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Stephanos Bibas

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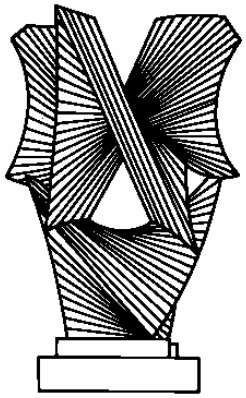

TRANSPARENCY AND PARTICIPATION IN CRIMINAL PROCEDURE

STEPHANOS BIBAS

THE LAW SCHOOL
THE UNIVERSITY OF CHICAGO

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Stephanos Bibas

College of Law, University of Iowa
University of Pennsylvania Law School

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Stephanos Bibas*

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ABSTRACT: The insiders who run the criminal justice system–judges, police, and especially prosecutors–have information, power, and self-interests that greatly influence the criminal justice process and outcomes. Outsiders–crime victims, bystanders, and most of the general public–find the system frustratingly opaque, insular, and unconcerned with proper retribution. As a result, a spiral ensues: insiders twist rules as they see fit, outsiders try to constrain them, and insiders find new ways to evade or manipulate the new rules. The gulf between insiders and outsiders undercuts the instrumental, moral, and expressive efficacy of criminal procedure in serving the criminal law's substantive goals. The gulf clouds the law's deterrent and expressive message and efficacy in healing victims; it impairs trust in and the legitimacy of the law; it provokes increasingly draconian reactions by outsiders; and it hinders public monitoring of agency costs. The most promising solutions are to better inform crime victims and other affected locals and to give them larger roles in criminal justice. It might be possible to better monitor and check insiders, but the prospects for empowering and educating the general public are dim.

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*Associate Professor, University of Iowa College of Law; Visiting Associate Professor, University of Pennsylvania Law School (fall 2005) and University of Chicago Law School (winter and spring 2006); former Assistant U.S. Attorney, Criminal Division, U.S. Attorney's Office for the Southern District of New York. B.A., Columbia; B.A. and M.A., Oxford; J.D., Yale. E-mail: bibas@philo.org. I thank Matt Adler, Jane Baron, Bethany Berger, Randy Bezanson, Richard Bierschbach, Christina Bohannan, Erin Buzuvis, Jeffrey Dunoff, Jill Gaulding, Frank Goodman, Craig Green, Richard Greenstein, David Hoffman, Leo Katz, Seth Kreimer, Erik Luna, Tracey Meares, Chuck Mooney, Gideon Parchomovsky, Nate Persily, Paul Robinson, David Rudovsky, Wendie Schneider, James Shellenberger, Ethan Stone, Cathy Struve, Michael Wachter, and Tung Yin and participants at faculty workshops at the Universities of Iowa and Pennsylvania and Temple University Law Schools for their helpful suggestions and comments and Jordan Esbrook, Brian Powers, and Brian Raimondo for able research assistance.

Transparency and Participation in Criminal Procedure

A gulf divides the knowledgeable, powerful participants inside American criminal justice from the poorly informed, powerless people outside of it. The insiders–the judges, prosecutors, police, and defense counsel who regularly handle criminal cases–are professional repeat players who monopolize criminal justice. They come to know the kinds of crimes, defendants, and sentences that dominate the justice system. They understand the intricate, technical rules that regulate arrests, searches and seizures, interrogations, discovery, evidence, and sentencing and the going rates in plea bargaining. In short, they are knowledgeable.

Insiders control the levers of power, deciding which cases to charge, which crimes and defendants deserve probation, and what prison sentences are appropriate. They reach many of these decisions in private negotiating rooms and conference calls; in-court proceedings are mere formalities that confirm these decisions. In an earlier era, lay juries and the litigants themselves called many of these shots at public trials. But in a world in which plea bargaining resolves almost 95% of cases,[1] professionals (especially lawyers) run the show.

Insiders also have a distinct set of incentives and practical concerns. While they may share the public's intuitions about justice and retribution, they also have self-interests in disposing of large caseloads quickly, lightening their own workloads, rewarding cooperative behavior, and ensuring certainty of conviction and sentence at the cost of severity. Dealing face-to-face with offenders,

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[1] BUREAU OF JUSTICE STATISTICS, 2003 SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS 426 tbl.5.24 (2003) (reporting that in fiscal year 2003, 95.4% of criminal cases in federal district court that were not dismissed ended in guilty or no-contest pleas), *available at* http://www.albany.edu/sourcebook/pdf/t524.pdf; *id.* at 450 tbl.5.46 (reporting that in 2000, 95% of state felony convictions resulted from guilty pleas), *available at* http://www.albany.edu/sourcebook/pdf/ t546.pdf. These figures exemplify a trend in recent decades away from trials and toward pleas. As recently as 1990, only 83.7% of federal criminal cases that were not dismissed ended in guilty or no-contest pleas. *Id.* at 423 tbl. 4.22 (chart displaying increasing numbers of pleas and decreasing numbers of trials over the last few decades), *available at* http://www.albany.edu/sourcebook/pdf/t522.pdf; *see also* BUREAU OF JUSTICE STATISTICS, 1994 SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS 486 tbl. 5.49 (reporting that in 1992, 92% of state felony convictions resulted from guilty pleas), *available at* http://www.albany.edu/sourcebook/pdf/sb1994/sb1994-section5.pdf. While not all guilty pleas result from plea bargains, most do.

they may develop sympathy and see individualized mitigating and aggravating factors that the public does not. There is also some evidence that insiders mellow with time, perhaps because repeated exposure dulls outrage and makes some crimes seem less heinous.[2]

Outsiders, namely the general public and many victims, have a very different perspective. To them, the criminal justice system seems opaque, cloaked in jargon, technicalities, and euphemism and hidden behind closed doors. Public information about criminal justice is notoriously inaccurate and outdated, derived from television and movies whose trials are worlds away from the reality of plea bargaining. Outsiders have little way of learning about, let alone participating in, the progress of most pending cases unless a newspaper publishes a verdict or sentence after the fact. Instead of participating in jury trials, the public must rely on sensationalist and often distorted media accounts of atypical, high-profile cases, from which citizens overgeneralize about the system as a whole. Politicians seize on these salient examples to whip up popular outrage at what may be an aberration rather than a trend. Thus, surveys show that outsiders consistently underestimate the average nominal sentences for particular crimes and so believe they need to be stiffened.[3] Outsiders also do not share insiders' agency costs, their aversion to risking acquittals, and their jadedness or mellowing over time.

The result is an enduring tension between self-interested insiders and excluded outsiders. The insiders have first-hand knowledge and understanding, run the show, and accommodate their own pragmatic concerns and self-interests. The outsiders find criminal justice opaque, run by lawyers, and more concerned with efficiency and technicalities than with justice.

This tension is far from an absolute dichotomy. Insiders doubtless bring their senses of justice to bear and not just their self-interests, and outsiders can at least dimly see some of the practical constraints on insiders. Moreover, outsiders are not by nature more harsh or punitive. When surveyed in the abstract, outsiders say they believe the criminal justice system is too lenient. But when

[2] *Infra* Section I.B.

[3] *Infra* Section I.C.

confronted with detailed case files, the public is often no more punitive than insiders,[4] apart from the jading or mellowing process mentioned earlier.

On average, however, insiders are more concerned with and informed about practical constraints, and they are comfortable with the tradeoffs and system that they themselves run. Outsiders, knowing and caring less about practical obstacles and insiders' interests, focus on process values and offenders' just deserts. The gap in information, participation, and self-interests causes insiders' and outsiders' views to diverge. While victims and the public expect police and prosecutors to represent their interests in a sense, the groups have markedly different perspectives.

I have previously explored some of the forces that can create rifts between insider defense counsel and outsider criminal defendants.[5] This essay focuses on different groups of insiders, namely judges, police, and especially prosecutors, and on different groups of outsiders, namely victims and the general public. The public, in turn, comprises locals affected by a particular crime, other residents of high-crime neighborhoods, and the remainder of the general public. These groups doubtless vary in their interests, knowledge, concerns, and relative powers.[6] For example, residents of high-crime neighborhoods

[4]Though "criminal justice professionals and policy makers . . . tend to overestimate the punitiveness of public sentiment," in fact "a consistent result from most [sentencing] studies is that the public is no more severe than judges." Julian V. Roberts & Loretta J. Stalans, *Crime, Criminal Justice, and Public Opinion*, *in* THE HANDBOOK OF CRIME AND PUNISHMENT 31, 49 (Michael Tonry ed.,1998); *see also* Jeffrey A. Roth, *Prosecutor Perceptions of Crime Seriousness*, 69 J. CRIM. L. & CRIMINOLOGY 232, 235, 238-39 (1978) (finding suggestive evidence "that those who administer criminal justice may share a view of crime seriousness with those who are administered by it" and with the general public).

The public might prefer sentences as harsh as the average nominal sentences specified by insiders, but jaded insiders may nevertheless increase some sentences and discount others more than the public would like, dispersing actual sentences. *See infra* Section I.B.

[5]Stephanos Bibas, *Plea Bargaining Outside the Shadow of Trial*, 117 HARV. L. REV. 2463, 2476-80, 2525-26 (2004). Of course, some repeat offenders are more like insiders, while neophyte defendants are more like outsiders.

[6]Victims have the strongest personal interests or stakes in seeing justice done and in being vindicated or avenged, as well as the greatest knowledge and power under some states' victims'-rights bills. Locals affected by a particular crime ("affected locals" for short) probably have the next-strongest interests in, knowledge about, and power in these particular

(continued...)

are probably more knowledgeable and personally concerned and so less like outsiders than the general public as a whole.[7] But outsiders vote and influence lawmaking and law enforcement at the national and state levels as well as the local level. Thus, one must consider outsiders in the aggregate as well as how particular subsets or communities behave and view insiders. Of necessity, the insider-outsider schema elides some complexities and variations, but in return it highlights important characteristics of each half of the divide.

Insiders control many other parts of government as well, which is a chronic source of friction in a democracy. As political scientists have noted, "street-level bureaucrats" in effect make policy through their low-visibility exercises of discretion in criminal justice and in many other areas.[8] Criminal justice, though, is special. Many ordinary citizens do not exhibit rational apathy about criminal justice, but show passionate interest in how insiders handle it. The Sixth Amendment enshrines public rights to information and participation in criminal trials, though in practice plea bargaining subverts these rights. The stakes are high as well: defendants' lives, liberties, and reputations compete with victims' rights, citizens' security, and the law's expressive and moral messages. Also, crime victims, bystanders, and ordinary citizens have few procedural and no substantive legal rights in criminal justice. Judges, police, and prosecutors are not constrained by identifiable clients in the ways that, for example, teachers and welfare case workers are.[9] Thus, the need for and limits on democratic participation are particularly acute in the criminal

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[6](...continued)
cases; after all, they are likely to be witnesses or complainants and may be scared or scarred by witnessing crimes or narrowly avoiding victimization. Residents of high-crime neighborhoods are not as directly invested in individual cases' outcomes, but have more general personal concerns and knowledge, though they may be a politically powerless group. Finally, the rest of the general public is likely to have the least direct interest and concern and only more general forms of power, such as the ballot box. Nevertheless, the general public does express its outrage and concerns about crime to its elected representatives and candidates.

[7]On the other hand, they may also be even more politically powerless than other outsiders, which may exacerbate their alienation.

[8]*E.g.*, MICHAEL LIPSKY, STREET-LEVEL BUREAUCRACY 3-25 (1980).

[9]*Cf. id.* at 54-70 (trying but failing to fit police and judges into a model of how "relations with clients" constrain and shape street-level bureaucrats' behavior).

arena.

The gulf arises from a combination of procedural and substantive rules. Most of the culprits are low-visibility procedures run by insiders, such as arrest, charging, dismissal, plea-bargaining, and sentencing procedures. But substantive criminal law and policy also shape the gulf. Outsiders seek to raise sentences, for example, while insiders may disagree with this substantive policy choice and subvert it procedurally. In other words, outsiders struggle with insiders to control substantive policy, while insiders dominate procedures and so can determine substantive outcomes. Substantive and procedural rules interact in ways that are obscured by the academic divide between substantive criminal law and criminal procedure. This Essay, though it will flag substantive and procedural forces, hopes to show how they interact.

The gulf between criminal justice insiders and outsiders impairs the law's efficacy in many ways. Some of these costs affect bottom-line substantive outcomes. For example, the gulf may provoke voters to vote for bumper-sticker sentencing policies, such as mandatory minimum sentences. It hinders public monitoring of agency costs as well, leaving insiders too much room to indulge their own preferences at the expense of outsiders' interests.

The gulf also inflicts substantive costs that are distinct from bottom-line sentencing outcomes. It may cloud the substantive criminal law's message and effectiveness by making the law too opaque to deter and express condemnation well. The gulf also obstructs victims' vindication, catharsis, and healing of their wounds.

Finally, the gulf imposes procedural costs. It leads insiders to use subterfuges to subvert democratically enacted laws. It impairs outsiders' faith in the law's legitimacy and trustworthiness, which undercuts their willingness to comply with it. And it may cloud the substantive criminal law's message and effectiveness by making the law too opaque to deter and express condemnation well. In short, the gulf impedes the criminal law's moral and expressive goals as well as its instrumental ones.

Identifying this tension is the first step toward resolving it.

We cannot return to the eighteenth-century world of public jury trials, but we can translate its values of publicity and participation into the twenty-first-century world of guilty pleas. If opacity frustrates and misleads outsiders, transparency and fuller disclosure can ameliorate it. For example, we could find better ways to summarize and publish accurate charging, conviction, and sentencing statistics. The public, which thinks sentences are too soft in part because it underestimates nominal sentences, would be more satisfied, perhaps allaying the impulse to ratchet up sentences. If outsiders feel shut out, the solution is to give victims and the public larger roles at charging, plea, and sentencing proceedings. For example, sentencing circles and other restorative-justice reforms are promising ways to give victims and other affected locals a voice and a stake.[10] Greater transparency and participation would facilitate monitoring insiders, checking their self-interests and agency costs. And if deterrence and social norms theorists want to send messages, criminal procedure must help to make the messages clear and simple enough to send to outsiders. (Criminal procedure must try harder to serve these goals of the substantive criminal law, instead of focusing exclusively on traditional procedural concerns such as efficiency and procedural fairness.)[11] This is a more charitable way to understand sound-bite sentencing reforms, such as "three strikes and you're out," as efforts by voters to participate in setting intelligible policies and sending messages.

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[10]Restorative justice is an umbrella term for various voluntary, nonadversarial processes that try to bring together offenders, crime victims, and others to repair the material and intangible harms caused by crime. For example, victim-offender mediation induces offenders to speak with their victims face to face about their crimes. Family group conferences use trained facilitators to encourage discussions among the families of offenders and victims. Sentencing circles encourage offenders, victims, their friends and families, members of the community, and criminal justice professionals to discuss and agree upon a sentence. Community reparative boards are panels of citizens that discuss crimes with offenders and work out restitution plans. *See* Gordon Bazemore & Mark Umbreit, *A Comparison of Four Restorative Justice Conferencing Models*, JUV. JUST. BULL., Feb. 2001, at 2-6.

[11]I have developed this point in more detail elsewhere. Stephanos Bibas, *Harmonizing Substantive-Criminal-Law Values and Criminal Procedure: The Case of* Alford *and Nolo Contendere Pleas*, 88 CORNELL L. REV. 1361 (2003); Stephanos Bibas & Richard A. Bierschbach, *Integrating Remorse and Apology into Criminal Procedure*, 114 YALE L.J. 85 (2004).

Though transparency and participation are no panacea, they can at least improve this state of affairs by countering misinformation. Unfortunately, there is a limit to how far these reforms can succeed. Politicians and the media play to both insiders and outsiders but do not fit neatly into either camp. The news media and politicians have incentives to find and exaggerate problems–no one will buy a newspaper because the headline reads "Crime stays even for third year in a row." Stirring the pot wins television viewers and voters, and, psychologically, people are more ready to generalize from the heart-rending example than from dry statistics.

Part I of this essay sketches out the origins and dimensions of the gulf between insiders and outsiders. It shows how opacity, domination by insiders, and practicalities such as agency costs separate the world of lawyers from the world of laymen. Section II.A explores how these differences create a tug-of-war or rather a spiral, as insiders set the rules, outsiders react, and insiders undercut the reactions. Section II.B discusses the harms that result from the lack of transparency, participation, and monitoring. Part III then turns to partial solutions, ranging from the legislative process to charging, plea bargaining, and sentencing. Insiders will always have more information, more power, and more practical concerns than outsiders, and the media and politicians will exploit this gap, but reforms can at least reduce the size of the gap. This essay concludes with thoughts about how transparency and participation might lead toward reforms in penology, imprisonment, and alternative sanctions.

I. The Gulf that Separates Insiders from Outsiders

A. What Criminal Justice Looked Like Before the Gulf

Today, few people look back fondly on eighteenth-century criminal justice. Capital and corporal punishments, such as whipping and the stocks, were commonplace. Women and minorities were excluded from a system run by white men. These criticisms, while important, obscure a key virtue that we have lost: laymen regularly saw criminal justice at work and took part in it.

Ordinary citizens played large roles in administering Anglo-American criminal justice in the eighteenth century. As Lawrence Friedman notes, "[c]olonial justice was a business of amateurs. Amateurs ran and dominated the system."[12] Lay magistrates, lay constables, and lay juries ran criminal justice.[13] Jurors were prized as popular local voices who could represent and express "the conscience of the community."[14] Grand and petit juries were centrally ways of empowering ordinary citizens to preserve their liberty, express their sense of justice, and check agency costs and insiders' self-interest.[15] The jury was also a way to educate citizens about the justice system.[16] Juries decided guilt in most cases. In practice, they often set sentences as well by calibrating their verdicts to the punishments that seemed fitting.[17] Until at least the eighteenth century, ordinary victims prosecuted and defendants defended their own felony cases *pro se*.[18] Even after defendants gained the right to hire their own lawyers, most could not afford them and continued to represent themselves. As a result, trial procedure was unencumbered by technical rules of procedure and evidence because there were few lawyers to run them.[19]

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[12]LAWRENCE M. FRIEDMAN, CRIME AND PUNISHMENT IN AMERICAN HISTORY 27 (1993).

[13]*Id.* at 27-30.

[14]Witherspoon v. Illinois, 391 U.S. 510, 519 (1968); *accord id.* n.15; Akhil Reed Amar, *The Bill of Rights as a Constitution*, 100 YALE L.J. 1131, 1183, 1186-89 (1991).

[15]Amar, *supra* note 14, at 1181-85, 1187-89 (summarizing the point of the Fifth, Sixth, Seventh, and Eighth Amendments to the Constitution); *Essays by a Farmer* (pt. 4), MD. GAZETTE, Mar. 21, 1788, *reprinted in* 5 THE COMPLETE ANTI-FEDERALIST 36, 37-40 (Herbert J. Storing with Murray Dry eds., 1981).

[16]ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 272-76 (J.P. Mayer ed., George Lawrence trans. 1969) (vol. I, pt. 2, ch. 8) (1835); Amar, *supra* note 14, at 1186-87.

[17]While, strictly speaking, this "pious perjury" was illegal, it was in practice quite common. 4 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND *238; *see, e.g.*, J. M. BEATTIE, CRIME AND THE COURTS IN ENGLAND 1660-1800, at 419-21, 424-29 (1986); John H. Langbein, *Shaping the Eighteenth-Century Criminal Trial: A View from the Ryder Sources*, 50 U. CHI. L. REV. 1, 22, 40-41, 52-55.

[18]JOHN H. LANGBEIN, THE ORIGINS OF ADVERSARY CRIMINAL TRIAL 10-12 (2003). Defense counsel did, however, appear more frequently in misdemeanor cases, and public prosecutors handled treason cases. *Id.* at 12-13, 36.

[19]Even into the first three decades of the nineteenth century, defense counsel appeared in roughly a quarter of cases and prosecution counsel were even rarer. *Id.* at 169-70

(continued...)

The visible, public aspect of trials and punishment was essential to this scheme. The Sixth Amendment guaranteed local, public trials, and trials were fast and simple enough that viewers could understand them. As Akhil Amar has shown, colonists prized public trials as a safeguard for republican government.[20] Public trials helped citizens to learn their rights and duties, bring relevant information to court, monitor government agents, prevent judicial corruption and favoritism, and check witness perjury.[21] They also "satisf[ied] the public that truth had prevailed at trial," increasing public confidence in the system.[22] Villages were small, and many locals knew the victims, the defendants, and what was happening in court.[23] Punishment on the gallows or in the stocks was a quick and public affair, indeed a bloodthirsty spectacle, visible to all in the town square.[24] In short, the lay public ran the system and watched the process and results first-hand. Ordinary citizens and victims would literally see criminal justice being done.

B. Insiders' Knowledge, Dominance, and Interests

Over the course of the eighteenth and nineteenth centuries, lawyers supplanted laymen in criminal justice. Public prosecutors displaced victims, and more defendants began hiring defense counsel.[25] As lawyers' dominance grew, judges could develop

[19](...continued)
& nn.302, 303 (collecting sources); John H. Langbein, *Understanding the Short History of Plea Bargaining*, 13 LAW & SOC'Y REV. 261, 262-64 (1979)

[20]AKHIL REED AMAR, THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION 112 (1998).

[21]*Id.* at 112-14.

[22]*Id.* at 113.

[23]*See* FRIEDMAN, *supra* note 12, at 23, 25-26.

[24]*See id.* at 26; MICHEL FOUCAULT, DISCIPLINE AND PUNISH: THE BIRTH OF THE PRISON 7-9, 32-69 (Alan Sheridan trans., 1977). Needless to say, I am not arguing that these spectacles were on balance desirable, let alone that we should return to the days of pillories and scaffolds. My more modest point is that the abolition of these punishments and professionalization of the system have brought with them unnoticed costs.

[25]*See* GEORGE FISHER, PLEA BARGAINING'S TRIUMPH: A HISTORY OF PLEA BARGAINING IN AMERICA 96-97 (2003); FRIEDMAN, *supra* note 12, at 67, 70; LANGBEIN, (continued...)

intricate rules of procedure and evidence, further lengthening trials, cloaking them in legalese, and reducing or excluding laymen's role.[26] Lawyers and judges also developed plea bargaining to avoid these increasingly lengthy trials and clear their expanding dockets.[27] The effect of plea bargaining was to reduce juries' roles and hide cases from public scrutiny. Finally, as capital punishment decreased and moved inside prison walls, and imprisonment replaced corporal punishment, punishment became a private, concealed matter entrusted to experts instead of a public spectacle.[28]

These trends have created the modern gulf between insiders and outsiders in criminal justice. Insiders know and understand the complex legal rules that govern the system and the typical kinds of crimes, defendants, and punishments.[29] Indeed, they structure these legal rules and informal norms, and they use them to dispose of their large caseloads.[30] They see the witness interviews, police files, and back-room negotiations that result in plea bargains in most cases. Of course the insiders' knowledge is not perfect, as hardly anyone has a comprehensive view of the system, but these insiders understand and control at least their own local fiefdoms.

Because insiders spend most of their time working in criminal justice, they have distinctive perspectives on how to run it. They do have intuitions about just outcomes, and at first they may share the

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[25](...continued)
supra note 18, at 113-36, 169-70 & nn.302, 303. For an interesting look at how lawyers have stolen victims' conflicts from them, see Nils Christie, *Conflicts as Property*, 17 BRITISH J. CRIMINOLOGY 1, 3-8 (1977).

[26]*See* LANGBEIN, *supra* note 18, at 171-77, 196, 242-51, 253-310, 319-31.

[27]FISHER, *supra* note 25, at 31, 121-24; Albert W. Alschuler, *Plea Bargaining and Its History*, 13 LAW & SOC'Y REV. 211, 240 (1979); John H. Langbein, *Torture and Plea Bargaining*, 46 U. CHI. L. REV. 3, 11 (1978).

[28]*See* FOUCAULT, *supra* note 24, at 14-16, 19-22.

[29]Bibas, *Plea Bargaining Outside the Shadow of Trial*, *supra* note 5, at 2475, 2481, 2483, 2485. As noted in the introduction, the insiders whom I discuss are the criminal justice professionals: the most important ones are judges, prosecutors, repeat defense counsel, and police.

[30]*Id.* For the classic discussion of a related phenomenon, how repeat players use and develop rules to gain advantages over one-shot litigants, see Marc Galanter, *Why the "Haves" Come Out Ahead: Speculations on the Limits of Legal Change*, 9 LAW & SOC'Y REV. 95 (1974).

public's intuitions. But their assessment of just punishment may soften over time, as insiders become jaded or mellower.[31] After one has seen many armed robberies, for example, unarmed burglaries and thefts pale in comparison. And while new insiders start out suspicious of plea bargaining, they grow used to the system and eventually find it difficult or impossible to imagine any other way.[32] Insiders see defendants individually, up close, which may lead them to consider aggravating and mitigating factors that the public and victims never learn about or consider.

Insiders also have practical concerns about huge dockets and self-interests in disposing of cases. Plea bargains guarantee certainty of conviction and punishment. In exchange for certainty, risk-averse prosecutors sacrifice severity to avoid possible acquittals that could embarrass and hurt their career prospects.[33] In addition, judges and most lawyers have little or no financial incentive to invest extra work in pending cases instead of disposing of them quickly.[34] Indeed, defense lawyers who receive flat or capped fees can earn more if they have high turnover.[35] The press of large caseloads and limited funding and support staff also pushes many lawyers and judges to settle quickly, before investing much work.[36] The sooner each

[31] *See* MILTON HEUMANN, PLEA BARGAINING: THE EXPERIENCE OF PROSECUTORS, JUDGES, AND DEFENSE ATTORNEYS 119-21 (1978) (describing how prosecutors undergo this mellowing process). It may also be true that insiders differ systematically from outsiders in their race, class, sex, culture, and levels of education, and that these differences exacerbate the gulf between insiders' and outsiders' perspectives. I am, however, aware of no empirical evidence to confirm this claim.

[32] *Id.* at 89-91, 95-99, 117, 148-50, 153-55, 162.

[33] *Id.* at 110-14; Bibas, *Plea Bargaining Outside the Shadow of Trial*, *supra* note 5, at 2471-72 & n.26 (collecting sources).

[34] Bibas, *Plea Bargaining Outside the Shadow of Trial*, *supra* note 5, at 2471, 2476-77. Privately retained defense lawyers who charge large hourly rates are an exception to this generalization, *see id.* at 2479, but they constitute only a small fraction of the defense bar.

[35] *Id.* at 2477.

[36] *Id.* at 2474, 2479 (discussing prosecutors' and defense counsel's incentives to dispose of their caseloads quickly through plea bargaining); FISHER, *supra* note 25, at 13, 40-49, 121-24 (discussing how funding and caseload pressures encourage prosecutors and judges to dispose of criminal cases through plea bargaining); *see also* State v. Peart, 621 So. 2d 780, 784, 788-90 (La. 1993) (finding the New Orleans public defender system presumptively ineffective because counsel handled 70 active felony cases at a time, amounting to 418 defendants in the space of seven months, and had inadequate support staff, library, and other

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pending case goes away, the earlier the lawyer or judge can go home to have dinner with friends and family.[37] Swift dispositions mean not only more leisure time, but also better caseload and conviction statistics, on which judges and prosecutors assess their performance.[38] Of course, lawyers and judges also have non-financial interests in doing justice, but few can avoid being influenced by finances and workloads as well.

Another factor reinforces the statistical mindset: legal training. Many law schools train future judges and prosecutors to use cost-benefit, net-present-value analysis when assessing outcomes.[39] Insiders, facing pressures to be efficient, may think that low-visibility procedures do not matter so long as ultimate sentences seem substantively acceptable to them. Most readers of this essay, trained as lawyers, probably lean toward evaluating bottom-line outcomes the same way.

C. Outsiders' Exclusion and Sense of Justice

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[36](...continued)
resources; as a result, counsel's clients entered 130 guilty pleas at arraignment during this seven-month period); Frank O. Bowman, III & Michael Heise, *Quiet Rebellion II: An Empirical Analysis of Declining Federal Drug Sentences Including Data from the District Level*, 87 IOWA L. REV. 477, 542-44, 552-53 (2002) (finding statistically significant correlation between federal prosecutors' workloads and declining federal drug sentences, suggesting that prosecutors use more-generous plea bargains to dispose of larger caseloads); http://bjsdata.ojp.usdoj.gov/dataonline/Search/Prosecutors/index.cfm (last visited Sept. 30, 2005) (reporting that in the 2001 National Survey of Prosecutors, 26,425 prosecutors handled a total of 14,975,073 criminal cases, for an average of 566.7 criminal cases per prosecutor during the year).

[37]Bibas, *Plea Bargaining Outside the Shadow of Trial*, *supra* note 5, at 2471.

[38]*Id.* at 2471 & nn.21-22 (collecting sources); FISHER, *supra* note 25, at 48-49; HEUMANN, *supra* note 31, at 144-48 ; Albert W. Alschuler, *The Prosecutor's Role in Plea Bargaining*, 36 U. CHI. L. REV. 50, 106-07 & n.138 (1968).

[39]Bibas & Bierschbach, *supra* note 11, at 147; *see also* Russell Korobkin & Chris Guthrie, *Psychological Barriers to Litigation Settlement: An Experimental Approach*, 93 MICH. L. REV. 107, 111-14 (1994) (describing the standard law-and-economics rational-actor approach to modeling settlements); Russell Korobkin & Chris Guthrie, *Psychology, Economics, and Settlement: A New Look at the Role of the Lawyer*, 76 TEX. L. REV. 77, 96-101, 121-22, 124 (1997) (empirical study finding "that lawyers are more likely [than lay litigants] to explicitly or implicitly employ expected financial value calculations when considering litigation options" and are thus more likely to favor settlement).

Criminal justice outsiders see the system quite differently.[40] Much of the criminal justice system is hidden from their view. Police understandably do not announce which motorists they will stop and what crimes and neighborhoods they will target. Prosecutors rarely explain publicly why they have declined prosecution, pursued felony charges, or bargained away imprisonment.[41] Discovery occurs between the prosecutor and defense lawyer and is not made public.[42] Strict secrecy requirements cloak grand jury proceedings.[43] Plea bargaining usually occurs in conference rooms, courtroom hallways, or telephone calls instead of open court.[44] Important conferences take place at sidebar or in judges' chambers. Public jury trials are rare.[45]

Even those hearings that are technically open to public view are in practice obscure. Hearings are often scheduled by conference call or orders tucked away in dockets, and court clerks do not publicize schedules. Plea and sentencing hearings are usually mere formalities that rubber-stamp bargains struck in secret.[46] Victims desperately want information about their cases, and "one of the greatest sources of frustration to them" is their lack of information.[47]

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[40]As noted in the introduction, by outsiders I mean victims, locals affected by the crime, the general public, and to a lesser extent residents of high-crime neighborhoods. One might also classify criminal defendants and potential defendants as outsiders, but they are a special case. Some of them have been through the system often enough to understand it and should count as insiders. Neophyte defendants are more like outsiders, but their perspective differs enough from the general public's that it is simpler to exclude them from the class of outsiders discussed in this essay.

[41]*See Department of Justice Authorization and Oversight, 1981: Hearings Before the Senate Comm. on the Judiciary*, 96th Cong. 1046 (supplemental statement of Assistant Attorney General Philip Heymann) ("[W]e can't talk very much about our declinations. . . . So the public is often not given any detailed information on the reason for a declination; they simply learn that an investigation of an obvious scoundrel has been closed").

[42]*See, e.g.*, FED. R. CRIM. P. 16 (specifying procedures for government disclosures to criminal defendants and vice versa).

[43]*E.g.*, FED. R. CRIM. P. 6(e) (federal grand-jury-secrecy rules).

[44]*See* HEUMANN, *supra* note 31, at 15-16.

[45]*See supra* note 1.

[46]*See id.* at 134, 150-51; FISHER, *supra* note 25, at 131-33.

[47]Heather Strang & Lawrence W. Sherman, *Repairing the Harm: Victims and Restorative Justice*, 2003 UTAH L. REV. 15, 20-21; *see also* JO-ANNE M. WEMMERS, VICTIMS

(continued...)

Though victims' bills of rights in many states guarantee victims notice of plea, sentencing, and parole hearings, nevertheless many victims fail to receive notice.[48] Even when they do attend hearings, they have difficulty understanding them; legalese, jargon, euphemism, and procedural complexities garble court proceedings. And charge bargaining divorces convictions from actual crimes so that, in court, murder becomes manslaughter and burglary becomes breaking and entering. To outsiders, then, the system seems at best mysterious, at worst frustrating and dishonest.[49] As a result, victims and the public may lose confidence in and respect for the system.[50]

The information that the general public does have is often inaccurate, distorted, or outdated. Unlike insiders, outsiders do not have a large, representative sample from which they can draw average or typical cases. Because the justice system is opaque, and most of the general public has little direct experience with crime or justice, they must fall back on memorable, unrepresentative, sensationalistic media accounts.[51] Increased media coverage of crime may make crime seem more frequent, salient, and important, even though crime has decreased in recent years.[52] The media report violent crime and

[47](...continued)
IN THE CRIMINAL JUSTICE SYSTEM 19-20 (1996).

[48]PEGGY M. TOBOLOWSKY, CRIME VICTIM RIGHTS AND REMEDIES 36-39 (2001); Bibas & Bierschbach, *supra* note 11, at 137 (collecting sources). For a discussion of the gap between victims' statutory rights and their implementation in procedural rules, see Paul G. Cassell, *Recognizing Victims in the Federal Rules of Criminal Procedure: Proposed Amendments in Light of the Crime Victims' Rights Act*, 2005 BYU L. REV. (forthcoming).

[49]*See* Ronald Wright & Marc Miller, *Honesty and Opacity in Charge Bargains*, 55 STAN. L. REV. 1409, 1410-12 (2003); Ronald Wright & Marc Miller, *The Screening/Bargaining Tradeoff*, 55 STAN. L. REV. 29, 33-34 (2002).

[50]*See infra* Subsection II.B.2. Likewise, criminal defendants believe they have either cheated justice or gotten bad deals for mysterious reasons, breeding cynicism. *See* Wright & Miller, *The Screening/Bargaining Tradeoff*, *supra* note 49, at 95-96.

[51]Lawrence W. Sherman, *Trust and Confidence in Criminal Justice*, 248 NAT'L INST. JUST. J. 22, 29 (2002); Rachel E. Barkow, *Administering Crime*, 52 UCLA L. REV. 715, 748-49 (2005) (collecting sources). Of course, those with direct experience with crime and justice, particularly residents of high-crime neighborhoods, do not need to rely on these accounts as much.

[52]For thoughtful discussions of the possible direct and indirect linkages between media crime coverage and public opinion, see Sara Sun Beale, *Still Tough on Crime? Prospects for Restorative Justice in the United States*, 2003 UTAH L. REV. 413, 425-28; Sara Sun Beale, (continued...)

unusually lenient sentences, instead of more prevalent minor crimes and average sentences.[53] Many citizens' sense of criminal justice comes from movies or television shows that build open-and-shut cases on forensic evidence and end with swift jury trials.[54] That portrait is anachronistic and ignores the dominance of plea bargaining today.[55] Media coverage focuses on atypical cases that go to trial, such as the Washington snipers (John Muhammad and Lee Boyd Malvo), Timothy McVeigh, O.J. Simpson, Michael Jackson, and Martha Stewart trials. A viewer who watched only these trials might conclude that most defendants proceed to trial and are convicted there, unless perhaps they are celebrities who can afford great lawyers. Media coverage of the Columbine school shooting were enough to create the impression of a wave of school shootings.[56] Politicians likewise publicize and exploit anecdotes as if they were symptomatic of trends: witness the sudden explosion of crack-cocaine penalties in

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[52](...continued)
What's Law Got to Do with It? The Political, Social, Psychological and Other Non-Legal Factors Influencing the Development of (Federal) Criminal Law, 1 BUFF. CRIM. L. REV. 23, 44-51 (1997).

[53]Barkow, *Administering Crime*, *supra* note 51, at 749-50 (collecting sources). The media on occasion report freakishly harsh sentences as well, but anecdotes of leniency are more likely to scare and thus attract viewers.

[54]*See, e.g.*, *CSI: Crime Scene Investigation* (CBS television series); *L.A. Law* (NBC television series). Apparently, jurors who have seen *CSI* come to expect air-tight forensic evidence in every case and "are reluctant to convict" in cases that lack forensic evidence. Jamie Stockwell, *Defense, Prosecution Play to New 'CSI' Savvy: Juries Expecting TV-Style Forensics*, WASH. POST, May 22, 2005, at A1; Nat'l Center for State Cts., *The CSI Effect*, JUR-E BULLETIN, July 29, 2005, *available at* http://view.exacttarget.com/?ffcc17-fe911575756d027574-fe2c1572736c0575771774; *see also* Juror Evaluation Forms, U.S. Dist. Ct., S.D. Ia. (on file with the author) ("Before coming to this court case, I tho't there had to be physical evidence . . . to bring a person to trial. I still think that may be the way it should be."). More than 61% of those surveyed regularly or sometimes get their information about the courts from such television dramas, and more than 40% do the same from television reality shows such as *Judge Judy*. NAT'L CENTER FOR STATE CTS., HOW THE PUBLIC VIEWS THE STATE COURTS: A 1999 NATIONAL SURVEY 19 fig. 7 (1999).

[55]Stephanos Bibas, *Judicial Fact-Finding and Sentence Enhancements in a World of Guilty Pleas*, 110 YALE L.J. 1097, 1148-49 (2001).

[56]Joel Best, *Monster Hype*, EDUCATION NEXT, Summer 2002, at 50, *available at* http://www.educationnext.org/20022/50.html (describing school shootings as a "phantom epidemic" and noting that "[i]n large part, media coverage promoted this distorted view of the problem").

response to basketball player Len Bias's cocaine overdose.[57] Collectively, these stories leave outsiders with a memorable but misleading picture of the kinds of crimes and cases that dominate criminal justice. The image is one of glamorous, sensational trials in major cases, not the reality of endless, rapid plea bargaining in myriad minor cases.

Based on these atypical media accounts, outsiders form generalized opinions *ex ante* about crime and punishment in the abstract.[58] Because outsiders no longer participate in criminal justice, the general public does not see the aggravating and mitigating facts of individual real cases. When people receive too simple a description of a crime, they mentally fill in the blanks and base their sentences on stereotypes or on memorable or recent examples.[59] Considering the actual details *ex post*, as jurors, would change their perspectives dramatically.[60] For instance, even though 86% of survey respondents

[57]In 1986, popular publications such as *Time* magazine were abuzz about the advent of crack cocaine. *E.g.*, Jacob V. Lamar Jr., *"Crack": A Cheap and Deadly Cocaine, Is a Spreading Menace*, TIME, June 2, 1986, at 16; Evan Thomas, *America's Crusade: What Is Behind the Latest War on Drugs*, TIME, Sept. 15, 1986, at 60 (cover story); *see* William A. Henry III, *Reporting the Drug Problem: Have Journalists Overdosed on Print and TV Coverage?*, TIME, Oct. 6, 1986, at 73, 73 ("Crack has dominated media attention during the recent surge in drug coverage," including many television, magazine, and front-page newspaper articles). That June, Boston Celtics draft pick Len Bias died of a cocaine overdose. Congress then rushed to pass new crack-cocaine penalties in time for the November election. As the bill wended its way through Congress, politicians kept raising the penalties to prove their toughness, until the bill provided for 5 grams of crack cocaine to receive the same penalty as 500 grams of powder cocaine. *See* David Sklansky, *Cocaine, Race, and Equal Protection*, 47 STAN. L. REV. 1283, 1291-97 (1995).

[58]*See* Barkow, *Administering Crime*, *supra* note 51, at 748-50; *see also* JOHN DOBLE, CRIME AND PUNISHMENT: THE PUBLIC'S VIEW 14, 16 (1987) (reporting that many focus-group participants focused on "recent highly publicized crimes," notably a string of child murders, and exaggerated the incidence of violent crimes); Loretta J. Stalans, *Measuring Attitudes to Sentencing*, *in* CHANGING ATTITUDES TO PUNISHMENT: PUBLIC OPINION, CRIME, AND JUSTICE 15, 23-24 (Julian V. Roberts & Mike Hough eds., 2002).

[59]James P. Lynch & Mona J.E. Danner, *Offense Seriousness Scaling: An Alternative to Scenario Methods*, 9 J. QUANTITATIVE CRIMINOLOGY 309, 311 (1993); *see also* Stalans, *supra* note 58, at 22; Paul H. Robinson, *Some Doubts About Argument by Hypothetical*, 88 CAL. L. REV. 813, 819-23 (2000) (explaining that frequently, hypothetical crime scenarios are too sketchy and leave respondents to mentally fill in many details relevant to blameworthienss, which makes it dangerous to generalize from their resulting judgments of blameworthiness).

[60]*See* Barkow, *Adminstering Crime*, *supra* note 51, at 751-52; Rachel E. Barkow, (continued...)

favored a mandatory three-strikes statute in the abstract, most favored one or more exceptions when presented with specific cases.[61] Another set of four studies had some respondents read newspaper accounts of a sentencing and others read court transcripts and the defendant's criminal record in the same case. Readers of the newspaper accounts consistently rated the sentences as more lenient than readers of the court transcripts did.[62]

Because the general public has very poor information about how the criminal justice system actually works, it suffers from misperceptions.[63] In polls, the public says in the abstract that it thinks that judges sentence too leniently.[64] But the general public routinely underestimates penalties. For instance, most Vermonters surveyed thought that rapists who wield knives often are not imprisoned. In fact, in Vermont such rapists definitely go to prison, almost certainly for at least fifteen years.[65] South Carolina, Georgia, and Virginia jurors greatly underestimated how long capital murderers would have to be imprisoned before being paroled. Perhaps as a result, they

[60](...continued)
Federalism and the Politics of Sentencing, 105 COLUM. L. REV. 1276, 1283-84 (2005); Edward Zamble & Kerry Lee Kalm, *General and Specific Measures of Public Attitudes Toward Sentencing*, 23 CANADIAN J. BEHAV. SCI. 327, 330-37 & tbl.1 (1990) (finding that when asked general poll questions, most survey subjects say that the criminal justice system is too lenient, but when asked to assign sentences for four specific crimes respondents' sentences were close to actual sentences, though more severe for breaking and entering and to a lesser extent for theft).

[61]Brandon K. Applegate et al., *Assessing Public Support for Three-Strikes-and-You're-Out Laws: Global Versus Specific Attitudes*, 42 CRIME & DELINQ. 517, 522 tbl.2, 528-30 & tbl.4 (1996).

[62]Indeed, in at least one notorious case, the newspaper readers rated the actual sentence as too lenient, while the readers of court documents saw the same sentence as too harsh. Anthony N. Doob & Julian Roberts, *Public Punitiveness and Public Knowledge of the Facts: Some Canadian Surveys*, *in* PUBLIC ATTITUDES TO SENTENCING: SURVEYS FROM FIVE COUNTRIES 111, 126-32 (Nigel Walker & Mike Hough eds., 1988).

[63]Once again, this statement is less true of those with direct experience with crime and justice, such as residents of high-crime neighborhoods.

[64]*E.g.*, JULIAN V. ROBERTS ET AL., PENAL POPULISM AND PUBLIC OPINION: LESSONS FROM FIVE COUNTRIES 27 (2003); Roberts & Stalans, *supra* note 4, at 49; *see* BUREAU OF JUSTICE STATISTICS, SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS 2002, at 140-41 tbl.2.43 (2003).

[65]JOHN DOBLE RESEARCH ASSOCIATES, INC. & JUDITH GREENE, ATTITUDES TOWARD CRIME AND PUNISHMENT IN VERMONT: PUBLIC OPINION ABOUT AN EXPERIMENT WITH RESTORATIVE JUSTICE 14-15 & n.5 (2000).

returned death sentences.[66]

In fact, sentences are often as tough as or tougher than the average citizen would want. For example, in one empirical study, roughly two-thirds of Illinois residents thought that Illinois judges sentenced burglars too leniently. Yet when given a concrete burglary scenario, 89% of them preferred penalties below two years' imprisonment, the effective statutory minimum.[67] Another Illinois study, involving four hypothetical scenarios, found that judges' sentences were equally or more severe than laymen's sentences.[68] In a California survey that gave brief descriptions of six crimes, respondents preferred sentences as low as or lower than the typical punishments prescribed by statute.[69] Another study found "remarkable agreement between average respondent sentences and [federal] guideline sentences."[70] Many other studies find that, when asked to sentence detailed cases, the public is no harsher or indeed more lenient than judges.[71]

This agreement on average sentences conceals troubling disparities and variations. Prosecutors sometimes raise sentences above the statutory or guideline minimum by stacking charges or adding enhancements. In other cases, they use charge or sentence

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[66]Theodore Eisenberg & Martin T. Wells, *Deadly Confusion: Juror Instructions in Capital Cases*, 79 CORNELL L. REV. 1, 7-8 (1993); Anthony Paduano & Clive A. Stafford Smith, *Deathly Errors: Juror Misperceptions Concerning Parole in the Imposition of the Death Penalty*, 18 COLUM. HUM. RTS. L. REV. 211, 220-25 (1987); William W. Hood, III, Note, *The Meaning of "Life" for Virginia Jurors and Its Effect on Reliability in Capital Sentencing*, 75 VA. L. REV. 1605, 1606-07, 1620-27 (1989).

[67]Loretta J. Stalans & Shari Seidman Diamond, *Formation and Change in Lay Evaluations of Criminal Sentencing: Misperception and Discontent*, 14 LAW & HUM. BEHAV. 199, 202 & n.1, 205-07 & tbls. 2, 3 (1990).

[68]Shari Seidman Diamond & Loretta J. Stalans, *The Myth of Judicial Leniency in Sentencing*, 7 BEHAV. SCI. & L. 73, 75-81 (1989).

[69]William Samuel & Elizabeth Moulds, *The Effect of Crime Severity on Perceptions of Fair Punishment: A California Case Study*, 77 J. CRIM. L. & CRIMINOLOGY 931, 938-40 & tbl.1 (1986). Indeed, the respondents' proposed sentences for five of the six crimes (auto theft, theft of $1000, armed robbery, armed rape, and homicide) appear to be lower than the sentences prescribed by statute as the middle or normal term. *Id.*

[70]PETER H. ROSSI & RICHARD A. BERK, JUST PUNISHMENTS: FEDERAL GUIDELINES AND PUBLIC VIEWS COMPARED 149 (1997).

[71]JULIAN V. ROBERTS & LORETTA J. STALANS, PUBLIC OPINION, CRIME, AND CRIMINAL JUSTICE 210-12 (1997) (collecting sources).

bargaining to lower real sentences beneath the nominal minimum or guideline sentences that citizens think appropriate. Outsiders have little way to review or check these hidden charging and plea-bargaining decisions, to determine when harshness or leniency is appropriate. A particularly lenient plea bargain in one case may mislead outsiders into thinking sentences are too light across the board. They may thus push for higher nominal penalties, not realizing that insiders will apply them inconsistently and use them as bargaining chips. The result is that arbitrary sentence dispersion increases, as some defendants receive freakishly high sentences and others much lower ones.

In short, misperceptions about average sentences fuel spiraling sentences and discontent with criminal justice. Because the public is badly misinformed, voters clamor for tougher sentences, three-strikes laws, and mandatory minima across the board. But this pressure is an artifact of poor information and *ex ante* consideration; citizens are not as reflexively punitive as one might think. The average voter, if fully informed, would think that the sentences on the books are tough enough.

Outsiders also want to participate in criminal justice, though they do not want to take charge.[72] More than 75% of victims surveyed considered it very important to be heard or involved in charge dismissals, plea negotiations, sentencings, and parole proceedings.[73] Participating makes victims feel empowered and helps them to heal emotionally.[74] More generally, citizens report that participating in the legal system increases their respect for the system and empowers them.[75]

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[72]*See* WEMMERS, *supra* note 47, at 208 (discussing crime victims' desires).

[73]DEAN G. KILPATRICK ET AL., THE RIGHTS OF CRIME VICTIMS–DOES LEGAL PROTECTION MAKE A DIFFERENCE? 4 (1998), *available at* http://ncjrs.org/pdffiles/173839.pdf.

[74]Strang & Sherman, *supra* note 47, at 21.

[75]*See, e.g.*, E. ALLAN LIND & TOM R. TYLER, THE SOCIAL PSYCHOLOGY OF PROCEDURAL JUSTICE 106 (1988) ("The perception that one has had an opportunity to express oneself and to have one's views considered by someone in power plays a critical role in fairness judgments."); TOM R. TYLER, WHY PEOPLE OBEY THE LAW 163 (1990); Brian L. Cutler & Donna M. Hughes, *Judging Jury Service: Results of the North Carolina Administrative Office of the Courts Juror Survey*, 19 BEHAV. SCI. & L. 305, 311-13 (2001) (reporting that jury

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Because victims, affected locals, and ordinary citizens do not even know about and understand criminal proceedings, however, they cannot participate in them. In theory, citizens run grand juries, but in practice they are dominated by prosecutors and "would indict a ham sandwich" if prosecutors asked them to.[76] In theory citizens run petit juries, but in practice most cases never make it to jury trials.[77] In many states, victims and citizens have no say in decisions to arrest, to charge, and to plea bargain.[78] Even at sentencing, a large majority of felony victims are absent.[79] When they are present, victims at most read brief victim-impact statements or, more commonly, submit written statements before sentencing.[80] They do not face defendants and, unlike judges, cannot engage in colloquies with them[81] or with the lawyers. Affected locals and ordinary citizens do not enjoy even this much participation.

Moreover, outsiders do not fully share insiders' self-interests and pragmatic concerns. Victims care only about their own cases, and they often care passionately. Victims and ordinary citizens do not care much about maximizing judges' and lawyers' won-loss records,

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[75](...continued)
service improved the opinions of the justice system of more than 20% of jurors); David B. Rottman, *On Public Trust and Confidence: Does Experience with the Courts Promote or Diminish It?*, CT. REV., Winter 1998, at 14, 19-20 (reporting that criminal court experience increased people's satisfaction with the courts); Daniel W. Shuman & Jean A. Hamilton, *Jury Service–It May Change Your Mind: Perceptions of Fairness of Jurors and Nonjurors*, 46 SMU L. REV. 449, 468 (1992) (reporting that those with jury experience view the criminal justice system as 11% fairer than nonjurors do); Telephone Interview with the Hon. Robert W. Pratt, U.S. District Judge, Southern District of Iowa (July 15, 2005) (reporting, based on empirical data from survey forms returned by ex-jurors, that they consistently gained respect for the system, learned a great deal, and came away impressed with the importance of their service).

[76]Jim Felman, *An Interview with Sol Wachtler*, FED. LAW., May 1999, at 40, 45.

[77]*See supra* note 1.

[78]DOUGLAS E. BELOOF, VICTIMS IN CRIMINAL PROCEDURE 201-02, 235-37, 279, 462-64 (1999).

[79]TOBOLOWSKY, *supra* note 48, at 96-98 (reviewing studies). Though, as noted earlier, a majority of victims want to take part, many victims may be unaware of sentencing hearings because prosecutors never notify them. Others may decline to attend because the law gives them inadequate rights to participate; if they are consigned to be powerless observers, they may see little reason to attend.

[80]*Id.* at 97.

[81]Bibas & Bierschbach, *supra* note 11, at 99-100.

case-processing statistics, profitability, or leisure time. To outsiders, many of these insider concerns may seem illegitimate and selfish. They base punishment judgments primarily on their intuitions about justice, also called retribution or just deserts.[82] Outsiders only dimly glimpse the caseload pressures, underfunding, and risks of acquittal that induce plea bargains, in part because criminal justice is so opaque. If they had better information, they might acknowledge these practical constraints and the need to trade off some severity for certainty of punishing more offenders. Even so, outsiders probably would not give self-interest and other practical constraints as much weight as insiders do. For example, outsiders are probably less risk averse than prosecutors, who fear that acquittals will result in personal embarrassment, so outsiders would often not settle as easily.[83] And outsiders do not become jaded or mellower as time goes by, as they do not see the repetitive cycle of cases that desensitize insiders.

Finally, outsiders are laymen, not lawyers. As noted earlier, insider lawyers focus on bottom-line sentence outcomes.[84] Russell Korobkin and Chris Guthrie's empirical work, however, finds that laymen take into account much more than bottom-line outcomes when evaluating settlements. Lay litigants care about a much wider

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[82]Roberts & Stalans, *supra* note 4, at 48; Cass R. Sunstein, *On the Psychology of Punishment*, 11 S. CT. ECON. REV. 171, 175-76 (2004) ("This study strongly suggests that punishment judgments are retributive in character, not tailored to consequentialist goals. . . . These studies indicate that when assessing punishment, people's judgments are rooted in outrage; they do not focus solely on social consequences, at least not in any simple way"); Cass R. Sunstein et al., *Do People Want Optimal Deterrence?*, 29 J. LEG. STUD. 237, 240-41 (2000) ("[T]hese studies strongly suggest that intuitive punishment judgments are not directly tailored to consequentialist goals"); *see also* Dan M. Kahan, *The Secret Ambition of Deterrence*, 113 HARV. L. REV. 413, 414-19, 472-76 (1999) (arguing that deterrence does not explain people's attitudes toward crime and punishment but instead serves as a rationalization or rhetoric to conceal disagreements rooted in their moral values).

Though most outsiders base their intuitive punishment judgments primarily on their retributive instincts, the criminal justice system simultaneously tries to serve other goals as well. *See infra* text accompanying notes 138, 162.

[83]Bibas, *Plea Bargaining Outside the Shadow of Trial*, *supra* note 5, at 2471-72. As I argued in that article, plea bargaining is far from a rational, efficient market in which prosecutors seek only to maximize retribution, deterrence, or some other measure of justice. Many other factors enter into their calculus. Even though fully informed outsiders would likely acknowledge the need for some plea bargaining, they would likely strike different bargains because they lack insiders' self-interests and mellowing over time.

[84]*See supra* text accompanying note 39.

array of justice concerns than do lawyers, including their own status, the other side's blameworthiness, and apologies.[85] This approach is not irrational. On the contrary, it suggests that insiders may take too narrow an approach when evaluating what factors matter to outsiders.[86] Outsiders care about sentences, but they also care about a host of process benefits that come from transparency and participation. Efficiency-minded insiders, however, do little to deliver these process goods.

II. The Resulting Political Tug-of-War or Spiral

A. The Political Dynamic

In many countries, political elites set criminal justice policy and have some freedom to ignore the public's wishes. European countries, for example, abolished the death penalty in spite of public opinion rather than because of it.[87] Because European governments are less directly democratic than America's, European political elites can resist popular pressure to change criminal justice policies.[88] In

[85]Korobkin & Guthrie, *Psychological Barriers to Litigation Settlement: An Experimental Approach*, *supra* note 39, at 148-50; Korobkin & Guthrie, *Psychology, Economics, and Settlement: A New Look at the Role of the Lawyer*, *supra* note 39, at 99-101, 108-12, 121-22, 124, 133-34. Both studies dealt with civil settlements. Richard Bierschbach and I have argued elsewhere that these concerns are likely to be even more powerful in criminal cases, because crime victims and offenders have powerful needs to heal, reconcile, learn lessons, and reintegrate into society. Bibas & Bierschbach, *supra* note 11, at 109-18.

[86]Korobkin & Guthrie, *Psychology, Economics, and Settlement: A New Look at the Role of the Lawyer*, *supra* note 39, at 129-36.

[87]STUART BANNER, THE DEATH PENALTY: AN AMERICAN HISTORY 301 (2002); FRANKLIN ZIMRING, THE CONTRADICTIONS OF AMERICAN CAPITAL PUNISHMENT 23 (2003).

[88]BANNER, *supra* note 87, at 301 (noting that European governments were able to abolish the death penalty in the face of popular support for it because their elected officials feel less pressure than American politicians do to implement the majority's preferred policies); JAMES Q. WHITMAN, HARSH JUSTICE: CRIMINAL PUNISHMENT AND THE WIDENING DIVIDE BETWEEN AMERICA AND EUROPE 13-15, 199-201 (2003) (explaining that the strong culture of deference to bureaucracies in France and Germany "works both to shield the state from the [tough-on-crime] pressures of democratic politics and to manage prisons and other punishments in a sober and disciplined way"); Joshua Micah Marshall, *Death in Venice*, NEW REPUBLIC, July 31, 2000, at 12, 13 (explaining that European parliamentary government makes it harder for upstarts to seize power and for single-issue politics to rock established party platforms; noting also that political elites dictate these platforms and that elites can

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contrast, America's political economy is very responsive to popular pressure, giving organized groups of voters tools with which to challenge or regulate insiders' policies.[89]

Step 1. Insiders' Procedural Discretion Shapes the Rules in Action

We start with a system of criminal laws and punishments on the books. But, in America, the law on the books often is tenuously related to the law in action, because insiders enforce the law only as far as they see fit. In other words, they use their wide procedural discretion to enforce substantive law selectively. As Bill Stuntz brilliantly argues, criminal laws create not binding obligations but rather a menu of options for insiders.[90] Police need not arrest and prosecutors need not charge at all, or they can divert defendants to drug treatment in lieu of punishment.[91] When they do charge, they can often choose from a variety of possible felony and misdemeanor charges. And when prosecutors do not like the existing rules, they persuade legislatures to enact more rules to give them more substantive and procedural options.[92] Prosecutors and defense

[88](...continued)
defy popular support for the death penalty).

[89]For example, not only do American voters vote for representatives every few years, but many states also permit them to use ballot initiatives, referenda, and recall petitions to pass laws directly and discipline elected representatives.

[90]William J. Stuntz, *Plea Bargaining and Criminal Law's Disappearing Shadow*, 117 HARV. L. REV. 2548, 2549-58 (2004).

[91]Options include declining to arrest, declining to charge, deferring prosecution pending successful drug treatment or restitution, and post-charge diversion of cases into drug treatment. Defendants whose cases are diverted may have their charges or sentences suspended or receive probationary sentences. Many of these options are restricted to or used most often for minor crimes. Prosecutors decline to prosecute a substantial minority of cases (between a quarter and a half) and divert a smaller fraction (fewer than 5% of felonies but more misdemeanors). *See* MARC L. MILLER & RONALD F. WRIGHT, CRIMINAL PROCEDURES: CASES, STATUTES, AND EXECUTIVE MATERIALS 798-820 (2d ed. 2003) (collecting sources).

[92]*See* William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505, 533-39 (2001). Stuntz gives two examples: when prosecutors found it too difficult to prove criminal attempt, legislatures made prosecutors' jobs easier by criminalizing solicitation; and when prosecutors found it too difficult to prove burglary, legislatures made prosecutors' jobs easier by criminalizing possession of burglars' tools. *See id.* at 537-38 &
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counsel can bargain around most rules.[93] For example, they can agree to forfeitures, civil settlements, or cooperation against other defendants as full or partial substitutes for criminal punishment.[94] Judges have flexibility to dismiss cases, to suggest settlement, and to hint at light or heavy sentences if the parties go along or refuse to do so. And parole and good-time credits create flexible gaps between nominal and real sentences, allowing insiders to set real prison sentences far below nominal ones.[95] These tools are often obscure or hidden from public view. Even when the public hears about these tools, it may not grasp their significance.

Unsurprisingly, insiders use these tools in part to serve their self-interests and other pragmatic concerns. Police avoid arresting and prosecutors avoid charging (or later dismiss) cases that are troublesome and not easy to win, such as domestic-abuse cases.[96] Prosecutors may decline cases or divert them to drug treatment in part to limit their workloads. They file multiple initial charges to give themselves plea-bargaining chips. They may avoid charging troublesome cases to spare themselves effort, headaches, and possible acquittals. As discussed earlier, they use plea bargaining in part to

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[92](...continued)
n.131.

[93]*See* Nancy J. King, *Priceless Process: Nonegotiable Features of Criminal Litigation*, 47 UCLA L. REV. 113, 114-15, 118-19 (1999).

[94]*See id.* at 118-19.

[95]Right now I am discussing the first step in the spiral, before the public catches on and reacts. Once the public learns of the pervasive discounting of sentences, it reacts to this perceived dishonesty by demanding truth-in-sentencing laws and abolishing parole. *See infra* Subsection II.A.2. The key point is that the system's opacity creates a lead time or lag between insiders' maneuvers and outsiders' reactions. At first, that meant that insiders could be lenient without outsiders' knowledge. Now, it explains why many citizens still assume that parole will discount sentences, long after many states and the federal government have abolished parole. *See supra* Section I.C (discussing citizens' systematic underestimation of actual sentences).

[96]At least, police and prosecutors were reluctant to bring domestic-abuse cases until legislatures enacted shall-arrest and pro-prosecution policies, as described *infra* Subsection II.A.4. *See, e.g.*, U.S. COMM'N ON CIVIL RIGHTS, UNDER THE RULE OF THUMB: BATTERED WOMEN AND THE ADMINISTRATION OF JUSTICE 12-34 (1982); Cheryl Hanna, *No Right to Choose: Mandated Victim Participation in Domestic Violence Prosecutions*, 109 HARV. L. REV. 1849, 1857-65 (1996); Lawrence W. Sherman & Richard A. Berk, *The Minneapolis Domestic Violence Experiment*, POLICE FOUND. REP., Apr. 1984, at 1-2, *available at* http://www.policefoundation.org/pdf/minneapolisdve.pdf (last visited July 21, 2005).

rack up relatively easy convictions and avoid risking embarrassing acquittals, at the expense of sentence severity.[97] They reward speedy pleas in order to discourage time-consuming motions, extensive discovery, and protracted negotiations.[98] They may be tempted to push a few strong cases to trial to gain marketable experience while bargaining away weak ones.[99] As noted earlier, defense lawyers may recommend plea agreements to their clients in part to lighten their workloads, dispose of cases easily, and earn quick fees.[100] They may even use pessimistic forecasts and slanted assessments to push their clients toward pleas.[101] Judges use their leverage over sentences to encourage prompt guilty pleas, in effect penalizing trials. By doing so, they improve their case-processing statistics and avoid time-consuming jury trials and possible appellate reversal.[102]

Step 2. Outsiders Try to Check Insiders

In a few respects, some outsiders' concerns shape insiders' self-interests and their exercises of procedural discretion. For example, most district attorneys are elected and face electoral pressure to maximize convictions. District attorneys, in turn, push their unelected subordinates to increase conviction rates. Three things are noteworthy about this influence: First, it works because voters have access to a little information (conviction statistics) and participation at the ballot box.[103] Second, it is candidates for office who publicize this information, as district attorneys or their opponents seize on a few

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[97]Bibas, *Plea Bargaining Outside the Shadow of Trial*, *supra* note 5, at 2470-72; *supra* Section I.B.

[98]*See, e.g.*, United States v. Ruiz, 536 U.S. 622, 625 (2002); State v. LaForest, 665 A.2d 1083, 1085 (N.H. 1995).

[99]Bibas, *Plea Bargaining Outside the Shadow of Trial*, *supra* note 5, at 2472-73.

[100]*Id.* at 2476-77, 2479, 2482. *But see id.* at 2479 (noting that well-paid, privately retained lawyers may have financial incentives to invest extra work in cases, and that defense lawyers who volunteer for court appointments may resist pleas in order to gain trial experience for themselves).

[101]*Id.* at 2525-26; *see supra* text accompanying notes 35-37.

[102]*See* HEUMANN, *supra* note 31, at 140-48.

[103]Not all of the public can vote. Aliens and convicted felons, for example, may lack the right to vote, so their voices carry little weight.

statistics to bring them to voters' attention. Third, the influence is imperfect because the information is imperfect. District attorneys can create the misleading impression of toughness by touting 99.5% conviction rates, when in fact most of those convictions come from lenient pleas. Unlike conviction statistics, sentencing statistics are usually not readily available to the public, so the public cannot check the bargains being struck.[104] District attorneys who push a few high-profile cases to trial and lose may lose their jobs as a result.[105] The upshot is that risk-averse prosecutors plea bargain more than fully informed voters would like, because voters see only conviction statistics and not charging or sentencing statistics. Even this imperfect oversight is limited and sporadic at best, because most of the system is opaque to outsiders.

Occasionally, an anecdote will capture the public's attention and lead to reform. The story of Megan Kanka's rape and murder by a recidivist child molester led to a push for sex-offender registration, for example.[106] Sometimes, politicians exploit or exacerbate these concerns. The Willie Horton advertisement in the 1988 presidential campaign played on public fears that violent criminals were being released into their communities too soon.[107] Partly in response, many states restricted or abolished parole.[108]

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[104]*See* Alschuler, *The Prosecutor's Role in Plea Bargaining*, *supra* note 38, at 107 (noting that prosecutors measure themselves on convictions rather than sentencing statistics and that "detailed sentencing statistics are rarely compiled.").

[105]At the very least, visible trial losses give fodder to electoral opponents and encourage them to run against incumbents. *E.g.*, Andrea Ford, *The Simpson Verdicts; The Prosecution: Another Stumble; The D.A.'s Office Adds to Its List of High-Profile Defeats, Which Could Leave Gil Garcetti Vulnerable in Next Year's Election*, L.A. TIMES, Oct. 4, 1995, at A3; Mitchell Landsberg, *Garcetti's Chances Were Slim, Analysts Say*, L.A. TIMES, Nov. 12, 2000, at B1.

[106]*See* www.megannicolekankafoundation.org/mission.htm (last visited July 11, 2005) (recounting how this crime led 400,000 citizens to sign petitions and the New Jersey state legislature to pass Megan's Law in "an unprecedented eighty-nine days").

[107]In the 1988 presidential campaign, a political action committee ran a television advertisement attacking Democratic candidate Michael Dukakis for granting weekend prison furloughs to convicted murderer Willie Horton. While on a furlough, the advertisement noted, Horton stabbed a man and raped a woman. *A 30-Second Ad on Crime*, N.Y. TIMES, Nov. 3, 1988, at B20.

[108]*See, e.g.*, Alexandra Marks, *For Prisoners, It's a Nearly No-Parole World*, CHRISTIAN SCI. MONITOR, July 10, 2001, at 1 (noting that many states have restricted and

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Media coverage also fans readers' and viewers' crime fears, provoking public reactions.[109] For example, extensive media coverage of a 1992 carjacking and murder wrongly implied that a carjacking "wave" was sweeping America.[110] As a result, the public clamored for politicians and prosecutors to create new crimes and penalties. To take a different example, the 1972 book *Criminal Sentences: Law Without Order* exposed the lawlessness of sentencing discretion and sparked the sentencing-reform movement.[111] Liberals worried about racial and class disparities at sentencing and conservatives inveighed against lenient sentences by soft-on-crime judges. There was little hard evidence of the size of the problem, but these concerns resonated with voters. Thus, many states and the federal government created sentencing commissions and procedures to make sentencing more equal and predictable.[112]

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[108](...continued)
thirteen states plus the federal government have abolished parole, and describing this trend as "the latest chapter in what some criminal-justice experts call the 'Willie Horton' effect. . . . a fear of releasing anyone because the parole board–and the politicians who appoint them–get blamed if anything goes wrong").

[109]*See* COMMITTEE ON UNIFORM CRIME RECORDS, INT'L ASS'N OF CHIEFS OF POLICE, UNIFORM CRIME REPORTING: A COMPLETE MANUAL FOR POLICE, REVISED 17 (1929) (explaining that accurate crime statistics are necessary because "[i]n the absence of data on the subject, irresponsible parties have often manufactured so-called 'crime waves' out of whole cloth, to the discredit of police departments and the confusion of the public").

[110]*E.g.*, Alan Farnham & Tricia Walsh, *US Suburbs Are Under Siege*, FORTUNE, Dec. 28, 1992, at 42; Bruce Frankel & Dennis Caudron, *Young & The Restless, Crime in 1992 More Violent*, USA TODAY, Dec. 31, 1992, at 7A; Don Terry, *Carjacking: New Name for Old Crime*, N.Y. TIMES, Dec. 9, 1992, at A18; *see* Stuntz, *The Pathological Politics of Criminal Law*, *supra* note 92, at 531 & n.108.

[111]MARVIN FRANKEL, CRIMINAL SENTENCES: LAW WITHOUT ORDER (1972).

[112]For the best account of the sentencing-reform movement at the federal level, culminating in the Sentencing Reform Act of 1984, see KATE STITH & JOSÉ A. CABRANES, FEAR OF JUDGING: SENTENCING GUIDELINES IN THE FEDERAL COURTS 29-77 (1998). At least eighteen states plus the District of Columbia and the federal government use sentencing guidelines, and a number of other states are considering enacting them. Richard S. Frase, *State Sentencing Guidelines: Diversity, Consensus, and Unresolved Policy Issues*, 105 COLUM. L. REV. 1190, 1195-96 (2005).

Step 3: Insiders' Procedural Discretion Undercuts Reforms

The result of this sporadic public oversight may be new substantive crimes and penalties, pressure for increased enforcement, or a sentencing commission. The public's attention then fades and insiders finish drafting, implementing, and administering these new rules. Sometimes, they implement the rules faithfully.[113] But often, instead of simply being constrained by them, insiders use their procedural powers to shape and implement these rules in unexpected ways.[114]

Some police departments, for example, tout their declining crime statistics and even use incentive pay to reward officers for reducing crime. In response, some police officers exaggerate their performance by misreporting burglaries as larcenies or as lower-value burglaries.[115] To give another example of how insiders use procedure, the Federal Sentencing Guidelines tried to reduce unwarranted sentence disparity and raised penalties for some kinds of crimes. They also specified a fixed discount for acceptance of responsibility as the only permissible reward for guilty pleas in most cases.[116] Some defendants, however, are reluctant to plead guilty and accept long sentences, so insiders find additional discounts to induce pleas. Prosecutors and defense counsel agree to conceal or not disclose

[113]I am aware of no evidence, for example, that insiders have subverted sex-offender registries by charge-bargaining away child-molestation charges. Child molesters are subjects of particular public concern, and few prosecutors or judges would want or dare to go easy on them to clear their dockets. The same is probably true of the most serious crimes of all, notably clear cases of murder. *See* Stuntz, *Plea Bargaining and Criminal Law's Disappearing Shadow*, *supra* note 90, at 2563.

[114]*Cf.* JAMES Q. WILSON, BUREAUCRACY: WHAT GOVERNMENT AGENCIES DO AND WHY THEY DO IT 31-110 (1989) (discussing how workloads, peer expectations, bureaucrats' own beliefs, interest-group pressures, and organizational culture all influence bureaucrats' behavior and providing examples of counterintuitive regulatory behaviors that result, some of which seem contrary to the agency's ostensible mission).

[115]*See* LIPSKY, *supra* note 8, at 167, 233 n.10.

[116]*See* U.S. SENTENCING GUIDELINES MANUAL § 3E1.1. (2003). The Supreme Court has recently struck down the federal Guidelines' binding force, rendering them advisory. United States v. Booker, 125 S. Ct. 738, 764-68 (2005) (Breyer, J., remedial majority opinion). Nonetheless, many sentencing judges still give "heavy weight" to the Guidelines and sentence within them "in all but the most exceptional cases." *E.g.*, United States v. Wilson, 350 F. Supp. 2d 910, 925 (D. Utah 2005).

aggravating facts to sentencing judges.[117] They use cooperation agreements to get around the Guidelines, even in cases where the proposed cooperation is marginally useful or a fig leaf for a sentence reduction.[118] Prosecutors create new fast-track departures to plead out large volumes of immigration and drug cases leniently in exchange for waivers of discovery and other rights.[119] Some judges use downward departures to undercut sentences they think are too harsh.[120] At the same time, by hinting that departures are likely or accepting plea agreements that provide for them, judges can induce quick pleas and clear their dockets. Because insiders apply the rules unevenly, the result is renewed sentencing disparity, as women, whites, citizens, the well-to-do, and the educated receive lighter sentences.[121] In short, expert insiders learn the complexities of

[117]*See* Ilene H. Nagel & Stephen J. Schulhofer, *A Tale of Three Cities: An Empirical Study of Charging and Bargaining Practices Under the Federal Sentencing Guidelines*, 66 S. CAL. L. REV. 501, 522, 547, 556 (1992); Probation Officers Advisory Group, *Probation Officers' Survey*, 8 FED. SENTENCING REP. 305, 306, 310-11 (1996).

[118]*See* Jeffrey T. Ulmer, *The Localized Uses of Federal Sentencing Guidelines in Four U.S. District Courts: Evidence of Processual Order*, 28 SYMBOLIC INTERACTION 255, 263-65 & tbl.1 (2005) (reporting that at least one federal prosecutor's office uses "soft" cooperation discounts for "information of questionable value" as a tool for reducing stiff sentences).

[119]*See* Stephanos Bibas, *Regulating Local Variations in Federal Sentencing*, 58 STAN. L. REV. 137, 145-48 (2005).

[120]For a judge's remarkably candid admission of this fact, see, *e.g.*, Jack B. Weinstein, Comment, *A Trial Judge's Second Impression of the Federal Sentencing Guidelines*, 66 S. CAL. L. REV. 357, 365 (1992) ("[T]he Guidelines . . . have made charlatans and dissemblers of us all. We spend our time plotting and scheming, bending and twisting, distorting and ignoring the law in an effort to achieve a just result."); *see also* Jack B. Weinstein, *A Trial Judge's Reflections on Departures from the Federal Sentencing Guidelines*, 5 FED. SENTENCING REP. 6, 12 (1992) ("One would think that most Americans, judges and legislators, as well as members of the Sentencing Commission would be embarrassed by this implacable urge to incarcerate and by the overwhelming desire to ignore the good that people have done and probably will do. Fortunately, court interpretations of the guidelines are not always so unyielding. Judges must continue to assume their individual responsibility of exercising the discretion to depart if sentencing is to approach the levels of fairness and economy that is required of our criminal justice system.").

[121]*See* LINDA DRAZGA MAXFIED & JOHN H. KRAMER, SUBSTANTIAL ASSISTANCE: AN EMPIRICAL YARDSTICK GAUGING EQUITY IN CURRENT FEDERAL POLICY AND PRACTICE 31 ex.9, 34 ex.12 (1998); Stephen Demuth, *The Effect of Citizenship Status on Sentencing Outcomes in Drug Cases*, 14 FED. SENTENCING REP. 271, 273-74 & tbl.2 (2002); David B. Mustard, *Racial, Ethnic, and Gender Disparities in Sentencing: Evidence from the U.S. Federal Courts*, 44 J.L. & ECON. 285, 311-12 (2001). Likewise, the victim's race appears to influence how insiders exercise their discretion, and in particular what charges prosecutors choose to

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sentencing reforms and exploit their inside knowledge and procedural discretion. They pursue their own interests in fast, certain dispositions and their own sense of justice, at the expense of the reform's goals of severity and uniform, equal treatment.

Step 4: Outsiders, Egged on by Politicians, Take Matters into Their Own Hands

Episodically, outsiders hear about these maneuvers and react. Sometimes these reactions result in procedural restrictions on plea bargaining and sentencing departures, for instance. At other times, they give rise to substantive sentencing statutes, such as three-strikes laws and mandatory minima, or new substantive crimes.

When the public learns of charge bargaining, for example, it expresses outrage at the sale of justice and the cheapening of crimes and punishments.[122] Sometimes, politicians may capitalize on and highlight an issue, such as downward departures from sentencing guidelines. They may please the public by blaming insider judges and restricting downward departures, as exemplified by the Feeney Amendment to the PROTECT Act.[123] At the same time, politicians

[121] (...continued)
file. Offenders who kill white victims, for example, are more likely to be charged with capital crimes and sentenced to death than those who kill black victims. David C. Baldus et al., *Racial Discrimination and the Death Penalty in the Post-*Furman *Era: An Empirical and Legal Overview, with Recent Findings from Philadelphia*, 83 CORNELL L. REV. 1638, 1659-60 (1998); David C. Baldus & George Woodworth, *Race Discrimination and the Legitimacy of Capital Punishment: Reflections on Fact and Perception*, 53 DEPAUL L. REV. 1411, 1423-26 (2004).

[122] *See, e.g.*, FISHER, *supra* note 25, at 148-52; *see also* Wright & Miller, *The Screening/Bargaining Tradeoff*, *supra* note 49, at 96 (noting that charge bargaining disappoints the public's expectations and creates a feeling of "learned helplessness"); Laura B. Myers, *Bringing the Offender to Heel: Views of the Criminal Courts*, *in* AMERICANS VIEW CRIME AND JUSTICE: A NATIONAL PUBLIC OPINION SURVEY 46, 49, 54-55 & tbl.4.2 (Timothy J. Flanagan & Dennis R. Longmire eds., 1996) (reporting multiple surveys that found that the public dislikes plea bargaining).

[123] S. 151, 108th Cong., 1st Sess. § 401 (2003) (enacted). The Feeney Amendment restricted sentencing judges' ability to lower sentences unilaterally under the federal Sentencing Guidelines. It did so by eliminating or restricting many permissible grounds for downward departures, requiring prosecutorial assent to several downward adjustments, and increasing appellate, executive, and legislative scrutiny of downward departures. *See generally* Stephanos Bibas, *The Feeney Amendment and the Continuing Rise of Prosecutorial Power to Plea*
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cater to prosecutors, a powerful insider constituency.[124] Thus, the Feeney Amendment left most prosecutor-initiated departures alone, approved of but capped fast-track departures, and gave prosecutors extra bargaining chips.[125] In other words, Congress did a deft job of catering to outsider outrage and insider interests simultaneously.[126]

Legislatures do the same thing by passing mandatory-minimum sentencing laws for drug trafficking, gun crimes, and other high-profile crimes.[127] These laws satisfy outsiders' desire to bind judges and clamp down on leniency while, in effect, giving insider prosecutors more tools and charging options.

Occasionally, however, legislatures side with outsiders in restricting prosecutorial discretion. In New York State, the 1973 Rockefeller drug laws greatly restricted prosecutors' ability to plea bargain away mandatory drug sentences.[128] Legislatures also restrict police and prosecutorial leniency involving politically salient crimes. In domestic-abuse cases, for example, legislatures passed shall-arrest and no-drop policies to change police and prosecutors' traditional reluctance to arrest and willingness to drop charges.[129] Candidates for office may also raise these issues by campaigning as outsiders against

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[123](...continued)
Bargain, 94 J. CRIM. L. & CRIMINOLOGY 295 (2004) (explaining these and other provisions).

[124]*See* Stuntz, *The Pathological Politics of Criminal Law*, *supra* note 92, at 529-38, 544-46.

[125]*See* Bibas, *The Feeney Amendment and the Continuing Rise of Prosecutorial Power to Plea Bargain*, *supra* note 123, at 296, 299-301.

[126]*Cf.* Vikramaditya S. Khanna, *Corporate Crime Legislation: A Political Economy Analysis*, 82 WASH. U. L.Q. 95, 104-29 (2004) (arguing that Congress keeps broadening corporate criminal liability to show the public that it is doing something and to give prosecutors tools with which to win convictions more easily, and that corporations actually prefer this response to broadened civil liability).

[127]*See, e.g.*, 18 U.S.C. § 924(c) (2000) (prescribing mandatory five-year consecutive sentence for anyone who "uses or carries a firearm" "during and in relation to any crime of violence or drug trafficking crime"); 21 U.S.C. § 841(a)(1), (b)(1)(A), (B) (2000 & Supp. 2002) (prescribing five- and ten-year mandatory minimum sentences for trafficking in certain quantities of drugs).

[128]N.Y. CRIM. PROC. L. § 220.10 (McKinney 2005).

[129]*E.g.*, FLA. STAT. § 741.2901 (West Supp. 1997) (establishing "a pro-prosecution policy" and special prosecutorial units for domestic abuse and empowering prosecutors to proceed even over the victim's objection); WIS. STAT. § 968.075 (West 1998); *see* Hanna, *supra* note 96, at 1857-65.

the abuses of insiders. For example, in New Orleans, Harry Connick, Sr. unseated District Attorney Jim Garrison by criticizing rampant plea bargaining and promising to clamp down.[130]

Outsiders sometimes take matters into their own hands and use direct democracy to circumvent legislatures. In California, for example, voters used a ballot initiative to pass a law banning plea bargaining in cases whose indictments or informations charge specified serious crimes.[131] Also in California, voters put a tough three-strikes-and-you're-out initiative on the ballot, mandating fifteen-year minimum sentences for three-time felons.[132] The legislature had buried the bill in committee, but then twelve-year-old Polly Klaas was kidnapped, molested, and murdered. In the wake of this heinous crime, a total of 840,000 people signed petitions to put the initiative on the ballot. Bowing to this pressure, the legislature passed the law.[133]

Many commentators criticize mandatory-sentencing laws as expressing the public's bloodthirsty desire for ever more punishment. Some denigrate these laws as no more than sound-bite sentencing slogans.[134] These laws also express voters' concern about the decay of social and moral cohesion.[135] But in addition, there is another, charitable way to understand mandatory laws, particularly initiatives and referenda. The public is frustrated by the criminal justice system.

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[130]*See* Wright & Miller, *The Screening/Bargaining Tradeoff*, *supra* note 49, at 61. Connick is the father of the famous singer Harry Connick, Jr.

[131]CAL. PENAL CODE § 1192.7 (West 2004). *See generally* CANDACE MCCOY, POLITICS AND PLEA BARGAINING: VICTIMS' RIGHTS IN CALIFORNIA (1993) (discussing the enactment, purposes, and scope of this initiative).

[132]CAL PENAL CODE § 667(e)(2) (West 1999).

[133]Richard Kelly Heft, *Legislating with a Vengeance: Criminals in California Now Face Life Sentences After Their Third Offence Under the "Three Strikes, You're Out" Law*, INDEPENDENT (London), Apr. 26, 1995, at 27.

[134]*See, e.g.*, Franklin E. Zimring, *Tough Crime Laws Are False Promises*, 7 FED. SENTENCING REP. 61, 62 (1994); Symposium, *Juvenile Justice: Reform After One-Hundred Years*, 37 AM. CRIM. L. REV. 1409, 1414-15 (2000) (remarks of Congressman Bobby Scott); *see also* Barkow, *supra* note 51, at 735 (same, and describing the public's views as lacking nuance, but not explicitly criticizing the public's approach).

[135]Tom R. Tyler & Robert J. Boeckmann, *Three Strikes and You Are Out, but Why? The Psychology of Public Support for Punishing Rule Breakers*, 31 LAW & SOC'Y REV. 237, 254-55 (1997).

The system seems opaque, tangled, insulated, and impervious to outside scrutiny and change. Even though voters dislike plea bargaining and revolving-door justice, it seems to happen all the time. Recidivists, in particular, seem to be thumbing their noses at the law's authority and getting away with it.[136] The solution may seem to be bumper-sticker policies, which are clear and simple enough that voters and prospective criminals can understand them.[137] Clarity and simplicity help to deter and express condemnation, two prominent justifications for punishment.[138] And by tying insiders' hands, these policies promise to produce consistency and make monitoring easier. In short, voters may try to turn flexible, discretionary standards and options into firm rules, in the hopes of binding insiders.

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[136]Julian L. Roberts, *Public Opinion, Criminal Record, and the Sentencing Process*, 39 SCIENTIST 488, 493 (1996), *quoted in* Tyler & Boeckmann, *supra* note 135, at 242.

[137]Tom Tyler and Robert Boeckmann found that social values and fears about social and moral cohesion are the dominant explanations for three dependent variables: California's three-strikes law, the public's general punitiveness, and the public's willingness to abandon criminal procedural protections. Tyler & Boeckmann, *supra* note 135, at 253-55. They also found significant, though smaller, correlations between judgments about crime and the courts and the public's support for general punitive policies (including mandatory sentencing) and willingness to abandon criminal procedural protections (including discontent with courts' solicitude for defendants and technicalities and courts' disregard for ordinary citizens' rights). *Id.* at 252. They speculated that the latter finding may rest on the public's judgment that current criminal procedures are unfair. *Id.* at 259. They found only an insignificant correlation between judgments about crime and the courts and support for California's three-strikes law. *Id.* They found strong and significant correlations among all three dependent variables (between .40 and .68 Pearson correlation coefficients). *Id.* at 250 tbl.1. They did not, however, test the causal pathways among these variables because they treated all three as dependent variables. *See id.* at 253-54. Thus, frustration with and willingness to abandon criminal procedures may partially explain California's three-strikes law; Tyler and Boeckmann did not test this hypothesis.

[138]*See also infra* text accompanying note 162 (noting that the criminal law tries to serve these and other goals). *But cf. supra* text accompanying note 82 (noting that outsiders care primarily about retribution or just deserts). The analysis in the text is particularly true for neophyte and potential defendants, as well as the public at large. Repeat-player defendants may be less deterrable (as evidenced by their track record) and more knowledgeable about the system, though bumper-sticker policies may have an impact even on them. When I was a prosecutor, I recall hearing about conversations in jail that happened shortly after arrest and before much consultation with lawyers. These defendants all seemed to know that one co-defendant's status as a "three-time loser" meant that he would go to prison for a very long time. Nevertheless, even recidivists frequently seemed to misunderstand actual penalties.

Step 5: Insiders Circumvent Even "Mandatory" Reforms

Outsiders may pass mandatory bumper-sticker laws, but insiders still get to enforce them. Because monitoring is difficult and agency costs exert their pull, insiders find new ways to turn rules back into discretionary options or standards. Sometimes they create or exploit inevitable wiggle room in statutes and discretionary procedures; at other times they simply flout the law. Either way, insiders' procedural powers trump, or at least soften, outsiders' substantive and procedural strictures.

First, prosecutors do not always charge supposedly mandatory crimes or penalties. Even under the mandatory California laws, prosecutors can plea bargain by claiming that the evidence was insufficient.[139] Also, despite the three-strikes law's ban on plea bargaining, California judges and prosecutors strike or dismiss felony counts or downgrade them to misdemeanors.[140] In particular, prosecutors have discretion to charge certain "wobbler" offenses as either misdemeanors or felonies. Only the latter charges trigger the three-strikes law, so prosecutors offer plea bargains that charge misdemeanors instead.[141] In other words, prosecutors turn three-strikes strictures into tools, using them to extract tougher but still discounted plea bargains.[142] One study tracked federal cases that

[139] CAL. PENAL CODE §§ 667(f)(g) (West 1999) (banning plea bargaining or dismissal of three-strikes allegations except for insufficiency of evidence or "in the furtherance of justice") ; *id.* § 1192.7(a) (banning plea bargaining or dismissal of serious crimes charged in indictments or informations except for insufficiency of evidence, unavailability of material witnesses, or where bargains would make no substantial difference to sentences).

[140] Erik G. Luna, *Foreword: Three Strikes in a Nutshell*, 20 THOMAS JEFFERSON L. REV. 1, 24-25 (1998); Samara Marion, *Justice by Geography: A Study of San Diego County's Three-Strikes Sentencing Practices from July-December 1996*, 11 STAN. L. & POL'Y REV. 29, 35-36 (1999).

[141] *See* CAL. PENAL CODE § 17(b)(4) (West 1999); Loren Gordon, *Where to Commit a Crime If You Can Only Spare a Few Days to Serve the Time: The Constitutionality of California's Wobbler Statutes As Applied in the State Today*, 33 SW. U. L. REV. 497, 505-08 (2004).

[142] *See* Marion, *supra* note 140, at 36; Joshua E. Bowers, Note, *"The Integrity of the Game Is Everything": The Problem of Geographic Disparity in Three Strikes*, 76 NYU L. REV. 1164, 1178 n.75 (2001) (collecting sources)

initially included 18 U.S.C. § 924(c) gun charges, which carry mandatory five-year consecutive sentences. In more than half of the cases studied, a § 924(c) charge was later dropped. Prosecutors seemed to be using these charge reductions to reward guilty pleas, particularly fast guilty pleas.[143] Another study found that in 40% of cases in which drug mandatory minima would otherwise apply, defendants pleaded guilty to lesser offenses. Whites and women were more likely than minorities and men to avoid minima this way.[144] Finally, while shall-arrest and no-drop policies may stiffen police and prosecutors' spines, the policies leave enough discretion that in practice they are far from mandatory.[145]

Dropping charges creates a record that is at least potentially open to oversight by supervisors or others. Thus, insiders also engage in pre-charge bargaining. Before a grand jury indicts a case, the insiders may agree to a plea to a lesser offense. For instance, defense counsel may suggest a plea to using a telephone in the course of drug trafficking instead of a substantive drug-trafficking offense. By doing so, they cap the sentence at four years and avoid a minimum sentence of five or ten years.[146] Because the heavier charges are never filed, supervisors and outsiders find it very difficult to detect the bargains. Similarly, in the case of the California ban on plea bargaining, insiders evaded the ban by striking bargains before indictment.[147] And New York prosecutors circumvented bargaining restrictions by offering

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[143]Celesta A. Albonetti, Empirical Evidence of Charge Bargaining in Federal Drug and Gun Cases (2005) (unpublished manuscript, on file with the author); *see also* United States v. Angelos, 345 F.Supp.2d 1227, 1231-32 (D. Utah. 2004) (recounting that prosecutors offered to let a defendant plead guilty to one § 924(c) gun charge, but, after the defendant rejected the plea bargain, they penalized him by adding four more § 924(c) counts in superseding indictments).

[144]*See* U.S. SENTENCING COMM'N, MANDATORY MINIMUM PENALTIES IN THE CRIMINAL JUSTICE SYSTEM 66 tbl.10, 77 tbl.19, 80 tbl.22 (1991).

[145]*See* Hanna, *supra* note 96, at 1864; Angela Corsilles, Note, *No-Drop Policies in the Prosecution of Domestic Violence Cases: Guarantee to Action or Dangerous Solution?*, 63 FORDHAM L. REV. 853, 854-55, 857 (1994) (collecting sources).

[146]*See* 21 U.S.C. §§ 841(a)(1), (b)(1)(A-B), 843(b), (d)(1) (2000 & Supp. 2002); Bibas, *Plea Bargaining Outside the Shadow of Trial*, *supra* note 5, at 2484-85; *see also* Frank O. Bowman, III & Michael Heise, *Quiet Rebellion? Explaining Nearly a Decade of Declining Federal Drug Sentences*, 86 IOWA L. REV. 1043, 1121-22 (2001) (noting that "such [phone charges] are almost always Guidelines-evading plea bargains").

[147]MCCOY, *supra* note 131, at 97-104.

misdemeanor pleas and allowing drug defendants to avoid indictment.[148]

Finally, even after indictment, insiders undercut supposedly mandatory sentences by using cooperation agreements. Cooperating with police and prosecutors' investigation unlocks otherwise mandatory sentencing laws, providing one of the few ways to avoid minimum sentences.[149] When insiders are determined to strike bargains, they can enter cooperation agreements despite thin evidence of cooperation.[150] Many judges gladly cooperate, using the flimsy cooperation motion as an opportunity to reduce sentences.[151] In some jurisdictions, stipulated-sentence plea agreements can likewise evade mandatory guideline penalties.[152]

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The tale just told interweaves substantive and procedural maneuvers and dissatisfactions. Low-visibility procedures such as charge bargaining and declination frustrate outsiders both because they seem procedurally unfair or dishonest and because they seem to produce bad substantive outcomes. Outsiders respond by pushing for new procedures, such as shall-arrest laws, plea-bargaining bans, and sentencing guidelines, as well as new substantive crimes and

[148]JOINT COMM. ON N.Y. DRUG LAW EVALUATION, THE NATION'S TOUGHEST DRUG LAW: EVALUATING THE NEW YORK EXPERIENCE 27-28, 95 (1977).

[149]*See*, e.g., 18 U.S.C.A. § 3553(e) (2000 & Supp. 2002); U.S. SENTENCING GUIDELINES MANUAL § 5K1.1 (2003); ALA. CODE § 13A-12-232(b) (West 2004); COLO. REV. STAT. ANN. § 18-18-409 (West 2004); N.C. GEN. STAT. ANN. § 90-95(h)(5) (West 2004); VA. CODE ANN. § 18.2-248.H2.5 (West 2005). The federal Guidelines, though not mandatory minimum statutes nor state guidelines, have been rendered advisory and non-binding by the Supreme Court's recent opinion in United States v. Booker, 125 S. Ct. 738, 764-68 (2005) (Breyer, J., remedial majority opinion).

[150]*See* Ulmer, *supra* note 118, at 263-65 & tbl.1.

[151]*See id.*; *see also* Jack B. Weinstein, *A Trial Judge's Reflections on Departures from the Federal Sentencing Guidelines*, 15 FED. SENTENCING REP. 6, 7 (1992) (suggesting the same).

[152]Though courts are split, a majority of federal courts let stipulated-sentence plea agreements trump mandatory guideline provisions. *See* Bibas, *The Feeney Amendment and the Continuing Rise of Prosecutorial Power to Plea Bargain*, *supra* note 123, at 305-06 & n.61.

sentences. Insiders then use their procedural powers to subvert these new procedures and substantive penalties. The traditional curricular divorce of substantive criminal law from criminal procedure, however, obscures this interplay.

The moral of the story is that outsiders cannot win enduring victories. Outsiders lack the knowledge, the power, and the enduring desire to keep monitoring low-visibility procedural decisions. Politicians and the media play entrepreneurial roles,[153] periodically seizing on gripping (and sometimes unrepresentative) anecdotes to excite popular outrage and pressure. But politicians simultaneously cater to insider prosecutors, playing both sides of the insider-outsider gulf. This dynamic is a tug-of-war or, more accurately, a spiral. If the dynamic were a simple circle, we would wind up right back where we started. But the spiral moves downward, taking a serious toll on criminal justice, as the next Section explains.

B. The Costs of the Insider/Outsider Gulf and Spiral

We should not take too much solace in insiders' ability to soften the worst excesses of outsiders' overreactions. The spiral wastes prison resources by unduly lengthening some sentences. It distracts public and legislative attention from other criminal justice problems and reforms. It gives insiders vast power to apply the new rules selectively to further their own interests or biases. This unchecked discretion makes possible sentencing disparities that disproportionately harm poor, male, and minority defendants.[154] And it is an ad hoc, low-visibility, not-very-accountable way to shape policy in a democracy. It also has three other side effects. Subsection 1 discusses how the gulf clouds the substantive criminal law's message and efficacy. Subsection 2 explores how the gulf impairs trust in and

[153] *See supra* text accompanying notes 56, 109 (explaining how the media fan the public's fears of crime); *supra* text accompanying notes 57, 107, 123 (explaining how politicians exacerbate and exploit the public's fears of crime); *cf.* Khanna, *supra* note 126, at 125-29 (discussing how politicians play to both the public and prosecutors in enacting corporate-crime legislation).

[154] *See* Bibas, *Regulating Local Variations in Federal Sentencing*, *supra* note 119 (collecting sources).

the legitimacy of the law. Subsection 3 assesses how the gulf obstructs public preferences and monitoring of agency costs.

1. Clouds the Law's Substantive Message and Effectiveness

The traditional Benthamite view holds that criminals commit crimes because they gain more pleasure than pain from them. The purpose of the criminal law is to deter this and other criminals by making the expected punishment for the crime exceed the expected benefit.[155] Thus, the law must be clear and straightforward enough that prospective criminals will understand the expected punishment.[156] But criminal procedure's opacity and unpredictability undercuts this aim of the substantive criminal law. If the expected punishment is unknown, it may not deter the potential or neophyte criminal. Even if some recidivists know expected sentences, first- and second-time offenders and potential offenders do not. This misunderstanding is especially likely because criminals are overoptimistic and prone to underestimate and take risks. Thus, in the face of criminal procedure's opacity and complexity, neophytes are likely to underestimate expected sentences and to take chances on not being punished heavily.[157]

Substantive criminal law also seeks to inculcate and reinforce social and moral norms. By threatening and inflicting proportionate punishment, the law proclaims the badness of the crime and vindicates the victim's worth.[158] It can thus help to heal victims. It

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[155]*See* JEREMY BENTHAM, AN INTRODUCTION TO THE PRINCIPLES OF MORALS AND LEGISLATION 170 n.1, 179-80 (Clarendon Press 1879) (new corrected ed. 1823).

[156]Bentham's desire to communicate a deterrent message helps to explain his obsession with codification, as a way of making the law rational and clear.

[157]*See* Bibas, *Plea Bargaining Outside the Shadow of Trial*, *supra* note 5, at 2498-2502, 2507-10. These and other problems impede deterrence in the real world. *See* Paul H. Robinson & John M. Darley, *Does the Criminal Law Deter? A Social Science Investigation*, 24 OXFORD J. LEGAL STUD. 173 (2004); Paul H. Robinson & John M. Darley, *The Role of Deterrence in the Formulation of Criminal Law Rules: At Its Worst When Doing Its Best*, 91 GEO. L.J.949, 953-56 (2003).

[158]*See* Jean Hampton, *The Moral Education Theory of Punishment*, *in* PUNISHMENT: (continued...)

also expresses the community's condemnation and, by doing so, reaffirms society's teachings.[159] For criminal punishment to communicate consistently and effectively, criminal procedure must be transparent. Otherwise, current and prospective criminals, victims, and the public do not see justice done nor hear its message.[160] But, as Section I.C explained, criminal justice is far from transparent to outsiders. In particular, victims have lost their day in court and do not see justice done, so they feel frustrated and long for vindication and healing.[161] In sum, criminal procedure's shortcomings obstruct the substantive criminal law's goals of deterring, educating, vindicating victims, and expressing condemnation.[162]

In recent years, scholars and the public have shown renewed interest in publicly shaming convicted criminals as ways of expressing condemnation of crimes.[163] One point, however, often gets lost in the shaming-punishment debate. Shaming punishments are expressively satisfying precisely because the rest of criminal justice seems opaque. While other punishments seem uncertain, cloaked in the fog of parole and jargon, and hidden behind prison walls, shaming punishments communicate brashly and unequivocally. They have clear meaning

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[158](...continued)
A *PHILOSOPHY & PUBLIC AFFAIRS* READER 112, 116-21 (A. John Simmons et al. eds., 1995); Jean Hampton, *The Retributive Idea*, *in* JEFFRIE G. MURPHY & JEAN HAMPTON, FORGIVENESS AND MERCY 111, 124-32 (1988).

[159]There are several variants of this idea. *See, e.g.*, JOEL FEINBERG, *The Expressive Function of Punishment*, *in* DOING & DESERVING: ESSAYS IN THE THEORY OF RESPONSIBILITY 95, 101-05 (1970); 2 JAMES FITZJAMES STEPHEN, A HISTORY OF THE CRIMINAL LAW OF ENGLAND 80-82 (1996) (1883); Jean Hampton, *An Expressive Theory of Retribution*, *in* RETRIBUTIVISM AND ITS CRITICS 1, 20-22 (Wesley Cragg ed., 1992). The most prominent recent advocate of this view is Dan Kahan. *See, e.g.*, Dan M. Kahan, *What Do Alternative Sanctions Mean?*, 63 U. CHI. L. REV. 591, 593, 597-601 (1996).

[160]*See* Erik Luna, *Transparent Policing*, 85 IOWA L. REV. 1107, 1138-63 (2000). In addition, outsiders will not respect the criminal law's message if they do not see the law as procedurally fair and legitimate. *See infra* Subsection II.B.2.

[161]*See* Bibas, *Harmonizing Substantive-Criminal-Law Values and Criminal Procedure: The Case of* Alford *and Nolo Contendere Pleas*, *supra* note 11, at 1406-07; Bibas & Bierschbach, *supra* note 11, at 136.

[162]*See also supra* text accompanying note 138 (discussing how the criminal law seeks to deter and express condemnation). *But cf. supra* text accompanying note 82 (noting that outsiders care primarily about retribution or just deserts).

[163]The leading proponent of shaming punishments is Dan Kahan. For Kahan's seminal work in the area, see Kahan, *supra* note 159.

and visible bite.[164] Perhaps one reason voters clamor for shaming punishments is that they are about the only ways outsiders can see justice being done.[165] If criminal procedure were not so opaque, we might have less need and demand for such humiliating punishments.[166]

2. Impairs Legitimacy and Trust

People respect the law more when it is visibly fair and they have some voice or control over its procedures. Procedural fairness, process control, and trust in insider's motives contribute greatly to criminal justice's legitimacy.[167] Individual experiences with an insider's procedural fairness and trustworthy motives spill over into broader attitudes about the criminal justice system's legitimacy. As Tom Tyler and Yuen Huo explain, "people generalize from their personal experiences with police officers and judges to form their broader views about the law and about their community."[168] Increased legitimacy increases compliance with the law. Most citizens obey the law not only because they fear punishment, but because the law seems fair and therefore legitimate.[169] Conversely, perceived

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[164]*See, e.g.*, Kahan, *supra* note 159, at 593, 630-37 (1996).

[165]*Cf.* James Q. Whitman, *What Is Wrong with Inflicting Shame Sanctions?*, 107 YALE L.J. 1055, 1089-92 (1998) (condemning "shaming as a form of lynch justice" because it stirs up and plays on mob passions).

[166]For criticisms of shaming punishments as cruel and humiliating, see, *e.g.*, ANDREW VON HIRSCH, CENSURE AND SANCTIONS 82-83 (1993); Stephen P. Garvey, *Can Shaming Punishments Educate?*, 65 U. CHI. L. REV. 733, 759 (1998); Toni M. Massaro, *Shame, Culture, and American Criminal Law*, 89 MICH. L. REV. 1880, 1942-43 (1991).

[167]*See* ALBERT O. HIRSCHMAN, EXIT, VOICE, AND LOYALTY: RESPONSES TO DECLINE IN FIRMS, ORGANIZATIONS, AND STATES 77-78 (1970) (noting that people who feel they have a voice in an organization tend to develop affection and loyalty for the organization); LIND & TYLER, *supra* note 75, at 106, 208, 215 ("Procedures are viewed as fairer when they vest process control or voice in those affected by a decision"); TYLER, *supra* note 75, at 94-108, 125-34, 146-47, 161-70, 178; TOM R. TYLER &YUEN J. HUO, TRUST IN THE LAW: ENCOURAGING PUBLIC COOPERATION WITH THE POLICE AND COURTS 101-38 (2002).

[168]TYLER & HUO, *supra* note 167, at 136.

[169]*See id.* at 101-38; LIND & TYLER, *supra* note 75, at 76-81; TYLER, *supra* note 75, at 161-70, 178; *see also* Fred W. Friendly, *On Judging the Judges*, *in* STATE COURTS: A

(continued...)

unfairness or lack of trust can erode the system's legitimacy and compliance.

Just as citizens must see the criminal law to be procedurally fair, so they must also see substantive justice being done. When citizens see that the law reaches substantively just outcomes, the law earns moral credibility that persuades citizens to obey the law in other cases.[170] Conversely, when the law reaches outcomes that are substantively unjust, or at least not visibly just, citizens view the law's judgments as less credible and less worthy of respect.[171] The likely result, as Janice Nadler's empirical work suggests, is decreased respect for and compliance with the criminal law.[172]

At one time, public jury trials not only educated ordinary citizens and let them see and influence justice being done, but also contributed to the law's democratic legitimacy.[173] But today, outsiders neither see nor understand nor participate much in criminal justice. The system is too opaque and remote to educate them well. They lack much of a voice, a stake, or a sense of inclusion. Moreover, many criminal-justice decisions result from secret or low-visibility exercises of discretion and are not constrained by any rules or standards.[174] Citizens see very little of the system's workings, except when politicians or the media expose some outrageous anecdote, so they cannot see fair procedures at work. This secrecy and opacity

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[169](...continued)
BLUEPRINT FOR THE FUTURE 70, 72 (Theodore J. Fetter ed., 1978) ("[A] public that is cynical or ignorant about its laws is a lawless one.").

[170]Paul H. Robinson & John M. Darley, *The Utility of Desert*, 91 NW. U. L. REV. 453, 474-48.

[171]*Id.* at 483-85, 488.

[172]Janice Nadler, *Flouting the Law*, 83 TEX. L. REV. 1399, 1410-26 (2005) (finding that survey subjects who read stories of unjust laws were later more willing to violate unrelated laws, and that survey subjects who read accounts of an unjust criminal outcome were later more willing to nullify the law as jurors in an unrelated criminal case); *see* Robinson & Darley, *supra* note 170, at 457, 485.

[173]*See* TOCQUEVILLE, *supra* note 16, at 271-76 (vol I, pt. 2, ch. 8); Amar, *supra* note 14, at 1182-89; *supra* Section I.A (discussing the public, democratic, populist, participatory character of colonial American justice).

[174]*See supra* note 1.

weakens citizens' trust in the law[175] and may also make them feel distant and alienated. The secrecy and opacity also mean that citizens do not see run-of-the-mill substantively just results. Instead, they see only the aberrantly harsh or lenient sentences that the media highlight. These visible injustices undermines the law's substantive moral credibility.

Perhaps because of these factors, nearly three-quarters of Americans lack great confidence and trust in the criminal justice system.[176] Two-thirds of Americans see plea bargaining, the most opaque and insider-dominated part of the system, as problematic.[177] Victims have similar reactions. Victims in states with weak victims'-rights laws are much less likely to receive notice and participate meaningfully in various stages of the criminal process.[178] Thus, they are more likely to come away dissatisfied and doubt the criminal justice system's fairness and thoroughness.[179] In short, criminal procedure's failings undercut the substantive criminal law's efficacy and goals.

3. Impairs Public Preferences and Monitoring

Another reason for the Sixth Amendment's guarantee of public jury trials was to make criminal justice "fundamentally populist

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[175]For a powerful argument to this effect in the context of police and prosecutorial discretion, see Luna, *Transparent Policing*, *supra* note 160, at 1156-63; *see also* AMY GUTMANN & DENNIS THOMPSON, DEMOCRACY AND DISAGREEMENT 95-101 (1996) (explaining that publicity of information and government officials' reasons for actions not only "help[s to] sustain a sense of legitimacy," but also promotes democratic deliberation).

[176]*See* Lydia Saad, *Military Again Tops "Confidence in Institutions" List*, GALLUP NEWS SERV., June 1, 2005, *available at* http://www.gallup.com/poll/content/?ci=16555&pg=1 (last visited July 11, 2005) (reporting that only 9% of poll respondents had "a great deal" of confidence in the American criminal justice system and an additional 17% had "quite a lot" of confidence in it). Of the fifteen institutions mentioned in the survey, only four ranked below the criminal justice system: organized labor, Congress, big business, and health maintenance organizations (HMOs). *Id.*

[177]*See* Myers, *supra* note 122, at 54-55 & tbl.4.2; Robert F. Rich & Robert J. Sampson, *Public Perceptions of Criminal Justice Policy: Does Victimization Make a Difference?*, 5 VIOLENCE & VICTIMS 109, 114 (1990).

[178]NAT'L VICTIM CENTER, STATUTORY AND CONSTITUTIONAL PROTECTION OF VICTIMS' RIGHTS: IMPLEMENTATION AND IMPACT ON CRIME VICTIMS 31-38 (1996)

[179]*Id.* at 43-46, 51-63.

and majoritarian."[180] In a related vein, grand juries used to publicize prosecutorial declinations and other hidden executive actions, which increased accountability and checked agency costs.[181] In other words, transparency and participation kept criminal justice in line with the public's sense of justice. Now that juries are an endangered species, however, criminal justice is opaque and dominated by insiders. These barriers obstruct outsiders' ability to monitor insiders and to influence them. Insiders have more room to indulge their self-interests in lenient, hurried dispositions. Thus, agency costs warp processes and substantive outcomes, causing them to diverge at times from the public's sense of justice.

Because of these barriers, outsiders can intervene only crudely. Citizens and victims cannot influence individual cases, so at best they can paint with a broad brush by voting and influencing legislatures. At worst, they must resort to ballot initiatives, such as three-strikes laws and mandatory minima, because they have lost faith in insiders and lack subtler tools. What should have been a cooperative relationship has degenerated into a competitive one, as outsiders wield these sledgehammers and insiders feel it necessary to evade these crude blows.

III. Partial Solutions

One is tempted to start reforming by empowering outsiders to help write a new set of laws and rules to check insiders. As Section II.A has shown, that enterprise is doomed to failure. In practice, insiders find ways to evade supposedly mandatory laws or twist them into plea-bargaining clubs. Rather, to monitor and check insiders, we must better inform outsiders and provide more ways for them to participate day-to-day. My aim is to translate the transparency, clarity, and participation of eighteenth-century village justice into the twenty-first century. Better information would create better electoral checks and better understanding of and respect for the process. More day-to-day participation would supervise the application of law to

[180] Amar, *supra* note 14, at 1185.

[181] *Id.* at 1184.

individual cases, much as juries once did. Participation would both improve the process and educate outsiders, though the latter is harder to do.

In other words, reforms should pursue two goals simultaneously. First, they should strive to reduce the negative procedural side effects of our secretive criminal process. These include outsider cynicism, frustration, and loss of faith and trust. Second, they should use transparency, participation, and monitoring to achieve better substantive outcomes. A transparent and participatory system would better heal and vindicate victims and encourage more to come forward. It would reduce agency costs and reduce reliance on bumper-sticker policies. And it could align arrest, charging, plea, and sentencing patterns more closely with public preferences.

A note of pessimism is in order. We are not about to abandon the twenty-first-century world of guilty pleas and return to the eighteenth century any time soon. Nor can better information return us all the way to the small eighteenth-century villages where little could remain hidden or private. As long as professionals run criminal justice, there will be a significant gap of information, participation, and desires between insiders and outsiders. Politicians and the media will continue to exploit and exacerbate the gap, and sound-bite policy-making will continue to work. Nevertheless, reforms could at least improve the current dismal state of affairs, creating more community knowledge, involvement, and oversight.

My proposed solutions try to influence three primary groups: 1) victims, by giving them information and participatory rights; 2) members of the public, by giving them information and participatory rights; and 3) insider prosecutors, police, and judges, by using outsiders' information and participation to check insiders' agency costs and perspective. The former two groups gain important substantive as well as procedural benefits from transparency and participation.[182] The latter need oversight to better align their

[182] *See supra* Subsections II.B.1-2.

substantive policies with public preferences.[183] There is good reason for optimism about victims and pessimism about the public; the prognosis for insiders is somewhere in between.

A. Informing and Empowering Victims

1. Victim Information

Informing victims about their cases should be relatively easy. Victims are a discrete, identifiable group with whom police and often prosecutors must make contact in any event.[184] As noted, while most states have some form of victims' rights law on the books, enforcement is uneven and many victims fail to receive notice.[185] States should redouble their efforts to provide timely advance notice of all key stages, from arrest through charging to plea and sentence. A dedicated official, such as a victim/witness coordinator, can help to increase contact with victims and keep tabs on the progress of cases. Now, with the advent of e-mail, notifying victims and defendants is even easier. The district attorney's or clerk of the court's computer system should e-mail automated updates every time an arraignment, bail, plea, trial, or sentencing hearing is scheduled or rescheduled and again two days before the hearing. For victims or defendants without e-mail access, an automated telephone reminder system could do the same job. Including directions to the courthouse and courtroom and contact telephone numbers would make it easier for victims to attend and see justice done. E-mails after each hearing could summarize what happened at each stage. While notifying crime victims will take work, time, and resources, this price is worth paying to increase victim information, satisfaction, and healing.[186]

2. Victim Participation

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[183] *See supra* Subsection II.B.3.

[184] My claim is most true of direct victims of personal and property crimes. Many others suffer indirectly from these and drug crimes, and these broader groups are harder to identify and track down.

[185] *See supra* note 48 and accompanying text.

[186] *Cf. supra* text accompanying note 161 (discussing how the gulf between insiders and outsiders obstructs the substantive goals of victim vindication, healing, and catharsis).

Empowering victims is a bit harder but still manageable. There will always be some participation gap between insiders and victims, because victims are not about to supplant prosecutors. As long as victims are not in charge, police, prosecutors, and judges will make some decisions that dismay them. But, "although victims' desire is to be included in the criminal justice process, they have no desire to take control . . . of the case."[187] Interestingly, most victims are not angry and vengeful and do not demand harsher punishments.[188] As noted earlier, simple participation helps to empower and heal victims.[189] Participants see the law as more fair and legitimate when they have some control over the process and feel they have been heard, whether or not they control ultimate outcomes.[190] A participatory role and fair and respectful treatment would go a long way toward addressing victims' grievances, regardless of the outcomes.[191] In short, criminal justice can make victims better off by better informing and including them. The same is probably true of crime bystanders and locals who live near the crime scene, though it would be logistically harder to identify and include a representative sample.

There are many ways to increase victims' participation. As Richard Bierschbach and I have argued elsewhere, victim-offender mediation makes both parties better off when both are willing to take part.[192] Victims who participate in mediation are more likely to believe that the system is fair, that their cases were handled satisfactorily, that they got to tell their stories, that the system considered their opinions, that the outcome was satisfactory, and that

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[187]WEMMERS, *supra* note 47, at 208.

[188]Strang & Sherman, *supra* note 47, at 18.

[189]*Id.* at 21.

[190]LIND & TYLER, *supra* note 75, at 106, 209-11, 215; TYLER, *supra* note 75, at 125-34; Tom R. Tyler et al., *Influence of Voice on Satisfaction with Leaders: Exploring the Meaning of Process Control*, 48 J. PERSONALITY & SOC. PSYCHOL. 72, 75-80 (1985).

[191]Strang & Sherman, *supra* note 47, at 18.

[192]Bibas & Bierschbach, *supra* note 11, at 132-34. This process goes by many names and variants, including sentencing circles, family group conferences, and community reparative boards, all under the umbrella of restorative justice. Gordon Bazemore & Mark Umbreit, *A Comparison of Four Restorative Justice Conferencing Models*, JUV. JUST. BULL., Feb. 2001, at 1-13.

the offender was accountable.[193] They are also more likely to receive apologies and to forgive and less likely to fear revictimization or to stay upset.[194]

Victims could participate in other ways as well. At a minimum, they could allocute orally at sentencing, instead of simply submitting perfunctory written victim-impact statements. They could also speak with, question, and respond to defendants and lawyers at trials and plea and sentencing hearings.[195] Prosecutors could be required to consult with victims before dropping charges, entering into plea bargains, or recommending sentences. This and other forms of participation would speed victims' emotional healing and combat their feelings of powerlessness and alienation.[196]

Increased participation carries costs. Victim information and participation cost time and money, may slow some cases down, and constrain prosecutors' flexibility. Defendants' speedy trial rights limit how much victims can be permitted to slow down cases. But these costs may well be worth paying. Criminal justice is not simply an assembly line that should maximize speed and quantity and minimize cost, though those are important considerations. Just as society spends money to promote accident victims' physical healing, it should support and fund crime victims' emotional healing through transparent, participatory criminal procedure.[197] These substantive goals may well be worth some sacrifice in procedural efficiency.

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[193]Barton Poulson, *A Third Voice: A Review of Empirical Research on the Psychological Outcomes of Restorative Justice*, 2003 UTAH L. REV. 167, 178-89 & tbls. 1-6 & figs. 1-6, 192-93 & tbls. 8-9 & figs. 8-9 (meta-analysis of up to six empirical studies of victims).

[194]*Id.* at 189-91 & tbl.7 & fig. 7, 195-98 & tbls. 11-12 & figs. 11-12.

[195]Bibas & Bierschbach, *supra* note 11, at 139.

[196]*Id.* at 138; Strang & Sherman, *supra* note 47, at 21.

[197]I have developed these themes at greater length elsewhere. Bibas, *Harmonizing Substantive-Criminal-Law Values and Criminal Procedure*, *supra* note 11, at 1388-89, 1408-11; Bibas & Bierschbach, *supra* note 11, at 145-48.

B. Increasing Public Information and Participation

1. Public Information

As Section I.C explained, though outsiders think they understand criminal justice, in fact they suffer from poor and misleading information. To remedy this problem, the government could publicize accurate statistics about average sentences and average time actually served for murder, manslaughter, rape, kidnapping, robbery, assault, arson, burglary, larceny, and auto theft. Arrest statistics could indicate the percentage of reported crimes in each category that result in arrests and the percentage that result in convictions for that crime. Statistics could also report the percentage of arrests that result in charges and the percentage of charges that result in charge reductions, acquittals, or dismissals. Each of these statistics could be broken down by prosecutorial or police district. These statistics would not cost much more to compile than those already compiled by the Bureau of Justice Statistics.

A little clear, simple, accurate information could go a long way. As I have noted, citizens call for tougher sentencing laws because they systematically underestimate average nominal sentences.[198] Correcting that misimpression alone would greatly alleviate the downward spiral. Moreover, what little information is out there is sometimes misleading. As mentioned earlier, conviction rates mislead the public by concealing charge reductions.[199] Few good sentencing statistics are published, let alone publicized.[200] The best way to counteract misleading information is with more and better information. Statistics on charge reductions and dismissals would round out the picture, showing that prosecutors have been bringing many marginal cases but then bargaining them away leniently.

Disseminating this information is an effort to approximate the villages of two centuries ago, when everyone would have known and

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[198] *See supra* text accompanying notes 64-66.

[199] *See supra* text accompanying note 104.

[200] *See* Alschuler, *The Prosecutor's Role in Plea Bargaining*, *supra* note 38, at 107. While it would take some work to turn the archived raw data into usable, digestible statistics, the Bureau of Justice Statistics or academic researchers could perform this task if given adequate access to data under confidentiality agreements.

seen the crimes, charges, verdicts, and punishments. Unfortunately, spreading better information among the general public is not easy to do. Insiders have vested interests in avoiding this scrutiny, and they may overreact in trying to shield themselves from criticism. As noted earlier, insiders may misreport data or distort statistics to paint rosy pictures of their own performance.[201] Also, it can be difficult and costly to publicize the facts in our cacophonous society. The public tends to react to television sound bites. The media and politicians have every incentive to play to this tendency, emphasizing gripping stories at the expense of dull statistics and policies. Vivid and troubling stories sell newspapers, attract viewers, and win votes. The availability heuristic causes people to over-generalize from salient and memorable anecdotes.[202] Conversely, people give too little weight to abstract statistical information.[203] What the public really needs to see are not statistics, but flesh-and-blood typical defendants facing typical sentences. But in our non-participatory system, that is not about to happen.

Electoral candidates can do much of the work of bringing statistics to voters' attention. In the status quo, incumbent district attorneys simply brag about astronomical conviction rates or cherry-pick juicy anecdotes. But if government offices published more good data, challengers could stress high rates of charge reductions and deflated sentences in their campaign advertisements. As noted earlier, data gathering in New Orleans has gone hand-in-hand with this kind of change in district attorney election rhetoric, and voters there have taken note.[204] Better statistics would help electoral rivals to fight statistics with statistics, painting a somewhat more balanced picture. The prognosis, however, is not bright, because anecdotes

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[201] *See supra* text accompanying note 115.

[202] *See, e.g.*, Shelley E. Taylor, *The Availability Bias in Social Perception and Interaction*, *in* JUDGMENT UNDER UNCERTAINTY: HEURISTICS AND BIASES 190, 192 (Daniel Kahneman et al. eds., 1982).

[203] The most obvious example is the representativeness heuristic, which causes people to over-rely on the details of one particular case and under-value statistics about probabilities. *See* Amos Tversky & Daniel Kahneman, *Judgment Under Uncertainty: Heuristics and Biases*, *in id.* at 3, 4.

[204] Wright & Miller, *The Screening/Bargaining Tradeoff*, *supra* note 49, at 60-61, 113-16.; *see supra* text accompanying note 130.

tend to trump dry statistics.

Other, more limited reforms are more likely to succeed. For example, some types of plea bargaining are particularly opaque. As Wright and Miller argue, charge bargaining and fact bargaining are more opaque and dishonest than trials, pleas without agreements, and sentence bargains.[205] Charge and fact bargains lie about the crime that actually happened and the facts surrounding it, breeding public cynicism. Historically, prosecutors have discouraged sentence bargaining more than charge bargaining, but this focus is backwards.[206] Though plea bargaining will persist for the foreseeable future, judges and head prosecutors can at least clamp down on charge and fact bargaining. Turning these bargains into sentence bargains or open pleas will make them more honest, transparent, and accessible to public scrutiny.[207] The public may thus regain some faith in the criminal justice system and view its message as more legitimate and worthy of obedience.[208]

One might also consider publishing prosecutors' procedural and substantive policies governing plea bargaining and sentencing.[209] A few prosecutors' offices have already done so.[210] Repeat defense counsel already know the going rates for particular crimes.[211] Providing this information would level the playing field for novice defense counsel, inform the public somewhat, and discipline

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[205]*Id.* at 111-13.

[206]*See id.*

[207]*See id.*

[208]*Cf. supra* Subsections II.B.1-2 (cataloguing the substantive and procedural harms caused by criminal procedure's opacity, including muting of the law's expressive message and dampening of its perceived legitimacy).

[209]Because the point of publication is to provide information rather than legal rights, the policies would not need to be enforceable, thus avoiding collateral litigation.

[210]*See* Richard H. Kuh, *Plea Bargaining: Guidelines for the Manhattan District Attorney's Office*, 11 CRIM. L. BULL. 48 (1975); Richard H. Kuh, *Sentencing: Guidelines for the Manhattan District Attorney's Office*, 11 CRIM. L. BULL. 62 (1975); *see also* Mario Merola, *Modern Prosecutorial Techniques*, 16 CRIM. L. BULL. 232, 237-40, 251-58 (1980) (publishing some details of the Bronx District Attorney's Office's internal screening and plea-bargaining procedures).

[211]*See* JONATHAN D. CASPER, AMERICAN CRIMINAL JUSTICE: THE DEFENDANT'S PERSPECTIVE 108 (1972); HEUMANN, *supra* note 31, at 76-78, 90.

prosecutors.[212] Because certainty of punishment, rather than severity, is the main factor in deterring criminals,[213] plea and sentencing policies would not encourage prospective criminals much. If anything, clearer information would reduce the room for potential criminals to optimistically underestimate their likely sentences and so gamble on going to trial.[214] Besides, recidivist offenders may know the going rates anyway.

One might fear that publishing substantive sentencing policies and statistics could backfire, because the public might conclude that penalties need to be stiffer. If the public is innately and unalterably hostile to criminal defendants, then bringing any information to its attention might lead to more pressure to raise sentences. But, as argued earlier, this knee-jerk response is an artifact of the spiral, not an unalterable fact. The public calls for raising sentences because it systematically underestimates actual average penalties.[215] The average voter, if fully informed, would think that nominal penalties are high enough and that further raising them would be costly and pointless.[216] One cannot be certain, but transparency might refocus voters away from raising overall sentences and toward scrutinizing prosecutors' disparate plea-bargaining practices. Moreover, in a democracy voters have the right to know about and influence these issues. Regardless of their own policy preferences, insider elites owe it to voters to try to work with and inform them instead of keeping them in the dark.

Transparency could also illuminate policing. As Erik Luna has argued, public administrative rulemaking could develop rules or standards to guide the use of force, vice enforcement patterns, and

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[212]But, as noted earlier in this Subsection, abstract policies and data are unlikely to carry the weight with the public that interaction with a flesh-and-blood defendant would.

[213]*See* Jeffrey Grogger, *Certainty vs. Severity of Punishment*, 29 ECON. INQUIRY 297, 307-08 (1991); Ann Dryden Witte, *Estimating the Economic Model of Crime with Individual Data*, 94 Q.J. ECON. 57, 79 (1980).

[214]*Cf.* Bibas, *Plea Bargaining Outside the Shadow of Trial*, *supra* note 5, at 2498, 2500 (explaining that most people are systematically overoptimistic and that sentencing guidelines reduce the likelihood of overoptimistic forecasts of sentences).

[215]*See supra* text accompanying notes 64-?.

[216]*See id.*

other practices.[217] Collaborative, open decisionmaking, such as some community-policing methods, can reflect neighborhood priorities and accommodate outsiders' concerns.[218] Better police recruitment, training, performance standards, oversight, and discipline can likewise check police actions that could breed antagonism and mistrust.[219] More open community review boards could restore public trust in the police.[220] Videotaping police interrogations and searches, and mandatory record-keeping, could improve monitoring and credibility.[221] Sharing crime maps with the community could facilitate reciprocal sharing of information. Information sharing also helps to explain police resource allocation decisions to minority neighborhoods and lets neighborhoods respond with their concerns. This transparency may thus allay minority fears that police targeting decisions are racially biased.[222]

In short, public information and transparency are unlikely to work wonders at the federal and state levels. Voters are too poorly informed, statistics are too dry, and unrepresentative anecdotes are too prevalent in media accounts to bode well for better public understanding overall. But, at the neighborhood level, transparency may well help local residents and local police to better understand and perhaps better trust each other. As a result, the substantive criminal law might communicate its message more effectively and command more respect and obedience.[223]

2. Public Participation

Perhaps members of the general public could participate more

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[217]Erik Luna, *Principled Enforcement of Penal Codes*, 4 BUFF. CRIM. L. REV. 515, 598-622 (2000).

[218]Erik Luna, *Race, Crime, and Institutional Design*, 66 LAW & CONTEMP. PROBS. 183, 207-11 (2003).

[219]*Id.* at 211-17.

[220]Luna, *Transparent Policing*, *supra* note 160, at 1167-69.

[221]*Id.* at 1169-70.

[222]*Id.* at 1170-93. For a thoughtful assessment of this participatory trend in the policing literature, see David Alan Sklansky, *Police and Democracy*, 103 MICH. L. REV. 1699 (2005).

[223]*Cf.* Subsections II.B.1-2 (cataloguing these defects in the status quo and attributing them in part to the criminal justice system's opacity).

actively as well. Though they rarely serve on petit juries, they could sit on newly created plea juries and sentencing juries to review pleas and sentences in the most serious cases.[224] Perhaps more realistically, citizens could serve for two weeks at a time as citizen advocates within prosecutors' offices, consulting on proposed felony charges and dispositions.[225] This rotation would ensure widespread lay participation and avoid jadedness, much as the Founders thought juries an important way to rotate citizens through government service.[226] These citizens would need to swear to secrecy, just as grand and petit jurors must swear to secrecy. Citizens would grumble about this service, just as they grumble about and try to wiggle out of jury duty. But just as jurors often come away impressed with the system,[227] these citizens would learn from their experience and might develop more respect for it. As noted earlier, giving citizens a voice in criminal justice procedures can increase the system's legitimacy and respect in their eyes.[228] Citizens would also see the law at work *ex post* in individual cases. As a result, they might better appreciate charging and sentencing variations than they would have when considering hypothetical or atypical cases *ex ante*.

Outsiders could also consult with police about proposed community-policing tactics and priorities. These tactics may include curfews, gang-loitering laws, anti-nuisance injunctions, and order-maintenance policing. As Tracey Meares and Dan Kahan have argued, these approaches enjoy much greater democratic legitimacy

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[224]These juries, comprising a dozen or so citizens, could scrutinize and provide input on every proposed plea or sentence over the course of one or two weeks, though they would not have veto power. *See* Bibas & Bierschbach, *supra* note 11, at 141, 144 (suggesting that plea and sentencing juries could assess defendants' remorse and apologies); Jason Mazzone, *The Waiver Paradox*, 97 NW. U. L. REV. 801, 874-78 (2003) (proposing plea panels that would investigate the voluntariness and fairness of proposed plea bargains).

[225]Some citizen advocates would review every incoming case and provide input on which criminal charges to file, while others would review and provide input on proposed plea agreements and sentences. They would not have veto power over these decisions.

[226]*See* Amar, *supra* note 14, at 1188-89.

[227]*See, e.g.*, Juror Evaluation Forms, *supra* note 54 (describing jury service as "an enlightening and humbling experience" that "increased respect for our judicial system" and educated and informed the jurors).

[228]*See supra* Subsection II.B.2.

when adopted in consultation with community members.[229] This consultation and legitimacy may reassure members of minority groups, who have historically mistrusted law enforcement. In addition, police tactics are far more likely to succeed with community support.[230]

Unfortunately, many of these proposals would be difficult to implement on a large scale. Now that grand and petit juries are rarities, it is hard to re-create their role effectively. Plea and sentencing juries would likely prove too cumbersome to replicate widely in our efficiency-obsessed assembly-line system.[231] Citizen advocates who rotated through police and prosecutors' offices and courts for a few weeks would probably lack enough expertise and knowledge of cases to serve as effective voices. Any new roles for citizens would cost much time and money, further straining our cash-strapped criminal justice system.

In addition, twenty-first-century society is much larger, more anonymous, and more distant than eighteenth-century villages were. No more than a small percentage of citizens would rotate through these positions or consult with police departments in any given year. Suburbs are so insular and far-flung that many residents do not even know their neighbors, let alone gossip with them about their quasi-jury service. Thus, it would not be easy to diffuse the Tocquevillean educative benefits of jury service through more than a small fraction of the populace. Only a minority of voters would see particular cases up close and *ex post*. As a result, most voters would remain amenable to politicians' anti-crime appeals and *ex ante* referenda such as three-strikes laws. The prognosis for major improvements in public information and participation, in short, is not great. Meaningful reform would be difficult, but not impossible.

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[229] *See* Dan M. Kahan & Tracey L. Meares, *Foreword: The Coming Crisis in Criminal Procedure*, 86 GEO. L.J. 1153, 1153-54 (1998).

[230] *See id.* at 1153-54, 1159-66, 1171-83.

[231] *See* Bibas & Bierschbach, *supra* note 11, at 141 n.280.

C. Checking Agency Costs and Insiders' Perspectives

The previous two Subsections discussed the benefits of information and participation for outsiders. But information and participation simultaneously help to check insiders' self-interests, agency costs, and pragmatic perspectives and preferences.[232] Victims, rotating citizen advocates, or plea and sentencing juries would serve many of the functions that grand and petit juries once did, by checking executive and judicial conduct. They could review proposed enforcement priorities, indictments, plea agreements, and sentence recommendations, just as many police and prosecutorial supervisors now do. Police would have to explain apparently discriminatory patterns of traffic stops, frisks, and arrests. Prosecutors would have to explain to victims and citizens why they needed to decline prosecution, drop particular charges, strike charge bargains, or agree to low sentences. Judges would face similar scrutiny.

I do not suggest that victims or ordinary citizens should receive vetoes over these decisions.[233] Simply giving them voices would force insiders to reckon with outsiders' perspectives, needs, and desires. Having to articulate reasons for decision, even orally and briefly, would discipline prosecutors, much as having to write a reasoned opinion disciplines judges. Faced with real live victims or concerned citizens, prosecutors might find it harder to indulge their risk aversion or sloth. Likewise, judges might be more reluctant to rubber-stamp plea agreements.

In practice, as the previous Subsection explained, general public participation is unlikely to serve as much of a check on insiders' self-interests and jadedness. Lay judges in Germany, for example, routinely defer to the professional judges with whom they sit and have almost no influence.[234] Greater transparency and public information, however, is more likely to discipline elected insiders. Even if they are

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[232] *Cf. supra* Subsection II.B.3 (discussing the scope of these problems).

[233] Bibas & Bierschbach, *supra* note 11, at 139 n.274. *Contra* GEORGE P. FLETCHER, WITH JUSTICE FOR SOME: PROTECTING VICTIMS' RIGHTS IN CRIMINAL TRIALS 247-48 (1996).

[234] *See, e.g.*, Jenia Iontcheva Turner, *Judicial Participation in Plea Negotiations: A Comparative View*, AM. J. COMP. L. (manuscript at 20) (forthcoming Dec. 2006).

uncertain how many people are paying attention, insiders may fear that an electoral opponent will seize on this information, swaying swing voters at the next election. In other words, they have reason to err on the side of caution.

One way to increase transparency and check insiders is to publishing arrest and charge declination policies. This solution, however, is problematic. As Meir Dan-Cohen famously put it, much of the criminal law operates on an "acoustic separation" between "conduct rules" and "decision rules."[235] For example, the criminal law forbids all stealing, but in practice police arrest and prosecutors prosecute only thieves who steal, say, $40 or more. Outsiders tend to know only the conduct rules, but insiders know the decision rules as well.[236] Publishing these decision rules would increase police and prosecutorial accountability at the expense of encouraging crimes below the threshold.

Other charging policies, such as procedural protocols and limits on adding and dropping charges, would be less susceptible to this critique. Policies that did not proclaim effective immunity for certain crimes, but simply regulated procedures for pending cases, would be less likely to undercut deterrence. For example, prosecutors could have to document and explain why they initially charged a case as murder but later downgraded it to manslaughter. Transparent guidelines would better enable voters and the press to check prosecutors and, in particular, opaque charge bargaining.[237] Criminal code reform could also make the definitions of crimes more transparent and so facilitate voters' and legislators' oversight of charging.[238]

Transparency would also improve policing. Many jurisdictions

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[235]Meir Dan-Cohen, *Decision Rules and Conduct Rules: On Acoustic Separation in Criminal Law*, 97 HARV. L. REV. 625 (1984); *see also* Richard A. Bierschbach & Alex Stein, *Overenforcement*, 93 GEO. L.J. (forthcoming 2005) (expanding on this theme).

[236]Carol Steiker, *Counter-Revolution in Constitutional Criminal Procedure? Two Audiences, Two Answers*, 94 MICH. L. REV. 2466, 2532-40 (1996).

[237]Ronald F. Wright, *Sentencing Commissions as Provocateurs of Prosecutorial Self-Regulation*, 105 COLUM. L. REV. 1010, 1042-46 (2005).

[238]*See* Daniel C. Richman & William J. Stuntz, *Al Capone's Revenge: An Essay on the Political Economy of Pretextual Prosecution*, 105 COLUM. L. REV. 583, 630-31 (2005).

do not even keep data on police shootings.[239] Laws should require this data collection, record-keeping, and publication, much as they now do the same for traffic stops to expose racial profiling.[240] Citizen review boards could then publicize these data and pressure errant police departments to change.[241] (One could create comparable citizen review boards to oversee prosecutors' offices and publicize data.) As Bill Stuntz argues persuasively, these optimistic-sounding transparent solutions are likely to work, just as disclosures effectively reduce lending discrimination and pollution.[242]

Another possibility is to create administrative agencies to oversee certain sectors of criminal justice. As Rachel Barkow has explained, the politically insulated U.S. Sentencing Commission has been a failure. But transparent, participatory state sentencing commissions have successfully regulated insider sentencing discretion by being responsive to political interests and by disseminating sentencing information.[243] Perhaps similar agencies could regulate and make transparent other insider decisions, such as diversion and police tactics.[244] New agencies cost money, but a modest investment might be worth the cost.

The most potent disciplining force is likely to be victims. Victims, and to a lesser extent affected locals, are a discrete, identifiable group who already know about their crimes and are motivated to take part. Because of their background knowledge, they do not need to be brought up to speed, can speak with authority, and will not automatically defer to insiders' assessments. They also have palpable stakes in the process and outcomes, which can counterbalance insiders' own stakes and preferences. And precisely because they are not repeat players, they can counteract the jading or

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[239]William J. Stuntz, *The Political Constitution of Criminal Justice* 57 (unpublished manuscript, available at http://papers.ssrn.com/sol3/ papers.cfm?abstract_id=783565 (last visited Sept. 2, 2005)).

[240]*Id.* at 57-59.

[241]*Id.* at 58-59.

[242]*Id.* at 59.

[243]*See* Barkow, *Administering Crime*, *supra* note 51, at 800-14.

[244]*See supra* text accompanying note 217 (discussing Erik Luna's proposals for using public administrative rulemaking to constrain police use of force and enforcement patterns).

mellowing that affects insiders as well as their emphasis on pragmatic concerns. At the same time, victims and locals will see some practical constraints and aggravating and mitigating factors *ex post*, helping them to understand outcomes better. In short, insiders will have to address outsiders' moralism, and outsiders will have to see insiders' *ex post* perspective and pragmatism. Though they will not always see eye to eye, the perspectives of the two sides may converge.[245]

CONCLUSION

The gulf between insiders and outsiders grows out of the professionalization of criminal justice over the last two to three centuries. Understanding it helps us to make sense of many otherwise puzzling or frustrating features of criminal justice. For example, it explains why insiders still use *Alford* and nolo contendere pleas to dispose of cases efficiently, even though outsiders may be deeply suspicious of them.[246] Pundits write about politicians and the public's vengefulness in passing three-strikes laws and mandatory minima.[247] Scholars have long criticized plea bargaining *ad nauseam* and called for banning it. But unless one explores outsiders' frustrations and insiders' incentives and circumvention methods, one cannot truly

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[245]One might expect victims and affected locals to be imperfect proxies for the public because they are supposedly more vengeful. Surprisingly, however, victims' views track the general public's rather closely. As noted earlier, victims are far less vengeful than most criminal justice professionals assume. *See supra* text accompanying note 188. While not identical, their views come rather close to the public's preferences. *See, e.g.*, PUBLIC AGENDA FOUNDATION, PUNISHING CRIMINALS: PENNSYLVANIANS CONSIDER THE OPTIONS 19 (1993). Thus, they can serve as reasonable proxies for the public.

[246]*See* Bibas, *Harmonizing Substantive-Criminal-Law Values and Criminal Procedure: The Case of* Alford *and Nolo Contendere Pleas*, *supra* note 11, at 1375-81, 1386-88. Defendants who plead nolo contendere or no contest neither admit nor deny guilt but accept conviction and punishment as if guilty. *Id.* at 1371. Defendants who enter *Alford* pleas affirmatively protest their innocence while pleading guilty and accepting punishment. *Id.* at 1372.

[247]*See, e.g.*, David Shichor & Dale K. Secrest, *Three Strikes as Public Policy: Future Implications*, *in* THREE STRIKES AND YOU'RE OUT: VENGEANCE AS PUBLIC POLICY 265, 275 (David Shichor & Dale K. Sechrest eds., 1996); Keith C. Owens, Comment, *California's "Three Strikes" Debacle: A Volatile Mixture of Fear, Vengeance, and Demagoguery Will Unravel the Criminal Justice System and Bring California to Its Knees*, 25 SW. U. L. REV. 129, 129, 140-41 (1995).

appreciate these problems, let alone find realistic solutions to them.

This survey also underscores the need to reform the structure of criminal justice to improve democratic legitimacy, transparency, popular participation, and monitoring of agency costs. As Rachel Barkow has argued, criminal procedure has been too slow to incorporate these and other insights from political science, agency theory, and administrative law.[248] Simply passing a ban on plea bargaining, for example, will probably do little lasting good because insiders evade paper rules. A checks-and-balances approach to criminal justice is likely to prove more effective in the long run.

Where do we go from here? The next logical target of scrutiny is penology and the prison system. As Foucault notes, punishment used to be a public spectacle but is now hidden away behind high prison walls, accessible only to prison guards.[249] This privacy seems more humane than whipping and the stocks, as it spares prisoners public humiliation. But, at the same time, it keeps the public from seeing justice done. This hiddenness mutes criminal justice's expression of condemnation, and the only way to amplify this muted message seems to be to keep raising the number of years. The public only dimly understands who the average prisoner is, how effectively prison punishes and deters, and how cost-effective it is to spend $40,000 per year on a prison cell. As a result, voters may ratchet up sentences *ex ante*, across the board, without appreciating the likely costs and benefits *ex post* in particular cases. Dangerous criminals, such as violent and serious drug felons, would need lengthy incapacitation under any system. But, in a more transparent and participatory regime, the public might prefer other punishments for many inmates who are less dangerous. Transparency and participation could reshape the politics of punishment and the search for alternative sanctions that are shorter, more memorable, more expressively satisfying, and less costly.

If outsiders have "eaten on the insane root / That takes the

[248] *See* Barkow, *Administering Crime*, *supra* note 51, at 716-20, 813.

[249] *See generally* FOUCAULT, *supra* note 24, at 7-15, 32-74, 236-39.

reason prisoner," it is not their fault.[250] Outsiders call for ever-higher penalties and rigid laws not because they are sadistic, but because our criminal justice system is opaque, insular, and unresponsive. The barriers to reform are formidable: suburban anonymity, crime-saturated media, and assembly-line efficiency separate us from the eighteenth-century world of small villages. While we cannot return to the colonial justice system, we can better incorporate its values of transparency, participation, and accountability. Now that we have moved from the jury box to the plea-bargaining table, we must find other ways to include victims and ordinary citizens in our participatory democracy. Otherwise, the spiral downward will continue to erode the system's efficacy, fairness, and legitimacy.

[250] WILLIAM SHAKESPEARE, MACBETH, Act I, sc. 3. I am grateful to Brian Raimondo for this passage, this sentence, and portions of the fifth sentence.

Readers with comments may address them to:

Professor Stephanos Bibas
University of Chicago Law School
1111 East 60th Street
Chicago, IL 60637
sbibas@uchicago.edu

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