"CLIENTLESS" PROSECUTORS

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ABSTRACT

Class counsel and prosecutors have a lot more in common than scholars realize. Because these lawyers have to make decisions on their client's behalf that clients would make in other contexts, they prompt substantial concerns about lawyers' accountability to their clients. Accordingly, there is a lot that each context can learn from the other about accountability. This Article examines the lessons about lawyer accountability that criminal law can learn from class action law. Its central insight is that just as judges play an important role in holding class counsel accountable to their client, so too should judges play an important role holding prosecutors accountable to their public-client.

Much of the Article considers how judges should be involved at various stages in plea negotiations, drawing on plea bargaining and class action scholarship. My answer is not the "never" embodied in the Federal Rules of Criminal Procedure. Rather, I argue that judges can be involved before, during, and after plea negotiations and that some combination of involvement at each phase seems ideal. Before plea bargaining begins judges should, in some cases, hear lawyers' preview of the case and then suggest the likely appropriate sentence to anchor plea negotiations. During plea negotiation, judges should be able to hold hearings as they do with civil settlement to explore how the negotiation process has proceeded. In so doing, judges can protect the prosecutor's public-client's interest in ensuring procedural fairness for defendants. More specifically, judicial involvement can protect against prosecutor overreach—often manifesting as protecting defendants from undue leverage used to secure an unduly harsh sentence. So too can judicial involvement check prosecutor under-reach, as we might be concerned with when police officers are the defendants.

After a plea agreement has been reached, courts should substantively review the sentence that the parties recommend with an eye to the process that yielded the agreement, much as courts review class action settlements. Lastly, if courts are hamstrung at sentencing by prosecutors' charging decisions that they think inappropriate, judges should require prosecutors to justify those decisions on the record in open court to facilitate electoral accountability. Or when the government decides to use a deferred prosecution agreement, the court could reject the agreement entirely.

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INTRODUCTION

My forthcoming article is the first to explore the unrecognized similarity between plaintiffs' lawyers in damages class actions and criminal prosecutors.[1] I call them both "clientless" lawyers because both represent a diffuse entity client that lacks a decisionmaking structure. Because of the nature of their client, 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. In "*Clientless" Lawyers*, I explained this comparison in greater detail and argued that the differences in the two systems and their sometimes-different objectives do not justify the completely different approaches to lawyer accountability that the two systems employ. I then considered the lessons that class actions could learn from criminal law's efforts to hold prosecutors accountable. This Article takes up the comparison in the other direction: what can criminal law learn from class actions to improve prosecutor accountability?

One striking difference between the two systems 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. Criminal law, by contrast, nearly swears off of

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[1] Russell M. Gold, *"Clientless" Lawyers*, 91 WASH. L. REV. (forthcoming 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 standard fare consumer class action. I do not mean to suggest that the distinction is a binary one with all lawyers in damages cases thinking about their own bottom lines and all lawyers in injunctive relief cases thinking themselves something else entirely.

judicial review entirely over critical decisions like charging,[2] including when the prosecutors' charging decisions tie judges' hands at sentencing as may be the case with mandatory minimums or sentencing enhancements.[3] Certifying a class action in federal court requires a judge to determine that a class meets all of the fundamental prerequisites of numerosity, commonality, typicality, adequacy, predominance, and superiority.[4]

Judges play diametrically different roles in litigants' decisions to resolve a case without trial in the two systems.[5] In the federal civil system,

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[2] Rachel E. Barkow, *Institutional Design and the Policing of Prosecutors: Lessons from Administrative Law*, 61 STAN. L. REV. 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.") [hereinafter Barkow, *Institutional Design*]; Bruce A. Green & Fred C. Zacharias, *Prosecutorial Neutrality*, 2004 WIS. L. REV. 837, 847 (2004) ("individual prosecutors' preferences still control a vast range and number of choices, free of outside or supervisory controls").

[3] *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*, 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. OF BOOKS, Nov. 20, 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 (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) ("Courts nominally forbid selective prosecution based on race. No race-based claim has succeeded for more than a century, however.") [hereinafter Bibas, *Prosecutorial Regulation*]. 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*, 47 U.C. DAVIS L. REV. 1591, 1629-31 (2014) [hereinafter Gold, *Beyond the Judicial Fourth Amendment*].

[4] FED. R. CIV. P. 23(a), (b)(3). As in *"Clientless" Lawyers*, I focus on class counsel in damages cases, which is why I mention the Rule 23(b)(3) requirements of predominance and superiority here.

[5] 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 (2005). This article focuses on the class action context as a basis for comparison.

the norm are managerial judges who actively seek to manage their caseloads to urge settlement.[6] Judges do so in a variety of ways including by holding pretrial conferences in which they require someone from each side with settlement authority to attend and establish discussion of settlement as an explicit objective.[7] In the federal criminal system, by contrast, judges are explicitly barred from involvement in plea negotiations.[8]

Before a class settlement can be approved, the court must not only satisfy itself that the Rule 23 prerequisites listed in the previous paragraph such as typicality 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 members.[9] In criminal law, judges' substantive review of guilty pleas is extremely lenient and deferential. It focuses only on ensuring whether there is a factual basis to support the plea.[10] That standard does not inquire whether the charges serve the public's interests.[11]

One important difference between the two lawyers, of course, is that most lead state and local prosecutors are elected while class counsel is self-selected and then ratified by a court. So it might be tempting to say that the election provides a meaningful way for the public-client to check its prosecutor that does not exist in the civil context and end the comparison there. But the election doesn't, at least not very often. For the most part, prosecutor elections fail to provide meaningful accountability because voters typically have little meaningful information and incumbents often run unopposed, further squelching a key means of disseminating information to voters.[12]

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

[7] *See* Carissa Byrne Hessick, Andy Hessick & Russell Gold, *A Criminal Settlement System* (unpublished manuscript) [Part II].

[8] FED. R. CRIM. P. 11. State systems' approaches vary. *See* Rishi Raj Batra, *Judicial Participation in Plea Bargaining: A Dispute Resolution Perspective*, 76 OHIO ST. L.J. 565 (2015).

[9] *See* FED. R. CIV. P. 23(e)(2).

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

[11] *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 3 ("in 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").

[12] Gold, *Clientless Lawyers*, *supra* note 1; Ronald F. Wright, *How Prosecutor Elections Fail Us*, 6 OHIO ST. J. CRIM. L. 581, 582 (2009) (concluding based on empirical study that "the reality of prosecutor elections is not so encouraging"); *see* Bibas, *Prosecutorial Regulation*, *supra* note 3, at 987 ("Because elections are not driven by accurate general assessments of incumbents' performance, they do not solve the principal-agent problem.").

The comparison to class actions then suggests that criminal law could improve prosecutor accountability by looking to judges to play a more meaningful role in protecting the prosecutor's public-client as judges do for class counsel's class-client. One of the core similarities that justifies the comparison between these two contexts is that both class counsel and the prosecutor represent diffuse entities comprised of rationally apathetic individuals—a notion that class action scholars have widely recognized. Thus, it makes sense that judges holding class action lawyers accountable to their class-clients may have some useful analogs in helping hold prosecutors accountable to their public-clients. I do not mean to suggest that the contexts are identical nor that the judge's role in them should be. But criminal law can usefully borrow from class action law on this score.

The purest analog to the class action system in criminal law would involve judges substantively assessing the terms of plea agreements to ensure that they are fair to the prosecutor's public-client. And I think that suggestion makes sense, but it is not alone enough in the criminal context. It comes too late in a very opaque plea bargaining process after the parties have already reached a deal when the judge has every incentive to go along to clear her docket. Moreover, to the extent this comparison suggests that a court could simply reject a plea entirely as unfair to the prosecutor's public-client as class action judges can, that notion raises unnecessary separation of powers concerns.

Put most simply, the judge can play an important role protecting the prosecutor's client before, during, and after plea bargaining. Before plea bargaining even begins, some scholars have usefully suggested that a court should hear the lawyers' previews of the case's merits and that the court should then indicate what sentence it would likely impose based on those presentations.[13] This sort of involvement can help inform defendants' decisionmaking and provide an anchor for bargaining from a neutral arbiter rather than an adversarial prosecutor. And indeed the idea resembles one scholar's suggestion of preliminary judgments in the civil context to steer settlement negotiations.[14] Once plea bargaining has begun, judges or other neutrals should be permitted to hold plea bargaining conferences during which they hear how the bargaining process has progressed to that point, much as civil judges hold conferences designed to discuss settlement.[15] Judges should be able to hear offers that both sides have made, any

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[13] Alschuler, *supra* note 3, at 1059; McConkie, *supra* note 3.

[14] Geoffrey P. Miller, *Preliminary Judgments*, 2010 U. ILL. L. REV. 165.

[15] *See* Sklansky & Yeazell, *supra* note 5, at 696-705 (drawing on comparison between ordinary civil cases and criminal plea negotiation to suggest more judicial involvement in criminal plea bargaining process but without seeking to provide a detailed proposal).

timelines imposed on those offers, or any other charges that prosecutors have threatened to bring absent a plea bargain. Although they will then need to tread quite carefully to avoid impinging on due process rights, judges should be permitted to share their views with the parties on how the case could be best resolved. This suggestion of involving judges in plea bargaining would require changing the Federal Rules of Criminal Procedure but is already permitted in a few states.[16]

Lastly, much as in class actions, courts can play a meaningful role reviewing the plea agreement that the parties ultimately reach. The court can consider any recommended sentence first with an eye to the norms for cases like that in the jurisdiction, much as Robert Scott and William Stuntz have suggested.[17] Unlike Scott and Stuntz, however, I argue that this judicial review of the proposed sentence should consider the process that led to that negotiated sentence, much as judges do in reviewing class settlements.[18] 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.[19] In the criminal context, if the bargaining process involved evidence of collusion, exploding offers,[20] 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.

Asking judges to carefully evaluate sentence recommendations has its limits, of course, in a system where prosecutors have huge sentencing power because they can charge a mandatory minimum or sentencing enhancement that tie the judge's hands. In most of those instances, where a court has concern about the fairness of the deal but cannot override the charging decision, the court should play an information-forcing role. The judge should ask the prosecutor to justify her decision on the record in open court. That record would help direct information to supervisors in the prosecutor's office and improve the direct political check by providing fodder for electoral challengers and more information to voters.

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[16] *See* Batra, *supra* note 8.

[17] Robert E. Scott & William J. Stuntz, *Plea Bargaining as Contract*, 101 YALE L.J. 1909, 1959-60 (1992).

[18] *See* 7B FED. PRAC. & PROC. CIV. § 1797.1 (3d ed.)

[19] *See id.*

[20] *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) (describing "strong pressures to plead quickly") [hereinafter Bibas, *Designing Plea Bargaining*].

In one limited circumstance, a judge can take an even more significant step is she thinks the prosecutor has struck a deal that poorly serves her public-client. In corporate crime cases when the government decides to use a deferred prosecution agreement, the judge can refuse to accept the deferred prosecution agreement because it substantively does not serve the public's interest.[21]

This article proceeds in three parts. Part I briefly explains the comparison between prosecutors and class counsel that I explained in greater detail elsewhere.[22] Part II then explains the vast differences in the judicial role between the two systems regarding negotiated resolutions—class settlements and plea bargains. Part III then considers the implications of the comparison, exploring ways that judges can play a more meaningful role checking prosecutors at various stages of the criminal plea process, drawing on criminal law and class action literature.

I. EXPLAINING THE COMPARISON

A brief overview of the basis for the comparison between class counsel and criminal prosecutors is in order here. 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 lawyer directly.[23] Class counsel represents the class-client as a whole rather than the interests of particular class members.[24] Somewhat similarly, prosecutors represent the public as a whole rather than the interests of particular victims.[25] 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

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[21] *See* United States v. HSBC Bank USA, N.A., No. 12-CR-763, 2013 WL 3306161 (E.D.N.Y. July 1, 2013).

[22] Gold, *Clientless Lawyers*, *supra* note 1 [Part I].

[23] 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.

[24] *See* FED. R. CIV. P. 23 advisory committee's note (2003) (explaining that "the obligation of class counsel [is] to represent the interests of the class, as opposed to the potentially conflicting interests of individual class members"); *see 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 (2000) ("Class action lawyers are duty-bound to represent the interests of the particular class . . . .").

[25] STANDARDS FOR CRIMINAL JUSTICE: PROSECUTION FUNCTION § 3-1.3 (2015) ("The prosecutor generally serves the public and not any particular government agency, law enforcement officer or unit, witness or victim."); Green & Zacharias, *supra* note 2, at 861-62 ("The prosecutor has a client in an abstract sense—she represents the 'public' or the 'state'").

decisions on behalf of her client who cannot voice its own interests.[26] 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,[27] class counsel can settle claims over the objection of the named plaintiffs or absent class members so long as the court finds that the proposed settlement is fair.[28]

Both clients have complex and amorphous goals that require difficult balancing, however, and that task necessarily falls to their lawyers in the first instance. The clients' goals are not identical in the two contexts. But they are sometimes they are more similar than people might realize.[29] In criminal law, prosecutors are tasked with considering victims' interests and seeking restitution on their behalf,[30] which is a private-law concern that looks a lot like civil redress.[31] And indeed, the scope of restitution in criminal law can be so large as to look remarkably similar to aggregate civil litigation.[32]

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 function of class actions is their deterrent effect—protecting the public from future harm by forcing

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[26] 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); Deborah L. Rhode, *Class Conflicts in Class Actions*, 34 STAN. L. REV. 1183, 1183 (1982); 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.").

[27] MODEL RULES OF PROF'L CONDUCT R. 1.2(a).

[28] *See* Lazy Oil 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).

[29] 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 5, at 697-703.

[30] 18 U.S.C. § 3771(a)(5)-(6); Adam S. Zimmerman & David M. Jaros, *The Criminal Class Action*, 159 U. PA. L. REV. 1385, 1393 (2011) ("Similarly, while prosecutors do not formally represent victims as private attorneys do in a civil case, Congress has charged prosecutors to seek victim input and recover restitution on their behalf.").

[31] 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.

Although the parallel to civil litigation is not quite as pure, efforts at restorative justice in criminal law also show deep concern with the private-law aspects of criminal law because they focus on relations between the victim and perpetrator. *See* Sklansky & Yeazell, *supra* note 5, at 701-02, 738.

[32] *See* Zimmerman & Jaros, *supra* note 30, at 1385. Adam Zimmerman and David Jaros refer to such cases as "criminal class actions."

decisionmakers to internalize externalities and not allow companies to avoid the fear of liability by spreading harm thinly across a large group.[33]

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 under-reach 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.[34] 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.[35] Moreover, because of the nature of their work, prosecutors "ordinarily are naturally aligned with the police and victims."[36] Ordinarily, the concern about prosecutor misalignment with the client's interest is one of overreach. In some instances such as those involving police defendants, concerns arise about prosecutor under-reach for the same reason.[37]

Thus, although I do not mean to suggest that class counsel and prosecutors are identical, they share several important similarities. They both represent diffuse entities comprised of rationally 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.

II. 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 and protect clients. Class counsel

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[33] *See supra* note 52.

[34] *See, e.g.*, Kevin M. Clermont & John D. Currivan, *Improving on the Contingent Fee*, 63 CORNELL L. REV. 529, 536 (1978) (explaining that class is best served by lawyer devoting large number of hours to ensure maximum recovery but that class counsel is better served by working 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) ("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).

[35] *See* Green & Zacharias, *supra* note 2, at 857 ("all prosecutors inevitably have a reputational interest in all their cases").

[36] *Id.* at 863.

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

has significant discretion, but that discretion is checked by judges in every case in which they try to bind more than a few named individuals.[38] In criminal law, prosecutorial discretion is vast,[39] widely recognized, and rarely checked by judges.[40] Criminal codes are broad and overlapping, which leaves prosecutors with a significant menu of options from which to choose when charging a case.[41] And because the vast majority of cases will be resolved by guilty plea, prosecutors, without recourse, charge serious crimes that most constitutionally-sensitive people would think inappropriate to use as a lever in plea bargaining.[42] Indeed, sometimes even the prosecutor herself may not wish for the defendant to be sentenced on the charges levied.[43] Lack of judicial review of prosecutors' decisions is

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[38] *See* Gold, *"Clientless" Lawyers*, *supra* note 1 [Part II.A].

[39] *See, e.g.*, Robert H. Jackson, *The Federal Prosecutor*, 31 J. 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 (1998) ("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) (labelling 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).

[40] *See* Barkow, *Institutional Design*, *supra* note 2 ("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."); Rachel E. Barkow, *Separation of Powers and the Criminal Law*, 58 STAN. L. REV. 989, 1024-28 (2006) (explaining the lack of oversight on decisionmaking by federal prosecutors) [hereinafter Barkow, *Separation of Powers*].

[41] Angela J. Davis, *The American Prosecutor: Power, Discretion, and Misconduct*, CRIM. JUST., Spring 2008, at 24, 28; Lynch, *supra* note 39, at 2136-37; Stuntz, *supra* note 39, 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. *Id.* at 529-33, 546-57.

[42] 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, 1411 (2003) (criticizing the "pervasive harm" or "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") [hereinafter Wright & Miller, *Honesty and Opacity*], *and* Ronald Wright & Marc Miller, *The Screening/Bargaining Tradeoff*, 55 STAN. L. REV. 29 (2002) [hereinafter Wright & Miller, *Screening/Bargaining Tradeoff*], *with* Gerard E. Lynch, *Screening Versus Plea Bargaining: Exactly What Are We Trading Off?*, 55 STAN. L. REV. 1399 (2003) (viewing charge bargaining as the result of prosecutors carefully considering evidence presented by defense counsel and evaluating the appropriate charges as a result).

[43] *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

typically defended based on separation of powers concerns, but separation of powers need not foreclose all judicial involvement.

Prosecutors' charging discretion is treated as nearly absolute, save for the theoretical limit that charges cannot be brought intentionally because of a suspect's race.[44] 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 at their option that impose a floor on the resulting sentence and on inertial forces that favor judges approving the parties' agreed-upon sentencing recommendations.[45]

Guilty pleas are subject to some judicial review, but that review is designed to protect the defendant rather than to ensure that the prosecutor has faithfully represented her client and is largely ineffectual in any event. The judge's role is to ensure that a defendant understands the rights she is waiving.[46] Even the procedural prohibition on involuntary pleas is not as powerful as many might think because the Supreme Court has held that neither dangling a death sentence over a defendant's head nor threatening any other more serious charge if the defendant refuses to plead guilty

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prosecuting. Instead, the extraneous or unduly severe allegations are put forward to incentivize the defendant to plead guilty to another charge or charges.")

[44] *See* United States v. Armstrong, 517 U.S. 456 (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 3, at 970 ("Courts nominally forbid selective prosecution based on race. No race-based claim has succeeded for more than a century, however.").

[45] *See* Bibas, *Prosecutorial Regulation*, *supra* note 3, 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); R. Michael Cassidy, *(Ad)ministering Justice: A Prosecutor's Ethical Duty to Support Sentencing Reform*, 45 LOY. U. CHI. L.J. 981 (2014) (making a similar point about state court prosecutors). And, at least in the federal system, judges may have the options only of imposing the negotiated sentence or rejecting the plea entirely. *See* FED. R. CRIM. P. 11(c)(1)(C).

[46] *See* McCarthy v. United States, 394 U.S. 459, 466 (1969) (guilty pleas violate due process unless they are knowingly and voluntarily entered); *see also* FED. R. CRIM. P. 11(b)(1)-(b)(2) (specifying requirements in federal court for ensuring that the defendant's plea is voluntary and that the defendant understands the rights she is waiving); Stephanos Bibas, *Regulating the Plea-Bargaining Market: From Caveat Emptor to Consumer Protection*, 99 CAL. L. REV. 1117, 1142 (2011) ("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." (citing FED. R. CRIM. P. 11)) [hereinafter Bibas, *Regulating the Plea-Bargaining Market*]; Anne R. Traum, *Using Outcomes to Reframe Guilty Plea Adjudication*, 66 FLA. L. REV. 823, 827-28 (2014) ("court oversight is typically limited to determining whether the defendant understands the terms of the deal he is accepting and the rights he is waiving").

renders a plea involuntary.[47] Substantively, the court must ensure only "that there is a factual basis for the plea,"[48] which is an extremely lenient standard that does not inquire whether the charges best serve the public's interests.[49] Ensuring that the prosecutor has struck a deal that serves the public's interest is not part of the analysis,[50] except insofar as the public's and defendant's interests align in preventing waiver of constitutional rights without at least a rudimentary understanding of those rights or because of coercion.[51]

Let us step back here and consider what courts must review and what they cannot in class actions and criminal prosecution. Before precluding individual claims that typically would not be financially viable in any event,[52] courts *must* ensure that a $5-$45 payment is enough compensation for those few consumers who bother to file claim forms[53] and who may have been misled into thinking, for instance, that their juice had naturally

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[47] Bordenkircher v. Hayes, 434 U.S. 357, 358-59, 365 (1978); Brady v. United States, 397 U.S. 742, 751, 755 (1970).

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

[49] *See* Garrett, *supra* note 11, at 906 ("Federal courts are more involved in reviewing plea bargains than charging decisions, but judges still remain highly deferential."); Rakoff, *supra* note 3 ("in 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"); *see also* Ion Meyn, *The Unbearable Lightness of Criminal Procedure*, 42 AM. J. CRIM. L. 39, 72-73 (2014) (quoting typical plea colloquy by one Magistrate Judge in the Northern District of Iowa and using it as an example of rote, surface level inquiry).

[50] 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. *See* U.S.S.G. § 6B1.2(a); 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" (quoting S. Rep. No. 225, 98th Cong., 1st Sess. 167 (1983), reprinted in 1984 U.S.C.C.A.N. 3182, 3350)). This provision means little in practice. *See, e.g.*, United States v. Ammidown, 497 F.2d 615 (D.C. Cir. 1973) (reversing district court in "this unusual case" of district court rejecting charge bargain on basis that resulting charges were too lenient).

A limited exception appears with a deferred prosecution agreement. *See* United States v. HSBC Bank USA, N.A., No. 12-CR-763, 2013 WL 3306161 (E.D.N.Y. July 1, 2013).

[51] This is not to suggest that courts actually succeed at preventing coerced guilty pleas but that coercing guilty pleas violates prosecutors' minister of justice duty.

[52] 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. Deposit Guaranty Nat'l Bank v. Roper, 445 U.S. 326, 339 (1980) ("[w]here 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).

[53] *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.").

occurring vitamins instead of chemically-synthesized equivalents.[54] 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 inappropriate.[55] Although a judge cannot stop it, such a process is unduly coercive and violates prosecutors' duty to their public-clients to ensure procedural fairness for defendants.[56]

Class action scholarship widely recognizes that class members are rationally apathetic about the litigation because their claims are typically very low value.[57] 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).[58]

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

[55] *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."). 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.

[56] *See* MODEL RULES OF PROF'L CONDUCT R. 3.8 cmt. 1 (explaining that the prosecutor has "specific obligations to see that the defendant is accorded procedural justice"). *But cf.* Brady v. United States, 397 U.S. 742, 750-51, 755 (1970) (holding that plea is not unduly coercive simply because it eliminates the possibility of the death penalty). 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. Wright, *supra* note 12, at 588 ("To some extent, we rely on the chief prosecutor's professional conscience.").

[57] *E.g.*, John C. Coffee, Jr., *Litigation Governance: Taking Accountability Seriously*, 110 COLUM. L. REV. 288, 305 (2010) (describing "rational apathy" of "many small claimants"); Samuel Issacharoff, *The Governance Problem in Aggregate Litigation*, 81 FORDHAM L. REV. 3165, 3171 (2013) (describing "rational apathy of the [class members] to expend huge effort to monitor developments" in their case); Leslie, *supra* note 34, at 1047 ("it is perfectly rational for each individual class member to forego any monitoring").

[58] Erik Lillquist, *Recasting Reasonable Doubt: Decision Theory and the Virtues of Variability*, 36 U.C. DAVIS L. REV. 85, 137-38 (2002); *cf.* Stephen J. Schulhofer, *Due Process of Sentencing*, 128 U. PA. L. REV. 733, 800 n.259 (1980) (distinguishing between visibility of 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 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

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. The judge could improve the viability of the first-party electoral check on prosecutors as part of that role.

Adding less-interested prosecutors to crucial decisions as Barkow proposes makes a lot of sense for combatting cognitive biases.[59] And that approach is particularly feasible in U.S. Attorneys' offices with three levels of prosecutors in the hierarchy.[60] 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,[61] looking up the ranks of prosecutors' offices cannot neutralize agency-cost concerns completely. 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 in the public perception of any decisions their office makes.[62] Such an approach, if only vertical, may strengthen pressures to maintain a high conviction rate and perhaps maximize the number of convictions given a budgetary constraint. And while the previous sentence assumed a fixed budget, pursuing cases likely to yield substantial forfeitures can aggrandize the office's budget and thus will likely be quite desirable for lead prosecutors in charge of those budgets.

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."[63] Accountability comes down to trusting prosecutors' commitment to public service and professional

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shared across the entity-client group, and therefore these victims cannot reliably monitor their agent on the group's behalf.

[59] *See, e.g.*, Burke, *supra* note **Error! Bookmark not defined.**, at 1621; Findley & Scott, *supra* note **Error! Bookmark not defined.**, at 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 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.

[60] Green & Zacharias, *supra* note **Error! Bookmark not defined.**, at 196.

[61] *Id.* at 201.

[62] *See id.* at 202-03; Shugerman, *supra* note 62.

[63] Green & Zacharias, *supra* note **Error! Bookmark not defined.**, at 902.

conscience in a regime where there are not well-established standards to guide them.[64] Many people, myself included, think that this trust is not totally misplaced.[65] But it is an awful lot of trust to place in self-interested actors with even the best of intentions.[66]

In criminal law, internal administrative processes and attention to organizational structure improve accountability beyond relying on largely-ineffectual elections,[67] but prosecutor accountability remains far from perfect.[68] To help close the accountability deficit in criminal law, thinking about class actions' 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.[69] The idea of greater judicial involvement is to protect the public-client, although that will in some instances mean ensuring that defendants are treated fairly because the

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[64] *See* Barkow, *supra* note **Error! Bookmark not defined.**, at 871 ("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."); Davis, *supra* note **Error! Bookmark not defined.**, at 18 (prosecutorial discretion "gives prosecutors more power than any other criminal justice officials, with practically no corresponding accountability to the public they serve"); Wright, *supra* note 12, 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 **Error! Bookmark not defined.**, at 903.

[65] *See, e.g.*, Bibas, *supra* note **Error! Bookmark not defined.**, at 443; Buell, *supra* note **Error! Bookmark not defined.**, at 1516; Wright & Miller, *supra* note **Error! Bookmark not defined.**, at 1589.

[66] *See* Wright, *supra* note **Error! Bookmark not defined.**, at 598 ("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.").

[67] 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, *Institutional Design*, *supra* note 2 (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); Rinat Kitai-Sangero, *Plea Bargaining As Dialogue*, 49 AKRON L. REV. 63, 85 (2016) (proposing separating functions within prosecutor offices to require a different prosecutor to try cases than the prosecutor who had the open dialog with the defendant that the article proposes).

[68] *See, e.g.*, Green & Zacharias, *supra* note 2, at 847 ("individual prosecutors' preferences still control a vast range and number of choices, free of outside or supervisory controls").

[69] 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 settlement and plea agreements and suggest that the comparison cuts in favor of more judicial involvement in plea negotiation. Sklansky & Yeazell, *supra* note 5, at 696-705.

prosecutor's public-client benefits from affording defendants fair treatment.[70]

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 I explore that in more detail throughout the rest of the article.

III. IMPLICATIONS

As I have discussed in more detail elsewhere, the dramatically different approaches that class actions and criminal law take to similar questions about accountability are not justifiable.[71] Part III now explores the lessons that criminal law can learn from class action law.

As a general matter, I conclude that contrary to the federal rules of criminal procedure,[72] judges can and should be more involved in plea negotiations.[73] Plea bargaining *is* the criminal justice system, by and large,[74] so it is passing strange that the neutral judicial actor is largely excluded from this process. This article explores judicial intervention before, during, and after plea bargaining and considers in parts A-C lessons that we can learn both from the plea bargaining literature and the class action literature at each stage. These different stages for judicial intervention can apply in isolation, but judges could also involve themselves in the plea negotiation process at multiple phases, combining several of these approaches, an idea to which Part D is dedicated.

Painting with a broad brush in this introduction to Part III, the most direct comparison would suggest that 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.[75] That move alone would add some value by correcting cases where the "bargained-for" recommended sentence deviates from the rough "market rate," and it would square with judges' sentencing authority. But it is designed to reach only particular outlier cases rather than getting

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[70] Gold, *Beyond the Judicial Fourth Amendment*, *supra* note 3, at 1642; Bruce A. Green, *Why Should Prosecutors "Seek Justice"?*, 26 FORDHAM URB. L.J. 607, 642 (1999).

[71] Gold, *"Clientless" Lawyers*, *supra* note 1.

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

[73] A recent article explains how *Lafler* and *Frye* provide doctrinal support for such an intervention, Traum, *supra* note 46, and another article draws this broad conclusion from a comparison between non-class civil litigation and criminal plea bargaining, Sklansky & Yeazell, *supra* note 5, at 696-705.

[74] Missouri v. Frye, 132 S. Ct. 1399, 1407 (2012).

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

underneath ways in which the "market rates" might themselves be inappropriate. And it would have no effect on the prosecutor's use of mandatory minimums or sentencing enhancements to control sentencing or pressure defendants into pleading guilty. Moreover, there are reasons grounded in both criminal law and class action literature to think that purely *ex post* review will not prove a wildly powerful tool. Class action and criminal law scholars have recognized that docket-management pressures and lack of information lead *ex post* judicial review of an already-negotiated settlement or plea deal to be highly deferential.[76] Moreover, the charging decision in the criminal context has far more import for the outcome of the case than does the filing of a complaint in a class action, and thus involving a judge after a deal is done comes too late.[77]

It bears acknowledging at the outset that all of the approaches suggested here involve additional judicial process that may seem inefficient. Normatively, I am not convinced that assigning great weight to efficiency in criminal law is sensible.[78] And indeed, it is not entirely clear that the processes proposed here would be inefficient if efficiency were to account for benefit rather than simply be equated to low cost as it sometimes mistakenly is.[79] More judicial involvement would add time costs and perhaps monetary costs if additional judges became necessary. But if that judicial involvement also results in shorter sentences and thus lower costs of incarceration, that is an offsetting benefit even if efficiency were the right metric.

A. Before Plea Bargaining

Largely out of concern that resource disparities rather than merit will dictate outcomes of negotiated resolutions, civil procedure and criminal law scholars have advocated allowing judges to pine early on the merits—

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[76] *See, e.g.*, Samuel Issacharoff, *Class Action Conflicts*, 30 U.C. DAVIS L. REV. 805, 829 (1997) (explaining judges docket management incentives to approve class settlements); Wright & Miller, *Screening/Bargaining Tradeoff*, *supra* note 42, at 88 ("The judge is complicit with the parties after they reach a plea agreement.").

[77] *See* Gold, *"Clientless" Lawyers*, *supra* note 1 (manuscript at 42-44) [12/15/16 version].

[78] *See* Darryl K. Brown, *The Perverse Effects of Efficiency in Criminal Law*, 100 VA. L. REV. 183 (2014) (arguing that efficiency in criminal law has perverse consequences by enabling more prosecutions); Bibas, *Designing Plea Bargaining*, *supra* note 20, at 1066 (arguing 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").

[79] *See* Brooke D. Coleman, *The Efficiency Norm*, 56 B.C. L. REV. 1777, 1778-79 (2015) (arguing in the civil context that reformers mistakenly equate efficient with cheap and fail to consider the benefits side of the efficiency calculus).

or seeming merits—of a case.[80] In the criminal context, Albert Alschuler recommended in the 1970's that before plea bargaining could begin judges would be required to hold an adversarial sentencing hearing in open court with a written record based on a limited presentence report,[81] after which the judge would then announce the sentences that she intends to impose if the defendant were to plead guilty or be convicted after trial by applying a specific discount rate between the two sentences that judges across the particular court had agreed upon.[82] If reaching the appropriate sentence required displacing a charge that carried a minimum sentence greater than that which the judge wants to impose, the judge could displace such a charge.[83] Dan McConkie recently offered a similar but more modest proposal, allowing individual judges to determine a discount rate (or trial penalty) on a case-by-case basis and not allowing judges to escape mandatory minimums or sentencing enhancements.[84]

On the civil side, Geoff Miller advocates a procedure that he calls a preliminary judgment that turns out to be surprisingly similar to the Alschuler/McConkie proposals.[85] Miller suggests that either party in a civil case be allowed to move for a preliminary judgment whereby the court would consider all of the evidence that the parties submit and offer its view on the merits of the claim based on that evidentiary record.[86] The greatest benefit of this procedure, Miller explains, would be providing both sides with greater information as to the likely outcome based on the assessment of a neutral arbiter to help facilitate a settlement that tracks a case's merit.[87] Existing civil procedure rules offer some opportunities for judges to opine early on a case's merits.[88] The first formal opportunity is the motion to

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[80] Alschuler, *supra* note 3 (criminal); J. Maria Glover, *The Federal Rules of Civil Settlement*, 87 N.Y.U. L. REV. 1713 (2012); McConkie, *supra* note 3 (criminal); Miller, *supra* note 14 (civil).

[81] *See* Alschuler, *supra* note 3, at 1146-47 (discussing a motion for pretrial conference); *see also* FED. R. CRIM. P. 11 advisory committee's note (1974) (explaining 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 have occurred in an informal and largely invisible manner"); *see also* McConkie, *supra* note 3, at 75 (arguing that recent Supreme Court decisions about effectiveness of counsel in plea bargaining counsel in favor of creating a written record).

[82] Alschuler, *supra* note 3, at 1146-47; *see also generally* Note, *Restructuring the Plea Bargain*, 82 YALE L.J. 286 (1972).

[83] Alschuler, *supra* note 3, at 1137, 1147. Because these articles have fleshed out many of the details of these proposals, I will not go into great detail about them here.

[84] McConkie, *supra* note 3, at 64 (explaining that his proposal is more modest than Alschuler's).

[85] Miller, *supra* note 14.

[86] *Id.* at 168-69.

[87] *See id.* at 170-79.

[88] *See* Hessick et al., *supra* note 7 [Part II].

dismiss for failure to state a claim, though that comes in the context of evaluating the allegations rather than the evidence.[89]

These proposals on both the criminal and civil sides seek to incorporate the judge's neutral view of a case's merit into the negotiation process at an early stage to steer the resolution to track a case's merit rather than tracking disparities in negotiating power. That scholars have made similar proposals in the civil system to combat a similar problem lends credence to proposals like Alschuler's that urge judges to opine on the merits of cases before plea bargaining can begin.

Alschuler, McConkie, and others[90] are right that judges should take more control of negotiated sentences and with much greater transparency[91] just as judges steer civil settlement early in a case by opining on its merit.[92] The best way to incorporate such an opportunity into the criminal system would be along the lines of the Alschuler/McConkie proposals. Plea bargaining would begin, if at all, only after a defendant's request for a judicial proceeding.[93] The probation department would then prepare a limited presentence report for the hearing.[94] This pretrial hearing would

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[89] *See* FED. R. CIV. P. 12(b)(6).

[90] *See, e.g.*, Isaac Borenstein & Erin J. Anderson, *Judicial Participation in Plea Negotiations: The Elephant in Chambers*, 14 SUFFOLK J. TRIAL & APP. ADVOC. 1 (2009); Jenia Iontcheva Turner, *Judicial Participation in Plea Negotiations: A Comparative View*, 54 AM. J. COMP. L. 199 (2006); *see also* 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).

[91] *See* Kate Levine, *Police Suspects*, 115 COLUM. L. REV. (forthcoming 2016) (on file with author) (manuscript at 7) (describing plea bargaining as "largely unreviewable"); *see also* Josh Bowers, *Legal Guilt, Normative Innocence, and the Equitable Decision Not to Prosecute*, 110 COLUM. L. REV. 1655, 1710 (2010) ("Conventionally, plea bargaining is criticized for insulating criminal charges from trial screens for legal sufficiency, but plea bargaining also serves to insulate charges from almost any kind of external screen for equitable sufficiency."); Alexandra Natapoff, *Misdemeanors*, 85 S. CAL. L. REV. 1313, 1328 (2012) (arguing that in the case of misdemeanors lack of review means that an arrest "can lead inexorably, and with little scrutiny to a guilty plea.").

[92] *See* Rishi Raj Batra, *Judicial Participation in Plea Bargaining: A Dispute Resolution Perspective*, 76 OHIO ST. L.J. 565, 572 (2015); Susan R. Klein, *Enhancing The Judicial Role In Criminal Plea And Sentence Bargaining*, 84 TEX. L. REV. 2023, 2045 (2006) ("Unlike Federal Rule of Criminal Procedure 11, which prohibits a judge from participating in plea negotiations, Federal Rule of Civil Procedure 16 was amended in 1983 and 1993 to explicitly place settlement discussion on the agenda at pre-trial conferences, to involve the judge in encouraging settlement, and to compel participation even when the parties are reluctant to engage in settlement negotiations."); Rakoff, *supra* note 3 (urging judicial involvement in plea negotiation); *see also* 5 LAFAVE ET AL., CRIM. PROC. § 21.3(d) (3d ed.) ("In some localities the judicial involvement [in plea bargaining] has become formalized to the extent that as a routine matter the parties often meet with the judge at a pretrial settlement conference.").

[93] *See* Alschuler, *supra* note 3, at 1146-47 (discussing a motion for pretrial conference); McConkie, *supra* note 3, at 84 (urging motion for indicated sentences).

[94] *See* Alschuler, *supra* note 3, at 1147.

include adversarial presentation of evidence and arguments in favor of a particular recommended sentence.[95] The defendant should be able to attend the hearing and a written transcript should be created.[96] The judge would then have a strong basis to provide a preliminary glimpse into a neutral view of the case's merits,[97] and the judge could then announce the sentence that she 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.[98] These sentence estimates would not be binding, and it is of course possible that later evidence would emerge that renders those estimates unreasonable. Nonetheless, they would provide a useful anchor for plea bargaining.

On the importance of anchoring in plea negotiation, recent empirical work by Jenny Roberts and Ron Wright shows that prosecutors typically make the first offer in plea negotiations.[99] That prosecutors make the first offer is particularly important because of the anchoring effect,[100] which means that the parties negotiate from the prosecutor's starting point even if that starting point was random or artificially high.[101] Because prosecutors frequently make first offers, "defense attorneys assimilate their own sentencing demand to it."[102] Indeed, defense attorneys and their clients may be tempted to "jump at the deal" when they receive an unfavorable offer if it appears low by contrast to an earlier offer.[103] Judicial

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[95] Alschuler, *supra* note 3, at 1147-48.

[96] *Id.* at 1147-48; *see also* FED. R. CRIM. P. 11 advisory committee's note (1974) (explaining 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 have occurred in an informal and largely invisible manner"); *see also* McConkie, *supra* note 3, at 75 (arguing that recent Supreme Court decisions about effectiveness of counsel in plea bargaining counsel in favor of creating a written record).

[97] *Cf.* J. Maria Glover, *The Federal Rules of Civil Settlement*, 87 N.Y.U. L. REV. 1713 (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); Miller, *supra* note 14.

[98] Alschuler, *supra* note 3, at 1147-48.

[99] Jenny Roberts & Ronald Wright, *Training for Bargaining*, 57 WM. & MARY L. REV. 1445, 1485-87 (2016).

[100] *See, e.g.*, Amos Tversky & Daniel Kahneman, *Judgment Under Uncertainty: Heuristics and Biases*, 185 SCI. 1124, 1128-30 (1974).

[101] *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.").

[102] Birte Englich et al., *The Last Word in Court—A Hidden Disadvantage for the Defense*, 29 L. & HUM. BEHAV. 705, 712 (2005).

[103] *See* Stephanos Bibas, *Plea Bargaining Outside the Shadow of Trial*, 117 HARV. L. REV. 2463, 2518 (2004) [hereinafter Bibas, *Outside the Shadow of Trial*].

involvement helps combat the upward-anchoring effect of prosecutors' first offers.[104]

Although the primary concern with prosecutors not tracking their public-clients' best interests tends to be about prosecutor overreach, the same procedure would help address cases where there is reason to be concerned that the prosecutor may under-reach. Such concerns might arise when the defendant is a police officer, for instance.[105] I do not mean to suggest that the judge should do anything in any type of case other than review the evidence and suggest the sentences she would likely impose. But when she does so, instead of anchoring the sentencing discussion downward, the judge's intended sentence might anchor the sentencing discussion upward in cases involving government defendants.

Another possibility would be for criminal cases to track existing civil procedure and provide for a meaningful motion to dismiss based on the sufficiency of the allegations.[106] That procedure, if used meaningfully in criminal law as it now is not, would allow for some judicial involvement early in the process in criminal cases as it does in civil cases to at least test the allegations themselves albeit not the underlying evidence. It would at least prevent defendants from pleading guilty when the allegations are legally insufficient.[107]

Either the preliminary evidentiary hearing or a meaningful motion to dismiss for facial insufficiency would provide defendants with more information when deciding whether to plead guilty. The judge indicating likely post-trial and post-plea sentences would much better inform these critically-important decisions that defendants now make based on their counsel's best guess at what the trial penalty would be—*i.e.*, the sentencing differential between pleading guilty and going to trial.[108] Allowing defendants to make more informed choices regarding whether to waive core constitutional rights before being deprived of their liberty of course helps defendants but so too does it serve the prosecutor's public-client's interests in rights protection and the prosecutor's oath to uphold the

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[104] Miller, *supra* note **Error! Bookmark not defined.**, at 1667.

[105] Levine, *supra* note 37 (regarding police defendants); Kate Levine, *Who Shouldn't Prosecute the Police*, IOWA L. REV. (2016) (same).

[106] *See* Hessick et. al, *supra* note 7 [Part III].

[107] So too would such a procedure improve courts' law-declaring function in criminal cases by allowing for rulings at a time when no one has yet been adjudged guilty. *See* Hessick et. al, *supra* note 7 [Part III].

[108] *See* Wright & Miller, *Screening/Bargaining Tradeoff*, *supra* note 42, at 89 ("the sentencing judge can offer defendants some of the most reliable information about the bottom line issue in the criminal proceedings: the sentence to be imposed"); *see also* Klein, *supra* note 92, at 2043-44 (explaining the reasons that defendants obtain very little information about the government's case against them).

Constitution.[109] While a motion to dismiss that tests the sufficiency of the allegations would add less cost than a preliminary evidentiary hearing, so too would it add less value. On balance then, the weighing of evidence rather than analyzing mere allegations seems more efficient.

The closest analog in current class action law to these proposals for judicial involvement before plea bargaining can begin is the requirement that judges engage in "rigorous analysis" to ensure that the Rule 23 requirements are satisfied before certifying a class and that the requirement that this analysis be based on actual evidence rather than mere allegation.[110] Often the Rule 23 inquiries overlap with the merits questions, and in that event the court's Rule 23 findings will offer some of its views on the merits.[111] Nonetheless, this mechanism is weakened because the parties can negotiate a settlement before the motion for class certification is briefed.[112] To the chagrin of some scholars, class counsel and defense counsel can walk into court together to file a proposed settlement agreement at the same time that class counsel is filing the original complaint.[113]

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[109] *See* Gold, *Beyond the Judicial Fourth Amendment*, *supra* note 3 (explaining that prosecutor's public-client benefits from affording rights to defendants); *see also* MODEL RULES OF PROF'L CONDUCT R. 3.8 cmt. 1 (prosecutors bear "specific obligations to see that the defendant is accorded procedural justice"); CRIMINAL JUSTICE STANDARDS: PROSECUTION FUNCTION § 3-1.2 ("The prosecutor should seek to . . . respect the constitutional and legal rights of all persons, including suspects and defendants.").

[110] Wal-Mart Stores, Inc. v. Dukes, 568 U.S. 338, 350-51 (2011)

[111] *Id.* at 351-52.

[112] *See, e.g.*, Amchem Prods., Inc. v. Windsor, 521 U.S. 591 (1997) (reversing class certification but not disapproving of motion for class certification and settlement approval being filed contemporaneously with complaint). Some scholars are chagrined by these so-called settlement class actions in which a class is certified for settlement purposes only and not for litigation. *See* Howard M. Erichson, *The Problem of Settlement Class Actions*, 82 GEO. WASH. L. REV. 951, 952 (2014) (arguing that class actions should not be certified for settlement purposes only because the inability for class counsel to threaten trial deprives it of important leverage and therefore impairs the class's interests); Martin H. Redish & Andrianna D. Kastanek, *Settlement Class Actions, the Case-or-Controversy Requirement, and the Nature of the Adjudicatory Process*, 73 U. CHI. L. REV. 545, 547 (2006) (arguing that settlement class actions lack sufficient adversity to satisfy the Article III case or controversy requirement).

[113] There may be some value to an analog to pre-settlement judicial involvement in the class action context to protect against the so-called "sweetheart settlement," *see* Bruce Hay & David Rosenberg, *"Sweetheart" and "Blackmail" Settlements in Class Actions: Reality and Remedy*, 75 NOTRE DAME L. REV. 1377 (2000), where class counsel sells the class's claims too cheaply to assure a contingency fee recovery, but that value is far less pronounced than in the criminal context because of differences in power disparities. Because of tools like mandatory minimums and sentencing enhancements, the leverage disparity between the parties is far greater in criminal law than in class actions where limited resources provide the greatest constraint on class counsel. Therefore, the early intervention by courts in criminal plea bargaining is comparatively more important. For a more detailed explanation of the inversion of power disparities between the two systems, see Gold, *"Clientless" Lawyers*, *supra* note 1 [Part III.A]. This idea of pre-settlement judicial

B.During Plea Bargaining

Judges can also play an important role once the plea negotiation process begins and before a final deal has been reached. As Susan Klein rightly explains, "[u]nlike Federal Rule of Criminal Procedure 11, which prohibits a judge from participating in plea negotiations, Federal Rule of Civil Procedure 16 was amended in 1983 and 1993 to explicitly place settlement discussion on the agenda at pre-trial conferences, to involve the judge in encouraging settlement, and to compel participation even when the parties are reluctant to engage in settlement negotiations."[114] Indeed, Civil Rule 16 was amended to facilitate *more* judicial involvement in settlement after Criminal Rule 11 had been amended to bar similar involvement.[115] The suggestion in this part of the article is to bring the criminal rule a little closer to its civil counterpart.

Although the system created by the first version of the Federal Rules of Civil Procedure was designed to be a system of trials,[116] the current system is one of "managerial judges" trying to facilitate settlement.[117] Managerial judges involve themselves from the early phases of litigation and steer cases toward settlement or some other form of dismissal short of trial.[118]

The Federal Rules of Civil Procedure encourage this managerial judging and afford substantial case management tools to drive parties toward settlement.[119] District courts are authorized to order the attorneys to appear for pretrial conferences with the explicit objective of "facilitating

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involvement in class actions could warrant more exploration elsewhere but is beyond the scope of this article.

[114] Klein, *supra* note 92, at 2045.

A few scholars have noted the usefulness of comparisons between the civil and criminal systems regarding judicial involvement in the process of negotiating a non-trial resolution through plea bargains or settlements. Sklansky & Yeazell, *supra* note 5, at 696-705; Zimmerman & Jaros, *supra* note 30, at 1428, 1447. Without trying to flesh out the details, David Sklansky and Stephen Yeazell argue that the criminal system may profitably borrow from the civil notion of allowing judges to participate in settlement discussions, as some states do. Sklansky & Yeazell, *supra* note 5, at 696-705.

[115] *See* FED. R. CRIM. P. 11 advisory committee's note (1974); FED. R. CIV. P. 16 advisory committee's note (1983); *see also* Hessick et al., *supra* note 7.

Civil Rule 16 is not focused on class actions as most of this comparison has been, but it applies equally in that context. And indeed judges' incentives to clear message aggregate litigation from their dockets seem even stronger than those incentives with individual litigation.

[116] Richard L. Marcus, *The Revival of Fact Pleading Under the Federal Rules of Civil Procedu*re, 86 COLUM. L. REV. 433, 440 (1986).

[117] *E.g.*, Coleman, *supra* note 79, at 1778-79; Judith Resnik, *Managerial Judges*, 96 HARV. L. REV. 374 (1982).

[118] *Id.*; *see also* Resnik, *supra* note 117, at 404 (listing reasons for judges to initiate pretrial management, including "speed[ing] settlement").

[119] *See, e.g.*, Marc Galanter & Mia Cahill, *"Most Cases Settle": Judicial Promotion and Regulation of Settlements*, 46 STAN. L. REV. 1339 (1994).

settlement."[120] District courts *must* issue a scheduling order (except where exempted by local rule),[121] which requires courts to actively manage their docket and thereby embraces the notion that early judicial intervention prompts quicker settlement.[122]

Although the federal criminal rules prohibit judicial involvement in plea bargaining,[123] states' approaches vary.[124] Plenty of states ban judicial involvement entirely.[125] But twenty-one states allow judicial participation in settlement, and nine of those states actively encourage it.[126] Eleven other states do not explicitly bar judicial participation in plea bargaining but have not ruled on the issue.[127] In Florida, the judge's role is ostensibly to provide information to both parties regarding the estimated length of the ultimate sentence if one of the parties so requests rather than acting as mediator similar to what Alschuler proposed.[128] Despite these formal requirements, some judges play a more active role mediating plea discussions in Florida.[129] Connecticut judges play a more active role still,

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[120] FED. R. CIV. P. 16(a)(5); *see also* FED. R. CIV. P. 16 advisory committee's note (1983) ("A settlement conference is appropriate at any time."); Galanter & Cahill, *supra* note 119, at 1340 ("The 1983 amendment of Rule 16 of the Federal Rules of Civil Procedure formally recognized the prosettlement position."); Samuel R. Gross & Kent D. Syverud, *Don't Try: Civil Jury Verdicts in A System Geared to Settlement*, 44 UCLA L. REV. 1, 2 n.3 (1996) ("The Advisory Committee Comments on the 1983 and 1993 amendments to Rule 16 make clear that their purpose is to facilitate settlement through the pretrial conference."); Laurie Kratky Dore, *Secrecy by Consent: The Use and Limits of Confidentiality in the Pursuit of Settlement*, 74 NOTRE DAME L. REV. 283, 290 & n.23 (1999); David L. Shapiro, *Federal Rule 16: A Look at the Theory and Practice of Rulemaking*, 137 U. PA. L. REV. 1969, 1986 (1989) (explaining that "the [1983] amendment [embracing the objective of facilitating settlement] implicitly rejects the views of some observers that judicial involvement in settlement is inconsistent with the judge's role as neutral adjudicator").

[121] FED. R. CIV. P. 16(b).

[122] *See* FED. R. CIV. P. 16 advisory committee's note (1983) ("when a trial judge intervenes personally at an early stage to assume judicial control over a case and to schedule dates for completion by the parties of the principal pretrial steps, the case is disposed of by settlement or trial more efficiently and with less cost and delay than when the parties are left to their own devices"); *see also* Shapiro, *supra* note 120, at 1985 ("A major purpose [of the 1983 amendment] was to recognize, and indeed to embrace, the strong trend toward increased judicial management of litigation from an early stage of the lawsuit.").

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

[124] *See generally* Batra, *supra* note 92 (surveying each state's approach); Turner, *supra* note **Error! Bookmark not defined.**, at 200 (comparing German system to Florida and Connecticut systems of judicial involvement in plea negotiations); Wright & Miller, *Screening/Bargaining Tradeoff*, *supra* note 42, 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)).

[125] *See* Batra, *supra* note 92, at 573-75.

[126] *Id.* at 575-78.

[127] *Id.* at 577-78.

[128] Turner, *supra* note **Error! Bookmark not defined.**, at 239; *see* State v. Warner, 762 So. 2d 507, 507 (Fla. 2000).

[129] Turner, *supra* note **Error! Bookmark not defined.**, at 240-41.

moderating between the parties' positions and sometimes directly offering views on a plea bargain's merits.[130]

As in civil cases, judges in criminal cases should be allowed to 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.[131] The judge can then lend a neutral perspective to the process, potentially cutting through the sorts of adversarial biases thought to impede settlement in the civil context.[132]

Unlike in the civil context, prosecutors have such powerful leverage to obtain guilty pleas by threatening a massive sentence that the prosecutor can control through the charging decision—what some think amounts to coercing a guilty plea.[133] Thus, judges' aims here should be to inquire about offers that have been made, timelines given on those offers, and how the two sides have progressed. Although judges will need to be careful to suggest rather than mandate, they can suggest to prosecutors if they are asking for too much time or to recalcitrant defendants if they are refusing what seems like a reasonable offer.[134] From a dispute resolution perspective, the idea is more mediation than arbitration, and a soft form of mediation at that. Although I will not pretend that this is an easy needle for judges to thread, having these conversations on the record in open court is likely to help judges self-police.[135] To check overreach, judges should keep a watchful eye on the use or threatened use of the prosecutors' heavy sentencing artillery such as prior felony enhancements.[136] Indeed, one of

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[130] *Id.* at 247.

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

[132] *See* Glover, *supra* note 97 (advocating use of civil procedure to incorporate more early opportunities for judges to weigh the merits of a case to better link settlement value with merit).

[133] Rakoff, *supra* note 3 (describing weapons with which prosecutors can "bludgeon defendants into effectively coerced plea bargains"); 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."); *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 3, at 971 ("Courts find no problem even when prosecutors use coercive sentencing differentials as plea bargaining leverage."); *see also* Klein, *supra* note 92, at 2037-38 (describing various "clubs" that prosecutors possess in plea bargaining).

[134] I look forward to results from Ron Wright and Nancy King's empirical project regarding the roles that judges play in the plea negotiation process in states that so permit to think through these issues in greater detail going forward.

[135] *See* Batra, *supra* note 92, at 589-92 (advocating written record of hearing to permit *ex post* review).

[136] Concerns about under-reach need not be checked during the plea process but rather can be sufficiently checked by judges anchoring plea negotiations at the outset and

the most concerning parts of the leverage that sentencing enhancements afford prosecutors is the nearly complete lack of transparency in their threatened use.[137] One objective of this proposal is to increase public visibility of a plea negotiation process that frequently operates through hallway conversations in which defense counsel does not always make counter-offers and must guess at what the judge might do.[138]

The notion that judges in criminal cases could act managerially somewhat like judges in civil cases does not mean that their aims or approaches should be identical. One of Judith Resnik's wonderful articles drew attention to normative concerns promoted by managerial civil judges.[139] Similar concerns about abandonment of the neutral judicial role and coercion of the parties led to the federal criminal rules' complete prohibition on judicial involvement in plea bargaining.[140] Concerns about coercion in the civil context apply with even more force in the criminal system driven by due process concerns about defendants' liberty, but these concerns can be resolved through attention to details of the proposal rather than a wholesale ban on judicial involvement.[141]

Rule 11's prohibition was driven by concern that a judge indicating that a defendant should plead guilty would lead a defendant to believe that she could not receive a fair trial before that judge later. That defendant would accordingly be coerced into taking a plea to avoid a foregone conclusion at trial.[142] That coercion is a real concern, but it can be largely

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reviewing sentence recommendations. The latter approach aligns well with the way that class action law seeks to combat the under-reach concern.

[137] *See Kupa*, 976 F. Supp. 2d at 435 ("one 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").

[138] Roberts & Wright, *supra* note 99, at 1485-87 (recounting empirical findings regarding 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 3, at 82 (arguing that judicial involvement "would foster transparency, rigor, consistency, and accountability"); Turner, *supra* note **Error! Bookmark not defined.**, at 238 (arguing that judicial involvement could improve "fairness and accuracy").

[139] Resnik, *supra* note 117.

[140] United States v. Davila, 133 S. Ct. 2139, 2146 (2013); FED. R. CRIM. P. 11 advisory committee's note (1974).

[141] Alschuler, *supra* note 3, at 1059 ("judicial bargaining, in an appropriately limited form, is no more coercive than prosecutorial bargaining, and I believe that the bargaining process can operate in a fairer, more straightforward manner when judges do take an active part").

[142] *Davila*, 133 S. Ct. at 2146; FED. R. CRIM. P. 11 advisory committee's note (1974).

alleviated.[143] Requiring a different judge to preside over trial than was involved in plea negotiations and being transparent about this requirement would overcome that due process concern.[144] The concerns about a powerful judge leaning too strongly on a defendant to waive her constitutional rights and plead guilty are also understandable, and I doubt that anyone would condone such behavior.[145] But those concerns are mitigated to some extent by exposing the discussions to the openness of a public courtroom and creating a written record.[146] Moreover, it seems strange to care deeply about whether an at-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[147] can 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.[148]

One concern with the robustness of any of these approaches is that judges' docket-management incentives will tend to lead them to prefer quick guilty pleas and make them unlikely to shape cases in ways that make pleas more difficult to obtain, especially in crowded state courts in urban areas. Thus, judges may push too hard to convince defendants to take a plea deal. These same docket-management incentives, however, could instead prompt judges to try to resolve cases by urging the prosecutor to offer a more lenient sentence. Moreover, it is hard to think that such a

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[143] *See* Alschuler, *supra* note 3, at 1059 ("judicial bargaining, in an appropriately limited form, is no more coercive than prosecutorial bargaining, and I believe that the bargaining process can operate in a fairer, more straightforward manner when judges do take an active part").

[144] *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 42, at 118 (explaining that this solution would resolve the ostensible conflict and would be akin to mediators in the civil context).

[145] *See* Liz Robbins, *In Judge's Brooklyn Courtroom, Made-for-TV Drama Without the Cameras*, N.Y. TIMES, Nov. 25, 2011 (describing a judge known for prodding defendants into pleading guilty including exploding plea offers and what one lawyer labeled "intimidation and fear").

[146] *See* Batra, *supra* note 92, at 582-83 (describing concerns about judicial overreach); *id.* at 589-92 (advocating written record of hearing to permit *ex post* review); Jocelyn Simonson, *The Criminal Court Audience in A Post-Trial World*, 127 HARV. L. REV. 2173, 2197-202 (2014) (explaining important function of open courtrooms for non-trial proceedings).

[147] *See* Gold, *"Clientless" Lawyers*, *supra* note 1 [Part I.C.2].

[148] *See, e.g.*, Bibas, *Prosecutorial Regulation*, *supra* note 3, 971 ("Courts find no problem even when prosecutors use coercive sentencing differentials as plea bargaining leverage.").

process would be worse than the one we have now where prosecutors know that trial is not a meaningful threat in the vast majority of cases.[149]

Instead of judicial involvement *substantively* to facilitate a deal or protect under-resourced defendants from the power of the State, judicial regulation of the plea bargaining *process* could also add great value, as one scholars has suggested.[150] 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) could all add value.[151] Not only should plea *agreements* be written but so too should all offers or threats made in plea negotiation as well as any deadlines placed on those offers.[152] These process requirements would add clarity for defendants and facilitate more meaningful *ex post* review by courts and voters.[153]

C. After Plea Bargaining

1. Reviewing Parties' Sentence Recommendation

Judges can also meaningfully improve plea bargaining and prosecutor accountability through more rigorous review after a deal has been struck through consideration both of whether the sentence tracks the "market rate" and the process by which the plea deal was negotiated.

One prominent article by Robert Scott and William Stuntz proposed a sort of *ex post* substantive review of recommended sentences in plea agreements.[154] They recommended that sentences from plea agreements be treated as a ceiling for judicial sentencing, and they then encouraged judges to impose a lower sentence when the recommended sentence deviates

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[149] *See* Missouri v. Frye, 132 S. Ct. 1399, 1407 (2012) ("plea bargaining" "is not some adjunct to the criminal justice system; it *is* the criminal justice system"); Padilla v. Kentucky, 559 U.S. 356, 372 (2010) ("Pleas account for nearly 95% of all criminal convictions."); Bibas, *Outside the Shadow of Trial*, *supra* note 103, at 2467 ("many plea bargains diverge from the shadows of trials").

[150] Bibas, *Regulating the Plea-Bargaining Market*, *supra* note 46, at 1153-59 (proposing these regulatory approaches)

[151] *Id.*

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

[153] Regarding the *ex post* review, see *infra* Part III.C.

[154] Adam Zimmerman and David Jaros draw on a comparison between class actions and criminal law to propose substantive judicial review of aspects of plea agreements related to victim compensation—portions of plea agreements that already look a lot like class settlements. Zimmerman & Jaros, *supra* note 30, at 1428, 1447.

substantially from the market rate in the jurisdiction.[155] Scott and Stuntz argue that judges are "in a very good position to recognize unusually high sentences."[156] I agree. Judges are in a good position to recognize sentences that deviate from the norm in a particular jurisdiction. Indeed, from a comparative standpoint, judges seem better positioned to evaluate appropriate sentences than the fairness of class settlements.[157] While judges do not see a perfect cross-section of a prosecutor's caseload,[158] they see numerous criminal cases every day from the same prosecutor's office.[159] The sheer volume of the two types of cases is quite different. This experience factor favoring judges in criminal cases at sentencing has to be set against the potential advantage that class action judges may have from adversarial briefing by objectors who challenge the fairness of a proposed settlement on which the parties' lawyers agree. These potentially-countervailing pressures are difficult to balance, but my instinct is that judges are better positioned on balance to do criminal sentencing than to evaluate the sufficiency of a monetary settlement based on the particular claims alleged, the number of victims, and the strength of the claims.

But Scott and Stuntz propose that judges focus only on outcomes from plea bargains (*i.e.*, recommended sentences) because they contend that bargaining *process* is not a useful consideration to determining whether counsel secured a good deal in a context like plea bargaining where knowing about other cases and going rates has more import than case-specific preparation.[160] That is where we part company. Unlike Scott and Stuntz, I think evaluating the process of plea bargaining in a particular case

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[155] Robert E. Scott & William J. Stuntz, *Plea Bargaining as Contract*, 101 YALE L.J. 1909, 1959-60 (1992); *see also* Traum, *supra* note 46 (proposing that judges monitor plea outcomes to protect defendants' constitutional rights).

[156] Scott & Stuntz, *supra* note 155, at 1959; *see also* Bibas, *Regulating the Plea-Bargaining Market*, *supra* note 46, at 1141 ("going rates and informal expectations develop among the repeat players in the market").

[157] Jonathan R. Macey & Geoffrey P. Miller, *Judicial Review of Class Action Settlements*, 1 J. LEGAL ANALYSIS 167, 182 (2009) ("Judges, dealing only with the cases that come before them, also have limited capacities to compare the settlement with settlements reached in other cases presenting similar or analogous facts[]" or "with the value of the relief obtained.").

[158] *See* Bibas, *Prosecutorial Regulation*, *supra* note 3, at 973 ("They are not well suited to take the synoptic, bird's-eye view needed to police systemic concerns about equality, arbitrariness, leniency, and overcharging.").

[159] The Supreme Court has recognized trial judges' expertise on customary sentencing. Missouri v. Frye, 132 S. Ct. 1399, 1410 (2012).

[160] Scott & Stuntz, *supra* note 155, at 1959. Scott and Stuntz's notion of judges treating the recommended sentence from a plea agreement as a ceiling makes good sense when the concerns about prosecutors serving their public-client are fears of overreach, as they typically are. But the idea should not apply when there are reasons to fear prosecutorial under-reach, which is a concept that needs more detailed exploration elsewhere.

can add real value.[161] In class actions, 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, especially discounting for factors like likelihood of success at trial.[162] Because of this difficulty, judges typically look to process as a proxy.[163] As the advisory committee is now seeking to clarify and unify the factors courts should consider to assess the fairness of settlements,[164] 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."[165] One important factor is "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."[166] So too is it important whether the settlement was negotiated at arm's length or whether there is evidence of collusion[167] and whether "a neutral or court-affiliated mediator or facilitator" was involved.[168]

Before the court accepts a guilty plea, just as before approving a class settlement, the judge should inquire into the fairness of the deal by considering in part the plea bargaining negotiation process. Her review should therefore not be limited to the rote plea colloquy.[169] Rather, as with class action fairness review, the court should consider the process

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[161] *See* Scott & Stuntz, *supra* note 155, at 1959.

[162] *See* FED. R. CIV. P. 23(e); Advisory Committee on Civil Rules, Agenda Book, July 2016 at 253, http://www.uscourts.gov/rules-policies/archives/agenda-books/committee-rules-practice-and-procedure-june-2016 (proposing that adequacy of relief for class 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").

[163] *See* Advisory Committee on Civil Rules, Agenda Book, July 2016 at 257, http://www.uscourts.gov/rules-policies/archives/agenda-books/committee-rules-practice-and-procedure-june-2016 (explaining usefulness of procedural factors as part of proposed amendments to make some of these procedural considerations such as negotiation at arm's length explicit in Rule 23(e) regarding settlement fairness); 7B FED. PRAC. & PROC. CIV. § 1797.1 (3d ed.) ("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.").

[164] *See* ALI PRINCIPLES OF LAW OF AGGREGATE LITIGATION § 3.05 (describing this case law as "in disarray").

[165] Agenda Book June 2016 at 257.

[166] *Id.* Although the current case law is messy, most circuits explicitly listed the extent of discovery as an important factor, while others list factors subsuming that consideration such as the stage of the proceedings. Rule 23 Subcommittee Report (Apr. 2015), at 36-41.

[167] *See* Agenda Book, June 2016, at 253 (proposing explicitly listing "arm's length" negotiation as a factor when considering settlement fairness in place of the current vague standard of "fair, reasonable, and adequate").

[168] *Id.*

[169] *See* FED. R. CRIM. P. 11 (providing the basic requirements for the colloquy).

underlying the plea negotiation, looking at how much information was exchanged between the lawyers about the merit of the case.[170] So too should the court consider whether the plea was negotiated at arm's length or whether a mediator or other neutral was involved in reaching the deal.[171] This type of procedural query could help judges detect any "sweetheart" plea deals where prosecutors have under-reached as we might expect with police defendants. So too should the judge ask about and consider any high-pressure tactics that the prosecutor used that might prompt questions about the harshness of the proposed sentence including threatened additional charges, mandatory minimums, sentencing enhancements, or exploding plea offers to look for overreach as we might fear in most other cases.[172] Current Supreme Court doctrine provides that these heavy-handed tactics do not render a plea involuntary,[173] but they could nonetheless trigger close review of the deal.

Perhaps the contexts are so fundamentally different that analyzing process makes great sense in class actions and none in criminal law. But I don't think so. 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 savvy defense counsel who knows that investigation will likely turn up little and has a strong sense about other cases and going rates rather than a sloppy or lazy lawyer.[174] But that assumes that case-specific facts do not affect market price or that one can know without investigation that there will be no case-

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[170] As a practical matter, the lack of meaningful information exchange would likely sweep in the vast majority of cases at present. *See, e.g.*, Bibas, *Designing Plea Bargaining*, *supra* note 20, at 1064 ("criminal discovery is pretty weak and frequently waived"). But establishing this factor as part of the stringency of plea review may usefully incentivize prosecutors to disclose more information to defendants than they do now before they are constitutionally compelled to do so. Added disclosure of course adds cost, but the benefit of affording defendants more informed choice before waiving their rights outweighs the added cost, in my view. *See also* Bibas, *Designing Plea Bargaining*, *supra* note 20, 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.").

[171] There is no reason to think that mediators or other neutrals are involved in many plea negotiations now, but including this factor in the plea fairness analysis could help bring a neutral perspective into these discussions.

[172] 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 the prosecutor and criminal defendant.

[173] *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.

[174] Scott & Stuntz, *supra* note 155, at 1959.

specific facts that bear on the applicable going rate.[175] Both seem mistaken in at least some instances.

I don't mean to suggest that considering process as a proxy for substantive fairness is perfect in class actions or that it would work perfectly in criminal law. Far from it.[176] But the basic idea seems generally right: lawyers who have taken discovery and secured helpful evidence (or 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. Likewise, a prosecutor who knows the market rates but also knows her own cases well enough to assess the applicability of market rates with sufficient nuance will tend to better serve the public-client than the one who knows only the former.[177] 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 results than those who just accept a prosecutor's plea offer as given.[178] At it seems quite plausible too that when defense counsel investigates the claims or receives discovery, the outcome of the negotiation will better track a case's merit. Indeed, the notion that greater exchange of information will help the parties' views of the merits converge and thus facilitate settlement underlies civil procedure scholarship identifying discovery as an important force in generating settlements.[179] Moreover, privileging pleas where a neutral mediator was

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[175] *Cf.* Bibas, *Designing Plea Bargaining*, *supra* note 20, at 1065 (arguing that because actors in the criminal justice system focus on technical questions like 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).

[176] 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 process that led to class settlements).

[177] *Cf.* Traum, *supra* note 46, at 869 (expressing concern that judges might treat unlike cases alike by focusing only on market rates).

[178] *See* Roberts & Wright, *supra* note 99, at 1485-87 (finding that defense attorneys "usually" but did not "always" counter a prosecutor's offer and that the defendant accepts the prosecutors' first offer "sometimes").

[179] Hessick et al., *supra* note 7 [Part II.D]; *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 & 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*

involved also makes sense insofar as there was someone to blunt the effects of the prosecutors' powerful charging tools that can essential coerce a guilty plea. To the extent that adding this consideration of input from a neutral simply encourages the involvement of neutrals, that too is good. In short, the comparison to fairness review in class action settlements suggests in part that judges in criminal cases can get purchase from considering the plea bargaining *process* as evidence of the substantive fairness of the deal.

2. Information Forcing

In some instances, asking judges to review the fairness of the deal just asks judges to do their job of sentencing defendants without deferring too much to the parties' sentencing recommendations. But sometimes judges' hands are tied at sentencing because of the way the prosecutor charged the case.[180] So the question arises about what a judge should do when she disagrees with the fairness of the sentence mandated by the charges to which the defendant pleaded. Alschuler proposed that judges should have greater control over sentencing even when the legislature has imposed mandatory minimums. He argued that judges should be able to strike a charge if that charge carried a mandatory sentence higher than what the judge deemed appropriate for the particular case.[181] That suggestion raises substantial separation of powers concerns insofar as mandatory minimums represent legislatures' efforts to force judges' hands, so I take a narrower tack. When judges have concerns about prosecutors' charging and plea decisions they should require prosecutors to justify those decisions on the record in open court. This portion of the article theorizes a few instances where judges have explicitly questioned prosecutors' charging decisions in that way and seeks to encourage similar activity where judges see fit.

In some important instances, judges have questioned prosecutors' decisions or the deal that the government has struck to resolve a case.[182] Complex litigation scholarship provides the theoretical justification for judges asking prosecutors to defend and explain their charging decisions: judges are monitoring the agency costs that arise between prosecutors and

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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.")

[180] *Supra* note 3.

[181] Alschuler, *supra* note 3, at 1125 n.220, 1147.

[182] *E.g.*, United States v. Dossie, 851 F. Supp. 2d 478, 478 (E.D.N.Y. 2012); Transcript of Sentencing, United States v. Doutre, 08-CR-10215 (D. Mass. Mar. 22, 2010), ECF No. 168; *see also* SEC v. Citigroup Global Markets Inc., 827 F. Supp. 2d 328 (S.D.N.Y. 2011), vacated and remanded, 752 F.3d 285 (2d Cir. 2014) (employing a similar approach to SEC settlement).

their public-clients.[183] The potential need to justify decisions on the record encourages reasoned deliberation *ex ante* and improves the flow of information *ex post*. Greater information flow can in turn enhance the political check and internal administrative controls on prosecutors.[184] In short then, when judges are concerned about the fairness of prosecutors' decisions they should feel empowered to require prosecutors to justify those decisions on the record in open court.

In *United States v. Doutre*, the prosecutor filed two prior felony informations, resulting in a mandatory life sentence.[185] Judge Saris—Chair of the United States Sentencing Commission—questioned that prosecutor's decision, saying, "I'm just trying to understand why this is . . . why you think this is just."[186] 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 triggering a life sentence because to do otherwise would undermine his credibility.[187] 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

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[183] *See, e.g.*, 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."); 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."); *see also* John C. Coffee, Jr., *Class Wars: The Dilemma of the Mass Tort Class Action*, 95 COLUM. L. REV. 1343, 1347 (1995) ("No opening generalization about the modern class action is sounder than the assertion that it has long been a context in which opportunistic behavior has been common and high agency costs have prevailed."); Nagareda, *supra*, *at* 931 ("The problem in the class action context is that "the negotiator on the plaintiffs' side, that is, the lawyer for the class, is potentially an unreliable agent of his principals." This is, in other words, a classic illustration of an agency cost problem . . .").

[184] *See* Bibas, *Prosecutorial Regulation*, *supra* note 3, 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."); Russell M. Gold, *Promoting Democracy in Prosecution*, 86 WASH. L. REV. 69, 78-79 (2011) [hereinafter Gold, *Promoting Democracy in Prosecution*] (describing political check as ineffective because of voters' lack of information); Gold, *"Clientless" Lawyers*, *supra* note 1, at [Part II.B] (explaining lack of public information regarding prosecutor performance); *see also* Cassidy, *supra* note **Error! Bookmark not defined.**, 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.

[185] Transcript of Sentencing, United States v. Doutre, 08-CR-10215 (D. Mass. Mar. 22, 2010), ECF No. 168.

[186] *Id.* at 4.

[187] *Id.* at 4-5.

sentence here."[188] 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.[189]

Former federal prosecutor and then-Judge Gleason too exemplified this information-forcing role in *United States v. Dossie*.[190] 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 minimum.[191] 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."[192] 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.[193] He revealed the heavy-handed procedure when it would have otherwise remained cloaked in the secrecy of plea bargaining.

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 in an amount less than $100, a crime punishably by two-to-ten years' imprisonment.[194] 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.[195] The Supreme Court ultimately upheld this life sentence for an $88 forgery.[196] 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 with a guilty plea was on the record in open court and that Hayes gambled with a life sentence hanging over his head. It is hard to see how dangling a life sentence over the head of someone who the

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[188] *Id.* at 11.
[189] *Id.* at 13.
[190] United States v. Dossie, 851 F. Supp. 2d 478 (E.D.N.Y. 2012).
[191] *Id.* at 481, 484.
[192] *Id.* at 489.
[193] United States v. Kupa, 976 F. Supp. 2d 417, 459 (E.D.N.Y. 2013).
[194] Bordenkircher v. Hayes, 434 U.S. 357, 358 (1978).
[195] *Id.* at 358-59.
[196] *Id.* at 365.

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 obtaining a life sentence on the taxpayers' dime.

Although much of this discussion has focused thus far on federal prosecutors and sentencing enhancements, 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.[197] *Bordenkircher*, for instance, was a state prosecution.[198] Decisions to reduce charges and thus withdraw a mandatory minimum or sentencing enhancement rest, as a practical matter, in the sole discretion of the prosecutor's office.[199] Consider one extreme example. For the early and mid-1900'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.[200] The prosecutor could choose to charge simple possession instead of possession with intent to distribute, which would yield a sentence of X instead of mandatory life imprisonment. Or, of course, the prosecutor could charge nothing.

I am not arguing that Judge Saris is right that Doutre did not deserve a life sentence for a drug charge or that Judge Gleason 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 it isn't obvious what that means in practice. Legislators typically protect themselves on these challenging questions by ceding massive authority to prosecutors who are then asked to do the right thing in individual cases.[201] Thus, if the democratic process were to play a meaningful role in resolving

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[197] *See* Cassidy, *supra* note 45, 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* Bibas, *Outside the Shadow of Trial*, *supra* note 103, at 2487 (explaining that state and federal "sentencing guidelines and statutes act as sledgehammers rather than scalpels").

[198] *Bordenkircher*, 434 U.S. at 358-59.

[199] *See* Cassidy, *supra* note 45, at 1002; *see also* Wayte v. United States, 470 U.S. 598, 608 (1985) (establishing extremely narrow parameters of an equal protection claim for discriminatory prosecution; Wright, *supra* note 12, at 591 (explaining how the democratic process fails to create prosecutor accountability). Cassidy proposes a useful internal administrative process for prosecutors' offices to check this decisionmaking. Cassidy, *supra* note 45, at 1013-15.

[200] *See* Act of Mar. 20, 1980, No. 432, § 1(d); *see also* Stephens v. Georgia, 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.

[201] Stuntz, *supra* note 39.

these questions, electing prosecutors would seem to be the best hope. Although most state and local lead prosecutors are elected,[202] as currently constructed, prosecutor elections do not provide a meaningful sense of voter priorities because voters have far too little information when they vote for prosecutor.[203] For federal prosecutors who are not elected, the best hope for accountability comes from within the executive branch.[204] Judges can play a meaningful role in combatting these information deficits by questioning prosecutors' decisions on the record when they have cause for concern and requiring prosecutors to justify decisions that seem questionable as Judge Saris did with the prosecutor in *Doutrie* and as Judge Gleeson did in *Dossie*.[205] And when the judge is not satisfied by the prosecutor's explanation, she should say so in writing.[206] Creating a record can facilitate a more informed populace during prosecutor elections, and so too can it improve prosecutors' internal accountability.

When the judge should require the prosecutor to create a record is highly fact-specific and will depend in part on the judge's experiences. 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.[207] And judges could 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 and wielding a crude instrument; they are thus most in need of checking. Sometimes hefty enhancements or mandatory minimums will fit the crime. In others they won't. Congress sought to impose hefty sentencing enhancements based on the role that an offender played in a drug conspiracy.[208] But instead of setting that

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[202] Sanford C. Gordon & Gregory A. Huber, *Citizen Oversight and the Electoral Incentives of Criminal Prosecutors*, 46 AM. J. POL. SCI. 334, 335 (2002).

[203] Gold, *Promoting Democracy in Prosecution*, *supra* note 12, at 78-79 (describing political check as ineffective because of voters' lack of information); Wright, *supra* note 12, 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.").

[204] Barkow, *Institutional Design*, *supra* note 2; Gold, *"Clientless" Lawyers*, *supra* note 1.

[205] United States v. Dossie, 851 F. Supp. 2d 478, 484 (E.D.N.Y. 2012); Transcript of Sentencing, United States v. Doutre, 08-CR-10215, at 1 (D. Mass. Mar. 22, 2010); *cf.* Gold, *Promoting Democracy in Prosecution*, *supra* note 12 (proposing legislative solution to informational deficit in prosecutor elections).

[206] *See, e.g.*, *Dossie*, 851 F. Supp. 2d at 489; *Doutre*, No. 08-CR-10215, at 13.

[207] Scott & Stuntz, *supra* note 155, at 1959.

[208] United States v. Dossie, 851 F. Supp. 2d 478, 479-81 (E.D.N.Y. 2012).

requirement directly, Congress took a shortcut by tying enhancements to drug quantity as a proxy, which led to misfits because that level of inquiry will treat large swaths of cases similarly and risks obscuring differences between them.[209]

Drawing again on the class action regime, the judge can also examine the plea bargaining process to help illuminate cases of particular concern. These factors would track those discussed as part of judicial involvement during the plea process.[210] In short, 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.[211] 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.[212] Of course most voters do not actually pore over the Federal Register and read environmental impact statements, but 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. Although without the same explicit legislative authorization as in NEPA, judges in criminal courts can and should embrace a similar task of requiring the

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[209] *Id.*

[210] *See supra* Part III.C.1.

[211] *See* National Environmental Policy Act of 1969, Pub. L. No. 91-190, 83 Stat. 852 (1970); 40 CFR § 1501.3.

[212] Robertson v. Methow Valley Citizens Council, 490 U.S. 332, (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* Albert C. Lin, *Clinton's National Monuments: A Democrat's Undemocratic Acts?*, 29 ECOLOGY L.Q. 707, 732 (2002) ("The public notice and participation requirements of NEPA have a strong democratic element in their emphasis on direct citizen participation."); 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) ("NEPA's strength lies in its democratization of Federal administrative law. NEPA mandates public and interagency involvement. It thereby empowers citizens with the information they need to meaningfully contribute to the environmental decision making process." (quoting 139 Cong. Rec. E2342 (daily ed. Oct. 5, 1993) (statement of Rep. Owens))).

government—through the prosecutor—to create a record of the prosecutor's reasoning when the judge has cause for concern about a prosecutor's charging or 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 consistent with separation of powers. But if harsh tactics to induce guilty pleas moved from courthouse hallways to open courtrooms on a written record so much the better.[213] Sunshine may help disinfect that process. Prosecutor elections fail to create accountability because voters have no meaningful information on which to vote.[214] Nowhere is this opacity more pronounced than in plea bargaining.[215] 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.[216] It 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. Moreover, defense attorneys may fear that calling the prosecutor to account on the record for 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

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[213] *See* Simonson, *supra* note 146, at 2197-202 (explaining the importance of publicity as an effective restraint on abuse of power and enhances democratic self-governance); Wright & Miller, *Honesty and Opacity*, *supra* note 42, at 1410-11 (criticizing the "pervasive harm" or "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"); *cf.* Peter A. Joy & Kevin C. McMunigal, *Innocent Defendants Pleading Guilty*, CRIM. JUSTICE, Spring 2015, at 45, 46 (criticizing Judge Rakoff's proposal to help prevent innocents from pleading guilty by involving federal magistrate judges in plea negotiations because it would not reduce the pressure from high sentencing differentials).

[214] Gold, *Promoting Democracy in Prosecution*, *supra* note 12, at 78-79; *see also* Gold, *"Clientless" Lawyers*, *supra* note 1 [Part II.B].

[215] *See* Bowers, *supra* note 91, at 1710; Levine, *supra* note 91, at 7; *see also* Scott & Stuntz, *supra* note 155, 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").

[216] *See* McConkie, *supra* note 3, at 100 (arguing that pre-plea hearing would hold prosecutors more publicly accountable).

the prosecutor and thus may need to speak up in cases where the defense attorney will not.

3. Deferred Prosecution Agreements

Convicting a company of a crime can cause harsh consequences for innocent employees, which some view as unfair.[217] Non-conviction avenues of resolution can allow prosecutors to monitor a company's future compliance and gain additional information that they would otherwise lack or impose penalties that the government would not be able to attain following a conviction. Thus, corporate criminal cases are often resolved through non-prosecution ("NPAs") or deferred prosecution agreements ("DPAs"). NPAs are written agreements that formalize the government's decision not to charge a defendant, but neither the NPA nor any criminal charges are filed with a court.[218] Accordingly, courts have no authority to review NPAs.[219] A DPA, however, is a bit of an odd creature. It is a formal agreement between the parties that *is* filed asking the court to hold the case in abeyance, tolling the speedy trial clock.[220]

When the government opts to resolve a case using a DPA, the district court has authority under the Speedy Trial Act and its supervisory power to determine whether to accept the DPA.[221] The Speedy Trial Act confers authority for a court to determine whether the agreement indeed seeks to

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[217] There is a serious debate over how much of a concern this should be. [Cites]. This article does not engage in that debate but simply recognizes that prosecutors sometimes seek to impose penalties on companies without a conviction. *Cf.* Jennifer Arlen, *Prosecuting Beyond the Rule of Law: Corporate Mandates Imposed Through Pretrial Diversion Agreements* (NYU Law Sch. Pub. Law & Legal Theory Research Paper Series, Working Paper No. 15-10), http://ssrn.com/abstract=2609111 (arguing that lack of review within Department of Justice renders pretrial diversion agreements that impose new legal duties on firms contrary to the rule of law).

[218] *See, e.g.*, United States v. HSBC Bank USA, N.A., No. 12-cv-763, 2013 WL 3306161, at *5 & n.6 (E.D.N.Y. July 1, 2013); 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) ("A key difference between NPAs and DPAs is that DPAs involve the filing of charges in federal court, just as would occur if the prosecutor were taking the case to trial. . . . In an NPA, no charges are filed in federal court.").

[219] *Id.*; United States v. Saena Tech Corp., 2015 WL 6406266, at *18 (D.D.C. Oct. 21, 2015)

[220] *See* United States v. Fokker Servs. B.V., 818 F.3d 733, 737 (D.C. Cir. 2016); *HSBC Bank USA, N.A.*, 2013 WL 3306161, at *3-6.

[221] *See* United States v. Dokmeci, No. 13-CR-00455 (JG), 2016 WL 915185, at *4 n.25 (E.D.N.Y. Mar. 9, 2016) (citing supervisory power as source of authority); *HSBC Bank USA, N.A.*, 2013 WL 3306161, at *3-6 (relying on supervisory power); *see also Fokker Servs. B.V.*, 818 F.3d at 744 (ruling on scope of review under Speedy Trial Act); United States v. Saena Tech Corp., Cr. Nos. 14-66 (EGS), 14-211 (EGS), 2015 WL 6406266, at *16 (D.D.C. Oct. 21, 2015) (finding authority under both Speedy Trial Act and supervisory power).

ensure that the defendant's conduct has improved.[222] Courts' supervisory affords judges the authority to ensure that the agreement is not imperiling the court's integrity.[223] The few courts that have discussed this issue indicate that this review should be quite deferential to prosecutors' charging decisions.[224] Despite some measure of deference, Judge Gleeson's opinion in *HSBC* certainly considers the extent to which the defendant would be forced by the terms of the agreement to change its behavior and the extent of pain inflicted upon it.[225] I contend that although some degree of deference is due to prosecutors' charging decisions, when the prosecutor chooses the DPA as her preferred mechanism for resolving a case, the judge can and should approve the DPA only if its terms impose meaningful and roughly appropriate consequences on the defendant. The analogy to class action law suggests that we should be a bit more willing to embrace judicial review of the substance of DPAs than the cases on point suggest.[226] Just as courts are tasked with seeking out cases where class counsel has reached a "sweetheart" settlement that does not do enough for her class-client, so too should courts reviewing DPAs ensure that they are not permitting "either overly-lenient prosecutorial action or overly-zealous prosecutorial misconduct"[227] on the public-client's behalf.[228] That standard has since been overruled by the D.C. Circuit.[229] But with some degree of deference built in to account for separation of powers,[230] it nonetheless aptly describes the role that the judge can play in monitoring agency costs between prosecutors and their public-clients when prosecutors chose the DPA form of resolution. Judges should be particularly wary of under-reach

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[222] *See Fokker Servs. B.V.*, 818 F.3d at 744; *Saena Tech Corp.*, 2016 WL 6406266, at *19.

[223] *See HSBC Bank USA, N.A.*, 2013 WL 3306161, at *3-6.

[224] *HSBC Bank USA, N.A.*, 2013 WL 3306161, at *7; *see also Saena Tech Corp.*, 2016 WL 6406266, at *19 (approving a DPA even though the agreements were "somewhat troubling to the Court").

[225] *See HSBC Bank USA, N.A.*, 2013 WL 3306161, at *8-11.

[226] *See* David M. Uhlmann, *Deferred Prosecution and Non-Prosecution Agreements and the Erosion of Corporate Criminal Liability*, 72 MD. L. REV. 1295, 1328 (2013) ("judicial review [of DPAs] is at best perfunctory").

[227] United States v. Fokker Servs. B.V., 79 F. Supp. 3d 160, 166 (D.D.C. 2015), vacated and remanded, 818 F.3d 733 (D.C. Cir. 2016).

[228] *Compare HSBC Bank USA, N.A.*, 2013 WL 3306161, at *6 (recognizing that defendants are unlikely to raise purported improprieties with their DPAs), *with* Issacharoff, *supra* note 76, at 808 (class settlements "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").

[229] 818 F.3d 733 (D.C. Cir. 2016).

[230] I do not disagree that judges are less well positioned to weigh all of the competing considerations that factor into charging decisions than are judges. *See, e.g.*, Wayte v. United States, 470 U.S. 598, 607 (1985). But I am not convinced that this relative competence means that judges can have no role in evaluating the consequences contained in a DPA against the admitted conduct. Rather, it counsels only in favor of deference in that regard.

in categories of cases involving police or perhaps well-resourced corporate defendants.[231]

D. Multiple Phases

Judicial involvement would work best if it occurred at multiple points throughout a case. For instance, judicial involvement before plea bargaining begins can highlight particular instances where judges should be concerned about the "bargained-for" sentences during her *ex post* review. If a judge hears 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 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.

Regulating plea agreements solely *ex post* conflicts with well-recognized concerns about judges' docket-management incentives and informational deficits.[232] In both criminal law and class action scholarship, scholars have rightly recognized that judges have an incentive to clear their dockets rather than allow cases to linger.[233] That docket-clearing incentive tends to mean that judges are unlikely to reject too many plea agreements *ex post* because accepting the plea agreement and the plea means clearing

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[231] The incentive to under-zealously prosecute well-resourced defendants comes from the idea that cases will be harder to bring and harder to win because of the defendant's resources. Accordingly, prosecutors' risk aversion and desire to keep conviction rates high will tend to skew their decisionmaking, at the margins, toward charging defendants who have fewer resources to defend themselves. *See* Bibas, *Prosecutorial Regulation*, *supra* note 3, at 996 ("Line prosecutors, however, also serve their own strong self-interests in racking up marketable win-loss records . . . ."); Gold, *"Clientless" Lawyers*, *supra* note 1 [Part I.C.2] (explaining prosecutors' interests in winning cases quickly and keeping conviction rates high).

[232] *Cf.* Bibas, *Designing Plea Bargaining*, *supra* note 20, at 1061 ("New safeguards need to be built in earlier to ensure that the investigation, negotiation, and consideration of pleas is done correctly up front.").

[233] *See, e.g.*, Issacharoff, *supra* note 76, at 829 (explaining judges docket management incentives to approve class settlements); Wright & Miller, *Screening/Bargaining Tradeoff*, *supra* note 42, at 88 ("The judge is complicit with the parties after they reach a plea agreement.").

the case, and rejecting the plea means keeping it on the docket.[234] This same idea drives the notion in class action scholarship 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 reformulating their proposed class rather than folding their tent and going home.[235]

In both contexts, judges are presented with deals from the two parties who are both friends of the bargain. Accordingly, judges often face substantial informational deficits in their ability to question the bargain because the information they receive is neatly selected and packaged by those seeking approval.[236]

Purely *ex post* review—the closest analog to class actions—is likely to prove even less helpful 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 and substantially affect the possible resulting sentence including controlling decades of a defendant's liberty in a way that makes "blackmail settlements" and "hydraulic pressure" in class actions seem like child's play.[237] Harsh mandatory minimums[238] and sentencing enhancements that

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[234] Laura I Appleman, *Who Watches the Watchers? Judges, Guilty Pleas, and Outsider Review*, 66 FLA. L. REV. F. 44, 45 (2015); *see also, e.g.*, Bibas, *Prosecutorial Regulation*, *supra* note 3, at 970-72; McConkie, *supra* note 3, at 64, 69; Rakoff, *supra* note 3.

[235] Issacharoff, *supra* note 76, 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); Richard A. Nagareda, *Turning from Tort to Administration*, 94 MICH. L. REV. 899, 968 (1996); William B. Rubenstein, *The Fairness Hearing: Adversarial and Regulatory Approaches*, 53 UCLA L. REV. 1435, 1445 (2006).

[236] *See, e.g.*, Bibas, *Regulating the Plea-Bargaining Market*, *supra* note 46, at 1142 ("judges must depend on the parties' selective presentation of the facts[,] . . . [which] encourages judges to rubber-stamp the parties' recommendations"); Issacharoff, *supra* note 76, 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."). Class action law affords voice rights to class members who object to the settlement, FED. R. CIV. P. 23(e)(5), and in criminal law judges occasionally receive unsolicited objections from members of the prosecutor's public-client, *see, e.g.*, HSBC Bank USA, N.A., 2013 WL 3306161, at *7.

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

[238] *See* Simons, *supra* note 3, at 324; Michael A. Simons, *Prosecutorial Discretion in the Shadow of Advisory Guidelines and Mandatory Minimums*, 19 TEMP. POL. & CIV. RTS. L. REV. 377, 384-85 (2010); Ian Weinstein, *Fifteen Years After the Federal Sentencing*

may be invoked at prosecutors' options mean that prosecutors hold the keys to sentencing, by and large.[239] Prosecutors can induce defendants[240] into waiving rights by creating an immense sentencing differential between convictions after a plea versus trial such that trial becomes far too risky.[241] 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.[242]

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,[243] and the complaint itself necessarily precedes any certification order.

If class certification is eventually sought without a concurrent settlement proposal,[244] the court will benefit from a defendant's brief

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Revolution: How Mandatory Minimums Have Undermined Effective and Just Narcotics Sentencing, 40 AM. CRIM. L. REV. 87, 88 (2003) ("The profusion of new narcotics and gun proscriptions, almost all of which carry mandatory minimum prison sentences, transformed the traditional prosecutorial power to charge into the contemporary prosecutorial power to determine the length of the sentence the defendant will serve.").

[239] *See* Simons, *supra* note 3, at 330 ("[S]entencing enhancements create a largely charge-based system in which prosecutorial decisions determine the sentence."); *see also, e.g.*, Alschuler, *supra* note 3, at 1063 (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."); McConkie, *supra* note 3, at 63 ("By selecting the charges, prosecutors strongly influence the sentence. This is so even where mandatory minimum sentences are not implicated because the advisory Federal Sentencing Guidelines are influential in plea bargaining and sentencing."); Rakoff, *supra* note 3 ("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.").

[240] *See* Klein, *supra* note 92, at 2037-38 (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 3 (describing weapons with which prosecutors can "bludgeon defendants into effectively coerced plea bargains").

[241] *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 3, at 971 ("Courts find no problem even when prosecutors use coercive sentencing differentials as plea bargaining leverage.").

[242] *See* Stuntz, *supra* note 39, at 512-23.

[243] *See, e.g.*, Standard Fire Ins. Co. v. Knowles, 133 S. Ct. 1345, 1349 (2013); Smith v. Bayer Corp., 131 S. Ct. 2368, 2380 (2011).

[244] 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

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.[245] In cases where a settlement is not proposed immediately, class counsel and defense counsel will often negotiate at arm's length, whereas criminal defense counsel sometimes do not do anything that looks like effective bargaining at all.[246]

Differences in methods of judicial selection and political pressures also favor earlier judicial review in the criminal context. For judicial selection, the primary difference is that most criminal cases are resolved in state courts whereas most class actions, at least since 2005,[247] are resolved in federal courts. And most states elect their judges. Thus, most criminal judges are elected while most class action judges are appointed. Even looking only at elected judges momentarily, pressures to appear tough on crime seem much more salient to voters and thus more powerful than political pressures that judges might face in the class action context.[248] Of course judges suffer from implicit biases[249] and many (state and federal) were previously prosecutors.[250] Both factors may tend to skew their decisions against criminal defendants, though the direction that prosecutorial experience skews is not obvious. Rather, some former-prosecutor-judges seem to be harsher on prosecutors having once walked in

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complaint, motion for class certification, and motion for settlement approval can all be filed consecutively.

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

[246] Roberts & Wright, *supra* note 99, at 1483-87 (finding based on empirical study that public defenders in their sample largely did not strategically deploy anchoring in plea negotiation by rarely making first offers and rarely making low or "very favorable" offers); *id.* at 1485-87 (finding that defense attorneys "usually" but did not "always" counter a prosecutor's offer and that the defendant accepts the prosecutors' first offer "sometimes"); *see also* Scott & Stuntz, *supra* note 155, at 1959 (arguing that analyzing plea bargaining process reveals little useful information).

[247] *See* Class Action Fairness Act of 2005, Pub. L. No. 109-2, § 4, 119 Stat. 4 (2005) (expanding federal class action jurisdiction).

[248] If anything, the public might tend to want judges to reject class settlements more frequently than they do because the public values compensation in class actions and perceives class actions largely as a way for lawyers to get rich at their clients' expense. *See* Russell M. Gold, *Compensation's Role in Deterrence*, 91 NOTRE DAME L. REV. (forthcoming 2016) (manuscript at 27-34).

[249] *See, e.g.*, Justice Michael B. Hyman, *Implicit Bias in the Courts*, 102 ILL. B.J. 40, 43 (2014) ("judges, like everyone else, harbor their own set of implicit biases, shaped by their experiences and identity (i.e., race, gender, religion, sexuality)"); Jeffrey J. Rachlinski et al., *Does Unconscious Racial Bias Affect Trial Judges?*, 84 NOTRE DAME L. REV. 1195, 1221 (2009) (finding that judges harbor implicit racial biases).

[250] 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).

their shoes.[251] In sum, differences in selection methods and political pressures mean that a judicial check on prosecutor agency costs that functions much like the one on class counsel would add some value[252] but not as much as a multi-stage process of judicial involvement.[253]

For these reasons, judicial involvement in the criminal process should come earlier than it does in class actions, and multiple stages of judicial involvement take on particular importance.

E. Revisiting the Judge's Role

Rather than protecting defendants qua defendants as some scholars have sought to do, the suggestion here about involving judges to monitor charging or sentencing decisions seeks to protect the public's interests; so too does this role amount to monitoring the prosecutor's performance of her minister of justice role. The prosecutor's public-client benefits when defendants receive fair process.[254] For that reason, in ways that probably seem totally peculiar to someone steeped in the civil system, the prosecutor's client can be well served by protecting the opposing party. This seeming inversion is explainable in part because the power dynamic is inverted between the two systems: the primary concern about agency costs in criminal prosecution is about checking prosecutor overreach, while the primary concern in class actions is about checking class counsel's under-reach.[255]

Before settling, class counsel will typically be checked by its well-resourced corporate-defendant adversary, making judicial review largely unnecessary to protect against successful *overreach*.[256] In criminal law, the

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[251] 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. Judge Rakoff has advocated judicial involvement in plea negotiations because innocent defendants feel undue pressure to plead guilty. 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 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 suss that out.

[252] Stuntz, *supra* note 39, at 540 (arguing that elected judges feel less pressure to please the public than do elected prosecutors or legislators).

[253] *Cf.* Turner, *supra* note **Error! Bookmark not defined.**, at 200 ("passive, 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").

[254] *See* MODEL RULES OF PROF'L CONDUCT 3.8 cmt. 1 (explaining this ethical requirement for prosecutors).

[255] *See* Gold, *"Clientless" Lawyers*, *supra* note 1, at 44-49 [12/15/16].

[256] Judicial review is the class action context is necessary for and geared toward protecting against *under*-reach.

typical enforcement target is an individual, poor defendant who is represented by an overstretched and under-resourced public defender.[257] Those constraints coupled with harsh trial penalties and the default position that the accused sit in jail while their case awaits resolution lead even the innocent to plead guilty.[258] Predictable failures of adversarial process in the criminal system mean that it is particularly important to enlist a third-party such as a judge to check overreach even though the adversarial process would provide a sufficient check in most contexts.[259]

The amorphousness of the prosecutor's minister of justice role makes monitoring her performance a task with less than obvious contours,[260] but scholars have given that role some useful dimensions. First, judges should try to prevent convicting the innocent and ensure that defendants get fair process such that they are not coerced into waiving constitutional rights.[261] Requiring more process might seem like a problem from an efficiency standpoint, especially in crowded urban state courts. But efficiency is not a clear good in criminal procedure as it is in civil.[262] If the time cost of each case for prosecutors increased, prosecutors might respond out of necessity by bringing fewer cases. In the midst of a crisis of mass incarceration, that outcome would be good so long as the choices of which cases to decline

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[257] Green, *supra* note 70, 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 (2014) (relying on empirical study of workload to conclude that "for 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."); Kitai-Sangero, *supra* note 67, at 78 ("Disparity 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* (unpublished manuscript) (on file with author) (manuscript at 15-24) (explaining significant resource disparity between prosecutors and public defenders).

[258] *See* Joy & McMunigal, *supra* note 213, at 46; Rakoff, *supra* note 3; THE PLEA (PBS Video 2004), *available at* 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).

[259] *See* MODEL RULES OF PROF'L CONDUCT R. 3.8 cmt. 1 ("A prosecutor has the responsibility of a minister of justice and not simply that of an advocate.").

[260] *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).

[261] *See, e.g.*, Gold, *Beyond the Judicial Fourth Amendment*, *supra* note 3, at 1643-44 (arguing that the minister of justice duty includes protecting citizens' constitutional rights); Green, *supra* note 70, at 634 (minister of justice duty means "avoiding punishment of those who are innocent of criminal wrongdoing . . . and affording the accused, and others, a lawful, fair process."); *see also* MODEL RULES OF PROF'L CONDUCT R. 3.8 cmt. 1 (explaining that prosecutors have a "specific obligations to see that the defendant is accorded procedural justice").

[262] *See* Brown, *supra* note 78 (arguing that efficiency in criminal law has perverse consequences by enabling more prosecutions).

were made thoughtfully.[263] And adequate process (even if for fewer defendants) serves prosecutors' duty to think about dispensing justice on a systemic level.[264]

Second, judges tailoring sentences to fit the objectives of criminal punishment protects prosecutors' public-clients' interests.[265] Judges should ensure that defendants receive a sentence "sufficient, but not greater than necessary, to" achieve public interests in criminal law such as retribution, deterrence, protecting the public, rehabilitation, and reentry following a sentence.[266] Even leaving aside concerns about criminogenic sentences, a greater sentence than necessary wastes public money.[267] Reaching a sentence that accurately achieves the traditional purposes of punishment is, of course, difficult. But experience across a wide swath of cases provides the knowledge to create a roughly proportional playing field for different defendants, even if not perfectly calibrated to purposes of punishment.[268] And judicial experience coupled with advisory guidelines is actually pretty good.[269]

Questions may arise as to why judges would be any better than prosecutors at protecting the public interest, whatever the mechanism employed. The short answer is that judges can introduce a useful perspective that prosecutors lack, and I am not suggesting that judges should wholly displace prosecutors' decisions. Judges do not share the

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[263] *Id.* at 194-98 (explaining that the number of prosecutions is not exogenous to the cost of prosecutions and determined solely by crime patterns); Kate Levine, *How We Prosecute the Police*, 104 GEO. L.J. (forthcoming 2016) (on file with author) (arguing that increasing pretrial process would have the beneficial effect of reducing prosecutions).

[264] Cassidy, *supra* note 45, at 983.

[265] *See* 18 U.S.C. § 3553(a).

[266] *E.g.*, *id.*; N.Y. Penal Law § 1.05 (describing "successful and productive reentry and reintegration into society" as one component of "insur[ing] the public safety"); *see also* United States v. Booker, 543 U.S. 220, 258-65 (2005) (rendering United States Sentencing Guidelines advisory).

[267] *See* Gold, *Promoting Democracy in Prosecution*, *supra* note 12 (arguing for efficiency in prosecution, meaning that costs and benefits of prosecution and incarceration should be equal)

[268] *See* Alschuler, *supra* note 3, at 1129 ("judges—by virtue of their training, temperament and experience—seem likely to do a substantively better job of sentencing than prosecutors"); Bibas, *Prosecutorial Regulation*, *supra* note 3, at 971 ("Traditionally, indeterminate sentencing has given judges some power to check or counterbalance prosecutorial charging and bargaining decisions."). That many judges were prosecutors before taking the bench contributes to their expertise. *See* Lee, *supra* note 250, at 200; Timothy Fry, Comment, *Prosecutorial Training Wheels: Ginsburg's* Connick v. Thompson *Dissent and the Training Imperative*, 102 J. CRIM. L. & CRIMINOLOGY 1275, 1304 n.219 (2012) (collecting sources supporting this proposition).

[269] *See* United States v. Booker, 543 U.S. 220, 259 (2005) (rendering United States Sentencing Guidelines advisory to alleviate Sixth Amendment concerns); Blakely v. Washington, 542 U.S. 296, 301 (2004) (holding that mandatory determinate sentencing scheme in Washington violated Sixth Amendment).

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.[270] And judges quickly build expertise on criminal sentencing.

Suggesting more judicial involvement in the criminal process to check prosecutors is not a new idea, and previous reforms have failed to materialize.[271] These practical hurdles are real,[272] but the time may be right for this sort of proposal. Judge Rakoff has drawn significant attention to the enormous pressures that plea bargaining creates for innocent defendants to plead guilty.[273] 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. 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.[274] And indeed, federal judges have seemingly

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[270] Barkow, *Institutional Design*, *supra* note 2, 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).

[271] *See, e.g.*, Barkow, *Institutional Design*, *supra* note 2, at 907 ("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.").

[272] *See, e.g.*, Ronald F. Wright & Marc L. Miller, *The Worldwide Accountability Deficit for Prosecutors*, 67 WASH. & LEE L. REV. 1587, 1607 (2010) ("judges have shown little interest in regulating any aspect of prosecutorial decision-making").

[273] Rakoff, *supra* note 3; *see also* Daniel Beekman, *Judge Jed Rakoff says plea-deal process is broken, offers solution*, N.Y. POST, May 27, 2014, *available at* http://www.nydailynews.com/news/crime/judge-plea-deal-process-fixed-article-1.1806358.

[274] *See* The National Registry of Exonerations, *Exonerations in 2014* at 1, 3 (Jan. 27, 2015) (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."); John H. Blume & Rebecca K. Helm, *The Unexonerated: Factually Innocent Defendants Who Plead Guilty*, 100 CORNELL L. REV. 157 (2014) (analyzing why innocent defendants plead guilty).

become more comfortable policing deals between individuals and the government.[275]

To be clear, I don't mean that prosecutors' duties to the public and their oath to protect and defend the Constitution require simple adherence to majority will. Rather, prosecutors' duties require protecting a constitutionally-sensitive public, which means that what the majority actually wants plays some non-dispositive role in how the prosecutor should act. Of course if an informed electorate threw out their lead prosecutor at the voting booth for making more constitutionally-sensitive decisions than the majority actually desired it would be challenging for the next prosecutor to pay sufficient heed to those constitutionally-sensitive values, but that is an inherent risk in a system of elected lead prosecutors asked to serve as ministers of justice.[276]

Comparing prosecution to complex civil litigation suggests that turning to judges to play a role in protecting a diffuse entity-client comprised largely of rationally apathetic individuals is far less radical than it might otherwise seem.

CONCLUSION

This article contends that much as in the civil settlement context, judges can play an important role protecting the prosecutor's public-client as cases proceed toward a plea bargain. In most civil cases, the judge's role is to facilitate a deal and then dismiss a case when the parties indicate that they have reached one. The court does not consider the terms of the deal. In class actions, however, to protect the absent class members—class counsel's client—class settlements can be approved only if a court finds that the class is properly structured so as to have enough in common and is not riven by intractable conflicts and that the deal the lawyers have reached is substantively fair.[277] One of the core similarities between class counsel and the prosecutor's roles is the nature of their clients—diffuse entities comprised of rationally apathetic individuals. Accordingly, the central

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[275] *See* Ben Protess & Matthew Goldstein, *Overruled, Judge Still Left a Mark on S.E.C. Agenda*, N.Y. TIMES, June 5, 2014, at B1, *available at* 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).

[276] *See* STANDARDS FOR CRIMINAL JUSTICE: PROSECUTION FUNCTION § 3-1.3 ("The public's interests and views are [sic] should be determined by the chief prosecutor and designated assistants in the jurisdiction."); *id.* 3-1.2(b) ("The primary duty of the prosecutor is to seek justice within the bounds of the law, not merely to convict.").

[277] *See* FED. R. CIV. P. 23(a), (b), (e).

insight of this article is that courts can play a somewhat similar role in the criminal context to protect the prosecutor's public-client as Rule 23 contemplates for judges to protect the class-client in class actions.

More specifically, this article explores the various ways in which courts can involve themselves at different points in the plea negotiation process and tentatively concludes that some combination of the different approaches seems ideal. Before plea bargaining can even begin, there is real value to a judge hearing the basics of the case and indicating 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 sentencing number generated by a neutral arbiter rather than anchoring coming from a prosecutor's first offer. After plea bargaining has begun, judges should be able to hold plea bargaining hearings in open court in which they ask about the negotiation process 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, much as in class actions, judges should review the substance of the deal to ensure that it is fair to the prosecutor's public-client. In some cases, a judge will see a recommended sentence in a plea agreement that diverges from the norm for the particular charges or from the sentence that the court preliminarily indicated before bargaining began. Those instances should prompt the judge to look closely at the case and seriously consider whether to impose a different sentence than the one the parties suggested. Beyond the outlier-case scenario, much as with class actions, judges should review plea agreement fairness with an eye to the procedures through which the agreement was negotiated. As a regulatory matter, all offers or threats in the plea negotiation process should be in writing to facilitate *ex post* judicial review. Judges should then inquire about (and review the documents that reveal) the plea negotiation process in the particular case. Where courts see lack of information exchanged, threats to impose heavy sentences that prosecutors can control such as mandatory minimums, sentencing enhancements, or exploding plea deals, the court should look particularly carefully at whether the parties' recommended sentence serves the public interest and consider whether to depart from it.

Because mandatory minimums and sentencing enhancements shift so much sentencing power to prosecutors, courts may find themselves faced with (for instance) a twenty-year mandatory minimum when that sentence seems unduly harsh. Separation of powers concerns prevent courts from departing downward from that 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 serve an information-forcing role, requiring the prosecutor to justify the relevant charging decision on the record in open court. That approach will help facilitate internal accountability mechanisms within prosecutors' offices and provide additional information for challengers in prosecutor elections and for voters. In a few cases judges have question charging decisions on the record. This article theorizes why those instances are normatively justified and why indeed courts should be more willing to adopt that approach.

In the limited context of deferred prosecution agreements, the parties' selection of the particular procedure affords the court with greater authority to review the deal. Accordingly, in that context, a court should refuse to accept the DPA entirely if it were to conclude that the DPA's terms do not serve the public-client's interests well.