

William & Mary Bill of Rights Journal

Volume 31 (2022-2023)
Issue 2 *The Problem of Mass Incarceration:
Diagnosis and Reform*

Article 5

12-2022

Judges and Mass Incarceration

Carissa Byrne Hessick

Follow this and additional works at: <https://scholarship.law.wm.edu/wmborj>



Part of the [Courts Commons](#), [Criminal Procedure Commons](#), [Judges Commons](#), and the [Law Enforcement and Corrections Commons](#)

Repository Citation

Carissa Byrne Hessick, *Judges and Mass Incarceration*, 31 Wm. & Mary Bill Rts. J. 461 (2022), <https://scholarship.law.wm.edu/wmborj/vol31/iss2/5>

Copyright c 2022 by the authors. This article is brought to you by the William & Mary Law School Scholarship Repository.
<https://scholarship.law.wm.edu/wmborj>

JUDGES AND MASS INCARCERATION

Carissa Byrne Hessick*

It seems to have fallen out of fashion to talk about judges as a source of criminal justice reform. Instead, the academic literature now focuses on the role that prosecutors and legislatures have played in mass incarceration.¹ But judges have also played an important role in the phenomenon that has come to be known as mass incarceration.² Perhaps more importantly, there are things that judges could do to help reverse that trend.

Judges will sometimes say our system is too harsh. But, in the same breath they tell us the decision to create such a system and the decision to dismantle it lie with the political branches.³ If we look closely, however, some decisions which made the criminal justice system harsher were made by judges. Some of those decisions represent affirmative exercises of judicial power—like the decision to impose longer sentences on defendants who insist on their right to a jury trial. But other decisions represent failures to act—such as deferring to prosecutorial recommendations. Both types of decisions had enormous consequences. They changed the very fabric of the criminal justice system. And judges continue to make decisions in courtrooms every day that reinforce those changes. The result is the system we have now—a system that incarcerates more people than any other country in the world.⁴

Judges could combat mass incarceration through pointed pronouncements or radical doctrinal changes handed down by appellate courts. The Supreme Court’s opinion in *Brown v. Plata*, for example, shows that courts can literally mandate the

* Anne Shea Ransdell and William Garland “Buck” Ransdell, Jr. Distinguished Professor of Law and Director of the Prosecutors and Politics Project, University of North Carolina School of Law.

¹ See, e.g., RACHEL ELISE BARKOW, PRISONERS OF POLITICS: BREAKING THE CYCLE OF MASS INCARCERATION (2019); JOHN F. PFAFF, LOCKED IN: THE TRUE CAUSES OF MASS INCARCERATION AND HOW TO ACHIEVE REAL REFORM (2017).

² The term “mass incarceration” has been used to refer to a number of phenomena in the criminal justice system. See generally Benjamin Levin, *The Consensus Myth in Criminal Justice Reform*, 117 MICH. L. REV. 259 (2018) (identifying different uses of the term and contrasting two major competing frames of reference in criminal justice reform). It is used in this Article to denote the dramatic rise in American incarceration rates since the 1970s.

³ See, e.g., Justice Anthony M. Kennedy, Address at the American Bar Association Annual Meeting (Aug. 9, 2003) (transcript available at https://www.supremecourt.gov/publicinfo/speeches/sp_08-09-03.html [<https://perma.cc/S23C-Q9GB>]).

⁴ NAT’L RSCH. COUNCIL, THE GROWTH OF INCARCERATION IN THE UNITED STATES: EXPLORING CAUSES AND CONSEQUENCES 36 fig.2-2 (2014) (indicating that the incarceration rate for the United States is higher than any other country).

reduction of prison populations.⁵ But not all reform must be sweeping or come from appellate courts. Trial court judges could make modest changes to how they handle their criminal dockets, and those changes could have a significant impact.

This Article will focus on how small changes in trial court practice could transform the criminal justice system for the better. This Article has three parts. Part I chronicles the ways in which judges have contributed to mass incarceration through action or inaction. Part II provides suggestions for what judges could do to help reverse that trend. Specifically, judges could reduce reliance on pretrial detention, modify the balance of power in plea bargaining, and impose more reasonable sentences. Part III identifies the sources of judicial authority for these recommendations and grapples with objections.

I. HOW JUDGES HAVE CONTRIBUTED TO MASS INCARCERATION

As the branch of government that is tasked with protecting individual rights, the judiciary arguably bears much of the blame for mass incarceration. Rather than developing robust doctrines to protect criminal defendants, the courts have repeatedly sided with legislatures, police, and prosecutors against those defendants.⁶ The U.S. Supreme Court, in particular, has allowed a dramatic increase in the rates of pretrial detention,⁷ abandoned any pretense of protecting the right to a jury trial by allowing coercive plea bargaining,⁸ and turned the Eighth Amendment into essentially a dead letter when it comes to claims about overly harsh prison sentences.⁹

But a judge's role in mass incarceration is not simply a story about the very visible doctrinal choices of the Supreme Court. There are numerous everyday decisions by lower court judges that have contributed to mass incarceration.

Perhaps most troubling is the judicial trial penalty. The trial penalty is the difference in sentences imposed on those defendants who insist on a trial compared to those who plead guilty. A 2018 report by the National Association of Criminal

⁵ See 563 U.S. 493, 493 (2011) (upholding a judicial order requiring the state of California to reduce its incarcerated population to remedy unconstitutional conditions within prisons).

⁶ As Rachel Barkow recently stated, modern court decisions about criminal justice matters “do not bear scrutiny if one cares about the Constitution’s text, original meaning, or good government design. Those decisions only make sense if the animating principle is an almost pathological deference to the government.” Rachel Barkow, *The Court of Mass Incarceration*, 2021–2022 CATO SUP. CT. REV. 11, 17.

⁷ E.g., *United States v. Salerno*, 481 U.S. 739 (1987); see also Jenny E. Carroll, *Beyond Bail*, 73 FLA. L. REV. 143, 150 (2021) (noting that “the U.S. Supreme Court has set few limitations on pretrial conditions—monetary or otherwise”).

⁸ E.g., *Bordenkircher v. Hayes*, 434 U.S. 357 (1978); *Brady v. United States*, 397 U.S. 742 (1970).

⁹ E.g., *Ewing v. California*, 538 U.S. 11 (2003); see also Youngjae Lee, *The Constitutional Right Against Excessive Punishment*, 91 VA. L. REV. 677, 695 (2005) (arguing that the Court’s decision in *Ewing* “all but defines the right against excessive punishment out of existence”).

Defense Lawyers documents that on average, defendants who insist on a trial receive sentences three times longer than those who plead guilty.¹⁰ For some crimes, the difference is even more pronounced. For example, anti-trust defendants who insist on exercising their constitutional right to a jury trial receive posttrial penalties that are more than eight times higher than those who plead guilty.¹¹

Judges are quite transparent about the trial penalty. They will threaten defendants in open court if they proceed to trial,¹² and they will praise defendants who plead guilty for being “smart” and doing “the right thing.”¹³ Indeed, the trial penalty is so engrained in American law that some sentencing commissions and legislatures classify whether a defendant pleads guilty (often referred to as “acceptance of responsibility”) as a mitigating sentencing factor.¹⁴

The trial penalty contributes to mass incarceration in two ways. First, it keeps those who insist on trial incarcerated for longer periods, thus increasing the number of people in prison over time. Second, it pressures people to plead guilty. The more people who plead guilty, the more efficient the criminal justice system becomes and the more defendants it can convict.¹⁵ Notably, the Supreme Court’s recognition of

¹⁰ NAT’L ASS’N OF CRIM. DEF. ATT’YS, *THE TRIAL PENALTY: THE SIXTH AMENDMENT RIGHT TO TRIAL ON THE VERGE OF EXTINCTION AND HOW TO SAVE IT*, 20 fig.1 (2018), <https://www.nacdl.org/getattachment/95b7f0f5-90df-4f9f-9115-520b3f58036a/the-trial-penalty-the-sixth-amendment-right-to-trial-on-the-verge-of-extinction-and-how-to-save-it.pdf>; see also Andrew Chongseh Kim, *Underestimating the Trial Penalty: An Empirical Analysis of the Federal Trial Penalty and Critique of the Abrams Study*, 84 MISS. L. J. 1195, 1252 tbl.3 (2015) (finding a trial penalty of four times the usual penalty, as federal defendants convicted at trial receive sentences sixty-four percent longer than if they had instead plead guilty).

¹¹ NAT’L ASS’N OF CRIM. DEF. ATT’YS, *supra* note 10, at 15.

¹² Albert W. Alschuler, *The Trial Judge’s Role in Plea Bargaining, Part I*, 76 COLUM. L. REV. 1059, 1089 (1976).

¹³ See Billy Binion, *Don’t Punish the QAnon Shaman—or Anyone—for Demanding a Jury Trial*, REASON (Nov. 18, 2021), <https://reason.com/2021/11/18/dont-punish-the-qanon-shaman-or-anyone-for-demanding-a-jury-trial/> [<https://perma.cc/HA5L-D4G8>].

¹⁴ See, e.g., U.S. SENT’G GUIDELINES MANUAL § 3E1.1 (U.S. SENT’G COMM’N 2021); FLA. STAT. § 921.0026(2)(a) (2013).

¹⁵ As Darryl Brown puts it:

The question is whether caseload increases are in fact exogenous to adjudication. With a better understanding of efficiency’s effects, we can see the possibility that they are not. Criminal prosecutions are a variable that may be partially *dependent* on adjudicative capacity. If so, efficiency gains in some part *contribute* to the rise in caseloads, rather than the rise in caseloads creating a need for greater efficiency. Rising caseloads can be partly a *consequence* of more plea bargaining—a rebound effect—rather than a cause. Criminal charging may be a response to the reduced costs of court judgments as much as it is a function of crime rates.

Darryl K. Brown, *The Perverse Effects of Efficiency in Criminal Process*, 100 VA. L. REV. 183, 195 (2014).

plea bargaining and the reduction of trial rates from ten percent to less than three percent coincides with the rise in criminal cases filed in both federal and state courts.¹⁶ That correlation might be coincidental, but as a matter of logic it is hard to imagine that the two developments are not causally related.

The trial penalty represents a clear, affirmative decision by judges to make convictions easier to obtain and to increase punishment merely on the basis of exercising a constitutional right. Given their role as the protector of individual rights, judges' decision to punish defendants for exercising their rights is particularly egregious. Judges also contribute to mass incarceration every time they decide to impose longer sentences. A recent report by the Sentencing Project shows that one of every seven people in America's prisons are serving life sentences.¹⁷ If we keep sending people to prison while not letting those who are already incarcerated be released, then it is no wonder our prisons are overcrowded.¹⁸

Some higher sentences may be outside of judicial control. Judges have no choice but to impose harsh sentences when mandatory minimum sentences apply.¹⁹ But there are instances where judges *do* have the power to impose more lenient sentences and do not exercise that power. For example, even though they have the discretion to impose lesser sentences, judges will often follow sentencing guidelines that were created by sentencing commissions. Federal district court judges need not follow the "advisory" U.S. Sentencing Guidelines, yet more than seventy percent of federal defendants received a sentence that complied with the Guidelines,²⁰ and "when a Guidelines range moves up or down, offenders' sentences move with it."²¹

¹⁶ See Shima Baradaran Baughman, *Subconstitutional Checks*, 92 NOTRE DAME L. REV. 1071, 1113–18 (2017) (documenting a multi-decade rise in the number of cases filed in both federal and state courts and identifying this trend as "contributing to mass incarceration").

¹⁷ ASHLEY NELLIS, THE SENT'G PROJECT, NO END IN SIGHT: AMERICA'S ENDURING RELIANCE ON LIFE IMPRISONMENT (Feb. 2021), <https://www.sentencingproject.org/wp-content/uploads/2021/02/No-End-in-Sight-Americas-Enduring-Reliance-on-Life-Imprisonment.pdf> [<https://perma.cc/JH5S-7PCT>].

¹⁸ See E. ANN CARSON, BUREAU OF JUSTICE STATISTICS, PRISONERS IN 2019, at 24 (2020), <https://bjs.ojp.gov/content/pub/pdf/p19.pdf> [<https://perma.cc/5QKL-EVX9>] (reporting that the prison population in seven states and the federal system was equal to or greater than their capacity based on three different measurements; twenty-one states and the federal system were at or past capacity for at least one of those three measurements).

¹⁹ See Shima Baradaran, *Drugs and Violence*, 88 S. CAL. L. REV. 227, 304 n.438–39 (2015) (giving examples of complaints judges have raised regarding mandatory minimum sentencing laws).

²⁰ "Almost three-quarters (73.7%) of all offenders received sentences under the *Guidelines Manual*, in that the sentence was within the applicable guideline range or it was outside of the applicable guideline range and the court cited a departure reason from the *Guidelines Manual*." U.S. SENT'G COMM., 2020 ANNUAL REPORT AND SOURCEBOOK OF FEDERAL SENTENCING STATISTICS at 7, <https://www.ussc.gov/sites/default/files/pdf/research-and-publications/annual-reports-and-sourcebooks/2020/2020-Annual-Report-and-Sourcebook.pdf> [<https://perma.cc/U3JK-ZQXK>].

²¹ *Peugh v. United States*, 569 U.S. 530, 544 (2013).

Modern judges do not simply follow sentencing guidelines, they also sometimes suggest it is *inappropriate* for them to make certain sentencing decisions. For example, the Seventh Circuit has stated that particular arguments about appropriate sentences are better directed at the U.S. Sentencing Commission than at judges.²² Judges also routinely accept plea bargains that dictate the imposition of a particular sentence, even when those sentences are very high. Despite the fact that they have the authority to reject those plea bargains, judges rarely do.²³

Another less visible decision that contributes to mass incarceration is how judges decide legal challenges to criminal prosecutions. Both the timing and substance of how judges decide those challenges tend to reduce the number of limiting interpretations that benefit criminal defendants.

To understand this decision, it is useful to compare how judges decide motions to dismiss in civil cases and criminal cases. When a civil defendant files a motion to dismiss for failure to state a claim at the beginning of a civil case, a judge will decide the legal question of whether the civil plaintiff's specific factual claims entitle him or her to relief. Even when considering a motion to dismiss that requires the judge to decide novel legal questions, the judge will render those interpretations and dismiss the civil claims if they fail the relevant legal test.

In contrast, trial judges will sometimes defer the purely legal question of whether the criminal defendants' alleged conduct constitutes a crime under the relevant statute until after the trial. And some judges do not appear to think that they are supposed to issue definitive legal rulings on the scope of statutes when ruling on a motion to dismiss an indictment. For example, when former Virginia governor Bob McDonnell was indicted for fraud, he filed a motion to dismiss on the grounds that the government's theory of the case swept broader than the statutory language. Rather than considering the argument on the merits, the trial court denied the motion in less than a paragraph, stating simply that a Fourth Circuit decision finding "conduct analogous" can "as a matter of law" fall within the relevant statute and that "[w]hether Defendants' conduct in fact constituted 'the corruption of official positions through misuse of influence in governmental decision-making' is a question for the jury, based on the evidence adduced at trial."²⁴ McDonnell went to trial and was convicted under the government's legal theory—a theory the Supreme Court ultimately rejected.²⁵

²² *E.g.*, *United States v. Garthus*, 652 F.3d 715, 721 (7th Cir. 2011) (stating that an argument about whether the sentence prescribed by the U.S. Sentencing Guidelines is "excessively harsh" is "more properly addressed to the Sentencing Commission, or to Congress . . . than to an individual district judge in a sentencing hearing").

²³ *See infra* text accompanying notes 65–71.

²⁴ *United States v. McDonnell*, No. 14-cr-00012 (E.D. Va. May 20, 2014) (order denying two motions to dismiss counts 1–11 of the indictment and two motions for discovery of selected grand jury communications) (first quoting *United States v. Jefferson*, 674 F.3d 332, 358 (4th Cir. 2012) and then quoting *United States v. Carson*, 464 F.2d 424, 433 (2d Cir. 1972)).

²⁵ *McDonnell v. United States*, 136 S. Ct. 2355 (2016).

Of course, the mere fact that conduct is “analogous” to other conduct does not mean it necessarily falls within the scope of a criminal statute. Independent statutory analysis is required. When judges require a defendant to proceed to trial to get a full legal ruling on whether the defendant’s conduct satisfies a legal standard, judges give more power to prosecutors to pressure defendants into pleading guilty. Such a decision also reduces the number of opportunities for legal rulings that could potentially narrow the legal scope of a criminal statute—rulings that would benefit not only the particular defendant who files the motion to dismiss, but also future potential defendants.

In addition to the affirmative decisions detailed above, judges’ failure to act have also contributed to mass incarceration. That inaction most often takes the form of a choice to defer to prosecutors instead of operating as a check on punitive executive decisions.

For example, judges often defer to prosecutorial recommendations with respect to bail and pretrial detention.²⁶ Multiple studies confirm that a prosecutor’s recommendation is the most important factor in judicial bail decisions.²⁷ And court watchers in Chicago courts recently documented that judges followed prosecutors’ recommendations regarding pretrial release in ninety percent of cases.²⁸ Setting onerous bail conditions and detaining defendants pretrial contributes to mass incarceration not only by contributing to the overall number of people incarcerated, but also by pressuring defendants to plead guilty.²⁹

²⁶ “[P]rosecutors play the primary role in molding the judge’s bail decision.” Jeffrey Manns, *Liberty Takings: A Framework for Compensating Pretrial Detainees*, 26 CARDOZO L. REV. 1947, 1962 (2005).

²⁷ See REID HASTIE & ROBYN M. DAWES, RATIONAL CHOICE IN AN UNCERTAIN WORLD: THE PSYCHOLOGY OF JUDGMENT AND DECISION MAKING 106 (2001) (finding that judges weighted prosecutor recommendations for bail more heavily than any other information); Ebbe B. Ebbesen & Vladimir J. Konecni, *Decision Making and Information Integration in the Courts: The Setting of Bail*, 32 J. PERSONALITY & SOC. PSYCHOL. 805, 820 (1975) (finding that while in hypothetical cases judges relied most heavily on a defendant’s local ties in setting bail, in actual cases prosecutors’ recommendations were the single most important determinant of judges’ bail decisions); see also Aurelie Ouss & Megan Stevenson, *Does Cash Bail Deter Misconduct?* (Feb. 12, 2022) (unpublished manuscript) (available at SSRN), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3335138 [<https://perma.cc/QEA7-JARY>] (finding that a change in prosecutorial bail policy led to a significant change in magistrate judges’ bail decisions).

²⁸ THE COALITION TO END MONEY BOND, MONITORING COOK COUNTY’S CENTRAL BOND COURT: A COMMUNITY COURTWATCHING INITIATIVE 34 (2018), http://www.chicagoappleseed.org/wp-content/uploads/2018/02/Courtwatching-Report_Coalition-to-End-Money-Bond_FINAL_2-25-18.pdf [<https://perma.cc/BFB6-5YX5>].

²⁹ See CARISSA BYRNE HESSICK, PUNISHMENT WITHOUT TRIAL: WHY PLEA BARGAINING IS A BAD DEAL 61–62 (2021); Paul Heaton et al., *The Downstream Consequences of Misdemeanor Pretrial Detention*, 89 STAN. L. REV. 711, 747 (2017); see also Shima Baradaran & Frank L. McIntyre, *Predicting Violence*, 90 TEX. L. REV. 497, 555 n.275 (2012); Manns, *supra* note 26, at 1951 (“By cutting defendants off from family, friends, and jobs and

Bail is not the only decision in which judges defer to prosecutors. When it comes to plea bargaining, judges rarely exercise their power to reject plea bargains reached as a result of negotiation by the parties. Not only are judges quick to defer to negotiated sentences,³⁰ but judges will also usually rely on the facts stipulated by the parties in the plea agreement rather than attempt to independently verify whether those facts are actually true.³¹ This tendency to accept negotiated outcomes can extend beyond facts to the law itself. As Thea Johnson has documented, defendants will sometimes agree to plead guilty to charges that do not cover the alleged conduct as a matter of law, or even to charges that do not exist within the state's criminal code.³²

Judicial deference during plea bargaining is especially troubling because there is reason to doubt that plea bargaining always leads to a full development of facts and law through give-and-take negotiations. Those give-and-take negotiations are often circumvented by the prosecutors' significant leverage. That leverage looks different in different types of cases. In felony cases, the leverage comes primarily from the harsher sentence or additional charges defendants will face if they refuse to plead guilty. In return for a guilty plea, prosecutors can offer to dismiss charges against defendants, to recommend lower sentences, or even to enter into an agreement that stipulates the precise sentence a defendant will serve. When the difference between what the prosecutor is offering and what a defendant faces if convicted at trial becomes too great, even innocent defendants will plead guilty.³³

The leverage looks different in misdemeanor cases. For those defendants, the relative harshness of the penalty after trial is not the primary source of pressure to plea. Instead, the primary sources of pressure are the costs imposed by attending multiple pretrial conferences that drive so many defendants to plead guilty.³⁴ If, for example, a defendant faces a \$1,000 fine if convicted at trial and is offered a \$300 fine as part of a plea bargain, the difference in sentences does not create significant pressure to plead guilty. But if proceeding to trial requires multiple pretrial appearances—all of which require the defendants to miss work and pay transportation costs—then the costs of going to trial are higher than the difference between the two sentences. In that scenario, the cost of insisting on a trial include multiple days of lost wages and the risk of losing one's job.

subjecting them to the indignities of detention, prosecutors place defendants in a position where they face great incentives to plea bargain to end or minimize the detention. As a result, pretrial detention has become a tool of prosecutorial efficiency to heighten pressure for plea bargaining. . . .”).

³⁰ See *supra* text accompanying note 23.

³¹ Christopher Slobogin, *Lessons from Inquisitorialism*, 87 S. CALIF. L. REV. 699, 720 (2014) (“[W]hile judges are supposed to ensure [negotiated guilty] pleas have a factual basis, they generally rely on the parties’ stipulation that such a basis exists, with very little independent attempt to verify the stipulation.”).

³² See Thea Johnson, *Fictional Pleas*, 94 IND. L. J. 855, 860–61 (2019).

³³ See HESSICK, *supra* note 29, at 35–39.

³⁴ See *id.* at 120–26.

Because of the leverage that they have, prosecutors are often able to pressure defendants into pleading guilty early in the case, sometimes without conducting any factual investigation.³⁵ In some states, the defendants' right to discovery does not attach until just before trial—well after the time for plea negotiations have past.³⁶ In jurisdictions where defendants are supposed to receive discovery at earlier stages, prosecutors will sometimes place time constraints on the bargaining process that evade the discovery right.³⁷ And the U.S. Supreme Court has refused to place limits on prosecutors' ability to make defendants waive their discovery rights as part of a plea agreement.³⁸

Prosecutorial leverage can also prevent defendants from filing any motions about the legal viability of the charges. Just as prosecutors can condition a favorable plea agreement on defendants foregoing their right to discovery, so too can they insist defendants not file motions that raise legal challenges to charges that have been filed.³⁹

The leverage prosecutors have also affects the substance of plea agreements. Because prosecutors hold all of the cards, defendants are rarely able to negotiate

³⁵ See *id.* at 56.

³⁶ Laurent Sacharoff & Sarah Lustbader, *Who Should Own Police Body Camera Videos?*, 95 WASH. U. L. REV. 269, 276–77 (2017). “With some noteworthy, recent exceptions, such as Texas, defendants are not entitled to receive police reports, witness statements, 911 calls, radio runs, lab reports, and other relevant evidence in a timely fashion—they very often plead guilty without ever having seen them.” *Id.* at 274. See generally Cynthia Alkon, *The Right to Defense Discovery in Plea Bargaining Fifty Years After Brady v. Maryland*, 38 N.Y.U. REV. L. & SOC. CHANGE 407 (2014).

³⁷ In Maricopa County, Arizona, for example, the local prosecutor's office has adopted a policy of offering pre-indictment pleas in order to evade the state rule that gives defendants a right to discovering upon indictment. The policy is clearly communicated to defense attorneys in the jurisdiction: if their client does not take the pre-indictment plea deal, then he or she will not receive another deal as favorable, and may receive no other deal at all. HESSICK, *supra* note 29, at 55–57. The refusal to hold a plea open until a defendant can obtain important factual information is not limited to Arizona, and it can be done by any individual prosecutor in any case.

³⁸ See *United States v. Ruiz*, 536 U.S. 622, 623 (2002) (holding that the Constitution does not require the government to disclose material impeachment evidence prior to entering a plea agreement with a criminal defendant).

³⁹ See Michael D. Cicchini, *An Economics Perspective on the Exclusionary Rule and Deterrence*, 75 MO. L. REV. 459, 472 (2010) (“In nearly every case, a prosecutor can make an offer that is difficult to refuse and can easily induce a plea and a waiver of the suppression motion in exchange for the reduction or dismissal of some of the charges.”); Russell M. Gold, *Beyond the Judicial Fourth Amendment: The Prosecutor's Role*, 47 U.C. DAVIS L. REV. 1591, 1630 (“Prosecutors sometimes offer deals that expire or degrade if a defendant files a suppression motion.”); see also Alexandra W. Reimelt, Note, *An Unjust Bargain: Plea Bargains and Waiver of the Right to Appeal*, 51 B.C. L. REV. 871, 872 (2010) (documenting an example of a prosecutor insisting that a defendant withdraw suppression motion or the negotiated sentence in the plea bargain would double).

meaningfully over terms. Instead, they must accept whatever terms the prosecutor offers.⁴⁰ As a result, defendants routinely agree to waive not only their trial rights, but also their appeal rights.⁴¹ And because the costs of going to trial—including the trial penalty⁴² as well as the prosecutors' ability to bring new charges to punish recalcitrant defendants⁴³—are so high, some defendants will settle for plea agreements in which the prosecutor makes very few concessions.

In addition to deferring to plea agreements, judges also routinely defer to prosecutors' sentencing recommendations, especially when those recommendations have been the subject of plea bargaining negotiation.⁴⁴ One study of felony courts in Houston found that five of the six judges in the court “followed the prosecutor’s sentence recommendation in almost every guilty-plea case that came before them.”⁴⁵ The sixth judge followed the prosecutor’s recommendation in approximately ninety percent of cases.⁴⁶

II. SIMPLE STEPS TO REVERSE MASS INCARCERATION

What follows is a series of recommendations individual trial court judges could adopt in their own courtrooms. While a single judge adopting only one of these proposals is unlikely to stem the tide of mass incarceration, the more judges who adopt these proposals, the bigger the difference will be.

Specifically, judges should reduce the number of people detained before trial by seeking to implement alternative methods of ensuring court appearances, and by identifying the small number of defendants who pose a risk of violence. Judges should alter plea bargaining dynamics by ending the judicial trial penalty, giving defendants access to pretrial discovery before accepting guilty pleas, making interpretive decisions about the scope of relevant statutes at the beginning of a case, and

⁴⁰ See G. NICHOLAS HERMAN, *PLEA BARGAINING* 75 (2d ed. 2004) (“Because the prosecutor almost always possesses superior bargaining power over the defendant, defense counsel is often faced with a take-it-or-leave-it plea offer.”).

⁴¹ See Susan R. Klein et al., *Waiving the Criminal Justice System: An Empirical and Constitutional Analysis*, 52 AM. CRIM. L. REV. 73, 74 (2015) (documenting the prevalence of different waivers in plea agreements); Quin M. Sorenson, *Appeal Rights Waivers: A Constitutionally Dubious Bargain*, 65 FED. LAW. 32, 33 (2018) (identifying appeal rights waivers as “[o]ne of the most common provisions in plea agreements in federal criminal cases”). See generally Reimelt, *supra* note 39.

⁴² See *supra* text accompanying notes 10–14.

⁴³ See, e.g., John F. Stinneford, *Dividing Crime, Multiplying Punishments*, 48 U.C. DAVIS L. REV. 1955, 1961–63 (2015) (describing the Weldon Angelos case).

⁴⁴ William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505, 596 (2001) (“Even when sentencing was everywhere discretionary, judges tended to defer to bargained-for sentencing recommendations.”).

⁴⁵ Alschuler, *supra* note 12, at 1063–64.

⁴⁶ *Id.* at 1064.

waiving the appearance of misdemeanor defendants at routine pretrial conferences. Judges should also reduce mass incarceration by imposing shorter sentences.

A. Reduce Pretrial Detention

Judges should detain fewer defendants pretrial, require lower amounts of bail, and release defendants without any financial guarantees. These changes will require judges not only to stop deferring to prosecutors' bail recommendations, but also to change their approach to bail more generally. Rather than detaining large numbers of defendants pretrial, judges should limit pretrial detention to only those defendants who pose a credible threat to the safety of others. And rather than viewing financial conditions for release as something that are supposed to be set as a matter of course, judges should limit financial conditions to those defendants who are unlikely to appear at their next court date without those conditions.

While these reforms may require big mindset adjustments, they would be relatively easy to implement. Judges control bail decisions in their courtrooms and can simply make different decisions.⁴⁷ Of course, to ensure that defendants will still appear for their court dates and that those released are unlikely to commit crimes of violence after release, judges will want to work with the relevant criminal justice agencies in their jurisdictions. As a first step, judges should consult with their pretrial services agency about the best methods to ensure appearances. There is a growing body of research demonstrating that most defendants will appear if given a simple reminder before their court dates.⁴⁸ Judges can advocate for an automatic notification system in their jurisdiction and then encourage the relevant agency to collect data about defendants who fail to appear despite such a notification in order to alter and improve the system.

More generally, judges should seek to limit the use of pretrial detention to those defendants who are most likely to harm others if released. Studies show the number of defendants who pose such a threat is quite small.⁴⁹ Again, judges should work with the relevant pretrial services agency to attempt to identify that small population, and they should encourage the agency to consult existing research on the matter and possibly even to conduct their own studies.

If pretrial agencies are not cooperative, judges could implement at least some of these recommendations on their own. They can direct their clerks or other chambers staff to make pretrial notifications. And they could seek input from academics and other experts about how to best identify those defendants who pose a risk of violence.

⁴⁷ See *infra* Section III.A.

⁴⁸ KATIE BENT-KOERICK & TIFFANY BERGIN, N.Y.C. CRIM. JUSTICE AGENCY, THE COURT APPEARANCE PILOT PROJECT: A RANDOMIZED EVALUATION OF AN INTERACTIVE INTERVENTION TO ENCOURAGE COURT DATE ATTENDANCE 3–4 (Feb. 2022), <https://www.nycja.org/assets/downloads/CAPP-draft-copy.pdf> [<https://perma.cc/RL2U-UZEX>] (reviewing the literature).

⁴⁹ See Baradaran & McIntyre, *supra* note 29, at 557 (finding that “the average rearrest rates are only about 1%–2% for a pretrial violent crime”).

Elected judges might be wary of attempting such changes because releasing defendants pretrial appears to be unpopular, especially if a defendant who has been released pretrial commits a violent crime. In such a situation, a judge could face significant political fallout. When judges defer to prosecutorial recommendations, they can avoid some of the blame by saying they merely did what the prosecutor suggested. But that is not the only way to insulate bail decisions from criticism. If judges are open and transparent about the changes they are adopting, they also have an opportunity to shape the narrative about the benefits of such changes. And in making those policy changes clear, judges should emphasize the dramatic monetary savings associated with a smaller pretrial detention population,⁵⁰ and the research showing the criminogenic effect of pretrial incarceration.⁵¹

Of course, even if the overall benefits of these changes outweigh the costs, a single high-profile crime committed by a defendant on pretrial release could still turn public opinion against bail reform. To help guard against this outcome, judges could rely on prosecutors not for bail recommendations, but rather as sources of information about dangerousness or the lack thereof. If, for example, a prosecutor argues in favor of pretrial detention, the judge can demand the prosecutor present credible evidence showing why the defendant poses a risk to public safety. If the prosecutor can supply such evidence, then the judge will have to make an independent assessment. But if the prosecutor is unable to present such evidence, the judge should make clear that her decision to release a defendant was based on the prosecutor's failure to present any credible evidence that would have justified detention.

Finally, judges should also pay attention not only to the arguments that prosecutors make about dangerousness, but also to their actions. If prosecutors are willing to give a defendant a plea bargain with an agreed upon sentence of time served or something equally minimal, judges should release that defendant immediately. Release would allow the defendant to make a meaningful decision about whether to plead guilty rather than allow the inherent pressure associated with pretrial detentions to drive that decision.⁵² Even if a prosecutor is willing to stand up in court and say such a defendant poses a risk, the judge can point out that the prosecutor's actions indicate otherwise.

B. Alter Plea Bargaining Dynamics

With respect to plea bargaining, judges also need to change their basic approach. Rather than assuming the plea bargaining process is a give-and-take negotiation

⁵⁰ See Shima Baradaran Baughman, *Costs of Pretrial Detention*, 97 B.U. L. REV. 1, 6 (2017) (estimating the direct costs to society of pretrial detention).

⁵¹ See, e.g., Heaton et al., *supra* note 29, at 762 (finding, over time, that "pretrial detention has a greater criminogenic than deterrent effect").

⁵² See *supra* note 29.

between two equal parties,⁵³ judges should acknowledge the significant pressure on defendants to plead guilty and attempt to decrease some of that pressure.

First, and perhaps most importantly, judges should stop imposing a trial penalty on those defendants who decide to exercise their Sixth Amendment right to a trial. It is unconscionable that the branch of government tasked with protecting individual rights has elected to punish criminal defendants for invoking their rights. To the extent that the trial penalty is baked into sentencing guidelines,⁵⁴ judges should use their discretion to eliminate the penalty by giving the benefit of the sentencing mitigation to all defendants, including those that proceed to trial.

Second, judges should ensure that defendants have access to sufficient information before deciding whether to plead guilty. On the issue of factual guilt, judges should refuse to accept a guilty plea until the prosecutor has turned over relevant factual information. For example, Judge Emmet Sullivan, a judge in the District Court of the District of Columbia, issues an order in every criminal case on his docket which “*sua sponte*, directs the government to produce to defendant in a timely manner—including during the plea bargaining stage—any evidence in its possession that is favorable to defendant and material either to defendant’s guilt or punishment.”⁵⁵

Defendants should also have access to all of the information they need to assess their legal guilt. To that end, judges should make their interpretive decisions at the beginning of a criminal case rather than just before the case is submitted to the jury or after the jury verdict. In other words, judges should treat motions to dismiss the indictment no different than motions to dismiss civil complaints. If it is unclear whether a defendant’s conduct falls within a statute, the judge should ask the parties to brief the issue before agreeing to accept the defendant’s guilty plea. The judge

⁵³ See *Bordenkircher v. Hayes*, 434 U.S. 357, 362–63 (1978) (describing “the give-and-take negotiation common in plea bargaining between the prosecution and defense, which arguably possess relatively equal bargaining power”) (quoting *Parker v. North Carolina*, 397 U.S. 790, 809 (Brennan, J., concurring)).

⁵⁴ See U.S. SENT’G GUIDELINES MANUAL, *supra* note 14.

⁵⁵ See Emmet G. Sullivan, *Enforcing Compliance with Constitutionally-Required Disclosures: A Proposed Rule*, 2016 CARDOZO L. REV. DE NOVO 138, 141, 150 (2016) (describing his practice and providing the standing order). Judge Sullivan is not the only judge who has adopted such a policy. Judge Calabrese, whose pretrial appearance policy is discussed *infra* in the text accompanying note 56, appears to enter a “*Brady v. Maryland* Notice and Order” in his all of his criminal cases, which “reminds the government of its obligations under *Brady v. Maryland*, 373 U.S. 83 (1963), to disclose evidence favorable to the defendant and material to the defendant’s guilt or punishment,” orders the government “to comply with *Brady* and its progeny,” and state that the failure to comply “in a timely manner may result in consequences, including dismissal of the indictment or information, exclusion of government evidence or witnesses, adverse jury instructions, dismissal of charges, contempt proceedings, sanctions by the Court, or any other remedy that is just under the circumstances.” See *United States v. Langford*, No. 22-CR-40 (N.D. Ohio Apr. 20, 2022) (notice and order regarding *Brady v. Maryland* obligations); *United States v. Taylor*, No. 21-CR-855 (N.D. Ohio Dec. 22, 2021) (same); *United States v. Hayden*, No. 21-CR-648 (N.D. Ohio Sept. 29, 2021) (same).

should call for such briefing even if a defendant has not filed a motion to dismiss the indictment. Only if the judge is convinced that the proper interpretation of the statute includes a defendant's conduct, should the judge enter a judgment of conviction. Otherwise, she should dismiss the charges.

In misdemeanor cases, judges can significantly ease the pressure on defendants to plead guilty by excusing their appearance at pretrial conferences. Just as civil defendants need not appear at every court date, so too should criminal litigants be spared the time and expense associated with appearing at every pretrial conference that does not require their participation.

At least one judge has already adopted such a policy in his courtroom. Judge Philip Calabrese, a district judge in the Northern District of Ohio who previously served as a state court judge, announced that, unless he said otherwise, criminal defendants only needed to attend court dates if they were pleading guilty or being sentenced.⁵⁶ Other judges could easily follow suit.

C. *Impose More Reasonable Sentences*

Judges should use their sentencing discretion to impose reasonable sentences. Rather than simply deferring to sentences recommended by prosecutors or by a sentencing commission, judges should follow the "parsimony principle" and impose the shortest sentence they think is acceptable. When the parties have agreed to a sentence as part of a plea bargain, judges should also inquire about the possibility of a lower sentence—by directly asking the prosecutors whether they or their supervisors could authorize a lower sentence for the defendant.⁵⁷

The parsimony principle appears in both formal sentencing law⁵⁸ and in punishment theory⁵⁹. The principle requires that any punishment imposed "should be no more severe than necessary."⁶⁰ Unlike sentencing guidelines and prosecutor recommendations, the parsimony principle does not give judges a ready-made sentence to impose. To the contrary, the principle gives minimal guidance, as it does not indicate what precise goals or principles must be balanced against the preference for lenient

⁵⁶ HESSICK, *supra* note 29, at 192.

⁵⁷ While the prosecutor is under no obligation to offer a lower sentence, the judicial request could prompt them to do so voluntarily. *See id.* at 199–200 (reporting that a judge in Phoenix sometimes makes these requests and that they are successful).

⁵⁸ *E.g.*, 18 U.S.C. § 3553(a) ("The court shall impose a sentence sufficient, but not greater than necessary, to comply with the purposes [of sentencing]."); *Pears v. State*, 698 P.2d 1198, 1204–05 (Alaska 1985) (reversing a sentence as too harsh using the "principle of parsimony").

⁵⁹ *See, e.g.*, NORVAL MORRIS, *THE FUTURE OF IMPRISONMENT* ix, x, xi (1974); *see also* Douglas A. Berman, *Reconceptualizing Sentencing*, 2005 U. CHI. LEGAL F. 1, 49 (2005) (tracing the parsimony principle to the nineteenth-century work of Jeremy Bentham).

⁶⁰ Alice Ristroph, *Desert, Democracy, and Sentencing Reform*, 96 J. CRIM. L. & CRIMINOLOGY 1293, 1336–37 (2006).

sentences.⁶¹ But while parsimony may not offer judges the ease and comfort of a specific recommended sentence or sentencing range, it provides an accepted basis for imposing shorter sentences.

Judges who desire more specific guidance than the parsimony principle can often find it in other sources. They can look to pre-sentencing guidelines, sentences in other jurisdictions, and information about what other judges are imposing as benchmarks. If any of these sources of sentencing guidance are lower than what the prosecutor or sentencing commission recommends, the judge should follow it instead.

III. JUDICIAL POWER TO ADDRESS MASS INCARCERATION

Some might question whether judges have the power to implement the recommendations outlined in the previous section. Indeed, there are a handful of circuit court decisions suggesting that the separation of powers require judges to defer to prosecutors' decisions about plea bargaining.⁶² But, upon closer inspection, it is clear judges have the power to follow these recommendations. As explained more fully below, authority to reduce pretrial detention, change the dynamics of plea bargaining, and impose more reasonable sentences can be found in the rules of criminal procedure, the historical understanding of the judicial power, and the inherent power of the courts. This section also addresses and ultimately dismisses arguments that the separation of powers requires judges to defer to prosecutor decisions in plea bargaining.

A. *The Power to Set Bail*

There is little doubt that judges have the power to set bail. Indeed, the power to make bail and pretrial release decisions is often specifically assigned to judges in statutes. The Bail Reform Act, for example, allows the prosecution to argue in favor of pretrial detention, but the decision must be made by a "judicial officer."⁶³ As the U.S. Supreme Court explained in *United States v. Salerno*, pretrial detention does not violate the Due Process Clause, in part because the prosecutor "must convince a neutral decisionmaker by clear and convincing evidence that no conditions of release can reasonably assure the safety of the community or any person."⁶⁴ Judges, not prosecutors, are neutral decision makers.

⁶¹ *See id.* at 1337 (noting that, depending on how "necessity" is defined for the parsimony principle, the term may become "elastic").

⁶² *See infra* notes 77–90 and accompanying text.

⁶³ 18 U.S.C. § 3142; *see also* VA. CODE § 19.2-119 (vesting the authority to make bail decisions in certain "judicial officers").

⁶⁴ 481 U.S. 739, 750 (1987).

B. Power over Plea Bargaining

The recommendations about altering plea bargaining dynamics are justified by a judge's powers under Article III of the United States Constitution (or comparable state understandings of the judicial power) and a judge's inherent power over her own courtroom. Any plea bargain that includes a defendant pleading guilty to a crime requires a judge to enter a judgment of conviction. This distinguishes plea bargaining from civil settlements, in which the parties can privately contract for the dismissal of claims, and from non-prosecution agreements, in which the prosecutor agrees not to bring any charges (or to dismiss all charges) in return for certain concessions from the defendant. Civil settlements and non-prosecution agreements can be effectuated by the parties acting alone, but plea bargains require the involvement of a judge in order to obtain a judgment of conviction.

The authority to enter judgments is an essential feature of the judicial power.⁶⁵ As Justice Samuel Miller explained, the federal courts have consistently defined the "judicial power" to be "the power of a court to decide and pronounce a judgment and carry it into effect between persons and parties who bring a case before it for decision."⁶⁶ Notably, the judicial power also includes "the ability to make factual and legal findings."⁶⁷ This ability is related to the power to enter judgments. As Madison's notes from the Constitutional Convention indicate, the Founders contemplated that judges would make determinations "of law & fact in rendering judgment."⁶⁸ Indeed, courts "can enter judgment only to the extent [the judgment is] authorized by an application of the law to fact."⁶⁹

Because an exercise of judicial power is required to convict a defendant, judges necessarily have discretion to refuse to enter plea agreements that set the terms of those convictions. This constitutional reality is reflected in the Federal Rules of Criminal Procedure, which specifically states that judges may reject plea agreements.⁷⁰ Notably, the Rules do not articulate the reasons for which a judge may

⁶⁵ F. Andrew Hessick, *Consenting to Adjudication Outside the Article III Courts*, 71 VAND. L. REV. 715, 720 (2018) (identifying "the ability 'to render dispositive judgments'" as one of three features of "what constitutes the judicial power") (quoting *Plaut v. Spendthrift Farms*, 514 U.S. 211, 219 (1995)).

⁶⁶ SAMUEL FREEMAN MILLER, LECTURES ON THE CONSTITUTION OF THE UNITED STATES 314 (New York, Banks & Bros., Law Publishers 1891) (1801). *See also* Hessick, *supra* note 65, at 720–21 (collecting other sources).

⁶⁷ Hessick, *supra* note 65, at 721.

⁶⁸ 1 RECORDS OF THE FEDERAL CONVENTION OF 1787, at 243 (Max Farrand ed., 1911).

⁶⁹ Hessick, *supra* note 65, at 721–22.

⁷⁰ FED. R. CRIM. P. 11(c). Rule 11(c) specifically states that judges may reject plea agreements in which the defendant pleads guilty in return for the government agreeing not to bring additional charges, agreeing to dismiss other charges, agreeing to the imposition of a particular sentence, or agreeing that a particular sentencing guideline does not apply. *See* FED. R. CRIM. P. 11(c)(3)(A). The Rule does not say anything about a judge's ability to reject

decline to accept a plea agreement. The advisory committee notes make clear that this omission was intended to indicate that the decision is a matter of judicial discretion: “The plea agreement procedure does not attempt to define criteria for the acceptance or rejection of a plea agreement. Such a decision is left to the discretion of the individual trial judge.”⁷¹

While there may be some question about the appropriate criteria for a judge to use in deciding whether to reject a plea bargain, there is no disputing that judges must reject plea agreements if there is no factual basis to convict the defendant. This conclusion is necessary because for *any* guilty plea by a defendant—whether that plea is a product of a plea bargain or not—judges may only enter a judgment of conviction after determining that there is a factual basis for the plea.⁷² This obligation is reflected in the Federal Rules of Criminal Procedure.⁷³ As the advisory notes to the rule indicate, that language was added to the rule “to impose a duty on the court in cases where the defendant pleads guilty to satisfy itself that there is a factual basis for the plea before entering judgment.”⁷⁴ This conclusion suggests that, if the facts alleged in an indictment or a plea agreement do not appear to satisfy the elements of the crime to which a defendant is prepared to plead guilty, judges must refuse to enter a judgment of conviction.

A judge’s power to require prosecutors to turn over discovery to criminal defendants before entering a guilty plea is also authorized by the judicial power to enter judgments. A judge’s order to turn over discovery before accepting a plea agreement should be seen as part of the inherent judicial power “to oversee the fact-finding process by managing discovery,” as the entry of judgments “depends upon an accurate and relevant factual record.”⁷⁵ It also can be justified by the judge’s obligation to ensure a defendant has entered a guilty plea that is knowing and intelligent.⁷⁶

plea agreement in which the defendant agrees to plead guilty in return for a sentencing recommendation from the prosecutor or a promise not to oppose a defendant’s sentencing request—a type of plea agreement contemplated by Rule 11(c)(1)(B). But such plea agreements do not affect the charges for which the defendant will be convicted, nor do they limit the judge’s sentencing authority. Put differently, the defendant is not getting much value from the prosecutor in return for the guilty plea, and so there is no meaningful difference between a plea bargain under 11(c)(1)(B) and a defendant pleading guilty of his own accord without any agreement with the prosecutor. As a result, there’s nothing for the judge to “reject” when it comes to these plea agreements.

⁷¹ FED. R. CRIM. P. 11(c) advisory committee’s note to 1974 amendment.

⁷² FED. R. CRIM. P. 11(b)(2).

⁷³ *Id.*

⁷⁴ FED. R. CRIM. P. 11(c) advisory committee’s note to 1966 amendment.

⁷⁵ Robert J. Pushaw, Jr., *The Inherent Powers of Federal Courts and the Structural Constitution*, 86 IOWA L. REV. 735, 742 (2001).

⁷⁶ See *Boykin v. Alabama*, 395 U.S. 238, 242 (1969); see also *Bousley v. United States*, 523 U.S. 614, 620 (1998) (stating that the constitutional requirement that a guilty plea be knowing and intelligent dates at least to *Smith v. O’Grady*, 312 U.S. 329 (1941)).

Importantly, a few circuit court opinions have interpreted the judicial power to reject plea bargains in an exceedingly narrow fashion, stating that such a narrow interpretation is required by the separation of powers. But, as explained more fully below, the idea that judges cannot use their authority to countermand executive decisions is inconsistent with both the principles underlying the separation of powers and with the history of criminal justice authority in the United States.

One recent decision questioning judicial authority to reject plea bargains comes from the Sixth Circuit. In that case, *In re United States*,⁷⁷ the district court rejected a plea agreement that included a waiver of the defendant's right to direct appeal and to collateral review. The district court informed the parties of its long-standing practice of rejecting plea agreements with such waivers, and when the parties then asked the trial court to accept an agreement that included such a waiver, the court refused and issued a written opinion.⁷⁸ That opinion explained such waivers were problematic because they insulated prosecutorial misconduct and trial court errors from review.⁷⁹ The U.S. Attorney's Office filed a writ of mandamus, which the Sixth Circuit granted on the ground that the district court abused its discretion by rejecting the plea agreement.⁸⁰ The Sixth Circuit faulted the judge for rejecting the plea agreement for reasons that could apply to any case involving an appellate waiver, rather than for some specific reason associated with the particular case.⁸¹

⁷⁷ 32 F.4th 584 (6th Cir. 2022).

⁷⁸ *Id.* at 589.

⁷⁹ *Id.* at 588–89, 595.

⁸⁰ *Id.* at 590.

⁸¹ *Id.* at 594–96. The Sixth Circuit also granted mandamus on the grounds that, in informing the parties of its practice of not accepting plea agreements that include appeal waivers, the trial court violated the prohibition on district courts not participating in plea negotiations. *See id.* at 592–94. Although the Federal Rules clearly do contain such a prohibition, *see* FED. R. CRIM. P. 11(c)(1) (“An attorney for the government and the defendant’s attorney . . . may discuss and reach a plea agreement. The court must not participate in these discussions.”), it is far from clear that the trial court’s announcement violated that prohibition. The committee notes explain that this prohibition exists to ensure that defendants do not feel pressured to plead guilty. As I have explained elsewhere:

If a judge participates in the plea-bargaining discussion, . . . that “might lead the defendant to believe that he would not receive a fair trial” or that the judge might impose a “substantially longer or even maximum sentence” if the defendant ultimately refused the plea bargain and proceeded to trial.

In this case, though, the judge wasn’t creating any pressure on the defendant to plead guilty. He was telling the prosecutor not to include a term that would be against the defendant’s interests. As a factual matter, the judge was not “participating” in the plea bargain discussions of the parties, but he also wasn’t creating the sort of pressure that the rule is meant to prevent.

Carissa Byrne Hessick, *A Federal Appeals Court Just Devastated the Power of Judges to Reject Bad Plea Deals*, SLATE (Apr. 29, 2022, 12:20 PM), <https://slate.com/news-and-politics/2022/04/sixth-circuit-court-bad-plea-bargain.html> [<https://perma.cc/W8HL-FHVA>].

The Sixth Circuit grounded this ruling in the separation of powers. After acknowledging that the Federal Rules of Criminal Procedure grant trial judges the power to reject plea agreements, the appellate court asserted that the discretion to reject plea agreements that include charge bargains—that is, agreements by the government to dismiss charges or to refrain from bringing additional charges in return for the defendant’s guilty plea—is constrained by separation of powers.⁸² Specifically, the Sixth Circuit noted that “charging decisions traditionally fall within the power of the Executive branch,” and thus concluded that a court that is “considering a charge bargain must, therefore, exercise its discretion with due regard to prosecutorial prerogatives.”⁸³ According to the Sixth Circuit, the judicial discretion to reject plea agreements that include charge bargains based only on an “individualized assessment” of the particular case is limited: “categorical rejections are improper.”⁸⁴

The Sixth Circuit is not the first appellate court to suggest that judges’ power to reject charge bargains is limited by the separation of powers or to suggest such rejections must be based on case-specific facts. For example, in 1983, the Ninth Circuit held that “[t]o assure that judicial discretion is exercised with due regard for prosecutorial independence, we hold that courts must review individually every charge bargain placed before them,” and that “the discretion of the trial court to reject these bargains is fairly narrow.”⁸⁵ According to the Ninth Circuit, “[c]ategorical limitations on charge bargains may force prosecutors to bring charges they ordinarily would not, or to maintain charges they would ordinarily dismiss as on-going investigations uncover more information.”⁸⁶ Interestingly, the Ninth Circuit subsequently extended its individualized assessment rule to sentence bargains.⁸⁷ This extension is notable because, unlike charging decisions, judges have long been thought to possess considerable authority over sentencing decisions.⁸⁸ The Ninth

⁸² *In re United States*, 32 F.4th at 594.

⁸³ *Id.*

⁸⁴ *Id.* at 595–96.

⁸⁵ *United States v. Miller*, 722 F.2d 562, 566 (9th Cir. 1983).

⁸⁶ *Id.* at 565.

⁸⁷ *See In re Morgan*, 506 F.3d 705, 711–12 (9th Cir. 2007).

⁸⁸ *See infra* text accompanying notes 119–20. Indeed, because of that, one might conclude that trial judges owe no deference to the parties’ negotiated sentencing outcomes. As Judge Kethledge of the Sixth Circuit has explained:

The power to sentence a criminal defendant lies not with this court or the parties themselves, but with the district court. Our role is simply to review the district court’s exercise of that power for an abuse of discretion. And nothing in Criminal Rule 11 or elsewhere in the law allows the parties to arrogate the district court’s sentencing power simply by agreeing upon a particular sentence. Hence that agreement does not create some sort of presumption that the district court must then overcome. That the parties agreed upon particular sentences here, therefore, does not mean that the district court was obligated to offer up reasons as to why those sentences were unreasonable. Instead, that

Circuit justified this expansion on the theory that, when a judge rejects a plea bargain on broad policy grounds rather than case-specific grounds, “no discretion has been exercised.”⁸⁹

At first glance, it may seem sensible to conclude that grants of discretion authorize only individualized assessments and do not authorize decisions based on broadly applicable policy grounds.⁹⁰ After all, officials are often granted discretion because categorical rules seem inappropriate.⁹¹ In addition, such a rule avoids the awkward situation in which the treatment an individual receives appears to depend on the official assigned to make the decision, rather than the specific facts at issue.

But the idea that discretion can be exercised only on a case-by-case basis and cannot be exercised through generalizable rules does not survive close scrutiny. Indeed, even the most cursory examination of *prosecutorial* discretion shows discretionary decisions can be—and are—made based on generalizable policies and not merely fact-specific bases. Prosecutor offices often have policies about the types of cases they will and will not bring.⁹² The Department of Justice, for example,

a district court thinks it *might* want to impose a different sentence than the one chosen by the parties—even, say, a sentence different by only a month—is reason enough for the court to reject a plea agreement under Rule 11(c)(1)(C).

United States v. Cota-Luna, 891 F.3d 639, 651 (6th Cir. 2018) (Kethledge, J., concurring).

⁸⁹ *In re Morgan*, 506 F.3d at 712 (quoting United States v. Miller, 722 F.2d 562, 565 (9th Cir. 1983)).

⁹⁰ The Sixth Circuit also adopted this idea. *In re United States*, 32 F.4th 584, 595 (6th Cir. 2022).

⁹¹ For example, for much of American history, judges enjoyed considerable sentencing discretion, in part, “because people believed that it was impossible to identify *ex ante* those facts that ought to increase or decrease sentences” and because sentencing “was thought to be a complex, circumstance-driven, and defendant-specific endeavor.” Carissa Byrne Hessick & William W. Berry III, *Sixth Amendment Sentencing After Hurst*, 66 UCLA L. REV. 448, 474–75 (2019). And there are scattered examples of appellate courts reversing sentences when trial judges imposed the maximum sentence based only on the offense of conviction and not any case-specific circumstances. *See, e.g.*, United States v. Hartford, 489 F.2d 652, 655 (5th Cir. 1974); United States v. Thompson, 483 F.2d 527, 529 (3d Cir. 1973); Woosley v. United States, 478 F.2d 139, 143 (8th Cir. 1973); United States v. Daniels, 446 F.2d 967, 970–71 (6th Cir. 1971); United States v. McCoy, 429 F.2d 739, 743 (D.C. Cir. 1970). The courts in these cases justified their intervention on the theory that, when the sentencing court does not actually exercise its discretion in imposing sentence, then “the appellate court does not usurp the discretion vested in the district court when it reviews the sentence.” United States v. Bates, 852 F.2d 212, 220 (7th Cir. 1988).

However, even these circuit cases, which suggest that some individualized assessment is necessary for the exercise of sentencing discretion did not advance the view that sentencing was a purely factual exercise. Discretionary sentencing includes not only factual decisions by judges, but also policy decisions and decisions applying those policy decisions to specific facts. Carissa Byrne Hessick & F. Andrew Hessick, *Procedural Rights at Sentencing*, 90 NOTRE DAME L. REV. 187, 198–99 (2014).

⁹² *See* Megan S. Wright et al., *Inside the Black Box of Prosecutor Discretion*, 55 U.C.

publishes some of its enforcement policies and criteria in the U.S. Attorneys Manual.⁹³ Some of those policies are written in categorical terms,⁹⁴ and they sometimes turn on broad policy considerations rather than on factual circumstances.⁹⁵

Indeed, the plea agreement in *In re United States* included an appeal waiver because the local U.S. Attorneys' Office adopted a policy "requiring as a condition of all plea agreements . . . that every defendant waive all rights to appeal any aspect of the proceedings and forfeit most post-conviction rights."⁹⁶ The Sixth Circuit was aware of this policy—it was discussed in the district court's opinion explaining its rejection of the plea agreement—and yet the appellate judges gave no indication that, in adopting such a policy (rather than giving "every case independent consideration"), the U.S. Attorney "abdicates its duty to exercise any discretion at all."⁹⁷ Instead, the Sixth Circuit appears to have accepted the U.S. Attorney's use of discretion to adopt a blanket appeal waiver policy to be part and parcel of "prosecutorial prerogatives."⁹⁸

Courts have refused to second-guess prosecutorial discretion even when different offices adopt different policies, thus making the different treatment criminal defendants receive appear arbitrary rather than individualized. For example, various U.S. Attorney Offices created fast-track programs in the 1990s, which gave certain immigration defendants lower sentences in return for the streamlining of their cases.⁹⁹ Those programs were eventually ratified by both the Attorney General and Congress,¹⁰⁰ but even before that ratification, appellate courts rejected arguments from defendants who claimed that different prosecutor offices adopting different policies was inappropriate or unfair.¹⁰¹

DAVIS L. REV. 2133, 2188 (2022) (reporting that "[s]lightly over half" of prosecutors surveyed reported "internal guidelines" in their office for charging decisions).

⁹³ The U.S. Attorney's Manual has recently been renamed the "Justice Manual."

⁹⁴ U.S. Dep't of Just., Just. Manual § 9-16.010 (2018) ("United States Attorneys may not consent to a plea of *nolo contendere* except in the most unusual circumstances and only after a recommendation for doing so has been approved . . ."); U.S. Dep't of Just., Just. Manual § 9-22.010 (2018) (articulating categorical prohibitions on prosecutor discretion to use pretrial diversion).

⁹⁵ U.S. Dep't of Just., Just. Manual § 9-16.330 (2018) (setting forth particular plea negotiation policies based on the "core value" of the right to effective assistance of counsel); U.S. Dep't of Just., Just. Manual § 9-27.220 (2018) (stating that prosecutor should commence or recommend prosecution only if it would "serve a substantial federal interest").

⁹⁶ *United States v. Townsend*, No. 19-20840, 2021 WL 777191, at *1 (E.D. Mich. Mar. 1, 2021).

⁹⁷ *In re United States*, 32 F.4th 584, 595 (6th Cir. 2022).

⁹⁸ *Id.* at 594.

⁹⁹ See Thomas E. Gorman, *A History of Fast-Track Sentencing*, 21 FED. SENT'G REP. 311, 311 (2009).

¹⁰⁰ *Id.* at 312–14 (discussing congressional and DOJ authorization in 2003).

¹⁰¹ See, e.g., *United States v. Banuelos-Rodriguez*, 215 F.3d 969, 977 (9th Cir. 2000) ("Defendant has not alleged, nor is there any evidence in this record that tends to show, that any of the policies implemented and pursued by the United States Attorney for the Central

As these examples of prosecutorial discretion show, discretion *as a concept* is not limited to decision-making based on individualized assessments. Discretion means the power to choose between outcomes.¹⁰² An official can adopt generally applicable policies to explain or guide her decision-making; so long as the official retains the power to depart from those generally applicable policies, she still has discretion. And so, when trial judges reject plea bargains for broad policy reasons, they have not failed to exercise their discretion.¹⁰³ They have used their discretion—their power—to reject plea agreements that contain terms they deem *never* appropriate, not merely inappropriate in some cases.¹⁰⁴

As noted above, limiting the ability of judges to reject plea agreements is often framed in separation of powers terms—namely that allowing judges to reject plea agreements impermissibly encroaches on the charging power of prosecutors. This separation of powers framing is part of a broader turn in modern doctrine that presents a relatively absolutist view of prosecutorial power and judicial subservience.¹⁰⁵

District were based on impermissible factors such as racial or religious animosity. Quite the opposite appears to be true. . . . [T]he United States Attorneys' differing policies appear to have been considered attempts to address the unique illegal immigration problems faced by their individual districts.”)

¹⁰² Hessick & Hessick, *supra* note 91, at 196–98 (defining and distinguishing between types of discretion).

¹⁰³ Somewhat ironically, the threat to trial court discretion comes not from trial judges articulating general principles and policies that justify their decisions, but rather from appellate courts declaring that certain grounds are off-limits—including a rule that only case-specific facts, and not generalizable policy reasons, can justify the rejection of a plea bargain. *See* Carissa Byrne Hessick & F. Andrew Hessick, *Appellate Review of Sentencing Decisions*, 60 ALA. L. REV. 1, 29 (2008) (observing that appellate review is inherently a limitation on district court discretion).

¹⁰⁴ Limiting the judicial power to reject plea agreements to case-specific facts could prevent judges from rejecting the most abusive plea bargains. As I have explained elsewhere, requiring individualized assessments to reject plea agreements:

would prohibit judges from rejecting agreements with terms that are universally unjust, limiting the power to the rejection of terms that might pass muster in certain circumstances. Imagine, for example, a plea agreement that required the defendant to burn the word criminal into his forehead in return for a favorable sentencing recommendation from the prosecutor. A judge should obviously reject that plea agreement, not because there is something about that particular defendant that makes the plea bargain inappropriate, but rather because the government should never be able to require a defendant to disfigure him- or herself. But according to the 6th Circuit, a judge could only reject that plea bargain if she can articulate some reason this particular defendant (rather than all defendants) should not suffer that indignity.

Hessick, *supra* note 81.

¹⁰⁵ *See* Darryl K. Brown, *Judicial Power to Regulate Plea Bargaining*, 57 WM. & MARY L. REV. 1225, 1234–39 (2016) (recounting modern doctrine). For a recent example of the

There are reasons to be skeptical of this absolutist view. Not only is it a relatively modern view of the separation of powers,¹⁰⁶ but it also turns the idea of separation of powers on its head. The absolutist view allows the prosecutor to usurp the judge's authority to reject plea agreements in the name of the executive charging power,¹⁰⁷ even though the entry of a plea agreement is much more closely related to the judicial power to enter judgments than the prosecutor's power to charge.

Indeed, it is hard to understand how a judge's decision to reject a plea agreement infringes on the executive charging power. The prosecutor remains free to bring additional charges or dismiss existing charges.¹⁰⁸ It is only because the prosecutor wants to exercise that power as part of a plea bargain—not only in exchange for a guilty plea by the defendant, but also memorialized in a written document that is enforceable and entered into the court record—that the judge's acceptance of the plea agreement is even necessary. In other words, the rejection of a plea agreement leaves the charging power of the prosecutor unchanged; what it affects is the entry of judgment by the court.

Of course, trial judges are bound by the appellate rulings in their jurisdictions. Consequently, the cases described above may create hurdles for those trial judges who seek to use their power over plea bargaining to push back against mass incarceration. But those hurdles are not insurmountable. Every circuit continues to recognize trial judges' power to reject plea bargains based on an individualized assessment. So long as trial judges articulate factual circumstances in which they would accept certain plea agreement terms and then make clear that those circumstances were not present, trial judges should remain free to reject plea agreements and thus be able to follow the recommendations in Part II.

Finally, a decision to waive the appearance of criminal defendants at many pretrial conferences is authorized by the courts' "strong inherent power" over "the administration of legal proceedings."¹⁰⁹ The idea of inherent judicial power is

absolutist view, see *In re Flynn*, 961 F.3d 1215, 1221–22 (D.C. Cir. 2020), *vacated en banc*, 973 F.3d 74 (D.C. Cir. 2020) where the D.C. Circuit contended that, *inter alia*, requiring the Executive to explain its discretionary decisions would "result in specific harms to the exercise of the Executive Branch's exclusive prosecutorial power" and that such harm would be irreparable.

¹⁰⁶ Brown, *supra* note 105, at 1239–55 (giving an historical that indicates the original understanding of the separation of powers does not stop the judiciary from reviewing plea agreements and other prosecutorial decisions).

¹⁰⁷ As Andrew Crespo notes, prosecutors' power to "pile charges on top of each other"—which in turn drives much of their leverage in charge bargaining—"is not some inherent feature of [prosecutorial] authority." Andrew Manuel Crespo, *The Hidden Law of Plea Bargaining*, 118 COLUM. L. REV. 1303, 1316 (2018). Instead that power finds its roots in the law of joinder and the law of severance. See *id.* at 1316–23.

¹⁰⁸ Those powers may be subject to other limits, such as the existence of probable cause for additional charges or Federal Rules of Criminal Procedure Rule 48(a), which requires judicial approval for the dismissal of charges.

¹⁰⁹ *Hanna v. Plummer*, 380 U.S. 460, 472–73 (1965).

accepted in both state and federal courts.¹¹⁰ And while some claims of inherent power have proven controversial, the notion that judges have the power to control the persons and activities within the judicial system itself is quite well established.¹¹¹ Excusing a defendant's presence from a pretrial conference fits comfortably within that category.

C. Power to Interpret Statutes

It is indisputable that judges have the power to interpret statutes. Like the power to enter judgments, the power to interpret statutes is at the very core of the judicial power. As Chief Justice John Marshall famously said in *Marbury v. Madison*: "It is emphatically the province and duty of the judicial department to say what the law is. Those who apply the rule to particular cases, must of necessity expound and interpret that rule."¹¹² The only question is whether trial courts are free to make definitive rulings about the scope of criminal laws at the beginning of a case, or whether they must wait until the end.

There is no reason to think judges must wait for the parties to proceed to trial and present evidence before issuing definitive ruling on a legal claim. The Federal Rules of Criminal Procedure allow defendants to file motions to dismiss an indictment on the grounds that the indictment fails to state an offense,¹¹³ and all states have a similar statute or rule.¹¹⁴ The Rules require defendants to file such motions before trial,¹¹⁵ but they permit judges to defer decision on those motions until after a jury verdict.¹¹⁶ That the rules *permit* judges to defer judgments on those motions until after verdict necessarily implies that judges have the power to decide those motions at the beginning of a case.

Even in the absence of the rules of criminal procedure, judges could easily justify the decision as part of the judicial power to oversee adjudication. As Professor

¹¹⁰ See Note, *Protective Orders Against the Press and the Inherent Powers of the Courts*, 87 YALE L. J. 342, 350 (1977).

¹¹¹ See Daniel J. Meador, *Inherent Judicial Authority in the Conduct of Civil Litigation*, 73 TEX. L. REV. 1805, 1805–11 (1995); Note, *supra* note 110, at 356–58.

¹¹² 5 U.S. (1 Cranch) 137, 177 (1803).

¹¹³ FED. R. CRIM. P. 12(b)(3)(B)(v).

¹¹⁴ Crespo, *supra* note 107, at 1354.

¹¹⁵ See FED. R. CRIM. P. 12(b)(3) ("The following defenses, objections, and requests must be raised by pretrial motion if the basis for the motion is then reasonably available and the motion can be determined without a trial on the merits.").

¹¹⁶ The 1974 advisory committee notes state:

Subdivision (e) provides that the court shall rule on a pretrial motion before trial unless the court orders that it be decided upon at the trial of the general issue or after verdict. This is the old rule. . . . It will be observed that subdivision (e) confers general authority to defer the determination of any pretrial motion until after verdict.

FED. R. CRIM. P. 12 advisory committee's note to 1974 amendment.

Robert Pushaw explained, “because the *sine qua non* of judicial power is rendering judgments, a court must control their content and timing.”¹¹⁷ In other words, the power to make definitive rulings on a defendant’s legal claims at the beginning of a case is part of the inherent power judges have over how to discharge their constitutional duties.¹¹⁸

D. Power to Sentence

Judicial deference to prosecutors and sentencing commissions about sentencing is quite remarkable because sentencing is an area in which judges were long thought to have considerable authority.¹¹⁹ As the Supreme Court stated in *Mistretta v. United States*:

[T]he sentencing function long has been a peculiarly shared responsibility among the Branches of Government and has never been thought of as the exclusive constitutional province of any one Branch. . . . For more than a century, federal judges have enjoyed wide discretion to determine the appropriate sentence in individual cases and have exercised special authority to determine the sentencing factors to be applied in any given case.¹²⁰

Beginning in the last quarter of the twentieth century, Congress and state legislatures began to limit judicial power over sentencing by enacting statutes and guidelines that required judges to find certain facts in order to impose certain sentences. But in the early 2000s, the Supreme Court began striking down such provisions on the theory that, if such rules altered judicial sentencing discretion based on judges’ factual findings, then they violated the Sixth Amendment right to a jury trial.¹²¹

¹¹⁷ Pushaw, *supra* note 75, at 854; see also Tyrrell Williams, *The Source of Authority for Rules of Court Affecting Procedure*, 22 WASH. U. L.Q. 459, 495–97 (1937) (claiming that legislative attempts to prescribe procedures for when and how judges decide cases are unconstitutional encroachments on the judicial function).

¹¹⁸ See, e.g., *Houston v. Williams*, 13 Cal. 24, 25–26 (1859) (expounding upon this power).

¹¹⁹ E.g., *Kistler v. State*, 54 Ind. 400, 403 (1876) (“According to the old law, all the jury had to do was to determine the question of guilt or innocence. It was the duty of the court, after a verdict of guilty, to declare the punishment which the law imposed. If any discretion was permitted as to the punishment, that discretion was exercised by the court alone.”); see also Carissa Byrne Hessick, *Motive’s Role in Criminal Punishment*, 80 S. CALIF. L. REV. 89, 131 (2006) (“Discretionary sentencing became the American norm no later than the nineteenth century.”).

¹²⁰ 488 U.S. 361, 390 (1989).

¹²¹ E.g., *Blakely v. Washington*, 542 U.S. 296 (2004); *Apprendi v. New Jersey*, 530 U.S. 465 (2000).

These Sixth Amendment sentencing decisions have reaffirmed the judicial power to select sentences within statutory ranges.¹²² And while some of the Court's more recent opinions on this topic acknowledge the legitimacy of some limits on judicial sentencing discretion,¹²³ the continued existence of such discretion remains a touchstone of the Court's Sixth Amendment sentencing doctrine.¹²⁴

Both the long-standing authority of judges over sentencing and the more recent Sixth Amendment sentencing cases indicate that judges have the power to impose reasonable sentences. Even when prosecutors and sentencing commissions recommend harsher punishments, judges have the discretion to impose shorter and more lenient sentences, so long as those sentences are within the relevant statutory range.

CONCLUSION

The dramatic increase in incarceration rates over the past half-century should be a cause for concern for everyone in the criminal justice system, including judges. While much of the blame for the rise of mass incarceration lies with legislators and prosecutors, judges also contributed to high levels of incarceration through both action and inaction. Because judges have been part of the problem, they should also be part of the solution.

Sweeping doctrinal change, such as allowing meaningful Eighth Amendment challenges to lengthy sentences of incarceration, could have an obvious effect on mass incarceration.¹²⁵ But smaller changes implemented by individual trial judges can also have significant effects. For example, when a culture change among judges in New York City led them to release more defendants pretrial without setting bail, the city's jail population dropped by nearly two-thirds.¹²⁶

¹²² See *Alleyne v. United States*, 133 S. Ct. 2151, 2163 (2013) (“[B]road sentencing discretion, informed by judicial factfinding, does not violate the Sixth Amendment.”); *Cunningham v. California*, 549 U.S. 270, 285 (2007) (“We have never doubted the authority of a judge to exercise broad discretion in imposing a sentence within a statutory range.”); *United States v. Booker*, 543 U.S. 220, 233 (2005) (“We have never doubted the authority of a judge to exercise broad discretion in imposing a sentence within a statutory range.”); *id.* (“[W]hen a trial judge exercises his discretion to select a specific sentence within a defined range, the defendant has no right to a jury determination of the facts that the judge deems relevant.”); *Apprendi*, 530 U.S. at 481 (“We should be clear that nothing in this history suggests that it is impermissible for judges to exercise discretion—taking into consideration various factors relating both to offense and offender—in imposing a judgment *within the range* prescribed by statute. We have often noted that judges in this country have long exercised discretion of this nature in imposing sentence *within statutory limits* in the individual case.”).

¹²³ See, e.g., *Kimbrough v. United States*, 552 U.S. 85, 109 (2007) (suggesting “closer review” of sentencing decisions by appellate courts may be warranted in some circumstances).

¹²⁴ See Hessick & Berry, *supra* note 91, at 468–75.

¹²⁵ See generally Barkow, *supra* note 6 (describing the many ways in which Supreme Court doctrine has contributed to mass incarceration).

¹²⁶ Eli Hager, *New York City's Bail Success Story*, THE MARSHALL PROJECT (Mar. 14,

There are numerous changes individual trial courts could make in their own courtrooms to reduce pretrial detention, change the dynamics of plea bargaining, and impose more reasonable sentences. This Article identifies a few specific recommendations to achieve those goals and it explains that trial court judges have the power to implement those changes in their own courtrooms, starting immediately. Indeed, some of these changes have already been implemented by judges across the country.¹²⁷

Of course, pushing back against mass incarceration might prove politically perilous for state judges who face elections. There are high-profile examples of judges losing their offices because of a lenient decision in a criminal justice case,¹²⁸ or because interest groups have used criminal justice cases to target judges in elections in order to elect new judges who are more favorable to their noncriminal law interests.¹²⁹ But political pressure does not explain why the thousands of appointed judges who need not worry about elections have contributed both actively and passively to America's incarceration problem.

Ultimately, individual judges will have to decide for themselves whether they want to continue to be part of the problem of mass incarceration or whether they want to be part of the solution.

2019, 7:00 AM), <https://www.themarshallproject.org/2019/03/14/new-york-city-s-bail-success-story> [<https://perma.cc/KTQ8-TYDD>] (describing “a culture change among judges and other decisionmakers” in New York City that increased the rate at which defendants are released without having to pay bail from 50% to 76% and reduced the jail population from nearly 22,000 to approximately 7,800).

¹²⁷ See *supra* notes 55–56 and accompanying text.

¹²⁸ See, e.g., *California Judge Recalled for Sentence in Sexual Assault Case*, 132 HARV. L. REV. 1369, 1369 (2019).

¹²⁹ See JED HANDELSMAN SHUGERMAN, *THE PEOPLE'S COURTS: PURSUING JUDICIAL INDEPENDENCE IN AMERICA* 1–3 (2012) (collecting recent incidents); Judith S. Kaye, *State Courts at the Dawn of a New Century: Common Law Courts Reading Statutes and Constitutions*, 70 N.Y.U. L. REV. 1, 14 n.74 (1995) (collecting incidents from the 1980s and 1990s).