CHALLENGES FOR PUBLIC ENFORCEMENT

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The law in books is different from the law in action. Enforcement determines the distance between the two. Studies show that only a fraction of people with legal grievances sue. State and federal agencies go after an even smaller proportion of offenders. If that changed overnight, and every arguable violation resulted in some form of enforcement action, the law as we know it would mean something very different. The words that appear in statutes and in judicial decisions would be the same, but their practical effect would be transformed by the shift in enforcement practices.

If enforcement controls the effective meaning of the law, it matters a great deal who controls enforcement. Most state and federal statutes vest enforcement authority in an administrative agency; some also create private rights of action that permit private parties to sue to enforce the law. Beyond the question of whom to empower lies a series of more targeted decisions that governments must make about how to structure enforcement authority. For example, if private litigants are permitted to sue, what remedies can they recover? Should public and private litigation supplement each other, or should government actions take precedence over private suits? Should government agencies be permitted to "eat what they kill" (so to speak), retaining a portion of the proceeds of their litigation efforts to fund their offices? The answers to these questions have profound consequences for the shape and scope of enforcement efforts—which, in turn, have profound consequences for the law.

For our purposes, I want to focus on a set of questions concerning how *public* enforcement—typically defined as "the use of public agents . . . to detect and sanction violators of legal rules"[1]—is structured and deployed. Much of my work addresses the relationship between public enforcement and the "private" alternative—litigation by private litigants and lawyers. The conventional wisdom holds that public and private litigation differ along at least three lines. The first has to do with the nature of the relevant interests. Most accounts of private litigation begin from a common premise: Private enforcement is fueled by the financial incentives of litigants and their lawyers. On that view, a plaintiff will sue if, and only if, her expected recovery—a function of the available damages award and the likelihood of success—exceeds the costs of litigation. Likewise, a private attorney will take a case if, and only if, the expected payoff exceeds the cost. To be sure, commentators sometimes acknowledge that private litigants may be motivated by goals other than money—goals such as revenge, or a desire to be heard, to "have one's day in court." But, like the financial interests that dominate most accounts, these non-financial interests share a common core: they are personal, individualized, private.

Public enforcement is different—or at least it can be. Public enforcement agencies are not for-profit businesses; they need not break even in every case, much less maximize recoveries. Public attorneys are salaried, and their annual take-home is not connected in any immediate way

[1] A. Mitchell Polinsky & Steven Shavell, *The Economic Theory of Public Enforcement of Law*, 38 J. Econ. Lit. 45, 45 (2000).

to the quantity or quality of cases they choose to pursue, or the size of the judgments they recover.

Like other lawyers, moreover, government attorneys are subject to ethical rules that demand zealous advocacy on behalf of their clients. The "clients" in public litigation typically are government officials and institutions who are themselves duty-bound to serve the public interest. And, in some cases, the only client is the public itself. When a government prosecutor decides to pursue charges against a criminal defendant, for example, or a state attorney general initiates affirmative litigation seeking to redress some harm to the state's citizens, there is no agency to act as intermediary between the public and the attorney. The attorney acts in the name of the state and its citizens, and her obligation is to the public generally.

Thus, while public enforcers, like their private counterparts, must weigh the expected costs and benefits of every enforcement action they undertake, their considerations are different—or at least they can be. Whereas private enforcers focus on *private* costs and benefits, public enforcers can take account of the broader *social* consequences of the case, including costs and benefits to defendants, third parties, and the system as a whole.

Public enforcement also can be centralized in ways that are hard to imagine for private enforcement. Control over public enforcement can, in theory, be vested in a central actor or institution, which can determine which cases to pursue, which sanctions to seek, and so on. Centralized control allows public enforcers to commit to a consistent approach to enforcement, such that the "law in action" is coherent, predictable, and grounded in some notion of good policy. In a decentralized system of private enforcement, by contrast, no one party can control the efforts of others, making it impossible to ensure that enforcement in the aggregate will follow a discernible pattern.

Finally, public enforcement is—or at least can be—accountable in a way that private enforcement is not. Indeed, accountability is at the heart of many critiques of private enforcement. Even when private litigants understand themselves as serving the public interest, they cannot claim to "represent" the relevant public in the same way as government. And, to the extent members of the public believe that private enforcement has disserved their interests, there is little they can do to hold the responsible actors accountable. Again, public enforcement can, in theory, be different: It is possible to imagine government enforcers standing for election, or answering to political representatives who are themselves accountable to the people.

You'll notice that I have been hedging my bets in this discussion: I keep saying that public enforcement "can be" different from private enforcement along the lines suggested above. Whether public enforcement really *is* different—and to what extent, and why—turn out to be difficult questions, which I hope we can discuss together on November 12th.

One place to start is with the identity of the government lawyer's client. When government lawyers undertake enforcement actions, whom do they represent? Academics have spilled a lot of ink on analogous questions about the U.S. Solicitor General: some say the SG represents the U.S. government as a whole, some say the client is the executive branch, some say it is the President, and others say the client is the public at large. Though far less attention has been paid to questions of day-to-day enforcement, particularly at the state level, legal ethicists have debated similar issues. Consider agency lawyers, for example. Some legal ethicists argue that agency lawyers'

obligations run to the public, such that an attorney would be justified—indeed, duty-bound—to go against the instructions of agency higher-ups if she believed those instructions were based on faulty legal reasoning or were otherwise inconsistent with the public interest. Others reject that view.

So, who's right? How should we conceive of the "client" in public enforcement actions?

A second question has to do with financial incentives. As noted above, it is commonplace in the literature on enforcement to distinguish between public and private enforcement on the ground that the latter is financially motivated while the former is not. I've argued that the reality is more complicated. In fact, both federal and state agencies have self-interested reasons to maximize financial recoveries, even though their employees are paid by salary and do not profit financially from successful enforcement. The most obvious incentive comes from institutional arrangements that allow enforcement agencies to retain a portion of any financial awards they win. Such arrangements are common at the state level and are beginning to crop up in federal law as well. Even where public enforcers must turn over any monetary recoveries to the general treasury, agencies (and their employees) may have reputational interests in maximizing financial awards. Money has two significant advantages over other forms of relief: it is easy to understand and easy to quantify and compare. An agency can easily trumpet a "record" financial judgment. It is far more difficult for public enforcers to convey the importance or the scale of injunctive remedies. The difficulty is compounded when the public-policy payoff of nonmonetary relief is uncertain and will be realized, if at all, in future years. Particularly when agencies face public scrutiny and increased oversight from the legislature, they may have strong incentives to focus their efforts on performance measures—such as dollars collected—that send a clear signal and permit comparisons over time and across agencies.

If I'm right that public enforcers sometimes have incentives to focus on financial recoveries in the way we'd expect from private litigants, is that a good thing or a bad thing? Is a focus on money more likely in some types of cases as opposed to others?

A third set of questions concerns the role of private actors—attorneys and other interested individuals and groups—in public enforcement. It is becoming increasingly common for government entities to rely on private lawyers to perform legal work for the government, often on a contingent-fee basis. Proponents of these arrangements argue that private lawyers can bring specialized expertise that the government is lacking. And when those lawyers are willing to work on contingency, they enable the government to undertake ambitious and expensive actions that would otherwise be impossible. Critics respond that contingent-fee arrangements allow the executive branch to evade budgetary controls set by the legislature, and they worry that private lawyers smuggle private priorities (including financial incentives) into public enforcement. To some extent, these debates track broader debates about the privatization of government services—but they also raise questions unique to enforcement. Should we be worried about the private actors participating in litigation in the name of the government?

Finally, and perhaps most fundamentally, we might ask about accountability. Critics of private enforcement often seize on notions of political accountability. Private parties may purport to represent the public interest in enforcement actions, but the representation is, at best, virtual. Public enforcers, by contrast, may be elected officials (in the case of most state attorneys general and, on the criminal side, district attorneys), or they may answer to officials who are themselves elected and accountable to the people. It's not difficult to make the case for accountability in the

enforcement context. Political accountability is, on most accounts, "the sine qua non of legitimacy in government action."[2] Accountability promotes majority rule and popular sovereignty; it makes it possible to talk about government "by the people." As I noted at the outset, enforcement can have critical consequences for the law on the ground. Enforcement often demands difficult, contestable, judgments about good policy and the public interest. If we understand enforcement as discretionary policymaking, then it would seem to follow that democratic legitimacy demands some measure of accountability. Nevertheless, there is something decidedly uncomfortable in the notion that government's choice of specific enforcement targets—and of penalties in each case—should be subject to public, or political, whim. When we think about judges, we tend to balance notions of accountability with a commitment to independence, even for elected judges. Should the same be true of enforcement? Or should we be doing more to promote accountability for public enforcers?

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For extended discussions of some of these topics, see *Privatizing Public Litigation* (forthcoming Geo. L.J.); *For-Profit Public Enforcement*, 127 Harv. L. Rev. 853 (2014) (with Max Minzner); *Aggregate Litigation Goes Public: Representative Suits by State Attorneys General*, 126 Harv. L. Rev. 486 (2012); *State Enforcement of Federal Law*, 86 N.Y.U. L. Rev. 698 (2011)—all available at https://law.duke.edu/fac/lemos/bibliography/.

[2] Rebecca L. Brown, *Accountability, Liberty, and the Constitution*, 98 Colum. L. Rev. 531, 533 (1998).