrisome because they inject IGs into the agency's substantive decisionmaking and they may lack the necessary expertise and experience to second-guess the agency. William S. Fields & Thomas E. Robinson, *Legal and Functional Influences on the Objectivity of the Inspector General Audit Process*, 2 GEO. MASON INDEP. L. REV. 97, 117 (1993).

<sup>231</sup> Cuellar, *supra* note 4, at 292 (IGs could "perform audits of executive discretion involving random (or stratified) sampling of legally consequential discretionary decisions, assessed against a defensible standard (either a pre-existing one or articulated by the auditors)"). In the policing context, these kinds of audits have been lauded as effective oversight mechanisms. POLICE EXEC. RESEARCH FORUM, CIVIL RIGHTS INVESTIGATIONS OF LOCAL POLICE: LESSONS LEARNED 30 (July 2013), [http://www.policeforum.org/assets/docs/Critical\\_Issues\\_Series/civil%20rights%20investigations%20of%20local%20police%20-%20lessons%20learned%202013.pdf](http://www.policeforum.org/assets/docs/Critical_Issues_Series/civil%20rights%20investigations%20of%20local%20police%20-%20lessons%20learned%202013.pdf).

<sup>232</sup> For instance, largely in response to the controversy that surrounded New York City's stop-and-frisk practices, an independent IG was created in 2013 to monitor, review, and make recommendations to the NYPD. Nathaniel Bronstein, *Police Management and Quotas: Governance in the CompStat Era*, 48 COLUM. J.L. & SOC. PROBS. 543, 580 (2015) (noting that "a permanent position that performs regular audits to determine the adequacy of the NYPD's policies could be especially impactful"); see also Kaitlyn Fallon, *Stop and Frisk City: How the NYPD Can Police Itself and Improve a Troubled Policy*, 79 BROOK. L. REV. 321, 333 (2013) (finding that the IG was created to counter "perceived stop and frisk abuse and because of the concern over the lack of oversight of the NYPD," but noting that it will be hard for the IG to actually implement any policies that are recommended to the NYPD). Even though the New York City Council passed the IG bill in the same month that the infamous stop and frisk court case was handed down, the newly-created IG could theoretically have produced the same set of statistical data

internal record keeping and the maintenance of statistical data within enforcement offices.<sup>233</sup> IGs could also help to identify weaknesses in enforcement strategies, such as when the Special Inspector General for the Troubled Asset Relief Program (“SIGTARP”) issued reports urging greater mechanisms for checking against fraud by recipients of the funds.<sup>234</sup>

IGs can also analyze how the agency is allocating limited resources to explore how its decisions might be undermining its broader goals. The IG for the DOJ, for example, has documented in his reports the ever-growing share of the DOJ budget taken up by the Bureau of Prisons (“BOP”) and how that takes away funds for law enforcement, which in turn undermines public safety.<sup>235</sup> The DOJ IG

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and information that was presented to the court in *Floyd v. City of New York*, 959 F. Supp. 2d 540 (S.D.N.Y. 2013). See David Rudovsky & Lawrence Rosenthal, *The Constitutionality of Stop-and-Frisk in New York City*, 162 U. PA. L. REV. 117, 120–25 (2013) (describing the statistical information gathered for the court, and noting that the plaintiffs’ expert’s review and regression analysis demonstrated a pattern of racial discrimination among the NYPD’s stop-and-frisk practices); see also *id.* at 126 (“[T]he expert reports and other evidence in *Floyd* provided no information not already known to the NYPD.”).

<sup>233</sup> See, e.g., Michael E. O’Neill, *When Prosecutors Don’t: Trends in Federal Prosecutorial Declinations*, 79 NOTRE DAME L. REV. 221, 285–87 (2003) (calling for better record keeping by prosecutors around the country because statistical information that can be gathered will likely expose the prevalent patterns of enforcement and nonenforcement, which in turn can help illuminate more troubling patterns within the confines of law enforcement). Not only could IGs then examine the patterns that emerge, but also the public could be privy to the activities of these enforcement agencies, allowing for greater transparency and accountability. *Id.* at 287.

<sup>234</sup> See, e.g., *Rep. John Lewis Holds a Hearing on the Troubled Asset Relief Program: Oversight of Federal Borrowing and the Use of Federal Monies Before the H. Comm. on Ways & Means, Subcomm.*, 111th Cong. 3 (2009) (statement of Neil Barofsky, Special Inspector General, Troubled Asset Relief Program), [https://www.sig tarp.gov/Testimony/Testimony\\_Before\\_the\\_House\\_Committee\\_on\\_Ways\\_and\\_Means\\_Subcommittee\\_on\\_Oversight.pdf](https://www.sig tarp.gov/Testimony/Testimony_Before_the_House_Committee_on_Ways_and_Means_Subcommittee_on_Oversight.pdf) (recommending that fund recipients be required “to establish internal controls to ensure that they comply with [the] conditions; and to report on their compliance, certifying, under criminal penalty, that their report is accurate”); *TARP Oversight: A 6-Month Update: Hearing Before the S. Fin. Comm.*, 111th Cong. 7 (2009) (statement of Neil Barofsky, Special Inspector General, Troubled Asset Relief Program) (“If a bank or financial institution does not want to participate in a TARP program because it is unwilling to disclose how it is using taxpayer money, or because it is afraid of the vigorous detection programs that we are establishing for fraud . . . Keeping such participants out of the TARP will only benefit the American taxpayer.”); Samuel R. Diamond, *Neil Barofsky’s SIG TARP: “Difficult, Rigorous, and Independent” Oversight of the TARP*, 15 N.C. BANKING INST. 313, 321 (2011) (noting that in one of its first reports to Congress, “SIG TARP sharply criticized Treasury’s lack of reporting requirements for institutions accepting TARP funds”). See generally NEIL BAROFSKY, *BAILOUT: AN INSIDE ACCOUNT OF HOW WASHINGTON ABANDONED MAIN STREET WHILE RESCUING WALL STREET* 71–77 (2012) (explaining that one of the SIG’s major recommendations was to require recipients to monitor and report on exactly how they were using TARP funds, and to persuade Treasury to maintain such checks).

<sup>235</sup> See Andrew Cohen, *Government Watchdog: We Have a Growing Federal Prison ‘Crisis’*,

has further pointed out that the agency could control some of this by doing a better job of managing and leveraging existing BOP programs to control the prison population.<sup>236</sup>

IGs can also be employed to evaluate agencies to ensure that individual rights are being protected, as shown by Shirin Sinnar's work examining the role of IGs at national security agencies and by the work of many IGs overseeing police departments.<sup>237</sup> For example, Sinnar concludes that the DOJ IG's investigation into the treatment of detainees held after the September 11 attacks and its review of the FBI's issuance of National Security Letters to obtain information about individuals without judicial approval led to important reforms.<sup>238</sup>

A broader role for IGs could be to help agencies see things they may miss on their own and improve their processes.<sup>239</sup> IGs may be particularly well-suited to point out flaws and make recommendations because of their great familiarity with the internal workings of the agency.<sup>240</sup> IGs can further enhance the impact of their work by making their investigations and reports publicly accessible, which should,

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ATLANTIC (Dec. 14, 2013), <http://www.theatlantic.com/national/archive/2013/12/government-watchdog-we-have-a-growing-federal-prison-crisis/282341/>; see also Andrew Cohen, *Can Victims' Groups Push Congress on Sentencing Reform?*, BRENNAN CTR. FOR JUSTICE (Mar. 18, 2014), <http://www.brennancenter.org/analysis/can-victims-groups-push-congress-far-enough-sentencing-reform> (quoting the IG as saying that "[e]very dollar spent on prisons is a dollar that is going to come from somewhere else in the Department" and recounting his argument that public safety will pay the price if prison spending is not brought under control).

<sup>236</sup> Cohen, *Government Watchdog*, *supra* note 235.

<sup>237</sup> Sinnar, *supra* note 225, at 1036 ("IGs now play a significant role in addressing the impact of counterterrorism policies on individual rights . . ."); OFFICE OF THE INSPECTOR GENERAL FOR THE NYPD, <http://www.nyc.gov/html/oignypd/pages/home/home.shtml> (last visited Aug. 6, 2016) ("[The Inspector General's] mission is to: . . . [p]rotect civil liberties and civil rights"); see also Stephen Rushin, *Structural Reform Litigation in American Police Departments*, 99 MINN. L. REV. 1343, 1402, 1402 n.317 (2015) (describing an Audit Unit in the LAPD that sent uncover informants to police stations around the city to identify and investigate "unlawful stops, searches, seizures, uses of excessive force, and to identify officers who discourage the filing of a complaint or fail to report misconduct" (citations omitted) (quoting *United States v. City of L.A.*, No. 2:00-cv-11769-GAF-RC (C.D. Cal. June 15, 2001), <http://www.clearinghouse.net/chDocs/public/PN-CA-0002-0006.pdf>)).

<sup>238</sup> Sinnar, *supra* note 225, at 1070 (noting that the "reviews resulted in the reform of agency processes that could improve decisionmaking and compliance with existing rules").

<sup>239</sup> "[I]f no external authority monitors the bureaucracy, then those who work there may be unwilling or unable to learn much of anything." Cuellar, *supra* note 4, at 261.

<sup>240</sup> Sinnar, *supra* note 225, at 1074 ("[A]s internal institutions, IGs appeared to benefit from expertise and legitimacy that allowed them to recommend tailored reform of internal procedures and controls.").

in turn, help the media and others outside the agency learn more about, and thus police, agency practices.<sup>241</sup>

To be sure, there are limits to what IG investigations can accomplish. These investigators, working as closely as they do with agencies on a daily basis, often find themselves prone to see things from the agency's perspective. They may therefore lack the objective judgment to make these reviews as valuable as they would otherwise be.<sup>242</sup> But IG audits of broader enforcement patterns could help as part of an overall plan to improve political monitoring of agencies.

### III. PRIVATE CITIZENS

Government overseers are not the only ones who can and should police agency enforcement. The public and nongovernmental organizations ("NGOs") also serve an important role. To enable these actors to do this effectively, however, may require more than simply making the agency's decisions more transparent. This Part discusses some design options to allow for greater public input.

One heavily evaluated model for public involvement in agency enforcement is the citizen suit, which allows private actors themselves to bring enforcement actions. On the one hand, this model has the virtue of allowing citizens to play a direct role in policing areas that might be prone to capture. Private actors may be well situated to detect certain violations and buttress limited government resources to pursue them.<sup>243</sup> On the other hand, private actors may go too far in the other direction and pursue cases that are not in the best interests of the agency.<sup>244</sup> While the agency will balance all the factors that

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<sup>241</sup> The DOJ IG now posts summaries of its investigations online. Lisa Rein, *Justice Watchdog Will No Longer Keep Employee Wrongdoing Secret. Will Others Follow?*, WASH. POST (June 8, 2015), <http://www.washingtonpost.com/blogs/federal-eye/wp/2015/06/08/justice-watchdog-will-publicize-employee-misconduct-investigations-online-will-others-follow/>.

<sup>242</sup> See BAROFSKY, *supra* note 234, at 61 (describing the "capture" and "utter subservience" of the IG of the Treasury).

<sup>243</sup> See, e.g., Kal Raustiala, *Police Patrols & Fire Alarms in the NAAEC*, 26 LOY. L.A. INT'L & COMP. L. REV. 389, 405–06 (2004) (citations omitted) (noting that, at least in terms of environmental violations, private citizens are often better positioned to detect these violations in their own neighborhoods, and therefore it is "socially desirable for such parties with information relevant for enforcement to supply it to a social authority").

<sup>244</sup> See Matthew D. Zinn, *Policing Environmental Regulatory Enforcement: Cooperation, Capture, and Citizen Suits*, 21 STAN. ENVTL. L.J. 81, 131–32 (2002) (noting that citizen plaintiffs are not well-positioned to judge effective cooperation by a regulated entity and may demand more from them than makes sense from a public interest and resource perspective). For an argument that public enforcers may suffer from similar limitations when they are pursuing financial recoveries, see Margaret H. Lemos & Max Minzner, *For-Profit Public Enforcement*, 127 HARV. L. REV. 853, 857 (2014) (noting that "critics of private enforcement have long argued that

affect the public interest, private actors have incentives to act whenever they benefit, regardless of the public interest.<sup>245</sup> Giving private actors this authority also effectively gives them a greater role in setting the agency's enforcement priorities because it may be that the agency has to divert resources from other things to decide how best to respond to the private litigation.

One way to mitigate this tension may be to let the agency devise the appropriate scope of private rights of action.<sup>246</sup> Another possibility is to follow a model along the lines of shareholder derivative litigation that creates certain hurdles for the private litigator to overcome before a private action can be filed, and that would allow the agency to dismiss the private action, but only if the agency can explain to a reviewing court why it is proper for it to do so.<sup>247</sup>

Another commonly written about role for private citizens is that of the whistleblower. For instance, in the wake of the financial crisis of 2007–2008, Congress was concerned that there were too many unchecked violations of the securities laws. In response, it passed legislation that requires the SEC to give a reward of between ten and thirty percent to any whistleblower who provides information that leads to a successful enforcement action that results in a sanction exceeding \$1 million.<sup>248</sup> As with citizen suits, there is a concern here that

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avaricious plaintiffs and attorneys may be tempted to overenforce and may emphasize financial recoveries in lieu of more meaningful injunctive relief" and pointing out that "the same risks exist on the public side of the line").

<sup>245</sup> Bressman, *supra* note 34, at 1704 ("Citizen-suit provisions thus enable private parties to pursue narrow interests at public expense."); Engstrom, *supra* note 176, at 1254 ("Profit-driven enforcers will act whenever it pays to do so, even where the *social* cost of enforcement—e.g., the transaction costs incurred, including judicial resources consumed, or the economic and social costs imposed on affected communities—exceeds any benefit."); *id.* ("[I]ndifference to social cost may lead profit-motivated private enforcers to initiate so-called *in terrorem* lawsuits, using the threat of massive discovery costs or bad publicity to extract settlements when the social cost of adjudication would exceed any possible benefit or, worse, where culpability is entirely absent."); Margaret H. Lemos, *State Enforcement of Federal Law*, 86 N.Y.U. L. REV. 698, 706 (2011) ("Private parties seek to advance their own private interests, ignoring costs and benefits to others.").

<sup>246</sup> Matthew C. Stephenson, *Public Regulation of Private Enforcement: The Case for Expanding the Role of Administrative Agencies*, 91 VA. L. REV. 93, 131 (2005). For instance, some agencies might encourage more private enforcement because of their own limited resources. Markell & Glicksman, *supra* note 136, at 36. Or, conversely, some agencies might set up higher bars to private enforcement when they are concerned that private actions will "undermine national consistency" and therefore compliance. *Id.*

<sup>247</sup> *Cf. In re Oracle Corp. Derivative Litig.*, 824 A.2d 917, 946–47 (Del. Ch. 2003) (court engages in careful oversight to make sure it is appropriate for a corporation's special litigation committee to dismiss a derivative action).

<sup>248</sup> Dodd-Frank Act § 922(a), 15 U.S.C. §§ 78u-6(a)–(b) (2012). For a discussion of the SEC whistleblower framework and how it compares to the False Claims Act whistleblower re-

the public response could overwhelm the agency, and that the time it takes to sort through whistleblower claims could end up meaning fewer resources for other enforcement efforts.<sup>249</sup> Thus, and again mirroring citizen suits, it is not always clear whether the tradeoff is worth it. The less likely it is that the agency will uncover violations on its own, the more valuable the whistleblower framework and the more likely it will be worth the costs it imposes.

As Amanda Leiter recently explained, not all whistleblowers are purely private actors. She highlights the practice she dubs “soft whistleblowing” in which “agency employees who disagree with their agency’s policy choices . . . use their expertise and inside information to generate outside pressure on their agency to shift direction.”<sup>250</sup> This can be a powerful tool in policing an agency’s enforcement practices. For example, Professor Leiter provides an example of an employee in the Equal Employment Opportunity Commission’s Office of General Counsel tipping off feminist activists in the 1960s of the agency’s failure to follow up on sex discrimination claims and urging these activists to form an organization (which would become the National Organization for Women) to start an NGO to fight for women’s rights.<sup>251</sup> As Leiter describes it, this employee “use[d] her knowledge about internal politics and policies at her employer agency to foment and facilitate external pressure on that agency to change course.”<sup>252</sup> Whistleblowing from inside an agency can “jumpstart congressional action with respect to a particular agency policy . . . .”<sup>253</sup> Agency whistleblowers can also assist inspectors general in their oversight of agencies, a point made clear by the DOJ’s IG when he created a “whistleblower ombudsman” in his office to focus on government whistleblowers as sources of information, and to make sure govern-

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gime, see Geoffrey Christopher Rapp, *Mutiny by the Bounties? The Attempt to Reform Wall Street by the New Whistleblower Provisions of the Dodd-Frank Act*, 2012 BYU L. Rev. 73, 76–77.

<sup>249</sup> See Rapp, *supra* note 248, at 124 (noting the criticism of whistleblower regimes that they can raise administrative costs for agencies that are already overburdened and suffer from limited resources).

<sup>250</sup> Amanda C. Leiter, *Soft Whistleblowing*, 48 GA. L. REV. 425, 429 (2014). In addition to this informal whistleblower model, there are more formal ways of providing a similar outlet for employees to raise concerns. For example, Neal Katyal notes that the State Department has a Dissent Channel that gives any officer in an embassy the ability to disagree with the ambassador and puts in place a process for that disagreement to be registered with the State Department, which then requires the State Department to reply. Katyal, *supra* note 229, 2328–89.

<sup>251</sup> Leiter, *supra* note 250, at 440–44.

<sup>252</sup> *Id.* at 444.

<sup>253</sup> *Id.* at 487.

ment employees know their rights and protections against retaliation.<sup>254</sup>

Administrative law scholarship has given quite a bit of attention to citizens in their roles as private attorney generals or whistleblowers, but there are other functions citizens can perform in overseeing agency enforcement that have received less attention. Particularly for agencies that have a great deal of direct contact with the public in their enforcement efforts—such as policing agencies or those who deal with benefits and claims—another important aspect of oversight is direct civilian oversight of the agency.

While a direct role for civilians in agency oversight has not been a main focus of administrative law scholars, policing scholars have paid a great deal of attention to citizen oversight models.<sup>255</sup> They have pointed out how citizens can be directly involved in evaluating agencies, performing functions ranging from agency audits to investigating specific complaints about particular agency employees.<sup>256</sup>

On the investigative front, political overseers have used citizens to conduct investigations into alleged misconduct by police officers or to review the police department's internal investigation once it is complete.<sup>257</sup> Concerns have been raised that neither of these models sufficiently addresses a pro-agency bias that may develop because civilians hired by the agency might come to see its point of view, and citizens

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<sup>254</sup> Brian Mahoney, *DOJ Taps Prosecutor as First Whistleblower Ombudsman*, LAW360 (Aug. 8, 2012, 10:33 PM), <http://www.law360.com/articles/367905/doj-taps-prosecutor-as-first-whistleblower-ombudsman> [https://perma.cc/2WWG-ZPVU].

<sup>255</sup> See, e.g., SAMUEL WALKER & CAROL A. ARCHBOLD, *THE NEW WORLD OF POLICE ACCOUNTABILITY* 137–77 (2d ed. 2014); Merrick Bobb, Symposium, *New Approaches to Ensuring the Legitimacy of Police Conduct: Civilian Oversight of the Police in the United States*, 22 ST. LOUIS U. PUB. L. REV. 151, 161 (2003) (arguing that a monitor makes the “heretofore mystery-shrouded, internal processes of the police more transparent and comprehensible”); Stephen Clarke, *Arrested Oversight: A Comparative Analysis and Case Study of How Civilian Oversight of the Police Should Function and How It Fails*, 43 COLUM. J.L. & SOC. PROBS. 1, 2 (2009); Debra Livingston, Eighth Annual Conference of NACOLE, *Citizen Review of Police Complaints: Four Dimensions of Value* (2001), <https://nacole.org/resources/citizen-review-of-police-complaints-four-dimensions-of-value> [http://archive-org.com/page/761963/2012-11-26/http://www.nacole.org/citizen-review-police-complaints-four-critical-dimensions-value]. The President's Task Force on 21st Century Policing recently called for more research into civilian oversight and specifically noted that the National Institute of Justice should add the topic to its research agenda. The Task Force also recommended that the DOJ's Office of Community Oriented Policing Services provide technical assistance, collect best practices, and be prepared to help cities establish civilian oversight regimes. See PRESIDENT'S TASK FORCE ON 21ST CENTURY POLICING, FINAL REPORT OF THE PRESIDENT'S TASK FORCE ON 21ST CENTURY POLICING 26 (2015), [http://www.cops.usdoj.gov/pdf/taskforce/TaskForce\\_FinalReport.pdf](http://www.cops.usdoj.gov/pdf/taskforce/TaskForce_FinalReport.pdf).

<sup>256</sup> Clarke, *supra* note 255, at 11.

<sup>257</sup> *Id.* at 12, 14.

supervising internal reviews may also feel pressure from those within the agency with whom they have to work.<sup>258</sup> That said, even with this limitation, a direct role for citizens in oversight may improve public perception of the fairness and procedural justice at the agency.<sup>259</sup> Citizen investigation, however, is a model that is geared toward looking into specific allegations of misconduct and does not address broader agency practices or usage patterns in agency enforcement discretion.<sup>260</sup>

The citizen-auditor model is better tailored for broader agency oversight.<sup>261</sup> The Los Angeles Sheriff's Department has been subject to this type of audit by its Special Counsel.<sup>262</sup> In this model, the auditor essentially operates like a citizen inspector general, with access to all the agency's records and with broad authority to report on the agency's policies and practices and advocate for any needed reforms.<sup>263</sup> To be effective, the citizen auditor needs sufficient expertise about the agency's subject matter, so in the case of police departments, these auditors tend to be experts in policing practices.<sup>264</sup> The flipside of that expertise is that it likely means the auditor has worked at the audited agency or one just like it, and thus the auditor will not appear as independent or as someone with no connection to the field.<sup>265</sup> This is similar to the revolving door problem, where effective

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258 See POLICE ASSESSMENT RES. CTR., REVIEW OF NATIONAL POLICE OVERSIGHT MODELS FOR THE EUGENE POLICE COMMISSION 14 (Feb. 2005), <http://static1.squarespace.com/static/5498b74ce4b01fe317ef2575/t/54caf3abe4b04c8e2a3b6691/1422586795583/Review+of+National+Police+Oversight+Models+%28Feb.+2005%29.pdf>.

259 PRESIDENT'S TASK FORCE ON 21ST CENTURY POLICING, *supra* note 255, at 26.

260 However, a pattern of complaints can indicate a larger problem at the agency that needs to be addressed. WALKER & ARCHBOLD, *supra* note 255, at 14.

261 *Id.* at 15, 53.

262 Clarke, *supra* note 255, at 17–18, 18 n.92 (citing Merrick Bobb's Los Angeles Sheriff's Department ("LASD") Special Counsel model, and noting that the Special Counsel is the only one of three civilian oversight bodies that oversee the LASD—the other two being the Office of Independent Review and the Office of the Ombudsman—that does not focus on reviewing individual complaints).

263 JACK McDEVITT, AMY FARRELL & W. CARSTEN ANDRESEN, NE. UNIV. INST. ON RACE & JUSTICE, ENHANCING CITIZEN PARTICIPATION IN THE REVIEW OF COMPLAINTS AND USE OF FORCE IN THE BOSTON POLICE DEPARTMENT 6 (Dec. 2005), <http://masspolice-reform.com/wp-content/uploads/2014/12/Northeastern-Civilian-Review-report12-05.pdf>; POLICE ASSESSMENT RESEARCH CTR., *supra* note 258, at 23, 24. For a summary of the "core principles" that police auditors have identified as necessary to do the job effectively, see WALKER & ARCHBOLD, *supra* note 255, at 200–02. For a similar list of requirements for an inspector general or auditor of police departments, see FAIZA PATEL & ANDREW SULLIVAN, BRENNAN CTR. FOR JUSTICE, A PROPOSAL FOR AN NYPD INSPECTOR GENERAL 20–22 (2012), <http://www.brennancenter.org/sites/default/files/legacy/Justice/NYPDInspectorGeneral-web.pdf>.

264 See Clarke, *supra* note 255, at 19.

265 *Id.*; see also McDEVITT ET AL., *supra* note 263, at 6; Bobb, *supra* note 255, at 161 (ac-

agency employees may need experience with an industry, but there is a corresponding concern that they might not have sufficient independence from it to objectively assess what reforms are needed.<sup>266</sup> One way to address this concern is to allow for community involvement in the auditor's process.<sup>267</sup>

Another citizen model involves the use of an ombudsmen or citizen representative within the agency. These officials have a designated role within the agency of speaking for the public, and can thus add some measure of pushback against an agency that is otherwise captured by a regulated interest or is not sufficiently focused on community needs.<sup>268</sup> Like bias-monitoring units, citizens working within the agency structure can speak out when they see specific trouble spots that the agency might otherwise overlook.

### CONCLUSION

The aim of this Foreword is to draw needed attention to the question of how to improve oversight of agency enforcement decisions. In cataloging some of the key initial design choices Congress could make, mechanisms for improving ongoing oversight by courts and political actors, and ways to get private citizens involved, the goal has not been to provide an exhaustive list or all the answers to the questions surrounding the policing of agency enforcement discretion. Agencies that combine all powers (legislative, enforcement, and judicial) under one roof might require a different set of constraints than agencies that can only proceed through enforcement. Agencies that enforce statutes with great specificity might require less oversight than ones administering broad statutory frameworks. The aim here is not to provide a framework for every instance of agency enforcement. In-

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knowledging that a monitor must be accountable to both the law enforcement agency and to the public).

<sup>266</sup> See, e.g., PETER FINN, U.S. DEP'T OF JUSTICE, OFFICE OF JUSTICE PROGRAMS, NAT'L INST. OF JUSTICE, NCJ 184430, CITIZEN REVIEW OF POLICE: APPROACHES & IMPLEMENTATION 125 (2001), <https://www.ncjrs.gov/pdffiles1/nij/184430.pdf> (recommending periodic monitoring "to ensure that 'co-option' does not become an issue," while acknowledging that there is no known, scientific measure for co-option); Barkow, *Insulating Agencies*, *supra* note 35, at 23 (citing the "revolving-door phenomenon" as one factor that can lead to agency capture); see also POLICE ASSESSMENT RESEARCH CTR, *supra* note 258, at 24–25 (noting that perceptions of capture may be exacerbated when the auditor is not required to consult with the community, yet works closely with police officials).

<sup>267</sup> WALKER & ARCHBOLD, *supra* note 255, at 200–02 (noting the importance of community involvement and suggesting it can be exercised through an advisory board with members representing the local population).

<sup>268</sup> See Katyal, *supra* note 250, at 2347–48 (explaining how an ombudsman model could check agency decisionmaking); McDonnell & Schwarcz, *supra* note 37, at 1653.

stead, the main goal has been to catalog some overarching tools and, even more importantly, to spark broader interest in the inquiry.

Just because agency enforcement discretion lacks a doctrinal footing for robust judicial review does not mean it is not important. On the contrary, that is precisely why attention is needed. Without courts doing the important work of checking abuse and irrationality through direct judicial review, the pressure falls on other mechanisms to pick up the slack. It is long past time we started to consider what those options are and when they can best be employed.