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# Redundant Public-Private Enforcement

Zachary D. Clopton

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## REDUNDANT PUBLIC-PRIVATE ENFORCEMENT

*Zachary Clopton*

THE LAW SCHOOL  
THE UNIVERSITY OF CHICAGO

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## REDUNDANT PUBLIC-PRIVATE ENFORCEMENT

ZACHARY D. CLOPTON\*

ABSTRACT: Redundancy is a four-letter word. According to courts and scholars, redundant litigation is costly, unfair, and confounding. Modern civil procedure has a (nearly) maximalist preference for centralization, and various rules seek to limit duplicative suits within and across court systems. This seemingly dominant view stands in marked contrast to the reality of the modern regulatory state. Redundant public-private enforcement, in which public and private actors have overlapping authority to enforce the law, is ubiquitous. Redundant enforcement also is noticeably underrepresented in the substantial literature on private and public enforcement, which treats government agencies and private attorneys general as substitutes rather than complements.

This Article seeks to fill these gaps. It begins with a survey of the myriad forms of redundant public-private enforcement in U.S. law, and then turns to a defense of redundant public-private enforcement. Scholars of engineering and public administration have built up a powerful literature about the potential uses of redundancy, and this Article is the first to apply those insights to the use of overlapping public and private enforcement in U.S. law. Drawing on those literatures, this Article derives principles of redundant enforcement accounting for the diversity of agents and the potential for strategic behavior. It argues that redundancy may be a response to errors, resource constraints, information problems, and agency costs, if redundant-enforcement regimes harness multiple diverse agents and are tailored to the relevant regulatory environment. Specifically, if the legislature worries that public or private agents are missing good cases, *redundant authority* may help to reduce errors, increase resources, aggregate information, and improve monitoring—though permitting duplicative suits may undercut these gains. Meanwhile, if the legislature is concerned about under-enforcing settlements or judgments, truly *redundant litigation* may be a valuable tool—though damages must offset to avoid multiple punishments, and procedural rules should maintain incentives and allocate cases.

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## PUBLIC-PRIVATE ENFORCEMENT

*Chief Justice Roberts: [W]hat prevents attorneys general from around the country sitting back and waiting until . . . the plaintiffs' class prevails, taking the same complaint, maybe even hiring the same lawyers, to go and say, well, now we are going to bring our parens patriae action, we know how the trial is going to work out, or we know what the settlement is going to look like, and we are going to get the same amount of money for the State? . . .*

*[T]he answer is that there is nothing to prevent fifty attorneys general—fifty-one, from saying, every time there is a successful class action as to which somebody in my State purchased one of the items, we are going to file a parens patriae action, the complaint is going to look an awful lot like the class action complaint, and we want our money? . . .*

*[Y]ou can't provide any reason why they wouldn't do so and, presumably, would start doing so with greater frequency if you prevail in this case.*

~Oral Argument in *Mississippi ex rel. Hood v. AU Optronics Corporation*.<sup>1</sup>

### I. INTRODUCTION

In *Mississippi ex rel. Hood*, the Attorney General of Mississippi filed a price-fixing suit on behalf of Mississippi residents against the manufacturers, marketers, and distributors of liquid crystal displays (LCD).<sup>2</sup> The Supreme Court unanimously held that the state's lawsuit on behalf of residents could not be consolidated with private class actions adjudicating common claims.<sup>3</sup> Though this decision addressed the meaning of "mass action" in the Class Action Fairness Act,<sup>4</sup> lurking behind that definitional question was a concern about duplicative public-private litigation. Could the state bring claims on behalf of residents when overlapping claims were maintained in separate, private class actions? Permitting the state to sue separately could allow state governments to file lawsuits duplicating private class actions, extorting damages from defendants while free-riding on the efforts of private attorneys.

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<sup>1</sup> *Mississippi ex rel. Hood v. AU Optronics Corp.*, 12-1036 (2013), Oral Argument Transcript (hereinafter "*Mississippi*, Argument").

<sup>2</sup> *Mississippi ex rel. Hood v. AU Optronics Corp.*, 134 S.Ct. 736 (2014); *Mississippi ex rel. Hood v. AU Optronics Corp.*, 701 F.3d 796 (5th Cir. 2012).

<sup>3</sup> 134 S.Ct. 736.

<sup>4</sup> See 28 U.S.C. § 1332(d)(11)(B)(i) (CAFA) (defining "mass action" as "any civil action . . . in which monetary relief claims of 100 or more persons . . .").

The Chief Justice’s concerns about follow-on government lawsuits recall the frequent criticism of private class actions trailing government investigations—so called coattail, tagalong, or piggyback class actions.<sup>5</sup> Professor Coffee, for example, colorfully exhorted the “spectacle, one resembling the Oklahoma land rush, in which the filing of the public agency’s action serves as the starting gun for a race between private attorneys, all seeking to claim the prize of lucrative class action settlements, which public law enforcement has gratuitously presented them.”<sup>6</sup> And Professor Rubenstein said that coattail class counsel “provides no independent search skills, no special litigation savvy, and no nonpoliticized incentives. She simply piles on and runs up the tab.”<sup>7</sup>

Criticism of redundant enforcement is equal opportunity. The aforementioned opponents of coattail class actions prefer government enforcement to private suits. As Professor Ratliff quipped “[w]hy pay for a ‘private attorney general’ when there is a public attorney general who works for free?”<sup>8</sup> Others worry about government enforcement. The Chamber of Commerce, no friend to the plaintiffs’ bar, has championed environmental citizen suits *over* EPA intervention.<sup>9</sup> Then-Attorney General, now-Judge William Pryor described “multigovernment litigation” as “the land of public corruption, constitutional subversion, and legalized antitrust conspiracies.”<sup>10</sup> And Chief Justice Roberts worried aloud that government attorneys would pile on and run up the tab against class-action defendants following the *Mississippi* decision.<sup>11</sup>

More broadly, the mere mention of duplication is met with resistance across a range of procedural contexts.<sup>12</sup> Modern civil procedure

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<sup>5</sup> *E.g.*, Howard M. Erichson, *Coattail Class Actions: Reflections on Microsoft, Tobacco, and the Mixing of Public and Private Lawyering in Mass Litigation*, 34 U.C. DAVIS L. REV. 1 (2000); Jamie Dodge, *Privatizing Mass Settlement*, 90 NOTRE DAME L. REV. 335 (2014); Myriam Gilles & Gary B. Friedman, *Exploding the Class Action Agency Costs Myth: The Social Utility of Entrepreneurial Lawyers*, 155 U. PA. L. REV. 103 (2006).

<sup>6</sup> John C. Coffee, Jr., *Rescuing the Private Attorney General: Why the Model of the Lawyer as Bounty Hunter Is Not Working*, 42 MD. L. REV. 215 (1983).

<sup>7</sup> William B. Rubenstein, *On What a “Private Attorney General” Is—And Why it Matters*, 57 VAND. L. REV. 2129 (2004).

<sup>8</sup> Jack Ratliff, *Parens Patriae: An Overview*, 74 TUL. L. REV. 1847 (2000).

<sup>9</sup> See Stephen M. Johnson, *Sue and Settle: Demonizing the Environmental Citizen Suit*, 37 SEATTLE UNIV. L. REV. 891 (2014). For a related argument with respect to civil-rights enforcement, see Michael Selmi, *Public vs. Private Enforcement of Civil Rights: The Case of Housing and Employment*, 45 UCLA L. REV. 1401 (1998).

<sup>10</sup> William H. Pryor, Jr., *A Comparison of Abuses and Reforms of Class Actions and Multigovernment Lawsuits*, 74 TUL. L. REV. 1885 (2000).

<sup>11</sup> *Mississippi*, Argument, *supra* note \_\_.

<sup>12</sup> See, *e.g.*, F. JAMES & G. HAZARD, CIVIL PROCEDURE 582 (3d ed. 1985) (“Failure [to join claims] has the consequences of multiplying and prolonging litigation, multiplying private and public legal costs, and bringing the system of justice into unnecessary disrepute.”); James E. Pfander, *Protective Jurisdiction, Aggregate Litigation, and the*

evinces a “maximalist” preference against redundancy;<sup>13</sup> the American Law Institute, in its measured way, has sought to increase opportunities for centralization in settlement and litigation;<sup>14</sup> and Professor Redish (less measuredly) has called for “zero tolerance” of duplicative litigation.<sup>15</sup>

As a general matter, these critics are correct. Duplication is costly and unfair, and we should worry that unjustified redundancy is the result of inattention or worse.<sup>16</sup> Accepting this conclusion, however, does not mean that redundancy is never justified. Scholars of engineering and public administration have built up a powerful literature about the potential uses of redundancy,<sup>17</sup> and this Article is the first to apply those insights to the nearly ubiquitous use of overlapping public and private enforcement in U.S. law.<sup>18</sup> This Article defends this type of duplication—what I call “redundant public-private enforcement”—and draws on the engineering and political-science literatures to offer a transsubstantive template for its use.

Redundant public-private enforcement describes legal regimes in which public and private agents may seek overlapping remedies for the same conduct on substantially similar theories. Importantly for the normative claims to follow, and in contrast to critics of redundancy, I further divide redundant enforcement into “redundant authority” and “redundant litigation.” Redundant authority describes the ability of multiple agents to bring separate enforcement actions that are mutually

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*Limits of Article III*, 95 CAL. L. REV. 1423 (2007) (“Congress enacted CAFA in part because state court class action practices unfairly burden corporate defendants with overlapping and duplicative litigation.”); Richard Freer, *Avoiding Duplicative Litigation: Rethinking Plaintiff Autonomy and the Court’s Role in Defining the Litigative Unit*, 50 U. PITT. L. REV. 809 (1989) (collecting sources); Alexandra D. Lahav, *Recovering the Social Value of Jurisdictional Redundancy*, 82 TUL. L. REV. 2369 (2008) (collecting sources).

<sup>13</sup> See Lahav, *supra* note \_\_; Richard L. Marcus, *Toward a Maximalist Use of the Multidistrict Litigation Panel’s Transfer Power*, 82 TUL. L. REV. 2245 (2008); Judith Resnik, *From “Cases” to “Litigation,”* 54 LAW & CONTEMP. PROBS. 5 (1991).

<sup>14</sup> See, e.g., Am. Law Inst., *Principles of the Law of Aggregate Litigation* (2006).

<sup>15</sup> Martin H. Redish, *Intersystemic Redundancy and Federal Court Power: Proposing a Zero Tolerance Solution to the Duplicative Litigation Problem*, 75 NOTRE DAME L. REV. 1347 (2000). When redundant litigation creates a litigation option for some plaintiffs, as it seems to do in *Mississippi*, courts and scholars are particularly wary. See Zachary D. Clopton, *Transnational Class Actions in the Shadow of Preclusion*, IND. L. J. (2015) (collecting sources and decisions denying class certification on this basis).

<sup>16</sup> Public choice may explain some of the existing redundant-enforcement regimes. See, e.g., DANIEL A. FARBER & PHILIP P. FRICKEY, *LAW AND PUBLIC CHOICE: A CRITICAL INTRODUCTION* (1991). This Article is indifferent to the causes of redundancy. Instead, the goal is to understand when and how redundancy can be a valuable legislative strategy.

<sup>17</sup> See *infra* Section III.A (collecting and discussing relevant literatures).

<sup>18</sup> See *infra* Part II (surveying areas of law). As noted below, occasionally legal scholars have discussed redundancy with respect to specific areas of law or to questions unrelated to enforcement. See *infra* note \_\_.

preclusive—public and private actors may have overlapping causes of action, but private-enforcement suits preclude future governmental litigation on the same claims, and vice versa. As argued below, redundant authority across diverse agents responds to errors, resource constraints, information problems, or agency costs at the level of case selection. Redundant public-private authority should mean that fewer good cases are missed, and claims-processing rules should allocate cases to target enforcement pathologies.

Redundant enforcement also may take the form of truly “redundant litigation.” Redundant litigation describes regimes in which public and private agents may file overlapping lawsuits, and the resolution of one suit does not preclude adjudication of the other.<sup>19</sup> Redundant litigation responds to some of the same problems as redundant authority, but it targets case outcomes—undervalued settlements or judgments resulting from agent (under-) performance. This Article explains that redundant litigation cures existing under-enforcement and deters future under-enforcement by allowing a second agent to fill the remedial gap, again depending on relevant differences between public and private enforcers. That said, redundant litigation by itself risks over-enforcement in the form of multiple punishments. Thus, legislatures adopting redundant litigation should rely on offsets to mitigate over-enforcement and claims-processing rules to reduce waste.

The natural place for this defense of redundant public-private enforcement is the substantial and growing literature comparing public and private enforcement of law.<sup>20</sup> But this literature routinely fails to grapple with redundant enforcement. The typical article in this vein totes up the relative advantages and disadvantages of private and public enforcement. These articles treat public and private enforcers as engaged in a zero-sum contest for enforcement jurisdiction. These enforcement scholars rightly observe that public and private enforcers differ on meaningful dimensions. But their conclusions, which assume that public and private enforcement are substitutes, miss both the descriptive reality and potential normative gains of complementary public and private enforcement. Filling these gaps, Part II documents the widespread use of redundant public-private enforcement in current law, and Part III draws on the engineering and political-science literatures to offer a defense of that practice and a template for its implementation. Redundancy may not be right fit for every situation, but it is similarly misguided to reject it without a second thought.

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<sup>19</sup> Scholars typically treat public and private enforcers as substitutes. See *infra* notes \_\_. As noted above, in redundant authority, agents have complementary authority, though they are substitutes in practice. In redundant litigation, however, agents are complementary in authority and in the courtroom.

<sup>20</sup> See *infra* notes \_\_ (collecting sources on public and private enforcement).

## II. EXISTING REDUNDANT PUBLIC-PRIVATE ENFORCEMENT

Redundant public-private enforcement is nothing new. The private enforcement of public law has been a central regulatory strategy for decades,<sup>21</sup> with historical antecedents tracing back centuries.<sup>22</sup> Meanwhile, for hundreds of years, governments have sued to vindicate seemingly private claims of their citizens,<sup>23</sup> culminating in modern litigation such as the consumer-protection suit that was the subject of *Mississippi ex rel. Hood*.<sup>24</sup> In many of these cases, public and private suits overlap. And yet, as noted above, the private and public enforcement literature often ignores redundant public-private enforcement.<sup>25</sup>

This Part begins by surveying redundant public-private enforcement—*i.e.*, enforcement schemes in which public and private actors may maintain separate but overlapping suits seeking remedies for the same conduct on substantially similar theories.<sup>26</sup> This review suggests that it is unwise to debate enforcement without considering the widespread use of redundant enforcement. This Part then turns to those procedural and remedial rules that govern when overlapping public-private claims are extinguished, maintained, or managed. Significantly, there is no universal template for rules on preclusion, damages, and claims processing that modulate public-private enforcement. Thus, those scholars who fail to engage with the reality of redundant enforcement miss an important opportunity to shape policy that is (or at least should be) subject to debate.

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<sup>21</sup> See, *e.g.*, Stephen B. Burbank, Sean Farhang & Herbert M. Kritzer, *Private Enforcement*, 17 LEWIS & CLARK L. REV. 637 (2013); J. Maria Glover, *The Structural Role of Private Enforcement Mechanisms in Public Law*, 53 WM. & MARY L. REV. 1137 (2012).

<sup>22</sup> See, *e.g.*, Rubenstein, *supra* note \_\_ (quoting an email from Professor Stephen Yeazell for the proposition that “private litigants for a millennium have sought prospective, specific remedies: replevin and ejectment were probably the two most commonly used remedies for 800 years, as long as land and livestock were major components of the economy”); Harold J. Krent, *Executive Control over Criminal Law Enforcement: Some Lessons From History*, 38 AM. U. L. REV. 275 (1989).

<sup>23</sup> See *Hawaii v. Standard Oil Co.*, 405 U.S. 251, 257 (1972) (discussing the kingly roots of *parens patriae*).

<sup>24</sup> See *supra* notes \_\_ and accompanying text (discussing *Mississippi*).

<sup>25</sup> See *infra* notes \_\_ (collecting sources). Not all literature on public-private enforcement ignores overlapping enforcement completely. Burbank, Farhang, and Kritzer’s study expressly identified private, public, and hybrid models. See Burbank, et al., *supra* note \_\_. And yet, even when acknowledging this third option, they addressed the advantages and disadvantages of private enforcement without expressly discussing redundant litigation. *Id.*

<sup>26</sup> For example, private suits for compensatory damages would be redundant with public suits aggregating all compensable injuries among state residents, but would not be redundant with public suits seeking only reimbursement of state Medicaid funds.

## A. Redundant Enforcement Regimes

This Section describes a range of examples of public-private enforcement, loosely grouped into three categories: (1) “private” claims; (2) “public” claims; and (3) hybrid regimes. These categories are blurry, but crisp divisions are not necessary here. The purpose of these divisions is to draw a general outline of the public-private enforcement landscape.

### 1. “Private” Claims

On one end of the spectrum are cases in which government actors bring claims that seem to address private rights.<sup>27</sup> I refer here to rights for which private parties have a remedy in court, so public enforcement necessarily has the capacity to overlap with private suits in these cases.

Many examples of public enforcement of private claims fall under the *parens patriae* label.<sup>28</sup> *Parens patriae* refers to the common-law right of a sovereign to bring suit on behalf of its citizens, though the term has been used to describe a larger set of governmental actions that seek to vindicate private rights.<sup>29</sup> *Parens patriae* actions address a wide range of issues. Notable cases have involved claims related to asbestos,<sup>30</sup> tobacco,<sup>31</sup> and firearms,<sup>32</sup> and less well-known examples can be found in antitrust, tax, insurance, and other areas.<sup>33</sup>

A useful illustration from comes from *Mississippi ex rel. Hood*, which provided the quotation at the start of this Article.<sup>34</sup> In that case, the State of Mississippi filed an antitrust and consumer protection suit on

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<sup>27</sup> See, e.g., Seth Davis, *Implied Public Rights of Action*, 114 COLUM. L. REV. 1 (2014); Adam S. Zimmerman, *Mass Settlement Rivalries*, 82 U. CIN. L. REV. 381 (2013); Margaret H. Lemos, *Aggregate Litigation Goes Public: Representative Suits by State Attorneys General*, 126 HARV. L. REV. 486 (2012) (hereinafter “Lemos, *Aggregate Litigation*”); Myriam Gilles & Gary Friedman, *After Class: Aggregate Litigation in the Wake of AT&T Mobility v. Conception*, 79 U. CHI. L. REV. 623 (2012); Adam S. Zimmerman, *Distributing Justice*, 86 N.Y.U. L. REV. 500 (2011); Richard P. Ieyoub & Theodore Eisenberg, *State Attorney General Actions, the Tobacco Litigation, and the Doctrine of Parens Patriae*, 74 TUL. L. REV. 1859 (2000).

<sup>28</sup> See, e.g., BLACK’S LAW DICTIONARY (9th ed. 2009) (defining *parens patriae* to mean, *inter alia*, “[a] doctrine by which a government has standing to prosecute a lawsuit on behalf of a citizen”). See also Alfred L. Snapp & Son, Inc. v. Puerto Rico, 458 U.S. 592 (1982) (discussing *parens patriae* in U.S. law).

<sup>29</sup> See Lemos, *Aggregate Litigation*, *supra* note \_\_. These public suits may draw on common-law or statutory sources for substantive rights as well as for the authority to bring such actions. *Id.* See, e.g., *supra* note \_\_ (citing Mississippi laws).

<sup>30</sup> *E.g.*, *Tioga Pub. Sch. Dist. 15 v. U.S. Gypsum Co.*, 984 F.2d 915 (8th Cir. 1993).

<sup>31</sup> See generally Ieyoub & Eisenberg, *supra* note \_\_ (discussing tobacco litigation).

<sup>32</sup> See generally David Kairys, *The Origin and Development of the Governmental Handgun Cases*, 32 CONN. L. REV. 1163 (2000).

<sup>33</sup> See Lemos, *Aggregate Litigation*, *supra* note \_\_ (collecting cases). See, e.g., 11 U.S.C. § 526 (authorizing private and state actions against debt relief agencies).

<sup>34</sup> See *supra* notes \_\_ and accompanying text (discussing *Mississippi*).

behalf of state residents against the LCD industry.<sup>35</sup> The state sought equitable and monetary relief on behalf of its citizens under antitrust and consumer-protection statutes, even though citizens had private rights of action under the same laws.<sup>36</sup> The Supreme Court held that the state suit could go forward in state court despite a consolidated, nationwide class action alleging the same claims.<sup>37</sup>

## 2. “Public” Claims

On the other end of the spectrum are cases in which private actors litigate seemingly public rights.<sup>38</sup> Again, these private suits complement public enforcement of the same claims.

The so-called “citizen suit” exemplifies the private enforcement of public rights.<sup>39</sup> The citizen suit is characterized by a lawsuit for injunctive or declaratory relief in order to compel compliance with the law, though many citizen-suit provisions permit monetary awards as well.<sup>40</sup> Citizen-suit options are particularly common in environmental statutes.<sup>41</sup> Indeed, according to Professor Thompson, “[e]very major environmental law passed since 1970 now includes a citizen suit provision (with the anomalous exception of the Federal Insecticide, Fungicide, and

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<sup>35</sup> 134 S.Ct. 736.

<sup>36</sup> See *Mississippi ex rel. Hood v. AU Optronics Corp.*, 701 F.3d 796 (5th Cir. 2012). Individual consumers had causes of action under the same statutes. *Id.* At least some private claims were settled prior to the Court’s decision. See, e.g., *In re TFT-LCD (Flat Panel) Antitrust Litigation*, No. 07-1827, 2013 WL 1365900 (N.D. Cal. Apr. 3, 2013).

<sup>37</sup> *Id.* The nationwide suit was consolidated in federal court pursuant to the Class Action Fairness Act of 2005. 28 U.S.C. §§ 1332(d), 1453 & 1711–15. See *supra* note \_\_.

<sup>38</sup> See, e.g., Stephen B. Burbank & Sean Farhang, *Litigation Reform: An Institutional Approach*, 162 U. PA. L. REV. (forthcoming); Burbank, et al., *supra* note \_\_; SEAN FARHANG, *THE LITIGATION STATE: PUBLIC REGULATION AND PRIVATE LAWSUITS IN THE UNITED STATES* (2010); Matthew C. Stephenson, *Public Regulation of Private Enforcement: The Case for Expanding the Role of Administrative Agencies*, 91 VA. L. REV. 93 (2005) (hereinafter “Stephenson, *Public Regulation*”); Rubenstein, *supra* note \_\_; Pamela H. Bucy, *Private Justice*, 76 S. CAL. L. REV. 1 (2002); Erichson, *supra* note \_\_; A. Mitchell Polinsky, *Private Versus Public Enforcement of Fines*, 9 J. LEGAL STUD. 105 (1980); William M. Landes & Richard A. Posner, *The Private Enforcement of Law*, 4 J. LEGAL STUD. 1 (1975); Gary S. Becker & George J. Stigler, *Law Enforcement, Malfeasance, and Compensation of Enforcers*, 3 J. LEGAL STUD. 1 (1974).

<sup>39</sup> See, e.g., BLACK’S LAW DICTIONARY (9th ed. 2009) (defining “citizen suit” to mean “[a]n action under a statute giving citizens the right to sue violators of the law (esp. environmental law) and to seek injunctive relief and penalties”).

<sup>40</sup> See, e.g., 33 U.S.C. § 1365(a) (granting district courts the authority to “apply any appropriate civil penalties” in Clean Water Act citizen suits).

<sup>41</sup> See, e.g., Clean Air Act, 42 U.S.C. § 7604; Comprehensive Environmental Response, Compensation and Liability Act of 1980, 42 U.S.C. §§ 9601-59; Endangered Species Act, 16 U.S.C. §§ 1531-40(g).

Rodenticide Act).<sup>42</sup> Explicit citizen-suit provisions also exist in consumer-protection and voting-rights statutes, among others.<sup>43</sup> And at common law, private and public actors may be able to bring overlapping claims variously described as “diffuse private rights” or “common public rights”—for example, a suit for the enjoyment of natural resources.<sup>44</sup> In each of the cases, public and private parties have the option to enforce the law. Sometimes private and public enforcers may each seek monetary relief,<sup>45</sup> and sometimes private attorneys may collect attorney fees from defendants if they win.<sup>46</sup>

In addition, in some circumstances, private parties stand in the shoes of the government. In *qui tam* cases,<sup>47</sup> a private party prosecutes a claim on behalf of the government—for example, a claim that a government contractor has defrauded a federal agency.<sup>48</sup> Private parties may litigate these cases themselves, or the government may intervene and displace the private suit.<sup>49</sup> Either way, the private party may share in the government’s recovery.<sup>50</sup>

### 3. *Hybrid Regimes*

The grey area between *parens patriae* suits vindicating private claims and citizen suits pursuing public-interest enforcement is expansive in breadth and depth. It would be impossible to survey every such

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<sup>42</sup> Barton H. Thompson, Jr., *The Continuing Innovation of Citizen Enforcement*, 2000 U. ILL. L. REV. 185, 192. But see 43 U.S.C. § 1701 (no citizen suits for Federal Land Policy and Management Act of 1976); 42 U.S.C. § 4321 (no citizen suits for NEPA).

<sup>43</sup> Consumer Product Safety Act, 15 U.S.C. §§ 2072-73 (creating a private right of action for injunction (and fees) to enforce product safety rules); National Voter Registration Act of 1993, 42 U.S.C. § 1973gg-9 (private party may seek declaratory or injunctive relief and fees). Indeed, one might say that injunctive-relief provisions of any hybrid statute authorize citizen suits. See *infra* Section II.A.3 (collecting hybrid regimes).

<sup>44</sup> *E.g.*, Alaska Sport Fishing Assn. v. Exxon, 34 F.3d 769 (9th Cir. 1994); Friends of Milwaukee’s Rivers v. Milwaukee Metro. Sewerage, 382 F.3d 743 (7th Cir. 2004).

<sup>45</sup> See, *e.g.*, Alaska Sport Fishing Assn., 34 F.3d at 770 (“Alaska Sportfishing Association and four individual sportfishers . . . [filed suit] seeking damages for loss of use and enjoyment of natural resources resulting from the 1989 Exxon Valdez oil spill.”).

<sup>46</sup> See FARHANG, *supra* note \_\_ (collecting data). Public attorneys also may be able to recover costs. See, *e.g.*, Pine River Logging Co. v. United States, 186 U.S. 279 (1902).

<sup>47</sup> *Qui tam* is short for *qui tam pro domino rege quam pro se ipso in hac parte sequitur*, or “who as well for the king as for himself sues in this matter.” BLACK’S LAW DICTIONARY (9th ed. 2009).

<sup>48</sup> The most well-known U.S. *qui tam* statute is the Federal False Claims Act, 31 U.S.C. § 3729 *et seq.*, though *qui tam* provisions also exist in state false claims acts, *e.g.*, Cal. Gov’t Code §§ 12650-56; 740 Ill. Comp. Stat. § 175/1-8; 6 Del. C. §§ 1201-11, as well as in other federal statutes. 25 U.S.C. § 201 (Indian protection laws); 35 U.S.C. § 292 (false marking of patented goods, prior to 2011 amendments).

<sup>49</sup> 31 U.S.C. § 3730(b) (permitting the government to take over FCA suit).

<sup>50</sup> See 31 U.S.C. § 3730(d) (providing relator recovery of 15 to 25 percent if the government intervenes or 25 to 30 percent if the government does not).

provision in a digestible format, but it is worth considering the range of regimes to better understand the place of redundant public-private enforcement in U.S. law.<sup>51</sup>

Perhaps the easiest way to organize this material is by area of law, and I will begin here with antitrust enforcement. Antitrust law serves both public and private values. According to the Supreme Court: “Congress created the Sherman Act’s private cause of action not solely to compensate individuals, but to promote ‘the public interest in vigilant enforcement of the antitrust laws.’”<sup>52</sup> There is overlapping public and private enforcement of the antitrust provisions of the Sherman Act, Clayton Act, and sections of the Robinson-Partman Act and Wilson Tariff Act.<sup>53</sup> Importantly for present purposes, public and private antitrust enforcement may proceed redundantly. Private enforcement of antitrust law frequently takes the form of “coattail class actions,” which are private suits following the announcement of public enforcement.<sup>54</sup> Private actions also might alert public regulators of a potential problem, leading to follow-on public enforcement.<sup>55</sup> Finally, public and private recoveries may interact as the Federal Trade Commission (FTC) has dedicated some disgorgement awards from government antitrust settlements for distribution to private parties.<sup>56</sup>

Securities enforcement tracks many elements of the antitrust-law story. Securities suits claim to vindicate both private and public values.<sup>57</sup> Securities law is characterized by a high degree of private enforcement,

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<sup>51</sup> Most of the examples here are from federal law, though state law also may provide for overlapping enforcement. See, e.g., Ann K. Wooster, *Annotation, Private Attorney General Doctrine—State Cases*, 106 A.L.R. 5th 523 (collecting state cases).

<sup>52</sup> *American Exp. Co. v. Italian Colors Restaurant*, 133 S.Ct. 2304, 2313 (2013) (quoting *Lawlor v. National Screen Service Corp.*, 349 U.S. 322, 329 (1955)).

<sup>53</sup> See 15 U.S.C. § 15 (referring to “antitrust laws,” defined in 15 U.S.C. § 12).

<sup>54</sup> See, e.g., Erichson, *supra* note \_\_ (noting that more than one hundred “coattail class actions” followed the government’s antitrust investigation of Microsoft).

<sup>55</sup> See, e.g., Arthur M. Kaplan, *Antitrust as a Public-Private Partnership: A Case Study of the NASDAQ Litigation*, 52 CASE W. RES. L. REV. 111 (2001) (noting that private lawsuits “resuscitated” public antitrust enforcement against NASDAQ). This phenomenon is not unique to antitrust. See Michael L. Rustad, *Smoke Signals From Private Attorneys General in Mega Social Policy Cases*, 51 DEPAUL L. REV. 511, 518 (2001) (“Private attorneys general, not government regulators, discovered that Firestone Tires mounted on Ford Explorers caused hundreds of rollover accidents due to tread separation. . . . The NHTSA [National Highway Traffic Safety Administration] based its recall of 6.5 million tires on information provided by plaintiff’s counsel, rather than [by] in-house government investigators.”).

<sup>56</sup> See, e.g., *In re First Databank Antitrust Litig.*, 209 F. Supp. 2d 96, 101 (D.D.C. 2002) (discussing FTC settlement offset); Fed. Trade Comm’n, Policy Statement (Aug. 4, 2003), 68 FR 45820-03, 2003 WL 21780660 (F.R.) (discussing FTC’s use of restitution).

<sup>57</sup> E.g., PSLRA, S. Rep. 104-98 at 8 (discussing compensation and deterrence).

whether through implied<sup>58</sup> or express<sup>59</sup> rights of action, but it also involves public enforcement by various federal and state agencies.<sup>60</sup> Private action may ride the coattails of public enforcement,<sup>61</sup> or may motivate it.<sup>62</sup> Finally, like the FTC, the Securities and Exchange Commission (SEC) attempts to compensate victims of securities fraud through the “fair funds program,” which distributes recoveries collected in public enforcement actions to private parties—even when redundant private securities actions may be available.<sup>63</sup>

Redundant private and public enforcement is also quite common in civil rights, labor, and employment. Public and private parties may bring overlapping employment suits alleging discrimination on the basis of race, color, religion, sex, or national origin,<sup>64</sup> disability,<sup>65</sup> or age.<sup>66</sup> Public and private suits can vindicate federal rules on minimum wage or maximum hour,<sup>67</sup> family and medical leave,<sup>68</sup> whistleblower protection,<sup>69</sup> or migrant and seasonal agricultural worker standards.<sup>70</sup> The Fair Housing Act provides for overlapping public and private enforcement,<sup>71</sup> and courts

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<sup>58</sup> See, e.g., *Musick, Peeler & Garrett v. Employers Ins. of Wausau*, 508 U.S. 286 (1993) (1934 Securities Exchange Act, Section 10(b) contribution action); *Merrill Lynch v. Curran*, 456 U.S. 353 (1982) (Commodities Exchange Act); *Superintendent of Ins. v. Bankers Life & Cas. Co.*, 404 U.S. 6 (1971) (1934 Securities Exchange Act, Section 10(b)); *J. I. Case Co. v. Borak*, 377 U.S. 426 (1964) (1934 Securities Exchange Act, Section 14(a)).

<sup>59</sup> See, e.g., 15 U.S.C. § 78i (manipulation of security prices); 15 U.S.C. § 78r (misleading statements); 15 U.S.C. § 78t-1 (insider trading).

<sup>60</sup> See *SEC v. Robert Collier & Co.*, 76 F.2d 939 (1935) (holding that the SEC had independent litigating authority); N.Y. Gen. Bus. Law §§ 352-359-h (“Martin Act”) (providing authority to New York State Attorney General). For criticism of the claim that private enforcement supplements SEC enforcement, see Maria Correia & Michael Klausner, *Are Securities Class Actions “Supplemental” to SEC Enforcement?* (in progress).

<sup>61</sup> See, e.g., Erichson, *supra* note \_\_.

<sup>62</sup> See *supra* note \_\_ (discussing NASDAQ case).

<sup>63</sup> See 15 U.S.C. § 7246. See generally Urska Velikonja, *Public Compensation for Private Harm: Evidence from the SEC’s Fair Fund Distributions*, 67 STAN. L. REV. (forthcoming); Verity Winship, *Fair Funds and the SEC’s Compensation of Injured Investors*, 60 FLA. L. REV. 1103 (2008). Private class actions were filed in 65% of cases in which the SEC created a fair fund, and investors were entitled to private recoveries in nearly half of these cases. *Id.*

<sup>64</sup> 42 U.S.C. § 2000e-5 (Title VII).

<sup>65</sup> 29 U.S.C. § 626 (Age Discrimination in Employment Act).

<sup>66</sup> 42 U.S.C. § 12117(a) (Americans with Disabilities Act)

<sup>67</sup> 29 U.S.C. § 216 (Fair Labor Standards Act).

<sup>68</sup> 29 U.S.C. § 2617 (Family and Medical Leave Act).

<sup>69</sup> 18 U.S.C. § 1514A (Sarbanes-Oxley Act).

<sup>70</sup> 29 U.S.C. §§ 1852-54 (Migrant & Seasonal Agricultural Worker Protection Act).

<sup>71</sup> 42 U.S.C. § 3613.

have found implied private rights of action in various civil rights statutes that also authorize public enforcement.<sup>72</sup>

Private and public enforcement overlap in any number of other federal and state enforcement schemes. The Employee Retirement Income Security Act (ERISA) relies on private and public actions,<sup>73</sup> as do many state and federal consumer-protection statutes.<sup>74</sup> Public and private civil actions may enforce the Racketeer Influenced and Corrupt Organizations Act (RICO) as well.<sup>75</sup> More obscurely, the U.S. Attorney General, state attorneys general, and “boxers” may sue under the Muhammad Ali Boxing Reform Act,<sup>76</sup> and educational institutions and the FTC may sue sports agents for unfair and deceptive acts with respect to student athletes.<sup>77</sup>

Finally, although not entirely relevant to this Article’s inquiry, there are various statutory schemes in which public *criminal* enforcement operates in parallel with public or private civil enforcement.<sup>78</sup> RICO<sup>79</sup> and some antitrust rules<sup>80</sup> may be enforced through criminal prosecution or civil suits. Criminal and private civil enforcement also are available in connection with sexual exploitation or child abuse,<sup>81</sup> and the Electronic Communications Privacy Act has private civil, public civil, and public criminal provisions.<sup>82</sup> During Prohibition, criminal enforcement of the alcohol laws was supplemented by private civil actions for property

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<sup>72</sup> *E.g.*, *Morse v. Republican Party of Va.*, 517 U.S. 186 (1996) (Section 10 of the Voting Rights Act (“VRA”)); *Thornburg v. Gingles*, 478 U.S. 30 (1986) (Section 2 of the VRA); *Cannon v. Univ. of Chicago*, 441 U.S. 677 (1979) (Title IX); *Allen v. State Bd. of Elections*, 393 U.S. 544 (1969) (Section 5 of the VRA).

<sup>73</sup> 29 U.S.C. § 1132.

<sup>74</sup> Myriam E. Gilles, *Reinventing Structural Reform Litigation: Deputizing Private Citizens in the Enforcement of Civil Rights*, 100 COLUM. L. REV. 1384, 1430 n.189 (2000) (discussing Uniform Deceptive Trade Practices Act); 15 U.S.C. §§ 1681n, 1681o, 1681s (public and private enforcement under the Truth in Lending Act); 39 U.S.C. § 3017 (liability for mailing skill contest or sweepstakes to individual who requested exclusion); 47 U.S.C. § 227 (liability for telephone solicitation to individual who requested exclusion).

<sup>75</sup> 18 U.S.C. § 1964.

<sup>76</sup> 15 U.S.C. § 6309. “Boxer” is defined as “an individual who fights in a professional boxing match.” 15 U.S.C. § 6301.

<sup>77</sup> 15 U.S.C. §§ 7803, 7805. For a few other examples, see 12 U.S.C §§ 1972, 1975 (private and public enforcement against bank tying arrangements); 47 U.S.C. §§ 206, 207, 274 (rights of action under the Communication Act); 50 App. U.S.C. §§ 597 & 597a (private and public actions under the Servicemembers Civil Relief Act).

<sup>78</sup> Criminal law also may overlap with common-law liability. See, *e.g.*, Thomas Koenig & Michael Rustad, “*Crimtorts*” as *Corporate Just Deserts*, 31 U. MICH. J.L. REFORM 289 (1998).

<sup>79</sup> 18 U.S.C. §§ 1961-68.

<sup>80</sup> 15 U.S.C. §§ 1 *et seq.*

<sup>81</sup> 18 U.S.C. § 2255; *Paroline v. United States*, 134 S.Ct. 1710 (2014) (discussing criminal restitution to victims of child pornography).

<sup>82</sup> 18 U.S.C. § 2520.

damage by an intoxicated person against the provider of liquor.<sup>83</sup> And, amusingly, while the U.S. government offers awards to private parties who help detect customs violations, if a public official tips off a private party in exchange for a share of that award, she may be the subject of a criminal prosecution and the complicit private party may bring a civil action to get her money back.<sup>84</sup> Although criminal restitution reflects some elements of the public enforcement discussed here, this Article's focus remains on overlapping *civil* enforcement.

## B. Managing Redundancy

Whether private, public, or hybrid subject matter, each of the described regimes allows both public and private actors to bring suit. But the authority to sue on the same claim does not tell the whole story. The procedural and remedial rules that govern these suits provide important context. Preclusion determines whether redundant litigation is maintained or extinguished. Damages rules determine whether consecutive actions will manifest in redundant payouts—whether defendants pay twice, and whether redundant plaintiffs recover irrespective of the first case. Claims-processing rules determine whether redundant litigation is sequential or simultaneous, and which party's suit goes first. This Section reviews the varied approaches to preclusion, damages, and claims processing in redundant enforcement in U.S. law. At best, current law offers an extensive experiment into manifold combinations of these rules. Less charitably, current law is a muddle calling out for the coherence that Part III hopes to offer.

### 1. Preclusion

The first potential management tool for redundant enforcement is preclusion. Although preclusion has a precise legal definition,<sup>85</sup> it is used here to refer to any situation in which prior adjudication forecloses a future suit, whether based on a judicially enunciated rule or a statute-specific requirement.<sup>86</sup> In particular, this Article is concerned with the effect of a prior disposition on a non-party plaintiff—the effect of a settlement or judgment in a public suit on a putative private plaintiff, or vice versa.<sup>87</sup> Again, if the first suit precludes the second, then redundant

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<sup>83</sup> Section 32, Act Oct. 28, 1919, c. 85, Title II, § 20, 41 Stat. 313 (repealed).

<sup>84</sup> 19 U.S.C. § 1620.

<sup>85</sup> See, e.g., Restatement (Second) of Judgments, ch. 3.

<sup>86</sup> See *infra* notes \_\_ and accompanying text.

<sup>87</sup> This discussion may bring to mind *United States v. Mendoza*, in which the Supreme Court held that nonmutual offensive issue preclusion does not apply against the federal government. 464 U.S. 154 (1984). Nonmutual offensive issue preclusion describes a new plaintiff's use of a finding of fact from an earlier proceeding to establish part of its case against the defendant from that earlier case. See, e.g., *Parklane Hosiery Co. v. Shore*, 439 U.S. 322 (1979). Even if one accepted the *Mendoza* rule uncritically, it relates

authority stops short of redundant litigation. If preclusion does not attach, redundant litigation is permitted and the second suit proceeds without regard to the outcome in the first case.<sup>88</sup>

To begin with a general observation, public and private suits are neither universally preclusive nor universally non-preclusive. In some situations, public and private enforcement actions are mutually non-preclusive. In antitrust, for example, the Supreme Court explained that “the Government is not bound by private antitrust litigation to which it is a stranger,” while “private parties, similarly situated, are not bound by government litigation.”<sup>89</sup> Likewise, in various voting-rights cases, courts have allowed public litigation to follow private suits on the same claims, or vice versa.<sup>90</sup> These cases thus permit redundant litigation.

In other situations, public and private suits are mutually preclusive. Traditionally, preclusion does not attach to non-parties.<sup>91</sup> But in some cases of redundant public-private enforcement, preclusion applies to non-parties as a result of common-law exceptions to the background rule,<sup>92</sup> special considerations for government representation,<sup>93</sup> or specific statutory provisions.<sup>94</sup> Courts have found preclusion between public and private actions in cases involving ERISA,<sup>95</sup> the Age Discrimination in

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to findings adverse to a party to both proceedings—but here we are potentially dealing with the effect of findings on a nonparty.

<sup>88</sup> See *supra* notes \_\_ and accompanying text.

<sup>89</sup> *Sam Fox Pub. Co. v. United States*, 366 U.S. 683 (1961).

<sup>90</sup> *E.g.*, *Hathorn v. Lovorn*, 457 U.S. 255, 268 n. 23 (1982) (“The Attorney General is not bound by the resolution of § 5 issues in cases to which he was not a party.”), *Cleveland Cty. Assn. v. Cleveland Cty. Bd. of Commrs.*, 142 F.3d 468, 473–74 & n. 11 (D.C. Cir. 1998) (private following public).

<sup>91</sup> See, *e.g.*, *Martin v. Wilks*, 490 U.S. 755, 761 (1989).

<sup>92</sup> See, *e.g.*, *Taylor v. Sturgell*, 553 U.S. 880 (2008) (discussing privity).

<sup>93</sup> For example, whether the government adequately represented its citizens has been treated differently by courts than private versions of the same inquiry. See Lemos, *Aggregate Litigation*, *supra* note \_\_. Indeed, some courts “presume that the state will adequately represent the position of its citizens.” *Alaska Sport Fishing*, 34 F.3d at 773.

<sup>94</sup> See, *e.g.*, *U.S. ex rel. Sarafoglou v. Weill Medical College*, 451 F.Supp.2d 613 (S.D.N.Y. 2006) (“In the qui tam context, the relator is in privity with the Government.”).

<sup>95</sup> *E.g.*, *Donovan v. Cunningham*, 716 F.2d 1455, 1462-63 (5th Cir. 1983); *Herman v. South Carolina Nat. Bank*, 140 F.3d 1413, 1422–27 (11th Cir. 1998); *Beck v. Levering*, 947 F.2d 639, 642 (2d Cir. 1991); *Secretary of Labor v. Fitzsimmons*, 805 F.2d 682, 687–97 (7th Cir. 1986) (en banc). Courts reaching this conclusion seek to cast ERISA in public-minded terms. See, *e.g.*, *Herman*, 140 F.3d at 1423 (“[I]n suing for ERISA violations, the Secretary seeks not only to recoup plan losses, but also to supervise enforcement of ERISA, to guarantee uniform compliance with ERISA, to expose and deter plan asset mismanagement, to protect federal revenues, to safeguard the enormous amount of assets and investments funded by ERISA plans, and to assess civil penalties for ERISA violations.”). One could say the same about any number of statutes that protect private rights. See *supra* notes \_\_.

Employment Act,<sup>96</sup> and the Fair Labor Standards Act,<sup>97</sup> to name a few.<sup>98</sup> *Qui tam* regimes also may apply mutual non-party preclusion,<sup>99</sup> though the meaning of “party” is complicated by this peculiar type of suit.<sup>100</sup>

In still other areas, preclusion is asymmetric. Some statutes codify one-way preclusion. A number of civil rights statutes provide that private actions may be cut off by public enforcement,<sup>101</sup> and EPA actions trump environmental citizen suits even though private suits would not preclude public enforcement.<sup>102</sup> Particularly when the government is pursuing a public-oriented remedy, there seems to be a background understanding that private actions do not preclude redundant public enforcement.<sup>103</sup> Meanwhile, many courts are willing to treat representative public actions as preclusive on private suits—*i.e.*, private citizens may *not* litigate individual claims if the state previously litigated on their behalf.<sup>104</sup> In sum, public-private preclusion attaches in some but not all cases; it may depend on judicial doctrine, statutory language, and case-specific factors; and it may be symmetrical or asymmetrical.

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<sup>96</sup> The ADEA provides that public enforcement bars subsequent private suits. See 29 U.S.C. § 626(c)(1). Some courts have treated private ADEA suits as preclusive on the EEOC. *E.g.*, *EEOC v. U.S. Steel Corp.*, 921 F.2d 489, 495 (3d Cir.1990) (Alito, J.).

<sup>97</sup> Compare *Chao v. A-One Medical Servs., Inc.*, 346 F.3d 908, 920–23 (9th Cir. 2003) (private FLSA suit bars public enforcement) with 29 U.S.C. § 216(b) (providing that public suits preclude subsequent private suits).

<sup>98</sup> Sarbanes-Oxley’s whistleblower protections limit private actions if the DOL issued a final decision. 18 U.S.C. § 1514A. At least one court held that a private judgment precluded future public enforcement. *Leon v. IDX Systems*, 464 F.3d 951 (9th Cir. 2006).

<sup>99</sup> *In re Schimmels* held that the government is bound by the result of a *qui tam* suit even if it did not intervene. 127 F.3d 875 (9th Cir. 1997). The government conceded this point at oral argument in *KBR v. United States ex rel. Carter*, No. 12-1497 (Jan. 13, 2015). Relatedly, some courts reject *pro se* relators because of the government may be precluded. See, *e.g.*, *United States ex rel. Mergent Servs. v. Flaherty*, 540 F.3d 89, 94 (2d Cir. 2008).

<sup>100</sup> For discussion of a related issue, see *Vermont Agency of Natural Resources v. United States ex rel. Stevens*, 529 U.S. 765 (2000) (Article III standing in *qui tam* suits).

<sup>101</sup> 42 U.S.C. § 3613 (Fair Housing Act); 29 U.S.C. § 626(c)(1) (Age Discrimination in Employment Act); 29 U.S.C. § 216(b) (Fair Labor Standards Act).

<sup>102</sup> See *supra* note \_\_ (collecting statutory provisions). For example, according to the Ninth Circuit: “the United States would not be bound by the proposed consent judgment in this action [under the Federal Water Pollution Control Act] and could bring its own enforcement action at any time.” *Sierra Club, Inc. v. Electronic Controls Design, Inc.*, 909 F.2d 1350, 1356 n. 8 (9th Cir. 1990) (internal citation omitted).

<sup>103</sup> See, *e.g.*, 18A Fed. Prac. & Proc. Juris. § 4458.1 (2d ed.). But this rough guide does not account for all cases nor does it explain which hybrid cases are public or private.

<sup>104</sup> See, *e.g.*, *Satsky v. Paramount Communications, Inc.*, 7 F.3d 1464, 1470 (10th Cir. 1993). Courts retain discretion to determine if the government suit sufficiently represented private interests. See, *e.g.*, *In re Exxon Valdez*, 270 F.3d 1215 (9th Cir. 2001).

## 2. Damages

Damages rules are a second set of tools to structure public-private enforcement. Civil damages are the central form of deterrence and compensation in many of these areas, and the ability to obtain damages is a key incentive for enforcement actions.<sup>105</sup> Under various statutes, public and private actors may obtain overlapping remedies,<sup>106</sup> though at times damages are characterized differently for public and private parties.<sup>107</sup> Related to damages are private attorney fees, which may be a necessary incentive for private actions.<sup>108</sup> Attorney fees are available in some but not all cases.<sup>109</sup>

If redundant authority becomes redundant litigation, an important question is whether damages are cumulative or concurrent—will a defendant pay double because she is subject to sequential enforcement suits?<sup>110</sup> The answer to this question has significant consequences for (over- or under-) deterrence, (over- or under-) compensation, and fairness.<sup>111</sup> Again, outcomes are not consistent across regulatory areas.<sup>112</sup> In both antitrust and securities enforcement, for example, the general rule is that a defendant will be able to offset compensatory or disgorgement awards.<sup>113</sup> If recoveries in a public suit are characterized as

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<sup>105</sup> See, e.g., *supra* notes \_\_ (discussing antitrust and securities enforcement).

<sup>106</sup> See, e.g., 42 U.S.C. § 3613 (Fair Housing Act); 29 U.S.C. § 1132 (ERISA); 42 U.S.C. § 1981a (employment discrimination).

<sup>107</sup> For example, private suits for bank-tying arrangements receive treble damages, while public enforcement seeks civil penalties. 12 U.S.C. §§ 1972, 1975. Available remedies also may differ markedly between public and private suits. *E.g.*, 15 U.S.C. §§ 78t-1(b), 78u-1(a)(2) (civil penalties to SEC and private actions for profit gained or loss avoided in insider trading).

<sup>108</sup> See, e.g., Burbank, et al., *supra* note \_\_ (collecting data on fee provisions in private-enforcement statutes); FARHANG, *supra* note \_\_.

<sup>109</sup> See *id.* Interestingly, attorney fees do not always depend on private recovery. In antitrust suits, even when a prior settlement with a co-defendant reduced a plaintiff's right to compensatory damages to zero, courts will permit litigation against the non-settling defendant for purpose of determining whether plaintiff is entitled to fees. See, e.g., *Funeral Consumers Alliance. v. Service Corp. Intern.*, 695 F.3d 330 (5th Cir. 2012).

<sup>110</sup> See *infra* note \_\_ (collecting sources on “multiple punishments”).

<sup>111</sup> See, e.g., *Winship*, *supra* note \_\_ (discussing McAfee securities case).

<sup>112</sup> The Supreme Court has cautioned on multiple occasions that “it goes without saying that the courts can and should preclude double recovery by an individual.” *EEOC v. Waffle House, Inc.*, 534 U.S. 279, 297 (2002); *General Telephone Co. of Northwest v. EEOC*, 446 U.S. 318, 333 (1980). But, of course, the issue here is not double recovery by the same party, but double liability paid by the same defendant to two different parties. See *infra* notes \_\_ and accompanying text (discussing compensation). And, notably, the Court's logic depended in part on the equitable nature of Title VII remedies, a status unlikely to attach to damage awards in most statutory and common-law schemes. See *General Telephone*, 446 U.S. at 333.

<sup>113</sup> *E.g.*, *Litton Indus. v. Lehman*, 734 F.Supp. 1071 (S.D.N.Y.1990) (securities); *In re First Databank Antitrust Litig.*, 209 F. Supp. 2d 96 (D.D.C. 2002) (antitrust). That

civil penalties, they will be independent of private damages, *i.e.*, they are not subject to offset.<sup>114</sup> Courts have taken steps in other areas to avoid double liability,<sup>115</sup> but again public and private remedies do not always offset symmetrically.<sup>116</sup> Reliance on judicial discretion also adds uncertainty to the enforcement regime.

### 3. *Claims Processing*

Finally, relevant to both redundant authority and redundant litigation are various doctrines that loosely fall under the label “claims processing.”<sup>117</sup> Courts have at their disposal tools such as stays and antisuit injunctions that can modulate otherwise simultaneous private and public enforcement actions.<sup>118</sup> Various enforcement statutes also include specific claim-processing rules. For example, environmental statutes often require private notice to the government,<sup>119</sup> while the Civil Rights Act of 1991 called for notice to effected private parties.<sup>120</sup> Sometimes the notice provision has direct consequences for litigation: in environmental statutes, private plaintiffs give notice to the government in order to permit the EPA to bring a public enforcement proceeding.<sup>121</sup>

Claims-processing rules may give priority to particular plaintiffs. Environmental citizen-suit provisions exhibit a preference for public enforcement, barring private suits if the government is diligently prosecuting.<sup>122</sup> Other statutes allow multiple parties to join the same suit: some enforcement regimes expressly allow for private intervention into public suits,<sup>123</sup> while others allow public intervention into private suits.<sup>124</sup>

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said, courts have found ways to permit redundant suits to go forward even following public disgorgement awards. See, *e.g.*, *In re Spear*, 399 F.Supp. 2d 1350 (S.D. Fla. 2005). The relationship between fair fund distributions and private settlements also appears inconsistent. See, *e.g.*, *In re American Intern. Group*, No. 04-8141, Dkt. 699 (S.D.N.Y.) (describing one settlement that accounts for fair funds and one that does not).

<sup>114</sup> *E.g.*, *Litton Indus.*, 734 F.Supp. 1071; *First Databank*, 209 F. Supp. 2d 96.

<sup>115</sup> See, *e.g.*, *Gen. Tel. Co. v. EEOC*, 446 U.S. 318, 333 (1980).

<sup>116</sup> See, *e.g.*, *Herman*, 140 F.3d 1413 (collecting ERISA and non-ERISA cases).

<sup>117</sup> See *Reed Elsevier v. Muchnick*, 559 U.S. 154 (2010).

<sup>118</sup> While courts have the inherent authority to enjoin parties, the ability to enjoin litigation in other courts is not so broad. See, *e.g.*, 28 U.S.C. § 2283 (Anti-Injunction Act).

<sup>119</sup> See, *e.g.*, 33 U.S.C. § 1365(b)(2) (Clean Water Act); 42 U.S.C. § 7604(b)(2) (Clean Air Act). Environmental statutes are not unique in this regard. See, *e.g.*, 15 U.S.C. § 6104 (private actions against telemarketers).

<sup>120</sup> 42 U.S.C. § 2000e-2(n).

<sup>121</sup> 33 U.S.C. § 1365(b)(1)(B) (Clean Water Act); 42 U.S.C. § 7604(b)(1)(B) (Clean Air Act).

<sup>122</sup> See *supra* notes \_\_\_. Not all government action is “diligent.” See, *e.g.*, *Friends of the Earth, Inc. v. Laidlaw Environmental Services (TOC)*, 528 U.S. 167, 178 n.1 (2000).

<sup>123</sup> See, *e.g.*, 42 U.S.C. § 2000e-5(f)(1) (Title VII); 33 U.S.C. § 1365(b)(1)(B) (CWA).

<sup>124</sup> See, *e.g.*, 47 U.S.C. § 227 (private rights of action and FCC intervention in suits regarding telephone equipment). See also Fed. R. Civ. P. 24(b)(2)(A).

In some cases, failing to intervene may be understood as acquiescence in the first representation, thus triggering preclusion of future actions.<sup>125</sup>

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The takeaways from this brief survey are twofold. First, redundant public-private enforcement does not exist in a vacuum, but is subject to rules that structure how and when claims may be brought. Redundant authority becomes redundant litigation only if preclusion rules allow the second suit, while damages and claims-processing rules structure enforcement in either case. Second, there is no uniform template for how redundant public-private enforcement proceeds in U.S. law. Instead, legislatures and courts have applied different procedural approaches to different regulatory regimes. Whether those choices have been justified requires a deeper understanding of the institutions and goals of redundant public-private enforcement.

### III. DESIGNING REDUNDANT PUBLIC-PRIVATE ENFORCEMENT

The foregoing discussion suggests that redundant authority and litigation exist across a range of enforcement schemes, yet the trend in modern procedure is to oppose duplication in favor of centralization.<sup>126</sup> The logic of this opposition is straightforward: redundancy creates direct costs as compared with one-shot enforcement; employing multiple enforcers may complicate a simple single-enforcer model; and duplication may lead to over-enforcement.<sup>127</sup>

There is no dispute that these costs exist, and lawmakers developing enforcement regimes should work to avoid them. But it would be a mistake to stop there—redundancy has some advantages that could be relevant to many enforcement challenges. This Part begins with a brief review of the potential benefits of redundant enforcement, specifically focusing on errors, resources, information, and agency costs. The claim here is that, despite obvious costs, redundant enforcement may serve valuable legislative goals, particularly when multiple diverse agents can be harnessed toward the same ends. Of course, the benefits of redundant enforcement will not spring up without careful husbandry in the form of institutional design. After surveying redundancy theory, this Part picks up the institutional-design challenge, looking first at redundancy as a response to problems with case selection and then as a response to

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<sup>125</sup> In *Adams v. Proctor & Gamble*, the Fourth Circuit held that a private plaintiff who did not intervene in an EEOC suit was bound by the outcome of the government's action. 697 F.2d 582, 583 (4th Cir. 1983) (en banc) (per curiam).

<sup>126</sup> See *infra* notes \_\_ and accompanying text. Part II also suggests that scholars writing on public-private enforcement are wrong to ignore enforcement redundancy.

<sup>127</sup> See, e.g., David Freeman Engstrom, *Agencies as Litigation Gatekeepers*, 123 YALE L. J. 616 (2013); Burbank, et al., *supra* note \_\_; Vermeule, *supra* note \_\_; Lahav, *supra* note \_\_.

problems with case outcomes. The result is a defense of redundant public-private enforcement and a transsubstantive template for its use. This discussion is aimed not only at critics of redundant enforcement, but also at legislatures creating and updating enforcement regimes and at courts considering procedural decisions that interact with legislative choices.<sup>128</sup>

### A. Redundancy Theory

While legal scholars have been slow to appreciate the benefits of redundancy, other disciplines have taken the lead.<sup>129</sup> Engineers have explored how redundant components can increase systemic reliability when components are independent.<sup>130</sup> Political scientists have applied these lessons to public administration, noting the presence of redundant structures within highly reliable organizations, and exploring how to manage strategic behavior within redundant systems.<sup>131</sup> This Section synthesizes these insights and applies them to law enforcement. This Section first outlines the basic claim that redundancy can improve

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<sup>128</sup> See *infra* note \_\_ (discussing, for example, *Shady Grove*).

<sup>129</sup> Works particularly helpful for the present study include Michael Ting, *A Strategic Theory of Bureaucratic Redundancy*, 47 AM. J. POL. SC. 274 (2003); C. F. LARRY HEIMANN, *ACCEPTABLE RISKS: POLITICS, POLICY, AND RISKY TECHNOLOGIES* (1998); Allan Lerner, *There Is More than One Way to Be Redundant*, 18 ADMIN. & SOC'Y 334 (1986); JONATHAN B. BENDOR, *PARALLEL STRUCTURES: REDUNDANCY IN GOVERNMENT* (1985); Martin Landau, *Redundancy, Rationality, and the Problem of Duplication and Overlap*, 29 PUB. ADMIN. REV. 346 (1969).

Recently, a few legal scholars have praised redundancy. Professor Lahav revived Professor Cover's notion of complex concurrency. Lahav, *supra* note \_\_ (discussing Robert M. Cover, *The Uses of Jurisdictional Redundancy: Interest, Ideology, and Innovation*, 22 WM. & MARY L. REV. 639 (1981)). Professor Gersen articulated the value of overlap in administrative law. Jacob E. Gersen, *Overlapping and Underlapping Jurisdiction in Administrative Law*, 2006 SUP. CT. REV. 201. Professor Huq assessed redundancy in terrorism prosecutions. Aziz Z. Huq, *Forum Choice for Terrorism Suspects*, 61 DUKE L.J. 1415 (2012). And Professor Kobayashi reviewed redundant litigation in intellectual property. Bruce H. Kobayashi, *An Economic Analysis of Relitigation Rules in Intellectual Property Litigation* (forthcoming). Notably, these few defenses focused on particular areas of law and/or have ignored the public-or-private identity of the redundant enforcers.

<sup>130</sup> The engineering literature distinguishes between component failure and system failure. See, e.g., HEIMANN, *supra* note \_\_. Redundancy is understood to be more effective when dealing with component failure, *id.*, and therefore the discussion here focuses on component failure in law enforcement.

<sup>131</sup> Modern debates about redundancy often pit the "highly reliable organization" (HRO) paradigm against "normal accident" theory. Cf. K.E. WEICK & K.M. SUTCLIFFE, K. M. MANAGING THE UNEXPECTED: ASSURING HIGH PERFORMANCE IN AN AGE OF COMPLEXITY (1st ed. 2001) with CHARLES PERROW *NORMAL ACCIDENTS: LIVING WITH HIGH-RISK TECHNOLOGIES* (1999). In the words of Larry Heimann, HRO theory accepts "the need for redundancy within and between organizations," while normal accident theory "disputes[s] the value of redundancy" when facing "complex interactions and tight coupling." HEIMANN, *supra* note \_\_. This is not a forum to adjudicate every aspect of these debates, though I would note that there are reasons to think that law-enforcement regimes are not always "highly complex" or "tightly coupled."

enforcement with respect to errors, resources, information, and agency costs, if actors are sufficiently differentiated—applying the lessons of engineering to the problems of law enforcement. This Section then uses the insights of political science to identify and deal with the potential for strategic behavior, including efforts to harness strategic behavior in a positive direction. Note that this Section’s theory of redundancy depends on whether laws are over- or under-enforced (with respect to case selection and case outcomes).<sup>132</sup> This Article does not offer a universal baseline for these questions, but instead recognizes that results must be judged against legislative preferences expressed in the relevant regulatory regime.

First, however the optimum level of enforcement is defined, redundancy can respond to under-enforcement resulting from random or non-random (biased) errors.<sup>133</sup> Redundancy may reduce under-enforcement resulting from random error because enforcers will not repeat the same errors in case selection or prosecution.<sup>134</sup> This is the “purest” engineering theory of redundancy—if parallel components function independently, both must fail to result in system error.<sup>135</sup> Redundancy also may reduce under-enforcement resulting from nonrandom bias, as long as the agents have different biases.<sup>136</sup> Although neither public nor private agents are perfect, there are good reasons to believe that public and private enforcers possess different preferences and interests, and thus are susceptible to different non-random biases.<sup>137</sup> The result is that employing both public and private agents should reduce biased under-enforcement as well. Note, however, that while redundancy may decrease Type II errors (false negatives), it also may increase Type I

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<sup>132</sup> See, e.g., George Stigler, *The Optimum Enforcement of Laws*, 78 J. POL. ECON. 526 (1970); Robert D. Cooter, *Punitive Damages, Social Norms, and Economic Analysis*, 60 LAW & CONTEMP. PROBS. 73 (1997). The distinction between case selection and case outcomes is taken up further in Sections III.B and III.C.

<sup>133</sup> Note that this discussion primarily addresses the problems of under-enforcement. Redundancy is not likely a solution to over-enforcement, and its use in areas characterized by over-enforced should be viewed with a jaundiced eye.

<sup>134</sup> See, e.g., Cover, *supra* note \_\_ at 657.

<sup>135</sup> See David A. Weisbach, *Tax Expenditures, Principal-Agent Problems, and Redundancy*, 84 WASH. U. L. REV. 1823, 1826 (2006) (referring to this reliability-enhancing feature as “purely engineering”). Indeed, Landau’s early advocacy for redundancy was inspired by a commercial airliner. Landau, *supra* note \_\_.

<sup>136</sup> See, e.g., Krishna K. Ladha, *The Condorcet Jury Theorem, Free Speech, and Correlated Votes*, 36 AM. J. POL. SC. 617, 625-30 (1992); Ting, *supra* note \_\_.

<sup>137</sup> See, e.g., Rubenstein, *supra* note \_\_ (discussing distinction between the rewards for public and private attorneys). See also Margaret H. Lemos & Max Minzner, *For-Profit Public Enforcement*, 127 HARV. L. REV. 853 (2014); Frank H. Easterbrook, *Criminal Procedure as a Market System*, 12 J. LEG. STUD. 289 (1983). For a classic study of prosecutorial discretion, see Robert L. Rabin, *Agency Criminal Referrals in the Federal System: An Empirical Study of Prosecutorial Discretion*, 24 STAN. L. REV. 1036 (1972).

errors (false positives).<sup>138</sup> This is the risk of over-enforcement noted by redundancy’s critics, and certainly it must be part of the institutional-design discussion as well.<sup>139</sup>

A second explanation for under-enforcement is resource constraints—an agent may under-enforce because it lacks the resources to identify and prosecute all of the cases it wants.<sup>140</sup> It does not take a degree in engineering to understand that if independent redundant agents bring different resources to a problem, then the total resources available will be increased. Unsurprisingly, resource constraints are an oft-cited explanation for under-enforcement,<sup>141</sup> and redundancy should improve this state of affairs if agents possess different resource pools. Scholars have argued about whether public or private enforcers are more resource constrained,<sup>142</sup> but it seems reasonable to assume that their resources differ, particularly given that some funding mechanisms (*e.g.*, alternative litigation financing; contingency fees) are not equally available to public and private parties.<sup>143</sup>

Third, under-enforcement may result if the relevant agent lacks the necessary information or expertise. Redundancy may help in these cases as well. Redundancy may serve to reveal private information, aggregate disparate information, and facilitate learning.<sup>144</sup> Redundancy also permits “perspectival aggregation,” as agents may offer a diversity of problem-solving approaches.<sup>145</sup> As with tangible resources, the benefits of redundancy attach when agents possess complementary intangible

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<sup>138</sup> See, *e.g.*, Ting, *supra* note \_\_; Huq, *supra* note \_\_.

<sup>139</sup> See, *e.g.*, *infra* Section III.C.2.

<sup>140</sup> Resource constraints are, in a sense, just another cause of errors, but they merit special attention here because they are particularly salient for enforcement issues.

<sup>141</sup> See, *e.g.*, Burbank, et al., *supra* note \_\_. Regarding securities regulation, a SEC Chairman observed that “[t]he Commission has long maintained that private actions provide valuable and necessary additional deterrence against securities fraud, thereby supplementing the Commission’s own enforcement activities.” Testimony of Arthur Levitt, Jr., Comm. on Banking, Housing & Urban Affairs, 105th Cong., 1997 WL 416650.

<sup>142</sup> *Cf.* Lemos, *Aggregate Litigation*, *supra* note \_\_ (public enforcers more constrained) *with* Engstrom, *supra* note \_\_ (private parties cannot “scale up”).

<sup>143</sup> But see Martin H. Redish, *Private Contingent Fee Lawyers and Public Power: Constitutional and Political Implications*, 18 SUP. CT. ECON. REV. 77 (2010) (discussing public use of contingency fee); David A. Dana, *Public Interest and Private Lawyers: Toward a Normative Evaluation of Parens Patriae Litigation by Contingency Fee*, 51 DEPAUL L. REV. 315 (2001) (same). In addition, it seems likely that public and private resources vary (but may not co-vary) with time, issue, litigant, etc.

<sup>144</sup> See, *e.g.*, Matthew Stephenson, *Information Acquisition & Institutional Design*, 124 HARV. L. REV. 1422 (2011) (hereinafter “Stephenson, *Information Acquisition*”); Huq, *supra* note \_\_.

<sup>145</sup> See, *e.g.*, Adrian Vermeule, *Second Opinions and Institutional Design*, 97 VA. L. REV. 1435 (2011); Lu Hong & Scott E. Page, *Problem Solving by Heterogeneous Agents*, 97 J. ECON. THEORY 123 (2001).

resources such as information.<sup>146</sup> And, again, public and private enforcers likely differ in their access to information, expertise, and perspectives.<sup>147</sup>

A final potential source of under-enforcement is inherent in the agency relationship. Principals incur costs when agent preferences deviate from principal preferences and when principals expend effort to monitor agents and mitigate their deviations.<sup>148</sup> From an engineering perspective, these agency costs may be seen as another nonrandom bias, and thus redundancy is a potential response if agents differ with respect to agency costs.<sup>149</sup> Given their divergent preferences, structures, and accountability mechanisms, agency relationships in public and private enforcement likely differ in ways that help harness the benefits of redundancy.<sup>150</sup>

Redundancy also has a dynamic effect on agency costs. One particular challenge for principals is monitoring agent performance. For example, it is difficult for Congress to know from the outside whether the EPA is doing a good job enforcing environmental law. Redundant delegations have the effect of producing information that permits principals to compare multiple diverse agents—Congress may be able to compare public and private outcomes to better assess performance.<sup>151</sup> In this way, competition limits agency costs by making it cheaper for the lawmaker to monitor the agents. In addition, if agents are aware of this monitoring effect, redundancy should reduce deviations because agents are competing against each other in a more open fashion.<sup>152</sup>

In short, although redundancy has direct costs and risks over-enforcement, it also can be effective at fighting under-enforcement

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<sup>146</sup> See *supra* note \_\_. If information can be easily transferred among agents—*e.g.*, if the government could require or cheaply induce a private party to share private information—then we might say that the information pools are not sufficiently different.

<sup>147</sup> Many sources identify private information as an advantage of private enforcement. See, *e.g.*, Lemos, *State Enforcement*, *supra* note \_\_; Burbank, et al., *supra* note \_\_; Stephenson, *Public Regulation*, *supra* note \_\_; Bucy, *supra* note \_\_. But public enforcers may have informational advantages as well. See, *e.g.*, Glover, *supra* note \_\_ at 1180 (suggested that public enforcement might be preferred for large datasets, comparative analyses, or complex facts). To give a simple example, a *qui tam* relator may have private information about a contractor's fraudulent billing, while public attorneys may have an intimate knowledge of the government program.

<sup>148</sup> See, *e.g.*, Michael C. Jensen & William H. Meckling, *Theory of the Firm: Managerial Behavior, Agency Costs and Ownership Structure*, 3 J. FIN. ECON. 305 (1976).

<sup>149</sup> See *supra* notes \_\_ and accompanying text.

<sup>150</sup> See, *e.g.*, Rubenstein, *supra* note \_\_ (preferences); Lemos, *Aggregate Litigation*, *supra* note \_\_ (structures); Stephenson, *Public Regulation*, *supra* note \_\_ (accountability); Engstrom, *supra* note \_\_ (accountability).

<sup>151</sup> See, *e.g.*, WILLIAM A. NISKANEN, JR., BUREAUCRACY AND REPRESENTATIVE GOVERNMENT (1971).

<sup>152</sup> See, *e.g.*, Gersen, *supra* note \_\_; Huq, *supra* note \_\_.

resulting from errors, resource constraints, information problems, or agency costs if agents are sufficiently diverse. But this “pure engineering” can get us only so far. The redundant o-rings on a space shuttle are not strategic actors,<sup>153</sup> so the insights from recent political-science literature are necessary to appreciate how these processes work in a world of strategic human actors. Particularly relevant here are two types of strategic behavior—“shirking” and “cue taking”—that have the potential to reduce the effectiveness of redundant systems.<sup>154</sup>

Shirking is the risk that when a second agent is added, each agent will reduce its effort level because they are aware of the other player. For example, if information is endogenous—*i.e.*, it is the result of agent effort in information gathering—the presence of a redundant agent might discourage that gathering effort.<sup>155</sup> This collective-action problem should give pause to a lawmaker considering redundancy, particularly when the first agent is fairly reliable. That said, the political-science literature suggests that this concern is not always dispositive.<sup>156</sup> First, the competitive redundancy described above with respect to agency costs cuts back on shirking when parties repeatedly compete over time.<sup>157</sup> A government agency concerned about its budget, for example, will be less inclined to shirk if Congress is watching. Second, not all shirking is created equal. Political scientists suggest that the less reliable the original agent, the less her shirking actually hurts the principal’s interest.<sup>158</sup> Particularly when a principal is saddled with an unreliable agent, the addition of a redundant enforcer can improve outcomes despite the risk of shirking. Third, the shirking problem assumes that the relevant pieces of information are substitutes, *e.g.*, both agents are

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<sup>153</sup> See, *e.g.*, HEIMANN, *supra* note \_\_. The physical failure of o-rings in the Challenger disaster was compounded by human error at a number of levels. *Id.*

<sup>154</sup> For an excellent summary of the relevant political-science literature on these issues, see HEIMANN, *supra* note \_\_.

<sup>155</sup> For example, assume Agent 1 or Agent 2 is tasked with finding evidence to prosecute an environmental violator. If either agent is tasked with this duty alone, the assigned agent will expend a certain amount of effort on the task. But if Agents 1 and 2 are given redundant responsibility, each one may offer less than full effort assuming that the other agent might pick up the slack. Further, if compensation is available only to the first agent to find the violation, then each agent in the redundant scenario will account for the reduced probability of compensation when choosing an effort level.

<sup>156</sup> See Ting, *supra* note \_\_. The shirking story assumes a collective-action problem, but that is not preordained. Continuing the information example, information may be exogenous or differentially available. If the violation directly affects an individual, we would not suggest that this information was the product of her effort nor would we worry about other agents changing behavior in response. Shirking also is reduced if agents explicitly or implicitly coordinated, dividing the information space between them.

<sup>157</sup> See *supra* note \_\_.

<sup>158</sup> See Ting, *supra* note \_\_.

seeking to identify a single violation of law.<sup>159</sup> But sometimes the relevant data will be complements, *e.g.*, two pieces of information gain additional value when put together. In this circumstance, the incentives to gather each piece of information are increased rather than decreased.<sup>160</sup>

A second strategic problem is cue taking. Nominally independent agents may change their behavior to mirror another agent's actions, thus reducing the reliability-enhancing features of redundant components. This, too, is a potential concern for redundant enforcement.<sup>161</sup> Here again, however, the political-science literature offers further clarity. First, interdependence can be avoided if agents are unaware of each other's activities or are incentivized to ignore them.<sup>162</sup> Indeed, the second agent may have the incentive to focus on exactly the areas that the first agent's biases cause it to miss. Second, if the first agent is *more reliable* than the second, then the literature suggests that cue taking by the second, less reliable agent might be preferred—the less reliable agent does better when following the more reliable agent's lead.<sup>163</sup> And, if the cue giver knows about the cue taking behavior, then it can intentionally signal to the second agent to take actions that, for various reasons, the first agent prefers to hand off. For example, a resource strapped first agent can shift some of its burden to a less reliable second agent by cueing the work to be done.<sup>164</sup> Last, with respect to either shirking or cue taking, strategic behavior can be understood as a cost, and sometimes that cost is worth paying in order to achieve the benefits of redundancy described here.

The foregoing analysis suggests the following principles for structuring redundant-enforcement regimes:

1. Redundancy creates direct costs and risks over-enforcement. (Many critics stop here.)
2. However, redundancy may be a response to under-enforcement resulting from errors, resource constraints, information problems, and agency costs if agents are sufficiently differentiated. (This is the “engineering” claim.)

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<sup>159</sup> See Stephenson, “Information Acquisition,” *supra* note \_\_.

<sup>160</sup> See Ting, *supra* note \_\_.

<sup>161</sup> One classic example of cue taking is that voters may make decisions about ballot initiatives based on the cues of interest groups and high profile individuals. See, *e.g.*, Arthur Lupia, *Shortcuts Versus Encyclopedias: Information and Voting Behavior in California Insurance Reform Elections*, 88 AM. POL. SCI. REV. 63 (1994).

<sup>162</sup> In other words, we can manipulate the system through incentives to return it to a state of independence.

<sup>163</sup> See HEIMANN, *supra* note \_\_.

<sup>164</sup> One could imagine, for example, that more routine tasks can be delegated to the less reliable agent. *Cf.* HEIMANN, *supra* note \_\_ (discussing programmatic functions).

3. Shirking may reduce redundancy’s effectiveness, though this concern is mitigated if the first agent is unreliable or if effort is complementary. Cue taking may reduce redundancy’s effectiveness, though this concern is mitigated if the first agent is reliable or if incentives are properly constructed to manage independence. (These are the strategic-behavior considerations.)

By failing to move beyond the first principle, critics of redundancy miss the potential of multiple diverse agents to improve law enforcement. The “engineering” claim suggests many avenues for redundancy to respond to under-enforcement as long as agents are diverse and public and private agents likely differ along meaningful dimensions.<sup>165</sup> The balance of this Part applies this general case for diverse-agent redundancy to problems with case selection and case outcomes. That said, the strategic-behavior concerns give some pause. Although this paper is not the forum for the fine-grained assessment necessary to apply those insights to specific areas, where relevant this Article will suggest how strategic behavior may affect the analysis under particular conditions.

## **B. Redundant Authority and Case Selection**

As described above, under-enforcement may result from errors, resource constraints, information and perspectives, or agency costs. These issues can manifest in problems with case selection—agents may fail to bring cases they should. Or they may result in problems with case outcomes—settlements or judgments may understate the appropriate recovery. Potential responses differ when the target is case selection versus case outcomes.<sup>166</sup> This Section considers case selection, leaving case outcomes to Section C.<sup>167</sup>

The basic claim of this Section is that redundant authority, described as the ability of public and private agents to bring overlapping but mutually preclusive claims, responds to problems with case selection. The suggestion is that, despite costs, redundancy may be valuable in these circumstances because it helps with errors, resources, information, and agency costs while avoiding the direct costs of truly redundant litigation. The notion that redundant authority may reduce under-selection of cases is not novel—indeed, the private-enforcement revolution

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<sup>165</sup> See *supra* notes \_\_ and accompanying text.

<sup>166</sup> Undifferentiated opposition to redundancy fails to appreciate this important distinction. See *supra* notes \_\_.

<sup>167</sup> This Section thus assumes that once a case is selected by a public or private enforcer, the legislature is comfortable with potential outcomes. Why might a legislature worry about case selection and not case outcomes? Perhaps the legislature believes it is well positioned to monitor case prosecution, but lacks information necessary to monitor case selection. Or perhaps agent incentives differ with respect to case selection and prosecution such that under-selection is likely but under-performance in litigation is not.

assumed benefits from redundant authority.<sup>168</sup> However, it is useful to articulate the logic of redundant authority both to see its scope and to identify the procedural rules that should structure its use. It is also important to differentiate between redundant authority and redundant litigation, and the different circumstances that justify those approaches.

First, some cases may go unselected because of random or non-random errors. The pure engineering version of redundancy suggests that redundant authority should reduce either type of under-enforcement.<sup>169</sup> Admittedly, in some circumstances the lawmaker may be able to improve enforcement without redundancy by targeting agent incentives—providing bounties,<sup>170</sup> increasing the attorney fee,<sup>171</sup> or raising the political profile of an issue often will be sufficient.<sup>172</sup> But in some circumstances the legislature will be unable to tailor the incentives to satisfy public or private attorneys,<sup>173</sup> and in those situations, redundant authority can improve enforcement through diversification. And because case selection is the issue here, redundant authority should be combined with preclusion to avoid costly (and unnecessary) relitigation. Note also that preclusion avoids the cue-taking problem because once a case is selected, there is no cue to take.<sup>174</sup>

Second, non-selection of cases may result from resource constraints. Because public and private enforcers draw on different resource pools, redundant authority should mitigate this under-selection by increasing available resources as compared with public or private authority alone.<sup>175</sup> Indeed, existing redundant-authority regimes are often justified on this basis.<sup>176</sup> For example, the SEC has acknowledged that private enforcement provides a necessary supplement to public securities enforcement.<sup>177</sup> When Congress first adopted private rights of action for

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<sup>168</sup> See *supra* notes \_\_ and accompanying text (collecting examples).

<sup>169</sup> Random errors are avoided by repetition; bias is counteracted by multiple diverse agents (with diverse biases). See *supra* notes \_\_.

<sup>170</sup> See, e.g., *supra* note \_\_ (citing False Claims Act recovery provisions).

<sup>171</sup> See, e.g., FARHANG, *supra* note \_\_ (collecting examples).

<sup>172</sup> See *supra* note \_\_ and accompanying text (public and private preferences),

<sup>173</sup> For example, Professor Weisbach noted that legislatures are disabled from using high-powered incentives for government attorneys. See Weisbach, *supra* note \_\_. For profit-motivated parties, due-process caps as well as available remedial metrics may limit potential recoveries. See, e.g., *Exxon Shipping Co. v. Baker*, 554 U.S. 471 (2008) (limiting punitive damages). Defendant's ability to pay also may blunt private incentives.

<sup>174</sup> See *supra* note \_\_.

<sup>175</sup> This assumes that resources are exogenous, at least for public actors, if not for private ones as well. The exogeneity of resources mitigates the shirking problem. See *supra* note \_\_.

<sup>176</sup> See *supra* note \_\_ (defining preclusion to include any rule that cuts off redundant litigation).

<sup>177</sup> See *supra* note \_\_ (citing testimony of Chairman Levitt).

antitrust violations, the appropriation for federal antitrust enforcement was zero.<sup>178</sup> Notably, although redundant authority may increase resources, converting redundant authority to redundant litigation may be counterproductive on this score—duplication will sap already scarce enforcement resources. For this reason, inter-party preclusion is particularly important in these cases.<sup>179</sup>

Information presents a third challenge to case selection, and again redundant authority may be helpful while redundant litigation may go too far. The potential information challenge is straightforward—the party who can most efficiently prosecute the case may not know that it exists (or that it is cost effective). Redundancy, properly constructed, responds to this information problem: redundant authority permits either agent to file a case; claims-processing rules publicize and allocate cases; and preclusion stems over-selection. In light of the potential for shirking, these regimes are particularly apt when agents have differential access to information, reducing incentives to shirk and increasing the possibility of complementary efforts.<sup>180</sup> Whistleblower regimes also may be employed to solve information problems, though redundant authority may be preferred because it incentivizes parties to bring cases and it insures against non-selection by the other agent.<sup>181</sup>

One potential example of this approach is the notice-and-intervention scheme of environmental statutes.<sup>182</sup> Private parties may

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<sup>178</sup> See Krent Roach & Michael J. Trebilcock, *Private Enforcement of Competition Laws*, 34 OSGOODE HALL L.J. 461, 465 (1996).

<sup>179</sup> But see *supra* notes \_\_ (discussing examples of non-preclusion). Further, because the target is limited resources, claims-processing rules in these regimes should allocate cases between public and private enforcers with an emphasis on opportunity costs. For example, Congress might give private parties first priority, assuming that public resources should be reserved for cases that lack a private option.

<sup>180</sup> If Agent 1 knows that Agent 2 cannot access information (or cannot gather it at a reasonable cost), then Agent 1 should not alter its behavior because of Agent 2. See *supra* note \_\_. Similarly, intangible resources often are complementary, for example private information about harms and expertise at prosecuting them. See *supra* note \_\_.

<sup>181</sup> Although whistleblower regimes also could include incentives, the private-enforcement model represents an existing tool to incentivize private parties (damages) and attorneys (fees). *Cf.* Huq, *supra* note \_\_ (discussing cost mitigation resulting from the use of existing institutions). And litigation has the added benefit of deterring some bad cases, as the costs of filing suit and the threat of sanctions (or worse) may act as a screening mechanism for misleading or false allegations. See, e.g., Anthony J. Casey & Anthony Niblett, *Noise Reduction: The Screening Value of Qui Tam* (forthcoming). Litigation may have other advantages as well. For example, litigation may smooth the information-sharing process, either because courts can endorse (and enforce) protective orders among parties, e.g., Fed. R. Civ. P. 26(c), or because courts can require information sharing even when parties are otherwise reluctant. *E.g.*, Fed. R. Civ. P. 37. At the same time, civil litigation is replete with claims-processing procedures that can be used to ensure the priority enforcer litigates first. See *supra* notes \_\_.

<sup>182</sup> See *supra* notes \_\_ and accompany text (discussing citizen suits).

have better information than the EPA about where and when environmental violations occur.<sup>183</sup> As a result, private parties are permitted to bring citizen suits.<sup>184</sup> But, Congress has indicated a preference for government enforcement: a claims-processing rule requires the private party to give notice to the government, and the government has the option to intervene and preclude private action.<sup>185</sup> If the government does not intervene, however, private litigation provides insurance against the government's non-selection.<sup>186</sup>

Agency costs are a final explanation for selection problems. For example, a government agency may be the most efficient enforcer, but because of capture, it would prefer not to prosecute an offending insider.<sup>187</sup> However, if case-selection decisions were easy to monitor, then in some of these situations, the agency will prefer to prosecute the suit itself. Redundant authority thus responds to agency problems by announcing good cases to agents and principals.<sup>188</sup> And, because agents are in competition, these effects should feed back on selection decisions and (again because of competition) should be less susceptible to shirking and cue taking.<sup>189</sup>

The *qui tam* mechanism in the False Claims Act may track these informational and agency-costs stories.<sup>190</sup> Sometimes the government will have the information and the will to prosecute, and in those cases the

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<sup>183</sup> Most obviously, a direct victim of an environmental violation may be the first to learn of it, and indeed citizen-suit plaintiffs must show an "injury in fact" to have standing. See, e.g., *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992). "Original sources" of information are prioritized in False Claims Act cases as well. See *infra* note \_\_. Note that this situation also tracks the observation that redundant authority is particularly helpful when agents have different access to information. See *supra* note \_\_.

<sup>184</sup> See *supra* note \_\_ (discussing citizen suits).

<sup>185</sup> See *supra* notes \_\_ (citing intervention and preclusion provisions). Perhaps this preference responds to the EPA's prosecutorial expertise. And, indeed, it may be that private information and government expertise are complementary. See *supra* note \_\_.

<sup>186</sup> For example, if the EPA declined to prosecute due to bias, resources, or agency costs, the backstop of private enforcement does the job.

<sup>187</sup> This is an extreme version of Professor Cover's concern with ideological commitments. See *Cover*, *supra* note \_\_.

<sup>188</sup> Professor Stephenson argued that executive agencies should determine when to allow private rights of action. See Stephenson, *Public Regulation*, *supra* note \_\_. But his proposal is susceptible to an agency-capture critique. Legislative, judicial, or market-based approaches reduce the effect of agency capture because the public enforcer is cooperating or competing with the private enforcer in the light of day.

<sup>189</sup> See *supra* notes \_\_. Redundant authority may improve enforcement efficiency as well. Agents may select weak cases if they are unaware of strong cases—an information problem. Or, they may take weak cases to hide strong cases that they would rather not prosecute—an agency problem. Redundant authority can improve case-selection efficacy by publicizing strong cases and reducing monitoring costs.

<sup>190</sup> See *supra* notes \_\_. The False Claims Act also might respond to resource constraints, as the government may not be able to prosecute all of the fraud against it.

government may bring an enforcement action that precludes further private efforts.<sup>191</sup> In other cases, government agents may not be aware of the fraud or may be complicit in it, so private parties may initiate suits.<sup>192</sup> Public enforcers, well versed in government litigation, may intervene once the case is announced by the private enforcer.<sup>193</sup> Redundant litigation in either case is avoided as public and private suits are mutually preclusive.<sup>194</sup>

To summarize, redundant authority may improve case selection by reducing errors, aggregating resources and information, and improving monitoring. This logic supports redundant authority but not redundant litigation. Preclusion should bar duplicative suits in these circumstances, and claims-processing rules should be targeted to the particular challenges in the regulated area. Cue taking is not a significant issue here, while the risk of shirking points to certain circumstances particularly well suited for redundant authority.

### C. Redundant Litigation and Case Outcomes

Because redundant authority avoids much of the waste and over-enforcement risk that comes from truly redundant litigation, the case for redundant authority may seem straightforward. In many circumstances, diversifying potential enforcers has positive consequences for enforcement levels, while the costs of this redundancy—though not nonexistent—are much lower. Therefore, it may not be surprising that redundant authority is a relatively common regulatory strategy, and that its adoption is open and notorious.<sup>195</sup>

The costs are clearly higher in redundant litigation. Two lawsuits are more costly than one, and the risks of over-enforcement are higher when plaintiffs get two bites at the apple. Therefore, it may not be surprising that redundant litigation is more frequently the subject of criticism, and that its uses documented in Part II are perhaps less obvious to outside observers. Indeed, a default preference against redundant litigation would not be unjustified.

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<sup>191</sup> 31 U.S.C. § 3730(a).

<sup>192</sup> 31 U.S.C. § 3730(b)(1). Indeed, private suits must provide non-public information—the relator must satisfy the “public-disclosure bar” or be an “original source.” 31 U.S.C. § 3730(e)(4). This might be seen as cue giving from the more reliable agent. See *supra* note \_\_.

<sup>193</sup> 31 U.S.C. § 3730(b)(2) & (c).

<sup>194</sup> See *supra* note \_\_. Private incentives are maintained independent of the government’s intervention decision. 31 U.S.C. § 3730(d) (providing award of 15 to 25 percent if the government intervenes, or 25 to 30 percent if the government does not).

<sup>195</sup> Environmental citizen suits, for example, should not surprise most observers of environmental law.

And yet, if lawmakers are concerned with settlements and judgments that understate the appropriate level of enforcement, redundant authority is insufficient. Denying inter-party preclusion may remedy and deter under-enforcement in case outcomes, and damages and claims-processing rules can minimize some costs of over-enforcement and waste, though again these costs remain an important consideration for enforcement design. The balance of this Section unpacks these ideas, moving stepwise through the procedural decisions that manage redundant litigation: (1) preclusion; (2) damages; and (3) claims processing.

Before delving into this analysis, though, there is one explanation for redundant litigation that should be mentioned. Perhaps the easiest case for redundant litigation exists when the lawmaker accepts the risk of over-enforcement in service of reducing under-enforcement.<sup>196</sup> It may be that for certain conduct, the lawmaker is so intent on punishment and deterrence that it tolerates over-enforcement.<sup>197</sup> Or it may be that the lawmaker assumes (rightly or wrongly) that agents will self-censor over-enforcement.<sup>198</sup> Either way, if the goal is a reduction in under-enforcement no matter the cost—and as long as constitutional protections are in place<sup>199</sup>—then the legislature could authorize redundant litigation purely as insurance against false negatives. However, concerns with over-enforcement are legitimate,<sup>200</sup> and “multiple punishments” should not be the norm.<sup>201</sup> For these reasons, the balance of this Section assumes that lawmakers are not unconcerned with over-enforcement.<sup>202</sup>

### 1. *Preclusion: Redundant Authority v. Redundant Litigation*

Case outcomes may be insufficient for many of the same reasons that good cases may not be selected. Agents may make random errors or biased ones. Resource constraints may reduce the effectiveness of

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<sup>196</sup> Bendor, for example, suggests that the justification for redundancy is stronger “the more critical or costly a failure would be.” BENDOR, *supra* note \_\_.

<sup>197</sup> For two sources discussing but not endorsing this notion, see Huq, *supra* note \_\_ (discussing terrorism), and Richard H. Fallon, Jr., *The Core of an Uneasy Case for Judicial Review*, 121 HARV. L. REV. 1693 (2008) (discussing constitutional rights).

<sup>198</sup> Perhaps agents are so concerned with legislative approval—and legislatures are so transparent about their concern with over-enforcement—that the risk is small. Or perhaps the legislature concludes that norms sufficiently discourage duplicative suits.

<sup>199</sup> See, e.g., *Exxon Shipping Co. v. Baker*, 554 U.S. 471 (2008) (limiting permissible punitive damages); U.S. CONST., amend. VIII (Excessive Fines Clause).

<sup>200</sup> *Cf. infra* notes \_\_ and accompanying text (discussing *Shady Grove*).

<sup>201</sup> See *infra* note \_\_ (citing sources on multiple punishments).

<sup>202</sup> Although the lawmaker may not want to encourage over-enforcement, presumably most laws are designed to be enforced once. For example, a statutory or common-law claim for compensatory damages seeks to make the victim whole. One might say that there are statutory schemes for which under-enforcement is preferred, e.g., speed limits, but recall that this Article judges enforcement against legislative preference, so those cases merely suggest a different baseline. See *supra* note \_\_.

enforcement operations. Information gaps may lead enforcers to underperform at settlement or judgment. And agency problems may result in sham suits or suboptimal settlements.

Redundant authority does not respond to problems with case outcomes, but redundant litigation might. The mechanism is direct: remove preclusion. If a private suit understates recovery, then a second (non-precluded) public suit is available to remedy the under-enforcement; if a public suit is insufficient, a second (non-precluded) private suit could fill the gap.<sup>203</sup> The second litigation also aggregates information exposed in the first case with new information from the redundant agent—efforts may be complementary.<sup>204</sup> And, by improving monitoring through competition and publicity, redundant suits curtail agency problems.<sup>205</sup> The threat of redundant litigation also should feed back into improved outcomes in the first case, and thus it may reduce the amount of redundant litigation that actually occurs.<sup>206</sup> Though redundant litigation has direct costs, a legislature may elect to pay these costs in order to remedy and deter under-enforcement in case outcomes.<sup>207</sup>

Why would a legislature elect redundant litigation when it could just select the better enforcer? One set of answers is that the better enforcer cannot be stretched to cover all cases. Most clearly, the better enforcer may be hard capped by resource constraints—states with balanced-budget requirements, for example, can only increase public-enforcement spending so much. This hard-capped constraint has parallels in other areas—*e.g.*, there may be something about the better agent that makes it impossible (or impractical) to overcome a particular bias or information problem. In these circumstances, redundant litigation may provide a backstop for under-enforcing outcomes.<sup>208</sup>

Perhaps a more interesting set of answers tracks the earlier observation that redundancy is particularly effective when the principal is saddled with an unreliable enforcer.<sup>209</sup> In those cases, allowing a second

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<sup>203</sup> Non-preclusion may reduce defendants' incentives to settle. Because remedies are critical to this analysis, this issue is taken up in the discussion of damages below.

<sup>204</sup> In this way, concern with shirking may be mitigated. See *supra* note \_\_.

<sup>205</sup> Publicity is relevant not only to inform legislatures about agent performance, but also to inform voters about legislative performance.

<sup>206</sup> This is a positive type of strategic behavior. See *supra* notes \_\_.

<sup>207</sup> Moreover, note that many of the costs of litigation do not need to be duplicated. For example, the costs of preservation and discovery may not be incurred twice. And, as it turns out, these costs seem to represent the largest share of litigation spending. See, *e.g.*, William H.J. Hubbard, *The Discovery Sombbrero* (forthcoming). Costs also are mitigated by the capacity for litigation among private parties, public enforcers, and the courts. See Huq, *supra* note \_\_ (discussing related issue).

<sup>208</sup> See *supra* Section III.A.

<sup>209</sup> See *supra* note \_\_.

agent to sue may fill the gap. For example, for claims that have some “private” character—*e.g.*, torts—a legislature may be unwilling or unable to eliminate private enforcement.<sup>210</sup> And yet, for various reasons, private actions may be systematically suboptimal. Thus, redundant government litigation may be necessary to achieve socially optimal outcomes.

Consider the case of private mass litigation. Suboptimal settlements are a notorious concern in class actions. The notion is that plaintiffs’ attorneys have incentives to settle cases too easily; plaintiffs themselves are poor monitors because individual stakes are low and information is expensive; and courts supervising litigation are handicapped because they only have information presented to them by the parties.<sup>211</sup> This problem is magnified in the context of dueling class actions.<sup>212</sup> If class actions are filed in different jurisdictions, defendants can hold a reverse auction among plaintiffs’ attorneys, bidding them down to lower and lower settlements.<sup>213</sup> Each class counsel is willing to negotiate because she wants her fee, and full-faith-and-credit rules mean that any judicially endorsed settlement may be preclusive in other U.S. courts.<sup>214</sup> If the private settlement were not preclusive on government suits, then redundant public litigation could improve the outcome and mitigate the reverse-auction problem. The threat of a redundant suit also may have a disciplining effect on the original settlement.<sup>215</sup>

A number of recent developments in complex-dispute resolution may call out for redundant public enforcement of this type. Private entities (like British Petroleum after Deep Water Horizon) have employed

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<sup>210</sup> See *supra* notes \_\_. Non-tort claims may also have a personal connection. A district court recently certified an antitrust class action on behalf of women who donated eggs through fertility clinics and donation agencies. *Kamakahi v. Am. Soc. Reproductive Med.*, No 11-cv-01781 (Feb. 3, 2015, N.D. Cal.). “Private” claims also may include those for which the private party has a nonpecuniary interest. For further discussion of the implications of these values for redundant enforcement, see *infra* note \_\_.

<sup>211</sup> See, *e.g.*, John C. Coffee, Jr., *Class Wars: The Dilemma of the Mass Tort Class Action*, 95 COLUM. L. REV. 1343 (1995) (hereinafter “Coffee, *Class Wars*”); Susan P. Koniak, *Feasting While the Widows Weep: Georgine v. Amchem Products, Inc.*, 80 CORNELL L. REV. 1045 (1995); Susan P. Koniak & George M. Cohen, *Under Cloak of Settlement*, 82 VA. L. REV. 1051 (1996). See also Fed. R. Civ. P. 23.

<sup>212</sup> See Rhonda Wasserman, *Dueling Class Actions*, 80 B.U. L. REV. 461 (2000).

<sup>213</sup> See, *e.g.*, John C. Coffee, Jr., *The Corruption of the Class Action: The New Technology of Collusion*, 80 CORNELL L. REV. 851 (1995); Wasserman, *supra* note \_\_.

<sup>214</sup> See U.S. CONST. art. IV § 1 (Full Faith and Credit Clause); 28 USC § 1738 (full faith and credit statute). See also *supra* note \_\_ (collecting sources).

<sup>215</sup> Allowing serial private suits is another possible response, and indeed this was the state of affairs with respect to damages class actions prior to 1966. See, *e.g.*, Geoffrey C. Hazard, Jr., John L. Gedid & Stephen Sowle, *An Historical Analysis of the Binding Effect of Class Suits*, 146 U. PA. L. REV. 1849 (1998). But such an approach risks over-enforcement, *cf.* Brainerd Currie, *Mutuality of Collateral Estoppel: Limits of the Bernhard Doctrine*, 9 STAN. L. REV. 281 (1957), and reduced incentives to settle. See *infra* notes \_\_.

so-called “corporate settlement mills” to privately resolve disputes and procure litigation waivers without resort to the legal process.<sup>216</sup> In a novel settlement agreement, parties to a class action applied mandatory class procedures to an agreement waiving the right to future class relief, while leaving open the possibility of future individual suits.<sup>217</sup> Arbitration is yet another potential intervener, as enforceable class-arbitration waivers have drawn skepticism from many judges and scholars.<sup>218</sup> In each of these circumstances, a legislature may not object to the new practice in theory, but may worry about its effect on case outcomes. Instead of banning the practice outright, a legislature could adopt non-preclusion to remedy or deter any under-enforcing outcomes that may result.<sup>219</sup>

Still another version of this account of redundant litigation addresses situations in which reliability varies across cases. Imagine a government agency that is a reasonably reliable enforcer except that it occasionally settles suboptimally with political allies (or as a result of some other nonrandom bias). On this set of facts, the lawmaker is—in a sense—saddled with an unreliable enforcer for those few cases if it wants to preserve the reliable enforcer for all other cases.<sup>220</sup> Redundant litigation can be available for these suboptimal outcomes,<sup>221</sup> and the threat of redundant litigation—and its ability to publicize and substantiate those suboptimal outcomes—may have a feedback effect on the agency’s behavior.<sup>222</sup>

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<sup>216</sup> See Dana A. Remus & Adam S. Zimmerman, *The Corporate Settlement Mill*, 101 VA. L. REV. (forthcoming). Remus and Zimmerman propose regulation, judicial scrutiny, participation, and ethical standards, but another response would be permitting redundant government litigation.

<sup>217</sup> See D. Theodore Rave, *When Peace Is Not the Goal of a Class Action Settlement* (citing *In re Trans Union Corporation Privacy Litigation*, 741 F.3d 811 (7th Cir. 2014)). The District Court approved a settlement agreement using the mandatory aggregation procedure of Rule 23(b)(1)(A), under which defendant offered some relief in exchange for waivers of the right to proceed in an “aggregated action.” The agreement did not seem to bar *parens patriae* actions on the same claims.

<sup>218</sup> *E.g.*, Judith Resnik, *Fairness in Numbers: A Comment on AT&T v. Concepcion, Wal-Mart v. Dukes, and Turner v. Rogers*, 125 HARV. L. REV. 78 (2011).

<sup>219</sup> This proposal would be particularly effective if combined with a setoff rule, such that the threat of relitigation would deter the most egregious versions of these practices but not deter their use entirely. See *infra* Section III.C.2.

<sup>220</sup> This assumes that the lawmaker cannot identify these cases *ex ante* and legislate accordingly. For example, if we knew that the EPA had a problem with clean water cases, we could strip its jurisdiction in that area only.

<sup>221</sup> See *supra* note \_\_ (discussing “diligent prosecution” requirements).

<sup>222</sup> Of course, reliability may vary between public and private agents, and there are practical and democratic-theory differences between public and private enforcers. See, *e.g.*, Stephenson, *Public Regulation*, *supra* note \_\_; Engstrom, *supra* note \_\_. For these reasons, legislatures may adopt asymmetric preclusion rules. See *supra* notes \_\_ (collecting statutes with asymmetric preclusion). For example, if a legislature concluded that public enforcement was more reliable, government outcomes could preclude private

Finally, redundant litigation could target cases based on disposition type. Specifically, a legislature may think differently about the reliability of settlements versus judgments. As noted above, under-enforcing settlements are a significant problem in class actions. There also are good reasons to be concerned about public settlements that cut off further investigation.<sup>223</sup> In the language of strategic behavior, the risk of shirking may be magnified in settlement cases.<sup>224</sup> These concerns may support a non-preclusion rule for settlements. Agency problems seem less severe in cases litigated to judgment. Courts actively supervise litigants and attorneys, opportunities to collude are reduced, and the public nature of judicial proceedings compared with settlements should create some sunlight-as-disinfectant effects.<sup>225</sup> Under-enforcing judgments may be a problem, but it would not be unreasonable for a legislature to be less concerned than when cases settle.<sup>226</sup> Therefore, settlements could be denied preclusive effect while relitigation of judgments would only be permitted if a high bar is cleared.<sup>227</sup>

This differentiation between the preclusive effect of settlements and judgments reflects what might be called *contingent delegation*. If an agent is willing to litigate cases, incur those costs, and subject itself to the scrutiny of the judicial process, then the lawmaker devolves significant authority. The litigating agent has full control unless its performance is so poor that it is susceptible to a collateral attack.<sup>228</sup> If parties settle cases,

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litigants asymmetrically. Less drastically, relative preclusion could vary depending on party order—*i.e.*, it is harder, but not impossible, to relitigate a government case.

<sup>223</sup> See, *e.g.*, Johnson, *supra* note \_\_ (discussing criticisms of EPA intervention).

<sup>224</sup> See *supra* note \_\_

<sup>225</sup> See, *e.g.*, Fed. R. Civ. P. 23 (judicial supervision of class-action representation).

<sup>226</sup> One potentially relevant consideration is that redundancy might affect fact-finder behavior—it might increase errors in favor of defendants or discourage investment of judicial resources in light of the potential backstop. See, *e.g.*, Huq, *supra* note \_\_; Jonathan Masur, *Patent Inflation*, 121 YALE L.J. 470 (2011) (showing how second-round review affects judicial behavior in the first case); Rosenberg, *supra* note \_\_ (discussing adjudicative investment as a function of stakes). Exactly how these effects may play out in redundant enforcement is not clear, and the presence of government actors may complicate matters further. These effects thus deserve further study.

<sup>227</sup> *Cf.* Lemos, *Aggregate Litigation*, *supra* note \_\_ (discussing class actions and *parens patriae* suits); William B. Rubenstein, *Finality in Class Action Litigation: Lessons from Habeas*, 82 N.Y.U. L. REV. 790, 820-41 (2007) (discussing habeas cases and class actions); Marcel Kahan & Linda Silberman, *The Inadequate Search for “Adequacy” in Class Actions: A Critique of Epstein v. MCA, Inc.*, 73 N.Y.U. L. REV. 765 (1998). Writing about public suits vindicating private claims, Professor Lemos rejected preclusion in favor of offset or opt-in. See Lemos, *Aggregate Litigation*, *supra* note \_\_. Lemos’s arguments apparently apply to settlements and judgments, but the logic described here suggests that judgments could be treated more respectfully (and more preclusively) than settlements.

<sup>228</sup> Note that preclusion attaches to claims actually litigated, so governmental under-claiming would not preclude private suits on claims not raised in the first action. *Cf.* Restatement (Second) of Judgments §§ 17 & 27.

however, the delegation is weaker—no preclusion attaches. The relative strength of the contingent delegation (*i.e.*, the relative strength of preclusion) is at the discretion of the legislature.<sup>229</sup> And, redundant enforcement may reveal information about public and private enforcers that informs future contingent delegations.

## 2. Damages: Multiple Punishments and Incentives

This Section makes a simple claim—damages in redundant litigation should offset to reduce over-enforcement—and then considers various implications of this proposal.

As explained above, legislatures may be justified in turning to redundant public-private litigation to reduce under-enforcement in case outcomes. Adopting a non-preclusion rule, however, risks over-enforcement in the form of multiple recoveries. If both private and public enforcers can sue on the same offense, defendants could easily pay twice. This is the “multiple punishments problem.”<sup>230</sup> A direct solution is to require that damages in the second case be offset by the value of the first recovery. That way, a defendant should never pay more than full value. In practice, pairing offset with non-preclusion is common in public-private litigation, though it is not the universal rule, and the lack of offsets in some areas should raise red flags.<sup>231</sup>

Note that this seemingly straightforward rejection of multiple damages has implications for alternative strategies to remedy under-enforcement in case outcomes. One potential response to under-enforcing outcomes would be to multiply damages—if parties routinely accept one

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<sup>229</sup> Potential standards could include rules borrowed from legal malpractice, *Gunn v. Minton*, 133 S.Ct. 1059, 1065 (2013) (discussing Texas law); ineffective assistance of counsel in habeas cases, *Strickland v. Washington*, 466 U.S. 668, 686 (1984); or inadequate representation in class-action jurisprudence. See *Matsushita*, 516 U.S. at 395-99 (Ginsburg, J., concurring in part and dissenting in part). See also *supra* note \_\_\_ (collecting sources).

<sup>230</sup> See, *e.g.*, Jim Gash, *Solving the Multiple Punishments Problem: A Call for a National Punitive Damages Registry*, 99 NW. U. L. REV. 1613 (2005); Thomas B. Colby, *Beyond the Multiple Punishment Problem: Punitive Damages as Punishment for Individual, Private Wrongs*, 87 MINN. L. REV. 583 (2003); Catherine M. Sharkey, *Punitive Damages as Societal Damages*, 113 YALE L.J. 347 (2003); Howard A. Denemark, *Seeking Greater Fairness when Awarding Multiple Plaintiffs Punitive Damages for a Single Act by a Defendant*, 63 OHIO ST. L.J. 931 (2002); Samuel Issacharoff, “*Shocked*”: *Mass Torts and Aggregate Asbestos Litigation After Amchem and Ortiz*, 80 TEX. L. REV. 1925 (2002). See also *Roginsky v. Richardson-Merrell, Inc.*, 378 F.2d 832 (2d Cir. 1967) (Friendly, J.).

<sup>231</sup> See *supra* notes \_\_\_ (collecting examples in securities, antitrust, and ERISA). In many areas, public and private damages are described differently—*e.g.*, private litigants may be able to recover punitive damages while public litigants recover civil penalties. The mere re-characterization of damages theories should not interfere with the offset regime. Only if damages truly seek different ends, should offset be reconsidered.

half of the optimum, a legislature could prescribe double damages.<sup>232</sup> The treble-damages provisions in antitrust laws, for example, may be pursuing this approach, which has the advantage of not requiring two suits to achieve the increased recovery.<sup>233</sup> That said, the multiple-punishments problem highlights reasons to favor redundant litigation over damage multipliers. First, although a damage multiplier might *on average* result in optimum recovery, in any given case a defendant might pay too much. For fairness reasons, these multiple punishments may be disfavored.<sup>234</sup> The risk of multiple damages also may disproportionately affect risk-averse parties, while they will be ineffective against parties with a limited ability to pay.<sup>235</sup> Finally, multiplied damages may not be effective in response to many of the enforcement problems identified above—a truly captured agency, an enforcer with a fixed resource constraint, or a case involving difficult-to-transfer knowledge may still call out for multiple diverse agents rather than a multiplier.<sup>236</sup>

Returning to the main thread, the simple claim that offsets avoid multiple damages must grapple with the potential consequences for the likelihood of redundant suits. Redundant litigation options cannot deter or remedy under-enforcement if they are never cost-effective to exercise.<sup>237</sup> Offset thus presents an incentive problem: whichever agent goes second will be pursuing a reduced opportunity for damages,<sup>238</sup> and this reduction in incentives could result in non-selection or under-investment.<sup>239</sup>

With respect to government attorneys as redundant enforcers, the reduction in the purely pecuniary incentives to litigate should be less troubling. Public attorneys have motives beyond monetary recovery.<sup>240</sup> If one subscribes to a budget-maximizing view of public agencies, then it would make sense for government attorneys to demonstrate the shortcomings of private enforcement in order to acquire more resources in

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<sup>232</sup> This is obviously an oversimplification, as one would expect dynamic effects resulting from a damage multiplier that may require a different ratio. However, the logic of this discussion holds no matter the proportions used here.

<sup>233</sup> See *supra* note \_\_.

<sup>234</sup> See *supra* note \_\_ (collecting sources). Indeed, in some areas, the Supreme Court has disallowed multiple punishments on constitutional grounds. See *supra* note \_\_.

<sup>235</sup> If a party had funds to pay a compensatory award but not a multiplied one, then it would not experience any greater deterrent effect from the multiplier.

<sup>236</sup> See *supra* Section III.A.

<sup>237</sup> It was a related worry about cost effectiveness that spurred the creation of opt-out class actions. See Benjamin Kaplan, *Continuing Work of the Civil Committee: 1966 Amendments of the Federal Rules of Civil Procedure (I)*, 81 HARV. L. REV. 356 (1967).

<sup>238</sup> Assuming multiple recoveries were disfavored, this is another reason to doubt serial private litigation as a policy response. See *supra* note \_\_.

<sup>239</sup> Assuming multiple recoveries were disfavored, this is another reason to doubt serial private litigation as a policy response. See *supra* note \_\_.

<sup>240</sup> See *supra* note \_\_ and accompanying text.

the next round of legislation.<sup>241</sup> Alternatively, if public attorneys were public spirited (or public-attention seeking), miscarriages of justice may call out for action. These same interests also may discourage public actors from relitigating cases in which prior outcomes were only slightly suboptimal. It would be hard to imagine a legislature responding positively to an agency that used valuable resources to recover a pittance, nor would such a suit maximize the public interest.<sup>242</sup>

The incentive problem is more acute when private actors are redundant enforcers. Private parties seem primarily motivated in these cases by profit,<sup>243</sup> and private parties necessarily will have reduced incentives in offset cases as compared with non-offset cases. If the legislature ranks cases according to potential recovery, then this reduction in incentives is appropriate—private parties will sue only when government underperformance is so extensive that it would be cost justified to bring a redundant suit to recover the remainder. If lawmakers want the disciplining effect of redundant litigation to reach beyond those cases, however, then they would need to construct incentives to encourage follow-on suits. Attorney fees are an obvious starting point.<sup>244</sup> For redundant suits, lawmakers could offer attorney fees calculated with reference to the pre-offset value.<sup>245</sup> To avoid private attorneys filing nearly frivolous suits in order to rack up attorney fees,<sup>246</sup> the legislature could limit the availability of fees to significant recoveries.<sup>247</sup> One could characterize this proposal as *contingent procurement*—the government is

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<sup>241</sup> See WILLIAM A. NISKANEN, JR., *BUREAUCRACY AND REPRESENTATIVE GOVERNMENT* (1971); Gersen, *supra* note \_\_\_\_.

<sup>242</sup> See, e.g., Bruce Hay & David Rosenberg, “Sweetheart” and “Blackmail” *Settlements in Class Action: Reality and Remedy*, 75 NOTRE DAME L. REV. 1377 (2000) (discussing the consequences of asymmetric stakes for accuracy). Of course, the asymmetric stakes between private plaintiffs and defendants in mass actions are notorious. See generally Alexandra D. Lahav, *Symmetry and Class Action Litigation*, 60 UCLA L. REV. 1494 (2013); Hay & Rosenberg, *supra*.

<sup>243</sup> See *supra* note \_\_\_\_.

<sup>244</sup> See, e.g., FARHANG, *supra* note \_\_\_\_ (collecting data on fee provisions).

<sup>245</sup> For example, if a set of claims were worth \$10 million plus a \$2 million attorney fee, and the government settled the *parens patriae* case for \$5 million, a private attorney obtaining \$5 million in additional recovery could be entitled to the same \$2 million fee. Legislatures may view this as unfair to defendants and as creating a disincentive for government attorneys to achieve maximum settlements. A solution to both problems would require defendants to satisfy the difference in damages and the government to reimburse the attorney fee.

<sup>246</sup> See *supra* note \_\_\_\_ (discussing an antitrust suit seeking zero-dollar recovery in order to qualify for an attorney-fee award).

<sup>247</sup> For example, the attorney may only recover if damages exceed the fee, some multiple of the fee, or some fixed amount. To avoid inflection points, perhaps the attorney fee should grow in proportion to the difference between the private result and the offset.

procuring substitute representation only if the private party achieves a certain level of recovery.<sup>248</sup>

Importantly, though, increasing the incentives to relitigate comes at a cost to settlement. If settlements are not preclusive, and if relitigation is likely, defendants may be reluctant to settle in the first place. The uncertainty of follow-on litigation undercuts the finality of settlement,<sup>249</sup> and defendants may worry about the signal that settlement sends to future enforcers.<sup>250</sup> Lawmakers must be aware of this tradeoff when considering redundant litigation.<sup>251</sup> That said, settlement effects should not be overstated. The incentives to settle are already quite strong,<sup>252</sup> and parties settle even if general releases are not available.<sup>253</sup> Moreover, offset provisions should help to reduce settlement effects because they link the risk of relitigation to the adequacy of the settlement. Defendants' incentive to settle will be most disturbed when settlement values are most troubling from a social perspective.<sup>254</sup>

In sum, when adopting redundant public-private litigation, lawmakers can curtail over-enforcement by offsetting damages in the redundant case, though incentives may need attention to ensure that useful disciplining litigation remains cost effective.<sup>255</sup>

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<sup>248</sup> If the redundant litigation follow a government judgment, different rules may be necessary. Perhaps private parties could be required to bring the underlying claim against the defendant and also argue inadequate representation, or they could have a takings-like claim against the government agency that failed them. It seems likely that a legislature would reject a rule in which the government could be liable for the full value of every claim it loses. But it would not be so unreasonable to provide restitution in those cases in which the government grossly underperformed.

<sup>249</sup> See, e.g., Richard A. Nagareda, *The Preexistence Principle and the Structure of the Class Action*, 103 COLUM. L. REV. 149 (2003).

<sup>250</sup> See, e.g., Omri Ben-Shahar & John A. E. Pottow, *On the Stickiness of Default Rules*, 33 FLA. ST. U. L. REV. 651 (2006).

<sup>251</sup> For example, lawmakers especially concerned with settlement effects could give defendants the protection of a fee-shifting provision tied to the redundant recovery.

<sup>252</sup> See, e.g., STEVEN SHAVELL, FOUNDATIONS OF ECONOMIC ANALYSIS OF LAW 410 (2004) (suggesting that 98 percent of cases settle). Although this 98-percent figure overstates the case, see, e.g., Theodore Eisenberg & Charlotte Lanvers, *What is the Settlement Rate and Why Should We Care?*, 6 J. EMP. LEG. STUD. 111 (2009), there is no doubt that a substantial number of civil cases settle.

<sup>253</sup> Defendants settle antitrust and securities cases with government regulators even in light of follow-on private suits. And the notorious difficulty of enforcing releases has not deterred settlements in the vast majority of cases.

<sup>254</sup> For this reason, it also should not be unfair to deprive defendants of the preclusive benefits of an illegitimate first disposition. See *supra* Section III.C.1.

<sup>255</sup> The discussion here has focused on damages cases, but of course enforcement suits may seek declaratory or injunctive relief. One need look no further than the classics of public-law litigation—e.g., *Brown v. Board of Ed.*, 347 U.S. 483 (1944); *Abram Chayes, The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281 (1976)—to see that declaratory and injunctive relief should not be ignored. One simple way to translate this

### 3. Claims Processing: Order and Timing

The foregoing discussion has assumed sequential enforcement, but public and private suits may be litigated simultaneously. Simultaneous suits risk duplicative work and lose out on beneficial aggregation. Simultaneous suits also risk shirking, as both agents will prefer that the other makes costly investments in research. Finally, if simultaneous litigation creates a race, it may discourage enforcers from sharing information, while encouraging them to cut corners, strike sweetheart deals, or engage in inefficient gamesmanship.<sup>256</sup>

Legislatures may respond to these concerns by turning simultaneous enforcement actions into sequential ones. Claims-processing rules have the power to affect litigation timing. The simplest version is a stay rule: all suits except one are stayed pending its outcome.<sup>257</sup> To ensure that parties and courts are aware of simultaneous suits, parties could be required to give notice of potentially redundant litigation.<sup>258</sup> Citizen-suit provisions, for example, often call upon private parties to notify the government of their suits.<sup>259</sup> Another way to reduce waste is to limit the time in which overlapping claims can be brought. For example, private actors could have the option to intervene as co-plaintiffs or to replace a public enforcer only at the outset of litigation.<sup>260</sup> And courts have various

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Section's recommendation to equity is to adopt its approach to preclusion rules, ignore offset rules (because there are no damages to offset), and turn directly to claims processing. Another view might be that governments never should be precluded from pursuing injunctive relief. A middle ground applies the former recommendation to private claims and the latter to public claims. And in some injunctive cases, remedies may be additive such that "offset" could apply.

<sup>256</sup> Cf. Jack Hirshleifer, *The Private and Social Value of Information and the Reward to Inventive Activity*, 61 AM. ECON. REV. 561 (1971). These effects should exist whether the first suit precludes or offsets the second.

The discussion here is simplified in that it assumes one public and one private enforcer. Of course, federal and state governments also may have overlapping claims, and multiple state governments may want a piece of the action. This paper takes no position on these questions. Instead, the focus here is how legislatures may tap public and private enforcers to improve law enforcement through redundant public-private action.

<sup>257</sup> Some statutes include stay provisions, see *supra* notes \_\_, and legislatures could take advantage of existing judicial tools for managing parallel proceedings.

<sup>258</sup> See *supra* note \_\_ and accompanying text (discussing notice provisions).

<sup>259</sup> See *supra* note \_\_ and accompanying text. Similar provisions could exist in other statutory contexts and in either direction. Cf. Lemos, *Aggregate Litigation*, *supra* note \_\_ (proposing notice and opt-out for private parties in government suits).

<sup>260</sup> Cf. 31 U.S.C. § 3730(b)(2) (permitting government intervention in False Claims Act suit within 60 days); 47 U.S.C. § 402 (permitting any interested party to intervene in judicial review of FCC decision within 30 days).

capabilities that can improve coordination between seemingly separate proceedings.<sup>261</sup>

Whether the government suit should stay the private suit or vice versa is an important choice.<sup>262</sup> The strategic-behavior considerations described above are particularly relevant to this claims-processing issue. Recall that cue-taking may be a good thing if the reliable agent cues the less-reliable one.<sup>263</sup> The legislature may well conclude that the government enforcer is more reliable but lacks the resources to prosecute every case vigorously.<sup>264</sup> If the government is allowed to move first but calibrate its effort, this action can signal to follow-on private enforcers that further work is necessary. For example, the government could pursue injunctive relief or liability only, thereby cueing private enforcers to take up damages actions. Indeed, in some areas, a finding of liability in a government enforcement action is *prima facie* evidence of a violation in the follow-on private suit,<sup>265</sup> and in others government litigation automatically stays the statute of limitations for redundant private litigation.<sup>266</sup> Alternatively, if redundant litigation is only necessary to cure occasional lapses by the public (or private) enforcer, then public (or private) suits should go first.<sup>267</sup>

An additional consideration with respect to party ordering is compensation. The multiple punishments literature worries about defendants unfairly paying multiple judgments, but it often ignores the issue of compensation—which of the many potential plaintiffs collects the damage award, and why are others barred from recovery?<sup>268</sup> In an offset regime, the party suing first has access to the largest potential recovery. A

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<sup>261</sup> See, e.g., MANUAL FOR COMPLEX LITIGATION (4th ed.) § 22.2 (“Courts routinely order counsel to disclose, on an ongoing basis past, and pending related cases in state and federal courts and to report on their status and results.”); Clopton, *supra* note \_\_ (discussing coordination in transnational litigation).

<sup>262</sup> Particular circumstances also may call for more creative solutions such as auctions or tournaments. See, e.g., Weisbach, *supra* note \_\_.

<sup>263</sup> See *supra* notes \_\_.

<sup>264</sup> See *supra* notes \_\_ and accompanying text (discussing this justification).

<sup>265</sup> See *supra* note \_\_.

<sup>266</sup> See *supra* note \_\_.

<sup>267</sup> See *supra* notes \_\_ and accompanying text (outlining this justification for redundant litigation).

<sup>268</sup> See *supra* note \_\_ (collecting sources). Professor Sharkey, a notable objector to this trend, identified a particularly telling passage from a law-and-economics textbook: “[T]hat the damages are paid to the plaintiff is, from an economic standpoint, a detail. It is payment by the defendant that creates incentives for more efficient resource use. The transfer of the money to the plaintiff affects his wealth but does not affect efficiency or value.” Sharkey, *supra* note \_\_ (quoting RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW 78 (1972)). Another response would be to decouple the award to plaintiff from the payment by defendant. E.g., David Rosenberg, *Decoupling Deterrence and Compensation Functions in Mass Tort Class Actions for Future Loss*, 88 VA. L. REV. 1871 (2002).

legislature allowing government litigation to proceed first must be comfortable with reducing potential private compensation, or it must come up with another way to compensate.<sup>269</sup> If private litigation goes first, however, private plaintiffs have an opportunity at full recovery. This option could be understood as forfeiting further compensation from the government litigation.<sup>270</sup>

Non-monetary values such as dignity and participation are also relevant to claim ordering.<sup>271</sup> Though much of this Article is framed in instrumentalist terms, particularly for “private law” claims, there are reasons to think that an aggrieved party should have the right to an individual day in court against a defendant that did her wrong.<sup>272</sup> These values may suggest that a private party should have the right to proceed first, particularly for private-law claims. If private parties have this option and choose to decline or accept socially suboptimal results, then government attorneys may be needed to fill the deterrence gap.<sup>273</sup> Indeed, as long as public actions do not preclude private ones, individuals will retain their right to a day in court independent of governmental action—and the monetary offset is less concerning for suits vindicating non-pecuniary interests.

#### IV. CONCLUSION

Law enforcement faces random errors, biases, resource constraints, information problems, and agency costs. Lawmakers can harness multiple diverse agents to help mitigate these concerns if they sensibly link institutional design to legislative preferences. Of course, redundant enforcement is not the right approach for all situations and in all forms. Legislatures must make the underlying judgments about which pathologies are sufficiently pernicious to justify redundant

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<sup>269</sup> Perhaps intervention is useful here. In many current regimes, intervention cuts off the second suit, but it also could have consequences for available damages. For example, if a party intervenes within the designated period, it would be entitled to full compensatory damages; if it does not, then a future suit would be subject to offset.

<sup>270</sup> Even if the prior case took the form of a class action, plaintiffs had rights to receive notice, opt out of litigation, and object to settlement. See Fed. R. Civ. P. 23. Certainly the government would be within its rights to distribute recoveries from the second suit, but such distributions should not be required.

<sup>271</sup> See, e.g., Frank I. Michelman, *The Supreme Court and Litigation Access Fees: The Right to Protect One’s Rights—Part I*, 1973 DUKE L.J. 1153 (discussing dignity, participation, effectuation, and deterrence values).

<sup>272</sup> See, e.g., *Martin v. Wilks*, 490 U.S. 755, 762 (1989) (referring to “[o]ur deep-rooted historic tradition that everyone should have his own day in court”); Owen M. Fiss, *The Allure of Individualism*, 78 IOWA L. REV. 965 (1993). For a discussion of the revival of “individual justice” in private law, see Nathan B. Oman & Jason Solomon, *The Supreme Court’s Theory of Private Law*, 62 DUKE L.J. 1109 (2013).

<sup>273</sup> And because the private party had her chance, the government in the second suit need not be preoccupied by individual (as opposed to social) goals. *Cf. supra* notes \_\_\_ and accompanying text (making a similar argument regarding compensation).

enforcement.<sup>274</sup> Legislatures have to decide whether to organize decisions based on enforcement unit or regulated area.<sup>275</sup> And legislatures must set enforcement policy by making choices about procedural and remedial design.<sup>276</sup> These are the hard questions: how should we weigh the costs and benefits, and how should we structure enforcement regimes?<sup>277</sup> Rejecting redundancy out of hand, or ignoring its central role in the modern regulatory state, results in a failure to grapple with these debates. A better approach acknowledges that redundant public-private enforcement is part of the enforcement landscape and thinks more deeply about when and how this strategy can form a valuable part of a broader regulatory regime.

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<sup>274</sup> See *supra* note \_\_ (discussing, for example, areas in which the legislature may be willing to accept over-enforcement).

<sup>275</sup> One could think of CAFA, as applied in *Mississippi*, as making a decision based on enforcement unit—state attorneys general pursuing *parens patriae* actions are treated differently than class counsel. See *supra* notes \_\_. Whereas the reliance on citizen-suits in nearly all environmental statutes might be seen as an enforcement strategy based on the regulated area. See *supra* note \_\_.

<sup>276</sup> See, e.g., Burbank, et al., *supra* note \_\_; Wolff, *supra* note \_\_; FARHANG, *supra* note \_\_. See also *infra* notes \_\_ and accompanying text (discussing *Shady Grove*).

<sup>277</sup> Relatedly, courts should remain sensitive to enforcement priorities reflected in enforcement design. But there are reasons to be concerned that this is not always the case. For example, in *Shady Grove*, the Supreme Court held that New York plaintiffs could maintain a class action for state law claims even though New York law would have prohibited aggregation of those claims in state court. 559 U.S. 393 (2010). Aggregation rules reflect a legislative judgment about enforcement, thus the decision in *Shady Grove* trumped a legislative choice about the scope of private enforcement. See, e.g., Stephen B. Burbank & Tobias Barrington Wolff, *Redeeming the Missed Opportunities of Shady Grove*, 159 U. PA. L. REV. 17 (2010). Courts also may have trumped legislative choices when they converted one-way preclusion rules in federal civil rights statutes into mutual preclusion rules, see *supra* notes \_\_, or when they inferred private causes of action. Readers also may think that *Mississippi* is another example of this phenomenon, as the Court rejected CAFA's preference for consolidation in favor of a strict definition of "mass action." See *supra* note \_\_. That said, the *Mississippi* decision seems consistent with state law, so the outcome may reflect legislative primacy after all.

Readers with comments may address them to:

Professor Zachary Clopton  
University of Chicago Law School  
1111 East 60th Street  
Chicago, IL 60637  
[zclopton@uchicago.edu](mailto:zclopton@uchicago.edu)

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