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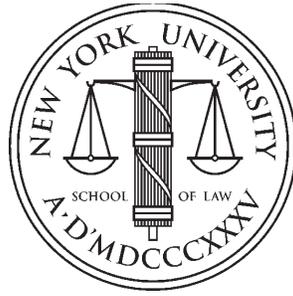
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Or land or life, if freedom fail?*  
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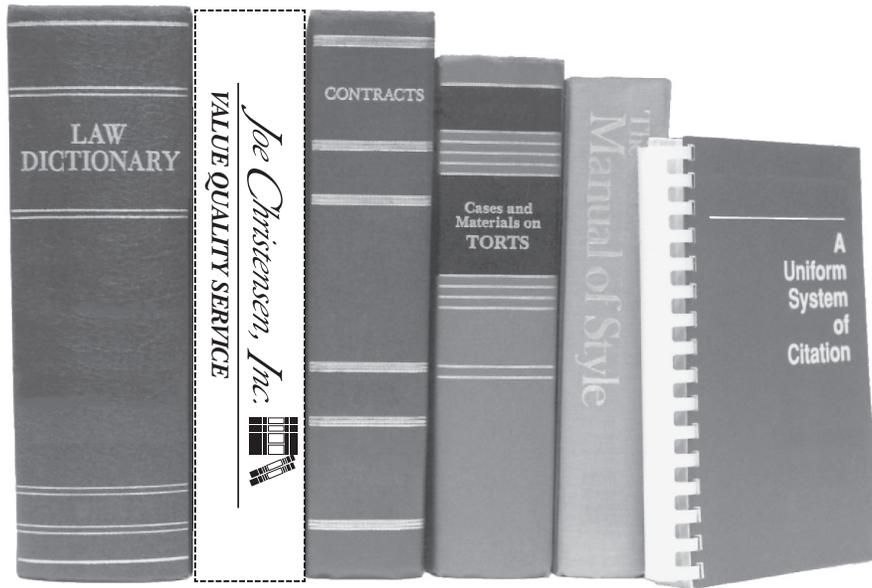
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# THE “NEW” DISTRICT COURT ACTIVISM IN CRIMINAL JUSTICE REFORM

JESSICA A. ROTH\*

*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 of whom, 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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\* Associate Professor of Law, Benjamin N. Cardozo School of Law. I am grateful to Michelle Adams, Gabriel J. Chin, Bruce Green, Kyron Huigens, Benjamin Lawsky, Burt Neuborne, Daniel Richman, and Kate Stith for very helpful comments on earlier drafts of this paper and to participants in the 2016 Ethics Schmooze and CrimFest 2016, where this Article was presented as a work in progress. Thanks also to Ben Cain, Rachel Karpoff, and Josh Ontell for excellent research assistance.

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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 dec-

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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, ‘[t]hat 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).

ade before they engaged in this activity. Some, like Judges Gleeson 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. How-

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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.”).

ever, I call this activity the “new” activism precisely to distinguish it 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,

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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.”); Gross & 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 (“[J]udicial 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).

judges in other eras occasionally questioned the wisdom and legality 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

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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.

“new” district court activism in historical context. This section notes 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

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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 the 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\\_ar\\_p\\_d\\_pdt\\_img\\_top?ie=UTF8](https://www.amazon.com/Mandatory-Minimum-Sentences-Arrests-Unfair/dp/B00SZ1DRUG/ref=cm_cr_ar_p_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, *A “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 Peñaloza, *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/cl3uEIXy>

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. 387 (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-

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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-

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

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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).

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 undercharging) 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

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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. 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*

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 ire of “new” activist judges. Those provisions give prosecutors the power to increase the mandatory minimum and maximum

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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”).

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 continuing concern to the DOJ"<sup>125</sup> about the issue, drawing a con-

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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.*

125. *Id.* at 908.

nection 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 decrying 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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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 pleas after the office’s longstanding practice of doing so was brought to her attention in 2010”).

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 that case, Judge Gleeson vacated two Section 924(c) convictions of

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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.

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 resentencing 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 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 guilty

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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).

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-WGY-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’s 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

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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-a6f3-21ccdbc5f74e\\_story.html?utm\\_term=.b8ea6c797f37](https://www.washingtonpost.com/opinions/getting-prosecutors-to-share-what-they-know/2016/03/20/cd5e42cc-eabb-11e5-a6f3-21ccdbc5f74e_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&pdbyasscitordocs=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 the 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. Claey, *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, 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.*

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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-

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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 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 Holtzoff (*supra* note 241) also publicly decried the discrepancies among judges in sentencing pursuant to the indeterminate sentencing regime. See Hon. Alexander Holtzoff, *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 noncitizen 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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pectations: “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. *Kimbrough 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: CASE 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* 1 (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, *CONVICTING 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> [<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 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 or 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-

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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 “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 correlates 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’s 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-

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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 “[a]n 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>].

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



# JUDICIAL ACTIVISM IN TRIAL COURTS

BRUCE A. GREEN\* & REBECCA ROIPHE\*\*

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## INTRODUCTION

“Judicial activism” has no fixed meaning. One might argue that it has either no meaning at all or multiple meanings with little to connect them beyond the predominant understanding that judicial activism is bad—a transgression of the judge’s role. Although most judges are trial judges, the term “judicial activism” is traditionally employed in the appellate, and especially Supreme Court, context, to refer to a liberal approach to interpreting the law, especially the Constitution. Supreme Court Justices, including several considered to be on the liberal (and, therefore, presumably activist) end of the philosophical spectrum, are among those who have used the term to criticize judicial opinions and conduct of which they disapprove.<sup>1</sup>

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1. *See e.g.*, *Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477, 486 (1989) (Stevens, J., dissenting) (lower court’s rejection of controlling Supreme Court precedent was “an indefensible brand of judicial activism”); *New Jersey v. T.L.O.*, 468 U.S. 1214, 1216 (1984) (Stevens, J., dissenting from order granting reargument) (“I believe that the adversary process functions most effectively when we rely on the initiative of lawyers, rather than the activism of judges, to fashion the questions for review.”); *Engle v. Isaac*, 456 U.S. 107, 123 n.25 (1982) (“It is immediately apparent that [the dissenting opinion’s] charges of ‘judicial activism’ and ‘revisionism’ carry more rhetorical force than substance.”); *Turner v. United States*, 396 U.S. 398, 426 (1970) (Black, J., dissenting) (“I wholly, com-

The modern critique of activist judges grew out of a preoccupation with what Alexander Bickel called the “countermajoritarian difficulty.” Beginning in the 1950’s and 60’s, legal scholars grew increasingly concerned that legal liberalism—faith in courts as an engine of progressive social change—was flawed because judges were not elected. If the law is not a science, as legal realism and later the critical legal studies movement so cogently argued, then what was left to justify this world of activist judges pursuing what seemed like their own personal agendas?<sup>2</sup> Judicial activism seemed in tension with democratic theory and those in favor of a pluralist democracy grew wary of a Court, removed from popular opinion, setting its course. It was out of this moment that we inherited the vision of the judge as umpire, a narrow and mechanistic view of the role.

Several scholars have sought to defend judicial activism in the context of appellate jurisprudence.<sup>3</sup> Professor Roth’s article shifts the focus to the trial level.<sup>4</sup> Drawing on their federal judicial experience, senior district court judges have promoted judicial reform in the areas of prosecutorial charging and sentencing primarily through dicta in opinions and extra-judicial activities—speeches and articles—while also occasionally making rulings that push legal boundaries based on their views about the law’s deficiencies. Professor Roth calls this activity “district court activism in criminal justice reform,” to capture that it both “signifies an active and engaged judicial posture” and “taps into debates about the proper role of the judge in our democracy.”

In this piece we follow Professor Roth’s lead by turning to the question of judicial activism in trial courts. In addressing judicial activism, we are particularly interested in the relationship between a

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pletely, and permanently reject the so-called ‘activist’ philosophy of some judges which leads them to construe our Constitution as meaning what they now think it should mean in the interest of ‘fairness and decency’ as they see it. This case and the Court’s holding in it illustrate the dangers inherent in such an ‘activist’ philosophy.”); *United States v. Wade*, 388 U.S. 218, 250 (1967) (Black, J., dissenting) (“[D]eciding what the Constitution is, not from what it says, but from what we think it would have been wise for the Framers to put in it . . . to me would be ‘judicial activism’ at its worst.”).

2. See ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS* 16-17 (1962); LAURA KALMAN, *THE STRANGE CAREER OF LEGAL LIBERALISM* 19-20 (1996), Barty Friedman, *The Birth of an Academic Obsession: The History of the Countermajoritarian Difficulty, Part V*, 112 *YALE L. J.* 153, 198-213 (2002). Ronald Dworkin pointed out this problem with process theory. See Ronald M. Dworkin, *The Model of Rules*, 35 *U. CHI. L. REV.* 14, 37-40 (1967).

3. Friedman, *supra* note 2, at 155 n.2; KALMAN, *supra* note 2, at 157, 231-32.

4. Jessica A. Roth, *The “New” District Court Activism in Criminal Justice Reform*, 72 *NYU ANN. SURV. AM. L.* 187 (2018).

judge's personality, emotions, courtroom demeanor and conduct of a trial. The active assertion of personality and emotional involvement in the trial is not necessarily a bad thing. In fact, on the trial court level, the exercise of discretion, which is fundamental to American jurisprudence, often requires just such emotional engagement. Bias, on the other hand, and impetuous decisions based on animus, ego, or whim are necessarily inappropriate. In its criminal contempt jurisprudence, the Supreme Court has conflated these two very different concepts under the rubric of judicial activism.

We begin by describing the Supreme Court's criminal contempt jurisprudence, in which the Court equates judicial activism in the trial courts with expressions of emotion, excessive engagement, and, ultimately, improper bias. We then critique the elision of these concepts. In doing so, we distinguish bias from activism, and improper impetuous decision-making from the proper, often active and assertive, use of discretion. This exercise is not merely semantic. Once we make this distinction, it becomes clear that the law should reduce opportunities for improper bias while fostering a courtroom atmosphere in which judges are encouraged to bring their own personal, emotional experiences to bear on the cases before them. Finally, we draw on H.L.A. Hart's recently discovered article on discretion to offer a theoretical defense of judicial activism in trial courts.<sup>5</sup>

By analyzing how judges preside over trials—one of their most distinctive activities—we seek to widen the picture of the judicial role. In doing so, we are inspired by Professor Roth both to better understand the meaning of judicial activism and to highlight its potential benefits. Untangling the concepts of judicial activism from bias and whim helps to free judges from the unattainable and undesirable ideal of the mechanical, disengaged arbiter while helping to ensure that they maintain an ethical approach to judging.

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5. H.L.A. Hart, *Discretion*, 127 HARV. L. REV. 652 (2013). Hart wrote this essay in November 1956 while visiting at Harvard University, but the piece was not published until 2013.

I.  
THE SUPREME COURT'S CRIMINAL CONTEMPT  
JURISPRUDENCE: JUDICIAL ACTIVISM VS.  
JUDICIAL DETACHMENT

In a 1972 decision, *Mayberry v. Pennsylvania*,<sup>6</sup> Justice Douglas referred to the trial judge who behaves as “an activist seeking combat,”<sup>7</sup> as distinguished from one fitting “the image of the impersonal authority of law.”<sup>8</sup> He used the term activism to criticize a judge’s emotional reaction or overreaction when a party or lawyer insults the judge or disrupts the proceedings. By way of illustration, Justice Douglas pointed to the district judge in an early Warren Court decision, *Offutt v. United States*.<sup>9</sup>

*Mayberry* and *Offutt* were part of a series of opinions that addressed how trial judges manage courtroom proceedings, particularly focusing on the use of criminal contempt power in the face of challenges to judicial authority.<sup>10</sup> By mislabeling biased judicial conduct as “activist” the Court in these opinions articulated an ideal of impersonal, disengaged judging that is unrealistic and undesirable. In doing so, the Court not only mislabeled undesirable conduct as “activist,” but also overlooked the value of an active judicial trial court in promoting fairness.

To understand how the Court came to identify trial judges’ “activism” with the expression of emotion and personality and, in turn, with impermissible judicial bias, some background in the development of the Court’s criminal contempt jurisprudence is useful. Although the decisions go back more than a century, a good starting point is the Court’s 1952 decision in *Sacher v. United States*,<sup>11</sup> which

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6. *Mayberry v. Pennsylvania*, 400 U.S. 455 (1971).

7. *Id.* at 465. Other courts have occasionally adopted this characterization. See e.g., *Whisenant v. Allen*, 556 F.3d 1198, 1210 (11th Cir. 2009); *In re Dodson*, 214 Conn. 344, 368 (1990).

8. *Mayberry*, 400 U.S. at 465 (quoting *Offutt v. United States*, 348 U.S. 11, 17 (1954)).

9. *Offutt v. United States*, 348 U.S. 11 (1954).

10. In addition to the opinions discussed in this Part, see e.g., *In re Little*, 404 U.S. 553 (1972); *Ungar v. Sarafite*, 376 U.S. 575 (1964) (upholding summary contempt procedure, where defendant refused to answer questions and made statements that, although disruptive, did not attack the judge’s integrity); *In re McConnell*, 370 U.S. 230, 235 (1962); *In re Murchison*, 349 U.S. 133 (1955) (overturning non-summary contempt, where the judge who presided over the contempt process was the judge before whom the contempt occurred); *Cooke v. United States*, 267 U.S. 517, 536-38 (1925); *Ex parte Hudgings*, 249 U.S. 378, 384-85 (1919); *Ex parte Terry*, 128 U.S. 289 (1888).

11. *Sacher v. United States*, 343 U.S. 1 (1952).

preserved the power of the trial court to use summary contempt procedures while recognizing the potential dangers.

*Sacher* reviewed criminal contempt convictions arising out of *United States v. Dennis*,<sup>12</sup> in which several defendants were convicted of organizing the Communist Party to overthrow the government. After the verdict, federal district judge Harold Medina summarily punished several of the defense lawyers, as well as one *pro se* defendant, for their contumacious trial conduct, which included interruptions, repetitive objections, and insulting remarks about the trial judge.<sup>13</sup> The principal legal question in the case was whether the power to summarily punish contempt occurring in the trial judge's presence must be exercised when the conduct occurs, or whether the judge may wait until the trial is over to exercise this authority.<sup>14</sup>

The summary criminal-contempt process is anomalous not only because it involves procedural shortcuts (e.g., no written notice of charges, no opportunity to call or examine witnesses),<sup>15</sup> but also because of the trial judge's combined role as victim, witness, prosecutor, judge, and jury. Having been affronted by the alleged contemnor, the judge makes the decision to prosecute, draws on first-hand observations, determines whether the conduct observed proves the crime of contempt beyond a reasonable doubt, and, if

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12. 183 F.2d 210 (2d Cir. 1950), *aff'd*, 341 U.S. 494 (1951).

13. *United States v. Sacher*, 182 F.2d 416 (2d Cir. 1950), *aff'd*, 343 U.S. 1 (1952).

14. *See id.* at 428-30 (holding that contempt power need not be exercised immediately); *id.* at 460 (Frank, J., concurring) ("It would be a strange topsy-turvy doctrine that judicial justice is carefully and constitutionally administered when a judge explosively goes into high-blood-pressured action, but that it becomes dangerously careless - and unconstitutional - when the judge, controlling his temper, gives himself a chance to cool off and to act deliberately. It is a quaint idea that a judge's white-hot indignation is a better guaranty of justice than his more seasoned judgment."); *id.* at 463 (Clark, J., concurring) ("If there are breaches of courtroom behavior to the point of preventing the proper functioning of the court, the judge has the authority to take the necessary steps to secure order. But if the difficulty does not require so drastic steps—has indeed been surmounted without resort to them—and the question is one only of punishment, as retribution and example, then the ordinary requirements of due process must be satisfied.").

15. *See Ex parte Hudgings*, 249 U.S. at 383 ("[T]he power to punish for contempt committed in the presence of the court is not controlled by the limitations of the Constitution as to modes of accusation and methods of trial generally safeguarding the rights of the citizen"). Federal judges have inherent authority to punish contemptuous conduct. *Young v. United States ex rel. Vuitton Et Fils S. A.*, 481 U.S. 787, 793 (1987) ("[I]t is long settled that courts possess inherent authority to initiate contempt proceedings for disobedience to their orders."). This authority is now codified in Rule 42(a) of the Federal Rules of Criminal Procedure.

so, enters a conviction and imposes a sentence.<sup>16</sup> Although this agglomeration of roles defies conventional notions of disinterested judging,<sup>17</sup> the trial judge's power to punish contumacious conduct immediately after it occurs in the judge's presence is considered to be a practical necessity to maintain order in the court,<sup>18</sup> notwithstanding the opportunities for abuse.<sup>19</sup> Although the Court has acknowledged the anomalous nature of the criminal contempt process,<sup>20</sup> it has consistently upheld trial judges' power to immediately punish contemptuous trial conduct.<sup>21</sup>

Once the trial is over, however, the necessity for a summary proceeding has abated. The judge has the option to refer the criminal contempt to a disinterested judge, who would afford the accused the full panoply of procedural protections—"the issuance of process, service of complaint and answer, holding hearings, taking evidence, listening to arguments, awaiting briefs, submission of findings, and all that goes with a conventional court trial."<sup>22</sup> When misconduct occurs outside the judge's presence, this procedure is required.<sup>23</sup> Over Justice Frankfurter's dissent, however, the *Sacher* Court did not impose this requirement when a lawyer's contuma-

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16. *Green v. United States*, 356 U.S. 165, 199 (1958) (Black, J., dissenting) ("When the responsibilities of lawmaker, prosecutor, judge, jury and disciplinarian are thrust upon a judge he is obviously incapable of holding the scales of justice perfectly fair and true and reflecting impartially on the guilt or innocence of the accused.").

17. For example, a judge ordinarily cannot preside over a trial if the judge has personal knowledge of the disputed facts, is likely to be a material witness in the proceeding, or is acting as a lawyer in the proceeding. See MODEL CODE OF JUDICIAL CONDUCT Canon 2 (AM. BAR ASS'N 2010); see also *Williams v. Pennsylvania*, 136 S. Ct. 1899, 1906 (2016) ("The due process guarantee that 'no man can be a judge in his own case' would have little substance if it did not disqualify a former prosecutor from sitting in judgment of a prosecution in which he or she had made a critical decision.").

18. "[T]he very practical reasons which have led every system of law to vest a contempt power in one who presides over judicial proceedings also are the reasons which account for it being made summary. Our criminal processes are adversary in nature and rely upon the self-interest of the litigants and counsel for full and adequate development of their respective cases. The nature of the proceedings presupposes, or at least stimulates, zeal in the opposing lawyers. But their strife can pervert as well as aid the judicial process unless it is supervised and controlled by a neutral judge representing the overriding social interest in impartial justice and with power to curb both adversaries." *Sacher*, 343 U.S. at 8.

19. See e.g., Geoffrey P. Miller, *Bad Judges*, 83 TEX. L. REV. 431, 442-43 (2004).

20. *Green*, 356 U.S. at 184.

21. *Id.* at 190-91 (Frankfurter, J., concurring).

22. *Sacher*, 343 U.S. at 9.

23. *Cooke v. United States*, 267 U.S. 517, 535-36 (1925).

cious conduct occurs in the trial judge's presence.<sup>24</sup> It reasoned that if a trial judge may summarily punish a lawyer when the contempt occurs in the judge's presence, the judge may delay doing so until after the trial, because delay averts potential harm to the client without prejudicing the lawyer.<sup>25</sup>

Along the way, Justice Jackson's opinion for the Court in *Sacher* acknowledged that judges are only human and that their personal traits might interfere with the fair exercise of summary contempt power. He cautioned that if a contempt sanction is "imposed in passion or pettiness, [it] brings discredit to a court as certainly as the conduct it penalizes,"<sup>26</sup> and that the power is subject to abuse because "[m]en who make their way to the bench sometimes exhibit vanity, irascibility, narrowness, arrogance, and other weaknesses to which human flesh is heir."<sup>27</sup> But he expressed confidence that such flawed judges are in the distinct minority.<sup>28</sup> In other criminal contempt cases around the same period, other Justices expressed similar concerns about trial judges' emotional response when their authority is challenged, and the Justices were not necessarily as sanguine about the infrequency of this occurring.<sup>29</sup>

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24. Justice Frankfurter explained: "The particular circumstances of this case compel me to conclude that the trial judge should not have combined in himself the functions of accuser and judge. For his accusations were not impersonal. They concerned matters in which he personally was deeply engaged. Whatever occasion may have existed during the trial for sitting in judgment upon claims of personal victimization, it ceased after the trial had terminated." *Sacher*, 343 U.S. at 28 (Frankfurter, J., dissenting).

25. *Id.* at 9-10.

26. *Id.* at 8.

27. *Id.* at 12.

28. The Court observed: "Most judges, however, recognize and respect courageous, forthright lawyerly conduct. They rarely mistake overzeal or heated words of a man fired with a desire to win, for the contemptuous conduct which defies rulings and deserves punishment. They recognize that our profession necessarily is a contentious one and they respect the lawyer who makes a strenuous effort for his client." *Id.*

29. Compare *Ungar v. Sarafite*, 376 U.S. 575, 584 (1964) ("We cannot assume that judges are so irascible and sensitive that they cannot fairly and impartially deal with resistance to their authority or with highly charged arguments about the soundness of their decisions.") with *Cooke v. United States*, 267 U.S. 517, 602 (1925) (Douglas, J., dissenting) ("An impartial judge, not caught up in the cross-currents of emotions enveloping the contempt charge, is the only one who can protect all rights and determine whether a contempt was committed or whether the case is either one of judicial nerves on edge or of judicial tyranny."); *Green v. United States*, 356 U.S. 165, 199 n.8 (1958) (Black, J., dissenting) ("A series of recent cases in this Court alone indicates that the personal emotions or opinions of judges often become deeply involved in the punishment of an alleged contempt.").

Attorney Offutt, the subject of an early Warren Court opinion, apparently found himself trying a case before the rare, irascible judge. Offutt was defending a physician, Dr. Peckham, accused of committing illegal abortions in the District of Columbia in the early 1950's. Offutt crossed swords with the federal district judge as well as the prosecutor throughout the 14-day trial. The judge berated Offutt for asking questions that contravened his prior rulings, remarking at one point in response to Offutt's professed misunderstanding, "You can't be as stupid as all that." When Offutt rose to object and disregarded the judge's instruction to return to counsel table, the judge threatened to call the Marshal to "stick a gag in your mouth."<sup>30</sup> Following the trial, which ended with a guilty verdict on one of the two counts, the judge expressed to the jury his disdain for Offutt,<sup>31</sup> then summarily found Offutt guilty of criminal contempt, and sentenced him to ten days' custody.<sup>32</sup>

A panel of the D.C. Circuit reversed Dr. Peckham's conviction, finding that the jury may have been improperly influenced by the district judge's questioning of witnesses and his hostile comments to Offutt, which, "though under provocation, demonstrated a bias and lack of impartiality."<sup>33</sup> But the same panel considered the trial judge fit to preside over Offutt's criminal contempt hearing. Although it reduced Offutt's sentence to 48 hours, the panel upheld his conviction,<sup>34</sup> concluding that the record amply supported some (though not all) of the judge's factual findings. Among them were that Offutt "made insolent, insulting and offensive remarks to the court, and was guilty of gross discourtesy," that he persistently asked questions that the judge had previously excluded, that he asked questions on cross-examination that were highly prejudicial and without foundation, and that he persistently tried to provoke a mistrial.<sup>35</sup>

Invoking its supervisory authority, the Supreme Court overturned Offutt's conviction and remanded the case for a hearing before a different trial judge.<sup>36</sup> Writing for the Court, Justice Frank-

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30. *Offutt v. United States*, 348 U.S. 11, 16 n.2 (1954).

31. *Id.* at 17 n.3 (1954) (The judge told the jury: "You have been compelled to sit through a disgraceful and disreputable performance on the part of a lawyer who is unworthy of being a member of the profession; and I, as a member of the legal profession, blush that we should have such a specimen in our midst.").

32. *Id.* at 12.

33. *Peckham v. United States*, 210 F.2d 693, 702 (D.C. Cir. 1953).

34. *Offutt v. United States*, 208 F.2d 842, 843 (D.C. Cir. 1953), *rev'd*, 348 U.S. 11 (1954).

35. *Id.* at 843.

36. *Offutt*, 348 U.S. at 17-18.

furter acknowledged that even judges must be allowed “a modicum of quick temper,” but in this case, he concluded, the trial judge went too far, “permit[ing] himself to become personally embroiled with” defense counsel.<sup>37</sup> Although a trial judge need not respond impassively to contumacious conduct, Justice Frankfurter urged trial judges to rein in strong feelings when invoking the contempt power. He wrote:

The power thus entrusted to a judge is wholly unrelated to his personal sensibilities, be they tender or rugged. But judges also are human, and may, in a human way, quite unwittingly identify offense to self with obstruction to law. Accordingly, this Court has deemed it important that district judges guard against this easy confusion by not sitting themselves in judgment upon misconduct of counsel where the contempt charged is entangled with the judge’s personal feeling against the lawyer.

Of course personal attacks or innuendoes by a lawyer against a judge, with a view to provocation, only aggravate what may be an obstruction to the trial. The vital point is that in sitting in judgment on such a misbehaving lawyer the judge should not give vent to personal spleen or respond to a personal grievance. These are subtle matters, for they concern the ingredients of what constitutes justice.<sup>38</sup>

Justice Frankfurter punctuated these thoughts with the phrase for which the opinion is probably best remembered: “Therefore, justice must satisfy the appearance of justice.”<sup>39</sup>

By way of contrast, in an early Burger Court decision, *Illinois v. Allen*,<sup>40</sup> Justice Black praised the trial judge’s demeanor. Responding to a *pro se* criminal defendant’s abusive and disruptive conduct, the judge ultimately expelled the defendant from the courtroom. The Court found that the judge had acted within his discretion, noting that the “judge at all times conducted himself with that dignity, decorum, and patience that befit a judge.”<sup>41</sup>

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37. *Id.* at 17.

38. *Id.* at 14.

39. *Id.*

40. *Illinois v. Allen*, 397 U.S. 337, 347 (1970).

41. *Id.* Justice Douglas filed a dissent, expressing concern about the implications of the Court’s decision for political trials and trials where leftist radicals sought to provoke right-wing repression, viewing it as to their ultimate advantage. *Id.* at 351-57 (Douglas, J., dissenting). Notably, *Illinois v. Allen* was argued in February 1970, within a week of the verdict and sentencing in the “Chicago 8” trial, so all of the Justices were undoubtedly aware of the implications of its decision for criminal trials arising out of anti-war protests.

Which brings us to *Mayberry*, decided a year after *Allen*. *Sacher* and *Offutt* seemed to distinguish between two types of judges. There is the dispassionate judge, who, *Sacher* says, can be trusted to use the summary contempt power impartially. And then there is the judge like the one in *Offutt* who takes grievances too personally and strikes back. The latter, says Justice Douglas in *Mayberry*, is the “activist seeking combat,”<sup>42</sup> who undermines the fair administration of justice by becoming “‘personally embroiled’” with another trial participant.<sup>43</sup>

The distinction turned out not to matter in *Mayberry*. The trial judge in that case managed to keep his cool in the face of a *pro se* criminal defendant’s “highly personal aspersions, even ‘fighting words’—‘dirty sonofabitch,’ ‘dirty tyrannical old dog,’ ‘stumbling dog,’ and ‘fool’”—and other “[i]nsults . . . apt to strike ‘at the most vulnerable and human qualities of a judge’s temperament.’”<sup>44</sup> But even so, the Court held that as a matter of constitutional due process, the trial judge should have referred the matter to a fellow judge, one “not bearing the sting of those slanderous remarks and having the impersonal authority of the law.” Although, to maintain order, the judge could lawfully have punished the defendant on the spot, the judge could not defer the contempt process until after the trial and then preside over a summary hearing.

The Court in *Mayberry* could simply have overruled *Sacher*, holding that unless summary contempt is used immediately, it cannot be used at all, because afterwards the necessity for a streamlined process dissipates. But, instead, the Court merely restricted judges’ authority to defer a summary contempt hearing. It allowed judges to wait until after trial to summarily punish defiant lawyers as long as the lawyer did not target the judge personally. The decision bars judges from using summary procedures after trial only if they were personally attacked, on the theory that even if the judge maintained a calm exterior and had the opportunity as time passed to cool off, the judge’s emotional reaction would presumptively impair decision-making. The following year, a D.C. Circuit opinion invoked this understanding to overturn a post-trial contempt con-

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42. *Mayberry v. Pennsylvania*, 400 U.S. 455 (1971). *Taylor v. Hayes*, 418 U.S. 488, 503 (1974), was another decision where the Court found that the trial judge was personally stung by the criminal defense lawyer’s remarks and therefore should have assigned the contempt proceedings to another judge.

43. *Mayberry*, 400 U.S. at 465 (quoting *Offutt v. United States*, 348 U.S. 11, 17 (1954)).

44. *Mayberry*, 400 U.S. at 466 (quoting *Bloom v. Illinois*, 391 U.S. 194, 202 (1968)).

viction imposed summarily against a peace activist's trial lawyer,<sup>45</sup> and a year after that, the Seventh Circuit did so more famously as the basis for overturning the summary contempt convictions of the defendants and defense lawyers in the "Chicago 8" trial.<sup>46</sup>

## II. REDEEMING JUDICIAL ACTIVISM IN TRIAL COURTS

Collectively, the Supreme Court's summary contempt decisions draw a connection between trial judges' conduct on the bench, their personality, and their emotions, ultimately equating biased judicial conduct with "activism," condemning activism as undesirable, and blaming activism on judges' inability to control their emotions. The Justices' underlying assumptions and ideas are contestable and, in the very least, worth examining.

### A. *Judicial Engagement*

Various Justices seem to have traced the problem in a case like *Offutt*, where the judge failed to maintain a dispassionate demeanor, to the judge's uncontrolled emotion and his personal engagement in a dispute, which ultimately prove that the judge is biased.<sup>47</sup> In criticizing this behavior, they dismiss the judge as an "activist." But all of this inaccurately describes the problem. In doing so, the Court risks minimizing or at least denigrating the beneficial use of personal emotion in trial court proceedings along with this corrosive biased judicial behavior. In an effort to comply with the Court's mandate, judges might seek to hide their true motiva-

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45. *United States v. Meyer*, 462 F.2d 827, 839-40 (D.C. Cir. 1972) (observing that *Mayberry* establishes that "it is of no significance that a trial judge who has been personally attacked has remained outwardly calm, so long as the attack is such that his personal feelings might reasonably be expected to have been affected").

46. *United States v. Seale*, 461 F.2d 345, 351-53 (7th Cir. 1972); *In re Dellinger*, 461 F.2d 389, 401 (7th Cir. 1972). For an account of the trial, see JOHN SCHULTZ, *THE CHICAGO CONSPIRACY TRIAL* (rev. ed. 1993).

47. See e.g., *Ungar v. Sarafite*, 376 U.S. 575, 585 (1964) ("Unlike . . . contempt cases from lower federal courts in which the Court found personal bias sufficient to disqualify the judge from convicting for contempt, this record does not leave us with an abiding impression that the trial judge permitted himself to become personally embroiled with petitioner."); *Brown v. United States*, 359 U.S. 41, 48 (1959) ("This is not a situation where the contempt was in any sense personal to the judge, raising issues of possible unfairness resulting from the operation of human emotions.").

tion, making it hard to distinguish proper emotional engagement from bias and personal animus.

The fundamental problem in a case like *Offutt* is the judge's trial conduct, not emotions. The court of appeals overturned the conviction of Offutt's client because the trial judge did not preside fairly. As the court put it, "indicating at times hostility," the trial judge "demonstrated a bias and lack of impartiality which may well have influenced the jury."<sup>48</sup> In other words, the jury could have inferred from the judge's words and behavior toward Offutt that the judge disfavored Offutt and perhaps Offutt's client; the jury could have been influenced by the attitude of the judge, as a respected authority, to convict Dr. Peckham. The same bias that the judge manifested throughout the trial rightly disqualified him from presiding afterwards over Offutt's contempt hearing. Whether the judge was actually predisposed against Offutt did not matter because, as Justice Frankfurter observed, "justice must satisfy the appearance of justice."<sup>49</sup> When put on trial for criminal contempt, particularly under a process giving so much power to the judge, Offutt was entitled to a presiding judge who both appeared to be and actually was impartial. The law and structure of trial court proceedings ought to minimize the chances that this sort of bias and improper animus animates a judge's conduct. It ought to go further by ensuring that proceedings appear proper, even if an individual judge has the personal strength to act fairly despite strong negative feelings toward any of the parties.

There is no way to know precisely why the trial judge was so hostile to Offutt—whether the judge had a prior run-in with the lawyer, whether the judge disliked doctors who performed abortions and anyone who represented them, or because of the lawyer's behavior in the particular trial. One cannot confidently assume, as Justice Frankfurter inferred, that the trial judge's demonstrations of bias were an emotional response to provocation.<sup>50</sup> The various opinions do not quote enough of the record to demonstrate that Offutt provoked the judge rather than the other way around. But even if Offutt overstepped first, one cannot necessarily attribute the judge's hostile reaction to an unchecked emotional response. The judge may just have been crotchety or intolerant, possessing character flaws of the sort Justice Jackson identified.

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48. *Peckham v. United States*, 210 F.2d 693, 702 (D.C. Cir. 1953).

49. *Offutt*, 348 U.S. at 14.

50. *Id.* at 16-17.

More significantly for our purposes, characterizing the trial judge in this case as “activist” is problematic. The concept of “judicial activism” is often equated with a philosophy of judging. But the judge’s hostile courtroom demeanor, if in fact fueled by the judge’s unchecked emotional response to provocation, did not reflect a philosophical approach to the role, but a reflexive one. Drawing on emotions or personal experience may not only be consistent with, but also fundamental to the exercise of sound judicial discretion. As Professor Roth demonstrates, the exercise of judicial discretion can reflect a positive active vision of the judicial role. Therefore, it seems problematic to equate this sort of bias with activism.

To the extent that the trial judge’s “activism” consisted of injecting himself into the trial—making himself more like a player than an umpire—the label does not deserve the pejorative connotation. Justice Frankfurter evidently blamed the judge for allowing himself to become “personally embroiled” in a dispute with defense counsel, but it is uncertain what this means and why the judge was to blame.<sup>51</sup> The judge’s personal engagement was unavoidable. Judges are participants in the trial as much as anyone else in the courtroom. They are not bit players: they have a more sustained role than witnesses, a more active role than jurors, and a more authoritative role than anyone else—they get the last word about how the trial is conducted and their word is law. Judges are necessarily engaged at every moment of the trial, and when their authority is challenged or tested, they almost invariably become “embroiled.” The problem with the judge in Dr. Peckham’s case was his choice of weapon: his statements were demeaning and his threats (e.g., to call in the Marshals, to have the lawyer gagged) were disproportionate to the defense lawyer’s perceived transgressions.

Trial judges have broad discretion in how they conduct trials. They are not simply bystanders, and they have a constitutional responsibility to make sure the trial “is fair and orderly.”<sup>52</sup> Toward this end, judges may inject themselves into their trials as long as they do so in a manner that does not convey bias.<sup>53</sup> Sometimes, failing to do so is an abdication of responsibility.<sup>54</sup> There is room to

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51. *Id.* at 17.

52. *United States v. Nobel*, 696 F.2d 231, 237 (3d Cir. 1982).

53. *See e.g.*, *United States v. Price*, 13 F.3d 711, 723-24 (3d Cir. 1994) (finding that the trial judge “did not overstep the bounds of prudent judicial conduct” in criticizing the length of defense cross-examination and “reacting to the failure of the defense counsel to accept the court’s rulings”).

54. For instance, in *Commonwealth v. Roldan*, 572 A.2d 1214, 1215 (Pa. 1990), the Supreme Court of Pennsylvania wrote:

debate, as a matter of judicial philosophy, how actively trial judges should serve as architects of a trial. At minimum, judges are expected to act on their own initiative—*sua sponte*—when the process seems to be going awry.<sup>55</sup> But judges also take initiative, injecting themselves into proceedings, to make the process and its outcomes fairer.<sup>56</sup> It is not always clear when judges exceed proper bounds. It is unhelpful to label the judge who crosses the gray boundary line an “activist” and to imply that it is undesirable for judges to take an active trial role, whether in response to lawyers’ and parties’ disruptive conduct or in general. There is a fuzzy line between being an assertive judge and an overly aggressive one, between being stern and being hostile, and the label does nothing to elucidate the distinctions.

To the extent the Court’s contempt-of-court opinions equate activism with excessive emotional engagement, they unfairly give “activism” a bad name. Equating activism with bias discounts the positive role that activism, as a philosophical approach to the trial judge’s function, may play at the trial level in service of fair process and impartial justice.

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Judges should refrain from extended examination of witnesses; they should not, during the trial, indicate an opinion on the merits, a doubt as to the witnesses’ credibility, or do anything to indicate a leaning to one side or the other, without explaining to the jury that all these matters are for them.

That does not mean that a trial judge must sit idly by, a mere evidential technician, silenced in the face of the impossible, absurd, ambiguous or the frivolous. Nor should he leave unasked or unanswered questions that center the matter or amplify relevant testimony on the question or issue. It is a false and dangerous neutrality that would allow loss of liberty or property when another question at further inquiry would gain the fact, expose a false or improper premise, interest or bias of a witness, or correct insinuation unfounded in the record. It is not partisan to maintain the wheel, steering evenly, between competing and often aggressive counsel, anxious to set the course. Nor should a judge yield the gavel to zealous partisans or allow counsel to impose their contentions by contumelious conduct. When others than the trial judge control the proceedings, one side has lost their day in court.

*Id.* (quoting *Commonwealth v. Myma*, 123 A. 486, 487 (Pa. 1924)).

55. *See e.g.*, *United States v. Modica*, 663 F.2d 1173, 1185 (2d Cir. 1981) (recognizing trial judge’s responsibility to ensure that trial lawyers act ethically and “to control the overall tenor of the trial,” including by interrupting improper arguments, giving curative instructions, or reprimanding or sanctioning the offending lawyer).

56. *See e.g.*, A.B.A., *STANDARDS FOR CRIMINAL JUSTICE, SPECIAL FUNCTIONS OF THE TRIAL JUDGE* § 6-1.1(a) (3d ed. 2000) (“The adversary nature of the proceedings does not relieve the trial judge of the obligation of raising on his or her own initiative, at all appropriate times and in an appropriate manner, matters which may significantly promote a just determination of the [criminal] trial.”).

Consider, for example, the question of whether a trial judge should participate in plea negotiations. Federal judges are currently forbidden by rule from doing so,<sup>57</sup> but not all state judges are. In New York, for example, the state judicial ethics commission recently advised state trial judges that they “may suggest alternatives to a plea agreement offered by a defendant and prosecutor, provided the judge does so non-coercively and is careful not to create an impression he/she has prejudged the case’s merits.”<sup>58</sup> In a *New York Review of Books* article, Jed Rakoff, one of the activist federal district judges identified by Professor Roth, argued that federal judges should be allowed a role in plea discussions, to redress deficiencies in the criminal charging and plea bargaining process.<sup>59</sup> A judge who participates in plea discussions in a non-coercive, unbiased manner, where permitted by law, is active and engaged and serves a proper judicial function. Whether or not this is activism in a positive or negative sense depends on one’s view of the appropriate judicial role in plea bargaining—a question on which courts are evidently divided.

### B. *Judicial Emotion*

Judges’ emotions and sympathies have traditionally been considered impermissible bases for their decisions.<sup>60</sup> Some persist in the view that judges must suppress their emotions and personalities.<sup>61</sup> But we question the ideal of the “impersonal authority of the

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57. FED. R. CRIM. P. 11(c)(1).

58. N.Y. Advisory Comm. on Jud. Ethics, Op 17-110 (2017). Where judicial participation is permissible, a judge may not pressure the defendant to accept a plea offer. See e.g., *People v. Sandoval*, 43 Cal. Rptr. 3d 911, 922 (Cal. Ct. App. 2006); *State v. Bouie*, 817 So. 2d 48, 56 (La. 2002); *Standley v. Warden*, 990 P.2d 783, 785 (Nev. 1999).

59. Jed S. Rakoff, *Why Innocent People Plead Guilty*, N.Y. REV. OF BOOKS (Nov. 20, 2014), <http://www.nybooks.com/articles/2014/11/20/why-innocent-people-plead-guilty/> [<https://perma.cc/2Q3S-DQU7>].

60. See, e.g., *District of Columbia v. Clawans*, 300 U.S. 617, 628 (1937) (“Doubts must be resolved, not subjectively by recourse of the judge to his own sympathy and emotions, but by objective standards such as may be observed in the laws and practices of the community taken as a gauge of its social and ethical judgments.”). But see *Berger v. United States*, 255 U.S. 22, 43 (1921) (McReynolds, J., dissenting) (“[W]hile ‘[a]n overspeaking judge is no well-tuned cymbal’ neither is an amorphous dummy unspotted by human emotions a becoming receptacle for judicial power.”).

61. See, e.g., Mugambi Jouet, *Reconciling the Conflicting Rights of Victims and Defendants at the International Criminal Court*, 26 ST. LOUIS U. PUB. L. REV. 249, 294 (2007) (“[J]udges have a duty to detach themselves from emotions so that they can rationally decide issues without any bias or unfair prejudice.”); Evan R. Seamone, *Understanding the Person Beneath the Robe: Practical Methods for Neutralizing Improper*

law,” at least insofar as it implies that judges themselves should try to subordinate their own personalities, to become more like machines or computers than human. While judges should strive for impartiality, the ideal of judicial detachment—dispassionate, impersonal, unemotional judging—reflects an outmoded and unrealistic philosophy.<sup>62</sup> Even on the appellate level, it is a long debunked fantasy to think that judges are like automatons, processing the facts and law and spitting out decisions uninfluenced by their individual personality. And, if achievable, it is questionable whether impersonal justice in this sense is desirable. Even if it were, the appellate ideal of impersonal judging does not translate to the trial level, where personality is among the tools that many good judges bring to their task. In response to disruptions, insults, and challenges to their authority, it is preferable to restore order through force of personality rather than to resort to more extreme and punitive measures. That is not to say that judges should belittle others or be belligerent or hostile. But judges can effectively express disapproval, communicate their expectations, and lay out the potential consequences of disobedience, all in a stern or forceful manner, without necessarily manifesting bias.<sup>63</sup>

Likewise, the role of emotion in judging is not only inevitable, as Jerome Frank observed almost 70 years ago,<sup>64</sup> but legitimate. Nineteenth-century opinions assumed that judges’ emotions led to biased or unreasoned decisions,<sup>65</sup> but many would argue that emo-

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*Judicial Biases*, 42 WILLAMETTE L. REV. 1, 10 (2006) (“Society expects judges to display professionalism by checking their emotions at the courthouse door and being impartial as they review and decide cases.”).

62. See generally Bruce A. Green & Rebecca Roiphe, *Regulating Discourtesy on the Bench: A Study in the Evolution of Judicial Independence*, 64 NYU ANN. SURV. AM. L. 497 (2009).

63. See *Berger v. United States*, 295 U.S. 78, 85 (1935) (Where prosecutor engaged in improper cross-examination and closing arguments, “the situation was one which called for stern rebuke and repressive measures.”); *In re Hocking*, 546 N.W.2d 234, 245 (Mich. 1996) (“To hold that a trial judge may not express strong displeasure or even anger, would ignore the reality that the potential for such reactions induces a level of civility in the process, without which the system literally could not function.”).

64. Green & Roiphe, *supra* note 62, at 497 (quoting JEROME FRANK, *LAW AND THE MODERN MIND* (1951)); see also Sharon Roach Anleu et al., *The Emotional Dimension of Judging: Issues, Evidence, and Insights*, 52 CT. REV. 60 (2016); Donald C. Nugent, *Judicial Bias*, 42 CLEV. ST. L. REV. 1 (1994); Andrew J. Wistrich et al., *Heart Versus Head: Do Judges Follow the Law or Follow Their Feelings?*, 93 TEX. L. REV. 855 (2015).

65. See Green & Roiphe, *supra* note 62, at 511.

tion has an important role in judging.<sup>66</sup> Perhaps not all emotions should be freely expressed, but many have a useful place. Consider the role of empathy in judging, which some equate with activism.<sup>67</sup> As Judge Denny Chin discussed in an essay several years ago, “the reality is that empathy and emotion play an essential role in the real-world, day-to-day administration of justice—particularly in sentencing.”<sup>68</sup> It is little wonder that the federal sentencing law, which significantly constrains judges’ discretion, is the target of many of the federal district judges who, in Professor Roth’s account, take an “activist” role. The Federal Sentencing Guidelines made the sentencing process more mechanical, precisely to reduce the apparent disparities that resulted because different judges had not only different sentencing philosophies but also, presumably, different emotional reactions to defendants and their crimes.

Some state courts have recognized that expressions of emotion are not the same as expressions of bias and that emotionally engaged judges can make decisions in an unbiased fashion. For example, an Ohio appellate court rejected a claim that the trial judge, who “was briefly overcome with emotion and began to cry” at a sentencing hearing was impermissibly biased.<sup>69</sup> It explained that “[t]he fact that the trial judge was briefly overcome with emotion and cried does not demonstrate judicial bias. It merely demonstrates that the trial judge is human and can understand and relate to other people’s feelings and emotions.”<sup>70</sup> Likewise, a Tennessee appellate court concluded that a trial judge could preside over a negligence case in an unbiased manner despite admittedly being “overcome with emotion” and becoming teary while viewing a video

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66. See *id.* at 556-57 (discussing William J. Brennan, Jr., *Reason, Passion, and “The Progress of the Law,”* 10 CARDOZO L. REV. 3 (1988)); Terry A. Maroney, *Angry Judges*, 65 VAND. L. REV. 1207, 1209 (2012); Terry A. Mahoney, *The Persistent Cultural Script of Judicial Dispassion*, 99 CALIF. L. REV. 629, 633 (2011); Terry A. Maroney, *Emotional Regulation and Judicial Behavior*, 99 CALIF. L. REV. 1485, 1492 (2011).

67. See Kim McLane Wardlaw, *Essay, Umpires, Empathy, and Activism: Lessons from Judge Cardozo*, 85 NOTRE DAME L. REV. 1629, 1658 (2010).

68. See Denny Chin, *A Role for Empathy*, 100 U. PA. L. REV. 1561, 1564 (2012) (defining empathy as “the capacity to understand and appreciate the perspective of others”).

69. *State v. Johnson*, 844 N.E.2d 372, 380 (Ohio Ct. App. 2005).

70. *Id.* (identifying judicial bias as “a hostile feeling or spirit of ill will or undue friendship or favoritism toward one of the litigants or his attorney, with the formation of a fixed anticipatory judgment on the part of the judge, as distinguished from an open state of mind which will be governed by the law and the facts”).

offered in evidence.<sup>71</sup> The court reasoned: “Contrary to popular belief, judges are human and, as such, have feelings and emotions. [T]he mere fact that a judge may feel emotion or may sympathize with a party does not, ipso facto, mean that he or she cannot be unbiased. It is the judge’s bias (actual or perceived), and not his or her emotion, that drives the inquiry of whether recusal is warranted.”<sup>72</sup>

While, unlike empathy, some emotions do not deserve a role in judicial decision-making, one might question the assumption that judges cannot effectively restrain those emotions or give voice to them only at appropriate moments. *Mayberry* assumes that judges who are personally attacked, though permitted to exercise summary contempt power (if only of necessity) when misconduct occurs, cannot be trusted to preside in a disinterested manner afterwards. In cases such as *Mayberry* and *Allen*, trial judges responded dispassionately to provocative conduct. But the Court assumes that even if they are calm on the outside, victimized judges will be roiling on the inside, despite the passage of time, and incapable of preventing their emotions from overwhelming their decision-making.

It is at least plausible that using the same mindfulness and self-mastery that enabled him to avoid openly expressing hostility, a judge can avoid the unfair influence of negative emotions on fact findings and sentencing decisions in a summary contempt proceeding—that the judge’s dispassionate exterior matches the judge’s interior. If a judge can be expected to preside impartially in the heated trial in which the contempt occurred, it is uncertain why the judge cannot be trusted to serve impartially in the post-trial contempt proceeding. How is the anger that is presumed to result from being attacked different from other emotions that judges may experience throughout a trial? Many of us—including both professionals (e.g., therapists, teachers, police) and others (e.g., telemarketers, flight attendants, subway clerks)—are expected to keep calm and carry on in the face of challenges and insults that might provoke an angry response. Why not judges?

### C. *Emotionally Engaged Judging*

The ideal of the rational disengaged judge is both unrealistic and flawed. On the trial court level, an umpire or automaton-like judge would have a hard time controlling the courtroom. Injustices

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71. *Williams v. HealthSouth Rehab. Hosp N.*, W2015-00639-COA-T10B-CV, 2015 Tenn. App. LEXIS 310, at \*16–20 (Ct. App. May 8, 2015).

72. *Id.* at \*18.

in the application of the law would remain unnoted and opportunities to correct systemic errors would be missed. Legislators, who are inevitably unaware of all the circumstances and consequences of the procedural and substantive rules they adopt would operate without the beneficial input of trial court judges.

Judge Rosemarie Aqualina, who sentenced Dr. Larry Nassar for sexually abusing Olympic gymnasts in his care, offers an example of the benefits and some of the dangers of an emotionally engaged trial court judge. At Nassar's sentencing, Judge Aqualina allowed testimony from over 160 victims and repeatedly offered her support and encouragement. She also commented that it was her "honor and privilege" to sentence the defendant and referred to the victims as "superheroes." Some have praised her for courageously standing up for the young women victims, and others have criticized her for abandoning or exceeding the proper role of a judge.

Whatever position one takes on the substance of her comments, we disagree that she abandoned the proper judicial role. Judge Aqualina took command over the sentencing process and claimed a strong and assertive role in using her courtroom not only to mete out justice but to correct errors and omissions in a system that leaves little room for victims to tell their stories. Critics argued that she abandoned the proper role of neutral arbiter, took sides, and inappropriately broadcast her views.<sup>73</sup> But the judge at sentencing has never had to maintain a neutral stance. The defendant has been convicted and the purpose of sentencing is to draw on all sorts of information to find the right punishment and justify the sentence imposed.<sup>74</sup> Judge Aqualina took the moment when a defendant would not be harmed by her position to broadcast her views and correct what she saw as a flaw in a system that discourages sexual assault victims from coming forward. She drew attention to the injustice and did what she could to compensate for it without negatively affecting the outcome of the case or the rights of the litigants. This is the sort of trial court activism we are trying to rehabilitate.

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73. See e.g., Anne E. Gowan, *How the Judge in Larry Nassar's Case Undermined Justice*, TIME (Jan. 26, 2018), <http://time.com/5119433/larry-nassar-judge-rosemarie-aqualina-justice/> [<https://perma.cc/V6MZ-73JC>]. Other commentators praised the Judge for giving the victims voice and encouraging other sexual assault victims to come forward. See e.g., Sophie Gilbert, *The Transformative Justice of Judge Aqualina*, THE ATLANTIC (Jan. 25, 2018), <https://www.theatlantic.com/entertainment/archive/2018/01/judge-rosemarie-aquilina-larry-nassar/551462/> [<https://perma.cc/RZ27-2UXQ>].

74. For a description of a judge's role as an "expert" in sentencing prior to the federal sentencing guidelines, see Nancy Gertner, *Sentencing Reform: When Everyone Behaves Badly*, 57 ME. L. REV. 569, 571 (2005).

Of course, like all judges, emotionally engaged judges are subject to legitimate criticism. Even if one accepts the engaged posture, one might not always agree that a judge has engaged in the right way or expressed the most appropriate emotions. Some will agree with a judge's active involvement in a proceeding and others will think she engaged in the wrong manner or at the wrong time. Some will consider the emotions misplaced or unbalanced, while others will approve. An active judge, in the sense we have described, might well make controversial statements and decisions. Just as some judicial reasoning seems better than others, some expressions of emotion will seem more effective and appropriate. Not everyone will agree with or applaud the activist judge's choices in every instance. But, on the whole, the personal and emotional engagement with a case is both inevitable and beneficial. Hiding it under the guise of dispassionate judging will do more harm than good.

In engaging actively in the Nassar sentencing, Judge Aqualina invited both praise and criticism. Some argued that she identified too much with the victims and not enough with the defendant. In using her courtroom to correct for an injustice in the system, she celebrated Nassar's conviction and even implied that it would be an appropriate punishment if he were sexually abused like his victims. Critics have suggested that this was a thinly veiled message to inmates in prison to rape or sodomize Nassar.<sup>75</sup> Judge Aqualina empathized with the victims, but may have failed to balance that with empathy or at least sympathy for the defendant.

Criticizing the manner in which the judge has engaged in a proceeding or the particular emotions expressed is different from criticizing the judge for engaging at all. It is also distinct from accusing the judge of bias, animus, or whim. The criminal contempt cases discussed above demonstrate how important it is to distinguish a judge's emotional engagement in a proceeding from bias. Judge Aqualina's controversial sentencing shows that even when judges do not operate with inappropriate bias, they may express unwise or misplaced emotion. Discerning improper judicial bias is not an easy exercise, but it is more feasible when a judge is encouraged to make her decision-making process transparent rather than pretending to function in an automatic, disengaged way.

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75. Rachel Marshall, *The Moment the Judge in the Larry Nasser Case Crossed the Line*, Vox (Jan. 25, 2018), <https://www.vox.com/the-big-idea/2018/1/25/16932656/judge-aqualina-larry-nassar-line-between-judge-advocate-sentencing> [https://perma.cc/Q2US-QAB8].

D. *How Judicial Emotion Was Equated with Activism*

We inherit the negative image of emotional trial court judges as activists from a decades-old debate about the role of the Supreme Court in American democracy. Generations of scholars have defended judicial review from allegations that the Court was merely a collection of unelected officials substituting their personal views for that of the elected branch.<sup>76</sup> Most of these scholars called for judicial restraint while appealing to the unique role of reason in judicial decision-making to defend the legitimacy of the court.<sup>77</sup> In the course of this debate, the concern over judicial activism could easily have been mistaken for a concern about emotional entanglement.

Perhaps the most important contribution to legal scholarship in America was made by the legal realists in the early twentieth century.<sup>78</sup> They argued, quite successfully, that there is no objective basis for legal decisions. Judges do not apply clear rules to attain an accurate result. Motivated by their own ideological beliefs and biases, they create the law.<sup>79</sup>

Progressives at the turn of the twentieth century drew on this insight to criticize the *Lochner* Court for striking down regulatory legislation intended to protect workers and other marginalized groups from an increasingly cruel industrial economy.<sup>80</sup> New Deal liberals similarly saw the Court as the enemy of social change.<sup>81</sup> In 1937, after President Roosevelt's famous court-packing plan, the Court grew compliant in government reform initiatives, but many progressive scholars still called on the judiciary to be careful and sparing with its power.<sup>82</sup> Many critics continued to express skepticism about the role of courts in promoting social change even after the Supreme Court decided *Brown v. Board of Education* in 1954. Even though the largely liberal academy most certainly approved of the outcome of the case, many drew on earlier critiques of judicial activism to criticize the decision.<sup>83</sup>

After World War II, critics grew concerned that legal realism might inevitably lead to a kind of nihilism. It failed to justify the

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76. KALMAN, *supra* note 2, at 1-13.

77. *Id.* at 40.

78. Joseph William Singer, *Legal Realism Now*, 76 CAL. L. REV. 465, 503-05 (1988).

79. *Id.* (arguing that the main break in legal thought is between the realists and the formalists).

80. KALMAN, *supra* note 2, at 18.

81. *Id.* at 45.

82. *Id.* at 19.

83. *Id.* at 34-37.

rule of law, which many saw as a necessary bulwark against fascism and communism.<sup>84</sup> At the same time, as Alexander Bickel argued in 1962, if judges make the law, then we are being ruled by a fundamentally anti-democratic institution.<sup>85</sup> Coining the term “countermajoritarian difficulty,” Bickel set the course for generations of scholars who would seek to justify the role of courts in America in the face of this challenge.<sup>86</sup> The process school did so by seeking a middle ground between legal formalism and legal realism, a way to justify judicial review without denying the fundamental indeterminacy of the law. The process school acknowledged that law is irreducibly creative, but argued that judicial review is nonetheless legitimate because judges are best situated to determine the outcome of individual cases.

Process school theorists focused on how processes and institutional arrangements lend legitimacy to legal reasoning. Each institution has a distinct area of competence and courts are unique in their ability to resolve problems through reasoned legal argument. Thus, the process school responded to the “countermajoritarian difficulty” by arguing that the law is distinct from politics not because it draws on transcendent legal concepts but rather because of the unique competence of courts to resolve problems in a particular way.<sup>87</sup>

The process school maintained the fear of an active judiciary, insisting that as soon as courts go beyond their prescribed role, they endanger the entire judicial endeavor. When they exceed their area of competence, judges are indistinguishable from political actors, substituting their own views for that of elected officials.<sup>88</sup> If, for instance, the constitutional text can be ascertained through reasoned analysis, then judges are best situated to interpret it, but if the meaning is ambiguous, then judges act illegitimately.<sup>89</sup>

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84. See generally EDWARD PURCELL, *THE CRISIS OF DEMOCRATIC THEORY: SCIENTIFIC NATURALISM AND THE PROBLEM OF VALUE* (1973).

85. BICKEL, *supra* note 2, at 16.

86. KALMAN, *supra* note 2, at 37-39.

87. Lon Fuller, *The Forms and Limits of Adjudication*, 92 HARV. L. REV. 353, 365 (1978).

88. BICKEL, *supra* note 2, at 15-23.

89. See Fuller, *supra* note 87, at 366-67. Critical Legal Studies took issue with the premise that there is any such thing as reasoned analysis, any determinate way to ascertain the meaning of a text. In the absence of this premise, the process school reasoning falls apart. Roberto Unger, *The Critical Legal Studies Movement*, 96 HARV. L. REV. 563, 572 (1983). For an overview of the legal process school, see DAVID KENNEDY & WILLIAM W. FISCHER III, *THE CANON OF AMERICAN LEGAL THOUGHT* 207-353 (David Kennedy & William W. Fischer III eds. 2006).

In the 1970s, critical legal theorists contributed to the anxiety about the role of courts by arguing that law is an exercise of power, a way to maintain imbalances in society. Many process school scholars, who shared their predecessors' progressive politics, inherited a concern about the legitimacy of courts and judges, but they, unlike the critical legal theorists, sought to justify the Court's decision in *Brown* as well as other socially progressive Warren Court decisions. They did so, in part, by arguing that the Court is legitimate because of its unique ability to employ reason to resolve disputes. Judicial decisions can be legitimate even if they are creative as long as judges draw on their professional training and institutional competence to address critical questions in accord with reason and logic.

In part because process school scholars focused almost entirely on appellate judges, they argued that the unique role of judges, the thing that lent them legitimacy, was reason. Reason is traditionally opposed to emotion. Thus, as judges, scholars, and other critics brought up in this scholarly tradition observed trial court judges, they seem to have grafted this ideal of reasoned decision-making and its unwelcome opposite—emotion—onto trial court judges.

#### *E. Activism as Discretion*

One way to rehabilitate trial court activism from this demeaned status is to view it instead as the exercise of discretion. The law is invariably indeterminate. There are holes that need to be filled, definitions that are incomplete, facts or stories that remain vague, and laws whose consequences are not fully understood.<sup>90</sup> Trial court judges are inevitably called upon to fill these gaps. The law is designed to evolve in context. The way that the law and procedural rules ought to play out in the courtroom is similarly unclear. Ethical, evidentiary, and courtroom protocol are by necessity vague. By drawing on their experience, the unique vantage point of the courtroom, and their own emotional engagement with the cases before them, judges can and should take part in that process of elaborating these laws and rules. They should play an active role in the courtroom to contribute both to the narrative and the outcome of cases.<sup>91</sup>

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90. Hart, *supra* note 5, at 661-64.

91. Scholars have discussed the role of law as narrative. See Robert M. Cover, *The Supreme Court, 1982 Term – Foreword: Nomos and Narrative*, 97 HARV. L. REV. 4, 4-5 (1983); see also Richard Delgado, *Storytelling for Oppositionists and Others: A Plea for Narrative*, 87 MICH. L. REV. 2411 (1989); Kim Lane Scheppele, *Foreword: Telling Stories*, 87 MICH. L. REV. 2073 (1989).

H.L.A. Hart himself was a positivist who, like the process school scholars, sought a middle ground between realism and formalism. Like his American counterparts, Hart largely focused on appellate judges. But in a previously unpublished essay that was recently discovered, Hart defended a more robust role for other institutional actors in the development of the law. He argued that law is a collaborative, multi-institutional, creative endeavor.<sup>92</sup> Law is essentially a discursive tradition, constrained by institutional norms and professional traditions.<sup>93</sup> Statutory and constitutional law are necessarily indeterminate. Rather than seeing this as a threat to the legitimacy of the system and the rule of law, Hart acknowledged that indeterminacy was a central and fundamental part of the law. In this essay, which was initially a presentation to a faculty philosophy group, Hart focused on how actors other than appellate court judges inevitably exercise discretion. The exercise of discretion is not inimical to law's legitimacy, but rather fundamental to it. As long as decision-making and active elaboration of law and norms are distributed to institutions with established traditions and in the best position to make those determinations, discretion is consistent with the rule of law. Trial court judges are well-situated to exercise discretion because of their proximity to the facts and their experience resolving criminal and civil disputes. Hart's understanding of discretion is useful in disentangling a positive sort of activism from biased or impulsive acts.

Hart began by distinguishing discretion from other forms of decision-making. Discretion, he explained, is not the same as indulging whim or desire. Thus, judges like the ones described above, who felt angry and insulted and lashed out at lawyers or litigants, were not exercising discretion. When a judge applies an obvious principle whose application to facts is beyond dispute, she is doing her job, but not exercising discretion. Discretion, Hart argued, lies somewhere in between caprice and this sort of logical deduction. Discretion involves the effort to do something wise or sound.<sup>94</sup> To exercise it properly, a judge draws on personal experience, exper-

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92. As his biographer argues, H.L.A. Hart did not fully explore the different roles of institutional actors in legal decision-making, nor the way different institutional arrangements or differently trained decision-makers ought to approach their work. Nicola Lacey, *The Path Not Taken: H.L.A. Hart's Essay on Discretion*, 127 *HARV. L. REV.* 636, 647 (2013). While Hart may have left the institutional nature of discretion somewhat vague, others have argued that discretion and law itself must be understood in institutional contexts. John Bell, *Discretionary Decision-Making: A Jurisprudential View*, in *THE USES OF DISCRETION* 89-92 (Keith Hawkins ed., 1992).

93. Lacey, *supra* note 92, at 648.

94. Hart, *supra* note 5, at 657-58.

tise, and the unique respect and perspective that the office of a judge entails. According to Hart, the exercise of discretion should involve a special regard to preserving the role of courts in legal discourse.

To be fair, Hart does not explicitly envision a place for emotional reactions like empathy or anger in courtroom deliberations. The process school, with which he shared much in common, distinguished the institutional competence of judges by emphasizing their unique ability to conduct reasoned analysis, and reason is traditionally seen as something quite distinct from, if not directly opposed to, emotional reaction. Insofar as Hart and the process school relied on this definition of reason, their contribution no longer comports with contemporary understanding. Social scientists have questioned the traditional opposition of emotion and reason, concluding that emotions can and often do play an important role in reasoned decision-making.<sup>95</sup> Rather than threatening reasoned analysis, emotion facilitates it.<sup>96</sup> Emotions are based on reasons and motivate action.<sup>97</sup> This description of the intersection between reason and emotion is particularly apt when thinking about trial court judges. In the midst of busy and often adversarial trial court proceedings, judges ought to be thoughtful, but they need to act as well. Emotion can and should help translate thoughts into appropriate actions.

Hart's description of discretion in this almost forgotten essay is consistent with the kind of activism Professor Roth describes in her article and we discuss above. Hart distinguishes discretion from "whim" and "fancy," which we take to mean a fleeting desire or impulse, not all emotion. Emotions such as empathy and anger are consistent with and should inform a reasoned analysis. A robust view of the role of trial judges in resolving disputes, opining on problems in the structure of the criminal justice system, and interacting with prosecutors, defense attorneys, witnesses, and defendants is not only consistent with Hart's understanding of institutional actors like trial courts but also fundamental to it. Judges are not

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95. Terry A. Maroney, *The Persistent Cultural Script of Judicial Dispassion*, 99 CALIF. L. REV. 629, 643-45 (2011). For a survey of the social science literature on how fundamental emotion is to judgment, see David J. Arkush, *Situating Emotion: A Critical Realist View of Emotion and Noncognitive Processes for Law and Legal Theory*, 2008 B.Y.U. L. REV. 1275, 1305-09. See generally CASS SUNSTEIN, *LEGAL REASONING AND POLITICAL CONFLICT* (1998) (arguing that judging is really the application of a kind of practical wisdom, the pursuit of good outcomes, rather than the result of pure reason).

96. Maroney, *Angry Judges*, *supra* note 66, at 1212-13.

97. *Id.* at 1216.

automatons applying law in a mechanistic way to easily discernible facts and running the judicial process literally like clockwork. They are critical actors situated to use judgment informed by experience, expertise, and emotional engagement to control their courtrooms and resolve cases.<sup>98</sup> Hart may have been wary of embracing the kind of judicial activism described by Professor Roth because of his commitment to legal positivism, to the distinction between law and morality.<sup>99</sup> But his essay on discretion seems nonetheless to embrace a vision of the law that has more room for judicial creativity in trial courts than many process school scholars would traditionally allow.

One of the key contributions of the legal process school was a recognition that law is a dynamic process, created not just by the legislature but rather by many institutions and many actors.<sup>100</sup> Judicial activism in the trial courts, of the sort described by Professor Roth, seems a productive part of this collaborative process. While the legal process school may have contributed to the negative connotations of judicial activism, Hart's essay on discretion demonstrates that its lessons can support a far more creative and engaged view of the judiciary, a view consistent with and supportive of the activist judges Professor Roth describes.

As Robert Cover has argued, law is more than rules. It is the stories people tell about the law and the meaning it acquires along the way.<sup>101</sup> The legitimacy of the law does not derive from its official source, but rather from its power to shape an ongoing dialog. The courtroom is often the center of this drama where the clash of different stories about the facts and the law vie for supremacy. In Cover's terms, the courtroom is an interpretive community, and the judge, like the other participants, plays a role in the development of law, the determination of facts, and the evolution of legal institutions. Trial court judges are not neutral observers or umpires. This new iteration of legal process does not tolerate the separation of reason from emotion. They are inextricably entwined, and as Hart argued, all actors draw on their own place and perspective to shape the dialog. Understood in this way, active emotional entanglement

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98. See *Harlow v. Fitzgerald*, 457 U.S. 800, 816 (1982) ("In contrast with the thought processes accompanying 'ministerial' tasks, the judgments surrounding discretionary action almost inevitably are influenced by the decision-maker's experiences, values, and emotions.").

99. Lacey, *supra* note 92, at 637.

100. Geoffrey C. Shaw, *H.L.A. Hart's Lost Essay: Discretion and the Legal Process School*, 127 HARV. L. REV. 666, 672 (2013).

101. Robert M. Cover, *Forward: Nomos and Narrative*, 97 HARV. L. REV. 4, 4-5 (1983).

is not only consistent with, but also necessary to, both justice and the appearance of justice.

### CONCLUSION

The image of the stern and detached judge, presiding in a dignified solemnity over a trial, is one we have inherited from generations of scholars who fear active engaged officials who are not directly accountable to the electorate. But as H.L.A. Hart explained over a half century ago, discretion is a necessary part of the system. It is built into the nature of law and legal institutions. Far from a necessary evil that threatens to undermine the legitimacy of official actors, the proper exercise of discretion justifies their role.

Discretion, in the mind of many of the original process school theorists, involves only reasoned and principled analysis. But as Hart acknowledged, once we recognize all the myriad actors and institutions that inevitably exercise discretion in elaborating the meaning and application of the law, discretion must be something more complicated than reasoned analysis. Hart most likely would not have had in mind Judge Aqualina presiding over Nassar's sentencing, but unlike many of his contemporaries, he did understand that implementing the law is complex. It involves actors with institutional experience and expertise, involved in the articulation of law and its application to contested facts. Each institutional actor brings a unique experience and expertise to the process. As process theory evolved through the decades, many adherents abandoned the outdated distinction between reason and emotion, opting instead for a narrative view of the law. Individual actors are cast in important roles in the ongoing articulation of the law and its meaning. Emotionally engaged, even vulnerable, individuals are more suited to the role.

The separation of reason and emotion and the repudiation of the latter in the contempt cases fail to grasp the full complexity of the law. They fail to comprehend the important role that discretion plays. As Hart explained, discretion is not the same as bias, whim, or fancy. The structure of legal institutions should strive to minimize judges' arbitrary decisions. The activist judges Professor Roth describes are engaged not in an illegitimate grab at power, but rather a collaborative exercise of discretion. They contribute to a conversation and elaboration of the law with their unique perspective and respect for the courtroom.



## ASPIRING TO A MODEL OF THE ENGAGED JUDGE

ELLEN YAROSHEFSKY\*

In 1967, within months of his appointment by President Lyndon Johnson to the Federal Bench in Detroit, Judge Damon Keith, [a] rookie judge and an African American . . . faced controversy almost immediately when, in an unusual confluence of circumstance, four divisive cases landed on his docket—all of which concerned hidden discriminatory practices that were deeply woven into housing, education, employment, and police institutions. Keith shook the nation as he challenged the status quo and faced off against angry crowds, the KKK, corporate America, and even a sitting U.S. President.<sup>1</sup>

In 1970, Judge Keith ordered citywide busing in Pontiac, Michigan, to help integrate the city's schools—a ruling that prompted death threats against him and intense resistance by some white parents.<sup>2</sup> In August 1971, ten school buses in Pontiac were firebombed by members of the Ku Klux Klan.<sup>3</sup>

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1. *The Movie*, THEDKDOC.COM, <https://www.thedkdoc.com/the-movie> [https://perma.cc/TA45-LPG7] (last visited April 9, 2018).

2. DeNeen L. Brown, *'I Don't Scare Easily': A 94-Year-Old Judge's Refusal to Bow to Racism, Death Threats*, WASH. POST (Oct. 6, 2016), [https://www.washingtonpost.com/local/i-dont-scare-easily-a-94-year-old-judges-refusal-to-bow-to-racism-death-threats/2016/10/06/cc8a2004-88fa-11e6-b24f-a7f89eb68887\\_story.html?utm\\_term=.593461a6a115](https://www.washingtonpost.com/local/i-dont-scare-easily-a-94-year-old-judges-refusal-to-bow-to-racism-death-threats/2016/10/06/cc8a2004-88fa-11e6-b24f-a7f89eb68887_story.html?utm_term=.593461a6a115).

3. In 2002, in *Detroit Free Press v. Ashcroft*, when Keith was on the Sixth Circuit, the Court ruled that President George W. Bush could not conduct deportation hearings of terrorism suspects in secret. 303 F.3d 681 (6th Cir. 2002). In perhaps his most famous ruling, challenging the claims of President Richard Nixon of executive power to suspend the Constitution, he told President Richard Nixon and Attorney General John Mitchell that the administration could not wiretap telephones of citizens without a warrant. *United States v. Sinclair*, 321 F. Supp. 1074, 1078-79 (E.D. Mich. 1971). That ruling became known as "the Keith Decision." *U.S. v. Sinclair*, 321 F. Supp. 1074 (E.D. Mich. 1971). In response, Nixon sued Keith personally. *United States v. United States Dist. Court*, 444 F. 2d 651 (1971). In *United States v. United States District Court*, the Supreme Court upheld Keith's decision in a 9-0 decision. 407 U.S. 297 (1972).

Judge Keith is one of the most prominent of the remarkable judges who sought to advance the promise of the Civil Rights Amendments in the Courts. As one of Justice Thurgood Marshall's students at Howard University, Judge Keith embodied Justice Marshall's teachings. Judge Keith told a 2016 audience who came to view a film about his life: "Thurgood would say, 'When you finish Howard Law, I want you to use the law as a means for social change,' . . . He used to tell us in class, 'Equal justice under the law was written by white men.'"<sup>4</sup> Justice Marshall urged his students to make the country live up to its words. Judge Keith's judicial decisions promoted equal justice under the law.<sup>5</sup>

Judge Keith is remarkable, but not unique. Noted federal court judges in southern states endured personal threats for their brave decisions in the civil rights era. For example, federal judge Frank Johnson ruled that it was a violation of due process and equal protection to refuse to allow Rosa Parks to ride the bus in Montgomery, Alabama.<sup>6</sup> This was the first time that *Brown v. Board of Education*<sup>7</sup> was applied outside of a school context.<sup>8</sup> Judge Johnson played a leading role in setting the nation's course on civil rights, access to public facilities, voting rights, school desegregation, and affirmative action.<sup>9</sup> His *Washington Post* obituary stated: "Although he was a man of the law rather than a reformer or a politician, many of his decisions had social and political consequences that have become touchstones of American life as the 20th century draws toward its close."<sup>10</sup>

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4. *Brown*, *supra* note 2.

5. *Id.*

6. Robert D. McFadden, *Frank M. Johnson Jr., Judge Whose Rulings Helped Desegregate the South, Dies at 80*, N.Y. TIMES (July 24, 1999), <https://www.nytimes.com/1999/07/24/us/frank-m-johnson-jr-judge-whose-rulings-helped-desegregate-the-south-dies-at-80.html> [<https://perma.cc/MQP6-EE6E>].

7. 347 U.S. 483 (1954).

8. *Id.*

9. *Mieth v. Dothard*, 418 F. Supp. 1169 (M.D. Ala. 1976); *Carr v. Montgomery Cty. Bd. of Ed.*, 289 F. Supp. 647 (M.D. Ala. 1968); *Gomillion v. Lightfoot*, 167 F. Supp. 405 (M.D. Ala. 1958); *Browder v. Gayle*, 142 F. Supp. 707 (M.D. Ala. 1956). He imposed federal mandates on state mental hospitals and state prisons for the treatment of patients and inmates, previously regarded as being the exclusive responsibility of state governments and carved a path toward redefining the relationship between the federal government and the states. He was influential and admired by many but was quite controversial.

10. J.Y. Smith, *Judge Frank M. Johnson Jr. Dies*, WASH. POST (July 25, 1999), [https://www.washingtonpost.com/archive/local/1999/07/25/judge-frank-m-johnson-jr-dies/db3794fd-6ffa-4d1f-9ed2-2de2e813eeaf/?utm\\_term=.696b361f95f9](https://www.washingtonpost.com/archive/local/1999/07/25/judge-frank-m-johnson-jr-dies/db3794fd-6ffa-4d1f-9ed2-2de2e813eeaf/?utm_term=.696b361f95f9).

In current times, among the most notable judges is Judge Jack Weinstein, whose significant, creative, and brave contributions to law and justice have been the subject of various symposia honoring him.<sup>11</sup> Judge Shira Scheindlin is another jurist who demonstrates creativity and courage. In a widely anticipated ruling in 2013, the judge issued a 198-page opinion concluding that the New York City police department's "stop and frisk" program violated the Fourth and Fourteenth Amendments because of the police department's widespread practice, and de facto policy of, making and conducting stops and frisks without reasonable suspicion.<sup>12</sup> The Court imposed somewhat unique and creative remedies to change police practices, including appointing a monitor to oversee a process that involved a broad range of community stakeholders in order to develop reforms.<sup>13</sup>

Professor Roth's article *New Judicial Activism* analyzes the most recent wave of federal judges who take it upon themselves to advance fundamental rights through creative and brave judicial decisions.<sup>14</sup> In addition to Judge Scheindlin, federal judges, such as Jed Rakoff, John Gleeson, Emmett Sullivan, Nancy Gertner, Frederic Block, Nicholas Garaufis, Paul Cassell, and Mark Wolf, make decisions and impose remedies to ensure that the criminal justice system is fair, uphold the constitutional rights of the accused, and demonstrate respect for individuals and for the justice system.<sup>15</sup> They do so within the constraints of their role as judges by providing reasonable resolutions of controversies.<sup>16</sup> As Professor Roth discusses, the last few decades marked a sea of change in federal and state criminal justice systems.<sup>17</sup> Federal courts, reacting in great measure to the shift in power between judges and prosecutors brought about by the 1986 Sentencing Guidelines, slowly began to assume greater responsibility for their sentencing role and exercised discretion in imposing appropriate sentences.<sup>18</sup> Professor

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11. See, e.g., Symposium, *A Roundtable Discussion to Honor One of America's Great Trial Judges on the Occasion of His 80th Birthday*, 12 J.L. & POL'Y 149 (2003).

12. *Floyd v. City of New York*, 959 F. Supp. 2d 540, 560 (S.D.N.Y. 2013).

13. Anil Kalhan, *Stop and Frisk, Judicial Independence, and the Ironies of Improper Appearances*, 27 GEO. J. LEGAL ETHICS 1043, 1068 (2014) (discussing criticism and unfair treatment of Judge Scheindlin by the Second Circuit that the author calls a "perfect storm of procedural irregularity").

14. Jessica A. Roth, *The New District Court Activism in Criminal Justice Reform*, 72 N.Y.U. ANN. SURV. AM. L. 187 (2018).

15. *Id.* at 272-73.

16. *Id.* at 194-95.

17. *Id.* at 228.

18. *Id.* at 221.

Roth also discusses judicial activism in response to over-criminalization and to the hundreds of wrongful convictions.<sup>19</sup> Many judges, including those identified by Professor Roth, are willing to acknowledge that the criminal justice system's quest for fairness is often at odds with reality.<sup>20</sup>

Criminal justice reform is often noted as *the* civil rights issue in current times.<sup>21</sup> The United States' system of "mass incarceration," and its intersection with race and poverty, continues to receive significant and ongoing attention.<sup>22</sup> Many stakeholders, including lawyers, policymakers, nonprofit organizations, governments, both local and federal, and the public, have identified numerous reasons for the significant increases in the United States jail and prison populations and have offered various comprehensive policies and programs to address mass incarceration.<sup>23</sup> These efforts to reform the criminal justice system focus on pretrial detention, sentencing disparities, alternatives to incarceration, increased consideration of collateral consequences in charging and sentencing, as well as increased attention towards implicit bias and how it affects decision-making.<sup>24</sup> The core of this work is primarily in state criminal justice systems because more than 90% of criminal cases are adjudicated in state and local courts.<sup>25</sup> But within the federal system, the judges in Professor Roth's article follow in the tradition of Judges Frank Johnson, Damon Keith, Julius Waties Waring, and others, by providing creative remedies in their judicial opinions to address criminal justice reform.<sup>26</sup>

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19. *Id.* at 198-99.

20. *Id.* at 254-55; Lisa Foster, *Judicial Responsibility for Justice in Criminal Courts*, 46 HOFSTRA L. REV. 21, 23 (2017).

21. Comprehensive Criminal Justice Reform Must Include Both Front End and Back End Reform, THE LEADERSHIP CONFERENCE ON CIVIL & HUMAN RIGHTS (Oct. 4, 2017), <https://civilrights.org/comprehensive-criminal-justice-reform-must-include-front-end-back-end-reform/> [<https://perma.cc/HH7G-RDYT>].

22. *Id.*

23. *Id.*

24. Susan Klein & Ingrid Grobey, *Debunking Claims of Overcriminalization of Federal Law*, 62 EMORY L. J. 1, 50 (2012).

25. *Id.* at 27.

26. See Roth, *supra* note 14; see also *Browder v. Gayle*, 142 F. Supp. 707 (M.D. Ala. 1956) (Johnson, J.); *Gomillion v. Lightfoot*, 167 F. Supp. 405 (M.D. Ala. 1958) (Johnson, J.); *United States v. Sinclair*, 321 F. Supp. 1074 (E.D. Mich. 1971) (Keith, J.); *United States v. Dossie*, 851 F. Supp. 2d 478, 484 (E.D.N.Y. 2012) (Gleeson, J.); *Floyd v. City of New York*, 959 F. Supp. 2d 540, 560 (S.D.N.Y. 2013) (Scheidlin, J.); RICHARD GERGEL, UNEXAMPLED COURAGE: THE BLINDING OF SGT. ISAAC WOODARD AND THE AWAKENING OF PRESIDENT HARRY S. TRUMAN AND JUDGE J. WATIES WARING (2019). Of course, one could ask why it took so many years for judges to act and not simply defer to legislatures or other courts. Problems in the

Beyond judicial opinions, judges such as Judge Jed Rakoff engage in public advocacy by giving speeches and writing editorials in magazines and journals. Judge Rakoff famously said that judges have the responsibility to end mass incarceration.<sup>27</sup> Such commentary outside of judicial opinions is not a new phenomenon. In a 1997 article, former Chief Judge Judith Kaye of the New York Court of Appeals noted that Justice Oliver Wendell Holmes gave an hour-long interview to a reporter about a recent opinion, and that Justice John Marshall published several rebuttals to criticisms of *McCullough v. Maryland*.<sup>28</sup> Over the years, many Supreme Court justices have given speeches and have made public pronouncements in order to advance civil and constitutional rights.<sup>29</sup> In recent times, Justice Scalia's speeches before the Federalist Society, and at numerous events, have been credited with sparking the current

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criminal justice system have been well known for many years and federal judges have significant power to address many concerns, but they do not. They may often agree that change is essential, but that "their hands are tied." A key example is *Strickland v. Washington*, a case that set the standard for reversal of a conviction for ineffective assistance of counsel. 466 U.S. 668 (1984). It requires a demonstration that the lawyer's performance fell below the standard of reasonably competent counsel and that, "but for" that performance, the result would be different. *Id.* It is well known that the second prong, the prejudice prong, contributes to affirming faulty convictions of the innocent. Adele Bernard, *Ineffective Assistance of Counsel and the Innocence Revolution*, WRONGFUL CONVICTIONS AND THE DNA REVOLUTION: TWENTY-FIVE YEARS OF FREEING THE INNOCENT 226 (Daniel Medwed ed., 2017). District courts could begin to address modification of the prejudice prong to pave the way for the Supreme Court review.

27. 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/XM9F-8KXB>].

28. Judith S. Kaye, *Safeguarding a Crown Jewel: Judicial Independence and Lawyer Criticism of Courts*, 25 HOFSTRA L. REV. 703, 714-15 (1997).

29. The examples are far too numerous to recount. Sterling Harwood, *Judicial Activism: A Restrained Defense* 113-17 (Rev. Ed. 1996) (labeling certain jurists as "activists," including Supreme Court Justices John Marshall, Hugo Black, Benjamin Cardozo, Warren Burger, William O. Douglas, Thurgood Marshall, William Brennan, Harry Blackmun, and in some areas, William Rehnquist); Jed S. Rakoff, U.S. Dist. Judge, S.D.N.Y., *Mass Incarceration and the "Fourth Principle,"* Speech at Harvard Law School (Apr. 10, 2015) (transcript available at <https://bol.bna.com/judge-rakoff-speaks-out-at-harvard-conference-full-speech/> [<https://perma.cc/9T6H-7YUK>]); 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) (interview with Judge Mark Bennett of Iowa); Carrie Johnson & Marisa Penalzoza, *Judge Regrets Harsh Human Toll of Mandatory Minimum Sentences*, NAT'L 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).

wave of judicial speeches outside the courtroom.<sup>30</sup> Justice Sotomayor has traveled around the country speaking to a wide range of audiences, and a recently-released film about Justice Ginsburg, the “Notorious RBG,” includes commentary from the Justice about a range of issues, notably sexism by her “brethren.”<sup>31</sup> District and appellate court judges have been slow to follow the lead of the public presence of Supreme Court justices. But public commentary by lower court federal judges is on the rise, in great measure because of the lead set by the Supreme Court. Most recently, Judge Frederic Block, citing instances of intentional misconduct by prosecutors that resulted in criminal convictions for innocent people, called for an end to prosecutorial immunity in a post on the Marshall Project.<sup>32</sup> Nevertheless, most judges are still reluctant to step outside the perceived boundaries of their role.<sup>33</sup>

These judges, whose decisions, speeches, and writings address the difficult issues of the day, represent a small minority of the nearly 700 federal district court judges. They are willing to step outside the safety of the narrow view of their role, at the risk of significant public criticism, threats, and other unwelcome consequences. These judges act well within their authority, yet few federal court judges follow their lead.

Many years ago, Judge Frank Johnson said in defense of promoting civil rights, “Judicial activism is a duty—not an intrusion.”<sup>34</sup> Despite such commentary, the majority of federal district court judges do not follow suit. This essay asks: Why don’t all federal district court judges engage in such action? After all, they have lifetime tenure and can therefore afford to be bold and carry out a broad

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30. Jeffrey Rosen, *Packing the Courts*, N. TIMES (May 10, 2013), <https://www.nytimes.com/2013/05/12/books/review/the-federalist-society-by-michael-avery-and-danielle-mclaughlin.html> [https://perma.cc/JQU5-VKN2] (reviewing MICHAEL AVERY & DANIELLE McLAUGHLIN, *THE FEDERALIST SOCIETY: HOW CONSERVATIVES TOOK THE LAW BACK FROM LIBERALS* (2013)); Jonathan Turley, Opinion, *Justice Scalia is a Political Popstar – and That’s Bad for the Supreme Court*, WASH. POST (Jan. 21, 2011, 7:00 PM), <http://www.washingtonpost.com/wp-dyn/content/article/2011/01/21/AR2011012102923.html>.

31. Ryan Reed, *Watch Ruth Bader Ginsburg Talk Sexism, Equality in New Doc Trailer*, ROLLING STONE (Mar. 7, 2018, 9:49 PM) <https://www.rollingstone.com/movies/news/ruth-bader-ginsburg-reflects-on-gender-equality-in-new-doc-w517572> [https://perma.cc/NG6S-9EMX].

32. Fredric Block, *Let’s Put an End to Prosecutorial Immunity*, MARSHALL PROJECT (Mar. 13, 2018 10:00 PM), <https://www.themarshallproject.org/2018/03/13/let-s-put-an-end-to-prosecutorial-immunity> [https://perma.cc/95UW-QW9L].

33. *Id.*

34. Frank M. Johnson, Jr., *Judicial Activism Is a Duty—Not an Intrusion*, 16 JUDGES’ J. 3, 4 (1977).

view of justice. This essay calls for an “Engaged Judge” model and examines the various factors that prevent many judges from acting in such fashion. It concludes that judicial philosophy, distinctions between law and politics, individual personalities, and a range of other factors affect the willingness of judges to adopt a bold view of their role.

### THE ENGAGED JUDGE MODEL

Professor Jessica Roth identifies the judges who adopt a broader view of their role as “new activists” despite her hesitation about using the term “activist.”<sup>35</sup> Currently, activism is a loaded and pejorative term, implying that a judge follows a certain political or ideological agenda and shapes decisions to fit that agenda, no matter what the law says.<sup>36</sup> Furthermore, the term “new activist” has become primarily associated with Cass R. Sunstein’s use of the term to describe a specific group of conservative federal judges, in his book *Radicals in Robes*.<sup>37</sup> Under the “veil of law” and a claim of a return to the original Constitution, Sunstein’s “new activist” judges have transformed constitutional rights and rendered numerous citizens’ claims nonjusticiable.<sup>38</sup> These “new activist” judges purport to revere history, and sometimes they are faithful to it. But, all too often, they read the Constitution in a way that fits their political views.<sup>39</sup> Sunstein and others argue that these justices are the “activist” judges and that President Trump’s appointees to the federal bench are likely to fit within this mold of activism.<sup>40</sup> Thus, while the term “activist” can be used to describe judges who engage in criminal justice and civil rights reform, it can also be used to describe judges who make determinations based upon partisanship.

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35. Roth, *supra* note 14 at 190 (noting that “activists” is often used to disparage an opinion a commentator disagrees with).

36. *Id.* But the term “activism” actually refers to the mindset of the judge more than the nature of the opinion itself. These often overlap but it should not be presumed that these are synonymous.

37. CASS R. SUNSTEIN, *RADICALS IN ROBES: WHY EXTREME RIGHT-WING COURTS ARE WRONG FOR AMERICA* (2005).

38. *Id.*

39. *Id.* at xiv.

40. *Id.*; See also Jason Zengerle, *How the Trump Administration is Remaking the Courts*, NY TIMES MAG. (Aug. 22, 2018); Donald Trump’s administration had 2 Supreme Court, 30 appellate court and 53 District court Judges confirmed. As of January 2, 2019, 70 additional judicial nominations are pending. The process has been conducted in close concert with the Federalist Society. Jason Zengerle, *How the Trump Administration Is Remaking the Courts*, NY Times (Aug. 22, 2018), <https://www.nytimes.com/2018/08/22/magazine/trump-remaking-courts-judiciary.html>.

Ultimately, few judges think of themselves as activists and many judges despise the term.<sup>41</sup> I suggest that given the ambiguity and controversy surrounding the term “activist,” the judicial aspiration should be that of the “Engaged Judge”—that is, a judge who acts in the best traditions of the role by engaging in creative and often bold solutions in order to advance a “justice mission.” That “justice mission” is to acknowledge that the constitution is a living, breathing document that must be interpreted to promote civil and constitutional rights and fairness to all. The contours of such a mission are subject to challenge for being overbroad and without clear focus, but the longstanding views of scholars, such as Laurence Tribe, provide its contours.<sup>42</sup> Although this “justice mission” will be subject to ongoing controversy, this essay is premised upon a belief that all judges should aspire toward this form of judicial engagement in carefully restrained contexts, both in judicial opinions and, in a more limited fashion, in public discourse outside of the courtroom. The term “Engaged Judge” does not include judges who substitute their own morality for the law or “result-oriented judging by tailoring legal principle to fit the judge’s prior convictions about how he wants the case to come out.”<sup>43</sup>

Engaged decision-making in criminal matters is essential for many aspects of a case, including pretrial detention, plea-bargaining, and discovery practices. It is noteworthy that state court judges in jurisdictions around the country have undertaken such an engaged role in individual cases and have influenced changes in their states’ respective criminal justice systems.<sup>44</sup> The majority of federal

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41. STERLING HARWOOD, *JUDICIAL ACTIVISM: A RESTRAINED DEFENSE* 47-52 (rev. ed. 1996) (providing quotations from various judges who disdain the term activist).

42. See Laurence H. Tribe, *Bush v. Gore and Its Disguises: Freeing Bush v. Gore from Its Hall of Mirrors*, 115 HARV. L. REV. 170, 300-01 (2001).

43. David Luban, *Judicial Activism vs. Judicial Restraint: A Close Look at the Bork Nomination*, 7 PHIL. & PUB. POL. QUART. 4, 10 (1987); CHARLES GARDNER GEYH, *WHAT’S LAW GOT TO DO WITH IT?* 4 (2011).

44. Greg Berman & John Feinblatt, CENTER FOR COURT INNOVATION, *JUDGES AND PROBLEM-SOLVING COURTS 1* (2002), <https://www.courtinnovation.org/sites/default/files/JudgesProblemSolvingCourts1.pdf> [<https://perma.cc/F6CR-ZM8Q>] (documenting the “growing number of judges around the country [who] have begun to test new ways of doing justice, re-engineering the ways that state courts address such everyday problems as mental illness, quality-of-life crime, drugs and child neglect. These innovators are united by a common belief: that judges have an obligation to attempt to solve the problems that bring people to court, whether it be as victims, defendants, litigants or witnesses.”). A recent symposium, *Judicial Responsibility for Justice in Criminal Courts*, promoted the best practices of courts around the country that have engaged in a judicial mission to change and improve the quality of justice delivered in state criminal courts. Symposium, *Judicial Respon-*

court judges are more moderate and cautious,<sup>45</sup> a phenomenon that cannot be wholly explained by the fact that most state court judges are elected and federal judges are appointed.<sup>46</sup>

Sentencing in criminal cases is another context in which judges should act as Engaged Judges and should utilize their discretion to impose a sentence that the court believes to be fair. Sentencing is quintessentially a judicial function, bounded as it is by the Sentencing Guidelines.

Beyond issues pertaining to the criminal justice system, judges should be ardent protectors of individuals' constitutional rights. This is, perhaps, the primary context for the Engaged Judge model. Issues arising under common law and certain other legal matters may call for less judicial engagement because there is less room to exercise discretion. But, as Ronald Dworkin has argued, the "difficult clauses of the Bill of Rights" are ripe for judicial interpretation.<sup>47</sup> Consequently, the broader context of constitutional and civil rights is where the Engaged Judge model should predominate.<sup>48</sup> Judges, legal scholars, historians, political scientists, and philosophers have long debated the fundamental and varied reasons why such engagement is essential to preserving and expanding democracy.<sup>49</sup> Consequently, the broader context of constitutional and civil rights is where the Engaged Judge model should predominate. Assuming that a significant number of federal judges may believe that the judiciary is tasked with preserving and expanding democracy, why do so few act upon it?

#### FACTORS COUNSELING AGAINST JUDICIAL ENGAGEMENT

One of the most prevalent reasons why the majority of judges cannot be described as "Engaged Judges" is judicial philosophy. For all judges, the overriding concern is, of course, maintaining the respect for the judiciary. Thus, the bedrock of judicial ethics is dignity, impartiality, and independence, because these principles preserve the public's trust in the judiciary.<sup>50</sup> These principles are

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*sibility for Justice in Criminal Courts*, 46 HOFSTRA L. REV. 21 (2017). These state courts presume the judicial "activist" posture that is controversial in federal courts. *Id.*

45. See CASS R. SUNSTEIN ET AL., ARE JUDGES POLITICAL: AN EMPIRICAL ANALYSIS OF THE FEDERAL JUDICIARY (2007) (exploring factors driving federal judiciary decision-making).

46. U.S. Const. art. II, § 2, cl. 2.

47. Ronald Dworkin, TAKING RIGHTS SERIOUSLY 147 (1978).

48. Roth, *supra* note 14, at 252.

49. Greg Jones, *Proper Judicial Activism*, 14 REGENT U. L. REV. 141, 168 (2001).

50. *See id.*

essential to maintaining the rule of law and for protecting individual rights in a democracy.<sup>51</sup> In order for judges to maintain independence and impartiality, they must be perceived to adjudicate matters based upon an application of what is viewed as “law” to the facts presented and not based upon ideological or personal perspectives. “Judges have no weapons, no armies. They depend on their moral authority.”<sup>52</sup> If the public believed that judicial outcomes are not the result of independent and impartial reasoning, and thus are not objective resolutions, judicial opinions would lose their moral authority. Respect for the independence of the judiciary may rest upon an unacknowledged slender reed of trust, and judges, well aware of the tenuous nature of public trust, may resist the Engaged Judge model for fear that they will be perceived as partisan, rather than as objective adjudicators.

The quest to maintain judicial independence and impartiality is closely related to another rationale for why judges may avoid adopting the Engaged Judge model: the desire to maintain the distinction between law and politics. A judge who adopts a broad view of her role and expresses her views about a particular matter may be concerned that she will be perceived as acting akin to a politician, who is seeking to achieve a specific goal, rather than as a fair adjudicator.

The extent that this concern plays a significant role in judicial opinions is unclear. Political scientists and legal scholars have studied and opined about judicial decision-making for decades. Recent empirical research finds that the influences on judicial decision-making are “complex and multivariate.”<sup>53</sup> This literature examines various models of judicial decision-making, all of which point to mixed motives for the court’s opinions. Judicial philosophy is one of many variables.

The belief that judges merely follow the “law” was the predominate theory of judicial decision-making for many years. This theory was derived from the formalist view of the role and operation of the law, which was known as the “legal model.” The legal model posited that judges “bracketed out extraneous influences on their decision-making . . . to base their decisions upon applicable facts and law.”<sup>54</sup> The notion was that judges decide cases solely in accordance with legal rules that are uncontroversial principles.

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51. *See id.*

52. Mark Alcott, *Defending Judges, Standing Up for the Rule of Law*, 90 N.Y. ST. B. ASS’N J. 20, 20 (2018).

53. Geyh, *supra* note 43 at 4.

54. *Id.*

Flaws in the logic of the legal model became apparent because, for example, “[s]tatutes and constitutions are riddled with ambiguous language.”<sup>55</sup> Over time, the legal realist movement debunked formalism (and, thus, the legal model) and scholars acknowledged that judges use what are considered “extralegal factors,” such as a judge’s own ideology and personal characteristics in deciding cases.<sup>56</sup> Legal scholars worked with behavioral psychologists and developed an “attitudinal model” of decision making.<sup>57</sup> Its premise is that when judges say that they are merely following the law, the reality is that their decisions are actually influenced by their individual attitudes or ideological views. This attitudinal model was challenged, in turn, by the “strategic choice model.” This model theorized that judges seek to have their policy views implemented and recognize that this can only be accomplished with the support of other institutional actors.<sup>58</sup> Thus, judges’ opinions are strategic to accomplish long term policy goals. In other words, as Charles Gardner Geyh notes, judges’ “impulse to act upon their attitudes is tempered by savvy for the politically possible.”<sup>59</sup>

Other theories of judicial decision-making abound. For example, some social psychologists argue that judges are driven by social acceptance and thus judicial decision-making is driven by the audiences that a particular judge seeks to convince or impress—i.e., fellow judges, higher courts, the bar, the public, or the media.<sup>60</sup> Another model, the economic model, suggests that judges are self-interested and seek to maximize their power, prestige, influence, income, and leisure. Thus, some judges may structure their decisions to increase their appointment to higher office.<sup>61</sup>

Perhaps the most cogent view explaining judicial decision-making is Judge Richard Posner’s view that judges are pragmatists; that is, they balance their discretion with pursuing traditional legal model

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55. Stefanie A. Lindquist & David E. Klein, *The Influence of Jurisprudential Considerations on Supreme Court Decisionmaking: A Study of Conflict Cases*, 40 L. & SOC’Y REV. 135, 137 (2006).

56. Frank B. Cross, *Law Is Politics*, in WHAT’S LAW GOT TO DO WITH IT? 92, 93 (Charles Gardner Geyh ed., 2011).

57. Geyh, *supra* note 43, at 5.

58. Virginia A. Hettinger et al., *Comparing Attitudinal and Strategic Accounts of Dissenting Behavior on the U.S. Courts of Appeals*, 48 AM. J. OF L. & POL. 1 (2004); THOMAS H. HAMMOND ET AL., STRATEGIC BEHAVIOR AND POLICY CHOICE ON THE U.S. SUPREME COURT (2005).

59. Geyh, *supra* note 43, at 2.

60. LAWRENCE BAUM, JUDGES AND THEIR AUDIENCES: A PERSPECTIVE ON JUDICIAL BEHAVIOR, 21-24 (2006).

61. Geyh, *supra* note 43, at 3.

standards.<sup>62</sup> The pragmatist judges seeks the “best” outcome which is a combination of common sense, respect for precedent, and an appreciation of society’s needs.<sup>63</sup>

Needless to say, these varied theories do not provide a consensus that explains how and why judges decide cases as they do and why certain judges tend to be engaged judges or speak out more than others. But this research clearly demonstrates that external factors, in addition to “law,” play a role in judicial decision-making. Furthermore, these competing models are intertwined with an effort to discern what judges mean by law and how law differs from politics and political decisions. This fundamental issue—how is law different from politics—drives a good deal of the scholarly discussion about the role of judges and the perspectives of members of the judiciary. Scholars acknowledge that law cannot readily be separated from politics because politics is the “art and science of government” and the judiciary is a part of the government.<sup>64</sup> As Judge Posner noted, “law is shot through with politics.”<sup>65</sup> And other scholars note that “[b]ecause the judicial system is part of our government, it is a central part of our politics.”<sup>66</sup>

The relationship between law and politics is blurry and often context-dependent.<sup>67</sup> Laws are often written broadly so that discretion is inevitable. Consequently, ideological or other influences are embedded in judicial decision-making.<sup>68</sup> But, acknowledging that the exercise of judicial discretion has political aspects does not infer that judges lack independence, nor does it diminish the importance of adjudicating disputes based on “law.” This is because judges are a different kind of “political” than legislators, and their decisions are subject to different constraints. So long as the judge exercises discretion within a reasonable range as defined by rules and norms of the courts and decides the case based on applying the

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62. RICHARD A. POSNER, *HOW JUDGES THINK* 230 (2008).

63. Geyh *supra* note 43, at 105-06.

64. Cross, *supra* note 56, at 91.

65. Posner, *supra* note 62, at 9.

66. Cross, *supra* note 56, at 92-93. Some argue that law is simply a subset of politics, that is, law incorporates room for judicial discretion and the discretion judges engage in is influenced by their political ideology. In such case, judicial discretion permits judges to be pragmatic and make decisions they believe to be sound.

67. See Baum, *supra* note 60, at 118-27 (arguing that law and policy are too intertwined to disentangle and to attempt to do so is misdirected).

68. See Stephen B. Burbank, *On the Study of Judicial Behaviors: Of Law, Politics, Science, and Humility*, in *WHAT’S LAW GOT TO DO WITH IT?* (Charles Gardner Geyh ed., 2011).

law to the facts, the judge acts within the scope of his or her authority. A judge's decision may advance a particular ideological commitment, but adjudicating a dispute is a presumptively fact-driven evaluation. Ultimately, what matters, or should matter, is "whether implementing an ideological preference is the judge's conscious motive or is simply a subconscious effect of decision-making."<sup>69</sup>

Thus, a judge can write or speak out about an issue as long as the expression of that view does not determine the outcome of the case. For example, if the law is clear, judges are duty-bound to follow precedent. Judges may express their disagreement with applicable precedents, but they are nevertheless required to uphold these precedents. Famously, in the antislavery cases noted by Professor Roth, judges made plain their personal views about the abhorrence of the fugitive slave laws, but nevertheless followed the law.<sup>70</sup> In one of the more remarkable judicial speeches, Judge Joseph Rockwell Swan enforced fugitive slave laws even as he advocated against them:

As a citizen I would not deliberately violate the Constitution or the law by interference with fugitives from service; but if a weary, frightened slave should appeal to me to protect him from his pursuers, it is possible I might momentarily forget my allegiance to the law and the Constitution and give him a covert from those who were upon his track. There are, no doubt, many slaveholders who would follow the impulses of human sympathy; and if I did, and were prosecuted, condemned and imprisoned, and brought by my council before this tribunal on a habeas corpus, and were there permitted to pronounce judgment in my own case, I trust I should have the moral courage to say, before God and country, as I am now compelled to say, under the solemn duties of a judge, bound by my official oath to sustain the supremacy of the Constitution and the law, **THE PRISONER MUST BE REMANDED.**<sup>71</sup>

More recently, Judge Jack B. Weinstein defended the "unredeemable" even though he was required to send them to prison.<sup>72</sup> Case law is replete with such cases.<sup>73</sup>

There is certainly a consensus that the lack of fidelity to existing law and the tailoring of judicial decisions to a judge's ideolog-

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69. Geyh, *supra* note 43, at 5.

70. Roth, *supra* note 14, at 229.

71. *Ex Parte Bushnell*, 9 Ohio St. 77, 188-89 (1859).

72. Alan Feuer, *This Judge Defends 'Unredeemables' Even as He Sends Them to Prison*, NY TIMES (Dec. 8, 2017), <https://www.nytimes.com/2017/12/08/nyregion/this-judge-defends-unredeemables-even-as-he-sends-them-to-prison.html>.

ical convictions are outside the bounds of acceptable judicial decision-making. But in many cases, laws are ambiguous, and judges are required to exercise discretion in interpreting the ambiguous language. This is where judicial philosophy matters. When exercising judicial discretion, the degree to which a judge's individual decision is bound by other factors is often a matter of degree, and "empirical research has clearly demonstrated that judicial ideology is a statistically significant determinant of judicial outcomes."<sup>74</sup>

Judges need to ensure that they do not act akin to politicians by letting political ideologies dictate the outcome of cases. But judges may state their opinion about a law, as exemplified by Judges Swan and Weinstein, without crossing the law-versus-politics boundary. Furthermore, when judges exercise discretion they must do so within the confines of applicable constraints. If done properly, opining about social issues and exercising judicial discretion do not undermine impartiality and independence. Nevertheless, the vast majority of judicial decisions are confined to the discussion of legal principles and existing law, even though empirical data establishes that individual judicial proclivities play an important role when the law is less determinate. A key example is that after the Sentencing Guidelines provided clarity, inter-judge variations in sentencing dropped because judges were required to follow the guidelines, even though many judges disagreed with the Sentencing Guidelines.<sup>75</sup> Expressing a viewpoint about the Sentencing Guidelines would not undermine a judge's objectivity in applying the guidelines, but the perceived need to maintain the veil that outcomes are driven solely by "law" prevails. Legitimacy is perceived to depend upon it. This perception influences judicial philosophy and may weigh against "judicial engagement."

In addition to judicial philosophy and the need to maintain the distinction between law and politics, judges may avoid becoming "Engaged Judges" because of their personalities. Judges are a particularly cautious group. Judges are people who have "perfected the art of avoiding controversy."<sup>76</sup> As former Judge Nancy Gertner candidly acknowledges, judges are timid and driven more by calen-

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73. For example, Bernard Meyer wrote an extraordinary opinion in *Engel v. Vitale*. 191 N.Y.S.2d 453 (1959). See David M. Schimmel, *The Battle over School Prayer: How Engel v. Vitale Changed America*, 116 Am. J. Educ. 453, 455 (2010).

74. Cross, *supra* note 56, at 92.

75. Cross, *supra* note 56, at 110.

76. Nancy Gertner, *Opinions I Should Have Written*, 110 N.W. U. L. Rev. 423, 432 (2016).

dar control than fairness. “The notion is to decide matters as narrowly as possible . . . .” Such a cautious approach may enhance judges’ reputations and the role of the courts.<sup>77</sup>

Of course, in addition to judicial philosophy, personality, and other factors, a judge’s predisposition toward the facts may be determinative in a case. Credibility evaluation of witnesses is affected by a judge’s background, personality, and various individual factors. As an anonymous district court judge said: “Give me some ambiguous facts and I will tell you what the justice is.” Most judges, however, are not this forthcoming or do not adopt a similar view. It is unclear whether individuals with cautious temperaments are more likely to pursue a career as a judge, or whether restrained decision-making is a byproduct of the role of being a judge. Nevertheless, the judiciary is not the home of changemakers.

Unlike the majority of federal judges, Engaged Judges are not afraid to express their viewpoints about social issues and help advance social change. Their individual reward systems play a significant role in their approaches to judicial decision-making. For example, Judge Weinstein, who serves as perhaps the iconic and legendary Engaged Judge, does what he considers the right thing, no matter the consequences. He notes that virtue is its own reward.<sup>78</sup> Many Engaged Judges seemingly appear to adopt this perspective and exercise discretion as they deem necessary and appropriate.<sup>79</sup> They are not the judges, described by former Judge Gertner, who seek to duck, evade, or avoid deciding cases. Engaged Judges are willing to take positions and speak out, even at the risk of reversal or public disapproval. Even though others may view these judges as pathbreakers, for better or worse, Engaged Judges believe that they are doing justice. For example, Judge John Coughenour of the Western District of Washington, who presided over the trial of the Ahmed Ressam, the “Millennium Bomber,” sentenced him to twenty-two years.<sup>80</sup> During Ressam’s sentencing, Judge Coughenour, a Reagan appointee, made an emotional speech unleashing “a broadside against secret tribunals” and other war on terrorism tactics that abandoned “the ideals that set our na-

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77. *Id.*

78. Arnold H. Lubasch, *Jack Weinstein: Creative U.S. Judge Who Disdains Robe and High Bench*, NY TIMES (May 28, 1991), <https://www.nytimes.com/1991/05/28/nyregion/jack-weinstein-creative-us-judge-who-disdains-robe-and-high-bench.html>.

79. In part, this may be that these judges do not seek to, or they recognize that they will not, be appointed to the appellate bench.

80. *U.S. v. Ressam*, No. CR99-666C-001, 2005 Westlaw 6582294 (W.D. Wash. 2005).

tion apart.”<sup>81</sup> The sentence issued by Judge Coughenour was ultimately reversed and remanded by the Ninth Circuit because, under the Sentencing Guidelines, Ressam should have received at least sixty-five years. On remand, Judge Coughenour again imposed a sentence of twenty-two years to the ire of the government.<sup>82</sup> The sentence was appealed and remanded for a second time, and this time the case was remanded to a different judge for resentencing.<sup>83</sup> While Judge Coughenour’s initial sentence did not stand, his critique of secret tribunals endured because he was willing to assert his independence despite the Circuit Court’s disapproval.

Similarly, Judge Shira Scheindlin, in a much-criticized series of actions by the Second Circuit, was removed from the “stop and frisk” case, ostensibly for improper application of a “related case” rule and because of a series of newspaper articles that were not even in the record before the Second Circuit.<sup>84</sup> The Second Circuit opined that interviews she gave to the media, even though they did not discuss the case, cast doubt upon her impartiality.<sup>85</sup> The case was perceived to be a political football, with the New York City Mayor’s Office and its counsel consistently casting aspersions on the judge.<sup>86</sup> Judge Scheindlin, with support of counsel and various lawyers and law professors, clashed with the Circuit over its findings and remedy.<sup>87</sup> She remained an Engaged Judge.

Justice, not mere “law,” drives the decisions of Engaged Judges. But these judges do not rule based on ideology alone. Their deci-

81. Hal Bernton & Sara Jean Green, *Ressam Judge Decries U.S. Tactics*, SEATTLE TIMES (July 28, 2005), [https://web.archive.org/web/20070101213103/http://seattletimes.nwsour.com/html/localnews/2002406378\\_ressam27m.html](https://web.archive.org/web/20070101213103/http://seattletimes.nwsour.com/html/localnews/2002406378_ressam27m.html) [<https://perma.cc/333S-8BZ5>]. Judge Coughenour then wrote an op-ed criticizing former judge and Attorney General appointee Michael Mukasey’s view that the U.S. Courts are not a safe and proper forum in which to try terrorism cases. See John C. Coughner, *How to Try a Terrorist*, NY TIMES (Nov. 1, 2007), <https://www.nytimes.com/2007/11/01/opinion/01coughenour.html>.

82. Kirk Johnson, *New Sentence is Imposed in Bomb Plot from 1999*, NY TIMES (Oct. 24, 2012) <https://www.nytimes.com/2012/10/25/us/millennium-bomber-sentenced-to-37-years-in-prison.html>.

83. *U.S. v. Ressam*, 679 F.3d 1069 (9th Cir. 2012).

84. *Ligon v. New York City*, 538 F. App’x. 101 at 102-03 (2d Cir. 2013).

85. *Id.*

86. Benjamin Weiser, *Shira Scheindlin, Judge Behind Stop-and-Frisk Ruling, Will Step Down*, NY TIMES (Mar. 23, 2016) <https://www.nytimes.com/2016/03/24/nyregion/shira-scheindlin-judge-behind-stop-and-frisk-ruling-will-step-down.html>.

87. Benjamin Weiser, *Departing Judge Offer Blunt Defense of Ruling in Stop-and-Frisk*, NY TIMES (May 2, 2016) <https://www.nytimes.com/2016/05/02/nyregion/departing-judge-offers-blunt-defense-of-ruling-that-ended-stop-and-frisk.html>.

sions are well-reasoned and are based on law.<sup>88</sup> They maintain judicial independence and act impartially while also advancing their justice missions.

### JUDICIAL ENGAGEMENT THROUGH PUBLIC DISCOURSE

Judges also have the opportunity to effectuate change through their role as public figures. While judges often speak outside the courtroom, at conferences and at other professional events, most of these talks do not involve advocacy of particular causes or positions. For example, Judge Learned Hand often gave talks, but most of his talks were about judicial restraint and not advocacy of various positions. Aside from certain restrictions, such as the prohibition against commentary in pending and impending cases,<sup>89</sup> a judge's role does not prevent engagement in the causes and controversies of the day. For example, Judge Louis Pollak made numerous speeches and participated on panels about issues of importance, including the role of religion and religious institutions in public life.<sup>90</sup> Furthermore, judges who are locally elected often run for reelection based upon their previous opinions, and their electioneering often consists of speeches advocating for the righteousness of their decisions.<sup>91</sup>

One factor that may deter federal judges from engaging in such advocacy is the concern with the public's perception about the impartiality of judges. But, there is no clarity about the extent to which a judge's public discourse has a harmful effect upon that perception. In fact, such public discourse may enhance the public's

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88. See Frank Sullivan, Nancy Vaidik, & Sarah Evans Barker, Three Views from the Bench, in *WHAT'S LAW GOT TO DO WITH IT?* 328 (Charles Gardner Geyh ed., 2011).

89. MODEL CODE OF JUD. CONDUCT, r. 2.10 ("A judge shall not make any public statement that might reasonably be expected to affect the outcome or impair the fairness of a matter pending or impending in any court, or make any nonpublic statement that might substantially interfere with a fair trial or hearing."); see also *Republican Party v. White*, 536 U.S. 765, 788 (2002) (holding that a Minnesota rule limiting campaign speech violates the First Amendment).

90. See, e.g., Symposium, *Brown v. Bd. of Educ.*, 61 *FORDHAM L. REV.* 19 (1992), <https://ir.lawnet.fordham.edu/cgi/viewcontent.cgi?referer=https://www.google.com/&httpsredir=1&article=2996&context=flr>; Samuel J. Silverman, *Louis H. Pollak*, 127 *U. PA. L. REV.* 311, 311 (1978); Dennis Hevesi, *Louis H. Pollack, Civil Rights Advocate and Federal Judge, Dies at 89*, *NY TIMES* (May 12, 2012), <http://www.nytimes.com/2012/05/13/us/louis-pollak-judge-and-civil-rights-advocate-dies-at-89.html> [<https://perma.cc/UFP2-9AFT>].

91. Melinda Gann Hall, *On the Cataclysm of Judicial Elections and Other Popular Anti-Democratic Myths*, in *WHAT'S LAW GOT TO DO WITH IT?*, 226 (Charles Gardner Geyh ed., 2011).

view about the role of the court and about its independence and impartiality. Judge Jed Rakoff's statement that it is the judiciary's responsibility to end mass incarceration and his various published essays engage and educate the public.<sup>92</sup> Judge Block's recent call to end prosecutorial immunity spotlighted a longstanding and key issue in the country's quest to address wrongful convictions of the innocent.<sup>93</sup> None of these public opinions necessarily have an impact upon any of these judges' ability to be impartial in future cases and to apply facts to law. The type of public advocacy that Judge Rakoff and Judge Block have engaged in does not undermine the public's respect for the judiciary and is consistent with the letter and spirit of the Code of Judicial Conduct.

However, if a vast majority of the federal judiciary consistently gave such speeches and published opinion pieces about their ideological views, the perception of the judicial role is likely to shift. Perhaps it will shift in a positive direction with the public having a greater respect for the judiciary and the role of law, but the fear is otherwise. The judiciary, the bar, and some scholars worry that greater public advocacy will call the judiciary's legitimacy into question.<sup>94</sup>

Of course, one must ask: what is legitimacy, and whose view of legitimacy matters? Legitimacy is the "political capital" that institutions need "in order to be effective to get their decisions accepted by others and be successfully implemented."<sup>95</sup> Respect for the judiciary hinges upon a "veil of law" where the public has a reservoir of good will for the courts because the public believes that the institution has the right to make certain decisions.<sup>96</sup> Courts are generally perceived to be weak institutions because they have neither the power of the sword (police agencies) nor the power of the purse (the treasury).

The core of the judiciary's legitimacy is the judiciary's social contract with the public. In accordance with this social contract, the

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92. Joel Cohen, *Do Judges Contribute To Injustices? A Conversation with Judge Jed Rakoff*, ABA JOURNAL (April 13, 2017) [http://www.abajournal.com/news/article/judge\\_jed\\_rakoff\\_joel\\_cohen\\_broken\\_scales](http://www.abajournal.com/news/article/judge_jed_rakoff_joel_cohen_broken_scales) [<https://perma.cc/6N2F-BAD5>].

93. Frederic Block, Opinion, *Prosecutors Aren't Above the Law: Gov. Cuomo Must Sign Legislation Creating an Oversight Commission*, NY DAILY NEWS (July 30, 2018) <http://www.nydailynews.com/opinion/ny-oped-prosecutors-arent-above-the-law-20180726-story.html>.

94. Roth, *supra* note 14.

95. James L. Gibson, *Judging the Politics of Judging: Are Politicians in Robes Inevitably Illegitimate?*, in *WHAT'S LAW GOT TO DO WITH IT?* 281, 283 (Charles Gardner Geyh ed., 2011).

96. Gibson, *supra* note 95, at 283-84.

public trusts the judiciary to rely on its expertise in rendering decisions by carefully considering the facts and applying law to those facts.<sup>97</sup> Thus, the judiciary relies upon the public's perception that courts are fair, impartial, and act in accordance with the rule of law. This perception that judges are impartial is in part dependent upon the view that judges are independent from the political branches of government.<sup>98</sup> However, it is unclear whether the public would in fact lose trust in the judiciary if judges were to engage in advocacy through public discourse.

Typically, the bar and the bench are self-referential and view their own perception of judicial legitimacy as the benchmark for the system's legitimacy. Thus, the aforementioned fear associated with increased judicial public advocacy may reflect judges' views, but the public may believe otherwise. Extensive data reveals that the public has mixed views of judges as arbiters of the law or as political actors influenced by their ideology.<sup>99</sup> Citizens have diverse understandings and expectations of courts that do not mirror the way in which lawyers and judges perceive judicial legitimacy. In a 2006 study, citizens of Kentucky were asked about their expectations of a good Supreme Court justice. The results of this study indicated that the public expected a good judge to protect people without power (72.9% of respondents), strictly follow the law (71.8%), and state policy positions during campaigns (64.2%).<sup>100</sup>

This study demonstrates that citizens have a confused and inconsistent view of judges and their roles. For example, "strictly following the law" is not always consistent with "protecting people without power."<sup>101</sup> Interestingly, these results did not vary based upon the respondents' educational backgrounds or their knowledge about the judicial function.<sup>102</sup> However, one significant variance based on the education level of the respondents was the extent to which judges should be "more than politicians in robes."<sup>103</sup> Respondents with lower levels of education believed that

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97. Gibson, *supra* note 95, at 284.

98. Gibson, *supra* note 95, at 283-84.

99. Keith Bybee, *The Rule of Law is Dead! Long Live the Rule of Law!*, in *WHAT'S LAW GOT TO DO WITH IT?* 306, 307, 312-14 (Charles Gardner Geyh ed., 2011); Gibson, *supra* note 95, at 281.

100. Gibson, *supra* note 95, at 289.

101. *Ex Parte Bushnell*, *supra* note 71; Feuer, *supra* notes 72. Years ago, Judge Rockwell made plain his contempt for fugitive slave laws even though he was constrained to enforce them. Similarly, Judge Weinstein criticized the treatment of an indigent criminal defendant even though he was required to send him to prison.

102. Gibson, *supra* note 95 at 294.

103. *Id.*

judges should represent majority opinions, implement majority ideology, and perhaps reflect their own partisanship.<sup>104</sup> Conversely, respondents with higher levels of education believed that the judiciary is worthy of respect when it exercises discretion in making independent and principled judgments.<sup>105</sup>

Given this important disparity in the respondents' perspectives, disagreement about the effect that public commentary by judges will have on the legitimacy of the judiciary is likely. As scholar James L. Gibson notes, "to the extent that popular confidence in the judiciary is a standard for evaluating the behaviors of judges, we must be aware that the sources of confidence are disparate and perhaps even contested, and that popular and elite expectations of judges may not be consonant."<sup>106</sup> Some citizens may prefer to know a judge's views. Additionally, some citizens may view Judge Judy or similar television personae as the embodiment of a legitimate judge. For some, Judge Judy is the face of the law and she expresses her views clearly.

But "legal elites" perceive independence and impartiality from a different vantage point. "Legal elites" likely believe that if judges were to engage in public advocacy, there will be a tendency for the public to perceive that judges are merely acting as another branch of politics by seeking to implement their political views. Furthermore, "legal elites" likely fear that if lawyers and judges were to explain the nature and process of judicial decision-making, and the effects that various external factors have upon a court's decision, respect for the courts will be eroded. Because "legal elites" have these beliefs and because there is not a clear consensus among citizens, there is not a definitive approach to whether judges should publicly acknowledge their ideological predispositions and views. To some, judges' speeches and articles may promote the long-term legitimacy of the federal judiciary, but to others, judicial public advocacy may produce the opposite effect.

## CONCLUSION

Overall, increased public education about the role of the judiciary is essential. It is important for judges to educate the public about the legal system and the role that the judiciary plays in our democracy. Public awareness about the significant impact judicial decisions can have upon daily lives is essential. Justice Sotomayor's

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104. Gibson, *supra* note 95 at 295.

105. *Id.*

106. Gibson, *supra* note 95, at 299.

numerous talks about the legal system have been inspirational to young and old alike, especially about her background, career, and role on the bench.<sup>107</sup> Judges can also educate the public about the meaning of “impartiality.” Our judicial system is predicated on the notion that judges do not decide cases based upon ideology, but there is little, if any, public acknowledgement that ideology plays a role in decision-making. This lack of public awareness can lead to public cynicism, because the public may believe, upon finding out that ideology does play a role in judicial decision-making, that judges are influenced solely by ideology and are therefore not impartial. Consequently, the public needs to understand the difficult task of judging and the role played by various factors including ideology. Impartiality is not the absence of ideology. It is a recognition that ideology may influence a judge, but that the court is cognizant of that influence and can render a fair decision upon the matters presented, regardless of ideological proclivities.<sup>108</sup>

Beyond public education about the role of courts and judicial decision-making, judges need to carefully evaluate the extent to which they should offer their ideological perspectives. Judges must consider the extent to which public advocacy might be perceived as having an impact upon a future case. Some members of the public may view both Judge Rakoff’s statements about judicial responsibility to end mass incarceration and Judge Block’s opinion piece about prosecutorial immunity, as compromising their independence. Despite the fact that both judges can and would render fair decisions, there may be a perception that they lack impartiality in cases that relate to their public advocacy. This would be unfortunate because their discourses serve an important purpose. Judges should not feel constrained to educate the public, but the decision to do so and the content of the public discourse must be carefully tempered in light of the potential perception that a judge has prejudged a particular matter in accordance with the judge’s viewpoint.

Encouraging a more engaged judiciary in the public sphere is likely to be controversial in the current political and judicial climate. Nevertheless, there is certainly a need to reevaluate the traditional model of discouraging judicial advocacy within and outside

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107. See, *e.g.* Justice Sonia Sotomayor, Associate Justice for the United States Supreme Court, NYU Commencement Speech (May 16, 2012).

108. MODEL CODE OF JUDICIAL CONDUCT Terminology (2011) (defining impartiality as the “absence of bias or prejudice in favor of, or against, particular parties or classes of parties, as well as maintaining an open mind in considering issues that may come before a judge”).

the courtroom. Perhaps the United States has entered a new era where the federal judiciary will be significantly changed and seemingly hopelessly politicized. The cynical and disturbing failure of the Senate to appoint Merrick Garland, by all accounts a fair and open-minded jurist,<sup>109</sup> was shocking. Judge Garland was universally applauded as a person of impeccable integrity and fairness who:

[i]s obviously brilliant but lacks arrogance and that is refreshing. . . . What makes him uniquely well qualified is that he has tried cases both as a prosecutor and as a defense attorney. It is an important qualification for service on the Supreme Court. . . . The fact that Judge Garland has tried cases makes him unique. He writes thoroughly reasoned opinions whether you agree with him or not.<sup>110</sup>

Despite his remarkable qualifications, Senator Mitch McConnell blocked consideration of Judge Garland's nomination.<sup>111</sup> Instead, Leonard Leo, the conservative legal activist who is the executive Vice President of the Federalist Society and an adviser to the Trump Administration on court appointments, led the conservative movement to quickly appoint a stunning number of federal judges, to date: two Supreme Court appointments and eighty-three lower court appointments to the bench of jurists.<sup>112</sup> The conservative movement calls this a "promising reorientation of the judiciary."<sup>113</sup> The American Bar Association ("ABA"), on the other hand, gave four recent federal court nominations an unqualified rating, including Leonard Grasz for the Eighth Circuit.<sup>114</sup> The ABA

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109. Greg Jaffe, *ABA Endorsement Suggests Merrick Garland May Be 'The Perfect Human Being,' Republicans Raise Doubts.*, WASH. POST (June 21, 2016).

110. STATEMENT OF KAROL CORBIN WALKER ON BEHALF OF THE STANDING COMMITTEE ON THE FEDERAL JUDICIARY AMERICAN BAR ASSOCIATION CONCERNING THE NOMINATION OF THE HONORABLE MERRICK B. GARLAND TO BE AN ASSOCIATE JUSTICE OF THE SUPREME COURT OF THE UNITED STATES TO THE COMMITTEE ON THE JUDICIARY UNITED STATES SENATE (June 21, 2016).

111. Charles Homans, *Mitch McConnell Got Everything He Wanted. But at What Cost?*, NY TIMES MAG. (Jan. 22, 2019), <https://www.nytimes.com/2019/01/22/magazine/mcconnell-senate-trump.html>.

112. *The Judicial Puppet Master*, U.S. NEWS (Oct. 27, 2017), <https://www.usnews.com/news/the-report/articles/2017-10-27/leonard-leo-is-calling-the-shots-on-judicial-appointments>; Edward Whelan, *Trump's Stellar Judges*, NAT. REV. (Jan. 22, 2018), <https://www.nationalreview.com/magazine/2018/01/22/trumps-stellar-judicial-nominations/> [https://perma.cc/B5L8-ZQFR].

113. Edward Whelan, *Trump's Stellar Judges*, NAT. REV. (Jan. 22, 2018), <https://www.nationalreview.com/magazine/2018/01/22/trumps-stellar-judicial-nominations/> [https://perma.cc/B5L8-ZQFR].

114. Editorial Board, *Some of Trump's Judicial Nominees May Be Unfit. The Senate is Rushing Them Through Anyway*, WASH. POST (Nov. 8, 2017), <https://>

questioned whether Grasz would follow the law and said that he would be unable “to separate his role as an advocate from that of a judge.”<sup>115</sup> The ABA noted that: “Mr. Grasz’s passionately-held social agenda appeared to overwhelm and obscure the ability to exercise dispassionate and unbiased judgment. In sum, the evaluators found that temperament issues particularly bias and lack of open-mindedness were problematic.”<sup>116</sup>

This is unparalleled. The notion that federal judges will be appointed, who are rated unqualified because they do not follow the law, is disturbing.<sup>117</sup> Fair-mindedness seems to be an unimportant characteristic in today’s political climate, and therefore federal trial courts around the country may become filled with ideologues.<sup>118</sup> Perhaps some of these newly appointed jurists will be more than “radicals in robes,” who alter constitutional values and tradition and uphold the principles of stare decisis. That remains to be seen.

Engaged Judges have played an important role in advancing liberty and equality for all. Furthermore, increased judicial engagement may help the public realize that judicial decisions have important implications for criminal and civil liberties and may garner support for the preservation of these rights.

Overall, the legitimacy of the judiciary and the preservation of the tenuous balance between the branches of government requires the judiciary to reaffirm its commitment to the role of law and to the impartiality of its judges. Within these constraints, judges should adopt the model of the Engaged Judge and promote greater democracy and respect for civil and constitutional rights within

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[www.washingtonpost.com/opinions/many-of-trumps-judicial-nominees-may-be-unfit-the-senate-is-rushing-them-through-anyway/2017/11/08/358ccd50-c4c2-11e7-aae0-cb18a8c29c65\\_story.html?utm\\_term=.ac5425a7bf20](http://www.washingtonpost.com/opinions/many-of-trumps-judicial-nominees-may-be-unfit-the-senate-is-rushing-them-through-anyway/2017/11/08/358ccd50-c4c2-11e7-aae0-cb18a8c29c65_story.html?utm_term=.ac5425a7bf20).

115. SUPPLEMENTAL STATEMENT OF PAMELA A. BRESNAHAN, CHAIR, CYNTHIA E. NANCE, EIGHT CIRCUIT REPRESENTATIVE, AND LAURENCE PULGRAM, NINTH CIRCUIT REPRESENTATIVE ON BEHALF OF THE STANDING COMMITTEE ON THE FEDERAL JUDICIARY AMERICAN BAR ASSOCIATION CONCERNING THE NOMINATION OF LEONARD STEVEN GRASZ FOR THE UNITED STATES COURT OF APPEALS FOR THE EIGHT CIRCUIT SUBMITTED TO THE COMMITTEE ON THE JUDICIARY UNITED STATES SENATE 6 (NOV. 13, 2017).

116. *Id.*

117. See generally Seung Min Kim, *ABA Deems Another Trump Judicial Nominee ‘Non-Qualified’*, POLITICO (Oct. 30, 2017), <https://www.politico.com/story/2017/10/30/aba-trump-judicial-nominee-not-qualified-244327> [<https://perma.cc/4F9B-8D8U>].

118. Erwin Chemerinsky, Opinion, *Many of Trump’s Judiciary Picks Have No Business Being Judges. Can Senate Republicans Say No?* SACRAMENTO BEE (NOV. 20, 2017), <http://www.sacbee.com/opinion/california-forum/article185689663.html> [<https://perma.cc/ED5M-P25D>].

their opinions. Outside of the courtroom, judicial speeches and articles can have immense value, but must be conducted carefully. The judiciary has a critical role to play in enhancing the public's understanding of the judiciary's role and the meaning of impartiality, which affect the public's respect for the judicial system.

# TRACING BLURRED LINES: CATHOLIC HOSPITAL FUNDING AND FIRST AMENDMENT CONFLICTS

*EMILY E. FOUNTAIN\**

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## INTRODUCTION

In his detached memoranda, Founding Father James Madison wrote, “the establishment of the chaplainship in Congress is a palpable violation of equal rights as well as of Constitutional principles. The danger of silent accumulations and encroachments by ecclesiastical bodies has not sufficiently engaged attention in the U.S.”<sup>1</sup> As religion’s role continues to expand beyond the context of didactic instruction and into the broader realm of social services, sometimes with the aid of federal funding, this statement is now both true and false.<sup>2</sup> Over time, courts and scholars alike have

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1. Leonard W. Levy, *THE ESTABLISHMENT CLAUSE: RELIGION AND THE FIRST AMENDMENT* 121 (1994).

2. Religious organizations started receiving federal funds in the 1930s, altering the relationship between church and state and further raising constitutional issues. See Thomas Pickrell & Mitchell Horwich, “*Religion as Engine of Civil Policy*”: A

agreed that some aid to religious organizations is permissible; however, questions of magnitude and form remain in tension with the Free Exercise and Establishment Clauses of the First Amendment.

The Court has held that, at their historic core, the Religion Clauses were designed to prevent states and the federal government from supporting church leaders through funding.<sup>3</sup> However, the debate has evolved far beyond funding clergy, as more and more funds are directed towards social services. The Court refers to the tension as a “play in the joints” between the two clauses in which they believe there to be space for “a benevolent neutrality which will permit religious exercise to exist without sponsorship and without interference.”<sup>4</sup> In so doing, the Court has made note that “in the absence of precisely stated constitutional prohibitions, we must draw lines with reference to the three main evils against which the Establishment Clause was intended to afford protection: sponsorship, financial support, and active involvement in religious activity.”<sup>5</sup>

The parameters of acceptable aid under the Establishment Clause can be viewed through the lenses of direct and indirect aid, with the latter being more permissible and the former being allowed under certain conditions.<sup>6</sup> Whereas direct aid allows the government to provide monetary support to religious institutions and organizations themselves provided that the aid is used for a secular purpose, indirect aid is given first to individuals who then select where to direct the funds.<sup>7</sup> Over the years, the Court has addressed both forms of aid in various contexts, with particular focus on the education sector.

Religious hospitals have, however, been largely left out of the evolving precedent.<sup>8</sup> While one could compare them to parochial

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*Comment on the First Amendment Limitations on the Church-State Partnership in the Social Welfare Field*, 44 LAW AND CONTEMP. PROBLEMS 111, 113 (Spring 1981).

3. See *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S. Ct. 2012, 2023 (2017).

4. *Walz v. Tax Comm'n of N.Y.*, 397 U.S. 664, 669 (1970).

5. *Lemon v. Kurtzmann*, 403 U.S. 602, 612 (1971) (quoting *Walz*, 397 U.S. at 668 (1968)).

6. PEW RESEARCH FORUM, *Shifting Boundaries: The Establishment Clause & Government Funding of Religious Schools & Other Faith-Based Organizations*, in RELIGION & THE COURTS: THE PILLARS OF CHURCH-STATE LAW [hereinafter *Shifting Boundaries*] (2009), <http://www.pewresearch.org/wp-content/uploads/sites/7/2009/05/funding.pdf> [<https://perma.cc/XF85-TRNG>].

7. *Id.*

8. See generally *Bradfield v. Roberts*, 175 U.S. 291 (1899) (discussing the sole Supreme Court case on federal aid to denominational hospitals); see also *Pickrell & Horwich*, *supra* note 2, at 125.

schools, hospitals, in particular Catholic hospitals, raise unique establishment and free exercise problems.

In this Note, I explore the development of Establishment Clause doctrine and the imprecise comparison of religious hospitals to religious schools, focusing in particular on the problems posed by the growing number of Catholic hospitals and the tensions they create in First Amendment jurisprudence. I propose that, to mitigate these tensions, Congress should implement a bifurcated funding structure—similar to the structure currently used to fund legal aid services—in geographic areas where Catholic hospitals serve as the Sole Community Hospital. In so doing, Congress could divert federal and state funds to conduits and avoid the excessive entanglement problems that arise when funds flow directly to religious institutions.

Part I of this paper will discuss the evolution of the Establishment Clause, with a specific focus on its treatment in the context of schools. It will also provide an overview of the precedent relating to direct and indirect aid to religious institutions. Part II will set out the existing structure of federal funding for religious hospitals. Part III will discuss the differences between Catholic hospitals and other religious hospitals and healthcare facilities. Part IV will raise the issue that Catholic hospitals in particular face regarding the Free Exercise Clause. Part V will discuss the conflicts that Catholic hospitals raise in the context of direct and indirect aid. Finally, Part VI will propose a bifurcated funding structure as a means of avoiding the legal issues raised in Parts I-V.

## I.

### THE EVOLUTION OF THE ESTABLISHMENT CLAUSE

One cannot appreciate the full impact of the tension between aid to religious organizations and religious establishment without an understanding of how Establishment Clause doctrine developed and where the law is now. This section traces that development.

#### *A. Maturation of Establishment Clause Jurisprudence*

The Supreme Court first ruled on governmental aid to religious organizations in *Bradfield v. Roberts*, when federal aid to a hospital operated by a Roman Catholic Order was challenged. In *Bradfield*, the Court found that the aid did not violate the Establishment Clause because the hospital was created by an act of Congress with the primary benefit being not one of a sectarian nature, but

rather one of providing secular services to the sick and poor.<sup>9</sup> This ruling, however, was isolated in nature. It was not until 1947 in *Everson v. Board of Education* that a broader rule emerged.

In *Everson*, applying the First Amendment to the states via the Fourteenth Amendment, the Court upheld a generalized state transportation program that allowed parents who sent their children to parochial schools to be reimbursed for the cost of transportation.<sup>10</sup> Finding this program to be neutral and supporting a secular end, the Court took its first step towards acceptance of indirect aid to religious organizations.<sup>11</sup> The Court, however, did caution that the New Jersey Statute approached the boundaries of a state's constitutional power, but ultimately reasoned that the Free Exercise Clause of the First Amendment would not allow for other religious groups to be excluded from such public welfare legislation.<sup>12</sup> This thought articulates the blurring of lines between Religious Establishment and Free Exercise and the push and pull of one against the other. In the cases that followed *Everson* and in the issues still evolving with the growth of social welfare legislation, this tension is paramount.<sup>13</sup>

Twenty-one years passed between *Everson* and the next Supreme Court case regarding public funding to religious institutions in 1968. In the decades that followed, however, the doctrine constantly evolved, chiefly in the context of religious education. With *Everson* as a backdrop, the Court began to rely heavily on the tests of primary effect and secular purpose in justifying aid to religious institutions.<sup>14</sup> For example, in *Board of Education v. Allen*, the Court held that a program allowing local school boards to freely loan textbooks to both public and private schools did not violate the Establishment Clause, despite the majority of the private schools being

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9. *Bradfield*, 175 U.S. at 299-300 (1899) ("The act of Congress, however, shows there is nothing sectarian in the corporation, and 'the specific and limited object of its creation' is the opening and keeping a hospital in the city of Washington for the care of such sick and invalid persons as may place themselves under the treatment and care of the corporation.").

10. See generally *Everson v. Bd. of Educ.*, 330 U.S. 1 (1947).

11. See *Shifting Boundaries*, *supra* note 6, at 11.

12. *Id.* at 7.

13. *Thomas v. Review Bd. of Ind. Emp't Sec. Div.*, 450 U.S. 707, 720-21 (1981) ("Although the relationship of the two Clauses has been the subject of much commentary, the 'tension' is of fairly recent vintage, unknown at the time of the framing and adoption of the First Amendment . . . the growth of social welfare legislation during the latter part of the 20th century has greatly magnified the potential for conflict between the two Clauses . . .").

14. See *Shifting Boundaries*, *supra* note 6, at 7.

Catholic.<sup>15</sup> The Court reasoned that the program advanced the secular purpose of promoting education while having the primary effect of furnishing books for all students, not just those at private Catholic schools.<sup>16</sup>

This *Allen* rationale became the foundation for what would come to be known as the *Lemon* Test—the tripartite test used to determine when a law violates the Establishment Clause.<sup>17</sup> To pass review, the law in question must (1) have a secular purpose, (2) have a predominantly secular effect, and (3) not foster excessive entanglement between government and religion.<sup>18</sup> Four years after *Allen* was decided in 1968, the Supreme Court set forth this standard in 1973 in a case called *Lemon v. Kurtzman*. *Lemon* struck down programs in Rhode Island and Pennsylvania that subsidized secular subject instruction in private schools due to excessive entanglement.<sup>19</sup> The early implementation of the *Lemon* Test in the 1970s and 1980s proved to be highly restrictive with the majority of the Court adhering to strict separationism.<sup>20</sup>

As early as the mid 1980s, however, the Court began to shift away from the idea of a wall between government and religion and embrace the idea of aid to religious entities.<sup>21</sup> The critical movement away from strict separationism came in 1985 with *Aguilar v. Felton*. *Aguilar* involved a federal program that provided students living in low-income neighborhoods with remedial instruction.<sup>22</sup> The program paid New York City public school teachers to provide services in both public and private schools, with a number of the schools being religiously affiliated.<sup>23</sup> The Court in *Aguilar* found that, because the program required the government to monitor the

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15. See generally *Bd. of Educ. v. Allen*, 392 U.S. 236 (1968).

16. *Id.* at 243.

17. See *Shifting Boundaries*, *supra* note 6, at 9.

18. See generally *Lemon v. Kurtzman*, 403 U.S. 602, 612-13 (1971).

19. *Id.* at 625.

20. *Lemon v. Kurtzman*, 411 U.S. 192, 193 (1973) (holding that Pennsylvania's statutory program, enacted in 1968, for reimbursing nonpublic sectarian schools for certain secular educational services violated the establishment clause of the First Amendment because of the excessive entanglement of church and state fostered by the program's requirements as to continuing state scrutiny of the schools' educational programs and state auditing of school accounts).

21. *Shifting Boundaries*, *supra* note 6, at 11. One such example is the overruling of *Aguilar v. Felton* in 1997 through the Court's decision in *Agostini v. Felton*, 473 U.S. 402 (1985), holding that the government may provide direct aid to religious institutions and signaling the end of the era of strict separationism that had pervaded throughout the 1970s and 1980s. *Id.* at 14-15.

22. See *Aguilar v. Felton*, 473 U.S. 402 (1985).

23. *Id.* at 427.

teachers to ensure that they were not bringing religion into the secular instruction, *Lemon's* second prong—secular effect—was met.<sup>24</sup> However, the government monitoring that proved that the program had a predominantly secular effect caused it to fail *Lemon's* third prong—excessive entanglement. Thus, because of the monitoring, the Court invalidated the program under *Lemon*.<sup>25</sup> In an attempt to get around *Lemon's* third prong, Justice O'Connor's dissenting opinion proposed that the Court should rely on a presumption that because public school teachers are public servants they would obey the regulations prohibiting them from teaching religious content thus absolving the need for such close government monitoring.<sup>26</sup>

Although only a dissent in *Aguilar*, Justice O'Connor's reasoning paved the way to strict separationism's end.<sup>27</sup> Twelve years later, Justice O'Connor would use the same logic in *Agostini v. Felton* to uphold a federal program that offered secular remedial services inside New York City religious schools.<sup>28</sup> This presumption of public servants following government regulations, however, has only been applied in the context of direct aid. Understanding the distinctions between direct and indirect aid requires a more nuanced look at how the law has evolved with respect to each category.

### B. Direct Aid to Religious Institutions

Although seemingly incompatible with the idea of a government free from religious establishment, the Supreme Court has found direct aid to religious organizations permissible in two forms: (1) when the aid is secular and the institution is not “pervasively sectarian” or (2) when sectarian institutions otherwise have safe-

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24. *Id.* at 416.

25. *Id.* at 414.

26. *Id.* at 427 (O'Connor, J., dissenting) (“It is not intuitively obvious that a dedicated public school teacher will tend to disobey instructions and commence proselytizing students at public expense merely because the classroom is within a parochial school. *Meek* is correct in asserting that a teacher of remedial reading ‘remains a teacher,’ but surely it is significant that the teacher involved is a professional, full-time public school employee who is unaccustomed to bringing religion into the classroom.”).

27. *Shifting Boundaries*, *supra* note 6, at 11.

28. See *Agostini v. Felton*, 521 U.S. 203, 224 (1997) (“[W]e assumed instead that the interpreter would dutifully discharge her responsibilities as a full-time public employee and comply with the ethical guidelines of her profession by accurately translating what was said.”) (referencing *Zobrest v. Catalina Foothills School Dist.*, 509 U.S. 1, 125 (1993)).

guards to assure that the aid will not be used for religious purposes.<sup>29</sup>

In 1971, the Court upheld the Higher Education Facilities Act (“HEFA”) in *Tilton v. Richardson*, finding that construction grants awarded to religious organizations by HEFA did not violate the Establishment Clause because, as a precondition to receive a HEFA grant, the recipient was not allowed to use the funding for religious purposes.<sup>30</sup> In *Bowen v. Kendrick*, the Court applied its *Tilton* rationale to the federal government’s funding of faith-based groups providing sex education under the 1981 Adolescent Family Life Act.<sup>31</sup> In a 5-4 vote, the Court upheld the statute on its face as long as the groups implemented safeguards, such as disallowing the incorporation of religious references and requiring meeting locations to be free from religious symbols.<sup>32</sup>

The Court also found that, even in the absence of safeguards, direct aid to religious institutions was permissible if the aid was secular in nature.<sup>33</sup> In *Agostini v. Felton*, the Court allowed direct government aid in the form of secular textbooks to religious schools because the aid itself was not sectarian. In order to circumvent the final hump and the third prong of the *Lemon* Test— excessive entanglement<sup>34</sup>—Justice O’Connor, now writing for the majority, established the presumption that public servants would teach only

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29. *Shifting Boundaries*, *supra* note 6, at 13.

30. *Tilton v. Richardson*, 403 U.S. 672, 679-80 (1971) (“The Act itself was carefully drafted to ensure that the federally subsidized facilities would be devoted to the secular and not the religious function of the recipient institutions. It authorizes grants and loans only for academic facilities that will be used for defined secular purposes and expressly prohibits their use for religious instruction, training, or worship.”).

31. *See generally* *Bowen v. Kendrick*, 487 U.S. 589 (1988).

32. *Id.* at 611 (“Instead, this litigation more closely resembles *Tilton* and *Roemer*, where it was foreseeable that some proportion of the recipients of government aid would be religiously affiliated, but that only a small portion of these, if any, could be considered ‘pervasively sectarian.’ In those cases, we upheld the challenged statutes on their face and as applied to the institutions named in the complaints, but left open the consequences which would ensue if they allowed federal aid to go to institutions that were in fact pervasively sectarian.”).

33. *See generally* *Agostini*, 521 U.S.

34. *Agostini*, 521 U.S. at 221 (“Even though this monitoring system might prevent the Title I program from being used to inculcate religion, the Court concluded, as it had in *Lemon* and *Meek*, that the level of monitoring necessary to be ‘certain’ that the program had an exclusively secular effect would ‘inevitably result in the excessive entanglement of church and state,’ thereby running afoul of *Lemon*’s third prong.”).

secular content.<sup>35</sup> With the government now absolved from excessively monitoring its teachers, the inherent conflict between *Lemon's* second and third prong would be avoided.

In *Mitchell v. Helms*, the Court held that direct aid to a religious institution is constitutional only if the recipients use that aid for secular activities and found that a government program giving funds to religious schools specifically to purchase instructional materials was constitutional.<sup>36</sup> In a narrow ruling, Justice O'Connor found that the governmental program in *Mitchell* was permissible because the schools (1) could not use the funds for religious purposes, (2) could only use the aid to purchase supplemental materials, and (3) did not retain ownership of the materials.<sup>37</sup> O'Connor's *Mitchell* ruling now serves as the primary test for when the government may directly support religious institutions.<sup>38</sup>

In *Locke v. Davey*, the Court extended the *Mitchell* logic, holding that a Washington State program did not violate the Free Exercise Clause for prohibiting students from using state-sponsored scholarship funds to pursue theology degrees.<sup>39</sup> The program allowed students to use scholarship funds to attend religious institutions, so long as students did not use the aid specifically to obtain a religious degree. Finding that nothing in the program suggested "animus towards religion," Chief Justice Rehnquist, writing for the majority, upheld the state scholarship program.<sup>40</sup>

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35. *Id.* at 224 ("We refused to presume that a publicly employed interpreter would be pressured by the pervasively sectarian surroundings to inculcate religion by 'adding to [or] subtracting from' the lectures translated. In the absence of evidence to the contrary, we assumed instead that the interpreter would dutifully discharge her responsibilities as a full-time public employee and comply with the ethical guidelines of her profession by accurately translating what was said.") (internal citation removed).

36. *Mitchell v. Helms*, 530 U.S. 793, 808 (2000).

37. *Id.* at 801 ("The specific criteria used to determine an impermissible effect have changed in recent cases which disclose three primary criteria to guide the determination: (1) whether the aid results in governmental indoctrination, (2) whether the program defines its recipients by reference to religion, and (3) whether the aid creates an excessive entanglement between government and religion. Finally, the same criteria can be reviewed to determine whether a program constitutes endorsement of religion.") (internal citations removed).

38. *Ams. United for Separation of Church & State v. Prison Fellowship Ministries, Inc.*, 509 F.3d 406, 420 (8th Cir. 2007) (holding that, although *Mitchell* permits direct government funding of religious organizations, the ruling still prohibited direct public funding of religious activities through tax appropriations).

39. *Locke v. Davey*, 540 U.S. 712, 715 (2004).

40. *Id.* at 725.

*Locke* clarified the steps that *Mitchell* had already taken. *Mitchell* departed from precedent by indicating that not all aid to religious institutions violates the Establishment Clause on its face and instead insisting on a principle of neutrality as the metric for permissibility.<sup>41</sup> *Locke* elucidated just how secular a program needed to be. By allowing scholarships funded by taxpayers to flow to religious institutions, the Court signified that there was even more “play in the joints”<sup>42</sup> between the Free Exercise and Establishment Clauses than previously thought.<sup>43</sup>

Most recently, this “play in the joints” played itself out not in a classroom, but on a playground. In *Trinity Lutheran Church of Columbia, Inc. v. Comer*, the Court faced the issue of a state-sponsored program that offered reimbursements to public and private schools if they purchased rubber playground surfaces made from recycled tires.<sup>44</sup> Trinity Lutheran Church Child Learning Center (“the Center”) was a preschool and daycare that operated on the church property but admitted students of any religion. In 2012, it applied for the reimbursement grant.<sup>45</sup> Although the Center ranked fifth among the 44 applicants, 14 of which ultimately received a grant,<sup>46</sup> the Missouri Department of Natural Resources dismissed its application because the Center was owned or, at the very least, controlled by the church.

The Court ultimately struck down the MO program holding that “the express discrimination against religious exercise here is not the denial of a grant, but rather the refusal to allow the Church—solely because it is a church—to compete with secular organizations for a grant.”<sup>47</sup> Distinguishing *Locke*, the Court stated, “Davey was not denied a scholarship because of who he *was*; he was denied a scholarship because of what he proposed *to do*—use the funds to prepare for the ministry. Here, there is no question that

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41. See Michael W. McConnell, *Trinity Lutheran: A Welcome Reminder that Church-State Separation is a Principle of Neutrality*, SLS BLOGS: LEGAL AGGREGATE (July 2, 2017), <https://law.stanford.edu/2017/07/02/trinity-lutheran-a-welcome-reminder-that-church-state-separation-is-a-principle-of-neutrality> [<https://perma.cc/5QWL-AMCT>].

42. *Locke*, 540 U.S. at 728 (explaining that the principle of “play in the joints” is really just a refusal to apply any principle “when faced with competing constitutional directives”).

43. *Id.*

44. *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S. Ct. 2012, 2017 (2017).

45. *Id.*

46. *Id.* at 2018.

47. *Id.* at 2015.

Trinity Lutheran was denied a grant simply because of what it is—a church.”<sup>48</sup> What *Trinity Lutheran* signaled is a movement toward neutrality in direct aid cases that began in *Mitchell*.

What precisely neutrality means, however, is yet to be determined. A dissent in *Trinity Lutheran* joined by Justices Sotomayor and Ginsberg stated, “True, this Court has found some direct government funding of religious institutions to be consistent with the Establishment Clause. But the funding in those cases came with assurances that public funds would not be used for religious activity, despite the religious nature of the institution.”<sup>49</sup> What constitutes an adequate assurance of neutrality is the question that remains open. While *Trinity Lutheran* purports to tell us that the bar for this assurance is not high, the majority limited its holding to the facts at hand, leaving the debate very much alive and at play.<sup>50</sup>

### C. Indirect Aid to Religious Institutions

Historically, the Court struck down programs that did not have safeguards in place to prevent the aid from being used to advance religion. In 1973, the Court struck down programs in New York and Pennsylvania that gave tuition reimbursements to parents who sent their children to religious schools in *Committee for Public Education & Religious Liberty v. Nyquist*.<sup>51</sup> These reimbursements were funded through general tax revenues, and although the reimbursements could not exceed over fifty percent in the New York Program or exceed the cost of tuition in the Pennsylvania program, the Court found that these programs amounted to public financial assistance in support of religion.<sup>52</sup> The Court said that the assistance here was causative to support religion, in contrast to *Everson* where “any assistance to religion was purely incidental.”<sup>53</sup>

Eventually, the Court’s view began to shift. The first signal in the changing approach of the Court towards indirect aid came in the form of approved tax breaks to parents for educational expenses—regardless of whether that education was private or pub-

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48. *Id.* at 2023.

49. *Id.* at 2029 (Sotomayor, J., dissenting).

50. *See generally id.* at 2024 n.3 (stating that “[t]his case involves express discrimination based on religious identity with respect to playground resurfacing. We do not address religious uses of funding or other forms of discrimination”).

51. *See generally* *Committee for Public Educ. & Religious Liberty v. Nyquist*, 413 U.S. 756, 789–98 (1973); *See generally* *Sloan v. Lemon*, 413 U.S. 825 (1973).

52. *Id.*

53. *Nyquist*, 413 U.S. at 781–82.

lic.<sup>54</sup> In *Mueller v. Allen*, the Court embraced these tax breaks as a form of indirect aid by holding that the government may provide this aid if the primary purpose and effect is to benefit children,<sup>55</sup> also known as the child-benefit theory.<sup>56</sup> The Court distinguished this from *Nyquist* by emphasizing that the tax breaks were available to students attending both public and private schools and analogized this case to *Everson* where the benefit ran to all children.<sup>57</sup>

This idea expanded into the realm of higher education in *Witters v. Washington Department of Services for the Blind*, when the Court upheld Washington's state program providing tuition assistance to the blind for higher education or vocational training.<sup>58</sup> In *Witters*, the Court found that "the fact that aid goes to individuals means that the decision to support religious education is made by the individual, not by the State."<sup>59</sup> This line of reasoning was reaffirmed in *Zobrest v. Cataline Foothills School District*, when the Individuals with

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54. *Shifting Boundaries*, *supra* note 6, at 11–12.

55. *Mueller v. Allen*, 463 U.S. 388, 397 (1983) ("[The] provision of benefits to so broad a spectrum of groups is an important index of secular effect.") (internal quotation marks omitted).

56. The underpinning of the child benefit theory dates back to the Court's ruling in *Everson*.

57. In *Mueller*, it was important that a substantial number of schools eligible for the exemption were public as well as private. Two years after *Mueller*, in *Grand Rapids School Dist. v. Ball*, 473 U.S. 373 (1985), the Court struck down a similar program because 40 of the 41 schools eligible were nonpublic institutions.

58. *Witters v. Washington Dept. of Social Services for the Blind*, 474 U.S. 481, 489 (1986).

59. Justice Marshall listed eight other factors to explain why this aid did not violate the Establishment Clause: here (1) payment is made directly to each student, who transmits it to the educational institution of his or her choice; (2) any aid which ultimately flows to religious institutions does so only as a result of the genuinely independent and private choices of aid recipients; (3) the aid program is made available generally without regard to the sectarian-nonsectarian, or public-nonpublic nature of the institution benefited, is in no way skewed towards religion, is not an ingenious plan for channeling state aid to sectarian schools, creates no financial incentive for students to undertake sectarian education, and does not tend to provide greater or broader benefits for recipients who apply their aid to religious education; (4) the full benefits of the program are not limited, in large part or in whole, to students at sectarian institutions; (5) aid recipients have full opportunity to expend vocational rehabilitation aid on wholly sectarian education, and, as a practical matter, have greater prospects to do so; (6) aid recipients' choices are made among a huge variety of possible careers, of which only a small handful are sectarian; (7) the decision to support religious education is made by the individual, not by the state; (8) there is no indication that any significant portion of the aid expended under the rehabilitation program as a whole will end up flowing to religious education; and (9) the program is not well suited to serve as a vehicle for subsidizing sectarian institutions. *Id.* at 488.

Disabilities Act (IDEA) allowed for a sign language interpreter to be provided to a deaf student at a Catholic high school.<sup>60</sup> The Court stated “that the service at issue in this case is part of a general governance program” and that the interpreter’s placement in the Catholic school was not a choice of the state, but one made by the parents when the child was sent to that school in the first place.<sup>61</sup>

*Witters*, in conjunction with *Mueller* and *Zobrest*, paved the way for the principle of “true private choice” articulated in *Zelman v. Simmons-Harris*. In *Zelman v. Simmons-Harris*, the Court upheld an Ohio program that gave vouchers to low income parents who sent their children to eligible private schools.<sup>62</sup> Under the voucher program, students could use the vouchers at both public and private schools, including religious schools.<sup>63</sup> Although 46 of the 56 private schools participating in the program were religious, the Court found that the program did not violate the Establishment Clause. The Court reasoned that the voucher did not amount to coercion because parents could choose where to send their children and, of all the options available to Ohio schoolchildren, only one was to attend a religious school.<sup>64</sup> Thus, despite the fact that 82 percent of the eligible private schools were religiously affiliated, the Court upheld the program.<sup>65</sup> Chief Justice Rehnquist, writing for the majority in *Zelman*, noted that if the funding goes to individuals who have a true private choice in deciding to use governmental funds for religious purposes, then this form of indirect aid is constitutional.<sup>66</sup>

This private choice analysis has been utilized in circuits following the Court’s decision in 2002, including the Ninth Circuit in 2013, and still holds much force in determining Establishment Clause violations.<sup>67</sup> Specifically, private choice has been an underpinning of the indirect aid analysis within the framework of govern-

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60. See generally *Zobrest v. Cataline Foothills School District*, 509 U.S. 1 (1993).

61. *Id.* at 3, 12 (“And, as we noted above, any attenuated financial benefit that parochial schools do ultimately receive from the IDEA is attributable to the private choices of individual parents.”) (internal quotation marks omitted).

62. *Zelman v. Simmons-Harris*, 536 U.S. 639, 645 (2002).

63. *Id.* at 647.

64. *Id.* at 652 (“If numerous private choices, rather than the single choice of a government, determine the distribution of aid, pursuant to neutral eligibility criteria, then a government cannot, or at least cannot easily, grant special favors that might lead to a religious establishment.”).

65. *Id.* at 647.

66. *Id.* at 653.

67. *Rubin v. City of Lancaster*, 710 F.3d 1087, 1089–90 (9th Cir. 2013). Here, the court considered whether a city council’s practice of opening its meetings with privately led prayers effected an unconstitutional establishment of religion.

ment funding to religious hospitals through popular programs, such as Medicare and Medicaid. To circumvent religious establishment in the context of medical services, the Court has often relied on the same doctrinal analysis it applied in the context of governmental aid to religious schools. However, to understand how the context of hospitals and medical services affects the precedent of government funding to religious organizations, it is necessary to unpack how the government has funded and continues to fund religious hospitals.<sup>68</sup>

## II. PROCESS OF FEDERAL FUNDING FOR RELIGIOUS HOSPITALS

Historically, denominational or religious hospitals received government assistance via construction grants and reimbursement services.<sup>69</sup> Within these categories, religious hospitals qualified for aid under three different federal schemes: (1) the Hill-Burton Act for facility expansion or modernization,<sup>70</sup> (2) Medicare or Medicaid, and (3) tax exemption for charitable institutions.<sup>71</sup> This section discusses each in turn before turning to the problems posed by these funding structures when applied to Sole Community Hospitals.

Under the Hill-Burton Act, also known as the Public Health Service Act, public and nonprofit facilities received construction grants under Titles VI and XVI.<sup>72</sup> The federal government tied Hill-Burton funding to Certificate of Need programs. Meaning that, before a facility could receive funds, the state government had to determine if there was a need for any new hospital construction. Nearly one-third of hospitals built in 1975 were attributed to Hill-Burton.<sup>73</sup> In the 1980s, all states except for Louisiana had enacted a Certificate of Need law, but in 1987 this federal mandate was re-

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68. Although funding is provided to medical service providers outside of a hospital setting, this paper will largely focus on hospitals as the institutions that receive the majority of federal and state funding.

69. Pickrell & Horwich, *supra* note 2, at 124.

70. See 42 U.S.C. §291a (1946).

71. Pickrell & Horwich, *supra* note 2.

72. *Medical Treatment in Hill Burton Funded Healthcare Facilities*, U.S. DEP'T OF HEALTH AND HUMAN SERVICES (Nov. 27, 2015), <https://www.hhs.gov/civil-rights/for-individuals/hill-burton/index.html> [<https://perma.cc/RR8R-8FB8>].

73. John H. Schumann, *A Bygone Era: When Bipartisanship Led to Health Care Transformation*, NAT'L PUB. RADIO, (Oct. 2, 2016), <https://www.npr.org/sections/health-shots/2016/10/02/495775518/a-bygone-era-when-bipartisanship-led-to-health-care-transformation> [<https://perma.cc/Y5VH-BKWE>].

pealed and, in 1997, the direct aid that Hill-Burton provided came to an end.<sup>74</sup>

Today, the government no longer provides construction grants, leaving only reimbursement grants in the form of Medicare or Medicaid or tax exemption for charitable institutions,<sup>75</sup> but Hill-Burton's federal-state matching idea still remains in the form of Medicaid financing.<sup>76</sup> Medicare and Medicaid programs now make up the bulk of direct assistance. Medicare, a federal reimbursement program, is funded through two trusts held by the U.S. Treasury.<sup>77</sup> The Hospital Insurance Trust Fund is funded primarily through payroll taxes, income taxes, and Medicare Part A premiums.<sup>78</sup> The Supplementary Medical Insurance Trust Fund is financed mainly through congressionally authorized funds, Medicare Part D premiums, and drug coverages under Part D.<sup>79</sup> Medicaid, on the other hand, operates on a federal-state matching program, which varies by state as well as on criteria like per capita income.<sup>80</sup> It is implemented through a state plan that is approved by the federal Department of Health and Human Services.<sup>81</sup>

The final source of aid for religious hospitals still applicable today comes through tax exemption for charitable institutions.<sup>82</sup> The government remains in a neutral position when conferring this economic benefit and believes that this status designation does not encumber the Establishment Clause. The government reasons that, because the choice to contribute to the religious institution falls on the taxpayer, rather than the government itself, no violation occurs.<sup>83</sup>

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74. See Richard Cauchi & Ashley Noble, *CON-Certificate of Need State Laws*, NAT'L CONF. OF STATE LEGISLATURES (Aug. 18, 2018), <http://www.ncsl.org/research/health/con-certificate-of-need-state-laws.aspx> [<https://perma.cc/Z5GR-S9RK>].

75. Pickrell & Horwich, *supra* note 2, at 124.

76. Schumann, *supra* note 73.

77. HOW IS MEDICARE FUNDED?, U.S. CTRS. FOR MEDICARE & MEDICAID SERVICES, <https://www.medicare.gov/about-us/how-medicare-is-funded/medicare-funding.html> [<https://perma.cc/5D4R-N454>] (last visited Dec. 6, 2018).

78. *Id.*

79. *Id.*

80. ALISON MITCHELL, CONG. RESEARCH SERV., R42640, MEDICAID FINANCING AND EXPENDITURES (2015).

81. *Id.* at 1.

82. Eric Santos, *Property Tax Exemptions for Hospitals: A Blunt Instrument Where a Scalpel is Needed*, COLUM. J. TAX L. 113, 115 (2016).

83. *Shifting Boundaries*, *supra* note 6, at 13.

This “freedom of choice” theory underlies the concept of reimbursement services through Medicare Medicaid<sup>84</sup> and tax exempt status.<sup>85</sup> In terms of Medicare and Medicaid, both programs have explicit freedom of choice provisions that include all denominational hospitals as medical service providers and leaves it up to the recipient to choose between these providers.<sup>86</sup> By leaving the choice to the individual, the government remains neutral and, thus, provides no aid directly to the religious institution itself, but rather to the recipient who then allocates those funds based on private choice. The logic of private choice is precisely the same analysis the Court used in the *Witters* and *Zelman* line of cases dealing with federal funding to sectarian schools. In those cases, the Court found indirect aid permissible because the choice to financially support a religious institution was up to the parent or guardian rather than the government itself.<sup>87</sup>

This freedom of choice theory, however, poses significant problems in many areas of the country where recipients’ options are limited. Unlike schools, for which there is always a public option, hospitals are not always present in both public and private forms, which becomes especially problematic when these singular institutions are religious rather than secular. In many areas of the country, Catholic hospitals operate as the Sole Community Hospital (SCH) within a specified geographic radius. Because these SCHs are the only institutions providing care within a rural or isolated area, they are eligible to receive even more federal funding from the Center for Medicare and Medicaid Funding.<sup>88</sup> For example, in Zanesville, Ohio, a rural area of Appalachia, Catholic-affiliated Genesis Hospital has 290 beds and an estimated number of 70,392 ER visits per year. By obtaining SCH status, Genesis Hospital has re-

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84. See 42 U.S.C. § 1395a (1976); 42 U.S.C. § 1396a(a)(23) (1976).

85. Pickrell & Horwich, *supra* note 2, at 128 n.111 (“Both Medicare and Medicaid have explicit freedom of choice provisions.”).

86. See 42 C.F.R. § 431.51 (“(1) Section 1902(a)(23) of the Act provides that beneficiaries may obtain services from any qualified Medicaid provider that undertakes to provide the services to them.”).

87. *Zobrest v. Cataline Foothills Sch. Dist.*, 509 U.S. 1 (1993); *Zelman v. Simmons-Harris*, 536 U.S. 639, 652 (2002).

88. MEDICARE PAYMENT ADVISORY COMM’N, SUMMARY OF MEDICARE’S SPECIAL PAYMENT PROVISIONS FOR RURAL PROVIDERS AND CRITERIA FOR QUALIFICATION 143 [hereinafter “MEDICARE PAYMENT ADVISORY”] (June 2001), [http://67.59.137.244/publications/congressional\\_reports/Jun01%20AppB.pdf](http://67.59.137.244/publications/congressional_reports/Jun01%20AppB.pdf).

ceived an additional six million dollars per year as a result of increased Medicare reimbursement.<sup>89</sup>

Specifically, SCHs benefit from four provisions. According to Congressional Reports, those provisions provide that SCHs are:

. . . first paid the highest of four amounts for Medicare inpatient services: the current prospective payment system rate (PPS), or base year costs per discharge from 1982 up to the current year. Secondly, an SCH that receives the PPS rate and qualifies for a disproportionate share hospital (DSH) payment receives up to a 10 percent adjustment, rather than the maximum of 5.25 percent received by other rural hospitals. Third, 'SCHs don't have to meet the proximity requirement of geographic reclassification, which could facilitate approval for reclassification to a region with a higher wage index, base payment rate, or both. Lastly, if an SCH experiences a decrease of more than 5 percent in the number of inpatient cases due to circumstances beyond its control, it is eligible to receive full compensation for fixed costs.<sup>90</sup>

Collectively, these provisions allow SCHs to recoup greater amounts of federal funds to subsidize the cost of operating in a rural area. For nonreligious hospitals, this extra funding poses few problems and, in terms of policy, is a good incentive for hospitals in rural areas to maintain adequate standards of care. The issue, however, is that many of these SCHs are Catholic-owned-and-operated or Catholic-affiliated, meaning that a religious entity is not only receiving federal funds, but receiving them at even greater amounts than their nonreligious counterparts.<sup>91</sup>

Consider, for example, Iowa where Catholic hospitals serve as the SCH in three areas—Carroll, Clinton and Mason City.<sup>92</sup> On a practical level, this means that the individuals living within these areas, seeking hospital or emergency care, only have one option: a Catholic hospital. Specifically, patients in these areas that receive

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89. *See id.*; *see also Sen. Brown Helps Secure New Federal Designation for Genesis Hospital*, Sherrod Brown Sen. for Ohio (Mar. 1, 2011), <https://www.brown.senate.gov/newsroom/press/release/sen-brown-helps-secure-new-federal-designation-for-genesis-hospital> [<https://perma.cc/PHK9-DTV8>].

90. *Id.*

91. LOUIS UTTLEY & CHRISTINE KHAIKIN, GROWTH OF CATHOLIC HOSPITALS AND HEALTH SYSTEMS: 2016 UPDATE OF THE MISCARRIAGE OF MEDICINE REPORT 6-7 (MergerWatch 2016), [http://static1.l.sqspcdn.com/static/f/816571/27061007/1465224862580/MW\\_Update-2016-MiscarrOfMedicine-report.pdf?token=GAWG5aAnZjwfvGdGq0FdUfGTTw%3D](http://static1.l.sqspcdn.com/static/f/816571/27061007/1465224862580/MW_Update-2016-MiscarrOfMedicine-report.pdf?token=GAWG5aAnZjwfvGdGq0FdUfGTTw%3D) [<https://perma.cc/7TUC-2CJG>].

92. Similarly, Texas and South Dakota have Catholic SCHs in four areas. *Id.* at 8.

Medicare or Medicaid can effectively only direct those federal funds to a religious institution or must otherwise travel far distances to receive care. This calls into question how much freedom of choice patients really have when geographic isolation severely limits their options.

The majority of courts reject this freedom of choice theory and instead look to justify federal funding programs like Medicare and Medicaid through the *Lemon* Test. Courts have found that the programs satisfy the first two prongs of the *Lemon* Test, regarding a secular purpose and effect, because the payments are self-regulating and fall under general welfare services.<sup>93</sup> The third prong of the *Lemon* Test—excessive entanglement between government and religion—is presumed to be satisfied based on the assumption that denominational hospitals are not pervasively religious or, in the language of *Tilton*, are not “pervasively sectarian.”<sup>94</sup> One can find justification for extending this logic to hospitals through Justice O’Connor’s language in *Agostini* and the idea that doctors and hospitals alike play a public service function.

This analysis likely holds true for some denominational hospitals. But, because the degree to which denominational hospitals are not “pervasively sectarian” varies, it is not enough to say that the public servant assumption can be applied broadly and uniformly. Catholic hospitals, a subset of denominational hospitals, pose particular challenges when reconciling this assumption with their practices. Moreover, because of the large number of Catholic hospitals that operate as SCHs, their status as recipients of higher amounts of federal funding further complicates the picture.

### III. A DIFFERENCE OF DEGREE: CATHOLIC HOSPITALS VERSUS OTHER DENOMINATIONAL HOSPITALS

It should be noted that Catholic hospitals do not make up the totality of religious hospitals. Denominational or religious hospitals encompass a variety of different types of hospitals, and within those types exist a variety of differences in terms of strength of affilia-

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93. CENTER FOR MEDICARE AND MEDICAID SERVICES, U.S. DEP’T OF HEALTH AND HUMAN SERVICES, MEDICARE PROGRAM; REPORTING AND RETURNING OF OVERPAYMENTS (Feb. 12, 2016), <https://www.federalregister.gov/documents/2016/02/12/2016-02789/medicare-program-reporting-and-returning-of-overpayments> [<https://perma.cc/RB85-F5M9>].

94. *Tilton v. Richardson*, 403 U.S. 672, 681 (1971).

tions.<sup>95</sup> Jewish-affiliated hospitals, for example, are not owned by Jewish organizations, but are run by boards of directors comprised of Jewish community members.<sup>96</sup> Christian hospitals, on the other hand, have a less formal mechanism for identification and operate under a Christian-based network with varying degrees of faith integrated throughout their mission statement and values.<sup>97</sup> In 2016, four percent of hospitals identified as “other religious non-profit” with 153 hospital locations and 9.4 percent of hospitals identified as “Catholic non-profit” with 355 hospital locations.<sup>98</sup> These numbers indicate that the vast majority of religious hospitals in the United States are Catholic owned and/or operated and warrant greater attention. Although the numbers alone provide cause for scrutiny, it is the structural differences between Catholic hospitals and their religious counterparts that produce the most significant issues.

Unlike Jewish or Christian hospitals, whose ties to their respective religions are categorized as more managerial, Catholic hospitals’ affiliation with the Catholic Church is embedded not only within the management, but also within the practice of medicine and the care of patients itself. Issued by the United States Conference of Catholic Bishops (USCCB), the Ethical and Religious Directives for Catholic Health Care Services (“the Directives”) prohibit a wide range of reproductive health services including “contraception, sterilization, many infertility treatments, and abortion, even when a woman’s health or life is jeopardized by pregnancy.”<sup>99</sup>

For example, directives §45,<sup>100</sup> §47,<sup>101</sup> §53,<sup>102</sup> §28<sup>103</sup> prohibit each of the services formerly listed. Hospitals that are owned by a

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95. Michael J. DeBoer, *Religious Hospitals and the Federal Community Benefit Standard—Counting Religious Purpose as a Tax-Exemption Factor for Hospitals*, 42 SETON HALL L. REV. 1549, 1599 (2012).

96. *Id.*

97. *Id.*

98. UTTLEY & KHAIKIN, *supra* note 91, at 2.

99. JULIA KAYE ET AL., AM. CIVIL LIBERTIES UNION, HEALTH CARE DENIED, PATIENTS AND PHYSICIANS SPEAK OUT ABOUT CATHOLIC HOSPITALS AND THE THREAT TO WOMEN’S HEALTH AND LIVES 7 (May 2016), [https://www.aclumontana.org/sites/default/files/field\\_documents/healthcaredenied.pdf](https://www.aclumontana.org/sites/default/files/field_documents/healthcaredenied.pdf) [<https://perma.cc/YRB2-ER2N>].

100. UNITED STATES CONFERENCE OF CATHOLIC BISHOPS, ETHICAL AND RELIGIOUS DIRECTIVES FOR CATHOLIC HEALTH CARE SERVICES, §45 (5th ed. 2009) [hereinafter *Directives*] (“Abortion (that is, the directly intended termination of pregnancy before viability or the directly intended destruction of a viable fetus) is never permitted. Every procedure whose sole immediate effect is the termination of pregnancy before viability is an abortion, which, in its moral context, includes the interval between conception and implantation of the embryo. Catholic health care institutions are not to provide abortion services, even based upon the principle of

Catholic health system or diocese, affiliated with a Catholic hospital or system through a business partnership, and even some formally owned by a Catholic health care system follow these directives.<sup>104</sup> Deviation from these directives can result in penalties, including loss of Catholic status for the hospital. The Directives, seventy-two in total, are divided up into six parts: (1) The Social Responsibility of Catholic Health Care Services; (2) The Pastoral and Spiritual Responsibility of Catholic Health Care; (3) The Professional-Patient Relationship; (4) Issues in Care for the Beginning of Life; (5) Issues in Care for the Seriously Ill and Dying; and (6) Forming New Partnerships with Health Care Organizations and Providers.<sup>105</sup>

For First Amendment purposes, the most concerning portions of the Directives are in parts (3) and (4), which involve the doctor-patient relationship and care for the beginning of life. Together, they severely restrict the range of procedures that Catholic-owned or affiliated hospitals are able to perform. At a minimum, these restrictions likely include abortion (in all circumstances including rape), euthanasia, sterilization and the provision of contraception to unwed couples. While these abstract prohibitions alone are deeply worrisome, the stories they generate are more concerning.

In a report published by the ACLU in March 2016, many women shared stories where Catholic-owned or affiliated hospitals denied them necessary healthcare services. Among others, this report shared the story of a woman named Maria (pseudonym) in Washington State who miscarried and was experiencing internal bleed-

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material cooperation. In this context, Catholic health care institutions need to be concerned about the danger of scandal in any association with abortion providers.”).

101. *Id.* at § 47 (“Operations, treatments, and medications that have as their direct purpose the cure of a proportionately serious pathological condition of a pregnant woman are permitted when they cannot be safely postponed until the unborn child is viable, even if they will result in the death of the unborn child.”).

102. *Id.* at § 53 (“Direct sterilization of either men or women, whether permanent or temporary, is not permitted in a Catholic health care institution. Procedures that induce sterility are permitted when their direct effect is the cure or alleviation of a present and serious pathology and a simpler treatment is not available.”).

103. *Id.* at § 28 (“Each person or the person’s surrogate should have access to medical and moral information and counseling so as to be able to form his or her conscience. The free and informed health care decision of the person or the person’s surrogate is to be followed so long as it does not contradict Catholic principles.”).

104. KAYE ET AL., *supra* note 99.

105. *See generally Directives, supra* note 100.

ing.<sup>106</sup> Because of the Directives, the hospital did not abort the fetus. Maria's insurance coverage extended to only that hospital, so she was forced to wait and see if her body would complete the miscarriage naturally per the doctor's instructions.<sup>107</sup> The hospital delayed performing the abortion until her iron levels were so low that she needed a blood transfusion, which would put her next pregnancy at risk.<sup>108</sup>

The ACLU report is filled with dozens of stories like Maria's, and the proverbial Marias in the United States today are countless. An important point in Maria's story is her status as a resident of Washington State. Washington is among five states where more than 40 percent of the acute care beds are located in hospitals with Catholic restrictions.<sup>109</sup> Moreover, in Bellingham and Centralia, WA, Catholic hospitals are the sole community providers within a 45-mile radius.<sup>110</sup>

It is worth noting that, although Catholic-owned or affiliated hospitals must follow the Directives to retain Catholic status, the Directives are viewed as guidelines, rather than rules, and interpretations can vary based on local Catholic bishops.<sup>111</sup> Even still, these differences are one of degree. Although 52 percent of OB/GYNs affiliated with Catholic providers reported having conflicts over religious policies dictating care, these conflicts rarely result in a difference in practice due to the threat of job loss or punishment.<sup>112</sup> So, it is and will be people like Maria, who do not have any choice, let alone "true private choice,"<sup>113</sup> that will bear the cost.

Embedded in Maria's story is the true dilemma: reconciling the right of an individual or organization to freely practice their religion with the infringement this creates on private citizens' freedom to choose a healthcare provider or hospital. At the heart of this conflict is the push and pull of the two religion clauses and the balance to be struck between free exercise and religious establishment. Historically, and specifically within the classroom context,

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106. KAYE ET AL., *supra* note 99, at 10.

107. *Id.* at 10–11.

108. *Id.*

109. UTTLEY & KHAIKIN, *supra* note 91, at 5 (the other four states are Wisconsin, Iowa, Alaska, and South Dakota).

110. *Id.* at 7.

111. KAYE ET AL., *supra* note 99, at 7.

112. Nina Martin, *Catholic Hospitals Grow, and With Them Questions of Care*, PROPUBLICA (Oct. 7, 2013), <https://www.propublica.org/article/catholic-hospitals-grow-and-with-them-questions-of-care> [<https://perma.cc/7JZF-BVMX>].

113. See generally *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002) for a discussion on true private choice.

free exercise has taken precedence over establishment. But, perhaps it is the field of health care and hospital funding that will alter this balance where the dominance of the Free Exercise Clause could have, and has in fact had, literal life or death consequences.

#### IV. CATHOLIC-AFFILIATED HOSPITALS AND FREE EXERCISE

The Court has agreed that “tension inevitably exists between the Free Exercise and the Establishment Clauses.”<sup>114</sup> The protection of free exercise interests of both individuals and entities alike has taken many forms over the course of the doctrine’s evolution. Protections for free exercise rights exist in the form of both precedential balancing tests and statutes.

Beginning in the early 1970s, the Court confronted various cases that asked them to weigh potential violations of the establishment clause against free exercise rights. In *Wisconsin v. Yoder*, the Court employed a balancing test to determine if a Wisconsin compulsory school-attendance law requiring children to attend school until age sixteen unduly burdened the Free Exercise Clause.<sup>115</sup> The parents, practitioners of the Amish and Mennonite religions who were convicted of violating the compulsory attendance law, argued that continuing to send their children to school after eighth grade threatened their way of life and interfered with their religion.<sup>116</sup> The Court held that Wisconsin’s law did unduly burden the Free Exercise Clause by forcing Amish parents to send their children to

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114. *Comm. for Public Educ. & Religious Liberty v. Nyquist*, 413 U.S. 756, 788–89 (1973).

115. *Wis. v. Yoder*, 406 U.S. 205, 240–41 (1972) (“But such entanglement does not create a forbidden establishment of religion where it is essential to implement free exercise values threatened by an otherwise neutral program instituted to foster some permissible, nonreligious state objective.”).

116. “The state court decision recognizing an exemption for the Amish from the state’s system of compulsory education does not constitute an impermissible establishment of religion, where (1) accommodating the religious beliefs of the Amish cannot be characterized as sponsorship or active involvement, and (2) the purpose and effect of such an exemption are not to support, favor, advance, or assist the Amish, but to allow their centuries-old religious society, which existed in the state long before the advent of any compulsory education, to survive free from the heavy impediment which compliance with the state compulsory-education law would impose; such an accommodation reflects nothing more than the governmental obligation of neutrality in the face of religious differences, and does not represent that involvement of religious with secular institutions which it is the object of the establishment of religion clause to forestall.” *Id.* at 207-09.

public school despite a core religious Amish belief of remaining “aloof from the world[.]”<sup>117</sup>

A three-part test emerged from *Yoder*. First, the Court examined whether the religious beliefs in question were sincerely held.<sup>118</sup> Second, the Court examined whether state law did in fact seriously burden those beliefs.<sup>119</sup> Third, and after answering in the affirmative to the first two parts, the Court considered the balance of the state’s interests against the free exercise interests of the religious group. The Court determined that, in order to rule for the state, the state’s interests had to override religious interests and that there must be no other way to meet state interests other than to impinge upon religious freedom.<sup>120</sup>

While this balancing test skews largely in favor of free exercise rights, the claiming of a violation of free exercise rights in the first place generates significant concerns. In their 1981 article, Thomas Pickrell and Mitchell Horwich articulate this problem:

. . . the religious institution receiving assistance may disable itself as an eligible participant in a social welfare program by claiming a cognizable free exercise right to be free of regulation accompanying the government assistance. The Establishment Clause permits the government to assist organizations to undertake only secular tasks. By asserting its free exercise right, the organization perforce implies that the task it undertakes is no longer predominantly secular, but predominantly religious. The assertion of a free exercise right magnifies the concern for entanglement under both the Free Exercise and Establishment Clauses.<sup>121</sup>

The confluence of state assistance to religious institutions and issues under both the Free Exercise and Establishment Clauses have left only two real choices in terms of this balancing test: (1) assistance with regulation or (2) no regulation at the cost of such assistance.

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117. *Id.* at 210 (“This concept of life aloof from the world and its values is central to their faith.”).

118. *Id.* at 205.

119. *Id.* at 220.

120. *Wisconsin v. Yoder – Significance*, LAW LIBRARY AMERICAN LAW AND LEGAL INFORMATION, <https://law.jrank.org/pages/22905/Wisconsin-v-Yoder-Significance.html> [<https://perma.cc/8U8D-2QDZ>].

121. Pickrell & Horwich, *supra* note 2.

As this tension became a larger problem in the early 1970s, particularly in the shadow of the 1973 decision of *Roe v. Wade*,<sup>122</sup> Congress passed a series of laws known collectively as “the Church Amendments.”<sup>123</sup> These amendments aimed to protect the conscience beliefs of individuals and entities who object to performing or assisting with abortion or sterilization procedures if doing so would be in opposition to the provider’s religious or moral convictions. The Court has held that moral convictions include those beliefs “an individual deeply and sincerely holds . . . that are purely ethical or moral in source and content but that nevertheless impose upon him a duty of conscience.”<sup>124</sup>

By enacting this legislation, Congress erected a shield for denominational hospitals receiving federal assistance and allowed them to opt out of performing procedures that go against certain religious beliefs.<sup>125</sup> The Church Amendments also prevent hospitals that receive federal funds from being forced to use their facilities for abortion procedures or to provide personnel for such procedures.<sup>126</sup> This protection is enforced even if such enforcement would impose a hardship on the mother.

If the Church Amendments put a thumb on the scale in favor of free exercise, the Hyde Amendment added yet more weight to the free exercise side of the balance. Originally passed in 1976, the Hyde Amendment prohibits federal funding of abortions and must be passed as a rider to the Human and Health Services Appropriations bill each year.<sup>127</sup> Medicaid funds are only allowed to be used for the exceptions of rape, incest or health of the mother.<sup>128</sup> The Court upheld the constitutionality of the Hyde Amendment against Establishment Clause concerns in 1980 in *Harris v. McRae*.<sup>129</sup>

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122. *Roe v. Wade*, 410 U.S. 113, 154 (1973) (holding that the right to privacy includes a woman’s right to obtain a pre-viability abortion).

123. See 42 U.S.C. § 300a-7 (1973).

124. *Welsh v. U.S.*, 398 U.S. 333, 340 (1970).

125. See 42 U.S.C. § 238n (1996).

126. Nathaniel James, *The Church Amendment: In Search of Enforcement*, 68 WASH. & LEE L. REV. 717, 723 (2011).

127. *Id.*

128. Palmer Williams, *Four Things You Need to Know About the Hyde Amendment & Federally Funded Abortion*, AM. CTR. FOR L. AND JUST. (Aug. 2016), <https://aclj.org/pro-life/four-things-you-need-to-know-about-the-hyde-amendment-federally-funded-abortion> [<https://perma.cc/TFZ7-2VCE>].

129. *Harris v. McRae*, 448 U.S. 297, 326 (1980) (“We hold that a State that participates in the Medicaid program is not obligated under Title XIX to continue to fund those medically necessary abortions for which federal reimbursement is unavailable under the Hyde Amendment. We further hold that the funding restric-

Embedded in both of these cases was the underlying point that, although *Roe* made abortion legal, taxpayer funding of abortion is neither a jump the government is required to take<sup>130</sup> nor one necessitated by *Roe*. In addition to speaking out against government funding, the Court also stated that *Roe* did not provide the right of governmental assistance in obtaining an abortion.<sup>131</sup> Over the years, Congress further solidified the notion that, even if the legal landscape permits abortion, free exercise still provides an escape hatch. In 1996, the Coats Amendment to the Public Health Service Act §245 prohibited discrimination in the federal funding of entities that refused to provide abortion related services.<sup>132</sup> In 2009, the Weldon Amendment to the Appropriations Act prohibited federal funding to organizations that discriminated against entities that did not participate in abortion services.<sup>133</sup> And, in 2010, the Patient Protection and Affordable Care Act protected providers who discriminated in health insurance coverage and those that refused to provide or refer for abortions.<sup>134</sup>

This cursory glance at key legislation since *Roe* shows a picture of the Court putting and keeping free exercise in the forefront. If the Free Exercise Clause stood alone, the paramount concern for the religious liberty would not be an issue. But, because free exercise often runs counter to the establishment of religion, courts must expand their focus. There are few examples more illustrative of the blurring lines between the Establishment Clause and Free Exercise Clause than Catholic hospitals.

## V.

### CONFLICTS POSED BY CATHOLIC HOSPITALS

Under the operation of the Directives, Catholic owned and affiliated hospitals pose a particularly unique conflict for First Amendment jurisprudence and the tension between the two religion clauses. On one hand, the Court has expressed a clear preference for valuing claims of free exercise over those of religious

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tions of the Hyde Amendment violate neither the Fifth Amendment nor the Establishment Clause of the First Amendment.”).

130. *Zelman v. Simmons-Harris*, 536 U.S. 639, 653 (2002).

131. *Shifting Boundaries*, *supra* note 6.

132. Jere Odell et al., *Conscientious Objection in the Healing Professions: A Readers' Guide to the Ethical and Social Issues, A Short Overview*, IUPUI SCHOOL OF MEDICINE (2014), <https://scholarworks.iupui.edu/bitstream/handle/1805/3845/conscientious-objection-short-overview.pdf?sequence=10> [<https://perma.cc/E833-G9RD>].

133. *Id.*

134. *Id.*

establishment, particularly within the school context.<sup>135</sup> On the other hand, the Court has only allowed federal funding to religious institutions under the guise of presumptions that are hard to apply to Catholic hospitals. These conflicts are best understood through the lenses of direct and indirect aid as previously discussed.

#### A. Direct Aid

Direct aid is permitted in two forms: (1) when the aid, and institution to which it flows, is secular in nature or (2) when the institution is not secular, but safeguards exist to prevent the funds from being used for religious purposes. In *Aguilar*, and later *Agostini*, Justice O'Connor found that direct aid to religiously affiliated schools was permissible under the *Lemon* Test.<sup>136</sup> In order to get there, however, O'Connor had to find a way around the excessive governmental monitoring that would be required to ensure that the funds were being used only for secular purposes.<sup>137</sup> This excessive monitoring, if necessary, would have been the death knell for many federally funded programs, because the monitoring would create excessive entanglement of government and religion and, thus, violate *Lemon's* third prong. Seeking to reconcile this problem, Justice O'Connor relied on a presumption that teachers, as public servants, would use funds appropriately and for non-religious purposes and found that excessive monitoring was not required.<sup>138</sup>

This presumption, although perfectly accurate for teachers who operate with relative autonomy, poses an issue in a narrower and virtually untouched area of Establishment Clause jurisprudence—direct aid to religious hospitals. Specifically, aid to Catholic hospitals directly conflicts with the public servant presumption. Catholic owned or affiliated hospitals now account for 14.5 percent of all acute care hospitals in the United States.<sup>139</sup> By design, Catholic hospitals operate under ethical directives issued by the U.S. Conference of Catholic bishops that prohibit the provision of key reproductive health services,<sup>140</sup> such as abortion, even when the

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135. *Agostini v. Felton*, 521 U.S. 203, 224 (1997).

136. *Id.*

137. *Id.*

138. *Id.*

139. *Women Who Have Been Denied Medically Necessary Health Care at Catholic Hospitals Speak Out*, AM. CIVIL LIBERTIES UNION (May 5, 2016), <https://www.aclu.org/news/new-report-reveals-1-6-us-hospital-beds-are-catholic-facilities-prohibit-essential-health-care> [<https://perma.cc/UAD7-PRVR>].

140. These include key services such as contraception, abortion, sterilization, and infertility services.

mother's life is at stake.<sup>141</sup> Thus, O'Connor's presumption in *Agostini*—that public servants will in effect be good stewards of government aid and will not require excessive monitoring—no longer makes sense in the context of Catholic hospitals, because, unlike school teachers, doctors are obligated to follow the Directives.

While one might be tempted to argue that the Directives control the hospital and not the doctors themselves, it is almost impossible to divorce the entity from the individual. As a precondition for employment, most Catholic hospitals require doctors to adhere to the Directives or lose their jobs.<sup>142</sup> Because of this, it is both foreseeable and likely that funds given to Catholic hospitals could be used to provide care that is in support of religious practices rather than what is best for the patient. When the choice between a practice favoring the Directives or disobeying protocol occurs, the inevitable result will be that the doctors adhere to religious principles and, if government funds are involved, those funds will be used to further that purpose. Or, in the words of Justice Sotomayor in reference to the playground involved in *Trinity Lutheran*, “The Church has a religious mission, one that it pursues through the Learning Center. The playground surface cannot be confined to secular use any more than lumber used to frame the Church's walls, glass stained and used to form its windows, or nails used to build its alter.”<sup>143</sup> Catholic hospitals are inextricably intertwined with the Directives and that religious mission cannot be separated from the services it provides. Where the Directives are directly in tension with the Establishment Clause, as occurs in the context of reproductive services, it cannot be said, or justifiably believed, that these institutions will employ the kind of neutrality the Court assumed in *Trinity Lutheran*.

This is particularly true in the case of SCHs where there is no private choice to seek alternative care, which also effectively nullifies the freedom of choice provisions located in the Medicare and Medicaid provisions. Professor Michael McConnell of Stanford Law School noted, “The historical focus of church-state separation was on forcing taxpayers to support churches as such—that is, to give churches financial aid to which other comparable secular organizations are not eligible.”<sup>144</sup> In the context of SCHs, the federal government is doing precisely this by conferring a benefit when there

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141. Directives, *supra* note 100.

142. KAYE ET AL., *supra* note 99, at 27.

143. *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S. Ct. 2012, 2030 (2017) (Sotomayor, J., dissenting).

144. McConnell, *supra* note 41.

is no comparable secular organization and, consequently, no freedom of choice. While it is hard to conceptualize direct aid to Catholic hospitals as permissible under the Establishment Clause, indirect aid presents an even more perplexing problem.

### B. *Indirect Aid*

Throughout the latter half of the 21st century, the Court has continued to justify indirect aid through the lens of true private choice between religious and secular options. With respect to religious hospitals, the potential issues arising out of this reasoning are: What happens if individuals who receive governmental funds do not have a choice between an institution that is secular and one that is religious? If Medicare and Medicaid recipients can only go to a religious hospital, can the aid even be classified as indirect at all? Further and finally, if this aid is indirect, does it violate the Establishment Clause in so far as it favors and supports one religion?

These questions are no longer lurking in the shadows. Specifically, the rise of Catholic hospitals in the United States poses a potential problem for Establishment Clause jurisprudence given their growth rate of 22 percent in the past fifteen years.<sup>145</sup> Moreover, it is the 46 Catholic hospitals that currently operate as SCHs<sup>146</sup> that pose the largest issue of all.<sup>147</sup> Embedded in SCH status is the absence of what is central to the Court's rationale for upholding indirect aid: true private choice.<sup>148</sup>

Because Catholic hospitals are so pervasive, particularly in areas in which they are an SCH, it becomes increasingly more difficult to categorize the aid the government provides to these institutions as indirect. If the option a sick resident in these areas faces is the lone Catholic hospital or no healthcare facility at all, it follows that the individual is not meaningfully choosing to support a religious institution with her federal funds. In reality, the government is providing direct aid to the religious institutions itself. This problem is exacerbated by the extra funds that SCHs are entitled to under

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145. UTTLEY & KHAIKIN, *supra* note 91, at 1.

146. *Id.* at 5. (Designation as a Sole Community Hospital means that the facility is located at last 35 miles away from other hospitals, or is located in a rural area and meets certain other criteria, such as being at least 45 minutes in travel time away from the nearest similar hospital.)

147. *Id.* at 1.

148. Robin F. Wilson, *When Governments Insulate Dissenters from Social Change: What Hobby Lobby and Abortion Conscience Clauses Teach About Specific Exemptions*, 48 U.C. DAVIS L. REV. 703, 714 (2014) ("Clearly, society should be especially vigilant about awarding an absolute right to object to a contested service when the objector possesses monopoly power in their particular community.").

Medicaid provisions.<sup>149</sup> Given the virtual certainty that many recipients of aid will have no choice but to go to these institutions for medical care, it is hard to imagine a court justifying this aid as anything other than direct aid by the government to a religious organization.

Notwithstanding its being permitted, two problems surface in the direct aid to religious organizations context. First, public funding directly to religious organizations without a true private choice to allocate those funds has not yet been permitted via tax appropriation.<sup>150</sup> The HI trust for Medicare is funded in part through payroll taxes,<sup>151</sup> and one could argue that, because the only presumable end for some Medicare and Medicaid payments are to religious institutions, this equates to a direct funding of religious organizations with taxpayer funds.

Second, Medicaid is a joint state-federal program that poses the problem of direct funding to religious institutions when recipients do not have a true private choice. Acknowledging that Medicare funding is tenuous because it involves conceptualizing direct funding as a step removed, this becomes less clear with regards to Medicaid, which is a joint state-federal program. Because there are actually fifty different Medicaid programs and the federal government only funds up to 50 percent, it is possible that in states like Washington, where residents pay taxes on a state Medicaid program, those state funds are directly supporting the Catholic hospitals, which make up over 40 percent of acute care beds in the state.<sup>152</sup>

However, assuming *arguendo* that taxes used to fund Medicaid programs do transform into direct funding, the problem of satisfying the *Lemon* Test still arises when the government gives funds to a person who does not have true private choice. Unlike school teach-

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149. MEDICARE PAYMENT ADVISORY, *supra* note 88.

150. *Ams. United for Separation of Church & State v. Prison Fellowship Ministries, Inc.*, 509 F.3d 406, 425 (8th Cir. 2007) (“In this case, there was no genuine and independent private choice. The inmate could direct the aid only to InnerChange. The legislative appropriation could not be directed to a secular program, or to general prison programs.”).

151. Mark Cussen, *How Much Medicaid and Medicare Cost Americans*, INVESTOPEDIA, (Aug. 20, 2015), <https://www.investopedia.com/articles/personal-finance/082015/how-much-medicaid-and-medicare-cost-americans.asp> [<https://perma.cc/PXX2-3L6V>].

152. Judy Stone, *Healthcare Denied at 550 Hospitals Because of Catholic Doctrine*, FORBES (May 2016), <https://www.forbes.com/sites/judystone/2016/05/07/health-care-denied-at-550-hospitals-because-of-catholic-doctrine/> [<https://perma.cc/3AL5-FWVR>].

ers, the Court cannot presume that doctors and staff in Catholic hospitals will not use government funds for religious purposes because they must follow the Directives. Thus, the excessive governmental monitoring that Justice O'Connor worked so hard to avoid in *Aguilar* and *Agostini* would be necessary in order for the Court to uphold direct funding to religious hospitals. However, just as Justice O'Connor was able to resolve this tension in the context of schools, a potential solution exists to resolve this conflict in the realm of Catholic hospitals as well.

## VI. PROPOSAL

While the issues here are somewhat novel as applied to Catholic hospitals, the solution need not be. When dealing with the complex interplay between both the Free Exercise and the Establishment Clauses, the easiest way to address the problem might be to go around it, not through it.

Without alternatives, a person needing emergency medical services in an area where a Catholic hospital is the SCH is essentially forced to allocate her Medicare or Medicaid granted funds to a Catholic owned or affiliated hospital and no longer retains true private choice. In some instances, this will not be an issue. There are a variety of fields in which treatment at a Catholic owned or affiliated hospital would appear no different than treatment rendered at an unaffiliated hospital. However, services rendered under the umbrella of reproductive care create a drastically different landscape between these two institutions in terms of both the type and the quality of care provided.<sup>153</sup> The Directives put forth by the Archdio-

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153. It should be noted that the American Civil Liberties Union filed suit in 2015 against Trinity Health Corporation, one of the largest Catholic health systems in the country, for its systematic failure to provide women suffering pregnancy complications an emergency abortion as required by the Emergency Medical Treatment and Active Labor Act. While this lawsuit is of grave importance, the issue in this paper is not about the services that Catholic health providers must perform, but rather about their funding structure and the intra-First Amendment conflicts that are raised when these funds are dispersed. Moreover, it should be noted that a potential case related to funding differs significantly from the case brought by the ACLU with respect to the question of standing. Whereas in *Trinity Health*, the ACLU had to define the injury with respect to the pregnant plaintiff which led to issues regarding probabilistic harms. Here, the injury is not about a service that was or was not provided, but rather about the structure of appropriations, which the Court has previously found to meet the threshold for an injury under Article III. See *ACLU v. Trinity Health Corp.*, 178 F. Supp. 3d 614 (E.D. Mich. 2016).

cases require Catholic hospitals to follow a certain set of guidelines when rendering care to patients. Because of these Directives, patients, most often women admitted for reproductive issues or labor and delivery, are forced to undergo a treatment or procedural plan that conforms to the beliefs of the Catholic Church as embodied by the Directives.

To avoid this, I propose Congress create a bifurcated funding structure analogous to the structure created to fund Legal Aid Services. In 1974, Congress created the Legal Services Corporation (LSC) as a publicly funded 501(c)(3) non-profit corporation.<sup>154</sup> It has an extensive budget that makes up over half of the operating budget of legal services. In fiscal year 2015, this amounted to \$375,000,000.<sup>155</sup> This funding structure allows public funds to be distributed privately and overseen by a board of directors. In so doing, LSC allows for more discretion over the flow of funds.<sup>156</sup> Congress could utilize this same structure to fund Catholic hospitals, in particular in areas where they serve as SCHs. If Congress were to look at the areas identified as having Catholic SCHs and determine the amount of Medicare and Medicaid funds granted to residents in those areas, it could use a bifurcated structure to divert that portion of funds to a separate non-profit corporation.

Said corporation could then distribute those diverted funds to isolated geographic areas and establish unaffiliated treatment centers that would offer the very services that the Directives forbid. In this way, the Catholic hospital do not violate their Directives and no free exercise problem ensues, but simultaneously, individuals in those isolated areas have a choice between the Catholic SCH and the privately funded treatment facility. This arrangement would mean that the individuals seeking treatment would no longer feel that, in order to receive care, they must direct their funds to a source that does not align with their own religious beliefs. Consequently, the government would be unencumbered from many potential Establishment Clause violations.

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154. *About LSC*, LEGAL SERVICES CORP. (2018), <https://www.lsc.gov/about-lsc> [<https://perma.cc/EH7P-PXGG>].

155. *LSC Funding*, LEGAL SERVICES CORP. (2018), <https://www.lsc.gov/lsc-funding> [<https://perma.cc/77GE-W8J5>].

156. CONFERENCE OF CHIEF JUSTICES, THE IMPORTANCE OF FUNDING FOR THE LEGAL SERVICES CORPORATION FROM THE PERSPECTIVE OF THE CONFERENCE OF CHIEF JUSTICES AND THE CONFERENCE OF STATE COURT ADMINISTRATORS, [http://ccj.ncsc.org/~media/Microsites/Files/CCJ/Web%20Documents/LSC\\_WHTPR.ashx](http://ccj.ncsc.org/~media/Microsites/Files/CCJ/Web%20Documents/LSC_WHTPR.ashx) [<https://perma.cc/XQ5B-K8DH>], (last visited Dec. 6, 2018).

While this solution may seem rather slight,<sup>157</sup> it is worth noting that it avoids the justiciability issues that might plague broader challenges to the type of services Catholic hospitals provide from the outset. By targeting the appropriation structure and seeking a Congressional remedy, the issues of injury and redressability are more easily satisfied for Article III purposes.<sup>158</sup>

### CONCLUSION

Although, as detailed above, the Court has often favored free exercise concerns over establishment ones, there is a new area of law that may change this calculus. Religious hospitals, and Catholic hospitals in particular, pose a new and challenging problem for First Amendment jurisprudence previously decided in the context of religious schools.

With federal and state funding to religious institutions coming in the form of both direct and indirect aid, the problems that arise in the context of Catholic hospitals are two-fold. First, with regards to direct aid, the Catholic Church operates on a set of ethical directives that force them to prioritize religious concerns with respect to abortion, sterilization, euthanasia and the like that could very well implicate the excessive entanglement provision of the *Lemon* Test. In the context of funding religious schools, the Court determined that excessive entanglement had not occurred because it could presume that teachers, as public servants, would use the aid for only secular purposes and, thus, excessive monitoring would not be needed to ensure the aid was used correctly.<sup>159</sup> In the funding of Catholic hospitals context, however, this presumption likely does not apply as the Directives may force doctors within those institutions to prioritize religious treatment over other forms of care, even if this means using federal or state funds to do so.

Second, indirect aid, in contrast, has been held permissible through the lens of true private choice. For decades, the Court has

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157. It is worth acknowledging that this solution poses additional complex political issues with respect to using tax payer funds to build facilities that would primarily be used for reproductive care. However, these political issues are beyond the scope of this paper.

158. See *Flast v. Cohen*, 392 U.S. 83, 103 (1968) (“Their constitutional challenge is made to an exercise by Congress of its power under Art. I, § 8, to spend for the general welfare, and the challenged program involves a substantial expenditure of federal tax funds. In addition, appellants have alleged that the challenged expenditures violate the Establishment and Free Exercise Clauses of the First Amendment.”).

159. *Aguilar*, 473 U.S. at 413.

justified indirect aid to schools in the form of things like vouchers by explaining that the aid was general aid and the parents or guardians of certain students decided where to direct those funds. Because of this, the government was merely a conduit and the ultimate affiliation with religion was the choice of the parents or guardians, not of the government itself. This cannot be said for Catholic hospitals that serve as SCHs for certain geographic areas. Because Catholic hospitals are the only service provider available to many individuals, the funds they receive through Medicare and/or Medicaid are no longer subject to their freedom of choice provisions that allow the aid to be directed at the institution of the recipient's choice. As such, the recipients in these isolated areas are forced to use the aid at Catholic hospitals, and the government is effectively subsidizing those religious hospitals in a manner more analogous to direct aid, given the lack of true private choice necessary to qualify the aid as indirect. This is particularly troubling given that SCHs qualify for increased funding through Medicare and thus receive more federal funding than their non-religious analogs.

The only way around this problem within the current framework is to increase the level of monitoring in Catholic hospitals receiving federal funding in a way that does not violate *Lemon*. Rather than go down that route, I propose that Congress establish a bifurcated system, one analogous to the LSC used to fund legal services organizations, to extricate itself from this entanglement. This system would allow Congress to divert Medicare and Medicaid funds utilized by SCHs to a separate entity that could then distribute those funds to a separate group of physicians, unaffiliated with the Catholic Church, who could render a greater panoply of services if desired by the patient.

Just such a solution is urgently needed. Between 2001 and 2016, Catholic owned or affiliated hospitals grew by 22 percent while acute care hospitals dropped by 6 percent.<sup>160</sup> Today, one in every six acute care hospital beds is in a facility that is Catholic owned or affiliated.<sup>161</sup> As the number of Catholic owned or affiliated facilities rise, the government's excessive entanglement with Catholicism will deepen. Given this, the danger of silent accumulations and encroachments by ecclesiastical bodies will continue to press forward and blur the lines between free exercise and religious establishment. This paper offers a possible solution.

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160. UTTLEY & KHAIKIN, *supra* note 91, at 1.

161. *Id.*

# THE FOREIGN EMOLUMENTS CLAUSE: TRACING THE FRAMERS' FEARS ABOUT FOREIGN INFLUENCE OVER THE PRESIDENT

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*“Foreign influence is truly the Grecian horse to a republic. We cannot be too careful to exclude its influence.”*<sup>1</sup>

—Alexander Hamilton

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1. Pacificus No. 6 (July 1793), *reprinted in* 15 THE PAPERS OF ALEXANDER HAMILTON, JUNE 1793?–JANUARY 1794, at 100-06 (Harold C. Syrett ed., Columbia Univ. Press, 1969).

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## I. INTRODUCTION

Amid the 2016 presidential election that brought us President Trump, legal historians resuscitated a historically overlooked constitutional provision from obscurity: the Foreign Emoluments Clause. This Clause provides that “no Person holding any Office of Profit or Trust under them, shall, without the Consent of the Congress, accept of any present, Emolument, Office, or Title, of any kind whatever, from any King, Prince or foreign State.”<sup>2</sup> Historians posited that, if his business entanglements follow him into office, President Trump could be violating the Clause.<sup>3</sup> No sitting president has ever been found to be in violation of the Clause. Then again, the Oval Office has never seen the likes of Donald J. Trump, whose business schemes and proclivity toward indebtedness—ideal access points for foreign interests seeking to influence U.S. policy—were exactly the types of things the Framers sought to avoid in a sitting president.<sup>4</sup> Now, the historians’ earlier predictions have reverber-

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2. U.S. CONST. art. I, § 9, cl. 8.

3. See, e.g., Zeke J. Miller, *How Donald Trump Could Legally Make Himself Richer in Office*, TIME (Sept. 24, 2016), <http://time.com/4506757/donald-trump-ethics-conflict-business/> [<https://perma.cc/6GX4-7W5L>].

4. See Chris Isidore, *Everything You Want to Know About Donald Trump's Bankruptcies*, CNN MONEY (Aug. 31, 2015), <https://money.cnn.com/2015/08/31/news/companies/donald-trump-bankruptcy/> [<https://perma.cc/PKJ6-5RGE>] (listing Trump's four bankruptcy filings). According to the Attorney General, Special

ated into lawsuits and calls for impeachment.<sup>5</sup> At least two courts may soon answer the question whether President Trump's business dealings involving foreign officials, including foreign diplomats' visits to Trump hotels, violate the Clause.<sup>6</sup> Not only would the outcome provide some long overdue clarity in an important area of constitutional law, but it would also shed some light on just how deep the rabbit hole of Trump's foreign network goes.

This Note aims to demonstrate that delineating the parameters of the Foreign Emoluments Clause is especially critical today, as the values and ideals instilled in the Constitution are under threat by

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Counsel Robert Mueller's investigation found no evidence of a conspiracy or an "agreement—tacit or express—between the Trump Campaign and the Russian government on election interference." See Letter from William Barr, Att'y Gen., to Hon. Lindsey Graham, Hon. Jerrold Nadler, Hon. Dianne Feinstein, and Hon. Doug Collins, H. and S. Judiciary Comms. (Mar. 24, 2019). Unlike that offense, a Foreign Emoluments Clause violation is triggered upon a president's acceptance of an emolument or gift from a foreign government, without congressional consent. An investigation into Trump's inaugural committee and emoluments lawsuits brought against Trump are ongoing. See Letter from William Barr, Att'y Gen., to Hon. Lindsey Graham, Hon. Jerrold Nadler, Hon. Dianne Feinstein, and Hon. Doug Collins, H. and S. Judiciary Comms. (Mar. 24, 2019); Maggie Haberman and Ben Protess, *Trump Inaugural Committee Ordered to Hand Over Documents to Federal Investigators*, N.Y. TIMES (Feb. 4, 2019), <https://www.nytimes.com/2019/02/04/us/politics/trump-inaugural-committee-subpoena.html>. Michael Cohen, President Trump's former lawyer, pleaded guilty to making false statements to Congress under oath about plans for a Trump Hotel Moscow. See Plea Agreement at 1-8, United States v. Cohen, No. 18 Civ. 602 (WHP) (S.D.N.Y. filed Nov. 29, 2018). The Donald J. Trump Foundation agreed to dissolve after New York Attorney General Barbara Underwood accused the so-called charity of illegally coordinating with the 2016 Trump campaign. See Shane Goldmacher, *Trump Foundation Will Dissolve, Accused of 'Shocking Pattern of Illegality'*, N.Y. TIMES (Dec. 18, 2018), <https://www.nytimes.com/2018/12/18/nyregion/ny-ag-underwood-trump-foundation.html>.

5. See First Amended Complaint, *Blumenthal v. Trump*, 335 F. Supp. 3d 45 (D.D.C. 2018) (No. 17 Civ. 1154 (EGS)); Original Complaint, *District of Columbia v. Trump*, 315 F.Supp.3d 875 (D. Md. 2018) (No. 17 Civ. 1596 (PJM)); First Amended Complaint, *Citizens for Responsibility & Ethics in Washington ("CREW") v. Trump*, 276 F. Supp. 3d 174 (S.D.N.Y. 2017) (No. 17 Civ. 458 (GBD)); Rashida Tlaib & John Bonifaz, *Now is the Time to Begin Impeachment Proceedings Against President Trump*, DETROIT FREE PRESS (Jan. 3, 2019), <https://www.freep.com/story/opinion/contributors/2019/01/03/donald-trump-impeachment/2463127002/> [https://perma.cc/YZR3-CWZF].

6. Judge Peter J. Messitte of the U.S. District Court for the District of Maryland and Judge Emmet G. Sullivan of the U.S. District Court for the District of Columbia have granted plaintiffs standing to sue in lawsuits against President Trump on the foreign emoluments issue. *Blumenthal v. Trump*, 335 F. Supp. 3d 45, 72 (D.D.C. 2018); *District of Columbia v. Trump*, 315 F. Supp. 3d 875, 878 (D. Md. 2018).

foreign forces seeking to compromise U.S. political processes and institutions. To that end, this Note presents both historical evidence of the Framers' anti-foreign influence motivation behind the Clause as well as modern considerations, like the secrecy around dealings between the Presidency and foreign nations. At the same time, the Clause faces substantial obstacles, many of which are not addressed in this Note. Among these excluded topics are the political question and standing doctrines and a silver bullet solution for enforcing the Clause in all applicable contexts. Additionally, this Note does not address the ongoing debate about the exact individuals who fall under the Clause. Because the presidency has been at the center of this dialogue, this Note focuses on why the Clause applies to the president. A few arguments are raised as to why the Clause applies to elected officials.<sup>7</sup>

The Foreign Emoluments Clause is the product of the Framers' salient concern that foreign influence could infiltrate the U.S. federal government.<sup>8</sup> President George Washington echoed this concern in his famous Farewell Address, warning that "foreign influence is one of the most baneful foes of republican government."<sup>9</sup> To preserve America's unprecedented form of republican government—the power of which derives, not from a monarch or the government itself, but from the people<sup>10</sup>—the Framers established constitutional limits on foreign intervention in U.S. affairs. The Framers' persistent admonitions against foreign interference arose from their belief that the American political system ought to be

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7. See *infra* Section III.A.

8. Cf. NORMAN L. EISEN, RICHARD PAINTER & LAURENCE H. TRIBE, *THE EMOLUMENTS CLAUSE: ITS TEXT, MEANING, AND APPLICATION TO DONALD J. TRUMP* 6 (2016) (suggesting that the Foreign Emoluments Clause was motivated by the Framers' concern regarding foreign corruption); Amandeep S. Grewal, *The Purposes of the Foreign Emoluments Clause*, 59 S. TEX. L. R. 167, 169 (2018) (noting that "most agree that the Foreign Emoluments Clause addresses corruption concerns"); Zephyr Teachout, *The Anti-Corruption Principle*, 94 CORNELL L. REV. 341, 361 (2009) (stating that the Foreign Emoluments Clause was formulated to prevent foreign corruption); Joshua Matz & Lawrence H. Tribe, *President Trump Has No Defense Under the Foreign Emoluments Clause*, AM. CONST. SOC'Y: ACS BLOG, (Jan. 24, 2017), <https://www.acslaw.org/wp-content/uploads/old-uploads/originals/documents/Trump%20and%20the%20Emoluments%20Clause.pdf> [https://perma.cc/K573-AJ74] (characterizing the Foreign Emoluments Clause as a "broad anti-corruption rule").

9. George Washington, Farewell Address (Sept. 17, 1796), in *AMERICAN DEMOCRACY FROM WASHINGTON TO WILSON: ADDRESSES AND STATE PAPERS* 1, 18 (John H. Finley ed., 1925). It is common knowledge that Hamilton wrote President Washington's Farewell Address.

10. See U.S. CONST. pmb. ("We the People of the United States . . . do ordain and establish this Constitution for the United States of America.").

largely independent from other nations. Foreign influence in the form of payments, benefits, or advantages to U.S. officeholders can pose a danger to the United States because it can slowly and surreptitiously sow the seeds of authoritarian policies, jeopardizing individual freedoms and other democratic values upon which the Constitution was formed. It can expose the U.S. policy making process to interference from despotic regimes and corrupt federal government officials.

The problem of foreign influence is no less dangerous today than it was during the lifetime of the Framers. Consider the foreign interference of the 2016 U.S. election, in which Russia hacked the voter registration systems of approximately half of the states in the United States.<sup>11</sup> Since then, Russia has sought to ‘advance’ a range of domestic and foreign political views in the United States, including anti-immigration sentiment, stances on race relations, extremism, opposition to U.S. law enforcement agencies, and support for pro-Russian policies.<sup>12</sup> What if the Russian government, known for its grave human rights violations<sup>13</sup> and rigid control over news media,<sup>14</sup> were to channel its efforts to influence U.S. policy affairs by gaining access to or bribing U.S. federal officials? The potential ramifications of this interference speak to the types of dangers that the Foreign Emoluments Clause aims to prevent. By prohibiting

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11. See Mike Levine and Pierre Thomas, *Russian Hackers Targeted Nearly Half of States’ Voter Registration Systems, Successfully Infiltrated 4*, ABC News (Sept. 29, 2016), <https://abcnews.go.com/US/russian-hackers-targeted-half-states-voter-registration-systems/story?id=424358221> [https://perma.cc/5QTA-TXET]; see also Scott Shane & Mark Mazzetti, *The Plot to Subvert an Election*, N.Y. TIMES (Sept. 20, 2018), <https://www.nytimes.com/interactive/2018/09/20/us/politics/russia-interference-election-trump-clinton.html> (detailing Russian government efforts to impact the 2016 U.S. election, including “hacked emails, social media fraud, and suspected spies”).

12. See *Tracking Russian Influence Operations on Twitter*, HAMILTON 68 (last visited Feb. 19, 2018), <http://dashboard.securingdemocracy.org> [https://perma.cc/5J2B-4DNF]; Sheera Frenkel & Daisuke Wakabayashi, *After Florida School Shooting, Russia ‘Bot’ Army Pounced*, N.Y. TIMES (Feb. 19, 2018), <https://www.nytimes.com/2018/02/19/technology/russian-bots-school-shooting.html?hp&action=click&pg-type=homepage&clickSource=story-heading&module=a-lede-package-region&region=top-news&WT.nav=top-news> [https://perma.cc/49E2-4DV9].

13. E.g., Nick Cumming-Bruce, *Russia Committed ‘Grave’ Rights Abuses in Crimea, U.N. Says*, N.Y. TIMES (Sept. 25, 2017), <https://www.nytimes.com/2017/09/25/world/europe/russia-crimea-un.html> (citing evidence by United Nation investigators of “detentions, torture and abductions” by Russian police officers in Crimea).

14. See Alexey Kovalev, *In Putin’s Russia, the Hollowed-Out Media Mirrors the State*, GUARDIAN (Mar. 24, 2017), <https://www.theguardian.com/commentisfree/2017/mar/24/putin-russia-media-state-government-control> [https://perma.cc/Y5H4-VNZF].

U.S. officeholders from accepting foreign gifts and emoluments, the Clause was designed to help mitigate the pernicious threat of foreign influence in the U.S. federal government, particularly from foreign government leaders whose political ideologies are antithetical to American democracy.

In the legal debate around the Foreign Emoluments Clause, two key questions remain contentious: (1) What is an emolument? (2) Does the Clause apply to the president? Legal precedent provides little insight into these questions. However, some progress has been made. On July 25, 2018, Judge Peter J. Messitte of the U.S. District Court for the District of Maryland permitted a lawsuit against President Trump to proceed, concluding that emolument “means any ‘profit,’ ‘gain,’ or ‘advantage’” and that the Clause applies to the President.<sup>15</sup> Conversely, Judge George B. Daniels of the U.S. District Court for the Southern District of New York dismissed two similar lawsuits against President Trump on standing grounds and thus did not address these questions.<sup>16</sup> It is crucial to resolve the debate surrounding the definition of “emolument” because this will help determine the scope of the Clause—whether it includes, and therefore prohibits, things like foreign bonds, favorable treatment from foreign governments, and commercial transactions involving foreign officials.

Several theories help illustrate why the courts have failed to address the contours of the Foreign Emoluments Clause. Some members of the legal community believe that the matter is a non-justiciable political question.<sup>17</sup> According to them, since the Constitution expressly grants Congress and no other political branch the power to override the foreign emoluments ban, the courts are precluded from addressing the matter.<sup>18</sup> In addition, plaintiffs face obstacles in satisfying certain elements of standing, such as injury and

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15. *District of Columbia v. Trump*, 315 F.Supp.3d 875, 878 (D. Md. 2018).

16. *CREW v. Trump*, 276 F.Supp.3d 174, 179-80 n.1 (S.D.N.Y. 2017) (stating the court’s decision does not “address whether the payments at issue would constitute an emolument”), *appeal docketed*, No. 18-474 (2d Cir. Feb. 16, 2018).

17. *E.g., id.* at 194. (“[T]his case involves a conflict between Congress and the President in which this Court should not interfere unless and until Congress has asserted its authority . . .”).

18. *E.g., id.* at 193 (“[T]he Foreign Emoluments Clause makes clear that Congress, and Congress alone, has the authority to consent to violations of that clause.”); *but see* *District of Columbia v. Trump*, 291 F.Supp.3d 725, 757 (D. Md. 2018) (“[I]n the absence of Congressional approval, this Court holds that it may review the actions of the President to determine if they comply with the [Foreign Emoluments Clause].”).

redressability.<sup>19</sup> Moreover, under a series of statutes, including the Foreign Gifts and Decorations Act,<sup>20</sup> Congress has provided advance consent for some types of gifts and emoluments—but not all—received by certain U.S. government employees from foreign governments.<sup>21</sup> Although the courts have danced around the meaning of emolument, other members of the legal community have tackled the issue head-on, including regarding whether the term should include benefits other than salary and compensation flowing from an office.<sup>22</sup>

Legal scholarship is not without its holes, however. In particular, the academic landscape has failed to give due attention to the Framers' deep concern about the presidency's unique susceptibility to foreign influence.<sup>23</sup> Singling the president out, Edmund Randolph stated at the Virginia Ratifying Convention that the Foreign Emoluments Clause is a key "provision against the danger of" the president receiving emoluments from foreign powers.<sup>24</sup> In cautioning that "foreign intrigues" may attempt to infiltrate the presidential election process, Hamilton stressed that "the executive should be independent for his continuance in office on all, but the people

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19. *E.g.*, *CREW*, 276 F.Supp.3d at 192 (S.D.N.Y. 2017) (declining to grant standing where the "time, money, and attention" a legal ethics group diverted to litigation strained their limited resources), *appeal docketed*, No. 18-474 (2d Cir. Feb. 16, 2018). For a discussion of justiciability issues associated with the lawsuits filed against President Trump, see generally Matthew I. Hall, *Who Has Standing to Sue the President Over Allegedly Unconstitutional Emoluments?*, 95 WASH. U. L. REV. 1 (2017).

20. 5 U.S.C. § 7342 (2011).

21. *E.g.*, *id.* § 7342 (c)(1)(A) (consenting to federal government employees' acceptance of foreign gifts of \$100 or less "received as a souvenir or mark of courtesy"); *id.* § 7342 (a)(5) (defining "minimal value" as \$100 or less).

22. *E.g.*, EISEN ET AL., *supra* note 8; Amandeep S. Grewal, *The Foreign Emoluments Clause and the Chief Executive*, 102 MINN. L. REV. 639 (2017); Erik M. Jensen, *The Foreign Emoluments Clause*, 10 ELON L. REV. 73, 96 (2018); Robert G. Natelson, *The Original Meaning of 'Emoluments' in the Constitution*, 52 GA. L. REV. 1, 1 (2017); Teachout, *supra* note 9, at 361; John Mikhail, *The Definition of 'Emolument' in English Language and Legal Dictionaries, 1523-1806* (June 30, 2017), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2995693](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2995693).

23. Some commentators even argue that the Foreign Emoluments Clause does not apply to the President. See *infra* Section III.A.; see also Seth Barrett Tillman, Colloquy, *The Original Public Meaning of the Foreign Emoluments Clause: A Reply to Professor Zephyr Teachout*, 107 NW. U. L. REV. 180, 181-82 (2013) (arguing that the foreign emoluments ban does not apply to the President and other elected officials).

24. 3 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION AS RECOMMENDED BY THE GENERAL CONVENTION AT PHILADELPHIA, at 486 (Jonathan Elliot, 2d ed. 1827) [hereinafter THE CONVENTION AT PHILADELPHIA].

themselves.”<sup>25</sup> A violation of the Clause is among the abuses of public trust relating “chiefly to injuries done immediately to the society itself.”<sup>26</sup> Without a way out of the Foreign Emoluments Clause snafu we currently find ourselves in, any foreign intervention into U.S. policy decisions by way of President Trump’s business pursuits remains undetected. As a result, the U.S. public may be deprived of their constitutional recourse to the mounting number of potential violations of the Clause surrounding the Trump presidency.

This Note proceeds in three parts. The first part examines the textual meaning of the term “emolument” and the Framers’ foreign influence concern. In particular, the first part contributes additional support for a broad application of emolument by establishing that the Foreign Emoluments Clause is a prophylactic against foreign *influence*, a concept which is broader than foreign *corruption*.<sup>27</sup> The second part explains why and how the Clause applies to the president. To help fill in the current gap in the legal commentary around this argument, the second part establishes that the president is a special target of foreign influence. The final part suggests that President Trump’s refusal to take certain steps to separate himself from his global enterprise and failure to seek congressional approval for foreign business dealings have led to a proliferation of foreign emoluments violations.

## II.

### THE WIDE REACH OF THE FOREIGN EMOLUMENTS CLAUSE

This part demonstrates that the Framers anticipated a broad application of “emolument” in the Foreign Emoluments Clause. In so doing, it explores the usage of the term in the Constitution and Federalist Papers as well as the historical context in which the Framers were operating. Importantly, it introduces the foreign emoluments ban as a prophylactic against foreign influence. Relying on the findings from this part, this paper adopts the broad definition of a foreign emolument referring to any payment, benefit, or advantage from a foreign state, espoused by former Ambassador Norman L. Eisen, Professor Richard W. Painter, and Professor

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25. THE FEDERALIST NO. 68, at 332 (Alexander Hamilton) (Terence Ball ed., 2012).

26. THE FEDERALIST NO. 65, at 317 (Alexander Hamilton) (Terence Ball ed., 2012).

27. In the context of the Foreign Emoluments Clause, foreign corruption is a corollary of foreign influence. See *infra* Section II.B.

Laurence H. Tribe (hereinafter “Eisen-Painter-Tribe”), and is similar to the approach recently adopted by Judge Messitte.<sup>28</sup>

A. *Competing Originalist Interpretations of the Emoluments Clause*

In interpreting “emolument” under the Foreign Emoluments Clause, commentators have turned to various sources for guidance, ranging from recent federal agency decisions, the scant case law that exists, the Federalist Papers, to dictionary definitions. Scholars relying primarily on materials that postdate the Constitution, however, will likely be led astray in their research because the usage of the term has since fallen out of fashion. And even when the term has been used in modern times, its meaning has drastically changed since the signing of the Constitution. Another problem is the fact that many of the conclusions drawn from these sources, regardless of the time period, address “emolument” within the ambit of the Domestic Emoluments Clause<sup>29</sup> or the Ineligibility Emoluments Clause,<sup>30</sup> both of which serve different functions than that of the Foreign Emoluments Clause, and thus yield different meanings of the term.

1. Originalist and Purposive Interpretive Tools: Text, Structure & Founding Era Records

To avoid the aforementioned problems, this Note relies on sources that uncover the Framers’ understanding of the term “emolument” specifically as it relates to the Foreign Emoluments Clause—most notably, the Federalist Papers and records of the Constitutional Convention.<sup>31</sup> These sources will be examined

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28. See *District of Columbia v. Trump*, 315 F.Supp.3d 875, 891 (D. Md. 2018) (“The clear weight of the evidence shows that an ‘emolument’ was commonly understood by the founding generation to encompass any ‘profit,’ ‘gain,’ or ‘advance.’”). The prophylactic anti-foreign influence function of the Foreign Emoluments Clause is evidenced by the historical context at the time of the Founders. An obvious reason is that the Framers feared European countries might seek to invade the United States for its access to the vast lands and resources of the Americas; perhaps they perceived this threat as even greater following the American Revolutionary War. Cf. THE FEDERALIST NO. 59, at 291 (Alexander Hamilton) (Terence Ball ed., 2012) (observing that the United States “will probably be an encreasing object of jealousy to more than one nation of Europe.”). For the purposes of this Note, foreign influence refers to any access to the presidency by a foreign nation through emoluments and other means prohibited under the Foreign Emoluments Clause. See *infra* Section II.B.

29. U.S. CONST. art. II, § 1, cl. 7.

30. U.S. CONST. art. I, § 6, cl. 2.

31. The Federalist Papers provide one of the most valuable perspectives into the minds of the Framers at the time they crafted the Constitution, and thereby are

through a dual lens of original meaning and purposivism, an approach that most observers have taken up to guide their interpretation of emolument.<sup>32</sup> In applying the above framework, this part concludes that the definition of emolument under the Clause is wider in scope than its usage in the other constitutional emoluments provisions.

The word “emolument” appears in the Federalist Papers a total of eleven times. Five of those times, it is employed in the context of officeholders engaged in corrupt or nefarious behavior or those who have fallen subject to foreign influence.<sup>33</sup> Six of those times, it refers to compensation or salary, most likely in relation to the Domestic Emoluments Clause and the Ineligibility Clause.<sup>34</sup> The diver-

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the ideal source for understanding the meaning of the Foreign Emoluments Clause. Referring to the Federalist Papers, Madison expressed that they contribute “the most authentic exposition of the text of the Federal Constitution, as understood by the Body which prepared and the authority which accepted it.” Letter from James Madison to Thomas Jefferson (Feb. 8, 1825), *in* 9 THE WRITINGS OF JAMES MADISON 218, 219 (Gaillard Hunt ed., 1910).

32. *See, e.g.*, *District of Columbia v. Trump*, 315 F.Supp.3d 875, 881 (D. Md. 2018) (“Both sides embrace a blend of original meaning and purposive analysis.”); *but see* Grewal, *supra* note 8, at 178 (calling for textualism over purposivism in interpreting the Foreign Emoluments Clause).

33. THE FEDERALIST NO. 1, at 2 (Alexander Hamilton) (Terence Ball ed., 2012) (describing certain opponents of the Constitution as a “class of men” who “resist all changes which may hazard a diminution of the power, emolument and consequences of the offices”); THE FEDERALIST NO. 55, at 272 (James Madison) (Terence Ball ed., 2012) (discussing how the proposed number of House of Representatives does not increase the likelihood that the representatives would be corrupted by foreign gold or “[t]heir emoluments of office”); THE FEDERALIST NO. 59, at 290 (Alexander Hamilton) (Terence Ball ed., 2012) (“The scheme of separate confederacies, which will always multiply the chances of ambition, will be a never failing bait to all such influential characters in the State administrations as are capable of preferring their own emolument and advancement to the public weal.”); THE FEDERALIST NO. 65, at 319 (Alexander Hamilton) (stating that an official who has been impeached will lose the “esteem and confidence, and honours and emoluments of his country.”); THE FEDERALIST NO. 72, at 354 (Alexander Hamilton) (Terence Ball ed., 2012) (stating that prohibiting a President from running for office in consecutive terms could lead to improper behavior, such as embezzlement and lead an “avaricious man . . . looking forward to a time when he must at all events yield up the emoluments he enjoyed, would feel a propensity . . . to make the best use of the opportunity he enjoyed, while it lasted.”).

34. THE FEDERALIST NO. 36, at 166 (Alexander Hamilton) (Terence Ball ed., 2012) (discussing how the federal government will employ state tax commissioners by attaching them to “the Union by an accumulation of their emoluments”); THE FEDERALIST NO. 46, at 229 (James Madison) (Terence Ball ed., 2012) (explaining how the public’s attachment to state governments will lead to a “greater number of offices and emoluments” in the administration of them); THE FEDERALIST NO. 51, at 252 (James Madison) (Terence Ball ed., 2012) (“[M]embers of each department

gent treatment of emolument in the Federalist Papers suggests that the meaning of the term depends on the context in which it is used—notably, in relation to compensation, foreign influence, or corruption.

Similarly, a textual review of the three constitutional emoluments clauses reveals that “emolument” has a wider scope under the Foreign Emoluments Clause than it does under the other clauses. The Domestic Emoluments Clause, which was intended to prevent Congress and state governments from capturing the president through manipulating the president’s salary,<sup>35</sup> provides that “[t]he President shall, at stated Times, receive for his Services, a Compensation, which shall neither be increased nor diminished during the Period for which he shall have been elected, and he shall not receive within that Period any other Emolument from the United States, or any of them.”<sup>36</sup> The Ineligibility Clause, on the other hand, was designed in part to prevent the president from improperly influencing Members of Congress through patronage.<sup>37</sup> The Ineligibility Clause states that Members of Congress are prohibited from being “appointed to any civil Office under the Authority of the United States, which shall have been created, or the Emoluments whereof shall have been increased during such time; and no Person holding any Office under the United States, shall be a Member of either House during his Continuance in Office.”<sup>38</sup> Unlike the Foreign Emoluments Clause, the Domestic Emoluments Clause and the Ineligibility Clause focus primarily on salary and compensation requirements when referring to emoluments.

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should be as little dependent as possible on those of the others, for the emoluments annexed to their offices.”); THE FEDERALIST NO. 55, at 273 (James Madison) (Terence Ball ed., 2012) (“The members of the Congress are rendered ineligible to any civil offices that may be created or of which the emoluments may be increased, during the term of their election.”); THE FEDERALIST NO. 73, at 357 (Alexander Hamilton) (Terence Ball ed., 2012) (discussing how the Domestic Emoluments Clause prohibits the president from accepting “any other emolument, than that which may have been determined by the first act”); THE FEDERALIST NO. 77, at 373 (Alexander Hamilton) (Terence Ball ed., 2012) (comparing the power to set “honors and emoluments” with the Senate’s power to consent to the president’s appointments).

35. See THE FEDERALIST NO. 73, at 357 (Alexander Hamilton) (Terence Ball ed., 2012) (“The Legislature, with a discretionary power over the salary and emoluments of the Chief Magistrate, could render him as obsequious to their will.”).

36. U.S. CONST. art. II, § 1, cl. 7.

37. See THE FEDERALIST NO. 55 (James Madison) (Terence Ball ed., 2012) (suggesting that the Ineligibility Clause would help prevent the President from “subduing the virtue of the Senate”).

38. U.S. CONST. art. I, § 6, cl. 2.

While many legal scholars have acknowledged that multiple definitions of “emolument” existed at the time of the Framers, they disagree on the term’s meaning in the Constitution. At the center of this debate is the *breadth* of “emolument.” In other words, how large is the umbrella of things that are considered an emolument under the Constitution? To date, commentators can be roughly grouped into two camps on the issue: a “broad emolument camp” and a “narrow emolument camp.”

## 2. The “Broad Emolument Camp”

The “broad emolument camp,” often associated with Eisen-Painter-Tribe, calls for a wide reading of “emolument,” the justification for which some have argued is to prevent even the appearance of foreign corruption.<sup>39</sup> Eisen-Painter-Tribe further conclude that emolument in the Foreign Emoluments Clause holds a broader meaning than the term as used in the other constitutional emoluments provisions.<sup>40</sup> They cite to the “of any kind whatever” language following “present, Emolument, Office, or Title” in the Clause.<sup>41</sup> This language, they argue, modifies emolument and the other items in the list, and thus emoluments are not restricted to those flowing from an office.<sup>42</sup> Under Eisen-Painter-Tribe’s approach, an officeholder’s profits from a fair market transaction constitute foreign emoluments regardless of whether the transaction involved an office-related exchange.<sup>43</sup> A corollary to this point is that a *quid pro quo* is not necessary to render a foreign emoluments violation.<sup>44</sup>

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39. See *infra* note 76; see also Jensen, *supra* note 22, at 124 (describing the function of the Foreign Emoluments Clause as “forbidding transfers from foreign governments to American officials that could call the loyalty of an official into question”).

40. EISEN ET AL., *supra* note 8, at 11; see, e.g., First Amended Complaint at 2, *supra* note 5 (stating that the Domestic Emoluments Clause is narrower than the Foreign Emoluments Clause).

41. EISEN ET AL., *supra* note 8, at 11.

42. *Id.*

43. See *id.* (concluding that a foreign emolument includes “any . . . benefit inconsistent with a purely fair market exchange in an arms-length transaction not specially tailored to benefit the holder of an Office under the United States”).

44. For a discussion on this issue as it applies to the president, see *infra* Section III.B. The U.S. District Court of Maryland has adopted a similar position. *District of Columbia v. Trump*, 315 F.Supp.3d 875, 893 (D. Md. 2018) (“There is, moreover, a substantial body of evidence suggesting that the founding generation used the word ‘emolument’ in a variety of contexts reaching well beyond payments tied to official duties.”).

### 3. The “Narrow Emolument Camp”

In the “narrow emolument camp” are Professor Amandeep S. Grewal and Professor Seth Barrett Tillman. Both suggest that a foreign “emolument” arises only out of circumstances under which an officeholder concurrently holds a U.S. Office and foreign government position or similar relationship.<sup>45</sup> They appear to diverge on the question whether the foreign government relationship must involve a legal mandate. In either case, arm’s length business exchanges—such as profits from foreign diplomats’ visits to Trump hotels—would not constitute “emoluments” and therefore would not be prohibited under the Foreign Emoluments Clause.

Grewal refers to foreign “emoluments” as compensation that an officeholder accepts “from providing services for a foreign government.”<sup>46</sup> Consequently, the Foreign Emoluments Clause would prohibit an officeholder from maintaining an employment services relationship with a foreign government while serving out their U.S. Office tenure. In a transaction involving goods, however, emoluments could not arise.<sup>47</sup> For an exchange in which payments do not reflect the market value of the goods or services, Grewal suggests excess payments may constitute prohibited gifts under the Clause or “impeachable bribes.”<sup>48</sup> In any case, Grewal’s approach poses certain logical inconsistencies. As Erik M. Jensen notes, it is unclear why the Clause should prohibit equal market value service arrangements and allow for equal market commercial good exchanges—both are “business transaction[s].”<sup>49</sup> If the Framers were concerned with “disguised payments”<sup>50</sup> because they could be bribes, for example, it would make more sense to treat the Clause as a *default rule* by which all gains officeholders receive from commercial transactions are presumed to be prohibited emoluments or gifts—regardless of whether they appear to be legitimate, fair market value transactions

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45. See Grewal, *supra* note 22, at 666 (defining emoluments as compensation for performing services that may be limited to those that “relate to the U.S. Officer’s position with the U.S. government” or “of any kind provided to a foreign government”); Motion for Leave to File Amicus Curiae Brief of Scholar Seth Barrett Tillman as Amicus Curiae in Support of the Defendant, Ex. Brief for Scholar Seth Barrett Tillman as Amicus Curiae in Support of the Defendants at 6, CREW, 276 F. Supp. 3d 174 (No. 17 Civ. 458) (arguing the Foreign Emoluments Clause prohibits “those *holding office . . . under the United States . . .* from taking emoluments associated with *foreign* government positions,” offices, and employments).

46. Grewal, *supra* note 22, at 644.

47. See *id.* at 683.

48. See *id.*

49. See Jensen, *supra* note 22, at 99.

50. See Grewal, *supra* note 22, at 642 n. 12.

on their face. The officeholder, when approaching Congress for permission to accept, has an opportunity to raise as a sort of affirmative defense the purported legitimacy of the transaction.<sup>51</sup> Along those lines, it is the role of Congress, rather than the officeholder, to determine the legitimacy of these transactions. This approach is consistent with the fact that the sole exemption for the ban on acceptance of gifts and emoluments enumerated under the Clause is where congressional consent has been secured.

Tillman's "emolument" interpretation, while covering salary and other forms of compensation, also extends to payments associated with a foreign "position" to which fixed services or duties are not necessarily attached.<sup>52</sup> Tillman's interpretation is not exactly broader than Grewal's, however. Tillman cabins the definition of emolument to payments that are fixed by law or regulations. As Tillman puts it, emoluments are "legal entitlements *mandated by public laws or regulations.*"<sup>53</sup> In the absence of a pre-determined set of services or duties, such as where a foreign employment or office is not concerned, a prohibited emolument would include a pension<sup>54</sup> or perhaps even an annuity or allowance, but only to the extent these payments are prescribed under law or regulations.

Although their "emoluments" constructions differ, Grewal and Tillman both cite as support specific language in the Supreme Court's *Hoyt* decision stating that "emoluments . . . embrac[es] every species of compensation or pecuniary profit derived from a discharge of the duties of the office. . . ."<sup>55</sup> But *Hoyt* does not purport to define the entire universe of "emoluments." On its face, the cited language from *Hoyt* clearly refers only to a specific category of

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51. For example, the Foreign Corrupt Practices Act criminalizes bribes made to foreign officials, including those delivered through commercial transactions motivated by a corrupt intent, and permits defendants to prove as an affirmative defense that the payments were made to secure the performance of routine governmental action rather than official action. *See, e.g.*, Foreign Corrupt Practices Act, 15 U.S.C. § 78dd-1(c) (2012). The foreign bribery offense under the Act requires evidence of a corrupt intent given the "corruptly" language in the statute. *See id.* § 78dd-1(c). As far as the Foreign Emoluments Clause is concerned, there is no intent requirement. This makes sense since the Clause is designed to make discoverable any foreign gifts, titles, and emoluments that may be hidden by a president or other officeholders.

52. *See* Brief for Scholar Seth Barrett Tillman, *supra* note 45, at 6.

53. Seth Barrett Tillman, Essay, *Business Transactions and President Trump's "Emoluments" Problem*, 40 HARV. J.L. & PUB. POL'Y 759, 771 (2017).

54. *See* Brief for Scholar Seth Barrett Tillman, *supra* note 45, at 9 (concluding that foreign emoluments can include "pensions and other perquisites").

55. *See* Grewal, *supra* note 22, at 643 n. 13 (citing *Hoyt v. United States*, 51 U.S. 109, 135 (1850)); Tillman, *supra* note 53, at 768 (same).

“emoluments”—“emoluments of an office.”<sup>56</sup> Recall that the Foreign Emoluments Clause refers to “any present, Emolument, Office, or Title, or any kind whatever . . . .” The Clause does not state “emoluments of an office” or “emoluments of employment.” Instead, it refers to “emoluments” in isolation.

#### 4. Other Originalist Legal Scholarship

Robert G. Natelson proposes four discrete emolument definitions based on sources providing insight into founding era-colloquim, including dictionaries, constitutional convention records, ratification debate records, and British and American government reform efforts.<sup>57</sup> In evaluating these four definitions, he argues that only two of the definitions can apply to the constitutional meaning of “emolument,” both of which refer only to those received for office-related purposes and so does not include profits from market transactions.<sup>58</sup> Unlike Eisen-Painter-Tribe, Natelson does not take a stance on whether the Foreign Emoluments Clause is wider in scope than the other constitutional emoluments provisions. In any case, Natelson’s evaluation of emolument is incomplete due in large part to the fact that he ignores the diverse purposes for which the constitutional emoluments provisions were crafted.<sup>59</sup> Regarding the “of any kind whatever” language unique to the Clause, Natelson argues that the constitutional language ought to be ignored “to avoid superfluous text and absurd results.”<sup>60</sup> His reasoning is that applying the “of any kind whatever” phrase might dissuade persons with foreign business dealings, such as Secretary of Finance for the Confederation Robert Morris (who was later imprisoned for his

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56. *Hoyt* refers to “emoluments of office” twice and “emoluments of the office” twice and repeatedly alludes to emoluments as interpreted under specific laws. See generally *Hoyt v. United States*, 51 U.S. 109 (1850).

57. See Natelson, *supra* note 22, at 9.

58. *Id.*

59. See *id.* at 8 (refusing to consider the values, including the anti-corruption concern, weighed by the Framers in formulating the constitutional emoluments provisions). Natelson criticizes Eisen-Painter-Tribe and Teachout for their reliance on the anti-corruption principle and for failing to address an article contending that multiple principles were balanced by the Framers in crafting one of the emoluments provisions. *Id.* It is easy to see why Eisen-Painter-Tribe and Teachout ignored this article—it examines the Ineligibility Clause and does not address the Foreign Emoluments Clause or the Domestic Emoluments Clause. See also John F. O’Connor, *The Emoluments Clause: An Anti-Federalist Intruder in a Federalist Constitution*, 24 HOFTRA L. REV. 89 (1995) (presenting multiple principles behind the Ineligibility Clause).

60. Natelson, *supra* note 22, at 53.

debts),<sup>61</sup> from serving in public office.<sup>62</sup> However, Natelson fails to take into account the Framers' foreign influence concern driving the Clause, which helps show why officeholders' foreign business dealings are prohibited under the Clause.<sup>63</sup> Likewise, accepting that the Framers would include superfluous language in the Constitution—and such exceptional, emphatic language for that matter—would lead to even more “absurd results” than those suggested by Natelson. Suffice it to say, Natelson would be hard-pressed to convince the Supreme Court to ignore constitutional language, such as the “of any kind whatever” phrase, in interpreting the Constitution.<sup>64</sup>

James C. Phillips and Sara White (hereinafter “Phillips-White”) apply a “corpus linguistic” analytical framework to decipher the meaning of “emolument,” comprising historical materials originating from 1760-1799, including the Framers' correspondence, cases, legislative debates, books, and pamphlets.<sup>65</sup> They speculate that the term as used in the Domestic Emoluments Clause and Ineligibility Clause refers to a narrow, office-based emolument definition.<sup>66</sup> Rather than settling on a definition of emolument in the Foreign Emoluments Clause, Phillips-White state that further inquiry is needed to interpret whether the “of any kind whatever” language denotes a broader application of emolument in the provision.<sup>67</sup> The many phrases they found are often associated with the use of emolument include “private emoluments” and “pay and emolument(s).”<sup>68</sup> By limiting their search to the frequency of words surrounding “emolument” in historical documents, however, Phillips-White's approach lacks consideration of the Framers' broader commentary around the word “emolument,” such as its uses in the contexts of compensation, foreign influence, and corruption in the Federalist Papers discussed earlier in this section.

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61. See *infra* Section II.C.

62. Natelson, *supra* note 22, at 54.

63. See *infra* Section II.B.

64. In rejecting President Trump's argument that the “of any kind whatever” phrase is extraneous, Judge Messitte declared, “The more logical conclusion is one that Plaintiffs urge: The use of ‘any kind whatever’ was intended to ensure the broad meaning of the term ‘emolument.’” *District of Columbia v. Trump*, 315 F.Supp.3d 875, 888 (D. Md. 2018).

65. James Cleith Phillips & Sara White, *The Meaning of the Three Emoluments Clauses in the U.S. Constitution: A Corpus Linguistic Analysis of American English, from 1760-1799*, 59 S. TEX. L. REV. 181 (2017).

66. *Id.* at 226.

67. See *id.* (“[I]t's unclear what impact ‘of any kind whatever’ has on determining the appropriate sense of *emoluments* in the Foreign Emoluments Clause.”).

68. *Id.* at 210.

Nevertheless, the “of any kind whatever” phrase, which is among the strongest language in the Constitution,<sup>69</sup> indicates that the broadest construction is most applicable to “present, Emolument, Office, or Title” under the Foreign Emoluments Clause. Comparatively, the fact that the Domestic Emoluments Clause and the Ineligibility Clause omit the “of any kind whatever” language suggests that “emolument” as used under these provisions primarily refers to compensation and salary. Given that the constitutional emoluments clauses serve separate functions, this Note adopts the position taken by Eisen-Painter-Tribe that “emolument” under the Foreign Emoluments Clause bears a definition that is wider and distinct from the other constitutional emoluments provisions.

*B. A Main Purpose of the Clause: Foreign Influence—a Notion Broader than Foreign Corruption*

Unlike the Domestic Emoluments Clause and the Ineligibility Clause, the Foreign Emoluments Clause is first and foremost the product of the Framers’ deep concern regarding foreign influence. This section aims to show that the Framers’ anti-foreign influence justification is the primary motivating force behind the Clause and that this motivation supports a broad interpretation of a foreign emolument. In doing so, it explores the origins of the foreign influence concern as it relates to the Clause and distinguishes foreign influence from the notion of foreign corruption.

1. Unearthing the Framers’ Concern with Foreign Influence

To be sure, the Constitution as a whole is concerned with foreign influence. In a letter to Noah Webster dated September 15, 1787, Thomas Fitzsimons, a delegate to the Constitutional Convention, stated that without the Constitution, “we shall become a prey to foreign influence and domestic violence.”<sup>70</sup> However, the origin of the Foreign Emoluments Clause, the debates surrounding its inclusion in the Constitution, and the structure of it altogether indicate that the Framers envisioned the Clause as a special antidote

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69. *Cf.* U.S. CONST. art. I, § 8, cl. 17 (stating that Congress shall have power “[t]o exercise exclusive Legislation in all Cases *whatsoever*”) (emphasis added).

70. SUPPLEMENT TO MAX FARRAND’S RECORDS OF THE FEDERAL CONVENTION OF 1787, at 273 (James H. Huston & Leonard Rapport eds., 1987); *see also* STEPHEN HOLMES, THE OXFORD HANDBOOK OF COMPARATIVE CONSTITUTIONAL LAW 206 (Michael Rosenfeld & András Sajó eds., 2012) (stating that in late eighteenth century America, “the greatest threat of bribery came from ‘foreign gold’ or ‘the desire in foreign powers to gain an improper ascendant in our councils’”) (quoting THE FEDERALIST NO. 68).

to foreign influence. On this point, Edmund Randolph stated at the Constitutional Convention, “[I]t was thought proper, in order to exclude corruption and foreign influence, to prohibit any one in office from receiving or holding any emoluments from foreign states.”<sup>71</sup> Thus, the Clause is necessarily a sweeping prophylactic tool designed to prevent foreign influence.

Representing a sharp break from European customs regarding acceptance of foreign gifts, the Foreign Emoluments Clause finds its roots dating back to a 1651 Dutch rule.<sup>72</sup> Under the Dutch policy, foreign ministers were barred from receiving “any presents, directly or indirectly, in any manner or way whatever.”<sup>73</sup> Drawing from the Dutch policy, the Articles of Confederation included a provision providing, “Nor shall any person holding any office of profit or trust under the United States, or any of them, accept of any present, emolument, office, or title of any kind whatever, from any king, prince, or foreign State.”<sup>74</sup> Initially, the first draft of the Constitution omitted the foreign emoluments ban. However, Charles Pinkney proposed the inclusion of the Foreign Emoluments Clause in the Constitution, “urg[ing] the necessity of preserving foreign Ministers and other officers of the U.S. independent of external influence.”<sup>75</sup> Upon this request, delegates at the Constitutional Convention unanimously adopted the Clause.<sup>76</sup> During the Virginia Ratifying Convention, Edmund Randolph described as one event that prompted the foreign emoluments ban former Ambassador Benjamin Franklin’s acceptance of a gift from King Louis XVI consisting of an opulent diamond-covered snuffbox displaying the King’s portrait.<sup>77</sup>

Under the Foreign Emoluments Clause, any U.S. officeholder who wishes to accept a gift or emolument must obtain congressional approval. The motivation for this requirement is two-fold: first, it provides U.S. officeholders with an excuse to decline gifts or emoluments from foreign governments without affronting them; and second, it draws public attention to foreign governments’ ef-

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71. 3 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 327 (Max Farrand ed., 1911).

72. EISEN ET AL., *supra* note 8, at 4.

73. Teachout, *supra* note 8, at 341.

74. EISEN ET AL., *supra* note 8, at 4.

75. 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 71, at 389.

76. *Id.*

77. See THE CONVENTION AT PHILADELPHIA, *supra* note 24, at 465.

forts to influence U.S. officeholders.<sup>78</sup> By granting Congress significant supervisory authority under the Clause, the Framers established Congress as the bulwark against the various forms—“foreign gold,”<sup>79</sup> gifts, titles, or other means—through which foreign governments may seek to curry favor with U.S. officials.

Considering the events and discussions that precede the adoption of the Foreign Emoluments Clause in the Constitution as well as the Clause’s structural features, it is fair to conclude that the drafters understood the Clause as directed towards preventing foreign influence. What follows is an elaboration of the foreign influence concern and how its significance in understanding the meaning of the Clause has become lost in today’s legal discourse, which has by and large been dominated by the anti-corruption principle.

## 2. The Foreign Influence Concern Supports a Broad Reading of the Clause

Legal scholars, notably including Eisen-Painter-Tribe and Professor Zephyr Teachout, have concluded that given the Framers’ prevalent corruption concern, “emolument” must be interpreted broadly.<sup>80</sup> Under the Eisen-Painter-Tribe and Teachout approach, foreign emoluments—regardless of whether they flow from a U.S. office—are prohibited unless approved by Congress. Yet, Eisen-Painter-Tribe and Teachout focus primarily on the “anti-corruption principle.”<sup>81</sup> But this draws the Foreign Emolument Clause too narrowly. As this section explains, the Framers envisioned the Clause as a limit not only on corruption, but also on activities outside the scope of corruption.

The distinction between foreign influence and foreign corruption is important. Whereas foreign *corruption* is a type of foreign

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78. See PAUL BREST ET AL., *Note: The Emoluments Clauses, in PROCESSES OF CONSTITUTIONAL DECISIONMAKING: CASES AND MATERIALS* (6th ed. Supp. 2017).

79. James Madison refers to payments from foreign governments as “foreign gold.” THE FEDERALIST NO. 55, at 272 (James Madison) (Terence Ball ed., 2012).

80. EISEN ET AL., *supra* note 8, at 2; Teachout, *supra* note 8, at 361. As noted earlier, Eisen-Painter-Tribe contend that “emolument” refers to any payment, benefit, or advantage—the definition which this Note adopts for reasons discussed at various points throughout. EISEN ET AL., *supra* note 8, at 11. Mikhail arrives at a similar definition but does so by surveying dictionary definitions of emolument since the formation of the Constitution. Mikhail, *supra* note 22.

81. EISEN AT AL., *supra* note 8, at 2; Teachout, *supra* note 8, at 361; *see also* District of Columbia v. Trump, 315 F.Supp.3d 875, 897 (D. Md. 2018) (characterizing the Framers’ concerns about undue foreign influence and corruption as “anti-corruption concerns”).

*influence*, the Framers' emphasis on the broader notion of foreign *influence* accords credence to a wide application of the Foreign Emoluments Clause. In the context of the Clause, foreign influence broadly refers to any access to U.S. officials by a foreign government through emoluments and other forms prohibited under the Clause. Granted, this Note agrees with most of the points Eisen-Painter-Tribe and Teachout make about the anti-corruption principle. For the purposes of the Clause, however, the foreign influence concern should be understood under its own "anti-foreign influence principle" instead of relegated to the "anti-corruption principle." These two concepts are further explained and distinguished from one another throughout this section.

As for the application of the anti-corruption principle to the Foreign Emoluments Clause, Teachout explains that the Clause derives from the Framers' deep concern that U.S. officeholders could betray their allegiance to the country by foreigners' attempts to "buy influence or access."<sup>82</sup> Her key concern is corruption in the form of betrayal whereby foreign influence is taken as one among other vehicles to betrayal.<sup>83</sup> Teachout arrives at this conclusion based on the historical context of the Constitutional Convention.<sup>84</sup> Because Teachout's analysis is through the anti-corruption framework, however, she overlooks the Framers' broader, separate concern about foreign influence. In other words, Teachout presupposes that, to the Framers, preventing foreign influence was merely a means to an end—the "end" being the thwarting of corruption.<sup>85</sup> Preventing foreign influence is not taken as a wholly singular concern nor an end itself.

Drawing from Teachout's work on the anti-corruption principle, Lessig distinguishes the modern-day understanding of corruption, which he describes as the "abuse of public office for private gain," from the Framers' broader framing of corruption.<sup>86</sup> Namely, Lessig explains that the Framers' sense of corruption, while it includes the modern day meaning of the term, refers to "improper dependence," where a U.S. officeholder or branch of government is dependent on something other than "the people."<sup>87</sup> Under this

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82. Teachout, *supra* note 8, at 362.

83. See ZEPHYR TEACHOUT, CORRUPTION IN AMERICA: FROM BENJAMIN FRANKLIN'S SNUFF BOX TO CITIZENS UNITED 54-55 (2014) (implying that dependence on a foreign sponsor is a kind of structural relationship that leads to corruption).

84. Teachout, *supra* note 8, at 361-62.

85. TEACHOUT, *supra* note 83.

86. Lawrence Lessig, *What an Originalist Would Understand "Corruption" to Mean*, 102 CAL. L. REV. 1, 6 (2014).

87. *Id.* at 7.

broader characterization of corruption, improper dependence would include a president who takes action to further a foreign nation's agenda over that of the United States. Lessig's theory is similar to Teachout's anti-corruption principle in that it would seem to raise questions about the corrupt purpose behind the gain and the impact it can have on the recipient. Practically speaking, the anti-corruption principle does in some respects share the Framers' anti-foreign influence goal of preserving the American republican form of government and maintaining the United States' autonomy in its political process, free from foreign intervention. However, private gains that are undue, improper, or illegal seem to be at the heart of the foreign corruption concern.<sup>88</sup> Beyond such gains, the anti-foreign influence principle goes further in that it is also concerned with things foreign nations confer for the purpose of garnering goodwill or providing a reward or compensation—the types of gains that might lead U.S. officeholders to develop even mere “attachments” to foreign governments.<sup>89</sup> Any form of conferral on the part of foreign governments is covered under the foreign influence concern. Accordingly, it is unnecessary to inquire into purpose and effect whenever the Clause is invoked. Whether the motive behind the gain is corrupt or whether it can have a tendency to corrupt a U.S. official are beside the point.

Interpreting the Foreign Emoluments Clause to apply across a broad range of things referred to as foreign emoluments—regardless of the motive behind the giving and the ensuing consequences—is most consistent with the Framers' fears of the often secretive and creeping nature of foreign influence. Warning that the United States “will probably be an encreasing object of jealousy

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88. TEACHOUT, *supra* note 83, at 20 (stressing that the foreign emoluments ban grew out of the Framers' concern that extravagant foreign gifts could lead a U.S. officeholder to put their own personal gain above American interests); *see also id.* at 17 (distinguishing presents that are corrupt from those given out of generosity).

89. While Teachout suggests that campaign donations motivated by gratification or expression are not corrupt, she does not address whether the same logic applies to foreign emoluments. *See id.* at 222 (stating campaign donations are not corrupt if they are made “out of allegiance, expression, or personal affection, but not in order to shape the exercise of power”). On the topic of a British king's authority to bestow offices, Teachout concedes that Hamilton identified a difference between influence and corruption, but ultimately rejects his view. *See id.* at 50 (dismissing Hamilton's belief that the British king's granting of offices to develop attachments constitutes mere influence rather than corruption). Being quick to assume that Hamilton's position was an outlier, Teachout avoids parsing out Hamilton's reasoning behind the distinction and how it might apply where there is an acceptance of foreign emoluments.

to more than one nation of Europe” and “that enterprises to subvert it will sometimes originate in the intrigues of foreign powers,” Hamilton emphasized that the preservation of the United States ought “to be committed to the guardianship of any but those, whose situation will uniformly beget an immediate interest in the faithful and vigilant performance of the trust.”<sup>90</sup> In *Pacificus*, Hamilton forcefully describes the consequences of opening the door to foreign attachments:

[T]he people of this country . . . [must] be upon our guard against *foreign attachments* . . . [which] will have a natural tendency to lead us aside from our own true interest, and to make us the dupes of foreign influence. They introduce a principle of action, which in its effects . . . is *anti-national*. Foreign influence is truly the Grecian Horse of a republic. We cannot be too careful to exclude its entrance. Nor ought we to imagine, that it can only make its approaches in the gross form of direct bribery. It is then most dangerous, when it comes under the patronage of our passions, under the auspices of national prejudice and partiality.<sup>91</sup>

To be sure, the Framers identified some benefits of foreign influence in American foreign policy, especially from allies. As Madison noted, “in doubtful cases, particularly where the national councils may be warped by some strong passion, or momentary interest, the presumed or known opinion of the impartial world, may be the best guide that can be followed.”<sup>92</sup> Nevertheless, foreign emoluments and gifts are particularly dangerous vehicles for foreign influence and are thus prohibited.<sup>93</sup>

For these reasons, the scope of the Foreign Emoluments Clause was drawn with an eye towards foreign influence more generally, not just foreign corruption. Under this anti-foreign influence

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90. THE FEDERALIST NO. 59, at 291 (Alexander Hamilton) (Terence Ball ed., 2012).

91. *Pacificus* No. 6, *supra* note 1, at 100-06.

92. THE FEDERALIST NO. 68, at 332 (Alexander Hamilton) (Terence Ball ed., 2012). This is consistent with the Framers’ emphasis throughout the Federalist Papers that the longevity and future success of the United States is in part dependent on its “respectability abroad.” *See, e.g.*, THE FEDERALIST NO. 30, at 140 (Alexander Hamilton) (Terence Ball ed., 2012) (commenting on how the federal government must collect revenue from the public and obtain loans from other nations to pay for the administration of the federal government) (emphasis added).

93. For an exploration of the foreign influence problem involving foreign emoluments in the context of land speculation and indebtedness, *see infra* Section II.C.

rationale, the foreign emoluments ban is designed to block foreign access in the form of payment, benefit, or advantage, which in turn helps to minimize such access from the outset of the U.S. policy process. To bring color to the anti-foreign influence principle, the next section presents one source of foreign influence that drew the Framers' attention: foreign nations' attempts to exploit U.S. officials' debts accrued from purchasing American land.

C. *Foreign Influence in Early America: Bankruptcy and Real Estate Speculation*

One illustration of the foreign influence problem that has generally been neglected in the Foreign Emoluments Clause debate concerns foreign emoluments in the form of debt forgiveness in founding-era America. Indeed, the widespread problems of indebtedness and bankruptcy arising from land speculation at this time provide insight into the Framers' belief that emoluments, including officer holders' private business interests,<sup>94</sup> could serve as channels of foreign influence. During this period, wide stretches of American lands, particularly in the Western region, were recognized as significant sources of profit.<sup>95</sup> Many Americans, ranging from political elites to small farmers, obtained loans to purchase real estate.<sup>96</sup> Famous land speculators from this period include former Supreme Court Justice James Wilson and American Revolution financier Robert Morris, who were eventually imprisoned for their debts. According to Madison, the land speculation engaged in by many Americans rendered them "more in debt" than the land was worth.<sup>97</sup>

No doubt, real estate speculation by itself was not widely seen as corrupt. In fact, many Founders, including George Washington, made their fortune from such dealings.<sup>98</sup> Rather, land speculators who suffered from *serious indebtedness* were likely targets of foreign influence, given that foreign governments might attempt to pay off their debts in exchange for access to U.S. affairs. For example, in the 1820s the Holland Land Company, a real estate investment

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94. See *infra* Section II.C.

95. See Edward L. Glaeser, *A Nation of Gamblers: Real Estate Speculation and American History*, 103 AM. ECON. REV. 1, 2 (2013).

96. *Id.*

97. 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 71, at 123.

98. E.g., A. M. SAKOLSKI, THE GREAT AMERICAN LAND BUBBLE: THE AMAZING STORY OF LAND-GRABBING, SPECULATIONS, AND BOOMS FROM COLONIAL DAYS TO THE PRESENT TIME 5 (William N. Parker ed., 1966) (noting that Washington "was one of the most active land speculators of colonial times").

company owned by a group of Dutch bankers, including Rutger Jan Schimmelpenninck, a prominent Dutch political figure who at one point led the authoritarian regime replacing the Dutch Republic,<sup>99</sup> received wide criticism from New Yorkers for gaining too much influence in the state.<sup>100</sup> A New York attorney complained to Governor DeWitt Clinton that “eighty to one hundred thousand people were subject to the will of the Hollanders for their prosperity.”<sup>101</sup> Following public outcry, New York trusts purchased much of the New Yorkers’ debts, thereby dismantling Holland Land Company’s network of control in New York.<sup>102</sup> Adding to the risk of foreign interference through leveraging the indebtedness of Americans, real estate dealings were often transacted in secret, without any paper trails.<sup>103</sup> Thus, if U.S. government officials secured payments from foreign actors to pay off their debts, such payments often went undiscovered by the public.

A prime example is Aaron Burr, whose presidential candidacy Hamilton opposed, in part because Hamilton believed him to be vulnerable to foreign bribes given his enormous debts. In response to Burr’s campaign for president, Hamilton expressed that “no circumstance . . . has given me so much pain as the idea that Mr. Burr might be elevated to the Presidency.”<sup>104</sup> He believed that Burr was too ambitious and egocentric to serve the interests of an autonomous, maturing America.<sup>105</sup> Hamilton predicted that Burr’s thirst for power would not be quenched by becoming president. Instead, Burr would look towards alliances with foreign nations and steer America away from its course of independence.<sup>106</sup>

Referring to Burr’s desperate financial situation, Hamilton confided in a letter that Burr was “bankrupt beyond redemption except by the plunder of his country” and labeled him as “the *Cat-*

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99. See MICHAEL BROERS ET AL., *THE NAPOLEONIC EMPIRE AND THE NEW EUROPEAN POLITICAL CULTURE* 103 (Michael Broers et al. eds., 2012).

100. See SAKOLSKI, *supra* note 98, at 83.

101. See *id.*

102. See *id.* at 83-86.

103. See *id.* at v (indicating that land speculation “has been conducted largely in secret and without enduring records”).

104. Letter from Alexander Hamilton to Oliver Wolcott, Jr. (Dec. 1800), in 25 *THE PAPERS OF ALEXANDER HAMILTON, JULY 1800?–APRIL 1802*, at 286 (Harold C. Syrett ed., Columbia Univ. Press, 1977).

105. See *id.* at 287 (“His ambition will not be content with those objects which virtuous men of either party will allot to it.”).

106. *Cf. id.* (“What would you think of [Burr] having seconded the positions that it was the interest of [the United States] to allow the belligerent [foreign] powers to bring in and sell their prizes and build and equip ships in our ports?”).

*aline* of America,”<sup>107</sup> a comparison to a first-century Roman senator who attempted to overthrow the Roman Republic. In another letter, Hamilton expressed that Burr was “without doubt insolvent for a large *deficit*” and the “fair emoluments of any station, under our government, will not equal his expences in that station.”<sup>108</sup> Because Burr’s government wages were insufficient to satisfy his debts, Hamilton reasoned, Burr was likely to seek debt relief by striking a “*bargain* and *sale* with some foreign power.”<sup>109</sup> More specifically, Hamilton suspected Burr of “having *corruptly* served the views of the Holland Company” during Burr’s tenure at the New York Assembly.<sup>110</sup>

Hamilton’s uncompromising suspicion was later vindicated. Burr had been bribed by the Holland Land Company.<sup>111</sup> In fact, Burr was partly responsible for the Holland Land Company’s ability to expand their land holdings in New York.<sup>112</sup> While serving on the New York Assembly, Burr became indebted to the Holland Land Company for failing to make payments on lands he purchased from it.<sup>113</sup> He then successfully pushed through legislation granting aliens, including the Dutch, the right to possess New York land.<sup>114</sup> In exchange, the Holland Land Company agreed to cancel Burr’s debt and paid him \$5,500,<sup>115</sup> a hefty sum at the time.

Decades after Burr served as vice president, a letter written by a British foreign minister publicly surfaced indicating that he had been secretly brokering a plan with the then-Vice President Burr under which Burr would assist the British government with separating the U.S. western territories from the rest of the Union.<sup>116</sup> In 1807, Burr was arrested for treason on allegations that he plotted to annex Louisiana and other territory for the formation of a nation

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107. *Id.* at 257.

108. Letter from Alexander Hamilton to John Rutledge, Jr. (Jan. 4, 1801), in 25 THE PAPERS OF ALEXANDER HAMILTON, JULY 1800?–?APRIL 1802, at 296 (Harold C. Syrett ed., Columbia Univ. Press 1977).

109. *Id.*

110. *Id.* at 295.

111. SAKOLSKI, *supra* note 98, at 80.

112. *Id.* at 79.

113. *Id.*

114. *Id.*

115. *Id.* at 80.

116. Letter from Anthony Merry to Lord Harrowby (Aug. 6, 1804), in HENRY ADAMS, 2 HISTORY OF THE UNITED STATES OF AMERICA 395 (Charles Scribner’s Sons 1909) (1889).

independent of the United States.<sup>117</sup> He was later acquitted given the lack of evidence required to prove that his conduct amounted to an “overt act.”<sup>118</sup> Perhaps Hamilton detected parallels between the “avaricious” or “ambitious” public servant he wrote about in *Federalist No. 75*, who might be convinced by a foreign power to betray the United States,<sup>119</sup> and Burr, whom Hamilton would later regularly mark as a man controlled by his pursuit of power and wealth.<sup>120</sup>

Unfortunately for Hamilton and the people of early America, the benefits of today’s Information Age filled with 24/7 news coverage and almost boundless electronic storage were not available to cast light on the prohibited foreign emoluments that Burr most likely received while in office. Letters revealing his land speculation activities were curiously destroyed by a confidant to whom he bequeathed them—certain letters depicting speculative money schemes, patronage, and influence were not.<sup>121</sup> If the swathes of Burr’s speculative business ventures were made public before his departure from office, lawmakers could have put a stop to any foreign influence funneled through Burr when he was serving out his federal tenure at a time during which preventing foreign influence from sabotaging American democratic institutions could matter the most.

*D. A Foreign Emolument is Any Payment, Benefit, or Advantage from a Foreign Government*

Because the Foreign Emoluments Clause is a prophylactic against foreign influence, only a definition of “emolument” referring to any payment, benefit, or advantage can stand. Under this definition, the Clause prohibits U.S. officials from accepting anything of value—whether pecuniary or nonpecuniary. For example, an elected official’s acceptance of campaign opposition research on the official’s electoral rival from a foreign government, without con-

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117. See *Aaron Burr Arrested for Treason*, This Day in History, HISTORY.COM (Feb. 9, 2010), <http://www.history.com/this-day-in-history/aaron-burr-arrested-for-treason> [<https://perma.cc/D3DT-RSHR>].

118. *Id.*

119. THE FEDERALIST NO. 75, at 365-66 (Alexander Hamilton) (Terence Ball ed., 2012).

120. See Letter from Alexander Hamilton to Oliver Wolcott, *supra* note 104, at 257 (claiming that Burr was capable of instigating war in furtherance of “power” and “wealth”); Letter from Alexander Hamilton to John Rutledge, *supra* note 108, at 294 (accusing Burr of having as his ultimate aim “stable power and Wealth”).

121. See Gordon S. Wood, *The Real Treason of Aaron Burr*, 143 PROC. AM. PHIL. SOC’Y 280, 282-83 (1999).

gressional approval, would constitute a foreign emoluments violation. Indeed, support for this approach derives from the language in the constitutional provision itself. The fact that “emolument” is separate from “present” in the text shows that the former encompasses more than merely foreign government gifts. Moreover, the “of any kind whatever” language following “present, Emolument, Office, or Title”<sup>122</sup> is evidence that emolument is further designed as a catch-all. The inclusion of the sweeping “of any kind whatever” language likely reflects the Framers’ understanding that foreign governments’ influence could manifest in many different forms.<sup>123</sup> On balance, a broad interpretation of “emolument” defined as any payment, benefit, or advantage is the most natural consequence of the Framers’ foreign influence concern and a textual analysis of the provision.

### III. THE FOREIGN EMOLUMENTS CLAUSE APPLIES TO THE PRESIDENT

This part addresses the argument that the Foreign Emoluments Clause applies to the president. A survey of the Framers’ anti-foreign influence considerations underpinning the structural design, powers, and attributes of the presidency reveals that the Clause directly contemplates the president vis-à-vis other U.S. offices. This part then argues that an expansive definition of a foreign emolument that reaches any payment, benefit, or advantage from a foreign government is in line with the Clause’s anti-foreign influence function, which helps tether the president’s loyalty to the American public.

#### A. *The President as a Target of Foreign Influence*

Notwithstanding the growing legal literature supporting a broad application of emolument, the lack of investigation into the anti-foreign influence spirit threading the Foreign Emoluments Clause and the presidency is surprising. This section begins with

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122. See *supra* Section II.A.

123. Cf. ST. GEORGE TUCKER, 3 BLACKSTONE’S COMMENTARIES: WITH NOTES OF REFERENCE TO THE CONSTITUTION AND LAWS OF THE FEDERAL GOVERNMENT OF THE UNITED STATES AND OF THE COMMONWEALTH OF VIRGINIA 386 (1803) (suggesting that the Foreign Emoluments Clause is a response to how “[c]orruption is too subtle a poison to be approached, without injury”); WASHINGTON, *supra* note 9, at 17 (“As avenues to foreign influence in innumerable ways,” passionate attachments to nations other than the United States “are particularly alarming to the truly enlightened and independent patriot.”).

the argument that, given the Framers' concern that the president is a special target of foreign influence, the exclusion of the president from the Clause is mistaken. Next, it fleshes out the anti-foreign influence goal that the Clause shares with three types of constitutional limitations on presidential power: (1) congressional oversight of Executive activity operating in secrecy and dispatch, (2) exclusion of monarchical attributes from the presidency, and (3) presidential election procedures and eligibility requirements.

The Framers stressed that, among the political branches, the president is an especially prominent object of foreign influence given the nature of the president as a key leader in foreign affairs.<sup>124</sup> In discussing the potential for corruption or improper behavior on the part of a president, Hamilton warned that “a man raised from the station of a private citizen to the rank of chief magistrate . . . might sometimes be under temptations to *sacrifice his duty to his interest*,” “[a]n avaricious man might be tempted to *betray the interests of the state to the acquisition of wealth*,” and “[a]n ambitious man might *make his own aggrandizement, by the aid of a foreign power*, the price of his treachery to his constituents.”<sup>125</sup> Given this heightened risk of foreign influence with the office of the presidency, the president is in many ways a focal point of the Foreign Emoluments Clause.

A view widely accepted among the legal community is that the Foreign Emoluments Clause applies to the president because the presidency is an “Office of Profit or Trust.”<sup>126</sup> Tillman, an outspoken critic of this view, takes the position that the Clause applies only to “holders of appointed federal statutory offices” and thus does not concern the president.<sup>127</sup> His main reasoning is that “[o]ffice . . . under the United States” translates into appointed or statutory offices.<sup>128</sup> However, Tillman places too much weight on one document: a list Hamilton provided to the Senate of “every person holding any civil office or employment under the United States, (except the judges) . . . .”<sup>129</sup> Because this list comprised federal appointed or statutory offices, and did not include elected officeholders, Tillman argues that appointed or statutory offices are the

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124. See *District of Columbia v. Trump*, 315 F.Supp.3d 875, 900 (D. Md. 2018) (submitting that the Framers' concern over potential foreign influence over the president led to adoption of the Foreign Emoluments Clause).

125. THE FEDERALIST NO. 75, at 365 (Alexander Hamilton) (Terence Ball ed., 2012) (emphasis added).

126. *E.g.*, EISEN ET AL., *supra* note 8, at 7-10; Teachout, *supra* note 8, at 361-66.

127. Tillman, *supra* note 24, at 181.

128. *Id.* at 185.

129. *Id.* at 186.

only ones to which the Clause applies.<sup>130</sup> As Teachout explains, however, Hamilton may have omitted the list of salaries of certain elected officeholders, such as the president and vice president, because their salaries may have been general knowledge at the time and thus unnecessary to include.<sup>131</sup> But Tillman also cites cases where President Washington accepted certain gifts from foreign nations and did not seek congressional approval for them.<sup>132</sup> Yet, he received these gifts when the federal government was in its infancy and still gaining its footing.<sup>133</sup> And this point is further overshadowed by the longstanding presidential practice of seeking congressional approval for foreign gifts following the Washington Presidency.<sup>134</sup> Lastly, Tillman rejects the notion that the Framers' corruption concern was a primary motivation for the creation of the Clause on the basis that other constitutional principles, such as separation of powers, could have been weighed more heavily.<sup>135</sup>

If the motivation of the Foreign Emoluments Clause is predicated on some concern regarding only appointed officials' acceptance of foreign gifts, as Tillman would argue, then surely some evidence of this narrow concern would exist. It is telling that Tillman's exact response as to why the Framers would exempt federal elected officeholders from the Clause is simply: "I do not know."<sup>136</sup> Historical evidence, on the other hand, points to the Framers' re-

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130. *Id.* at 187.

131. Zephyr Teachout, *Colloquy, Gifts, Offices, and Corruption*, 107 Nw. U. L. REV 30, 41 (2012).

132. Tillman, *supra* note 23, at 188-89.

133. *Cf.* TUCKER, *supra* note 123, at 386-87 (stating that the Foreign Emoluments Clause has "said to have been overlooked" and expressing hope that "all future ministers" will refuse presents from foreign governments to "ensure a proper respect to this clause of the constitution").

134. See Richard Tofel, *Emoluments Clause: Could Overturning 185 Years of Precedent Let Trump off the Hook?*, PROPUBLICA (Dec. 13, 2016), <https://www.propublica.org/article/emoluments-clause-overturning-185-years-of-precedent-let-trump-off-the-hook> [<https://perma.cc/4R7U-ZJU2>] (enumerating instances where presidents sought congressional approval prior to accepting foreign gifts or emoluments). *Cf.* *District of Columbia v. Trump*, 315 F.Supp.3d 875, 883 (D. Md. 2018) ("The Court finds executive branch precedent and practice overwhelmingly consistent" with a broad interpretation of emolument.); *but see* Teachout, *supra* note 131, at 38-39 (acknowledging that Thomas Jefferson initially took affirmative steps to satisfy the Foreign Emoluments Clause, but eventually accepted foreign gifts without congressional approval).

135. Tillman, *supra* note 23, at 183.

136. *Id.* at 203; *but see* Grewal, *supra* note 22, at 646 (offering as an explanation for limiting the Foreign Emoluments Clause to appointed officials a potential expectation that appointed officials were subject to improper foreign influences given visits abroad and that the president would remain at home).

peated mistrust that foreign bribery could turn U.S. officials, particularly the president and other elected officials. Moreover, foreign interference would undermine the United States' autonomy in foreign policy. Foreign influence and corruption concerns are perhaps the strongest evidence of the Framers' intent behind the Clause.

#### 1. The President's Role in Foreign Affairs: Secrecy and Dispatch

Given the president's unique, significant leadership role in foreign affairs, the Foreign Emoluments Clause serves as an important prophylactic measure to guard against foreign influence in the Executive Branch. Although the president shares certain foreign affairs powers with other branches of government—for example, the president's power to make treaties is shared with the Senate—the Framers contemplated that the president's work in foreign affairs would sometimes operate in ways distinct from that of the other branches of government, including sometimes in “secrecy” and “dispatch.”<sup>137</sup> The Framers expressed that secrecy and dispatch were crucial to certain aspects of the president's foreign affairs involvement because, without these characteristics, important transactions with foreign nations might be excessively delayed or forestalled altogether.<sup>138</sup>

Even where secrecy and dispatch of the president are necessary, however, the Framers anticipated some level of congressional participation in foreign transactions. Hamilton pointed out that, although the president is the “most fit agent” in foreign negotiations, “the vast importance of the trust, and the operation of treaties as laws, plead strongly for the participation of the whole or a part of the legislative body in the office of making them” and that it “would be utterly unsafe and improper to entrust that power to an elective magistrate of four years duration.”<sup>139</sup> The chief advantages for the Senate's involvement in foreign affairs matters include “talents, information, integrity, and deliberate investigations.”<sup>140</sup> Given that the Framers envisioned a significant role for the Senate in foreign affairs matters to guard against foreign intervention, where the president is acting alone in foreign affairs, further congressional supervision is appropriate, if not necessary. The Foreign Emoluments Clause is a constitutional device conferred to Congress em-

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137. See THE FEDERALIST NO. 64, at 315 (John Jay) (Terence Ball ed., 2012).

138. See *id.*

139. THE FEDERALIST NO. 75, at 365 (Alexander Hamilton) (Terence Ball ed., 2012).

140. THE FEDERALIST NO. 64, at 315 (John Jay) (Terence Ball ed., 2012).

powering it to supervise the president, so as to ensure that the president is faithfully discharging their duty to the American public—rather than promoting a foreign nation’s agenda.

## 2. Distinguishing the President from a Monarch

General comparisons that the Framers make between republics and monarchies also demonstrate that the Foreign Emoluments Clause is designed as a limitation on emoluments that may induce the president and other officeholders to take actions that might adversely affect American interests and institutions. “One of the weak sides of republics,” Hamilton wrote, “is that they afford too easy an inlet to foreign corruption.”<sup>141</sup> For a hereditary monarchy, Hamilton stated, “it is not easy for a foreign power to give him an equivalent for what he would sacrifice by treachery to the State.”<sup>142</sup> Hamilton further explained that elected officials of “stations of great pre-eminence and power, may find compensations for betraying [the U.S. public’s] trust . . . .”<sup>143</sup> Similarly, Madison observed that, unlike a monarch who inherits their title, the president lacks a “permanent stake in the public interest which [would] place him out of the reach of foreign corruption.”<sup>144</sup> Because the president is particularly in a position of “great pre-eminence and power,” the risk of foreign emoluments tempting the president away from American interests is higher than that of the other branches of government.

Interestingly, the fact that the ban against titles of nobility is located in the same clause as the foreign emoluments prohibition<sup>145</sup> also sheds light on the relationship between the Foreign Emoluments Clause and the presidency. Like the foreign emoluments prohibition, the titles of nobility ban symbolizes the United States’ radical retreat from European customs. At the time of the Constitutional Convention, some opponents to the Constitution feared that the president was a sort of monarch. One reason for the

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141. THE FEDERALIST NO. 22, at 103 (Alexander Hamilton) (Terence Ball ed., 2012).

142. *Id.*

143. *Id.*

144. THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 71, at 138.

145. U.S. CONST. art. I, § 9, cl. 8 (“No Title of Nobility shall be granted by the United States: And no Person holding any Office of Profit or Trust under them, shall . . . accept of any present, Emolument.”).

titles of nobility ban was to further distinguish the United States from a monarchy, which certain Founders saw as corrupt.<sup>146</sup>

In comparing the U.S. president to the king of Great Britain, Hamilton noted that, unlike the president, the king “can confer titles of nobility at pleasure.”<sup>147</sup> In addition, he pointed out that the president “can confer no privileges whatever,” whereas the king can make naturalized citizens of immigrants and nobles of commoners and establish corporations “with all the rights incident to corporate bodies.”<sup>148</sup> These specific references to the president in the context of the titles of nobility ban indicate that the Foreign Emoluments Clause, which contains exclusively the titles of nobility ban and the foreign emoluments prohibition, could on the whole be a result of the Framers’ anxieties that the presidency is more predisposed to certain types of abuse than the other branches of government. In other words, because both the ban against titles of nobility and the foreign emoluments prohibition appear in the same clause, the strong limits on presidential authority in the former imply a similar restriction in the latter.

Treason and bribery addressed in a separate constitutional provision<sup>149</sup> also appear to bring vigor to the Foreign Emoluments Clause and further justifies its application to the president. To quell concerns that the president would resemble a monarch, Hamilton stressed that the president could be convicted of “treason, bribery, or other high crimes.”<sup>150</sup> Describing the boundaries of treason, Hamilton stated that treason is “levying war upon the United States, and adhering to their enemies, giving them aid and comfort.”<sup>151</sup> Given the president generally has more exposure to foreign leaders than, say, Members of Congress, the president is uniquely situated to providing such “aid and comfort” or engaging in bribery. What if there is an acceptance of emoluments that would seem to set in motion the “giving aid and comfort” to foreign enemies? Acceptance of emoluments would probably not rise to the level of treason

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146. See, e.g., THOMAS PAINE, *OF THE OLD AND NEW SYSTEMS OF GOVERNMENT* (1791), reprinted in 2 *THE WRITINGS OF THOMAS PAINE, 1779-1792*, 413, 416 (Moncure Daniel Conway ed., New York, G.P. Putnam’s Sons 1894) (characterizing monarchs where “one is a tyrant, another an idiot, a third insane, and some all three together”).

147. *THE FEDERALIST* NO. 69, at 339 (Alexander Hamilton) (Terence Ball ed., 2012).

148. *Id.* at 340.

149. U.S. CONST. art. III, § 3.

150. *THE FEDERALIST* NO. 69, at 335 (Alexander Hamilton) (Terence Ball ed., 2012).

151. *Id.* at 338.

or bribery across all cases, however.<sup>152</sup> To illustrate, a president may have inadvertently accepted an emolument and, upon discovering that it should have been presented to Congress, immediately returns the emolument to the foreign giver and reports the mistake to Congress. A violation has occurred but, taken in isolation, the conduct here does not depict a pattern of behavior indicating the president is a foreign agent. But a persuasive argument can be made that the Framers believed that, at least in the most concerning cases, violations of the foreign emoluments ban should be accorded equal punishment to treason or bribery.<sup>153</sup> Perhaps the acceptance of an emolument (or emoluments over a substantial period of time) can be so grave or improper such that it naturally gives rise to suspicion that treasonous conduct or bribery is afoot. Accordingly, a kinship between the foreign emoluments ban and treason clause, especially with respect to the presidency, can be seen.

### 3. Election Processes, Eligibility Requirements & Voting Rules

Another manifestation of the foreign influence problem with respect to the president relates to the U.S. election system. One motivation for the election processes for the presidency and Senate was an assurance that treaties and other matters in foreign affairs would be managed by individuals “most distinguished by their abilities and virtue.”<sup>154</sup> Put differently, the electoral processes were de-

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152. Madison makes clear that the definition of treason under the Constitution is to be construed narrowly and describes the risk that impassioned factions that might otherwise abuse the offense by convicting opponents for their political views. *See* THE FEDERALIST NO. 43, at 210 (James Madison) (Terence Ball ed., 2012).

153. Placing a serious violation of the foreign emoluments ban on equal footing with treason and bribery certainly has significant repercussions for the type of punishment required when such a violation occurs. Treason can certainly serve as grounds for impeachment. *See* THE FEDERALIST NO. 69, at 335 (Alexander Hamilton) (Terence Ball ed., 2012) (“The President . . . would be liable to be impeached, tried, and upon conviction of treason . . . removed from office.”). In the same vein, a strong argument can be made that at least serious violations of the ban rising to the level of treason or bribery are impeachable. *See* THE FEDERALIST NO. 66, at 326 (Alexander Hamilton) (Terence Ball ed., 2012) (positing that impeachment might be applicable to circumstances in which the president has acted without integrity in negotiations with foreign governments or Senators have acted as “mercenary instruments of foreign corruption”). At any rate, whether a violation of the foreign emoluments ban can make a case for impeachment against the president is beyond the scope of this Note.

154. *See* THE FEDERALIST NO. 64, at 313 (John Jay) (Terence Ball ed., 2012); *see also* THE CONVENTION AT PHILADELPHIA, *supra* note 24, at 489 (stating that without safeguards in the presidential election process, European countries may seek

signed to inhibit foreign government agents disguised as candidates from gaining electoral support and to eliminate certain perverse incentives, such as bribery, that would attract dishonest and corrupt candidates.

More specifically, the creation of the electoral college<sup>155</sup> was a key response to the foreign influence concern. Referring to the electoral college, Hamilton affirmed, “Nothing was more to be desired, than that every practicable obstacle should be opposed to cabal, intrigue and corruption,” all of which he stated are most likely to stem from the “desire of foreign powers to gain improper ascendant in our councils.”<sup>156</sup> Hamilton continued, “How could they better gratify this, than by raising a creature of their own to the chief magistracy of the union?”<sup>157</sup> At the Constitutional Convention, Pierce Butler also emphasized that the presidential election process would be targeted by foreign powers, warning that “the two great evils to be avoided” in selecting the executive were “cabal at home” and “influence from abroad.”<sup>158</sup> Thus, both the transient nature of the electoral college and the ineligibility of officeholders for the delegate positions were designed to make it prohibitively costly for foreign nations to infiltrate the Executive Branch.<sup>159</sup>

Much like the election processes, the Framers sought to limit foreign influence by establishing a citizenship requirement for presidential candidates and age requirements for candidates for the president and other elected offices.<sup>160</sup> Because the president is more accessible to foreign influence than other officials, the Framers set the age limit higher for presidential candidates than candidates for the Senate and House of Representatives. Madison

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to gain influence through the process and that if there is nothing to prevent the president’s “corruption but his virtue, which is but precarious, we have not sufficient security”).

155. U.S. CONST. art. II, § 1 (“[The President shall] be elected, as follows . . . Each State shall appoint, in such Manner as the Legislature thereof may direct, a Number of Electors, equal to the whole Number of Senators and Representatives.”).

156. THE FEDERALIST NO. 68, at 332 (Alexander Hamilton) (Terence Ball ed., 2012).

157. *Id.*

158. 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 71, at 112.

159. See THE FEDERALIST NO. 68, at 332 (Alexander Hamilton) (Terence Ball ed., 2012) (explaining that the transient and detached nature of the electoral college will help prevent the “business of corruption”).

160. U.S. CONST. art. II, § 1, cl. 5 (listing qualifications for President); U.S. CONST. art. I, § 2, cl. 2 (listing qualifications for House of Representatives); U.S. CONST. art. I, § 3, cl. 3 (listing qualifications for Senate).

reasoned that those engaged “immediately in transactions with foreign nations” should be “thoroughly weaned from the prepossessions and habits incident to foreign birth and education.”<sup>161</sup> Otherwise, Madison anticipated, the American public’s “hasty admission” of foreign-born immigrants “might create a channel for foreign influence on the national councils.”<sup>162</sup> To address this concern, the most stringent qualifications are imposed on candidates running for offices with significant foreign affairs policy exposure. Given the president serves as commander-in-chief, receives ambassadors, appoints diplomats, and makes treaties, the president holds more responsibilities in foreign affairs than any other political branch. For this reason, presidential candidates are subject to a natural-born citizenship requirement, whereas candidates running for congressional seats are not. In addition, the age of presidential eligibility is thirty-five years old or older. Comparing the two chambers of Congress, the treaty-making power bestowed upon the Senate gives it higher authority in foreign affairs as compared to the House of Representatives. Reflecting this disparity, age qualifications for Senate candidates are higher than those imposed on House candidates: Senate candidates must be 30 years or older and House candidates need only be 25 years or older.

The anti-foreign influence motivations behind the structure of congressional voting rules in the Constitution also bring color to the Foreign Emoluments Clause and its application to U.S. officeholders who are special prey of such influence, such as the president. Passage of a bill requires a simple majority vote of the House and Senate, unless the president vetoes the bill, in which case passage requires a two-thirds vote.<sup>163</sup> Hamilton provided two reasons why the two-thirds vote, rather than the simple majority vote, would expose the process to heightened foreign influence. First, the greater delay in securing a two-thirds vote in support of a bill could

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161. THE FEDERALIST NO. 62, at 300 (James Madison) (Terence Ball ed., 2012).

162. *Id.* Operating within the anti-corruption framework, Teachout does not go far enough in uncovering the Framers’ anti-foreign influence justifications for the citizenship and age requirements. On the citizenship requirement, Teachout focuses on foreigners seeking U.S. office in their individual capacities rather than as foreign government agents and argues that the main concern was that foreigners “exploited the system and did not truly belong to or intend to respond to the residents.” See TEACHOUT, *supra* note 83, at 75-76. On the age requirements, Teachout describes them as limitations on “the power of family dynasties.” *Id.* at 76.

163. U.S. CONST. art. I, § 7.

present sufficient time for foreign powers to invade the process.<sup>164</sup> Second, under the simple majority system, the steep expense that foreign governments might be required to incur in order to bribe or coax a number of lawmakers short of a simple majority serves as a financial disincentive. Under the two-thirds system, on the other hand, it would be cheaper for these foreign governments because fewer resources are needed to sway the reduced number of lawmakers that it could take to move the vote in their favor.<sup>165</sup> Applying this rationale, because the president is an individual, foreign governments seeking influence in U.S. affairs have further motivation to funnel their efforts through the presidency, since doing so is less time-consuming and costly as compared with paying off the requisite number of Senators and U.S. Representatives.

*B. Prohibiting Extra-Office Emoluments to Ensure the President's Loyalty*

At the outset, the Foreign Emoluments Clause aims to secure the president's loyalty to U.S. interests by prohibiting the president from holding any private interests that might lead them to advance foreign nations' interests at the expense of the United States. At the Virginia Ratifying Convention, James Monroe warned that if the president and their advisers "can escape punishment with so much facility, what a delightful prospect must it be for a foreign nation, which may be desirous of gaining territorial or commercial advantages over us, to practice on them!"<sup>166</sup> Perhaps to dispel doubts such as Monroe's, John Jay explained, "having no private interest distinct from that of the nation," the president and Senate "will be under no temptations to neglect the latter."<sup>167</sup> Indeed, the ban on foreign emoluments appears to be among the "most effectual precautions" in the Constitution designed to keep U.S. officeholders "virtuous, whilst they continue to hold their public trust."<sup>168</sup> This

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164. THE FEDERALIST NO. 22, at 102 (Alexander Hamilton) (Terence Ball ed., 2012) ("tedious delays—continual negotiation and intrigue—contemptible compromises of the public good").

165. *Id.* at 103 ("[W]here two thirds of all the votes were requisite . . . he would have to corrupt a smaller number.").

166. THE CONVENTION AT PHILADELPHIA, *supra* note 24, at 220.

167. THE FEDERALIST NO. 64, at 316 (John Jay) (Terence Ball ed., 2012); *see also* THE CONVENTION OF PHILADELPHIA, *supra* note 24, at 485-86 (raising concern that the reeligibility of the president would render the president such that, "instead of being attentive to" the interests of the American public, "he will lean to the augmentation of his private emoluments").

168. *See* THE FEDERALIST NO. 57, at 277 (James Madison) (Terence Ball ed., 2012); *see also* TUCKER, *supra* note 123, at 386 ("Nothing can be more dangerous to

section examines how the broad definition of “emolument”—namely, any payment, benefit, or advantage provided by a foreign government—under the Clause is consistent with the Clause’s prophylactic nature designed in part to further ensure that the president remains dependent on the American people alone—that is, loyal.

Despite the historical evidence confirming that the Foreign Emoluments Clause is a powerful tool designed to prevent the president from furthering foreign nations’ interests over those of the American people, certain legal scholars insist that the scope of “emolument” as applied to the president is limited to those that flow from the president’s office. One such scholar is Grewal who, in assuming *arguendo* that the Clause applies to the president, concludes that the president could violate the Clause only if there is evidence that the president personally provided services to a foreign government in exchange for compensation.<sup>169</sup> Grewal argues that finding violations where the president accepts extra-office emoluments would lead to “strange results,” such as violations where U.S. officers own “building permits, trademarks, and licenses from foreign governments.”<sup>170</sup> But these results are not so “strange” considering that these benefits, especially if the president enjoys many of them, create a conflict of interest that could incentivize a president to betray their loyalties to the public while in office. Indeed, the Clause is geared towards eradicating these incentives in the first place. The transparency and accountability mechanisms that the Framers built into the design of the presidency and practical considerations show that Grewal’s interpretation of emolument is misguided.

Consistent with the disclosure regime demanded under the Foreign Emoluments Clause, the great weight that the Framers placed on ensuring transparency over presidential behavior and the presidency’s accountability to the public further lends credence to a broad application of the Clause to the president. Among the safeguards designed to protect the American public from unfaithful exercises of constitutional power, the “greatest” include public opinion and discoverability of misconduct.<sup>171</sup> By confining the pres-

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any state, than influence from without, because it must be invariably bottomed upon corruption within.”); THE CONVENTION AT PHILADELPHIA, *supra* note 24, at 486 (“It is impossible to guard better against corruption.”).

169. Grewal, *supra* note 22, at 644.

170. *Id.* at 662-64.

171. See THE FEDERALIST NO. 70, at 346 (Alexander Hamilton) (Terence Ball ed., 2012).

idency to a single person, rather than multiple persons, the Framers sought to make certain that any misconduct on the part of the president is more easily discoverable for the purpose of punishing or impeaching the president. A “plurality of the executive,” Hamilton argued, would “deprive the people of the two greatest securities they can have for the faithful exercise of any delegated power,” the securities including public opinion and the opportunity to discover, with “facility and clearness,” the president’s misconduct.<sup>172</sup> These securities, Hamilton reasoned, are necessary for the removal or punishment of the president.<sup>173</sup> Consequently, the narrow interpretations of emoluments as including no more than authorized benefits flowing from an office fall flat when taking into account that the Clause is a transparency tool designed to minimize foreign intervention attempts, which would most likely manifest in the form of unauthorized benefits to the president.

In many ways, the Framers’ commentary on a president’s undesirable, corrupt behavior that could ensue in the absence of certain constitutional limitations to presidential power casts a wide net on the types of emoluments banned by the Foreign Emoluments Clause. Prohibiting the reelection of an incumbent president is one scheme the Framers posited could entice an “avaricious” or “ambitious” president to engage in corrupt behavior,<sup>174</sup> which, according to Hamilton, would most likely involve some form of foreign intervention.<sup>175</sup> In response to an argument that the president should be prohibited from holding consecutive terms in office, Hamilton speculated that such a ban could provide an incentive for a president to engage in corrupt behavior, such as embezzlement or usurpation of other branches of government.<sup>176</sup> Hamilton continued:

An avaricious man, who might happen to fill the offices, looking forward to a time when he must at all events yield up the *emoluments* he enjoyed, would feel a propensity, not easy to be resisted by such a man, to make the best use of the opportunity he enjoyed, while it lasted; and might not scruple to have recourse to the most corrupt expedients to make the harvest as abundant as it was transitory; though the same man probably,

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172. *Id.*

173. *Id.*

174. See THE FEDERALIST NO. 72, at 353 (Alexander Hamilton) (Terence Ball ed., 2012) (explaining that the re-eligibility of a president induces good behavior).

175. THE FEDERALIST NO. 68, at 332 (Alexander Hamilton) (Terence Ball ed., 2012) (noting that corruption in election would most likely stem from the “desire of foreign powers to gain an improper ascendant in our councils”).

176. THE FEDERALIST NO. 72, at 354 (Alexander Hamilton) (Terence Ball ed., 2012).

with a different prospect before him, might content himself with the *regular perquisites* of his station, and might even be unwilling to risk the consequences of an abuse of his opportunities.<sup>177</sup>

Since the above passage directly follows a discussion of embezzlement and other corrupt behavior, Hamilton appears to refer to emoluments as including the benefits or advantages from the improper conduct and not only those related to the president's office. This conclusion is further supported by the fact that Hamilton contrasts "emoluments" obtained by a corrupt president with "regular perquisites" of a President's office. Similarly, Hamilton explained that an "avaricious" president "might be tempted to betray the interests of the state to the acquisition of wealth" and an "ambitious" president "might make his own aggrandizement, by the aid of a foreign power."<sup>178</sup> In short, the use of "emolument" in this context shows that the term as understood under the Foreign Emoluments Clause includes both intra- and extra- presidential office benefits and advantages.

Apart from the foregoing transparency and accountability reasons, Grewal's view of "emolument" as applied to the president is also misguided from a practical standpoint. Under Grewal's definition requiring an exchange, a foreign emoluments violation is established only with evidence of a quid pro quo relationship.<sup>179</sup> Owing to the fact that the president may sometimes act in secrecy where the other branches of government cannot, any party seeking to challenge the president's violation of the Foreign Emoluments Clause may never be capable of establishing evidence of a quid pro quo or unauthorized compensation received by the president.<sup>180</sup> If a sitting president has the desire to accept illegal emoluments, they would always choose to do so in secrecy to prevent the discovery of

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177. *Id.* (emphasis added).

178. THE FEDERALIST NO. 75, at 365-66 (Alexander Hamilton) (Terence Ball ed., 2012).

179. See Grewal, *supra* note 22, at 644 (submitting that a foreign emolument "refers only to the compensation that a U.S. Officer receives from providing services for a foreign government"). For example, Grewal states that, "if a foreign government paid the United States Secretary of the Treasury a consultation fee in exchange for economic advice," the payment would constitute an emolument. *Id.* at 650.

180. Cf. THE CONVENTION AT PHILADELPHIA, *supra* note 24, at 484 ("It is not many years ago – since the revolution – that a foreign power offered emoluments to persons holding offices under our government. It will, moreover, be difficult to know whether he receives emoluments from foreign powers or not.").

a “smoking gun.”<sup>181</sup> For the Clause to have any affect at all on the president, an interpretation of emolument under the Clause must include, not only a broad interpretation of “emolument” as any payment, benefit, or advantage, but any direct or indirect benefit with or without any evidence of a *quid pro quo*. Putting aside the impracticality of a *quid pro quo* requirement, the Clause is not only about ferreting out U.S. officeholders’ corrupt activities with foreign governments, but it is also about blocking foreign governments from accessing the U.S. political process through foreign emoluments from the very beginning.<sup>182</sup>

#### IV. THE MODERN PRESIDENCY AND FOREIGN EMOLUMENTS

This part explains how the modern president’s growing unilateral activity in foreign affairs at the exclusion of congressional participation exacerbates the risk of foreign emoluments violations. In addition, it discusses the accumulation of foreign emoluments that President Trump has amassed as a result of his presidency. It concludes with preliminary compliance proposals, such as disclosure of tax returns and dissociation from business holdings. These proposals are not intended to provide a comprehensive policy solution. Rather, they serve as a starting point to further the discussion re-

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181. A group of Members of Congress alleges in its lawsuit against President Trump that, because President Trump has received foreign payments “in secret,” the lawmakers are unable to review any undisclosed emoluments that the president has accepted. See Ellis Kim, *Trump Tells Xi Jinping U.S. Will Honor ‘One China’ Policy*, NAT’L L. J., June 7, 2018, <https://www.law.com/nationallawjournal/2018/06/07/judge-grapples-with-democrats-standing-in-trump-emolument-lawsuit/?slreturn=20180817231847>.

182. It is worth noting that the U.S. Supreme Court’s recognition of and rationale behind a quid pro quo requirement for placing restrictions on political contributions does not apply to the realm of officeholders’ acceptance of foreign emoluments. See *Citizens United v. FEC*, 558 U.S. 310, 357 (2010). For one thing, the Court left open the question of whether there is a compelling governmental interest in “preventing foreign influence over the political process” that would justify such contribution restrictions. *Id.* at 362. Needless to say, the Framers’ foreign influence concern driving the Foreign Emoluments Clause is not exclusive to elections, but also extends to events concerning a U.S. official while they are in office, regardless of whether they are running for reelection. Thus, *Citizens United* may have been alluding to a different sense of foreign influence. Second, the Court in *McCutcheon v. FEC* made a distinction between quid pro quo corruption and general influence. See 134 S.Ct. 1434, 1444 (2014). That being said, the relationship between foreign influence in U.S. political campaigns on the one hand, and foreign influence by way of prohibited emoluments on the other, is beyond the concern of this Note.

garding steps that the president ought to take in order to avoid a violation of the Foreign Emoluments Clause.

A. *Unilateral Executive Action in Foreign Affairs: Increasing Risk of Foreign Emoluments Violations*

With the modern practice of presidents undertaking unilateral actions in foreign affairs, there has been a growing secrecy surrounding the modern presidency that creates a grave risk of foreign emoluments violations. Indeed, the roles of the president and Senate in foreign affairs have drastically evolved in ways that depart from the Framers' intentions. Today, the president often undertakes unchecked action in foreign affairs even where the president lacks the constitutional authority to do so or when their constitutional power is shared with Congress.<sup>183</sup> For example, although the Constitution gives the Senate the power to declare war, several presidents in modern times have left in their wake a pattern of engaging the United States in wars without Senate approval.<sup>184</sup> Despite the president and Congress's "joint agency" to make treaties,<sup>185</sup> many presidents have unilaterally made clandestine deals with foreign nations.<sup>186</sup> This is deeply troubling because the Framers intended for the joint agency between the president and Congress embedded in the treaty power to serve as a safeguard against treaties that are the product of corruption or improper foreign influence. Hamilton stressed that the security against "corruption and treachery in the formation of treaties, is to be sought for in the numbers and characters of those who are to make them."<sup>187</sup>

The practice of presidential unilateral decision-making in foreign affairs implicates the Foreign Emoluments Clause because the safeguard of joint agency has essentially been cast aside. Conse-

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183. For an informative discussion on the adverse consequences associated with unilateral executive decision-making, see Stephen Holmes, *In Case of Emergency: Misunderstanding Tradeoffs in the War on Terror*, 97 CAL. L. REV. 301 (2009).

184. Examples include President Truman's decision to initiate the Korean War and President Nixon's clandestine war in Cambodia. See CHRIS EDELSON, *POWER WITHOUT CONSTRAINT: THE POST-9/11 PRESIDENCY AND NATIONAL SECURITY* 15 (2016).

185. THE FEDERALIST NO. 66, at 325 (Alexander Hamilton) (Terence Ball ed., 2012).

186. The Iran-Contra affair is one famous example of a secret foreign deal under which the Reagan administration agreed to sell missiles to Iran in exchange for the release of American hostages detained in Lebanon. See EDELSON, *supra* note 184, at 38-39.

187. THE FEDERALIST NO. 66, at 325 (Alexander Hamilton) (Terence Ball ed., 2012).

quently, foreign nations now have further incentive to persuade or bribe a disloyal president to advance their interests, knowing full well that the modern president can effectively conceal these efforts from Congress and the public eye by simply branding such interactions as matters of “national security.” The absence of congressional participation in foreign policy decisions leads to less oversight of the exchanges between the president and foreign nations. Without congressional supervision, the president has access to numerous hidden channels through which they may accept prohibited foreign emoluments with little chance of being discovered. Surely, the overarching anti-foreign influence goal of the Clause commands that the Clause play a significant role in a world where the president is increasingly engaged in unilateral foreign policy decision-making. In the following section, consider how the current lack of supervision over the Executive Branch in national security matters might have further enabled President Trump to expand his spoils of office to include unchecked, massive foreign profits and benefits.

### B. *President Trump’s Foreign Emolument Conundrum*

The historical failure to enforce the Foreign Emoluments Clause and thus Congress’s constitutional role in serving as the gatekeeper of foreign emoluments to U.S. officials has allowed President Trump’s foreign dealings to avoid the level of scrutiny that could be necessary to expose whether any of his policy decisions have been compromised by a foreign nation. As examined in this section, President Trump has appeared to have benefitted considerably from this lack of oversight. Since he took office, his business enterprise has experienced record profits<sup>188</sup> and continues to expand around the world. President Trump’s business interests, which extend across 25 countries globally, create vast financial conflicts of interest between the president and foreign governments.<sup>189</sup> In response to these conflicts of interest, President Trump stated, “[T]he law’s totally on my side, the president can’t have a conflict

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188. See, e.g., Alexandra Berzon, *Trump Hotel in Washington Saw Strong Profit in First Four Months of 2017*, WALL ST. J. (Aug. 11, 2017), <https://www.wsj.com/articles/trump-hotel-in-washington-saw-strong-profit-in-first-four-months-of-2017-1502424589> [<https://perma.cc/E6DA-YYBD>].

189. See Carolyn Kennedy & John Norris, *Trump’s Conflicts of Interest*, CTR. FOR AM. PROGRESS (June 14, 2017, 12:01 AM), <https://www.americanprogress.org/issues/security/news/2017/06/14/434171/trumps-conflicts-interest/> [<https://perma.cc/VJ3F-XHVY>].

of interest.”<sup>190</sup> President Trump has reaped millions of dollars’ worth of benefits from foreign governments. Benefits include foreign governments’ ownership of property leases and condominiums connected with the Trump Organization, foreign diplomats’ transactions with Trump hotels and other properties, foreign government broadcast companies’ payments to air “The Apprentice,” and favorable treatment that President Trump has received from foreign governments with respect to his trademarks.<sup>191</sup> In 2018, President Trump’s former personal and business attorney Michael Cohen pled guilty to lying under oath for false statements he made before Congress in which he lied about having knowledge of business negotiations that took place during the 2016 presidential election in connection with a Trump tower in Moscow.<sup>192</sup> Ongoing investigations into President Trump’s financial dealings and foreign interference in the 2016 presidential election will hopefully establish a complete record of President Trump’s attachments to foreign nations.<sup>193</sup>

Of deep concern, President Trump’s history of bankruptcy arising from some of his real estate dealings harken back to land speculation and indebtedness in early America,<sup>194</sup> a vulnerability which the Framers believed foreign nations might seek to exploit.<sup>195</sup> And the many ways in which President Trump has increasingly profited from foreign governments suggest that foreign governments believe that providing special treatment to the Trump Organization is an optimal means to further their governments’ agendas. For example, immediately following President Trump’s announcement that the United States would uphold the one-China policy,<sup>196</sup> President Trump received 38 trademark approvals from

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190. Issac Arnsdorf, *Trump: ‘The president can’t have a conflict of interest’*, POLITICO (Nov. 22, 2016), <https://www.politico.com/story/2016/11/trump-the-president-cant-have-a-conflict-of-interest-231760> [<https://perma.cc/SD9N-FFPM>].

191. See Original Complaint, *supra* note 5, at 4.

192. See Plea Agreement, *supra* note 4, at 1-8.

193. See *supra* 4 and accompanying text.

194. See Dean Obeidallah, *For Trump this Time Bankruptcy Won’t Get Him Out of a Mess*, CNN (Jan. 22, 2018, 5:37 AM), <https://www.cnn.com/2018/01/22/opinions/trump-bankruptcy-opinion-obeidallah/index.html> [<https://perma.cc/TV2A-B68S>].

195. See *supra* Section II.C.

196. Mark Landler & Michael Forsythe, *Trump Tells Xi Jinping U.S. Will Honor ‘One China’ Policy*, N.Y. TIMES (Feb. 9, 2017), <https://www.nytimes.com/2017/02/09/world/asia/donald-trump-china-xi-jinping-letter.html> [<https://perma.cc/N524-FCSJ>].

the Chinese Government.<sup>197</sup> One of these trademarks was the subject of a lawsuit that lasted for 10 years.<sup>198</sup> Additionally, after switching its reservation at the Four Seasons, the Kuwaiti Embassy moved its National Day event to the Trump hotel in Washington, D.C.<sup>199</sup> And a local Indonesian government permitted the construction of a roadway between a Trump resort and the main Bali airport, which reduced the time it takes to drive between the two.<sup>200</sup> Finally, to further secure the completion of a Trump hotel in Panama City, Panama's federal government constructed water and sewer pipes in the area surrounding the hotel.<sup>201</sup>

President Trump's failure to transfer his global business holdings and release his tax returns also likely gives rise to Foreign Emoluments Clause violations. In January 2017, President Trump announced that he was transferring control of the Trump Organization to his sons, Donald Jr. and Eric, through a "revocable trust," from which he may readily withdraw funds and exclusively benefits.<sup>202</sup> In addition, the president can regain control of the organization at any point.<sup>203</sup> On February 22, 2018, the Trump Organization announced that it donated its profits attributable to foreign governments from 2017 to the U.S. Treasury.<sup>204</sup> Nevertheless, the Trump Organization admitted to the difficulty in identifying whether the payments came from foreign governments,<sup>205</sup> so the donated amount likely represents an under-estimation. Because President Trump's significant ties to his business dealings remain largely intact, the president has failed to allay the American public's

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197. Adam Jourdan & Eric Walsh, *China Gives Greenlight to Dozens of Trump Trademarks*, REUTERS (Mar. 8, 2017), <https://www.reuters.com/article/us-usa-trump-china-trademarks/china-gives-greenlight-to-dozens-of-trump-trademarks-id-USKBN16F2JP> [<https://perma.cc/N524-FCSJ>].

198. *Id.*

199. Aaron C. Davis & Karen Tumuity, *D.C. and Maryland AGs: Trump 'Flagrantly Violating' Emoluments Clause*, WASH. POST (June 12, 2017), [https://www.washingtonpost.com/investigations/dc-and-marylands-lawsuit-trump-flagrantly-violating-emoluments-clause/2017/06/12/8a9806a8-4f9b-11e7-be25-3a519335381c\\_story.html?utm\\_term=.c291277e52ef](https://www.washingtonpost.com/investigations/dc-and-marylands-lawsuit-trump-flagrantly-violating-emoluments-clause/2017/06/12/8a9806a8-4f9b-11e7-be25-3a519335381c_story.html?utm_term=.c291277e52ef) [<https://perma.cc/M6B4-NF24>].

200. Anita Kumar, *Foreign Governments are Finding Ways to Do Favors for Trump's Business*, McCLATCHY DC BUREAU (Jan. 2, 2018, 5:00 AM), <http://www.mcclatchydc.com/news/nation-world/article192131074.html> [<https://perma.cc/6855-GYWS>].

201. *Id.*

202. Kennedy & Norris, *supra* note 189.

203. *Id.*

204. Cristina Alesci, *Questions Remain Over Trump Organization's Donation of Foreign Profits*, CNN (Feb. 27, 2018), <https://www.cnn.com/2018/02/27/politics/trump-organization-foreign-profits/index.html> [<https://perma.cc/Z87D-6NLY>].

205. *Id.*

concerns regarding the mounting conflicts of interest associated with his presidency. Even though divestiture from business dealings would not prevent the Trump Organization from profiting to some extent from the Trump presidency, it would at least blunt the conflicts of interest by separating President Trump from the profits while he holds office.

President Trump has reneged on several of his public promises that he would take certain steps to separate himself from the Trump Organization. Immediately after taking office, President Trump announced that he would withdraw his involvement in the day-to-day operations of the Trump Organization and would not discuss the business with his sons.<sup>206</sup> However, President Trump's son has stated that the president regularly receives updates on the business.<sup>207</sup> Trump International Hotel's revenue management director, Jeng Chi Hung, stated that "DJT is supposed to be out of the business and passed on to his sons, but he's definitely still involved . . . I had a brief meeting with him a few weeks ago, and he asked if his presidency hurt the business."<sup>208</sup>

Further, in January of 2017, President Trump announced that the Trump Organization would not undertake any new foreign deals,<sup>209</sup> but the company continues to pursue such deals. For example, in August 5, 2017, the Trump Organization announced a new Dubai real estate project entailing the development of luxury villas connected to President Trump's golf resort in Dubai.<sup>210</sup> President Trump has denied having any business connections in Russia even though he went on record in 2007 stating that he "has done a lot of business with the Russians."<sup>211</sup> In addition, President Trump

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206. *Id.*

207. Jennifer Calfas, *Eric Trump Says He'll Give the President Quarterly Updates on Business Empire*, FORTUNE (Mar. 24, 2017), <http://fortune.com/2017/03/24/eric-trump-president-business-organization/> [https://perma.cc/525B-3893].

208. Betsy Woodruff, *Trump Inc. Had a Rough Year, but His D.C. Hotel Is Killing It*, DAILY BEAST (Dec. 28, 2017, 7:00 PM), <https://www.thedailybeast.com/trump-inc-had-a-rough-year-but-his-dc-hotel-is-killing-it> [https://perma.cc/VQ66-94DB].

209. *Donald Trump's News Conference: Full Transcript and Video*, N.Y. TIMES, (Jan. 11, 2017), <https://www.nytimes.com/2017/01/11/us/politics/trump-press-conference-transcript.html>.

210. Jeremy Venook, *Trump's Interests vs. America's, Dubai Edition*, ATLANTIC (Aug. 9, 2017), <https://www.theatlantic.com/business/archive/2017/08/donald-trump-conflicts-of-interests/508382/> [https://perma.cc/Y3CA-86QG].

211. Jeremy Venook, *Trump's Been Talking About His Business Interests in Russia for 30 Years*, ATLANTIC (May 10, 2017), <https://www.theatlantic.com/business/archive/2017/05/trump-lawyers-up-conflicts-of-interest/526185/> [https://perma.cc/73LX-USYP].

held the Miss Universe Pageant in Russia.<sup>212</sup> On presidential election night, the Russian government approved the extension of President Trump's six trademarks that were set to expire.<sup>213</sup>

Increasingly, the Trump International Hotel, which is located in Washington, D.C., markets itself to foreign diplomats, many of whom have expressed their intentions to stay at Trump Hotels.<sup>214</sup> One week following the election, the Trump International Hotel hosted approximately 100 foreign diplomats at an event to promote the hotel.<sup>215</sup> Diplomats entered into raffles to win overnight stays at Trump hotels.<sup>216</sup> One diplomat from an Asian country stated, "Why wouldn't I stay at his hotel blocks from the White House, so I can tell the new President, 'I love your new hotel!' Isn't it rude to come to his city and say, 'I am staying at your competitor?'"<sup>217</sup> In a filing to the Department of Justice, a representative from Saudi Arabia disclosed a payment of \$190,272 towards the representative's stay at a Trump hotel.<sup>218</sup> Following President Trump's oath of office, the Trump International Hotel significantly raised its rates and exceeded its profit predictions.<sup>219</sup>

In addition to benefits from foreign governments, President Trump has enjoyed significant financial advantages from the U.S. government, further showing that the presidency has been converted into a means for profit. Perhaps to avoid criticism from the Trump Presidency, the D.C. government recently reduced its tax assessment of the Trump International Hotel.<sup>220</sup> The General Services Administration has leased out the Old Post Office building to President Trump, which now serves as an extension of the Trump International Hotel, implicating both the Domestic Emoluments

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212. *Id.*

213. Venook, *supra* note 210.

214. See, e.g., Jonathan O'Connell & Mary Jordan, *Foreign Diplomats, Trump Hotel is Place to Be*, WASH. POST (Nov. 18, 2016), [https://www.washingtonpost.com/business/capitalbusiness/2016/11/18/9da9c572-ad18-11e6-977a-1030f822fc35\\_story.html?utm\\_term=.4a953f8c57e0](https://www.washingtonpost.com/business/capitalbusiness/2016/11/18/9da9c572-ad18-11e6-977a-1030f822fc35_story.html?utm_term=.4a953f8c57e0) [<https://perma.cc/6KSZ-KJWS>].

215. *Id.*

216. *Id.*

217. *Id.*

218. Chuck Ross, *Saudis Spent \$270K at Trump Hotel in Lobbying Campaign Against 9/11 Bill*, DAILY CALLER (Jun. 4, 2017), <http://dailycaller.com/2017/06/04/saudis-spent-270k-at-trump-hotel-in-lobbying-campaign-against-911-bill/> [<https://perma.cc/R6K2-Z2WQ>].

219. Berzon, *supra* note 188.

220. See Josh Gerstein, *Judge Seems Open to Emoluments Suit Against Trump*, POLITICO (Jan. 25, 2018 1:11 PM), <https://www.politico.com/story/2018/01/25/trump-emoluments-lawsuit-369445> [<https://perma.cc/PQJ6-6PDT>].

Clause and Foreign Emoluments Clause.<sup>221</sup> The combined benefits President Trump receives from U.S. and foreign government entities underscore the enormous profits President Trump has made as a result of his presidency.

Considering the myriad ways in which President Trump has already financially benefited from his presidency, the number of potential foreign emoluments violations will conceivably rise. As the Trump Organization expands across the globe and reaps further profits, foreign governments will continue to find new opportunities to curry favor with the president.

*C. Compliance Practices: Divestiture, Blind Trusts & Tax Returns*

In keeping with the Foreign Emoluments Clause's prophylactic goal of minimizing foreign threats to the president's dependency on the American people, compliance with the Clause requires the president to disassociate themselves from any private financial interests that foreign nations may seek to exploit. Therefore, before entering office, the president has two plausible options: (1) transfer any of their business interests to an independent party; or (2) seek congressional approval for maintaining any of these business interests while in office. An incoming president who owns a business, for example, might be required to establish a blind trust or liquidate the assets.<sup>222</sup> Whatever the nature of the financial interests may be, the president must submit them for congressional review before entering office so that lawmakers can screen out any business affairs that create points of access between the president and any foreign government. The decision over whether the president's business dealings are vulnerable to foreign influence is categorically Congress's alone. Without these preliminary measures, constitutional congressional supervision over the many forms of benefits that the president could receive from their business throughout their term of office would be impossible, given administrability issues and Congress's limited resources.

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221. OFFICE OF INSPECTIONS, OFFICE OF INSPECTOR GEN., U.S. GEN. SERVS. ADMIN., JE19-002, EVALUATION OF GSA'S MANAGEMENT AND ADMINISTRATION OF THE OLD POST OFFICE BUILDING LEASE 1 (2019) (finding that the GSA improperly failed to give due consideration to the Emoluments Clauses issues posed by leasing the building to the president despite its awareness of these issues).

222. Examples of presidents who established blind trusts include George W. Bush, Bill Clinton, Lyndon Johnson, Ronald Reagan, and Jimmy Carter. See Glenn Kessler & Michelle Ye Hee Lee, *Trump's Claim that 'the President Can't Have a Conflict of Interest*, WASH. POST (Nov. 23, 2016), [https://www.washingtonpost.com/news/fact-checker/wp/2016/11/23/trumps-claim-that-the-president-cant-have-a-conflict-of-interest/?utm\\_term=.f5916eaa258c](https://www.washingtonpost.com/news/fact-checker/wp/2016/11/23/trumps-claim-that-the-president-cant-have-a-conflict-of-interest/?utm_term=.f5916eaa258c) [<https://perma.cc/8ASG-N5Y7>].

Compliance with the Foreign Emoluments Clause could also require the president to release their tax returns to Congress, so that Congress can review them for evidence of potential foreign emoluments violations. One might argue that Congress lacks the resources to review the tax returns of every U.S. officeholder. But, because the presidency raises unique conflicts of interest given the office is particularly an object of foreign influence, the president ought to be compelled to submit their tax returns to Congress. Besides, the release of tax returns is a common practice among presidents—they have been doing so for over forty years.<sup>223</sup> Certainly, the public's interest in holding presidents accountable for representing foreign nations' interests at the expense of the United States' outweighs any confidentiality the president may seek to maintain in their financial interests.

## V. CONCLUSION

The Foreign Emoluments Clause plays an instrumental role in preserving the democratic institutions, ideals, and principles upon which the U.S. system of government was delicately built. The Framers' concern that foreign influence in the form of emoluments to U.S. officeholders corrodes American democracy remains vital today, especially as the Executive Branch increasingly operates in foreign affairs matters unilaterally and secretly. Moreover, the continued failure on the part of the branches of government to hold President Trump accountable for his looming foreign emoluments violations sets a dangerous precedent for the modern presidency. Consequently, the American people are increasingly left wondering whether a foreign policy decision is the product of a U.S. goal, foreign nation's interest, or personal agenda. Resolving the Foreign Emoluments Clause debate should not be left for another day, lest we may never learn the truth behind whether the same foreign influence that has invaded U.S. elections has also made its way into the presidency.

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223. See Jill Disis, *Presidential Tax Returns: It Started with Nixon. Will it End with Trump?*, CNN BUSINESS (Jan. 26, 2017, 2:06 PM), <http://money.cnn.com/2017/01/23/news/economy/donald-trump-tax-returns/index.html> [<https://perma.cc/SR8A-9BCC>].