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## Response

### It's the Reply, Not the Comment: Observations About the Bierschbach and Bibas Proposal

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Criminal justice policy in a democracy would not be legitimate if it were to ignore the priorities of the voters; at the same time, criminal justice policy would be foolish if it were to ignore the wisdom of experts. The design trick is to combine the insights of the public and the experts into an informed yet responsive system.

As part of a larger project to find more places for popular views in the ordinary operations of criminal justice,<sup>1</sup> Richard Bierschbach and Stephanos Bibas explore the law and institutions of criminal sentencing in their article, *Notice-and-Comment Sentencing*.<sup>2</sup> Their search for ways to involve the public in sentencing leads to that cradle of populism, administrative law. This is an underutilized but fruitful source of ideas for criminal justice.<sup>3</sup> Administrative law doctrines try to mesh the expertise of insiders and their technical skills with the practical wisdom of outsiders and their awareness of public priorities and values.<sup>4</sup>

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1. Professor Bibas recently developed a package of related ideas in *THE MACHINERY OF CRIMINAL JUSTICE* (2012). The theme has also formed the basis for some of Professor Bierschbach's previous work. See Richard A. Bierschbach, *Allocution and the Purposes of Victim Participation Under the CVRA*, 19 FED. SENT'G REP. 44 (2006) (describing controversies arising from the passage of the Crime Victims' Rights Act).

2. Richard A. Bierschbach & Stephanos Bibas, *Notice-and-Comment Sentencing*, 97 MINN. L. REV. 1 (2012).

3. *Id.* at 4.

4. For examples of work that combines the insights from this unlikely pair of disciplines, see Rachel Barkow, *Institutional Design and the Policing of Prosecutors: Lessons from Administrative Law*, 61 STAN. L. REV. 869 (2009);

The administrative process that forms the basis for the Bierschbach-Bibas proposal in sentencing law is known as “notice-and-comment” rulemaking.<sup>5</sup> As the name suggests, government rule makers must notify the public about a proposed rule and then accept comments from interested outsiders.<sup>6</sup> Despite the name, however, the real key to this device is not the agency’s *notice* about its proposed rule, nor is it the *comment* that the agency receives. Instead, the heart of this procedural device is revealed in the *reply* that the agency must make to those comments. Without the reply, the comment goes nowhere. If the agency offers no serious reply to a comment, then the public input either makes no difference to outcomes, or speakers have no way of knowing when they make a difference.<sup>7</sup>

A well-functioning administrative process creates a responsive environment: that is, a set of habits and incentives that forces the agency to listen carefully and to respond meaningfully to the comments. In some settings, judicial review creates this responsive environment. If the agency fails to reply to comments adequately when it issues final rules, a reviewing court will later invalidate the rules and force the agency to start over.<sup>8</sup> In other settings, agencies cultivate a responsive environment even when judges are not there to require a high-quality response.<sup>9</sup>

The prospects for notice-and-comment sentencing, therefore, depend on whether the institutional players—acting together—can create a responsive environment. In such an environment, a high-quality reply from a sentencing actor proves that the notice and the comments mattered.

In this Essay, I will offer two brief observations about the responsive environment that might develop for sentencing institutions as they pursue notice-and-comment sentencing. First, institutions will likely respond differently to comments

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Darryl K. Brown, *Criminal Law’s Unfortunate Triumph over Administrative Law*, 7 J.L. ECON. & POL’Y 657 (2011).

5. See Bierschbach & Bibas, *supra* note 2, at 25.

6. See RICHARD J. PIERCE, JR. ET AL., ADMINISTRATIVE LAW AND PROCESS § 6.4.6 (5th ed. 2008).

7. *Id.*

8. *Id.* § 6.4.6b.

9. See David L. Markell & Emily H. Meazell, *Administrative Proxies for Judicial Review: Building Legitimacy from the Inside-Out*, 37 HARV. ENVTL. L. REV. (forthcoming 2013) (manuscript at 16–19), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2127838](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2127838).

that come from system insiders (such as prosecutors, defense attorneys, judges, and corrections officials) than comments that come from outsiders (such as crime victims and community advocacy groups). A truly responsive system will value the outsider comments, even though they do not add value in the same way as insider comments. Outsider comments matter more for their collective themes and weight than for the contents of each comment in isolation.

Second, the most important sentencing institutions operate at the state level. Consequently, a responsive environment must account for the high volumes and minimal staffing levels that are routinely present in state sentencing. The best response to comments in a high-volume system is to draw insights from the sheer quantity of comments rather than responding only to the merits of each individual comment.

### I. CONSIDER THE SOURCE OF THE COMMENT

Regulatory agencies receive comments during the rulemaking process both from insiders and outsiders.<sup>10</sup> The insiders include trade associations within the industry targeted for a potential new regulation (say, automobile manufacturers), along with organizations that might benefit from the regulation (for instance, auto insurance companies that would pay fewer claims from policyholders who drive safer cars).<sup>11</sup> The repeat players in the commenting process also include organizations that represent more dispersed groups of regulatory targets or beneficiaries (consumer groups or business “roundtable” confederations).<sup>12</sup>

On the other hand, outsider commenters are not repeat players. They could simply be individuals—anyone at all, for there is no limit on the parties who have the right to submit comments to an agency during the rulemaking process.<sup>13</sup>

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10. See Marissa Martino Golden, *Interest Groups in the Rule-Making Process: Who Participates? Whose Voices Get Heard?*, 8 J. PUB. ADMIN. RES. & THEORY 245, 247–48 (1998).

11. See, e.g., *id.* at 252–54 (noting that for the eight examined National Highway Traffic Safety proposed rules, “between 66.7 percent and 100 percent of the comments were submitted by corporations, public utilities, or trade associations” and not “a single comment [was] from an individual citizen”).

12. See Wendy Wagner, *Revisiting the Impact of Judicial Review on Agency Rulemakings: An Empirical Investigation*, 53 WM. & MARY L. REV. 1717, 1781–87 (2012) (discussing different impacts of repeat players and other groups during the rulemaking process).

13. The rulemaking process in Europe historically has relied less on com-

The comments from insiders and outsiders are quite different. Insiders often hire attorneys to draft their comments about proposed rules, and they typically offer technical information about the costs and benefits of the proposed regulatory method, along with alternatives to that method.<sup>14</sup> These savvy commenters acquaint the regulators with normal operating procedures in the industry. Insiders (and their lawyers) also tend to include legal arguments about potential limits on the agency's authority to pursue certain solutions.<sup>15</sup>

As for outsider comments, many tend to register preferences—in effect, casting a vote for or against the rule.<sup>16</sup> In some cases, these comments result from grassroots campaigns by organizations. One such organization, the Sierra Club, places form letters in the hands of their members, urging them to send a pre-packaged statement to the agency as a comment on the proposed rule.<sup>17</sup> In other cases, the outsider commenter might tell a story that connects the rule to a real-world example of the harm that flows from unregulated conduct, or the concrete costs that might flow from a new regulation.<sup>18</sup> In addition, outsider comments tend to link the agency's choice to larger themes about government regulation and corporate responsibility.<sup>19</sup> Although lawyers do not guide these commenters and they often lack technical knowledge, they do address ques-

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ments from groups without a direct financial interest in the subject of the rule. See JOANA MENDES, PARTICIPATION IN EUROPEAN UNION RULEMAKING: A RIGHTS-BASED APPROACH 36–43 (2011).

14. See David C. Nixon et al., *With Friends Like These: Rule-Making Comment Submissions to the Securities and Exchange Commission*, 12 J. PUB. ADMIN. RES. & THEORY 59, 63 (2002).

15. See, e.g., Christopher Jewell & Lisa Bero, *Public Participation and Claimsmaking: Evidence Utilization and Divergent Policy Frames in California's Ergonomics Rulemaking*, 17 J. PUB. ADMIN. RES. & THEORY 625, 626–27 (2007).

16. See, e.g., *Wolf Management*, MINN. DEPARTMENT NAT. RESOURCES, <http://www.dnr.state.mn.us/mammals/wolves/mgmt.html> (last visited Apr. 23, 2013) (follow “Survey Results” hyperlink) (stating that seventy-nine percent of commenters opposed wolf hunting while twenty-one percent were in support).

17. See, e.g., *Sample Form Letter 5*, FED. HOUSING FIN. AGENCY, [http://www.fhfa.gov/webfiles/23808/SAMPLE\\_FORM\\_LETTER\\_5-Sierra\\_Club\\_22543\\_Member\\_Letters.pdf](http://www.fhfa.gov/webfiles/23808/SAMPLE_FORM_LETTER_5-Sierra_Club_22543_Member_Letters.pdf) (last visited Apr. 23, 2013). I place these comments in the “outsider” category because the content does not stress technical information and it originates from a concerned individual.

18. See Mariano-Florentino Cuéllar, *Rethinking Regulatory Democracy*, 57 ADMIN. L. REV. 411, 451–52, 453 (2005).

19. *Id.* at 443.

tions that are relevant for the rulemaking agency.<sup>20</sup> Indeed, they expand the range of topics for the agency to consider.<sup>21</sup>

Agencies know very well how to respond to insider comments. They identify claims about the potential benefits of a rule, placing those facts and predictions into the context of current scientific knowledge, with all of its uncertainties.<sup>22</sup> They remain alert for new information about potential costs of the rule, and predict the size and distribution of such costs.<sup>23</sup> And finally, the agencies create tailored responses to the merits of each important comment.<sup>24</sup>

The rulemaking agency faces more of a puzzle in how to respond to outsider comments. The agency might count the “votes” involved when form letters endorse a particular argument about the proposed rule, reporting the vote tally as one indication of the breadth of support for a viewpoint.<sup>25</sup> Some agencies rely on contractors to analyze and aggregate the themes that appear most frequently in those comments, using data analysis techniques common to the e-discovery field.<sup>26</sup>

Agencies have also begun to explore various “e-rulemaking” techniques of advertising and framing their proposed rules.<sup>27</sup> Such techniques are designed to enable ordinary citizens to participate in ways that are more relevant to the agency, despite the commenters’ lack of technical expertise or awareness of the regulatory context.<sup>28</sup> Similarly, outsiders benefit from the annual “Unified Regulatory Agenda” that each federal agency publishes to describe its current regulatory timetable and priorities: it can help outsiders understand how their comments fit into current conversations at the agency.<sup>29</sup>

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20. *Id.* at 452.

21. *Id.* at 449–52.

22. *See id.* at 463–64.

23. *Id.*

24. *Id.* at 459.

25. *See* Mortgage Assets Affected by PACE Programs, 77 Fed. Reg. 3958, 3958–64 (Jan. 26, 2012) (to be codified at 12 C.F.R. pt. 1254).

26. *See* Alice Lipowicz, *Conference to Advise Agencies on E-Rulemaking*, FCW.COM (June 13, 2011), <http://fcw.com/articles/2011/06/13/administrative-conference-advising-agencies-on-erulemaking-this-week.aspx>.

27. *See* Cynthia R. Farina et al., *Rulemaking in 140 Characters or Less: Social Networking and Participation in Online Rulemaking*, 31 PACE L. REV. 382, 383 (2011).

28. *See id.* at 386; Cynthia R. Farina et al., *Rulemaking 2.0*, 65 U. MIAMI L. REV. 395, 402–03 (2011).

29. 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

When it comes to the notice-and-comment sentencing that Bierschbach and Bibas propose, a similar divide is likely to appear in agency responses to insider and outsider comments. The easier questions arise in connection with insiders. Sentencing judges at the retail level and sentencing policy makers at the wholesale level could learn a great deal from insider comments coming from criminal justice professionals.

This does not mean that sentencing systems necessarily make room for such valuable input. One of the signal shortcomings of the U.S. Sentencing Commission was its failure to incorporate into the sentencing guidelines the insights available from system experts other than prosecutors.<sup>30</sup> By putting so much energy into stamping out “noncompliance” among sentencing judges, rather than creating a receptive environment for judicial insights, the Commission missed some crucial opportunities in its early decades.<sup>31</sup>

The same could be said of the insider insights of defense attorneys, state corrections experts, state sentencing commissions, criminologists, and numerous other groups with valuable inside information about criminal investigation, adjudication, and punishment. While the U.S. Sentencing Commission received sporadic comments from those groups, there was no prospect of judicial review to force the Commission to engage those comments seriously.<sup>32</sup> Nor was there any other force at work to create the sort of responsive environment that many other regulatory agencies achieve.<sup>33</sup>

State sentencing commissions have sometimes built a more responsive environment for system insiders. The most successful commissions at the state level drew their members from all across the criminal justice landscape.<sup>34</sup> At the wholesale level of

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(2011).

30. See Amy Baron-Evans & Kate Stith, *Booker Rules*, 160 U. PA. L. REV. 1631, 1663 (2012); Marc Miller & Ronald Wright, *Your Cheatin' Heart(land): The Long Search for Administrative Sentencing Justice*, 2 BUFF. CRIM. L. REV. 723, 756–60 (1999) (noting that the Commission claimed to mirror past sentencing practices rather than consulting system insiders for input on prescriptive guidelines).

31. Baron-Evans & Stith, *supra* note 30, at 1646–57.

32. See Ronald F. Wright, *Sentencers, Bureaucrats, and the Administrative Law Perspective on the Federal Sentencing Commission*, 79 CAL. L. REV. 1, 13–15, 41–42 (1991).

33. *Id.* at 13–14.

34. See Rachel Barkow, *Administering Crime*, 52 UCLA L. REV. 715, 772 (2005) [hereinafter Barkow, *Administering Crime*]; Rachel Barkow, *Sentencing Guidelines at the Crossroads of Politics and Expertise*, 160 U. PA. L. REV. 1599,

guideline policy formation, the commissions in many states not only gave notice about their proposals and received comments, but they also replied to insider comments in a meaningful way.<sup>35</sup> Both the initial state sentencing guidelines and the amendments to those guidelines over the years reflected the experience of insider criminal justice experts, largely because the commission members included representatives of those actors.<sup>36</sup>

The record is weaker for outsider comments at the state level. In a few states, representatives of crime victims, groups advocating rehabilitation programs, and business groups held seats on the sentencing commission, but they tended to be passive players in the writing of guidelines.<sup>37</sup> As for outsider comments at the retail level of individual sentences, the opportunity for crime victims to speak is limited and other outsider viewpoints simply have no practical point of entry at sentencing.<sup>38</sup>

In sum, the sentencing actors who receive comments—whether at the wholesale policy level or the retail case outcome level—will likely respond differently to comments, depending on whether they come from insiders or outsiders. Insider commenters speak the language of the sentencing agencies; that is, they invoke the types of issues and the categories of evidence that usually drive the discussion of sentencing policy or case outcomes. As a result, insiders who submit comments can expect over time to hear meaningful responses from sentencing actors.

On the other hand, comments from outsiders (precisely those who most interest Bierschbach and Bibas) will generate little meaningful response if they are subjected to the same protocols as the insider comments. Other regulatory agencies have developed specialized methods to promote useful comments from outsiders and to find meaning in their comments, primarily by analyzing those statements in the aggregate rather than individually. Sentencing agencies must do the same if

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1613–19 (2012).

35. Barkow, *Administering Crime*, *supra* note 34, at 773.

36. See Richard S. Frase, *State Sentencing Guidelines: Diversity, Consensus, and Unresolved Policy Issues*, 105 COLUM. L. REV. 1190, 1197–98, 1218–19 (2005).

37. See N.C. GEN. STAT. § 164-37 (2011).

38. Edna Erez, *Victim Participation in Sentencing: Rhetoric and Reality*, 18 J. CRIM. JUST. 19, 20 (1990).

they are to create a responsive environment for outsider comments.

## II. CONSIDER THE CAPACITY FOR A REPLY IN HIGH-VOLUME STATE SYSTEMS

A second relevant feature of the agency's reply builds on this observation: most sentencing authorities operate at the state rather than the federal level. As a result, most of the agencies' practices will develop within a state-specific administrative practice. The state system backdrop for sentencing matters in at least two ways: the local norms for administrative review and the high volume of state systems.

I begin with norms of review. Any administrative lawyer who is asked about the intensity or effectiveness of administrative review by judges will respond with more questions. Which agency is being reviewed? Which circuit court is performing the review? What category of agency action is receiving the scrutiny? While the formal standard of review for the court has surprisingly little impact,<sup>39</sup> the expectations for external review of agency action takes on a local flavor.

Ultimately, this context for review will drive the quality of the agency's reply. Strong external accountability in the rule-making context leads agencies to respond more substantively and thoroughly to comments from the public; weaker norms of external review will sometimes lead to less responsive agencies.<sup>40</sup>

The intensity of review that an agency can expect may differ from state to state. In some states, the courts have no power to review the rationality of agency rules and therefore have limited power to test the quality of an agency's replies to public comments.<sup>41</sup> In other states, judicial review of agency action is every bit as vigorous (and varied) as one finds in the federal system.<sup>42</sup>

39. See David Zaring, *Reasonable Agencies*, 96 VA. L. REV. 135, 155 (2010).

40. Michael D. Sant'Ambrogio, *Agency Delays: How a Principal-Agent Approach Can Inform Judicial and Executive Branch Review of Agency Foot-Dragging*, 79 GEO. WASH. L. REV. 1381, 1388 (2011).

41. See William Funk, *Rationality Review of State Administrative Rule-making*, 43 ADMIN. L. REV. 147, 147 (1991); Jim Rossi, *Politics, Institutions, and Administrative Procedure: What Exactly Do We Know from the Empirical Study of State Level APAs, and What More Can We Learn?*, 58 ADMIN. L. REV. 961, 974 (2006).

42. Funk, *supra* note 41, at 153–56.



Just as the external review norms can vary, the same is true of the internal cultures of different agencies. Some agencies deal with regulatory topics or operate within an organizational or political structure that coaxes them toward responsive, high-quality outcomes, even without close monitoring from judges.<sup>43</sup> Other agencies are just the opposite.<sup>44</sup> This variety of review contexts probably means that Bierschbach and Bibas's notice-and-comment sentencing would have markedly different impact from place to place.

A second feature of the sentencing actor's institutional setting matters even more to the quality of the reply: the high volume of cases that flow through state criminal justice systems. Most of the sentencing policy choices and sentencing case outcomes in the United States happen under state law.<sup>45</sup> State courts rather than federal courts sentence over ninety percent of all felons each year, and over ninety-nine percent of the misdemeanants.<sup>46</sup> While the federal system processes about as many felony cases as some of the larger single-state systems, the state courts collectively overwhelm the federal courts in volume.<sup>47</sup>

Moreover, the resources devoted to each case in the state system are much lower than what the federal system employs.<sup>48</sup> The state systems are larger both in raw output and in case-loads for judges, prosecutors, defense attorneys, probation officers, and other actors.<sup>49</sup> The staff levels at the policy institutions

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43. See Sidney A. Shapiro & Ronald F. Wright, *The Future of the Administrative Presidency: Turning Administrative Law Inside-Out*, 65 U. MIAMI L. REV. 577, 585–89 (2011).

44. See *id.* The parole boards in some states have developed a track record for minimal judicial review of individual outcomes, and minimal external review of any guidelines or standards that they adopt. See, e.g., Timothy P. Wile, *Contributions of the Commonwealth Court to the Field of Probation and Parole*, 21 WIDENER L.J. 77, 80–81 (2011). In jurisdictions where this holds true for parole practices, other sentencing actors might expect the tradition of deference to carry over into their work.

45. See BUREAU OF JUSTICE STATISTICS, FELONY SENTENCES IN STATE COURTS, 2006—STATISTICAL TABLES 1–2 (last updated Nov. 22, 2010), available at <http://bjs.ojp.usdoj.gov/content/pub/pdf/fssc06st.pdf>.

46. *Id.*

47. See *id.* at 2.

48. Judith Resnik, *Constitutional Entitlements to and in Courts: Remedial Rights in an Age of Egalitarianism: The Childress Lecture*, 56 ST. LOUIS U. L.J. 917, 973 (2012).

49. Compare U.S. COURTS, U.S. DISTRICT COURTS—CRIMINAL CASES COMMENCED, TERMINATED, AND PENDING (INCLUDING TRANSFERS) DURING THE 12-MONTH PERIODS ENDING MARCH 31, 2010 AND 2011 (2011), available

of the state systems, such as the sentencing commissions, are smaller than their federal counterparts.<sup>50</sup>

Finally, the state criminal systems spend a larger percentage of the total budgets in their jurisdictions than one finds with the federal budget.<sup>51</sup> The larger fiscal impact at the state level affects the type of arguments that sentencing actors will find persuasive, because spending constraints carry more weight at the state level.

The large volumes and tight budgets of the state systems have important implications for the capacity of sentencing actors to reply meaningfully to any comments from the public. Case-level comments directed to busy sentencing judges in the state courts would likely have less impact than comments directed to federal sentencing judges. A state sentencing judge would be hard pressed to reply meaningfully to comments at the case level. Similarly, while Bierschbach and Bibas's vision of a probation officer who moderates an online discussion to inform the sentencing in a particular case<sup>52</sup> sounds challenging but plausible in the federal context, the idea would produce only laughs in the state context.

At the level of policy, the guidelines themselves reflect the different needs of state actors. Where the federal guidelines (occupying hundreds of printed pages) require intricate fact-finding to make specified adjustments to "base level" starting points, the state guidelines (typically embodied in about a dozen pages of text) leave room for more flexible adjustments to the presumptive sentence for the particular crime of conviction.

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at <http://www.uscourts.gov/Viewer.aspx?doc=/uscourts/Statistics/FederalJudicialCaseloadStatistics/2011/tables/D00CMar11.pdf>, with *State Court Caseload Statistics*, BUREAU JUST. STAT., <http://bjs.ojp.usdoj.gov/index.cfm?ty=tp&tid=30> (last updated Jan. 23, 2012). Note that 54% of the more than 100 million state cases every year are due to traffic violations.

50. Compare U.S. SENTENCING COMM'N, AN OVERVIEW OF THE UNITED STATES SENTENCING COMMISSION 3, [http://www.ussc.gov/About\\_the\\_Commission/Overview\\_of\\_the\\_USSC/USSC\\_Overview.pdf](http://www.ussc.gov/About_the_Commission/Overview_of_the_USSC/USSC_Overview.pdf) (last visited Apr. 23, 2013), with *Commission Members and Staff*, MINN. SENT'G GUIDELINES COMM'N (2007), <http://www.msgc.state.mn.us/msgc5/commission.htm>. The Federal Commission has over 100 employees while Minnesota's only has 17.

51. In 2006, the federal government spent only \$36 billion of a \$3 trillion budget on criminal justice, while state and local government spending combined exceeded \$178 billion. Matthew Robinson, *How Much of the U.S. Budget Goes to Criminal Justice?*, MEDIA COVERAGE CRIME & CRIM. JUST. (Apr. 1, 2011), <http://mediacriminaljustice.blogspot.com/2011/04/how-much-of-us-budget-goes-to-criminal.html>.

52. Bierschbach & Bibas, *supra* note 2, at 48–49, 57–58.

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It could not be otherwise, given the huge dockets in state criminal courts.

Yet there are still important insights from insider and outsider comments that could produce meaningful replies from sentencing actors, even in the torrential criminal justice systems of the states. The key idea in the state systems would be to stress quantity over quality. Instead of looking for ways to increase the depth of comments and viewpoints that attach to any given case, one might link the comments that happen to land in the files across an entire category of cases. Although the file for any single case might contain no comments at all, or unbalanced and unrepresentative comments, a collection of cases might offer a rich and balanced array of comments, both from insiders and outsiders.

Such a body of commentary might even prompt a thoughtful reply if the sentencing actor had some control over the moments to seek out such input. Imagine a sentencing judge who encounters a puzzling and unusual case, or develops concerns about the accepted way of resolving a typical case. The judge might access an information system, select parameters that would define the “similar” cases in the judge’s mind, and receive information about the distribution of sentences imposed in that case.<sup>53</sup> At the same time, the judge could access any comments filed by the public, the probation officer, the attorneys, the original sentencing judge, corrections officials, taxpayers, or anybody else interested in any of the cases brought together in the judge’s search.<sup>54</sup> Those outcomes and comments, taken together, might inform the sentence imposed in the current case. It might also prompt the judge and other interested persons—insiders and outsiders—to reply to those comments, entering further observations into the record for possible use in future similar cases.

Now imagine a staffer at a state sentencing commission, asked to recommend possible changes to the sentencing rules for a particular type of case. Again, a search for all the comments on file for the types of cases that the staffer deems to be analogous could make a difference to the staffer. The comments

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53. See Marc L. Miller, *A Map of Sentencing and a Compass for Judges: Sentencing Information Systems, Transparency, and the Next Generation of Reform*, 105 COLUM. L. REV. 1351, 1351 (2005). The parties should have access to the comments that the judge consults, along with an opportunity to respond to those comments.

54. See *id.* at 1376–80.

might prompt a reply from the commission if it amends the rules. Where the volume of comments in the case-level database becomes large, the policymaker could resort to the techniques that other regulatory agencies use to identify themes and trends in large numbers of submissions.

The very fact that judges enter a non-standard sentence in a category of cases at an above-average rate could itself function as a type of comment. This pattern in the outcomes might reflect the judgment that the preferred sentence is set at the wrong level. If all of the movement points in one direction (above or below the presumptive sentence), that offers some clue about a possible policy change.<sup>55</sup>

These pre-existing comments, when used at the wholesale policy level, would have the advantage of being grounded in particular facts, rather than an abstract discussion of punishment options.<sup>56</sup> This context tends to produce more restrained, affordable, and humane judgments about proper sentences.

Sending routine reports to sentencing actors—reports that summarize the number and type of comments on file for any given category of offense or offender—could also prove useful. The presence of a large number of comments within an area may prompt actors at the wholesale policy level to give extra scrutiny to that set of rules. It could convince actors at the retail case level to reconsider their current practices. Because the reports would appear routinely without a specific request from a sentencing actor, they might identify blind spots for those actors. A regular practice of “auditing” the comments that accumulate within particular subgroups of cases could also identify new areas for scrutiny.<sup>57</sup>

## CONCLUSION

Notice-and-comment sentencing does not necessarily endorse the wisdom of crowds. Neither does it leave experts to their own devices. It is built, instead, on the hope that experts

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55. See Ronald F. Wright, *Counting the Cost of Sentencing in North Carolina, 1980–2000*, 29 CRIME & JUST. 39, 46–47 (2002).

56. It offers a version of the oft-proposed “common law of sentencing.” See Ryan W. Scott, *The Skeptic’s Guide to Information Sharing at Sentencing*, 2013 UTAH L. REV. (forthcoming) (manuscript at 4), available at <http://ssrn.com/abstract=2160484>.

57. Cf. Mariano-Florentino Cuéllar, *Auditing Executive Discretion*, 82 NOTRE DAME L. REV. 227, 227–28 (2006) (recommending auditing executive branch discretionary decisions).

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can interact with people who care enough to participate, and reach better results on that basis.

This tempered populism, as filtered through expertise, sets the Bierschbach-Bibas proposal apart. The academics and professionals who work in criminal justice routinely look for ways to insulate criminal punishment from popular passions; they hope above all to take advantage of specialized professional insights unsullied by popular views.

This minimization strategy tries to keep popular influence over criminal justice as small as possible. The strategy, however, fails far more often than it succeeds. Sometimes it fails because the one set of insiders irresponsibly stirs public misconceptions about crime for political advantage. Sometimes it fails because the public simply cares too much about criminal policy to stay on the sidelines, regardless of the manipulative plans of political leaders.

The challenge is to find those settings where public input can happen while retaining a sense of proportion. As a rule of thumb, this happens when the public understands the whole context for the crime and the punishment. For instance, voters favor more modest punishment levels when they concentrate on the tax revenues needed to run a massive corrections system. Jurors reach more nuanced judgments in particular cases as they learn more about the defendant's circumstances. Community members have more ambivalent views about punishment when they live in the same neighborhood where the wrongdoers live and where they inflict their harms.

This sense of context can be built. Sentencing actors who notify the public about their plans for policy and for case outcomes, and then accept comments from the public, can learn what the people understand (or do not understand) about sentencing context. The insiders themselves can learn more from these comments about the sentencing context, and improve their choices accordingly. But it is the reasoned reply to the comments that allows sentencing actors to deepen the public's sense of context about sentencing. A quality reply from sentencing insiders leads to greater public trust in a transparent and responsive system. I share with Professors Bierschbach and Bibas an optimistic view: a sense of context will improve the common sense of criminal sentencing.