

NEW YORK UNIVERSITY LAW REVIEW

VOLUME 81

JUNE 2006

NUMBER 3

ESSAY

TRANSPARENCY AND PARTICIPATION IN CRIMINAL PROCEDURE

STEPHANOS BIBAS*

A great gulf divides insiders and outsiders in the criminal justice system. 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 system's 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 of this gulf, a spiral ensues: Insiders twist rules as they see fit, outsiders try to constrain them through new rules, and insiders find 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 messages, as well as its 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 inform crime victims and other affected locals better and to give them larger roles in criminal justice. It also might be possible to do a better job monitoring and checking insiders, but the prospects for empowering and educating the general public are dim.

* Copyright © 2006 by Stephanos Bibas. Associate Professor, University of Iowa College of Law; Visiting Associate Professor, University of Chicago Law School; Professor-designate, University of Pennsylvania Law School; former Assistant U.S. Attorney, Criminal Division, U.S. Attorney's Office for the Southern District of New York. B.A., Columbia University; B.A. and M.A., University of Oxford; J.D., Yale Law School. E-mail: stephanos.bibas@gmail.com. I thank Matt Adler, Al Alschuler, Randy Bezanson, Richard Bierschbach, Emily Buss, Jeffrey Dunoff, Craig Green, David Hoffman, Doug Lichtman, Erik Luna, Tracey Meares, Nate Persily, Eric Posner, Paul Robinson, Geof Stone, David Strauss, Lior Strahilevitz, and Tung Yin and participants at faculty workshops at the Universities of Chicago, 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.

INTRODUCTION

In colonial America, criminal justice was the business of laymen, not lawyers. Lay constables arrested suspects, victims prosecuted their own cases, and defendants defended themselves *pro se*. Lay juries heard and decided all cases at public trials. Ordinary citizens regularly watched these trials, and gossip about the trials quickly spread through small colonial communities. Everyone could witness punishment in the town square, as convicts swung from the scaffold or languished in the stocks. In short, laymen participated in most criminal cases and routinely saw criminal justice first-hand.

Today, however, criminal justice is the province of professionals. 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 dominate 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, as well as 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 should receive 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. In a world in which plea bargaining resolves almost 95% of cases,¹ however, professionals (especially lawyers) run the show.

¹ BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS 2003, at 426–27 tbl.5.24 (2004), available at <http://www.albany.edu/sourcebook/pdf/t524.pdf> (reporting that in fiscal year 2003, 95.4% of criminal defendants in federal district court whose cases were not dismissed pleaded guilty or no-contest); *id.* at 450 tbl.5.46, available at <http://www.albany.edu/sourcebook/pdf/t546.pdf> (reporting that in 2000, 95% of state felony convictions resulted from guilty pleas). These figures exemplify a trend in recent decades away from trials and toward pleas. As recently as 1990, only 83.7% of federal criminal defendants whose cases were not dismissed pleaded guilty or no-contest. *Id.* at 423 tbl.5.22, available at <http://www.albany.edu/sourcebook/pdf/t522.pdf> (displaying increasing proportion of pleas and decreasing proportion of trials since 1970s); see also BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS 1994, at 486 tbl.5.49 (1995), available at <http://www.albany.edu/sourcebook/pdf/sb1994/sb1994-section5.pdf> (reporting that in 1992, 92% of state felony convictions resulted from guilty pleas). While not all guilty pleas result from plea bargains, most felony guilty pleas do. HERBERT S. MILLER ET AL., U.S. DEP'T

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, reducing their own workloads, rewarding cooperative behavior, and ensuring certainty of conviction and sentence at the cost of severity. Dealing face-to-face with offenders, 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, hidden behind closed doors, and cloaked in jargon, technicalities, and euphemism. Public information about criminal justice is notoriously inaccurate and outdated, derived from television and movies in which trials are worlds away from the reality of plea bargaining. Outsiders have few ways to learn about, let alone participate 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. In addition, outsiders do not share insiders' agency costs, their aversion to risking acquittals, and their jadedness or mellowing over time.³

The result is an enduring tension between self-interested insiders and excluded outsiders. The insiders have firsthand 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 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

OF JUSTICE, PLEA BARGAINING IN THE UNITED STATES 17 (1978) (basing this finding on field research).

² See *infra* note 30 and accompanying text.

³ See *infra* Part I.C.

criminal justice system is too lenient. But when confronted with detailed cases, 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 trade-offs and the 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, each group has a markedly different perspective.

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 general public, in turn, includes many subgroups. There are people affected by a particular crime, residents of high-crime neighborhoods, voters, citizens, and aliens. Each group varies in its interests, knowledge, concerns, and relative power.⁶ Moreover, some groups straddle the insider-outsider fence, as they are better informed than the average outsider but

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 & PUNISHMENT* 31, 49 (Michael Tonry ed., 1998); see also Jeffrey A. Roth, *Prosecutor Perceptions of Crime Seriousness*, 69 J. CRIM. L. & CRIMINOLOGY 232, 235 (1978) (finding suggestive evidence "that those who administer criminal justice may share a view of crime seriousness with those who are administered by it").

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* Part 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 interest or stake 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 (whom I will call "affected locals") probably have the next-strongest interest in, knowledge about, and power in these particular 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 the outcomes of individual cases but have more general personal concerns and knowledge. They may, however, 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.

lack the power of insiders. For example, residents of high-crime neighborhoods are probably more knowledgeable and personally concerned about the criminal justice system and so less like outsiders than the general public as a whole.⁷ Despite their differences, the various groups of outsiders share important interests and exercise power collectively. Many outsiders, for example, vote and influence lawmaking and law enforcement at the national and state levels as well as the local level. Thus, this Essay will consider outsiders in the aggregate as well as how particular subsets or communities of outsiders 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 of government is a chronic source of friction in a democracy. In criminal justice and in many other areas, "street-level bureaucrats" in effect make policy through their low-visibility exercises of discretion.⁸

Criminal justice, though, is special. Many ordinary citizens do not exhibit rational apathy about criminal justice, but rather show passionate interest in how insiders handle it.⁹ 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 in criminal justice as well: Defendants' lives, liberties, and reputations compete with victims' rights, the public's 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,

A person's subjective perceptions and concerns might also be relevant to classifying that person. For example, voters with exaggerated fears of becoming victims may display intense interest and concern in criminal justice and may acquire greater knowledge, even though they will likely have less power than actual victims.

⁷ On the other hand, they may also be even more politically powerless than other outsiders, which may exacerbate their alienation. Thus, my proposals to empower outsiders may apply with special force to this group, whereas my proposals to provide better information may not be as relevant to this group.

⁸ See MICHAEL LIPSKY, *STREET-LEVEL BUREAUCRACY: DILEMMAS OF THE INDIVIDUAL IN PUBLIC SERVICES* 3–25 (1980).

⁹ Voters exhibit rational apathy when they do not bother to vote or invest in becoming informed because the costs of voting or gathering information exceed the likely benefits to that particular voter. See Eugene Volokh, *The Mechanisms of the Slippery Slope*, 116 HARV. L. REV. 1028, 1108–09 (2003) (examining rational apathy in voting as component of slippery slope phenomenon); cf. ROBERT CHARLES CLARK, *CORPORATE LAW* 390–92 (1986) (detailing rational apathy problem in corporate context).

teachers and welfare case workers are.¹⁰ Thus, both the need for and limits on democratic participation are particularly acute in the criminal 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. 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 will both highlight substantive and procedural forces and 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 substantive outcomes. For example, the gulf may provoke voters to vote for bumper-sticker sentencing policies,¹¹ 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. In addition, the gulf obstructs victims' sense of vindication, catharsis, and healing.

Finally, the gulf imposes procedural costs. It leads insiders to use subterfuge to subvert democratically enacted laws. It also impairs outsiders' faith in the law's legitimacy and trustworthiness, which undercuts their willingness to comply with it. In short, the gulf impedes the criminal law's moral and expressive goals as well as its instrumental ones.

¹⁰ Cf. LIPSKY, *supra* note 8, at 54–70 (trying, but failing, to fit police and judges into model of how “relations with clients” constrain and shape street-level bureaucrats’ behavior).

¹¹ I dub these simplistic sentencing slogans “bumper-sticker sentencing policies” because each one is crude enough to fit on a bumper sticker or a billboard. They are easy enough for outsiders to understand and enact (perhaps through initiatives or referenda), and they rest upon common-sense, intuitive judgments rather than subtle penological expertise.

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 infuse the 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 alleviate these problems. For example, we could find better ways to summarize and publish accurate charging, conviction, and sentencing statistics. The public, which thinks sentences are too lenient in part because it underestimates nominal sentences, would be more satisfied. Thus, providing more and better data might allay the impulse to ratchet up sentences. If outsiders feel shut out, one 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 represent promising ways to give victims and other affected locals a voice and a stake.¹²

Greater transparency and participation would also facilitate the monitoring of insiders by checking their self-interests and agency costs. Furthermore, if policymakers want to use criminal law to send messages, criminal procedure must help to make the messages clear and simple enough to send to outsiders. 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.

Though transparency and participation are no panaceas, they can at least improve this state of affairs by countering misinformation. Unfortunately, there is a limit to what these reforms can achieve. 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 a heartrending anecdote than from dry statistics.

¹² 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. Circle sentencing encourages 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 Conferencing Models*, JUV. JUST. BULL., Feb. 2001, at 1–7, available at http://www.ncjrs.org/html/ojjdp/2001_2_1/contents.html.

This Essay unfolds in three parts. Part I 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. Part II.A explores how these differences create a spiral, as insiders set the rules, outsiders react, and insiders undercut those reactions. Part 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 always 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 to 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: Ordinary citizens 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.”¹³ Lay magistrates, lay constables, and lay juries ran criminal justice.¹⁴ Jurors were prized as popular local voices who could represent and express the community’s sense of justice.¹⁵ Grand and petit juries empowered ordinary citizens to preserve their liberty, express their sense of justice, and check agency costs and insiders’ self-interests.¹⁶ The jury was also a way to

¹³ LAWRENCE M. FRIEDMAN, *CRIME AND PUNISHMENT IN AMERICAN HISTORY* 27 (1993).

¹⁴ *Id.* at 28–30.

¹⁵ Akhil Reed Amar, *The Bill of Rights as a Constitution*, 100 YALE L.J. 1131, 1183, 1186–89 (1991). The Supreme Court continues to emphasize the jury’s populist role. As the Court put it in one capital case, the role of the jury is to express “the conscience of the community.” *Witherspoon v. Illinois*, 391 U.S. 510, 519 (1968).

¹⁶ Amar, *supra* note 15, at 1183–85; *Essays by a Farmer IV* (Mar. 21, 1788), in 5 THE COMPLETE ANTI-FEDERALIST 5, 37–40 (Herbert J. Storing ed., 1981).

educate citizens about the justice system.¹⁷ Juries determined guilt or innocence in most cases. In practice, they also often set sentences by calibrating their verdicts to the punishments that seemed fitting.¹⁸

In addition, laymen, not lawyers, ran the criminal justice system. Until at least the eighteenth century, most ordinary victims prosecuted and defendants defended their own felony cases *pro se*.¹⁹ Even after defendants gained the right to hire their own lawyers, most could not afford them and continued to represent themselves. As a result, trials were unencumbered by technical rules of procedure and evidence because there were few lawyers to run them.²⁰

¹⁷ 1 ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 274–76 (J.P. Mayer ed., George Lawrence trans., Harper & Row 1988) (1835); Amar, *supra* note 15, at 1186–87.

¹⁸ Strictly speaking, this “pious perjury” was illegal, but it was quite common in practice, at least in England. See WILLIAM BLACKSTONE, 4 COMMENTARIES ON THE LAWS OF ENGLAND *239; see also J.M. BEATTIE, *CRIME AND THE COURTS IN ENGLAND 1660–1800*, at 419–21, 424–29 (1986) (noting historical examples of juries’ determining sentences of those they convicted); 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 (1983) (same).

¹⁹ 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. Though this evidence comes from England, the American colonies appear to have followed the English model. Under Dutch influence, several of the mid-Atlantic colonies adopted some public prosecution in the mid-seventeenth century. W. Scott van Alstyne, Jr., Comment, *The District Attorney—A Historical Puzzle*, 1952 WIS. L. REV. 125, 132–37 (also suggesting that office apparently died out thereafter in several of these colonies). By and large, however, public prosecutors and defense counsel appear not to have become the norm in America until the nineteenth century. See, e.g., GEORGE FISHER, *PLEA BARGAINING’S TRIUMPH: A HISTORY OF PLEA BARGAINING IN AMERICA* 246 n.1 (2003) (explaining that office of Massachusetts county attorney was created in 1807); FRIEDMAN, *supra* note 13, at 57 (“[C]olonial trials were at first as lawyerless as trials in England. . . . There were, after all, very few trained lawyers in the colonies before the eighteenth century. Judges, too, were for the most part not law-trained.”); ALLEN STEINBERG, *THE TRANSFORMATION OF CRIMINAL JUSTICE: PHILADELPHIA, 1800–1880*, at 38 (1989) (“During the first half of the nineteenth century, private prosecution dominated criminal justice in Philadelphia. . . . [M]ost criminal prosecutions were initiated by private citizens.”); Carolyn B. Ramsey, *The Discretionary Power of “Public” Prosecutors in Historical Perspective*, 39 AM. CRIM. L. REV. 1309, 1325–27 (2002) (explaining that while van Alstyne demonstrated existence of occasional public prosecution in former Dutch colonies, public prosecution as institution did not take root until much later; in New York, for example, it took root in mid-nineteenth century); James D. Rice, *The Criminal Trial Before and After the Lawyers: Authority, Law, and Culture in Maryland Jury Trials, 1681–1837*, 40 AM. J. LEGAL HIST. 455, 457 tbl.1 (1996) (noting that between 1766 and 1771, only 27.5% of felony defendants and 15.1% of misdemeanor defendants in Frederick County, Maryland had defense counsel).

²⁰ 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. LANGBEIN, *supra* note 19, at 170 nn.302–03 (discussing English evidence); John H. Langbein, *Understanding the Short History of Plea Bargaining*, 13 LAW & SOC’Y REV. 261, 262–64 (1979) (same); see also FISHER, *supra* note 19, at 96–97 (inferring that few Massachusetts defendants had defense counsel at beginning of nineteenth century and that rate of defense representation rose to majority of defendants by mid-nineteenth century);

The visible, public aspect of trials and punishment was essential to this scheme. The Sixth Amendment guaranteed local, public trials, which 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. 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[ie]d 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 blood-thirsty spectacle, visible to all in the town square.²⁴ In short, laymen ran the system and watched the process and results firsthand. 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 ordinary citizens in criminal justice. Public prosecutors displaced victims, and more defendants began hiring counsel.²⁵ As lawyers' dominance grew, judges developed intricate rules of procedure and evidence, further lengthening trials, cloaking them in legalese, and reducing or excluding laymen's role.²⁶ Prosecutors and judges also developed plea bargaining to avoid these increasingly lengthy trials and to clear their expanding dockets.²⁷ One effect of

STEINBERG, *supra* note 19, at 38 (noting that private citizens initiated most criminal prosecutions in Philadelphia in first half of nineteenth century). *But see* Rice, *supra* note 19, at 457 tbl.1 (noting that in Frederick County, Maryland between 1818 and 1825, 92.1% of felony defendants and 36.1% of misdemeanor defendants were represented by counsel).

²¹ AKHIL REED AMAR, *THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION* 112–14 (1998).

²² *Id.* at 113.

²³ *See* FRIEDMAN, *supra* note 13, 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* FISHER, *supra* note 19, at 96–97; FRIEDMAN, *supra* note 13, at 67, 70; LANGBEIN, *supra* note 19, at 113–36, 169–70 & nn.302–03. For an interesting look at how lawyers have stolen victims' conflicts from them, see Nils Christie, *Conflicts as Property*, 17 *BRIT. J. CRIMINOLOGY* 1, 3–8 (1977).

²⁶ *See* LANGBEIN, *supra* note 19, at 171–77, 196, 242–51, 253–310, 319–31.

²⁷ FISHER, *supra* note 19, at 13, 31, 121–24 (explaining that prosecutors plea bargained "to ease their crushing workloads" and that judges did so to offset their expanding civil

plea bargaining was to reduce juries' roles and to hide cases from public scrutiny. Finally, as capital punishment decreased and moved outside the public view, and as imprisonment replaced corporal punishment, punishment became a private, concealed matter entrusted to experts, instead of a public spectacle.²⁸

These trends 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 They see the witness interviews, police files, and backroom negotiations that result in plea bargains in most cases. Of course 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 the criminal justice system. They have personal intuitions about just outcomes, which at first may coincide with the public's intuitions. Their assessment of just punishment tends to soften over time, however, as they become jaded or mellower.³⁰ 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.³¹ In addition, insiders see defendants individually and 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

dockets); Albert W. Alschuler, *Plea Bargaining and Its History*, 13 LAW & SOC'Y REV. 211, 240 (1979) (explaining that plea bargaining served as way of avoiding increasingly lengthy and cumbersome criminal trials); John H. Langbein, *Torture and Plea Bargaining*, 46 U. CHI. L. REV. 3, 9–11 (1978) (same).

²⁸ See FOUCAULT, *supra* note 24, at 14–16.

²⁹ Bibas, *supra* note 5, at 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 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.

³¹ *Id.* at 89–91, 95–99, 117, 148–50, 153–55, 162.

embarrass them and hurt their career prospects.³² In addition, most lawyers have little or no financial incentive to invest extra work in pending cases instead of disposing of them quickly.³³ Indeed, defense lawyers who receive flat or capped fees can earn more if they have high turnover.³⁴ The press of large caseloads and limited funding and support staff also pushes many lawyers and judges to settle quickly, before investing much work.³⁵ The sooner each pending case goes away, the earlier the lawyer or judge can go home to have dinner with friends and family.³⁶ Swift dispositions mean not only more leisure time, but also better caseload and conviction statistics, the measures by which judges and prosecutors assess their performance.³⁷ Of course, lawyers and judges have nonfinancial interests in doing justice, but few can avoid being influenced by finances and workloads as well.

Another factor reinforces insiders' focus on case-processing statistics: legal training. Many law schools train future judges and prosecutors to use cost-benefit, net-present-value analysis when assessing

³² *Id.* at 110–14; Bibas, *supra* note 5, at 2471–72, 2472 n.26.

³³ Bibas, *supra* note 5, at 2471, 2476–77. Privately retained defense lawyers who charge high hourly rates are an exception to this generalization, *see id.* at 2479, but they constitute only a small fraction of the defense bar. *See* Caroline Wolf Harlow, *Defense Counsel in Criminal Cases*, BUREAU JUST. STAT. SPECIAL REP., Nov. 2000, at 1, 3, available at <http://www.ojp.usdoj.gov/bjs/pub/pdf/dccc.pdf> (reporting that in 1998, more than 80% of those charged with violent felonies in largest urban counties had publicly financed attorneys, and 66% of felony defendants in federal district courts had publicly financed attorneys); *see also* William J. Stuntz, *The Uneasy Relationship Between Criminal Procedure and Criminal Justice*, 107 YALE L.J. 1, 10–11 (1997) (reporting that average court-appointed criminal defense lawyer earns roughly “\$30 or \$40 an hour for the first twenty to thirty hours, and zero thereafter”).

³⁴ Bibas, *supra* note 5, at 2477.

³⁵ *See id.* at 2474, 2479 (discussing prosecutors' and defense attorneys' incentives to dispose of their caseloads quickly through plea bargaining); FISHER, *supra* note 19, at 13, 40–44, 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 New Orleans public defender system ineffective because counsel handled seventy active felony cases at once, amounting to 418 defendants in space of seven months, and had inadequate support staff, library, and other resources; as result, counsel's clients entered 130 guilty pleas at arraignment during this seven-month period); *cf.* 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); Bureau of Justice Statistics, *Prosecutors' Offices Statistics*, <http://bjsdata.ojp.usdoj.gov/dataonline/Search/Prosecutors/index.cfm> (last visited Mar. 19, 2005) (including downloadable dataset) (reporting that in 2001 National Survey of Prosecutors, 26,425 prosecutors handled total of 14,975,073 criminal cases, for average of 566.7 criminal cases per prosecutor during year).

³⁶ Bibas, *supra* note 5, at 2471.

³⁷ *Id.* at 2471 & nn.21–22; FISHER, *supra* note 19, at 48–49; HEUMANN, *supra* note 30, at 144–48; Albert W. Alschuler, *The Prosecutor's Role in Plea Bargaining*, 36 U. CHI. L. REV. 50, 106–07, 106 n.138 (1968).

outcomes.³⁸ 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

Criminal justice outsiders see the system quite differently.³⁹ Much of the criminal justice system is hidden from their view. Police 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.⁴⁰ Discovery occurs between the prosecutor and defense lawyer and is not made public.⁴¹ Strict secrecy requirements cloak grand jury proceedings.⁴² Plea bargaining usually occurs in conference rooms, courtroom hallways, or on private telephone calls instead of open court.⁴³ Important conferences take place at sidebar or in judges' chambers. Public jury trials are the exception, not the rule.⁴⁴

³⁸ See Stephanos Bibas & Richard A. Bierschbach, *Integrating Remorse and Apology into Criminal Procedure*, 114 YALE L.J. 85, 147 (2004); see also Russell Korobkin & Chris Guthrie, *Psychological Barriers to Litigation Settlement: An Experimental Approach*, 93 MICH. L. REV. 107, 111–14 (1994) [hereinafter Korobkin & Guthrie, *Psychological Barriers to Litigation Settlement*] (describing 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) [hereinafter Korobkin & Guthrie, *Psychology, Economics, and Settlement*] (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).

³⁹ 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.

⁴⁰ See *Department of Justice Authorization and Oversight, 1981: Hearings Before the S. Comm. on the Judiciary*, 96th Cong. 1046 (1980) (supplemental statement of Assistant Att'y Gen. Philip B. 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.”).

⁴¹ See, e.g., FED. R. CRIM. P. 16 (specifying procedures for government disclosures to criminal defendants and vice versa).

⁴² See, e.g., FED. R. CRIM. P. 6(e) (federal grand jury secrecy rules).

⁴³ See HEUMANN, *supra* note 30, at 115–16.

⁴⁴ See *supra* note 1 and accompanying text.

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.⁴⁵ Victims desperately want information about their cases; “one of the greatest sources of frustration to them” is their lack of information.⁴⁶ Though victims’ bills of rights in many states promise victims notice of plea, sentencing, and parole hearings, many victims still fail to receive notice.⁴⁷ Even when they do attend hearings, they have difficulty understanding them; legalese, jargon, euphemism, and procedural complexities garble court proceedings. 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.⁴⁸ As a result, victims and the public may lose confidence in and respect for the system.⁴⁹

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 criminal justice, they must fall back on memorable, unrepresentative, sensationalistic media accounts.⁵⁰ Increased media coverage of crime may make

⁴⁵ See FISHER, *supra* note 19, at 131–33; HEUMANN, *supra* note 30, at 134, 150.

⁴⁶ 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 IN THE CRIMINAL JUSTICE SYSTEM 19–20 (1996).

⁴⁷ PEGGY M. TOBOLOWSKY, CRIME VICTIM RIGHTS AND REMEDIES 36–39 (2001); Bibas & Bierschbach, *supra* note 38, at 137. For a discussion of the gap between victims’ statutory rights and their implementation in procedural rules, see generally 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. 835.

⁴⁸ See Ronald Wright & Marc Miller, *Honesty and Opacity in Charge Bargains*, 55 STAN. L. REV. 1409, 1411–12 (2003); Ronald Wright & Marc Miller, *The Screening/Bargaining Tradeoff*, 55 STAN. L. REV. 29, 34 (2002) [hereinafter Wright & Miller, *The Screening/Bargaining Tradeoff*].

⁴⁹ See *infra* Part 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 48, at 95–96 (arguing that defendants who believe their sentences turned more on plea negotiations than on their underlying crimes lose respect for law).

⁵⁰ Rachel E. Barkow, *Administering Crime*, 52 UCLA L. REV. 715, 748–49 (2005); Lawrence W. Sherman, *Trust and Confidence in Criminal Justice*, NAT’L INST. JUST. J., Mar. 2002, at 22, 28–29. 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.

crime seem more frequent, salient, and important, even though crime has decreased in recent years.⁵¹ News media report violent crime and unusually lenient sentences, instead of more prevalent minor crimes and average sentences.⁵² Even patently fictional crime dramas influence viewers. Many citizens' sense of the criminal justice system comes from movies or television shows that build open-and-shut cases on forensic evidence and end with swift jury trials.⁵³ That portrait is anachronistic and ignores the dominance of plea bargaining today.⁵⁴

Like crime dramas, news stories focus on atypical cases that go to trial, such as the trials of the Washington snipers (John Muhammad and Lee Boyd Malvo), Timothy McVeigh, O.J. Simpson, Michael Jackson, and Martha Stewart. 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 was enough to create the impression of a wave of school shootings.⁵⁵ Politicians likewise publicize and exploit anecdotes as if they were symptomatic of trends: Witness the sudden explosion of crack-cocaine penalties in response to basketball player Len Bias's cocaine over-

⁵¹ 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 (discussing how news media's deluge of crime stories helped to set political agenda and may have increased public's fear of crime); Sara Sun Beale, *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) (same).

⁵² Barkow, *supra* note 50, at 749–50. The media occasionally report freakishly harsh sentences as well, but anecdotes of leniency seem more likely to scare and thus attract viewers.

⁵³ 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 airtight forensic evidence in every case and “are reluctant to convict” in cases that lack forensic evidence. See Jamie Stockwell, *Defense, Prosecution Play to New ‘CSI’ Savvy; Juries Expecting TV-Style Forensics*, WASH. POST, May 22, 2005, at A1; *The CSI Effect*, JUR-E BULL. (Nat’l Ctr. for State Courts, Arlington, Va.), July 29, 2005, available at <http://view.exacttarget.com/?ffcc17-fe911575756d027574-fe2c1572736c0575771774>; see also Juror Evaluation Forms, U.S. Dist. Court, S. Dist. Iowa (May 2–3, 2005) (on file with the *New York University Law Review*) (“Before coming to this court case, I tho’t [sic] 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 CTR. FOR STATE COURTS, HOW THE PUBLIC VIEWS THE STATE COURTS: A 1999 NATIONAL SURVEY 19 fig.7 (1999).

⁵⁴ Stephanos Bibas, *Judicial Fact-Finding and Sentence Enhancements in a World of Guilty Pleas*, 110 YALE L.J. 1097, 1148–49 (2001).

⁵⁵ See Joel Best, *Monster Hype*, EDUC. NEXT, Summer 2002, at 51, available at <http://www.educationnext.org/20022/50.html> (describing school shootings as “phantom epidemic” and noting that “[i]n large part, media coverage promoted this distorted view of the problem”).

dose.⁵⁶ Collectively, these news and fictional 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.⁵⁷ 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 the sentences they would impose on stereotypes or on memorable or recent examples.⁵⁸ When people consider the actual details as jurors *ex post*, their perspectives change dramatically.⁵⁹ For instance, even though 88% of survey

⁵⁶ 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 ("Crack has dominated media attention during the recent surge in drug coverage," including many television, magazine, and front-page newspaper articles.). That June, college basketball star 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 five grams of crack cocaine to receive the same penalty as 500 grams of powder cocaine. See David A. Sklansky, *Cocaine, Race, and Equal Protection*, 47 *STAN. L. REV.* 1283, 1294-96 (1995).

⁵⁷ See Barkow, *supra* note 50, at 748-50 (describing how voters base ideas about crime and sentencing on especially heinous crimes reported in media); 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 string of child murders, and exaggerated 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) (noting that people base answers to general questions about punishment on atypical and extreme images of criminals often taken from media).

⁵⁸ James P. Lynch & Mona J.E. Danner, *Offense Seriousness Scaling: An Alternative to Scenario Methods*, 9 *J. QUANTITATIVE CRIMINOLOGY* 309, 311 (1993); see also 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 blameworthiness, which makes it dangerous to generalize from respondents' resulting judgments of blameworthiness); Stalans, *supra* note 57, at 22 (describing study that found that subjects who were given descriptions of serious burglary case before determining sentence in typical case tended to give higher sentences to typical offender).

⁵⁹ See Barkow, *supra* note 50, at 750-51 (suggesting that when members of public assess appropriate sentences *ex post* in context of detailed case files, they are far less harsh); Rachel E. Barkow, *Federalism and the Politics of Sentencing*, 105 *COLUM. L. REV.* 1276, 1283-84 (2005) (arguing that *ex post* sentencing deliberations by judges or jurors based on particular facts would check political process's excesses); Edward Zamble &

respondents favored a mandatory three-strikes statute in the abstract, most favored one or more exceptions when presented with specific cases.⁶⁰ A set of four Canadian surveys 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 did readers of the court transcripts.⁶¹

Because ordinary citizens have very poor information about how the criminal justice system actually works, they suffer from misperceptions.⁶² In polls, the public says in the abstract that it thinks that judges sentence too leniently.⁶³ The general public, however, regularly underestimates penalties. For instance, most Vermonters surveyed thought that rapists who wield knives often are not imprisoned. Criminal justice insiders in Vermont, however, maintain that such rapists definitely go to prison, almost certainly for at least fifteen years.⁶⁴ 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 returned death sentences.⁶⁵

Kerry Lee Kalm, *General and Specific Measures of Public Attitudes Toward Sentencing*, 22 CAN. J. BEHAV. SCI. 327, 330–32, 330 tbl.1 (1990) (finding that when asked general poll questions, most survey subjects say that 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 lesser extent for theft).

⁶⁰ 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, 525, 528–39, 529 tbl.4 (1996).

⁶¹ 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). Indeed, in at least one notorious Canadian case, a majority of newspaper readers rated the actual sentence as too lenient, while a majority of the readers of court documents saw the same sentence as too harsh. *Id.* at 128–29. Of course, one cannot be certain that these Canadian findings apply equally to America, but given the two countries' similarities and overlap in culture and media, the findings are at least suggestive.

⁶² Once again, this statement is less true of those with direct experience with crime and justice, such as residents of high-crime neighborhoods.

⁶³ 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, U.S. DEP'T OF JUSTICE, SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS 2002, at 140–41 tbl.2.43 (2003), available at <http://www.albany.edu/sourcebook/pdf/sb2002/sb2002-section2.pdf>.

⁶⁴ JOHN DOBLE RESEARCH ASSOCS. & JUDITH GREENE, ATTITUDES TOWARD CRIME AND PUNISHMENT IN VERMONT: PUBLIC OPINION ABOUT AN EXPERIMENT WITH RESTORATIVE JUSTICE 14 & n.5 (2000).

⁶⁵ Theodore Eisenberg & Martin T. Wells, *Deadly Confusion: Juror Instructions in Capital Cases*, 79 CORNELL L. REV. 1, 7–8 (1993) (reviewing juror misinformation in death penalty cases in South Carolina); Anthony Paduano & Clive A. Stafford Smith, *Deathly Errors: Juror Misperceptions Concerning Parole in the Imposition of the Death Penalty*, 18

In fact, sentences are often as tough as or tougher than the general public 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.⁶⁶ Another Illinois study, involving four hypothetical scenarios, found that judges' sentences were equally or more severe than laymen's sentences.⁶⁷ 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.⁶⁸ Another study found "remarkable agreement between average respondent sentences and [federal] guidelines sentences."⁶⁹ Many other studies found that, when asked to sentence detailed cases, the public is no harsher and may indeed be more lenient than judges.⁷⁰

The public's agreement with insiders 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 bargaining to lower real sentences beneath the nominal minimum or guideline sentences that the public thinks appropriate. Outsiders have little way to review or check these hidden charging and plea-bargaining decisions. 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 may be that arbitrary sentence dispersion

COLUM. HUM. RTS. L. REV. 211, 220-25 (1987) (recounting poll of potential jurors in Georgia capital case); 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, 1623-27 (1989) (summarizing results of survey of potential capital jurors in Virginia).

⁶⁶ 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, 206 tbl.2, 207 tbl.3 (1990).

⁶⁷ Shari Seidman Diamond & Loretta J. Stalans, *The Myth of Judicial Leniency in Sentencing*, 7 BEHAV. SCI. & L. 73, 75-81 (1989).

⁶⁸ 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, 939 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.*

⁶⁹ PETER H. ROSSI & RICHARD A. BERK, JUST PUNISHMENTS: FEDERAL GUIDELINES AND PUBLIC VIEWS COMPARED 149 (1997).

⁷⁰ JULIAN V. ROBERTS & LORETTA J. STALANS, PUBLIC OPINION, CRIME, AND CRIMINAL JUSTICE 210-12 (1997).

increases as some defendants receive freakishly high sentences and others much lower ones.⁷¹

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

Many outsiders also want to participate in criminal justice, though they do not want to take charge of the process.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

In reality, victims, affected locals, and ordinary citizens rarely participate actively in criminal proceedings. 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 do so.⁷⁶

⁷¹ Cf. Bibas, *supra* note 5, at 2483–85 (discussing how knowledgeable defense counsel negotiate plea bargains substantially below applicable mandatory minimum penalties, while clients of less experienced defense lawyers are more likely to receive those mandatory penalties).

⁷² See WEMMERS, *supra* note 46, at 208 (discussing crime victims’ desires).

⁷³ Dean G. Kilpatrick et al., *The Rights of Crime Victims—Does Legal Protection Make a Difference?*, NAT’L INST. JUST.: RES. IN BRIEF, Dec. 1998, at 4, available at <http://ncjrs.org/pdffiles/173839.pdf>.

⁷⁴ Strang & Sherman, *supra* note 46, 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) (arguing that “an opportunity to take part in the decision-making process” contributes significantly to perceptions that procedures are fair); 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 (2001) (reporting that jury service improved opinions of justice system of more than 20% of jurors); 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 criminal justice system to be about 11% fairer than nonjurors do); Telephone Interview with Judge Robert W. Pratt, U.S. Dist. Judge, S. Dist. of Iowa (July 15, 2005) (reporting, based on empirical data from survey forms returned by ex-jurors, that they consistently gained respect for system, learned great deal, and came away impressed with importance of their service).

⁷⁶ David Margolick, *Law Professor to Administer Courts in State*, N.Y. TIMES, Feb. 1, 1985, at B2 (quoting then-Chief Judge Sol Wachtler of New York Court of Appeals).

Similarly, 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, charge, and plea bargain.⁷⁸ Even at sentencing, a large majority of felony victims are absent.⁷⁹ When they are present, many victims merely read prepared 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 them⁸¹ 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. For the most part, 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' win-loss records, case-processing statistics, profitability, or leisure time. To outsiders, many of these insider concerns may seem illegitimate and selfish. Outsiders base punishment judgments primarily on their intuitions about retributive justice.⁸² They only dimly glimpse the caseload pressures, funding limitations, 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 the certainty of punishing more offenders. Even if they were fully informed, outsiders

⁷⁷ *Supra* note 1.

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

⁷⁹ TOBOLOWSKY, *supra* note 47, 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 38, at 99-100.

⁸² See Roberts & Stalans, *supra* note 4, at 48 (noting importance of retribution in public's attitudes about sentencing); Cass R. Sunstein et al., *Do People Want Optimal Deterrence?*, 29 J. LEGAL STUD. 237, 240-41 (2000) ("[T]hese studies strongly suggest that intuitive punishment judgments are not directly tailored to consequentialist goals."); Cass R. Sunstein, *On the Psychology of Punishment*, 11 SUP. 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."); 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 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 141, 168.

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 mellow or become jaded 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 tend to 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 array of justice concerns than do lawyers, including their own status, the other side's blameworthiness, and apologies.⁸⁵ Their approach is completely rational, and it suggests that insiders may take too narrow a view 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 SPIRAL

A. *The Political Dynamic*

In many countries, political elites set criminal justice policy and have some freedom to ignore the public's wishes. Many European countries, for example, abolished the death penalty in spite of public

⁸³ Bibas, *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. *Id.* 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 38.

⁸⁵ See Korobkin & Guthrie, *Psychological Barriers to Litigation Settlement*, *supra* note 38, at 148–50; Korobkin & Guthrie, *Psychology, Economics, and Settlement*, *supra* note 38, 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 38, at 109–18.

⁸⁶ See Korobkin & Guthrie, *Psychology, Economics, and Settlement*, *supra* note 38, at 129–36 (explaining that clients may legitimately seek to maximize ends other than wealth and that lawyers should not substitute their own utility functions for those of their clients; giving example of client whose auto accident settlement decision is influenced by desire to maintain “‘BMW’ level of status”).

opinion rather than because of it.⁸⁷ European political elites are evidently better able to resist popular pressure to change criminal justice policies than their American counterparts.⁸⁸ America's political economy is more responsive to popular pressure, giving organized groups of voters tools with which to challenge or regulate insiders' policies.⁸⁹

Because insiders are powerful and knowledgeable, but outsiders can exercise sporadic political pressure, a spiral ensues. Insiders use their procedural discretion to apply the laws on the books selectively to suit their own interests and goals. After a lead or lag time, outsiders episodically learn of these maneuvers and react by pushing for new substantive and procedural laws. Insiders then use their procedural powers to twist the new laws, provoking outsiders to push for tougher substantive laws and mandatory procedural strictures. Insiders, however, continue to find new procedural ways to subvert even mandatory laws. The spiral never ends, though insiders usually maintain the upper hand.

Step One: Insiders' Procedural Discretion Shapes the Rules in Action

We start with a system of criminal laws and punishments on the books. In America, however, 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 has persuasively argued, criminal laws do not create binding obligations but

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

⁸⁸ BANNER, *supra* note 87, at 301 (noting that European governments were able to abolish death penalty in face of popular support for it because their elected officials feel less pressure than American politicians do to implement 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 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, 14 (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 defy popular support for 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.

rather a menu of options for insiders.⁹⁰ Police need not arrest, and prosecutors may decide either not to charge at all or to 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 counsel can bargain around most rules.⁹³ For example, they can agree to forfeitures, restitution, 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. Finally, 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.

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. Studies show that 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 801, 802–03, 808–09, 811–12, 818–19 (2d ed. 2003).

⁹² See William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505, 534–35 (2001) (arguing that police and prosecutors constitute “very powerful lobb[ies] on criminal law issues”). 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, 537 n.131.

⁹³ See Nancy Jean King, *Priceless Process: Nonnegotiable Features of Criminal Litigation*, 47 UCLA L. REV. 113, 114–15, 118–19 (1999) (describing types of concessions made by both prosecutors and defense counsel in plea bargaining).

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* notes 103–14 and accompanying text. 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* notes 63–71 and accompanying text (discussing citizens’ systematic underestimation of actual sentences).

Unsurprisingly, insiders use these tools in part to serve their self-interests and pragmatic concerns. Police avoid making arrests and prosecutors avoid bringing (and pursuing) charges in cases that are troublesome and not easy to win, such as domestic abuse cases.⁹⁶ Prosecutors may decline cases entirely or divert some defendants to drug treatment in part to limit their workloads. They may file multiple initial charges to give themselves plea-bargaining chips. They may avoid charging troublesome cases to spare themselves effort, headaches, and possible acquittals. They may use plea bargaining to help rack up relatively easy convictions and avoid risking embarrassing acquittals at the expense of sentence severity.⁹⁷ They reward speedy pleas 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 On the other side, 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 those who go to

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* notes 132–33 and accompanying text. See also U.S. COMM’N ON CIVIL RIGHTS, UNDER THE RULE OF THUMB: BATTERED WOMEN AND THE ADMINISTRATION OF JUSTICE 21–22, 33–34 (1982) (reporting police and prosecutorial practices in cases of domestic violence); Cheryl Hanna, *No Right to Choose: Mandated Victim Participation in Domestic Violence Prosecutions*, 109 HARV. L. REV. 1849, 1859–64 (1996) (describing move toward mandatory arrest and pro-prosecution policies in domestic violence cases); 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> (describing traditional police reluctance to arrest in domestic violence cases and reporting data that suggest that arrest is most effective police method for reducing domestic violence).

⁹⁷ Bibas, *supra* note 5, at 2471–72; see *supra* notes 33–34 and accompanying text.

⁹⁸ See, e.g., United States v. Ruiz, 536 U.S. 622, 625 (2002) (describing standard “fast track” plea bargain, which requires defendants to waive most discovery, indictment, trial, and appeal and plead guilty in exchange for sentencing concessions); State v. Laforest, 665 A.2d 1083, 1085 (N.H. 1995) (describing plea agreement that conditioned prosecutor’s dismissal of two charges and recommendation of reduced sentences upon defendant’s accepting plea by date of pretrial conference and defense counsel’s agreement not to file motions or take depositions).

⁹⁹ Bibas, *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 to gain trial experience for themselves).

¹⁰¹ *Id.* at 2525–26.

trial. By doing so, they improve their case-processing statistics and avoid time-consuming jury trials and possible appellate reversal.¹⁰²

Step Two: 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.¹⁰³ Because they face electoral pressure to maximize convictions, they push their unelected subordinates to increase conviction rates.¹⁰⁴ Three things are noteworthy about this influence. First, it works because voters have access to minimal information (mostly in the form of conviction statistics) and can participate at the ballot box.¹⁰⁵ Second, it is candidates for office who publicize this information, as district attorneys or their opponents seize on a few 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 usually are not readily available to the public, so the public cannot check the bargains being struck.¹⁰⁶ District attorneys who push a few high-profile cases to trial and lose may lose their jobs as a result.¹⁰⁷ The upshot is that risk-averse prosecutors plea bargain more

¹⁰² See HEUMANN, *supra* note 30, at 140–45.

¹⁰³ See Carol J. DeFrances & Greg W. Steadman, *Prosecutors in State Courts*, 1996, BUREAU JUST. STAT. BULL., July 1998, at 1 (reporting that more than 95% of chief prosecutors are elected locally).

¹⁰⁴ See Daniel S. Medwed, *The Zeal Deal: Prosecutorial Resistance to Post-Conviction Claims of Innocence*, 84 B.U. L. REV. 125, 182 (2004) (“[T]he institutional culture of most prosecutors’ offices treasures convictions, and an attorney’s conviction rate may serve as a barometer of that person’s stature within the organization and a key factor in determining that person’s chances for internal advancement.”); Abbe Smith, *Can You Be a Good Person and a Good Prosecutor?*, 14 GEO. J. LEGAL ETHICS 355, 390 (2001) (“The same pressure [to win] is present in ordinary, run-of-the-mill cases. The pressure is both external, the result of the inherently political nature of prosecution, and internal, the result of policies relating to salary and promotion.”).

¹⁰⁵ Of course, not all of the public can vote. Aliens and many convicted felons, for example, lack the right to vote, so their voices carry little weight.

¹⁰⁶ See Alschuler, *supra* note 37, at 106–07 (noting that prosecutors measure themselves on convictions rather than sentencing statistics and that “detailed sentencing statistics are rarely compiled”).

¹⁰⁷ At the very least, visible trial losses give fodder to electoral opponents and encourage them to run against incumbents. See, 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 (reporting that O.J. Simpson’s not guilty verdict likely hurt District Attorney Gil Garcetti in his failed bid for re-election).

than fully informed voters would like, because voters see only conviction statistics and not charging or sentencing statistics.

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.¹⁰⁸ 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.¹⁰⁹ Partly in response, many states restricted or abolished parole.¹¹⁰

Media coverage also fans readers' and viewers' fears of crime, provoking public reactions.¹¹¹ For example, extensive media coverage of a 1992 carjacking and murder misleadingly suggested that a carjacking "wave" was sweeping America.¹¹² 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.¹¹³ Liberals worried about racial and class disparities at sentencing, and conservatives inveighed against lenient sentences by soft-on-crime judges.

¹⁰⁸ See Megan Nicole Kanka Foundation, Mission, <http://www.megannicolekanka.com/foundation.org/mission.htm> (last visited Mar. 19, 2006) (recounting how this crime led 400,000 citizens to sign petitions and New Jersey state legislature to pass Megan's Law in "an unprecedented eighty-nine days").

¹⁰⁹ 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 (transcript and description of advertisement).

¹¹⁰ 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 parole and that thirteen states plus federal government have abolished parole, and describing this trend as "the latest chapter in what some criminal-justice experts call the 'Willie Horton' effect," or "a fear of releasing anyone because the parole board—and the politicians who appoint them—get blamed if anything goes wrong").

¹¹¹ See COMM. ON UNIF. CRIME RECORDS, INT'L ASS'N OF CHIEFS OF POLICE, UNIFORM CRIME REPORTING: A COMPLETE MANUAL FOR POLICE 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").

¹¹² E.g., Alan Farnham, *US Suburbs Are Under Siege*, FORTUNE, Dec. 28, 1992, at 42 (reporting heightened fear in suburbia over increases in carjacking and other violent crimes); Bruce Frankel & Dennis Cauchon, *'Young & The Restless': Crime in 1992 More Violent*, USA TODAY, Dec. 31, 1992, at 7A (reporting increases in carjacking and other violent crimes); Don Terry, *Carjacking: New Name for Old Crime*, N.Y. TIMES, Dec. 9, 1992, at A18 (reporting apparent increase in carjacking); see Stuntz, *supra* note 92, at 531 & n.108 (describing carjacking as new threat in popular mind).

¹¹³ MARVIN E. FRANKEL, *CRIMINAL SENTENCES: LAW WITHOUT ORDER* (1972).

There was little hard evidence of the size of the problem, but these concerns resonated with voters. Thus, many states, as well as the federal government, created sentencing commissions and procedures to make sentencing more uniform and predictable.¹¹⁴

Step Three: 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.¹¹⁵ Often, however, instead of simply being constrained by them, insiders use their procedural knowledge or power to shape and implement these rules in unexpected ways.¹¹⁶

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.¹¹⁷

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.¹¹⁸ They also specified fixed discounts for acceptance of responsibility as almost the

¹¹⁴ For a thorough 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 (2005).

¹¹⁵ 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, *supra* note 90, at 2563 (claiming that prosecutors pursue almost every murder case because voters “surely won’t forgive blowing off a homicide”).

¹¹⁶ 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 agency’s ostensible mission).

¹¹⁷ See LIPSKY, *supra* note 8, at 167, 233 n.10 (citing Washington, D.C. police as example).

¹¹⁸ For an exposition of the legislative history leading up to the Federal Sentencing Guidelines, see generally Kate Stith & Steve Y. Koh, *The Politics of Sentencing Reform: The Legislative History of the Federal Sentencing Guidelines*, 28 WAKE FOREST L. REV. 223 (1993).

only permissible reward for guilty pleas in most cases.¹¹⁹ 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 aggravating facts to sentencing judges.¹²⁰ They use cooperation agreements to get around guidelines, even in cases where the proposed cooperation is marginally useful or a fig leaf for a sentence reduction.¹²¹ 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.¹²² Some judges use downward departures to undercut sentences they think are too harsh.¹²³ At the same time, by hinting that departures are likely or accepting plea agreements that

¹¹⁹ 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, 764–65 (2005) (Breyer, J., remedial majority opinion). Despite *Booker*, many sentencing judges still give “heavy weight” to the Guidelines and state that they intend to 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).

¹²⁰ 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 (1992) (discussing cases of fact bargaining); Probation Officers Advisory Group, *Probation Officers' Advisory Group Survey*, 8 FED. SENT'G REP. 305, 306, 310–11 (1996) (citing, as evidence of fact bargaining, federal probation officers' survey responses that indicate that plea agreements frequently omit or misrepresent relevant facts).

¹²¹ 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, 264 tbl.1 (2005) (reporting that at least one federal prosecutor's office uses “soft” cooperation discounts for “information of questionable value” as tool for reducing stiff sentences).

¹²² See Stephanos Bibas, *Regulating Local Variations in Federal Sentencing*, 58 STAN. L. REV. 137, 145–46 (2005) (discussing this practice in California, Arizona, New Mexico, and Texas).

¹²³ For one judge's remarkably candid admission of this fact, see Jack B. Weinstein, Comment, *A Trial Judge's Second Impression of the Federal Sentencing Guidelines*, 66 S. CAL. L. REV. 357, 364–65 (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.”) (alterations in original) (quoting Questionnaire Survey from Judge Jack B. Weinstein to Eastern and Southern Districts of New York Judges (Feb. 24, 1992) (unpublished)). Judge Weinstein has also noted:

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.

Jack B. Weinstein, *A Trial Judge's Reflections on Departures from the Federal Sentencing Guidelines*, 5 FED. SENT'G REP. 6, 9 (1992).

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.¹²⁴ In short, expert insiders learn the complexities of sentencing reforms and exploit their inside knowledge and procedural discretion. They pursue their own sense of justice and their self-interests in fast, certain dispositions, at the expense of the reforms' goals of severity and equal treatment.

Step Four: Outsiders, Egged On by Politicians, Take Matters into Their Own Hands

Occasionally, outsiders hear about these maneuvers and react by creating new, rigid rules in an effort to bind insiders or at least limit their discretion. Sometimes these reactions result in procedural restrictions on practices such as plea bargaining and sentencing departures. 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.¹²⁵ Sometimes, politicians capitalize on and high-

¹²⁴ See LINDA DRAZGA MAXFIELD & JOHN H. KRAMER, SUBSTANTIAL ASSISTANCE: AN EMPIRICAL YARDSTICK GAUGING EQUITY IN CURRENT FEDERAL POLICY AND PRACTICE 31 exhibit 9, 34 exhibit 12 (1998) (presenting data of disparities between various racial, sex, and citizen groups in § 5K1.1 departures); Stephen Demuth, *The Effect of Citizenship Status on Sentencing Outcomes in Drug Cases*, 14 FED. SENT'G REP. 271, 273–74 & tbl.2 (2002) (citing evidence that, on average, whites and citizens receive shorter sentences than blacks and noncitizens respectively); 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) (concluding that large differences in length of sentence exist on basis of race, sex, education, income, and citizenship). Likewise, the victim's race appears to influence how insiders exercise their discretion, and in particular what charges prosecutors choose to 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 & George Woodworth, *Race Discrimination and the Legitimacy of Capital Punishment: Reflections on the Interaction of Fact and Perception*, 53 DEPAUL L. REV. 1411, 1423–26 (2004); 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).

¹²⁵ See, e.g., FISHER, *supra* note 19, at 148–52 (presenting evidence that public disapproved of plea bargaining in nineteenth-century America); see also 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, 54 tbl.4.2 (Timothy J. Flanagan & Dennis R. Longmire eds., 1996) (recounting surveys that found that public opposes plea bargaining); Wright & Miller, *The Screening/Bargaining Tradeoff*, *supra* note 48, at 96 (noting that charge bargaining disappoints public's expectations and creates feeling of “learned helplessness”).

light an issue, such as downward departures from sentencing guidelines. They may, for example, please the public by blaming insider judges and restricting downward departures, as exemplified by the Feeney Amendment to the PROTECT Act.¹²⁶ At the same time, politicians cater to prosecutors, a powerful insider constituency.¹²⁷ Thus, the Feeney Amendment left most prosecutor-initiated departures alone; approved of, but capped, fast-track departures; and gave prosecutors extra bargaining chips.¹²⁸ In other words, Congress skillfully catered to outsider outrage and insider interests simultaneously.¹²⁹

Legislatures do the same thing by passing mandatory-minimum sentencing laws for drug trafficking, gun crimes, and other high-profile crimes.¹³⁰ 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.¹³¹ 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.¹³² Candidates for

¹²⁶ PROTECT Act, Pub. L. No. 108-21, § 401, 117 Stat. 650, 667-76 (2003) (codified as amended at scattered sections of 18 U.S.C. & 28 U.S.C.). 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 Bargain*, 94 J. CRIM. L. & CRIMINOLOGY 295 (2004) (explaining these and other provisions).

¹²⁷ See Stuntz, *supra* note 92, at 529-33, 544-46 (noting that police and prosecutors are most important interest groups for criminal legislation).

¹²⁸ See Bibas, *supra* note 126, at 296, 299-301.

¹²⁹ Cf. Vikramaditya S. Khanna, *Corporate Crime Legislation: A Political Economy Analysis*, 82 WASH. U. L.Q. 95, 105, 125-28, 140 (2004) (arguing that Congress keeps broadening corporate criminal liability to show 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).

¹³⁰ 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. II 2002) (prescribing five- and ten-year mandatory minimum sentences for trafficking in certain quantities of drugs).

¹³¹ N.Y. CRIM. PROC. LAW § 220.10 (McKinney 2006).

¹³² E.g., FLA. STAT. § 741.2901 (2005) (establishing "a pro-prosecution policy" and special prosecutorial units for domestic abuse and empowering prosecutors to proceed even over victim's objection); WIS. STAT. § 968.075 (2003-2004) (requiring police officers to

office may also raise these issues by campaigning as outsiders against the abuses of insiders. For example, in New Orleans, Harry Connick, Sr. unseated District Attorney Jim Garrison by criticizing and promising to clamp down on rampant plea bargaining.¹³³

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 generally banning plea bargaining in cases whose indictments or informations charge specified serious crimes.¹³⁴ Also in California, voters put a tough three-strikes-and-you're-out initiative on the ballot, mandating twenty-five-year minimum sentences for three-time felons.¹³⁵ 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.¹³⁶

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.¹³⁷ These laws do express voters' concerns about the decay of social and moral cohesion.¹³⁸ Yet there is another, more charitable

arrest domestic abusers whenever victim suffered physical injury or is likely to suffer continued abuse, requiring police to adopt written policies encouraging arrest in other domestic abuse cases, and requiring police officers to explain in writing any decisions not to arrest domestic abusers); see also Hanna, *supra* note 96, at 1859–64 (recounting move toward mandatory-arrest and pro-prosecution policies for domestic violence cases).

¹³³ See Wright & Miller, *The Screening/Bargaining Tradeoff*, *supra* note 48, at 60–61.

¹³⁴ CAL. PENAL CODE § 1192.7 (West 2004). See generally CANDACE MCCOY, POLITICS AND PLEA BARGAINING: VICTIMS' RIGHTS IN CALIFORNIA (1993) (discussing enactment, purposes, and scope of this initiative). An information is a charging instrument filed solely by the prosecutor, whereas an indictment is a charging instrument returned by a grand jury.

¹³⁵ CAL. PENAL CODE § 667(e)(2) (West 1999).

¹³⁶ Richard Kelly Heft, *Legislating with a Vengeance: Criminals in California Now Face Life Sentences After Their Third Offense Under the 'Three Strikes, You're Out' Law*, INDEP. (London), Apr. 26, 1995, at 27.

¹³⁷ See, e.g., Franklin E. Zimring, *Tough Crime Laws Are False Promises*, 7 FED. SENT'G REP. 61, 62 (1994) (arguing that such laws are "sound-bite crime control"); Symposium, *Juvenile Justice: Reform After One-Hundred Years*, 37 AM. CRIM. L. REV. 1409, 1414–15 (2000) (citing Congressman Bobby Scott's remarks that people are more focused on "tough-on-crime sound bites" like three-strikes-and-you're-out than on instituting measures that have been proven to reduce crime); see also Barkow, *supra* note 50, at 735 (describing public's views of these sentencing policies as lacking nuance, but not explicitly criticizing public's approach).

¹³⁸ 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) (arguing that support for three-strikes law is linked primarily to judgments about moral cohesion, not dangerousness).

way to understand mandatory laws, particularly initiatives and referenda. The public is frustrated by the criminal justice system. 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.¹³⁹ The solution may seem to be bumper-sticker policies, which are clear and simple enough that voters and prospective criminals can understand them.¹⁴⁰ Clarity and simplicity help to deter and to express condemnation, two prominent justifications for punishment.¹⁴¹ And by tying insiders' hands, these policies promise to produce greater consistency and to make monitoring easier. In short, voters may try to turn flexible, discretionary standards and options into firm rules in the hopes of binding insiders.

¹³⁹ See Julian V. Roberts, *Public Opinion, Criminal Record, and the Sentencing Process*, 39 AM. BEHAV. SCIENTIST 488, 493 (1996) (suggesting that public support for recidivist enhancements is due to perception that repeat offenders are flouting law and showing contempt for criminal justice system).

¹⁴⁰ 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 138, at 253–55. They also found significant, though smaller, correlations between judgments about crime and the courts, the public's support for general punitive policies (including mandatory sentencing), and the public's willingness to abandon criminal procedural protections (which includes discontent with courts' solicitude for defendants and technicalities and courts' disregard for ordinary citizens' rights). See *id.* at 245, 252 tbl.2. Tyler and Boeckmann 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.* at 252. They also 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. Frustration with and willingness to abandon criminal procedures may thus partially explain California's three-strikes law; Tyler and Boeckmann did not test this hypothesis.

¹⁴¹ See *infra* text accompanying note 168 (noting that 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 need for clarity and simplicity 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 Five: Insiders Circumvent Even "Mandatory" Reforms

Outsiders may pass mandatory bumper-sticker laws, but insiders still get to enforce them. Because monitoring remains imperfect 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.¹⁴² Also, despite the three-strikes law's ban on plea bargaining, California judges and prosecutors can and do strike or dismiss felony counts or downgrade them to misdemeanors.¹⁴³ 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.¹⁴⁴ In other words, prosecutors turn three-strikes strictures into tools, using them to extract tougher but still discounted plea bargains.¹⁴⁵ One study tracked federal cases that 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,

¹⁴² 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"); CAL. PENAL CODE § 1192.7(a) (West 2004) (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).

¹⁴³ Erik G. Luna, *Foreword: Three Strikes in a Nutshell*, 20 T. 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, 37 (1999).

¹⁴⁴ See CAL. PENAL CODE § 17(b)(4) (West 1999) (allowing prosecutors discretion to specify that crime is misdemeanor where that crime is punishable by imprisonment in state jail or by fine or imprisonment in county jail); David Bjerk, *Making the Crime Fit the Penalty: The Role of Prosecutorial Discretion Under Mandatory Minimum Sentencing*, 48 J.L. & ECON. 591, 604–09 (2005) (reporting empirical findings that after passage of California's three-strikes law, prosecutors were significantly more likely to drop prior strikes and pursue misdemeanors instead); 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) (noting that California prosecutors have applied this law unevenly, creating regional sentencing disparities).

¹⁴⁵ See Marion, *supra* note 143, at 36; Joshua E. Bowers, Note, *"The Integrity of the Game Is Everything": The Problem of Geographic Disparity in Three Strikes*, 76 N.Y.U. L. REV. 1164, 1178 n.75 (2001).

§ 924(c) charges were later dropped.¹⁴⁶ Prosecutors seemed to be using these charge reductions to reward guilty pleas and to soften tough sentences.¹⁴⁷ Another study found that in up to 40% of cases in which mandatory minima for drug crimes would otherwise apply, defendants pleaded guilty to lesser offenses.¹⁴⁸ Whites and women were more likely than minorities and men to avoid minima this way.¹⁴⁹ 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.¹⁵⁰

Since dropping charges creates a record that is at least potentially open to oversight by supervisors or others, insiders also engage in less visible 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.¹⁵¹ 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 indicted cases, insiders evaded the ban by striking bargains before indictment.¹⁵² And New York prosecutors circumvented bargaining restric-

¹⁴⁶ See Paul J. Hofer, *Federal Sentencing for Violent and Drug Trafficking Crimes Involving Firearms: Recent Changes and Prospects for Improvement*, 37 AM. CRIM. L. REV. 41, 53–57 (2000).

¹⁴⁷ See *id.* at 57–59; see also *United States v. Angelos*, 345 F. Supp. 2d 1227, 1231–32 (D. Utah 2004) (recounting that prosecutors offered to let defendant plead guilty to one § 924(c) gun charge, but, after defendant rejected plea bargain, they penalized him by adding four more § 924(c) counts in superseding indictments).

¹⁴⁸ See U.S. SENTENCING COMM'N, MANDATORY MINIMUM PENALTIES IN THE FEDERAL CRIMINAL JUSTICE SYSTEM 66 tbl.10 (1991).

¹⁴⁹ See *id.* at 77 tbl.19, 80 tbl.22.

¹⁵⁰ See Hanna, *supra* note 96, at 1864 (noting that even jurisdictions that strictly mandate victim participation leave prosecutors “broad discretion over whether to pursue cases”); 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) (noting that often, police do not arrest and prosecutors do not charge or undercharge domestic abusers; also noting that while no-drop policies reduce dismissals and case attrition, even no-drop jurisdictions dismiss 10% to 34% of cases).

¹⁵¹ See 21 U.S.C. §§ 841(a)(1), (b)(1)(A)–(B), 843(b), (d)(1) (2000 & Supp. II 2002) (setting minimum sentences of five or ten years for drug trafficking, and setting maximum sentence of only four years, fine, or both for use of communication facility); Bibas, *supra* note 5, at 2484–85 (noting that knowledgeable defense lawyers often suggest plea to using telephone before grand juries indict); 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”).

¹⁵² See CAL. PENAL CODE § 1192.7(a) (West 2004) (limiting plea-bargaining ban to “any case in which the indictment or information charges” certain crimes); McCoy, *supra* note

tions by offering misdemeanor pleas and allowing drug defendants to avoid indictment.¹⁵³

Finally, even after indictment, insiders undercut supposedly mandatory sentences. The most popular way to do so is by using cooperation agreements. Cooperating with police and prosecutors' investigations unlocks otherwise mandatory sentencing laws, providing one of the few ways to avoid minimum sentences.¹⁵⁴ When insiders are determined to strike bargains, sometimes they can enter cooperation agreements despite thin evidence of cooperation.¹⁵⁵ Many judges gladly cooperate, using even flimsy cooperation motions as an opportunity to reduce sentences.¹⁵⁶ Another way to undercut sentencing guidelines is by plea agreement. In some jurisdictions, parties can stipulate to particular sentences in plea agreements and so evade mandatory guideline penalties.¹⁵⁷

* * * *

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

134, at 37–38, 80–84, 90–95 (finding that California's ban apparently did not reduce plea bargaining, because parties simply began bargaining over complaints filed in municipal court, before any indictment or information was ever filed in superior court).

¹⁵³ JOINT COMM. ON N.Y. DRUG LAW EVALUATION, ASS'N OF THE BAR OF THE CITY OF N.Y., *THE NATION'S TOUGHEST DRUG LAW: EVALUATING THE NEW YORK EXPERIENCE* 95 (1977).

¹⁵⁴ See, e.g., 18 U.S.C. § 3553(e) (2000 & Supp. II 2002) (authorizing imposition of sentence below statutory minimum to reward substantial assistance in investigation or prosecution); U.S. SENTENCING GUIDELINES MANUAL § 5K1.1 (2003) (allowing departure below federal guidelines if defendant provides substantial assistance in investigation or prosecution); ALA. CODE § 13A-12-232(b) (LexisNexis 2005) (authorizing court, on prosecutor's motion, to reduce or suspend sentence for substantial assistance); COLO. REV. STAT. § 18-18-409 (2004) (same); N.C. GEN. STAT. § 90-95(h)(5) (2005) (same, except not requiring prosecutorial motion); VA. CODE ANN. § 18.2-248.H2.5 (2005) (allowing courts to impose minimum of forty years rather than life on methamphetamine traffickers who cooperate substantially with authorities). Unlike the Federal Guidelines, mandatory minimum statutes and state guidelines were not rendered advisory and nonbinding by the Supreme Court's recent opinion in *United States v. Booker*, 125 S. Ct. 738, 764–68 (2005) (Breyer, J., remedial majority opinion).

¹⁵⁵ See Ulmer, *supra* note 121, at 263–65 (describing districts where defendants received downward departures despite providing information of “questionable value”).

¹⁵⁶ See *id.* (describing liberal standard for providing substantial assistance and receiving cooperation motions in certain districts); see also Weinstein, *A Trial Judge's Reflections on Departures from the Federal Sentencing Guidelines*, *supra* note 123, at 7 (suggesting that judges are happy to cooperate with prosecutors' motions for downward departures).

¹⁵⁷ Though courts are split, a majority of federal courts let stipulated-sentence plea agreements trump mandatory guideline provisions. See Bibas, *supra* note 126, at 305–06, 305 n.61.

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 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.¹⁵⁸ 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,¹⁵⁹ periodically seizing on gripping (and sometimes unrepresentative) anecdotes to excite popular outrage and pressure for their own ends. Politicians simultaneously cater to insider prosecutors, playing both sides of the insider-outsider gulf. This dynamic is a spiral. If the dynamic were a simple circle, we would wind up right back where we started. But, as the next Section explains, the spiral warps the system, taking a serious toll on criminal justice.

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 gulf and resulting spiral waste prison resources by unduly lengthening some sentences. They distract public and legislative attention from other criminal justice problems and reforms. The gulf and spiral give 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.¹⁶⁰ Moreover, it is an ad hoc, low-visibility, low-accountability way to shape policy in a democracy.

The gulf and spiral also have three other side effects. Subsection 1 discusses how they cloud the substantive criminal law's message and efficacy. Subsection 2 explores how the gulf and spiral impair trust in

¹⁵⁸ I have explored the artificial separation of criminal procedure from substantive criminal law in greater detail elsewhere. See Bibas, *supra* note 54, at 1150–51, 1183, 1185; Stephanos Bibas, *Harmonizing Substantive-Criminal-Law Values and Criminal Procedure: The Case of Alford and Nolo Contendere Pleas*, 88 CORNELL L. REV. 1361, 1362, 1389, 1408–11 (2003); Bibas & Bierschbach, *supra* note 38, at 89–91, 95–96, 148.

¹⁵⁹ See *supra* text accompanying notes 55, 111 (explaining how media fan public's fears of crime); *supra* text accompanying notes 56, 109, 126 (explaining how politicians exacerbate and exploit public's fears of crime); cf. Khanna, *supra* note 129, at 125–29 (discussing how politicians play to both public and prosecutors in enacting corporate-crime legislation).

¹⁶⁰ See *supra* note 124 and accompanying text.

and the legitimacy of the law. Subsection 3 assesses how they obstruct public preferences and monitoring of agency costs.

1. *The Gulf 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. On this view, the purpose of the criminal law is to deter would-be criminals by making the expected punishment for the crime exceed the expected benefit.¹⁶¹ Thus, the law must be clear and straightforward enough that prospective criminals will understand the expected punishment.¹⁶² Criminal procedure's opacity and unpredictability undercut 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 over-optimistic and prone to underestimate and take risks. As a result, 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.¹⁶³

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.¹⁶⁴ It can thus help to heal victims. The law also expresses the community's condemnation and, by doing so, reaffirms society's norms.¹⁶⁵ For criminal punishment to communicate consist-

¹⁶¹ See JEREMY BENTHAM, AN INTRODUCTION TO THE PRINCIPLES OF MORALS AND LEGISLATION 170 n.1, 179–80 (new ed. corrected by author, Oxford, Clarendon Press 1879) (1789).

¹⁶² 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.

¹⁶³ See Bibas, *supra* note 5, at 2498–502, 2507–10. These and other problems impede deterrence in the real world. See 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). See generally Paul H. Robinson & John M. Darley, *Does the Criminal Law Deter? A Behavioural Science Investigation*, 24 OXFORD J. LEGAL STUD. 173 (2004) (arguing that behavioral science data show that manipulating criminal law rules will not normally increase deterrence because potential offenders do not know legal rules, make irrational choices, or weigh costs and benefits in skewed manner).

¹⁶⁴ See Jean Hampton, *The Moral Education Theory of Punishment*, in PUNISHMENT: 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).

¹⁶⁵ 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

ently and effectively, criminal procedure must be transparent. Otherwise, current and prospective criminals, victims, and the public do not see justice done or hear the law's message.¹⁶⁶ As Section I.C explained, criminal justice is far from transparent to outsiders. In particular, over the last few centuries victims have lost their day in court and do not see justice firsthand, so they feel frustrated and long for vindication and healing.¹⁶⁷ In sum, criminal procedure's shortcomings obstruct the substantive criminal law's goals of deterring, educating, vindicating victims, and expressing condemnation.¹⁶⁸

In recent years, scholars and the public have shown renewed interest in publicly shaming convicted criminals as a way of expressing condemnation of crimes.¹⁶⁹ One point, however, often gets lost in the shaming-punishment debate: Shaming punishments are expressively satisfying precisely because the rest of criminal justice is so 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

BILITY 95, 101–04 (1970) (emphasizing that by condemning crimes, punishment authoritatively disavows those crimes, symbolically refuses to acquiesce in them, and vindicates law); 2 JAMES FITZJAMES STEPHEN, A HISTORY OF THE CRIMINAL LAW OF ENGLAND 81–82 (London, Macmillan 1883) (suggesting criminal law's ability to reinforce morality by sealing its judgments and ratifying public's hatred of crimes); Jean Hampton, *An Expressive Theory of Retribution*, in RETRIBUTIVISM AND ITS CRITICS 1, 20–22 (Wesley Cragg ed., 1992) (urging that primary justification for punishment is not to educate wrongdoer but to defeat message implicit in crime and to right moral relationships). 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) (asserting that punishment signifies seriousness of crime and society's moral condemnation of it).

¹⁶⁶ See Erik Luna, *Transparent Policing*, 85 IOWA L. REV. 1107, 1138–63 (2000) (describing existence of unwritten code of enforcement and discussing how this secret law harms trust, legitimacy, and perceptions of procedural justice). 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* Part II.B.2.

¹⁶⁷ See Bibas, *supra* note 158, at 1406–07.

¹⁶⁸ See *supra* text accompanying note 141 (discussing how 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).

¹⁶⁹ The leading proponent of shaming punishments is Dan Kahan. For Kahan's seminal work in the area, see Kahan, *supra* note 165, at 635–37 (endorsing shaming penalties as way of unambiguously expressing condemnation as alternative to imprisonment). Other publications in this vein include Katharine K. Baker, *Sex, Rape, and Shame*, 79 B.U. L. REV. 663, 698–701 (1999) (advocating use of shaming sanctions to change social meaning and acceptability of date rape); Jayne W. Barnard, *Reintegrative Shaming in Corporate Sentencing*, 72 S. CAL. L. REV. 959, 1001–02 (1999) (endorsing certain corporate shaming penalties as ways to promote remediation, repair, and future compliance, while addressing concern that more stigmatizing shaming penalties might degenerate into humiliating, pointless spectacles); David A. Skeel, Jr., *Shaming in Corporate Law*, 149 U. PA. L. REV. 1811, 1812 (2001) (arguing that shaming sanctions have been and can be effective penalties for corporations and their directors).

and visible bite.¹⁷⁰ Perhaps one reason voters clamor for shaming punishments is that they are almost the only ways that outsiders can see justice being done.¹⁷¹ If criminal procedure were not so opaque, we might have less need and demand for such humiliating punishments.¹⁷²

2. *The Gulf Impairs Legitimacy and Trust*

People respect the law more when it is visibly fair and when they have some voice or control over its procedures. Procedural fairness, process control, and trust in insider's motives contribute greatly to the criminal justice system's legitimacy.¹⁷³ 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."¹⁷⁴ 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.¹⁷⁵ Conversely, perceived unfairness or lack of trust can erode the system's legitimacy and compliance.

¹⁷⁰ See, e.g., Kahan, *supra* note 165, at 630–37.

¹⁷¹ 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).

¹⁷² For criticisms of shaming punishments as cruel and humiliating, see, for example, ANDREW VON HIRSCH, *CENSURE AND SANCTIONS* 82–83 (1993) (arguing that degrading punishments deny those punished right to be treated as persons); Stephen P. Garvey, *Can Shaming Punishments Educate?*, 65 U. CHI. L. REV. 733, 759 (1998) (asserting that "some contemporary shaming penalties do cross—or come close to crossing—the line"); and Toni M. Massaro, *Shame, Culture, and American Criminal Law*, 89 MICH. L. REV. 1880, 1942–43 (1991) (noting that shaming's "assault on human dignity" outweighs its negligible practical advantages).

¹⁷³ See 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 (reporting study on effects of experience, control, and normative attitudes on perceptions of procedural justice and legitimacy); TOM R. TYLER & YUEN J. HUO, *TRUST IN THE LAW: ENCOURAGING PUBLIC COOPERATION WITH THE POLICE AND COURTS* 101–38 (2002) (examining how legitimacy, trust in one's community, and identification promote acceptance of legal decisions); cf. 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 voice in organization tend to develop affection for and loyalty to it).

¹⁷⁴ TYLER & HUO, *supra* note 173, at 136.

¹⁷⁵ Empirical studies confirm this point. See *id.* at 101–22; LIND & TYLER, *supra* note 75, at 76–81; TYLER, *supra* note 75, at 161–70, 178; cf. Fred W. Friendly, *On Judging the Judges*, in *STATE COURTS: A 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.").

Just as citizens must see the criminal law as procedurally fair, 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.¹⁷⁶ 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.¹⁷⁷ The likely result, as Janice Nadler's empirical work suggests, is decreased respect for and compliance with the criminal law.¹⁷⁸

At one time, public jury trials not only educated ordinary citizens and let them see and influence justice being done, but they also contributed to the law's democratic legitimacy.¹⁷⁹ Yet today, now that jury trials are uncommon, outsiders seldom see, understand, or participate in criminal justice. The system is too opaque and remote to educate them well. Outsiders 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 rules or standards.¹⁸⁰ Citizens see very little of the system's workings, except when politicians or the media expose some outrageous anecdote. Secrecy and opacity weaken citizens' trust in the law¹⁸¹ and may also make them feel distant and alienated. 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 or politicians highlight. These visible injustices undermine the law's substantive moral credibility.

¹⁷⁶ Paul H. Robinson & John M. Darley, *The Utility of Desert*, 91 NW. U. L. REV. 453, 474, 477 (1997).

¹⁷⁷ *Id.* at 483–85, 488.

¹⁷⁸ 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 unjust criminal outcome were later more willing to nullify law as jurors in unrelated criminal case); see also Robinson & Darley, *supra* note 176, at 457, 485 (arguing that citizens are more willing to defer to and respect law if they believe law is accurate guide to moral behavior and that, conversely, public is much less likely to comply if it views law as unjust).

¹⁷⁹ See TOCQUEVILLE, *supra* note 17, at 270–76 (remarking that juries put “real control of [legal] affairs into the hands of the ruled”); Amar, *supra* note 15, at 1183–89 (noting roles of juries as populist protectors, as pupils, and as political participants); *supra* Part I.A (discussing public, democratic, populist, and participatory character of colonial American justice).

¹⁸⁰ See *supra* note 1 (noting that overwhelming majority of criminal cases that are not dismissed end in guilty or no-contest pleas).

¹⁸¹ For a powerful argument to this effect in the context of police and prosecutorial discretion, see Luna, *supra* note 166, 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).

Perhaps because of these factors, nearly three-quarters of Americans lack much confidence and trust in the criminal justice system.¹⁸² Two-thirds of Americans see plea bargaining, the most opaque and insider-dominated part of the system, as problematic.¹⁸³ Victims have similar reactions. Victims in states with weak victims' rights laws are much less likely to receive notice or participate meaningfully in various stages of the criminal process.¹⁸⁴ Thus, they are more likely to come away dissatisfied and doubt the criminal justice system's fairness and thoroughness.¹⁸⁵ In short, criminal procedure's failings may undermine the criminal justice system's legitimacy and efficacy.

3. *The Gulf Impairs Public Preferences and Monitoring*

Another reason for the Sixth Amendment's guarantee of public jury trials was to make criminal justice "fundamentally populist and majoritarian."¹⁸⁶ In a related vein, grand juries used to publicize prosecutorial declinations and other hidden executive actions, which increased accountability and checked agency costs.¹⁸⁷ These procedures used transparency and participation to keep criminal justice in line with the public's sense of justice. Now that juries are an endangered species, however, criminal justice is more opaque and dominated by insiders. These barriers obstruct outsiders' ability to monitor insiders and to influence them. Insiders now have more room to indulge their self-interests in lenient, hurried dispositions. As a result, agency costs warp processes and substantive outcomes, causing them to diverge at times from the public's sense of justice.

Without jury participation, outsiders can intervene only crudely. Citizens and victims cannot influence individual cases. At best, they

¹⁸² See Lydia Saad, *Military Again Tops "Confidence in Institutions" List*, GALLUP POLL NEWS SERV., June 1, 2005, available at <http://poll.gallup.com/content/default.aspx?ci=16555> (subscription required) (reporting an eight-point decline, from 34% to 26%, in public confidence in criminal justice). 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.*

¹⁸³ See Myers, *supra* note 125, at 54–55 & tbl.4.2 (reporting that respondents overwhelmingly opposed plea bargaining); Robert F. Rich & Robert J. Sampson, *Public Perceptions of Criminal Justice Policy: Does Victimization Make a Difference?*, 5 VIOLENCE & VICTIMS 109, 114 (1990) (reporting that majority of public simply does not like plea bargaining).

¹⁸⁴ NAT'L VICTIM CTR., U.S. DEP'T OF JUSTICE, STATUTORY AND CONSTITUTIONAL PROTECTION OF VICTIMS' RIGHTS: IMPLEMENTATION AND IMPACT ON CRIME VICTIMS 31–38 (1996).

¹⁸⁵ *Id.* at 43–46, 51–63.

¹⁸⁶ Amar, *supra* note 15, at 1185.

¹⁸⁷ *Id.* at 1184.

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 may be tempted to start reforming by empowering outsiders to help write a new set of laws and rules to check insiders. As Part 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 chips. Rather, to monitor and check insiders, we must better inform outsiders and provide more ways for them to participate day-to-day.

A transparent, participatory solution should pursue two goals. First, it 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, it should use transparency, participation, and monitoring to achieve better substantive outcomes. A more transparent and participatory system would better heal and vindicate victims and encourage more of them 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 anytime soon. Nor can better information return us all the way back 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 policymaking 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) other 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 first two groups gain important substantive as well as procedural benefits from transparency and participation.¹⁸⁸ The latter group is in need of oversight to better align its substantive policies with public preferences.¹⁸⁹ 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.¹⁹⁰ 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.¹⁹¹ States should redouble their efforts to provide victims with timely advance notice of all key stages, from arrest, through charging, to plea and sentence. A dedicated official, such as a victim/witness coordinator, could help to increase contact with victims and keep tabs on the progress of cases. 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 victims 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. These communications should include directions to the courthouse and courtroom, as well as contact telephone numbers, to make it easier for victims to attend proceedings and see justice done. E-mails after each hearing could summarize what happened at each stage. These simple measures would increase victim information, satisfaction, and healing.¹⁹²

2. Victim Participation

Empowering victims is a bit harder but still manageable. There will always be some participation gap between insiders and victims

¹⁸⁸ See *supra* Part II.B.1–2.

¹⁸⁹ See *supra* Part II.B.3.

¹⁹⁰ 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.

¹⁹¹ See *supra* note 47 and accompanying text.

¹⁹² Cf. *supra* notes 167–68 and accompanying text (discussing how gulf between insiders and outsiders obstructs substantive goals of victim vindication, healing, and catharsis).

because victims will not supplant prosecutors. As long as victims are not in charge, police, prosecutors, and judges will make some decisions that upset them. But even though the "victims' desire is to be included in the criminal justice process, they have no desire to take control . . . of the case."¹⁹³ Interestingly, most victims are not angry and vengeful, and many do not demand harsher punishments.¹⁹⁴ It is simple participation that helps to empower and heal victims.¹⁹⁵ 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.¹⁹⁶ A participatory role and fair and respectful treatment would go a long way toward addressing victims' grievances, regardless of the outcomes.¹⁹⁷ Thus, 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.¹⁹⁸ Victims who participate in mediation are more likely to believe that the system is fair, that their cases were handled satisfactorily, that they were able to tell their stories, that the outcome was satisfactory, and that the offender was held accountable.¹⁹⁹ They are also more likely to receive apologies and to forgive, and they are less likely to fear revictimization or stay upset.²⁰⁰

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 at

¹⁹³ WEMMERS, *supra* note 46, at 208.

¹⁹⁴ Strang & Sherman, *supra* note 46, at 18.

¹⁹⁵ *Id.* at 21.

¹⁹⁶ LIND & TYLER, *supra* note 75, at 106, 206–11, 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).

¹⁹⁷ Strang & Sherman, *supra* note 46, at 18.

¹⁹⁸ Bibas & Bierschbach, *supra* note 38, at 131–34. This process goes by many names and variants, including circle sentencing, family group conferences, and community reparative boards, all under the umbrella of restorative justice. See Bazemore & Umbreit, *supra* note 12, at 1–13 (describing and contrasting standard victim-offender mediation, community reparative boards, family group conferences, and circle sentencing).

¹⁹⁹ Barton Poulson, *A Third Voice: A Review of Empirical Research on the Psychological Outcomes of Restorative Justice*, 2003 UTAH L. REV. 167, 178–84, 179 tbl.1, 180 fig.1, 181 tbl.2, 182 fig.2, 183 tbl.3, 184 fig.3, 187, 188 tbl.6, 189 fig.6, 191, 193 tbl.9 & fig.9 (meta-analysis of up to six empirical studies of victims).

²⁰⁰ *Id.* at 189–91, 190 tbl.7, 191 fig.7, 195–98, 196 tbl.11 & fig.11, 197 tbl.12, 198 fig.12.

plea and sentencing hearings.²⁰¹ Prosecutors could be required to consult with victims before dropping charges, entering into plea bargains, or recommending sentences. These and other forms of participation would speed victims' emotional healing and combat their feelings of powerlessness and alienation.²⁰²

B. Increasing Public Information and Participation

1. Public Information

As Part I.C explained, though outsiders think they understand criminal justice, they actually 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, and accurate information could go a long way. As I have noted, citizens call for tougher sentencing laws because they systematically underestimate average nominal sentences.²⁰³ Correcting that misimpression alone would greatly allay 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.²⁰⁴ Few good sentencing statistics are published, let alone publicized.²⁰⁵ 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 may bring many marginal cases but then bargain them away leniently.

²⁰¹ Bibas & Bierschbach, *supra* note 38, at 139.

²⁰² *Id.* at 138; Strang & Sherman, *supra* note 46, at 21.

²⁰³ See *supra* text accompanying notes 63–65.

²⁰⁴ See *supra* text accompanying note 106.

²⁰⁵ See Alschuler, *supra* note 37, 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.

Disseminating this information is an effort to approximate the villages of two centuries ago, when everyone would have known and 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.²⁰⁶ Also, providing more information may simply reinforce preexisting biases, allowing people to recall selectively those facts that fit their ideas.²⁰⁷

Finally, it can be difficult 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 overgeneralize from salient and memorable anecdotes.²⁰⁸ Conversely, people give too little weight to abstract statistical information.²⁰⁹ What the public really needs to see are not statistics, but flesh-and-blood typical defendants facing typical sentences. In our nonparticipatory system, however, that is not likely 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. If, however, 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.²¹⁰ Better statistics would help electoral rivals to fight statistics with statistics, painting a somewhat more balanced picture.

²⁰⁶ See *supra* text accompanying note 117.

²⁰⁷ See Bibas, *supra* note 5, at 2498 & n.136, 2522.

²⁰⁸ 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) (noting that "salience bias" makes distinctive stimuli more available and thus disproportionately influential on judgments).

²⁰⁹ See, e.g., Amos Tversky & Daniel Kahneman, *Judgment Under Uncertainty: Heuristics and Biases*, in JUDGMENT UNDER UNCERTAINTY: HEURISTICS AND BIASES, *supra* note 208, at 3, 4 (describing example of representativeness heuristic, which causes people to over-rely on details of one particular case and undervalue other overarching statistical probabilities).

²¹⁰ See Wright & Miller, *The Screening/Bargaining Tradeoff*, *supra* note 48, at 60–61, 113–16; see *supra* text accompanying note 133.

The prognosis, however, is not bright, since anecdotes still 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.²¹¹ 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.²¹² 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.²¹³ The public may thus regain some faith in the criminal justice system and view its message as more legitimate and worthy of obedience.²¹⁴

One might also consider publishing prosecutors' procedural and substantive policies governing plea bargaining and sentencing.²¹⁵ A few prosecutors' offices have already done so.²¹⁶ Repeat defense counsel already know the going rates for particular crimes.²¹⁷ Providing this information would level the playing field for novice defense counsel, help inform the public, and discipline prosecutors.²¹⁸ Because certainty of punishment is a greater factor than severity in deterring criminals,²¹⁹ plea and sentencing policies would not

²¹¹ Wright & Miller, *The Screening/Bargaining Tradeoff*, *supra* note 48, at 111–13.

²¹² *See id.*

²¹³ *See id.*

²¹⁴ *Cf. supra* Part II.B.1–2 (cataloguing substantive and procedural harms caused by criminal procedure's opacity, including muting of law's expressive message and dampening of its perceived legitimacy).

²¹⁵ 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.

²¹⁶ *See, e.g.,* Richard H. Kuh, *Plea Bargaining: Guidelines for the Manhattan District Attorney's Office*, 11 CRIM. L. BULL. 48 (1975) (publishing internal memorandum from New York County District Attorney's Office on plea-bargaining guidelines); Richard H. Kuh, *Sentencing: Guidelines for the Manhattan District Attorney's Office*, 11 CRIM. L. BULL. 62 (1975) (same for sentencing); Mario Merola, *Modern Prosecutorial Techniques*, 16 CRIM. L. BULL. 232, 237–40, 251–58 (1980) (publishing some details of Bronx County District Attorney's Office's internal screening and plea-bargaining procedures).

²¹⁷ *See* JONATHAN D. CASPER, *AMERICAN CRIMINAL JUSTICE: THE DEFENDANT'S PERSPECTIVE* 108 (1972); HEUMANN, *supra* note 30, at 76–78, 90.

²¹⁸ 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.

²¹⁹ *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).

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.²²⁰ 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. This potential knee-jerk response is an artifact of the spiral, however, not an unalterable fact. The public calls for raising sentences because it systematically underestimates actual average penalties.²²¹ The average voter, if fully informed, would think that penalties are high enough and that raising them further would be costly and pointless.²²² 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 other practices.²²³ Collaborative, open decisionmaking, such as some community-policing methods, can reflect neighborhood priorities and accommodate outsiders' concerns.²²⁴ More open community review boards could restore public trust in the police.²²⁵ Videotaping police interrogations and searches, as well as mandatory record-keeping, could improve monitoring and credibility.²²⁶ Sharing crime maps with the community could facilitate reciprocal sharing of information. Information sharing also helps to explain police resource allocation

²²⁰ Cf. Bibas, *supra* note 5, at 2498, 2500 (explaining that most people are systematically overoptimistic and that sentencing guidelines reduce likelihood of overoptimistic forecasts of sentences).

²²¹ See *supra* text accompanying notes 63–71.

²²² See *supra* text accompanying notes 63–71.

²²³ Erik Luna, *Principled Enforcement of Penal Codes*, 4 BUFF. CRIM. L. REV. 515, 598–622 (2000).

²²⁴ Erik Luna, *Race, Crime, and Institutional Design*, 66 LAW & CONTEMP. PROBS. 183, 207–11 (2003). In addition, better police recruitment, training, performance standards, oversight, and discipline can likewise help check police actions that might breed antagonism and mistrust. *Id.* at 211–17.

²²⁵ Luna, *supra* note 166, at 1167–69.

²²⁶ *Id.* at 1169–70.

decisions to minority neighborhoods and lets neighborhoods respond with their concerns. This increased transparency may help allay minority fears that police targeting decisions are racially biased.²²⁷

In summary, public information about policing and prosecution are unlikely to work wonders at the federal and state levels. 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 understand and perhaps trust each other better. As a result, the substantive criminal law might communicate its message more effectively and command more respect and obedience.²²⁸

2. *Public Participation*

Perhaps members of the general public could participate more actively as well. Though they rarely serve on petit juries, we could create plea juries and sentencing juries to review pleas and sentences in the most serious cases.²²⁹ 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.²³⁰ This rotation would ensure widespread lay participation and reduce jadedness, much as the Founders thought juries an important way to rotate citizens through government service.²³¹ These citizens would need to swear to secrecy, just as grand jurors must swear to secrecy. Citizens would doubtless grumble about this service, just as they grumble about and try to avoid jury duty. But just as jurors often come away impressed with the system,²³² these citizens would learn from their experiences and might develop more respect for it. As

²²⁷ *Id.* at 1177–78, 1192–93. For a thoughtful assessment of this participatory trend in the policing literature, see generally David Alan Sklansky, *Police and Democracy*, 103 MICH. L. REV. 1699 (2005).

²²⁸ *Cf.* Part II.B.1–2 (cataloguing these defects in status quo and attributing them in part to criminal justice system's opacity).

²²⁹ 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 38, at 141, 144 (suggesting that plea and sentencing juries could assess defendants' remorse and apologies); Jason Mazzone, *The Waiver Paradox*, 97 N.W. U. L. REV. 801, 874–78 (2003) (proposing plea panels that would investigate voluntariness and fairness of proposed plea bargains).

²³⁰ 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.

²³¹ See Amar, *supra* note 15, at 1188–89.

²³² See, e.g., Juror Evaluation Forms, *supra* note 53 (describing jury service as “an enlightening and humbling experience” that “increased respect for our judicial system” and educated and informed jurors).

noted earlier, giving citizens a voice in criminal justice procedures can increase the system's legitimacy and respect in their eyes.²³³ Citizens would also get to 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, antinuisance injunctions, and order-maintenance policing. As Tracey Meares and Dan Kahan have argued, these approaches are more democratically legitimate when adopted in consultation with community members.²³⁴ This consultation and legitimacy may help reassure members of minority groups, who have historically distrusted law enforcement. In addition, police tactics are far more likely to succeed with community support.²³⁵

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.²³⁶ 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.

In addition, twenty-first-century society is much larger, more anonymous, and more dispersed 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' anticrime 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.

²³³ See *supra* Part II.B.2.

²³⁴ See Dan M. Kahan & Tracey L. Meares, *Foreword: The Coming Crisis in Criminal Procedure*, 86 GEO. L.J. 1153, 1153–54 (1998).

²³⁵ See *id.* at 1163–64 (noting that community policing can reinforce community structures and so discourage crime).

²³⁶ See Bibas & Bierschbach, *supra* note 38, at 141 n.280.

C. Checking Agency Costs and Insiders' Behavior

The previous two subsections discussed the benefits of information and participation for outsiders. Information and participation simultaneously help to check insiders' self-interests, agency costs, and pragmatic perspectives and preferences.²³⁷ Victims, rotating citizen advocates, or plea and sentencing juries would serve many of the functions that grand and petit juries once did, checking executive and judicial conduct. They could review proposed enforcement priorities, indictments, plea agreements, and sentence recommendations, just as many police and prosecutorial supervisors do now. 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.²³⁸ Simply giving them voices would force insiders to reckon with outsiders' perspectives, needs, and desires. Having to articulate reasons for decisions, even orally and briefly, would discipline prosecutors, much as having to write reasoned opinions 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 check insiders' self-interests and jadedness effectively. Lay judges in Germany, for example, routinely defer to the professional judges with whom they sit and have almost no influence.²³⁹ Greater transparency and public information, however, is more likely to discipline elected insiders. Even if they are 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. As a result, they would have reason to err on the side of caution.

²³⁷ Cf. *supra* Part II.B.3 (discussing scope of these problems).

²³⁸ See Bibas & Bierschbach, *supra* note 38, at 139 n.274 (rejecting possibility of giving victims veto power). But see GEORGE P. FLETCHER, WITH JUSTICE FOR SOME: PROTECTING VICTIMS' RIGHTS IN CRIMINAL TRIALS 247–50 (1996) (suggesting that victims should have rights to veto plea bargains and to question witnesses at trial).

²³⁹ See, e.g., Jenia Iontcheva Turner, *Judicial Participation in Plea Negotiations: A Comparative View*, AM. J. COMP. L. (forthcoming Dec. 2006) (manuscript at 20, on file with the New York University Law Review).

One way to increase transparency and check insiders is to publish arrest and charge-declination policies. This solution, however, is problematic because much of the criminal law operates on an “acoustic separation” between “conduct rules” and “decision rules.”²⁴⁰ For example, the criminal law forbids all stealing, but in practice police arrest and prosecutors prosecute only thieves who steal, say, forty dollars or more. Outsiders tend to know only the conduct rules, but insiders know the decision rules as well.²⁴¹ 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 be required 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.²⁴² Criminal code reform could also make the definitions of crimes more transparent and so facilitate voters’ and legislators’ oversight of charging.²⁴³

Transparency could also improve policing. Many jurisdictions do not even keep data on police shootings.²⁴⁴ Laws should require this data collection, record-keeping, and publication, much as they currently do for traffic stops to expose racial profiling.²⁴⁵ Citizen review boards could then publicize these data and pressure errant police departments to change.²⁴⁶ One could even create comparable citizen review boards to oversee prosecutors’ offices and publicize data. As Bill Stuntz argues persuasively, these optimistic-sounding transparent

²⁴⁰ Meir Dan-Cohen, *Decision Rules and Conduct Rules: On Acoustic Separation in Criminal Law*, 97 HARV. L. REV. 625, 630 (1984); see also Richard A. Bierschbach & Alex Stein, *Overenforcement*, 93 GEO. L.J. 1743, 1756–77, 1757 n.56 (2005) (analyzing use of decision rules to prevent certain conduct rules from over-detering).

²⁴¹ Carol S. Steiker, *Counter-Revolution in Constitutional Criminal Procedure? Two Audiences, Two Answers*, 94 MICH. L. REV. 2466, 2532–40 (1996) (applying Dan-Cohen’s terminology to describe public knowledge of Fourth, Fifth, and Sixth Amendment criminal procedure conduct rules and ignorance of corresponding decision rules).

²⁴² Ronald F. Wright, *Sentencing Commissions as Provocateurs of Prosecutorial Self-Regulation*, 105 COLUM. L. REV. 1010, 1042–46 (2005).

²⁴³ 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) (outlining benefits of this approach).

²⁴⁴ William J. Stuntz, *The Political Constitution of Criminal Justice*, 119 HARV. L. REV. 780, 826 (2006).

²⁴⁵ *Id.* at 828.

²⁴⁶ *Id.* at 827–28.

solutions may actually work, just as disclosures effectively reduce lending discrimination and pollution.²⁴⁷

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.²⁴⁸ Participatory state sentencing commissions, however, have successfully regulated insider sentencing discretion by being responsive to political interests and by disseminating sentencing information.²⁴⁹ Perhaps similar agencies could regulate and make transparent other insider decisions, such as diversion and police tactics.²⁵⁰

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 the crimes they have endured 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 interests in the process and outcomes, which can counterbalance insiders' own stakes and preferences. Precisely because they are not repeat players, they can counteract the jading or mellowing that affects insiders as well as insiders' 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.²⁵¹

²⁴⁷ *Id.* at 828.

²⁴⁸ See Barkow, *supra* note 50, at 765–71 (describing U.S. Sentencing Commission's relative lack of influence over sentencing policy in face of congressional resistance).

²⁴⁹ See *id.* at 800–11 (showing that political connections and ability to provide useful information give state sentencing commissions influence).

²⁵⁰ See *supra* note 223 and accompanying text (referring to Erik Luna's proposals for using public administrative rulemaking to constrain police use of force and enforcement patterns).

²⁵¹ 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 194. "Victim surveys have consistently revealed that victims are no more punitive than the general public." Lucia Zedner, *Victims*, in *THE OXFORD HANDBOOK OF CRIMINOLOGY* 419, 443–44 (Mike Maguire et al. eds., 2002). They may thus serve as reasonable proxies for the public.

* * * *

Increasing information and participation would carry significant costs. Giving victims and the public participatory rights, for example, would cost time and money, could slow cases down, and would constrain prosecutors' flexibility.²⁵² New agencies or layers of supervisory review would carry similar costs. Nevertheless, there is good reason to believe that these costs are worth paying. As Part I.B explained, insiders face strong temptations to serve their self-interests by processing cases efficiently. But 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 is willing to bear some of the cost of accident victims' physical healing, it should support and fund crime victims' emotional and psychological healing through transparent, participatory criminal procedure.²⁵³ These substantive goals are worth some sacrifice of procedural efficiency.

CONCLUSION

The gulf between insiders and outsiders has grown out of the professionalization of criminal justice over the last two to three centuries. Understanding this 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.²⁵⁴ Pundits write about politicians' and the public's vengefulness in passing three-strikes laws and mandatory minima.²⁵⁵

²⁵² Note that defendants' speedy trial rights would limit how much victims and the public could slow down cases. See *Barker v. Wingo*, 407 U.S. 514, 530 (1972) (establishing four-part balancing test for determining violations of Sixth Amendment speedy trial right, in which reason for delay is only one factor and must be balanced against length of delay, defendant's assertion of right, and prejudice to defendant).

²⁵³ I have developed these themes at greater length elsewhere. Bibas, *supra* note 158, at 1388–89, 1408–11; Bibas & Bierschbach, *supra* note 38, at 136–40, 145–48.

²⁵⁴ See Bibas, *supra* note 158, at 1375–81 (noting support for *Alford* and no-contest pleas among defense counsel and ambivalence among prosecutors and judges); *id.* at 1386–88 (arguing that public views these pleas with suspicion). 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.

²⁵⁵ 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. Secrest 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, 140–41 (1995).

Scholars have criticized plea bargaining *ad nauseam* and called for banning it. Unless one explores outsiders' frustrations and insiders' incentives and circumvention methods, however, one cannot truly appreciate these problems, let alone find realistic solutions to them.

This discussion 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.²⁵⁶ 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.²⁵⁷ This privacy seems more humane than whipping and the stocks, as it spares prisoners public humiliation. 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 understands only dimly who the average prisoner is, how effectively prison punishes and deters, and how cost-effective it is to spend \$23,000 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. In a more transparent and participatory regime, however, 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 reason prisoner," it is not their fault.²⁵⁸ 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 bar-

²⁵⁶ See generally Barkow, *supra* note 50, at 717–21, 813–14.

²⁵⁷ See generally FOUCAULT, *supra* note 24, at 7–15, 32–74, 236–39 (tracing decline of punishment's public character).

²⁵⁸ WILLIAM SHAKESPEARE, *MACBETH* act I, sc. 3. I am grateful to Brian Raimondo for this passage, this sentence, and portions of the fifth sentence.

riers 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.