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The Criminal Class Action


Adam S. Zimmerman

Loyola Law School, Los Angeles, adam.zimmerman@lls.edu

David Jaros

University of Baltimore School of Law, djaros@ubalt.edu

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ARTICLE

THE CRIMINAL CLASS ACTION

ADAM S. ZIMMERMAN[†] & DAVID M. JAROS^{††}

Over the past ten years, in a variety of high-profile corporate scandals, prosecutors have sought billions of dollars in restitution for crimes ranging from environmental dumping and consumer scams to financial fraud. In what we call “criminal class action” settlements, prosecutors distribute that money to groups of victims as in a civil class action while continuing to pursue the traditional criminal justice goals of retribution and deterrence.

Unlike civil class actions, however, the emerging criminal class action lacks critical safeguards for victims entitled to compensation. While prosecutors are encouraged, and even required by statute, to seek victim restitution, they lack adequate rules requiring them to (1) coordinate with other civil lawsuits that seek the same relief for victims, (2) hear victims’ claims, (3) identify conflicts between different parties, and (4) divide the award among victims. We argue that prosecutors should continue to play a role in compensating victims for widespread harm. However, when prosecutors compensate multiple victims in a criminal

[†] Assistant Professor of Law, St. John’s University School of Law. From 2001 to 2003, I served as Deputy Special Master of the United States September 11th Victim Compensation Fund. I also owe a special debt to my wife for her insightful edits and endless patience with this project. The errors, generally, are Dave’s.

^{††} Assistant Professor of Law, University of Baltimore School of Law. I am similarly indebted to my wife for her encouragement as well as her willingness to read multiple drafts. The errors, generally, are Adam’s.

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class action, prosecutors should adopt rules similar to those that exist in private litigation to ensure that the victims receive fair and efficient compensation.

We propose four solutions to give victims more voice in their own redress while preserving prosecutorial discretion: (1) that prosecutors and courts coordinate overlapping settlements before a single federal judge, (2) that prosecutors involve representative stakeholders in settlement discussions through a mediation-like process, (3) that courts subject prosecutors' distribution plans to independent review to police potential conflicts of interest, and (4) that prosecutors adopt the distribution guidelines the American Law Institute developed for large-scale civil litigation to balance victims' competing interests.

INTRODUCTION.....	1387
I. THE GROWING PHENOMENON OF THE CRIMINAL CLASS ACTION	1395
A. <i>The Definition of a Criminal Class Action</i>	1395
B. <i>The Origins of the Criminal Class Action</i>	1400
1. Prosecutors as Compensators.....	1401
2. Prosecutors as Regulators.....	1406
II. COMPENSATION THROUGH CLASS ACTION SETTLEMENTS	1410
A. <i>Common Goals of Civil and Criminal Class Action Settlements</i>	1411
B. <i>Criminal Class Action Settlement Problems</i>	1414
1. Should Criminal Class Actions Exist?.....	1417
2. No Rules to Coordinate with Other Actions.....	1421
3. No Rules to Ensure Victims Meaningfully Participate	1423
4. No Rules to Protect Victims from Potential Conflicts of Interest.....	1426
5. No Rules to Distribute Awards Equitably.....	1430
III. TOWARD A NEW CRIMINAL CLASS ACTION.....	1434
A. <i>Coordination of Civil and Criminal Class Actions</i>	1434
1. Complementary Criminal Class Action Settlements.....	1435
2. Formal and Informal Multidistrict Coordination.....	1439
B. <i>Criminal "Negotiated Rulemaking" to Improve Participation</i>	1441
C. <i>"Hard Look" Judicial Review to Police Conflicts</i>	1447
D. <i>Distribution Guidelines for Criminal Class Actions</i>	1452
CONCLUSION.....	1454

INTRODUCTION

The past decade has witnessed the rise of new, massive settlements forged not out of civil litigation but on the periphery of the criminal justice system. Since 2003, prosecutors have demanded that defendants in a variety of high-profile corporate scandals set up multi-million-dollar restitution funds for victims to settle criminal charges. Yet few rules exist for the prosecutors who create and distribute these complex settlements. Consider three examples:

(1) In September 2004, software giant Computer Associates conceded that it had unlawfully inflated its quarterly earnings reports by using shadow accounting practices that effectively backdated lucrative licensing contracts.¹ As part of its agreement with the U.S. Attorney's Office, Computer Associates agreed to establish a \$225 million restitution fund to compensate shareholders injured by the scandal.² Months after the fund was announced, however, not a single shareholder had come forward with a proposal for how to dispense the money in a fair and appropriate manner.³

(2) Shortly after Bernard Madoff committed the largest criminal fraud in United States history,⁴ federal prosecutors sought to compensate victims with his seized assets.⁵ In what some have called "reality-show kind of fighting,"⁶ Madoff's victims sharply contested the distribution of his property. Because of the nature of the fraud, some long-

¹ Press Release, SEC, SEC Files Securities Fraud Charges Against Computer Associates International, Inc., Former CEO Sanjay Kumar, and Two Other Former Company Executives (Sept. 22, 2004), available at <http://www.sec.gov/news/press/2004-134.htm>.

² See Deferred Prosecution Agreement, United States v. Computer Assocs., No. 04-0837 (E.D.N.Y. Sept. 24, 2004), available at http://lib.law.virginia.edu/Garrett/prosecution_agreements/pdf/computerassociates.pdf.

³ See Gretchen Morgenson, *Giving Away Lots of Money is Easy, Right?*, N.Y. TIMES, Feb. 13, 2005, at BU1.

⁴ See Diana B. Henriques, *Madoff, Apologizing, Is Given 150 Years*, N.Y. TIMES, June 30, 2009, at A1.

⁵ See Government's Memorandum in Support of Its Motion Pursuant to Title 18, United States Code, Section 3664(d)(5), at 2, United States v. Madoff, No. 09-0213 (S.D.N.Y. June 19, 2009), available at <http://www.justice.gov/usao/nys/madoff/061909motionrestitution.pdf>. A bankruptcy trustee now overseeing the claims process for investors, Irving H. Picard, decided to pay investors based on how much they invested with Madoff and how much they withdrew before the scheme collapsed. See *Sec. Investor Prot. Corp. v. Bernard L. Madoff Inv. Sec. LLC (In re Bernard L. Madoff Inv. Sec. LLC)*, 424 B.R. 122, 132 (Bankr. S.D.N.Y. 2010) (describing the competing claims of three classes of victims); Diana B. Henriques, *It's Thankless, but He Decides Madoff Claims*, N.Y. TIMES, May 29, 2009, at A1 (describing the controversial method for paying claims).

⁶ Eric Konigsberg, *Investors in a Competition for a Piece of the Madoff Pie*, N.Y. TIMES, June 29, 2009, at B1.

term investors lost their life savings. Others, who withdrew funds over time, made less than they thought, but actually profited from the scheme. Still others lost millions through “feeder funds” without ever investing with Madoff directly.⁷ Prosecutors, however, lacked any rules to hear and resolve victims’ competing claims to Madoff’s estate.

(3) After the pharmaceutical company Eli Lilly reached a \$1.2 billion settlement with 30,000 plaintiffs for side effects associated with its antipsychotic drug Zyprexa,⁸ federal prosecutors launched a separate criminal case to recover \$1.4 billion in restitution.⁹ Although both actions sought overlapping monetary damages against the same defendant and for the same conduct, no formal procedures existed to ensure that victims were not doubly compensated or to prevent defendants from being punished twice for the same misconduct.¹⁰

Had all three cases proceeded only in civil litigation, the result would have been decidedly different. From the start, counsel for the shareholders in *Computer Associates*, guided in part by the strength of their legal claims, would have negotiated and participated in the discussions over the amount and distribution of the settlement.¹¹ The Madoff victims would have been entitled to an array of procedural protections, separate attorney representation, and payouts based on

⁷ *Id.*

⁸ See Alex Berenson, *Lilly Settles with 18,000 over Zyprexa*, N.Y. TIMES, Jan. 5, 2007, at C1.

⁹ In January 2009, Lilly pled guilty in the Eastern District of Pennsylvania to federal criminal charges of selling misbranded drugs in interstate commerce. Press Release, Eli Lilly & Co., *Lilly Resolves Investigations of Past Zyprexa Marketing and Promotional Practices* (Jan. 15, 2009), available at <http://newsroom.lilly.com/releasedetail.cfm?ReleaseID=359242>.

¹⁰ The civil settlement related to Zyprexa had already set aside over \$43 million to reimburse Medicare, Medicaid, and other welfare expenditures by the United States and all fifty state governments. See *Hood v. Eli Lilly & Co. (In re Zyprexa Prods. Liab. Litig.)*, 671 F. Supp. 2d 397, 404-05 (E.D.N.Y. 2009) (describing parallel proceedings and government payouts). In addition, the United States sought to recover similar losses through a criminal restitution agreement with Eli Lilly in another court. *Id.* at 406. Although no formal procedures existed to coordinate the criminal and civil actions, the District Court for the Eastern District of New York, charged by the Judicial Panel for Multidistrict Litigation (JPML) to coordinate all federal civil cases against Eli Lilly, informally worked with the criminal court and other state courts to ensure the civil settlement was fair. See *id.* at 402-08 (describing informal coordination efforts).

¹¹ See, e.g., PRINCIPLES OF THE LAW OF AGGREGATE LITIG. § 1.05 (2010) (describing judicial authority to appoint lead counsel or committees of counsel); *id.* § 3.09 (describing the use of special masters or settlement judges to oversee or facilitate settlement); JACK B. WEINSTEIN, *INDIVIDUAL JUSTICE IN MASS TORT LITIGATION: THE EFFECT OF CLASS ACTIONS, CONSOLIDATIONS, AND OTHER MULTIPARTY DEVICES* 143-46 (1995) (describing negotiation tactics of special settlement masters in the Brooklyn Naval Yard, Dalkon Shield, and Agent Orange cases).

their different statuses and needs.¹² The Zyprexa cases would have been centralized before a single federal judge for pretrial coordination and review.¹³

For years, private lawsuits in the United States have been the primary tool to ensure people pay damages to those they harm.¹⁴ When many people are hurt, special litigation procedures exist for defendants to compensate victims comprehensively.¹⁵ Although those procedures are far from perfect, class action, bankruptcy, and other multi-party litigation rules try to accomplish at least three things: (1) to ensure parties meaningfully participate in a process that affects their substantive rights, (2) to empower judges to police conflicts of interest between injured parties and their representatives, and (3) to facilitate a final resolution of the dispute accurately and efficiently.¹⁶

¹² See, e.g., 15 U.S.C. § 78eee(a)(3) (2006) (directing courts to appoint a trustee and remove the liquidation proceeding to bankruptcy court when a registered broker or dealer is unable to meet obligations to investors); see also Trustee's First Interim Report for the Period December 11, 2008 Through June 30, 2009, Sec. Investor Prot. Corp. v. Bernard L. Madoff Inv. Sec. LLC (*In re* Bernard L. Madoff Inv. Sec. LLC), No. 08-1789 (Bankr. S.D.N.Y. July 9, 2009) [hereinafter First Interim Report], available at http://www.madofftrustee.com/documents/TrusteeInterimReport_090709.pdf (summarizing bankruptcy court proceedings, objections to claims determinations, and claims administration for the first six months of the bankruptcy trust operation); see also Adam S. Zimmerman, *Distributing Justice*, 85 N.Y.U. L. REV. (forthcoming May 2011) (manuscript at 1-2) (comparing the procedural protections afforded to victims under bankruptcy, private class actions, and SEC actions).

¹³ The multidistrict litigation statute, 28 U.S.C. § 1407 (2006), has led to global resolutions for thousands of complex civil cases. See Yvette Ostolaza & Michelle Hartmann, *Overview of Multidistrict Litigation Rules at the State and Federal Level*, 26 REV. LITIG. 47 (2007) (collecting cases); Daniel A. Richards, *An Analysis of the Judicial Panel on Multidistrict Litigation's Selection of Transferee District and Judge*, 78 FORDHAM L. REV. 311, 329 (2009) (analyzing 303 transfer orders during a four and a half year period).

¹⁴ See 1 FRANCIS HILLIARD, *THE LAW OF TORTS OR PRIVATE WRONGS* 82 (Boston, Little, Brown & Co. 1859) ("The liability to make reparation . . . rests upon an original moral duty, enjoined upon every person, so to conduct himself or exercise his own rights as not to injure another." (emphasis omitted)); John C.P. Goldberg, *The Constitutional Status of Tort Law: Due Process and the Right to a Law for the Redress of Wrongs*, 115 YALE L.J. 524, 541-49 (2005) (tracing the history of tort law as a tool to seek public redress for private harm).

¹⁵ Many procedures evolved out of equitable doctrines that tried to bring together all persons whose rights were affected by "any particular litigation and to render a complete decree adjusting all the rights and protecting all the parties against future litigations." CHARLES W. BACON & FRANKLYN S. MORSE, *THE REASONABLENESS OF THE LAW* 204 (1924); see also Stephen N. Subrin, *How Equity Conquered Common Law: The Federal Rules of Civil Procedure in Historical Perspective*, 135 U. PA. L. REV. 909, 921 (1987) ("[F]rom the beginning, equity's expansiveness led to larger cases . . . than were customary with common law practice.").

¹⁶ See, e.g., PRINCIPLES OF THE LAW OF AGGREGATE LITIG. § 1.03 (describing general principles of aggregate litigation); WEINSTEIN, *supra* note 11, at 134-43 (describing

Recently, another body of law—criminal law—has begun to assume the same compensatory role as the large private lawsuit. Since 2003, federal prosecutors increasingly have sought to settle charges with corporate defendants in exchange for multimillion dollar victim restitution funds¹⁷—or what we call “criminal class actions.”¹⁸ Despite the fact that victims are not technically parties to the case, these criminal settlements¹⁹ include massive restitution awards that appear to mimic civil class actions. Like class action settlements, criminal class action agreements take advantage of economies of scale by efficiently compensating multiple people through a single, comprehensive scheme. And while prosecutors, rather than private attorneys, negotiate the size of the award, the end result is typically a large fund managed by the very same private administrators who oversee civil class action settlements.²⁰

the history and purposes of class actions, bankruptcy, and multiparty consolidations in mass tort cases); Adam S. Zimmerman, *Funding Irrationality*, 59 DUKE L.J. 1105, 1115-20 (2010) (identifying access, efficiency, and equity as the goals of aggregate litigation).

¹⁷ U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-09-636T, CORPORATE CRIME: PRELIMINARY OBSERVATIONS ON DOJ'S USE AND OVERSIGHT OF DEFERRED PROSECUTION AND NON-PROSECUTION AGREEMENTS 1 (2009) (finding that the Department of Justice “entered into 3 such agreements in 2002 compared to 41 such agreements in 2007”); Brandon L. Garrett, *Structural Reform Prosecution*, 93 VA. L. REV. 853, 900 (2007) (collecting agreements and finding that of the total \$4.95 billion sought against many corporate defendants, eighty-six percent was not for punitive fines, but rather for large civil compensation awards).

¹⁸ Criminal procedure does not have a class action rule, like Rule 23 of the Federal Rules of Civil Procedure, in part because of the due process concerns that aggregating criminal cases generally raises. For example, each criminal defendant enjoys a personal right to decide whether to enter a plea, testify, or cross-examine witnesses. See *Rock v. Arkansas*, 483 U.S. 44, 51-53 (1987) (describing personal rights in criminal trials that otherwise complicate the aggregation of cases); *Faretta v. California*, 422 U.S. 806, 819 (1975) (“The Sixth Amendment does not provide merely that a defense shall be made for the accused; it grants to the accused personally the right to make his defense.”); see also Brandon L. Garrett, *Aggregation in Criminal Law*, 95 CALIF. L. REV. 383, 394 (2007) (“Unlike the civil system, the criminal system overwhelmingly prosecutes single defendants with only the sporadic and procedurally-restricted group trial involving conspiracies or co-participants.”). Rather, these cases function like class actions by spurring large settlement funds for thousands of potential victim-claimants.

¹⁹ Even though criminal attorneys generally refer to the resolution of a criminal case as an “agreement,” in this Article we use the terms “agreements” and “settlements” interchangeably to reflect the parallel between large criminal restitution funds and their civil counterparts.

²⁰ For example, the U.S. Attorney picked Kenneth R. Feinberg, recently dubbed by the *Wall Street Journal* as the “Special Master of America,” to oversee the \$225 million fund for defrauded stockholders in *Computer Associates*. See Morgenson, *supra* note 3; see also Ashby Jones, *Spotlight on Ken Feinberg: The Special Master of America*, WALL ST. J. L. BLOG (Jan. 14, 2010, 11:06 AM), <http://blogs.wsj.com/law/2010/01/14/spotlight-on-ken-feinberg-the-special-master-of-america>. Similarly, in 2002, former New York Attor-

Unlike civil class actions, however, criminal class action settlements lack procedures to hear victims' claims. No rules guarantee that an attorney or representative will advocate on behalf of different stakeholders as to the appropriate size and distribution of the award. No court or administrative process exists to check conflicts of interest among victim groups. To complicate matters further, a prosecutor may target the same wrongdoer, for the same funds, and on behalf of the same set of victims as parties to a privately initiated lawsuit.²¹ Even so, few guidelines instruct prosecutors on how to properly coordinate with private lawsuits.²² Finally, virtually no guidelines exist for how prosecutors, or their appointed agents, should divide these multi-million-dollar awards among victims.

Many have observed that prosecutors and private litigants increasingly use the threat of litigation to regulate the same kinds of conduct.²³ Some have gone so far as to characterize prosecutors' use of criminal settlement agreements as a form of "structural reform litiga-

ney General Eliot Spitzer settled civil and criminal charges under New York State's Martin Act with the nation's largest investment banks for over \$1.4 billion. See Press Release, SEC, NY Attorney General, NASD, NASAA, SEC, NYSE and State Regulators Announce Historic Agreement to Reform Investment Practices: \$1.4 Billion Global Settlement Includes Penalties and Funds for Investors (Dec. 20, 2002), available at <http://www.sec.gov/news/press/2002-179.htm>. Frances McGovern, a well-known scholar in the area of mass torts who has administered many multibillion dollar settlement funds, was appointed to oversee the distribution. SEC v. Bear, Stearns & Co., 626 F. Supp. 2d 402, 407 (S.D.N.Y. 2009).

²¹ Professor Brandon L. Garrett maintains a collection of almost all federal deferred and nonprosecution agreements after 2003. See Brandon L. Garrett & Jon Ashley, *Federal Organizational Prosecution Agreements*, U. VA. L. SCH., http://www.law.virginia.edu/html/librarysite/garrett_bycompany.htm (last visited Feb. 15, 2011); see also Garrett, *supra* note 17, at 938 (collecting data through 2007). According to our review of those agreements, more than half of the federal agreements that provided victim compensation were accompanied by civil class actions or administrative agency actions for similar relief.

²² See, e.g., Memorandum from Larry D. Thompson, Deputy Attorney Gen., to the Heads of Dep't Components, U.S. Attorneys § X.A (Jan. 20, 2003) [hereinafter Thompson Memo], available at http://www.justice.gov/dag/cftf/corporate_guidelines.htm (observing that prosecutors "may consider" whether civil litigation would "adequately deter, punish, and rehabilitate a corporation that has engaged in wrongful conduct").

²³ See, e.g., Miriam Hechler Baer, *Insuring Corporate Crime*, 83 IND. L.J. 1035, 1065-67 (2008) (criticizing "regulation by prosecution"); Garrett, *supra* note 17, at 861-75 (explaining how prosecutors use their discretion to pursue structural reform similar to that in the civil rights litigation context); see also David Michael Jaros, *Unfettered Discretion: Criminal Orders of Protection and Their Impact on Parent Defendants*, 85 IND. L.J. 1445, 1448 (2010) (describing the "ever-expanding nature of the criminal law . . . in the direction of broader liability").

tion,”²⁴ a term that describes the use of civil litigation to improve institutional behavior. However, few have addressed criminal law’s new role—one historically performed by private litigation—as a provider of compensation to large groups of people.²⁵ No commentator has examined the procedures that prosecutors should follow and the principles that should guide a criminal class action.

This Article argues that prosecutors can and should continue to compensate victims of widespread harm. However, prosecutors should act only when the government is in a unique position to facilitate such compensation. Moreover, prosecutors should adopt internal administrative procedures to hear from representatives of victim groups with competing interests and to formulate guidelines for payment.²⁶ Finally, where possible, courts should review criminal class action settlements with a “hard look”²⁷ to ensure that the distribution scheme adequately balances the conflicting interests between various parties and the prosecutor.

We note that there are significant differences between class action settlements and criminal restitution funds, but those differences should not be overstated. Because victims are not legal parties to a criminal case, they are not entitled to the due process rights they

²⁴ Garrett, *supra*, note 17, at 853; see also Peter Spivack & Sujit Raman, *Regulating The ‘New Regulators’: Current Trends in Deferred Prosecution Agreements*, 45 AM. CRIM. L. REV. 159, 161 (2008) (observing that some believe that the principal role of corporate criminal prosecution is to “effect widespread structural reform”).

²⁵ One notable exception is Judge Jack B. Weinstein, a jurist and scholar well known for his expertise in complex litigation. See *United States v. Cheung*, 952 F. Supp. 148, 149-51 (E.D.N.Y. 1997) (Weinstein, J.) (describing the importance of and reasons for coordinating civil and criminal litigation); *United States v. Ferranti*, 928 F. Supp. 206, 219 (E.D.N.Y. 1996) (Weinstein, J.) (discussing how the system of compensation for mass torts and environmental defects is in flux, and that it is unclear “[h]ow far [the United States] will move towards an integrated criminal-civil-administrative system”); Jack B. Weinstein, *Compensation for Mass Private Delicts: Evolving Roles of Administrative, Criminal, and Tort Law*, 2001 U. ILL. L. REV. 947, 955 (“The trend to compensate through governmental litigation marks a departure for the U.S. civil system.”).

²⁶ Other scholars have argued that prosecutors should adopt internal administrative safeguards to ensure more transparency without unduly constraining prosecutorial discretion. See, e.g., Rachel E. Barkow, *Institutional Design and the Policing of Prosecutors: Lessons from Administrative Law*, 61 STAN. L. REV. 869, 873 (2009); Gerard E. Lynch, *Our Administrative System of Criminal Justice*, 66 FORDHAM L. REV. 2117, 2149 (1998). This Article advocates a similar approach to criminal class actions. See *infra* Part III.

²⁷ Hard look review is already a well-established doctrine in the review of agency decisions. See, e.g., *Nat’l Lime Ass’n v. EPA*, 627 F.2d 416, 451 & n.126 (D.C. Cir. 1980) (discussing the roots of hard look review); see also Catherine M. Sharkey, *Federalism Accountability: “Agency-Forcing” Measures*, 58 DUKE L.J. 2125, 2181 (2009) (describing hard look review as a tool “to ensure that agencies disclose relevant data and provide reasoned responses to material objections raised during the rulemaking process”).

would otherwise enjoy in civil litigation.²⁸ However, as discussed below, victims have an array of statutory rights that entitle them not only to restitution, but also to participate in the criminal process itself.²⁹ 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.³⁰ Additionally, unlike in a class action, principles of *res judicata* or collateral estoppel do not bar victims from filing their own lawsuits. However, a criminal restitution fund may practically limit victims' ability to recover civil damages when the fund requires that eligible victims waive rights to civil claims, reduces plaintiffs' bargaining power in civil litigation by decreasing the size of a putative class action, and depletes the pool of funds available to defendants to pay civil awards.³¹ Finally, and perhaps most importantly, while the criminal justice system pursues different goals than the civil system, both share an interest in principled, efficient, and fair compensation.³²

In Part I, we describe the growing role prosecutors play in compensating victims for collectively felt harm, with a specific focus on federal prosecutors.³³ Over the past six years, the United States Department of Justice (DOJ) has sought compensation for large groups of victims in a variety of cases typically resolved through complex civil litigation, such as environmental crimes, consumer fraud actions, and

²⁸ See, e.g., *Linda R. S. v. Richard D.*, 410 U.S. 614, 619 (1973) (holding that private individuals lack a "judicially cognizable interest" in the prosecution of another person).

²⁹ See *infra* subsection I.B.1. Prosecutors and their agents must make their "best efforts" to, among other things, afford crime victims their rights to "full and timely restitution," to consult with the prosecutor, to be heard in the district court in plea and sentencing proceedings, and to be "treated with fairness and with respect for the victim's dignity." 18 U.S.C. § 3771(a), (c) (2006). But see *infra* subsection I.B.2 (describing a lack of agreement over when such rights attach in the criminal process).

³⁰ See 18 U.S.C. § 3771(a)(5)–(6) (stating that victims have the right to "confer with the attorney for the Government in the case" and the right to "full and timely restitution as provided in law"); see also 18 U.S.C. § 3664(d)(1) ("[T]he attorney for the Government, after consulting, to the extent practicable, with all identified victims, shall promptly provide the probation officer with a listing of the amounts subject to restitution.").

³¹ See *infra* Section I.B and subsection II.B.2.

³² See *infra* Section II.A.

³³ Criminal class actions occur in the state system as well. See, e.g., Barbara Hoberock, *MCI Coughs Up \$280,000 Payment to State*, TULSA WORLD, Mar. 31, 2005, at A1, available at 2005 WLNR 24871305 (describing WorldCom's agreement to pay \$280,000 to create jobs for Oklahoma state residents in exchange for the dismissal of state felony fraud charges). We focus on federal prosecutors because the DOJ makes those agreements available and because federal agreements tend to involve larger companies capable of establishing substantial restitution funds for victims.

securities violations. These criminal class actions reflect federal prosecutors' evolving response to two distinct developments in criminal law. First, as victims' rights advocates successfully moved criminal law toward "a more victim-centered justice system," prosecutors were encouraged—and sometimes required—to seek victim compensation aggressively.³⁴ Second, large corporate scandals like Enron prompted the DOJ to shift its focus from punishing individual offenders to using the criminal law to reform business practices.³⁵ The DOJ's newly adopted strategy created an opportunity for prosecutors to fashion compensation schemes for large classes of victims harmed by wealthy corporate criminals.

Part II compares the ways criminal and civil class actions compensate people. In general, large civil cases aim to serve diverse populations by following four kinds of rules: (1) rules that encourage people to participate in the settlement, (2) rules that allow judges to resolve conflicts of interest between participants, (3) rules that coordinate the settlement with other forms of litigation, and (4) rules that govern the distribution of awards among different classes of victims.³⁶

In contrast, few rules address how prosecutors should compensate large classes of victims. While some federal statutes require "victim-witness coordinators" to identify victims and notify them about ongoing criminal proceedings, many of those same rules expressly exempt complex cases like those that lead to criminal class action settlements.³⁷ Little judicial review exists to police conflicts of interest between parties.³⁸ No procedures allow government officials to identify conflicting stakeholders' interests in the action, to coordinate overlapping civil and criminal class action settlements, or to assure that victims are not over- or undercompensated.

Part III thus argues that prosecutors should adopt procedures that govern class action lawyers and judges when prosecutors, in effect, perform the same job. Prosecutors, however, need not borrow procedures wholesale from complex litigation. In contrast to purely private actions, prosecutors need flexibility to adjust their criminal

³⁴ See *infra* subsection I.B.1.

³⁵ See *infra* subsection I.B.2.

³⁶ See *infra* Section II.B.

³⁷ See, e.g., 18 U.S.C. § 3663A(c)(3) (2006) (exempting restitution payments when there are a large number of victims or when "complex issues of fact" complicate the sentencing process); *id.* § 3771(d)(2) (providing an exception when the "number of crime victims makes it impracticable" to enforce victims' rights under federal law).

³⁸ See *infra* Section III.C.

investigations and settlement discussions to fulfill their historic mission to fight crime.³⁹ Furthermore, separation-of-powers principles require some deference to a prosecutor's authority to enforce the law.⁴⁰

We accordingly propose four solutions to give victims greater procedural protection while preserving prosecutorial discretion: (1) that prosecutors adopt an administrative process that involves representative stakeholders in the settlement discussions, (2) that courts subject prosecutors' distribution plans to independent review to police potential conflicts of interest, (3) that prosecutors and courts coordinate overlapping settlements before a single federal judge, and (4) that prosecutors adopt the distribution guidelines the American Law Institute (ALI) developed for large-scale civil litigation, which seek to balance victims' competing interests.

I. THE GROWING PHENOMENON OF THE CRIMINAL CLASS ACTION

A. *The Definition of a Criminal Class Action*

In a "criminal class action," the prosecutor obtains restitution from a criminal defendant who has caused widespread harm to a large class of victims. Theoretically, prosecutors may seek group restitution against both individuals and corporate defendants. But just as in the civil system, most individual defendants cannot afford to pay large classes of victims for the victims' losses.⁴¹ Accordingly, most of the criminal class actions we discuss involve large corporate defendants who are capable of compensating many people.

³⁹ See, e.g., *Wayte v. United States*, 470 U.S. 598, 607 (1985) (describing the need for prosecutorial discretion); *United States v. Dotterweich*, 320 U.S. 277, 285 (1943) (trusting the "good sense of prosecutors").

⁴⁰ See U.S. CONST. art. II, § 3 (granting the executive branch power to "take Care that the Laws be faithfully executed"); *Bordenkircher v. Hayes*, 434 U.S. 357, 364 (1978) (observing that when a prosecutor has probable cause, "the decision whether or not to prosecute, and what charge to file or bring before a grand jury, generally rests entirely in his discretion"); see also Baer, *supra* note 23, at 1047 ("Absent some showing of post-trial 'vindictiveness' or racially motivated behavior, the prosecutor's charging decision is sacrosanct.").

⁴¹ Prosecutors have difficulty enforcing victim restitution judgments against individuals. Of the approximately \$50 billion in outstanding criminal sanctions uncollected by the United States government in 2007, nearly \$40 billion is victim restitution, much of which is owed by individual defendants. U.S. DEP'T OF JUSTICE, U.S. ATTORNEYS' ANNUAL STATISTICAL REPORT tbls.8B & 8C (2007); see also Dickman, *supra* note 79, at 1695 ("The reason for such a strong connection between collection rates and setting the amount of restitution in accordance with an offender's ability to pay is that an overwhelming majority of offenders do not have the financial resources to pay substantial restitution orders.").

When parties settle charges before trial, as is typically the case, the prosecutor will demand that the defendants agree to a number of conditions—including private monitoring, fines, and sometimes a large victim restitution fund.⁴² That fund may be overseen by prosecutors, probation officers, a third-party administrator, or the corporate defendant, whose task is to distribute money to victims. In this way, the criminal class action is a variant of what some jurists and commentators recently have dubbed “structural class actions.”⁴³ In a structural class action, court procedures are not used to collect and coordinate common claims. Rather, a single institution, like an insurer, union, or government agency, brings a single lawsuit that is predicated on harm to many different people.⁴⁴

Large criminal cases that result in criminal class action settlements may be resolved at any stage in the criminal process, but as we discuss below, they often conclude before the prosecutor files charges against the defendant.⁴⁵ Between 2003 and 2009, the DOJ recovered over \$6 billion in criminal restitution without a trial or, for that matter, much

⁴² See U.S. GOV'T ACCOUNTABILITY OFFICE, *supra* note 17 (analyzing the terms of fifty-four criminal settlement agreements between federal prosecutors and corporate defendants); Garrett, *supra* note 17 (collecting the terms of 150 agreements between federal prosecutors and corporate defendants).

⁴³ See, e.g., Hood v. Eli Lilly & Co. (*In re Zyprexa Prods. Liab. Litig.*), 671 F. Supp. 2d 397, 433 (E.D.N.Y. 2009) (describing “structural class actions” as cases in which a single entity, such as a government actor, insurer, or union, “brings claims for reimbursement . . . founded upon large numbers of individual” parties’ damages). Richard Nagareda has referred to this trend as “embedded aggregation.” Richard A. Nagareda, *Embedded Aggregation in Civil Litigation*, 95 CORNELL L. REV. 1105, 1105 (2010).

⁴⁴ See, e.g., Blue Cross & Blue Shield of N.J., Inc. v. Philip Morris USA Inc., 344 F.3d 211, 228-29 (2d Cir. 2003) (certifying questions of law to the New York Court of Appeals in an insurer action against major tobacco companies for New York State smokers’ medical expenses); UFCW Local 1776 v. Eli Lilly & Co. (*In re Zyprexa Prods. Liab. Litig.*), 253 F.R.D. 69, 201 (E.D.N.Y. 2008) (describing overpayment claims by third-party payors, like unions or other institutional plaintiffs, against Eli Lilly for consumers who purchased Zyprexa), *rev'd*, 620 F.3d 121 (2d Cir. 2010); State v. Philip Morris, No. 96122017, CL211487, 1997 WL 540913, at *20 (Md. Cir. Ct. May 21, 1997) (approving attorney-general action against Philip Morris to recover health expenses for individual smokers).

⁴⁵ See *infra* Section II.B. Although the DOJ claims that pretrial agreements are rare, the DOJ’s Criminal Division has entered into more pretrial diversion agreements than it has prosecuted in the past five years for cases involving large multinational corporations. See U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-10-110, DOJ HAS TAKEN STEPS TO BETTER TRACK ITS USE OF DEFERRED AND NON-PROSECUTION AGREEMENTS, BUT SHOULD EVALUATE EFFECTIVENESS 14-15 (2009), available at <http://www.gao.gov/new.items/d10110.pdf> (“[From 2004 to 2009], the Criminal Division pursued 0.9 times more prosecutions than [pretrial diversion] agreements . . .”).

judicial oversight.⁴⁶ Those cases generally involved large corporate defendants like Adelphia Communications,⁴⁷ British Petroleum (BP),⁴⁸ America Online (AOL),⁴⁹ Beazer Homes,⁵⁰ and Computer Associates.⁵¹ Of the more than 150 agreements that federal prosecutors reached with corporate defendants before filing criminal charges, more than 30% provided for group-victim restitution awards with an average of \$120 million per agreement.⁵² Such large restitution awards are consistent with victims' rights laws and the federal sentencing guidelines,

⁴⁶ In 2009, the DOJ collected over \$1 billion in corporate restitution and penalties alone. Letter from Edward N. Siskel, Deputy Attorney Gen., to Eileen Larence, Dir. of Homeland Sec. & Justice, U.S. Gov't Accountability Office 1-2 (Dec. 19, 2009) [hereinafter Siskel Letter], in U.S. GOV'T ACCOUNTABILITY OFFICE, *supra* note 45, app. III. Over \$5 billion in restitution and other forms of compensation was collected between 2003 and 2007. See Garrett, *supra* note 17, app. A; see also *Crime Without Conviction: The Rise of Deferred and Non Prosecution Agreements*, CORP. CRIME REP. (Dec. 28, 2005), <http://www.corporatecrimereporter.com/deferredreport.htm> (detailing fines collected through nonprosecution (NPAs) and deferred-prosecution agreements (DPAs) with corporations between 1992 and 2005).

⁴⁷ Adelphia paid \$715 million in restitution to defrauded shareholders. According to Adelphia's agreement with federal prosecutors, the Attorney General and SEC would disburse funds to victims "in such forms and amounts [to be determined] in their sole discretion." Letter from David N. Kelley, U.S. Attorney, to Alan Vinegrad et al., Counsel to Adelphia 3 (Apr. 25, 2005), available at <http://www.justice.gov/usao/nys/adelphia/adelphianon-pros.pdf>.

⁴⁸ BP paid over \$53 million into a restitution fund for direct and indirect purchasers of propane to settle criminal price-fixing charges as part of a larger settlement with the U.S. Attorney for the Northern District of Illinois. Deferred Prosecution Agreement at 7-13, United States v. B.P. America Inc., No. 07-0683 (N.D. Ill. Oct. 25, 2007), available at http://lib.law.virginia.edu/Garrett/prosecution_agreements/pdf/bp.pdf.

⁴⁹ AOL created a \$150 million victim compensation fund to settle criminal securities fraud violations. Deferred Prosecution Agreement at 2, United States v. Am. Online, Inc., No. 04-1133 (E.D. Va. Dec. 14, 2004), available at http://lib.law.virginia.edu/Garrett/prosecution_agreements/pdf/aol.pdf.

⁵⁰ Beazer Homes agreed to pay up to \$50 million in victim restitution to defrauded homebuyers through a "national restitution fund" as part of a larger agreement to settle federal housing fraud charges. Deferred Prosecution Agreement at 6, United States v. Beazer Homes USA, Inc., No. 09-0113 (W.D.N.C. July 1, 2009), available at http://lib.law.virginia.edu/Garrett/prosecution_agreements/pdf/beazer.pdf.

⁵¹ Computer Associates settled criminal securities violations by, among other things, agreeing to set up a \$225 million fund for victims. Deferred Prosecution Agreement, United States v. Computer Assocs. Int'l, Inc., No. 04-0837 (E.D.N.Y. Sept. 22, 2004), available at http://lib.law.virginia.edu/Garrett/prosecution_agreements/pdf/computerassociates.pdf.

⁵² See Garrett & Ashley, *supra* note 21 (follow "Excel spreadsheet" link) (listing fines for each organization). Only twelve such agreements appeared in the 1990s, few of which provided for any victim compensation at all. See *id.*

which instruct prosecutors to prioritize victim compensation when assessing corporate criminal penalties.⁵³

As large criminal restitution awards increasingly look like multi-million dollar class action settlements, they confront similar obstacles to ensure victims receive notice, compensation, and fair representation. Some criminal restitution funds have used mass mailings, toll-free phone services, and victim-witness coordinators to alert victims to their rights in large criminal restitution funds.⁵⁴ While few detailed rules exist to notify or resolve claims between multiple parties in a criminal class action, the notice forms used in both civil and criminal class actions may be strikingly similar. They both may require victims to give up rights to sue in civil litigation.⁵⁵ In a few cases, the inattentive victim may never notice that a prosecutor, and not a private plaintiff attorney, commenced the original action.⁵⁶

Because the volume of money and claims can overwhelm prosecutors, criminal class actions may also rely upon the same sophisticated claim administrators used in the civil system to develop distribution plans for potential victims.⁵⁷ Federal courts, for example, may refer complex restitution orders to magistrate judges and special masters, who in turn may “require additional documentation or hear testimony” from victims.⁵⁸ In cases where courts do not review the settlement

⁵³ See U.S. SENTENCING GUIDELINES MANUAL § 8B1.1 (2010) (“As a general principle, the court should require that the organization take all appropriate steps to provide compensation to victims and otherwise remedy the harm caused or threatened by the offense.”).

⁵⁴ See, e.g., *Federal and State Enforcement of Financial Consumer and Investor Protection Laws: Hearing Before the H. Comm. on Fin. Servs.*, 111th Cong. 8 (2009) (statement of Rita Glavin, Acting Assistant Att’y Gen., Criminal Div., U.S. Dep’t of Justice), available at <http://judiciary.gov/ola/testimony/111-1/2009-03-20-crm-glavin-financial-consumer.pdf> (“The Department’s many victim-witness coordinators and law enforcement officials work tirelessly to identify the victims in mortgage fraud cases and to help ensure that what money is recovered reaches them.”).

⁵⁵ See, e.g., *United States v. Rigas* (*In re* W.R. Huff Asset Mgmt. Co.), 409 F.3d 555, 563 (2d Cir. 2005) (describing a settlement requiring third-party releases).

⁵⁶ Compare Notice of Claims Process for Distribution of the Restitution Fund, *United States v. Computer Assocs. Int’l, Inc.*, No. 04-0837 (E.D.N.Y. 2005), available at <http://www.computerassociatesrestitutionfund.com/pdf/carflnot.pdf> (notice for the criminal restitution fund in *Computer Associates*), with Proof of Claim and Release, *In re* Computer Assocs. Class Action Sec. Litig., 2007 WL 2713336 (E.D.N.Y. 2007) (Nos. 98-4839, 02-1226, and 03-4199), available at http://securities.stanford.edu/1010/CA98/2003919_r06x_98CV04839.pdf (notice for the civil class action settlement in *Computer Associates*).

⁵⁷ See *supra* note 20 and accompanying text.

⁵⁸ 18 U.S.C. § 3664(d)(4)(6) (2006); see also *United States v. Brennan*, 526 F. Supp. 2d. 378, 384 (E.D.N.Y. 2007) (referring the question of sufficiency of a \$90 million in vic-

agreement at all, prosecutors still may refer cases to a third party. For example, when BP was accused of fixing prices in the propane market, the prosecutor required that BP establish a \$53 million victim restitution fund to be overseen by a special administrator.⁵⁹

Finally, criminal restitution funds struggle to serve multiple classes of victims who may have very different interests in the award. In the \$225 million *Computer Associates* settlement, for example, institutional investors, bondholders, and individual stockholders ultimately petitioned the administrator to distribute funds differently.⁶⁰ But such conflicts may pale in comparison to the conflicts victims have with prosecutors themselves. Prosecutors may seek deals with corporate defendants to obtain information about other criminal parties or to reduce collateral impact of a large award on innocent third-parties like employees or shareholders.⁶¹ Politically ambitious prosecutors may prioritize a rapid resolution and big headlines at the expense of victims' different interests in compensation.⁶²

tim restitution to a federal magistrate); *United States v. Salim*, 287 F. Supp. 2d 250, 258 (S.D.N.Y. 2003) (appointing two special masters to determine the amount of restitution).

⁵⁹ See Deferred Prosecution Agreement, *supra* note 48, at 9 (calling for BP to appoint a "Third Party Administrator" to be approved by the Department of Justice); see also Deferred Prosecution Agreement, *supra* note 50, at 6 (requiring the appointment of a claims administrator to oversee victim restitution fund to defrauded homebuyers).

⁶⁰ See Plan of Allocation for Restitution Fund at 2 n.2, *United States v. Computer Assocs. Int'l, Inc.*, No. 04-0837 (E.D.N.Y. July 21, 2005), available at <http://www.computerassociatesrestitutionfund.com/pdf/carflplan.pdf> (describing disputed claims by holders, purchasers, and sellers of defendants' stock). *But cf.* Morgenson, *supra* note 3 (describing "investor passivity" in coming up with ideas to disburse funds).

⁶¹ See, e.g., *Accountability, Transparency, and Uniformity in Corporate Deferred and Non-Prosecution Agreements: Hearing Before the H. Subcomm. on Commercial and Admin. Law*, 111th Cong. 93 (2009) (statement of Chuck Rosenberg, former U.S. Attorney) (considering DPAs as a middle ground between allowing corporate crime to go unpunished and the "staggering collateral costs to innocent parties that far exceed the benefits of prosecution itself"), available at <http://judiciary.house.gov/hearings/pdf/Rosenberg090625.pdf>; John Ashcroft, Op-Ed., *Bailout Justice*, N.Y. TIMES, May 5, 2009, at A27 ("Think of the effect on the community if these companies had been shuttered: employees would have lost their jobs, shareholders and pensioners would have lost their savings and countless people in need of hip and knee replacement would have been out of luck . . .").

⁶² See, e.g., *SEC v. Bear, Stearns & Co.*, 626 F. Supp. 2d 402, 403 (S.D.N.Y. 2009) (chastising the government for "tortured restructuring and embarrassing consequences" that resulted from the failure to identify investor losses). Perhaps unsurprisingly, Eliot Spitzer and Chris Christie, two prosecutors-turned-governors, sought to create massive restitution funds in connection with highly publicized corporate misconduct. See Barbara Moses, *The "Discovery" of Analysts Conflicts on Wall Street*, 70 BROOK. L. REV. 89, 99-105 (2004) (describing the evolution of the global settlement between the investment banks, government actors, and former New York Attorney Eliot Spitzer); Stephanie Saul, *Bristol Meyers Seen Settling Case by U.S.*, N.Y. TIMES, June 6, 2005, at C1 (describing the terms of Chris Christie's \$300 million settlement with Bristol Meyers).

The recent movement toward group criminal restitution is just the beginning. Recent high-profile criminal investigations of Goldman Sachs and BP may lead to enormous settlements.⁶³ If so, government attorneys will be responsible for doling out billions of dollars in restitution to many classes of victims—from sophisticated victims, like traders and institutional investors, to comparatively unsophisticated victims, like homeowners, deep-sea fisherman, and retirees.⁶⁴ Few express rules or procedures, however, say how they should do so.

As set forth below, the practical absence of procedures for harm compensation developed, in part, because of two trends in criminal law: (1) the increasing impact of the victims' rights movement on laws requiring criminal restitution and (2) prosecutors' evolving role in regulating corporate behavior.

B. *The Origins of the Criminal Class Action*

The criminal class action is the product of two distinct developments in criminal law that fundamentally changed the role of the federal prosecutor. First, victims' rights advocates successfully convinced prosecutors to revise their traditional offender-based goals of retribution and deterrence to include restitution for victims. Second, in response to post-Enron corporate fraud scandals, prosecutors adopted a "bold new prosecutorial mission"⁶⁵ to regulate corporate America by using the threat of indictment to encourage sweeping institutional reforms. As a result, prosecutors started to focus more intently on restitution just as they found themselves in a position to negotiate generous compensation awards on behalf of large classes of victims. Moreover, as prosecutors made restitution a significant component of the agreements they executed with corporate defendants, large compen-

⁶³ At the time of this writing, BP had agreed to establish an unprecedented \$20 billion dollar fund to be administered by Kenneth R. Feinberg. Jackie Calmes, *For Gulf Victims, Mediator with Deep Pockets and Broad Power*, N.Y. TIMES, June 23, 2010, at A17. Goldman Sachs has agreed to a record \$550 million settlement with the SEC, part of which will compensate injured investors. Press Release, SEC, Goldman Sachs to Pay Record \$550 Million to Settle SEC Charges Related to Subprime Mortgage CDO (July 15, 2010), available at <http://sec.gov/news/press/2010/2010-123.htm>. Although neither settlement resolves both companies' pending criminal investigations, such government-driven settlements on behalf of thousands of victims raise the same concerns as other criminal class actions discussed herein.

⁶⁴ Peter J. Henning, *Looking for Liability in the BP Oil Spill*, NYTIMES.COM DEALBOOK (June 7, 2010, 9:30 AM), available at <http://dealbook.blogs.nytimes.com/2010/06/07/looking-for-liability-in-bps-gulf-oil-spill> (describing possible criminal and civil penalties against BP).

⁶⁵ Garrett, *supra* note 17, at 858.

sation schemes were increasingly fashioned outside the scope of the federal statutes designed to protect victims and without the benefit of judicial review.

1. Prosecutors as Compensators

Criminal restitution has always been “embedded in common law.”⁶⁶ Even as common law crimes gradually disappeared from the American system,⁶⁷ the idea that the criminal law should make victims whole did not fully disappear from the public consciousness. In 1925, Congress gave federal courts the authority to suspend sentences and order restitution as a condition of a defendant’s probation.⁶⁸ In the 1970s, victims’ rights advocates urged politicians to return victims to their central role within the criminal justice system.⁶⁹ The victims’ rights movement argued that crime victims “were a discrete and unserved minority that deserved equal justice under law.”⁷⁰ In so doing, they expressly highlighted the historical antecedents of restitution to support their claim that crime victims were not treated fairly.⁷¹

By the 1990s, policymakers in the United States adopted the language of the victims’ rights movement wholesale, emphatically declaring that the “principle of restitution is an integral part of virtually every formal system of criminal justice, of every culture and every time.”⁷² Whatever else the “sanctioning power of society” does to pu-

⁶⁶ *United States v. Brennan*, 526 F. Supp. 2d 378, 382 (E.D.N.Y. 2007) (citing 4 WILLIAM BLACKSTONE, COMMENTARIES *356).

⁶⁷ See Thomas W. Merrill, *The Disposing Power of the Legislature*, 110 COLUM. L. REV. 452, 456-61 (2010) (explaining the development of the public prosecutor’s monopoly on criminal prosecutions and the disappearance of common law crimes).

⁶⁸ See Act of Mar. 4, 1925, ch. 521, 43 Stat. 1259, *repealed by* Sentencing Reform Act of 1984, Pub. L. No. 98-473, tit. II, ch. 2, § 212(a)(2), 98 Stat. 1837, 1987.

⁶⁹ See Edna Erez & Julian Roberts, *Victim Participation in the Criminal Justice System* (outlining the rise of the victims’ role in the judicial system), in VICTIMS OF CRIME 277 (Robert C. Davis et al. eds., 3d ed. 2007); David E. Aaronson, *New Rights and Remedies: The Federal Crime Victims’ Rights Act of 2004*, 28 PACE L. REV. 623, 627-28 (2008) (describing different developments in the law aimed at granting victims of crimes better remedies).

⁷⁰ Jon Kyl et al., *On the Wings of Their Angels: The Scott Campbell, Stephanie Roper, Wendy Preston, Louarna Gillis, and Nila Lynn Crime Victims’ Rights Act*, 9 LEWIS & CLARK L. REV. 581, 584 (2005).

⁷¹ See, e.g., Bruce Jacobs, *The Concept of Restitution: An Historical Overview* (citing the Code of Hammurabi and other historical legal codes to buttress arguments about the need for victims’ compensation), in RESTITUTION IN CRIMINAL JUSTICE 45, 45-51 (Joe Hudson & Burt Galaway eds., 1977).

⁷² S. REP. NO. 104-179, at 12 (1995) (quoting S. REP. NO. 97-532, at 30 (1982)), *reprinted in* 1996 U.S.C.A.N. 924, 925.

nish, Congress later found, it should require wrongdoers to “restore the victim to his or her prior state of well-being.”⁷³

The victims’ rights movement successfully reshaped the goals of the criminal justice system and, accordingly, the role of the prosecutor.⁷⁴ Not only did this result in a normative shift that made compensation for victims an important criminal justice priority, it led to the passage of several federal statutes aimed at addressing the role of the victim in the criminal justice system. Chief among these were the Victim and Witness Protection Act of 1982,⁷⁵ the Victims’ Rights and Restitution Act of 1990,⁷⁶ the Mandatory Victims Restitution Act of 1996,⁷⁷ and the Scott Campbell, Stephanie Roper, Wendy Preston, Louna Gillis, and Nila Lynn Crime Victims’ Rights Act (CVRA).⁷⁸ With each piece of legislation, Congress encouraged, and at times compelled, prosecutors to take a more aggressive role in recovering victim compensation.⁷⁹ To ensure prosecutors adopted a “more victim-centered” approach, Congress also granted victims three kinds of rights in the restitution process: rights to participation, fair representation, and equitable compensation.

Federal laws and regulations reinforce the right of victims to participate in the criminal process, for example, by affording victims the right to notice and to be heard.⁸⁰ Throughout the duration of the criminal case, prosecutors, victim-witness coordinators, probation of-

⁷³ *Id.*; see also *A Bill to Provide for Restitution of Victims of Crimes, and for Other Purposes: Hearing on S. 173 Before the S. Comm. on the Judiciary*, 104th Cong. 1-2 (1995) (statement of Sen. Orrin Hatch, Chairman, S. Comm. on the Judiciary) (advocating for lawmakers to recognize victims’ rights); 141 CONG. REC. 3911 (1995) (statement of Rep. Mark Foley) (“For far too long we have forgotten the innocent victims of crime.”).

⁷⁴ See, e.g., Douglas Evan Beloof, *The Third Model of Criminal Process: The Victim Participation Model*, 1999 UTAH L. REV. 289, 290 (observing that the victims’ rights movement “has shaken conventional assumptions about the criminal process to their foundation”).

⁷⁵ Pub. L. No. 97-291, 96 Stat. 1248 (codified as amended at 18 U.S.C. §§ 1512-1515, 3579-3580 (2006)).

⁷⁶ Pub. L. No. 101-647, tit. V, 104 Stat. 4789, 4820-23 (codified as amended at 42 U.S.C. §§ 10606-10607).

⁷⁷ Pub. L. No. 104-132, tit. II, 110 Stat. 1214, 1227-41 (codified as amended in scattered section of 18 U.S.C.).

⁷⁸ Pub. L. No. 108-405, tit. I, 118 Stat. 2260, 2261-65 (2004) (codified as amended at 18 U.S.C. § 3771 and 42 U.S.C. §§ 10603d-10603e).

⁷⁹ The Mandatory Victims Restitution Act of 1996, for example, was hailed as part of a move “toward a more victim-centered justice system” that would help transform a criminal justice system that Congress believed was ignoring the plight of victims. Matthew Dickman, Comment, *Should Crime Pay?: A Critical Assessment of the Mandatory Victims Restitution Act of 1996*, 97 CALIF. L. REV. 1687, 1688-89 (2009) (quoting S. REP. NO. 104-179, at 18 (1995)).

⁸⁰ 18 U.S.C. § 3771(a)(2), (4).

ficers, and even clerks of the court must identify and notify potential victims about important proceedings that take place throughout the criminal case.⁸¹ Victims also have a “reasonable right to confer” with prosecutors and probation officers before criminal indictment, trial, or sentencing.⁸² Finally, victims may appear and petition the court before, during, or after trial, unless their appearance interferes with the defendant’s ability to obtain a fair trial.⁸³

Federal laws also provide a limited right to representation, particularly when victims have conflicts of interests with the prosecuting attorney. Inside the DOJ, a Victims’ Rights Ombudsman may hear complaints lodged by victims against the federal prosecutor handling the case.⁸⁴ Outside the DOJ, victims may move separately in federal court to enforce their rights.⁸⁵ If the district court denies the victim’s request—such as a request to be heard—the victim can petition the court of appeals for a writ of mandamus.⁸⁶

Finally, federal law guarantees victims the right to “full” compensation.⁸⁷ Prosecutors must seek restitution for certain crimes whenever “an identifiable victim or victims” suffer any “physical injury or pecuniary loss.”⁸⁸ The Federal Sentencing Guidelines, while no longer binding,⁸⁹ direct courts in such cases to enter restitution orders and to impose victim compensation as a condition of probation or supervised

⁸¹ *Id.* § 3771(c)(1).

⁸² *Id.* § 3771(a)(5); *see also id.* § 3664(d)(1) (“Upon the request of the probation officer . . . the attorney for the government after consulting . . . with all identified victims, shall promptly provide the probation officer with a listing of amounts subject to restitution.”).

⁸³ *Id.* § 3771(b), (d); *see also* United States v. Turner, 367 F. Supp. 2d 319, 321-22 (E.D.N.Y. 2005) (analyzing the CVRA in detail).

⁸⁴ *See* 18 U.S.C. § 3771(f)(2)(A) (directing the DOJ to create an administrative authority to monitor compliance with the act).

⁸⁵ *See id.* § 3771(d)(1) (“The crime victim or the crime victim’s lawful representative . . . may assert the rights described in subsection (a).”); *see also In re Dean*, 527 F.3d 391, 395-96 (5th Cir. 2008) (discussing the CVRA-established victims’ right to confer with the attorney for the government); United States v. Rubin, 558 F. Supp. 2d 411, 417 n.5 (E.D.N.Y. 2008) (opining that the CVRA may provide a cause of action in federal court for victims even in the absence of a criminal prosecution).

⁸⁶ 18 U.S.C. § 3771(d)(3).

⁸⁷ *Id.* § 3771(a)(6); *see also* Dolan v. United States, 130 S. Ct. 2533, 2540 (2010) (“[J]ustice cannot be considered served until full restitution is made.” (alteration in original) (quoting S. REP. NO. 104-179, at 20 (1995))).

⁸⁸ 18 U.S.C. § 3663A(c)(1)(B).

⁸⁹ *See* United States v. Booker, 543 U.S. 220, 249-58 (2005) (rejecting the “mandatory” nature of the Sentencing Guidelines).

release.⁹⁰ Criminal restitution laws also observe a “collateral source” rule. That is, a criminal defendant must pay restitution even if a victim is entitled to receive compensation “from the proceeds of insurance or any other source,” including civil litigation.⁹¹ Victims, however, are not entitled to recover more than their losses.⁹²

While the victims’ rights movement successfully focused prosecutors on the importance of victim compensation, it fell short in its effort to codify that right in cases involving multiple victims. To avoid overtaxing prosecutors, Congress expressly exempted overly “complex” cases and cases with multiple victims.⁹³ Instead, Congress settled on a rule that only requires prosecutors to develop “reasonable” procedures to enable victims to participate in complex cases.⁹⁴ In so doing, legislators acknowledged the practical constraints courts and prosecutors faced in cases with thousands of victims. Congress does not appear to have contemplated that prosecutors or judges would seek massive restitution awards that rivaled class action settlements.⁹⁵

Nevertheless, despite the express exemption for complex cases, some federal courts and prosecutors continue to require restitution in large criminal cases involving widespread harm.⁹⁶ For example, in one

⁹⁰ See U.S. SENTENCING GUIDELINES MANUAL § 8B1.1(a)(2) (2007) (“In the case of an identifiable victim, the court shall . . . impose a term of probation or supervised release with a condition requiring restitution for the full amount of the victim’s loss . . .”).

⁹¹ 18 U.S.C. § 2259(b)(4)(B)(ii); *id.* § 3664(j)(1).

⁹² See *id.* § 3664(j)(2) (“Any amount paid to victim under an order of restitution shall be reduced by any amount later recovered as compensatory damages for the same loss . . .”).

⁹³ *Id.* § 3663A(c)(3).

⁹⁴ *Id.* § 3771(d)(2).

⁹⁵ In the floor debate that preceded the CVRA, policymakers discussed adopting procedural safeguards to ensure victim participation in large criminal trials. The debate, however, ignored the issue of restitution. Rather, policymakers focused on the logistical barriers facing the many victims who wanted to participate in the Oklahoma City bombing trial. See 150 CONG. REC. 7303 (2004) (statement of Sen. Dianne Feinstein) (“This legislation is meant to ensure that cases like the McVeigh case, where victims of the Oklahoma City bombing were effectively denied the right to attend the trial and to avoid federal appeals courts from determining, as the Tenth Circuit Court of Appeals did, that victims had no standing to seek review of their right to attend the trial under the former victims’ law that this bill replaces.”); see also *id.* at 7303-04 (statement of Sen. Jon Kyl) (indicating that the CVRA requires courts to identify methods to handle complex cases).

⁹⁶ See, e.g., *United States v. Cienfuegos*, 462 F.3d 1160, 1168 (9th Cir. 2006) (“[T]he district court abused its discretion by relying on the perceived complexity of the restitution determination and the availability of a more suitable forum to decline to order restitution for future lost income.”); see also *United States v. Brennan*, 526 F. Supp. 2d 378, 384-86 (E.D.N.Y. 2007) (listing several cases involving a large number of victims where the courts still required full restitution).

case involving a \$193 million criminal restitution fund for over 10,000 victims, the court found “meritless [the defendant’s] argument that the number of victims is too large for restitution to be practicable.”⁹⁷ In a criminal securities case involving Adelphia, the Second Circuit approved the prosecutor’s request to establish a \$715 million fund to compensate victims of securities fraud.⁹⁸

The DOJ provides few instructions to guide prosecutors, or their appointed agents, who seek to create and distribute large restitution awards. The Attorney General Guidelines for Victim and Witness Assistance states that in large cases, “responsible officers may publish a notice in a manner designed to reach as many victims as possible.”⁹⁹ Nor do guidelines exist to ensure that the interests of different categories of victims hurt by the same conduct are fairly represented. Rather, after “consultation” with the victims, the prosecutor may make an “independent determination” regarding the losses that may be proven by a preponderance of the evidence.¹⁰⁰

Moreover, no assurances exist in complex cases that victims will be compensated fairly and accurately. Probation officers and victim-witness coordinators, often charged with identifying the amount of money at stake, may avoid doing so by informing the court that they cannot “ascertain” the number or identity of victims.¹⁰¹ A court may set restitution without regard to other pending litigation.¹⁰²

More troubling is the fact that cases involving the greatest amount of money and victims—large corporate cases—are particularly likely to be resolved before an indictment. As a result, they fall outside the scope of the federal statutes designed to ensure victims’ participation in their own redress.¹⁰³ As set forth below, in these instances, large-

⁹⁷ United States v. Catoggio, 326 F.3d 323, 328 (2d Cir. 2003); *see also* United States v. Khan, 193 F. App’x 700, 702 (9th Cir. 2006) (remanding to the district court because it did not clearly make a determination that calculation of victims’ actual losses would complicate or prolong the sentencing process so as to outweigh the need for restitution).

⁹⁸ United States v. Rigas (*In re* W.R. Huff Asset Mgmt. Co.), 409 F.3d 555, 563-64 (2d Cir. 2005).

⁹⁹ U.S. DEP’T OF JUSTICE, ATTORNEY GENERAL GUIDELINES FOR VICTIM AND WITNESS ASSISTANCE 41 (2005), *available at* http://www.justice.gov/olp/pdf/ag_guidelines.pdf.

¹⁰⁰ *Id.*

¹⁰¹ *Id.* at 42.

¹⁰² *See* United States v. Bright, 353 F.3d 1114, 1122 (9th Cir. 2004) (interpreting 18 U.S.C. § 3664 (2006) and concluding that the court does not need to wait for other compensation decisions before it fashions a remedy).

¹⁰³ Courts disagree about precisely what triggers a victim’s right to consult with the prosecuting attorney. *Compare* United States v. BP Products N. Am. Inc., No. 07-0434, 2008 WL 501321, at *11, *12 n.7 (S.D. Tex. Feb. 21, 2008) (finding that the CVRA

scale compensation packages are crafted in an ad hoc manner without the benefit of judicial review and without binding statutory protection for victims.

2. Prosecutors as Regulators

The DOJ's newly adopted strategy of business reform creates an opportunity for prosecutors to fashion large compensation schemes without significant judicial oversight. The DOJ currently focuses on reforming corrupt corporate cultures¹⁰⁴ instead of pursuing large corporate fines and incarcerating individual offenders.¹⁰⁵ Although the DOJ originally pursued structural reform through plea agreements, prosecutors increasingly seek pretrial diversion agreements in which they agree not to seek a conviction, and in return, corporations agree to a number of conditions designed to correct past misdeeds and control future behavior. Such agreements may include provisions for new compliance programs, independent monitors, fines, and often, victim compensation.¹⁰⁶

This new strategy has important implications for victims. On the one hand, victims may benefit from the overwhelming leverage prosecutors have in preindictment negotiations to extract large restitution awards from corporate defendants—sums that can potentially exceed the amount authorized by statute following a conviction.¹⁰⁷ On the other hand, pretrial diversion agreements are subject to extremely limited judicial review.¹⁰⁸ Moreover, the applicability of victims' rights

clearly provided for rights that apply "before any prosecution is underway"), *with* United States v. Merkosky, No. 02-0168, 2008 WL 1744762, at *2 (N.D. Ohio Apr. 11, 2008) (noting that the CVRA "does not confer any rights upon a victim until a prosecution is already begun").

¹⁰⁴ See Thompson Memo, *supra* note 22, at 1 ("Indicting corporations for wrongdoing enables the government to address and be a force for positive change of corporate culture, alter corporate behavior, and prevent, discover, and punish white collar crime.").

¹⁰⁵ See, e.g., Garrett, *supra* note 17, at 860 (indicating that prosecutors increasingly use structural-reform settlements in exchange for nonprosecution agreements); Spivack & Raman, *supra* note 24, at 161 (noting a change in DOJ policy in the corporate context to regulate corporate culture, rather than to pursue criminal convictions).

¹⁰⁶ See U.S. GOV'T ACCOUNTABILITY OFFICE, *supra* note 17, at 1 (explaining how the DOJ can use DPAs and NPAs to monitor companies).

¹⁰⁷ See Spivack & Raman, *supra* note 24, at 182.

¹⁰⁸ See, e.g., Garrett, *supra* note 17, at 860 (observing that "[j]udicial review is also very deferential at the charging stage . . . giving prosecutors especially wide discretion"); Benjamin M. Greenblum, *What Happens to a Prosecution Deferred? Judicial Oversight of Corporate Deferred Prosecution Agreements*, 105 COLUM. L. REV. 1863, 1870 (2005) ("The judiciary's limited role in deferred prosecution may explain the substance of criticisms lodged against the deferral mechanism.").

laws may vary depending on where the case is in the criminal process. As a result, victims may depend entirely upon the prosecutor to solicit their input affirmatively, to represent their interests adequately, and to distribute settlement proceeds fairly and equitably.

The use of pretrial diversion agreements skyrocketed after Arthur Andersen's collapse, when the DOJ realized that prosecutors needed to take into account the severe collateral consequences of indicting or convicting large corporations.¹⁰⁹ Prosecutors also discovered that they often "get better results more quickly" when they negotiate with corporations under the threat of indictment than when they go to trial.¹¹⁰ Moreover, corporations favor resolving cases before indictment to avoid the immediate costs of litigation, the collateral costs of indictment, and the even higher costs associated with a potential conviction.¹¹¹

Pretrial diversion agreements fall into two categories based upon the timing of the settlement. Nonprosecution agreements (NPAs) occur before charges are filed, and the agreement is maintained by the parties.¹¹² Deferred-prosecution agreements (DPAs) occur after the government has filed a formal charging document with the court.¹¹³ Notwithstanding the proliferation of pretrial diversion agreements over the past decade,¹¹⁴ prosecutors may also pursue a third settlement

¹⁰⁹ See, e.g., Garrett, *supra* note 17, at 879-80 (describing the devastating collateral consequences of indictment and characterizing the Andersen case as a "turning point" for the DOJ); Thompson Memo, *supra* note 22, at 3 (instructing prosecutors to consider the "collateral consequences" of indictment on "shareholders, pension holders and employees not proven personally culpable").

¹¹⁰ Vanessa Blum, *Justice Deferred: The Feds' New Weapon of Choice Makes Companies Turn Snitch to Save Themselves*, LEGAL TIMES, Mar. 21, 2005, at 1.

¹¹¹ See Pamela H. Bucy, *Organizational Sentencing Guidelines: The Cart Before the Horse*, 71 WASH. U. L.Q. 329, 352-53 (1993) (noting the high costs of criminal proceedings by factoring in all the "collateral costs" of a potential prosecution); Greenblum, *supra* note 108, at 1885-86 (explaining that collateral costs are typically higher for corporations than individuals, which helps elucidate why corporations have a strong incentive to reach a preprosecution agreement); Spivack & Raman, *supra* note 24, at 187-89 (concluding that use of DPAs and NPAs will grow because there are benefits for both companies and prosecutors, but noting the need for better guidance).

¹¹² See Memorandum from Craig S. Morford, Acting Deputy Attorney Gen., to the Heads of Dep't Components, U.S. Attorneys 1 n.2 (March 7, 2008) [hereinafter Morford Memo] ("Non-prosecution agreement[s] . . . [are] maintained by the parties rather than being filed with a court.").

¹¹³ See *id.* ("[A] deferred prosecution agreement is typically predicated upon the filing of a formal charging document by the government, and the agreement is filed with the appropriate court.").

¹¹⁴ See Spivack & Raman, *supra* note 24, at 159 (providing evidence of the increased use of these agreements by government prosecutors).

option, the plea bargain, in situations that they deem to warrant an actual criminal conviction.

Courts scrutinize prosecution agreements more carefully as the case progresses through the criminal process. Courts generally do not review NPAs, only rarely review DPAs,¹¹⁵ and will review plea agreements with great deference.¹¹⁶ Courts' resistance to judicial review of criminal settlement agreements can be attributed to a number of concerns, which we discuss in more detail in Section III.C: a constitutional concern about separation of powers, a practical concern about courts' competence to evaluate the charging decision, and a statutory concern that courts lack clear authority to interfere in the earliest stages of the criminal process.

Prosecutors' virtually unlimited authority to set the terms of a pre-trial settlement agreement has been a cause for concern among commentators and policymakers.¹¹⁷ Prosecutors may, without limitation, use the threat of criminal indictment to promote their own policy agenda. In some cases, the DOJ has required so-called "extraordinary restitution"—payments to parties whom defendants did not technically harm.¹¹⁸ For example,

[one] DPA required the organization to provide uncompensated medical care to the state's residents, while an NPA required the company to provide funding for a not-for-profit organization to support projects designed to improve the quality and affordability of health care services in the state. Another DPA required a company that had not complied with water treatment regulations to provide an endowment of \$1 million to the U.S. Coast Guard Academy for the purposes of enhancing the study

¹¹⁵ Most judges randomly polled by the Government Accountability Office (GAO) did not hold a hearing to review a DPA and its terms. See U.S. GOV'T ACCOUNTABILITY OFFICE, *supra* note 45, at 25 (reporting that nine out of twelve district court and magistrate judges who handled cases involving DPAs did not hold hearings to review the DPAs or their terms).

¹¹⁶ Garrett, *supra* note 17, at 906 ("Federal courts are more involved in reviewing plea bargains than charging decisions, but judges still remain highly deferential.").

¹¹⁷ See *id.* at 856-57 (noting several criticisms of prosecutors' power regarding criminal settlements). Professor Richard Epstein, for example, compares such agreements to "the confessions of a Stalinist purge trial, as battered corporations recant their past sins and submit to punishments wildly in excess of any underlying offense." Richard A. Epstein, Op-Ed., *The Deferred Prosecution Racket*, WALL ST. J., Nov. 28, 2006, at A14; see also John C. Coffee, Jr., *Deferred Prosecution: Has It Gone Too Far?*, NAT'L L.J., July 25, 2005, at 13 ("[P]ower corrupts and . . . prosecutors are starting to possess something close to absolute power.").

¹¹⁸ See U.S. GOV'T ACCOUNTABILITY OFFICE, *supra* note 17, at 15 n.21, (noting instances of restitution being distributed to nonparties, such as "charitable, education, community, or other organizations").

of maritime environmental enforcement, with an emphasis on compliance, enforcement, and ethical issues.¹¹⁹

In some ways, the controversy involving “extraordinary restitution” mirrors the distributional concerns raised when judges give unclaimed class action settlement proceeds to charities or nonprofit associations.¹²⁰ Federal restitution laws only authorize courts to compensate victims.¹²¹ However, corporate defendants often accede to such demands in the hopes of reducing their own criminal liability and avoiding the collateral costs of indictment.

The DOJ has since voluntarily barred prosecutors from seeking “extraordinary restitution.”¹²² Congress also considered federal legislation to restrict the DOJ’s use of “extraordinary restitution” in DPAs and NPAs in April 2009.¹²³ Nonetheless, Congress has all but ignored the multimillion dollar distributions paid to the victims themselves. Despite the voluntary limitations adopted by the DOJ, no binding rules govern the distribution of large funds designed to compensate multiple victims.

Accordingly, even as prosecutors increasingly seek massive victim restitution awards, they do so with extremely limited regulation or judicial oversight. Moreover, prosecutors forge settlement agree-

¹¹⁹ *Id.* at 18; *see also* Deferred Prosecution Agreement app. A, *United States v. Operations Mgmt. Int’l, Inc.*, No. 06-0017 (D. Conn. Feb. 8, 2006) (providing for the payment to the U.S. Coast Guard Academy).

¹²⁰ *See, e.g.*, *Fears v. Wilhelmina Model Agency, Inc.*, No. 07-3119, 2009 WL 690048, at *2 (2d Cir. Mar. 16, 2009) (vacating the district court’s award of residual settlement fees to charities but noting that the award was not an abuse of discretion); Adam Lipstak, *Doling Out Other People’s Money*, N.Y. TIMES, Nov. 26, 2007, at A14 (describing criticism of efforts to award funds to hospitals, law schools, and legal aid societies).

¹²¹ 18 U.S.C. § 3663(a)(1)–(2) (2006) (mandating that restitution be paid to the “victim” of the offense, defined as a “person directly and proximately harmed as a result of the commission of an offense for which restitution may be ordered”).

¹²² *See* Memorandum from Mark Filip, Deputy Attorney Gen., to Holders of the U.S. Attorneys’ Manual (May 14, 2008) [hereinafter *Filip Memo*], *available at* http://www.abanet.org/litigation/committees/criminal/docs/0608_FilipMemo.pdf (“Plea agreements, deferred prosecution agreements and non-prosecution agreements should not include terms requiring the defendant to pay funds to [an] organization or individual that is not a victim of the criminal activity”); *see also* UNITED STATES ATTORNEYS’ MANUAL § 9-16.325 (2010), *available at* http://www.usdoj.gov/usao/eousa/foia_reading_room/usam/title9/16mcrn.htm#9-16.320 (reflecting the change in policy).

¹²³ *See* Accountability in Deferred Prosecution Act, H.R. 1947, 111th Cong. § 6(a) (2009) (“A deferred prosecution agreement shall not require an organization to pay money to a third party . . . if the payment is unrelated to the harm caused by the defendant’s conduct that is the basis for the agreement.”). Among other things, the proposed bill would have required federal judges to review the terms of any deferred-prosecution agreement to ensure the agreement “is consistent with the interests of justice.” *Id.* § 7(c).

ments unconstrained by the federal laws Congress designed to encourage victim participation and equitable compensation.

II. COMPENSATION THROUGH CLASS ACTION SETTLEMENTS

Even though prosecutors have adopted victim restitution as a criminal justice priority, few rules address massive criminal restitution funds. As set forth below, criminal class actions serve many of the same goals as their civil counterparts, compensating private parties more efficiently and equitably than would be possible with thousands of small individual lawsuits. Beneath the surface, however, the two regimes are fundamentally different. While complex procedures in civil litigation exist to protect individual parties, virtually no rules govern criminal class actions.¹²⁴ Prosecutors thus find themselves increasingly constructing complex compensation schemes with little guidance to address the very challenges that have long concerned similar class action settlements.

Section II.A below describes the common goals served by class action settlements and large criminal restitution funds. Section II.B then compares the specific rules they observe to further those goals. Unlike criminal class actions, civil class actions have rules to (1) ensure multiple parties participate in their own redress, (2) police potential conflicts of interests among different stakeholders, (3) coordinate with overlapping lawsuits, and (4) guide the division of funds among thousands of victims efficiently and equitably.

¹²⁴ There is a constitutional dimension to the protections afforded plaintiffs in the class action context that does not apply to a criminal case. Because parties to a class action are precluded from subsequently litigating their individual claims, due process dictates that they be afforded timely notice and adequate representation. *See* *Martin v. Wilks*, 490 U.S. 755, 762 n.2 (1989) (“[W]here a special remedial scheme exists expressly foreclosing successive litigation by nonlitigants . . . legal proceedings may terminate preexisting rights if the scheme is otherwise consistent with due process.”), *superseded by statute*, Civil Rights Act of 1991, Pub. L. No. 102-166, § 108, 105 Stat. 1071, 1076; *Hansberry v. Lee*, 311 U.S. 32, 45 (1940) (“[S]election of representatives for purposes of litigation, whose substantial interests are not necessarily or even probably the same as those whom they are deemed to represent, does not afford that protection to absent parties which due process requires.”). Conversely, while a criminal class action may practically preclude victims from pursuing a civil claim, victims are not constitutionally entitled to the same protections. Complex procedures that govern large civil settlements, however, do more than merely satisfy the demands of due process. As we discuss below, the procedures were adopted as part of a much broader set of goals, including providing fair and efficient compensation to victims of widespread harm. The criminal justice system shares this goal. *See infra* Section II.A.

A. *Common Goals of Civil and Criminal Class Action Settlements*

Over the last forty years, judges have increasingly certified “settlement-only class actions,” simultaneously approving both a class action and a massive settlement on behalf of its members.¹²⁵ In so doing, courts and commentators have identified three advantages that civil class actions have over individualized litigation: accountability, efficiency, and equity.¹²⁶ More recently, large criminal restitution funds have sought to accomplish the very same goals.

Both criminal and civil class action settlements attempt to hold defendants accountable by enabling parties to resolve claims that otherwise would not be brought in individual litigation. Class certification in civil lawsuits allows for litigation when damages are too small for individuals to justify the high costs of retaining counsel.¹²⁷ Civil class actions also ensure that economies of scale do not disadvantage individual plaintiffs when they face well-financed corporate defendants.¹²⁸ In so doing, civil class actions hold defendants accountable for diffuse harms too costly to be prosecuted through individual litigation.¹²⁹

¹²⁵ See, e.g., DEBORAH R. HENSLER ET AL., CLASS ACTION DILEMMAS 22-25 (2000) (describing the increase in mass tort litigation during the 1980s); THOMAS E. WILLING ET AL., EMPIRICAL STUDY OF CLASS ACTIONS IN FOUR FEDERAL DISTRICT COURTS: FINAL REPORT TO THE ADVISORY COMMITTEE ON CIVIL RULES 61-62 (1996) (analyzing the timing and relationship between settlement and certification for class actions).

¹²⁶ See, e.g., FED. R. CIV. P. 23(b)(3) advisory committee’s note (observing that Rule 23(b)(3) “encompasses those cases in which a class action would achieve economies of time, effort, and expense, and promote uniformity of decision as to persons similarly situated, without sacrificing procedural fairness”); Nagareda, *supra* note 43, at 1107 (“For its proponents, certification of a class action promises to match allegations of wrongdoing on a mass scale with a commensurately aggregate mode of procedure.”).

¹²⁷ See *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 617 (1997) (“A class action solves this problem by aggregating the relatively paltry potential recoveries into something worth someone’s (usually an attorney’s) labor.” (quoting *Mace v. Van Ru Credit Corp.*, 109 F.3d 338, 344 (1997))); Zimmerman, *supra* note 16, at 1115-17 (discussing the purpose and function of class actions).

¹²⁸ See David Rosenberg, *Adding a Second Opt-Out to Rule 23(b)(3) Class Actions: Cost Without Benefit*, 2003 U. CHI. LEGAL F. 19, 27 (arguing that collectivized adjudication assures that mass production liability will minimize accident costs); David Rosenberg, *Mass Tort Class Actions: What Defendants Have and Plaintiffs Don’t*, 37 HARV. J. ON LEGIS. 393, 397-98 (2000) (explaining that aggregating claims creates economies of scale for plaintiffs to match the well-financed, global litigation strategies of corporate defendants).

¹²⁹ See William B. Rubenstein, *Why Enable Litigation?: A Positive Externalities Theory of the Small Claims Class Action*, 74 UMKC L. REV. 709, 710 (2006) (“The class action mechanism is important not just because it enables a group of litigants to conquer a collective action problem and secure relief, but also—perhaps more so—because the litigation it engenders produces external benefits for society.”); Jack B. Weinstein, *The Role of Judges in a Government of, by, and for the People: Notes for the Fifty-Eighth Cardozo Lecture*, 30 CARDOZO L. REV. 1, 174 (2008) (noting the significant procedural advantages

Like their civil counterparts, criminal class actions hold defendants directly accountable to large groups of victims who otherwise may have insufficient incentive or resources to litigate privately.¹³⁰ When a defendant harms many people, group criminal restitution awards satisfy victims' interests in compensation while forcing defendants to bear more of the social cost of the harm and deterring future criminal acts.¹³¹ In one case, for example, then-Deputy Attorney General Paul J. McNulty hailed a settlement with Prudential that included a \$270 million victim restitution fund as a "victory for the investing public."¹³² Chastising the "corporate con-men who stacked the deck" against individual investors, the agreement sent "a strong message to predatory traders who dupe the system to reap millions in illegal profits."¹³³ In another case, then-Attorney General Alberto Gonzales declared the \$715 million Adelphia criminal settlement with 10,000 victims as "a day of restitution for the victims of corporate corruption."¹³⁴

Civil and criminal class action settlements are also more efficient than traditional litigation. Class actions eliminate the time and expense associated with traditional one-on-one litigation, which other-

gained by consolidating actions); *see also* THOMAS E. WILLING, FED. JUDICIAL CTR., MASS TORTS PROBLEMS & PROPOSALS: A REPORT TO THE MASS TORTS WORKING GROUP (APPENDIX C) 20 (1999) ("Aggregating mass torts claims may provide an opportunity to correct more systematically the harms that products have caused [and] to meet more consistently and completely the compensation goals of the tort system . . .").

¹³⁰ Criminal class actions also give prosecutors the flexibility to hold defendants accountable without imposing the severe collateral costs that result from pursuing a criminal conviction. *See* Ashcroft, *supra* note 61 ("[Deferred prosecution agreements] avoid the destructiveness of indictments and allow companies to remain in business while operating under the increased scrutiny of federally appointed monitors."); *see also supra* note 109 and accompanying text (discussing collateral consequences of prosecution).

¹³¹ *Cf.* RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW 615-17 (7th ed. 2007) (observing that both class actions and criminal prosecutions similarly overcome collective action barriers to combat unlawful conduct).

¹³² Press Release, U.S. Dep't of Justice, Prudential Financial Subsidiary Agrees to Pay \$600,000,000 in Largest Resolution of Market Timing Case (Aug. 28, 2006) (quoting Paul J. McNulty, Deputy Attorney Gen.), *available at* <http://www.justice.gov/usao/ma/Press%20Office%20-%20Press%20Release%20Files/Prudential-Agreement/Prudential.pdf>.

¹³³ *Id.*

¹³⁴ Geraldine Fabrikant, *Rigas Family to Cede Assets to Adelphia*, N.Y. TIMES, Apr. 26, 2005, at C1; *see also* Press Release, U.S. Dep't of Justice, Beazer Homes USA Inc. Reaches \$50,000,000 Settlement of Mortgage and Accounting Fraud with United States (July 1, 2009), *available at* <http://www.justice.gov/usao/ncw/press/beazer.html> (describing a \$50 million victim restitution agreement for victims of mortgage fraud as "hold[ing] the company responsible for the fraud of its employees, and put[ting] money back in the hands of victimized home-owners" (quoting Edward R. Ryan, U.S. Attorney)).

wise involves months or years of the “same witnesses, exhibits and issues from trial to trial.”¹³⁵ Criminal class actions seek similar efficiencies. First, like class actions, a criminal restitution fund resolves a multitude of claims in a single case. Moreover, because of the pressures on defendants to settle early in the criminal process, large restitution agreements compensate victims quickly.¹³⁶ Large criminal restitution awards also satisfy a concern many victims’ rights advocates express: such awards save victims the litigation costs otherwise necessary to recover independently from wrongdoers in civil actions.¹³⁷

Finally, class action settlements attempt to compensate more equitably than traditional litigation. A class action settlement seeks to maximize recovery to plaintiffs as a whole, while creating procedures to protect the individual claims and interests of the members of the class action.¹³⁸ At the same time, class action settlements seek equity—to split the pie more fairly when defendants with limited funds are accused of massive harm.¹³⁹ Class action settlements thus aspire to strike

¹³⁵ *Jenkins v. Raymark Indus., Inc.*, 782 F.2d 468, 473 (5th Cir. 1986); *see also* WEINSTEIN, *supra* note 11, at 135-36 (noting that economies of scale reduce discovery and expert fee expenses); William W. Schwarzer, *Settlement of Mass Tort Class Actions: Order Out of Chaos*, 80 CORNELL L. REV. 837, 837 (1995) (identifying minimizing transaction costs as an objective of mass tort litigation).

¹³⁶ *See* Siskel Letter, *supra* note 46, at 2 (observing that criminal restitution agreements accomplish compensation “more quickly and efficiently . . . without the delays resulting from the formal charging of a company, the protracted litigation, post-conviction restitution hearings and administration, and appeals”).

¹³⁷ *See, e.g.*, Debbie Deem et al., *Victims of Financial Crime* (“Many victims cannot pay [an attorney] as a result of the crimes they’ve experienced. Although restitution can be enforced with civil judgments, the process for doing so in most states and federally is likely to be expensive and cumbersome . . .”), in VICTIMS OF CRIME, *supra* note 69, at 125, 139.

¹³⁸ *See* Nancy Morawetz, *Bargaining, Class Representation, and Fairness*, 54 OHIO ST. L.J. 1, 42-46 (1993) (considering a mixed model for class actions that balances individuals’ interests in their claims and settlement value in the aggregate). The idea that funds should compensate as many eligible claimants as equitably as possible is also reflected in the claim settlement procedures of many mass tort settlements forged through class actions and bankruptcy. *See, e.g.*, NGC Bodily Injury Trust, First Amended Claims Resolution Procedures at 1 (on file with authors) (“[T]he NGC Bodily Injury Trust shall treat similar claims with similar circumstances as equivalently as possible.”); UNR Asbestos-Disease Claims Trust, Claims Resolution Procedures, Annex B to the Proposed Trust Agreement, at 134-35 (1990) (on file with authors) (“The purpose of the Procedures is to provide fair payment to all persons . . . and the lowest feasible transaction costs shall be incurred in order to conserve resources and ensure, as much as possible, substantially equal payment for all valid claims.”).

¹³⁹ *See* FED. R. CIV. P. 23(b)(1)(B) (providing for class certification when litigating individual claims would impair the claims or interests of others not party to the litigation); Arthur R. Miller, *An Overview of Federal Class Actions: Past, Present and Future*, 4 JUST. SYS. J. 197, 211 (1978) (“The paradigm Rule 23(b)(1)(B) case is one in which

a balance between these competing goals. They attempt to match substantive awards with the merits of individual participants' injuries within the bounds of what is practical, feasible, and fair.

While no rules require the equitable distribution of a criminal class action settlement, actors supervising such funds have naturally adopted the same goals. In the *Computer Associates* criminal restitution fund, Kenneth R. Feinberg, the designated Special Master, summarized the distributive justice principles at play in a similar manner:

I have been guided in defining this Plan by two princip[le]s: first and foremost to fairly allocate and distribute the Fund to those individuals and entities who suffered damages . . . and second, to accomplish this task as efficiently as possible while still ensuring that all of those entitled will receive Notice and the opportunity to participate in the Fund.¹⁴⁰

Criminal class actions and civil class actions increasingly serve similar goals of compensatory justice: they both hold defendants accountable for widespread harm, at great economies of scale, in a way that strives to compensate victims commensurate with their losses.

B. *Criminal Class Action Settlement Problems*

Given that civil and criminal class actions serve many of the same compensatory goals, this Section first examines whether criminal class actions should exist at all. Because many civil class actions often follow on the coattails of a criminal proceeding,¹⁴¹ it is worth asking whether a prosecutor need bother with a large restitution fund. As set forth below, we argue that federal prosecutors should pursue a criminal class action only in limited cases, due to the costs such cases impose on the civil and criminal justice system.

Since we ultimately conclude that prosecutors can play a useful role in compensating some victim groups, we then examine what safeguards are needed to ensure fair compensation. Civil class action settlements have long demanded procedural protections that do not exist in the criminal justice system. All large private representative settlements—class actions, mass bankruptcies, and trustee suits—generally

there are multiple claimants to a limited fund There is a risk, if litigants are allowed to proceed on an individual basis, that those who sue first will deplete the fund and leave nothing for the late comers.”).

¹⁴⁰ Plan of Allocation for Restitution Fund, *supra* note 60, at 1.

¹⁴¹ See, e.g., Howard M. Erichson, *Coattail Class Actions: Reflections on Microsoft, Tobacco, and the Mixing of Public and Private Lawyering in Mass Litigation*, 34 U.C. DAVIS L. REV. 1, 46 (2000) (arguing to preserve the separation between government lawsuits and “coattail” class actions).

contain sophisticated rules to better serve the goals of accountability, efficiency, and equity in private litigation.¹⁴² Although such rules are far from perfect, they attempt to include many different claimants in a final settlement that provides efficient and equitable compensation.

The traditional justification for such safeguards is that class actions suffer from a principal-agent problem. Just as managers of a large corporation may not always serve the interests of their corporate shareholders, so it is between lawyers and plaintiffs in a large class-wide settlement.¹⁴³ In a class action settlement, a small group of actors—usually plaintiffs' class counsel—must effectively represent multiple stakeholders with potentially conflicting interests in a privately negotiated settlement.¹⁴⁴ Without rules, plaintiffs may lack the interest or ability to participate or monitor their representatives.¹⁴⁵ Worse, defense counsel may forge collusive, or “sweetheart,” deals with opposing counsel, compromising the efficiency and deterrent effect of class actions.¹⁴⁶ Moreover, class actions may produce inequitable results,

¹⁴² See, e.g., *Taylor v. Sturgell*, 553 U.S. 880, 900-01 (2008) (describing rules designed to ensure fairness in class actions and other representative lawsuits); see also *In re General Motors Corp. Pick-Up Truck Fuel Tank Prod. Liab. Litig.*, 55 F.3d 768, 796 (3d Cir. 1995) (reviewing Rule 23 class certification requirements).

¹⁴³ See John C. Coffee, Jr., *Understanding the Plaintiff's Attorney: The Implications of Economic Theory for Private Enforcement of Law Through Class and Derivative Actions*, 86 *COLUM. L. REV.* 669, 726 (1986) (explaining that the goal of class action reform should be to reduce agency costs between class counsel and its members); 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, 7-8 (1991) (arguing that class action attorneys operate according to their own personal interests with little oversight).

¹⁴⁴ See *Martin v. Wilks*, 490 U.S. 755, 762 n.2 (1989) (recognizing that strangers to a class action may be barred by the outcome if they have sufficiently similar interests as a party such that their interests were adequately represented), *superseded by statute*, Civil Rights Act of 1991, Pub. L. No. 102-166, § 108, 105 Stat. 1071, 1076; see also *Richards v. Jefferson Cnty.*, 517 U.S. 793, 798 (1996) (explaining that the judgment in the prior action may also bind a nonlitigant who is in privity with a party).

¹⁴⁵ See Christopher R. Leslie, *The Significance of Silence: Collective Action Problems and Class Action Settlements*, 59 *FLA. L. REV.* 71, 81 (2007) (arguing that plaintiffs are unlikely to monitor class counsel because no single plaintiff has a large enough stake in the claim and it is impracticable to coordinate all of the plaintiffs to help monitor). Others observe that without oversight, attorneys lack rational incentives to obtain fair settlements for their clients because attorneys may earn large fees by settling quickly. See, e.g., Jack B. Weinstein, *Ethical Dilemmas in Mass Tort Litigation*, 88 *NW. U. L. REV.* 469, 530 (1994) (suggesting that competitive bidding may address this problem).

¹⁴⁶ See John C. Coffee, Jr., *The Regulation of Entrepreneurial Litigation: Balancing Fairness and Efficiency in the Large Class Action*, 54 *U. CHI. L. REV.* 877, 883-89 (1987) (describing “sweetheart” settlements, in which the plaintiff's attorney trades a high fee award for a low recovery”); Leslie, *supra* note 145, at 79-83 (explaining that the inter-

favoring the interests of some plaintiffs over others or awarding attorney fees in ways that do not serve the interests of the class.¹⁴⁷

At first blush, prosecutors seem to present less of a principal-agent problem than private class counsel. Prosecutors have no independent financial stake in the final settlement. In some cases, Congress has even adopted policies to encourage government lawyers to act as watchdogs to ensure class action settlements are fair.¹⁴⁸ Under this rationale, public attorneys provide an “extra layer of security for the plaintiffs” and can ensure that abusive settlements are not approved without “a critical review.”¹⁴⁹ Finally, class action rules were designed, in part, to ensure that individuals who enforce the law as “private attorneys general” do so in the public interest.¹⁵⁰ Because a real attorney general is presumed to act in the public interest, such procedures would seem unnecessary.

Principal-agent problems exist, however, even when public officials are charged with representing victims’ interests. In a large criminal restitution fund, prosecutors are the primary officers charged

ests of class counsel and defendants are both met by settling early, which is often to the detriment of the plaintiffs).

¹⁴⁷ See, e.g., *Polar Int’l Brokerage Corp. v. Reeve*, 187 F.R.D. 108, 112 (S.D.N.Y. 1999) (explaining that the court must consider potential collusion between the class counsel and the defendants when approving a settlement); *In re Oracle Sec. Litig.*, 136 F.R.D. 639, 645 (N.D. Cal. 1991) (noting the lack of client oversight and the lack of adversity when the court approves fees at the end of litigation); see also Bruce L. Hay, *Asymmetric Rewards: Why Class Actions (May) Settle for Too Little*, 48 HASTINGS L.J. 479, 479 (1997) (articulating concerns about class counsel “selling out” and settling for less than reasonably possible).

¹⁴⁸ Under the Class Action Fairness Act of 2005 (CAFA), for example, class counsel must distribute copies of any class action notice to the DOJ and to all fifty state attorney general offices. 28 U.S.C. § 1715(b) (2006). The DOJ or the state attorney general may then intervene to ensure greater transparency and fairness in the settlement. See *id.* § 1715 (requiring courts to refrain from approving settlement until ninety days after service of the required notice to state and federal officials).

¹⁴⁹ 151 CONG. REC. 660 (2005) (statement of Sen. Herb Kohl); see also S. REP. NO. 109-14, at 34-35 (2005), reprinted in 2005 U.S.C.C.A.N. 3, 33-34 (explaining that Congress intended the Class Action Fairness Act notice provision “to combat the ‘clientless litigation’ problem”); see also 147 CONG. REC. 22,739-40 (2001) (statement of Sen. Chuck Grassley) (contending that class action lawyers may target state courts that are quick to certify a class and do not scrutinize settlement agreements, requiring federal legislation to remedy the problem).

¹⁵⁰ See *U.S. Parole Comm’n v. Geraghty*, 445 U.S. 388, 403 (1980) (contending that class action claims are more similar to the “private attorney general concept” than typical private litigation); *Deposit Guar. Nat’l Bank v. Roper*, 445 U.S. 326, 338 (1980) (noting that class actions made possible by contingent fee arrangements are increasingly used for the “vindication of legal rights”).

with soliciting victim input and providing compensation.¹⁵¹ Yet, prosecutors may fail to compensate victims appropriately because, like lead counsel in a class action, prosecutors have very different interests in reaching an agreement with defendants than victims do.¹⁵² Moreover, even the most well-meaning prosecutor may lack information necessary to effectively serve different classes of victims. Finally, in a large restitution fund, prosecutors may experience the same kinds of practical challenges that plaintiff attorneys face when they manage and distribute funds to large groups of people.¹⁵³ Civil class action rules thus provide a starting point for assessing what safeguards may be necessary to effect massive compensation in the criminal justice system.

We identify four common procedural problems with criminal class actions by comparing them to their civil counterparts. As set forth below, prosecutors lack the rules to (1) coordinate relief with other kinds of lawsuits, (2) afford victims a meaningful right to participate in their own redress, (3) ensure judges police potential conflicts of interest, and (4) provide guidelines for distributing the award.

1. Should Criminal Class Actions Exist?

To determine when prosecutors should seek collective compensation, one must first determine whether prosecutors should ever demand compensation for large classes of victims. After all, federal law already allows prosecutors to avoid restitution in any case involving multiple parties.¹⁵⁴ This is, in part, because complex restitution orders can delay sentences, impede criminal investigations, and prevent the prosecutor from obtaining cooperation from other criminal defendants. Large funds also impose enormous administrative and oppor-

¹⁵¹ See 18 U.S.C. § 3771(a) (affording crime victims the right to consult with the prosecuting attorney and to be heard at public proceedings); see also *supra* Section I.B (discussing the prosecutor's role in criminal class actions).

¹⁵² It is, in part, because of those conflicting interests that the Supreme Court has rejected attempts by state attorneys general to recover civil damages on behalf of state residents, absent express authorization from Congress. See *Hawaii v. Standard Oil Co.*, 405 U.S. 251, 266 (1972) (reasoning that there should be sufficient private attorneys to litigate antitrust laws since the statute provides the winning plaintiff with court costs and attorneys fees); cf. *Farmers Grp., Inc. v. Lubin*, 222 S.W.3d 417, 422 (Tex. 2007) (discussing insurance-policy class actions which the Department of Insurance, the Attorney General, or a private citizen may bring as authorized by statute).

¹⁵³ See *supra* Section I.A (describing common obstacles to providing victims fair notice, compensation, and representation).

¹⁵⁴ See 18 U.S.C. § 3663A(c)(3) (exempting prosecutors from providing restitution when it is impracticable due to the large number of victims, or is so complex that the burden it imposes on the sentencing system outweighs the need to provide restitution).

tunity costs. Government attorneys expend limited resources to process claims; prosecutors may even need to hire private counsel to distribute publicly obtained awards.¹⁵⁵ Large funds also force prosecutors to divert limited government resources away from prosecuting other crimes in order to provide mass compensation.

Alternatively, prosecutors wield enormous power when they forge large criminal settlements. Just as class actions were once attacked as “legalized blackmail,”¹⁵⁶ some have criticized the overpowering leverage prosecutors hold in criminal settlement negotiations.¹⁵⁷ Other critics argue criminal restitution agreements let corporations “off the hook” too easily.¹⁵⁸ Indeed, corporations arguably receive lighter penalties when prosecutors can tout the benefits of a large victim settlement. Given that some restitution funds require claimants to give up rights to recover money in private litigation, a targeted corporation may end up actually saving money by agreeing to a criminal settlement.

Nor is it clear that victims will receive more opportunities to participate in an agreement forged by a prosecutor. As set forth below, criminal class actions can be improved to ensure victims submit written statements, consult with prosecutors, and testify in court. But claimants already enjoy all of those rights in a class action settlement. In addition, there are no guarantees that a criminal class action settlement will result in a more equitable distribution than a civil class action settlement. Despite congressional efforts to use government attorneys to police the fairness of large class action settlements,¹⁵⁹ vic-

¹⁵⁵ See Roger A. Fairfax, *Delegation of the Criminal Prosecution Function to Private Actors*, 43 U.C. DAVIS L. REV. 411, 415-19 (2009) (describing the trend of “prosecution outsourcing” to private attorneys); see also *supra* note 20 and accompanying text (discussing the appointment of Kenneth R. Feinberg as the Special Master in *Computer Associates*).

¹⁵⁶ See *In re Rhone-Poulenc Rorer, Inc.*, 51 F.3d 1293, 1298-99 (7th Cir. 1995) (referring to settlements of low-probability claims that could impose enormous liability as “blackmail settlements” (citing HENRY J. FRIENDLY, *FEDERAL JURISDICTION: A GENERAL VIEW* 125 (1973)); Milton Handler, *The Shift from Substantive to Procedural Innovations in Antitrust Suits—The Twenty-Third Annual Antitrust Review*, 71 COLUM. L. REV. 1, 9 (1971) (characterizing class actions as blackmail because they impose “the threat of unmanageable and expensive litigation”).

¹⁵⁷ See *supra* note 117 and accompanying text (citing critics of prosecutorial power over DPA and NPA settlements).

¹⁵⁸ See Press Release, Citizen Works, Ralph Nader, Citizen Works Criticize Wall Street Settlement as an Anemic Slap on the Wrist (Apr. 28, 2003), available at <http://www.citizenworks.org/admin/press/secsettle-pr.php> (describing a “miniscule and potentially tax-deductible” settlement as the “inevitable conclusion of weak white-collar prosecution,” which does not “offer a credible deterrent”).

¹⁵⁹ See *supra* notes 148-49 and accompanying text.

tims do not necessarily benefit more when their claims are managed by public, rather than private, attorneys.

In light of these costs, the comparative benefits of a large restitution fund seem small, particularly if private parties have already resolved their claims in a class action settlement. Some argue that class actions could be improved by competition, and have called for dueling civil class actions, where rival attorneys organize separate competing class actions to attract claimants unsatisfied with another, already approved, class settlement.¹⁶⁰ Criminal class actions could conceivably play this role. However, the limited benefits of competition are likely to be outweighed by the additional costs of the duplicative, large-scale litigation.¹⁶¹

Large criminal restitution funds offer some other advantages, however. Criminal class actions may be warranted when there are legal or practical obstacles to a civil class action. For example, when many different state laws apply to a business that commits nationwide fraud, attorneys may not be able to certify a class action.¹⁶² Courts may also deny certification when putative class members, their class representatives, or their class counsel have insuperable conflicts of interest.¹⁶³ In contrast, a federal prosecutor may be able to provide compensation to many different people under a uniform federal criminal restitution law.¹⁶⁴

¹⁶⁰ See John C. Coffee, Jr., *Class Action Accountability: Reconciling Exit, Voice, and Loyalty in Representative Litigation*, 100 COLUM. L. REV. 370, 436-37 (2000) (arguing for a market-based approach to better align client and class-counsel interests).

¹⁶¹ See Geoffrey P. Miller, *Overlapping Class Actions*, 71 N.Y.U. L. REV. 514, 516 (1996) (contending that multistate class action policy attempts to balance the mutually exclusive goals of enforcing the law and respecting state sovereignty); Rhonda Wasserman, *Dueling Class Actions*, 80 B.U. L. REV. 461, 462-63 (2000) (detailing problems of waste in dueling class actions).

¹⁶² See, e.g., *In re Bridgestone/Firestone, Inc., Tires Prods. Liab. Litig.*, 288 F.3d 1012, 1018 (7th Cir. 2002) (stating that claims are not manageable if they are to be adjudicated under the disparate laws of the fifty states and multiple territories); *Spence v. Glock*, 227 F.3d 308, 311 (5th Cir. 2000) (observing that variations in the law "may swamp any common issues and defeat predominance" (quoting *Castano v. Am. Tobacco Co.*, 84 F.3d 734, 741 (5th Cir. 1996))).

¹⁶³ See, e.g., *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 864 (1998) (finding that separate settlements of different subclasses presented conflicting interests); *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 600 (1997) (discussing an asbestos litigation negotiated by several different steering committees that had conflicting interests); *Reynolds v. Beneficial Nat'l Bank*, 288 F.3d 277, 284 (7th Cir. 2002) (describing "suspicious circumstances" behind the settlement negotiations in that case).

¹⁶⁴ Such a determination may raise federalism concerns that are beyond the scope of this paper. For almost twenty years, class action scholars have debated the merits of a single federal law to permit parties to bring class action claims. See AM. LAW INST.,

Criminal class actions also offer advantages in cases where there are practical obstacles to civil litigation, like when victims fear retaliation or reprisal. Victims, quite understandably, may be hesitant to commence a class action against defendants involved in organized crime.¹⁶⁵ Employees of a target company may avoid lawsuits under “wage and hour” laws out of a fear of losing their jobs.¹⁶⁶ Undocumented immigrants shy away from litigation out of a fear of deportation.¹⁶⁷ In such cases, prosecutors may find that the interest in collectively compensating victims is still warranted.

Finally, there may be rare cases in which criminal class actions enjoy a competitive advantage over civil litigation. There may be cases in which the amount of compensation to each victim is easily calculated and providing additional procedural protections, like mailing individual notice and providing separate counsel to victims, is unnecessary. For example, some consumer class actions may involve very similar kinds of victims who suffer almost identical, very minor damages. There may be less need for the additional protections (and related

COMPLEX LITIGATION PROJECT § 6.01 cmt. a (Proposed Final Draft 1993) (explaining the desirability of applying the tort law of a single state to a particular issue that is common to all claims); Larry Kramer, *Choice of Law in Complex Litigation*, 71 N.Y.U. L. REV. 547, 549-50 (1996) (supporting uniform federal law to govern complex litigation); Simon C. Symeonides, *The ALI's Complex Litigation Project: Commencing the National Debate*, 54 LA. L. REV. 843, 852 (1994) (considering Congress's “power to federalize the law of choice of law” for complex litigation). It is worth considering whether competing concerns of efficient restitution may, in some cases, override such federalism concerns.

¹⁶⁵ See, e.g., *United States v. Agate*, 613 F. Supp. 2d 315, 326-27 (E.D.N.Y. 2009) (awarding restitution in a criminal action involving sixty-two defendants of the Gambino crime family).

¹⁶⁶ See *Mitchell v. Robert DeMario Jewelry, Inc.*, 361 U.S. 288, 292 (1960) (“[I]t needs no argument to show that fear of economic retaliation might often operate to induce aggrieved employees quietly to accept substandard conditions.”); Craig Becker & Paul Strauss, *Representing Low-Wage Workers in the Absence of a Class: The Peculiar Case of Section 16 of the Fair Labor Standards Act and the Underenforcement of Minimum Labor Standards*, 92 MINN. L. REV. 1317, 1326-28 (2008) (explaining that participation in wage and hour claims is difficult to secure because of high turnover rates and frequent changes of addresses among low-wage workers).

¹⁶⁷ See, e.g., Jennifer M. Chacón, *Tensions and Trade-Offs: Protecting Trafficking Victims in an Era of Immigration Enforcement*, 158 U. PA. L. REV. 1609, 1612 (2010) (“Unauthorized peoples are more vulnerable to threats because they know that efforts to seek legal recourse can result in protracted immigration detention, criminal prosecution, and, of course, removal.”); Orde F. Kittrie, *Federalism, Deportation, and Crime Victims Afraid to Call the Police*, 91 IOWA L. REV. 1449, 1453 (2006) (pointing to a survey finding that undocumented workers were reluctant to pursue claims against employers because of their immigration status (citing ABEL VALENZUELA, JR. ET AL., ON THE CORNER: DAY LABOR IN THE UNITED STATES (2006), available at http://www.sscnet.ucla.edu/issr/csup/upload_files/Nat_DayLabor-On_the_Corner.pdf)).

costs) of a class action for those victims. By saving attorneys' fees associated with civil litigation, the criminal class action may produce more efficient and fair compensation for victims. Prosecutors in many cases, however, may lack the ability or resources to estimate the comparative costs and benefits of procedures in a criminal or civil class action.

Given these advantages, we argue in Part III that prosecutors should consider criminal class actions when there are legal or practical obstacles to a civil lawsuit.

2. No Rules to Coordinate with Other Actions

Even when class actions may be warranted, criminal class actions lack rules to coordinate effectively with civil actions involving the same defendants and plaintiff-victims. In civil litigation, a judge must carefully consider whether common claims should proceed through a class action.¹⁶⁸ Rules also exist for coordinating claims across state and federal lines. The Judicial Panel on Multidistrict Litigation (JPML) may appoint a single federal judge to coordinate pretrial proceedings for overlapping civil actions pending in different districts, which themselves often fuel aggregate settlements.¹⁶⁹ In addition, class action settlements bar eligible recipients from participating in future related actions, so long as they participate voluntarily or receive adequate representation in the original suit.¹⁷⁰

In contrast, prosecutors lack rules to determine when they should seek to compensate victims through a criminal class action, even though other civil lawsuits may accomplish the same goal more efficiently and fairly. Prosecutors are only informed that they should "consider" private litigation and other "non-criminal" alternatives when deciding whether to charge a corporation.¹⁷¹ Even highly touted

¹⁶⁸ FED. R. CIV. P. 23(b)(3) (requiring that, to maintain a class action, the court must find that issues common to all class members predominate over issues pertinent to individual class members only).

¹⁶⁹ See 28 U.S.C. § 1407 (2006) ("When civil actions involving one or more common questions of fact are pending in different districts, such actions may be transferred to any district for coordinated or consolidated pretrial proceedings."). In practice, the multidistrict litigation statute has led to global settlements and resolutions for thousands of complex cases. See generally Richards, *supra* note 13 (collecting and evaluating over four years of multidistrict litigation transfer orders).

¹⁷⁰ See 18A CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 4455, at 448 (2d ed. 2002 & Supp. 2004) ("[P]reclusion by representation lies at the heart of the modern class action."); see also Samuel Issacharoff, *Preclusion, Due Process, and the Right to Opt Out of Class Actions*, 77 NOTRE DAME L. REV. 1057, 1057 (2002) (discussing due process limitations on binding litigants to different types of class proceedings).

¹⁷¹ U.S. ATTORNEYS' MANUAL, § 9-28.1100 (2008), available at <http://www.justice.gov/>

government “task forces,” in which prosecutors coordinate with other agencies, do not publish guidelines detailing how prosecutors should account for private litigation involving the same corporate misconduct.¹⁷²

Moreover, once prosecutors have charged a corporate defendant, federal law seems to provide little leeway for judges and prosecutors to account for parallel civil litigation.¹⁷³ Rather, prosecutors must seek full restitution regardless of any pending litigation until after victims receive other payment.¹⁷⁴ In some cases, this policy leads to perverse results. To avoid compensating victims twice, a criminal restitution fund may require that victims waive rights to private settlement before they even know the nature and size of a civil award.¹⁷⁵

Finally, unlike in complex civil litigation, federal courts lack rules to coordinate overlapping criminal and civil cases across state lines. Constitutional and institutional concerns may limit the prosecutors’

usao/eousa/foia_reading_room/usam/title9/28mcrm.htm#9-28.900.

¹⁷² The DOJ relies upon “task forces” to coordinate efforts between agencies and government attorneys in cases of financial fraud, environmental crimes, and consumer harm. *See, e.g.*, Exec. Order No. 13,519, 3 C.F.R. 271 (2010) (establishing the Financial Fraud Enforcement Task Force); Tracy Russo, *Mortgage and Financial Fraud*, U.S. DEP’T JUST. JUST. BLOG (Nov. 24, 2009), <http://blogs.usdoj.gov/blog/archives/425> (describing the Task Force as a “model of inter-agency and inter-governmental cooperation, bringing together senior-level officials from no fewer than 20 federal agencies and regulatory bodies, as well as our partners in state and local government”). For example, two-thirds of the federal pretrial criminal agreements between criminal prosecutors and corporate defendants that we examined were accompanied by agency actions by agencies such as the SEC, the U.S. Postal Service, the EPA, the Nuclear Regulatory Agency, and even NASA. *See* Garrett, *supra* note 17, at 938 app. A (noting parallel agency actions); Garrett & Ashley, *supra* note 21 (listing agreements and their jurisdictions).

¹⁷³ *See* 18 U.S.C. § 3664(f)(1)(B) (“In no case shall the fact that a victim has received or is entitled to receive compensation with respect to a loss from insurance or any other source be considered in determining the amount of restitution.”); *United States v. Cienfuegos*, 462 F.3d 1160, 1168 (9th Cir. 2006) (holding that the district court abused its discretion in considering the civil availability of restitution in a criminal case). *But see* *United States v. McCracken*, 487 F.3d 1125, 1128-29 (8th Cir. 2007) (observing that the amount of money the government seized from the defendant bank robber would be offset against the full ordered restitution once the seizure was paid to the court); *United States v. Ruff*, 420 F.3d 772, 774 (8th Cir. 2005) (remanding to district court to allow forfeiture amount already received to offset ordered restitution).

¹⁷⁴ *See* 18 U.S.C. § 3664(j)(2) (stating that restitution “paid to a victim under an order of restitution shall be reduced by any amount *later* recovered as compensatory damages for the same loss by the victim” in federal or state civil proceedings (emphasis added)); *see also* *United States v. Brennan*, 526 F. Supp. 2d 378, 390 (E.D.N.Y. 2007) (discussing 18 U.S.C. § 3663(j) and related court decisions).

¹⁷⁵ *See* *United States v. Rigas (In re W.R. Huff Asset Mgmt. Co.)*, 409 F.3d 555, 563 (2d Cir. 2005) (holding that the district court did not err in approving a settlement fund and indemnity agreement that might fail to compensate the many victims fully).

ability to consolidate criminal cases into the same court as a civil case. Many criminal cases against corporations may involve individual criminal defendants with venue rights that limit the prosecutors' ability to charge in the same jurisdiction in which a private lawsuit may be filed.¹⁷⁶ Moreover, U.S. Attorney offices in different jurisdictions have different demands and different case loads, and prosecutors generally may allocate resources from office to office in light of their disparate needs.

Prosecutors need better rules to coordinate criminal class actions with other forms of civil litigation. Otherwise, uncoordinated criminal class action settlements waste agency and judicial resources, may over-compensate victims, and frustrate the finality and peace that the defendant ordinarily seeks in class action settlements and other forms of representative litigation. Part III accordingly proposes (1) that prosecutors account for the likelihood of civil litigation and (2) the creation of a judicial panel to coordinate competing criminal and civil claims.

3. No Rules to Ensure Victims Meaningfully Participate

Unlike civil litigation, criminal class actions lack rules to ensure victims adequate voice in the restitution process. Civil class action settlements have long observed rules that encourage participation. Any civil class action settlement must provide individual notice of the action to all putative class members.¹⁷⁷ Judges may divide parties into specific interest groups—called “subclasses”—represented by separate counsel,¹⁷⁸ or they may hold fairness hearings, designed to solicit objections and produce other evidence about the fairness of the settlement.¹⁷⁹ Judges may then appoint special masters to oversee negotia-

¹⁷⁶ See U.S. CONST. amend. VI (affording defendants the right to a jury trial in the state and district where the crime was committed); see also *United States v. Cabrales*, 524 U.S. 1, 9-10 (1998) (limiting prosecution to the state where alleged money laundering took place). Under the Federal Rules of Criminal Procedure, a defendant can move for a change of venue to avoid substantial prejudice, for the convenience of parties and witnesses or in the interest of justice. FED. R. CRIM. P. 21(a)-(b); see also *Platt v. Minn. Mining & Mfg. Co.*, 376 U.S. 240, 245-46 (1964) (holding that a respondent's home office “has no independent significance” in determining whether to transfer venue, but courts may consider it as part of the convenience inquiry).

¹⁷⁷ FED. R. CIV. P. 23(c)(2); see also *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 173 (1974) (requiring individualized notice to each class member).

¹⁷⁸ FED. R. CIV. P. 23(c)(5); see also *MANUAL FOR COMPLEX LITIGATION (FOURTH)* § 21.23 (2004) (discussing the role of subclasses).

¹⁷⁹ See FED. R. CIV. P. 23(e) (directing courts to approve a class settlement only after a hearing and a finding that the settlement is “fair, reasonable, and adequate”). Of course, parties who do not want to participate may opt out of the settlement, except in

tions between representative parties.¹⁸⁰ In so doing, class action settlements attempt to give participants at least some chance to have “transformative exchanges about . . . social and moral values.”¹⁸¹

In contrast, criminal class actions lack rules to ensure victim participation in complex distribution decisions. As we discuss above, federal laws designed to ensure victim participation expressly exempt cases that involve multiple parties, complex issues of law or fact, or difficult questions of causation.¹⁸² It is unclear whether any federal law governs the victim restitution funds that form a part of many pretrial diversion agreements. Those cases that are governed by federal law say little about how prosecutors should encourage victim participation.¹⁸³ DOJ guidelines only state that, in some cases, “responsible officials *may* publish a notice . . . designed to reach as many victims as possible.”¹⁸⁴ No rules ensure that the interests of different categories of victims hurt by the same conduct are fairly represented.

As a result, large restitution funds lack procedures to notify victims, collect information necessary to calculate damages, or resolve conflicts between competing claims. For example, when BP America settled with federal prosecutors after allegedly attempting to corner the propane market, the DPA called for the appointment of a “Third Party Administrator” to formulate a distribution plan within a year.¹⁸⁵ No process in the agreement required the administrator to notify interest-

limited, well-defined circumstances. See FED. R. CIV. P. 23(c)(3)(B), (d)-(e) (describing opportunities for exclusion and objections to the settlement).

¹⁸⁰ MANUAL FOR COMPLEX LITIGATION (FOURTH) § 22.91 (2004) (observing that a judge may appoint a magistrate judge, a special master, or even a settlement judge to oversee and facilitate settlement); see also *In re Simon II Litig.*, No. 00-5332, 2002 WL 862553, at *1 (E.D.N.Y. Apr. 23, 2002) (describing a special master’s attempts to reach negotiated settlement in tobacco class action suits); *Lindsey v. Dow Corning Corp. (In re Silicone Gel Breast Implant Prods. Liab. Litig.)*, Nos. 92-10000, 94-11558, 1994 WL 578353, at *23 (N.D. Ala. Sept. 1, 1994) (approving a settlement negotiated by three court-appointed independent persons).

¹⁸¹ Judith Resnik et al., *Individuals Within the Aggregate: Relationships, Representation, and Fees*, 71 N.Y.U. L. REV. 296, 382 (1996).

¹⁸² See *supra* subsection I.B.1.

¹⁸³ Federal law gives judges substantial discretion in these cases. See 18 U.S.C. § 3771(d)(2) (2006) (“In a case where the court finds that the number of crime victims makes it impracticable to accord all of the crime victims the rights described in subsection (a), the court shall fashion a reasonable procedure to give effect to this chapter that does not unduly complicate or prolong the proceedings.”).

¹⁸⁴ U.S. DEP’T OF JUSTICE, *supra* note 99, at 41 (emphasis added).

¹⁸⁵ See Deferred Prosecution Agreement, *supra* note 48, at 9-11.

ed parties about the terms of the plan, although the court did require BP America to notify potential victims of the restitution fund.¹⁸⁶

Without rules that require prosecutors to gather information, prosecutors may grossly miscalculate damages among multiple victims. In one recent case, Tom Petters, otherwise known as the “Minnesota Madoff,” was sentenced to fifty years in prison for a multibillion-dollar Ponzi scheme.¹⁸⁷ After receiving nearly 100 objections to the prosecutor’s proposed distribution plan, the district court charged with overseeing the award found that the plan was plagued by “incomplete” information, errors, and revisions that dropped multi-million-dollar claims without any explanation:¹⁸⁸

For example, one victim’s initial claim was more than \$320 million, which was reduced to approximately \$139 million on the Government’s preliminary victim list. With its final list, however, that victim (and its large claim, which accounts for over 5% of the restitution total) has been deleted entirely. The Government’s ostensible basis for doing so is the following cursory explanation: “Claim withdrawn.” Besides having difficulty accepting that one would be willing to easily forego a nine-figure sum, the Court finds nothing in the record to support the assertion that the victim has decided to drop its restitution claim.¹⁸⁹

Some private administrators appointed to oversee criminal restitution funds have solicited input from potential stakeholders with some success.¹⁹⁰ However, no rule requires that they do so.¹⁹¹

¹⁸⁶ *Id.* at 12. The agreement required the administrator to develop victim identification procedures. *Id.* at 10.

¹⁸⁷ Anthony Lake, *Tom Petters, the “Minnesota Madoff,” Gets 50 Years out of Potential 335 Years for \$3.7 Billion Ponzi Scheme*, FED. CRIM. DEF. BLOG (Apr. 9, 2010), <http://www.federalcriminaldefenseblog.com/2010/04/articles/ponzi-schemes/tom-petters-the-minnesota-madoff-gets-50-years-out-of-potential-335-years-for-37-billion-ponzi-scheme/>.

¹⁸⁸ *United States v. Petters*, No. 08-0364, 2010 WL 2291486, at *1-2 (D. Minn. June 3, 2010).

¹⁸⁹ *Id.* at *2.

¹⁹⁰ The administrator in *Computer Associates*, Kenneth R. Feinberg, underscored the importance of meeting with victims to hear input about the distribution plan, stating, “I have a substantive challenge: What should the formula be for the distribution? But I also have a mechanical challenge of how best, in a cost-effective way, to get the money out to eligible claimants and how best to cut checks.” Morgenson, *supra* note 3.

¹⁹¹ Because *Petters* involved a criminal conviction, victims were able to object to, and the court was authorized to review, the sufficiency of victim restitution in that case. As we discuss below, when prosecutors resolve criminal cases before filing criminal charges, there is no opportunity for judicial review. While victims may raise objections to a DPA in court, *see* 18 U.S.C. § 3771(d)(3) (2006), judicial intervention is rare, and at such a late stage, victim input may come too late to effect any changes to the agreement. *See infra* note 198 and accompanying text.

Prosecutors, probation officers, and victim-witness coordinators also lack rules to categorize divergent interests and efficiently deal with stakeholders who may have conflicting interests in the award. Like a class action, a criminal restitution fund involves many different people with very different interests. As a result, it will not be enough for officials simply to notify parties affected by the criminal's misdeeds, presume that they all share the same interests, or gather limited information about the victims' damages.¹⁹² They need to identify and classify victims' interests and, if necessary, ensure that those interests are adequately represented. Otherwise, some interest groups may be ignored in the restitution process, rendering the calculation and method of distribution ineffective.¹⁹³

Of course, the goals and demands of the criminal justice system may warrant different procedural and distributive standards. After all, criminal procedures do not have to mimic the procedures and standards that exist in private litigation. However, when prosecutors fail to include victims in the formation of a settlement, they sacrifice important democratic values associated with victim participation. They also miss an important opportunity to calculate damages, identify different interests, and force wrongdoers to account accurately for the harm they cause. Criminal class action settlements need rules that identify different stakeholders and encourage their involvement early in the settlement process. Part III proposes the use of negotiated rulemaking—a solution that in many ways resembles the way a judge might settle a class action—as a possible answer.

4. No Rules to Protect Victims from Potential Conflicts of Interest

Criminal class actions also lack rules to limit conflicts of interest. In contrast, other forms of representative litigation rely on judicial review to police conflicts of interest. Unlike individual settlement negotiations, where judges provide very little judicial review out of respect

¹⁹² See, e.g., *United States v. Rubin*, 558 F. Supp. 2d 411, 426 (E.D.N.Y. 2008) (observing that the government need only “gather from victims and others the information needed to list the amounts subject to restitution in the report”).

¹⁹³ Lawmakers originally sought to provide victims with separate attorney representation to ensure that all stakeholders' interests were adequately represented. However, the proposal was not included in the final version of the Crime Victim Rights Act of 2004. See 150 CONG. REC. 7306 (2004) (statement of Sen. Patrick Leahy) (noting that the bill does not “allow courts to appoint attorneys to help crime victims”).

for the parties' litigation choices,¹⁹⁴ judges in representative litigation carefully review settlements to police potential conflicts of interest between counsel and the represented parties. In such cases, judges must review settlements to ensure that the lawyers serve their clients and the settlement fairly allocates awards among different parties.¹⁹⁵ Judges may also require counsel, mediators, or experts in the settlement to offer detailed explanations for their decisions.¹⁹⁶ Judges often apply heightened scrutiny to class actions settled early in the settlement process, where it is otherwise "difficult to assess the strength and weaknesses of the parties' claims."¹⁹⁷ Finally, judges look for signs of collusion, as in cases where class actions settle for a small amount compared to the harm alleged, or when the settlement leaves out whole classes of victims.

In contrast, many criminal class action settlements lack meaningful judicial review, or for that matter, any review at all.¹⁹⁸ In most cases, federal courts review settlement plans with great deference to the prosecutor or the designated third-party administrator. When

¹⁹⁴ See *SEC v. Bank of Am. Corp.*, 653 F. Supp. 2d 507, 508 (S.D.N.Y. 2009) ("[A]n ordinary civil settlement that includes dismissal of the underlying action is close to unreviewable.").

¹⁹⁵ See, e.g., *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 619-20 (1997) (explaining that a court's "close inspection" of a settlement is proper); *Synfuel Techs., Inc. v. DHL Express (USA), Inc.*, 463 F.3d 646, 648 (7th Cir. 2006) (vacating a district court's settlement approval "because the court did not adequately evaluate whether the settlement is fair to class members"); *Mirfasihi v. Fleet Mortg. Corp.*, 356 F.3d 781, 785-86 (7th Cir. 2004) (rejecting a settlement that excluded an entire class without a reasoned explanation); see also John C. Coffee, Jr., *Conflicts, Consent, and Allocation After Amchem Products—Or, Why Attorneys Still Need Consent to Give Away Their Clients' Money*, 84 VA. L. REV. 1541, 1545 (1998) (observing that class counsel will often have no incentive to "resist an allocation plan favored by the defendant, who often has an interest in preferring one subgroup within the class over another").

¹⁹⁶ See, e.g., *Isby v. Bayh*, 75 F.3d 1191, 1198-99 (7th Cir. 1996) (discussing factors to be considered in the evaluation of a settlement agreement, including counsel opinions); *Murillo v. Tex. A&M Univ. Sys.*, 921 F. Supp. 443, 445 (S.D. Tex. 1996) (finding a presumption of a settlement's fairness where, among other things, counsel has engaged in "sufficient discovery"); MANUAL FOR COMPLEX LITIGATION (FOURTH) § 21.612-62 (2004) (discussing review of settlement agreements and citing cases in which courts apply close scrutiny for potential conflicts of interest, particularly when there has been "little or no discovery" to test the "strengths and weaknesses" of each party's position).

¹⁹⁷ MANUAL FOR COMPLEX LITIGATION (FOURTH) § 21.612; see also *In re Matzo Food Prods. Litig.*, 156 F.R.D. 600, 604 (D.N.J. 1994) (noting that "the factual record . . . must be sufficiently developed" before a court can approve a settlement); Jonathan R. Macey & Geoffrey P. Miller, *Judicial Review of Class Action Settlements*, 1 J. LEGAL ANALYSIS 167, 192 (2009) (recommending heightened judicial scrutiny for "shotgun" class action settlements that occur very early in the litigation).

¹⁹⁸ See *supra* notes 115-16 and accompanying text (noting judicial defence to DPAs and NPAs); see also *infra* Section III.C (arguing for "hard look" review).

settlement funds are the product of nonprosecution agreements, they receive almost no judicial scrutiny.

There may be good reasons for criminal class action settlements to follow different rules. Unlike private attorneys in a class action, prosecutors do not have an independent financial stake in the outcome. Some argue that civil class actions could more legitimately serve the interests of claimants when they are monitored by “neutral” government attorneys or other public officials.¹⁹⁹ Under this view, criminal class actions accomplish just that by relying entirely on government attorneys to take charge of the settlement.

Finally, courts owe prosecutors deference to the extent that a criminal class action settlement reflects the prosecutors’ decision not to prosecute violations of law.²⁰⁰ In contrast to purely private actions, which ordinarily implicate only private interests, criminal prosecutions are intended to serve the public. As we discuss below in Part III, prosecutors need flexibility to allocate their resources when fighting crime. Judicial review of criminal class action settlements also raises weighty constitutional and policy concerns, particularly when courts intervene in prosecutorial enforcement decisions.²⁰¹

However, because prosecutors have different interests than the victims they compensate, additional judicial review may be necessary to ensure that the entire settlement is fair. Prosecutors may seek quick settlements to conserve resources, to avoid collateral consequences to corporate defendants, to hide their own embarrassing missteps, or to compete with other prosecutors.²⁰² Prosecutors may also lack appropriate incentives to address victims’ interests.²⁰³ All of these

¹⁹⁹ See *supra* notes 148-50 and accompanying text.

²⁰⁰ See *infra* notes 278-88 and accompanying text (discussing the proper scope of prosecutorial discretion).

²⁰¹ See *id.*

²⁰² See *supra* notes 61-64, 118-22, and accompanying text (discussing prosecutors’ incentives to enter into DPAs and NPAs); see also Jeremy Pelofsky, *Virginia Prosecutor Wants in on Big Fraud Cases*, REUTERS, May 21, 2010, available at <http://www.reuters.com/article/idUSTRE64K5WT20100521> (observing a rivalry between U.S. Attorney Offices in Virginia and New York to take on “the largest and most significant cases”).

²⁰³ Federal law recognizes that the interests of prosecutors and victims may diverge. As discussed in subsection II.B.1, under the Crime Victims’ Rights Act, the DOJ established a Victim’s Rights Ombudsman to hear victim complaints about the federal prosecutor handling the case. 18 U.S.C. § 3771(f)(2)(A) (2006). Victims may move separately in federal court when the district court denies the relief sought. *Id.* § 3771(d)(3). Those protections are not sufficient in cases with multiple victims. Putting aside the express exceptions for restitution in “complex” or “multiple” victim cases, victims may not be sophisticated or active enough to petition the ombudsman or court to vindicate their interests.

conditions threaten the ultimate fairness of any final criminal class action settlement.

Recently, some courts have scrutinized criminal class action settlements. Days before sentencing, Judge Jack B. Weinstein, an experienced jurist and scholar in the area of mass litigation, found that the U.S. Attorney for the Eastern District of New York had failed to justify her decision not to seek restitution for thousands of victims of a \$100 million advertising scheme by *Newsday*.²⁰⁴ The court appointed a magistrate judge to examine the sufficiency of notice, the identities of the victims who recovered funds, and the sufficiency of the entire settlement.²⁰⁵ Judge Weinstein ultimately found that the prosecutor's refusal to seek more compensation was justified after the prosecutor submitted evidence that notice was sufficient and that *Newsday* paid over \$90 million to victims.²⁰⁶ However, absent prodding by the court, questions critical to the task of complex compensation might have gone unaddressed.

Of course, because the *Newsday* case involved a number of criminal convictions and pleas, the court was statutorily authorized to review the sufficiency of victim restitution.²⁰⁷ Had the prosecutors in those cases settled before filing criminal charges, there may have been no opportunity for judicial review.

Commentators have questioned the effectiveness of judicial review in class action settlements, noting that courts themselves may lack information necessary to evaluate the fairness of a settlement.²⁰⁸ At a minimum, however, courts can demand that prosecutors explain the

²⁰⁴ *United States v. Brennan*, 526 F. Supp. 2d 378, 391 (E.D.N.Y. 2007) (noting that although the court asked the government to consider restitution, it remained unaddressed). Newspaper publishers *Newsday* and Hoy agreed to pay forfeiture to the United States in the amount of \$15 million and another \$90 million to advertisers. See Agreement Between *Newsday, Inc.*, Hoy Publ'ns LLC, & the U.S. Attorney's Office for the Eastern Dist. of N.Y. at 4, 6, *In re Newsday Litig.*, No. 08-0096 (E.D.N.Y. Dec. 12, 2007), available at http://lib.law.virginia.edu/Carrett/prosecution_agreements/pdf/newsday.pdf.

²⁰⁵ *United States v. Brennan* (*In re Newsday Litig.*), No. 08-0096, 2008 WL 4279570, at *1 (E.D.N.Y. Sept. 18, 2008) (reporting the magistrate's findings).

²⁰⁶ *Id.* at *2-3.

²⁰⁷ Federal courts can reject a plea agreement and order restitution as part of a conviction. See FED. R. CRIM. P. 11(c)(5) (detailing the procedures for accepting or rejecting a plea agreement); U.S. SENTENCING GUIDELINES MANUAL § 8A1.2(a)-(b) (2007) (describing judicial discretion to assess fines or civil restitution).

²⁰⁸ See, e.g., Samuel Issacharoff, *Class Action Conflicts*, 30 U.C. DAVIS L. REV. 805, 808 (1997) (noting judges' "lack of access to quality information" and dependence on the parties involved); William B. Rubenstein, *The Fairness Hearing: Adversarial and Regulatory Approaches*, 53 UCLA L. REV. 1435, 1445 (2006) (observing that judges "suffer from a remarkable informational deficit in the fairness-hearing process").

complex trade-offs they have made in arriving at a settlement and require a reasonable decisionmaking process when prosecutors arrive at a distribution that affects restitution to thousands of potential victims. In so doing, courts can police conflicts of interest in criminal class actions without compromising prosecutorial discretion. Part III accordingly argues that courts should review criminal class action settlements with the “hard look” that the court implicitly endorsed in the *Newsday* case.

5. No Rules to Distribute Awards Equitably

Prosecutors also lack standards for distributing awards. In class action litigation, courts review whether the settlement roughly approximates the merits of plaintiffs’ claims.²⁰⁹ Courts and administrators also attempt to assure “horizontal equity”—when funds compensate similarly situated plaintiffs equally. Finally, class action settlements seek “rough justice” in cases where individual damage calculations are difficult.²¹⁰ Rough justice means that representatives may adjust or average settlement amounts in light of the practical limitations of compensating many people through a massive settlement scheme.²¹¹ In

²⁰⁹ See FED. R. CIV. P. 23(e)(2) (“If the proposal would bind class members, the court may approve it only after a hearing and on finding that it is fair, reasonable and accurate.”); see also Rubenstein, *supra* note 208, at 1468-71 (noting cases that supplement and explain the requirements of Rule 23(e)). Federal courts have developed a common set of factors, which include:

- (1) likelihood of recovery, or likelihood of success;
- (2) amount and nature of discovery or evidence;
- (3) settlement terms and conditions;
- (4) recommendation and experience of counsel;
- (5) future expense and likely duration of litigation;
- (6) recommendation of neutral parties, if any;
- (7) number of objectors and nature of objections; and
- (8) the presence of good faith and the absence of collusion.

4 ALBA CONTE & HERBERT B. NEWBERG, *NEWBERG ON CLASS ACTIONS* § 11:43 (4th ed. 2002).

²¹⁰ See, e.g., PRINCIPLES OF THE LAW OF AGGREGATE LITIG. § 1.04 cmt. f (2010) (explaining rough justice as a plan that minimizes differences in claims); Matthew Diller, *Tort and Social Welfare Principles in the Victim Compensation Fund*, 53 DEPAUL L. REV. 719, 737-38 (2003) (describing principles of equitable compensation in class action settlements).

²¹¹ For example, it is not uncommon for a large settlement fund to follow “damage averaging,” using grids or compensation schemes that ignore some components of an individual claim to expedite payment to many different people. See *In re MetLife Demutualization Litig.*, 689 F. Supp. 2d 297, 342 (E.D.N.Y. 2010) (“‘Fluid recoveries’ of this type, which do not call for direct calculation and distribution of precise recoveries to the class members, can be a fair means of delivering value to class members without

some cases, class action settlements may distribute funds to unrelated charities and nonprofits, but only as a last resort and after multiple efforts are made to identify victims with meritorious claims.²¹²

By comparison, few principles govern the way prosecutors distribute victim compensation funds. For example, in cases involving a small number of victims, federal law requires prosecutors and courts to compensate according to identifiable injuries that were “proximately” caused by the defendant’s misconduct.²¹³ However, no similar limitation applies to criminal cases involving many victims. The DOJ’s self-imposed ban on “extraordinary restitution” was a direct response to criticism that prosecutors lacked any legal restriction on their ability to dictate the restitution terms of prosecution agreements.²¹⁴

Beyond the recent bar on “extraordinary restitution,” no other guidance exists for prosecutors or courts to distribute funds among groups of victims. In the Computer Associates case, for example, the federal prosecutor appointed Kenneth Feinberg as a special master to distribute hundreds of millions to many kinds of victims.²¹⁵ Among other things, Special Master Feinberg had to consider who would be eligible to recover from the fund. Although some were ineligible to recover in the civil system because their claims were time-barred, Feinberg chose to allow those parties to recover from the criminal restitution fund.²¹⁶ Moreover, payments in civil litigation ordinarily reflect the litigation costs and risks associated with different categories

undue administrative costs.”); PRINCIPLES OF THE LAW OF AGGREGATE LITIG. § 1.04 cmt. f (commenting on damage averaging that ignores differences in litigants’ claims).

²¹² Judges may devote unclaimed settlement funds to third parties under the cy pres doctrine, which attempts to distribute funds “as near as possible” to the original purpose of a settlement. See 3 NEWBERG & CONTE, *supra* note 209, § 10:17 (observing that the purpose of cy pres distribution is to “put[] the unclaimed fund to its next best compensation use, e.g., for the aggregate, indirect, prospective benefit of the class”). But courts and commentators have suggested limits to cy pres distributions. See, e.g., PRINCIPLES OF THE LAW OF AGGREGATE LITIG. § 3.07 (recommending judges limit such payments to circumstances in which direct distribution to individual class members is not economically feasible, or where funds remain after class members are given a full opportunity to make a claim).

²¹³ 18 U.S.C. § 3663(a)(2) (2006).

²¹⁴ See Filip Memo, *supra* note 122, at 1 (restricting terms requiring defendants to pay funds to organizations or individuals who are not victims).

²¹⁵ Plan of Allocation for Restitution Fund, *supra* note 60, at 1.

²¹⁶ Just as in civil litigation, however, the special master denied claims by those who only held Computer Associates stock. Putting aside the fact that only buyers and sellers are ordinarily entitled to recover in a securities case, the special master also cited the difficult valuation questions raised by such claims. *Id.* at 2 n.2.

of claims.²¹⁷ However, Feinberg chose to ignore these factors in his distribution plan.²¹⁸ No rules existed then—or now—to guide a special master in any of these decisions.

Even more complicated are cases in which prosecutors do seek relief for victims, but no civil remedy is available at all. Many federal laws permit government actors to commence criminal actions against parties who aid and abet crimes, even when no comparable private right of action exists in the civil system.²¹⁹ Federal actors may also obtain awards unavailable under state law.²²⁰

Part III accordingly argues that prosecutors should adopt the distribution guidelines the ALI has developed for large-scale civil litigation.

* * *

We do not argue that class action settlements set the gold standard for procedural justice. Commentators still criticize many class actions for producing unfair outcomes for plaintiffs and defendants. Some attack plaintiffs' class counsel for forging collusive settlements for their own financial benefit.²²¹ Others question whether expensive

²¹⁷ See, e.g., PRINCIPLES OF THE LAW OF AGGREGATE LITIG. § 1.04 cmt. f (observing that in conventional and aggregate litigation, settlement values reflect "risk aversion, the ability to endure delay, and other arbitrary factors"); MANUAL FOR COMPLEX LITIGATION (FOURTH) § 21.62 (2004) (observing factors in class action settlement may include "probable outcome of a trial," "probable time, duration, and cost," and "probable resources and ability of the parties to pay, collect, or enforce the settlement").

²¹⁸ As we discuss in Section III.D, the special master's decision was well grounded. While courts usually consider such factors in civil class action settlements, crime victims do not face the same costs and litigation risks in criminal prosecutions as they do in civil litigation. We argue only that some standards should exist for those faced with similar distribution questions in future criminal class actions.

²¹⁹ See, e.g., *Cent. Bank of Denver v. First Interstate Bank of Denver*, 511 U.S. 164, 182-83 (1994) (observing that Congress has taken a "statute-by-statute approach to civil aiding and abetting liability" and collecting statutes describing when private or public actors may commence such actions").

²²⁰ For example, state law bars Michigan consumers from suing pharmaceutical companies for failing to disclose risks of a drug, so long as the company has made appropriate disclosures under the Food and Drug Act. MICH. COMP. LAWS ANN. § 600.2946(5) (West 2000); *Desiano v. Warner-Lambert & Co.*, 467 F.3d 85, 87-88 (2d Cir. 2006) (describing Michigan's drug immunity law). However, should a prosecutor commence a criminal action under the Food, Drug, and Cosmetic Act for failing to disclose adverse side-effects against the same company, the prosecutor could recover restitution for those same victims. See 21 U.S.C. § 331 (2006) (prohibiting misbranded drugs in interstate commerce).

²²¹ See, e.g., *Weinberger v. Kendrick*, 698 F.2d 61, 73 (2d Cir. 1982) (Friendly, J.) (scrutinizing a settlement to ensure the absence of collusion or undue pressure to settle); Robin J. Effron, *The Plaintiff Neutrality Principle: Pleading Complex Litigation in the*

procedures, like personalized notice, are always justified—particularly when the settlement only offers class members very small awards or coupons.²²² In fact, one could argue that prosecutors, as public servants, may accomplish traditional class action goals more accountably and inexpensively than private attorneys. After all, prosecutorial settlements serve many of the same functions as a class action settlement, but without big contingency fees.

However, criminal class actions raise significant concerns. They not only impose administrative and institutional costs on the prosecutor, but they also undermine legitimacy by forcing defendants to negotiate these agreements under the coercive threat of criminal indictment. Moreover, as discussed above, prosecutors lack critical safeguards that otherwise exist in private litigation to assure that massive victim-restitution schemes are fair, efficient, and equitable.

In sum, both criminal and civil class action settlements share a common structural problem that exists in all large lawsuits: a loss of “control” by persons who otherwise may never get their day in court. In both criminal and civil class actions, there are practical limits to the extent to which any massive scheme can encourage and represent the interests of so many people, all with varying degrees of interest in a settlement. It is for these reasons that courts cannot certify civil class action settlements without meeting very strict requirements.²²³

Prosecutors can explore ways to improve claimant control using procedures common to class actions. Prosecutors can also encourage additional participation, judicial review, and coordination without compromising their ability to fight crime. Part III proposes four such reforms.

Era of Twombly and Iqbal, 51 WM. & MARY L. REV. 1997, 2033 (2010) (collecting commentary that criticizes class settlements where “plaintiffs’ lawyers walk away with hefty fees from a favorable settlement . . . [and] plaintiffs recoup little, if any, of the award”).

²²² See, e.g., PRINCIPLES OF THE LAW OF AGGREGATE LITIG. § 3.04 (recommending that courts weigh the “cost of notice and the likely recovery involved” to determine whether individual notice is necessary); *id.* § 3.04 cmt. a (“In many cases, personal notice may not make economic sense.”); Kenneth W. Dam, *Class Action Notice: Who Needs It?*, 1974 SUP. CT. REV. 97, 98-100 (criticizing the individual notice requirement set forth in *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156 (1974)).

²²³ See, e.g., *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 864 (1999) (“[T]he applicability of Rule 23(b)(1)(B) to a fund and plan purporting to liquidate actual and potential tort claims is subject to question, and its purported application in this case was in any event improper.”); *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 628-29 (1997) (decertifying a class settlement of asbestos claims for failure to establish “common issue predominance and adequacy of representation”).

III. TOWARD A NEW CRIMINAL CLASS ACTION

Prosecutors need not go so far as to guarantee exactly the same process as a class action settlement for criminal restitution. A large restitution fund does not have the same *res judicata* or collateral estoppel effect as a civil class action. Moreover, prosecutors need to balance a victim's interest in litigation against the prosecutor's public mission. Finally, prosecutors undoubtedly require some discretion to do their jobs. In contrast to purely private actions, prosecutors need flexibility to evaluate their resources to investigate and prosecute crime. To that end, we recommend that prosecutors adopt procedures from private litigation and public law when they seek to compensate victims for collectively felt criminal harm.²²⁴

Accordingly, this Part recommends four such rules for criminal class actions: (1) that prosecutors and courts coordinate large criminal restitution awards with the civil system, (2) that prosecutors (or their appointed agents and officers) afford a mediation-like process to encourage victim participation in the restitution process, (3) that courts review victim restitution schemes to police potential conflicts of interest, and (4) that prosecutors use principles based on the ALI's *Principles of the Law of Aggregate Litigation* to distribute awards.

A. Coordination of Civil and Criminal Class Actions

Prosecutors need guiding principles and procedures to coordinate criminal restitution settlements with other forms of private litiga-

²²⁴ In doing so, we note that we are not the first to propose introducing procedural protections from both private and public law into the criminal justice system. As prosecutors increasingly control criminal law outcomes, scholars have looked to administrative law to prevent prosecutorial abuse. Plea bargaining, for example, has been characterized as an informal system of administrative adjudication. Scholars have thus recommended that prosecutors openly describe the basis for charging decisions, notify the public when they intend to enforce vague penal laws, or even hold formal hearings with internal appeals as part of the plea bargaining process. See, e.g., Barkow, *supra* note 26, at 895-906 (proposing a structural separation between U.S. Attorneys who decide to prosecute cases and those who litigate the cases); Lynch, *supra* note 26, at 2145-51 (proposing a hybrid model of prosecution that includes the favorable features of current prosecutorial regimes and administrative law). In fact, prosecutors who forge class action-like funds may learn a great deal from administrative law; class action settlement funds have long used payout grids and techniques resembling administrative rulemaking. See RICHARD A. NAGAREDA, *MASS TORTS IN A WORLD OF SETTLEMENT* 57-70 (2007) (describing use of compensation grids in mass tort settlements, social security, and other administrative compensation schemes); Richard A. Nagareda, *Turning from Tort to Administration*, 94 MICH. L. REV. 899, 921 (1996) (describing class settlements as "miniature" administrative agencies).

tion. This Section argues that criminal class action settlements should complement private aggregate settlements. Prosecutors should assess whether a parallel class action settlement is likely before they seek to negotiate and distribute settlement awards on their own. Otherwise, criminal class action settlements may duplicate private litigation at an unnecessary cost to the prosecutors' efforts to fight crime.

Federal courts, where possible, should also coordinate litigation across state lines when prosecutors and private parties file overlapping lawsuits. A court's ability to coordinate will likely depend upon who files first. When prosecutors file charges before plaintiffs file a civil action involving the same defendants and the same victims, a procedural mechanism, like the JPML, could centralize proceedings before the judge handling the criminal case. When the plaintiffs are the first to file, constitutional and institutional concerns may limit the prosecutor's ability to file the criminal case in the same court. The criminal and civil courts, however, may informally coordinate with each other to avoid duplication, unnecessary expense, and unfair settlement distributions. In such cases, prosecutors should adopt internal procedures to ensure that judges handling parallel civil proceedings are informed about efforts to provide restitution to similar victims through a criminal class action.

1. Complementary Criminal Class Action Settlements

We argue that prosecutors should seek large-scale compensation only when there is strong evidence that neither a civil class action nor individual private litigation will hold defendants accountable, efficiently resolve multiple claims, or equitably distribute victim compensation. When a class action will achieve the goals of accountability, efficiency, and equity, a parallel criminal class action settlement may waste resources, overcompensate victims, and frustrate the finality and peace ordinarily sought in other forms of representative litigation.²²⁵

²²⁵ In other contexts, commentators have argued that public actors should seek outcomes that complement private litigation to avoid waste and duplication. See, e.g., Barbara Black, *Should the SEC Be a Collection Agency for Defrauded Investors?*, 63 BUS. LAW. 317, 345-46 (2008) (concluding that the SEC's new role in providing investor compensation in securities fraud cases unnecessarily duplicates private securities fraud class actions); Verity Winship, *Fair Funds and the SEC's Compensation of Injured Investors*, 60 FLA. L. REV. 1103, 1134-41 (2008) (proposing a framework for the SEC to determine whether to use its power to create a victims' compensation scheme when private and public actions are available); Zimmerman, *supra* note 12 (manuscript at 57) ("[A]gencies should seek large scale compensation only when there is strong evidence

Similarly, there will be some cases where a class action is too unwieldy and expensive, and individual private litigation will offer superior procedural protections to victims while effectively holding defendants accountable. However, when neither civil class actions nor private litigation adequately achieve the goals of accountability, efficiency, and equity, prosecutors should consider pursuing a criminal class action.

In many cases, this determination will be straightforward. As a general matter, prosecutors should presume that the civil system will competently provide an efficient and equitable resolution of the matter that adequately holds defendants accountable when they harm multiple victims. As discussed above, the civil system has developed sophisticated procedures to resolve cases involving widespread harm, and there is little reason to assume the criminal system can do it better. In some instances, however, barriers may exist to civil litigation. A criminal restitution fund may be warranted in cases in which the victims fear the defendant will retaliate against them if they file suit.²²⁶ On the other hand, when the parties already have settled claims in a class action, the prosecutor need not establish a separate restitution fund.

There will be times where prosecutors must make decisions about restitution before a class action is filed or settled, and when the barriers to civil litigation will be less obvious. In such cases, a prosecutor should begin by evaluating the “variability” and “marketability” of potential claims.²²⁷ A group of claims are highly “variable” when they differ significantly from each other. Claims are less “marketable” when they promise small verdicts or settlement values. Courts often refuse to certify class actions when claims are very highly variable. When claims are less marketable, private parties and attorneys may lack resources or incentives to pursue individual litigation.

Consider Table 1, reproduced from a reporters’ note to the *Principles of the Law of Aggregate Litigation*, which outlines occasions when

that neither a class action nor individual private litigation will hold defendants accountable, efficiently resolve multiple claims, and equitably distribute victim compensation.”).

²²⁶ See *supra* notes 165-67 and accompanying text (noting that victims of organized crime, employees, and undocumented workers often hesitate to bring lawsuits for fear of retaliation).

²²⁷ See PRINCIPLES OF THE LAW OF AGGREGATE LITIG. § 2.02 cmt. b (identifying “viability” and “variation” as two considerations for whether aggregate treatment is superior to “other realistic procedural alternatives”); Samuel Issacharoff, *Group Litigation of Consumer Claims: Lessons from the U.S. Experience*, 34 TEX. INT’L L.J. 135, 149-50 (1999) (describing the relationship between “variability” and “value,” and how that relationship affects the potential for class actions).

class actions (and other forms of private aggregation, like large-scale bankruptcies) are better than other forms of individual litigation.²²⁸

Table 1: Effect of Variability and Value on Class Treatment of Individual Claims

	Low Variance Between Individual Claims	High Variance Between Individual Claims
Low Value of Individual Claims	Class actions indispensable for private prosecution	Private enforcement difficult because of manageability concerns
High Value of Individual Claims	Class actions necessary but greater concern for right of individual opt-out and other control	Aggregate treatment not essential and class actions held suspect

Cases involving claims with low variability and low marketability, such as consumer cases that only involve small dollar amounts, can generally be resolved effectively by civil class actions. Conversely, cases that are both highly variable and marketable, like a mass tort case, may be resolved more competently through individual one-on-one litigation.²²⁹ Cases involving low variability and highly marketable claims, like some antitrust and commercial litigation, can be effectively resolved by either class actions or individual litigation.²³⁰

²²⁸ PRINCIPLES OF THE LAW OF AGGREGATE LITIG. § 2.02 reporters' note cmt. b (quoting Issacharoff, *supra* note 227, at 149).

²²⁹ The cases involving the anti-inflammatory drug Vioxx provide a good example of highly variable and highly marketable claims. Courts rejected class actions because the individual circumstances that gave rise to each claim varied substantially. See *In re Vioxx Prods. Liab. Litig.*, 239 F.R.D. 450, 459 (E.D. La. 2006) (denying the class action because "individualized factual issues concerning specific causation and damages dominate this litigation and create independent hurdles to certification"); *Int'l Union of Operating Eng'rs Local No. 68 Welfare Fund v. Merck & Co.*, 929 A.2d 1076, 1088 (N.J. 2007) (rejecting the plaintiff's argument that a "fraud on the market" theory sufficed to illustrate that the case was appropriate for a class action). The high value of each claim, however, ensured that the vast majority of plaintiffs (if not all) were able to initiate an individual suit against the drug manufacturer through coordinated civil litigation. See Charles Silver & Geoffrey P. Miller, *The Quasi-Class Action Method of Managing Multi-District Litigation: Problems and a Proposal*, 63 VAND. L. REV. 107, 138 (2010) ("Over 1,100 law firms participated in the Vioxx litigation alone.").

²³⁰ Securities law class actions, for example, comprise the greatest share of class action settlements over the past decade. Almost half of the 5179 class action claims pending in federal court as of September 2004 were securities class actions. LEONIDAS RALPH MECHAM, ADMIN. OFFICE OF THE U.S. COURTS, JUDICIAL BUSINESS OF THE U.S.

In light of the above, prosecutors should scrutinize cases as they become more variable and less marketable. In such cases courts may refuse to certify a class action, and there may be insufficient incentive for private actors to resolve the case through individual suits. For example, an employment lawsuit that occurs across multiple state lines may be highly variable (the claims may differ based on the different state laws) and may promise individual awards that are too small to attract private litigators. In such an instance, a criminal restitution fund might well be justified. Neither a class action nor private litigation is likely to achieve an efficient and equitable resolution that holds the defendant accountable.

Absolute barriers to civil litigation are not the only factors that prosecutors may consider when evaluating whether a criminal class action is appropriate. Prosecutors may also consider other issues, such as the amount of time it will take for the civil system to resolve claims, the potential for a flood of lawsuits to overwhelm the civil courts, the negotiating strength of the defendant relative to the victims, and the degree to which victims know the extent of their damages. Courts have long considered such factors when evaluating the fairness of large complex civil settlements.

Many claims arising out of the BP oil spill in the Gulf of Mexico, for example, are likely too variable to warrant class action certification: they vary from shrimp-boat business-interruption claims to beachfront property claims to toxic tort injuries.²³¹ On the one hand, a prosecutor may conclude that these claims are marketable and that private attorneys will come forward to sue BP on behalf of the individual injured parties. Thus, there may not be an obvious barrier to civil litigation that should prompt a prosecutor to initiate a criminal class action against

COURTS: 2004 ANNUAL REPORT OF THE DIRECTOR 400 tbl.X-4 (2004), available at <http://host4.uscourts.gov/judbus2004/appendices/x4.pdf>; see also John C. Coffee, Jr. & Stefan Paulovic, *Class Certification: Developments Over the Last Five Years 2002–2007: The Future of Class Actions* (observing that securities class actions “have long been the largest single category of class actions,” but noting a decline in 2005 and 2006), in CLASS ACTION LITIGATION 2008: PROSECUTION AND DEFENSE STRATEGIES, at 193, 196 (PLI Litig. & Admin. Practice, Course Handbook Ser. No. H-777, 2008). These numbers are so large because securities law class actions tend to involve low variable claims. As set forth below, a complementary approach would recommend that prosecutors avoid using settlement proceeds for victims, absent some compelling reason that prosecutors could accomplish the same goals more effectively than a civil class action.

²³¹ See Ray Henry, *Kenneth Feinberg, Oil Fund Czar, Must Decide Who Gets Paid: Seafood Restaurants? Souvenir Stands? Strip Clubs?*, HUFFINGTON POST (June 23, 2010), http://www.huffingtonpost.com/2010/06/23/Kenneth-feinberg-oilfund_n_622108.html (noting the diversity of individuals and businesses who have made claims to receive money out of the BP Oil Spill Liability Trust Fund).

BP. On the other hand, a prosecutor might also determine that the civil system would be too slow to process claims and that BP would be able to exploit its greater bargaining power relative to unrepresented individual litigants.²³² In such a case, the prosecutor may decide that a criminal restitution fund is appropriate because civil litigation will not efficiently and equitably hold BP accountable.

Prosecutors currently lack guidelines to make comparative judgments about whether a criminal class action is necessary to hold defendants who cause widespread harm accountable efficiently and fairly. By evaluating factors such as claim variability, claim marketability, the parties' relative negotiating strength, and other characteristics of complex litigation, prosecutors will be better able to make this critical determination.

2. Formal and Informal Multidistrict Coordination

Even if prosecutors adopt internal guidelines to avoid overlapping civil and criminal settlements, the guidelines will not be foolproof. There will still be occasions when plaintiffs and prosecutors commence parallel actions, and those actions will settle at different times. An amendment to the rules governing multidistrict litigation,²³³ however, could centralize criminal and civil class action proceedings before a single federal judge.

Without a centralized forum, different courts may oversee criminal settlement distributions and private class action settlements involving the same parties. This, in turn, may create confusion, leading to potentially unfair overlapping awards for some and insufficient awards for others. Moreover, by centralizing cases, courts will have greater information and be better equipped to review the adequacy of settlements.

Amending the rules governing multidistrict litigation could allow the JPML to select a single federal judge to coordinate and oversee both a criminal restitution fund and the pretrial phases of all the related federal lawsuits. The JPML generally certifies an action for multidistrict litigation on a petition from either plaintiffs or defendants

²³² Conversely, the prosecutor may decide to set up a limited fund. For example, the prosecutor might decide to cover business-interruption claims, but not cover as-yet-unknown damages for health and environmental claims.

²³³ See 28 U.S.C. § 1407(a) (2006) (authorizing the JPML to transfer pending civil lawsuits involving "common questions of fact" to a single district court for consolidated proceedings).

when parties bring lawsuits in many different courts.²³⁴ The JPML has the expertise to evaluate whether a case is complex enough to warrant pretrial coordination.²³⁵

Criminal class action settlements, on their face, do not easily fit within the JPML framework. As discussed above, constitutional and institutional concerns may limit the prosecutor's ability to shift a criminal case to another court.²³⁶ When the prosecutor files first, an amendment to the rules governing the JPML could allow courts to consolidate parallel class action litigation in the federal court that handles the criminal case. A centralized mechanism to coordinate actions would save resources and assure that criminal and civil class action settlements do not overcompensate victims. A single federal court would conduct hearings to assess the adequacy of individual awards from two different settlements and offset overlapping criminal restitution awards to putative class members.

On the other hand, consolidation could still take place when private plaintiffs file first, but only if individual defendants and the U.S. Attorney agree. Individual defendants could raise meritorious objections to transferring venue. Moreover, prosecutors may have institutional and practical reasons to avoid splitting a case across different jurisdictions.²³⁷

In those cases, criminal and civil courts could informally coordinate actions across federal districts. This is consistent with judicial efforts to informally coordinate efforts in complex actions between state and federal court.²³⁸ Prosecuting attorneys could be obliged to produce information to the judge overseeing the civil case, including the

²³⁴ See Ostolaza & Hartmann, *supra* note 13, at 51-63 (explaining the procedures for initiating multidistrict litigation).

²³⁵ The JPML maintains detailed statistical summaries of its activities. See U.S. JUDICIAL PANEL ON MULTIDISTRICT LITIG., STATISTICAL ANALYSIS OF MULTIDISTRICT LITIGATION (2007), available at http://www.jpml.uscourts.gov/Statistics/JPML_Statistical_Analysis_of_Multidistrict_Litigation_2007.pdf. According to calculations current through September 30, 2007, 265,269 actions have been subjected to multidistrict litigation proceedings since the JPML's inception in 1968. *Id.*

²³⁶ See *supra* note 176 and accompanying text.

²³⁷ See *supra* subsection II.B.2 (providing some considerations that affect whether prosecutors will choose to compensate the victims by way of a criminal class action).

²³⁸ See William W. Schwarzer et al., *Judicial Federalism in Action: Coordination of Litigation in State and Federal Courts*, 78 VA. L. REV. 1689, 1690 (1992) (noting informal state-federal cooperation, including "calendar coordination, coordinated discovery, joint settlement efforts, and joint motions hearings and rulings"); Byron G. Stier, *Resolving the Class Action Crisis: Mass Tort Litigation as Network*, 2005 UTAH L. REV. 863, 893 ("[M]any state and federal judges meet and form networked responses to the challenges of mass tort litigation.").

names of victims scheduled to receive restitution, the basis for the awards, and any other related fines or money awarded to government entities in the criminal proceeding.²³⁹

Finally, we note that coordinated proceedings would also further the other recommendations we propose below. Coordination would help prosecutors—or designated officials—identify representatives of different classes of victims and provide a springboard for selecting representatives to assure a fair division of the criminal restitution fund.²⁴⁰ Coordination also would save resources by enabling a single court to conduct a “hard look” review of any offered settlement.

B. Criminal “Negotiated Rulemaking” to Improve Participation

Criminal class action settlements should encourage parties to participate in large settlements that affect their interests. As *Computer Associates* illustrates, those tasked with overseeing large settlements need to do more than simply collect and notify putative claimants. There, the DOJ acknowledged the importance of victim input in the fair distribution of awards.²⁴¹ Prosecutors need a way to identify potentially conflicting interests that different stakeholders may have in a criminal restitution settlement, to involve stakeholders early in the process, and in many cases, to afford groups of victims representation to ensure the settlement represents their varying interests fairly. Otherwise, the ultimate restitution award may be entirely inconsistent with victims’ losses. In short, criminal class actions need a process to identify conflicts between victims and a mechanism to address those differences.

Other officers within the criminal justice system could theoretically play this role. Victim-witness coordinators and probation officers, depending on the stage of the criminal proceeding, are already responsible for identifying victims, assessing their potential losses, and apprising them of new developments in the criminal case.²⁴² However,

²³⁹ Such procedures are common when different plaintiffs’ attorneys commence separate actions in different jurisdictions. See MANUAL FOR COMPLEX LITIGATION (FOURTH) § 22.2 (2004) (“Courts routinely order counsel to disclose, on an ongoing basis past[] and pending related cases in state and federal courts and to report on their status and results.”).

²⁴⁰ Cf. NAGAREDA, *supra* note 224, at 260 (observing the potential for a multidistrict litigation process to facilitate negotiated rulemaking of attorneys’ fees).

²⁴¹ See Morgenson, *supra* note 3 (quoting the lead prosecutor in the case as saying input “will be invaluable in ensuring that the fund is administered fairly and in a way that benefits them most”).

²⁴² See *supra* notes 54, 81, and accompanying text (describing the role of victim-witness coordinators).

the current system clearly contemplates restitution on a smaller scale than massive criminal restitution funds. It is also unclear whether victim-witness coordinators or probation officers possess the skills needed to resolve disputes over aggregate settlement awards, or even whether it would be desirable for them to perform such tasks.²⁴³

Alternatively, prosecutors could consider procedures under the Negotiated Rulemaking Act²⁴⁴ to give private parties a voice in the distribution process.²⁴⁵ Negotiated rulemaking resembles the kind of judicially supervised mediations that exist in class action settlements.²⁴⁶ Under a negotiated-rulemaking procedure, the prosecutor would appoint a mediator or special master who would use a transparent administrative process to identify victims affected by the final criminal settlement. The parties could then develop a settlement distribution plan subject to notice-and-comment rulemaking.

Congress passed the Negotiated Rulemaking Act in 1990²⁴⁷ to provide agencies a less adversarial process through which they could design regulations.²⁴⁸ In negotiated rulemaking, administrative agencies allow parties significantly affected by a regulation to debate and propose the language of a regulation in advance of the rulemaking

²⁴³ Prosecutors could also rely upon the work of special masters or judicial officers. See 18 U.S.C. § 3664(d)(6) (2006) (permitting the appointment of special masters and magistrate judges in aid of restitution determinations). However, court proceedings may take place too late in some cases. Moreover, even well-intentioned efforts by special masters may lack transparency when they act outside of a judicial or administrative process.

²⁴⁴ 5 U.S.C. §§ 561–570.

²⁴⁵ We are also not the first to consider negotiated rulemaking as a solution to classwide settlements. Professor Richard Nagareda has similarly called for negotiated rulemaking to resolve attorneys' fee disputes in mass tort litigation. See NAGAREDA, *supra* note 224, at 257-62 (proposing an adaptation of negotiated rulemaking for the mass tort setting).

²⁴⁶ See, e.g., *Georgine v. Amchem Prods.*, 157 F.R.D. 246, 265-66 (E.D. Pa. 1994) (describing negotiations between plaintiff and defense steering committees), *aff'd sub nom.* *Amchem Prods. v. Windsor*, 521 U.S. 591 (1997); *In re Silicone Gel Breast Implants Prods. Liab. Litig.*, 793 F. Supp. 1098, 1099-100 (J.P.M.L. 1992) (using a panel to decide the forum for a massive class action); MANUAL FOR COMPLEX LITIGATION (FOURTH) § 22.62 (2004) (describing the court's authority to appoint lead counsel or committees of counsel to coordinate litigation); *id.* § 22.91 (describing the use of magistrate judges, special masters, or settlement judges to oversee and facilitate settlement).

²⁴⁷ Pub. L. No. 101-648, 104 Stat. 4970 (codified as amended at 5 U.S.C. §§ 561–570).

²⁴⁸ See Philip J. Harter, *Negotiating Regulations: A Cure for Malaise*, 71 GEO. L.J. 1, 42-112 (1982) (detailing the original proposal for negotiated rulemaking); see also ADMIN. CONFERENCE OF THE UNITED STATES, NEGOTIATED RULEMAKING SOURCEBOOK (1990) (providing background on the operation of negotiated-rulemaking procedures under the Negotiated Rulemaking Act).

process.²⁴⁹ Those rules are then subject to ordinary rules of administrative process and judicial review.²⁵⁰

A negotiated-rulemaking process aspires to improve stakeholder participation, transparency, and the comprehensiveness of the settlement through private involvement and public oversight. The agency may appoint a mediator, or “convener,” to identify stakeholders significantly affected by a rule.²⁵¹ The mediator, in turn, may suggest that those stakeholders form a committee to represent all identifiable interests in formulating a generally applicable rule.²⁵² A notice in the Federal Register announces the plan to use a negotiated-rulemaking committee to develop rules, names the members of the committee, and describes the interests likely affected by the rule.²⁵³ The agency (in this case, the Office of the U.S. Attorney or the DOJ) may adopt the rule developed through negotiated rulemaking, in whole or in part.²⁵⁴

Although originally conceived as a way to avoid contentious court battles over agency environmental regulations,²⁵⁵ there is no reason why prosecutors could not use negotiated rulemaking to include parties in settlement formation. Such a procedure is fitting for prosecutors who seek to settle with corporate defendants. Some commentators have already recommended subjecting other aspects of prosecutors’ agreements, like corporate structural reforms and federal monitoring, to a form of notice and comment.²⁵⁶ Many special masters already informally reveal proposed restitution-distribution plans to ma-

²⁴⁹ See 5 U.S.C. §§ 563–564 (allowing affected parties to identify areas of concern and to apply for membership on the rulemaking committee).

²⁵⁰ *Id.* § 564(a).

²⁵¹ *Id.* § 536(b).

²⁵² *Id.* § 564(b). In addition, those who believe they will not be adequately represented on the committee may apply, or nominate another representative, for membership. *Id.*

²⁵³ *Id.* § 564(a).

²⁵⁴ *Id.* § 563(a)(7). An agency may rely on the committee’s results only “to the maximum extent possible consistent with [its] legal obligations.” *Id.*

²⁵⁵ See Henry H. Perritt, Jr., *Negotiated Rulemaking Before Federal Agencies: Evaluation of Recommendations by the Administrative Conference of the United States*, 74 GEO. L.J. 1625, 1655 (1986) (stating that due to adversarial conflict, Occupational Safety and Health Administration officials found negotiated rulemaking “worth a try” in developing its benzene standard); Lawrence Susskind & Gerard McMahon, *The Theory and Practice of Negotiated Rulemaking*, 3 YALE J. ON REG. 133, 142-43 (1985) (discussing the emergence of negotiated rulemaking within the EPA).

²⁵⁶ See, e.g., Garrett, *supra* note 17, at 925 (suggesting legislation that required “an opportunity for public notice and comment” for DOJ agreements).

for stakeholders before finalizing a large settlement.²⁵⁷ Negotiated rulemaking makes that process more regular and transparent, while offering a public forum for parties to participate in their own redress.

Negotiated rulemaking in criminal class action settlements would thus track settlement methods commonly used to encourage participation in representative litigation. Judges often appoint magistrates or special settlement masters to oversee settlement negotiations between members of plaintiff and defense steering committees, as well as other representatives in aggregate litigation.²⁵⁸ Negotiated rulemaking in this context could involve the same limited number of parties that would otherwise participate in a private aggregate settlement.

Many common criticisms of negotiated rulemaking would not apply to criminal class action settlements. Some critics, for example, fear that negotiated rulemaking would lead to regulations that fall outside the objectives of agency action.²⁵⁹ By contrast, negotiated rulemaking would not prevent a prosecutor from enforcing the law.

Others have argued that negotiated rulemaking is costly and time-consuming.²⁶⁰ To be sure, there may be times where individual awards are too small to justify negotiated rulemaking. In those cases, prosecutors should have the option to bypass negotiated rulemaking if they determine the process would unnecessarily delay sentencing. Negotiated rulemaking, however, may be useful in cases involving medium to large settlement awards, where a comparable class action settlement would be equally time consuming, and where there are divergent interests with regard to the award. Moreover, such a rulemaking would

²⁵⁷ See, e.g., Plan of Allocation for Restitution Fund, *supra* note 60, at 2 n.2 (describing a meeting among represented stakeholders, law professors, and other parties in the Computer Associates litigation).

²⁵⁸ See *supra* note 180 and accompanying text (describing the appointment of special masters in class actions).

²⁵⁹ See, e.g., William Funk, *Bargaining Toward the New Millennium: Regulatory Negotiation and the Subversion of the Public Interest*, 46 DUKE L.J. 1351, 1375 (1997) (arguing that in negotiated rulemaking, "law becomes nothing more than the expression of private interests mediated through some governmental body").

²⁶⁰ See, e.g., MATTHEW MCKINNEY & WILLIAM HARMON, *THE WESTERN CONFLUENCE: A GUIDE TO GOVERNING NATURAL RESOURCES* 115 (2004) (observing that negotiated rulemaking is uncommon because of the time-consuming nature of appointing a facilitator, holding committee meetings, and reviewing documents); Cary Coglianese, *Assessing Consensus: The Promise and Performance of Negotiated Rulemaking*, 46 DUKE L.J. 1255, 1321 (1997) (criticizing negotiated rulemaking for creating new sources of conflict, reaching only fragile consensus, and achieving its goals less effectively than regular rulemaking).

resolve grievances among a very narrow set of interests—specific parties with specific injuries.

Negotiated rulemaking also raises questions of power imbalances, timing, and ripeness. First, powerful interests at the bargaining table arguably may exploit negotiated rulemaking to benefit defendants or certain victims.²⁶¹ Commentators routinely criticize class action settlements for the same kind of abuse.²⁶² Opening criminal class action funds to negotiation may expose the settlement to the same danger. However, prosecutors or, more likely, other appointed officers inside or outside of the U.S. Attorneys' Office could minimize the potential for collusion with other tools. They could limit fee arrangements between attorney representatives and the victim groups they represent; alternatively, they could ensure parties with sizable stakes in the settlement assume leadership roles on the negotiating committee.²⁶³

Second, the prosecutor will have to consider the timing of a negotiated rulemaking. Should the development of a distribution scheme in negotiated rulemaking take place before or after the prosecutor determines the size of the total award? On the one hand, the prosecutors' determination of any final restitution award and fines affects victims' interests.²⁶⁴ For those reasons, victims' rights statutes grant victims the right to confer with the prosecutor well before a conviction.²⁶⁵ Moreover, by involving putative claimants, prosecutors would increase the chances that a final restitution award would reflect victims' injuries.

²⁶¹ See, Susan Rose-Ackerman, *Consensus Versus Incentives: A Skeptical Look at Regulatory Negotiation*, 43 DUKE L.J. 1206, 1211 (1994) (noting the danger of regulatory negotiation's legitimacy if all interested parties are not adequately represented).

²⁶² For example, some complain that powerful defendants will conduct "reverse auctions," searching out under-resourced plaintiffs' counsel to orchestrate sweetheart deals at the expense of class members. See, e.g., MANUAL FOR COMPLEX LITIGATION (FOURTH) § 21.61 n.952 (2004) (listing cases that may have been affected by "reverse auctions"); BARBARA J. ROTHSTEIN & THOMAS E. WILLGING, FED. JUDICIAL CTR., MANAGING CLASS ACTION LITIGATION: A POCKET GUIDE FOR JUDGES 14 (2005) (describing "reverse auctions," which allow defense attorneys to pick the weakest plaintiff attorney).

²⁶³ See PRINCIPLES OF THE LAW OF AGGREGATE LITIG. § 1.05 cmt. d, e (2010) (describing tools to encourage adequate representation, including putting named parties with sizable stakes in control of representative litigation).

²⁶⁴ Actions proceeding in federal court—for that reason alone—would seem to permit plaintiffs to intervene as a matter of right. See FED. R. CIV. P. 24(a) ("On timely motion, the court must permit anyone to intervene who . . . claims an interest relating to the property or transaction that is the subject of the action . . .").

²⁶⁵ See 18 U.S.C. § 3771(a)(5) (2006).

Victims, after all, are in the best position to know the scope of their damages.²⁶⁶

On the other hand, a prosecutor may need to determine penalties and restitution before negotiated rulemaking can be completed. The Speedy Trial Act, for example, imposes time limits on prosecutors once they file charges against a defendant.²⁶⁷ Moreover, if a prosecutor involves victims too early in the settlement process, those negotiations could compromise the prosecutor's ability to obtain cooperation or other information about related investigations. In such cases, negotiated rulemaking may have to give way to the prosecutor's need to fight crime. Finally, if commenced too soon, negotiated rulemaking could frustrate the fairness of a settlement. If a prosecutor begins negotiations before civil discovery commences, both the corporate defendants and victims may have difficulty identifying the strengths and weaknesses of their case or whether the settlement is fair. This is a common concern when class action settlements are certified and settled at the same time.²⁶⁸ Like class action settlements, a settlement achieved through negotiated rulemaking should, at minimum, receive closer judicial scrutiny when there has been little or no discovery, litigation, or other forms of adversarial process.²⁶⁹

Negotiated rulemaking is a quasi-public, quasi-private process that may be necessary when prosecutors seek massive restitution awards for potential victims. A negotiated-rulemaking process does not solve everything. But, at the very least, it permits prosecutors to gather information about potential victims and resolve potential disputes between victim interest groups in much the same way a court might manage a comparable class action settlement. In so doing, prosecu-

²⁶⁶ See, e.g., *SEC v. Bear, Stearns & Co.*, 626 F. Supp. 2d 402, 406 (S.D.N.Y. 2009) ("The remedial principles animating the SEC's economic settlement in this case . . . were not compatible with a major objective the parties sought to accomplish—restitution for the aggrieved investors.").

²⁶⁷ 18 U.S.C. §§ 3161–3174 (2006 & Supp. 2009). Of course, the Speedy Trial Act is not implicated when a prosecutor resolves a case before filing a criminal information or indictment. See *id.* § 3161(a) (stating that the statute can be invoked "in any case involving a defendant charged with an offense").

²⁶⁸ See MANUAL FOR COMPLEX LITIGATION (FOURTH) § 21.612 (2004) ("Class actions certified solely for settlement . . . sometimes make meaningful judicial review more difficult and more important.").

²⁶⁹ See *Macey & Miller*, *supra* note 197, at 192, 202 (recommending heightened judicial scrutiny over "shotgun" class action settlements that occur very early in the litigation); see also *Murillo v. Tex. A&M Univ. Sys.*, 921 F. Supp. 443, 445 (S.D. Tex. 1996) (requiring that counsel have engaged in "sufficient discovery"); *In re Matzo Food Prods. Litig.*, 156 F.R.D. 600, 604 (D.N.J. 1994) (noting that the factual record must be sufficiently developed before settlement can be approved).

tors can provide fair and efficient compensation while satisfying an important goal of the victims' rights movement: granting victims control over the outcome of a dispute that involves their interests.

C. *"Hard Look" Judicial Review to Police Conflicts*

In civil class actions, judges play a critical role in ensuring that lawyers adequately serve their clients and that the settlement fairly allocates awards among different claimants.²⁷⁰ We argue in this Section that judges should play a similar role in criminal class actions by subjecting the compensation terms of pretrial diversion agreements to a "hard look" review. Hard look review demands more information about the parties' competing interests in settlement, more participation by potential stakeholders, and more reasoned explanations for the distributional decisions the prosecutor makes between parties.²⁷¹ Importantly, we do not suggest that judges should scrutinize the entire agreement; rather, they should review those terms that relate to victim compensation. Such a review, we argue, effectively balances the need to police conflicts of interest with the constitutional and practical concerns that are often raised to justify deferring entirely to prosecutors in matters relating to nonprosecution and plea agreements.

Hard look review requires courts to evaluate whether an agency action was arbitrary or capricious by considering whether the agency engaged in properly "reasoned decisionmaking."²⁷² In doing so, courts force agencies to demonstrate a rational connection between the evidence in the administrative record and their actions. While prosecutors do not follow the strict procedures that govern agencies under the Administrative Procedures Act, they too can be asked to demonstrate a "rational connection between the facts found and the choice made."²⁷³

²⁷⁰ See *supra* subsection II.B.4 (describing how judges remedy conflicts of interest in the civil class action system).

²⁷¹ See Nagareda, *supra* note 224, at 945 (observing that hard look review demands that the agency rely upon "reasoned decisionmaking" to "guard against precisely the kinds of infidelities that lie at the core of the agency cost problem in administrative law"); Sharkey, *supra* note 27, at 2181 (stating that hard look review is a tool for courts to ensure the disclosure of relevant data).

²⁷² See *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 52 (1983) (rejecting the National Highway Traffic Safety Administration's rescission of the passive restraint requirement because the agency failed to present an adequate basis and explanation for its decision).

²⁷³ *Id.* at 52 (quoting *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168 (1962)).

Under hard look review, a court would not scrutinize the compensation terms of a settlement agreement de novo. Instead, the court would consider whether the prosecutor's decisionmaking process was justified and reasonable.²⁷⁴ Thus, prosecutors should, at a minimum, have to explain how they calculated victims' losses, how they identified victims' shared and conflicting interests, and how they balanced those interests against other criminal justice objectives, such as prosecutors' legitimate interests in conserving resources, rehabilitating defendants, and doling out punishment. Additionally, prosecutors should explain the basis for the proposed distribution plan and whether they intend to coordinate payment through another civil settlement.

Hard look review would permit judges to review criminal class action settlements more closely when the prosecutor lacks an independent basis to form a reasoned decision. If the prosecutor settles the case with little adversarial process—meaning little formal investigation or other litigation—courts would have more power to probe the justifications for the settlement. Hard look review, at a minimum, would require judges to assess the strengths and weaknesses of the parties' claims and consider how participants would actually benefit from the proposed settlement.

Such a procedure is not unlike a class action settlement, where courts are encouraged to review the substance of a settlement more carefully when the court lacks confidence that “the settlement negotiations were at arm's length.”²⁷⁵ At least hard look review would demand more information about the parties' competing interests in settlement, more participation by potential stakeholders, and more reasoned explanations for the distributional decisions a prosecutor makes.

Hard look review would improve the current system under which courts scrutinize settlement agreements differently depending on where the case is in the criminal process. Courts do not review NPAs, only reluctantly review DPAs,²⁷⁶ and review plea agreements with great

²⁷⁴ Cf. Merrick B. Garland, *Deregulation and Judicial Review*, 98 HARV. L. REV. 505, 557 (1985) (stating that hard look review decreases “the odds that an agency decision motivated by improper purposes will escape invalidation”); Nagareda, *supra* note 224, at 945 (noting that hard look review “may detect when [an] agency has skewed its analysis”).

²⁷⁵ MANUAL FOR COMPLEX LITIGATION (FOURTH) § 21.612 (2004); see also *Isby v. Bayh*, 75 F.3d 1191, 1199 (7th Cir. 1996) (providing an example of a court's analysis of whether settlement negotiations were adversarial); see also Macey & Miller, *supra* note 197, at 192 (observing that early class action settlements “present substantial risks” and justify more judicial scrutiny).

²⁷⁶ In his study of DPAs, for example, Professor Brandon Garrett found that “[e]very judge approving a deferred prosecution agreement has done so without any

deference.²⁷⁷ The most significant obstacles to hard look review involve three concerns about the judicial role in a criminal settlement: a constitutional concern about separation of powers, a practical concern about courts' competence to evaluate the charging decision, and a statutory concern that courts lack clear authority to interfere in the earliest stages of the criminal process. None of these concerns, however, should prevent courts from reviewing the fairness and adequacy of a victim restitution scheme in a criminal settlement agreement.

Some courts have refused to review pretrial diversion agreements to avoid constraining prosecutorial discretion and, accordingly, violating the separation of powers between the judiciary and the executive branch of government. As a general rule, courts may not interfere with the "free exercise of the discretionary powers" of federal prosecutors' control over criminal cases.²⁷⁸ It is less clear, however, whether judicial review of the terms of an NPA or a DPA should raise the same constitutional concerns. First, deep questions remain about the validity and scope of the doctrine.²⁷⁹ Given the Framers' professed intention to arrange each branch of government to "be a check on the other,"²⁸⁰ there is reason to question whether the Constitution grants the

published rulings or modifications." Garrett, *supra* note 17, at 922. According to a separate study by the GAO, seventy-five percent of all judges (nine of twelve) did not hold a hearing to review a DPA and its terms. See U.S. GOV'T ACCOUNTABILITY OFFICE, *supra* note 45, at 25.

²⁷⁷ See Garrett, *supra* note 17, at 906 ("Federal courts are more involved in reviewing plea bargains than charging decisions, but judges still remain highly deferential.").

²⁷⁸ United States v. Lox, 342 F.2d 167, 171 (5th Cir. 1965); see also United States v. Armstrong, 517 U.S. 456, 464 (1996) (describing prosecutorial discretion and its limits); Heckler v. Chaney, 470 U.S. 821, 832 (1985) (analogizing an agency's decision to institute proceedings against a party to "the decision of a prosecutor in the Executive Branch not to indict").

²⁷⁹ See, e.g., Rachel E. Barkow, *Separation of Powers and the Criminal Law*, 58 STAN. L. REV. 989, 993 (2005) ("[T]he existing approach to separation of powers in criminal matters cannot be squared with constitutional theory . . ."). The sole textual support for the separation of powers comes from the ambiguous language of Article II, section 3, which provides that the President "shall take Care that the Laws be faithfully executed." U.S. CONST. art. II, § 3; see also William B. Gwyn, *The Indeterminacy of the Separation of Powers and the Federal Courts*, 57 GEO. WASH. L. REV. 474, 484-85 (1989) (asserting that Article II, section 3 "gave the President sole possession of the prosecutorial function"). But some suggest that the traditional deference to prosecutors' decisions has little basis in the Constitution itself. Rather, it is a historical artifact of English criminal procedure, *nolle prosequi*. Rebecca Krauss, *The Theory of Prosecutorial Discretion in Federal Law: Origins and Development*, 6 SETON HALL CIRCUIT REV. 1, 1, 16-19 (2009) (describing the historical origins of *nolle prosequi* and its absorption into American criminal procedure).

²⁸⁰ THE FEDERALIST NO. 51, at 269 (James Madison) (George W. Carey & James McClellan eds., 2001).

executive branch unfettered discretion over pretrial settlements.²⁸¹ Second, federal judges commonly review other executive functions, like administrative agencies, for abuse of discretion.²⁸² It is difficult to understand why prosecutors would be entitled to more deference when they make agreements to advance the same kinds of policies promoted by administrative agencies.

Finally, while the initial decision to prosecute is arguably tied to the President's duty to "take Care that the laws be faithfully executed,"²⁸³ compensation is not a traditional executive function. To the extent that restitution serves to punish the defendant, like a fine, it is Congress's prerogative to decide penalties for criminal violations.²⁸⁴ Indeed, pretrial diversion agreements raise problems precisely when they lack a connection to the range of criminal penalties determined by Congress. Conversely, in common law civil actions, judges and juries determine victim compensation.²⁸⁵ Thus, even if the decision to indict is "the special province of the Executive Branch,"²⁸⁶ larger questions of victim compensation fall outside the scope of any core executive function.²⁸⁷

²⁸¹ See *In re Sealed Case*, 838 F.2d 476, 524 n.19 (D.C. Cir. 1988) (Ginsburg, J., dissenting) (observing that "it is far from evident that the duty to 'take Care' was intended to establish unbridled authority in the President and his men. More plausibly, the words were meant to import a limitation.").

²⁸² See Barkow, *supra* note 26, at 893 ("All agency actions are subject to judicial review under an arbitrary and capricious standard pursuant to the APA."); Krauss, *supra* note 279, at 12 (noting that federal judges, while highly deferential to prosecutors, "commonly review actions undertaken by other branches of government, such as administrative agencies within the executive branch").

²⁸³ U.S. CONST. art. II, § 3.

²⁸⁴ See *United States v. Evans*, 333 U.S. 483, 486 (1948) (acknowledging that it is the legislature's function to fix a penalty for a criminal statute); *United States v. Hudson*, 11 U.S. 32, 34 (1812) ("The legislative authority of the Union must first make an act a crime, affix a punishment to it, and declare the Court that shall have jurisdiction of th[e] offence.").

²⁸⁵ See *Seaboard Air Line Ry. Co. v. United States*, 261 U.S. 299, 304 (1923) ("Just compensation is provided for by the Constitution and the right to it cannot be taken away by statute. Its ascertainment is a judicial function.").

²⁸⁶ *Heckler v. Chaney*, 470 U.S. 821, 832 (1985).

²⁸⁷ The DOJ takes the position that NPAs, which do not involve court filings, cannot be subject to judicial review without raising separation of powers concerns. The DOJ does not, however, take a position on increased judicial involvement in the DPA process. See U.S. GOV'T ACCOUNTABILITY OFFICE, *supra* note 45, at 28 ("According to DOJ officials, DOJ does not have a position on whether greater judicial involvement in the DPA process creates separate of power issues . . .").

Practical considerations also explain courts' reluctance to review prosecution charging decisions.²⁸⁸ Judges risk delaying criminal proceedings, chilling law enforcement by subjecting the prosecutor's motives and decisionmaking to outside inquiry, and revealing the Government's enforcement policies and strategies.²⁸⁹ The practical concerns associated with subjecting charging decisions to judicial review, however, are not raised when judges review a settlement's compensation terms. Judges regularly evaluate settlement agreements involving compensation schemes in complex litigation.

Finally, federal law does not clearly define when courts may review victim challenges to a prosecutor's decisions. On the one hand, federal law explicitly provides that victims can assert their statutory rights in the district in which the crime occurred if no prosecution is underway.²⁹⁰ On the other hand, the same federal statute explains that none of the rights guaranteed to victims "shall be construed to impair the prosecutorial discretion of the Attorney General or any officer under his direction."²⁹¹ Accordingly, while some courts have held that "[t]here are clearly rights under the CVRA that apply before any prosecution is underway,"²⁹² other courts have wavered when it comes to precharge prosecution agreements.²⁹³ As Congress considers legislation to regulate prosecutors' use of criminal settlement agreements, it should consider amending victims' rights laws to clarify that courts may subject criminal restitution funds to hard look review at any time in the criminal process.

Hard look review does not aim to create another layer of onerous oversight to the difficult distributional questions raised by criminal class action settlements. Courts can, however, demand that prosecutors produce arguments supporting and opposing the proposed settlement, explain the complex trade-offs made in arriving at the settlement, and provide a reasoned explanation for the final

²⁸⁸ See *Wayte v. United States*, 470 U.S. 598, 607 (1985) (observing that courts should defer to prosecutors' decision to prosecute because it involves complex considerations that are "ill-suited" for judicial review).

²⁸⁹ *Id.*

²⁹⁰ 18 U.S.C. § 3771(d)(3) (2006).

²⁹¹ *Id.* § 3771(d)(6).

²⁹² *United States v. BP Prods. N. Am., Inc.*, No. 07-0434, 2008 WL 501321, at *11 (S.D. Tex. Feb. 21, 2008); see also *United States v. Rubin*, 558 F. Supp. 2d 411, 417 n.5 (E.D.N.Y. 2008) (noting federal law "envisions the possibility of judicial vindication of certain CVRA rights outside the context of an actual prosecution").

²⁹³ See *United States v. Turner*, 367 F. Supp. 2d 319, 327 (E.D.N.Y. 2005) (discussing "some of the difficulties of implementing the CVRA's notification requirements").

choice of settlement terms. Courts have already undertaken such an approach—most recently in the *Newsday* settlement—without explicitly recognizing it.²⁹⁴ Formally accepting the use of hard look review would empower courts to police conflicts of interest without compromising prosecutorial independence.

D. *Distribution Guidelines for Criminal Class Actions*

As illustrated above, prosecutors lack many guidelines to distribute awards. This Section argues that prosecutors should seek to divide awards according to what victims would be entitled to recover in civil litigation. This will reduce the costs associated with coordinating civil and criminal actions involving the same activity, minimize strategic behavior between the parties, and limit the chances for error-prone, inconsistent, and arbitrary distribution schemes.

When criminal and civil class actions compensate different victims under different standards, they risk promoting strategic behavior and complicating judicial review. Some victims may raise unnecessary objections in civil litigation if they believe they have an edge with the prosecutor. Strategic behavior may also compromise criminal justice goals. Prosecutors may not obtain the evidence they need to move ahead with a criminal case, particularly if victims believe they stand to benefit monetarily by slowing down the criminal case. Different standards may also complicate judges' efforts to coordinate review of criminal restitution and civil damage settlements. Even where a single judge oversees the distribution, multiple standards may unnecessarily complicate the assessment of the overarching settlement between the corporate defendant, the prosecuting attorneys, the plaintiffs' class counsel, and the victims.

Additionally, judges and prosecutors may struggle to apply standards rooted in something other than victims' civil losses. Distributing criminal restitution funds based on need, for example, may require difficult valuation decisions and evidentiary support, and may impose additional administrative costs. Such distributions may also permit prosecutors and judges too much discretion to make subjective distribution decisions.²⁹⁵ An equality-based standard that pays every-

²⁹⁴ See *supra* notes 204-06 and accompanying text.

²⁹⁵ Need-based standards may also be subject to abuse, as stakeholders with more vocal and powerful advocates may push for awards that compensate certain needs over others.

one the same amount may be easy to administer. However, it may not be just, particularly when victims are harmed in different ways.

Finally, standards rooted in the civil litigation system more legitimately track existing criminal restitution laws.²⁹⁶ Unlike other standards, criminal restitution awards already require that prosecutors use concepts familiar to civil litigation. For example, criminal restitution statutes require compensation based on losses and require that the defendant “proximately cause” the victim’s harm.²⁹⁷ A standard that tracks civil settlements minimizes strategic behavior, reduces the possibility for error and discretion, and accounts for differences in harm based on well-established guidelines that seems consistent with existing victim restitution laws.

As a result, criminal restitution funds should consider the ALI’s *Principles of the Law of Aggregate Litigation (Principles)*. The *Principles* reflects the combined work of class action scholars, litigants, and judges. Some courts have already relied upon draft versions of the *Principles* to make difficult distribution decisions in complex distribution schemes, including the landmark \$1.5 billion settlement then–New York State Attorney General Elliot Spitzer forged with the nation’s largest investment banks.²⁹⁸

According to the *Principles*, judges, administrators, and lawyers should attempt to distribute awards according to principles of “vertical equity,” “horizontal equity,” and “rough justice.”²⁹⁹ That is, parties should be compensated (1) according to the losses they may recover in civil litigation, (2) consistent with similarly situated parties, but (3) mindful of the practical limitations of administering a complex compensation scheme.

The *Principles* also provides guidance on payments to nonparties, like provisions for “extraordinary restitution.”³⁰⁰ Unlike current DOJ guidance, the ALI’s *Principles* does not absolutely bar payments to third parties. Rather, it provides that such distributions take place only under circumstances in which direct distribution to individual class

²⁹⁶ See 18 U.S.C. § 3771(a)(6) (stating that victims shall only receive “[t]he right to full and timely restitution as provided in law” (emphasis added)).

²⁹⁷ *Id.* § 3663(a)(2).

²⁹⁸ See *SEC v. Bear, Stearns & Co.*, 626 F. Supp. 2d 402, 416-17, 420 (S.D.N.Y. 2009) (directing that any money remaining in the Distribution Funds be transferred to the U.S. Department of the Treasury, a decision consistent with the principles articulated by the ALI).

²⁹⁹ PRINCIPLES OF THE LAW OF AGGREGATE LITIG. § 1.04 cmt. f (2010).

³⁰⁰ See *supra* notes 118-22 and accompanying text.

members is not economically feasible or in which funds remain after class members are given a full opportunity to make a claim.³⁰¹ The ALI's guidelines, though controversial, provide some protections for victims while permitting prosecutors and defendants to forge creative solutions when damages are not easily traced to specific victims. For example, federal law already permits a victim to assign his or her interest in restitution to a "Crime Victims Fund" in the United States Treasury.³⁰² A modification of that law could allow prosecutors to deposit funds in the same Crime Victims Fund when compensation to individual class members is not feasible under the ALI's guidelines.

Notably, the *Principles* is not a panacea for the many complex issues that confront distributions in criminal class actions. The ALI's guidelines do not address the difficult questions raised when federal law promises to pay according to different standards than state law or under different statutes of limitations. There may be little benefit to evaluating the available claims under state law when federal prosecutors operate under different statutory authority.³⁰³ In addition, it may seem strange for prosecutors to include another common feature mentioned in the *Principles*: litigation risks and costs. No such costs exist for victims who make claims to a criminal restitution fund. Accordingly, prosecutors must balance the broader policies behind enforcing federal criminal law against the potential coordination problems that may result when federal law conflicts with state law remedies. While some of these questions fall outside the scope of this Article, we hope that the ALI's guidelines provide at least a start for addressing the distributional questions raised here.

CONCLUSION

The criminal class action is a part of two emerging trends. First, criminal class actions reflect the expansion of criminal law into areas

³⁰¹ PRINCIPLES OF THE LAW OF AGGREGATE LITIG. § 3.07.

³⁰² 18 U.S.C. § 3664(g)(2).

³⁰³ In the context of civil class actions, some scholars have raised these federalism concerns when a class action attempts to compensate victims according to a single state's law or federal common law. See, e.g., Kramer, *supra* note 164, at 574-79 (discussing the use of choice-of-law rules in determining the applicable law for class action cases tried in state courts); Linda Silberman, *The Role of Choice of Law in National Class Actions*, 156 U. PA. L. REV. 2001, 2027 (2008) (discussing the failures of national statutory solutions to this dilemma and suggesting that "a federal choice of law rule might fit the types of nationwide classes that already have been identified by CAFA as appropriate for federal court treatment").

traditionally governed by civil laws and regulations.³⁰⁴ Congress has increasingly criminalized harms traditionally resolved through private dispute resolution and common law civil actions. Players and procedures within the criminal justice system have yet to catch up.

Second, government actors increasingly seek to compensate people for collectively felt harm. Class action attorneys, regulatory agencies, state attorneys general, and criminal prosecutors commence actions seeking the same funds against the same defendant, for the same conduct, and on behalf of the same set of victims. Commentators have largely ignored how the convergence of these legal regimes may inform or alter the responsibilities of public actors to provide compensatory justice to private parties. Who acts as a check against indifference or conflicts of interest? How do we assure transparency when disseminating information about such settlements? Who decides an appropriate way to allocate and distribute settlement proceeds? Only by examining such questions can we shed light on the state's ability to provide procedural, distributive, and corrective justice to victims of collective harm.

This Article has explored the specific questions and concerns that arise when prosecutors mimic class actions by collecting large monetary settlements on behalf of victims. While many scholars have explored the way that private class actions complement public goals of "deterrence," few have explored the opposite: ways that public settlements complement private goals of compensation. Currently, prosecutors afford comparatively few procedural protections to the victims they compensate. There are good reasons for prosecutors to continue to play a role—albeit a limited one—in compensating victims. When they do so, however, prosecutors should adopt procedures from private litigation to assure victims more voice, representation, consistency, and justice in their own redress.

³⁰⁴ See Jaros, *supra* note 23, at 1448 (discussing "the expansion of criminal courts' jurisdiction . . . [and] the ever-expanding nature of the criminal law").

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