Washington University
Law Review

VOLUME 94 NUMBER 3 2017

JUDGING AGGREGATE SETTLEMENT

DAVID M. JAROS[*]
ADAM S. ZIMMERMAN[**]

ABSTRACT

While courts historically have taken a hands-off approach to settlement, judges across the legal spectrum have begun to intervene actively in "aggregate settlements"—repeated settlements between the same parties or institutions that resolve large groups of claims in a lockstep manner. In large-scale litigation, for example, courts have invented, without express authority, new "quasi-class action" doctrines to review the adequacy of massive settlements brokered by similar groups of attorneys. In recent and prominent agency settlements, including ones involving the SEC and EPA, courts have scrutinized the underlying merits to ensure settlements adequately reflect the interests of victims and the public at large. Even in criminal law, which has lagged behind other legal systems in acknowledging the primacy of negotiated outcomes, judges have taken additional steps to review iterant settlement decisions routinely made by criminal defense attorneys and prosecutors.

* Associate Professor of Law, University of Baltimore School of Law. The errors, generally, are Adam's.

** Professor of Law, Loyola Law School. The authors owe deep thanks to the insightful comments and conversations with Hiro Aragaki, Stephanos Bibas, Rachel Barkow, Andrew Brandt, Elizabeth Burch, Sergio Campos, Nora Engstrom, Kenneth Feinberg, Brandon Garrett, Maria Glover, Samuel Issacharoff, Alexandra Lahav, Carrie Menkle-Meadow, Eric Miller, Alexandra Natapoff, Teddy Rave, Judith Resnik, Mila Sohoni, Joanna Schwartz, Colin Starger, Joan Steinman, Jay Tidmarsh, Georgene Vairo, and Judge Jack B. Weinstein, as well as members of workshops at the University of Maryland, Loyola Law School, Los Angeles, University of Baltimore, the 2015 Federal Courts Workshop, and the 2016 Civil Procedure Workshop. The errors, generally, are David's.

Increasingly, courts intervene in settlements out of a fear commonly associated with class action negotiations—that the "aggregate" nature of the settlement process undermines the courts' ability to promote legitimacy, loyalty, accuracy and the development of substantive law. Unfortunately, when courts step in to review the substance of settlements on their own, they may frustrate the parties' interests, upset the separation of powers, or stretch the limits of their ability. The phenomenon of aggregate settlement thus challenges the judiciary's duty to preserve the integrity of the civil, administrative, and criminal justice systems.

This Article maps the new and critical role that courts must play in policing aggregate settlements. We argue that judicial review should exist to alert and press other institutions—private associations of attorneys, government lawyers, and the coordinate branches of government—to reform bureaucratic approaches to settling cases. Such review would not mean interfering with the final outcome of any given settlement. Rather, judicial review would instead mean demanding more information about the parties' competing interests in settlement, more participation by outside stakeholders, and more reasoned explanations for the trade-offs made by counsel on behalf of similarly situated parties. In so doing, courts can provide an important failsafe that helps protect the procedural, substantive, and rule-of-law values threatened by aggregate settlements.

TABLE OF CONTENTS

INTRODUCTION

Judges do more than "say what the law is."[1] They also preserve the integrity of our justice system by ensuring that it produces fair outcomes.[2] When it comes to settlement, however, judges have historically taken a more hands-off approach. Judges ordinarily will not set aside a privately reached settlement as long as it is a product of a contested and arm's-length negotiation.[3]

Recently, however, some judges in civil, administrative, and even criminal law have begun to question the propriety of "aggregate settlements"—repeated settlements between the same parties or institutions that resolve large groups of claims in a lockstep manner. Consider the following examples:

- Judge Alvin Hellerstein rejected a multi-million-dollar settlement to resolve over 10,000 Ground Zero workers' claims, arguing: "Most settlements are private; a plaintiff and defendant come together, shake hands, and it's done with . . . [B]asically

1. Marbury v. Madison, 5 U.S. 137, 177 (1803) (Marshall, C.J.).

2. *See Ex parte* Burr, 22 U.S. 529, 530 (1824) (Marshall, C.J.) ("[I]t is extremely desirable that the respectability of the bar should be maintained, and that its harmony with the bench should be preserved. For these objects, some controlling power, some discretion ought to reside in the Court."). *See also* D. Brock Hornby, *The Business of the U.S. District Courts*, 10 GREEN BAG 2d 453, 463 (2007) (describing the public's reliance on judges to ensure "the integrity of the process"); RICHARD H. FALLON, JR. ET. AL., HART & WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 72–76 (6th ed. 2009) (discussing "dispute resolution" and "law declaration" models of the federal courts); Henry P. Monaghan, *Constitutional Adjudication: The Who and When*, 82 YALE L.J. 1363, 1365–71 (1973).

3. *See* Abram Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281, 1285 (1976) (observing that traditionally "courts could be seen as an adjunct to private ordering, whose primary function was the resolution of disputes about the fair implications of individual interactions"). Lon Fuller is frequently associated with this traditional model of adjudication. *See, e.g.*, LON L. FULLER, *The Forms and Limits of Adjudication*, *in* THE PRINCIPLES OF SOCIAL ORDER 86 (Kenneth I. Winston ed., 1981); LON L. FULLER, THE PROBLEMS OF JURISPRUDENCE 705–08 (temp. ed. 1949) [hereinafter FULLER, JURISPRUDENCE].

> it's the parties that decide . . . This is different . . . This is a case that's dominated my docket, and because of that, I have the power of review."[4]

- In a series of opinions reviewing the SEC's handling of more than 200 consent decrees, Judge Jed Rakoff rejected several proposed corporate settlements with the SEC.[5] In one case, the Court said the deal showed a "cynical relationship between the parties: the S.E.C. gets to claim that it is exposing wrongdoing . . . [, while] the Bank's management gets to claim that they have been coerced into an onerous settlement by overzealous regulators."[6]
- Judge William Young rejected several criminal plea deals, explaining that "however agreeable [the plea is] to the executive—once aggregated together with similar decisions across the criminal justice system—[it] results in the denigration of the criminal law."[7]

At the time, all of these cases attracted attention for what were perceived as renegade acts of maverick judging.[8] Each case represents, however, part of a broader, unexplored trend. Across the civil, administrative and criminal divide, courts have intervened out of a fear that the "aggregate" nature of the settlement process undermined the ability of our public dispute resolution system to promote legitimacy, loyalty, accuracy, and the

4. Transcript of Status Conference at 54, *In re* World Trade Ctr. Disaster Site Litig., No. 21 MC 100 (AKH) (S.D.N.Y. Mar. 19, 2010).

5. S.E.C. v. Bank of Am. Corp., 653 F. Supp. 2d 507, 512 (S.D.N.Y. 2009) (Rakoff, J.); S.E.C. v. Vitesse Semiconductor Corp., 771 F. Supp. 2d 304 (S.D.N.Y. 2011); S.E.C. v. Citigroup Global Mkts. Inc., 827 F. Supp. 2d 328, 332 (S.D.N.Y. 2011).

6. Bank of Am. Corp., 653 F. Supp. 2d at 512.

7. United States v. Orthofix, Inc., 956 F. Supp. 2d 316, 334 (D. Mass. 2013).

8. *See, e.g.*, Howard M. Erichson, *The Role of the Judge in Non-Class Settlements,* 90 WASH. U. L. REV. 1015 (2013) (criticizing Judge Hellerstein's decision); Jeremy T. Grabill, *Judicial Review of Private Mass Tort Settlements*, 42 SETON HALL L. REV. 123, 182 (2012) (disagreeing with judicial decisions to reject private settlements); Robert Khuzami, Dir., Div. of Enf't, U.S. Securities and Exchange Comm'n, Public Statement by SEC Staff: Court's Refusal to Approve Settlement in Citigroup Case (Nov. 28, 2011), http://perma.cc/7464-QJSV (alleging that Judge Rakoff's decision "ignores decades of established practice throughout federal agencies and decisions of the federal courts"); Gina L. Simms & John S. Linehan, *The Judge Doth Reject: How to Prepare for Increased Judicial Scrutiny of Corporate Settlement Agreements in Health Care Cases*, WHITE COLLAR CRIME COMM. NEWSLETTER (Am. Bar Ass'n, Criminal Justice Section, Chicago, IL), Winter 2013, at 3 (noting that Judge Young's decision was either an "aberration[]" or a "momentous shift" in judicial review of criminal plea bargains), http://www.americanbar.org/content/dam/aba/publications/criminaljustice/simms_etal.authcheckdam.pdf.

development of substantive law. At the same time, judicial intervention into the substance of the settlement risked contravening the interests of the parties, upsetting the separation of powers, and stretching the limits of judicial competence.

An increase in judicial supervision of aggregate settlements would have wide-ranging repercussions across the law. Many informal procedures aggregate cases in civil, administrative, and criminal law. In personal injury, insurance, and multidistrict litigation, for example, the same plaintiff and defense lawyers rely on routine settlement practices in individual cases—sometimes negotiating sweeping settlement matrices to resolve thousands of claims brought by similarly situated victims.[9] In criminal law, a categorical approach to plea bargains has led to high-volume and cookie-cutter settlement systems, with little regard for criminal defendants' culpability and individual circumstances.[10] In multi-million-dollar administrative settlements, federal agencies increasingly rely on centralized enforcement divisions, a small number of private claim facilities, and boilerplate settlements to set policy and provide compensation without traditional procedural safeguards to make rules or decide cases transparently.[11] Even as we promise people the right to their

9. *See* Nora Freeman Engstrom, *Sunlight and Settlement Mills*, 86 N.Y.U. L. REV. 805, 809–11 (2011); Howard M. Erichson, *Informal Aggregation: Procedural and Ethical Implications of Coordination Among Counsel in Related Lawsuits*, 50 DUKE L.J. 381, 386–401 (2000); H. LAURENCE ROSS, SETTLED OUT OF COURT: THE SOCIAL PROCESS OF INSURANCE CLAIMS ADJUSTMENT 22 (2d ed. 1980) (finding that the system of insurance adjustment for automobile accidents "is individualistic mainly in theory; in practice it is categorical and mechanical, as any system must be if it is to handle masses of cases in an efficient manner").

10. *See* Alexandra Natapoff, *Aggregation and Urban Misdemeanors,* 40 FORDHAM URB. L.J. 1043, 1071 (2013); Rachel E. Barkow, *Institutional Design and the Policing of Prosecutors: Lessons from Administrative Law*, 61 STAN. L. REV. 869, 876–84 (2009); Gerard E. Lynch, *Our Administrative System of Criminal Justice*, 66 FORDHAM L. REV. 2117 (1998). *Cf.* Albert W. Alschuler, *The Failure of Sentencing Guidelines: A Plea for Less Aggregation*, 58 U. CHI. L. REV. 901, 908–09 (1991) (arguing aggregation in criminal sentencing has "led to the substitution of crime tariffs for the consideration of situational and offender characteristics in even simple and recurring cases" and emphasizes "harms, not people"); Malcolm M. Feeley & Jonathan Simon, *The New Penology: Reformulating Penal Objectives and Implications for Penal Growth*, *in* GROWTH AND ITS INFLUENCE ON CORRECTIONAL POLICY: PERSPECTIVES ON THE REPORT OF THE BLUE RIBBON COMMISSION (1990) (arguing that the "new penology" focusing on "the management of aggregate populations" has replaced an "old penology" that "focuse[d] on individuals").

11. *See, e.g.*, MICHAEL D. SANT'AMBROGIO & ADAM S. ZIMMERMAN, ADMIN. CONFERENCE OF THE UNITED STATES, DRAFT REPORT ON AGGREGATE AGENCY ADJUDICATION (Feb. 19, 2016), https://www.acus.gov/sites/default/files/documents/aggregate-agency-adjudication-draft-report.pdf; Urska Velikonja, *Public Compensation for Private Harm: Evidence from the SEC's Fair Fund Distributions*, 67 STAN. L. REV. 331 (2015) (describing use of centralized enforcement and management in SEC settlements).

own lawyer and their own "day in court,"[12] outcomes in civil, criminal, and administrative disputes just as often turn on what happens in massive and opaque settlement bureaucracies—unseen organizations of lawyers, businesses and claim facilities—which quietly sweep together and resolve large groups of cases, swiftly and categorically.[13]

In this Article, we set out to show what aggregated settlement means for our public system of adjudication and specifically for the obligations of the judges who shepherd cases through that system. Specifically, we think a legal system dependent on informally aggregated settlement presents challenges to judges across many areas of civil, criminal, and administrative law. All three systems, to varying degrees, rely on courts to resolve disputes in order to protect individual rights and promote the public interest. Settlements have long been a part of that process—conserving public resources, while offering flexible alternative resolutions for the parties.[14] But, in each system, courts have traditionally assumed that settlements resulted from contested, individualized, and arm's-length negotiations requiring little judicial oversight of either the process or the result.[15]

The reality of informal aggregate-settlement practice, however, upends the traditional view that settlements are simply creatures of contract that reflect parties' individual choices made in the "shadow of the law."[16] Settlements are instead mass produced by private bureaucratic systems,

12. Taylor v. Sturgell, 553 U.S. 880, 892–93 (2008) (observing the "'deep-rooted historic tradition that everyone should have his own day in court,'" (quoting Richards v. Jefferson Cty., 517 U.S. 793, 798 (1996))); Rock v. Arkansas, 483 U.S. 44, 51 (1987) (stating that the right to a day in court is a "necessary ingredient[]" of due process); Martin H. Redish & William J. Katt, Taylor v. Sturgell, *Procedural Due Process, and the Day-in-Court Ideal: Resolving the Virtual Representation Dilemma*, 84 NOTRE DAME L. REV. 1877, 1881 (2009) ("Our legal system employs a presumption that each person has a right to her day in court.").

13. *See* Dana A. Remus & Adam S. Zimmerman, *The Corporate Settlement Mill*, 101 VA. L. REV. 129 (2015); Natapoff, *supra* note 10, at 1071; Samuel Issacharoff & John Fabian Witt, *The Inevitability of Aggregate Settlement: An Institutional Account of American Tort Law*, 57 VAND. L. REV. 1571, 1575 (2004).

14. *See* Judith Resnik, *Diffusing Disputes: The Public in the Private of Arbitration, the Private in Courts, and the Erasure of Rights*, 124 YALE L. J. 2804, 2844 (2015) ("Through a series of statutes and rule reforms, mediation and arbitration—methods characterized in the 1980s by both Chief Justice Burger and the Federal Rules of Civil Procedure as extrajudicial procedures—turned in the 1990s into everyday practices *inside* courts.").

15. Chayes, *supra* note 3, at 1285; FULLER, JURISPRUDENCE, *supra* note 3.

16. *See* Robert Cooter et al., *Bargaining in the Shadow of the Law: A Testable Model of Strategic Behavior,* 11 J. LEGAL STUD. 225 (1982); Robert H. Mnookin & Lewis Kornhauser, *Bargaining in the Shadow of the Law: The Case of Divorce*, 88 YALE L.J. 950, 968 (1979); Byron G. Stier, *Jackpot Justice: Verdict Variability and the Mass Tort Class Action*, 80 TEMP. L. REV. 1013, 1056–66 (2007) (describing benefits of multiple individual cases and jury verdicts for achieving accurate claim valuation in mass tort settlements).

resolving disputes according to categorical rules, local norms, and "going rates" divorced from the legal merits of the underlying claims.[17] The attractions of aggregate settlement are manifold. Attorneys—who hold a legal monopoly over access to the courts—are naturally encouraged to broker ready-made deals based on their repeated interactions with the small coterie of judges, administrators, and decisionmakers who handle their clients' disputes. Mass claim handling offers predictability in a world of open-ended legal standards, not to mention a survival mechanism to fight off crushing caseloads. Perhaps it should be little surprise that lawyers have relied on precursors to modern aggregate settlement practice since as long ago as the 1880s, when the American legal profession first came to maturity.[18]

In all this time, however, we have continued to lack any satisfying theoretical foundation for judges to supervise aggregate settlement.[19] The current judicial response to the rise of bureaucratic settlement has either been to passively accept such settlements as indistinguishable from individualized settlements or to intervene in an ad hoc fashion to try to assure "adequate" representation. In large-scale multidistrict litigation, for example, courts have created new "quasi-class action" doctrines to review the adequacy of massive settlements without express authority to do so.[20]

---

17. *See* Nora Freeman Engstrom, *Run-of-the-Mill Justice*, 22 GEO. J. LEGAL ETHICS 1485, 1490 (2009) (describing "going rates" for repeat personal injury claims where "settlement values are lumped together, largely decoupled from the substantive merit of the underlying claim"); Stephanos Bibas, *Plea Bargaining Outside the Shadow of Trial*, 117 HARV. L. REV. 2464, 2483 n.78 (2004) ("[B]argaining is tempered by stable going rates for ordinary crimes . . . .").

18. *See* Issacharoff & Witt, supra note 13, at 1584–93; Lawrence M. Friedman, *Civil Wrongs: Personal Injury Law in the Late 19th Century*, 1987 AM. BAR FOUND. RES. J. 351, 372–73 (1987); MALCOLM M. FEELEY, THE PROCESS IS THE PUNISHMENT: HANDLING CASES IN A LOWER CRIMINAL COURT (1979); MILTON HEUMANN, PLEA BARGAINING: THE EXPERIENCES OF PROSECUTORS, JUDGES, AND DEFENSE ATTORNEYS (1978).

19. Judith Resnik, *Judging Consent*, 1987 U. CHI. LEGAL F. 43 (1987) (raising questions about the role of judicial review of non-aggregate across civil, administrative and criminal law). For one notable exception involving civil cases, see D. Theodore Rave & Andrew D. Brandt, *The Information-Forcing Role of the Judge in Multidistrict Litigation*, 105 CAL. L. REV. __ (forthcoming 2017) (manuscript at 7) (arguing that federal judges may serve as information "intermediaries" in federal multidistrict litigation settlements), available at https://ssrn.com/abstract=2828461. Professors Rave and Bradt's forthcoming article is limited to complex civil litigation, but parallels arguments we advance abou that topic in Parts I.A.1 and II.A.1. Their proscriptions go further, however, by asserting that judges can provide an important "signal" to parties about whether a settlement is good or bad based on a judge's familiarity with the underlying litigation. *Id.* Our model, which we discuss in Part III, focuses instead on a judge's ability to improve the *parties' incentives to exchange information* and make reasoned trade-offs when they settle.

20. *See* Elizabeth Chamblee Burch, *Judging Multidistrict Litigation*, 90 N.Y.U. L. REV. 71 (2015) (collecting cases and scholarship summarizing trend); Jack B. Weinstein, *Ethical Dilemmas in Mass Tort Litigation*, 88 NW. U. L. REV. 469, 529 (1994) (arguing mass consolidations "should be treated for some purposes as class actions").

Similarly, in recent and prominent agency settlements, including ones involving the SEC and EPA, courts have scrutinized the underlying merits to ensure settlements adequately reflect the interests of victims and the public at large.[21] Even criminal law, which has lagged behind other legal systems in acknowledging the primacy of settlement, has begun to require judges to review the adequacy of settlement decisions routinely made by criminal defense attorneys and prosecutors.[22] It remains to be seen if the Supreme Court, which has been slow to acknowledge the critical role that plea-bargaining plays in the criminal process, will recognize the implications of *aggregated* pleas.

While the passive acceptance of aggregate settlements might seem like an abdication of judicial responsibility, we ought to view this ad hoc judicial intervention with deep ambivalence. After all, courts themselves acknowledge that they lack the power, information, and expertise to ensure adequate representation at critical stages of the settlement process.[23] And ensuring that attorneys remain loyal to their clients or to the public good provides little solace in a system where many predetermined features of the settlement exist beyond the control of any one attorney.

The aggregation of individual settlement practices thus requires a rethinking of the role of judges in a world of bureaucratic settlement. We argue for a model of judicial review that plays a modest, but critical role in a world of mass settlement. Judicial review should exist to alert and press other institutions—private associations of attorneys, government lawyers, and the coordinate branches of government—to reform their institutional approach to settling cases. Such review would not mean interfering with the final outcome of any given settlement. Instead, judicial review would mean: (1) demanding more information about the parties' competing interests in settlement, (2) more participation by outside stakeholders, and (3) more reasoned explanations for the trade-offs made by the counsel on

---

21. *See* Alison Frankel, *Judge in SEC's Bear Stearns case catches Rakoff fever*, THOMPSON REUTERS NEWS & INSIGHT (Feb. 15, 2012), http://blogs.reuters.com/alison-frankel/2012/02/15/judge-in-secs-bear-stearns-case-catches-rakoff-fever/; Bob Van Voris, *SAC Judge Questions Record $602 Million SEC Settlement*, BLOOMBERG (Mar. 28, 2013), http://www.bloomberg.com/news/2013-03-28/sac-judge-questions-record-602-million-sec-settlement.html.

22. *See* Missouri v. Frye, 132 S. Ct. 1399, 1407 (2012) ("The reality is that plea bargains have become so central to the administration of the criminal justice system that defense counsel have responsibilities in the plea bargain process, responsibilities that must be met to render the adequate assistance of counsel . . . ."); Lafler v. Cooper, 132 S. Ct. 1376, 1384–88 (2012).

23. *See, e.g.*, JACK B. WEINSTEIN, INDIVIDUAL JUSTICE IN MASS TORT LITIGATION 103 (1995) ("Yet we must bear in mind the need for humility on the part of the court. It often knows little about what goes on outside the courtroom. Its knowledge of the intricacies of the case is limited. Hubris is dangerous. Power tends to corrupt."). *See also infra* Part II.B.

behalf of similarly situated parties. In so doing, courts can provide an important failsafe that helps protect the procedural, substantive, and rule-of-law values threatened by recurring settlements.

This Article proceeds in three parts. Part I charts the rise of informal aggregate settlement practice across civil, criminal, and administrative law. Even though courts sometimes formally aggregate cases, like when one party represents and settles claims on behalf of many others in a class action, informally aggregated settlement practice is far more common in civil, criminal, and administrative law. In an "informal aggregation," courts or parties group cases for settlement purposes by (1) centralizing individually represented parties with the same claims in front of the same judge or on the same courthouse docket or (2) using the offices of personal injury attorneys, corporate settlement facilities, or government divisions to organize and settle similar claims in bulk, mostly outside of any formal judicial process.

After defining the concept of informal aggregation, Part I goes on to show that a legal system dependent on aggregated settlement challenges the judiciary's obligation to preserve the integrity of the civil, administrative, and criminal justice processes. Aggregated settlement practice, however desirable or inevitable, raises new problems—introducing new conflicts of interest, complicating parties' meaningful participation, undermining accuracy, and reshaping legal rights in ways that frustrate the judiciary's ability to "say what the law is." In short, informal aggregation means that judges cannot rely on traditional adversarial decision-making to assure fair procedures, test the parties' claims, promote just outcomes, or determine parties' formal rights and responsibilities to each other.

Part II shows how the lack of any satisfying theoretical foundation for judges to review recurring settlements in criminal, civil, and administrative law has created doctrinal disarray. The current judicial response to the rise of bureaucratic settlement has been to try to assure "adequate" representation for parties in criminal, civil, and administrative law. At the same time, courts acknowledge that they lack the information, expertise, and authority to ensure adequate representation at critical stages in an ongoing settlement process.

Accordingly, Part III argues that judges may play a limited, but critical role in mass settlement practice. Judicial review of informally aggregated settlements should exist primarily to alert and press other institutions to reevaluate and reform institutional approaches to settling cases. We show that this form of judicial intervention recognizes that judges are in a unique position to identify—and to encourage parties to avoid—recurring

problems in repeat settlements. Our model of judicial review reflects the fact that courts do not only exist in a system of checks and balances designed to constrain action, but that our constitutional separation of powers forms a system of "prods and pleas"[24] where distinct governmental branches and private institutions can push each other to improve the way they make decisions.

Although some criticize[25] and others praise[26] judges who aggressively review repeat settlements, to date they have limited their attention to separate spheres of civil, administrative, and criminal law. As a result, they have overlooked what the challenge of aggregated settlement means for the judiciary itself. Our model of judicial behavior allows judges to promote fair outcomes in each system, while respecting the limits of their own abilities and the rights and privileges of the parties before them.

I. THE INEVITABILITY OF AGGREGATE SETTLEMENT IN CIVIL, CRIMINAL, AND ADMINISTRATIVE LAW

Civil, criminal, and administrative proceedings begin with the "day in court" ideal. Plaintiffs in civil court receive personalized hearings to sort out private disputes with others.[27] Judges frequently refuse to consolidate

24. *See* Benjamin Ewing & Douglas A. Kysar, *Prods and Pleas: Limited Government in an Era of Unlimited Harm*, 121 YALE. L.J. 350, 410 (2011) ("In the face of many twenty-first century harms, however, 'pluralism' requires not only multiple values, but also multiple institutions.").

25. *See* Erichson, *supra* note 8, at 1024 ("When a judge purports to *reject* a settlement that would have been acceptable to the parties, the judge deprives the parties of control over their claims."); Jean Eaglesham & Chad Bray, *Citi Ruling Could Chill SEC, Street Legal Pacts*, WALL ST. J. (Nov. 29, 2011), http://www.wsj.com/articles/SB10001424052970203935604577066242448635560 (quoting Stanford University law professor Joseph Grundfest as saying, "Judge Rakoff's decision will likely be troubling to the entire federal government, and not just the SEC.").

26. *See* Tobias Barrington Wolff, *Managerial Judging and Substantive Law*, 90 WASH. U. L. REV. 1027 (2013) (arguing that substantive law empowered Judge Hellerstein to review substantive settlements); Samuel W. Buell, *Liability and Admissions of Wrongdoing in Public Enforcement of Law*, 82 U. CIN. L. REV. 505 (2013); John Cassidy, *Why Judge Rakoff Was Right to Block the Citigroup Settlement*, THE NEW YORKER (Nov. 29, 2011), http://perma.cc/86X8-WZUR; Brief of *Amici Curiae* Securities Law Scholars for Affirmance in Support of the District Court's Order and Against Appellant and Appellee at 17–23, S.E.C. v. Citigroup Global Mkts., Inc., 673 F.3d 158 (2d Cir. 2012) (No. 11-5227-cv), 2012 WL 7009633, at *17–23; Gordon Bourjaily, Note, *DPA DOA: How and Why Congress Should Bar the Use of Deferred and Non-Prosecution Agreements in Corporate Criminal Prosecutions*, 52 HARV. J. ON LEGIS. 543, 568 (2015) (observing that meaningful judicial review guards against overzealous prosecution and the risk of collusion).

27. *See* Ortiz v. Fibreboard Corp., 527 U.S. 815, 846 (1999); Martin v. Wilks, 490 U.S. 755, 762 (1989) (observing it is "our 'deep-rooted historic tradition that everyone should have his own day in court'" (quoting 18 CHARLES ALAN WRIGHT, ARTHUR MILLER, & EDWARD COOPER, FEDERAL PRACTICE AND PROCEDURE §4449, at 417 (1981))); JULES L. COLEMAN, THE PRACTICE OF PRINCIPLE: IN DEFENSE OF A PRAGMATIST APPROACH TO LEGAL THEORY 16 (2001) ("Tort law's structural core is

criminal trials in order to protect each criminal defendant's right to a fair trial and effective counsel.[28] Agencies must provide citizens with a personal "kind of hearing"[29] to challenge government acts that threaten their lives, property, or liberty.[30] And while each system has come to recognize that most cases settle, we still tend to think of the outcome as part of an arm's-length negotiation, brokered between two adversaries, conducted "in the shadow" of a legal process.[31]

Each system, however, has long adopted exceptions that, in many respects, swallow the rule—grouping together and resolving large groups of similar claims, or what we call "aggregation."[32] Aggregation is a central feature of all legal systems. Policymakers and judges must design and interpret rules to treat like cases in a like manner.[33] Legislators create agencies to adjudicate particular categories of cases.[34] Federal and state criminal sentencing commissions set guidelines for punishing similar

represented by case-by-case adjudication in which particular victims seek redress" from particular defendants, each of whom "must . . . make good her 'own' victim's compensable losses.").

28. *See* Uphaus v. Wyman, 360 U.S. 72, 79 (1959) ("[G]uilt by association remains a thoroughly discredited doctrine . . . ."); Glasser v. United States, 315 U.S. 60, 70 (1942) (holding that requiring an attorney to represent two codefendants in a conspiracy case whose interests were in conflict denied them the Sixth Amendment right to the effective assistance of counsel); *In re* Winship, 397 U.S. 358, 64 (1970) ("[T]he Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged."). *See also* Brandon L. Garrett, *Aggregation in Criminal Law,* 95 CALIF. L. REV. 383, 386 (2007) ("The Supreme Court has held that the Constitution guarantees a fundamental right to an individual, not an aggregate, jury determination regarding each element of a crime necessary to prove guilt.").

29. Henry J. Friendly, "*Some Kind of Hearing"*, 123 U. PA. L. REV. 1267 (1975); Goldberg v. Kelly, 397 U.S. 254, 264 (1970) (requiring pre-termination hearing procedures for welfare benefit recipients).

30. 1 KENNETH CULP DAVIS, ADMINISTRATIVE LAW TREATISE § 7.02, at 412 (1958); Londoner v. City and Cnty. of Denver, 210 U.S. 373 (1908); Heckler v. Campbell, 461 U.S. 458, 467 (1983) (observing that, in past decisions, people received "ample opportunity" to present evidence relating to their own claims and to show that an agency's general "guidelines" for resolving common cases "do not apply to them").

31. Mnookin & Kornhauser, *supra* note 16 (adopting individualized approach to settlement bargaining in divorce cases). *But see* Issacharoff & Witt, *supra* note 13; Adam F. Scales, *Man, God and the Serbonian Bog: The Evolution of Accidental Death Insurance*, 86 IOWA L. REV. 173 (2000); Stephen C. Yeazell, *Re-Financing Civil Litigation*, 51 DEPAUL L. REV. 183 (2001); Robert G. Bone, *Rethinking the "Day in Court" Ideal and Nonparty Preclusion*, 67 N.Y.U. L. REV. 193 (1992).

32. Howard M. Erichson, *A Typology of Aggregate Settlements*, 80 NOTRE DAME L. REV. 1769, 1784–95 (2005).

33. Martin v. Franklin Capital Corp., 546 U.S. 132, 139 (2005) ("Discretion is not whim, and limiting discretion according to legal standards helps promote the basic principle of justice that like cases should be decided alike."); Alexandra D. Lahav, *The Case for "Trial By Formula"*, 90 TEX. L. REV. 571, 572 (2012) ("That like cases ought to be treated alike is a basic common law principle.").

34. *See, e.g.*, National Childhood Vaccine Injury Act of 1986, Pub. L. No. 99-660, §§ 2110–18, 100 Stat. 3755, 3758-71 (codified as amended at 42 U.S.C. §§ 300aa-1 to -18 (2012)); Nora Freeman Engstrom, *A Dose of Reality for Specialized Courts: Lessons from the VICP*, 163 U. PA. L. REV. 1631, 1635 (2015).

forms of misconduct.[35] Common law judges publish reasoned opinions and consider the precedential impact of their decisions on similar cases.[36]

Legal systems also use other procedures to group together and settle large numbers of cases. In the United States, one a well-known kind of "aggregate lawsuit" is the class action—a single lawsuit that includes claims or defenses held by many different people. Other kinds of formal aggregations include derivative lawsuits, trustee actions, and state attorneys general *parens patriae* actions.[37] In all such formal aggregations, a person, or a small group of people, may bind others to the outcome.

But courts and parties routinely group together civil, administrative, and criminal claims in other ways.[38] First, courts may "administratively aggregate" cases—channeling individually represented parties into the same courthouse, before the same judge, or onto a specialized docket. Second, parties may "privately aggregate" claims, largely outside of any formal judicial process, for settlement purposes. Each form of informal aggregation hopes to promote more efficiency, consistency, and, sometimes, a desired settlement outcome. We discuss these different forms of aggregation, which appear in Table 1 below, in Section A.

---

35. Alschuler, *supra* note 10, at 908–09 (arguing aggregation in criminal sentencing has led to "substitution of crime tariffs for the consideration of situational and offender characteristics in even simple and recurring cases. The focus has been on harms, not people").

36. Issacharoff & Witt, *supra* note 13, at 1578 ("Common law tort doctrine has long adopted what we may call doctrines of substantive aggregation in tort.").

37. *See* Margaret H. Lemos, *Aggregate Litigation Goes Public: Representative Suits by State Attorneys General*, 126 HARV. L. REV. 486 (2012).

38. *See* PRINCIPLES OF THE LAW OF AGGREGATE LITIG. § 1.02 (AM. LAW INST. 2010) [hereinafter ALI Principles] (describing informal aggregation); Erichson, *supra* note 9, at 386; Judith Resnik, *Compared to What?: ALI Aggregation and the Shifting Contours of Due Process and of Lawyers' Powers*, 79 GEO. WASH. L. REV. 628 (2011); Judith Resnik, *From "Cases" to "Litigation"*, 54 L. & CONTEMP. PROBS. 5 (1991) [hereinafter Resnik, *From "Cases" to "Litigation"*].

TABLE 1

	Civil Law	**Administrative Law**	**Criminal Law**
Formal Aggregation	Class Action Parens Patriae Lawsuits	Class Actions Agency Restitution Funds	Habeas Class Actions Criminal Victim Compensation Funds
Administrative Aggregation	Multidistrict Litigation Patent Dockets and Intra-District Coordination	Omnibus Proceedings Immigration "Surge Courts"	Criminal "Problem Solving Courts" Domestic Violence Courts
Private Aggregation	High Volume Personal Injury Practices Corporate Settlement Mills	Coordinated Settlement Offers "Industry-Wide" Settlements	Standardized Pleas Boilerplate Waivers

As we discuss in Section B below, aggregate settlements also create new risks and challenges. In individual settlement negotiations, a single lawyer ideally serves one client, responds to the client's wishes in an arm's-length transaction, and relies on past judicial decisions and trial outcomes to arrive at a fair deal. But, as we show, many civil, administrative, and criminal settlement negotiations are better viewed as aggregate bargains that resolve large portfolios of claims untethered from the merits of any one case. These aggregate settlements raise new concerns about what role judges should play in resolving aggregate disputes in a legitimate, meaningful, and accurate way.

A. Aggregation in Civil, Administrative and Criminal Law

Although commonly associated with complex litigation, different forms of procedural aggregation exist across civil, administrative, and criminal law. This section describes the use of aggregation in each area of law, before describing what they mean for judicial power.

1. Aggregate Settlements in Civil Law

Policymakers and courts have long embraced civil settlements. The general assumption is that one-on-one lawsuits, which make up the "bulk"

of civil filings in federal and state courts, are usually very easy to resolve.[39] The litigation system relies on each side to develop its own case and control its own lawyers. Judges only get involved when lawyers fail to live up to their duty to faithfully represent the interests of their clients in settlement negotiations, or when there is a concern that the resolution of the case will impact other parties or interests not represented in the immediate dispute. The limited role of judges in individual civil settlements reflects the idea that private dispute resolution will produce superior outcomes when negotiations are conducted outside the courtroom, at arm's-length and taking into account the facts of the individual case.

The most well-known exception to this rule is the class action, where judges review settlements precisely because publicly approved counsel who represent large groups of people, and may be tempted to reach sweetheart deals, make class-wide determinations.[40] Judicial review thus exists to ensure class counsel faithfully represent absent class members, to provide a forum to hear from dissenting interest groups, and to ensure that the final settlement adequately reflects the underlying merits and the public interest. Thus, even as they promise greater efficiency, consistency and legal access, class action lawsuits struggle to (1) promote *loyalty* when attorneys serve disparate interests; (2) ensure *legitimacy* when clients lack input and control over the outcome; and (3) achieve *accuracy* when ready-made settlements blur characteristics of many different kinds of cases or overlook their individual merits.

In addition to class actions, rules in civil litigation have, for a long time, also allowed parties to collectively bring large numbers of similar cases in informal ways, including: (1) administrative aggregation; (2) private aggregation; and (3) passive aggregation. Like class actions, informal aggregation also invites judges to "manage" mass settlements more actively than they would individual "cases and controversies." This is because informal aggregations and class actions have long raised similar concerns.

Administrative aggregation captures those times where many different parties retain separate counsel, but are assigned to the same judicial forum because the claims raise common questions of law or fact. In civil litigation, the most well-known form of administrative aggregation is

39. *See* ALI Principles, *supra* note 38, § 1.05 cmt. b.

40. FED. R. CIV. P. 23(e) advisory committee's note to 2003 amendment ("Settlement may be a desirable means of resolving a class action. But court review and approval are essential to assure adequate representation of class members who have not participated in shaping the settlement.").

multidistrict litigation,[41] where a panel of judges may assign a large number of similar claims filed around the country to the same judge to streamline discovery, manage motion practice, coordinate counsel and, in many cases, expedite settlement.[42] Since its creation in 1968, the Judicial Panel on Multidistrict Litigation has centralized almost half a million civil actions for pretrial proceedings.[43] Other forms of administrative aggregation in civil law include specialized dockets—like those designed to expedite patent claims filed in the Eastern Districts of Virginia and Texas[44]—or inter-district rules designed to ensure that a single judge hears all "related claims" in the same district.[45]

But administratively aggregated civil cases may also frustrate loyal representation and accurate outcomes. First, lawyers experience conflicts when they settle individual cases in administrative aggregations, particularly because the success of any one settlement often depends on the same lawyer settling hundreds of similar claims.[46] One example involved the settlement of the national Vioxx litigation. In *Vioxx*, the settlement globally resolved the litigation after plaintiffs' attorneys and Merck agreed that each participating attorney recommend the settlement to 100% of her eligible clients (and, more controversially, to withdraw from representing any client who refused).[47] If fewer than 85% of claimants consented, Merck could rescind its offer entirely. Such "walk-away clauses" can exert enormous pressure on counsel, requiring lawyers

41. *See* Emery G. Lee III et al., *Multidistrict Centralization: An Empirical Examination*, 12 J. EMPIRICAL LEGAL STUD. 211, 222 (2015).

42. 28 U.S.C. § 1407 (2012). *See also* Andrew Bradt, *A Radical Proposal: The Multidistrict Litigation Act of 1968*, 165 U. PA. L. REV. (forthcoming 2016) (on file with authors).

43. Lee et al., *supra* note 41, at 211. By the end of 2013, 13,432 actions had been remanded for trial, 398 had been reassigned within the transferee districts, 359,548 had been terminated in the transferee courts, and 89,123 were pending throughout the district courts. *Judicial Panel on Multidistrict Litigation – Judicial Business 2013*, ADMIN. OFFICE OF THE U.S. COURTS, http://www.uscourts.gov/statistics-reports/judicial-panel-multidistrict-litigation-judicial-business-2013.

44. *See* J. Jonas Anderson, *Court Competition for Patent Cases*, 163 U. PA. L. REV. 631 (2015); Daniel Klerman & Greg Reilly, *Forum Selling*, 89 S. CAL. L. REV. 241 (2016).

45. *See, e.g.*, S.D.N.Y. & E.D.N.Y. LOCAL R. 13 (amended Jan. 1, 2014); Richard G. Kopf, *A cheap shot*, HERCULES AND THE UMPIRE (Nov. 3, 2013), http://herculesandtheumpire.com/2013/11/03/a-cheap-shot/ ("The reason we have relatedness rules in the district courts is to avoid treating similar cases dissimilarly and because it wastes judicial resources by duplicating effort when two judges deal with similar issues.").

46. *See* ALI Principles, *supra* note 38, § 3.16 cmts. a–c; Erichson, *supra* note 32, at 1784 (characterizing such conflicts as problems of claim "conditionality").

47. Settlement Agreement at § 1.2.8.1–2, *In re* Vioxx Prods. Liab. Litig., MDL No. 1657 (E.D. La. Nov. 9, 2007), http://www.officialvioxxsettlement.com/documents/Master%20Settlement%20Agreement%20-%20new.pdf. *See also* Howard M. Erichson & Benjamin C. Zipursky, *Consent Versus Closure*, 96 CORNELL L. REV. 265, 279–92 (2011).

simultaneously to take into account the interests of the individual and the larger group before advising how to settle any one case.[48]

Second, administratively aggregated civil cases complicate legitimacy because they rarely lead to tailored negotiated bargains that reflect individual control. Most instead inevitably lead to private bureaucracies established by a small number of lawyers, special masters, or magistrates, designed to efficiently determine payouts. In the multidistrict litigation involving September 11 recovery workers, to this day, parties continue to work out settlements according to a matrix established using a sophisticated database that sorted among different categories of diseases, exposures, and ages.[49]

Third, administrative aggregation complicates accuracy—particularly when settlements do not reflect one-on-one bargaining, but instead are resolved categorically by the same plaintiff and defense counsel, with weak incentives to learn about the underlying merits. This is sometimes a result of perverse incentives created by the ways parties must organize themselves to process large volumes of claims. For example, plaintiffs and defendants complain that multidistrict litigation favors volume over knowledge: attorneys often receive coveted and lucrative positions on steering committees based on the sheer number of clients they retain in the litigation.[50] Those incentives may, in turn, delay and discourage lawyers from investing limited resources to develop the facts of individual cases before reaching a global settlement.[51]

Counsel may also frustrate accuracy by "bundling" different cases in order to settle them in the same way.[52] Settlements in multidistrict litigation often lead to "damage averaging," where parties informally agree to settle a mix of strong and weak cases for more or less than they would

48. Erichson, *supra* note 32, at 1796–97 (observing that such walk-away deals "pit[] the lawyer's self-interest, as well as the interest of other clients, against the interest of a client who does not wish to accept the settlement").

49. *See In re* World Trade Ctr. Lower Manhattan Disaster Site Litig., 66 F. Supp. 3d 477, 479–80 (S.D.N.Y. 2015).

50. RICHARD A. NAGAREDA, MASS TORTS IN A WORLD OF SETTLEMENT 231, 260 (2007).

51. Jaime Dodge, *Facilitative Judging: Organizational Design in Mass-Multidistrict Litigation*, 64 EMORY L.J. 329, 351 (2014) (observing that, in multidistrict litigation, "the financial incentive [for lawyers] is to invest as little as possible in the individual case, as any time invested will not impact their ultimate payout—as only time spent on developing generic assets, and not individual cases, is compensable as common-benefit work").

52. For one example, see, e.g., *In re* Guidant Corp. Implantable Defibrillators Prods. Liab. Litig., MDL No. 05–1708 (DWF/AJB), 2008 WL 682174, at *10 (D. Minn. Mar. 7, 2008) (justifying the amount of the common benefit award by noting that "Plaintiffs' counsel achieved a global settlement of $240,000,000.00 for 8,550 Plaintiffs" and "that many of the individual cases likely are not strong stand-alone cases"). *See also* Burch, *supra* note 20, at 80–82 (discussing *Guidant*).

ordinarily be worth if the cases were settled separately.[53] As a result, settlements in multidistrict litigation sometimes mean that a single case may not be resolved according to its individual merit, but, more often, according to categorical rules of thumb, established norms, and predetermined outcomes.

"Private aggregations" raise some of the same problems associated with other forms of civil aggregation. In private aggregation, parties resolve large groups of cases in the same way without relying on judges or courts to centralize them. One example is personal injury "settlement mills"—high volume settlement practices, where a single law firm bundles large numbers of claims, otherwise worth too little to represent separately, to settle with insurance adjusters, claim facilities, or other defendants. Jim Rogers, known by his infamous ads in the San Francisco Bay Area as "The People's Lawyer," handled as many as 1,500 open automobile cases at any given time, with settlement values ranging between $1,000 and $9,000.[54] Settlement mill bargains are remarkable because they are typically struck based on "going rates," without first-hand information about verdicts obtained in comparable cases or the intricacies of any particular claim.[55]

Similarly, corporate defendants frequently use private aggregation to create "corporate settlement mills" to resolve large numbers of similar claims.[56] Private aggregation systems, created by defendants, plaintiffs, and sometimes large intermediaries to resolve large numbers of claims outside of court, have existed for over a century.57 But corporate settlement mills can impose costs of their own. Defendants who settle repeat cases in obscurity invite abuse, offer inconsistent payouts, and may undermine the public regulatory goal of deterring future bad behavior.[58]

---

53. *See* Howard M. Erichson, *Beyond the Class Action: Lawyer Loyalty and Client Autonomy in Non-class Collective Representation*, 2003 U. CHI. LEGAL F. 519, 551–52 (2003) (some parties "may worry that collective representation will have a damage-averaging effect, raising the value of weak claims and reducing the value of strong ones.".); ALI Principles, *supra* note 38, § 3.16 cmt. c.

54. Erin Hallissy, *'People's Lawyer Accused: State Bar Says He Charges Too Much,* S.F. GATE (Jan. 11, 1997), http://www.sfgate.com/bayarea/article/PAGE-ONE-People-s-Lawyer-Accused-State-Bar-2858914.php ("Rogers said he has about 1,500 cases, more than most other attorneys handle."); Engstrom, *supra* note 8, at 821.

55. *See, e.g.*, Engstrom, *supra* note 17, at 1534 ("Instead of an individualized and fact-intensive analysis of each case's strengths and weaknesses alongside a careful study of case law and comparable jury verdicts, settlement mill negotiators and insurance claims adjusters assign values to claims with little regard to fault based on agreed-upon formulas, keyed off lost work, type and length of treatment, property damage, and/or medical bills, which in turn relate to the severity of the injury.").

56. *See* Remus & Zimmerman, *supra* note 13, at 136–48.

57. *See* Friedman, *supra* note 18, at 372–73; Issacharoff & Witt, *supra* note 13, at 1584–93.

58. Remus & Zimmerman, *supra* note 13, at 158 (observing that such settlement systems,

Claimants also may unwittingly waive valuable rights because the defendants, as "repeat players" in the system, enjoy inherently superior bargaining positions. Owens Corning, in the late 1990s, leveraged its market share to persuade over 215,000 asbestos plaintiffs, who could receive nothing if Owens Corning went bankrupt, to waive their rights to sue and participate in its private National Settlement Program.[59]

In addition to deliberate forms of aggregation, aggregation can occur in more subtle ways where no court or party consciously groups cases together, but where norms, boilerplate language, and "going rate" values for different personal injuries dictate the outcome.[60] In complex civil litigation, the same plaintiff and defense lawyers often serve on "steering committees" collaborating and sharing information about related cases—carrying certain biases about how to structure discovery, handle complex scientific questions, allocate fees, and approach settlement negotiations based on their past experiences with one another. Those attorneys may avoid raising dissenting views about how to approach litigation out of a not-altogether-misplaced fear that their objections may impact their ability to serve on another steering committee.[61] Organizational norms may similarly lead insurance adjusters and claim handlers to streamline completely unrelated personal injury and automobile accident cases according to the same standard operating procedure.[62]

"created at the encouragement or requirement of the law, frequently exploit the compromised positions of travelers stranded at a gate, shrimpers grounded by an oil spill, or homeowners facing foreclosure").

59. NAGAREDA, *supra* note 50, at 109–11 (describing Owens Corning's efforts to "accumulate a sufficiently large chunk of the remaining liability in the asbestos litigation" to "induce" plaintiffs to participate in its National Settlement Program); Remus & Zimmerman, *supra* note 13, at 141–42, 158.

60. Engstrom, *supra* note 17, at 1490 (describing "going rates" for repeat personal injury claims where "settlement values are lumped together, largely decoupled from the substantive merit of the underlying claim"); Stephen Daniels & Joanne Martin, *It Was the Best of Times, It Was the Worst of Times: The Precarious Nature of Plaintiffs' Practice in Texas*, 80 TEX. L. REV. 1781, 1796, 1804 (2002); HERBERT M. KRITZER, LET'S MAKE A DEAL: UNDERSTANDING THE NEGOTIATION PROCESS IN ORDINARY LITIGATION 39, 71 (1991).

61. Charles Silver & Geoffrey P. Miller, *The Quasi-Class Action Method of Managing Multi-District Litigations: Problems and a Proposal*, 63 VAND. L. REV. 105, 151 (2010) ("Clientless lawyers depend entirely on judges' largesse. Beholden more to judges than to plaintiffs, they can be expected to prefer the former over the latter when interests collide."); Burch, *supra* note 20, at 86 ("[C]ooperation fosters a need for attorneys to curry favor with one another, which, when combined with the prevalence of repeat players, can infect leadership committees with well-documented group decision-making biases, like conformity.").

62. ROSS, *supra* note 9, at 22 (finding that the system of insurance adjustment for automobile accidents "is individualistic mainly in theory; in practice it is categorical and mechanical, as any system must be if it is to handle masses of cases in an efficient manner").

2. Aggregate Settlements in Administrative Law

In administrative law, agency enforcement actions already carry the efficiencies of aggregate litigation by organizing special interests to enforce laws passed by Congress. Agencies, for example, often seek restitution, injunctive relief, and other remedies on behalf of large groups of stakeholders.[63] Agencies also resolve large groups of claims through formal consolidations, statistical sampling, and even class actions.[64] But far more often, agencies informally aggregate cases administratively, privately, and passively.

First, some agencies employ forms of administrative aggregation that resemble multidistrict litigation in federal court. The Executive Office of Immigration Review—which hears all cases involving detained aliens, criminal aliens, and aliens seeking asylum—offers one example of administrative aggregation. In the past year, it has designated special "surge courts" to respond to over 2,000 Central American asylum cases pending in West Texas.[65] In the National Vaccine Injury Compensation Program, over 5,000 separate cases alleging that a particular vaccine caused autism may proceed in front of the same special master in what is known as an "Omnibus Proceeding."[66] Such cases raise some of the same potential problems as other administrative aggregations—producing settlements brokered by repeat counsel, sometimes categorically, without detailed inquiry into the individual merits of each case.

---

63. *See* Velikonja, *supra* note 11, at 339; Verity Winship, *Fair Funds and the SEC's Compensation of Injured Investors*, 60 FLA. L. REV. 1103, 1134–41 (2008); Adam S. Zimmerman, *Distributing Justice*, 86 N.Y.U. L. REV. 500, 527–39 (2011).

64. The Equal Employment Opportunity Commission, for example, created an administrative class action procedure, modeled after Rule 23 of the Federal Rules of Civil Procedure, to resolve "pattern and practice" claims of discrimination made by federal employees. *See also* 29 C.F.R. § 1614.204 (2016) (establishing class complaint procedures); 42 C.F.R. § 431.222 (2016) (providing "group hearings" for Medicaid-related claims); 45 C.F.R. § 205.10(a)(5)(iv) (2016) (providing "group hearings" to applicants who request a hearing because financial assistance was denied). *See generally* Michael D. Sant'Ambrogio & Adam S. Zimmerman, *Inside the Agency Class Action*, 126 YALE. L.J. 1634 (2017).

65. S*ee, e.g.*, Press Release, Dep't of Justice, EOIR Announces Change to Immigration Judges Hearing Cases Out of Dilley (Apr. 14, 2015), https://www.justice.gov/eoir/pr/eoir-announces-change-immigration-judges-hearing-cases-out-dilley (announcing that the Executive Office for Immigration Review assigned over 2,000 cases in Dilley, Texas to the Miami Immigration Court to conduct hearings by teleconference); Wil S. Hylton, *The Shame of America's Family Detention Camps,* N.Y. TIMES MAG. (Feb. 4, 2015), http://www.nytimes.com/2015/02/08/magazine/the-shame-of-americas-family-detention-camps.html.

66. Snyder *ex rel.* Snyder v. Sec'y of Dep't of Health & Hum. Servs., No. 01–162V, 2009 WL 332044, at *4 (Fed. Cl. Feb. 12, 2009) (describing history of omnibus proceedings involving allegations by 5,000 claimants that vaccines caused autism); Sant'Ambrogio & Zimmerman, *supra* note 64.

Second, administrative settlements may also be organized and consolidated by the agency itself, mostly outside of judicial control. Medicare and the EPA have entered what some call "industry-wide" settlements,[67] brokering deals as part of a systemic response to an ongoing policy or problem. For example, facing an estimated backlog of over 800,000 billing disputes with medical providers, hospitals, and doctors, in October 2014 Medicare offered to resolve hundreds of thousands of billing disputes by globally offering to pay hospitals with pending claims 68% of their net value.[68] By June 2015, Medicare executed serial settlements with more than 1,900 hospitals, representing approximately 300,000 claims, for over $1.3 billion.[69] Of course, in such cases, individually represented parties have almost no room to bargain; they rather must accept or reject offers that may have little to do with the different merits of each case.

Industry-wide settlements also risk shutting out the public, by creating obscure obligations divorced from substantive law. In 2005, for example, the EPA offered qualified animal feeding operations (AFOs)—over 2,500 agribusinesses that produce pork, dairy, turkey and eggs across the country— a global settlement to resolve their liability under the Clean Air Act.[70] Much like a private aggregation, each individual AFO would enter into separate, but otherwise identical, agreements with the EPA. Each AFO would agree to pay a civil fine (categorically based only on the size of the AFO) to fund a nationwide study on monitoring AFO emissions and, if requested, help the EPA to monitor emissions from the AFO. In return, the EPA agreed not to sue the participating AFOs for past and ongoing violations while the study was undertaken. The settlement was viewed favorably by industry, as well as the EPA, which had long claimed that it lacked a precise methodology for calculating the amount of pollutants emitted by AFOs. But citizens who lived downstream from the AFOs complained that they too deserved a chance to comment on what

67. *See* Ass'n of Irritated Residents v. E.P.A., 494 F.3d 1027 (D.C. Cir. 2007); Daniel T. Deacon, *Deregulation Through Nonenforcement*, 85 N.Y.U. L. REV. 795, 813–16 (2010) (describing industry-wide settlements).

68. Press Release, Ctrs. for Medicare & Medicaid Servs., Inpatient Hospital Reviews (last checked Oct. 6, 2016) [hereinafter Inpatient Hospital Reviews], https://www.cms.gov/Research-Statistics-Data-and-Systems/Monitoring-Programs/Medicare-FFS-Compliance-Programs/Medical-Review/InpatientHospitalReviews.html; Reed Abelson, *Medicare Will Settle Short-Term Care Bills*, N.Y. TIMES (Aug. 29, 2014), http://www.nytimes.com/2014/08/30/business/medicare-will-settle-appeals-of-short-term-care-bills.html.

69. Inpatient Hospital Reviews, *supra* note 68.

70. *See* Animal Feeding Operations Consent Agreement and Final Order, 70 Fed. Reg. 40,016, 40,017 (July 12, 2005).

seemed to be, in effect, an entirely new regime for taxing and regulating major farming operations.[71]

Even when agencies adopt procedural safeguards to individually evaluate claims, they may be subject to "group think" or other norms when they resolve similar cases.[72] For example, according to former SEC General Counsel and Chairman, Harvey Pitt, the SEC follows "exacting standards" before filing and settling its enforcement actions.[73] The Enforcement Division utilizes a "tiered review" structure—several layers of review are performed before the Division reaches any final determination, including "detailed written memoranda, indicating their conclusions, describing evidence supporting those conclusions, [and] identifying and addressing 'exculpatory' evidence."[74] Notwithstanding the SEC's well-intended effort to consider the individual facts of each enforcement action, many continue to raise concerns about the SEC's practice of settling enforcement actions alleging serious fraud without admitting facts, on the basis of pro forma "obey the law" injunctions, and disproportionately small financial penalties.[75] For example, only after a federal district judge pointed out the contradiction of allowing defendants in an SEC enforcement action to settle charges without admitting or denying the allegations after they had previously pleaded guilty in parallel criminal proceedings, did the SEC's Division of Enforcement change its policy to eliminate the "neither admit nor deny" option in all such cases.[76]

---

71. *See Ass'n of Irritated Residents*, 494 F.3d at 1030–31 (noting and rejecting plaintiffs' arguments).

72. CASS R. SUNSTEIN & REID HASTIE, WISER: GETTING BEYOND GROUPTHINK TO MAKE GROUPS SMARTER (2015); Cass R. Sunstein, *The Most Knowledgeable Branch,* 164 U. PA. L. REV. (forthcoming) (manuscript at 15) [hereinafter Sunstein, *The Most Knowledgeable Branch*], http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2630726 ("If an agency is acting on its own, there might well be reason to worry about myopia, mission orientation, and tunnel vision, potentially compromising the ultimate judgment.").

73. Brief of Amicus Curiae Former Securities and Exchange Commission General Counsel and Chairman, Harvey Pitt in Support of Affirmance of District Court's Ruling at 9, S.E.C. v. Citigroup Glob. Mkts. Inc., 673 F.3d 158 (2d Cir. 2012) (No. 11-5227-cv), 2012 WL 7009635, at *9.

74. *Id.* at 10 (citing SEC DIV. OF ENF'T OFFICE OF CHIEF COUNSEL, ENFORCEMENT MANUAL 62–73 (Mar. 9, 2012)).

75. *See, e.g.*, Samuel W. Buell, *Potentially Perverse Effects of Corporate Civil Liability*, *in* PROSECUTORS IN THE BOARDROOM: USING CRIMINAL LAW TO REGULATE CORPORATE CONDUCT 87 (Anthony S. Barkow & Rachel E. Barkow eds., 2011).

76. Robert Khuzami, Dir., Div. of Enf't, U.S. Securities and Exchange Comm'n, Public Statement by SEC Staff: Recent Policy Change (Jan. 7, 2012), http://www.sec.gov/news/speech/2012/spch010712rsk.htm.

3. Aggregate Settlements in Criminal Law

At first blush, criminal law would appear to be the last bastion of individualized justice. Each defendant is guaranteed a "day in court" and an attorney who is loyal only to the defendant's cause.[77] The plea bargaining process is generally characterized as an arm's-length negotiation between two adversaries.[78] Indeed, legal ethics demand that defense attorneys vigorously advocate on behalf of their individual clients without regard to the needs or interests of any other party.[79] Closer inspection, however, reveals that the criminal process also relies on informal aggregation, which shapes criminal bargains in ways that raise the same issues of loyalty, legitimacy, and accuracy as civil and administrative settlements.

Unlike civil litigation, the criminal justice system rarely tolerates formal aggregation, like class actions.[80] The Supreme Court has sharply limited class actions of habeas petitions—an area that once provided a source of criminal justice reform.[81] On occasion, however, courts have aggregated shared claims, such as those concerning falsified crime lab evidence,[82] ineffective assistance of counsel claims based on an inadequately funded public defender program,[83] and allegations of racial disparities in death penalty sentencing.[84] Finally, prosecutors may

77. *In re* Oliver, 333 U.S. 257, 273 (1948) ("A person's . . .right to his day in court [is] basic in our system of jurisprudence; and these rights include, as a minimum, a right to examine the witnesses against him, to offer testimony, and to be represented by counsel.").

78. *But see* Natapoff, *supra* note 10; FEELEY, *supra* note 18.

79. Margareth Etienne, *The Ethics of Cause Lawyering: An Empirical Examination of Criminal Defense Lawyers As Cause Lawyers*, 95 J. CRIM. L. & CRIMINOLOGY 1195, 1236 (2005) ("Lawyers scrupulously observing their ethical duty to represent each client zealously would never advise a client to join [a] collective action unless the client would clearly be one of the beneficiaries.").

80. *See* Garrett, *supra* note 28, at 385 (describing the increased use of aggregation to provide "system-wide relief in criminal cases"). Since the 1990s, the Supreme Court has limited the occasions where criminal defendants may pursue class-wide relief. *Id.* at 404–10 (tracing the rise and fall of habeas corpus class actions, observing that they "illuminate[] what the criminal system would look like if there was a role for aggregation to permit vindication of patterns of constitutional violations").

81. State v. Reynolds, 836 A.2d 224, 374 (Conn. 2003). *But see* Calderon v. Ashmus, 523 U.S. 740, 748 (1998) (rejecting class action of habeas petitioners when the district court did not first determine whether all class members properly exhausted their individual claims in state courts).

82. *See In re* Investigation of the W. Va. State Police Crime Lab., Serology Div., 438 S.E.2d 501 (W. Va. 1993); *see also* Garrett, *supra* note 28, at 386.

83. *See* State v. Peart, 621 So. 2d 780, 784 (La. 1993) (describing how the trial court held a series of hearings on the defense services being provided to criminal defendants in Section E of Criminal District Court before finding that "the system of securing and compensating qualified counsel for indigents" in Louisiana was "unconstitutional as applied in the City of New Orleans").

84. *See* Garrett, *supra* note 28, at 419–21 (describing the aggregation of death penalty cases asserting racial disparities in sentencing); *see also In re* Proportionality Review Project, 735 A.2d 528, 532–33 (N.J. 1999); *Reynolds*, 836 A.2d at 376–86.

indirectly aggregate claims for victim restitution—pursuing actions against corporate criminals, collecting their ill-gotten gains, and distributing restitution to groups of victims who never directly participate in the lawsuit.[85]

But while formal aggregations remain relatively rare, the criminal justice system commonly uses administrative aggregation.[86] Sometimes government officials group together large numbers of similar cases in the same courthouse or docket in response to temporary "surges" in policing, like those following the 2004 Republican National Convention in New York or attempts to "sweep" away homeless populations.[87] But criminal courts also routinely group together cases that share a common attribute in specialized courts—from traditional traffic courts[88] to more modern court innovations like "problem solving" drug, mental health, and veterans' courts.[89] These aggregated cases are subject to a particularized settlement environment—court personnel trained to deal with certain social issues, prosecutors who specialize in a specific type of crime or defendant, and court resources that support particular kinds of dispositions. While some praise specialized courts for adopting a "[t]ailored [a]pproach to [j]ustice,"[90] they inevitably produce machine-made settlements much like the rest of the criminal justice system. For example, prosecutors routinely offer standardized "alternative sentencing options" in domestic violence

85. Brandon L. Garrett, *Structural Reform Prosecution*, 93 VA. L. REV. 853 (2007); Adam S. Zimmerman & David M. Jaros, *The Criminal Class Action*, 159 U. PA. L. REV. 1385 (2011).

86. *See* David Jaros, *Flawed Coalitions and the Politics of Crime*, 99 IOWA L. REV. 1473, 1505 (2014) (describing the rise of specialized "problem-solving courts"); Betsy Tsai, *The Trend Toward Specialized Domestic Violence Courts: Improvements on an Effective Innovation*, 68 FORDHAM L. REV. 1285 (2000).

87. *See* Caleb Foote, *Vagrancy-Type Law and Its Administration*, 104 U. PA. L. REV. 603, 632 (1956).

88. In California state courts, traffic filings, including both misdemeanors and infractions, consistently hovered around the six-million filing mark from 2004 through 2013, the last year for which figures are available. *See* JUDICIAL COUNCIL OF CALIFORNIA, 2014 COURT STATISTICS REPORT: STATEWIDE CASELOAD TRENDS 2003-2004 THROUGH 2012-2013 75 (2014), http://www.courts.ca.gov/documents/2014-Court-Statistics-Report.pdf; Ross D. Netherton, *Fair Trial in Traffic Court*, 41 MINN. L. REV. 577, 581 (1957) ("[P]eople are coming to these courts by millions each year as defendants or as witnesses in traffic matters—20 million as defendants in 1951—in comparison with the relatively small number who experience justice from the courts of last resort in the state house.") (citations omitted). This figure, roughly six times the number of non-traffic misdemeanors and infractions, has recently forced state courts to scramble to search for new ways to automate and privatize the case handling of most traffic violations.

89. *See* John S. Goldkamp, *Justice and Treatment Innovation: The Drug Court Movement* 1 (First Nat'l Drug Court Conference, Working Paper No. 149260, 1993).

90. GREG BERMAN & JOHN FEINBLATT WITH SARAH GLAZER, GOOD COURTS: THE CASE FOR PROBLEM-SOLVING JUSTICE 4–5 (2005).

court based upon established relationships with private service providers who offer prepackaged anger management or conflict resolution classes.[91]

Formal office policies governing the treatment of particular kinds of criminal cases also mirror the private aggregation observed in civil litigation. Just as single firms bundle cases together and resolve them according to a unified settlement strategy,[92] so too do prosecutors adopt policies that govern the treatment of large categories of cases. In 2002, the District Attorneys of all five boroughs of New York City adopted a city-wide plea bargaining policy under a program entitled "Operation Spotlight" that targeted "persistent misdemeanants."[93] Pursuant to the policy, the assistant district attorneys refused to offer a reduced plea at arraignment and, instead, recommended a plea to the top charge and the maximum statutorily allowed sentence.[94] Regardless as to whether the defendant was arrested for shoplifting cheese[95] or misdemeanor assault,[96] prosecutors categorically demanded the maximum one-year sentence for both crimes.[97]

Like their state counterparts, federal prosecutors also adopt categorical policies that dictate settlement practice for large groups of cases. In the Western District of Texas, federal prosecutors have standardized their plea agreements to include boilerplate language requiring every defendant, regardless of the nature of the crime or the circumstances of the charges, to waive any and all constitutional claims that might arise from a failure of the prosecution to satisfy their obligation to disclose exculpatory evidence to the defense.[98]

---

91. ATLANTA MUNICIPAL CT., OFFICE OF CT. PROGRAMS, http://court.atlantaga.gov/courtprograms (last visited Oct. 6, 2016) (describing Municipal Court of Atlanta's Community Court "partnerships with county, state, private and non-profit agencies which provide treatment services to the Court's defendants").

92. *See* Remus & Zimmerman, *supra* note 13.

93. A "persistent misdemeanant" was defined as a defendant with an adult criminal record with two or more prosecuted arrests in the previous year, at least one of which must have had a top arrest charge of misdemeanor severity. "In addition, the defendant must previously have been convicted of misdemeanor crimes at least twice, and at least one of these convictions must have been within twelve months of the current arrest." FREDA F. SOLOMON, N.Y.C. CRIMINAL JUSTICE AGENCY, OPERATION SPOTLIGHT: YEAR FOUR PROGRAM REPORT (2007), http://www.nycja.org/library.php.

94. Issa Kohler-Hausmann, *Managerial Justice and Mass Misdemeanors*, 66 STAN. L. REV. 611, 660–61 (2014) (describing the New York City district attorney's plea bargaining policy under Operation Spotlight).

95. *See id.* (discussing a defendant accused of stealing cheese who was subject to Operation Spotlight); *see also* N.Y. PENAL LAW § 155.25 (McKinney 2004) (petit larceny).

96. *See* N.Y. PENAL LAW § 120.00 (McKinney 2004).

97. *See* Kohler-Haussmann, *supra* note 94, at 660 (noting that the defendant accused of stealing cheese would have been offered a plea carrying one year of jail time under Operation Spotlight).

98. *See* Susan R. Klein et al., *Waiving the Criminal Justice System: An Empirical and*

To a significant extent, prosecutors' ability to privately aggregate their cases exploits a collective action problem among defendants.[99] While prosecutors routinely adopt categorical settlement policies, public defenders' duty to vigorously advocate for their individual clients limits their ability to act collectively.[100] There have been instances, however, when public defender offices have, in fact, treated individual cases as a group—either in an attempt to improve outcomes for defendants as a whole or as a response to budget constraints. In Los Angeles, public defenders adopted a blanket policy to refuse all guilty pleas in prostitution cases as part of a successful effort to persuade judges to adopt a more lenient sentencing policy for those cases.[101] Defenders burdened by overwhelming caseloads have been forced to "group advise" the pleas for up to fifteen clients at a time, in the courthouse hallways, with little or no opportunity to explore the specific facts surrounding each defendant's individual charge.[102]

Private aggregation in the criminal system also jeopardizes accuracy, loyalty, and legitimacy. Plea policies will often fail to account for the idiosyncrasies of individual cases. By treating cases collectively, public defenders reduced the average sentence in Los Angeles for prostitution cases in the future, but only at the expense of ignoring their duty of loyalty to their existing individual clients.[103] Finally, when public defenders collectively advise clients to take pleas in response to crushing caseloads,

---

Constitutional Analysis, 52 AM. CRIM. L. REV. 73, 83 (2015) (highlighting the boilerplate agreement offered by the government in Plea Agreement, *United States v. Botello*, No. 13-051, ¶ 2 (W.D. Tex., Apr. 3, 2013)).

99. *See* Oren Bar-Gill & Omri Ben-Shahar, *The Prisoners' (Plea Bargain) Dilemma*, 1 J. LEGAL ANALYSIS 737 (2009) (describing the ability of prosecutors to overcome their budget constraints by exploiting defendants' collective action problem).

100. *Id.* at 761 ("The public defender's office can solve the collective action problem that plagues its clients only if each public defender forgoes her duty of loyalty to the individual client."); *see also* Albert W. Alschuler, *The Defense Attorney's Role in Plea Bargaining*, 84 YALE L.J. 1179, 1252 (1975) (explaining how collective action by public defenders can "pose a serious ethical issue").

101. Alschuler, *supra* note 100, at 1251 (describing the two-week "strike" that helped to persuade Los Angeles judges to revise their sentencing policies). *See also* Brandon Buskey, *When Public Defenders Strike: Exploring How Public Defenders Can Utilize the Lessons of Public Choice Theory To Become Effective Political Actors*, 1 HARV. L. & POL'Y REV. 533, 537–38 (2007) (discussing a public defender strike in St. Louis, Missouri, which the chief public defender described as an attempt to end practices of meeting and pleading).

102. *See* Complaint at 24, Phillips v. California, No. 15CECG02201 (Cal. Super. Ct. Jul. 14, 2015), https://www.aclu.org/sites/default/files/field_document/file_stamped_phillips_v_state_of_alifornia_complaint.pdf.

103. *Cf.* Alschuler, *supra* note 100, at 1252–53 ("In this way, the lawyer's traditional duty to serve his client without reservation may become a device for quieting opposition to injustice and for perpetuating unfairness from one case to the next.").

the settlement process undermines the legitimacy of a system predicated on individual guilt and moral responsibility.[104]

Even as many argue that prosecutor's offices dictate the terms of most settlements,[105] many cases settle on terms that bear scant relationship to any conscious policy. Common settlement outcomes often reflect shared courtroom cultures, local norms, and boilerplate settlement terms. In this way, standardized pleas ignore "the facts and circumstances of individual cases,"[106] and instead categorically apply the same punishment to each defendant based largely on the local jurisdiction's treatment of the charged crime. In fact, the relatively fixed "market price" for a plea is generally a function of history—current plea deals are based almost entirely on the sentences that similar defendants pled to in the past.[107]

B. The Pitfalls of Aggregate Settlement Civil, Administrative and Criminal Law

Ordinarily, policymakers and courts embrace settlement as an important adjunct to our court system—producing superior outcomes that, when negotiated privately and at arm's-length, presumably reflect the merits of any given case. Informally aggregated settlement, however, complicates all these features of private negotiation in civil, administrative, and criminal law, undermining the ability of our public dispute resolution system to promote legitimacy, loyalty, accuracy, and the development of substantive law.

First, aggregated settlements undermine *legitimacy* when clients lack input and control over the outcome. Aggregate settlements do not involve privately negotiated bargains controlled by, or with significant input from, each individual party. They instead involve systematic "take-it-or-leave-it" deals dictated by a small number of brokers, institutions, or default "going

---

104. *Cf.* Natapoff, *supra* note 10, at 1084 (describing how the concern "with individual guilt and moral responsibility [is] giving way to an 'actuarial' approach to justice concerned with management of groups").

105. Lynch, *supra* note 10, at 2132 ("The frequent disparity of power between the prosecutor and the defendant makes the role-definition of the prosecutor particularly important to the outcome of the negotiation.").

106. Natapoff, *supra* note 10, at 1070.

107. *See* HEUMANN, *supra* note 18, at 120 (describing how plea deals set "precedent" for future deals and how prosecutors follow "habits of disposition"); Natapoff, *supra* note 10, at 1070 ("[T]he extent of punishment is [determined] by reference to the local 'price' for certain offenses."); David Sudnow, *Normal Crimes: Sociological Features of the Penal Code in a Public Defender Office*, 12 SOC. PROBS. 255 (1965) (observing that public defense attorneys developed an expertise in classifying and describing their cases according to patterns, identifying case similarities in large groups, and recharacterizing them as "normal crimes").

rates." In multidistrict litigation and private "settlement mills," insurance-like grids determine payouts for victims of defective drugs, toxic exposure, and even seemingly disconnected automobile accidents. In administrative settlements, animal feeding operations and medical providers may be stuck with flat payouts, while mortgage banks sign boilerplate agreements denying liability. Criminal pleas, particularly in high-volume misdemeanor cases, categorically apply the same punishment based largely on local norms and private "sentencing alternatives" determined by the local prosecutor's office. Even when clients appreciate the value of a settlement, administrative offer, or plea, they may have had little choice or ability to shape the ultimate outcome.

Second, aggregated settlements undermine *loyalty* when high case volumes require that attorneys serve disparate interests in a system that rarely involves pure arm's-length transactions. Many systematic settlements rely on repeat players who may sacrifice their clients, or the public interest, for other unrelated goals. In blockbuster deals that resolve cases like *Vioxx* and *September 11 Litigation*, commentators worried that the same group of lawyers anxious to recoup their fees and quickly resolve the litigation pushed individual clients to settle their claims.[108] Although administrative settlements do not involve private clients, agencies may sacrifice the public interest in exchange for headline-grabbing awards that "quiet the public furor quickly and shift the formulation" of how to divvy up multi-million dollar settlements for another day.[109] In criminal law, prosecutors exploit their bargaining power to adopt categorical settlement policies that, in some cases, bear only a weak relationship to the substantive offense, while public defender offices broker mass pleas under the weight of crushing caseloads. Public defenders, although hard pressed to admit it, also know that hard bargaining for one client may jeopardize a plea with the same prosecutor's office for another client.[110]

Third, informally aggregated settlements undermine *accuracy* when ready-made settlements blur characteristics or overlook the merits of different kinds of cases. The high volume of aggregated cases means that parties may lack information or time to resolve cases according to their merits. Multidistrict litigation favors volume over knowledge; attorneys

108. *See supra* notes 46–49 and accompanying text.

109. S.E.C. v. Bear, Stearns & Co., 626 F. Supp. 2d 402, 405 (S.D.N.Y. 2009); *see also* Sonia A. Steinway, Comment, *SEC "Monetary Penalties Speak Very Loudly," But What Do They Say? A Critical Analysis of the SEC's New Enforcement Approach*, 124 YALE. L.J. 209 (2014) (arguing the SEC's focus on attention-getting fines against corporations undermines more effective, targeted sanctions against individual wrongdoers).

110. *See* HEUMANN, *supra* note 18, at 62–63.

with large numbers of claims receive coveted positions on steering committees that shape the litigation, at the expense of attorneys with small numbers of meritorious claims. The sheer number of asbestos, hip-replacement or toxic exposure cases requires counsel to "bundle" or "damage average" cases. Bulk administrative payouts and settlements, like those recently offered by Medicare and the EPA, similarly "bundle" cases, rewarding strong and weak claims alike.[111] Finally, defense counsel and prosecuting attorneys in misdemeanor cases lack time and incentives to collect all but the most superficial information in a "system of pleas," and not of trials.[112] In criminal cases, "standardized pleas cannot be assumed to reflect defendant culpability, the availability of defenses, or the strength of the evidence."[113]

Finally, aggregation may frustrate the "rule of law" when interested parties cannot evaluate outcomes on an individual basis because of limited resources, crushing caseloads, and repeat players subject to "group think." Organizational norms may lead repeat steering committee members and claim handlers to streamline completely unrelated personal injury accident cases according to the same standard operating procedure.[114] Federal agencies increasingly rely on centralized enforcement divisions and boilerplate settlements to set policy. And while the term "plea bargaining" suggests that the prosecutor and the defense attorney haggle over the appropriate sentence much like traders in a Turkish bazaar,[115] going rates often determine the defendant's plea to a charge, just like in civil litigation.[116] In these ways, aggregate settlement "may dim our capacity to see injustice,"[117] distorting the incentives for attorneys to develop facts, or,

111. *See supra* notes 67–71 and accompanying text.

112. *See* Lafler v. Cooper, 132 S.Ct. 1376, 1388 (2012); *see also* Robert E. Scott & William J. Stuntz, *Plea Bargaining as Contract*, 101 YALE L.J. 1909, 1912 (1992) (identifying various critiques of plea bargaining, including "the unfairness (and inaccuracy) of determining defendants' fate without full investigation, without testimony and evidence and impartial factfinding").

113. Natapoff, *supra* note 10, at 1071.

114. *See* ROSS, *supra* note 9, at 22 (finding that the system of insurance adjustment for automobile accidents "is individualistic mainly in theory; in practice it is categorical and mechanical, as any system must be if it is to handle masses of cases in an efficient manner").

115. *See* Scott & Stuntz, *supra* note 112, at 1912 (describing plea bargaining as "allocating criminal punishment through what looks like a street bazaar").

116. *See* Lynch, *supra* note 10, at 2130 ("The rules are more like those of the supermarket than those of the flea market: there is a fixed price tag on the case, and you will get no farther 'bargaining' with the prosecutor than you will by making a counteroffer on the price of a can of beans at the grocery."). *See also* HEUMANN, *supra* note 18, at 188–89 n.19; FEELEY, *supra* note 18, at 187; Josh Bowers, *Punishing the Innocent*, 156 U. PA. L. REV. 1117, 1146 (2008) ("Bargains are struck according to 'going rates'—known and somewhat fixed starting-point prices."); Bibas, *supra* note 17, at 2483 n.78 ("[B]argaining is tempered by stable going rates for ordinary crimes . . . .").

117. Resnik, *From "Cases" to "Litigation"*, *supra* note 38, at 65.

for that matter, judges' ability to articulate substantive law for large groups of cases.

II. JUDICIAL REVIEW OF AGGREGATE SETTLEMENTS

Concerns about legitimacy, loyalty, accuracy, and the rule of law have produced disarray. The current judicial response to the rise of bureaucratic settlement has been that some courts have sought to assure "adequate" representation for parties in criminal, civil, and administrative settlements. Unfortunately, when judges intervene to review the substance of settlements on their own, they may violate the interests of the parties, upset the separation of powers, or stretch the limits of judicial competency. Judges who themselves participate and sometimes benefit from repeat settlements also may be poorly suited to substantively review the quality of those agreements.

Section A describes the current, ad hoc judicial response to the rise of aggregation in civil, administrative, and criminal law. Section B describes the challenges for judges who try to review informally aggregated settlements.

A. Ad Hoc Judicial Responses to Aggregate Settlement Practice

In response to the rise of aggregation, some courts have intervened in aggregate settlement practice in civil, criminal, and administrative law. But precisely because aggregate settlement represents a mixture of individualized contract and bureaucratic dispute resolution, courts have struggled to define how and when they can competently review such settlements.

1. Judicial Review of Aggregate Civil Settlements

Over the years, judges in complex civil litigation have struggled to identify what role, if any, they should play when large numbers of seemingly individual cases settle together in multidistrict consolidations or private settlement mills. Unlike class action rules that expressly require judges to review the overall fairness of any settlement, no formal rules govern how judges should review informally aggregated settlements. Nevertheless, judges have intervened to police multidistrict and other private aggregate settlements out of a concern that, like class actions, such massive deals may raise conflicts of interest, lose sight of individual litigants, and produce results divorced from the merits of the disputes.

In multidistrict litigations involving thousands of plaintiffs with billions of dollars in liability claims,[118] courts have created new doctrines to police problems of loyalty, legitimacy, accuracy, and the rule of law.[119] First, judges may police attorneys who they worry may lack incentives to faithfully represent the interests of many very different clients. Shortly before a deadline to settle a large number of similar cases arising out of exposure to toxic chemicals at Ground Zero, Judge Hellerstein noticed a surge of 185 voluntary dismissals on the eve of the settlement deadline.[120] The judge was "[t]roubled" by the apparent surge of dropped claims because, under the arrangement negotiated between hundreds of plaintiff and defense counsel, plaintiff attorneys' fees increased as a greater share of existing claimants settled with defendants.[121] Accordingly, Judge Hellerstein *sua sponte* ordered a hearing to determine whether the clients authorized the dismissals. At the hearing, the district court learned that the clients did not explicitly authorize counsel to dismiss their claims, but had simply not responded to counsel's inquiries by the settlement deadline.[122] Judges will rarely know as much about negotiated settlements and practices as the attorneys who appear before them. But in mass cases, like the September 11 cases, they may intervene because they occupy a unique position to detect unusual settlement patterns, pose questions to counsel, and unearth more information about obscure mass practices.

Second, and relatedly, judges may intervene to make up for the diminished role of individual client participation and consent in large "off-

118. *See, e.g.*, *In re* Vioxx Prods. Liab. Litig., 650 F. Supp. 2d 549, 552–53 & n.7 (E.D. La. 2009) (discussing the Vioxx Settlement Agreement and its authorizations to the court); *In re* Diet Drugs (Phentermine, Fenfluramine, Dexfenfluramine) Prods. Liab. Litig., 553 F. Supp. 2d 442, 456–59 (E.D. Pa. 2008); *In re* Zyprexa Prods. Liab. Litig., No. 04–MD–1596, 2008 WL 2511791, at *1 (E.D.N.Y. June 19, 2008); *In re* Air Crash Disaster at Florida Everglades on Dec. 29, 1972, 549 F.2d 1006, 1012 (5th Cir. 1977). *See also* Richard L. Marcus, *Cure-All for an Era of Dispersed Litigation? Toward a Maximalist Use of the Multidistrict Litigation Panel's Transfer Power*, 82 TUL. L. REV. 2245 (2008).

119. Judge Weinstein first proposed that courts should supervise mass consolidations, like class actions, referring to them as "quasi-class actions." Weinstein, *supra* note 20, at 480–81 ("What is clear from the huge consolidations required in mass torts is that they have many of the characteristics of class actions. . . . It is my conclusion . . . that mass consolidations are in effect quasi-class actions. Obligations to claimants, defendants, and the public remain much the same whether the cases are gathered together by bankruptcy proceedings, class actions, or national or local consolidations."). *See also* Transcript of Status Conference at 54:14-24, 62:24, 63:8-12, *In re* World Trade Ctr. Disaster Site Litig., No. 21 MC 100 (AKH) (S.D.N.Y. Mar. 19, 2010) ("Most settlements are private; a plaintiff and defendant come together, shake hands, and it's done with. Although the judge may look and see if there's some infant or some compromise or something else, basically it's the parties that decide. . . . This is different. This is 9/11. This is a special law of commons. This is a case that's dominated my docket, and because of that, I have the power of review.").

120. *In re* World Trade Ctr. Disaster Site Litig., 754 F.3d 114, 119 (2d Cir. 2014).

121. *Id.*

122. *Id.*

the-rack" settlements. Because many administrative aggregations lead to boilerplate settlements based on a small number of categories and variables, courts may conduct "fairness hearings" and videoconferences to ensure victims have some say in massive settlement agreements offered on a "take-it-or-leave-it" basis. They may go even further to police relationships between lawyers and their more remote clients—setting aside complex, individual settlements when the court believes attorneys charge too much for their work or disagrees with the substance of the settlement award.[123] As Judge Jack B. Weinstein once wisely observed: "Theoretically, each client has the option of rejecting his share of a settlement. . . . In practice the attorney almost always can make a global settlement and convince the clients to accept it."[124]

Third, judicial review promotes accuracy. Courts may issue "core discovery" orders that require initial disclosures, code huge databases of claimants' personal information, conduct sample trials, or schedule bellwether settlements to understand how the resolution of one case will impact similar cases and ensure outcomes consistent with their merits.[125] Perhaps most notably, Judge Eduardo Robreno quickly resolved over 180,000 asbestos claims in an MDL proceeding long known as the "black hole" or the "roach motel" of American litigation—where cases checked in, but never checked out. He did so by helping the steering committees of

123. *See, e.g.*, In re *Vioxx Prods. Liab. Litig.*, 650 F. Supp. 2d at 565 (upholding the cap of originating attorney's fees at 32% with the caveat that "in the rare case where an individual attorney believes a departure from this cap is warranted, he shall be entitled to submit evidence to the Court for consideration"); *In re* Guidant Corp. Implantable Defibrillators Prods. Liab. Litig., MDL No. 05-1708 (DWF/AJB), 2008 WL 682174, at *10 (D. Minn. Mar. 7, 2008) (noting that "Plaintiffs' counsel achieved a global settlement of $240,000,000.00 for 8,550 Plaintiffs" and "that many of the individual cases likely are not strong stand-alone cases" and using this to justify the amount of the common benefit award).

124. Weinstein, *supra* note 20, at 521 n.212.

125. In the September 11 cases, for example, Judge Hellerstein appointed two special masters to gather and code detailed personal information about all of the 11,000 claims in a searchable database. Information gleaned from the database helped the parties select "test cases" to value and understand how the resolution of one case would impact other similar cases. According to the court, the massive electronic database assured more accurate awards by identifying:

> correlations between the ages of plaintiffs and the severities of injuries suffered and whether the length of the plaintiffs' exposure to the WTC site increased the severity of injury. Thus, by adding or subtracting from the criteria reflected in the various fields one could discern which factors strongly correlated with the severity of injury and which factors had a lesser impact, or no impact at all.

Alvin K. Hellerstein et al., *The 9/11 Litigation Database: A Recipe for Judicial Management*, 90 WASH. U. L. REV. 653, 658 (2013).

lawyers find ways to identify and sort large numbers of very different claims, shortly after he took over the process.[126]

Notwithstanding the reasons for judges to intervene in multidistrict settlements, commentators fear that judges who do so may frustrate litigants' choices, lack critical information, or aggrandize power without clear guidance or rules. First, like class actions, judges may appoint and compensate "lead lawyers" who do not have any clients, replacing parties' chosen counsel with experienced lawyers who the judges believe will more competently coordinate motions and settle large groups of cases.[127] Second, MDL courts, like those reviewing class action settlements, lack information to verify whether the settlement process itself will produce fair outcomes. Finally, some worry that judges who review aggregated settlements assume unchecked administrative power to control the settlement process—particularly, where no formal rule exists to guide judges who police the very aggregate settlements they often encourage in multidistrict litigation.[128] Judge Hellerstein, reflecting on the lack of guidance for judges in multidistrict litigation, observes:

> On the one hand, if I was right in asserting supervisory control of the litigation and rejecting the initial settlement, then those powers should be clearly set forth so that the next judge who faces these issues does not feel overly constrained for fear of appellate reversal. On the other hand, if I was wrong, then an explicit rule should define the proper constraints.[129]

The deep ambivalence over the judicial role in aggregate civil settlements extends beyond multidistrict litigation. Although rarer, judges also have intervened in private aggregated settlements involving a variety of cases—from those involving oil spill and toxic waste claim facilities to agreements governing mortgage and debt adjustment practices. For

---

126. *See* Hon. Eduardo C. Robreno, *The Federal Asbestos Product Liability Multidistrict Litigation (MDL-875): Black Hole or New Paradigm?*, 23 WIDENER L.J. 97 (2013). *See also* DUKE LAW CTR. FOR JUDICIAL STUDIES, STANDARDS AND BEST PRACTICES FOR LARGE AND MASS TORT MDLS 42, 110 (2d rev. ed. 2014), https://law.duke.edu/sites/default/files/centers/judicialstudies/standards_and_best_practices_for_large_and_mass-tort_mdls.pdf ("The initial case-management order should inform counsel that the leadership structure will be discussed at the initial case-management conference and direct them to be prepared to identify case-specific issues that may inform the appropriate structure.").

127. Silver & Miller, *supra* note 61, at 149; Burch, *supra* note 20, at 86.

128. Grabill, *supra* note 8, at 126–27 (arguing that courts should not have authority to review non-class aggregate settlements); Linda S. Mullenix, *Dubious Doctrines: The Quasi-Class Action,* 80 U. CIN. L. REV. 389 (2011) (criticizing the use of "quasi-class actions").

129. Alvin K. Hellerstein et al., *Managerial Judging: The 9/11 Responders' Tort Litigation*, 98 CORNELL L. REV. 127, 177 (2012).

example, following the Deepwater Horizon explosion, BP created a sophisticated private claim process to resolve millions of claims outside any formal court process, opening claim offices in strip malls across the Gulf that promised thirty-minute, one-on-one sessions with any injured person wishing to file a claim for compensation. Fearful that the BP fund might fail to accurately compensate parties pressured to settle under severe financial strain following the spill, judges (1) enjoined BP from asking people to waive their rights to sue in exchange for compensation; (2) regulated the kinds of statements BP could make to potential litigants; and even (3) considered imposing fees against those who filed with the BP fund to financially support attorneys pursuing separate claims against BP in federal court.[130]

Other courts have limited high-volume plaintiff offices from categorically resolving large groups of similar personal injury claims with repeat insurance agencies, employers, and other defendants. In *Johnson v. Nextel Communications, Inc.*,[131] for example, the Second Circuit allowed parties to challenge a private dispute resolution process for a large group of clients, brokered by the same law firm against their employer. Among other things, the agreement included tight time frames for claimants to participate and resolve their claims. The agreement also reduced plaintiff counsels' fee awards, on a sliding scale, when they failed to persuade clients to meet those deadlines or participate in the settlement. By entering into the deal, according to the Second Circuit, the plaintiffs' former lawyers "violated [their fiduciary] duty to advise and represent each client individually, giving due consideration to differing claims, differing strengths of those claims, and differing interests in one or more proper tribunals in which to assert those claims."[132]

Courts have never firmly resolved, however, how far judges may go to upset a private aggregate settlement. Out of respect for the parties' interest in settling group cases, the Second Circuit in *Nextel* notably left the scope of its opinion unclear. The Second Circuit cautioned that its decision should not "necessarily preclude" such "group treatment" of claims in arm's-length bargains "where manageable numbers of claimants are

130. *See* Colin McDonell, Comment, *The Gulf Coast Claims Facility and the Deepwater Horizon Litigation: Judicial Regulation of Private Compensation Schemes*, 64 STAN. L. REV. 765, 772–80 (2012).

131. 660 F.3d 131 (2d Cir. 2011).

132. *Id.* at 140.

involved" and "defendants are not paying the claimants' lawyer to aggregate the claims."[133]

2. Judicial Review of Aggregate Agency Settlements

In administrative law, some courts have also asserted their authority to review aggregate settlement practices. Like judges who review class actions and other private aggregate settlements, these judges worry that public officials who forge mass, pro forma agreements undercut the administrative agency's ability to faithfully represent the public interest, legitimately hear from interested stakeholders in a transparent fashion, and reach settlement agreements that accurately reflect the seriousness of the alleged misconduct.

To some extent, the struggle to identify the proper judicial role in the review of agency settlements arises from the nature of the agreements frequently struck between agencies and regulated parties, which are called "consent decrees." When agencies choose to resolve a dispute with another party, they frequently file that agreement with a court. The resulting "consent decree" gives the court continuing power to see that the agreement is followed and to punish a party that violates the agreement with contempt sanctions.[134] Because consent decrees represent a blend of private contract and public "decree," courts have always struggled to define their role in the approval of such settlements.[135] The Supreme Court, for example, has long said that "[p]arties to a suit have the right to agree to any thing they please" in consent decrees and judges, "when applied to, will ordinarily give effect to their agreement."[136] At the same time, judges must remain "free to reject agreed-upon terms as not in furtherance of statutory objectives [and] . . . to modify the terms of a consent decree" when laws change.[137]

---

133. *Id.* at 140 n.4.

134. The Securities and Exchange Commission, the Federal Trade Commission, and other regulatory enforcement agencies regularly follow this approach, although the practice has been changing.

135. For an extensive, thoughtful discussion of this historical tension, see Judith Resnik, *Judging Consent*, 1987 U. CHI. LEGAL F. 43, 50–63 (1987).

136. Pac. R.R. v. Ketchum, 101 U.S. 289, 297 (1879). Judges must also enforce the bargain made by the parties, instead of considering the purposes of the legislation that gave rise to the underlying action. United States v. ITT Cont'l Baking Co., 420 U.S. 223, 236–37 (1975); Swift & Co. v. United States, 276 U.S. 311 (1928).

137. Sys. Fed'n No. 91 v. Wright, 364 U.S. 642, 651 (1961). *See also* Aaron v. S.E.C., 446 U.S. 680, 701 (1980); United States v. Swift & Co., 286 U.S. 106, 114 (1932).

Although the hybrid nature of consent decrees has spawned a scholarly debate about the appropriate role of judicial review in agency settlements, *aggregate* agency settlement practice changes the calculus even more. As set out below, some courts express concerns that repeat settlements permit agencies to adopt new policies that depart from their statutory mission, fail to involve stakeholders or the public interest in those decisions, and avoid accurately assessing whether serial punishments reflect the wrong alleged. Thus, much like private aggregate settlements, judicial concerns about loyalty, legitimacy, and accuracy have encouraged courts to scrutinize repeat agency settlement practices.

Perhaps the most famous proponent of increased judicial oversight of pro forma agency settlement practice is Judge Jed Rakoff in the Southern District of New York. In the past few years, Judge Rakoff has rejected several similar private settlements between the Securities and Exchange Commission (SEC) and private parties that raised concerns about loyalty, legitimacy, and accuracy.[138] In rejecting a multi-million dollar agreement between the SEC and Bank of America, he openly worried the settlement reflected a "cynical relationship between the parties"—that the SEC sold out the public in what he believed to be a low-ball settlement.[139] Judge Rakoff's complaints about the SEC's position on consent decrees echo what others have said about large sweetheart deals in private aggregate litigation—that government consent decrees represent a "failure of the adversary system" to bring to light problems the settlement would pose for third parties because both parties—prosecutor and defendant—agree.[140]

---

138. S.E.C. v. Vitesse Semiconductor Corp., 771 F. Supp. 2d 304 (S.D.N.Y. 2011); S.E.C. v. Citigroup Global Mkts. Inc., 827 F. Supp. 2d 328, 332 (S.D.N.Y. 2011); S.E.C. v. Bank of Am. Corp., 653 F. Supp. 2d 507, 512 (S.D.N.Y. 2009).

139. *Bank of Am. Corp.*, 653 F. Supp. 2d at 512 (Rakoff, J.) ("The proposed Consent Judgment in this case suggests a rather cynical relationship between the parties: the S.E.C. gets to claim that it is exposing wrongdoing on the part of the Bank of America in a high-profile merger; the Bank's management gets to claim that they have been coerced into an onerous settlement by overzealous regulators.").

140. *Compare* Jed S. Rakoff, *Are Settlements Sacrosanct?*, 37 LITIG. 15, 16–17 (2011) ("Once the parties of record have settled, they have no incentive to apprise the court of respects in which the settlement might be argued to be unfair, unreasonable, or inadequate.") *with* Silver & Miller, *supra* note 61, at 133–34 (describing "structural collusion" between plaintiff and defense counsel in multidistrict litigation that impairs judicial oversight), Alon Klement, *Who Should Guard the Guardians? A New Approach for Monitoring Class Action Lawyers*, 21 REV. LITIG. 25, 42–43 (2002) (discussing various forms sweetheart deals can take in class actions and mass tort cases), *and* 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, 714 (1986) ("Often, the plaintiff's attorneys and the defendants can settle on a basis that is adverse to the interests of the plaintiffs.").

In another order denying approval of a proposed consent judgment proffered by the SEC and Citigroup Global Markets Inc. (Citigroup), Judge Rakoff described the problem such repeat settlements create for legitimacy. He worried about the impact such blanket settlement policies would have on third parties likely to be impacted by the judgment, as well as the rule of law, when courts passively review agency settlements.[141] He argued:

> Purely private parties can settle a case without ever agreeing on the facts, for all that is required is that a plaintiff dismiss his complaint. But when a public agency asks a court to become its partner in enforcement [without knowledge of the facts] . . . , the court becomes a mere handmaiden to a settlement privately negotiated on the basis of unknown facts, while the public is deprived of ever knowing the truth in a matter of obvious public importance.[142]

Although most do not think of Judge Rakoff's decisions in *Citigroup* as a form of aggregate settlement, chief among his concerns was the SEC's seemingly repeat and reflexive approach to its own settlement agreements. Reviewing the SEC's handling of over 200 consent decrees, the court found that the SEC settlements, among other things: (1) routinely failed to require defendants to admit or deny liability; (2) did not account for the interests of shareholders; and (3) never pursued corporate violations of the terms of the same consent decrees. Accordingly, Judge Rakoff pressed for more information to support the terms of the instant agreement, without which he could not find that the agreement was "fair, nor reasonable, nor adequate, nor in the public interest."[143]

Judge Rakoff's decision encouraged a large number of federal district judges to follow suit—expressing concern that rubber-stamped, repeat agreements between the SEC, Federal Trade Commission, and other government agencies and corporate wrongdoers distort and dilute the judicial role, while subordinating the public good to the private interests of the parties.[144]

---

141. *See Citigroup Global Mkts., Inc.*, 827 F. Supp. 2d at 332.

142. *Id.* (footnotes omitted).

143. *Id.*

144. *See, e.g.*, S.E.C. v. CR Intrinsic Inv'rs, LLC, 939 F. Supp. 2d 431, 436–37 (S.D.N.Y. 2013) (Marrero, J.) (disputing the idea that "Congress intended the judiciary's function in passing upon these settlements as illusory, as a predetermined rubber stamp for any settlement put before it by an administrative agency, or even a *prosecutor* ") (emphasis added); Transcript of Status Conference Hon. Richard J. Leon U.S. Dist. Judge at 9:2, 9:10–14, S.E.C. v. Int'l Bus. Machs. Corp., No. 11–cv–00563–RJL (D.D.C. Dec. 20, 2012) (Leon, J.), ECF No. 10 ("This is not a rubber stamp court . . . . This Court has had a lot of SEC enforcement cases, and I don't just sign it and turn it over. I am part of

Remarking that "[i]t is not . . . the proper function of federal courts to dictate policy to executive administrative agencies,"[145] the Second Circuit, however, reversed Judge Rakoff's order. In so doing, the Second Circuit required that judges only review consent decrees for procedural infirmities, like unclear language, lack of consent, and collusion. Although Judge Rakoff worried that the SEC might ignore its mission in settling large groups of cases through categorical practices, the Second Circuit worried more about what the growing number of decisions like Judge Rakoff's might mean for party-autonomy, judicial competency, and the separation of powers. By limiting judicial review to only the most basic contract formalities, the Second Circuit adopted a very different view of judicial power: one that was supposed to give effect to the parties' wishes and respect how a coordinate branch of government exercised its prosecutorial discretion.

In *Association of Irritated Residents*, the judges reviewing the "industry-wide" settlement in the EPA's global agreement over animal feeding operations raised similar concerns, highlighting how aggregate consent decrees challenge judges who hope to protect the integrity of the judicial process while respecting the interests of the parties and the separation of powers. A divided panel of the D.C. Circuit Court of Appeals not only blessed the EPA's settlement, but ultimately said it was an unreviewable act of prosecutorial discretion.[146] Writing for the majority, Judge Sentelle characterized the Agreement as a routine enforcement action: "The Agreement merely defers enforcement of the statutory requirements, and makes that deferral subject to enforcement conditions that will ultimately result in compliance."[147] Moreover, the Agreement fell well within the bounds of the EPA's enforcement discretion. After all, the statute already described the Agency's enforcement authority in "permissive terms."[148]

Judge Rogers, in dissent, focused on the aggregate nature of the EPA's settlement process. She found that the aggregation of individual cases transformed the settlement into a kind of public law that demanded judicial review to ensure agencies lived up to their statutory mission, heard

---

a growing number of District judges in the country who have grown increasingly concerned about that kind of conduct . . . ."); F.T.C. v. Circa Direct LLC, Civil No. 11–2172 RMB/AMD, 2012 WL 589560, at *1 (D.N.J. Feb. 22, 2012) (Bumb, J.) ("Recently, the propriety of courts approving settlements of regulatory actions, similar to the Order at issue here, has been questioned.").

145. S.E.C. v. Citigroup Global Mkts. Inc., 673 F.3d 158, 163 (2d Cir. 2012).

146. Ass'n of Irritated Residents v. E.P.A., 494 F.3d 1027 (D.C. Cir. 2007).

147. *Id.* at 1033.

148. *Id.* at 1032.

from the public, and calibrated enforcement actions to those who deserved it. "[B]y imposing a civil penalty on AFOs in the absence of individualized determinations of statutory violations," Judge Rogers wrote, the "EPA has attempted to secure the benefits of legislative rulemaking without the burdens of its statutory duties."[149] The EPA had, in effect, abandoned individual enforcement actions for "an unauthorized system of nominal taxation of regulated entities."[150] Treating the global settlement like any other garden-variety enforcement action, according to Judge Rogers, frustrated the courts' ability to assure that the agency loyally interpreted the will of Congress, allowed public participation, and accurately applied the law to the facts.

Association of Irritated Residents highlights the different challenges aggregation presents for the judicial review of settlements. Like other forms of bureaucratic settlement, the global agreement in that case allowed the EPA to dramatically change "the regulatory environment for an entire industry,"[151] without Congress, public input, or any case-by-case assessment of animal feeding operations themselves. The terms of the agreement offered to each AFO were identical; only the amount of the "fine" varied among them, based on their size, and not the degree to which any one operation violated the Clean Air Act.

But Judge Sentelle's opinion also underscored the danger that judicial involvement posed to the separation of powers and the rights of the parties to independently resolve problems through contract. As a general rule, when Congress vests authority in an agency to enforce the law, that agency has the discretion to decide whether a particular violation of the law warrants prosecution, compromise, or other enforcement action.[152] The EPA's agreement is not very different from how agencies frequently exercise their prosecutorial discretion to enforce the law—consistently, and hopefully, according to an informed policy.[153] If the EPA could simply have considered, and declined, to bring individual enforcement actions against every animal feeding operation, then why shouldn't the EPA

149. *Id.* at 1037 (Rogers, J., dissenting).

150. *Id.*

151. Deacon, *supra* note 67, at 815.

152. Heckler v. Chaney, 470 U.S. 821, 831 (1985).

153. *See* Sunstein, *The Most Knowledgeable Branch*, *supra* note 72, at 12 ("[W]ithin the executive branch, there is a great deal of deliberation, and it often involves people with diverse perspectives and high levels of technical expertise."); Zachary S. Price, *Enforcement Discretion and Executive Duty*, 67 VAND. L. REV. 671, 768 (2014) ("We live under a vast accretion of civil and criminal prohibitions, softened in application by (hopefully) benevolent enforcers who may produce a law on the ground very different from the law on the books."); Peter L. Strauss, *The President and Choices Not To Enforce*, 63 L. & CONTEMP. PROBS. 107, 110–11 (2000).

resolve those cases more efficiently in an aggregate settlement? The majority was unable to draw a meaningful line between individual settlement agreements—which courts do not review out of respect for the agencies' authority to contract—and more creative aggregate agreements that, according to the dissent, jeopardize public and deliberative lawmaking.[154]

3. Judicial Review of Aggregate Criminal Settlements

Much like their civil and administrative counterparts, judges have wrestled with how to properly preside over an aggregated criminal settlement process. Just as consent decrees transform private agreements into public "decrees," criminal settlements necessarily involve judges in the implementation of the "contract" and require the court to "place its imprimatur" on the parties' agreed-upon resolution.[155] Moreover, when criminal cases are resolved through an aggregate settlement process, they not only impact the defendant, but also incrementally change rules that govern how the entire justice system functions. In this way, criminal settlements involve both the formation of criminal justice policy as well as its implementation.[156] As a result, criminal settlements often pit judges' duty to protect the integrity of judicial proceedings against their obligation to respect prosecutors' "broad discretion to enforce the Nation's criminal laws."[157]

While courts recognize that they should play some practical role in policing the loyalty, legitimacy, and accuracy of a criminal dispute system dominated by repeat settlements, the exact parameters of that role are difficult to identify. This problem is exacerbated by the different ways in which criminal charges can be resolved—deferred prosecution

154. *Cf.* Crowley Caribbean Transp., Inc. v. Peña, 37 F.3d 671, 677 (D.C. Cir. 1994) (warning that "a broad policy against enforcement poses special risks that [the government] 'has consciously and expressly adopted a general policy that is so extreme as to amount to an abdication of its statutory responsibilities'" (quoting *Chaney*, 470 U.S. at 833 n.4)); Kenney v. Glickman, 96 F.3d 1118, 1123 (8th Cir. 1996).

155. United States v. Orthofix, Inc., 956 F. Supp. 2d 316, 325 (D. Mass. 2013) ("[I]n accepting a plea bargain and moving thereafter to sentence the defendant, the court places the imprimatur of legitimacy, as an independent branch of government, on the parties' bargain.").

156. *See* Eric J. Miller, *Policy By Numbers: Judicial Policy-Making In Low-Level Criminal Courts* (manuscript on file with authors).

157. United States v. Armstrong, 517 U.S. 456, 464 (1996) (internal quotation marks omitted); *see also* Rebecca Krauss, *The Theory of Prosecutorial Discretion in Federal Law: Origins and Developments*, 6 SETON HALL CIR. REV. 1, 4 (2009) ("According to modern case law, the separation of powers doctrine requires judges to permit broad prosecutorial discretion.").

agreements, pleas with advisory sentences, and what are known as "take it or leave it" pleas.

First, some judges assert authority to review criminal settlements that never result in a formal plea agreement, like "deferred prosecution agreements." In a deferred prosecution, a prosecutor initiates a case against a defendant but defers prosecution in exchange for some form of punishment or rehabilitative effort.[158] Once the defendant has satisfied his side of the bargain, the prosecutor dismisses the case without ever securing a criminal conviction. Prosecutors first used deferred prosecution agreements (DPAs) as an alternative to more formal plea agreements in order to rehabilitate juvenile and drug offenders.[159] The use of DPAs in corporate criminal cases grew dramatically after the Arthur Andersen firm's collapse, when the Department of Justice (DOJ) adopted policies requiring prosecutors to take into account the severe collateral consequences of indicting or convicting large corporations.[160]

DPAs present a significant challenge to judges seeking to police the "integrity of the judicial process."[161] Yet while federal courts have traditionally approved DPAs with little or no scrutiny,[162] some courts have sought to exercise their limited authority over DPAs to ensure that prosecutors adequately represent the public interest and that the aggregated settlement process produces legitimate and accurate outcomes.

For example, when state and federal prosecutors agreed to defer their prosecution of HSBC Bank for helping Mexican and Colombian drug traffickers launder over $881 million in drug trafficking proceeds, they ostensibly relied on the executive branch's exclusive authority over the decision whether or not to prosecute.[163] This particular agreement, however, was drafted in the wake of the 2008 financial crisis in a period of growing public criticism of the government's pattern of using DPAs to

158. Benjamin M. Greenblum, Note, *What Happens to A Prosecution Deferred? Judicial Oversight of Corporate Deferred Prosecution Agreements*, 105 COLUM. L. REV. 1863, 1864 (2005).

159. *Id.*

160. Zimmerman & Jaros, *supra* note 85, at 1407; *see also* Memorandum from Larry D. Thompson, Deputy Attorney Gen., to the Heads of Dep't Components, U.S. Attorneys § II.A (Jan. 20, 2003) (instructing prosecutors to consider the "collateral consequences" of indictment on "shareholders, pension holders and employees not proven personally culpable").

161. See United States v. Goodson, 204 F.3d 508, 514 (4th Cir. 2000) (describing courts' "general supervisory power to… preserve the integrity of the judicial process").

162. Zimmerman & Jaros, *supra* note 85, at 1408 ("Courts . . . only rarely review DPAs . . . ."); *see also* Greenblum, *supra* note 158, at 1869 ("The decision to defer is generally not subject to judicial review unless an applicable statute provides otherwise.").

163. United States v. HSBC Bank USA, N.A., No. 12–CR–763, 2013 WL 3306161, at *1, *8 (E.D.N.Y. July 1, 2013).

resolve cases involving large financial institutions without seeking criminal convictions.[164]

Openly acknowledging the public's concern that no corporation should be "too big to jail," Judge Gleeson balked at the government's pro forma request to toll the speedy trial statute to allow the deal to take effect and asserted that he had the right to review the substance of the DPA just as he would a plea.[165] He then ordered the parties to explain in writing why the agreement "adequately reflect[ed] the seriousness of the offense behavior and why accepting the DPA would yield a result consistent with the goals of our federal sentencing scheme."[166]

At a second hearing, Judge Gleeson rejected the parties' arguments that he lacked the authority to evaluate whether the DPA was in the public's interest. The judge readily acknowledged he had no authority to review the government's decision not to seek a criminal conviction;[167] however, he reasoned that the parties had "implicated" the court in their agreement by filing criminal charges and that his "supervisory power" over the proceedings gave him the authority to evaluate the substance of the DPA.[168]

The court's initial decision to review the agreement was motivated, in part, by concerns typically raised about aggregate settlement practices. Judge Gleeson expressed concern that the DOJ's repeat decisions to resolve corporate criminal cases with DPAs threatened the "integrity of judicial proceedings."[169] Moreover, his requirement that the government justify the terms of the agreement marked a "novel"[170] exercise of supervisory authority—ensuring that the DOJ adequately represented the public's interest and that the DPA was a fair and accurate resolution of the criminal charges.[171]

---

164. *See id.* at *7 (explaining that the court was "aware of the heavy public criticism of the DPA").

165. *Id.* at *2–4.

166. *Id.* at *1.

167. *Id.* at *5 ("The government has absolute discretion to decide not to prosecute.").

168. *Id.* at *4–5.

169. *Id*. at *4.

170. *Id.* at *6 ("I recognize that the exercise of supervisory power in this context is novel.").

171. More recently, the DC Circuit rejected this approach, finding district courts lack the competence and authority to reject a DPA. See United States v. Fokker Servs. B.V., 818 F.3d 733 (D.C. Cir. 2016). The Court reasoned that courts were poorly equipped to second-guess a prosecutor's settlement decisions and that such judicial scrutiny infringed the Executive's core function under the Take Care Clause. Id. at 741 (citing U.S. Const. art. II, § 3). *But see* Note, *D.C. Circuit Holds that Courts May Not Reject Deferred-Prosecution Agreements Based on Inadequacy of Charging Decisions or Agreement Conditions*, 130 HARV. L. REV. 1048, 1053 (2017) (arguing this conclusion

Unlike deferred prosecutions, courts enjoy formal, but limited authority to accept or reject plea agreements: in the federal system, judges may not participate in plea discussions[172] and, in many federal cases, must accept the prosecutor's sentencing recommendation. For example, a judge reviewing a "take it or leave it" plea under Federal Rule of Criminal Procedure 11(c)(1)(C) must either accept the prosecutor's sentencing recommendation or allow the defendant the opportunity to withdraw his plea and proceed to trial.[173]

While many judges "rubber stamp" the plea deals prosecutors work out with defendants,[174] some have rejected the notion that they have no role to play in supervising a system of aggregated criminal settlements. In a 2012 decision, Judge William Young rejected two separate "take it or leave it" pleas offered by the Department of Justice. Importantly, the judge's decision did not rest solely on his concern that the proffered pleas failed to adequately punish the defendants.[175] In his decision rejecting the pleas, Judge Young explained, "for the Court to place its imprimatur on such a bargain, however agreeable to the executive—once aggregated together with similar decisions across the criminal justice system—results in the denigration of the criminal law."[176]

Judge Young's rejection of the defendants' plea bargains reflects the same concerns for accuracy, loyalty, and legitimacy that can be identified in courts' reviews of aggregated civil and administrative settlements. Not only did the court reject the plea for failing to impose sanctions accurately reflecting the severity of the defendants' crimes,[177] he openly questioned whether the prosecutor had loyally represented the public's interest with such a lenient resolution.[178] The judge also challenged the legitimacy of a settlement that appeared to be one of a "series of utilitarian compacts

---

conflicts with the "panel's statement that the purpose of the court's approval authority is to ensure that the DPA will allow a defendant to demonstrate good conduct.").

172. FED. R. CRIM. P. 11(c)(1).

173. FED. R. CRIM. P. 11(c)(5).

174. *See* Stephanos Bibas, *The Myth of the Fully Informed Rational Actor*, 31 ST. LOUIS U. PUB. L. REV. 79, 84 (2011) (explaining that most plea colloquies involve a recitation of "foregone procedural rights rather than the substantive merits" of the deal and "largely rubber stamp deals already struck"); *see also* United States v. Orthofix, Inc., 956 F. Supp. 2d 316, 317 (D. Mass. 2013) ("I [have] continued, rather reflexively, to accept 'take it or leave it' pleas from corporate criminals.").

175. *Orthofix, Inc.*, 956 F. Supp. 2d 316.

176. *Id.* at 334.

177. *See id.* at 335 (finding "the government's recommendation as to the appropriate fine" to be "strikingly low").

178. *Id.* at 328 ("Because . . . the parties cannot be expected to dispense justice by themselves, it is incumbent upon the judge to ensure that justice is done when performing her function in vetting plea bargains and imposing sentences.").

punctuated by blustering admonishments."[179] Ultimately, Judge Young's rejection of the pleas was concerned not only with "robbing corrective justice in this particular case" but also that the systematic settlement of similar corporate cases with similarly lenient plea agreements was undermining "the normative edifice of the criminal law."[180]

Some commentators have accused Judge Young of overreach—ignoring the rules of procedure and the parties' wishes because, in his view, judges should more aggressively review plea bargains struck with corporations.[181] They suggest that, in so doing, the court ignored the institutional consequences for prosecutors, agencies, and corporate defendants who jointly enter into such pleas after many different executive departments approve the deal.[182] Introducing more uncertainty into the consequences of the criminal plea may undermine other aspects of a comprehensive deal also struck with the EPA and the Treasury to perform clean-up or reform shoddy banking practices.

Even the Supreme Court has begun to grapple with the fact "that criminal justice today is for the most part a system of pleas, not a system of trials."[183] In its landmark Sixth Amendment decisions, *Padilla v. Kentucky*, *Missouri v. Frye*, and *Lafler v. Cooper*, the Court clarified that the right to effective assistance of counsel included the right to be informed of formal plea offers;[184] the right to be advised (correctly) as to the collateral consequences of a plea,[185] and the right of a defendant to receive competent advice before rejecting a plea offer. [186] Despite Justice Scalia's dissenting admonition in *Lafler* "that bad plea bargaining has nothing to do with ineffective assistance of counsel in the constitutional sense,"[187] the majority in *Frye* recognized that "plea bargains have become so central to the administration of the criminal justice system that . . . . it is insufficient simply to point to the guarantee of a fair trial as a backstop that inoculates any errors in the pretrial process."[188]

---

179. *Id.* at 335.
180. *Id.* at 336, 337.
181. *See* Simms & Linehan, *supra* note 8, at 3–4.
182. *See id.* at 4.
183. Lafler v. Cooper, 132 S. Ct. 1376, 1388 (2012). *See also* Missouri v. Frye, 132 S. Ct. 1399, 1407 (2012) ("The reality is that plea bargains have become so central to the administration of the criminal justice system that defense counsel have responsibilities in the plea bargain process, responsibilities that must be met to render the adequate assistance of counsel that the Sixth Amendment requires in the criminal process at critical stages.").
184. *Frye*, 132 S. Ct. at 1408.
185. Padilla v. Kentucky, 559 U.S. 356, 374 (2010).
186. *Lafler*, 132 S. Ct. at 1385.
187. *Id.* at 1393 (Scalia, J., dissenting).
188. *Frye*, 132 S. Ct. at 1407.

Although the Supreme Court has finally accepted what commentators and practitioners had asserted for some time—that plea bargaining is "'not some adjunct to the criminal justice system; it *is* the criminal justice system'"[189]—the Court has not yet fully come to terms with the aggregate nature of the criminal settlement process. Despite some recognition that plea offers are largely uniform and predetermined by the large volume practice that characterizes the majority of criminal courts,[190] the Court persists in characterizing the pleas as individualized "horse trading."[191] Indeed, the Court has justified its reluctance to regulate the plea bargaining process precisely because it believes that it cannot effectively govern such a highly individualized process.[192] As a result, even as the Court has recognized the primacy of pleas in the criminal justice system, the Court's effort to regulate that process remains predicated on the presumption that ours continues to be a system of individualized justice.

If, as we suggest, some plea bargaining is better viewed as aggregate settlement rather than individualized bargains, then the Supreme Court's current approach to regulating the plea process is incomplete. Although *Padilla*, *Lafler*, and *Frye* guarantee each defendant a competent and loyal attorney in criminal settlement, that right is greatly diminished in a system in which trials are rare and the substance of the plea is largely predetermined.[193] Although the Court's remedies focus on providing defendants with competent counsel, the reality of aggregate settlement is that individual attorneys, regardless of their skill, have substantially less control over the outcomes of their cases.[194] It is ironic that Anthony Cooper's constitutional right to the effective assistance of counsel in *Lafler* was violated precisely because his attorney's incompetent advice denied him the plea that "*others in his position would have received in the ordinary course.*"[195]

---

189. *Id*. (citing Scott & Stuntz, *supra* note 112, at 1912).

190. *Lafler*, 132 S. Ct. at 1387 (recognizing that "[t]he favorable sentence that [had] eluded the defendant" was one which he would have received "in the ordinary course, absent the failings of counsel").

191. *Frye*, 132 S. Ct. at 1407.

192. *Id.* at 1408 ("The alternative courses and tactics in negotiation are so individual that it may be neither prudent nor practicable to try to elaborate or define detailed standards for the proper discharge of defense counsel's participation in the process.").

193. *See* Alexandra Natapoff, Gideon *Skepticism*, 70 WASH. & LEE L. REV. 1049, 1052 (2013) ("The petty offense system generates cases and convictions by the millions in a speedy, low-scrutiny process in which outcomes are largely predetermined.").

194. *See id.* at 1067 ("A different, smaller literature suggests that defense counsel cannot perform its assigned functions for structural reasons, not because lawyers lack the time or ability, but because the very nature of plea bargaining or sentencing prevents it.").

195. *Lafler*, 132 S. Ct. at 1387 (emphasis added).

Thus, while the Court's recent jurisprudence contemplates a role for judges in policing criminal settlements, it has not fully resolved how judges should protect the integrity of an aggregate criminal justice process. In many respects, the Court's refusal to embrace a role for judges in policing *aggregate* settlements in the criminal system reflects the recognition that, despite courts' supervisory powers, significant obstacles exist that hamper judges' ability to regulate aggregate settlements on their own.

B. Challenges to Judicial Oversight of Aggregated Settlement

The informal aggregation of settlements suggests that courts can no longer—if they ever could—rely on adversarial, case-by-case decision-making to produce fair and accurate outcomes. Unfortunately, however, judges are substantially constrained in their ability to police informally aggregated settlements by the limits of their own judicial competence, the constitutional demands imposed by the separation of powers, and their need to respect the interests of the parties.

Judges often lack the information and expertise to ensure adequate representation at critical stages in the settlement process. First, judges are not privy to all the information that motivates parties to strike a deal. Judges lack critical details about the substance of the claims and the parties' interests and risk tolerance. Even when judges raise questions about settlements produced by the cookie-cutter application of accepted norms, judges may lack sufficient knowledge to either critique the attorneys or offer an acceptable substitute.

Judges also may lack the perspective to effectively craft settlements that are not shaped primarily by institutional memory. Because judges work inside the very system that they are obliged to monitor and protect, they may base their sentences on "going rates" as much as prosecutors and defense attorneys. Indeed, the Supreme Court acknowledged as much in *Frye*.[196] Moreover, judges cannot claim to be immune to the pressures that

196. *Frye*, 132 S. Ct. at 1410 ("It can be assumed that in most jurisdictions prosecutors and judges are familiar with the boundaries of acceptable plea bargains and sentences."); *see also* Ronald Wright & Marc Miller, *The Screening/Bargaining Tradeoff*, 55 STAN. L. REV. 29, 80 (2002) ("Custom dictates the sentence more than the arguments of counsel do. . . . District Court judges in the parish operate in the same building and are aware of the sentencing habits of their colleagues. This setting keeps the judges aware of the 'going rate' for various crimes committed by various types of offenders."); Jeff Yates & Elizabeth Coggins, *The Intersection of Judicial Attitudes and Litigant Selection Theories: Explaining U.S. Supreme Court Decision-Making*, 29 WASH. U. J.L. & POL'Y 263, 267 (2009) ("[C]ases with clear-cut outcomes often have associated 'going rates,' or shared views of how judges might decide the appropriate sentence for a given offense.").

can lead cases to be settled in the aggregate. Like the attorneys who come before them, judges are susceptible to the pressures of overwhelming caseloads. As a result, courts may lack incentives to identify problems in an aggregate process in which they are highly invested.[197]

Not only may judges lack the competence to effectively supervise aggregated settlements, but constitutional concerns regarding the separation of powers also impede the judiciary from seizing control of the settlement process. Despite invoking his supervisory authority to monitor the HSBC DPA, Judge Gleeson was forced to concede that DPAs are "not the business of the courts" and that the executive branch has the exclusive discretion not to prosecute.[198] The same separation of powers concerns animated the Second Circuit when they rebuked Judge Rakoff for attempting to dictate the terms of the SEC's settlement with Citibank.[199] Civil cases do not raise the same separation of powers concerns because they arise between private parties. But some commentators raise similar concerns when judges fashion remedies through settlements that look like legislation or appear to aggrandize judicial power.[200]

Finally, courts remain reluctant to interfere in settlements out of respect for the right of each party to resolve cases in their perceived best interests. A defendant may not have a constitutional right to plea bargain,[201] but judges are justifiably hesitant to obstruct a resolution that the defendant is willing to accept in lieu of trial. Moreover, judges recognize that the parties to a dispute have the right to resolve their differences outside of the courthouse. Informally aggregated cases are a significant challenge to judges precisely because there is no obvious role for judges to play in a

197. William B. Rubenstein, *The Fairness Hearing: Adversarial and Regulatory Approaches*, 53 UCLA L. REV. 1435, 1468 (2006) (observing the concerns associated with judicial review over complex settlements); Colin S. Diver, *The Judge as Political Powerbroker: Superintending Structural Change in Public Institutions*, 65 VA. L. REV. 43, 45 (1979) ("Th[e] transformation in the character of litigation necessarily transforms the judge's role as well.").

198. United States v. HSBC Bank USA, N.A., No. 12-CR-763, 2013 WL 3306161, at *5 (E.D.N.Y. July 1, 2013).

199. S.E.C. v. Citigroup Global Mkts. Inc., 673 F.3d 158, 163 (2d Cir. 2012) ("It is not, however, the proper function of federal courts to dictate policy to executive administrative agencies.").

200. *See, e.g.*, James A. Henderson, Jr., *The Lawlessness of Aggregative Torts*, 34 HOFSTRA L. REV. 329, 338 (2005); Donald G. Gifford, *The Constitutional Bounding of Adjudication: A Fuller(ian) Explanation for the Supreme Court's Mass Tort Jurisprudence*, 44 ARIZ. ST. L.J. 1109, 1154–56 (2012); Jonathan T. Molot, *An Old Judicial Role for a New Litigation Era*, 113 YALE L.J. 27, 30 (2003); Linda S. Mullenix*, Mass Tort as Public Law Litigation: Paradigm Misplaced*, 88 NW. U. L. REV. 579 (1994). *But see* Ewing & Kysar, *supra* note 24, at 410 (suggesting that the separation of powers should not be read so expansively as to preclude courts from prodding sister branches into action).

201. Weatherford v. Bursey, 429 U.S. 545, 561 (1977) (Marshall, J., dissenting).

process that at least superficially only involves the parties named in the case.

The challenge for judges, then, is to identify a role they can play in supervising the integrity of the settlement process given the very significant constraints on their ability to evaluate the substance of agreements and to dictate terms to the parties. As we discuss below, judges can play a productive role in minimizing some of the risks of aggregated settlement, while supporting the integrity of a legal system that aspires to provide consistent but individual justice.

III. TOWARDS A NEW MODEL OF JUDICIAL REVIEW OF AGGREGATE SETTLEMENT

A. Judicial Review to Prod Aggregate Settlement Reform

The aggregation of individual settlement practices requires a rethinking of the role of judicial review in a world of bureaucratic settlement. In this part, we argue for a model of judicial review that plays a modest, but critical role in mass settlement: managing the flow of information throughout the settlement process to press other institutions—government lawyers, private associations of attorneys, and the coordinate branches of government—to examine their institutional approach to those aggregated cases.

Such review would not mean interfering with the final outcome of any given settlement. Indeed, judges need not exercise this power in every instance involving a pattern of repeat settlements. Rather, judges would simply be alert for opportunities to improve the settlement process by demanding more information about the parties' competing interests in settlement, more participation by outside stakeholders, and more reasoned explanations for the trade-offs made by counsel on behalf of similarly situated parties. In so doing, courts may help protect the process, substance and rule-of-law values threatened by recurring settlements.

The aggregation of settlement—and the judicial response to it that we discuss above—challenges two dominant views about the judicial role in our modern system of governance. Under one line of thought, the "classical" model, judges enable "private ordering" through our public system of dispute resolution.[202] That is, people ordinarily resolve disputes on their own, and when they cannot, courts provide a neutral public forum

202. Chayes, *supra* note 3; FULLER, JURISPRUDENCE, *supra* note 3, at 705–08.

to arbitrate disputes between a limited number of plaintiffs and defendants,[203] determine the parties' entitlement to discrete legal remedies based on past events,[204] and rely on facts and arguments the parties choose to present.[205] Afterwards, later disputants can use the precedent established in that earlier case to resolve similar cases in court or, more commonly, through individual settlements brokered in "the shadow of the law."[206]

This narrow view of judges as "umpires" who neutrally arbitrate disputes reflects a concern that a more activist, "managerial" judging style would violate the parties' due process rights,[207] not to mention the separation of powers,[208] particularly when judicial review curbs actions of democratically elected members of the legislative or executive branches of government.

Another line of thought, the "public" model, imagines a very different kind of adjudication. The public model captures cases commonly associated with structural reform litigation—where judges do more than hear one-on-one disputes arising out of past events, but instead oversee "polycentric" disputes, using flexible case management and equitable tools to declare what is right and wrong, with sweeping implications for large groups of people before the court.[209] This model does not view "adequate representation" as a due process problem, but instead, largely considers whether the proceeding will accurately reflect interest-group politics.[210]

---

203. John H. Langbein, *The German Advantage in Civil Procedure*, 52 U. CHI. L. REV. 823, 824–25 (1985) (critiquing the American embrace of neutral judicial decision-making, while recognizing more active, inquisitorial judicial management of "Big Case" multi-party disputes). *But see* Marc Galanter et al., *The Crusading Judge: Judicial Activism in Trial Courts*, 52 S. CAL. L. REV. 699, 706–08 (1979) (describing active judicial management in small claims court cases).

204. G. EDWARD WHITE, TORT LAW IN AMERICA: AN INTELLECTUAL HISTORY 14–16 (Expanded ed. 2003); FRANCIS HILLIARD, THE LAW OF TORTS OR PRIVATE WRONGS 75 (1874) ("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).

205. STEPHAN LANDSMAN, THE ADVERSARY SYSTEM: A DESCRIPTION AND DEFENSE 38 (1984); Lon L. Fuller, *The Forms and Limits of Adjudication*, 92 HARV. L. REV. 353, 383 (1978).

206. Mnookin & Kornhauser, *supra* note 16, at 968; Chayes, *supra* note 3, at 1288 ("Although it was well that particular disputes should be fairly settled, there was comfort in the thought that the consequences of the settlement would be confined to the individuals involved.").

207. *See* Judith Resnik, *Managerial Judges*, 96 HARV. L. REV. 374, 425 (1982) (arguing that granting judges procedural control over actions transforms the judges into managers and creates "opportunities for judges to use—or abuse—their power").

208. *See, e.g.*, Henderson, *supra* note 200, at 338 ("In exercising these extraordinary powers, courts arguably exceed the legitimate limits of both their authority and their competence.").

209. Chayes, *supra* note 3, at 1297–98 ("With the diffusion of the party structure, fact issues are no longer sharply drawn in a confrontation between two adversaries, one asserting the affirmative and the other the negative. The litigation is often extraordinarily complex and extended in time, with a continuous and intricate interplay between factual and legal elements.").

210. *See* Richard B. Stewart, *The Reformation of American Administrative Law*, 88 HARV. L. REV. 1667, 1723–47 (I975); Jody Freeman, *Collaborative Governance in the Administrative State*, 45

Although advocates of this model recognize that it pushes the limits of judicial power, they claim the public model makes up for a dysfunctional democratic system that often ignores discrete interest groups otherwise unable to register grievances at the ballot box.[211]

But neither model adequately captures the problems associated with informally aggregated settlements. Unlike the classic model, in repeat "take-it-or-leave-it" settlements, judges cannot depend on formal, public dispute resolution between two adversaries to protect parties' rights and ensure due process and the legitimate evolution of law. As demonstrated above, informal aggregation means that parties often resolve whole categories of civil, administrative, and criminal cases with little individualized input, according to established norms untethered from substantive law.

But unlike the public model of adjudication—where the court actively supervises all of the parties and the application of broad prospective remedies—the parties in informally aggregated settlements often appear before the court only one at a time, if at all. Consequently, even though informal aggregate settlements may impact as many people as public law adjudication, judges that participate in informal aggregate settlements cannot easily monitor and police the public and private bureaucracies responsible for dispensing justice. For the same reasons, courts cannot micromanage informal aggregations that often take place outside the courthouse without threatening separation of powers and disturbing party autonomy.

A new model would recognize that informal aggregate settlement blurs the lines between the private and public models of judging. Even when courts hear traditional disputes between just a few parties, their decisions can impact out-of-court institutions responsible for concluding large groups of similar cases, with the same sweeping impact as public litigation. But such a model would also have to acknowledge the limits courts themselves have recognized on their own power. Policing aggregate

---

UCLA L. REV. 1, 32–36 (1997) (illustrating instances of interest group participation and recommending a new "collaborative model" to involve groups in decision-making).

211. *See* JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW 76 (1980) (stating that courts "keep the machinery of democratic government running as it should, to make sure the channels of political participation and communication are kept open" and thus should concern themselves "with what majorities do to minorities"); Chayes, *supra* note 3, at 1315 ("Moreover, one may ask whether democratic theory really requires deference to majoritarian outcomes whose victims are prisoners, inmates of mental institutions, and ghetto dwellers."). *But see* Neil K. Komesar, *Taking Institutions Seriously: Introduction to a Strategy for Constitutional Analysis*, 51 U. CHI. L. REV. 366 (1984) (questioning whether courts provide a superior forum to address interests of underrepresented minority groups).

settlement requires help from institutions outside the court—prosecutors, agencies, and even steering committees of private lawyers—to apply complementary approaches to protecting the integrity of our public dispute resolution process.

In other areas of public law, commentators have begun to recognize that, even under the classical model, judicial decisions generate dialogue to improve the way other public institutions make public policy.[212] Benjamin Ewing and Doug Kysar, for example, thoughtfully observe that courts do more than operate within a system of "checks and balances" that curbs government overreach.[213] Judicial decisions also can "prod and plea"—sparking an exchange of ideas between other institutions to protect citizens from "government under-reach," when the risks of inaction, in a system of divided government, threaten the public interest.

For that reason, they provocatively argue that courts should entertain questions related to climate change in public nuisance litigation, even though the coordinate branches arguably possess more legitimate authority and expertise to do so. In such cases, courts should not dodge the merits by raising standing, political question, or other concerns grounded in the separation of powers. Rather, they should reach the merits of those cases, understanding that even losses promote greater openness and deliberation. Accordingly, judges should perform their traditional official roles, but with "a self-conscious appreciation for the ways in which they can signal

212. *See* Ewing & Kysar, *supra* note 24, at 410 ("In the face of many twenty-first century harms, however, 'pluralism' requires not only multiple values, but also multiple institutions."); Douglas NeJaime, *Winning Through Losing*, 96 IOWA L. REV. 941, 941 (2011) (recognizing that even court defeats "appeal to other state actors, including elected officials and judges, through reworked litigation and nonlitigation tactics"); Wendy Wagner, *When All Else Fails: Regulating Risky Products Through Tort Litigation*, 95 GEO. L.J. 693, 728 (2007) ("A second and perhaps larger lesson for institutional reformists is the need to combine institutions in a way that maximizes their respective capabilities to correct or compensate for underlying participatory imbalances."); David A. Sklansky, *Quasi-Affirmative Rights in Constitutional Criminal Procedure*, 88 VA. L. REV. 1229 1232–33 (2002) (suggesting that courts adopt "strategies designed to promote ongoing dialog between the judiciary on the one hand and the political branches on the other"). Others recognize how multiple institutional perspectives offer more information and perspectives to identify and solve problems. *See* Matthew C. Stephenson, *Information Acquisition and Institutional Design*, 124 HARV. L. REV. 1422 (2011) (observing that redundant institutions reveal private information, aggregate disparate information, and facilitate learning); Adrian Vermeule, *Second Opinions and Institutional Design*, 97 VA. L. REV. 1435, 1452 (2011) (observing that overlapping institutional roles facilitate "perspectival aggregation," as agents may offer a diversity of problem solving approaches).

213. Ewing & Kysar, *supra* note 24, at 411–12 ("Whether it is a legislature that succumbs to dysfunction or a court that abdicates its duty to adjudicate, when one branch falls down on the job, the elusive goal of balance may be thwarted just as much as when one branch usurps authority entrusted to another.").

to other institutional actors that a given problem demands attention and action."[214]

Even though Ewing and Kysar write with extremely complex cases in mind, in some ways, their model of adjudication fits squarely within the classical framework.[215] Judges should not shy away from getting to the merits of a private nuisance dispute just because they worry their decision might overlap with that of another branch of government.[216] But they also are mindful of the courts' institutional role when judges decide such cases. Courts should adjudicate such disputes with an understanding that they can spur other public and private actors better positioned to respond to such problems.

To date, most literature that advocates that judges consciously open dialogue among other institutions focuses on those rare cases resolved by courts, as opposed to the overwhelming number that settle.[217] Perhaps the closest analogy may be found in the judicial reaction to the rise of public bureaucracy and administration. As public agencies and regulation blossomed in the early 1970s, courts attempted to strike an appropriate balance between deferring to public authorities charged with acting in the public interest and their own institutional obligation to "say what the law is." Courts settled on a doctrine of "hard look" review, where courts review an agency's decisions to ensure that the agency deliberates and explains the basis for its actions. Under "hard look review," courts do not substitute their own judgment for complex policymaking decisions. Rather, they encourage public actors to act more deliberately and faithfully by requiring agencies to "explain the evidence which is available" and "offer a rational connection between the facts found and the choice

214. *Id.* at 354.

215. *See id.* at 378 ("Notwithstanding a dramatic factual backdrop, recent climate change nuisance suits remain unequivocally tort actions.").

216. *See id.* at 375 ("[W]hen courts contract the common law's scope through justiciability doctrines . . . [to avoid] a politically wrought issue, any suggestion they might make about whether or how the legislature should act comes wrapped in a self-effacing (if not self-vitiating) disclaimer: . . . [that] the court lacks the institutional authority to suggest that other branches take any particular action, or even act at all.").

217. David M. Jaros, *Preempting the Police*, 55 B.C. L. REV. 1149, 1152 (2014) (suggesting state courts apply the "intrastate preemption doctrine" in judicial opinions to prod legislators to provide greater guidance about police activities that they condone); NeJaime, *supra* note 212, at 941 (recognizing that even court defeats "appeal to other state actors, including elected officials and judges, through reworked litigation and nonlitigation tactics"); Wagner, *supra* note 212, at 728 ("A second and perhaps larger lesson for institutional reformists is the need to combine institutions in a way that maximizes their respective capabilities to correct or compensate for underlying participatory imbalances."); Sklansky, *supra* note 212, at 1232–33 (suggesting that courts adopt "strategies designed to promote ongoing dialog between the judiciary on the one hand and the political branches on the other").

made."[218] Hard look review respects the technical and policy judgments of a public bureaucracy, while demanding reasoned decision-making to "guard against precisely the kinds of infidelities that lie at the core of the agency cost problem in administrative law."[219]

Even though this kind of review arose in response to the growth of public bureaucracies, a similar inter-branch dialogue is needed to protect against the rising private bureaucracy of settlement. Judicial input may be required to improve the process by which institutions reach a settlement, whether those institutions include federal prosecutors, agencies, steering committees, or private claim facilities responsible for processing large volumes of similar cases.

First, as we discussed in Part I, cases that settle in groups deserve more public scrutiny and regulation than individually negotiated contracts, as parties lose individual control over their terms and conditions. Just as some argue that boilerplate contracts assume the character and form of public law,[220] the same arguably holds true for "take-it-or-leave-it" settlements offered to large groups of people. Group settlements can reshape legal obligations and entitlements for large numbers of stakeholders,[221] but without input and oversight from interest groups, courts, agencies, and legislatures ordinarily responsible for forming and interpreting social regulations. Judicial review, in some cases, can bring

218. Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 52 (1983) (internal quotation marks omitted in second quote).

219. Richard A. Nagareda, *Turning from Tort to Administration*, 94 MICH. L. REV. 899, 945 (1996); *see also* Catherine M. Sharkey, *Federalism Accountability: "Agency-Forcing" Measures*, 58 DUKE L.J. 2125, 2181 (2009) (describing hard look review as a tool used "to ensure that agencies disclose relevant data and provide reasoned responses to material objections raised during the rulemaking process").

220. MARGARET JANE RADIN, BOILERPLATE: THE FINE PRINT, VANISHING RIGHTS, AND THE RULE OF LAW 96 (2013) (arguing that "consent in the robust sense expressed by the ideal of 'freedom of contract' is arguably absent in the vast majority of the contracts we enter into these days, but its absence does little to affect the enforceability of these contracts") (internal quotation marks omitted); Todd D. Rakoff, *Contracts of Adhesion: An Essay in Reconstruction*, 96 HARV. L. REV. 1173, 1176 (1983) ("The use of standard form contracts grows from the organization and practices of the large, hierarchical firms that set the tone of modern commerce. The relationships of such businesses to their customers and to the legal system generate a dynamic that accounts for the salient features of contracts of adhesion."); W. David Slawson, *Standard Form Contracts and Democratic Control of Lawmaking Power*, 84 HARV. L. REV. 529, 531 (1971); Lewis A. Kornhauser, *Unconscionability in Standard Forms*, 64 CALIF. L. REV. 1151, 1166 (1976); Arthur Allen Leff, *Contract as Thing*, 19 AM. U. L. REV. 131 (1970); Friedrich Kessler, *Contracts of Adhesion—Some Thoughts About Freedom of Contract*, 43 COLUM. L. REV. 629 (1943); Edwin W. Patterson, *The Delivery of a Life-Insurance Policy*, 33 HARV. L. REV. 198, 222 (1919).

221. *Cf.* Richard A. Nagareda, *Class Certification in the Age of Aggregate Proof*, 84 N.Y.U. L. REV. 97, 104 (2009) ("Aggregate proof frequently offers . . . an implicit demand for a new and often controversial conception of the substantive law that governs the litigation.").

dysfunctional mass settlement practices out of the shadows and into public view.

Second, judicial intervention also may improve the quality and deliberation that outside institutions devote to the settlement process. Settlements change when institutions know they must justify outcomes to generalist judges, who (sometimes) sit outside the echo-chamber of repeat-settlement arrangements. Moreover, as judges review serial settlements between similar classes of plaintiffs and defendants, they may see settlement patterns among classes of claims that others cannot see in isolation. Courts thus play an important role in encouraging other institutions responsible for repeat settlements—prosecutors, agencies, and specialized practitioners—to thoughtfully design contracts that govern many people, when they otherwise may not be able to do so themselves.[222]

Our view of informal aggregate settlements thus supports decisions by lower court judges to demand more information about deals that reflect problematic, but standard, settlement practices. Judicial supervision of mass settlement practice can prod other institutions to develop richer perspectives about large numbers of cases that otherwise may go unnoticed, and thus, more effectively encourage reform. In so doing, courts would attempt to account for the impact of their decisions not only on precedent, but on the institutional actors that churn the courts' decisions into their own mass settlement program.

B. Judicial Review of Settlement Practices in Action

Our model sheds a different light on judicial opinions that—under the classical model of adjudication—could be criticized or rebuked as improper assertions of judicial power in civil, administrative, and criminal law. But our model also points to where courts may go too far. The ability of judges to "prod and plea" supports judges who use their power to facilitate discussion, demand attention to important issues, and prompt responses from other institutional actors responsible for mass settlement. Courts, however, should resist overturning or rejecting settlements based on the substance of their agreements, which falls outside judicial

222. *Cf.* Dan T. Coenen, *A Constitution of Collaboration: Protecting Fundamental Values with Second-Look Rules of Interbranch Dialogue*, 42 WM. & MARY L. REV. 1575 (2001); Ruth Bader Ginsburg, *Speaking in a Judicial Voice*, 67 N.Y.U. L. REV. 1185, 1198 (1992) ("[J]udges play an interdependent part in our democracy. They do not alone shape legal doctrine but . . . they participate in a dialogue with other organs of government, and with the people as well.").

competency, raises separation of powers concerns, and in some cases, may jeopardize the parties' settlement options.

1. Complex Civil Litigation

At first blush, private institutions, like bar associations and steering committees of attorneys, seem like an unlikely fit for our model of judicial review of settlements. Those who advocate "prods and pleas" generally imagine a more robust dialogue between the coordinate branches of government. But private institutions, just like their public counterparts, can benefit from judicial input in their approach to settling thousands of ostensibly similar cases. In complex civil litigation, this more dynamic version of judicial review may support judges in multidistrict litigation who: (1) use "facilitative judging"[223] to inform the settlement process; (2) help parties evaluate important trade-offs in global agreements; and (3) supervise attorney's fees for individual parties in multidistrict litigation.

First, in facilitative judging, judges in multidistrict litigation avoid forcing plaintiffs and defendants to settle in groups. They instead focus their resources on helping the parties develop their own system to manage the flow of information necessary to resolve cases in a variety of ways—sometimes through initial disclosure requirements, motion practice, and court-annexed mediation. For example, Judge Eduardo Robreno successfully resolved over 180,000 asbestos claims in less than five years by helping the steering committees of lawyers identify ways to sort large numbers of very different claims early in the process.[224] Judge Hellerstein similarly helped parties create a "core discovery database," requiring counsel to produce and code the personal and medical histories for 10,000 September 11 workers to assist the parties in evaluating more than 200 different types of injuries for their eventual global settlement.[225] Judge Brian R. Martinotti developed a unique "bellwether settlement" process to encourage repeat-litigators to share information they ordinarily would not—particularly when preparing for high-stakes bellwether trials.[226]

---

223. Dodge, *supra* note 51; Georgene Vairo, *Lessons Learned by the Reporter: Is Disaggregation the Answer to the Asbestos Mess?*, 88 TUL. L. REV. 1039 (2014) (describing the author's discussions with judges in Texas and Pennsylvania who were doing the same).

224. Robreno, *supra* note 126.

225. Hellerstein et al., *supra* note 129, at 143–44; *see also* Hellerstein et al., *supra* note 125.

226. *See generally* Adam S. Zimmerman, *The Bellwether Settlement,* 85 FORDHAM L. REV. 2275 (2017) (providing case study of Judge Martinotti's bellwether mediation process to resolve thousands of hip implant cases).

Judges themselves sometimes say that "facilitative judging" represents just another version of the classical adjudication model—letting "lawyers be lawyers" by forcing advocates to develop facts to support their respective positions.[227] But they understate the way judicial intervention improves the decision-making process of the lawyers themselves in the settlement process. Many judges, for example, now impose case management orders that allow parties to put up information about the merits of their disputes early in the process, inverting federal rules that ordinarily require parties to develop evidence later in the proceeding.[228] What courts have learned, however, is that such a process can produce vital information for institutions responsible for settling large groups of claims, enabling them to identify the relative merits of many different claims early, and thus reducing the pressure and cost for steering committees of attorneys to develop facts that apply to all of the potential claims.[229]

Judicial prodding may also encourage private and public institutions to revisit difficult trade-offs and produce creative settlements. A recent example outside of multidistrict litigation is the National Football League settlement involving players suffering from traumatic brain injuries. Skeptical that a $765 million umbrella settlement fund was large enough to cover 20,000 NFL players suffering from different traumatic brain injuries for sixty-five years, Judge Anita Brody demanded the negotiating steering committees produce more actuarial details to determine whether the fund would remain solvent.[230] The court's investigation prompted the parties to agree to settle all cases without any cap on liability (the settlement instead adopted an agreed-to payout formula for individual

227. Robreno, *supra* note 126, at 188; Vairo, *supra* note 223, at 1058.

228. *See* J. Maria Glover, *The Federal Rules of Civil Settlement*, 87 N.Y.U. L. REV. 1713 (2012) (outlining, and then criticizing, pretrial rules of procedure that fail to advance dispute resolution given the modern reality of frequent settlements).

229. Attorneys in multidistrict litigation frequently complain that, without facilitative judging, incentives in mass proceedings perversely lead to the opposite result: steering committees of attorneys knowing less information about large volumes of cases, even as they attempt to settle them in large volume. This is because MDL judges often appoint counsel to coveted positions on steering committees based on the number of plaintiffs they represent to develop common evidence. Thus, the early incentives in the litigation favor bulk collection and lengthy litigation over common issues instead of individual evaluation of case files. By forcing parties to evaluate their cases early, judges may relieve pressure on steering committees to resolve the big abstract questions first, and make settlement discussions more concrete and viable. *See supra* notes 50–51 and accompanying text.

230. *In re* Nat'l Football League Players' Concussion Injury Litig., 961 F. Supp. 2d 708 (E.D. Pa. 2014).

retirees that took into account players' age and illness).[231] The parties' creative response to the judge's inquiry, in the end, reduced the appearance that the settlement favored football players with current injuries over those likely to manifest symptoms in the future, while improving the chance that an appeals court would approve the grand bargain.[232]

A borderline question involves the highly-charged issue over whether federal judges should supervise attorney's fees in multidistrict litigation.[233] At first blush, our model would seem to bar judges from substantively altering attorney's fee agreements. Some argue, for example, that MDL courts may even inadvertently skew lawyers' incentives to develop important information when judges, and not individual parties, set the price for legal services. When MDL judges select and control attorney compensation, "lead attorneys rarely challenge them," because "[i]n practical effect, MDL judges [become] lead lawyers' clients."[234]

But judges also may unearth important information for the settlement process when they supervise attorney's fees. First, judges in multidistrict litigation occupy a unique position to create standing orders that may expose unsavory side-deals or conflicts with third-party financiers who fund the litigation.[235] Second, when judges establish procedures for

231. *In re* Nat'l Football League Players' Concussion Injury Litig., 301 F.R.D. 191 (E.D. Pa. 2014).

232. *In re* Nat'l Football League Players' Concussion Injury Litig., 821 F.3d 410, 433 (3d Cir. 2016) ("The Fund is uncapped and inflation-adjusted, protecting the interests of those who worry about developing injuries in the future.").

233. *Compare, e.g.*, RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 30 cmt. b (AM. LAW INST., Tentative Draft No. 3, 2004) ("By comparison with [fee awards in] class actions, court-imposed fees to appointed counsel in consolidated litigation frequently appear inconsistent with restitution principles, since litigants may have no choice but to accept and pay for certain legal services as directed by the court."), *with In re* Vioxx Prods. Liab. Litig., 650 F. Supp. 2d 549, 565 (E.D. La. 2009) (upholding the cap of originating attorney's fees at 32% with the caveat that "in the rare case where an individual attorney believes a departure from this cap is warranted, he shall be entitled to submit evidence to the Court for consideration").

234. Silver & Miller, *supra* note 61, at 109–10; Judith Resnik, *Money Matters: Judicial Market Interventions Creating Subsidies and Awarding Fees and Costs in Individual and Aggregate Litigation*, 148 U. PA. L. REV. 2119, 2129 (2000) ("Judges now have the power of payment, serving more like clients and consumers . . . .").

235. *Cf.* Mark Hamblett, *Plaintiffs' Lawyers in 9/11 Cases Lose Bid To Recoup Interest Costs*, N.Y. L.J. (Aug. 30, 2010) (describing decision prohibiting parties from charging clients $6.1 million in interest costs from third-party financing), http://www.newyorklawjournal.com/id=1202483579123/Plaintiffs-Lawyers-in-911-Cases-Lose-Bid-to-Recoup-Interest-Costs?slreturn=20160925153240; Elizabeth Chamblee Burch, *Financiers as Monitors in Aggregate Litigation*, 87 N.Y.U. L. REV. 1273, 1331–32 (2012) (arguing that funding agreements should be disclosed to prevent collusion between attorneys and financiers who might aspire to influence or control litigation decisions); Memorandum from the Hon. David G. Campbell, Chair of Advisory Comm. on Civil Rules, to the Hon. Jeffrey S. Sutton, Chair of Comm. on Rules of Practice and Procedure 3–4 (Dec. 2, 2014) ("[J]udges currently

resolving conflicts over "common benefit work" fees—i.e., fees for work that benefits all of the plaintiffs in the litigation—they help the parties themselves produce valuable information for the settlement process, while managing concerns about free-riding[236] and excessive costs.[237]

Finally, our model of review would not necessarily support judicial decisions that set aside complex, individual settlements because a court disagrees with the substance of the settlement award.[238] Others, for example, have argued that Judge Hellerstein lacked power to reject a settlement that would have resolved 10,000 September 11 claims.[239] While other models might justify judicial intervention in such cases,[240] a judicial decision that only says a settlement award is too high[241] will not improve information and deliberation in the settlement process itself.

---

have the power to obtain information about third-party funding when it is relevant in a particular case."), http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Reports/CV12-2014.pdf.

236. *See* Dennis E. Curtis & Judith Resnik, *Contingency Fees in Mass Torts: Access, Risk, and the Provision of Legal Services When Layers of Lawyers Work for Individuals and Collectives of Clients*, 47 DEPAUL L. REV. 425, 444 (1998) ("The worry is about 'free riders' who obtain clients and receive, by private contract, significant percentages of the clients' recoveries for minimal work.").

237. We take no position about whether judges should set the fees by themselves, or instead, appoint attorneys who, in turn, set those fees. *Compare* Burch, *supra* note 20, at 128 (recommending judges determine lead lawyer fees on a quantum-meruit basis) *with* Silver & Miller, *supra* note 61, at 160–69 (recommending that judges establish a process where lawyers with the largest numbers of clients and the strongest interests in getting good, cost-effective representation hire and set fees for attorneys performing common benefit work).

238. *See, e.g.*, *In re* Vioxx Prods. Liab. Litig., 574 F. Supp. 2d 606, 617 (E.D. La. 2008) (presumptively capping originating attorneys' fees at 32% of the settlement value), *partially overruled by* 650 F. Supp. 2d 549, 565 (E.D. La. 2009) (upholding the cap of originating attorney's fees at 32% with the caveat that "in the rare case where an individual attorney believes a departure from this cap is warranted, he shall be entitled to submit evidence to the Court for consideration"); *In re* Guidant Corp. Implantable Defibrillators Prods. Liab. Litig., MDL No. 05–1708 (DWF/AJB), 2008 WL 682174, at *10 (D. Minn. Mar. 7, 2008) (noting that "Plaintiffs' counsel achieved a global settlement of $240,000,000.00 for 8,550 Plaintiffs" and "that many of the individual cases likely are not strong stand-alone cases" and using this to justify the amount of the common benefit award).

239. *See, e.g.*, Erichson, *supra* note 8; Grabill, *supra* note 8, at 182; Alexandra N. Rothman, Note, *Bringing an End to the Trend: Cutting Judicial "Approval" and "Rejection" out of Non-Class Mass Settlement*, 80 FORDHAM L. REV. 319, 353 (2011).

240. Wolff, *supra* note 26 (arguing that substantive law empowered Judge Hellerstein to review substantive settlements); *In re* Zyprexa Prods. Liab. Litig., 433 F. Supp. 2d 268, 271 (E.D.N.Y. 2006) (grounding a judicial duty to review settlements in part in the court's fiduciary obligation to plaintiffs using medication to treat bipolar schizophrenia).

241. Transcript of Status Conference at 54, *In re* World Trade Center Disaster Site Litig., No. 21 MC 100 (AKH) (S.D.N.Y. Mar. 19, 2010); Alvin K. Hellerstein, *Democratization of Mass Tort Litigation: Presiding over Mass Tort Litigation to Enhance Participation and Control by the People Whose Claims Are Being Asserted*, 45 COLUM. J.L. & SOC. PROBS. 473, 476 (2012) ("I declined to approve the settlement, rejecting objections that I lacked authority to review settlements agreed to by counsel in individual lawsuits. Ultimately, the settlement amounts were increased, the fees were lowered, and the procedures were modified. I then gave my approval.").

Our model, however, parts ways from those who argue that "there is no need or justification for judicial review of private mass tort settlements because such settlements only bind those plaintiffs who affirmatively opt in to them."[242] As we show in Part I, while individual settlements in "classic" cases may be improved by assurances that the parties knowingly and voluntarily entered into their individual agreements, attorneys' system-wide practices often predetermine most "choices" even in informally aggregated settlements. In such cases, judges should be able to, at least, demand that institutional players properly obtain information and explain the trade-offs they make in routine settlements they broker. Otherwise, aggregate settlements may elude scrutiny by large constituencies who, one way or the other, depend on early negotiations to determine the value of their own claims.

2. Administrative Law

Judges that review administrative settlements enjoy less formal power than judges in multidistrict litigation to organize how the parties interact before they file a consent decree. But courts still can demand more public input and call attention to recurring problems in government deal-making procedures in ways that similarly benefit repeat settlement practice.

Our view, for example would support judicial efforts to include interested stakeholders in a large settlement process. For example, the D.C. Circuit's conclusion in *Association of Irritated Residents* that judges could not review the EPA's industry-wide settlement without interfering with the agency's "prosecutorial discretion" ignored the important role courts play in preventing aggregate settlements from scuttling the interests of third parties, while ensuring the open development of law.[243] In this sense, Judge Rogers was right to require that the EPA explain the basis for the settlement in a public notice, subject to public comment.[244]

Judges may also encourage public institutions, like federal agencies and prosecutors, to reevaluate their own settlement practices by inviting more public scrutiny. After Judge Rakoff demanded that the SEC explain why a corporate defendant did not have to "admit or deny" responsibility when the same defendant did so in a parallel criminal case,[245] the SEC

242. Grabill, *supra* note 8, at 182; *see also* Erichson, *supra* note 8, at 1024 ("When a judge purports to *reject* a settlement that would have been acceptable to the parties, the judge deprives the parties of control over their claims.").

243. *See supra* notes 146–150 and accompanying text.

244. *See supra* notes 149–150 and accompanying text.

245. S.E.C. v. Vitesse Semiconductor Corp., 771 F. Supp. 2d 304 (S.D.N.Y. 2011).

revisited its policy for handling settlements in parallel criminal and civil proceedings.[246] Similarly, after Judge Pauley chastised the SEC for its "embarrassing" handling of a $700 million distribution fund for investors, he required that the SEC develop a plan to identify victims of fraud with more particular information about the securities covered, securities violations alleged, and time periods for investor losses.[247] Shortly thereafter, the SEC revised its policy for providing victim restitution.[248] Other commentators similarly point to the benefits of judicial review of antitrust settlements, observing that they deter "sweetheart" deals between the Federal Trade Commission and big business.[249]

Viewing judicial review of administrative dealmaking from this angle, the Second Circuit may have underestimated some of the benefits of Judge Rakoff's approach for agency regulators. By limiting the judge's consideration of a consent decree to only whether it was "procedurally proper,"[250] the court ignored the vital way judges may call attention to agency drift and encourage more public discussion about their settlement policies.[251] However, the Second Circuit was right in other ways. Judge Rakoff could not categorically reject settlements because he disagreed with the SEC's charging decision[252] or "discretionary matters of policy,"

246. David S. Hilzenrath, *SEC Changes Settlement Rules for Companies Found Guilty of Crimes*, WASH. POST (Jan. 6, 2012), https://www.washingtonpost.com/business/economy/sec-settlements-with-companies-found-guilty-of-crimes-will-acknowledgewrongdoing/2012/01/06/gIQAf9yRfP_story.html.

247. S.E.C. v. Bear, Stearns & Co., 626 F. Supp. 2d 402, 403 (S.D.N.Y. 2009) ("When such cases settle and the adversarial process melts away—the engagement and commitment of the parties to bring the matter to conclusion weakens. Further, the application of inherently incompatible remedial principles—disgorgement, penalties, and restitution—should be analyzed carefully before a Court is burdened with tortured restructuring and embarrassing consequences.").

248. The SEC now centralizes the settlement process for restitution claims in the same department and carefully demands more information about injured investors during the settlement process. *See* Velikonja, *supra* note 11, at 389–90 ("It appears that the SEC took the court's harsh words to heart after the Global Research Analyst Settlement and learned from its mistakes.").

249. Lloyd C. Anderson, United States v. Microsoft*, Antitrust Consent Decrees, and the Need for a Proper Scope of Judicial Review*, 65 ANTITRUST L.J. 1, 37–38 (1996) (finding that, since judges began reviewing the adequacy of antitrust consent decrees in the 1970s, "there appear to have been almost no controversies" or "cries of foul play"); Lawrence G. Baxter, *"Capture" in Financial Regulation: Can We Channel It Toward the Common Good?*, 21 CORNELL J.L. & PUB. POL'Y 175, 182 (2011).

250. S.E.C. v. Citigroup Global Mks., Inc., 752 F.3d 285, 295 (2d Cir. 2014).

251. *Accord* Case Comment, *Securities Regulation — Consent Decrees — Second Circuit Clarifies That a Court's Review of an SEC Settlement Should Focus on Procedural Propriety. —* SEC v. Citigroup Global Markets, Inc*., 752 F.3d 285 (2d Cir. 2014)*, 128 HARV. L. REV. 1288, 1288 (2015) ("By reformulating the standard of review as a highly deferential procedural test, however, the Second Circuit overcorrected….").

252. S.E.C. v. Citigroup Global Mkts. Inc., 827 F. Supp. 2d 328, 330 (S.D.N.Y. 2011) (suggesting that the defendant should have been charged with an "allegation of knowing and fraudulent intent" rather than "negligence").

such as the SEC's decision to settle without requiring Citigroup to admit liability.[253] The SEC, and not Judge Rakoff, must evaluate the best way to allocate its own resources to deter wrongdoing, subject to difficult budgetary constraints. But by limiting the questions federal judges may ask when they review consent decrees, the Second Circuit inadvertently deprived the SEC and other agencies of an important tool to evaluate when their own settlement practice runs off the rails.[254]

3. Criminal Law

Although courts in criminal law enjoy more formal authority to review deals struck between the government and criminal defendants, our model also has consequences for how courts have interpreted their "supervisory" authority to review and set aside deferred prosecution and plea agreements.

Our prodding model of judicial review would allow judges limited authority over DPAs to ensure that prosecutors adequately represent the public interest and that the aggregated settlement process produces legitimate and accurate outcomes. Accordingly, it would support orders designed to introduce more information and explanation in the settlement process, like Judge Gleeson's request that the parties explain why the agreement "adequately reflect[ed] the seriousness of the offense behavior and why accepting the DPA would yield a result consistent with the goals of our federal sentencing scheme."[255]

However, our approach does not necessarily embrace Judge Young's position in *Orthofix*. Importantly, the judge's decision expressly worried about the aggregate impact of the prosecutors' settlement practice—"such a bargain, however agreeable to the executive—once aggregated together with similar decisions across the criminal justice system—results in the denigration of the criminal law."[256] Moreover, Judge Young's rejection of the pleas was concerned not only with "robbing corrective justice in this particular case" but also that the systematic settlement of similar corporate cases with similarly lenient plea agreements was undermining "the

253. *Citigroup Global Mkts. Inc.*, 752 F.3d at 297.

254. Although the Second Circuit rejected Judge Rakoff's efforts to get more of the "cold, hard, solid facts" to support the settlement, *id.* at 295, the Second Circuit may also have underestimated the SEC's capacity to factually support its settlement decisions.

255. United States v. HSBC Bank USA, N.A., No. 12–CR–763, 2013 WL 3306161, at *1 (E.D.N.Y. July 1, 2013).

256. United States v. Orthofix, Inc., 956 F. Supp. 2d 316, 334 (D. Mass. 2013).

normative edifice of the criminal law."[257] Judge Young's solution, however, did not force the government to reevaluate its position, but instead simply forced the government to change its plea bargaining practice in a way that maximized judicial power over the final sentence.

Finally, even as it understates the role of aggregation in criminal law, the Supreme Court's approach in *Padilla*, *Frye*, and *Lafler* also demonstrates the potential of a judicial model designed to prod aggregate settlement practice. *Padilla*, notably, invited prosecutors, public defenders, and rules committees to improve their approach to plea offers to noncitizens, which often involve high volumes of plea bargains to resolve many different low-level infractions.[258] Simply reaffirming judges' obligation to review whether defendants received adequate counsel in plea negotiations like those in *Padilla* caused some prosecutor's offices—already in a superior position to prevent and counteract errors—to adopt policies that give all defendants written warnings and list the types of convictions that could trigger immigration consequences.[259] Public defenders also began cultivating in-house immigration experts among their attorneys and staff, as well as changing arraignment procedures and providing guides and checklists for defense lawyers to follow in preparing cases.[260] Similarly, after *Frye*, federal defender offices lobbied federal prosecutors to change boilerplate terms in plea agreements in ways they could not do on a case-by-case basis.[261] As one commentator observes, the

257. *Id.* at 336–37.

258. Padilla v. Kentucky, 559 U.S. 356 (2010); Stephanos Bibas, *Incompetent Plea Bargaining and Extrajudicial Reforms*, 126 HARV. L. REV. 150, 156 (2012) ("The majority's approach to separation of powers is flexible. It favors checks and balances by a range of institutions. As noted, it relies on bar authorities and case law to flesh out defense lawyers' obligations. It encourages prosecutors, trial courts, and rules committees to explore various ways to make records of plea offers.").

259. CRIMINAL COURTS & CRIMINAL JUSTICE OPERATIONS COMMS., N.Y.C. BAR ASS'N, *PADILLA V. KENTUCKY*: THE NEW YORK CITY CRIMINAL COURT SYSTEM, ONE YEAR LATER 6 (2011), http://www2.nycbar.org/pdf/report/uploads/PadillaCrimCtsCJOReportFINAL6.15.11.pdf; IMMIGRANT DEF. PROJECT & N.Y.U. SCH. OF LAW IMMIGRANT RIGHTS CLINIC, JUDICIAL OBLIGATIONS AFTER *PADILLA V. KENTUCKY*: THE ROLE OF JUDGES IN UPHOLDING DEFENDANTS' RIGHTS TO ADVICE ABOUT THE IMMIGRATION CONSEQUENCES OF CRIMINAL CONVICTIONS 13–14 (2011), http://immigrant defenseproject.org/wp-content/uploads/2011/11/postpadilla FINALNov 2011.pdf.

260. The American Bar Association also developed guidance for prosecutors and defense lawyers on their obligations post-*Padilla*. *See* Mark Walsh, *Task Force Probes Defense Lawyers' Role After Padilla*, A.B.A. J. (Apr. 1, 2011), http://www.abajournal.com/magazine/article/task_force_probes_ defense_lawyers_role_after_padilla/.; AM. BAR ASS'N CRIMINAL JUSTICE SECTION, PADILLA AND BEYOND 23–54 (2010) (reprinting practice advisories, checklists, and interview sheet by The Bronx Defenders, Immigrant Legal Resource Center, Immigrant Defense Project, Public Defender Service for the District of Columbia, and American Bar Association Criminal Justice Section).

261. *See* Klein et al., *supra* note 98, at 87 (empirically reviewing boilerplate plea agreements and finding that "[f]orty-nine districts' boilerplate agreements that mandate waivers of collateral attack

Supreme Court's decision "woke up a wide range of actors," and "prodded them all to address a problem that they had largely ignored until then." [262]

CONCLUSION

Debates will continue about whether judges enjoy power to certify quasi-class actions, disturb blockbuster settlement arrangements with big banks, or question how prosecutors treat broad classes of defendants under the rules that govern civil, administrative, and criminal cases.[263] But commentators have devoted less attention to what aggregated settlement means for our public system of adjudication and specifically for the obligations of the judges who shepherd cases through that system.

Generalist judges have historically encouraged public administrative systems to act deliberatively and responsively on behalf of the people who create and depend on them.[264] We believe that judges should perform a similar role—generating more information, participation, and reasoned reflection—in the private bureaucracies that dominate the way our justice system now resolves disputes.

---

also include an exception for ineffective assistance claims. The inclusion of this exception in many of the plea agreements can be attributed to lobbying . . . . For example, in the Southern District of California, the Federal Defender wrote to the United States Attorney in the district and agreed that the proposed boilerplate plea could include a waiver of 28 U.S.C. § 2255 and appellate rights only so long as the waiver excepted ineffective assistance of counsel claims.").

262. Bibas, *supra* note 258, at 166.

263. *See, e.g.*, Mullenix, *supra* note 128 (quasi-class actions); Khuzami, *supra* note 8 (administrative settlements); Simms & Linehan, *supra* note 8.

264. Thomas W. Merrill, *Article III, Agency Adjudication, and the Origins of the Appellate Review Model of Administrative Law*, 111 COLUM. L. REV. 939 (2011) (detailing the development of the appellate review model of administrative law in the early twentieth century); Reuel E. Schiller, *The Era of Deference: Courts, Expertise, and the Emergence of New Deal Administrative Law*, 106 MICH. L. REV. 399 (2007); Matthew C. Stephenson, *A Costly Signaling Theory of "Hard Look" Judicial Review*, 58 ADMIN. L. REV. 753, 754 (2006) (describing the view that judicial scrutiny of bureaucratic explanations can resolve "the perceived need for expert decisionmaking and the perceived need for a judicial check").