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CONFRONTING COGNITIVE "ANCHORING EFFECT" AND "BLIND SPOT" BIASES IN FEDERAL SENTENCING: A MODEST SOLUTION FOR REFORMING A FUNDAMENTAL FLAW

MARK W. BENNETT*

Cognitive "anchoring effect" bias, especially related to numbers, like sentencing guidelines ranges, is widely recognized in cognitive psychology as an extremely robust and powerful heuristic. It is a cognitive shortcut that has a strong tendency to undermine judgments by "anchoring" a judgment to an earlier disclosed number, the anchor. Numerous studies prove anchoring bias produces systematic errors in judgment in wide-ranging circumstances, including judgments by experts—doctors, lawyers, real estate agents, psychologists, and auditors—as well as a variety of decisions by foreign and American federal and state judges. The anchoring effect occurs even when the anchor is incomplete, inaccurate, irrelevant, implausible, or even random. Roughly corresponding in time with the developing understanding of the anchoring effect, federal sentencing has undergone a revolution from judges having virtually unlimited discretion, to virtually no discretion, and back to considerable discretion, as the Federal Sentencing Guidelines went from mandatory to advisory in a single monumental U.S. Supreme Court decision, United States v. Booker*, 543 U.S. 220 (2005). Surprisingly, since judges were granted much greater discretion in* Booker*, the length and severity of federal sentences, for the most part, has not changed. This remains true despite long-standing, persistent, and*

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widespread dissatisfaction among federal district court judges with the Guidelines and the length of sentences. This Article argues that this is because judges' sentences are subconsciously anchored by the calculated Guidelines range. This Article offers a simple, modest, and practical solution that requires no change in existing law by the Supreme Court or Congress. It simply requires rearranging the numerical anchoring information in the presentence report and adding additional relevant numerical information to counteract the anchoring effect of the Guidelines. If federal district court judges are educated about the effect of cognitive anchoring and their own bias-based blind spots to it—their improved awareness can only enhance the fairness of sentencing.

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INTRODUCTION

"*God not only plays dice. He also sometimes throws the dice where they cannot be seen*."

—Stephen William Hawking[1]

Trial judges, too, roll dice in sentencing. They just do it unwittingly. Like God's dice roll in Hawking's quote above, judges' dice rolls are never seen—except in one startling series of studies establishing that the actual number rolled on the dice, when disclosed to the judges, affected the length of sentences they gave! For state and federal judges who sentence pursuant to advisory guidelines, there are potent psychological heuristics at play. "Psychologists have learned that human beings rely on mental shortcuts . . . 'heuristics,' to make complex decisions. Reliance on these heuristics . . . can also produce systematic errors in judgment. . . . [C]ertain fact patterns can fool people's judgment, leading them to believe things that are not really true."[2] These heuristics have a strong potential to affect the length of sentences. Whether judges consider their sentencing philosophy to be tough, lenient, or in between, to be the best judges they can be, they need to recognize and understand how these cognitive and implicit forces tend to increase judges' sentences without their conscious knowledge.

This Article explores how judges' hidden cognitive biases, specifically the "anchoring effect" and, to a lesser extent, the "bias blind spot," impact the length of sentences they impose by subconsciously influencing judges to give greater weight to the now-advisory Federal Sentencing Guidelines than to other important sentencing factors. Biologically, every mammalian eye has a scotoma in its field of vision—colloquially known as a blind spot.[3] Everyone, including sentencing judges, has blind spots. This Article is not concerned with our scotomas, the physical blind spots of our eyes, but with their psychological corollary: the cognitive bias known as the "bias blind spot." This psychological blind spot prevents us from seeing our own cognitive biases, yet allows us to see them in others.[4] This "tendency to see

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[1] CHAMBERS DICTIONARY OF QUOTATIONS 460–61 (Alison Jones ed., 1996).

[2] Chris Guthrie et al., *Inside the Judicial Mind*, 86 CORNELL L. REV. 777, 780 (2001) (citations omitted).

[3] As the authors of the new book, *Blindspot: Hidden Biases of Good People*, note in their preface, all vertebrates have a blind spot in each of the retinas of their eyes. MAHZARIN R. BANAJI & ANTHONY G. GREENWALD, BLINDSPOT: HIDDEN BIASES OF GOOD PEOPLE, at xi (2013). "This region, a *scotoma* (from the Greek word for *darkness*), has no light-sensitive cells and therefore light arriving at that spot has no path to the visual areas of your brain. Paradoxically, you can 'see' your own blind spot." *Id.*

[4] Joyce Ehrlinger et al., *Peering into the Bias Blind Spot: People's Assessments of Bias in Themselves and Others*, 31 PERSONALITY & SOC. PSYCHOL. BULL. 680, 681–82 (2005).

bias in others, while being blind to it in ourselves," means that judges impacted by the anchoring effect in sentencing are unlikely to recognize it.[5] This creates a double bind for judges. First, a lack of awareness prevents perception of the powerful and robust impact of the anchoring effect in sentencing. Second, once one becomes aware of the anchoring effect, an inability to see how the anchoring effect impacts one's own sentencing persists because of the "bias blind spot." "Moreover, to the extent that judges might consider themselves experts in the law, they are probably more confident of their abilities to disregard biases than they should be."[6]

Even more troubling, research indicates that sentencing judges are influenced by anchors, even irrelevant anchors, to the same extent as lay people and that the effects of the anchors are not reduced by the judges' actual experience.[7] Compounding this conundrum is that while more experienced judges are equally susceptible to the effects of anchoring as novices, they "feel more certain about their judgments."[8] That is why it is critically important for sentencing judges, probation officers who prepare presentence reports, and practicing lawyers to understand the potential robust and powerful anchoring effect of advisory Guidelines and the effect of the "bias blind spot" in determining just sentences.

In the last quarter century, federal sentencing has undergone enormous upheaval: from unbridled discretion to sentence as low as probation up to the statutory maximum, to the mandatory and inflexible United States Sentencing Guidelines—the grin-and-bear-it approach to sentencing[9]—to advisory Guidelines with the return of significant, but not unbridled discretion. Shockingly, given the substantial judicial displeasure and even hostility toward the Guidelines, the return of substantial discretion has not significantly altered the length of most defendants' sentences. I suggest that this is due primarily to the anchoring effect. Computing the advisory

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[5] Emily Pronin & Matthew B. Kugler, *Valuing Thoughts, Ignoring Behavior: The Introspection Illusion as a Source of the Bias Blind Spot*, 43 J. EXPERIMENTAL SOC. PSYCHOL. 565, 565 (2007). Pronin and Kugler provide a fascinating explanation as to why people possess a "bias blind spot," a subject beyond the reach of this Article.

[6] Marybeth Herald, *Deceptive Appearances: Judges, Cognitive Bias, and Dress Codes*, 41 U.S.F. L. REV. 299, 303 (2007).

[7] Birte Englich et al., *Playing Dice with Criminal Sentences: The Influence of Irrelevant Anchors on Experts' Judicial Decision Making*, 32 PERSONALITY & SOC. PSYCHOL. BULL. 188, 197 (2006). "Experienced criminal judges who have worked on many related cases and have made many related sentencing decisions were still influenced by a sentencing demand that was determined by throwing a set of dice." *Id.*

[8] *Id.* at 198.

[9] The sentencing table, or grid, of the United States Sentencing Guidelines contains 258 cells, each containing a sentencing range. U.S. SENTENCING GUIDELINES MANUAL ch. 5, pt. A, sentencing tbl. (2012).

Guideline range so early in the sentencing process strongly anchors a judge's sentence to that range, or close to it. This is true even when compelling factors suggest a significantly lower or, on rare occasions, higher sentence.[10]

This Article is organized as follows. Part I comprehensively examines the anchoring effect in a variety of intriguing settings through the lens of classic cognitive anchoring studies. Part II focuses on cognitive anchoring studies in several judicial contexts that involve actual judges, including some from Germany, but mostly federal and state court judges in the United States. Together, these first Parts provide a more thorough and in-depth analysis of the robustness of the anchoring effect than any prior scholarship discussing judges and anchoring.

Part III presents an overview of the federal sentencing revolution, from the implementation of the *mandatory* United States Sentencing Guidelines in 1987 through the *Booker*[11] and *Gall*[12] shockwaves arising from the *Apprendi*[13] upheaval leading to the now-*advisory* Guidelines. These advisory Guidelines restore substantial, but not unlimited, sentencing discretion. Part IV examines the statistical trends of federal sentencing, showing that the Guidelines, even in their current advisory role, continue to exert a strong gravitational pull on federal sentencing. This Part also explains that the result of this pull is that very little has changed in terms of the length of federal judges' sentences, even with their new, broad discretion. Part V argues that the most likely culprit as to why federal district court judges have remained so tethered to the Guidelines, post *Booker* and *Gall*, despite their wide dissatisfaction with them, is the anchoring effect.

Part VI offers a modest, sententious but meaningful and straightforward proposal to help reduce the undesirable anchoring effect of the Guidelines. The proposal reorders the information in the presentence report (PSR) prepared by the U.S. Probation Office in every federal sentencing. Rather than disclosing the often complex Sentencing Guidelines calculations early in the PSR (where the anchoring effect comes in), the information about the defendant's personal history and other factors that a judge must consider and may use to vary downward or upward from the Guidelines would be disclosed first. The judge could then note on the PSR a preliminary

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[10] Upward variances occur with great infrequency. For example, in fiscal year 2011, of the 76,216 defendants sentenced that the USSC received sufficient information to analyze, only 1.9% received an above-Guidelines-range sentence, while 18.6% received a non-government sponsored, below-range sentence. U.S. SENTENCING COMM'N, REPORT ON THE CONTINUING IMPACT OF *UNITED STATES V. BOOKER* ON FEDERAL SENTENCING pt. C, at 13–17 (2012), *available at* http://goo.gl/f6HmIH.

[11] United States v. Booker, 543 U.S. 220 (2005).

[12] Gall v. United States, 552 U.S. 38 (2007).

[13] Apprendi v. New Jersey, 530 U.S. 466 (2000).

sentencing range based on everything the judge is required to consider pursuant to 18 U.S.C. § 3553(a) and reach a tentative sentencing range before the PSR discloses the advisory Guidelines sentencing range. This reordering would greatly help in reducing the anchoring effect of the Guidelines. The judge would first have to confront why the initial sentencing range he or she wrote down, unencumbered by the actual computed Guidelines range, was different. The judge would then decide if the gravitational pull of the Guidelines unfairly influenced his or her § 3553(a) analysis or vice versa. Also, other highly relevant numerical sentencing information not currently included in the PSR should be presented in the latter portions of the PSR to counteract the anchoring effect of the Guidelines. Unlike prior unrealistic proposals offered by law professors to reduce the effect of anchoring in federal sentencing,[14] this proposal requires no further action by the U.S. Supreme Court or Congress and is easily implemented by any federal district court judge that chooses to adopt this recommendation.

I. THE POWER AND ROBUSTNESS OF THE "ANCHORING EFFECT"

A. BACKGROUND

Virtually all judges strive to be as fair and rational as possible when sentencing. But what if there are hidden psychological processes quietly at work that undermine their best efforts to be fair? Psychologists label such processes "cognitive biases."[15] These biases—which can lead to serious mistakes in decisionmaking, judgment, and reasoning—can cause judges to hold on to certain preferences and beliefs regardless of contrary, persuasive information.[16]

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[14] *See* Jelani Jefferson Exum, *The More Things Change: A Psychological Case Against Allowing the Federal Sentencing Guidelines to Stay the Same In Light of* Gall*,* Kimbrough*, and New Understandings of Reasonableness Review*, 58 CATH. U. L. REV. 115, 150 (2008) (suggesting that the Supreme Court could "take the steps to do away with the Guidelines calculation requirement"); Anne R. Traum, *Mass Incarceration at Sentencing*, 64 HASTINGS L.J. 423, 463 (2013) (arguing that the courts should consider the Guidelines "midstream" in sentencing procedures but recognizing this is contrary to Supreme Court sentencing requirements).

[15] Cory S. Clements, Comment, *Perception and Persuasion in Legal Argumentation: Using Informal Fallacies and Cognitive Biases to Win the War of Words*, 2013 BYU L. REV. 319, 334 ("Phenomena studied in social psychology and cognitive science, cognitive biases are common mistakes and predispositions in mental processing that affect people's beliefs and understandings of the world.").

[16] The precise number of identified cognitive biases is uncertain, but one online source lists ninety-three types of cognitive biases, from "[a]mbiguity effect" to "[z]ero-sum heuristic." *List of Cognitive Biases*, WIKIPEDIA, http://goo.gl/5ECRMB (last updated Feb. 12, 2014, 11:18 AM). Often, more than one cognitive bias is at play. *See, e.g.*, Michael A. McCann, *It's Not About the Money: The Role of Preferences, Cognitive Biases, and Heuristics*

Anchoring is a cognitive bias that describes the human tendency to adjust judgments or assessments higher or lower based on previously disclosed external information—the "anchor."[17] Studies demonstrate "that decisionmakers tend to focus their attention on the anchor value and to adjust insufficiently to account for new information."[18] Cognitive psychology teaches that the anchoring effect potentially impacts a huge range of judgments people make. This includes people who have developed expertise in their fields, like experienced real estate agents,[19] auto mechanics,[20] and physicians.[21] In discussing cognitive biases among specialized experts, Jeffrey Rachlinski and his colleagues observe: "Research on some experts—including doctors, real estate agents, psychologists, auditors, lawyers, and judges—shows that they often make the same kinds of mistakes the rest of us make."[22] Amazingly, repeated studies show that the "anchor" produces an effect on judgment or assessment even when the anchor is incomplete, inaccurate, irrelevant, implausible, or random. When it comes to numbers, "[o]verwhelming psychological research demonstrates that people estimate or evaluate numbers by 'anchoring' on a preliminary number and then adjusting, usually inadequately, from the initial anchor."[23] Without a thorough and comprehensive understanding of anchoring studies, it is nearly impossible to grasp the full impact of the anchoring effect on sentencing under an advisory Guidelines regime.

B. THE COGNITIVE "ANCHORING EFFECT" STUDIES

In the 1970s, the notion of cognitive biases was first noted by cognitive psychologists Amos Tversky and Daniel Kahneman and reported in their

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Among Professional Athletes, 71 BROOK. L. REV. 1459 (2006) (considering the following cognitive biases: framing effects, confirmation bias, optimism bias, hindsight bias, the anchoring effect, and endowment effects at work when professional athletes consider contract offers); Jeffrey J. Rachlinski et al., *Inside the Bankruptcy Judge's Mind*, 86 B.U. L. REV. 1227 (2006) (considering anchoring, framing, and omission bias in bankruptcy judges' decisions).

[17] Todd McElroy & Keith Dowd, *Susceptibility to Anchoring Effects: How Openness-to-Experience Influences Responses to Anchoring Cues*, 2 JUDGMENT & DECISION MAKING 48, 48 (2007).

[18] Robert A. Prentice & Jonathan J. Koehler, *A Normality Bias in Legal Decision Making*, 88 CORNELL L. REV. 583, 602–03 (2003).

[19] Birte Englich & Thomas Mussweiler, *Sentencing Under Uncertainty: Anchoring Effects in the Courtroom*, 31 J. APPLIED SOC. PSYCHOL. 1535, 1536–37 (2001).

[20] *Id.*

[21] Noel T. Brewer et al., *The Influence of Irrelevant Anchors on the Judgments and Choices of Doctors and Patients*, MED. DECISION MAKING, Mar.–Apr. 2007, at 203, 208.

[22] Rachlinski et al., *supra* note 16, at 1229–30 (footnotes omitted).

[23] Alafair S. Burke, *Prosecutorial Passion, Cognitive Bias, and Plea Bargaining*, 91 MARQ. L. REV. 183, 201 (2007).

classic work, *Judgment Under Uncertainty: Heuristics and Biases*.[24] In one of their studies described in that work, which "is often seen as *the* classic anchoring study,"[25] Tversky and Kahneman asked the study participants questions about the percentage of African nations in the United Nations.[26] The participants were asked if the percentage of African nations was higher or lower than an arbitrary number (the anchor), which they selected by spinning a wheel of fortune before them.[27] After the wheel landed, for example, on the number 10, the participants were asked if the percentage of African nations was higher or lower than 10.[28] They were then asked what their best judgment was as to the percentage of African nations in the United Nations.[29] Participants given the number 10 anchor gave median averages of 25%, while those given the number 65 anchor gave median averages of 45%.[30] The anchoring effect occurred even though the anchors selected and known to the participants were random and bore no rational relationship to the judgment.

In February 2013, I conducted a similar anchoring test while conducting a training session in Dallas on implicit bias for lawyers in the Leadership Academy of the Torts, Trial, and Insurance Practice Section of the American Bar Association. Half the lawyers were asked in writing if Texas, at its widest point, was narrower or wider than 820 miles. The other half were asked the same question, but the "anchor" changed to 420 miles. Each lawyer only saw one anchor, either 820 or 420 miles, on the written sheet before him or her and had no idea what, if any, number/"anchor" the others received. The lawyers, none of whom were from Texas, were then asked to write down how wide they thought Texas was at its widest point. The lawyers given the

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[24] *See generally* Amos Tversky & Daniel Kahneman, *Judgment Under Uncertainty: Heuristics and Biases*, 185 SCIENCE 1124 (1974). Kahneman went on to win the Nobel Prize in 2002 for his work in behavioral economics. *See* Alex Stein, Book Review, *Are People Probabilistically Challenged?*, 111 MICH. L. REV. 855, 855 (2013) (reviewing DANIEL KAHNEMAN, THINKING, FAST AND SLOW (2011)); *The Sveriges Riksbank Prize in Economic Sciences in Memory of Alfred Nobel 2002*, NOBELPRIZE.ORG, http://goo.gl/6kix5Q (last visited May 22, 2014).

[25] Thomas Mussweiler, *The Malleability of Anchoring Effects*, 49 EXPERIMENTAL PSYCHOL. 67, 68 (2002).

[26] Tversky & Kahneman, *supra* note 24, at 1128.

[27] *Id.*

[28] *Id.*

[29] *Id.*

[30] *Id.*

420 mile anchor judged the width of Texas to be 59% shorter than the lawyers given the 820 mile anchor.[31] The actual width of Texas is 773 miles.[32]

In yet another series of anchoring studies, participants were asked "how thick a piece of paper would be if it were folded in on itself 100 times."[33] The results? "Only rarely do people give estimates larger than a few yards or meters, yet the correct answer, given an initial sheet of paper 0.1 millimeter thick, is roughly 1.27×10^{23} kilometers—more than 800,000,000,000,000 times the distance between the earth and the sun!"[34] Few get anywhere near this answer "because they begin by imagining the first few folds (a very low anchor) and do not adjust their estimate upward sufficiently for the doubling effect of later folds."[35]

The next anchoring study is important because it demonstrates the power of anchoring in a real world setting and also establishes that professionals with specialized expertise are not immune to the power of anchoring.[36] In a classic study of real estate prices, dozens of real estate agents in the Tucson, Arizona area, after touring two houses and receiving the standard ten-page packet of information, were asked to give their best estimates of: (1) the appraised value, (2) the appropriate selling price, (3) "a reasonable price to pay for the house," and (4) the lowest offer they would accept if they were the seller.[37] All the agents received the same information, except the listing price: some received a listing price 11% to 12% above the appraised value, some 11% to 12% below the appraised value, some 4% below, and some 4% above.[38] As can be seen in Figure 1, "the agents consistently saw the listing price as too high (regardless of what the listing price was) and all four estimates showed significant evidence of anchoring. Interestingly, however, when asked what their top three considerations were

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[31] In February 2013, I replicated this anchoring study with eleven Drake University School of Law students in my Employment Discrimination Litigation class. The results were nearly identical to those in Dallas. This was true even with the much smaller sample size. The data for both studies is on file with the author.

[32] *See, e.g.*, Tex. State Historical Ass'n, *Environment*, TEX. ALMANAC, http://goo.gl/DzZ8CP (last visited May 22, 2014) ("The greatest east-west distance is 773 miles from the extreme eastward bend in the Sabine River in Newton County to the extreme western bulge of the Rio Grande just above El Paso.").

[33] SCOTT PLOUS, THE PSYCHOLOGY OF JUDGMENT AND DECISION MAKING 149 (1993).

[34] *Id.* ("The correct answer can be found by multiplying the thickness of the paper (0.1 millimeter) by the total number of layers (2^{100}). This number works out to be 1.27×10^{29} millimeters, or 1.27×10^{23} kilometers.").

[35] *Id.*

[36] *Id.* at 148–49.

[37] *Id.* at 148.

[38] *Id.*

in making these judgments, only 1 agent in 10 mentioned the listing price."[39] This is because anchoring works at the subconscious level.

Figure 1

The Effects of Anchoring on Real Estate Prices[40]

Apparent	MEAN ESTIMATES GIVEN BY REAL ESTATE AGENTS			
Listing Price	Appraised Value	Recommended Selling Price	Reasonable Purchase Price	Lowest Offer
$119,900	$114,204	$117,745	$111,454	$111,136
$129,900	$126,772	$127,836	$123,209	$122,254
$139,900	$125,041	$128,530	$124,653	$121,884
$149,900	$128,754	$130,981	$127,318	$123,818

What about the effect of arbitrary anchors in unrelated tasks? In an anchoring experiment conducted by Timothy Wilson and his colleagues, participants were asked to copy either five pages of numbers ranging from 4,421 to 4,579; four pages of random words and one page of four-digit numbers; or five pages of random words.[41] They were then asked to estimate the number of current students at the University of Virginia who will contract cancer in the next forty years.[42] The participants who copied the five pages of numbers estimated the number of incidences of cancer to be substantially higher than the group that copied one page of numbers, and that group was higher (although not significantly so) than the group who copied no numbers.[43] Figure 2 summarizes the results of this study. Thus, the anchoring effect occurs even when the arbitrary anchor is presented in an unrelated preceding task.[44] Interestingly, the participants gave low estimates when asked how much the anchor influenced their answers, but gave higher estimates for others being influenced.[45] In fact, 86% reported the anchor had "no effect" on their answers.[46] The authors concluded that "[t]hese results

[39] *Id.*

[40] *Id.* at 149 tbl.13.1 (citation omitted).

[41] Thomas Mussweiler et al., *Anchoring Effect*, *in* COGNITIVE ILLUSIONS: A HANDBOOK ON FALLACIES AND BIASES IN THINKING, JUDGEMENT AND MEMORY 183, 188 (Rüdiger F. Pohl ed., 2004) (citing Timothy D. Wilson et al., *A New Look at Anchoring Effects: Basic Anchoring and Its Antecedents*, 125 J. EXPERIMENTAL PSYCHOL. 387 (1996)).

[42] *Id.*

[43] Wilson et al., *supra* note 41, at 394.

[44] *Id.* at 394–95; *see also* Mussweiler et al., *supra* note 41, at 183–200.

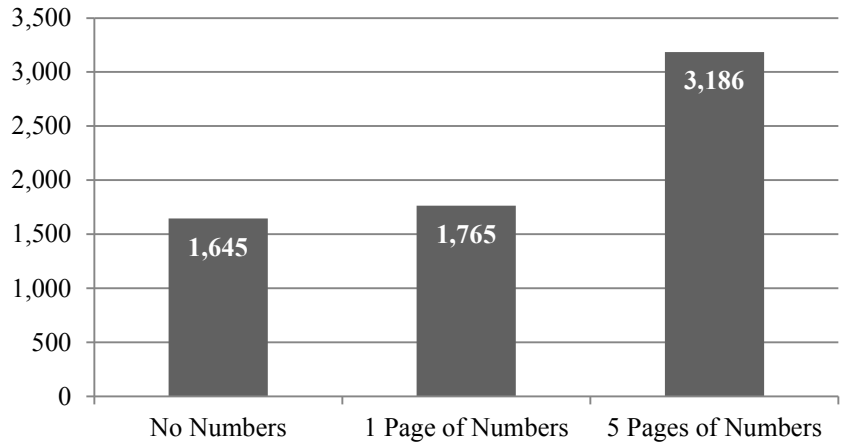
[45] Wilson et al., *supra* note 41, at 395.

[46] *Id.* at 394.

are consistent with the assumption that anchoring effects are unintentional and nonconscious . . . ."[47]

Figure 2

Ratings of the Number of Students Who Will Get Cancer in the Next Forty Years as a Function of the Anchoring Condition[48]



The anchoring effect impacts judgments, even when the anchor is extreme. In a study conducted by Thomas Mussweiler and Fritz Strack, participants were asked if Mahatma Gandhi was "older or younger than either 140 years or 9 years" at the time of his death.[49] Participants, who received the high anchor, 140 years, estimated on average that Gandhi lived to the age of 67 years.[50] Participants, who received the lower anchor, 9 years, estimated on average that Gandhi lived to the age of 50.[51] The authors concluded, "[T]he consideration of what is clearly an impossible state of affairs (i.e., Gandhi having reached the age of 9 or 140 years) strongly influenced subsequent judgments."[52]

Thus, stunningly, the anchoring effect occurs even when the anchor is ludicrous or implausible. In another study, college students provided a higher

[47] *Id.* at 395.

[48] *Id.* at 395 fig.4 (modified form).

[49] Thomas Mussweiler & Fritz Strack, *Considering the Impossible: Explaining the Effects of Implausible Anchors*, 19 SOC. COGNITION 145, 146 (2001).

[50] *Id.*

[51] *Id.*

[52] *Id.*

estimate of the average cost of a college textbook when they were first asked if it was higher or lower than $7,128.53.[53] In a different study, people provided higher estimates of the average annual temperature in San Francisco when first asked if it was higher or lower than 558 degrees.[54]

Importantly, the anchoring effect is greater when the anchor is plausible rather than implausible.[55] In another study conducted by Mussweiler and Strack, the participants were asked about the average annual mean temperature in the Antarctic: "Is the annual mean temperature in the Antarctic higher or lower than X°C?" and, "How high is the annual mean temperature in the Antarctic?"[56] Two implausible anchors were used: 700°C and 900°C.[57] Two plausible anchors were also used: -17°C and -3°C.[58] The actual mean temperature in the Antarctic was -68°C.[59] The plausible anchors were established from another set of similarly situated participants who were simply asked, "How high is the annual mean temperature in the Antarctic?"[60] The plausible temperatures used in the actual study were based on one standard deviation above the mean for the high anchor (-17°C) and one standard deviation below the mean for the low anchor (-43°C) from the pretest group.[61] The implausible low anchor (700°C) "was about 56 standard deviations above the mean" of the pretest group and the "high implausible anchor (900°C) was about 72 standard deviations above" the pretest group.[62] "Thus, the difference between the two implausible anchors was about 8 times that between the two plausible anchors. For each participant the critical comparative anchoring question contained one of these four anchors."[63] The results of the study are summarized in Figure 3. Analysis of Figure 3 reveals that while there was a much greater difference between the two implausible anchors (700°C v. 900°C) than the two plausible anchors (-17°C v. -43°C), "the difference in the resulting absolute estimates was much larger for the plausible than the implausible anchors."[64]

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[53] Guthrie et al., *supra* note 2, at 788 & n.53 (citing PLOUS, *supra* note 33, at 146).

[54] *Id.* at 788–89 (citing PLOUS, *supra* note 33, at 146).

[55] *See generally* Mussweiler & Strack, *supra* note 49.

[56] *Id.* at 153.

[57] *Id.*

[58] *Id.*

[59] *Id.*

[60] *Id.*

[61] *Id.*

[62] *Id.*

[63] *Id.*

[64] *Id.* at 154. To verify this conclusion, Mussweiler and Strack replicated the study in principle in a second study, a knock-off of their earlier Mahatma Gandhi study, using two plausible anchors (61 and 86 years) and two implausible anchors (214 and 271 years). The Gandhi study results supported the Antarctic study conclusion. *Id.* at 155–56.

Figure 3

Absolute Estimates for the Annual Mean Temperature in the Antarctic by Anchor and Plausibility[65]

	PLAUSIBILITY	
Anchor	Plausible	Implausible
High	-24.84 (*SD* = 16.36)	-24.44 (*SD* = 18.58)
Low	-41.12 (*SD* = 16.79)	-23.27 (*SD* = 13.83)

Many studies have observed that anchoring also influences the outcomes of mock civil jury verdicts.[66] In one study, researchers found that the amount of money requested by the plaintiff's lawyer for damages in a personal injury case directly anchored the amount of damages awarded by the mock jurors.[67] The mock jurors received the exact same set of facts about the plaintiff's injury, except the amount requested by the plaintiff's lawyer was different, and the mock jurors were told the request was either $100,000; $300,000; $500,000; or $700,000.[68] As Figure 4 indicates, the more the plaintiff's lawyer requested, the more the mock jurors awarded in damages to the plaintiff.

Figure 4

Effects of Requesting Different Damage Amounts in Personal Injury Trials[69]

Damages Request	Mean Award
$100,000	$90,333
$300,000	$188,462
$500,000	$282,868
$700,000	$421,538

[65] *Id.* at 154.

[66] Dan Orr & Chris Guthrie, *Anchoring, Information, Expertise, and Negotiation: New Insights from Meta-analysis*, 21 OHIO ST. J. ON DISP. RESOL. 597, 605 n.43 (2006) (citing numerous studies).

[67] *Id.* at 606; *see also* John Malouff & Nicola S. Schutte, *Shaping Juror Attitudes: Effects of Requesting Different Damage Amounts in Personal Injury Trials*, 129 J. SOC. PSYCHOL. 491, 495 (1989).

[68] Malouff & Schutte, *supra* note 67, at 495.

[69] *Id.*

Dan Orr and Chris Guthrie conducted the first meta-analysis[70] of the effect of anchoring with an opening number or demand in negotiations to measure the impact of these first numbers on outcomes and to "assess how potent this phenomenon is."[71] The authors concluded that the "meta-analysis demonstrates that anchoring has a powerful impact on negotiation."[72] However, Orr and Guthrie also concluded that anchoring "has a less pronounced—though still quite substantial—impact in circumstances where the recipient of the anchor is an experienced negotiator and where the recipient possesses a rich body of information containing competing anchor points."[73] The authors also noted that "[a]nchoring can be pernicious in court," leading to "serving an inappropriately long sentence in jail."[74]

In summary, the anchoring effect heuristic has been repeatedly confirmed in a multitude of cognitive bias studies since Tversky and Kahneman first wrote about it in 1974. Virtually all cognitive psychologists agree that previous research on anchoring has shown this heuristic to be a robust psychological phenomenon ubiquitous across many domains of human judgment and decisionmaking.[75] Assessments and judgments are affected by "anchors," even when the anchors are incomplete, inaccurate, irrelevant, implausible, or random.[76] Of critical significance for this Article

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[70] "Meta-analysis" is defined as "a quantitative statistical analysis of several separate but similar experiments or studies in order to test the pooled data for statistical significance." *Meta-analysis – Definition*, MERRIAM-WEBSTER DICTIONARY, http://goo.gl/vRyibT (last visited May 22, 2014).

[71] Orr & Guthrie, *supra* note 66, at 598.

[72] *Id.* at 624.

[73] *Id.* at 628.

[74] *Id.* at 608.

[75] *See* Mussweiler et al., *supra* note 41, at 196.

[76] In general, four theoretical accounts or mechanisms of anchoring have been proposed: (1) insufficient adjustment from a starting point, (2) conversational inferences, (3) numeric priming, and (4) selective accessibility. *Id.* at 189. Surprisingly, there is little consensus among cognitive experts as to the precise theoretical models for how the anchoring effect actually works in a given situation. *See, e.g.*, Mussweiler et al., *supra* note 41, at 196 ("The various paradigms that have been used to examine anchoring effects, however, appear to differ with respect to the additional mechanisms they may involve. With a perspective on psychological processes rather than judgemental effects, we may well find that what has previously been considered as instantiations of one judgemental heuristic called 'anchoring' is actually a conglomeration of fairly diverse phenomena whose similarity rests solely on the net outcome they produce."); Brewer et al., *supra* note 21, at 210–11 ("The anchoring bias has presented longstanding fascination for those in the field of judgment and decision making. The present findings suggest that irrelevant anchors may have more complex effects than initially thought, particularly when the bias extends from judgment to choice. Models of the anchoring bias may require refinement to better reflect such findings."); Mussweiler & Strack, *supra* note 49, at 146 ("Although such effects of implausible anchors are well documented in the literature . . . little is known about the psychological mechanisms that produce them.");

are the findings that the more plausible the anchor, the greater the effect it has on distorting assessment and judgment. Scott Plous, after discussing many of the anchoring studies mentioned above, concludes "[t]he effects of anchoring are pervasive and extremely robust. More than a dozen studies point in the same direction: People adjust insufficiently from anchor values, regardless of whether the judgment concerns the chances of nuclear war, the value of a house, or any number of other topics."[77] Or, in the case of sentencing, judges adjust insufficiently from the anchoring effect of the advisory Guidelines range where the judgment concerns length of sentence.

II. JUDGES AND THE ANCHORING EFFECT

Are judges somehow immune to the anchoring effect? One might think that by virtue of our education, training, and experience in assessing and judging evidence and facts we might be. A plethora of empirical studies establish that cognitive biases, sometimes including anchoring, infect the judgments of professionals, including doctors, lawyers, accountants, real estate appraisers, option traders, psychologists, military leaders, and engineers.[78] In three recent studies, one of federal magistrate judges (generalist judges),[79] one of federal bankruptcy judges (specialist judges),[80] and the third involving both state and federal judges,[81] the authors found each group of judges susceptible to strong anchoring effects. Before turning to these studies in some detail, a brief look at a series of studies about judges in Germany confirming the existence of the anchoring effect in sentencing is in order.

A. THE GERMAN JUDGES STUDIES

A series of studies using German judges sheds light on the effect of anchoring in determining the length of sentences.[82] In one such study, researchers found that anchoring influenced the length of a sentence in a rape case.[83] The researchers presented German criminal trial court judges with a

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Mussweiler, *supra* note 25, at 71 ("These findings appear to be inconsistent with a numeric priming account of anchoring . . . .").

[77] PLOUS, *supra* note 33, at 151.

[78] Guthrie et al., *supra* note 2, at 782–83 (footnotes omitted).

[79] *Id.* at 786–92.

[80] Rachlinski et al., *supra* note 16.

[81] Andrew J. Wistrich et al., *Can Judges Ignore Inadmissible Information? The Difficulty of Deliberately Disregarding*, 153 U. PA. L. REV. 1251 (2005).

[82] Englich et al., *supra* note 7, at 190–93; Englich & Mussweiler, *supra* note 19, at 1538–41.

[83] Englich & Mussweiler, *supra* note 19, at 1538–41.

lengthy vignette of a rape case.[84] The participating judges were assigned one of two conditions: in the first group, the judges learned that the prosecutor had requested a two-month sentence for the defendant, and the second group was told that the prosecutor had requested a sentence of thirty-four months.[85] The judges exposed to the higher anchor (thirty-four months) increased their average sentences by more than 50%.[86]

Another German judge study using real judges in a mock sentencing scenario found that the judges were influenced by the anchor number given by a news reporter in an unexpected telephone call where the reporter asked: "Do you think that the sentence for the defendant in this case will be higher or lower than [1 or 3] year(s)?"[87] Half the judges were exposed to the low anchor (one year) and half to the high anchor (three years).[88] The judges were requested not to answer the reporter's question.[89] The participants given the low anchor imposed an average sentence of 25.43 months, and those exposed to the high anchor gave an average sentence of 33.38 months.[90] The participants in the study were both prosecutors and judges, and there was no difference in the data.[91]

The lead author of these and other studies of German judges' criminal sentencing practices, Birte Englich, observes: "In general, judicial sentencing decisions should be guided by facts and not by chance. Disconcertingly, however, several studies have shown that sentencing decisions—even those made by experienced legal professionals—are influenced by demands that are blatantly determined at random."[92] Englich notes that: "Converging evidence suggests that judicial decisions may indeed be influenced by anchors."[93] Englich further observes that several studies demonstrate, in the criminal context, that real judges' sentences were strongly influenced by the prosecutors' sentencing suggestions, even when the suggestions were

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[84] *Id.*

[85] *Id.* at 1540.

[86] *Id.*

[87] Englich et al., *supra* note 7, at 191.

[88] *Id.*

[89] *Id.*

[90] *Id.*

[91] *Id.* Some of the participants in the studies "were junior lawyers from different German courts who had recently received their law degree[s] and had acquired their first experiences as judges in court." *Id.* at 194. In "the German system of legal education, judges and prosecutors receive identical training and alternate between both positions in the first years of professional practice." *Id.* at 190.

[92] Birte Englich, *Blind or Biased? Justitia's Susceptibility to Anchoring Effects in the Courtroom Based on Given Numerical Representations*, 28 L. & POL'Y 497, 498 (2006) (citation omitted); *see also* Englich et al., *supra* note 7.

[93] Englich, *supra* note 92, at 500.

random.[94] In one of the studies, conducted by Englich, Mussweiler, and Strack, the judges were specifically told that the prosecutor's sentencing suggestion was determined at random.[95] Two related studies "went even further to ensure that sentencing demands [by the prosecutors] were clearly irrelevant."[96] Using this loaded die, the judges selected the sentencing demands of the prosecutors themselves.[97] "Even though this procedure ensured that [the] participants were aware of the irrelevance of the sentencing demands, their sentencing decisions were dramatically influenced by them."[98] This remained true even among experienced judges.[99]

When "junior lawyers" were substituted for more experienced judges, the only difference in the sentencing outcomes was that "experienced judges in these studies felt much more certain about their—equally biased—judgments."[100] Englich observed not only the anchoring effect on German judges but the "blind spot" bias—the tendency to believe that one's own judgments are less biased than others.[101] This research demonstrates "that judgmental anchoring has a strong influence on criminal sentencing decisions."[102] There is no reason to believe that American judges are immune from blind spot bias. This bias makes it challenging for judges who are aware of the anchoring effect in sentencing to admit that it affects their sentencing as well as that of their colleagues.

The results of the German judge studies are troubling. The legal professionals studied had "received extensive training in the critical judgment domain, had considerable experience in making similar sentencing decisions, and were motivated to provide an accurate judgment."[103] However, disturbingly, "they were [still] influenced by random numbers even if they determined these numbers themselves by throwing dice."[104] Moreover, these studies "are the first to demonstrate that expert judgments are influenced by clearly irrelevant anchors."[105] More concerning, not only for sentencing judges but also for appellate judges who review appealed sentences, "the present findings demonstrate that whereas experts are as

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[94] *Id. passim*; *see also* Englich et al., *supra* note 7.
[95] Englich et al., *supra* note 7, at 197.
[96] *Id.*
[97] *Id.*
[98] *Id.*
[99] Englich, *supra* note 92, at 500.
[100] *Id.* (internal citations omitted).
[101] *See* Ehrlinger et al., *supra* note 4, at 681.
[102] Englich & Mussweiler, *supra* note 19, at 1547.
[103] Englich et al., *supra* note 7, at 198.
[104] *Id.*
[105] *Id.*

susceptible to anchoring influences as novices, they feel more certain about their judgments."[106] As Englich, Mussweiler, and Strack note in their opening quote by Albert Einstein, "God does not play dice with the universe."[107] But the German studies establish that the anchoring effect in sentencing decisions should make all judges pause to consider if we are unknowingly playing dice.

B. THE AMERICAN JUDGES STUDIES

In two empirical studies of sitting federal judges in the United States, magistrate judges, and bankruptcy judges, and a third of state and federal judges, researchers found that these judges, too, were susceptible to the anchoring effect in their judicial decisions.[108] Guthrie and his colleagues observed: "Judges, it seems, are human. Like the rest of us, they use heuristics that can produce systematic errors in judgment. Unlike the rest of us, however, judges' judgments can compromise the quality of justice that the courts deliver."[109]

1. *The U.S. Magistrate Judges Study*

The study of U.S. magistrate judges[110] looked at whether five cognitive biases—"anchoring, framing, hindsight bias, the representativeness heuristic,

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[106] *Id.*

[107] *Id.* at 188.

[108] Guthrie et al., *supra* note 2, at 784–85 (focusing on U.S. magistrate judges); Rachlinski et al., *supra* note 16, at 1230 (focusing on U.S. bankruptcy judges); Wistrich et al., *supra* note 81, at 1259.

[109] Guthrie et al., *supra* note 2, at 821 (internal footnote omitted).

[110] Congress created the office of the United States magistrate judge in 1968. Federal Magistrates Act, Pub. L. No. 90-578, 82 Stat. 1107–19 (1968) (codified as amended at 28 U.S.C. §§ 631–39 (2012)). The Federal Magistrates Act authorizes magistrate judges to conduct misdemeanor trials with the consent of the litigants, to serve as special masters in civil matters, and to assist district judges with pretrial and post-trial functions and "additional duties as are not inconsistent with the Constitution and laws of the United States." 28 U.S.C. § 636(a)(5), (b)(1)–(b)(3) (2012); *see also Magistrate Judgeships*, FED. JUDICIAL CTR., http://goo.gl/eYbvcO (last visited May 22, 2014). After several congressional amendments, the role of the magistrate judge has greatly expanded. *See* Ira P. Robbins, *Magistrate Judges, Article III, and the Power to Preside over Federal Prisoner Section 2255 Proceedings*, 2002 FED. CTS. L. REV. 2, 6. Magistrate judges have authority to conduct habeas proceedings, subject to district court review, and to conduct civil trials with the consent of the litigants. *See* 28 U.S.C. § 636(b)(1)(B), (C) (2012); *see also* Judith Resnik, *Building the Federal Judiciary (Literally and Legally): The Monuments of Chief Justices Taft, Warren, and Rehnquist*, 87 IND. L.J. 823, 877 (2012). "For the 12 month period ending September 30, 2010, Magistrate Judges performed 353,847 judicial duties in civil cases, . . . including 169,134 [pretrial] motions, 20,515 settlement conferences, and 52,322 other pretrial conferences." *About Us*, FED. MAGISTRATE JUDGES ASS'N, http://goo.gl/woa8TM (last visited May 22, 2014). Magistrate judges "also performed 186,337 felony pretrial duties, including 98,115 motions,

and egocentric biases[—]would influence the decision[s] . . . of a sample of 167 federal magistrate judges."[111] For the purposes of this Article, I focus primarily on the anchoring results. In the study, while attending an annual conference, 167 judges were each presented with a written description of a hypothetical personal injury suit in which the amount of damages was the only issue, the parties had waived a jury, and the parties were asked to award the amount of damages they thought appropriate.[112] The judges were randomly assigned either an "anchor" or "no anchor" condition.[113] The "no anchor" group received only a hypothetical laying out the facts.[114] They were then simply asked, "How much would you award the plaintiff in compensatory damages?"[115] The "anchor" group received the same hypothetical but was also given the anchor condition that "[t]he defendant has moved for dismissal of the case, arguing that it does not meet the jurisdictional minimum for a diversity case of $75,000."[116] The "anchor" group was then asked to rule on the motion and was told, "If you deny the motion, how much would you award the plaintiff in compensatory damages?"[117] The authors explain: "Because the plaintiff clearly had

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38,921 pretrial conferences, and 2,222 evidentiary hearings." *Id.* During this period, "Magistrate Judges terminated 12,470 civil cases with litigants' consent . . . [and] Magistrate Judges conducted 333 civil jury trials and 171 civil trials without jury." *Id.* In this twelve-month period, "Magistrate Judges submitted 21,385 recommended dispositions in prisoner cases (habeas corpus and civil rights)," and they "completed 4,225 reports and recommendations in social security appeals." *Id.* Magistrate judges are Article I judicial officers who are appointed by a majority vote of the district judges of each district court to serve in a United States district court for a renewable term of eight years. *See* 28 U.S.C. § 631(a), (e). In 2011, there were 527 full-time magistrate judge positions, as well as 41 part-time magistrate judges, and 3 combination clerk-of-court/magistrate judges. *About Us*, FED. MAGISTRATE JUDGES ASS'N, *supra*.

[111] Guthrie et al., *supra* note 2, at 778. The sample of 167 magistrate judges represented about one-third of the 519 magistrate judges then serving. *Id.* at 787.

[112] *Id.* at 790–91. The judges were given the following hypothetical:

> Suppose that you are presiding over a personal injury lawsuit that is in federal court based on diversity jurisdiction. The defendant is a major company in the package delivery business. The plaintiff was badly injured after being struck by one of the defendant's trucks when its brakes failed at a traffic light. Subsequent investigations revealed that the braking system on the truck was faulty, and that the truck had not been properly maintained by the defendant. The plaintiff was hospitalized for several months, and has been in a wheelchair ever since, unable to use his legs. He had been earning a good living as a free-lance electrician and had built up a steady base of loyal customers. The plaintiff has requested damages for lost wages, hospitalization, and pain and suffering, but has not specified an amount. Both parties have waived their rights to a jury trial.

Id. at 790.

[113] *Id.*

[114] *Id.* For the full text of the hypothetical, see *supra* note 112.

[115] *Id.* at 790–91.

[116] *Id.* at 791.

[117] *Id.*

incurred damages greater than $75,000, the motion was meritless. Nevertheless, we hypothesized that the $75,000 would serve as an anchor, resulting in lower damage awards from those judges who first ruled on the motion."[118]

Indeed, the anchor of ruling on the meritless motion "had a large effect on [the] damage awards."[119] The judges in the "no anchor" group awarded the plaintiff an average of $1,249,000, while the judges in the "anchor" group awarded an average of $882,000.[120] "[A]sking the judges to rule on [the] frivolous motion [to dismiss (the "anchor" group)] depressed average damage awards by more than $350,000 (or 29.4%)."[121] Because damage award data presented by a mean award can be skewed by a few large awards, the authors also presented the data by median and quartile statistics, here duplicated in Figure 5.

Figure 5

Results of Asking Magistrate Judges to Award Compensatory Damages: Quartile Results[122]

Condition	First Quartile (25th Percentile)	Second Quartile (Median)	Third Quartile (75th Percentile)
No Anchor	$500,000	$1,000,000	$1,925,000
Anchor	$288,000	$882,000	$1,000,000

From Figure 5, the authors noted that the motion to dismiss in the "[a]nchor" group "had a pronounced effect on the judges at all response levels."[123] Interestingly, for purposes of this Article, Guthrie and colleagues pontificated that "[t]he potentially pernicious effects of anchoring also suggest a source of error in both the civil and criminal justice systems."[124]

2. *The U.S. Bankruptcy Judges Study*

After studying magistrate judges, Guthrie and colleagues proceeded to study bankruptcy judges.[125] The primary purpose of this study was to look at whether specialization in judging leads to superior decisionmaking.[126]

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[118] *Id.*
[119] *Id.*
[120] *Id.*
[121] *Id.* at 792.
[122] *Id.* at 792 tbl.1.
[123] *Id.* at 792.
[124] *Id.* at 793.
[125] *See* Rachlinski et al., *supra* note 16, at 1227, 1230.
[126] *Id.* at 1228–30.

Generalist trial judges can breathe a huge sigh of relief;[127] for the purposes of this Article, I focus on the bankruptcy judges study's look at the anchoring effect on their judgments (although the study took into account several heuristics).[128] Like the magistrate judge study, the 113 bankruptcy judges in the study were recruited at one of their annual seminars in 2004.[129]

To test the influence of the cognitive bias of anchoring on bankruptcy judges, the authors constructed a "Truck Driver" problem.[130] The problem asked the bankruptcy judges "to set an interest rate on a restructured loan in a Chapter 13 proceeding" based on the then-recent Supreme Court ruling in *Till v. SCS Credit Corp*.[131] In *Till*, the Court rejected a creditor's argument that the 21% interest rate on the current loan should be the presumptive rate on the restructured loan.[132] Instead, the Court adopted the debtor's view that the current prime rate adjusted for the debtor's greater risk of default should be used.[133]

The bankruptcy judges participating in the Truck Driver problem were assigned randomly, unbeknownst to them, to either a "control" group with no anchor or an "anchor" group.[134] The judges in the control group were informed that the parties in the Truck Driver problem agreed under *Till* that the "original contract interest rate is irrelevant to the court's determination."[135] The judges in the "anchor" group received the same sentence, but the words "of 21%" were inserted between the words "rate" and "is irrelevant."[136] All judges in both groups were then asked to set the restructured loan interest rate.[137] Specifically, they were all asked: "Because the parties disagree on the appropriate annual interest rate, it is up to you to select one. What annual interest rate would you select?"[138]

The authors of the study "found that the initial interest rate affected judges' assessments."[139] The judges in the "control" group set a mean interest rate of 6.33%, while the judges in the "anchor" group set a mean

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[127] *Id.* at 1230–31, 1257.
[128] *Id.* at 1233–37.
[129] *Id.* at 1231.
[130] *Id.* at 1233.
[131] 541 U.S. 465 (2004); Rachlinski et al., *supra* note 16, at 1233.
[132] *Till*, 541 U.S. at 478–80; Rachlinski et al., *supra* note 16, at 1233.
[133] *Till*, 541 U.S. at 478–80; Rachlinski et al., *supra* note 16, at 1233–34.
[134] Rachlinski et al., *supra* note 16, at 1235.
[135] *Id.*
[136] *Id.*
[137] *Id.*
[138] *Id.*
[139] *Id.*

interest rate .8% higher at 7.13%.[140] The authors concluded that because some judges merely selected the prime rate with no adjustments, the effect of the anchoring was understated.[141] With those judges removed, the difference became almost 1.5%.[142] Both the 0.8% and 1.5% were statistically significant, and while the difference might seem small, the authors noted that even this difference on a modest loan of $10,000 dollars "can mean hundreds or even thousands of dollars over the life of the loan."[143]

The authors then compared their results with the results of the magistrate judges study, using comparative standard deviations for the anchoring and varying exercises between the magistrate and bankruptcy judges.[144] The magnitude of the anchoring effect was similar but slightly smaller for the bankruptcy judges, and the authors observed: "we cannot conclude from this that bankruptcy judges are less susceptible than generalist judges to the anchoring effect."[145]

3. *One Final Anchoring Study—Information Obtained in Settlement Conferences*

The same authors of the two previous studies also conducted a third judicial study, which in part looks at the role of anchoring in settlement discussions with judges.[146] The data collected on this part of the study came from judges attending five different judicial education conferences.[147] Portions of the study examined whether judges were influenced or "anchored" by inadmissible information (i.e., the monetary demand by plaintiff's counsel in a settlement conference) when the same judge later was asked to decide the amount of damages to be awarded at trial.[148] The judges were presented with an "Assessment of Damages" scenario involving "a 31-year-old high school teacher who lost his right arm after he was hit by a truck

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[140] *Id.*

[141] *Id.*

[142] *Id.*

[143] *Id.*

[144] *Id.* at 1237.

[145] *Id.* The authors did find something of interest in their demographic data: "Republican judges were more likely than their Democratic counterparts to make decisions that favored creditors." *Id.* at 1258. However, political party affiliation did not affect susceptibility to the anchoring effect. *Id.* at 1257–58.

[146] Wistrich et al., *supra* note 81, at 1286.

[147] *Id.* at 1279, 1285 tbl.1. In the study, 62 magistrate judges came from conferences in either San Diego or Minneapolis; 71 state trial court judges came from a large urban court (they were promised the identity of the jurisdiction would not be revealed); and 105 state trial court judges came from Maricopa County, Arizona. *Id*. at 1279–80. For more demographic information about the judges in the study and the study procedures, see *id.* at 1279–89.

[148] *Id.* at 1286.

driven by one of the defendant's employees."[149] The materials indicated that the judge agreed to hold a last-minute settlement conference on the eve of trial, but the conference was unsuccessful, so the case proceeded to trial.[150] Judges in the control group did not receive a specific dollar request from plaintiff's counsel in materials describing the settlement conference, while the other judges learned that plaintiff's counsel had demanded either $175,000 (the low anchor) or $10,000,000 (the high anchor) to settle.[151]

The judges with the low anchor awarded a mean of $612,000, while the judges in the matched control group awarded a mean award of nearly $1,400,000; the judges with the high anchor awarded a mean award over $2,200,000, while the judges in the matched control group awarded a mean award of $808,000.[152] Thus, the "low anchor" group produced a mean award 56.29% lower than the matched control group and the "high anchor" group produced a mean award 172.28% greater than the matched control group. The authors concluded: "The anchors appear to have influenced the judges' assessments of the appropriate amount of damages to award. Relative to the judges assigned to the control conditions, the high-anchor judges gave substantially higher awards and the low-anchor judges gave substantially lower awards."[153] Here, the powerful effects of the high and low anchors, derived using anchors that are at least relevant to the judges' assessments about the amount of damages, are "in contrast to the anchors that psychologists typically provide in their studies of anchoring . . . ."[154]

4. *Summary of Cognitive "Anchoring Effect" Studies*

The studies of judges—German, American, experienced, generalist, and specialist—clearly establish that judges, like the general population, are strongly impacted by the anchoring effect. This remains true even with random and unrelated anchors, like the effect of rolling dice on the length of sentences. When related and plausible anchors are used, the gravitational pull of the anchors is even stronger and has a greater effect on judges' assessments and judgments. Before turning to the anchoring effect and sentencing under the current advisory Guidelines regime, the next part of this Article provides a brief overview of federal sentencing.

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[149] *Id.* at 1288.
[150] *Id.* at 1288–89.
[151] *Id.*
[152] *Id.* at 1289–90.
[153] *Id.* at 1291.
[154] *Id.*

III. THE FEDERAL SENTENCING REVOLUTION

A. BRIEF OVERVIEW OF FEDERAL SENTENCING

In its new report to Congress on the impact of *United States v. Booker*,[155] the United States Sentencing Commission's (USSC) "sentencing data analyses spanned a broad time frame, from October 1995 through September 2011."[156] This data spanned four periods: "the *Koon* period (June 13, 1996 through April 30, 2003), the PROTECT Act period (May 1, 2003 through June 24, 2004), the *Booker* period (January 12, 2005 through December 10, 2007), and the *Gall* period (December 11, 2007 through September 30, 2011)."[157] The Commission chose these periods because they reflected "Supreme Court decisions and legislation that influenced federal sentencing in fundamental ways."[158] The latter two periods, *Booker* and *Gall*, are particularly important because they reflect the current state of federal sentencing and are thus described in greater detail.

Characterizing the first period, the Supreme Court in *Koon v. United States* established that district court departure decisions under the Guidelines were entitled to deference on appeal by adopting an abuse of discretion standard of review and rejecting a *de novo* standard.[159] The second period referred to by the USSC is the PROTECT Act period. In 2003, Congress enacted the Prosecutorial Remedies and Other Tools to end the Exploitation of Children Today Act (PROTECT Act)[160]—which restricted the use of departures by sentencing courts and changed the standard of review for departures to *de novo*.[161] However, looking at important USSC data spanning

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[155] U.S. SENTENCING COMM'N, *supra* note 10, pt. A.

[156] *Id.* at 2.

[157] *Id.* at 2–3.

[158] *Id.* at 3. The Commission describes these four periods as follows:

> Specifically, in *United States v. Koon*, the Supreme Court defined the level of deference due to district courts' decisions to sentence outside the guideline range and determined that such decisions should be reviewed for abuse of discretion. In passing the PROTECT Act nearly seven years later, Congress restricted district courts' discretion to impose sentences outside the guideline range, and required that courts of appeals review such decisions *de novo*, or without any deference to the district court's decision. In *Booker*, the Supreme Court struck down two statutory provisions in the SRA that made the guidelines mandatory, and also defined the standard of review for sentences on appeal. In *Gall v. United States*, the Court further defined the appellate standard of review.

Id. (footnotes omitted).

[159] 518 U.S. 81, 96–100 (1996).

[160] Pub. L. No. 108-21, 117 Stat. 650 (2003).

[161] U.S. SENTENCING COMM'N, *supra* note 10, pt. A.

> The PROTECT Act included several directives to the Commission, among them a directive to promulgate guideline amendments "to ensure that the incidence of downward departures are [sic] substantially reduced." The Commission responded to these directives and statutory changes with two amendments implementing the PROTECT Act's direct amendments to the guidelines and an

all four periods is essential to understand the nature and gravitational pull of the Federal Sentencing Guidelines as cognitive anchors for sentencing judges.

B. THE *BOOKER* REVOLUTION

For nearly a decade, federal sentencing law has been in a period of fundamental and "profound change."[162] The so-called *Booker*[163] revolution marked the Maginot line between the *mandatory* sentencing guideline regime (in place since the Sentencing Reform Act of 1984 (SRA) went into effect on November 1, 1987)[164] and the new post-*Booker advisory* Guideline sentencing scheme.[165] *Booker*, in short, held the Sentencing Guidelines

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> eight-part emergency amendment that modified nine guideline provisions. The amendment also created the early disposition departure (or "fast track") called for in the PROTECT Act at §[ ]5K3.1 (Early Disposition Programs) (Policy Statement) and a new guideline at §[ ]1A3.1 (Authority) setting forth the statutory authority for the Commission and the guidelines. The amendments' overall effect was to limit the availability of departures by prohibiting certain factors as grounds for departure, restricting the availability of certain departures, narrowing when certain permitted departures were appropriate, and limiting the extent of departures.

Id. (footnotes and citations omitted).

[162] Scott Michelman & Jay Rorty, *Doing* Kimbrough *Justice: Implementing Policy Disagreements with the Federal Sentencing Guidelines*, 45 SUFFOLK U. L. REV. 1083, 1083 (2012).

[163] United States v. Booker, 543 U.S. 220 (2005).

[164] *See, e.g.*, U.S. SENTENCING COMM'N, AN OVERVIEW OF THE UNITED STATES SENTENCING COMMISSION 2 (n.d.), *available at* http://goo.gl/z6c5bE. (last visited May 22, 2014).

[165] Actually, the seeds of the post-*Booker* sentencing revolution were sown in the somewhat obscure case of *Jones v. United States*, 526 U.S. 227 (1999). In *Jones*, the Supreme Court interpreted a federal carjacking statute, 18 U.S.C. § 2119 (Supp. V 1988), to define three separate offenses rather than a single offense with potentially three different maximum sentences triggered by aggravating factors that were not found by a jury. *Id.* at 251–52. This interpretation avoided the potential due process and Sixth Amendment constitutional issues identified by the Court. *Id.* at 239–52. The following year, in *Apprendi v. New Jersey*, 530 U.S. 466 (2000), the Supreme Court answered the question raised, but not decided, in *Jones* and held:

> In sum, our reexamination of our cases in this area, and of the history upon which they rely, confirms the opinion that we expressed in *Jones*. Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt.

Id. at 490. Then, in *Blakely v. Washington*, 542 U.S. 296 (2004), the Court extended the *Apprendi* rationale to invalidate a state mandatory sentencing regime because the Sixth Amendment right to a jury trial prohibited a state sentencing judge from enhancing a criminal sentence three years above the fifty-three-month maximum sentence based on facts not decided by a jury or admitted by a defendant, in this case, that Ralph Howard Blakely acted with deliberate cruelty. *Id.* at 298, 313–14. *Blakely*, thus, refined the *Apprendi* rule by holding:

unconstitutional under the *Apprendi-Blakely* rationale because the sentencing judge enhanced Freddie Booker's sentence beyond the 262-month sentence he could have imposed (based on facts the jury found beyond a reasonable doubt) to 360 months based on facts the judge found by a preponderance of the evidence.[166] The *Booker* remedy did two things. First, it severed and excised the provision of the SRA that made the Guidelines mandatory and binding on federal judges, 18 U.S.C. § 3553(b)(1).[167] The Court noted that had Congress made the Sentencing Guidelines advisory rather than mandatory, the SRA would fall "outside the scope of *Apprendi*'s requirement."[168] Second, the Court severed and excised 18 U.S.C. § 3742(e), which "sets forth standards of review on appeal, including *de novo* review of departures from the applicable Guidelines range."[169] Thus, *Booker* made clear that mandatory guidelines violated the Sixth Amendment right to trial by jury by extending the Court's prior holdings in *Apprendi* and *Blakely* to the United States Sentencing Guidelines.[170] Thus, the Court answered the first question presented in the case—"Whether the Sixth Amendment is violated by the imposition of an enhanced sentence under the United States Sentencing Guidelines based on the sentencing judge's determination of a fact (other than a prior conviction) that was not found by the jury or admitted by the defendant"[171]—in the affirmative. The second part of *Booker*, the remedial portion, held that the proper remedy for the Sixth Amendment violation was to make the Guidelines advisory by severing two provisions that made the Guidelines mandatory.[172]

C. THE POST-*BOOKER* SENTENCING REGIME

Booker clearly gave federal sentencing judges more discretion, but not much clarity on how to apply the § 3553(a) factors. "Mandatory Guideline sentencing was out. The seven factors of 18 U.S.C. § 3553(a) (§ 3553

> In other words, the relevant "statutory maximum" is not the maximum sentence a judge may impose after finding additional facts, but the maximum he may impose *without* any additional findings. When a judge inflicts punishment that the jury's verdict alone does not allow, the jury has not found all the facts "which the law makes essential to the punishment," and the judge exceeds his proper authority.

Id. at 303–04 (citation omitted). "*Blakely* made *Booker*'s constitutional holding all but inevitable . . . ." Michelman & Rorty, *supra* note 162, at 1093.

166 *Booker*, 543 U.S. at 227, 243–44.

167 *Id.* at 258–59.

168 *Id.* at 259.

169 *Id.* (citation omitted).

170 *Id.* at 243–44.

171 *Id.* at 229 n.1.

172 *Id.* at 245.

factors) were in."[173] The Court in *Rita v. United States* described the § 3553 factors as:

> That provision tells the *sentencing judge* to consider (1) offense and offender characteristics; (2) the need for a sentence to reflect the basic aims of sentencing, namely, (a) "just punishment" (retribution), (b) deterrence, (c) incapacitation, (d) rehabilitation; (3) the sentences legally available; (4) the Sentencing Guidelines; (5) Sentencing Commission policy statements; (6) the need to avoid unwarranted disparities; and (7) the need for restitution.[174]

Additionally, *Rita* reinforces that the § 3553 factors also mandate "the sentencing judge to 'impose a sentence sufficient, but not greater than necessary, to comply with' the basic aims of sentencing as set out above."[175]

The central issue in *Rita* was whether a presumption of reasonableness, adopted by several federal courts of appeals as part of their post-*Booker* "reasonableness" review, attached to a sentence on appeal that was within the Sentencing Guidelines.[176] The Court held that the courts of appeals were free to adopt a presumption of reasonableness in part because by the time they review "a within-Guidelines sentence[,] . . . *both* the sentencing judge and the [USSC] will have reached the *same* conclusion as to the proper sentence in the particular case. That double determination significantly increases the likelihood that the sentence is a reasonable one."[177] The Court noted: "We repeat that the presumption before us is an *appellate* court presumption. Given our explanation in *Booker* that appellate 'reasonableness' review merely asks whether the trial court abused its discretion, the presumption applies only on appellate review."[178]

But is that how sentencing judges have implemented *Booker*? Justice Stephen Breyer, the author of the majority opinion in *Rita*, wondered as much: "*Rita* may be correct that the presumption will encourage sentencing judges to impose Guideline sentences."[179] Justice John Paul Stevens, concurring in *Rita*, candidly recognized that "I am not blind to the fact that, as a practical matter, many federal judges continued to treat the Guidelines as virtually mandatory after our decision in *Booker*."[180] In his *Rita* concurring opinion, Justice Antonin Scalia, who was in the majority on the *Booker* holding that the mandatory Guidelines violated the Sixth Amendment, but dissented as to the *Booker* remedy, noted: "The only way to

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[173] Michelman & Rorty, *supra* note 162, at 1095.
[174] 551 U.S. 338, 347–48 (2007).
[175] *Id.* at 348.
[176] *Id.* at 341.
[177] *Id.* at 347.
[178] *Id.* at 351.
[179] *Id.* at 354.
[180] *Id.* at 366 (Stevens, J., concurring).

assure district courts that they can deviate from the advisory Guidelines, and to ensure that judge-found facts are never legally essential to the sentence, is to prohibit appellate courts from reviewing the *substantive* sentencing choices made by district courts."[181] Finally, even Justice David Souter in his *Rita* dissent expressed grave concerns about district court judges' "substantial gravitational pull" to the now-advisory Guidelines.[182] Justice Souter warned that "a presumption of Guidelines reasonableness would tend to produce Guidelines sentences almost as regularly as mandatory Guidelines had done" and that this "would open the door to undermining *Apprendi* itself, and this is what has happened today."[183] Justices Breyer, Scalia, and Souter raised these very concerns without explicitly considering the powerful evidence of the anchoring effect!

D. THE IMPORTANCE OF *GALL V. UNITED STATES*

In *Gall v. United States*, the Court reversed the United States Court of Appeals for the Eighth Circuit's decision, which had in turn reversed the trial court judge for varying from the bottom of the Guidelines range of thirty months to probation.[184] The trial court judge, in fashioning the sentence, relied on the facts that Gall was a recent college graduate, who several years earlier had voluntarily withdrawn from his limited seven-month involvement in an ecstasy drug trafficking conspiracy, started his own successful business, lacked a criminal history, and had the support of his family and friends.[185] The Court took serious issue with the Eighth Circuit's view that a sentence outside the advisory Guidelines range must be supported by justifications that are proportional to the extent of the variance.[186] The Court also rejected the Eighth Circuit's view that the thirty-month variance at issue was "extraordinary" and must be supported by extraordinary circumstances.[187] The Court held that neither of the Eighth Circuit's views was consistent with the Court's remedial opinion in *Booker*.[188] The Court held:

> [W]hile the extent of the difference between a particular sentence and the recommended Guidelines range is surely relevant, courts of appeals must review all sentences—whether inside, just outside, or significantly outside the Guidelines range—under a

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[181] *Id.* at 373 n.3 (Scalia, J., concurring).
[182] *Id.* at 390 (Souter, J., dissenting).
[183] *Id.*
[184] 552 U.S. 38, 41 (2007).
[185] *Id.* at 43–46.
[186] *Id.* at 45–53.
[187] *Id.* at 46–48.
[188] *Id.* at 46–49.

> deferential abuse-of-discretion standard. We also hold that the sentence imposed by the experienced District Judge in this case was reasonable.[189]

The Court explained: "If the sentence is within the Guidelines range, the appellate court may, but is not required to, apply a presumption of reasonableness."[190] Critically, the Court held that "if the sentence is outside the Guidelines range, the court may not apply a presumption of unreasonableness."[191] Moreover, even "[t]he fact that the appellate court might reasonably have concluded that a different sentence was appropriate is insufficient to justify reversal of the district court."[192]

The Court also explained that trial court judges are "in a superior position to find facts," determine the credibility of the witnesses, apply the § 3553(a) factors, and "gain[] insights not conveyed by the record."[193] Quoting from its earlier opinion in *Koon*, the Court emphasized the historic role of a federal sentencing judge: "It has been uniform and constant in the federal judicial tradition for the sentencing judge to consider every convicted person as an individual and every case as a unique study in the human failings that sometimes mitigate, sometimes magnify, the crime and the punishment to ensue."[194] The Court further observed, "[I]t is not for the Court of Appeals to decide *de novo* whether the justification for a variance is sufficient or the sentence reasonable."[195] Rather, under the more deferential "abuse-of-discretion review, the Court of Appeals should have given due deference to the District Court's reasoned and reasonable decision that the §[ ]3553(a) factors, on the whole, justified the sentence."[196]

Thus, *Gall* gave federal sentencing judges wider discretion to apply the § 3553(a) factors and to achieve the overarching principle of federal sentencing that every federal district court judge "shall impose a sentence sufficient, but not greater than necessary, to comply with the purposes" of sentencing.[197]

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[189] *Id.* at 41.

[190] *Id.* at 51.

[191] *Id.*

[192] *Id.*

[193] *Id.* (quoting Brief Amici Curiae of Federal Public & Community Defenders & National Ass'n of Federal Defenders in Support of Petitioner at 16, *Gall*, 552 U.S. 38 (No. 06-7949)).

[194] *Id.* at 52 (quoting Koon v. United States, 518 U.S. 81, 113 (1996)).

[195] *Id.* at 59.

[196] *Id.* at 59–60.

[197] 18 U.S.C. § 3553(a) (2012).

E. THE PRE-SENTENCING AND SENTENCING PROCESS

After a defendant pleads guilty or is found guilty by a jury or judge in a trial, the U.S. Probation Office prepares a presentence report (PSR).[198] The requirements for the presentence investigation and the preparation of the PSR are contained in Rule 32 of the Federal Rules of Criminal Procedure. The key provisions of the Rule require the probation officer to apply and compute the advisory Guidelines range by calculating the defendant's offense level and criminal history, stating the resulting sentencing range, and identifying all relevant sentencing factors, including the defendant's history, characteristics, and any prior criminal record.[199] The PSR is then disclosed to the parties,[200] and they are given time to object in writing to anything in the PSR, including the calculation and proposed advisory Sentencing Guidelines range.[201] At sentencing, the judge resolves any contested advisory Guidelines or fact issues, takes any evidence, and hears any witnesses offered by the parties.[202] Before imposing a sentence, the judge must allow both the defense attorney and the attorney for the government an opportunity to be heard and "address the defendant personally in order to permit the defendant to speak or present any information to mitigate the sentence . . . ."[203]

The Supreme Court in *Gall* described the proper procedure for post-*Booker* sentencing.[204] First, "a district court should begin all sentencing proceedings by correctly calculating the applicable Guidelines range."[205] The Guidelines ranges are contained in a sentencing table or grid consisting of "43 offense levels on a vertical axis and 6 criminal history categories on a horizontal axis that intersect to form a sentencing grid with 258 cells that each contain an advisory guideline sentencing range, except for the 6 cells for offense level 43 that have a single sentence: life."[206] The judge then should give "both parties an opportunity to argue for whatever sentence they deem appropriate . . . ."[207] Next, "the district judge should then consider all

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[198] The percentage of defendants who plead guilty has remained constant over the years: the *Koon* period was 95.0%; the PROTECT Act period was 95.4%; the *Booker* period was 95.3%; and the *Gall* period until 2011 was 96.5%. U.S. SENTENCING COMM'N, *supra* note 10, pt. A, at 58.

[199] FED. R. CRIM. P. 32(d).

[200] *Id.* 32(e).

[201] *Id*. 32(f).

[202] *Id*. 32(i).

[203] *Id*. 32(i)(2)–(4).

[204] Gall v. United States, 552 U.S. 38, 49–50 (2007).

[205] *Id.* at 49. (citing Rita v. United States, 551 U.S. 338, 347–48 (2007)).

[206] United States v. Newhouse, 919 F. Supp. 2d 955, 957 n.1 (N.D. Iowa 2013) (Bennett, J.) (citing U.S. SENTENCING GUIDELINES MANUAL, *supra* note 9, ch. 5, pt. A, sentencing tbl.).

[207] *Gall*, 552 U.S. at 49.

of the § 3553(a) factors . . . ."[208] The judge "must make an individualized assessment based on the facts presented."[209] If the judge "decides that an outside-Guidelines sentence is warranted, he must consider the extent of the deviation and ensure that the justification is sufficiently compelling to support the degree of the variance."[210] Finally, the judge "must adequately explain the chosen sentence to allow for meaningful appellate review and to promote the perception of fair sentencing."[211]

IV. POST-*BOOKER* SENTENCING AND THE GRAVITATIONAL PULL OF THE GUIDELINES RANGE

Were Justices Breyer, Scalia, and Souter's concerns correct in *Rita* that an appellate presumption of reasonableness would create a gravitational pull towards the now-advisory Guidelines so that federal judges would sentence just like they had when the Guidelines were mandatory? In discussing that gravitational pull, one scholar and policy analyst suggested that "the guidelines' recommendation serves as a psychological 'anchor,' which appears to simplify or obviate the daunting task of evaluating the seriousness of the offense, the dangerousness of the offender, and other considerations relevant to the statutory purposes."[212] The scholar notes, "It is no surprise that judges would be grateful for a recommendation that purports to take into account the difficult considerations that bear on sentencing."[213] Thus, like wearing old shoes or old blue jeans, judges may just feel more comfortable relying on the Guidelines. Does anchoring by the actual Sentencing Guidelines range either discourage or minimize the extent of applying the other § 3553(a) factors and downward variances?

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[208] *Id.* at 49–50.

[209] *Id.* at 50.

[210] *Id.*

[211] *Id. Contra* Amy Baron-Evans & Thomas W. Hillier, II, *The Commission's Legislative Agenda to Restore Mandatory Guidelines*, 25 FED. SENT'G REP. 293 (2013) (scathingly discussing the U.S. Sentencing Commission's 2010 promulgation of its three-step Guideline, U.S. SENTENCING GUIDELINES MANUAL § 1B1.1 (2010), allegedly incorporating the holding of *Gall*). This blistering analysis establishes that this new Guideline is totally inconsistent with *Gall*, and contrary to the claim by the Commission, it is also inconsistent with all of the holdings of the courts of appeals and likely unconstitutional. *See generally id.*

[212] Paul J. Hofer, *Beyond the "Heartland": Sentencing Under the Advisory Federal Guidelines*, 49 DUQ. L. REV. 675, 689 (2011) (footnote omitted).

[213] *Id.* Yet another reason for the gravitational pull of the Guidelines is the standard in some circuits that within-Guidelines sentences require a lesser explanation by the sentencing judge than a sentence outside the Guidelines range. *See, e.g.*, United States v. Carty, 520 F.3d 984, 990–94 (9th Cir. 2008) (en banc); United States v. Ausburn, 502 F.3d 313, 331 n.36 (3d Cir. 2007).

In looking at very recent and comprehensive data from the USSC, presented here in Figure 6, it is fascinating to observe how little the increased discretion of federal district court judges post-*Booker* and *Gall* has impacted the frequency and extent of non-Guidelines variances.

Figure 6

Selected Sentencing Characteristics, All Offenses, Koon *Period through* Gall *Period* [214]

	Koon Period (6/13/96 – 4/30/03)	PROTECT Act Period (5/1/03 – 6/24/03)	*Booker* Period (1/12/05 – 12/10/07)	*Gall* Period (12/11/07 – 9/30/11)
	Percent	Percent	Percent	Percent
Sentence Relative to Guidelines Range				
Non-Gov't Sponsored Below Range	15.4	5.7	12.6	17.4
	Months	Months	Months	Months
Average Guidelines Minium	58	59	63	59
Average Sentence	49	53	54	49
Non-Gov't Sponsored Below Range	32	39	50	47
Average Extent of Reduction	Percent (Months)	Percent (Months)	Percent (Months)	Percent (Months)
Non-Gov't Sponsored Below Range	41.8 (17)	40.0 (17)	39.1 (20)	40.7 (21)

[214] U.S. SENTENCING COMM'N, *supra* note 10, pt. C (citation omitted).

The gravitational pull of the Guidelines appears to be so strong that the change from mandatory to advisory Guidelines has had little to no impact on the average length of federal sentences. Indeed, as shown in Figure 6, the average sentence for all federal sentences imposed[215] in the *Koon* era was forty-nine months,[216] while the average sentence for all federal sentences imposed[217] in the *Gall* era is also forty-nine months.[218] The average non-government sponsored, below range sentence in the *Koon* era was thirty-two months, while the average during the *Gall* era actually increased by 68% to forty-seven months.[219] The average non-government sponsored, below-range sentence occurred 15.4% of the time in the *Koon* era and increased to only 17.4% in the *Gall* era.[220] Finally, if judges were actually consistently exercising discretion using the § 3553(a) factors to vary downward, one would expect to see a substantial increase in the average extent of reductions for non-government sponsored, below-range sentences for all offenses from the *Koon* era to the *Gall* era. However, the actual average extent of reductions was more modest. The average percent reduction and number of months reduced in the *Koon* era was 41.8% and seventeen months; in the PROTECT Act era 40.0% and seventeen months; in the *Booker* era 39.1% and twenty months; and in the *Gall* era 40.7% and twenty-one months.[221] Thus, the impact of the greater discretion given federal judges under *Booker* and *Gall* has only minimally affected non-Guidelines sentencing. As the D.C. Circuit has observed, "It is hardly surprising that most federal sentences fall within Guidelines ranges even after *Booker*—indeed, the actual impact of *Booker* on sentencing has been minor."[222]

As Figures 7 and 8 demonstrate, the post-*Booker* broadening of judicial discretion has had virtually no impact on mitigating the harshness of sentencing under advisory Guidelines rather than mandatory Guidelines. The average sentence imposed in terms of months compared to the average Guidelines minimum has remained virtually constant from the *Koon* period through the *Gall* period.

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[215] *Id.* at 81.
[216] *Id.* at 19.
[217] *Id.* at 81.
[218] *Id.* at 19.
[219] *Id.*
[220] *Id.*
[221] *Id.*
[222] United States v. Turner, 548 F.3d 1094, 1099 (D.C. Cir. 2008) (citing U.S. SENTENCING COMM'N, FINAL QUARTERLY DATA REPORT FISCAL YEAR 2007, at 1 tbl.1 (2008); U.S. SENTENCING COMM'N, FINAL REPORT ON THE IMPACT OF *UNITED STATES V. BOOKER* ON FEDERAL SENTENCING 57 (2006)).

Figure 7
Average Guideline Minimum and Sentence Imposed
All Offenses, Fiscal Years 1996–2011[223]

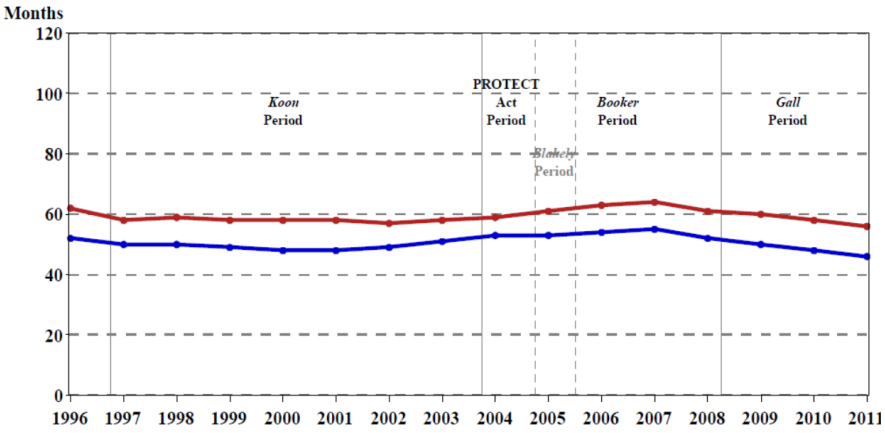
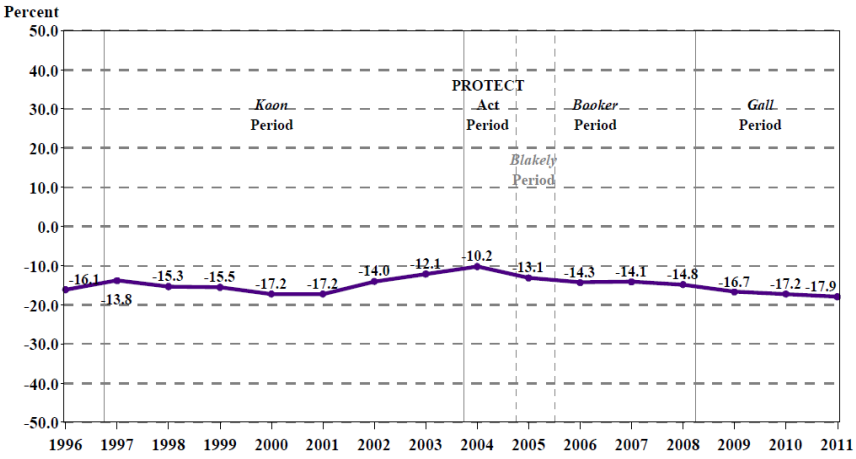


Figure 8
Percent Difference Between Average Guidelines Minimum
and Sentence Imposed, All Offense, Fiscal Years 1996–2011[224]



[223] U.S. SENTENCING COMM'N, *supra* note 10, pt. C (citation omitted).
[224] *Id.*

Legal scholars have also recognized the marginal impact of *Booker* on the length of sentences.[225] Ryan Scott has observed that the expected post-*Booker* revolution "did not prompt immediate changes in sentencing outcomes."[226] In fact, the average length of sentences, even in drug trafficking offenses, increased for several years post-*Booker*.[227] Scott concluded: "The rate of below-guideline sentencing jumped, but quickly leveled out, and the change was hardly 'earth-shattering.' Many commentators lamented that, far from ushering in a revolution, the decision turned out to be a dud."[228] I now turn to the most likely explanation for this post-*Booker* dud.

V. ANCHORING AND FEDERAL SENTENCING

It is hardly surprising that the United States Sentencing Guidelines still act as a hulking anchor for most judges.[229] After all, is this not exactly what Congress intended when it passed the SRA and created the mandatory sentencing Guidelines? Even though the Guidelines are now advisory, as a result of the *Rita* presumption of reasonableness, the D.C. Circuit observed, "judges are more likely to sentence within the Guidelines in order to avoid the increased scrutiny that is likely to result from imposing a sentence outside the Guidelines."[230] In addition to the effect of the *Rita* presumption, the D.C. Circuit has also noted, "[p]ractically speaking, applicable Sentencing Guidelines provide a starting point or 'anchor' for judges and are likely to influence the sentences judges impose."[231] As one judge on the Eleventh

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[225] *See, e.g.*, Douglas A. Berman, *Tweaking* Booker*: Advisory Guidelines in the Federal System*, 43 HOUS. L. REV. 341, 349 (2006) (noting that "the *Booker* decision appears to have only slightly mitigated the rigidity and severity of the federal sentencing system" and "data on post-*Booker* sentencing outcomes released by the Commission reveal only relatively small changes in the patterns of sentencing outcomes" (footnotes omitted)).

[226] Ryan W. Scott, *Inter-judge Sentencing Disparity After* Booker*: A First Look*, 63 STAN. L. REV. 1, 14 (2010).

[227] *Id.* (footnote omitted).

[228] *Id.* at 14–15 (footnotes omitted).

[229] Daniel M. Isaacs, Note, *Baseline Framing in Sentencing*, 121 YALE L.J. 426, 428 (2011). "The robust research on cognitive biases and framing effects suggests that judges do commit cognitive errors while sentencing and that sentencing baselines anchor sentences." *Id.* at 449.

[230] United States v. Turner, 548 F.3d 1094, 1099 (D.C. Cir. 2008).

[231] *Id.*; *see also* United States v. Robertson, 662 F.3d 871, 876 (7th Cir. 2011) (citing *Turner* and other cases); United States v. Wetherald, 636 F.3d 1315, 1321 (11th Cir. 2011) (citing *Turner*); United States v. Doyle, 621 F. Supp. 2d 345, 351 (W.D. Va. 2009) (same); United States v. Kladek, 651 F. Supp. 2d 992, 996 (D. Minn. 2009) (same). *But see* United States v. Lewis, 606 F.3d 193, 204–05 (4th Cir. 2010) (Goodwin, C.J., concurring and dissenting). Chief Judge Joseph Goodwin of the Southern District of West Virginia criticized the majority for giving too much weight to the *Turner* anchoring language: "Relying upon the D.C. Circuit's characterization of the Guidelines as an 'important anchor for a sentencing

Circuit Court of Appeals has noted: "Not only have district courts now become used to relying on them, but the Guidelines inevitably have a considerable anchoring effect on a district court's analysis."[232] Indeed, former Federal District Court Judge Nancy Gertner, after briefly mentioning the potential role of cognitive anchoring in federal sentencing, observed: "In effect, the 300-odd page Guideline Manual provides ready-made anchors."[233] Gertner continued: "District judges have gotten the message. Advisory or not, 'compliance' with the Guidelines is high."[234] Most recently, Justice Sonia Sotomayor, in dicta in her *Peugh v. United States* majority opinion, wrote: "The post-*Booker* federal sentencing scheme aims to achieve uniformity by ensuring that sentencing decisions are anchored by the Guidelines and that they remain a meaningful benchmark through the process of appellate review."[235] Just four days later, Judge Guido Calabresi wrote in a concurring opinion in *United States v. Ingram*,[236] after citing to several of the "anchoring effect" studies described earlier:

> It is important to distinguish the guidelines' intended, salutary effect—promoting consistency and proportionality in sentencing—from the unintended anchoring effect that the guidelines can exert. Proper reliance on the guidelines is not only rational, but legally compelled. As our court has stated, en banc, "sentencing judges, certainly, are not free to ignore the Guidelines. . . . The Guidelines provide the starting point and the initial benchmark for sentencing, and district courts must remain cognizant of them throughout the sentencing process." Anchoring leads to cognitive error not insofar as judges *intentionally* use the guidelines in an advisory fashion, but instead when "judges *irrationally* assign too much weight to the guidelines range, just because it offers some initial numbers."[237]

It is sentencing judges' extraordinarily difficult task to distinguish between Justice Sotomayor's intended "anchoring" of the Guidelines and Judge Calabresi's concern that the anchoring effect will lead to irrational and subconscious weighting of the Guidelines that calls out for a solution.

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judge,' the majority necessarily concludes that the Guidelines are more of a requirement for district courts to follow than advice to be considered." *Id.* at 204 (quoting *Turner*, 548 F.3d at 1099). The *Turner* majority thus gives more weight to the Guidelines than the Sixth Amendment permits.

[232] United States v. Docampo, 573 F.3d 1091, 1105 n.5 (11th Cir. 2009) (Barkett, J., concurring and dissenting).

[233] Nancy Gertner, *What Yogi Berra Teaches About Post*-Booker *Sentencing*, 115 YALE L.J. POCKET PART 137, 138 (2006).

[234] *Id.* at 140.

[235] 133 S. Ct. 2072, 2083 (2013) (holding that a defendant sentenced under higher Guidelines than those in effect at the time of the offense violated the Ex Post Facto Clause).

[236] 721 F.3d 35 (2d Cir. 2013).

[237] *Id.* at 40 n.2 (Calabresi, J., concurring) (quoting United States v. Cavera, 550 F.3d 180, 189 (2d Cir. 2008) (quotation marks and citations omitted); Scott, *supra* note 226, at 45).

For federal district court judges with twenty-six years or fewer years of experience on the bench (75% of all sitting federal district court judges), the Guidelines have been with them their entire judicial career.[238] Is it any wonder they remain anchored to them?[239] Even the structure of the PSR promotes anchoring to the Guidelines range. In either the traditional PSR or the newer version increasingly used by most courts,[240] the computation of the Guidelines range is included in Part A of the PSR, "The Offense." The Guidelines calculation is preceded by only the cover page, which provides basic data about the defendant, like name, address, citizenship, the statement of the offense, and the offense conduct. The calculation of the Guidelines range is followed by Part B of the PSR, which includes, in great detail, the defendant's complete criminal history. Part C includes all the offender characteristics, like personal and family data, physical condition, mental and emotional health, substance abuse, educational, vocational, and special skills, and financial condition—the grist for most of the § 3553(a) factors. Part D includes sentencing options. Thus, before a judge learns virtually anything about the defendant's personal history and unique personal characteristics, the advisory Guidelines range forms an anchor for the sentence.

When asked, federal district court judges have expressed considerable dissatisfaction with the Sentencing Guidelines. A comprehensive survey of federal district court judges in 2010 by the USSC reported a plethora of criticism of the current Guidelines. By way of a few examples, only 22% of judges surveyed strongly agreed "the federal sentencing guidelines have increased fairness in meeting the purposes of sentencing."[241] Sixty-six percent of the judges surveyed thought that the "safety valve" in drug cases was too limited and should be expanded to offenders with two or three criminal history points.[242] Sixty-nine percent of the judges surveyed thought that the safety valve should be expanded to all offenses with a mandatory minimum.[243] Seventy-one percent of the judges surveyed disagreed with the lack of safety valve status for receipt of child pornography.[244] Eighty-four

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[238] There are 1,043 sitting federal district court judges: 606 are on active status, and 437 are on senior status. Of the sitting judges, 794 judges (574 active and 220 senior) were appointed after the effective date of the Guidelines, November 1, 1987. *See Biographical Directory of Federal Judges, 1789-Present*, FED. JUDICIAL CTR., http://goo.gl/Bw0lL4 (follow "Select research categories" hyperlink) (last visited May 22, 2014).

[239] *But see* Scott, *supra* note 226, at 42–44.

[240] The newer version is known as "PACTS v.6.0/PSX." PACTS stands for Probation and Pretrial Services Case Management Software.

[241] U.S. SENTENCING COMM'N, RESULTS OF SURVEY OF UNITED STATES DISTRICT JUDGES JANUARY 2010 THROUGH MARCH 2010, at tbl.17 (2010).

[242] *Id.* at tbl.2.

[243] *Id.*

[244] *Id.*

percent of the judges surveyed disagreed with considering acquitted conduct as relevant conduct for sentencing purposes.[245] Sixty-eight percent of the judges surveyed disagreed that uncharged conduct only referenced in the PSR could be considered relevant conduct.[246] More than half of the judges surveyed thought that the Guidelines should be amended to allow judges to reduce a defendant's sentence for substantial assistance, even if the Government does not make a motion.[247]

When asked if certain factors were relevant to variances from the Guidelines, 60% or more of the judges responded that the following factors were ordinarily relevant: age, mental condition, emotional condition, physical condition, employment record, family ties and responsibilities, stress related to military service, civic, charitable or public service, prior good works, diminished capacity, voluntary disclosure of the offense, aberrant behavior, exceptional efforts to fulfill restitution obligations, and undue influence related to affection, relationship, or fear of other offenders.[248] This is significant because the vast majority of these factors were not available for judges to consider prior to *Booker* unless they were present to an extraordinary degree. Furthermore, federal district court judges have wide latitude and discretion to determine how much weight to give any of the § 3553(a) factors and to attach greater weight to one factor over others.[249] However, as Figures 7 and 8 illustrate, judges do not now use these discretionary factors, each part of the § 3553(a) non-Guidelines factors, to any meaningful extent to reduce sentences. This strongly suggests that the Guidelines act as a powerful anchor in current federal judicial sentencing.

In addition to the USSC survey, federal judges have strongly criticized the Guidelines in scholarly journals, indicating, for example, that the Guidelines "need substantial change, if not complete rejection"[250] and

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[245] *Id.* at tbl.5.

[246] *Id.*

[247] *Id.* at tbl.15.

[248] *Id.* at tbl.13.

[249] United States v. Overstreet, 713 F.3d 627, 636–39 (11th Cir. 2013); United States v. Gasaway, 684 F.3d 804, 808 (8th Cir. 2012); United States v. Jeffery, 631 F.3d 669, 679–80 (4th Cir. 2011); United States v. Busara, 551 F.3d 669, 673–74 (7th Cir. 2008).

[250] Myron H. Bright, *Judge Gerald W. Heaney: A True Son of the Soil*, 81 MINN. L. REV. 1101, 1103 (1997) ("Today almost all federal judges agree that these guidelines need substantial change, if not complete rejection."); *see also* Jose A. Cabranes, *Sentencing Guidelines: A Dismal Failure*, 207 N.Y. L.J., Feb. 11, 1992, at 1 (claiming "virtually everyone who is associated with the federal justice system" deems the Guidelines a "dismal failure"); Hon. Nancy Gertner, *From Omnipotence to Impotence: American Judges and Sentencing*, 4 OHIO ST. J. CRIM. L. 523, 530, 539 (2007) (describing "robust judicial opposition to the Guidelines"); Hon. Nancy Gertner, *Supporting Advisory Guidelines*, 3 HARV. L. & POL'Y REV. 261, 267 (2009) (commenting that district court judges "had overwhelmingly opposed the Guidelines"); Michael W. McConnell, *The* Booker *Mess*, 83 DENV. U. L. REV. 665, 681 (2006)

"threaten to transform the venerable ritual of sentencing into a puppet theater . . . ."[251] Indeed, federal judges in their judicial opinions have also had harsh words for the perceived injustices of the Guidelines, calling them: "unworkable," "unfair," "a prescription for injustice," and "exceptionally harsh."[252] Even senators who voted for the Guidelines recognize these issues. Senator Orrin Hatch observed: "A lot of judges hate the sentencing guidelines; they hate the mandatory minimums. I can understand why . . . ."[253] Legal scholars have also noted that "[c]riticisms of the structure, content, and operation of the pre-*Booker* Guidelines are legion . . . ."[254]

But, of course, not all within-Guidelines sentences can fairly be attributed to anchoring. Scott, in attempting to minimize the anchoring effect of the Guidelines as an explanation for the continued strong and persistent tethering to the Guidelines post-*Booker*, has argued that "some judges actually agree with the Guidelines' recommendations or consciously choose to impose within-range sentences for institutional reasons."[255] Certainly, that is true. Some judges post-*Booker* likely impose Guidelines sentences more

("But not long after they were enacted, the Guidelines began to attract serious criticism, which became more vehement as years went by. Many critics, especially federal judges, argued that the rigidity of the Guidelines prevented judges from sentencing defendants in accordance with the justice of the particular case." (footnote omitted)).

[251] Kate Stith & Jose A. Cabranes, *Judging Under the Federal Sentencing Guidelines*, 91 NW. U. L. REV. 1247, 1263 (1997) ("[T]he Guidelines threaten to transform the venerable ritual of sentencing into a puppet theater in which defendants are not persons, but *kinds* of persons, abstract entities to be defined by a chart, their concrete existence systematically ignored and thus nullified.").

[252] *See, e.g.*, United States v. Spencer, 700 F.3d 317, 326 (8th Cir. 2012) (Bright, J., dissenting) ("Since their adoption in 1987, many of the federal sentencing guidelines have proven unworkable, unfair, and have filled our federal prisons with defendants serving undeserved lengthy sentences . . . ."); United States v. Brewer, 899 F.2d 503, 513 (6th Cir. 1990) (Merritt, C.J., dissenting) (describing the Guidelines as "a prescription for injustice because district judges can no longer prevent the imposition of inappropriately harsh sentences"); United States v. Marshall, 908 F.2d 1312, 1335 (7th Cir. 1990) (Posner, J., dissenting) ("The positivist view [of the Sentencing Guidelines], applied unflinchingly to this case, commands the affirmance of prison sentences that are exceptionally harsh by the standards of the modern Western world, dictated by an accidental, unintended scheme of punishment nevertheless implied by the words (taken one by one) of the relevant enactments.").

[253] Blakely v. Washington *and the Future of the Sentencing Guidelines: Hearing Before the S. Comm. on the Judiciary*, 108th Cong. 3–4 (2004) (statement of Sen. Orrin G. Hatch, Chairman, S. Comm. on Judiciary).

[254] Berman, *supra* note 225, at 363. Berman also observed that "[t]wo scholars recently summarized many of these sentiments, observing that the Guidelines 'have been the subject of sustained criticism from judges, lawyers, scholars, and members of Congress, and a wide consensus has emerged that the Federal Guidelines have in many ways failed.'" *Id.* at 363 n.85 (quoting Robert Weisberg & Marc L. Miller, *Sentencing Lessons*, 58 STAN. L. REV. 1, 2 (2005)).

[255] Scott, *supra* note 226, at 2.

often than others to promote uniformity. Others weigh policy or potential policy disagreements with the Guidelines in determining how much weight, if any, to give them. Some Guidelines, like the former 100:1 crack/powder cocaine Guideline, and to some extent the current 18:1 ratio, generate less gravitational pull.[256] And then there are the child pornography Guidelines, recently derided by one scholar, "the new crack cocaine in the sentencing world."[257] Melissa Hamilton concludes that the child pornography Guideline "is nonsensical and incongruous with normal sentencing practices"; that it "fails to represent the Commission's institutional abilities and has not incorporated the federal judiciary's learned judgments on the reasonableness of sentencing for these crimes"; and that the "child pornography guideline recommends sentences that are extraordinarily disproportionate . . . ."[258] And drug trafficking Guidelines are no more rational than the child pornography Guidelines. In *United States v. Diaz*, Judge John Gleeson recently laid bare what not all judges realize: the drug trafficking Guidelines have been deeply flawed from the beginning and "are not based on empirical data and national experience . . . ."[259] Given the widespread dissatisfaction among federal district judges with the Guidelines, judicial acceptance cannot possibly explain the extent of judges' tethering to the Guidelines. Moreover, Scott's cursory minimization of the anchoring effects of the Guidelines undermines the strength of his argument.[260]

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[256] *See, e.g.*, Kimbrough v. United States, 552 U.S. 85 (2007) (holding that judges could vary from the 100:1 crack/powder Guidelines, even in a mine-run case based on a categorical policy disagreement); United States v. Williams, 788 F. Supp. 2d 847 (N.D. Iowa 2011) (Bennett, J.) (continuing, after the Fair Sentencing Act of 2010, Pub. L. No. 111-220, 124 Stat. 2372, the categorical policy disagreement from the old 100:1 to the new 18:1 crack/powder ratio even in mine-run cases).

[257] Melissa Hamilton, *Sentencing Adjudication: Lessons from Child Pornography Policy Nullification*, GA. ST. U. L. REV. (forthcoming 2014) (manuscript at 1), *available at* http://goo.gl/7LIGls

[258] *Id.* at 62.

[259] United States v. Diaz, No. 11-CR-00821-2 (JG), 2013 WL 322243, at *1 (E.D.N.Y. Jan. 28, 2013).

[260] Scott, *supra* note 226, at 45–46. Scott contends that the advisory Guidelines are supposed to serve as an anchor, and thus cognitive anchoring "seems strained." *Id.* at 45. Scott ignores and summarily dismisses the incredible body of cognitive anchoring research that Ryan barely mentions in passing, citing just one anchoring study. *Id.* at 45 n.202. Moreover, Scott's quote from *Gall* that the Guidelines should be the "starting point and the initial benchmark," is taken completely out of context. *Id.* at 19. A fair reading of this quote is that the *Gall* Court described how the actual sentencing hearing is to be structured, not the judges' presentencing hearing approach to the PSR and a preliminary sentencing range. *See* Gall v. United States, 552 U.S. 38, 49–50 (2007). Scott's argument that there are numerous other numerical anchors also ignores the actual sentencing process that happens in the real world where the Guidelines range in the PSR is virtually always the most powerful numerical anchor and, of course, the first and often only one to which the judge is exposed.

Indeed, the anchoring effect is so strong that even when people are told to ignore it in subsequent judgments, the effect remains powerful.[261] More pernicious is that participants in anchoring studies deny that anchoring had an effect on their judgments when in fact "substantial anchoring effects were found."[262] Thus, even if judges become aware of how the Guidelines cognitively anchor their sentencing practices, they are likely to deny its existence in specific cases. Cognitive research has outlined the conditions necessary to overcome the anchoring effect and for people to "avoid making contaminated judgments . . . ."[263] These conditions are (1) "[p]eople must be aware that bias has occurred"; (2) "be motivated to correct the bias"; (3) "know the direction and magnitude of the bias"; and (4) "have sufficient control over their responses to be able to correct for the bias."[264] Because the anchoring effect "occur[s] unintentionally and outside of awareness,"[265] judges who become aware of it and are motivated to prevent it still have to determine "the direction and magnitude of the effect" to adjust for it.[266] The purpose of the modest proposal below is to help achieve each of these conditions to avoid "contaminated" sentencing decisions subconsciously anchored by the advisory Guidelines.

VI. A MODEST PROPOSAL

The Court in *Rita* appropriately observed that "[t]he sentencing judge, as a matter of process, will normally begin by considering the [PSR] and its interpretation of the Guidelines."[267] *Gall* followed with a more commanding and somewhat incorrect observation of *Rita* that "[a]s we explained in *Rita*, a district court *should* begin all sentencing proceedings by correctly calculating the applicable Guidelines range."[268] Importantly, how a judge "normally" or "should" begin a sentencing hearing says nothing about the order of the information presented in the PSR or how the judge should prepare for the sentencing hearing. Based on my experience in reading over 3,500 PSRs in four districts, spanning two circuits, the Guidelines calculations are always presented before most of the other § 3553(a) factors (often only "the nature and circumstances of the offense," § 3553(a)(1), is presented before the calculated Guidelines range). However, nothing in either *Rita* or *Gall*, Rule 32, or any decision I am aware of, requires either

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[261] Wilson et al., *supra* note 43, at 400.
[262] *Id.*
[263] *Id.* at 390.
[264] *Id.*
[265] *Id.*
[266] *Id.*
[267] Rita v. United States, 551 U.S. 338, 351 (2007).
[268] Gall v. United States, 552 U.S. 38, 49 (2007) (emphasis added).

that the PSR present the Guidelines calculations *first* before disclosing and discussing the other § 3553(a) factors, or that the sentencing judge review the Guidelines calculations prior to reviewing the other § 3553(a) factors.[269]

I suggest that the sentencing judge should review and study the information in a PSR's non-Guidelines § 3553(a) first. While this approach would require a reversal of the traditional format of the order of information in the PSR, it is a matter of custom and practice and can easily be changed. Any judge may request that the order of information in the PSR be reversed. I strongly urge that this long-standing practice be reversed to lessen the anchoring effect of the Guidelines calculation.

But there is more to my proposal. If this is all that is done, the anchoring effect of the Guidelines would still be too robust and powerful. The key to my proposal is that a sentencing judge, before reviewing the Guidelines calculations, first review the non-Guidelines § 3553(a) factors and determine a preliminary sentencing range without exposure to the Guidelines range computed in the PSR. Thus, the judge would first examine all but the advisory Guidelines range, as the Court described the § 3553(a) factors in *Rita*. The judge would look at:

> (1) offense and offender characteristics; (2) the need for a sentence to reflect the basic aims of sentencing, namely, (a) "just punishment" (retribution), (b) deterrence, (c) incapacitation, (d) rehabilitation; (3) the sentences legally available; (4) the Sentencing Guidelines; (5) Sentencing Commission policy statements; (6) the need to avoid unwarranted disparities; and (7) the need for restitution.[270]

Under this proposal, the judge would carefully examine all of the above factors, except factors 4 and 5, and then determine a tentative sentencing range untethered from the advisory Guidelines. Once the tentative sentencing range is developed, the judge would then examine the PSR's calculated advisory Guidelines range and any relevant Guidelines policy statements. The tentative sentence would then be adjusted based on the weight the judge believes the Guidelines should be given among all the other § 3553(a) factors. This would all be done as preparation prior to the sentencing hearing. At the sentencing hearing, the judge would then, of course, resolve any contested Guidelines issues, properly compute the Guidelines range if there were any objections in the PSR, hear any witness testimony, receive any exhibits, listen to the prosecution and defense's sentencing arguments, and hear the defendant's allocution, if any. The judge would then pronounce the sentence. This is all fully consistent with *Gall*.

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[269] Rule 32 of the Federal Rules of Criminal Procedure does list the calculation of the Guidelines as the first matter under Section (d), but the Rule does not require that the information be presented to the judge in the PSR prior to the other Section 3553(a) factors.

[270] *Rita*, 551 U.S. at 347–48.

Such a proposal differs substantially from the one proposed by Jelani Jefferson Exum.[271] Exum proposes that federal judges be completely relieved from computing a Guidelines range.[272] Exum suggests, "[i]f the Supreme Court would take the steps to do away with the Guidelines calculation requirement, then perhaps Congress could be prompted to revise the Guidelines so that they are still relevant to sentencing decisions."[273] I suppose the Tooth Fairy could also remove the Guidelines calculations from each PSR and leave the judge one dollar in its place. The obvious problem with Exum's suggestion is that it is impracticable and unrealistic because it requires both a substantial reversal of current law by the Supreme Court and favorable action by Congress that runs counter to the congressional intent in passing the SRA. While I am deeply skeptical of Exum's proposed solution, her article is excellent in identifying the anchoring problem with Guidelines calculations. I wholeheartedly agree that "blind reliance on the properly calculated Guideline ranges as trustworthy anchors should be rethought."[274]

My proposal also differs, but less dramatically so, from Anne Traum's proposal that to reduce the anchoring effect of the Guidelines, courts "should instead consider the Guidelines midstream in the § 3553(a) analysis," which acknowledges that Traum's "approach is not currently allowed under the Supreme Court's decisions. . . ."[275] Traum concludes that her approach is barred by the language in *Gall* that "[a]s a matter of administration and to secure nationwide consistency, the Guidelines should be the starting point and the initial benchmark."[276] Traum's analysis brings to mind the Albert Einstein quote: "In theory, theory and practice are the same. In practice, they are not."[277] As previously discussed, the Court in *Gall* was referring to the actual sentencing hearing, not how judges arrive at a tentative sentence in preparation for the sentencing hearing.

My modest proposal would have little impact on the process of sentencing, but a significant salutary effect on the sentence. I am confident most judges already formulate a tentative sentence after reading and pondering the PSR, but prior to the sentencing hearing. That tentative sentence, however, is anchored by judge exposure to the Guidelines range

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[271] Exum, *supra* note 14.

[272] *Id.* at 148.

[273] *Id.* at 150.

[274] *Id.* at 146.

[275] Traum, *supra* note 14, at 463.

[276] Gall v. United States, 552 U.S. 38, 49 (2007); Traum, *supra* note 14, at 441–46.

[277] James S. Wallace, *Value(s)-Based Management: Corporate Social Responsibility Meets Value-Based Management*, *in* THE DRUCKER DIFFERENCE: WHAT THE WORLD'S GREATEST MANAGEMENT THINKER MEANS TO TODAY'S BUSINESS LEADERS 47, 56 (Craig L. Pearce et al. eds., 2009) (noting that the quote "has been credited to both Albert Einstein and Yogi Berra").

before the other § 3553(a) factors are considered. Under my proposal, the judge would simply arrive at two tentative sentences—one before analyzing the Guidelines range and the other after considering it. Judges would then at least know what they thought fair sentences would be independent of the Guidelines ranges. This is critically important:

> Because anchor values ordinarily precede specific, individualized information, the anchoring bias suggests that the first items of information are likely to receive more consideration than information that appears later. Although the order in which information is received *should be* irrelevant to decisions that rely on that information, the mind does not work this way. First impressions are powerful influences on judgment and seem to provide the prism through which subsequent information is filtered. Even when first impressions are erroneous, they continue to affect judgment long after they have been discredited.[278]

My proposal would reduce the effect of Guidelines-range anchoring and result in fairer sentencing. Additionally, to reduce and counteract the anchoring effect of the Guidelines in the PSR, other significant and useful sentencing numerical information should be included in the PSR before the Guidelines calculations and range appear. This information could possibly include:

1) The average sentencing for the offense imposed in the district, in all the districts within the circuit, and nationally, taking into account the defendant's criminal history;
2) The average frequency and extent of departures and variance for the offense in the district, in all the districts within the circuit, and nationally, taking into account the defendant's criminal history;
3) The average pre-Guidelines sentence for the offense; and/or
4) Recidivism data for the offense and criminal history obtained from the USSC.

I suggest that this additional data should be used in the same manner as the core of my proposal—disclosed in the PSR *only after* the other non-numeric information is considered and the judge has formulated a preliminary sentencing range untethered from anchoring effect of the Guidelines or this new numerical information.

For this proposal to be accepted, judges would have to overcome their blind spot bias and overcome "the operation of bias in human judgment—except when that bias is their own."[279] In terms of recognizing cognitive biases, it is important for judges to constantly doubt and reevaluate their own

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[278] Prentice & Koehler, *supra* note 18, at 603–04 (footnotes omitted).

[279] Emily Pronin, *Perception and Misperception of Bias in Human Judgment*, 11 TRENDS COGNITIVE SCI. 37 (2006).

objectivity.[280] It is particularly important given that judges tend to overestimate their abilities to avoid biases in their own decisionmaking. By way of example, one study found that 97% of judges (thirty-five out of thirty-six) scored themselves in the top half of that group in "avoid[ing] racial prejudice in decisionmaking."[281] This is not mathematically possible. So judges must be willing to recognize the anchoring effect, acknowledge that it does not only occur with other judges, and be motivated to correct the bias. Because the recent scientific evidence is so strong that our "blind spot" creates a pervasive tendency to see bias in others but not in ourselves,[282] I am optimistic that once judges understand this, they will seek to overcome both the anchoring effect and their blind spot biases.

CONCLUSION

Well-established principles of cognitive bias, known as the "anchoring effect," undermine judgments. That is, exposure to a numerical "anchor" undermines the soundness of subsequent judgments by anchoring those judgments to that numerical anchor. The history and breadth of cognitive psychological studies demonstrates that the powerful nature of anchoring on subsequent judgments occurs in all contexts of judgment. Amazingly, the anchoring effect skews judgments even when the anchor is incomplete, inaccurate, irrelevant, implausible, and even random. Anchoring studies involving judges establish that judges are as susceptible as anyone to the anchoring effect. These studies also show that judges are not insulated from the effect by their specialization and expertise. Additionally, judges are equally affected by another cognitive bias—the blind spot bias—which allows them to see bias in others but not in themselves. This creates a double bind for sentencing judges who subconsciously increase sentences as a result of anchoring effects. Even when judges are made aware of the effect of anchoring, they are unable to recognize it in their sentences. The dramatic federal sentencing revolution of the last quarter century, which led to the current substantially increased sentencing discretion of federal judges unparalleled since the Sentencing Reform Act went into effect in 1987, has not had much effect on the length of federal sentences.

Comprehensive data from the USSC establishes that the new discretion has, for the most part, had a surprisingly limited impact on federal sentencing. This is due primarily to the robust anchoring impact of first computing the advisory Guidelines sentencing range before considering the other non-

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[280] Jerry Kang, Mark Bennett, et al., *Implicit Bias in the Courtroom*, 59 UCLA L. REV. 1124, 1172–73 (2012).

[281] Jeffrey J. Rachlinski et al., *Does Unconscious Racial Bias Affect Trial Judges?*, 84 NOTRE DAME L. REV. 1195, 1225 (2009).

[282] Ehrlinger et al., *supra* note 4, at 681.

numerical § 3553(a) sentencing factors. This impact can be eliminated, or at least substantially reduced with a modest, but important change that, unlike other proposals, requires no shift or backtracking by the Supreme Court or new legislation from Congress. This modest proposal suggests that federal district court judges first review all the important non-Guidelines sentencing factors contained in § 3553(a) and formulate a tentative sentence before reviewing the advisory Guidelines range and getting subjected to its potential powerful anchoring effect. Once a judge formulates a tentative sentencing range uninfluenced by the anchoring effect of the advisory Guidelines range, the judge should then consider what weight to give the advisory Guidelines range in determining the ultimate sentence. In the end, increasing federal district court judges' knowledge of the powerful potential anchoring effect in sentencing, coupled with a greater understanding of the blind spot bias, should ensure fairer sentencing. This is true independent of my proposal.