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## The Assessment and Mitigation of Civil Money Penalties by Federal Administrative Agencies\*

Colin S. Diver \*\*

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\*\* Associate Professor of Law, Boston University; Visiting Associate Professor, John F. Kennedy School of Government, Harvard University. B.A., 1965, Amherst College; LL.B., 1968, Harvard University.

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The administrative civil money penalty has unquestionably come of age. Disillusioned with cumbersome criminal, injunctive, and license-removal sanctions, students of regulation have increasingly turned to the civil fine in their search for a more effective enforcement device.<sup>1</sup> Their call has not gone unheeded; in the past decade the civil fine has assumed a place of paramount importance in the compliance arsenal of federal regulators. Indeed, it is today almost inconceivable that Congress would authorize a major administrative regulatory program without empowering the enforcing agency to impose civil monetary penalties as a sanction.

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1. See, e.g., Ayres, *Enforcement of Air Pollution Controls on Stationary Sources under the Clean Air Amendments of 1970*, 4 *ECOLOGY* L.Q. 441, 474-75 (1975); Gribetz & Grad, *Housing Code Enforcement: Sanctions and Remedies*, 66 *COLUM. L. REV.* 1254 (1966); Kovel, *A Case for Civil Penalties: Air Pollution Control*, 46 *J. URB. L.* 153 (1969); Marshall, *Environmental Protection and the Role of the Civil Money Penalty: Some Practical and Legal Considerations*, 4 *ENV'TL AFF.* 323 (1975). See also COMPTROLLER GENERAL OF THE UNITED STATES, *UNITED STATES ATTORNEYS DO NOT PROSECUTE MANY SUSPECTED VIOLATORS OF FEDERAL LAWS 11-12* (1978).

A 1972 Administrative Conference of the United States study of the use of civil money penalties by federal administrative agencies found that although such penalties were in widespread and growing use, there remained many situations in which agencies had to rely on cumbersome license-removal or criminal sanctions as a means of enforcing compliance with the laws they administered. Goldschmid, *An Evaluation of the Present and Potential Use of Civil Money Penalties As a Sanction by Federal Administrative Agencies*, in 2 *RECOMMENDATIONS AND REPORTS OF THE ADMINISTRATIVE CONFERENCE OF THE UNITED STATES* 896, 898 (1972). Concluding that civil monetary penalties provide an ideally flexible sanctioning tool, the Administrative Conference recommended that authority to invoke such sanctions generally should be sought. 1 *C.F.R.* § 305.72-6 (1979). The recommendation asserted that the benefits of civil penalties could best be achieved by an "administrative imposition system," in which the agency itself was empowered to adjudicate the violation and assess

Although doubts about the constitutional authority of Congress to establish "civil" offenses vanished long ago,<sup>2</sup> there remain serious unresolved questions about the proper role of administrative agencies in the enforcement process.<sup>3</sup> Many statutes make no express reference to any agency role in the penalty imposition process. Others apparently contemplate only a limited role, with the courts remaining the principal factfinder. Yet casual observation, supplemented by the more systematic empirical observation of several studies,<sup>4</sup> confirms that agencies usually do in fact play very important roles in the administration of such statutes. At a minimum, of course, agencies typically initiate all or nearly all of the civil money penalty actions brought under the statutes they administer. Furthermore, they typically resolve the vast majority of these actions without ever reaching the stage of formal adjudicatory hearing.<sup>5</sup> The initiation and termination of civil penalty actions thus constitutes one of those vast areas of largely undocumented, unstudied, and misunderstood agency behavior customarily described as "informal action."<sup>6</sup>

The purpose of this Article<sup>7</sup> is to remedy that lack of understanding

the penalty, after a trial-type hearing, subject only to "substantial evidence" judicial review. 1 C.F.R. § 305.72-6(b) (1979). Since those recommendations were made, the number of civil money penalties in general and "administratively imposed" penalties in particular has increased significantly. For a partial list of civil money penalty statutes enacted since 1972, see *Atlas Roofing Co. v. OSHRC*, 518 F.2d 990, 1008-09 n.43 (5th Cir. 1975), *aff'd*, 430 U.S. 442 (1977).

2. See, e.g., *Atlas Roofing Co. v. OSHRC*, 430 U.S. 442 (1977); *Hilvering v. Mitchell*, 303 U.S. 391 (1938); *Lloyd Sabauo S.A. v. Elting*, 287 U.S. 329 (1932).

3. See, e.g., Bickart, *Civil Penalties Under Section 5(m) of the Federal Trade Commission Act*, U. CHI. L. REV. 761 (1977); Gaynor, *The Toxic Substances Control Act: A Regulatory Morass*, 30 VAND. L. REV. 1149, 1187-89 (1977); Lawrence, *Judicial Review of Variable Civil Money Penalties*, 46 U. CIN. L. REV. 373 (1977); Schmeltzer & Kitzes, *Administrative Civil Penalties Are Here to Stay—But How Should They Be Implemented?*, 26 AM. U.L. REV. 847 (1977).

4. See, e.g., C. DAVENPORT, REPORT ON ADMINISTRATIVE PROCEDURES OF THE INTERNAL REVENUE SERVICE, S. DOC. NO. 266, 94th Cong., 2d Sess. 619-729 (1975); P. Gerhart, *Judicial Review of Customs Service Actions: A Report For the Administrative Conference of the United States 71-81* (Aug. 17, 1977); Gifford, *Remission and Mitigation of Forfeitures in the Justice Department*, 1 RECOMMENDATIONS AND REPORTS OF THE ADMINISTRATIVE CONFERENCE OF THE UNITED STATES 697 (1968). The recommendations adopted by the Administrative Conference on the basis of the Davenport report (ACUS Recommendation 75-7, 41 Fed. Reg. 3984 (1976)) were discussed in Asimow, *Civil Penalties for Inaccurate and Delinquent Tax Returns*, 23 U.C.L.A. L. REV. 637 (1976). For other studies of the penalty-imposition process, see COMPTROLLER GENERAL OF THE UNITED STATES, CUSTOMS; PENALTY ASSESSMENT AND MITIGATION PROCEDURES—CHANGES WOULD HELP BOTH THE GOVERNMENT AND IMPORTERS (1978); Dickey, *Customs: Fines, Forfeitures, Penalties and the Mitigation Procedures—Sections 592 and 618 of the Tariff Act of 1930*, 30 BUS. LAW. 299 (1975); Dickey, *Survivals from More Primitive Times: Customs Forfeitures in the Modern Commercial Setting Under Sections 592 and 618 of the Tariff Act of 1930*, 7 LAW & POL'Y INT'L BUS. 691 (1975); Murphy, *Money Penalties—An Administrative Sword of Damocles*, 2 SANTA CLARA LAW. 113 (1962).

5. This is true whether the hearing is offered at the agency or the judicial level. See, e.g., notes 101, 125 & 126 and accompanying text *infra*.

6. For discussions of the need, and methods by which, to study informal administrative action, see Davis, *Informal Administrative Action: Another View*, 26 AM. U.L. REV. 836 (1977); Gardner, *The Informal Actions of the Federal Government*, 26 AM. U.L. REV. 799 (1977); Gardner, *The Procedures by Which Informal Action Is Taken*, 24 AD. L. REV. 155 (1972); Lockhart, *The Origin and Use of "Guidelines for the Study of Informal Action in Federal Agencies"*, 24 AD. L. REV. 167 (1972).

7. This Article is adapted from a report prepared for the Administrative Conference of

by critically examining the ways in which federal regulatory agencies administer civil penalty programs. Part I begins with an overview of penalty statutes and enforcement procedures. It then supplements this broad analysis with a detailed look at the enforcement programs of two agencies. Part II considers the need for penalty standards and explores the criteria to be taken into account in framing such standards. Part III discusses the procedures used in assessing penalties and in disposing of contests to penalty assessments. Finally, the Article concludes by proposing three model enforcement processes, each suitable to a different regulatory setting.

## I. AN OVERVIEW OF CIVIL MONEY PENALTIES

### A. *Statutory Types*

There are some 348 statutory civil penalties<sup>8</sup> enforced by 27 federal departments and independent agencies. These penalties are authorized for the enforcement of a host of regulatory commands relating to such varied subjects as the operating authority of carriers<sup>9</sup> and broadcasters;<sup>10</sup> safety standards for consumer products,<sup>11</sup> workplaces,<sup>12</sup> vessels,<sup>13</sup> and vehicles;<sup>14</sup> marketing restrictions;<sup>15</sup> prohibitions against fraud and deception;<sup>16</sup> liquidity requirements for banks;<sup>17</sup> revenue laws;<sup>18</sup> and pollution abatement requirements.<sup>19</sup> Civil money penalties may be invoked for violating statutes, administrative regulations, or administrative orders; for failure to file reports, keep records, permit entry, or respond to agency inquiries; or for willful, negligent, repeated, or even unintended conduct. Historically, many regulatory statutes specified a fixed monetary penalty, reflecting early doubts about the constitutional authority of the legislature to delegate a flexible

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the United States, C. DIVER, *THE ASSESSMENT AND MITIGATION OF CIVIL MONEY PENALTIES BY FEDERAL ADMINISTRATIVE AGENCIES, FINAL REPORT TO THE ADMINISTRATIVE CONFERENCE OF THE UNITED STATES* (May 1979) [hereinafter cited as *CONFERENCE REPORT*]. Throughout the Article reference is made to the more extensive empirical findings contained in the Conference Report.

8. For purposes of the statistical findings reported herein the unit of analysis is variously designated the "civil penalty," "statute," or "statutory provision." Each separately numbered or alphabetized subsection of a statute which specifies that a civil money penalty is authorized for the violation of a specified offense is counted as a single "penalty" (or "statute"). Thus, a single numbered statutory section may contain several "penalties" (or "statutes").

9. *E.g.*, 47 U.S.C. § 203 (1976) (communications); 49 U.S.C. § 1(12) (1976) (rail); 49 U.S.C. § 1474 (1976) (air).

10. *E.g.*, 47 U.S.C.A. § 503(b) (Supp. 1979).

11. *E.g.*, 15 U.S.C. § 2069 (1976).

12. *E.g.*, 29 U.S.C. § 666 (1976) (occupational health and safety); 30 U.S.C. § 820 (Supp. I 1977) (mine health and safety).

13. *E.g.*, 33 U.S.C. § 1208 (1976) (vessel navigation); 46 U.S.C. § 1484 (1976) (boating safety).

14. *E.g.*, 15 U.S.C. § 1917 (1976) (passenger motor vehicles).

15. *E.g.*, 7 U.S.C. § 1314 (1976) (tobacco); 7 U.S.C. § 1359(a) (1976) (peanuts).

16. *E.g.*, 7 U.S.C. § 9 (1976) (commodity future trading).

17. *E.g.*, 12 U.S.C. § 1425a (1976) (FHLBB member banks).

18. *E.g.*, 26 U.S.C. § 6677 (1976) (failure to file).

19. *E.g.*, 33 U.S.C. § 1005 (1976) (oil pollution); 42 U.S.C. § 7420 (Supp. I 1977) (air pollution).

fining power to an administrative agency.<sup>20</sup> Today, fixed-penalty statutes are increasingly giving way to variable-penalty statutes authorizing the penalty to be set at any level up to a statutory limit, sometimes supplemented by a statutory enumeration of the factors to be considered in the process.

Except for penalties provided for in certain maritime statutes,<sup>21</sup> civil penalties are, by express provision<sup>22</sup> or by implication,<sup>23</sup> subject to ultimate collection in a civil action to be brought in a United States district court.<sup>24</sup> Such an action includes, of course, an opportunity for jury trial of contested factual issues not foreclosed by a previous binding judgment.<sup>25</sup> Except in those relatively rare instances in which the agency is authorized by statute to appear in court through its own counsel,<sup>26</sup> enforcement actions must be initiated by the Department of Justice.<sup>27</sup> Once the case has been referred

20. Such doubts may have been fed by the Supreme Court's denunciation of an administrative imprisonment and deportation power in *Wong Wing v. United States*, 163 U.S. 228 (1896), and the fact that early money penalty cases involved fixed-penalty statutes. *E.g.*, *Oceanic Steam Navigation Co. v. Stranahan*, 214 U.S. 320 (1909); see Schwenk, *The Administrative Crime, Its Creation and Punishment by Administrative Agencies*, 42 MICH. L. REV. 51, 82 (1943). (*Wong Wing*, of course, is easily distinguished in terms of the nature, rather than the flexibility, of the penalty). Whatever their source, such doubts led several lower federal courts and state courts to oppose delegation of flexible finings power to administrative agencies. See, e.g., *Jasper v. Hellmich*, 4 F.2d 852 (E.D. Mo. 1925); *Tite v. State Tax Comm'n*, 89 Utah 404, 57 P.2d 734 (1936). The Supreme Court has, apparently, never squarely faced that specific issue. But its decision in *Helvering v. Mitchell*, 303 U.S. 391, 400 (1938), indicated approval of the practice. Its recent decisions under the Occupational Safety and Health Act (*Atlas Roofing Co. v. OSHRC*, 430 U.S. 442 (1977)) and the Mine Safety and Health Act (*National Independent Coal Operators' Ass'n v. Kleppe*, 423 U.S. 388 (1976)) demonstrate that the issue has no remaining vitality at the federal level.

21. Many statutes dealing with maritime law specify that the appropriate procedure is an action in libel brought by the United States against the offending vessel. *E.g.*, 8 U.S.C. § 1321(a) (1976) (landing of aliens); 18 U.S.C. § 1083 (1976) (transporting persons to gambling ship); 47 U.S.C. § 386(a) (1976) (radio installations on vessels). See generally 28 U.S.C. § 2461(b) (1976).

22. *E.g.*, 7 U.S.C. § 203 (1976) (registration of stockyard dealer); 12 U.S.C. § 1908 (1976) (Federal Reserve credit control); 13 U.S.C. § 305 (1976) (import-export information); 15 U.S.C. § 45(in) (Supp. I 1977) (unfair and deceptive trade practices).

23. See 28 U.S.C. § 2461(a) (1976).

24. See 28 U.S.C. §§ 1355, 2461(a) (1976). See also *Lees v. United States*, 150 U.S. 476, 478 (1893) ("From the earliest history of the government the jurisdiction over actions to recover penalties and forfeitures has been placed in the District Court."). Occasionally, sanctions not requiring the prior approval of a court are provided. See, e.g., 8 U.S.C. § 1221(d) (1976), authorizing the Attorney General to refuse clearance to an aircraft or vessel whose owner or master has refused to pay a penalty administratively assessed for failing to deliver a full and accurate manifest of passengers. A similar enforcement device is authorized by 8 U.S.C. §§ 1284(a), 1323(b), 1323(d) (1976).

25. An adjudication of facts by an agency on the record of an evidentiary hearing may, of course, be binding on the accused. *United States v. Sykes*, 310 F.2d 417 (5th Cir. 1962); *Weir v. United States*, 310 F.2d 149 (8th Cir. 1962). A number of statutes specifically provide that an unappealed administrative order imposing a penalty is binding on the accused in a subsequent collection action. *E.g.*, 15 U.S.C. § 2008(c)(2) (1976) (automotive efficiency); 15 U.S.C. § 2615 (Supp. I 1977) (toxic substances control); 47 U.S.C.A. § 503(b)(3)(A) (Supp. 1979) (FCC rules and license conditions).

26. *E.g.*, 12 U.S.C. § 1464(d)(1) (1976) (Federal Home Loan Bank Board); 15 U.S.C. § 56(a) (Supp. I 1977) (Federal Trade Commission, if Attorney General fails to commence action within 45 days of request to do so); 15 U.S.C. § 1917(a) (1976) (Secretary of Transportation, with concurrence of Attorney General); 15 U.S.C. § 2076(b)(7) (1976) (Consumer Product Safety Commission, with concurrence of Attorney General); 29 U.S.C. § 216(e) (1976) (Secretary of Labor); 33 U.S.C. § 944(i) (1976) (Secretary of Labor).

27. In practice, the Justice Department has delegated its authority to prosecute most civil money penalties to the several United States Attorneys. 28 C.F.R. § 0.168 (1979); 28

to the Department, it possesses exclusive control over prosecution, trial, appeal, and settlement,<sup>28</sup> unless the statute expressly provides otherwise.<sup>29</sup>

Statutes use a great variety of terms to define the precise role to be played by administrative agencies in imposing civil money penalties, and its relationship to the role of the Justice Department and the courts. Most early civil money penalty statutes limited the agency's function to that of prosecuting—or more accurately, to referring cases for prosecution by the Department of Justice. These statutes, however, sometimes conferred an explicit authority on the agency to “mitigate” penalties prior to referral for prosecution. A few older statutes, and a number of more recent ones, contemplate a larger agency role. The agency may be directed to “assess” the penalty, perhaps after affording the alleged violator notice and an opportunity to reply, prior to referring the case for prosecution. Some statutes authorize the agency to adjudicate the penalty claim itself, subject only to limited review of its action.

The following subsections examine the body of civil penalty statutes with respect to the provisions having the greatest bearing on the agency role: those pertaining to the penalty amount, and those providing for “assessment” and “mitigation” functions.

1. *Penalty Amount.* All but three<sup>30</sup> of the 348 civil penalty statutes impose at least an upper limit on the penalty amount: 197 statutes (fifty-seven percent) specify a fixed penalty amount, while 151 (forty-three percent) authorize the imposition of a variable amount up to a specified limit.<sup>31</sup> These are hereinafter referred to as “fixed-penalty” and “variable-penalty” statutes, respectively. The upper limit—whether the fixed amount or maximum amount for a variable penalty—is usually stated in dollar terms; sixty-eight statutes (twenty percent), however, use a verbal formula—such as the “value” of illegally imported goods<sup>32</sup> or the “economic value” of delayed compliance with air pollution regulations<sup>33</sup>—to indicate the limit. The unit to which the penalty limit applies is, of course, the individual “violation” or “offense.” Eighty-two statutes (twenty-four percent) specify that each day

C.F.R. Subpart Y app. (1979); United States Department of Justice, United States Attorneys' Manual §§ 4-1.311, 4-1.313 (Jan. 3, 1977). A few statutes explicitly confer prosecutorial authority on the United States Attorneys. *E.g.*, 16 U.S.C. § 825n(b) (1976); 45 U.S.C. §§ 6, 18, 34, 64a(a) (1976); 49 U.S.C. § 20(9) (1976).

28. *See* FTC v. Guignon, 390 F.2d 323 (8th Cir. 1968); Executive Order No. 6166, § 5, 3 U.S.C. § 132 app., at 47 (1934); United States Department of Justice, United States Attorneys' Manual §§ 4-1.100, 4-1.410, 4-1.420 (Jan. 3, 1977).

29. *See, e.g.*, 15 U.S.C. § 56(a)(3)(B) (Supp. I 1977) (requiring FTC approval for settlement by Attorney General on appeal of any action initially prosecuted by FTC counsel). *See also* 15 U.S.C. § 45(m)(3) (Supp. I 1977).

30. 12 U.S.C.A. §§ 1725(j)(1) & 1730(l)(5) (Supp. 1979) (authorizing the Federal Savings and Loan Insurance Corporation to impose “such civil penalties . . . as the Corporation may prescribe”); 39 U.S.C. § 5403 (1976) (United States Postal Service, limit unspecified).

31. Twelve of these 151 statutes specify a minimum penalty figure. In seven of these, the minimum is set at one-tenth of the maximum. *E.g.*, 45 U.S.C.A. §§ 6, 13, 34 & 438(b) (Supp. 1979) (equipment and safety requirements for railroads enforced by the Federal Railroad Administration: maximum penalty \$2,500, minimum \$250).

32. 19 U.S.C. § 1592 (1976).

33. 42 U.S.C. § 7420 (d)(2) (Supp. I 1977).

of offense is a separate violation, but most statutes leave the precise unit of violation undefined.

About half of the civil money penalties have upper limits between \$100 and \$1,000; the median figure is \$500. Thirty-five penalties carry dollar limits of \$10,000 or more per violation, and twelve carry limits of \$25,000 or more.<sup>34</sup> In addition to imposing an upper limit on the amount of penalty per violation, thirty-five statutes establish an upper limit on the total civil penalty liability that may be imposed for a related series of offenses.<sup>35</sup>

In the case of most variable-penalty statutes, Congress has imposed few constraints on the discretion of the penalty-imposing authority to determine the amount of the penalty within the stated limits. The most common constraint is the enumeration of standards to be considered in determining the penalty amount. An example is section 16 of the Toxic Substances Control Act, which requires the Administrator of the Environmental Protection Agency, in determining the amount of a penalty, to consider "the nature, circumstances, extent, and gravity of the violation or violations and, with respect to the violator, ability to pay, effect on ability to continue to do business, any history of prior such violations, the degree of culpability, and such other matters as justice may require."<sup>36</sup> While the precise language varies considerably, most statutory guidelines contain similar factors. Statutory standards are found in forty-seven statutes, forty-five of which are variable-penalty statutes—a somewhat surprisingly low percentage (thirty) of total variable-penalty statutes. Most statutes containing enumerated criteria empower the agency to assess the penalty.

2. *Assessment.* In 141 (forty-one percent) of the 348 statutes Congress has expressly conferred upon an administrative agency an authority to "assess" the penalty. For convenience, these 141 statutory penalties will be referred to as "agency-assessment" penalties, and the remaining 207 as "court-assessment" penalties. While the term "assess"<sup>37</sup> is not defined in the statutes, it appears to contemplate at least a process of making a formal

34. Statutes carrying the highest limit per offense are: 7 U.S.C. § 9 (1976) (manipulation of commodity future price, etc.: \$100,000); 7 U.S.C. § 13a (1976) (violation of rules by contract market: \$100,000); 16 U.S.C. § 971e(e)(1)(C) (1976) (illegal importation of protected species of fish: \$100,000); 16 U.S.C. § 971e(e)(1)(A) (1976) (catching or transporting such fish: \$50,000 for second offense); 16 U.S.C. § 1433(a) (1976) (violation of marine sanctuaries regulation: \$50,000); 33 U.S.C. § 1415(a) (1976) (ocean dumping: \$50,000); 15 U.S.C. § 2615(a) (1976) (unauthorized manufacture or distribution of toxic substances: \$25,000); 16 U.S.C. § 1376(b) (1976) (taking protected marine mammals: \$25,000); 16 U.S.C. § 1858(a) (1976) (violation of fishery management plan: \$25,000); 21 U.S.C. § 842(c)(1) (1976) (violation of controlled substances regulations: \$25,000); 42 U.S.C. § 6928(a)(3) (1976) (improper disposal of hazardous wastes: \$25,000); 42 U.S.C. § 7413(b) (Supp. I 1977) (stationary source violation of air pollution abatement plan: \$25,000).

35. *E.g.*, 15 U.S.C. § 1398 (1976) (manufacture, sale, delivery or importation of substandard motor vehicles: penalty not to exceed \$1,000 per violation or \$800,000 for a "related series" of violations).

36. 15 U.S.C. § 2615(a)(2)(B) (1976).

37. A few statutes use terms other than "assess" that I have interpreted as having the same meaning. *E.g.*, 7 U.S.C. §§ 1314(b), 1359(a) (1976) ("require collection of"); 29 U.S.C. § 216(e) (1976) ("determining the amount of," "imposed"); 39 U.S.C. § 5403 (1976) ("impose").

claim upon a person for a specified or specifiable sum of money, premised upon an initial determination that that person has violated a legal command and that the sum demanded is either the statutorily mandated penalty or a statutorily permitted and appropriate penalty for that offense.<sup>38</sup>

Since the role of prosecutor or even prosecution-referral is usually assumed to include those same activities, the operational significance of an unembellished "assessment" authority may not be readily apparent. At a minimum, it may simply be a way of limiting the scope of prosecutorial discretion customarily exercised by the Justice Department by mandating that a judicial enforcement action may not be instituted by the Department until the regulatory agency has first "assessed" the penalty.<sup>39</sup> As such, the express delegation of assessment responsibility reflects a congressional judgment that regulatory effectiveness and uniformity require agency participation in the initiation of any enforcement action. Furthermore, an express assessment provision may impose a useful constraint on the agency's prosecutorial discretion that would not otherwise be present—that is, to create a judicially enforceable obligation on the agency to institute an enforcement action when certain conditions are present. By specifying that the agency "shall" assess a penalty for a suspected violation, an assessment provision may counteract the usual presumption that prosecutors have no judicially enforceable duty to prosecute.<sup>40</sup>

An unadorned assessment power may also be read as an implicit statement about the allocation of decisional authority between the agency and the courts. A delegation of assessment authority to the agency can be viewed as a congressional instruction to the courts to accord the agency's action at least some weight in a subsequent enforcement action.<sup>41</sup> The price of such deference, of course, may be an implicit requirement that the agency exercise a more balanced, considered judgment than might be characteristic of a prosecutor. It might also be interpreted as a signal to the agency to articulate substantive assessment criteria at a level of detail greater than may be found in the statute or may be likely to emerge from a sporadic process

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38. The Supreme Court seemed implicitly to adopt such a definition in *National Independent Coal Operators' Ass'n v. Kleppe*, 423 U.S. 388, 398 (1976), when it held that "assess," as used in §109(a)(3) of the Federal Coal Mine Health and Safety Act of 1969, 30 U.S.C. § 819(a)(3) (1976), did not require formal findings of fact: "the Secretary has a sufficient factual predicate for the assessment of a penalty based on the reports of the trained and experienced inspectors who find violations."

39. As a practical matter, this constraint on the prosecutorial discretion of the Justice Department hardly seems necessary. While the Department could conceivably initiate a prosecution under a court-assessment statute without the agency's concurrence, it has a policy of rejecting prosecution requests until the agency makes an affirmative effort to resolve the case by negotiation. Only if efforts to settle the case at the administrative level fail and the agency formally requests the Department to initiate a judicial enforcement action will the Department prosecute. See 4 C.F.R. § 105.1 (1979). Cf. United States Department of Justice, United States Attorneys' Manual § 4-6.500 (Jan. 3, 1977) ("Civil penalties are assessed to vindicate agency enforcement policy, or to compel compliance with agency orders, etc. . . . Thus, the views of the client agency should always be sought before considering the compromise or closing of such cases. . . .") (emphasis in original).

40. See notes 245-50 and accompanying text *infra*.

41. See also note 292 and accompanying text *infra*.



of judicial decision.<sup>42</sup> In many instances such speculation is unnecessary; delegation of assessment power to the agency is often accompanied by explicit statutory language or legislative history directing the agency to provide procedural safeguards, such as hearings, during the assessment process.<sup>43</sup>

3. *Mitigation.* Another method by which Congress defines the scope of authority delegated to agencies is the "mitigation clause." Congress has explicitly authorized agencies to mitigate or compromise seventy-nine percent (266) of the civil money penalties currently in force.<sup>44</sup> Many mitigation clauses are found in the same statutory provision authorizing the penalty itself, while some agencies have general mitigation authority applicable to many or all of the civil money penalties that they enforce.<sup>45</sup> Congress rarely imposes any explicit standards on the exercise of a delegated authority to mitigate civil penalties. Only about ten percent of the mitigation clauses contain any standards whatever, and even those tend to be quite open-ended or limited.<sup>46</sup> Detailed criteria are rare.<sup>47</sup> This lack of standards confirms the traditional view of mitigation as a discretionary act of mercy; in fact many statutes expressly authorize the administrator to mitigate "in his discretion."<sup>48</sup>

Mitigation clauses are found in conjunction with all types of statutes. The function served by, and indeed the need for, an express mitigation authority depends on the precise context. A mitigation power, in the classical sense, is most obviously useful in the enforcement of statutorily fixed penalties. The mitigation authority makes it clear that the decisionmaker need not be bound to impose the fixed penalty amount where it would be unjust to do so. In fact, Congress has delegated an express mitigation power in 178 of the 197 fixed-penalty statutes. A second function apparently served by mitigation clauses in court-assessment statutes is to delineate the

42. See note 151 *infra*.

43. Fifty-four (38%) of the agency-assessment statutes require the agency to provide an opportunity for some form of hearing. Twenty-seven of these statutes specify that the hearing must be a formal trial-type hearing on the record. *E.g.*, 7 U.S.C. § 9 (1976); 15 U.S.C. § 2615(a)(2)(A) (1976); 16 U.S.C. § 1540(a)(1) (1976); 29 U.S.C. § 216(e) (1976); 30 U.S.C. § 815(c)(3) (Supp. I 1977); 42 U.S.C. § 7420(a)(1)(A) (Supp. I 1977). The remaining 27 "hearing" statutes merely require the agency to afford the alleged violator "notice and opportunity for a hearing," without further specification of the procedures required. *E.g.*, 7 U.S.C. § 13a (1976); 15 U.S.C. § 1825(b)(1) (1976); 16 U.S.C. § 668(b) (1976); 33 U.S.C. § 1005 (1976); 46 U.S.C. § 170 (1976).

44. Congress has used a variety of terms in what I have called mitigation clauses, including "mitigate," *e.g.*, 8 U.S.C. § 1229 (1976); 12 U.S.C. § 1425b (1976); "modify," *e.g.*, 15 U.S.C. § 1825 (1976); 15 U.S.C. § 2008(b) (1976); "compromise," *e.g.*, 7 U.S.C. § 2149 (1976); 15 U.S.C. § 1398 (1976); "remit," *e.g.*, 16 U.S.C. § 772 (1976); 33 U.S.C. § 364 (1976); and "refund," *e.g.*, 46 U.S.C. § 8 (1976).

45. *E.g.*, 19 U.S.C. §§ 1618, 1623(c) (1976) (Secretary of Treasury, penalties imposed under customs laws); 26 U.S.C. § 7122 (1976) (Secretary of Treasury, penalties under revenue laws); 46 U.S.C. § 7 (1976) (Commandant of Coast Guard, penalties under laws relating to vessels); 47 U.S.C.A. § 504(b) (Supp. 1978) (FCC, most penalties under communications laws).

46. *E.g.*, 16 U.S.C. § 668(b) (1976) ("for good cause shown"); 46 U.S.C. § 23 (1976) ("without willful negligence or intention of fraud").

47. See, *e.g.*, 15 U.S.C. § 2008(b) (1976); 15 U.S.C. § 2069 (1976); 46 U.S.C. § 1484 (1976).

48. *E.g.*, 33 U.S.C. § 1005 (1976); 33 U.S.C. § 1226 (1976); 46 U.S.C. § 817d (1976); 46 U.S.C. § 1122a (1976).

allocation of settlement authority among the regulatory agency, the Justice Department, and the courts. A clause expressly authorizing the agency to mitigate a court-assessable penalty removes any doubts that the agency may accept payment in compromise of a prospective prosecution without approval by the Justice Department or a court.

Congress has not restricted mitigation clauses to fixed-penalty or court-assessment statutes, however. In fact, it has quite freely incorporated mitigation clauses in agency-assessment variable-penalty statutes.<sup>49</sup> The utility of a mitigation clause in this context is far from obvious. A variable-penalty statute clearly empowers—indeed, implicitly directs—the decisionmaker to consider “mitigating” factors in assessing the penalty, and an explicit delegation of authority to “assess” a penalty would seem to subsume a power to compromise the penalty claim.<sup>50</sup> The inclusion of mitigation clauses in statutes of this type appears to be little more than a mechanical carryover from the older fixed-penalty statutes. If they serve any purpose, it is perhaps to remind agencies of their responsibility to temper justice with mercy in the application of general rules to individual cases.

Even in the absence of an express mitigation power, agencies have a general authority to compromise civil money penalty claims under the Federal Claims Collection Act of 1966,<sup>51</sup> which authorizes the “head of an agency” to “compromise . . . claims of the United States for money or property arising out of the activities of, or referred to, his agency.”<sup>52</sup> This authority is more limited, however, than that arising from an express mitigation clause. First, there are several exclusions from the Act.<sup>53</sup> Moreover, an express mitigation clause appears to confer a broader range of discretion to settle cases; the grounds upon which an agency may compromise a claim under the Claims Collection Act are implicitly limited to issues relating to the collectibility of the claim.<sup>54</sup> A mitigation authority, by contrast,

49. There are 69 such statutes, of which 35 contain mitigation clauses.

50. In other contexts courts have presumed that agencies have broad authority to settle cases that they are empowered to adjudicate. *See, e.g., Mobil Oil Corp. v. FPC*, 417 U.S. 283, 312-13 (1974); *NLRB v. Martin A. Gleason, Inc.*, 534 F.2d 466 (2d Cir. 1976); *ILGWU v. NLRB*, 501 F.2d 823 (D.C. Cir. 1974).

This does not mean, of course, that an agency may ignore a specific congressional limitation on its discretion to assess a variable penalty, such as a statutory minimum penalty amount.

51. 31 U.S.C. §§ 951-953 (1976).

52. 31 U.S.C. § 952 (1976). Implementing regulations promulgated jointly by the Attorney General and the Comptroller General, 4 C.F.R. §§ 101.1-105.7 (1979), interpret “claim” to include claims for civil money penalties as well as claims arising from such sources as government contracts, revenue laws, or tortious acts against the government. 4 C.F.R. § 103.5 (1979). Several federal agencies charged with enforcing statutes providing for court-assessable or fixed-penalty statutes have utilized the settlement authority conferred by the Federal Claims Collection Act to compromise civil money penalties. *See, e.g., 7 C.F.R. § 1.52* (1978) (Department of Agriculture); 31 C.F.R. §§ 5.1-4 (1978) (Department of the Treasury); 46 C.F.R. §§ 504-505 (1978) (Federal Maritime Commission); 49 C.F.R. § 1021 (1978) (Interstate Commerce Commission).

53. 31 U.S.C. § 952(b) (1976) (excluding claims (1) exceeding \$20,000, (2) “as to which there is an indication of fraud . . . or misrepresentation,” or (3) “based in whole or in part on conduct in violation of the anti-trust laws”). As a practical matter, however, very few civil money penalty claims would founder on any of these exclusions.

54. *See* 4 C.F.R. §§ 103.1-9 (1979). *See also* notes 255-58 and accompanying text *infra*.

permits the agency to reduce the penalty for other reasons, such as the gravity of the offense or the culpability of the violator.

### B. *Enforcement Procedures*

Assessment and collection of civil money penalties has become one of the dominant regulatory activities of the federal government; federal agencies collected more than \$52,000,000 in some 360,000 civil penalty cases during 1977.<sup>55</sup> While historical comparisons are difficult because of differences in the data base, it seems evident that administrative penalty collections, in terms of both caseload and dollar amounts, have increased sharply in recent years.<sup>56</sup> Although the civil money penalty is often viewed as a supplement to other regulatory sanctions, such as criminal penalties or license revocation,<sup>57</sup> the traditional view of the civil money penalty as a purely supplemental sanction understates its actual importance in the enforcement program of most federal agencies. Most agencies use civil money penalties far more often than other sanctions, in some cases even for relatively serious offenses. In a significant minority (twenty percent) of statutory schemes, it is the only penalty authorized for the specified offense.

A survey conducted in connection with the Administrative Conference Report from which this Article was adapted<sup>58</sup> indicates that the procedures used by federal agencies in prosecuting civil money penalty claims vary widely. There are differences, for example, in the extent to which and detail with which agencies provide a statement of written reasons for the assessment of a penalty, stating the basis for the finding of a violation and the basis for the penalty calculation. Agencies provide a relatively complete statement of reasons in the process of enforcing some seventy-six percent (288) of all penalty provisions.<sup>59</sup> Agencies afford respondents at least some form of oral hearing on the assessment with somewhat lower frequency (sixty-eight per-

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55. The aggregate figures are most heavily influenced by a handful of agencies—chiefly the Customs Service, and secondarily the Internal Revenue Service, the Mine Safety and Health Administration, and the Occupational Safety and Health Administration. But most federal regulatory agencies—seven departments, representing 21 major administrative units, and 12 independent agencies—report at least some civil money penalty collections as part of their enforcement programs.

56. Professor Goldschmid found that federal agencies collected \$9,506,568 in 62,977 cases in fiscal year 1970. Goldschmid, *supra* note 1, at 954, 956. These totals include, however, only partial data for several agencies (including the Customs Service) and no data for several others (including the IRS and Labor Department). Goldschmid also includes an enormous quantity of Postal Service claims, which I excluded as contract claims (penalties imposed under the terms of mail transportation contracts with carriers).

57. See, e.g., L. JAFFE, *JUDICIAL CONTROL OF ADMINISTRATIVE ACTION* 114 (1965). About 45% of the offenses for which civil money penalties may be invoked are also subject to criminal penalties; 11% are subject to license or permit revocation or suspension; 22% are subject to a prohibitory judicial or administrative order; and 46% may result in seizure or forfeiture of property.

58. See CONFERENCE REPORT, *supra* note 7, at 4-5. A detailed questionnaire was prepared asking agencies to specify, for each civil money penalty statute enforced by them, certain characteristics of the statute and the procedures used by the agency to implement it. Much of the information summarized in this Article was drawn from the results of this survey; citations to the empirical data contained in the CONFERENCE REPORT will be made as necessary.

59. See CONFERENCE REPORT, *supra* note 7, at E 14-16.

cent of the enforcement procedures).<sup>60</sup> A formal trial-type hearing is made available in conjunction with fourteen percent of the penalty provisions.<sup>61</sup> About sixty-five percent of the enforcement procedures include a right to appeal to a higher level of the agency from an initial decision denying a request to cancel or mitigate a penalty.<sup>62</sup>

It is surprisingly rare for agencies to publish criteria for calculating the dollar amount at which to assess or by which to mitigate a penalty. Agencies have written standards to assist in the enforcement of thirty-three percent (123) of the penalty authorities.<sup>63</sup> In about half (sixty-three) of these cases, the agency has merely enumerated criteria to be considered in making the decision, without indicating the relative weight to be attached to them, while in the rest agencies have provided a fairly specific rule for translating decisional factors into a dollar amount.<sup>64</sup> In making penalty assessment or mitigation decisions, agencies claim to use prior decisions as precedent under sixty-three percent of the statutes.<sup>65</sup>

Although most agencies have a highly decentralized process for detecting and investigating violations of their laws, penalty assessment responsibility tends to be somewhat more centralized.<sup>66</sup> Few agencies, however, have established any formal quality control system for evaluating the accuracy, consistency, and substantive correctness of assessment and mitigation decisions;<sup>67</sup> most simply rely on a system of administrative appeals to monitor quality. Only seventy-nine penalty enforcement procedures include any

60. *Id.*

61. Thirty of these procedures are based on statutes expressly requiring a formal hearing, 18 on statutes requiring an unspecified "hearing," and three on statutes that are silent on the procedure to be followed. The procedures used to enforce another 203 statutory provisions (54%) provide an opportunity for some form of informal hearing, three-quarters of which include a right to present witnesses and are conducted by an impartial employee of the agency. Agencies enforcing "notice and opportunity for hearing" statutes have interpreted "hearing" as requiring a trial-type hearing in 18 cases and as requiring only an informal hearing in 17 cases.

62. See CONFERENCE REPORT, *supra* note 7, at E 14-16. The availability of an administrative appeal correlates highly with the formality of the assessment procedure. Of the "no-appeal" procedures, 58% provide for no administrative hearing of any type, and 33% incorporate only a highly informal "conference"-type hearing. These procedures are used primarily in connection with court-assessment penalties, which the agency makes only a single effort to negotiate; the recourse for a dissatisfied respondent is to await prosecution and make a defense in court.

63. *Id.* at E 17-19.

64. In only nine instances have agencies gone beyond the enumeration in the governing statute to establish their own more specific regulatory criteria.

65. See CONFERENCE REPORT, *supra* note 7, at E 17-19. Agencies claim to follow precedent "always" in enforcing 14% (51) of the statutes, and to follow precedent "sometimes" in enforcing 50% (185) of the statutes. As expected, the use of prior assessment decisions as precedents correlates highly with the formality of procedures—particularly, of course, with the right to some sort of hearing and provision of a written statement of reasons for assessment or mitigation decisions.

66. See *id.* at E 20-22. Although 65% of penalty procedures involve decentralized assessment, most of these (210 of 244) are enforced by three agencies: the Coast Guard, the IRS, and the Customs Service. Most agencies (32) assess all or most of their penalties on a centralized basis; only a few (nine) rely on a primarily or exclusively decentralized process.

67. *Id.*

kind of systematic procedure for auditing assessment and mitigation decisions as a means of checking quality.<sup>68</sup>

### C. Case Studies

Detailed examination of the procedures followed by particular agencies can enhance understanding of the penalty imposition process. For this reason, case studies of two agencies—the Mine Safety and Health Administration and the Federal Communications Commission Broadcast Bureau—follow.<sup>69</sup> Two case studies cannot, of course, encompass the wide range of variables revealed by the foregoing statistical analysis. The two agencies selected are not presented as typical: indeed, their procedures are more highly developed than those used by many federal agencies. Yet, together they reveal most of the issues that confront the architect of any penalty imposition process and provide useful points of reference for the discussion to follow.

1. *Mine Safety.* The Mine Safety and Health Administration (MSHA)—a division of the Labor Department—is responsible for enforcing mandatory health and safety standards for mines. The agency<sup>70</sup> is empowered to assess a civil penalty of up to \$10,000 for each violation of the standards.<sup>71</sup> In determining the amount of the penalty, it is instructed by statute to consider the following six factors:

the operator's history of previous violations, the appropriateness of [the] penalty to the size of the business of the operator charged, whether the operator was negligent, the effect on the operator's ability to continue in business, the gravity of the violation, and the demonstrated good faith of the person charged in attempting to achieve rapid compliance after notification of a violation.<sup>72</sup>

If the mine operator wishes to contest a penalty assessment, he may demand a hearing<sup>73</sup> before an autonomous review board—the Federal Mine Safety and Health Review Commission (MSHRC).<sup>74</sup> A final order of the Com-

68. Most of these statutes (63) are enforced by the IRS. Only 12 of the remaining 181 decentralized assessment procedures utilize a systematic audit process.

69. The case studies presented here are abbreviated versions of studies appearing in CONFERENCE REPORT, *supra* note 7, at 25-42, 55-67. In addition, the Conference Report contains comprehensive studies of the enforcement operations of the United States Coast Guard, *id.* at 43-54, the Interstate Commerce Commission, *id.* at 84-95, and the Federal Communications Commission Safety and Special Radio Services Bureau, *id.* at 70-83.

70. The statutes actually grant all authority for assessing penalties to the Secretary of Labor. *See, e.g.*, 30 U.S.C. § 820(a) (Supp. I 1977). The Secretary has delegated his assessment power to MSHA.

71. 30 U.S.C. § 820(a) (Supp. I 1977).

72. 30 U.S.C. § 820(i) (Supp. I 1977).

73. 30 U.S.C. § 815(d) (Supp. I 1977). The statute specifies that the hearing is subject to § 5 of the Administrative Procedure Act (APA) (5 U.S.C. § 554 (1976)).

74. 30 U.S.C. § 823 (Supp. I 1977). MSHRC consists of five members appointed to staggered six-year terms by the President with the advice and consent of the Senate. MSHRC employs administrative law judges who "shall hear, and make a determination upon, any proceeding instituted before the Commission." 30 U.S.C. § 823(d)(1) (Supp. I 1977).

mission is subject to review in a court of appeals at the behest of any "aggrieved" party.<sup>75</sup> The Secretary of Labor may also apply to a court of appeals for enforcement of a MSHRC order.<sup>76</sup> If such an enforcement proceeding is brought after the deadline for a review petition, MSHRC's findings of fact and order shall be "conclusive."

MSHA assesses most violations according to a "regular assessment" method, which specifies a range of "penalty points" to be assigned for each of five statutory factors:<sup>77</sup> "size of the operator's business" (up to fifteen points, based on the size of both the mine and the "controlling company," as measured by annual tonnage or hours worked);<sup>78</sup> "history of previous violations" (up to twenty points, based on the number of violations assessed and average number of violations assessed per inspection day, during the past twenty-four months);<sup>79</sup> "negligence" (one to twenty points for "ordinary negligence," twenty-one to twenty-five for "gross negligence");<sup>80</sup> "gravity" (up to twenty points based on the probability of an accident, the severity of the injuries likely to occur, and the number of employees likely to be affected);<sup>81</sup> and "demonstrated good faith" in taking corrective action (from -10 to +10 points). A conversion table translates the resulting total number of points into a dollar figure.<sup>82</sup>

The assignment of penalty points for "size" and "history" is mechanical. To assist assessors in assigning points for "negligence," "gravity," and "good faith," MSHA has promulgated a manual providing more detailed guidance and helpful examples.<sup>83</sup> The sixth statutorily enumerated factor—the effect of the penalty on the operator's ability to continue in business—is not incorporated into the basic penalty assessment. The regulations "initially presume" that a penalty determined by the formula will not adversely affect the operator's ability to remain in business. It is up to the operator to rebut that presumption by requesting mitigation of the penalty and providing information to substantiate his claim.<sup>84</sup>

In addition to its "regular assessment" method, MSHA rules authorize the use of a "special assessment" procedure whenever the regular formula does not produce "an appropriate penalty."<sup>85</sup> The regulation enumerates

75. 30 U.S.C. § 816(a)(1) (Supp. I 1977).

76. 30 U.S.C. § 816(b) (Supp. I 1977).

77. 43 Fed. Reg. 23,517 (1978) (to be codified in 30 C.F.R. § 100.3).

78. 43 Fed. Reg. 23,517 (1978) (to be codified in 30 C.F.R. § 100.3(b)).

79. 43 Fed. Reg. 23,517 (1978) (to be codified in 30 C.F.R. § 100.3(c)).

80. 43 Fed. Reg. 23,517-18 (1978) (to be codified in 30 C.F.R. § 100.3(d)).

81. 43 Fed. Reg. 23,518 (1978) (to be codified in 30 C.F.R. § 100.3(e)). Up to ten points may be assigned for each of the three criteria.

82. The conversion table is designed so that an average violation will generate a \$200 penalty. The table is skewed markedly toward the lower end, however; a one-point increment in penalty points produces a \$2 increment in penalty liability at the low end and a \$500 increase at the upper end. One-half of the possible penalty points (50) corresponds with a penalty representing only 3.5% of the maximum penalty (\$345 as compared to \$10,000). See 43 Fed. Reg. 23,518 (1978) (to be codified in 30 C.F.R. § 100.3(g)).

83. MINE ENFORCEMENT AND SAFETY ADMINISTRATION, OFFICE OF ASSESSMENTS, STANDARDIZATION OF ASSESSMENTS (1977).

84. 43 Fed. Reg. 23,519 (1978) (to be codified in 30 C.F.R. § 100.3(h)).

85. 43 Fed. Reg. 23,519 (1978) (to be codified in 30 C.F.R. § 100.4).

several illustrative categories, such as fatalities, patterns of recurring violations, or prolonged noncompliance, but otherwise places no constraint on the agency's discretion to proceed by special assessment. The only standard specified for making a special assessment is a requirement that the six statutory factors be taken into account and that all findings be "in narrative form." In practice, MSHA uses the "special assessment" approach in all fatality and serious injury cases and in at least some cases of "unwarrantable failure" to comply with mandatory standards.<sup>86</sup> Overall, however, the special assessment method is used in only a small number of cases: in cases closed during 1978 only 1.3 percent of the violations had been assessed by the special assessment method.<sup>87</sup> Nevertheless, the Director of MSHA's Office of Assessments has indicated that he would use the special assessment method more frequently if staff resources permitted,<sup>88</sup> since he views it as a better way to generate a just assessment.

MSHA's enforcement process begins with inspections of mines, carried out both on a periodic basis and in response to complaints or reported incidents. If an inspector detects a violation,<sup>89</sup> he issues a citation notice to the mine operator. In the early days of the money penalty program, the inspector also calculated the amount of the proposed penalty and issued a notice to the operator assessing that amount. Following criticism of this practice as producing inconsistent assessment levels,<sup>90</sup> the Mine Enforcement and Safety Administration (MESA)—MSHA's predecessor in enforcing the penalty program—centralized the assessment function. Under the new system, the inspector prepares a narrative description of the conditions directly observed by him relating to the gravity of the violation, the operator's negligence, and the operator's good faith corrective action.

MSHA's Office of Assessments reviews the inspector's report for correctness, thoroughness, and persuasiveness and computes penalty points for

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86. Until recently, MSHA used special formulas in fatality, serious injury, and "unwarrantable failure" cases. Use of the formula added points to the assessment and, given the skewness of the conversion table, tended to increase penalties radically. MSHA assessors now use no written formulas in generating special assessment figures, depending, instead, on what one official called an "eyeball assessment" approach, based upon an intuitive sense of what is a fair penalty and what an administrative law judge might award.

87. See CONFERENCE REPORT, *supra* note 7, at Table I.

88. The special assessment method consumes greater staff resources than the regular assessment because it often builds upon the regular method and because persons subjected to a highly discretionary assessment are more likely to demand time-consuming explanatory or participatory procedures.

89. Inspectors enforce a wide variety of health and safety standards, relating to the design, construction, and operation of the mine structure, machinery, and equipment. The most common violations cited by mining inspectors in underground mines during 1976 were those relating to standards for electrical equipment (31%), ventilation (13%), accumulation of combustible materials (11%), fire protection (9%), and roof support (9%). [1976] MESA ANN. REP. 19. In surface mining operations, the most common violations concerned standards for mechanical equipment (22%), fire protection (12%), and loading and haulage procedures (11%).

90. See COMPTROLLER GENERAL OF THE UNITED STATES, IMPROVEMENTS NEEDED IN THE ASSESSMENT AND COLLECTION OF PENALTIES—FEDERAL COAL MINE HEALTH AND SAFETY ACT OF 1969, at 24-26 (1972); COMPTROLLER GENERAL OF THE UNITED STATES, IMPROVEMENTS STILL NEEDED IN COAL MINE DUST-SAMPLING PROGRAM AND PENALTY ASSESSMENTS AND COLLECTIONS 42-44 (1975).

gravity, negligence, and good faith.<sup>91</sup> Data on the violation are then entered into MSHA's computer-based information system, which automatically adds penalty points for operator size and previous history of violations. The system sums up the points assigned for the five categories and converts the total into an "initial review" penalty amount.

The information system has several programs to convert "violations" into "cases." All "special assessment" violations discovered in a single inspection are immediately combined into a single case.<sup>92</sup> "Regular assessment" violations, on the other hand, are initially filed in the information system for storage; as soon as twenty violations have accumulated for a single mine, or after fourteen days, whichever occurs first, the system combines the accumulated violations into a single "case."<sup>93</sup>

Once the computer has established a "case," it prints an "initial review" document, describing each outstanding violation and showing the penalty-point computation and corresponding dollar amount from the conversion table, which is sent to the mine operator and the miners' "representative" (usually the miners' union).<sup>94</sup> The initial review letter gives the operator essentially four options: (1) pay the penalty at the specified level; (2) submit additional information; (3) request an oral conference at one of MSHA's nine conference offices; or (4) do nothing.<sup>95</sup> If MSHA receives no timely reply, it will issue a "proposed assessment" notice, triggering the statutory thirty-day period to request a hearing.<sup>96</sup> Of the cases closed with payment in 1978, twelve percent were closed by direct payment of the full amount demanded in the initial notice. As one would expect, cases closed by direct payment involved a much smaller average initial assessment per violation (\$71) than cases closed at a later stage (\$165).<sup>97</sup>

In a surprisingly large percentage of cases mine operators demand conferences;<sup>98</sup> cases closed after a conference or at some subsequent stage in the process comprise more than eighty-five percent of all violations assessed.<sup>99</sup> Conferences are conducted by "conference specialists" who have

91. The review is conducted by "assessment officers" who have had at least three years' experience as mining inspectors.

92. The average special assessment "case" consists of one to three violations, with a mean number of 1.4 violations per case.

93. The mean number of regular assessment violations per case is about 5.4.

94. 43 Fed. Reg. 23,519 (1978) (to be codified in 30 C.F.R. § 100.5(b)).

95. The miners' representative may also submit additional data or request an oral conference.

96. 30 U.S.C. § 815(a) (Supp. I 1977); 43 Fed. Reg. 23,519 (1978) (to be codified in 30 C.F.R. § 100.6(a)(1)).

97. See CONFERENCE REPORT, *supra* note 7, Tables I & II.

98. The conference is an administrative creation first authorized in 1974 in response to criticism of the enormous backlog of mine safety cases. See [1976] MESA ANN. REP. 34. It has proven to be an efficient means of settling cases at an early stage. See text accompanying note 101 *infra*. Although MSHA regulations provide that "it is within the sole discretion of the Office of Assessments to conduct a conference or deny a request for a conference," 43 Fed. Reg. 23,519 (1978) (to be codified in 30 C.F.R. §§ 100.5(d), (e)), the Office exercises its discretion to deny a conference request only in extremely rare cases.

99. As an index of propensity to challenge initial assessments, this figure is somewhat deceiving. Whenever a conference is sought for *any* violation contained in a "case," MSHA records all of the violations contained in the case as violations for which a conference was



at least three years' experience as mining inspectors. At the conference the mine operator and the miners' representative may be represented by counsel, present witnesses, and inspect the case file. The parties may also present arguments concerning the existence of the violation and the appropriateness of the "initial review" amount. Based on the results of the conference, the conference specialist may cancel the penalty assessment altogether, if he finds that no violation has occurred, or he may reduce the penalty amount based on a recomputation of penalty points for any of the original five factors.<sup>100</sup> Of the cases in which a conference was requested in 1978, approximately ninety-two percent of the violations were closed with payment after the conference without further proceedings.<sup>101</sup> As a result of cancelling assessments for some violations and reducing assessments for others, conference officers collect about seventy-two per cent of the amounts initially assessed.<sup>102</sup>

After a conference (or after reviewing any written material submitted in lieu of a conference request), the conference officer prepares a "proposed assessment" letter, which contains essentially the same information as the "initial review" letter, indicating the recomputed penalty. If the operator fails to contest the proposed assessment within thirty days from receipt of the letter, the assessment becomes a final order of the Commission and not subject to review by a court. If the operator files a timely notice of contest, MSHA refers the case to the Office of the Solicitor of Labor for further action. MSHRC takes the position that the filing of a notice of contest by the operator invokes its jurisdiction and, therefore, any settlement by the Solicitor must receive its approval.<sup>103</sup> Once the Solicitor files a petition with MSHRC, a hearing is scheduled before one of its administrative law judges (ALJs), whose decision becomes final unless the Commission decides to

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requested. In the regular assessment category, at least half of the violations paid after conference are not in fact contested; consequently, the overall propensity of mine operators to challenge initial assessments is probably closer to 40% than 85%. Nonetheless, even this figure seems unusually high given the modest amounts typically assessed and the relatively mechanical standards of liability and assessment used. This propensity to challenge assessments may be partly a function of the peculiar character of mine operators—an independent-minded breed of entrepreneurs whose understanding of and tolerance for governmental intervention are reputed to be quite low. It may also be due to the fact that many mine operators own a network of relatively small, scattered mines, are not always familiar with daily operations, and wish to ascertain the strength of the government's case.

100. Conference specialists may also reduce the penalty on grounds of inability to pay, but they have oral instructions not to make "substantial" reductions (roughly, 50% or more) without prior approval from MSHA's central office.

101. See CONFERENCE REPORT, *supra* note 7, at n.169 & Table I.

102. *Id.* at Table II. The conference system is also remarkably expeditious; conferences are conducted within a regulatory 33-day guideline in more than 98% of all cases.

103. See 30 U.S.C. § 820(K) (Supp. I 1977). The Solicitor settles only 4% of regular assessment violations, but about 26% of special assessment cases, which involve larger sums of money and more discretionary judgments. The Solicitor, as a prosecutor, is typically more generous than the conference officers in settling cases.

exercise its discretionary power of review.<sup>104</sup> Final decisions of MSHRC are subject to "substantial evidence" review in federal courts of appeals.<sup>105</sup>

The propensity of mine operators to contest violations is significantly higher for special assessment cases.<sup>106</sup> There are two immediately apparent explanations for this. First, special assessment cases involve much higher average penalty assessments per violation (\$2,595) than regular assessment cases (\$123). Second, the determination of a penalty amount by the special assessment method involves the exercise of much broader discretion than the application of the regular assessment formula. A respondent is more likely, therefore, to view an assessment figure as arbitrary. Moreover, these cases may present more frequent disputes about issues of fact, such as whether the fatality or serious injury was caused by the alleged violation or whether a failure to take corrective action was "unwarrantable."

2. *Federal Communications Commission Broadcast Bureau.* The Federal Communications Act contains some 14 statutory civil money penalty provisions administered by the Federal Communications Commission.<sup>107</sup> The FCC has delegated principal enforcement responsibilities to its three functional bureaus: the Broadcast Bureau, the Common Carrier Bureau, and the Safety and Special Radio Services Bureau. The Commission's investigative unit, the Field Operations Bureau (FOB), provides investigative support to all three bureaus and has authority to issue initial assessments in a very limited category of cases.<sup>108</sup>

The Broadcast Bureau (BB) is responsible for licensure and regulation of the FCC's broadcast licensees. Its civil forfeiture authority derives from section 503(b) of the Act, which authorizes a forfeiture of up to \$2,000 per day of violation, up to a maximum of \$20,000 per episode, for willful or repeated failure to comply with any applicable provision of the statute, FCC regulations, a cease and desist order, or the terms of a license or permit.<sup>109</sup> Section 503 requires the Commission, when setting forfeiture amounts, to "take into account the nature, circumstances, extent, and gravity of the prohibited acts committed and, with respect to the violator, the degree of culpability, any history of prior offenses, ability to pay, and such other matters as justice

104. Contested administrative hearings are rare. Of cases closed with payment in 1978, only about 2.4% were contested beyond the Solicitor settlement stage; of these, only about two in five resulted in adversary hearings. See CONFERENCE REPORT, *supra* note 7, Table I. 105. 30 U.S.C. § 816(a)(1) (Supp. I 1977). 1977 amendments shifted from de novo trial to limited judicial review, in response to a serious backlog of cases.

106. See CONFERENCE REPORT, *supra* note 7, Tables I & II.

107. 47 U.S.C.A. §§ 202(c), 203(e), 214(d), 219(b), 220(d), 362(a), 362(b), 386(a), 386(b), 503(a), 503(b), 503(b)(3)(A), 507(a), 507(b) (1976 & Supp. 1978).

108. The Common Carrier Bureau administers statutory forfeiture provisions relating to unlawful acts of regulated common carriers, but rarely exercises its forfeiture authority. The Safety and Special Radio Services Bureau actively assesses penalties for violations of regulations governing citizen's band radio transmissions and statutes requiring that ships and vessels be equipped with adequate radio equipment. See CONFERENCE REPORT, *supra* note 7, at 70-83.

109. 47 U.S.C.A. § 503(b)(2) (Supp. 1979). Section 503(b) also authorizes impositions of forfeitures against non-licensees who violate any provision of the statute or regulations. 47 U.S.C.A. § 503(b)(5) (Supp. 1979).

may require.”<sup>110</sup> The statute also requires notice and opportunity to reply in writing, as a prerequisite to instituting an enforcement suit.<sup>111</sup> The Commission may, however, at its discretion elect to utilize an alternative procedure involving an administrative hearing under section 5 of the Administrative Procedure Act, followed by limited judicial review or summary collection action.<sup>112</sup>

The Broadcast Bureau supervises the activities of some 9,000 broadcast licensees, ranging in size, profitability, and sophistication from tiny independent rural radio stations to network-affiliated television stations serving the top fifty markets. Broadcast licensees are subject to a wide range of operating regulations relating to equipment, power output, time of operation, assigned frequency, recordkeeping, and content of broadcasts.<sup>113</sup> Most broadcast-related violations are detected as a result of special inspections conducted either at the request of the BB's Renewal Branch or in response to a complaint. If an inspector concludes that a violation has occurred, he issues a “notice of violation” to the licensee, informing him that violations, “if repeated or willful, . . . may result in the imposition of monetary forfeitures.”<sup>114</sup> The notice does not “assess” a penalty or even specify what the statutory maximum amount is.

The field office forwards a copy of the violation notice to FOB headquarters in Washington, which reviews it for accuracy, completeness, adequacy of asserted evidence, and consistency with enforcement policy.<sup>115</sup> After allowing a reasonable period for written reply from the respondent,<sup>116</sup> the field office sends a copy of the complete file to FOB headquarters with a cover memorandum recommending a disposition.<sup>117</sup> FOB headquarters, in turn, reviews the file and forwards it to the Broadcast Bureau with its own recommendation. At the BB, a staff attorney reviews the file, checks on the financial condition of the respondent as indicated by its most recent annual financial report on file at the FCC and prepares a recommendation

110. 47 U.S.C.A. § 503(b)(2) (Supp. 1979). The Commission's implementing regulations merely echo the statutory language. 43 Fed. Reg. 49,308 (1978) (to be codified in 47 C.F.R. § 1.80(b)(3)).

111. 47 U.S.C.A. § 503(b)(2) (Supp. 1979).

112. 47 U.S.C.A. § 503(b)(3) (Supp. 1979).

113. See generally 47 C.F.R. § 0.281 (1978). Typical broadcast violations include operating at an unauthorized hour of day, 47 C.F.R. § 73.73 (1978), failure to keep accurate records of equipment checks, 47 C.F.R. § 73.114 (1978), failure to identify commercial sponsors, 47 C.F.R. § 73.1212 (1978), advertising lotteries, 47 C.F.R. § 73.1211 (1978), and failure to provide equal opportunity to respond to personal attacks or political endorsements, 47 C.F.R. § 73.123 (1978).

114. FCC FORM 793, OFFICIAL NOTICE OF VIOLATION (Apr. 1975). See 47 C.F.R. § 1.89(a) (1978).

115. If the notice is defective, the field office may be directed either to reconsider or to cancel the notice.

116. 47 C.F.R. § 1.89 (1978).

117. If the field office concludes that the offense was neither willful nor repeated and if the respondent has taken corrective action, the field office recommends that no sanction be imposed. Otherwise, the field office will recommend the imposition of a sanction, usually a forfeiture, and occasionally, in the case of particularly egregious violations, license suspension or revocation or criminal penalties.

to the chief of the BB.<sup>118</sup> With regard to the precise amount to be assessed, a typical staff recommendation reads:

Forfeitures for this type of violation normally range from \$500 to \$2000. The staff believes that \$2000 is appropriate since the violations are of long duration and the daily duration averages one hour with full daytime power prior to sunrise.

If a decision is made to impose a monetary forfeiture, the next step is the issuance of a "notice of apparent liability."<sup>119</sup> The FCC has delegated to the chief of the BB authority to issue notices of apparent liability for forfeitures up to \$4,000; assessment of a larger amount must be issued by the full Commission.<sup>120</sup> The notice gives the respondent three choices: to pay the assessed amount in full; to submit a detailed statement "as to why . . . the forfeiture should be cancelled or reduced";<sup>121</sup> or to take no action (in which case an order of forfeiture would issue).<sup>122</sup> The respondent is not offered an opportunity to discuss the case in person or by telephone. According to BB officials, an unsolicited request for a personal interview is never denied, but respondents are advised that only what they put in writing will be considered in the final decision.<sup>123</sup>

After considering the written response, if any, to the forfeiture notice, the BB prepares a "Memorandum Opinion and Order" (usually called a "forfeiture order") issued in the name of the Commission by the chief of the Bureau. Forfeiture orders provide relatively little explanation of why the precise penalty amount was chosen. Licensees dissatisfied with the forfeiture order may request a reconsideration of the order by the issuing authority (usually the chief of the BB). Finally, there is an opportunity to appeal to the full Commission for review of the order, and, if the Commission sustains the order, for reconsideration.<sup>124</sup>

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118. The financial data reported in a typical memorandum includes gross revenues, depreciation, payments to principals, and net earnings (loss). The precise relevance of and weight to be given to these various indicators is not expressed. A review of selected case files suggests that the policy is to disregard a net loss if either the depreciation figure exceeds the loss or the amount of payments to principals is substantial.

119. See 47 U.S.C.A. § 503(b)(2) (Supp. 1979); 43 Fed. Reg. 49,309 (1978) (to be codified in 47 C.F.R. § 1.80(f)).

120. The BB rarely suggests a forfeiture in excess of its delegated limit, except in cases of extremely flagrant or serious violations. Securing Commission approval for issuing a forfeiture notice delays the process by about one month.

121. FCC Form 5003-A (March 1976).

122. 43 Fed. Reg. 49,309 (1978) (to be codified in 47 C.F.R. § 1.80(f)(4)). The letter does not specify criteria that the agency might consider in deciding whether to cancel or reduce a penalty.

123. The justification for this position is that, unlike an oral communication, a written communication helps to provide a basis for any subsequent administrative review or external audit of the decision.

124. 43 Fed. Reg. 49,309 (1978) (to be codified in 47 C.F.R. § 1.80(i)); 47 C.F.R. § 1.106 (1977). As previously mentioned, the Commission is authorized, as an alternative procedure, to provide respondents with "notice and an opportunity for a hearing" before the Commission or an ALJ in accordance with 5 U.S.C. § 554 (1976) (APA § 5). 47 U.S.C.A. § 503(b)(3)(A) (Supp. 1979). This procedure is followed only when such a hearing is being held for some other reason, such as a license suspension or revocation, and a monetary fine is being considered as an alternative or in addition to other action.

A high percentage of closed cases (seventy percent) are resolved by direct payment on the notice of apparent liability.<sup>125</sup> An additional twenty-six percent are closed after one exchange of correspondence (submission of a written reply followed by issuance of a forfeiture order).<sup>126</sup> The remaining cases are normally closed after one additional step—a petition for reconsideration.<sup>127</sup> Thus, broadcasters rarely request mitigation of penalties.<sup>128</sup> Moreover, the BB rejects over three-quarters of the requests made.<sup>129</sup>

## II. PENALTY STANDARDS

The process used to impose civil money penalties differs from agency to agency and may be shaped by many variables—political, statutory, organizational, or financial.<sup>130</sup> In order to evaluate any given process, and to determine whether and how it can be improved, it is necessary to develop criteria for measuring performance. Paramount among such criteria is effectiveness: a process is good if it advances the substantive objectives of a governmental program.<sup>131</sup> The imposition of civil monetary

125. CONFERENCE REPORT, *supra* note 7, Table VII. All statistics are based on the 148 cases initiated between September 24, 1976, and June 12, 1978.

126. *Id.*

127. *Id.* The last two steps add considerably to the processing time. Cases settled after the forfeiture take an average of about 179 days to close, more than five times as long as direct payment cases, and cases closed after a reconsideration request consume an average of 301 days.

128. *See* CONFERENCE REPORT, *supra* note 7, Table VII. The willingness of licensees to submit to forfeiture claims without protest is probably due to factors other than lack of disputes over liability. In fact, one would expect disputes over liability in the broadcasting context to be more frequent than, for example, disputes under the mine safety program, because most broadcast-related forfeitures may be assessed only for "willful or repeated" conduct, while the mine safety statutes employ a strict liability standard. Moreover, the Commission typically gives licensees no basis for evaluating the fairness of the particular assessment chosen. While the Commission relies on a body of "precedents" as a source of "standards" in assessing penalties, licensees have relatively little access to precedent files. The high degree of licensee compliance is most likely explained by the pervasiveness of FCC regulation: enterprises that owe their existence to the initial and indefinitely renewable approval of an administrative agency are not likely to protest regulatory interference with as much vigor as their less completely regulated counterparts might.

129. *Id.* The average reduction in these cases was substantial (80%), primarily because the penalty was rescinded altogether in seven of the cases, presumably because no provable offense was established. In the remaining four mitigation cases, the average reduction was only 46%. The overall impression one gets from looking at the data, then, is of a system in which reductions in penalty amounts are extremely rare. *See also* Goldschmid, *supra* note 1, at 922.

130. The penalty-imposition "process," as I have used the term, encompasses more than the "procedures" used by agencies to decide individual cases. It necessarily includes the development, and content, of standards and rules applied in those cases, as well as methods used to review and evaluate agency performance.

131. Enumerations of normative criteria for evaluating administrative "procedures" abound, but the concept of substantive effectiveness is not usually among them. *See, e.g.,* Cramton, *A Comment on Trial-Type Hearings in Nuclear Power Plant Siting*, 58 VA. L. REV. 585, 592-93 (1972) ("accuracy," "efficiency," and "acceptability"); Michelman, *Formal and Associational Aims in Procedural Due Process*, in *DUE PROCESS: NOMOS XVIII* 126 (J. Pennock & J. Chapman eds. 1977) ("accuracy," "revelation," and "participation"); Verkuil, *The Emerging Concept of Administrative Procedure*, 78 COLUM. L. REV. 258, 279-93 (1978) ("fairness," "efficiency," "participant satisfaction"). While some or all of the values traditionally invoked (especially "accuracy") may be viewed as serving a "substantive

penalties can be thought to promote regulatory objectives in at least two ways. The most obvious and widely acknowledged method is by motivating future behavior.<sup>132</sup> The prospect of punishment, it may be hoped, will discourage conduct that the government wishes to discourage and encourage conduct that it wishes to encourage. The motivation may be "general" or "specific" in its focus—that is, aimed generally at the universe of actors whose conduct the government may wish to influence, or more specifically at one actor or a small group of actors, such as those who have previously engaged in forbidden conduct.<sup>133</sup>

A second function that might conceivably be served by a civil money penalty is compensation.<sup>134</sup> By definition, a civil money penalty does not serve a "specific" compensatory function of making whole an identifiable individual specifically injured by the offending conduct.<sup>135</sup> Money penalties can, however, be used to serve a "general" compensatory function—that is, to compensate "society" at large for harm that it has suffered at the hands of a violator. Alternatively, one might view the payment as compensation to the government for the costs incurred by it in enforcing the substantive standard.<sup>136</sup>

effectiveness" objective, they are usually presented solely as primary values in their own right. This inattention to the substantive role of procedures has produced a reaction by a growing number of scholars. *E.g.*, Gellhorn & Robinson, *Perspectives on Administrative Law*, 75 COLUM. L. REV. 771 (1975). *See also* Breyer, *Vermont Yankee and The Courts' Role in the Nuclear Energy Controversy*, 91 HARV. L. REV. 1833 (1978); Rabin, *Administrative Law in Transition: A Discipline in Search of an Organizing Principle*, 72 N.W. U. L. REV. 120 (1977).

132. *See, e.g.*, *National Independent Coal Operators' Ass'n v. Kleppe*, 423 U.S. 388, 401 (1976) (purpose of mine safety penalties to provide "strong incentive for compliance with the mandatory health and safety standards"); *United States v. IIT Continental Baking Co.*, 420 U.S. 223, 232 (1975) (Federal Trade Commission Act civil penalties designed to "provide a meaningful deterrence against violations").

133. *See generally* H. PACKER, *THE LIMITS OF THE CRIMINAL SANCTION* 39, 45-53 (1968). The motivational function of legal sanctions is, of course, more commonly referred to as "deterrence." Because of its association with criminal law, however, the term "deterrence" has acquired in the minds of many a wholly prohibitory connotation not necessarily appropriate in the civil regulatory context. Much modern regulation—particularly that dealing with environmental protection or human health and safety—is essentially affirmative in operation; that is, it seeks to stimulate discrete forms of beneficial behavior more than to prevent isolated instances of harmful behavior. While the distinction between affirmative and negative injunctions may be artificial in concept or unmanageable in application, I have generally attempted to use terms—such as "motivation"—that avoid a bias in either direction.

134. *See, e.g.*, Becker, *Crime and Punishment: An Economic Approach*, 76 J. POL. ECON. 169, 208 (1968) (speaking of "fines" generally); Comment, *The Use of Civil Penalties in Enforcing the Clean Water Act Amendments of 1977*, 12 U.S.F.L. REV. 437, 445 (1978). Courts have, on rare occasions, expressly acknowledged a compensatory objective of civil fines. *E.g.*, *Helvering v. Mitchell*, 303 U.S. 391, 401 (1938) (penalties under the revenue laws intended in part "to reimburse the Government for the heavy expense of investigation and the loss resulting from the taxpayer's fraud"); *Stockwell v. United States*, 80 U.S. (13 Wall.) 531, 547 (1871) (customs penalties considered "as providing indemnity [to the government] for loss").

135. That function, in our legal system, is performed by a system of private remedies, usually enforceable through the courts, but in some cases enforceable by administrative agencies. *See, e.g.*, 49 U.S.C. § 304a (1976) (ICC authority to award reparations against carrier for overcharging shipper).

136. *See* notes 197 & 198 and accompanying text *infra*. Retribution and restitution are two additional objectives sometimes invoked as justifications for legal sanctions, but not particularly relevant to the present discussion. "Retribution," as a concept distinct from deterrence, is likely to be implicated only by offenses against society's most fundamental moral

Whatever the objective, however, the "effectiveness" measure will typically subsume some secondary evaluative criteria, such as predictability, accuracy, consistency, expedition, economy, and acceptability. In fact, these criteria embody independent values that should be advanced, at least to some degree, by any system for the imposition of a governmental sanction.<sup>137</sup> That is, a regulatory process should make predictable the consequences of certain conduct and illuminate the procedures for determining those consequences. It must also strive to assure that like cases are treated in similar fashion and that the procedures followed involve no more delay or cost than necessary.

An examination of the penalty-imposition process logically begins with the standards used by agencies to determine whether and in what amount to impose a monetary penalty. The sections that follow explore the need for penalty standards and the methods by which such standards can be framed.

#### A. *The Need for Penalty Standards*

The proposition that persons charged with the determination of penalties should be guided by reasonably clear, complete, and objective policies seems too obvious to warrant prolonged discussion. Others have made the general case for standards so often and so forcefully as not to require repetition.<sup>138</sup> Yet the need for standards is often ignored in the context of determining the severity of sanctions.<sup>139</sup> Some may feel that standards of liability are much more important than remedial standards since the guilty are less deserving of protections afforded by standards than the

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convictions. The conduct punishable by civil monetary penalties usually does not have that character. See, e.g., H. PACKER, *supra* note 133, at 359; Ball & Friedman, *The Use of Criminal Sanctions in the Enforcement of Economic Legislation: A Sociological View*, 17 STAN. L. REV. 197 (1965); Kadish, *Some Observations on the Use of Criminal Sanctions in Enforcing Economic Regulations*, 30 U. CHI. L. REV. 423 (1963). Furthermore, preservation of the admittedly tenuous constitutional distinction between "civil" and "criminal" penalties evidently requires the exclusion of retributive rhetoric from the "civil" sphere. *Helvering v. Mitchell*, 303 U.S. 391, 397-402 (1938). See also *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 168-69 (1963); *Trop v. Dulles*, 356 U.S. 86, 94-99 (1958); *United States ex rel. Marcus v. Hess*, 317 U.S. 537, 548-52 (1943). On the insubstantiality of the "civil"- "criminal" distinction, and proposals to strengthen it, see Charney, *The Need for Constitutional Protections for Defendants in Civil Penalty Cases*, 59 CORNELL L. REV. 478 (1974); Levin, *OSHA and the Sixth Amendment: When Is a "Civil" Penalty Criminal in Effect?* 5 HASTINGS CONST. L.Q. 1013 (1978).

Although the civil money penalty is an obviously appropriate method of achieving a restitutive objective—that is, removing from a violator the benefits of his wrongdoing—the concept of restitution overlaps so completely with the concepts of motivation, compensation and punishment that its inclusion as an independent criterion will rarely serve any useful purpose.

137. See note 131 *supra*.

138. See generally K. DAVIS, *DISCRETIONARY JUSTICE: A PRELIMINARY INQUIRY* 52-96 (1969); K. DAVIS, *POLICE DISCRETION* 112-20 (1975); T. LOWI, *THE END OF LIBERALISM* (1969). A particularly forceful judicial statement of the functions served by standards in the determination of civil money penalty amounts is *Dickinson v. Davis*, 277 Or. 665, 561 P.2d 1019 (1977) (Linde, J.).

139. See, e.g., M. FRANKEL, *CRIMINAL SENTENCE: LAW WITHOUT ORDER* (1973) (criminal sentencing); Thomforde, *Patterns of Disparity in SEC Administrative Sanctioning Practice*, 42 TENN. L. REV. 465 (1975) (SEC license revocation and suspension).

innocent. But this view is at best an argument for relative allocation of regulatory effort, not for totally neglecting the formulation of penalty standards.

Prevailing conceptions of justice certainly do not support a view that once a person has been found to have committed an offense, his continuing interest in participation, accuracy of factfinding, and consistency of decision deserves no further recognition at the sanctioning stage.<sup>140</sup> The lack of moral opprobrium attaching to most regulatory offenses<sup>141</sup> would make such a value judgment especially inappropriate in the civil penalty context. Furthermore, that attitude ignores the rather substantial interest that society itself has in the determination of penalties by reference to established standards. The efficacy of any regulatory program depends on the sanctions imposed in individual cases. If those sanctions are set too low, potential violators may be insufficiently motivated to minimize the social harm resulting from their behavior, or society may be undercompensated for the harm that does occur. If they are set too high, resources may be misallocated in the opposite direction—behavior that produces a net social benefit will be discouraged.<sup>142</sup> Chronic errors in either direction can undermine the credibility and political acceptability of the regulatory program. Only by reference to a set of standards can one determine whether a particular penalty is too low or too high.

In a sense, of course, the real issue is not whether standards should be formulated, but rather who should do so. A penalty scheme could hardly be administered at all unless individual decisionmakers were applying some set of standards, however implicit, to the cases before them. Every decision to assess or mitigate a penalty, except those—hopefully rare—decisions inspired wholly by caprice, implies a standard, which in turn implies a conception of regulatory purpose. If neither the legislature nor the agency formally establishes penalty standards, that function will devolve, by default, on individual agency employees responsible for processing assessments and mitigation requests. In the great majority of cases<sup>143</sup> governmental “policy” will consist solely of those personal judgments.

Congressional action can, of course, avert the tyranny of multiple, invisible sets of penalty standards. But Congress has rarely given administrative decisionmakers very useful guidance in setting penalty levels.<sup>144</sup> Only about one-fourth of the variable-penalty statutes contain any criteria for the assessment of penalties, and even these are little more than a

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140. See, e.g., *Lindhorst v. United States*, 585 F.2d 361 (8th Cir. 1978); *United States v. Robin*, 545 F.2d 775 (2d Cir. 1976); *United States v. Espinoza*, 481 F.2d 553 (5th Cir. 1973) (criminal sentencing). Cf. *Wolff v. McDonnell*, 418 U.S. 539 (1974) (right of prisoner to due process hearing in disciplinary case); *Morrissey v. Brewer*, 408 U.S. 471 (1972) (right of prisoner to parole revocation hearing).

141. See note 136 *supra*.

142. See R. POSNER, *ECONOMIC ANALYSIS OF LAW* 358-59 (1977).

143. As the case studies indicate, the majority of penalty cases are disposed of at a preliminary stage. See notes 101 & 125-28 and accompanying text *supra*.

144. See text accompanying notes 34-36 *supra*.



laundry list of factors to be considered. Even less common are statutory guidelines for the exercise of a mitigation authority.<sup>145</sup> Although it lies within the capacity of Congress to fill this vacuum, the orthodox view of congressional delegation does not counsel optimism on this score.<sup>146</sup> Here, as in so many other contexts, the search for substantive standards seems to lead inexorably to the agencies' doors.<sup>147</sup>

Agencies given little or no explicit statutory authority in the penalty-imposition process might respond, however, that they cannot establish meaningful standards because their adjudicative role is purely derivative, largely restricted to persuasion and negotiation. Such agencies are constrained in what they may demand by factors beyond their control—by the likelihood of convincing a United States Attorney to prosecute and a jury to convict, by the amounts that the prosecutor is likely to settle for or the court to award, by the costs of further proceedings, and by the strength of the evidence. In this context, the pragmatist might insist, “standards” based on ideal considerations of effectuating regulatory purposes must yield to the reality of appraising the bargaining positions of the two parties.

This position—evidently held by some regulatory officials—may have certain implications for the *content* of administrative penalty standards, but it is hardly an acceptable justification for failing to articulate standards altogether. In the first place, its implication that “effectiveness” criteria are not relevant in the pre-adjudicatory setting is plainly wrong. When an agency attempts to compromise a penalty claim—regardless of the source of its authority—it should not permit itself to ignore underlying regulatory objectives; a mitigation requested or a compromise offered should be acceptable to the agency only because payment of that particular sum furthers statutory goals, not simply because the violator is willing to pay it. Without having first articulated those goals and translated them into operative standards, the agency can never make that judgment. Second, by establishing standards for assessing or compromising penalties recoverable in a civil action, the agency may well be able to influence the courts in the exercise of their penalty-setting discretion. A penalty structure developed and articulated by the agency responsible for the initiation of enforcement action can make a legitimate claim to at least some deference by a judge.<sup>148</sup> Third, there is some value in establishing penalty assessment standards even in “pure bargaining” settings simply because the presence of such standards should reduce the transaction costs to the agency of negotiating a large

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145. See text accompanying notes 46-48 *supra*.

146. See, e.g., Bruff & Gellhorn, *Congressional Control of Administrative Regulation: A Study of Legislative Vetoes*, 90 HARV. L. REV. 1369, 1372 (1977). But cf. Wright, *Beyond Discretionary Justice*, 81 YALE L.J. 575 (1972).

147. See generally Davis, *A New Approach to Delegation*, 36 U. CHI. L. REV. 713 (1969).

148. On this assumption, for example, the EPA has proceeded to develop a highly detailed policy for calculating proposed air and water pollution penalties even though these penalties may be collected only in a *de novo* civil action and the agency has no express statutory assessment authority. See notes 182-85 and accompanying text *infra*.

number of cases.<sup>149</sup> Finally, the establishment of standards is necessary to facilitate oversight of the penalty negotiation process by agency management, the executive, Congress, and the general public.<sup>150</sup> Regulatory agencies cannot, in short, escape a responsibility to articulate penalty standards, no matter how minimal the role conferred upon them by the enabling statute, so long as they possess de facto power to institute and terminate penalty claims.<sup>151</sup>

The skeptic might question whether the adoption of penalty standards, however desirable as a matter of principle, is feasible. Can an agency hope to anticipate all of the factors that ought properly to bear on a sanctioning decision? Can an agency draft a set of standards that really confine discretion without destroying the capacity to do justice? Indeed, experience with attempts to structure prosecutorial discretion<sup>152</sup> and judicial sentencing policy<sup>153</sup> counsels extreme caution in expecting dramatic results. The very fact that so few agencies have established penalty standards<sup>154</sup> raises doubts about their ability to do so. Nevertheless, there is room for significant improvement in administrative standards.

At a minimum, agencies could simply enumerate the factors that influence the determination of penalty amounts and the direction of that influence. One may protest that this step is either unnecessary, because any intelligent person can guess what factors properly bear on determination of a penalty, or ineffectual, because a typically vague and open-ended enumeration can exert no real constraint on arbitrariness. Such arguments, however, exaggerate. Agencies are not necessarily influenced by every imaginable factor. Enumeration of factors saves time and effort by implicitly excluding factors not relevant to the determination. Furthermore, the very discipline of preparing an official list of decisional factors helps

149. On the tendency of interest negotiation to coalesce around "adjudicative" norms, see Eisenberg, *Private Ordering Through Negotiation: Dispute-Settlement and Rule Making*, 89 HARV. L. REV. 637 (1976). See also G. ALLISON, *ESSENCE OF DECISION: EXPLAINING THE CUBAN MISSILE CRISIS* 169-71 (1971).

150. One rather emphatic statement of this "political accountability" justification for administrative standards may be found in *Sun Ray Drive-In Dairy, Inc. v. Oregon Liquor Control Comm'n*, 16 Or. App. 63, 71, 517 P.2d 289, 294 (1973). See also *Amalgamated Meat Cutters v. Connally*, 337 F. Supp. 737, 746 (D.D.C. 1971). The utility of standards for this purpose is especially great in a decentralized penalty negotiation process.

151. The role conferred on the agency by statute may, however, be relevant in determining the extent to which the standard-setting "obligation" posited in the text might be judicially enforceable. A penalty imposed under an explicit assessment authority will usually be accorded at least some deference by a court in a subsequent enforcement action, but only to the extent that the reviewing court finds that the agency has reasons for the assessment rationally related to the statutory objective. See, e.g., *Butz v. Glover Livestock Comm'n Co.*, 411 U.S. 182 (1973); *Beck v. SEC*, 430 F.2d 673 (6th Cir. 1970); *United States v. General Motors Corp.*, 417 F. Supp. 933 (D.D.C. 1976). In that sense, at least, a court may require an agency to articulate "standards" under an assessment statute.

152. See, e.g., Lockhart, *Discretionary Clemency: Mercy at the Prosecutors' Option*, 1976 UTAH L. REV. 55; McClintock, *The Unreviewable Power of the General Counsel—Partial Enforcement of the Labor Act*, 12 GONZ L. REV. 79 (1976).

153. See, e.g., Alschuler, *Sentencing Reform and Prosecutorial Power: A Critique of Recent Proposals for "Fixed" and "Presumptive" Sentencing*, 126 U. PA. L. REV. 550 (1978). See generally P. O'DONNELL, M. CHURGIN & D. CURTIS, *TOWARD A JUST AND EFFECTIVE SENTENCING SYSTEM: AGENDA FOR LEGISLATIVE REFORM* (1977).

154. See notes 63-65 and accompanying text *supra*.

focus agency policy. It can help policymakers to identify and eliminate overlaps and ambiguity in such commonly used terms as "size of violator" and "gravity"<sup>155</sup> and indicate how such general concepts as "size" and "ability to pay" should be measured.

Standards can go beyond mere enumeration and provide some guidance about the relationship among or the relative weights to be assigned to the various factors. For example, a body of standards could specify whether any particular factor—such as fault—is a precondition for assessing a penalty, how to compute the minimally acceptable penalty in any given case, or what regulatory violations will be treated as most serious. At the highest level of detail, of course, an agency could specify a mathematical formula, such as the MSHA "regular assessment" formula,<sup>156</sup> for combining the various factors or, in the case of frequent and relatively minor violations, a simple schedule of fixed penalties.<sup>157</sup>

### B. Framing Standards

In order to frame a set of standards for determining the penalty amount appropriate for an individual violation, one must first identify the purpose or purposes the penalty is intended to serve. As noted earlier,<sup>158</sup> money penalties may serve one or more of at least two conceptually distinct purposes: motivation of behavior and compensation for harm to society. While these objectives necessarily overlap to a considerable degree,<sup>159</sup> a penalty optimally suited to achieve one may not necessarily be best suited to the other. For example, motivation may require a good deal larger penalty than one that merely compensates society for its injury. So, too, the procedures needed to apply those standards may be different. A compensatory goal may require a more elaborate procedure designed to identify and resolve factual disputes about the size of the injury, whereas a general deterrent function could be served adequately by a more mechanical approach to calculating the size of the penalty. Consequently, it may be important to determine which of these purposes are at work in a particular context and, at least roughly, the relative weights assigned to each.

Penalty statutes rarely give explicit guidance on this score. If such guidance is available at all, it must usually be deduced inferentially. When a statute enumerates criteria to be considered in assessing a penalty, the choice of criteria may be illuminating. For example, a statute that requires

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155. On the ambiguity of these terms, see notes 163-64 and accompanying text *infra*.

156. See notes 77-84 and accompanying text *supra*.

157. For example, the Federal Communications Commission has specified fixed forfeiture amounts for each of five common citizen's band (CB) radio violations: use of excess power (\$100); use of unauthorized frequency (\$100); communicating beyond 150 miles (\$75); overheight antenna (\$75); and failure to identify transmission by assigned call sign (\$50).

158. See notes 132-36 and accompanying text *supra*.

159. For example, knowledge that certain conduct may trigger a demand, backed by the state's coercive power, for payment of compensation is itself a powerful incentive not to engage in the conduct. The pursuit of a compensatory goal, then, must almost invariably imply the simultaneous pursuit of a motivational objective as well.

the agency to determine the economic benefit<sup>160</sup> of noncompliance evinces a statutory purpose to motivate behavior by removing any unjust enrichment. Inclusion of "culpability"<sup>161</sup> or a similar factor<sup>162</sup> obviously connotes a deterrent objective. Unfortunately, many criteria commonly cited in penalty statutes could support two or more possible interpretations. Consider, for example, the common requirement that the penalty reflect the "size" of the offender.<sup>163</sup> The word "size" may be shorthand for "ability to pay"—thus recognizing a common assumption of deterrence theory that the motivational effect of a penalty depends on how much it hurts the particular offender. On the other hand, inclusion of the criterion may reflect a legislative view that the violator's "scale of operations" is a useful indicator of the social harm caused by his conduct—thus implying a compensatory objective. "Gravity"<sup>164</sup> of the offense may refer to the perceived gravity to those others whose conduct must be deterred or to the actual gravity as a measure of the harm for which "compensation" must be paid to society.

In some cases other statutory language may provide useful guidance. For example, a provision that sums collected will go into a special fund to be "applied toward reimbursement of the costs of determining the violations and assessing and collecting such penalties,"<sup>165</sup> may imply a compensatory purpose. Or the presence in the statute of an alternative remedy for compensating society for the harm caused by a violation—such as a civil action to recover costs of removing an oil spill<sup>166</sup>—may suggest that the money penalty is designed solely for deterrence.

If agencies, or their employees, have formulated operational definitions of the purpose served by civil money penalties, they have not done so with noticeable clarity. Employees of most agencies operate on the assumption that motivation is the principal, if not the exclusive function of their civil penalties.<sup>167</sup> But no agency policy statements of which the author is aware expressly indicate the role, if any, played by nonmotivational objectives. At best, one must decipher the relationship among potential objectives from the official standards promulgated by, or the de facto standards used by,

160. *E.g.*, 42 U.S.C. § 7420(d)(2)(A) (Supp. I 1977) (violation of emission control standards by stationary air pollution source).

161. *E.g.*, 15 U.S.C. § 1990b (1976) (failure to report information about motor vehicle accident losses); 15 U.S.C. § 2615(a)(2)(B) (1976) (toxic substance controls); 16 U.S.C. § 1858(a) (1976) (fishery conservation).

162. "Good faith" is another term commonly used to suggest degree of culpability. *E.g.*, 7 U.S.C. § 2149(b) (1976) (illegal sale of animals); 16 U.S.C. § 668(b) (1976) (protection of bald and golden eagles).

163. *See, e.g.*, 7 U.S.C. § 1361(a)(3) (1976) (illegal use of pesticides); 15 U.S.C. § 2069(b) (1976) (consumer product safety); 46 U.S.C. § 1484(c) (1976) (boating safety).

164. *See, e.g.*, 15 U.S.C. § 1825(b)(1) (1976) (horse protection); 29 U.S.C. § 666(i) (1976) (occupational safety and health); 33 U.S.C. § 1322(j) (1976) (marine sanitation devices).

165. 29 U.S.C.A. § 216(e) (Supp. 1979) (child labor laws).

166. 33 U.S.C. § 1321(f) (1976).

167. *See, e.g.*, 43 Fed. Reg. 23,514 (1978) (MSHA rules). A particularly clear statement of the motivational objectives of a penalty scheme is contained in EPA, Memorandum from Assistant Administrator for Enforcement to Regional Administrators, Enforcement Against Major Source Violators of Air and Water Acts (Apr. 11, 1978) [hereinafter cited as EPA Memorandum], reprinted in [1977-1978] Pollution Control Developments ¶ 49,050.

the agency to determine actual dollar amounts. For example, a former Coast Guard directive on assessing oil spill penalties instructed hearing officers in determining the "gravity" of an offense to consider seven factors, six of which related to culpability and one of which related to whether a minimum amount of oil was discharged. In basing "gravity" primarily on culpability rather than on the magnitude of the spill, the directive strongly implied that such penalties should serve a deterrent rather than compensatory function.<sup>168</sup> But if that is the message, the agency could certainly have communicated it with much greater clarity. Likewise, the detailed "regular assessment" formula used by MSHA implies the relative weights assigned by the agency to possible purposes.<sup>169</sup> Since the factors are additive, one might infer that motivation has less weight than it would in a multiplicative formula where a finding of "gross negligence" would substantially increase the penalty over the amount assessable for mere negligence. But, once again, the message is ambiguous, especially in view of the agency's use of a wholly separate discretionary "special assessment" procedure in some cases.<sup>170</sup>

The first step in formulating penalty standards, then, should be a well-reasoned determination of the purposes served by the penalty assessment. Once one has identified the mix of purposes served, one must establish criteria for determining the precise dollar amount that will best promote those purposes in any given case. An examination of the various factors that may be considered in this process follows.

1. *Motivational Impact.* General deterrence theory can provide some guidance with respect to the motivational effects of penalty sanctions. The little empirical research that has been done on the subject suggests that severity of punishment is important in deterring economic crime,<sup>171</sup> a conclusion powerfully reinforced by economic theory.<sup>172</sup> Civil penalties are typically addressed to the adverse consequences, or "social costs," of private

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168. U.S.C.G., COMMANDANT INSTRUCTION 5922.11B at 8-9 (1974). See CONFERENCE REPORT, *supra* note 7, at 46-47.

169. See notes 78-84 and accompanying text *supra*.

170. See notes 85-86 and accompanying text *supra*.

171. See, e.g., Lane, *Why Business Men Violate the Law*, 44 J. CRIM. L. & CRIMINOLOGY 151 (1953); Stotland, *White Collar Criminals*, 33 J. Soc. ISSUES 179 (1977). Cf. Sjoquist, *Property Crime and Economic Behavior: Some Empirical Results*, 63 AM. ECON. REV. 439 (1973). Although some general literature on deterrence suggests that severity of punishment is not as important a deterrent as certainty of punishment, most studies acknowledge that the relative and absolute motivational importance of severity and certainty depends on the context. See, e.g., Chiricos & Waldo, *Punishment and Crime: An Examination of Some Empirical Evidence*, 18 Soc. PROB. 200 (1970); Silberman, *Toward a Theory of Criminal Deterrence*, 41 AM. Soc. REV. 442 (1976). Moreover, the relationship between severity and certainty, even in a given context, may be complex: severity may have more motivational force when the certainty of punishment exceeds some threshold value. See Tittle & Rowe, *Certainty of Arrest and Crime Rates: A Further Test of the Deterrence Hypothesis*, 52 Soc. FORCES 455 (1974). Other variables, such as the type of punishment, may be more important than the severity of a particular punishment. See, e.g., M. CLINARD, *THE BLACK MARKET* 243-45 (1952) (businessmen fear imprisonment more than financial sanctions). In any event, the applicability of the general literature on criminal deterrence to the very specialized subject of economic or white-collar crime is highly questionable.

172. See generally R. POSNER, *supra* note 142, at 357-73; Becker, *supra* note 134; Stigler, *The Optimum Enforcement of Laws*, 78 J. POL. ECON. 526 (1970).

productive activity,<sup>173</sup> such as oil spills, black lung disease, or degradation of the quality of broadcasting services. It is precisely because the marketplace has no effective means of forcing producers to internalize these costs that regulation is thought necessary. Regulation, then, is addressed to one of the most assumedly rational of human activities—the calculation of cost and revenue by a productive economic entity. The penalty for violating a regulation serves as a surrogate “cost” of production—a way to internalize an otherwise external social cost.<sup>174</sup> As such, its severity becomes as much a part of the rational calculus of the producer as any other cost, and the severity of regulatory fines will likely have significant motivational impact.

Nevertheless, enumeration of the factors that motivate a large group of diverse, frequently corporate actors, is an inexact art;<sup>175</sup> any attempt to construct a system of effective inducements must involve a great deal of guesswork. In most agencies, however, it has apparently involved little else. Most agency officials do not know how effectively their existing penalties deter unlawful conduct. None of the agencies surveyed for the Conference Report<sup>176</sup> had made any systematic effort to ascertain the motivational impact of their penalties, and few had made even an informal analysis.

Many agencies have the means to estimate the motivational effects of their penalty structures. Even in the absence of reliable economic or psychological models of motivation in so complex a setting, experience is a useful guide. What effect does the institution or change of a penalty system have on the rate of compliance? Is recidivism common? Do the undeterred violations fit a particular pattern? An agency that prosecutes only a handful of violations per year may find those questions difficult to answer. But when an agency prosecutes hundreds or thousands of violations, the information generated by those cases can be a powerful tool for evaluating the effectiveness of the enforcement effort. By gathering and storing relevant information from those cases in such a way as to facilitate its analysis, the agency can begin to identify changes in the rate of various types of violations, isolate characteristics of violators, and estimate the impact of changes in the level or frequency of penalty assessments on the rate of compliance.

Some of the information necessary to perform this review requires special agency investigation or audit. Agencies should conduct compliance surveys of at least a random sample of recent violators to see whether they have corrected the offending condition or repeated the offense.<sup>177</sup> But the

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173. See generally Coase, *The Problem of Social Cost*, 3 J.L. & ECON. 1 (1960).

174. This theory has been thoroughly developed in the field of environmental pollution. See generally M. EDEL, *ECONOMICS AND THE ENVIRONMENT* (1973); L. HINES, *ENVIRONMENTAL ISSUES: POPULATION, POLLUTION AND ECONOMICS* (1973).

175. On the difficult problem of influencing corporate behavior through the use of negative sanctions, see, e.g., C. STONE, *WHERE THE LAW ENDS* 39-40 (1975); Mueller, *Mens Rea and the Corporation*, 19 U. PITT. L. REV. 21 (1957). See also Olds, Unkovic & Lewin, *Thoughts on the Role of Penalties in the Enforcement of the Clean Air and Clean Water Acts*, 17 DUQUESNE L. REV. 1 (1978).

176. See note 58 *supra*.

177. My investigation suggests that relatively few federal agencies conduct systematic compliance surveys of the type suggested. The closest approximation among the agencies

penalty administration process itself generates most of the information needed to perform an effectiveness review. The problem is to make usable information already in agency files. For large penalty-processing operations, this probably requires a computer-based information system. Two of the agencies with the largest civil penalty caseloads—MSHA and the Coast Guard—each have a computer-based case file containing a wealth of information useful for program evaluation purposes.<sup>178</sup>

The lack of systematic penalty impact studies does not mean that agencies ignore the issue. The FCC's Safety Bureau, for example, showed a commendable sensitivity to the issue in a 1963 memorandum to the Commission explaining the reasons for its proposed ship forfeiture schedule.<sup>179</sup> In that memorandum the Bureau computed forfeiture rates (number of vessels incurring forfeitures as a percentage of number inspected) and recidivism rates for each type of ship forfeiture during the previous year. Based upon the fact that these rates were extremely low, as well as a qualitative judgment that violations rarely resulted from willfulness, the Bureau recommended a schedule of very small first-offense forfeitures. A later memorandum concluded that no change in the policy was warranted, since noncompliance and recidivism rates remained low.<sup>180</sup> In rather sharp contrast to this stands MSHA's decision in 1978 to overhaul its "regular assessment" formula so as to double average assessments,<sup>181</sup> a decision made without the kind of

studied is MSHA, which conducts a reinspection at the end of the abatement period. See CONFERENCE REPORT, *supra* note 7, at 31-32. In fact, MSHA inspects all mines so frequently that it probably has no need for a special reinspection of recent violators. Other agencies, while conceding the value of compliance reinspection, plead inadequacy of resources.

178. For example, MSHA's "Assessment Data Base Management System" collects the following data on every violation assessed: the mine in which the violation occurred, the date on which the violation notice was issued, the type of citation, the mandatory health or safety standard violated, the penalty points assessed for each assessment criterion, the total points assessed, and the dollar amount assessed. MSHA, Description of the Assessment Data Base Management System (Draft March 17, 1978). Since MSHA inspects all mines on a frequent, periodic basis, it should be able to utilize these data, as well as centrally stored data on the ownership, status, and type of mine, to determine rates of violations by type of violation, assessment criterion, and operator/controller. Any category showing a particularly high rate of violation or a pronounced increase in the rate of violations would be a logical candidate for an increase in penalty amounts. Unfortunately, at the time research for this study was conducted, neither MSHA's nor the Coast Guard's system was capable of more than data retrieval on individual cases. More recently, however, the capacity of both systems has been improved.

179. Memorandum from Chief, Safety and Special Radio Services Bureau, to the Commission 3 (Oct. 30, 1963).

180. Memorandum from Chief, Safety and Special Radio Services Bureau, to the Commission 1 (June 18, 1975).

181. 43 Fed. Reg. 23,514 (1978) (to be codified in 30 C.F.R. §§ 100.1-7). In its statement of the basis and purpose for the changes, MSHA did use quantitative data drawn from its previous enforcement experience to explain two changes in the size of point ranges allocated for "negligence" and "good faith," 43 Fed. Reg. at 23,515-16, but not to explain its general elevation of the conversion table. In its defense, it should be said that MSHA had been severely criticized on a number of occasions for the low level of its penalties. See, e.g., *Hearings on S. 717, Before the Subcomm. on Labor of the Senate Comm. on Human Resources*, 95th Cong., 1st Sess. 335 (1977) (statement of L. Thomas Galloway); *Hearings Before the Subcomm. on Labor of the Senate Comm. on Labor and Public Welfare*, 91st Cong., 2d Sess. 195 (1970) (statement of W.A. "Tony" Boyle, President, UMWA). Also, as indicated earlier, at the time the penalty schedule was amended, MSHA's information system did not have the capability of producing the analysis suggested in the text. In the statement of basis and purpose, MSHA notes that its proposed formula is not "perfect," and promises to

systematic analysis of violation and recidivism rates, by type of violation and violator, that should be readily possible given its data base.

2. *Removal of Economic Benefit.* Even those agencies that lack the resources or the data base to conduct a systematic study of the impact of their penalty structure on compliance patterns need not rely on unsupported guesswork in framing a sensible penalty structure. Since most regulatory offenses punishable by administrative fines involve the adverse social consequences of private productive activity, removal of the benefit realized from noncompliance could be posited as a minimal condition for motivational adequacy. A good example of a standard based on this premise is the formula developed by the Environmental Protection Agency to assess penalties for failure to comply with air and water pollution abatement orders.<sup>182</sup> The most important single element in the formula is a calculation of the economic benefit realized by the violator.<sup>183</sup> The EPA has developed a complex formula for estimating economic benefit, which calculates the present value to the polluter of the stream of savings resulting from refusal to make required modifications in operating processes or to install required equipment.<sup>184</sup> Both capital and operating cost savings are included. The sophistication of this system stands in marked contrast to certain agencies' crude efforts to estimate economic benefit.<sup>185</sup>

That very sophistication, however, sharply limits its utility as a model for other agencies. Despite the use of computer-based algorithms and published averages for certain parameters in the equation,<sup>186</sup> the formula imposes a heavy factfinding burden on EPA staff. Application of the formula

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review the formula "once there has been some experience under this system." 43 Fed. Reg. 23,516 (1978).

182. EPA, Civil Penalty Policy For Application of Section 309(d) of the Clean Water Act and Section 113(b) of the Clean Air Act to Certain Water Act Violators and Air Act Stationary Source Violators (Apr. 11, 1978), reproduced in [1977-1978] Pollution Control Developments ¶49,050.

183. *Id.* at 13-14. "Economic value" is also the basis of administratively imposed mandatory penalties assessed under section 120 of the Clean Air Act, 42 U.S.C. § 7420(d)(2)(A) (Supp. I 1977) (effective July 1, 1979). See EPA Proposed Rules, 44 Fed. Reg. 17,310 (1979).

184. EPA, Technical Support Document for the Civil Penalty Policy (Sept. 1978).

185. For example, the Interstate Commerce Commission, although it purports to base minimum settlement figures in "unauthorized operations" cases on the gross revenues earned by the carrier from the documented violations, often arrives at minimum settlement figures that bear no relationship to the estimated revenues. In one recent case, the estimated revenues from 107 documented violations exceeded \$103,000 (the statutory maximum was \$53,500), and the minimum settlement figure was set at \$4,000. Because the "revenue" figure derives from the number of "documented" violations, not the usually much higher number of "discovered" violations, the actual economic benefit to the carrier may be even more seriously undervalued. For example, in one case settled at \$2500, the estimated revenues for 25 "documented" violations were \$11,250 and for 120 "discovered" violations, \$54,000. On the other hand, to the extent that revenue from illegal operations is relevant to setting forfeiture amounts, it would seem logical to use a net revenue figure rather than a gross revenue figure. The former is at least a crude measure of the extent to which the violator profited from his misdeeds; the latter has no apparent logic to support its use.

186. For example, "annual inflation rate of pollution control equipment," "interest rate on source's long-term debt," and "useful life of pollution control equipment." EPA Technical Support Document, *supra* note 184, at 10, 11, 13.



requires information about a large number of parameters specific to the pollution source<sup>187</sup> or the particular pollution-abatement requirement violated,<sup>188</sup> usually covering a period of years. Acquisition of such information can impose significant investigative costs and provide the basis for factual disputes between the agency and the polluter. Only in a regulatory scheme in which the typical case involves very high stakes is such a system feasible.

This does not mean, however, that the principle of restitution has utility only under those conditions. There are many contexts involving relatively small penalties in which agencies can make tolerably reliable estimates of illegal benefit at little cost. For example, the ICC, which has been largely unsuccessful at estimating the economic benefit of unauthorized operations of motor carriers,<sup>189</sup> could use standardized ratios to translate the "gross revenues" of an unauthorized operation into a reliable estimate of the net revenues received as a result. As part of its ratemaking function, the ICC routinely computes the ratios of average and marginal costs to revenues from trucking operations.<sup>190</sup> Penalty assessment personnel could use such preexisting ratios in individual cases without great loss of accuracy.<sup>191</sup>

Mere removal of economic benefit will usually be insufficient by itself to secure compliance with regulatory standards. It is necessary, at least in theory, to multiply the documented benefit by a factor representing the likelihood of escaping punishment altogether.<sup>192</sup> For example, suppose a firm realizes a profit of \$1,000 from an activity that, on average, is detected and punished only ten percent of the time. If the only cost of being apprehended were the penalty and if the firm were behaving rationally, a \$10,000 penalty would presumably be necessary to deter that conduct. Since there are other costs associated with being apprehended—such as legal fees, adverse publicity, or greater exposure to closer scrutiny in the future—a somewhat smaller penalty may prove to be adequate. Precisely measuring these other costs, as well as the risk of detection, is probably an impossible task and, in any event, would be prohibitively expensive in individual cases. Nonetheless, an agency could make a reasoned estimate of such factors and combine them into a simple multiple that would be applied to all economic benefit calculations. If, however, the agency concluded that the probability

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187. For example, its marginal tax rate, rate of return on equity, capital structure, and income tax depreciation method. *Id.* at 10-13.

188. For example, the original capital expenditure that should have been made for required pollution control equipment, the annual operating and maintenance expenses that would have been incurred in connection with such equipment, and the period of delayed compliance. *Id.* at 8, 9, 13.

189. See note 185 *supra*.

190. See, e.g., Middle West General Increases, 48 M.C.C. 541 (ICC, Div. 3, 1948); ICC Bureau of Accounts, Cost Finding and Valuation, Statement No. 4-59 (1959). See generally 2 A. KAHN, *THE ECONOMICS OF REGULATION* 54-56 (1971); Goodman, *Recent Trends in Transport Rate Regulation*, 70 MICH. L. REV. 1225, 1249-56 (1972).

191. Other things being equal, the agency should probably use a ratio based on marginal (or "variable" or "out-of-pocket") cost rather than average (or "fully distributed") cost. In the short run, at least, it is presumably the excess of incremental revenue over out-of-pocket costs that provides the incentive to use existing equipment in an illegal operation.

192. See, e.g., R. POSNER, *supra* note 142, at 360.

and nonpenalty costs of detection were incapable of estimation or motivationally irrelevant, it could limit itself to recovering only the unlawful profits documented in the case at hand.

3. *Compensation.* Translating the "compensation" objective into operational standards presents another set of difficulties. Since, by hypothesis, money penalties serve a general, as distinct from specific, compensatory function, one must, in theory, measure the nonspecific "social" harm caused by an illegal activity. The EPA, for example, directs its regional penalty assessment officers to consider "the harm or risk of harm to public health or the environment" caused by unlawful air and water pollution.<sup>193</sup> But the lack of specificity of the guideline reflects the difficulty of the task.<sup>194</sup> EPA regional officials confirm that impression and note that, largely as a result, the "harm" factor does not significantly affect most penalty calculations.

MSHA's "regular assessment" penalty formula makes a commendable effort to isolate and measure the elements of the "harm" calculation. The formula separately assigns points for three such elements: the probability that an offending condition will cause actual harm, the number of persons exposed, and the severity of the harm likely to be experienced by the average exposed person.<sup>195</sup> While this approach necessarily involves essentially arbitrary assignments of values, it has the salutary effect of directing enforcement officials' attention to the individual elements by which total harm might be determined. The approach seems well suited to cases where the "harm" is potential, rather than actual, damage or injury. MSHA's approach in cases where a death or serious injury has actually occurred is more problematical. There the agency replaces the regular formula with the largely discretionary "special assessment" procedure, which results in much higher penalties. Since the harms involved are "specific" harms that can be, and presumably are, compensated directly,<sup>196</sup> it is not clear what regulatory purpose—other than pure retribution—is served by imposing a penalty more severe than if the same act of noncompliance had not actually caused a serious injury. MSHA presumes that serious injury implies grossest negligence on the mine operator's part, but it offers no empirical support for that presumption.

In cases in which measurement of social harm is particularly difficult in principle or expensive in practice, the agency might adopt as a substitute the concept of compensating the government for its enforcement efforts.<sup>197</sup>

193. EPA Memorandum, *supra* note 167, at 12-13.

194. See R. POSNER, *supra* note 142, at 160. Some economists have tackled the ambitious task of developing methods to measure environmental harm. See, e.g., M. CLAWSON, *THE ECONOMICS OF OUTDOOR RECREATION* (1966); J. DALES, *POLLUTION, PROPERTY AND PRICES* (1968); B. ACKERMAN, S. ROSE-ACKERMAN, J. SAWYER JR. & D. HENDERSON, *THE UNCERTAIN SEARCH FOR ENVIRONMENTAL QUALITY* (1974); Pearse, *Toward a Theory of Multiple Use: The Case of Recreation Versus Agriculture*, 9 NAT. RESOURCES J. 561 (1969).

195. 43 Fed. Reg. 23,518 (1978) (to be codified in 30 C.F.R. § 100.3(e)).

196. These losses can be compensated under a state workers compensation act or in a common-law tort action.

197. The Supreme Court has expressly recognized compensation of the government for its enforcement expenses as a legitimate objective of money penalties. *Helvering v. Mitchell*, 303 U.S. 391, 401 (1938); *Stockwell v. United States*, 80 U.S. (13 Wall.) 531, 547 (1871).

The sums appropriated by Congress or expended by an agency for controlling a particular type of conduct might be taken as a very crude proxy for a more direct measure of the social harm caused by that conduct.<sup>198</sup> Even if an agency structures its penalties so as to recover the government's overall related costs of regulation, however, it will still be necessary to develop a standard for allocating this aggregate sum among individual violators. Presumably some measure of the scale of violations would have to be developed for this purpose—for example, the quantity of oil illegally spilled, the revenues from unauthorized operations, or the percentage in excess of authorized power output. While it may be difficult in some contexts to develop easily administered measures of the relative scale of violations, the undertaking will usually be considerably easier than attempting directly to calculate social harm.<sup>199</sup>

4. *Ability to Pay.* The principle that a penalty otherwise appropriate should be adjusted to fit the financial circumstances of the violator is widely acknowledged. Statutory enumerations of penalty criteria frequently include a reference to ability to pay,<sup>200</sup> as do some administrative standards.<sup>201</sup> Unfortunately, the concept of "ability to pay" is pregnant with a degree of ambiguity that invites arbitrary and capricious application. A set of administrative penalty standards that fails to resolve that ambiguity thus leaves a dangerous gap.<sup>202</sup>

The term "ability to pay," as used in the context of monetary penalties, may have one of at least three distinct meanings. First, it can invoke the common assumption of deterrence theory that the motivational impact of a sanction depends on the subjective pain it inflicts on the wrongdoer. However, in most forms of economic offenses, the violator's penalty tolerance

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198. It is a "proxy" rather than a "measure," because it is the social harm *prevented* by regulation—not the harm that occurs *despite* regulation—which presumably determines the amount that society is willing to expend on regulation. There is no necessary relationship between the value of the harm prevented by regulation and the harm occurring despite regulation. The "cost of regulation" approach, then, is justified not so much by logic as by expedience.

199. Attempting to recover enforcement costs through the penalty system may seem objectionable as a disguised tax. Agencies have been rebuffed in their attempts to set regulatory fees on that basis. *National Cable Television Ass'n v. United States*, 415 U.S. 336 (1974); *FPC v. New England Power Co.*, 415 U.S. 345 (1974); *National Ass'n of Broadcasters v. FCC*, 554 F.2d 1118 (D.C. Cir. 1976); *Capital Cities Communications, Inc. v. FCC*, 554 F.2d 1135 (D.C. Cir. 1976). But a fee, according to the Supreme Court, is a means by which the government obtains reimbursement for rendering a specific service. *National Cable Television Ass'n v. United States*, 415 U.S. 336 (1974). Consequently, it must be commensurate with an identifiable and measurable benefit conferred on the fee payer. A penalty, by contrast, may be used as one means to force a violator to compensate society for harm inflicted upon it. The cost, to society, of a program designed to prevent that harm may reasonably be taken as an estimate of that harm in the absence of more accurate measures.

200. *See, e.g.*, 15 U.S.C. § 1825(b)(1) (1976) (horse protection); 15 U.S.C. § 1990b(b) (1976) (motor vehicle reporting requirements); 16 U.S.C. § 1858(a) (1976) (fishery conservation).

201. *See, e.g.*, EPA, Civil Penalty Policy, *supra* note 182, at 22. *Cf.* 4 C.F.R. § 103.2 (1979) (standards for "compromising" claims under Federal Claims Collection Act).

202. *See, e.g.*, the MSHA standards, 43 Fed. Reg. 23,517-19 (1978) (to be codified in 30 C.F.R. § 100.3).

will presumably be a direct function of the net benefits realized from the illegal conduct. Thus, application of restitution principles advanced earlier<sup>203</sup> will adequately dispose of "ability to pay" considerations in this first, or motivational, sense.

A second, and colloquially more common, meaning focuses on the practical ability of the government to collect the debt. In the extreme version of this interpretation, a violator is "unable to pay" a penalty only in the event that he possesses insufficient assets for distribution to holders of equally or more senior obligations in the event of bankruptcy. While this strict definition of "inability to pay" has the advantage of minimizing the number of cases in which the defense would be successful, or indeed even offered, its very Draconian character suggests that "ability to pay" may—or should—also include consideration of the welfare of the violator, either for his own sake or for the sake of those dependent on him.

A penalty otherwise appropriate in view of the benefit realized by the violator and the adequacy of his assets to insure collection might impose so much hardship on the violator or, secondarily, on others as to warrant its reduction. In the common case of a corporate entity, this point may be reached, for example, when the penalty literally forces the business to shut down, causing secondary unemployment and economic dislocation. It is presumably for this reason that several statutes require the agency, when assessing a penalty, to consider its effect on the ability of the violator to remain in business.<sup>204</sup> Even in the absence of specific guidance, it is undoubtedly appropriate for agencies to weigh that factor in the balance. Any effort to do so, however, confronts decisionmakers with formidable difficulties. In the first place, predicting the impact of a penalty on ability to continue in business requires intensive financial analysis that will add considerably to the cost of the penalty calculation. Second, it may be extremely difficult to separate the adverse effect of the *penalty* from the adverse effect of other compliance costs. Third, balancing the "social cost" of closing down a business against the social cost of continued noncompliance involves an unavoidably high degree of subjectivity.

In the face of these difficulties, agencies would be well advised either to exclude ability to pay in this third sense from the penalty calculation, or at least to limit its applicability to a narrow class of cases in which the costs of compliance are so great as to threaten the continued economic viability of a significant minority of firms. In any event, agencies should specify in their penalty standards whether decisionmakers should consider this aspect of "ability to pay,"<sup>205</sup> and, if so, what financial indicators or elements ought properly to be considered in its application.

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203. See notes 182-92 and accompanying text *supra*.

204. See, e.g., 7 U.S.C. § 13a (1976) (commodity futures contract market); 7 U.S.C. § 136f (1976) (manufacturer or user of pesticides); 15 U.S.C. § 2615(a)(2)(B) (1976) (manufacturer or distributor of toxic substances); 46 U.S.C. § 170(17)(A) (1976) (transporter of explosives).

205. The EPA's standards specify that "serious economic hardship" may justify reducing a penalty, but not relaxing the obligation to come into compliance. EPA, Civil Penalty

5. *Costs and Risks of Collection.* The discussion to this point has focused on substantive criteria for determining an ideal penalty amount in the abstract. Penalty determinations are not made in the abstract, however, but in concrete procedural contexts. Agency officials empowered to assess, mitigate, or compromise penalties exercise their powers within the constraints imposed by the enforcement process itself. The process is costly—it requires an investment of staff and financial resources invariably in limited supply. It is risky—each successive stage exposes prior determinations to an uncertain prospect of modification or reversal. Persons entrusted with making decisions at any point short of the ultimate adjudicative stage will inevitably feel the influence of these factors. A set of standards to guide agency action cannot, therefore, be complete without explicitly addressing the question of whether and to what extent these factors may enter into penalty determinations.

Litigative probability and collection costs are factors plainly related to the efficiency and effectiveness of the agency's enforcement program. Reduction of a penalty otherwise appropriate may well be justified by savings in future collection costs or the avoidance of a significant risk of failure. But agencies should exercise great care in incorporating such calculations in the penalty determination. Assessing litigative probabilities requires a prediction about the behavior of persons performing prosecutorial and factfinding functions, whose interests, views, and motives may be unfamiliar to agency officials authorized to mitigate or compromise penalties.<sup>206</sup> Moreover, it is rare for most agencies to prosecute cases that have a probability of success significantly less than unity; in view of the severe limitations on their enforcement resources, that policy seems wise. Only in a narrow category of actions involving major violations whose punishment would carry substantial precedential or public relations value does it make sense to prosecute a doubtful case. For this reason, agencies' penalty standards should probably limit the use of the "litigative probabilities" factor to that narrow category of cases.

Authorizing settlement of a penalty claim on the basis of collection costs is also hazardous. It is understandable, of course, that the prospect of saving further enforcement expenses may induce an agency official to accept a penalty lower than the ideal. But procedural cost generates in both parties to the penalty proceeding a symmetrical motivation: in the government, a willingness to settle for less than the probable adjudicatory results in the violator, a willingness to settle for more. An agency sensitive

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Policy, *supra* note 182, at 22-23. But, unless the EPA has another means of coercing compliance, it cannot have it both ways. Alleviation of penalty amounts in "hardship" cases has the effect of a relaxation of the compliance obligation in those cases.

206. Predicting the outcome of litigation before a court is particularly hazardous, since the fate of the case rests in the hands of often unknown United States Attorneys, jurors, and district judges. While agency officials can presumably predict the outcome of an administrative adjudication with greater confidence, the percentage of penalty cases which reach adjudication is infinitesimal, and the behavior of even a known prosecutor or factfinder will often be difficult to determine beforehand.

to the realities of bargaining position should therefore exercise restraint in its willingness to discount its demand by a factor representing litigation savings. In theory, agency negotiators should consider this factor only to the extent that the utility to the government of saving litigation costs exceeds the utility to the accused of its probable cost savings. Except in extreme cases, estimating those quantities involves such guesswork that an agency would be justified in altogether excluding the cost-saving factor from its calculus.<sup>207</sup>

### C. *Disclosure of Standards*

One important question concerning the formulation of penalty standards is the extent to which they should be revealed to the public. There is, of course, a strong bias in administrative law, reinforced by the Freedom of Information Act,<sup>208</sup> in favor of public disclosure of administrative policy. Indeed, the central function served by penalties—motivation of behavior—implies public disclosure. Potential offenders cannot conform their conduct to the desired standard unless they have some idea of the consequences of nonconformity. Disclosure of the standards used to calculate penalties seems necessary to accomplish that result.<sup>209</sup>

Yet the issue of disclosing penalty standards is not without its difficulties. Some agency officials are noticeably reluctant to reveal to the public the standards used by their agency to set civil money penalties. The case against revelation is premised on one of three arguments: that revelation dilutes the deterrent value of the sanction, weakens the bargaining position of the agency in settling penalty claims, or reduces the efficiency of the enforcement process.

The argument for the deterrent value of secrecy<sup>210</sup> assumes that potential offenders have a strong aversion to risk. That is, they will tend to resolve a situation of uncertainty about the penalty likely to be imposed by assuming either the maximum possible penalty or at least a more severe penalty than will in fact be imposed. If, on the other hand, potential

207. The EPA—the only agency I encountered with detailed written settlement standards—does not include litigation cost in its settlement criteria, presumably for this reason. EPA, Civil Penalty Policy, *supra* note 182, at 10-12.

208. 5 U.S.C. § 552 (1976). Indeed, FOIA probably requires the disclosure, and perhaps even publication in the Federal Register, of the kinds of standards discussed in the text. See 5 U.S.C. § 552(a)(1)(D) (1976). To the extent that this is so, opponents of public disclosure might cite FOIA as an additional reason for not articulating standards in the first place. In view of the substantial justification for administrative articulation of, penalty standards, even apart from any value inhering in their public disclosure (see notes 139-51 and accompanying text *supra*), such an argument appears rather anemic.

209. *Cf. Dickinson v. Davis*, 277 Or. 665, 673, 561 P.2d 1019, 1023 (1977) (“importance” of standards for mitigation “is not to give notice to potential violators”). It is probably true that because overestimation of leniency is less likely than underestimation, the motivational argument for disclosure of mitigation standards is weaker than for disclosure of assessment standards.

210. See, e.g., Sofaer, *Judicial Control of Informal Discretionary Adjudication and Enforcement*, 72 COLUM. L. REV. 1293, 1297 (1972). *Cf. Abrams, Internal Policy: Guiding the Exercise of Prosecutorial Discretion*, 19 U.C.L.A. L. REV. 1, 29 (1971) (impact of disclosing prosecutorial policies on deterrence).

offenders were risk accepters and tended to undervalue the risk in the face of uncertainty,<sup>211</sup> secrecy would produce a counterproductive result.<sup>212</sup> It is not intuitively obvious that the risk-aversion hypothesis is a more accurate description of reality, at least in any given setting;<sup>213</sup> in the absence of some empirical evidence, it seems a dubious proposition to base public policy on either hypothesis.

The incremental deterrent value of uncertainty about the penalty amount depends also on the degree to which other consequences of a violation can be predicted. The severity of the sanction is but one of several elements in the calculation. The cost of committing an offense is also a function of the likelihood of detection, the likely strength of the evidence, the cost of defending an enforcement action, the adverse publicity attending prosecution, the enhanced exposure of the offender to closer agency scrutiny in the future, and the cost of correcting the offending condition. Since civil monetary penalties are often only one of an arsenal of possible sanctions that the government might invoke,<sup>214</sup> the calculations must assess the probability and attendant costs of each. Most of these elements in the calculation are extremely uncertain. The agency can, to be sure, reduce this uncertainty by better articulation of its overall enforcement policy,<sup>215</sup> and, as suggested earlier, an ideal deterrent penalty formula would contain a factor reflecting the costs and risks of detection. But these steps would necessarily leave a significant residue of uncertainty in the potential offender's cost/benefit calculation. If the potential offender is risk averse, he may be deterred far more effectively by an exaggerated estimate of those nonpenalty costs than by an exaggerated estimate of the penalty amount.

Finally, of course, uncertainty has utility as a deterrent only to the extent that the actual prospective penalty is too low, by itself, adequately to deter. The ideal penalty is, by definition, one that is large enough to induce compliance. If the penalties actually imposed by the agency fail to have that effect, it is preferable to raise the penalties rather than rely on secrecy to create a false impression of enhanced severity.

A second possible basis for a reluctance to reveal standards for penalty determination is the view that secrecy enhances the agency's bargaining position in negotiating settlement. In "conflict" bargaining situations, so the argument goes, knowledge is power. The object of each party is to obtain as much knowledge about the other's position while concealing as much as

211. Professor Vorenberg thinks that this is precisely the effect of uncertainty in the criminal law. Vorenberg, *Narrowing the Discretion of Criminal Justice Officials*, 1976 DUKE L.J. 651, 664.

212. In settings where the cost of further precaution against possible liability is greatly in excess of even the maximum possible penalty, secrecy has no incremental deterrent impact.

213. Corporations are generally assumed to be risk-neutral. R. POSNER, *ANTITRUST LAW: AN ECONOMIC PERSPECTIVE* 223-24 n.4 (1976). *But cf.* Breit & Elzinga, *Antitrust Penalties and Attitudes Toward Risk: An Economic Analysis*, 86 HARV. L. REV. 693, 704-06 (1973) (arguing that modern businessmen are generally risk averse).

214. *See* note 57 *supra*.

215. *See* text accompanying notes 251-53 *infra*.

possible about its own position.<sup>216</sup> Revelation transforms a party's minimum position into a maximum position: the other party will never agree to settle for more, and may well be able to hold out for less. If an agency publicizes its standards for setting penalties, it effectively discloses its minimum position.

Even if revelation of standards reduces the agency's chances of settling at a figure above its minimum, it is not obvious that the public interest will suffer as a result. If the agency has correctly applied well-designed penalty standards, its minimum figure will presumably represent an amount that properly balances the competing values at work in the statutory scheme. If collection of an amount in excess of that minimum will produce a net gain to society, the minimum has, in effect, been incorrectly computed and should be raised. Exacting a larger penalty from a particular offender may, for example, produce some incremental increase in motivating compliance, but perhaps at a greater cost in curtailment of socially useful economic activity.<sup>217</sup>

Moreover, the claim that premature revelation of the agency's "bottom line" figure would undermine enforcement effectiveness, even if true, is not a justification for complete secrecy. Surely the agency can reveal most of the significant elements of its penalty determination process without enabling a respondent to chart its bargaining strategy with mathematical precision. For example, as mechanical as the MSHA "regular assessment" formula appears, it leaves to agency personnel considerable room for discretionary judgments about such issues as the gravity of the violation and the culpability and good faith of the violator.<sup>218</sup> To the extent that agency negotiators consider such factors as ability to pay, litigative probabilities, and collection costs in arriving at a minimal settlement value, a violator is not likely to guess correctly how they assess those imponderables.<sup>219</sup>

A final argument against revelation of standards is that, by encouraging respondents to contest assessments, it will drive up the cost of resolving individual penalty cases. The validity of this argument may depend largely on the content of the standard itself. A standard specifying a mechanical schedule of penalties, such as the FCC's schedule for common CB radio offenses<sup>220</sup> will have little effect on processing costs because it leaves the accused little to argue about.

The asserted link between nondisclosure and adjudicative efficiency seems most plausible in the more common case of qualitative standards whose application may turn on disputable questions of observation, credibility, or inference. But it is not obvious that the publication of such standards will, by itself, produce a significant net increase in adjudicative cost. The amount at stake significantly constrains the propensity of an

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216. See T. SCHELLING, *THE STRATEGY OF CONFLICT* 175 (1960).

217. See text accompanying note 142 *supra*.

218. See note 83 and accompanying text *supra*.

219. Indeed, it is precisely because of their indeterminate nature that I have urged agencies to limit their use. See notes 206 & 207 and accompanying text *supra*.

220. See note 157 *supra*.



accused to contest a penalty claim.<sup>221</sup> The fact that accused violators pay the vast majority of claims with little or no contest, despite the presence of published liability standards and the availability of elaborate formal procedures, suggests that publication of penalty standards is unlikely to precipitate any material increase in adjudicative costs.<sup>222</sup> Indeed, it seems at least equally plausible that disclosure of standards will have the opposite effect. Published or otherwise publicly available standards enable the accused to focus his energies on only those factual or interpretive issues relevant to the decision, rather than waste his time on the scattershot argument necessary to defend against unrevealed objections. Revelation of standards saves the violator the effort of having to feel out the agency officials with whom he is dealing and discourages any inclination to engage in a protracted bargaining process. Finally, there is evidence, from the MSHA case study<sup>223</sup> and elsewhere,<sup>224</sup> to suggest that persons who feel that they have been judged by objective and reasonable standards are less likely to challenge the result than those who do not. Publicizing decisional criteria is often an indispensable step towards developing that trust.

The general case, then, for suppressing publication of penalty standards is not particularly convincing. Even in those limited contexts where it is, there are additional countervailing arguments for revelation. Revelation tends to reduce the disparities that inevitably arise in a system of secret law between those who have access to or the ability to decipher the rules and those who do not. It enhances accuracy by giving respondents some indication of the factors that will govern their case and to which they should address their arguments. Finally, it enhances the overall quality of decision-making by facilitating the self-correction of official errors. In a system of mass administrative justice, often conducted at a highly decentralized level, internal quality control may be a more expensive and less effective substitute.

#### D. *Manner of Formulating Standards*

It remains to be considered by what method agencies should formulate standards and what form they should take. Students and practitioners of administration are accustomed to view this question as involving a choice between two modal extremes: "rulemaking" and "adjudication."<sup>225</sup> Policy may be formulated either by an explicit abstract statement of policy to govern

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221. See note 106 and accompanying text *supra*; CONFERENCE REPORT, *supra* note 7, at 52, 65.

222. The efficiency of the MSHA system—with its highly detailed published penalty standards—should dispel visions of administrative paralysis.

223. See text following note 106 *supra*.

224. Abraham Sofaer reached this same conclusion in his study of change-of-status determinations by the Immigration and Naturalization Service. Sofaer, *The Change-of-Status Adjudication: A Case Study of the Informal Agency Process*, 1 J. LEGAL STUDIES 349, 421 (1972).

225. See Verkuil, *supra* note 131, at 363.

future cases, or by the emergence of general principles from a series of individual decisions.<sup>226</sup>

The justification for rulemaking seems especially strong in most contexts involving money penalty adjudications. Very few agency decisions generate the kind of thoroughgoing analysis and written discussion of issues necessary for an effectively functioning common-law system. The number of cases decided at the highest levels of the agency is often too small to be an effective vehicle for articulating a comprehensive body of decisional standards. Regional penalty assessment officers and relatively junior central administrators resolve most cases, and review of decisions is usually perfunctory. Formal administrative appeals beyond the first factfinding level are rare, and rarer still are hearings on the record at any stage of the administrative review. Although the precedential value of such predominantly low-level decisions can and should be enhanced,<sup>227</sup> the potential of the adjudicatory process as a means of formulating agency policy in this context is, in short, inherently limited.

To suggest that agencies should rely more heavily on rulemaking, however, is not a complete prescription. In the generic, nontechnical sense used to this point, rulemaking is not a single identifiable mode of decisionmaking, but rather a whole range of methods available to an agency to give general prospective guidance to decisionmakers or the public. Policy may be expressed in legislative rules promulgated after notice-and-comment procedures, interpretive rules or general statements of policy, staff manuals, internal memoranda, interpretive rulings, or a host of other forms.<sup>228</sup>

An important distinction among these various methods is the form and degree of public participation involved in the formulation of a policy. Although it is always desirable to obtain some measure of public input into the making of general policy,<sup>229</sup> the case for broad public participation in the formulation of penalty standards is not as strong as the case for input into substantive regulatory standards. Primary standards define the forms of conduct that expose an actor to legal liability in the first instance, while penalty standards merely help to calibrate the adverse consequences that may follow from liability. Regulatory standards, moreover, often involve fundamental choices among competing values not highly constrained by

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226. This is not the place to review the debate about the relative merits of rulemaking and adjudication as methods of establishing policy. See generally Robinson, *The Making of Administrative Policy: Another Look at Rulemaking and Adjudication and Administrative Procedure Reform*, 118 U. PA. L. REV. 485 (1970); Shapiro, *The Choice of Rulemaking or Adjudication in the Development of Administrative Policy*, 78 HARV. L. REV. 921 (1965). Most empirical studies of adjudication, including several sponsored by the Administrative Conference, have concluded that rulemaking should be utilized to a greater degree. See, e.g., Morgan, *Toward a Revised Strategy for Ratemaking*, 1978 U. ILL. L.F. 21 (reduction of delay in ratemaking); Sofaer, *supra* note 224, at 382-93. See also Thomforde, *supra* note 138.

227. See text accompanying notes 305-20 *infra*.

228. See K. DAVIS, *DISCRETIONARY JUSTICE*, *supra* note 139, at 102-03.

229. See generally Cramton, *The Why, Where and How of Broadened Public Participation in the Administrative Process*, 60 GEO. L.J. 525 (1972); Gellhorn, *Public Participation in Administrative Proceedings*, 81 YALE L.J. 359 (1972).

statutory language. Penalty amounts, by contrast, are almost always at least constrained by a statutory maximum,<sup>230</sup> and the range of value choices is typically narrower.<sup>231</sup>

The case for broad public participation is less cogent, also, in those contexts in which it is the judiciary, not the agency, that has final factfinding responsibility. Since any penalty standards promulgated by the agency in such a case could be binding only at the preliminary (administrative) but not the final (judicial) adjudicative stage, any accused person dissatisfied with the standards applied to his case by the agency has an opportunity to propose his own standards to a court.<sup>232</sup> Thus the classical model of public participation—notice-and-comment rulemaking under section 4 of the APA<sup>233</sup>—seems most appropriate when the agency has final adjudicative authority, and especially when its penalty standards reflect significant value choices. In other cases, the balance of costs and benefits would justify a lower level of public participation. For example, the agency could promulgate its standards without prior public input, but explicitly invite public comment on them with a view to their possible revision.<sup>234</sup> Or it could seek comment on a more selective basis from those most directly affected.

Agencies also have choices with respect to the form their penalty standards might take—whether prescriptive rules, enumerations of decisional factors, or illustrative or hypothetical cases. The MSHA standards illustrate the way in which these methods can be used in combination.<sup>235</sup> MSHA uses prescriptive rules to identify: (1) the factors that must be considered in assessing a penalty; (2) in the case of some factors, the quantities by which the factor must be measured; (3) the range of possible weights assignable to each factor; and (4) the method to be used to convert weights to a penalty amount. MSHA supplements the rules with instructions to staff containing interpretive guidelines and illustrative cases. The use of mechanical rules is obviously most suited to factors such as “size of business” and “prior history,” since both factors may be measured with tolerable accuracy by simple quantitative indicators readily available or computable from agency files. Interpretive guidance and illustrative cases necessarily play a much larger role in the application of criteria such as “negligence” and

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230. For the rare exceptions, see note 30 *supra*.

231. All penalties presumably serve a motivational objective. The only important value choices concern the extent to which that objective should be accommodated to the values of compensating society or preventing economic dislocation.

232. Penalty standards evolved by courts in enforcement actions also become practical constraints on the content of any set of standards the agency may wish to establish to govern its own prehearing assessment or mitigation actions. These constraints further reduce the value of or need for public participation in the formulation of standards.

233. 5 U.S.C. § 553 (1976).

234. Compare Michael Asimow's proposed procedure for adopting “interpretive” agency rules of general applicability. Asimow, *Public Participation in the Adoption of Interpretive Rules and Policy Statements*, 75 MICH. L. REV. 520 (1977). This report is the basis for Recommendation 76-5 of the Administrative Conference, 1 C.F.R. § 305.76-5 (1979).

235. See 43 Fed. Reg. 23,517 (1978) (to be codified in 30 C.F.R. § 100.3), discussed at notes 77-84 *supra*.

"good faith," which can be measured acceptably only by eyewitness observation and subjective judgment.

As a means of structuring discretion, however, the MSHA standards have their weaknesses. In the first place, they provide very little guidance for quantifying the "ability to pay" factor. The precision of the method used to treat the first five variables could be undermined by sloppy application of the sixth. Moreover, the agency's published rules impose no restrictions on the use of the "special assessment" method. In theory, any penalty case, however mundane, could be pulled out of the regular assessment process and assessed on any basis that the agency chose.<sup>236</sup> If the regular assessment formula needs a safety valve for special cases, the agency could define the scope of that safety valve with greater precision; so large a reservoir of unrestricted discretion to deviate from standard operating procedures discredits an otherwise commendable effort at specificity.<sup>237</sup>

### III. THE PENALTY IMPOSITION PROCESS

Once an agency has formulated standards for civil money penalties, it must establish procedures to govern their assessment and mitigation. The "penalty imposition process" is divided into two stages: the initial assessment of penalties, and the disposition of contested assessments.

#### A. *Initial Assessment*

A process for imposing civil money penalties—like any sanctioning process—begins with an affirmative governmental decision. Although a complaint from outside the agency may initially set the process in motion, the agency usually has no legally enforceable obligation to pursue a lead.<sup>238</sup>

Once the agency *has* detected and documented an apparent violation, it must decide whether to seek the imposition of a sanction and, if so, what sanction to seek. Following common usage, as reflected in many penalty statutes, I have referred to the administrative action that formally triggers the penalty-imposition process as the "initial assessment" decision.

1. *Deciding Whether to Assess a Penalty.* Agencies make two kinds of prosecutorial decisions: whether to assess a penalty for a violation and,

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236. It is true that the violator has a right to adjudicate a penalty claim before a MSHRC ALJ. But adjudication cannot correct an excess of prosecutorial leniency. And, given the costs of litigation, it cannot always correct even excesses of prosecutorial severity.

237. This is not to say that a mathematical formula is necessary or even wise in all contexts. Standardized penalties seem most appropriate for the most frequent and relatively least severe penalties. The FCC's "price list" of penalties for citizen's band offenses is a good example. See note 157 *supra*. Schedules of fines for illegal parking are another. As the penalty increases in complexity, the factors bearing on the determination of an appropriate sanction tend to multiply to the point that no mathematical formula can encompass them all. Even so, agencies can state with some specificity the factors that govern their decisions and provide at least some degree of guidance on how those factors should be weighed and measured.

238. For exceptions to this rule, see note 243 *infra*.

if so, in what amount. The first, referred to hereafter as the "charging" decision, is the subject of this section. The second, referred to as the "penalty" decision, is discussed in the following section. Both kinds of decisions present two distinct questions. What is the scope of the agency's discretion in making choices? To the extent that the agency possesses discretion, how should it exercise it?

Reviewing courts have traditionally defined the scope of prosecutorial charging discretion in extremely broad terms. For a variety of apparent reasons—including separation of powers notions,<sup>239</sup> doubts about judicial competence,<sup>240</sup> or perhaps just the force of history<sup>241</sup>—courts have been extremely reluctant to review prosecutors' charging decisions. Although this attitude has recently begun to change, particularly in the context of civil administrative enforcement,<sup>242</sup> most agencies still retain discretion to decline prosecution of particular suspected violations.<sup>243</sup> The increasing willingness of courts to review administrative prosecutorial decisions for abuse of discretion may mean only that the decision not to prosecute *A* or to prosecute *B* must not be based on personal favoritism or vindictiveness;<sup>244</sup> the pragmatic need to allocate scarce resources and the presumed difficulty of writing binding rules for the exercise of choice will discourage courts from going further. Courts, therefore, will probably interpret civil penalty statutes patterned after criminal statutes not to impose a judicially enforceable duty of universal prosecution on the agency.<sup>245</sup>

Explicit statutory language can, of course, override that presumption.

239. See, e.g., *United States v. Cox*, 342 F.2d 167, 171 (5th Cir.), cert. denied, 381 U.S. 935 (1965).

240. See, e.g., *Newman v. United States*, 382 F.2d 479 (D.C. Cir. 1967). See also *Nader v. Saxbe*, 497 F.2d 676, 679 n.18 (D.C. Cir. 1974); *Terminal Freight Handling Co. v. Solien*, 444 F.2d 699, 708-09 (8th Cir. 1971), cert. denied, 405 U.S. 996 (1972).

241. See, e.g., *Confiscation Cases*, 74 U.S. (7 Wall.) 454, 457 (1868); *Decatur v. Paulding*, 39 U.S. (15 Pet.) 497, 516 (1840); J. HURST, *LAW AND SOCIAL ORDER IN THE UNITED STATES* 135-39 (1977).

242. See, e.g., *Dunlop v. Bachowski*, 421 U.S. 560 (1975); *Environmental Defense Fund v. Ruckelshaus*, 439 F.2d 584 (D.C. Cir. 1971); *Medical Comm. for Human Rights v. SEC*, 432 F.2d 659 (D.C. Cir. 1970), vacated as moot, 404 U.S. 403 (1972); *Environmental Defense Fund v. Hardin*, 428 F.2d 1093 (D.C. Cir. 1970). See also, e.g., *United States v. Jacobs*, 531 F.2d 87 (2d Cir.), vacated and remanded, 429 U.S. 909, reaffirmed, 547 F.2d 772 (2d Cir. 1976), cert. dismissed, 436 U.S. 31 (1978) (criminal case).

243. This is not to say that systematic failure to enforce a regulatory program might not be judicially cognizable. In several recent cases, courts have granted broad injunctive remedies for systemic nonenforcement. E.g., *Adams v. Richardson*, 356 F. Supp. 92 (D.D.C.), aff'd in part, 480 F.2d 1159 (D.C. Cir. 1973) (en banc); *American Pub. Health Ass'n v. Veneman*, 349 F. Supp. 1311 (D.D.C. 1972). See generally Note, *Judicial Control of Systemic Inadequacies in Federal Administrative Enforcement*, 88 *YALE L.J.* 407 (1978).

244. See *FTC v. Universal-Rundle Corp.*, 387 U.S. 244, 251 (1967) ("the Federal Trade Commission does not have unbridled power to institute proceedings which will arbitrarily destroy one of many law violators in an industry"). Cf. *North Carolina v. Pearce*, 395 U.S. 711 (1969) (condemning "vindictive" indictment of criminal defendant for exercising procedural rights with respect to previous conviction).

245. Most "court-assessment" statutes are of this type: they recite that a person who engages in certain conduct "shall be liable to," e.g., 49 U.S.C. § 6(10) (1976) (common carrier tariffs), or "shall forfeit to the United States" a specified penalty, e.g., 47 U.S.C. § 202(c) (1976) (unjust discrimination by communication common carrier). Despite the mandatory "shall" such statutes do not address the agency's or even usually the Attorney General's prosecutorial obligation directly, and certainly not with enough specificity to override a presumption of prosecutorial charging discretion.

In a handful of recent cases, courts have interpreted regulatory statutes to impose on an agency a judicially enforceable duty to initiate enforcement actions.<sup>246</sup> In the context of administrative civil money penalties, there are many statutes—particularly “agency-assessment” statutes—that could be interpreted to impose such a duty. For example the Mine Safety Act provides that if, after inspection, the secretary “believes” that a mine operator has violated a safety standard, he “shall” issue a citation,<sup>247</sup> and if the secretary issues such a citation, he “shall notify the operator . . . of the civil penalty proposed to be assessed.”<sup>248</sup> Even so, with regard to issuing a citation the agency retains the degree of discretion implied by the term “believes,” and the Act preserves some charging discretion since it states that “[e]ach occurrence of a violation of a mandatory health or safety standard *may* constitute a separate offense.”<sup>249</sup> But, MSHA takes the view—correctly, I think—that once a citation issues, it has no discretion to refuse to assess a penalty, no matter how inconsequential the violation or immediate its correction.<sup>250</sup>

The fact that many agencies retain a broad range of charging discretion not subject to judicial interference does not mean that the agency should not make some effort to structure that discretion. The choice of which offenses to prosecute can have significant impact on the fairness and the effectiveness of the regulatory program. For the same reasons that agencies should set and publicize standards for determining penalty amounts,<sup>251</sup> agencies should attempt to formulate standards governing the decision to prosecute. An example of an attempt to structure broad enforcement discretion is the EPA’s policy statement on seeking civil penalties for air and water pollution.<sup>252</sup> The statement directs regional enforcement personnel to concentrate on “major” sources of air and water pollution that have delayed compliance beyond a specified date. Most agencies, however, have not articulated very specific policies for prosecutorial charging decisions and most agency officials can offer only impressionistic explanations of how their agency chooses whether to prosecute a violation and which type of sanction to seek.<sup>253</sup> Thus, there is room for improvement in the structuring of charging discretion.

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246. *E.g.*, *Dunlop v. Bachowski*, 421 U.S. 560 (1975); *Environmental Defense Fund v. Ruckelshaus*, 439 F.2d 584 (D.C. Cir. 1971); *American Pub. Health Ass’n v. Veneman*, 349 F. Supp. 1311 (D.D.C. 1972).

247. 30 U.S.C. § 814(a) (Supp. I 1977).

248. 30 U.S.C. § 815(a) (Supp. I 1977).

249. 30 U.S.C. § 820(a) (Supp. I 1977 (emphasis added)).

250. Some “agency-assessment” statutes, on the other hand, explicitly preserve the agency’s traditional charging discretion. *E.g.*, 7 U.S.C. § 9 (1976) (Commodity Futures Trading Commission “may assess” penalty for violation of chapter); 16 U.S.C. § 1375(a) (1976) (any person who takes protected marine mammals “may be assessed a civil penalty by the Secretary” of Interior or Commerce).

251. See text accompanying notes 139-51 & 208-24 *supra*.

252. See EPA Memorandum, *supra* note 167.

253. Most officials claim to seek criminal sanctions or license revocation for “serious” offenses and civil money penalties in all other cases unless the evidence is “weak.”

2. *Setting the Penalty Amount.* The second type of prosecutorial discretion involves the determination of the level at which to assess a penalty. Here, as in the "charging" decision, one must look to the authorizing statute to define the scope of the agency's discretion. A variable-penalty statute confers on the agency a range of "penalty" discretion in order to enable it to tailor the penalty to the particular circumstances of the violation and the offender. A fixed-penalty statute, on the other hand, seems to foreclose the exercise of administrative discretion in assessing the penalty. Statutory specification of the penalty level manifests an apparent legislative judgment that the interests of justice and regulatory efficiency will be better served by prescribing a definite, certain, invariable punishment, than by conferring discretion on either an administrator or a judge to tailor the punishment to the circumstances. In those cases in which Congress has made such a judgment, the enforcing agency must honor it by assessing the stipulated amount.

An agency may, however, be able to point to other possible sources of "penalty" discretion even when enforcing a fixed-penalty statute. The most promising is an express mitigation authority. Delegation of power to mitigate a fixed penalty indicates a congressional recognition of the need to individualize. It states implicitly that the fixed penalty, however appropriate in the average run of cases, is too rigid to serve the ends of justice and regulatory effectiveness in all cases. Some sort of safety valve is needed.

One might question whether authority to mitigate penalties justifies a practice of setting initial assessments below the statutorily prescribed level. Mitigation is an act of mercy, exceptional and dispensational: allowing the agency to grant "anticipatory" mitigation permits the exception to swallow the rule. Furthermore, agencies will rarely possess reliable evidence of mitigating circumstances at the time of initial assessment, and premature mitigation may frequently result in excessive leniency. These arguments, however, reflect an exaggeratedly formalistic view of mitigation; such a view may not only produce unjust inconsistency of treatment, but can as easily subvert as promote other regulatory goals. To force a person otherwise eligible for mitigation to request it affirmatively may trap the unwary and escalate the transaction costs of the proceeding. For example, prior to 1975 the FCC's Safety and Special Radio Services Bureau (SSRSB) invariably assessed CB radio violations at the statutory maximum (\$100) and then routinely reduced the assessment to \$25 upon a request for mitigation.<sup>254</sup> No reason had to be given for the mitigation request—the violator had merely to check an appropriate box on the form. The potential for injustice in such a system was obvious. SSRSB officials recount the example of two cases involving similar amateur radio license violations, one involving a religious order and the other a national beverage bottler. The religious

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254. Penalties for second offenses were reduced to \$50; no mitigation was allowed for subsequent offenses.

order compliantly sent in a check for the full amount of the \$400 penalty while the bottler hired a Washington lawyer to reduce the penalty to \$100.

It may be true that mitigation requests will often turn on information not in the possession of the agency at the time of initial penalty assessment. But this fact argues not against "anticipatory" mitigation in principle, but rather for the use of caution in its exercise. Whether assessing a variable or a fixed penalty, the agency should base its assessment only on reliable information unearthed by its preliminary investigation. For that reason the agency should not ordinarily adjust an initial assessment figure to accommodate a presumed inability to pay a higher amount. But when the agency possesses reliable information that would be the basis for mitigating a fixed penalty on request, it should not be foreclosed from granting an anticipatory mitigation.

Agencies lacking an express statutory authority to mitigate a fixed money penalty might also point to the Federal Claims Collection Act<sup>255</sup> as a potential source of discretion to assess penalties at a lower level. The Act authorizes agencies to "compromise" any "claim"; since the agency may settle a "fixed-penalty" claim at a lesser amount, one could argue that it may initially assess the penalty at a level approximating the claim's probable settlement value. This argument is considerably weaker than the argument based on an express mitigation authority. Congress passed the Claims Collection Act to give federal agencies general authority to settle governmental claims without having to refer them to the General Accounting Office or the Justice Department.<sup>256</sup> Although the language of the Act is broad enough to encompass civil money penalty claims, its principal sponsors emphasized its application to contract and tort claims.<sup>257</sup> Thus it cannot be read as a congressional statement about the need to individualize the assessment of civil monetary penalties in the interests of regulatory effectiveness or justice. Furthermore, although the Act does not specify standards for the compromise of a claim, it is implicit in the statutory purpose that the principal, if not exclusive, criteria are the costs and prospects of collections.<sup>258</sup> The Claims Collection Act, then, does not confer a broad authority to "mitigate" a fixed penalty.

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255. 31 U.S.C. §§ 951-953 (1976). See notes 51-54 and accompanying text *supra*.

256. See S. REP. NO. 1331, 89th Cong., 2d Sess. (1966), reprinted in [1966] U.S. CODE CONG. & AD. NEWS 2532, 2533-34.

257. See, e.g., *Improvement of Procedures in Claims Settlement and Government Litigation, Hearing on H.R. 13651 Before Subcomm. No. 2 of the House Judiciary Comm.* 89th Cong., 2d Sess. 22, 24, 26 (1966) (statement of John W. Douglas, Assistant Attorney General).

258. See S. REP. NO. 1331, *supra* note 256, at 2533 (bill designed to enable agencies to "compromise" a claim "if such a settlement would be in the interest of the Government and justified by normal practice in business in the light of the debtor's ability to pay and the risks and costs inherent in litigation"). This conclusion is reinforced by the statutory requirement that agency heads "shall attempt collection of all claims" and the specification of "financial ability to pay" and "cost of collection" as the criteria for terminating collection action altogether. 31 U.S.C. § 952 (1976). Regulations jointly promulgated by the Attorney General and Comptroller General under the Act's authority make explicit this conclusion. The only bases on which the rules permit an agency to compromise a claim are "inability



There remains the question of whether agencies possess an inherent penalty discretion. An agency might argue that, since it can often influence the total potential liability of an offender by its choice of investigative and charging policy, one should forthrightly recognize a penalty discretion as well. The pragmatic justifications for a broad charging discretion, however, do not require a broad penalty discretion. Certainty of punishment may have some deterrent value even though the prospect of detection and prosecution is unavoidably uncertain. Where Congress has expressed its intention about the certainty of the penalty, no invocation of inherent penalty discretion should be permitted to override that expression.

Defining the scope of an agency's penalty discretion is only the first step. To the extent that the agency has discretion in setting the penalty amount, it must decide whether and how to use that discretion. Should it initially assess a penalty at the statutory maximum or at some lesser amount more closely approximating its estimate of the proper amount? A policy of initially assessing a variable penalty at the statutory maximum has some advantages. Invoking the highest potential monetary liability maximizes the impact of the assessment notice on the respondent. This, in turn, maximizes the likelihood that the notice will be taken seriously and answered expeditiously. Assessing at the maximum may also strengthen the agency's bargaining position. It creates a concession—reduction of the penalty demanded—that the agency can offer the respondent in return for relinquishing his right to demand a hearing, and it enables the agency to conceal its minimum position as long as possible. Finally, the agency may simply lack sufficient information at the time the penalty is initially assessed to make a more accurate estimate of the ultimate liability.

The policy has corresponding drawbacks, of course. In some cases, the respondent may pay the penalty amount initially assessed even though it is out of proportion to the amounts customarily paid for similar offenses or the amount necessary adequately to serve the statutory purpose.<sup>259</sup> There may be other cases in which overrepresenting the likely outcome needlessly increases the transaction costs of the penalty settlement process. A high assessment may induce a recipient to hire a lawyer or prepare elaborate documentary defenses, when a more moderate assessment could have produced a quick settlement.

The balance struck by these competing considerations will vary with the context. Generally, the case for assessing at the maximum is strongest in cases involving large sums. The transaction costs involved in these cases

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to pay," "litigative probabilities," and "cost of collecting claims." 4 C.F.R. § 103.2-103.4 (1979). The rules implicitly enjoin agencies from compromising penalties or forfeitures unless "the agency's enforcement policy in terms of deterrence and securing compliance, both present and future, will be adequately served" by the compromise. 4 C.F.R. § 103.5 (1979).

259. See text following note 254 *supra*. Such voluntary "overpayment" may occur because the respondent is unaware of the possibility of mitigation or is deterred from seeking mitigation by either the apparent cost, relative to the potential benefit, or fear of antagonizing the agency. See also note 128 *supra*.

are likely to be relatively high in any event, the danger of taking unfair advantage of unsophisticated offenders slim, and the need for enhanced agency bargaining power greater. Conversely, the case for assessing a moderated amount is strongest when the proper penalty is relatively small, especially when the typical respondent is not likely to be very sophisticated about agency policies. The fact that the penalty calculation may depend on information within the respondent's possession should not excuse the agency from making an effort to estimate the penalty based on those factors with respect to which its investigation has generated reliable information.

3. *Locus of Assessment Authority.* An issue closely related to the scope and exercise of assessment discretion is the locus of assessment authority. Who in the agency should have authority to assess a civil money penalty? One can identify at least four functional locations: the investigative staff, supervisory or administrative officials in the field, a supervisory or administrative official at headquarters, or the head of the agency. The last of these seems likely to be an attractive solution in the most limited number of cases. Only penalty assessments involving a very significant impact on regulatory policy require the personal attention of an agency head. It is difficult to define this category in advance. While the dollar amount assessed may be one measure, it is not necessarily a reliable indicator.<sup>200</sup>

Few agencies authorize primary investigators to assess penalties, and for good reason. The assessment process usually requires the exercise of considerable judgment about enforcement policy. The assessing authority must usually make a preliminary decision concerning the type of sanction to seek and, if he chooses a civil monetary penalty, the proper amount. While investigators are trained to know and apply the governing legal standards, they do not necessarily have sufficient knowledge of applicable principles to resolve close questions of interpretation. Nor are they likely to be able to determine whether the agency's enforcement resources are sufficient to warrant prosecution of the case. Their closeness to the evidence may impair their capacity to evaluate the strength of the case that the agency can present to an impartial adjudicator. In some contexts investigators may be too familiar with a violator to make a truly objective assessment of liability. Finally, separating the assessment and investigatory processes gives the agency a built-in check on the quality of its investigations.

As a consequence, a delegation of assessment authority to investigative staff seems justified only in a very narrow range of cases where the effectiveness of the enforcement process would suffer materially in its absence. The FCC's procedure for enforcement of CB radio regulations is an example.<sup>201</sup>

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200. The FCC's delegation limit, *see* note 120 and accompanying text *supra*, illustrates one kind of distortion introduced by a dollar amount. The tendency of penalty assessments to cluster just below the dollar limit strongly suggests that the agency's staff, seeking to avoid the inconvenience of going to the Commission, have undervalued some serious violations. *See* CONFERENCE REPORT, *supra* note 7, at 59-60.

201. The FCC has delegated to investigative staff authority to assess penalties for five common violations. *See* note 157 *supra*. Because the Communications Act, prior to 1978, required that notice of apparent liability issue within 90 days of the alleged violation, *see*

The Commission felt that immediate penalty assessment was necessary because of the brief duration of the limitations period and in order to maximize the impact of a concentrated enforcement program. Even in such a context, however, an agency should minimize the potential risks inherent in a system of investigatory penalty assessment—as did the FCC—by structuring assessment discretion to the greatest possible degree.

Similar considerations inform the choice between assigning assessment authority to a field office or a central office. One presumptively effective way to reduce decisional inconsistency in a system is to reduce the number of decisionmakers.<sup>262</sup> For this reason, MSHA's predecessor centralized its penalty assessment process.<sup>263</sup> That undertaking demonstrates that even a very large-volume nationwide program can be effectively centralized. The mine safety study illustrates, however, that to the extent that a smoothly functioning prehearing process requires some form of participatory procedure, such as the oral conference system there provided, violators must have access to personnel with decisionmaking authority.<sup>264</sup> In a nationwide enforcement program, access of this kind usually implies decentralization of authority. This does not necessarily mean, of course, that *initial* assessment authority must be decentralized; the tension preserved in the MSHA system between centralized assessment and decentralized mitigation provides a useful check against error.

### B. Agency Disposition of Contested Assessments

The recipient of an initial penalty assessment has essentially three options: to pay it, to ignore it, or to contest it. The fact that respondents select the first option in a very large percentage of cases<sup>265</sup> reinforces the need to assure the accuracy of the initial assessment process. The second option—not infrequently exercised in many regulatory regimes<sup>266</sup>—challenges the government to devise efficient enforcement mechanisms.<sup>267</sup> It is the third option—to contest the assessment—with which this section is concerned.

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47 U.S.C. § 510(c) (repealed by Pub. L. No. 95-234, § 4, 92 Stat. 35 (1978)), the Commission felt that the volume of violations would preclude use of a multistep processing system. To compensate for the loss of central control over the assessment process, the Commission imposed fixed, nondiscretionary penalty amounts.

262. This tactic may facilitate reduction of inconsistency between decisionmakers, as well, by reducing training costs and, if they are located in the same office, increasing interactions among them.

263. See text accompanying note 90 *supra*.

264. For example, personal interviews employed as part of the FCC's CB radio enforcement process were rendered largely useless by the fact that the interviewer had no authority to change or cancel the forfeiture, but merely transmitted comments to headquarters.

265. See, e.g., note 125 and accompanying text *supra* (70% of broadcast forfeitures paid on demand). But cf. CONFERENCE REPORT, *supra* note 7, Table I (12% of mine safety violations closed after initial assessment).

266. See CONFERENCE REPORT, *supra* note 7, Table I (suggesting that more than 3% of MSHA assessments are defaulted), 52 (suggesting a default rate on oil spill assessments possibly as high as 11%), 79 (noting 30% rate of closure of CB forfeiture cases as "uncollectible").

267. The existing practice of initiating an enforcement action in federal district court is probably effective in most contexts except those in which the value of the claims or the

Propensity to contest an initial assessment notice depends on a variety of factors including the character of the regulated population<sup>268</sup> and its sense of dependence on harmonious governmental relations,<sup>269</sup> the amount of the penalty initially assessed,<sup>270</sup> the specificity of the liability and penalty standards,<sup>271</sup> the reliability of the methods used to detect violations, and the adequacy of the assessment notice. Although some of these factors—such as the character of the regulated population—may not be subject to the agency's direct control, the enforcing agency possesses the capacity to exert at least some influence over most of them. Since the efficiency of an enforcement process depends in part on the propensity of alleged offenders to contest assessments, agencies may justifiably pursue measures designed to reduce that propensity, so long as the resulting efficiency gains exceed the attendant costs to other compelling regulatory objectives such as deterrent efficacy or procedural fairness.<sup>272</sup>

This section discusses a variable that affects both the propensity to contest and the fairness of the process—the procedures used to handle contested assessments. The first subsection examines the extent to which a formal evidentiary hearing is required during some stage of the collection process, and, in particular, the extent to which agencies must—or should—provide such hearings themselves. The second subsection explores the need for *informal* agency procedures. The last two subsections consider the extent to which agencies should state reasons for decisions and rely on “precedent,” and the desirability of public disclosure of agency decisions.

1. *Opportunity for an Evidentiary Hearing.* Most civil money penalty statutes mandate the right to a trial of disputed issues during at least one stage of the collection process, by providing, explicitly or implicitly, for collection in a “civil action.”<sup>273</sup> Enforcement actions brought under those statutes are thus presumably governed by the general procedural rules obtaining in civil proceedings in federal district courts, including the right to be represented by counsel, adequate notice of the charges, an opportunity to present testimonial and documentary evidence, an opportunity to con-

prospects of collection are so low as to discourage the agency or the Justice Department from making the effort in the first place. In that case, it may be necessary either to adopt some more summary mode of collection or to invoke some more serious form of sanction.

268. See, e.g., note 99 *supra* (noting the relatively high propensity to contest among mine operators).

269. See, e.g., note 128 *supra* (broadcast licensees).

270. See, e.g., text accompanying note 106 *supra* (mine safety); CONFERENCE REPORT, *supra* note 7, at 52 (oil spills), 65 (broadcast regulation).

271. See, e.g., note 106 and accompanying text *supra* (comparing propensity to contest “regular assessment” and “special assessment” mine safety assessments).

272. Trade-offs among these objectives are unavoidable so long as the agency's enforcement resources are limited. The higher the average assessment level, for example, the smaller the number of enforcement cases the agency may be able to close at an early stage. But deliberately reducing penalties so as to increase the rate of “voluntary” payment is a very risky bargain. The deterrent and compensatory value of a penalty whose collection depends primarily on voluntary payment is likely to be quite small. Even if that strategy maximized agency collections, it would probably also maximize net (uncompensated) social harm as well.

273. See notes 22 & 23 and accompanying text *supra*. All court-assessment statutes so provide.

front and rebut the government's evidence (including the right to cross-examine its witnesses), a neutral factfinder (usually a jury), and a written decision based solely on the evidence on the record of the trial. Of the 141 agency-assessment statutes, moreover, twenty-seven require an administrative hearing based on section 5 of the APA.<sup>274</sup> That procedure generally accords the respondent the same rights previously enumerated, except that the trial is conducted before an ALJ or member of the agency rather than a judge and jury.<sup>275</sup> Even where statutes do not unambiguously require an evidentiary hearing at some stage,<sup>276</sup> due process requires that a full-scale trial-type hearing be provided before a civil penalty can be exacted.<sup>277</sup>

An independent issue is whether accused violators have a right to challenge agency determinations of sanctions, as opposed to determinations of liability, in an evidentiary hearing. A few "agency-hearing" statutes provide an unambiguously affirmative answer to this question,<sup>278</sup> but the vast majority do not. The Supreme Court has held that, in a civil action to enforce a court-assessment penalty, the determination of the penalty amount is a function for the court, not the jury.<sup>279</sup> This result accords with the traditional view that the imposition of a penalty is an "exercise of a discretionary grant of power,"<sup>280</sup> not a finding of fact. But the exercise of even a concededly discretionary judgment presumably rests on some sort of factual predicate. There may be cases in which the penalty calculation depends on issues—such as the size, ability to pay, or prior history of the violator—not directly relevant to the liability determination; without an opportunity to know and to meet the evidence on which the decisionmaker relies in making such judgments, the respondent may be unfairly penalized.

In the context of a "de novo review" statute that did specify factors (mitigating and aggravating) to be considered in imposing a penalty—the Federal Coal Mine Health and Safety Act—the Supreme Court has expressly ruled that "the amount of the penalty is subject to *de novo* review in the district court whether or not [an administrative] hearing was held."<sup>281</sup> This

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274. See note 43 *supra*.

275. 5 U.S.C. §§ 556-557 (1976).

276. Some agency-assessment statutes contain no procedural requirements, and others—such as those requiring an undefined "hearing"—are at least susceptible to varying interpretations. See notes 286-90 and accompanying text *infra*.

277. Application of the three-part balancing test in *Mathews v. Eldridge*, 424 U.S. 319 (1976), might suggest that something less than a full-scale trial-type hearing could in certain instances satisfy due process. But *Mathews* and most of the other recent cases applying its instrumental calculus, e.g., *Smith v. Organization of Foster Families for Equality & Reform*, 431 U.S. 816 (1977), and *Dixon v. Love*, 431 U.S. 105 (1977), presented a question only of the timing, not the availability, of a trial. The Supreme Court has not expressly countenanced a procedure that included no provision for trial at any stage, except in the peculiar context of assessing performance and maintaining discipline in educational institutions. *Board of Curators v. Horowitz*, 435 U.S. 78 (1978); *Goss v. Lopez*, 419 U.S. 565 (1975).

278. See, e.g., 15 U.S.C. § 1825 (1976); 16 U.S.C. § 1858 (1976); 30 U.S.C. § 1268 (Supp. I 1977). Some cases have suggested that the Occupational Safety and Health Act, 29 U.S.C. § 659 (1976), requires a hearing on both issues. See, e.g., *Long Mfg. Co. v. OSHRC*, 554 F.2d 903 (8th Cir. 1977).

279. *Missouri, Kan. & Tex. Ry. v. United States*, 231 U.S. 112 (1913).

280. *Brennan v. OSHRC*, 487 F.2d 438, 442 (8th Cir. 1973).

281. *Kleppe v. Delta Mining, Inc.*, 423 U.S. 403, 408 (1976).

language suggests that a statutory "hearing" includes factual issues bearing on the applicability of any criteria for setting the penalty expressly specified in the governing statute.<sup>282</sup> A statute containing no explicit penalty criteria presents a harder case. In *United States v. J.B. Williams Co.*,<sup>283</sup> a panel of the Second Circuit stated that it would be "desirable" for a district court to conduct an evidentiary hearing in such a case. This dictum seems sound when the defendant wishes to challenge the accuracy of factual assertions made by the government in justification for a severe penalty. But it seems questionable if intended to afford the accused an open-ended opportunity to introduce evidence on alleged mitigating factors not expressly recognized by statute.

The third step in defining the formal contours of a penalty-enforcement process is deciding under what circumstances the *agency* must conduct an evidentiary hearing. Due process cases requiring an administrative hearing are not necessarily applicable to most civil penalty situations, since the "deprivation" does not occur at the administrative stage but only after judicial review.<sup>284</sup> Even forcible administrative collection by offset or seizure leading to the temporary loss of the use of property would probably not be considered so serious as to compel a predeprivation administrative hearing if a reasonably prompt postdeprivation judicial hearing were available.<sup>285</sup>

Many statutes, however, do require that the agency provide an opportunity for a hearing before assessing a penalty. Half of them use language that makes it clear that Congress had a trial-type hearing in mind.<sup>286</sup> The difficult case is the statute that merely uses the unadorned term "hearing." Must the agency afford a respondent a trial-type hearing, or will something less do? Sometimes the legislative history contains an answer.<sup>287</sup> Sometimes other sections of the statute provide a clue, such as the provision for judicial

282. *Cf. Nowicki v. United States*, 536 F.2d 1171 (7th Cir. 1976), *cert. denied*, 429 U.S. 1092 (1977); *Martin v. United States*, 459 F.2d 300 (6th Cir.), *cert. denied*, 409 U.S. 878 (1972) (both cases concerning review of administrative sanctions under Food Stamp Act, and suggesting that there is no right to evidentiary hearing to review severity of sanctions). Neither case, however, raised the actual issue of the right to an evidentiary hearing to *find* facts bearing on the determination of sanctions; both involved claims that, given conceded facts, or facts found after trial de novo, a particular penalty was excessively harsh.

283. 498 F.2d 414, 438 (2d Cir. 1974).

284. A few statutes authorize administrative officers forcibly to collect a penalty. *E.g.*, 8 U.S.C. § 1229 (1976) (detention of aircraft for violation of immigration laws); 19 U.S.C. § 1592 (1976) (detention of vessel for violation of customs laws). *Cf.* 15 U.S.C. § 1948 (1976) (offset of penalty claim against the offender's claims against the United States); 42 U.S.C. § 263k (1976) (same).

285. *See Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663 (1974) (vessel containing contraband); *Ewing v. Mytinger & Casselberry, Inc.*, 339 U.S. 594 (1950) (misbranded food); *Aircrane, Inc. v. Butterfield*, 369 F. Supp. 598 (E.D. Pa. 1974) (aircraft violating Federal Aviation Act). The precedents all require a showing of compelling governmental justification for summary seizure. Mere convenience in the collection of the prospective penalty may well be insufficient. Detention of vessels or vehicles used in violations of customs or immigration laws may, however, be justified as preventing removal of property from the jurisdiction or preventing future violations.

286. *See note 43 supra.*

287. *See, e.g., United States v. Ceramic Bo-Truc No. 5, Inc.*, 538 F.2d 696, 698-99 (5th Cir. 1976); *Independent Bankers Ass'n v. Board of Governors*, 516 F.2d 1206, 1212-13 (D.C. Cir. 1975).

review of the agency's action. For example, specification of a "substantial evidence" standard implies a trial-type administrative hearing.<sup>288</sup>

In other cases, one might turn to the APA for guidance. Even if the organic statute does not recite the talismanic phrase "on the record," which traditionally triggers use of APA's formal adjudicatory model, the adjudicative nature of a civil penalty hearing may be sufficient to suggest that a congressionally mandated "hearing" implies the full panoply of procedural elements provided by APA sections 7 and 8.<sup>289</sup> Moreover, there are sound practical reasons for interpreting such a directive as allocating factfinding responsibility to the agency alone rather than dividing it between the agency and the courts. Since the agency must, under such a statute, hold at least an informal "hearing," the incremental social cost of transforming that hearing into a trial-type hearing will probably be much less than the cost of

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288. See, e.g., *Independent Bankers Ass'n v. Board of Governors*, 516 F.2d 1206, 1216 (D.C. Cir. 1975). The formal reason for this is the traditional linkage, reflected in the APA, between "substantial evidence" review and a hearing "on the record." 5 U.S.C. § 706(2)(E) (1976). See *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 415 (1971). The functional reason for this linkage is the view that "substantial evidence" review requires an exclusive agency record. See Scalia & Goodman, *Procedural Aspects of the Consumer Product Safety Act*, 20 U.C.L.A. L. REV. 899, 934 (1973). Cf. *Mobil Oil Corp. v. FPC*, 483 F.2d 1238, 1257-63 (D.C. Cir. 1973) (implying an agency duty to provide some opportunity for confrontation of adverse evidence and rebuttal in rulemaking proceeding subject to "substantial evidence" review). See also *Industrial Union Dep't v. Hodgson*, 499 F.2d 467, 469 (D.C. Cir. 1975) (difficulty of reconciling informal rulemaking procedures with substantial evidence review). The implication, then, is that the agency has been given sole responsibility for factfinding. If one assumes that the due process clause requires a trial-type hearing at some stage, then that hearing must be conducted before the agency.

289. A contrary conclusion may appear to be indicated by *United States v. Allegheny-Ludlum Steel Corp.*, 406 U.S. 742 (1972), and *United States v. Florida E.C. Ry.*, 410 U.S. 224 (1973) (interpreting words "after hearing," as used in § 1(14)(a) of Interstate Commerce Act (49 U.S.C. § 1(14)(a) (1973)), as *not* requiring a trial-type hearing). Both cases, however, involved what the Court characterized as "rule-making" actions. 406 U.S. at 756-57; 410 U.S. at 245-46. In both cases the Court very explicitly distinguished earlier cases requiring a trial-type "hearing" as involving "adjudicative facts." 406 U.S. at 756; 410 U.S. at 242-45. See *Morgan v. United States*, 304 U.S. 1 (1938); *Ohio Bell Tel. Co. v. Public Utilities Comm'n*, 301 U.S. 292, 304-05 (1937); *ICC v. Louisville & Nashville Ry.*, 227 U.S. 88 (1913); *Londoner v. City & County of Denver*, 210 U.S. 373 (1908). Since civil penalty cases are paradigmatic illustrations of "adjudication," the holding of the cases would not seem to apply in this context.

Furthermore, the Court in *Florida East Coast Railway* referred to the APA to flesh out the meaning of the word "hearing" as applied to rulemaking activity. 410 U.S. at 238-46. Thus, the functional analysis used by the Court, when applied to an "adjudicative" activity, becomes a surrogate for the "on the record" touchstone. See *Independent Bankers Ass'n v. Board of Governors*, 516 F.2d 1206, 1216-17 (D.C. Cir. 1975) (question of whether public benefit of a bank holding company acquisition outweighs its cost involves adjudicative facts; hence formal APA adjudication required). See also U.S. DEPARTMENT OF JUSTICE, ATTORNEY GENERAL'S MANUAL ON THE ADMINISTRATIVE PROCEDURE ACT 42-43 (1947), reprinted in 15 ICC PRAC. J. 3, 34-35 (1948) (contemporaneous interpretation of APA by Attorney General).

Nevertheless, several agencies have interpreted an unadorned "hearing" requirement in a civil money penalty statute as *not* requiring a formal trial-type hearing modeled on APA § 5, apparently believing that a subsequent judicial enforcement action can adequately provide the missing procedural elements. See note 61 *supra*. See also *United States v. General Motors Corp.*, 403 F. Supp. 1151 (D. Conn. 1975). But see *United States v. Independent Bulk Transport, Inc.*, 394 F. Supp. 1319 (S.D.N.Y. 1975) (requiring agency to conduct full hearing comporting with due process). Although a *de novo* trial would in most cases satisfy due process, see notes 284 & 285 and accompanying text *supra*, there is no reason to believe that it would satisfy the congressional intent signified by a statutory requirement that the agency provide opportunity for a "hearing."

a full judicial trial. Among other things, the administrative trial—unlike the judicial trial—avoids the need for a jury.<sup>200</sup> Thus, even if due process does not mandate it, an unadorned hearing requirement in a civil penalty statute should be interpreted as calling for a trial-type hearing, and quite possibly a hearing of the sort required by the APA.

Even when the statute does not require an administrative trial, there may be instances in which it would be desirable for the agency to conduct one. As the Supreme Court has said, there is no *legal* impediment to an agency's providing more procedural formalities than the law requires.<sup>201</sup> Of course, attributes traditionally associated with trial-type procedures—oral testimony, cross-examination, use of counsel, transcription of the proceedings, a formal written decision—impose costs and delays not encountered in less formal procedures. There may, however, be countervailing benefits resulting from such hearings that would justify the cost. First, there is the possibility of forestalling *de novo* review at the judicial level by conducting a trial at the agency level. Particularly where Congress, by delegating an express assessment or mitigation power, has signaled the importance of having the agency present its views on the issues, courts should defer—by according only limited review—to findings and conclusions made at an agency hearing, even when that hearing is not required by statute.<sup>202</sup> Even if a court would not defer to agency findings to the extent of according limited judicial review, it might still be willing to accord them some weight in a subsequent enforcement proceeding. Treatment of an agency's factfindings as *prima facie* evidence of liability would itself save the government witness time and prosecutorial effort. Finally, even if a court in an enforcement action gave no deference whatsoever to the agency's findings, an optional agency hearing might still be useful as a means of increasing the rate of voluntary resolution at the pre-enforcement stage.

2. *Need for an Informal Disposition Process.* The opportunity for a judicial or, in some cases, administrative trial is not, by itself, a sufficient process for the disposition of contested assessments. A trial procedure alone may not fully satisfy the twin objects of fairness and efficiency that a disposition process should serve; the expense of a trial-type hearing can nullify its practical utility. The very decision to make a formal charge, moreover, may impose a kind of injury—a psychological anxiety or a weak-

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200. See H. ZEISEL, H. KALVEN, JR. & B. BUCHHOLZ, *DELAY IN THE COURT* 79 (2d ed. 1978) (estimating that jury trials take 67% longer than trials to a judge alone). Furthermore, very few civil money penalties involve the kind of *mala in se* offenses uniquely requiring reference to the "conscience of the community." Schwenk, *supra* note 20, at 52. Most offenses involve technical, usually prophylactic, rules whose interpretation and application are probably better committed to a national body of specialists than local generalist prosecutors, judges, and juries.

201. *United States v. Florida E.C. Ry.*, 410 U.S. 224, 236 n.6 (1973) (dictum).

202. If the organic statute expressly provides for "*de novo* trial" or "*de novo* review," such deference would, of course, be improper. Cf. *Chandler v. Roudebush*, 425 U.S. 840 (1976) (interpreting legislative history of 1972 amendments to title VII of Civil Rights Act of 1964 to require judicial trial *de novo* of federal employee discrimination claims).



ening of credit position<sup>293</sup>—that generates a legitimate demand for more immediate explanatory and participatory procedures. Informal prehearing procedures can resolve a dispute on a more economical and expeditious basis than is possible by trying the case. In the absence of a powerful countervailing interest, then, an agency should provide a structured opportunity to pursue consensual prehearing resolution of a disputed assessment case.

The design of a prehearing process must of course reflect the “technology” of the regulatory program—the nature of the substantive standards enforced, the factual disputes typically presented, and the means available for detection and investigation of violations. It should also be responsive to the characteristics of the participants themselves and the determinants of their relative bargaining positions—the skill and sophistication of the typical offender, the amounts at stake relative to costs of adjudication and the resources of the agency, and the attitudes of prosecutors and courts.

The agency’s first task is to provide some vehicle for communication of exonerating or mitigating information without so encumbering the prehearing process as to destroy its utility. It is difficult to make useful generalizations about the cost-effectiveness of modes of communication. A fifteen-minute telephone conversation may be both less expensive and more informative than the submission of a written reply. Yet an oral conference, complete with counsel and witnesses, may be far more expensive and no more informative than a well-written letter. Prescribing prehearing procedures, in the abstract, is not really a productive activity. Agencies must unavoidably adjust the procedures to the reality of their situation.

A few parameters can guide the evolution of such a procedure. In the first place, written communication has the advantage, over oral communication, of being preserved for the record. It provides a basis for subsequent administrative audit or review of a penalty assessment or mitigation decision. It facilitates the subsequent use of the case for precedential purposes, and, of course, helps to build a case file for eventual prosecution.<sup>294</sup> Consequently the agency should not only receive written replies, but encourage their submission. The staff time consumed by reading useless correspondence is not likely to be substantial.

Oral communication presents more difficult choices. Agency officials are unlikely to—and probably never should—refuse to accept at least an initial telephone call from an alleged violator. Nor should agency officials refuse a personal interview or conference if it appears from a preliminary response that important factual or interpretive issues might be resolved in the process.<sup>295</sup> This does not mean, however, that an agency should

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293. See P. Gerhart, *supra* note 4, at 75. See also 17 C.F.R. § 210.3-16(i)(2) (1979) (requiring statement of “contingent liabilities” in notes to financial statements of corporations).

294. It is for these reasons, for example, that the FCC’s Broadcast Bureau insists on written mitigation requests. See note 123 and accompanying text *supra*.

295. See, e.g., Ringle, *Meetings Policy Criticism Puzzling to FTC*, Legal Times of Washington, January 1, 1979, at 4, col. 1 (describing FTC policy denying or limiting opportunities for oral conferences between agency officials and respondents’ attorneys).

extend a right to an oral conference as a general practice. The special advantages afforded by oral procedure—the greater opportunity to test, elaborate, and explain—may require a degree of formality that quickly destroys its usefulness. Establishing an opportunity for oral hearing, moreover, has important implications for the locus of authority in the agency. In order to make oral conferences both accessible and functional, the agency must decentralize its penalty mitigation authority.<sup>296</sup> This, in turn, imposes further costs on the agency, in the form of either greater inconsistency of decision<sup>297</sup> or greater training and quality control costs.<sup>298</sup>

Most agencies that routinely provide an opportunity for oral conference sensibly allow the respondent to bring an attorney and witnesses.<sup>299</sup> The small sums at stake in most penalty cases operate as an effective constraint on the abuse of such a privilege. In more serious cases involving large sums, respondents are unlikely to settle without an attorney's assistance and, in some cases, a chance to present direct testimonial evidence. On the other hand, agencies wisely resist requests to produce investigative personnel to answer questions since that practice could impose considerable costs on the agency in lost investigative time. Respondents, bearing no part of that cost, have little incentive to minimize demands on the investigator's time. Thus, before complying with such requests, the agency should require the respondent to justify the need for the investigator's presence by identifying the precise point of dispute,<sup>300</sup> and then make an effort, *ex parte*, to obtain clarification from the investigator. If issues of investigative accuracy or reliability arise with any frequency, the agency should review its investigative practices or substantive standards.<sup>301</sup>

There is some obvious value in a policy of choosing relatively impartial agency personnel to preside at oral conferences. While the explanatory value of the conference may be enhanced if it is conducted by the person who made the initial assessment, the real or apparent danger of self-vindication may induce an agency to designate an employee not previously connected with the case to conduct the interview. This decision will inevitably turn on other factors, as well, such as the agency's resource constraints and degree of centralization. MSHA's policy of centralized assessment followed by decentralized conferences appears to be a very effective resolution of competing values.<sup>302</sup> There may be some loss of consistency and explana-

296. See, e.g., note 264 and accompanying text *supra*.

297. See, e.g., CONFERENCE REPORT, *supra* note 7, at 41-42, 53-54 (describing inter-district variations in MSHA and Coast Guard mitigation practices).

298. See note 90 and accompanying text *supra* (discussing MSHA's reasons for centralizing penalty assessment responsibility).

299. See note 61 *supra*. See also notes 98-100 and accompanying text *supra*.

300. The Coast Guard's recent regulations contain this sensible precaution. See 43 Fed. Reg. 54,188 (1978) (to be codified in 33 C.F.R. § 1.07-55).

301. Likewise, agencies need not ordinarily go to the expense of recording the conference, since the format for presenting evidence and arguments is sufficiently casual that little would be gained by that formality. If, however, the agency official who conducts the conference does not have authority to rescind or modify the original assessment—a situation that I have criticized—the expense of a transcript might be justified.

302. See text accompanying notes 262-64 *supra*.

tory utility by separating the assessment and the conference functions, but the system enables MSHA to combine the advantages of centralized assessment with conveniently located conferences and minimizes the danger of self-vindication.

An important question concerning the design of an informal disposition process is whether agency employees involved in initial review of mitigation requests should be permitted to engage in settlement negotiations with an alleged offender. Explicitly giving such employees an unrestricted license to bargain may produce unfortunate results. They may neglect their primary duty to ascertain the accuracy of the charge and the proper penalty level in favor of seeking quick settlement of cases. By displaying an early willingness to bargain, the agency may forever lose its chance to achieve an optimal settlement. The legitimacy and credibility of an agency official's mitigation "decision" may be undercut by his willingness to horse-trade.

These dangers suggest that it might be desirable to establish a structural distinction between mitigation and compromise. An agency might design the prehearing process to comprise two distinct stages. The first stage would consist of the initial request for mitigation of the proposed penalty. The agency employee who considers that request would consider only the substantive criteria specified by Congress or by the agency for determining whether the violation occurred and what penalty is necessary to promote regulatory goals. He would neither invite nor entertain any offer in settlement at a lower amount. If the respondent wished to make such an offer, he would be required to present it to a different, presumably superior, agency official authorized to consider such an offer and engage in explicit bargaining.

Separation of mitigation and compromise, however, should not be an inflexible requirement. The assumed cleavage between factors appropriate to a mitigation decision and to a negotiated settlement is not sharp. As I have indicated earlier,<sup>303</sup> ability to pay—a classic compromise consideration—is also directly relevant to the primary deterrent objective of most penalties. Even such considerations as the costs and risks of collection relate significantly to regulatory effectiveness, since an agency with limited enforcement resources must often balance the severity and the frequency of its sanctions. Furthermore, measurement of collectibility is usually so uncertain as to raise doubts about its utility as a decisional criterion.<sup>304</sup> Thus, the advantages of separation might not always justify its attendant cost and delays.

There are, of course, independent reasons for a multistaged informal disposition process. Internal review provides a potentially useful check on the accuracy and objectivity of initial mitigation decisions and reduces the likelihood of wasteful enforcement litigation. Although the marginal utility of successive reviews undoubtedly falls off sharply, most agencies—especially those that depend on a highly decentralized mitigation process—should

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303. See text accompanying note 203 *supra*.

304. See text accompanying notes 206 & 207 *supra*.

probably offer respondents at least one opportunity to seek higher-level review of a mitigation decision.

3. *Statement of Reasons and Use of Precedents.* Whenever an agency denies, in whole or in part, a written request to cancel or mitigate a penalty, the APA appears to require a "statement of the grounds" for the denial.<sup>305</sup> Even if this procedure were not commanded by statute, it would ordinarily be in the agency's self-interest, since the value of the prehearing process as a means of facilitating settlement requires communication of the agency's position. Without giving its reasons for rejecting a request, the agency leaves the accused party with no additional basis for assessing the wisdom of litigating the matter. Furthermore, a statement of reasons promotes the independent explanatory purpose of procedural fairness.

In most settings, a written statement of reasons is vastly superior to an oral statement. The cost of preparing a written statement is probably only marginally greater than the cost of making a comparably well-prepared and well-reasoned oral statement, and unlike its oral counterpart, the written statement is preserved for the record. It facilitates administrative review of the decision, postaudit quality control procedures, and use of the decision as a precedent for future cases. The preservation of written reasons for official decisions is often essential to the effective and just operation of a system in which the vast majority of cases is resolved at a relatively low level.<sup>306</sup> One of the reasons agencies find it difficult to articulate general prospective standards for the assessment and mitigation of penalty amounts is the claimed difficulty of anticipating and quantifying all the diverse factors bearing upon a proper decision. Preparation and retention of written decisions enables the agency to build an empirical base from which to generate a body of general standards.<sup>307</sup> Until the agency feels that it can generalize with confidence, it can at least use that body of decisions as a guide for future decisions.

The first step in constructing an informal system of precedents is to identify the decisions having precedential value and the weight to be given them. The precedential use and weight of an informal agency action depends on the stage at which it is produced and the process followed. A decisionmaker should accord greater binding force to a prior decision if made by his superior than if made by the decisionmaker himself, and none at all if made by an equal or subordinate. A decision reached after reasoned argument by both sides should have greater force than an *ex parte* pronouncement. Consequently, final decisions on mitigation requests made by

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305. 5 U.S.C. § 555(e) (1976). *Cf.* Childs v. United States Bd. of Parole, 511 F.2d 1270 (D.C. Cir. 1974) (denial of parole). *But see* Cleveland Trust Co. v. United States, 421 F.2d 475, 482 (6th Cir.), *cert. denied*, 400 U.S. 819 (1970) (IRS's denial of conference agreement requires no statement of reasons since matter subject to *de novo* trial). *See also* Dunlop v. Bachowski, 421 U.S. 560, 573 (1975) (statement of reasons by Secretary of Labor for refusal to bring suit to set aside labor union election required by organic statute).

306. *See* text accompanying note 227 *supra*.

307. *See generally* K. DAVIS, DISCRETIONARY JUSTICE, *supra* note 139, at 107-09.

a superior agency official should be relied upon as guides to all future actions, whereas initial assessment or mitigation decisions deserve only very limited adherence.

The second requirement of a functioning system of precedents is that they be physically accessible to decisionmakers. To the extent that decisions are made centrally, this is rarely a problem. But in a system of decentralized decisionmaking it is important that actions having precedential use be communicated to the several regional offices. Reproduction and transmittal of entire case files present obvious problems of expense. In most cases an acceptable substitute is to disseminate written decisions themselves, so long as they fully describe the circumstances of the case. At a minimum, all final decisions on appeals to the central office should be transmitted to regional offices. The case for disseminating final decisions made at the regional level is less compelling. Since most cases are typically resolved at a low level, the cost of nationwide distribution will be much higher, and, unlike central decisions, regional decisions have no precedential value in other regions.<sup>308</sup>

The issue of physical accessibility blurs into the issue of practical usability. A body of decisions is useful as a guide for future action only if indexed in such a manner as to facilitate location of relevant material. Although most agencies claim to rely on earlier decisions as precedents most of the time,<sup>309</sup> survey evidence raises doubts about the extent to which agencies have established a reliable system for identifying and locating relevant precedents.<sup>310</sup> Filing cases chronologically or alphabetically hardly assures the attainment of that objective. If agency personnel can index or file decisions by one criterion only, the best choice is probably the substantive regulatory or statutory provision implicated.

Far better, however, would be a case finding system that indexes cases by all significant substantive issues involved in the determination of liability and by the factors relied upon in calculation of the penalty. In this way, for example, an agency official confronted with a request for mitigation for alleged inability to pay could review prior decisions that expressly considered that issue, to identify the indicators of financial status used and the resulting adjustment made. Agencies with a substantial caseload should consider installing an automated indexing system. Indeed, any well-designed case management system should be able to be programmed to retrieve information on cases having any characteristic contained in the data base.<sup>311</sup> In the absence of an automated system, agencies should prepare a manual indexing system.

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308. They may have some value as a basis for comparison or analogy, of course. But, only if individual regional offices do not handle enough cases to generate an acceptable body of "common law" will that value justify the expense of routine dissemination.

309. See CONFERENCE REPORT, *supra* note 7, at 22.

310. See, e.g., CONFERENCE REPORT, *supra* note 7, at 68 (FCC broadcast licensee forfeiture decisions); *id.* at 93 (ICC forfeiture files).

311. The MSHA system represents an outstanding example. See note 178 *supra*.

4. *Public Disclosure of Assessment and Mitigation Decisions.* The question remains to what extent an agency should make available to the public the written or recorded material from previous cases that guides its staff in deciding pending cases. Although the Freedom of Information Act (FOIA)<sup>312</sup> imposes a general obligation on agencies to disclose records in their possession, much of the material in files of pending or closed cases might be excluded under one or more of the Act's exclusions. For example, portions of files in open cases would probably qualify for exemption as "investigatory records."<sup>313</sup> Internal agency reports and communications prepared by investigators, analysts, or lawyers for the benefit of decision-making personnel would be excludable as "intra-agency memorandums."<sup>314</sup> But those exemptions would not apply to communications in closed cases between an official of the agency and an alleged violator, including those that announce the agency's decision on a contested issue. Consequently, it is safe to conclude that an agency could ordinarily be required to disclose penalty assessment notices, decisions on initial requests to cancel or mitigate an assessment, decisions on review or reconsideration of such decisions, and settlement agreements.<sup>315</sup>

A right of general access to such material will, of course, have little practical value unless potential users know precisely what documents to ask for.<sup>316</sup> Although FOIA does impose an affirmative obligation on agencies to prepare indices of certain kinds of disclosable material, including "final opinions . . . made in the adjudication of cases,"<sup>317</sup> the question of when an agency statement constitutes a "final opinion" is not easy to answer. An opinion accompanying a decision by an agency official, not reversible at a higher agency level, to dismiss a penalty assessment or claim would probably satisfy the "finality" requirement,<sup>318</sup> as would a decision to grant fully a request to mitigate a penalty to a specified amount. A decision denying a request for mitigation in whole or in part, however, is not "final" in the

312. 5 U.S.C. § 552 (Supp. I 1977).

313. 5 U.S.C. § 552(b)(7) (Supp. I 1977). Congress amended FOIA in 1976 to tighten the "investigatory files" exemption. See *NLRB v. Robins Tire & Rubber Co.*, 437 U.S. 214 (1978). Investigatory files may be excluded only for one of six specified reasons.

314. 5 U.S.C. § 552(b)(5) (Supp. I 1977). See *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132 (1975); *Renegotiation Bd. v. Grumman Aircraft Eng'r Corp.*, 421 U.S. 168 (1975); *EPA v. Mink*, 410 U.S. 73 (1973).

315. Portions of such documents might contain material exempt from disclosure under other FOIA exclusions, such as that pertaining to "trade secrets and commercial or financial information obtained from a person and privileged or confidential." 5 U.S.C. § 552(b)(4) (Supp. I 1977). See, e.g., *Continental Oil Co. v. FPC*, 519 F.2d 31 (5th Cir. 1975), cert. denied, 425 U.S. 971 (1976); *Sterling Drug Inc. v. FTC*, 450 F.2d 698 (D.C. Cir. 1971). But courts read these exclusions narrowly, see, e.g., *Soucie v. David*, 448 F.2d 1067 (D.C. Cir. 1971), and would in any event probably require disclosure with identifying details deleted. See, e.g., *Department of the Air Force v. Rose*, 425 U.S. 352 (1976).

316. Unless the agency's caseload is quite small, few potential users of the information will undergo the expense of sifting through a mass of undigested material. While private information services sometimes can fill the gap by spreading the cost of gathering and indexing information over many users, this method has not been a reliable means of enhancing access to informal rulings of subordinate agency personnel.

317. 5 U.S.C. § 552(a)(2)(A) (Supp. I 1977).

318. See *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132 (1975).

same sense, since it does not of its own force terminate the matter. The alleged violator may have an opportunity to request reconsideration or review of that denial at a higher administrative level and, in any case, retains his statutory or constitutional right to an evidentiary hearing on contested issues and determination of the penalty. An administrative denial may nevertheless be "final" in the weaker sense that it persuades the accused to drop the case and pay the penalty as assessed. Whether FOIA requires indexing of opinions that are "final" in that sense alone appears not to have been squarely answered.<sup>319</sup>

Even if FOIA did not require agencies to index, as well as make publicly available, their "opinions" granting or denying requests for cancellation or mitigation of civil money penalties, they should ordinarily do so. Certainly, if the value of using past decisions to guide future decisions is great enough to justify creating an indexing system in the first place, it should be made available to the public as well as agency staff. Refusal to disclose the index simply discourages the use of information otherwise publicly available except by those with sufficient resources to conduct a general search. If the use of precedents will enhance the fairness and accuracy of the agency's informal decisional processes, they should be available to both sides in the contest.

Previous decisions by agency personnel do not, of course, bind future decisionmakers. Access to decisions gives respondents no right to any particular outcome. But it does give them a legitimate claim to an explanation for any failure by an agency decisionmaker to follow a previous decision. Otherwise, the previous decisions exert no useful guiding force at all and public access to them is a charade. Agency officials may resist public disclosure of individual decisions for reasons similar to those ad-

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319. The Supreme Court's decision in *NLRB v. Sears, Roebuck & Company*, 421 U.S. 132 (1975), suggests that it does not. There the Court held that an order of the NLRB's general counsel directing a regional director to dismiss an unfair labor practice complaint was "final," but that an order directing the regional counsel to file a complaint was not. The latter, the Court concluded, was not a "final opinion" because it did not effect a "final disposition" of the "case." *Id.* at 160. In the companion case of *Renegotiation Bd. v. Grumman Aircraft Eng'r Corp.*, 421 U.S. 168 (1975), the Court held that staff memoranda to the board recommending determination of excess profit claims are not "final." The documents at issue in both cases, however, were communications between agency officials, not communications between an agency official and a private party. The issue of "finality" was presented in the context of applying the "intra-agency memorandum" exemption, not the indexing requirement. Public disclosure of an "opinion" contained in a communication to an alleged violator explaining the basis for denying a mitigation request presents none of the dangers to the "consultative functions of government" addressed by the "intra-agency memorandum" exception. See *EPA v. Mink*, 410 U.S. 73, 87 (1973) (quoting from *Kaiser Aluminum & Chem. Corp. v. United States*, 157 F. Supp. 939, 946 (Ct. Cl. 1958) (Reed, J.)).

Even the opinion of a subordinate official can be "final" if not appealed to a higher administrative level. Although a denial of mitigation does not operate directly to deprive an accused of property or even foreclose *de novo* review of all issues presented at a subsequent stage, it has some "operative effect," *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 158-59 n.25, 160 (1975), in that it closes off an avenue of immediate relief from exposure to further prosecution. In the *Sears* case, the Supreme Court conceded that a decision to file an unfair labor practice complaint has "operative effect" in the sense that it "permits litigation before the Board." *Id.* at 160. The denial of a structured opportunity afforded by the agency to dispose of penalty cases without hearing has a similar impact.

vanced to block revelation of general standards,<sup>320</sup> but those arguments carry no more conviction in this context than they did there.

#### IV. CONCLUSION: MODELS OF DECISIONMAKING UNDER CONSTRAINTS

There are risks inherent in decomposing any problem to its component parts; a segmented evaluation can overlook important interrelationships among system components and may undervalue the impact of constraints operating in actual situations. Individual procedural elements, examined in isolation, are too easily pushed to an ideal level of formality without sufficient concern for their costs or the efficacy of alternatives. While I have attempted throughout the Article to call attention to relationships among elements of the enforcement process, the discussion necessarily has been more of a catalogue of particular recommendations than a coherent blueprint for one or more enforcement models. While that objective may well be excessively ambitious, given the enormous variety of regulatory objectives pursued by federal agencies, I have attempted in this concluding section to suggest the lines along which such a blueprint could be drawn.

The problem for the architect of an enforcement process is to select procedural and operational elements that maximize the attainment of desired objectives within existing constraints. The most obvious constraint on the design of a civil penalty system is fiscal. Agencies have limited budgetary resources to devote to the processing and handling of cases. Most agencies concede that they investigate and prosecute only a fraction of all the violations that occur. The "technology" of detection and investigation imposes relatively inflexible limits on the caseload they can generate. The cost of various explanatory and participatory procedures forces trade-offs between the number of generated cases they can prosecute and the amount of attention they can give to each prosecuted case. The necessity for giving individualized attention to each case is another crucial constraint. Effective motivation of private conduct may, in some contexts, require the imposition of a penalty individually tailored to the circumstances of the offense and the offender. The presence of a powerful compensatory objective may have the same consequence. Regardless of the regulatory purpose, some populations of regulated persons may exhibit an unusually high propensity to litigate. Finally, of course, the statutory allocation of decisional authority among the regulatory agency, the Department of Justice, and the courts imposes constraints on the agency's choice of procedure.

An enforcement process should serve several objectives: guidance to the public, specific explanation to the accused, opportunity for participation, accuracy of factfinding, and consistency of outcomes. Each can be accomplished by a variety of techniques: guidance, by general rules or by individual advice or warnings; explanation and participation, by written or oral,

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320. See text accompanying notes 208-24 *supra*.



one-way or interactive communications; accuracy, by inspections, tests, argument, or confrontation; consistency, by rules, precedents, training, appeals, or audits. Rarely can an agency pursue all of these objectives to the same degree or adopt all of the techniques available for their realization. Vigorous pursuit of one objective can sometimes provide an acceptable substitute for another. The more specific and effective the guidance afforded by the agency to potential violators, the less compelling is the need to provide separate explanation to an accused violator. A reduction in decisional consistency may be excused more easily if the accuracy of factfinding and degree of participation by the accused are maintained at a high level. Similarly, some elements of an enforcement process can serve several objectives simultaneously. Establishment of written penalty standards, for example, directly promotes consistency of decision, facilitates explanation, participation, and accuracy of factfinding by focusing effort on relevant issues, and, if published, provides guidance for primary conduct.

One can combine components of an enforcement process into an enormous variety of hypothetical models. It is not necessary, of course, for an agency to choose only one model to the exclusion of all others. To some extent, it can structure a hierarchy of procedures, ranging from the simple to the complex, for different kinds of cases or successive stages of a case. In a sense, this is inevitable, since, as I have concluded, any procedure for the imposition of a civil money penalty must include an opportunity for an evidentiary hearing on disputed factual issues. But the importance of choice is not, for that reason, diminished. The "informal" process utilized by the agency will have crucial consequences for the quality of justice actually dispensed by it. With this in mind, I have identified three common scenarios for the administrative assessment and imposition of civil money penalties. In each, I have attempted to identify the major operational constraints and to outline a model enforcement process responsive to those constraints.

### *Model I*

The first scenario is the small-penalty case. Most enforcement programs resulting in penalties below, say, \$200 fall into this category. In this context, the dominant constraint is, of course, the amount of the penalty itself. When the amount at stake is small, neither the accused nor the agency will find it in their interest to devote much effort or expense to the individual case.<sup>321</sup>

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321. The amount of the penalty, of course, is not necessarily the exclusive measure of the amount at stake in a case. The cost to the accused of correcting the offending condition or preventing future offenses may be considerably greater than the penalty itself. The agency, on the other hand, may view the benefit to the regulatory program of collecting even a small penalty as considerable. Such cases may better fit other procedural models. But in most cases it is probably safe to say that a very low penalty correlates with a low amount at stake for both parties.

In order to maximize the efficiency and fairness of its enforcement effort in the low-penalty context, the agency should rely most heavily on written standards and inspectional procedures. It should define violations in such a way as to be susceptible to direct observation or measurement. A standard of strict liability is essential in order to eliminate disputes about knowledge or intent. The definition of liability should exclude conduct whose harmful nature can be determined only by consideration of total surrounding circumstances. The agency should establish a fixed schedule of penalties to be assessed for each violation. The agency's standards should either preclude mitigation altogether or permit mitigation only in specified amounts and for readily and objectively ascertainable reasons, such as lack of previous violations. The penalty notice should invite the respondent to reply in writing only. It should not invite requests to mitigate the penalty assessed except for enumerated reasons.

### *Model II*

The highly mechanistic structure and extreme curtailment of participatory opportunities characteristic of Model I do not suit cases requiring some degree of individualization. For example, the agency may conclude that a simple uniform penalty cannot adequately serve an important regulatory objective, such as special deterrence or restitution. Or, it may be dealing with a regulated population characterized by a relatively high propensity to contest assessments. Model II is designed for the common situation that combines a need for modest individualization with a severe resource constraint, resulting from the small size of the sums at stake. As a very rough approximation, this scenario has best application to regulatory programs in which penalties tend to fall within a "moderate" range—say, \$200 to \$2000.

In this setting, the agency may relax somewhat the mechanical approach to defining the offending conduct and the amount of the sanction. It should still strive to minimize sources of factual dispute by making liability turn on readily observable or quantifiable conduct. Definitions of liability should rest on a standard of strict liability or, at least, an empirically and intuitively defensible presumption of intent. The agency should specify either a schedule of "ideal" penalty amounts or a relatively narrow range of penalties for each violation. It should limit the grounds for mitigation and specify methods of measuring each one. The agency should encourage written requests for cancellation or mitigation except to the extent that disputes about primary facts or questions of interpretation are reasonably common and many members of the regulated population are unlikely to be able to explain their position adequately in writing. In that case, the agency should afford an opportunity for oral conference at a location convenient to the accused, before a relatively impartial agency official empowered to cancel or modify the assessment. The accused should have a right to be represented by an advisor and, if necessary, to bring witnesses, but not to confront or cross-examine agency witnesses. The official responsible for mitigation decisions

should give a brief written statement of the reasons for his decision specifically addressing all contested issues. These statements of reasons should be retained within the field office and indexed for easy reference in future cases involving similar facts.

### *Model III*

Where the need for individualized decisionmaking is especially great and the resource constraints less severe, a third model is appropriate. To some extent, high penalty amounts necessarily imply a greater need to individualize since the higher the potential penalty, the greater the range of potential motivational impact. Ability to pay becomes a significant factor as penalty levels move into the thousands of dollars. The need to individualize does not relate solely to penalty amounts, however. The substantive standard being enforced may be necessarily open textured due to the difficulty of anticipating all of the circumstances that determine the social harmfulness of particular conduct. Attainment of the regulatory objective may require a penalty finely tuned to the precise circumstances of the case. Model III is designed for this type of situation, where the agency's resources are sufficient to adopt a more individualized process.

This model permits—and responds to a need for—relaxation of the mechanical quality of standards needed for Models I and II. Penalty-determination criteria are still required, but mathematical formulae are, by hypothesis, inappropriate here. Because the penalty assessment necessarily involves considerable prosecutorial discretion, one or a small number of officials at the central office should specialize in that function. Officials may assess penalties at the maximum unless the investigation clearly establishes the presence of mitigating factors. The assessment notice should invite the respondent to reply in writing or to request an informal hearing involving an opportunity to present testimony by witnesses and to review the written file of the case. The file or the presiding official should identify the factors and the evidence upon which the assessment officer determined liability and calculated the penalty. The decisionmaker should accompany his decision with a written opinion. The accused should have the right to submit a written appeal or request for settlement to a supervisory official. A written statement of reasons should accompany a decision on the merits of an appeal. Statements of reasons prepared at both primary and appellate levels should be indexed and made available to the public and to all agency officials authorized to grant mitigation requests. Mitigation officials should either follow a previous decision cited by a respondent or explain their reasons for deviating from it.

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The three models sketched above are by no means intended to exhaust possible procedural models for imposing money penalties. Agencies such

as the Federal Trade Commission or the Consumer Product Safety Commission, whose caseloads consist of a small number of cases often involving very large penalty claims and fiercely disputed issues, may require different strategies. But such programs are comparatively rare. The vast majority of federal regulatory programs involve relatively small penalties assessed often in large numbers for common and repetitive offenses. Although all alleged violators have a right to an evidentiary hearing of disputed issues at some stage, that right is rarely available as a practical matter and still less frequently invoked. The efficacy of the agency's enforcement efforts and the quality of the justice it dispenses therefore depend on the informal procedures it has created to dispose of routine cases. It is inevitable that the constraints under which agencies must operate require an accommodation with an ideal level of performance. But the extent of that accommodation nonetheless remains a direct consequence of deliberate agency choice. The purpose of this Article has been to examine the parameters of that choice and to suggest ways in which its exercise can enhance the quality of administrative justice.