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### Clientless Lawyers

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# “CLIENTLESS” LAWYERS

Russell M. Gold\*

*Abstract:* Class counsel and prosecutors have a lot more in common than scholars realize. These lawyers have clients, but their clients are diffuse and lack a formal decisionmaking structure. Because of the nature of their clients, class counsel and prosecutors have to make decisions for their clients that one would ordinarily expect clients to make—and indeed that legal ethics rules would expressly require clients to make in other contexts—such as decisions concerning objectives of representation or whether to settle or plead guilty. Both complex litigation and criminal law scholars recognize that these lawyers’ self-interests diverge from their clients’ interests. But the complex litigation and criminal law literatures discuss the ensuing accountability problem solely in their own spheres. This article considers the insights about accountability that complex litigation can learn from criminal law.

More specifically, the article argues that although there are real differences between the two systems, these differences do not justify the completely different approaches to accountability that the two contexts employ. Rather, the comparison suggests that internal checks within class counsel’s firm, between plaintiffs’ firms, or between third-party funders and class counsel can improve accountability, much as internal checks improve accountability within some prosecutors’ offices.

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## INTRODUCTION

Clients control the objectives of representation and core decisions such as whether to go to trial or resolve a case through a settlement or guilty plea.<sup>1</sup> Usually. In some types of cases, however, the client is a diffuse group with no decisionmaking structure, so the lawyers have to make the essential decisions about how best to protect the client. The two most studied instances of “clientless”<sup>2</sup> lawyers are class counsel and

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1. MODEL RULES OF PROF'L CONDUCT r. 1.2(a) (AM. BAR ASS'N 1983). I do not mean to suggest that lawyers play a trivial role in these decisions. To the contrary, a lawyer's advice about a proposed settlement is important to the client's decision. *See, e.g.,* Geoffrey P. Miller, *Some Agency Problems in Settlement*, 16 J. LEGAL STUD. 189, 214 (1987) (“The attorney will always—or almost always—know much more about the lawsuit than the client. The attorney's advice about the merits of a proposed settlement will often weigh heavily in the client's decision.”); William H. Simon, *Lawyer Advice and Client Autonomy: Mrs. Jones's Case*, 50 MD. L. REV. 213, 217 (1991) (“Even where they think of themselves as merely providing information for clients to integrate into their own decisions, lawyers influence clients by myriad judgments, conscious or not, about what information to present, how to order it, what to emphasize, and what style and phrasing to adopt.”).

2. I call them “clientless” because, as a practical matter, these lawyers can largely operate as though they are clientless. Nonetheless, I use the quotation marks because I contend that it is important for even these “clientless” lawyers to remain faithful to their diffuse clients.

To be clear, I do not mean that these lawyers are clientless in the same sense as lawyers who lack actual clients but serve in important committee roles in multidistrict litigation, as other scholars have used this term. *See* Charles Silver & Geoffrey P. Miller, *The Quasi-Class Action Method of Managing Multi-District Litigations: Problems and a Proposal*, 63 VAND. L. REV. 107, 151 (2010) (employing “clientless” in that context).

prosecutors.<sup>3</sup> Although the roles of class counsel and prosecutors are certainly not identical, they share core unrecognized similarities: diffuse clients, complicated client interests, and self-interested lawyers.<sup>4</sup> There are certainly differences between the criminal and class action contexts. But class counsel and prosecutors are similar in the ways that matter for considering how to hold lawyers accountable to their clients when the clients cannot do so themselves.<sup>5</sup>

Both complex litigation literature and criminal law literature separately recognize that vesting self-interested lawyers with the power to control litigation without the opportunity for meaningful client monitoring creates substantial accountability concerns.<sup>6</sup> Class counsel and prosecutors both have entity-clients whose members, by and large, are apathetic about the litigation. Class action scholars have widely recognized this apathy,<sup>7</sup> and there is no reason to think that most

3. See, e.g., John C. Coffee, Jr., *Understanding the Plaintiff's Attorney: The Implications of Economic Theory for Private Enforcement of Law Through Class and Derivative Actions*, 86 COLUM. L. REV. 669, 677–78 (1986) (explaining that it is well understood in class actions that clients have only a nominal stake and that clients do not in fact define litigation objectives); R. Michael Cassidy, *(Ad)ministering Justice: A Prosecutor's Ethical Duty to Support Sentencing Reform*, 45 LOY. U. CHI. L.J. 981, 992 (2014) (“Because the prosecutor represents society at large, she has no personal client to direct her course of action, and must make decisions about what is in the best interests of the sovereign that ordinarily would be entrusted to a client. This unique role of both principal and agent requires the prosecutor to pursue the public interest, rather than simply pursue a conviction.”); Russell M. Gold, *Promoting Democracy in Prosecution*, 86 WASH. L. REV. 69, 71 (2011) (explaining that prosecutors must make decisions about what best serves the client’s interests). Government litigation fits this category too but is not the emphasis of this article.

4. See *infra* Part I.

5. This article focuses on damages class actions under Rule 23(b)(3). Cf. David Marcus, *The Public Interest Class Action*, 104 GEO. L.J. 777 (2016) (explaining why institutional reform litigation for injunctive relief warrants different treatment from damages class actions). Lawyers’ potential conflicts of interest are also quite different in civil rights cases than damages suits. See, e.g., Derrick A. Bell, Jr., *Serving Two Masters: Integration Ideals and Client Interests in School Desegregation Litigation*, 85 YALE L.J. 470 (1976).

6. See, e.g., Stephanos Bibas, *Prosecutorial Regulation Versus Prosecutorial Accountability*, 157 U. PA. L. REV. 959, 963 (2009) (“Prosecutors are agents who imperfectly serve their principals (the public) . . .”); Samuel Issacharoff, *Litigation Funding and the Problem of Agency Cost in Representative Actions*, 63 DEPAUL L. REV. 561, 578 (2014) (“The major class action cases of the past fifteen years have returned time and again to the problem of how to ensure the faithfulness of the class representatives to the interests of the passive class members who lack the ability or incentive to monitor the litigation activities of those who act on their behalf. This theme unifies the disparate technical questions presented in cases from *Amchem* and *Ortiz* over a decade ago, to *Wal-Mart Stores, Inc. v. Dukes* and *Smith v. Bayer* more recently.”).

7. E.g., John C. Coffee, Jr., *Litigation Governance: Taking Accountability Seriously*, 110 COLUM. L. REV. 288, 305 (2010) (describing “rational apathy” of “many small claimants”); Samuel Issacharoff, *The Governance Problem in Aggregate Litigation*, 81 FORDHAM L. REV. 3165, 3171 (2013) (describing “‘rational apathy’ of the [class members] to expend huge effort to monitor developments” in their case).

members of the prosecutor's client—the public as a whole<sup>8</sup>—care (or even know) much about outcomes of individual criminal cases (save for victims and defendants about their own cases or the occasional high-profile case).<sup>9</sup>

Because of this disconnect between lawyer and client and the inability of a diffuse entity-client to monitor the lawyer in any traditional sense, both systems seek to restrain the lawyer's authority in some fashion to ensure faithfulness to her client's interests.<sup>10</sup> These two bodies of scholarship and doctrine have, however, largely marched along without pausing to notice how the other system deals with a similar problem.<sup>11</sup> That comparative analysis begins in earnest here, focusing on what complex litigation doctrine can learn from accountability scholarship in criminal law.<sup>12</sup>

Perhaps unsurprisingly, because of the lack of comparative analysis to this point, the monitoring regimes that aim to control these lawyers in the two systems are quite different. Class counsel are monitored largely through judicial review while prosecutors, at least formally, are monitored through the ballot box.<sup>13</sup> The primary insight of criminal law scholarship on prosecutor accountability is that elections and other mechanisms external to prosecutors' offices are largely ineffective.

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8. STANDARDS FOR CRIMINAL JUSTICE: PROSECUTION FUNCTION § 3-1.3 (AM. BAR ASS'N 2015) ("The prosecutor generally serves the public and not any particular government agency, law enforcement officer or unit, witness or victim."); Bruce A. Green & Fred C. Zacharias, *Prosecutorial Neutrality*, 2004 WIS. L. REV. 837, 861–62 (2004) ("The prosecutor has a client in an abstract sense—she represents the 'public' or the 'state' . . .").

9. See Erik Lillquist, *Recasting Reasonable Doubt: Decision Theory and the Virtues of Variability*, 36 U.C. DAVIS L. REV. 85, 137–38 (2002) ("[T]he public is generally not aware of most murder trials in the United States, let alone any significant portion of the verdicts in other criminal cases."); Ronald F. Wright, *Beyond Prosecutor Elections*, 67 SMU L. REV. 593, 610 (2014) (describing "the entire electorate" as typically showing "collective disinterest" in the work of its prosecutors); cf. Stephanos Bibas, *Designing Plea Bargaining From the Ground Up: Accuracy and Fairness Without Trials as Backstops*, 57 WM. & MARY L. REV. 1055, 1076 (2016) (explaining that plea bargaining expedites process so much that it precludes public participation).

10. See *infra* Part II.

11. The notable exception is one portion of an excellent article that discusses an analog to presentence investigations for class settlement fairness review. See William B. Rubenstein, *The Fairness Hearing: Adversarial and Regulatory Approaches*, 53 UCLA L. REV. 1435, 1442 (2006).

12. *Infra* Part III; cf. David A. Sklansky & Stephen C. Yeazell, *Comparative Law Without Leaving Home: What Civil Procedure Can Teach Criminal Procedure, and Vice Versa*, 94 GEO. L.J. 683 (2005) (calling for more comparative work between civil and criminal procedure while explaining their core similarities). In other work I consider what criminal law can learn from complex litigation about accountability. See Russell M. Gold, "Clientless" Prosecutors, 51 GA. L. REV. (forthcoming 2017).

13. In theory, grand juries and petit juries also check prosecutors, but neither works particularly well. See *infra* section II.B.

Thus, the best people to restrain prosecutors are not voters but other prosecutors.<sup>14</sup> That insight about a turn to monitoring by the lawyer’s colleagues can helpfully apply in the class action context.<sup>15</sup>

In damages class actions, most victims are largely apathetic about their small-value claims.<sup>16</sup> Accordingly, while class members may offer their views regarding the adequacy of their lawyer and the fairness of a proposed settlement, they cannot actually control or fire their lawyer.<sup>17</sup> Rather, because there is no reason to expect that the class-client will directly monitor its lawyer, class action law turns to judges to monitor the lawyer-client relationship. Judicial monitoring in class actions is not perfect, however. Docket pressures and informational deficits pose barriers to review. Assigning a judge to monitor class counsel is a reasonable solution, but there are structural reasons to doubt its effectiveness and thus look elsewhere for monitoring.<sup>18</sup> And here the core insight from criminal law proves instructive.

Class action law too could turn to a lawyer’s colleagues and look within the plaintiffs’ bar to supplement judicial monitoring. Such monitoring could come from within individual firms, between plaintiffs’ firms, and between third-party funders and class counsel. I do not suggest mandating internal review or prescribing a particular form.

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14. See, e.g., Rachel E. Barkow, *Institutional Design and the Policing of Prosecutors: Lessons from Administrative Law*, 61 STAN. L. REV. 869 (2009) (advocating greater attention to supervision in federal prosecutors’ offices and separating adjudication and enforcement as tasks to be done by different actors to check prosecutor overreach); Kay L. Levine & Ronald F. Wright, *Prosecution in 3-D*, 102 J. CRIM. L. & CRIMINOLOGY 1119, 1123, 1137, 1147, 1152 (2012) (finding that some offices assign different prosecutors to handle each procedural phase of a case and that offices vary substantially as to how much consultation prosecutors do with colleagues while prosecutors in other offices view themselves as independent contractors assigned to their roster of cases).

15. See *infra* Part III.

16. E.g., Rubenstein, *supra* note 11, at 1442 (“Class members’ passivity and absence is expected; indeed it provides much of the justification for aggregate treatment of their claims in the first place.”).

17. See *Lazy Oil v. Witco Corp.*, 166 F.3d 581, 584, 588–91 (3d Cir. 1999). Individual class members can opt out and pursue their claim individually, FED. R. CIV. P. 23(c)(2)(B)(v), but most certified class actions involve claims that are sufficiently low-value that they cannot feasibly be pursued individually. *Carnegie v. Household Int’l, Inc.*, 376 F.3d 656, 661 (7th Cir. 2004) (“The realistic alternative to a class action is not 17 million individual suits, but zero individual suits, as only a lunatic or a fanatic sues for \$30.”) (emphasis omitted).

18. See, e.g., Rubenstein, *supra* note 11, at 1445 (describing judges’ “remarkable information deficit” when reviewing class settlements); Samuel Issacharoff, *Class Action Conflicts*, 30 U.C. DAVIS L. REV. 805, 829 (1997) (describing judges’ self-interest in clearing cases from their dockets); Jonathan R. Macey & Geoffrey P. Miller, *The Plaintiffs’ Attorney’s Role in Class Action and Derivative Litigation: Economic Analysis and Recommendations for Reform*, 58 U. CHI. L. REV. 1, 46 (1991) (explaining that judges are conditioned to view negotiated resolutions of litigation favorably).

Rather, courts should incentivize review within firms and allow those firms to make their own implementation choices. Courts could do so by predictably and transparently decreasing attorney's fees in cases where class counsel had previously proposed a settlement that was rejected as unfair to the class or where the deal that class counsel secured for the client is not particularly good. Courts reviewing class settlements could also consider class counsel and her firm's track record in previous cases. Both approaches would create profit incentives for law firm partners who are not working on a case to ensure that their colleagues have gotten a good enough deal for the client.

In sum, this article argues that comparing class actions and criminal prosecution can offer useful lessons because class counsel and prosecutors share certain key similarities that create similar accountability problems. The comparison suggests that internal checks within class counsel's firm, between plaintiffs' firms, or between third-party funders and class counsel can improve accountability, much as criminal law scholars have explained about internal accountability within prosecutors' offices.

This article proceeds in three parts. Part I explains the core similarities between class counsel and prosecutors that make the comparison worthwhile. Part II then considers the different monitoring regimes that the two systems use to hold these lawyers accountable. Lastly, Part III considers what class action law can learn from criminal law regarding holding these "clientless" lawyers accountable to their clients.

## I. "CLIENTLESS" CONCERNS

The core similarity between class counsel and prosecutors is what I call their "clientless" nature. Both are lawyers with diffuse clients comprised primarily of individuals who are apathetic about their cases and therefore cannot be expected to monitor their lawyers directly.<sup>19</sup> Both clients have complex and amorphous goals that require difficult balancing, which necessarily falls to their lawyers.<sup>20</sup> Nonetheless, as scholars have widely recognized with class counsel and prosecutors, the lawyers have powerful self-interests at play that may diverge from the

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19. I do not mean to suggest that comparing class counsel and prosecutors is more useful than comparisons of other "clientless" lawyers and plan to expand the frame of the comparison in future work.

20. See *infra* sections I.A–I.B.

clients’ interests.<sup>21</sup> Thus, for those concerned about these lawyers acting as faithful agents for their clients,<sup>22</sup> it is important to find effective means of monitoring and checking these lawyers. Sections A through C of this Part explore these three core similarities between class counsel and prosecutors that give rise to substantial accountability concerns and call for some other source of agent monitoring: (a) diffuse clients, (b) amorphous interests, and (c) self-interested lawyers. Finally, Section D explains why the resulting accountability deficits are problematic in both contexts.

### A. *Diffuse Entity-Clients*

Both class counsel and criminal prosecutors represent diffuse groups that lack a decisionmaking structure.<sup>23</sup> In both instances, most of the members of these groups are apathetic as to the outcome of each case.<sup>24</sup>

#### 1. *Class Counsel*

Whom class counsel should represent is a source of some disagreement,<sup>25</sup> but I assume the approach embodied in the current

21. See *infra* section I.C.

22. One reason for that commitment is the basic idea that lawyers are agents who should always faithfully represent their clients. Other reasons why observers of class action law and criminal prosecution should care about lawyer faithfulness to the client are addressed below. See *infra* section I.D.

23. Contrast the nature of these representations with representing a more traditional entity-client such as a corporation that has a board of directors and formal decisionmaking processes.

24. Securities class actions with large institutional investors may be an exception, but these large investors have no great incentive to both remain in and control the litigation. See UNITED STATES COURT OF APPEALS, THIRD CIRCUIT, FINAL REPORT: THIRD CIRCUIT TASK FORCE ON SELECTION OF CLASS COUNSEL 94 (2002), <http://www.ca3.uscourts.gov/sites/ca3/files/final%20report%20of%20third%20circuit%20task%20force.pdf> [https://perma.cc/25EP-6F97] (“[I]t is the exceptional class action (not the rule) to find a lead plaintiff who has suffered a loss that would financially support an individual suit, yet who prefers to prosecute a class action, taking on fiduciary duties to others and incurring the delay and expense of all the attendant procedures.”) [hereinafter THIRD CIRCUIT TASK FORCE REPORT]; James D. Cox et. al., *Does the Plaintiff Matter? An Empirical Analysis of Lead Plaintiffs in Securities Class Actions*, 106 COLUM. L. REV. 1587, 1602 (2006) (“[F]ew financial institutions seek to so involve themselves, presumably because they do not see that the rewards of doing so are sufficient to offset the cost of becoming involved.”)

25. Compare John C. Coffee, Jr., *Class Action Accountability: Reconciling Exit, Voice, and Loyalty in Representative Litigation*, 100 COLUM. L. REV. 370, 379–80 (2000) (arguing that monetary damages class actions are merely aggregation devices and that class counsel owes individual duties to the class members), with David L. Shapiro, *Class Actions: The Class as Party and Client*, 73 NOTRE DAME L. REV. 913, 924 (1998) (embracing description of class as an entity-client, much like a corporation).



version of Rule 23, in which class counsel should represent the interests of her class-client as a whole.<sup>26</sup>

Others argue that class counsel should aim, at least in part, to serve as a private attorney general and promote overall public welfare rather than the interests of the particular class.<sup>27</sup> Private class actions provide an important private enforcement mechanism that supplements limited governmental enforcement resources.<sup>28</sup> But my view is that class counsel should represent her class-client's best interests, and in so doing, her work may generate incidental but important public benefit.<sup>29</sup>

Under either view of whom class counsel should represent, class counsel represents a diffuse entity and thus must make the critical decisions about what course of action to take.<sup>30</sup> Unlike the traditional model in which the client holds ultimate authority over the decision of whether to settle a case and on what terms,<sup>31</sup> class counsel can settle claims over the objection of the named plaintiffs or absent class members so long as the court finds that the proposed settlement is fair.<sup>32</sup>

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26. See FED. R. CIV. P. 23 advisory committee's note (2003) (explaining that "the obligation of class counsel [is] to represent the interests of the class, as opposed to the potentially conflicting interests of individual class members"); see, e.g., Howard M. Erichson, *Coattail Class Actions: Reflections on Microsoft, Tobacco, and the Mixing of Public and Private Lawyering in Mass Litigation*, 34 U.C. DAVIS L. REV. 1, 3 (2000) ("Class action lawyers are duty-bound to represent the interests of the particular class . . .").

27. See William B. Rubenstein, *On What A "Private Attorney General" Is—and Why It Matters*, 57 VAND. L. REV. 2129, 2132 (2004) (arguing that class counsel has responsibilities to both the class and the public that vary in relative degree based on the case); cf. Myriam Gilles, *Class Dismissed: Contemporary Judicial Hostility to Small-Claims Consumer Class Actions*, 59 DEPAUL L. REV. 305, 308–09 (2010) (contrasting the "public law" conception of the class action as promoting broad social goals such as deterrence with the "private law" view that prioritizes compensation).

28. See Harry Kalven, Jr. & Maurice Rosenfield, *The Contemporary Function of the Class Suit*, 8 U. CHI. L. REV. 684, 720 (1940).

29. Erichson, *supra* note 26, at 25 ("In contrast to the duties of government lawyers, private class counsel owe a duty of loyalty to the members of the particular class."); Martin H. Redish, *Class Actions and the Democratic Difficulty: Rethinking the Intersection of Private Litigation and Public Goals*, 2003 U. CHI. LEGAL F. 71, 86 (2003) ("[W]hatever impact federal adjudication may have on the public interest must come as an incident to the assertion and adjudication of narrower, personal interests.").

30. Coffee, *supra* note 3, at 677–78; Samuel Issacharoff & Richard A. Nagareda, *Class Settlements Under Attack*, 156 U. PA. L. REV. 1649, 1695 (2008); Deborah L. Rhode, *Class Conflicts in Class Actions*, 34 STAN. L. REV. 1183, 1183 (1982).

31. MODEL RULES OF PROF'L CONDUCT r. 1.2(a) (AM. BAR ASS'N 1983).

32. See *Lazy Oil Co. v. Witco Corp.*, 166 F.3d 581, 584, 588–91 (3d Cir. 1999). The notion that class counsel can settle claims over the objections of absent class members is built into the structure of the rule that allows for objectors' voices to be heard in a public fairness hearing before a judicial decision on the proposed settlement. See FED. R. CIV. P. 23(e)(2), (e)(5).

## 2. Prosecutors

Prosecutors’ responsibilities to their clients are particularly complicated. They are tasked with serving their clients’ interests as other lawyers are,<sup>33</sup> but the nature of their clients—their populaces as a whole<sup>34</sup>—and their oath to uphold the Constitution complicate that charge.<sup>35</sup> Serving the public does not mean seeking to maximize convictions or sentences.<sup>36</sup> Similarly, although prosecutors are tasked with considering victims’ interests,<sup>37</sup> victims are not prosecutors’ clients.<sup>38</sup> Rather, prosecutors’ role is to assure that justice is done<sup>39</sup> because justice is their public-clients’ objective in criminal law.<sup>40</sup>

Except in its most obvious dimensions such as not convicting the innocent,<sup>41</sup> however, saying that the prosecutor should do justice answers very little.<sup>42</sup> The duty to do justice entails “specific obligations

33. Russell M. Gold, *Beyond the Judicial Fourth Amendment*, 47 U.C. DAVIS L. REV. 1591, 1642 (2014); Gold, *supra* note 3, at 75–80.

34. STANDARDS FOR CRIMINAL JUSTICE, *supra* note 8, § 3-1.3 (“The prosecutor generally serves the public and not any particular government agency, law enforcement officer or unit, witness or victim.”); Green & Zacharias, *supra* note 8, at 861–62 (“The prosecutor has a client in an abstract sense—she represents the ‘public’ or the ‘state’ . . .”).

35. Prosecutors’ duties to the public and their oath to protect and defend the Constitution are not satisfied with simple adherence to majority will. Rather, what the majority actually wants plays an important role in what prosecutors should do, but the prosecutor should not always be a majoritarian actor. See STANDARDS FOR CRIMINAL JUSTICE, *supra* note 8, § 3-1.2(b) (“The primary duty of the prosecutor is to seek justice within the bounds of the law, not merely to convict.”).

36. *Id.* (“The prosecutor serves the public interest and should act with integrity and balanced judgment to increase public safety both by pursuing appropriate criminal charges of appropriate severity, and by exercising discretion to not pursue criminal charges in appropriate circumstances.”).

37. For federal prosecutors, see Justice for All Act of 2004, 18 U.S.C. § 3771(a)(5) (2012).

38. STANDARDS FOR CRIMINAL JUSTICE, *supra* note 8, § 3-1.3; Green & Zacharias, *supra* note 8, at 861 (“[P]rosecutors are independent in that they, not the police or the victims, are the ultimate decision-makers.”).

39. MODEL RULES OF PROF’L CONDUCT r. 3.8 cmt. 1 (AM. BAR ASS’N 1983) (“A prosecutor has the responsibility of a minister of justice and not simply that of an advocate.”); STANDARDS FOR CRIMINAL JUSTICE, *supra* note 8, § 3-1.2(b) (“The primary duty of the prosecutor is to seek justice within the bounds of the law, not merely to convict.”).

40. See *United States v. Agurs*, 427 U.S. 97, 110–11 (1976) (“For though the attorney for the sovereign must prosecute the accused with earnestness and vigor, he must always be faithful to his client’s overriding interest that ‘justice shall be done.’”); Bruce A. Green, *Why Should Prosecutors “Seek Justice”?*, 26 FORDHAM URB. L.J. 607, 642 (1999) (explaining that the identity of the prosecutor’s sovereign client is the clearest source of prosecutors’ obligation to “seek justice”).

41. STANDARDS FOR CRIMINAL JUSTICE, *supra* note 8, § 3-1.2(b) (“The prosecutor should seek to protect the innocent and convict the guilty . . .”).

42. See R. Michael Cassidy, *Character and Context: What Virtue Theory Can Teach Us About a Prosecutor’s Ethical Duty to “Seek Justice,”* 82 NOTRE DAME L. REV. 635, 638 (2006); Green, *supra* note 40, at 618.

to see that the defendant is accorded procedural justice”<sup>43</sup> and that the defendant is treated fairly.<sup>44</sup> It requires prosecutors to “think about the delivery of criminal justice on a systemic level” rather than focusing only on seeking individual convictions.<sup>45</sup> Because the prosecutor’s duty to do justice is rooted in the notion of serving the public-client’s interest, I have argued elsewhere that prosecutors’ enforcement priorities should track their citizenry’s preferences.<sup>46</sup> Such an approach would more effectively balance the complex array of their public-clients’ interests in criminal justice.<sup>47</sup> Deciding what particular course of action best serves the public’s interest in each case is left to the prosecutor.<sup>48</sup> This idea that prosecution should seek to track the public interest explains the Nineteenth Century shift from private prosecution by victims to public prosecutors in America.<sup>49</sup>

### 3. *Similarity*

Because of the diffuse nature of their clients, both class counsel and prosecutors ultimately must decide for themselves what course of action best serves the clients’ interests, including deciding whether to go to trial or on what terms to settle a dispute. Victims’ views play some role in

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43. MODEL RULES OF PROF’L CONDUCT r. 3.8 cmt. 1 (AM. BAR ASS’N 1983); accord STANDARDS FOR CRIMINAL JUSTICE, *supra* note 8, § 3-1.2(b) (the prosecutor should “respect the constitutional and legal rights of all persons, including suspects and defendants”).

44. Green, *supra* note 40, at 642.

45. Cassidy, *supra* note 3, at 983.

46. Gold, *Beyond the Judicial Fourth Amendment*, *supra* note 33, at 1642; Gold, *supra* note 3, at 75–80; see also Bruce A. Green & Fred C. Zacharias, “The U.S. Attorneys Scandal” and the Allocation of Prosecutorial Power, 69 OHIO ST. L.J. 187, 203 (2008) (“[P]rosecutors should not make decisions in individual cases according to what is popular, resource-allocation and other politically-controversial judgments (e.g., whether to prosecute marijuana use) can [legitimately] be informed by what citizens in the jurisdiction believe is appropriate”). For instance, even if the public may wish for a prosecutor to pursue charges in a particular case against a disfavored defendant, she may nonetheless pursue such charges only if she concludes that they are supported by probable cause. See MODEL RULES OF PROF’L CONDUCT r. 3.8(a) (AM. BAR ASS’N 1983).

47. See *infra* section I.B.

48. STANDARDS FOR CRIMINAL JUSTICE: PROSECUTION FUNCTION § 3-1.3 (“The public’s interests and views are should be [sic] determined by the chief prosecutor and designated assistants in the jurisdiction.”); see Gerard E. Lynch, *Our Administrative System of Criminal Justice*, 66 FORDHAM L. REV. 2117, 2124–29 (1998) (describing effect of not having a traditional client on prosecutor’s role).

49. Darryl K. Brown, *The Perverse Effects of Efficiency in Criminal Process*, 100 VA. L. REV. 183, 213–14 (2014); see also Roger A. Fairfax, Jr., *Delegation of the Criminal Prosecution Function to Private Actors*, 43 U.C. DAVIS. L. REV. 411, 432–33 (2009) (describing history of shift to public prosecution); Robert M. Ireland, *Privately Funded Prosecution of Crime in the Nineteenth-Century United States*, 39 AM. J. LEGAL HIST. 43, 43 (1995) (same).

both contexts, but in neither case do the victims’ views bind the decisionmaker as they would in a traditional lawyer-client relationship.<sup>50</sup> Prosecutors can charge and pursue cases against victims’ wishes,<sup>51</sup> and class counsel can settle cases over the objection of the class representatives with judicial approval.<sup>52</sup> Neither client can fire its lawyer.<sup>53</sup>

Under the class-interest model assumed here,<sup>54</sup> class counsel should represent the interests of the class as a whole—a diffuse aggregate client—rather than the individual class members.<sup>55</sup> The identity of their clients is not exactly the same as prosecutors’ public-clients. But class counsel, like prosecutors, are the ones calling the shots and making the key decisions on behalf of their clients who cannot voice their own interests.

Under the private attorney general model of class actions,<sup>56</sup> the parallel is closer. Both lawyers represent the public.

### B. *Complex Client Interests*

In neither class actions nor criminal law is the lawyer’s task of figuring out what best serves the client’s interests a straightforward one. Scholars who argue that class counsel should pursue the class’s best interests typically focus primarily on class counsel maximizing victim compensation.<sup>57</sup> Scholars who take a social welfarist view of class counsel typically focus on deterrence as the primary objective that class actions should achieve.<sup>58</sup> Both focuses are too narrow, even given their

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50. See *Lazy Oil Co. v. Witco Corp.*, 166 F.3d 581, 584, 588–91 (3d Cir. 1999); Green & Zacharias, *supra* note 8, at 861.

51. See, e.g., 4 WAYNE R. LAFAVE ET AL., *CRIMINAL PROCEDURE* § 13.1(a) (4th ed. 2016) (“state courts have viewed these various victims’ rights provisions as not limiting the prosecutor’s charging discretion and not as conferring upon victims any right to judicial review of the exercise of that discretion”).

52. See *Lazy Oil*, 166 F.3d at 584, 588–91.

53. Voters as a whole can periodically throw out their lead prosecutor (if fortune strikes and the incumbent is opposed), but they cannot fire their lawyer to change course in a particular case.

54. See *supra* section I.A.1.

55. FED. R. CIV. P. 23(g)(1)(B) advisory committee’s notes (2003).

56. See *supra* section I.A.1.

57. Gilles, *supra* note 27, at 308–09.

58. See, e.g., RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* 785 (8th ed. 2011) (“[W]hat is most important from an economic standpoint is that the violator be confronted with the costs of his violation—this preserves the deterrent effect of litigation—not that he pay them to his victims”); Myriam Gilles & Gary B. Friedman, *Exploding the Class Action Agency Costs Myth: The Social Utility of Entrepreneurial Lawyers*, 155 U. PA. L. REV. 103, 105 (2006) (“All that matters” in small-

premises. The class is typically well-served when defendants are forced to internalize externalities and when firms know that there is a sufficient fee incentive for private lawyers to enforce consumer, securities, employment, and other laws.<sup>59</sup> Class actions can also serve the important, albeit less widely recognized, social functions of generating information and drawing attention to allegations of wrongdoing that tend to help both class members and the broader public.<sup>60</sup> Lastly, defendants settling and therefore ceasing to dispute allegations will look to some—class members included—as tacitly admitting wrongdoing even when defendants purport to deny wrongdoing in the settlement agreements.<sup>61</sup> And that tacit admission may be psychologically valuable to some. In this article, I do not aim to discuss these sometimes-competing interests in any detail but simply seek to explain that determining the class's interests is not a straightforward exercise in getting as much money for the class members as possible. The complication arises because of interests like information generation and attention drawing and because deterrence turns less on how much money goes to class members versus other recipients like lawyers than on aggregate payouts.<sup>62</sup>

Scholarship theorizing the aims of criminal law seeks to flesh out what a theory of justice should seek to accomplish and thus provides some large-scale objectives that prosecutors' public-clients desire. Criminal law seeks deterrence, retribution, incapacitation, rehabilitation,

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claim class actions “is whether the practice causes the defendant-wrongdoer to internalize the social costs of its actions.”).

59. See Sergio J. Campos, *Mass Torts and Due Process*, 65 VAND. L. REV. 1059, 1093–95 (2012) (explaining that deterrence is an individual entitlement of plaintiffs because it helps them avoid harm).

60. See Russell M. Gold, *Compensation's Role in Deterrence*, 91 NOTRE DAME L. REV. 1997, 2044–47 (2016); Joanna C. Schwartz, *Introspection Through Litigation*, 90 NOTRE DAME L. REV. 1055, 1057 (2015) (explaining in the context of informational benefits to defendants that “lawsuits can unearth information about misconduct that organizations have hidden from regulators and the public at large”); Steven Shavell, *The Fundamental Divergence Between the Private and the Social Motive to Use the Legal System*, 26 J. LEGAL STUD. 575, 605 (1997) (explaining that litigation can bring damaging facts to light and that “if the public learns about the defect, perhaps people can take precautions to reduce harm”).

61. See Gold, *supra* note 60.

62. See Brian T. Fitzpatrick, *Do Class Action Lawyers Make Too Little?*, 158 U. PA. L. REV. 2043, 2060 (2010) (explaining that total amount defendant has to pay determines deterrent effect); Gilles & Friedman, *supra* note 58, at 105–06 (same). *But see* Gold, *supra* note 60 (arguing that reputational deterrence is greater if victims are typically compensated in class actions than if they are not). More deeply exploring the interests of diffuse clients in various types of cases will have to be left for another day.

and restitution or some other benefit for victims.<sup>63</sup> There is nothing simple, straightforward, or value-neutral about weighing these different considerations and determining how best to resolve each case in light of them.<sup>64</sup> Each prosecutor’s constituents may weigh these objectives differently and indeed may weigh them differently in each case, and each constituency is far from monolithic or homogenous in its interests.<sup>65</sup> Thus, even for the best-intentioned, most publicly oriented prosecutor, deciding how best to serve these various objectives in each case through charging, plea bargaining, and sentencing recommendations is a tall order.

Although the clients’ interests across the class action and criminal law contexts are different, sometimes they are more similar than people might realize.<sup>66</sup> In criminal law, prosecutors are tasked with considering victims’ interests and seeking restitution on their behalf,<sup>67</sup> which is a private-law concern that looks a lot like tort law.<sup>68</sup> And indeed, the scope of restitution in criminal law can be so large that it looks

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63. See, e.g., Darryl K. Brown, *Cost-Benefit Analysis in Criminal Law*, 92 CAL. L. REV. 323, 325 (2004); see also Gold, *supra* note 3, at 81; Stephen J. Schulhofer, *Criminal Justice Discretion as a Regulatory System*, 17 J. LEGAL STUD. 43, 50 (1998) (referring to “maximum deterrence” as the public’s interest in criminal law enforcement).

64. See Gold, *supra* note 3, at 81; Green, *supra* note 40, at 634 (“It is the prosecutor’s task, in carrying out the sovereign’s objectives, to resolve whatever tension exists among them in the context of individual cases.”).

65. See Bibas, *supra* note 6, at 982 (“Some prosecutors and some citizens emphasize retribution, while others may care more about deterrence, incapacitation, or rehabilitation. . . . The aggregation of stakeholders’ views will never be an elegant equation . . .”); Green & Zacharias, *supra* note 8, at 867 (“Different constituencies of individual prosecutors, and constituencies of prosecutors in different jurisdictions, inevitably have diverging views . . .”); Schulhofer, *supra* note 63, at 65 (“To minimize the social cost of crime, the prosecutor cannot simply attempt to minimize the total number of crimes; she must evaluate the harm associated with each offense and determine the mix of prosecutions that will minimize the total quantum of harm.”).

66. This is because, as David Sklansky and Stephen Yeazell have persuasively argued, criminal law is not purely public law nor is civil litigation purely private law. Sklansky & Yeazell, *supra* note 12, at 697–703; see also Owen M. Fiss, *Against Settlement*, 93 YALE L.J. 1073, 1085–87 (1984) (arguing that the purpose of adjudication is not merely private dispute resolution and that settlement brings only peace for the parties and not necessarily justice in a broader sense).

67. Justice for All Act of 2004, 18 U.S.C. § 3771(a)(5)–(6) (2012); Adam S. Zimmerman & David M. Jaros, *The Criminal Class Action*, 159 U. PA. L. REV. 1385, 1393 (2011) (“Similarly, while prosecutors do not formally represent victims as private attorneys do in a civil case, Congress has charged prosecutors to seek victim input and recover restitution on their behalf.”).

68. I do not mean to suggest that the label and the stigma of a criminal conviction does not matter. Rather, the point is that the same concerns animate criminal restitution as civil relief.

Although the parallel to civil litigation is not quite as pure, efforts at restorative justice in criminal law also show deep concern with the private-law aspects of criminal law because they focus on relations between the victim and perpetrator. See Sklansky & Yeazell, *supra* note 12, at 701–02, 738.

remarkably similar to aggregate litigation.<sup>69</sup> Adam Zimmerman and David Jaros refer to such cases as “criminal class actions.”<sup>70</sup> They point to examples of prosecutors’ efforts to secure \$1.4 billion in restitution over side effects from Zyprexa, a fund to distribute assets seized from Bernie Madoff, and a \$225 million restitutionary fund set up to compensate shareholders of Computer Associates for inflating earnings reports.<sup>71</sup>

Much as criminal law shares the private-law concern about restitution, so too does aggregate litigation share public-law concerns such as deterring wrongdoing. Creating a procedure that allows for victims to be compensated even when their individual claims are small is a private-law concern underlying class actions.<sup>72</sup> But the primary social-welfare-promoting function of class actions and the primary reason to award attorney’s fees to encourage such suits is deterring wrongdoing.<sup>73</sup> They protect the public from future harm by forcing companies to internalize externalities and prevent companies from avoiding the threat of liability by spreading harm thinly across a large group.<sup>74</sup>

Class counsel and prosecutors’ clients’ interests are not identical, and the comparison does not work in every respect. One important difference is the degree of internal conflicts of interests within the client group that the two systems permit. Let us again leave aside prosecutors’ attempts (or obligations) to secure restitution for groups of victims. In the remainder of their work, prosecutors’ public clients are composed of victims, defendants, and disinterested members of the public whose views on the correct amount of criminal enforcement and their priorities within that enforcement vary widely.<sup>75</sup> Class actions, on the other hand, cannot be certified if the putative class contains sufficiently important

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69. See Zimmerman & Jaros, *supra* note 67, at 1398.

70. See *id.*

71. See *id.* at 1387–88.

72. See, e.g., *Deposit Guaranty Nat’l Bank v. Roper*, 445 U.S. 326, 339 (1980) (“Where it is not economically feasible to obtain relief within the traditional framework of a multiplicity of small individual suits for damages, aggrieved persons may be without any effective redress unless they may employ the class-action device.”); *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 161 (1974) (recognizing that petitioner could not recover anything on his \$70 claim without a class action).

73. See POSNER, *supra* note 58, at 785; Gilles & Friedman, *supra* note 58, at 105.

74. *Bais Yaakov of Spring Valley v. ACT, Inc.*, 798 F.3d 46, 48 (1st Cir. 2015), *cert. denied*, 136 S. Ct. 982 (2016); see also *supra* note 58.

75. Green & Zacharias, *supra* note 8, at 866 (“A nonpartisan prosecutor must at least consider the interests of all her constituencies in some fashion, including those of the defendant.”).

internal conflicts, including conflicts between current and future victims.<sup>76</sup>

While the Supreme Court has required increasing similarity between class members in the past two decades,<sup>77</sup> classes can nonetheless still be certified with internal conflicts as to the core decisions that clients would be asked to make in individual litigation. For example, individual clients decide whether to settle.<sup>78</sup> But class members likely have varying risk tolerances, discount rates for recovery, levels of animosity toward the defendant for conduct related or unrelated to the lawsuit, desires for public acknowledgement of wrongdoing, desires for information regarding the underlying conduct, and desires to continue a relationship with the defendant. At least a few class members demonstrate these different preferences in many cases by actively opposing some settlements. All of these factors substantially affect preferences for quick settlement, a protracted battle with extensive discovery, a case litigated to judgment or resolved by explicit admission, or whether information and acknowledgements of wrongdoing would be better traded for cash. But these differences do not preclude certification.<sup>79</sup> Moreover, scrutiny of intraclass conflicts is weakened by courts' incentives to clear their dockets, particularly in settlement class actions where a settlement is proposed concurrently with the motion for class certification.<sup>80</sup>

Thus, both systems task lawyers with balancing competing objectives on behalf of a client that is (albeit to different degrees) internally divided

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76. See *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 858 (1999); Samuel Issacharoff, *Assembling Class Actions*, 90 WASH. U. L. REV. 699, 707 (2013) (explaining that the focus of the Court's concerns over class action governance is “that there are no structural allegiances of class counsel that would create incentives to favor one part of the class over another, or be biased against seeking the best possible return to a defined subset of claims.”).

77. See, e.g., Robert G. Bone, *The Misguided Search for Class Unity*, 82 GEO. WASH. L. REV. 651, 687 (2014) (“[I]t appears that courts have required a stronger degree of cohesiveness for (b)(2) classes after *Amchem*.”); Robert H. Klonoff, *The Decline of Class Actions*, 90 WASH. U. L. REV. 729, 774 (2013) (“The Supreme Court's *Dukes* decision appears to have given new meaning to commonality.”); see also D. Theodore Rave, *Governing the Anticommons in Aggregate Litigation*, 66 VAND. L. REV. 1183, 1186 (2013) (“[T]he class action has become less and less practical for resolving many types of large-scale aggregate litigation . . .”).

78. MODEL RULES OF PROF'L CONDUCT R. 1.2(a) (AM. BAR ASS'N 1983).

79. For plaintiffs whose views on these issues are very strongly (perhaps irrationally) held, the ability to opt out and pursue their own case helps accommodate these interests. But opting out to pursue one's own case is a big step to take when individual claim values are small. See *Carnegie v. Household Int'l, Inc.*, 376 F.3d 656, 661 (7th Cir. 2004) (“[O]nly a lunatic or a fanatic sues for \$30.”).

80. See Issacharoff, *supra* note 18, at 829; Macey & Miller, *supra* note 18, at 45–46; Richard A. Nagareda, *Turning from Tort to Administration*, 94 MICH. L. REV. 899, 968 (1996); Rubenstein, *supra* note 11, at 1445.



about the objectives and how best to pursue them in each case. Civil litigation often poses difficult questions about risk aversion and settlement, how much money is enough, and how extensively to use discovery tools. In individual litigation, clients get to decide on questions about settlement preferences, both as a matter of ethical rules<sup>81</sup> and good practice.<sup>82</sup> In aggregate litigation and criminal prosecution, these decisions fall to lawyers. Internal conflicts are less pronounced in class actions than in criminal prosecution, but that difference in degree does not detract from the value of comparing the two systems for monitoring these clientless lawyers.

### C. *Self-Interested Lawyers*

Both complex litigation literature and criminal law literature recognize that there are substantial reasons to be concerned that these "clientless" lawyers' interests will diverge from their clients'.

#### 1. *Class Counsel*

Class action scholars widely recognize the potential disconnect between class counsel's interests and the class's.<sup>83</sup> Class counsel has her own pecuniary interest in the litigation, which can lead to the conflict.<sup>84</sup> Both typically want to be paid, but that can be the full extent of the congruence of interests. Most scholars worry that class counsel will under-reach and sell out the class's claims too cheaply or after expending too little effort.<sup>85</sup> The concerns arise because class counsel

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81. MODEL RULES OF PROF'L CONDUCT r. 1.2(a) (AM. BAR ASS'N 1983).

82. When seeking repeat business, it makes good sense to leave clients feeling like they are deciding key questions.

83. The scholarship deems these "agency costs." See, e.g., John C. Coffee, Jr., *Class Wars: The Dilemma of the Mass Tort Class Action*, 95 COLUM. L. REV. 1343, 1347 (1995) ("No opening generalization about the modern class action is sounder than the assertion that it has long been a context in which opportunistic behavior has been common and high agency costs have prevailed."); Nagareda, *supra* note 80, at 931 ("The problem in the class action context is that 'the negotiator on the plaintiffs' side, that is, the lawyer for the class, is potentially an unreliable agent of his principals.' This is, in other words, a classic illustration of an agency cost problem . . ." (quoting *Mars Steel v. Continental Ill. Natl. Bank & Trust*, 834 F.2d 677,681 (7th Cir. 1987))).

84. See, e.g., Howard M. Downs, *Federal Class Actions: Diminished Protection for the Class and the Case for Reform*, 73 NEB. L. REV. 646, 657-58 (1994) ("Invariably direct conflicts arise between class counsel, the class, and its representatives with respect to attorneys' fees, settlement, fee sharing, and other issues."); Macey & Miller, *supra* note 18, at 22 ("Unfortunately, there is a substantial deviation of interests between attorney and client.").

85. See, e.g., Kevin M. Clermont & John D. Currihan, *Improving on the Contingent Fee*, 63 CORNELL L. REV. 529, 536 (1978) (explaining that the class is best served when its lawyer devotes a

fronting the costs of litigation will tend to make class counsel more risk averse than the client and because the opportunity cost of pursuing new cases might seem greater than additional dollars earned from fighting harder in an existing case.<sup>86</sup> That “sell-out” or “sweetheart” settlement may be in exchange for the certainty of recovery or the defendant’s agreement not to object to an attorney’s fee request.<sup>87</sup>

Morris Ratner argues that the traditional model of class counsel’s incentives accurately reflects the practice in very small firms but not in the larger firms that dominate today’s plaintiffs’ class action bar.<sup>88</sup> Ratner explains that an accurate account of lawyers’ interests must account for firm structure and whether the person managing the litigation will personally bear the risk of funding the litigation, how much control she has over directing firm resources, and how much of her compensation and promotion depends on the success of the case.<sup>89</sup> Under his model, lawyers controlling class action litigation may seek to maximize something other than the class’s well-being because their compensation or reputation may be tied in some measure to the success of the case, but they may be far less risk-averse than is conventionally assumed because they do not individually bear all of the financial risk.<sup>90</sup>

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large number of hours to ensure maximum recovery but that class counsel is better served when she works a smaller number of hours).

86. *Id.* at 543–46 (explaining that a contingency fee creates an incentive for class counsel to shift her time to other matters before the client would wish because of the lawyer’s opportunity cost) Christopher R. Leslie, *A Market-Based Approach to Coupon Settlements in Antitrust and Consumer Class Action Litigation*, 49 UCLA L. REV. 991, 1042 (2002) (“even when a trial would increase the net recovery for class members, class counsel can maximize its rate of return by avoiding trial and settling early” because class counsel fronts litigation costs with no guarantee of recovery).

87. William D. Henderson, *Clear Sailing Agreements: A Special Form of Collusion in Class Action Settlements*, 77 TUL. L. REV. 813, 815 (2003); *see also* Creative Montessori Learning Ctrs. v. Ashford Gear LLC, 662 F.3d 913, 918 (7th Cir. 2011) (“We and other courts have often remarked the incentive of class counsel . . . [to] agree[] with the defendant to recommend that the judge approve a settlement involving a meager recovery for the class but generous compensation for the lawyers . . . .”); *Malchman v. Davis*, 761 F.2d 893, 908 (2d Cir. 1985) (Newman, J., concurring) (“It is unlikely that a defendant will gratuitously accede to the plaintiffs’ request for a ‘clear sailing’ clause without obtaining something in return. That something will normally be at the expense of the plaintiff class.”). Because these “clear-sailing” agreements create the potential for an unholy alliance, they must now be disclosed as part of seeking judicial settlement approval. FED. R. CIV. P. 23(e)(3).

88. *See* Morris Ratner, *A New Model of Plaintiffs’ Class Action Attorneys*, 31 REV. LITIG. 757, 774 (2012) (“[L]arger firms have in fact come to dominate the plaintiffs’ class action bar.”).

89. *Id.* at 783.

90. *Id.* at 790–91.

Other scholars worry that class counsel will file “strike suits”—meritless claims filed just to secure an attorney’s fee.<sup>91</sup> But the usual concern with strike suits is about filing socially inefficient litigation.<sup>92</sup> Strike suits are unlikely to impair the class’s interests in a meaningful way. Any certified class action will extinguish the rights to sue of all individual class members who do not opt out,<sup>93</sup> but these claims are meritless by hypothesis, and thus extinguishing them does not constitute a great loss to the class members. Leaving aside securities cases, there may be some cost to class members to the extent that litigation costs from meritless suits result in higher prices. But that transfer would be difficult to measure and presumably would depend on price elasticity of demand. Moreover, if the strike suit generates small payments to class members, those small payments may offset any price increases. There is more reason for concern about overreach impairing the class’s interests in securities class actions where the concern is that these cases simply impose costs on shareholders without benefit because these shareholders are—at least indirectly—on both sides of the “v.”<sup>94</sup>

## 2. Prosecutors

Similarly, there is reason to think that prosecutors’ self-interest does not perfectly align with their constituents’ interests,<sup>95</sup> and prosecutorial

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91. Rubenstein, *supra* note 11, at 1442 (“[C]lass counsel may do too much, filing meritless cases in the hopes of extracting nuisance fees (a strike suit).”); see also John C. Coffee, Jr., *Accountability and Competition in Securities Class Actions: Why “Exit” Works Better than “Voice”*, 30 CARDOZO L. REV. 407, 410 & n.9 (2008) (explaining the concept of a “strike suit”).

92. See, e.g., Elliott J. Weiss & John S. Beckerman, *Let the Money Do the Monitoring: How Institutional Investors Can Reduce Agency Costs in Securities Class Actions*, 104 YALE L.J. 2053, 2084 (1995) (“Other critics make a similarly disturbing claim: that plaintiffs’ attorneys automatically file frivolous class actions—which they term ‘strike suits’—whenever a public company’s stock declines by more than ten percent during some brief period. This, they argue, has led to an ‘explosion’ of frivolous class action litigation.”).

93. See, e.g., D. Theodore Rave, *When Peace Is Not the Goal of A Class Action Settlement*, 50 GA. L. REV. 475, 477 (2016).

94. See William W. Bratton & Michael L. Wachter, *The Political Economy of Fraud on the Market*, 160 U. PA. L. REV. 69, 100 (2011); John C. Coffee, Jr., *Reforming the Securities Class Action: An Essay on Deterrence and Its Implementation*, 106 COLUM. L. REV. 1534, 1535–36 (2006). But see Barbara Black, *Eliminating Securities Fraud Class Actions Under the Radar*, 2009 COLUM. BUS. L. REV. 802, 812–13 (2009) (refuting pocket-shifting critique).

95. See Schulhofer, *supra* note 63, at 50 (“For prosecutors, day-to-day motivations include numerous considerations different from and often incompatible with the public’s interest in maximum deterrence.”); see, e.g., Kate Levine, *Who Shouldn’t Prosecute the Police*, 101 IOWA L. REV. 1447, 1464–87 (2016) (describing prosecutors’ self-interests in maintaining relationships with police that will prove helpful in future cases but cut against the public’s interest in police-officer

discretion is vast.<sup>96</sup> Prosecutors have career-driven self-interests that favor creating splashy headlines, being viewed as tough on crime, and pleading out cases as quickly and easily as possible.<sup>97</sup> Moreover, because of the nature of their work, prosecutors “ordinarily are naturally aligned with the police and victims.”<sup>98</sup> But because these two groups are only small components of prosecutors’ aggregate clients, these affiliations may exacerbate the disconnect between prosecutors’ actions and the public-client’s best interests.<sup>99</sup> Each of these points warrant more detailed analysis.

The chief prosecutor in most local offices is elected.<sup>100</sup> Her strongest self-interested motivation is to remain in office and then perhaps to use the office as a pathway to higher executive branch office or a judgeship.<sup>101</sup> Thus, she has to be concerned with her reputation and political standing.<sup>102</sup> Perhaps it could be said that just doing her job well would best protect her office, but given the widespread criticisms of prosecutor elections, that seems misguided.<sup>103</sup> Rather, lead prosecutors

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accountability). The focus of this article is on prosecutors’ charging, plea, and other pre-trial decisions where they remain far from the purely adversarial cauldron of trial.

96. See, e.g., Bibas, *supra* note 6, at 959, 963; Frank H. Easterbrook, *Criminal Procedure as a Market System*, 12 J. LEGAL STUD. 289, 300–01 (1983); Richard H. McAdams, *Race and Selective Prosecution: Discovering the Pitfalls of Armstrong*, 73 CHI.-KENT L. REV. 605, 605, 647 (1998) (“Criminal defendants in this country almost never win on claims that prosecutors acted with racially discriminatory purpose in bringing a charge.”).

97. See Green & Zacharias, *supra* note 8, at 857 (“[A]ll prosecutors inevitably have a reputational interest in all their cases . . .”) (emphasis omitted).

98. *Id.* at 863 (emphasis omitted).

99. See *id.* at 866 (“A nonpartisan prosecutor must at least consider the interests of all her constituencies in some fashion, including those of the defendant.”); H. Richard Uviller, *The Neutral Prosecutor: The Obligation of Dispassion in a Passionate Pursuit*, 68 FORDHAM. L. REV. 1695, 1697 (2000) (“Neutrality, I will suggest, puts the prosecutor in the position of advocate for all the people—including the person against whom the evidence has been accumulating.”).

100. Ronald F. Wright, *How Prosecutor Elections Fail Us*, 6 OHIO ST. J. CRIM. L. 581, 589 (2009).

101. Jed Shugerman, *The Prosecutor-Politicians 2* (May 5, 2015) (on file with author) (“[T]he office of prosecutor has become a stepping stone to higher office in America.”); see also Stephanos Bibas, *Plea Bargaining Outside the Shadow of Trial*, 117 HARV. L. REV. 2462, 2472 (2004) (“Prosecutors are particularly concerned about their reputations because they are a politically ambitious bunch.”). I do not mean to imply that remaining in office is necessarily more important to every lead prosecutor than doing justice by her constituents, but rather to explore the import of the conscious or unconscious tug of prosecutors’ self-interests.

102. Stephen J. Schulhofer, *Plea Bargaining as Disaster*, 101 YALE L.J. 1979, 1987 (1992); Schulhofer, *supra* note 63, at 50–51; William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505, 535 (2001) (“District attorneys are likely to seek to manage their offices in ways that win them public support.”).

103. See Schulhofer, *supra* note 102, at 1987. For more on the problems of prosecutor elections, see *infra* section II.B.

have a strong interest in being viewed as tough on crime.<sup>104</sup> That label seems less essential than it did a decade ago,<sup>105</sup> but it is far safer than a contrary label. Accordingly, lead prosecutors best assure their chances of reelection if they ensure a high conviction rate and avoid high-profile losses;<sup>106</sup> these factors are far more immediate and easily measurable than considering whether a prosecutor's office has balanced goals of protecting the public, deterring future wrongdoing, retribution, rehabilitation, restitution, and easing reentry to her constituents' liking.<sup>107</sup> Similarly, locking up a lot of people (in raw numbers and not just proportional to the number charged) also helps support a story about being tough on crime. And the more easily cases are resolved, the more cases prosecutors can bring with the same fixed budget, which creates a strong incentive to favor frequent early plea bargains.<sup>108</sup>

Line prosecutors have their own self-interests.<sup>109</sup> They tend to want their bosses to be reelected because it serves their own employment

104. See Angela J. Davis, *Prosecution and Race: The Power and Privilege of Discretion*, 67 *FORDHAM L. REV.* 13, 61 (1998) ("Like most politicians, prosecutors view 'tough on crime' themes as the most effective tools to assure re-election."); Sara Sun Beale, *What's Law Got to Do With It? The Political, Social, Psychological and Other Non-Legal Factors Influencing the Development of (Federal) Criminal Law*, 1 *BUFF. CRIM. L. REV.* 23, 29 (1997) ("The epithet 'soft on crime' is the contemporary equivalent of 'soft on Communism.'"). Criminal justice interest groups also line up much more heavily on the side of increased punishment. Brown, *supra* note 63, at 330–31.

105. David Alan Sklansky, *Unpacking the Relationship Between Prosecutors and Democracy in the United States* (revised version forthcoming in *PROSECUTORS AND DEMOCRACY: A CROSS NATIONAL STUDY* (Maximo Langer & David Alan Sklansky eds. 2017)) (manuscript at 4), <http://ssrn.com/abstract=2829251> [<https://perma.cc/2EMN-L6BZ>] ("If winning a race for District Attorney by promising less incarceration would have been 'unthinkable in an earlier era,' it is not unthinkable today." (quoting Leon Neyfakh, *How to Run Against a Tough-on-Crime DA—and Win*, *SLATE* (Nov. 12, 2015), [http://www.slate.com/articles/news\\_and\\_politics/crime/2015/11/district\\_attorneys\\_scott\\_colom\\_proves\\_you\\_can\\_run\\_against\\_a\\_tough\\_on\\_crime.html](http://www.slate.com/articles/news_and_politics/crime/2015/11/district_attorneys_scott_colom_proves_you_can_run_against_a_tough_on_crime.html) [<https://perma.cc/3L98-6452>])); see, e.g., Roger A. Fairfax, Jr., *The "Smart on Crime" Prosecutor*, 25 *GEO. J. LEGAL ETHICS* 905 (2012) (describing criminal justice reforms to reduce incarceration, among other ways to save money in the criminal justice system).

106. See Zimmerman & Jaros, *supra* note 67, at 1399 ("Politically ambitious prosecutors may prioritize a rapid resolution and big headlines at the expense of victims' different interests in compensation.").

107. Green & Zacharias, *supra* note 8, at 902–03 ("[T]he public tends to overemphasize the measurable or obvious aspects of what prosecutors do . . ."); Schulhofer, *supra* note 102, at 1987 (explaining why deterrent effects of prosecutors' policies are less powerful to a prosecutor's political standing than the factors mentioned above the line); Schulhofer, *supra* note 63, at 50–51 (same); e.g., N.Y. *PENAL LAW* § 1.05 (McKinney 2017) (describing "successful and productive reentry and reintegration into society" as one component of "insur[ing] the public safety"); see also Justice for All Act of 2004, 18 U.S.C. § 3553(a) (2012) (listing just punishment, deterrence, protection of the public as some of the objectives of criminal sentencing).

108. Brown, *supra* note 49, at 194–207; Stuntz, *supra* note 102, at 536–37.

109. See Bibas, *supra* note 6, at 996 ("Line prosecutors, however, also serve their own strong self-interests in racking up marketable win-loss records, making names for themselves, and

prospects,<sup>110</sup> which makes their elected boss an important person to placate. But electoral pressures do not carry as much weight for line prosecutors as for lead prosecutors.<sup>111</sup> Line prosecutors may also be looking to secure a position in private practice later and thus are best served to be viewed as tough prosecutors with high conviction rates, though they might be more willing than their bosses to try cases to gain trial experience.<sup>112</sup> That said, trying cases that have a substantial risk of losing unnecessarily jeopardizes the prosecutor’s reputation for purposes of seeking a promotion or private-sector employment.<sup>113</sup> Moreover, prosecutors naturally have reason to want to lighten their workloads,<sup>114</sup> which tends to favor quick pleas rather than trials.<sup>115</sup> Thus, other than a

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lightening their own workloads.”); Schulhofer, *supra* note 63, at 51 (“[U]nderlying the agency problems between chief prosecutor and the public is an additional layer of agency problems between the chief and his assistants.”).

110. See Stephanos Bibas, *The Need for Prosecutorial Discretion*, 19 TEMP. POL. & CIV. RTS. L. REV. 369, 373–74 (2010) (explaining that lead prosecutors might fire line prosecutors who damage their reelection prospects); Gold, *supra* note 3, at 73 & n.21; Stuntz, *supra* note 102, at 535 (“To some degree, line prosecutors will seek to [maximize political support] too, because that is their bosses’ goal, and they must satisfy their bosses in order to keep their jobs.”).

111. See Green & Zacharias, *supra* note 46, at 202–03 (“The chief prosecutor may be influenced by an illegitimate self-interest in reelection or political advancement in those situations where lower-level prosecutors would be less affected by those interests.”); Schulhofer, *supra* note 102, at 1987 (“Front-line prosecutors who actually negotiate plea agreements may or may not share the District Attorney’s desire to enhance the office’s political stature.”).

112. See Bibas, *supra* note 6, at 961–62 (“They are tempted to try a few strong or high-profile cases to gain marketable experience while striking hurried plea bargains in most other cases.”); Stephanos Bibas, *Rewarding Prosecutors for Performance*, 6 OHIO ST. J. CRIM. L. 441, 443 (2009) (line prosecutors “also would like to gain trial experience and to feel the thrill of the chase”); Richard T. Boylan & Cheryl X. Long, *Salaries, Plea Rates, and the Career Objectives of Federal Prosecutors*, 48 J.L. & ECON. 627, 629 (2005) (explaining that data regarding future career opportunities of federal prosecutors supports the notion that people choose to be Assistant United States Attorneys to gain trial experience); Ronald F. Wright & Marc L. Miller, *The Worldwide Accountability Deficit for Prosecutors*, 67 WASH. & LEE L. REV. 1587, 1602 (2010) (“In the United States, by contrast, it is more common for new prosecutors to leave the office after a few years for other (often more lucrative) positions, either in criminal defense or in civil litigation.”).

113. See Stephanos Bibas, *Transparency and Participation in Criminal Procedure*, 81 N.Y.U. L. REV. 911, 921–22 (2006) (“Plea bargains guarantee certainty of conviction and punishment. In exchange for certainty, risk-averse prosecutors sacrifice severity to avoid possible acquittals that could embarrass them and hurt their career prospects.”); Bibas, *supra* note 6, at 996 (“Line prosecutors, however, also serve their own strong self-interests in racking up marketable win-loss records . . .”).

114. See Stuntz, *supra* note 102, at 535 (“Like most of us, line prosecutors are likely to seek to make their jobs easier, to reduce or limit their workload where possible.”).

115. Bibas, *supra* note 6, at 961–62; see also Bibas, *Transparency and Participation in Criminal Procedure*, *supra* note 113, at 913 (“While they may share the public’s intuitions about justice and retribution, they also have self-interests in disposing of large caseloads quickly, reducing their own workloads, rewarding cooperative behavior, and ensuring certainty of conviction and sentence at the

slightly more risk-seeking approach to trying cases, line prosecutors' interests tend to bear substantial similarity to lead prosecutors' interests in keeping conviction numbers and rates high.

These pressures for both lead and line prosecutors cut in favor of resolving the vast majority of cases through quick plea bargains using whatever powerful leverage is available to garner that result. Such an approach tends to cut against the public's interest in fair procedures for defendants<sup>116</sup> and may impose substantial hidden costs on the public fisc such as incarceration costs.<sup>117</sup>

The accountability story is somewhat different for federal prosecutors. They are politically checked by being accountable to an elected president, but that check is far more distant than in state offices where the elected official is much closer on the organizational chart. Thus, the political pressures to keep conviction stats high are less potent, at least to appease their current bosses. But federal prosecutors tend to be a particularly ambitious group of people who may use the office as a launching pad.<sup>118</sup> Preserving a perception of toughness helps.

For state and federal prosecutors alike, civil forfeiture creates financial self-interest for prosecutors, albeit not as direct of a financial incentive as for some class action lawyers.<sup>119</sup> Federal law provides for wide-reaching forfeiture of assets related to a crime in some manner.<sup>120</sup>

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cost of severity."); Brown, *supra* note 49, at 194 (describing several possible uses of efficiency improvements such as faster and more prevalent plea bargaining).

116. Gold, *supra* note 33, at 1643–44 (arguing that the minister of justice duty includes protecting citizens' constitutional rights); Green, *supra* note 40, at 634 (minister of justice duty means "avoiding punishment of those who are innocent of criminal wrongdoing . . . and affording the accused, and others, a lawful, fair process"); MODEL RULES OF PROF'L CONDUCT r. 3.8 cmt. 1 (AM. BAR ASS'N 1983) (explaining that prosecutors have a "specific obligations to see that the defendant is accorded procedural justice").

117. Gold, *supra* note 3, at 80–82 (explaining that costs such as incarceration are not publicly transparent).

118. See *supra* note 101.

119. See Margaret H. Lemos & Max Minzner, *For-Profit Public Enforcement*, 127 HARV. L. REV. 853, 863 (2014) ("It is true that public enforcers do not profit from successful litigation in the sense of taking home a percentage of awards, as private lawyers might. Nevertheless, the institutional structures in which many public enforcers work provide ample incentives for salaried government employees to prioritize and maximize financial recoveries.").

120. See Anti-Drug Abuse Act of 1986, 18 U.S.C. § 981(a)(1) (2012) (listing a substantial number of crimes that can trigger forfeiture of assets with some relationship to the crime including offenses such as making false statements, mail fraud, and altering or removing motor vehicle identification numbers); Eric Blumenson & Eva Nilsen, *Policing for Profit: The Drug War's Hidden Economic Agenda*, 65 U. CHI. L. REV. 35, 45–50 (1998). Congress recently expanded the list to encompass human trafficking. See Justice for Victims of Trafficking Act of 2015, Pub. L. No. 114-22, § 105(b), 129 Stat. 227, 237 (2015).

Forfeited proceeds at the federal level go into a Department of Justice Asset Forfeiture Fund that is then allocated for the DOJ’s use in numerous ways.<sup>121</sup> In such a scheme, the DOJ naturally has an incentive to maximize forfeitures to aggrandize its budget.<sup>122</sup> Encouraging forfeiture was why Congress allowed the DOJ to keep its proceeds.<sup>123</sup> Individual prosecutors share this institutional incentive to increase forfeiture for a couple of reasons.<sup>124</sup> First, if DOJ directives encourage more forfeitures to bolster the agency’s budget,<sup>125</sup> individual prosecutors’ performance evaluations and job retention may be based at least in part on how effectively they secure forfeited assets.<sup>126</sup> Second, the agency’s reputation may be bolstered by substantial forfeiture numbers,<sup>127</sup> and employees prefer to work for organizations with strong reputations.<sup>128</sup> States can pursue their own forfeitures but have

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121. See Criminal Law and Procedure Technical Amendments Act of 1986, 28 U.S.C. § 524(c)(1) (2012) (listing wide range of authorized uses for forfeited funds).

122. See Blumenson & Nilsen, *supra* note 120, at 56 (“The most intuitively obvious problem presented by the forfeiture and equitable sharing laws is the conflict of interest created when law enforcement agencies are authorized to keep the assets they seize. It takes no special sophistication to recognize that this incentive constitutes a compelling invitation to police departments to stray from legitimate law enforcement goals in order to maximize funding for their operations.”).

123. Lemos & Minzner, *supra* note 119, at 868 (citing S. REP. NO. 98-225, at 191 (1983)).

124. *Id.* at 895 (“Our theory suggests that, in many cases, the individuals responsible for public enforcement will share their employers’ institutional interest in building the agencies’ budget or the agencies’ reputation through financial penalties.”).

125. See Blumenson & Nilsen, *supra* note 120, at 63 (DOJ “has regularly exhorted its attorneys to make ‘every effort’ to increase ‘forfeiture production’ so as to avoid budget shortfalls”).

126. See Barry L. Johnson, *Purging the Cruel and Unusual: The Autonomous Excessive Fines Clause and Desert-Based Constitutional Limits on Forfeiture After United States v. Bajakajian*, 2000 U. ILL. L. REV. 461, 509–10 (2000) (“[T]o the extent that policymakers in the Justice Department and in Congress view the quantity of forfeited assets as an indicator of prosecutorial effectiveness, lower-ranking officials have a powerful incentive to pursue forfeiture aggressively.”). For similar metrics in police departments, see Blumenson & Nilsen, *supra* note 120, at 65 (“[W]hen a police department relies on a steady stream of forfeiture income to pay for its operations, as many now do, an officer’s choice of who and what to target may mean the difference between a paycheck and a pink slip.”).

127. Lemos & Minzner, *supra* note 119, at 856–57, 875 (“Agencies that reap large financial recoveries can develop reputations as strong and effective enforcers . . .”); see also *id.* at 857 (“Money has two significant advantages over other forms of relief: it is easy to understand and easy to quantify and compare. An agency can easily trumpet a ‘record’ financial judgment. It is far more difficult for public enforcers to convey the importance or the scale of injunctive remedies.”); *id.* at 880 (pointing to “agencies commonly seek[ing] press coverage based on the large size of their financial enforcement judgments” as evidence that they believe these figures enhance their reputations).

128. See TOM R. TYLER & STEVEN L. BLADER, COOPERATION IN GROUPS: PROCEDURAL JUSTICE, SOCIAL IDENTITY, AND BEHAVIORAL ENGAGEMENT 144 (2000) (“people’s views of themselves are linked to their views about the status of the groups to which they belong”); *id.* at 151



frequently relied on the federal government's (now suspended) "equitable sharing" program whereby the federal government "adopts" the seizure as a federal forfeiture and gives the state back approximately eighty percent of the value to be used for law enforcement purposes.<sup>129</sup> These financial incentives are likely to skew enforcement priorities toward forfeitable assets, and there is no reason to think that cases with the most forfeitable assets will necessarily align with the public's enforcement interests.<sup>130</sup>

Prosecutors also face cognitive biases that skew their decisionmaking in ways that do not necessarily serve their clients' interests well.<sup>131</sup> These cognitive biases are exacerbated by the amorphous nature of prosecutors' "do justice" mandate.<sup>132</sup> And their biases will tend to skew toward those with whom they are naturally aligned: police and victims.<sup>133</sup>

This discussion is not meant to suggest that prosecutors are solely self-interested rational actors who pursue only these objectives without any consideration for the public interest.<sup>134</sup> To the contrary, my sense is that most people who become prosecutors do so to serve the public.<sup>135</sup>

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("Membership in a high-status group leads to a more favorable social identity and to higher feelings of self-esteem and self-worth.").

129. Blumenson & Nilsen, *supra* note 120, at 50–51; *see also id.* at 54 ("The profit and ease of federal adoption has led to widespread circumvention of stricter state forfeiture laws."); Letter from M. Kendall Day, Chief, Asset Forfeiture and Money Laundering Section, Criminal Division, U.S. Dept. of Justice (Dec. 21, 2015) (describing decision to "defer[] equitable sharing payments" to address \$1.2 billion reduction in appropriation for asset forfeiture), <http://www.theiacp.org/portals/0/documents/pdfs/RescissionImpactonEquitableSharing122115.pdf> [<https://perma.cc/BXR3-HMY8>].

130. MICHELLE ALEXANDER, *THE NEW JIM CROW* 78–80 (2010).

131. *See, e.g.,* Alafair S. Burke, *Improving Prosecutorial Decision Making: Some Lessons of Cognitive Science*, 47 WM. & MARY L. REV. 1587 (2006); Keith A. Findley & Michael S. Scott, *The Multiple Dimensions of Tunnel Vision in Criminal Cases*, 2006 WIS. L. REV. 291 (2006).

132. *See* Andrew M. Perlman, *A Behavioral Theory of Legal Ethics*, 90 IND. L.J. 1639, 1660–61 (2015) (explaining that unclear facts or law amplify cognitive biases related to partisanship).

133. Green & Zacharias, *supra* note 8, at 863; Levine, *supra* note 95, at 1464–77 (describing prosecutors' self-interests in placating police because prosecutors need those same police offices to win future cases).

134. *See* Samuel W. Buell, *The Upside of Overbreadth*, 83 N.Y.U. L. REV. 1491, 1516 (2008) ("Prosecutors may maximize things other than their own wealth.").

135. *Id.*; Bibas, *supra* note 112, at 443 ("If they were driven only by short-term monetary considerations, most would have chosen more lucrative private-sector options. Many public-spirited prosecutors want to do justice and serve as officers of the court . . ."); Wright & Miller, *supra* note 112, at 1589 ("Prosecutors in many countries, including American prosecutors, pay careful attention to the power that goes with their everyday decisions . . . Most prosecutors, in our experience, are conscientious public servants."). Scholars treat class counsel's motivations, at least in damages class actions, as solely those of rational profit-maximizers. *See, e.g.,* Coffee, *supra* note 3, at 677–84;

Rather, the claim is that prosecutors’ self-interests play some role, even if unintentional, in their broad discretionary decisionmaking that may skew their decisions away from their public-clients’ best interests.<sup>136</sup>

Although the sources of their self-interest are different, there is reason to be concerned about lawyer self-interest and faithfulness to the clients’ interests for both class counsel and prosecutors.

#### D. *Who Cares About the Customers?*<sup>137</sup>

If the lawyer, rather than the client, has to make the critical decisions in “clientless” litigation, why not just let the lawyer do what she wants and ignore whether those decisions protect the client’s interests? For legal ethicists, one answer is simply that lawyers are fiduciaries who should do the best they can by their clients even when the clients are not looking over their shoulders. But for those who do not share that normative commitment, there are particular reasons in both prosecution and class actions that make it important for lawyers to remain faithful to their clients’ interests.

In criminal law, prosecutors are delegated the sovereign power to determine who should be deprived of their liberty by choosing some or all of the crimes listed on the broad and deep menu of charges that could be levied against countless people.<sup>138</sup> Leaving extensive sovereign power over citizens’ liberty to be exercised in whatever way an individual prosecutor sees fit without meaningful checks on that authority is troubling in a society undergirded by popular sovereignty.<sup>139</sup>

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Macey & Miller, *supra* note 18, at 7–27. That seems reasonable in many but not all instances, though a more detailed exploration of that notion is beyond the scope of this article.

136. See Bibas, *supra* note 112, at 443 (“I do not mean to suggest that prosecutors are money-grubbing materialists who care only for the bottom line. . . . Nevertheless, economic considerations cannot help but influence people, at least at the margins. Prosecutors, like everyone else, have ordinary, human, material desires as well as civic-minded zeal.”).

137. Cf. CLERKS (View Askew Productions 1994) (“This job would be great if it wasn’t for the [expletive] customers.”).

138. See Austin Sarat & Conor Clarke, *Beyond Discretion: Prosecution, the Logic of Sovereignty, and the Limits of Law*, 33 L. & SOC. INQUIRY 387, 391, 410–11 (2008) (“Decisions of prosecutors are quintessentially sovereign acts in that they are moments when officials can decide who shall be removed from the purview of the law.”); Julie R. O’Sullivan, *The Federal Criminal “Code” is a Disgrace: Obstruction Statutes as a Case Study*, 96 J. CRIM. L. & CRIMINOLOGY 643, 646 (2006) (noting “prosecutors’ vast discretion in selecting among elastic and redundant code provisions”); William J. Stuntz, *Plea Bargaining and Criminal Law’s Disappearing Shadow*, 117 HARV. L. REV. 2548, 2549, 2560–62 (2004) (analogizing modern criminal codes to a menu off of which a prosecutor may order).

139. Gold, *supra* note 3, at 84–87.

The modern class action system depends on the mutual understanding that the defendant and absent class members who do not opt out of the litigation will be bound by the judgment. For the defendant, the knowledge that preclusion will follow makes class actions an appealing way to resolve mass disputes.<sup>140</sup> Due process prevents people from being bound by litigation to which they were not a party except in a few narrow instances,<sup>141</sup> such as a properly conducted class action in which that person's interests are adequately represented.<sup>142</sup> Thus, ensuring class counsel's fidelity to the class-client enables class actions to preclude individual claims consistent with due process.<sup>143</sup>

## II. MONITORING AGENTS

To keep these lawyers tethered to their clients' interests even though the diffuse clients cannot do so themselves, both systems employ some monitoring scheme. But that is where the similarities end.

Part I explained that both class counsel and prosecutors are self-interested lawyers with diffuse clients comprised of individuals whose interests are amorphous and divergent. In each situation, because the client's interests are diffuse, there is no reason to expect that the principal can monitor the agents directly. To address the potential disconnect between the lawyer's actions and the client's interests in this scenario, the typical approach is to look for a "superagent"<sup>144</sup> to monitor the lawyer. And class action law uses superagents within the principal group and a third-party superagent in the form of a judge, albeit not with equal weight.<sup>145</sup> Interestingly, however, the approach to finding a superagent to monitor agency costs or indeed whether superagency is the

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140. See Richard A. Nagareda, *Administering Adequacy in Class Representation*, 82 TEX. L. REV. 287, 289 (2003) ("finality is what the settling defendant seeks to purchase in the transaction"); Rave, *supra* note 77, at 1193–95 (explaining benefits to defendants of broad peace gained from aggregate litigation).

141. *Hansberry v. Lee*, 311 U.S. 32, 44–46 (1940).

142. *Taylor v. Sturgell*, 553 U.S. 880, 894 (2008); *Hansberry*, 311 U.S. at 44–46.

143. See, e.g., Bone, *supra* note 77, at 671 ("[Rule 23(a)(4)] tracks the Supreme Court's pivotal decision in *Hansberry v. Lee*, holding that due process of law is satisfied if the interests of absentees are adequately represented."); Elizabeth Chamblee Burch, *Adequately Representing Groups*, 81 FORDHAM L. REV. 3043, 3043 (2013) (describing "[a]dequate representation and preclusion" as "the yin and yang of procedural due process"). This notion of adequate representation has been the driving force behind the Supreme Court's most important class action cases of the past two decades. Issacharoff, *supra* note 6, at 578.

144. The term "superagent" was coined in Samuel Issacharoff & Daniel R. Ortiz, *Governing Through Intermediaries*, 85 VA. L. REV. 1627 (1999).

145. Issacharoff, *supra* note 7, at 3177–80.

right approach diverges significantly between the two systems. And that divergence offers interesting lessons that each system can learn from the other.

Class actions rely primarily on judicial review to ensure class counsel’s faithfulness to the class-client, informed by the potential input of members of the class-client.<sup>146</sup> Criminal law shares the idea of input from members of the client group by affording rights to victims, but it turns largely to elections as a means of monitoring prosecutors and forswears nearly all judicial review of prosecutors’ core decisions regarding charging or plea negotiation.<sup>147</sup> In so doing, criminal law uses a theoretically interesting mechanism of aggregation to evade the apathy that voters feel as to particular cases in which they are neither a victim nor a defendant and that do not draw significant media attention. This mechanism does not work in practice, however, because of the massive informational deficits that afflict prosecutor elections.<sup>148</sup> Accordingly, criminal law scholars such as Rachel Barkow have looked to a different source for a superagent: others in the agent’s organization.<sup>149</sup> Barkow argues that structuring offices so that prosecutors check their colleagues improves accountability.<sup>150</sup>

#### A. *Class Actions*

To address the potential disconnect between lawyers’ actions and their clients’ interests in light of the widely recognized apathy of class members, class action law relies heavily on judicial review.<sup>151</sup> If a damages class action is not resolved in the defendant’s favor on a

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146. FED. R. CIV. P. 23; *Reynolds v. Beneficial Nat’l Bank*, 288 F.3d 277, 279–80 (7th Cir. 2002) (describing the judge as a fiduciary for the class members); *see also* Issacharoff, *supra* note 7, at 3174 (“[T]he right of participation is directed not at the collective process of group decision making but at the court, the arbiter of outcomes more than process as such.”).

147. *E.g.*, *Wayte v. United States*, 470 U.S. 598, 607 (1985).

148. *Supra* section II.B.

149. Barkow, *supra* note 14, at 895–911.

150. *Id.* at 895–906.

151. John C. Coffee, Jr., *The Regulation of Entrepreneurial Litigation: Balancing Fairness and Efficiency in the Large Class Action*, 54 U. CHI. L. REV. 877, 884 (1987) (“The members of the plaintiff class usually have very little capacity to monitor their agents.”); Nagareda, *supra* note 80, at 902 (“The idea is that judicial review may substitute for the direct monitoring of counsel by the client, as is typical in traditional litigation on behalf of an individual plaintiff.”); Jonathan R. Macey & Geoffrey P. Miller, *Judicial Review of Class Action Settlements*, 1 J. LEGAL ANALYSIS 167, 167 (2009) (“Judicial scrutiny over settlements is the most important safeguard against inadequate or conflicted representation by class counsel.”).

procedural motion but a class is certified, it will typically settle.<sup>152</sup> Class settlements can be approved only if a judge determines that the procedural requirements for class certification are satisfied<sup>153</sup> and substantively that the settlement is “fair, reasonable, and adequate” after a hearing.<sup>154</sup> Some of these procedural requirements, though malleable, are meant to protect the rights of the absent class members. A class cannot be certified if the claims or defenses of the putative class representatives do not align well with those of the absent class members,<sup>155</sup> a requirement that seeks to ensure that flaws in the class representatives’ claims are not held against the absent class members.<sup>156</sup> A class cannot be certified if its members have intractable conflicts of interest.<sup>157</sup> A class cannot be certified unless the court finds that class counsel will “fairly and adequately represent the interests of the class.”<sup>158</sup> Further, a class cannot be certified unless the number of claimants is sufficiently numerous that individual joinder is impracticable.<sup>159</sup>

Several mechanisms allow subsets of the client to articulate their views, but these processes are structured to inform judicial monitoring of class counsel rather than as direct first-party monitoring mechanisms. Class members are entitled to notice of proposed class certification and

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152. See Brian T. Fitzpatrick, *An Empirical Study of Class Action Settlements and Their Fee Awards*, 7 J. EMPIRICAL LEGAL STUD. 811, 812 (2010).

153. See *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 620–21 (1997) (requiring that certification of class action for purposes of settlement meet the same standards as certification of class action for litigation purposes); FED. R. CIV. P. 23(a)–(b).

154. FED. R. CIV. P. 23(e)(2). Courts have expounded on these factors in a variety of different ways, and the advisory committee has proposed a rule change to focus courts’ attention on the most important of these considerations. See Memorandum from Hon. John D. Bates, Chair, Advisory Committee on Civil Rules to Hon. Jeffrey S. Sutton, Chair, Committee on Rules of Practice and Procedure 3 (May 12, 2016), in *Advisory Committee on Civil Rules, Agenda Book, July 2016* at 253, <http://www.uscourts.gov/rules-policies/archives/agenda-books/committee-rules-practice-and-procedure-june-2016> [<https://perma.cc/7AJ8-9VPE>].

155. FED. R. CIV. P. 23(a)(3).

156. See, e.g., 7A CHARLES ALAN WRIGHT ET AL., *FED. PRAC. & PROC. CIV.* § 1764 (3d ed. 2016) (“Rule 23(a)(3) assures that the claims of the named plaintiffs are similar enough to the claims of the class so that the representative will adequately represent them.”).

157. FED. R. CIV. P. 23(a)(4); *Amchem*, 521 U.S. at 625.

158. FED. R. CIV. P. 23(g)(4); see also *id.* at 23(g)(1) (requiring the court to appoint class counsel).

159. *Id.* at 23(a)(1). There are other procedural hurdles to class certification, but they largely serve to protect judicial economy or the defendant’s interest in finality. See *id.* at 23(a)(2) (commonality); *id.* at (b)(3) (predominance and superiority).

any settlement.<sup>160</sup> They may challenge the propriety of class certification or object to the fairness of a settlement and seek to dissuade judicial approval.<sup>161</sup> Class members may also opt out of the litigation,<sup>162</sup> and courts typically view large numbers of opt-outs as a red flag about a settlement.<sup>163</sup> Named plaintiffs play a titular role in the case but typically—like every other class member—have an insufficient stake in its outcome to monitor class counsel.<sup>164</sup>

Congress has tacked on a few more procedures in securities cases in hopes of enlisting an interested victim to monitor her own lawyer but again subject ultimately to judicial monitoring. The Court is required to appoint the “most adequate plaintiff” as lead plaintiff to represent the class.<sup>165</sup> The most adequate plaintiff then selects class counsel, subject to judicial approval.<sup>166</sup> This process seeks to enlist a named plaintiff that will meaningfully monitor its lawyer, though its success has been roundly criticized.<sup>167</sup> In securities cases, the notice required for class members about a proposed settlement must include a summary that discloses the key terms.<sup>168</sup> This requirement allows for a somewhat better opportunity for absent class members to understand the terms of the proposed deal and thus informs the exercise of objection and opt-out rights.

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160. *Id.* 23(c)(2)(B), (e)(1). Notice requirements are different for other types of class actions, but this article focuses on Rule 23(b)(3) damages class actions.

161. *Id.* 23(e)(5).

162. *Id.* 23(c)(2)(B)(v); see also Theodore Eisenberg & Geoffrey Miller, *The Role of Opt-Outs and Objectors in Class Action Litigation: Theoretical and Empirical Issues*, 57 VAND. L. REV. 1529, 1536 (2004) (explaining that the rights to opt out and object are typically seen as a check on class counsel).

163. Eisenberg & Miller, *supra* note 162, at 1537.

164. Leslie, *supra* note 86, at 1046 (“Neither does the named plaintiff serve as an adequate check against self-dealing by class counsel.”); Macey & Miller, *supra* note 18, at 5 (“The named plaintiff does little—indeed, usually does nothing—to monitor the attorney in order to ensure that representation is competent and zealous . . .”).

165. Private Securities Litigation Reform Act of 1995, 15 U.S.C. § 78u-4(a)(3)(B)(i) (2012).

166. *Id.* § 78u-4(a)(3)(B)(v).

167. See, e.g., THIRD CIRCUIT TASK FORCE REPORT, *supra* note 24, at 415 (“[I]t is the exceptional class action (not the rule) to find a lead plaintiff who has suffered a loss that would financially support an individual suit, yet who prefers to prosecute a class action, taking on fiduciary duties to others and incurring the delay and expense of all the attendant procedures.”); see also *id.* (“The party who lost the most is not by that fact always the best party to control the case and control the lawyers.”); Cox et. al., *supra* note 24, at 1602 (“[F]ew financial institutions seek to so involve themselves, presumably because they do not see that the rewards of doing so are sufficient to offset the cost of becoming involved.”).

168. 15 U.S.C. § 78u-4(a)(7).

Congress also sought to enlist executive branch officials to object to unfair settlements on their constituents' behalf, but it did so only as a means of informing judicial supervision.<sup>169</sup> For that reason, the parties must notify relevant state and federal executive branch officials of the terms of a class settlement in federal court.<sup>170</sup>

Relying on judges informed through various sources is a reasonably good option given the choices. But it certainly is not perfect. Class settlement review suffers from several structural defects. American judges are used to resolving disputes based on adversarial briefing,<sup>171</sup> and when a settlement is presented for review the attorneys have an incentive to gloss over any weaknesses in either the class's ability to satisfy the Rule 23 prerequisites of numerosity, commonality, typicality, adequacy, predominance, superiority, or the substantive fairness of the settlement.<sup>172</sup> Objectors can help raise valid concerns, but objectors are not always present and may be driven by their lawyers' financial motivation to obstruct settlement rather than by a principled objection. Despite efforts to provide information to judges, they nonetheless face "a remarkable informational deficit."<sup>173</sup> Judges also have self-interest in approving settlements to clear complicated cases off their dockets.<sup>174</sup> And judges are conditioned in non-class contexts to view negotiated resolutions of disputes as preferable to litigated ones.<sup>175</sup> Courts repeat this same pro-settlement rhetoric when approving class settlements.<sup>176</sup>

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169. Class Action Fairness Act of 2005, 28 U.S.C. § 1715(b) (2012); see Issacharoff, *supra* note 7, at 3179 (explaining intended effect of CAFA notice provision); Alexandra D. Lahav, *Two Views of the Class Action*, 79 *FORDHAM L. REV.* 1939, 1952 (2011) (same).

170. 28 U.S.C. § 1715(b).

171. Rubenstein, *supra* note 11, at 1472.

172. See Macey & Miller, *supra* note 18, at 46.

173. Rubenstein, *supra* note 11, at 1445; accord Issacharoff, *supra* note 18, at 808 ("Perhaps in no other context do we find courts entering binding decrees with such a complete lack of access to quality information and so completely dependent on the parties who have the most to gain from favorable court action.").

174. See Issacharoff, *supra* note 18, at 829; Macey & Miller, *supra* note 18, at 45–46; Nagareda, *supra* note 80, at 968; Rubenstein, *supra* note 11, at 1445.

175. Macey & Miller, *supra* note 18, at 46.

176. See, e.g., *Linney v. Cellular Alaska P'ship*, 151 F.3d 1234, 1238 (9th Cir. 1998) (discussing "strong judicial policy that favors settlements, particularly where complex class action litigation is concerned"); *In re PaineWebber Ltd. P'ships Litig.*, 147 F.3d 132, 138 (2d Cir. 1998) (describing a "strong judicial policy in favor of settlements, particularly in the class action context"); *Murillo v. Tex. A&M Univ. Sys.*, 921 F. Supp. 443, 445 (S.D. Tex. 1996) ("Settlements in class action cases are encouraged and favored."); see also Robin Effron, *Co-Management and Co-Interpretation: Reconceptualizing the Dynamics of Judges and Litigants in the Execution and Application of Procedural Rules* (Jan. 10, 2017) (unpublished manuscript) (on file with author) (arguing that courts

## B. Prosecution

In criminal prosecution, there are no effective case-by-case monitoring mechanisms to facilitate review by anyone outside the prosecutors' office over the vast majority of prosecutors' decisions.<sup>177</sup> Rather, the primary formal accountability mechanism is the ballot box: most state and local lead prosecutors typically must stand for election every few years.<sup>178</sup> The electoral check operates on lead prosecutors, and administrative processes within the office check agency costs down the line.<sup>179</sup> For federal prosecutors, the primary accountability mechanism ties back somewhat detachedly through the administrative state to the elected President.<sup>180</sup> Or at least, that is how the theory goes.<sup>181</sup> Although aggregating voters' concerns in periodic election is a theoretically interesting approach to evade the apathy problem, the political check on elected prosecutors does not work well because voters lack sufficient information about their prosecutors' enforcement priorities.<sup>182</sup> Because of the ineffectiveness of the electoral check, scholars have urged internal review processes for prosecutors to provide meaningful input and check each other.<sup>183</sup> These are useful in combatting predictable cognitive biases, but they cannot avoid the problem of prosecutor self-interest in career protection or career advancement.

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defer to parties' assessment of settlement fairness in class actions because of their inclinations to defer to private procedural ordering more broadly).

177. Petit and grand juries do not perform this function well. *See infra* text accompanying notes 200–11.

178. *See, e.g.,* Wright, *supra* note 100, at 581 (“[T]he public guards against abusive prosecutors through direct democratic control. In the United States, we typically hold prosecutors accountable for their discretionary choices by asking the lead prosecutor to stand for election from time to time.”); *id.* at 589 (explaining that the vast majority of lead state and local prosecutors are elected).

179. *Id.* at 581. The actual structure of prosecutors' offices varies significantly, including by how hierarchical they are. Levine & Wright, *supra* note 14, at 1123.

180. *See* Green & Zacharias, *supra* note 46, at 190 (explaining that the distribution of authority within the DOJ constrains discretion through supervisory oversight).

181. *See* Wright, *supra* note 100, at 582 (“There are reasons to believe that elections could lead prosecutors to apply the criminal law according to public priorities and values . . . . Yet the reality of prosecutor elections is not so encouraging.”); Wright & Miller, *supra* note 112, at 1606 (“In theory, electoral control of prosecutors in the United States takes its most powerful form: Local control.”).

182. Bibas, *supra* note 6, at 987 (“Because elections are not driven by accurate general assessments of incumbents' performance, they do not solve the principal-agent problem.”); Gold, *supra* note 3, at 78–79 (describing political check as ineffective because of voters' lack of information); Wright, *supra* note 9, at 593 (“[A]ny observer of prosecutor elections would have to conclude that they do a poor job.”); Wright, *supra* note 100, at 582 (“[T]he reality of prosecutor elections is not so encouraging.”); *see also* Barkow, *supra* note 14, at 871 (“[Prosecutors] have the authority to take away liberty, yet they are often the final judges in their own cases.”).

183. *See, e.g.,* Barkow, *supra* note 14, at 895–906; Bibas, *supra* note 6, at 996–1015.



The primary external accountability mechanism—prosecutor elections—very rarely create meaningful accountability.<sup>184</sup> Prosecutorial races are rarely contested: about eighty-five percent of prosecutor incumbents run unopposed.<sup>185</sup> And incumbents who run are reelected ninety-five percent of the time.<sup>186</sup> Widespread reelection and lack of opposition could mean that ninety-five percent of prosecutors are doing just as their constituents would wish. But I am skeptical. The vote share that prosecutors receive does not correlate with either crime rates or performance metrics.<sup>187</sup>

Voters lack meaningful information about their prosecutors' performance or their priorities in criminal law enforcement in the vast majority of instances. Accordingly, neither reelection nor lack of electoral opposition indicate meaningful alignment of priorities between prosecutors and their constituents.<sup>188</sup> Potential challengers also lack information about the incumbent's performance,<sup>189</sup> so the lack of opposition is hardly surprising. That lack of opposition in turn results in the public having even less information because elections are when candidates must make their cases to voters, albeit often in soundbite form.<sup>190</sup> For these reasons, it is hard to see prosecutor elections as a meaningful tool to promote democratic accountability in most instances. Indeed, even when there is electoral competition, prosecutor election campaigns nonetheless fail to facilitate a genuine assessment by the

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184. See Bibas, *supra* note 6, at 987; Bruce A. Green & Alafair S. Burke, *The Community Prosecutor: Questions of Professional Discretion*, 47 WAKE FOREST L. REV. 285, 315 (2012) (“As scholars have previously noted, prosecutorial transparency increases public confidence in prosecutors and courts and enhances the legitimacy of the criminal justice system. Public elections of prosecutors would be more reliable if the public were better informed about prosecutorial policies and discretionary decision making.”).

185. Wright, *supra* note 100, at 593; Wright & Miller, *supra* note 112, at 1606.

186. Wright, *supra* note 100, at 592; Wright & Miller, *supra* note 112, at 1606. *But cf.* David Alan Sklansky, *The Changing Political Landscape for Elected Prosecutors*, 14 OHIO ST. J. CRIM. L. (forthcoming 2017) (manuscript at 4–17) (on file with author) (analyzing a few recent, albeit rare instances of incumbent prosecutors losing elections).

187. David Schleicher & Elina Treyger, *The Case Against the DA 40–54* (Sept. 30, 2016) (unpublished manuscript) (on file with author).

188. Bibas, *supra* note 6, at 983 (“Though in theory prosecutors serve the public interest, the public cannot monitor whether they are in fact serving the public well . . . Members of the public have sparse and unreliable information about how well prosecutors perform.”); Gold, *supra* note 3, at 78–79; *see also* Cassidy, *supra* note 3, at 1018 (“Prosecutors in the United States earn very low grades for any kind of transparency, internal or external.”).

189. *See* Gold, *supra* note 3 (proposing mandatory disclosures of information to enable meaningfully-contested prosecutor elections).

190. *Cf.* Issacharoff, *supra* note 7, at 3170 (explaining that Schumpeterian account of democracy “necessarily entailed a competition for office by political elites”).

voters of prosecutors’ preferences and policies because of the information deficit.<sup>191</sup> Instead of a vigorous debate about enforcement priorities or ideological differences, campaigns dwell on the outcome of a few high visibility cases,<sup>192</sup> generic claims about personal integrity,<sup>193</sup> competence,<sup>194</sup> and conviction rates.<sup>195</sup> They rarely involve discussions of office priorities, even in the simplified traditional election discourse. Accordingly, even though the vast majority of lead prosecutors in America are directly elected, those elections do not provide a meaningful check on prosecutors.

Input from victims provides a sort of monitoring by a small sub-group of the principal.<sup>196</sup> Just as class members are entitled to notice and the right to be heard,<sup>197</sup> so too are crime victims.<sup>198</sup> But as with class members, victim input is simply meant to inform the lawyer’s or judge’s decision rather than to give victims final say.<sup>199</sup>

Other mechanisms in criminal law ostensibly seek to hold prosecutors accountable to their public-clients, but they do not work in practice

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191. Bibas, *supra* note 6, at 961 (“District attorneys’ electoral contests are rarely measured assessments of a prosecutor’s overall performance. At best, campaign issues boil down to boasts about conviction rates, a few high-profile cases, and maybe a scandal.”); Levine & Wright, *supra* note 14, at 1126 (“Prosecutorial elections are marked by heavy incumbency advantages and empty rhetoric.”); Wright, *supra* note 100, at 605 (“In sum, the rhetoric of election campaigns puts too much weight on the wrong criteria and completely ignores some criteria that could help voters make meaningful judgments about the quality of a prosecutor’s work. Some of the most common themes are downright silly.”). Several of Harry Connick’s campaigns for District Attorney in New Orleans are a notable exception where election discourse addressed issues like the prevalence of plea bargaining by prosecutors who were “lazy” and his efforts to dramatically reduce plea bargaining. Ronald Wright & Marc Miller, *The Screening/Bargaining Tradeoff*, 55 STAN. L. REV. 29, 61, 65 (2002).

192. Wright, *supra* note 100, at 582–83.

193. *Id.* at 602.

194. Wright & Miller, *supra* note 112, at 1606.

195. *Id.*

196. See *supra* section I.A; Bibas, *supra* note 113, at 953–55 (arguing that victims provide important input for the insiders who run the criminal justice system).

197. See FED. R. CIV. P. 23(c)(2)(B) (requiring notice to class members of certified class actions); *id.* at (e)(1) (requiring that courts notify class members of proposed settlements); *id.* at (e)(2) (requiring that courts hold hearings to evaluate settlement fairness); *id.* at (e)(5) (affording class members the right to object to a proposed settlement).

198. See Justice for All Act of 2004, 18 U.S.C. § 3771(a)(2) (2012) (affording victims the right to notice of proceedings); *id.* § 3771(a)(4) (affording victims “the right to be reasonably heard”); *id.* § 3771(a)(9) (affording victims the right to be informed of plea bargains or deferred prosecution agreements).

199. Green & Zacharias, *supra* note 8, at 861–62.

either.<sup>200</sup> The grand jury interposes a subset of the public between the prosecutor and criminal defendants as a prerequisite to any federal felony prosecution and some state prosecutions.<sup>201</sup> In theory then, it could provide a source of case-by-case monitoring by a subset of the client to ensure that the prosecutor's choices track the public-client's interests.<sup>202</sup> But modern grand jury procedure is not structured to do that, at least in the vast majority of American jurisdictions. Prosecutors dominate grand jury proceedings<sup>203</sup> and are rarely put through their paces by evidence from the defendant or defense counsel.<sup>204</sup> To top it all off, grand juries are instructed that their role is to serve only as a probable cause filter<sup>205</sup> and are not called upon to analyze whether

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200. In a narrow range, constitutional criminal procedure such as *Brady* obligations or very limited restrictions on use of evidence obtained through unlawful means could be seen as judges checking prosecutor overreach. But disclosure and use of evidence encompasses only a narrow subset of prosecutors' decisions; judicial review does not reach questions of what crimes to charge from amongst an array of options or what sentence to accept for the defendant in a plea agreement. See, e.g., Wright, *supra* note 9, at 595. Moreover, *Brady* violations are common fare, see, e.g., Angela J. Davis, *The American Prosecutor: Independence, Power, and the Threat of Tyranny*, 86 IOWA L. REV. 393, 431 (2001), and suppression is a tall order for all but the most egregious constitutional violations, e.g., Aziz Z. Huq, *Judicial Independence and the Rationing of Constitutional Remedies* (Univ. Chi. Pub. Law and Legal Theory, Working Paper No. 524), [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2584488](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2584488) [<https://perma.cc/6U3G-6ASR>].

201. See U.S. CONST. amend. V ("No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury . . ."); *Hurtado v. California*, 110 U.S. 516 (1884) (declining to incorporate the grand jury right against the states); 2 SARA SUN BEALE ET AL., *GRAND JURY LAW AND PRACTICE* § 8:2 (2d ed. 2005) (collecting sources regarding scope of grand jury rights in the 50 states); Bibas, *supra* note 113, at 918 ("Grand and petit juries empowered ordinary citizens to preserve their liberty, express their sense of justice, and check agency costs and insiders' self-interests.").

202. See generally Josh Bowers, *The Normative Case for Normative Grand Juries*, 47 WAKE FOREST L. REV. 319 (2012); Roger A. Fairfax, Jr., *Grand Jury Discretion and Constitutional Design*, 93 CORNELL L. REV. 703 (2008).

203. Bibas, *supra* note 113, at 929; William J. Campbell, *Eliminate the Grand Jury*, 64 J. CRIM. L. & CRIMINOLOGY 174, 174 (1973) ("[T]he grand jury is the total captive of the prosecutor who . . . can indict anybody, at any time, for almost anything . . ."); Niki Kuckes, *The Useful, Dangerous Fiction of Grand Jury Independence*, 41 AM. CRIM. L. REV. 1, 29–33 (2004); Larry E. Ribstein, *Agents Prosecuting Agents*, 7 J.L. ECON. & POL'Y 617, 635 (2011); see also Ric Simmons, *Re-Examining the Grand Jury: Is There Room for Democracy in the Criminal Justice System?*, 82 B.U. L. REV. 1, 30 (2002) (describing current federal grand jury as "little more than a tool of the prosecutor, unable to perform any meaningful function" and "impotent").

204. See Bowers, *supra* note 202, at 344; Simmons, *supra* note 203, at 23–24. The well-publicized Ferguson grand jury proceedings were quite unusual insofar as the prosecutors sought to present a complete picture of the evidence. See Kate Levine, *How We Prosecute the Police*, 104 GEO. L.J. 745, 745–46, 765–66, 766 (2016).

205. See Fairfax, *supra* note 202, at 761 ("An empaneling judge will typically charge the grand jurors that if they find probable cause in a case, they should indict.") (emphasis omitted); see generally *id.* (arguing that the historical role of the grand jury was to broadly check the wisdom of prosecution and not merely to serve as a probable cause filter).

pursuing a criminal sanction serves the community’s interest in a particular factual context.<sup>206</sup>

The petit jury could in theory provide another conceivable way for a subset of the client to check prosecutor overreach.<sup>207</sup> But the biggest problem with that approach is that very few cases go to, or even seriously contemplate trial.<sup>208</sup> Thus, no petit jury is ever empaneled.<sup>209</sup> Nor does bargaining occur in trial’s shadow.<sup>210</sup> When substantive law is broad and deep and carries severe penalties, the prospect of trying cases is rarely a feasible one for the defendant or her already-overworked counsel.<sup>211</sup>

A guilty plea cannot resolve a criminal case unless a judge approves it, but judicial review of guilty pleas is perfunctory and seeks only to ensure that there is some factual basis for the plea and that the defendant can say “yes” to each question in a colloquy.<sup>212</sup> And even at sentencing judges may be constrained if the prosecutor has charged a sentencing enhancement or mandatory minimum.<sup>213</sup>

Because of the lack of external monitoring mechanisms, several scholars argue that we should look within prosecutor offices for a source of monitoring.<sup>214</sup> And indeed, internal monitoring is an essential

206. See Bowers, *supra* note 202 (proposing such a normative role for grand juries); Fairfax, *supra* note 202, at 712–16 (categorizing types of “grand jury nullification”).

207. See, e.g., Toni M. Massaro, *Peremptories or Peers?—Rethinking Sixth Amendment Doctrine, Images, and Procedures*, 64 N.C. L. REV. 501, 546 (1986) (“One function of the jury, although not the only function, is to satisfy a community-centered interest in participation in the justice system by injecting representative community voices and values into the decision process.”).

208. Bibas, *supra* note 113, at 930; Simmons, *supra* note 203, at 47.

209. Bibas, *supra* note 113, at 930; Simmons, *supra* note 203, at 47.

210. Bibas, *supra* note 113, at 930; Simmons, *supra* note 203, at 47.

211. See Stuntz, *supra* note 102, at 512–23.

212. See FED. R. CRIM. P. 11(b)(1)–(2) (specifying requirements in federal court for ensuring that the defendant’s plea is voluntary and that the defendant understands the rights she is waiving); Ion Meyn, *The Unbearable Lightness of Criminal Procedure*, 42 AM. J. CRIM. L. 39, 72–73 (2014) (quoting typical plea colloquy by one magistrate judge in the Northern District of Iowa and using it as an example of rote, surface level inquiry); Jed S. Rakoff, *Why Innocent People Plead Guilty*, N.Y. REV. OF BOOKS, Nov. 20, 2014 (“[I]n practice, most judges, happy for their own reasons to avoid a time-consuming trial, will barely question the defendant beyond the bare bones of his assertion of guilt.”).

213. Bibas, *supra* note 6, at 971 (explaining that prosecutors have the “dominant role in setting sentences” because of mandatory minimums and overlapping crimes); Richard A. Bierschbach & Stephanos Bibas, *Notice-and-Comment Sentencing*, 97 MINN. L. REV. 1, 8–9, 11 (2012) (describing how prosecutors control sentencing outcomes through charging and charge bargaining); Cassidy, *supra* note 3, at 1010–24 (making a similar point about state court prosecutors).

214. See, e.g., Barkow, *supra* note 14 (advocating greater attention to supervision in federal prosecutors’ offices and separation-of-function requirements that treat adjudication and enforcement separately to be done by separate actors as a check on prosecutor overreach); Burke, *supra* note 131,

component of any notion of accountability for federal prosecutors where the electoral check is quite removed from the individual prosecutor.<sup>215</sup> For federal prosecutors, internal review is required in several instances such as for decisions to seek the death penalty, subpoena a journalist, seek waiver of corporate attorney-client privilege, or charge a case under the Racketeer Influenced and Corrupt Organizations Act.<sup>216</sup> The existence of such internal processes in local prosecutors' offices varies considerably.<sup>217</sup> Opportunities for hierarchical supervision are limited in many offices simply by their small size,<sup>218</sup> but that does not eliminate the possibility of separating functions horizontally amongst prosecutors. Even small offices can assign a prosecutor to screen and potentially charge a case who is different than the one who helped police with an investigation;<sup>219</sup> yet a third prosecutor could be assigned to plead out or try the case.

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at 1621 (proposing "fresh looks" at a file by prosecutors not already involved in cases); Cassidy, *supra* note 3, at 1011 ("I propose an administrative check on prosecutorial discretion with respect to charge bargaining of mandatory minimum penalties, and I lay the groundwork below for an internal regulatory structure that may be refined and adopted by state prosecutors . . ."); Findley & Scott, *supra* note 131, at 388 (suggesting multiple levels of screening before charging as a check on cognitive biases); Daniel S. Medwed, *Emotionally Charged: The Prosecutorial Charging Decision and the Innocence Revolution*, 31 CARDOZO L. REV. 2187, 2208 (2010) (advocating secondary, internal review of charging decisions to counter predictable cognitive biases).

215. Green & Zacharias, *supra* note 46, at 190; *see also id.* at 197 (describing involvement of centralized DOJ as most significant difference in office structure between federal and state prosecutors); *id.* at 201 ("[D]ecision making by the chief prosecutor and those closest to him promotes democratic ideals.").

216. Rachel E. Barkow, *Federalism and Criminal Law: What the Feds Can Learn from the States*, 109 MICH. L. REV. 519, 525 (2011) (citing U.S. DEP'T OF JUSTICE, UNITED STATES ATTORNEYS' MANUAL §§ 9-10.040, 9-110.101, 9-110.300 to 9-110.400 (1997)); Green & Zacharias, *supra* note 46, at 190; *see also* Sara Sun Beale, *Rethinking the Identity and Role of United States Attorneys*, 6 OHIO ST. J. CRIM. L. 369, 402 & n.187 (2009) (explaining that United States Attorneys Manual includes more than 200 provisions that require prior approval, consultation, or notification to Main Justice).

217. Levine & Wright, *supra* note 14, at 1123, 1137, 1152 (studying one office that divides some of its cases as between various stages of the adjudicatory process and another office in which "prosecutors regard themselves as independent contractors" with no need to consult others about their cases); Bruce A. Green & Ellen Yaroshefsky, *Prosecutorial Discretion and Post-Conviction Evidence of Innocence*, 6 OHIO ST. J. CRIM. L. 467, 494 (2009) ("But it is likely that, despite what is known about cognitive biases, prosecutors' offices ordinarily refer new evidence to the trial prosecutor who obtained the conviction if he is still in the office . . ."); *see* ANGELA J. DAVIS, ARBITRARY JUSTICE: THE POWER OF THE AMERICAN PROSECUTOR 80 (2007) (explaining that federal and some state prosecutors undergo significant internal processes before seeking the death penalty).

218. Levine & Wright, *supra* note 14, at 1136.

219. Barkow, *supra* note 14, at 897-902.

### C. *Accounting for Differences*

Although these two systems raise similar concerns about accountability of lawyers to their diffuse clients, they reach dramatically different solutions as to how to hold the lawyers accountable. The question naturally arises then whether the core differences between civil and criminal systems, or the different nature of the divergence between lawyer and client interests in the two systems, justify these rather different approaches.

One significant difference between the systems, of course, is the nature of the prosecutor’s work.<sup>220</sup> If someone must wield great sovereign authority over citizens’ liberty, it seems sensible that this person should be a public official accountable to the people. But of course most prosecutors are not in fact elected, even if their bosses are. Given this extraordinary power and the self-interested pressures that tend to favor locking up more people, for longer, and with less procedural fairness than seems to serve the public’s interest, the lack of prosecutor accountability from external sources in the current system is troubling.<sup>221</sup>

Class counsel and prosecutors also face widely disparate playing fields with different procedural hurdles checking their actions. Prosecutors have tremendous procedural and resource advantages over their opponents, whereas class counsel faces procedural disadvantages vis-à-vis their adversaries.<sup>222</sup> Prosecutors’ financial resources vastly outstrip their opponents’ in most cases.<sup>223</sup> Prosecutors also have an investigative apparatus at their disposal, can offer incentives for information such as freedom from criminal punishment, can ask a judge to authorize forcible searches, can (usually successfully) urge a judge to incarcerate the defendant while the case is pending, and can benefit from marathon interrogations during which officers can lie or trick suspects.<sup>224</sup> By contrast, if there is an imbalance in resources between

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220. See Bruce A. Green, *Ethics 2000 and Beyond: Reform or Professional Responsibility as Usual*, 2003 U. ILL. L. REV. 1573, 1576 (detailing unique nature of prosecutors’ work).

221. *Supra* section II.B.

222. See Green, *supra* note 40, at 624–28 (describing prosecutors’ advantages).

223. See *id.* at 626; Darryl K. Brown, *The Decline of Defense Counsel and the Rise of Accuracy in Criminal Adjudication*, 93 CAL. L. REV. 1585, 1590 (2005) (describing legislatures “consistently underfunding defenders in order to constrain their effectiveness”).

224. See Green, *supra* note 40, at 626–33 (detailing prosecutors’ advantages including their ability to have agents employ deception); Fred C. Zacharias, *Structuring the Ethics of Prosecutorial Trial Practice: Can Prosecutors Do Justice?*, 44 VAND. L. REV. 45, 59 (1991) (“[A] prosecutor enjoys practical advantages over her adversaries [including] the state’s hefty investigative and

corporate defendants and repeat-player plaintiffs' class action lawyers, the corporate defendant is likely to be better resourced.<sup>225</sup> Class counsel faces the procedural hurdles of numerosity, commonality, typicality, adequacy, predominance, and superiority to get a class certified as well as demonstrating that any settlement is fair,<sup>226</sup> all of which require supporting evidence before she can favorably resolve her case.<sup>227</sup> In sum, there are already plenty of hurdles that tend to prevent class counsel from overreaching on the client's behalf, or at least doing so successfully. But there are not analogous checks on prosecutorial overreach.<sup>228</sup>

Preclusion is another difference between the class action and criminal prosecution, though it is less important than it may seem at first glance. Although prosecutions are brought formally in the name of the people or the State, no victim's legal rights are impaired or their claims extinguished. The difference is less important than it seems for several reasons: first, there is somewhat of an analog to preclusion in criminal law insofar as the same sovereign cannot bring a subsequent case on the same charges if jeopardy has attached in the first case.<sup>229</sup> And even though precluding a subsequent criminal case does not extinguish any victims' rights to private relief, it may frustrate their wishes for the public accountability and stigma of a criminal conviction. Second, to the extent that class members want to preserve their own right to litigate,

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litigation resources."); Jenia Iontcheva Turner, *Judicial Participation in Plea Negotiations: A Comparative View*, 54 AM. J. COMP. L. 199, 210 (2006) ("State funding for defense investigations is also too limited.").

225. *But see* Alexandra D. Lahav, *Symmetry and Class Action Litigation*, 60 UCLA L. REV. 1494, 1519 (2013) ("[T]he plaintiff class (despite its internal flaws) can stand on equal footing with an organizational defendant with the same capacity to pursue a lawsuit."); Issacharoff, *supra* note 76, at 716 ("The modern plaintiffs' mass harm bar has evolved to counter the repeat-play advantage that institutional defendants enjoy with regard to any individual claimant.").

226. FED. R. CIV. P. 23(a), (b)(3), (e).

227. *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 350–51 (2011).

228. Class counsel is (at least theoretically) subject to malpractice liability whereas prosecutors have absolute immunity. *See Imbler v. Pachtman*, 424 U.S. 409, 427–31 (1976) (holding that prosecutors have absolute liability from civil suits for their work initiating a prosecution and presenting their cases). Malpractice suits against class counsel are basically a nonstarter though, so this difference is not a meaningful one in practice. There is, however, at least one recent case in which a defendant pursued plaintiff's counsel for civil RICO liability. *See Briana Lyn Rosenbaum, The RICO Trend in Class Action Warfare*, 102 IOWA L. REV. 165 (2016) (discussing CSX Transp., Inc. v. Gilkison, No. 05-cv-00202-FPS-JES, 2013 WL 85253 (N.D. W.Va. Jan. 7, 2013) and the desirability of using RICO to regulate class counsel).

229. U.S. CONST. amend V. Double jeopardy also bars future charges on lesser-included offenses. *See Brown v. Ohio*, 432 U.S. 161, 168 (1977).

they can opt out of any damages class action.<sup>230</sup> Finally, many class-action claims are not worth very much and indeed are worth less individually than they would cost to litigate.<sup>231</sup> Such “negative value” suits do not pose a choice between individual cases or a class action but rather between a class action and no litigation, so the class action is not typically precluding anything otherwise practically valuable.<sup>232</sup> Thus, although extinguishing individual claims might seem like a weighty difference between the two systems at first glance, it actually poses less of a concern in practice. These differences in the nature of the two systems suggest that the need for accountability is more compelling in criminal prosecution because of the weighty consequences, but they do not suggest that the approaches to accountability in the two contexts should be completely different.

The concerns about the nature of the misalignment between lawyer and client interests also differs between the two contexts. Class counsel’s self-interests are direct financial interests that raise concerns about under-reach.<sup>233</sup> Their firms front the costs of litigation and get paid only if they obtain a judgment (either after settlement or trial). Thus, scholars fear that class counsel will under-reach and settle cases for too little to ensure a payday, and that bearing the costs of litigation will tend to induce risk aversion.<sup>234</sup>

Prosecutors’ self-interests are largely not financial, and they tend to raise concerns not of under-reach but of overreach.<sup>235</sup> Prosecutors’ self-interests cut in favor of preserving a high conviction rate, avoiding high-profile losses, and efficiently using their resources to lock up criminals.<sup>236</sup> These results help protect electoral success where the boss

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230. FED. R. CIV. P. 23(c)(2)(B)(v).

231. Courts have become increasingly skeptical of class actions that seem viable if litigated individually on the basis that class actions are not a superior method of adjudication. Jay Tidmarsh, *Living in CAFA’s World*, 32 REV. LITIG. 691, 692 (2013); see also FED. R. CIV. P. 23(b)(3) (superiority requirement).

232. See, e.g., *Bais Yaakov of Spring Valley v. ACT, Inc.*, 798 F.3d 46, 48 (1st Cir. 2015), cert. denied, 136 S. Ct. 982 (2016) (“The principal intended beneficiaries of [the class action] are persons who have suffered small but similar losses as a result of wrongful conduct by the same defendant or defendants. . . . For such persons, it will often make little practical sense for any one of them to bring a claim only for herself . . .”).

233. See *supra* section I.C.1.

234. See Leslie, *supra* note 86.

235. See *supra* section I.C.2.

236. Bibas, *supra* note 113, at 913; Brown, *supra* note 49, at 194–207; Stuntz, *supra* note 102, at 535–37; Zimmerman & Jaros, *supra* note 67, at 1399.



is directly elected (as in most state systems) and facilitate future career options in elected office or the private sector.<sup>237</sup>

The self-interests in class actions are financial and tend toward underreach while the self-interests in criminal prosecution are largely career-driven and tend toward overreach. This difference is important to account for when analyzing what we can learn from the comparison, but it does not justify completely different treatment of lawyer accountability in the two systems, as the next section explains in more detail.

### III. IMPLICATIONS

These differences in monitoring regimes between the two systems offer important lessons that civil and criminal procedure scholars can learn from each other in the search for lawyer accountability to the sort of diffuse clients described above.<sup>238</sup> The lesson from criminal law scholars about looking internally within the agent's organization to improve accountability can be incorporated into class action law in some respects.<sup>239</sup>

Prodded by the ineffectiveness of external constraints on prosecutorial discretion, criminal law scholars have turned to internal administrative processes within prosecutors' offices in the search for an effective monitoring scheme.<sup>240</sup> Scholars have turned to second opinions, supervision, and other checking mechanisms within prosecutors' offices to restrain the extent to which cognitive biases steer prosecutors away from their public-client's best interests.<sup>241</sup> The problem these scholars rightly seek to combat is that prosecutors who investigate a case are then in a poor position to make a detached, neutral decision about the defendant's guilt or deserts.<sup>242</sup> Barkow advocates for assigning

237. Stuntz, *supra* note 102, at 535 ("To some degree, line prosecutors will seek to [maximize political support] too, because that is their bosses' goal, and they must satisfy their bosses in order to keep their jobs.")

238. *Cf.* Sklansky & Yeazell, *supra* note 12, at 683 ("This is a plea for comparative work in civil and criminal procedure."); *see generally* William B. Rubenstein, *Finality in Class Action Litigation: Lessons from Habeas*, 82 NYU L. REV. 790 (2007) (comparing class action law to habeas corpus litigation); Zimmerman & Jaros, *supra* note 67 (drawing on class action law as a basis for suggesting reform to mass criminal restitutionary proceedings).

239. I address elsewhere the lessons that criminal law can learn from class actions about accountability. *See* Gold, *supra* note 12.

240. *Supra* section II.B.

241. Barkow, *supra* note 14, at 873.

242. *Id.* at 883; *see also, e.g.*, Daniel Richman, *Prosecutors and Their Agents, Agents and Their Prosecutors*, 103 COLUM. L. REV. 749, 803 (2003) ("[P]rosecutors who have helped call the shots in

investigative and adjudicative responsibilities to different prosecutors in each case in United States Attorney’s offices and involving at least one supervisor in each adjudicative decision because supervisors will have practical expertise and a less myopic perspective due to their longevity.<sup>243</sup> A panel of decision-makers would be better still, she explains, to check biases that even experienced prosecutors hold.<sup>244</sup> Other scholars have persuasively advocated a second opinion or “fresh look” from a prosecutor not involved in the case who would be less affected by tunnel vision and confirmation biases.<sup>245</sup> Anticipating this check by a second prosecutor would help debias the first prosecutor.<sup>246</sup> Fresh look could be combined with an adversarial process by allowing both the investigating attorney and defense counsel to present their cases to the fresh-look prosecutor.<sup>247</sup> For instance, the Department of Justice’s Capital Case Unit allows arguments from defense attorneys when considering whether to seek the death penalty.<sup>248</sup>

In class actions, scholars have widely recognized that judicial monitoring is imperfect, and a similar turn to internal checks within the plaintiffs’ bar in addition to the existing accountability regime could help restrain class counsel and bolster the existing external check of judicial review. This internal checking could occur within plaintiffs’ class action firms, amongst plaintiffs’ firms, or between third-party litigation funders and class counsel. Checking within firms is most analogous to the criminal law scholarship, but the other approaches share some degree of similarity insofar as they look for monitoring from those affiliated with the agent in some capacity and may hold greater promise in class action law as a practical matter.

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an investigation will be hard pressed to retain their magisterial perspective not just about the tactics used in the investigation, but about whether charges should be pursued thereafter.”); Uviller, *supra* note 99, at 1716.

243. Barkow, *supra* note 14, at 903–04.

244. *Id.* at 904.

245. Burke, *supra* note 131, at 1621 (proposing “fresh looks” at a file by prosecutors not already involved in cases); Findley & Scott, *supra* note 131, at 388 (suggesting multiple levels of screening before charging as a check on cognitive biases); Medwed, *supra* note 214, at 2208 (advocating secondary, internal review of charging decisions to counter predictable cognitive biases).

246. DANIEL S. MEDWED, PROSECUTION COMPLEX: AMERICA’S RACE TO CONVICT AND ITS IMPACT ON THE INNOCENT 26, 182 (2012).

247. Barkow, *supra* note 14, at 905; *see also* Lynch, *supra* note 48, at 2147–49 (recommending allowing defense counsel to present her case to the prosecutor); James Vorenberg, *Decent Restraint of Prosecutorial Power*, 94 HARV. L. REV. 1521, 1565 (1981) (proposing a similar process).

248. DAVIS, *supra* note 217, at 80.

The basic similarity between all of the models proposed in criminal law is the need to consult colleagues and gain internal approval for critical decisions. Similarly, class action lawyers involved in negotiating a settlement could be encouraged to gain approval from colleagues or co-counsel before presenting the settlement to a court.<sup>249</sup> If a third party such as a hedge fund is funding the litigation, class counsel may in fact be required to seek approval before presenting the settlement to a court.

Class action plaintiffs' lawyers seek to maximize their firms' profits to some extent, but they are only human. As with prosecutors who were involved in an investigation, the lawyers directly involved in negotiating a settlement will be the least capable of neutrally assessing how well it serves the class-client's interests. These lawyers might overvalue their own performance and the deal they secured. Or, for lawyers whose compensation does not depend directly on the settlement such as associates or non-equity partners in a larger firm, they might be particularly tempted to steer a case toward settlement to improve their compensation or promotion opportunities if they are nearing a year-end.<sup>250</sup>

#### A. *Monitoring Within Firms*

To address these concerns about tunnel vision or individual financial or career-driven interest within the firm, encouraging lead attorneys on a case to present the merits of the settlement to their financially interested colleagues in some capacity will have a debiasing effect and provide a more detached check on class counsel's under-reach.<sup>251</sup>

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249. As a practical matter, this can work only if class counsel's firm or group of firms has a sufficient number of lawyers not directly working on the case to check those who are. That condition will not always hold, but sometimes it will. See Ratner, *supra* note 88, at 774 ("[L]arger firms have in fact come to dominate the plaintiffs' class action bar."); *id.* at 779 (describing smaller firms forming ad hoc coalitions for individual cases that form the equivalent of a complex, larger firm).

250. *Id.* at 786–88 (describing incentives for gamesmanship near the end of a year for compensation and promotion purposes).

251. Adversarial biases and individual lawyers' initial decision to pursue the case could lead to overconfidence in its merits and thus a higher bottom line in settlement negotiation, and a similar effect might result if success in each case redounds to the individual lawyers more than does failure. See *id.* at 790–91. In these scenarios, the internal check could be structured to encourage the lawyers working on the case to accept a settlement proposal rather than continuing to litigate. But the incentive working in that direction to check settlement obstinacy within firms already exists because of colleagues wanting to get paid, so no judicial prod is necessary.

### 1. *Private Actors*

Class action plaintiffs’ firms could designate a particularly experienced partner to review class settlements.<sup>252</sup> Assigning the same partner to this role in case after case would allow her to build expertise and take the role seriously,<sup>253</sup> though she might also come to be viewed internally with the same warm embrace as internal affairs officers in police departments. Firms could alternatively establish a committee of lawyers with varying levels of experience for such review.<sup>254</sup> Lastly, they may wish to designate one or more of their lawyers to serve as devil’s advocate in a quasi-adjudicative internal proceeding. Such a process would parallel what many lawyers do when testing arguments before a mock jury and the adversarial processes that some scholars describe within prosecutors’ offices.<sup>255</sup> For any of these methods, a double-blind approach would help prevent personal relationships from skewing the analysis.

These different structures of internal review are listed in the previous paragraph in order of increasing cost. Whether the more costly structures (or indeed any internal review structure) are worth the benefit should be left to each firm individually to assess in each case. I am not suggesting mandating formal review within private law firms. Rather, I suggest that courts should create incentives for firms to consider internal processes. A firm can then employ whatever processes it sees as most efficient in each case.

Very little complex litigation scholarship discusses any such internal checks within firms.<sup>256</sup> But Ratner’s recent work analyzing the structure

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252. See Barkow, *supra* note 14, at 903–04 (explaining the benefits of expertise in conducting the adjudicative prosecutorial function).

253. See *id.* at 904–05 (suggesting that prosecutor’s offices create a separate group of adjudicators who can develop a culture of taking this task seriously).

254. Douglas R. Richmond, *Law Firm Partners as Their Brothers’ Keepers*, 96 Ky. L.J. 231, 270 (2007) (explaining that “[p]artners find the [substantive] evaluation of peers[’] work] ‘much less palatable than the rather commonplace practice of reviewing associates’” (quoting Harry H. Schneider, Jr., *Your Partner’s Keeper*, 1993 A.B.A. J. 104, 104 (Nov. 1993)); see also Barkow, *supra* note 14, at 904 (explaining why multiple people with different levels of experience would add value to internal process)).

255. See Rubenstein, *supra* note 11, at 1453–55, 1475–77 (suggesting appointment of devil’s advocate to improve judicial class settlement fairness review); Barkow, *supra* note 14, at 905.

256. Cf. Susan Saab Fortney, *Are Law Firm Partners Islands Unto Themselves? An Empirical Study of Law Firm Peer Review and Culture*, 10 GEO. J. LEGAL ETHICS 271, 290 (1997) (finding based on empirical study of Texas law firms with ten or more attorneys that only ten percent of respondents have formal procedure to evaluate how partners handle client matters but that thirty-four percent of respondents had an individual or committee tasked with such evaluation);

of plaintiffs' class action firms and its effect on individual lawyers' incentives alludes to the idea that structural complexity of a plaintiffs' class action firm may already help facilitate internal accountability in some measure.<sup>257</sup> In a large firm, each partner's income will not typically turn solely (and perhaps not even predominately) on the financial success of the cases she manages because her equity stake more likely depends on factors, such as seniority, that are independent of results in her own cases, Ratner explains.<sup>258</sup>

In firms where equity is dispersed in the manner that Ratner describes,<sup>259</sup> each partner already has some incentive to monitor others' cases with the strength of that incentive varying based on a rough estimate of each case's value.<sup>260</sup> Attorney's fees are typically awarded as a percentage of the settlement amount,<sup>261</sup> so proportionally small differences in the total settlement value on which the fee is based may translate into real money for the firm in large-dollar cases. Thus, under such a firm structure, partners who are not emotionally invested in a case have some (albeit imperfect) incentive to ensure that their colleagues do not sell out the class's interests. As with lawyers working on the case, these partners face opportunity costs as to their colleagues' time, and so too do these partners bear a share of any unreimbursed costs. Thus, the difference in emotional investment between partners working on a case and those who are not seems greater than the difference in financial interests. But the point remains that intrafirm accountability measures already exist, to at least some extent in firms with dispersed equity that do not work on an eat-what-you-kill model.

## 2. *How Public Actors Could Facilitate*

To facilitate these checks, judges could predictably and transparently reduce attorney's fee awards to class counsel from what they would have otherwise awarded if one or more previously-proposed settlements in the

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Richmond, *supra* note 254, at 271 (explaining as to law firms generally that "few firms attempt to evaluate partners' substantive performance in their practice areas").

257. See Ratner, *supra* note 88, at 821.

258. *Id.* at 786, 795.

259. Ratner's work does not empirically study plaintiffs' law firms' equity-sharing models but discusses law firm structure based on his own experience. *Id.* at 780–96. A detailed analysis of whether indeed equity is widely dispersed amongst partners or whether most plaintiffs' firms operate on an "eat what you kill basis" where each partner profits primarily from their own cases would be useful.

260. See *id.* at 801 (explaining very rough ability to estimate anticipated fees).

261. Fitzpatrick, *supra* note 152, at 832.

case have been rejected as unfair or if class counsel has not delivered sufficient value for the class. Determining the amount of a fee award is within judges' broad discretion and should be structured to get the incentive system right for class counsel.<sup>262</sup> Some courts may already take this approach implicitly,<sup>263</sup> but if so, the transparency and predictability are missing.<sup>264</sup> Under such a regime, lawyers with an equity stake in a plaintiffs' class action firm who are not directly working on a particular case would have an incentive to monitor the settlements that are actually proposed to the court themselves or set up a process to facilitate such review, at least if the anticipated fee were large. Their financial incentive would be approximately the same as the partners working on the case (though perhaps scaled because of varying numbers of shares), but they would not have the same emotional investments or bases for tunnel vision. Firms might adopt internal rules regarding procedures to be used given particular dollar amount triggers in settlement value. Mechanically, this change in fees law could come about through common law evolution or through altering the sub-section of Rule 23 that governs fee awards.<sup>265</sup> Because predictability is important to structuring incentives, a rule change would be preferable.

A second and related way to encourage internal monitoring of class counsel is to increase the costs of having a settlement rejected as unfair by requiring that judges consider class counsel's individual track record and her firm's track record.<sup>266</sup> This idea borrows loosely from voters

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262. See Macey & Miller, *supra* note 18, at 50 (“The trial court’s broad discretion to determine the amount of the fee award gives the judge enormous potential leverage with plaintiffs’ counsel to control the conduct of the litigation and to deter conduct by plaintiffs’ counsel that the trial court dislikes.”).

263. By way of a possible example, in a privacy class action against Facebook in which the district court first rejected a proposed settlement on fairness grounds before approving a revised settlement, the court reduced class counsel’s fee from the requested amount. See Order Granting in Part Motion for Attorney Fees, Costs, and Incentive Awards, *Fraley v. Facebook, Inc.*, 830 F. Supp. 2d 785 (N.D. Cal. Aug. 26, 2013) (No. C 11-1726 RS) [hereinafter *Fee Order, Fraley*]. If we take the court at its word, however, the fees awarded were lower than requested because of the way injunctive relief was used in the fees motion as a basis for the award; the reduction ostensibly had nothing to do with the initially rejected settlement. *Id.*

264. Although there is some very useful empirical work on attorney’s fee award practices in class actions, see Theodore Eisenberg & Geoffrey P. Miller, *Attorney Fees and Expenses in Class Action Settlements: 1993–2008*, 7 J. EMPIRICAL LEGAL STUD. 248 (2010); Fitzpatrick, *supra* note 152, I am not aware of any work exploring the relationship between fee awards and whether settlements were approved as first proposed.

265. See FED. R. CIV. P. 23(h).

266. See Richard A. Nagareda, *Class Actions in the Administrative State: Kalven and Rosenfield Revisited*, 75 U. CHI. L. REV. 603, 646 (2008) (describing consideration of the firm’s track record in prior settlements in determining adequacy of representation as a “more dramatic innovation[.]”). But see NEWBERG ON CLASS ACTIONS § 22:79 (4th ed.) (explaining current standard that “counsel’s

having a basic statistic about conviction rates when voting for their prosecutor.<sup>267</sup> If courts knew what percentage of class counsel's (and her firm's) previously proposed class settlements had been rejected, they could use spotty track records as indicia of reason for concern about the settlement. Because proposed settlements are not frequently rejected or even modified,<sup>268</sup> that record would be underinclusive. Accordingly, courts should also consider whether lead counsel's fee requests in previous class actions were reduced based on problems with the underlying settlement.<sup>269</sup> Reducing a fee request rather than rejecting a settlement allows judges to penalize class counsel for less than stellar performance while nonetheless clearing the docket and assuring the class's recovery.<sup>270</sup> Thus, considering fee awards would help combat the false negatives of looking only to rejected settlements. Fee award opinions do not typically cite performance issues as the basis for a smaller award than requested, but knowing that the opinion could be put to future use might encourage judges to do so. Analysis of previous fee requests should be limited solely to individuals proposed as class counsel rather than across the firms involved. Although that limitation increases the potential for gamesmanship in deciding which individuals

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'track record' [is not] relevant to a determination of adequacy of representation" (citing *Cohen v. Long Island Lighting Co.*, No. CV-84-0588 (LDW), 1986 WL 9961 (E.D.N.Y. May 20, 1986)). A class certification motion may propose numerous people and firms as class counsel to benefit from the combined expertise for purposes of demonstrating their adequacy. *See, e.g.*, *Pls.' Mot. for Class Certification* at 43, *Dukes v. Wal-Mart Stores, Inc.*, 222 F.R.D. 137 (N.D. Cal. 2004) (No. C-01-2252 MJJ). ("Plaintiffs retained a coalition of three not-for-profit organizations and three private law firms each of which, standing on its own, possesses substantial experience in litigating employment discrimination cases; collectively they are more than qualified to serve as class counsel."). In that instance, so too is it reasonable for a court to factor each's track record into its analysis.

267. *Wright & Miller, supra* note 112, at 1606. In the prosecution context, the conviction rate statistic is largely meaningless, *id.*; *Bibas, supra* note 112, at 442, but its analog could be helpful in class actions.

268. *See, e.g.*, THOMAS E. WILLGING ET AL., *FED. JUDICIAL CTR., EMPIRICAL STUDY OF CLASS ACTIONS IN FOUR FEDERAL DISTRICT COURTS* 35 (1996) (finding that eighty-six percent of settlements were approved by district courts without changes).

269. *See Eisenberg & Miller, supra* note 264, at 270 (analyzing the number of fee requests granted as proposed). When resolving fee award requests, courts must explain their findings and legal conclusions on the record or in writing. *FED. R. CIV. P.* 23(h)(3), 52(a)(1). Notice must also be given to class members who are afforded a right to object. *Id.* at 23(h)(1)-(2). Fee awards that are granted in an amount lower than requested because the court rejects the methodology underlying the calculation, *see, e.g.*, *Fee Order, Fraley, supra* note 263, are not the sorts of modifications that would signal anything useful about class counsel's performance for future cases.

270. Refusing to certify a class may also clear the court's docket, but it is far less certain. Class counsel might react by folding, settling the named plaintiffs' claims individually, and abandoning the class claims. But they may instead propose a revised class or seek new discovery to support a subsequent motion.

to propose as class counsel, a contrary proposal under which courts had to analyze every fee request that anyone in class counsel’s firm had ever submitted that was not approved in full would be unwieldy.<sup>271</sup> Moreover, considering fee requests and awards may beneficially make class counsel more cautious *ex ante* when making such requests—a moment at which class counsel and the class’s interests are at odds.<sup>272</sup>

Assuming the concerns about track record are not great enough to defeat adequacy entirely—which they could be in some instances—courts could ratchet up their scrutiny of settlement fairness<sup>273</sup> or appoint an advocate to argue against the settlement.<sup>274</sup> In some cases, the court could simply refuse to approve the settlement. Another possibility would be auctioning the claims to the highest bidder with the existing settlement as a reserve price, though auctions have not gained traction in class action practice despite scholars’ persuasive arguments in their favor.<sup>275</sup>

As a practical matter, settlement review is deferential in part because of judges’ docket management incentives.<sup>276</sup> Even if courts had the institutional capacity to investigate settlements or they had a court investigator to help,<sup>277</sup> courts might nonetheless have too little bandwidth to carefully scrutinize the results of all of those investigations.<sup>278</sup> If judges could focus their efforts on cases where class counsel’s track record caused concern, that limiting factor would make searching review more feasible. Of course this would not eliminate

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271. That conclusion seems likely even though most fee requests in class actions are approved in full. See Eisenberg & Miller, *supra* note 264, at 270.

272. Macey & Miller, *supra* note 151, at 196–202. This statement assumes, as is true in many class actions, fees awarded as a percentage of the recovery. Fitzpatrick, *supra* note 152, at 831–32.

273. See Macey & Miller, *supra* note 151 (suggesting varying standards of scrutiny for class settlement approval based on nature of settlement akin to standards of scrutiny in constitutional law); cf. David S. Han, *Rethinking Speech-Tort Remedies*, 2014 WIS. L. REV. 1135 (2014) (arguing that courts should not take an all-or-nothing approach to conflicts between First Amendment interests and tort liability but rather use intermediate approaches that limit damages).

274. Rubenstein, *supra* note 11, at 1452–55.

275. See, e.g., Macey & Miller, *supra* note 18, at 105–18; Jay Tidmarsh, *Auctioning Class Settlements*, 56 WM. & MARY L. REV. 227, 230–31, 241–42 (2014).

276. See Issacharoff, *supra* note 18, at 829; Macey & Miller, *supra* note 18, at 45–46; Nagareda, *supra* note 80, at 968; Rubenstein, *supra* note 11, at 1445.

277. See Rubenstein, *supra* note 11, at 1461–62, 1477–81 (proposing class action investigation office to investigate procedural details of settlement negotiations to facilitate judicial review for fairness).

278. Cf. Huq, *supra* note 200 (arguing that limits on judicial capacity have led to skewing substantive standards in the Fourth Amendment and other contexts to focus on fault as a gatekeeping mechanism to limit caseloads).



judges' incentives to approve the settlement to clear their dockets, but a meaningful way to prioritize might reduce those pressures.

Rather than refusing to certify a class or rejecting a proposed settlement entirely, judges could approve a settlement but transparently reduce the attorney's fee from what they would otherwise award if the more stringent review yielded concerns about class counsel's performance in the particular case.<sup>279</sup>

Fear that a rejected or weak settlement could cascade into losing claims to other bidders, more stringent review, failed attempts at class certification across the firm, or predictably reduced fees across the firm would provide a stronger incentive for internal monitoring within class counsel's firm than would simply scaling fees in the particular case. As a practical matter, settlement (and an ensuing fee award) is plaintiffs' counsel's desired outcome in damages class actions. Anything that would make future settlement approvals and therefore future paydays more difficult or less valuable would impose a substantial cost on class counsel and her equity-holding colleagues.

Track records of settlement approval would be a slightly noisy signal, and I am not suggesting that one rejected settlement should prevent all future settlements by that firm or lawyer. Rather than indicating a meaningful problem, in some instances, rejected settlements could result from an overly stringent trial judge, a particular jurisdiction with active circuit courts conducting interlocutory review of class certification,<sup>280</sup> cases drawing greater-than-usual public attention,<sup>281</sup> or perhaps settlement with an intractable defendant in a case where going to trial would not serve the class well. But because docket-management pressures give district judges a reason to be *too generous* in settlement approvals,<sup>282</sup> a settlement that a judge rejects as not "fair, reasonable, and adequate"<sup>283</sup> tends to meaningfully indicate that class counsel actually got her class-client a raw deal. Or to put it differently, false

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279. See FED. R. CIV. P. 23(h) (providing judges control over attorney's fee awards).

280. See, e.g., *Pearson v. NBTY, Inc.*, 772 F.3d 778, 778 (7th Cir. 2014) (Posner, J.); *Eubank v. Pella Corp.*, 753 F.3d 718 (7th Cir. 2014) (Posner, J.).

281. When the largest-ever employment discrimination class was certified against the world's largest private employer, the case led to two levels of circuit court review with three different majority opinions, and then Supreme Court review. *Dukes v. Wal-Mart, Inc.*, 474 F.3d 1214 (9th Cir. 2007), *vacated*, 509 F.3d 1168 (9th Cir. 2007), *aff'd in part, rev'd in part en banc*, 603 F.3d 571, *rev'd*, 564 U.S. 338 (2011).

282. Issacharoff, *supra* note 18, at 829; Rubenstein, *supra* note 11, at 1445; Redish, *supra* note 29, at 104.

283. FED. R. CIV. P. 23(e)(2).

positives are far more likely than false negatives; negatives will thus tend to be meaningful signals.<sup>284</sup>

Monitoring previous performance at the level of the *firm* is meant to encourage internal checking and make these data less manipulable. If one lawyer in a firm has a settlement rejected, it would be easy enough to just take her name off of future class settlements so long as a colleague also has sufficient experience. There is of course still some room to game the process, including lawyers moving to other firms, which is why the data point of the particular lawyers' performance is also important.

To the extent that an internal check such as review by a colleague or funder prevents class counsel from accepting a lowball settlement offer that she would otherwise accept, the internal check has provided an effective substitute for the client. That result might seem inefficient insofar as it adds process costs, but it should add value for the class-client.<sup>285</sup> In that instance, class counsel can mimic a tactic already available to defense counsel and well known to negotiators—blaming the client for tying her hands and for the resulting refusal.<sup>286</sup> The defendant might then make a higher settlement offer in hopes of attaining complete peace through the class device.<sup>287</sup>

One cost of the proposal to consider the firm's track record during settlement approval is that it would encourage class counsel to find the most favorable possible forum in which to file so as to prevent any black marks on her firm's record, but class counsel already has an incentive to forum shop. At least when choosing among fora where venue lies and

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284. See ALI PRINCIPLES OF THE LAW OF AGGREGATE LITIGATION § 1.05 cmt. g (2010) (“A track record of success can be at most a necessary condition for appointment to the class-counsel post, not a sufficient one.”).

285. See Brooke Coleman, *The Efficiency Norm*, 56 B.C. L. REV. 1777 (2015) (urging a reimagining of the efficiency norm in civil procedure to account for benefits and not simply to equate efficiency with low cost).

286. See Donald G. Gifford, *The Synthesis of Legal Counseling and Negotiation Models: Preserving Client-Centered Advocacy in the Negotiation Context*, 34 UCLA L. REV. 811, 854–55 (1987) (explaining that lawyers can use this sort of client-based argument defensively when rejecting opposing counsel's settlement offer, including specifically to justify a competitive tactic of refusing a settlement offer while preserving the cordiality of the relationship between opposing lawyers). Although a lawyer's colleagues do not have final say on a settlement the way that clients do in ordinary litigation, MODEL RULES OF PROF'L CONDUCT r. 1.2 (AM. BAR ASS'N 1983), they may be harder to convince to accede to a settlement offer than a non-lawyer client.

287. See Rave, *supra* note 77, at 1186 (discussing benefit to defendants of complete peace in non-class aggregate litigation).

there is personal jurisdiction over the defendant, why wouldn't class counsel seek out the one most likely to lead to a favorable result?<sup>288</sup>

This proposal creates only a stick that can make plaintiffs' lawyers' lives harder or less profitable without a corresponding carrot. That may discourage some socially valuable lawsuits, at least at the margins. I tend to think that judges will be fairly restrained in their use of track records to avoid that result. But to the extent that this approach does undercut valuable suits, one possible approach would be to increase attorney's fees when firms use well-structured internal administrative processes. A simpler approach would be increasing fees across the board as a percentage of recovery and using that increased fee range as a benchmark for any performance-based deductions. The choice between the two schemes depends largely on whether one thinks that fees are too low now<sup>289</sup> and how feasible it would be for courts to determine when firms have used meaningful internal administrative processes.

### *B. Monitoring Across Plaintiffs' Firms*

When class actions are brought by a coalition of law firms rather than a single firm, similar opportunities for monitoring exist within the coalition.<sup>290</sup> The split of the eventual attorney's fee award between the firms is not a forgone conclusion; the court ultimately decides that split.<sup>291</sup> Anticipating competition over the ultimate fee award among the members of the plaintiffs' coalition,<sup>292</sup> each firm thus has an incentive to criticize others' lack of effort or results to build a record for the fees motion.<sup>293</sup>

In some instances, lawyers' interests in joining coalitions in future cases could tend to encourage them to go along without objection in deals that they think less than stellar to protect their future portfolios, as

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288. See Aaron Simowitz, *A U.S. Perspective on Forum Shopping, Ethical Obligations, and International Commercial Arbitration*, in *FORUM SHOPPING IN THE INTERNATIONAL COMMERCIAL ARBITRATION CONTEXT* (Franco Ferrari, ed., 2013) (arguing that plaintiffs' lawyers have a duty to forum shop to protect their clients).

289. See Fitzpatrick, *supra* note 62 (arguing that attorney's fees are too low in class actions and advocating that all recovery in small-claim cases go to attorneys).

290. Cf. Silver & Miller, *supra* note 2, at 159–69 (proposing inter-firm monitoring in non-class aggregate litigation).

291. See FED. R. CIV. P. 23(h); NEWBERG ON CLASS ACTIONS § 15:23 (5th ed.).

292. See Elizabeth Chamblee Burch, *Financiers as Monitors in Aggregate Litigation*, 87 N.Y.U. L. REV. 1273, 1289–90 (2012) (describing skirmish between firms over allocation of fees in nonclass aggregate litigation).

293. Cf. Silver & Miller, *supra* note 2, at 141 (describing “a messy process in which lawyers . . . compete for shares of a limited fund” of attorneys' fees in multidistrict litigation).

Elizabeth Burch recognizes in multidistrict litigation practice.<sup>294</sup> Burch’s proposal for courts to appoint multiple, cognitively diverse leadership committees in non-class aggregate litigation helps address this concern in class actions too.<sup>295</sup> Courts should also favor appointing multiple, cognitively diverse firms to represent the class. Such appointments may help combat concerns that the plaintiffs’ firms may seek to advance their long-term cooperation interest over their short-term financial gain.<sup>296</sup>

Moreover, several scholars have usefully proposed harnessing competitive forces within the plaintiffs’ bar as a means to help encourage class counsel to serve their clients’ interests. Jonathan Macey and Geoff Miller proposed an auction in which the winning bidder would purchase the class’s claims and pay the amount of her bid to be distributed to the victims.<sup>297</sup> The winning bidder could then pursue the claims herself with both ownership and control.<sup>298</sup> One potential bidder would be another plaintiffs’ firm,<sup>299</sup> which fits the paradigm of interfirm accountability mechanisms. Most recently, Jay Tidmarsh suggested that courts conduct auctions when a class settlement is proposed using the settlement value as the reserve price.<sup>300</sup> Then another plaintiffs’ firm could outbid that settlement amount to pursue the claim.<sup>301</sup> These auction proposals provide one more potential tool to improve accountability in class actions by facilitating accountability within the plaintiffs’ bar—albeit using a tool that requires more work from courts and thus faces some practical hurdles.

### C. *Monitoring by Third-Party Funders*

Lastly, when lawsuits are funded by third parties such as hedge funds, those funders can provide a highly interested monitor and reduce the extent to which class counsel may not represent her class-client’s

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294. See Elizabeth Chamblee Burch, *Judging Multidistrict Litigation*, 90 N.Y.U. L. REV. 71, 94 (2015) (explaining concerns about relying on consensus in multidistrict litigation committee appointment because attorneys “may silence themselves out of concern that they will be ostracized and thus ineligible for future leadership positions”).

295. *Id.* at 120.

296. See *id.* at 85–101.

297. Macey & Miller, *supra* note 18, at 105–18.

298. *Id.* It is the separation of ownership and control that gives rise to the agency costs that class action scholars discuss at length. See, e.g., *id.*

299. *Id.*

300. Tidmarsh, *supra* note 275, at 241–45.

301. As with Macey and Miller’s proposal, there are other potential bidders in Tidmarsh’s auction proposal such as third-party funders, but those sorts of bidders will be addressed below. See *infra* section III.C.

interests.<sup>302</sup> Third-party funding can remove the internal conflict that comes from class counsel being both funder and lawyer and diminish the risk aversion that scenario generates. If the agreement between funder and lawyer provided for an attorney's fee based on billable hours plus a small contingency bonus, lawyer and funder would tend to check each other in a way that redounds to the class's benefit.<sup>303</sup> The lawyer would tend to want to work more hours, while the funder would want the most relief per hour expended. Moreover, if class counsel wishes to recruit third-party funders in future cases, their reputational concerns become far more important than would typically be the case for lawyers such as class counsel who don't need clients to hire them.<sup>304</sup> Class counsel has to worry about reputational concerns to some extent to secure judicial settlement approval, but judges enter the picture with a case already on their dockets with an incentive to clear that docket. Third-party funders can simply decline to work with potential class counsel because of concerns about class counsel's reputation without any counterweight similar to docket management pressure. Third-party funders operate in a similar role to the auction winners that some scholars have suggested to address accountability concerns between class counsel and the class-client.<sup>305</sup> They play a somewhat similar role to plaintiffs' management committees in multidistrict litigation comprised of lawyers with large inventories of clients. Both have a large financial stake in selecting and monitoring other attorneys who conduct common benefit work.<sup>306</sup>

Courts' role in facilitating this check by third-party funders is to get doctrine out of its way. If these third-party funding arrangements sound like champerty and maintenance, that is because they are. Champerty and maintenance are historical prohibitions on supporting another's lawsuit that remain in effect, to some extent, in many jurisdictions.<sup>307</sup>

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302. See Burch, *supra* note 292; Issacharoff, *supra* note 6. This idea of a large stakeholder as monitor also animated the most adequate plaintiff provisions of the Private Securities Litigation Reform Act. See Private Securities Litigation Reform Act, 15 U.S.C. § 78u-4(a)(3)(B)(i) (2012); *supra* note 167 (recounting criticisms of that approach in securities law).

303. Burch, *supra* note 292, at 1278, 1316–17; Coffee, *supra* note 7, at 342.

304. Burch, *supra* note 292, at 1312–15 (describing third-party funders as “hiring” or funding lawyers with good reputations).

305. See Macey & Miller, *supra* note 18, at 105–18; Tidmarsh, *supra* note 275, at 230, 238 & n.43 (describing similarities between auction mechanism and third-party funding for agent monitoring).

306. See Silver & Miller, *supra* note 2; *id.* at 169–70 (explaining that their proposal would align the management committee's interests with those of all plaintiffs).

307. Anthony J. Sebok, *The Inauthentic Claim*, 64 VAND. L. REV. 61, 98–99, 99 n.162 (2011) (listing jurisdictions that permit some measure of champerty); see also *Osprey, Inc. v. Cabana Ltd. P'ship*, 532 S.E.2d 269, 273 (S.C. 2000) (“[P]ut simply, ‘maintenance’ is helping another prosecute

“[A]ll fifty-one jurisdictions permit at least one form of maintenance: the contingency fee.”<sup>308</sup> Thus, the first step in some jurisdictions to facilitate third-party funders as a check on class counsel is simply eliminating prohibitions on champerty and maintenance beyond allowing contingency-fee suits.<sup>309</sup> Not only should litigation funding be permitted, but to achieve a meaningful monitoring role, third-party litigation funders should be empowered to control the litigation as the client otherwise would.<sup>310</sup> Communications between lawyers and potential funders also need to be dependably cloaked in attorney-client privilege and work product protection to allow for free and open communication and successful vetting of claims.<sup>311</sup>

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None of these internal accountability mechanisms is perfect—nor is the existing regime of judges monitoring class counsel. But facilitating multiple overlapping mechanisms in addition to the existing regime of judicial control can improve accountability.<sup>312</sup>

The internal structures for class actions suggested here are designed to target not the complaint-filing decision as would be most analogous to prosecutor internal review of a charging decision but rather the class settlement. The difference in timing between this proposal and the criminal law scholarship comes from important differences in the two systems. In criminal law, the charging process is hugely important, whereas the filing of a class complaint is far less momentous. In criminal law, charging a case in certain ways can give the government massive leverage to induce a plea and substantially affect the possible resulting sentence, including controlling decades of a defendant’s liberty in a way that makes “blackmail settlements” and “hydraulic pressure” in class

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a suit; ‘champerty’ is maintaining a suit in return for a financial interest in the outcome”); *Champerty*, BLACK’S LAW DICTIONARY (10th ed. 2014) (“an agreement to divide litigation proceeds between the owner of the litigated claim and a party unrelated to the lawsuit who supports or helps enforce the claim”); *Maintenance*, BLACK’S LAW DICTIONARY (10th ed. 2014) (“Improper assistance in prosecuting or defending a lawsuit given to a litigant by someone who has no bona fide interest in the case; meddling in someone else’s litigation.”).

308. Sebok, *supra* note 307, at 99.

309. Burch, *supra* note 292, at 1326–28.

310. See Jack L. Millman, Note, *Structuring a Legal Claims Market to Optimize Deterrence*, 91 N.Y.U. L. REV. 496, 501–21 (2016).

311. Burch, *supra* note 292, at 1327–28 (collecting sources regarding common-interest doctrine in privilege law).

312. Cf. Zachary Clopton, *Redundant Public-Private Enforcement*, 69 VAND. L. REV. 285 (2016) (arguing that redundancy shouldn’t always be treated as a four-letter word and explaining the benefit of combining public and private enforcement).

actions<sup>313</sup> seem like child's play.<sup>314</sup> Harsh mandatory minimums and sentencing enhancements that may be invoked at prosecutors' discretion mean that prosecutors' charging decisions substantially affect sentencing.<sup>315</sup> Prosecutors can induce defendants<sup>316</sup> into waiving rights by creating an immense sentencing differential between convictions after a plea versus trial such that trial becomes far too risky.<sup>317</sup> The most famous example is *Bordenkircher v. Hayes*.<sup>318</sup> The prosecutor indicated on the record that he intended to recommend a five-year sentence for

313. See, e.g., *In re Rhone-Poulenc Rorer Inc.*, 51 F.3d 1293, 1299–300 (7th Cir. 1995) (describing so-called “blackmail settlement” concern); *Newton v. Merrill Lynch*, 259 F.3d 154, 164 (3d Cir. 2001) (describing “hydraulic pressure” to settle). *But see* Charles Silver, “*We’re Scared to Death*”: *Class Certification and Blackmail*, 78 N.Y.U. L. REV. 1357 (2003) (arguing that none of the various iterations of the blackmail settlement narrative are persuasive).

314. See Michael A. Simons, *Prosecutors as Punishment Theorists: Seeking Sentencing Justice*, 16 GEO. MASON L. REV. 303, 324 (2009); Michael A. Simons, *Prosecutorial Discretion in the Shadow of Advisory Guidelines and Mandatory Minimums*, 19 TEMP. POL. & CIV. RTS. L. REV. 377, 384–85 (2010); Ian Weinstein, *Fifteen Years After the Federal Sentencing Revolution: How Mandatory Minimums Have Undermined Effective and Just Narcotics Sentencing*, 40 AM. CRIM. L. REV. 87, 88 (2003) (“The profusion of new narcotics and gun proscriptions, almost all of which carry mandatory minimum prison sentences, transformed the traditional prosecutorial power to charge into the contemporary prosecutorial power to determine the length of the sentence the defendant will serve.”).

315. See Simons, *Prosecutors as Punishment Theorists*, *supra* note 314, at 330 (“[S]entencing enhancements create a largely charge-based system in which prosecutorial decisions determine the sentence.”); see, e.g., Albert W. Alschuler, *The Trial Judge’s Role in Plea Bargaining*, 76 COLUM. L. REV. 1059, 1063 (1976) (describing that in some of the systems the author observed, “the task of sentencing in guilty-plea cases had been transferred from the courts to the District Attorney’s office.”); Daniel S. McConkie, *Judges as Framers of Plea Bargaining*, 26 STAN. L. & POL’Y REV. 61, 63 (2015) (“By selecting the charges, prosecutors strongly influence the sentence. This is so even where mandatory minimum sentences are not implicated because the advisory Federal Sentencing Guidelines are influential in plea bargaining and sentencing.”); Rakoff, *supra* note 212 (“In actuality, our criminal justice system is almost exclusively a system of plea bargaining, negotiated behind closed doors and with no judicial oversight. The outcome is very largely determined by the prosecutor alone.”).

316. See Susan R. Klein, *Enhancing The Judicial Role In Criminal Plea And Sentence Bargaining*, 84 TEX. L. REV. 2023, 2037–38 (2006) (describing various “clubs” that prosecutors possess in plea bargaining); *United States v. Kupa*, 976 F. Supp. 2d 417, 420 (2013) (describing sentencing enhancements as “produc[ing] the sentencing equivalent of a two-by-four to the forehead”); Rakoff, *supra* note 212 (describing weapons with which prosecutors can “bludgeon defendants into effectively coerced plea bargains”).

317. *Kupa*, 976 F. Supp. 2d at 420 (“To coerce guilty pleas, and sometimes to coerce cooperation as well, prosecutors routinely threaten ultra-harsh, enhanced mandatory sentences that *no one*—not even the prosecutors themselves—thinks are appropriate.”); *id.* (“The government’s use of [prior felony informations] coerces guilty pleas and produces sentences so excessively severe they take your breath away.”); Bibas, *supra* note 6, at 971 (“Courts find no problem even when prosecutors use coercive sentencing differentials as plea bargaining leverage.”).

318. *Bordenkircher v. Hayes*, 434 U.S. 357 (1978).

Hayes’s eighty-eight-dollar forgery if he pleaded guilty.<sup>319</sup> When he refused to plead guilty, the prosecutor charged him instead as a habitual criminal, which led to Hayes’s mandatory life sentence.<sup>320</sup> Of course the possibility of trial can serve as a theoretical check on this behavior, but substantive criminal law is so broad and deep that this check is exceptionally weak.<sup>321</sup>

By contrast, a civil complaint can be amended and superseded, and it has no great weight on the force of any settlement discussions except insofar as it provides basic notice to the defendant of the claims and the proposed scope of the class.<sup>322</sup> Moreover, the class-client’s rights can be affected only when a class is certified,<sup>323</sup> and the complaint itself precedes any certification order. If class certification is eventually sought without a concurrent settlement proposal,<sup>324</sup> the court will also have the benefit of a defendant’s brief arguing against certification. In cases where a settlement is not proposed immediately, class counsel and defense counsel will often negotiate at arm’s length over a settlement, whereas criminal defense counsel may not do anything that would look to civil lawyers like bargaining.<sup>325</sup>

Relatedly, we expect a resource disparity in criminal law; to the extent we can expect a resource disparity in class actions, the disparity is inverted. In one system (criminal) the better-resourced actor initiates the case,<sup>326</sup> and in the other (class action) the weaker actor (class counsel, if there is a weaker actor) files.<sup>327</sup> Accordingly, internal checks in criminal

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319. *Id.* at 358–59.

320. *Id.*

321. *See* Stuntz, *supra* note 102, at 512–23.

322. The binary decision of *whether* to file a complaint certainly affects potential settlement.

323. *See, e.g.,* Standard Fire Ins. Co. v. Knowles, 133 S. Ct. 1345, 1349 (2013); *Smith v. Bayer Corp.*, 564 U.S. 299, 314–15 (2011).

324. The timing is not uniform from case to case. The complaint can be filed concurrently with a proposed settlement and motion for class certification; the complaint can precede a joint filing of a motion for class certification and settlement approval; or the complaint, motion for class certification, and motion for settlement approval can all be filed consecutively.

325. Jenny Roberts & Ronald Wright, *Training for Bargaining*, 57 WM. & MARY L. REV. 1445, 1483–87 (2016) (finding based on empirical study that public defenders in their sample largely did not strategically deploy anchoring in plea negotiation by rarely making first offers and rarely making low or “very favorable” offers); *id.* at 1485–87 (finding that defense attorneys “usually” but did not “always” counter a prosecutor’s offer and that the defendant accepts the prosecutors’ first offer “sometimes”).

326. *See* Green, *supra* note 40, at 626 (“[O]ne can scarcely question the underlying premise . . . that ordinarily prosecutors have far greater power than their adversaries.”); Ion Meyn, *The Lightness of the Prosecutor’s Burden* 23–24 (unpublished manuscript) (on file with author).

327. *But see* Lahav, *supra* note 225, at 1519; *see also* Issacharoff, *supra* note 76, at 716.



law are designed to begin checking overreach right from the outset of a case. In contrast, the internal check in class actions is less necessary at the filing stage where the more powerful actor is not yet even involved.<sup>328</sup> Rather, the need for monitoring would not be implicated until there is reason to be concerned that class counsel may under-reach so as not to continue litigating against a better-resourced defendant. Because of these differences, internal processes in criminal law are very important at the charging stage, whereas internal processes for class counsel make more sense at settlement than in the initial phases of claim investigation or complaint drafting.<sup>329</sup>

## CONCLUSION

Unlike in the traditional paradigm of client-controlled representation, class counsel and criminal prosecutors have no client actively controlling the litigation. These lawyers' diffuse entity-clients have amorphous and complicated interests, and the lawyers themselves have self-interests that tend to diverge from their clients' interests. Both scenarios therefore create serious accountability concerns.

Nonetheless, class actions and criminal prosecution turn to dramatically different approaches to monitor lawyers when they are making client-like decisions. In the settlement context, class actions rely on judges to ensure that class counsel has reached a deal that is fair to her client, while criminal law turns to elections and internal administrative processes. Accountability in class actions would improve by adding some form of criminal law's internal accountability regime.

More specifically, courts should create an incentive for class counsel's colleagues to monitor proposed class settlements to ensure that the class-clients' interests are being well served. That incentive could come from predictably reducing attorney's fee awards for poor performance. Or it could be greater still if class certification or settlement approval were linked in some measure to putative class counsel's firm's track record and her individual track record in previous cases. So too does this comparison illuminate the notion that accountability within the plaintiffs' bar can come from one firm

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328. Plaintiffs' firms can use internal checks before deciding whether to invest resources to pursue a case, but the need for such checks to protect class members is not terribly compelling at that early stage.

329. That said, I am not suggesting that any process be mandated for class counsel, so each firm can make its own choices as to timing.

monitoring another or potentially from third-party funders monitoring class counsel, where such third-party funding exists.

In addition to the direct implications of the comparison for improving accountability in class actions, the comparison reveals ways in which criminal law can learn from class actions.<sup>330</sup> It also yields broader insights about "clientless" lawyers' motivations, how "clientless" lawyers are publicly perceived, and the mismatch of lawyer and client interests. This article seeks to explain why the comparison is fruitful and draw out the direct implications for ways in which class action law can learn from criminal prosecution. Lessons that we can learn about accountability in criminal law and the broader implications and discussions of other "clientless" contexts must be left for another day.

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330. The lessons that class action law affords to accountability in criminal law are addressed elsewhere. See Gold, *supra* note 12.

