

2012

Notice-and-Comment Sentencing

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Recommended Citation

Bibas, Stephanos and Bierschbach, Richard A., "Notice-and-Comment Sentencing" (2012). *Faculty Scholarship*. Paper 916.
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Article

Notice-and-Comment Sentencing

Richard A. Bierschbach[†] & Stephanos Bibas^{††}

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INTRODUCTION

In theory, criminal sentencing is a matter of justice, a question of public policy. Legislators, sentencing commissions, police, prosecutors, and judges are supposed to weigh an array of public values. In a democracy, voters naturally expect public servants to serve the public's shared sense of justice. That sense reflects popular intuitions about retribution and expressive condemnation tempered in some cases by the need to deter, incapacitate, reform, ensure fairness, and conserve resources.¹ That does not mean sentencing by opinion poll or mob rule; of course prosecutors and judges should use their expertise and try to filter out bias, vengefulness, and momentary passion. It means giving the public a view and a voice, but not a veto. Even though criminal justice experts should retain the upper hand, they should at least consider a range of facts, factors, and views. Public input not only informs the process, but also makes the system democratically legitimate.

In practice, however, sentencing today looks very different from this ideal. For one thing, most judges' sentences are largely dictated by prosecutors' plea bargains, which in turn reflect charging decisions and enforcement and arrest policies. That is doubly true in structured-sentencing jurisdictions, where sentencing guidelines adopted by unelected commissions add yet another layer of constraint. Thus, sentencing judges often resemble figureheads, rubber-stamping *faits accomplis* rather

1. See Kevin M. Carlsmith et al., *Why Do We Punish? Deterrence and Just Deserts as Motives for Punishment*, 83 J. PERSONALITY & SOC. PSYCHOL. 284, 288–97 (2002) (finding in empirical study that ordinary people assigned punishments based on the seriousness of the crime and the existence of mitigating factors, but paid little attention to the chance of detection or the amount of publicity); John M. Darley et al., *Incapacitation and Just Deserts as Motives for Punishment*, 24 LAW & HUM. BEHAV. 659, 660–71, 676 (2000) (finding in empirical study that ordinary people assigned punishments based on the wrongfulness of and moral outrage at the crime, but weighed the danger of future crime only in limited circumstances).

than speaking in terms of deserved punishment or the broader aims of sentencing.

A corollary is that dispositions are dictated by lawyers with little if any lay input or information. At sentencing, victims, defendants, and community members may perhaps testify or submit letters describing the offenses and harms suffered. But that input comes far too late to receive meaningful consideration because lawyers and other experts have already decided most factors determining sentence length before judges hear it. Criminal justice professionals, especially prosecutors, largely set sentences out of the public eye.

Relying heavily on plea-bargained sentences makes sense only on the assumption that prosecutors, judges, police, and sentencing commissions fully stand in for the public in doing justice. That is in essence what the law of plea bargaining assumes. Today, the American criminal justice system treats a plea bargain, including the sentence that it largely dictates, primarily as a private bargain between the prosecutor and the individual defendant. For decades, the Supreme Court has upheld large sentence discounts and bargaining threats of far higher punishments by pointing to the “mutuality of advantage” that prosecutors and defendants reap by compromising.² Leading scholars, most notably Judge Frank Easterbrook, endorse this view of “[p]lea [b]argaining as [c]ompromise” because just as “[s]ettlements of civil cases make both sides better off[,] settlements of criminal cases do so too.”³ Prosecutors (as well as police and judges) lighten their workloads and conserve time and resources for pursuing more cases, while defendants get lower sentences. And both sides purchase certainty of sentences, minimizing risk.⁴ Viewed narrowly as a bilateral private contract, a plea-bargained sentence leaves both prosecutor and defendant better off.

There is only one thing missing from this rosy mutuality of advantage: justice. Sentencing should not be about haggling over the market price of a sack of potatoes, but about doing justice. In a democracy, justice must heed public values and voices. That is especially true of sentencing policy, which should balance an eclectic assortment of facts, factors, and competing

2. Brady v. United States, 397 U.S. 742, 752 (1970); accord Bordenkircher v. Hayes, 434 U.S. 357, 363 (1978).

3. Frank H. Easterbrook, *Plea Bargaining as Compromise*, 101 YALE L.J. 1969, 1969, 1975 (1992).

4. See *id.*

conceptions of the public good. The interests and views at stake are not limited to those of two partisans who bring their deal to the sentencing judge as a *fait accompli*. Those partisans may selectively present information and pursue private agendas that may diverge from those of the public at large. As prosecutors are imperfect agents of the public interest, we cannot complacently trust plea bargaining to do justice.⁵

When regulating plea bargaining, courts look by analogy to private law, specifically contracts. But in modern criminal justice, with vastly overbroad criminal codes that offer prosecutors extensive menus of options, plea bargaining *is* the making of sentencing policy. In practice, it is prosecutors, not legislatures or judges, who resolve many of the complex debates about justice in sentencing. But they make those value-laden decisions out of sight, with little public input into or oversight of the tradeoffs involved. This gap between prosecutors, as agents, and the public, as the nominal principal whom they serve, leaves prosecutors free to pursue their own self-interests, endangering the legitimacy of criminal justice and undercutting public confidence and respect. To solve these problems, we need to do more to ensure transparent and participatory processes for real-world, prosecutor-driven sentencing. That would give the public a voice, enhance legitimacy and oversight, and better balance the public's eclectic demands in the scales of justice. Sentencing procedures should be open, fair, and accountable, not just fast and cheap.

Public law, particularly administrative law, offers better models for soliciting an array of information and viewpoints that bear on the public interest in sentencing. Although calls for reforming plea bargaining are decades old, only a few scholars have approached the issue from an administrative law perspective. Those who have done so have generally focused on the institutional design of prosecutors' offices or more robust enforcement of separation of powers and other structural constitutional norms.⁶ The vast majority of plea-bargaining critiques

5. See Stephanos Bibas, *Plea Bargaining Outside the Shadow of Trial*, 117 HARV. L. REV. 2463, 2470–75 (2004).

6. See, e.g., Rachel E. Barkow, *Institutional Design and the Policing of Prosecutors: Lessons from Administrative Law*, 61 STAN. L. REV. 869 (2009) [hereinafter Barkow, *Institutional Design*]; Rachel E. Barkow, *Separation of Powers and the Criminal Law*, 58 STAN. L. REV. 989 (2006) [hereinafter Barkow, *Separation of Powers*]; Gerard E. Lynch, *Our Administrative System of Criminal Justice*, 66 FORDHAM L. REV. 2117 (1998); Ronald F. Wright, *Sentencing Commissions as Provocateurs of Prosecutorial Self-Regulation*, 105 COLUM. L. REV. 1010 (2005); Ronald F. Wright & Marc L. Miller, *The Screen-*

center on concerns that are internal to criminal justice, such as leniency, disparity, unjust outcomes, and defendants' individual rights.

These concerns are important, and they partly drive our argument as well. But our public-law critique goes deeper, to the legitimacy and soundness of policymaking by plea with few meaningful opportunities for public input. We approach the problem from the angle of citizen input into sentencing itself. Modern administrative law views public participation as critical to limit agency discretion and ensure that agencies reflect and protect the public interest. It is thus worth exploring how administrative law might suggest reforms to make sentencing a more participatory and inclusive process. We might consider, then, notice-and-comment sentencing, by analogy to notice-and-comment rulemaking. That framework could apply to a range of actors and decisions that influence sentencing, not only judges' imposition of sentences, but also prosecutors' decisions to charge and plea bargain, sentencing commissions' guidelines, and possibly police decisions to arrest. Much of this input would operate at the wholesale level (the level of formulating overarching policies). Some of it could even be tried at the retail level (the level of deciding individual cases), particularly in the most significant cases that merit the greatest public concern.

Of course, the administrative law analogy is far from exact. Sentencing is a far more common event than administrative rulemaking and must necessarily move more swiftly. Prosecutors prosecute and judges decide individual cases, while most agencies (except the NLRB) make rules of general applicability. But, particularly for more important crimes, sentences often reverberate beyond an individual case. Substantive policies both emerge from and drive patterns of individual arrests, charges, plea bargains, and sentences. Yet these patterns and policies may be hidden and substantively questionable. Even wholesale policies that are eventually made public suffer from too little public involvement in their formulation. Sentencing

ing/Bargaining Tradeoff, 55 STAN. L. REV. 29 (2002) [hereinafter Wright & Miller, *Screening/Bargaining Tradeoff*]; Ronald F. Wright & Marc L. Miller, *The Worldwide Accountability Deficit for Prosecutors*, 67 WASH. & LEE L. REV. 1587 (2010) [hereinafter Wright & Miller, *Accountability Deficit*]; see also KENNETH CULP DAVIS, DISCRETIONARY JUSTICE 188–207, 220–32 (1969) (suggesting ways to limit and structure prosecutorial discretion and to subject it to judicial review); James Vorenberg, *Decent Restraint of Prosecutorial Power*, 94 HARV. L. REV. 1521 (1981) (examining the nature and scope of prosecutorial discretion and proposing reforms for channeling discretion and enhancing accountability).

guidelines, for instance, sometimes emerge from hidden deliberations of unrepresentative sentencing commissions that neither provide public notice nor solicit public comment. In particular, the Federal Guidelines never went through the notice-and-comment process and have long been criticized as complex, unintelligible, and unjust. The same insularity and opacity infects the prosecutorial decision-making that leads up to sentencing. At both the wholesale and retail levels, there is little public input, little meaningful reason-giving to justify sentences, and only limited appellate review.

Despite their dissimilarities, administrative law may have much to teach sentencing, including the arrest, charging, and plea-bargaining processes that cash out at sentencing. A more transparent, participatory process could create a feedback loop. Trends in retail decisions could improve wholesale and retail sentencing policy incrementally over time and flesh out in practice the meaning of fuzzy abstractions such as retribution. The right sentencing procedures could better blend expert and lay perspectives to offer competing views their day in court and illuminate prosecutors' and judges' sentencing decisions. And better sentencing procedures could promote statements of reasons, appellate review, and consistency across cases. These reforms could improve post-trial sentencing as well. But they are especially needed in the many cases that would otherwise be resolved unilaterally by a prosecutor's charging and plea-bargaining decisions.

Public participation could improve sentencing and its antecedent processes in three distinct ways. First, it can illuminate the values at stake, shedding light on the composite public interest. Information about values matters most in setting wholesale policies, but it might also matter interstitially at the retail level, in applying policies to atypical cases within a defined sentencing range. Second, public input can also bring important facts and data to light, subject to fact-finding procedures and safeguards. And third, both wholesale and retail participation carry expressive benefits, empowering citizens to air their views and take part in public policy debate.

The remainder of this Article unfolds in four parts. Part I critiques the dominant treatment of the process leading up to sentencing, particularly plea bargaining, as mostly a bilateral private deal and explains the sentencing deficiencies that flow from that approach. Prosecutors need not explain or even have any charging policies, which allows charges to vary by prosecu-

tor and by the desire to stack up plea-bargaining chips. In plea bargaining, prosecutors are free to threaten artificially high sentences or compromise on unduly low ones through a hidden process with little real oversight. The resulting charges and plea bargains largely dictate sentences. Judges usually rubber-stamp these deals for a variety of reasons: sentencing laws and unelected sentencing commissions often tie judges' hands; judges have little information beyond what the parties supply; and no one else offers contrary views, or those views arrive too late to matter. Judges may give sparse reasons for their sentences, and those reasons are often subject to little appellate review, particularly because neither party will complain. The process largely shuts out information and perspectives provided by the public, victims, and other defendants.

Part II explains how administrative law has long sought to address similar concerns. Often, broad governing statutes offer little substantive guidance, leaving agencies free to make countless value-laden choices in the name of the public interest. Early on, administrative law recognized the need to leaven agency policymaking with meaningful public input, backed up by explanations and judicial review. A variety of laws, including the Administrative Procedure Act's notice-and-comment provisions,⁷ cabin agency discretion and foster legitimacy, accountability, and substantively good outcomes by opening agency processes to public participation. While criminal sentencing suffers from the same underlying structural and institutional concerns, criminal justice has not kept pace. A prime example is the U.S. Sentencing Commission: the opacity and insularity of its process is partly to blame for the failings of its much-hated Guidelines.

Part III considers how one could translate these administrative law principles into criminal cases to create something like notice-and-comment sentencing. At the wholesale level, public input would inform the drafting of policies on arrest, charging, and plea bargaining, as well as sentencing guidelines. At the retail level, judges would first have to give notice of proposed sentences before accepting plea bargains, at least in the most visible, most serious cases. The notice could solicit a range of public input on everything from the harm to the victim and community, to the wrongfulness of the act and the blameworthiness of the actor, to the need for deterrence, to the interests of third parties and society at large. The sentence would need

7. 5 U.S.C. § 553(c) (2006).

to take significant comments into account, include a reasoned decision responding to them, and be subject to appellate review that probes the sentencer's reasoning. We envision a ladder of possible retail input, depending on one's willingness to heed citizens, victims, and community members. Public participation could be limited to providing factual information about the crime, the defendant, and the harms suffered. It could also illuminate the relevant sentencing factors. Or it might even extend to offering views and suggested outcomes, at least within ranges established by wholesale policies. Sentencing procedures would let the parties contradict or respond to public comments before judges made retail findings. Because prosecutors and defense counsel would not appeal their own bargains, one might also need to allow *sua sponte* appellate review or appeals by probation officers or other stakeholders.

Part IV responds to likely objections, including concerns about participation by a representative sample of the public, negative effects on law enforcement, and the cost and volume of cases. These are real concerns, but they are not insurmountable. This Article concludes that the right administrative procedures and structures could blend popular input and expertise, checking agency costs and making sentencing more democratically legitimate, inclusive, and fair.

I. PLEA-BARGAINED SENTENCING: PRIVATE DEALS VS. THE PUBLIC INTEREST

This Article's overarching concern is with criminal sentencing. But today, the idea of a single, unitary moment of sentencing is by and large a myth. Real-world sentencing—what really determines sentences—has multiple stages. One of the most critical is plea bargaining. We start there, because it epitomizes the system's insularity and opacity.

A. THE STATUS QUO: PRIVATE DEALS

The Supreme Court has repeatedly endorsed plea bargaining as an efficient way to save time and money and further the parties' preferences. As the Court recognized in *Brady v. United States*, plea bargains benefit both sides: defendants cap their sentencing exposure and get their cases over with, while prosecutors conserve resources to pursue other cases.⁸ Though the Court hinted that defendants who plead guilty are more ame-

8. 397 U.S. 742, 752 (1970).

nable to rehabilitation and more quickly incapacitated, it focused on the “mutuality of advantage” accruing to both sides.⁹ The Court believed the parties “arguably possess relatively equal bargaining power” and arrive at mutually beneficial deals through “give-and-take negotiation.”¹⁰ Competently advised defendants “are presumptively capable of intelligent choice.”¹¹ Plea bargaining is “essential,” the Court has held, because otherwise the judiciary would need many more judges and courtrooms to handle prosecutors’ crushing workloads.¹² Thus, prosecutors may not only offer lower sentences, but also threaten heavier ones, in order to induce guilty pleas.¹³

The Court’s bargain model is consistent with its general deference to the parties’ preferences, even in criminal cases. The Court strongly presumes that most rules of evidence and criminal procedure can be waived as long as the waiver is knowing and voluntary and Congress has not expressly forbidden it.¹⁴ That is true even of the constitutional rights to jury trial and proof beyond a reasonable doubt, which defendants waive every day in pleading guilty.¹⁵ A defendant may even plead guilty while simultaneously protesting his innocence.¹⁶

Consistent with the Court’s focus on party autonomy, the main limitations on plea bargaining are analogous to the requirements for a valid contract. A plea must be knowing and voluntary.¹⁷ There are a few more safeguards than in contract law, including the right to counsel and the requirements of an adequate factual basis and a litany of waivers on the record.¹⁸ But the main rule of law is that prosecutors must live up to their bargains. As in contract law, “when a plea rests in any

9. *Id.* at 752–53; *see also* *Santobello v. New York*, 404 U.S. 257, 260–61 (1971).

10. *Bordenkircher v. Hayes*, 434 U.S. 357, 362 (1978) (quoting *Parker v. North Carolina*, 397 U.S. 790, 809 (1970) (opinion of Brennan, J.)).

11. *Id.* at 363.

12. *Santobello*, 404 U.S. at 260.

13. *See Bordenkircher*, 434 U.S. at 363–65; *Brady*, 397 U.S. at 750–54.

14. *See United States v. Mezzanatto*, 513 U.S. 196, 200–02 (1995).

15. *See* FED. R. CRIM. P. 11(b)(1) (enumerating the rights waived during a federal guilty-plea colloquy).

16. *See North Carolina v. Alford*, 400 U.S. 25, 37–38 (1970).

17. *See* FED. R. CRIM. P. 11(b)(2); *Boykin v. Alabama*, 395 U.S. 238, 242 (1969).

18. *See* FED. R. CRIM. P. 11(b); *see also Alford*, 400 U.S. at 38 (emphasizing the presence of a “strong factual basis for the plea” when accepting defendant’s guilty plea despite his simultaneous protestation of innocence); *Boykin*, 395 U.S. at 242–43 (holding that waiver of rights cannot be presumed from a silent record).

significant degree on a promise or agreement of the prosecutor, so that it can be said to be part of the inducement or consideration, such promise must be fulfilled.”¹⁹ Thus, when enforcing plea bargains, courts borrow such contract-law doctrines as detrimental reliance and the rule of construing contracts *contra proferentem*.²⁰ The main practical safeguard is that prosecutors and many defense counsel are repeat players who know the going rates and have reputational stakes in living up to their word.²¹

The federal and a majority of state systems forbid judges to participate in plea discussions, leaving bargained-for sentences up to the two parties.²² Of course, judges remain free to reject plea agreements or to vary from the recommended sentence, except under stipulated-sentence plea agreements.²³ But the plea-bargaining system presupposes that judges usually will accept bargains and hew close to the parties’ recommended sentences. Presented with a *fait accompli*, and unfamiliar with the facts because there has been no trial, most judges do just that, rubber-stamping the bargain and sentence.²⁴ A bit more information may emerge at sentencing, when victims may submit victim-impact statements and probation officers offer presentence investigation reports. By then, however, the judge usually has accepted the plea bargain and so can do little to incorporate new information or perspectives. At most, the judge may con-

19. *Santobello v. New York*, 404 U.S. 257, 262 (1971).

20. *Contra proferentem* is the canon of construing ambiguities in contracts against the drafter. *See, e.g.*, *United States v. Gebbie*, 294 F.3d 540, 552 (3d Cir. 2002) (summarizing cases applying *contra proferentem* canon to plea agreements); *People v. Navaroli*, 521 N.E.2d 891, 893–95 (Ill. 1998) (detrimental reliance); *see also Ricketts v. Adamson*, 483 U.S. 1, 10 (1987) (allowing parties to specify remedy for breach that operated in effect as waiver of double-jeopardy right); *Mabry v. Johnson*, 467 U.S. 504, 509–10 (1984) (treating plea agreement as binding only when defendant pleads guilty in reliance on prosecutorial promise that the prosecution later breaches), *abrogated on other grounds by Puckett v. United States* 556 U.S. 129 (2009); *Santobello*, 404 U.S. at 262 (granting relief where defendant pleaded guilty in reliance on prosecutorial promise and prosecutor later breached that promise, albeit inadvertently).

21. *See* STEPHANOS BIBAS, *THE MACHINERY OF CRIMINAL JUSTICE* 30 (2012); Bibas, *supra* note 5, at 2480–81.

22. *See* MARC L. MILLER & RONALD F. WRIGHT, *CRIMINAL PROCEDURES: PROSECUTION AND ADJUDICATION* 390 (2d ed. 2005); *see also* FED. R. CRIM. P. 11(c)(1).

23. *See, e.g.*, FED. R. CRIM. P. 11(c)(1), (3).

24. *See, e.g.*, GEORGE FISHER, *PLEA BARGAINING’S TRIUMPH: A HISTORY OF PLEA BARGAINING IN AMERICA* 131–34 (2003).

sider these factors in exercising discretion within the sentencing range left open by the bargain.

The prosecutor's charging decisions control that range to begin with. Judges can sentence defendants only for crimes to which they plead, and defendants can plead only to crimes with which they are charged. Charge bargains let prosecutors hem in judges' freedom to deviate at sentencing by choosing from an extensive menu of charges and sentencing ranges provided by today's modern criminal codes.²⁵ In structured-sentencing jurisdictions, sentencing guidelines bolster that power, further constraining judges and allowing prosecutors to promise specific sentences more credibly.²⁶ Charges thus become contract offers, setting the terms of the bargain and nailing down the price of performance at sentencing. Prosecutors vary the offers by varying the charges. Judges, operating within a long tradition of strong deference to prosecutors, are reluctant to intervene.²⁷

Plea bargains, like private bargains, require almost no public justification. A prosecutor need not explain a plea bargain at all, and a judge need do little to justify an agreed-upon sentence. In the minority of jurisdictions with sentencing guidelines, the judge may have to compute the offense level and recommended range and fill out a simple form. But, especially for a sentence within the recommended range, the judge need say little about his reasons for selecting a specific sentence.²⁸ Thus, there is little justification or record to permit meaningful appellate review. Indeed, when the judge sentences in accordance with the parties' bargain, there probably will be no appellate review at all because neither side will appeal. Even if the parties are occasionally unhappy with the sentences on which they have agreed, plea bargains typically waive the right to ap-

25. See, e.g., David A. Starkweather, *The Retributive Theory of "Just Deserts" and Victim Participation in Plea Bargaining*, 67 IND. L.J. 853, 872 (1992).

26. See Stephen J. Schulhofer & Ilene H. Nagel, *Plea Negotiations Under the Federal Sentencing Guidelines: Guideline Circumvention and Its Dynamics in the Post-Mistretta Period*, 91 NW. U. L. REV. 1284, 1304 (1997); Jeffrey Standen, *Plea Bargaining in the Shadow of the Guidelines*, 81 CALIF. L. REV. 1471, 1505-17 (1993).

27. See Barkow, *Institutional Design*, *supra* note 6, at 871-72.

28. See, e.g., *Rita v. United States*, 551 U.S. 338, 347, 356-59 (2007) (allowing courts to presume within-Guidelines sentences reasonable, requiring less explanation for within-Guidelines sentences (particularly when the defendant and prosecutor do not argue for a different sentence), and affirming a brief statement of reasons).

peal sentences, at least within the agreed-upon range.²⁹ Victims and the public are not parties to criminal cases and cannot appeal sentences.³⁰

Academic defenders of plea bargaining, most notably Judge Frank Easterbrook, embrace the market analogy to contracts for particular sentences, including the charge bargaining that comes with it. Easterbrook candidly acknowledges that the contract analogy fits awkwardly. The two sides are bilateral monopolists, and they bargain in the shadow of sentencing guidelines that operate as price controls, over a deal that makes one side worse off.³¹ Nevertheless, plea bargains make sense, he argues. “[C]ompromise is better than conflict” because it allows defendants to cap their exposure and get their cases over with, while letting prosecutors leverage their resources to convict many more defendants and maximize deterrence.³² The revealed preferences of defendants and prosecutors confirm that it must leave both sides better off.³³

Another group of plea-bargaining proponents who are less enamored of the free market embrace the contract metaphor even as they seek to regulate it. Robert Scott and the late Bill Stuntz, for example, acknowledge “fundamental structural impediments” that warp plea bargaining, but propose to mend it, not end it.³⁴ They nevertheless insist that “classical contract theory supports the freedom to bargain over criminal punishment.”³⁵ While perhaps defendants and the government should not be free to barter punishment, Scott and Stuntz believe that view would collide with “[t]he entire structure of the criminal

29. See Nancy J. King & Michael E. O’Neill, *Appeal Waivers and the Future of Sentencing Policy*, 55 DUKE L.J. 209, 231, 243–44 (2005) (finding, in an empirical study of nearly one thousand defendants, that defendants waived their rights to appeal in nearly two-thirds of all plea-bargained cases and that most of those waivers applied to appealing sentences as well as convictions).

30. See DOUGLAS E. BELOOF ET AL., VICTIMS IN CRIMINAL PROCEDURE 760–61, 764 (2d ed. 2006) (noting that victims may appeal only if expressly authorized to do so by statute and that only Maryland and Utah authorize appeals of denials of victims’ procedural rights, although several other states permit discretionary review of victims’-rights claims via the extraordinary writ of mandamus).

31. See Easterbrook, *supra* note 3, at 1975.

32. *Id.*

33. See Frank H. Easterbrook, *Criminal Procedure as a Market System*, 12 J. LEGAL STUD. 289, 309 (1983).

34. Robert E. Scott & William J. Stuntz, *Plea Bargaining as Contract*, 101 YALE L.J. 1909, 1910–11 (1992).

35. *Id.* at 1910.

justice system” in America.³⁶ The private law of contracts is woven into the fabric of our law; a fundamentally public-law model is too radical for Scott and Stuntz to contemplate.

B. MISSING: THE PUBLIC INTEREST

The loose thread that unravels Easterbrook’s account is his identification of prosecutors with the public interest: “If defendants and prosecutors (representing society) both gain, the process is desirable.”³⁷ While prosecutors and defense lawyers suffer from agency costs, he dismisses that objection as “trivial” because “[a]gency costs are endemic” throughout life.³⁸ Easterbrook’s casual equation of prosecutors with all of society’s multifarious interests is far too quick. It reduces justice to convictions and reduces the criminal justice morality play to a hidden bargain.

Because prosecutorial discretion is standardless and opaque, prosecutors have great leeway to exploit the gap between their own interests and those of the public, and they frequently do. Prosecutors may often view their job as maximizing convictions, but that is far from society’s only interest. Prosecutors have self-interests in lightening their workloads and avoiding embarrassing acquittals, so they are likely to be too risk-averse about taking cases to trial and thus too pliable on sentences.³⁹ They may offer deeper discounts to aggressive or well-connected defense counsel, especially in cases involving corporate or white-collar crime.⁴⁰ That pliability undermines racial and economic equality and can harm the diffuse public interest

36. *Id.* at 1917.

37. Easterbrook, *supra* note 33, at 309. The public interest, we note, is a famously slippery concept, and we do not offer or defend a full normative account of that concept here. Our claim is more modest: however one defines the public interest, one must seek to accommodate, balance, and reflect the public’s disparate and often conflicting values. Criminal justice, as currently administered, has drifted too far from that ideal.

38. *Id.* at 309; Easterbrook, *supra* note 3, at 1975.

39. See Bibas, *supra* note 5, at 2470–72.

40. See David Luban, *Are Criminal Defenders Different?*, 91 MICH. L. REV. 1729, 1745 (1993) (“The credible threat of an aggressive defense that will not necessarily lead to acquittal . . . may provide a bargaining chip sufficient to persuade an otherwise recalcitrant prosecutor to bargain in good faith.”); see also Darryl K. Brown, *Street Crime, Corporate Crime, and the Contingency of Criminal Liability*, 149 U. PA. L. REV. 1295, 1330–31 (2001) (observing that “white-collar criminals are harder for the government to pursue because they can raise enforcement costs with vigorous legal defenses starting early in investigations”).

in vigorous enforcement.⁴¹ Prosecutors might also overregulate, quickly pleading out high volumes of low-level crimes while glossing over real questions of guilt or the serious collateral consequences that might flow from such low-level pleas.⁴² They are trained to put cases into legal and administrative pigeonholes, shutting out laymen's broader concerns about equity and morality.⁴³ In Josh Bowers's evocative phrase, they "learn to think inside the proverbial legal box" without reflecting on how to exercise their discretion in line with the public's sense of justice.⁴⁴ They grow jaded by legal training and force of habit, so they come to lack outsiders' fresh perspectives.⁴⁵

Moreover, prosecutors appear to share Easterbrook's fundamentally bottom-line approach. They behave as if their job is to maximize convictions and thus deterrence and incapacitation. That view tends to slight less quantifiable substantive goals such as rehabilitation, retribution, and expressive condemnation, as well as softer values like reconciliation and forgiveness. The rhetoric of justice, not just efficiency, matters. The bottom-line mentality also slights the process benefits of transparent, participatory procedures.⁴⁶ Victims, defendants, and community members want their day in court. They want to know that the prosecutor has their best interests at heart. They want to *see* justice done, and they may want a voice in doing it. The mix of public values that goes into plea bargaining is complex, and we cannot necessarily trust prosecutors to get it right on their own.

Historically, criminal justice was both transparent and participatory. Until about two centuries ago, lay litigants and juries took the lead in matters of crime and punishment, hearing and deciding cases, assigning blame, and imposing sentences at public trials.⁴⁷ Even after professional prosecutors displaced pro se victims, prosecutors and judges lived in or near the neighborhoods they governed and were responsive to local communities' needs, views, and senses of justice. That collective historical memory, embedded in the Bill of Rights' jury-trial

41. See Bibas, *supra* note 5, at 2477–86.

42. See BIBAS, *supra* note 21, at 30, 32–33, 48–49.

43. See Josh Bowers, *Legal Guilt, Normative Innocence, and the Equitable Decision Not to Prosecute*, 110 COLUM. L. REV. 1655, 1689–92 (2010).

44. *Id.* at 1690.

45. BIBAS, *supra* note 21, at 32–33, 39–40.

46. See Stephanos Bibas, *Transparency and Participation in Criminal Procedure*, 81 N.Y.U. L. REV. 911, 922–23, 930–31 (2006).

47. See BIBAS, *supra* note 21, at 1–9.

guarantees, still informs the public's expectations and desire to see justice done. But these virtues are all but absent from today's sentencing hearings that rubber-stamp plea-bargained sentences. Plea bargaining occurs much earlier and out of sight. It excludes victims, community members, and other third parties from meaningful roles in illuminating the public interests at stake in sentencing.⁴⁸

Partisan control also threatens the structural safeguards on criminal justice. An independent judiciary is supposed to pursue justice, ensure public confidence, and promote the development of the law through precedent. It is supposed to check partisan prosecutors, who may be overzealous and overreach or serve their self-interests. To that end, witnesses and victims should offer their information and views, and probation officers should (and do) write up presentence investigation reports to inform sentencing judges. Sentencing judges are then supposed to offer reasons, and appellate courts can review those decisions and issue reasoned opinions that seek to ensure fair and consistent sentencing policy across cases.

The collusion endemic to plea bargaining subverts these structural safeguards, tying judges' hands at sentencing. It risks letting prosecutors, unchecked by judges, vary sentence discounts for possibly arbitrary or discriminatory reasons. Defendants themselves provide almost no pushback, as they overwhelmingly prefer to avoid trial and more severe post-trial sentences. Defendants' individual rights thus do little to check prosecutors, even when the exercise of those rights would clearly serve the public interest.⁴⁹ In addition, witnesses and victims who never testify cannot explain the harms defendants have caused or the punishments they might merit, and defendants' families or affected communities cannot explain how the sentencing policies at issue affect their own interests. When explanations do come, they often arrive only after bargains have settled matters. Parties sometimes limit or manipulate the sentencing information available, and judges often ignore presentence reports when they conflict with the parties' bargains.⁵⁰ Parties choose not to appeal and may waive their rights to do so. As a result, appellate review has little power to pre-

48. See *id.* at 1–6, 18–20, 29–40, 52.

49. See Barkow, *Separation of Powers*, *supra* note 6, at 1033–34.

50. See Francesca D. Bowman, Prob. Officers Advisory Grp. to the U.S. Sentencing Comm'n, *Probation Officers Advisory Group Survey*, 8 FED. SENT'G REP. 303, 305–06 (1996).

vent inequality, protect victims, or develop sentencing precedents in typical cases.⁵¹ And it does little to assure that plea-bargained sentencing adequately reflects and furthers public values.

The opacity and insularity of prosecutorial policies exacerbate the problem. Bargained-for sentences often reverberate beyond the individual case, with substantive policies both emerging from and driving individual charging, bargaining, and sentencing.⁵² Yet these policies may often be hidden and substantively questionable. Some prosecutors' offices have barebones charging and bargaining guidelines, if they have any at all.⁵³ Others have more extensive but still informal policies, developed incrementally through office meetings, memoranda, and "a general process of osmosis."⁵⁴ Even those offices that have fairly detailed written guidelines rarely make them public. And even those guidelines that are public are usually formulated behind closed doors without public input.⁵⁵

Lacking both wholesale- and retail-level input, the public has little way to probe plea bargaining's value choices or to

51. See Stephanos Bibas et al., *Policing Politics at Sentencing*, 103 NW. U. L. REV. 1371, 1394–95 (2009) (discussing how broad appeal waivers license collusion and threaten the development of precedent).

52. For a particularly salient example of non-party effects of retail sentences, consider what some observers have dubbed a possible "Madoff effect" on recent white-collar sentences, involving a noticeable uptick in sentences of record-breaking severity since Bernard Madoff received a prison sentence of 150 years after pleading guilty to arguably the largest individual financial crime in U.S. history. See Amir Efrati, *Possible Madoff Effect: Triple-Digit White-Collar Prison Sentences*, WALL ST. J. L. BLOG (Feb. 19, 2010, 2:20 PM), <http://blogs.wsj.com/law/2010/02/19/possible-madoff-effect-triple-digit-white-collar-prison-sentences/> (describing three record-breaking white-collar sentences handed down in the months following Madoff's sentencing and noting belief among many legal scholars that the Madoff sentence "likely empowered other judges to impose enormous, symbolic sentences for fraudsters").

53. See, e.g., Thomas Michael McDonnell, *Playing Beyond the Rules: A Realist and Rhetoric-Based Approach to Researching the Law and Solving Legal Problems*, 67 UMKC L. REV. 285, 301 n.86 (1998); Welsh S. White, *A Proposal for Reform of the Plea Bargaining Process*, 119 U. PA. L. REV. 439, 442 (1971); Dominick R. Vetri, Note, *Guilty Plea Bargaining: Compromises by Prosecutors to Secure Guilty Pleas*, 112 U. PA. L. REV. 865, 900 (1964) (finding that forty-seven out of sixty-seven prosecutors questioned worked in offices without formal rules or procedures with respect to plea bargaining).

54. White, *supra* note 53, at 442.

55. See Angela J. Davis, *The American Prosecutor: Independence, Power, and the Threat of Tyranny*, 86 IOWA L. REV. 393, 443 (2001) ("Unless the prosecutor alerts her constituents to policies and invites input, the public may remain uninformed. Prosecutors rarely publicize information on charging and plea bargaining policies on the ground that such openness would threaten law enforcement."); McDonnell, *supra* note 53, at 301 n.86.

check their prosecutorial agents. They cannot question whether a lenient sentence for a first-time thief reflects a line prosecutor's personal mercy or an officewide policy of flushing petit larceny cases to rack up quick conviction statistics. They cannot know whether a stiff penalty for a juvenile mugger flows from a prosecutor's own vindictiveness or a blanket refusal to charge bargain over violent crimes. And they cannot weigh in on the written and unwritten rules that drive plea bargaining. Those rules stretch from the moment of arrest, through charging thresholds, to diversion standards, to sentencing enhancements, to prosecutorial resource allocation across cases. Prosecutors are free to craft those policies as they see fit, privileging their own interests and concerns over those of the public they supposedly serve.

C. AN ILLUSTRATION

The problems inherent in bargained-for sentences became apparent most recently in one of the rare cases to reject a bargain. In October 2011, the Securities and Exchange Commission (SEC) sued Citigroup civilly for securities fraud, accusing it of misleading investors into investing in weak assets that Citigroup proceeded to bet against.⁵⁶ On the same day that it filed its complaint, the SEC proposed and Citigroup consented to a civil settlement of the charges. Under the settlement, Citigroup would disgorge its profits on the deal plus interest, pay a \$95 million penalty, agree to a permanent injunction, and adopt internal safeguards against securities fraud. As part of the settlement, Citigroup would neither admit nor deny the allegations.⁵⁷ The SEC has long entered into such consent decrees without requiring any admission or denial of wrongdoing. That "long-standing policy [is] hallowed by history," as judges usually go along with the SEC's recommendations.⁵⁸ Like many prosecutors, the SEC justifies its practice by noting that settlements allow the agency to pursue many more cases with its limited resources.⁵⁹

56. See *SEC v. Citigroup Global Mkts. Inc.*, 827 F. Supp. 2d 328, 329–30 (S.D.N.Y. 2011).

57. See *id.* at 330.

58. *Id.* at 332.

59. See, e.g., SEC's Memorandum of Law in Response to Questions Posed by the Court Regarding Proposed Settlement at 12–13, *SEC v. Citigroup Global Mkts. Inc.*, No. 11 Civ. 7387 (JSR) (S.D.N.Y. Nov. 7, 2011) (citing *SEC v. Randolph*, 736 F.2d 525, 529–30 (9th Cir. 1984)).

Judge Jed Rakoff rejected the settlement. His rejection was so extraordinary that it made the front page of the *New York Times*.⁶⁰ Judge Rakoff noted that Citigroup was a recidivist, having been accused of and settled similar claims before.⁶¹ Yet the settlement would produce little deterrence or restitution given Citigroup's size and profitability and the \$700 million lost by investors.⁶² More importantly, the parties' "narrow interests [in settling] . . . cannot be automatically equated with the public interest, especially in the absence of a factual base on which to assess whether the resolution was fair, adequate, and reasonable."⁶³ While courts must defer to the SEC's expertise, they must independently satisfy themselves that settlements serve the public interest.⁶⁴ Unless a trial establishes facts or the parties admit them, judges lack a basis for evaluating settlements and deploying coercive power.⁶⁵ And while the public has an "overriding public interest in knowing the truth," settlements without facts "deprive[] [the public] of ever knowing the truth in a matter of obvious public importance."⁶⁶

Granted, *Citigroup* is a civil-fraud case and involves hundreds of millions of dollars. But its concern for the judiciary's independent role in safeguarding the public good applies at least as strongly to criminal cases. And the problem it illustrates is endemic to even the most mundane, low-level criminal matters.⁶⁷ Prosecuting agencies are imperfect guardians of the public interest, so judges must check them. The parties' private interests in settling disputes do not exhaust the public's interest in airing all the facts, seeing justice done, and testing bar-

60. See Edward Wyatt, *Judge Rejects an S.E.C. Deal With Citigroup*, N.Y. TIMES, Nov. 29, 2011, at A1.

61. See *Citigroup Global Mkts. Inc.*, 827 F. Supp. 2d at 333–34.

62. See *id.* at 329, 333–34.

63. *Id.* at 335.

64. See *id.* at 330–32.

65. See *id.* at 332, 335.

66. *Id.* at 332, 335.

67. To be sure, unlike in the administrative penalty context, in all criminal cases, even the most mundane ones, Rule 11 of the Federal Rules of Criminal Procedure and analogous state rules require a judge accepting a plea to find that it has an adequate factual basis. See FED. R. CRIM. P. 11(b)(3); WAYNE R. LAFAVE ET AL., CRIMINAL PROCEDURE § 21.4(f) nn. 21–22 (5th ed. 2009) (discussing the factual basis requirement of Rule 11 and comparable state rules). In practice, however, that requirement does little to ensure either that the actual facts surrounding the crime are fully disclosed or that the prosecutor's charging decision takes full and fair account of those facts. See *infra* notes 71–72 and accompanying text.

gaining policies that may be “hallowed by history, but not by reason.”⁶⁸

Yet the ruling is exceptional, almost unprecedented.⁶⁹ It is the rare judge who will stick his neck out and thwart a settlement. Judges value settlements because they clear their dockets expeditiously, and when the parties agree there is no one to complain, appeal, or offer a different point of view. For many years, judges have routinely acceded to securities settlements without requiring an admission of wrongdoing.⁷⁰ Much the same happens in criminal cases, where defendants may hedge, take no position, or even openly deny guilt while reaping plea-bargained sentences.⁷¹ Even when defendants grudgingly admit guilt as part of plea bargains, the parties may present only selective and partial accounts rather than a full record of all the facts and views. And even when judges, sentencing guidelines, or statutes might call for a different sentence in light of a given bad act, prosecutors can still determine the effective sentence by deciding what crime to charge. The upshot, as Judge Gerard Lynch, Rachel Barkow, and others have explained, is that prosecutors hold all the cards: they are the investigators, adjudicators, and sentencers rolled into one, with tremendous power to shape sentencing policy in practice.⁷²

The problem of plea bargaining, then, is not just one of disparity, questionable convictions or acquittals, or unjust outcomes. These are real problems, but they are symptoms of a structural flaw that leaves prosecutors and defendants free to pursue their own interests outside of the public eye. The problem, in short, is one of hidden and unaccountable policymaking by plea.

68. *Citigroup Global Mkts. Inc.*, 827 F. Supp. 2d at 331.

69. See Wyatt, *supra* note 60, at A1 (quoting former SEC chairman Harvey Pitt: “This is clearly a case of great significance . . . It’s also a case for which there is no direct precedent.”). The Second Circuit has stayed the proceedings before Judge Rakoff, finding “that the S.E.C. and Citigroup have made a strong showing of likelihood of success in setting aside” Judge Rakoff’s rejection of the settlement. *SEC v. Citigroup Global Mkts, Inc.*, 673 F.3d 158, 169 (2012). Given that the SEC and Citigroup are united in opposition to Judge Rakoff’s order, the court also appointed counsel to defend the order on appeal. *Id.* at 161.

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

71. See BIBAS, *supra* note 21, at 60–62.

72. See Lynch, *supra* note 6 at 2120; see also Barkow, *Separation of Powers*, *supra* note 6 at 1025.

II. PARTICIPATION AND THE PUBLIC INTEREST IN ADMINISTRATIVE LAW

Administrative law has long grappled with similar issues. Administrative agencies, like prosecutors, operate under massive statutory delegations of power. The agency personnel who implement those statutory charges make thousands of value-laden decisions every day, from micro-level choices about whether to issue drilling permits to macro-level judgments about allowable levels of contaminants in drinking water. As in criminal law, those decisions greatly affect regulated parties, communities, and the general public.

But unlike criminal law, administrative law has been built around ensuring that agencies make those decisions in the public interest. A central concept is participation, the idea that citizens should have some input into agency decisions. Public participation, of course, is not the only way to check agency abuses. But it is a crucial way to ensure that agency decisions are legitimate, accountable, and just.

There are many ways to ensure participation, ranging from the Administrative Procedure Act's requirements to common-law principles that inform judicial review. They all seek to leaven agency decision-making with a healthy dose of public input, blending democracy with agency expertise and judicial oversight. And while the same legitimacy and accountability concerns that drive participation in administrative law also exist in criminal justice, criminal law has not kept pace.

A. WHY PARTICIPATION MATTERS

Before continuing, we should say more about what participation is and why it matters. Members of the public can participate in governmental decision-making in many ways. One can vote for a president, a member of Congress, or one's local prosecutor. Voting is abstract and general: it imperfectly communicates the voter's preferences on any given policy and does not involve the voter in the details of policymaking. At the other end of the spectrum are more direct modes of participation, in which citizens actually exercise governmental power. Examples include serving on a citizen licensing board or a criminal jury.⁷³

73. See James D. Chesney, *Citizen Participation on Regulatory Boards*, 9 J. HEALTH POL. POL'Y & L. 125, 125-35 (1984); Ronald F. Wright, *Why Not Administrative Grand Juries?*, 44 ADMIN. L. REV. 465, 475-80 (1992).

Both forms of participation are important, and we will return to each briefly later on.⁷⁴ But the kind of participation we envision is somewhere in between. It involves letting citizens communicate their information and views, but leaves the governmental decision-maker ultimate power to balance the various inputs and make a final decision. In the process of reconciling these voices, the decision-maker mediates among various conceptions of the public good. This sort of participation has become a cornerstone of modern administrative law. Indeed, as Ronald Wright and Marc Miller put it, “the history of administrative government in the United States can be framed as a story about combining expertise and public input.”⁷⁵

Why does participation of this sort matter to administrative law? It was not always this way. The Progressive reformers who put into place the broad institutional outlines of the modern regulatory state aimed to insulate administrative agencies from citizen involvement, not encourage it. At best, citizens were seen as incompetent in the affairs of government; at worst, they were suspect as corrupted instruments of majoritarian politics.⁷⁶ Professional agency personnel, by contrast, were viewed as highly skilled technocrats who merely called upon their professional training to implement judgments that already had been made by Congress.⁷⁷ New Dealers like James Landis took the notion further, famously maintaining that administration was a science in which experts “bred to the facts” could ascertain and implement the objective public interest with only the most casual guidance from their organic statutes.⁷⁸

But as the federal government exploded in size and the authority delegated to agencies mushroomed, the place of participation in the administrative state quickly changed. It soon be-

74. See *infra* text accompanying notes 249–250, 287–293.

75. Wright & Miller, *Accountability Deficit*, *supra* note 6, at 1591.

76. See Jasper Y. Brinton, *Some Powers and Problems of the Federal Administration*, 61 U. PA. L. REV. 135, 160–61 (1913) (discussing need for special training of administrative officials); Wright, *supra* note 73, at 495–96 (discussing Progressive concern that lay citizens could not serve competently or independently).

77. See BENJAMIN P. DE WITT, *THE PROGRESSIVE MOVEMENT* 299–318 (1915); MARTIN J. SCHIESL, *THE POLITICS OF EFFICIENCY: MUNICIPAL ADMINISTRATION AND REFORM IN AMERICA: 1880–1920*, at 6–25 (1977); RUSSELL STORY, *THE AMERICAN MUNICIPAL EXECUTIVE* 218–20 (1918); Morris L. Cooke, *Scientific Management of the Public Business*, 9 AM. POL. SCI. REV. 488 (1915).

78. See JAMES M. LANDIS, *THE ADMINISTRATIVE PROCESS* 154–55 (1938).

came apparent that even the most expert agency personnel engaged in the most seemingly technical of inquiries could not avoid making deeply discretionary, highly value-laden decisions in the name of the public interest.⁷⁹ One cannot, for instance, determine the limit on parts per million of airborne benzene that is “reasonably necessary or appropriate to provide safe or healthful employment” without confronting difficult tradeoffs of dollars versus lives or lives versus jobs; even “safety” is a fundamentally normative question that implicates unavoidable value judgments.⁸⁰ At the same time, scholars increasingly recognized that agencies were not the enlightened Platonic guardians of the New Dealers’ vision. They were imperfectly attuned to the public interest, with their own preferences, agendas, incentives, and susceptibilities to capture by the very industries they were supposed to regulate. In other words, “the public interest is a texture of multiple strands”⁸¹ and “not a monolith”;⁸² even if it were monolithic, we could not necessarily trust agencies to pursue it. Those realizations undermined the notion of the impartial and just administrator and opened up a troubling legitimacy gap in the field.⁸³ The project of administrative law quickly shifted from protecting agencies from citizen interference to closing that gap and structuring agency discretion. Scholars now seek to “explain how unelected bureaucrats, making their choices without resort to a scientific method that produces a single correct answer, can claim to exercise legitimate power in a democracy.”⁸⁴

79. See Richard B. Stewart, *Reformation of American Administrative Law*, 88 HARV. L. REV. 1669, 1676 (1975).

80. See *Indust. Union Dep’t, AFL-CIO v. Am. Petroleum Inst.*, 448 U.S. 607, 615 (1980).

81. *FPC v. Hope Natural Gas Co.*, 320 U.S. 591, 627 (1944) (Frankfurter, J., dissenting).

82. Ernest Gellhorn, *Public Participation in Administrative Proceedings*, 81 YALE L.J. 359, 360 (1972).

83. See Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245, 2253–54 (2001) (tracing the rise of the regulatory state and the evolution of concerns about objectivity and legitimacy that accompanied it); Stewart, *supra* note 79, at 1682–88 (discussing reduced faith in agencies’ ability to protect collective interests and the resulting need for new approaches to legitimating agency action and controlling agency discretion).

84. Wright, *supra* note 73, at 501 (citing CHRISTOPHER F. EDLEY, *ADMINISTRATIVE LAW: RETHINKING JUDICIAL CONTROL OF ADMINISTRATIVE AGENCIES* 217 (1990)); see also William Funk, *Public Participation and Transparency in Administrative Law—Three Examples as an Object Lesson*, 61 ADMIN. L. REV. 171, 172–80 (2009) (discussing the history and legal and political context of the development of public participation as a cornerstone of modern American administrative law).

Participation has become embedded in modern administrative law as critical to that project for several reasons. It enhances the soundness of agency decisions by improving the quality and variety of the information an agency considers, whether empirical or related to the public's preferences.⁸⁵ It improves accountability by obligating agencies to justify their actions publicly, ensuring that they are "relatively informed and responsive to public needs."⁸⁶ It increases public trust and educates citizens in government affairs, creating feedback loops between agencies and citizens.⁸⁷ And, by requiring agencies to "balanc[e] all elements essential to a just determination of the public interest," it bolsters agency decision-making's democratic pedigree.⁸⁸

Of course, how participation binds agents to the citizenry and promotes legitimacy will vary depending on one's theory of how agencies work.⁸⁹ Neo-pluralist theorists view agency decisions as legitimate because they let agencies aggregate the information and preferences of a wide variety of competing interest groups.⁹⁰ Civic republicans focus more on the intrinsically democratic nature of agency decision-making itself, seeing it as

85. See Stewart, *supra* note 79, at 1748.

86. *Misso Servs. Corp., v. Small Bus. Admin.*, No. 81-0283, 1981 WL 30841, at *3 (D.D.C. Dec. 23, 1981).

87. See HARRY C. BOYTE, *COMMONWEALTH: A RETURN TO CITIZEN POLITICS* 131–33, 147–56 (1989); MARY G. KWEIT & ROBERT W. KWEIT, *IMPLEMENTING CITIZEN PARTICIPATION IN A BUREAUCRATIC SOCIETY: A CONTINGENCY APPROACH*, 35–36, 84–96 (1981); CAROLE PATEMAN, *PARTICIPATION AND DEMOCRATIC THEORY* 22–44 (1970); John Ladd, *The Ethics of Participation*, in XVI *NOMOS: PARTICIPATION IN POLITICS* 98, 112–20 (J.R. Pennock & John R. Chapman eds., 1975); Hannah F. Pitkin, *Justice: On Relating Private and Public*, 9 *POL. THEORY* 327, 343, 348 (1981).

88. *Air Line Pilots Ass'n v. Civil Aeronautics Bd.*, 475 F.2d 900, 905 (D.C. Cir. 1973); see also *Sierra Club v. Costle*, 657 F.2d 298, 400–01 (D.C. Cir. 1981) ("[T]he very legitimacy of general policymaking performed by unelected administrators depends in no small part on the openness, accessibility, and amenability of these officials to the needs and ideas of the public."); *Palisades Citizens Ass'n v. Civil Aeronautics Bd.*, 420 F.2d 188, 191–92 (D.C. Cir. 1969).

89. It also will vary to at least some degree depending on the specific context, as the possibility of a gap between principal and agent interests, and the discounting of public values, will be more intense in some agency settings than in others. For an effort to sort out the times when external monitoring and public input will be most valuable as a supplement to agency expertise and professionalism, see Sidney A. Shapiro & Ronald F. Wright, *The Future of the Administrative Presidency: Turning Administrative Law Inside-Out*, 65 *U. MIAMI L. REV.* 577, 589–95 (2011).

90. See Steven P. Croley, *Theories of Regulation: Incorporating the Administrative Process*, 98 *COLUM. L. REV.* 1, 57–60 (1998).

collective deliberation about competing regulatory values.⁹¹ Public-interest theorists focus “on the general public’s ability to monitor regulatory decisionmakers.”⁹² Principal-agent theories take a different tack, seeking to locate agencies’ legitimacy in their responsiveness to democratically elected actors.⁹³ Public-choice theorists eschew legitimating agency regulation altogether. Instead, they see it as suboptimal market decision-making, in which agencies deliver regulatory “goods” to well-organized political interest groups, which profit at the expense of the diffuse public.⁹⁴

The differences among these theories are significant, and we do not mean to oversimplify. But our point is not to debate them here. As Nina Mendelson explains, virtually all of the major theories that seek to legitimate administrative decision-making see participation as important.⁹⁵ Neo-pluralists might see the opportunity to supply information and participate as crucial to aggregating interests effectively.⁹⁶ Civic republicans might see it as necessary to ensure that agency deliberations “thoroughly engage relevant viewpoints.”⁹⁷ Even presidential-control proponents might see direct public involvement as a way to supply data and analyses and to monitor agencies’ compliance with statutory mandates.⁹⁸ And though confidence in interest representation has waned in recent decades, participatory mechanisms remain a cornerstone of administrative law.⁹⁹

91. See Mark Seidenfeld, *A Civic Republican Justification for the Bureaucratic State*, 105 HARV. L. REV. 1511, 1515 (1992).

92. See Croley, *supra* note 90, at 5.

93. See Kagan, *supra* note 83, at 2273; Nina A. Mendelson, *Regulatory Beneficiaries and Informal Agency Policymaking*, 92 CORNELL L. REV. 397, 418–20 (2007).

94. See Croley, *supra* note 90, at 5, 34–41.

95. See Mendelson, *supra* note 93, at 419–20; see also Croley, *supra* note 90, at 142–62 (reviewing extent to which administrative processes accord with various theories of regulation).

96. See Mendelson, *supra* note 93, at 418.

97. See *id.* at 419.

98. See Kagan, *supra* note 83, at 2360; Mendelson, *supra* note 93, at 419.

99. See Sidney A. Shapiro & Richard W. Murphy, *Eight Things Americans Can't Figure Out About Controlling Administrative Power*, 61 ADMIN. L. REV. (SPECIAL EDITION) 5, 6 (2009) (observing that “[f]or agency governance to be legitimate . . . administrative law must find ways to mediate [its] power,” and that one critical mechanism for doing so in American administrative law is through “fostering public participation in agency decision-making”); Wright & Miller, *Accountability Deficit*, *supra* note 6, at 1593 (“Current doctrines of administrative law carve out special zones of influence for expertise and for public input.”).

B. HOW PARTICIPATION WORKS

1. Mechanisms of Participation

The paradigmatic example of administrative law's requirement for public participation in agency policymaking is the APA's notice-and-comment procedure. In informal rulemaking, the APA requires an agency to provide the public with notice and an opportunity to comment before its proposed rule finally takes effect.¹⁰⁰ In practice, that applies whenever an agency seeks to lay down legally binding substantive obligations at the wholesale level. The notice, which is published in the Federal Register and on the federal government's central rulemaking website,¹⁰¹ must adequately frame the issues so as to enable meaningful input by citizens: the agency must lay out both the terms or substance of the proposed rule and its basis, including its factual and scientific support.¹⁰² The comment period stays open for a specified amount of time, often a few months. During that time, any interested members of the public may submit their own "written data, views, or arguments" concerning the proposal.¹⁰³ After considering the public's comments and making any changes, the agency publishes its final rule, again accompanied by a statement of its "basis and purpose."¹⁰⁴ The statement of basis and purpose must explain "what major issues of policy were ventilated by the informal proceedings and why the agency reacted to them as it did."¹⁰⁵ The entire process, as the D.C. Circuit put it, is "designed (1) to ensure that agency regulations are tested via exposure to diverse public comment, (2) to ensure fairness to affected parties, and (3) to give affected parties an opportunity to develop evi-

100. 5 U.S.C. § 553(c) (2006).

101. REGULATIONS.GOV, <http://www.regulations.gov> (last visited Sept. 6, 2012).

102. See 5 U.S.C. § 553(b)(3) (2006); *Portland Cement Ass'n v. Ruckelshaus*, 486 F.2d 375 (D.C. Cir. 1973); RICHARD J. PIERCE, JR. ET AL., *ADMINISTRATIVE LAW AND PROCESS* § 6.4.6a (5th ed. 2008).

103. 5 U.S.C. § 553(c); see, e.g., 16 C.F.R. § 1.13(h) (2012) (requiring minimum of sixty-day comment period after FTC presiding officer places a recommended decision in rulemaking record); 44 C.F.R. § 1.4(e) (2012) (FEMA policy to allow public sixty days for comment submission); 50 C.F.R. § 424.16(c)(2) (2012) (sixty-day comment period for proposed rules of the Fish and Wildlife Service, Department of the Interior and National Marine Fisheries Service, National Oceanic and Atmospheric Administration, and Department of Commerce relating to listing of endangered and threatened species).

104. 5 U.S.C. § 553(c).

105. *Auto. Parts & Accessories Ass'n v. Boyd*, 407 F.2d 330, 338 (D.C. Cir. 1968).

dence in the record to support their objections to the rule and thereby enhance the quality of judicial review.”¹⁰⁶

Broad standing rules enhance public input. The APA allows any “person . . . adversely affected or aggrieved” within the meaning of an agency’s organic statute to seek judicial review of agency action.¹⁰⁷ Courts interpret this language liberally to extend well beyond parties directly subject to an agency rule.¹⁰⁸ They routinely allow trade groups, public interest groups, and others having an interest in the subject of a rule to challenge agency decisions.¹⁰⁹ Challengers can contest the procedures used in promulgating the rule, by, for example, alleging lack of notice of the basis for a proposed rule.¹¹⁰ They can attack a rule’s substance, arguing, for instance, that it is arbitrary and capricious because it contravenes the weight of scientific evidence.¹¹¹ Or they can raise hybrid procedural-substantive challenges, such as attacking a rule as arbitrary and capricious for failing to respond to a major objection raised in comments.¹¹²

Other general statutory provisions bolster participation as well. The Negotiated Rulemaking Act encourages agencies to work closely with affected stakeholders to reach consensus on proposed rules before the agencies issue them.¹¹³ The Act permits an agency to convene a committee of interested persons and organizations, some of whom the agency invites and others who apply after public notice, to address a specific problem in need of a rule.¹¹⁴ The committee then works with a facilitator, who keeps a record of the proceedings, to reach consensus on the substance of the rule.¹¹⁵ Successful negotiations result in a proposed rule; unsuccessful negotiations at least result in some

106. *Int’l Union, United Mine Workers of Am. v. Mine Safety & Health Admin.*, 407 F.3d 1250, 1259 (D.C. Cir. 2005).

107. 5 U.S.C. § 702 (2006).

108. *See Ass’n of Data Processing Serv. Org., Inc. v. Camp*, 397 U.S. 150, 154 (1970).

109. *See id.* at 155.

110. *See United States v. N. S. Food Prod. Corp.*, 568 F.2d 240, 251 (2d Cir. 1977); *Portland Cement Ass’n v. Ruckelshaus*, 486 F.2d 375, 402 (D.C. Cir. 1973).

111. *See Motor Vehicle Mfrs. Ass’n of the U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 52–54 (1983).

112. *See cases cited infra* note 126.

113. *See Negotiated Rulemaking Act*, 5 U.S.C. §§ 561–570a (2006); *PIERCE ET AL.*, *supra* note 102, § 6.4.6f, at 342–43 (describing negotiated rulemaking).

114. 5 U.S.C. § 564 (2006).

115. *See id.* § 566(d).

pre-proposal airing of what the issues are.¹¹⁶ The Federal Advisory Committee Act and the Government in the Sunshine Act similarly seek to ensure that meetings and consultations with private interests on matters of agency policy are known and open to the public.¹¹⁷

Organic statutes and agency practices provide for similar consultation in more specific contexts, such as long-range planning programs involving public land management and transportation.¹¹⁸ The Environmental Protection Agency, the Department of Health and Human Services, and other agencies use risk-ranking, willingness-to-pay, and similar surveys to determine public preferences and values regarding harms to life, health, or the environment.¹¹⁹ A number of agencies, such as the Internal Revenue Service, the Department of Homeland Security, and the Occupational Safety and Health Administration (OSHA), also adopt public enforcement memoranda to guide and explain their enforcement decisions, and they periodically revise those policies in response to public concerns.¹²⁰

116. See generally NEGOTIATED RULEMAKING SOURCEBOOK (David M. Pritzker & Deborah S. Dalton eds., 2d ed. 1995) (describing processes and communications from a number of successful and unsuccessful negotiated rulemakings).

117. See Federal Advisory Committee Act, 5 U.S.C. app. 2 § 2 (2006); Government in the Sunshine Act, 5 U.S.C. § 552b (2006). The Freedom of Information Act also grants members of the public widespread access to agency information, enhancing citizens' ability to make participation effective. See 5 U.S.C. § 552 (2006).

118. See, e.g., Forest and Rangeland Renewable Resources Planning Act, 16 U.S.C. § 1612 (2006) (providing that the Secretary of Agriculture shall establish procedures to give the public adequate notice and an opportunity to comment on the formulation of standards, criteria, and guidelines applicable to Forest Service programs).

119. See U.S. ENVTL. PROT. AGENCY, VALUING THE PROTECTION OF ECOLOGICAL SYSTEMS AND SERVICES: A REPORT OF THE EPA SCIENCE ADVISORY BOARD 44–45 (2009), available at [http://yosemite.epa.gov/sab/sabproduct.nsf/F3DB1F5C6EF90EE1852575C500589157/\\$File/EPA-SAB-9-012-unsigned.pdf](http://yosemite.epa.gov/sab/sabproduct.nsf/F3DB1F5C6EF90EE1852575C500589157/$File/EPA-SAB-9-012-unsigned.pdf) (describing survey methods used in valuing ecosystem services); Baruch Fischhoff, *Ranking Risks*, 6 RISK 191, 196–97 (1995) (describing EPA's use of state and local risk-ranking exercises to aid in priority determinations); see also Samuel R. Bagenstos, *The Americans with Disabilities Act as Risk Regulation*, 101 COLUM. L. REV. 1479, 1508 & n.115 (2001) (discussing the Health Services Commission's use of public quality-of-life ratings in determining priority condition-treatment lists).

120. See, e.g., I.R.S. Notice 2011-1, 2011-1 C.B. 259, available at <http://www.irs.gov/pub/irs-drop/n-11-01.pdf>; U.S. DEPT OF HOMELAND SEC., GUIDANCE TO ICE ATTORNEYS REVIEWING THE CBP, USCIS, AND ICE CASES BEFORE THE EXECUTIVE OFFICE FOR IMMIGRATION REVIEW (2011), available at <http://www.ice.gov/doclib/foia/prosecutorial-discretion/guidance-to-ice-attorneys-reviewing-cbp-uscis-ice-cases-before-eoir.pdf>; OCCUPATIONAL SAFE-

Like the APA's notice-and-comment procedure itself, many of these mechanisms apply primarily to agency actions taken at the wholesale, or rulemaking, level—the equivalent of a sentencing commission's creation of binding sentencing guidelines. Individual sentencing determinations, by contrast, are more like adjudications. But even at the retail level of individual agency adjudications, public input is important, if less systematized. Some agencies, like the FCC, allow interested parties wide latitude to intervene in formal adjudications.¹²¹ Others, like the NLRB, let interested parties submit views and data via amicus briefs.¹²²

Where civil penalties or consent decrees are at issue in agency enforcement actions, some statutes and regulations require soliciting and considering public comments.¹²³ A few, like the Tunney Act, go even further. It requires the Department of Justice to give public notice of civil consent judgments entered under U.S. antitrust laws, provide a sixty-day comment period, and publish both the comments and its own written response in the Federal Register.¹²⁴ The district court must find that the consent judgment is in fact in the public interest before entering it and may consider the public's comments in making that determination.¹²⁵

TY AND HEALTH ADMIN., U.S. DEPT OF LABOR, OSHA'S FIELD OPERATIONS MANUAL (FOM) (2009), available at http://www.osha.gov/OshDoc/Directive_pdf/CPL_02-00-148.pdf. Many agencies adopt similar practices for a variety of informal and non-binding guidance documents. See Mendelson, *supra* note 93, at 424–27; see also Memorandum from Rob Portman, Dir., Office of Mgmt. and Budget, to the Heads of Executive Departments and Agencies 13–18 (Jan. 18, 2007), available at <http://www.whitehouse.gov/omb/memoranda/fy2007/m07-07.pdf> (requiring agencies to gather and accept public comments for “significant” guidance documents, but generally not requiring them to offer a public response).

121. See 47 C.F.R. § 1.223 (2012).

122. See BRENT GARREN ET AL., HOW TO TAKE A CASE BEFORE THE NLRB 207 (7th ed. 2000); see generally PIERCE ET AL., *supra* note 102, §§ 5.5–5.5.4, at 171–81 (surveying agency intervention rules).

123. See 33 U.S.C. § 1319(g)(4) (2006); FTC Regulations, 16 C.F.R. §§ 2.34(c)–(e) (2012); Consumer Product Safety Commission Regulations, 16 C.F.R. §§ 1118.20(e)–(g) (2012); see also Resource Conservation and Recovery Act, 42 U.S.C. § 6973(d) (2006); Clean Air Act, 42 U.S.C. § 7413(g) (2006); Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C. § 9622(d)(2) (2006); 28 C.F.R. § 50.7 (2012) (adopting procedures for public comment on proposed consent judgments under CERCLA).

124. See 15 U.S.C. §§ 16(b)–(d) (2006).

125. See *id.* §§ 16(e), (f)(4) (2006).

2. Participation, Explanation, and Judicial Review

Opportunities to participate would be worth little if agencies could ignore public comments at will, with no explanation or oversight. Administrative law gives teeth to participation by requiring robust explanations and judicial review. Agencies conducting informal rulemakings, for example, must respond to significant public comments on the record, particularly those that criticize the agency's position or provide new, pertinent information.¹²⁶ In informal adjudications, statutes do not formally require agencies to respond to comments. Even there, however, agencies cannot act "arbitrar[ily] and capricious[ly]" or ignore significant information or arguments provided by intervenors or other commenters.¹²⁷ In all cases, agencies must base their decisions on the information before them and must adequately explain their choices.

Courts take a "hard look" at agency action to enforce that principle, probing the record and agencies' reasoning to ensure that their decisions are not arbitrary, have some basis in fact, and comply with their organic statutes.¹²⁸ That means that agencies must justify refusals to embrace obvious alternatives, such as the choice of one route over another in building a highway through a park.¹²⁹ They must explain how they are treating like cases alike and different cases differently, such as why one refusal to bargain with a group of faculty at one university constitutes an unfair labor practice while another does not.¹³⁰ And they must give reasons for changing course from past positions, such as denying waivers of deportation to aliens who fraudulently enter the country after having allowed such waivers for years.¹³¹ In short, in implementing their visions of the public in-

126. See, e.g., *PPL Wallingford Energy LLC v. FERC*, 419 F.3d 1194, 1198–99 (D.C. Cir. 2005); *La. Fed. Land Bank Ass'n, FLCA v. Farm Credit Admin.*, 336 F.3d 1075, 1078 (D.C. Cir. 2003).

127. See 5 U.S.C. § 706(2)(A) (2006); *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 416 (1971).

128. See *PIERCE ET AL.*, *supra* note 102, § 7.5, at 391–403 (describing the hard-look doctrine).

129. See *Citizens to Preserve Overton Park*, 401 U.S. at 413–20; see also *Motor Vehicle Mfrs. Ass'n of the U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 57 (1983) ("An agency's view of what is in the public interest may change, either with or without a change in circumstances. But an agency changing its course must supply a reasoned analysis." (quoting *Greater Bos. Television Corp. v. FCC*, 444 F.2d 841, 852 (D.C. Cir. 1970)) (internal quotation marks omitted)).

130. See *Lemoyne-Owen Coll. v. NLRB*, 357 F.3d 55, 61 (D.C. Cir. 2004).

131. See *INS v. Yang*, 519 U.S. 26, 32 (1996).

terest, agencies must explain and justify each exercise of their discretion.

Public input and judicial review do not give either courts or the public the final say. Agency decisions are still *agency* decisions. It is a time-honored principle of administrative law that, in reviewing agency actions, courts will not substitute their own vision of the public good for that of the agency.¹³² Judges must give great deference to agency judgments, particularly where they are “the product of administrative experience, appreciation of the complexities of the problem, realization of the statutory policies, and responsible treatment of the uncontested facts.”¹³³ Agencies have the primary role in shaping their substantive agenda, as exemplified by *Chevron*’s famous instruction that courts must defer to agencies’ reasonable interpretations of their organic statutes whenever Congress has not “directly spoken to the precise question at issue.”¹³⁴

Public input into agency decision-making does not by itself drive all of these requirements, and we do not mean to suggest that it does. What it does do, however, is serve as a critical spur for judicial review. It helps courts to prod agencies to defend their actions as they “reweigh and reconcile . . . often nebulous or conflicting policies . . . in the context of a particular factual situation with a particular constellation of affected interests.”¹³⁵ By forcing agencies to defend their actions in light of competing facts and values, participation helps courts to ensure that agency action aims at some honest vision of the public good.¹³⁶

Thus, even though notice-and-comment procedures have proven to be costly, courts and scholars criticize agency procedures that cut the public out of the process. Policymaking through case-by-case adjudication is one example, particularly where adjudications are ill-publicized and inaccessible. The D.C. Circuit has criticized such an approach as “pure ad

132. See *PIERCE ET AL.*, *supra* note 102, § 7.5, at 391–97; see also *Motor Vehicle Mfrs. Ass’n*, 463 U.S. at 42–43.

133. *SEC v. Chenery Corp.*, 332 U.S. 194, 209 (1947).

134. *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842 (1984).

135. Stewart, *supra* note 79, at 1684.

136. See *Ass’n of Irrigated Residents v. EPA*, 494 F.3d 1027, 1043 (D.C. Cir. 2007) (“[P]ublic participation assures that the agency will have before it the facts and information relevant to a particular administrative problem . . . [and] increase[s] the likelihood of administrative responsiveness to the needs and concerns of those affected.” (alterations in original) (quoting *Am. Hosp. Ass’n v. Bowen*, 834 F.2d 1037, 1061 (D.C. Cir. 1987)) (internal quotation marks omitted)).

hocery” that is inconsistent with important participatory values.¹³⁷ Agencies’ increasing use of informal guidance documents to establish enforcement and regulatory priorities has sparked similar concerns. Nina Mendelson has shown how the use of guidance documents is especially likely to cut input by diffuse regulatory beneficiaries out of the process.¹³⁸ Courts have likewise criticized agencies for using guidance to make policy slowly without either public input or the opportunity for judicial review.¹³⁹ As if to underscore the point, the Supreme Court has stressed that *Chevron* deference is presumptive where the agency’s interpretation has been run through “a relatively formal administrative procedure tending to foster . . . fairness and deliberation,” such as notice-and-comment rulemaking.¹⁴⁰

C. CRIMINAL LAW’S INSULARITY

Many of the same institutional conditions that drove support for public input into agency decision-making underlie criticisms of plea bargaining. Federal prosecutorial power expanded rapidly throughout the twentieth century, particularly during Prohibition, the New Deal, and the last four decades.¹⁴¹ As criminal laws multiplied, so did prosecutors’ discretion to charge and enforce. And as plea bargaining replaced trials as the dominant mode of resolving cases, discretion to charge and enforce quickly became discretion to sentence. That gave prosecutors enormous practical control over determining and implementing criminal law policy.¹⁴²

137. *Am. Mining Cong. v. Mine Safety & Health Admin.*, 995 F.2d 1106, 1112 (D.C. Cir. 1993); *see also* Lisa Schultz Bressman, *Beyond Accountability: Arbitrariness and Legitimacy in the Administrative State*, 78 N.Y.U. L. REV. 461, 542 (2003) (describing the participatory shortcomings of policymaking by adjudication); David L. Franklin, *Legislative Rules, Nonlegislative Rules, and the Perils of the Short Cut*, 120 YALE L.J. 276, 306–07 (2010) (describing the participatory benefits of policymaking by rulemaking).

138. *See* Mendelson, *supra* note 93, at 420; *see also* Franklin, *supra* note 137, at 305 (reviewing participation-based criticisms).

139. *See* *Appalachian Power Co. v. EPA*, 208 F.3d 1015, 1020 (D.C. Cir. 2000).

140. *United States v. Mead Corp.*, 533 U.S. 218, 226–30 (2001); *see also* Bressman, *supra* note 137, at 534–45.

141. *See* Barkow, *Institutional Design*, *supra* note 6, at 884–85.

142. *See* Wright & Miller, *Screening/Bargaining Tradeoff*, *supra* note 6, at 30–32, 30 n.1; *see also* BUREAU OF JUSTICE STATISTICS, U.S. DEPT OF JUSTICE, FELONY SENTENCES IN STATE COURTS, 1998, at 8–9 (2001); Lynch, *supra* note 6, at 2123 (“The substantive evaluation of the evidence and assessment of the defendant’s responsibility is not made in court at all, but within the executive branch, in the office of the prosecutor.”).

Yet the role of public input in binding governmental actors to the public interest has received far less attention in criminal than in administrative law. That is in part because of the lingering myths that juries still safeguard the public's interest in crime and punishment and that sentencing remains a predominantly judicial act. Most fundamentally, criminal law has been slow to appreciate that prosecutors are now the "real lawmakers" of criminal justice.¹⁴³ It has thus failed to implement the same structural and procedural safeguards upon which administrative law has long relied.¹⁴⁴

The depth and consequences of that failure are well-illustrated by the U.S. Sentencing Commission, tasked with formulating the Federal Sentencing Guidelines. Congress established the Commission as an "independent commission in the judicial branch," seeking to insulate it from political pressures and give the commissioners freedom to exercise their expert judgment on difficult issues of sentencing policy.¹⁴⁵ But Congress also exempted it from the most important procedures designed to ensure honesty, transparency, and accountability in federal rulemaking, including meaningful notice and comment backed up by judicial review.¹⁴⁶ Because courts could not invalidate the Federal Guidelines as arbitrary and capricious, the Commission did not have to explain its choices, build a factual record in support of its policies, or respond to public comments with reasoned justifications.¹⁴⁷ At the time, Congress thought that the Commission would nevertheless adhere to even more extensive procedures for seeking early comment, "acquaint[ing] itself fully on the issues involved in the promulgation of specific guidelines."¹⁴⁸

143. William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505, 506 (2001).

144. See Barkow, *Separation of Powers*, *supra* note 6, at 1022–28.

145. 28 U.S.C. § 991(a) (2006).

146. Specifically, the Commission was subject only to section 553 of the APA, 5 U.S.C. § 553. See 28 U.S.C. § 994(x) (2006). It was not subject to any of the other requirements in chapter 5 of the APA, such as 5 U.S.C. §§ 551, 554–59. Nor was it subject to the Freedom of Information or the Government in the Sunshine Acts, 5 U.S.C. §§ 552, 552b. Most significantly, it was not subject to the judicial review provisions in chapter 7 of the APA, 5 U.S.C. §§ 701–06.

147. See Amy Baron-Evans & Kate Stith, *Booker Rules*, 160 U. PA. L. REV. 1631, 1643–44 (2012).

148. S. Rep. No. 98-225, at 180–81 (1984); see also 28 U.S.C. §§ 994(o), (p), (x) (requiring notice and comment, consultation, and statements of reasons for proposed Guidelines amendments). For an early assessment that proved to be overly optimistic, see Ronald F. Wright, *Sentencers, Bureaucrats, and the Administrative Law Perspective on the Federal Sentencing Commission*, 79 CALIF.

The reality was far different. As Kate Stith and Amy Baron-Evans explain, facing no real constraints, “[t]he Commission was therefore under no pressure to base its actions on reasons, evidence, or a sound empirical foundation, and frequently acted instead on the basis of political pressure or the Commissioners’ personal policy views.”¹⁴⁹ It failed to take into account the views of trial judges, the defense bar, or others who did not support its proposals.¹⁵⁰ It ignored suggestions and empirically grounded analyses from probation officers and others in the field, offering no justification apart from past practice for many sentence levels.¹⁵¹ It made key policy choices that were unsupported by evidence, such as the decision to dismiss most mitigating offender characteristics as irrelevant to the purposes of sentencing.¹⁵² And, while nominally soliciting public input, it promulgated amendments that differed from those proposed for comment, leaving stakeholders no opportunity to respond.¹⁵³ The guidelines that resulted have long been criticized as unintelligible, complex, and unjust. The Commission’s approach “significantly impaired the legitimacy of the Commission’s rulemaking process” and undermined its credibility with the public.¹⁵⁴

L. REV. 3, 7–16, 22–23 (1991).

149. Baron-Evans & Stith, *supra* note 147, at 1644; *see also* Samuel L. Buffone, *Control of Arbitrary Sentencing Guidelines: Is Administrative Law the Answer?*, 4 FED. SENT’G REP. 137, 139 (1991) (Commission relied on “the instincts or political judgment of the individual commissioners rather than a sound empirical basis”).

150. *See* Baron-Evans & Stith, *supra* note 147, at 1643.

151. *See id.* at 1644–45; Stephen Breyer, *The Federal Sentencing Guidelines and the Key Compromises upon Which They Rest*, 17 HOFSTRA L. REV. 1, 15–18 (1988); Joseph W. Luby, *Reining in the “Junior Varsity Congress”: A Call for Meaningful Judicial Review of the Federal Sentencing Guidelines*, 77 WASH. U. L.Q. 1199, 1202 (1999) (“The Commission . . . rarely justifies its guidelines, consistently avoids on-the-record decisionmaking, and operates unencumbered by the procedural safeguards that ensure the political legitimacy of other administrative agencies.”).

152. *See* Baron-Evans & Stith, *supra* note 147, at 1723–24; *see also* Breyer, *supra* note 151, at 19–20.

153. *See* Baron-Evans & Stith, *supra* note 147, at 1643; Ronald F. Wright, *Amendments in the Route to Sentencing Reform*, 13 CRIM. JUST. ETHICS 58, 64 (1994) (noting lack of open meetings by Commission’s advisory committees and conclusory nature of the Commission’s explanations for its final Guidelines, without the supporting factual evidence or responses to important comments typically offered by most rule-making agencies).

154. Kate Stith & Karen Dunn, *A Second Chance for Sentencing Reform: Establishing a Sentencing Agency in the Judicial Branch*, 58 STAN. L. REV. 217, 229 (2005). The same problems infect some state guidelines. *See* BUREAU OF JUSTICE ASSISTANCE, U.S. DEP’T OF JUSTICE, NATIONAL ASSESSMENT OF

The same problems of opacity and insularity infect prosecutorial charging and bargaining. Unlike sentencing commissions, prosecutors are not formally charged with formulating sentencing policy as a matter of law. But they undoubtedly exercise their charging and bargaining authority to make such policy in fact. When they do, they very often confront the same sort of intractable tradeoffs that exist in other areas of regulatory policymaking. Many charging and bargaining decisions involve difficult value judgments about how to spend limited resources in light of a host of competing and incommensurable factors.¹⁵⁵ These include the need for retribution and deterrence, concerns for victims and communities, equality, patterns of police enforcement, and the relative notoriety of some crimes.¹⁵⁶

The public interest in plea bargaining, like the public interest in other administrative decisions, is a “texture of multiple strands” that “involves a balance of many interests” not always in harmony.¹⁵⁷ Prosecutors must “reweigh and reconcile . . . often nebulous or conflicting policies . . . in the context of a particular factual situation with a particular constellation of affected interests.”¹⁵⁸ And, in the absence of any objective guidepost of the public good, they should do so against the background of the public’s information and values, explaining their decisions and justifying the tradeoffs involved.

III. CRAFTING A SYSTEM OF NOTICE-AND-COMMENT SENTENCING

While the analogy is far from exact, criminal sentencing

STRUCTURED SENTENCING 36–37 tbl.4-1 (1996), available at <https://www.ncjrs.gov/pdffiles/strsent.pdf> (compiling descriptions of state sentencing guideline commissions, not all of which include members of the public).

155. See, e.g., Michael Edmund O’Neill, *Understanding Federal Prosecutorial Declinations: An Empirical Analysis of Predictive Factors*, 41 AM. CRIM. L. REV. 1439, 1446–63 (2004) (examining reasons for prosecutorial declination decisions).

156. See *id.* See generally Richard S. Frase, *State Sentencing Guidelines: Diversity, Consensus, and Unresolved Policy Issues*, 105 COLUM. L. REV. 1190 (2005) (examining normative, resource-allocation, and other tradeoffs in the design of state sentencing systems).

157. *FPC v. Hope Natural Gas Co.*, 320 U.S. 591, 627 (1944) (Frankfurter, J., dissenting); Ernest Gellhorn, *Public Participation in Administrative Proceedings*, 81 YALE L.J. 359, 360 (1972).

158. Stewart, *supra* note 79, at 1684; see also Wright & Miller, *Accountability Deficit*, *supra* note 6, at 1594 (“In the administration of crime policy, as in other government activities, expertise has become essential, yet justice officials must also come to terms with public input.”).

could learn a good deal from administrative law. Applying administrative law principles does not mean mirroring how agencies implement them, especially at the retail level of deciding individual cases. The particular procedures that work for developing nationwide emissions standards are far too slow and rigid for criminal adjudications. Nevertheless, administrative law principles could inform the range of wholesale and retail decisions that influence sentences downstream, including sentencing-guidelines, charging, plea bargaining, and possibly arrest decisions. Those principles support broad rights to participate, reasoned sentencing decisions, and appellate review. These changes would check agents' discretion and bolster the legitimacy of sentencing, increasing transparency and accountability and fostering better outcomes.

A. WHOLESALE OR RETAIL?

Sentencing-related decisions occur at multiple levels. Individual officers decide whether to arrest; individual prosecutors decide how to charge and plea bargain; and individual judges decide how to sentence individual defendants. These are retail decisions. Traditionally, most of the action was at the retail level. But increasingly, retail decisions are powerfully shaped by a variety of wholesale-level standards, including statutes, guidelines, policies, and norms.

The pros and cons of wholesale versus retail decision-making, and rules versus case-by-case adjudication, are well known.¹⁵⁹ Rules promise greater consistency and allow broader input from a wider range of people, which bolsters their legitimacy. As they provide advance notice, they can more easily shape conduct *ex ante*. The downsides can include rigidity and the difficulty of specifying and weighting the relevant criteria in advance.¹⁶⁰ Case-by-case decisions are more flexible, allowing decision-makers to tailor sentences *ex post*. They can thus reflect the particular facts and factors at issue, especially atypical or hard-to-codify circumstances. They can also more easily include the harms suffered, evidence, and possibly views of the persons most affected by the decision. But case-by-case decisions risk being arbitrary or discriminatory, too slow and cost-

159. See generally FREDERICK SCHAUER, *PLAYING BY THE RULES* (1991).

160. See Richard A. Bierschbach & Alex Stein, *Overenforcement*, 93 *GEO. L.J.* 1743, 1754–56 (2005) (discussing definitional spillovers inherent in rules and the impact they have on deterrence).

ly, and too narrowly focused and shortsighted.¹⁶¹

We propose a mixture of wholesale- and retail-level reforms. At a minimum, prosecutors' offices, sentencing commissions, and probably police departments should apply notice-and-comment principles in adopting wholesale policies. They should propose policies, solicit public comment on them, respond to important comments, and publish final policies with reasoned justifications.¹⁶² As we discuss below, most of these policies should be judicially reviewable at the wholesale level, whether or not individual defendants or victims can challenge their application. The policies could be framed with some generality, exceptions, and room to evolve.¹⁶³ Even so, they would furnish benchmarks and concrete guidance to police, prosecutors, judges, legislatures, and the public.

Readers convinced by our wholesale solutions could stop there. Adopting policies would be most analogous to administrative notice-and-comment rulemaking, and the costs and delays would be easiest to bear at the wholesale level. But we propose going further, to apply notice-and-comment-like principles to at least the most visible and serious cases at the retail level. Temporally, retail notice and comment would occur at individual sentencing hearings. But at those hearings, judges would review a host of upstream decisions that affect sentences, most notably the charges and plea bargains upon which prosecutors agree. When prosecutors had declined to charge at all, there would be no sentencing hearing at which to review these decisions, so retail notice and comment would not apply to individual declinations. When prosecutors had struck charge bargains, however, judges would review those bargains.¹⁶⁴ As

161. See *id.* at 1755–56.

162. See *supra* Section II.B (discussing basic notice-and-comment principles). An example of what we envision is the U.S. Department of Justice's policy on selecting charges. See U.S. DEP'T OF JUSTICE, UNITED STATES ATTORNEYS' MANUAL 9-27.300 (1997). The most recent version of that policy instructs federal prosecutors ordinarily to charge and not drop the most serious readily provable offense. *Id.* But it goes on to identify factors that prosecutors may consider in assessing, case by case, how stringently to apply this policy when charging and plea bargaining. See *id.*

163. See Erik Luna, *Principled Enforcement of Penal Codes*, 4 BUFF. CRIM. L. REV. 515, 601–02 (2000) (quoting Roscoe Pound, *Discretion, Dispensation, and Mitigation: The Problem of the Individual Special Case*, 35 N.Y.U. L. REV. 925, 927 (1960)) (discussing how formally adopted policies can serve as “established starting points for reasoning, pointing the decision-maker in a specific direction without mandating a particular result” or precluding flexibility when circumstances dictate).

164. When prosecutors agreed to a deferred prosecution before filing a

Part IV notes, costs and delays loom larger at the retail level, and practical constraints limit the numbers and kinds of cases covered. With those caveats, we suggest that both levels of decision-making could benefit from notice-and-comment-type processes.

The wholesale and retail levels would interact. Wholesale policies would structure retail decisions ab initio, and patterns of retail decisions could later prompt new policies or amendments in light of experience. Commenters on proposed wholesale rules could draw attention to patterns of retail cases, and commenters in individual cases could point to the purposes and limits of applicable rules. Pragmatism calls for allowing some ex post input to clarify concepts, such as retribution, that rules cannot precisely specify ahead of time. The reasoning justifying decisions at each level could take account of the lessons learned at the other level. Ideally, the combined system would be dynamic and evolutionary.¹⁶⁵ It would learn gradually from the collective wisdom embodied in patterns of individual decisions while ironing out inconsistencies and outliers.

B. AT THE WHOLESALE LEVEL: ARRESTS, CHARGING, PLEA BARGAINING, GUIDELINES, AND SENTENCING

Our goal is to improve the functioning and legitimacy of the sentencing process. But criminal procedure is a stream, and decisions upstream have profound consequences for the justice that flows downstream. Police arrests, prosecutors' charging decisions, and sentencing guidelines structure plea bargaining, which in turn channels discretion at sentencing. Conversely, plea and sentencing hearings may allow judges to revisit upstream decisions before accepting pleas or imposing sentences.

Police traditionally enjoy broad latitude in whether to arrest or not, so long as they meet the low threshold of probable cause.¹⁶⁶ Likewise, prosecutors traditionally enjoy broad discretion in whether and how to charge, so judges have been hesi-

charge, there would be no hearing at which to review the decision. But judges could review post-charge deferred prosecution decisions at hearings on whether to adjourn the charge in contemplation of dismissal.

165. See, e.g., David Millon, *Objectivity and Democracy*, 67 N.Y.U. L. REV. 1, 7 n.16 (1992) (reviewing conceptions of legal decision-making as a dialogic activity).

166. See, e.g., John Koerner, *Between Healthy and Hartman: Probable Cause in Retaliatory Arrest Cases*, 109 COLUM. L. REV. 755, 785–86 (2009) (discussing arrest discretion).

tant to regulate prosecutorial charging.¹⁶⁷ Prosecutors, the thinking goes, are in the best position to weigh enforcement priorities and the need for general deterrence, and revealing their enforcement policies could chill enforcement and undermine prosecutorial effectiveness.¹⁶⁸ Like prosecutors, police labor under resource constraints, and they do not want to telegraph situations in which they will not arrest, lest they encourage crimes below that threshold. Thus, courts abjure dictating which arrests and charges police and prosecutors should pursue or bargain away.

Courts and other actors can, however, achieve the same goal in less intrusive ways. For example, as Ronald Wright has pointed out, judges, legislatures, or sentencing commissions could prompt prosecutors to self-regulate by making them draft their own charging guidelines.¹⁶⁹ At plea and sentencing hearings, judges could then review prosecutors' consistency or their reasons for deviating from those guidelines. Wright points to the example of New Jersey: The New Jersey Supreme Court held that the imbalance of prosecutorial power over mandatory minimum sentences, coupled with limits on judges' traditional sentencing discretion, would violate the state separation of powers.¹⁷⁰ The court required the state attorney general to draft guidelines to instruct county prosecutors on when to seek enhanced sentences for repeat drug offenders.¹⁷¹ The attorney general complied, instructing trial attorneys on when to trigger enhancements, how big plea discounts should be in ordinary cases, and what aggravating or mitigating factors might justify

167. "[S]o long as the prosecutor has probable cause to believe that the accused committed an offense defined by statute, the decision whether or not to prosecute, and what charge to file or bring before a grand jury, generally rests entirely in his discretion." *Bordenkircher v. Hayes*, 434 U.S. 357, 364 (1978); see also *United States v. Armstrong*, 517 U.S. 456, 468, 470 (1996) (requiring a high evidentiary threshold before a defendant can even obtain discovery to help prove a claim of racially selective prosecution); *Wayte v. United States*, 470 U.S. 598, 607 (1985) ("This broad discretion [to decide whether to prosecute] rests largely on the recognition that the decision to prosecute is particularly ill-suited to judicial review."); *United States v. Batchelder*, 442 U.S. 114, 123–24 (1979) (finding no constitutional problem in allowing prosecutors to choose among overlapping charges with differing penalties, absent unconstitutional discrimination).

168. See *Wayte*, 470 U.S. at 607.

169. See Ronald F. Wright, *Sentencing Commissions as Provocateurs of Prosecutorial Self-Regulation*, 105 COLUM. L. REV. 1010, 1027–42 (2005).

170. *Id.* at 1030–31 (citing *State v. Lagares*, 601 A.2d 698, 701–05 (N.J. 1992)).

171. See *Lagares*, 601 A.2d at 704.

larger or smaller discounts.¹⁷² In each case, prosecutors had to explain why they were or were not seeking the extended sentences.¹⁷³ Sentencing courts would then review prosecutors' actions in light of the guidelines and stated reasons to determine whether (as in administrative law) they had exercised their discretion arbitrarily and capriciously.¹⁷⁴

Several years' experience showed that local variations in prosecutorial policies let troubling disparities remain.¹⁷⁵ Thus, six years after the initial guidelines, the state supreme court directed the attorney general to issue new guidelines that allowed less regional variation.¹⁷⁶ The attorney general complied, issuing prosecutorial guidelines that keyed plea offers to the seriousness of the crime, the defendant's criminal history, and the timing of the plea.¹⁷⁷ The attorney general tweaked the guidelines over the next few years, and, after six years and consultation with judges, defense attorneys, and county prosecutors, issued a major overhaul of the guidelines.¹⁷⁸

The New Jersey experience was not perfect. The guidelines that resulted were still largely expert-driven, and, as with the Federal Guidelines, members of the public were not integral to the process.¹⁷⁹ But it teaches that sentencing judges can review upstream charging and plea-bargaining decisions downstream, at sentencing, without usurping the prosecutorial role. Retail-level cases can prompt wholesale-level charging and bargaining policies that are refined over time in light of future retail cases

172. See Wright, *supra* note 169, at 1031 (citing N.J. DEP'T OF LAW & PUB. SAFETY, ATTORNEY GENERAL EXECUTIVE DIRECTIVE NO. 1996-03 (1996)).

173. *E.g.*, State v. Vasquez, 609 A.2d 29, 32 (N.J. 1992).

174. See Wright, *supra* note 169, at 1031 (citing State v. Leonardis, 375 A.2d 607, 618–19 (N.J. 1977)); see also Lagares, 601 A.2d at 704–05; Vasquez, 609 A.2d at 32.

175. Wright, *supra* note 169, at 1031.

176. See *id.* at 1031–32 (citing State v. Brimage, 706 A.2d 1096, 1107 (N.J. 1998)).

177. See, *e.g.*, N.J. DEP'T OF LAW & PUB. SAFETY, ATTORNEY GENERAL DIRECTIVE NO. 1998-1: PROSECUTING CASES UNDER THE COMPREHENSIVE DRUG REFORM ACT (1998), available at <http://www.state.nj.us/lps/dcj/pdfs/agdir.pdf>; N.J. DEP'T OF LAW & PUB. SAFETY, ATTORNEY GENERAL GUIDELINES FOR NEGOTIATING CASES UNDER N.J.S.A. 2C:35-12 (1998), available at <http://www.state.nj.us/lps/dcj/pdfs/agguid.pdf>.

178. Wright, *supra* note 169, at 1032–33; see also N.J. DEP'T OF LAW & PUB. SAFETY, BRIMAGE GUIDELINES 2 (2004 REVISIONS), available at http://www.nj.gov/lps/dcj/agguide/brimage_all.pdf.

179. See Ronald F. Wright, *Prosecutorial Guidelines and the New Terrain in New Jersey*, 109 PENN. ST. L. REV. 1087, 1094 n.31 (2005) (discussing the speed with which the New Jersey Attorney General promulgated the guidelines).

and input from the bench and bar, creating a feedback loop.¹⁸⁰ Outside oversight and pushback helps to ensure that guidelines do not remain hopelessly vague generalities but offer increasingly concrete guidance. And rather than drafting guidelines themselves, judges can prod prosecutors to self-regulate their upstream decisions. By prompting guidelines and reasons, judges can elicit both better sentencing information in individual cases and more consistent exercises of discretion across cases.

While the New Jersey example did not involve public input, courts could use these same tools to catalyze public input into upstream decisions, encouraging police and prosecutors to take a notice-and-comment approach to guidelines. Some prosecutors' offices, such as that of Kitsap County, Washington, already do just that.¹⁸¹ Since 1995, the Kitsap County prosecutor's office has published charging and plea-bargaining guidelines intended to "answer[] . . . most . . . questions about [its] approach to charging and disposing of criminal cases."¹⁸² The guidelines manual does so in detail, by, for example, ranking enforcement priorities in descending order,¹⁸³ differentiating charging standards based on categories of crime,¹⁸⁴ and spelling out criteria for sentencing and diversion.¹⁸⁵ But "its true value comes from the way it was developed."¹⁸⁶ Volunteer citizens' groups and representatives from local government, police agencies, the defense bar, and the community at large had direct input into the process. Their input challenged the office to define its role and required it "to give straight answers."¹⁸⁷ When reviewing prosecutors' actions downstream, courts could consider how thoroughly applicable guidelines had been vetted, perhaps deferring more where they resulted from a participatory, open, accountable process.¹⁸⁸

180. See Michael M. O'Hear, *Explaining Sentences*, 36 FLA. ST. U. L. REV. 459, 484 (2009) (discussing feedback loops that could flow from meaningful sentencing explanations on the record).

181. See RUSSELL D. HAUGE, OFFICE OF KITSAP CNTY. PROSECUTING ATTORNEY, MISSION STATEMENT AND STANDARDS AND GUIDELINES 1 (2007), available at <http://www.kitsapgov.com/pros/StandardsGuidelines2007.pdf>.

182. *Id.*

183. *Id.* at 4.

184. *Id.* at 6–9.

185. *Id.* at 10–15.

186. *Id.* at 1.

187. *Id.*

188. See *infra* text accompanying notes 263–269 (discussing appellate review); cf. *United States v. Mead Corp.*, 533 U.S. 218, 221, 227 (2001) (stating

Another lesson from New Jersey is that not all charging decisions are alike. People often lump all enforcement and charging decisions together, but not all decisions fit the same mold. Some charging and arrest decisions are classic decisions *not* to pursue certain wrongdoers at all because of insufficient evidence, limited resources, or similar factors.¹⁸⁹ On the one hand, these can be seen as classic enforcement decisions involving non-judicial issues of resource allocation, and their revelation might telegraph to prospective wrongdoers that crimes below certain thresholds will not be pursued at all. There is thus some argument that such decisions touch core issues of discretion, entrusted to the executive and less suited to judicial review or public involvement.¹⁹⁰ On the other hand, decisions not to arrest and not to charge can contribute to patterns of sentencing inequality and otherwise implicate the public's concern for justice.¹⁹¹ Particularly where proof problems are absent, declination can result from early, hidden plea bargaining, cloaking prosecutors' value judgments and substantive decisions about whether and how to punish.

Thus, at the wholesale level, we tentatively favor requiring advance notice, public deliberation, revisions based on input, and reasoned justifications for declination and perhaps arrest policies. Offices could also give notice that they were developing entire groups of rules, such as plea-bargaining guidelines, and solicit input in their large-scale development processes.¹⁹²

that deference to administrative authority may be shown by an agency's power to "engage in adjudication or notice-and-comment rulemaking").

189. See Marc L. Miller & Ronald F. Wright, *The Black Box*, 94 IOWA L. REV. 125, 136 tbl.1 (2008) (laying out some of the most common reasons for declining to bring charges).

190. Cf. *Heckler v. Chaney*, 470 U.S. 821, 831 (1985) ("This Court has recognized on several occasions over many years that an agency's decision not to prosecute or enforce, whether through civil or criminal process, is a decision generally committed to an agency's absolute discretion This recognition of the existence of discretion is attributable in no small part to the general unsuitability for judicial review of agency decisions to refuse enforcement.").

191. See, e.g., Albert W. Alschuler, *Sentencing Reform and Prosecutorial Power: A Critique of Recent Proposals for "Fixed" and "Presumptive" Sentencing*, 126 U. PA. L. REV. 550, 564 (1978) ("[T]he discretion of American prosecutors lends itself to inequalities and disparities of treatment because of disagreements concerning issues of sentencing policy It may also lead to a general perception of unfairness, arbitrariness and uncertainty and may even undercut the deterrent force of the criminal law.").

192. At the federal level, the Office of Information and Regulatory Affairs (OIRA) does something similar with its annual Unified Regulatory Agenda, which it publishes in the Federal Register. The Unified Regulatory Agenda compiles the regulatory agendas from all federal entities that have regulations

These notices could be posted on government websites and criminal justice blogs, as well as in the traditional criminal justice periodicals, community newspapers, and government publications like the Federal Register (or state equivalents). As in other areas of policymaking, the aim would be to better incorporate the facts, preferences, and values of the public into crafting prosecutorial policies. Prosecutors' offices could even use surveys to help rank the public's values and concerns for certain categories of crimes, punishments, or enforcement criteria, much as agencies' willingness-to-pay surveys elicit the relative values of lives, jobs, and the environment.¹⁹³ Many organizations would have the incentives and expertise to contribute a range of perspectives by commenting on the issues at stake. Likely commenters include academics, public defenders, criminal-defense organizations, civil-liberties groups, victim advocates, police unions, prosecutor organizations, and bar authorities.¹⁹⁴

Police and prosecutorial policies could be non-binding, or binding and subject to exceptions. But they would still set benchmarks against which the public could evaluate police and prosecutors, much like the enforcement guidelines already used by many agencies.¹⁹⁵ As Erik Luna has proposed, community input could, for example, guide police policies on using force and limiting vice enforcement.¹⁹⁶ Such input into declination

under development or review. Exec. Order No. 12,866, 3 C.F.R. 638, 642 (1993), *reprinted as amended in* 5 U.S.C. § 601 (2006); *see also* Exec. Order No. 13,563, 3 C.F.R. 215, 215 (2011); Christopher Demuth, *OIRA at Thirty*, 63 ADMIN. L. REV. (SPECIAL EDITION) 15, 16 (2011) (discussing history of OIRA's approach to the annual agenda).

193. *See supra* text accompanying note 119.

194. *See infra* notes 297–299 and accompanying text.

195. *See supra* text accompanying note 120.

196. Luna, *supra* note 163, at 590–623. *See also* KENNETH CULP DAVIS, POLICE DISCRETION 98–120 (1975), WAYNE R. LAFAVE, ARREST 513 (1965), Anthony G. Amsterdam, *Perspectives on the Fourth Amendment*, 58 MINN. L. REV. 349, 423–28 (1974), and Gerald M. Caplan, *The Case for Rulemaking by Law Enforcement Agencies*, 36 LAW & CONTEMP. PROBS. 500, 502 (1971), for examples of other earlier and notable proposals to use rulemaking to guide and constrain police practices. For examples of more modern takes on the issue, *see* Debra Livingston, *Police Discretion and the Quality of Life in Public Places: Courts, Communities, and the New Policing*, 97 COLUM. L. REV. 551, 658–63 (1997) (discussing the role of guidelines in community and problem-oriented policing), David Sklansky, *Quasi-Affirmative Rights in Constitutional Criminal Procedure*, 88 VA. L. REV. 1229, 1271–79 (2002) (discussing the evolution—or lack thereof—of police rulemaking in the Fourth Amendment context since Professor Amsterdam's 1974 article), and David Sklansky *Police and Democracy*, 103 MICH. L. REV. 1699 (2005) (connecting evolving conceptions of

and possibly arrest policies would guard against discriminatory patterns of enforcement and increase public legitimacy. Kitsap County, for one, already publishes its declination guidelines, suggesting that fears of publicity are overblown.¹⁹⁷ Kitsap County's policy expressly differentiates between its willingness to decline property and violent crimes, stating its willingness to proceed with the latter based on weaker evidence.¹⁹⁸ It stakes out its potentially controversial position publicly, opening it to scrutiny and debate.

Many charging issues are not really enforcement decisions but sentencing decisions. Often, the government has investigated, arrested, and decided to prosecute the wrongdoer and can prove his guilt any number of ways. At that point, the prosecutor files specific charges in order to promise or threaten a specific sentence and thereby induce a plea. Charge-bargaining decisions implicate classic sentencing considerations such as equality, remorse, and the goals of punishment.¹⁹⁹ When the question is not whether to arrest and prosecute but how much to punish, judges can more easily bring arbitrary-and-capricious review and similar administrative law tools to bear. Sentencing is a judicial decision amenable to review. Both wholesale and retail charging and plea-bargaining decisions that amount to sentencing decisions could easily receive the same treatment.

Reforms should address not only the sentencing pipeline from police to prosecutor to judge, but also the guidelines promulgated by sentencing commissions. The widely criticized U.S. Sentencing Guidelines emerged from a secretive, insular process that nominally involved public comment but in fact included no meaningful public deliberation, justifications, or judicial review.²⁰⁰ The Federal Guidelines rarely evolve in light of retail feedback.²⁰¹ Yet federal courts still routinely defer to the

democracy to jurisprudential and academic approaches to policing).

197. See HAUGE, *supra* note 181, at 6–9.

198. *Id.* at 6–7.

199. See Mary Patrice Brown & Steven E. Bunnell, *Negotiating Justice: Prosecutorial Perspectives on Federal Plea Bargaining in the District of Columbia*, 43 AM. CRIM. L. REV. 1063, 1076–84 (2006) (discussing the role of such considerations in both informal and formal plea bargaining).

200. See *supra* notes 148–154 and accompanying text.

201. See, e.g., KATE STITH & JOSÉ A. CABRANES, FEAR OF JUDGING: SENTENCING GUIDELINES IN THE FEDERAL COURTS 56–57, 94–95 (1998) (describing the Federal Guidelines as “simply a compilation of administrative *diktats*” because “the Commission almost never explains the reason behind a particular Guidelines rule”).

Commission without requiring the statements of reasons demanded of other agencies.²⁰² The lesson of the Federal Guidelines is that a sentencing commission must do more than just solicit public input and then disregard it. Sentencing commissions should instead take input seriously, deliberate over it, respond to substantial comments, offer clear reasoning, and face judicial review of both wholesale guidelines and the retail sentences that apply them.

In marked contrast to the federal experience, many states have succeeded by applying these lessons.²⁰³ Many states' guidelines emerged from deliberative processes that included a variety of lawyers and laymen, such as victims and even convicts.²⁰⁴ A more open commission is more likely to listen to and show respect for each voice, deliberate over the inevitable hard choices, create buy-in, and adopt simple guidelines that turn on obviously relevant criteria.²⁰⁵ And transparent, reasoned guidelines are better able to evolve.²⁰⁶ New criticisms and unexpected cases can challenge the expressed rationales for guidelines, leading sentencing commissions to refine or revisit their initial rules in light of experience.²⁰⁷ At the retail level, individual sentencing judges can justify deviations based on factors that were not adequately taken into account in formulating guidelines. In Federal-Guideline-speak, those are cases that fall outside the heartland of typical cases.²⁰⁸ An accumulation of such individu-

202. See *id.* at 57 (noting that “unlike the rules of other federal agencies, the Sentencing Guidelines may not be challenged in court” for being arbitrary or capricious); Carissa Byrne Hessick, *Appellate Review of Sentencing Policy Decisions After Kimbrough*, 93 MARQ. L. REV. 717, 724 (2009) (observing that existing approaches to appellate review of the Guidelines run “counter to ordinary principles of administrative law”); Stith & Dunn, *supra* note 154, at 229–33 (discussing lack of judicial review of the Guidelines and the Sentencing Commission’s reasoning).

203. See Rachel E. Barkow, *Administering Crime*, 52 UCLA L. REV. 715, 758–87 (2005) (contrasting the failures of the insular U.S. Sentencing Commission with the successes of the more inclusive Minnesota, Washington, and North Carolina commissions).

204. See *id.* at 771–87; see also Dale Parent, *What Did the United States Sentencing Commission Miss?*, 101 YALE L.J. 1773, 1775–77 (1992) (discussing Minnesota guidelines); Wright, *supra* note 153, at 63 (discussing Wisconsin, Louisiana, Arkansas, Washington, Utah, and Minnesota guidelines).

205. See Parent, *supra* note 204, at 1777–78 (discussing Minnesota experience).

206. See, e.g., *Rita v. United States*, 551 U.S. 338, 357–58 (2007) (explaining how feedback, input, and reasoned responses from the Sentencing Commission enables the Guidelines to evolve).

207. See Stith & Dunn, *supra* note 154, at 228–29.

208. See U.S. SENTENCING GUIDELINES MANUAL § 1A1.1, ch. 1, pt. A, intro.

al cases may signal that it is time to reexamine the general rule in light of experience, perhaps because the atypical case may have become typical.²⁰⁹ More problematically, the typical sentence may continue to generate such resistance that it suggests the commission should reconsider its rule.

The Federal Guidelines were supposed to embody such an evolutionary process, but the rigid, insular federal process has not lived up to that promise.²¹⁰ Yet there is no inherent reason why it could not. Many federal agencies—including the Occupational Safety and Health Administration, the Federal Communications Commission, the Mine Safety and Health Administration, and the Federal Aviation Administration—have used notice and comment to produce what are effectively sentencing guidelines for their administrative penalty systems, periodically refining those guidelines in light of experience.²¹¹

A final lesson of the New Jersey experience is that, as in

cmt. 4(b) (2006).

209. See Stith & Dunn, *supra* note 154, at 229–30; *Rita*, 551 U.S. at 357–58 (explaining how the reasoned sentencing judgments of individual judges contribute to the Guidelines’ evolution).

210. See 28 U.S.C. § 991(b)(1)(B), (C) (2006) (stating Sentencing Commission’s goals of promoting fairness and equal treatment while maintaining flexibility and reflecting advancements in knowledge of human behavior as it relates to criminal justice); O’Hear, *supra* note 180, at 484 (discussing “the evolutionary process that guidelines development is intended to be”).

211. See *U.S. Tel. Ass’n v. FCC*, 28 F.3d 1232, 1233 (D.C. Cir. 1994) (setting aside FCC civil penalty schedule for failure to conform to notice-and-comment procedures under the APA); Rules of Practice for FAA Civil Penalty Actions, 55 Fed. Reg. 7980, 7980 (Mar. 6, 1990) (inviting public comment on changes to rules of practice regarding FAA’s civil penalty authority); Civil Monetary Penalty Inflation Adjustment Rule, 68 Fed. Reg. 39,882, 39,882 (July 3, 2003) (to be codified at 40 C.F.R. pts. 19, 27) (requesting comments regarding the EPA’s proposed inflation adjustment to civil monetary penalties); Criteria and Procedures for Proposed Assessment of Civil Penalties, 72 Fed. Reg. 13,592 (Mar. 22, 2007) (to be codified at 30 C.F.R. pt. 100) (promulgating final rule of Mine Safety and Health Administration revising civil penalty assessment regulations and incorporating revisions suggested during notice-and-comment period); Nationally Recognized Testing Laboratories, Supplier’s Declaration of Conformity, 73 Fed. Reg. 62,327, 62,337 (Oct. 20, 2008) (seeking comment regarding OSHA’s administration of a Supplier’s Declaration of Conformity system for policing the safety of certain products in the workplace, including comments on the use of penalties to sanction “inaccurate or incomplete information”); see also Max Minzner, *Why Agencies Punish*, 53 WM. & MARY L. REV. 853, 869, 872–73 (2012) (reviewing civil penalty guidelines of the Mine Safety and Health Administration and FCC). Even when agencies do not use the formal notice-and-comment procedure, they frequently publish detailed but non-binding guidelines, which they periodically revise based on experience and informal input from stakeholders. See *supra* note 120 and accompanying text.

administrative law, individual adjudications can be bound up with generating, applying, and refining rules. Judges adjudicate concrete cases or controversies, but in doing so they consider proffered reasons and patterns of disparate enforcement and outcomes.²¹² Sometimes those reasons and patterns are rooted in formal or informal policies, but sometimes they emerge from individual, case-by-case decisions.²¹³ In either scenario, judges and the public can prod prosecutors to self-regulate, promulgating and explaining their rules while specifying exceptions and leaving some wiggle room. As prosecutors apply these guidelines to offer reasons for individual sentences, judges and members of the public can ensure consistency and prompt further refinements and revisions.²¹⁴ The process is iterative and collaborative, with room for feedback and incremental improvements. It respects prosecutors' superior knowledge and resource constraints but calls on them to weigh these factors and justify workable policies. And it demonstrates how individual adjudications can go hand in hand with ongoing systemic reform.

The more general point here is that, to be meaningful, input and review must come in time. If judges at plea colloquies accept charge or sentence bargains that effectively dictate particular sentences, sentencing becomes a charade. The time-sensitivity of input and review argues in favor of having judges defer acceptance of charge bargains and stipulated sentences until sentencing, where they can more pointedly question both the wholesale policies and retail considerations driving proposed punishments. Courts already have this power, but deferring acceptance could be required, or at least become the

212. Cf. *Lemoyne-Owen Coll. v. NLRB*, 357 F.3d 55, 61 (D.C. Cir. 2004) (observing that the need for an agency to explain itself and distinguish analogous cases is "particularly acute" when the agency makes policy through case-by-case adjudication, because it ensures predictability, intelligibility, and equal treatment).

213. *SEC v. Chenery Corp.*, 332 U.S. 194, 202–03 (1947) (discussing agencies' ability to establish policies through general rules or "the case-by-case evolution of statutory standards"); White, *supra* note 53, at 449–53 (same, in context of plea bargaining).

214. See Steven L. Chanenson, *Guidance from Above and Beyond*, 58 STAN. L. REV. 175, 180–82 (2005) (discussing how reason-giving and appellate review can function as a feedback tool in sentencing, engaging courts in an extended conversation between sentencing commissions and legislatures); Wright & Miller, *Accountability Deficit*, *supra* note 6, at 1611 ("As the topics addressed in general guidelines multiply, questions can arise about the basis for the policy choices built into the guidelines.").

norm.²¹⁵

Time-sensitivity also argues in favor of allowing citizens to challenge finally adopted, binding, wholesale policies at the time of their promulgation, as is common in administrative law. Because of the breadth of public interest in criminal justice, any citizen of the jurisdiction should be able to bring such a challenge.²¹⁶ The process would function much as it does in any garden-variety challenge to a final agency rule. After the sentencing commission, prosecutor's office, or other policymaking body issued a final rule, the reviewing court would apply some variant of hard-look review, examining the record and the explanation accompanying the rule to ensure that the policymaker had responded to significant comments, considered the relevant evidence and data, explored reasonable alternatives, and otherwise not acted arbitrarily or capriciously.²¹⁷ As courts reviewing administrative agency policies have occasionally done, reviewing courts also could relax threshold ripeness and finality requirements to allow significant but technically non-binding guidance documents to be immediately challenged at the promulgation stage, particularly where it is clear that the guidance effectively establishes on-the-ground policy in the mine-run of cases.²¹⁸

C. AT THE RETAIL LEVEL

Something analogous to notice and comment could also operate at the retail level of at least some individual sentencing. The formality of procedure that accompanies true notice and comment of the administrative law sort would be far too cumbersome if simply transferred over to retail sentencing hearings. But the concepts and principles that underlie notice and comment—advance notice, inclusion of a range of views, and

215. See, e.g., FED. R. CRIM. P. 11(c)(3)(A) (authorizing courts to accept, reject, or defer decisions on charge or stipulated-sentence bargains until after the court reviews the presentence report).

216. Cf. 5 U.S.C. § 702 (2006) (allowing any "person . . . adversely affected or aggrieved" within the meaning of an agency's organic statute to seek judicial review of agency action).

217. See *supra* notes 128–131 and accompanying text.

218. See, e.g., *Gen. Elec. Co. v. EPA*, 290 F.3d 377, 380–81 (D.C. Cir. 2002); *Appalachian Power Co. v. EPA*, 208 F.3d 1015, 1020–23 (D.C. Cir. 2000); *Clean Air Implementation Project v. EPA*, 150 F.3d 1200, 1204 (D.C. Cir. 1998); *McLouth Steel Prods. Corp. v. Thomas*, 838 F.2d 1317, 1320–21 (D.C. Cir. 1988); see also *Mendelson*, *supra* note 93, at 438–44 (describing possible approaches to and standards for judicial review of significant guidance documents at the promulgation stage).

meaningful consideration of those views by the decision-maker, against a backstop of judicial review—could inform retail participation. These concepts would apply loosely and with less formality than in full-blown rulemaking, but still subject to sentencing’s procedural safeguards. This section sketches how such an approach might look.

1. Who and How: Advance Notice

We see at least two possible models for initiating notice-and-comment sentencing at the retail level. One would allow prosecutors to set the agenda in major cases, as they do now. The prosecutor would publish a notice, in writing and on the Internet, setting forth the basic facts, charges, and benchmark guideline sentences for similar offenders and offenses and proposing a particular plea-bargained sentence. For a set period of time, members of the public, victims, defendants, and their families could submit written or recorded comments. These could include both facts and opinions bearing on the appropriate sentence. The defendant and perhaps the victim could see and respond to the various comments, as could the probation officer who prepares the presentence report. They might also be able to testify in open court. A judge would make the final sentencing determination, taking into account the prosecutor’s explanation, all comments, and responses to those comments. The judge would defer where appropriate but still probe the substance and the reasoning of the recommendation.

This approach would continue our tradition of leaving prosecutors in charge. It would not be a radical change in that sense, but it also would do less to fix the excesses of prosecutorial power. For example, prosecutors’ initial sentence recommendations would serve as powerful mental anchors that frame the terms of debate going forward.²¹⁹ Empirical evidence shows that judges defer heavily to prosecutors’ discretionary recommendations.²²⁰

219. See DANIEL KAHNEMAN, THINKING, FAST AND SLOW 119–28 (2011) (describing the anchoring effect, which causes a decision-maker to rank options based on one piece of information and then adjust upward or downward, giving the initial anchor inordinate influence on the final outcome); RICHARD H. THALER & CASS R. SUNSTEIN, NUDGE 23–24 (2008) (describing the same effect).

220. See, e.g., Ebbe B. Ebbesen & Vladimir J. Konecni, *Decision Making and Information Integration in the Courts: The Setting of Bail*, 32 J. PERSONALITY & SOC. PSYCHOL. 805, 820 (1975) (finding that while in hypothetical cases judges relied most heavily on a defendant’s local ties in setting bail, in actual cases prosecutors’ recommendations were the single most important

The other possible structure would give probation officers the power to set the terms of debate. They would issue notices of proposed sentencing listing the facts, charges, and guidelines calculations specifying a range of sentences, very much like the presentence investigation reports that probation officers already routinely prepare for federal sentencing.²²¹ (This would be harder to accomplish in overburdened state courts, where funds are tight and presentence investigations are much less thorough than in federal cases.) Prosecutors, defendants, victims, and the public would react and submit their own comments and proposals. As discussed below, the final decision would lie in the hands of a judge.²²² At least the most important cases might also involve advisory sentencing juries, reflecting the public's shared sense of justice. Judges would render ultimate decisions and issue public, reasoned opinions. The goal is to come up with a blend of judicial expertise and public input that reflects and balances systemic needs, individualized considerations, and popular concerns.

2. What: The Range of Facts, Factors, and Views

There is a range of ways to implement notice and comment at sentencing. We envision a ladder of types of retail input, which readers may climb as high as they like. Even skeptical readers should join us on the first rung of the ladder, acknowledging the importance of factual input bearing on the seriousness of the crime and the blameworthiness of the wrongdoer. The second rung involves soliciting broader factual information relevant, for example, to various justifications for punishment or broad concerns about enforcement or sentencing patterns. That could include the seriousness of the crime problem in the community, the harms suffered by this victim, and how possible punishments would affect third parties such as the defendant's family and neighborhood residents. A third rung would seek assessments of the factors and values relevant to a particular sentence, such as the particular defendant's blameworthiness and factors not taken into account by statutes or sentencing guidelines. The final, most controversial rung would solicit a range of views on the appropriate outcome. On any of these rungs, as in administrative law, commenters would enjoy no

determinant of judges' bail decisions).

221. See NORA V. DEMLEITNER ET AL., SENTENCING LAW AND POLICY 496–504 (2d ed. 2007) (discussing preparation of presentence investigation reports).

222. See *infra* notes 248–256 and accompanying text.

decision-making power.²²³ The courts would ultimately find facts, apply the law, weigh the relevant factors, and impose sentence.

At the first rung, a small group of people—defendants’ families, doctors, employers, teachers, and neighbors—can offer factual information about the individual wrongdoer. Often, there are extenuating circumstances ranging from mental handicaps to good character and prospects for a law-abiding life.²²⁴ Good defense lawyers and probation officers already adduce some of this information.²²⁵ But currently, prosecutors and sentencing judges need not explicitly respond to it, and soliciting input more broadly and systematically might paint more complete pictures. This modest effort to systematize what already happens haphazardly should not be controversial.

At the second rung, a somewhat larger group can offer broader factual information relevant to sentencing. Victims and their families can explain the direct and indirect harms that they have suffered from this crime or whether the defendant has tried to make amends.²²⁶ Residents of the neighborhood can likewise illuminate the harms and fears they have suffered from similar recent crimes.²²⁷ Commenters can also cast light on a variety of remedial and third-party interests.²²⁸ They could talk about the costs and benefits of incarcerating this wrongdoer. Even if a wrongdoer deserves punishment, for example, barring him from his profession or depriving his family of its breadwinner may not prevent future danger or might harm innocent third parties.²²⁹ Neighborhood residents can discuss the benefits of prison, restitution, drug treatment, and other alter-

223. See *supra* notes 127–135 and accompanying text (explaining that while agencies must take public input seriously, decision-making power remains with the agencies).

224. See, e.g., Scott Atlas, *How Can We Be Sure?*, 29 LITIGATION 1, 1–2 (2003) (reviewing types of mitigating evidence at sentencing).

225. See Denny Chin, *Sentencing: A Role for Empathy*, 160 U. PA. L. REV. 1561, 1567 (2012) (describing typical submissions from the parties and interested persons before sentencing); Tess Lopez, *Make the Sentencing Process Work for You*, CRIM. JUST., Winter 2009, at 59–60 (describing items defense counsel should prepare during the presentence process).

226. See Douglas E. Beloof, *Constitutional Implications of Crime Victims as Participants*, 88 CORNELL L. REV. 282, 299–305 (2003) (discussing victim participation at sentencing).

227. See generally Katie Long, Note, *Community Input at Sentencing: Victim’s Right or Victim’s Revenge?*, 75 B.U. L. REV. 187, 195 (1995).

228. See Darryl K. Brown, *Third-Party Interests in Criminal Law*, 80 TEX. L. REV. 1383 (2002).

229. See *id.* at 1390.

native sanctions and remedies, and can reflect on what the wrongdoer would have to do to redeem himself in the community.²³⁰ This factual information is highly relevant not only to harm-based understandings of retribution, but also to the need for deterrence, expressive condemnation, mercy, and forgiveness.

In addition to facts about the crime, at the third rung, members of the community can offer a range of perspectives on relevant policies and values in the context of the particular case. For example, they can debate the wrongfulness of this particular crime, the blameworthiness of this wrongdoer, the need to deter and incapacitate him, and the like. The array of perspectives can only help to inform the sentencer's ultimate balancing of the aims of punishment. They can also reflect upon how global, macro-level considerations about enforcement, charging, plea bargaining, and sentencing apply to this case. They could discuss equality, adducing statistics about the sentences awarded to similar defendants and any alleged racial or socioeconomic disparities.²³¹ They could reflect on the costs of depriving this community of its young men. They could likewise criticize the racial impact of enforcement and charging decisions made earlier in the process, such as enforcement efforts targeting this neighborhood.²³² They could criticize the dishonesty of a charge bargain or an equivocal guilty plea and question the award of a massive discount for a cooperating witness. And they could shed light on the public message that various sentences here would send to potential wrongdoers and victims.

Some readers might even be comfortable with a final rung, allowing commenters to voice their views on the appropriate sentence. Prosecutors and defense lawyers already offer such views. Victims, community members, and public interest groups could serve as counterweights, offering and justifying their own proposed sentences. Expressing these views might prove cathartic, venting steam and giving commenters their day in court.²³³ But it would also offer judges a range of opinions upon which to reflect. Sentencing judges would remain free to accept or reject these suggestions, but these views could

230. See *id.* at 1390–92.

231. See *id.* at 1401–02.

232. See generally David B. Mustard, *Racial, Ethnic, and Gender Disparities in Sentencing: Evidence from the U.S. Federal Courts*, 44 J.L. & ECON. 285, 296–97 (2001).

233. See Stephanos Bibas & Richard A. Bierschbach, *Integrating Remorse and Apology into Criminal Procedure*, 114 YALE L.J. 85, 88–89 (2004).

prompt them to consider diverse approaches and explain the reasoning supporting their sentences.

However high up the ladder one goes, we do not suggest letting sentencers in individual cases use comments as a basis for disregarding wholesale value judgments embodied in applicable guidelines or policies.²³⁴ Comments on appropriate sentences would carry influence only within the guideline sentencing range, except when they highlighted unusual factors not considered by the guidelines that made those cases atypical. Patterns of comments reflecting sustained criticism of guidelines might, however, eventually lead to reforming the wholesale rules. Ideally, retail comments would form part of a larger feedback loop.

The comment period would remain open for a set time—say, thirty or sixty days. Comments could be submitted orally in open court (at least by the immediate parties), in writing, or over the Internet. Some commenters might request that their names or their comments not be published beyond the immediate parties and sentencers, particularly when they discuss sensitive personal information. With those exceptions and redactions, most comments could be made available over the Internet, allowing other commenters to reflect on and take issue with one another's assertions. On some blogs, threads of comments degenerate into name-calling, but well-managed threads (perhaps moderated by a probation officer) could highlight areas of consensus and disagreement. E-rulemaking proponents such as Cynthia Farina have already been grappling with how practically to use websites, social media, and other new technologies to manage and aggregate public comments, and their insights and findings could be brought to bear here.²³⁵

234. At least, that is, where the guidelines or policies were the product of open, participatory, and reasoned processes. Where they resulted from closed, insular, and opaque processes that failed to address significant input, evidence, and criticism, some deviations, whether in response to comments or not, might be appropriate. *Cf.* Kimbrough v. United States, 552 U.S. 85, 101–02 (2007) (authorizing district courts to disregard the U.S. Sentencing Guidelines' 100-to-1 crack-to-powder cocaine ratio for sentencing).

235. See Cynthia R. Farina et al., *Rulemaking 2.0*, 65 U. MIAMI L. REV. 395, 412–16, 432–40 (2011) [hereinafter Farina et al., *Rulemaking 2.0*] (discussing strategies for facilitating effective online commentary, including the use of both trained moderators and systemic design components to stratify and manage information and comments); Cynthia R. Farina et al., *Rulemaking in 140 Characters or Less: Social Networking and Public Participation in Rulemaking*, 31 PACE L. REV. 382, 393–416 (2011) [hereinafter Farina et al., *140 Characters or Less*] (describing case studies involving a pilot Rulemaking 2.0 project, Regulation Room, that uses web technologies, including Facebook,

Before and at sentencing hearings, the parties could read and respond to comments raising significant evidentiary or factual issues, using live rebuttal witnesses, documentary evidence, and reasoned arguments. They might even be able to subpoena, cross-examine, and impeach adverse witnesses.²³⁶ There would thus be multiple checks on the accuracy and representativeness of commenters' views: other commenters could disagree, the parties would have notice and opportunities to respond, and sentencers would have the final say. That input would enjoy more procedural safeguards than the bare hearsay that currently fills many probation officers' presentence reports.²³⁷

Allowing such input would inform judges in giving concrete meaning to abstract justifications for punishment. In administrative law, governing statutes often set forth vague standards such as public "safety" or the "public interest."²³⁸ The same is true of sentencing provisions in criminal law. In federal law, for example, 18 U.S.C. § 3553(a)(2) directs sentencing courts to consider retribution, deterrence, incapacitation, and rehabilitation.²³⁹ These concepts, however, are abstract and elastic, and they take shape through practical reasoning and application to concrete cases. Popular judgments of blameworthiness and just deserts, in particular, are quite subtle and influenced by the specific circumstances of individual wrongdoers as well as

Twitter, and others, to inform stakeholders of proposed rulemakings and facilitate their participation and comments).

236. Many jurisdictions already provide some version of this process for resolving disputed issues of fact relating to sentencing. See ARTHUR W. CAMPBELL, *LAW OF SENTENCING* § 10:4 (3d ed. 2004); WAYNE R. LAFAVE ET AL., *CRIMINAL PROCEDURE* § 26.4(g) (5th ed. 2009). In the Second Circuit, for instance, such hearings are known as Fatico hearings. See *United States v. Fatico*, 603 F.2d 1053, 1057 n.9 (2d Cir. 1979).

237. See, e.g., Gary M. Maveal, *Federal Presentence Reports: Multi-Tasking at Sentencing*, 26 SETON HALL L. REV. 544, 574–76 (1995).

238. See, e.g., 21 U.S.C. § 360b(d)(1)(B) (2006) (providing that applications for use of new drugs shall be denied if the drug is found to be "unsafe"); 47 U.S.C. § 307(a) (2006) ("The [Federal Communications] Commission, if public convenience, interest, or necessity will be served thereby . . . shall grant to any applicant therefore a station license provided for by this chapter.").

239. Section 3553(a)(2) provides, "[t]he court, in determining the particular sentence to be imposed, shall consider . . . the need for the sentence imposed— (A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense; (B) to afford adequate deterrence to criminal conduct; (C) to protect the public from further crimes of the defendant; and (D) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner." 18 U.S.C. § 3553(a)(2) (2006).

crimes.²⁴⁰ Public input in a concrete case can reflect the many facets of just deserts, helping judges to give desert appropriate weight.²⁴¹

Popular involvement also can legitimate the more eclectic, less philosophically pure approach to punishment that exists in real-world criminal justice. In an eclectic approach, just deserts may be central but tempered by a variety of other considerations such as incapacitation, deterrence, moral reform, restitution, and apologies.²⁴² Theorists may abhor such a hash, but the public, prosecutors, and policymakers care about a fairly wide range of factors. Yet it is surprisingly difficult to specify in the abstract how much weight each factor deserves, and that weight may vary from case to case.²⁴³ A more robust feedback mechanism for considering these factors in real cases helps to check discretion and promote the accountability and legitimacy on which criminal justice depends in a democracy. A hybrid system can allow both probation officers and the public, both judges and juries to have their say, blending expertise with popular voice. That range of voices is more likely to lead judges toward a consensus middle ground, moderating the idiosyncra-

240. See Paul H. Robinson, *Some Doubts About Argument by Hypothetical*, 88 CALIF. L. REV. 813, 819–23 (2000). See generally PAUL H. ROBINSON & JOHN M. DARLEY, *JUSTICE, LIABILITY, AND BLAME: COMMUNITY VIEWS AND THE CRIMINAL LAW* (1995) (comparing lay views with substantive criminal code provisions on a variety of criminal law issues).

241. The Supreme Court's jury sentencing cases reflect just this notion. See Morris B. Hoffman, *The Case for Jury Sentencing*, 52 DUKE L.J. 951, 994–1002 (2003); see also Witherspoon v. Illinois, 391 U.S. 510, 519–20 (1968) (explaining capital jury's sentencing role as “express[ing] the conscience of the community” and “speak[ing] for the community”).

242. See, e.g., Cass R. Sunstein, *On the Psychology of Punishment*, 11 SUP. CT. ECON. REV. 171, 175–76 (2004) (noting that retribution, rather than consequentialist goals, is central to popular punishment judgments); see also Darley, *supra* note 1, at 661–76 (noting empirical evidence of public's central focus on retribution but willingness to consider incapacitation in at least some cases); Paul H. Robinson et al., *Extralegal Punishment Factors: A Study of Forgiveness, Hardship, Good-Deeds, Apology, Remorse, and Other Such Discretionary Factors in Assessing Criminal Punishment*, 65 VAND. L. REV. 737 (2012) (confirming that substantial numbers of respondents are willing to modify sentences significantly based on factors such as remorse, apology, forgiveness, and restitution).

243. See Richard A. Bierschbach, *Proportionality and Parole*, 160 U. PA. L. REV. 1745, 1770–72 (2012) (discussing difficulty of specifying appropriate weighting of sentencing factors ex ante through general rules); see also CASS R. SUNSTEIN, *LEGAL REASONING AND POLITICAL CONFLICT* 43 (1996) (“Any simple, general, and monistic or single-valued theory of a large area of the law . . . is likely to be too crude to fit with our best understandings of the multiple values that are at stake in that area.”).

sies of a given prosecutor or judge.²⁴⁴ The result should be a more well-rounded, inclusive process that reflects upon all the relevant factors.²⁴⁵

The broad range of factors requires an equally broad scope for comment and input. Collectively, the array of comments would amount to a detailed record supporting the sentencing decision, permitting more thorough appellate review. Retail sentencing decisions by jurors or judges, unlike popular initiatives and referenda, rest on detailed facts that can trump generalized fears and stereotypes.²⁴⁶ They may thus be inoculated against “the pathological politics of criminal law.”²⁴⁷

3. To Whom: The Identity and Job of the Sentencer

As suggested above, one could allocate the ultimate power to sentence in several different ways. One way is the status quo, which leaves sentencing to a single judge. The advantage of judicial sentencing is the judge’s expertise and insulation from immediate political pressure. But those very advantages can be seen as disadvantages, as non-lawyers distrust judges’ representativeness and attentiveness to popular moral judgment.²⁴⁸

Another approach, used by only a handful of states, is to vest power in a sentencing jury.²⁴⁹ That would add a further

244. See SUNSTEIN, *supra* note 243, at 35–54; Cass R. Sunstein, *Beyond the Republican Revival*, 97 YALE L.J. 1539, 1545 (1988) (discussing how injection of public perspectives and information into agency policymaking helps to determine the public’s “preferences about preferences”). See Bierschbach & Stein, *supra* note 160, for a similar argument in the context of systemic rules for determining criminal liability and punishment.

245. See Jody Freeman & Laura I. Langbein, *Regulatory Negotiation and the Legitimacy Benefit*, 9 N.Y.U. ENVTL. L.J. 60, 124–27 (2001) (arguing that rules adopted through the use of negotiated rulemaking have greater legitimacy and public acceptance); Cass R. Sunstein, *Deliberative Trouble? Why Groups Go to Extremes*, 110 YALE L.J. 71, 73 (2000) (discussing how popular participation informs the course of deliberation in a deliberative democracy, “combin[ing] popular responsiveness with a high degree of reflection and exchange among people with competing views”).

246. See Robinson, *supra* note 240, at 819–23.

247. The phrase, though not the particular conception of pathology we are discussing, is of course from the title of William J. Stuntz’s *The Pathological Politics of Criminal Law*, *supra* note 143 (initial capital letters lowercased).

248. See, e.g., Bradford C. Mank, *Protecting the Environment for Future Generations: A Proposal for a “Republican” Superagency*, 5 N.Y.U. ENVTL. L.J. 444, 469–70 (1996) (discussing ways in which federal judges “are frequently overly insulated from popular values”).

249. Six states retain jury sentencing in non-capital cases. See Nancy J. King & Rosevelt L. Noble, *Felony Jury Sentencing in Practice: A Three-State*

measure of democratic legitimacy to sentences, ensuring that they track popular moral judgments.²⁵⁰ But, like sentencing by popular poll, unfettered jury decision-making raises fears of mob rule by ignorant amateurs.

A compromise, hybrid approach would somehow blend sentencing judges and juries. One could have juries make recommendations but vest final power in judges.²⁵¹ One could give sentencing power to juries subject to judicial comment, remittitur, or other review.²⁵² Or one could have hybrid lay-expert panels, much as German panels comprise professional and lay judges.²⁵³

The choice along this spectrum depends on how one balances expertise and democracy. Academics tend to favor expertise and distrust popular input as mob rule; hence, scholars are often hostile to juries.²⁵⁴ Voters, on the other hand, may distrust judges and experts and see criminal justice as a matter for lay intuition and moral desert. Administrative law offers a framework for reconciling these perspectives. Courts defer to experts so long as they follow public, transparent procedures that solicit a range of input.²⁵⁵ That requires the experts to take public input into account and to justify their decisions with on-the-record reasons. And, within the executive branch, expert bureaucrats remain accountable to elected superiors, who can reverse or moderate their policies. Expertise and democracy may sometimes be in tension, but they can coexist and accommodate each other's perspectives.²⁵⁶

Leaving final authority with sentencing judges would be

Study, 57 VAND. L. REV. 885, 886 (2004).

250. See Morris B. Hoffman, *The Case for Jury Sentencing*, 52 DUKE L.J. 951, 992–95 (2003); Jenia Iontcheva, *Jury Sentencing as Democratic Practice*, 89 VA. L. REV. 311, 350–53 (2003).

251. See Laura I. Appleman, *The Plea Jury*, 85 IND. L.J. 731, 749 (2010) (discussing differences between plea and petit juries); Bibas & Bierschbach, *supra* note 233, at 141–44 (discussing plea and sentencing juries).

252. See Hoffman, *supra* note 250, at 1008–09 (discussing use of judicial review as a safeguard against excessive jury sentences); Iontcheva, *supra* note 250, at 373–76 (same).

253. See Hans-Heinrich Jescheck, *Principles of German Criminal Procedure in Comparison with American Law*, 56 VA. L. REV. 239, 243 (1970).

254. See, e.g., BIBAS, *supra* note 22, at 121–22 (lamenting this phenomenon).

255. See *supra* Subsection II.B.2.

256. See Wright & Miller, *Accountability Deficit*, *supra* note 6, at 1594 (“In the administration of crime policy, as in other government activities, expertise has become essential, yet justice officials must also come to terms with public input.”).

less radical, and we favor that approach. The critical point is that whoever the sentencers are, they must digest and reflect upon the comments submitted. Having to respond to comments and justify sentences publicly would not only discipline sentencers, but also legitimate their decisions.²⁵⁷ So, for example, sentencers would have to justify why they treated seemingly like cases unlike, distinguishing the current case from the typical case meriting the median guideline sentence.²⁵⁸ They would have to explain why they chose not to use obvious alternatives such as civil remedies, non-prosecution agreements, probation, drug treatment, and other less-costly alternatives to prison.²⁵⁹ (In theory, federal judges are supposed to explain why their proposed sentences are “sufficient, but not greater than necessary, to” serve the various goals of punishment.²⁶⁰ But, unchallenged by third parties and able to impose guideline sentences with scant explanation, courts feel little pressure to apply this principle of parsimony.) And, as in administrative law, sentencers would have to respond to other major comments.²⁶¹ Sentencers would not have to devote equal time to every comment, but they would have to heed clusters of comments, recurring themes, and individual comments offering significant information or argument.²⁶² They would issue public reasoned decisions, which both justified the sentence and announced precedents that could develop sentencing law and guide future cases. These evolving lines of precedent would articulate and weigh the competing values at sentencing.

As in administrative law, the emphasis on reasoned decisions situated within a fuller public record would enhance appellate review.²⁶³ To check defendants’ tendencies to collude with prosecutors and waive their appeals even when it is not in their interest, it might be necessary to allow *sua sponte* review or enable probation officers or others close to a case to challenge sentences. A broader appellate process could even allow aggrieved stakeholders to challenge sentences, checking possi-

257. See *supra* notes 126–131 and accompanying text.

258. See *LeMoyné-Owen Coll. v. NLRB*, 357 F.3d 55, 60 (D.C. Cir. 2004).

259. See *Motor Vehicle Mfrs. Ass’n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 34, 46–51 (1983).

260. 18 U.S.C. § 3553(a) (2006).

261. See *Conn. Light & Power, Co. v. NRC*, 673 F.2d 525, 528 (D.C. Cir. 1982).

262. See *id.*

263. See *Int’l Union, United Mine Workers of Am. v. Mine Safety & Health Admin.*, 407 F.3d 1250, 1259 (D.C. Cir. 2005).

ble abuses. That would include not only victims but also defendants' families, public defender groups, sentencing think tanks, and community members.²⁶⁴ One could establish thresholds for intervention on appeal or loosen rules of standing to let these actors challenge final sentences on direct appeal.²⁶⁵

Again, appellate courts could use a sort of hard-look review to reverse sentences that were arbitrary and capricious in light of the entire record. Factors that might trigger concern include a thin evidentiary record; a perfunctory or generic explanation; an extremely harsh or lenient sentence compared to similar cases; and a failure to consider obvious alternatives, particularly when imposing a novel sentence.²⁶⁶ The reviewing court would consider the entire process and reasons given, probing to ensure a reasoned connection between the facts, arguments, and policies (whether laid out in guidelines or developed ad hoc) below and the final sentencing determination. It would not, however, substitute its own value judgments or punishment policy.²⁶⁷ Where the explanation or record support was deficient, the court would vacate the sentence and remand for reconsideration.²⁶⁸ Careful appellate review of this sort could police sentences for fairness, consistency, and discrimination while still allowing sentencers to develop sentencing policy to reflect local values and concerns.²⁶⁹

The goal here is not to create a welter of substantive rights that could breed complexity and endless collateral litigation. That is a legitimate concern but a manageable one. The aim is simply to create procedural avenues that give stakeholders voice and help to channel and influence exercises of discretion. One can hope that, in the longer term, the lessons learned from public comment and responses would create feedback loops. In the end, these reforms might help judges, juries, parties, and

264. See 5 U.S.C. § 702 (2006) (allowing any "person . . . adversely affected or aggrieved" within the meaning of an agency's organic statute to seek judicial review of agency action); *Ass'n of Data Processing Serv. Org. Inc., v. Camp*, 397 U.S. 150, 154 (1970) (liberally interpreting 5 U.S.C. § 702's "adversely affected or aggrieved" language).

265. See *supra* notes 121–122 and accompanying text.

266. See Chanenson, *supra* note 214, at 178–82; Michael M. O'Hear, *Appellate Review of Sentences: Reconsidering Deference*, 51 WM. & MARY L. REV. 2123, 2163 (2010).

267. See *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 42–43 (1983).

268. See *SEC v. Chenery Corp.*, 318 U.S. 80, 94 (1943).

269. See *id.*

commenters to appreciate one another's perspectives even if they respectfully disagree.

D. AN EXAMPLE: THE PROBLEM OF COOPERATION

This notice-and-comment framework could ameliorate some of the most contentious issues within criminal justice. Take, for example, the problem of witnesses who cooperate with the prosecution. Cooperating witnesses can earn large sentence discounts for assisting police with undercover investigations (by, for example, recording conversations and passing along information) or for testifying against their former accomplices.²⁷⁰ The practice, however, is quite controversial. On the one hand, criminal organizations are often hierarchical. So, for instance, only low-level couriers and street-corner dealers can be caught red-handed smuggling or selling drugs. A code of silence and fear prevails, making low-level dealers unwilling to rat out their bosses and so insulating the high-level wrongdoers from prosecution. The same is true of other organized-crime syndicates and gangs. Cooperation rewards help police and prosecutors to flip the small fry to incriminate the middlemen and work up the chain to catch the big fish.²⁷¹

The threat of stiff penalties, coupled with the lure of large cooperation discounts, allows prosecutors to crack organizations and make cases that they could not otherwise have made.²⁷² Ringleaders, the most culpable wrongdoers, no longer enjoy impunity but face their just deserts. That not only promotes retribution and expressive condemnation, but also increases deterrence by making detection and conviction more likely.²⁷³ And it sows fear within organizations about potential cooperators, potentially raising the cost of running a criminal

270. See Michael A. Simons, *Retribution for Rats: Cooperation, Punishment, and Atonement*, 56 VAND. L. REV. 1, 20–22 (2003).

271. See Neal Kumar Katyal, *Conspiracy Theory*, 112 YALE L.J. 1307, 1328–29 (2003).

272. Daniel C. Richman, *Cooperating Defendants: The Costs and Benefits of Purchasing Information from Scoundrels*, 8 FED. SENT'G REP. 292, 294 (1996) (“Sentencing discounts to cooperators may thus be the only way to get critical testimony in a large class of cases worth prosecuting.”); see also Ronald S. Saffer & Matthew C. Cowl, *Substantial Assistance Departures: Valuable Tool or Dangerous Weapon?*, 12 FED. SENT'G REP. 41, 42, 44 (1999) (offering example in which the threat of mandatory federal drug sentences, coupled with the prospect of cooperation discounts, outweighed gang members' fears about the risks of cooperating).

273. See Miriam Hechler Baer, *Cooperation's Cost*, 88 WASH. U. L. REV. 903, 920–24 (2010); Richman, *supra* note 272, at 293.

conspiracy.²⁷⁴

Cooperation discounts, however, have their dark side. They encourage snitching and disloyalty even to friends and family, about which our society is deeply ambivalent.²⁷⁵ They endanger horizontal equity, treating similarly culpable defendants differently.²⁷⁶ They threaten vertical equity, if more-culpable defendants have more information to trade and succeed in trading it for lower sentences.²⁷⁷ They may undercut general deterrence, encouraging conspirators to think they can cop pleas and get off easily.²⁷⁸ Prosecutors may overbuy testimony and offer overly generous discounts out of risk aversion, investigative laziness, or a desire to undercut excessive sentences.²⁷⁹ Because prosecutors' consent is a prerequisite to federal cooperation discounts, there may be little oversight or explanation to check these decisions.²⁸⁰ Cooperation discounts also risk encouraging perjury from overeager cooperators.²⁸¹ And they risk putting a premium

274. See Katyal, *supra* note 271, at 1334, 1340–43; Daryl J. Levinson, *Collective Sanctions*, 56 STAN. L. REV. 345, 398–400 (2003). *But cf.* Baer, *supra* note 273, at 925–26 (noting some circumstances in which cooperation benefits may encourage socially deleterious behavior such as more price competition among fragmented narcotics cartels and more threats of violence to maintain group cohesion).

275. See Richman, *supra* note 272, at 293; see also *Interview: Clarence Aaron*, FRONTLINE: SNITCH, <http://www.pbs.org/wgbh/pages/frontline/shows/snitch/cases/aaron.html> (last visited Oct. 17, 2012) (recounting example of a defendant convicted based on cooperation by his friends and cousin); *Interview: Joey Settembrino*, FRONTLINE: SNITCH, <http://www.pbs.org/wgbh/pages/frontline/shows/snitch/cases/joey.html> (last visited Oct. 17, 2012) (recounting example of a defendant convicted based on cooperation by his friend).

276. See Richman, *supra* note 272, at 292.

277. See *id.* *But see* Linda Drazga Maxfield & John H. Kramer, *Substantial Assistance: An Empirical Yardstick Gauging Equity in Current Federal Policy and Practice*, 11 FED. SENT'G REP. 6, 11 (1998) (finding that data did not support perception that more-culpable conspirators were more likely to receive discounts).

278. See Baer, *supra* note 273, at 907, 944; Richman, *supra* note 272, at 293.

279. See Frank O. Bowman, III, *Defending Substantial Assistance: An Old Prosecutor's Meditation on Singleton, Sealed Case, and the Maxfield-Kramer Report*, 12 FED. SENT'G REP. 45, 48–49 (1999); Richman, *supra* note 272, at 292–94.

280. See 18 U.S.C. § 3553(e) (2006) (requiring prosecutorial substantial-assistance motion as prerequisite for imposing sentencing below statutory mandatory minimum); U.S. SENTENCING GUIDELINES MANUAL § 5K1.1 (2011) (authorizing judges to offer substantial-assistance discounts upon motion of the prosecutor).

281. See Ellen Yaroshefsky, *Cooperation with Federal Prosecutors: Experiences of Truth Telling and Embellishment*, 68 FORDHAM L. REV. 917, 952 (1999).

on defense counsel's experience, connections, and willingness to cooperate.²⁸²

Scholars often view cooperation discounts as binary, a choice between trusting prosecutors and trusting judges to ration appropriate discounts.²⁸³ But a range of inputs at both the wholesale and retail levels could illuminate the range of competing values at stake. Notice and comment could chill prosecutorial overbuying and excesses of pressure to cooperate. (Recall, for instance, the public criticism of Kenneth Starr for pressuring Monica Lewinsky to cooperate by subpoenaing her mother to testify before a grand jury.²⁸⁴) Public commentary could also call attention to suspected perjury and to discounts that threaten vertical and horizontal sentencing equity.

In responding to comments, prosecutors and others would help to build records explaining and justifying their sentences. Prosecutors and sentencing commissions would both adopt wholesale policies to structure the cooperation process and justify retail sentencing recommendations in individual cases.²⁸⁵ At both levels, they would explain when there are no alternatives to cooperation; how cooperators are chosen; and why specified discounts are reasonable and proportional to the amount of assistance given. They would also demonstrate why, on balance, discounts in certain circumstances increase overall deterrence by removing ringleaders' impunity. And they would help to justify prosecutorial priorities, explaining why the costs of cooperation are worth it for certain types of cases and flagging or fleshing out guidelines for cooperation in the process. If properly justified, these sentences would seem more equitable, commensurate with the assistance given, the risks taken, and the remorse manifested by cooperators.

This process would improve particular sentences, but it would also help to create a positive feedback loop. Knowing that they would be held publicly accountable at the end of the

282. See Bibas, *supra* note 5, at 2485–86.

283. See, e.g., Richman, *supra* note 272, at 294 (framing this choice as a dichotomy and favoring prosecutorial power because prosecutors are better placed to discern deception).

284. See, e.g., Ian Fisher, *Testing of a President: The Mother; Mother's Legal Vulnerability is Seen as Motive for Lewinsky*, N.Y. TIMES, July 30, 1998, at A16.

285. At least some prosecutors' offices, such as U.S. Attorneys' offices, already have such policies, although they are formulated behind closed doors and not made public. See Cynthia Kwei Yung Lee, *Prosecutorial Discretion, Substantial Assistance, and the Federal Sentencing Guidelines*, 42 UCLA L. REV. 105, 125–30 (1994).

process, police and prosecutors would be more careful about their investigative, charging, and plea-bargaining decisions earlier on. They would exhaust alternative investigative techniques before resorting to cooperation. They would take more care to sign up the least culpable cooperators, compensating for the natural tendency to favor defendants who have familiar, well-connected defense lawyers.²⁸⁶ And they would better ration their use of cooperating witnesses, reducing the systemic costs of sentencing inequity and perceived unfairness. Opening sentencing to an array of viewpoints would not only increase transparency and reasoned justifications, but in the long run would also improve this shadowy corner of criminal justice.

IV. OBJECTIONS

We recognize that our participatory sentencing framework brings with it its own set of concerns. One obvious objection is that it is unnecessary: one might think that elections of local prosecutors already provide a much more direct way of cabining discretion, injecting public input into prosecutorial policymaking, and ensuring legitimacy and accountability to boot. Ronald Wright, however, has shown that elections deliver far less than they promise.²⁸⁷ Re-election rates are greater than 95%, with about 85% of sitting district attorneys running unopposed.²⁸⁸ Even those who face challengers “do not face much meaningful public scrutiny of their policies or priorities.”²⁸⁹ Instead, Wright shows, “elections turn on generic claims about ‘competence,’ familiar but unhelpful measures (‘conviction rate’), and—most common of all—claims about high profile cases (both successes and failures). Election rhetoric does not highlight ideological or policy differences.”²⁹⁰ And even if it did, elections do not elicit the same granularity of input on specific policies or the same diversity of viewpoints from affected communities.²⁹¹ As Erik Luna explains, some of the groups most affected by real-world sentencing policies—such as poor, urban, inner-city communities—have no real voice at the ballot box, leaving them with no

286. See Bibas, *supra* note 5, at 2485–86.

287. Ronald F. Wright, *How Prosecutor Elections Fail Us*, 6 OHIO ST. J. CRIM. L. 581 (2009).

288. See *id.* at 592–93 (stating re-election statistics).

289. Wright & Miller, *Accountability Deficit*, *supra* note 6, at 1606.

290. *Id.* (summarizing findings and conclusions in Wright, *How Prosecutor Elections Fail Us*, *supra* note 287).

291. See Adriaan Lanni, *The Future of Community Justice*, 40 HARV. C.R.-C.L. L. REV. 359, 389–90 (2005).

effective remedy to or input into policymaking at the electoral level.²⁹² Notice and comment could bypass some of these pathologies, encouraging prosecutors to pay more attention to a wider array of voices and information brought to bear on particular policies or decisions.²⁹³

Of course, for notice and comment to deliver on that promise, those voices must in fact materialize. A related concern thus has to do with who participates. After all, one way of framing the problem with American criminal justice today is that we have too much public participation, not too little. The broad and deep codes that give prosecutors their power are the result of a lopsided politics in which the “voices in favor of broader laws and longer punishments are powerful” and those opposed are weak.²⁹⁴ Critics might worry that a similar dynamic will infect the process we propose. They might fear that victims’ rights groups, prison guard unions, and other organized tough-on-crime interests would dominate the comment process, further skewing sentences toward even harsher punishments.²⁹⁵ Interest representation in administrative law has in fact been criticized on just these grounds.²⁹⁶

But by formalizing and regularizing the voices that go into sentencing, notice and comment likely would yield more balanced interest representation on sentencing issues than currently exists. The lesson of the Federal Sentencing Guidelines was not that tough-on-crime interests always drown out all others. It was that, for interest representation to work in sen-

292. See Luna, *supra* note 163, at 589.

293. See *id.* at 587–90; Stewart, *supra* note 79, at 1775–76; Sunstein, *supra* note 245, at 105–06.

294. Barkow, *Separation of Powers*, *supra* note 6, at 1030; see also Stuntz, *supra* note 143, at 546–52.

295. See Barkow, *Institutional Design*, *supra* note 6, at 912 (noting that “the problem with making prosecutorial decisions more transparent is that the politics of crime might push them in a decidedly antidefendant direction”); Wright, *supra* note 169, at 1013; see also Aya Gruber, *A Distributive Theory of Criminal Law*, 52 WM. & MARY L. REV. 1, 52–58 (2010); Erik Luna, *The Overcriminalization Phenomenon*, 54 AM. U. L. REV. 703, 720 n.82 (2005) (noting that California’s prison guard union “poured money into the campaign for the anti-recidivist statute”).

296. See Croley, *supra* note 90, at 58–60; Kagan, *supra* note 83, at 2266 (noting criticisms that the efforts made to ensure broad interest representation in administrative law “had left in place, or perhaps even aggravated, substantial disparities in interest group influence”); Stewart, *supra* note 79, at 1670; see also William Funk, *Bargaining Toward the New Millennium: Regulatory Negotiation and the Subversion of the Public Interest*, 46 DUKE L.J. 1351, 1356 (1997) (criticizing negotiated rulemaking on the ground that it “establish[es] privately bargained interests as the source of putative public law”).

tencing, procedural mechanisms must exist to make participation meaningful. Most organized interest groups probably would participate in formulating wholesale policies, as well as in high-profile cases or those raising wholesale-level policy issues.²⁹⁷ Where they do, public defender groups, sentencing-reform organizations, and other pro-defendant groups would have the incentives and ability to participate along with everyone else, as they sought to do with the Federal Guidelines.²⁹⁸ The experiences of some state guidelines commissions, as well as those of localities like Kitsap County, show that open, inclusive processes can be far more balanced than legislatures or the Federal Sentencing Commission.²⁹⁹ Notice and comment could thus help force on-the-ground sentencing policymakers to take seriously voices that get little traction at the legislative level.

The dynamic would be similar in more run-of-the-mill cases, in which victims, defendants' friends and families, and others often already submit information or arguments in a variety of ways.³⁰⁰ A comment period would flush these views into the open and put them on equal footing. True, in any given case some risk will always exist that one side's comments might overwhelm the others. But sheer volume matters less than substance in the comment process. Moreover, the judge as sentencer would retain the authority to disregard hysterical, hateful, or other comments, as agencies disregard irrelevant or extreme comments in rulemakings.³⁰¹ As we have argued elsewhere, victims and individual citizens are far less vengeful than we usually assume. They care not only about substantive outcomes, but also about being listened to and taken seriously. Particularly if they have their day in court, they will not automatically demand the maximum punishment.³⁰² And in all cases, prosecutors and judges would consider comments against background sentencing principles that aim to ferret out bias,

297. See FRANKLIN E. ZIMRING ET AL., PUNISHMENT AND DEMOCRACY: THREE STRIKES AND YOU'RE OUT IN CALIFORNIA 173 (2003) (discussing interest-group participation in high-profile criminal law policy issues); Wright & Miller, *Accountability Deficit*, *supra* note 6, at 1594 (discussing public input into local criminal justice policy debates).

298. Baron-Evans & Stith, *supra* note 147, at 1643.

299. Richard S. Frase, *Is Guided Discretion Sufficient? Overview of State Sentencing Guidelines*, 44 ST. LOUIS U. L.J. 425, 443-44 (2000).

300. See *supra* note 225 and accompanying text.

301. See *Portland Cement Ass'n v. Ruckelshaus*, 486 F.2d 375, 394 (D.C. Cir. 1973).

302. See Bibas & Bierschbach, *supra* note 233, at 137-39; see also BIBAS, *supra* note 21, at 36-40, 91.

inequality, and the like. By flushing into the open the policy tradeoffs that drive prosecutorial charging, bargaining, and sentencing decisions, notice and comment may guard against such concerns.³⁰³

Making prosecutorial policies more open and accessible carries its own risks. Some readers might worry that disclosure of guidelines or decisional criteria will undermine deterrence by bridging the criminal law's acoustic separation and sending signals that some crimes are freebies.³⁰⁴ That worry is overblown, for several reasons. First, disclosure of prosecutorial policies does not mean the creation of binding enforcement or charging thresholds. Prosecutors always could exercise their reasoned discretion to pursue a given case as they see fit, and some low-level arrest and declination decisions would still implicate resource-allocation issues largely off limits to comment and review. Second, the limited evidence is that even jurisdictions that have disclosed declination and charging policies have not seen an increase in low-level crimes.³⁰⁵ That may be in part because deterrence is at least as much normative as it is coercive,³⁰⁶ and in part because for those repeat offenders who are most likely to offend again, disclosure only confirms what they already know.³⁰⁷ Third, to the extent that deterrence is coercive, it is the certainty and not the severity of punishment that matters most.³⁰⁸ For more serious cases in which the only issue is

303. See Mendelson, *supra* note 93, at 441 (arguing that a right to petition for notice and comment for regulatory guidances could "prompt agencies to identify more significant and controversial policies earlier, as well as to use a more thorough, participatory process for these policies").

304. See Meir Dan-Cohen, *Decision Rules and Conduct Rules: On Acoustic Separation in Criminal Law*, 97 HARV. L. REV. 625, 669 (1984); see also Edward K. Cheng, *Structural Laws and the Puzzle of Regulating Behavior*, 100 NW. U. L. REV. 655, 686 (2006) ("Ordinarily, enforcement strategies are closely guarded secrets, since disclosure undermines their efficacy and deterrence value."); Michael M. O'Hear, *Plea Bargaining and Procedural Justice*, 42 GA. L. REV. 407, 452 (2008).

305. See Wright & Miller, *Accountability Deficit*, *supra* note 6, at 1615–17 (discussing Kitsap County). For examples of published prosecutorial policies, see Richard H. Kuh, *Plea Bargaining: Guidelines for the Manhattan District Attorney's Office*, 11 CRIM. L. BULL. 48 (1975) and 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).

306. See, e.g., Dan M. Kahan, *What Do Alternative Sanctions Mean?*, 63 U. CHI. L. REV. 591, 603–04 (1996).

307. See O'Hear, *supra* note 304, at 452.

308. See Jeffrey Grogger, *Certainty vs. Severity of Punishment*, 29 ECON. INQUIRY 297, 307–08 (1991); Ann Dryden White, *Estimating the Economic*

what and not whether to charge, the impact of disclosure on law enforcement goals will thus be less of an issue. Finally, given the low risks of apprehension and offenders' over-optimism about their own risk of getting caught, deterrence is speculative even without more disclosure. If disclosure teaches offenders anything new, the benefits might equal or outweigh the costs by bolstering the message that certain serious crimes are at the top of prosecutors' lists.³⁰⁹

Finally, there are issues of cost and feasibility. Notice-and-comment sentencing will take time and money, and the volume of cases to which it could potentially apply is huge. While these concerns are real, they are also manageable. While we believe many lessons can be learned from administrative law's approach to participation, we do not recommend all of its cumbersome statutory and judicial strictures. Reforms need not happen all at once, and courts, legislators, and prosecutors' offices should experiment with what works best. At the wholesale level, the most formal procedures—those most closely akin to true notice and comment in the administrative agency context—might be reserved for statewide sentencing commissions, guidelines from state attorneys general, and other significant bodies.³¹⁰ Counties and local governments might start out by adopting less formal approaches bearing more resemblance to negotiated rulemaking, such as town meetings or transparent working groups comprising representatives of various interests.³¹¹ In retail cases, notice and comment could be restricted

Model of Crime with Individual Data, 94 Q.J. ECON. 57, 79 (1980).

309. O'Hear, *supra* note 304, at 452.

310. *Cf.* Memorandum from Rob Portman, *supra* note 120, at 15–18 (discussing when both traditional notice-and-comment procedures and less formal alternatives might be appropriate for “significant” agency guidance documents).

311. As administrative law scholars recognize, negotiated rulemaking and other informal processes tend to work best for rules that affect a relatively small number of interests or manageable communities. Formal notice and comment, by contrast, is better suited for rules that have significant effects on many interests across a broad political community. *See, e.g.*, PIERCE ET AL., *supra* note 102, § 6.4.6f; *see also* Cary Coglianese, *Assessing Consensus: The Promise and Performance of Negotiated Rulemaking*, 46 DUKE L.J. 1255, 1318–19 (1997) (noting in an empirical study of negotiated rulemaking that “the EPA recommends formal negotiation only when the parties are ‘reasonably few in number,’” and that “the EPA rules that affect the broadest number of organizations have never been selected for negotiated rulemaking” (citation omitted)); Philip Harter, *Negotiating Regulations: A Cure for Malaise*, 71 GEO. L.J. 1, 30, 46 (1982) (arguing that negotiated rulemaking “can reduce the time and cost of developing regulations,” but that “negotiation would not work” where “even several individuals could not represent the interests” of all of the

to the most serious and heinous crimes, such as death-penalty cases, terrorism cases, or widespread financial frauds. Or laws could pick out contentious categories of cases, such as domestic abuse, drunk driving, or victimless crimes, to throw competing viewpoints into sharp relief. Alternatively, notice and comment could be limited to cases raising significant issues that bear on the public's interest in the administration of criminal justice, such as the use of informants.³¹² Judges could be given the authority to order notice and comment in individual cases they find to meet that standard. Or the parties, probation officers, or even members of the public could be allowed to petition for notice and comment under the same criteria, with rules prohibiting pro forma or abusive petitions and judges having the final say.³¹³ Drawing these lines will not be easy, but neither will it be impossible.

Similar issues will need to be worked out as to how best to notify members of the public and encourage the submission of comments by a representative cross-section of the community, especially at the retail level. One possibility would be to post "Notices of Proposed Sentencing" on courthouse websites, with links to critical record information and a comment form.³¹⁴ This likely would go some distance toward fostering involvement by well-organized interest groups and those with easy Internet access. But its usefulness for drawing in more dispersed or less

industrial or other sectors affected by a rule); Keith Werhan, *Delegalizing Administrative Law*, 1996 U. ILL. L. REV. 423, 437 n.109 (arguing that "for negotiated rulemaking to be effective, the number of affected interests must be relatively small (less than 20–25) and the interests of the parties should be those that they are willing to trade off and compromise"). In small jurisdictions in which on-the-ground policymakers are already plugged into local concerns from a cross-section of the community—think, for instance, of a rural jurisdiction in which the local prosecutor, judge, police, defense attorney, and townsfolk generally know one another—much of what we propose might already be occurring informally one way or another, making the case for reform less pressing.

312. Cf. Mendelson, *supra* note 93, at 444–45 (discussing feasibility of providing notice and comment for "significant" regulatory guidances).

313. Cf. *id.* at 439–44 (discussing feasibility of allowing citizens to petition for notice and comment for regulatory guidances when certain criteria are satisfied).

314. See, e.g., Farina et al., *140 Characters or Less*, *supra* note 235, at 390–91 (describing one approach for translating a traditional Notice of Proposed Rulemaking to a digestible set of "Issue Posts" for use in soliciting comments on the Internet); Peter M. Shane, *Empowering the Collaborative Citizen in the Administrative State: A Case Study of the Federal Communications Commission*, 65 U. MIAMI L. REV. 483, 498–500 (2011) (reviewing Internet-based tools for broadening the range of public input in FCC rulemakings).

advantaged members of the public is less clear, particularly in garden-variety retail cases in which public interest groups are unlikely to be effective stand-ins.³¹⁵ Perhaps probation officers could collect brief comment sheets in advance as part of their presentence investigations. They could also do more to reach indirect victims, neighbors, and families of defendants, as well as neighborhood watch groups, churches, parent-teacher associations, and the like.³¹⁶ Or perhaps standing, advisory sentencing juries could be empaneled, much like grand juries currently sit, to help elicit factual information and inject more views into the process.³¹⁷ Admittedly, the further into retail sentencing our proposal goes, and the further up the rungs of the retail ladder one climbs, the more difficult the questions become. But the fact that there are not easy answers here should not obscure the point that there are questions worth asking. Without taking seriously the public's voice in the public interest, we cannot even begin the conversation.³¹⁸

CONCLUSION

Criminal and administrative law both grapple with how to

315. See Farina et al., *Rulemaking 2.0*, *supra* note 235, at 396–414 (describing results of two case studies that used a combination of traditional and Internet-based approaches to attempt to increase outreach to and participation of stakeholders in rulemaking, and reporting mixed success).

316. Here too, the use of social media, including social networking sites like Facebook, and other Internet-based strategies, might expedite such outreach, although more research still needs to be done on how effectively to use such tools. See generally *id.* (surveying current issues in agency rulemaking context). For recent examples of the burgeoning literature on this subject, see Cliff Lampe et al., *Motivations to Participate in Online Communities*, PROC. 28TH INT'L CONF. ON HUM. FACTORS IN COMPUTING SYS. 1927 (2010), available at <http://portal.acm.org/citation.cfm?id=1753616>, and Jennifer Preece & Ben Shneiderman, *The Reader-To-Leader Framework: Motivating Technology-Mediated Social Participation*, 1 AIS TRANSACTIONS ON HUM.-COMPUTER INTERACTION 13 (2009), available at <http://aisel.aisnet.org/thci/vol1/iss1/5/>.

317. See, e.g., Iontcheva, *supra* note 250, at 373–76 (2003) (discussing different models of judge-jury interaction at sentencing); see also *United States v. Khan*, 325 F. Supp. 2d 218, 219, 226–28 (E.D.N.Y. 2004) (discussing potential use of advisory juries by courts).

318. Readers generally skeptical of the value of participation in administrative law will be skeptical of our proposals as well. Whether participation has any place in administrative law generally is a much larger question that we do not take on here. Our point is more limited: rightly or wrongly, administrative law is premised on the virtues of participation as a response to some of the pathologies of the administrative state. Those same pathologies infect criminal sentencing. It is thus worth thinking seriously about how that same framework maps onto criminal justice, and onto real-world sentencing in particular.

justify, channel, and legitimize professionals' exercise of state power. Yet the two fields have developed in almost complete isolation from each other. Administrative law procedures elicit the public's information and value preferences, helping to blend public input and expertise in giving meaning to vague terms such as the public interest. Notice-and-comment procedures thus constrain agency discretion and promote better outcomes. But they also legitimize agency actions taken publicly after heeding the public's voices. While experts remain in charge, they must reflect upon public input and justify their exercises of discretion.

Criminal procedure could likewise benefit from explicitly blending expert and lay perspectives. That does not mean importing all the slowness and rigidity of administrative rulemaking. Nor does it mean relying primarily on external controls such as judicial review. But it does suggest that internal policies, checked by judicial review and public oversight, could do much more to incorporate public input and promote clear, consistent justice. Although considerations of cost and volume must limit the extent of retail reforms, criminal justice need not remain a lawless anomaly. Few substantive standards guide the decisions by which prosecutors and others shape charges and sentences. We can do more to check professionals' faithfulness in exercising discretion.

One could extend this Article's ideas to other domains of criminal justice, especially at the back end. One possibility is to apply notice and comment to parole. To the public, parole risks seeming like haphazard leniency that undercuts deserved punishment. Existing parole guidelines are flawed because they were created without public notice or comment, so they do little to justify parole or respond to legitimate public concerns.³¹⁹ Public, transparent, and participatory parole guidelines, pegged to dangerousness, rehabilitation, illness, old age, and the like, could both improve decisions and better explain them

319. See, e.g., NORA V. DEMLEITNER ET AL., SENTENCING LAW & POLICY 821 (2d ed. 2007) (noting that "usually . . . [parole] guidelines have been issued by the parole board itself," with little legislative or other oversight); ASS'N OF PAROLING AUTHS. INT'L, PAROLE BOARD SURVEY 2003, at 7 (2004), available at <http://www.apaintl.org/documents/surveys/2003.pdf> (finding in a survey of fifty-two parole boards, including those of forty-four states and several territories, that more than half did not use any formal set of written guidelines or assessment instruments in making release decisions); Giovanna Shay, *Ad Law Incarcerated*, 14 BERKELEY J. CRIM. L. 329 app. at 376 (2009) (detailing exemptions from state notice-and-comment laws for rules related to prisoners and prison conditions, including rules governing parole).

to the public.³²⁰ Likewise, executive clemency seems like arbitrary favoritism for well-connected convicts, or else gubernatorial softness on crime.³²¹ Thus, pardons and sentence commutations have all but died out in many states.³²² Clemency guidelines could structure consideration of remorse, apology, reform, and prospects for a law-abiding life. In both instances, public input at the wholesale level could help in working through messy and difficult normative questions—what sorts of release risks are worth taking, for what types of offenders do the costs of continued imprisonment overwhelm the benefits, what factors should matter most for the community’s for-

320. The factors governing parole release decisions are broad and varied. They include things like the offender’s participation in prison programs; infractions of prison rules; job opportunities upon release; family ties; the seriousness of the original offense; expressions of remorse and repentance; the risk of recidivism; and the views of victims, community members, prosecutors, or sentencing judges. *See, e.g.*, PAULA M. DITTON & DORIS JAMES WILSON, BUREAU OF JUSTICE STATISTICS, NCJ 170032, TRUTH IN SENTENCING IN STATE PRISONS 4–14 (1999), available at <http://bjs.ojp.usdoj.gov/index.cfm?ty=pbdetail&iid=820> (describing how state boards approach parole decisions and listing factors that shape those decisions); *see also* Miller v. N.Y. State Div. of Parole, 897 N.Y.S.2d 726, 727 (App. Div. 2010) (noting the parole board’s consideration of “the petitioner’s institutional record, including his disciplinary record, program accomplishments, academic achievements, and post-release living arrangements, as well as the violent circumstances of his crime, his criminal history, and his continued claim of innocence” in making its release decision (citations omitted)). Today, as a practical matter, dangerousness and other public safety factors top the list. *See* Joshua Stengel, *Parole’s Function, Purpose, and Role in the Criminal Justice System*, NAT’L INST. CORRECTIONS (Aug. 30, 2010, 4:38 PM), <http://community.nicic.gov/blogs/parole/archive/2010/08/30/parole-s-function-purpose-and-role-in-the-criminal-justice-system.aspx> (describing how risk assessment and public safety concerns have begun to dominate release decisions).

321. *See, e.g.*, Rachel E. Barkow, *The Ascent of the Administrative State and the Demise of Mercy*, 121 HARV. L. REV. 1332, 1345–51 (2008) (connecting declines in clemency and pardon rates both to concerns about unreviewable, arbitrary, and capricious exercises of executive discretion and to tough-on-crime politics).

322. *See Presidential Clemency Actions by Administration: 1945 to Present*, U.S. DEP’T OF JUSTICE, http://www.justice.gov/pardon/actions_administration.htm (last updated Apr. 4, 2011) (documenting steady decrease in presidential grants of clemency petitions from 36% under President Nixon to 1.8% under President George W. Bush); Eric R. Johnson, *Doe v. Nelson: The Wrongful Assumption of Gubernatorial Plenary Authority over the Pardoning Process*, 50 S.D. L. REV. 156, 179 (2005) (observing that “[a] similar downward trend” to the one at the federal level “can be found at the state level”); Daniel T. Kobil, *Should Mercy Have a Place in Clemency Decisions?*, in FORGIVENESS, MERCY, AND CLEMENCY 36, 37 (Austin Sarat & Nasser Hussain eds., 2007) (citing a survey of commutations from 1995 to 2003 that found that “most states averaged fewer than one hundred commutations per state, with thirty-four states . . . having dispensed twenty or fewer”).

givenness, and so forth.³²³ Retail-level input, say by parole or even clemency juries in the most important cases, could provide further political cover for risk-averse governors to grant mercy in the right cases.³²⁴

Practical challenges remain. Criminal justice agencies, like other agencies, must experiment with identifying and including representative samples of the public and managing issues of cost and confidentiality. They must foster thoughtful dialogue between expert and lay voices, modulating knee-jerk assumptions and responses. But these practical challenges should not halt reform. Ultimately, we must strive to make criminal justice transparent and participatory enough to serve the public interest and to earn the public's confidence.

323. As David Ball notes, these and similar questions raised by parole are especially amenable to some form of public input, which could help “determine whether releasing an individual would be ‘worth it,’ with all the vague, value- and policy-laden implications that phrase entails.” W. David Ball, *Normative Elements of Parole Risk*, 22 STAN. L. & POL’Y REV. 395, 408 (2011). The same holds true for clemency, at least insofar as it should serve the public’s and not the executive’s purely private or political interests. Whether an executive’s application of clemency guidelines should be subject to any sort of explanation or judicial review requirements is a separate question. For an argument that they should not be, see Barkow, *supra* note 321, at 1358–65.

324. *Cf.* Ball, *supra* note 323, at 407–10 (proposing an increased role for juries in parole decision-making as a way of injecting community values into parole release decisions); Douglas A. Berman, *A Truly (and Peculiarly) American “Revolution in Punishment Theory,”* 42 ARIZ. ST. L.J. 1113, 1120 (2010–2011) (discussing how parole juries could bring laypersons’ sense of justice to parole release decisions).