

2004

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### Recommended Citation

Jack B. Weinstein, *Every Day Is a Good Day for a Judge to Lay Down His Professional Life for Justice*, 32 Fordham Urb. L.J. 131 (2004).  
Available at: <https://ir.lawnet.fordham.edu/ulj/vol32/iss1/6>

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# Every Day Is a Good Day for a Judge to Lay Down His Professional Life for Justice

## **Cover Page Footnote**

Senior United States District Judge, Eastern District of New York. I am grateful for the extensive contributions of my former law clerks, Fred A. Bernstein and Joshua Hill, in the preparation of this Article. A discussion of her own writing and pre-Nazi Austria research with Maria L. Marcus, Joseph M. McLaughlin Professor of Law, Fordham University School of Law, was particularly useful.

## EVERY DAY IS A GOOD DAY FOR A JUDGE TO LAY DOWN HIS PROFESSIONAL LIFE FOR JUSTICE

*Jack B. Weinstein \**

### INTRODUCTION

For the moral judge each day is a good day to live as well as—in the words of the Plains Indian warriors—“a good day to die.”<sup>1</sup> That is to say, the judge embraces his professional life most fully when he is prepared to fight—and be criticized or reversed—in striving for justice.

In a democratic republic such as ours, the role of judges is severely circumscribed. They must apply the constitution and laws as adopted by the founders, legislature, and executive—with the interstitial play provided by our common law system. Some discretion to interpret and obtain a reasonable result is afforded. Even in a hierarchical judicial system that provides room for review and correction on appeal, any more unstructured freedom of judges to ignore or apply rules as their personal predilections suggested could lead to a chaotic, arbitrary, and unpredictable system of jurisprudence, impossible for citizens to comply with in their real worlds because they could not foresee when their conduct was in accord with society’s not yet delineated demands. When judges can cut themselves free of the law’s dictates, it is not a foregone conclusion that all will see fairness the same way. Some German judges were Nazis; some post-*Brown* judges were segregationists.

So, the conclusion is clear: judges must follow the law to avoid a

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1. HOWELL RAINES, FLY FISHING THROUGH THE MIDLIFE CRISIS 204 (1993). According to Raines, “‘It is a good day to die’ was the battle cry of the . . . warrior class of the Cheyenne Indians[,] the most feared fighters among the Plains Indians.” *Id.* Haines notes that “the cry . . . is not about fatality but about freedom” from unwarranted cautions. *Id.* at 205; *cf.* Letter from Thomas Jefferson to William Stevens Smith (Nov. 13, 1787) (“The tree of liberty must be refreshed from time to time with the blood of patriots and tyrants.”).

kritarchy<sup>2</sup>—except, it is submitted, when that law requires the violation of the essence of mankind’s sense of justice. The incongruity between the law and demands of a core right (call it natural justice if you will) must be absolutely clear if a judge is to rely on this fall-back duty to the heart of fairness.

In this country, the crisis of conscience was reached most clearly in the contradiction between, on one side, Calhoun and Chief Justice Taney who predicated their views on the assumption that Negroes were inferior to whites and, on the other, Lincoln’s and Jefferson’s (in his better self) that the Declaration of Independence was decisive in holding that all men are created equal.<sup>3</sup> A subsidiary aspect of that great battle over “race,” which dominates our history, was resolved fifty years ago when *Brown v. Board of Education*<sup>4</sup> overruled *Plessy v. Ferguson*.<sup>5</sup> The reverberations of that *Brown* struggle are still being played out.<sup>6</sup>

The judge must decide: does this law violate the essence of my duty to self and humanity. The process is gut wrenching. To society it is often confounding. The battle against fundamental injustice is now being waged in trial courtrooms in the confrontation between Federal Sentencing Guidelines<sup>7</sup> designed to punish by those afar without understanding the

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2. James Vescovi & Rebecca Thomas, *Columbia Commemorates the 50th Anniversary of Brown v. Board of Education*, COLUM. L. SCHOOL REP., Summer 2004, at 14, 20.

The last holdout [to *Brown*] was Justice Reed. Appointed to the court by President Roosevelt in 1938, he regarded desegregation as a problem the states should work out for themselves. The basis for his dissent is encapsulated in a story involving his clerk, who did not want to draft a dissenting opinion because he believed that the opposing side had reached the right decision. Justice Reed asked him whether he favored a “kritarchy.” The clerk did not know what the word meant, so Justice Reed pointed to the Oxford English Dictionary. The word meant “government by judges.” . . . However, the clerk never wrote an opinion. Justice Warren approached his colleague and said, “Stan, you’re all by yourself in this now. You’ve got to decide whether it’s really the best thing for the country.” Justice Reed gave his vote, though he reportedly never agreed with the decision handed down on May 17, 1954.

*Id.* at 20.

3. THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776); *see also, e.g.*, HARRY V. JAFFA, *A NEW BIRTH OF FREEDOM: ABRAHAM LINCOLN AND THE COMING OF THE CIVIL WAR* (2000) (focusing almost exclusively on this conflict of right between the principled protagonists Calhoun and Lincoln, with Douglas the man without principle).

4. 347 U.S. 483 (1954).

5. 163 U.S. 537 (1896).

6. *See* *RV v. New York City Dep’t of Educ.*, 321 F. Supp. 2d 538, 539-40 (E.D.N.Y. 2004); Symposium, *Brown v. Board of Education at Fifty: Have We Achieved its Goals?*, 78 ST. JOHN’S L. REV. 253 (2004); Jack B. Weinstein, *Brown v. Board of Education After Fifty Years*, 26 CARDOZO L. REV. (forthcoming 2004) [hereinafter Weinstein, *Brown v. Board of Education*]; *see also infra* sources cited at note 18.

7. U.S. SENTENCING GUIDELINES MANUAL (2003).

unnecessary cruelties that result when real human beings before the court are treated as cyphers rather than individuals. That struggle is not yet resolved, though unrelenting pressure by trial judges and others for rationality and justice may be having some effect.<sup>8</sup>

This Article discusses the exercise of judicial independence by judges who have opposed racism and other legally-sanctioned injustices, as well as judicial failures to oppose injustice. In illustrating the range of options available to judges faced with the prospect of enforcing unjust laws, only one is ruled out: silent acquiescence. In Germany, the Nazi judges' silence, compliance, and active participation in the gravest crimes against humanity serves as a reminder that the duty to decide cases in accordance with statutes, precedent, or regulations cannot be absolute.<sup>9</sup>

As Professor Maria Marcus's article *Austria's Pre-War Brown v. Board of Education*<sup>10</sup> shows, the Austrian Constitutional Court chose to nullify a 1931 Nazi-inspired effort to separate Jewish and Christian students in Universities rather than to adopt a readily available basis for refusing the case.<sup>11</sup> This judicial choice, made despite pressure and peril, warded off legally imposed university segregation until the Anschluss of Germany and Austria seven years later.<sup>12</sup>

The episode described in Professor Marcus's analysis of the Vienna pre-Nazi court decision protecting Jews from unlawful discrimination in the universities was unusual. Despite strong efforts of President Woodrow Wilson and others to protect the rights of Jews and other minorities after World War I, their protective work and those of treaties on which they

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8. See *Blakely v. Washington*, 124 S. Ct. 2531 (2004); *Koon v. United States*, 518 U.S. 81 (1996); *United States v. Khan*, 325 F. Supp. 2d 218 (E.D.N.Y. 2004) (use of jury to ameliorate sentencing under guidelines); *United States v. Croxford*, 324 F. Supp. 2d 1255 (D. Utah 2004); Laurie P. Cohen, *Judge Rejects Federal Rules on Sentencing*, WALL ST. J., July 1, 2004, at B1.

9. See Markus Dirk Dubber, *Judicial Positivism and Hitler's Injustice*, 93 COLUM. L. REV. 1807 (1993) (reviewing INGO MULLER, *HITLER'S JUSTICE: THE COURTS OF THE THIRD REICH* (1991)). Dubber notes Muller's report stating that the legal profession in Germany refuses to admit to failure during the Nazi period; that Nazi judges and legal scholars continued in their careers; and that the courts of the Federal Republic have not voided any Nazi-era decisions. *Id.* at 1811; see also EDWARD FELD, *THE SPIRIT OF RENEWAL* 123 (1994) ("Hitler used the instruments of Western legalism to accomplish his ends.").

10. 32 FORDHAM URB. L.J. \_\_\_\_ (2004).

11. *Id.* at \_\_\_\_\_. The Pan-German press accused the court of breaking the law and called for nullification of the decision. *Id.* at \_\_\_\_\_.

12. *Id.* at \_\_\_\_\_. My reflections on Professor Maria Marcus's article and its comparison of the Nazi system to pre-*Brown* Southern segregation arose also from my conversation with Professor Marcus on May 20, 2004 about *Brown*, Austria, and the vital significance of judicial independence.

insisted proved useless.<sup>13</sup> Central European governments flouted treaty obligations and basic humanity, putting increasing pressure on the Jews, ultimately leading to the Holocaust.<sup>14</sup> Austria, influenced in part by Germany, strongly rejected its own glorious tradition of artistic, economic, and scientific achievements in which the Jews had played such a large role since the turn of the century. The Jews, despite their major contributions to Austria in World War I and afterwards, were declared outcasts, forced into nonpersonhood by the hoodlums and haters of the Right.<sup>15</sup>

The goal of the Nazis was to denigrate, segregate, and destroy. The purpose of Jim Crow laws in the American South—segregation mandated by government as well as by custom—was to dehumanize, segregate, and reduce to peonage.<sup>16</sup> Because of their color, African-Americans suffered gross social and economic disadvantages.

I had the honor of playing a minor role in working with NAACP counsel in *Brown v. Board of Education*, which ultimately cut the legs out from under Jim Crow and its legal foundation, *Plessy v. Ferguson*.<sup>17</sup> As a junior faculty member at Columbia Law School, I was introduced to Thurgood Marshall and was entranced by what he and his colleagues were doing at the NAACP Legal Defense Fund to obtain better education for African-Americans. My work involved research, writing and rewriting, listening to the debates, and occasionally interjecting minor comments or tactical considerations: should plaintiffs go for separate but real equality throughout the nation—an impossible position because it would have made it necessary to litigate in every one of the thousands of school districts—or should they insist on the position that segregation was inherently unequal and denigrating? Marshall, Robert Carter, Constance Motley, Jack Greenberg, and many others launched a frontal attack on the separate-but-equal rationale that they and so many others had been preparing for by cases leading up to *Brown*.

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13. See HOWARD M. SACHAR, DREAMLAND: EUROPEANS AND JEWS IN THE AFTERMATH OF THE GREAT WAR 26 (2003) (detailing 1919 and later efforts of Louis Marshall, Cyrus Adler, Henry Morgenthau, and others to protect Jews against pogroms and other attacks by treaty and agreement).

14. *Id. passim*. On this and other forms of modern evil, see generally HANNAH ARENDT, THE ORIGINS OF TOTALITARIANISM (1951) and SUSAN NEIMAN, EVIL IN MODERN THOUGHT: AN ALTERNATIVE HISTORY OF PHILOSOPHY (2002).

15. See, e.g., Jack B. Weinstein, *Nazis in the Courtroom: Lessons from the Conduct of Lawyers and Judges Under the Laws of the Third Reich and Vichy, France*, 61 BROOK. L. REV. 1121 (1995).

16. See J. MICHAEL KLARMAN, FROM JIM CROW TO CIVIL RIGHTS: THE SUPREME COURT AND THE STRUGGLE FOR RACIAL EQUALITY (2004); JERROLD M. PACKARD, AMERICAN NIGHTMARE: THE HISTORY OF JIM CROW (2002).

17. See generally Weinstein, *Brown v. Board of Education*, *supra* note 6.

Chief Justice Earl Warren, in a magnificent piece of judicial statesmanship, pulled the Supreme Court Justices together in *Brown*. The opinion had an enormous impact. President Eisenhower and the federal legislature were ultimately forced to accept it. Last year, I attended a conference at New York University where a Supreme Court Justice spoke. I asked him during the course of the discussion why the Supreme Court was not more active in developing new protective rights. The response: “The court has an essentially passive, not an active role.”

And then I asked, “What about *Brown* where you reversed *Plessy*?”

The reply: “Well, *Plessy* and *Brown* were different.”<sup>18</sup>

*Plessy* was fundamentally unacceptable. It was so foreign to The Declaration of Independence, the Thirteenth, Fourteenth, and Fifteenth Amendments, and post-World War II changes in demography and sociology that it simply could not be permitted to stand. If all were acknowledged to have been created equal under our founding document of July 4, 1776, then forced legal separation was anathema as a matter of basic foundational pre-constitutional law.

### I. JUDICIAL INDEPENDENCE AND SENIOR FEDERAL JUDGES

The current sentencing regime in the United States is an instructive starting point for exploring judicial reactions to unjust laws. Federal drug statutes relegate some of the least culpable participants to decades in prison without possibility of parole. Given the large number of drug cases that come before federal judges—some half of all criminal cases<sup>19</sup>—and the

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18. *Brown* was different. See LEE COKORINOS, *THE ASSAULT ON DIVERSITY* (2003) (introduction by Theodore M. Shaw); ROBERT COTTROL ET. AL., *BROWN V. BOARD OF EDUCATION: CASTE, CULTURE, AND THE CONSTITUTION* (2003); JACK GREENBERG, *CRUSADER IN THE COURTS: LEGAL BATTLES OF THE CIVIL RIGHTS MOVEMENT* (50th Ann. ed. 2004); OLIVER W. HILL, *THE BIG BANG: BROWN V. BOARD OF EDUCATION AND BEYOND* (2000); Elaine R. Jones, *Forward* to GARY ORFIELD & SUSAN E. EATON, *DISMANTLING DESEGREGATION: THE QUIET REVERSAL OF BROWN V. BOARD OF EDUCATION* (1996); RICHARD KLUGER, *SIMPLE JUSTICE: THE HISTORY OF BROWN V. BOARD OF EDUCATION AND BLACK AMERICA'S STRUGGLE FOR EQUALITY* 751 (Rev. ed. 2004); CONSTANCE BAKER MOTLEY, *EQUAL JUSTICE UNDER LAW* (1998); CHARLES J. OGLETREE, JR., *ALL DELIBERATE SPEED: REFLECTIONS ON THE FIRST HALF CENTURY OF BROWN V. BOARD OF EDUCATION* (2004); Robert L. Carter, *Thirty-Five Years Later: New Perspectives on Brown*, in *RACE IN AMERICA: THE STRUGGLE FOR EQUALITY* 83 (Herbert Hill & James E. Jones, Jr., eds. 1993); HARVARD LAW SCH., *Harvard to Celebrate 50<sup>th</sup> Anniversary of Brown v. Board of Education* (Apr. 8, 2004), available at [http://www.law.harvard.edu/news/2004/04/brown\\_v\\_board/](http://www.law.harvard.edu/news/2004/04/brown_v_board/) (last visited Oct. 29, 2004).

19. See Marc Miller & Daniel J. Freed, *Editors' Observations: The Disproportionate Imprisonment of Low-Level Drug Offenders*, 7 *FED. SENTENCING REP.* 3 (1994). In 1992, according to a Bureau of Prisons Researcher, drug offenders accounted for more than half of federal criminal cases, and more than 60% of the federal prison population. *Id.*

grotesque over-sentencing often required, this is no small example of injustice but a problem of national dimension measured in unnecessarily destroyed lives and huge wasted costs to taxpayers. As one of my colleagues put it, "Courage in public life means not only the fortitude to withstand criticism and even outrage, but the strength as well to examine one's conscience and soul and to speak from the truth and conviction that we know lies deep within our hearts."<sup>20</sup>

The judge who made that statement took senior status to be able to refuse cases that required him to impose lengthy sentences on minor drug offenders.<sup>21</sup> Some judges have relied upon their senior status to decline such cases.<sup>22</sup> In weighing the merits of this action, we are reminded of the advice given to doctors: First, do no harm. Judges should attempt to follow the same precept, which may mean refusing to decide cases in which an unjust result is *preordained*.

In following this dictate of morality, senior judges in our federal system may be at an advantage. Senior status is not, as it is almost invariably characterized in the press, "retirement."<sup>23</sup> It is rather a flexible tool permitting the retention by the system of the most experienced jurists at a time in their lives when they may need, or simply desire, to reduce their caseload.<sup>24</sup> Because it permits judges to choose the cases they will hear, it

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20. Frank J. Battisti, *Remarks to the Akron Bar Association*, 18 AKRON L. REV. 353, 362 (1985).

21. See, e.g., Mark Rollenhagen, *Battisti Chooses Senior Status on District Court*, PLAIN-DEALER (Cleveland), Mar. 24, 1994, at 1B (describing decision of Judge Frank J. Battisti to take senior status in light of "draconian" sentencing statutes).

22. See Joseph B. Treaster, *Two Judges Decline Drug Cases, Protesting Sentencing Rules*, N.Y. TIMES, Apr. 17, 1993, at A1 (describing decisions by Judges Jack B. Weinstein and Whitman Knapp to exercise prerogative of senior status in refusing low-level drug importation cases); see also Stephen Labaton, *Reno Moving to Reverse Stiff Sentencing Rule for Minor Drug Crimes*, N.Y. TIMES, May 5, 1993, at A19 ("Federal officials estimate that dozens of senior judges, who have wide latitude in choosing their cases, are quietly refusing to hear drug prosecutions."). Subsequently, I took these cases because I could, at least, ameliorate some sentences.

23. See, e.g., Rollenhagen, *supra* note 21 ("Battisti's retirement . . . creates a third opening on the District Court bench in Cleveland.") (emphasis added). 28 U.S.C. §§ 294, 371 also uses the term "retired" in connection with senior judges.

24. Senior judges retain most, but not all, of the perquisites of active judges. For example, a senior judge must carry at least one-fourth the caseload of an active judge to participate in future salary increases. See 28 U.S.C. § 371(e)(1) (2004). More important, in the wake of a 1964 Judicial Conference Resolution, senior judges are subject to the requirement of being certified under 28 U.S.C. § 294, by the chief judge of the circuit, to continue serving. For a critique of this provision, see Charles L. Brieant, *Comment on Proposed Long Range Plan for the Federal Courts* (Recommendations 65 & 66), at 2 (May 24, 1995) ("demeaning" requirement of annual certification turns senior district judges into "second class citizen[s]"; it also "serves no present purpose, since senior and active judges alike are now subject to the 'mental and physical disability' proceedings authorized by 28



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*a priori* permits them to make decisions about the *types* of cases they will hear.

Some may see this as an unfortunate consequence of what is essentially a tool of “human resource” allocation. Admittedly, a decision by a judge not to take a certain category of cases requires that other judges take those cases. This argument from fairness, as Professor Raz puts it, “is that anyone who denies an obligation to obey in a just state take[s] unfair advantage of others who submit to such an obligation.”<sup>25</sup>

In the case of a senior judge refusing to hear drug cases, this argument is largely inapplicable for two reasons. First is that what may be distasteful to one judge may not be to another.<sup>26</sup> Second is the possibility, which is real in the case of drug sentencing, that in the long (but not *too* long) run, the decision by the judge may influence higher authorities to change the drug laws, thus reducing the scope of the unjust obligation for all judges. This has, in fact, apparently begun to happen.<sup>27</sup>

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U.S.C. § 372”) (on file with author).

Judge Brieant elaborated on these concerns in his *Request for Action by the Judicial Conference of the United States* (June 19, 1995), in which he proposed eliminating the annual certification requirement. According to Judge Brieant, this would be a logical extension of Recommendation 66, which states, “Judges should be encouraged to assume senior status through improvement of policies or procedures that affect senior judges.” Judge Brieant argued that the requirement of annual designation is offensive, not only to the district judges involved, but to the interest of the litigants who are entitled under Article III of the United States Constitution to a judge who is beholden to the law, the Constitution, his or her conscience, and nothing else. *Id.* at 3.

Judge Brieant observed:

Once judges get such coercive power over other judges that they can determine the right of a judge to continue in office, or remove judges from their caseloads or from particular types of cases (all without a hearing or factual findings), the potential for abuse is so great that the subtle coercive effect created by what *might* take place in itself threatens judicial independence.

*Id.* at 8 (emphasis in original).

25. JOSEPH RAZ, *The Obligation to Obey: Revision and Tradition*, in *ETHICS IN THE PUBLIC DOMAIN: ESSAYS IN THE MORALITY OF LAW AND POLITICS* 325 (1994).

26. Reading the work of Professor Michael Paulsen, see *infra* text accompanying notes 63-70, one is struck by the obvious fact that, while to some judges, decisions permitting abortion are unjust, to other judges, anti-choice decisions are abhorrent. This suggests that, by refusing to take some kinds of cases, judges are “specializing.” The merits of such specialization—which would diminish resistance to laws *some* judges consider unjust—are worth further consideration.

27. See Laurie P. Cohen & Gary Fields, *Judge Rejects Federal Rules on Sentencing*, WALL ST. J., July 1, 2004, at B1 (“The high court . . . never would have assembled a majority in the absence of the boiling frustration of the federal judiciary over the state of the federal sentencing system”) (internal quotations omitted); Labaton, *supra* note 22 (“Emboldened by support from a growing number of Federal judges, Attorney General Janet Reno has begun to take the first steps toward reversing the policy of meting out tough criminal sentences for minor drug offenders.”). Congress has also acted. See 18 U.S.C.

Nonetheless, it has been suggested by some that senior judges who refused to take drug cases were demonstrating, and even fostering, disrespect for the rule of law. One critic, argued that a senior judge whose moral scruples make enforcement of a current legal policy too painful has no alternative but to resign.<sup>28</sup> At least one Congressman,<sup>29</sup> and a columnist,<sup>30</sup> took similar positions. Both the purpose and intent of the statute, however, leave me confident that senior judges were on safe ground, legally as well as ethically, in giving their morality effect rather than leaving the bench.<sup>31</sup>

The option of refusing to take certain kinds of cases is not as readily available to “active” federal judges, or to judges in state systems lacking an equivalent of “senior status”—though I would respect the decision of any active Article III or state judge who takes that position. Thus the question of what is proper for senior judges is peripheral to a larger question: what may judges—generally—do to avoid the burdens of enforcing laws they believe to be fundamentally unjust.<sup>32</sup> That is, how may a judge conform

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§3553(f) (2004) (“safety valve” provision); Fred A. Bernstein, *Discretion Redux: Mandatory Minimums, Federal Judges, and the ‘Safety Valve’ Provision of the 1994 Crime Act*, 20 U. DAYTON L. REV. 765 (1995) (describing role of district judges in bringing about Congressional action); *see also infra* text accompanying note 140.

28. *See* Avern Cohn, *Letter to the Editor: A Questionable Exclusion*, 78 JUDICATURE 5 (1994) (responding to my argument that senior judges may properly exclude themselves from minor drug cases).

29. *See Successful Drug War Can Afford to Shift Focus; The Judges Transgress*, N.Y. TIMES, May 3, 1993, at A14 (letter from Congressman Charles E. Schumer) (“Judges should not pick and choose the laws they want to enforce . . . [T]he best way for them to make a change is to knock on Congress’s door and tell us what is happening in their courtrooms.”).

30. *See* A.M. Rosenthal, *Dismantling the Drug War*, N.Y. TIMES, May 18, 1993, at A21 (suggesting that judges unhappy with drug laws should resign).

31. *See* 28 U.S.C. § 294(c) (a senior judge “may . . . perform such judicial duties within the circuit as he is willing and able to undertake”); *see also Senior Judges Keep Court System Afloat*, N.Y. TIMES, May 29, 1993, at A18 (letter from Steven Flanders, Circuit Executive, Second Judicial Circuit of the United States) (explaining senior judges’ actions in context of structure and procedures of district court).

In my own case, I began taking drug cases again in response to the passage by Congress of the “safety valve” provision of the Violent Crime Control and Law Enforcement Act of 1994, codified at 18 U.S.C. § 3553(f). This provision permits the courts to avoid imposing mandatory punishment for many first-time drug offenses. *See infra* text accompanying notes 112-14.

32. Public servants of all kinds—not only judges—face decisions about whether to exercise conscience or conform to law (or, at least, their superiors’ conception of the law). *See*, JOHN P. BURKE, BUREAUCRATIC RESPONSIBILITY (1986); EDWARD WEISBRAND & THOMAS M. FRANCK, RESIGNATION IN PROTEST: POLITICAL AND ETHICAL CHOICES BETWEEN LOYALTY TO TEAM AND LOYALTY TO CONSCIENCE IN AMERICAN PUBLIC LIFE (1975); Geoffrey P. Miller, *Government Lawyers’ Ethics in a System of Checks and Balances*, 54 U. CHI. L. REV. 1293 (1987); *see also* MONROE H. FREEDMAN, UNDERSTANDING LAWYERS’ ETHICS 44-52 (1991) (discussing lawyers’ ethical dilemmas in choosing and consulting with

his official actions to the dictates of his conscience?

## II. THE RANGE OF ALTERNATIVES AVAILABLE TO JUDGES FACED WITH UNJUST LAWS

### A. Resignation

Resignation in the face of unjust laws is a principled option, but it can also be seen as a defeat. In extreme cases, it will result in replacement of “good” judges with government puppets, eliminating the last vestiges of justice. This was the result in Peru in the early nineties where the dictatorial government replaced all judges, good and bad, with a subservient corps.<sup>33</sup>

Principled resignation is the route taken by at least two state judges who attributed their decisions to draconian sentencing laws, Lois Forer of Pennsylvania<sup>34</sup> and Robert Utter of Oregon,<sup>35</sup> and probably many others

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clients); Jack B. Weinstein, *Considering Jury “Nullification”: When May and Should a Jury Reject the Law to Do Justice?*, 30 AM. CRIM. L. REV. 239, 245-46 (1993) (discussing “executive nullification,” through pardon or amnesty) [hereinafter Weinstein, *Considering Jury “Nullification”*]. For a reminder that few lawyers can be courageous in every situation, see Monroe H. Freedman, *Atticus Finch: Right and Wrong*, 45 ALA. L. REV. 473 (1994).

For lawyers—government or private—the decision to advise clients whose actions seem unjust raises complex ethical questions. See Norman Silber & Geoffrey Miller, *Toward “Neutral Principles” in the Law: Selections from the Oral History of Herbert Wechsler*, 93 COLUM. L. REV. 854 (1993) (including Prof. Herbert Wechsler’s description of his decision to participate in the writing of briefs supporting the government’s position in the Japanese internment case, *Korematsu v. United States*, 323 U.S. 214 (1944)). Professor Wechsler recalls: “I think what we provided was what the Court was entitled to and what the government was entitled to. After all, the responsible person in *Korematsu* was the President of the United States.” *Id.* at 886. The authors of the article note that:

The ABA Canons of Professional Ethics . . . in effect at the time of Wechsler’s supervision of the briefs defending Japanese internment policies provided [that] . . . [i]f the client insists upon an unjust or immoral course in the conduct of his case, or if he persists over the attorney’s remonstrance in presenting frivolous defenses, . . . the lawyer may be warranted in withdrawing on due notice to the client.

*Id.* at 886 n.91 (citing ABA CANONS OF PROFESSIONAL ETHICS Canon 44 (1978)).

33. See Jack B. Weinstein, *Limits on Judges’ Learning, Speaking and Acting: Part II Speaking and Part III Acting*, 20 U. DAYTON L. REV. 1, 3 (1994) [hereinafter Weinstein, *Limits on Judges’ Learning, Speaking, and Acting*], and sources cited therein.

34. See LOIS G. FORER, *A RAGE TO PUNISH: THE UNINTENDED CONSEQUENCES OF MANDATORY SENTENCING* 13 (1994) (describing decision to step down rather than impose a mandatory minimum term); see also *id.* at 4-5 (describing similar decisions by other sentencing judges).

35. See Jim Simon & Jack Broom, *Utter Quitting Supreme Court—Justice Says He Can’t Be Party to State’s Capital Punishment*, SEATTLE TIMES, Mar. 29, 1995, at A1

who chose not to explain their decisions. Resignation in such cases has tragic consequences both for the judges whose judicial careers are cut short and for the system. As with senior judges, it is subject to the burden-shifting critique in jurisdictions where appointment and confirmation of judges is a time-consuming process.<sup>36</sup> More importantly, resignation deprives the bench of some of those who may be most inclined to try to encourage positive changes in controlling law.<sup>37</sup> The proponents of the unjust laws emerge the victors.<sup>38</sup> In the case of a thoroughly bankrupt regime, however, mass resignation coupled with public statements may precipitate reform. In Nazi Germany, mass resignation of judges—especially if they gave their reasons—might have helped.

Historically, America's gravest legally-sanctioned injustice was slavery. The reaction of judges to the laws of slavery was, as Professor Robert Cover has documented, largely disappointing, although the judiciary did not entirely succumb to such "controlling" caselaw as *Dred Scott*.<sup>39</sup> Professor Cover devoted much of his career to the problem of judicial responses to unjust laws. His book, *Justice Accused*,<sup>40</sup> grew out of a far more radical polemic prompted by the Vietnam War.<sup>41</sup> In that opening

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(quoting justice Utter as saying "I could no longer serve in a legal system that takes human life"). Justice Utter later explained that his decision to resign was influenced by his reading of a book about the co-opting of judges in Nazi Germany, which he analogized to "his own moral struggles." See Kery Murakami et al., *Book Influenced Judge to Quit Post*, SEATTLE TIMES, March 30, 1995, at B4.

36. Moreover, resignation prompted by a recently enacted and highly publicized set of laws, such as the Sentencing Guidelines, would presumably result in the appointment of a judge reconciled to the new system.

37. Of course, some judges who resign may feel that, freed from the restraints on judicial speech, see text accompanying notes 164-74, *infra*, they are able to be more effective advocates for change than they could be from the bench. See CODE OF CONDUCT FOR UNITED STATES JUDGES, Canon 3(A)(6) (1992) ("A judge should avoid public comment on the merits of a pending or impending action.").

38. See, e.g., Jack B. Weinstein, *Some Reflections on Seven Lean Years of Guidelines Sentencing*, 8 FED. SENTENCING REP. 12 (1995) (suggesting that recently appointed judges, who have never known another system, will be more likely to accept the inequities of the Guidelines); cf. Jack B. Weinstein & Mae Quinn, *Some Reflections on the Federal Judiciary Role During the War on Drugs*, in THE JUDICIAL ROLE IN CRIMINAL PROCEEDINGS 269 (Sean Doran & John Jackson eds., 2000); Jack B. Weinstein & Nicholas Turner, *The Cost of Avoiding Injustice by Guideline Circumventions*, 9 FED. SENTENCING REP. 298 (1997); Jack B. Weinstein, *The Effect of Sentencing on Women, Men, the Family, and the Community*, 5 COLUM. J. GENDER & L. 169 (1996).

39. 60 U.S. 393 (1856).

40. ROBERT M. COVER, *JUSTICE ACCUSED: ANTISLAVERY AND THE JUDICIAL PROCESS* (1975) [hereinafter COVER, *JUSTICE ACCUSED*].

41. See generally Michael Stokes Paulsen, *Accusing Justice: Some Variations on the Themes of Robert M. Cover's Justice Accused*, 7 J.L. & RELIGION 33, 33 (1989) (describing Robert M. Cover, Book Review, 68 COLUM. L. REV. 1003, 1005 (1968) (reviewing RICHARD

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salvo, he drew on the memory of the Holocaust and the “screaming silence of the German people”<sup>42</sup> to excoriate the federal judiciary of the 1960’s for “remain[ing] faithful to its long tradition as executors of immoral law” in enforcing the draft laws of the Vietnam era:

No judge has resigned in protest. No judge has availed himself of the opportunity presented by a draft case to instruct the public on the moral issues of the war. No judge has publicly engaged in creative judicial obstruction of the war effort.<sup>43</sup>

That article was followed by seven years of research into the behavior of anti-slavery judges, during which Cover was apparently somewhat chastened. The final version of *Justice Accused*, observes Professor Michael Paulsen, “cooled very nearly to the point of being a mild *apologia* for [the anti-slavery judges’] fidelity to law and faithlessness to moral conscience.”<sup>44</sup> As Judge Avern Cohn similarly noted:

Robert Cover, in *Justice Accused* . . . well describes the dilemma of federal judges required to enforce the Fugitive Slave Law [which required federal judicial officers to return to captivity slaves who had escaped to “free” states, as well as the *Dred Scott* decision] when they thought it repugnant to their moral values. Pre-Civil War judges who could not enforce that law in good conscience, rather than simply recusing themselves and passing on the obligation to another judge, left the bench.<sup>45</sup>

Obviously, a history, however illuminating, of what one group of judges did is not a guide to the full range of options available to other judges. Moreover, I am not convinced that Cover presented the whole picture. Some Northern judges did avoid the harsh pro-slavery rules laid down by the Taney Court.<sup>46</sup> And they had considerable justification for doing so.

The *Dred Scott* decision, with a split court and dissenting opinions, was

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HILDRETH, ATROCIOUS JUDGES: LIVES OF JUDGES INFAMOUS AS TOOLS OF TYRANTS AND INSTRUMENTS OF OPPRESSION (1856)) [hereinafter Cover, Book Review].

42. Cover, Book Review, *supra* note 41, at 1006.

43. *Id.* at 1005-06 (footnotes omitted). In fact, in the Eastern District of New York, judges were far from unresponsive to problems raised by the Vietnam conflict, a problem beyond the scope of this paper.

44. Paulsen, *supra* note 41, at 82-88.

45. See Cohn, *supra* note 28, at 5.

46. See, e.g., CARL B. SWISHER, THE OLIVER WENDELL HOLMES DEVISE: THE HISTORY OF THE SUPREME COURT OF THE UNITED STATES—THE TANEY PERIOD, 1836-64, at 5 (1974). Of particular interest are Chapters XXV (Aftermath of the Scott Case) and XXVI (The Booth Cases and Northern Nullification). See also William W. Fisher III, *Ideology, Religion, and Constitutional Protection of Private Property*, 39 EMORY L.J. 65, 121-31 (1990) (discussing actions taken in Northern Courts to avoid enforcing Fugitive Slave Laws).

not preordained by ruling case law.<sup>47</sup> According to Dean Russell Osgood, “Chief Justice Taney’s opinion in *Dred Scott* . . . took his personal and political preference for slavery and a bolt-out-of-the-blue political resolution . . . and attempted to superimpose both on the legal order.”<sup>48</sup> Similarly, Professor Carl Swisher refers to *Dred Scott* as “a major disaster, degrading the Court and the Constitution . . . .”<sup>49</sup> Given this background, it is not surprising that nullification by Northern judges, in part through standard interpretative practices and the distinguishing of cases did occur.<sup>50</sup> In 1860 the New York Court of Appeals, in *Lemmon v. People*,<sup>51</sup> allowed grants of freedom to slaves that were brought into New York on the way to the South; concurring, one judge wrote: “[T]he exclusive right of the State of Missouri to determine and regulate the status of persons within her territory, was the only point in judgment in the *Dred Scott* case, and all beyond this was obiter.”<sup>52</sup>

But even if Professor Cover’s *history* were complete, it would be merely descriptive and in no way *proof* that acquiescence or resignation are the only alternatives available to judges who oppose a current policy on moral grounds. Justice Cardozo has reminded us that the law progresses in a human and humane framework and adjusts to the needs of society.<sup>53</sup> And,

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47. SWISHER, *supra* note 46, at 628-30 (noting Justice Cardozo’s approval of the dissent in *Dred Scott* by Justice Curtis). Chief Justice Charles Evans Hughes referred to *Dred Scott* as a “self-inflicted wound.” *Id.* at 631.

48. Russell K. Osgood, *The Enterprise of Judging*, 17 HARV. J.L. & PUB. POL’Y 13, 17-18 (1994) (describing Justice Taney’s jurisprudential errors).

49. SWISHER, *supra* note 46, at 631; *see also* Book Note, 65 HARV. L. REV. 1279 (1952) (reviewing VINCENT C. HOPKINS, *DRED SCOTT’S CASE* (1951) and noting arguments that “the decision weakened the court’s prestige so much that it was unable to properly prevent executive and legislative excesses in the ensuing years”). The *New York Tribune*, on March 7, 1857, editorialized that the decision was “entitled to just so much moral weight as would be the judgment of a majority of those congregated in any Washington bar-room.” *Id.* at 1280.

50. KARL N. LLEWELLYN, *THE COMMON LAW TRADITION: DECIDING APPEALS* 193 (1960) (“Judges are to answer to the Law (which is so much more than the Rules of law) and also, if they can, to sense and justice.”); *see* SWISHER, *supra* note 46, at 653-75; *see also* Kirsten Sauer, *Informed Conviction: Instructing the Jury About Mandatory Sentencing Consequences*, 95 COLUM. L. REV. 1232, 1258-59 (1995) (noting that “[j]ury acquittals contributed to the downfall of the Fugitive Slave Act” and suggesting that in periods of social upheaval “nullification plays [a significant role] in our democratic system”).

51. 20 N.Y. 562 (1860).

52. *Id.* at 624; *see also* PAUL FINKELMAN, *FUGITIVE SLAVES AND AMERICAN COURTS—INTRODUCTION* (1988); *cf.* Charles Sumner, *Our Immediate Antislavery Duties* (speech given at Faneuil Hall, Boston, Nov. 6, 1850), in CHARLES SUMNER, *THE WORKS OF CHARLES SUMNER* 398, 403-11 (1870) (vowing to defy Fugitive Slave Law, even if “elsewhere, individuals may forget humanity, in fancied loyalty to law”) (emphasis added).

53. Myriam J. Altman, *The Lessons of Justice Cardozo*, N.Y.L.J., Apr. 7, 1995, at 2 (quoting Cardozo’s famous statement that “when a rule, after it has been duly tested by

Professor Roscoe Pound observed that “[l]aw cannot depart far from ethical custom nor lag far behind. For law does not enforce itself. Its machinery must be set in motion . . . and guided by individual human beings [rather than by] abstract . . . legal precept[s].”<sup>54</sup>

Developments in legal academia in the last half century have alerted us to the full array of options available to judges<sup>55</sup>—they range between the poles of resignation, on the one end, and mechanical and wooden adherence to precedent, on the other.<sup>56</sup> It may be that, partly in response to these academic movements which may to some extent have the effect of self-fulfilling prophecies, or in response to larger changes in society, we have all become more accepting of efforts by common law judges to maneuver within the confines of controlling lines of cases.<sup>57</sup>

This transition since the Taney era is implicit in Professor G. Edward White’s statement, in explaining the transcendent importance of Justices Holmes and Brandeis: at “the close of the nineteenth century [they] were still unusual among lawyers and judges in . . . rejecting the jurisprudential orthodoxy that legal principles were not created by the judges who applied them . . . .”<sup>58</sup> Society has grown accustomed to the idea, however radical

experience, has been found to be inconsistent with the sense of justice or with the social welfare, there should be less hesitation in frank avowal and full abandonment.” (quoting BENJAMIN CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* 150 (1921)).

54. ROSCOE POUND, *LAW AND MORALS* 122 (Rothman Reprints, Inc. 1969) (1924); see also Jack B. Weinstein, *Ethical Dilemmas in Mass Tort Litigation*, 88 NW. U. L. REV. 469, 568 (1994) (“Ethical and legal norms out of touch with real life lead not to morality but to hypocrisy, abuse, and waste.”).

55. See, e.g., Karl N. Llewellyn, *Some Realism About Realism—Responding to Dean Pound*, 44 HARV. L. REV. 1222, 1238-39 (1931) (arguing that the “rule of law” has never really existed because judges have always made law using “rules” to make their decisions seem plausible); cf. Martin Shapiro, *Judges as Liars*, 17 HARV. J.L. & PUB. POL’Y 155, 156 (1994) (“[Judges] must always deny their authority to make law, even when they are making law.”).

56. The issue of enforcement of unjust laws often arises not as the duty to enforce unjust statutory law, but to enforce unjust *case* law. That is because, under our system, any judge, at any level, has the power to declare a law unconstitutional. It is only after a higher court upholds the questionable law, as it did with the statute creating the sentencing commission, that the lower court’s compliance with the law becomes a duty.

57. Cf. Lord Woolf, *Access to Justice*, at 109 ¶30 (Interim Report to the Lord Chancellor on the Civil Justice System in England and Wales, June 1995), notes that British jurists, interviewed by Professor Baldwin, presented widely differing views about the extent to which they should be constrained by legal principles. Some saw it as their unequivocal duty to apply the principles of English law, while those at the other end of the spectrum spoke of a wider responsibility to “do justice” even if that meant disregarding the strict requirements of the law and adopting a more common sense approach in some cases. See also *id.* at 109 ¶31 (noting “the lack of any detailed evidence as to the circumstances under which one judge will “follow the law” and another will “do justice.”).

58. G. Edward White, *The Canonization of Holmes and Brandeis: Epistemology and*

in the early Holmes and Brandeis years, that judges do not merely follow, but make, law. So complete is this shift in perception that it may be time to replace the phrase “line of cases” with “band of cases,” the addition of a concept of width giving a clearer picture of our view of legal precedent after almost a century of legal realism and other myth-puncturing academic movements.<sup>59</sup>

That Professor Cover recognized the dynamism of our legal system—and the give-and-take between law and morals—is clear. He wrote:

*In a static and simplistic model of law, the judge caught between law and morality has only four choices. [1] He may apply the law against his conscience. [2] He may apply conscience and be faithless to the law. [3] He may resign. [4] Or he may cheat: He may state that the law is not what he believes it to be and, thus preserve an appearance (to others) of conformity of law and morality.*<sup>60</sup>

Cover’s second and fourth options ignore the great flexibility of the American common law and its historical forms of interpretation. In a

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Judicial Reputations 5 (Mar. 5, 1995) (unpublished manuscript).

59. Cf. Richard H. Fallon, Jr., *Non-Legal Theory in Judicial Decisionmaking*, 17 HARV. J.L. & PUB. POL’Y 87, 87-88 (1994) (stating that judges seek to “identify legal principles that deserve to be extended into the future. In such cases, legal argument attempts to connect past decisions with current outcomes through the construction of . . . ‘narratives of deserved continuity’”) (citing RONALD DWORKIN, *LAW’S EMPIRE* 238-39 (1986)); Osgood, *The Enterprise of Judging*, *supra* note 48, at 15 (“[J]udges should not just look in the immediate zone of a particular rule, statute, or prior decision, but across the entire legal system to resolve ambiguities and answer hard questions.”). In his book, *POSTMODERN LEGAL MOVEMENTS*, Gary Minda writes:

There was also a real danger presented by neutral process thinking—there was the possibility that process theorists might fail to support morally correct results in particular cases. Process theorists failed to establish that there was a necessary analytical link between their theory of process and the achievement of social justice. The reality of racial inequality and disadvantage, justified and enforced by the judiciary, was hardly the basis for believing in legal process claims of justice through *neutral* modes of decision making.

GARY MINDA, *POSTMODERN LEGAL MOVEMENTS* 42 (1995) (emphasis in original).

60. COVER, *JUSTICE ACCUSED*, *supra* note 40, at 6 (emphasis added). Professor Cover continues:

Once we assume a more realistic model of law and of the judicial process, these four positions become only poles setting limits to a complex field of action and motive. For in a dynamic model, law is always becoming. And the judge has a legitimate role in determining what it is that the law will become. The flux in law means also that the law’s content is frequently unclear. We must speak of direction and of weight as well as of position. Moreover, this frequent lack of clarity makes possible “ameliorist” solutions. The judge may introduce his own sense of what “ought to be” interstitially, where no “hard” law yet exists. And, he may do so without committing the law to broad doctrinal advances (or retreats).

*Id.*



sophisticated analysis of the role of appellate courts and trial courts in predicting future trends in the law, Professor Llewellyn described the many techniques used by judges in giving due weight to stability and yet avoiding and circumventing dubious precedents.<sup>61</sup> In criminal cases—in which grave injustice is most likely to occur—the rule of lenity establishes a *duty* in the face of statutory ambiguity not to take the path of least resistance, but one that leads to the most favorable result for the defendant.<sup>62</sup> The widespread acceptance of this rule suggests a universal understanding of the discretionary aspects of the role of judges in statutory interpretation.

## B. Disobedience and distinguishing cases

### 1. *Must lower courts obey higher-court precedent?*

Among legal academics, the duty of lower courts to follow superior court precedents has been the subject of considerable debate. One contributor to that discussion is Professor Michael Paulsen, whose views may have been influenced by his opposition to abortion. Paulsen argues that “lower court judges can, and should, disregard the authority of *Roe v. Wade*.”<sup>63</sup> Noting that “all *federal* judges, at least, hold their authority under equivalent commissions,”<sup>64</sup> he suggests that:

While lower courts may be “inferior” in the hierarchy—i.e., their decisions can be *countermanded* by a higher tribunal—they are not

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61. See, e.g., KARL N. LLEWELLYN, *THE COMMON LAW TRADITION: DECIDING APPEALS* (1960).

62. See, e.g., William N. Eskridge & Philip P. Frickey, *The Supreme Court, 1993 Term: Foreword—Law as Equilibrium*, 108 HARV. L. REV. 26, 104 (1994) (noting the importance of rule of lenity in recent Supreme Court jurisprudence); Sarah Newland, Note, *The Mercy of Scalia: Statutory Construction and the Rule of Lenity*, 29 HARV. C.R.-C.L. L. REV. 197, 228 (1994) (“The rule of lenity should serve . . . to inform the entire process of interpretation . . .”); see generally Oliver Wendell Holmes, Jr., *The Path of the Law*, 10 HARV. L. REV. 457, 461 (1897) (“The prophecies of what the courts will do in fact, and nothing more pretentious, are what I mean by the law.”).

63. Paulsen, *supra* note 41, at 82 (discussing *Roe*, 410 U.S. 113 (1973)).

The argument for the power of lower courts to ‘underrule’ the Supreme Court is . . . straightforward . . . First, the judge’s obligation, by oath, is to the Constitution, not to the Supreme Court interpretations of the Constitution. There is nothing morally disingenuous in taking the oath and disobeying ‘controlling’ precedent . . . There may be Supreme Court opinions that hold . . . that lower court judges are bound . . . to uphold . . . the precedents of higher courts. But that only begs the question of whether lower courts are bound to follow the holdings of the Supreme Court . . .

*Id.* at 82-83.

64. *Id.* at 83 n.132 (emphasis added).

constitutionally *subordinate* in terms of either their duties under the Constitution or their relationship to higher courts. Reviewing courts have no power to remove lower court judges from office, reduce their pay, or hold them in contempt, at least not in the federal system . . . . So long as the lower court may still be reversed by the higher court, there is no interference with either the “supremacy” of the Supreme Court or with the idea of the rule of law. . . . The asserted need for “uniformity” is not threatened. . . . [O]nly the costs of enforcing uniformity are new.<sup>65</sup>

He concludes that “underruling” may in fact “be an essential part of the process of judicial self-correction,” giving as an example the Supreme Court’s powerful defense of religious liberty in *West Virginia State Board of Education v. Barnette*.<sup>66</sup> *Barnette* affirmed a decision by a three-judge district court panel that “underruled” the Supreme Court’s prior, anti-First Amendment holding in *Minersville School District v. Gobitis*.<sup>67</sup>

Ultimately, to Paulsen, the problem with underruling is simply a pragmatic one:

[W]ere judges to choose such a course on *every* issue on which they disagreed with higher courts, the smooth functioning of the judicial system might rapidly break down. This is an important consideration for deciding *when* an issue is sufficiently important that the conscientious judge should flout controlling precedent.<sup>68</sup>

As he notes, however, a judge who chooses such a course “will be reversed (and chastised) by a reviewing court, and directed to enter an order based on the unjust and unjustifiable precedent.”<sup>69</sup> At that point, he suggests, the appropriate responses are “criticism, recusal, and, if necessary, resignation.”<sup>70</sup> Thus, he concedes, judicial disobedience cannot flout or trump appellate control.

Another contributor to the debate—one without an apparent explicit substantive goal—is Professor Evan H. Caminker, who reviews the history of and rationales for the “rule” that lower courts must follow the dictates of superior tribunals.<sup>71</sup> Along the way, he discards a number of possible

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65. *Id.* at 84-85; see also Note, *Lower Court Disavowal of Supreme Court Precedent*, 60 VA. L. REV. 494, 495 (1974) (“[I]t is unclear exactly what it means for a lower court to be ‘bound’ by a prior decision. As a practical matter, since the Supreme Court cannot hire and fire judges, a lower court is bound only in the sense that it can be reversed on appeal.”).

66. 319 U.S. 624 (1943); Paulsen, *supra* note 41, at 85.

67. 310 U.S. 586 (1940).

68. Paulsen, *supra* note 41, at 86 (emphasis in original).

69. *Id.* at 88. For a discussion of the duty of a judge in the face of a specific mandate, see text accompanying notes 110-21, *infra*.

70. Paulsen, *supra* note 41, at 88.

71. See Evan H. Caminker, *Why Must Inferior Courts Obey Superior Court*

reasons for such a rule—among them the assumption, probably held by many but unexamined by most, that higher courts are superior at determining the law.<sup>72</sup> (If true, this would suggest that any district court should follow the holding of *any* court of appeals, something not required in our system.) Professor Caminker concludes that the duty to follow direct precedent does in fact exist, although the route to that conclusion is far less obvious than might otherwise have been assumed.<sup>73</sup>

His primary support for the rule is pragmatic: “The doctrine[] . . . is justified by its service of various institutional values, including judicial economy, uniformity of interpretation, and decisional proficiency; these values are sufficiently weighty to overcome potential countervalues such as ‘issue percolation’ or even ‘error correction’ by the lower courts.”<sup>74</sup> His utilitarian analysis of why judges would generally follow higher-court precedent suggests that the system would survive even if more freedom *not* to follow precedents were acknowledged.<sup>75</sup> The problem is not whether a lower court can depart from precedent but when it *should*. One of the shortcomings of utilitarianism as a guide to social policy is that it may ignore or even flout common views of morality.<sup>76</sup>

If a judge concludes that she is bound by her oath of office to diverge from precedent, what harm occurs? According to Professor Paul Colby, the pragmatic and utilitarian arguments for acquiescing in injustice do not trump the moral imperative not to.<sup>77</sup> “The appellate courts can reverse [the trial judge], they can issue a writ of mandamus, and they can reassign the case to another judge.”<sup>78</sup> He notes further that “[i]f the Supreme Court

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*Precedents?*, 46 STAN. L. REV. 817 (1994) [hereinafter Caminker, *Inferior Courts*]. Professor Caminker’s argument is limited to rules derived from other cases, rather than “the law of the case,” discussed in text accompanying notes 110-21, *infra*. See also Evan H. Caminker, *Precedent and Prediction: The Forward-Looking Aspects of Inferior Court Decisionmaking*, 73 TEX. L. REV. 1 (1994) [hereinafter Caminker, *Precedent and Prediction*].

72. Caminker, *Inferior Courts*, *supra* note 71, at 845.

73. *Id.* at 873.

74. Caminker, *Precedent and Prediction*, *supra* note 71, at 35.

75. Cf. Richard Posner, *What Do Judges Maximize?*, in OVERCOMING LAW 109, 124 (1995) (leisure-seeking judges tend to avoid “hassle” by claiming their decisions are dictated by “the law.”).

76. See THE ENCYCLOPEDIA OF PHILOSOPHY 208 (Paul Edwards ed., 1972) (“utilitarianism”).

77. Paul L. Colby, *Two Views on the Legitimacy of Nonacquiescence in Judicial Opinions*, 61 TUL. L. REV. 1041 (1987).

78. *Id.* at 1057 (footnotes omitted). But see Jack B. Weinstein, *The Limited Power of the Federal Courts of Appeals to Order a Case Reassigned to Another District Judge*, 120 F.R.D. 267 (1988) (making legal and prudential arguments against practice).

errs, no other court may correct it.”<sup>79</sup> Yet,

[a]ppeals . . . are taken from final judgments, not from judicial opinions. Thus, in the “right” cases, the Supreme Court has affirmed the decisions of lower court judges who, in lieu of employing the time-honored stratagems of distinguishment, conscious judicial by-pass and oversight, explicitly disapproved of applicable Supreme Court doctrine . . . . The rules binding lower courts to adhere to precedent are, therefore, not compulsory but suasive.<sup>80</sup>

Some commentators have distinguished between categories of precedents. Professor Lawson takes the radical position that the Constitution requires that precedent—at least *horizontal* precedent—be recognized as *non-binding*. He argues: “[I]f courts have the duty . . . to decide cases according to the Constitution, and not according to legislative or executive determinations that conflict with the Constitution, then they . . . also have the duty to decide cases according to the Constitution and not according to prior (horizontal) precedent.”<sup>81</sup> Although he argues that the practice of employing precedent is “a sort of intellectual adverse possession [of the] constitution,”<sup>82</sup> he warns litigants inclined to adopt his view in court that they can expect to be sanctioned.<sup>83</sup>

Even in the rarefied world of academic debate, Lawson’s view has been pronounced “clearly wrong.”<sup>84</sup> Professor Charles Fried has observed: “If Lawson allows constitutional decisions to take into account anything other than the text of the Constitution itself, such as data about the world . . . then

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79. Colby, *supra* note 77, at 1057 n.78 (quoting *Jaffree v. Bd. of Sch. Comm’rs*, 705 F.2d 1526, 1533 (11th Cir. 1983); *see also* *Hutto v. Davis*, 454 U.S. 370, 374-75 (1982), described in text accompanying note 92, *infra*).

80. Colby, *supra* note 77, at 1058-59 (footnotes omitted). Professor Colby notes that “the Supreme Court itself abandoned strict adherence to the doctrine [of *stare decisis*] long ago because *stare decisis*, strictly speaking, requires a court to follow its own previous decisions.” *Id.* at 1058.

81. Charles Fried, *Reply to Lawson*, 17 HARV. J.L. & PUB. POL’Y 35, 35 (1994). The debate about the limits of *stare decisis* is, of course, not new.

[T]his rule [that precedents are binding] admits of exception, where the former determination is most evidently contrary to reason; much more if it be contrary to the divine law. But even in such cases the subsequent judges do not pretend to make a new law, but to vindicate the old one from misrepresentation. For if it be found that the former decision is not manifestly absurd or unjust, it is declared, not that such a sentence was *bad law*, but that it was *not law*.

1 WILLIAM BLACKSTONE, COMMENTARIES, at \*69-\*70.

82. Gary Lawson, *The Constitutional Case Against Precedent*, 17 HARV. J.L. & PUB. POL’Y 23, 33 (1994) (quoting *Tyler Pipe Indus. v. Washington Dep’t of Revenue*, 483 U.S. 232, 265 (1987) (Scalia, J., dissenting)).

83. *Id.*

84. Fried, *supra* note 81, at 35.

by what rationale must the Court's prior decisions be excluded?"<sup>85</sup>

For purposes of this discussion, it is more important to note that Lawson never explains why his argument would not apply to *vertical* as well as horizontal precedent. This provides an insight into the possible fallacy of his claim.<sup>86</sup> As Professor Akhil Reed Amar notes:

If we take seriously the idea that the Constitution is the supreme law . . . and perhaps that every person should interpret it directly and follow it, it is not clear that vertical precedent should be distinguished from horizontal precedent. [Others have] made this point as well. Mike Paulsen, for example, has argued that in some situations a lower court judge should simply say to a higher court: "Go ahead, make my day: reverse me. You're wrong about the Constitution. You've taken your oath of office, but that's no excuse [for] violating mine. I'm going to follow my oath of office and decide the Constitution correctly as I understand it. If you don't like it, take cert."<sup>87</sup>

Amar himself is not certain that adherence to *vertical* precedent is required. He will go only so far as to note that there is "an *implicit* hierarchy that is at least permitted—perhaps compelled—by Article III, where the oaths of office and the interpretations of higher courts trump those of lower courts."<sup>88</sup> Yet he fails to explain how Article III compels this "trumping," an omission he appears to acknowledge implicitly in his half-hearted conclusion: "Precedents need not always be followed, but they are entitled to *some* rather than zero weight."<sup>89</sup>

Other commentators have staked out a more definitive position. Professor Sanford Levinson argues that the duty to obey superior court

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85. *Id.* at 38.

86. Akhil Reed Amar, *On Lawson on Precedent*, 17 HARV. J.L. & PUB. POL'Y 39 (1994).

87. *Id.* at 41 (quoting Paulsen, *supra* note 41, at 82-88). Of course, a lower court making such an argument might rely on the likelihood that the Supreme Court would not grant certiorari. At the district court level, where the right of appeal is automatic from a final judgment, there is still no guarantee that the losing party will appeal.

88. *Id.* at 41 (emphasis added).

89. *Id.* at 43 (emphasis added). Professor Frederick Schauer, too, notes that Professor "Lawson seeks to take the question of vertical precedent off the . . . agenda, but that effort is unavailing." Frederick Schauer, *Precedent and the Necessary Externality of Constitutional Norms*, 17 HARV. J.L. & PUB. POL'Y 45, 47 n.10 (1994); see also Steven G. Calabresi & Gary Lawson, *Equity and Hierarchy: Reflections on the Harris Execution*, 102 YALE L.J. 255, 276 n.106 (1992) (discussing the importance of precedent applied through vertical hierarchy in the judicial system). Like Professor Fried, he argues that the duty to follow precedent—vertically as well as horizontally—is a question settled not by the Constitution, but by constitutional interpretation. "Should the American people, or American judges, decide that judicial precedents should be authoritative in constitutional decisionmaking, and should count as part of what 'the Constitution' is, nothing in the Constitution itself could preclude such a social and political decision." Schauer, *supra*, at 55 (emphasis in original).

precedents is a well-established matter of positive law,<sup>90</sup> given the views of the Supreme Court on the subject. For example, *Hutto v. Davis*<sup>91</sup> chastised a court of appeals panel for having ignored the hierarchy of the federal court system created by the Constitution and Congress. Precedent must be followed in order to prevent “anarchy,” the Court opined.<sup>92</sup>

Although Levinson recognizes the existence of some “outright defiance of hierarchy,”<sup>93</sup> he writes: “Nor, I suspect, would many of us, whatever our political views, wish to find many examples of such overruling in the respective legal reporters for the lower courts.”<sup>94</sup> In a final hint that he acknowledges more room for judicial interpretation than his doctrinal arguments might suggest, he adds, in a footnote: “A very interesting article remains to be written about the use of the term ‘a case of first impression’ in legal opinions.”<sup>95</sup> His point, apparently, is that precedent need not bind a judge who sees the problem before him as unresolved by existing case law.

New law clerks, and even their colleagues, experienced trial and appellate judges, are startled to discover the number of “new” issues that arise each day in each court. Our constantly changing society, and technology, as well as philosophical views, statutes, and precedents, require a renewal of the law as applied in every generation. Application of the law

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90. Sanford Levinson, *On Positivism and Potted Plants: “Inferior” Judges and the Task of Constitutional Interpretation*, 25 CONN. L. REV. 843 (1993).

91. 454 U.S. 370, 374-75 (1982).

92. *Id.* at 375.

93. Levinson, *supra* note 90, at 851.

94. *Id.* “‘Inferior’ judges know their place, as it were, which is the enforcement of the decisions of superiors, whatever their own views.” *Id.* at 847. It should, he argues, “be clear that the operating theory of the ‘inferior’ judiciary is precisely that the disciplined techniques of legal analysis take second place to obedience to the particular persons who contingently occupy the top positions in the judicial hierarchy.” *Id.* at 849. Levinson gives several examples of anguished acquiescence, including that of Stephen Reinhardt, *The Supreme Court, The Death Penalty, and the Harris Case*, 102 YALE L.J. 205, 206 (1992) (“Whatever our sorrow over the systematic erosion of established rights, we must continue to apply whatever decisions the Court issues. And we will do that.”). Levinson describes this as “an interesting reversal of Andrew Jackson’s insistence that Supreme Court justices ‘have only such influence as the force of their reasoning may deserve.’” See PAUL BREST & SANFORD LEVINSON, PROCESSES OF CONSTITUTIONAL DECISIONMAKING 49-52 (1992).

Yet, in the end, Levinson does not expect blind acquiescence from lower court judges. Citing an article by Judge Posner on the interpretive duties of lower court judges, he notes: “Posner undoubtedly wrote for many more inferior judges than himself when he . . . rejected a role as a ‘potted plant.’ Still, I strongly suspect that the way that most such judges exercise their independence is through imaginative interpretation of the precedents.” Levinson, *supra* note 90, at 850-51 (citing Richard Posner, *What Am I? A Potted Plant?*, NEW REPUBLIC, Sept. 28, 1987, at 23 (“Everyone professionally involved with law knows that, as Holmes put it, judges legislate “interstitially”)).

95. Levinson, *supra* note 90, at 850 n.26.

to the incredible diversity of people and situations we see in court results in a shortage of “all fours” cases. No judge alert to the myriad possibilities of creation and reinterpretation of the law that Llewellyn or Cardozo or Holmes or the others in the pantheon of legal heroes have taught us exist could treat the law as static.

Respect for colleagues’ work and the desire to have uniformity in the law will almost invariably lead to following the rulings of other federal courts at both the trial and appellate level—whether within or without the circuit.<sup>96</sup>

## 2. *Application of the duty of lower courts to follow higher-court precedent*

Conceding that lower courts should generally follow the dictates of superior courts tells us surprisingly little about trial judges’ obligations in real life. The general principle applies only where, first, the rule of the superior court is clear, and, second, where intimations and other changes in case law, statutes or conditions have suggested that the rule will remain the same when the “right” case comes before the higher court, and, third, where that clear rule applies unequivocally to the facts before the lower court. That eliminates a number of cases.

First, depending on one’s definition, it is possible to conclude that few rules announced by appellate courts are clear and eternal. This is increasingly so as more and more rules are issued. The attempt, in recent years, to decide more appeals (both in absolute numbers and as a percentage of district court dispositions)<sup>97</sup> may have the opposite of the courts’ intended effect. As more “rules” are announced, each with slightly different intonation, the effect is a cacophony, the antithesis of a controlling law.<sup>98</sup> Too much law begins to look suspiciously like little law.<sup>99</sup>

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96. It is rare that the legislature will explicitly require lower courts to follow the highest appellate court without deviation. In an attempt to limit habeas corpus petitions from state prisoners, the petitioner must rely upon “a decision that . . . 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)(1). The provision has severely limited the power of the lower federal courts to interpret the Federal constitution in habeas cases.

97. See generally THOMAS E. BAKER, THE JUSTICE RESEARCH INSTITUTE, RATIONING JUSTICE ON APPEAL: THE PROBLEMS OF THE U.S. COURTS OF APPEALS (1994) (describing explosion in number of cases heard by appellate courts).

98. As Judge Posner suggested in his opinion in *In re Rhone-Poulenc Rorer Inc.*, 51 F.3d 1293, 1300 (7th Cir. 1995), it is possible that the laws of fifty-one jurisdictions could be combined into a kind of legal “Esperanto.” The laws of hundreds of appellate panels, however, are too disparate to be melded into a common tongue.

99. The Supreme Court, which has attempted to concentrate on the “law pronouncement” function, has been able to hear fewer and fewer cases. See, e.g., Linda Greenhouse, *The Supreme Court: The Overview*; U.S. Justices Open Their New Session by

Second is the issue of distinguishing cases on their facts. As Judge Guido Calabresi noted in a court of appeals *dissent*, “[F]acts are often surprising and always essential.”<sup>100</sup> The district judge develops a “closeness” to the facts that cannot be replicated at the appellate level. This is true even, for example, when the facts are stated in terms of statistics—arguably the type of information most easily transmitted to a reviewing court. As the Panel on Statistical Assessments as Evidence in the Courts concluded:

When it comes to understanding and coping with statistical evidence, the institutional advantage appears to be with the trial court. In dealing directly with the expert witnesses and acquiring an intimate knowledge of the facts of the case, the trial judge has an opportunity that the appellate judge lacks for instruction on the role of statistical evidence in the case in question. . . . [This may lead] appellate judges . . . to resolve statistical issues through law-like pronouncements . . . without either a full understanding of the issues raised or an appreciation of what good statistical methodology implies given the specific facts of the case.<sup>101</sup>

The ability to distinguish cases on their facts is often congruent with the tenacity of the parties and the trier in developing the record. As Judge Wyzanski noted:

[T]he percentage and type of novel cases may depend on the judge’s own interests and his alertness to . . . novel points not fully appreciated by counsel. Did *MacPherson v. Buick Motor Co.* . . . and *Palsgraf v. Long Island R.R.* come to Judge Cardozo with what we now regard as their distinctive significance already marked—or was Judge Cardozo prepared by prior study and reflection to look for possibilities of extending the law . . . ? Is it not true of original judges as of original scientists that “success comes out the prepared mind,” to use Pasteur’s phrase?<sup>102</sup>

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*Refusing Cases*, N.Y. TIMES, Oct. 4, 1994, at A1 (noting that “[l]ast term, the Court decided only 84 cases, the lowest number since 1955, while receiving 6,897 [petitions]”).

100. *Giano v. Senkowski*, 54 F.3d 1050, 1062 (2d Cir. 1995) (Calabresi, J., dissenting); see also *United States v. Kinder*, 64 F.3d 757 (2d Cir. 1995). In *Kinder*, Judge Pierre Leval’s ringing dissent identifies discrepancies between the methods of weighing LSD for mandatory minimums and Sentencing Guidelines purposes. 64 F.3d at 761-73.

101. PANEL ON STATISTICAL ASSESSMENTS AS EVIDENCE IN THE COURTS, *THE EVOLVING ROLE OF STATISTICAL ASSESSMENTS AS EVIDENCE IN THE COURTS* 82 (Stephen E. Fienberg ed., 1989); see also *United States v. Casamento*, 887 F.2d 1141, 1156 (2d Cir. 1989) (when a finder of fact has “pieced[d] together circumstantial evidence,” a “reviewing court must view . . . [the] evidence not in isolation but in conjunction”). This is no less true when the finder has pieced together statistical and non-statistical proof. See also *Verizon Directories Corp. v. Yellow Book USA, Inc.*, 331 F. Supp. 2d 136 (E.D.N.Y. 2004) (noting the need for increased pedagogical devices at trial and appellate level in complex and science-based cases).

102. Charles E. Wyzanski, Jr., *A Trial Judge’s Freedom and Responsibility*, 65 HARV. L.



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Dean Russell Osgood has observed: “The greatest insight of the common-law system was that . . . additions or emendations of fact sometimes require reanalysis of a legal rule.”<sup>103</sup> This suggests that—to paraphrase Justice Holmes<sup>104</sup>—the life of a trial judge is not of the law, but of experience.

Trial judges have an obligation to decide all relevant issues before them, even when doing so forces them to confront difficult moral choices; they should not be deterred by fear of reversal at the appellate level.<sup>105</sup> The problem is not whether a trial judge has the obligation to move the law in a direction he or she deems principled, but the limits of what can be said—much; and done—somewhat less. In Judge Wyzanski’s still-timely words, “[n]o trial judge of any sense supposes his quality is measured by a naked tabulation of affirmances and reversals.”<sup>106</sup> Even where it is clear that the appellate courts seem to be going in a different direction, trial judges must be true to an inner core of responsibility.<sup>107</sup> They must sometimes risk, even court, reversal when necessary to make certain that the appellate courts, the bar, academia, and the public are fully aware that there is a strong opposing view.<sup>108</sup> As a district judge, Learned Hand repeatedly, by dictum and holding, took positions contrary to current doctrine. Many of these controversial positions subsequently became law.<sup>109</sup>

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REV. 1281, 1301 (1952) (citations omitted).

103. Osgood, *supra* note 48, at 15 (noting that this reality “tug[s] against . . . the principle that like cases ought to be treated alike”).

104. OLIVER W. HOLMES, *THE COMMON LAW* \*1 (1881) (“The life of the law has not been logic: it has been experience.”).

105. That is not to say that there are no consequences to speaking out. One of the great men of the law was Samuel Seabury. See HERBERT MITGANG, *THE MAN WHO RODE THE TIGER: THE LIFE AND TIMES OF JUDGE SAMUEL SEABURY* (1963); W. Bernard Richland, Book Review, 64 COLUM. L. REV. 180, 182 (1964). Richland notes that after becoming a judge, Seabury “continued to denounce publicly” unpalatable decisions, including holdings by “the New York Court of Appeals striking down the Workmen’s Compensation Law, the Employers Liability Act, and other social legislation.” Richland, *supra*, at 182. Members of the Court of Appeals later told the Governor that because of Seabury’s outspokenness, “they would not welcome his appointment.” *Id.*

106. Wyzanski, *supra* note 102, at 1299. *But see* Caminker, *Precedent and Prediction*, *supra* note 71, at 77-78 (listing reasons “lower court judges dislike being reversed on appeal”).

107. *Cf.* Freeman Dyson, *The Scientist as Rebel*, N.Y. REV. BOOKS, May 25, 1995, at 31 (“I feel myself a traveler on a journey that is far longer than the history of nations.”).

108. See Charles E. Clark, *A Plea for the Unprincipled Decision*, 49 VA. L. REV. 660 (1963) (criticizing Professor Wechsler’s view of neutral principles as re-enforcing dead hand of the law and applauding “unprincipled” decisions in landmark cases such as *Brown* that represent progress and evolution); see also Deborah Pines, *Second Circuit Panel Transfers Bias Case to Another Trial Judge*, N.Y.L.J., Oct. 17, 1994, at 1 (describing *McLee v. Chrysler Corp.*, 38 F.3d 67 (2d Cir. 1994), in which the trial judge who challenged the Second Circuit’s summary judgment standard was chastised by the appellate court).

109. See, e.g., GERALD GUNTHER, *LEARNED HAND: THE MAN AND THE JUDGE* 148-49, 329

I am not suggesting that every reversal is predicated on a dispute about a matter of principle. All judges make errors. Only a small percentage of cases present a basis for moral or technical-legal disagreement between trial and appellate judges.

### 3. *The exception for specific mandates*

Trial judges have the obligation to maintain the pressure for sound interpretation when they see grave and unnecessary injustice. Occasionally, they will be reversed in a harsh opinion, but that possible slight to their egos cannot and should not be permitted to inhibit them. Trial judges protected by Article III are, like their appellate court colleagues, expected to use their independence to help guarantee a fair and effective system of justice.

There are, of course, limits. If the trial court can find no reasoned way to distinguish precedents, acquiescence in the courtroom—but not silence—is required. In the face of a specific mandate, a trial judge has no alternative but to follow the court of appeals' instructions.<sup>110</sup> By contrast, there can be no obligation to reach an unjust decision in deference to an indirect or *hypothetical* decision of a superior court.<sup>111</sup> Even this rule, however, may leave a judge great latitude, within the language of the mandate, to reach the most just result.

To cite a pertinent example, a court of appeals panel ordered a district court judge to increase the sentence of a young mother of three small children, who was a peripheral and minor figure in a drug transaction, to

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(1994) (discussing *United States v. Kennerley*, 209 F. 119 (S.D.N.Y. 1913)); *id.* at 151-70 (discussing *Masses Publishing Co. v. Patten*, 244 F. 535 (S.D.N.Y. 1917), *rev'd*, 246 F. 24 (2d Cir. 1917)); *id.* at 340-42 (discussing *United States v. Levine*, 83 F.2d 156 (2d Cir. 1936)). Hand's correspondence and activities with Justices Felix Frankfurter, Oliver Wendell Holmes, Jr., Professor Zachariah Chaffee, Jr., and many others about these and other cases were unethical by current standards.

110. *See, e.g.*, *United States v. Ekwunoh*, 888 F. Supp. 369 (E.D.N.Y. 1994) (history and interpretation of mandate rule). A judge *could* refuse to obey, which would be a form of civil disobedience. Civil disobedience is known in a variety of cultures. *See, e.g.*, Ina Friedman, *To Obey Or Not to Obey?*, JEWISH WEEK, July 21, 1995, at 28 (discussing ruling by prominent Israeli rabbis forbidding soldiers and civilians from participating in the evacuation of the West Bank); *cf.* Calvin Trillin, *State Secrets*, NEW YORKER, May 29, 1995, at 54 (describing Mississippi State Sovereignty Commission, formed by the legislature in 1956 to "do and perform any and all acts and things deemed necessary and proper to protect the sovereignty of the State of Mississippi . . . from encroachment thereon by the federal government.").

111. *Cf.* *United States v. DeRiggi*, 45 F.3d 713, 717 (2d Cir. 1995) (deciding in part, based on prediction of how Supreme Court would decide case); *see generally* Evan H. Caminker, *Precedent and Prediction*, *supra* note 71 (discussing if and when "lower" courts should decide cases on the basis of assumptions about how "higher" courts would act).

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ten years in prison without any possibility of parole.<sup>112</sup> Even the prosecutor offered, after winning the appeal, to stipulate to a lower sentence. The trial judge postponed the sentence so that the parties could petition the court of appeals to amend its mandate. The court of appeals denied the petition. As it turns out, intervention by Congress, in the form of the “safety valve” provision of the 1994 crime act,<sup>113</sup> was the *deus ex machina* that permitted the imposition of a more humane sentence despite the call for harshness by the remand.<sup>114</sup>

In another instance, the district court sentenced a number of defendants who were involved in a municipal bribe-taking scheme.<sup>115</sup> The culpability of the defendants varied widely. Some were organizers of the scheme; others merely followed instructions. Under the Guidelines, all the defendants would have received essentially the same sentence. The district judge, finding this result unconscionable, sentenced the defendants in proportion to their culpability. As a result, the least blameworthy defendants received sentences below the applicable Guidelines range. On appeal by the government of the sentences of some of these least culpable defendants, the court of appeals ordered the district court to resentence them in accordance with the Guidelines.<sup>116</sup> This meant that the district judge could—and was in all likelihood expected to—sentence them to substantially longer terms in prison than he had initially imposed.

By the time the case came back to the trial court on remand,<sup>117</sup> a year had passed since the initial sentencing proceedings. Thus the sentencing court considered a far different set of facts than it had faced the first time, which the court of appeals had considered in the record on appeal:

[A]t the time of resentencing, one defendant was eight days away from the end of a one-year prison term. He was well into the deinstitutionalization process. He had moved to a community facility to assist in obtaining employment, and had begun psychologically to reestablish family ties. His children—three of whom appeared in court—awaited his arrival home with intense anticipation. To add a second year to his sentence would have been cruel, and would have exacted a far higher price from the defendant and his family than the imposition, at the outset of

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112. *United States v. Ekwunoh*, 12 F.3d 368 (2d Cir. 1993), *vacating* 813 F. Supp. 168 (E.D.N.Y. 1993).

113. 18 U.S.C. 3553(f) (1994).

114. *United States v. Ekwunoh*, 888 F. Supp. 369 (E.D.N.Y. 1994).

115. *United States v. Abbadessa*, 848 F. Supp. 369 (E.D.N.Y. 1994), *vacated by United States v. DeRiggi* 45 F.3d 713 (2d Cir. 1995), *modified on remand*, 893 F. Supp. 171 (E.D.N.Y. 1995).

116. *United States v. DeRiggi*, 45 F.3d 713 (2d Cir. 1995).

117. *United States v. DeRiggi*, 893 F. Supp. 171 (E.D.N.Y. 1995).

a significantly longer prison term.

Another of these defendants had already been released. He described in detail his efforts to reestablish ties with his wife and two children since his return home. The relationships had been severely strained by his incarceration. To send the defendant back to prison would have had far more serious consequences than initial imposition of a longer term.<sup>118</sup>

In the Second Circuit, sentencing judges can, and often do, depart from the prescribed Guidelines range when faced with extraordinary family circumstances.<sup>119</sup> On remand, the judge conducted fact finding into the effects on family stability of reincarcerating a defendant who had already been released, or lengthening the prison term of a defendant who was about to be released. What he found convinced him that family circumstances departures were required.

In so finding, the sentencing court fully complied with the court of appeals mandate, which left open the possibility of downward departure on the basis of factors not considered at the initial sentencing proceedings. The mandate rule permits lower courts to take into account, on remand, any issue that was not raised and decided on appeal. A mandate instructing a court to sentence a defendant to a given term—without permitting consideration of grounds for departure not previously raised, or reconsideration of old grounds on the basis of facts and circumstances not reflected in the record on appeal—would, arguably, violate this rule. More to the point, it would seriously undermine the district court's ability, which is co-extensive with its duty to do justice, to consider all facts and circumstances known to it at the time of its resentencing decision.<sup>120</sup>

Seen this way, the mandate rule imposes constraints on the reviewing court as well as on the court below.<sup>121</sup> A court of appeals that recognizes

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118. *Id.* at 174.

119. See U.S.S.G. § 5H1.6; *United States v. Johnson*, 964 F.2d 124 (2d Cir. 1992).

120. See 18 U.S.C. § 3661 (“No limitation shall be placed on the information concerning the background, character, and conduct of a person convicted of an offense which a court of the United States may receive and consider for the purpose of imposing an appropriate sentence.”); *United States v. Shonubi*, 895 F. Supp 460 (E.D.N.Y. 1995) (arguing for broad discretion in obtaining and using information at sentencing). *But see* Bernstein, *supra* note 27, at 771 (arguing that the Guidelines, in conjunction with § 3661, have the effect of “prevent[ing] a judge from using all the information [he or] she acquires. This makes the judge’s job not easier, but harder”). This freedom has been somewhat circumscribed by the Feeney Amendment. See *United States v. Kahn*, 325 F. Supp. 2d 218 (E.D.N.Y. 2004) (construing that amendment restrictively and discussing use of a jury to ameliorate harsh sentences in light of history and constitutional requirements).

121. The court of appeals, arguably, violated this rule in the *Eastway Construction* cases, when it required the district judge to impose monetary sanctions ten times larger than the district judge believed appropriate. See *Eastway Constr. Corp. v. City of New York*, 762 F.2d 243 (2d Cir. 1985) (reversing denial of sanctions), *on remand*, 637 F. Supp. 558

the duty of the district judge to consider all the facts and circumstances of the case will ensure that its mandates do not unnecessarily restrict the trial judge's ability to utilize all relevant information.

### III. THE SENTENCING GUIDELINES AS A PARADIGM OF JUDICIAL REACTION TO UNJUST LAWS

Observing one long-time district judge at sentencing, a colleague wrote: "I am struck by how much he sought, within the range of discretion, to tailor the sentences of individual defendants to their particular crimes, needs and circumstances."<sup>122</sup> The Guidelines system and mandatory minimums which bind all federal courts have made such tailoring a much more difficult task. The results have been widespread injustice.<sup>123</sup> "[F]ederal judges are almost unanimously opposed to mandatory minimums"<sup>124</sup> and to overly harsh and rigid guidelines. Their words and deeds in responding to the current sentencing regime reflect the range of options available to judges who feel the burden of unjust laws.

Many judges first declared the Guidelines unconstitutional.<sup>125</sup> They then attempted to show why, under the controlling statutory scheme, the Guidelines are not binding in cases in which they produce irrational results.<sup>126</sup> Next, constrained to work within the Guidelines system, they

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(E.D.N.Y. 1986); *Eastway Constr. Corp. v. City of New York*, 821 F.2d 121, 123 (2d Cir. 1987) (increasing sanctions from \$1000 to \$10,000 without explaining why the former constituted an abuse of discretion); see also Stephen B. Burbank, *The Chancellor's Boot*, 54 BROOK. L. REV. 31, 31 (1988) (discussing district and appellate court opinions in *Eastway*). Rule 11 by itself made it clear that it was the district court, not the court of appeals, which was to decide the type of punishment to be imposed. Were it not for the unwarranted insistence by the court of appeals on a monetary sanction, the court would have merely publicly admonished the attorney.

122. Solomon Oliver, Jr., *The Judge As Guardian: A Tribute to Judge Frank J. Battisti*, 42 CLEV. ST. L. REV. 369, 369 (1994).

123. The literature on these injustices is overwhelming. See, e.g., Barbara S. Meierhoefer, *The Role of Offense and Offender Characteristics in Federal Sentencing*, 66 S. CAL. L. REV. 367 (1992) (describing decrease in judicial discretion and increase in severity of sentencing under Guidelines). See also American Bar Association's program to reform criminal punishment in this country by reducing American reliance on incarceration, following the invitation of Justice Anthony M. Kennedy, 75 CRIM. L. REP. 549 (2004).

124. Jose A. Cabranes & Leonard Orland, *Lessons from the Federal Courts Study Committee*, 5 FED. SENTENCING REP. 203 (1993).

125. See Mark A. Cohen, *Explaining Judicial Behavior or What's "Unconstitutional" About the Sentencing Commission?*, 7 J.L. ECON. & ORG. 183, 186-87 (1991) (analyzing early responses to the Commission and its Guidelines).

126. See *United States v. Abbadessa*, 848 F. Supp. 369 (E.D.N.Y. 1994), *vacated by*

strove to achieve maximum room to maneuver, for example by expanding the departure power,<sup>127</sup> into a variety of situations not considered by the Sentencing Commission in the formulation of the Guidelines.<sup>128</sup> At the same time, they have criticized the Guidelines (and mandatory minimums) in opinions, often following them “with regret” while sending strong messages to the appellate courts. In addition, they have made their objections known in a variety of other ways, from op-ed pages<sup>129</sup> to Congressional committee hearings.<sup>130</sup> Finally, through such organizations as the Judicial Conference, they urged the legislative branch to change the laws and the Sentencing Commission (on which several federal judges sit) to modify the Guidelines.<sup>131</sup>

These multi-pronged efforts have had an impact on all three branches of government. While some federal courts of appeals have persisted in unnecessarily restricting lower-court decision-making,<sup>132</sup> others, including

United States v. DeRiggi, 45 F.3d 713 (2d Cir. 1995); United States v. Concepcion, 795 F. Supp. 1262 (E.D.N.Y. 1992).

127. U.S.S.G. § 5K2.0 (1994) (“[T]he sentencing court may impose a sentence outside the range established by the applicable guideline, if the court finds ‘that there exists an aggravating, or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission.’”).

128. See, e.g., United States v. Rose, 885 F. Supp. 62 (E.D.N.Y. 1995) (applying family circumstances departure applicable to defendant caring for members of extended family); United States v. Lopez-Aguilar, 886 F. Supp. 305 (E.D.N.Y. 1995) (applying family circumstances departure when lengthy incarceration would prevent defendant from having children). One sentencing judge, responding anonymously to a survey, described, with unflinching honesty, the effects of the Guidelines: “[T]he Guidelines . . . have made charlatans and dissemblers of us all. We [judges] spend our time plotting and scheming, bending and twisting, distorting and ignoring *the law* in an effort to achieve a just result.” Jack B. Weinstein, *A Trial Judge’s Second Impression of the Federal Sentencing Guidelines*, 66 S. CAL. L. REV. 357, 365 (1992) (emphasis in original).

129. See, e.g., Jack B. Weinstein, *Drugs, Crime and Punishment: The War on Drugs is Self-Defeating*, N.Y. TIMES, July 8, 1993, at A19.

130. See Sauer, *supra* note 50, at 1239 n.41 (cataloguing judicial criticism of mandatory sentencing schemes); see also Steve Y. Koh, *Reestablishing the Federal Judge’s Role in Sentencing*, 101 YALE L.J. 1109, 1125 (1992) (quoting *Sentencing Guidelines: Hearings Before the Subcomm. on Criminal Justice of the House Comm. on the Judiciary*, 100th Cong., 1st Sess. 2747 (1987) (statement of Judge Robert W. Sweet)).

131. Such lobbying may raise separation of powers problems. See J. Clark Kelso, *Time, Place, and Manner Restrictions on Extrajudicial Speech by Judges*, 28 LOY. L.A. L. REV. 851, 863 (1995) (suggesting, but not exploring, idea that such “involvement in legislative activities is inconsistent with the judiciary’s limited role in our constitutional structure”); Weinstein, *Limits on Judges’ Learning, Speaking, and Acting*, *supra* note 33, at 7 n.23 (“When the judiciary speaks in an organized, official way, as through the Judicial Conference, complex issues of separation of powers are implicated.”).

132. See Steven L. Chanenson, *Consistently Inconsistent: Circuit Rulings on the Guidelines in 1994*, 7 FED. SENTENCING REP. 224 (1995); see generally JEFRI WOOD, FEDERAL JUDICIAL CENTER, GUIDELINE SENTENCING: AN OUTLINE OF APPELLATE CASE LAW ON SELECTED ISSUES (2002), available at

the Second Circuit, have wisely permitted district judges a good deal of judicial discretion—an action a former Chief Judge of the Circuit has attributed to the legacy of Learned Hand.<sup>133</sup> In the meantime, Congress has permitted judges to avoid imposing unduly harsh sentences in the case of minor first-time drug offenders. This provision, dubbed the “safety valve,” was a direct response to the entreaties of district court judges.<sup>134</sup> The attorney general initiated her own investigation of drug sentencing laws because of requests from federal judges.<sup>135</sup> Even the Sentencing Commission sometimes has given indications of rethinking the unnecessary harshness of the Guidelines, including surprisingly candid analysis in reports to Congress.<sup>136</sup>

One subset of judges’ objections to current sentencing law involves criteria that are racially discriminatory in their effect.<sup>137</sup> The fine opinion of the district court in *United States v. Clary*,<sup>138</sup> as well as other judicial

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[http://www.fjc.gov/newweb/jnetweb.nsf/autoframe?openform&url\\_r=pages/556&url\\_l=index](http://www.fjc.gov/newweb/jnetweb.nsf/autoframe?openform&url_r=pages/556&url_l=index) (last visited Oct. 29, 2004).

133. In his essay *Personal Reflections on Learned Hand and the Second Circuit*, 47 STAN. L. REV. 387 (1995), Judge James Oakes asserted that Learned Hand would have “vehemently disagreed” with the straitjacketing of judges by the Federal Sentencing Guidelines. Judge Oakes wrote:

Hand was far too much a craftsman to countenance so rigid an intrusion on the discretion of a judge. “To him, the writing of an opinion was a work of creation, individual to every judge and unique to every case.” . . . He would not have agreed . . . that the quantity of drugs or money surrounding the circumstances of any given crime should determine the offender’s sentence. Moreover, I think that Hand would find the guidelines rather appalling for their insistence that judges sentence each individual defendant without reference to their individuality . . . . I cannot help but believe that the Second Circuit’s uniquely flexible approach to the guidelines [as shown by *United States v. Johnson*, 964 F.2d 124 (2d Cir. 1992)] is due in part to Learned Hand’s legacy of craftsmanship and care.

*Id.* at 391-92.

134. See Letter from Congressman Don Edwards to Article III Judges, Aug. 30, 1994 (on file with author) (“Success in adoption of the safety valve was in large part due to the eloquent statements of federal judges who consistently described the unfair and inequitable results of mandatory minimum sentences.”). Congress’s delegate, the Sentencing Commission, has also begun to contemplate ameliorative measures. See, e.g., U.S. SENTENCING COMM’N, *Proposal to Reduce Importance of Drug Quantity as a Sentencing Factor* (draft proposal Sept. 9, 1994) (on file with author).

135. See Labaton, *supra* note 22.

136. See generally U.S. SENTENCING COMM’N, *Special Report to Congress: Cocaine and Federal Sentencing Policy* (2002) [hereinafter USSC, *Cocaine Sentencing*].

137. See, e.g., U.S.S.G. § 2D1.1 (treating crack as “worth” 100 times as much as powder cocaine for sentencing purposes).

138. 846 F. Supp. 768, 774-82 (E.D. Mo. 1994) (examining role of racism in drug enforcement since late 17th century, particularly “unconscious racism” underlying disparate treatment of crack and its chemical equivalent, cocaine), *rev’d*, 34 F.3d 709 (8th Cir. 1994) (overruling but praising district court’s “painstakingly crafted opinion”). The view set out

and academic views, prompted Congress to act. In the Crime Bill enacted in September 1994, it directed the United States Sentencing Commission to study “the differences in penalty levels that apply to different forms of cocaine.”<sup>139</sup> The resulting report recommended lower sentences for offenses involving crack.<sup>140</sup>

Thus, in the case of the Sentencing Guidelines and mandatory minima,<sup>141</sup> the effects of district judges’ words and deeds, while not all some judges have hoped for, have not been inconsequential.<sup>142</sup> Much more can and should be done by the courts to improve sentencing even under the Guidelines.

A retrograde tendency by Congress to limit discretion of the courts to ameliorate harsh Guidelines sentences has manifested itself. Passage of the Prosecutorial Remedies and Other Tools to end the Exploitation of Children Today Act of 2003 (“PROTECT Act”) is illustrative of the legislature’s attempts to hinder the ability of federal judges to do their work properly by requiring the Court of Appeals to review *de novo* a District Court’s departure from the applicable Sentencing Guidelines range.<sup>143</sup> Appellate judges gain *de facto* sentencing authority whenever a trial court

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by the trial court has also received considerable academic attention. *See, e.g.*, DAVID MUSTO, *THE AMERICAN DISEASE* 274 (1987) (describing racist motivations of drug substantive and sentencing law).

139. Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, § 280006, 108 Stat. 1796, 2097 (1994).

140. *See* USSC, *Cocaine Sentencing*, *supra* note 136, at 198 (concluding that the present 100-1 ratio is too great). Congress refused to allow amelioration.

141. *See* Bernstein, *supra* note 27, at 768-70 (describing relationship between Guidelines and mandatory minimum systems).

142. The dialogue between the district courts and the courts of appeals concerns more than the substance of sentencing provisions, extending into “procedural” concerns that can have dramatic outcome-determinative effects. For example, the appeals courts have generally held that a preponderance standard applies in determining facts that may result in many more years in prison. Trial judges, a survey shows, apply a more sensible sliding scale that goes up to beyond-a-reasonable-doubt on critical sentencing issues. *See* *United States v. Fatico*, 458 F. Supp. 388, 410 (E.D.N.Y. 1978) (surveying judges), *aff’d on other grounds*, 603 F.2d 1053 (2d Cir. 1979).

The practice of the trial courts, brought to the attention of the courts of appeals in a number of opinions, may be having some effect on the appellate court judges. In the Second Circuit, the Chief Judge has stated that “a strong argument can be made that the ‘clear and convincing evidence’ standard should be used, at least for substantial enhancements [under the Guidelines].” *See* *United States v. Concepcion*, 983 F.2d 369, 394 (2d Cir. 1992) (Newman, J., concurring). Another panel of the same court has suggested that, at the very least, “there is a constitutional requirement of some rough proportionality between the weight of the evidence of . . . uncharged conduct and the degree of adjustment or departure [to which that evidence leads].” *United States v. Gigante*, 39 F.3d 42, 47 (2d Cir. 1994).

143. PROTECT Act, Pub. L. No. 108-21, § 401, 117 Stat. 650, 670 (2003) (amending 18 U.S.C. 3742(e)).



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provides a lower sentence than do the Guidelines matrices. The courts reacted strongly against this legislative change.<sup>144</sup>

The Supreme Court has again signaled its concern with Guidelines and upward departures permitting sentences based on “facts” not found by juries. In *Blakely v. Washington*, the Court found that enhancement of the length of a sentence under a state guideline based on findings of “fact” required, under the Federal Constitution, that the “facts” be either conceded or found by a jury.<sup>145</sup> The question remains open as to whether *Blakely’s* reasoning invalidates the Guidelines.<sup>146</sup>

#### IV. THE DUTY OF A JUDGE TO SPEAK OUT AGAINST UNJUST LAWS

##### A. In judicial opinions

A judge who cannot “underrule” can, at the very least, express reservations in a strongly-worded memorandum. According to Judge Charles Wyzanski, such reservations

promote[] the growth of the law in the court where it most counts. For if the criticism of the precedent be just, the appellate court will set matters straight, and any trial judge worthy of his salt will feel *complimented* in

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144. See, e.g., *In re Sentencing*, 219 F.R.D. 262 (E.D.N.Y. 2004) (ordering the video recording of all sentencing hearings); Linda Greenhouse, *Chief Justice Attacks a Law Infringing on Judges*, N.Y. TIMES, Jan. 1, 2004, at A14; Carl Hulse, *Bill to Create Alert System on Abduction is Approved*, N.Y. TIMES, Apr. 10, 2003, at A1 (quoting letter from Chief Judge Rehnquist to Senate Judiciary Committee stating that the Feeney amendment “would do serious harm to the basic structure of the sentencing guideline system and would seriously impair the ability of courts to impose just and reasonable sentences”); David M. Zlotnick, *The War Within the War on Crime: The Congressional Assault on Judicial Sentencing Discretion*, 57 SMU L. REV. 211, 229-37 (2004) (criticizing Feeney Amendment in text accompanying notes 121-62).

145. 124 S. Ct. 2531 (2004).

146. See, e.g., *United States v. Croxford*, 324 F. Supp. 2d 1230 (D. Utah 2004) (reverting to pre-Guidelines procedure, the sentence was much the same as it would have been under the Guidelines); *United States v. Green*, Nos. CR. A. 02-10054-WGY, CR.A. 01-10469-WGY & CR.A. 99-10066-WGY, 2004 WL 1381101 (D. Mass. June 18, 2004) (finding Guidelines are unconstitutional before *Blakely*, based on the pre-*Blakely* decision in *Apprendi v. New Jersey*, 530 U.S. 466 (2000) and *Ring v. Arizona*, 536 U.S. 584 (2002)); Alan Vinegrad and Jonathan Sack, *Blakely: The End of the Sentencing Guidelines*, N.Y.L.J., July 6, 2004, at 4 (“the entire federal guidelines scheme is on precarious constitutional grounds.”). My current views are stated in *United States v. Khan*, 325 F. Supp. 2d 218 (E.D.N.Y. 2004) (use of jury to ameliorate sentencing under guidelines). The subject is beyond the scope of this article.

being reversed on a ground he himself suggested.<sup>147</sup>

In one instructive case, the Second Circuit responded to such an invitation to reverse. After imposing a harsher sentence than he would have liked in a drug prosecution, Chief Judge Thomas Platt, according to the court of appeals,

urged defense counsel to seek a reversal of his refusal to depart [under the Guidelines] . . . . This explicit invitation for reversal from a jurist of long and distinguished service is a clear indication that Chief Judge Platt did not believe justice was served by the sentence he imposed. [Given the possibility of departure], we remand this case and provide Chief Judge Platt the opportunity “to fulfill the traditional role of a district judge in bringing compassion and common sense to the sentencing process.”<sup>148</sup>

Even when there is little chance of winning vindication through reversal, a judge should have no qualms in candidly expressing views. As Judge Shirley S. Abrahamson reminds us,

The voice of a judge’s conscience can enable us to believe more ardently in the principle of the law. Yet the judge’s passionate words and emotive sentences can also force us to question the fairness and humanity underlying our legal system. Whether they serve to exalt or to challenge the law, words and sentences from the judge’s heart most assuredly serve justice.<sup>149</sup>

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147. Wyzanski, *supra* note 102, at 1299 (emphasis added).

148. *United States v. Mickens*, 977 F.2d 69, 73 (2d Cir. 1992) (quoting *United States v. Rogers*, 972 F.2d 489, 495 (2d Cir. 1992)).

149. Shirley S. Abrahamson et al., *Words and Sentences: Penalty Enhancement for Hate Crimes*, 16 U. ARK. LITTLE ROCK L.J. 515, 541-42 (1994). In the course of evaluating her own dissent in *State v. Mitchell*, 485 N.W. 2d 807, 818 (Wis. 1992) (Abrahamson, J., dissenting), in which she expresses her personal views about the wisdom of a hate crimes law, Judge Abrahamson embarks on an evaluation of the role of personal expression in judicial opinions. She notes:

[A]n appeal to the emotions has an ironic effect. When a judge moves from personal statement to legal argument, the law rises above the fray of passions. The detachment of the legal analysis is enhanced. The legal conclusion appears more reasonable, more authoritative, precisely because the judge has wrestled with, and overcome, the personal passions. The overall effect is a heightened sense of objectivity that befits the weighty task at hand.

Abrahamson et al., *supra*, at 531.

Judge Abrahamson notes, a “judge who voices personal views risks the reprobation of his colleagues.” She cites Justice Scalia’s response to the dissenters in a death penalty case, *Herrera v. Collins*, 506 U.S. 390 (1993). The dissenters wrote that “[n]othing could be . . . more shocking to the conscience . . . than to execute a person who is actually innocent.” *Id.* at 430 (Blackmun, J., dissenting). Justice Scalia responded: “If the system that has been widely in place for 200 years (and remains widely approved) ‘shocks’ the dissenters’ consciences, . . . perhaps they should doubt the calibration of their consciences, or, better still, the usefulness of ‘conscience-shocking’ as a legal test.” *Id.* at 428 (Scalia, J.,

In using judicial opinions to express opposition to controlling caselaw, appellate judges have the option not available to district judges to file a dissenting or concurring opinion, thereby preserving those arguments that do not prevail. As Chief Justice Hughes observed, “a dissent in a court of last resort is an appeal to the brooding spirit of the law, to the intelligence of a future day, when a later decision may possibly correct the error into which the dissenting judge believes the court to have been betrayed.”<sup>150</sup> Institutions such as the New York Law Revision Commission, established on the suggestion of Judge Cardozo, exist to listen to courts’ dissatisfaction with the law so that corrective legislation can be drafted.

Supreme Court Justice Ruth Bader Ginsburg has addressed the purposes and effects of dissents at the appellate level,<sup>151</sup> comparing the United States’ judicial system to that of Britain (in which justices announce opinions *seriatim*<sup>152</sup>) and of continental Europe (where anonymous decisions represent “the court”). She concluded that ours was a middle path; opinions represent the institution, with occasional concurrences and dissents appended to remind the various audiences of the court’s human components.<sup>153</sup> Justice Ginsburg suggested that too many dissents have the effect of undermining public confidence in the legal system and that in some situations—notably in capital cases—they may be unfair to the losing party.<sup>154</sup>

There is no question that a unanimous opinion carries more weight than the holding of a divided court. This explains why Chief Justice Warren strove to obtain a unanimous court for his opinion in *Brown*.<sup>155</sup> Yet dissents also have a respected position in our system; many embody what later become majority views.<sup>156</sup>

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concurring).

150. CHARLES EVANS HUGHES, *THE SUPREME COURT OF THE UNITED STATES* 68 (1936).

151. Ruth Bader Ginsburg, *Remarks on Writing Separately*, 65 WASH. L. REV. 133 (1990); see also Ruth Bader Ginsburg, *Speaking in a Judicial Voice*, 67 N.Y.U. L. REV. 1185 (1992) [hereinafter Ginsburg, *Speaking*]; Ruth Bader Ginsburg, *Styles of Collegial Judging*, 39 FED. BAR NEWS & J. 199 (1992).

152. Ginsburg, *Speaking*, *supra* note 151, at 1189 (citing LOUIS BLOM-COOPER & GAVIN DREWRY, *FINAL APPEAL: A STUDY OF THE HOUSE OF LORDS IN ITS JUDICIAL CAPACITY* 81-82 (1972)).

153. In civil law countries, a judge’s decision does not carry the precedential weight of *stare decisis*. The anonymity and concise nature of these opinions leave little room for debate. Conversely, in common-law countries, a judge must write under his own name, risking his reputation on the outcome.

154. *Id.* at 1191.

155. 347 U.S. 483 (1954).

156. See, for example, Justice Harlan’s dissent in *Plessy v. Ferguson*, 163 U.S. 537, 552 (1896).

In fact, it is possible that, contrary to Justice Ginsburg's view, dissents *increase* public respect for judicial institutions. Judge Stanley Fuld of the New York Court of Appeals, one of the all-time great common law judges, characterized the role of the dissent as an "antidote for judicial lethargy," an assurance that the bench does not merely rubber stamp the opinion of one member.<sup>157</sup> The dissent can also serve as a spur to legislators, or as a precursor for en banc review by a circuit court or for the grant of certiorari by the Supreme Court. The dissent helps to clarify the issues on appeal and may serve as a "blueprint for a new majority opinion."<sup>158</sup>

It is not necessary to write separately, however, to express disagreement with controlling case law. For example, one Ninth Circuit judge, writing for a unanimous panel, expressed regret at having to follow a Supreme Court decision that appeared to require an unjust result.<sup>159</sup> This type of expression is analogous to the protests typically undertaken by district court judges. At the district level, cases are heard by only one judge, so there can be no dissenting or concurring view—in the formal sense—within a single memorandum. This does not, however, prevent the trial judge from criticizing controlling caselaw<sup>160</sup> or from fully describing more persuasive principles he or she does not feel free to follow.<sup>161</sup> Judges should recognize that there is no danger, even of reversal, in doing so; "only judicial deeds—not judicial words—may constitute legal error."<sup>162</sup>

In fact, a well-balanced opinion, on an issue important to the trial judge,

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157. See Stanley H. Fuld, *The Voices of Dissent*, 62 COLUM. L. REV. 923, 927 (1962).

158. Frank X. Altimari, *The Practice of Dissenting in the Second Circuit*, 59 BROOK. L. REV. 275, 279 (1993).

159. See *United States v. Isgro*, 974 F.2d 1091, 1093-94 (9th Cir. 1992) (criticizing *United States v. Williams*, 504 U.S. 36 (1992) (prosecutors have no duty to present substantial exculpatory evidence to the grand jury)). The same Supreme Court decision has provoked a number of other critical opinions. See, e.g., *United States v. Orjuela*, 809 F. Supp. 193, 197 (E.D.N.Y. 1992) ("[R]egrettably, [*Williams*] compels the conclusion that this court lacks power to remedy the government's apparent abuse of its power."); see generally Fred A. Bernstein, *Behind the Gray Door: Williams, Secrecy, and the Federal Grand Jury*, 69 N.Y.U. L. REV. 563 (1994) (criticizing *Williams* as unjust and inconsistent with practice in many districts).

160. See, e.g., *United States v. Shonubi*, 895 F. Supp. 460 (E.D.N.Y. 1995) (criticizing Second Circuit rule of automatic obstruction of justice enhancement under section 3C1.1 of the sentencing Guidelines, but imposing enhancement in light of court of appeals mandate); *United States v. Tropiano*, 898 F. Supp. 90 (E.D.N.Y. 1995) (following court of appeals mandate despite grave doubt that it reflected either wise policy or the current view of the Supreme Court).

161. See, e.g., *United States v. Ekwunoh*, 888 F. Supp. 369 (E.D.N.Y. 1994) (describing importance of considering mens rea in drug sentencing, despite court of appeals' instruction to disregard defendant's reasonable belief); cf. Jack B. Weinstein & Fred A. Bernstein, *The Denigration of Mens Rea in Drug Sentencing*, 7 FED. SENTENCING REP. 121 (1994).

162. *Cook v. Hirschberg*, 258 F.2d 56, 57 (2d Cir. 1958).

will invariably contain opposing views. A trial judge, like an appellate dissenter or even an appellate regretter, has an obligation to move the law in a direction believed to be compelled by moral and ethical principles and by underlying precepts of law. A judge who must follow unjust caselaw need not suffer in silence.<sup>163</sup>

### B. Through out-of-court speech

In our democracy, the people have a right to be informed when there is as much hypocrisy and sacrifice of lives and money as there is in our sentencing and drug laws.<sup>164</sup> In the case of sentencing, silent acquiescence by individual judges would have sacrificed significant constitutional values, as well as individual defendants, to a rigid regulatory scheme.<sup>165</sup> Judges who see the system in operation have an obligation to advise the public of the facts as they observe them. A judge who believes he or she is called upon to commit an immoral act should make that view known, and the judge's colleagues should respect his or her decision to "go public."

A decision must be made by each individual judge on the basis of both law and conscience. Too much civil disobedience by jurors, citizens, or judges can result in destructive anarchy,<sup>166</sup> but some flexibility in recognizing differences in moral views is essential in a free republic.<sup>167</sup> A

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163. Cf. GUNTHER, *supra* note 109, at 149 (noting that "bowing to precedent did not prevent [Learned Hand] from expressing sharp and thoughtful criticism of the prevailing law, or from suggesting a better approach"); Murakami et al., *supra* note 35 (noting that, before leaving office, Justice Utter wrote powerful dissents in many death penalty cases, some of which were later used by federal courts to overturn convictions); see generally Erwin Chemerinsky, *Is it the Siren's Call? Judges and Free Speech While Cases are Pending*, 28 LOY. L.A. L. REV. 831, 844 (1995) ("[J]udicial speech, even about pending cases, should be regarded as constitutionally protected unless the government can prove that the speech posed a substantially likelihood of materially prejudicing an adjudicatory proceeding, or at the very least, prove that the statement might reasonably be expected to affect its outcome or impair its fairness."); Weinstein, *Limits on Judges' Learning, Speaking, and Acting*, *supra* note 33.

164. The inequities of the drug laws, which are myriad, are beyond the scope of this paper. They are catalogued elsewhere. See, e.g., DEP'T OF JUSTICE, *An Analysis of Non-Violent Drug Offenders with Minimal Criminal Histories* (1994). The government-sponsored study found that federal prisons are "packed with 'low-level' drug law violators"; two-thirds of them received long mandatory minimum sentences even though a short prison term would have been an equally effective deterrent.

165. See Jack B. Weinstein, *Comments on Jury Nullification: Proceedings of the Fifty-Third Judicial Conference of the District of Columbia Circuit*, 145 F.R.D. 149, 170 (1993) (Panel Discussion—Jury Nullification) (commenting that "trial Judges are, I suppose, nullifying the guidelines") [hereinafter Weinstein, *Jury Nullification*].

166. See, e.g., Kaimipono David Wenger & David A. Hoffman, *Nullificatory Juries*, 2003 WIS. L. REV. 1115 (citations omitted).

167. Actions of judges may be seen as analogous to jury nullification. See Alan Schefflin

system as robust as ours has a good deal of play in its joints.

In a number of instances in which judges have spoken out about matters of which they had special knowledge, their efforts have been effective in eliciting ameliorative action. For example, the view that courts of appeals could tell a trial court that a particular judge should not preside over a case on remand has created intercourt tensions. In the Eastern District of New York, trial judges agreed that this practice was ill-advised. The trial judges explained their position to the appellate courts through direct conversations with appellate judges, the promulgation of court rules, and an article in *Federal Rules Decisions*.<sup>168</sup> This open communication enabled the trial courts to moderate the earlier appellate practice, which now generally conforms to the district court's view.

That judges are *permitted* to make their views known was, I thought, a settled question. Nevertheless, one Ninth Circuit judge admonished two of his colleagues for publicly criticizing the actions of the Supreme Court. The criticism grew out of the Supreme Court's refusal to hear an eleventh-hour petition in the capital case of Robert Alton Harris.<sup>169</sup> In the view of some judges, that refusal required California to proceed with Harris' execution before appropriate legal remedies had been fully considered. A Ninth Circuit judge had written an article for the *New York Times* arguing that the decision forced lower court judges to commit "treason to the constitution."<sup>170</sup> A second Ninth Circuit judge gave a speech, later published in the *Yale Law Journal*, in which he called the Harris matter "the logical culmination of a series of Supreme Court decisions subordinating individual liberties to the less-than-compelling interests of the state and stripping lower federal courts of the ability to protect

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& John Van Dyke, *Jury Nullification: The Contours of a Controversy*, 43 LAW & CONTEMP. PROBS. 51, 88 (1980) ("Jury nullification, rather than destroying the law, is necessary to protect it."); Weinstein, *Considering Jury "Nullification"*, *supra* note 32, at 243-45 ("The exercise of the nullification power does not cast doubt on the jury process; rather, it reaffirms the liberty of a free society upon which it is based."); Weinstein, *Jury Nullification* *supra* note 165, at 168-72; *see also* Gail Dance Cox, *Jurors Rise Up Over Principle and Their Perks*, NAT'L L. J., May 29, 1995, at A1 (describing hints of a juror revolt); Sauer, *supra* note 50, at 1254-60 (describing jury nullification as an important check on governmental power). *But see* Zal v. Steppe, 968 F.2d 924, 930 (9th Cir. 1992) (Trott, J., concurring) (calling jury nullification "illegitimate" power); Robert G. Morvillo, *Jury Nullification*, N.Y.L.J., June 7, 1994, at 3 ("The strength and consistency of the view that jurors [should] be kept in the dark about their ultimate power is remarkable [given] . . . the historical foundations of [the] jury power and the near unanimous recognition that the jury should continue to possess this power.").

168. *See generally* Weinstein, *supra* note 78.

169. *See* Gomez v. United States Dist. Court, 503 U.S. 653 (1992).

170. John T. Noonan, *Should State Executions Run on Schedule?*, N.Y. TIMES, Apr. 27, 1992, at A17.

individual rights.”<sup>171</sup>

Responding in a law review forum, Judge Arthur Alarcon wrote that he was “astonished by this public . . . criticism of contemporary decisions of the Supreme Court [which] I had thought . . . was clearly contrary to elementary principles of ethical judicial conduct.”<sup>172</sup> Judge Alarcon wrote:

It is my view that public, off-the-bench criticism of the decisions of the Supreme Court is prohibited by existing ethical rules. If it is not, then rules should be adopted to make it clear that such conduct will not be tolerated because of the threat it would pose to the rule of law if other lower court judges were to publicly attack decisions of the United States Supreme Court.<sup>173</sup>

Judge Reinhardt—the author of the *Yale Law Journal* article—responded that “judges should speak forthrightly about the role of the courts in American society, about the relationship between law and justice, about the true meaning of the Constitution and some of its principal provisions, and about our own personal visions of justice and judging.” And, Judge Reinhardt added, “[w]e should do so in specific as well as general terms.”<sup>174</sup>

I share that view. Judges have a duty, given their unique vantage point, intimate knowledge of the system and—in the federal realm—the invaluable protection of life tenure, to expose injustice where they can. Moderation in this, as in other matters, is desirable. Respectful disagreement when the judge deems it appropriate.

### CONCLUSION

For a judge who declines to participate passively in injustice, every day is a good day to “die.”

In Nazi Germany, jurists continued their “law abiding” careers, using legal instruments to segregate and direct the destruction of their fellow-citizens. One may ask, had the German judiciary stood up for the right,

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171. Stephen Reinhardt, *The Supreme Court, the Death Penalty, and the Harris Case*, 102 *YALE L. J.* 205 (1992).

172. Arthur Alarcon, *Judicial Speech: Off-the-Bench Criticism of Supreme Court Decisions by Judges Fosters Disrespect for the Rule of Law and Politicizes Our System of Justice*, 28 *LOY. L.A. L. REV.* 795, 798 (1995).

173. *Id.* at 798-99. The irony is that Judge Alarcon had to resort to publicly criticizing his colleagues to make these views known.

174. Stephen Reinhardt, *Judicial Speech and the Open Judiciary*, 28 *LOY. L.A. L. REV.* 805, 806 (1995); see also J. Clark Kelso, *supra* note 131, at 851 (defending speeches like Judge Reinhardt’s following a reasonable post-litigation “cooling-off period”); George M. Kraw, *Beyond Published Opinions*, *RECORDER*, Aug. 11, 1993, at 10-11 (defending Judge Reinhardt’s public statements on the Harris execution).

might the Holocaust and even the Second World War have been avoided?

By contrast, in *Brown*, the United States Supreme Court rejected—though belatedly—a racist precedent that legally walled off black Americans from the society of whites. One may ask, had the Supreme Court stood for the right before the Civil War, might that war have been avoided? Continued implementation of the principles established in *Brown* has become an economic and social necessity.<sup>175</sup> America will not be able to compete internationally unless everyone enjoys the benefits of a good education, and the cross-racial understanding indispensable to success in global marketplace. In this instance, as in many others, morality and social practicality lead to much the same result. Acquiescence in injustice is a danger to the spirit as well as our physical well-being.

In daily sentencing, when we knowingly create injustice, tarnishing our country's reputation for a compassionate rule of law, are we laying up a moral debt that will be paid in unforeseen ways?<sup>176</sup>

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175. See, e.g., *Grutter v. Bollinger*, 539 U.S. 306, 332 (2003) (“In order to cultivate a set of leaders with legitimacy in the eyes of the citizenry, it is necessary that the path to leadership be visibly open to talented and qualified individuals of every race and ethnicity.”).

176. See Anthony Lewis, *Making Torture Legal*, N.Y. REV. OF BOOKS, June 17, 2004, at 4 (“A committed prosecutor would do what investigators of official crimes have done since Nuremberg: apply the principle of command responsibility and work his way up the chain to the source of misconduct. . . . [T]here is no other visible way for America to recover its good name—and its moral sense of self.”); Eric Schmitt, *Abuses at Prison Tied to Officers in Intelligence*, N.Y. TIMES, Aug. 26, 2004, at A1; see also Jack B. Weinstein, *When Judges Are Asked to Do Evil*, N.Y.L.J., Oct. 28, 2004, at 2.