2016

Clientless Prosecutors

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GEORGIA LAW REVIEW

VOLUME 51 SPRING 2017 NUMBER 3

ARTICLES

"CLIENTLESS" PROSECUTORS

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I. INTRODUCTION

Plaintiffs' lawyers in damages class actions and criminal prosecutors have much more in common than people realize.[1] They are both "clientless" lawyers[2]—lawyers whose clients are diffuse entities without a decisionmaking structure. Accordingly, these "clientless" lawyers have to make decisions that would be reserved to clients in other types of representation such as decisions about the objectives of representation or whether to resolve a dispute without litigation.

Because of the nature of prosecutors' and class counsel's clients, there is no reason to expect these clients to hold their lawyers accountable in the way that we expect of lawyers and clients in most scenarios. Clients with a substantial interest in their litigation have a reason to keep an eye on their lawyers. But the primary reason for the class action device and its accompanying procedures—especially in small-claim cases—is that class members do not have a sufficient incentive to monitor their lawyers; the small amount at stake is not worth the time cost. For prosecutors, similarly, most members of the public don't care about the vast majority of cases that churn through the criminal justice system.[3] The ultimate stick that most clients wield is the ability to

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[1] Russell M. Gold, *"Clientless" Lawyers*, 92 WASH. L. REV. 87 (2017) [hereinafter Gold, *"Clientless" Lawyers*]. I focus on damages class actions because there is reason to think that lawyers' motivations in traditional civil rights class actions are quite different than in small-claim monetary cases, such as the typical consumer class action. I do not mean to suggest that the distinction is binary with all lawyers in damages cases thinking about their own bottom lines and all lawyers in injunctive relief cases thinking themselves something else entirely.

[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).

[3] Criminal defendants of course have a particularized stake in their own cases sufficient to warrant monitoring their lawyer, but this Article is focused on the government side of the "v." On that side, some cases have identifiable victims who have a strong interest in monitoring the prosecutor, but the individual victims themselves are not the prosecutor's

fire their lawyers if they're unhappy. But neither absent class members, named plaintiffs, nor members of the prosecutor's public-client can fire the aggregate-client's lawyer, save for occasional contested district attorney elections.[4]

Although both systems try to deal with problems of lawyer accountability, they take very different approaches. One striking difference is the extent of judicial review. Class actions rely on judges—potentially informed by the input of defendants or objectors—to ensure that class counsel faithfully represents her client.[5] Criminal law, by contrast, nearly swears off judicial review entirely over critical decisions like charging,[6] including when the prosecutors' charging decisions tie judges' hands at sentencing as may be the case with mandatory minimums or sentencing enhancements.[7] Certifying a class action in federal

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client. CRIMINAL JUSTICE STANDARDS FOR THE PROSECUTION FUNCTION § 3-1.3 (4th ed. 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 ("The prosecutor has a client in an abstract sense—she represents the 'public' or the 'state' . . . ."). And indeed, the public as a whole may have very different interests in enforcement than the particularly aggrieved victims.

[4] *See* Stacy Caplow, *What if There is No Client?: Prosecutors as "Counselors" of Crime Victims*, 5 CLINICAL L. REV. 1, 5 (1998) (noting that prosecutors do not have "serious concerns" for "client autonomy" or "personal accountability"); *Developments in the Law: Conflicts of Interest in the Legal Profession*, 94 HARV. L. REV. 1244, 1453 (1981) (describing how named plaintiffs and absent class members have no ability to control class counsel).

[5] *See Developments in the Law*, *supra* note 4, at 1453.

[6] *See* Rachel E. Barkow, *Institutional Design and the Policing of Prosecutors: Lessons from Administrative Law*, 61 STAN. L. REV. 869, 871 (2009) ("In the 95% of cases that are not tried before a federal judge or jury, there are currently no effective legal checks in place to police the manner in which prosecutors exercise their discretion to bring charges, to negotiate pleas, or to set their office policies."); Green & Zacharias, *supra* note 3, at 847 ("[I]ndividual prosecutors' preferences still control a vast range and number of choices, free of outside or supervisory controls.").

[7] *See* Michael A. Simons, *Prosecutors as Punishment Theorists: Seeking Sentencing Justice*, 16 GEO. MASON L. REV. 303, 330 (2009) ("[S]entencing enhancements create a largely charge-based system in which prosecutorial decisions determine the sentence."); *see also, e.g.*, Albert W. Alschuler, *The Trial Judge's Role in Plea Bargaining, Part I*, 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."); Jed S. Rakoff, *Why Innocent People Plead Guilty*, N.Y. REV. BOOKS, Nov. 20,

court requires a judge to determine that a class meets all of the fundamental prerequisites: numerosity, commonality, typicality, adequacy, predominance, and superiority.[8]

Judges play wildly different roles in reviewing lawyers' decisions to settle a case in the two systems.[9] Once the lawyers have reached an agreement and before a settlement that binds the class can be approved in federal court, the court must not only satisfy itself that the Rule 23 prerequisites listed in the previous paragraph—such as commonality and predominance—have been satisfied but must also find after a hearing that the settlement is substantively fair, reasonable, and adequate to the absent class

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2014 ("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."). Courts may invalidate charging decisions only when they purposely target members of a protected class. *See* United States v. Armstrong, 517 U.S. 456, 463–68 (1996) (holding that courts should check prosecutors' charging discretion only when it violates equal protection by purposely discriminating against a suspect class); *see also* Stephanos Bibas, *Prosecutorial Regulation Versus Prosecutorial Accountability*, 157 U. PA. L. REV. 959, 970 (2009) [hereinafter Bibas, *Prosecutorial Regulation*] ("Courts nominally forbid selective prosecution based on race. No race-based claim has succeeded for more than a century, however."). Of course, judges continue to review constitutional questions such as search and seizure or *Brady* violations, but these types of questions may be irrelevant as a practical matter in our system where nearly all cases are resolved by guilty plea and many are resolved before suppression motions—let alone *Brady* motions—could ever be filed. *See* Russell M. Gold, *Beyond the Judicial Fourth Amendment: The Prosecutor's Role*, 47 U.C. DAVIS L. REV. 1591, 1629–31 (2014) [hereinafter Gold, *Beyond the Judicial Fourth Amendment*].

[8] FED. R. CIV. P. 23(a), (b)(3). This Article focuses on class counsel in damages cases, which is why it mentions the predominance and superiority requirements here.

For purposes of the comparison, this discussion of class actions focuses on federal courts and Rule 23. Although some class actions can and do proceed in state courts, federal courts have jurisdiction so long as at least one member of the class is a citizen of a different state than one defendant and the amount in controversy exceeds $5 million, 28 U.S.C. § 1332(d)(2) (2012), or the more traditional bases of federal jurisdiction are met, *id.* §§ 1331, 1332(a). And defendants typically prefer to remove to federal court when possible. *See, e.g.*, Howard B. Stravitz, *Recocking the Removal Trigger*, 53 S.C. L. REV. 185, 185–86 (2002).

[9] David Sklansky and Stephen Yeazell draw out this comparison in a wonderful article, though they compare the traditional civil case to the criminal plea bargaining process and note that class actions are different insofar as they require judicial approval on substantive grounds. 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, 696–705 (2006); *see also* Russell M. Gold, Carissa Byrne Hessick & F. Andrew Hessick, *Civilizing Criminal Settlements*, 97 B.U. L. REV. (forthcoming 2017) (arguing that the civil and criminal systems should not take vastly different approaches to facilitating consensual resolution and that criminal systems should adopt civil procedures). This Article focuses on the class action context as a basis for comparison.

members.[10] In criminal law, judges' substantive review of guilty pleas is extremely lenient and deferential. It focuses only on ensuring that there is a factual basis to support the plea.[11] That standard does not inquire whether the charges serve the public's interests.[12]

Before the parties have reached an agreement in the civil system, including in class actions,[13] managerial judges actively seek to manage their caseloads to urge settlement.[14] In the federal criminal system, by contrast, judges are explicitly barred from involvement in plea negotiations.[15] Many states follow the prohibition in the federal rules, but other states don't.[16]

Of course there are differences between the class action system and the criminal justice system. But they share a similar problem of lawyer accountability, and they are similar in the ways that matter for purposes of how to address the accountability problem. Both systems can learn from the other, and each should adopt aspects of the other system's approach to supplement its own existing accountability mechanisms.[17] This Article considers what

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[10] FED. R. CIV. P. 23(e)(2).

[11] FED. R. CRIM. P. 11(b)(3); *see also* 5 WAYNE R. LAFAVE ET AL., CRIMINAL PROCEDURE § 21.4(f), at 1005–07 (4th ed. 2015) (explaining that many states have adopted a provision comparable to the federal rule).

[12] *See* Brandon L. Garrett, *Structural Reform Prosecution*, 93 VA. L. REV. 853, 906 (2007) ("Federal courts are more involved in reviewing plea bargains than charging decisions, but judges still remain highly deferential."); Rakoff, *supra* note 7 ("[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. . . .").

[13] What is different in class actions than other civil litigation is that the decision to settle on the plaintiff's side belongs to the lawyer rather than the client. *Compare* Lazy Oil Co. v. Witco Corp., 166 F.3d 581, 584, 588–91 (3d Cir. 1999) (approving settlement over the objection of the named plaintiffs—who are the closest thing to a mouthpiece for the client's interests other than class counsel), *with* MODEL RULES OF PROF'L CONDUCT r. 1.2(a) (AM. BAR ASS'N 2016) (providing that clients control the decision of whether to settle and on what terms).

[14] *See generally* Judith Resnik, *Managerial Judges*, 96 HARV. L. REV. 374 (1982).

[15] FED. R. CRIM. P. 11(c)(1).

[16] *See generally* Rishi Raj Batra, *Judicial Participation in Plea Bargaining: A Dispute Resolution Perspective*, 76 OHIO ST. L.J. 565 (2015) (providing a fifty-state survey of rules for judicial participation in plea bargaining); Nancy J. King & Ronald F. Wright, *The Invisible Revolution in Plea Bargaining: Managerial Judging and Judicial Participation in Negotiations*, 95 TEX. L. REV. 325 (2016) (empirically studying judicial involvement in plea negotiations through interviews with judges and attorneys).

[17] None of the mechanisms are perfect, and the overlapping use of multiple mechanisms is valuable. *Cf.* Zachary D. Clopton, *Redundant Public-Private Enforcement*, 69 VAND. L.

criminal law can learn from class actions to improve prosecutor accountability.[18]

The comparison to class actions suggests that criminal law could improve prosecutor accountability by asking judges to play a more meaningful role in protecting the prosecutor's public-client as judges do for class counsel's class-client. As with class action settlements, judges presented with plea agreements should substantively assess the terms of those agreements to ensure that the prosecutor's public-client's interests are well served and that prosecutors are adhering to their responsibility to afford defendants fair process. In some respects, the first suggestion is merely that judges should impose the sentence they think is right and not be unduly influenced by the lawyers' sentencing recommendations. But this Article goes further by drawing on the class action context to suggest two methods to help courts with that challenging fairness analysis.

First, as in class actions, courts should consider the process that led to that negotiated sentence.[19] In class action law, courts look more cautiously at class settlements that were not negotiated at arm's length, were reached very quickly, or were reached without discovery.[20] In the criminal context, if the bargaining process involved evidence of collusion, exploding offers,[21] threats to charge a mandatory minimum or sentencing enhancement, or lack of investigation or shared information between the parties, the court should look particularly carefully at whether the ultimate deal serves the public-client's interests and evinces a prosecutor satisfying her constitutional obligations.[22] This approach will help

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REV. 285, 285–91 (2016) (arguing that redundancy in legal regimes should not always be treated as a four-letter word).

[18] I take up the comparison in the other direction elsewhere. *See generally* Gold, *Clientless Lawyers*, *supra* note 1.

[19] *See infra* Section IV.A.*1*.

[20] 7B CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 1797.1 (3d ed. 2005).

[21] *See* Stephanos Bibas, *Designing Plea Bargaining from the Ground Up: Accuracy and Fairness Without Trials as Backstops*, 57 WM. & MARY L. REV. 1055, 1061 (2016) [hereinafter Bibas, *Designing Plea Bargaining*] (describing "strong pressures to plead quickly").

[22] *But see* Robert E. Scott & William J. Stuntz, *Plea Bargaining as Contract*, 101 YALE L.J. 1909, 1959 (1992) (contending that judges examining the plea bargaining process would not provide useful information to determine whether counsel secured a good deal).

facilitate meaningful review *ex post* but can also usefully shape plea bargaining *ex ante* by encouraging more information sharing and discouraging heavy-handed tactics.

Second, as with class members in class actions, judges in criminal cases should afford members of the prosecutor's public-client the opportunity to be heard regarding appropriate sentences in particular cases once the parties have struck a plea deal.[23] Victims already have such rights in the federal system and most state systems,[24] but the suggestion is to broaden those rights to more members of the prosecutor's public-client, potentially including amici appointed to argue against a plea agreement. Unlike in class actions, every member of the aggregate client need not be provided the right to be heard. Most members of the public will not care to be heard in most criminal cases, but voice rights provide at least some opportunity for judges to hear dissenting views when—as in class actions—both parties before the court are trying to get a deal approved and thus have no incentive to provide information or reasoning that would undermine that objective.

Lastly, fairness considerations should include comparing the proposed sentence to the norms for similar cases in the jurisdiction,[25] as two scholars have already suggested.[26]

Asking judges to carefully evaluate sentence recommendations and determine what sentence they think is fair has inherent limitations in systems where prosecutors wield huge sentencing power because they can charge a mandatory minimum or sentencing enhancement that ties the judge's hands. When a court has concern about the fairness of the deal but cannot override the charging decision, this Article contends that the judge should play

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[23] *See infra* Section IV.A.*2*.

[24] 18 U.S.C. § 3771(a)(4) (2012); 5 LAFAVE ET AL., *supra* note 11, § 21.3(f), at 921–22 (explaining that all fifty states have a statutory crime victims' bill of rights, some states also have constitutional provisions on point, and that victims' rights typically include allowing the victim to be heard about a plea bargain before the court).

[25] *See infra* Section IV.A.*3*.

[26] *See* Scott & Stuntz, *supra* note 22, at 1959–60 (arguing that "downward discretion" of sentences by judges "should be encouraged whenever the sentence is substantially above the 'market level' in the relevant jurisdiction" (emphasis omitted)). That lawyers tend to warn judges in advance if they plan to recommend a sentence that deviates from those norms suggests that judges already employ this approach. *See* King & Wright, *supra* note 14, at 341–42, 374–76, 388.

an information-generating and information-forcing role.[27] In these instances, the judge should express her concerns on the record in open court and ask the prosecutor to justify her decision. That record would help direct information to supervisors in the prosecutor's office and improve the direct political check on prosecutors by providing fodder for electoral challengers and more information to voters.

Because *ex post* fairness review comes late in a very opaque plea bargaining process after the parties have already reached a deal and the judge has every incentive to go along to clear her docket, it may not be sufficiently robust to protect the public-client's interests. It also comes after prosecutors may have already used their substantial leverage to obtain a guilty plea, perhaps using sources of leverage that do not best embody prosecutors' role as ministers of justice who should assure fair process for defendants. Thus, this Article briefly considers ways that judges can monitor prosecutors—both to ensure that they are protecting their client's interests and that they are affording basic procedural fairness to defendants[28]—during (and indeed before) plea bargaining.[29]

This Article theorizes a broader role that judges should play in approving plea bargains. But its practical aim is modest: encouraging judges, despite docket management pressures, to look carefully at the criminal cases before them and make noise when they see cause for concern about prosecutors over or under-reaching. It does not suggest added ritual but simply urges conscientious judges to employ their judgment and expertise. In some respects, this proposal is a second (or perhaps third) best solution. Legislatures reining in prosecutors' incredibly powerful

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[27] *See infra* Section IV.A.*4.b.*

[28] There is reason to think that protecting defendants' rights serves the prosecutor's public-client well even if rights protection would not embody the actual majoritarian preferences in a particular community. *See* Gold, *Beyond the Judicial Fourth Amendment*, *supra* note 7, at 1642; Bruce A. Green, *Why Should Prosecutors "Seek Justice"?*, 26 FORDHAM URB. L.J. 607, 642 (1999). Regardless of whether protecting defendants' procedural rights is seen as serving the prosecutor's public-client's interests or prosecutors' obligations in some other respect, that remains the prosecutor's task. *See* MODEL RULES OF PROF'L CONDUCT r. 3.8 cmt. 1 (AM. BAR ASS'N 2016); ABA STANDARDS FOR CRIMINAL JUSTICE: PROSECUTION AND DEFENSE FUNCTION § 3-1.2 (4th ed. 2015).

[29] *See infra* Section IV.B.

tools to obtain guilty pleas, such as by shrinking the scope of substantive criminal law and prosecutors' menu of charging and sentencing options, would also reduce prosecutor accountability concerns.[30] Better funding public defender offices to provide a stronger adversarial check would too.[31] But neither reform seems politically feasible, which prompts the turn to judges as a more modest solution.

This Article proceeds in three parts. Part II briefly explains the comparison between prosecutors and class counsel.[32] Part III then explains the vast differences in the judicial role between the two systems regarding negotiated resolutions—class settlements and plea bargains. Part IV then considers the implications of the comparison, focusing on judges conducting substantive fairness review of plea agreements. Part IV also briefly considers other opportunities for judicial involvement if *ex post* fairness review alone is not sufficiently robust.

II. EXPLAINING THE COMPARISON

The most important 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 rationally apathetic about their cases and therefore cannot be expected to monitor their lawyers directly.[33] Class counsel represents the class-client as a whole rather than the interests of particular class members.[34] Somewhat similarly,

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[30] *See* William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505, 546–57 (2001) (explaining legislatures' institutional incentives to delegate broad power to prosecutors); William J. Stuntz, *Plea Bargaining and Criminal Law's Disappearing Shadow*, 117 HARV. L. REV. 2548, 2555–58 (2004) (explaining how much power legislatures have given prosecutors through broad and deep substantive law); *infra* Part IV.A.*4*.

[31] *See* William J. Stuntz, *The Uneasy Relationship Between Criminal Procedure and Criminal Justice*, 107 YALE L.J. 1, 7–12 (1997) (discussing the disparity in funding changes between public defenders' offices and prosecutors' offices).

[32] A more complete explanation can be found in Gold, *Clientless Lawyers*, *supra* note 1.

[33] 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.

[34] *See* FED. R. CIV. P. 23 advisory committee's note to 2003 amendment; *see also, 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

prosecutors represent the public as a whole rather than the interests of particular victims.[35] The identity of the class-client and public-client are not exactly the same, of course. But class counsel, like the prosecutor, is the one calling the shots and making the key decisions on behalf of her client who cannot voice its own interests.[36] Unlike the traditional model of lawyer-client representation in which the client holds ultimate authority over the decision of whether to settle a case and on what terms,[37] class counsel can settle claims regardless of whether the named plaintiffs or absent class members object, so long as the court finds that the proposed settlement is fair.[38]

Both clients have complex and amorphous goals that require difficult balancing, however, and that task necessarily falls to their lawyers in the first instance. Although the clients' goals are not identical in the two contexts, they are sometimes more similar than people realize.[39] In criminal law, prosecutors are tasked with considering victims' interests and seeking restitution on their

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(2000) ("Class action lawyers are duty-bound to represent the interests of the particular class . . . .").

[35] ABA STANDARDS FOR CRIMINAL JUSTICE: PROSECUTION AND DEFENSE FUNCTION § 3-1.3 (4th ed. 2015); Green & Zacharias, *supra* note 3, at 861–62.

[36] *See* 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 a class action attorney "has no 'true' identifiable client" and thus is given more control over the litigation); Deborah L. Rhode, *Class Conflicts in Class Actions*, 34 STAN. L. REV. 1183, 1183 (1982) ("In many such cases, the lawyer represents an aggregation of litigants with unstable, inchoate, or conflicting preferences. The more diffuse and divided the class, the greater the problems in defining its objectives."); *see also* Samuel Issacharoff & Richard A. Nagareda, *Class Settlements Under Attack*, 156 U. PA. L. REV. 1649, 1695 (2008) ("In many class actions, there is little realistic prospect of individual class members playing an active role, either in monitoring class counsel or pursuing their own interests independently.").

[37] MODEL RULES OF PROF'L CONDUCT r. 1.2(a) (AM. BAR ASS'N 2016).

[38] *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).

[39] 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 9, at 701–04.

behalf;[40] restitution and concern for particular victims are private-law concerns that look a lot like civil redress.[41] And indeed, the scope of restitution in criminal law can be so large as to look remarkably similar to aggregate civil litigation.[42]

Much as criminal law shares the private-law concern about restitution, so too does class action law share public-law concerns about deterring wrongdoing. The primary social welfarist reason to have class actions is their deterrent effect—protecting the public from future harm by forcing decisionmakers to internalize externalities and not allowing companies to avoid the fear of liability by spreading harm thinly across a large group.[43]

Prosecutors face more internally-divergent client interests than do class counsel, but the class-client's interests—like the prosecutor's public-client's—are not homogenous.[44] The Supreme Court has required increasing similarity between class members in the past two decades,[45] but classes can still be certified with internal conflicts as to core preferences such as 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

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[40] *See* 18 U.S.C. § 3771(a)(5)–(6) (2012); 5 LAFAVE ET AL., *supra* note 11, § 21.3(f) (describing the widespread adoption of victims' bill of rights); Adam S. Zimmerman & David M. Jaros, *The Criminal Class Action*, 159 U. PA. L. REV. 1385, 1393 (2011).

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

To some extent, 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 9, at 701–02, 738.

[42] *See* Zimmerman & Jaros, *supra* note 40, at 1385 (noting that prosecutors have sought billions of dollars in restitution and distributed the money to victims much like a civil class action). Tellingly, Adam Zimmerman and David Jaros refer to such cases as "criminal class actions."

[43] *See infra* note 105 and accompanying text.

[44] For more detail regarding this similarity, see Gold, *"Clientless" Lawyers*, *supra* note 1, at 97–102.

[45] *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.").

relationship with the defendant;[46] at least a few class members demonstrate these different preferences in many cases by actively opposing a proposed settlement. A single prosecutor's public-client includes defendants, victims, those who seek less use of the criminal justice system, and those who want to lock more people up and throw away the key.

Concern about the complexity of client interests is compounded in both contexts because the lawyers have powerful self-interests at play that may diverge from the client's interests, as scholars on both sides of the civil-criminal divide have recognized. Class action scholars typically worry that class counsel will underreach and sell out the class's claims too cheaply or after expending too little effort; the idea is that class counsel will tend to be more risk averse than the client because class counsel has to front the costs of litigation.[47] 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.[48] Moreover, because of the nature of their work, prosecutors "ordinarily are naturally aligned with the police and victims."[49] The typical concern about prosecutor misalignment with the client's interest is one of overreach.[50] In some instances, such as those involving police defendants[51] or deferred prosecution

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[46] *Cf.* Rhode, *supra* note 36, at 1183, 1185–91 (discussing the wide number of internal conflicts that can arise within a structural reform class action).

[47] *See, e.g.*, Kevin M. Clermont & John D. Currivan, *Improving on the Contingent Fee*, 63 CORNELL L. REV. 529, 536 (1978) (explaining that a class is best served by a lawyer devoting a large number of hours to ensure maximum recovery but that class counsel is better served by working a smaller number of hours); Christopher R. Leslie, *A Market-Based Approach to Coupon Settlements in Antitrust and Consumer Class Action Litigation*, 49 UCLA L. REV. 991, 1042 (2002) (noting that "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).

[48] Gold, *"Clientless" Lawyers*, *supra* note 1, at 104–11.

[49] Green & Zacharias, *supra* note 8, at 863.

[50] *See* Gold, *"Clientless" Lawyers*, *supra* note 1, at 104–11; *see also, e.g.*, Brian A. Sun, *The Overzealous Prosecutor*, LITIG., Winter 1992, at 38, 38–40 (noting reasons that prosecutors may overreach).

[51] *See, e.g.*, Kate Levine, *How We Prosecute the Police*, 104 GEO. L.J. 745, 749 (2016) (explaining the different and more favorable procedures that police defendants receive in the criminal process).

agreements with large fines that provide splashy headlines,[52] concerns arise about prosecutor underreach because of these same self-interests.

One meaningful difference between the two systems is the complicated role of the prosecutor to respect defendants' rights and embody her constituents' preferences. Class counsel's job should be to pursue cases in ways that best serve her class-client's interests.[53] While figuring out what best serves the class-client's interests is a challenging task, few would suggest that class counsel owes allegiance to promote anyone else's interests. The same is not true for prosecutors. Prosecutors should embody their constituents' majoritarian preferences in some respects. But prosecutors' role as constitutional actors with substantial power to determine which citizens should be deprived of their liberty creates other obligations, such as ensuring fairness for defendants that may not always be popular amongst prosecutors' constituencies.[54] The crucial similarity is that in neither class actions nor criminal law can we expect clients to meaningfully monitor their lawyers; both can accordingly look to the other to borrow additional mechanisms that substitute for client control. The difference explored in this paragraph, however, means that holding prosecutors accountable requires more than trying to ensure that they adhere to the actual preferences of their constituents; it requires judges instead to consider whether prosecutors are amply serving some more abstract notion of the public's interest and whether prosecutors are abiding by their obligation to serve as ministers of justice. Monitoring whether prosecutors are adequately protecting the interests of justice is a

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[52] *See generally* David M. Uhlmann, *Deferred Prosecution and Non-Prosecution Agreements and the Erosion of Corporate Criminal Liability*, 72 MD. L. REV. 1295 (2013) (arguing that the dramatic increase in deferred prosecutions for corporate criminal liability erodes trust in the criminal justice system and undermines the rule of law).

[53] *See supra* note 34 and accompanying text.

[54] Sometimes embodying majoritarian preferences runs in tension with prosecutors' obligations to do justice, including affording fairness to defendants. *See* Stephen J. Schulhofer, *Due Process of Sentencing*, 128 U. PA. L. REV. 733, 803 (1980) (explaining that majoritarian control results in greater punishment at sentencing than experts think appropriate).

task with less than obvious contours,[55] but it includes at least trying not to convict the innocent and ensuring that defendants receive fair process.[56]

Although one instinct may be to say that every prosecutor's constituents desire the prosecutor to lock up as many people as possible for as long as possible, those constituents have to pay for the law enforcement they get. Thus, even leaving aside concerns about criminogenic sentences and the notion that more cost might mean marginal safety decreases, a greater sentence than necessary wastes public money.[57]

Thus, although class counsel and prosecutors are not identical, they share several important similarities. They both represent diffuse entities comprised primarily of apathetic individuals who are unlikely to meaningfully monitor their lawyers. Yet both cases involve lawyers whose interests tend to diverge from their clients'. Thus, both contexts raise significant concerns about lawyer accountability and prompt the need to look outside the lawyer-client relationship to hold the lawyers accountable.

Some readers might be tempted to say that the adversarial process provides a sufficient check on lawyers in both contexts, rendering judicial review unnecessary. It doesn't, albeit for different reasons in the two systems. Class counsel will typically be checked by its well-resourced corporate-defendant adversary, making judicial review largely unnecessary to protect against *overreach*. Instead, judicial review in class actions is meant to

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[55] *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); Rory K. Little, *"It's Not My Problem?" Wrong: Prosecutors Have an Important Ethical Role to Play*, 7 OHIO ST. J. CRIM. L. 685, 688 (2010).

[56] *See, e.g.*, Gold, *Beyond the Judicial Fourth Amendment*, *supra* note 7, at 1643–44 (arguing that the minister of justice duty includes protecting citizens' constitutional rights); Green, *supra* note 28, at 634 (defining the minister of justice duty to mean "avoiding punishment of those who are innocent of criminal wrongdoing . . . and affording the accused, and others, a lawful, fair process"); *see also* MODEL RULES OF PROF'L CONDUCT r. 3.8 cmt. 1 (AM. BAR ASS'N 2016) (explaining that prosecutors have "specific obligations to see that the defendant is accorded procedural justice").

[57] *See generally* Russell M. Gold, *Promoting Democracy in Prosecution*, 86 WASH. L. REV. 69 (2011) [hereinafter Gold, *Promoting Democracy in Prosecution*] (arguing for efficiency in prosecution, meaning that cases should be prosecuted when their marginal benefits exceed or equal their marginal costs including incarceration).

protect against *underreach*.[58] In criminal law, the primary concern with prosecutors not tracking their public-clients' best interests tends to be (though is not always) about prosecutor overreach. But there are structural reasons why the adversarial process fails to check that overreach. The typical enforcement target is an indigent individual who is represented by an overstretched and under-resourced public defender.[59] Defendants who opt to go to trial face harsh trial penalties, and the accused frequently sit in jail while their case awaits resolution.[60] Accordingly, resource constraints and money bail create reasons to doubt the ability of the adversarial process to check prosecutor overreach.

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[58] The comparison also reveals that class counsel in some contexts may overreach in seeking to represent the class's interests in ways that scholars have not previously recognized. Although a detailed analysis of this point is beyond the scope of this Article, the basic idea is that the defendant will serve as an ample check against overreach, but the class's interests may be poorly served when class counsel overreaches and a defendant successfully blocks that overreach.

[59] Green, *supra* note 28, at 626 (explaining that prosecutors' "typical adversaries are among society's most powerless"); Peter A. Joy & Rodney J. Uphoff, *Systemic Barriers to Effective Assistance of Counsel in Plea Bargaining*, 99 IOWA L. REV. 2103, 2112–13 n.52 (2014) (relying on an empirical study of workload to conclude that "[f]or indigent defendants . . . too many are represented by an inexperienced or overwhelmed lawyer with a crushing caseload that prevents counsel from doing anything more on a case than a cursory interview and the presentation of the prosecutor's plea offer"); Rinat Kitai-Sangero, *Plea Bargaining as Dialogue*, 49 AKRON L. REV. 63, 78 (2016) (noting that "[d]isparity of power between the prosecutor and the accused is inherent in the criminal process" because of, among other reasons, resource disparities); Ion Meyn, The Lightness of the Prosecutor's Burden 15–24 (unpublished manuscript) (on file with author) (explaining the significant resource disparity between prosecutors and public defenders).

[60] *See* Peter A. Joy & Kevin C. McMunigal, *Innocent Defendants Pleading Guilty*, 30 CRIM. JUST. 45, 45–46 (2015) (arguing that "the difference between the potential sentence a defendant faces after a trial and the sentence the same defendant faces after a guilty plea . . . plac[es] an unfairly high price on defendants exercising the constitutional right to a jury trial"); Rakoff, *supra* note 7 (contending that "the consequences of going to trial . . . are too severe to take the risk"); *Frontline: The Plea* (PBS television broadcast June 17, 2004), http://video.pbs.org/video/2216784391/ (explaining the pressures that face even innocent defendants to plead guilty when the sentence would result in immediate release from jail).

Detaining many defendant who have never been convicted of a crime is itself a major concern that I take up elsewhere. *See* Russell M. Gold, *Jail as Interim Relief* (unpublished manuscript) (on file with author); *see also* Shawn Carter, *Jay Z: For Father's Day, I'm Taking on the Exploitative Bail Industry*, TIME, June 16, 2017, http://time.com/4821547/jay-z-racism-bail-bonds (articulating the massive scope of pretrial detention and extensive harms that pretrial detention can cause).

III. COMPARING THE JUDICIAL ROLES IN NEGOTIATED RESOLUTIONS

One perplexing aspect of the comparison between accountability measures in criminal prosecution and class actions is the cavernous divide in reliance on judges to monitor lawyers, especially as to negotiated resolutions of cases. Class counsel has significant discretion, but that discretion is checked by judges in every case in which class counsel tries to bind more than a few named individuals.[61] In criminal law, prosecutorial discretion is vast,[62] widely recognized, and rarely checked by judges.[63]

A. CLASS ACTIONS

Class action law relies heavily on judicial review to protect the class's interests.[64] If a damages class action is not resolved in the defendant's favor on a procedural motion and a class is certified,

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[61] *See* Gold, *"Clientless" Lawyers*, *supra* note 1, at 113–16.

[62] *See, e.g.*, Robert H. Jackson, *The Federal Prosecutor*, 31 J. AM. INST. CRIM. L. & CRIMINOLOGY 3, 3 (1940) ("The prosecutor has more control over life, liberty, and reputation than any other person in America. His discretion is tremendous."); Stephen J. Schulhofer, *Criminal Justice Discretion as a Regulatory System*, 17 J. LEGAL STUD. 43, 43 (1988) ("In criminal justice, as perhaps nowhere else in the American legal system, the life and liberty of the citizen are exposed to the largely uncontrolled discretion of individual public officials. Prosecutors have unlimited discretion not to charge, and when they do proceed, they have largely unlimited power to determine which charges to file."); William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505, 506 (2001) (labeling prosecutors as "the criminal justice system's real lawmakers"). The vastness of prosecutorial discretion has led to widespread acceptance of the notion that American criminal justice is a largely administrative system run by prosecutors. *See generally* Gerard E. Lynch, *Our Administrative System of Criminal Justice*, 66 FORDHAM L. REV. 2117 (1998).

[63] *See* Barkow, *supra* note 6, at 871; Rachel E. Barkow, *Separation of Powers and the Criminal Law*, 58 STAN. L. REV. 989, 1024–28 (2006) [hereinafter Barkow, *Separation of Powers*] (explaining the lack of oversight on decisionmaking by federal prosecutors).

[64] *See* 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."); 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."); Richard A. Nagareda, *Turning from Tort to Administration*, 94 MICH. L. REV. 899, 902 (1996) ("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.").

the case will typically settle.[65] Class settlements can be approved only if a judge determines that several procedural requirements for class certification are satisfied and,[66] substantively, that the settlement is "fair, reasonable, and adequate" after a hearing.[67] Some of these procedural requirements, though malleable, seek 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[68]—a requirement that seeks to ensure that flaws in the class representatives' claims are not held against the absent class members. A class cannot be certified if its members have intractable conflicts of interest, such as the conflicts between those who have already been injured and those whose harm has not yet manifested.[69] A class cannot be certified unless the court finds that class counsel will "fairly and adequately represent the interests of the class."[70] Further, a class cannot be certified unless the number of claimants is sufficiently numerous that individual joinder is impracticable.[71]

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

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

[67] 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. COMMITTEE ON RULES OF PRACTICE AND PROCEDURE OF THE JUDICIAL CONFERENCE OF THE UNITED STATES, PRELIMINARY DRAFT OF PROPOSED AMENDMENTS TO THE FEDERAL RULES OF APPELLATE, BANKRUPTCY, CIVIL, AND CRIMINAL PROCEDURE, AUGUST 2016, at 213–14, http://www.uscourts.gov/sites/default/files/2016-08-preliminary_draft_of_rules_forms_publ ished_for_public_comment_0.pdf [hereinafter PROPOSED AMENDMENTS].

[68] FED. R. CIV. P. 23(a)(3).

[69] *See id.* at 23(a)(4) (providing that putative class representatives must "fairly and adequately protect the interests of the class"); *Amchem*, 521 U.S. at 625 ("The adequacy inquiry under Rule 23(a)(4) serves to uncover conflicts of interest between named parties and the class they seek to represent.").

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

[71] *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) (requiring commonality); *id.* (b)(3) (requiring predominance and superiority).

To help facilitate judicial review of these requirements, class members are entitled to notice when a class is certified and of any proposed settlement.[72] They may object to the fairness of a settlement and seek to dissuade judicial approval.[73]

The parties must also notify relevant state and federal executive branch officials of proposed settlements so that those officials may object on their constituents' behalf.[74]

Consider a concrete example of a Fair Credit Reporting Act class action where—as is common—a class has not yet been certified when the parties ask the court to approve a settlement. Once the lawyers reached a deal, they jointly moved for class certification and preliminary approval of settlement.[75] In their motion papers, they detailed the "arms'-length mediation and negotiation process" including naming the mediator and describing the number of communications exchanged between the parties.[76] In this particular example, the parties did not provide excruciating detail regarding the number of pages or the size of the data exchanged in discovery.[77] The court preliminarily approved the settlement and ordered that notice be given to the absent class

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[72] *Id.* at 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.

[73] *Id.* at 23(e)(5).

[74] 28 U.S.C. § 1715(b) (2012); *see also* Samuel Issacharoff, *The Governance Problem in Aggregate Litigation*, 81 FORDHAM L. REV. 3165, 3179 (2013) (explaining the intended effect of CAFA notice provision); Alexandra D. Lahav, *Two Views of the Class Action*, 79 FORDHAM L. REV. 1939, 1952 (2011) ("The risk that the class counsel would not live up to the public trust spurred a provision in CAFA requiring notice of class action settlements to appropriate state and federal officials.").

[75] *See* Motion for Preliminary Approval of Settlement and Certification of a Settlement Class at 1, Brown v. Lowe's Cos., Nos. 5:13-CV-00079-RLV-DSC, 5:15-CV-00018-RLV-DSC (W.D.N.C. Dec. 7, 2015), ECF No. 96.

[76] Memorandum of Law in Support of Joint Motion for Preliminary Approval of Settlement and Certification of a Settlement Class at 4, *Brown*, Nos. 5:13-CV-00079-RLV-DSC, 5:15-CV-00018-RLV-DSC (W.D.N.C. Dec. 7, 2015), ECF No. 97.

[77] *See id.* at 13 (explaining that the plaintiffs "did not agree to the settlement until their counsel . . . had litigated the matter for some time and had analyzed significant documents and information both obtained through their own efforts and produced by the defendants"). By comparison, see Stipulation of Settlement at 4, Pappas v. Naked Juice Co. of Glendora, Inc., No. LA CV 11-08276-JAK (PLAx) (C.D. Cal. July 2, 2013), ECF No. 118 (providing detailed information regarding 75,000 pages and one Terabyte of data produced, numbers of written responses to discovery requests, and lists of actions such as litigating discovery motions, working with experts, and testing of products).

members.[78] The lawyers then notified the relevant federal and state government officials and the absent class members.[79] A few class members filed objections, and a small portion of the class opted out.[80] After the court held a fairness hearing in which any class member who objected could be heard,[81] the court approved the settlement and certified the class.[82]

B. CRIMINAL LAW

Prosecutors' charging discretion is treated as nearly absolute in the federal system, save for the theoretical limit that charges cannot be brought based intentionally on a suspect's race.[83] Criminal codes are broad and overlapping, which leaves prosecutors with a significant menu of options from which to choose when charging a case.[84] And because the vast majority of cases will be resolved by guilty plea, prosecutors, without recourse, charge serious crimes that most constitutionally-sensitive people

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[78] Order Granting Preliminary Approval of Class Action Settlement at 1–2, *Brown*, Nos. 5:13-CV-00079-RLV-DSC, 5:15-CV-00018-RLV-DSC (W.D.N.C. Feb. 26, 2016), ECF No. 105.

[79] *See* Plaintiffs' Memorandum of Law in Support of Motion for Final Approval of Class Action Settlement at 14–16, *Brown*, Nos. 5:13-CV-00079-RLV-DSC, 5:15-CV-00018-RLV-DSC (W.D.N.C. May 15, 2010), ECF No. 128; Defendant Lowe's Companies, Inc.'s Certification of Notice of Mailing Notice of Proposed Settlement, *Brown*, Nos. 5:13-CV-00079-RLV-DSC, 5:15-CV-00018-RLV-DSC (W.D.N.C. Dec. 18, 2015), ECF No. 98 & 98-1.

[80] Plaintiffs' Memorandum of Law in Support of Motion for Final Approval of Class Action Settlement at 3, *Brown*, Nos. 5:13-CV-00079-RLV-DSC, 5:15-CV-00018-RLV-DSC (W.D.N.C. May 23, 2016), ECF No. 128.

[81] Minute Entry: Settlement Conference for Final Approval of Class Action Settlement, *Brown*, Nos. 5:13-CV-00079-RLV-DSC, 5:15-CV-00018-RLV-DSC (W.D.N.C. June 6, 2016), ECF No. 136.

[82] Order Granting Motion for Final Approval of Class Action Settlement, at 2–3, *Brown*, No. 5:13-CV-00079-RLV-DSC (W.D.N.C. June 21, 2016), ECF No. 137.

[83] *See* United States v. Armstrong, 517 U.S. 456, 464–65 (1996) (holding that courts should check prosecutors' charging discretion only when it violates equal protection by purposely discriminating against a suspect class); *see also* Bibas, *Prosecutorial Regulation*, *supra* note 7, at 970 ("Courts nominally forbid selective prosecution based on race. No race-based claim has succeeded for more than a century, however.").

[84] Angela J. Davis, *The American Prosecutor: Power, Discretion, and Misconduct*, 23 CRIM. JUST. 24, 28 (2008); Lynch, *supra* note 62, at 2136–37; Stuntz, *supra* note 62, at 512–19. That elected legislatures create this wide and deep net for prosecutors might suggest some popular legitimacy to the approach, but William Stuntz's excellent explanation of legislatures' institutional incentives discredits that notion. *See id.* at 529–33, 546–57.

would think inappropriate to use as a lever in plea bargaining.[85] Indeed, sometimes even the prosecutor herself may not wish for the defendant to be sentenced on the charges levied.[86] Lack of judicial review of prosecutors' decisions is typically defended based on separation of powers concerns, but separation of powers need not foreclose all judicial involvement.[87]

Judges retain some power to impose an appropriate sentence no matter what sentence the parties suggest, but that power is severely constrained by prosecutors' ability to charge enhancements or mandatory minimums that impose a floor on the resulting sentence and on inertial forces that favor judges approving the parties' agreed-upon sentencing recommendations.[88] And even when there is no mandatory sentence driven by the charging decision, the parties may choose a take-it-or-leave-it plea

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[85] This sort of charge bargaining is quite controversial. *Compare* Ronald Wright & Marc Miller, *Honesty and Opacity in Charge Bargains*, 55 STAN. L. REV. 1409, 1410–11 (2003) [hereinafter Wright & Miller, *Honesty and Opacity*] (criticizing the "pervasive harm" of "charge bargains due to their special lack of transparency" and the ability that they afford prosecutors to "eliminate virtually all access to trials for defendants" by creating "extreme sentence differentials"), *and* Ronald Wright & Marc Miller, *The Screening/Bargaining Tradeoff*, 55 STAN. L. REV. 29, 111–13 (2002) [hereinafter Wright & Miller, *Screening/Bargaining Tradeoff*] (explaining concerns with charge bargaining and arguing that lead prosecutors should curtail it), *with* Gerard E. Lynch, *Screening Versus Plea Bargaining: Exactly What Are We Trading Off?*, 55 STAN. L. REV. 1399, 1403–04 (2003) (viewing charge bargaining as the result of prosecutors carefully considering evidence presented by defense counsel and evaluating the appropriate charges as a result).

[86] *See* Kyle Graham, *Overcharging*, 11 OHIO ST. J. CRIM. L. 701, 704–05 (2014) ("[In both types of] overcharging, the prosecutor originally alleges a charge or charges that she subjectively does not want to pursue to conviction, or is at least indifferent about prosecuting. Instead, the extraneous or unduly severe allegations are put forward to incentivize the defendant to plead guilty to another charge or charges.").

[87] *See* Darryl K. Brown, *Judicial Power to Regulate Plea Bargaining*, 57 WM. & MARY L. REV. 1225, 1253 (2016) ("There are good reasons to question the strong conception of separation of powers doctrine in the federal context, where it prohibits meaningful judicial oversight of prosecutorial discretion about filing, amending, or dismissing charges. That kind of constitutional barrier has an even weaker basis in many states . . . ."); *see also id.* at 1232–42 (explaining a much more complex history of federal prosecution than would support the story that separation of powers requires complete deference to the executive branch); *id.* at 1242–53 (explaining the even less compelling case in the states for a rigid bar on judicial involvement in charging decisions).

[88] *See* Bibas, *Prosecutorial Regulation*, *supra* note 7, 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).

agreement where the parties' sentencing recommendation binds the court unless it rejects the agreement entirely.[89]

In many state courts, mandatory minimums and sentencing enhancements afford similar power to prosecutors.[90] And it is the rare—albeit quite interesting—case to find courts setting aside that broad discretion.[91]

Guilty pleas are subject to some judicial review, but that review is not designed to ensure that the prosecutor has faithfully represented her client. It is designed to protect defendants. It thus provides an instance of judges monitoring prosecutors' performance of their constitutional duties, but it is largely ineffectual.[92] The judge's role is to ensure that the plea is knowingly and voluntarily entered—meaning that the defendant understands the rights she is waiving.[93] But that procedural

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[89] FED. R. CRIM. P. 11(c)(1)(C); *see also* Jeremy Sternberg & Christopher Iaquinto, *The Future of Corporate Criminal Pleas Under Rule 11(c)(1)(C)*, 28 CRIM. JUST., Winter 2014, at 12, 13 (explaining that district courts rejecting take-it-or-leave-it pleas "seems to be more the exception than the rule").

[90] R. Michael Cassidy, *(Ad)ministering Justice: A Prosecutor's Ethical Duty to Support Sentencing Reform*, 45 LOY. U. CHI. L.J. 981, 983–89 (2014); *see also* 6 LAFAVE ET AL., *supra* note 11, § 26.3(c) ("By 1994, all fifty states had enacted one or more mandatory sentencing laws . . . . [P]rosecutors for the most part have remained free to circumvent mandatory minimums through initial charging and charge bargaining."). For an excellent description of a scheme where prosecutors held all of the sentencing power, see Ronald F. Wright, *Sentencing Commissions as Provocateurs of Prosecutorial Self-Regulation*, 105 COLUM. L. REV. 1010, 1030 (2005) (detailing how "the drug laws in [New Jersey] grant[ed] exceptional authority to prosecutors," at least before the courts—quite unusually—substantially modified the regime); *see also* Alschuler, *supra* note 7, at 1063 (explaining that "the task of sentencing in guilty-plea cases had been transferred from the courts to the District Attorney's office" in some of the jurisdictions the author visited).

[91] New Jersey provides a particularly interesting example of judges going far outside the norm to rebalance judicial authority vis-à-vis prosecutors to create uniformity in sentencing. *See* Ronald F. Wright, *Prosecutorial Guidelines and the New Terrain in New Jersey*, 109 PENN ST. L. REV. 1087, 1092–98 (2005) (explaining the initial allocation of vast power to prosecutors in deciding whether to charge enhancements, such as whether a drug crime occurred in proximity to a school, and detailing the case law forcibly reallocating authority through a typical administrative law scheme); Wright, *supra* note 90, at 1030–32 (same).

[92] *See* Brown, *supra* note 87, at 1231 ("American plea bargaining is highly—probably uniquely—'deregulated.' ").

[93] *See* McCarthy v. United States, 394 U.S. 459, 466 (1969) (explaining that guilty pleas violate due process unless they are knowingly and voluntarily entered); Anne R. Traum, *Using Outcomes to Reframe Guilty Plea Adjudication*, 66 FLA. L. REV. 823, 827–28 (2014) ("[C]ourt oversight is typically limited to determining whether the defendant understands the terms of the deal he is accepting and the rights he is waiving."); *see also* FED. R. CRIM. P. 11(b)(1)–(b)(2) (specifying requirements in federal court for ensuring that the defendant's

prohibition on involuntary pleas is not as powerful as many might think. Neither dangling a death sentence over a defendant's head, threatening another more serious charge, nor threatening to prosecute a family member if the defendant refuses to plead guilty renders a plea involuntary.[94] Substantively, the court must ensure only "that there is a factual basis for the plea,"[95] which is an extremely lenient standard that does not inquire whether the charges best serve the public's interests.[96] Ensuring that the prosecutor has struck a deal that serves the public's interests is not part of the analysis,[97] except insofar as the public's and defendant's interests align in preventing a defendant from waiving

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plea is voluntary and that the defendant understands the rights she is waiving); Stephanos Bibas, *Regulating the Plea-Bargaining Market: From Caveat Emptor to Consumer Protection*, 99 CAL. L. REV. 1117, 1142 (2011) [hereinafter Bibas, *Regulating the Plea-Bargaining Market*] (citing FED. R. CRIM. P. 11) ("Far from actively managing the plea-bargaining process, judges are passive and reactive. They can neither investigate nor advise about the tactics and merits of pleas.").

[94] Bordenkircher v. Hayes, 434 U.S. 357, 358–59, 365 (1978) (holding that a prosecutor's threat to impose a drastic sentencing enhancement if the defendant did not plead guilty did not violate due process); Brady v. United States, 397 U.S. 742, 751, 755 (1970) (concluding that the threat of death penalty did not render a guilty plea compelled and thus did not violate due process); Brown, *supra* note 87, at 1231 ("[P]rosecutors can act strategically and add charges solely if a defendant insists on trial, and they can pressure defendants by leveraging circumstances such as limited defense resources, pretrial detention that disrupts work and family obligations, or the threat of prosecution against family members if defendants refuse to plead guilty." (footnotes omitted)); *see also* Cynthia Alkon, *Hard Bargaining in Plea Bargaining: When Do Prosecutors Cross the Line?*, 17 NEV. L.J. 401, 407 (2017) ("prosecutorial hard bargaining tactics are routine"). For more on prosecutors' "hard bargaining" plea negotiation tactics, see *id.* at 406–13.

[95] FED. R. CRIM. P. 11(b)(3); *see also* 5 LAFAVE ET AL., *supra* note 11, § 21.4(f) (explaining that many states have adopted a provision comparable to the federal rule).

[96] *See supra* note 12; *see also* Ion Meyn, *The Unbearable Lightness of Criminal Procedure*, 42 AM. J. CRIM. L. 39, 72–73 (2014) (quoting the typical plea colloquy by one Magistrate Judge in the Northern District of Iowa and using it as an example of rote, surface-level inquiry).

[97] The Sentencing Guidelines afford federal judges authority to reject a plea agreement in which the prosecutor has bargained away charges that sufficiently reflect the seriousness of the defendant's conduct. U.S. SENTENCING GUIDELINES MANUAL § 6B1.2(a) (U.S. SENTENCING COMM'N 2004); *see also* United States v. Fine, 975 F.2d 596, 601 (9th Cir. 1992) ("The purpose of the 6B1.2(a) plea bargaining standard is to avoid inappropriate lenience."). This provision means little in practice though. *See, e.g.*, United States v. Ammidown, 497 F.2d 615, 617 (D.C. Cir. 1973) (reversing the district court in "this unusual case" where the district court rejected a charge bargain because the resulting charges were too lenient).

A limited exception to judges not considering the public's interest appears with deferred prosecution agreements. *See, e.g.*, United States v. HSBC Bank USA, N.A., No. 12-CR-763, 2013 WL 3306161, at *1–8 (E.D.N.Y. July 1, 2013) (holding that courts have authority to approve or reject a deferred prosecution agreement after reviewing its substance).

constitutional rights without at least a rudimentary understanding of those rights or because of coercion.[98]

One place where rules and courts have shown skepticism of plea deals and sought to protect the public's interests are *nolo contendere* pleas in which defendants refuse to admit wrongdoing and *Alford* pleas in which the defendant denies wrongdoing.[99] With *nolo contendere* pleas, federal courts are required to consider whether allowing a guilty plea without an admission of guilt serves the public's interest.[100] *Alford* permitted but did not require state courts to accept guilty pleas when defendants maintain their innocence,[101] and courts in a few states have declined the invitation.[102] In other states, the scope of permissible *Alford* pleas is construed quite narrowly.[103] This skepticism of *Alford* and *nolo* pleas to preserve the legitimacy of the criminal justice system requires courts to take a fairly active role in ensuring that most defendants are not incarcerated without either an admission of guilt or a finding by a factfinder.[104] But *Alford* and *nolo* pleas provide

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[98] This is not to suggest that courts actually prevent coerced guilty pleas but instead that coercing guilty pleas violates prosecutors' minister of justice duty.

[99] North Carolina v. Alford, 400 U.S. 25, 37–39 (1970) (holding that a guilty plea is not invalid even when coupled with the defendant's protestations of innocence).

[100] *See* FED. R. CRIM. P. 11(a)(3).

[101] *See Alford*, 400 U.S. at 38 n.11 ("[T]he States may bar their courts from accepting guilty pleas from any defendants who assert their innocence.").

[102] *See* Ross v. State, 456 N.E.2d 420, 423 (Ind. 1983) ("[A] judge may not accept a plea of guilty when the defendant both pleads guilty and maintains his innocence at the same time."); State v. Korzenowski, 303 A.2d 596, 597 n.1 (N.J. Super. Ct. App. Div. 1973) ("[N]otwithstanding the recent decision in North Carolina v. Alford . . ., except in capital cases, a plea shall not be accepted from a defendant who does not admit commission of the offense."). *But see* McGuyton v. State, 782 S.E.2d 21, 23 (Ga. 2016) (holding that a trial court may accept a guilty plea, even if the defendant maintains innocence, "[s]o long as [the] defendant intelligently concludes that his interests require entry of a guilty plea and the record before the judge contains strong evidence of actual guilt" (quotation omitted)).

[103] *See* Sydney Schneider, Comment, *When Innocent Defendants Falsely Confess: Analyzing the Ramifications of Entering* Alford *Pleas in the Context of the Burgeoning Innocence Movement*, 103 J. CRIM. L. & CRIMINOLOGY 279, 283–84 (2013) ("[S]tates such as North Carolina, Washington, Rhode Island, and Wisconsin construed Alford pleas very narrowly.").

[104] *See, e.g.*, People v. Hill, 946 N.E.2d 169, 171 (N.Y. 2011) (explaining that *Alford* pleas are—and should be—rare while reversing an *Alford* plea because of the lack of evidence that the defendant understood the nature of an *Alford* plea); *see also* FED. R. CRIM. P. 11 advisory committee's note to 1974 amendment (explaining the different presumptions that courts employ when deciding whether to allow a *nolo contendere* plea); U.S. DEP'T OF JUSTICE, UNITED STATES ATTORNEYS' MANUAL § 9-27.440(B) (2017), https://www.justice.gov/usam/usam-9-27000-principles-federal-prosecution#9-27.440 ("Despite the constitutional

merely a narrow exception to the broader claim I make here that courts do not strive to protect the public's interest in reviewing defendants' decisions not to contest the charges against them.

C. COMPARING JUDICIAL REVIEW

Consider what courts must review and what they cannot review in class actions and criminal prosecution. Before precluding individual claims that typically would not be financially viable in any event,[105] courts *must* ensure that a $5–$45 payment is enough compensation for those few consumers who bother to file claim forms[106] and who may have been misled into thinking, for instance, that their juice had naturally occurring vitamins instead of chemically-synthesized equivalents.[107] But courts *cannot* stop a prosecutor from dangling a Damoclean mandatory sentence over a defendant's head to induce a guilty plea even when everyone in the room—prosecutor included—thinks the resulting sentence is

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validity of *Alford* pleas, such pleas should be avoided except in the most unusual circumstances . . . . Involvement by attorneys for the government in the inducement of guilty pleas by defendants who protest their innocence may create an appearance of prosecutorial overreaching."); Abraham S. Goldstein, *Converging Criminal Justice Systems: Guilty Pleas and the Public Interest*, 49 SMU L. REV. 567, 573 (1996) ("An equivocal plea of guilty invites suspicion about the processes of justice. And that suspicion, inevitably, does serious damage to the symbolic, deterrent, and correctional functions of criminal law.").

[105] When individual claims have positive value because they could feasibly be brought individually, courts are more hesitant to certify class actions than when the claims have negative value. *See* Deposit Guar. 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).

[106] *See, e.g.*, Samuel Issacharoff & Geoffrey P. Miller, *Will Aggregate Litigation Come to Europe?*, 62 VAND. L. REV. 179, 205 (2009) ("Some documented consumer claim rates have been in the single digits, and in one case not a single class member filed a claim, even though the class consisted of more than a million people.").

[107] *See* Pappas v. Naked Juice Co. of Glendora, Inc., No. 2:11-cv-08276-JAK-PLA, 2014 WL 12382279, at *4–9 (C.D. Cal. Jan. 2, 2014) (granting final settlement approval after determining that the proposed settlement was fair, reasonable, and adequate); Amended Consolidated Class Action Complaint ¶¶ 26–63, *In re* Naked Juice Cases, No. 2:11-cv-8276-JAK-PLA (C.D. Cal. June 5, 2012), ECF No. 63 (detailing allegations about misleadingly using synthesized vitamins in place of naturally-occurring equivalents in juices labeled "all natural").

inappropriate.[108] Although existing due process case law defangs judges in this scenario,[109] such a process is coercive and violates prosecutors' duty to ensure procedural fairness for defendants.[110]

Class action scholarship widely recognizes that class members are apathetic about the litigation because their claims are typically very low value.[111] Accordingly, class action law turns to judges as third-party monitors. Although it may not seem obvious, criminal law suffers from the same rational apathy problem. The average member of the public cares very little about each individual case that proceeds through the criminal courts (exempting cases in which they are particularly involved as a victim or defendant and the rare high-profile case).[112]

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[108] *See* United States v. Kupa, 976 F. Supp. 2d 417, 420 (E.D.N.Y. 2013) ("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." (emphasis omitted (footnote omitted)). Courts can, of course, *say* that prosecutors' actions in this regard are unjust as Judge Gleeson did in *Kupa*, but they are powerless to actually stop this from happening. During the Obama administration, at least the guidance from the top sought to avoid this behavior. *See* Memorandum from The Attorney Gen. on Guidance Regarding § 851 Enhancements in Plea Negotiation to Dep't of Justice Attorneys (Sept. 24, 2014), https://www.justice.gov/oip/foia-library/ag_guidance_on_section_851_enhancements_in_plea_negotiations/download (instructing prosecutors not to use prior felony enhancements "for the sole or predominant purpose of inducing a defendant to plead guilty").

[109] Brady v. United States, 397 U.S. 742, 750–51, 755 (1970) (holding that a plea is not unduly coercive simply because it eliminates the possibility of the death penalty).

[110] *See* MODEL RULES OF PROF'L CONDUCT r. 3.8 cmt. 1 (AM. BAR ASS'N 2016) (explaining that the prosecutor has "specific obligations to see that the defendant is accorded procedural justice"). Much of the discretion built into prosecutors' decisionmaking relies on the notion of trusting prosecutors to abide by their duty to do justice and simply do the right thing in the absence of meaningful checks. *See* Ronald F. Wright, *How Prosecutor Elections Fail Us*, 6 OHIO ST. J. CRIM. L. 581, 588 (2009) (noting that the public relies "on the chief prosecutor's professional conscience" and not institutional constraints, to hold prosecutors accountable).

[111] *See, e.g.*, John C. Coffee, Jr., *Litigation Governance: Taking Accountability Seriously*, 110 COLUM. L. REV. 288, 305 (2010) (describing the "rational apathy" of "many small claimants"); Samuel Issacharoff, *The Governance Problem in Aggregate Litigation*, 81 FORDHAM L. REV. 3165, 3171 (2013) (describing the "rational apathy of the [class members] to expend huge effort to monitor developments" in their case (internal quotations omitted)); Leslie, *supra* note 47, at 1047 ("[I]t is perfectly rational for each individual class member to forego any monitoring.").

[112] Erik Lillquist, *Recasting Reasonable Doubt: Decision Theory and the Virtues of Variability*, 36 U.C. DAVIS L. REV. 85, 137–38 (2002); *cf.* Schulhofer, *supra* note 54, at 800 n.259 (distinguishing between visibility of the criminal justice system to individual defendants and in cases that receive press coverage from visibility to the broader public of rules applicable in all cases). In both contexts, a few individual victims may hold strong

That the public-client in criminal law suffers from the same rational apathy as is well-recognized in class members indicates that criminal law too should be skeptical of an approach to accountability that relies heavily on direct monitoring by the public-client. Yet the primary formal mechanism for prosecutor accountability—an election—does exactly that. Rather, the comparison to class counsel suggests that judges might also be effective third-party monitors of prosecutors' behavior. In some instances, rather than substituting for direct voter control, judges can improve the viability of voters' check on prosecutors.

Some scholars have rightly explained that adding less-interested prosecutors to crucial decisions makes a lot of sense for combating prosecutors' cognitive biases.[113] And that approach is particularly feasible in U.S. Attorneys' offices, which have three levels of prosecutors in the hierarchy.[114] But while such measures can prevent prosecutors who have already made up their minds that the defendant deserves to go to prison from overlooking contrary evidence that arises later or from failing to disclose exculpatory evidence,[115] looking up the ranks of prosecutors' offices cannot neutralize completely concerns about misalignment between prosecutors' interests and their constituents'. Rather, looking further up the organization is likely to aggravate, rather than mitigate, career-driven self-interests by drawing in even more ambitious people with an even greater self-interested stake

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views, and there are procedures to bring these views to the fore. But there is no reason to think that those victims' views are widely shared across broader public, and therefore these victims cannot reliably monitor their agent on the group's behalf.

[113] *See, e.g.*, Barkow, *supra* note 6, at 895–906; Alafair S. Burke, *Improving Prosecutorial Decision Making: Some Lessons of Cognitive Science*, 47 WM. & MARY L. REV. 1587, 1621 (2006); Keith A. Findley & Michael S. Scott, *The Multiple Dimensions of Tunnel Vision in Criminal Cases*, 2006 WIS. L. REV. 291, 388. Separating functions is not costless. It requires more time for each successive prosecutor to get up to speed about the case before making critical decisions and, to the extent that there is an identifiable victim, that victim may no longer have a single point of contact in the prosecutor's office depending on how responsibilities are divided. But these costs seem well worth their while.

[114] Bruce A. Green & Fred C. Zacharias, *"The U.S. Attorneys Scandal" and the Allocation of Prosecutorial Power*, 69 OHIO ST. L.J. 187, 196–97, 203 (2008) (explaining that each federal district has three levels of prosecutors, including the head U.S. attorney, supervisory assistants, and line prosecutors that handle day-to-day matters).

[115] *See id.* at 201.

in the public perception of decisions their office makes.[116] Such an approach may actually strengthen pressure to maintain a high conviction rate and perhaps maximize the number of convictions given a budgetary constraint. Civil forfeiture can aggravate these concerns.[117] Forfeitures can aggrandize the office's budget and thus will likely be quite desirable for lead prosecutors in charge of those budgets.[118]

Ultimately, because internal processes do not check all relevant agency costs and prosecutor elections do not work well, "prosecutors are among the least accountable public officials."[119] Accountability comes down to trusting prosecutors' commitment to public service and professional conscience in a regime where there are not well-established standards to guide them.[120] Many people, myself included, think that this trust is not totally misplaced.[121]

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[116] *See id.* at 202–03 ("The chief prosecutor may be influenced by an illegitimate self-interest in reelection or political advancement in situations where lower-level prosecutors would be less affected by those interests."); Jed Shugerman, The Rise of the Prosecutor-Politicians 3 (Apr. 2015) (unpublished manuscript), https://www.berekeley.edu/wp-content/uploads/2015/04/Shugerman-Earl-Warren-chapter-Rise-of-the-Prosecutor-Politicians-1.22.pdf ("[T]he office of prosecutor can be a stepping stone to higher political office. . . .").

[117] *See* Eric Blumenson & Eva Nilsen, *Policing for Profit: The Drug War's Hidden Economic Agenda*, 65 U. CHI. L. REV. 35, 56 (1998).

[118] *Id.*

[119] Green & Zacharias, *supra* note 3, at 902.

[120] *See* Barkow, *supra* note 6, at 871 (arguing that the lack of a legal check on federal prosecutors' discretion to bring charges, negotiate pleas, and set office policies is a "dangerous exception" to the national commitment to separation of powers); Angela J. Davis, *Prosecution and Race: The Power and Privilege of Discretion*, 67 FORDHAM L. REV. 13, 18 (1998) (arguing that prosecutorial discretion "gives prosecutors more power than any other criminal justice officials, with practically no corresponding accountability to the public they serve" (footnotes omitted)); Wright, *supra* note 110, at 588 ("To some extent, we rely on the chief prosecutor's professional conscience: the prosecutor must remain individually committed to the ideal of responsible prosecution. Our most beloved descriptions of the job speak to the importance of a prosecutor doing the job well without any prompting from the outside."). Regarding the lack of guidance, see Green & Zacharias, *supra* note 3, at 903.

[121] *See, e.g.*, Stephanos Bibas, *Rewarding Prosecutors for Performance*, 6 OHIO ST. J. CRIM. L. 441, 443 (2009) ("Many public-spirited prosecutors want to do justice and serve as officers of the court and also would like to gain trial experience and to feel the thrill of the chase."); Samuel W. Buell, *The Upside of Overbreadth*, 83 N.Y.U. L. REV. 1491, 1516 (2008) (discussing prosecutors' career ambitions and noting that "their motivations should be expected to include ones that are social regarding even if their actions sometimes, or even frequently, prove misguided"); Ronald F. Wright & Marc L. Miller, *The Worldwide Accountability Deficit for Prosecutors*, 67 WASH. & LEE L. REV. 1587, 1589 (2010) ("Most prosecutors, in our experience, are conscientious public servants.").

But it is an awful lot of trust to place in self-interested actors with even the best of intentions.[122]

In criminal law, internal administrative processes and attention to organizational structure improve accountability beyond relying on largely-ineffectual elections,[123] but prosecutor accountability remains far from perfect.[124] To help close the accountability deficit in criminal law, thinking about class action law's use of judges to monitor class counsel's behavior and protect the client's interests (imperfect though it is) suggests that judges can play a more meaningful substantive role supervising prosecutors' charging decisions and the plea process.[125] The idea of greater judicial involvement is to protect the public-client and ensure that prosecutors abide by their obligation to treat defendants fairly.[126]

How exactly the notion of judicial class settlement fairness review translates into the criminal context, where separation of powers concerns come to the fore, is not straightforward, but the rest of the Article explores that in more detail.

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[122] *See* Ronald F. Wright, *Beyond Prosecutor Elections*, 67 SMU L. REV. 593, 598 (2014) ("But in a constitutional design meant to create a 'government of laws' that does not count on the angelic qualities of the people who hold power, the professional integrity of prosecutors as individuals is not enough.").

[123] *See* 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); *see also* Barkow, *supra* note 6, at 895–906 (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); Kitai-Sangero, *supra* note 59, at 85 (proposing separating functions within prosecutor offices to require a different prosecutor to try cases than the prosecutor who had the open dialogue with the defendant).

[124] *See, e.g.*, Green & Zacharias, *supra* note 3, at 847 ("[I]ndividual prosecutors' preferences still control a vast range and number of choices, free of outside or supervisory controls.").

[125] In an article explaining the benefits of comparativism between civil and criminal procedure, David Sklansky and Stephen Yeazell briefly lay out a comparison between civil settlements and plea agreements and suggest that the comparison cuts in favor of more judicial involvement in plea negotiation. Sklansky & Yeazell, *supra* note 9, at 696–705.

[126] *See* Gold, *Beyond the Judicial Fourth Amendment*, *supra* note 7, at 1642 (explaining that the public-client typically benefits from affording defendants fair treatment); Green, *supra* note 28, at 642 (explaining that prosecutors' "minister of justice" duty requires seeking to avoid punishment of innocent people and ensuring fair procedure for defendants).

IV. IMPLICATIONS

The dramatically different approaches that class actions and criminal law take to similar questions about accountability are not justifiable.[127] This Part explores the lessons that criminal law can learn from class action law in addressing the accountability deficit that arises in both contexts from the lack of client control. In short, the answer is to allow judges to check prosecutors, much as they do in class actions.

As with class action judges at settlement, judges in criminal cases should review plea agreements to ensure that the substantive terms are fair to the prosecutor's public-client and that prosecutors have adhered to their constitutional obligations.[128] When mandatory minimums or sentencing enhancements prevent judges from imposing the sentences they think are right, those judges should articulate their views on the record in open court and ask the prosecutor to justify her decisions.

If *ex post* fairness review does not prove sufficiently robust in criminal cases, judges could be involved during the negotiation process[129] or even before it begins.[130] And indeed, earlier involvement by judges can help improve their ability to meaningfully conduct fairness review *ex post*, and thus judicial intervention at multiple points makes good sense.[131]

A. SUBSTANTIVE FAIRNESS REVIEW

As in class actions, judges should seek to hold the "clientless" lawyer accountable by substantively reviewing the fairness of the sentences proposed in plea agreements.[132] In some contexts, this

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[127] I explain this in more detail elsewhere. Gold, *"Clientless" Lawyers*, *supra* note 1.

[128] *See* FED. R. CIV. P. 23(e)(2) (requiring judicial review of class settlements for substantive fairness).

[129] *See infra* Section IV.B.*1*.

[130] *See infra* Section IV.B.*2*.

[131] *See infra* Section IV.B.*2*.

[132] *See* FED. R. CIV. P. 23(e)(2) (requiring judicial review of class settlements for substantive fairness). Adam Zimmerman and David Jaros draw on a comparison between class actions and criminal law to propose substantive judicial review of aspects of plea

notion means only that judges should impose sentences that they think best serve the public's interest, which does not seem terribly controversial.[133] This Article also seeks to consider how judges in criminal cases should tackle the amorphous and difficult task of reviewing the fairness of plea agreements by drawing on the ways that class action judges approach their similar task of fairness review. First, as in class actions, judges in criminal cases should inquire into the process that facilitated the plea agreement for indicia of fairness or cause for concern. Second, judges should afford opportunities for greater input about the fairness of a proposed plea agreement, which parallels class members' rights to object to a class settlement. Moreover, although this suggestion does not track anything that judges in class actions do explicitly,[134] judges should also consider whether the recommended sentence tracks the rough "market rate," as two prominent scholars have already recommended.[135] If all of these steps occurred or were explained in open court and on a written record, these measures would better facilitate prosecutor accountability both within their offices and to voters by increasing the availability of information that is deeply deficient now.[136]

A brief overview of the form that this review should take seems useful here.[137] In cases where the parties present a plea agreement for approval and the sentencing term contained is only

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agreements related to victim compensation—portions of plea agreements that already look a lot like class settlements. Zimmerman & Jaros, *supra* note 40, at 1428, 1447.

133 *See* United States v. Orthofix, Inc., 956 F. Supp. 2d 316, 327 (D. Mass. 2013) ("[W]hen a court is asked to place its imprimatur on the parties' invocation of the coercive power of the state, it must consider whether the recommended sentence will best serve the public interest. It would be wrong to infer from the parties' confidence that their narrow interests are served by the bargain that the bargain thereby addresses the broad range of concerns which are held by the public."); *see also* Bierschbach & Bibas, *supra* note 88, at 3–4 (explaining that even if plea deals strike a balance between the private interests of two adversaries, the process gives no reason to think that the public's interests in justice will be protected).

134 Judges reviewing class settlement fairness may conduct market rate analysis implicitly. *See infra* note 159.

135 *See* Scott & Stuntz, *supra* note 22, at 1922–23, 1959.

136 *See* Gold, *supra* note 57, at 78–79 (describing the political check as ineffective because of voters' lack of information); Wright, *supra* note 110, 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.").

137 *See supra* Section III.A for more detail.

a recommendation, the judge should use fairness review to help determine whether to impose the recommended sentence or whether to be more harsh or more lenient. In the context of a take-it-or-leave-it plea agreement, where the judge can only accept the proposed sentence or reject the plea agreement entirely, she should reject it with an explanation of why the proposed sentence was not fair to the prosecutor's public-client. Lastly, when a judge cannot impose a fair sentence because a mandatory minimum has forced the sentence above or a charge bargain has forced the sentence below what she thinks is fair, the judge should play an information-generating and information-forcing role. She should explain her concerns with the resulting sentence on the record in open court and ask the prosecutor to justify the charging decision that is requiring that sentence. This additional information will improve accountability both within prosecutors' offices and with the electorate.

1. Evaluating Plea Negotiation Process. Courts face a tall order in trying to assess whether a class settlement amount is large enough to render it fair to the absent class members,[138] especially discounting for factors like the likelihood of success at trial.[139] To combat these challenges, one approach that class action judges take is evaluating the negotiation process that led to the settlement for indicia of fairness.[140] Indeed, the advisory committee is in the

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[138] *See* Howard M. Erichson, *The Problem of Settlement Class Actions*, 82 GEO. WASH. L. REV. 951, 984 (2014) ("Evaluating the fairness of class settlements presents a challenge for judges . . . ."); Samuel Issacharoff, *Class Action Conflicts*, 30 U.C. DAVIS L. REV. 805, 811 (1997) (explaining that "we have no baseline by which to judge whether or not the plaintiffs are getting a good deal" in settlement class actions); Macey & Miller, *supra* note 64, at 179 ("Courts have limited capacity to value what the class is receiving in the settlement.").

[139] *See* FED. R. CIV. P. 23(e) (specifying the necessary procedures for court approval of a class action settlement); PROPOSED AMENDMENTS, *supra* note 67, at 214 (proposing rule change specifying that adequacy of relief for the class should consider, as it already does based on case law, the "risks" of "trial and appeal"); *see also, e.g.*, City of Detroit v. Grinnell, 495 F.2d 448, 463 (2d Cir. 1974) (considering "the risks of establishing liability, the risks of establishing damages," and "the risks of maintaining the class action through the trial . . .").

[140] *See* PROPOSED AMENDMENTS, *supra* note 67, at 225 (explaining the usefulness of procedural factors such as negotiation at arm's length); 7B WRIGHT, MILLER & KANE, *supra* note 20, § 1797.1 ("A presumption of fairness, adequacy, and reasonableness may attach to a class settlement reached in arm's-length negotiations between experienced, capable counsel after meaningful discovery."); *see also, e.g.*, Wal-Mart Stores, Inc. v. Visa U.S.A., Inc., 396 F.3d 96, 116 (2d Cir. 2005) ("A court determines a settlement's fairness by looking at both the settlement's terms and the negotiating process leading to settlement.").

process of amending Rule 23 to clarify the usefulness of considering the negotiation process when judges analyze class settlement fairness.[141] In so doing, it has explained that "looking to the conduct of the litigation and of the negotiations leading up to the proposed settlement . . . is an important foundation for scrutinizing the specifics of the proposed settlement."[142] In evaluating the negotiation process, courts should consider "the nature and amount of discovery in this or other [related] cases" because this "may indicate whether counsel negotiating on behalf of the class had an adequate information base."[143] So too will the amended Rule 23 direct courts to consider whether "a neutral or court-affiliated mediator or facilitator" was involved.[144]

As in class actions, evaluating the process of plea bargaining in a particular case can add real value.[145] The court can glean something useful about the fairness of the deal by looking at how much information the defendant obtained to evaluate the charges against her or whether the case settled very early.[146] So too is it valuable for the court to consider whether the plea was negotiated with the help of a mediator or other neutral that will make it seem less like the product of heavy prosecutorial leverage being brought to bear against an incarcerated defendant with no good choices.[147] As indicia of overreach, the judge should ask about and consider any "hard bargaining" tactics employed that might prompt

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[141] *See* PROPOSED AMENDMENTS, *supra* note 67, at 213–14 (listing proposed factors to assess settlement fairness); *see also* PRINCIPLES OF LAW OF AGGREGATE LITIGATION § 3.05 cmt. a (AM. LAW INST. 2010) (describing case law on evaluating settlement fairness as "in disarray").

[142] PROPOSED AMENDMENTS, *supra* note 67, at 225.

[143] *Id.* at 225–26. Although the current case law is messy, most circuits explicitly list the extent of discovery as an important factor, while others list factors encompassing that consideration such as the stage of the proceedings. RULE 23 SUBCOMMITTEE, APRIL 2015 REPORT 36–41.

[144] PROPOSED AMENDMENTS, *supra* note 67, at 226.

[145] *See id.* at 225 (explaining that procedural provide "an important foundation" for scrutinizing the fairness of a settlement).

[146] *See* Macey & Miller, *supra* note 64, at 192 (describing very early "shotgun" settlements as a "yellow flag" for judicial review of class action settlement fairness). Lack of meaningful information exchange would likely sweep in the vast majority of cases at present, but including this factor in the review process will usefully change lawyers' incentives going forward. *See infra* notes 166–68 and accompanying text.

[147] It is not clear to what extent mediators or other neutrals are involved in plea negotiations now, *see* King & Wright, *supra* note 16, at 351–55, but including this factor in the plea fairness analysis could help bring a neutral perspective into these discussions.

questions about the harshness of the proposed sentence, including: threatened additional charges, mandatory minimums, sentencing enhancements, or exploding plea offers.[148] Current Supreme Court doctrine provides that these heavy-handed tactics do not render a plea involuntary,[149] but they could nonetheless trigger close review of the deal. Such tactics suggest that the proposed outcome was the result of leverage and not the result of negotiation by informed adversaries.

So too might procedural queries about the volume of information exchanged and the duration and form of the negotiations help judges detect "sweetheart" plea deals where prosecutors have underreached. Underreach might be a particular concern in cases involving deferred prosecution agreements (DPAs) in which the government secures a hefty and headline-grabbing settlement amount in exchange for not bringing criminal charges, as the public might have preferred.[150] Securities cases may also generate underreach concerns, simply because scienter—an element that must be proven in those cases—is harder to prove than, for instance, proving possession after a buy-and-bust. Public sentiment regarding culpability for the financial crisis and the number of individuals prosecuted seem disconnected, which might evince underreach.[151] Underreach concerns might also arise with police officer defendants, such as in Ferguson, where no charges were

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[148] *See* Alkon, *supra* note 95, at 406–13 (categorizing and detailing forms of "hard bargaining"). The particularities of this inquiry into threats are not analogous to class actions but are necessary because of the power disparity that existing law creates between prosecutors and criminal defendants. *See supra* notes 83–87 and accompanying text.

[149] *See* Bordenkircher v. Hayes, 434 U.S. 357 (1978) (holding that a prosecutor threatening a charge carrying a mandatory life sentence to induce a plea does not violate due process); Brady v. United States, 397 U.S. 742 (1970) (holding that a prosecutor threatening the death penalty to induce a plea does not violate due process). For purposes of this discussion I take these holdings as given.

[150] *See supra* notes 49–51 and accompanying text.

[151] *See, e.g.*, *Frontline: The Untouchables* (PBS Jan. 22 2013), http://www.pbs.org/wgbh/frontline/film/untouchables (investigating why Wall Street leaders avoided prosecution for their role in the financial crisis). Whether the lack of prosecution simply reflects prosecutors' ethical obligations and a lack of evidence is a much more difficult question that I do not address here. *See, e.g.*, Jed S. Rakoff, *The Financial Crisis: Why Have No High-Level Executives Been Prosecuted?*, N.Y. REV. BOOKS, Jan. 9, 2014, http://www.nybooks.com/articles/2014/01/09/financial-crisis-why-no-executive-prosecutions/ (arguing that a government report repeatedly found instances of fraud underlying the financial crisis, which thus made the lack of prosecutions all the more concerning).

filed,[152] or with the lack of prosecutions of employers for serious workplace injuries and deaths.[153] In these sorts of cases, judges should be particularly vigilant at examining underreach. To be sure, judges' ability to check prosecutor underreach is inherently limited. If a prosecutor decides not to bring a case, that decision is insulated from judicial review for separation of powers reasons.[154]

Perhaps the class action and criminal law contexts are so fundamentally different that analyzing process makes great sense in class actions and no sense in criminal law.[155] But that seems unlikely. Scott and Stuntz make a good point that a two-minute conversation between a prosecutor and public defender in the hallway, for which defense counsel is poorly prepared, might suggest that defense counsel is savvy and knows that the investigation will likely turn up little and has a strong sense about other cases and going rates, rather than a sloppy, lazy, or overstretched lawyer.[156] But that point assumes that case-specific facts do not affect market price or that one can know without

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[152] *See* Levine, *supra* note 51, at 755–56 (noting the unraveling of the normal charge and indictment process with police defendants). *See generally* Kate Levine, *Who Shouldn't Prosecute the Police*, 101 IOWA L. REV. 1447 (2016) (arguing that a structural conflict of interest arises when prosecutors are expected to bring cases against local police).

[153] *See* MARTHA T. MCCLUSKEY ET AL., CTR. FOR PROGRESSIVE REFORM, PREVENTING DEATH AND INJURY ON THE JOB: THE CRIMINAL JUSTICE ALTERNATIVE IN STATE LAW 1 (Mar. 2016), http://www.progressivereform.org/articles/WorkerProsecutionManual_1602.pdf (citing a statistic showing that 4,679 workers suffered fatal occupational injuries in 2014 alone and noting that "criminal charges for the violation are rare").

[154] *See* Inmates of Attica Corr. Facility v. Rockefeller, 477 F.2d 375, 381 (2d Cir. 1973) (holding that federal courts could not compel prosecutions, even in the context of a federal civil rights statute, which provides that United States Attorneys are "authorized and required . . . to institute prosecutions against all persons violating" any of the relevant statutes (emphasis omitted) (quoting 42 U.S.C. § 1987 (2012)). Non-prosecution agreements (NPAs) raise the same concern as DPAs, but it is hard to see a role for judicial review of NPAs. *See* United States v. HSBC Bank USA, N.A., No. 12-CR-763, 2013 WL 3306161, at *5–7 (E.D.N.Y. July 1, 2013) (finding that the court has authority to review the substance of DPAs but not NPAs). Unlike in DPAs where charges are filed and held in abeyance, no charges are ever filed in an NPA. Cindy R. Alexander & Mark A. Cohen, *The Evolution of Corporate Criminal Settlements: An Empirical Perspective on Non-Prosecution, Deferred Prosecution, and Plea Agreements*, 52 AM. CRIM. L. REV. 537, 545 (2015).

[155] *See* Scott & Stuntz, *supra* note 22, at 1959 (contending that the bargaining process does not provide any information useful to determine whether counsel secured a good deal through plea bargaining because knowing about other cases and going rates has greater import than case-specific preparation).

[156] *See id.*

investigation that there will be no case-specific facts that bear on the applicable going rate.[157] Both assumptions seem mistaken in at least some instances.

Considering process as a proxy for substantive fairness is not perfect in class actions, and it will not work perfectly in criminal law.[158] But the basic idea seems right in class actions: lawyers who have taken discovery and secured helpful evidence (or have been unable to secure helpful evidence) have likely struck a deal that better reflects the merits of the case than lawyers who simply settled on a $20 million settlement as the going-rate for a particular type of class action.[159] Likewise, although going rates are quite relevant, a prosecutor who knows the going rates and knows her own cases well enough to assess the applicability of those rates with sufficient nuance will tend to better serve the public-client than the one who knows only the former.[160] More controversially, it seems plausible (though certainly not provable here) that criminal defense attorneys who engage in protracted negotiations involving numerous counter-offers secure better

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[157] *Cf.* Bibas, *Designing Plea Bargaining*, *supra* note 21, at 1065 (arguing that because actors in the criminal justice system focus on technical questions such as the permissible reach of a statute they miss equitable factors and sentence guilty defendants often to "far more punishment than they really deserve"); *id.* at 1066 (explaining that the criminal justice system has taken a "mechanical, assembly-line approach to processing cases" in which "we have squeezed out individualized weighing of desert, remorse, reform, and similar particularistic moral values"); Josh Bowers, *Legal Guilt, Normative Innocence, and the Equitable Decision Not to Prosecute*, 110 COLUM. L. REV. 1655, 1688–92 (2010) (explaining that prosecutors, in part because of their legal training, tend to view cases in categories and may miss the equitable particulars).

[158] *See* Geoffrey C. Hazard, Jr., Lecture, *The Settlement Black Box*, 75 B.U. L. REV. 1257, 1264 (1995) (discussing limits to courts' capacity to rationally assess the negotiation processes that lead to class settlements).

[159] *See, e.g.*, Objector-Appellant Ginger McCall's Petition for Rehearing En Banc, at 15–17, Lane v. Facebook, Inc., No. 10-16380 (9th Cir. Oct. 4, 2012), ECF No. 62 (urging en banc review so that district courts could have sufficient guidance on how to review settlements with cy pres awards rather than simply having to compare proposed settlements to going rates); Kashmir Hill, *Facebook Judge Doesn't Realize $10 Million Is The Going Rate To Settle Privacy Lawsuits*, FORBES (Aug. 6, 2012, 11:27 AM), https://www.forbes.com/sites/kashmirhill/2012/08/06/facebook-judge-doesnt-realize-10-million-is-the-going-rate-to-settle-privacy-lawsuits/#9ae7fb6430e2 (collecting information about settlements of other digital privacy class actions in the Ninth Circuit for similar amounts as the initially-proposed settlement in a privacy class action against Facebook).

[160] *Cf.* Traum, *supra* note 93, at 869 (expressing concern that judges might treat unlike cases alike by focusing only on market rates).

results than those who just accept a prosecutor's plea offer as given.[161] And it seems quite plausible too that when criminal defense counsel investigates a claim or receives discovery, the outcome of the negotiation will better track a case's merit.[162]

To facilitate judicial review *ex post*, regulating the plea bargaining *process* could also add great value.[163] Plea bargaining regulation modeled on consumer law, such as requiring clear disclosures, reasonable standard terms that can be deviated from with detailed explanation by the prosecutor, and interpretive conventions such as construing against the drafter (the prosecutor, by assumption) would help.[164] All plea agreements,[165] offers or threats made in plea negotiation, and any deadlines placed on those offers should be written.

When the lawyers know that certain process factors will make it easier or harder to get their deal ratified *ex post*, they may change their behavior during negotiations to account for that scrutiny in ways that improve the fairness of the settlement process. For instance, most criminal cases do not now involve a wide exchange of information.[166] But establishing the volume of information exchanged as a factor in plea agreement fairness review may encourage prosecutors to disclose more information to defendants than they do now or before they are constitutionally compelled to do so. Some prosecutors could adopt open file policies even in the many jurisdictions where open file is not required. Disclosure of more evidence in more cases adds cost of course, but the benefit of affording defendants more informed choice before

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[161] *See* Jenny Roberts & Ronald F. Wright, *Training for Bargaining*, 57 WM. & MARY L. REV. 1445, 1485–87 (2016) (finding that defense attorneys "usually" but did not "always" counter a prosecutor's offer and that defendants "sometimes" accept prosecutors' first offer).

[162] *Cf.* Strickland v. Washington, 466 U.S. 668, 691 (1984) (finding that the objective standard of reasonableness for effective assistance of counsel requires "mak[ing] reasonable investigations or . . . mak[ing] a reasonable decision that makes particular investigations unnecessary").

[163] Bibas, *Regulating the Plea-Bargaining Market*, *supra* note 93, at 1153–59 (proposing these regulatory approaches).

[164] *Id.* at 1153–56.

[165] *See id.* at 1154 (arguing that all plea agreements should be in writing).

[166] *See, e.g.*, Bibas, *Designing Plea Bargaining*, *supra* note 21, at 1064.

waiving their rights outweighs the added cost, in my view.[167] A greater exchange of information helps facilitate settlement by tending to cause the parties' views of the merits to converge rather than through one side wielding disproportionate leverage, which is a good thing for prosecutors seeking to ensure procedural fairness for defendants.[168]

Privileging pleas in which a neutral mediator was involved also makes sense. In such cases, a neutral actor would be present to anchor or steer the discussions and potentially blunt the effects of the prosecutors' powerful charging tools that can essentially coerce a guilty plea.[169] Accordingly, to the extent that adding this consideration of input from a neutral into fairness review encourages prosecutors to involve neutrals in future cases, that too is good.[170] In short, the comparison to fairness review in class action settlements suggests in part that judges in criminal cases can benefit from considering the plea bargaining *process* as evidence of the substantive fairness of the deal.

Although the notion of judges reviewing plea agreements for fairness to protect the prosecutor's public-client may seem strange, the idea is to insert an actor into the process to look after interests

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[167] *Accord id.* at 1079 ("The most obvious remedy is to liberalize both the amount and timing of discovery, as discussed above. Discovery must be ample and occur well in advance of a plea hearing." (footnotes omitted)).

[168] Gold et al., *supra* note 9; *see also* Robert D. Cooter & Daniel L. Rubinfeld, *An Economic Model of Legal Discovery*, 23 J. LEGAL STUD. 435, 439 (1994) ("The first purpose of discovery is to increase the probability of settlement."); David Luban, *Settlements and the Erosion of the Public Realm*, 83 GEO. L.J. 2619, 2647–48 (1995) ("[When] the parties learn the crucial facts of the case before trial, they can assess its prospects, worth, and how best to dispose of it."); Maurice Rosenberg, *Federal Rules of Civil Procedure in Action: Assessing Their Impact*, 137 U. PA. L. REV. 2197, 2198 (1989) ("Open discovery would promote settlements; with both sides obliged to turn over all their important cards, secrets would disappear and realistic negotiations would occur.").

[169] Prosecutors' huge menu of charging options that result in different possible sentences (sometimes mandatorily) with different potential collateral consequences, and their ability to threaten to charge a more serious offense or charge a defendant's relative if the defendant pleads guilty are well-documented sources of prosecutor leverage. *See, e.g.*, Marc L. Miller, *Domination & Dissatisfaction: Prosecutors as Sentencers*, 56 STAN. L. REV. 1211, 1252–59 (2004) (discussing the immense authority that federal prosecutors have under the sentencing guidelines); Stuntz, *supra* note 30, at 2549 (describing criminal law and sentencing law and providing "a menu from which the prosecutor may order as she wishes"); Gold et al., *supra* note 9 (discussing this leverage).

[170] *See infra* Section IV.B.*1*.

that are not sufficiently protected by the private bargaining process.[171] Questions may arise as to why judges would be any better than prosecutors at protecting the public interest. The short answer is first that my proposal encourages judges—in addition to rather than instead of prosecutors—to protect the public interest. And second, that judges do not share the cognitive biases that may lead to overreach because they are not being asked to view the case through both an adversarial and neutral, quasi-judicial lens as prosecutors are.[172] And judges quickly build expertise on criminal sentencing. As to some aspects of criminal justice enforcement, executive branch officials are better equipped than judges; questions about resource allocation or a case's relationship to an overall enforcement scheme fit this bill.[173] But the Supreme Court's notion that judges are ill-equipped to assess the strength of a case—at least if called upon to do so and given opportunities to gather sufficient facts—is passing strange.[174] Ultimately, the takeaway from these cases about judicial expertise is that judges should focus their review on questions about just deserts and the purposes of sentencing in their individual cases rather than on questions regarding resource allocation.[175]

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[171] *But see* United States v. Orthofix, Inc., 956 F. Supp. 2d 316, 327 (D. Mass. 2013) ("It would be wrong to infer from the parties' confidence that their narrow interests are served by the bargain that the bargain thereby addresses the broad range of concerns which are held by the public."); Bierschbach & Bibas, *supra* note 88, at 3–4 (explaining that even if plea deals strike a balance between the private interests of two adversaries, the process gives no reason to think the public's interests in justice will be protected).

[172] *See* Barkow, *supra* note 6, at 908 ("In theory, greater judicial involvement would be the ideal corrective measure because it would interject a truly independent actor—an Article III judge—to curb the abuses outlined above. Judges are certainly less biased than a . . . prosecutor."); Alafair S. Burke, *Prosecutorial Passion, Cognitive Bias, and Plea Bargaining*, 91 MARQ. L. REV. 183, 207–08 (2007) (explaining that "judges stand in a better position to make a more objective, accurate assessment of the likelihood of conviction" than prosecutors because of their lack of adversarial position).

[173] *See* Wayte v. United States, 470 U.S. 598, 607 (1985) ("This broad discretion rests largely on the recognition that the decision to prosecute is particularly ill-suited to judicial revisions.").

[174] *See id.* ("Such factors as the strength of the case . . . are not readily susceptible to the kind of analysis the courts are competent to undertake."); *see also, e.g.*, 4 LAFAVE ET AL., *supra* note 11, § 12.1(b) (listing the "strength of the case" as a factor that judges consider when determining whether to grant bail).

[175] *Cf.* United States v. HSBC Bank USA, N.A., No. 12-CR- 763, 2013 WL 3306161, at *4, *8 (E.D.N.Y. July 1, 2013) (explaining that although the court had the power to review the

That many judges in criminal cases are elected poses some challenges. Most criminal cases are resolved in state courts, and most states elect their judges.[176] As with prosecutors, elected judges have some incentive to appear tough on crime to please voters and keep their jobs. But elected judges should feel less pull to appear tough on crime than should prosecutors, except in high-profile cases, because the public is much more likely to blame prosecutors for crime than judges.[177] And appellate review checks trial court judges in ways that, absent a strong judicial check, prosecutors are not constrained.[178] That elected judges may seek to curry favor with the electorate by sentencing more harshly than the prosecutor wishes remains somewhat troubling, but given the feasible options, placing sentencing power in judicial rather than prosecutorial hands makes sense.[179]

2. Rights to be Heard. As another tool for judges to review class settlements, Rule 23 explicitly provides opportunities for class members to voice their objections to the fairness of a

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fairness of a deferred prosecution agreement, its review should be deferential to recognize prosecutors' institutional expertise).

[176] By contrast, at least since 2005, most class actions are heard in federal court. *See* Class Action Fairness Act of 2005, Pub. L. No. 109-2, § 4, 119 Stat. 4, 9 (2005) (expanding federal class action jurisdiction).

[177] *See* Stuntz, *supra* note 62, at 540.

[178] That many state judges were once prosecutors may also skew judges' decisions in favor of the government. *See* Cynthia K.Y. Lee, *From Gatekeeper to Concierge: Reigning in the Federal Prosecutor's Expanding Power over Substantial Assistance Departures*, 50 RUTGERS L. REV. 199, 200 (1997) (recognizing that many judges were previously prosecutors). But that result is not obvious. Some former-prosecutor-judges seem to be harsher on prosecutors having once walked in their shoes. For instance, Judge Gleeson has been a prominent advocate of reforming unduly harsh criminal sentences and an opponent of prosecutors' non-judicious use of sentencing enhancements. *See* United States v. Vasquez, No. 09-CR-259 (JG), 2010 WL 1257359, at *5 (E.D.N.Y. Mar. 30, 2010) ("The mandatory minimum sentence in this case supplanted any effort to do justice . . . ."). Judge Rakoff has advocated judicial involvement in plea negotiations because innocent defendants feel undue pressure to plead guilty. Rakoff, *supra* note 7. That both were federal prosecutors probably strengthens their sense that these practices are wrong. These two examples are New York-centric, but clerking on a court outside New York also influences my sense that former-prosecutor-judges may sometimes be the harshest critics of prosecutorial overreach. That is, of course, merely anecdotal, and I am not aware of any empirical work trying to evaluate that instinct.

[179] Perhaps it is worth repeating here that judges checking prosecutors' faithfulness to their public-clients is a third-best solution to accountability concerns. But the two better solutions—restraining the scope of substantive law or better funding public defenders—seem far-fetched practically.

settlement proposal.[180] The basic idea is to combat the information deficit that courts face when lawyers for both sides are friends of the deal.[181] To facilitate class members' input, class members receive notice of the terms of a proposed settlement.[182]

Similarly, in criminal cases, once the lawyers for both sides have struck a deal, they will have every incentive to get the court to approve it. They are unlikely then to present the sorts of considerations that might lead a court to think that the sentence the lawyers have agreed upon is unfair to the prosecutor's public-client—whether too high or too low.[183] Thus, analogously to class actions, courts should look for other potential sources of information by affording opportunities to be heard about the fairness of the deal.[184] Even without a formal mechanism for such input now, judges in criminal cases occasionally receive input from members of the prosecutor's public-client.[185] Thus, there is reason to think that, at least in some cases, if courts were to afford a broader opportunity for members of the public to be heard regarding plea agreement fairness during the plea hearing, judges could receive additional useful information. Unlike in class

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[180] FED. R. CIV. P. 23(e)(5).

[181] *See, e.g.*, Issacharoff, *supra* note 138, 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."); *see also* Bibas, *Regulating the Plea-Bargaining Market*, *supra* note 93, at 1142 ("[J]udges must depend on the parties' selective presentation of the facts[,] . . . [which] encourages judges to rubber-stamp the parties' recommendations." (footnote omitted)).

[182] FED. R. CIV. P. 23(e)(1); *see also* Eisen v. Carlisle & Jacquelin, 417 U.S. 156, 173–77 (1974) (discussing Rule 23's notice requirement and noting that this "is not a discretionary consideration to be waived in a particular case" but instead is "an unambiguous requirement of Rule 23"). Notice and the opportunity to be heard or request exclusion take on constitutional dimension in the class action context because class members who do not opt-out of the case will have their claims adjudicated and thereby barred from future litigation. *See* Phillips Petroleum Co. v. Shutts, 472 U.S. 797, 811–14 (1985).

[183] *See* Bibas, *Regulating the Plea-Bargaining Market*, *supra* note 93, at 1142 (explaining that judges are "passive and reactive" in the plea bargain context and "can neither investigate nor advise about the tactics and merits of pleas," which forces them to rely upon the parties' selective disclosure of facts).

[184] I do not mean to suggest that these objectors would *better* represent the public's interest than do prosecutors. The idea instead is simply to elicit more information and an additional perspective for the judge to evaluate.

[185] *See, e.g.*, HSBC Bank USA, N.A., 2013 WL 3306161, at *7 (E.D.N.Y. July 1, 2013) (explaining that the court was "aware of the heavy public criticism" of the DPA at issue due to "unsolicited input from members of the public urging" rejection of the DPA).

actions, a criminal case does not subsume or preclude anyone's individual claims, so this right to be heard in the criminal context does not take on constitutional dimension. Rather, voice rights for members of the public are meant solely to serve the practical purpose of adding information for the judge to consider. Thus, courts can put reasonable parameters on these opportunities to be heard as they see fit rather than being required to hear every potentially-redundant comment by every interested member of the public, which would become quite burdensome in high-profile cases.[186]

In cases with particularized victims, there is reason to expect victims to appear. But victims already have the right to be heard.[187] The idea here is to expand voice opportunities.[188]

Yet, except in high-profile cases where the public is already paying attention, there is no particularly great reason to think that most members of the public have any idea what cases are set on a particular day in a particular courthouse; thus, there is no reason to expect them to show up and offer meaningful input. The same rational apathy that creates the lack of prosecutor accountability[189] will tend to mean that opportunities for members of the public to be heard will not be robustly utilized. But one could imagine interest groups facilitating public campaigns to bring community sentiment to bear on particular issues. Or courts could appoint an amicus curiae to oppose a deal in some instances such as where the process gives no basis for assurance of fairness.[190] In cases where there is no identifiable victim who

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[186] *Cf.* 18 U.S.C. § 3771(d)(2) (2012) (providing that the court may fashion a reasonable procedure in providing rights to crime victims when according all victims complete statutory rights would be impracticable); FED. R. CRIM. P. 60(b)(3) (same).

[187] 18 U.S.C. § 3771(a)(4) (2012); *see also* LAFAVE ET AL., *supra* note 11, § 21.3(f) (examining that all fifty states have a statutory crime victims' bill of rights, some states also have constitutional provisions on point, and that victims' rights typically include allowing the victims to be heard about a plea bargain before the court).

[188] While affording voice rights to others, courts should take care not to undermine the import of victims' rights provisions in the process by drowning out their voices.

[189] *See supra* note 112 and accompanying text.

[190] *See* William R. Rubenstein, *The Fairness Hearing: Adversarial and Regulatory Approaches*, 53 UCLA L. REV. 1435, 1453–56 (2006) (discussing benefits of devil's advocates in adding perspective to courts' class settlement fairness evaluations).

wishes to be heard opposing the deal,[191] a court could appoint two amici—one arguing that the deal is too defendant-friendly and the other that it is too government-friendly. Another possibility to generate additional informational input would be for courts to afford an incentive for entrepreneurial lawyers to oppose the deal by granting fees to a lawyer who brings useful new information to the court's attention as class action law does for objectors.[192]

3. Evaluating Market Rates. Lastly, judges evaluating proposed sentences in plea agreements should look for deviations from market rates, as two scholars have suggested.[193] Scott and Stuntz propose that judges treat sentences from plea agreements as a ceiling;[194] they then encourage judges to sentence below that ceiling when the recommended sentence deviates substantially from the market rate in the jurisdiction.[195] Scott and Stuntz are right that judges are "in a very good position to recognize unusually high sentences."[196] Indeed, there is good reason to think that judges are using market rate considerations already because lawyers tend to warn judges in advance if they plan to recommend

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[191] *See* 18 U.S.C. § 3771(a)(4) (2012) (providing victims the right to be heard at plea, sentencing, and parole hearings).

[192] The practicalities here in criminal prosecution get tricky though because there is not a settlement fund from which to garner the money. These fees could come from prosecutors' offices and perhaps, more specifically, from forfeiture funds. Such an approach would chill plea bargaining, but whether that result is desirable is a much deeper question than can be addressed here.

[193] *See* Scott & Stuntz, *supra* note 22, at 1959–60. In some class actions, courts seem to navigate the challenges of fairness review by considering whether the settlement adheres to some rough market rate. *See* Hill, *supra* note 159 (discussing "going rate" for settling class actions against technology companies in the Ninth Circuit). But the practical obstacles to obtaining meaningful information about similar settlements make that endeavor more challenging. Indeed, it is surprisingly difficult to find out how much money class members received in previous cases, either individually or in the aggregate, because that information is often spread across numerous documents that can be found only by wading through individual dockets.

[194] Scott & Stuntz, *supra* note 22, at 1959–60.

[195] *Id.* at 1960; *see also* Traum, *supra* note 93, at 828 (proposing that judges monitor plea outcomes to protect defendants' constitutional rights).

[196] Scott & Stuntz, *supra* note 22, at 1959; *see also* Bibas, *Regulating the Plea-Bargaining Market*, *supra* note 93, at 1141 ("[G]oing rates and informal expectations develop among the repeat players in the market.").

a sentence that deviates from certain norms.[197] Sentencing guidelines play in establishing such norms.[198]

4. Handling Unfair Proposed Sentences. What a judge should do when she concludes that a proposed sentence in a plea agreement is unfair depends on the nature of the plea. In some cases, the parties simply suggest a sentence, and the court has the authority to impose a different sentence.[199] In such cases, courts should impose whatever sentence they deem fair even if it departs from the lawyers' recommendation.[200] Explaining the reasons for the modification will likely mean that recommended sentences in future cases better fit the judge's views on fairness.[201]

a. "Take-it-or-leave-it" Pleas. In "take-it-or-leave-it" plea agreements, the court can choose only between accepting or rejecting the agreement entirely, which poses a more difficult question. When the court finds that the parties' agreement does not serve the prosecutor's public-client's interests, the court should reject the plea agreement.[202] Whether the court concludes that the proposed sentence was too lenient or too harsh or simply that the defendant was not treated fairly in a particular way, the court should explain its reasoning to the lawyers in open court. The lawyers will then likely respond with a proposed sentence much more to the court's liking in that case and others.[203] Of course it is possible that a frustrated prosecutor could use the judge's rejection as motivation to charge the case in a way that would guarantee a

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[197] King & Wright, *supra* note 16, at 341–42, 376.

[198] *See generally* Mark W. Bennett, *Confronting Cognitive "Anchoring Effect" and "Blind Spot" Biases in Federal Sentencing: A Modest Solution for Reforming A Fundamental Flaw*, 104 J. CRIM. L. & CRIMINOLOGY 489 (2014).

[199] *See* FED. R. CRIM. P. 11(c)(1)(B).

[200] *See, e.g.*, United States v. Orthofix, Inc., 956 F. Supp. 2d 316, 322 (D. Mass. 2013) ("Just as the Court must take account of the public interest when it exercises its discretion to fashion its own sentence, so too the Court must take account of the public interest when called upon to review a sentencing recommendation attached to a plea bargain.").

[201] *See* Schulhofer, *supra* note 54, at 745.

[202] *See* FED. R. CRIM. P. 11(c)(5) (providing procedures in the event the court rejects a take-it-or-leave-it plea).

[203] *See* Schulhofer, *supra* note 54, at 745; *see also* Hillary A. Sale, *Judges Who Settle*, 89 WASH. U. L. REV. 377, 403 (2011) (explaining that judges reviewing securities class actions and derivative suits who occasionally reject settlements will create pressure for parties to provide better records and that simply asking deeper questions of the lawyers will also improve settlement records that come before courts).

harsher sentence, such as through a mandatory minimum, but that would risk seriously invoking the judge's ire and may be unconstitutional.[204]

Although judges do not often reject take-it-or-leave-it plea agreements, *United States v. Sharper*[205] provides one prominent example to consider. There, Judge Milazzo rejected a take-it-or-leave-it plea by a famous defendant that included a sentence of more than six years below the bottom of the guidelines range on charges involving the rape of numerous women through the use of pharmaceutical drugs.[206] The judge explained that a substantial downward variance from the guidelines range would not "reflect the seriousness of the offense, promote respect for the law, or provide just punishment for the offense."[207] Judge Milazzo eventually sentenced Darren Sharper to 220 months' imprisonment—more than nine years longer than the sentence from the original "C" plea.[208] A more detailed explanation of why the originally-proposed nine-year sentence was unduly lenient and a request that the prosecutor to justify the substantial downward variance before rejecting the "C" plea would have improved accountability. But reaching the sentence she thought right by rejecting the "C" plea is the most important part of what Judge Milazzo did. Separation of powers and prosecutors' substantial leverage make judges' decisions to reject "C" pleas as unduly *harsh* sit more comfortably than decisions to reject them as unduly *lenient*, but the fact that the originally-proposed sentence was well below the guidelines range without any offered justification lends credence to the court's decision.

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[204] This scenario begins to steer somewhat close to the rule that prosecutors cannot indict a defendant on a more serious charge for the same conduct in response to a defendant appealing a conviction. Blackledge v. Perry, 417 U.S. 21, 28–29 (1974).

[205] No. 14-CR-284 (E.D. La. 2016).

[206] Transcript of Plea Hearing at 9–10, United States v. Sharper, No. 14-CR-284 (E.D. La. Feb. 18, 2016), ECF No. 259.

[207] *Id.* at 10.

[208] Judgment in a Criminal Case at 3, *Sharper*, No. 14-CR-284 (E.D. La. Aug. 18, 2016) ECF No. 505. The term "C" plea refers to a plea agreement entered under Rule 11(c)(1)(C) where a judge can only take the plea agreement as reached or reject it entirely. The original plea agreement provided for a sentence of 108 months. Transcript of Plea Hearing at 9, *Sharper*, No. 14-CR-284 (E.D. La. Feb. 18, 2106), ECF No. 259.

b. Improving Information. In some instances, no matter what they think of the substantive fairness of the deal, judges' hands are tied at sentencing because the prosecutor charged the case to trigger a mandatory minimum or sentencing enhancement.[209] When the legislature has authorized prosecutors to control sentencing this way, allowing judges to displace prosecutors' charging decisions, as one scholar has suggested,[210] would violate the separation of powers.[211] Rather, when judges have concerns about prosecutors' charging and plea decisions they should articulate those concerns and should ask prosecutors to justify those decisions on the record in open court—a tactic that judges have employed in a few cases discussed in this section.[212]

The remainder of this section theorizes a few instances where judges have articulated their concerns with prosecutors' charging decisions and where those judges asked for justifications from the prosecutor as proposed here; it seeks to encourage other judges to act similarly when they have cause for concern. Judges generating information by providing their views and helping create a record of the prosecutor's justification will help combat the information

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[209] *See supra* note 7 and accompanying text.

[210] *See* Alschuler, *supra* note 7, at 1125 n.220, 1147 (arguing for judges to be able to reduce the level or number of charges against a defendant to reach the appropriate sentence).

[211] At least in the state context, New Jersey courts invalidated mandatory minimums as trampling on judicial sentencing authority. *See* State v. Lagares, 601 A.2d 698, 701–05 (N.J. 1992) (holding that state's repeat-offender statute, which required a court to impose a period of parole ineligibility at the prosecutor's request, would violate the separation of powers doctrine unless interpreted to give courts more authority over the decision); State v. Vasquez, 609 A.2d 29, 32–33 (N.J. 1992) (interpreting the statute in a similar manner as in *Lagares* to avoid a violation of separation of powers); *see also* Wright, *supra* note 91, at 1091–93 (describing this body of case law). But a similar ruling seems rather unlikely in the federal context. Indeed, there is reason to think that separation of powers applies more strongly in the federal criminal system than in state systems. *See* Brown, *supra* note 87, at 1242–53.

[212] *See* Andrew D. Bradt & D. Theodore Rave, *The Information-Forcing Role of the Judge in Multidistrict Litigation*, 105 CAL. L. REV. (forthcoming) (suggesting that a judge in multidistrict litigation who has concerns about the fairness of an aggregate settlement should articulate those concerns to aid the lawyers' clients, who are often lumped into a large inventory of people represented by the same lawyer, and pointing to Judge Hellerstein in the World Trade Center litigation as an example); *see also* Transcript of Hearing at 54-64, *In re* World Trade Center Disaster Site Litig., No. 21 MC 100 (AKH) (S.D.N.Y. Mar. 19, 2010), ECF No. 2037 (rejecting the fairness of the non-class aggregate settlement and explaining on the record his view that too much of the settlement money would go to the lawyers).

deficit that impedes prosecutor accountability.[213] Greater information can facilitate accountability both through internal checks within prosecutors' offices and by informing voters in prosecutor elections.[214] Moreover, the potential need to justify decisions on the record encourages prosecutors to engage in more-reasoned deliberation *ex ante* and thus helps debias their decisionmaking.[215]

New Jersey's Supreme Court took a particularly strong approach to improving prosecutor accountability: requiring prosecutors to routinely justify decisions about sentencing enhancements.[216] Because of the disparities that decisions to charge sentencing enhancements created, the court required the Attorney General's Office to promulgate guidelines about when sentencing enhancements should apply.[217] It also required prosecutors to state a reason on the record for the decision to charge a sentencing enhancement, and it made this reason subject to judicial review.[218] When prosecutors failed to provide reasons or simply provided reasons not rooted in the statewide guidelines to support the decision to charge an enhancement, New Jersey courts remanded those cases;[219] so too did the New Jersey courts readily

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[213] Although the focus of the article is on accountability, encouraging judges to express their concerns on the record may also help defendants feel that their concerns have been heard.

[214] *See* Bibas, *Prosecutorial Regulation*, *supra* note 7, 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, *Promoting Democracy in Prosecution*, *supra* note 57, at 78–79 ("Poor information flow between prosecutors and the public renders the political check ineffective."); Gold, *"Clientless" Lawyers*, *supra* note 1, at 117–26 (explaining the lack of public information regarding prosecutor performance); *see also* Cassidy, *supra* note 88, at 1018 ("Prosecutors in the United States earn very low grades for any kind of transparency, internal or external."). Internal administrative process cannot work without information flow either, though the information there need not necessarily be made public.

[215] *See* Oren Bar-Gill & Barry Friedman, *Taking Warrants Seriously*, 106 NW. U. L. REV. 1609, 1641–47 (2012) (explaining social science theory in the context of police applying for search warrants on why anticipating having to justify a decision *ex post* debiases decisionmaking *ex ante*).

[216] *See* Wright, *supra* note 91, at 1090–98 (describing the evolution of this case law); Wright, *supra* note 90, at 1030–32 (same).

[217] *See* State v. Lagares, 601 A.2d 698, 704 (N.J. 1992).

[218] *See id.* at 704–05.

[219] *See* State v. Maldonado, 715 A.2d 996, 999 (N.J. Super. Ct. App. Div. 1998) (remanding for statement of reasons due to lack of explanation by prosecutor for denying defendant's entry into a pretrial intervention program); State v. Perez, 701 A.2d 750, 752–53 (N.J.

affirm mandatory enhancements when the prosecutors gave reasons rooted in the guidelines.[220] This approach did not offend separation of powers, the court explained, because sentencing is a traditional judicial function.[221]

California's Supreme Court held that judges retain authority to impose sentences that serve the interests of justice even when imposing such sentences means ignoring the defendant's prior "strikes" under the "three strikes" law.[222] Although the statutory language seemed to require judges to impose a life sentence for felons with two prior serious or violent felonies when so-charged by the prosecutor,[223] the court held that a judge can depart from three-strikes sentencing without the prosecutor so requesting.[224]

This Article does not go so far as to propose judicial review of prosecutors' reasons or to allow judges to refuse to impose sentencing enhancements that prosecutors have charged as New Jersey and California do, though that might make sense in some state systems depending on each system's conception of its horizontal separation of powers;[225] it instead encourages judges to exercise judgment in individual cases by raising any concerns on the record and asking prosecutors to justify their decisions on the record.

Super. Ct. App. Div. 1997) (remanding because prosecutor did not file statement of reasons); State v. Press, 651 A.2d 1068, 1072 (N.J. Super. Ct. App. Div. 1995) (remanding because prosecutor did not explain refusal to waive mandatory minimum punishment for dugs within school zone).

[220] Wright, *supra* note 91, at 1095 & n.35; *see also, e.g.*, State v. Kirk, 678 A.2d 233, 238–39 (N.J. 1996) (holding that state sufficiently explained its reasoning on the record and cited ample evidence demonstrating an escalating pattern of drug activity).

[221] State v. Leonardis, 375 A.2d 607, 612 n.4 (N.J. 1977); *see also Lagares*, 601 A.2d at 701–05 (holding that prosecutors' power over sentencing enhancements violated separation of powers because it displaced judges' power over sentencing).

[222] *See* People v. Romero, 917 P.2d 628, 639–49 (Cal. 1996).

[223] *See* CAL. PENAL CODE § 667 (West current through 2017) ("[I]f a defendant has two or more prior serious and/or violent felony convictions . . . the term for the current felony conviction *shall be* an indeterminate term of life imprisonment . . . ." (emphasis added)).

[224] *Romero*, 917 P.2d at 646–47.

[225] *Cf.* Brown, *supra* note 87, at 1253 (explaining that separation of powers notions of prosecutorial discretion as a purely executive function are historically weaker in the states than in the federal system).

A few examples from federal cases provide a closer illustration of what is urged here.[226] In *United States v. Doutre*, the prosecutor filed two prior felony informations in a drug case, resulting in a mandatory life sentence.[227] Judge Saris—Chair of the United States Sentencing Commission—questioned that prosecutor's decision in open court, saying, "I'm just trying to understand why this is . . . why you think this is just."[228] In response, the prosecutor admittedly did not "address [the court's] question of justness" but instead explained that he needed to maintain the two prior felony informations with which he threatened to trigger a life sentence because to do otherwise would undermine his credibility.[229] Eventually the prosecutor made a record of the defendant's history as "a dedicated drug trafficker all his life," though even he then recognized that "it's hard to say that any defendant warrants a life sentence in a drug case—and I can understand the Court's consternation with respect to the sentence here."[230] Judge Saris then explained to the defendant that he did indeed deserve a "hefty sentence," and that she had no choice but to sentence him to life—a sentence she had never given for a drug crime—because of the prosecutor's decision to proceed with two felony informations, although she was "troubled by" that sentence.[231]

Former federal prosecutor and then-Judge Gleeson exemplified this information-forcing role in a written opinion in *United States v. Dossie*.[232] First, Judge Gleeson questioned the prosecutor on the record as to why Dossie, "a young, small-time, street-level drug dealer's assistant" warranted the five-year mandatory

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[226] This Article provides a few examples of cases where judges have employed the approach suggested here, but there are assuredly others. *See, e.g.*, King & Wright, *supra* note 16, at 366 (recounting interviews with judges who explained the role that they played in helping resolve criminal cases by asking prosecutors questions such as why the public should pay to house a defendant for a long time when she does not present a danger).

[227] Transcript of Sentencing, at 3–4, United States v. Doutre, No. 08-CR-10215-PBX (D. Mass. Mar. 22, 2010), ECF No. 168.

[228] *Id.* at 4.

[229] *Id.* at 4–5.

[230] *Id.* at 10–11.

[231] *Id.* at 13.

[232] United States v. Dossie, 851 F. Supp. 2d 478 (E.D.N.Y. 2012).

minimum.[233] Having then questioned the prosecutor on the record, Judge Gleeson imposed the mandatory five-year sentence and wrote an opinion explaining that "[t]he only reason for the five-year sentence imposed on Dossie is that the law invoked by the prosecutor required it. It was not a just sentence."[234] In *United States v. Kupa*, Judge Gleeson took the time to explain in writing that he was able to impose a sentence of eleven years' imprisonment only because, at the last minute, the defendant decided to plead guilty so that the prosecutor would withdraw the prior felony information that would have otherwise required life imprisonment.[235] He revealed those heavy-handed tactics that would otherwise have remained cloaked in the secrecy of plea bargaining.[236]

Had Kupa not caved under the Damoclean pressure of a life sentence, he would have ended up like Paul Lewis Hayes—a man whose fate is known to many students of criminal procedure. Hayes was charged with uttering a forged instrument for less than $100, a crime punishable by two to ten years' imprisonment.[237] When he refused to plead guilty, the prosecutor charged him instead as a habitual criminal just as he had promised in open court, which carried a mandatory life sentence in Kentucky.[238] The Supreme Court ultimately upheld this life sentence for an $88

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[233] *Id.* at 481, 484.

[234] *Id.* at 489.

[235] United States v. Kupa, 976 F. Supp. 2d 417, 459 (E.D.N.Y. 2013) (explaining that the only reason the court could impose this lesser sentence was because "Kupa buckled under the enormous pressure that looming [life] sentence placed on him").

[236] Somewhat similarly, see a recent dissent in the Supreme Court of Louisiana. State v. Howard, No. 2015-KO-1404, at 1 (La. May 3, 2017) (Johnson, C.J., dissenting) ("I find it outrageous that defendant's conviction of possession of marijuana with intent to distribute, and sentence of 18 years imprisonment without benefit of parole, probation, or suspension of sentence, resulting from the discovery of a mere 18 grams of marijuana, will be allowed to stand. Considering the rapidly relaxing social attitudes toward the use of marijuana, the increasing number of states whose voters have approved the recreational use of marijuana, and changing laws (even in Louisiana) providing more lenient penalties relative to marijuana possession, the result of this case is even more ridiculous." (footnotes omitted)). The extremely long sentence in that case resulted from a habitual felon penalty to which the defendant agreed when faced with a much harsher habitual felon penalty if he had not. *See Howard*, No. 2015-KO-1404, at 2 (per curiam).

[237] Bordenkircher v. Hayes, 434 U.S. 357, 358 (1978).

[238] *Id.* at 358–59.

forgery.[239] What's unusual about *Bordenkircher v. Hayes* is that the threat of a mandatory life sentence instead of the five years the prosecutor intended to recommend had Hayes pleaded guilty was on the record in open court and that Hayes gambled with a life sentence hanging over his head. But it is hard to see how dangling a life sentence over the head of someone who the prosecutor was content to give five years' imprisonment represents the prosecutor's public-client well. It is harder still to understand pursuing that charge to conviction and requiring taxpayers to fund that life sentence.

State and local prosecutors hold similarly-heavy hammers in the form of mandatory minimum sentences or sentencing enhancements that they can charge and dismiss at their discretion.[240] *Bordenkircher* was a state prosecution.[241] Consider another extreme example. From 1980 until the mid-1990's, Georgia imposed a mandatory minimum of life imprisonment for a second conviction of the sale or possession with intent to distribute a controlled substance.[242] A prosecutor operating under that statute could charge simple possession instead of possession with intent to distribute, which, even with a prior offense would have yielded a mandatory minimum sentence of five years' imprisonment instead of mandatory life imprisonment.[243] Or the prosecutor could avoid mentioning the defendant's prior offense, which also would have triggered only the five-year mandatory

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[239] *See id.* at 365.

[240] *See* Cassidy, *supra* note 88, at 1000 ("When prosecutors have discretion to charge a defendant with a crime carrying a harsh mandatory penalty and then allow the defendant to plead guilty to a lesser crime carrying a discretionary and lower penalty, this disparity may exert unconscionable pressure on the defendant."); *see also* Stephanos Bibas, *Plea Bargaining Outside the Shadow of Trial*, 117 HARV. L. REV. 2464, 2487 (2004) (explaining that state and federal "sentencing guidelines and statutes act as sledgehammers rather than scalpels").

[241] *Bordenkircher*, 434 U.S. at 358–59.

[242] *See* Georgia Controlled Substances Act Amended, No. 888, § 1(d), 1980 Ga. Laws 432, 432–33; *see also* Stephens v. State, 456 S.E.2d 560, 560 (Ga. 1995) (quoting statute then in effect). The mandatory minimum was substantially lowered in 1996. *See* Act of Apr. 15, 1996, No. 932, § 1.1, 1996 Ga. Laws 1023, 1023–24.

[243] Act of Mar. 20, 1980, No. 888, § 1(c), 1980 Ga. Laws 432, 433. Without the prior offense the defendant would have been eligible for a diversion program. Act of Mar. 31, 1976, No. 1185, § 1, 1976 Ga. Laws 1083, 1085–86.

minimum.[244] Of course, the prosecutor could also always charge nothing. Georgia prosecutors during this time had an incredible menu of options with consequences to the defendant ranging from avoiding all criminal process; undergoing some process but avoiding a conviction; or going to prison for at least two years, five years, or life.

I am not arguing that Judge Saris is right that Doutre did not deserve a life sentence for a drug charge or that Judge Gleeson is right about hydraulic leverage of prior felony informations coercing guilty pleas, though I tend to think they both are. Rather, the point is that sentence length and plea differentials pose difficult public policy questions. So it makes some sense to leave them to the democratic process. But leaving these questions to the democratic process does not entail a passive judicial role in the way we typically expect. Rather, judges need to create a record of these instances that voters and prosecutors' supervisors can evaluate. Legislators tend to cover themselves on these challenging questions by ceding massive authority to prosecutors who are then asked to do the right thing in individual cases.[245] Thus, for the democratic process to play a meaningful role in resolving these questions, electing prosecutors would seem to be the best hope. But voters often have far too little information when they vote for prosecutors, and thus prosecutor elections do not typically provide a meaningful sense of voter priorities.[246] For federal prosecutors who are not elected, the best hope for accountability comes from within the executive branch, but that too requires information.[247] And judges are in the best position to facilitate this information.

Judges giving voice to injustices that they cannot correct will help facilitate internal and external accountability. In the federal system, the Attorney General has recently instructed federal

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[244] *See* Act of Mar. 20, 1980 § 1(d).

[245] *See* Stuntz, *supra* note 62, at 506 (noting that criminal law empowers prosecutors to be the "criminal justice system's real lawmakers").

[246] Gold, *Promoting Democracy in Prosecution*, *supra* note 57, at 78–79; Wright, *supra* note 110, at 582.

[247] *See* Barkow, *supra* note 6, at 871 (noting the lack of an effective legal check on prosecutors' use of discretion to bring charges); Gold, *"Clientless" Lawyers*, *supra* note 1 (same).

prosecutors to charge mandatory minimums whenever available (subject to rare exception).[248] Under Attorney General Sessions, instances where judges explain that prosecutors have charged a case to trigger too harsh of a sentence are quite unlikely to trigger any response within the Department of Justice. But voters will have no access to information about how this approach plays out in practice unless judges draw attention to particular cases. And most criminal law in the United States comes from the states, where many jurisdictions—including some of the most populous—seem poised to approach charging quite differently than Sessions as evident in part based on an open letter that many district attorneys signed expressing their disagreement with the Sessions charging memo.[249] Predictions are always tricky, but in a city like Philadelphia where a civil rights lawyer has won the Democratic nomination for District Attorney (and presumptively the general election in such a heavily Democratic city) by campaigning in part on ending mass incarceration,[250] judges holding prosecutors to account for being too harsh at sentencing is likely to yield a very meaningful response from presumptive-incoming-District Attorney Larry Krasner.[251]

When the judge should require the prosecutor to create a record is highly fact-specific and will depend in part on the judge's experience. For one thing, judges are already reasonably well equipped to spot what seem like outlier cases that deviate from the market rate sentence on particular charges.[252] And judges could

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[248] Memorandum from The Attorney General on Department Charging and Sentencing Policy to All Federal Prosecutors (May 10, 2017), https://assets.documentcloud.org/documents/3719168/Sessions-Charging-Memo.pdf [hereinafter Sessions Memo].

[249] Linsey Bever, *Prosecutors are pushing back against Sessions order to pursue most severe penalties*, WASH. POST, May 19, 2017.

[250] Maura Ewing, *The Progressive Civil-Rights Lawyer Philadelphia Wants for District Attorney*, THE ATLANTIC, May 16, 2017), http://theatlantic.com/politics/archive/2017/05/philadelphia-district-attorney-election-reform/526812.

[251] Something similar might occur with recently-elected District Attorney Kim Ogg in Houston. *See* Casey Tolan & Rebecca McCray, *Making Freedom Free*, SLATE, Mar. 29, 2017, http://www.slate.com/articles/news_and_politics/trials_and_error/2017/03/poor_defendants_get_locked_up_because_they_can_t_afford_cash_bail_here_s.html (last visited Apr. 5, 2017) (describing Ogg's opposition to using cash bail as a default recommendation).

[252] Scott & Stuntz, *supra* note 22, at 1959.

be better equipped still to spot those outliers if court clerk's offices collected data on point.

But beyond simply looking for cases that deviate from the market rate, judges should keep a particularly close eye on cases where sentencing enhancements or mandatory minimums are charged. These cases find the prosecutor's power at its apex, wielding a crude instrument; they are thus most in need of checking.[253] Sometimes hefty enhancements or mandatory minimums will fit the crime. Sometimes they won't. Congress sought to impose hefty sentencing enhancements based on the role that an offender played in a drug conspiracy.[254] But Congress took a shortcut by tying enhancements to drug quantity as a proxy for role, which led to misfits and the potential for government manipulation.[255] It remains to be seen how federal prosecutors will implement the Attorney General's charging memo requiring prosecutors to charge mandatory minimums when available except in extenuating circumstances that require explanation and approval.[256] But it seems quite likely that prosecutors will follow by filing more charges that carry mandatory minimums.

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[253] *See supra* notes 240–47 and accompanying text.

[254] *See* United States v. Dossie, 851 F. Supp. 2d 478, 479–81 (E.D.N.Y. 2012).

[255] *See id.* at 480–81 (explaining that drug quantity does not always indicate one's role in a drug conspiracy and that the DOJ has employed these mandatory minimums without regard to their purpose of penalizing defendants with supervisory rules in these conspiracies); Eda Katharine Tinto, *Undercover Policing, Overstated Culpability*, 34 CARDOZO L. REV. 1401, 1413–14 (2013) (describing "sentencing manipulation" by the government that occurs in part through manipulating drug quantity).

[256] Sessions Memo (providing that prosecutors should charge the "most serious, readily provable offense," which it defines as "those that carry the most substantial guidelines sentence, including mandatory minimum sentences"). This is a marked departure from the fact-specific, case-sensitive approach that the Obama administration took to charging mandatory minimums and prior felony enhancements. *See* Memorandum from The Attorney General on Department Policy on Charging Mandatory Minimum Sentences and Recidivist Enhancements in Certain Drug Cases to the United States Attorneys and Assistant Attorney General for the Criminal Division at 2-3 (Aug. 12, 2013), https://www.justice.gov/sites/default/files/ag/legacy/2014/04/11/ag-memo-drug-guidance.pdf ("We must ensure that our most severe mandatory minimum penalties are reserved for serious, high-level, or violent drug traffickers. . . . Long sentences for low-level, non-violent drug offenses do not promote public safety, deterrence, and rehabilitation. . . . Recidivist Enhancements: Prosecutors should decline to file an information pursuant to 21 U.S.C. § 851 unless the defendant is involved in conduct that makes the case appropriate for severe sanctions.").

Drawing again on the class action regime and circling back to an earlier portion of this Article, the judge can also examine the plea bargaining process to help illuminate cases of particular concern.[257] In sum, when the judge inquires in detail about the plea bargaining process before accepting the plea, some types of facts should give a judge pause: cases where the parties have exchanged little or no information, any evidence of collusion, cases where the prosecutor threatened to charge a mandatory minimum or sentencing enhancement, and cases with exploding plea offers.

This idea of information-forcing to allow the democratic process to competently resolve difficult policy questions animates much of environmental law. The National Environmental Policy Act (NEPA) requires federal agencies to create environmental assessments and, when necessary, environmental impact statements documenting the environmental effect of proposed actions.[258] It does not impose substantive boundaries on what the federal government can do but instead requires disclosure of the anticipated effects so that voters can evaluate various competing interests for themselves.[259] Of course, most voters do not actually pore over the Federal Register and read environmental impact statements; they rely instead on relevant interest groups or political candidates to cull those documents. The courts' job in the NEPA context is simply to ensure the sufficiency of the disclosure.[260] Although without the same explicit legislative authorization as in NEPA, judges in criminal courts can and should embrace a similar task of requiring the government—through the prosecutor—to create a record of its reasoning when the judge has cause for concern about a prosecutor's charging or

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[257] *See supra* Section IV.A.*1*.

[258] National Environmental Policy Act of 1969, Pub. L. No. 91-190, § 102, 83 Stat. 852, 853 (1970); *see also* 40 C.F.R. § 1501.3 (1978).

[259] *See* Robertson v. Methow Valley Citizens Council, 490 U.S. 332, 350–51 (1989); Helen Leanne Serassio, *Legislative and Executive Efforts to Modernize NEPA and Create Efficiencies in Environmental Review*, 45 TEX. ENVTL. L.J. 317, 319 (2015); *see also* Albert C. Lin, *Clinton's National Monuments: A Democrat's Undemocratic Acts?*, 29 ECOLOGY L.Q. 707, 732 (2002); Lorna Jorgensen, Note, *The Move Toward Participatory Democracy in Public Land Management Under NEPA: Is it Being Thwarted by the ESA?*, 20 J. LAND RESOURCES & ENVTL. L. 311, 315 (2000).

[260] Serassio, *supra* note 259, at 335-36, 355 n.138.

plea bargaining decisions. As with NEPA, improving information flow can improve accountability.

Ultimately, courts cannot displace mandatory minimum sentences or sentencing enhancements that legislatures have authorized and prosecutors have charged. But if harsh tactics to induce guilty pleas move from courthouse hallways to open courtrooms on a written record, so much the better.[261] Sunshine may help disinfect that process. Nowhere is criminal justice opacity more pronounced than in plea bargaining.[262] Judges requiring prosecutors to make a record of their plea bargaining behavior and the bases for what seem like questionable charging decisions would help inform voters and candidates challenging incumbent prosecutors and would thus help improve prosecutors' accountability to their public-client.

So too should the judge allow a defense attorney to create a record regarding the appropriateness of the charges or the plea bargaining based on the specific facts of the case. The question may arise why the judge should play an active managerial role here when the defense attorney would seemingly have sufficient incentive to voice her concerns. In part, the answer is that the defense attorney is highly unlikely to actually gain any benefit for her particular client from contesting the appropriateness of the prosecutor's charging decisions.[263] Moreover, defense attorneys may fear that calling the prosecutor to account on the record for

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[261] *See* Jocelyn Simonson, *The Criminal Court Audience in a Post-Trial World*, 127 HARV. L. REV. 2173, 2197–2202 (2014) (explaining the importance of publicity to restrain abuse of power and enhance democratic self-governance); Wright & Miller, *Honesty and Opacity*, *supra* note 85, at 1410–11 (criticizing the harmful nature of charge bargains due to their lack of transparency and immense pressure on defendants to plead guilty).

[262] *See* Bowers, *supra* note 157, at 1710 (discussing the insulated nature of plea bargaining); Levine, *supra* note 152, at 1479 ("Because prosecutors have so much discretion when it comes to charging, and because so many criminal cases are resolved by plea bargaining, prosecutors are more critical than judges when it comes to the appearance of justice in the criminal justice system"); *see also* Scott & Stuntz, *supra* note 22, at 1911 (describing "scandalously casual" plea bargaining comprised of "a quick conversation in a prosecutor's office or a courthouse hallway between attorneys familiar with only the basics of the case, with no witnesses present").

[263] *Cf.* Bibas, *supra* note 240, at 2486 ("The federal Sentencing Guidelines significantly discount the sentences of defendants who accept responsibility in a timely manner, typically by pleading guilty. Defendants whose lawyers take extensive discovery or file many motions may suffer retaliation by judges and prosecutors and thus lose some or all of this discount.").

her unfair or inappropriate decisions will impair their future clients' interests. The judge then is in an important position because she need not fear retaliation from the prosecutor and thus may need to speak up in cases where the defense attorney will not.

B. CONSIDERING OTHER MECHANISMS

Regulating plea agreements solely *ex post* conflicts with well-recognized concerns about judges' docket-management incentives and informational deficits that scholars have recognized in both criminal law and class action scholarship.[264] Class action scholars recognize that judges have little incentive to rigorously scrutinize class action settlements because approving the settlement means clearing the case from the docket and rejecting it may mean the plaintiffs reformulate their proposed class rather than folding their tent and going home.[265] Criminal law scholars too recognize that the docket-clearing incentive tends to mean that judges are unlikely to reject too many plea agreements *ex post* because accepting the plea agreement means clearing the case;[266] rejecting the plea agreement, by contrast, may mean keeping the case on the docket.[267]

Purely *ex post* review is likely to prove even less potent in criminal law than in class actions because of the difference between the import of the charging decision in criminal law and the civil filing decision. In criminal law, charging a case in certain ways can give the government massive leverage to induce a plea

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[264] *See, e.g.*, Issacharoff, *supra* note 138, at 829 (explaining judges' docket management incentives to approve class settlements); Wright & Miller, *Screening/Bargaining Tradeoff*, *supra* note 85, at 88 ("The judge is complicit with the parties after they reach a plea agreement.").

[265] Issacharoff, *supra* note 138, at 829; 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, 45–46 (1991); Nagareda, *supra* note 64, at 968; Rubenstein, *supra* note 195, at 1445.

[266] Laura I Appleman, *Who Watches the Watchers? Judges, Guilty Pleas, and Outsider Review*, 66 FLA. L. REV. F. 44, 45 (2015); McConkie, *supra* note 7, at 64, 69; Rakoff, *supra* note 7.

[267] When the parties present the court with a "take-it-or-leave-it" plea, FED. R. CRIM. P. 11(c)(1)(C), rejecting the plea means that the case will continue and may in fact proceed to trial.

and substantially affect the possible resulting sentence,[268] including controlling decades of a defendant's liberty in a way that makes "blackmail settlements" and "hydraulic pressure" in class actions seem like child's play.[269] Harsh mandatory minimums and sentencing enhancements that may be invoked at prosecutors' options mean that prosecutors hold the keys to sentencing, by and large.[270] Prosecutors can induce defendants[271] into waiving rights by creating an immense sentencing differential between convictions after a plea versus trial such that trial becomes far too risky.[272] 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.[273]

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. Moreover, the class-client's rights can be affected only when a class is certified,[274] and the complaint itself necessarily precedes any certification order.

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[268] *See supra* notes 85–86 and accompanying text.

[269] *See, e.g.*, Newton v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 259 F.3d 154, 164 (3d Cir. 2001) (describing "hydraulic pressure" to settle); *In re* Rhone-Poulenc Rorer Inc., 51 F.3d 1293, 1299–1300 (7th Cir. 1995) (describing the so-called "blackmail settlement" concern). *But see generally* 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).

[270] *See supra* notes 7, 83–91 and accompanying text.

[271] *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); *see also* United States v. Kupa, 976 F. Supp. 2d 417, 420 (E.D.N.Y. 2013) (describing sentencing enhancements as "produc[ing] the sentencing equivalent of a two-by-four to the forehead"); Rakoff, *supra* note 7 (describing weapons with which prosecutors can "bludgeon defendants into effectively coerced plea bargains").

[272] *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, *Prosecutorial Regulation*, *supra* note 7, at 971 ("Courts find no problem even when prosecutors use coercive sentencing differentials as plea-bargaining leverage.").

[273] *See* Stuntz, *supra* note 62, at 512–23.

[274] *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).

If class certification is eventually sought without a concurrent settlement proposal,[275] the court will benefit from a defendant's brief opposing certification. There is no analog to the class certification motion on the criminal side and no analogous opportunity for someone to put information before the court that could imperil a deal, at least as a formal matter.[276]

Differences in methods of judicial selection and political pressures discussed above also mean that earlier judicial review is likely to be more necessary in the criminal context to check prosecutors than in the class action context to check class counsel.[277] Thus, a judicial check on prosecutors that functions much like the one on class counsel would add some value[278] but not as much as a multi-stage process of judicial involvement.[279]

For these reasons, judicial involvement in the criminal process would be more effective if it came earlier than it does in class actions, and multiple stages of judicial involvement take on particular importance.

1. Judicial Involvement During Plea Bargaining. To create a more robust role for judges to check prosecutors, judges can play an important role during the plea negotiation process. Contrary to the federal rules, some state judges mediate criminal cases.[280] In so doing, just as with their *ex post* fairness review, judges should inquire about the process of the negotiation, including any offers or threats between the lawyers.[281]

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[275] 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.

[276] On rare occasion some members of the public may provide unsolicited criticism. *See, e.g.*, *HSBC Bank USA, N.A.*, 2013 WL 3306161, at *7.

[277] *See supra* Part III.

[278] *See* Stuntz, *supra* note 62, at 540 (arguing that elected judges feel less pressure to please the public than do elected prosecutors or legislators).

[279] *Cf.* Jenia Iontcheva Turner, *Judicial Participation in Plea Negotiations: A Comparative View*, 54 AM. J. COMP. L. 199, 266 (2006) ("[P]assive, after-the-fact review of the plea by the judge has not provided a sufficient safeguard of the important public interests in fair and accurate outcomes.").

[280] *See supra* note 147 and accompanying text.

[281] *See supra* notes 148–49 and accompanying text.

The federal criminal rules have barred judicial involvement in plea negotiations since 1974,[282] while the federal civil rules have been amended since then to create "managerial judges" who actively work to settle cases.[283] The Federal Rules of Civil Procedure afford substantial case management tools to drive parties toward settlement.[284] The suggestion in this part of the Article is to bring the federal criminal rule closer to its civil counterpart and closer to the practice in some states.[285]

States' approaches vary on judicial involvement in plea bargaining.[286] Plenty of states ban judicial involvement entirely.[287] But twenty-one states allow judicial participation in settlement, and nine of those states actively encourage it.[288] Eleven other states do not explicitly bar judicial participation in plea bargaining but have not ruled on the issue.[289] Unsurprisingly, the forms of judicial participation vary. At least some counties in eight of the ten jurisdictions studied in Nancy King and Ron Wright's recent qualitative project routinely hold early settlement conferences.[290] In many of these jurisdictions, defendants and victims are not

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[282] *See* FED. R. CRIM. P. 11 advisory committee's note to 1974 amendment ("Subdivision (e)(1) prohibits the court from participating in plea discussions.").

[283] *See* FED. R. CIV. P. 16 advisory committee's note to 1983 amendment (discussing the amendments expansion of pretrial judicial management); *see also* Gold et al., *supra* note 9 (discussing the role of judges in promoting settlements). Civil Rule 16 is not focused on class actions as most of this comparison has been, but it applies equally in that context.

[284] *See, e.g.*, FED. R. CIV. P. 16(a)(5) (allowing pretrial conferences with the explicit objective of "facilitating settlement"); Marc Galanter & Mia Cahill, *"Most Cases Settle": Judicial Promotion and Regulation of Settlements*, 46 STAN. L. REV. 1339, 1342–46 (1994) (discussing judges' ability to take on the role of manager in the early phases of civil litigation).

[285] *See supra* note 226 and accompanying text. *But see* ADVISORY COMMITTEE ON CRIMINAL RULES, MINUTES OF NOVEMBER 2014 MEETING 2–9 (reporting discussion and rejection by a vote of six to four of proposal to amend Rule 11 to allow judicial participation in plea bargaining).

[286] *See* Wright & Miller, *Screening/Bargaining Tradeoff*, *supra* note 85, at 89 & n.224 ("To give defendants more complete and reliable information, a growing number of states encourage rather than forbid judicial involvement in plea discussions." (collecting sources)). *See generally* King & Wright, *supra* note 16 (reporting results of interviews with participants in ten different states); Turner, *supra* note 279 (comparing German system to Florida and Connecticut systems of judicial involvement in plea negotiations).

[287] *See* Batra, *supra* note 16, at 573–75 (listing states with this prohibition, either by statute or court rule).

[288] *Id.* at 575–78.

[289] *Id.* at 577–78.

[290] King & Wright, *supra* note 16, at 337–43.

present for these conferences.[291] In a few others, however, defendants are present, which allows the defendant to hear directly from the judge and see how her case is resolved;[292] the defendant's presence also humanizes her for the judge and prosecutor.[293] As an administrative matter, some courts direct cases onto settlement dockets or trial dockets.[294] Some courts in Oregon and Kansas assign cases to mediation, just as some civil local rules require alternative dispute resolution.[295] Connecticut judges play a very active role, moderating between the parties' positions and sometimes directly offering views on a plea offer's merits.[296]

As in civil cases, judges in criminal cases could hold pretrial plea bargain conferences in which the judge talks to both sides' lawyers about the offers each has made or would be willing to make.[297] Because of prosecutors' leverage over defendants, judges should also keep a watchful eye on the use or threatened use of the prosecutors' heavy sentencing artillery such as prior felony enhancements.[298] One of the most concerning facets of sentencing enhancements is the nearly complete lack of transparency if they are threatened but never used.[299] One objective of this proposal is to create a record of this behavior and thereby increase public

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[291] *Id.* at 339.

[292] *Id.* at 340.

[293] *Id.*

[294] *Id.* at 343–47.

[295] *See id.* at 351–55 (discussing the policy in some jurisdictions to encourage mediation); Michael P. Dickey, *ADR Gone Wild: Is It Time for a Federal Mediation Exclusionary Rule*, 25 OHIO ST. J. ON DISP. RESOL. 713, 770–78 (2010) (listing ADR requirements in each United States District Court including mandatory mediation rules); *see also* 28 U.S.C. § 652(a) (2012) ("[E]ach district court shall, by local rule adopted under section 2071(a), require that litigants in all civil cases consider the use of an alternative dispute resolution process at an appropriate stage in the litigation . . . [and] shall provide litigants in all civil cases with at least one alternative dispute resolution process . . . .").

[296] Turner, *supra* note 279, at 247.

[297] In the federal system, this of course contravenes Rule 11 as it is currently written.

[298] Concerns about underreach need not be checked during the plea process but rather can be sufficiently checked by judges reviewing sentence recommendations as it is with class action settlements. *See supra* notes 169, 194–98 and accompanying text.

[299] *See* United States v. Kupa, 976 F. Supp. 2d 417, 435 (E.D.N.Y. 2013) ("[O]ne of the many problems associated with tracking the use of prior felony informations is defendants often plead guilty in response to the *threat* that one will be filed, producing an outcome that is very much the result of this prosecutorial power without any record of its use.").

visibility of a plea negotiation process that frequently operates by hallway conversations in which defense counsel does not always make counter-offers and must guess at what the judge might do.[300] For the sake of visibility and due process, holding these proceedings in public courtrooms is better than holding them in chambers.[301]

Just as managerial civil judges raise normative concerns,[302] so too do managerial criminal judges, and perhaps even more so.[303] But these concerns can be resolved through attention to details of the proposal rather than a wholesale ban on judicial involvement.[304] Requiring a different judge to preside over trial than was involved in plea negotiations and being transparent about this requirement would combat that due process concern.[305] It could also help if the court's involvement had to await invitation from one of the parties, as it does in some courts in Florida.[306] Moreover, it is important to keep track of the "compared to what" question. It seems strange to care deeply about whether an at-

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[300] *See* Roberts & Wright, *supra* note 161, at 1485–87 (recounting empirical findings regarding the frequency of counter-offers by defense counsel); *see also* John G. Douglass, *Fatal Attraction? The Uneasy Courtship of Brady and Plea Bargaining*, 50 EMORY L.J. 437, 484 (2001) ("Plea bargains often result from a quick phone call or hallway conversation between prosecutor and defense counsel."); McConkie, *supra* note 7, at 82 (arguing that judicial involvement "would foster transparency, rigor, consistency, and accountability"); Turner, *supra* note 279, at 238 (arguing that judicial involvement could improve "fairness and accuracy").

[301] *See* King & Wright, *supra* note 16, at 341 (indicating that some jurisdictions hold these proceedings in chambers); Simonson, *supra* note 261, at 2197–2202 (explaining the importance of open courtrooms for non-trial proceedings).

[302] *See* Resnik, *supra* note 14, at 403–13.

[303] *See* United States v. Davila, 133 S. Ct. 2139, 2146 (2013) ("the prohibition was included out of concern that a defendant might be induced to plead guilty rather than risk displeasing the judge who would preside at trial"); *see also* FED. R. CRIM. P. 11 advisory committee's note to 1974 amendment ((explaining that judicial involvement in plea bargaining "might lead the defendant to believe that he would not receive a fair trial, were there a trial before the same judge," which "might induce the defendant to plead guilty, even if innocent").

[304] *See* Alschuler, *supra* note 7, at 1060.

[305] *See id.* at 1110–11 (arguing for this rule to protect against judicial prejudice and appearance of impropriety); Wright & Miller, *Screening/Bargaining Tradeoff*, *supra* note 85, at 88–91 (explaining that this solution would resolve the ostensible conflict and would be akin to mediators in the civil context).

[306] King & Wright, *supra* note 16, at 349–50, 350 n.144. Awaiting request of both parties would be too weak of a protection for defendants.

least-ostensibly-neutral judge will overbear a defendant's will and force her to plead guilty when prosecutors, whose cognitive biases cut in favor of harsher treatment,[307] can already essentially force a defendant to plead guilty by threatening to impose a massive sentencing enhancement if she refuses and when our criminal justice system regularly allows defendants to be punished at sentencing for exercising their constitutional right to trial.[308]

2. Judicial Involvement Before Plea Bargaining. If fairness review and judicial involvement during the negotiation process prove insufficient to monitor prosecutors, two scholars have offered useful mechanisms for judicial involvement before plea bargaining begins. Under these proposals, plea bargaining would begin, if at all, only after a defendant's request for a judicial proceeding.[309] The probation department would then prepare a limited presentence report for the hearing.[310] This pretrial hearing would include adversarial presentation of evidence and arguments in favor of a particular recommended sentence.[311] The defendant should be able to attend the hearing, and a written transcript should be created.[312] The judge would then have a strong basis to provide a preliminary glimpse into a neutral view of the case's merits,[313] and the judge could announce the sentence that she

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[307] *See* Gold, *"Clientless" Lawyers*, *supra* note 1, at 104–11.

[308] *See, e.g.*, Bibas, *Prosecutorial Regulation*, *supra* note 7, at 971 ("Courts find no problem even when prosecutors use coercive sentencing differentials as plea bargaining leverage.").

[309] *See* Alschuler, *supra* note 7, at 1146–47 (discussing a motion for pretrial conference); McConkie, *supra* note 7, at 84 (urging a motion for indicated sentences).

[310] *See* Alschuler, *supra* note 7, at 1147.

[311] *Id.* at 1147–48.

[312] *Id.*; *see also* FED. R. CRIM. P. 11 advisory committee's note to 1974 amendment (explaining the value of transparency by providing that "it is generally agreed that it is preferable that the fact of the plea agreement be disclosed in open court and its propriety be reviewed by the trial judge" and criticizing "plea discussions and agreements [that] have occurred in an informal and largely invisible manner"); *see also* McConkie, *supra* note 7, at 75 (arguing that recent Supreme Court decisions about effectiveness of counsel in plea bargaining encourage creating a written record).

[313] *Cf.* J. Maria Glover, *The Federal Rules of Civil Settlement*, 87 N.Y.U. L. REV. 1713, 1775–78 (2012) (arguing that civil procedure should embrace its settlement focus by providing opportunities for judges to weigh the merits of cases earlier to help align settlement value with merit). *See generally* Geoffrey P. Miller, *Preliminary Judgments*, 2010 U. ILL. L. REV. 165 (suggesting an early procedure in a civil case by which the court could consider all of the evidence that the parties submit and offer its view on the merits of the claim based on that evidentiary record).

would impose if the defendant were to plead guilty and the sentence that she would impose if the defendant were to be convicted after trial.[314]

Interestingly, there are at least a few jurisdictions that have adopted some version of this approach with the two sides previewing the evidence before the judge provides a preliminary indication of sentence.[315] The idea behind these procedures is for the initial anchor for the negotiations to come from the judge's anticipated sentence rather than the prosecutor's opening gambit and for the defendant to have more information about the merits of the case against her when deciding to waive her rights.[316]

Judges can also simply dismiss charges outright where they are legally insufficient to avoid defendants feeling pressure to plead guilty when their actions were not in fact illegal.[317]

On the civil side, the federal rules offer several opportunities for judges to opine early on a case's merits.[318] The opportunities include motions to dismiss,[319] discovery motions,[320] pretrial

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[314] Alschuler, *supra* note 7, at 1147–48.

[315] *See* King & Wright, *supra* note 16, at 340–41.

[316] *See* Colin Miller, *Anchors Away: Why the Anchoring Effect Suggests That Judges Should Be Able to Participate in Plea Discussions*, 54 B.C. L. REV. 1667, 1667 (2013) (arguing that judicial involvement helps combat anchoring effects caused by prosecutors making initial plea offers). Recent empirical work shows that prosecutors typically make the first offer in plea negotiations. Roberts & Wright, *supra* note 161, at 1485–87. That prosecutors make the first offer is particularly important because it means that the lawyers begin from the prosecutor's starting point even if that starting point was random or artificially high. *See, e.g.*, Adam D. Galinsky & Thomas Mussweiler, *First Offers as Anchors: The Role of Perspective—Taking and Negotiator Focus*, 81 J. PERSONALITY & SOC. PSYCHOL. 657, 657 (2001) ("[W]e empirically demonstrate for the first time that simply making a first offer in an actual negotiation affords a distributive advantage because the first offer serves as an anchor.").

[317] *See* 5 LAFAVE ET AL., *supra* note 11, § 19.3(a) ("The pleading defect of a 'failure to charge [or "state"] an offense,' or its counterpart of the 'facts stated do not constitute a public offense' is the one pleading defect specifically recognized in the statutes or court rules of every state and the federal system."); *see also* Gold et al., *supra* note 9 (arguing that courts should invigorate motions to dismiss in criminal cases).

[318] *See* Gold et al., *supra* note 9.

[319] *See* FED. R. CIV. P. 12(b)(6) (failure to state a claim).

[320] *See* Brooke D. Coleman, *The Efficiency Norm*, 56 B.C. L. REV. 1777, 1808 (2015) (recognizing that the creation of discovery "led to a necessity of judicial refereeing"); Resnik, *supra* note 14, at 393 (noting that judges must consider facts and litigation strategies when ruling on discovery issues).

conferences,[321] and summary judgment.[322] Indeed, these procedures constitute the civil system's means of facilitating settlement in part by requiring the exchange of information and allowing for judicial input.[323] This comparison to the civil system suggests that proposals like Alschuler's or McConkie's are less radical than they might otherwise seem.[324]

Judicial involvement both before and during plea bargaining can help improve the quality of *ex post* fairness review. The earlier involvement can help highlight particular instances where judges should be concerned about the "bargained-for" sentences proposed for judicial approval. For instance, if a judge hears a preliminary adversarial presentation of the facts at the outset and indicates the sentence she would likely impose, when the same judge (or a different judge) sees a recommended sentence in a plea agreement that deviates substantially from the judge's initial indication, that scenario should prompt questions. It may be that the development of a factual record rendered a higher or lower sentence much more reasonable than it seemed at the outset. Or it may be that little has changed except for the prosecutor bringing her leverage to

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[321] *See* Stephen McG. Bundy, *The Policy in Favor of Settlement in an Adversary System*, 44 HASTINGS L.J. 1, 3 (1992) (explaining that the 1983 amendments to Rule 16 "emphasize the court's role in settlement negotiations").

[322] *See* Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 266 (1986) (Brennan, J., dissenting) (contending that the majority opinion invites judges to weigh evidence when deciding a summary judgment motion); *see also* Samuel Issacharoff & George Loewenstein, *Second Thoughts About Summary Judgment*, 100 YALE L.J. 73, 89 (1990) ("[S]ummary judgment . . . has been transformed into a mechanism to assess plaintiff's likelihood of prevailing at trial."); D. Theodore Rave, Note, *Questioning the Efficiency of Summary Judgment*, 81 N.Y.U. L. REV. 875, 894–95 (2006) ("What is perhaps even more valuable is that summary judgment gives the parties a neutral evaluation of the claim by an impartial decisionmaker reviewing a substantial factual record.").

[323] *See* Gold et al., *supra* note 9 (arguing that the procedural devices encourage settlement by "improv[ing] access to information about the adversary's case to allow for more informed bargaining" and "provid[ing] opportunities for the judge . . . to preview her view of the merits").

[324] Another possibility for early judicial involvement in criminal cases would be to track civil procedure by providing a meaningful motion to dismiss based on the sufficiency of the allegations—an approach my co-authors and I suggest elsewhere. *See id.* at 33–38. Such a procedure would also improve courts' law-declaring function in criminal cases by allowing for rulings at a time when no one has yet been adjudged guilty. *See id.* at 35–36 ("The ability to challenge legal theories would also tend to clarify the law for future cases, which would facilitate future plea bargaining. Criminal laws remain unclear because criminal systems do not provide a good mechanism for courts to clarify the criminal law.").

bear and securing a longer sentence than the judge thought would fit. In that latter instance, the court should ask the prosecutor to justify that decision even when the court cannot override it.[325]

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All of the approaches suggested here involve additional judicial process, which may seem inefficient. But there are two reasons to think that may not be right. First, it is not obvious in the abstract that the net result of these procedures would be increased cost. More judicial involvement would add time costs and perhaps monetary costs if additional judges became necessary. But if that judicial involvement resulted in shorter sentences and thus lower costs of incarceration, then the question of whether net costs increased or decreased would be an empirical one. Second, the benefit side of efficiency is too often ignored.[326] Although it is very difficult to monetize the added value of procedural fairness to defendants, it is nonetheless an important benefit to set against any potential increased costs.

Moreover, it is not so clear that assigning great weight to efficiency in criminal law is sensible.[327]

Lastly, some readers might be skeptical of the practical hurdles to broader judicial involvement in the plea process;[328] that is fair, but the time may be right to revisit these questions. Judge Rakoff has drawn significant attention to the enormous pressures that

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[325] *See supra* Part III.A.*4*.

[326] *See* Coleman, *supra* note 320, at 1778–79 (arguing that in the civil context reformers mistakenly equate efficient with cheap and fail to consider the benefits side of the efficiency calculus).

[327] *See* Darryl K. Brown, *The Perverse Effects of Efficiency in Criminal Law*, 100 VA. L. REV. 183, 185–86 (2014) (arguing that efficiency in criminal law has perverse consequences by enabling more prosecutions); *see also* Bibas, *Designing Plea Bargaining*, *supra* note 21, at 1066 (arguing that the criminal justice system has adopted a mechanical process lacking concern for individualized aspects of cases); Josh Bowers, *Physician, Heal Thyself; Discretion and the Problem of Excessive Prosecutorial Caseloads, a Response to Adam Gershowitz and Laura Killinger*, 106 NW. U. L. REV. COLLOQUY 143, 148 (2011) ("[A] lack of resources may be the best available check against overzealous prosecution.").

[328] *See, e.g.*, Barkow, *supra* note 6, at 907–08 ("Perhaps the most common suggestion for controlling prosecutorial abuses is to have greater federal court oversight over plea bargaining [and] charging . . . . The problem with this type of reform is that it has not shown itself to be viable."); Wright & Miller, *supra* note 121, at 1607 ("[J]udges have shown little interest in regulating any aspect of prosecutorial decision-making.").

plea bargaining creates for innocent defendants to plead guilty.[329] The Supreme Court's recognition in *Frye* that plea bargaining *is* the criminal justice system said something widely known to scholars and criminal lawyers but increased public salience of the topic.[330] Similarly, as DNA technology has improved and come to the fore, exonerations have received a great deal of attention, and some of these wrongful convictions followed guilty pleas.[331] And indeed, federal judges have seemingly become more comfortable policing deals between individuals and the government.[332]

V. CONCLUSION

In sum, this Article contends that much as with class counsel in the class action context, judges can play an important role holding

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[329] *See* Rakoff, *supra* note 7; *see also* Daniel Beekman, *Judge Jed Rakoff Says Plea-Deal Process Is Broken, Offers Solution*, N.Y. DAILY NEWS (May 27, 2014), http://www.nydailynews.com/news/crime/judge-plea-deal-process-fixed-article-1.1806358 (noting that "[t]oo many innocent people go to prison because the American plea bargain process is broken" and recommending that judges become more involved so that "prosecutors armed with harsh mandatory minimum sentences are less able to bully defendants").

[330] *See* Missouri v. Frye, 566 U.S. 133, 143–45 (2012).

[331] *See* THE NAT'L REGISTRY OF EXONERATIONS, EXONERATIONS IN 2014, at 1, 3 (2015), http://www.law.umich.edu/special/exoneration/Documents/Exonerations_in_2014_Report.pdf (reporting that 125 wrongfully-convicted defendants were exonerated in 2014 and that more than a third of those defendants pleaded guilty); Bruce A. Green & Ellen Yaroshefsky, *Prosecutorial Discretion and Post-Conviction Evidence of Innocence*, 6 OHIO ST. J. CRIM. L. 467, 470–71 (2009) ("No one knows how many people who plead guilty or who are convicted by a jury are factually innocent. But the number of exonerations in the comparatively few old cases in which DNA testing can be conducted suggests that the numbers are meaningful."); Daniel S. Medwed, *Emotionally Charged: The Prosecutorial Charging Decision and the Innocence Revolution*, 31 CARDOZO L. REV. 2187, 2187 (2010) ("Since 1989, post-conviction DNA testing has exonerated over two hundred and fifty inmates, and at least three hundred other innocent prisoners have gained their freedom in cases lacking the magic bullet of DNA."); *see also* John H. Blume & Rebecca K. Helm, *The Unexonerated: Factually Innocent Defendants Who Plead Guilty*, 100 CORNELL L. REV. 157, 161–62 (2014) (analyzing why innocent defendants plead guilty).

[332] *See, e.g.*, United States v. Orthofix, Inc., 956 F. Supp. 2d 316, 319, 321 (D. Mass. 2013) (refusing to accept guilty pleas from two corporate defendants with binding sentencing recommendations because those sentences did not adequately serve the public interest); Ben Protess & Matthew Goldstein, *Overruled, Judge Still Left a Mark on S.E.C. Agenda*, N.Y. TIMES (June 5, 2014), http://dealbook.nytimes.com/2014/06/04/appeals-court-overturns-decision-to-reject-s-e-c-citigroup-settlement/?_r=0 (arguing that other judges were inspired by Judge Rakoff's rejection of an SEC settlement with Citigroup to question other government securities settlements).

prosecutors accountable. One of the core similarities between class counsel's and the prosecutor's roles is the nature of their clients—diffuse entities comprised of rationally apathetic individuals. Accordingly, this Article contends that in neither context can we expect the client to hold its lawyer accountable. And courts can play a somewhat similar role in the criminal context to protect the prosecutor's public-client to the one Rule 23 contemplates for judges to protect the class-client in class actions.

More specifically, this Article contends that judges should review the substance of plea agreements to ensure that the resulting sentence is fair to the prosecutor's public-client. Class action law helps provide tools for judges in conducting that review. First, judges should consider the bargaining process that resulted in a particular plea agreement. Where courts see a lack of information exchanged; threats to impose heavy sentences that prosecutors can control such as mandatory minimums or sentencing enhancements; or exploding plea deals, they should look particularly carefully at whether the parties' recommended sentence serves the public interest and consider whether to depart from it. All offers or threats in the plea negotiation process should be written to facilitate this review. Judges examining negotiating procedure will not only help them determine the fairness of a deal; so too will it likely alter lawyers' plea bargaining behavior to some extent by encouraging prosecutors to disclose more evidence to defendants and discouraging threatening behavior. Judges should also elicit objections to sentences proposed in plea agreements, much as class action judges hear from objectors; as in class actions, the lawyers in criminal cases have no reason to present evidence or argument that would break the deal once a deal is done. Lastly, as two scholars have already recommended, judges should (and seemingly already do) consider whether a proposed sentence in a particular case diverges from the norm in that jurisdiction.

Because mandatory minimums and sentencing enhancements shift so much sentencing power to prosecutors, courts may find themselves faced with a mandatory minimum that seems unduly harsh. Separation of powers concerns prevent at least federal courts from departing downward from the minimum that the legislature has authorized and the prosecutor has decided to

impose, but the judge is not powerless. Instead of altering the sentence, the judge can express her concern and require the prosecutor to justify the charging decision on the record in open court, as judges have done in a few cases discussed above. That approach will help facilitate internal accountability mechanisms within prosecutors' offices and provide additional information for challengers in prosecutor elections and for voters.

For an even greater judicial role, judges can hold settlement hearings in open court in which they ask about the negotiation process then underway and can gently suggest, much like a mediator, that one side or the other should move from its position. Asking judges to police themselves and not overstep at this point to push a defendant into pleading guilty is a tall order, but open court and a written record will help. Lastly, before plea bargaining begins, a judge could hear the basics of the case and indicate her preliminary view of what sentence she would likely impose upon conviction. That step would inform the defendant's choices and anchor plea bargaining with a potential sentence generated by a neutral arbiter.