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# THE “NEW” DISTRICT COURT ACTIVISM IN CRIMINAL JUSTICE REFORM

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*Historically, the debate over the judicial role has centered on the constitutional and administrative law decisions of the United States Supreme Court, with an occasional glance at the Federal Courts of Appeals. It has, moreover, been concerned solely with the “in-court” behavior of Article III appellate judges as they carry out their power and duty “to say what the law is” in the context of resolving “cases and controversies.” This Article seeks to deepen the discussion of the appropriate role of Article III judges by broadening it to trial, as well as appellate, judges; and by distinguishing between an Article III judge’s “decisional” activities on the one hand, and the judge’s “hortatory” and other activities on the other. To that end, the Article focuses on a cohort of deeply respected federal district judges—many, although not all, experienced Clinton appointees in the Southern and Eastern Districts of New York—who, over the last decade, have challenged conventional norms of judicial behavior to urge reform of fundamental aspects of the federal criminal justice system. These “new” judicial activists have made their case for reform in the pages of their judicial opinions, often in dicta; in articles and speeches; and through advocacy within and beyond the judicial branch. This Article summarizes this activity, places it in historical context, and assesses its value as well as its risks.*

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The role of an umpire and a judge is critical. They make sure everybody plays by the rules. But it is a limited role. Nobody ever went to a ballgame to see the umpire.<sup>1</sup>

[F]or too long, too many judges (including me) have been too quiet about an evil of which we are ourselves a part: the mass incarceration of people in the United States today.<sup>2</sup>

## I. INTRODUCTION

You do not have to agree fully with Chief Justice Roberts’ insistence that Supreme Court Justices never do anything but call balls and strikes to believe that, most of the time, judges should try to act as umpires, not players. When the ground rules are relatively clear,

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1. John Roberts, Chief Justice, Supreme Court of the United States, Statement During Nomination Hearings Before the Senate Judiciary Committee (Sept. 12, 2005) (transcript available at <http://www.cnn.com/2005/POLITICS/09/12/roberts.statement> [<https://perma.cc/69M3-GK8Z>]).

2. Jed S. Rakoff, U.S. Dist. Judge, S. Dist. N.Y., Mass Incarceration and the “Fourth Principle,” Speech at Harvard Law Sch. Conference (Apr. 10, 2015) (transcript available at <https://bol.bna.com/judge-rakoff-speaks-out-at-harvard-conference-full-speech/> [<https://perma.cc/9T6H-7YUK>]).

the strike zone is well-defined, and the game is working well, an umpire/judge should seek to apply the rules fairly and blend into the background. What should happen, though, when an experienced umpire/judge believes that the rules are harming the game, threatening one or more of the players with serious injury? Notwithstanding Justice Roberts’s insistence that “[n]obody ever went to a ballgame to see the umpire,” over the last decade, a cohort of well-respected and experienced federal trial judges have engaged in an unmistakably public campaign for criminal justice reform that causes them to look more like players than umpires. For example, as noted in the quote at the beginning of this Article, around 2015, Senior Judge Jed Rakoff in the Southern District of New York started to call attention in speeches and popular articles to “mass incarceration”—a non-judicial term favored by the political left—and declared that judges had a duty to speak out against it.<sup>3</sup> Previously, he had engaged in a similar campaign regarding what he saw as federal prosecutors’ failure to aggressively prosecute white-collar criminals and corporations in the wake of the financial crisis of 2007–08.<sup>4</sup> Other judges—including, for example, now-former Judge John Gleeson in the Eastern District of New York—have focused on issues such as prosecutorial overcharging in drug cases and the collateral consequences of convictions on the employment, housing, and educational opportunities of persons previously convicted of a crime. As Douglas Berman recently described the phenomenon, “A growing number of federal judges, usefully insulated by life tenure, are feeling a need to speak out[,] . . . moved by the broader public conversation about the need for reforms.”<sup>5</sup>

By and large, President Bill Clinton appointed these judges in the 1990s. Most of them had been on the bench for at least a decade before they engaged in this activity. Some, like Judges Gleeson

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3. See *id.*; see also Jed S. Rakoff, *Mass Incarceration: The Silence of the Judges*, N.Y. REV. BOOKS (May 21, 2015), <http://www.nybooks.com/articles/2015/05/21/mass-incarceration-silence-judges/> [https://perma.cc/Y9SQ-SKLN].

4. See, e.g., Jed S. Rakoff, *The Financial Crisis: Why Have No High-Level Executives Been Prosecuted?*, N.Y. REV. BOOKS (Jan. 9, 2014), <http://www.nybooks.com/articles/2014/01/09/financial-crisis-why-no-executive-prosecutions/> [https://perma.cc/7DAR-D6NH].

5. Stephanie Clifford, *From the Bench, a New Look at Punishment*, N.Y. TIMES (Aug. 26, 2015), [https://www.nytimes.com/2015/08/27/nyregion/from-the-bench-a-new-look-at-punishment.html?\\_r=0](https://www.nytimes.com/2015/08/27/nyregion/from-the-bench-a-new-look-at-punishment.html?_r=0) [https://perma.cc/7DAR-D6NH] (quoting Douglas Berman, law professor at the Ohio University Moritz College of Law). Moreover, “certain [judges] say, ‘That broader conversation ought to be reflected in the work that I do, not just in the work that the political branch does.’” *Id.* (quoting Douglas Berman).

and Rakoff, were long-time federal prosecutors before ascending to the bench, but others, such as Judge Mark Bennett in Iowa, who has played a prominent role in this effort, had different professional backgrounds. The appendix to this Article contains a table setting forth the professional backgrounds, year of appointment, and name and party of the President who appointed the judges discussed in the text of this Article.

I call the project that these judges collectively engaged in the “new” district court activism in criminal justice reform. I hesitate to use the term “activism” at all, given that it has become little more than an epithet for describing judges and decisions with which the speaker disagrees.<sup>6</sup> But I use it nevertheless, for two reasons. First, it captures the sense in which this behavior signifies an active and engaged judicial posture rather than a passive, reactive one.<sup>7</sup> Second, it taps into important debates about the proper role of the judge in our democracy,<sup>8</sup> debates that have not fully explored the hortatory and other forms of judicial activity described in this Article. However, I call this activity the “new” activism precisely to distinguish it

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6. See, e.g., JEFFREY B. MORRIS, LEADERSHIP ON THE FEDERAL BENCH: THE CRAFT AND ACTIVISM OF JACK WEINSTEIN 110 (2011) (“[I]t is fair to say that in the great majority of cases, the term ‘activist’ is thrown around by those whose ox has been gored.”); KERMIT ROOSEVELT III, THE MYTH OF JUDICIAL ACTIVISM: MAKING SENSE OF SUPREME COURT DECISIONS 3 (2006) (“‘[A]ctivist’ turns out to be little more than a rhetorically charged shorthand for decisions the speaker disagrees with.”); Frank H. Easterbrook, *Do Liberals and Conservatives Differ in Judicial Activism?*, 73 U. COLO. L. REV. 1401, 1401 (2002) (“Everyone scorns judicial ‘activism,’ that notoriously slippery term.”).

7. See, e.g., Lawrence H. Tribe, Senior Counselor for Access to Justice, U.S. Dep’t of Justice, *Keynote Address at the Annual Meeting of the Conference of Chief Justices and Conference of State Court Administrators (July 26, 2010)*, in FUTURE TRENDS IN STATE COURTS, 2011, at 1, 4 (describing “activism” as “the opposite of passivity—a passivity that disclaims responsibility for the systems of which [judges are] . . . the stewards.”). In recent years, some judges have embraced the “activist” term when used in this sense. See, e.g., Fern Fisher, *Moving Toward a More Perfect World: Achieving Equal Access to Justice Through a New Definition of Judicial Activism*, 17 CUNY L. REV. 285, 286–87 (2014) (embracing vision of judicial activism emphasizing less what judges do on the bench and more judges’ “stewardship over the improvement of laws, the legal system, and the administration of justice.”); cf. MORRIS, *supra* note 6, at 111 (describing some aspects of the work of Judge Jack Weinstein as “hyperactive” rather than “activist”).

8. As Ernest Young has observed, the utility of the term “judicial activism” is “it focuses attention on the judiciary’s institutional role rather than the merits of particular decisions.” Ernest A. Young, *Judicial Activism and Conservative Politics*, 73 U. COLO. L. REV. 1139, 1141 (2002); see also Frank B. Cross & Stefanie A. Lindquist, *The Scientific Study of Judicial Activism*, 91 MINN. L. REV. 1752, 1756 (2006–2007) (“At the core of the criticisms of judicial activism lies a concern that the judiciary is acting outside its proper judicial role.”).

from the types of behavior traditionally characterized as judicial activism, e.g., decisions that invalidate the actions of another branch of government or depart from precedent.<sup>9</sup> Unlike the “old” judicial activism, which might also be called “decisional activism,” the “new” district court activism is not limited to the judge’s exercise of Article III power. Although some of it occurs in the context of judicial opinions, much of it is set forth in dicta. Some of it also occurs outside of judicial opinions entirely—e.g., in extrajudicial speeches and writings, through the issuance of individual court rules, or otherwise cajoling other local actors. While there is a voluminous literature on decisional activism, there is considerably less on these other forms of activity, little on the role of the federal district court judge in general,<sup>10</sup> and none examining this recent burst of district court engagement in criminal justice reform.<sup>11</sup>

Finally, the quotation marks around “new” signify an acknowledgement that much of this activity—while distinct from the “old” tropes of judicial activism debates—is not entirely new. To be sure, judges in other eras occasionally questioned the wisdom and legal-

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9. See, e.g., CASS R. SUNSTEIN, *RADICALS IN ROBES: WHY EXTREME RIGHT-WING COURTS ARE WRONG FOR AMERICA* 42–43 (2005) (“[I]t is best to measure judicial activism by seeing how often a court strikes down the actions of other parts of government, especially those of Congress.”); Cross & Lindquist, *supra* note 8, at 1759 (“The most common standard for evaluating judicial activism is the extent to which judges invalidate legislative enactments.”); Young, *supra* note 8, at 1144 (“judicial activism” also is commonly used to describe decisions that: “depart[ ] from text and/or history; . . . depart[ ] from judicial precedent; . . . issue broad or ‘maximalist’ holdings rather than narrow or ‘minimalist’ ones; . . . [or] exercis[e] broad remedial powers.”). The term also is used to describe any judicial action that reflects the partisan or ideological preferences of the judge. See, e.g., Neil S. Siegel, *Interring the Rhetoric of Judicial Activism*, 59 *DEPAUL L. REV.* 555, 558 (2009–2010) (explaining contemporary conservative critiques).

10. See, e.g., MORRIS, *supra* note 6, at 4 (noting the relative lack of attention to the work of federal district courts); Doni Gewirtzman, *Lower Court Constitutionalism: Circuit Court Discretion in a Complex Adaptive System*, 61 *AM. U.L. REV.* 457, 459 (2012) (noting scholarly focus on work of the U.S. Supreme Court to the exclusion of role played by lower federal courts). For one notable exception, written by a judge who in many ways pioneered the “new” district court activism but has since gained considerable company, see Jack B. Weinstein, *Limits of Judges’ Learning, Speaking, and Acting: Part II Speaking and Part III Acting*, 20 *U. DAYTON L. REV.* 1 (1994). See generally MORRIS, *supra* note 6, at 91 (describing the characteristics of a “Weinstein opinion” as often lengthy, “graced with scintillating prose,” sometimes including a table of contents, photographs, charts, and appendices).

11. Given the dangers in attempting to “characterize[e] a collective judicial view,” this Article—like others of a similar qualitative ilk—attempts “to discern some trends in the comments and criticisms” made by (admittedly the most vocal) judges. Jeffrey O. Cooper, *Judicial Opinions and Sentencing Guidelines*, 8 *FED. SENT’G. REP.* 46, 46 (1995).

ity of various laws and government practices.<sup>12</sup> But the fact that this activity is happening in the federal district courts, the lowest level of our federal judiciary (where the famously meticulous but dispassionate Edward Weinfeld for generations exemplified the ideal judge),<sup>13</sup> is notable.<sup>14</sup> At a minimum, then, this is a substantial burst of activity that we have seen iterations of before.<sup>15</sup> But it could also reflect the emergence of a more robust model of the role of the Article III judge, especially the federal district court judge, one that provides for an active dialogic engagement with Courts of Appeals and the Supreme Court, as well as Congress, the Executive, local actors, the academy, and the public.

The remainder of this Article proceeds as follows. In Part II, I summarize the “new” district court activism, with a section devoted to each of the two overarching issues that have attracted substantial judicial attention over the past decade: our overly punitive state and the excesses of prosecutorial discretion. In Part III, I place the “new” district court activism in historical context. This section notes

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12. Judge Jerome Frank of the Second Circuit is one prominent example of an appellate judge who frequently used his opinions to question “the wisdom or constitutionality of past rulings,” and “[e]laborate reasons that supported change,” including citation to unconventional sources such as fiction, psychological literature, and the history of science. Robert J. Glennon, Jr., *Portrait of the Judge as an Activist: Jerome Frank and the Supreme Court*, 61 CORNELL L. REV. 950, 958–62 (1976). Frank also was a prolific writer of books and articles. See, e.g., JEROME FRANK, *COURTS ON TRIAL: MYTH AND REALITY IN AMERICAN JUSTICE* (1949). However, historically, judges “refrained from giving interviews, rarely wrote books, and avoided the limelight, preferring to let their opinions speak for themselves.” Harvey Rishikof & Bernard Horowitz, *Clues of Integrity in the Legal Reasoning Process: How Judicial Biographies Shed Light on the Rule of Law*, 67 SMU L. REV. 763, 764 (2014).

13. See WILLIAM E. NELSON, *IN PURSUIT OF RIGHT AND JUSTICE: EDWARD WEINFELD AS LAWYER AND JUDGE* 4–5, 113 (2004).

14. Judge Learned Hand, who sat on the United States District Court for the Southern District of New York for fifteen years before he was elevated to the United States Court of Appeals for the Second Circuit, stands out as one of the few historical examples of a district judge who explicitly questioned prevailing law and governmental practices in his opinions and in extrajudicial fora. See, e.g., *United States v. Kennerly*, 209 F. 119, 120–21 (S.D.N.Y. 1913) (Hand, J.) (questioning prevailing obscenity standards); see also GERALD GUNTHER, *LEARNED HAND: THE MAN AND THE JUDGE* 192–215 (2d ed. 2011) (describing some of Hand’s extrajudicial activities as a district court judge, including his participation in the Progressive Party’s Convention in 1912 and his writings on political subjects in *The New Republic*). Later in his career, Hand questioned whether he had gone too far in his political activities while a sitting judge. See *id.* at 293.

15. As discussed further below, precursors of the “new” judicial activism may be found in the 1980s, in the federal judiciary’s vocal reaction to Congress’s expansion of mandatory minimum sentencing statutes and the creation of the mandatory sentencing guidelines. See *infra* Part II.A.1.

the absence of historical parallels for the existing ferment in the federal district courts over criminal justice issues. It then explores some of the potential contributing factors to the advent of the “new” district court activism. These include the Supreme Court’s decision in *United States v. Booker*,<sup>16</sup> which realigned power dynamics at the district court level by holding unconstitutional the United States Sentencing Guidelines as a violation of a defendant’s right to trial by jury to the extent they were mandatory. Other factors include, a broader cultural shift in thinking about incarceration and its social and economic costs; the example set by higher level judges, including members of the United States Supreme Court; and the new media era.

Part IV then takes a step back to evaluate the benefits and the risks of “new” judicial activism, including whether it has been effective in achieving reform and the extent to which it challenges traditional concepts of the judicial role. It finds that there is value to these federal district court judges’ efforts to reshape the workings of the criminal justice system, but that there are aspects of this enterprise that merit a hard look. Finally, the Article considers some alternative mechanisms to channel judicial expertise, energy, and concern over the future of the criminal justice system and concludes with some thoughts about the calculus for would-be “new” activists in the Trump era.

## II.

### A SUMMARY OF THE “NEW” DISTRICT COURT ACTIVISM

This first section is primarily descriptive, summarizing and cataloguing what I am calling the “new” district court activism. As noted *supra*, there are two overarching themes. The first is the overly punitive nature of the criminal justice system, which includes (1) the overuse of imprisonment as a criminal sanction (“mass incarceration”), and (2) the collateral consequences attached to criminal convictions that make it difficult for a person, once convicted of a crime, to fully participate in society. The second is the excesses of prosecutorial discretion with respect to (1) charging decisions, and (2) criminal discovery.

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16. 543 U.S. 220 (2005).



## A. *The Overly Punitive State*

### 1. Background

For most of American history, federal trial court judges enjoyed broad latitude in imposing sentences.<sup>17</sup> The judge could select the sentence the judge deemed most appropriate, up to the statutory maximum sentence, drawing upon the judge's own experience in sentencing.<sup>18</sup> That fundamentally changed in the 1980s, when Congress enacted statutory mandatory minimum sentences for many drug crimes and required that judges impose at least the minimum sentence on any person convicted of those crimes.<sup>19</sup> With the Sentencing Reform Act of 1984,<sup>20</sup> Congress also created a new body, the United States Sentencing Commission, and charged it with creating a set of sentencing guidelines that would constrain judges' sentencing discretion in all cases.<sup>21</sup> Under the Sentencing Reform Act, judges were required to impose a sentence within a narrow range dictated by a calculation of various factors articulated

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17. See KATE STITH & JOSÉ A. CABRANES, *FEAR OF JUDGING: SENTENCING GUIDELINES IN THE FEDERAL COURTS* 9 (1998).

18. See Hon. Nancy Gertner, *A Short History of American Sentencing: Too Little Law, Too Much Law, or Just Right*, 100 J. CRIM. L. & CRIMINOLOGY 691, 696 (2010); Susan R. Klein, *The Return of Federal Judicial Discretion in Criminal Sentencing*, 39 VAL. U. L. REV. 693, 697 (2005).

19. See Stephen J. Schulhofer, *Rethinking Mandatory Minimums*, 28 WAKE FOREST L. REV. 199, 200–01 (1993) (reviewing history of federal mandatory minimum sentencing statutes). Although there have been mandatory minimum penalties for some federal crimes since the beginning of the nation, they were rare until Congress seriously got into the business of regulating narcotics. See *id.* In the 1950s, Congress established mandatory minimum sentences for certain drugs offenses, but it repealed nearly all of those laws in the 1970s, deeming them a failure. In 1984, Congress reinstated many mandatory minimum penalties for drugs offenses and created new, consecutive ones for the use of a gun in furtherance of drug crimes. From 1986 through 1990, Congress repeatedly enacted mandatory minimum sentences for additional crimes or “stiffened some of those already on the books.” *Id.* at 201; see also U.S. SENTENCING COMM’N, *MANDATORY MINIMUM PENALTIES IN THE FEDERAL CRIMINAL JUSTICE SYSTEM: A SPECIAL REPORT TO CONGRESS* 5–15 (1991).

20. Pub. L. No. 98-473, 98 Stat. 1987 (codified as amended at 18 U.S.C. §§ 3551–673 (1984)).

21. See 28 U.S.C. § 991 (2012) (establishing the U.S. Sentencing Commission as an independent commission in the judicial branch, consisting of seven voting members and one nonvoting member, to be appointed by the President, with the advice and consent of the Senate). By statute, the Commission must include at least three federal judges. *Id.*

in the Guidelines, including the type of offense, the defendant’s role in the offense, and the defendant’s criminal history.<sup>22</sup>

Since Congress expanded the use of mandatory minimum sentencing statutes in the 1980s, federal judges have protested them as an unwarranted intrusion upon the judges’ previously unfettered sentencing authority. For example, the Judicial Conference, the official voice of the federal judiciary,<sup>23</sup> has continuously registered its opposition to mandatory minimum sentencing statutes in its reports to Congress.<sup>24</sup> And, as Kate Stith and Judge Jose Cabranes chronicled in their 1998 book, *Fear of Judging*, federal judges also protested the Sentencing Guidelines before and after they went into effect, loudly and often.<sup>25</sup> Before the Supreme Court upheld the Guidelines against a separation of powers challenge in 1989 in *Mistretta v. United States*,<sup>26</sup> over two hundred district court judges held the Sentencing Reform Act unconstitutional.<sup>27</sup> Even beyond holding the guidelines unconstitutional, many judges voiced their disapproval of the Guidelines as a policy matter in their judicial opinions, in law review and popular articles, and in testimony before Congress.<sup>28</sup>

Between the Supreme Court’s resolution of the Guidelines’ constitutionality in *Mistretta* and the challenge brought decades later in *Booker*, federal judges by and large devoted themselves to interpreting and distinguishing specific guidelines.<sup>29</sup> Even at times with the complicity of prosecutors, judges also “found” facts that

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22. See STITH & CABRANES, *supra* note 17, at 67–72 (describing structure of the U.S. Sentencing Guidelines).

23. See 28 U.S.C. § 331 (1948) (setting forth authority of the Judicial Conference). The Judicial Conference was created in 1922 and was formerly known as the Conference of Senior Circuit Judges. It changed its name and expanded membership in 1948. *Administrative Agencies: Judicial Conference of the United States, 1948–Present*, FED. JUD. CTR., <https://www.fjc.gov/history/administration/administrative-agencies-judicial-conference-united-states-1948-present-0> [<https://perma.cc/VRT8-UVDE>].

24. See, e.g., *Mandatory Minimum Sentencing Laws—The Issues: Hearing Before the Subcomm. on Crime, Terrorism & Homeland Sec. of the H. Comm. on the Judiciary*, 110th Cong. 43–45 (2007) (statement of Judge Paul G. Cassell, Judicial Conference of the United States) (documenting “the Judicial Conference’s long-standing opposition to mandatory minimum sentencing schemes”).

25. See STITH & CABRANES, *supra* note 17, at 5 n.12 (collecting opinions and articles in which federal judges expressed their disapproval of the Sentencing Guidelines).

26. 488 U.S. 361, 388 (1989).

27. See U.S. SENTENCING COMM’N. ANN. REP. 11 (1989).

28. See STITH & CABRANES, *supra* note 17, at 5 & n.12.

29. See COOPER, *supra* note 11, at 47–48 (after *Mistretta*, courts used their decisional powers to interpret and distinguish guidelines and their interstices).

avoided the Guidelines' harshest application.<sup>30</sup> But over time, much of the most voluble individual judicial resistance to the Guidelines ebbed, as judges adjusted to the new order.<sup>31</sup> After all, the Guidelines at that point were law, which judges were duty-bound to apply.<sup>32</sup> As Jeffrey Cooper observed, the decrease in overt resistance did not necessarily indicate judicial acquiescence, but instead perhaps an understandable reluctance, "as the guidelines bec[ame] an established part of the legal landscape, to continue beating one's head against the wall."<sup>33</sup> Also, the Supreme Court's decision in 1996 in *Koon v. United States*,<sup>34</sup> affirming trial judges' authority to depart from the Guidelines for reasons not considered therein and holding that departures would be reviewed for abuse of discretion gave back to trial judges a "modicum" of sentencing authority,<sup>35</sup> and possibly released some of the pressure to rebel.

To be sure, some judges never stopped registering their opposition to the Guidelines,<sup>36</sup> and there were moments of renewed collective protest. For example, in 2002, Judge James Rosenbaum, the Chief Judge of the District of Minnesota, testified before the House Judiciary Committee that the Guidelines were too harsh in many drug cases. In response, the Committee threatened to subpoena the records of all cases in which Judge Rosenbaum had departed from

30. See STITH & CABRANES, *supra* note 17, at 90 (noting the temptation under the binding Guidelines regime for judges to "reconsider factual 'findings' in order to alter the Guidelines calculation" or "manipulate their Guidelines calculation to avoid the results called for by the Guidelines"); Jack B. Weinstein, *A Trial Judge's Second Impression of the Federal Sentencing Guidelines*, 66 S. CAL. L. REV. 357, 365 (1992) (quoting another district judge as bemoaning that "the Guidelines have made charlatans and dissemblers of us all. We spend our time plotting and scheming, bending and twisting, distorting and ignoring *the law* in an effort to achieve a just result.").

31. See Cooper, *supra* note 11, at 46 (noting, in the years since the Guidelines' constitutionality was resolved, an "apparent diminution in the frequency of overt criticism" of the Guidelines has occurred); see also STITH & CABRANES, *supra* note 17, at 6 (noting that, as the Guidelines became entrenched, judicial criticism had "begun to dissipate—especially as new judges are appointed, some of whom may welcome reduced responsibility over criminal sentencing").

32. See STITH & CABRANES, *supra* note 17, at 6 ("Judges as a group aspire to be vigilant law-abiders, and the Guidelines—whatever their faults . . . are, of course, the law.").

33. Cooper, *supra* note 11, at 46.

34. 518 U.S. 81, 92, 99 (1996).

35. See, e.g., *United States v. Green*, 346 F. Supp. 2d 259, 283–84 (D. Mass. 2004) (explaining impact of *Koon* on district courts' discretion).

36. See, e.g., Kate Stith, *Weinstein on Sentencing*, 24 FED. SENT'G. REP 214 (2012) (chronicling Judge Weinstein's ongoing critical engagement with the guidelines).

the Guidelines.<sup>37</sup> Over judicial opposition,<sup>38</sup> Congress also passed the so-called Feeney Amendment in 2003, which imposed new recordkeeping and reporting requirements on trial courts and restricted trial courts’ discretion to downwardly depart from the Guidelines.<sup>39</sup> This additional encroachment upon judicial authority, undoing much that was gained in *Koon*, prompted judges to fight back, including through their judicial opinions,<sup>40</sup> and statements to the press.<sup>41</sup> A few resigned.<sup>42</sup> However, the Feeney

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37. CHARLES GARDNER GEYH, *WHEN COURTS AND CONGRESS COLLIDE: THE STRUGGLE FOR CONTROL OF AMERICA’S JUDICIAL SYSTEM* 269–70 (2009).

38. *See, e.g.*, Letter from William Rehnquist, Chief Justice, U.S. Supreme Court, to Patrick Leahy, Senator, U.S. Cong. (Apr. 4, 2003), in 15 *FED. SENT’G. REP.* 345 (2003); Ricardo J. Bascuas, *The American Inquisition: Sentencing After the Federal Guidelines*, 45 *WAKE FOREST L. REV.* 1, 28–29 (2010) (describing organized opposition to Feeney Amendment from, among others, individual federal judges and the Judicial Conference).

39. *See, e.g.*, Stephanos Bibas, *The Feeney Amendment and the Continuing Rise of Prosecutorial Power to Plea Bargain*, 94 *J. CRIM. L. & CRIMINOLOGY* 295, 297 (2004) (describing impact of Feeney Amendment to the 2003 PROTECT bill passed by Congress); Kate Stith, *The Arc of the Pendulum: Judges, Prosecutors, and the Exercise of Discretion*, 117 *YALE L.J.* 1420, 1466 (2008) (same).

40. *See, e.g.*, *United States v. Kirsch*, 287 F. Supp. 2d 1005, 1007 (D. Minn. 2003) (Magnuson, J.) (predicting that Feeney Amendment’s reporting requirement “will have a devastating effect on our system of justice” because of its “unwarranted intimidation of the judiciary”); *United States v. Kim*, No. 03 Cr. 413, 2003 WL 22391190, at \*5–6 (S.D.N.Y. Oct. 20, 2003) (Patterson, J.) (criticizing Feeney Amendment, including hasty process resulting in its passage); *United States v. Dyck*, 287 F. Supp. 2d 1016, 1022 (D.N.D. 2003) (Webb, J.) (judge dissenting from his own sentencing opinion “as an appeal for a restoration of individualized sentencing”); *United States v. Thurston*, 286 F. Supp. 2d 70, 71 n.4 (D. Mass. 2003) (Harrington, J.) (district court judge recused himself rather than impose required sentence on remand noting that the Feeney Amendment’s provisions for de novo appellate review of sentencing “renders the trial judge superfluous . . . notwithstanding the fact that the trial judge possesses deep understanding of the case based on knowledge acquired from presiding at two complex criminal jury trials”).

41. *See, e.g.*, Ian Urbina, *New York’s Federal Judges Protest Sentencing Procedures*, *N.Y. TIMES* (Dec. 8, 2003), <http://www.nytimes.com/2003/12/08/nyregion/new-york-s-federal-judges-protest-sentencing-procedures.html> [<https://perma.cc/MF6A-ZFBF>] (discussing letter signed by Second Circuit Chief Judge John M. Walker, Jr. and twenty six other federal judges calling for repeal of the Feeney Amendment and protests registered by other federal judges in New York); *see also* GEYH, *supra* note 37, at 269–70 (2009) (describing judicial backlash against the Feeney Amendment).

42. *See, e.g.*, John S. Martin, Jr., Opinion, *Let Judges Do Their Jobs*, *N.Y. TIMES* (June 24, 2003), <http://www.nytimes.com/2003/06/24/opinion/let-judges-do-their-jobs.html> [<https://perma.cc/D65U-N4GH>] (Op-Ed by U.S. District Judge John S. Martin, the former U.S. Attorney for the Southern District of New York, announcing that he was retiring in protest of the mandatory Sentencing Guidelines and the Feeney Amendment).

Amendment persisted until 2005, when *Booker* effectively undid most of its provisions when it rendered the Guidelines advisory only.

Perhaps paradoxically, since the Supreme Court in *Booker* handed trial judges a major victory, judicial advocacy about sentencing policy has taken on a new urgency. Its subjects include the propriety of statutory mandatory minimum sentences, which were left untouched by *Booker*, as well as the wisdom of the now-advisory sentencing guidelines. Judges also have started to ask why the system does not do more to create alternatives to incarceration, and why it makes it so difficult for former offenders to reintegrate into society. These are the “new” activist critiques of sentencing policy, discussed further below.

## 2. Mass Incarceration

Examples of the “new” activist critiques of sentencing policy abound. Long before Judge Rakoff made his 2015 speech at Harvard calling upon judges to speak up about “mass incarceration,” other judges were identifying the problem. For example, in a 2008 opinion, now-former Judge Nancy Gertner in Massachusetts wrote about the “significant downside to what has been called the American experiment in mass incarceration”<sup>43</sup> and suggested that “[c]ourts may no longer ignore the possibility that mass incarceration of nonviolent drug offenders has disrupted families and communities . . . without necessarily deterring the next generation of young men from committing the same crimes.”<sup>44</sup> In a 2011 opinion,<sup>45</sup> Senior Judge Jack Weinstein in the Eastern District of New York warned that mandatory minimum sentencing “impose[s] grave costs not only on the punished but on the moral credibility upon which our system of criminal justice depends.”<sup>46</sup> Similar *cris de coeur* appear in the opinions or in-court statements of numerous other judges, including Judge Gleeson, who in a 2012 opinion warned that we need to make “smart, bold choices” about “the lengths of the prison terms we impose” and “the categories of de-

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43. *United States v. Haynes*, 557 F. Supp. 2d 200, 207 (D. Mass. 2008) (Gertner, J.).

44. *Id.* at 203; *see also* *United States v. Whigham*, 754 F. Supp. 2d 239, 242–43 (D. Mass. 2010) (Gertner, J.) (criticizing career offender and crack cocaine guidelines as “wholly inconsistent to the purposes of sentencing under 18 U.S.C. § 3553(a)”).

45. *United States v. Bannister*, 786 F. Supp. 2d 617, 689 (E.D.N.Y. 2011) (Weinstein, J.).

46. *Id.*

fendants we routinely” put in prison who do not need to be there.<sup>47</sup> In a 2015 opinion, Judge Mark Bennett of Iowa wrote that “in most of the over 1,000 congressionally-mandated mandatory minimum sentences that I have imposed over the past twenty-two years, I have stated on the record that they were unjust and too harsh.”<sup>48</sup>

Other judges have more recently joined the call for reform—such as Judge Nicholas Garaufis of the Eastern District of New York, who during a 2016 sentencing called the Guidelines “incredibly excessive and irrational,” and stated that “if the Sentencing Commission doesn’t want to do justice, they should all just resign.”<sup>49</sup> Many of these statements appear in the context of sentencing decisions wherein they constitute dicta. But the discussions of sentencing policy surrounding them are often lengthy anyway, incorporating extensive social science and academic literature in the style of a Brandeis brief.<sup>50</sup>

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47. *United States v. Dossie*, 851 F. Supp. 2d 478, 484 (E.D.N.Y. 2012) (Gleeson, J.); *see also* *United States v. Dokmeci*, No. 13-CR-00455, 2016 WL 915185, at \*1 (E.D.N.Y. Mar. 9, 2016) (Gleeson, J.) (“As a nation, we need to deal with—and not just talk about—our over-incarceration problem.”); *United States v. Vasquez*, No. 09-CR-259, 2010 WL 1257359, at \*2 (E.D.N.Y. Mar. 30, 2010) (Gleeson, J.).

48. *United States v. Feauto*, 146 F. Supp. 3d 1022, 1024–25 (N.D. Iowa 2015) (Bennett, J.).

49. *See* John Marzulli, *Brooklyn perv who sexually exploited underage boys, including one with brain cancer, sentenced to 15 years*, N.Y. DAILY NEWS (May 18, 2016), <http://www.nydailynews.com/new-york/nyc-crime/rooklyn-perv-sexually-exploited-underage-boys-15-years-article-1.2641566> [<https://perma.cc/7W6V-RLMY>] (reporting statements by Judge Nicholas Garaufis of the Eastern District of New York at sentencing in *United States v. Naim*, 13-CR-660 (E.D.N.Y. May. 19, 2015) (Garaufis, J.)). For additional voices outside of New York, *see*, for example, *United States v. McDade*, 121 F. Supp. 3d 26, 29–31 (D.D.C. 2014) (Friedman, J.) (noting that court continued to believe that the sentence it was required to impose was “unjust,” urging defendant to seek executive clemency, and recounting history of court’s efforts to bring case to the attention of the Pardon Attorney at the Department of Justice); *United States v. Childs*, 976 F. Supp. 2d 981, 982 (S.D. Ohio 2013) (Graham, J.) (accepting plea agreement in child pornography case stipulating to a below-Guidelines sentence, but noting that the case was “disturbing” because “I would not have been free to select such a sentence without the government’s agreement”); *United States v. Marshall*, 870 F. Supp. 2d 489, 499–500 (N.D. Ohio 2012) (Zouhary, J.) (“[T]his Court arrives at a frustrating conclusion: it is statutorily bound to impose a sentence of 60 months, and does so, while at the same time emphasizing its strong disagreement.”); *United States v. Shull*, 793 F. Supp. 2d 1048, 1050 (S.D. Ohio 2011) (Marbley, J.) (“The history of unfairness in crack cocaine sentencing is well known, but the inaccuracies it was based on and the injustices it caused make its retelling all the more necessary.”).

50. *See* David E. Bernstein, *Brandeis Brief Myths*, 15 GREEN BAG 2D 9, 10 (2011) (a so-called “Brandeis Brief,” named for the brief filed by then attorney Louis

The judicial campaign against mass incarceration has also made extensive use of extrajudicial fora. For example, since at least 2012, Judge Bennett has written extensively about the need to reform sentencing policy in a variety of publications and has granted numerous interviews to journalists.<sup>51</sup> Acknowledging that “[f]ederal judges have a longstanding culture of not speaking out on issues of public concern,” he explained that he was “breaking with this tradition” because the “daily grist” of unjust mandatory minimum sentencing for non-violent drug offenders “compels [him] to.”<sup>52</sup> Other judges also have written policy<sup>53</sup> and opinion pieces,<sup>54</sup> granted interviews to journalists,<sup>55</sup> or made public speeches. For example, in

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Brandeis in *Muller v. Oregon*, 208 U.S. 412 (1908), is “heavy on social science data and policy analysis, light on legal citation”).

51. See, e.g., Eli Saslow, *Against His Better Judgment*, WASH. POST. (June 6, 2015), [http://www.washingtonpost.com/sf/national/2015/06/06/against-his-better-judgment/?utm\\_term=.2e3c6c5fa2f6](http://www.washingtonpost.com/sf/national/2015/06/06/against-his-better-judgment/?utm_term=.2e3c6c5fa2f6) [https://perma.cc/8NA8-L4AE] (interview with Judge Mark Bennett of Iowa); *Why Mandatory Minimum Sentences On Drug Arrests Are “Unfair and Racist,”* HUFFPOST LIVE (May 6, 2014), [https://www.amazon.com/Mandatory-Minimum-Sentences-Arrests-Unfair/dp/B00SZ1DRUG/ref=cm\\_cr\\_arp\\_d\\_pdt\\_img\\_top?ie=UTF8](https://www.amazon.com/Mandatory-Minimum-Sentences-Arrests-Unfair/dp/B00SZ1DRUG/ref=cm_cr_arp_d_pdt_img_top?ie=UTF8) [https://perma.cc/YY7Y-MHP2]; see also Mallory Simon & Sara Sidner, *The Judge Who Says He’s Part of the Gravest Injustice in America*, CNN POLITICS (June 3, 2017), <http://www.cnn.com/2017/06/02/politics/mandatory-minimum-sentencing-sessions/index.html> [https://perma.cc/PS4J-FEDM] (video interview with Judge Bennett in his courtroom in which he stated that “80% of the mandatory sentences he hands down are unjust”).

52. Mark W. Bennett, *How Mandatory Minimums Forced Me to Send More Than 1,000 Nonviolent Drug Offenders to Federal Prison*, NATION (Oct. 24, 2012), <https://www.thenation.com/article/how-mandatory-minimums-forced-me-send-more-1000-nonviolent-drug-offenders-federal-pri/> [https://perma.cc/G2AB-RTSY]; see also Mark K. Bennett, *A Slow Motion Lynching? The War on Drugs and Mass Incarceration, Doing Kimbrough Justice, and a Response to Two Third Circuit Judges*, 66 RUTGERS L. REV. 873 (2014); Mark Osler & Judge Mark W. Bennett, *“Holocaust in Slow Motion?” America’s Mass Incarceration and the Role of Discretion*, 7 DEPAUL J. FOR SOC. JUST. 117 (2014).

53. See, e.g., Judge James S. Gwin, *Juror Sentiment on Just Punishment: Do the Federal Sentencing Guidelines Reflect Community Values?*, 4 HARV. L. & POL’Y REV. 173, 176 (2010) (Judge Gwin, of the U.S. District Court for the Northern District of Ohio, and a Clinton appointee, calling for the Sentencing Commission to regularly survey jurors on their views of appropriate punishment).

54. See, e.g., Stefan R. Underhill, *Opinion, Did the Man I Sentenced to 18 Years Deserve It?*, N.Y. TIMES (Jan. 23, 2016), <https://www.nytimes.com/2016/01/24/opinion/sunday/did-i-sentence-a-murderer-or-a-cooperative-witness.html> [https://perma.cc/TKA3-K4A5] (U.S. District Judge Underhill of the U.S. District Court for the District of Connecticut, calling for “a mechanism for judges to reevaluate the sentences they’ve imposed”).

55. See, e.g., Matthew Van Meter, *One Judge Makes the Case for Judgment*, ATLANTIC (Feb. 25, 2016), <http://www.theatlantic.com/politics/archive/2016/02/one-judge-makes-the-case-for-judgment/463380> [https://perma.cc/94FB-G5EC] (interview with Judge John Coughenour of the U.S. District Court for Western District

2016, Senior Judge Raymond Dearie of the Eastern District of New York gave a speech to a group of New York lawyers in which he wondered about the “love affair in this country with lengthy incarceration, to our great embarrassment as a civilized nation.”<sup>56</sup> And as noted earlier, Judge Rakoff spoke in 2015 at Harvard Law School about “the mass incarceration of people in the United States today,”<sup>57</sup> and judges’ “special duty to be heard on this issue,”<sup>58</sup> expressing similar views in a *New York Review of Books* article published the same year.<sup>59</sup> Judges also have appeared before Congress<sup>60</sup> and

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of Washington, a Reagan appointee, about sentencing policy); Carrie Johnson & Marisa Peñalosa, *Judge Regrets Harsh Human Toll of Mandatory Minimum Sentences*, NAT. PUB. RADIO (Dec. 16, 2014), <http://www.npr.org/2014/12/16/370991710/judge-regrets-harsh-human-toll-of-mandatory-minimum-sentences> [https://perma.cc/2MFM-9NQ9] (interview with Judge Gleeson in which he states that mandatory minimums are “wrong” as a policy matter); Mosi Secret, *Outside Box, Federal Judges Offer Addicts a Free Path*, N.Y. TIMES (Mar. 1, 2013), <http://www.nytimes.com/2013/03/02/nyregion/us-judges-offer-addicts-a-way-to-avoid-prison.html> [https://perma.cc/P6XZ-AAQ8] (interviews with federal district court Judge Stefan Underhill of Connecticut and Judge Ricardo S. Martinez of the Western District of Washington); *Straight Talk From a Judge*, CRIME REP. (Sept. 24, 2012), <https://thecrimereport.org/2012/09/24/2012-09-straight-talk-from-a-judge> [https://perma.cc/7GN9-H598] (interview with Judge Block on a range of subjects, including overly harsh sentencing policy); John Tierney, *For Lesser Crimes, Rethinking Life Behind Bars*, N.Y. TIMES (Dec. 11, 2012), <https://mobile.nytimes.com/2012/12/12/science/mandatory-prison-sentences-face-growing-skepticism.html> [https://perma.cc/7XMK-4YLX] (interview with Judge Roger Vinson of Florida stating that “[m]andatory sentences breed injustice”).

56. See Alan Feuer, *Federal Judges Urge U.S. to Jettison the Madness of Mass Incarceration*, N.Y. TIMES (June 23, 2016), <https://www.nytimes.com/2016/06/24/nyregion/federal-judge-urges-us-to-jettison-the-madness-of-mass-incarceration.html?mcubz=0> [https://perma.cc/NVE7-B7HQ].

57. See Rakoff, Speech at Harvard Law Sch. Conference, *supra* note 2.

58. *Id.* (citing commentary to Canon Four of the Code of Conduct for U.S. Judges).

59. See Rakoff, *Mass Incarceration*, *supra* note 3.

60. See, e.g., Testimony of Judge Irene Keeley, Chair of the Judicial Conference Committee on Criminal Law, Before H. Comm. on the Judiciary Over-Criminalization Task Force of 2014 (July 11, 2014) (setting forth position of Judicial Conference against mandatory minimum sentencing); *Mandatory Minimums and Unintended Consequences: Hearing on H.R. 2934, H.R. 834, and H.R. 1466 Before the Subcomm. on Crime, Terrorism, and Homeland Security of the H. Comm. on the Judiciary*, 111th Cong. 42 (2009) (statement of Chief Judge Julie E. Carnes, U.S. District Court for the Northern District of Georgia, on behalf of the Judicial Conference of the United States) (arguing that mandatory penalties produce unfair and irrational sentences that undermine public confidence in the judicial system and waste public resources by incarcerating offenders for longer than necessary); *Mandatory Minimum Sentencing Laws—The Issues: Hearing Before the Subcomm. on Crime, Terrorism, and Homeland Security of the H. Comm. on the Judiciary*, 110th Cong. 43 (2007) (statement of Judge Paul G. Cassell on behalf of the Judicial Conference of the



the Sentencing Commission<sup>61</sup> to urge those bodies to take corrective action. Much of this advocacy has taken place under the auspices of the Judicial Conference, which has consistently opposed mandatory minimum sentences.<sup>62</sup>

### 3. Alternatives to Incarceration

Most intriguingly, “new” activist district court judges have pushed the limits of their supervisory and persuasive authority to create local diversionary programs and alternatives to incarceration. These programs take a variety of forms, but typically they involve diverting an offender from the usual criminal justice process, either before that process starts or after a guilty plea has been entered but before a sentence is imposed. Some programs are available only to certain classes of offenders, such as those with a demonstrated history of drug addiction.<sup>63</sup> They generally steer the individual toward drug treatment or other services and counseling. Successful completion of these programs usually will result in the individual facing no prison time, and often emerging with no crimi-

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United States); cf. Jess Bravin, *Two Supreme Court Justices Say Criminal-Justice System Isn't Working*, WALL ST. J. (Mar. 24, 2015), <https://www.wsj.com/articles/two-supreme-court-justices-say-criminal-justice-system-isnt-working-1427197613> [<https://perma.cc/38M9-8PDD>] (quoting testimony before House subcommittee by Justices Breyer and Kennedy harshly critical of incarceration rates, with Justice Breyer calling mandatory minimum sentences a “terrible idea”).

61. See, e.g., Chief Judge Robert J. Conrad, Jr., U.S. W. Dist. N.C., testimony to the U.S. Sentencing Commission, at 4 (Feb. 11, 2009), <https://www.ussc.gov/sites/default/files/pdf/amendment-process/public-hearings-and-meetings/2009-0210-11/Judge%20Robert%20Conrad%20021109.pdf> [<https://perma.cc/8R7F-GHTZ>] (“Statutory mandatory minimum punishments and the Guidelines written to implement them achieve the goals of uniformity at the cost of sometimes unjust sentences.”).

62. See, e.g., JUDICIAL CONFERENCE OF THE UNITED STATES REPORT OF THE PROCEEDINGS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES 17 (Mar. 2009), <http://www.uscourts.gov/sites/default/files/2009-03.pdf> [<https://perma.cc/JX6F-9FVG>] (“In light of the Conference’s long-standing position that mandatory minimum sentences can produce results contrary to the interests of justice,” the Committee on Criminal Law seeks an amendment to 18 U.S.C. § 924(c) to preclude stacking of counts, which “compounds that risk”); JUDICIAL CONFERENCE OF THE UNITED STATES REPORT OF THE PROCEEDINGS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES 18 (Sept. 2006), <http://www.uscourts.gov/sites/default/files/2006-09.pdf> [<https://perma.cc/53UC-XRBR>] (opposing the differential treatment of crack and powder cocaine in the Anti-Drug Abuse Act of 1986).

63. See PAMELA M. CASEY & DAVID B. ROTTMAN, NAT’L CTR FOR STATE COURTS, *PROBLEM-SOLVING COURTS: MODELS AND TRENDS* (2003) (surveying various types of specialized courts developed in the United States).

nal record.<sup>64</sup> Since 1989, numerous state court systems have established such diversionary programs.<sup>65</sup> In recent years, they have captured the imagination of “new” judicial activists in federal district courts.<sup>66</sup> In 2013, there were seven such programs among the

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64. See generally Jessica M. Eaglin, *The Drug Court Paradigm*, 53 AM. CRIM. L. REV. 595, 603–07 (2016) (discussing structure of drug courts and their influence on the creation of other problem-solving courts such as “[m]ental health courts, domestic violence courts, community courts, homeless courts, truancy courts, reentry courts, and veterans’ courts”).

65. See generally DOUGLAS B. MARLOWE, CAROLYN D. HARDIN, & CARSON L. FOX, NAT’L DRUG COURT INST., PAINTING THE CURRENT PICTURE: A NATIONAL REPORT ON DRUG COURTS AND OTHER PROBLEM-SOLVING COURTS IN THE UNITED STATES 13 Fig. 1 (June 2016), <http://www.nadcp.org/sites/default/files/2014/Painting%20the%20Current%20Picture%202016.pdf> [<https://perma.cc/N9HN-SRAQ>]; *Id.* (showing Milestones in the Development of Drug Courts and Other Problem-Solving Courts); Allegra M. McLeod, *Decarceration Courts: Possibilities and Perils of a Shifting Criminal Law*, 100 GEO. L.J. 1587, 1590 (2012) (noting the proliferation of specialized state courts since the early 1990s and reaching approximately 3,000 by 2010).

66. See, e.g., U.S. DIST. COURT, E.D.N.Y., ALTERNATIVES TO INCARCERATION IN THE EASTERN DISTRICT OF NEW YORK (2015), [https://img.nyed.uscourts.gov/files/local\\_rules/ATI.EDNY\\_SecondReport.Aug2015.pdf](https://img.nyed.uscourts.gov/files/local_rules/ATI.EDNY_SecondReport.Aug2015.pdf) [<https://perma.cc/P4H9-4RUT>] (discussing programs created in the Eastern District of New York and cataloging programs in federal courts throughout the United States); Stephanie Barry, *Federal judge in Springfield pilots pre-sentence diversion program for drug defendants*, SPRINGFIELD REPUBLICAN (Nov. 9, 2013), [http://www.masslive.com/news/index.ssf/2013/11/federal\\_judge\\_in\\_springfield\\_p.html](http://www.masslive.com/news/index.ssf/2013/11/federal_judge_in_springfield_p.html) [<https://perma.cc/7H3L-T2HK>] (“Joining federal judges nationally, U.S. District Judge Michael A. Ponsor has launched a fledgling effort in this city to steer young, often drug-addicted defendants away from prison.”); *National Association of Drug Court Professionals Applauds Justice Department Smart on Crime Initiative; Calls for Federal Drug Court Expansion*, NAT’L ASS’N DRUG CT. PROFS. (August 12, 2013), <http://www.nadcp.org/DOJ> [<https://perma.cc/Y7HK-SH7B>] (quoting District Judge Keith Starrett urging federal courts to implement drug courts); Robert Patrick, *New Program in Federal Court Here Helps Defendants Avoid Prison*, ST. LOUIS POST-DISPATCH (Mar. 24, 2016), [http://www.stltoday.com/news/local/crime-and-courts/new-program-in-federal-court-here-helps-defendants-avoid-prison/article\\_df453143-ff85-5101-89a9-3068694902fa.html](http://www.stltoday.com/news/local/crime-and-courts/new-program-in-federal-court-here-helps-defendants-avoid-prison/article_df453143-ff85-5101-89a9-3068694902fa.html) [<https://perma.cc/S3KH-DEZA>] (describing SAIL, an alternative to incarceration program run by the District Court in the Eastern District of Missouri, which “is not limited to drug cases or people with substance-abuse problems”); Secret, *supra* note 55 (noting that federal judges had instituted special treatment programs for drug-addicted defendants in California, Connecticut, Illinois, New Hampshire, New York, South Carolina, Virginia, and Washington, involving about 400 defendants nationwide); Sudhin Thanawala, *Federal Defendants Get Chance to Avoid Prison, Turn Their Lives Around in New Court Programs*, U.S. NEWS & WORLD REP. (Oct. 17, 2015), <http://www.usnews.com/news/us/articles/2015/10/17/federal-court-programs-aim-to-keep-defendants-out-of-prison> [<https://perma.cc/4VGD-D6GQ>] (discussing the rise of pretrial diversion programs in federal courts in the last five years); Milton J. Valencia, *Drug Violators Get a Chance to Change Lives, Avoid Prison*, BOS. GLOBE (Oct. 27, 2015), <https://www.bostonglobe.com/metro/2015/10/26/court-offer-alternatives-prison-for-drug-defendants/cl3uElIXy>

94 federal districts; as of 2016, that number had more than tripled to twenty-two.<sup>67</sup> In many districts, the trial judges have been leaders in setting up such programs.<sup>68</sup> As Judge Stefan Underhill of Connecticut, who championed the effort in Connecticut explained, “I had been a judge long enough that I had become frustrated with the revolving door,”<sup>69</sup> i.e., sentencing those with drug addiction to prison, only to see them later re-offend because they did not receive treatment. Judge Gleeson led the effort in the Eastern District of New York<sup>70</sup> and presented that district’s program to judges from numerous other districts. He wrote in one of his final opinions that “the tide is just beginning to turn”<sup>71</sup> on over-incarceration, due in part to a “grassroots movement in the federal courts.”<sup>72</sup>

In addition to participating in the creation of alternatives to incarceration in their own districts, federal trial judges have lobbied the Sentencing Commission to give official recognition to such programs.<sup>73</sup> Such an endorsement could promote the spread of the programs to other districts and help judges throughout the federal system appreciate how the programs fit in to the overall sentencing regime.

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H17FjfNGE0JeUO/story.html [https://perma.cc/SK3A-BSVG] (describing RISE, a federal alternative to incarceration program created by the District Court of Massachusetts).

67. *United States v. Dokmeci*, No. 13-CR-00455 (JG), 2016 WL 915185, at \*3 (E.D.N.Y. Mar. 9, 2016) (Gleeson, J.).

68. See sources cited *supra* note 66; see also Rachel E. Barkow & Mark William Osler, *Designed to Fail: The President’s Deference to the Department of Justice in Advancing Criminal Justice Reform*, 59 WILLIAM & MARY L. REV. \_\_ (2017).

69. Lucy Nalpathanchil, *Instead of Jail, Judges Take More Hands-On Role With Addicts in Connecticut*, WNPR (Aug. 5, 2014), <http://wnpr.org/post/instead-jail-judges-take-more-hands-role-addicts-connecticut#stream/0> [https://perma.cc/L78H-N8HC] (cleaned up).

70. See Jack B. Weinstein, *Federal Trial Judges: Dealing with the Real World*, 69 U. MIAMI L. REV. 355, 365 (2015) (noting Judge Gleeson’s leadership role); Secret, *supra* note 55 (same).

71. *Dokmeci*, 2016 WL 915185, at \*2.

72. *Id.* at \*3; see also *United States v. Leitch*, No. 11-CR-00039, 2013 WL 753445, at \*2 (E.D.N.Y. Feb. 28, 2013) (Gleeson, J.).

73. See, e.g., *Dokmeci*, 2016 WL 915185, at \*13 n.84 (detailing previous ask for Commission to authorize a downward departure for successful participation in a judge-involved intensive supervision program) (citing letter from the Hon. John Gleeson, U.S. Dist. Judge in the E. Dist. of N.Y., to Patti B. Saris, Chief Judge & Chair, U.S. Sentencing Comm’n (May 21, 2014)); Jordan Smith, *Judges Seek Alternatives to Incarceration*, AUSTIN CHRON. (Nov. 27, 2009), <http://www.austinchronicle.com/news/2009-11-27/921497/> [https://perma.cc/KZQ3-RJBB] (“At a meeting of the U.S. Sentencing Commission last week, Judge William K. Sessions III said that federal judges are interested in seeing more alternatives to incarceration included in federal sentencing guidelines.”).

## 4. Collateral Consequences of Convictions

In addition to excessive incarceration, the “new” judicial activists have brought attention to the consequences of criminal convictions for the ability of previously convicted persons to obtain employment, housing, education, and otherwise participate fully in society. Most of these consequences are imposed by state, not federal, law, but they apply equally to those convicted of offenses in federal court. Laws imposing such restrictions have existed for centuries.<sup>74</sup> Many people are familiar with some of their harshest manifestations, e.g., precluding convicted felons who are United States citizens from voting, or providing grounds for deportation of non-citizens. Such laws have proliferated in the economic, educational, and social spheres as well, precluding individuals convicted of a crime from being eligible for a variety of professional licenses, excluding them from housing and related benefits, and from educational opportunities.<sup>75</sup> Previously relegated to the corridors of defense and immigration attorneys’ offices, these collateral consequences have emerged in recent years into public consciousness through popular books like Michelle Alexander’s *The New Jim Crow: Mass Incarceration in the Age of Colorblindness*.<sup>76</sup>

For decades, federal criminal law was officially blind to these real-life consequences, deeming them “non-punishment.”<sup>77</sup> Thus, they were considered irrelevant at sentencing, to the adequacy of defense representation, and to the voluntariness of a guilty plea.<sup>78</sup> That changed in 2010 when the Supreme Court held in *Padilla v. Kentucky* that defense counsel’s failure to advise a client of the deportation consequences of a conviction constituted constitutionally incompetent representation.<sup>79</sup> And while the Supreme Court in *Pa-*

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74. See generally JAMES B. JACOBS, *THE ETERNAL CRIMINAL RECORD* 246–47 (2015); MARGARET COLGATE LOVE, JENNY ROBERTS, & CECELIA KLINGELE, *COLLATERAL CONSEQUENCES OF CONVICTIONS: LAW, POLICY AND PRACTICE* (2013).

75. See *National Inventory of the Collateral Consequences of Conviction*, JUSTICE CTR., <https://niccc.csgjusticecenter.org> [<https://perma.cc/BF5J-73KL>] (searchable database of approximately 45,000 distinct collateral consequences of convictions).

76. MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS* (2010).

77. See, e.g., Gabriel J. Chin, *The New Civil Death: Rethinking Punishment in the Era of Mass Conviction*, 160 U. PA. L. REV. 1789, 1814–15 (2012).

78. See Jenny Roberts, *The Mythical Divide Between Collateral and Direct Consequences of Criminal Convictions: Involuntary Commitment of “Sexually Violent Predators,”* 93 MINN. L. REV. 670, 671–72 (2008) (explaining constitutional jurisprudence regarding collateral consequences).

79. 559 U.S. 356, 374 (2010).

*dilla* took pains to distinguish deportation from other collateral consequences—holding that deportation is “uniquely difficult to classify as either a direct or a collateral consequence” because of “its close connection to the criminal process”<sup>80</sup>—lower courts, especially in the wake of *Booker*, have held that other collateral consequences may be considered at sentencing.<sup>81</sup>

Like the campaign against mass incarceration, the “new” activist campaign against collateral consequences has played out in extrajudicial statements as well as the pages of judicial opinions. For example, starting at least in 2011, Judge Lynn Adelman of Wisconsin has, through panel discussions and writings, publicly called for the reexamination of collateral consequences.<sup>82</sup> And in 2015 and 2016, Judges Gleeson and Block of the Eastern District of New York devoted considerable space in their judicial opinions to the issue, starting with a pair of cases authored by Judge Gleeson captioned *Doe v. United States*.<sup>83</sup>

In the *Doe* cases, Judge Gleeson explored the role that federal district judges could play in ameliorating collateral consequences for individuals convicted in their courts. Like many other “new” activist opinions, these *Doe* opinions extensively survey the social science literature on the effect of felony convictions<sup>84</sup> and the status of various reform efforts around the country.<sup>85</sup> They also explicitly invite a broader conversation—among other judges,<sup>86</sup> the Execu-

80. *Id.* at 366.

81. *See, e.g.*, *United States v. Stewart*, 590 F.3d 93, 141 (2d Cir. 2009) (affirming trial court’s consideration of impact of conviction on defendant’s career as academic or translator).

82. *See, e.g.*, *Sentenced for Life: Considering the Collateral Consequences of Criminal Convictions*, AM. CONSTITUTION SOC’Y FOR L. & POL’Y (June 17, 2011), <http://www.acslaw.org/news/video/sentenced-for-life-considering-the-collateral-consequences-of-criminal-convictions> [<https://perma.cc/LDV8-BWW9>] (panel discussion featuring Judge Adelman discussing collateral consequences); *see also* Lynn Adelman, *Criminal Justice Reform: The Present Moment*, 2015 Wis. L. REV. 181 (2015) (calling for widespread criminal justice reform, including to collateral consequences of conviction).

83. *See Doe v. United States*, 110 F. Supp. 3d 448, 458 (E.D.N.Y. 2015) (Gleeson, J.) (*Doe I*); *Doe v. United States*, 168 F. Supp. 3d 427 (E.D.N.Y. 2016) (Gleeson, J.) (*Doe II*).

84. *Doe II*, 168 F. Supp. 3d at 429–30.

85. *See id.* at 433.

86. *See Doe I*, 110 F. Supp. 3d at 457 (“The seemingly automatic refusals by judges to expunge convictions when the inability to find employment is the ‘only’ ground for the application have undervalued the critical role employment plays in re-entry. They are also increasingly out of step with public opinion.”).

tive Branch,<sup>87</sup> legislators,<sup>88</sup> and the public<sup>89</sup>—about policies affecting the re-entry into society of individuals with criminal convictions.

In the first *Doe* case, Judge Gleeson tried to persuade the United States Attorney to agree to the expungement of the defendant’s conviction.<sup>90</sup> When the United States Attorney refused, Judge Gleeson expunged it anyway on the grounds that it created an extraordinary hardship to her ability to obtain employment.<sup>91</sup> In the second *Doe* case, Judge Gleeson found the applicant’s hardship insufficient to warrant expungement but nevertheless issued a federal “certificate of rehabilitation,” modeled on similar certificates available under New York law, to make it easier for the defendant to demonstrate to future employers that she was a worthy candidate—a certificate that he persuaded the Chief Probation Officer of the Eastern District of New York to co-sign.<sup>92</sup>

The Second Circuit reversed the first *Doe* decision, finding that Judge Gleeson did not have jurisdiction to consider the application for expungement,<sup>93</sup> a holding that precluded (as least in the Second Circuit) district courts from entertaining any future applications for expungement or certificates of rehabilitation. But the *Doe* opinions have had a lasting effect anyway, even beyond their contribution to the overall policy debate. Other district court judges have started to discuss collateral consequences in their opinions,<sup>94</sup> and

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87. See *Doe II*, 168 F. Supp. 3d at 446 n.41 (describing as “unfortunate[ ]” the infrequency of pardons issued by the Executive branch).

88. See *id.* at 445 (calling for congressional authorization of a “robust federal certification system” like that in effect in New York and several other states).

89. See *Doe I*, 110 F. Supp. 3d at 457 (*Doe I*’s case “highlights the need to take a fresh look at policies that shut people out from the social, economic, and educational opportunities they desperately need in order to reenter society successfully.”).

90. See Brief and Appendix for the United States at \*7, *Doe v. United States*, 833 F.3d 192 (2d Cir. 2016) (No. 15-1967), 2015 WL 5559948 (describing order issued by Judge Gleeson asking the government to consider consenting to expungement).

91. *Doe I*, 110 F. Supp. 3d at 455. In granting the expungement, Judge Gleeson cited among other considerations *Doe*’s representation that she had been “terminated from half a dozen jobs [as a home health aide] because of the record of her conviction.” *Id.*

92. See *Doe II*, 168 F. Supp. 2d at 447 (attachment showing Certificate of Rehabilitation issued, co-signed by the Chief Probation Officer for the District).

93. *Doe v. United States*, 833 F.3d 192, 196–98 (2d Cir. 2016).

94. In addition to *Nesbeth*, discussed *infra*, see, for example, *United States v. Saena Tech Corp.*, 140 F. Supp. 3d 11, 42–47 (D.D.C. 2015) (Sullivan, J.) (citing *Doe I* and in dicta imploring the Department of Justice to use deferred prosecution agreements and other similar tools in individual prosecutions to allow individual defendants, like corporate defendants, a chance to avoid the deleterious collateral

two judges on the Second Circuit, in reversing Judge Gleeson's order, expressed sympathy for the issue he had identified.<sup>95</sup> For example, they noted that Congress might do well to consider providing federal courts with jurisdiction to expunge the convictions of those, like Doe, who "want and deserve to have their criminal convictions expunged after a period of successful rehabilitation."<sup>96</sup>

In May 2016, Senior District Judge Frederic Block of the Eastern District of New York took up Judge Gleeson's campaign against collateral consequences in *United States v. Nesbeth*.<sup>97</sup> *Nesbeth* did not involve expungement, but instead the extent to which a judge could take collateral consequences into account at sentencing. First, the judge, *sua sponte*, asked the Probation Office and the parties to address the collateral consequences the defendant was likely to face due to her drug conviction.<sup>98</sup> The judge then held that these consequences, which included the inability to pursue a teaching career and accomplish the defendant's goal of becoming a school principal, justified a sentence of probation.<sup>99</sup> Written in the "new" activist style, the opinion traces the history and contemporary landscape of laws imposing collateral consequences, the practical effect of such laws on those subject to them,<sup>100</sup> and the status of modern reform efforts.<sup>101</sup> Finally, it nudges numerous other actors in the criminal justice system to take action—e.g., calling for legislators around the country to take a "hard look"<sup>102</sup> at laws imposing collateral consequences; observing that defense counsel and prose-

consequences of criminal convictions); *Stephenson v. United States*, 139 F. Supp. 3d 566, 572 (E.D.N.Y. 2015) (Dearie, J.) (in dicta calling for action by all three branches of government to ensure that individuals who are finished serving their sentences are given a second chance to make a life).

95. *See Doe v. United States*, 833 F.3d at 199 ("The unfortunate consequences of Doe's conviction compel us to offer a few additional observations.")

96. *Id.* The opinion went on to quote at length a speech by then-Attorney General Loretta Lynch calling for reforms of the laws that effectively turns "terms of incarceration into . . . a life sentence." *Id.* at 200 (quoting Loretta E. Lynch, Attorney Gen., Dep't of Justice, Remarks at National Reentry Week Event in Philadelphia (Apr. 25, 2016), <https://www.justice.gov/opa/speech/attorney-general-loretta-e-lynch-delivers-remarks-national-reentry-week-event> [<https://perma.cc/4R7X-C9DY>]).

97. 188 F. Supp. 3d 179 (E.D.N.Y. 2016) (Block, J.).

98. *See id.* at 188.

99. *Id.* at 194.

100. *Id.* at 181–83.

101. *Id.* at 183.

102. *Id.* at 198 ("It is for Congress and the states' legislatures to determine whether the plethora of post-sentence punishments imposed upon felons is truly warranted, and to take a hard look at whether they do the country more harm than

cutors may be derelict in their professional duties if they do not pay greater attention to collateral consequences when advising clients and the court in future sentencing proceedings;<sup>103</sup> and suggesting that the Court’s Probation Department should prepare a collateral consequences analysis in all future pre-sentence reports.<sup>104</sup>

### B. *The Excesses of Prosecutorial Discretion*

The second theme of the “new” judicial activism is the excesses of prosecutorial discretion. Prosecutorial discretion—the wide latitude that prosecutors enjoy in making charging and settlement decisions, and in performing other aspects of their work—is fundamental to the American criminal justice system.<sup>105</sup> Traditionally, it has been justified by a variety of rationales, including prosecutors’ dual roles as both advocates and “ministers of justice,”<sup>106</sup> the availability of juries to serve as a check on prosecutorial charging

good. Hopefully, this opinion will be of value to the bench and bar, and to all those who are committed to serving the ends of justice.”).

103. 188 F. Supp. 3d at 196–97. (citing defense counsel’s duties to advocate the client’s cause, consult with the client on important decisions, and keep the client informed of significant developments, as well as prosecutors’ obligations under Rule 3.8 of New York’s Rules of Professional Conduct as a “minister of justice,” imposed on federal prosecutors pursuant to 28 U.S.C. § 530B(a) (2012)).

104. *Id.* at 197. Following the *Nesbeth* decision, the Probation Department in the Eastern District of New York has included a collateral consequences analysis for all defendants sentenced in that district. Telephone Interview with Eileen Kelly, Chief Probation Officer, E.D.N.Y., (Jan. 10, 2017) (notes on file with author).

105. See, e.g., Bruce A. Green & Fred C. Zacharias, *Prosecutorial Neutrality*, 2004 WIS. L. REV. 837, 840 (2004) (“Discretion pervades every aspect of [prosecutors’] work.”); James Vorenberg, *Decent Restraint of Prosecutorial Power*, 94 HARV. L. REV. 1521, 1536–39 (1981) (discussing range of prosecutorial discretion).

106. See, e.g., MODEL RULES OF PROF’L CONDUCT r. 3.8 cmt. [1] (AM. BAR ASS’N 1983) (“A prosecutor has the responsibility of a minister of justice and not simply that of an advocate.”). As the Supreme Court famously stated in *Berger v. United States*,

The United States Attorney is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice be done. As such, he is in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer. He may prosecute with earnestness and vigor—indeed, he should do so. But, while he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one.

295 U.S. 78, 88 (1935).



decisions, and the impracticality of judicial or other oversight of the investigatory and other aspects of prosecutors' work.

There have long been calls for greater regulation and/or oversight of prosecutors.<sup>107</sup> Especially since legislators embraced mandatory sentencing regimes, critics have argued that the system concentrates too much power in the hands of prosecutors, who are effectively able to dictate the sentence that a defendant receives through charging decisions.<sup>108</sup> Moreover, by overcharging a case, a prosecutor can coerce a guilty plea to at least a lesser offense.<sup>109</sup> Since the financial crisis, critics also have focused on prosecutors' failures to aggressively pursue white collar and corporate crime.<sup>110</sup>

In the last decade, one hears echoes of these critiques in the work of "new" activist judges. These judges have not challenged the basic premise of prosecutorial discretion—i.e., that prosecutors must be given a wide berth to do their jobs effectively—but have suggested that prosecutors are in some cases abusing their authority. As set forth below, these concerns have been raised most commonly with respect to prosecutorial charging decisions (both over and under-charging) and prosecutors' exploitation of the criminal discovery rules that can keep defendants in the dark about critical evidence.

### 1. Overcharging

A number of judges have raised concerns about prosecutorial overcharging,<sup>111</sup> especially charges carrying (or increasing) a

107. See, e.g., ANGELA J. DAVIS, *ARBITRARY JUSTICE: THE POWER OF THE AMERICAN PROSECUTOR* 180–83 (2007) (calling for greater oversight of prosecutors by bar disciplinary authorities); Vorenberg, *supra* note 105, at 1562 (discussing a variety of mechanisms that could be leveraged to limit prosecutors' unchecked discretion).

108. See STITH & CABRANES, *supra* note 17, at 130.

109. See William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505, 537 (2001) (explaining how legislators have given prosecutors a menu of overlapping charges which support prosecutors' "ability to induce a plea").

110. See Brandon Garrett, *The Corporate Criminal as Scapegoat*, 101 VA. L. REV. 1789, 1792–93 (2015); see also *id.* at 1849 & n.237 (gathering the "unrelenting" criticisms by members of Congress and the press of the Department of Justice's "failures to prosecute top executives and officers" for actions relating to the global financial crisis).

111. See, e.g., *United States v. Burciaga-Duarte*, No. CR 14-0592, 2015 WL 3862946, at \*3 (D.N.M. June 9, 2015) (Browning, J.) (raising concern about DOJ prosecution of marijuana distribution in New Mexico, while "turning a blind eye" to the same crime in other states that have legalized marijuana); *United States v. Washington*, 131 F. Supp. 3d 1007, 1018 (E.D. Cal. 2015) (Mueller, J.) ("The government's initial targeting of the defendants without any individualized suspicion gives this court pause."); *United States v. Hudson*, 3 F. Supp. 3d 772, 788 (C.D. Cal.

mandatory minimum sentence. Often, the judges’ disapproval of prosecutors’ charging decisions is bound up with the judges’ distaste for the legislative judgments reflected in the statutory schemes themselves.<sup>112</sup> It can thus sometimes be difficult to disentangle the judges’ distress at the prosecutors’ conduct from the judges’ frustration with Congress. Nevertheless, there is a distinct shift in the “new” activism away from simply voicing the need for corrective legislative action (a sentiment that judges have long expressed with regard to mandatory minimum sentences),<sup>113</sup> toward calling attention to prosecutors’ *choices* to exploit these punitive statutory schemes.<sup>114</sup>

Federal prosecutors’ use of the prior felony information provisions set forth in Section 851 of Title 21 has particularly drawn the

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2014) (Wright, II, J.) (dismissing drug and robbery indictment where charges were based on “stash house” reserve sting operation), *rev’d & remanded sub nom.*, United States v. Dunlap, 593 F. App’x. 619 (9th Cir. 2014); United States v. Henderson, 857 F. Supp. 2d 191, 212 (D. Mass. 2012) (Woodlock, J.) (suggesting that “[a] sense of outrage out of proportion to the circumstances of the misconduct here has apparently driven the case to be pursued as a felony”); United States v. Cromitie, 781 F. Supp. 2d 211, 227 (S.D.N.Y. 2011) (McMahon, J.) (noting the “serious questions that this [terrorism sting] case raises about how the Government is deploying the public fisc in an age of both terror and budgetary constraints”); United States v. Bass, No. 8:04CR384, 2007 WL 2226007, at \*3 (D. Neb. Aug. 1, 2007) (Bataillon, J.) (questioning government’s decision to charge defendant in federal rather than state court, given his minor role in drug conspiracy and vastly different sentencing consequences).

112. See, e.g., United States v. Dossie, 851 F. Supp. 2d 478, 479 (E.D.N.Y. 2012) (Gleeson, J.) (discussing distortive effects of mandatory minimum sentences in drug cases, but calling on the Attorney General to use his powers to remedy those effects, even absent new legislation).

113. See *supra* note 24.

114. See, e.g., United States v. Marshall, 125 F. Supp. 3d 652, 659–60 (N.D. Ohio 2015) (Zouhary, J.) (noting, in cases involving receipt of child pornography, that the court “would have preferred a charging decision that did not include a mandatory minimum” and that government’s charging decision “may have been an ‘irresponsible’ use of the Government’s broad discretion to select charges”) (internal citation omitted); *Dossie*, 851 F. Supp. 2d at 489 (Gleeson, J.) (“The only reason for the five-year sentence imposed on Dossie is that the law invoked by the prosecutor required it.”); United States v. Vasquez, No. 09-CR-259, 2010 WL 1257359, at \*5 (E.D.N.Y. Mar. 30, 2010) (Gleeson, J.) (noting that there was “but one” reason for the sentence imposed—“I was forced by a law that should not have been invoked to impose a five-year prison term”); United States v. Gellatly, No. 8:08CR50, 2009 WL 35166, at \*10 (D. Neb. Jan. 5, 2009) (Bataillon, J.) (imposing required five year sentence for receipt of child pornography, but noting that “[i]f not constrained by the government’s charging decision, the court would be inclined to sentence this defendant to a shorter term of imprisonment that would be more in line with the sentences impose[d] on similar defendants convicted of possession”).

ire of “new” activist judges. Those provisions give prosecutors the power to increase the mandatory minimum and maximum sentences for defendants prosecuted for drug crimes by filing a document—known as a prior felony information—alleging that the defendant previously was convicted of a qualifying felony.<sup>115</sup> Once that document is filed, a defendant who otherwise would face a mandatory minimum sentence of ten years and a maximum of life for a drug offense instead faces a mandatory minimum of twenty years’ imprisonment.<sup>116</sup> A defendant who otherwise would face a mandatory minimum of five years’ imprisonment and a maximum of forty years instead faces a minimum of ten years and a maximum of life imprisonment.<sup>117</sup> If the defendant has two prior qualifying convictions, a prosecutor can file two prior felony informations, triggering a mandatory life term of imprisonment.<sup>118</sup> The prior felony information provisions were enacted in 1970,<sup>119</sup> and contain no restrictions on when prosecutors may invoke them.

By at least 2013, federal district court judges started to voice their displeasure with how prosecutors were exercising their discretion regarding Section 851. Judge Mark Bennett’s 2013 decision in *United States v. Young*<sup>120</sup> provides a good example. In a lengthy opinion filed as the court’s statement of reasons for imposing sentence, Judge Bennett berated the Department of Justice and the United States Attorney’s Office for the Northern District of Iowa for what he called “the stunningly arbitrary application by the Department of Justice (DOJ) of [Section] 851 drug sentencing enhancements.”<sup>121</sup> To that end, Judge Bennett included in the opinion the conclusions of his original research on DOJ’s use of prior felony informations, using data provided (at his request) by the United States Sentencing Commission, summarized in various charts and appendices.<sup>122</sup> And in a final section of the opinion captioned “The Role of the Judiciary in Attempting to Correct the Problem,”<sup>123</sup> Judge Bennett called upon his fellow judges to hold prosecutors accountable for their use of Section 851,<sup>124</sup> and to “express their

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115. 21 U.S.C. § 851 (2012).

116. § 841(b)(1)(A).

117. § 841(b)(1)(B).

118. § 841(b)(1)(A).

119. Act of Oct. 27, 1970, Pub. L. No. 91-513, 84 Stat. 1236.

120. 960 F. Supp. 2d 881 (N.D. Iowa 2013) (Bennett, J.).

121. *Id.* at 882.

122. *Id.* at 893, 910–932 apps. A–E.

123. *Id.* at 903.

124. *Id.*

continuing concern to the DOJ<sup>125</sup> about the issue, drawing a connection to the problem of mass incarceration.<sup>126</sup> All of this was dicta, because the prior felony information had no effect in the case at hand; the defendant qualified for escape from the mandatory minimum sentence pursuant to two other statutory provisions—one known as the safety valve<sup>127</sup> and the other for providing “substantial assistance” to the government in the investigation or prosecution of others.<sup>128</sup> Thus, the statutory mandatory minimum sentence, before or after the filing of the prior felony information, did not bind Judge Bennett’s hands in sentencing.<sup>129</sup> Nevertheless, the *Young* opinion was a shot across the bow to the Department of Justice.

Shortly on the heels of the *Young* decision, Judge Gleeson issued a lengthy opinion in *United States v. Kupa*, also decriing DOJ’s policy regarding Section 851.<sup>130</sup> Like *Young*, most of the *Kupa* opinion is not devoted to the facts of the case or the pertinent law. Instead, it offers a history of mandatory minimum sentencing statutes and DOJ charging policy, a survey of contemporary charging practice, and a strongly-worded message of disapproval. And as in *Young*, it was all dicta—the Section 851 enhancement ultimately did not increase the defendant’s sentence—in this case because the government withdrew it pursuant to a plea agreement.<sup>131</sup> Still, Judge Gleeson used his statement of reasons for the sentence to express his concerns about DOJ’s strategic use of Section 851 enhancements to coerce guilty pleas<sup>132</sup>—a policy he thought he had persuaded the United States Attorney’s Office in his district to drop.<sup>133</sup>

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125. *Id.* at 908.

126. *Young*, 960 F. Supp. 2d at 903 (“I believe we [judges] have an equal right—even duty—to call out the DOJ on its application of the new national policy [reflected in a 2013 memo from Attorney General Holder], its secrecy in applying § 851 enhancements, and the completely arbitrary way in which it could continue to apply these devastating enhancements, which add to the burdens of our Nation’s mass incarceration problems, in the absence of new transparency accompanying the new policy.”).

127. 18 U.S.C. § 3553(f) (2012). This safety valve is available to defendants who do not have a significant criminal record who disclose information about their offense to the government.

128. § 3553(e).

129. *Young*, 960 F. Supp. 2d at 883.

130. 976 F. Supp. 2d 417 (E.D.N.Y. 2013) (Gleeson, J.).

131. *Id.* at 432.

132. *Id.* at 434.

133. *See id.* at 434 (recounting Judge Gleeson’s “belief that the United States Attorney had agreed to refrain from using prior felony informations to coerce

Although less fulsome in their critiques, other judges during the past decade also have criticized federal prosecutors' use of Section 851. For example, in 2013, Judge Anne Conway of the Middle District of Florida expressed a similar concern, characterizing a prosecutor's decision to file a prior felony information as "vindictive," and warning that Section 851 enhancements should not be used to force minor participants to accept a plea.<sup>134</sup> In another case, Judge Marilyn Hall Patel of the Northern District of California struck a prior felony information filed against a defendant, finding that the government "exercised its discretion in a manner that amounts to a due process violation and prosecutorial abuse."<sup>135</sup>

In a similar vein, judges have started to question prosecutors' exploitation of the consecutive, mandatory minimum sentences authorized by Title 18, United States Code, Section 924(c).<sup>136</sup> That provision provides for a mandatory minimum sentence for carrying or possessing a gun in furtherance of a crime of violence or drug offense—of five, seven, or ten years, depending on the extent to which the gun was used.<sup>137</sup> Like Section 851 enhancements, prosecutors have total discretion over whether to charge a Section 924(c) count, and how many to charge, since a different count can be charged for each gun used or possessed. The sentence for each Section 924(c) count of conviction must run consecutive to every other sentence, including the sentence imposed for the underlying drug offense or crime of violence.<sup>138</sup> If there are two or more stacked Section 924(c) counts, the person must be sentenced to at least 25 years' imprisonment.<sup>139</sup>

In 2014, Judge Gleeson wrote a lengthy opinion in *United States v. Holloway*<sup>140</sup> in which he referred to prosecutors' use of stacked Section 924(c) counts as a "misuse of prosecutorial power."<sup>141</sup> In

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pleas after the office's longstanding practice of doing so was brought to her attention in 2010").

134. *Ross v. United States*, No. 6:03-cv-729, at \*9–10 (M.D. Fla. filed July 11, 2013), ECF No. 40 (Conway, J.).

135. *United States v. Jones*, No. CR 08-0887-2, 2009 WL 2912535, at \*7 (N.D. Cal. Sept. 9, 2009) (Patel, J.).

136. See, e.g., JUDICIAL CONFERENCE (Mar. 2009), *supra* note 62, at 17, ("In light of the Conference's long-standing position that mandatory minimum sentences can produce results contrary to the interests of justice," the Conference sought an amendment to 18 U.S.C. § 924(c) to preclude stacking of counts, which "compounds that risk").

137. 18 U.S.C. § 924(c)(1)(A) (2012).

138. § 924(c)(1)(D)(ii).

139. § 924(c)(1)(C)(i).

140. 68 F. Supp. 3d 310 (E.D.N.Y. 2014) (Gleeson, J.).

141. *Id.* at 311–12.

that case, Judge Gleeson vacated two Section 924(c) convictions of a defendant who had already served nearly 20 years of a 57-year prison sentence and had no legal grounds for seeking correction of his sentence. Ultimately, the court acted with the consent of both parties. However, as the opinion makes clear, the prosecutor’s consent was wrangled by Judge Gleeson, who used the opinion as a vehicle to publicize the maneuver and celebrate the United States Attorney for relenting.<sup>142</sup> Not surprisingly, applications for “*Holloway*” relief are now working their way through United States Attorneys’ Offices and courts throughout the country.<sup>143</sup>

## 2. Undercharging

The “new” district court activism also can be found at the other end of the criminal justice spectrum, in the white-collar area, where judges have questioned prosecutors’ policies regarding the decision *not* to charge. For example, in a variety of fora, Judge Rakoff of the Southern District of New York has criticized the DOJ and the Securities and Exchange Commission (SEC) for their response to the financial crisis of 2007–08 and failure to charge any high-level officials. Most notably, in two cases brought by the SEC in the wake of the financial crisis, *SEC v. Bank of America Corp.*<sup>144</sup> and *SEC v Citigroup Global Markets Inc.*,<sup>145</sup> he publicly embarrassed SEC lawyers by refusing to approve consent judgments with banks, with considerable commentary.

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142. *Id.* at 311 (“In the spirit of fairness—and with the hope of inspiring other United States Attorneys to show similar wisdom and courage—I write to applaud the admirable use of prosecutorial power in this case.”).

143. *See, e.g.*, *United States v. Rivera*, Nos. 83-00096-01-CR & 83-00138-02-CR (E.D. Okla. Sept. 15, 2015) (granting defendant’s motion to vacate and resentence after government agreed to support the motion); *United States v. Ezell*, No. 02-815-01, at \*23–27 (E.D. Pa. Aug. 18, 2015), ECF No. 253 (asking the government to consent to such relief); *United States v. Trader*, No. 04-680-06, 2015 WL 4941820, at \*16 (E.D. Pa. Aug. 19, 2015) (asking government to consent to *Holloway* relief so that court could impose a sentence “that better serves the interests of justice”); *United States v. Martinez–Blanco*, No. 06–cr–396 (N.D. Ga. Mar. 31, 2014) (granting joint motion of the parties to reduce mandatory sentence of life imprisonment, imposed pursuant to Government’s filing of a notice under 21 U.S.C. § 851, to a 25-year term).

144. *See SEC v. Bank of America Corp.*, No. 09 Civ. 6829, 2009 WL 2842940, at \*2 (S.D.N.Y. Aug. 25, 2009) (Rakoff, J.) (discussing Court’s request for additional submissions and briefing); *SEC v. Bank of America Corp.*, 653 F. Supp. 2d 507, 508 (S.D.N.Y. 2009) (Rakoff, J.) (rejecting consent judgment even after reviewing additional submissions).

145. *SEC v. Citigroup Glob. Mkts., Inc.*, 827 F. Supp. 2d 328 (S.D.N.Y. 2011) (Rakoff, J.), *vacated and remanded*, 752 F.3d 285 (2d Cir. 2014).

Judge Rakoff was disturbed that the proposed consent decrees did not require an admission of wrongdoing or the payment of penalties by individual wrongdoers.<sup>146</sup> In both cases, the judge repeatedly required the parties to submit additional evidentiary materials and briefing to address his concerns. In one case, Judge Rakoff finally approved the consent decree,<sup>147</sup> but only after the parties substantially modified the agreements to, among other things, give the court a role in approving the outside experts retained to audit its implementation. In the other, Judge Rakoff refused to approve the agreement, concluding his written opinion with a rebuke to the SEC for abdicating its statutory duty to flush out the truth.<sup>148</sup> The SEC filed an interlocutory appeal with the Second Circuit, which reversed.<sup>149</sup> On remand, Judge Rakoff approved the decree but warned that the consequence of the Second Circuit's decision would be "no meaningful oversight whatsoever"<sup>150</sup> of future settlements, including those "enforced by the judiciary's contempt powers."<sup>151</sup> Judge Rakoff followed up his in-court critiques with a headline article<sup>152</sup> published in 2014 in the *New York Review of Books* in which he pointed to "weaknesses in our prosecutorial system" that contributed to the lack of prosecutions of senior corporate executives.<sup>153</sup> He also gave numerous interviews to journalists exploring similar topics.<sup>154</sup>

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146. See *Bank of America*, 653 F. Supp. 2d at 509 (noting that the shareholders will bear the brunt of the penalty assessment); *Citigroup*, 827 F. Supp. 2d at 333 (noting that the consent agreement did not require an admission of wrongdoing).

147. Even while approving the final consent decree, Judge Rakoff called it "half-baked justice at best," because it imposed "very modest" measures on the company that were unlikely to change future conduct. *SEC v. Bank of America Corp.*, Nos. 09 Civ. 6829, 10 Civ. 0215, 2010 WL 624581, at \*5–6 (S.D.N.Y. Feb. 22, 2010) (Rakoff, J.).

148. See *Citigroup*, 827 F. Supp. 2d at 330–35.

149. *Citigroup*, 752 F.3d at 294 (2d Cir. 2014). The Second Circuit held that the district court had applied an erroneous legal standard and that it was not necessary for "the SEC to establish the 'truth' of the allegations against a settling party" before a court could approve a consent decree. *Id.* at 295.

150. *SEC v. Citigroup Glob. Mkts. Inc.*, 34 F. Supp. 3d 379, 380 (S.D.N.Y. 2014) (Rakoff, J.).

151. *Id.*

152. The Article received top billing on the cover of the *New York Review of Books* issue in which it appeared. See Rakoff, *supra* note 4 (including digital image of cover).

153. *Id.* (these included the allocation of resources within DOJ, a shift toward corporate rather than individual prosecutions, reliance on corporate internal investigations, and prosecutors' preference for easier cases).

154. See, e.g., Sasha Abramsky, *Jed Rakoff and the Lonely Fight for Wall Street Justice*, NATION (June 18, 2014), <https://www.thenation.com/article/jed-rakoff-and->

Judge Rakoff may be the most prominent voice expressing federal trial courts’ concern about DOJ and SEC under-enforcement in the white-collar context, but he is not alone.<sup>155</sup> In a substantial number of recent cases, other judges have criticized the DOJ for

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lonely-fight-wall-street-justice/ [https://perma.cc/5PJ2-3Z6E]; Terry Carter, *Judge Jed Rakoff’s Stance on the SEC Deals Draws Fire, Praise—and Change*, A.B.A. J. (Oct. 1, 2013), [http://www.abajournal.com/magazine/article/judge\\_jed\\_rakoffs\\_stance\\_on\\_the\\_sec\\_deals\\_draws\\_fire\\_praiseand\\_change](http://www.abajournal.com/magazine/article/judge_jed_rakoffs_stance_on_the_sec_deals_draws_fire_praiseand_change) [https://perma.cc/6CHB-WYNR]; see generally JESSE EISINGER, *THE CHICKENSHIT CLUB: THE JUSTICE DEPARTMENT AND ITS FAILURE TO PROSECUTE WHITE COLLAR CRIMINALS* (2017) (referencing extensive interviews with Judge Rakoff about the failures of the SEC and Department of Justice in responding to the financial crisis).

155. For additional examples not discussed in the text, see, for example, Nate Raymond, *U.S. judge tells CFTC he won’t ‘rubber stamp’ Deutsche Bank deal*, REUTERS (Sept. 23, 2016), <http://www.reuters.com/article/us-deutsche-bank-cftc-idUSKCN11T1VT> [https://perma.cc/B3YK-TA9Q] (describing action before Judge William Pauley of the Southern District of New York); *SEC v. Hohol*, No. 14-C-41, 2014 WL 461217, at \*2 (E.D. Wis. Feb. 5, 2014) (Randa, J.) (requiring additional information to permit court to determine whether settlement was “fair, reasonable, adequate, and in the public interest”); *SEC v. CR Intrinsic Inv’rs, LLC*, 1:12-cv-08466, at \*16–17 (S.D.N.Y. Apr. 16, 2013), ECF No. 33 (Marrero, J.) (questioning “whether the regulatory and judicial practices which have governed to date fail to reflect what new realities demand to adequately protect the public interest”); *Court Rejects SEC Settlement in Alleged Ponzi Scam*, BLOOMBERG BNA, (Jan. 22, 2013), <http://www.bna.com/court-rejects-sec-settlement-in-alleged-ponzi-scam> [https://perma.cc/T6EB-2YCN] (Judge John Kane of the District of Colorado); Anne Blythe & Joseph Neff, *Judge Refuses to Accept WakeMed Settlement with Federal Prosecutors*, THE NEWS & OBSERVER (Jan. 17, 2013) (quoting *United States v. WakeMed*, No. 5:12-cr-00398 (E.D.N.C. Dec 19, 2012) (Boyle, J.)) (criticizing settlement as a “slap on the hand” for a “too big to fail company”); *United States v. Orthofix, Inc.*, No. 1:12-cr-10169 (D. Mass. Jun 07, 2012) (Young, J.) as quoted in Jef Feeley & Janelle Lawrence, *Orthofix’s Settlement of Medicare Probe Rejected by Judge*, BLOOMBERG NEWS (Sept. 6, 2012) (criticizing criminal settlement because it treated “corporate criminal conduct like a civil case,” and limited the ability to impose penalties for corporate misconduct when “the court’s hands ought not to be tied.”); Zachary A. Goldfarb, *Judge Balks at SEC’s Settlement with Citigroup*, WASH. POST (Aug. 17, 2010), <http://www.washingtonpost.com/wp-dyn/content/article/2010/08/16/AR2010081604807.html> [https://perma.cc/A9S4-LLT6] (describing demand by United States District Judge Ellen S. Huvelle of the District of Columbia for more information before approving SEC settlement with Citigroup, including explanation for why only two executives were charged with wrongdoing); Barry Meier, *Judge Rejects Plea Deal on Guidant Heart Device*, N.Y. TIMES (Apr. 27, 2010), <http://www.nytimes.com/2010/04/28/health/28device.html> [https://perma.cc/S4H5-Y4XN] (describing decision by United States District Judge Donovan W. Frank of the District of Minnesota, rejecting plea agreement between the Department of Justice and the Guidant Corporation that would have required defendant corporation to plead guilty to two misdemeanors and pay \$265 million fine, on grounds that its provisions were “not in the best interest of justice and do not serve the public’s interest because they do not adequately address Guidant’s history and the criminal conduct at issue”)



being too lax with corporate and white-collar individual defendants; in some of them, one can feel the judges straining against the boundaries of their authority to review prosecutorial charging and settlement decisions. For example, in *United States v. HSBC Bank*,<sup>156</sup> Judge Gleeson *sua sponte* explored various bases for judicial review of the substance of a proposed deferred prosecution agreement (DPA).<sup>157</sup> This apparently represented the first time that a district court judge had not “automatically approve[d]”<sup>158</sup> a DPA. The parties ultimately persuaded Judge Gleeson that he did not have the full authority he initially thought he did, and he approved the DPA.<sup>159</sup> But along the way, he outlined a novel theory of a district court’s inherent supervisory power to review DPAs to a certain limited extent.<sup>160</sup>

In *United States v. Fokker*,<sup>161</sup> Judge Richard Leon of the District of Columbia went further. He refused to approve a DPA with a Dutch aerospace company suspected of evading United States sanctions against Iran and other nations. This marked the first time that any federal court had denied a joint request to exclude time under the Speedy Trial Act pursuant to a DPA.<sup>162</sup> Acknowledging the lim-

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

157. *Id.* (noting that, at status conference, the court suggested it had authority to accept or reject a DPA pursuant to Federal Rule of Criminal Procedure 11(c)(1)(A) and U.S. Sentencing Guideline § 6B1.2).

158. *United States v. Saena Tech Corp.*, 140 F. Supp. 3d 11, 25 (D.D.C. 2015).

159. *HSBC Bank*, 2013 WL 3306161, at \*2 (concluding that the court did not have authority under the Federal Rules of Criminal Procedure or the Sentencing Guidelines to substantively review the DPA).

160. *See HSBC Bank*, 2013 WL 3306161, at \*5 (“By placing a criminal matter on the docket of a federal court, the parties have subjected their DPA to the legitimate exercise of that court’s authority.”); *id.* at \*6 (discussing situations in which provisions or implementation of a DPA might “so transgress[ ] the bounds of lawfulness or propriety as to warrant judicial intervention to protect the integrity of the Court”). The Second Circuit later held that the district court lacked such supervisory authority to monitor implementation of a DPA absent a particularized showing of impropriety. *See United States v. HSBC Bank USA, N.A.*, 863 F.3d 125, 135 (2d Cir. 2017).

161. *United States v. Fokker Servs. B.V.*, 79 F. Supp. 3d 160, 165 (D.D.C. 2015) (Leon, J.), *vacated and remanded*, 818 F.3d 733 (D.C. Cir. 2016).

162. *United States v. Fokker Servs. B.V.*, 818 F.3d 733, 740 (D.C. Cir. 2016). As the D.C. Circuit explained, the “interplay between the operation of a DPA and the running of time limitations under the Speedy Trial Act,” a DPA “involves the formal initiation of criminal charges,” thus triggering the “Speedy Trial Act’s time limits for the commencement of a criminal trial.” *Id.* at 737. The Speedy Trial Act allows “a court to suspend the running of the time within which to commence a trial for any period during which the government defers prosecution under a DPA.” *Id.*

ited nature of the court’s supervisory power,<sup>163</sup> Judge Leon nevertheless held that the DPA was “grossly disproportionate to the gravity of [the defendant’s] conduct in a post-9/11 world” and constituted an inappropriate “exercise of prosecutorial discretion.”<sup>164</sup> The government immediately appealed his decision to the D.C. Circuit, which reversed, holding that the trial court had no authority under the Speedy Trial Act to disapprove the settlement—while noting that it had “no occasion to disagree (or agree) with [Judge Leon’s] concerns about the government’s charging decisions in this case.”<sup>165</sup>

And in *United States v. Saena Tech Corp.*,<sup>166</sup> D.C. District Court Judge Emmet Sullivan also was troubled by a set of proposed DPAs and the non-adversarial nature of the process before him. He therefore appointed amicus curiae<sup>167</sup> to brief the position that the court had broad authority to assess the substantive reasonableness of a DPA. Judge Sullivan ultimately rejected that view and approved the DPAs,<sup>168</sup> although he required additional reporting on their implementation.<sup>169</sup> The case also provided an opportunity for Judge Sullivan to express his dismay that federal prosecutors did not offer individual criminal defendants the full array of disposition options regularly utilized for corporate defendants.<sup>170</sup>

### 3. Criminal Discovery

The rules governing criminal discovery are another focus of the “new” district court activism. As commentators have observed for many years, discovery in federal criminal cases is far more limited than in civil cases.<sup>171</sup> Upon a defendant’s request, the prosecution must disclose: the defendant’s statements and prior criminal

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163. *Fokker Servs.*, 79 F. Supp. 3d at 165–66.

164. *Id.* at 167.

165. *See Fokker Servs.*, 818 F.3d at 738.

166. 140 F. Supp. 3d 11, 19 (D.D.C. 2015) (Sullivan, J.).

167. *Id.* The court appointed as amicus curiae Professor Brandon Garrett of the University of Virginia School of Law, author of books including *TOO BIG TO JAIL: HOW PROSECUTORS COMPROMISE WITH CORPORATIONS* (2014) and *CONVICTING THE INNOCENT: WHERE CRIMINAL PROSECUTIONS GO WRONG* (2011).

168. 140 F. Supp. 3d at 13.

169. *Id.*

170. *See id.* at 14.

171. *See, e.g.*, Bruce A. Green, *Federal Criminal Discovery Reform: A Legislative Approach*, 64 MERCER L. REV. 639, 642 (2013); Daniel S. Medwed, *Brady’s Bunch of Flaws*, 67 WASH. & LEE L. REV. 1533, 1536 (2010) (“The scope of discovery in criminal cases is generally (and bizarrely, given the stakes) narrower than that of civil cases.”).

record;<sup>172</sup> documents or other tangible items taken from the defendant that are material to preparing the defense, or that the government intends to use in its case-in-chief;<sup>173</sup> and the results of examinations or scientific tests of evidence material to the defense or that the government intends to offer in its case-in-chief.<sup>174</sup> Upon request, prosecutors also must disclose a summary of the testimony from any expert witnesses whom the prosecution intends to call at trial.<sup>175</sup> However, the government need not disclose its witness list, and witness depositions are extremely rare.<sup>176</sup> Importantly, the rules do not say when required disclosures must be made. Pursuant to Title 18, United States Code Section 3500 (known as the “Jencks Act”), prosecutors must disclose to the defense any prior statements by the witnesses whom the government calls at trial by the time their direct examination is over.<sup>177</sup>

The Supreme Court has long held that the government must disclose exculpatory information that is “material” to the defense (known as *Brady* material)<sup>178</sup> and information that would be significant in impeaching the credibility of the government’s witnesses (known as *Giglio* material)<sup>179</sup> in sufficient time for it to be utilized by the defense at trial. Prosecutors, however, get to determine what constitutes *Brady* or *Giglio* information.<sup>180</sup> Courts deem evidence “material,” if there is a reasonable likelihood that it would affect that the outcome of the trial,<sup>181</sup> or if the prosecution’s failure to disclose it “undermines confidence in the outcome of the trial.”<sup>182</sup> The Supreme Court has held that criminal defendants do not have a statutory or constitutional right to discovery before entering a

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172. FED. R. CRIM. P. 16(a)(1)(A), (B), (D).

173. *Id.* R. 16(a)(1)(E).

174. *Id.* R. 16(a)(1)(F).

175. *Id.* R. 16(a)(1)(G).

176. *See id.* R. 15(a)(1) (authorizing depositions of witnesses, upon order of court, “in order to preserve testimony for trial” in “exceptional circumstances”).

177. *See* 18 U.S.C. § 3500(a) (2012) (providing that, in any criminal prosecution, no statement or report by government witnesses or prospective witnesses “shall be the subject of subpoena [sic] discovery, or inspection until said witness has testified on direct examination in the trial of the case”). For decades, judges in some districts have ordered prosecutors to turn over witness statements well in advance of trial cases where there is no danger to witnesses.

178. *Brady v. Maryland*, 373 U.S. 83, 87 (1963).

179. *Giglio v. United States*, 405 U.S. 150, 15455 (1972).

180. *See* Miriam H. Baer, *Timing Brady*, 115 COLUM. L. REV. 1, 12 (2015).

181. *See* *United States v. Bagley*, 473 U.S. 667, 682 (1985).

182. *Kyles v. Whitley*, 514 U.S. 419, 434 (1995).

guilty plea.<sup>183</sup> Thus, of the vast majority of criminal defendants who plead guilty rather than go to trial,<sup>184</sup> many never receive discovery before doing so.<sup>185</sup>

This discussion provides the background for an emerging sense among many judges that prosecutors have, to a significant extent, abused the tremendous discretion this regime affords them. As Ellen Yaroshefsky and Bruce Green demonstrate in a recent article, *Prosecutorial Accountability 2.0*,<sup>186</sup> there has been a notable shift in judicial rhetoric and behavior regarding prosecutorial discovery misconduct, especially *Brady* violations. Until recently, judges were concerned with willful, rather than careless, misconduct. They generally gave prosecutors the benefit of the doubt in determining which of the two had occurred and trusted internal mechanisms within prosecutorial offices to punish rogue “bad apples.”<sup>187</sup>

That is not the case anymore. Now, judges are more likely to define misconduct as including negligent as well as willful failures, are more likely to see problems as systemic rather than aberrational, and have become less “hands off” in regulating prosecutors. For example, in 2007, Senior Judge Mark Wolf of the District Court for Massachusetts wrote directly to then-Attorney General Alberto Gonzalez to express his concerns that the DOJ’s Office of Professional Responsibility had imposed a sanction on a prosecutor for discovery violations that was too mild and inappropriately kept secret.<sup>188</sup> He also referred the matter for bar disciplinary action.<sup>189</sup> In a 2009 case, he chastised a prosecutor for discovery violations and

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183. See *United States v. Ruiz*, 536 U.S. 622, 628–32 (2002) (finding no constitutional right to *Giglio* material before guilty plea). The Supreme Court has left open the door to the possibility that a defendant could have a constitutional right to pre-plea disclosure of exculpatory *Brady* material, but has not so held. See, e.g., Daniel S. McConkie, *Structuring Pre-Plea Criminal Discovery*, 107 J. CRIM. L. & CRIMINOLOGY 1, 9–12 (2017) (reviewing defendant’s lack of legal right to insist upon most pre-plea discovery).

184. See *Missouri v. Frye*, 566 U.S. 133, 143 (2012) (noting that “[n]inety-seven percent of federal convictions and ninety-four percent of state convictions are the result of guilty pleas”).

185. See Ion Meyn, *Discovery and Darkness: The Information Deficit in Criminal Disputes*, 79 BROOK. L. REV. 1091, 1104 (2014) (“[T]he federal disclosures are predominantly oriented toward trial preparation, despite trials’ rare occurrence.”).

186. See generally Bruce Green & Ellen Yaroshefsky, *Prosecutorial Accountability 2.0*, 92 NOTRE DAME L. REV. 51 (2016).

187. *Id.* at 52.

188. See Adam Liptak, *Federal Judge Files Complaint Against Prosecutor in Boston*, N.Y. TIMES (July 3, 2007), <http://www.nytimes.com/2007/07/03/washington/03justice.html> [<https://perma.cc/XD5E-NR2Q>].

189. See *In re Auerhahn*, No. 09-10206-RWZ-WGZ-GAO, 2011 WL 4352350, at \*2, \*17 (D. Mass. Sept. 15, 2011) (recounting Judge Wolf’s role in initiating Bar

arranged a remedial discovery training program for all prosecutors in the district.<sup>190</sup>

Other district judges around the country have similarly become more active and creative, and have used shaming,<sup>191</sup> the contempt power,<sup>192</sup> and referral for professional discipline to sanction prosecutors<sup>193</sup> in addition to more conventional remedies like jury instructions,<sup>194</sup> new trials,<sup>195</sup> and dismissals.<sup>196</sup>

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counsel's disciplinary action, and ultimately concluding that the allegations of professional conduct had not been proven by clear and convincing evidence).

190. See *United States v. Jones*, 620 F. Supp. 2d 163, 167 (D. Mass. 2009).

191. See, e.g., Kirk Johnson, *Judge Says Abestos Case Can Proceed*, N.Y. TIMES (APR. 27, 2009), <http://www.nytimes.com/2009/04/28/us/28grace.html> [https://perma.cc/LN9V-DU7Y]; cf. Lara Bazelon, *For Shame: The Public Humiliation of Prosecutors by Judges to Correct Wrongful Convictions*, 29 GEO. J. LEGAL ETHICS 305, 305 (2016) (discussing shaming practices employed by the Ninth Circuit Court of Appeals judges); Hon. Alex Kozinski, *Criminal Law 2.0*, 44 GEO. L.J. ANN. REV. CRIM. PROC. iii, xxxv–vi (2015) (discussing benefits of publicly “[n]aming names” when prosecutors engage in misconduct). In 2013, Judge Alex Kozinski of the Ninth Circuit memorably declared in a dissenting opinion that the nation was experiencing an “epidemic of *Brady* violations” that only judges could address. See *United States v. Olsen*, 737 F.3d 625, 626 (9th Cir. 2013) (Kozinski, J., dissenting from denial of rehearing en banc).

192. See, e.g., *United States v. Dvorin*, 817 F.3d 438 (5th Cir. 2016) (district court *sua sponte* issued an order to show cause by prosecutor should not be sanctioned for failing to disclose impeachment material and permitting witness to testify falsely regarding promises made to him and held evidentiary hearing); *United States v. Shaygan*, 661 F. Supp. 2d 1289, 1292–93 (S.D. Fla. 2009) (Gold, J.) (requiring government to pay \$600,000 of the defendant's legal fees for violating the Hyde Amendment); *United States v. Jones*, 609 F. Supp. 2d 113, 131 (D. Mass. 2009) (Wolf, J.) (ordering prosecutors to file affidavits to show cause why sanctions should not be imposed on the government for failure to disclose exculpatory material).

193. See Green & Yaroshefsky, *supra* note 186, at 55–56 nn.21–22 (summarizing cases); see also *United States v. Welton*, No. CR 09-00153, 2009 WL 2390848, at \*12 (C.D. Cal. Aug. 1, 2009) (Morrow, J.) (naming prosecutor involved in witness coaching and referring his conduct to United States Attorney and DOJ Office of Professional Responsibility to “determine whether any ethical or legal violations were committed . . . that warrant further discipline”).

194. See, e.g., *United States v. Grace*, No. CR-05-07, 2009 WL 1160401 (D. Mont. Apr. 28, 2009) (Molloy, J.) (instructing jury to disregard testimony of government witness in light of government's failure to disclose impeachment material concerning the witness).

195. See, e.g., *United States v. Burns*, No. 6:13-cr-00022, 2016 WL 3910273, at \*8 (W.D. Va. July 14, 2016) (Moon, J.); *United States v. Hector*, No. CR 04-00860, 2008 WL 2025069, at \*22 (C.D. Cal. May 8, 2008) (Pregerson, J.) (ordering new trial in light of numerous disclosure violations, and noting that the “Government's credibility in this case has been compromised”).

196. See, e.g., Transcript of Motions Hearing, *United States v. Annappareddy et al.*, 1:13-CR-374 (D. Md. Sept. 1, 2016) (Russell III, J.) (dismissing fraud charges

Although much of this activity is memorialized in judicial opinions and has occurred in the context of discrete cases, one of the most interesting aspects of the “new” district court activism in this area over the past decade has come in the form of judges exploring intra-judicial mechanisms to address these issues *ex ante*. For example, numerous trial judges have participated in the creation of local discovery rules or standing orders on discovery, many of which are far more demanding of prosecutors than are the Federal Rules of Criminal Procedure or the constitutional law decisions of the Supreme Court or the federal Courts of Appeals. Approximately forty-one of the ninety-four federal district courts have local rules<sup>197</sup> or standing orders<sup>198</sup> regarding criminal discovery, a number that ap-

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based on prosecutors’ *Brady* violations and presentation of false testimony); *United States v. Chapman*, 524 F.3d 1073, 1088 (9th Cir. 2008) (upholding trial court’s dismissal of charges because of prosecutors’ discovery violations); *cf.* *United States v. Stein* 495 F. Supp. 2d 390, 427 (S.D.N.Y. 2007) (Kaplan, J.) (dismissing indictment against several former executives at the accounting firm KPMG after finding that prosecutors, whom the judge named in the opinion, violated defendants’ Fifth and Sixth Amendment right to counsel by pressuring KPMG to discontinue payment of defendants’ legal fees).

197. A recent search of a local rule database revealed thirty-two such local rules. *See, e.g.*, S.D. Ala. L.R. 16; E.D. Cal. Crim L.R. 440; N.D. Cal. Crim. L.R. 16-1, 17-1; N.D. Fla. L.R. 26.2; S.D. Fla. L.R. 88.10; N.D. Ga. L.R. 16.1; S.D. Ga. L.R. 16.1, 16.2; D. Haw. L.R. 16.1, 17.1; C.D. Ill. L.R. 16.1; N.D. Ill. L.R. 16.1; N.D. Md. L.R. 17.1.1; D. Mass. L.R. 116.1, 116.2, 116.6, 116.7, 116.8; D. Minn. L.R. 12.1(a); D. Mont. L.R. Cr. 16.1, 16.3, 16.5; D. Neb. L.R. 16.1; D. Nev. L.R. 16-1; D.N.H. L.R. 16.1, 16.2; D.N.M. L.R. 16.1, 16.2; N.D.N.Y. L.R. Cr. P. 14.1; E.D.N.C. L.R. 16.1; E.D. Okla. L.R. 16.1, App. V; W.D. Okla. L.R. 16.1; E.D. Pa. L.R. 16.1; W.D. Pa. L.R. 16; M.D. Tenn. L.R. 16.01; W.D. Tex. R. 16, 15-B(b)(3); D. Vt. L.R. 16; E.D. Wash. L.R. 16; W.D. Wash. L.R. 16; N.D. W. Va. L.R. Cr. P. 16.01, 16.02, 16.03, 16.04, 16.05, 16.06; S.D. W. Va. L.R. Cr. P. 16.1; E.D. Wis. Cr. R. 16.

198. My research revealed nine such standing orders. *See, e.g.*, Standing Order on Criminal Discovery, Cr. Misc. No. 534 (M.D. Ala. Feb. 4, 1999), <https://www.almd.uscourts.gov/download/file/fid/87> [<https://perma.cc/6XLH-A2QV>]; Standing Order on Discovery, L. Cr. R. App. 145 (D. Conn. Dec. 1, 2009), [http://www.ctd.uscourts.gov/sites/default/files/local\\_rules/Revised%20Local%20Rules%20%2011-15-2012.pdf](http://www.ctd.uscourts.gov/sites/default/files/local_rules/Revised%20Local%20Rules%20%2011-15-2012.pdf) [<https://perma.cc/ES6P-ZY2S>]; *In re* Revised Criminal Procedure Order, Gen. Order No. 242 (D. Idaho Mar. 1, 2010), [http://www.id.uscourts.gov/Content\\_Fetcher/index.cfm/Criminal\\_Procedural\\_Order\\_1553.pdf?Content\\_ID=1553](http://www.id.uscourts.gov/Content_Fetcher/index.cfm/Criminal_Procedural_Order_1553.pdf?Content_ID=1553) [<https://perma.cc/GR8C-LCD5>]; General Order of Discovery and Scheduling (D. Kan. June 12, 2012); *In re* Standing Order for Discovery and Inspection and Fixing Motion Cut-Off Date in Criminal Cases, Admin. Order No. 03-AO-027 (E.D. Mich. Sept. 30, 2003), <https://www.mied.uscourts.gov/PDF-Files/03-AO-027.pdf> [<https://perma.cc/A8JZ-B4TG>]; Standing Order Regarding Discovery in Criminal Cases, Admin. Order No. 06-085 (W.D. Mich. Aug. 28, 2006), <http://www.miwd.uscourts.gov/sites/miwd/files/Administrative%20Order%2006-085.pdf> [<https://perma.cc/EX4W-NXP6>]; *In re* Best Practices for Electronic Discovery of Documentary Materials in Criminal Cases General Order No.

pears to have been steadily increasing over the past decade.<sup>199</sup> For example, the local rules of the District of Massachusetts, developed with the help of Judge Wolf, which are among the most rigorous, require prosecutors to disclose information about search warrants, electronic surveillance, consensual interceptions, identifications, and unindicted co-conspirators—in addition to everything already enumerated in Federal Rule of Criminal Procedure 16.<sup>200</sup> They also require the government to disclose all exculpatory evidence—defined more broadly than *Brady*, to include information that tends to negate the defendant's guilt or to cast doubt on the admissibility of the government's evidence, or that could be used to impeach government witnesses.<sup>201</sup> All of this material ordinarily must be dis-

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09-05 (W.D.Okla. Aug. 20, 2009) (summarizing proposed electronic discovery best practices), <http://www.okwd.uscourts.gov/wp-content/uploads/2014/09/genord09-5.pdf> [<https://perma.cc/H6ZT-6FYJ>]; *In re* Criminal Trial Scheduling and Discovery, Standing Order No. 15-2 (D.N.J. Sept. 22, 2015), [http://www.njd.uscourts.gov/sites/njd/files/Standing%20Order%2015-2\\_In%20Re%20Criminal%20Trial%20Scheduling%20%26%20Discovery.pdf](http://www.njd.uscourts.gov/sites/njd/files/Standing%20Order%2015-2_In%20Re%20Criminal%20Trial%20Scheduling%20%26%20Discovery.pdf) [<https://perma.cc/T3J3-TULV>]; *In re* Criminal Discovery, Standing Order No. 2015-5 (D. Or. Mar. 16, 2015), <https://www.ord.uscourts.gov/index.php/court-info/standing-orders?download=442:2015-5-in-re-criminal-discovery> [<https://perma.cc/WQ5B-QGHW>]; see also Hon. Emmet G. Sullivan, *Enforcing Compliance with Constitutionally-Required Disclosures: A Proposed Rule*, 2016 CARDOZO L. REV. DE NOVO 138, 147–48 nn. 60–61 (2016) (collecting local district court rules and standing orders).

199. In 2011, thirty-eight districts had a local rule or standing order that codified the government's *Brady* obligations “in either very general or specific terms, and/or provide[d] timing requirements.” LAURAL HOOPER ET AL., FED. JUDICIAL CTR., A SUMMARY OF RESPONSES TO A NATIONAL SURVEY OF RULE 16 OF THE FEDERAL RULES OF CRIMINAL PROCEDURE AND DISCLOSURE PRACTICES IN CRIMINAL CASES 8 (2011). This was one more than the number of districts reporting a local rule regarding disclosure of *Brady* material as of 2007 and eight more than the number of districts with a similar rule or order in 2004. See LAURAL HOOPER & SHELLA THORPE, FED. JUDICIAL CTR., *BRADY V. MARYLAND MATERIAL IN THE UNITED STATES DISTRICT COURTS: RULES, ORDERS, AND POLICIES* 7–8 (2007) (thirty-seven of the ninety-four districts reported having a local rule or order governing disclosure of *Brady* material); see also *id.* Appendix C (including a sample of individual judge orders addressing *Brady* disclosures); LAURAL L. HOOPER, JENNIFER E. MARSH, & BRIAN YEH, FED. JUDICIAL CTR., *TREATMENT OF BRADY V. MARYLAND MATERIAL IN UNITED STATES DISTRICT AND STATE COURTS' RULES, ORDERS, AND POLICIES* 4 (2004) (thirty districts had local rule or order governing disclosure of *Brady* material).

200. See D. Mass. L.R. 116.1 (Discovery in Criminal Cases).

201. *Id.* L.R. 116.2 (Disclosure of Exculpatory Evidence). This includes criminal records, pending criminal cases, and promises of any rewards or inducements made to government witnesses, regardless of whether the material would meet *Brady*'s materiality standard.

closed within twenty-eight days of arraignment, without any prior request by the defense.<sup>202</sup>

Even in those districts in which the entire court has not yet adopted a local rule or standing order, individual judges have. For example, Judge Sullivan in the District of Columbia has issued a standing discovery order in all criminal cases<sup>203</sup> ever since the debacle in the Ted Stevens trial of 2008.<sup>204</sup> In the *Stevens* case, Judge Sullivan appointed a special counsel to investigate the prosecutors’ behavior and consider the propriety of contempt charges.<sup>205</sup> The special counsel determined that the prosecution had engaged in “systematic concealment of significant exculpatory evidence.”<sup>206</sup> Nevertheless, he also concluded that contempt sanctions were not appropriate because no specific court order required prosecutors to comply with their constitutional obligations.<sup>207</sup> Ever since, Judge Sullivan has issued a standing order on discovery that specifically

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202. *Id.* L.R. 116.1–116.2. Other forms of impeachment material, such as prior inconsistent statements, must be disclosed at least twenty-one days before trial. *Id.* L.R. 116.2. If the prosecutor is concerned about the safety of witnesses, or otherwise deems that it would be “detrimental to the interests of justice” to make the disclosures required by the local rules, the prosecutor can decline to do so, upon notifying the defense. The defense can then seek a court order to compel disclosure, with the prosecution bearing the burden of demonstrating “by affidavit and supporting memorandum citing legal authority, why such disclosure should not be made.” *Id.* L.R. 116.6 (Declination of Disclosure and Protective Orders).

203. See Standing *Brady* Order, (D.D.C.) <http://www.dcd.uscourts.gov/sites/dcd/files/StandingBradyOrder.pdf>, [<https://perma.cc/2BDH-AEJS>].

204. Senator Theodore (“Ted”) Stevens was a three-term United States Senator from Alaska who was charged with lying on Senate forms about gifts he had received, including of repairs to his ski home in Alaska. He was killed in an airplane crash in August 2010. See Adam Clymer, *Ted Stevens, Longtime Alaska Senator, Dies at 86*, N.Y. TIMES (Aug. 10, 2010), <https://www.nytimes.com/2010/08/11/us/politics/11stevens.html>, [<https://perma.cc/AD88-M9QN>]. During the trial, Judge Sullivan repeatedly chastised the prosecutors as allegations of *Brady* violations surfaced. After Stevens’ conviction, the prosecution forwarded to the court a “whistle-blower” complaint from an FBI agent detailing additional allegations of misconduct. Later, Judge Sullivan granted a motion by newly-appointed Attorney General Eric Holder to vacate the conviction.

205. See Order Appointing Henry F. Schuelke, *United States v. Stevens*, No. 1:08-cr-23100231 (D.D.C. Apr. 8, 2009), ECF. No. 375 (Sullivan, J.). The special counsel delivered a 512-page report, [http://legaltimes.typepad.com/files/stevens\\_report.pdf](http://legaltimes.typepad.com/files/stevens_report.pdf). Notice of Filing Report to Hon. Emmet G. Sullivan, *In re* Special Proceedings, Misc. No. 1:09-0198 (mc-00198 (D.D.C. filed Mar. 12, 2012)), [http://legaltimes.typepad.com/files/stevens\\_report.pdf](http://legaltimes.typepad.com/files/stevens_report.pdf) [<https://perma.cc/8F84-55VL>] [hereinafter Schuelke Report].

206. Schuelke Report, *supra* note 205, at 29.

207. *Id.* at 29 (although the evidence established that the misconduct was intentional, it was not done in contravention of a “clear and unambiguous order”).



directs prosecutors to produce, among other things, all *Brady* and *Giglio* material. He also has (thus far unsuccessfully) urged his colleagues to adopt a local discovery rule for the entire district.<sup>208</sup> Judge Sullivan regularly amends his own order in response to new case law developments, most recently adding a requirement that prosecutors “disclose exculpatory evidence during plea negotiations.”<sup>209</sup> Many other judges have adopted similar standing orders,<sup>210</sup> even if not as expansive as Judge Sullivan’s. For example, Judge Rakoff recently amended his individual rules to require the government to produce *Brady* material two weeks after indictment, and in any event “no later than four weeks prior to any trial or guilty plea.”<sup>211</sup>

District court judges also have participated in efforts to amend the Federal Rules of Criminal Procedure to codify broader and earlier discovery requirements. That effort has largely involved lobbying within the bureaucracy of the Judicial Conference or the Advisory Committee,<sup>212</sup> although it has occasionally been expressed

208. See, e.g., Editorial, *A New Rule Could Help Ensure Prosecutors Share Info with the Defense*, WASH. POST (Mar. 20, 2016), [https://www.washingtonpost.com/opinions/getting-prosecutors-to-share-what-they-know/2016/03/20/cd5e42cc-eabb-11e5-a6f3-21ccd5c5f74e\\_story.html?utm\\_term=.b8ea6c797f37](https://www.washingtonpost.com/opinions/getting-prosecutors-to-share-what-they-know/2016/03/20/cd5e42cc-eabb-11e5-a6f3-21ccd5c5f74e_story.html?utm_term=.b8ea6c797f37) [<https://perma.cc/7PQK-RGVZ>] (noting Judge Sullivan’s role in pushing for changes to District of Columbia local rules).

209. See Sullivan, *supra* note 198, at 148 n.648 (noting circuit split on whether prosecutors must disclose *Brady* material during plea discussions).

210. See, e.g., Standing Order for Criminal Cases (Hayes, Mag. J.) (W.D. Mo.), [http://www.mow.uscourts.gov/sites/mow/files/SWH\\_COMBINED\\_STANDING\\_ORDER.pdf](http://www.mow.uscourts.gov/sites/mow/files/SWH_COMBINED_STANDING_ORDER.pdf) [<https://perma.cc/V3T6-S2MF>]; Certificate of Engagement and Criminal Pre-Trial Order (Glasser, J.) (E.D.N.Y.), <https://www.nyed.uscourts.gov/pub/pretrial/ILG-crpto.pdf> [<https://perma.cc/7W3Q-2R87>]; Trial Procedure Order—Criminal Trial (Black, J.) (S.D. Ohio), <http://www.ohsd.uscourts.gov/sites/ohsd/files/Criminal%20Procedures%20Form%20%28website%29%203.16.pdf> [<https://perma.cc/85AG-D3UF>]; Criminal Preliminary Trial Order (Barrett, J.) (S.D. Ohio), <http://www.ohsd.uscourts.gov/sites/ohsd/files/Criminal%20Pretrial%20order.pdf> [<https://perma.cc/S984-ANUQ>]; Criminal Cases (Carr, J.) (N.D. Ohio), <http://www.ohnd.uscourts.gov/home/judges/judge-james-g-carr/criminal-cases/> [<https://perma.cc/RM99-QQRL>]; see also Kozinski, *Criminal Law 2.0*, *supra* note 191, at xxxiii–xxxv (2015) (collecting local court rules and individual court orders); McConkie, *supra* note 183 (reviewing local rules and individual standing orders).

211. Individual Rules of Practice 10–12, Hon. Jed S. Rakoff, J. 10–12 (effective S.D.N.Y. Feb. 13, 2017), [http://www.nysd.uscourts.gov/cases/show.php?db=judge\\_info&id=1369](http://www.nysd.uscourts.gov/cases/show.php?db=judge_info&id=1369) [<https://perma.cc/DM3J-LX84>].

212. See, e.g., Sullivan, *supra* note 198, at 144 (recounting his effort to reinvigorate interest in the Advisory Committee in amending Rule 16 in the aftermath of the Stevens case); Letter from Hon. Emmet G. Sullivan, Judge, D.D.C., to Hon. Richard C. Tallman, Chair, Judicial Conference Advisory Comm. on the Rules of

in other fora.<sup>213</sup> So far, the effort to amend the Federal Rules of Criminal Procedure has not succeeded, nor does it presently have the endorsement of the Judicial Conference.<sup>214</sup> However, it did lead to a new section of the 2013 edition of the Federal Judicial Center Bench Book for federal judges—which Judge Paul Friedman of the D.C. Circuit (who along with Judge Sullivan has been a leader in the push for an amendment to the local rules on criminal discovery for the District of Columbia)<sup>215</sup> took the lead in drafting.<sup>216</sup> This section provides district court judges with information

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Criminal Procedure (Apr. 28, 2009); Letter from Hon. Christina Reiss, Chief Judge, D. Vt., to Hon. Reena Raggi, Chair, Advisory Comm. on Federal Rules of Criminal Procedure (Feb. 9, 2012). President Obama appointed Judge Reiss to the District Court of Vermont in 2009. See *Biographical Directory of Article III Federal Judges, 1789–present*, FED. JUDICIAL CTR., <https://www.fjc.gov/history/judges/reiss-christina-clair><https://www.fjc.gov/history/judges> [<https://perma.cc/ETT7-LQP9>] (entry for Christina Reiss). She was previously a state court judge and a lawyer in private practice. *Id.*

213. See, e.g., Zoe Tillman, *D.C. Judges Weigh Rule to Curb Prosecutor Misconduct*, NAT’L L.J. (Feb. 3, 2016), <https://advance.lexis.com/search?crd=f2e86a3f-ad1b-4227-8e82-ad89fe9bc990&pdsearchterms=LNSDUID-ALM-NTLAWJ-1202748711837&pdbyasscitatordocs=False&pdmfid=1000516&pdisurlapi=true> [<https://perma.cc/Y92F-RBWK>] (noting that Judge Sullivan emailed the National Law Journal to explain that “[a] federal rule that requires the government to produce all exculpatory material in a readily useable format to the defense serves the best interests of the court, the prosecution, the defense, and ultimately, the public”); Sullivan, *supra* note 198, at 141–47 (discussing need for a proposed amendment to Federal Rule 16 of Criminal Procedure and framing it in the broader context of criminal justice reform, including the need to address “over-incarceration”); Hon. Christina Reiss, *Closing Fed. R. Crim. P. 16(a)’s Loopholes: Why Criminal Defendants Are Entitled to Discovery of All of Their Statements*, 7 AM. U. CRIM. L. BRIEF 242 (2012).

214. As recently as 2006, the Advisory Committee on Criminal Rules endorsed an amendment to Rule 16. See LAURAL HOOPER ET AL., *supra* note 199, at 4 (2011). However, in 2007, the DOJ persuaded the Judicial Conference’s Standing Committee on the Rules of Practice and Procedure Committee to oppose the proposed amendment. *Id.* In 2011, the Advisory Committee on Criminal Rules again considered the idea, debating a “discussion draft” of a proposal to amend Rule 16. After hearing objections from DOJ, the Standing Committee again voted (6–5) not to recommend any proposed amendment that year. See R. Michael Cassidy, *Plea Bargaining, Discovery, and the Intractable Problem of Impeachment Disclosures*, 64 VAND. L. REV. 1429, 1451–52 (2011); Memorandum from Hon. Reena Raggi, Chair, Advisory Comm. on Federal Rules of Criminal Procedure, to Hon. Mark R. Kravitz, Chair, Standing Comm. on Rules of Practice and Procedure (May 17, 2012) (reporting on proposed amendments to the Federal Rules of Criminal Procedure). In a 2010 survey of federal district and magistrate judges conducted at the request of the Advisory Committee, researchers with the Federal Judicial Center found that judges were evenly split (51% in favor) on whether to amend Rule 16 to increase prosecutors’ discovery obligations. Laural Hooper et. al, *supra*, at 19.

215. See Tillman, *supra* note 213.

216. See Sullivan, *supra* note 198, at 146–47.

about their options, including their supervisory authority to dictate by order or local rule the timing of *Brady* disclosures.<sup>217</sup>

### III. THE “NEW” DISTRICT COURT ACTIVISM IN HISTORICAL CONTEXT

Having described in Part II the “new” district court activism—i.e., federal district judges’ muscular engagement, in and out of court, with a set of fundamental criminal justice issues—this section now attempts to place it in historical context. First, it notes the apparent absence of historical precedents for the existing ferment in the federal district courts over these criminal justice issues. Second, it posits some possible explanations for the development of the “new” activism in the district courts with respect to criminal justice in recent years.

#### A. *A Search for Historical Parallels*

If there were historical precedents for the “new” district court activism, one might expect to find them during periods when the federal judiciary was regularly presented with prosecutions that were controversial in their time.<sup>218</sup> But, although it is impossible to

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217. See FED. JUDICIAL CTR., BENCHBOOK FOR U.S. DISTRICT COURT JUDGES 163–79 (6th ed. 2013).

218. The federal judiciary has undergone several structural changes in its history and has grown considerably, but it has had a three-tiered structure since its inception. The Constitution provides that “[t]he judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish.” U.S. Const. art. III, § 1. All federal judges are entitled to Article III’s protections of holding Office “during good Behaviour,” with no diminution of their salary. *Id.* The First Judiciary Act of 1789 created thirteen district courts, each with jurisdiction over a geographical area, to preside as the trial courts in admiralty cases, minor federal criminal cases, and minor civil cases in which the United States government was the plaintiff, and authorized the appointment of one district court judge per district. The 1789 Act placed each district in one of three circuits, and created another type of court—the circuit court—to serve as the intermediate court of appeals for those circuits, as well as the trial court for other types of cases, typically more serious cases than those heard in the district courts. However, the 1789 Act did not authorize the hiring of distinct “circuit” court judges; rather Supreme Court justices “riding circuit” and district court judges sat together in panels that constituted the circuit court. See RUSSELL R. WHEELER & CYNTHIA HARRISON, FED. JUDICIAL CTR., CREATING THE FEDERAL JUDICIAL SYSTEM 3–8 (2d ed. 1994). The current structure of the federal courts, including a permanent court of appeals for each of the circuits (which grew in number as the nation grew), with judges appointed specifically to those courts, dates to the Circuit Court of Appeals Act of 1891, also known as the Evarts Act for its sponsor, Senator William Evarts of New York. See *id.* at 18.

say conclusively whether it happened or not, it is hard to find evidence of similar moments of sustained judicial protest. For example, the prosecutions brought in the early years of the Republic pursuant to Alien and Sedition Act of 1798 did not appear to rouse the public ire of the federal judiciary.<sup>219</sup> It was juries, popular sentiment, and political agitation that ended such prosecutions, apparently with little encouragement from the bench.<sup>220</sup>

Similarly, federal trial judges appear to have done little to protest slavery, including the federal statutes providing for the return of escaped slaves and criminal prosecution of those who helped them.<sup>221</sup> The reasons for judicial reticence in this area have been thoroughly explored by Robert Cover and other scholars. The explanations have included the need by antislavery judges to reduce the cognitive dissonance caused by enforcing laws they believed immoral, the relative novelty of judicial review of Congressional action as a feature of American jurisprudence,<sup>222</sup> and the special status of

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219. To the contrary, the historical record suggests that some of the judges supported these prosecutions. *See, e.g.*, JOHN C. MILLER, *CRISIS IN FREEDOM: THE ALIEN AND SEDITION ACTS* 117–20 (1951) (describing how U.S. Supreme Court Justice Samuel Chase, riding circuit, took an active role in the questioning of the defendant, and imposed the heaviest sentence to that point for a Sedition Act case, in the 1799 prosecution of an obscure pamphleteer).

220. *See, e.g., id.* at 138–39 (describing how Federalist federal judges as a whole supported the Sedition Act); Akhil Reed Amar, *The Bill of Rights as a Constitution*, 100 *YALE L.J.* 1131, 1209 (1991) (“Less than a decade after the Bill of Rights became law, federal judges cheerfully sent men to jail for criticizing the government.”); Eric R. Claeys, *Judicial Engagement and Civic Engagement: Four Case Studies*, 19 *GEO. MASON L. REV.* 887, 889–90 (2012) (describing how the Sedition Act was brought to an end through political action after “inferior federal judges appointed by the Federalists all upheld the Act”).

221. *See generally* ROBERT M. COVER, *JUSTICE ACCUSED: ANTISLAVERY AND THE JUDICIAL PROCESS* (1975); H. Robert Baker, *The Fugitive Slave Clause and the Antebellum Constitution*, 30 *LAW & HIST. REV.* 1133 (2012). While the first Fugitive Slave Act of 1793 gave federal and state courts concurrent jurisdiction over cases involving escaped slaves, and contemplated “self help” by slave owners, a later statute, passed in 1850, created exclusive federal power to enforce the Fugitive Slave Clause of the Constitution and created a federal administrative apparatus for that purpose, thus placing “the prestige of the national government behind the rendition of fugitive slaves.” Paul Finkelman, *Sorting Out Prigg v. Pennsylvania*, 24 *RUTGERS L.J.* 605, 664 (1993). Many of the cases that arose under the Fugitive Slave Act of 1850 were criminal proceedings brought against abolitionists who sought to rescue or aid fugitive slaves. *See COVER, supra* at 190–91. When such cases were tried in federal court, the judges neither “welcomed [n]or easily tolerated jury proclivities to acquit.” *Id.* at 191. Moreover, the federal circuit courts “were unanimous in upholding the new act.” *Id.* at 208.

222. *See generally* COVER, *supra* note 221; *id.* at 232; H. ROBERT BAKER, *PRIGG V. PENNSYLVANIA, SLAVERY, THE SUPREME COURT, AND THE AMBIVALENT CONSTITUTION* 5

the Fugitive Slave Laws as a means of preserving the Union.<sup>223</sup> For perhaps these and other reasons, federal judges passed up important opportunities to rule on constitutional and statutory issues in ways favorable to slaves.<sup>224</sup> But they also avoided the kinds of hortatory dicta that one finds in the opinions of “new” district court activists. Although some antebellum judges expressed their personal opposition to slavery in their judicial opinions,<sup>225</sup> such statements are comparatively brief and modest. They also are more prevalent in the opinions of state<sup>226</sup> rather than federal courts.<sup>227</sup> And there

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(2012) (“The courts themselves demonstrated a remarkable deference to legislative construction of the Constitution, at least until the 1830s.”); H. ROBERT BAKER, *THE RESCUE OF JOSHUA GLOVER: A FUGITIVE SLAVE, THE CONSTITUTION, AND THE COMING OF THE CIVIL WAR* 37 (2006) (“Judicial deference to congressional constitutional interpretation was a fundamental feature of the early republic’s constitutionalism. Whatever tacit right to review legislation the courts claimed, the power of judicial review was circumscribed by constitutional practice.”); Richard A. Posner, *The Rise and Fall of Judicial Self-Restraint*, 100 CAL. L. REV. 519, 555 (2012) (noting that judicial deference in the early years of the Republic also may have been related to the fact that “key members of Congress had been personally involved in the drafting and ratification of the Constitution [so their] constitutional arguments were more than rhetoric”).

223. See BAKER, *supra* note 222; Bruce A. Green & Rebecca Roiphe, *Regulating Discourtesy on the Bench: A Study in the Evolution of Judicial Independence*, 64 N.Y.U. ANN. SURV. AM. L. 497, 509–10 (2009) (as the Civil War approached, “judges, who were motivated by a largely instrumental view of the law, rejected the rhetoric of the anti-slavery movement by appealing to the practical need to maintain the union”); William E. Nelson, *The Impact of the Anti-Slavery Movement Upon Styles of Judicial Reasoning in the Nineteenth Century*, 87 HARV. L. REV. 513, 538–39 (1974) (“[A]dvocates of antislavery lost nearly all these cases, for . . . judges steeped in the instrumental style of reasoning continued to give effect to the related objectives of economic growth and national unity.”).

224. See COVER, *supra* note 221, at 233. *But see* United States v. Hanway, 26 F. Cas. 105, 121, 126–27 (C.C.E.D. Pa. 1851) (federal district court charged jury that law of treason required more than armed resistance to the enforcement of a particular law, in trial for murder of a slave catcher).

225. Cover describes these statements as examples of the judicial “can’t”—i.e., rhetoric aimed not at justifying the result and its underlying principles, but at justifying the judge, who thus communicates that he or she knows the result is “morally indefensible” but wishes to explain “the sense in which [he or she is] compelled to reach it.” COVER, *supra* note 221, at 119.

226. See, e.g., *Ex parte Bushnell*, 9 Ohio St. 77, 196 (1859) (“Is a judge to treat the settled interpretation of the constitution, announced to the country in a previous generation, by Congress assuming to legislate, sanctioned by an unbroken current of judicial decisions, as of no binding judicial obligation, and to be overthrown by the authority of his individual convictions that the constitution should have a different interpretation? And if a state judge can thus, by his interpretation, alter the constitution when it has received such acquiescence and sanction, what provisions of the constitution, state or national, are safe from change and alteration, under the assumption of such judicial power? They would be writ-

is scant evidence of extrajudicial public engagement by federal trial judges, once they became judges, in the antislavery cause.<sup>228</sup>

In the 20th century, federal criminal law vastly increased<sup>229</sup> and so did the resources of the federal criminal law enforcement apparatus,<sup>230</sup> including the federal courts.<sup>231</sup> The dockets of federal

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ten upon sand. For myself, I disclaim the exercise of any such judicial discretion.”); *JACK a negro man v. MARY MARTIN*, 1835 WL 2938, at \*528 (N.Y. 1835) (“However much . . . we may deplore the existence of slavery in any part of the Union, as a national as well as a local evil, yet, as the right of the master to reclaim his fugitive slave is secured to him by the federal constitution, no good citizen, whose liberty and property are protected by that constitution, will interfere to prevent this provision from being carried into full effect.”); *Wright v. Deacon*, 1819 WL 1857, at \*2 (Pa. 1819) (“Whatever may be our private opinions on the subject of slavery, it is well known that our southern brethren would not have consented to become parties to a constitution under which the United States have enjoyed so much prosperity, unless their property in slaves had been secured.”).

227. See COVER, *supra* note 221, at 119–21. For an example of a “judicial can’t” opinion by a federal judge, see *Miller v. McQuerry*, 17 F. Cas. 335, 339 (C.C.D. Ohio 1853) (“With the abstract principles of slavery, courts called to administer this law have nothing to do. It is for the people, who are sovereign, and their representatives, in making constitutions, and in the enactment of laws, and to consider the laws of nature, and the immutable principles of right. This is a field which judges can not explore. Their action is limited to conventional rights. They look to the law, and to the law only. A disregard of this, by the judicial powers, would undermine and overturn the social compact. If the law be injudicious or oppressive, let it be repealed or modified. But this is a power which the judiciary can not reach.”).

228. Such reticence is consistent with efforts to create a more independent, professional judiciary. See Gordon S. Wood, *The Origins of Judicial Review Revisited, Or How the Marshall Courts Made More Out of Less*, 56 WASH. & LEE L. REV. 787, 803–05 (1999) (noting that, before 1800, judges were appointed based on social and political connections, and “were involved in politics and governing to an extent that we today find astonishing,” but after 1800, the “tendency to make the courts purely judicial bodies increased dramatically. More and more, law grew separate from politics . . . [and] courts now tended to concentrate on individual cases and to avoid the most explosive and partisan political issues.”). Several scholars have suggested that this repositioning of the judiciary as professional and independent was a necessary precondition for the development of a more robust practice of judicial review. See, e.g., *id.* at 801–05.

229. See Rachel E. Barkow, *Institutional Design and the Policing of Prosecutors: Lessons from Administrative Law*, 61 STAN. L. REV. 869, 884 (2009) (“[F]ederal criminal law itself was a limited category for much of the nation’s history. Federal criminal law barely existed prior to 1896. Indeed, there was no federal penitentiary before that date.”).

230. In the late nineteenth century, during Reconstruction, Congress created the Department of Justice and entrusted it, along with the Freedmen’s Bureau and Federal Marshals Service, with enforcement of the newly enacted Reconstruction Amendments and civil rights acts. See LOU FALKNER WILLIAMS, *THE GREAT SOUTH CAROLINA KU KLUX KLAN TRIALS 1871–1879* 43 (1996). Congress also entrusted to the DOJ the enforcement of other new federal crimes such as conspiracy to de-

district judges, especially on the criminal side, became considerably more crowded, as Prohibition and other vice crimes became staples of law enforcement.<sup>232</sup> The conception of the judge also had shifted, with the judge's creative functions increasingly embraced.<sup>233</sup> Nevertheless, it is hard to find evidence of judicial agitation about what today we might call federal over-criminalization. Some prosecutors balked at enforcement of some of the least popular of these new laws,<sup>234</sup> but it is not clear that federal judges pushed back.

To the extent that federal judges attempted to limit executive authority in criminal law enforcement, that effort was reflected in decisions that *granted* relief and largely was concentrated in the opinions of the Supreme Court. For example, the Warren Court's revolution in criminal procedure was largely a "top down" revolution, with many of the most significant cases of that period—like *Gideon v. Wainwright*,<sup>235</sup> *Miranda v. Arizona*,<sup>236</sup> and *Mapp v.*

fraud the United States and mail fraud. *See generally* Abraham S. Goldstein, *Conspiracy to Defraud the United States*, 68 *YALE L.J.* 405, 405–06 (1959); Jed S. Rakoff, *The Federal Mail Fraud Statute (Part I)*, 18 *DUQ. L. REV.* 771, 779–86 (1980).

231. *See* Aziz Z. Huq, *When Was Judicial Self-Restraint?*, 100 *CAL. L. REV.* 579, 588 (2012) (noting the "institutional transformation of the federal courts in the second half of the nineteenth century," eventually going from an "understaffed and unpaid' judicial infrastructure headed by justices perennially distracted by the travails of riding circuit" to "a real third branch of government") (quoting Howard Gillman, *How Political Parties Can Use the Courts to Advance Their Agendas: Federal Courts in the United States, 1875–1891*, 96 *AM. POL. SCI. REV.* 511, 512 (2002)); *see generally* Erwin C. Surrency, *Federal District Court Judges and the History of Their Courts*, 40 *F.R.D.* 139 (1966).

232. *See, e.g.*, KENNETH M. MURCHISON, *FEDERAL CRIMINAL LAW DOCTRINES: THE FORGOTTEN INFLUENCE OF NATIONAL PROHIBITION* 159 (1994) ("[T]he Eighteenth Amendment and the Volstead Act produced a flood of cases that nearly inundated the federal courts."); Edward Rubin, *A Statistical Study of Federal Criminal Prosecutions*, 1 *LAW & CONTEMP. PROBS.* 494, 497 tbl. 1 (1934) (showing that the federal courts' criminal docket in 1932 had more than doubled since 1918, the last year before Prohibition).

233. *See* Susanna L. Blumenthal, *Law and the Creative Mind*, 74 *CHI.-KENT L. REV.* 151, 225–26 (1998) (noting that "the creativity of the judge was increasingly recognized and celebrated in the nineteenth century . . . . It was not the mechanical jurisprude but the judicial genius who embodied the professional ideal").

234. *See* Daniel C. Richman, *Federal Sentencing in 2007: The Supreme Court Holds—the Center Doesn't*, 117 *YALE L.J.* 1374, 1398–99 (suggesting that federal prosecutors around the country may not have shared DOJ's commitment to prosecuting violations of Prohibition, and describing one vivid such battle between the DOJ and the United States Attorney for the Southern District of New York).

235. 372 U.S. 335 (1963) (holding that indigent defendants in state prosecutions are entitled to appointment of counsel).

*Ohio*<sup>237</sup>—bypassing the lower federal courts because they were appeals by criminal defendants from the highest courts of the various states.<sup>238</sup> However, even the Warren Court cases involving federal criminal prosecutions reflected the “top down” aspect of the era, with the Supreme Court (and occasionally the circuit courts), but not the district courts, generally leading the way in articulating new doctrine.<sup>239</sup> This lesser role in generating legal change is, of course, consistent with district courts’ place in the judicial hierarchy, which most district court judges historically have internalized.<sup>240</sup> In fact,

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236. 384 U.S. 436 (1966) (holding that criminal defendants subjected to custodial interrogation must be advised of, and waive, their constitutional rights for their statements to be admissible).

237. 367 U.S. 643 (1961) (holding that evidence obtained by state agents pursuant to unconstitutional search was inadmissible).

238. The infamous *Lochner* decision also involved an appeal of a criminal conviction from a state’s highest court, which bypassed the lower federal courts. See *Lochner v. New York*, 198 U.S. 45 (1905) (holding unconstitutional under Due Process Clause state labor law limiting number of hours bakers could work per week).

239. See, e.g., *United States v. Wade*, 388 U.S. 218 (1967) (new trial required where defendant deprived of counsel at line up); *Massiah v. United States*, 377 U.S. 201 (1964) (requiring suppression of evidence obtained in violation of defendant’s Sixth Amendment right to counsel); *Elkins v. United States*, 364 U.S. 206 (1960) (evidence acquired by state agents in violation of defendant’s Fourth Amendment rights could not be used in federal prosecution). But see *Brady v. Maryland*, 373 U.S. 83 (1963) (federal district court granted habeas relief to state petitioner who was deprived of materially exculpatory evidence by the prosecution). The leadership role of the Supreme Court in criminal procedure, relative to the district courts, also is reflected in cases that predate the Warren Court. See, e.g., *McNabb v. United States*, 318 U.S. 332 (1943) (statements obtained in violation of defendant’s statutory right to prompt presentment must be excluded); *Nardone v. United States*, 308 U.S. 338 (1939) (requiring suppression of evidence obtained indirectly as a result of illegal wiretap); *Nardone v. United States*, 302 U.S. 379 (1937) (same as to evidence obtained directly from illegal wiretap); *Silverthorne Lumber Co. v. United States*, 251 U.S. 385 (1920) (invoking the fruit of the poisonous tree doctrine (though not using that term)); *Weeks v. United States*, 232 U.S. 383 (1914) (evidence obtained in violation of defendant’s Fourth Amendment rights could not be used against him in subsequent criminal prosecution). But see *Sorrells v. United States*, 287 U.S. 435 (1932) (defense of entrapment originated in lower federal courts); see also MURCHISON, *supra* note 232, at 23–31 (same).

240. See Ashutosh Bhagway, *Separate But Equal?: The Supreme Court, the Lower Federal Courts, and the Nature of the “Judicial Power”*, 80 B.U. L. REV. 967, 1015 (2000) (noting that the “institutional culture of the lower judiciary . . . has largely become a culture of obedience”); MORRIS, *supra* note 6, at 94 (district court judges generally “anticipate that changes in case law will [largely] come from above”); *id.* at 94 (noting that “[f]ar fewer district judges view their role as ‘law makers’” than do other judges).



in some cases, lower court judges were hostile to the “pro-defendant” decisions of the Supreme Court.<sup>241</sup>

During the McCarthy era, the federal judiciary also was notably silent in the face of prosecutions of alleged communists pursuant to the Alien Registration Act.<sup>242</sup> Nor did most federal judges protest when it became clear that the sentences meted out to similarly situated federal offenders—prosecuted pursuant to the ever-multiply

241. For example, U.S. District Judge Alexander Holtzoff, co-author of the criminal procedure treatise Barron & Holtzoff, now known as Wright & Miller, and Secretary to the Advisory Committee that drafted the Federal Rules of Criminal Procedure, was critical of the Supreme Court’s adoption of the *McNabb-Mallory* rule, which rendered inadmissible a defendant’s confession if obtained during an unnecessary delay between arrest and initial appearance before a magistrate judge. In a statement to the Senate Committee on the Judiciary, Judge Holtzoff noted that the Advisory Committee of the Federal Rules of Criminal Procedure specifically rejected such a proposal and that there was no requirement to bring an arrested party before a magistrate “immediately.” *A Study of the Constitutional Aspects of Police Detention Prior to Arraignment and of Confessions Obtained from Suspects During Such Detention*: Hearings on S. Res. 234 Before a Subcomm. on Constitutional Rights of the Senate S. Comm. on the Judiciary, 85th Cong., 2d Sess. 2–6 (1958). He also made this point in *United States v. Heideman*, 21 F.R.D. 335, 339 (D.D.C. 1958) (“The Committee rejected this proposal on the ground that such a penalty for a violation of the Rule would be too drastic and would be visited not on the delinquent officer, but on the public.”). In other fora, Judge Holtzoff warned against “permit[ting] the pendulum to swing so far in [the direction of protecting the accused] as to neglect the interests of society as a whole and the rights of the victim of a crime.” Hon. Alexander Holtzoff, *Leadership in the Struggle for Law Reform*, 17 F.R.D. 251, 254 (1955) (address before the Missouri State Bar); see also Hon. Alexander Holtzoff, *Shortcomings in the Administration of Criminal Law*, 17 HASTINGS L.J. 17, 26–28 (1965–66) (criticizing judges for ignoring the harmless error rule and reversing judgments on technicalities that do not bear on guilt or innocence).

242. Portions of the Alien Registration Act made it a criminal offense to “knowingly or willfully advocate, abet, advise or teach the . . . desirability, or propriety of overthrowing or destroying any Government in the United States by force or violence,” or to organize or be a member of any association advocating or encouraging such action. 18 U.S.C. § 2583 (1940). Pub. L. No. 76-670, § 2, 54 Stat. 670, 671 (1940) (repealed 1952). More than one hundred people were prosecuted under this law in the 1940s and 1950s. See GEOFFREY R. STONE, *PERILOUS TIMES: FREE SPEECH IN WARTIME, FROM THE SEDITION ACT OF 1798 TO THE WAR ON TERRORISM* 314 (2004). Judge Learned Hand was one of the few judges who spoke out against McCarthyism. At the time, he was a member of the Second Circuit Court of Appeals and had taken senior status. See GUNTHER, *supra* note 14, at 580–92, 654–72 (discussing Hand’s public speeches condemning McCarthyism). As William O. Douglas wrote in his autobiography, judges during this era “were whipped by public passions and transformed into agents of intolerance.” WILLIAM O. DOUGLAS, *THE COURT YEARS 1939–1975: THE AUTOBIOGRAPHY OF WILLIAM O. DOUGLAS* 92–93 (1980). Although elected state judges were the worst, “even federal judges, named for life, were affected.” *Id.*

ing federal criminal laws—varied wildly around the country.<sup>243</sup> The most notable exception, of course, was Judge Marvin Frankel of the Southern District of New York.<sup>244</sup> His slim 1973 book *Criminal Sentences: Law Without Order*,<sup>245</sup> which was arguably the single most influential act of extrajudicial speech by a judge ever, laid the intellectual foundation for the Sentencing Reform Act of 1984, which ushered in the era of mandatory minimum sentencing statutes and the Sentencing Guidelines to curb the very judicial discretion that Frankel found lawless.<sup>246</sup>

As Frankel later wrote, these developments prompted federal judges, “so quiet about sentencing for so long,” suddenly [to come] to life—often passionately.<sup>247</sup> What ensued was a loud clash between federal judges, Congress, the Sentencing Commission, and the Executive Branch, as judges reacted to their loss of virtually unfettered discretion in imposing sentences.<sup>248</sup> For the changes not only curtailed the power of the individual district court judge, but did so in an arena in which district court judges had long been considered, including by themselves, uniquely qualified to determine the appropriate outcome.<sup>249</sup> As noted *supra*, sometimes that battle was waged in the form of judicial opinions holding the Guidelines and the Sentencing Reform Act unconstitutional, but some of it was waged in extrajudicial fora.<sup>250</sup> This was essentially the first wave of the “new” district court activism—focused on a single issue, sentencing authority. As recounted in Part II, this activism, which never fully died out after the Supreme Court upheld the new

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243. See Marvin E. Frankel, *Sentencing Guidelines: A Need for Creative Collaboration*, 101 YALE L.J. 2043, 2044 (1992).

244. Judge Holtzhoff (*supra* note 241) also publicly decried the discrepancies among judges in sentencing pursuant to the indeterminate sentencing regime. See Hon. Alexander Holtzhoff, *Defects in the Administration of Criminal Justice*, 9 F.R.D. 303 (1949) (speech before the American Bar Association’s Section on Criminal Law).

245. MARVIN E. FRANKEL, *CRIMINAL SENTENCES: LAW WITHOUT ORDER* (1973).

246. See STITH & CABRANES, *supra* note 17, at 2.

247. See Frankel, *Sentencing Guidelines*, *supra* note 243, at 2045.

248. See STITH & CABRANES, *supra* note 17, at 9–11 (reviewing history of federal district courts’ sentencing authority); Carissa BYrne Hessick & F. Andrew Hessick, *Appellate Review of Sentencing Decisions*, 60 ALA. L. REV. 1, 4 (2008) (“For the greater part of American history, appellate review of federal criminal sentences was non-existent in most cases.”).

249. See Hon. Nancy Gertner, *From Omnipotence to Impotence: American Judges and Sentencing*, 4 OHIO ST. J. CRIM. L. 523, 538 (2007) (describing judges’ “overblown sense of their own expertise in the indeterminate sentencing days”).

250. See STITH & CABRANES, *supra* note 17, at 5 & n.12 (collecting opinions and articles in which federal judges expressed their disapproval of the Sentencing Guidelines).

sentencing scheme in 1989, has been resurgent in the last decade with an expanded set of concerns. The next section explores why.

### B. *Why Now?*

This section sets forth some of the possible reasons for the “new” district court activism of the past decade. It asks what explains the recent engagement by district court judges, often in a highly personal way, in criminal justice reform, including visibly advocating for doctrinal, legal, and policy change, in many cases ahead of the Courts of Appeals and the Supreme Court.

#### 1. The Impact of *Booker*

First, the “new” district court activism may be attributable, at least in part, to the effect of *Booker* in the context of Congress’s ongoing assault on the federal judiciary’s authority in the administration of criminal law, which predates the mandatory sentencing laws of the 1980s. For example, in 1974, Congress amended the Federal Rules of Criminal Procedure to kick federal judges out of the plea-bargaining process, citing a concern that defendants would feel coerced into pleading guilty by the judge’s involvement.<sup>251</sup> The same year, Congress enacted the Speedy Trial Act, which limited trial courts’ discretion in controlling their criminal dockets, citing a concern about delays in bringing criminal cases to trial.<sup>252</sup> Then, in the 1980s, Congress substantially curtailed the sentencing authority of federal judges with the passage of laws expanding the application of mandatory minimum sentencing and establishing the United States Sentencing Commission. The trend continued in the 1990s, when Congress further expanded statutory mandatory minimum sentences but also restricted federal district courts’ authority over

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251. Since then, Rule 11 has provided that “[t]he court must not participate in [plea] discussions.” FED. R. CRIM. P. 11(c)(1). Prior to the amendment, federal judges’ participation in plea bargaining was “common practice.” FED. R. CRIM. P. 11(e)(1), Notes of Advisory Committee on Rules—1974 Amendment, advisory committee’s note to 1974 amendment. See also *United States v. Davila*, 133 S. Ct. 2139, 2146 (2013). Most states have not followed suit and continue to allow trial court judges to be involved in plea discussions, although the extent to which state judges do so varies. See generally Nancy J. King & Ronald F. Wright, *The Invisible Revolution in Plea Bargaining: Managerial Judging and Judicial Participation in Negotiations*, 95 TEX. L. REV. 325 (2016).

252. 18 U.S.C. §§ 3161–3174 (2012); see generally Linda M. Ariola, Deborah A. DeMasi, Edward D. Loughman III, & Timothy G. Reynolds, et al., *The Speedy Trial Act: An Empirical Study*, 47 FORDHAM L. REV. 713, 713–23 (1979) (discussing history of Speedy Trial Act and the negative reaction to it from various quarters, including trial judges).

criminal justice in other ways, including over the deportation consequences of convictions<sup>253</sup> and review of previously-entered state and federal criminal judgments.<sup>254</sup>

No institutional actor in this space suffered a more substantial blow as a consequence of these measures than the federal district court judge. And no group received a greater boost to its authority than federal prosecutors, who now were largely able to dictate the sentence that a defendant would receive (and the collateral consequences that would flow from conviction) through charging decisions and manipulation of the Sentencing Guidelines.<sup>255</sup> The trend to restrict district courts’ sentencing authority, and shift more power to prosecutors, continued into the early 2000s, including the enactment of the Feeney Amendment in 2003, which subjected district court judges’ downward departures to increased scrutiny.<sup>256</sup>

*Booker*, which ended more than two decades of mandatory adherence to the United States Sentencing Guidelines, fundamentally altered this dynamic. The extent to which it upended the status quo

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253. Legislation enacted in 1990 repealed district courts’ authority to issue a recommendation at sentencing against deportation in cases of non-citizen defendants. *See Padilla v. Kentucky*, 559 U.S. 356, 362–64 (2010) (discussing history of the judicial recommendation against deportation (JRAD) under U.S. immigration law, which was repealed in 1990); Margaret H. Taylor & Ronald F. Wright, *The Sentencing Judge as Immigration Judge*, 51 EMORY L.J. 1131, 1151 (2002) (observing that JRADs were “simply washed out of the [Immigration and Nationality Act] statute among the waves of increasingly harsh congressional measures intended to crack down on noncitizen criminal offenders”).

254. The Anti-Terrorism and Effective Death Penalty Act of 1996 greatly restricted federal courts’ authority to grant habeas relief to federal and state prisoners. It imposed a one-year statute of limitations, whereas previously there had been none; tightened standards for second or subsequent petitions; placed limits on federal courts’ authority to hear a petition from a state conviction in the case of procedural default; and restricted the authority of federal courts to grant relief where a claim was previously adjudicated on the merits in state court to those instances where the decision was “contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States.” 28 U.S.C. § 2254(d) (2012); *see generally* John H. Blume, *AEDPA: The “Hype” and the “Bite”*, 91 CORNELL L. REV. 259 (2006); Brian M. Hoffstadt, *Common-Law Writs and Federal Common Lawmaking on Collateral Review*, 96 NW. U. L. REV. 1413, 1414 (2002).

255. *See* STITH & CABRANES, *supra* note 17, at 136 (in an era of mandatory Guidelines, prosecutors could in effect control the sentence through careful selection of the charges and facts presented); Sonja B. Starr & M. Marit Rehani, *Mandatory Sentencing and Racial Disparity: Assessing the Role of Prosecutors and the Effects of Booker*, 123 YALE L.J. 2, 13 (the Guidelines “increased [prosecutors’] power: the choices prosecutors made more conclusively determined the sentence” than ever before).

256. *See supra* note 39 and sources cited therein.

in federal criminal law was of “earthquake” proportions.<sup>257</sup> But because it had no effect on statutory mandatory minimum sentencing (or many of the other limits on trial courts’ authority discussed above), it only partly ameliorated the consolidation of “indecent power”<sup>258</sup> in the hands of federal prosecutors that had occurred over several decades.<sup>259</sup> It may nevertheless have been a galvanizing moment for federal trial judges, especially those whose careers preceded the Guidelines but who had long given up on any real hope of change emanating from Congress or the Supreme Court. That Congress took no action in the wake of *Booker* to resurrect the Guidelines by incorporating them into statutory minimum sentences—despite predictions that it would<sup>260</sup>—may have been further emboldening. The “new” judicial activism therefore may be an example of a “revolution of rising expectations.”<sup>261</sup>

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257. See Starr & Rehavi, *supra* note 255, at 15 (“*Booker* was widely seen as an earthquake in federal sentencing law.”). The earthquake was preceded by tremors. First, the Supreme Court revitalized the jury trial right in *Apprendi v. New Jersey*, 530 U.S. 466 (2000), holding that any fact increasing the statutory maximum sentence a defendant faced was an element that must be proven beyond a reasonable doubt to a jury rather than a sentencing factor that could be established by a preponderance before a judge. In *Blakely v. Washington*, 542 U.S. 296 (2004), the Supreme Court extended *Apprendi* to hold Washington State’s sentencing scheme unconstitutional because the facts establishing the effective maximum sentence were found by a judge rather than a jury. As Kate Stith has written, *Blakely* “foretold the unconstitutionality of the mandatory Sentencing Guidelines, as decreed the next year in *Booker*.” Stith, *supra* note 39, at 1494.

258. Stith, *supra* note 39, at 1425. In addition to holding that the Guidelines would henceforth be advisory rather than binding, *Booker* undid “every significant provision of the Feeney Amendment.” *Id.* at 1482.

259. See Paul J. Hofer, *Has Booker Restored Balance? A Look at Data on Plea Bargaining and Sentencing*, 23 FED. SENT’G. R. 326, 330 (2011) (noting that “*Booker* has not solved all of the problems with federal sentencing,” with many remaining problems traceable “to the continuing presence, and even expansion, of mandatory minimum penalties and enhancements”).

260. See, e.g., Frank O. Bowman, III, *Train Wreck? Or Can the Federal Sentencing System Be Saved? A Plea for Rapid Reversal of Blakely v. Washington*, 41 AM. CRIM. L. REV. 217, 262 (2004) (predicting that, if the Supreme Court applied *Blakely* to hold the United States Sentencing Guidelines unconstitutional, Congress would attempt to restore the system “as close as possible to the *status quo ante*” or would impose “a system far more harsh, far less advantageous to defendants, and far less hospitable to judicial discretion.”); David M. Zlotnick, *The Future of Federal Sentencing Policy: Learning Lessons From Republican Judicial Appointees in the Guidelines Era*, 79 U. COLO. L. REV. 1, 14 (2008) (“Given that *Booker* outraged conservatives, who viewed the opinion as a judicial coup d’etat, many commentators initially believed it was only a matter of time before Congress acted.”).

261. See ALEXIS DE TOCQUEVILLE, *THE OLD REGIME AND THE REVOLUTION* 222 (U. Chi. Press 1998) (1856) (explaining his theory of the revolution of rising ex-

Even for those judges who came of age during the Guidelines era,<sup>262</sup> the experience of exercising real discretion in sentencing post-*Booker* may have served as a “wake-up” call which focused their attention on the disproportionality of the mandatory minimum sentences that remained and on the irrationality of the advisory Guidelines as applied in many cases.<sup>263</sup> Especially once the Supreme Court made clear in two post-*Booker* decisions, *Rita*<sup>264</sup> and *Gall*,<sup>265</sup> that district courts really did have discretion in sentencing—and held in *Kimbrough*<sup>266</sup> that this discretion encompassed disagreements over policy with the Sentencing Commission—judges got a taste of true engagement with sentencing policy. *Booker* and its progeny thus may have injected a renewed energy into the federal judiciary to address injustices in the criminal justice system more broadly. The result in *Booker* also may have given judges reason to believe that their protests could make a difference. For although, as a formal matter, *Booker* extended the Supreme Court’s doctrinal shift of at least five years earlier regarding the meaning of the jury trial right,<sup>267</sup> many have attributed *Booker* at least in part to the judiciary’s long-standing opposition to the Sentencing Guidelines.<sup>268</sup>

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pections: “Every abuse that is then eliminated seems to highlight those that remain . . . the evil has decreased . . . but the sensitivity is greater.”).

262. See Gertner, *supra* note 249, at 533 n.40 (citing Federal Judicial Center statistics showing that 89.97 percent of then-active federal district court judges were confirmed after the Guidelines went into effect and thus had “no experience with discretionary criminal sentencing”).

263. See Richman, *supra* note 234, at 1394 (“[O]rganizational cultures can change. Life-tenured judges had, over time and through self-selection, become increasingly inured to the way the Guidelines and mandatory minimums cut to the heart of what their predecessors saw as the judge’s role.”); *id.* at 1411–12 (“More and more judges [had] become accustomed to the Guidelines”).

264. *Rita v. United States*, 551 U.S. 338 (2007).

265. *Gall v. United States*, 552 U.S. 38 (2007).

266. *Kimrough v. United States*, 552 U.S. 85 (2007).

267. See *supra* note 257 (explaining impact of *Apprendi* and its extension in *Blakely*).

268. See, e.g., Stith, *supra* note 39, at 1426 (“[I]t is not a mere coincidence, in my view, that both *Blakely* and *Booker* . . . occurred in the wake of Congress’s own extraordinary intervention in 2003 and Main Justice’s subsequent restrictions (required by Feeney) on local prosecutorial autonomy.”); Ian Weinstein, *The Revenge of Mullaney v. Wilbur: United States v. Booker and the Reassertion of Judicial Limits on Legislative Power to Define Crimes*, 84 OR. L. REV. 393, 430 (2005) (describing *Booker* and the cases leading up to it as “a healthy exercise in correcting power imbalances among the branches of our government,” whereby “the Court circled back around to renewed concern with the limits of legislative power as the issues took on a very different cast in the world of mandatory minimums and enforceable guidelines”); DAVID M. ZLOTNICK, REPUBLICAN APPOINTEES AND JUDICIAL DISCRETION: CASES STUD-

## 2. Social and Political Context

Second, the larger social and political context in which the “new” district court activism has occurred is an important factor. Since the mid-1990s, the United States has enjoyed more than two decades of declining crime rates.<sup>269</sup> Meanwhile, over the past decade, people of different political views have coalesced around the idea that we have overly relied on incarceration and indiscriminately accepted collateral consequences of convictions.<sup>270</sup> Moreover, as Sharon Dolovich and Alexandra Natapoff have described our “current historical moment,” it is one “in which the criminal justice system . . . has become a primary battleground for civil rights and social justice.”<sup>271</sup> States around the country are experimenting with criminal justice policies to downsize their prison populations and keep people out of the criminal justice system entirely.<sup>272</sup> This movement has gained traction at the federal level as well, where the Fair Sentencing Act of 2010 reduced the disparity between sentencing for crack and powder cocaine and increased eligibility for certain forms of relief from statutory mandatory minimum sentences.<sup>273</sup> At least before the 2016 elections, more fundamental

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IES FROM THE FEDERAL SENTENCING GUIDELINES ERA 68 (June 2007) (unpublished report) (available at <http://faculty.rwu.edu/dzlotnick/OSI-Report-june2007.pdf> [<https://perma.cc/7GEC-2KEN>]) (“While the *Booker* majority rested its holding upon its interpretation of the Sixth Amendment, many in Congress, academia, and even the judiciary, saw *Booker* in the context of the power struggle between the branches and a delayed reaction to the Feeney Amendments and the longstanding war on judicial discretion.”).

269. See FED. BUREAU OF INVESTIGATION: UNIFORM CRIME REPORTING, CRIME IN THE UNITED STATES (2014), <https://ucr.fbi.gov/crime-in-the-u.s/2014/crime-in-the-u.s.-2014/tables/table-1> [<https://perma.cc/7FXB-W8C>] (indicating an overall decline in violent crimes—murder, rape robbery, aggravated assault—and nonviolent crimes—property crimes, burglary, larceny, and motor vehicle theft—between 1995 and 2014).

270. See Sharon Dolovich & Alexandra Natapoff, *Introduction: Mapping the New Criminal Justice Thinking*, in THE NEW CRIMINAL JUSTICE THINKING I (Sharon Dolovich & Alexandra Natapoff eds., 2017) (“Liberals and conservatives alike condemn the enormous economic costs and questionable public safety benefits of the current system.”).

271. *Id.* at 27.

272. See, e.g., Richard A. Oppel, Jr., *States Trim Penalties and Prison Rolls, Even as Sessions Gets Tough*, N.Y. TIMES (May 18, 2017), <https://www.nytimes.com/2017/05/18/us/states-prisons-crime-sentences-jeff-sessions.html> [<https://perma.cc/CG3Z-YM8M>] (citing changes in more than thirty states in recent years to limit prison sentences and expand alternatives to incarceration in order to keep costs down and crime rates low).

273. Fair Sentencing Act of 2010, Pub. L. 111-220, 124 Stat. 2372.

change to federal criminal sentencing law was close to passage.<sup>274</sup> The financial crisis of 2007–08 is another important part of this social and political context, as it not only focused national attention on the economic trade-offs of mass incarceration, but also cast doubt on whether government actors could be trusted to prevent and address corporate wrongdoing. But for these factors, it seems doubtful that we would be hearing the voices of the “new” judicial activism on these issues. Judges, after all, are the product of their social and political context.<sup>275</sup>

The innocence revolution is an additional part of this larger context.<sup>276</sup> Since 1989, at least 350 people in the United States have been exonerated through DNA evidence of crimes for which many served decades in prison.<sup>277</sup> Other estimates of the number of wrongful convictions in the United States, including through means other than DNA evidence, put the number at over 1,700.<sup>278</sup> The United States is now home to a network of local innocence projects, many of them non-profits based at law schools, together

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274. Carl Hulse, *Unity Was Emerging on Sentencing. Then Came Jeff Sessions.*, N.Y. TIMES (May 14, 2017), <https://www.nytimes.com/2017/05/14/us/politics/jeff-sessions-criminal-sentencing.html> [<https://perma.cc/U2WK-BTSD>] (describing how, prior to 2016 election, conservatives and liberals in Congress were working together and were “on the verge of winning reductions in mandatory minimum sentences and creating new programs to help offenders adjust to life after prison” in light of “the success shown by similar changes at the state level”).

275. See Corinna Barrett Lain, *Countermajoritarian Hero or Zero? Rethinking the Warren Court’s Role in the Criminal Procedure Revolution*, 152 U. PA. L. REV. 1361, 1452 (2004) (“[P]ersonal perspectives will inevitably make their way into the decision-making process, and so will the social and political currents that shape those perspectives.”); *id.* (quoting Kenneth Pye’s observation in 1968: “A hundred years from now lawyers will not be amazed by the changes wrought by the Warren Court. They will wonder how it could have been otherwise in the America of the sixties.”).

276. See Mark A. Godsey & Thomas Pulley, *The Innocence Revolution and Our “Evolving Standards of Decency” in Death Penalty Jurisprudence*, 29 U. DAYTON L. REV. 265 (2004); Lawrence C. Marshall, *The Innocence Revolution and the Death Penalty*, 1 OHIO ST. J. CRIM. L. 573 (2004).

277. INNOCENCE PROJECT, <https://www.innocenceproject.org> [<https://perma.cc/UKK6-RVCE>]. The first DNA exoneration in the United States occurred in 1989. Additional exonerations followed steadily thereafter, reaching a peak of twenty-five in 2002. Since 2002, the number of DNA exonerations per year in the United States has ranged between thirteen and twenty-three. See Keith A. Findley, *Innocence Found: The New Revolution in American Criminal Justice*, in *CONTROVERSIES IN INNOCENCE CASES IN AMERICA* 3 (Sarah Lucy Cooper ed., 2014).

278. THE NAT’L REGISTRY OF EXONERATIONS, *EXONERATIONS IN 2015* 3 (2016), [https://www.law.umich.edu/special/exoneration/Documents/Exonerations\\_in\\_2015.pdf](https://www.law.umich.edu/special/exoneration/Documents/Exonerations_in_2015.pdf) [<https://perma.cc/U2WK-BTSD>] (reporting 1,733 exonerations in the United States between 1989 and January 27, 2016).



serving every region of the country.<sup>279</sup> There is no question that “innocence consciousness”<sup>280</sup> is now part of our national legal culture. Scholarship on the causes of wrongful convictions has come of age over the past decade, revealing that, in a substantial number of these cases, the person later exonerated had pled guilty to the offense.<sup>281</sup> In a substantial portion of these cases, prosecutorial misconduct was a contributing factor.<sup>282</sup>

Although the overwhelming majority of the DNA exonerations involved state prosecutors, cases like the *Stevens* prosecution have demonstrated that federal prosecutors are not immune from many of the same problems. Moreover, the innocence movement has brought about a major cultural shift in how we think about the fallibility of our adversarial system of criminal justice more broadly,<sup>283</sup> and the extent to which prosecutors, even those acting in good faith, may contribute to the conviction of the innocent. This shift helps explain why judges may feel that they must take a more active role in monitoring prosecutors’ compliance with their discovery obligations and in seeking reform of the rules governing criminal dis-

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279. See Jacqueline McMurtrie, *The Innocence Network: From Beginning to Branding*, in *CONTROVERSIES IN INNOCENCE CASES IN AMERICA* 21 (Sarah Lucy Cooper ed., 2014).

280. See Marvin Zalman, *An Integrated Justice Model of Wrongful Convictions*, 74 ALB. L. REV. 1465, 1468 (2011) (defining “innocence consciousness” as “the idea that innocent people are convicted in sufficiently large numbers as a result of systemic justice problems to require efforts to exonerate them, and to advance structural reforms to reduce such errors in the first place”).

281. See, e.g., BRANDON L. GARRETT, *CONVICING THE INNOCENT: WHERE CRIMINAL PROSECUTIONS GO WRONG* 150–53 (2011).

282. See *id.* at 167–70; Jon B. Gould, Julia Carrano, Richard A. Leo & Katie Hail-Jones, *Predicting Erroneous Convictions*, 99 IOWA L. REV. 471, 501–02 (2014).

283. The 2009 Report by the National Research Council, which found that numerous forensic sciences regularly used in criminal prosecutions were not scientifically valid, was an important landmark in this shift. NAT’L RES. COUNCIL, *STRENGTHENING FORENSIC SCIENCE IN THE UNITED STATES: A PATH FORWARD* (2009). The Report was followed by scandals in the crime laboratories of several states, and the FBI’s acknowledgment in April 2015 that its forensic examiners had given flawed hair-match testimony in hundreds of criminal cases from 1972 to 2000. See, e.g., Mark Hansen, *Crime Labs Under the Microscope After a String of Shoddy, Suspect, and Fraudulent Results*, A.B.A. JOURNAL (Sept. 1, 2013), [http://www.abajournal.com/magazine/article/crime\\_labs\\_under\\_the\\_microscope\\_after\\_a\\_string\\_of\\_shoddy\\_suspect\\_and\\_fraudu](http://www.abajournal.com/magazine/article/crime_labs_under_the_microscope_after_a_string_of_shoddy_suspect_and_fraudu) [<https://perma.cc/H77L-LVWD>]; Spencer S. Hsu, *After FBI Admits Overstating Forensic Hair Matches, Focus Turns to Cases*, WASH. POST (Apr. 20, 2015), [https://www.washingtonpost.com/local/crime/after-fbi-admits-overstating-forensic-hair-matches-focus-turns-to-cases/2015/04/20/a846aca8-e766-11e4-9a6a-c1ab95a0600b\\_story.html?utm\\_term=.4dba4af6af6b](https://www.washingtonpost.com/local/crime/after-fbi-admits-overstating-forensic-hair-matches-focus-turns-to-cases/2015/04/20/a846aca8-e766-11e4-9a6a-c1ab95a0600b_story.html?utm_term=.4dba4af6af6b) [<https://perma.cc/L3R5-YPTF>].

covery.<sup>284</sup> This is particularly so as courts increasingly have acknowledged that our criminal justice system, at the federal level as much as in the states, is overwhelmingly one of pleas, not trials.<sup>285</sup> Accordingly, the rights to trial by jury and to discovery before the conclusion of trial are insufficient to protect the innocent. Thus, the “new” activist judges can be viewed as channeling and reflecting these larger social currents and ways of thinking about criminal justice policy that surround them.<sup>286</sup>

The presence of a receptive audience in the Obama Administration also may have led some judges to decide that the time was right to speak up, at least during the Obama years of 2009–16. The Obama Justice Department implemented many initiatives that were consistent with the expressed concerns of the “new” judicial activists. For example, starting in 2010, under Attorney General Holder—in the wake of the *Stevens* trial fiasco of 2008 and 2009—the Department changed its policies to expand the scope of discovery regularly provided to the defense, improve training of prosecu-

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284. See, e.g., Green & Yaroshefsky, *supra* note 186, at 93–95 (citing impact of innocence revolution). In a number of different contexts, Judge Rakoff has revealed the impact of the innocence revolution on his thinking. See, e.g., Jed S. Rakoff, *Why Innocent People Plead Guilty*, N.Y. REV. OF BOOKS (Nov. 20, 2014) (citing studies documenting the number of innocent people who pled guilty); *United States v. Quinones*, 196 F. Supp. 2d 416 (S.D.N.Y. 2002) (holding federal death penalty unconstitutional in light of undue risk of executing an innocent person), *rev'd*, 313 F.3d 49 (2d Cir. 2002). Judge Rakoff was the only federal judge appointed to the federal forensic science commission established during the Obama Administration, discussed further at *infra* note 294 and accompanying text. See Press Release, Dep’t of Justice, Office of Pub. Affairs, U.S. Departments of Justice and Commerce Name Experts to First-ever National Commission on Forensic Science (Jan. 10, 2014), <https://www.justice.gov/opa/pr/us-departments-justice-and-commerce-name-experts-first-ever-national-commission-forensic-science> [https://perma.cc/6GXS-BEYF] (listing appointees).

285. See, e.g., *Lafler v. Cooper*, 566 U.S. 156, 170 (2012) (“[C]riminal justice today is for the most part a system of pleas, not a system of trials.”); *Missouri v. Frye*, 566 U.S. 133, 143 (2012) (same); see also Rakoff, *supra* note 284 (“[O]ur criminal justice system is almost exclusively a system of plea bargaining, negotiated behind close doors . . . [in which] [t]he outcome is very largely determined by the prosecutor alone.”).

286. See OLIVER WENDELL HOLMES, JR., *THE COMMON LAW* 1 (Dover Publications 1991) (1881) (“The felt necessities of the time, the prevalent moral and political theories . . . even the prejudices which judges share with their fellow-men, have had a good deal more to do than the syllogism in determining the rules by which men should be governed.”); J.W. PELTASON, *58 LONELY MEN: SOUTHERN FEDERAL JUDGES AND SCHOOL DESEGREGATION* 247 (Illini Books ed., Univ. of Illinois Press 1971) (“[J]ust as the laws enacted by the legislature reflect the dominance of certain values in the community, so do the decisions of judges. It is so today; it has always been so.”).

tors on their discovery obligations,<sup>287</sup> and require greater documentation of interrogations and meetings with witnesses.<sup>288</sup> Starting in 2010, Holder also started to shift department policy to more explicitly encourage prosecutors to exercise their discretion in charging, ultimately directing prosecutors in 2013 not to charge drug quantities requiring the harshest mandatory minimum sentences unless the defendant's conduct called for such severe sanctions,<sup>289</sup> and in 2014 prohibiting the use of Section 851 sentencing enhancements to induce guilty pleas.<sup>290</sup> Attorney General Holder committed the Department to a "Smart on Crime" approach, to reduce the severity of criminal sentencing<sup>291</sup> and expand

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287. See *Ensuring that Federal Prosecutors Meet Discovery Obligations: Hearing on S. 2197 Before the S. Comm. on the Judiciary*, 112th Cong. 1 (2012) (statement of James M. Cole, Deputy Att'y Gen.) [hereinafter Cole Statement] (describing so-called "Blue Book" issued to federal prosecutors and paralegals in 2011 which "comprehensively covers the law, policy, and practice of prosecutors' disclosure obligations"). The Blue Book supplemented previous guidance, including several memoranda issued in 2010 by then-Deputy Attorney General David Ogden, which reminded prosecutors that Department policy was to provide disclosure beyond that required by *Brady* and *Giglio*. See Memorandum from David W. Ogden, Deputy Att'y Gen., for Dep't Prosecutors, Guidance for Prosecutors Regarding Criminal Discovery (Jan. 4, 2010). The Department of Justice also appointed a high-level National Criminal Discovery Coordinator to lead and oversee all disclosure policies and practices for the Department, required each U.S. Attorney's Office to appoint a criminal discovery coordinator, and increased ongoing training requirements and programming on discovery for all federal prosecutors. See *supra* Cole Statement.

288. See, e.g., Memorandum from David W. Ogden, *supra* note 287 (recommending that, although not legally required, witness interviews should be memorialized by the interviewing agent); see also Memorandum from James M. Cole, Deputy Att'y Gen., Policy Concerning Electronic Recording of Statements (May 12, 2014) (requiring that federal officials electronically record interrogations of individuals in federal custody).

289. See Memorandum from Eric H. Holder, Jr., Att'y Gen., to the U.S. Att'ys and Assistant Att'ys Gen. for the Criminal Div., Department Policy on Charging Mandatory Minimum Sentences and Recidivist Enhancements in Certain Drug Cases (Aug. 12, 2013); Memorandum from Eric H. Holder, Jr., Att'y Gen., to All Fed. Prosecutors, Department Policy on Charging and Sentencing (May 19, 2010).

290. See Memorandum from Eric H. Holder, Jr., Att'y Gen., to Dep't of Justice Att'ys, Guidance Regarding § 851 Enhancements in Plea Negotiations (Sept. 24, 2014) (making clear that a defendant's decision to go to trial ordinarily is not an appropriate reason to file a prior felony information).

291. See, e.g., Eric H. Holder, Jr., Remarks at the Annual Meeting of the American Bar Association's House of Delegates (Aug. 12, 2013), <http://www.justice.gov/iso/opa/ag/speeches/2013/ag-speech-130812.html> [<https://perma.cc/RJ8H-2CKE>]; DEP'T OF JUSTICE, SMART ON CRIME: REFORMING THE CRIMINAL JUSTICE SYSTEM FOR THE 21ST CENTURY (Aug. 2013), <https://www.justice.gov/sites/default/files/ag/legacy/2013/08/12/smart-on-crime.pdf> [<https://perma.cc/STR6-WXFN>]. In a speech delivered at the United States District Court for the Eastern

opportunities for diversion and reentry,<sup>292</sup> causes embraced by his successor, Loretta Lynch.<sup>293</sup> In January 2013, the Obama Administration created a new National Commission on Forensic Science to prepare recommendations to the Attorney General on the use of forensic science.<sup>294</sup> In June 2013, the new Chair of the SEC, Mary Jo White (formerly the United States Attorney in the Southern District of New York) announced a new policy for the SEC, henceforth requiring that in certain cases of “egregious misconduct,” defendants would be required to admit wrongdoing to settle an SEC enforcement action.<sup>295</sup> In April 2014, the Department of Justice announced a clemency initiative to increase the number of federal prisoners receiving clemency.<sup>296</sup> And in September 2015, the Department of Justice adopted a new policy, outlined in the so-called “Yates memo” issued by then Deputy Attorney General Sally Yates, to encourage prosecutors to seek greater accountability for corporate wrongdoing from the individuals who perpetrated it.<sup>297</sup> In

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District of New York during a celebration of that courts’ diversionary programs, Attorney General Holder thanked Judge Gleeson for his leadership in establishing such programs, and jested of Judge Gleeson’s influence: “I’m afraid of this man. You see him in the newspapers, he sends me letters. He and I believe in the same things, but I’m afraid of him.” Presentation of Alternatives to Incarceration in the Eastern District of New York 38 (Oct. 20, 2014) (transcript on file with author).

292. See, e.g., Memorandum from Eric H. Holder, Jr., Att’y Gen., to Heads of Dep’t of Justice Components and U.S. Att’ys, Consideration of Collateral Consequences in Rulemaking (Aug. 12, 2013).

293. See *Hearing on the Fiscal Year 2017 Dep’t of Justice Budget Request Before the Subcomm. on Com., Just., Sci., and Related Agencies*, U.S. H.R., 1, 6 (Feb. 24, 2016) (statement of Loretta Lynch, Att’y Gen.); Loretta E. Lynch, Remarks at the National Association of Attorneys General Annual Winter Conference (Feb. 23, 2016), <https://www.justice.gov/opa/speech/attorney-general-loretta-e-lynch-delivers-remarks-national-association-attorneys-general> [<https://perma.cc/QF5B-97EX>].

294. See Spencer S. Hsu, *U.S. to Commit Scientists and New Commission to Fix Forensic Science*, WASH. POST (Feb. 15, 2013), [https://www.washingtonpost.com/local/crime/us-to-commit-scientists-and-new-commission-to-fix-forensic-science/2013/02/15/e11c31f8-77b3-11e2-8f84-3e4b513b1a13\\_story.html?utm\\_term=.9c83fcb3292a](https://www.washingtonpost.com/local/crime/us-to-commit-scientists-and-new-commission-to-fix-forensic-science/2013/02/15/e11c31f8-77b3-11e2-8f84-3e4b513b1a13_story.html?utm_term=.9c83fcb3292a) [<https://perma.cc/GW6S-UPL9>].

295. James B. Stewart, *S.E.C. Has a Message for Firms Not Used to Admitting Guilt*, N.Y. TIMES (June 21, 2013), <http://www.nytimes.com/2013/06/22/business/secs-new-chief-promises-tougher-line-on-cases.html> [<https://perma.cc/K8BK-BDYS>]; see also Mary Jo White, Chair, SEC, Speech at the Council of Institutional Investors Fall Conference: Deploying the Full Enforcement Arsenal (Sept. 26, 2013) (describing new policy).

296. See *Clemency Initiative*, U.S. DEP’T OF JUSTICE, <https://www.justice.gov/pardon/clemency-initiative> [<https://perma.cc/GB6R-FULE>].

297. Memorandum from Sally Quillian Yates, Deputy Att’y Gen., to all DOJ Att’ys, Individual Accountability for Corporate Wrongdoing (Sept. 9, 2015).

sum, during the Obama Administration, judges may have felt that there was a rare historical moment to be seized when change was possible—by legislation, executive action, or some combination thereof—and that their voices could help bring it to fruition.

Even if national change was not likely, judges may have thought that the Obama-appointed United States Attorneys in their districts—who enjoyed greater charging discretion under the Holder memoranda than prior generations—would heed their calls. Finally, the Obama years also coincided with many of the Clinton appointees’ reaching their second decade on the bench, by which point some judges’ views may have shifted or coalesced. Others may have decided that they had accumulated sufficient experience to speak with authority. Moreover, after passing the decade mark on the district court, some may have relinquished hope of promotion, taken senior status, or decided to leave the bench, thus liberating them to spark controversy.<sup>298</sup>

### 3. Shifting Judicial Roles and Norms

Third, the “new” district court activism may reflect an evolving model of the judicial role with roots that go back decades. That is, in a variety of contexts, district court judges today participate in policy-making processes, wield appellate power, and serve in quasi-legislative roles. For example, since the 1920s and 30s, district court judges have participated in law reform efforts through ALI projects,<sup>299</sup> including the Model Penal Code,<sup>300</sup> have been mem-

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298. See Stephen J. Choi, Mitu Gulati, & Eric A. Posner, *What Do Federal District Judges Want? An Analysis of Publications, Citations, and Reversals*, 28 J. LAW, ECON. & ORG. 518, 521–22 (2011) (suggesting that most district judges seek elevation to appellate courts); Nancy Gertner, *Opinions I Should Have Written*, 110 Nw. U. L. REV. 423, 432 (2016) (noting that if a judge wants to move up the judicial ladder, he or she “has every incentive” to avoid controversy); see also EISINGER, *supra* note 154 at 226–27 (describing Judge Rakoff’s “radicalization” upon realizing that, at age 65, he would never be appointed to the appellate court by the Obama Administration, which appeared to have an “age test for its judicial appointees”).

299. AM. LAW INST., PAST AND PRESENT ALI PROJECTS (2015), [https://www.ali.org/media/filer\\_public/f5/6a/f56af0aa-719e-4cd8-b293-baccecc1163b/past\\_present\\_aliprojects.pdf](https://www.ali.org/media/filer_public/f5/6a/f56af0aa-719e-4cd8-b293-baccecc1163b/past_present_aliprojects.pdf) [<https://perma.cc/9QRW-THCZ>]. ALI produced drafts of four Restatements of the Law in 1923: Agency, Conflict of Laws, Contracts, and Torts. *Id.*

300. MODEL PENAL CODE (AM. LAW INST., Proposed Official Draft 1962). The American Law Institute proposed preparation of a model penal code prior to 1931 and drafting began in the 1950s. See Memorandum for Advisory Comm. on Criminal Law, The Proposal to Prepare a Model Penal Code (June 1951).

bers of the Federal Rules Advisory Committees<sup>301</sup> and the Judicial Conference;<sup>302</sup> and have participated in the ABA Criminal Justice Standards Project.<sup>303</sup> As of at least 1948, federal district court judges have sat by designation on the United States Courts of Appeals.<sup>304</sup> District court judges also have been members of the U.S. Sentencing Commission since its creation in 1984.<sup>305</sup> Given all of these activities, perhaps it is not surprising that at least some district judges have come to view themselves as responsible for more than finding facts, presiding over the occasional trial, and applying law handed down by someone else.<sup>306</sup>

Federal district court judges also may be following the example set by federal appellate judges. This includes not only policy-mak-

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301. The Supreme Court established a federal rules advisory committee in June 1935. *Committee Membership Selection*, U.S. COURTS, <http://www.uscourts.gov/rules-policies/about-rulemaking-process/committee-membership-selection> [<https://perma.cc/5QBA-AQK7>]. A district judge served as a member of the advisory board in 1939. See *Meeting Minutes*, ADVISORY COMM. ON RULES OF CIVIL PROCEDURE (Dec. 7, 1939), [http://www.uscourts.gov/sites/default/files/fr\\_import/CV12-1939-min.pdf](http://www.uscourts.gov/sites/default/files/fr_import/CV12-1939-min.pdf) [<https://perma.cc/NY2S-8CHF>]. There are currently thirty-four district court Judges on the Federal Rules Advisory Committees. See U.S. COURTS, COMMITTEES ON RULES OF PRACTICE AND PROCEDURE CHAIRS AND REPORTERS (2016), <http://www.uscourts.gov/sites/default/files/committee-roster.pdf> [<https://perma.cc/5KU4-W84X>].

302. See 28 U.S.C. § 331 (1948). The Judicial Conference has numerous subject-area committees, including a Committee on Criminal Law and a Committee on Rules of Practice and Procedure. The Chief Justice appoints judges to the committees, which in turn are responsible for proposing policy positions on behalf of the Judicial Conference. See James E. Pfander, *The Chief Justice, The Appointment of Inferior Officers, and the “Court of Law” Requirement*, 107 NW. L. REV. 1125, 1133–34 (2013). These recommendations are presented to the Judicial Conference’s governing board, which must approve them before they become official policy. The governing board is composed of twenty-seven federal judges, including the Chief Judges of each of the judicial circuits and the Court of International Trade, and one district court judge from each of the Circuits. See 28 U.S.C. § 331 (2012). While the Chief Judges serve for the length of their terms as Chief, the district court representatives serve for terms not less than three but no more than five years. *Id.*

303. *Criminal Justice Standards*, AM. BAR ASS’N, [http://www.americanbar.org/groups/criminal\\_justice/standards.html](http://www.americanbar.org/groups/criminal_justice/standards.html) [<https://perma.cc/DF85-BMS2>] (noting that the initial volumes of the ABA Criminal Justice Standards were published in 1968).

304. 28 USC § 292(a), (d) (1948).

305. See Sentencing Reform Act of 1984, Pub. L. No. 98-473, 98 Stat. 1837 (1987). The Commission “was created by the Sentencing Reform Act provisions of the Comprehensive Crime Control Act of 1984.” U.S. SENTENCING COMM’N, ANN. REP. (2015), <http://www.ussc.gov/about/annual-report/archive/annual-report-2015> [<https://perma.cc/RDA5-KMZK>].

306. I thank Gabriel “Jack” Chin for this point.

ing efforts at the courthouse-level,<sup>307</sup> but also the length and scholarly aspirations of some of the “new” activist opinions, which reflect a shift in judicial writing styles that is traceable all the way to the Supreme Court.<sup>308</sup> The opinions’ personal tone and the frankness with which they criticize fellow institutional actors also are consistent with opinions by higher-ranked judges,<sup>309</sup> some of which are explicitly disdainful of Congress<sup>310</sup> or their fellow judges.<sup>311</sup> The ex-

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307. See, e.g., Laurie L. Levenson, *Discovery from the Trenches: The Future of Brady*, 60 UCLA L. REV. DISCOURSE 74, 85–86 (2013) (discussing retreat organized by the Ninth Circuit to repair the relationship between U.S. Attorneys and Federal Defenders); Kirk Semple, *Seeking Better Legal Help for Immigrants*, N.Y. TIMES (Jan. 28, 2014), <https://www.nytimes.com/2014/01/29/nyregion/service-program-will-recruit-law-school-graduates-to-help-represent-immigrants.html> [<https://perma.cc/V6DK-Z9AW>] (describing initiative spearheaded by Robert A. Katzmann, Chief Judge of the U.S. Court of Appeals for the Second Circuit, to provide representation for immigrants facing deportation).

308. See Posner, *supra* note 222 at 548 (“The increase in the quality and quantity of the Supreme Court’s staff (mainly law clerks) in recent decades, combined with the appointment to the Court mainly of former judges, and the steep reduction in the number of cases that the Court hears, has enabled the modern Court to produce opinions that have a glossier patina of legal scholarship than the opinions of their predecessors.”); Gerald Lebovits et al., *Ethical Judicial Opinion Writing*, 21 GEO. J. LEGAL ETHICS 237, 254 (2008) (“[B]etween 1960 and 1980, the average length of federal court of appeals opinions increased from 2863 to 4020 words; the average number of footnotes increased from 3.8 to 7; and the average number of citations rose from 12.4 to 24.7.”).

309. See, e.g., *Utah v. Strieff*, 136 S. Ct. 2056, 2065–71 (2016) (Sotomayor, J., dissenting) (speaking in an intensely personal tone about the indignity and severe consequences of the police stops authorized by the majority opinion). On the history of opinion writing practices at the Supreme Court, see Finkelman, *supra* note 221 at 606–07 (discussing early practices of the Supreme Court, which discouraged separate opinion writing); Hon. Ruth Bader Ginsburg, *The Role of Dissenting Opinions*, 95 MINN. L. REV. 1 (2010) (on the history and significance of opinion writing practices in the United States, as distinct from civil law countries).

310. See, e.g., *Yates v. United States*, 135 S. Ct. 1074, 1101 (2015) (Kagan, J., dissenting) (describing a statutory provision as “bad law” which “is unfortunately not an outlier, but an emblem of a deeper pathology in the federal criminal code”); see also *id.* (noting that judges who “disagree with Congress’s choice . . . are perfectly entitled to say so—in lectures, in law review articles, and even in dicta”).

311. See, e.g., RICHARD A. POSNER, *THE FEDERAL COURTS: CRISIS AND REFORM* 232–33 (1985) (noting the “increasingly common manifestation of excessive judicial self-assertion” in the “abuse—often shrill, sometimes nasty—of one’s colleagues . . . [which] figure ever more prominently not only in dissenting and concurring opinions but in majority opinions as well, now that it is the fashion for the author of the majority opinion, usually in footnotes, to attack the dissenting opinion (and sometimes even a concurring opinion)”); Stephen A. Newman, *Political Advocacy on the Supreme Court: The Damaging Rhetoric of Antonin Scalia*, 51 N.Y.L. SCH. L. REV. 907 (2007) (tracing the rhetorical excesses of Justice Scalia since his appointment to the Supreme Court in 1986); William G. Ross, *Civility Among*

trajudicial speeches and writings of the “new” activist judges also are consistent with the examples set by members of the Supreme Court and the Courts of Appeals, many of whom have embraced a publicly-facing version of their role,<sup>312</sup> even regarding controversial legal or political issues.<sup>313</sup> Since judges operate within a set of norms

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*Judges: Charting the Bounds of Proper Criticism by Judges of Other Judges*, 51 FLA. L. REV. 957, 958 (1999) (noting the “apparent increase in acerbity in written opinions, starting with those of members of the U.S. Supreme Court”).

312. See, e.g., Tony Mauro, *Judge Posner Slams ‘Stupid’ Decisions by Chief Justice Roberts, ‘Silly’ Stances By Scalia*, NAT’L L.J. (Nov. 30, 2016), <http://www.national-lawjournal.com/id=1202773466396/Judge-Posner-Slams-Stupid-Decisions-by-Chief-Justice-Roberts-Silly-Stances-by-Scalia> [https://perma.cc/T445-S56N] (discussing a video of Judge Posner criticizing certain Supreme Court decisions and how Chief Justice Roberts manages the federal judiciary); Alex Kozinski, Opinion, *Rejecting Voodoo Science in the Courtroom*, WALL ST. J. (Sept. 19, 2016), <http://www.wsj.com/articles/rejecting-voodoo-science-in-the-courtroom-1474328199> [https://perma.cc/TDU2-DWYJ] (recommending that the court system adopt standards to validate forensic evidence given that current methods are generally unreliable); Adam Liptak, *Ruth Bader Ginsburg, No Fan of Donald Trump, Critiques Latest Term*, N.Y. TIMES (July 10, 2016), <http://www.nytimes.com/2016/07/11/us/politics/ruth-bader-ginsburg-no-fan-of-donald-trump-critiques-latest-term.html> [https://perma.cc/P5BJ-PBLR] (quoting Justice Ginsburg criticizing then-presidential candidate Donald Trump, chastising the Senate’s failure to act on President Obama’s Supreme Court nominee, and commenting on specific Supreme Court cases); Hon. Richard A. Posner, *The Academy is Out of Its Depth*, SLATE (June 24, 2016), [http://www.slate.com/articles/news\\_and\\_politics/the\\_breakfast\\_table/features/2016/supreme\\_court\\_breakfast\\_table\\_for\\_june\\_2016/law\\_school\\_professors\\_need\\_more\\_practical\\_experience.html](http://www.slate.com/articles/news_and_politics/the_breakfast_table/features/2016/supreme_court_breakfast_table_for_june_2016/law_school_professors_need_more_practical_experience.html) [https://perma.cc/CU5F-8VU6] (criticizing law school hiring practices, the uniformity of the Supreme Court Justices, and the application of the Constitution to modern times); *Inside the Supreme Court* (C-SPAN television broadcast Feb. 3, 2016) (interviewing Chief Justice John Roberts regarding his view that the current Supreme Court nomination “process is not functioning well” due to the political divisiveness of the Senate); Richard A. Posner & Eric J. Segall, Opinion, *Justice Scalia’s Majoritarian Theocracy*, N.Y. TIMES (Dec. 2, 2015), [http://www.nytimes.com/2015/12/03/opinion/justice-scalias-majoritarian-theocracy.html?smid=tw-share&\\_r=5&mtref=undefined&gwh=B211950D6FDB644BDFC8647CB42961E5&gwt=pay&assetType=opinion](http://www.nytimes.com/2015/12/03/opinion/justice-scalias-majoritarian-theocracy.html?smid=tw-share&_r=5&mtref=undefined&gwh=B211950D6FDB644BDFC8647CB42961E5&gwt=pay&assetType=opinion) [https://perma.cc/54HF-WEU3] (criticizing former Supreme Court Justice Antonin Scalia’s views on gay rights); *60 Minutes: The Execution of Joseph Wood* (CBS News television broadcast Nov. 29, 2015) (interviewing Judge Alex Kozinski about his opposition to the use of lethal injection in administering the death penalty); Tony Mauro, *Q&A: Justice Breyer’s Interview With The NLJ*, NAT’L L.J. (Sept. 12, 2015), <http://www.nationallawjournal.com/id=1202736925982/QampA-Justice-Breyers-Interview-With-The-NLJ> [https://perma.cc/6FBX-FMAJ] (interviewing Justice Breyer about issues including capital punishment).

313. See, e.g., Andrew L. Kaufman, *Judicial Ethics: The Less-Often Asked Questions*, 64 WASH. L. REV. 851, 867 (1989) (expressing concern about “the increasing number of articles and speeches by judges, especially Supreme Court Justices . . . in which they discuss all sorts of issues that seem likely to come before them and discuss also the views and foibles of their colleagues”).



that are fluid and indeterminate, there is ample room for influence by other judges.<sup>314</sup>

#### 4. The New Media Environment

Fourth, the new media environment, and the extent to which it facilitates dissemination of information about the “new” district court activism, may be playing a role in fueling its rise. Although a judge’s closest peers still may wield the most influence—as the concentration of “new” activist decisions in the Eastern District of New York suggests—the increased availability of judges’ opinions,<sup>315</sup> statements, and writings may be making it easier for litigants to find examples they can cite when asking other judges to follow suit, or inspiring some judges to engage in similar activity *sua sponte*.<sup>316</sup> Judges who seek to influence public policy—even if only indirectly by cultivating public opinion—now have many more means to get their message out than in the more limited media environment of the past. They are not dependent upon established media organizations or on official government publications.<sup>317</sup> This increased ease of access to the public domain may be enough to persuade some judges to speak or publish where previously they might not.

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314. See Craig Green, *An Intellectual History of Judicial Activism*, 58 EMORY L.J. 1195, 1225 (2009) (“New judges do their job by applying their own views of judicial role, following whatever principles they find applicable, and mimicking whatever role models they find appropriate. Over time, judges’ ideas about judging morph to accommodate lived experience, and so the wheel turns.”).

315. See Charles Gardner Geyh, *The Criticism and Speech of Judges in the United States*, in JUDICIARIES IN COMPARATIVE PERSPECTIVE 257, 262 (H.P. Lee ed., 2011) (“[T]he Internet has enabled information about judicial decisions to be communicated quickly and unfiltered. Controversial decisions by remote courts that would never have come to national attention through traditional media can be communicated instantaneously to a worldwide audience.”).

316. Since some district court judges might find the activities of other district court judges most influential, it is particularly significant that such information is increasingly accessible. Writing in 1952, Judge Charles Wyzanski of the federal District Court in Massachusetts noted the limitations on judges’ ability to learn about the practices of judges in other districts. See Charles E. Wyzanski, Jr., *A Trial Judge’s Freedom and Responsibility*, 65 HARV. L. REV. 1281, 1282 (1952) (“[W]hat transpires in trial courts is not readily available. One man knows the practices only of his own and perhaps a few other courts.”). Nevertheless, he noted that trial court practices, if they “win approval and imitation by other similarly circumstanced courts,” over time take on the quality of law. *Id.* at 1303.

317. See Gertner, *supra* note 298, at 438 (noting that the Sentencing Commission “only posts the decisions of the appellate courts on its website”); Nancy Gertner, *Judicial Discretion in Federal Sentencing—Real of Imagined?* 28 FED. SENT. R. 165 (2016) (noting that the Sentencing Commission web site only publishes proposals for new Guidelines, not proposals for new programs like the “[i]mportant pre-trial diversion and reentry programs [that] are cropping up around the country”).

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In sum, there are a variety of plausible reasons for the “new” district court activism of the past decade, some of which will continue to be present in the years to come. As the new Administration begins to implement its own criminal justice policy initiatives, in some cases reversing favored initiatives of the Obama Administration,<sup>318</sup> there may be a temptation for judges to speak out further. This may be particularly so not only for those already identified herein as “new” activist judges who remain on the bench, but also for some of the Obama appointees who will soon be entering their second decade of service.<sup>319</sup> At the same time, the first few months of the Trump Administration suggest that federal judges will be called upon for the foreseeable future to adjudicate challenges to Executive branch policies<sup>320</sup> (as federal courts always are) and that their legitimacy will be attacked whenever they thwart the President’s wishes,<sup>321</sup> no matter how solid their legal reasoning. The new

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318. See, e.g., Memorandum from Jeffrey Sessions, Att’y Gen., to All Fed. Prosecutors, Department Charging and Sentencing Policy (May 10, 2017) (rescinding Obama-era policies and instructing prosecutors to “charge and pursue the most serious, readily provable offense,” which “[b]y definition,” includes “those that carry the most substantial guidelines sentence, including mandatory minimum sentences”); Allen Cone, *Justice Department to End Partnership With Forensic Science Panel*, UPI (Apr. 10, 2017), [http://www.upi.com/Top\\_News/US/2017/04/10/Justice-Department-to-end-partnership-with-forensic-science-panel/6451491836304/](http://www.upi.com/Top_News/US/2017/04/10/Justice-Department-to-end-partnership-with-forensic-science-panel/6451491836304/) [<https://perma.cc/8CHN-Y3BY>] (reporting that Attorney General Jeff Sessions announced that the Justice Department would not renew its partnership with the National Commission on Forensic Science).

319. President Obama appointed 270 judges to the United States District Courts. See *Judgeship Appointments by President*, U.S. COURTS, <http://www.uscourts.gov/sites/default/files/apptsbypres.pdf> [<https://perma.cc/TG4G-XJ7R>].

320. See, e.g., *Int’l Refugee Assistance Project v. Trump*, 857 F.3d 554, 591–92 (4th Cir. 2017), *vacated and remanded as moot*, No. 16-1436 (U.S. June 26, 2017) (upholding a nationwide injunction of President Trump’s Executive Order 13769, “Protecting the Nation From Foreign Terrorist Entry Into the United States,” in part because of ample evidence that the government’s actions were not “facially legitimate” based on statements suggesting a Muslim-ban); *Washington v. Trump*, 847 F.3d 1151, 1169 (9th Cir. 2017) (denying the government’s motion to stay the temporary restraining order on Executive Order 13769, as it would “substantially injure” plaintiffs if put into effect); *Cty. of Santa Clara v. Trump*, No. 17-CV-00485, 2017 WL 1459081, at \*23 (N.D. Cal. Apr. 25, 2017) (Orrick, J.) (enjoining enforcement of Executive Order 13768, “Enhancing Public Safety in the Interior of the United States,” which purports to prevent “sanctuary jurisdictions,” considering it “unconstitutionally coercive”).

321. See David Wright, *Trump Again Thunders Against Judiciary*, CNN (Apr. 27, 2017), <http://www.cnn.com/2017/04/26/politics/trump-tweets-ninth-circuit-sanctuary-cities-order/index.html> [<https://perma.cc/TSN6-HLEV>] (“President Donald Trump is again attacking the federal judiciary, this time denouncing a

President also will have the opportunity to appoint hundreds of new federal district court judges.<sup>322</sup> Cognizant of this new political environment, the next section analyzes the value and risks of the “new” district court activism.

#### IV. EVALUATING THE “NEW” DISTRICT COURT ACTIVISM

##### A. *The Value of the “New” District Court Activism*

The “new” district court activism is valuable in many respects. First, through their judicial opinions, extrajudicial speech, and quasi-legislative activity, these judges have been contributing to the marketplace of ideas and providing accountability to the other branches of government in the spirit of “entrepreneurial judges” from ages past and present.<sup>323</sup> These are roles that appellate judges have played for generations (often in dissenting or concurring opinions) and they have long been celebrated in our legal cul-

ruling that halted implementation of an executive order targeting ‘sanctuary’ cities.”); Kristine Phillips, *All the Times Trump Personally Attacked Judges—and Why His Tirades Are ‘Worse Than Wrong’*, WASH. POST (Apr. 26, 2017), [https://www.washingtonpost.com/news/the-fix/wp/2017/04/26/all-the-times-trump-personally-attacked-judges-and-why-his-tirades-are-worse-than-wrong/?utm\\_term=.3b983eeb3dd](https://www.washingtonpost.com/news/the-fix/wp/2017/04/26/all-the-times-trump-personally-attacked-judges-and-why-his-tirades-are-worse-than-wrong/?utm_term=.3b983eeb3dd) [https://perma.cc/K24A-HBUT] (listing the incidents where Trump has attacked judges); see, e.g., Donald J. Trump, @realDonaldTrump, TWITTER (Feb. 5, 2017, 12:39 PM), <https://twitter.com/realDonaldTrump/status/828342202174668800> [https://perma.cc/9D6G-HTGB] (“Just cannot believe a judge would put our country in such peril. If something happens blame him and court system. People pouring in. Bad!”); Donald J. Trump, @realDonaldTrump, TWITTER (Feb. 4, 2017, 5:12 AM), <https://twitter.com/realDonaldTrump/status/827867311054974976> [https://perma.cc/3JPJ-3C7G] (“The opinion of this *so-called judge*, which essentially takes law-enforcement away from our country, is ridiculous and will be overturned!”) (emphasis added).

322. This President may appoint as many as 130 district court judges over the next four years. See Shira A. Scheindlin, Opinion, *America’s Trial Court Judges: Our Front Line for Justice*, N.Y. TIMES (May 6, 2016), <https://www.nytimes.com/2016/05/07/opinion/americas-trial-court-judges-our-front-line-for-justice.html> [https://perma.cc/9C94-YG79]. As of October 12, 2017, there were 120 vacancies on the District Courts and twenty-one on the Courts of Appeals. See *Judicial Vacancies*, U.S. COURTS, <http://www.uscourts.gov/judges-judgeships/judicial-vacancies> [https://perma.cc/MY55-WQMX].

323. See WAYNE V. MCINTOSH & CYNTHIA L. CATES, JUDICIAL ENTREPRENEURSHIP: THE ROLE OF THE JUDGE IN MARKETPLACE OF IDEAS 5 (1997) (defining an entrepreneurial judge as “one who is alert to the opportunity for innovation, who is willing to invest the resources and assume the risks necessary to offer and develop a genuinely unique legal concept, and who must strategically employ the written word to undertake change”) (emphasis omitted).

ture.<sup>324</sup> When it comes to criminal justice issues, district court judges are, in many ways, better situated than any other type of federal judge to contribute new ideas and informed insights on how the system is working and could be improved. In a world in which the overwhelming majority of criminal cases are resolved by a guilty plea—thereby limiting any judicial involvement at all—the trial judge is still more likely than any other judge to glean meaningful information from each case and cumulatively to spot systemic issues, including those with a local twist. Because many criminal cases are never heard on appeal, trial judges are the only judges who will interact with the facts and the parties.<sup>325</sup> Even when a case is appealed, review is often limited and invariably will be based on a cold record that captures only a fraction of what transpired below. Because many trial judges are drawn from the legal community over which they preside, and frequently are alumni of the local prosecutor’s office, they are well situated to assess issues in context and speak with credibility. Thus, when a trial judge who has been on the bench many years describes a problem based on repeated encounters, the judge speaks with a special expertise that we should heed. The same is true when the judge identifies an innovation that could address the problem. Even when the judges are powerless to effect any change on their own, calling out the folly or errors of judgment of other institutional actors can shape future behavior.

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324. See, e.g., William J. Brennan, Jr., *In Defense of Dissents*, 37 HASTINGS L.J. 427, 435 (1986) (“Dissents contribute to the integrity of the process, not only by directing attention to perceived difficulties with the majority’s opinion, but, . . . also by contributing to the marketplace of competing ideas.”); Ruth Bader Ginsburg, *Remarks on Writing Separately*, 65 WASH. L. REV. 133, 133–34 (1990) (discussing that “[s]eparate opinions in intermediate appellate courts can serve an alert function,” for reviewing courts, charting “alternative grounds of decision” where appeal is of right or signaling “that the case is troubling and perhaps worthy of a place on its calendar” where review is discretionary); *id.* at 144 (separate opinions also can serve “as a call for rectification by non-judicial hands”) (internal citations omitted); *United States v. Ingram*, 721 F.3d 35, 43 n.9 (2d Cir. 2013) (Calabresi, J., concurring) (“[W]e judges have a right—a duty even—to express criticism of legislative judgments that require us to uphold results we think are wrong”); *United States v. Then*, 56 F.3d 464, 466 n.1 (2d Cir. 1995) (Calabresi, J., concurring) (“The tradition of courts engaging in dialogue with legislatures is too well-established in this and other courts to disregard.”).

325. For example, in the twelve-month period ending March 31, 2015, there were 10,654 criminal appeals filed in the federal courts of appeals, out of a total of 54,244 appeals filed (19.64%). During the same period, there were 80,081 criminal filings in the district courts, out of a total of 361,689 filings (22.14%). See *Federal Judicial Caseload Statistics 2015*, U.S. COURTS, <http://www.uscourts.gov/statistics-reports/federal-judicial-caseload-statistics-2015> [https://perma.cc/5XUB-YAAZ].

It is particularly important that Article III judges, who enjoy life tenure, engage with issues affecting politically disempowered groups like criminal defendants, because no other institutional actor is likely to do so.<sup>326</sup> As former Judge Nancy Gertner has written, this part of the judicial role—i.e., “[e]ducation of the public and officials”—is so important that arguably it should “move from an avocational aspect of the job to part of its central mission.”<sup>327</sup> The Code of Conduct for United States Judges, which expressly allows judges to engage in “extrajudicial activities,” and to “speak, write, lecture, and teach” on law-related subjects,<sup>328</sup> and otherwise “participate in other activities concerning the law, the legal system, and the administration of justice,”<sup>329</sup> acknowledges the special value that judges brings to law reform efforts, “including revising substantive and procedural law and improving criminal and juvenile justice.”<sup>330</sup> It was this Commentary that Judge Rakoff cited in his Harvard Law School speech when he suggested that judges “have a special duty to be heard” on mass incarceration.<sup>331</sup>

Second, the “new” judicial activism in fact has achieved meaningful reform in numerous tangible ways. For example, the local discovery rules and orders discussed above have changed the practices in scores of districts, providing criminal defendants with earlier and more meaningful discovery than they are entitled to under

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326. See, e.g., Rachel Barkow, *The Ascent of the Administrative State and the Demise of Mercy*, 121 HARV. L. REV. 1332, 1359 (2008) (noting “the powerful groups uniformly line up in favor of greater government power and harsher penalties” such that the “[t]he process that produces criminal laws is far less balanced” than for example the one producing administrative law); Stuntz, *supra* note 109, at 529–30 (noting the historical absence of private intermediaries to “monitor the [criminal] law’s content and mobilize interested voters” and the dominant influence on legislators of prosecutors and police). Defense lawyers, particularly public defenders or appointed attorneys who are constantly under threat of losing funding, are unable to play this role as effectively. See, e.g., David E. Patton, *The Structure of Federal Public Defense: A Call for Independence*, 102 CORNELL. L. REV. 335, 358–59 (2017) (describing dramatic cuts in staffing that public defender organizations were forced to make under the federal budget cuts known as “sequestration” in 2013).

327. Nancy Gertner, *To Speak or Not To Speak: Musings on Judicial Silence*, 32 HOFSTRA L. REV. 1147, 1160 (2004); see also Stephen Reinhart, *Judicial Speech and the Open Judiciary*, 28 LOY. L.A. L. REV. 805, 806–07 (1995) (suggesting that judges should be able to say “to the general public that which are willing to say to the legal elite”).

328. CODE OF CONDUCT FOR U.S. JUDGES Canon 4.

329. *Id.* Canon 4(A)(1).

330. *Id.* commentary to Canon 4. Thus, judges are “encouraged” to engage in such activities, “either independently or through a bar association, judicial conference, or other organization dedicated to the law.” *Id.*

331. See *supra* note 3.

federal law, a goal that many have long believed will increase the fairness and reliability of criminal trials.<sup>332</sup> This is immediately impactful in those districts. It also holds the potential to be impactful on a broader scale, especially if prosecutors in those districts with the more demanding rules grow comfortable that these rules do not adversely affect their ability to do their jobs effectively. Similarly, the local diversionary programs that judges have developed in their districts have benefited hundreds of individuals, giving them the opportunity to gain treatment rather than incarceration and restart their lives.<sup>333</sup> Like the discovery innovations, these programs have the potential for even wider impact if they are successful. In smaller ways, innovations by individual judges like Judge Gleeson’s *Holloway* decision,<sup>334</sup> and Judge Block’s *Nesbeth* opinion, have had a concrete effect. As noted *supra*, *Holloway* has spawned a wave of applications by similarly situated defendants across the country, some of which have been granted. Following *Nesbeth*, the Eastern District of New York Probation Office has included a collateral consequences analysis in all subsequent Pre-Sentence Reports.<sup>335</sup>

Other effects are harder to determine with precision, but the circumstantial evidence of them is compelling. For example, the timing of important policy changes by the Obama Department of Justice correlate strongly with some of the “new” judicial activists’ most overt criticisms—including the new policies on discovery, charging of crimes carrying mandatory minimum sentences, and filing of prior felony informations.<sup>336</sup> The same is true regarding changes of policy (at least as formally announced) at DOJ and the

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332. See *supra* Part II.B.3.

333. See generally *supra* Part II.A.3; see also *Table H-1. U.S. District Courts—Pretrial Services Cases Activated During the 12-Month Period Ending September 30, 2016*, U.S. COURTS, [http://www.uscourts.gov/sites/default/files/data\\_tables/jb\\_na\\_pre\\_0930.2016.pdf](http://www.uscourts.gov/sites/default/files/data_tables/jb_na_pre_0930.2016.pdf) [<https://perma.cc/YC2Y-UL8Z>] (listing 598 total pretrial diversion cases by circuit and district court during calendar year 2016); *Pretrial Services—Judicial Business 2016*, U.S. COURTS, <http://www.uscourts.gov/statistics-reports/pretrial-services-judicial-business-2016> [<https://perma.cc/LGE2-FDKH>] (providing a summary of pretrial services cases, including diversion cases, between 2012 and 2016).

334. See *supra* notes 140–43 and accompanying text.

335. See Telephone Interview with Eileen Kelly, *supra* note 104.

336. For example, Attorney General Holder restricted the charging of the harshest mandatory minimum sentences on August 12, 2013, less than one year after Judge Gleeson expressly called on him to do so in *United States v. Dossie* (filed March 30, 2012). Holder then clarified that a defendant’s decision to go to trial was not a valid reason to file a prior felony information in a memo dated September 24, 2014, less than one year after Judge Gleeson excoriated that practice in his Kupa decision, filed on October 9, 2013.

SEC regarding corporate and white-collar prosecutions. Even though the “new” activist judges were reversed in some of these cases (for example, when they refused to approve a DPA), no one likes to be embarrassed. The judges’ opinions and extrajudicial activity also may have emboldened some individual prosecutors and regulators to explore new and tougher enforcement strategies. During the past decade, both Congress and the U.S. Sentencing Commission also took steps to ameliorate some of the issues related to sentencing identified by the “new” judicial activists as problematic.<sup>337</sup> Of course, some of these changes could reflect correlation rather than causation.<sup>338</sup> As discussed above in Part III.B.2, broader cultural shifts have been at work, which may explain fully the actions by Congress or Executive branch actors, or alternatively why they were particularly receptive to the “new” judicial activists’ calls. But it is hard not to come away with the impression that the “new” judicial activists deserve some credit for moving the needle on these issues.

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337. See, e.g., Fair Sentencing Act of 2010, Pub. L. 111-220, 124 Stat. 2372 (reducing the sentencing disparity between crack cocaine and powder cocaine offenses by producing an 18-to-1, instead of 100-to-1, crack-to-powder ratio drug quantity ratio, and eliminating mandatory minimum sentences for the simple possession of crack cocaine); U.S. SENTENCING COMM’N., AMENDMENTS TO THE GUIDELINES MANUAL, <http://www.ussc.gov/guidelines/amendments> [<https://perma.cc/V2DX-AQJ4>] (amending the Sentencing Guidelines to broaden compassionate release requirements for prisoners, adjust monetary penalty tables for inflation, provide additional guidance as to whether a mitigating role adjustment should apply, and reduce the cumulative impact of a defendant’s prior sentences).

338. For example, although numerous commentators have pointed to a “Rakoff effect” to explain the SEC’s change in policy to require that wrongdoers admit misconduct more frequently, SEC Chair Mary Jo White disclaimed that Judge Rakoff’s decisions were responsible for the shift. She stated, “Judge Rakoff and other judges put this issue more in the public eye, but it wasn’t his comments that precipitated the change . . . I’ve lived with this issue for a long time [including as a prosecutor], and I decided it was something that we should review, and that could strengthen the SEC’s enforcement hand.” Stewart, *supra* note 295 (quoting SEC Chair Mary Jo White). *But see* Jason E. Siegel, *Admit It! Corporate Admissions of Wrongdoing in SEC Settlements: Evaluating Collateral Estoppel Effects*, 103 GEO. L.J. 433, 439 (2015) (noting “at least seven other federal judges questioned or refused to approve SEC settlements” following Judge Rakoff’s decision in *Bank of America*); Michael Corkery, *Will Goldman Plead to a Lesser Charge? Beware the ‘Rakoff Effect’*, WALL ST. J. BLOG (May 28, 2010, 2:46 PM), <https://blogs.wsj.com/deals/2010/05/28/will-goldman-plead-to-a-lesser-charge-beware-the-rakoff-effect> [<https://perma.cc/NAU5-7YAH>] (describing the possibility of the “Rakoff Effect” on Goldman Sachs Group’s settlement negotiations with the SEC).

Third, there is expressive value to the “new” district court activism.<sup>339</sup> By speaking out publicly, and in some instances with moral outrage, the judges signal the importance of the issues they have identified. The expressive value of their speech is high, however, precisely because, as discussed further *infra*, it is unusual and challenges conventional norms about the appropriate role of the judge.<sup>340</sup> A poignant, self-conscious example may be found in a 2004 opinion<sup>341</sup> by then-District Court Judge Paul Cassell, who served only five years on the bench, in which he discussed a statutorily mandated sentence of fifty-five years’ imprisonment for three stacked Section 924(c) gun charges. In a final section of his lengthy opinion, entitled “Recommendations to Other Branches of Government,” Judge Cassell wrote:

Having disposed of the legal arguments in this case, it seems appropriate to make some concluding, personal observations. I have been on the bench for nearly two-and-half years now. During that time, I have sentenced several hundred offenders under the Sentencing Guidelines and federal mandatory minimum statutes. By and large, the sentences I have been required to impose have been tough but fair. In a few cases, to be sure, I have felt that either the Guidelines or the mandatory minimums produced excessive punishment. But even in those cases, the sentences seemed to be within the realm of reason.

This case is different. It involves a first offender who will receive a life sentence for crimes far less serious than those committed by many other offenders—including violent offenders and even a murderer—who have been before me. For the reasons explained in my opinion, I am legally obligated to impose this sentence. But I feel ethically obligated to bring this injustice to the attention of those who are in a position to do something about it.<sup>342</sup>

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339. See, e.g., Dan M. Kahan, *Social Influence, Social Meaning, and Deterrence*, 83 VA. L. REV. 349, 362–64 (1997) (discussing the expressive value of various behaviors in different contexts, depending on the social meaning attached to that behavior).

340. See *infra* Part IV.B.

341. *United States v. Angelos*, 345 F. Supp. 2d 1227 (D. Utah 2004) (Cassell, J.). Judge Cassell’s opinion in *Angelos* precedes the post-*Booker* decade that is the focus of this Article, demonstrating that strains of the “new” judicial activism, especially regarding sentencing, were present earlier—and the difficulty of drawing lines when charting judicial trends.

342. *Id.* at 1261.



Such expressions of outrage or despair may be significant not only to the other institutional actors who register them, such as members of Congress and the Executive Branch, but also to the very specific audience involved in a case such as the prosecutors who charged it. They may be valuable to the defendant, injecting some humanity into a process that otherwise can be highly impersonal and bureaucratic.<sup>343</sup> The speech also may have expressive value for the individual judge who engages in it and thereby affirms his or her own continued moral agency.<sup>344</sup>

Fourth, there is something to be said for judges setting forth their views transparently. Since “[w]e are all legal realists now”<sup>345</sup> notwithstanding Chief Justice Roberts’ statement at his confirmation hearing, we understand that no judge is completely impartial in the sense of having no ideological or policy preferences. The question is not who is a perfectly impartial judge, but as Charles Geyh has suggested, who is “impartial enough.”<sup>346</sup> When a judge speaks or writes in a public forum, we can evaluate the remarks, their tone, and take appropriate remedial action if necessary, such as seeking disqualification in future cases or even disciplinary action. This may be preferable to a judge remaining silent<sup>347</sup> or em-

343. See generally STEPHANOS BIBAS, *THE MACHINERY OF CRIMINAL JUSTICE* (2012) (describing the increased mechanization of the criminal justice system); TOM R. TYLER & YUEN J. HUO, *TRUST IN THE LAW: ENCOURAGING PUBLIC COOPERATION WITH THE POLICE AND COURTS* 101–38 (2002) (“[P]eople generalize from their personal experiences with police officers and judges to form their broader views about the law and about their community.”); see also Simon & Sidner, *supra* note 51 (quoting an individual who was sentenced in federal court for a drug offense, who “took comfort” from the judge’s remarks at sentencing that the judge considered the mandatory sentence too harsh).

344. See Patricia M. Wald, *The Problem with the Courts: Black-Robed Bureaucracy, or Collegiality Under Challenge?*, 42 MD. L. REV. 766, 769 (1983); see also ANTHONY T. KRONMAN, *THE LOST LAWYER: FAILING IDEALS OF THE LEGAL PROFESSION* 12 (1993); Owen M. Fiss, *The Bureaucratization of the Judiciary*, 92 YALE L.J. 1442, 1443 (1983) (“[B]ureaucratization tends to corrode the individualistic processes that are the source of judicial legitimacy.”); Simon & Sidner, *supra* note 51 (quoting Judge Mark Bennett as stating he “couldn’t live with myself if I didn’t speak out . . . . The burden of having given so many unjust sentences is a very heavy thing for me to carry around”).

345. Joseph William Singer, *Legal Realism Now*, 76 CAL. L. REV. 465, 467 (1988).

346. Charles Gardner Geyh, *The Dimensions of Judicial Impartiality*, 65 FLA. L. REV. 493, 510 (2014).

347. See Reinhart, *supra* note 327, at 811 (stating that perpetuating “the illusion that a connection exists between judicial silence and neutral decision-making [ ] may compromise our integrity in the eyes of the people” who recognize that “judges possess values, ideals, and philosophies” and may be “suspicious of those who deny this fact”).

ploying less scrutable methods in the service of desired ends, such as a private lecture<sup>348</sup> or ex parte conversations with litigants or governmental actors.<sup>349</sup>

### B. *Reasons for Concern*

However, there are also reasons to take a hard look at the “new” judicial activism, at least in some of its forms, and for concern were it to become too widespread. First, the expressive value of judicial speech on politically charged issues depends precisely on its rarity. If it were to become the new norm, that value would dissipate. For a variety of reasons, it seems unlikely that such speech would become pervasive,<sup>350</sup> but it is worth noting that such a development would not necessarily be desirable.

Second, the norm that historically has kept this kind of speech rare is grounded in important judicial values. As former Judge Charles Fried has written, when a judge appears to take sides on contentious issues, the judge starts to look “more like a politician,”<sup>351</sup> an actor “with a project, an agenda,”<sup>352</sup> thus “tear[ing] the

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348. See, e.g., *In re Charges of Judicial Misconduct*, 769 F.3d 762 (D.C. Cir. 2014) (finding no ethics violation in a case brought against Fifth Circuit Court of Appeals Judge Edith Jones based on a speech she gave at a law school about death penalty litigation, where there was no transcript, recording, or prepared text, and one of the difficulties presented was compiling an accurate record of what she said).

349. See, e.g., Nathan Greenblatt, *How Mandatory Are Mandatory Minimums? How Judges Can Avoid Imposing Mandatory Minimum Sentences*, 36 AM. J. CRIM. L. 1, 28 (2008) (“[J]udges can ‘facilitate’ a plea bargain or other prosecutorial decision by commenting, nudging, persuading, threatening, retaliating, and obstructing.”); Abbe Smith, *Defense-Oriented Judges*, 32 HOFSTRA L. REV. 1483, 1483 (2004) (describing practice of “back-rooming cases”—i.e., “informally seek[ing] a favorable non-trial disposition with the judge in a chamber behind the courtroom” and the author’s discomfort with it); Neil A. Lewis, *A Judge, a Renomination and the Cross-Burning Case That Won’t End*, N.Y. TIMES (May 28, 2003), <http://www.nytimes.com/2003/05/28/us/a-judge-a-renomination-and-the-cross-burning-case-that-won-t-end.html> [<https://perma.cc/9D7A-7463>] (describing various actions taken by U.S. District Judge Charles W. Pickering, Sr., of Federal District Court in Louisiana, to persuade prosecutors to lower charges in a case, including an ex parte phone call to a high-ranking official at the Department of Justice).

350. As Judge Robert Katzmann observed (before he became a judge on the United States Court of Appeals for the Second Circuit), federal judges generally have been hesitant to opine on policy issues and legislation out of concern about the courts’ legitimacy and “the need to avoid prejudging issues that might come before them.” ROBERT A. KATZMANN, COURTS & CONGRESS 85 (1997); see also *supra* note 298 and accompanying text, discussing other career-related reasons for judges to avoid controversy.

351. Charles Fried, *A Meditation on the First Principles of Judicial Ethics*, 32 HOFSTRA L. REV. 1227, 1241 (2004).

robe of decorum which clothes [judges] in the aura of impartiality and open-mindedness that . . . makes their role distinct and justifies the extraordinary power they enjoy.”<sup>353</sup>

Impartiality is the core value of the judge.<sup>354</sup> It encompasses not only the absence of any personal interest in a case or bias toward or against any party in a dispute, but also the absence of a political or ideological commitment that could color the judge’s decision in future cases or be perceived as doing so.<sup>355</sup> The Code of Conduct for United States Judges incorporates this comprehensive view of impartiality, repeatedly emphasizing the need to maintain both the reality and the appearance of impartiality along all axes.<sup>356</sup> Whether a judge employs dicta or extrajudicial speech to express views on a policy subject, there are risks for the judge’s actual and perceived impartiality. However, the Canons omit how judges are to balance the call to participate in law reform efforts<sup>357</sup> with

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352. *Id.*

353. *Id.*

354. See Geyh, *supra* note 346, at 512 (“For over two thousand years, being a good judge has meant being an impartial judge.”); Judith Resnik, *Managerial Judges*, 96 HARV. L. REV. 374, 445 (1982) (“[T]he virtues of disinterest and disengagement . . . form the bases of the judiciary’s authority.”).

355. See Geyh, *supra* note 346, at 499–509 (describing these different types of bias).

356. For example, Canon 1 provides that “An independent and honorable judiciary is indispensable to justice in our society. A judge should maintain and enforce high standards of conduct and should personally observe those standards, so that the integrity and independence of the judiciary may be preserved.” CODE OF CONDUCT FOR U.S. JUDGES Canon 1. Canon 2 provides that a judge should “act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary,” “should not allow family, social, political, financial, or other relationships to influence judicial conduct or judgment” and should not “hold membership in any organization that practices invidious discrimination on the basis of race, sex, religion, or national origin.” *Id.* Canon 2. Canon 3 provides that a “judge should not make public comment on the merits of a matter pending or impending in any court,” and “shall disqualify himself or herself in a proceeding in which the judge’s impartiality might reasonably be questioned,” such as when “the judge has a personal bias or prejudice concerning a party” or “has expressed an opinion concerning the merits of the particular case in controversy.” *Id.* Canon 3. Canon 4 provides that extrajudicial activity is permissible so long as it does not “detract from the dignity of the judge’s office,” “reflect adversely on the judge’s impartiality” or “lead to frequent disqualification” because of the appearance of bias. *Id.* Canon 4. Canon 5 generally prohibits judges from engaging in any political activity related to holders of or candidates for political office, political parties, or organizations “whose principal purpose is to advocate for or against political candidates or parties in connection with elections for public office.” *Id.* Canon 5.

357. See *supra* notes 328–30 and accompanying text.

the need to maintain their impartiality. This is a difficult line to walk.<sup>358</sup>

Maintaining the perception of impartiality is a concern for all judges, but it is arguably most important for district court judges. District court judges may be the lowest-ranked judges in the Article III federal judiciary, but they wield far more unchecked power as individuals than any other kind of judge. Judges on the Courts of Appeals, who generally sit in panels of three, must persuade at least one of their colleagues before they may exercise power.<sup>359</sup> Justices of the Supreme Court need a majority. District court judges need not persuade anyone else. They render far more decisions, in many more cases, than any other category of judge. And unlike the Court of Appeals or the Supreme Court, only a fraction of the decisions made by a District Court judge are reduced to writing.<sup>360</sup>

Moreover, although the decisions of a district court judge are, in theory, subject to appellate review, more so than the decisions of the Courts of Appeals, many decisions rendered by a district court judge or other actions taken<sup>361</sup> in fact are unreviewable. Many occur in the context of an ongoing trial or proceeding and are not subject to review until the proceeding has concluded. Even then, many will not be reviewed because no appeal is or may be filed (because, for example, of a waiver of appellate rights or Double Jeopardy).<sup>362</sup> Even when an appeal is filed, doctrines such as harm-

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358. See KATZMANN, *supra* note 350, at 88 (noting the ambiguity in the Canons and their commentary that leaves much unclear, including “whether a judge should participate in activities having to do with substantial legal changes not directly related to the administrative and procedural aspects of a running a court system”).

359. See Raymond Lohier, *The Court of Appeals as the Middle Child*, 85 *FORDHAM L. REV.* 945, 945 (2016) (describing judges of the Courts of Appeals as “each not much more than one-third of a judge”); Patricia M. Wald, *The Rhetoric of Results and the Results of Rhetoric: Judicial Writings*, 62 *U. CHI. L. REV.* 1371, 1377–78 (1995) (describing the requirement of obtaining the votes of one’s colleagues for one’s reasoning as well as particular result as a constraint on rhetoric in appellate opinions).

360. As Judge Learned Hand once described the ephemeral nature of much of the trial judge’s work, it “takes place in the courtroom and either slips away into anonymity, or remains only in the transient recollection of those who may be present.” *THE RECORD OF THE ASS’N OF THE BAR OF THE CITY OF NEW YORK* 182, 183 (1952).

361. See, e.g., Michael Pinard, *Limitations on Judicial Activism in Criminal Trials*, 33 *CONN. L. REV.* 243, 254–66 (2000) (trial judges’ commentary on evidence, questioning of witnesses, and non-verbal behavior can influence the outcome of a trial by, inter alia, conveying to the jury the judge’s view of the case).

362. See, e.g., Nancy J. King & Michael E. O’Neill, *Appeal Waivers and the Future of Sentencing Policy*, 55 *DUKE L.J.* 209, 212 (2005) (noting that, in the authors’ ran-

less error and deference to district court findings of fact and credibility determinations often preclude meaningful review.<sup>363</sup> Thus, the threat of appellate reversal is in many instances a relatively weak constraint on district court judges. This is particularly so with respect to some rulings against the government in criminal prosecutions because of Double Jeopardy. The repeat participants in the criminal justice system know all of this and nevertheless must trust district court judges to discharge their duties faithfully and impartially. A loss of trust at the local level could lead to judge shopping, disqualification motions, and hostility to reforms promoted by the bench.

If that trust erodes, the courts' legitimacy also may be called into doubt more broadly, leading individual judges, and their decisions, to come under attacks from the political branches.<sup>364</sup> As Andrew Kaufman has observed, this dynamic has a one-way ratchet effect—once judges start acting more like politicians, they will be viewed and treated as such by others.<sup>365</sup> Indeed, this very concern prompted Chief Justice Rehnquist to write to a senior district court judge in 1993 that he did not mind that the judge had decided, upon taking senior status, not to accept future drug cases on ideological grounds, only the publicity surrounding his decision to do so.<sup>366</sup>

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dom sample of federal cases resolved by plea agreement and sentenced in fiscal year 2003, nearly two-thirds of those agreements included defendants' waiver of right to appeal).

363. See, e.g., FRANK, *supra* note 12, at 168 (an unprincipled district court judge could “without fear of challenge, ‘fudge’ the facts he finds”); Greenblatt, *supra* note 349, at 9–30 (describing the myriad options available to a district court judge to avoid the application of mandatory minimum sentences, many effectively unreviewable).

364. See Geyh, *supra* note 346, at 544–51 (observing that, when courts' impartiality is perceived as being inadequately addressed in the ethical and procedural dimensions, regulation in the political dimension increases).

365. See Kaufman, *supra* note 313, at 867 (noting the “relation between the willingness of judges to enter into the public fray and the increasing tendency of some academics and some media figures to equate judges with legislators”); see also Stephen B. Burbank, *Judicial Independence, Judicial Accountability, and Interbranch Relations*, 95 GEO. L.J. 909, 913 (2007) (“[I]f judges are policy agents, they should be ‘accountable’ for their decisions in individual cases (or at least those involving issues of high salience).”); Dr. Roger E. Hartley, “It’s Called Lunch”: *Judicial Ethics and the Political and Legal Space for the Judiciary to “Lobby”*, 56 ARIZ. L. REV. 383, 394 (2014) (“[When judges] are viewed as taking sides on controversial issues . . . this might do larger harm to the impression that elected leaders and the public have of the branch”).

366. See Weinstein, *Limits of Judges’ Learning, Speaking, and Acting*, *supra* note 10, at 11–12 & n.55 (quoting Letter from William H. Rehnquist, Chief Justice of

Moreover, if trial judges come to be viewed as political actors, then there is little to stop a President from making appointments based on political views. Historically, this is a fate that has largely been avoided at the district court level, relative to appointments to the Courts of Appeals and the Supreme Court.<sup>367</sup> It would be a shame if it were to be otherwise. Given the recent change in administration and the number of lower court vacancies to be filled, it also could be counterproductive to the aims of many of the “new” district court activists.<sup>368</sup>

Third, district court judges’ use of dicta as a vehicle for accomplishing policy ends provides special cause for concern. The Code of Conduct for U.S. Judges does not address opinion writing, a failure that several commentators have noted.<sup>369</sup> Of course, district court judges do not have the option of writing a concurring or dissenting opinion. But there is a tension between dicta and Article III’s limitation of federal courts’ jurisdiction to “cases or controversies.”<sup>370</sup> This is not a mere technicality: the case or controversy requirement reflects in part courts’ core competency of adjudicating disputes rather than formulating policy.<sup>371</sup> Flouting Article III’s requirements thus potentially signals a disregard for the judge’s most

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the United States Supreme Court, to Whitman Knapp, District Court Judge for the Southern District of New York (May 25, 1993), explaining his remarks at a federal judges meeting, and referring specifically to the decisions made by Judges Knapp and Weinstein and their attendant publicity).

367. See Geyh, *supra* note 346, at 545 (“To date, district judges have largely avoided the highly politicized confirmation showdowns that have plagued Supreme Court and circuit court nominees.”).

368. See *supra* note 322 (discussing number of district court vacancies).

369. See, e.g., Alex Kozinski, *The Real Issues of Judicial Ethics*, 32 HOFSTRA L. REV. 1095, 1097–103 (2004); see also Gertner, *supra* note 298, at 430–32 (describing the ethical dilemmas associated with opinion writing).

370. See Pierre N. Leval, *Judging Under the Constitution: Dicta About Dicta*, 81 N.Y.U. L. REV. 1249, 1259–60 (2006) (discussing interaction between dicta and Article III’s grant of authority to federal courts to decide “Cases” and “Controversies”).

371. See Jonathan T. Molot, *An Old Judicial Role for a New Litigation Era*, 113 YALE L.J. 27, 32 (2003) (“[T]he judiciary’s traditional adjudicative role reflects its core institutional competence. Judges are ideally suited to resolve party-framed disputes, rather than to frame disputes themselves, because they lack the institutional capacity that other government officials have to initiate and conduct factual investigations.”); see also *Doe v. United States*, 833 F.3d 192, 200–01 (2d Cir. 2016) (Livingston, J., concurring) (suggesting that the Court of Appeals, having concluded that the court below lacked jurisdiction to consider the merits of petitioner’s application for expungement, should not “suggest to Congress how it might go about assessing and weighing” the various relevant considerations).

essential institutional role.<sup>372</sup> There are also prudential reasons to avoid dicta, including that it can render judicial opinions unnecessarily long and potentially obfuscate the law.<sup>373</sup> Thus, lengthy treatments of a policy subject, when they are not necessary to the court's holding, may be better put in a book (like Marvin Frankel's slim but inordinately influential *Law Without Order*), law review article, or speech, rather than a judicial opinion, even if the latter may be more likely to get attention or be considered "citable" by lawyers.

Fourth, when district courts engage in local rulemaking, issue standing orders, or create diversionary programs, they must be careful not to overstep their delegated authority under the Rules Enabling Act<sup>374</sup> or their supervisory power.<sup>375</sup> Such excesses not only risk legal challenges by prosecutors, but, like judicial opinions or extrajudicial speech, such quasi-legislative activities could undermine trust in the judges' impartiality and role fidelity. Thus judges operating in all these spheres must be very attuned to the nuances of their language, tone, and context.<sup>376</sup> Ideally, rule changes, prophylactic orders, and new programs would be initiated only after cultivating the genuine buy-in of all local actors, based on a persuasive record of their necessity and responsiveness to local facts and conditions.<sup>377</sup>

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372. For example, Canon 2 of the Code of Conduct for U.S. Judges provides that "[a] judge should respect and comply with the law and should act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary." CODE OF CONDUCT FOR U.S. JUDGES Canon 2.

373. See, e.g., Lebovits et al., *supra* note 308, at 255–56 (suggesting that the liberal inclusion of dicta in judicial opinions is unethical because it makes the opinions longer and harder to decipher, with "the potential to obscure holdings" and invite "incorrect predictions").

374. 28 U.S.C. §§ 2071–77 (2012). Through Section 2017 of that Act and Rule 57 of the Federal Rules of Criminal Procedure, Congress has authorized the district courts to "fine tune" and fill in gaps in the Rules of Criminal Procedure. See McConkie, *supra* note 183, at 55 n.275. Rule 57 provides that a local rule "must be consistent with—but not duplicative of—federal statutes and rules adopted under" the Rules Enabling Act. FED. R. CRIM. P. 57(a)(1).

375. See, e.g., Sara Sun Beale, *Reconsidering Supervisory Power in Criminal Cases: Constitutional and Statutory Limits on the Authority of the Federal Courts*, 84 COLUM. L. REV. 1433, 1455–56 (1984); John Gleeson, *Supervising Criminal Investigations: The Proper Scope of the Supervisory Power of Federal Judges*, 5 J.L. & POL'Y 423, 462–65 (1997).

376. Cf. KATZMANN, *supra* note 350, at 89 ("The canons do not consider how such variables as substance and form, conjoining in a multiplicity of ways, affect the propriety of communication.").

377. Cf. *United States v. Morrison*, 529 U.S. 598, 625–26 (2000) (describing test developed by U.S. Supreme Court to assess prophylactic legislation under Section 5 of the Fourteenth Amendment as requiring a "congruence and proportion-

### C. Possible New Mechanisms of Judicial Input

Because these concerns identified above are real—and may be both constraining and skewing the public debate, leading only the most intrepid and passionate judges who are unhappy with the status quo to engage—this section explores some other possible mechanisms to elicit feedback from trial court judges.

#### 1. A Greater Institutionalized Role in Clemency

One possible way for district court judges to make their views known on sentencing policy would be to create a greater institutionalized role for district court judges in the clemency process. At one time, district court judges in the United States apparently spoke up somewhat regularly in support of clemency petitions from defendants they had sentenced to mandatory penalties, when they thought them too harsh.<sup>378</sup> In the modern era, input from district court judges appears to be somewhat haphazard.<sup>379</sup> Some judges on their own initiative have sent copies of their sentencing opinions to the Pardon Attorney at the Department of Justice, when they despaired that they had no discretion to impose a lower sentence.<sup>380</sup> The more routine course, which is set forth in the non-binding United States Attorneys’ Manual, is for the United States Attorney’s Office that handled a case to ask the sentencing judge her views on a petition once it has been filed.<sup>381</sup> If the United States Attorney’s Office does not wish to seek the judge’s views, the Pardon Attorney may do so. In any event, such consultation is discretionary and depends upon a clemency petition having been filed (no small feat for those serving long sentences who generally lack

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ality between the injury to be prevented or remedied and the means adopted to that end”) (internal citations omitted).

378. See Margaret Colgate Love, *Justice Department Administration of the President’s Pardon Power: A Case Study in Institutional Conflicts of Interest*, 47 U. TOL. L. REV. 89, 93 (2015); George Lardner, Jr., & Margaret Colgate Love, *Mandatory Sentences and Presidential Mercy: The Role of Judges in Pardon Cases, 1790–1850*, 16 FED. SENT’G REP. 212 (2004).

379. See, e.g., David S. Doty, *Clemency: A View from the Bench of Two Commutations—Vignali and Willis*, 13 FED. SENT’G REP. 161, 162 (2001) (discussing case where the judge “was not asked by anyone to respond” to a petition for clemency).

380. See, e.g., *United States v. Angelos*, 345 F. Supp. 2d 1227, 1263 (D. Utah 2004) (Cassell, J.) (directing Clerk’s office to forward a copy of the opinion with its commutation recommendation to the Office of the Pardon Attorney). See also *supra* note 342 and accompanying text.

381. See U.S. ATT’YS MANUAL § 1-2.111 (U.S. DEP’T OF JUSTICE); Samuel T. Morison, *The Politics of Grace: On the Moral Justification of Executive Clemency*, 9 BUFF. CRIM. L. REV. 1, 39 (2005) (discussing the pardon process).



counsel) and on the Executive Branch seeking the judge's input. If the sentencing judge has since died, there is no judicial input.

Although the sentencing judge's recommendation will never be more than advisory to the President,<sup>382</sup> there is no reason why judges could not play a more regular role in clemency. For example, at the time of sentencing, a judge could be asked to record her initial views on whether the case is a reasonable candidate for clemency and why. Those views could be recorded in the original court documents generated with the judgment so that they would be preserved. There also could be a second-stage part of the process, whereby the sentencing judge could be asked after a set interval of time to reevaluate the sentence in light of the judge's subsequent sentencing experience.<sup>383</sup> These records would be helpful both in circumstances when the judge has died before a petition has been filed (not necessarily so uncommon, given the length of sentences often meted out), and when a living judge, by the time a petition is filed, no longer has a distinct memory of the case. It also would prove a valuable resource that researchers with the Sentencing Commission and the Judicial Branch—for example, the Federal Judicial Center—could use to track judges' views about sentencing with granularity in cases where (precisely because the judge has no discretion) the judge's initial views generally will not be reflected in the judgment.

District court judges also potentially could play a role in referring defendants to counsel for assistance in preparing clemency petitions. In the wake of the Obama Administration's effort to reinvigorate the clemency process,<sup>384</sup> several bar associations and other organizations created mechanisms for screening and taking on clients for the prosecution of clemency petitions and recruited attorneys to handle them.<sup>385</sup> Those groups are disbanding with the

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382. Article II, section 2 of the Constitution gives the power exclusively to the President to "grant Reprieves and Pardons for Offenses against the United States, except in Cases of Impeachment." U.S. CONST. art. II, § 2, cl.1.

383. This would be separate from other proposals to provide an opportunity for "second look" sentencing—i.e., by authorizing the judge to adjust the sentence after a set period of time. *See, e.g.*, Meghan J. Ryan, *Taking Another Look at Second-Look Sentencing*, 81 BROOK. L. REV. 149 (2015) (discussing the MPC proposal to provide sentencing judges the authority to adjust a sentence fifteen years after it was imposed). Unlike true second look sentencing, the proposal I describe would not require legislative action.

384. *See supra* notes 296 and accompanying text.

385. *See Clemency Project 2014*, NAT'L ASS'N OF CRIM. DEF. LAWS., <https://www.nacdl.org/cp2014> [<https://perma.cc/2HG4-N3ZW>] (listing participating organizations, including the American Bar Association, the American Civil Liberties

end of the Obama Administration and its clemency initiative. But if bar associations were to reinstate those programs, judges could connect defendants, even at sentencing, with the resources necessary to pursue the only option that remains, even if it is a long shot. This could be valuable in cases where there is no reason to think that appellate or collateral review will yield any change in the defendant's sentence, because, for example, the mandatory sentence is the result of a guilty plea. Neither of these initiatives would require judges to speak or write publicly about their general views on sentencing.

## 2. Annual Open-Ended Surveys of District Court Judges and Exit Interviews

Judges also could be asked, on an annual basis, what criminal justice policy issues in their view need attention. The Federal Judicial Center, which already conducts research for the federal judiciary, could undertake this project and analyze the results, or it could be conducted by a separate entity. For example, this would provide a forum for a judge to express support for an update to the criminal discovery rules, or for greater use of diversionary programs, or some other new issue that the Judicial Conference—including through its subject-area committees<sup>386</sup>—has not yet addressed. Presently, the Sentencing Commission regularly polls judges, and judges are invited to testify and submit remarks to the Commission. However, such communications are limited to sentencing issues. The Judicial Council conducts surveys of judges on other discrete issues, but they are not regular. Nor are they generally open-ended.

Taking the pulse of federal trial judges in this way might be exactly what is required to “unlock”<sup>387</sup> the jaws of judges concerned about the future of the criminal justice system but who have been hesitant to speak in other fora, a dynamic that may be masking the depth or range of judicial views on various subjects. An internal, official request is consistent with the distinction that judicial ethics rules make in a variety of other contexts between responding to a request for information and volunteering to provide it.<sup>388</sup> The re-

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Union, Families Against Mandatory Minimums, the Federal Public and Community Defenders, and the National Association of Criminal Defense Lawyers).

386. See *supra* note 302.

387. See Leslie B. Dubeck, *Understanding “Judicial Lockjaw”: The Debate Over Extrajudicial Activity*, 82 N.Y.U. L. REV. 569, 570 (2007) (quoting Felix Frankfurter, *Personal Ambitions of Judges: Should a Judge “Think Beyond the Judicial”?*, 34 A.B.A. J. 656, 658 (1948)).

388. See, e.g., CODE OF CONDUCT FOR U.S. JUDGES Canon 2B Commentary (Judges may respond to requests for information from another sentencing judge,

sults of the surveys could be put to a variety of uses, including setting the agenda for the Judicial Conference, whose leadership and committees might not be aware of the concerns thereby revealed, or the level of support on an issue. It also could be used in preparing reports for internal and external consumption.

Finally, in addition to annual surveys, the Federal Judicial Center could conduct more detailed “exit interviews” with judges who have announced their intention to retire or resign from the bench. Such interviews could take full advantage of the opportunity to cover a wide range of subjects with experienced trial judges, preserving their remarks for future research and analysis.

### 3. A Judicial Clearinghouse and Dissent Channel

A third possibility would be to create a clearinghouse channel within the Judicial Branch that could provide an authorized forum for judges to write white papers, conduct educational panels for other judges, communicate with the other branches of government,<sup>389</sup> or express dissent. Currently, the Judicial Conference sets the policy agenda and operates as a gatekeeper to official communications on behalf of the Judiciary.<sup>390</sup> Its structure has resulted in those communications being relatively infrequent and limited in scope. Statements by individual judges who disagree with policy positions adopted by the Judicial Conference generally are discouraged.<sup>391</sup> The creation of an official channel for additional

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or a probation or corrections officer but should not “initiate communications.” Judges also may respond to requests by screening committees for information considering potential judicial nominees); *cf.* *Williams-Yulee v. Florida Bar*, 135 S. Ct. 1656 (2015) (upholding distinction drawn by Florida bar rules that allowed candidates for elected judicial office to send “thank you” notes for campaign donations, but not to solicit them).

389. Other commentators have called for similar facilitator entities within the Judicial Branch. *See, e.g.,* KATZMANN, *supra* note 350, at 100–06 (suggesting a variety of means to foster inter-branch dialogue on a wide range of issues in which courts and Congress are interested); Lynn Adelman & Jon Deitrich, *Marvin Frankel’s Mistakes and the Need to Rethink Federal Sentencing*, 13 BERKELEY J. CRIM. L. 239, 259 (2008) (calling for the creation of a “facilitator of communication” among judges about sentencing).

390. *See* KATZMANN, *supra* note 350, at 100.

391. *See* Judith Resnik, *The Programmatic Judiciary: Lobbying, Judging, and Invalidating the Violence Against Women Act*, 74 S. CAL. L. REV. 269, 286 (2000) (“[T]he federal judiciary has developed an etiquette of quieting dissent. Official policy is stated, conveyed to Congress or others through designated speakers, and those who disagree are told that it is inappropriate to do so publicly. Thus, through structuring modes of generating policy, members of the Article III judiciary have crafted mechanisms that damp down dissent and limit occasions for reconsideration.”).

communication, albeit not on behalf of the entire judiciary, might prove welcome for those judges who wish to engage with one another, with members of Congress and their staff, and with the Executive Branch more regularly on policy issues.

Any judge who wishes to effect real change might well decide as a matter of strategy to seek approval from the Judicial Conference before formally communicating a position to Congress, as the imprimatur of the Judicial Conference “has special force.”<sup>392</sup> But providing more opportunities for informal communication, especially among Article III judges, could be very valuable. Judges could share concerns, ideas, and local innovations. Such a side-channel would also help ensure that future judges view policy issues in a wider frame than that provided by official Judicial Conference policy.<sup>393</sup> This clearinghouse could include an internal RSS feed for district court judges, regularly scheduled meetings (even by audiovisual conference) between judges and House or Senate Judiciary Committee staffers, and any number of other fora that might have seemed far-fetched years ago but that new technologies make both possible and relatively inexpensive. Another feature of this clearinghouse function could be an authorized dissent channel like the one created by the State Department during the Vietnam War for its employees to express constructive dissent.<sup>394</sup> Like the State Department’s channel, this could be a vehicle for district court judges to ensure that their policy disagreements are considered at the highest levels of the Judiciary.

## V. CONCLUSION

In the decade since *Booker*, there has been a notable burst of federal district court engagement in the project of criminal justice reform. A cohort of well-respected and experienced district court

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392. KATZMANN, *supra* note 350, at 102.

393. See Resnik, *The Programmatic Judiciary*, *supra* note 391, at 289 (the commitments by the Judicial Conference “become a vehicle for education and acculturation within the judiciary itself. . . . As new judges are appointed and become a part of the judiciary, its institutional platform becomes a constitutive element of what they understand the federal judiciary to be about.”).

394. See 2 FAM 071 (A dissent channel adopted to facilitate “open, creative, and uncensored dialogue on substantive foreign policy issues within the professional foreign affairs community”); Nahal Toosi, *White House Slap at Dissenting Diplomats Sparks Fear of Reprisal*, POLITICO (Jan. 30, 2017), <http://www.politico.com/story/2017/01/trump-immigration-ban-state-department-dissent-channel-memo-234364> [<https://perma.cc/8MBK-3S4Z>] (discussing history of State Department Dissent Channel).

judges has employed a variety of means to reform the system in which they operate, but over which they have limited authority. Sometimes the judges have exercised that limited authority to make incremental advances through their legal rulings or through exercise of their supervisory powers; but they also have exhorted others to action, including the Executive branch, legislators, and the public. Although as a historical matter, this is not the traditional role of the federal district court judge, none of this behavior is entirely new. In fact, in the years immediately after the Sentencing Reform Act and the Sentencing Guidelines went into effect in the 1980s, federal district court judges joined the rest of the federal judiciary in protesting loudly and regularly—in their opinions and in extrajudicial fora—against the Guidelines and the intrusion on their sentencing authority.

What is interesting and arguably “new” about the recent activity is that it has extended beyond sentencing to issues such as prosecutorial charging and settlement policies, discovery, and the collateral consequences of conviction. What once might have been construed as a defense of the trial judge’s prerogatives in a narrow slice of the criminal justice picture has become a more comprehensive engagement with the criminal justice system. And some of the means pursued, such as the local criminal discovery rules and the creation of diversionary programs, are relatively novel for federal courts.

Some of these new means have resulted in concrete changes in policy. But the “new” activism is valuable in other ways, even when its consequences are less sure. Through their opinions and extrajudicial activity, the judges are providing critical feedback about issues in the administration of criminal justice that deserve attention. That feedback is particularly important on policies and laws that disadvantage already disempowered groups (like criminal defendants), or where the adversarial system otherwise tends to break down (as when the interests of the parties may align in seeking a quick, lenient resolution of a corporate prosecution). Trial court judges are in fact better positioned to identify such issues than judges at any other level in our federal judiciary. When they speak up, we should listen.

On the other hand, how judges express their concerns matters. Because the core value of the judiciary is its impartiality, it is important that judges act in a manner that is consistent with that value and that cultivates the public’s trust in the judges’ fidelity to their role. That public trust is always crucial, but it is particularly so when our country is so divided, when few institutions are viewed as apolit-

ical, and when so many questions regarding the limits of Executive and Legislative authority are likely to be decided by the federal courts.

The “new” judicial activists—most of them Clinton appointees—have presented a complex model for how district court judges can leverage their position, both in court and outside of court, in the pursuit of criminal justice reform. Other judges, especially the 270 Obama appointees, some of whom are now approaching their second decade on the bench, will have to decide whether to embrace this model for themselves. To be sure, the changed political environment may make their calculus different. It is a time for careful evaluation but not for disengagement. To the contrary, federal district court judges must continue to provide feedback and accountability to the other branches of government, to other judges, and to the public, and play a part in shaping the present and future of the criminal justice system.

VI.  
APPENDIX\*

### Judges Discussed in Text

Judge (alphabetical order by last name)	District	Year Received Commission/ Retirement	Background	Appointing President	Party of Appointing President
Lynn Adelman	E.D. Wis.	1995	State senator; legal aid lawyer	Bill Clinton	Democrat
Mark Bennett	N.D. Iowa	1994	Magistrate judge; private practice including civil rights	Bill Clinton	Democrat
Frederic Block	E.D.N.Y.	1994	Private practice	Bill Clinton	Democrat
Paul Cassell	D. Utah	2002 Resigned in 2007	Prosecutor; associate deputy attorney general; law professor	George W. Bush	Republican
Anne Conway	M.D. Fla.	1991	Private practice	George H.W. Bush	Republican
Raymond Dearie	E.D.N.Y.	1986	Prosecutor	Ronald Reagan	Republican
Marvin Frankel	S.D.N.Y.	1965 Resigned in 1978	Assistant to the Solicitor General; private practice; law professor	Lyndon Johnson	Democrat
Paul Friedman	D.D.C.	1994	Prosecutor	Bill Clinton	Democrat
Nicholas Garaufis	E.D.N.Y.	2000	Prosecutor; private practice; NY state assistant attorney general; FAA chief counsel	Bill Clinton	Democrat
Nancy Gertner	D. Mass.	1994 Retired in 2011	Civil rights lawyer	Bill Clinton	Democrat
John Gleeson	E.D.N.Y.	1994 Resigned in 2016	Federal prosecutor	Bill Clinton	Democrat

\* Information compiled from the *Biographical Directory of Article III Federal Judges, 1789–present*, FED. JUDICIAL CTR., <https://www.fjc.gov/history/judges> [<https://perma.cc/HE3T-L5GB>].

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Judge (alphabetical order by last name)	District	Year Received Commission/ Retirement	Background	Appointing President	Party of Appointing President
Richard Leon	D.D.C.	2001	Prosecutor; special counsel to congressional investigatory committees; private practice; law professor	George W. Bush	Republican
Marilyn Hall Patel	N.D. Cal.	1980 Took senior status in 2009, retired in 2012	Private practice; general counsel for the INS; adjunct professor of law; CA municipal court judge	Jimmy Carter	Democrat
Jed Rakoff	S.D.N.Y.	1996	Federal prosecutor; private lawyer	Bill Clinton	Democrat
James Rosenbaum	D. Minn.	1985 Retired in 2010	Civil service attorney; private practice; federal prosecutor	Ronald Reagan	Republican
Emmett Sullivan	D.D.C.	1994	DC superior court and court of appeals judge	Bill Clinton (but appointed to DC courts by Presidents Bush and Reagan)	Democrat
Stefan Underhill	D. Conn.	1999	Private practice	Bill Clinton	Democrat
Edward Weinfeld	S.D.N.Y.	1950 Died in 1988	Private practice; NY State Commissioner of Housing	Harry Truman	Democrat
Jack Weinstein	E.D.N.Y.	1967	Law professor	Lyndon Johnson	Democrat
Mark Wolf	D. Mass.	1985	Prosecutor	Ronald Reagan	Republican

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