

RESOLVING JUDICIAL DILEMMAS

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ABSTRACT

The legal reasons that bind a judge and the moral reasons that bind all persons can sometimes pull in different directions. There is perhaps no starker example of such judicial dilemmas than in criminal sentencing. Particularly where mandatory minimum sentences are triggered, a judge can be forced to impose sentences that even the judge deems to be “immensely cruel, if not barbaric.” Beyond the direct victims of overly harsh laws, some courts have recognized that “judges who, forced to participate in such inhumane acts, suffer a loss of dignity and humanity as well.”

When faced with such a judicial dilemma—a powerful tension between the judge’s legal and moral reasons—the primary question is what a judge can do to resolve it. We argue that the two standard responses—sacrificing morality to respect the law (“legalism”), or sacrificing the law to respect morality (“moralism”)—are unsatisfying. Instead, this Article defends an underexplored third response: rather than abandoning one ideal to maximally promote the other, we argue that judges should seek to at

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The authors would like to thank Stephen Bero, Stephen Galoob, William Most, Vanessa Reid, and Connie Rosati for extremely helpful comments on earlier drafts of this article.

least minimally satisfy the demands of both. Judges should, in other words, look for and employ what we dub Satisficing Options. These are actions that enjoy sufficient support from both the legal reasons and the moral reasons, and thus are both legally and morally permissible—even if the acts in question would not strictly count as optimal by the lights of the law or morality.

This commonsensical response to the problem is not only underappreciated in the literature, but also has great practical import. Focusing on the sentencing context, this Article demonstrates that judicial dilemmas can be systematically resolved, mitigated or avoided through a range of concrete strategies that on their own or in conjunction can constitute Satisficing Options: these strategies include seeking out legally permitted but morally preferable interpretations of the law, expressing condemnation of unjust laws in dicta, and seeking assistance or cooperation from other actors to help defendants facing substantively unjust mandatory sentences. While these strategies can at times also go too far, we argue that in certain contexts, they are sufficiently defensible on both legal and moral grounds to be justifiable responses to judicial dilemmas. This article thus provides both a novel theoretical framework for understanding the justification of judicial responses to unjust laws, as well as a practical menu of options which judges can use to guide their responses to the judicial dilemmas they are increasingly likely to encounter within our criminal justice system.

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INTRODUCTION

In 1989, Andres Magana Ortiz illegally entered the United States of America.¹ He was fifteen. In the three decades since, he has led a quiet, productive, responsible life: he ran a successful coffee business in Hawaii, married a U.S. citizen, and fathered three children (all of whom are U.S. citizens).² On March 21, 2017, the U.S. government ordered Ortiz to report for removal in the next month.³ Ortiz applied for a stay from the district court, and when that was denied, he appealed to the U.S. Court of Appeals for the Ninth Circuit.⁴ His appeal was also denied.⁵

Judge Reinhardt’s concurring judgment in this decision was remarkable. He noted that “the government conceded during the immigration proceedings that there was no question as to Magana Ortiz’s good moral character”,⁶ that Ortiz is “currently attempting to obtain legal status on the basis of his wife’s and children’s citizenship, a process that is well underway,”⁷ and that it “was fully within the government’s power to once more grant his reasonable request” for a stay.⁸ In denying that request, “the government forces us”—that is, the judges and the court—“to participate in ripping apart a family”:⁹

We are unable to prevent Magana Ortiz’s removal, yet it is contrary to the values of this nation and its legal system. Indeed,

¹ *Magana Ortiz v. Sessions*, No. 17-16014, slip op. at 4 (9th Cir. May 30, 2017) (Reinhold, J., concurring), <http://cdn.ca9.uscourts.gov/datastore/opinions/2017/05/30/17-16014.pdf>.

² *Id.* at 4–5.

³ *Id.* at 5.

⁴ *Id.*

⁵ *Id.*

⁶ *Id.*

⁷ *Id.* at 6.

⁸ *Id.*

⁹ *Id.*

the government's decision to remove Magana Ortiz diminishes not only our country but our courts, which are supposedly dedicated to the pursuit of justice. Magana Ortiz and his family are in truth not the only victims. Among the others are judges who, forced to participate in such inhumane acts, suffer a loss of dignity and humanity as well. I concur as a judge, but as a citizen I do not.¹⁰

Judge Reinhardt's concurrence is remarkable in three respects. First, it candidly discusses the injustice of Ortiz's deportation. Second, for how candidly it discusses the complicity of the courts and "judges who, forced to participate in such inhumane acts, suffer a loss of dignity and humanity."¹¹ Finally, the decision is remarkable for the media attention it received, and the role it may well have played in leading to the Department of Homeland Security's decision to grant Ortiz an 11th hour reprieve of 30 days on June 6, 2017.¹²

Judge Reinhardt and his colleagues on the Ninth Circuit faced what we will call a *judicial dilemma*: a choice scenario in which a powerful tension arises between the judge's moral and legal reasons, with each group appearing to pull toward a different course of action. Regardless of whether you think the right resolution of this case was clear, we take it that there are many cases that are aptly described as judicial dilemmas. The central issue we will tackle in this paper is: Can judicial dilemmas be adequately resolved, and if so, how?

¹⁰ *Id.* at 7–8.

¹¹ *Id.*

¹² Safia Samee Ali & Maria Paula Ochoa, *Coffee Farmer Gets an 11th Hour Extension on Day of Deportation*, NBC NEWS, June 7, 2017, <http://www.nbcnews.com/news/latino/coffee-farmer-gets-11th-hour-extension-day-deportation-n770051>. Shortly after the reprieve ended in July, Ortiz was deported. William Cole & Susan Essovan, *Kona Farmer says goodbye to family ahead of deportation*, HONOLULU STAR ADVERTISER, July 8, 2017, <http://www.staradvertiser.com/2017/07/08/breaking-news/kona-coffee-farmer-says-goodbye-to-family-ahead-of-deportation/>.

Our first task in pursuing this issue will be to clarify what a judicial dilemma is. We will offer an account of the conceptual structure of judicial dilemmas below: briefly, our view is that judicial dilemmas are cases where the option for judges that is morally best (*i.e.* most supported by the moral reasons) comes apart from the option that is legally best (*i.e.* most supported by the legal reasons). A virtue of this account is that it is maximally general. As we show, it is compatible with a wide array of theoretical accounts of judicial dilemmas in the literature. Moreover, it does not just apply to, say, immigration law. This matters because judicial dilemmas can arise in a variety of areas of law. In fact, they are perhaps most pervasive in criminal contexts, where judges are frequently forced to make morally questionable decisions, especially in cases involving mandatory minimum sentencing provisions. Indeed, a decade ago, Judge Reinhardt himself lamented that such a provision required him to affirm a 159-year sentence that he described as “immensely cruel, if not barbaric.”¹³

¹³ *United States v. Hungerford*, 465 F.3d 1113 (9th Cir. 2006) (Reinhardt, J., concurring). In this case, Judge Reinhardt issued a concurring judgment that affirmed the “immensely cruel, if not barbaric” 159-year term of incarceration for Marian Hungerford, because this sentence was the mandatory minimum set by the relevant statutory provision (section 924(c)). *Id.* at 1120. Hungerford was an impecunious, unemployed 52-year-old woman who had no criminal record and suffered from a severe form of Borderline Personality Disorder. *Id.* at 1119. She was convicted of seven violations of section 924(c) for her “extremely limited” role in conspiring in and aiding and abetting several armed robberies—she had never held a gun. *Id.* Judge Reinhardt’s judgment in *Hungerford* illustrates one type of strategy for resolving judicial dilemmas: he *expressed* his condemnation of the law he was legally required to enforce. *See id.* at 1118-23. And in both cases, this strategy may have helped to yield welcome results. After a settlement agreement with the U.S. Attorney’s Office, Hungerford was subsequently resentenced to a 7-year term of incarceration that Chief District Judge Richard Cebull described as “no more nor less than necessary” for her convictions. *See* Clair Johnson, *Judge cuts 159-year sentence in casino robbery case*, BILLINGS GAZETTE, Oct. 27, 2010, http://billingsgazette.com/news/local/crime-and-courts/judge-cuts--year-sentence-in-casino-robbery-case/article_9c4c5966-e1e4-11df-b934-001cc4c03286.html. Indeed, Hungerford’s resentencing and release from prison perhaps partly resulted from the language in Reinhardt’s concurrence, but it is more likely, in the words of U.S. Attorney Mike Cotter, that this “just conclusion” was “the result of extraordinary efforts” by Judge

To frame our discussion, let us focus on *United States v. Angelos*—a similar judicial decision by a trial court—as our paradigm example of a judicial dilemma.¹⁴ In 2002, Weldon Angelos, a 22-year-old man with no criminal record, sold \$350 worth of marijuana to a police informant on three occasions.¹⁵ During two of these deals he was in possession of a Glock.¹⁶ When he was arrested, police found marijuana and more handguns in his apartment and other locations they searched.¹⁷ Mr. Angelos was offered a plea bargain that recommended a prison sentence of 15 years. He was told that if he refused the offer, he would be charged with additional offenses, including five counts of possessing a firearm in furtherance of a drug trafficking crime in violation of § 924(c), which in total could leave Mr. Angelos facing over 100 years of mandatory prison time.¹⁸

He refused the plea.¹⁹ At trial, he was convicted of thirteen drug, firearm, and money laundering offenses, as well as three violations of § 924(c).²⁰ In November 2004, Judge Paul Cassell of the U.S. Court for the District of Utah sentenced Mr. Angelos to “a prison term of 55 years and one day, the minimum that the law allows.”²¹ Judge Cassell himself described this sentence as “unjust, cruel, and even irrational.”²² So why did he impose it?

Cebull, along with Hungerford’s attorney Daniel Wilson and Assistant U.S. Attorney Jim Seykora. *Id.*

¹⁴ *United States v. Angelos*, 345 F. Supp. 2d 1227 (D. Utah 2004), *aff’d*, 433 F.3d 738 (10th Cir. 2006).

¹⁵ *Id.* at 1231.

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ *Id.* at 1231–32.

¹⁹ *Id.* at 1232.

²⁰ *Id.* (“The jury found Mr. Angelos guilty on sixteen counts, including three § 924(c) counts: two counts for the Glock seen at the two controlled buys and a third count for the three handguns at Mr. Angelos’ home.”).

²¹ *Id.* at 1230.

²² *Id.*

Because he had to. Although the U.S. Sentencing Guidelines recommended a sentence of 78-97 months' imprisonment for the 13 offenses under other provisions besides § 924(c),²³ Judge Cassell was bound by statute to add to this 55 additional years for the firearms offenses under § 924(c).²⁴ Section 924(c)(1)(A) provides that

any person who, during and in relation to any crime of violence or drug trafficking crime...uses or carries a firearm...shall, in addition to the punishment provided for such crime...be sentenced to a term of imprisonment of not less than 5 years.²⁵

Furthermore, Section 924(c)(1)(C) ratchets up the mandatory minimum sentences for subsequent violations of the statute:

In the case of a second or subsequent conviction under this subsection, the person shall...be sentenced to a term of imprisonment of not less than 25 years.²⁶

Thus, Mr. Angelos's three violations of § 924(c) carried an additional minimum sentence of 55 years: five years for the first violation of this section, and 25 additional years for each subsequent violation.²⁷ Cassell was deeply troubled by the severity of this required sentence in light of Mr. Angelos's comparatively minor misconduct,²⁸ and reduced the sentence for the 13 offenses under other statutes from 78-97 months to just a single day.²⁹ But this still left the additional 55 years' imprisonment for

²³ *Id.* at 1232.

²⁴ *Id.* at 1230 (finding that "this 55-year additional sentence is decreed by § 924(c)").

²⁵ 18 U.S.C. § 924(c)(1)(A).

²⁶ 18 U.S.C. § 924(c)(1)(C).

²⁷ *Angelos*, 345 F. Supp. 2d at 1230.

²⁸ *Id.* (stating that the court believed the sentence to be unjust, cruel and irrational).

²⁹ *Id.*

the three § 924(c) violations. Moreover, the court was compelled to reject Angelos's constitutional challenges to his sentence: both his argument that the sentence made "arbitrary classifications" in violation of the Fourteenth Amendment Equal Protection Clause,³⁰ and his argument that the sentence was cruel and unusual in violation of the Eighth Amendment.³¹

Judge Cassell's long and painstaking decision is evidence of the intractable dilemma he felt he faced. On the one hand, Judge Cassell's legal reasons required him to impose the applicable mandatory minimum sentence. The law was relatively clear on this point. But on the other hand, Judge Cassell also had weighty moral reasons³² not to impose a punishment that was, in his own words, "unjust, cruel, and even irrational."³³ Intuitively, over half a century of incarceration is disproportionate to the severity of Mr. Angelos's offense conduct; as the court noted, his minimum sentence is more severe than the maximum sentences for a number of violent offenses.³⁴ This disproportionality is, on many views, sufficient to make Angelos' sentence unjust.³⁵ Moreover, during his 55-year prison term, Mr. Angelos will be deprived of liberty,

³⁰ *Id.* at 1235; *see generally id.* at 1239–56.

³¹ *Id.* at 1256–60.

³² As we explain in Part I, there are several possible grounds or sources of these moral reasons. The harm to the defendant clearly is one. But another might be the duty to avoid being complicit in injustices done by others. Thus, a judge faced with a case like *Angelos* would plausibly have weighty moral reasons to avoid being complicit in the injustice of applying overly stringent mandatory minimum laws to a defendant such as Mr. Angelos.

³³ *Angelos*, 345 F. Supp. 2d at 1230.

³⁴ *Id.* at 1245, n.88 (comparing the minimum sentence for Angelos (738 months), to the maximum sentences for a kingpin of a major drug trafficking ring in which death resulted (293 months), an aircraft hijacker (293 months), a terrorist who detonates a bomb in public intending to kill bystanders (235 months), and a second-degree murderer (168 months)).

³⁵ Proportionality principles are widely endorsed in the philosophical literature on punishment. *See* Antony Duff & Zachary Hoskins, *Legal Punishment*, THE STANFORD ENCYCLOPEDIA OF PHILOSOPHY (2013).

social standing, and his right to vote.³⁶ He will be exposed to unacceptably high risks of serious sexual abuse,³⁷ and he could face the torturous conditions of solitary confinement for arbitrary reasons.³⁸ This is not to mention the harms Mr. Angelos's punishment imposes on others—such as the \$1.3 million bill to the taxpayer.³⁹ It is unclear that these harms are counterbalanced by, say, the general deterrent effects of Mr. Angelos's

³⁶ American Bar Association Criminal Justice Standards Committee, ABA STANDARDS FOR CRIMINAL JUSTICE, 3RD ED., COLLATERAL SANCTIONS AND DISCRETIONARY DISQUALIFICATION OF CONVICTED PERSONS 7 (2004), https://www.americanbar.org/content/dam/aba/publishing/criminal_justice_section_newsletter/crimjust_standards_collateralsanctionwithcommentary_authcheckdam.pdf (“convictions will expose [defendants] to numerous additional legal penalties and disabilities, some of which may be far more onerous than the sentence imposed by the judge in open court. These ‘collateral consequences of conviction’ include relatively traditional penalties such as disenfranchisement, loss of professional licenses, and deportation in the case of aliens, as well as newer penalties such as felon registration and ineligibility for certain public welfare benefits”); MICHELLE ALEXANDER, *THE NEW JIM CROW* 142 (2011) (“Once labeled a felon, the badge of inferiority remains with you for the rest of your life, relegating you to a permanent second-class status”); *Id.* at 153 (“Forty-eight states... prohibit inmates from voting while incarcerated for a felony offense [and the] vast majority of states continue to withhold the right to vote when prisoners are released on parole. Even after the term of punishment expires, some states deny the right to vote for a [long] period....”).

³⁷ A study by the Justice Department's Bureau of Justice Statistics found that in 2011-12, 4% of federal and state inmates reported experiencing sexual abuse during the past 12 months. U.S. Department of Justice, *Sexual Victimization in Prisons and Jails Reported by Inmates, 2011-12*, at 6 (May 2013), <https://www.bjs.gov/content/pub/pdf/svpjri1112.pdf>.

³⁸ Tim Heffernan & Graeme Wood, *The Wrong Box*, NAT. REV., April 20, 2015, <https://www.nationalreview.com/nrd/articles/416339/wrong-box>; Atul Gawande, *Hellhole*, THE NEW YORKER, March 30, 2009, <http://www.newyorker.com/magazine/2009/03/30/hellhole>.

³⁹ As Judge Myron Bright of the Eighth Circuit Court of Appeals wrote in *United States v. Hiveley* 61 F.3d 1358, 1363 (8th Cir. 1995), mandatory minimums require “excessively long” sentences that “not only ruin lives of prisoners and often their family members, but also drain the American taxpayers of funds which can be measured in billions of dollars.”

punishment, since drug trafficking is notoriously difficult to deter.⁴⁰

Of course, this only shows that laws imposing such mandatory minimums are themselves often unjust. Skeptics of judicial dilemmas may point out that it is still possible that judges also have weighty moral reasons to apply the law even when it is unjust. In some cases, it might be that a judge's all-things-considered moral duty is to obey even certain unjust laws. Nonetheless, we contend that *sometimes* the balance of a judge's moral reasons might require him not to apply specific immoral laws that are beyond the pale, in which case there would be a genuine conflict between the balance of the judge's moral reasons and the balance of his legal reasons.⁴¹ A case like *Angelos* is about as good a candidate for such a scenario as can be found in this country.⁴² So we will continue to treat it as our paradigm example of a judicial dilemma.

Cases like *Angelos* and the dilemmas they raise merit particular scrutiny. In part, this is because the conflict between judges' moral and legal reasons, as noted, is especially stark in criminal contexts involving mandatory minimums. But it is also warranted for two other reasons. First, judges have shown great ingenuity in exploring practical solutions to this type of judicial dilemma, so considering what judges have done or could do in criminal contexts is a profitable way to investigate what judges could do to resolve judicial dilemmas in other legal contexts. The second reason

⁴⁰ Estimates of this effect "are all over the place." Judge Jed S. Rakoff, *Mass Incarceration: The Silence of the Judges*, THE N.Y. REV., May 21 2015, <http://www.nybooks.com/articles/2015/05/21/mass-incarceration-silence-judges/>. Still, evidence does show that deterrence is largely ineffective vis a vis drug trafficking. See, e.g., Vanda Felbab-Brown, *Focused Deterrence, Selective Targeting, Drug Trafficking and Organized Crime: Concepts and Practicalities*, INT'L DRUG POLICY CONSORTIUM (Feb. 2013), <https://www.brookings.edu/wp-content/uploads/2016/06/drug-law-enforcement-felbabbrown.pdf>.

⁴¹ Regardless of whether one thinks a judge's moral and legal obligations can literally come into conflict, at the very least there often is a powerful *tension* between judges' moral reasons not to do injustice by applying unfair mandatory minimum laws, on the one hand, and their legal reasons to apply the law as written, on the other.

⁴² It is easy to imagine even more clear-cut examples from Nazi Germany, for instance. But our focus is the existing U.S. legal system.

is that we think judicial dilemmas in criminal contexts, and in particular in criminal sentencing, are likely to become more pervasive in the near future. This is due in part to Attorney General Jeff Sessions' Memorandum to Federal Prosecutors on May 10, 2017.⁴³ Sessions' memo directs federal prosecutors to "charge and pursue the most serious, readily provable offense."⁴⁴ That instruction marks a significant departure from efforts by former Attorney General Eric Holder to limit federal prosecutors in applying harsh mandatory minimum sentencing provisions to non-violent drug offenders.⁴⁵ Accordingly, judges appear likely to encounter the sort of judicial dilemmas we analyze in this article, in cases very much like *Angelos*, with increasing frequency in the years to come.

Some might quibble about whether *Angelos* really poses a judicial dilemma, strictly construed. While there is an interesting theoretical question about what constitutes judicial dilemma, which we address at length below, do not let this theoretical question distract from the crucial, but too often neglected practical question: *How, if at all, should judicial dilemmas be resolved?* This practical question arises as long as one thinks judicial dilemmas arise in systems like ours. It is this practical question that will be our primary focus in this Article.

There are some responses to this crucial question that we will not discuss at length, because we think that they are inadequate in important respects. One such response is to pass the buck by insisting that judges cannot resolve such dilemmas; only Congress can. We agree that the best state of affairs would be one in which Congress prevented judicial dilemmas from arising in the first place via legislative reform. For

⁴³ Attorney General Jefferson B. Sessions III, *Memorandum For All Federal Prosecutors on Department Charging and Sentencing Policy* (May 10, 2017), <http://i2.cdn.turner.com/cnn/2017/images/05/12/ag.memo.on.department.charging.and.sentencing.policy.pdf>.

⁴⁴ *Id.*

⁴⁵ Attorney General Eric H. Holder Jr., *Memorandum For All Federal Prosecutors on Department Charging and Sentencing Policy* (May 19, 2010), https://www.fd.org/sites/default/files/criminal_defense_topics/essential_topics/sentencing_resources/clemency/holdermemo.pdf.

instance, Congress could abolish mandatory minimums altogether, preventing judges like Cassell from facing judicial dilemmas in criminal sentencing. Although Congress came close last year to reaching an agreement that would remove or reduce mandatory minimums for many non-violent offenders, the bipartisan criminal justice reform effort appears to have stalled in the wake of the recent Presidential election.⁴⁶ Thus, we assume that Congress, given the current political climate, is unlikely to remove even the harshest mandatory minimums for the time being. This leaves judges with the important, unanswered question of what to do in the interim in response to judicial dilemmas in the criminal context.

Another inadequate response is for judges to opt out of facing judicial dilemmas by resigning in protest. Some judges have resigned in ways that can be interpreted this way, and such acts of protest would send a valuable message that reform is needed.⁴⁷ We raise some concerns about resignation as a response to judicial dilemmas below. But even if one is not persuaded by these responses, at the very least we think resignation is not a *generalizable* response to judicial dilemmas. If our legal system is to function at all, let alone function well, *some* officials must decide cases like *Angelos*. So the important question remains: what should those judges do when confronted with judicial dilemmas?

Our view about how judges should navigate judicial dilemmas in cases like *Angelos* is best understood in terms of how it departs from, and is more satisfying than, the two most obvious remaining responses. One option is for judges to be “legalists”, and just do whatever is legally best—to obey the law, pure and simple—despite the moral considerations to the

⁴⁶ Justin George, *Can Bipartisan Criminal-Justice Reform Survive in the Trump Era?*, THE NEW YORKER, June 6, 2017, <http://www.newyorker.com/news/news-desk/can-bipartisan-criminal-justice-reform-survive-in-the-trump-era> (“Last year, reformers on both sides agreed to support a proposed [federal] law that would relax mandatory minimum sentences,” but “[t]he bill stalled, then died.... (...) [A]s the contentious Presidential election neared its conclusion, the alliance started to come undone. (...) Since President Trump took office, the strain on the coalition has only intensified.”).

⁴⁷ See Nicole Hong, *John Gleeson, Prominent Brooklyn Federal Judge, to Step Down*, WALL ST. J. L. BLOG (Jan 4, 2016), <http://blogs.wsj.com/law/2016/01/04/john-gleeson-prominent-brooklyn-federal-judge-to-step-down/>.

contrary. Another option is for judges to just do what is morally best—which may well involve disobeying the law, perhaps in surreptitious ways—despite the legal considerations to the contrary. Each of these options requires the judge to sacrifice a standard that she is deeply committed to, be it morality or law. In contrast to both of these options, our view is that judges should seek to *satisfice* the demands of both morality and law: that is, to perform actions that are both morally and legally permissible, even if those actions are somewhat sub-optimal according to both morality and the law. We dub such responses *Satisficing Options*.⁴⁸ Although they may not be the very *best* alternative either by the lights of the law or by the lights of morality (*i.e.* enjoy maximal support from the moral reasons or the legal reasons), these Satisficing Options would still be *good enough* by the lights of both law *and* morality.

The fundamental problem we address is an instance of the core question in professional ethics generally: what should officials do when their general and role-based duties conflict? Some, like Prof. David Luban, allow that role-based duties must “be balanced against the moral reasons for breaking the role,” and officials should be “willing to deviate” from their role-based duties when doing so is required by moral “common sense.”⁴⁹ For others, like Prof. Bradley Wendell, the duty to be faithful to the law must be stronger than officials’ duties to do justice in particular cases, so that the legal system fulfills its fundamental roles of resolving social disagreements and providing equal treatment of citizens before the law.⁵⁰ As these arguments illustrate, much of the discussion in this literature is focused on whether officials (typically lawyers, rather than judges) should be moralists or legalists; the availability and assessment of Satisficing Options is neglected.

⁴⁸ See *infra* note 63 (discussing the origins of the term “satisficing”).

⁴⁹ DAVID LUBAN, *LAWYERS AND JUSTICE: AN ETHICAL STUDY* 125 (1988); David Luban, *Misplaced Fidelity*, 90 TEXAS L. REV. 673, 688 (2012); See also David Luban, *Freedom and Constraint in Legal Ethics: Some Mid-course Corrections to Lawyers and Justice*, 49 MD. L. REV. 424 (1990); see generally ARTHUR ISAK APPLBAUM, *ETHICS FOR ADVERSARIES: THE MORALITY OF ROLES IN PUBLIC AND PROFESSIONAL LIFE* (1999).

⁵⁰ See BRADLEY WENDEL, *LAWYERS AND FIDELITY TO LAW* (2010).

We think this is unfortunate. The existing focus, we suggest, is due largely to a climate in which the natural response to a judicial dilemma would be to maintain that a judge *can't* do anything but apply the law—often referred to as the “judicial can't.”⁵¹ We contend that the “judicial can't” rings hollow as a response to judicial dilemmas. Our basis for this contention is not the bold claim that the demands of morality are paramount, as moralists like Robert Cover famously argued in relation to antebellum judges applying the *Fugitive Slave Act*,⁵² rather, we make the mundane and in many ways more dialectically important complaint that there is a great deal more that judges *can* do in addition to “applying” the law. This reveals the limitation of Wendell's defense of fidelity to law as a fully general response to judicial dilemmas: if there are Satisficing Options, judges can do much more to promote justice in particular cases without violating their arguably stronger official, role-based duties. It is thus an advantage of our approach that it allows us to defend Satisficing Options that are morally *and* legally permissible, and that resolve judicial dilemmas, without requiring us to settle all debates in legal ethics between legalism and moralism, Luban, Wendell, Cover, and their many interlocutors.

Of course, our view would be of little interest if there *are* no Satisficing Options. If that were the case, judges would still face a hard choice between legalism and moralism. That would be a significant blow to our view. Given this, perhaps the most important task in this Article will be to explore what Satisficing Options look like in the context of mandatory minimums. In particular, we will consider five possible satisficing strategies: interpretative, expressive, assistive, cooperative, and suggestive strategies. These strategies can be pursued independently or in tandem. We think they are generally worth exploring, even if they may ultimately prove unworkable in particular cases.

⁵¹ See Scott Shapiro, *Judicial Can't*, PHILOSOPHICAL ISSUES (2001), (especially at p. 532).

⁵² ROBERT COVER, JUSTICE ACCUSED: ANTISLAVERY AND THE JUDICIAL PROCESS 199–222 (1975).

These strategies differ along two dimensions: first and foremost, in the type of activity that they require of judges, and second, in whether and how that activity involves interaction with other legal actors (such as the executive branch, prosecutors, or jurors). The first two strategies can be implemented by judges acting independently. *Interpretative strategies* involve seeking creative and legally permissible, if suboptimal, interpretations of the law to support more morally attractive legal outcomes. *Expressive strategies* involve applying the law while expressing condemnation of its iniquitous features. The remaining three strategies involve interaction with other legal actors. *Assistive strategies* involve advocacy on behalf of harmed parties to legal agents outside of the court system, such as calling for the executive to pardon defendants like Mr. Angelos. *Cooperative strategies* involve collaborating with other legal actors within the court system to seek morally acceptable outcomes, and may require legally permissible but suboptimal acts to create incentives for actors such as prosecutors to collaborate. Finally, *suggestive strategies* involve “nudging” other actors within the legal system—as opposed to collaborating with them—so that they independently use their discretion to produce a morally preferable solution of their own accord. For example, judges might seek out legally permissible, if admittedly suboptimal, means to prompt juries to consider nullifying the law in cases like *Angelos*.

We will discuss the extent to which each type of strategy genuinely counts as a Satisficing Option on its own, or perhaps in tandem with the other strategies that we listed above. To be clear, we do not defend the ambitious but implausible view that such Satisficing Options will be available in every instance of a judicial dilemma. As such, we do not claim that this Article offers an exhaustive answer to the question of what judges should do to resolve judicial dilemmas. Perhaps some judges will be stuck choosing between moralism or legalism; we cannot rule that out. However, we think that the Satisficing Options we discuss are quite widely available in a variety of legal contexts, and where they are available they constitute the judge’s best prospect for safely navigating the risks posed by judicial dilemmas. As such, our view offers significant progress towards answering our central question.

The order of business will be as follows. In Part I, we provide a

precise account of the conceptual structure of the conflict between judges' moral and legal reasons where mandatory minimums are concerned. We map out the sources of the obligations at issue and explain how they interact. We then provide a clearer account of the type of Satisficing Options we favor, and explain why they constitute a resolution of the judicial dilemma.

In Part II, we then discuss the five types of strategies just mentioned, which judges have employed or could employ in response to judicial dilemmas. We consider each one in relation to criminal cases involving mandatory minimum sentencing provisions. For example, in such contexts, the *interpretive strategy* might involve construing applicable Constitutional provisions in creative ways to soften the impact of mandatory minimums, while the *cooperative strategy* may involve delaying proceedings in extreme cases to coax prosecutors into dropping certain excessive criminal charges that carry harsh mandatory minimum sentences that are out of place in the case at hand. For each of the five strategies, we discuss the extent to which they actually amount to a Satisficing Option of the sort we favor. Our hope is that this Part will offer a partial menu of concrete options for judges to consider when they see a judicial dilemma on the horizon.

In Part III, we consider the biggest source of opposition to our advocacy of Satisficing Options: that they constitute, or risk, intolerable erosions of the rule of law. We agree that protecting rule of law values is of great moral importance. As such, strategies which are morally preferable along some other dimension (for instance, by promoting justice to particular defendants) might ultimately be morally impermissible if they constitute a sufficiently serious violation of the rule of law. However, we contend that this does not rule out at least some of the strategies that we consider, because (a) our advocacy of these strategies can be restricted in simple ways that significantly attenuate concerns about the erosion of rule of law values, and (b) in some contexts, the strategies that we advocate on balance promote rule of law values.

Finally, the Conclusion briefly draws out some lessons from the foregoing discussion of the various strategies judges might adopt in the

face of judicial dilemmas involving mandatory minimums. Our contention is that while there may be no silver bullet for resolving any and every judicial dilemma that arises, adopting a combination of some of the above strategies would go a long way toward mitigating the injustice of mandatory minimums while allowing judges to sufficiently comply with both their moral responsibilities and their legal duties. Rather than making legal sacrifices to attain moral perfection or making moral sacrifices to attain perfection in the eyes of the law, we submit that judges facing judicial dilemmas should chart a middle course: Seek out options that are at least *sufficiently good* by the lights of both morality *and* law. Perfection is the enemy of the good, as the old saying goes. This is true not only for statesmen and craftsmen, but also for judges facing judicial dilemmas.

I. THE CONCEPTUAL STRUCTURE OF JUDICIAL DILEMMAS

To ground and clarify the subsequent discussion, it will help to proceed with an account of the conceptual structure of judicial dilemmas and a corresponding account of what it takes to *resolve* a judicial dilemma. We will provide accounts of each in this section. Section A offers a rough sketch of the conceptual structure of judicial dilemmas and our favored approach to resolving them, while Section B refines this account and Section C considers crucial theoretical questions about the framing device we use to explain how judicial dilemmas operate. Finally, Section D provides an overview of the strategies for resolving judicial dilemmas we will explore in depth.

A. A SIMPLE MODEL OF JUDICIAL DILEMMAS AND HOW TO RESOLVE THEM

Any passably precise account of such topics will inevitably have to draw on framing devices that will be somewhat controversial; but most of the framing devices we employ here are not ones we are especially firmly wedded to, so we should not be distracted by such controversies. Our subsequent arguments can be easily translated into other analytical

frameworks, or subject to different interpretations, and we are happy to adopt a different conceptual structure should it prove more advantageous.

Our central framing device, then, will be the notion of a reason: a consideration that counts in favor of an action.⁵³ We will also appeal to the now familiar distinction between *moral* and *legal* reasons.⁵⁴ We will not offer an account of this distinction as we wish to be ecumenical, but some illustrative examples can be used to glom onto these intuitive notions. That a child is starving overseas is a moral reason to give to charity, but not a legal reason to give to charity; the law is silent on private philanthropy. By contrast, there are strong legal reasons not to open someone else's mail (doing so can be a felony)⁵⁵ even if the letter is clearly just an unwanted ad and opening it would be morally innocuous (or at least trifling). Moral and legal reasons thus come apart.⁵⁶

If moral and legal reasons come apart, it is at least conceptually possible that one can face decisions where what is morally best (*i.e.* most

⁵³ See, e.g., DEREK PARFIT, ON WHAT MATTERS: VOLUME ONE 1 (2011) ("Facts give us reasons when they count in favour of our having some belief or desire, or acting in some way. When our reasons to do something are stronger than our reasons to do anything else, this act is what we have most reason to do, and may be what we should, ought or must do.") (emphasis omitted); THOMAS SCANLON, WHAT WE OWE TO EACH OTHER (1998).

⁵⁴ For an extensive discussion of the role legal reasons can play in understanding other legal notions such as precedent, see John Horty, *Rules and Reasons in the Theory of Precedent*, 17 LEGAL THEORY 1 (2011); JOHN HORTY, REASONS AS DEFAULTS (2012). For more general discussion of 'legal reasons', and how they may differ from 'moral reasons', see Scott Shapiro, *What is the Internal Point of View*, 75 FORDHAM L. REV. 1157, 1161-63 (2006), and SCOTT SHAPIRO, LEGALITY 184-88 (2011). But see David Enoch, *Reason-Giving and the Law*, in OXFORD STUDIES IN THE PHILOSOPHY OF LAW 1, 17, n. 28 (Leslie Green & Brian Leiter eds., 2011) (arguing that there is nothing special about legal reasons); and cf. Scott Hershovitz, *The End of Jurisprudence*, 124 YALE L. J. 1160, 1194 n. 55 (2016).

⁵⁵ 18 U.S.C. § 1702 (defining the crime of "obstruction of correspondence").

⁵⁶ We take this position to be intuitive, but not entirely uncontroversial. To say that moral and legal reasons come apart is to take a stand against the view that legal reasons just are moral reasons one has because of the law. (The latter is the analog of Greenberg's view about legal duties. See generally Mark Greenberg, *The Moral Impact Theory of Law*, 123 YALE L. J. 1288 (2014).)

supported by the moral reasons) and what is legally best (*i.e.* most supported by the legal reasons) come apart by non-negligible margins. When judges face such decisions in determining whether to obey or disobey the law, they face a judicial dilemma.

We can make this more precise in two stages: the first clarifies the structure of a judicial dilemma and the second elucidates what it is to resolve a dilemma. To begin with, then, we can represent the two most obvious actions that a judge might take in cases like *Angelos*. Some scholars—the *moralists*—argue that judges should engage in *disobedience* in such cases. This is what Jeffrey Brand-Ballard calls “lawless judging”: it can involve willfully misinterpreting and misapplying unambiguous laws to reach morally preferable outcomes (perhaps only in the view of the judge).⁵⁷ In claiming that judges should sometimes engage in disobedience, moralists in effect argue that judges should do what is morally best even if it is legally worst. In the terminology we adopt, this option can be labeled *disobedience*. Other writers—the *legalists*—might advocate for what we will call *pure obedience*. J.D. Mabbott, for instance, famously argued that punishment is a “purely legal issue,” such that judges should simply apply the law when punishing any particular defendant, *and that’s it*. Judges ought to do so because it is legally best, regardless of the moral reasons at play.⁵⁸

For the sake of the argument, let us grant the moralist that disobedience is morally best, and let us grant the legalist that pure obedience is legally best. Now we can represent (a simplified instance of) the structure of a judicial dilemma by representing how these options are evaluated according to moral and legal reasons on a scale of 0 (worst) to 10 (best):

	DISOBEDIENCE	PURE OBEDIENCE
MORAL REASONS	10	0
LEGAL REASONS	0	10

⁵⁷ JEFFREY BRAND-BALLARD, *LIMITS OF LEGALITY: THE ETHICS OF LAWLESS JUDGING* (2010).

⁵⁸ J.D. Mabbott, *Punishment*, 48 *MIND* 152, 152–54 (1939).

If a judge faced a decision with this structure, we think that there is an intuitive sense in which neither the moralist nor the legalist offers a satisfactory way to *resolve* the dilemma. Indeed, if a judge is forced to choose between these options, her position is tragic: she is doomed to score terribly according to one standard that she is deeply committed to: morality or law.

Of course, judges rarely if ever face decisions quite like the one above. This representation of a judicial dilemma is too simple in two main respects. First, there are more (moral and legal) reasons at play than the simple table above suggests. In particular, morality is obviously not wholly opposed to pure obedience, and—less obviously—the law is not wholly opposed to some disobedience. Thus, on the one hand, there are plenty of familiar moral reasons for judges to apply the law, which may even give judges a *prima facie* moral duty to apply the law (even when it is somewhat unjust).⁵⁹ On the other hand, philosophers such as Brand-Ballard have emphasized that there are legal considerations that at least can militate in favor of some disobedience, such as the judicial oath to do *justice*.⁶⁰ Moreover, a judge might face a conflict between different provisions of law. For instance, the judge might be convinced that a particular statute is unconstitutional, even though a higher court might have disagreed. This is another way in which one might contend that the judge believes there are legal reasons in favor of disobedience.⁶¹ In light of this, a more accurate representation of actual judicial dilemmas might be this:

⁵⁹ M.B.E. Smith, *Is There a Prima Facie Obligation to Obey the Law?*, 82 YALE L. J. 950 (1973).

⁶⁰ BRAND-BALLARD, *supra* note 57; Jeffrey Goldsworthy, *The Limits of Judicial Fidelity to Law: The Coford Lecture*, 24 CANADIAN J. L. & JURISPRUDENCE 305 (2011).

⁶¹ Of course, the law judicial system provides a safe outlet in such cases: namely, the option for the judge to write a dissenting opinion rather than engage in outright disobedience of the higher court's ruling.

	DISOBEDIENCE	PURE OBEDIENCE
MORAL REASONS	10	4
LEGAL REASONS	2	10

Notably, even in such messier decision contexts, it is still the case that one option is morally best but legally worst, and vice versa. So this complication makes the picture of a judicial dilemma more accurate, but not less concerning: moralistic views still demand that judges perform acts that are worst according to legal reasons, and *mutatis mutandis* for legalistic views and moral reasons. Neither choice *resolves* the dilemma.

The second way in which the above tables are too simple is that there often are more options available than doing what is morally best or what is legally best. For instance, instead of obeying or disobeying the law, judges can simply resign at an earlier point in time. This is frequently recognized, but widely disparaged: it does not *resolve* the dilemma, because it just *avoids* the dilemma. To illustrate this, consider a putative instance of a moral dilemma: a young Frenchman during World War II might have to choose between staying at home to help his ailing mother and leaving home to join the frontlines of the French Resistance.⁶² The Frenchman could avoid (rather than resolve) this dilemma by choosing to do neither: he could commit suicide. Judicial resignation is in some ways not unlike suicide. The judge faces a hard choice between two options that are supported by different reasons. Resignation just allows the judge to opt out of the system and avoid that hard choice. (There are also moral reasons that militate against resignation: it depletes the pool of conscientious and competent judges, for example.) We will ignore resignation in what follows, as we want to consider options that *resolve* judicial dilemmas.

This takes us to the second stage of our framework: conceptually, what is it to resolve a judicial dilemma? A central contention in what follows will be that there are options—alternatives to disobedience, pure obedience, and resignation—that resolve judicial dilemmas. What does

⁶² JEAN-PAUL SARTRE, *EXISTENTIALISM AND HUMAN EMOTIONS* 24–26 (1957).

that mean?

Think of moral dilemmas once more. Imagine that the young Frenchman had a third option: he could live in a house on the outskirts of his village where he could (a) support the resistance to a slightly lesser degree by, say, secretly printing pamphlets *and* (b) frequently check in on his ailing mother. This is not as good for the Resistance, or as good for his mother. But plausibly, it is good enough for both: it *satisfices* with respect to both types of demands but does not *maximize* either.⁶³ This, we claim, would resolve his moral dilemma.

Likewise, we think that *if* there is an option that satisfices the judge's moral and legal reasons,⁶⁴ it would resolve the judicial dilemma even if that option is neither morally nor legally optimal. Such an option need not be *best* by the lights of morality or law, but it is *good enough* by the lights of both.

Indeed, there might be several such options in a given case. After all, we might think most real-life cases present a range of options on the continuum between pure legal obedience and pure disobedience. Typically, there will be a range of actions judges can take where some conflict less flagrantly with the law than others. For instance, a decision that flatly contradicts the text of a statute might be far towards the pure disobedience end of the spectrum, while stretching a statutory term beyond what might seem natural may still amount to disobeying the law,

⁶³ H.A. Simon, *Rational Choice and the Structure of the Environment*, 63 PSYCH. REV. 129, 136 (1956) (introducing, for the first time, the notion of satisficing). The term is also widely used in the philosophical literature on consequentialism. See, e.g., Michael Slote & Philip Pettit, *Satisficing Consequentialism*, 58 PROCEEDINGS OF THE ARISTOTELIAN SOCIETY 139 (1984); Walter Sinnott-Armstrong, *Consequentialism*, STANFORD ENCYCLOPEDIA OF PHILOSOPHY (2015) (discussing arguments for and against satisficing consequentialism). Our view does not rely in any way on the truth of satisficing consequentialism. We merely draw inspiration from the very basic concept underlying these theories.

⁶⁴ Our talk of an action's "satisficing the judge's moral and legal reasons" is shorthand for an action that *exemplifies the satisficing strategy with respect to the applicable moral and legal reasons* (or standards)—*i.e.* is an action that is sufficiently (if not optimally) good with respect to the relevant kinds of reasons (or standards).

but in a less flagrant way that lies closer to the obedience end of the spectrum. Thus, a more realistic picture of a judicial dilemma might be this:

	PURE DISOBEDIENCE	SATISFICING A	SATISFICING B	PURE OBEDIENCE
MORAL REASONS	10	8	7	4
LEGAL REASONS	2	7	9	10

We take it to be intuitive that *if* there are Satisficing Options, then there is an important sense in which judges ought to take them.⁶⁵ Crucially, we do not claim that judges ought to take this option because they must maximize the satisfaction of moral and legal reasons. This view that one ought to “maximize all reasons” might be one possible view that some might endorse, but we do not. In other words, we do not defend Satisficing Option B in the table above because its total score (16) is greater than the total for Satisficing Option A (15), or Pure Disobedience (12) or Pure Obedience (14). To defend such a claim, we would have to supply some account of how we can meaningfully compare and aggregate moral and legal reasons on a single scale, and we are not confident that such comparisons can be meaningfully made.⁶⁶ Rather, our claim is that judges ought to take such options because they are good enough by the lights of *both* relevant normative standards that judges ought to take seriously in judicial deliberations. This only requires that we make

⁶⁵ One might ask: in what sense of “ought”? Morally, the judge ought to engage in disobedience and legally the judge ought to engage in pure obedience (*ex hypothesi*). One way to resolve this issue that we are attracted to is to claim that the answer is: *rationally* the judge ought to take a Satisficing Option. We think this answer is plausible so long as we have a specific sense of rationality in mind. See, e.g., Amelia Hicks, *Moral Uncertainty and Value Comparison*, 13 OXFORD STUDIES IN METAETHICS (forthcoming) (2018).

⁶⁶ Ruth Chang, *Value Incomparability and Incommensurability*, in THE OXFORD HANDBOOK OF VALUE THEORY 1, 5 (Iwao Hirose and Jonas Olson, eds., 2015).

meaningful comparisons between moral reasons and moral reasons, and between legal reasons and legal reasons; it does not require comparisons between moral and legal reasons. Accordingly, one important motivation for focusing on Satisficing Options as a distinct approach to resolving judicial dilemmas is that one can identify them without needing to compare, aggregate or trade off moral and legal reasons against each other. Satisficing Options can be identified even if moral and legal reasons are not strictly commensurable: all one needs to do is to ask which actions sufficiently meet the demands of the law, considered alone, and sufficiently meet the demands of morality, considered alone.

Thus, our view is that if both Satisficing Options A and B in the above table are *good enough* by the lights of the law and good enough by the lights of morality, then *either* Satisficing Option A *or* Satisficing Option B could be a defensible way to resolve the judge's dilemma. That is, assuming either one would pass muster under both of the applicable normative standards the judge is committed to (perhaps both law and morality required at least a score of 7 to be at least defensible), then either one could be adopted by a reasonable person—even if reasonable minds might differ as to whether Satisficing Option A or Satisficing Option B is the strictly the best resolution to the dilemma. Accordingly, our view is quite minimal: we claim only that *if* there are Satisficing Options (*i.e.* ones that fare sufficiently well both by the lights of the law and by the lights of morality), then judges ought to take one of them. Further than this we will not venture here.

B. REFINING THE MODEL

Even this more sophisticated model of Satisficing Options is still too simple in crucial ways. The above tables misleadingly suggest that a judge encounters judicial dilemmas as isolated decision-points in which she considers a range of options simultaneously and determines which, if any, amounts to a Satisficing Option. Thus, to complete our account, note that in reality, a judge's role in any given case is temporally extended: she faces a series of complex choices wherein what is morally best may depart

from what is legally best. The interaction between these choices is often significant. A determination of the admissibility of crucial evidence at t_1 can significantly alter the legal options available to the jury in determining whether to convict at t_2 and thus how the judge may sentence at t_3 . Given this, it would be more accurate to say that the appropriate targets of assessment in judicial ethics should not be limited to individual choices at particular points in time, but should also include *sequences* of such choices over time. In short, the relevant options display a diachronic structure.⁶⁷

Thus, one particular judicial action might not qualify as a Satisficing Option in isolation, but it could still figure into a defensible package deal that together amounts to a Satisficing Option. Indeed, one core component of such a satisficing package might be doing something that is legally and morally permissible, but sub-optimal, in order to *avoid* having to face a deeper conflict between morality and law at a later point in time; a somewhat loose way of describing such actions would be that they alleviate or preclude judicial dilemmas before they arise. In addition to seeking to resolve judicial dilemmas after they arise, the underlying interests and values at stake can give judges reason to seek to minimize the risk of encountering judicial dilemmas in the future. This is, of course, particularly pressing where judges have reason to anticipate the emergence of judicial dilemmas in discrete contexts (say, in a particular class of immigration cases, or with respect to sentencing or guilty pleas). As a result, a package of steps that together comprise a Satisficing Option need not involve only *ex post* steps to extricate oneself from an existing judicial dilemma, but can also incorporate *ex ante* steps to block such dilemmas from arising downstream.

Accordingly, the structure of Satisficing Options might end up being quite complex in practice, and nothing we say below is meant to diminish this complexity. In the next Part, we will present a range of possible strategies aimed at resolving judicial dilemmas, and we will discuss the extent to which they might or might not amount to Satisficing

⁶⁷ This point is familiar from work on deontic logic. *See, e.g.*, FRED FELDMAN, *DOING THE BEST WE CAN: AN ESSAY IN INFORMAL DEONTIC LOGIC* (1986).

Options on their own, while also considering the ways in which some of them might be combined to make up a temporally extended sequence that constitutes a Satisficing Option.

In taking the view that if there are Satisficing Options, judges ought to take them, we do not also commit ourselves to the contentious claim that there will *always* be Satisficing Options. In the next Part, we will defend the view that there are often such options. Our strategy will be to focus on criminal contexts and identify courses of action that satisfy the moral and legal demands on judges, and then note that these strategies generalize to many other legal contexts. It could be argued that some of these courses of action are not genuine Satisficing Options. And it could be argued that some of the Satisficing Options also do not generalize to other legal contexts. We are open to such views about the details of our approach, as we are decidedly not trying to establish that all judicial dilemmas will be resolvable. Rather, we grant that some judicial dilemmas may well remain irresolvable despite all we say, in which case there remains a further question—which we do not attempt to answer in this article—about whether judges should prioritize morality or law.

C. DEFENDING THE PRESUPPOSITIONS OF THE MODEL

Having offered this account of the conceptual structure of judicial dilemmas, and of resolving judicial dilemmas, we can now say more about our choices with respect to the framing device of conflicting moral and legal reasons. Why have we appealed to moral and legal reasons rather than *duties*? Appealing to duties would perhaps be a more traditional framing device, and if one likes, one can translate our talk of reasons into talk of duties by appealing to, say, Joseph Raz's famous analysis of duties in terms of reasons.⁶⁸ Nonetheless, we think that appealing to reasons allows for a more fine-grained analysis in at least four respects.

First, there are plausible sources of moral reasons that are not

⁶⁸ JOSEPH RAZ, PRACTICAL REASON AND NORMS 76 (1975) (arguing that moral duties can be understood as exclusionary reasons).

plausible sources of moral duties. For instance, judges plausibly have moral reasons to maintain their own integrity, even though it is contentious that one can owe moral duties to *oneself*.⁶⁹ Or perhaps judges have reasons to take some steps at some point to avoid judicial dilemmas (or reduce the frequency), even if they do not have a duty to do so on any particular occasion.

Second, there are also plausible instances in which judges can fail to do what they have most legal reason to do without violating any legal duties. For instance, Hart argued that judges have “interstitial discretion” in interpreting ambiguous sources of law,⁷⁰ and this might permit them to adopt a morally preferable interpretation even when other interpretations are better supported by legal reasons. Thus, adopting the best moral interpretation might be only legally second-best, but still perhaps not legally impermissible. Such a scenario is easier to capture by talking in terms of reasons, as opposed to duties.

Third, appealing to legal reasons renders it easier to make a detailed comparison between a wide array of alternatives. For instance, it may well be that most of the moral reasons that favor pure obedience (but not pure disobedience) also favor Satisficing Options, and most of the moral reasons that favor pure disobedience (but not pure obedience) also favor Satisficing Options. This would be much harder to represent clearly using talk of duties. Hence our talk of reasons instead.

Finally, for any view about what judges should do regarding conflicts between morality and law, there will be *epistemic* questions about when they do and do not have sufficient access to moral and legal status of different decisions. We will not present a full answer to that issue

⁶⁹ See, e.g., Kurt Baier, *Moral Obligation*, 3 AMERICAN PHILOSOPHICAL QUARTERLY 224, 225 n. 27 (arguing against the notion of self-regarding duties); Dennis Anthony Rohatyn, *Self-Regarding Duties Again*, 5 CRITICA 117 (1971) (responding to Baier’s argument and defending the idea of self-regarding duties).

⁷⁰ H.L.A. HART, CONCEPT OF LAW 124–47 (1994) (arguing that judges have discretion to fill in gaps left by vague laws with an open texture); see also *id.* at 259 (summarizing Hart’s view that “courts exercise a genuine though interstitial law-making power or discretion in those cases where the existing explicit law fails to dictate a decision”).

here since it is a difficulty all theorists face equally. But our framework in terms of *reasons* rather than duties may help here since there is considerable work on this issue that proceeds in terms of reasons (particularly, what it takes for an agent to *have* or *possess* a reason).⁷¹ Within our framework, we can appeal to well-developed general answers to these hard questions about epistemic access; frameworks that proceed in terms of duties do not have this advantage. We will not dwell on this advantage, however. As noted, questions about judges' epistemic access to what morality and the law require are a challenge on all views.

Some might further object to our framing the discussion in terms of legal versus moral reasons. There is, after all, a range of theories, or interpretations, of the nature of moral and legal reasons. For instance, some influential theorists like Professors Mark Greenberg and Scott Hershovitz contend that legal reasons are simply one type of moral reasons.⁷² So are we in trouble for distinguishing between moral and legal reasons?

We think not. Our account of Satisficing Options and the discussion below of different approaches to judicial dilemmas in the sentencing context can straightforwardly be translated into one's preferred view about the nature of legal and moral reasons. Thus, if one thinks that legal reasons are simply a species of moral reasons, there would be no difficulty in recasting our concerns entirely *within* the domain of morality (*i.e.* between two groups of moral reasons), rather than as a conflict between morality and law. If our concerns are recast in any such way, a conflict between some categories of reasons will remain. Some might still worry that this would make the motivation behind satisficing solutions to

⁷¹ See, *inter alia*, Mark Schroeder, *Having Reasons*, 139 PHILOSOPHICAL STUDIES 57 (2008); Mark Schroeder, *What Does it Take to 'Have' a Reason?*, in REASONS FOR BELIEF (Andrew Reisner & Anglich Setglich-Petersen eds., 2011); Errol Lord, *Having Reasons and the Factoring Account*, 149 PHILOSOPHICAL STUDIES 238 (2010), and *The Coherent and the Rational*, 55 ANALYTIC PHILOSOPHY 151 (2014), and Daniel Whiting, *Keep Things in Perspective: Reasons, Rationality, and the A Priori*, 8, JOURNAL OF ETHICS & SOCIAL PHILOSOPHY 1 (2014).

⁷² See footnotes 49 and 51 above and surrounding text.

such conflicts dissipate, but we are not convinced that this is the case. If we take seriously that there are different types of moral reasons, it is far from clear that they are easily commensurable, such that it is appropriate to always aim to maximize the aggregate of all the applicable reasons. Our focus on Satisficing Options is motivated in part by the desire to figure out how to approach and resolve judicial dilemmas without needing the relevant groups of reasons to be strictly commensurable or capable of aggregation. As a result, we think that both the underlying conflict and the motivations behind Satisficing Options remain intact if one interprets judicial dilemmas in a different way than we do or adopts some other view on the nature of legal and moral reasons than the one we used in framing our account above. This is, we think, to be expected: little of substance should hang on one's choices over dispensable framing devices.

D. PREVIEWING THE MENU OF SATISFICING OPTIONS

Let us turn, now, to Satisficing Options themselves. In what follows, we will discuss the relative merits of five kinds of Satisficing Options that we think can resolve judicial dilemmas. We do not take a stand on which of these options is best, all things considered. We think many of them are compatible, and indeed complimentary, rather than competing. Moreover, we do not take ourselves to bear the burden of establishing that each and every one of the strategies we discuss constitutes a genuine Satisficing Option: we aim to show that some such options exist by charting some theoretically neglected terrain. Before we discuss the details of each strategy and whether it constitutes a genuine Satisficing Option, let us outline them up front for the sake of clarity.

The first two involve strategies that judges can successfully implement on their own, without the aid of other actors. First, we will discuss *interpretive strategies*. Under this approach, the judge seeks to resolve the dilemma by putting in effort and creativity to seek an interpretation of the applicable legal materials that would be more morally attractive than the Pure Obedience option (*i.e.* applying the simplest, most legally uncontroversial interpretation, which might be less than morally

ideal). Second, we will consider *expressive strategies*. This approach combines Pure Obedience with actions that express the judge's moral disapproval of the applicable legal regime.

The next three strategies involve the judiciary interacting in different ways with different legal actors. Thus, the third option we will discuss covers *assistive strategies*. This approach also combines Pure Obedience with further actions—in this case, actions by the judge that are aimed at assisting or advocating on behalf of the defendants appearing before the court (or on behalf of other parties who are directly impacted by the judge's decisions). This strategy focuses on seeking assistance for defendants or other impacted parties from legal actors outside the court system: primarily, the executive.

Fourth, we will look at *cooperative strategies*. These strategies attempt to engage with legal actors within the court system to cooperate in finding a morally preferable solution to the case at hand that nonetheless are legally permissible. Most obviously, a sentencing judge seeking cooperation from the prosecutor to impose a lesser sentence would be one example; for this strategy to succeed, the judge and prosecutor need to cooperate, or act in concert. In this context we also discuss ways in which judges can offer carrots and sticks to other legal actors, especially prosecutors, to ensure that they are willing to cooperate and collaborate in finding a legally and morally satisfactory outcome.

Finally, we will look at *suggestive strategies*. This ambitious strategy also involves interacting with legal actors within the court system to use their discretion to produce a morally preferable solution. However, cooperative and suggestive strategies differ because the latter do not require other agents to act *in concert* with judges. Juries, for instance, may nullify the law of their own accord—this is not a cooperative venture. For judges to suggestively *prompt* juries to nullify the law would be an illustrative instance of the suggestive strategy. This way of suggesting or nudging other legal actors is likely to be legally dubious or controversial at times, but nonetheless might qualify as a permissible Satisficing Option if it is pursued in the right way. We will discuss how a judge might walk this tightrope in particular practical contexts.

As it will become clear, many of the strategies we consider are aimed at combining a strict application of the law (Pure Obedience) with other actions—whether extra-judicial or within the adjudicatory context—that aim to promote justice in a broad sense. Other strategies we discuss involve using the flexibility that legal doctrine itself provides as a way to pursue morally just outcomes.

We acknowledge that a natural concern with this project is that judges in principle could go too far in pursuit of morality as they see it. There are tremendous benefits to civil society in terms of fairness and stability that stem from the courts' powerful commitment to the rule of law. One might wonder whether our project is in tension with rule of law values.

We are mindful of this risk, to be sure. But we think it is still worthwhile to inquire into how far judges might go to combat clear injustices caused by laws that there is not the political will to remove *without* substantially undermining the rule of law. Thus, our project takes for granted a judicial climate like ours with a vigorous commitment to rule of law values. We think that the norms of judicial ethics that are widely endorsed in the U.S.⁷³ serve as a powerful counterbalance to the risk to the rule of law that, in other systems, might be posed by judges seeking to comply with morality as they perceive it. Against the backdrop of widespread commitment by judges to rule of law values, however, there is utility in asking what Satisficing Options might be available to help judges adequately comply both with their legal and moral reasons when faced with a judicial dilemma. In other less rigorous judicial climates with a substantially weaker commitment to the rule of law, we would not necessarily endorse some of the strategies for resolving judicial dilemmas

⁷³ See, e.g., UNITED STATES COURTS, CODE OF CONDUCT FOR UNITED STATES JUDGES, Canon 2(A), <http://www.uscourts.gov/judges-judgeships/code-conduct-united-states-judges#b> (“Respect for Law. A judge should respect and comply with the law and should act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary.”).

discussed in this paper (perhaps especially the bolder ones).⁷⁴ But we are not in such a judicial climate. Thus, we intend our discussion of Satisficing Options to be confined to systems like ours where a strong commitment to the rule of law can be taken for granted. With this caveat, let us begin to consider the strategies judges might reasonably employ in order to resolve judicial dilemmas.

II. STRATEGIES TO RESOLVE JUDICIAL DILEMMAS

A. INTERPRETATIVE STRATEGIES

When faced with dilemmas between the applicable moral and legal reasons, the most natural strategy a judge might take to resolve it is to seek out a plausible interpretation of the law in the case at hand that would also be acceptable by the lights of morality. We call this the *interpretive strategy*. Under this approach, the judge seeks to resolve her dilemma by exerting effort and creativity to find an interpretation of the relevant legal materials that is more morally attractive than Pure Obedience. “Pure Obedience” here refers to the least legally controversial interpretation of the legal materials (*i.e.* the resolution that is best supported by the legal reasons), which is assumed to be morally problematic (*i.e.* is disfavored by the moral reasons). The interpretive strategy recommends searching for a legally available interpretation of the law that would yield outcomes that are significantly more morally attractive than Pure Obedience.

To illustrate how the interpretive strategy operates in practice, we’ll consider in detail how it can be used in one of our core instances of

⁷⁴ Indeed, note that where the rule of law concerns are paramount and decisively outweigh all other moral considerations, one might think there would no longer be any judicial dilemma to resolve—even if the judge believes she is faced with a somewhat unjust law. We defined a judicial dilemma as a case faced by a judge where what is most supported by the moral reasons comes apart from what is legally best. If rule of law considerations are decisive, however, then there would arguably be no divergence between what is morally and legally best. The morally best thing to do would just be to follow the best legal course of action (*i.e.* Pure Obedience).

the judge's dilemma. In the Introduction, we saw the judge's dilemma squarely presented in cases involving the troublingly harsh mandatory minimum sentences that are demanded by federal criminal law. To resolve this dilemma, judges might apply the interpretive strategy to seek out ways to avoid imposing the relevant mandatory minimums. Toward this end, they might entertain bold legal theories that provide the grounds for striking down the applicable mandatory minimum sentencing provisions as unconstitutional.

We will discuss the prospects for two common constitutional challenges to mandatory minimums of the sort that were involved in *Angelos*. First, some argue that such mandatory minimums violate the Eighth Amendment ban on cruel and unusual punishment. Second, others argue that some mandatory minimum provisions are void for vagueness.

These two challenges are useful for our purposes because they demonstrate where the line goes between legally unavailable interpretations that judges cannot adopt and the sort of Satisficing Option that we think judges *should* adopt. On the one hand, while striking down the provision at issue in *Angelos* under the Eighth Amendment might produce a morally desirable outcome, it is too legally tenuous to count as a genuine Satisficing Option. It is not sufficient by the lights of the law.

On the other hand, the vagueness challenge to the provision in *Angelos* has more going for it in light of the recent Supreme Court decision in *United States v. Johnson*, which invalidated a related provision as unconstitutionally vague.⁷⁵ In fact, there is a Circuit split about whether *Johnson* carries over to cases like *Angelos* and requires invalidating provisions like the one at issue there as well. Even if the optimal legal interpretation would recommend against carrying *Johnson* over to strike down the provision in *Angelos*, the Circuit split shows that there at least are some strong legal grounds for doing so. There is a close call on the legal question of whether *Johnson* carries over to *Angelos*, and so there would be adequate legal support for Judge Cassell to strike down the provision in *Angelos* as void for vagueness. Since this option is

⁷⁵ *Johnson v. United States*, 135 S. Ct. 2551, 2557 (2015).

significantly better by the lights of morality, and is also supported by strong legal arguments, this would amount to a Satisficing Option that we think judges generally should take. Accordingly, we think that Judge Cassell, if faced with a legally close call like this, should advert to the decisive moral reasons in favor of accepting a reasonable, and legally permissible, interpretation of the law that prevents him from having to impose the unjust mandatory minimum. We think this conclusion is, in fact, quite ecumenical in jurisprudence.⁷⁶

So as to not lose sight of the forest for the trees, let us emphasize what we are using the difference between these two constitutional challenges to illustrate. There may well be morally preferable interpretations (such as declaring that mandatory minimums violate the Eighth Amendment) that are legally impermissible because they are ruled out by binding, unambiguous precedential decisions or other sources of law; these are not Satisficing Options, on our view. These should not be conflated with morally preferable interpretations (such as declaring specific provisions of mandatory minimums to be void for vagueness) that may be legally sub-optimal, but are still legally permissible all the same; these *are* Satisficing Options, on our view.

We hope that the discussion of two specific constitutional

⁷⁶ So described, our position here might be read to rest on a significant assumption about the concept of law. Namely, it may be read to assume a form of legal positivism (such as H.L.A. HART, *CONCEPT OF LAW* 185–86), and reject a form of anti-positivism (especially that of RONALD DWORKIN, *LAW'S EMPIRE* 27–43 (1986)). We do not think, however, that our position rests on any such assumption about the concept of law. Legal anti-positivists allow that in some rare cases judges should disobey the law (see RONALD DWORKIN, *JUSTICE IN ROBES* 18–19 (2006)). And more pertinently, anti-positivist views struggle to entirely remove legal indeterminacy (and hence some degree of judicial discretion between rival interpretations), for reasons that have been discussed at length by others (see TIMOTHY ENDICOTT, *VAGUENESS IN LAW* 167 (2000)). Besides, as many have noted, Dworkin's views about constitutional interpretation rest on implausible assumptions about the role of original intent and the ability of judges: see, e.g., Connie Rosati, *The Moral Reading of Constitutions*, in *THE LEGACY OF RONALD DWORKIN* 327–37 (Wil Waluchow & Stefan Sciaraffa eds., 2016). The latter assumption is telling in this context; even if there is a determinate answer to what the law is, plausibly the difficulty of knowing it makes a variety of interpretations legally permissible.

approaches helps to illuminate the space for legally permissible but sub-optimal interpretations. But in case it helps, considering a literary analogy may serve to illustrate and motivate the difference we have in mind. Between three possible interpretations of *King Lear*, it is possible that the first is ruled out by unambiguous features of the text itself, but the second is not, even though the third fits the text slightly better than the second. If this were the case, the second interpretation would be permissible (unlike the first), even though it is not optimal (like the third). As an interpretation, it would *satisfice*. Like in the literary case, we think there are legal interpretations that *satisfice* the demands of the law: they fit the sources well enough to be permissible even if they do not fit them as well as other interpretations. So long as you accept that, and you accept that some *satisficing* interpretations can be morally superior, you should accept that there can be interpretative *Satisficing Options*.

1. Cruel and Unusual

As seen above, although Judge Cassell found Mr. Angelos' 55-year sentence to be disproportionate to the seriousness of the offense,⁷⁷ he determined that this punishment was not cruel and unusual in violation of the Eighth Amendment. Could Judge Cassell have reached a different conclusion with regard to this challenge to the constitutionality of Mr. Angelos' sentence?⁷⁸

As the Supreme Court recently stated, it “has struggled with whether and how to apply the Cruel and Unusual Punishments Clause to sentences for noncapital crimes.”⁷⁹ There is significant precedent,

⁷⁷ *Angelos*, 345 F. Supp. 2d at 1257–59.

⁷⁸ An Amicus Brief signed by 163 individuals—including former United States District and Circuit Judges, former United States Attorneys, and four former Attorneys General of the United States—argued that Mr. Angelos' sentence constituted “cruel and unusual punishment” in violation of the Eighth Amendment. See Amici Curiae Brief at 1–2, *United States v. Angelos*, 433 F.3d 738 (10th Cir. 2006) (No. 04-4282), 2005 WL 2347343.

⁷⁹ *Graham v. Florida*, 560 U.S. 48, 86 (2010) (Roberts, C.J., concurring).

however, for the position that the Eighth Amendment prohibits terms of incarceration that are grossly disproportionate to the offense charged: in *Solem v. Helm*, the Supreme Court declared that the imposition of a mandatory term of life imprisonment under a state recidivist statute constituted cruel and unusual punishment.⁸⁰ The Court outlined a three-step test to determine whether a non-capital punishment is grossly disproportionate to the offense, which involves considering “(i) the gravity of the offense and the harshness of the penalty; (ii) the sentences imposed on the other criminals in the same jurisdiction; and (iii) the sentences imposed for commission of the same crime in other jurisdictions.”⁸¹

As the Supreme Court has noted, it has “not established a clear or consistent path for courts to follow in applying the highly deferential narrow proportionality analysis.”⁸² But lower courts have largely followed the Supreme Court’s highly deferential approach, expressing clear unwillingness to invalidate state sentencing practices.⁸³ Following the lead of the Supreme Court, challenges to severe mandatory minimum sentences on Eighth Amendment grounds are rarely raised, and almost never

⁸⁰ *Solem v. Helm* 463 U.S. 277 (1983). *See also* *Ewing v. California*, 538 U.S. 11, 30–31 (2003) (upholding sentence under three strikes law but applying 8th Amendment proportionality analysis); *O’Neil v. Vermont* 144 U.S. 323, 339–40 (1892) (Field, J. dissenting); *Weems v. United States* 217 U.S. 349, 371 (1910).

⁸¹ *Solem*, 63 U.S. at 292.

⁸² *Graham*, 130 S. Ct. 2011, 2036–37(2010) (Roberts, C.J., concurring). *See also* *Lockyer v. Andrade*, 538 U.S. 63, 72 (2003) (noting that with regard to the grossly disproportionate test, the Supreme Court has “not established a clear or consistent path for the courts to follow” and “precedents in this area have not been a model of clarity”).

⁸³ *See, e.g.*, *United States v. Polk*, 546 F.3d 74, 76 (1st Cir. 2008); *United States v. MacEwan*, 445 F.3d 237, 247–48 (3d Cir. 2006); *Alford v. Rolfs*, 867 F.2d 1216, 1222 (9th Cir. 1989); *Adaway v. State*, 902 So. 2d 746, 750 (Fla. 2005); *State v. Harris*, 844 S.W.2d 601, 602 (Tenn. 1992).

succeed.⁸⁴

This, in fact, is why Judge Cassell determined that he was bound by precedent to conclude that Mr. Angelos' sentence did not violate the Eighth Amendment.⁸⁵ In *Harmelin v. Michigan*, the Supreme Court upheld the defendant's sentence of life in prison without parole for possessing 672 grams of cocaine, as required by a Michigan statute.⁸⁶

Suppose now that Judge Cassell wanted to adopt the interpretive strategy for resolving the apparent dilemma between his moral and legal reasons. One move he might make is to try to distinguish *Angelos* from *Harmelin*. Thus, perhaps Judge Cassell could have argued that *Angelos* involved federal sentencing practices, while *Harmelin* challenged a state sentencing regime.

Why might this matter? Because of federalism. The Supreme Court to this point has dealt with Eighth Amendment "cruel and unusual" challenges primarily as against state sentencing laws, but some theorists argue that federalism demands that courts show greater deference to state legislation than to federal legislation.⁸⁷ Thus, a federal sentencing statute might face a steeper uphill battle when challenged under the Eighth

⁸⁴ See Michael J. Zydney Mannheimer, *Cruel and Unusual Federal Punishments*, 98 IOWA L. REV. 69, 87 n. 116 (2012) ("It is telling as well that some defendants sentenced to extraordinarily long prison terms in federal court do not even bother to challenge their sentences on Eighth Amendment grounds. See, e.g., *United States v. Porter*, 293 F. App'x 700, 702–03 (11th Cir. 2008) (defendant sentenced to 182 years imprisonment on seventeen gun- and narcotic-related counts did not raise an Eighth Amendment challenge).")

⁸⁵ *Angelos*, 345 F. Supp. 2d at 1259–60.

⁸⁶ *Harmelin v. Michigan*, 111 S. Ct. 2680 (1991).

⁸⁷ See Mannheimer, *supra* note 84 at 69 ("the Supreme Court's jurisprudence on cruel and unusual carceral punishments is extraordinarily deferential to legislative judgments about how harsh prison sentences ought to be for particular crimes. This deferential approach stems largely from concerns of federalism, for all of the Court's modern cases on the Cruel and Unusual Punishments Clause have addressed state, not federal, sentencing practices. Thus, they have addressed the Eighth Amendment only as incorporated by the Fourteenth. Federal courts accordingly find themselves applying a deferential standard designed in large part to safeguard the values of federalism in cases where those values do not call for deference").

Amendment than a state sentencing statute would, given the extra deference that the latter is owed under federalism principles. The legal hook here is that the Eighth Amendment is made binding upon the states by the due process clause of the Fourteenth Amendment,⁸⁸ and so courts implicitly apply Fourteenth Amendment rational basis scrutiny in determining whether state sentences (in non-capital cases) are grossly disproportionate to the offense.⁸⁹ By contrast, federal statutes challenged under the Eighth Amendment might face something less deferential than rational basis review. Instead, they would be subject to the Eighth Amendment's own, native standard of review, which might well turn out to be stricter than the standard applied under the Eighth Amendment as read through the Fourteenth Amendment against the states. Adopting this theory, Judge Cassell could perhaps have concluded that a higher level of scrutiny would be appropriate in *Angelos*, such that the court need not presume that the length of Mr. Angelos' sentence is constitutional.

This legal theory would offer a more *morally* satisfactory solution to the judge's dilemma in *Angelos* than Pure Obedience would. After all, this theory would avoid imposing such a harsh sentence on Mr. Angelos. However, the question remains of whether it is sufficiently supported by the applicable *legal* reasons to be a Satisficing Option. After all, there are other grounds *besides* federalism that could require courts to defer to even the federal legislature's determination about the proportionality of sentences. For example, considerations about legislative competence or sensitivity to popular values might be adduced to justify also deferring to

⁸⁸ *Furman v. Georgia*, 408 U.S. 238, 240 (1972) (holding that "carrying out of the death penalty in these cases constitute cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments").

⁸⁹ See Christopher J. DeClue, *Sugarcoating the Eighth Amendment: The Grossly Disproportionate Test is Simply the Fourteenth Amendment Rational Basis Test in Disguise*, 41 SW. L. REV. 533, 533 (2012) ("the Eighth Amendment grossly disproportionate test is simply the Fourteenth Amendment rational basis test in disguise. More pointedly, the precise standard of review applied under the grossly disproportionate test is as follows: when reviewing the length of a sentence under the Eighth Amendment, the court will uphold the sentence so long as it furthers a conceivable penological purpose.") (emphasis added).

federal sentencing laws (and not just their state analogs).

For that reason, we think it would at least be legally questionable if Judge Cassell had determined that Mr. Angelos' sentence violated the Eighth Amendment. It appears to be a significant departure from existing precedent.⁹⁰ For this reason, we do not think that striking down the mandatory minimum provision at issue in *Angelos* would be a Satisficing Option that offers an acceptable resolution to the judge's dilemma. It is not sufficiently well supported by the applicable legal reasons to be a legally permissible interpretation.

2. Void for Vagueness

Matters are different, we think, when it comes to a second strategy for striking down mandatory minimums as unconstitutional. In particular, this is the argument that certain provisions triggering a mandatory minimum are unconstitutionally vague. In the recent case of *Johnson v. United States*, the Supreme Court endorsed just such an argument.⁹¹ There, the Court held that the "residual clause" of the Armed Career Criminal Act ("ACCA"), 18 U.S.C. § 924(e), is unconstitutionally vague in violation of the Due Process Clause.⁹² This was hailed as a victory by reform-minded advocates in the fight against overly harsh mandatory

⁹⁰ Gary T. Lowenthal, *Mandatory Sentencing Laws: Undermining the Effectiveness of Determinate Sentencing Reform*, 81 CAL. L. REV. 61, 117 (1993) (in Harmelin "no member of the Court would interfere with a legislative grading of noncapital punishment for potentially violent crime. Both the concurring and dissenting opinions indicate judicial disinclination to review even those laws that mandate life imprisonment without any eligibility for release for offenses that directly threaten the physical safety of others. Hence, a legislature can be as harsh as it desires without crossing constitutional lines in mandating incarceration for such matters as possession of weapons in the commission of offenses").

⁹¹ *Johnson v. United States*, 135 S. Ct. 2551 (2015).

⁹² *Id.* at 2563 ("We hold that imposing an increased sentence under the residual clause of the Armed Career Criminal Act violates the Constitution's guarantee of due process.").

minimums.⁹³ It would be natural to try to build on this success by using *Johnson* as the basis for invalidating analogous provisions that also carry mandatory minimums—for example, the provision of 18 U.S.C. § 924(c) at issue in *Angelos*. Let us consider the prospects for this argument.

Go back to *Johnson* for a moment. The ACCA states that any defendant convicted of a firearms offense under 18 U.S.C. § 922(g) who “has three previous convictions...for a violent felony or a serious drug offense” must be “imprisoned not less than fifteen years.”⁹⁴ A “violent felony” is defined as a crime that either contains the use of force as an element, or else “is burglary, arson, or extortion, involves use of explosives, or *otherwise involves conduct that presents a serious potential risk of physical injury to another*.”⁹⁵ The italicized phrase is the so-called “residual clause” of the ACCA.⁹⁶ The Supreme Court in *Johnson* struck down the ACCA residual clause—§ 924(e)(2)(B)(ii)—as unconstitutionally vague, holding that it “denies fair notice to defendants and invites arbitrary enforcement by judges.”⁹⁷

Angelos did not involve § 924(e), which was at issue in *Johnson*, but rather another provision that contains a similar residual clause—namely, § 924(c).⁹⁸ This provision increases the defendant’s sentence by 25 years for each subsequent “crime of violence.”⁹⁹ Moreover, the residual clause of § 924(c) defines “crime of violence” to include any crime “that

⁹³ Families Against Mandatory Minimums, SCOTUS Strikes Down ACCA’s Residual Clause (June 15, 2016) <http://famm.org/scotus-strikes-down-accas-residual-clause/> (quoting Families Against Mandatory Minimums General Counsel Mary Price as stating that “We are very pleased by this decision. All criminal laws should be clear about what conduct is criminal,” (...). “This is especially true when the law calls for a mandatory minimum sentence. Today the Supreme Court ruled (decisively) in favor of clarity in one of the harshest mandatory minimum laws on the books.”).

⁹⁴ 18 U.S.C. § 924(e)(1) (2012)

⁹⁵ 18 U.S.C. § 924(e)(2)(B) (2012) (emphasis added).

⁹⁶ *Johnson*, 135 S. Ct. at 2556.

⁹⁷ *Id.* at 2557.

⁹⁸ See *supra* notes 23-26.

⁹⁹ § 924(c)(1)(A)-(C) (2012).

by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense."¹⁰⁰ The italicized phrase here is the § 924(c) residual clause.¹⁰¹

Now, the question is whether Judge Cassell, were he to decide *Angelos* today, would be justified in extending *Johnson* to cover the § 924(c) residual clause as well.¹⁰² This would be tempting if Judge Cassell wanted to resolve his moral-legal dilemma by using the interpretive strategy. Indeed, a handful of district courts in the Ninth Circuit have issued decisions doing just this.¹⁰³

Nonetheless, some appellate courts that have considered the question have held that there are important textual differences between the ACCA residual clause and the § 924(c) residual clause that prevent the latter from being struck down as unconstitutionally vague under *Johnson*. Most notably, this argument was rejected by the Sixth Circuit's decision in *United States v. Taylor* because of textual differences between the two residual clauses.¹⁰⁴ Specifically, the ACCA residual clause focuses on

¹⁰⁰ § 924(c)(3)(B) (emphasis added).

¹⁰¹ See, e.g., *United States v. Smith*, 215 F.Supp.3d 1026, (D. Nev. 2016); *United States v. Thongsouk Theng Lattanaphom*, 159 F.Supp.3d 1157 (E.D. Cal. 2016).

¹⁰² Note that accepting argument would in any case not have helped Mr. Angelos. Although he was convicted of several violations of § 924(c) and received the applicable mandatory minimums, the crimes of violence he committed did not qualify as such under the residual clause of § 924(c)(3)(B). Rather, they counted as crimes of violence under § 924(c)(3)(A).

¹⁰³ See *Smith*, 215 F.Supp.3d at 1035-36 (extending *Johnson* to § 924(c)'s residual clause and striking it down as void for vagueness); *Thongsouk Theng Lattanaphom*, 159 F.Supp.3d 1157 at 1162 (same); *United States v. Bell*, 158 F.Supp.3d 906, at 922-23 (N.D. Cal. 2016) (same).

¹⁰⁴ *United States v. Taylor*, 814 F.3d 340, 376 (6th Cir. 2016) ("There are significant differences making the definition of "crime of violence" in § 924(c)(3)(B) narrower than the definition of "violent felony" in the ACCA residual clause."). See *id.* at 376-77 ("Whereas the ACCA residual clause merely requires conduct "that presents a serious potential risk of physical injury to another," § 924(c)(3)(B) requires the risk "that *physical force* against the person or property of another may be used *in the course of* committing the offense." Risk of physical force against a victim is much more definite than [the potential] risk of physical injury to a victim." (internal citations omitted)).

conduct that poses a “potential risk” of “physical injury,” while the § 924(c) residual clause mentions a “substantial risk” of “physical force” used in the course of committing an offense.¹⁰⁵ The former phrase seems more vague than the latter, since it’s not clear what the ACCA meant by a *potential risk* (as opposed to merely a risk). Moreover, in principle, any type of conduct—even conduct that does not involve force against another (e.g. telling a lie)—could potentially risk causing physical injury to others, and so arguably would be a crime of violence under the ACCA—though perhaps not under the § 924(c) residual clause. Other courts to have declined to apply *Johnson* to § 924(c) rely on similar textual differences.¹⁰⁶

Now, suppose that Judge Cassell wanted to extricate himself from the dilemma he faced in *Angelos* using the interpretive strategy. To do so, he would seek to minimize or explain away the textual differences between the § 924(c) and the ACCA residual clauses. For example, he might assume that the use of the phrase “potential risk” in § 924(e) rather than “substantial risk,” as in § 924(c), was inartful drafting rather than the mark of an intended substantive difference between the two residual clauses. Adopting this sort of reasoning would accomplish the more morally desirable outcome of not having to sentence Mr. Angelos under the mandatory minimum in § 924(c).

¹⁰⁵ Compare 18 U.S.C. § 924(e)(2)(B) (defining, for purposes of the ACCA, the term “violent felony” as one that “otherwise involves conduct that presents a serious *potential risk of physical injury to another*”) with 18 U.S.C. § 924(c)(3)(B) (defining “crime of violence” as one “that by its nature, involves a *substantial risk* that physical force against the person or property of another may be used in the course of committing the offense”) (emphasis added).

¹⁰⁶ *United States v. Dervishaj*, 169 F.Supp.3d 339, 350 (E.D.N.Y. 2016) (discussing textual differences between the two residual clauses, and holding that “defendants have not established that § 924(c)(3)(B) is unconstitutionally vague”); see also *id.* at 348, n.13 (discussing other district courts that have declined to find § 924(c)(3)(B) void for vagueness under *Johnson*); *United States v. Green*, No. CR RDB-15-0526, 2016 WL 277982, at *5 (D. Md. Jan. 22, 2016) (“In light of the many differences between the residual clause in Section 924(c)(3)(B) and the Armed Career Criminal Act’s residual clause, (...) the residual clause in Section 924(c)(3)(B) is not unconstitutionally vague.”).

Is this interpretation sufficiently well supported on legal grounds? As it turns out, there is circuit split as to whether the Supreme Court's invalidation of the ACCA residual clause in *Johnson* also requires invalidating the residual clause of § 924(c), at issue in *Angelos*. To begin with, there are several appellate decisions suggesting that § 924(c) is to be interpreted so that it is governed by the Supreme Court's decision in *Johnson*. Most importantly, the Ninth Circuit in *Dimaya v. Lynch* struck down a third residual clause, which is practically identical to § 924(c), on the basis of *Johnson*.¹⁰⁷ This, in turn, led some district courts in the Ninth Circuit to hold that the § 924(c) residual clause itself is unconstitutionally vague under *Johnson*.¹⁰⁸

More specifically, in *Dimaya v. Lynch*,¹⁰⁹ the Ninth Circuit held that *Johnson* requires invalidating the residual clause of the definition of “crime of violence” that is provided in the Immigration and Naturalization Act (“INA”), 18 U.S.C. § 16(b)—despite the same textual differences that exist from the ACCA residual clause, § 924(e). The INA residual clause defines “crime of violence” to include any felony “that, by its nature, involves a substantial risk that physical force.”¹¹⁰ The court in *Dimaya* held that the *Johnson* Court's “reasoning applies with equal force to the similar statutory language and identical mode of analysis used to define a

¹⁰⁷ *Dimaya v. Lynch*, 803 F.3d 1110 (9th Cir. 2015).

¹⁰⁸ See *Thongsouk Theng Lattanaphom*, 159 F.Supp.3d at 1162 (“Existing authority in the Ninth Circuit compels this court to extend *Johnson* to the residual clause of 18 U.S.C. § 924(c)”); *Smith*, 215 F.Supp.3d at 1035 (“I find no basis to distinguish 18 U.S.C. § 16(b) from § 924(c)'s residual clause or *Dimaya* from this case. Though many districts outside of the Ninth Circuit have declined to extend *Johnson* to § 924(c)'s residual clause, none of those courts are bound by the Ninth Circuit's decision in *Dimaya* invalidating the INA's identically worded residual provision. The binding authority in this circuit thus compels me to conclude that 18 U.S.C. § 924(c)(3)(B) is unconstitutionally vague.”); *Bell*, 158 F.Supp.3d 906 at 923 (finding that the Ninth Circuit's decision in *Dimaya* requires the court to reject as “not material” the textual differences between the 924(c)(3) residual clause and the 924(e) or ACCA residual clause).

¹⁰⁹ *Dimaya*, 803 F.3d 1110.

¹¹⁰ 18 U.S.C. § 16(b) (2012).

crime of violence for purposes of the INA.”¹¹¹ It concluded that “because of the same combination of indeterminate inquiries, [the INA residual clause] is subject to identical unpredictability and arbitrariness as ACCA’s residual clause,” and was therefore unconstitutionally vague under *Johnson*.¹¹²

Note that the Ninth Circuit was not alone in this reasoning. The Seventh Circuit has also applied *Johnson* to strike down the INA residual clause on similar grounds.¹¹³ Moreover, the Tenth Circuit adopted this reasoning in *Golicov v. Lynch*, a case which expressly followed the Ninth Circuit’s decision in *Dimaya*.¹¹⁴ Thus, the Seventh and Tenth Circuits are aligned with the Ninth in seeing the textual differences between the INA and ACCA residual clauses as fairly trifling.

This matters to us because the INA residual clause is equivalent to the § 924(c) residual clause at issue in *Angelos*. Neither one mentions a “potential risk” of “physical injury” as § 924(e) in *Johnson* did. Rather, the INA and § 924(c) residual clauses mention only a “substantial risk that physical force...may be used in the course of committing the offense.”¹¹⁵¹¹⁶ Thus, the courts that reach this result about the INA residual clause provide persuasive authority for also invalidating the § 924(c) residual clause under *Johnson*.

However, matters are not so straightforward because some appellate courts have expressly rejected this argument. Most importantly,

¹¹¹ *Dimaya*, 803 F.3d at 1115.

¹¹² *Id.*

¹¹³ *United States v. Vivas–Ceja*, 808 F.3d 719, 723 (7th Cir. 2015).

¹¹⁴ *Golicov v. Lynch*, 837 F.3d 1065, 1072 (10th Cir. 2016) (“[W]e agree with the Sixth, Seventh, and Ninth Circuits that 18 U.S.C. § 16(b) is not meaningfully distinguishable from the ACCA’s residual clause and that, as a result, § 16(b), and by extension 8 U.S.C. § 1101(a)(43)(F), must be deemed unconstitutionally vague in light of *Johnson*.”).

¹¹⁵ *Cf.* § 924(c)(3) and § 16(b).

¹¹⁶ *Dimaya*, 803 F.3d at 1120 (“Although the government can point to a couple of minor distinctions between the text of the [ACCA] residual clause and that of the INA’s definition of a crime of violence, none undermines the applicability of *Johnson*’s fundamental holding to this case.”).

the Second Circuit, in *United States v. Hill*,¹¹⁷ found *Dimaya* and the other appellate decisions striking down the INA residual clause under *Johnson* to be unpersuasive given the textual differences between the ACCA residual clause in *Johnson* and the INA residual clause.¹¹⁸ Therefore, the Second Circuit declined to follow their lead in applying *Johnson* to the § 924(c) residual clause.¹¹⁹ Accordingly, the Second Circuit refused to strike down the § 924(c) residual clause as unconstitutionally vague under *Johnson*.¹²⁰ The Sixth Circuit took a similar position in *Taylor*, and found substantial textual differences between § 924(c) and the ACCA residual clause at issue in *Johnson*.¹²¹

Accordingly, there is a split of authority as to whether the Supreme Court's invalidation of the ACCA residual clause in *Johnson* also requires invalidating the residual clause of § 924(c), at issue in *Angelos*. On the one hand, the Sixth and Second Circuits found sufficient textual differences between the ACCA and § 924(c) residual clauses to prevent *Johnson* from requiring the invalidation of § 924(c).¹²² On the other hand, the Seventh, Ninth and Tenth Circuits found *Johnson* to require at least invalidating the INA residual clause, which is practically indistinguishable from the § 924(c) residual clause.¹²³

Thus, consider Judge Cassell's situation as though he were faced

¹¹⁷ *United States v. Hill*, 832 F.3d 135 (2d Cir. 2016).

¹¹⁸ *Id.* at 149 (noting that “four other circuits... have considered the language in 18 U.S.C. § 16(b), which appears materially the same as that in § 924(c)(3)(B), and have determined that § 16(b) is void for vagueness after *Johnson*,” but noting that “we find these opinions unpersuasive”).

¹¹⁹ *Id.* at 150 (“we do not find these § 16(b) cases persuasive, and we decline to follow their reasoning here”).

¹²⁰ *Id.* (“Having considered each of *Hill*'s arguments that the risk-of-force clause is unconstitutionally vague, we are unpersuaded.”).

¹²¹ See *Taylor*, *supra* note 104, at 376.

¹²² See *supra* notes 104 (discussing the Sixth Circuit's decision in *Taylor*), 117–119 (discussing the Second Circuit's decision in *Hill*).

¹²³ See *supra* notes 109 (discussing the Ninth Circuit's decision in *Dimaya*), 113–114 (discussing similar cases from the Seventh and Tenth Circuits).

with applying a sentencing enhancement under § 924(c) today. Judge Cassell was sitting in the District of Utah, which is within the Tenth Circuit. Plausibly, he would be bound to invalidate the § 924(c) residual clause under *Golicov*, which invalidated the INA residual clause under *Johnson* (just like the Ninth Circuit's decision in *Dimaya*).¹²⁴

To make matters more theoretically interesting, instead suppose Judge Cassell were sitting within a Circuit that had yet to weigh in on whether *Johnson*'s invalidation of the ACCA residual clause carries over to the INA or § 924(c) residual clauses. Suppose Judge Cassell's court were within the D.C. Circuit, for instance. What situation would he then face? A very close call. On the one hand, he could rely on the Second and Sixth Circuits' reasoning as persuasive authority for declining to strike down § 924(c) as unconstitutionally vague under *Johnson*. On the other hand, he could follow the reasoning of the Seventh, Ninth and Tenth Circuits, which invalidated the essentially indistinguishable INA residual clause on the basis of *Johnson*, and therefore decide to strike down § 924(c) under *Johnson* as well. Reasonable minds, it would appear, can differ.

Given that there is a Circuit split on this issue, we think that if Judge Cassell were deciding the case today while sitting within a Circuit that had yet to decide the matter, it would be legally acceptable to strike down § 924(c) on the basis of *Johnson* relying on the Seventh, Ninth and Tenth Circuit's decisions as persuasive authority. This would be a Satisficing Option of the sort that we think judges should adopt where possible. Given the Seventh, Ninth and Tenth Circuit's reasoning, a hypothetical Judge Cassell would have a plausible legal basis for invalidating § 924(c) under *Johnson*, and so it would lead to what we take to be the distinctively morally better outcome. What is more, this decision is at least defensible by the lights of the law. The Seventh, Ninth and Tenth Circuits did not think there were sufficient textual differences to treat the INA residual clause, which is identical to § 924(c), any differently from the ACCA residual clause—*i.e.* as unconstitutionally

¹²⁴ *Golicov*, 837 F.3d at 1072.

vague. Accordingly, we think someone in Judge Cassell's position today should resolve the close call on the legal question by appealing to the decisive moral reasons against applying the § 924(c) residual clause to a defendant like Mr. Angelos whose minor offenses do not warrant such harsh sentences. We can numerically represent this scenario as follows:

	6TH & 2D CIR. (DON'T EXTEND JOHNSON TO § 924(c))	7TH, 9TH & 10TH CIR. (EXTEND JOHNSON TO § 924(c))
MORAL REASONS	2	7
LEGAL REASONS	7	7

Faced with a scenario like this, we think it would be sound for Judge Cassell to break the tie on the legal question by appealing to (what we assume to be) the decisive moral reasons in favor of invalidating the § 924(c) residual clause and thus preventing the harsh mandatory minimum sentences it triggers from being widely applied.

So far, we have only argued that moral reasons can break a strict numerical tie on a legal question. But we would also go slightly further than that. We think overwhelming moral reasons can not only break a strict tie, but also be the basis for resolving a very close legal question, which is not quite a tie.

Thus, for the sake of argument, suppose that the Second and Sixth Circuits have a slightly better legal position when compared to the Seventh, Ninth and Tenth Circuits' position. That is, suppose *arguendo* that the textual differences that the Second and Sixth Circuits picked up on between the ACCA and § 924(c) residual clauses are robust enough that strictly speaking *the best* legal resolution of the case would be to refrain from invalidating the § 924(c) residual clause under *Johnson*. Still, the question remains a close call. There are also weighty legal reasons in favor of invalidation, given the close textual parallels between the ACCA and § 924(c) residual clauses. These are what led the Seventh, Ninth and Tenth Circuits to strike down the INA residual clause (given that the INA and §

924(c) residual clauses are the same). Plausibly, the remaining differences that exist between the ACCA and the § 924(c) residual clauses—*e.g.* that the former says “potential risk” while the latter says “substantial risk”—are not robust enough to save the § 924(c) residual clause from the degree of vagueness that felled the ACCA residual clause. Some might think the § 924(c) residual clause remains vague to an unconstitutional degree. But even supposing that this interpretation is slightly less well supported by the applicable legal reasons, it is still a close enough a call to be at least legally *defensible* to strike down the § 924(c) residual clause under *Johnson*. Thus, consider the case might not be a strict tie on the legal question, but rather can be represented in the following way:

	6TH & 2D CIR. (DON'T EXTEND JOHNSON TO § 924(c))	7TH, 9TH & 10TH CIR. (EXTEND JOHNSON TO § 924(c))
MORAL REASONS	2	7
LEGAL REASONS	7.1	7

We contend that because there is strong legal support for either option here—even if the Sixth Circuit position is slightly better, legally speaking—extending *Johnson* to § 924(c) is a Satisficing Option that Judge Cassell should take. Given the Seventh, Ninth and Tenth Circuit decisions, a Judge Cassell (deciding *Angelos* today in the D.C. Circuit) would be justified in striking down the § 924(c) residual clause following the Seventh, Ninth and Tenth Circuits. There is weighty legal backing for this decision and it is decisively favored by the moral reasons. In this way, we think appeal to decisive moral reasons can not only serve as a way to break a strict numerical tie on a legal issue, but can also be the basis for resolving a very close legal question, which is not strictly a tie—as represented in the table above. Where it is not a close call, legally speaking, however, the judge would not be dealing with a genuinely

Satisficing Option, and so we think it would not be properly available.¹²⁵

One final note: the posture assumed in the above discussion will not last long. The Supreme Court is about to rule on whether to endorse the Ninth Circuit's decision in *Dimaya*, which extended *Johnson* to invalidate the INA residual clause.¹²⁶ Our analysis sought to draw an interesting lesson from considering the position of the hypothetical Judge Cassell who has to re-decide *Angelos* today while not being decisively bound by a precedential decision of a superior court. But if the Supreme Court rejects the Seventh, Ninth and Tenth Circuits' reasoning, then this would no longer be a legally available interpretation. Hence it would not be a Satisficing Option, on our view. To be a Satisficing Option that would genuinely resolve the judge's dilemma, a legal interpretation cannot

¹²⁵ Note one limitation of our argument. We do not contend that Judges who resolve a close call on a legal question on the basis of decisive moral reasons should always come out and say that this is what they are doing. We are agnostic on this difficult prudential and strategic question. Perhaps coming out and saying that they are resolving a legally close call on clear moral grounds would be favored for transparency reasons. On the other hand, this might also be disfavored for reasons of preserving trust in the neutrality of the judicial system—to say nothing of being disfavored by career advancement reasons in a judicial system like the United States.

¹²⁶ See Kevin Johnson, *Argument analysis: Is the statutory phrase "crime of violence" in the immigration laws void for vagueness?* (Jan. 18, 2017) (available online: <http://www.scotusblog.com/2017/01/argument-analysis-statutory-phrase-crime-violence-immigration-laws-void-vagueness/>) (analyzing the oral arguments in *Dimaya* and concluding that "[e]ven if the justices are willing to apply due process scrutiny to Section 16(b), however, they appear to be divided as to whether this case is distinguishable from *Johnson v. United States* and whether Section 16(b) is void for vagueness").

expressly be ruled out by a precedential decision of a higher court.¹²⁷

B. EXPRESSIVE STRATEGIES

We have contrasted two constitutional challenges to mandatory minimums in order to illustrate how judges can adopt morally preferable and legally permissible albeit sub-optimal interpretations of the law. That is the first type of strategy we think judges can take on their own to resolve judicial dilemmas. The second type of strategy we will consider is *expressive*, in the sense that it consists of the judiciary expressing its moral condemnation of the laws that it applies. Like the first, this is also a strategy that judges can adopt on their own. Though unlike interpretative strategies, the expression of judicial condemnation is not confined to the courtroom: judges can express condemnation in a range of venues. We think that it is worth separating two outlets for the expression of moral condemnation by the judiciary.

The first outlet is in judicial decisions as *dicta*. Judge Paul Cassell, for instance, originally decried that Weldon Angelos' sentence was "unjust, cruel, and irrational" in the sentencing decision itself.¹²⁸ A number of other judges have similarly expressed condemnation of

¹²⁷ This also raises potential moral risks for judges pursuing such an interpretative strategy: the judge must consider how their decision changes the conditional probability that a higher court would issue a precedential decision on the interpretative issue at hand and thereby close off opportunities for other lower courts to resolve such judicial dilemmas. Say that a judge on a lower court knows both (a) that she is subject to unusually close scrutiny (and hence is more likely to have her decisions appealed to higher courts), and (b) that the current higher courts are more likely to issue a verdict that closes off options for resolving judicial dilemmas. Plausibly, there would be good moral reasons for such a judge to eschew this interpretative strategy (and pursue the other strategies outlined below), in order to increase the odds that it is left available to others.

¹²⁸ *Angelos*, 345 F. Supp. 2d at 1263.

mandatory minimum sentencing provisions in judicial decisions¹²⁹—especially in the Eastern District of New York.¹³⁰ It is conceivable that judges could take this expressive strategy further. For instance, judges could attach a stock paragraph to *every legal opinion that they issue*—regardless of whether it is a civil or a criminal case—that decries the injustice of certain types of mandatory minimum sentences.

The second outlet is in extra-judicial writing: Cassell condemned the mandatory minimum sentencing provision in application to *Angelos* in a number of academic articles,¹³¹ speeches, and opinion pieces in popular media outlets.¹³² Other prominent judges have similarly condemned mandatory minimums in these forums.¹³³

It is important to distinguish these outlets for expressive strategies in part because it is plausible that some legal reasons militate against

¹²⁹ See, e.g., *United States v. Wendell Rivera-Ruperto*, 852 F.3d 1, 16 (1st Cir. 2017) (agreeing that the sentence was “extraordinarily long” though rejecting 8th Amendment challenge); see also *id.* at 20 (decrying the defendant’s sentence as “draconian” and “grossly disproportionate to his offense”) (Torruella, J., dissenting).

¹³⁰ Judges Weinstein, Gleeson, Dearie and Block are notable examples.

¹³¹ Paul G. Cassell, *Too Severe? A Defense of the Federal Sentencing Guidelines (And a Critique of the Federal Mandatory Minimums)*, 56 *Stan. L. Rev.* 1017, 2004); Paul Cassell and Erik Luna, *Mandatory Minimalism*, 32 *Cardozo L. Rev.* 1 (2010); Paul G. Cassell and Erik Luna, *Sense and Sensibility in Mandatory Minimum Sentencing*, *Federal Sentencing Reporter* (2011).

¹³² See, e.g., Paul G. Cassell, *Weldon Angelos is free, but many more still wait for justice reform*, *THE SALT LAKE TRIBUNE*, Jun. 12, 2016. Cassell also made written statements available to reporters for popular media outlets. See, e.g., Sari Horwitz, *Former federal judge to President Obama: Free the man I sentenced to 55 years in prison*, *WASHINGTON POST*, Feb. 6, 2016 (<https://www.washingtonpost.com/news/post-nation/wp/2016/02/09/former-federal-judge-to-president-obama-free-the-man-i-sentenced-to-55-years-in-prison/>); Families Against Mandatory Minimums, *Report on Weldon Angelos* (<http://famm.org/weldon-angelos/>); The Sentenced Project, *Profile on Weldon Angelos* (<http://thesentencedproject.com/>).

¹³³ Alan Feuer, *Federal Judge Urges U.S. to ‘Jettison the Madness of Mass Incarceration’*, *N. Y. TIMES*, June 23, 2016 (http://www.nytimes.com/2016/06/24/nyregion/federal-judge-urges-us-to-jettison-the-madness-of-mass-incarceration.html?smid=re-share&_r=0).

expressing condemnation in *dicta* in particular. For the judiciary to condemn legislation on purely moral grounds in judicial opinions could compromise the appearance of impartiality at the crucial point at which judges exercise their duties of office; we think it is plausible that no similar legal reasons militate against the judiciary expressing outrage in extra-judicial writing, or, if they do, those reasons have less force in such contexts.¹³⁴ Given this, there is at least some basis for considering expressive strategies to not meet a legal ideal, in comparison to pure obedience. But we do not think that it is plausible that judges are legally required to not decry that the laws they must apply are unjust, cruel and irrational. In other words, expressive strategies are not legally ideal (especially if they may run up against the limits of the canons of professional ethics), but they are often legally permissible.

It is also important to distinguish these outlets for expressive strategies because somewhat different moral reasons count in their favor. Extra-judicial writing plays an important role with respect to informing the public: within a deliberative democracy, it draws attentions to politically relevant injustices in the legal system that might not otherwise be salient to the voting populace. The moral significance of this should not be understated. There is some evidence that public support for mandatory

¹³⁴ This is not to say that judges who express strong disapproval of existing legislation will not take any flack for it. Quite the contrary, we are aware that this can have professional and political consequences, as well as impacting the management of judges' caseloads. For example, District Judge Shira Scheindlin was rebuked by the Second Circuit and removed from a case in part for extra-judicial criticism of New York City's Stop-and-Frisk policies. See Pete Brush, *2nd Circ. Stop-And-Frisk Rebuke A Warning To Chatty Judges*, Law360 (Nov. 1, 2013) (<https://www.law360.com/articles/485420/2nd-circ-stop-and-frisk-rebuke-a-warning-to-chatty-judges>) ("The panel stayed [Judge Scheindlin's] rulings pending appeal and said Scheindlin 'ran afoul' — both in a courtroom statement and in comments to the news media — of the requirement that judges 'avoid impropriety and the appearance of impropriety' in their activities."). *Ligon v. City of New York*, 736 F.3d 118, 121 (2d Cir. 2013) (vacated on other grounds) (observing that "[b]y order dated October 31, 2013, we both granted that stay and, because the appearance of impartiality had been compromised by certain statements made by Judge Scheindlin during proceedings in the district court and in media interviews, we reassigned the cases to a different district judge, to be chosen randomly").

minimums is undergirded by a familiar bias: the “availability heuristic”. Mandatory minimums are popular when considered in the abstract, because when the public accepts the generic proposition that drug dealers who use firearms should be subject to minimum sentences of x years, they are likely to assess its merits in terms of the most cognitively accessible instance of that group: a real or imagined individual who is far more likely to resemble El Chapo than Weldon Angelos.¹³⁵ When members of the public are asked to consider the application of mandatory minimums to particular cases with facts like those in *Angelos*, support for these policies plummets. Since the expressive strategy can help make cases like *Angelos* more publicly salient and accessible, it can thereby help ensure that the voting public assess mandatory minimums with a clearer sense of their impacts on offenders. To be clear, we are not claiming that an opinion piece in the *Washington Post* has this effect on its own. Rather, we think that extra-judicial writing can help bring more sustained media attention to mandatory minimums in general and cases like *Angelos* in particular. For instance, HBO’s *Last Week Tonight with John Oliver* may not have discussed *Angelos* if not for Cassell’s extra-judicial writings.¹³⁶ That said, in a highly partisan political climate in which some already see the judiciary as a partisan political force, we recognize that should the judiciary express disapproval or even outrage, there may be unintended short or long term negative consequences in the public perception of, or discourse about, the judiciary. We think that such risks must be evaluated on a case-by-case basis. It would be folly to assume that all extra-judicial expressions of condemnation—or none of them, for that matter—would be morally permissible.

Since judicial opinions in the lower courts are rarely read by the

¹³⁵ See Loretta J. Stalans, *Citizens' crime stereotypes, biased recall, and punishment preferences in abstract cases: The educative role of interpersonal sources*, 17 L. & HUMAN BEHAVIOR, 451-70 (1993).

¹³⁶ See John Oliver, *Last Week Tonight, Report on Mandatory Minimums* (July 26, 2015); Melissa Locker, *Watch John Oliver Demand an End to Mandatory Minimum Sentencing Laws*, TIME (July 27, 2017) (<http://time.com/3972717/watch-john-oliver-last-week-tonight-mandatory-minimum-laws/>).

voting public, or discussed in popular media, we do not think that such democratic considerations have much force in relation to expressing condemnation in *dicta*. However, we think that a number of moral considerations have significant force here. For one, we think that it is morally important to the judiciary that they use *dicta* to morally condemn at least the most egregiously unjust laws that they are nonetheless legally required to apply. In part, we think this is plausible for considerations related to the moral integrity of the sentencing judge.¹³⁷ in other contexts, such as voting, it is often recognized that there are some self-regarding moral reasons to maintain one's moral integrity.¹³⁸ Moreover, the judiciary has moral reasons to condemn mandatory minimums in *dicta* in order to influence other judges. In a law review article published shortly after the *Angelos* decision, it was noted that "Judge Cassell's actions may augur a new wave of judicial decision-writing in which judges record their observations about evolving sentencing norms and in so doing expand the post-*Booker* sentencing discussion to include mandatory minimums."¹³⁹ There is at least some evidence that Cassell's actions have had this influence. For instance, the majority in *Rivera-Ruperto* noted that in that case "the dissent relies largely on the rationale of Judge Cassell in *United States v. Angelos*."¹⁴⁰

There are further moral reasons in favor of expressive strategies as well. For instance, we think that it can be meaningful and morally

¹³⁷ There is a large literature on expressive and symbolic duties, as well as duties of protest. Bernard R. Boxill, *Self-Respect and Protest*, 6 PHIL. & PUB. AFF. 58 (1976); Thomas E. Hill, *Symbolic Protest and Calculated Silence*, 9 PHIL. & PUB. AFF. 83 (1979).

¹³⁸ See Loren Lomasky and Geoffrey Brennan, *Is there a Duty to Vote*, 17 SOCIAL PHIL. AND POLICY 62 (2000) (discussing expressive norms).

¹³⁹ Eva S. Nilsen, *Indecent Standards: The Case of U.S. versus Weldon Angelos*, 11 ROGER WILLIAMS U. L. REV. 537, 541 (2006).

¹⁴⁰ *United States v. Wendell Rivera-Ruperto*, 852 F.3d 1, 18—19 n.21 (1st Cir. 2017). This arguably shows that mandatory minimums present what has been dubbed the "sticky norms problem," namely that "the prevalence of a social norm [e.g. against overly harsh sentences] makes decision makers reluctant to carry out a law intended to change that norm." Dan Kahan, *Gentle Nudges vs. Hard Shoves: Solving the Sticky Norms Problem*, 67 YALE L.J. 607, 607 (2000).

important to particular defendants that judges condemn unjust punishments in *dicta*. A standard view about the nature and justification of punishment is that both are in part expressivist: punishment necessarily involves the expression of blame, and whether it is justified in part depends on whether the expression of blame is fitting or appropriate.¹⁴¹ In other words, the severity of Angelos' punishment is unjust in part because of the inappropriate severity of the moral condemnation of his character and conduct that it expresses. For Cassell to decry the injustice of the punishment he imposes undermines the condemnation expressed by the punishment itself. And this is not merely symbolic: it puts the defendant in a position where he or she can helpfully point to an authoritative expression of the injustice of his or her punishment in, for instance, applying for parole, or applying for employment upon release.

Given this, we think there are important moral reasons that favor expressive strategies, and such strategies carry comparatively small moral risks. This makes them a fairly safe option. But expressive strategies also have obvious limitations, especially with respect to the defendants who are wronged by the criminal justice system. Angelos' severe punishment does more than express unwarranted condemnation: it imposes hardships and restricts liberties. Decrying the injustice of such outcomes provides little comfort to those who suffer them. And plausibly, the fact that judges *were* intimately involved in the imposition of such hardships in past cases, and would be again in future cases, generates strong retrospective and prospective moral reasons for the judiciary to make reparations (to past defendants) and minimize harm (to future defendants).¹⁴² Given this, our verdict is that expressive strategies may not always be morally sufficient: in especially egregious cases, they may be a crucial component in resolving judicial dilemmas, but on their own they do not satisfy the moral considerations that apply to judges in judicial dilemmas.

¹⁴¹ The locus classicus for this view is Joel Feinberg's work. See JOEL FEINBERG, *The Expressive Function of Punishment*, in *DOING AND DESERVING* (1970).

¹⁴² These fall under two of the five fundamental prima facie moral duties famously discussed by Ross. W.D. ROSS, *THE RIGHT AND THE GOOD* (1930).

C. ASSISTIVE STRATEGIES

The last two strategies we discussed were ones that judges can put to good use themselves without the aid of other actors. By contrast, the next three strategies aim to enlist the help of other actors in securing morally preferable, but still legally permissible, outcomes. Thus, the third class of strategies that we will consider is *assistive*, in the sense that these strategies consist of the judiciary assisting or advocating on behalf of defendants for specific remedies from other actors outside the legal system. Generally, the assistive strategy will be most appropriate at or after the conclusion of the criminal trial. (In sub-sections D and E, we will consider attempts to enlist the help of specifically *judicial* actors, where some of these steps might also be taken before the trial concludes.)

The most obvious (but to be clear, not the *only*¹⁴³) example of an assistive strategy thus would be for the judge to attempt to secure reprieves and pardons from the executive. This strategy is naturally coupled with suggestive strategies: judges are in a unique position to not only condemn unjust punishment of the accused, but also call on the executive to redress this injustice.

The Constitution grants the President the power “to grant Reprieves and Pardons for Offences against the United States,”¹⁴⁴ and the executive retains wide discretion in exercising this power. As such, one safe option for the judiciary to take is to call out the injustice of a particular mandatory minimum sentence and recommend that the

¹⁴³ For example, judges might also encourage defendants to pursue a college education while incarcerated or after completion of the sentence—perhaps even offering a letter of support or recommendation for deserving parties. Last year, a federal judge issued a “federal certificate of rehabilitation” to a woman he had sentenced over a decade earlier. *See Doe v. United States*, 168 F.Supp.3d 427, 429 (E.D.N.Y. 2016). There has also been litigation as to whether district courts have the power to expunge not only arrest records, but convictions after completion. *Doe v. United States*, 833 F.3d 192 (2d Cir. 2016). Such tools might be tried more often. This list is not meant to be exhaustive but rather illustrative of the range of options that could be pursued.

¹⁴⁴ U.S. CONST. Art. II, § 2, cl. 1.

executive issue a commutation.

Judicial involvement in clemency is typically limited to “when a sentencing judge *is asked* to make a recommendation in a particular pardon case.”¹⁴⁵ Some judges have taken on a more active involvement in the clemency process by recommending commutation in *dicta* in their judicial opinions. Judge Paul Cassell, for instance, did so in *Angelos*.¹⁴⁶ This is rare, but by no means the only case of a judge explicitly recommending clemency in a judicial opinion.¹⁴⁷ Judges can also recommend clemency in public or private extra-judicial writings: Cassell continued to call for *Angelos*’ sentence to be commuted in public forums and in, for instance, privately petitioning President Obama to “swiftly” commute *Angelos*’ sentence in February 2016.

Interestingly, the rarity of active judicial involvement in the clemency process is a relatively new phenomenon. In the early years of the Republic, “federal judges were, then as now, sometimes required by law to impose punishments they considered unjust,” and in such situations judges recommended a grant of clemency “more frequently than they do today, and with greater expectation of success” than today.¹⁴⁸ Such recommendations were frequently solicited after defendants petitioned the President for clemency, but judges were also known to take “the initiative in approaching the President.”¹⁴⁹

Plausibly, for the judiciary to actively advocate on behalf of defendants—especially in *dicta*—could undermine their impartiality, and

¹⁴⁵ The 2009 Criminal Justice Transition Coalition, *Smart on Crime: Recommendations for the Next Congress* 117 (Nov. 5, 2008) (emphasis added).

¹⁴⁶ *Angelos*, 345 F. Supp. 2d at 1262.

¹⁴⁷ See, e.g., *United States v. Harvey*, 946 F.2d 1375, 1378–79 (8th Cir. 1991) (Sachs, C.J.), *United States v. McDade*, 639 F. Supp. 2d 77, 86 (D.D.C. 2009) (Friedman, J.) (“urge[ing] the President to consider executive clemency for McDade and to reduce McDade’s sentence”).

¹⁴⁸ George Lardner, Jr. & Margaret Colgate Love, *Mandatory Sentences and Presidential Mercy: The Role of Judges in Pardon Cases, 1790–1850*, 16 FED SENT’G REP. 212, 212 (2004).

¹⁴⁹ *Id.* at 213.

the appearance thereof. So, there are some grounds to consider this practice legally sub-optimal. But we do not think these grounds amount to a legal duty, and any claim to the contrary would have the revisionary implication that a rare practice today that was relatively common practice in the early years of the Republic was legally impermissible all along. We find that implication implausible. This suggests that this option satisfies judges' legal reasons.

We also think that there is a range of moral reasons for the judiciary to take an active role in the clemency process. Some concern judges' moral reasons to rectify unjust punishments that they have imposed: plausibly, Cassell has strong moral reasons to be concerned with Angelos' fate given the role that he played in imposing Angelos' punishment. Following other recent scholars, we also think that there are two more general moral reasons for judges to play an active and public role in the clemency process, whether they do so formally,¹⁵⁰ or informally.¹⁵¹ The first of these is the "alarming decline in the number of pardons and commutations granted by presidents," which suggest "a need to look to the courts to help 'reinvigorate' the power."¹⁵² Prominently recommending clemency in judicial opinions, and persistently repeating such recommendations in extra-judicial writing, could help reverse this decline.

The second reason is the appearance, if not reality, that "clemency decisions can potentially violate Equal Protection or Due Process principles."¹⁵³ Margaret Love, a former U.S. Pardon Attorney, recently wrote that

as the official route to clemency has all but closed, the back-door

¹⁵⁰ See Daniel T. Kobil, *Compelling Mercy: Judicial Review and the Clemency Power*, 9 U. ST. THOMAS L. J. 698 (2012).

¹⁵¹ See Joanna Huang, *Correcting Mandatory Injustice: Judicial Recommendations of Executive Clemency*, 60 DUKE L.J. 131 (2010).

¹⁵² See Kobil, *supra* note 150, at 698.

¹⁵³ *Id.*

route has opened wide. In the past two administrations, petitioners with personal or political connections in the White House bypassed the pardon bureaucracy in the Department of Justice, disregarded its regulations, and obtained clemency by means (and sometimes on grounds) not available to the less privileged.¹⁵⁴

Similar accusations have been leveled at the use of executive clemency power by the states, especially by former Oklahoma Governor J.C. Walton, and former Ohio Governor Richard F. Celeste.¹⁵⁵

Since the judiciary is independent of the executive and best positioned to assess offenders' culpability, granting clemency following sentencing judges' recommendations in judicial opinions could improve the appearance, if not reality, of consistent and merit-based commutations. For these reasons, calls for clemency by the judiciary should be welcomed on moral grounds.

That said, our ultimate assessment of assistive strategies is similar to our assessment of expressive ones: even though assistive strategies do have some chance of redressing the hardship that the particular defendant suffers, those chances are far too low for this strategy to be morally sufficient on its own. The alarming decline in the number of Presidential pardons and commutations makes it very unlikely that efforts to secure pardons for offenders like Angelos will be successful. That was true under President Obama, and it is all the more obviously true today: both President Trump and Attorney General Jeff Sessions have publicly championed the War on Drugs and tougher sentences for drug traffickers,¹⁵⁶ so we can expect offenders like Angelos to be even less likely to receive pardons under the current administration.

¹⁵⁴ Margaret Colgate Love, *The Twilight of Pardon Power*, 100 J. CRIM. L. & CRIMINOLOGY 1169, 1169 (2010).

¹⁵⁵ See Huang, *supra* note 151, at 150.

¹⁵⁶ See e.g. Lois Becket, *How Jeff Sessions and Donald Trump Have Restarted the War on Drugs*, THE GUARDIAN, August 21 2017, <https://www.theguardian.com/us-news/2017/aug/21/donald-trump-jeff-sessions-war-on-drugs>.

Indeed, even in the unlikely event that a judge advocates for a Presidential pardon and one is granted, we think the judge still may not have done enough to satisfy the moral obligations she owes to similarly situated defendants. This is because it is largely a matter of *moral luck* that such an endeavor was successful.¹⁵⁷ Plausibly, when one judge petitions successfully for an offender to receive a pardon and another judge is unsuccessful in that same endeavor, this is less likely to reflect the merits of their respective cases for a reprieve, or their efforts and skills in publicly or privately petitioning for executive action. It is more likely to reflect factors beyond their control, such as the political climate at the time, or their (perceived) partisan alignment. If this is right, then if we think that the unsuccessful advocate did not do enough (morally speaking), we should hold the same verdict with regard to the successful advocate: unless there is some morally relevant difference *in their conduct*, neither did enough for wronged defendants; one was just lucky.¹⁵⁸

Even if one disagrees about this last point, we think there is a further reason why even successfully petitioning for a Presidential pardon is not by itself sufficient to satisfy all the judge's moral reasons. Pardons typically target a select group of offenders. Securing a pardon for an individual like Angelos is likely to do little to help the many other similarly situated offenders; it is, moreover, very unlikely to help the enormous number of individuals who accept unfavorable plea bargains in order to avoid being subject to mandatory minimums. Offender-specific advocacy, then, does too little to address the systematic injustices imposed by mandatory minimums, for which the judiciary bear some moral responsibility. Plausibly, the moral reasons that apply to judges also support taking actions to rectify these systemic injustices that mandatory minimums predictably lead to. We will consider some such steps judges might take in this direction in the next section.

We should emphasize, however, that in arguing that expressive and

¹⁵⁷ See THOMAS NAGEL, MORTAL QUESTIONS 24–38 (1979); BERNARD WILLIAMS, MORAL LUCK: PHILOSOPHICAL PAPERS 1973-1980, 20–39 (1981).

¹⁵⁸ *Id.*

assistive strategies on their own may fail to satisfy the demands of morality, we are not ruling out that these strategies can form an integral part of a Satisficing Option. It may be, for instance, that it is morally permissible (though still not optimal) for a judge to combine interpretative, assistive, and expressive strategies. Here the legal costs may aggregate: a judge who pursued this approach may compromise the appearance of judicial impartiality to a degree that, while legally permissible, is far from optimal. But the moral gains would also aggregate: that judge would also do far more to help specific defendants (through increasing their odds of receiving an offender-specific remedy) while also helping similarly situated defendants (through increasing democratic opposition to mandatory minimums and/or rendering void their vague provisions). It also may be that in specific contexts no two of these strategies would be morally sufficient; the third would be necessary, even if not sufficient, for the judges' conduct to satisfy the demands of morality. This illustrates how the assessment of specific strategies in isolation does not settle whether they can form part of a genuine Satisficing Option. And in doing so, it also illustrates the importance of the *diachronic* assessment of judges' choices in judicial dilemmas: if we only considered in isolation a choice made in interpreting the law at trial, in expressing condemnation at sentencing, or in advocating for a pardon post-sentencing, we may miss how this *sequence of choices* constitutes a Satisficing Option, even though no specific choice did.

D. COOPERATIVE STRATEGIES

This section focuses on a type of strategy that is similar in spirit to the assistive strategies just discussed, but while the latter help harmed parties to obtain relief from other branches of government, the strategies discussed in this section involve pushing for cooperation from legal actors within the court system. These cooperative strategies can be pursued in tandem with others on our list. The aim is to enlist the help of prosecutors or other legal actors to open up legally available avenues for securing morally preferable solutions to a particular case or class of cases, which

otherwise would not be easily available.

Cooperative strategies come in many varieties. Sometimes a judge might use carrots to incentivize legal actors to voluntarily collaborate to find morally preferable solutions that remain legally available. Other times, the judge might resort to sticks of various kinds to compel such cooperation. Moreover, some cooperative strategies are *ex post* responses to a judicial dilemma that has already arisen in a particular case. As we will see, several courts have recently used such a strategy effectively to re-open cases where the other apparent options for avoiding injustice have been exhausted. By contrast, other cooperative strategies—like alternative sentencing programs—are *ex ante* efforts to prevent judicial dilemmas from arising in the first place by setting up institutional mechanisms to systematically side-step mandatory minimums where such sentences would be least appropriate. We begin with the *ex post*, case-specific cooperative strategies before turning to the *ex ante* version toward the end of this section.

1. Seeking Cooperation from Prosecutors

One of the most natural ways that judges might seek to resolve judicial dilemmas is to push for cooperation from prosecutors to avoid charges that trigger unjust mandatory minimum sentences. Such cooperation can take place while the trial is pending or in progress to prevent a judicial dilemma from arising. It can also take place *ex post*—that is, after a judicial dilemma has arisen—when judges work with prosecutors to seek a legally available mechanism for imposing a fairer sentence. Either way, this strategy is case-specific: it focuses on redressing or ameliorating the unjust punishment of a particular defendant. This strategy itself comes in several flavors. As we'll see, some judges might not rest easy with merely *requesting* prosecutorial cooperation, but in fact take active steps to compel it.

In a growing trend, several courts have begun employing this sort

of strategy.¹⁵⁹ Particularly in cases involving defendants sentenced under especially harsh mandatory minimum provisions, some courts were able to get prosecutors to agree to allow the defendant's conviction to be vacated, thus allowing the defendant to be resentenced more moderately after pleading guilty to lesser charges that did not carry a mandatory minimum. Despite being used in a variety of cases,¹⁶⁰ this is often referred to as the *Holloway* doctrine, after the 2014 case of *United States v. Holloway*.¹⁶¹

In the mid-1990s, District Judge John Gleeson was required to sentence Francois Holloway to fifty-seven years, on the basis of two "stacked" gun charges under § 924(c), each carrying a mandatory minimum of twenty-five years' imprisonment.¹⁶² Once the appeal and the standard post-conviction litigation concluded,¹⁶³ Judge Gleeson issued an order in February 2013 asking Attorney General Loretta Lynch to consider agreeing to vacate Holloway's convictions so that he could be resentenced.¹⁶⁴ "Recognizing that there were good reasons to revisit Holloway's excessive sentence but no legal avenues or bases for vacating it," Judge Gleeson requested "the United States Attorney [to] consider

¹⁵⁹ See Richard A. Serrano, *Cocaine smuggler serving 140 years freed early, part of national trend*, L.A. TIMES, Sept. 17, 2015 (<http://www.latimes.com/nation/la-na-prisoner-release-20150916-story.html>).

¹⁶⁰ See *United States v. Rivera*, No. 83-00096-01-CR (E.D. Okla. Sept. 21, 2015); *Drug Lifer Luis Rivera Released Tuesday Under New "Holloway" Doctrine* (<http://clemencyreport.org/lifer-luis-rivera-released-tuesday-under-holloway-doctrine/>); Clair Johnson, *Judge cuts 159-year sentence in casino robbery case*, BILLINGS GAZETTE, Oct. 27, 2010 (http://billingsgazette.com/news/local/crime-and-courts/judge-cuts--year-sentence-in-casino-robbery-case/article_9c4c5966-e1e4-11df-b934-001cc4c03286.html) (discussing Judge Richard Cebull's efforts to get the prosecutor to agree to the court's granting defendant Marion Hungerford's habeas petition, so that the court could vacate her sentence of 159 years and resentence her to seven years for lesser offenses). See also *United States v. Holloway*, 68 F.Supp.3d 310, n.2 (E.D.N.Y. 2014) (describing other cases from the same District in which a similar procedural mechanism had been employed).

¹⁶¹ *United States v. Holloway*, 68 F.Supp.3d 310 (E.D.N.Y. 2014).

¹⁶² *Id.* at 312–13.

¹⁶³ *Id.* at 313–14 (describing Holloway's direct appeal and habeas petitions).

¹⁶⁴ *Id.* at 314.

exercising her discretion to agree to an order vacating two or more of Holloway's [firearms convictions under] 18 U.S.C. § 924(c)...¹⁶⁵ The procedural mechanism at work here was the Rule 60(b) motion Holloway had filed in 2012 to re-open his earlier habeas petition,¹⁶⁶ arguing that his sentence was unjust but that he had no other legal avenues available to him by which to seek justice.¹⁶⁷ Holloway had served twenty years by then and had been an exemplary prisoner, and the Judge felt Holloway deserved better treatment.¹⁶⁸ But in July 2013, Attorney General Lynch initially denied Judge Gleeson's request, arguing that Holloway's proper avenue of relief was to request clemency from the President.¹⁶⁹

Judge Gleeson then issued a second order on May 14, 2014 requesting that the Attorney General reconsider her decision.¹⁷⁰ The reason was that the President had in the meantime issued new guidelines for clemency decisions, which said that nonviolent offenders were to be prioritized.¹⁷¹ Since Holloway had committed robbery, he would not have qualified for clemency under the new rules.¹⁷² Judge Gleeson's strongly worded order requested that the prosecutors reconsider their decision to continue opposing the vacatur of Holloway's conviction. In fact, the order concluded by supplementing the high-minded appeal to conscience with

¹⁶⁵ *Id.*

¹⁶⁶ *Id.*

¹⁶⁷ *Id.* Federal Rule of Civil Procedure 60(b) states that “[o]n motion and just terms, the court may relieve a party or its legal representative from a final judgment, order, or proceeding” not only on the basis of conditions like “mistakes” or “newly discovered evidence,” but also for “any other reason that justifies relief.” F.R.Civ.P. 60(b)(1)–(6).

¹⁶⁸ *Holloway*, 68 F.Supp.3d at 314.

¹⁶⁹ *Id.*

¹⁷⁰ *Id.* at 314. *See also United States v. Holloway*, Order, No. 01-CV-1017, Dkt. # 54 (E.D.N.Y.) (order requesting the Attorney General to reconsider) (<http://www.schlamstone.com/wp-content/uploads/2014/05/holloway.pdf>).

¹⁷¹ *Id.* at 4 (noting that “[r]ecent events make it clear that clemency is not a realistic avenue to justice for Holloway”); *see also Holloway*, 68 F.Supp.3d at 314.

¹⁷² *See Holloway Order*, *supra* note 170, at 4 (observing that “the fact that Holloway committed crimes of violence will disqualify him” under the new clemency rules); *Holloway*, 68 F.Supp.3d at 312, 314.

several concrete threats: the Judge stated that unless the prosecutors cooperated, he would reopen several constitutional issues in the case, which would require a great deal of briefing from the prosecutor's office.¹⁷³

The prosecutors agreed to the court's second request and stated that they were willing to drop their opposition to the motion to reopen Holloway's habeas petition.¹⁷⁴ That gave the court the authority to vacate Holloway's conviction, and going forward the prosecution agreed to drop the "stacked" gun counts with the mandatory minimums.¹⁷⁵ Thus, Holloway's sentence could be dramatically reduced. He was subsequently resentenced to time served.¹⁷⁶

Once the defendant has pursued all legally available avenues of relief, this sort of advocacy by the court seems uniquely appropriate. It is a meaningful step the judge can take to help right the moral wrong he or she was forced to impose. Moreover, even if the judge ultimately fails to get prosecutors to agree to vacate the defendant's sentence, as happened in *Holloway*, the defendant will at least see the court acting forcefully on his

¹⁷³ See *Holloway Order*, *supra* note 170, at 5. The court explained:

In the absence of a government agreement to reopen the sentencing, I will address the pending application to reopen Holloway's collateral challenge to his conviction. The extraordinary trial penalty in this case may warrant further briefing on the constitutional issues raised by such a use of prosecutorial power. In addition, though I long ago rejected a claim of ineffective assistance of counsel based on trial counsel's admission in his opening statement that Holloway in fact robbed the three victims of their cars, upon further reflection I may direct a closer inspection of that issue as well.

Id.

¹⁷⁴ *Holloway*, 68 F.Supp.3d at 315.

¹⁷⁵ *Id.* at 315–16.

¹⁷⁶ Monique O. Madan, *At Behest of Judge, U.S. Shortens Man's 57-Year Mandatory Sentence*, N.Y. TIMES, July 29, 2014, <http://www.nytimes.com/2014/07/30/nyregion/at-judges-behest-us-shortens-mans-57-year-mandatory-sentence.html> (noting that Holloway, "who had been serving a 57-year mandatory federal prison sentence was resentenced on Tuesday to time served").

or her behalf, which likely would be felt to count for something.

Thus, requesting cooperation from prosecutors can be an effective way to resolve a judicial dilemma—provided the requested cooperation is given. This, however, highlights a drawback of cooperative strategies in general: there is always a risk that the requested cooperation will not be forthcoming. That risk would be especially pronounced in jurisdictions where prosecutors have been given institutional incentives to seek as many convictions as possible, with the most severe sentences available.

2. Compelled Cooperation

If cooperation is requested and refused, judges might nonetheless use other tools at their disposal to elicit it. To give this approach a name, we might call it the *strategy of compelled cooperation*. The idea is to create competing institutional incentives for the relevant legal actors to collaborate in finding morally preferable outcomes. In the case of prosecutors, it is worth bearing in mind that they are repeat players in the courtroom, and so judges have numerous tools at their disposal to pressure prosecutors to help find ways to avoid the most extreme injustices caused by mandatory minimums.

Holloway itself demonstrates what the compelled cooperative strategy might look like. Judge Gleeson showed himself willing to insist quite forcefully on prosecutorial cooperation toward seeking a more morally defensible sentence for Mr. Holloway, who otherwise faced a prison term the judge himself dubbed “excessive.”¹⁷⁷ Recall the court’s threat to create substantially more work for the prosecutor’s office by reopening several constitutional issues in the case unless the prosecutors agreed to cooperate in securing a more just outcome for Mr. Holloway.¹⁷⁸ This amounts to imposing concrete consequences for prosecutors in the

¹⁷⁷ *Holloway*, 68 F.Supp.3d at 314.

¹⁷⁸ See *Holloway Order*, *supra* note 170, at 5 (declaring that “[t]he extraordinary trial penalty in this case may warrant further briefing on the constitutional issues raised by such a use of prosecutorial power,” as well as re-briefing other issues).

event that they unreasonably withhold cooperation; a prosecutor seeking to maximize convictions within considerable time constraints will naturally wish to avoid having to engage in complex, time-consuming constitutional analysis in order to secure a single conviction.

In this way, the court did not merely *request* cooperation, but took active steps to *extract* it. There are a variety of concrete consequences that judges might take to elicit cooperation where it is not forthcoming. Mandatory minimums might erode judicial discretion over sentencing, but they do not erode judicial discretion over a wide range of procedural matters that affect individual prosecutors. To be clear, our claim here is not that judges should engage in any form of prejudicial treatment of prosecutors that violates the law or is otherwise legally unsupportable. That, of course, would not *satisfice* the law's demands and so would not count as a Satisficing Option. However, a judicial action can be legally permissible even if it is not the absolutely top-ranked option in terms of the applicable legal reasons. If judges use procedural rulings to elicit cooperation from prosecutors who might otherwise withhold it (perhaps unreasonably), this might be sub-optimal by the lights of the law, but still legally permissible. This allows for a kind of forceful advocacy in pursuit of outcomes that are both legally and morally satisfactory, and can be a promising way to resolve judicial dilemmas in this context. Schematically, the strategy is to create incentives for prosecutors to push them to cooperate in seeking legally available resolutions of particular cases that are morally preferable.

One might object that this approach is too little too late for Mr. Holloway. It is merely a post hoc fix to a wrong that has already happened, and this, one might fairly argue, is not nearly as good as avoiding the wrong in the first place.

We think this is a legitimate concern in Mr. Holloway's case. But in principle, there are ways to avoid it. One could imagine judges signaling to the parties set to appear before the court what the consequences will be for failing to cooperate as needed in pursuit of justice. For example, the judge might adopt a standing policy—perhaps in the form of a local rule—requiring prosecutors to cooperate to avoid

triggering mandatory minimums in cases where it is most likely to result in excessive sentences, and not merely at the sentencing stage, but also with respect to initial charging decisions. Although Attorney General Jeff Sessions has recently ordered that the DOJ policy going forward will be to always charge defendants with the most serious offense that is available,¹⁷⁹ judges might seek to counteract this development by establishing standing policies that require cooperation from individual prosecutors in pursuit of more restrained charging decisions, as well as less severe positions with regard to sentencing. Indeed, a judge could, in principle, back up such a standing policy with the sort of threat made by Judge Gleeson in *Holloway* to the effect that failing to cooperate in pursuit of more moderate sentences would yield an onerous workload and could result in personal inconvenience for non-cooperative prosecutors in extreme cases. In a similar vein, the National Association of Criminal Defense Lawyers suggests that defense attorneys move for the court to order prosecutors to comply with the applicable ethical rules in order to give these rules more bite in the event of serious non-compliance.¹⁸⁰

The array of steps that fall within the strategy of compelled cooperation is limited only by the judge's imagination—and the law. An even bolder idea that might appeal to some judges (if not all) would be to demand, as a condition for appearing before the court, that prosecutors sign a pledge in which they promise to cooperate in pursuit of justice

¹⁷⁹ See Sessions, *supra* note 43; see also Kevin Johnson, *Attorney General Jeff Sessions Enacts Harsher Charging, Sentencing Policy*, USA TODAY, May 12, 2017, <https://www.usatoday.com/story/news/politics/2017/05/12/attorney-general-jeff-sessions-enacts-harsher-charging-sentencing-policy/101571324> (reporting that “Attorney General Jeff Sessions is directing federal prosecutors to seek ‘the most serious’ criminal charges against suspects”).

¹⁸⁰ Barry Scheck and Nancy Gertner, *Combatting Brady Violations With An ‘Ethical Rule’ Order for the Disclosure of Favorable Evidence*, THE CHAMPION, May 2013, <https://www.nacdl.org/Champion.aspx?id=28478> (“What the defense attorney should do to make the ‘ethical order’ motion is very straightforward: File a pretrial motion that tracks and cites the relevant ethical rule of the defense attorney’s jurisdiction... [and a]sk for an order that the prosecutor search her file and disclose all information that ‘tends to negate the guilt of the accused or mitigates the offense’”).

where charging and sentencing is concerned. Violating the pledge could then form the basis for sanctions should reasonable cooperation be arbitrarily or unjustifiably refused. For example, had such a pledge been in effect in *Holloway*, the prosecutors refusing to cooperate to provide a legal avenue for imposing a more appropriate sentence on Mr. Holloway could perhaps have been deemed non-cooperative, which could trigger concrete consequences for violating the pledge.

Of course, using such a heavy hand in extracting cooperation carries risks. Most importantly, it risks undermining the appearance of the court's neutrality. Accordingly, quite some care would have to be taken by the court in crafting a standing policy of this sort in order to remain neutral between litigants and merely demand a cooperative approach by all involved in pursuit of just case outcomes. Perhaps the policy could be specifically limited to cases where mandatory minimums are implicated. To further minimize the threat to the appearance of judicial neutrality, perhaps the forceful mechanisms designed to promote cooperation from litigants in avoiding overly harsh sentences would be triggered only *post-conviction*, once the relevant facts have been legally established by a jury or by plea. If it then becomes clear that, for example, the prosecution behaved in a non-cooperative manner through overly aggressive charging decisions (e.g. involving a frivolous use of "stacking"), and then continued to refuse to cooperate in pursuit of moderation at the sentencing stage, then and only then, the suggestion goes, would the relevant sanctions in the standing policy be triggered. Crafting the court's policy in such a way would help lessen the risks to the perception of judicial neutrality. What is more, the judge's efforts to elicit cooperation from litigants need not all take the form of threatened burdens; instead, they might involve efforts to name and laud parties who have been especially helpful and cooperative in pursuit of justice—as the prosecutors in *Hungerford* proved to be.¹⁸¹

Given all this, we think that using the judge's unique position to put pressure on litigants to work together to avoid excessive sentences—perhaps especially in cases like *Holloway*—can be a promising way for

¹⁸¹ See *United States v. Hungerford*, 465 F.3d 1113 (9th Cir. 2006) (Reinhard, J., concurring).

judges to navigate the conflict between their legal and moral reasons where mandatory minimums are concerned.¹⁸² The compelled cooperative strategy must be executed with care, bearing in mind the crucial importance of minimizing the threat to the perception of the court's neutrality and commitment to the rule of law. But used within appropriate limits, we suggest that it can be an effective tool for resolving judicial dilemmas. This is just another way to say that pursuing such strategies within proper limits can amount to the sort of Satisficing Option we expressed sympathy for above.

3. Ex Ante Cooperative Strategies

Thus far, we have focused on case-specific strategies that aim—with varying degrees of forcefulness—to enlist the cooperation of litigants in pursuit of more just sentences. Besides the worries about judicial neutrality posed by more aggressive forms of compelled cooperation, a further concern about case-specific cooperative strategies is their *ex post* nature. As noted above, some might worry that seeking cooperation from prosecutors to re-open Mr. Holloway's conviction was too little too late. So, might there be ways for the judiciary to intervene earlier, in collaboration with prosecutors, to avoid imposing harsh sentences on particular low-level offenders, thus preventing judicial dilemmas from arising as frequently in this context? Moreover, is there a way for the judiciary to intervene more *systematically* to reduce the burdens that mandatory minimums bear on a broad class of defendants who are brought before courts?

¹⁸² It seems there are several kinds of moral reasons that apply in this context. First, it seems judges have moral reasons to make up for the wrong that she personally commits by applying overly harsh mandatory minimums without sufficient efforts to avoid or mitigate this result. Second, judges plausibly also have moral reasons to avoid unjust sentences owing to mandatory minimums *in general*, which the judiciary can at least be complicit in, even when the specific case in question does not involve sentencing anybody unfairly. The measures taken by Judge Gleeson in *Holloway* help satisfy the first set of moral reasons. The standing policy demanding cooperation from prosecutors in pursuit of just sentencing would be a way to comply with the second set of reasons.

We think that there is. In addition to taking *ex post* steps to assist particular defendants who have already been haled before the court, judges have strong reasons to consider *ex ante* cooperative strategies that seek to divert defendants away from the criminal justice system in the first place. One obvious example of such a strategy that judges have pursued in some jurisdictions is to use, or work to establish, an alternative sentencing program.

One success story in this vein is the Conviction and Sentencing Alternative (“CASA”) Program that has operated in the Central District of California since 2012.¹⁸³ It aims to provide those charged with felonies with an alternative to prosecution, conviction, and incarceration. For a person charged with a crime to be selected for the program, broad judicial cooperation is required: the participating judge, the Pretrial Services Agency, the U.S. Attorney’s office and the Federal Public Defender’s office must all agree that the person selected is a suitable candidate.¹⁸⁴ The participant enters a guilty plea under Rule 11(c)(1)(C), which, upon successful completion of the program, binds the CASA judge to either dismiss the charges or enter a non-custodial sentence.¹⁸⁵ Successful completion of the program requires that there are no disqualifying relapses.¹⁸⁶ During the program, the participant is not incarcerated, but is supervised by the Pretrial Services Agency.¹⁸⁷

Two groups of defendants are eligible for the program. The first covers those with no criminal history to speak of, “whose criminal conduct appears to be an aberration that could appropriately be addressed by supervision” and rehabilitative programs.¹⁸⁸ The second encompasses

¹⁸³ *The Central District of California’s Conviction And Sentence Alternatives (“CASA”) Program* at 1, <http://colsontaskforce.org/wp-content/uploads/2015/10/4.-Cardona-Testimony.pdf>.

¹⁸⁴ *Id.*

¹⁸⁵ *Id.* at 3.

¹⁸⁶ *Id.* at 4 (“repeated failures and relapses will result in graduated sanctions up to and potentially including termination from the program”).

¹⁸⁷ *Id.* at 1.

¹⁸⁸ *Id.* at 1.

those with more serious criminal histories, “whose criminal conduct appears primarily motivated by substance abuse or similar issues,” and for these defendants, intensive treatment is typically part of the CASA program.¹⁸⁹ The program generally excludes defendants charged with more serious offenses like child pornography, narcotics distribution, or violent crimes.¹⁹⁰

The heart of the CASA program is a course of monthly meetings between participants and CASA team members (the judge, prosecutor, or other court officials) in a courtroom.¹⁹¹ These sessions are devoted to discussion between CASA participants and the CASA team members. The discussions are “intended to encourage self-recognition of the underlying causes, acceptance and understanding of the sanctions imposed.”¹⁹² Notably, the CASA program assumes that “there will be failures and relapses,” which are subject to increasing sanctions up to termination from the program.¹⁹³ Accountability is not imposed top-down by the CASA team (e.g. a judge or a prosecutor); rather, CASA participants hold *each other* accountable.¹⁹⁴ The Central District of California’s CASA program has graduated well over 100 participants at this point,¹⁹⁵ and its creators believe it is a success.¹⁹⁶

¹⁸⁹ *Id.*

¹⁹⁰ *Id.* at 2.

¹⁹¹ *Id.* at 3.

¹⁹² *Id.* at 4.

¹⁹³ *Id.*

¹⁹⁴ *Id.* (noting that the CASA discussion group thus is autonomous and egalitarian in the sense that other “program participants play an integral role in emphasizing the need for truthfulness, often providing examples of their own failures and relapses, their own efforts to lie about and fabricate excuses for these failures and relapses, and what has and has not worked for them in trying to come to grips with and address them”).

¹⁹⁵ *Id.* at 2.

¹⁹⁶ *Id.* (quoting one District Court judge who asserts that the program demonstrates that “even those who have committed crimes, can change for the better, and that given a little help they can break the vicious cycle of recidivism and failure that we see all too often in our criminal justice system”).

Making use of a program like CASA thus seems to be a very promising *ex ante* way for judges to respond to the judicial dilemmas they are likely to face where mandatory minimums are concerned. Indeed, several defendants who would have faced mandatory minimums of five to ten years have successfully graduated from the Central District of California's CASA program, and thereby avoided jail time.¹⁹⁷ Using a program like CASA in cases where mandatory minimums would be especially unjust—which are precisely the cases where the defendant would be most likely to be a good fit for CASA—is a particularly attractive option because it avoids doing injustice to the defendant in the first place, which then requires an *ex post* response of the sort we discussed in earlier sections. After all, the program provides a legal mechanism by which the judge can, via cooperating with prosecutors, sidestep the need to impose a mandatory minimum sentence on the defendant at all. Moreover, judges could also take steps with varying degrees of strength to incentivize prosecutors to participate in such programs. As before, where the means to generate such incentives are legally permissible but sub-optimal, pursuing alternative sentencing programs can constitute a Satisficing Option.

On the other hand, alternative sentencing programs may also face drawbacks as a way to avoid conflicts between a judge's legal and moral reasons in the context of mandatory minimums. Some judges may not find themselves in a jurisdiction in which a program like CASA exists. These judges could still respond to their judicial dilemmas (past, present, and future) by working to establish such a program. But that may be a difficult and time-consuming task.¹⁹⁸ Under such circumstances, judges might also use carrots or sticks (or both) to induce prosecutors and other legal actors to work together to set up an alternative sentencing program, which could turn this strategy into a full-fledged Satisficing Option in its own right.

A different limitation of a CASA-style program is that only a narrow

¹⁹⁷ *Id.*

¹⁹⁸ Indeed, it is not hard to imagine pressure being put on U.S. Attorney's offices not to participate in alternative sentencing programs like CASA to the extent this can be portrayed as "soft on crime."

slice of defendants would be eligible. It is not hard to imagine that some of the excluded defendants still would be subject to mandatory minimums that are excessively harsh relative to what they deserve, given the mitigating factors that might apply in their particular cases. For example, Mr. Angelos was charged with drug trafficking offenses involving the use of a firearm, and so it is doubtful that he would be eligible for a program like CASA.

Nonetheless, alternative sentencing programs have the advantage of providing a valuable *ex ante* method for reducing the incidence of judicial dilemmas in the first place. Working to establish such a program can figure into a series of steps that together constitute a broad, diachronic Satisficing Option (we might call it a satisficing package). Moreover, these programs have the benefit of not merely providing case-specific remedies, but rather promise to offer a more systemic response to the threat of judicial dilemmas in the sentencing context in general.¹⁹⁹ They are thus worth including in the judge's arsenal of responses to judicial dilemmas. To put the point simply, even when judicial activity that uses or establishes an alternative sentencing program does not constitute a Satisficing Option (because it does not strictly *resolve* an existing judicial dilemma), it may be a necessary step towards *avoiding future* judicial dilemmas before they arise. Plausibly, merely responding to existing judicial dilemmas is not enough in the eyes of morality, given the importance of combating systemic injustices flowing from mandatory minimums. So the same reasons that make it worthwhile to consider how

¹⁹⁹ Indeed, such programs could also help defendants who otherwise would be pressured into accepting unfavorable plea bargains due to the threatened use of mandatory minimums. See, e.g., Human Rights Watch, *Report: An Offer You Can't Refuse: How US Federal Prosecutors Force Drug Defendants to Plead Guilty*, 2 (Dec. 5, 2013), <https://www.hrw.org/report/2013/12/05/offer-you-cant-refuse/how-us-federal-prosecutors-force-drug-defendants-plead#page> (noting that “[p]lea bargaining means higher sentences for defendants who go to trial,” and that “[t]he threat of higher sentences puts ‘enormous pressure [on defendants] to plead’”). By diverting defendants away from the criminal justice system, alternative sentencing programs help defendants escape the pressure to plead that they would otherwise face because of harsher sentences should they elect to go to trial.

judges should resolve existing judicial dilemmas also warrant consideration of the legally permissible options for judges to prevent such dilemmas from arising in the first place.

E. SUGGESTIVE STRATEGIES

The prior two strategies we have been discussing for dealing with judicial dilemmas have focused on how the judiciary can engage with other legal actors—especially the executive branch and prosecutors—to find legal avenues for avoiding or correcting the imposition of morally unjust sentences. There is, however, one other group of actors in legal proceedings who have a significant degree of legal power to prevent unjust mandatory minimum punishments: juries. Juries have the legal power to nullify the law and prevent unjust punishments. This observation is the basis for the final strategy that we shall consider: rather than expressly cooperating with legal actors like prosecutors, judges can resolve judicial dilemmas by nudging other legal actors like juries to independently use their discretion in ways that would defuse judicial dilemmas. While we will focus on the role that judges can play in suggestively nudging the jury to nullify the law, this example is intended to illustrate more generally how the judiciary can use legally permissible if suboptimal means to nudge other legal actors to independently use their discretion in morally beneficial ways.

Two initial points of clarification should be made about this strategy. First, what is jury nullification? If the jury is satisfied that the defendant's guilt has been proven beyond a reasonable doubt, the jury have the power to acquit the defendant. When a jury does so because they believe that a conviction would be unjust (often because they believe that the resultant sentence would be too severe),²⁰⁰ they “nullify” the law in its application to that particular case. It is accepted that the jury has the *power* to nullify the law; we take no stand on the further, contested issue of

²⁰⁰ Darryl K. Brown, *Jury Nullification Within the Rule of Law*, 81 MINN. L. REV. 1149, 1183 (1997).

whether the jury has a legal *right* to do so.²⁰¹

Second, what would it take for the judge to *suggest* that the jury nullify the law? There are several possibilities here, which differ in terms of the extent to which the relevant suggestion is (a) direct or indirect, and (b) explicit or implicit. On one end of the spectrum, the judge can instruct the duty to nullify the law by acquittal because a conviction would result in injustice. On the other end of the spectrum, the judge can indicate that the defense will be allowed to introduce relevant evidence that ends up supporting a nullification argument. It is important to keep this spectrum in mind, as different ways of executing suggestive strategies raise different moral and legal considerations.

Let us start with directly and explicitly instructing the jury to nullify the law. In many jurisdictions, explicit nullification instructions are legally impermissible.²⁰² And even if they are legally permissible, many contend that nullification instructions raise worrisome moral and legal

²⁰¹ The United States Supreme Court held in its 1895 decision in *Sparf & Hansen v. United States* that the jury has the power but not the right to nullify the law. 156 U.S. 51 (1895). More recently, the D.C. Circuit noted that it may “invite chaos” to encourage the jury to nullify the law. *United States v. Dougherty*, 473 F.2d 1113, 1133–34 (D.C. Cir. 1972) (quoting *United States v. Moylan*, 417 F.2d 1002, 1009 (4th Cir. 1969)). Nonetheless, the court accepted that the jury can legitimately nullify the law in extraordinary cases. *Id.* at 1136 (noting that “[w]hat makes for health as an occasional medicine would be disastrous as a daily diet,” and recognizing the “existence of the jury’s prerogative”). See also Lawrence W. Crispo, et al., *Jury Nullification: Law Versus Anarchy*, 31 LOY. L.A. L. REV. 1, 17 (1997). Jury nullification has been estimated to occur in about 4% of cases. See Chaya Weinberg-Brodt, *Jury Nullification And Jury Control Procedures*, 65 N.Y.U. L. REV. 825, 826 n.5 (1990). Nonetheless, it does not produce much case law, given that acquittals usually do not result in reported decisions. Major Bradley J. Huestis, *Jury Nullification: Calling for Candor from the Bench and Bar*, 173 MIL. L. REV. 68, 71 (2002). As a result, it is largely an academic debate “whether or not juries have a *right* to nullify, or whether it is just an illegal tradition that is tolerated.” Steve J. Shone, *Lysander Spooner, Jury Nullification, and Magna Carta*, 22 QUINNIPIAC L. REV. 651, 653 (2004).

²⁰² See Weinberg-Brodt, *supra* note 201 at 832 n.37; *United States v. Moylan*, 417 F.2d 1002, 1006–07 (4th Cir. 1969), cert. denied, 397 U.S. 910 (1970); *United States v. Dellinger*, 472 F.2d 340, 408 (7th Cir. 1972); *United States v. Drefke*, 707 F.2d 978, 982 (8th Cir. 1983); *United States v. Washington*, 705 F.2d 489, 494 (D.C. Cir. 1983).

concerns.²⁰³ Even scholars who argue that the jury has the right to nullify the law have shied away from advocating that the judiciary “explicitly recommend or actively encourage nullification,”²⁰⁴ due to the fear that nullification would become too widespread. It is not clear whether this fear is well grounded. Empirical evidence does not support the view that nullification instructions produce unwarranted acquittals,²⁰⁵ but since direct and explicit nullification instructions are legally impermissible, this is a moot point.

Further down the spectrum, judges can directly but *implicitly* suggest nullification in how they frame their instructions to the jury. Specifically, the idea would be to instruct juries that they “*may* find the defendant guilty only if her guilt has been established beyond a reasonable doubt.” This language communicates only a necessary condition for when a jury is permitted to convict, and thereby *implicates* that the jury can acquit even when this condition is met without *explicitly stating* that this is so. Certain courts have indicated that such instructions are legally

²⁰³ See, e.g., *Sparf & Hansen*, 156 U.S. at 148 (Gray, J. dissenting) (“while the power of the jury is admitted, it is denied that they can rightfully or lawfully exercise it, (...). The law must...have intended, in granting this power to a jury, to grant them a lawful and rightful power(...).” (quoting *People v. Croswell*, 3 Johns. Cas. 366–68)).

²⁰⁴ Aaron McKnight, *Jury Nullification as a Tool to Balance the Demands of Law and Justice*, 2013 B.Y.U. L. Rev. 1103, 1130 (2013).

²⁰⁵ See Irwin A. Horowitz, *Jury Nullification: The Impact of Judicial Instructions, Arguments, and Challenges on Jury Decision Making*, 12 L. & HUM. BEHAV. 439, 452 (1988); Keith E. Niedermeier, Irwin Horowitz, and Norbert L. Kerr, *Informing Jurors of their Nullification Power: A Route to a Just Verdict or Judicial Chaos?*, 23 L. & HUM. BEHAV. 331 (1999).

permissible.²⁰⁶ Some scholars defend such instructions on the legal basis that they are necessary to prevent a judicial deception: *if* one assumes that the jury has the right to nullify the law, one can argue that it is “affirmatively misleading” to instruct the jury that “If you are satisfied that the defendant’s guilt has been proven beyond a reasonable doubt, then you *must* find the defendant guilty.”²⁰⁷ Whether the “may convict” instruction is legally preferable to the “must convict” instruction, on the grounds that the latter is deceptive, depends on the contested issue of whether the jury does in fact have the legal right to nullify the law—an issue we do not aim to resolve here. However, even if direct but implicit suggestions *were* legally permitted, we do not think that this is the morally best way for judges to execute suggestive strategies. Psychological studies have found that the subtle implication in the instructions above has little effect on jury deliberations or verdicts²⁰⁸—“in order to increase juror awareness of their power to nullify, instructions must contain a strong and

²⁰⁶ *United States v. Dougherty*, 473 F.2d 1113, 1135 (D.C. Cir. 1972) (“The totality of input generally convey adequately enough the idea of prerogative, of freedom in an occasional case to depart from what the judge says. Even indicators that would on their face seem too weak to notice—*like the fact that the judge tells the jury it must acquit (in case of reasonable doubt) but never tells the jury in so many words that it must convict*—are a meaningful part of the jury’s total input.” (emphasis added)). See also Judge B. Michael Dann, *The Constitutional and Ethical Implications of “Must-Find-the-Defendant-Guilty” Jury Instructions*, in *JURY ETHICS: JUROR CONDUCT AND JURY DYNAMICS* 93–118, 104 (John Kleinig and James P. Levine eds., 2006) (questioning the validity of so-called “must-find-the-defendant-guilty” jury instructions, and supporting a “may-find-the-defendant-guilty” instruction instead).

²⁰⁷ Dann, *supra* note 206 at 104. It is worth noting that others also object to the use of “must” in this context. See also Judge Jack B. Weinstein, *The Many Dimensions of Jury Nullification*, 81 *JUDICATURE* 168–71 (1998).

²⁰⁸ Irwin Horowitz, *The Effect of Jury Nullification on Verdicts and Jury Functioning in Criminal Trials*, 9 *L. AND HUM. BEHAV.* 25 (1985). See also Joseph A. Hamm, Brian H. Bornstein, Jenna Perkins, *Jury Nullification: The Myth Revisited*, in *PSYCHOLOGY OF POLICY-MAKING* 49–71 (2013).

explicit message.”²⁰⁹

What about indirect ways of executing suggestive strategies? The suggestion can still be explicit or implicit. In some jurisdictions, the judge can allow defense attorneys to explicitly advocate for jury nullification in their closing arguments.²¹⁰ Here the suggestion is explicit, but the judge plays an indirect role in allowing the suggestion to be made. The suggestion can also be indirect and implicit: judges can allow the defense to admit evidence that happens to support a nullification argument,²¹¹ including evidence of the severity of the mandatory minimum sentence that would attach to a conviction. This evidence is arguably relevant to the

²⁰⁹ Shari Seidman Diamond, *When Ethics and Empirics are Entwined: A Response to Judge Dann's Nullification Proposals*, in *JURY ETHICS: JUROR CONDUCT AND JURY DYNAMICS* 119–30, 122 (John Kleinig and James P. Levine eds., 2006).

²¹⁰ For instance, in *New Hampshire v. Elvin Mayo, Jr.*, the New Hampshire Supreme Court affirmed the legal permissibility of the trial judge's decision to allow defense counsel to argue the following in his closing statement: “[I]f you find that the prosecution has proven to you beyond a reasonable doubt each and every element, you may, or should, find [the defendant] guilty. You are not required to. You must find him not guilty if each and every element has not been proven; you may, or should, find him guilty if each and every element has been proven. You don't have to.” 125 N.H. 200, 204 (N.H. 1984). The New Hampshire Supreme Court found that this was legally permissible because “[t]he jury was expressly made aware of its prerogative to disregard the strict requirements of the law if it found that those requirements were not being justly applied in the defendant's case.” *Id.* Notably, not all jurisdictions agree on this issue. In *United States v. Trujillo*, the Eleventh Circuit held that “While we recognize that a jury may render a verdict at odds with the evidence or the law, neither the court nor counsel should encourage jurors to violate their oath,” and hence “defense counsel may not argue jury nullification during closing argument.” 714 F.2d 102, 106 (11th Cir. 1983). See also Huestis, *supra* note 201, at 89–94; Monroe H. Freedman, *Jury Nullification: What It Is, and How to Do It Ethically* 42 *HOFSTRA L. REV.* 1125 (2014).

²¹¹ Jack B. Weinstein, *Considering Jury "Nullification": When May and Should a Jury Reject the Law to Do Justice?* 30 *AM. CRIM. L. REV.* 239, 251 (1993). We put aside other evidence that could be admitted in order to support a nullification argument in jury deliberations, such as irrelevant evidence that helps portray the defendant in a sympathetic light. Not all defendants who are subject to severe mandatory minimums have an especially sympathetic background, and there is strong resistance—grounded in case law—to allowing juries to hear irrelevant evidence.

question of guilt.²¹² If the defendant knew that extremely harsh penalties would kick in for a particular crime, then the penalties themselves would be some evidence that the defendant did not do the crime—this is the “anti-motive” theory. Interestingly, the empirical evidence suggests that juries are more likely to nullify when informed, implicitly or explicitly, of their nullification power by an attorney rather than a judge.²¹³

One legal challenge to this indirect and implicit version of suggestive strategies is that such evidence is irrelevant to the question of guilt, and hence legally inadmissible. In *Shannon v. United States*, the Supreme Court held that “[i]nformation regarding the consequences of a verdict is . . . irrelevant to the jury’s task, so when a jury has no sentencing function, it should be admonished to ‘reach its verdict without regard to what sentence might be imposed.’”²¹⁴ However, there is a plausible argument that this decision should be interpreted as endorsing a principle that is “intended to protect the defense, not the prosecution,” proscribing the admission of evidence about lenient punishments, but not proscribing the admission of evidence about severe punishments.²¹⁵ Moreover, there are ways to argue that evidence of the applicable sentences is relevant to the question of guilt. Specifically, the idea here is based on the “long-approved argument” employed by prosecutors who contend, with respect to corroborating witnesses with pending criminal charges, that the known prospect of a criminal sanction for perjury “supports an inference that the cooperating witness is less likely to have committed an alleged crime.”²¹⁶

²¹² Jeffrey Bellin, *Is Punishment Relevant After All? A Prescription for Informing Juries of the Consequences of Conviction*, 90 BOSTON U. L. REV. 2223 (2010) (<http://www.bu.edu/law/journals-archive/bulr/documents/bellin.pdf>).

²¹³ Irwin A. Horowitz, *Jury Nullification: The Impact of Judicial Instructions, Arguments, and Challenges on Jury Decision Making*, 12 L. & HUM. BEHAV. 439, 446 (1988).

²¹⁴ *Shannon v. United States* 512 U.S. 573, 579 (1994).

²¹⁵ Bellin, *supra* note 212, at 2240–41. Bellin cites Justice Stevens’ argument that nullification instructions are unlikely to prejudice the defendant as “as there is no need to give the instruction unless the defendant requests it.” *Id.* (citing *Shannon v. United States*, 512 U.S. 573, 591 (1994) (Stevens J., dissenting)).

²¹⁶ *Id.* at 2252.

The same thinking suggests that criminal defendants are less likely to commit more serious crimes since these are punished more severely, and so evidence of sentencing ranges is technically relevant to the question of guilt and thus not inadmissible.²¹⁷ Given this, we think it plausible that judges do not have a legal duty to exclude such evidence; admitting such evidence might be considered to stretch the law, but it does not violate the letter of the law, and hence would not obviously be legally impermissible. Thus, this strategy, if implemented properly, can amount to a Satisficing Option.

Another legal challenge to this indirect and implicit version of suggestive strategies is that since the jury has no right to engage in jury nullification, judges should not take steps that increase the likelihood of jury nullification. This argument also depends on an answer to the contested question of whether the jury has a right to engage in jury nullification. Since we wish to take no stand on that issue here, we are willing to grant this premise for the sake of argument. Instead, we reject the inference from this premise to the conclusion that judges should not take steps that increase the likelihood of jury nullification. We think that even if they are nudged by the judge or the defense, the jury and its members make autonomous decisions about whether to nullify the law. This is a *novus actus interveniens*, and it severs any legal responsibility that judges might be thought to have over the nullification outcome. In other words, even if there is a causal chain from acts by the judiciary to nullifications by juries, the judiciary arguably is not responsible for the independent decision of juries to nullify.

For these reasons, we think that some suggestive strategies are legally permissible even if they may not be legally ideal: they satisfy the legal reasons at play. We also think that there are good moral reasons to engage in this strategy. Most obviously, it can improve the defendant's odds of avoiding unjustly harsh mandatory minimums. Less obviously, it provides a further disincentive to prosecutors who would seek to strategically apply severe mandatory minimums in contexts where they

²¹⁷ *Id.*

would not be warranted. Given that this strategy is available wherever severe mandatory minimum provisions are applied, it could provide a significant constraint on prosecutorial discretion even if there is significant debate about the legality of providing exculpatory evidence regarding the consequences of a verdict. Insofar as prosecutors aim to maximize their track record of “wins” and resolve trials quickly, they have strong incentives to both avoid nullifications on slam-dunk convictions and not get drawn into the time-consuming litigation of evidentiary questions. In this way, suggestive strategies have some of the same benefits as compelled cooperative strategies.

III. ARE SATISFYING OPTIONS AN INTOLERABLE THREAT TO THE RULE OF LAW?

Perhaps the most serious objection that could be leveled against the strategies above is that they are not genuine Satisfying Options because of the risks that they pose to important rule of law values. For instance, some might object that these strategies could be co-opted by advocates of any possible conception of what justice or morality demands—even ones that to some might seem deeply troubling—in order to push for whatever case outcomes this or that judge happens to prefer. This is a familiar concern in discussions of judicial lawlessness: Jeffrey Brand-Ballard calls it “mimetic failure.”²¹⁸ This is Brand-Ballard’s term for scenarios in which one group’s at least perceived deviation from the accepted norms induces another group to deviate themselves in sub-optimal ways that mirror the behavior of the former group, thus leading to a breakdown of coordination around the relevant norms.²¹⁹ The risk of mimetic failure provides an important moral argument in favor of the practices advocated by Legalists:

²¹⁸ Brand-Ballard, *supra* note 57 at 207 (“Mimetic failure occurs when deviation by Group O provokes another judge to deviate in an optimal-result case. But for the latter judge’s reaction, the group’s deviation would not have had this negative effect.”). Similar points are made about justified civil disobedience more generally. *See, e.g.*, WILLIAM SMITH, CIVIL DISOBEDIENCE AND DELIBERATIVE DEMOCRACY 6–7 (2013).

²¹⁹ Brand-Ballard, *supra* note 57 at 207.

they argue on this basis that courts should only apply the accepted legal rules, lest the courts descend into chaotic forums for the airing of each judge's personal views on partisan political issues. Since this concern, like other concerns about the rule of law, reflects important *moral* considerations, it should be clear how it is relevant under the conceptual framework we provided in Part II. It can change the balance of moral reasons, and so what initially may have appeared to be a Satisficing Option would become morally impermissible, and hence not a Satisficing Option at all.

As we have emphasized throughout this article, some rule of law concerns do arise with each strategy we consider; however, such concerns do not arise in each case with equal force. Consider Expressive Strategies. Say that it became much more common for judges like Cassell to express their outrage at the injustices inflicted on defendants like Weldon Angelos. This may carry some risk that judges more generally would express their personal views on partisan issues. But would that cost be so great as to render Cassell's expressions of opposition to mandatory minimums morally impermissible? This seems doubtful. Since some of the moral significance of Expressive Strategies comes from how the judiciary can stimulate democratic debate, the costs of mimetic failure here do not seem prohibitive. We think that this objection at best could show that *some* of the strategies that we have laid out are not Satisficing Options; we do not think it shows that there can be *no* Satisficing Options.

More importantly, we do not think that this concern shows that any of the strategies that we have analyzed are flatly ruled out as Satisficing Options—for three reasons. First, these strategies can be restricted in simple ways that attenuate concerns about the erosion of rule of law values. We will continue to focus on mimetic failure here, though we think the same point applies for other rule of law worries. If the concern is that judges being influenced by their *personal* views would make the courts devolve into chaotic forums on divisive partisan issues, a simple fix would be to limit these strategies to issues *on which the judiciary is united*. Under this proposal, a judge can use Interpretative, Expressive, Assistive, Cooperative, and Suggestive Strategies *only when* her views reflect a near-consensus within the judiciary. Note that this would prohibit judges from

using these strategies in relation to laws on more controversial issues like abortion or certain restrictions on speech or religion; but it would not prohibit judges from using these strategies in relation to unjust mandatory minimums. The Judicial Conference of the United States has opposed mandatory minimum sentencing provisions regularly and consistently since 1953, and as a matter of “established policy” since at least 1962.²²⁰ Limiting the above strategies to matters where judicial bodies have a unified stance is one way to operationalize the idea that departures from Pure Obedience should be restricted to issues on which there is a broad moral consensus on the applicable body of law in order to prevent mimetic failure and address other rule of law-based concerns.

Second, even if our strategies are not restricted in their application in such a manner, we do not think that rule of law concerns will always outweigh other moral considerations. It is at least possible that the risks of mimetic failure or similar breakdowns could be outweighed by, say, the need to prevent or redress an egregious injustice to particular defendants. Proponents of the mimetic failure objection may disagree; they may, for instance, think that concerns about the rule of law are lexically prior to other moral concerns that the judiciary must consider. But this would require further argument. That there are risks like mimetic failure does not in itself show that those risks always dominate other moral concerns, such as those raised by the near-certainty that Pure Obedience will condemn some low-level offenders to several decades of incarceration.

Finally, and perhaps most importantly, even if one argues that rule of law concerns are lexically prior to other moral concerns, we do not think that rule of law values always militate in favor of Pure Obedience. There are at least some cases in which strategies like the ones we described above on balance promote the rule of law as compared to Pure

²²⁰ See Paul Cassell, *Statement of Judge Paul Cassell on Behalf of the Judicial Conference of the United States*, 19 Fed. Sent. R. 5, at 34–39 (June 2007), <http://constitutionproject.org/pdf/120.pdf> (explaining in Part II why “the Judicial Conference has consistently opposed mandatory minimums for more than fifty years” and showing in Part III that “the Judicial Conference has considerable company in opposing mandatory minimum sentences”).

Obedience. A similar point has been recognized in other contexts. One famous example is *Marbury v. Madison*, which is credited with establishing the courts' power of judicial review.²²¹ The authority was at best dubious for the Supreme Court in this case to exercise judicial review to strike down an Act of Congress as unconstitutional, and so the Court's decision in *Marbury* amounted merely to a questionable *assertion* of the power of judicial review.²²² As such, the legality of the decision was far from clear. In our terminology, it was legally sub-optimal. Nonetheless, few doubt that *Marbury* has enhanced the rule of law as we know it by enabling the judiciary to serve as a powerful check on the powers of

²²¹ *Marbury v. Madison*, 5 U.S. 137 (1803).

²²² Jack B. Weinstein, *The Role of Judges in a Government of, by, and for the People: Notes for the Fifty-Eighth Cardozo Lecture*, 30 CARDOZO L. REV. 1, 20 (2008) (noting that "*Marbury v. Madison*'s assumption of the right to declare legislation unconstitutional has been described with some justification as 'a political coup of the first magnitude.'"); Christopher L. Eisgruber, *Marbury, Marshall, and the Politics of Constitutional Judgment*, 89 VA. L. REV. 1203, 1203 ("In *Marbury*, Marshall exercised judicial review in a way that seems, at least in hindsight, more political than legal. For example, his opinion relied upon a highly contestable construction of Article III of the United States Constitution.").

Congress and the Executive.²²³ As such, some celebrated cases that on balance promoted the rule of law in part rest on what can be described as the deliberate use of a legally sub-optimal interpretation of a source of law—a plausible candidate for what we have been calling a Satisficing Option.²²⁴

The same may well be true in at least some judicial dilemmas that the courts face today. That may be particularly true in areas where legal doctrine directly concerns rule of law constraints on the executive, as well

²²³ See, e.g., Jonathan R. Siegel, *Suing the President: Nonstatutory Review Revisited*, 97 COLUM. L. REV. 1612, 1614 (1997) (“In cases as early and prominent as *Marbury v. Madison*, courts have taken a leading role in upholding the rule of law by creating remedies against unlawful government action.”). At least this is the traditional view. Robert M. Casale, *Revisiting One of the Law’s Great Fallacies: Marbury v. Madison*, 89 CONN. B.J. 62, 62 (2015) (“Chief Justice Marshall in *Marbury* is credited with incorporating the doctrine of judicial review into American constitutional law, and thereby elevating the Supreme Court to the role of guardian of the Constitution.”). However, the actual impact of *Marbury* in genuinely establishing the power of judicial review has been questioned by legal historians. See, e.g., *Id.* at 63–64; Davison M. Douglas, *The Rhetorical Uses of Marbury v. Madison: The Emergence of a “Great Case”*, 38 WAKE FOREST L. REV. 375, 375 (2003) (noting that “[b]etween 1803 and 1887, the Supreme Court never once cited *Marbury* for the principle of judicial review,” and arguing that *Marbury* didn’t become a “great case” until the late nineteenth century when “proponents of an expansive doctrine of judicial review have needed it to assume greatness”). Nonetheless, the traditional view of *Marbury* still serves to illustrate at least the possibility of legally sub-optimal actions promoting the rule of law. The actual impact of one specific case does not alter our fundamental point.

²²⁴ See also Jeffrey Denys Goldsworthy, *The Limits of Judicial Fidelity to Law: The Coxford Lecture*, 24 CANADIAN J. L. AND JURIS. 316, 316 (2011) (“It is widely believed that Chief Justice John Marshall lied in the famous American case of *Marbury v. Madison*, in which the doctrine of judicial review of legislation was firmly established for the first time. It is not that he lied about that doctrine; rather, the claim is that he lied about the meaning of a statute, by adopting an absurd interpretation of it, in order to raise the question of judicial review.”).

as administrative and constitutional law.²²⁵ But it is also plausible in relation to our focal case of judicial dilemmas that arise due to the use or threatened use of mandatory minimums in criminal trials. One reason why the judiciary is mostly united in its opposition to many mandatory minimums is precisely that such provisions threaten to undermine the rule of law by transferring discretion from the judiciary to prosecutors,²²⁶ and generating prohibitive costs to the exercise of the constitutional right to trial by jury.²²⁷ As a result, Satisficing Options—if used judiciously—could end up promoting the rule of law on balance. The extent to which this is true for particular Satisficing Options must of course be evaluated

²²⁵ For instance, one could imagine the rule of law being strengthened by judicial efforts to curtail presidential pardons for contempt of court convictions, even if this is done through a permissible but legally sub-optimal route. Such limits on the presidential pardon power could help ensure that courts can compel legal officers to act in accordance with the constitution through contempt of court charges. Of course, how effective this would be as a way to strengthen the rule of law would also depend on empirical issues, including how likely it is to provoke “mimetic failure.” See *supra* note 218.

²²⁶ See, e.g., Erik Luna and Paul Cassell, *Mandatory Minimalism*, 32 *CARDOZO L. REV.* 1, 13 (2010) (“Mandatory minimums effectively transfer sentencing authority from trial judges to federal prosecutors, who may pre-set punishment through creative investigative and charging practices, producing troubling punishment differentials among offenders with similar culpability.”); *Id.* at 70 (arguing that this practice undermines the “independent role of judges in sentencing” via the “effective transfer of that power to the executive branch” (internal citations omitted)). See also references therein. For an in-depth discussion of the considerable role that this transfer of power to prosecutors seems to have played in relation to mass incarceration, see John Pfaff’s interesting new book. JOHN F. PFAFF, *LOCKED IN: THE CAUSES OF MASS INCARCERATION* 127–60 (2017).

²²⁷ See Human Rights Watch, *An Offer You Can’t Refuse: How US Federal Prosecutors Force Drug Defendants to Plead Guilty* (December 5, 2013), <https://www.hrw.org/report/2013/12/05/offer-you-cant-refuse/how-us-federal-prosecutors-force-drug-defendants-plead> (providing a detailed study of this of “trial penalty”). As Judge Rakoff has argued, one result of this trial penalty is that 2–8% of convicted felons who plead guilty are estimated to be innocent. See Jed S. Rakoff, *Why Innocent People Plead Guilty*, *N.Y. REV. BOOKS*, 8 (November 20, 2014), <http://www.nybooks.com/articles/2014/11/20/why-innocent-people-plead-guilty/> (asking “[h]ow prevalent is the phenomenon of innocent people pleading guilty,” and noting that “criminologists...estimate that the overall rate for convicted felons as a whole is between 2 percent and 8 percent.”).

on a case-by-case basis, but we believe we have shown that this is at least a live possibility that is worth taking seriously.

CONCLUSION

Judicial dilemmas seem likely to become increasingly pressing in the context of cases involving low-level criminal offenders like Weldon Angelos or unlawful long-term immigrants like Magana Ortiz. Despite this, the ethics of judicial dilemmas remains neglected in jurisprudence and philosophy. Our intention has not been to settle the debate about what judges should do in such cases; rather, we have sought to stimulate that debate by showing that the choice between the legalist's strategy of pure obedience and the moralist's strategy of disobedience is often a false dichotomy. While judges frequently face decisions involving a serious tension between the applicable moral and legal reasons, they can still seek options that are good enough by the lights of both morality and law. That is, they can seek Satisficing Options along the lines of the strategies we discussed above. In doing so, they can avoid the worst features of both the moralist and legalist options. Satisficing Options need not substantially undermine the rule of law; yet they still help to prevent, or at least ameliorate, serious injustices done at the hands of the law.

Judge Reinhardt began with the powerful observation that among the victims in unjust legal outcomes in cases like *Ortiz* "are judges who, forced to participate in such inhumane acts, suffer a loss of dignity and humanity as well," and he concluded: "I concur as a judge, but as a citizen I do not".²²⁸ In defending Satisficing Options as a way to resolve judicial dilemmas, our hope has been to identify ways in which judges can carry out their legal duties without suffering a loss of dignity and humanity, and thereby concur not only as a judge, but also as a citizen.

²²⁸ *Magana Ortiz v. Sessions*, No. 17-16014, slip op. at 8.