
YALE LAW & POLICY REVIEW

The Collection Gap: Underenforcement of Corporate and White-Collar Fines and Penalties

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INTRODUCTION

The modern administrative state depends in large part on fines, penalties, restitution orders, and similar sanctions.¹ Contemporary policy assumes that the state, once it orders offenders to pay those sanctions, will collect them.² This Article suggests that we cannot depend on that assumption. Even where offenders are corporate or white-collar executives with the resources to pay, a fine imposed is in many cases not a fine collected. To the contrary, the available data shows a massive gap between penalties imposed “on the books” and penalties collected in reality.

1. Colin S. Diver, *The Assessment and Mitigation of Civil Money Penalties by Federal Administrative Agencies*, 79 COLUM. L. REV. 1435, 1436, 1445 (1979).

2. See, e.g., U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-05-80, CRIMINAL DEBT: COURT-ORDERED RESTITUTION AMOUNTS FAR EXCEED LIKELY COLLECTIONS FOR THE CRIME VICTIMS IN SELECTED FINANCIAL FRAUD CASES 2 (2005) [hereinafter GAO, RESTITUTION 2005] (describing public expectation that perpetrators of corporate fraud will pay fines imposed against them and analyzing to what extent certain fines are actually collected).

For decades, scholars have debated how best to calibrate government fines and penalties³ to achieve optimal deterrence and other public policy goals.⁴ Particularly in the corporate context, where financial penalties are often the primary means of redressing both civil and criminal offenses,⁵ commentators have disagreed whether assessing certain fines is fair or efficient.⁶ Some scholars have

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3. While fines, penalties, and restitution are distinct sanctions, such distinctions are largely immaterial for our purposes. Thus, for convenience, we refer to all such forms of civil and criminal monetary sanctions as “fines” unless otherwise indicated.
 4. See, e.g., John E. Calfee & Richard Craswell, *Some Effects of Uncertainty on Compliance with Legal Standards*, 70 VA. L. REV. 965, 995 (1984) (arguing that the uncertainty of application of legal rules creates systemic risks both of overcompliance and that wrongful behavior will go undetected, and that traditional approaches to setting penalties to optimize behavior may not adequately account for these phenomena); Amanda M. Rose, *The Multienforcer Approach to Securities Fraud Deterrence: A Critical Analysis*, 158 U. PA. L. REV. 2173 (2010) (arguing that the risks of over- and under-deterrence can best be minimized by consolidated enforcement authority in a centralized agency such as the Securities and Exchange Commission (SEC), but cautioning that misalignment between agency incentives and the public interest may undermine efficiency gains). See generally Gary S. Becker, *Crime and Punishment: An Economic Approach*, 76 J. POL. ECON. 169 (1968); A. Mitchell Polinsky & Steven Shavell, *The Optimal Tradeoff Between the Probability and Magnitude of Fines*, 69 AM. ECON. REV. 880, 880 (1979) (discussing the parameters under which fines may or may not achieve optimal deterrence).
 5. See, e.g., KATHLEEN F. BRICKEY, 1 CORPORATE CRIMINAL LIABILITY §§ 1.07-.08 (2d ed. 1991); William Funk, *Close Enough for Government Work?—Using Informal Procedures for Imposing Administrative Penalties*, 24 SETON HALL L. REV. 1, 1-3 (1993); V.S. Khanna, *Corporate Criminal Liability: What Purpose Does It Serve?*, 109 HARV. L. REV. 1477, 1497-98 (1996); Mary Kreiner Ramirez, *The Science Fiction of Corporate Criminal Liability: Containing the Machine Through the Corporate Death Penalty*, 47 ARIZ. L. REV. 933, 942-72 (2005).
 6. See, e.g., Jennifer Arlen, *Potentially Perverse Effects of Corporate Criminal Liability*, 23 J. LEGAL STUD. 833 (1994) (arguing that a corporate criminal liability regime that fails to take into account internal enforcement efforts not only overdeters but may actually increase crime); Darryl K. Brown, *Street Crime, Corporate Crime, and the Contingency of Criminal Liability*, 149 U. PA. L. REV. 1295 (2001) (arguing that criminal enforcement does and should play a limited role in regulating corporate wrongdoing due to, among other things, the ability of social norms to regulate corporate conduct); John C. Coffee, Jr., *Law and the Market: The Impact of Enforcement*, 156 U. PA. L. REV. 229 (2007) (analyzing the extent to which the level of enforcement of regulations regarding corporate wrongdoing impacts the cost of capital and financial development); Christopher Kennedy, *Criminal Sentences for Corporations: Alternative Fining Mechanisms*, 73 CALIF. L. REV. 443 (1985) (analyzing the fairness and efficiency of various forms of corporate fines vis-à-vis their effect on shareholder and corporate management behavior); Alexandra Natapoff, *Underenforcement*, 75 FORDHAM L. REV. 1715, 1751-52 (2006) (contrasting the current approach to street crime with the “positive underenforcement” approach

advocated minimal imposition of corporate fines because the negative impact of such fines is arguably passed onto innocent parties, such as shareholders or consumers.⁷ Others have posited theories explaining the benefits of regulators' assessment of robust penalties against corporate offenders.⁸

However, existing scholarship has not seriously addressed what happens after the state orders offenders to pay these sanctions. Instead, the administrative enforcement literature has essentially ignored to what extent offenders actually pay the penalties imposed against them.

This Article seeks to describe empirically, for the first time, the degree to which regulators follow through on enforcing corporate and white-collar fines and penalties. Drawing on evidence from federal—and, to a lesser extent, state and local⁹—government studies, Freedom of Information Act requests, media reports, and agencies' own formal and informal disclosures,¹⁰ we demonstrate a fundamental disconnect between what offenders are ordered to pay and what they actually do pay.

Administrative agencies never collect the vast brunt of regulatory and criminal penalties.¹¹ The U.S. Department of Justice, for example, has collected in recent years less than 4% of criminal penalties and fines it imposes.¹² Other federal agencies collect at a similarly dismal rate.¹³ Agencies like the Securities and Exchange Commission and the Commodities and Futures Trading Commission that regulate primarily well-financed companies tend to do better than other federal agencies, although they still collect less than half of the penal-

to white-collar and corporate wrongdoing); Barry J. Pollack, *Time To Stop Living Vicariously: A Better Approach to Corporate Criminal Liability*, 46 AM. CRIM. L. REV. 1393 (2009) (arguing that the current regime of vicarious criminal liability for corporations is unduly broad, and that corporate liability should be tied more directly to the intent of senior management).

7. See, e.g., Kennedy, *supra* note 6, at 448-50.

8. See, e.g., Coffee, *supra* note 6, at 235-36.

9. The available state and local evidence is drawn largely, although not entirely, from California.

10. See *infra* Section II.A.

11. See *infra* Part II.

12. U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-04-338, CRIMINAL DEBT: ACTIONS STILL NEEDED TO ADDRESS DEFICIENCIES IN JUSTICE'S COLLECTION PROCESSES 7 (2004) [hereinafter GAO, CRIMINAL DEBT 2004].

13. See, e.g., U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-02-211, CIVIL FINES AND PENALTIES DEBT: REVIEW OF OSM'S MANAGEMENT AND COLLECTION PROCESSES 9 (2001) [hereinafter GAO, OSM 2001].

ties offenders are ordered to pay.¹⁴ While data on state and local agencies is more limited, it suggests they suffer from similar problems.¹⁵

The disconnect between enforcement expectations and enforcement reality extends to agency attitudes. According to scholars, regulators impose fines to deter misconduct, compensate victims, and generate government revenue.¹⁶ Ensuring offenders actually pay helps achieve those enforcement goals.¹⁷ Agencies, however, do not necessarily agree. The Environmental Protection Agency, for example, views fine-collection as irrelevant to its enforcement function and refuses to publicly disclose its collections figures.¹⁸

These findings have significant theoretical implications. They undermine the “assumption of collection” underlying much of the discussion about administrative fines and penalties. They also challenge accepted notions about how administrative agencies understand their enforcement mission.

Moreover, exposure of the undercollection phenomenon could spark political controversy. Government agencies are failing to collect billions of dollars in civil and criminal fines—even when the offenders possess the means to pay.¹⁹ During a recession in which governments are slashing budgets, cutting back public services, and laying off workers, they are at the same time neglecting to recover huge sums from corporations and executives that have actually been found to have engaged in wrongdoing.

Particularly in such an economic environment, one would expect a groundswell of support to push government agencies to improve their fine collection rates. But neither the public, the press, nor the political branches has said much about the problem, let alone sought explanations for why it is occurring.

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14. U.S. GOV'T ACCOUNTABILITY OFFICE, GAO 03-795, SEC AND CFTC FINES FOLLOW-UP: COLLECTION PROGRAMS ARE IMPROVING, FURTHER STEPS ARE WARRANTED 21, 23-24 (2003) [hereinafter GAO, SEC AND CFTC 2003].
 15. JOHN CHIANG, CAL. HIGHWAY PATROL, S09-PRS-900, REPORT OF REVIEW: ACCOUNTING AND ADMINISTRATIVE PROCESSES AND PROCEDURES FOR COLLECTING DEBT DUE THE STATE 11 (2009) [hereinafter CHIANG, CHP AUDIT]; Mark Madler, *L.A.'s Deadbeat Tab: Staggering \$559 Million*, SAN FERN. VAL. BUS. J., May 10, 2010, available at <http://www.allbusiness.com/government/government-bodies-offices-regional/14568277-1.html>.
 16. Diver, *supra* note 1, at 1456; Kennedy, *supra* note 6, at 446.
 17. Oren Bar-Gill & Omri Ben-Shahar, *Credible Coercion*, 83 TEX. L. REV. 717, 728 (2005) (“Only a threat that is perceived to be credible has the power to coerce.” (emphasis omitted)); Don E. Scheid, *Constructing a Theory of Punishment, Desert, and the Distribution of Punishments*, 10 CAN. J.L. & JURIS. 441, 466 (1997) (“[I]n order to maintain the credibility of its threats, punishments must actually be imposed on those who commit crimes.”).
 18. See *infra* text accompanying notes 165-173.
 19. See *infra* Parts II and III.

This Article undertakes the first empirical and theoretical overview of the problem of undercollection of government fines. We have amassed available evidence regarding agencies' collection rates, and have found that such rates are pervasively low. We then take on the question of whether low collection rates are in fact evidence of *undercollection*—i.e., are they the result of agency failures, rather than merely being a product of rational decisions to forgo collections; or are they the result of factors beyond the agencies' control, such as offenders' inability to pay? We conclude that agencies must bear much of the blame for their dismal collections performance.

After demonstrating that low collections are in fact undercollection, we address the root causes. Applying theoretical models from psychology, administrative law, and organizational behavior,²⁰ we examine the mechanisms behind regulators' failure to collect fines and penalties. Although insufficiency of resources undoubtedly plays a role, individual and institutional incentives and perceptions regarding the collections function are critical to collections performance. As we demonstrate, agency staffers tend to perceive collections as a ministerial task that is “below them” or “someone else’s problem.”²¹ Likewise, agency leaders may de-prioritize collections in favor of higher-profile tasks like rule promulgation. Both of these phenomena systematically undermine collections performance. Agencies' lack of a direct financial stake in money collected from offenders compounds the problem: Administrative agencies typically do not keep the money they collect, and individual collections personnel do not get commissions or other performance-based incentives. Moreover, this de-emphasis of the collections role contributes to (and is in part a result of) a lack of inter- and intra-agency coordination regarding collections, further exacerbating the problem.

Having described the phenomenon of undercollection and its causes, we consider potential solutions. The possibilities range from incremental improvements to radical restructurings. For example, we examine subtle ways to “nudge” regulators toward a more positive perception of the collections function.²² We also consider various strategies to reorder the flow of collected funds to better reward strong performance. On the other end of the spectrum, reform could mean removing collections responsibilities from the agencies. We examine different ways in which agencies could delegate collections duties or auction off penalty debt, and we analyze the benefits and risks of privatizing this aspect of government enforcement. Although widespread reliance on private collection agencies may ultimately provide the most promising approach to

20. See, e.g., ANTHONY DOWNS, *INSIDE BUREAUCRACY* (1967); HERBERT A. SIMON, *ADMINISTRATIVE BEHAVIOR* (4th ed. 1997); RICHARD H. THALER & CASS R. SUNSTEIN, *NUDGE* (2008).

21. See *infra* text accompanying notes 306-313.

22. See, e.g., THALER & SUNSTEIN, *supra* note 20, at 65 (“If choice architects want to shift behavior and to do so with a nudge, they might simply inform people about what other people are doing.”).

boost collection rates, we conclude that, given the financial and political constraints, intra-governmental reforms should be attempted first. If all of the above-suggested efforts fail, then wholesale privatization of the collections function will be more palatable, and more demonstrably worth the potential risks.

This Article proceeds in five parts. In Part I, we provide background regarding the authority for, structure of, and rationales for the imposition of civil and criminal fines. In Part II, we provide empirical evidence that low collections rates are widespread. In Part III, we demonstrate that low collections evidence undercollection. In Part IV, we examine potential explanations for these collections failures at the individual, institutional, and systemic levels. In Part V, we offer our recommendations for how to reform the collections process.

I. STRUCTURE OF ADMINISTRATIVE FINE ENFORCEMENT

The modern administrative state includes thousands of different agencies, administrative bodies, and executive entities at the federal, state and local levels.²³ These bodies regulate practically every imaginable industry and subject matter.²⁴ Agencies enforce statutes, rules, and regulations through a variety of means, but imposition of monetary sanctions (including fixed or variable fines and penalties, and restitution²⁵) is the primary enforcement tool.²⁶

Administrative fines may be imposed in both the civil and criminal contexts.²⁷ Virtually every major administrative regulatory program contains some type of monetary sanction.²⁸ Sometimes, fines are the only available sanction.²⁹

23. See, e.g., KENNETH F. WARREN, *ADMINISTRATIVE LAW IN THE POLITICAL SYSTEM* 41 (4th ed. 2004) (tracking the growth of federal agencies from zero in 1789 to nearly five hundred agencies by 2004); *Agency Directory*, STATE OF CAL., <http://www.ca.gov/CaSearch/Agencies.aspx> (last visited June 28, 2010) (listing nearly four hundred agencies in California alone).

24. See Diver, *supra* note 1, at 1438 (listing a variety of such industries and subjects).

25. Susan E. Nash, *Collecting Overcharges from the Oil Companies: The Department of Energy's Restitutionary Obligation*, 32 *STAN. L. REV.* 1039, 1056 n.97 (1980) (“[C]ourts have granted other administrative agencies wide discretion in fashioning restitutionary remedies.”); Marshall L. Small, *Limitations Imposed by the Federal Debt Collection Procedures Act on Use of Prejudgment Remedies To Enforce Federal Administrative Agency Claims for Monetary Payments*, 49 *BUS. LAW.* 1541, 1542 (1994).

26. Diver, *supra* note 1, at 1436, 1438, 1445.

27. Funk, *supra* note 5, at 2; Small, *supra* note 25, at 1542.

28. Laura J. Kerrigan et al., *Project: The Decriminalization of Administrative Law Penalties: Civil Remedies, Alternatives, Policy, and Constitutional Implications*, 45 *ADMIN. L. REV.* 367, 387 (1993) (noting that within the past twenty years, “the civil fine has assumed a place of paramount importance in the search for a more effec-

A. Purposes of Administrative Fines

Monetary remedies can serve various regulatory objectives. First and foremost is deterrence: “[M]otivating future behavior” is “[t]he most obvious and widely acknowledged” purpose of administrative fines.³⁰ Such deterrence—which includes both discouraging undesirable conduct and encouraging salutary behavior³¹—may be “general” (directed toward the general universe of actors subject to regulation) or “specific” (directed to rule violators themselves).³²

A second potential purpose for administrative fines is compensation.³³ Restitution is designed specifically to compensate identifiable victims; whereas other civil and criminal monetary remedies are generally not geared toward this purpose.³⁴

A third purpose is punishment.³⁵ Although as a practical matter, money remedies sought in civil proceedings may have a punitive motivation,³⁶ generally only criminal fines are considered “retributive.”³⁷ That is because “[i]f Congress intended the penalty to be punishment, then the sanction is viewed as

tive enforcement tool” (citing Diver, *supra* note 1, at 1436)); Kenneth Mann, *Punitive Civil Sanctions: The Middleground Between Criminal and Civil Law*, 101 YALE L.J. 1795, 1844 (1992) (“In 1979, Colin Diver found that twenty-seven federal departments and independent agencies enforced 348 civil statutory penalties. Since that time, Congress has added new punitive civil sanctions, increased their size, and made their imposition procedurally easier.” (footnotes omitted)); Small, *supra* note 25, at 1542.

29. Kerrigan et al., *supra* note 28, at 387.

30. Diver, *supra* note 1, at 1456; Kennedy, *supra* note 6, at 446 (“The mainstream of commentary . . . has settled on a utilitarian rationale for the corporate fine, with deterrence as its centerpiece.”); *see, e.g.*, *Hudson v. United States*, 522 U.S. 93, 105 (1997) (noting that monetary penalties under the Federal Reserve Act and the Federal Deposit Insurance Act are “intended to deter future wrongdoing”); *United States v. ITT Cont’l Baking Co.*, 420 U.S. 223, 232 (1975) (noting that Federal Trade Commission Act civil penalties are designed to “provide a meaningful deterrence against violations”).

31. Diver, *supra* note 1, at 1456.

32. *Id.*

33. *Id.*; *see also Helvering v. Mitchell*, 303 U.S. 391, 401 (1938) (explaining that penalties under the revenue laws are intended in part “to reimburse the Government for the heavy expense of investigation and the loss resulting from the taxpayer’s fraud”).

34. Diver, *supra* note 1, at 1456.

35. *Id.* at 1456 n.136.

36. Mann, *supra* note 28, at 1807-08.

37. Diver, *supra* note 1, at 1456 n.136; Kerrigan et al., *supra* note 28, at 387.

‘criminal’ in nature, entitling the defendant to the constitutional procedural safeguards of criminal proceedings.”³⁸

Finally, fines and penalties generate revenue,³⁹ which can fund government programs and operations, offset the burden on taxpayers, and help pay down budget deficits.⁴⁰ Although fundraising is not always an express purpose of particular fines,⁴¹ it can be one of their most direct and measurable effects.

B. Fine Enforcement Processes

In this Section, we describe the processes by which administrative agencies enforce fines and penalties against violators. We provide an overview of the ways agencies (and/or courts) (1) initially assess these fines; (2) mitigate, or reduce, the amounts they initially assess; and (3) collect money owed by violators.

1. Initial Fine Assessment

There are several means by which monetary sanctions may be assessed against violators of administrative statutes, rules, or regulations. These mechanisms include judicially-imposed fines, fines assessed by administrative agencies, and informal administrative assessments.

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38. Kerrigan et al., *supra* note 28, at 372 (“If, on the other hand, the statute has a legitimate nonpunitive purpose, the defendant is merely afforded the procedural safeguards of a civil action.”).
39. Dep’t of Revenue v. Kurth Ranch, 511 U.S. 767, 780 (1994); Kerrigan et al., *supra* note 28, at 377 (“[C]ivil remedies also have the potential of providing the government with much needed funds.”).
40. See Diver, *supra* note 1, at 1456 (describing the use of fines to compensate the government for the loss the violator caused); Press Release, Cal. State Controller’s Office, Chiang Finds Massive Losses from Uncollected Fines and Penalties (Apr. 16, 2009), http://www.sco.ca.gov/eo_pressrel_5688.html [hereinafter SCO Press Release] (noting that the state “loses millions of dollars each year because state agencies often fail to collect the fines and penalties they levy”); Daniel Pearce, *Unpaid Fines Hit \$3M: County Hires Another Collection Agency To Go After Offenders*, SIMCOE REFORMER, <http://www.simcoereformer.ca/ArticleDisplay.aspx?archive=true&e=1080189> (last visited Apr. 24, 2011) (“The \$3 million in collectibles represents close to six per cent [sic] of the annual amount in taxes the county collects every year.”); *Team #4: State Failing To Collect Millions in Unpaid Fines*, WTAE.COM, Nov. 10, 2008, <http://www.thepittsburghchannel.com/team4/17949994/detail.html> [hereinafter Pennsylvania Fines Report] (“[T]he state is owed more than \$14 million in fines and fees at a time when the state is facing a more than half-billion dollar budget hole.”).
41. By contrast, taxes are typically explicitly directed toward revenue-generation. *Kurth Ranch*, 511 U.S. at 780.

First, civil or criminal fines or penalties may be judicially imposed.⁴² Standard distinctions between criminal and civil cases (such as differences in the burden of proof and persuasion) apply,⁴³ but all court-imposed fines require the commencement of a case and a formal finding of guilt or liability by a judge or jury, as applicable.⁴⁴ For example, the Clean Water Act authorizes the Environmental Protection Agency (EPA) to file a lawsuit in federal court to pursue civil penalties against violators.⁴⁵

Second, administrative agencies may assess civil penalties through the “formal” administrative penalty process, which mirrors the judicial procedure, but without an elected or Article III judge or jury.⁴⁶ An administrative law judge generally makes a recommended decision about the violation and the amount of the penalty.⁴⁷ After providing an opportunity for parties to object, the agency makes a final decision. The decision may be judicially reviewed under the Administrative Procedure Act (APA) or a specific state review statute.⁴⁸

Third, an even more informal administrative assessment procedure may be statutorily permitted.⁴⁹ The agency unilaterally raises the allegations of a violation, makes non-judicial findings, and sets the penalty.⁵⁰ Congress has often

42. Funk, *supra* note 5, at 1-3. Some statutes prohibiting a given type of misconduct can give rise to both criminal and civil penalties. *See, e.g.*, 33 U.S.C. § 1319(c) (2006) (criminal penalties for water pollution); *id.* § 1319(d) (civil penalties for water pollution).

43. Funk, *supra* note 5, at 1-3.

44. Tull v. United States, 481 U.S. 412 (1987); Funk, *supra* note 5, at 1-3; *see also* 33 U.S.C. § 1319(d) (2006) (listing factors a court shall consider in determining a penalty).

45. 33 U.S.C. § 1319(b).

46. 5 U.S.C. §§ 554, 556-557 (2006); Funk, *supra* note 5, at 1-3.

47. All Regions Chem. Labs, Inc. v. EPA, 932 F.2d 73 (1st Cir. 1991); Funk, *supra* note 5, at 2.

48. For example, the APA broadly provides that persons “aggrieved” by any agency action, or who wish to challenge a final agency ruling, may seek judicial review. 5 U.S.C. §§ 702, 704. The APA generally requires the reviewing court to uphold the agency determination if supported by substantial evidence. 5 U.S.C. § 706(2)(E); Funk, *supra* note 5, at 2. The amount of the penalty, as opposed to the fact of violation, may be reviewed under the deferential abuse of discretion standard, because the fixing of a penalty amount is considered an important exercise of prosecutorial discretion. *See, e.g.*, 33 U.S.C. § 1319(g)(8) (providing for substantial evidence review of the finding of violation and abuse of discretion review for the amount of the penalty).

49. Funk, *supra* note 5, at 3.

50. *Id.*

authorized such informal procedures for smaller penalties, while requiring formal processes for larger penalties or penalties for continuing violations.⁵¹

Through either formally assessed administrative penalties or those imposed by an informal agency procedure, administrative agencies often have substantial but not unlimited discretion to determine the amount of a penalty. Many civil penalty statutes or authorizing regulations impose lower and upper limits on penalty amounts.⁵² They also provide guidance on how to exercise discretion within the permitted range of penalty amounts, by listing factors to be considered in determining the penalty.⁵³ For example, the Toxic Substances Control Act⁵⁴ requires the EPA to consider the nature, circumstances, extent, and gravity of the violation or violations; the violator's ability to pay; the effect of any penalty on the violator's ability to continue to do business; any history of prior violations; and the degree of culpability.⁵⁵ Most statutory guidelines contain similar factors.⁵⁶

2. Fine Mitigation

Many administrative agencies have the express power to mitigate, i.e., compromise or wholly write off, monetary penalties after initial assessment.⁵⁷ In

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51. Compare 33 U.S.C. § 1319(g)(2)(B) (requiring formal adjudication for Class II penalties), with 33 U.S.C. § 1319(g)(2)(A) (explicitly mandating non-APA proceedings for Class I penalties); compare 42 U.S.C. § 9609(b) (2006) (requiring formal adjudication for Class II penalties), with 42 U.S.C. § 9609(a) (implicitly providing for non-APA proceedings for Class I penalties); compare 42 U.S.C. § 11045(b)(2) (requiring formal adjudication for Class II penalties), with 42 U.S.C. § 11045(b)(1) (implicitly providing for non-APA proceedings for Class I penalties).
 52. Diver, *supra* note 1, at 1441; see, e.g., 7 U.S.C. § 13a (2006) (providing a \$500,000 maximum penalty for individual violation of rules in contracts markets); 31 U.S.C. § 3729(a) (2006) (providing, as part of the False Claims Act, for penalties of “not less than \$5,000 and not more than \$10,000”); 33 U.S.C. § 1415(a) (providing \$50,000 maximum for ocean dumping).
 53. Diver, *supra* note 1, at 1441.
 54. 15 U.S.C. § 2601 (2006).
 55. *Id.* § 2615(a)(2)(B).
 56. Diver, *supra* note 1, at 1441; see, e.g., 12 U.S.C. § 4585(c)(2) (2006) (National Housing Act); 15 U.S.C. § 45(m)(1)(c) (FTC unfair competition); 15 U.S.C. § 78u-2(c)-(d) (Securities and Exchange Commission); 21 U.S.C. § 333(g)(3)(B) (2006) (Food, Drug, and Cosmetic Act); 42 C.F.R. § 488.438(f) (2010) (Centers for Medicare and Medicaid Services).
 57. GAO, OSM 2001, *supra* note 13, at 7, 13; Diver, *supra* note 1, at 1440. One (cynical) view of the rationale for granting agencies such liberal mitigation authority is that it serves to augment agency power at the expense of the rights of those subject to regulation. See Kenneth Culp Davis, *Administrative Powers of Supervising, Prosecuting, Advising, Declaring, and Informally Adjudicating*, 63 HARV. L. REV. 193, 215

many cases, mitigation clauses are found in the same statutory provision authorizing the penalty itself; alternatively, some agencies have general mitigation authority applicable to many or all of the civil money penalties that they enforce.⁵⁸

The limitations on agencies' mitigation authority vary. Although the statutory sources of mitigation power often do not provide detailed criteria regarding the exercise of that power,⁵⁹ many agencies have internal guidelines regarding when penalty debt may be written off, e.g., when the cost of collection is excessive or where the debtor cannot be located.⁶⁰ In some instances, write-offs may not be permitted unless another agency, such as the U.S. Department of Justice (DOJ) or the state Attorney General's Office, approves.⁶¹ Agency procedures may also limit the amount by, or the circumstances under, which a penalty may be reduced or payment deferred.⁶² As we demonstrate below, however, agencies routinely deviate from their own procedures in mitigating fines and penalties.⁶³

(1949) ("The maximum penalties are always initially imposed, although Congress could not have intended such penalties to be collected. Nevertheless, the customary attitude is that mitigation is an act of grace and that the alleged offender has neither substantive nor procedural rights."); *see also infra* text accompanying notes 181-207 for discussion of concerns raised by agencies' employment of the power to mitigate.

58. Diver, *supra* note 1, at 1443. Even in the absence of an express mitigation power, federal agencies have a general authority to compromise money penalty claims under the Federal Claims Collection Act of 1966, which authorizes the "head of an agency" to "compromise . . . claims of the United States for money or property arising out of the activities of, or referred to, his agency." *Id.* at 1444.
59. *Id.* at 1443.
60. GAO, OSM 2001, *supra* note 13, at 7.
61. CHIANG, CHP AUDIT *supra* note 15, at 8 ("[California s]tate departments that wish to write off their accounts receivable are required to file a Request for Discharge From Accountability with the Victim Compensation and Government Claims Board (VCGCB) through the [State Controller's Office] and/or the Attorney General's Office (AGO)."); GAO, OSM 2001, *supra* note 13, at 7.
62. U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-02-116, CIVIL FINES AND PENALTIES DEBT: REVIEW OF CMS'S MANAGEMENT AND COLLECTION PROCESSES 6 (2001) [hereinafter GAO, CMS 2001] (noting that internal Centers for Medicare and Medicaid Services (CMS) procedures dictate that the CMS should not reduce a penalty by more than 35% if the violator did not timely waive its right to an administrative hearing); GAO, OSM 2001, *supra* note 13, at 6 (noting that OSM policies discussing agency payment plans depend on certain circumstances for debtors).
63. *See infra* text accompanying notes 172-187.

3. Fine Collection

This Subsection describes the mechanisms by which administrative agencies collect fines. We highlight several key aspects of these mechanisms, including: the fragmentation of collection responsibilities within or among different agencies; the discretion entrusted to agencies with respect to collections; and the process by which collected funds enter the government's coffers.

There is generally no centralized entity tasked with, nor a standardized process for, collecting government fines, even in the federal system. Instead, collections responsibilities are largely dispersed among different agencies.

In the criminal context, district court judges initially determine any fine or restitution to be paid,⁶⁴ as well as related matters such as the propriety of payment plans.⁶⁵ Consistent with judicial assessment of fines, most criminal fines must be paid to the court clerk's office.⁶⁶

However, it is DOJ, not the Administrative Office of the United States Courts, which is charged with initiating criminal fine collections.⁶⁷ In other words, although the courts assess criminal fines and ultimately receive payment of them, a different entity—DOJ—is charged with pursuing payment of those amounts.⁶⁸ DOJ then delegates collections to the ninety-four United States Attorneys' Offices located in each federal district throughout the country.⁶⁹ Each local United States Attorney's Office, in turn, entrusts collections to its own Financial Litigation Unit (FLU), which operates within each office's Civil Division.⁷⁰ The FLUs within each district maintain their own separate databases to meet their enforcement responsibilities.⁷¹

Although FLU personnel are primarily responsible for ensuring offenders pay amounts due to the court, personnel from the Bureau of Prisons, as well as the court system's probation offices, also get involved.⁷² For example, the Bureau of Prisons provides a means of collecting voluntary periodic deductions

64. U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-01-664, *CRIMINAL DEBT: OVERSIGHT AND ACTIONS NEEDED TO ADDRESS DEFICIENCIES IN COLLECTION PROCESSES 26-27* (2001) [hereinafter GAO, *CRIMINAL DEBT 2001*].

65. *Id.*

66. *Id.* at 29.

67. *Id.* at 28.

68. *Id.* at 29.

69. *Id.*

70. *Id.* at 10.

71. *Id.* at 29.

72. *Id.*

from inmates' wages earned from prison occupations.⁷³ And probation officers can use unpaid fines as a basis on which to restrict the activities of offenders.⁷⁴

Fine assessment and collections in the civil context can be similarly fragmented. For example, DOJ personnel, not EPA officials, are primarily responsible for resolving civil judicial enforcement actions involving environmental violations.⁷⁵ Although the EPA generates penalty estimates for such cases, those estimates do not govern DOJ's decisions.⁷⁶ As for collection of fines, the EPA itself collects administrative fines through its office of its Chief Financial Officer, whereas civil judicial penalties are collected through DOJ and individual United States Attorney's Offices.⁷⁷

There is, however, one unifying thread in the federal system: Federal agencies are usually required to transfer fine debt that is more than 180 days delinquent to the Treasury Department's Financial Management Services. Financial Management Services is then required to take appropriate steps to collect the debt or terminate collection actions.⁷⁸ But as will be discussed below, agencies often fail to timely refer all eligible debt to Financial Management Services as required, undermining consistency.⁷⁹

Collections practices are also often fragmented within agencies, although there are significant variations. In many cases, the specific personnel collecting fines have both collection and non-collection duties. For example, at the Securities and Exchange Commission (SEC), some staff attorneys are responsible for a variety of functions, including investigating potential violations of securities law, recommending enforcement actions, prosecuting the SEC's civil suits, negotiating settlements, and conducting collection activities for fines levied.⁸⁰

73. *Id.*

74. *Id.*

75. U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-08-1111R, ENVIRONMENTAL ENFORCEMENT: EPA NEEDS TO IMPROVE THE ACCURACY AND TRANSPARENCY OF MEASURES USED TO REPORT ON PROGRAM EFFECTIVENESS 4 (2008) [hereinafter GAO, EPA 2008].

76. *Id.* at 10.

77. *Id.* at 16, Enclosure II.

78. See 31 U.S.C. § 3711(g)(1) (2006); GAO, SEC AND CFTC 2003, *supra* note 14, at 7. Financial Management Services can use traditional methods of collecting debt, like sending demand letters and hiring private collection agencies. GAO, SEC AND CFTC 2003, *supra* note 14, at 7. In addition, the Service can use the Treasury Offset Program, which identifies federal payments (e.g., tax refunds) that are owed to individuals and applies the payments to their outstanding debt. *Id.*

79. See *infra* text accompanying notes 272-273.

80. U.S. GOV'T ACCOUNTABILITY OFFICE, GAO 05-670, SEC AND CFTC PENALTIES: CONTINUED PROGRESS MADE IN COLLECTION EFFORTS, BUT GREATER SEC MANAGEMENT ATTENTION IS NEEDED 20 (2005) [hereinafter GAO, SEC AND CFTC 2005].

Although much of the available data involves federal agencies, the problem is by no means confined to the federal arena. Collection responsibilities at the California Public Utilities Commission, for example, float among staff in no less than five different divisions within the Agency.⁸¹

Other agencies, by contrast, delegate civil debt collection work to private collection agencies.⁸² But such delegations take different forms. An agency may enter into an exclusive contract with a given debt collector.⁸³ Or the agency may contract with multiple collection agencies, providing more work to high-performers.⁸⁴

Collection personnel generally have substantial discretion in utilizing collection tools. Methods include filing liens, identifying debtor assets, garnishing debtor wages, and serving notice of late payments.⁸⁵ Agencies can also initiate installment or payment plans for debtors that cannot pay the full debt immediately,⁸⁶ although the agencies' own policies may curb this discretion.⁸⁷ Many agencies are also required to report information about their fine collections to oversight agencies, such as the federal Office of Management and Budget or the state Controller's Office.⁸⁸

Fines collected by agencies typically go to general coffers rather than to the collecting agency. The Miscellaneous Receipts Act⁸⁹ requires that all monies received on behalf of the federal government must be deposited with the United States Treasury.⁹⁰ Although a number of agency authorizing statutes override

81. JOHN CHIANG, CAL. PUB. UTIL. COMM'N, REPORT OF REVIEW: FINES AND RESTITUTION ACCOUNTING AND COLLECTION 9 (2007) [hereinafter CHIANG, CPUC AUDIT].

82. Pearce, *supra* note 40; Teresa Moore, *County Seeks Help Recovering Unpaid Fines*, IRONTON TRIB., Feb. 21, 2009, at 1A, 3A.

83. Moore, *supra* note 82.

84. Pearce, *supra* note 40.

85. GAO, CRIMINAL DEBT 2001, *supra* note 64, at 29.

86. GAO, OSM 2001, *supra* note 13, at 13; GAO, CRIMINAL DEBT 2001, *supra* note 64, at 29.

87. *See infra* notes 205-216; *see also* GAO, OSM 2001, *supra* note 13, at 13.

88. GAO, CMS 2001, *supra* note 62, at 29; GAO, OSM 2001, *supra* note 13, at 15; *see* CHIANG, CHP AUDIT *supra* note 15, at 7 (noting that California agencies must properly record receivables balances for review by the Controller's Office, the State Department of Justice and the Victims' Compensation and Government Claims Board).

89. 31 U.S.C. § 3302 (2006).

90. There are certain exceptions. *See, e.g.*, 8 U.S.C. § 1363(a)(3)-(4) (2006) (authorizing the retention and use of sums collected in connection with undercover immigration investigations for limited periods); 19 U.S.C. § 1631 (2006) (authorizing the imposition of costs of collecting customs duties, and allowing a department to retain those sums to cover debt collection expenses). Thus, whether an agency

this act by allowing an agency to keep fines that it collects, many do not.⁹¹ Thus, agencies that collect fines often do not retain the fruits of their efforts.

This Part provided relevant background on fines and their purposes, the processes by which they are administered, and the fragmented nature of how they are assessed and collected. In the Parts that follow, we describe the evidence demonstrating low collection rates among administrative agencies, and then discuss the ways in which current fine collections processes contribute to low collections and ultimately undermine some of the core purposes of fines and penalties levied by administrative agencies.

II. EVIDENCE OF LOW FINE COLLECTION RATES

In this Part, we describe our methodologies for gathering and interpreting agency collections data from different sources, as well as obstacles we faced in amassing such data. We then present our analysis of current fine collection rates among a cross-section of federal and some state agencies. We conclude that the data demonstrates a systemic failure to substantially collect fines and penalties originating with administrative agencies.

A. Research Methodology

1. Data Sources

Given the historic inattention to the issue of collection of administrative fines, we sought to be the first to collect, distill, and analyze relevant information across multiple agencies. This required us to locate and synthesize data from a variety of disparate sources, including audits, responses to informational requests and questionnaires, financial reports, and press releases.

We started with financial audits conducted by the federal government. For example, we located reports of audits by the United States Government Accountability Office (GAO), which investigates the efficiency and effectiveness of other federal government agencies.⁹² Each report addressed the collection

retains fines collected, and the extent to which and/or circumstances under which they do so, may vary from agency to agency. However, the default is that the agencies do not retain the amounts collected.

91. This issue has been particularly controversial with regard to the EPA. *See, e.g.*, Todd David Peterson, *Protecting the Appropriations Power: Why Congress Should Care About Settlements at the Department of Justice*, 2009 *BYU L. REV.* 327, 347-48, 351-58 (discussing the issue of DOJ entering into settlements under the Clean Air and Clean Water Acts which involve “supplemental environmental projects,” as opposed to monetary payments, so as to avoid the requirements of the Miscellaneous Receipts Act).

92. *See, e.g.*, GAO, CMS 2001, *supra* note 62; GAO, OSM 2001, *supra* note 13; GAO, CRIMINAL DEBT 2004, *supra* note 12; GAO, CRIMINAL DEBT 2001, *supra* note 64; GAO, EPA 2008, *supra* note 75; U.S. GOV'T ACCOUNTABILITY OFFICE, GAO

practices of a major federal administrative agency, e.g., DOJ, EPA, SEC, the Commodities and Futures Trading Commission, Treasury's United States Customs Service (Customs),⁹³ the Department of Health and Human Services' Centers for Medicare and Medicaid Services, and the Department of the Interior's Office of Surface Mining.⁹⁴

These government audits were a significant source of collections data. The GAO received substantial cooperation from agencies during investigations and was able to gather volumes of collections-related financial data for a variety of time periods for each agency.⁹⁵ The GAO also researched and tested agencies' systems and procedures for tracking collections data.⁹⁶ This information helped us evaluate the reliability and any potential distortions of agencies' collections figures. Further, the GAO interviewed officials at each agency for more information about specific collections tactics, problems, and strategies.⁹⁷ Descriptions from these interviews helped us pinpoint specific causes of agencies' low collection figures. Finally, these audits included written responses from the agencies,⁹⁸ which revealed regulators' sometimes telling views about the role of collections in the agencies' overall enforcement functions.

We also tracked down several audits of agencies at the state level. For example, we found helpful information in audits by the California State Controller of the Department of Industrial Relations and the Highway Patrol,

02-655, REVIEW OF U.S. CUSTOMS SERVICE'S MANAGEMENT AND COLLECTION PROCESSES (2002) [hereinafter GAO, CUSTOMS 2002]; U.S. GOV'T ACCOUNTABILITY OFFICE, GAO 07-830, SECURITIES AND EXCHANGE COMMISSION: ADDITIONAL ACTIONS NEEDED TO ENSURE PLANNED IMPROVEMENTS ADDRESS LIMITATIONS IN ENFORCEMENT DIVISION OPERATIONS (2007) [hereinafter GAO, SEC 2007]; GAO, SEC AND CFTC 2003, *supra* note 14; GAO, SEC AND CFTC 2005, *supra* note 80.

93. In 2003—after the GAO conducted its audit—the Customs Service was dissolved to form part of the U.S. Department of Homeland Security, and was split into the Bureau of Customs and Border Protection and the Immigration and Customs Enforcement Division. See *History: Who Became Part of the Department*, U.S. DEP'T OF HOMELAND SEC. (Apr. 11, 2008), http://www.dhs.gov/xabout/history/editorial_0133.shtm.
94. GAO, OSM 2001, *supra* note 13.
95. See, e.g., GAO, CMS 2001, *supra* note 62, at 4; GAO, OSM 2001, *supra* note 13, at 3; GAO, CRIMINAL DEBT 2004, *supra* note 12, at 5-6.
96. See, e.g., GAO, CMS 2001, *supra* note 62, at 4-5; GAO, OSM 2001, *supra* note 13, at 3; GAO, CRIMINAL DEBT 2004, *supra* note 12, at 6; GAO, SEC AND CFTC 2003, *supra* note 14, at 11.
97. See, e.g., GAO, CMS 2001, *supra* note 62, at 4; GAO, OSM 2001, *supra* note 13, at 3-4; GAO, CRIMINAL DEBT 2004, *supra* note 12, at 6.
98. See, e.g., GAO, CMS 2001, *supra* note 62, at 68; GAO, OSM 2001, *supra* note 13, at 67-69; GAO, CRIMINAL DEBT 2004, *supra* note 12, at 24-27; GAO, SEC AND CFTC 2003, *supra* note 14, at 36-38.

among others.⁹⁹ Like the federal audits, these reports provided collections-related financial data for a variety of time periods, assessed agencies' internal controls and data tracking systems, and included information from interviews with agency officials.¹⁰⁰

In addition to assembling data from various government reports and audits, we conducted a campaign to unearth more information. For example, we submitted Freedom of Information Act (FOIA) requests to a dozen federal agencies¹⁰¹ seeking, among other things: (1) data regarding fine assessments and collections, either collectively or in individual cases; and (2) documents reflecting the agencies' reasons for collecting less than the total amount of fines assessed (again, either collectively or individually).¹⁰² We also submitted a questionnaire regarding fine collection procedures and performance statistics to agencies in all fifty states and a sampling of federal agencies.¹⁰³ In these questionnaires, we sought information about collections personnel, collection budgets, amounts actually collected and data about any use of private collection companies. Furthermore, we reviewed fine and penalty-related information posted on the websites for federal, state and local agencies and regulatory bodies throughout the country. We examined both periodic financial reports on agency websites, as well as enforcement-related press releases.

Finally, we sought additional anecdotal data. We researched press and media reports addressing administrative fine collection, in addition to seeking some anecdotal information through the FOIA.¹⁰⁴ We also conferred with jour-

99. CHIANG, CHP AUDIT, *supra* note 15; JOHN CHIANG, DEP'T OF INDUS. RELATIONS, REPORT OF REVIEW: ACCOUNTING AND ADMINISTRATIVE PROCESSES AND PROCEDURES FOR COLLECTION OF DEBT DUE THE STATE (2008) [hereinafter CHIANG, DIR AUDIT].

100. CHIANG, CHP AUDIT, *supra* note 15, at 5-6; CHIANG, DIR AUDIT, *supra* note 99, at 6-7.

101. These agencies included the Commodities Futures Trading Commission, Consumer Products Safety Commission, U.S. Customs Service, Department of Agriculture, Department of Health and Human Services, Federal Communications Commission, Federal Motor Carrier Safety Administration, Federal Trade Commission, Food and Drug Administration, Occupational Safety and Health Administration, Office of Surface Mining, and SEC.

102. FOIA requests are on file with the authors.

103. Questionnaires, and the agency responses, are on file with the authors.

104. See, e.g., Martha Mendoza & Christopher Sullivan, *More Corporations Stiffing Government on Fines*, CORPWATCH, Mar. 19, 2006, <http://www.corpwatch.org/article.php?id=13415>; Ross Todd, *Three Cents on the Dollar: Convicted White-Collar Criminals Owe Billions in Restitution. Getting Them To Pay It Is Another Story*, AM. LAW., Nov. 1, 2007, available at <http://www.law.com/jsp/cc/PubArticleCC.jsp?id=1193821428808>.

nalists and others who had written about fine collections.¹⁰⁵ Where we relied on data from these reporters, we confirmed they had discovered the information via the FOIA process.¹⁰⁶

2. Problems with Agency Data

Although our efforts created a snapshot of the state of regulatory fine collection, we confronted obstacles in assembling reliable data. These obstacles stemmed from agencies' data-tracking problems and unwillingness to disclose certain information. More specifically, we confronted shortcomings in agencies' own collections records, limits on information agencies voluntarily disclosed, and agencies' incomplete responses to our FOIA requests.

Many agencies' internal controls raise concerns about their collection-related data. For example, the SEC's Inspector General determined that the Agency's system for tracking cases with money judgments "was not complete and accurate and could not be relied upon for financial accounting and reporting purposes."¹⁰⁷ The SEC replaced its system, but the new system was still "severely limited,"¹⁰⁸ e.g., it was unable to produce detailed reports on certain types of investigations.¹⁰⁹ The tracking systems used by DOJ's Financial Litigation Units (FLUs) for federal criminal fines failed to capture certain data altogether, such as court-ordered terms of repayment,¹¹⁰ and did not permit the FLUs to allocate outstanding debts between amounts likely to be collected and those not likely to be collected.¹¹¹ The California Highway Patrol was wholly unable to calculate the amount of underbilled penalties because its system for tracking debt collection had "inadequate controls . . . to ensure the accuracy, reliability, and completeness" of its recovery billings.¹¹² A 2007 report from the Los Angeles City Controller concluded that the city simply did not know its total account receivables.¹¹³ To minimize the problems posed by these data

105. We contacted Martha Mendoza, co-author of *More Corporations Stiffing Government on Fines*, to discuss her article and research. Mendoza & Sullivan, *supra* note 104. We also contacted Timothy L. Dickinson, practicing attorney and the author of *The Past Year in Review: Another Banner Year for Enforcement*, in *THE FOREIGN CORRUPT PRACTICES ACT 2009: COPING WITH HEIGHTENED ENFORCEMENT RISKS* 185 (PLI Corp. Law & Practice, Course Handbook Ser. No. 18,499, 2009).

106. Mendoza & Sullivan, *supra* note 104.

107. GAO, SEC AND CFTC 2003, *supra* note 14, at 11.

108. GAO, SEC 2007, *supra* note 92, at 4.

109. *Id.*

110. GAO, CRIMINAL DEBT 2001, *supra* note 64, at 43, 54.

111. *Id.* at 54.

112. CHIANG, CHP AUDIT, *supra* note 15, at 10.

113. Madler, *supra* note 15.

flaws, we relied where possible on data tested and audited by government investigators. Further, as described below, agencies' information-tracking problems likely overstate how well they are following through on fine collection. Thus, these problems do not undermine, and if anything reinforce, our core finding of low collection of penalties by administrative agencies.

Another obstacle to gathering information was that agencies voluntarily disclose limited information on their websites and in annual reports.¹¹⁴ For example, individualized press releases typically disclose only the amount of claims initially sought against regulated companies, or at best the amount of fines eventually imposed or assessed; these disclosures leave the reader to speculate as to whether those amounts were or ever will be collected.¹¹⁵ Even agencies that publish annual reports regarding the results of agency-wide collections efforts, including the totals of all fine and restitution awards,¹¹⁶ sometimes disclose only amounts assessed, not amounts collected.¹¹⁷ In some cases, these reported figures include amounts awarded in default judgment cases, where even fractional collections may be impossible.¹¹⁸ One government investigator stated that

114. See, e.g., *Air Resources News Room*, CAL. AIR RESOURCES BOARD, <http://www.arb.ca.gov/newsrel/newsrel.php> (last visited Aug. 6, 2010); *Justice News*, DEP'T JUSTICE, <http://www.justice.gov/opa/pr/2010/June/> (last visited Aug. 6, 2010) (listing press releases by month with fine assessment reports); *News: 2009 Press Releases*, CAL. DEP'T INSURANCE., <http://insurance.ca.gov/0400-news/0100-press-releases/0080-2009/> (last visited Aug. 6, 2010) (listing press releases that concern fines, among other news items); *News & Events: Press Announcements*, FOOD & DRUG ADMIN., <http://www.fda.gov/NewsEvents/Newsroom/PressAnnouncements/default.htm> (last visited Aug. 6, 2010); CAL. DEP'T OF INDUS. REL., http://www.dir.ca.gov/dirnews/link_page.html (last visited Aug. 6, 2010) (cataloging press releases that concern fines); *Recent Press Releases*, SEC. & EXCHANGE COMMISSION, <http://www.sec.gov/news/press.shtml> (last visited Aug. 6, 2010) (containing press releases that detail initial charges brought); see also *infra* text accompanying notes 174-180 for discussion of agencies' ostensible motives for limiting disclosures about collections data.

115. See *supra* note 114. Press releases on agencies' website sometimes link directly to documents ordering payment of fines, but these likewise shed light only on amounts assessed, not collected. See, e.g., *Administrative Proceedings*, SEC. & EXCHANGE COMMISSION, <http://www.sec.gov/litigation/admin.shtml> (last visited Aug. 6, 2010) (linking to orders for payment of fines and other relief); *Newsroom*, FED. TRADE COMMISSION, <http://www.ftc.gov/opa/index.shtml> (last visited Aug. 6, 2010) (listing news releases, complaints and orders for relief).

116. ENVTL. PROT. AGENCY, OFFICE OF ENFORCEMENT AND COMPLIANCE ASSURANCE, ENFORCEMENT AND COMPLIANCE ANNUAL RESULTS (2008) [hereinafter EPA, ANNUAL RESULTS 2008], available at <http://www.epa.gov/compliance/resources/reports/endofyear/eoy2008/fy2008results.pdf>.

117. *Id.* at 33.

118. *Id.* at 31.

these selective disclosures “overstat[e] the impact of [a particular agency’s] enforcement programs.”¹¹⁹

Finally, many agencies to which we submitted formal and informal requests for additional information resisted providing any data that was not already on their websites. For example, most agencies provided no response to our informal questionnaire and, of those that did respond, none provided information comparing the amount of fines collected to amounts assessed or imposed, the key area of interest.¹²⁰ And although we did receive responses to our FOIA requests, many agencies objected that the requested records were either privileged or did not exist (and asserted no obligation to create them). Of the information agencies did disclose in response to our FOIA requests, most consisted of the same material available on the agencies’ websites. Several agencies made voluminous production of court pleadings and documents from particular case files, which provided information regarding amounts assessed, but nothing about amounts actually collected.¹²¹

B. Available Data Demonstrates Pervasively Low Collections

In this Section, we present aggregate data showing widespread collections failures; describe low collection rates on an agency-by-agency basis; and enumerate reasons why actual collection rates are likely even lower than the data reflect.

1. Aggregate Data

The information that is available demonstrates a systemic failure to collect a substantial portion of assessed government fines. For instance, one source reported that in 2004, federal authorities assessed \$7.8 billion in fines in criminal and civil cases, but collected less than half of that amount.¹²² Yet the true collection figure is likely even worse: The \$7.8 billion figure reflects only newly imposed fine debt, not all outstanding fine debt, including older uncollected debt—a much larger number. The same source conservatively estimated¹²³ that

119. GAO, EPA 2008, *supra* note 75, at 3, 6. Agencies’ selective disclosures apparently support Anthony Downs’ hypothesis that “[o]fficials’ perceptions will operate so as to partially screen out data adverse to their own interests, and magnify those favorable to their interests.” Downs, *supra* note 20, at 272.

120. Documentation regarding the questionnaire and agency responses is on file with the authors.

121. These FOIA requests and the agency responses are on file with the authors.

122. Mendoza & Sullivan, *supra* note 104.

123. Another source put the federal criminal debt balance alone in 2006 at \$46 billion. *Enhanced Financial Recovery and Equitable Retirement Treatment Act of 2007; Hearing on H.R. 2878 Before the Subcomm. on Crime, Terrorism, and Homeland Sec.*, 110th Cong. 27 (2007) (statement of Kenneth E. Melson, Director, Exec. Of-

as of 2006, the federal government was owed more than \$35 billion in total outstanding fines.¹²⁴ Thus, if agencies collected several billion dollars in fines, the true overall collection rate would be more like 10% of the total, not 50%.

The volume of outstanding federal fine debt grows each year, and so is undoubtedly much larger now: The cited \$35 billion fine debt figure itself represented a nearly five-fold increase over the previous decade.¹²⁵ Similarly, the uncollected federal criminal debt balance grew from \$16 billion to \$25 billion between 2000 and 2002.¹²⁶ Figure 1 illustrates the rapid growth of uncollected criminal debt from 1995-2002, as well as the stagnation of amounts annually collected by DOJ:

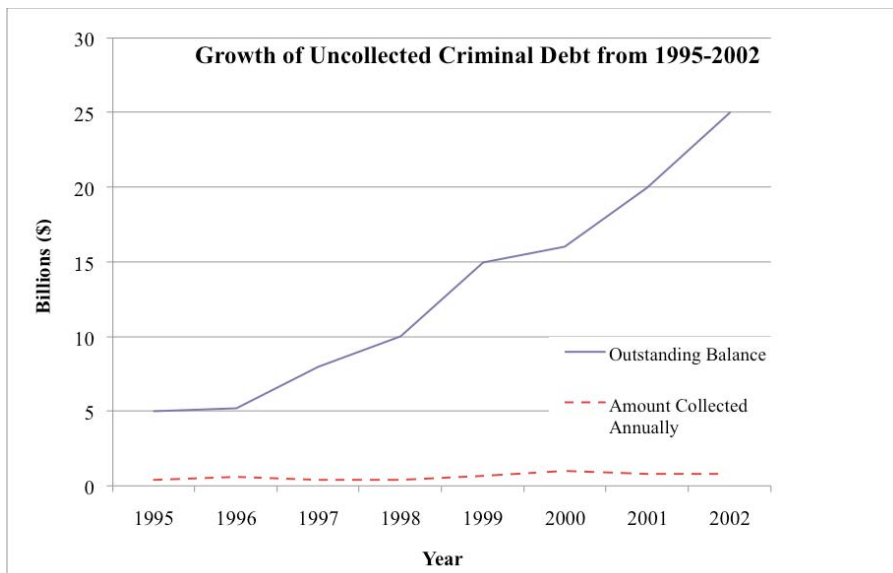


Figure 1: Uncollected Federal Criminal Debt¹²⁷

Outstanding fines owed to state and local governments are also substantial. Audits of just three out of California's more than four hundred agencies showed over \$80 million in uncollected fines as of 2008,¹²⁸ and this did not even

fi ce for U.S. Att'ys) [hereinafter *Melson Testimony*]. Neither this congressional testimony nor the research by Mendoza and Sullivan provides sufficient data to explain the discrepancy.

124. Mendoza & Sullivan, *supra* note 104.

125. *Id.*

126. GAO, CRIMINAL DEBT 2004, *supra* note 12, at 7.

127. This graph is drawn from the GAO's 2004 report on criminal debt. *Id.* at 8 fig.1.

128. SCO Press Release, *supra* note 40.

take into account all types of fines imposed by those agencies.¹²⁹ The State Controller stated that “poor collection efforts are not unique” to the three agencies, but are a “systemic problem that plagues the State.”¹³⁰ Thus, in California alone, the total of uncollected fines is likely well into the hundreds of millions if not billions of dollars. And California, of course, is just one of fifty states that collect administrative fines.¹³¹

2. Agency-Specific Data

Consistent with these overall estimates, collection rates for particular agencies are typically well below 50%. Some examples:

- DOJ’s collection rate for federal criminal cases hovered around 4% from 2000-2002.¹³²
- The Office of Surface Mining (OSM) had, at best, a 5% collection rate from 1986-1988 and 1997-2000.¹³³
- The California Highway Patrol (CHP) collection rate for DUI-related fines and penalties was 6.4% for 2006-2007 and 6.7% for 2007-2008.¹³⁴
- The California Department of Industrial Relations’ (CDIR) annual collection rate for worker wage-related fines was 24.7% from 2004 to 2006.¹³⁵ The collection rate for worker safety-related fines was much lower, ranging from 2.4% to 7.4% for the same period.¹³⁶

129. CHIANG, CHP AUDIT, *supra* note 15, at 1 (noting that audit focused only on DUI penalties); CHIANG, DIR AUDIT, *supra* note 99, at 1 (discussing penalties imposed through the California Department of Industrial Relations’ Department of Labor Standards and Enforcement).

130. SCO Press Release, *supra* note 40.

131. The available data shows substantial uncollected penalty and fine balances in other locales as well. *See, e.g.*, Pearce, *supra* note 40 (noting \$3 million in outstanding uncollected fines in Norfolk, Virginia); Pennsylvania Fines Report, *supra* note 40 (noting \$14 million in Pennsylvania fines outstanding). In 2002, outstanding debt in Oregon (including fine debt) was \$1.2 billion, yet the state collected only \$200 million. SEC’Y OF STATE, AUDIT REPORT NO. 2004-24, DEBT COLLECTIONS: PROGRESS MADE BUT OPPORTUNITIES FOR IMPROVEMENT STILL EXIST 2 (2004) [hereinafter OREGON AUDIT].

132. GAO, CRIMINAL DEBT 2004, *supra* note 12, at 7.

133. GAO, OSM 2001, *supra* note 13, at 9.

134. CHIANG, CHP AUDIT, *supra* note 15, at 11 (noting approximately \$270,000 collected from \$4.27 million imposed in FY 2006-07 and approximately \$360,000 collected from \$5.35 million in FY 2007-08).

135. CHIANG, DIR AUDIT, *supra* note 99, at 15.

136. *Id.* at 10.

- Customs collected approximately 31%, after certain adjustments, of outstanding penalty debt for 1997-2000.¹³⁷
- Although data from the Centers for Medicare and Medicaid Services (CMS) was sufficiently unreliable that an accurate collection rate was incalculable, only 30% of outstanding penalty debt had been collected for at least three years.¹³⁸
- The SEC collected approximately 40% of its outstanding fine debt from 1997-2002¹³⁹ and 49% of its outstanding fine and disgorgement debt from 2003-2004.¹⁴⁰
- The Commodities Futures Trading Commission (CFTC) collected approximately 45% of outstanding fine debt from 1997-2002¹⁴¹ and approximately 34% of its outstanding fine and disgorgement debt from 2002-2004.¹⁴²

3. Data Inflation

Even these dismal collections figures are likely overstated. As described below: (1) the data do not always reflect the total amount of debt outstanding; (2) some of these figures exclude improperly written-off debts from total debt, inflating collection rates; (3) some of the data reflect periods when a high percentage of total debt was unusually easy to collect; (4) collection rates in some instances are trending downward; and (5) agencies' data-tracking difficulties lead to overstated collection rates.

First, except for DOJ's rates, the collection rates cited above represent amounts collected in a given time frame divided by the amounts levied in that same period; they do *not* describe the amount collected as a percentage of the *total* amount outstanding—an important measure of collections effectiveness. When outstanding balances are incorporated back into the equation, total col-

137. GAO, CUSTOMS 2002, *supra* note 92, at 10.

138. GAO, CMS 2001, *supra* note 62, at 2, 13 (failing to collect \$172 million of \$260 million). The GAO reviewed the CMS' long-term care cases in which civil monetary penalties were imposed and settlement data for fiscal years 1999 and 2000. However, the GAO determined that the \$172 million in debt as of fiscal year 2000 remained outstanding from fiscal year 1997.

139. GAO, SEC AND CFTC 2003, *supra* note 14, at 21 tbl.1 (collecting approximately \$190 million of \$480 million of open and closed cases).

140. GAO, SEC AND CFTC 2005, *supra* note 80, at 23-24 (collecting approximately \$2.8 billion of \$5.6 billion).

141. GAO, SEC AND CFTC 2003, *supra* note 14, at 21 tbl.1 (collecting approximately \$161 million of \$358 million of open and closed cases).

142. GAO, SEC AND CFTC 2005, *supra* note 80, at 42 (collecting \$210 million of \$458 million).

lection rates plummet. For example, the OSM’s initially-calculated 5% collection rate drops to a mere 1%.¹⁴³

Second, agencies sometimes improperly “write off” collectible fine debt¹⁴⁴ or fail to properly record unpaid fines as accounts receivable.¹⁴⁵ Such actions lower the agency’s outstanding debt balance and simultaneously boost the agency’s apparent collection rate.¹⁴⁶ For example, the Customs’ 31% collection rate reflected write-offs of nearly 90% of assessments from 1997-2000.¹⁴⁷ Factoring those write-off amounts back in reduces the collection rate to less than 3%.¹⁴⁸ At the CMS, there is an established policy limiting agents’ authority to settle civil fines and penalties beyond a 35% discount.¹⁴⁹ In over 40% of cases, however, the Agency exceeded its own threshold—and in fact more than doubled it, discounting cases by an average of 73%.¹⁵⁰ This reduced potential collections by millions.¹⁵¹ As we discuss below, although it is possible that CMS is settling (albeit beyond their authority) for legitimate post-assessment reasons, because of their failure to document their reasoning,¹⁵² one is only left to speculate whether the reductions are settlements or disguised write-offs.

Third, some of the fine collection rates cited above may be abnormally high. For example, according to the SEC, its 49% collection rate for the 2003-2004 period was significantly higher than usual because the SEC happened at the time to be collecting primarily from large, well-financed entities, like mutual funds, that posed little challenge to recovery.¹⁵³

Fourth, for some of these agencies collection rates are declining. The average collection rate for federal criminal cases was 7% from 1995-1999; decreased to an average of 4% from 2000-2002;¹⁵⁴ and fell even further to 3.3% for 2006.¹⁵⁵

143. GAO, OSM 2001, *supra* note 13, at 8-9.

144. DEP’T OF THE TREASURY, FISCAL YEAR 2006 REPORT TO THE CONGRESS: U.S. GOVERNMENT RECEIVABLES AND DEBT COLLECTION ACTIVITIES OF FEDERAL AGENCIES 10 (2007); CHIANG, CHP AUDIT, *supra* note 15, at 8; *see also* CHIANG, DIR AUDIT, *supra* note 99, at 12 (noting that a deputy unilaterally cut in half a citation and never reported reduction); GAO, OSM 2001, *supra* note 13, at 13.

145. CHIANG, CHP AUDIT, *supra* note 15, at 8; *see supra* notes 92-97.

146. *See, e.g.*, CHIANG, CHP AUDIT, *supra* note 15, at 1, 8, 11; CHIANG, DIR AUDIT, *supra* note 99, at 1, 10, 12.

147. GAO, CUSTOMS 2002, *supra* note 92, at 9.

148. *Id.*

149. GAO, CMS 2001, *supra* note 62, at 3, 13-14.

150. *Id.* at 13.

151. *Id.* at 13-14.

152. *Id.* at 3, 13-14.

153. GAO, SEC AND CFTC 2005, *supra* note 80, at 23.

154. GAO, CRIMINAL DEBT 2004, *supra* note 12, at 7.

In fact, the decrease from 2000 to 2002 was not merely the result of DOJ collecting a smaller portion of an increased *assessment* of fines; the *absolute* amount collected decreased.¹⁵⁶ Likewise, collection rates for the CFTC and the OSM dropped or remained static at best.¹⁵⁷

Finally, agencies' problems tracking their own fine-related data can lead to understated fine receivables and consequently overstated collection rates. For example, approximately \$126 million in fines imposed by the California Public Utilities Commission over an eight-year period were never entered into the Agency's accounting records.¹⁵⁸ Its records also indicated that other fines had been paid in full, when in fact they had not.¹⁵⁹ Likewise, the CDIR failed to record as much as \$72 million in fines as accounts receivables over a three-year period.¹⁶⁰ The EPA also failed to record millions of dollars in disputed penalties.¹⁶¹ The absence of adequate controls in agencies' data tracking systems was found to pose a "high risk that fines or penalties may have been intentionally or inadvertently excluded from the department's records."¹⁶²

III. UNDERCOLLECTION: AN UNDESIRABLE PROBLEM CAUSED BY AGENCIES

In this Part, we ask whether low collection rates are problematic and within agencies' control. If they are, then agencies are systematically "undercollecting." First, we examine several arguments that low collection rates may be desirable, and find them lacking. Second, we analyze whether low collections are as a practical matter beyond agencies' control, and find that they are not. We find that low collection rates indicate undercollection rather than optimal and pragmatic policy.

155. Todd, *supra* note 104.

156. GAO, CRIMINAL DEBT 2004, *supra* note 12, at 7.

157. GAO, OSM 2001, *supra* note 13, at 8-9; GAO, SEC AND CFTC 2005, *supra* note 80, at 43-44; GAO, SEC AND CFTC 2003, *supra* note 14, at 21. The counter-argument that collection rates are artificially depressed because they fail to take into account what percentage of fine debt is actually collectible is taken up in Part III.

158. CHIANG, CPUC AUDIT, *supra* note 81, at 2.

159. *Id.* at 10.

160. CHIANG, DIR AUDIT, *supra* note 99, at 1, 10; *see also* CHIANG, CHP AUDIT, *supra* note 15, at 7 (indicating that CHP improperly classified DUI cost recovery billings, understating account balances by millions of dollars).

161. EPA, OFFICE OF INSPECTOR GENERAL, AUDIT REPORT NO. 10-P-0077, EPA NEEDS TO IMPROVE ITS RECORDING AND REPORTING OF FINES AND PENALTIES 4 (2010) [hereinafter EPA, OIG AUDIT 2010].

162. CHIANG, DIR AUDIT, *supra* note 99, at 10.

A. Low Collection Rates Are Undesirable

Government auditors¹⁶³ and many agencies ostensibly agree¹⁶⁴ that non-collection of fines does not promote deterrence, punishment, compensation, or revenue generation. Despite the apparent consensus favoring collection, some agencies may eschew collections to promote compliance instead, or because the agencies initially levy unreasonably high fees. Ultimately, we conclude that these are not compelling justifications for deliberately failing to collect fines, both because of the risk of unintended consequences among regulated entities and the public, and because a policy of non-collection creates skewed incentives within agencies.

1. Trade-Offs Between Collecting Fines and Inducing Compliance

Some agencies dispute that improving collection rates is an important, or even advisable, goal. The EPA, for example, routinely “assesses” large fines or penalties against firms that have violated its rules or regulations, but then waives or significantly reduces the assessments if the violators agree to bring their operations into compliance going forward.¹⁶⁵

163. See, e.g., GAO, CRIMINAL DEBT 2001, *supra* note 64, at 67 (“[A]gencies are to (1) service and collect debts in a manner that best protects the value of the federal government’s assets and (2) provide accounting and management information for effective stewardship, including resources entrusted to the government.”); EPA, OIG AUDIT 2010, *supra* note 161, at 17 (“[B]illings and collections . . . serve as a deterrent to noncompliance with environmental statutes.”); U.S. GOV’T ACCOUNTABILITY OFFICE, GAO-01-900, SEC AND CFTC: MOST FINES COLLECTED, BUT IMPROVEMENTS NEEDED IN THE USE OF TREASURY’S COLLECTION SERVICE 1 (2001) [hereinafter GAO, SEC AND CFTC 2001] (“Levying fines is an important mechanism that regulators use to sanction those who violate . . . industry rules. However, for fines to be an effective means of ensuring adherence with the rules, regulators must collect them.”); SCO Press Release, *supra* note 40 (stating that agencies’ failure to collect fines leaves “taxpayers to pick up the tab” for “unscrupulous businesses and employers,” and “ultimately shortchang[es] the State’s General Fund”).

164. See, e.g., GAO, CRIMINAL DEBT 2004, *supra* note 12, at 27; GAO, SEC AND CFTC 2001, *supra* note 163, at 33.

165. Mendoza & Sullivan, *supra* note 104. The EPA is by no means the only agency to routinely waive penalties. See, e.g., GAO, OSM 2001, *supra* note 13, at 11. When confronted with dismal fine collection rates, the OSM argued that, although collecting fines is an “important objective, maximizing revenue from [civil fine and penalty] collections is less important to management than achieving compliance with mining laws.” The OSM reportedly routinely writes off or compromises fines when it has met its enforcement objectives, citing to the fact that 72% of its notices of violations were abated. *Id.* But a 72% violation abatement rate still does not explain (let alone justify) a mere 1-5% fine collection rate. *Id.* at 8-9.

Ostensibly, from the agency's perspective, this trade-off between fine collection and rule compliance achieves the greatest good. A firm changing its behavior going forward is a definite ongoing long-term benefit, whereas a fine provides a one-time, short-term revenue-raising or compensation benefit and an unclear, longer-term deterrence benefit. Moreover, it may be difficult to calibrate a fine to achieve optimal deterrence, so getting a firm to change its practices avoids the risk of both over- and under-detering that firm. If fines are designed to induce compliance, compliance-for-collection swaps simply eliminate an unnecessary intermediate step.

But the EPA's willingness to forgo fine collections undermines revenue generation and compensation (to the extent the latter is applicable), and also may undermine deterrence. If regulated firms know that the EPA routinely fails to collect fines, such firms will not take such fines seriously. If firms get caught, they can simply make the adjustments to come into regulatory compliance that they should have made all along. In the meantime, until they are caught, they benefit from the advantages of non-compliance, and the public suffers the harmful environmental effects.

The EPA has acknowledged that regulated firms' knowledge of their low collection rates could jeopardize deterrence.¹⁶⁶ The Agency's response: Do not let them find out. The EPA publicly reports the amount of fines assessed, not fines collected,¹⁶⁷ and has repeatedly rejected auditors' recommendations that it make this distinction clear and separately report collections.¹⁶⁸ It regards "reporting of penalties assessed as being of greater deterrent value than reporting both assessed and collected penalties,"¹⁶⁹ and has asserted that, while "penalties collected is a useful *internal* management measure, we do not believe that penalties collected should be publicly reported."¹⁷⁰

Although there is a superficial appeal to this approach—better to let firms believe that all assessed penalties are collected—it is naïve, because it assumes that firms will not obtain information regarding collections if it is not publicly reported. Firms, particularly those within an industry, communicate; and the attorneys who represent them are repeat players who gain knowledge and expertise regarding how an agency is likely to treat violators.¹⁷¹

This approach is also dangerous because it creates skewed incentives. If an agency gets the public relations benefit of reporting large assessed fines without actually collecting them, it will tend to chase the headlines and prioritize

166. GAO, EPA 2008, *supra* note 75, at 16.

167. *Id.* at 3, 6.

168. *Id.* at 15-16; EPA, OIG AUDIT 2010, *supra* note 161, at 15-16.

169. GAO, EPA 2008, *supra* note 75, at 16.

170. *Id.* (emphasis added); see EPA, OIG AUDIT 2010, *supra* note 161, at 16.

171. Richard W. Painter, *Game Theoretic and Contractarian Paradigms in the Uneasy Relationship Between Regulators and Regulatory Lawyers*, 65 *FORDHAM L. REV.* 149 (1996).

appearance over substantive accomplishment.¹⁷² The EPA has boasted increases in assessed penalties, when in fact penalties collected from 1998 to 2007 (adjusted for inflation) were found to have decreased by 43%.¹⁷³

Such exaggerated self-reporting also dupes the public into believing that the agency is doing more than it is. This belief can create a false sense of trust in the agency's integrity and success, which could collapse when accurate figures come to light.¹⁷⁴ Further, without accurate information about the actual state of agency performance, taxpayers are in no position to demand a shift in agency priorities or improved performance. Congress may also be misled regarding the agency's enforcement outcomes, resulting in inappropriate budgetary allocations based on inaccurate information.¹⁷⁵

172. For example, the U.S. Department of Transportation assessed a \$3.05 million penalty against the owner of a pipeline that killed three people during an explosion. Mendoza & Sullivan, *supra* note 104. The agency announced that the fine was the largest in the history of the federal pipeline safety program, and stated that the large penalty was warranted because “[t]ragic events like this pipeline failure must never happen again.” *Id.* But that penalty was ultimately reduced by 92%, to a mere \$250,000, without evidence of inability to pay more. *Id.*

Similarly, the California Public Utilities Commission (CPUC) imposed a \$1.2 million fine on San Diego Gas and Electric, and the Commission's records indicated it had collected 100% of the fine. CHIANG, CPUC AUDIT, *supra* note 81, at 10. However, CPUC had in fact waived the fine altogether and agreed that the utilities company could instead pay \$200,000 for an education program that the company would administer. Ultimately, there was no evidence showing how or when the company spent any amount on education. *Id.*

173. GAO, EPA 2008, *supra* note 75, at 3 (reporting a decrease in collections from \$240.6 million to \$137.7 million). The EPA would likely counter that the lost deterrence from decreased fine collection was more than outweighed by the value of injunctive relief obtained and reduced pollution achieved. But these figures are likewise unreliable because they are based on *estimates* arrived at by the Agency's own staff (which are often derived from information provided by the violators themselves, who have their own incentive to overstate the value of their compliance measures), rather than on results actually achieved, let alone audited. *Id.* at 3-4, 9. Moreover, since the EPA reports both the estimated value of compliance measures taken and the value of fines imposed, ostensible success in inducing compliance cannot justify overstating the impact of the Agency's fining activity. The specific ways the EPA determines when to forgo collections raise a host of issues, a full analysis of which is beyond the scope of this Article.

174. See EPA, OIG AUDIT 2010, *supra* note 161, at 16; JAMES O. FREEDMAN, CRISIS AND LEGITIMACY: THE ADMINISTRATIVE PROCESS AND AMERICAN GOVERNMENT 10 (1978) (“Institutional legitimacy is an indispensable condition for institutional effectiveness.”).

175. EPA, OIG AUDIT 2010, *supra* note 161, at 16.

2. Unreasonably High Assessments, Not Low Collections

Some agencies have assessed the maximum fine allowed by law and subsequently mitigate the fine according to the circumstances of each case.¹⁷⁶ Such a practice can give an agency strategic bargaining leverage, allowing the agency to induce the offender to stipulate to pay more (and pay more quickly) than it otherwise would have. If assessed fine amounts are artificially high, then an agency that waives or lowers the fine in order to extract concessions from a regulated firm arguably has not lost anything at all. It is only undercollecting in relation to an unrealistic figure.

But a policy of over-assessment has potential drawbacks. Some firms may pay the assessed amount in full, leading to overdeterrence.¹⁷⁷ The prospect of excessive fines may also increase transaction costs and needlessly complicate settlement prospects by inducing offenders to hire an attorney or prepare a vigorous or elaborate defense.¹⁷⁸

In any event, agencies often fail to document why fines are reduced subsequent to initial assessment, making it difficult to determine if over-assessment explains low collection rates.¹⁷⁹ Agencies also routinely neglect to follow their own guidelines for reducing penalties, suggesting that they are not engaging in a structured or calibrated assessment and mitigation process.¹⁸⁰ Further, if over-assessment were a significant explanatory factor in low collections, one would expect agencies to invoke it in response to government audits criticizing collections performance. However, in the dozen GAO audits in which agencies responded to GAO's collections-related findings, no agency relied on this rationale.

We conclude that deliberately abdicating collections risks undermining the core purposes of fines. At the same time, our findings belie any strategic over-assessment of fines by agencies that would favorably explain low collection rates. Thus, the evidence does not show that failing to collect assessed fines is desirable.

B. Low Collection Rates Are Caused by Factors Within Agencies' Control

If fines are not fully collected because of factors out of agencies' control—such as offenders' inability to pay—then we cannot expect collection rates to improve, nor blame agencies for failing to collect more. In such circumstances, low collection rates would not indicate undercollection. In this Section we conclude that while factors outside of agencies' control substantially contribute

176. Diver, *supra* note 1, at 1481.

177. *Id.* at 1483.

178. *Id.*

179. See *infra* text accompanying note 195.

180. See, e.g., GAO, CMS 2001, *supra* note 62, at 13-14.

to less-than-perfect collection rates, agencies nevertheless leave billions of dollars in potentially collectible fines on the table.

1. External Obstacles to Fine Collections

Even when agency personnel are acting diligently and competently, offenders may lack means to pay the fine;¹⁸¹ alternatively, the offenders may hide or dissipate their assets. Inability to pay has been a particularly vexing issue in the criminal context because the Mandatory Victim Restitution Act of 1996 mandates that restitution be imposed in a wide variety of federal criminal cases, without regard to the offender's ability to pay.¹⁸² Approximately 70% of DOJ's outstanding criminal debt balance consists of nonfederal restitution (owed to parties other than the federal government),¹⁸³ much of which may be uncollectible because restitution was ordered without regard to the offenders' means.¹⁸⁴ There are also restrictions on writing off such debt.¹⁸⁵ Thus, although DOJ has collected as little as 4% of outstanding criminal debt in recent years,¹⁸⁶ this may not reflect the percentage of *collectible* debt that has been recovered.¹⁸⁷

Uncollectibility has also been blamed for low collection rates of civil fines.¹⁸⁸ But the Mandatory Victim Restitution Act does not apply to federal civil fines (or to any state or local fines), and so most agencies are not obligated to impose fines without regard to ability to pay. To the contrary, many agencies—including the very agencies whose audits have revealed a substantial failure to collect fine amounts assessed—are explicitly directed to consider the offender's ability to pay in setting the initial fine amount.¹⁸⁹ Nevertheless, it is possible that these agencies, appropriately or not, are considering ability to pay after imposition of the fine, but before collection, through the mitigation process. Or agen-

181. GAO, CRIMINAL DEBT 2001, *supra* note 64, at 10.

182. See 18 U.S.C. § 3663A (2006).

183. GAO, CRIMINAL DEBT 2004, *supra* note 12, at 2-3.

184. GAO, CRIMINAL DEBT 2001, *supra* note 64, at 35.

185. *Id.* at 32; see 18 U.S.C. § 3613.

186. GAO, CRIMINAL DEBT 2004, *supra* note 12, at 3, 27.

187. See GAO, CRIMINAL DEBT 2001, *supra* note 64, at 10.

188. See, e.g., GAO, OSM 2001, *supra* note 13, at 67; see also CHIANG, CHP AUDIT, *supra* note 15, at 4 attach. A.

189. Diver, *supra* note 1, at 1441; see 12 U.S.C. § 4585(c)(2) (2006) (requiring that ability to pay be considered in determining size of the penalty); 15 U.S.C. § 45(m)(1)(C) (2006) (same); 15 U.S.C. § 78u-2(d) (same); Federal Food, Drug, and Cosmetic Act, 21 U.S.C. § 333(f)(5)(B) (2006) (same); Gimbel v. Commodity Futures Trading Comm'n, 872 F.2d 196, 201 (7th Cir. 1989) (same); United States v. New-Form Mfg. Co., 277 F. Supp. 2d 1313, 1327-28 (Ct. Int'l Trade 2003) (same); 19 C.F.R. § 171, App. B(E)(b)(ii) (2010) (same); 42 C.F.R. § 488.438(f) (2010) (CMS) (same).

cies may be mitigating fines not because offenders lack means, but because the agencies have made a determination that the benefits of pursuing collection are outweighed by the costs of collection and the risk that collection efforts will ultimately be unsuccessful.¹⁹⁰ If so, then a comparison of assessed fines to collected fines would be misleading, as it would fail to reflect the amounts the agency realistically expects to collect.

These claimed excuses are inadequate to explain agencies' poor collections performance. First, agencies have more or less consistently failed to undertake a meaningful analysis of what portion of outstanding fine debt *is* collectible¹⁹¹ (even when required to do so¹⁹²) and so have made it difficult to assess what portion of collectible debt is actually being recovered.¹⁹³ In 1999, for example, DOJ placed nearly \$10 billion in criminal debt in "suspense," without formally assessing the prospects for collectability.¹⁹⁴

Second, agencies often fail to adequately document fine mitigations or the reasons therefor—be they the strategic maneuvers discussed above, or concessions to uncollectability—and so they make it difficult to confirm whether such mitigations account for the discrepancies between assessments and collection.¹⁹⁵

190. Diver, *supra* note 1, at 1471. We distinguish eschewing collections to avoid collection costs or risks that judgment enforcement techniques will be unsuccessful, from discounting a fine based on the risk that an assessment would not be judicially upheld because liability itself is questionable. The latter type of discount may be perfectly rational and legitimate; but there is little documentation of its occurrence.

191. GAO, CMS 2001, *supra* note 62, at 2, 10-13 (noting that the CMS failed to conduct "individual account analysis" of "debtor's ability to pay"); GAO, OSM 2001, *supra* note 13, at 8, 13 (finding that although the OSM claimed that its historically poor collections rate was due largely to the fact that violators routinely went bankrupt or were financially not viable, in every audited case in which the OSM had agreed to an installment plan, the Agency lacked documentation demonstrating that the offender was unable to pay the fine immediately); GAO, CRIMINAL DEBT 2004, *supra* note 12, at 12; GAO, CRIMINAL DEBT 2001, *supra* note 64, at 67-68 ("[N]either [the courts nor DOJ] perform[ed] an analysis of criminal debts to estimate how much of the outstanding amounts are uncollectible."); GAO, CUSTOMS 2002, *supra* note 92, at 22 (concluding that Customs relied on a deficient collectibility analysis); *see also* CHIANG, CHP AUDIT, *supra* note 15, at 10 (noting that a state agency required to prepare cost-benefit analyses of collections options—in all cases where initial efforts failed—never did so).

192. *See, e.g.*, CHIANG, CHP AUDIT, *supra* note 15, at 10; GAO, CRIMINAL DEBT 2001, *supra* note 64, at 67-68 ("Unless FLUs or the courts assess the collectibility of this debt, set expectations as to the amount of debt that can be collected, and compare expectations against actual collections, management cannot effectively monitor program performance in debt collection.").

193. GAO, CRIMINAL DEBT 2001, *supra* note 64, at 74-75.

194. *Id.* at 67-68.

195. CHIANG, DIR AUDIT, *supra* note 99, at 10.

Third, to the extent that collectability estimates exist, they suggest that agencies are doing a dismal job with collections. For example, estimates of the portion of the federal criminal debt balance that is collectible range from about 10 to 33% of the total.¹⁹⁶ Although this suggests that the lion's share of criminal debt is not collectible, it also indicates that, with a 4% collection rate, DOJ is still collecting only about 12 to 40% of *collectible* criminal debt.¹⁹⁷

The limited data regarding mitigations is similarly inculpatory. For example, Customs initially assessed the maximum fine authorized by law as a matter of course, and explicitly considered cost and difficulty of collecting fines and the offender's inability to pay in determining whether to adjust the initial assessment.¹⁹⁸ Thus, offender-based obstacles to collection were already taken into account when comparing the post-mitigation fines to the amounts collected. From fiscal years 1997 to 2000, Customs adjusted its assessed fines from \$9.3 billion down to \$900 million. But it still collected only \$257 million, less than a third of the *adjusted* amount.¹⁹⁹ There are also instances of regulators reducing fines assessed against extremely well-funded corporations by 80 to 90%—even when the violations were egregious and caused substantial injuries.²⁰⁰

Fourth, mitigating fines on the ground that it reduces costs is problematic. Contesting fines creates roughly symmetrical costs for offenders and the agency; such costs encourage offenders to settle sooner or for a higher amount than they otherwise would have in a cost-free world. Therefore, “[A]n agency sensitive to the realities of bargaining position should . . . exercise restraint in its willingness to discount its demand by a factor representing litigation savings,”

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196. *Melson Testimony*, *supra* note 123, at 34 (noting that an independent contractor hired by the Executive Office for United States Attorneys estimated that 10% of debt was collectible); GAO, CRIMINAL DEBT 2004, *supra* note 12, at 26 n.3 (noting that outside investigators estimated that 33% of debt was collectible); GAO, CRIMINAL DEBT 2001, *supra* note 64, at 97 (noting that DOJ has concluded that approximately 25% of debt is collectible).
197. *See also Melson Testimony*, *supra* note 123, at 6 (noting the Executive Office for United States Attorneys conceding that only about one-third of collectible debt is recovered); GAO, CRIMINAL DEBT 2001, *supra* note 64, at 97 (also estimating one-third of collectible debt being recovered).
198. GAO, CUSTOMS 2002, *supra* note 92, at 9, 11-12.
199. *Id.* at 10; *see also* GAO, OSM 2001, *supra* note 13, at 8-9 (noting that after adjusting receivables to take into account write-offs and very old debts, the OSM's collection rate improved only slightly, from 1-3% up to about 5%).
200. CHIANG, CPUC AUDIT, *supra* note 81, at 10 (reducing by 83% a fine against San Diego Gas & Electric); Mendoza & Sullivan, *supra* note 104 (noting that a pipeline fine related to a pipeline rupture in Bellingham, Washington resulting in multiple deaths was reduced by 92%, from \$3.05 million to \$250,000); *see also* NAT'L TRANSP. SAFETY BD., NTSB/PAR-02/02, PIPELINE ACCIDENT REPORT: PIPELINE RUPTURE AND SUBSEQUENT FIRE IN BELLINGHAM, WASHINGTON 1 (2002), *available at* <http://www.nts.gov/publicn/2002/PAR0202.pdf> (discussing the Bellingham pipeline rupture in more detail).

because the offender should be willing to increase its offered payment by a similar amount.²⁰¹ Moreover, although forgoing fine collection does reduce costs, doing so also undermines deterrence. The general deterrence benefits of pursuing fines may justify the cost of more vigorous collections efforts, even if collection costs may approach or exceed the fine collected in a given instance.²⁰²

Fifth, uncollectability is generally less of a concern with white-collar and corporate offenders than it is with individuals engaged in “street crime.”²⁰³ Granted, white-collar offenders are more likely to generate massive financial losses that would be impossible to pay back in full (take Bernard Madoff, for example²⁰⁴). But they are more likely to have significant future income streams, and so long-term garnishment could provide a realistic means of providing meaningful recovery for many victims, even after serving a prison sentence.

Indeed, one federal audit showed that only 7% of ordered restitution had been collected from selected white-collar offenders, despite evidence that they had significant wealth streams and continued to live very comfortably post-conviction.²⁰⁵ As the GAO concluded: “Taking into account the factors that are not controllable, the present management practices and processes do not provide assurance that offenders are not afforded their ill-gotten gains and that innocent victims are compensated for their losses to the fullest extent possible.”²⁰⁶ Billions in collectible sums are thus left on the table.²⁰⁷

201. Diver, *supra* note 1, at 1471-72.

202. Cf. Richard S. Gruner, *Beyond Fines: Innovative Corporate Sentences Under Federal Sentencing Guidelines*, 71 WASH. U. L.Q. 261, 266 (1993) (“[T]here may be unusual judicial administration costs associated with these innovative sanctions. However, these appear to be costs that Congress intended sentencing courts and convicted firms to bear in the interest of reducing corporate crime and preventing repeat offenses.”).

203. GOV’T ACCOUNTABILITY OFFICE, GAO/T-GGD-94-178, RESTITUTION, FINES, AND FORFEITURE: ISSUES FOR FURTHER REVIEW AND OVERSIGHT 13 (1994) (statement by Henry R. Wray, Director of Administration of Justice Issues) [hereinafter GAO, WRAY STATEMENT]; see GAO, CRIMINAL DEBT 2001, *supra* note 64, at 46.

204. See, e.g., *Madoff Gets 150 Years for Fraud*, CBC News (June 29, 2009, 2:23 PM), <http://www.cbc.ca/money/story/2009/06/29/madoff-ponzi-fraud-sentences564.html> (“Madoff was ordered to forfeit \$170 billion in connection with his massive Ponzi scheme.”). Actual losses were likely below that, but still well into the billions. *Id.* (noting that “1,341 accounts opened since December 1995 alone suffered losses of \$13.2 billion”); Ian Katz and Jesse Westbrook, *Madoff Trustee Finds \$830 Million of Liquid Assets (Update2)*, Bloomberg, Jan. 5, 2009, <http://www.bloomberg.com/apps/news?pid=newsarchive&sid=aVJ.rD9jZOWQ> (estimating \$37 billion in losses). But Madoff’s recoverable assets have been estimated at less than \$1 billion. Katz & Westbrook, *supra* (noting that the trustee identified \$830 million to \$850 million in recoverable assets).

205. GAO, RESTITUTION 2005, *supra* note 2, at 4, 11.

206. GAO, CRIMINAL DEBT 2001, *supra* note 64, at 11.

2. Agency Failures Contributing to Undercollection

Certain agency deficiencies noted above, such as failing to timely and accurately enter fine data into data-tracking systems, failing to assess collectability, or excessively writing off fines,²⁰⁸ not only hinder assessment of agencies' performance of fine collection, but also impair agencies' ability to collect fines.²⁰⁹ Other agency failures also impair collections, as summarized below.

Inadequate Asset Discovery. Although the U.S. Attorneys' Manual provides that FLUs should "promptly and vigorously" perform asset discovery work, little or no asset discovery work was done at all in 66% of cases, including 48% of "high-dollar cases."²¹⁰ Lack of prompt asset discovery buys offenders time to hide or liquidate assets, and prevents agencies from effectively prioritizing collections cases.²¹¹

Officials from the U.S. Attorneys' Offices stated that asset discovery work is performed "only if the FLU believes, based on its judgment, that the offender

207. The federal criminal debt balance in 2006 was \$46 billion. *Melson Testimony*, *supra* note 123, at 2. Between half and three quarters of this total, or \$23 to \$34 billion, relates to corporate and/or white-collar crime. GAO, WRAY STATEMENT, *supra* note 203, at 8-9 (according to figures from DOJ, approximately 50% of then-outstanding criminal debt was attributable to offenders in financial fraud cases); *see id.* According to analysis by the GAO, approximately 75% of the 50 largest criminal debts were owed by offenders convicted of financial fraud. If 10-33% of this white-collar crime total is collectible, *see supra* note 196 and accompanying text, then roughly \$2.3 to \$11 billion could be collected. Yet DOJ typically collects \$1 billion per year or less in total criminal debt. GAO, CRIMINAL DEBT 2004, *supra* note 12, at 7-8.

A further possibility is that the amounts currently collected are low only because many offenders are in the middle of installment plans which, when completed, will yield substantially higher collections. But again, there is little evidence of this, and agencies are not invoking this explanation in response to audits.

208. *See supra* text accompanying notes 107-113, 144-151, 158-162.

209. *See* GAO, CMS 2001, *supra* note 62, at 2; EPA, OIG AUDIT 2010, *supra* note 161, at 4; EPA, OIG AUDIT 2010, *supra* note 161, at 14 (finding that, although unauthorized write-offs may be in the agency's best interest in particular cases, the lack of oversight regarding routine deviations from stated policy undermines confidence that the purposes behind imposing the fines and penalties in the first place are being furthered).

210. GAO, CRIMINAL DEBT 2001, *supra* note 64, at 14, 45. "High-dollar cases" are defined as those in which the criminal debt is "greater than or equal to \$14 million at the four federal judicial districts with the largest amount of outstanding criminal debt." *Id.* at 8.

211. *Id.* at 45.

may have assets.”²¹² Such assessments make little sense because discovery is often aimed at discovering *hidden* assets, which an FLU is unlikely to know about pre-discovery. Moreover, the FLUs were not required to document the reasons justifying the “judgment” to forgo such work in individual cases.²¹³ The GAO concluded that the FLU’s practice of relying solely on the offender’s description of available assets—without independent verification—jeopardized effective collections.²¹⁴

Civil fine collections similarly suffer from inadequate asset discovery. Customs did not require offenders who claimed an inability to pay to provide *any* audited financial statements or other independent audit reports to corroborate their claims.²¹⁵ The GAO cited six fines totaling \$28.7 million that were reduced to a total of \$1.5 million, based in whole or in part on offenders’ claimed inability to pay.²¹⁶ Even after these drastic reductions, Customs collected only \$108,000, or about 7% of the total.²¹⁷

Under-Utilization of Available Collections Mechanisms. Not surprisingly, the GAO found that “the likelihood of recovering amounts owed decreases dramatically with the age of delinquency.”²¹⁸ Nevertheless, collections personnel have routinely failed to utilize collection methods in a timely manner or at all.²¹⁹

A 1985 audit found that U.S. Attorneys and federal probation officers used garnishment in *zero* out of 635 cases reviewed, even though income was available in 20 to 90% of cases.²²⁰ Two decades later, GAO estimates that they

212. *Id.*

213. *Id.*

214. *See id.* at 45-46 (citing, as an example, a white-collar offender who had paid only \$750 of a \$344,000 restitution order; the FLU did not even begin to conduct an asset investigation until six years later—and even then only began investigating once it learned that the offender’s case would be included in the GAO audit).

215. GAO, CUSTOMS 2002, *supra* note 92, at 21.

216. *Id.* at 22.

217. *Id.*

218. GAO, CRIMINAL DEBT 2001, *supra* note 64, at 41; *see* OREGON AUDIT, *supra* note 131, at 3.

219. Administrative agencies have access to a wide variety of collection tools, including: conducting asset searches; filing liens on offender assets to prevent asset transfers; sending delinquency notices and demand letters; reviewing open cases to reassess offenders’ ability to pay; establishing installment plans for debt payments; and in some situations referring collections to specialized collections units. *See supra* Subsection I.B.3.

220. U.S. GOV’T ACCOUNTABILITY OFFICE, GAO/GGD-86-02, AFTER THE CRIMINAL FINE ENFORCEMENT ACT OF 1984—SOME ISSUES STILL NEED TO BE RESOLVED 34 (1985) [hereinafter GAO, CRIMINAL FINES 1985].

still failed to file liens to prevent the transfer of assets in 30% of cases;²²¹ and when they did file them, the average delay between entry of judgment and lien filing was 639 days.²²² The GAO concluded that deficiencies regarding lien filing contributed to inadequate collections.²²³ When confronted with their failure to pursue available enforcement techniques,²²⁴ U.S. Attorneys' Office representatives asserted that such techniques "are not pursued until the FLU determines that an offender has assets or sufficient earnings and is willfully not paying amounts owed."²²⁵ But this, again, was circular logic, as the FLUs performed limited asset discovery work in the first place.²²⁶

DOJ, as well as other federal and state agencies, also neglected or delayed collections in a variety of other ways,²²⁷ including: failing to use secured promissory notes to ensure debt payment, even when the Agency's own audit division had identified assets to back the notes;²²⁸ failing to send delinquency notices in the majority of cases;²²⁹ failing to review open cases annually to reassess the offender's ability to pay;²³⁰ failing to properly establish installment plans²³¹ or monitor installment plans when established;²³² failing to consistently assess and pursue interest and penalties on delinquent debt;²³³ allowing the statute of limitations to expire on collections efforts;²³⁴ neglecting to file judgments within a

221. GAO, CRIMINAL DEBT 2001, *supra* note 64, at 13.

222. *Id.* at 44.

223. GAO, RESTITUTION 2005, *supra* note 2, at 10 n.14.

224. GAO, CRIMINAL FINES 1985, *supra* note 220, at 4 (describing agencies' failure to use seizure of property, court summons, or contempt of court citations as enforcement techniques); GAO, CRIMINAL DEBT 2001, *supra* note 64, at 33 (noting that although laws authorized pre-conviction seizure of assets, FLUs were not pursuing liquidation of assets until after an offender was sentenced).

225. GAO, CRIMINAL DEBT 2001, *supra* note 64, at 47.

226. *Id.*

227. *See generally id.* at 42; EPA, OIG AUDIT 2010, *supra* note 161, at 5.

228. GAO, CUSTOMS 2002, *supra* note 92, at 17.

229. GAO, CRIMINAL DEBT 2001, *supra* note 64, at 50.

230. GAO, CRIMINAL FINES 1985, *supra* note 220, at 39; GAO, CRIMINAL DEBT 2001, *supra* note 64, at 50.

231. GAO, CRIMINAL FINES 1985, *supra* note 220, at 37; GAO, CRIMINAL DEBT 2001, *supra* note 64, at 56.

232. GAO, CMS 2001, *supra* note 62, at 12-13; GAO, CRIMINAL DEBT 2001, *supra* note 64, at 58-59.

233. GAO, RESTITUTION 2005, *supra* note 2, at 4; GAO, CRIMINAL DEBT 2001, *supra* note 64, at 50-51.

234. CHIANG, DIR AUDIT, *supra* note 99, at 8; GAO, CUSTOMS 2002, *supra* note 92, at 23-25 (noting that the Agency failed to timely request an extension of a statute of

one-year period;²³⁵ delaying more than a year before referring collections to specialized collection units;²³⁶ and delaying an average of nearly two years in sending demand letters to offenders.²³⁷ These defects diminished offenders' incentives to make prompt payments,²³⁸ and led to the failure to collect available funds.²³⁹

Agencies responsible for collections often complain that legal obstacles—such as limitations on pre-judgment restraint of assets,²⁴⁰ laws shielding assets from seizure,²⁴¹ the automatic stay that protects offenders who file for bankruptcy,²⁴² or even unfavorable rulings by judges²⁴³—make it difficult to quickly and effectively collect fines.²⁴⁴ But agencies often fail to utilize legal tools already at their disposal,²⁴⁵ so it is unlikely that giving them bigger or better tools will do much to solve the problem.

limitation, resulting in mitigation or writing off of tens of millions of dollars in fines).

235. CHIANG, DIR AUDIT, *supra* note 99, at 8.

236. *Id.* at 9.

237. GAO, CRIMINAL DEBT 2001, *supra* note 64, at 49-50.

238. GAO, RESTITUTION 2005, *supra* note 2, at 4; GAO, CRIMINAL DEBT 2001, *supra* note 64, at 50; see Paul H. Robinson & John M. Darley, *The Role of Deterrence in the Formulation of Criminal Law Rules: At Its Worst When Doing Its Best*, 91 GEO. L.J. 949, 954 (2003) (“[A] delay between violation and punishment can dramatically reduce the perceived cost of the violation.”).

239. See, e.g., GAO, CRIMINAL DEBT 2001, *supra* note 64, at 51, 58-59.

240. GAO, RESTITUTION 2005, *supra* note 2, at 12-13.

241. GAO, CRIMINAL DEBT 2001, *supra* note 64, at 10, 39; see GAO, CRIMINAL FINES 1985, *supra* note 220, at 36.

242. 11 U.S.C. § 362(a) (2006); CHIANG, CPUC AUDIT, *supra* note 85, at 1; GAO, RESTITUTION 2005, *supra* note 2, at 14.

243. GAO, CRIMINAL DEBT 2001, *supra* note 64, at 60 (citing instances in which judges rejected recommendations by probation officers that offenders not be released from probation based on nonpayment of criminal debt in accordance with an established installment schedule).

244. CHIANG, CPUC AUDIT, *supra* note 81, at 1, 7-8; CHIANG, DIR AUDIT, *supra* note 99, at 8; GAO, RESTITUTION 2005, *supra* note 2, at 12, 14-15.

245. See, e.g., CHIANG, CPUC AUDIT, *supra* note 81, at 1 (finding that offender-based collections obstacles were compounded by numerous “processing shortcomings and control deficiencies”); *id.* at 2 (“We noted many cases in which the CPUC apparently made no effort to collect, even after it had obtained court judgments at considerable effort and expense.”); GAO, CRIMINAL DEBT 2001, *supra* note 64, at 54-55 (observing that while FLUs complained of offenders’ lack of cooperation in disclosing their assets, agency officials had legal means—and obligation—to determine ability to pay through other avenues).

Inefficient Administrative Organization. Sometimes mismanagement causes collections problems. For example, the GAO noted in 2009 that the SEC’s newly created Office of Collections and Distributions (OCD)—which was intended to streamline and improve collections—utilized an inefficient and ineffective dual reporting structure.²⁴⁶ The OCD director reported to the SEC’s executive director, who reported to the SEC Chairman. But the OCD’s deputy director—to whom all but two OCD staff ultimately reported—had a direct report relationship to both the OCD director and the SEC’s Director of Enforcement; the SEC’s Director of Enforcement meanwhile has no formal link to the OCD director. Thus, most staff ostensibly within the OCD were, for practical purposes, in the organizational structure of a different division. All parties involved reported that this dual structure hampered efficient utilization of resources and led to delays and confusion about who was responsible for what duties.²⁴⁷

Lack of Inter-Agency Cooperation and Coordination. Poor cooperation and coordination between agencies also contributes to undercollection. For example, although federal law mandates that federal agencies refer certain delinquent debts to Treasury’s Financial Management Services to pursue collection, the GAO found that multiple agencies had policies that were inadequate to ensure timely referrals.²⁴⁸ Even once referrals occurred, when Financial Management Services and the violator reached a proposed compromise, agencies would sometimes fail to review and approve the compromise in a timely manner—delaying nearly a year, in some instances—by which point the violator’s assets had been diminished or diverted, and they were no longer able or willing to pay the agreed-upon amount.²⁴⁹ As commentators have noted, such lack of coordination exacerbates low collections by administrative agencies.²⁵⁰

Perhaps the best illustration of the failure of agencies to coordinate their efforts is the decades-long attempt to centralize the collection of federal criminal fines. A 1984 GAO audit recommended, among other things, increased cooperation and sharing of information among DOJ and the Administrative Office of the United States Courts (AOUSC), which share responsibility for

246. U.S. GOV’T ACCOUNTABILITY OFFICE, GAO-09-358, SECURITIES AND EXCHANGE COMMISSION: GREATER ATTENTION NEEDED TO ENHANCE COMMUNICATION AND UTILIZATION OF RESOURCES IN THE DIVISION OF ENFORCEMENT 15 (2009).

247. *Id.* at 16.

248. GAO, CMS 2001, *supra* note 62, at 15; GAO, SEC AND CFTC 2001, *supra* note 163, at 3, 25.

249. GAO, SEC AND CFTC 2001, *supra* note 163, at 20, 22.

250. Mona Lewandoski, *Barred from Bankruptcy: Recently Incarcerated Debtors In and Outside Bankruptcy*, 34 N.Y.U. REV. L. & SOC. CHANGE 191, 248 n.360 (2010) (“Debts often remain unpaid at least partly because staff working for distinct agencies do not have clear guidelines as to how their collection efforts should be prioritized. . . . There is little coordination among agencies responsible for collecting various debts. . . .” (citations omitted)).

recording and collecting federal criminal debt.²⁵¹ DOJ claimed that it was already in the process of working with the AOUSC to establish a centralized system for reporting, tracking, and accounting for all court-imposed criminal fines.²⁵² By the following year, the planned system was still “not yet operational,”²⁵³ and eventually that plan was scrapped in favor of development of a “National Fine Center” (NFC), intended to centralize federal criminal fine collections and record-keeping.

Development of the NFC began in 1990,²⁵⁴ and it was originally supposed to be operational nationwide by early 1995.²⁵⁵ In 1994, the AOUSC (to which primary responsibility for accounting for and processing criminal debt had been transferred in 1987²⁵⁶) acknowledged that “the NFC project proved to be much larger, more complex, and more difficult than originally expected.”²⁵⁷ The new target date for completion of the NFC was late 1996.²⁵⁸ By mid-1996, however, it was apparent that the NFC was not going to materialize, and efforts at centralization were terminated that year.²⁵⁹

Among the reasons for the delays in the centralization effort was an inability to efficiently reconcile the various agencies’ records, because “judicial district and U.S. Attorney staffs had difficulty agreeing on account balances”—notwithstanding protocols to minimize those differences.²⁶⁰ At congressional hearings, testimony revealed inter-departmental bickering and consequent lack of adequate planning²⁶¹ to accomplish a task that could have been completed months or years earlier, and for far less, if conducted by private enterprises.²⁶²

251. GAO, CRIMINAL FINES 1985, *supra* note 220, at 21, 28-29; *see supra* text accompanying notes 64-75.

252. GAO, CRIMINAL FINES 1985, *supra* note 220, at 23. The purported plan of centralization was concededly “not as complete” as the GAO recommended. *Id.* at 30.

253. *Id.* at 30.

254. GAO, CRIMINAL DEBT 2001, *supra* note 64, at 9.

255. GAO, WRAY STATEMENT, *supra* note 203, at 14.

256. GAO, CRIMINAL DEBT 2001, *supra* note 64, at 9.

257. GAO, WRAY STATEMENT, *supra* note 203, at 15.

258. *Id.*

259. GAO, CRIMINAL DEBT 2001, *supra* note 64, at 11.

260. U.S. GOV'T ACCOUNTABILITY OFFICE, GAO/AIMD-95-76, NATIONAL FINE CENTER: PROGRESS MADE BUT CHALLENGES REMAIN FOR CRIMINAL DEBT SYSTEM 10 (1995) [hereinafter GAO, NATIONAL FINE CENTER 1995].

261. For example, there were no collection specialists to staff the new fine center. *Criminal Debt Collection Efforts: Hearing Before the S. Comm. on Gov't Affairs*, 104th Cong. 1, 35 (1995) (Testimony of Michael A. Insko, President, Margate Systems, Inc.) [hereinafter 1995 SENATE HEARING].

Unfortunately, the GAO observed that “enhancing the effectiveness and efficiency of criminal debt collection hinges on these entities working together.”²⁶³

To make matters worse, the Office of Management and Budget and the Treasury Department—which play central oversight roles in financial reporting and debt management, respectively²⁶⁴—have routinely refused to take a leading role in collections,²⁶⁵ notwithstanding the GAO’s conclusion that such oversight is needed.²⁶⁶

Failure to Heed Auditors’ Recommendations. Agencies responsible for collections not only failed to work with each other, they also failed to implement

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262. See, e.g., *id.* at 10 (“[T]here appears to be a communications problem between the Department of Justice and AO[USC].”); *id.* at 21 (stating that the AOUSC claimed that “the Department of Justice has been, while helpful in some ways, challenging in other ways”); *id.* at 22 (statement of Sen. McCain) (“[W]e should not have to be ventilating these differences in a Congressional hearing.”); *id.* at 31 (testimony of M. Kenneth Bien of Andersen Consulting) (“[I]t is possible to put in place an effective nationwide collection system for criminal debts within 18 months for \$15 million, more than \$10 million than the current estimates for a system. When the Criminal Fines Improvement Act was passed in 1987, the intentions of the U.S. Congress were noble, but good intentions also require good strategy, good planning, and good implementation. We are here today because, 8 years later, we are still awaiting the system that fulfills the good intentions of Congress.”); *id.* at 34 (testimony of Insko) (“[T]he National Fine Center is no closer today to being a reality than it was 10 years ago. I also indicate to you that I believe that victims have made a very, very poor investment of their money in a system that has only cost them money and, in fact, has not returned anything to them.”); *id.* at 36 (testimony of Insko) (“I do not believe that they [DOJ and AOUSC] can solve this problem if they do not understand the problem.”).
263. GAO, CRIMINAL DEBT 2001, *supra* note 64, at 60. When agencies do work together, collections have been found to improve. GAO, SEC AND CFTC 2001, *supra* note 163, at 11 (noting that the National Association of Securities Dealers (NASD) saw its collection rate improve dramatically after it initiated a program to obtain SEC assistance in obtaining court orders directing violators to pay outstanding NASD fines); GAO, CRIMINAL DEBT 2001, *supra* note 64, at 68 (“During our reviews, we found that prior to [the Debt Collection Improvement Act of 1996], the FLUs referred certain debts to the former Tax Refund Offset Program and were successful in collecting payments.”).
264. GAO, CMS 2001, *supra* note 62, at 3, 14-15; GAO, CRIMINAL DEBT 2001, *supra* note 64, at 11, 16.
265. GAO, CMS 2001, *supra* note 62, at 14; GAO, OSM 2001, *supra* note 13, at 15; GAO, CUSTOMS 2002, *supra* note 92, at 29.
266. GAO, CRIMINAL DEBT 2001, *supra* note 64, at 66; *id.* at 70 (“Without additional high-level oversight and cooperation between the entities, criminal debt collection is likely to remain ineffective. Further, the assessment of criminal fines and restitution as an effective punitive tool may be in jeopardy.”).

proposals suggested by internal and outside auditors.²⁶⁷ In the majority of situations, these agencies have not disputed the desirability of pursuing their auditors' proposals, despite opportunities to object.²⁶⁸ However, as described below, they have nevertheless neglected to follow many of these recommendations.

The agencies responsible for collecting criminal debt, for example, have been intransigent with regard to a variety of issues.²⁶⁹ In 2001, after the collapse of the NFC centralization project, the GAO's principal fall-back recommendation was that DOJ and AOUSC, along with the Office of Management and Budget and Treasury, should establish a task force to develop a strategic plan to improve coordination and establish effective collections processes.²⁷⁰ But by 2004, the inter-agency collections task force had still not been formed, and the GAO renewed its recommendation.²⁷¹ The Agencies again did nothing, until Congress directed them to form the task force as part of the Consolidated Appropriations Act of 2005.²⁷² Even then, their report was submitted months past the deadline, and indicated that the task force did only the bare minimum to mollify Congress.²⁷³

DOJ and AOUSC failed to implement a number of other recommendations years or even decades after they were first made,²⁷⁴ including failing to: consis-

267. See, e.g., CHIANG, DIR AUDIT, *supra* note 99, at 10 (noting that although the CDIR's failure to adequately track collections data was identified in a 1997 report, the failure had not been remedied as of 2009).

268. See, e.g., GAO, OSM 2001, *supra* note 13, at 69 (noting that agency agreed with all recommendations); GAO, RESTITUTION 2005, *supra* note 2, at 18 (noting that DOJ commented on findings, but objected to no recommendations); GAO, CUSTOMS 2002, *supra* note 92, at 35-37 (noting that the Agency "concur[red]" with all recommendations); GAO, SEC 2007, *supra* note 92, at 37 (noting that the Agency agreed with all recommendations).

269. This intransigence is not just disturbing, it is surprising. Mark Seidenfeld, *Why Agencies Act: A Reassessment of the Ossification Critique of Judicial Review*, 70 OHIO ST. L.J. 251, 298 (2009) ("According to the psychology of accountability, the most predictable reaction of agency decision makers to such outcome review will simply be to attempt to act in accordance with the preferences of its overseers.").

270. GAO, CRIMINAL DEBT 2001, *supra* note 64, at 70.

271. GAO, CRIMINAL DEBT 2004, *supra* note 12, at 20-21; see Letter from Paul R. Corts, Assistant Att'y Gen. for Admin. to Hon. Frank Wolf, Comm. on Appropriations (Aug. 31, 2005) (on file with author) [hereinafter DOJ TASK FORCE LETTER].

272. See 2005 Appropriations Act for the Departments of Commerce, Justice, and State, the Judiciary, and related agencies, H.R. 4754, 108th Cong. (2004).

273. DOJ TASK FORCE LETTER, *supra* note 271, at 2 (noting that the task force met in full only twice in ten months, and made recommendations, but accomplished little in terms of concrete changes).

274. GAO, CRIMINAL DEBT 2001, *supra* note 64, at 46-47; GAO, CRIMINAL DEBT 2004, *supra* note 12, at 5.

tently assess and pursue interest and penalties on delinquent criminal debt;²⁷⁵ properly review suspended debts annually to reassess the offender’s ability to pay;²⁷⁶ document instances of and reasons why assets discovery work was not performed;²⁷⁷ and adequately share information.²⁷⁸ DOJ submitted its report regarding its incomplete implementation of the GAO’s recommendations two years past the deadline—and even then only after prodding by the GAO.²⁷⁹

This intransigence has not gone unnoticed. Commenting upon AOUSC’s issuance of revised collections guidelines in light of its recommendations, the GAO complained: “[U]nless probation officers effectively *implement* these guidelines, such weaknesses will continue to exist.”²⁸⁰

In other instances in which agencies have expressly objected to their auditors’ recommendations, their responses reveal dismissive attitudes toward collections. For example, when the EPA was criticized for publicly reporting only penalties assessed and not penalties collected (a much lower figure), the Agency responded that it believed it unnecessary to report the latter figure, because “the billing and collection of penalties *are not an enforcement function*.”²⁸¹ Other agencies have expressed similar views.²⁸² If the agency does not

275. GAO, CRIMINAL DEBT 2001, *supra* note 64, at 50-51 (noting that DOJ Office of Inspector General made recommendation as early as 1993).

276. Compare GAO, CRIMINAL FINES 1985, *supra* note 220, at 39 (making original recommendations in 1985), with GAO, CRIMINAL DEBT 2001, *supra* note 64, at 48 (noting failures to annually reassess offenders’ abilities to pay throughout the 1990s).

277. GAO, CRIMINAL DEBT 2004, *supra* note 12, at 15 (noting that such documentation was recommended in 2001).

278. GAO, CRIMINAL DEBT 2001, *supra* note 64, at 11, 15; *id.* at 60 (“This lack of coordination is a long-standing problem that has not been adequately addressed. The failure to adequately address this problem results in inefficient processes and duplication of efforts.”).

279. GAO, CRIMINAL DEBT 2004, *supra* note 12 at 10-11 (noting that agency heads are typically required to submit report within 60 days); see 31 U.S.C. § 720(b) (2006).

280. GAO, RESTITUTION 2005, *supra* note 2, at 18 (“[I]t is important that the policies and procedures be effectively implemented once they are established.”); GAO, CRIMINAL DEBT 2001, *supra* note 64, at 54-55. In a similar vein, a 2009 report of the collections efforts of the City of Los Angeles noted many of the same problems that had been identified in audit reports going back to at least 1991. Madler, *supra* note 15.

281. EPA, OIG AUDIT 2010, *supra* note 161, at 17 (emphasis added).

282. See GAO, OSM 2001, *supra* note 13, at 11 (noting that OSM management prioritized “achieving compliance” over fine collections). Similarly, in response to an audit criticizing it for failing to record fines as accounts receivables, the CDIR stated that it had “discussed establishing an accounts receivable procedure in the past but budget considerations determined that our limited resources should be focused on enforcement issues.” CHIANG, DIR AUDIT, *supra* note 99, Attach. A at

view collections of penalties as part of its job, it is only to be expected that agency personnel will not vigorously pursue collections.

IV. ROOT CAUSES OF AGENCY UNDERCOLLECTION

We have established that undercollection of fines is a significant yet correctible problem, not caused solely by factors outside agencies' control. If agencies should and could be doing better, why are they not? Using applicable research in psychology, administrative law, and organizational behavior, we identify a number of potential explanations for agencies' inadequacy in this area of enforcement. In this Part, we analyze the role in agencies' collections failures played by: insufficient resources; individual incentives; institutional incentives; agency capture; and confusion and blame-shifting by different participants in the collections process.

A. *Insufficient Resources*

An agency may simply lack the quantity of asset investigators or collections personnel needed to devote sufficient time and attention to each case.²⁸³ For example, between 1995 and 1999, average staffing levels at DOJ's FLUs increased only 6%, while the number of assessments increased 45% and the average dollar amount of outstanding debts per staff increased by over 160%.²⁸⁴ This "weaken[ed] their ability to aggressively follow up on and enforce collections."²⁸⁵ Customs was likewise hamstrung by limited staffing.²⁸⁶ State agencies similarly suffer: An audit of Oregon's collection found a direct correlation between high caseloads and low collections.²⁸⁷

3. Although agencies must necessarily make hard choices in allocating finite resources, the implication that improving collections is not an "enforcement issue" is troubling.

283. GAO, CRIMINAL FINES 1985, *supra* note 220, at 35 ("Within the U.S. attorneys' offices, collections, especially criminal fine collections, . . . suffer from staffing problems."); *id.* at 36 ("[T]he use of available enforcement tools can prove to be time-consuming . . ."); GAO, CRIMINAL DEBT 2001, *supra* note 64, at 14, 43; Madler, *supra* note 15 (citing "antiquated technology, and staff shortages," among other reasons for Los Angeles' collections failures).

284. GAO, CRIMINAL DEBT 2001, *supra* note 64, at 14 (noting that the average number of staff at an FLU rose from 8.7 to 9.3).

285. *Id.* at 43. Agencies may exaggerate the problem somewhat. For example, DOJ reiterated its invocation of insufficient staffing during a 2004 GAO audit of its collections functions, but overlooked that it had recently received funding beginning in fiscal year 2002 for additional asset investigators. GAO, CRIMINAL DEBT 2004, *supra* note 12, at 18-19.

286. GAO, CUSTOMS 2002, *supra* note 92, at 25-26.

287. OREGON AUDIT, *supra* note 131, at 3.

Employing dedicated collections personnel has improved collections.²⁸⁸ But many agencies require their employees to allocate their time between the collections function and myriad others, including rulemaking, investigating possible rule violations, and assessing penalties for violations.²⁸⁹ Having employees who cannot spend enough time on collections is the functional equivalent of not having enough employees. Moreover, personnel who have not been hired exclusively or primarily for collections are less likely to have the training and experience that will facilitate effective collection.²⁹⁰

Merely having a sufficient number of staff will not effectuate collections if an insufficient budget leads to poorly qualified staff who cannot be trained and lack access to necessary technology.²⁹¹ Low salaries erode morale, reduce incentives to perform, and impede recruitment of highly qualified individuals in the first place.²⁹² An agency that cannot afford to attract well-qualified specialists will also likely lack resources to invest in on-the-job training.²⁹³ And even well-paid, well-trained personnel will not perform optimally if they lack the requisite technology to investigate assets, record fines, and track payments.²⁹⁴ Deficiencies in fine and collections data tracking systems have been cited in audits of numerous agencies' collections processes,²⁹⁵ and may have contributed to the failure to collect billions in fines.²⁹⁶

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288. See, e.g., GAO, CRIMINAL DEBT 2001, *supra* note 64, at 53 (discussing a Northern District of California pilot program to employ one full-time and four part-time former criminal investigators resulted in recovery of over \$10 million).
289. CHIANG, DIR AUDIT, *supra* note 99, at 12 (noting an inadequate segregation of personnel duties); GAO, CRIMINAL DEBT 2001, *supra* note 64, at 53 (“[N]one of the four FLUs we visited had full-time resources dedicated to or specializing in performing searches to identify hidden assets.” (footnote omitted)); see also *supra* text accompanying notes 68-69.
290. GAO, CRIMINAL FINES 1985, *supra* note 220, at 18 (“The majority of chief probation officers we interviewed told us that their probation officers do not have the time or expertise needed to conduct financial investigations.”).
291. See GAO, CRIMINAL DEBT 2001, *supra* note 64, at 51-52 (“[O]nly when the right personnel for the job are on board and are provided the right training, tools, structure, incentives, and responsibilities is operational success possible.”).
292. *Id.* at 53 (noting that one official indicated that his FLU “often has difficulty in filling its lower-paying positions, such as those for debt collection agents.”).
293. GAO, CRIMINAL FINES 1985, *supra* note 220, at 18; GAO, CRIMINAL DEBT 2001, *supra* note 64, at 53 (“[B]udget constraints limit the FLUs’ ability to provide the additional training or hire additional staff that would enable them to collect debt more effectively.”).
294. GAO, CRIMINAL DEBT 2001, *supra* note 64, at 51-52.
295. See CHIANG, DIR AUDIT, *supra* note 99, at 11-12; GAO, SEC AND CFTC 2005, *supra* note 80, at 10, 11; *supra* notes 107-113.
296. GAO, SEC AND CFTC 2005, *supra* note 80, at 3.

Legislatures bear responsibility for inadequate collections budgets,²⁹⁷ although agencies generally have some discretion in deciding what portion of their budget is allocated to collections.²⁹⁸ Allocating funds to an agency's collections functions need not reduce the funds available to pay for other agency functions: Investment in collections could more than pay for itself.²⁹⁹ This increased revenue can fund additional government services, or at least offset the burden on taxpayers of funding existing services.³⁰⁰

Ultimately, lack of resources is only part of the problem of undercollection of fines. As discussed below, broad-based structural problems pervade the fine collection process, distorting the incentives of individual collections personnel and the attitudes of agency leadership toward collections.

B. Individual Incentives

As scholars such as Donald Langevoort and Mark Seidenfeld have posited (relying on theories of organizational behavior), individual agency staff members are rational utility maximizers³⁰¹ who will be motivated to act by a complex array of interacting factors,³⁰² primarily those occurring within the

297. GAO, CRIMINAL DEBT 2004, *supra* note 12, at 18 (“[The Executive Office for United States Attorneys] has not been successful in requesting additional staff for debt collection.”).

298. *Cf.* GAO, OSM 2001, *supra* note 13, at 11 (noting that the Agency prioritized rule compliance over fine collections).

299. *See, e.g.*, OREGON AUDIT, *supra* note 131, at 4 (finding that the statewide median return rate on collections costs was over eight dollars for each dollar spent); Madler, *supra* note 15 (referencing strategies of the Los Angeles Commission on Revenue Efficiency and noting that “[a]s the city looks to reduce its workforce to save money, it must be careful not to shed revenue producing positions such as in code and parking enforcement. Those positions, after all, have the potential to bring in more money than they cost in salaries and benefits.”); *see also infra* note 386 (discussing the cost-effectiveness of contracting with private debt collection firms).

300. Whether a particular investment in collections will yield a net-benefit is highly fact-dependent; but so is any decision regarding whether to invest capital in a potential revenue-generating enterprise. Given the billions in uncollected fines that are recoverable, it stands to reason that some increase in resource allocation to this field will be cost-effective.

301. Donald C. Langevoort, *The SEC as a Bureaucracy: Public Choice, Institutional Rhetoric, and the Process of Policy Formation*, 47 WASH. & LEE L. REV. 527, 529 (1990) (“[O]ne can posit intuitively that each decisionmaker within a bureaucracy will act as a utility-maximizer.”); Seidenfeld, *supra* note 269, at 268.

302. *See* Langevoort, *supra* note 301, at 529 (summarizing a wide array of potential incentives); Seidenfeld, *supra* note 269, at 268-81.

confines of the agency itself.³⁰³ Staff members seek promotions and avoid firing, demotion, or undesirable job duties.³⁰⁴ They also seek approval from peers, praise from superiors, and an internal sense of satisfaction.³⁰⁵ Unfortunately, few of these motivating factors are likely to push agency employees to vigorously pursue collections.

Agency personnel, particularly those not dedicated exclusively to collections, are likely to view collections as ministerial drudgery, neither as prestigious nor as intellectually rewarding as other agency functions, such as rule-making or investigating violations.³⁰⁶ This disinclination toward collections is particularly true for the type of personnel who are likely to be involved in the fine assessment process: attorneys, investigators, and other highly-trained or

303. Langevoort, *supra* note 301, at 529 (citing a “vast body of research on organizational behavior that argues that the activity of bureaucracies is not characterized by a high degree of either sensitivity or responsiveness to external stimuli. Instead, typical behavior is more aptly described as inner-directed”); Seidenfeld, *supra* note 269, at 268 (“Staff members’ most immediate job incentives come from opportunities within the agency itself.”).

304. SIMON, *supra* note 20, at 145 (“Promotion is, of course, both an economic and a prestige incentive.”); Seidenfeld, *supra* note 269, at 268-70, 274-75.

305. SIMON, *supra* note 20, at 145 (“In addition to the salary he receives, he may value the status and prestige that his position in the organization gives him . . .”); Seidenfeld, *supra* note 269, at 268-81.

306. GAO, CRIMINAL FINES 1985, *supra* note 220, at 36 (“Most probation officers view ‘bill collection’ as contradictory to their rehabilitative duty . . .”); *id.* at 39 (“Available enforcement techniques have rarely been used because U.S. attorneys’ offices generally place low priority on collections . . .”); *see* Langevoort, *supra* note 301, at 529; Seidenfeld, *supra* note 269, at 275 (“Data suggest that in many contexts, agency staff members prefer policy accomplishments, recognition from others or agency loyalty, and consonance to their perceived role over pecuniary rewards or leisure.”).

Indeed, even many *private* collections personnel, who, unlike agency collectors, are actually compensated for their collections performance, *see infra* text accompanying notes 386-388, may find the task unrewarding, *see* Matthew W. Ludwig, *Abuse, Harassment, and Deception: How the FDCPA Is Failing America’s Elderly Debtors*, 16 ELDER L.J. 135, 140-41 (2008) (“Working as a debt collector can be a frustrating, mind-numbing way to make a living, and even the relatively high pay often does not make up for the frustration of the job.”).

educated professionals.³⁰⁷ Collections tend to be seen as below them; once the sanction is imposed, collecting it is somebody else's problem.³⁰⁸

Collections personnel, even if they do not view their role as unimportant, are unlikely to have much of a personal stake in collections. Such personnel, like most civil servants, are invariably salaried, have significant job security, and do not work on commission,³⁰⁹ so their financial compensation is unaffected by how much they collect.³¹⁰ Nor are effective collections likely to lead to promotions, praise, or even informal elevated status among bosses or peers,³¹¹ particularly if the employee (or his or her department) is not dedicated to collections.

Agency personnel's incentives may even run counter to maximizing collections. They will seek to get cases off their desks, both to minimize work³¹² and to create the appearance of productivity among supervisors and colleagues.³¹³ The temptation is understandable. The number of cases closed is a concrete figure well within the control of the agency, whereas a "percentage of collectible debt"

307. GAO, CRIMINAL FINES 1985, *supra* note 220, at 35 ("Within the U.S. attorneys' offices, collections, especially criminal fine collections, receive low priority . . ."); *cf.* Sherry Scheel Matteucci, *Montana's 1st Female Attorney Ella Knowles*, 33 MONT. LAW. 1, 5 (2008) (describing collections as "one of the least rewarding but most common legal tasks for a young lawyer").

308. *See* Seidenfeld, *supra* note 269, at 277-78 ("Counsel's Office in an agency will have lawyers who, by virtue of their legal schooling, see themselves as fulfilling a role of implementing law.").

309. Similarly, in a civil service system, bonuses, if they exist, are not typically tied to collections; and in any event, the incentive of a year-end bonus is more attenuated than a direct commission.

310. Langevoort, *supra* note 301, at 529 (observing that governmental agencies "lack the discipline imposed by a competitive marketplace," and "line personnel are protected from rapid replacement by civil service regulations"); Seidenfeld, *supra* note 269, at 274 ("If supervisors have little authority to penalize lazy workers, staff members have an incentive to do little work for their pay."). Staff members who perform poorly may be assigned undesirable job duties or transferred to an undesirable location, *see* Seidenfeld, *supra* note 269, at 268, but simply performing mediocre work is unlikely to incur these consequences.

311. *See* Seidenfeld, *supra* note 269, at 270 ("[O]pportunities for promotions are limited and a staff member must affirmatively make a good name for himself in order to have any chance to secure a promotion.").

312. Seidenfeld, *supra* note 269, at 274 ("[E]conomically rational bureaucrats have an interest in maximizing their leisure, which translates into a preference for minimizing their workloads.").

313. *Cf.* GAO, CRIMINAL DEBT 2001, *supra* note 64, at 68 (noting that neither DOJ nor U.S. courts wanted to take responsibility for disclosing receivables for relevant criminal debt). Conversely, non-dedicated personnel may not even desire this appearance of success, lest they gain reputations as collection experts and be assigned greater roles in collections.

benchmark requires a labor-intensive determination regarding what is “collectible,” in addition to the labor-intensive effort to recover those amounts.³¹⁴

C. Institutional Incentives

Incentives may be misaligned for agency management as well as for lower-level personnel. If senior management or an agency head does not prioritize collections, neither will lower-level staff members.³¹⁵ As discussed above, deprioritization of collections at high levels has been observed at a number of agencies.³¹⁶

The attitudes of an agency’s leadership toward collections can be better understood by examining the leaders’ incentives, which may vary depending on

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314. When audited by the GAO, the SEC and CFTC reported fine collection rates approaching 100%. GAO, SEC AND CFTC 2001, *supra* note 163, at 2 (91% and 86%, respectively); GAO, SEC AND CFTC 2005, *supra* note 80, at 42 tbl.5 (91% and 99%, respectively). However, these figures reflect percentages collected on total fines levied in *closed cases*. GAO, SEC AND CFTC 2001, *supra* note 163, at 2; GAO, SEC AND CFTC 2005, *supra* note 80, at 42 tbl.5. This is entirely circular: If the agency is able to collect, it will close the case. In essence, these agencies reported that in cases in which they collected virtually all the amounts levied, they collected virtually all the amounts levied. Collection rates for *all* cases, including open ones, were much lower: 49% and 45%, respectively. GAO, SEC AND CFTC 2005, *supra* note 80, at 23, 42.
315. See, e.g., GAO, CRIMINAL DEBT 2004, *supra* note 12, at 2 (“[U]ntil top management [at DOJ and the AOUSC] placed a higher priority on ensuring that the entities involved in the criminal debt collection process more effectively and efficiently pursued collection efforts, the assessment of criminal fines and restitution as an effective punitive tool would be jeopardized, and valuable, limited resources would continue to be wasted on duplicative efforts.” (citing GAO, CRIMINAL DEBT 2001, *supra* note 64, at 11)); Seidenfeld, *supra* note 269, at 275 (“A staff member may be able to act less carefully on a matter that has not attracted attention of a supervisor or others higher up in the agency.”).
316. See *supra* text accompanying notes 289-290. As an example, the CMS failed to perform detailed audit work on its \$260 million in outstanding civil monetary penalties—almost all of which related to Medicare fraud and abuse cases—because this amount represented only 3% of the Agency’s total Medicare receivables, and so was deemed immaterial. GAO, CMS 2001, *supra* note 62, at 8, 10. But collection of these fines could go a long way toward funding the CMS’ other operations. Moreover, unlike collection of other receivables, it would also serve a deterrent function; if anything, the Agency should be more focused on collecting these debts, not less. Cf. 1995 SENATE HEARING, *supra* note 261, at 5 (“We take action to collect taxes against people who have not committed crimes. If people commit crimes and are fined, I expect us to be 50 times more aggressive in collecting those fines” (statement by Sen. Dorgan)).

the “type” of leader. Mark Seidenfeld has identified three categories of agency heads: “careerists,” “politicians,” and “professionals.”³¹⁷

Careerists who wish to remain with the agency “can best maintain their positions by lying low and not doing anything that attracts attention.”³¹⁸ Thus, unless government watchdogs, the media or others draw attention to undercollection, such agency heads have little incentive to actively address the problem and improve collections. Politicians will “try to generate public name recognition by taking action that attracts the attention of the press.”³¹⁹ But good press is achieved by announcing the *imposition* of large fines; collecting them simply does not make for big headlines.³²⁰ And professionals—agency heads hired for their industry knowledge or connections—are prone to the risk of capture by firms within the industries they regulate, and so may be disincentivized to vigorously enforce collections efforts.³²¹

Regardless of self-interest, all three types of leaders are likely to be more interested in the policy-oriented aspects of their role than the ministerial aspects. Enforcement of penalties for violations of agency rules certainly promotes agency policy, but the collections component of the enforcement process is likely to be viewed as primarily or purely ministerial and of little interest to senior personnel.³²²

There may be other psychological factors that explain agency leaders’ disinclination to focus on changing and improving the collections process. One such factor is “prospect theory.” This theory “predicts a bias against agency action when the agency faces a choice between imposing certain losses to avoid uncertain ones or to create the potential for uncertain gains.”³²³ Current collections practices may leave billions in uncollected fines on the table, but agency leaders may not want to risk seeking more funding for collections because they do not want to bear the risk that collections will not sufficiently improve and thus that the additional funding will be deemed to have been wasted. Better to do poorly with little than risk doing poorly with a lot.

Indeed, concerns regarding funding may play a critical role. By requesting additional funding, an agency effectively would be admitting that it is not currently adequately accomplishing its delegated functions. But agency heads of all

317. Seidenfeld, *supra* note 269, at 281 & n.100 (citing JAMES Q. WILSON, BUREAUCRACY: WHAT GOVERNMENT AGENCIES DO AND WHY THEY DO IT 131, 197-200 (1989)).

318. *Id.* at 281.

319. *Id.* at 282.

320. See *supra* text accompanying notes 114-118, 179-184.

321. Seidenfeld, *supra* note 269, at 283; cf. Madler, *supra* note 15 (noting that Los Angeles city agency personnel at all levels are reluctant to collect so as to avoid angering powerful local businesses).

322. See *supra* notes 306-308 and accompanying text.

323. Seidenfeld, *supra* note 269, at 289.

stripes want to demonstrate that they are competent, and they do not want to admit to existing deficiencies,³²⁴ thereby making them reluctant to establish the very facts that would warrant additional funds.

Conversely, even if agency heads are willing to argue that they could improve collections with more funding, Congress—not wanting to throw good money after bad—may be reluctant to increase funding unless the agency can establish its ability to collect effectively. The collections process may suffer as a result of this chicken-and-egg conundrum, with the agency claiming it cannot collect unless it has more funds, and the legislature not wanting to give more funds until the agency can show it can collect.³²⁵

Agency heads may also de-emphasize collections to minimize judicial scrutiny. Agency heads prefer autonomy and flexibility;³²⁶ but judicial review of administrative sanctions imposes constraints on agency freedom.³²⁷ Agencies may prefer to compromise administrative fines for less than they otherwise might. This compromise may reflect not only the desire to save litigation costs, but also the desire to avoid a full-blown contest that could result in judicial review and the establishment of precedents regarding the scope and exercise of the agency's fining authority.³²⁸

324. *Id.* at 295; DOWNS, *supra* note 20 at 279 (“Every bureau ideology . . . [s]tresses the high present level of the bureau’s efficiency . . . [and e]mphasizes its achievements and future capabilities and ignores or minimizes its failures and inabilities.”). For example, the Executive Office for United States Attorneys, in response to an audit identifying numerous agency inefficiencies and failures, claimed that no “serious deficiencies exist in the collection process with the exception of the lack of human resources.” GAO, CRIMINAL DEBT 2001, *supra* note 64, at 97. The institution had been effectively called out for not doing the best it could with what it had, but insisted it could do better only if it were given more to work with.

325. There may also be the inverse problem: Agencies may risk funding if they establish that they are doing *too* well. The legislature may be inclined to direct money to failing entities or areas, and freeze or even reduce funding for those government elements that have established that they can do well on a shoestring.

326. DOWNS, *supra* note 20, at 266 (“Leaders of all large organizations are opposed to detailed investigations of the behavior of their organizations by outsiders.”); Seidenfeld, *supra* note 269, at 285.

327. See Richard J. Pierce, Jr., *Two Problems in Administrative Law: Political Polarity on the District of Columbia Circuit and Judicial Deterrence of Agency Rulemaking*, 1988 DUKE L.J. 300, 300-03, 308-13; Seidenfeld, *supra* note 269, at 251-52.

328. See *supra* Subsection I.B.1 regarding the scope of judicial review of agency fine and penalty assessments. Admittedly, an agency’s desire to avoid judicial review would have greater relevance at the fine assessment stage than at the fine collection stage, since (as the agency would expect) a violator would not likely be willing to waive its right to challenge the assessed fine on appeal based on the possibility that the agency will eschew collection of it. However, an agency could impose the larger fine (and obtain the public relation benefits therefrom) and then hastily write off a large portion of it (possibly in consultation with the offender itself, in a form of post-assessment settlement), thereby minimizing the violator’s incentive to fight it

D. Agency Capture

In its most common form, agency capture theory³²⁹ holds that if an agency comes to be dominated by personnel formerly employed by firms in the industry the agency is regulating—or by personnel who hope to join those firms *after* leaving the agency³³⁰—they will cater to the interests of the firms.³³¹ Capture could affect either agency leadership or lower-level bureaucrats involved in fine collections.³³²

One might expect agency capture to affect fine imposition more than collection: Captured agency personnel would better serve the regulated firm by declining to find that a violation occurred, or by imposing a light fine if a violation is found.³³³ Thus, agency capture might even be expected to *improve* collection rates as it would tend to reduce the frequency or severity of fines initially imposed.

on appeal rather than simply pay the reduced fine. But, as discussed above, limitations on agency documentation and disclosure make it difficult to assess the extent to which this is occurring. See *supra* Section III.A.

329. We are discussing capture separately here, but recognize that it could be viewed as another type of incentive problem. Generally, these “categories” of agency failures are artificial, and may overlap.
330. Langevoort, *supra* note 301, at 529; Seidenfeld, *supra* note 269, at 271-72.
331. Langevoort, *supra* note 301, at 528 (explaining that public choice theory posits that regulators will allocate benefits to those groups that provide the greatest levels of support, including those industries they are supposed to be regulating); Seidenfeld, *supra* note 269, at 271-73; see Anne C. Mulkern, *Watchdogs or Lap Dogs? When Advocates Become Regulators*, DENVER POST, May 24, 2004, at A-01 (noting that at least one hundred high-level Bush Administration officials regulated industries they once represented as lobbyists, lawyers, or company advocates); Mike Palmedo, *Revolving Door Between U.S. Government and Industry*, CONSUMER PROJECT ON TECH. (Feb. 2006), <http://www.cptech.org/ip/health/politics/revolvingdoor.html> (listing former members of governmental agencies and/or Congress now representing the pharmaceutical industry).
332. Seidenfeld, *supra* note 269, at 271-73, 283. A 2009 report on the City of Los Angeles revealed a surprisingly candid assessment of agency capture by large local businesses. See Madler, *supra* note 15 (“Many management staff across all departments explained that collection activities do not necessarily receive a high priority because of their interest in maintaining effective working relationships with payees.”).
333. Jesse Westbrook & David Scheer, *Cox’s SEC Hindered Probe, Slowed Cases, Shrank Fines*, GAO SAYS, BLOOMBERG, May 6, 2009, <http://www.bloomberg.com/apps/news?pid=aPus5C5B.JhQ> (noting that the SEC’s chairman was found by its enforcement-unit lawyers to have opposed fining companies; fines and restitution collected fell from \$3 billion in prior years to \$1 billion under his watch).

However, it is just as likely that agency capture would undermine collections but not fine imposition. Promoting a regulated firm's interests at the expense of the agency's is risky; thus, capture is more likely to occur where the captured staff member's efforts are less publicly visible or less subject to supervisory scrutiny.³³⁴ Unlike policymaking or adjudication, collections is virtually invisible to the public and not likely to draw much attention from agency management (particularly if the agency culture is unsupportive).

There are also great incentives for a captured agency to fail to adequately collect fines because it is a win-win situation. The agency garners the public relations benefit of appearing to be a tough enforcer and spares the regulated firm from bearing the negative effect of the fine. In fact, the firm also gets the public relations benefit of the façade of contrition. The loser, of course, is the public that depends on the agency to follow through on its regulatory mission.

Moreover, a modified form of agency capture by industry participants may occur if the regulated firm can make the staff member's job easier or more difficult by controlling access to information the staffer needs to do his job.³³⁵ Collections personnel often require accurate information regarding a regulated firm's assets and income in order to effectively prioritize and pursue collection of fines and penalties. Much of this information is most readily obtained from the firms themselves. Thus, collections personnel may be particularly prone to this form of capture.

Yet another potential form of capture is political capture, in which elected officials or branches may co-opt regulatory agencies for their own purposes.³³⁶ The recent Bush Administration, known for its anti-regulatory leanings, appointed an SEC chairman who opposed fining corporations, which resulted in drastically reduced enforcement of the agency's rules.³³⁷ Such capture may also affect collections: The political branches may put pressure on agencies to chase headlines and impose large fines while at the same time either disregarding the collection of those fines, or failing to provide the requisite resources to adequately pursue them.³³⁸

334. Seidenfeld, *supra* note 269, at 272 n.70.

335. *Id.* at 273.

336. See, e.g., Lloyd Hitoshi Mayer & Brendan M. Wilson, *Regulating Charities in the Twenty-First Century: An Institutional Choice Analysis*, 85 CHI.-KENT L. REV. 479, 537 (2010); Seidenfeld, *supra* note 269, at 256 ("Congress and the President greatly influence agency agendas, both by establishing procedures that stack the deck toward agency outcomes that favor constituents whom they want to benefit and by monitoring and funding programs that they desire."). *But see id.* at 256 (citing evidence "that political principals cannot easily direct agency officials to follow their bidding").

337. See Westbrook & Scheer, *supra* note 333.

338. Todd, *supra* note 104. Indeed, scholars who advocate more stringent regulatory enforcement without focusing on whether the agency has the means or wherewithal to follow through on that enforcement may be recommending reforms that

E. Confusion and Blame-Shifting

Confusion regarding which of several agencies is responsible for collections can also thwart collections success.³³⁹ For instance, the CMS' accounting records reflected that certain delinquent debts were the responsibility of the Department of Health and Human Services' Office of Inspector General, whereas they were in fact the responsibility of DOJ.³⁴⁰ Similarly, the California Public Utilities Commission's Consumer Protection and Safety Division believed that the Agency's Legal Division was responsible for collections,³⁴¹ whereas attorneys at the Legal Division did not believe collections were their responsibility.³⁴² In the criminal fine collection context, a Senator noted that "the bureaucracy here is so convoluted that you cannot plug things together."³⁴³

Similarly, due to inadequate communication between the CFTC's Division of Trading and Markets and its Division of Enforcement, a fine of over \$7 million was not referred to Treasury's Financial Management Services for collection for more than two years.³⁴⁴

Often, however, the failure to work together is not the result of mere inadvertence. Agency employees have powerful motivations to shirk work and avoid blame.³⁴⁵ Although a bureaucrat wants to appear to be—and actually be—successful at accomplishing duties,³⁴⁶ it is easier to claim success by narrowing the scope of duties than by doing a better job.

Collections is an area that is particularly prone to responsibility shifting because of how the task of collections is perceived.³⁴⁷ Partial collections will tend to be framed as failures, rather than as successes. Agencies and agency personnel naturally will not want to be associated with an area that is more likely to draw blame than praise. This may be why finger-pointing was so prevalent

actually exacerbate the undercollection problem. *See, e.g.*, Jill E. Fisch, *Top Cop or Regulatory Flop? The SEC at 75*, 95 VA. L. REV. 785 (2009) (discussing other scholars' limited proposals).

339. *See supra* Subsection III.B.2.

340. GAO, CMS 2001, *supra* note 62, at 12.

341. CHIANG, CPUC AUDIT, *supra* note 81, at 9.

342. *Id.* at 9.

343. 1995 SENATE HEARING, *supra* note 261, at 28 (statement of Sen. Dorgan).

344. GAO, SEC AND CFTC 2001, *supra* note 163, at 25.

345. Seidenfeld, *supra* note 269, at 274-75.

346. *Id.* at 275.

347. *Id.* at 289 (explaining that whether an outcome is viewed as positive or negative depends on the how the reference point is framed).

during the failed effort to reform federal criminal fine collections.³⁴⁸ With collections, the agencies are fighting an inverted turf war, trying to give up as much ground as possible. Ironically, agencies' inability to cooperate thus makes centralization of collections necessary³⁴⁹ (to eliminate opportunities for blame-shifting and finger-pointing) and, at the same time, highly unlikely to occur (because the centralization effort itself requires inter-agency comity).

In this Part, we outlined potential explanations for agencies' collections failures. The incentive problems that undermine a commitment to collections at the personnel and management levels of administrative agencies likely lie at the heart of undercollection. Although a lack of resources plays a role, it does not explain why agency collectors do not make the most of the funding and tools they already have. And other explanations, like blame-shifting, appear to flow in large part from the underlying distortion in agency incentives. Incentive-based commitment to collections is apparently a prerequisite to collections success.

V. RECOMMENDATIONS

Some proposals to address administrative agencies' pervasive undercollection problems involve reforms within the existing institutional framework, whereas others involve removing responsibility for collections from the agencies in whole or in part.³⁵⁰ In other words, some propose to fix the system while others propose to replace it. In this Part, we first examine several options that fall into the "fix it" category: adding resources to collections efforts; locating collections responsibilities exclusively with in-house collections specialists rather than personnel with general enforcement duties; and restructuring col-

348. GAO, CRIMINAL DEBT 2004, *supra* note 12, at 13; GAO, CRIMINAL DEBT 2001, *supra* note 64, at 69; GAO, NATIONAL FINE CENTER 1995, *supra* note 260, at 24; *see supra* text accompanying notes 251-258.

349. *See* Madler, *supra* note 15 (noting that Los Angeles city officials and auditors recommend centralization of collections under a "Collections Sheriff," on the rationale that "[a] single person . . . would work with all the departments and be there to take credit—or the blame—for what money does come in").

350. Our proposals are limited to the goal of improving the collection of monetary sanctions. It is beyond the scope of this Article to evaluate options that would expand collections to unconventional "payments," such as extracting services rather than money (e.g., an oil company might help clean a different company's spill rather than paying for unrelated violations); "extra-legal" compliance (e.g., the EPA could require an offender to construct "green" infrastructure exceeding current environmental requirements); or an ownership/control interest in corporate offenders (e.g., an agency could receive an equity interest in the offending corporation, entitling it to a say in the conduct of, and/or in a decision whether to continue business or induce a bankruptcy of, the offender). *See, e.g.*, Gruner, *supra* note 202, at 292-95 (discussing corporate community service); Kennedy, *supra* note 6, at 460-68 (discussing "equity fines").

lections-based incentives in various ways. We then discuss more radical options that would replace aspects of the current system: delegating collections responsibilities to private or public interest firms; or selling collections rights through debt auctions. We argue that any reform must take into account institutional and individual incentives, and that more ambitious changes should be attempted only if less drastic reforms have proven ineffective. Specifically, we conclude that governments should first try reforms within the agencies—for example, specializing the collections function and tethering aspects of collectors' pay or agency funding to collections performance—and progress to more radical, "replace it"-style solutions only if internal reforms fail.

A. *Fix It—Reform Agencies' Collections Processes*

1. Optimize Existing Approaches

Additional Resources. Agencies often attribute low collection rates to insufficient funding and manpower.³⁵¹ But boosting human and financial capital is easier said than done. Federal and state governments are running record deficits. Even if money is available, lawmakers may not view increased funding of collections as a good investment of their political capital. Agency collections rates do not make headlines like oil spills, Ponzi schemes, or rampant unemployment.³⁵² Of course, if agencies' dismal collection rates were better publicized, perhaps public outrage would generate greater political will.³⁵³ Nevertheless, not only is there a risk that increased funding may not improve collection rates³⁵⁴—a measurable benchmark for which lawmakers will be blamed—but whatever increases may result are likely to be gradual and incremental, not the type of flashy reforms for which credit can swiftly be taken.³⁵⁵ Thus, it is unlikely that funding levels for collections will increase dramatically, at least in the absence of other reforms.

Moreover, boosting resources will not necessarily motivate agency leadership to devote sufficient energy or attention to collections if there is more bang

351. See *supra* Section IV.A.

352. A thorough analysis of the political dynamics that would lead legislators to overlook or downplay such a seemingly attractive source of revenue is beyond the scope of this Article, but is an issue that one of the authors (Professor Ross) intends to explore in a subsequent piece.

353. See Madler, *supra* note 15 ("Some bills have gone unpaid for years and not until the city spiraled down into a fiscal crisis did the importance of getting that money open the eyes of policy makers.").

354. Increased funding without other reforms might even depress collection rates if it entrenches ineffective undercollection practices.

355. Seidenfeld, *supra* note 269, at 282 (noting that a political actor "will tend to take action for which she can claim credit and avoid action for which she can be blamed").

for the buck in announcing impressive initial assessments.³⁵⁶ Nor will an increase in resources prevent agency staff members from perceiving collections as menial, thankless work.³⁵⁷

On the other hand, funding can serve a signaling function, so increased funding for collections may convey its importance.³⁵⁸ Staff members who understand collections to be an integral part of the agency mission may be less likely to shirk collections work and shift their time and energy to other tasks. And regulators who see their collections role as prioritized may be less subject to capture by regulated entities, as the “premium” required to compromise their duties may be higher.

Ultimately, supplementing resources and funding is politically and practically difficult and would not address the root causes of undercollection—misaligned incentives, as discussed above in Sections IV.B and IV.C. Therefore, funding is at best an incomplete approach to the problem.

Improve Utilization of Conventional Collection Tools. Agencies could improve collections by using tools already available to them. For example, when a violator cannot pay immediately, an agency can establish a payment plan, allowing the imposition of higher total penalties and facilitating collection.³⁵⁹ Increased targeted reliance on installment plans could thus improve overall collection rates.

A tougher issue is *how* to get agencies to more effectively use such tools. Guidelines already exist at many agencies that govern the usage of collections tools and processes; yet agencies routinely neglect to follow them and often disregard auditors’ recommendations that they do so.³⁶⁰ Some guidelines may provide insufficient direction. For example, vague guidance to use installment plans “when appropriate”³⁶¹ may not be as effective as a checklist delineating

356. See *supra* text accompanying notes 114-119, 179-184.

357. See *supra* text accompanying notes 324-326.

358. Congress can appropriate money for an agency to use for a particular purpose, and can similarly prohibit appropriated money from being used for a particular purpose. Peterson, *supra* note 91, at 337 (“[Congress can] describe the purposes for which the funds may be used, the length of time the funds may remain available for these uses, and the maximum amount an agency may spend on particular elements of a program. In this manner, Congress may, and often does, use its appropriation power to accomplish policy objectives and to establish priorities among federal programs.” (quoting 1 U.S. GEN. ACCOUNTING OFFICE, PRINCIPLES OF FEDERAL APPROPRIATIONS LAW 1-5 (3d ed. 2004))).

359. GAO, SEC AND CFTC 2001, *supra* note 163, at 7 (noting that CFTC saw fine collections increase 5% after increasing use of installment plans).

360. See *supra* Subsections III.B.1 and III.B.2.

361. See, e.g., GAO, CMS 2001, *supra* note 62, at 12 (“[I]nformal policies and procedures do not . . . contain specific guidance on recording due dates for payments being made through payment plans . . .”).

precisely when and how to apply such plans.³⁶² Thus, one solution may be to provide more concrete guidelines and instructions. But many guidelines *are* concrete, yet are still disregarded.³⁶³ Indeed, agency staff may react to new, highly-defined requirements not by doing better, but by shirking even more.³⁶⁴ Thus, more concrete requirements, standing alone, may not solve the problem.

Even if improved guidelines are not counter-productive, they (like increased resources) still do little to address agency staffers' lack of incentives to pursue collections vigorously. For reforms to be effective, they will likely need to address *why* agencies do what they do, not merely how they do it. Therefore, as we discuss below in Subsections V.A.2 and V.A.3, other mechanisms, like specialization of the collections function, will better focus agencies' attention on the problem of undercollection.

2. Specialization

The lack of dedicated collections personnel hampers collections.³⁶⁵ Establishing collections-only positions could carry several advantages, such as promoting expertise, reducing confusion, and improving employee incentives for effectively collecting.

First, specialization promotes expertise. Managers can hire employees based on collections-related interest, skills and experience. And because collections would be these bureaucrats' sole job function, new employees could be expected to learn a job's requirements much more quickly.

Second, demarcating the line between collections and non-collections personnel would reduce confusion regarding collection roles and responsibili-

362. Cf. Atul Gawande, *The Checklist*, THE NEW YORKER, Dec. 10, 2007, available at http://www.newyorker.com/reporting/2007/12/10/071210fa_fact_gawande (describing how fields as diverse as emergency room care and airline piloting have improved dramatically through the use of mandatory checklists).

363. See, e.g., *supra* text accompanying note 245.

364. DOWNS, *supra* note 20, at 262 ("The greater the effort made by a sovereign or top-level officials to control the behavior of subordinate officials, the greater the efforts made by those subordinates to evade or counteract such control."); Seidenfeld, *supra* note 269, at 302-03 ("The need for an agency to comply with procedural requirements adds costs to the decision-making process, and in that sense . . . discourages agency action.").

365. See *supra* text accompanying notes 81-82, 324-326. The California State Controller found that the "lack of duty segregation," CHIANG, CPUC AUDIT, *supra* note 81, at 11, between collections and other enforcement functions in various agencies "represents a serious internal control weakness, as it does not provide the adequate checks and balances that would prevent errors and irregularities," CHIANG, DIR AUDIT, *supra* note 99, at 12.

ties. This both promotes efficient and effective performance of collections tasks, and reduces opportunities for finger-pointing and blame-shifting.³⁶⁶

Third, designating collections personnel could boost employee pride in the collections function. Changing collections from one task among many assigned to employees to the only task assigned would ensure that employees would not deprioritize it.³⁶⁷ Individuals interested in collections would be more likely to choose the pure collections role in the first place. This, in turn, may reduce capture risk, as increased role identification could bolster collectors' resistance to compromising their bureaucratic responsibilities.

There are, however, potential drawbacks. Collections specialization would mean that the agency staffers who shepherded a case from the stages of investigation to liability assessment to penalty imposition would *not* be the ones to follow the case through to the collection stage. Staffers who have lived with a case since its inception may become invested in it and so have an interest in ensuring that it is handled thoroughly to its conclusion. Separate collections personnel, however, would not necessarily share the commitment to see that a particular offender is brought to justice.

Further, specialization may serve to increase the risk of capture in certain ways. Regulated entities may rationally decide to focus their capture efforts on collections personnel, reasoning that they are more isolated, less closely monitored, and less visible than other enforcement personnel.³⁶⁸

Moreover, segregating collections personnel would not necessarily have a substantial impact if the underlying goals and priorities of the agency were not changed. For example, if collectors understood their priority to be closing as many cases as possible, that could cause collectors to accept low payments for each case as a means to quickly resolve matters. The fact that they did not have non-collection duties would not necessarily ameliorate the underlying problem.³⁶⁹

However, the benefits of specialization outweigh these speculative drawbacks. The contention that the regulators who set the fines are the best people to collect the fines seems unlikely because agency enforcement personnel who perform a variety of duties often view collections as menial and thankless.³⁷⁰ Nor would specialization necessarily increase capture risks, particularly because

366. See Madler, *supra* note 15 (observing that the potential benefit of a “Collections Sheriff” is that he would “be there to take credit—or the blame—for what money does come in.”); *supra* Subsection III.B.2.

367. Seidenfeld, *supra* note 269, at 295-96 (“[O]nce a potential problem within an individual’s official authority is identified, the individual is likely to see his role as calling for action to try to cure the problem.”). Indeed, separate collections units could promote healthy competition within each agency. Downs, *supra* note 20, at 265 (“Every part of a bureau is partly competitive with every other part.”).

368. See *supra* text accompanying note 332.

369. See *supra* text accompanying notes 330-332.

370. See *supra* text accompanying notes 324-326.

specialists would likely take more pride in their collections work and thus could be *less* likely to abandon their responsibilities. Finally, although segregation might not be a complete solution—particularly if other agency goals push against effective collections—it is an important step in the right direction and could, in itself, signal to agency personnel the increased prioritization of collections.

There are two primary approaches to specialization: (1) creating special units within each agency; or (2) creating a centralized collections agency. Each approach carries potential benefits and disadvantages.

Intra-Agency Collection Units. In-house collections units have already been tried with success in some agencies,³⁷¹ and could serve as models for intra-agency specialization. However, dispersal of collections responsibilities among specialized units within different agencies may exacerbate problems with inter-agency coordination and cooperation such as those experienced by DOJ and AOUSC personnel in collecting criminal debt.³⁷² Further, if personnel are shunted from generalized enforcement duties to pure collections, there is the risk they may feel marginalized. However, as discussed above, specialization is more likely to have an overall morale-boosting effect. Further, if assignments to collections units are based on candidates' interest and experience in collections, such self-selection will counteract any risk of feelings of marginalization.

Centralization. A centralized agency dedicated to collecting fines for other agencies would help solve the problem of coordinating separate collection units.³⁷³ On the other hand, creating new, free-standing entities could be expensive, logistically difficult, and politically challenging, as was illustrated by the failed attempt to establish the National Fine Center.³⁷⁴ Central agency staffers, like in-house collections specialists, may lack a sense of personal investment in

371. See, e.g., GAO, SEC AND CFTC 2001, *supra* note 163, at 7 (noting that the SEC improved its collection rate eight percentage points over the preceding four-year timeframe when it established a “staff position to serve as a focal point for collecting fines.”).

372. See *supra* Subsection III.B.2 (describing the multi-year failure of DOJ and AOUSC to either establish an effective information-sharing protocol, or to develop and implement a centralized fine collections bureau).

373. See Lewandoski, *supra* note 250, at 248 (“The government could consolidate debts in a single agency or have a single agency handle all assessments and collections, greatly simplifying the debt collection process.”).

374. See *supra* Subsection III.B.2. Yet centralization is not unprecedented: The Treasury Department’s Financial Management Services has general collection responsibility for most delinquent federal debt. See *supra* text accompanying note 78. Any new collection-focused agency might mimic Treasury’s program, but simply handle collections at the initial, not delinquent, stage. Indeed, one possible approach is to simply build more (or earlier) collections responsibility into Treasury’s existing program.

particular cases. Moreover, although centralization could remove certain coordination barriers, it could also create new ones with enforcement personnel from referring agencies. It may be more difficult or time consuming (or referring personnel may be less willing) to share offender or case history information with central collections personnel than with specialized collectors within the referring agency itself.

Ultimately, specialization is a promising direction for improving collections performance. Although risks exist, many potential drawbacks are speculative, and specialized collection units have already been tried with success by some agencies. As between different forms of specialization, implementing in-house collection groups is a more realistic model than implementing a centralized collection agency, both because agencies have already profitably employed in-house units in different contexts, and because prior efforts at centralization have proved so problematic.

3. Restructure Underlying Incentives

Specialization may have indirect effects on agency and agency staff incentives. Other potential reforms could attempt to target performance incentives directly.

Performance Standards and Review. As discussed above, agencies generally neglect to systematically evaluate their own fine collections performance. When they do so, collections tend to improve.³⁷⁵

An initial step in performance evaluation is formulating performance standards. Developing performance standards that accurately assess success without encouraging individuals to game the system can be challenging. For example, if performance is evaluated primarily based on collections rates, regulators might cynically reduce initial assessments of fines in order to artificially increase the percentage collected.

If employees assessing fines are distinct from those collecting them, and are evaluated only based on performance of their own discrete duties, there would be less motivation for non-collectors to depress fines.³⁷⁶ Aside from creating separate performance standards, agencies could also discourage employees from gaming the system by establishing performance standards that rely on factors besides collection rates. For example, factoring total assessments as well as collection rates into a performance-gauging formula could counterbalance the motivation to underassess fines. Similarly, collections performance could be gauged in part by compliance with selected best practices such as how frequent-

375. See generally GAO, SEC AND CFTC 2001, *supra* note 163, at 9-10 (reporting that collections rates doubled in the years following a previous GAO report).

376. The incentives of agency heads may still lean toward underassessment, but it may be more difficult to induce subordinates to pursue such a policy.

ly and timely collection personnel conduct asset discovery or pursue liens or other prejudgment remedies.

In addition to formulating well-calibrated performance standards, agencies can formally review or audit collections performance at both the agency and individual collector level. In general, external audits tend to be more rigorous than internal ones;³⁷⁷ but as we have seen, many agencies have brushed off recommendations even of outside oversight agencies.³⁷⁸ Although detailed feedback is an essential element of any effective review,³⁷⁹ feedback alone may not be enough. Performance reviews may need to be directly tethered to concrete consequences for agencies and agency staffers in order to counteract the incentives to de-prioritize collections work.³⁸⁰

Encouraging Competition Through Performance Disclosure. Another way to improve incentives is to encourage competition, both among agency staff and among agencies, by disclosing collection performances. If agencies disclose individual collectors' performance to their colleagues, staff members may try to meet or exceed the performance of their co-workers.³⁸¹ However, if many collectors are weak performers, disclosure might communicate that poor work is normal, reinforcing practices that lead to undercollection. Agencies might therefore disclose to employees only top collectors' performances. But this, too, could backfire: Instead of fostering healthy competition, it might bond low performers against the few high performers.³⁸²

Mandatory *public* disclosure of collections performance could provide broader benefits by stoking collections performance competition at the agency

377. DOWNS, *supra* note 20, at 271 (“Surveillance bureaus with career paths separate from those of the agencies they monitor are much more zealous about detecting and reporting behavior undesirable to top-level officials than are surveillance bureaus without separate career paths.”).

378. See *supra* Subsection III.B.2.

379. THALER & SUNSTEIN, *supra* note 20, at 90 (“Well-designed systems tell people when they are doing well and when they are making mistakes.”).

380. Any system for gathering collections information should account for distortions in regulators' communication of data. See DOWNS, *supra* note 20, at 266 (“Each official tends to distort the information he passes upward in the hierarchy, exaggerating those data favorable to himself and minimizing those unfavorable to himself.”); *id.* at 269 (“Use of redundant information channels increases the probability of obtaining accurate information.”).

381. See THALER & SUNSTEIN, *supra* note 20, at 65 (“If choice architects want to shift behavior and to do so with a nudge, they might simply inform people about what other people are doing.”).

382. See DOWNS, *supra* note 20, at 263 (“As the proportion of climbers in a bureau rises, a higher proportion of their efforts is devoted to internal politics and rivalry rather than performance of their social functions.”).

level.³⁸³ Such disclosure could also defeat agencies' tendency to selectively disclose only impressive-sounding initial penalty assessments.³⁸⁴ However, agencies' failure to improve their collections performance in the wake of GAO reports of poor collections performance data for a number of agencies may indicate that public disclosure, alone, is unlikely to encourage better collections.

Thus, despite the theoretical benefits of performance disclosures, it is unclear whether disclosures, standing alone, would do much to actually improve collections.

Rewarding Performance. Rewards in the form of collections-based commissions, bonuses, or promotions can powerfully motivate bureaucrats by giving them a tangible stake in collections outcomes.³⁸⁵ Likewise, if agencies know that part of their funding is tethered to collections performance, or if regulators get to keep some portion of the amounts they collect, they may make collections more of a priority. Concrete rewards for performance could also minimize capture pressures: Agency personnel would be giving up more by compromising their public duties, and the prospect of future employment in the private sector may be less tempting.

There are several objections to rewarding individual collector performance in this manner, none of which defeats the potential benefits. First, such rewards are arguably unseemly: Government officials should be seeking to enforce the law, not to generate more revenue for themselves. But the fact that the civil servants tasked with collection of administrative fines currently have no personal motivation to thoroughly or efficiently perform their duties is arguably at least as offensive to the public as the alternative of giving them a stake in the matter.

383. However, agencies may take the view that fine collections in different industries are simply not comparable. For example, the OSM claims that its low collection rates are due to the insolvency of many mining firms, GAO, OSM 2001, *supra* note 13, at 2, whereas the SEC collected from better-capitalized financial firms during the period of time reviewed, GAO, SEC AND CFTC 2005, *supra* note 80, at 23.

384. See DOWNS, *supra* note 20, at 266 (acknowledging bureaucrats' inclination to exaggerate favorable data and de-emphasize unfavorable information). Obviously, if agencies could hide fine print disclosures in far corners of websites, disclosure requirements might have little effect. Moreover, disclosure of raw numbers or information—without a rating scheme or benchmark comparison—would likely mean little to the public or even to some lawmakers.

385. DOWNS, *supra* note 20, at 264 (“An organization can maintain high-quality personnel even if it does not experience relatively rapid growth in size, so long as it experiences such growth in the incentives it offers its members.”). *But cf.* Simon Burgess et al., *Incentives in the Public Sector: Evidence from a Government Agency* (CMPO Working Paper Series No. 04/103, 2004), available at <http://ideas.repec.org/p/bri/cmpowp/04-103.html> (showing that whether incentives change performance among civil servants may depend on the size of the team whose performance is being measured).

Second, financial incentives could compromise regulators' integrity. This could lead to over-deterrence: Collectors may employ expensive asset seizure techniques, even where it is not cost-effective to do so, in order to maximize their personal bonuses. Similarly, collections agents might insist on ruinously large up-front payments from offending companies, when longer-term installment plans would be more fair and sensible, in order to line their own pockets. However, financial incentives are not likely to over-deter because they would encourage thorough collections of fines already assessed, rather than excessive initial assessment of penalties (which *could* over-deter, but which could actually *hurt* collection rates). This risk might exist if bureaucrats tasked with enforcement are also tasked with collections, highlighting the need to segregate these job functions.

Third, such incentives may lead to a form of corruption that under-deters: A collector (possibly in collusion with the regulated entity) may prefer an upfront payment for less than the full amount—even where a payment plan would yield a collection of a greater portion of the fine—in order to speed up the collector's own remuneration. But any concern about corrupt collectors "low-balling" collections is overstated, given that factors warranting penalty reductions could and should have been incorporated into initial penalty assessments, and so should not play major roles in collections. The mere fact that money might corrupt some regulators mandates careful crafting and execution of any rewards regime, not avoiding such a regime altogether.

Objections to rewarding performance at the agency—as opposed to individual collector—level also do not warrant rejection of a performance-based reward system. First, critics could argue that more funding should be provided not to agencies with the best collections performance, but to those with the most room for improvement. However, to incentivize good performance, funding simply cannot be shunted toward weak performers. And performance-based funding need not disadvantage low-performing agencies, as funding could be tied to agencies' showing the greatest improvement or to their demonstrating strong compliance with best practices, rather than merely to collection rates or total amounts collected. Second, any collections gains resulting from healthy inter-agency competition might be offset by losses in agency coordination, as agencies might undermine each other in order to make themselves look better as they fight for bigger slices of the appropriations pie. But lack of inter-agency coordination is already a problem; there is no indication that paying for performance would make that worse. Rather, if performance, not finger-pointing, earns funding, agencies might cooperate out of self-interest. Third, although performance-based funding might minimize industry capture, it could exacerbate political capture. That is, the legislature could conceivably exert increased influence on agency decision making through its selective or conditional distribution of funds. However, it seems unlikely that political capture would reduce collections in this manner: If lawmakers wanted to deprioritize collections, directing funding toward high-performing collectors would not be the way to do it.

In short, if the root cause of undercollection is misaligned incentives, modifying individual and institutional incentives is likely the most direct—and most effective—manner of correcting the problem. However, as discussed in the next section, more radical structural changes could sidestep agency incentive problems altogether.

B. *Replace It—Privatize Collections*

Tying agency funding or agency staffers' pay to collections performance is a major step in the direction toward privatization; thus, actual privatization is the logical next option. There are several variations on the privatization model, each with its own potential benefits and risks. As we discuss below, several general benefits and risks cut across the different models. On the one hand, privatization can improve incentives to collect more penalty debt by ensuring collectors have a direct financial stake in the money generated by their collection efforts. On the other hand, some critics could view privatization as an abdication of an important government enforcement function. We conclude that one form of privatization—delegation of collections duties to private collection firms—best balances these benefits and drawbacks. However, given the institutional impediments to radical reform, we advocate efforts at intra-governmental reform before moving to a fully privatized model.

1. Private Collection Firms

Some agencies have experimented with hiring private firms to collect fines and penalties on their behalf,³⁸⁶ with apparent success.³⁸⁷ Many of the advantag-

386. GAO, SEC AND CFTC 2001, *supra* note 163, at 12; see *Federal Debt Management - Are Agencies Using Collection Tools Effectively?: Hearing Before the Subcomm. on Gov't Efficiency and Fin. Mgmt. of the H. Comm. on Gov't Reform*, 108th Cong. 7980 (2003) (statement of Richard L. Gregg, Comm'r of Financial Management Services) [hereinafter Gregg Testimony], available at <https://www.fms.treas.gov/news/reports/testimony-jun17-2003.html> (noting that private agencies under contract with Treasury's Financial Management Services increased their collections each of the three years for which data was tracked, collecting over \$156 million in five years); George F. Cole, *Fines Can Be Fines—And Collected; Here's How*, Winter 1989 JUDGES' J. 5, 9 (noting that an experiment in Snohomish County, Washington demonstrated that private collection agency collected 20.6% of criminal fines assigned to it; a third-party billing service, 14.3%; and court-generated notices, only 5.7%); Adam Melita, *Much Ado About \$26 Million: Implications of Privatizing the Collection of Delinquent Federal Taxes*, 16 VA. TAX REV. 699, 705 (1997) ("Since 1982, private collectors have gathered about \$1 billion in delinquent loan repayments on behalf of the Department of Education."); see also Melita, *supra*, at 714 (noting that "[s]tatistical estimates indicate that if the non-tax debts of \$48 billion had been turned over to private collectors promptly, nearly \$29 billion would have been recovered"—a recovery rate of about 60%, which is higher than the various agencies' collection rates in the available federal agency audit reports).

es of privatizing collections—such as stronger incentives and increased expertise—track the benefits of specializing the collections function and tethering pay to collections performance within the agency.³⁸⁸ But there are additional potential advantages. Whereas even well-functioning agencies serve quasi-legislative, judicial, and executive functions—they promulgate rules, impose sanctions for violations of those rules, and enforce those sanctions—private firms do not have potentially conflicting functions and mandates that can detract from the collection incentive. Similarly, whereas tying agency funding to collections effectiveness might jeopardize coordination among agencies, privatization would sidestep the drama: Private firms, unlike interdependent agencies, need not coordinate with competitors. Further, delegating collections to companies already subject to market forces³⁸⁹ would avoid the difficulties of trying to restructure regulators' incentives and financial stakes to essentially simulate market dynamics within government agencies.³⁹⁰

There are, however, potential drawbacks. In addition to variations of the unseemliness³⁹¹ and overdeterrence objections addressed above, there are cost-

387. See Melita, *supra* note 386, at 714.

388. One preliminary consideration that agencies face when delegating collections to private firms is how many firms to hire. If a single firm is effectively granted a monopoly over an agency's collections, it may demand too high a price for its services; it may have little incentive to avoid abusive practices; and, despite the profit motive, it may still not be sufficiently incentivized to act as efficiently as it otherwise would in the presence of competition. The presence of multiple firms alleviates some of these concerns, but could create logistical difficulties regarding how collections cases are assigned to different firms and how payables are processed and transferred to the agency. It also creates a risk of inconsistent treatment of offenders, unless the agency itself dictates and carefully monitors collections practices—an action which threatens to undermine the cost-savings that initially prompt the shift to private cost-collectors.

Treasury's Financial Management Services has developed a policy of contracting with various private collection agencies, which compete against each other such that those agencies that collect and resolve more debt gain a larger share of the referred debt portfolio. Gregg Testimony, *supra* note 386.

389. Firms hired by government agencies to collect debt are not necessarily exposed to market forces merely because they are private firms. Agencies may engage with firms in ways that insulate the firms from market forces, such as by retaining them regardless of their performance and costs. However, at least one agency, Treasury's Financial Management Services, has found a way to ensure that hired firms face competitive pressure. See *id.*

390. Melita, *supra* note 386, at 706 (“The agencies most burdened by delinquency are the ones pushing hardest for increased freedom to contract out [collections], a trend that may be attributable to the bureaucratic inertia of federal agencies, compelled to alter their procedures only when the outstanding debt problem becomes severe.”).

391. Commentators have raised or acknowledged criticism of privatization in various contexts, including situations where the delegation of government powers

related concerns. First, the private firm's commission cuts into collections performance gains. But so long as the increases in fines collected (plus the costs saved by avoiding internal collections) exceed the private firm's take, the move should be a net benefit. Moreover, if private firms' fees are a concern, one solution—already adopted by at least one local agency³⁹²—is to build the collector's fee into the fine itself as a “surcharge.” This would not pose a significant overdeterrence concern. If an offender violates a law, the offender, not the government, should pay—not only for any harm, but also for the particular costs of enforcement against that offender.³⁹³ Given that there will always be less than perfect collection of fines (let alone perfect detection of violations and enforcement of sanctions), the risk of overdeterrence through over-assessment should be minimal.

Second, private firms' incentives might exacerbate undercollection in some instances. Because private firms would receive only a fraction of amounts recovered, they might eschew collections in cases where the expected *recovery* exceeds collection costs, but the expected collector's *fee* does not.³⁹⁴ Abandonment of cases within this “blind spot” for private collectors would undermine deterrence and government revenue generation. Indeed, even government collectors under the current regime—unrestrained by private collectors' cost-benefit analysis—might collect such fines more effectively. However, as a practical matter, this should not be a significant problem. Private collectors (whether seeking to maintain an exclusive government contract or to compete with

includes enforcement-related responsibilities. Jody Freeman, *Extending Public Law Norms Through Privatization*, 116 HARV. L. REV. 1285, 1302 (2003) (explaining that adherents of “public law” view “bristle at the notion that government would seek to avoid . . . obligations by systematically contracting out functions” (emphasis omitted)); cf. Clifford J. Rosky, *Force, Inc.: The Privatization of Punishing, Policing, and Military Force in Liberal States*, 36 CONN. L. REV. 879, 969 (2004) (“Critics declare that the privatization of force is an ‘unseemly,’ ‘inappropriate’ delegation of an ‘inherently public function,’ a function that is ‘the quintessence of the state’s sovereign power.’”); Jack B. Weinstein, *Compensation for Mass Private Delicts: Evolving Roles of Administrative, Criminal, and Tort Law*, 2001 U. ILL. L. REV. 947, 978 n.131 (2001) (“In qui tam actions, if the Department of Justice does not intervene, private attorneys can themselves run with the ball. Sometimes the urge to obtain fees can appear unseemly.”).

392. Moore, *supra* note 82 (discussing Lawrence County, Ohio's imposition of fees as surcharges).
393. Incorporating collectors' fees into fines might, however, undermine collectors' incentive to collect fines inexpensively. But administrative agencies could combat any such effect by soliciting collections work from competing collections specialists. See *supra* note 388. Competition would undercut each firm's ability to collect in an inefficient or overpriced manner.
394. For example, private collectors might rationally forgo collecting a fine with an expected recovery of \$1000, expected collection costs of \$500, and a fee of 25% of the amount recovered (\$250).

rival firms) would have an incentive to pursue collections of some “net negative” penalties just to improve collections rates and keep agencies happy. Moreover, agencies could potentially sidestep the problem by hiring multiple, specialized collection firms, e.g., one for large debts and another for smaller debts.³⁹⁵ Similarly, this form of undercollection could also be avoided by forcing offenders to pay private firms’ collection costs. As argued above, offenders, not taxpayers, should bear enforcement costs.³⁹⁶ Adding the *costs* of collections to the fine is even more appropriate than adding the collector’s *fee* because costs perfectly track the harms flowing from an offender’s violation, mitigating the risk of overdeterrence. Finally, private undercollection could also be minimized by allowing or requiring private firms to return to referring agencies fines they choose not to pursue. Under this arrangement, government regulators would have the option to pursue private firms’ “blind spot” penalties, and no fines would be abandoned unless both government and private collectors passed on them. Thus, agencies could elect to promote deterrence by collecting fines even where they would not necessarily financially profit from doing so.

A third potential drawback to private collection firms is the costs involved in selecting, monitoring, and coordinating with private firms. Monitoring costs exist whether collections responsibilities are privatized or not, but these costs might be increased by the difficulties of monitoring a separate entity rather than internal personnel.³⁹⁷ Yet that increase might be outweighed by other efficiency gains.³⁹⁸ Unlike agencies, which largely lack effective collections record-tracking systems, private collectors (which both have a bottom line and are accountable to clients) are more likely to have robust systems in place to make both internal and external monitoring easier and more accurate. In addition, if initial screening adequately tests a private firm’s practices and procedures, less ongoing monitoring may be necessary.

395. Melita, *supra* note 386, at 712 (noting that some states “permit private contracts for specific types of debts, which can be especially costly to collect because of the smaller sums involved”); *id.* at 713 (“California has been using a private collection approach since 1984, specifically targeting small delinquent accounts which the state cannot afford to pursue otherwise.”).

396. See *supra* text accompanying note 392.

397. See OREGON AUDIT, *supra* note 131, at 5-6 (finding that agencies failed to adequately monitor the multiple private collections agencies under contract with the state, due at least in part to inadequate staffing, which prevented a determination of both firm compliance and of the efficiency of the referrals).

398. See Melita, *supra* note 386, at 713 (“Michigan has been using private collections for the past ten years. Collections have risen from a modest \$29 million in 1986 to \$106 million in 1995. Initially instituted because of the greater technological and personnel resources that the private collections firms had to offer, the state’s Commissioner of Revenue has been very pleased with the arrangement.” (footnotes omitted)); *id.* at 720 (“[T]he [Internal Revenue] Service simply cannot compete with private firms using the latest technological and methodological innovations and who are dedicated exclusively to the practice of debt collection.”).

Perhaps one of the most significant issues regarding both the effectiveness and propriety of utilizing private collection firms is timing. In general, the older a debt, the harder it is to collect,³⁹⁹ so the advantages of bringing in private collectors are muted when they are pursuing very old debt.⁴⁰⁰ However, even where agencies do use private firms as a primary collections technique, they typically only involve them after judgment has been entered or the agency has assessed the fine. But agencies often do not investigate offender assets prior to fine imposition or effectively exploit pre-judgment remedies.⁴⁰¹ Indeed, if collections performance is attributed to private agencies, agency staffers may have even less incentive to optimally investigate assets or use pre-judgment attachment because poor collections from pre-judgment mistakes will not be blamed on them.

One seemingly radical solution is to involve private firms even at the pre-judgment or pre-fine assessment stage. Private firms would bring their unique expertise into this process, quickly and effectively analyzing offenders' assets and advising agencies regarding whether attachments are worthwhile. Their incentives to do so might be somewhat attenuated: If no fine has yet been assessed, firms cannot be compensated on a commission basis at this stage. But firms can anticipate that the more assets they discover and/or seize, the larger the fine that they ultimately collect (a share of which they will receive).

Of course, such early involvement raises new risks. Giving private firms access to regulated companies' financial data raises confidentiality concerns.⁴⁰² Private firms' profit motives may impel them to abuse discovery methods, exaggerate offender assets, or over-utilize pre-judgment attachment remedies.⁴⁰³

399. *Id.* at 708 (“[D]ebts which are promptly turned over to a collection agency have a better chance of being recovered than stale debts.”).

400. *See* OREGON AUDIT, *supra* note 131, at 6-7 (reviewing sampling of debts that were referred to private collections agencies only after the agencies' internal collections units had first spent considerable time pursuing them, and finding that only \$200 of \$500,000 had been collected).

401. *See supra* Subsection III.B.2.

402. *But see* Melita, *supra* note 386, at 722 (discounting privacy concerns by noting that “[t]he experience of the Department of Education shows that during the more than fourteen years that the private collection program has been operating, not a single privacy complaint has ever been received.”).

403. Indeed, Congress passed the Fair Debt Collection Practices Act in large part because of the concern that private collection agencies' profit motives were driving them to engage in unsavory and abusive practices. Kara B. Schissler, Note, *Come and Knock on Our Door: The Fair Debt Collection Practices Act's Intrusion into New York's Summary Proceedings Law*, 22 CARDOZO L. REV. 315, 320 (2000). *But see* Gregg Testimony, *supra* note 386 (reporting, with regard to Treasury's FMS referrals to private collections agencies, that there were “no substantiated cases of [these agencies] using abusive or bullying tactics with debtors under our contracts”).

However, protections could be implemented, e.g., collectors could be walled off from agency personnel with discretion regarding fine assessment. In any event, use of private firms could potentially *minimize* abuses because only private firms, and not the government, are subject to the Federal Debt Collection Practices Act.⁴⁰⁴ That statute prohibits a variety of different abuses by private collectors.⁴⁰⁵

Ultimately, the more autonomy granted to private collection firms, the more effective they will be; but at the same time, concerns about agency abdication of responsibility and the risk of abuses increase. Despite the potential challenges, given the promising evidence about the ability of privatization to boost collections, experimentation with different levels and modes of agency control may be worthwhile.

2. Selling Collection Rights

An alternative to hiring for-profit collection agencies is to transfer to private entities not only the responsibility, but the *right*, to collect. This could be accomplished by sale of penalty debt to private bidders. There are several advantages to such a scheme.

First, selling collection rights would provide the ultimate stake-based incentive. Unlike collection agencies, which receive only a fraction of amounts collected, or government collectors, who currently receive no share of collected funds, purchasers of government receivables would keep every dollar collected. Moreover, this arrangement takes advantage of the “endowment” effect: Purchasers would be seeking to recover out-of-pocket losses (the sums expended to purchase the debt), and so are more likely to “feel” the loss intensely and, accordingly, pursue collections more vigorously.⁴⁰⁶

Second, creating private owners of collection rights would eliminate agency monitoring and coordination costs. Unlike agency-retained collection firms, private owners’ relationship with regulators would largely end upon transfer of the collection right.

404. 15 U.S.C. § 1692a(6)(C) (2006). The Fair Debt Collection Practices Act prohibits various abuses by collection agencies, but exempts state and federal employees acting within their duties.

[T]his creates a double standard whereby private collectors are more forthright and less abusive than their counterparts in government. An even more strange result is that a government agency which contracts out the collection of a debt to a private collector suddenly transforms the set of tactics that can be used, bringing the collection activity under the scope of the FDCPA.

Melita, *supra* note 386, at 715-16.

405. See Melita, *supra* note 386, at 715-16.

406. Seidenfeld, *supra* note 269, at 288.

Third, there may be some benefit to inviting entities besides private collection agencies to pursue penalty debt. Financially sophisticated firms, like hedge funds or investment banks, could have an advantage at valuing penalty debt and determining when to use, and how to structure, payment plans for corporate debtors. They might also be better at handling “existential fines,” i.e., fines that could potentially bankrupt debtors. Compared with collection firms, sophisticated bidders may be more familiar with particular industries or with business dynamics generally, and so may be more effective at determining and negotiating the maximal amount that could be collected without toppling a company.⁴⁰⁷

On the other hand, the arguable unseemliness of tethering pay to collections performance and of delegating important government duties to private parties reaches its apogee with auctions of collection rights. Some of the questionable distastefulness could be mitigated by a bidder vetting process: Agencies could set basic standards relating to collections procedures that would-be bidders would be required to satisfy before participating.⁴⁰⁸ The agency could also monitor bidders’ compliance with their requirements on a periodic or ongoing basis. Of course, as with the other efforts to rein in the risk of abuses,⁴⁰⁹ the more stringent the bidding standards or reporting requirements, the more the advantages of privatization are blunted.⁴¹⁰ As always, experimentation may be the only way to strike the right balance between the competing considerations.

Debt-pricing is another potential concern.⁴¹¹ A sales-based regime would mean that agencies would receive only the purchase price for the debt, not any part of amounts actually collected. Of course, if winning bids roughly reflect sums actually collectible, there should be no concern. Critics might contend

407. Auctions could also potentially enable efficient specialization. In other words, they could help match the companies best-suited to collecting money from certain types of debtors, e.g., criminal defendants, near-bankrupt corporations, etc.

408. Freeman, *supra* note 391, at 1317 (noting that agencies can extend public law norms to private companies by conditioning contracts on compliance with substantive regulations); see also Sarah Rubenstein, *Hospitals Put Patients’ Debt Up for Auction: Collection Agencies Bid Online for Right To Recoup Funds; Worries About Tougher Tactics*, WALL ST. J., June 3, 2008, <http://online.wsj.com/article/SB121244901525139563.html> (discussing how “[c]ollection firms are vetted for their tactics and approach to patient needs and concerns before they are allowed to participate in auctions” in the context of medical debts).

409. See generally Rubenstein, *supra* note 408 (“Now, some of the same collection agencies, as well as other firms that purchase debt outright, have begun participating as bidders in online auctions, in which they buy the debt or provide guaranteed payments to hospitals for access to the unpaid accounts. Some experts say this gives them more reason to aggressively pursue patients in arrears.”).

410. Freeman, *supra* note 391, at 1339.

411. Cf. Melita, *supra* note 386, at 721 (contrasting abuses of an early “tax-farming” system, where “[t]ypically, tax-farmers were held liable for the total expected tax revenue, meaning that every dollar not collected was another dollar lost by the tax-farmer”).

that bids could undervalue collectible amounts, and could reflect discounts based on inflated estimates of collection costs. In that case, agencies might pocket lower revenues than they would have retrieved had they conducted collections themselves. However, in time, competition among bidders should mitigate these risks; there is no reason to think a market-based system for “pricing” government debt would be less efficient than the current system.

Finally, the costs of implementing a bidding system might overwhelm its benefits. For example, bidders would expend resources analyzing the value of debt for sale, including the financial state of offenders, the risks and costs of collection, and the propriety of payments plans. This costly process would presumably be duplicated on the other side by agencies identifying an acceptable bidding range. Regulators might reduce such costs by simply accepting the highest bid without conducting their own pricing analysis, but this raises problems of its own, such as the risk of buyer collusion. Again, a well-developed market should alleviate this risk; but markets do not become robust overnight.

Because debt auctions would involve a more radical departure from existing prevalent models than the utilization of private firms, more robust evidence of their promise would be needed before a shift to this model would be warranted.

3. Public Interest Firms

Another radical option, and one that has not been considered in any of the literature we have reviewed, is for agencies to hire as collectors, or sell the right to collect fines to, public interest organizations. This alternative could address the “leakage” problem noted with hiring private collectors or selling collection rights—namely, that some of the money collected benefits only the private entity, and fails to promote the interests of the government or the public. Public interest organizations would, by virtue of their missions, reinvest any profits from fine collections in pursuing the public good. This approach would also reduce or eliminate the appearance of unseemliness inherent in transferring collection rights to purely for-profit enterprises.

However, public interest firms might not be any better incentivized or equipped than agencies to pursue collections. Public interest firms’ employees might perceive collections as low-reward, low-priority work. Public interest firms may lack specialized personnel to effectively conduct collections. They may even delegate collections to private collections agencies, thus perpetuating or exacerbating the benefit-leakage problem. And their mandates may diverge from those of the referring agencies. Thus, any advantages of this system could well be outweighed by the drawbacks.

C. Summary

For any approach to collection of government fines to be successful, it must properly align the incentives of those tasked with collections with the interests of the government and the public. The most promising approach appears to be

increased use of private collections agencies. Their concrete financial stake eliminates many of the problems undermining public agencies' collections efforts, and so maximizes the deterrence value of fines.⁴¹² Because that stake is inherent in the private firms' compensation structure, there is no need to engineer what may ultimately be ineffective ways to simulate market forces within the agencies.

Yet widespread utilization of private collection firms generates logistical challenges and risks of abuse. Moreover, to maximize the effectiveness of private firms, it may be necessary to utilize them in novel and potentially problematic ways—such as involving them at the pre-judgment stage.

Despite the attraction of private collection firms, in recognition of the risks—and of the realities of institutional inertia—we would advocate that, as a general matter, governments should first try reforms within the agencies before looking outside the agencies for solutions. If an agency segregates and specializes the collections function and communicates its prioritization through increased pay or other rewards, and collections still do not improve, then the inability of the agency to address the problem internally will have been squarely demonstrated.⁴¹³ At that point, turning to private collection firms will be both politically and economically defensible.

Of course, agencies will need to improve their recordkeeping and internal monitoring if their performance is to be fairly assessed in the first place. If they cannot accomplish even that preliminary step, then moving more quickly to a privatization regime may be warranted.

As more experiments with different forms of privatization occur, the details of how to best strike the balance between extracting benefits and minimizing risks should emerge. Because there are thousands of government agencies owed untold billions in outstanding fines, the room for such experimentation is vast.

CONCLUSION

As debates rage about whether and when to impose civil or criminal fines on corporate and white-collar offenders, or about how large such fines should be, the fact that only a fraction of the fines imposed are ever collected has drawn scant attention. The precise magnitude of the problem of undercollection of such fines is difficult to determine—a state of affairs due in large part to failures by administrative agencies themselves. What is clear is that undercollection is a significant problem, and one that is by no means entirely outside the agencies' hands. Whether policymakers will muster the political will to address the problem is an open question. Quite possibly, articles such as this one, which shed

412. Cf. Melita, *supra* note 386, at 725 (“If a tax debtor can escape government collectors—a problem that is growing ever more common—then the public may perceive that a delinquent return is just as good as a timely one.”).

413. See *supra* note 371 and accompanying text regarding success of agencies that have specialized their in-house collections functions.

light on the scope and seriousness of the problem, may stoke sufficient interest—and public outrage—to create such political will. Should that occur, the recommendations in this Article may serve as a blueprint to point policymakers in the direction of reforms with a realistic probability of yielding meaningful gains.