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Into the Twilight Zone: Informing Judicial Discretion in Federal Sentencing

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*“Between ideals for the system and their practical use is . . . a twilight zone. It is in this zone that ideals are transformed into social action by human actors who must use their interpretive powers to reach desired ends. Individual decisions must be made and discretion as an outcome is inevitable.”*¹

Humans are creatures of order. We categorize that which we know and associate new encounters with our established categories.² We operate from that which we know and extend our learning outward. We create new categories or exceptions to our categories as necessary. Social psychologists posit that humans categorize others humans immediately upon encountering them by at least three features: race, gender, and age.³ We tend to give preference to those in

¹ See T. KENNETH MORAN & JOHN L. COOPER, DISCRETION AND THE CRIMINAL JUSTICE PROCESS 8-9, 14 (1983) (summarizing Roscoe Pound). See also Roscoe Pound, *Discretion, Dispensation and Mitigation: The Problem of the Individual Special Case*, 35 N.Y.U. L. REV. 925 (1960) (defining discretion as “an authority conferred by law to act in certain conditions or situations in accordance with an official’s or an official agency’s own considered judgment and conscience. It is an idea of morals, belonging to the twilight zone between law and morals.”). Kenneth Culp Davis drew a similar analogy, observing that law and discretion are not sharply divided concepts but instead are distinguished “as night and day are separated by dawn.” KENNETH CULP DAVIS, DISCRETIONARY JUSTICE: A PRELIMINARY INQUIRY 106 (1969).

² See *infra* Part III; ; Thus, for example, social scientists have empirically demonstrated that humans will anchor their replies to suggestive questions; if a group is initially asked whether more or less than 10% of African nations are members of the United Nations, they will give lower numbers than if they are asked whether more or less than 65% are members. Amos Tversky & Daniel Kahneman, *Judgment Under Uncertainty: Heuristics and Biases*, 185 SCIENCE 1124, 1128 (1974) (“For example, the median estimates of the percentage of African countries in the United Nations were 25 and 45 for groups that received 10 and 65, respectively, as starting points.”); Gretchen B. Chapman & Eric J. Johnson, *Incorporating the Irrelevant: Anchors in Judgments of Belief and Value*, in THE PSYCHOLOGY OF INTUITIVE JUDGMENT: HEURISTICS AND BIASES 120 (Thomas Gilovich, Dale W. Griffin & Daniel Kahneman eds., 2002).

³ See THE NATIONAL JUDICIAL COLLEGE, CULTURAL COMPETENCE: MODEL CURRICULUM FOR JUDGES, PowerPoint slide 17 (2005) [hereinafter NJC, MODEL CURRICULUM].

categories familiar to us, but especially to those in categories to which we belong.⁴ This associational bias is part of our attempt to order our world, but whether the bias is positive, negative, or neutral, can be affected by our recognition of the tendency to associate, and our understanding of other categories.⁵ Thus, we can deliberately exercise our discretion to counter associational bias.⁶ The salience of these facts is underscored by the recent U.S. Supreme Court

⁴ Henri Tajfel, *Experiments in Intergroup Discrimination*, 223 SCI. AM. 96 (1970) (demonstrating that membership in a group creates preference for that group and against other groups, even when groups are defined based upon arbitrary and trivial factors).

⁵ See Anthony G. Greenwald et al., *Measuring Individual Differences in Implicit Cognition: The Implicit Association Test*, 74 J. PERSONALITY & SOC. PSYCHOL. 1464 (1998). The Implicit Association Test (“IAT”) measures social cognition by demonstrating the conscious-unconscious divergences between what people say consciously and the unconscious associations that would appear to diverge from their conscious attitudes. Harvard University offers a website, *Project Implicit*, which introduces IAT Demonstration Tests in which website visitors may take part in an IAT assessing the participant’s associations. See Project Implicit, <https://implicit.harvard.edu/implicit/demo> (last visited Aug. 6, 2008). The test pairs two social categories (e.g., racial categories, or male and female) with positive and negative attributes or simply attributes often associated with one of the categories (good and bad, or career and family) to measure the strength of the association. See Anthony G. Greenwald et al., *A Unified Theory of Implicit Attitudes, Stereotypes, Self-Esteem, and Self-Concept*, 109 PSYCHOL. REV. 3 (2002) (providing an overview of implicit social cognition). The IAT website offers fifteen demonstration tests to assess the implicit associations in race, religion, age, disability, and gender, among others. See Project Implicit, <https://implicit.harvard.edu/implicit/demo/selectatest.html> (last visited Aug. 6, 2008). “Implicit attitude” is defined on the website as follows: “An *attitude* is a positive or negative evaluation of some object. An *implicit attitude* is an attitude that can rub off on associated objects.” See Project Implicit, <https://implicit.harvard.edu/implicit/> (follow “Three Countries IAT” hyperlink; then follow “general information about the IAT” hyperlink; then follow “Answers to frequently asked questions about the IAT” hyperlink) (question 19) (last visited Aug. 6, 2008); see also Anthony G. Greenwald & Linda Hamilton Krieger, *Implicit Bias: Scientific Foundations*, 94 CAL. L. REV. 945, 948 (2006). Thus, a favorable disposition toward a political candidate may cause one to have a favorable disposition towards that candidate’s spouse, despite knowing nothing about that spouse. See *Id.* at 948-49. “Implicit stereotype” is defined as follows: “A *stereotype* is a belief that members of a group generally possess some characteristic (for example, the belief that women are typically nurturing). An *implicit stereotype* is a stereotype that is powerful enough to operate without conscious control.” See <http://harvard.edu/implicit/demo/background/faqs.html> (question 20); see also Greenwald & Krieger, *supra*, at 948-49. Greenwald & Krieger offer as an example of a stereotype the belief that one might associate drivers over the age of 70 as slow drivers simply because statistics demonstrate that 10-15% of drivers over the age of 70 drive below the speed limit on the highway, as compared to only 5% of drivers under the age of 70; the belief is correct as to that 10-15% of drivers, but if it becomes associated with that group (drivers over the age of 70), it may become a default assumption that all drivers over the age of 70 drive slow. See *id.* at 949.

⁶ See Irene V. Blair, *The Malleability of Automatic Stereotypes and Prejudice* 6 PERSONALITY & SOC. PSYCHOL. REV. 242, 243, 257-58 (2002).

decision in *United States v. Booker*⁷ which returns judicial discretion to federal sentencing.⁸

Discretion is critical to the independence of the judiciary, at least insofar as the tri-partite government was conceived.⁹ The legislature may react to a particular instance of concern to create a law, but must make it sufficiently general to cover a variety of situations; otherwise, the number of necessary laws would be excessive, and yet many instances of conduct harmful to society would be allowed.¹⁰ The executive may wish to prosecute and punish certain conduct, but it is the judiciary that retains the authority to restrain power that might otherwise become abusive, and wielded to attack the executive's critics.¹¹ Judicial independence, thus, acts as the buffer to shield individuals from political interests.

Ronald Dworkin colorfully analogized judicial discretion to a donut hole, where discretion is the hole, surrounded by rules and limitations, that is, the donut.¹² Though discretion is exercised by many actors at nearly every stage of the criminal process, judicial discretion impacts our liberty most deeply. The courts review claims of civil rights violations in searches

⁷ 543 U.S. 200 (2005)

⁸ *See id.*

⁹ *See* John A. Ferejohn & Larry D. Kramer, *Independent Judges, Dependent Judiciary: Institutionalizing Judicial Restraint*, 77 N.Y.U. L. REV. 962, 966-67 (2002).

¹⁰ "When federal judges exercise their federal-question jurisdiction under the 'judicial Power' of Article III of the Constitution, it is 'emphatically the province and duty' of those judges to 'say what the law is.'" *Williams v. Taylor*, 529 U.S. 362, 378 (2000) (citing *Marbury v. Madison*, 1 Cranch 137, 177, 2 L. Ed. 60 (1803)). "At the core of this power is the federal courts' independent responsibility – independent from its coequal branches in the Federal Government, and independent from the separate authority of the several States – to interpret federal law." *Id.* at 378-79.

¹¹ Article III of the U.S. Constitution vests "judicial power" in the federal judiciary, meaning that the executive must enforce the law before independent federal judges that hold office "during good Behaviour." *See* U.S. CONST. art. III, § 1.

¹² RONALD DWORKIN, *TAKING RIGHTS SERIOUSLY* 31 (1977) ("Discretion, like the hole in a doughnut, does not exist except as an area left open by a surrounding belt of restriction.").

and seizures;¹³ hears motions to suppress evidence¹⁴ and motions *in limine* ;¹⁵ decides motions to quash grand jury subpoenas¹⁶ and motions to dismiss charges;¹⁷ accepts or rejects plea agreements;¹⁸ and if the case goes to trial, rules on *voir dire* ¹⁹, admissibility of evidence²⁰, jury instructions²¹, and sentencing.²² Although some issues are questions of fact and some questions of law, the court chooses what evidence enters in support, and where there is dispute about how to interpret the law, whether to read the law broadly or narrowly. Moreover, many exercises of discretion by district court judges are subject to limited review on appeal. Many evidentiary decisions are subject to abuse of discretion²³ or clearly erroneous²⁴ standards, and in criminal

¹³ See FED. R. CRIM. P. 12; U.S. CONST. Amend. IV.

¹⁴ See FED. R. CRIM. P. 12(b)(3)(C).

¹⁵ See FED. R. CRIM. P. 12(b)(4).

¹⁶ See FED. R. CRIM. P. 17(c)(2).

¹⁷ See FED. R. CRIM. P. 12(b)(3)(B).

¹⁸ See FED. R. CRIM. P. 11.

¹⁹ See FED. R. CRIM. P. 24(a) & (b).

²⁰ See, e.g., FED. R. EVID. 403, 608, 701.

²¹ See FED. R. CRIM. P. 30(b) & (d).

²² See FED. R. CRIM. P. 32(h) & (i).

²³ See, e.g., *Mu'Min v. Virginia*, 500 U.S. 415, 423-24 (1991) (trial judge has broad discretion in ruling on challenges for cause); *Dennis v. United States*, 339 U.S. 162, 168 (1950) (trial judge has broad discretion in questioning of potential jurors); *United States v. Eizember*, 485 F.3d 400, 403 (8th Cir. 2007), *cert. denied*, 128 S. Ct. 526 (2007) (concluding court did not abuse discretion in weighing prejudicial versus probative value of testimony under Federal Rule of Evidence 403); *United States v. Cooper*, 375 F.3d 1041, 1045 (10th Cir. 2004) (no abuse of discretion under Federal Rule of Evidence 701 in admitting lay testimony); *United States v. Denman*, 100 F.3d 399 (5th Cir. 1996) (denying motion to suppress as untimely is reviewed for abuse of discretion); *In re Grand Jury Matters*, 751 F.2d 13 (1st Cir. 1984) (applying abuse of discretion standard to review ruling on motion to quash grand jury subpoena).

²⁴ See, e.g., *United States v. Nance*, 962 F.2d 860 (9th Cir. 1992) (court reviews denial of motion to suppress *de novo* but accepts underlying factual findings unless clearly erroneous); *United States v. Kye Soo Lee*, 962 F.2d 430 (5th Cir. 1992) (court accepts factual findings in suppression hearing unless clearly erroneous); *In re Grand Jury Proceedings*, 626 F.2d 1051 (1st Cir. 1980) (mixed question of law and fact subject to clearly erroneous standard of

cases, because the Supreme Court has concluded that a defendant is “entitled to a fair trial but not a perfect one,”²⁵ some errors are further reviewed to assess whether they are harmless.²⁶ It is only questions of law, and some mixed questions of law and fact that receive *de novo* review.²⁷ Thus, for many cases, poor judgment that does not rise to the level of abuse by the trial court will rarely be overcome.

Historically, federal judges had nearly unlimited discretion in sentencing decisions under an indeterminate sentencing system that permitted sentences at any level authorized by statute for the crime.²⁸ Thus, a defendant convicted of a crime with a statutory maximum sentence of twenty years, could receive a sentence of probation, or twenty years, or anywhere between these two options.²⁹ Judges were not required to explain the reasons for their sentencing decisions, and appellate review was virtually non-existent except in extraordinary circumstances when allegations of constitutional civil rights violations occurred.³⁰ This indeterminate discretionary regime was not without controversy.³¹

review of motion to quash).

²⁵ *Lutwak v. United States*, 344 U.S. 604, 619 (1953).

²⁶ *See* FED. R. CRIM. P. 52(a).

²⁷ It is well settled that on appeal courts will not disturb findings of fact unless “clearly erroneous” but decide questions of law “*de novo*.” *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 948 (1995).

²⁸ *See* KATE STITH & JOSE A. CABRANES, *FEAR OF JUDGING: SENTENCING GUIDELINES IN THE FEDERAL COURTS* 9 (1998) (describing federal sentencing prior to the adoption of the U.S. Sentencing Guidelines).

²⁹ *See* Mary Kreiner Ramirez, *Just in Crime: Guiding Economic Crime Reform After the Sarbanes-Oxley Act of 2002*, 34 *LOY. U. CHI. L.J.* 359, 365 (2003) (describing federal indeterminate sentencing prior to the enactment of the Sentencing Reform Act of 1984 (“SRA”), 18 U.S.C. §§ 3551-3552, 3554-3559 (2004), and the implementation of the U.S. Sentencing Guidelines).

³⁰ *See* Ramirez, *supra* note 29, at 365-66.

³¹ *See* STITH & CABRANES, *supra* note 28, at 29-37 (recounting the historical drive to diminish discretion in

The Sentencing Reform Act of 1984 created the U.S. Sentencing Commission to cabin judicial discretion in sentencing for the federal courts, which some characterized as undisciplined under the historical indeterminate sentencing system.³² The resulting sentencing guidelines were implemented in November 1987 and remained mandatory until the U.S. Supreme Court concluded in *United States v. Booker*³³ that certain provisions violated a defendant's Sixth Amendment right to a jury trial and created the remedy of striking §§ 3553(b)(1) and 3742(e) from the Guidelines, making the Guidelines advisory, rather than mandatory.³⁴ *Booker* reintroduced discretion into the district courts in a measure not possessed since the guidelines first went into effect.³⁵ Nevertheless, the Court retained appellate review of sentences, to be

sentencing that lead to the U.S. Sentencing Guidelines); Edward M. Kennedy, *Foreword: Federal Sentencing Guidelines Symposium*, 29 AM. CRIM. L. REV. 771, ix (1992); MARVIN E. FRANKEL, LAW WITHOUT ORDER 103 (1973).

³² See Sentencing Reform Act (SRA) of 1984, 18 U.S.C. §§ 3551-3552, 3554-3559 (2004); FRANKEL, *supra* note 31, 5-6.

³³ *United States v. Booker*, 543 U.S. 200, 245 (2005).

³⁴ U.S. SENTENCING GUIDELINES MANUAL § 1A1.1, historical note (2007).

³⁵ “Prior to the Guidelines, judges were not required to state their reasons for imposing a particular sentence and, often, the sentence reflected the judicial philosophy and even the prejudices of the individual judge.” Sandra D. Jordan, *Have We Come Full Circle? Judicial Sentencing Discretion Revived in Booker and Fanfan*, 33 PEPP. L. REV. 615, 617 (2006). A number of commentators have assessed the implications of the return of judicial discretion in sentencing. *E.g.*, Joanna Shepherd, *Blakely's Silver Lining: Sentencing Guidelines, Judicial Discretion, and Crime*, 58 HASTINGS L.J. 533, 586-88 (2007) (arguing empirically that rigid sentencing guidelines cause increases in crime); Douglas A. Berman, *Conceptualizing Booker*, 38 ARIZ. ST. L. J. 387, 421-23 (2006) (arguing that “encouraging judges to exercise reasoned judgment at sentencing is a step in the right direction as a matter of policy as well as a matter of constitutional jurisprudence”); Stephanos Bibas, *White-Collar Plea Bargaining and Sentencing After Booker*, 47 WM. & MARY L. REV. 721, 724, 740-41 (2005) (arguing that traditional excessive leniency in white-collar sentencing that may arise from unconscious class and racial bias could lead Congress to reassert its authority over sentencing after *Booker*). Others have suggested that either the Court or Congress may need to clarify or restrict the discretion of district court judges' exercise over sentencing after *Booker*. *E.g.*, William W. Berry III, *Discretion Without Guidance: The Need to Give Meaning to § 3553 After Booker and its Progeny*, 40 CONN. L. REV. 631, 667-71 (2008) (suggesting legislative or regulatory means of clarifying § 3553); Robert L. Boone, Comment, *Booker Defined: Examining the Application of United States v. Booker In the Nation's Most Divergent Circuit Courts*, 95 CAL. L. REV. 1079, 1112-13 (2007) (“Pending clarification by the Supreme Court, or legislation by Congress, federal courts are likely to continue to take the middle road on thorny Booker-related

assessed under a “reasonableness” standard.³⁶ Most of the district court judges sitting on the federal bench have spent the majority, if not all, of their judgeship under the strictures of the Guidelines.³⁷ With recent Supreme Court decisions, judges are freed from those strictures, and assured that their reasonable exercise of discretion will be supported.³⁸

Judges are touted for their impartiality, as being neutral and detached from the “often

issues; recognizing *Booker* in their analysis, but ultimately applying it narrowly.”); Ronald J. Allen & Ethan Hastert, *From Winship to Apprendi to Booker: Constitutional Command or Constitutional Blunder?* 58 STAN. L. REV. 195, 200, (2005) (stating that either Congress or the Court can police sentencing discretion by lower courts with little impact upon jury decision-making).

³⁶ In its 2006 term, the Supreme Court developed the *Booker* holding regarding appellate reasonableness review. *Rita v. United States*, 127 S. Ct. 2456, 2462-63 (2007) (holding that appellate courts may adopt a nonbinding appellate presumption that a sentence imposed within a properly calculated guidelines range is a reasonable sentence). In the 2007 term, the Court extended the reasonableness assessment in sentencing by the trial judge in two cases. In *Gall v. United States*, 128 S. Ct. 586 (2007), the Court confirmed that a district judge may take into account extraordinary circumstances in departing from the sentencing range recommended by the U.S. Sentencing Guidelines. 128 S. Ct. at 600 (“[T]he only question for the Court of Appeals was whether the sentence was reasonable— *i.e.*, whether the District Judge abused his discretion in determining that the § 3553(a) factors supported a sentence of probation and justified a substantial deviation from the Guidelines range.”). In *Gall*, the Court reiterated the assessment in *Rita* that the district court may *not* presume that a guidelines sentence is reasonable, but rather, must consider the factors set forth in 18 U.S.C. § 3553(a). *Gall*, 128 S. Ct. at 596-97.

³⁷ See *infra* Part II; FEDERAL COURTS MANAGEMENT STATISTICS 2007, U.S. DISTRICT COURTS JUDICIAL CASELOAD PROFILE, <http://www.uscourts.gov/cgi-bin/cmsd2007.pl> (follow “Generate” hyperlink) (last visited Sept. 4, 2008) [hereinafter JUDICIAL CASELOAD PROFILE] (678 district court positions authorized); Sheldon Goldman et al., *Picking Judges in a Time of Turmoil: W. Bush’s Judiciary During the 109th Congress*, 90 JUDICATURE 252, 277 (2007) [hereinafter Goldman et al., *Time of Turmoil*] (George W. Bush appointed 203 district judges in his first six years; Bill Clinton appointed 305 district judges).

³⁸ In *Kimbrough v. United States*, 128 S. Ct. 558 (2007), the Court considered whether a district court may find the advisory guidelines for crack cocaine sentencing unreasonable and exercise its discretion to award a lower term of imprisonment. 128 S. Ct. at 576. In assessing the district court’s reasonable exercise of discretion, the Court embraced the institutional role of the U.S. Sentencing Commission to “formulate and constantly refine national sentencing standards” based upon empirical data and national experience, guided by the expertise of a professional staff, but also acknowledged that the crack cocaine guidelines at issue in the case were not the product of the Commission’s expertise, but rather the consequence of the Anti-Drug Abuse Act of 1986, Pub. L. No. 99-570, 100 Stat. 3207, imposing mandatory minimums with a disparate sentencing structure that was contrary to the Commission’s position that the crack/powder disparity produces disproportionately harsh sanctions. 128 S. Ct. at 575. Thus, the Court recognized that a district court might conclude that imposing such a sentence could be contrary to the statutory prohibition in 18 U.S.C. § 3553(a) that “a court shall impose a sentence sufficient, but not greater than necessary,” to provide “just punishment” of a defendant. 128 S. Ct. at 575; 18 U.S.C. § 3553(a)(2).

competitive enterprise of ferreting out crime.”³⁹ In Justice Cardozo’s *The Nature of the Judicial Process*, he suggests that “the judicial process in its highest reaches is not discovery [of the law], but creation.”⁴⁰ If judicial discretion is to be consistent with serving justice in the criminal justice system, a judge must exercise discretion impartially, that is, the judge must act free from bias.⁴¹ Federal district judges are political appointees, who come from across the political spectrum bringing a variety of personal and legal experiences to the bench, and serve in diverse courts throughout the United States.⁴² Though their caseloads are varied, nowhere is the federal district judge’s responsibility greater than when he or she oversees the criminal process and denies the defendant’s liberty through detention and sentencing decisions.⁴³ In the federal courts, given the lifetime appointment of Article III judges and the discretionary nature of sentencing, eliminating bias is fundamental to any notion of justice.

Research on automatic social cognition suggests that automatic stereotypes and prejudice

³⁹ *Johnson v. United States*, 333 U.S. 10, 14 (1948). See STEVEN L. WINTER, A CLEARING IN THE FOREST 313-14 (2001) (law “is something that judges do”). Winter disputes the “exaggerated” concern of legal scholars such as Oliver Wendell Holmes, Karl Llewellyn, Richard Posner, and Duncan Kennedy that judges’ personal views will shape the law unless their discretion is contained. *Id.* at 309. But see MORAN & COOPER, *supra* note 1, at 10 (1983) (disputing the basic attitude of society that justice is “objective and beyond social influence and pressure”). “[R]ecall that witnesses are sworn in on the Bible; this implies that the court is doing God’s work. If you lie under oath, you are lying against God’s Holy Words. The court then takes on a biblical, mystical air that can often frighten and mortify defendants, witnesses and lawyers alike. . . . When a judge believes he has the power of God behind him, he can feel very self-righteous in carrying out his responsibilities. Indeed, this major area of criminal justice is shrouded in mystery that augments the discretionary powers of judges.” *Id.* at 14.

⁴⁰ BENJAMIN N. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 166-67 (1921); see also Dan Simon, A *Psychological Model of Judicial Decision Making*, 30 RUTGERS L.J. 1, 9 (1998).

⁴¹ See LINDA G. MILLS, A PENCHANT FOR PREJUDICE: UNRAVELING BIAS IN JUDICIAL DECISION MAKING 20 (1999) (asserting that the terms “equality, objectivity, and impartiality are veils for protecting the privilege of the white male elite” in judicial decisions).

⁴² U.S. CONST. art. II §2 par.2, cl.2.

⁴³ “The exercise of the discretion accorded to a judge in determining the sentence of a convicted criminal offender bears directly on the coherence and the legitimacy of any criminal justice system.” Berry, *supra* note 35, at 631.

are major culprits in the endurance of bias.⁴⁴ Studying the sources of bias has enabled social psychologists to determine that although bias can be enduring, it is also malleable and therefore, techniques can be employed to counteract such automatic cognition.⁴⁵ The key to impacting cognition is alerting those who wish to be fair that their unconscious or subconscious associations may be influencing their decision-making, and providing countermeasures to address such bias.⁴⁶ In a nation that incarcerates more of its citizens than any other, including disproportionate numbers of citizens of color,⁴⁷ informing judicial discretion in the wake of *Booker* is an urgent mandate.⁴⁸ Federal district judges are not required to attend educational programs, but judges are expected ethically to be fair and impartial.⁴⁹ For those who exert discretion over the liberty of others, comprehending the biases which infect their cognitive functioning is attainable through education.

⁴⁴ See *infra* part III; Greenwald & Krieger, *supra* note 5.

⁴⁵ See Blair, *supra* note 6, at 243, 257.

⁴⁶ See *infra* part III; Blair, *supra* note 6, at 250; Gordon B. Moskowitz, Peter M. Gollwitzer, Wolfgang Wasel & Bernd Schaal, *Preconscious Control of Stereotype Activation Through Chronic Egalitarian Goals*, 77 J. OF PERSONALITY & SOC. PSYCHOL. 167 (1999).

⁴⁷ See Kevin Johnson, *Taking the “Garbage” Out in Tulia, Texas: The Taboo on Black-White Romance in Racial Profiling in the “War on Drugs”*, 2007 WISC. L. REV. 283, 306-08 (“Even though the available statistics suggest that whites, blacks, Latinos, and Asian Americans use illicit drugs at roughly comparable rates, the war on drugs has had a devastating impact on minority communities.”).

⁴⁸ “As Americans ushered in the new millennium, they also reached the two million mark, in terms of the number of people incarcerated in the United States. With this ‘achievement,’ the United States earned the dubious distinction of having the highest incarceration rate in the world – five to eight times that of most industrialized nations.” Mary Beth Lipp, *A New Perspective on the War on Drugs: Comparing the Consequences of Sentencing Policies in United States and England*, 37 LOY. L.A. L. REV. 1017-19 (2004) (“United States drug sentencing laws have focused on incarceration as the primary solution to the drug problem. Rather than prioritizing the incapacitation of violent criminals, U.S. sentencing laws continue to incarcerate non-violent drug offenders at a higher rate and to the exclusion of violent offenders.”).

⁴⁹ See MODEL CODE OF JUDICIAL ETHICS R. 2.2 (2007) (providing that a judge “shall perform all duties of judicial office fairly and impartially.”). Comment 1 further provides that “[t]o ensure impartiality and fairness to all parties, a judge must be objective and open-minded.” *Id.* R. 2.2 cmt. 1.

This article seeks to give meaning to that obligation by demonstrating the need for judicial education in the wake of *United States v. Booker* – judicial education that examines rapid cognition and social cognition biases (particularly the influence of race, gender, class, and culture) and provides tools to enhance informed discretion in the specific context of federal sentencing.⁵⁰ With its collared discretion based upon reasonableness in sentencing, *Booker* paves the way for getting sentencing in the federal system right without being either too rigid or too discriminatory, so long as that discretion is further collared by appropriate judicial education on the pitfalls of intuitive decision-making and cultural and social bias.

In part one, this article considers the current tension concerning judicial discretion in criminal sentencing. Part two examines influential factors on discretion. Part three considers means of channeling discretion through training. Finally, part four considers how to encourage

⁵⁰ A number of commentators have reckoned with the new social science evidence regarding human cognition insofar as the legal system is concerned. See Chad M. Oldfather, *Writing, Cognition, and the nature of the Judicial Function*, 96 GEO. L. J. 1283, 1286-1288 (2008) (reviewing “developing psychological research” to assess the impact of written opinions upon the quality of judicial decision-making); Eva Paterson, Kimberly Thomas Rapp & Sara Jackson, *The Id, The Ego, and the Equal Protection in the 21st Century: Building upon Charles Lawrence’s Vision to Mount a Contemporary Challenge to the Intent Doctrine*, 40 CONN. L. REV. 1175, 1199 (2008) (“We now possess the science, the hard evidence, and the educational tools necessary to educate both the judiciary, and the public, about the realities of implicit bias and its implications for anti-discrimination law. Our next step is to marshal this evidence, and the public’s support, to mount a constitutional challenge to the Intent Doctrine [of equal protection clause jurisprudence]”); Chris Guthrie, Jeffery J. Rachlinski & Andrew J. Wistrich, *Blinking on the Bench: How Judges Decide Cases*, 93 CORNELL L. REV. 1, 43 (“the justice system should take what steps it can to increase the likelihood that judges will decide cases in a predominately deliberative, rather than a predominately intuitive way.”); Paul H. Robinson & John M. Darley, *Intuitions of Justice: Implications for Criminal Law and Justice Policy*, 81 S. CAL. L. REV. 1, 3-13 (2007) (because “social science evidence suggests that judgments about justice, especially for violations that might be called the core of criminal wrongdoing, are more the product of intuition than reasoning,” reforms such as “the abolition of punishment, the distribution of punishment, . . . and programs designed to change people’s intuition about what constitutes serious wrongdoing and how much it should be punished,” may not be possible in a liberal democracy). This article seeks to build upon this work to address the specific challenges facing judges in the wake of *Booker* and to mitigate the potential negative consequences of those challenges.

judges to take a proactive approach to cultural competency. Reasonableness is the desired outcome of the exercise of discretion. Judicial education and training on social cognition can promote reasonable decisions in federal sentencing.

I. Independence versus Accountability: The Limits of Judicial Discretion in Federal Sentencing

The nature of criminal law is such that it is impossible to define rules precisely to cover every possible combination of facts that might be defined as a crime.⁵¹ Indeed, scholars have long recognized that legal systems compromise between rule certainty and discretionary choice by “informed” officials based upon particular facts.⁵² Thus, judicial discretion is fundamentally inherent to the criminal justice system, ranging from the definition of criminal acts to all aspects of trial.⁵³

The Supreme Court’s ruling in *United States v. Booker* that the U.S. Sentencing Guidelines are advisory and not mandatory and its recent rulings bring the issue of discretion in sentencing to the legal forefront.⁵⁴ Attempts to salvage some of the mandatory structure have focused primarily on adjusting the current U.S. Sentencing Guidelines structure, both to simplify

⁵¹ Some would argue that individuals do not want perfect definition nor enforcement of crimes. See MORAN & COOPER, *supra* note 1, at 10 (“It is now firmly believed by those who work in the process, and by those who observe it, that strict adherence to the rules of law, precisely as they are narrowly laid down, certainly as it relates to the criminal laws, would be socially intolerable. This is to say that society, not the criminal justice system, would not stand for full enforcement of the laws. Here is clearly a basis for a high degree of discretion in the process.”).

⁵² H.L.A. HART, *THE CONCEPT OF LAW* 127 (1961).

⁵³ See *supra* notes 13-22.

⁵⁴ *United States v. Booker*, 543 U.S. 200, 245 (2005).

the rubric and to address some of the chief criticisms of the Supreme Court and others.⁵⁵ The Federal Judicial Council preference is to retain the judiciary's reacquired discretion.⁵⁶ The underlying concern is one of judicial independence.⁵⁷

Sentencing responsibility is traditionally the province of the judiciary, whereas creation of law is part of the legislative responsibility, and enforcement responsibility falls upon the executive through its prosecutors.⁵⁸ Historically, the legislative control of sentencing was

⁵⁵ See Frank O. Bowman, III, *'Tis a Gift to be Simple: A Model Reform of Federal Sentencing Guidelines*, 18 FED. SENT'G REP. 1 (2006) (as of June 1, 2006, there had "been little or no discussion among representatives of the primary institutional actors in federal sentencing – Congress, the Sentencing Commission, the judiciary, the Justice Department, and the defense bar – about significant reform of the federal sentencing regime"). Professor Bowman describes the Constitution Project Sentencing Initiative ("CPSI"), created by the Constitution Project, as "a diverse group of sentencing and criminal justice professionals" that developed a set of "Principles for the Design and Reform of Sentencing Systems," and then applied those principles to propose a simplified sentencing guidelines system. *Id.* at 1; see also THE CONSTITUTION PROJECT, THE CONSTITUTION PROJECT'S SENTENCING INITIATIVE, PRINCIPLES FOR THE DESIGN AND REFORM OF SENTENCING SYSTEMS, http://www.constitutionproject.org/pdf/sentencing_principles2.pdf (last visited Aug. 7, 2008); CONSTITUTION PROJECT, THE CONSTITUTION PROJECT'S SENTENCING INITIATIVE, PRINCIPLES FOR THE DESIGN AND REFORM OF SENTENCING SYSTEMS: A BACKGROUND REPORT, http://www.constitutionproject.org/pdf/Sentencing_Principles_Background_Report.pdf (site last visited Aug. 7, 2008); Constitution Project Sentencing Initiative, *Recommendations for Federal Criminal Sentencing in a Post-Booker World*, 18 FED. SENT'G REP. 310 (2006), available at <http://www.constitutionproject.org/pdf/SentencingRecs-Final.pdf> (last visited Aug. 7, 2008) (recommending in part that Congress "take no action at the present time to enact sentencing legislation in response to the Supreme Court's decision in *United States v. Booker*). See also *Excerpts from Principles for Sentencing Systems? A Background Report*, 18 FED. SENT'G REP. 207 (2006). Professor Bowman also describes the work of an ad hoc group arising out of the formal CPSI that sought to fill in the details to propose a model sentencing guidelines, using the CPSI principles and reports as its outline. Bowman, *A Model Reform*, *supra* note 55, at 1, 2.

⁵⁶ See REPORT OF THE PROCEEDINGS OF THE JUDICIAL COUNCIL OF THE UNITED STATES, at 15-16 (Mar. 15, 2005) (agreeing to "[u]rge Congress to take no immediate legislative action and instead to maintain an advisory sentencing guidelines system" and to "[o]ppose legislation that would respond to the Supreme Court's decisions [in *United States v. Booker*, 125 S. Ct. 738 (2005)] by (1) raising directly the upper limit of each guidelines range or (2) expanding the use of mandatory minimum sentences."). See also *id.* at 15 (delegating to the Committee on Criminal Law the authority to "develop educational programs, forms and other similar guidance to maintain an advisory sentencing guidelines system.").

⁵⁷ See Editorial, *The War on Courts and Other Wars*, 90 JUDICATURE 148 (2007) (suggesting that calls for judicial accountability are political tools to undermine judicial independence and an effort to obtain "judicial subservience" to the will of elected politicians and political interest groups).

⁵⁸ Berry, *supra* note 35, at 633 ("Prior to 1984, federal judges exercised discretion that was virtually 'unfettered' in

minimal, using broad strokes to define sentences, primarily by the minimum and maximum punishment available for each crime.⁵⁹ Prosecutors had only slight ability to control sentencing: charging decisions could extend or limit the maximum available sentence, and under the Federal Rules of Criminal Procedure, prosecutors could agree to a specific sentence that would bind the court if the court accepted the plea agreement.⁶⁰

The U.S. Sentencing Guidelines altered the historical balance of power, shifting discretion in sentencing primarily from the judiciary and to a sentencing commission and the prosecutors. The Sentencing Reform Act of 1984 (SRA) delegated broad authority to the U.S. Sentencing Commission to review and rationalize the federal sentencing process.⁶¹ Congress sought to create a more uniform sentencing structure and to enhance criminal punishments through the SRA.⁶² The SRA provided that no less than three of the seven voting members of the Commission must also be federal judges.⁶³ The Commission promulgated detailed

determining sentences, guided only by broad sentence ranges provided by federal criminal statutes.”).

⁵⁹ *Id.*

⁶⁰ See FED. R. CRIM. P. 11(c)(1)(C). Aside from a specific term specified in a plea agreement, a judge had three options when imposing a sentence of imprisonment, prior to the Guidelines. See Frank O. Bowman III, *Fear of Law: Thoughts on Fear of Judging and the State of the Federal Sentencing Guidelines*, 44 ST. LOUIS U. L.J. 299, 302 n.12 (2000) (summarizing the three option as follows: the court could set a maximum term of imprisonment (1) of which the offender would be required to serve one-third before being eligible for parole (18 U.S.C. § 4205(a) (2004) (repealed 1984)); or (2) which specified a minimum term that was less than one-third of the maximum (18 U.S.C. § 4205(b)(1) (repealed 1984)); or (3) which specified that the Parole Commission may determine when the prisoner may be released on parole (18 U.S.C. § 4205(b)(2) (repealed 1984)).

⁶¹ See U.S. SENTENCING GUIDELINES MANUAL § 1A1.1 cmt. background (2007). The Commission is a permanent independent agency of the judicial branch, with seven voting members and two *ex officio* members. 28 U.S.C. §§ 991(a), 992 (2004); U.S. SENTENCING GUIDELINES MANUAL § 1A1.1 (2007) (editorial note).

⁶² See Jordan, *supra* note 35, at 622-24; Shepherd, *supra* note 35, at 538-41. See also Kennedy, *supra* note 31, at ix (“Passage of the Act marked the end of a sentencing system that had long been a national disgrace.”).

⁶³ See Ramirez, *supra* note 29, at 364 n.31; 28 U.S.C. § 991(a) (1984), amended by Prosecutorial Remedies and Other Tools to End the Exploitation of Children Today (“PROTECT”) Act of 2003, Pub. L. No. 108-21, § 401(m),

guidelines prescribing sentencing ranges for offenders of federal crimes.⁶⁴ The promulgated Guidelines and any amendments had to be presented to Congress, and Congress retained the authority to reject any recommendation of the Commission.⁶⁵

The resulting guidelines provided narrow sentencing ranges based upon a point system that take into account the type of crimes, specific characteristics of that crime, defendant conduct such as acceptance of responsibility or obstruction of justice, and the defendant's criminal history.⁶⁶ Judges were expected to sentence within the calculated sentencing range in most cases.⁶⁷ Departures from the sentencing range were permitted under the Guidelines in two circumstances: (1) the prosecutor could move for a downward departure from the sentencing range due to substantial assistance to law enforcement by the defendant; or (2) the judge could grant an upward or downward departure from the sentencing range based upon circumstances not adequately taken into consideration by the Guidelines.⁶⁸ Congress added an additional avenue of

117 Stat. 650, 675.

⁶⁴ U.S. SENTENCING GUIDELINES MANUAL (2007).

⁶⁵ See U.S. SENTENCING GUIDELINES MANUAL § 1A1.1 cmt. background (2007). The Commission is also tasked with the continuing responsibility to monitor the effect of the Guidelines and to recommend any subsequent changes to the Guidelines. *Id.*

⁶⁶ See U.S. SENTENCING GUIDELINES MANUAL § 1B1.1 (2007). Each range overlaps the preceding and succeeding range, and the maximum of any range cannot exceed the minimum of that range by the greater of twenty-five percent or six months. U.S. SENTENCING GUIDELINES MANUAL § 1A1.1, editorial note (2007) (The Sentencing Table); see U.S. SENTENCING GUIDELINES MANUAL Ch.5, pt. A (2007) (Sentencing Table).

⁶⁷ See U.S. SENTENCING GUIDELINES MANUAL § 1A1.1, editorial note (2007) (Departures).

⁶⁸ See U.S. SENTENCING GUIDELINES MANUAL § 5K1.1 (2007). Non-substantial assistance guilty pleas are sometimes accompanied by a government agreement to recommend or consent to a downward departure by the judge. See, e.g., UNITED STATES SENTENCING COMM'N, 2002 SOURCEBOOK OF FEDERAL SENTENCING STATISTICS 53, fig. G, available at <http://www.ussc.gov/ANNRPT/2002/fig-g.pdf> (last visited Aug.7, 2008) (providing four categories for sentences: within range, substantial assistance departures, other downward departures, and upward departures). See also Frank O. Bowman, III, *The Year of Jubilee . . . or Maybe Not: Some Preliminary Observations About the Operation of the Federal Sentencing System After Booker*, 43 HOUS. L. REV. 279, 303 (2006).

departure with “fast-track” pleas, authorized under the PROTECT Act, to encourage early pleas by defendants in districts with heavy caseloads.⁶⁹ Departures were subject to appellate review.⁷⁰ Congress retained the authority to reject Commission proposed amendments to the Guidelines, and to use its legislative authority to mandate specific sentences, including statutorily enacting mandatory minimum sentences for certain offenses.⁷¹ Moreover, prosecutors could use the Guidelines effectively to calculate the likely sentence of a defendant for any charge and make its charging decisions accordingly.⁷² Consequently, the broad sentencing authority of judges had been greatly narrowed and the influence of prosecutors had been greatly expanded...

Implementing the Guidelines prompted legal wrangling from the outset. Early challenges to the constitutionality of the Guidelines were quashed with the ruling in *Mistretta v. United States*, which upheld the delegation of authority for promulgating the guidelines to the judicial

⁶⁹ See Prosecutorial Remedies and Other Tools to End the Exploitation of Children Today (PROTECT) Act of 2003, Pub. L. No. 108-21, § 401(m), 117 Stat. 650, 675; ROGER W. HAINES ET AL., FEDERAL SENTENCING GUIDELINES HANDBOOK 1684-86 (2004) (describing fast track pleas, including the requirement that defendants waive numerous trial and appellate rights).

⁷⁰ In 1996, the Supreme Court held that sentencing departures that were outside of the “heartland” of the Guidelines would be reviewed applying an abuse of discretion standard. *Koon v. United States*, 518 U.S. 81, 91, 111-13 (1996) (recognizing that some cases will fall outside the heartland of the offense as defined within the Guidelines, and that a departure may be warranted if it is reasonable).

⁷¹ See, e.g., Anti-Drug Abuse Act of 1986, Pub. L. No. 99-570, § 1, 100 Stat. 3207 (1986) (mandatory minimums embracing disparate sanctions for crack versus cocaine violations); 21 U.S.C. §§ 841, 844, 846, 960, 963; but see 18 U.S.C. § 3553(f), as amended (1994) (safety valve provisions). Indeed, the disparity in sentencing amounted to a 100 to 1 punishment ratio and fell disproportionately on African-Americans. David A. Sklansky, *Cocaine, Race, and Equal Protection*, 47 STAN. L. REV. 1283, 1289 (1995) (finding that during one twelve-month period “more than 91 percent of all federal crack defendants were black; only 3 percent were white. During this same period, by way of contrast, blacks accounted for only slightly over 27 percent of federal prosecutions for powder cocaine, and 28 percent of federal prosecutions generally”).

⁷² See Frank O. Bowman, III, *Quiet Rebellion? Explaining Nearly a Decade of Declining Federal Drug Sentences*, 86 IOWA L. REV. 1043, 1120-22 (2001) (describing the use of charge bargaining in plea agreements by federal prosecutors to achieve the desired sentencing result).

branch.⁷³ In 2003, Congress further altered the balance of power⁷⁴ when it changed the rules for selecting U.S. Sentencing Commissioners from “no less than three judges” to “no more than three judges.”⁷⁵ This legislative change, reportedly urged by the Department of Justice,⁷⁶ assured that judges could never be a majority of the Commission’s voting members, implying a lack of confidence in the ability of the judiciary to meaningfully evaluate appropriate sentences.⁷⁷ The Judicial Conference of the United States expressed opposition in April 2003, prior to the passage of the Act, to this provision and several others proposed in the Feeney Amendment⁷⁸ to the PROTECT Act,⁷⁹ and voted to support repeal of the Feeney Amendment provisions after the Act’s passage because the judiciary and the Sentencing Commission had not been consulted regarding the legislation.⁸⁰ Congress was concerned with the limiting judicial discretion to

⁷³ *Mistretta v. United States*, 488 U.S. 361 (1989); *See* Bowman, *Quiet Rebellion*, *supra* note 72, at 1083-84 (discussing the various U.S. Supreme Court decisions and circuit court decisions that had supported the constitutionality of the Guidelines over numerous attacks).

⁷⁴ *See* Stephanos Bibas, *The Feeney Amendment and the Continuing Rise of Prosecutorial Power to Plea Bargain*, 94 J. CRIM. L. & CRIMINOLOGY 295, 295 (2004).

⁷⁵ *See* PROTECT Act, Pub. L. No. 108-21, § 401(n)(1), 117 Stat. 676. The legislation amended 28 U.S.C. § 991 and was signed into law on April 30, 2003.

⁷⁶ *See* Daniel Richman, *Federal Sentencing in 2007: The Supreme Court Holds-- the Center Doesn't*, 117 YALE L.J. 1374, 1389-90 (2008).

⁷⁷ *See* Frank O. Bowman, III, *No Time for Judges: With Feeney Amendment, Justice Department Seeks Control of Federal Sentencing*, LEGAL TIMES, April 21, 2003, at 67.

⁷⁸ H. Amend. 19 to H.R. 1104, 108th Cong. (2003).

⁷⁹ *See, e.g.*, PROTECT Act, Pub. L. No. 108-21, § 401(d), (e), (g), (h), (l), (j), (m), & (n), 117 Stat. at 670-75(2003).

⁸⁰ *See* REPORT OF THE PROCEEDINGS OF THE JUDICIAL COUNCIL OF THE UNITED STATES, at 5-6, 18-20 (Sept. 23, 2003) [hereinafter SEPT. 2003 PROCEEDINGS]. The Judicial Council’s Committee on Criminal Law reacted to the March 27, 2003, approval by the House of Representatives of the floor amendment, the Feeney Amendment, by expediting review of the proposed legislation through the Executive Committee. *Id.* at 5. Concerns included legislation to limit downward departures, and to substitute *de novo* appellate review in place of the “due deference” standard of review applied to a judge’s application of the guidelines to the facts of a case granting a downward

depart and appeared determined to exercise greater oversight of sentencing.⁸¹ Thus, the PROTECT Act implemented reporting requirements to further this end.⁸² The requirement to include district judge *names* rather than simply the *districts* from which downward departures were issued appeared intended to threaten judicial independence rather than merely monitor Guidelines adherence.⁸³

The following term, in 2004, the Supreme Court rendered a ruling in a challenge to a state guidelines sentencing scheme that would rock the stability of the federal courts. In *Blakely v. Washington*,⁸⁴ the Supreme Court found that defendant's Sixth Amendment constitutional

departure. *Id.* at 5. At the September 2003 Judicial Council Conference meeting, the judges renewed their concerns and opposition raised in April, and added the following:

- a. Requesting Congress to establish standards to protect confidentiality of sensitive court records prior to requiring their release to the House and Senate Judiciary Committees;
- b. Opposing requirements that data files containing judge-specific information be released by the Sentencing Commission and forwarded to the House and Senate Judiciary Committees;
- c. Opposing the directive that the Sentencing Commission develop further limits on departures, and "limiting the authority of the courts and the United States attorneys' offices to develop and implement early disposition programs"; and
- d. Opposing "[t]he amendment of 28 U.S.C. § 991(a) limiting the number of judges who may be members of the Sentencing Commission."

Id. at 19-20.

⁸¹ See Bibas, *The Feeney Amendment*, *supra* note 74, at 300.

⁸² The reporting requirements imposed by the PROTECT Act included the following:

- (1) Courts must describe with specificity in the written judgment the reasons relied on when departing from sentencing guidelines. See PROTECT Act (Prosecutorial Remedies and Other Tools to End the Exploitation of Children Today Act of 2003), Pub. L. No. 108-21, § 401, 117 Stat. 650 (amending 18 U.S.C. § 3553(c));
- (2) Courts must submit a statement of reasons for the sentence (including reasons for any departure) to the U.S. Sentencing Commission). *Id.* (amending 28 U.S.C. § 994(w)).
- (3) The Attorney General must report any downward departure to the House and Senate Judiciary committees, including the sentencing judge's name in the report. *Id.* See 18 U.S.C. § 3553, Historical & Statutory Notes, Pub. L. 108-21, § 401(l), 117 Stat. 674 (2003).

⁸³ See Andre M. Davis, *What Do Judges Think about the Feeney Amendment?*, 88 JUDICATURE 8, 9-11 (2004) ("Unfortunately, systematic collection of judge-specific data suggests an effort to affect a judge's performance on the bench.").

⁸⁴ 542 U.S. 296 (2004).

right to a jury trial was violated in a Washington state case in which the sentencing court, under a state sentencing guidelines scheme, departed from the “standard range” in sentencing the defendant, finding that the defendant had acted with deliberate cruelty,” a statutorily defined ground for departure under the state sentencing scheme.⁸⁵ The Supreme Court in *Blakely* specifically declined to address the validity of other presumptive sentencing guidelines schemes, including the United States Sentencing Guidelines.⁸⁶ Nevertheless, the impact of the decision in *Blakely* threw federal sentencing into a tailspin because the similarity between the Washington state guideline scheme and the federal sentencing guideline scheme suggested the likelihood that the Court’s reasoning would also apply to reject the constitutionality of the federal sentencing guidelines.⁸⁷

One year later, the Court addressed the issue directly in *United States v. Booker*.⁸⁸ In *Booker*, the Court followed the reasoning in *Blakely* to find the federal sentencing guidelines

⁸⁵ 542 U.S. 296 (2004). Washington statutory law provided by broad sentencing ranges for the major classes of felonies and a separate statute that specified narrower “standard ranges” for particular offenses. A sentencing court could depart from the standard range for an offense if he or she found “substantial and compelling reasons justifying an exceptional sentence.” The range for *Blakely*’s offense was 49 to 53 months imprisonment; the court sentenced him to 90 months. *Blakely v. Washington*, 542 U.S. 296, 300 (2004). *Blakely* extended the logic of *Apprendi v. New Jersey*, 530 U.S. 466 (2000), in which the Court ruled that “[o]ther 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.” *Blakely v. Washington*, 542 U.S. 296, 303-04 (2004) (emphasis in original). In finding the sentencing scheme unconstitutional, the Court reasoned in *Blakely* that “the ‘statutory maximum’ for *Apprendi* purposes is the maximum sentence a judge may impose solely on the basis of the facts reflected in the jury verdict or admitted by the defendant.” *Blakely v. Washington*, 542 U.S. 296, 303-04 (2004). Thus, the maximum available sentence is one the trial judge may impose without any additional findings. *Id.*

⁸⁶ WAYNE R. LAFAYE, CRIMINAL PROCEDURE 21-22 (2004 Supp.).

⁸⁷ See Douglas A. Berman, *The Roots and Realities of Blakely*, 19 CRIM. JUST. 5, 11 (Winter 2005); Douglas A. Berman, *Examining the Blakely Earthquake and its Aftershocks*, 16 FED. SENT’G. RPTR. 307 (2004) (describing the immediate impact of the decision on federal sentencing, the subsequent circuit splits regarding the constitutionality of the federal sentencing guidelines, and the position of the U.S. Department of Justice); Albert W. Alschuler, *To Sever or Not to Sever? Why Blakely Requires Action by Congress*, 17 FED. SENT’G. RPTR. 11 (2004).

⁸⁸ 543 U.S. 220 (2005).

were unconstitutional, but determined that the Guidelines could be saved by severing and excising those sections of the statute that contained the language imposing the Guidelines as mandatory, and declaring the Guidelines to be advisory.⁸⁹ The district court was to take the now advisory guidelines into account together with other sentencing factors enumerated in 18 U.S.C. § 3553(a), and after calculating the advisory Guidelines range, the district court could then impose a sentence outside the range in order to “tailor the sentence in light of the other statutory concerns” in § 3553(a).⁹⁰ Title 18 U.S.C. § 3553(a) provides that “a court shall impose a sentence sufficient, but not greater than necessary,” to provide “just punishment” of a defendant.⁹¹ The change from mandatory to advisory guidelines shifted discretion away from

⁸⁹ The Court severed and excised 18 U.S.C. §§ 3553(b)(1) & 3742(e). *United States v. Booker*, 543 U.S. 220 (2005) (mandatory sentencing guidelines are unconstitutional; district court must take the advisory guidelines into account together with other sentencing factors enumerated in 18 U.S.C. § 3553(a)). After calculating the advisory Guidelines range, the district court may then impose a sentence outside the range in order to “tailor the sentence in light of the other statutory concerns” in § 3553(a). *Booker*, 543 U.S. at 245-46.

⁹⁰ *Booker*, 543 U.S. at 245-46 (Breyer, J., Opinion of the Court in part).

⁹¹ 18 U.S.C. § 3553(a). The language of the statute takes into account the nature of the crime, the criminal history of the defendant, and the various purposes of punishment in arriving at a “just punishment”:

(a) Factors to be considered in imposing a sentence. The court shall impose a sentence sufficient, but not greater than necessary, to comply with the purposes set forth in paragraph (2) of this subsection. The court, in determining the particular sentence to be imposed, shall consider –

- (1) the nature and circumstances of the offense and the history and characteristics of the defendant;
- (2) the need for the sentence imposed –
 - (A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense;
 - (B) to afford adequate deterrence to criminal conduct;
 - (C) to protect the public from further crimes of the defendant; and
 - (D) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner.

18 U.S.C. § 3553(a).

prosecution and back toward the judges.⁹² As time extends forward from the *Booker* decision, more courts stray from the strictures of the Guidelines.⁹³ In exercising their reacquired discretion, the courts appear to face a singular concern identified by the Supreme Court in each departure case before it since the *Booker* decision was rendered: reasonableness.⁹⁴

Reasonableness is the optimal outcome of the exercise of discretion. Yet, without constraints on discretion, the fear is that judges will “impose their personal values” through their sentencing decisions.⁹⁵ The Sentencing Reform Act of 1984 (SRA) came about because of legitimate concerns about the lack of uniformity and risk of judicial bias in sentencing.⁹⁶ On the other hand, there are also legitimate concerns that the Guidelines themselves were too rigid, and similarly undermined justice while opening the door to political bias. *Booker* provides an

⁹² “Booker’s flexibility restores some balance of power by preventing prosecutors from unilaterally promising or threatening certain results upon trial and upon plea. Judges regain more power to adjust sentences to fit their ex post perceptions of individual defendants’ blameworthiness and need for specific deterrence.” Bibas, *White-Collar Plea Bargaining*, *supra* note 35, at 731.

⁹³ See U.S. SENTENCING COMM’N, PRELIMINARY POST-KIMBROUGH/GALL DATA REPORT 2 (July 2008) (Table 1) (comparing percentage of federal criminal cases sentenced within the guideline range for two relevant periods: the post-*Booker* period, 61.3% sentenced within Guideline range, and the post-*Kimbrough/Gall* period, 59.7% sentenced within Guideline range); Bowman, *Year of Jubilee*, *supra* note 68, at 297-99 (evaluating the statistical information from the U.S. Sentencing Commission regarding guidelines departures since the *Booker* decision, and concluding that departures have increased in all circuits since *Booker*, but more in some circuits than in others); see also U.S. SENTENCING COMM’N, FINAL REPORT ON THE IMPACT OF UNITED STATES V. BOOKER ON FEDERAL SENTENCING (2006), http://www.ussc.gov/booker_report?Booker_Report.pdf.

⁹⁴ See *Kimrough v. United States*, 128 S. Ct. 558, 576 (2007); *Gall v. United States*, 128 S. Ct. 586, 600 (2007); *Rita v. United States*, 127 S. Ct. 2456, 2462-63 (2007). Reasonableness has been a cornerstone of appellate review of sentencing. See 18 U.S.C. § 3553(a); *United States v. Booker*, 543 U.S. 220, 260-61 (2005) (recognizing that 18 U.S.C. § 3742(e)(3) (1994 ed.) required appellate courts review a sentencing departure to assess whether it is “unreasonable” in light of the factors set forth in § 3553(a), and that such considerations remain through “two decades of appellate practice” despite the PROTECT Act’s revision of § 3742(e) and the Court’s decision in *Booker* to sever and excise § 3742(e)).

⁹⁵ WINTER, *supra* note 39, at 309; Bibas, *White-Collar Plea Bargaining*, *supra* note 35, at 724, 740-41 (suggesting that traditional judicial austerity in white-collar sentencing arises from cultural and demographic affinity); Jordan, *supra* note 35, at 617 (suggesting that too much discretion invites prejudice).

⁹⁶ See *supra* note 31.

opportunity for another route to enhance reasonableness in the exercise of judicial discretion that would discourage legislative (*i.e.*, political) interference with judicial discretion.

II. Influential Factors Shaping Discretionary Decisions

Dworkin's donut metaphor suggested that discretion was restrained solely by the rules that surround it. The question of what influences that discretion is more complicated. Federal district judges are political appointees and several studies have identified political ideology as impacting judicial outcomes in sentencing.⁹⁷ Judges are also human beings and consequently their experiences, both socially and as lawyers, impact their discretionary decisions.⁹⁸

Additionally, but not incidentally, the legal and procedural rules pertinent to the issues before a

⁹⁷ See Max M. Schanzenbach & Emerson H. Tiller, *Strategic Judging Under the U.S. Sentencing Guidelines: Positive Political Theory and Evidence*, 23 J. L. ECON. & ORG. 24, 52-53 (2007) (finding that the political party of the appointing U.S. president was a significant factor in sentencing preferences of federal district judges for street crimes, and a factor in sentencing for white collar crimes; political alignment of district court judge to appellate judges was a significant factor in sentencing departures); Pauline T. Kim, *Lower Court Discretion*, 82 N.Y.U. L. REV. 383 (2007); Terri Jennings Peretti, *Does Judicial Independence Exist? The Lessons of Social Science Research*, in JUDICIAL INDEPENDENCE AT THE CROSSROADS: AN INTERDISCIPLINARY APPROACH 105 (Stephen B. Burbank & Barry Friedman editors, 2002); KEVIN L. LYLES, THE GATEKEEPERS: FEDERAL DISTRICT COURTS IN THE POLITICAL PROCESS 220 (1997) (finding that appointing presidents achieve strong rate of success in achieving their high priority overt policy goals through their federal district court judge appointments); MORAN & COOPER, *supra* note 1, at 13 (1983) ("Studies have also shown that the background of judges also influences their behavior on the bench. The political affiliation of a judge is frequently an indicator. President Johnson sought out liberal Democrats for appointment to the federal judiciary and to the Supreme Court. President Nixon sought out conservative Republicans as the basis for his appointments. Each President wanted judges who were sympathetic to their political ideology."). Another indicator recognizing the influence of political ideology on court decisions is the reaction of Senate Judiciary Committee Chairman Orrin Hatch, after Republicans took control of both houses of Congress in the 1996 federal election; Hatch vowed that "nominees who are, or will be, judicial activists" would not be confirmed and asked each U.S. Senator to sign a pledge to that effect. LYLES, *supra*, at 187. In the election year of 1996 and for the first time in 40 years, the Senate failed to confirm a single federal appellate judge nominee in its second session. *Id.* at 186. *But see* C.K. ROWLAND & ROBERT A. CARP, POLITICS AND JUDGMENT IN FEDERAL DISTRICT COURTS 30-31 (1996) (observing that the "right-of-center" decision-making by the Burger Supreme Court impacted all lower court judges, both conservative and liberal in a shift to the right).

⁹⁸ *E.g.*, Guthrie et al., *supra* note 50, at 28, 43 (finding empirically that judges may rely too much on intuitive decisions that are in error but that judges can overcome such errors and make more deliberative decisions).

court impact discretionary sentencing.⁹⁹ The extent of influence from each of these factors varies from judge to judge and even case to case. The self-awareness by the judges and the acknowledgement by others of the factors' influence on decision-making depend in part on one's legal philosophy.

A. Political Process & the Judiciary

Federal district judges are appointed for life tenure, subject to “good Behaviour.”¹⁰⁰ They are nominated by the president of the United States and confirmed by the Senate.¹⁰¹ The process for selecting nominees has evolved over time with the changes in administrations and

⁹⁹ *Id.* at 42-43 (suggesting that some reforms may enhance “accuracy” in judicial decision-making by facilitating more “deliberative decisions”).

¹⁰⁰ U.S. CONST. art. III, § 1. The primary source of judicial power and limit of that power is Article III of the U.S. Constitution, which provides for federal judges that serve subject to “good Behaviour.” U.S. CONST. art. III, § 1. Although scholars have disputed the constitutionally imposed limits on service of the federal judiciary, general agreement exists that judges are removable for “Treason, Bribery, or other High Crimes and Misdemeanors.” U.S. CONST. art. II, § 4; *see* Peter M. Shane, *Who May Discipline or Remove Federal Judges? A Constitutional Analysis*, 142 U. PA. L. REV. 209, 213 (1993). Impeachment of federal judges is a rarely used tool, however, with only 13 judicial impeachments occurring in U.S. history, 7 of which resulted in convictions, six of those convicted were federal district court judges. *See* American Judicature Society, http://www.ajs.org/cji/cji_impeachment.asp (last visited Aug. 11, 2008); *see also* Michael J. Gerhardt, *The Constitutional Limits on Impeachment and Its Alternatives*, 68 TEX. L. REV. 1, 10 n.29 (1989). This article is unconcerned, however, with judicial acts that would merit impeachment or other criminal sanction. The Judicial Conduct and Disability Act, Pub. L. No. 107-273, § 11042, 116 Stat. 1853 (2002), 28 U.S.C. §§ 351-364, provides statutory authority for the Judicial Conference and judicial councils to prescribe rules to conduct a limited inquiry reviewing any complaint made against a federal judge “alleging that a judge has engaged in conduct prejudicial to the effective and expedition administration of the business of the courts.” 28 U.S.C. § 351.

¹⁰¹ U.S. CONST. art. II §2 par.2, cl.2: The President “shall nominate and by and with the advice and consent of the Senate, shall appoint . . . judges of the Supreme Court, and all other officers of the United States . . . but the Congress may by law vest the appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law or in the Heads of Departments.” This appointment process was the compromise position reached at the Constitutional Convention in 1787. *See* LYLES, *supra* note 97, at 37-39, 44. *See also* Garland W. Allison, *Delay in Senate Confirmation of Federal Judicial Nominees*, 80 JUDICATURE 8 (1996) (reviewing statistical data regarding the political impact of the Senate's advice and consent on the pace of judicial confirmations). A confirmation may require a sixty percent majority if the nomination is subject to a filibuster. *Id.*

senatorial preferences.¹⁰² At the district court level, the selection of nominees does not receive the same level of scrutiny that the federal appellate courts receive, but the vetting process is extensive.¹⁰³ Potential nominees may be submitted to the president from a variety of sources depending upon whether the president has a particular candidate in mind; candidates may be proposed based upon political affiliation with the senators from the state in which the judge will sit or the congressional representative if no senators from that state are of the same political party as the president.¹⁰⁴ In some states, a bi-partisan committee may recommend potential nominees.¹⁰⁵ The Attorney General and the Department of Justice have also played a key role in judicial selection to a greater or lesser degree over time.¹⁰⁶ The same is true for the American Bar Association which has participated in the review process of federal judicial nominations for over sixty years, although its role shifted from pre-nomination to post-nomination after George

¹⁰² See LYLES, *supra* note 97, at 44-46 (1997) (describing the historical role of the senate in nominating and approving federal district court judicial appointments; historically, the senior senator from the state in which the judge would sit recommended the nominee, and the rest of the Senate typically supported that recommendation as a matter of senatorial courtesy); see also Tracey E. George, *Judicial Independence and the Ambiguity of Article III Protections*, 64 OHIO ST. L.J. 221, 229-33 (2003) (positing that the attention directed toward appointment of district court judges began with President Franklin D. Roosevelt's desire to appoint lower court judges who would affirm his New Deal policies, and has continued to garner attention as presidents have recognized the ability to shape policy by appointing judges of similar political ideology to cement policy gains during their administrations).

¹⁰³ See LYLES, *supra* note 97, at 40-41, 44-63 (observing that presidents take a more active role in the selection of Supreme Court justices and appellate court judges).

¹⁰⁴ See *id.* at 42,44-46.

¹⁰⁵ See National Asian Pacific Bar Association, *Federal Judicial Appointments Gavel to Gavel*, available at <http://www.napaba.org/uploads/napaba/Confirmation.pdf> (last visited Aug. 24, 2008).

¹⁰⁶ See LYLES, *supra* note 97, at 44-46. Potential nominees are asked to complete the U.S. Department of Justice Questionnaire for Judicial Candidates that obtains information used to assess credentials. *Id.* Information sought includes an extensive personal history, including financial disclosures, any criminal history, and a career history, that includes disclosing names of friends, colleagues, clients, and opposing counsel. The Federal Bureau of Investigation uses this information as the basis of a background check, prior to the decision about whether to nominate the candidate. See also Goldman et al., *Time of Turmoil*, *supra* note 37, at 277 (describing the process under the current Bush administration).

W. Bush took office in 2001.¹⁰⁷ In place of the ABA's review process, the Bush administration created a "Judicial Selection Committee" composed of participants from the White House Counsel's Office and the Department of Justice's Office of Legal Policy.¹⁰⁸

Once a candidate has passed through the screening and review processes afforded by the executive branch, the White House passes the nominee's name on to the Senate Judiciary Committee.¹⁰⁹ The Chair of the Senate Judiciary Committee may schedule a hearing on the nominee, which the public may attend.¹¹⁰ Scheduling such a hearing may be dependent upon

¹⁰⁷ See LYLES, *supra* note 97, at 49-55. The ABA Standing Committee on the Federal Judiciary has 15 members, appointed by the President of the ABA; each member serves for a three-year term; terms are staggered, and no member may serve more than two terms. AMERICAN BAR ASSOCIATION, THE ABA STANDING COMMITTEE ON THE FEDERAL JUDICIARY: WHAT IT IS AND HOW IT WORKS 1 (2007). From 1952 to 2000, every U.S. President involved the ABA Standing Committee on Federal Judiciary in the review of prospective nominees prior to the submission of names to the Senate Judiciary Committee. *Id.* at 1 n.1. Beginning in 2001, the White House announced the President would no longer seek the ABA Standing Committee's review, however, the democrats on the Senate Judiciary Committee requested the ABA Standing Committee continue the process. *Id.* Thus, the ABA Standing Committee now conducts its review *after* names have been submitted to the Senate Judiciary Committee as *nominees*. *Id.*; Sheldon Goldman et al., *W. Bush's Judiciary: The First Term Record*, 88 JUDICATURE 244, 254-55 (2005) [hereinafter Goldman et al., *W. Bush's Judiciary*]. The ABA Standing Committee's review remains limited to issues regarding professional qualification and currently results in one of the following ratings: (1) well qualified, (2) qualified, or (3) not qualified. ABA STANDING COMMITTEE ON THE FEDERAL JUDICIARY, *supra*, at 8. The Committee's impact on the nomination through its review and ratings has been "altered dramatically" by the shift from pre- to post-nomination, because those interviewed about the nominees may be reluctant to be critical of the nominee once the name is announced publicly. See Goldman et al., *W. Bush's Judiciary*, *supra*, at 254-55. Because of this "chilling effect", the Judiciary Committee looks harder at nominees receiving a "not qualified" rating, and it has questioned the reliability of positive ratings, thereby further diminishing the impact of the ABA Committee on the process. *Id.*

¹⁰⁸ See Goldman et al., *Time of Turmoil*, *supra* note 37, at 254. The Judicial Selection Committee consults "regularly" with representatives of the American Center for Law and Justice, the Federalist Society, the Heritage Foundation, and C. Boyden Gray, former head of the Committee for Justice, although these organizations maintain no "official role" in the selection process. *Id.* at 277-78; Goldman et al., *W. Bush's Judiciary*, *supra* note 107, at 251-52.

¹⁰⁹ The nominee completes another extensive form providing personal and career information, and the review process begins anew. See LYLES, *supra* note 97, at 55, 57-58.

¹¹⁰ See U.S. SENATE COMM. ON THE JUDICIARY, RULES OF PROCEDURE, http://judiciary.senate.gov/committee_rules.cfm (last visited Sept. 4, 2008).

any objections from senators,¹¹¹ however, if the Senate Judiciary Committee schedules a confirmation hearing, any public opposition to the nominee may be made available to the committee through correspondence.¹¹² Numerous legal organizations and public interest groups routinely comment upon proposed nominations.¹¹³ For the district judges who are appointed, the nomination and confirmation process may be relatively straightforward or brutally political.¹¹⁴

Judges bring to the bench their life experiences. Although historically, those appointed to the federal bench were typically active in politics, the trend toward a more professional judiciary has focused on broader political ideology, prior judicial experience, and professional qualifications. Thus, in the George W. Bush and Clinton Administrations, half of the appointed

¹¹¹ In accord with historical protocol, Senators from the state in which the appointment will be seated, may object to the candidate through a process known as the “blue slip.” The two senators are given a blue slip (named for the color of the paper) seeking an affirmative or negative response to the nominee, along with an opportunity to explain any objection to the candidate. The Committee Chair determines whether to deny a hearing based upon whether the slip is returned or to schedule a hearing over the objection. LYLES, *supra* note 97, at 58-59. Historically, failure to return a blue slip was treated as an objection to the nomination, but the practice has not been followed entirely. *Id.* at 58-59. In 2003, the Chairman of the Senate Judiciary Committee came under fire for disregarding the process when used by democratic senators to block confirmation hearings. Amanda Cherrin, *Right-Wing Plays Politics with Judicial Nominees*, NAT’L NOW TIMES, Fall 2003, available at http://findarticles.com/p/articles/mi_qa3820/is_200310/ai_n9313853 (site last visited Aug. 24, 2008). Senator Orrin Hatch was criticized for altering the “gentlemen’s agreement” regarding use of the blue slip, and for violating Rule IV of the Senate Judiciary Committee that permitted extended committee debate over a nominee. See Goldman et al., *W. Bush’s Judiciary*, *supra* note 107, at 261-63. Bitter partisan battles over judicial confirmations led to threats by the Republican led Senate majority threatening to change traditional Senate filibuster rules (requiring 60 votes to end debate), that would have effectively ended the ability of the minority party from insisting upon a 60 vote majority to confirm a nominee. See Goldman et al., *Time of Turmoil*, *supra* note 37, at 264-65. The threat was labeled the “nuclear” option because it would have eliminated the filibuster as a tool of the minority party for all matters, and not simply for judicial confirmations. *Id.*

¹¹² See U.S. Senate Comm. on the Judiciary, Frequently Asked Questions, <http://judiciary.senate.gov/faq.htm> (last visited Aug. 24, 2008).

¹¹³ Goldman et al., *Time of Turmoil*, *supra* note 37, at 254-55. Some of the organizations mentioned include, the American Center of Law and Justice, the federalist society, the Committee for Justice, the Heritage Foundation, the Alliance for Justice, and the People for the American Way. *Id.* at 254-55, and nn.8 and 9.

¹¹⁴ See *infra* notes 144, 145 (describing the inequity in the nomination process for women and persons of color).

federal district court judges had engaged in significant past political party activism, whereas for the George H. Bush, Reagan, and Carter administrations, over sixty percent were actively engaged in political activity.¹¹⁵ In 2007, over one-half of the federal judges had prior judicial experience and over forty percent of federal judges had prior prosecutorial experience, while less than thirty percent had neither judicial nor prosecutorial experience.¹¹⁶ For the non-traditional appointee, judicial experience has been a key factor in appointment to the federal bench, in that about 75% of those non-traditional appointees had judicial experience at the time of the appointment to the federal bench, as compared to less than half of traditional appointees.¹¹⁷ The high rate of judicial experience suggests that at least for the federal bench, the trend is toward a professional judiciary. Selecting federal district judges with experience in judging permits those in the nomination process to consider whether the nominee has the characteristics sought in good judging. Given the life tenure of the appointment, the trend has merit.¹¹⁸

¹¹⁵ Goldman et al., *Time of Turmoil*, *supra* note 37, at 277. The percentages are as follows: G.W. Bush (2001-07) 50.6%; Clinton 50.2%; G.H. Bush 64.2%; Reagan 60.3%; Carter 61.4%. *Id.*

¹¹⁶ *Id.*

¹¹⁷ *See* Goldman et al., *W. Bush's Judiciary*, *supra* note 107, at 267-68.

¹¹⁸ *But see Oversight Hearing on Federal Judicial Compensation: Hearing Before the Subcomm. on Courts, the Internet, and Intellectual Property of the H. Comm. on the Judiciary*, 110th Cong. 6-7 (April 19, 2007) [hereinafter *Hearing*] (statement of Stephen Breyer, Associate Justice, United States Supreme Court), available at http://judiciary.house.gov/hearings/April2007/hear_041907_2.html (last visited Aug. 28, 2008). Justice Breyer cautions against a professionalized judiciary that would draw federal judges from primarily the state court system, suggesting that a diverse judiciary should draw upon broader sectors of legal experience (including small firms and large firms, firms of different practices, academia, and government positions) and prior state court experience may interfere with judicial independence. *Id.* Many of the judges enter state court judiciaries with the experience Justice Breyer touts, and many others have served as U.S. Magistrates prior to being appointed to the federal district court. *See* Goldman et al., *Time of Turmoil*, *supra* note 37, at 274-75, 277 (indicating that a number of state court judges, federal magistrates, and federal bankruptcy judges have been appointed to federal district court, including thirty-two federal magistrates during George W. Bush's first six years in office).

B. Bias and Diversity

While characteristics sought in good judging include intelligence, fairness, integrity, impartiality¹¹⁹ and good temperament,¹²⁰ other immutable characteristics are bound to influence personal experience and outlook, such as race,¹²¹ gender, age, and orientation.¹²² Indeed, those who advocate for diversity on the bench maintain that such diversity “will bring traditionally excluded perspectives to their work.”¹²³

The founders of the United States sewed issues of race, gender, and economic class into

¹¹⁹ See MODEL CODE OF JUDICIAL ETHICS R. 2.2 (2007) (providing that a judge “shall perform all duties of judicial office fairly and impartially.”). Comment 1 further provides that “[t]o ensure impartiality and fairness to all parties, a judge must be objective and open-minded.” *Id.* R. 2.2, Comment 1. *But see* MILLS, *supra* note 41, at 26: “While judges believe that they have the benefit of neutrality and detachment, . . . [studies] confirm that judges are mired in biography, in stereotypes reflecting the dominant culture’s judgment of good and evil, deserving and undeserving, worthy and worthless. To rework the modern notion of impartiality is to recognize that there is no detached observer and that no judges can escape the affective parameters of their role.”

¹²⁰ The ABA Standing Committee on the Federal Judiciary limits its review of candidates to the federal judiciary to issues bearing on prospective nominees’ professional qualifications including “integrity, professional competence, and judicial temperament.” American Bar Association, Standing Committee on the Federal Judiciary, <http://www.abanet.org/scfedjud/> (last visited Aug. 26, 2008); LYLES, *supra* note 97, at 50.

¹²¹ Compare JUDGES ON JUDGING: VIEWS FROM THE BENCH (David M. O’Brien ed., 1997), with BLACK JUDGES ON JUSTICE: PERSPECTIVES FROM THE BENCH (Linn Washington ed., 1994).

¹²² The “iron law of persuasion” requires an open mind. See WINTER, *supra* note 39, at 320. “What is true for reason is true for eloquence; both must find receptive ground if they are to do any work at all. To be effective, the advocate must not only know the audience but also be able to speak to it. Persuasion, in other words, is constrained by what the audience already believes.” *Id.* (summing up lessons learned from a guilty verdict by an all-white jury against an African American defendant, where a juror remarked on the eloquence of attorney John Thurgood Marshall (who was African American)).

¹²³ Rorie Spill Solberg, *Diversity and George W. Bush’s Judicial Appointments: Serving Two Masters*, 88 JUDICATURE 276, 276 (2005); see Sherrilyn A. Ifill, *Racial Diversity on the Bench: Beyond Role Models and Public Confidence*, 57 WASH. & LEE L. REV. 405, 410 (2000) (advocating racial diversity on the bench as a means to “introduce traditionally excluded perspectives and values into judicial decision-making”); Suzanna Sherry, *Civic Virtue and the Feminine Voice in Constitutional Adjudication*, 72 VA. L. REV. 543, 613 (1986) (“regardless of the content of a feminine perspective, recognition of its existence and its different voice might itself change the outcome of some cases”). See also SEPT. 2003 PROCEEDINGS, *supra* note 123, at 31 (vote by Judicial Council to recommit recommendations from the Committee on the Administration of the Magistrate Judges System to encourage district courts to make and report on affirmative efforts to identify “all qualified applicants, including women and members of minority groups”). This is significant because magistrates are often considered on the short list for district court positions due to their experience gained as a federal magistrate. See *infra* note 146.

the fabric of the U.S. Constitution by leaving the issue of voting rights to the states and by reducing those persons “bound to Service” to be counted as three-fifths of a person.¹²⁴ Certainly much has changed since that fateful document was ratified; in particular, the Thirteenth Amendment outlawed slavery,¹²⁵ the Fourteenth Amendment amended the three-fifths count to counting the “whole number” of persons,¹²⁶ the Fifteenth Amendment gave suffrage to persons of color,¹²⁷ the Nineteenth Amendment gave suffrage to women,¹²⁸ and the Twenty-fourth Amendment removed the economic restraint of the poll tax on voting rights.¹²⁹ American history is replete with the passionate and sometimes violent struggle of persons of color and women to gain equality. Limited access to legal education for both groups limited opportunities to participate in government in a representative capacity. Even today, no one other than a white male has reached the height of executive office in the United States; indeed, 2008 marks the first time the United States’ 222 year history that a person of color is a major political party’s nominee for the Chief Executive office.¹³⁰ Moreover, persons of color and women continue to be underrepresented in Congress relative to their presence in the general population.¹³¹

¹²⁴ U.S. CONST. art. I, §4, cl. 1 (amended 1870, 1920, 1964); U.S. CONST. art. I, §2, cl. 3 (amended 1865, 1868); *see* DERRICK BELL, *AND WE ARE NOT SAVED* 28-37, 43 (1987).

¹²⁵ U.S. CONST. amend. XIII, § 1.

¹²⁶ U.S. CONST. amend. XIV, § 2

¹²⁷ U.S. CONST. amend. XV, § 1.

¹²⁸ U.S. CONST. amend. XIX, § 1.

¹²⁹ U.S. CONST. amend. XXIV, § 1.

¹³⁰ If by the time of publication, this statement has changed, I would reword it to state as follows: Indeed, 2008 marks the first time in the United States’ 222 year history that a person other than a white male has held the office of President of the United States.

¹³¹ In the 110th Congress, seventy-three women serve in the House of Representatives, and sixteen in the Senate;

In the last thirty-five years, the federal judiciary has begun to acquire meaningful diversity on the bench, although presently only one woman and one African American sit on the U.S. Supreme Court.¹³² Traditionally, federal district judges were overwhelming white and male.¹³³ By 1993, there were 809 federal district judges, including both active and senior judges.¹³⁴ At that time, only 7% of the judges were people of color and 9% were female.¹³⁵

seventy-two persons of color serve in the House of Representatives, and six serve in the Senate. See Infoplease.com, *Minorities and Women in the 110th Congress*, <http://www.infoplease.com/us/government/women-minorities-110th-congress.html> (last visited July 23, 2008) [hereinafter *Minorities and Women*] (persons of color included the following categories: Blacks, Hispanics, Asians and Pacific Islanders, and American Indians); U.S. Senate, *Women in the Senate*, http://www.senate.gov/artandhistory/history/common/briefing/women_senators.htm; U.S. House of Representatives, 110th Congress, 2nd Session, www.house.gov (select “office of the clerk”, then “member information” then “current vacancies”) (last visited Sept. 4, 2008); U.S. House of Representative, Office of the Clerk, Current Vacancies, http://clerk.house.gov/member_info/vacancies.html (last visited Sept. 4, 2008). Twenty-three of the persons of color in the House are also women; thus, women and persons of color comprise 28% of the Congress, and 22% of the Senate. See Infoplease.com, *Minorities and Women in the 110th Congress*, *supra*. See also Mildred L. Amer, *Women in the United States Congress: 1917-2005*, Congressional Research Service Report for Congress (2005), available at http://holt.hous.gov/pdf/CRS_on_women_in_Congress_Sep_2005.pdf (last visited July 23, 2008) (a total of 229 women had served in the U.S. Congress through the 109th Congress: 196 in the House and 26 in the Senate)

¹³² Until President Jimmy Carter appointed twenty-nine women during his term in office, appointment of women in the federal judiciary, had not exceeded two in any president’s tenure; See *Minorities and Women*, *supra* note 131. President Carter also greatly expanded appointments of persons of color, appointing twenty-eight African Americans, fourteen Hispanics, and one Asian, or 13.5% of his total appointments. See LYLES, *supra* note 97, at 64-65. The greatest gains for diversity in the federal judiciary came during President Bill Clinton’s first term when approximately half of his appointments were persons of color and women. See Sheldon Goldman et al., *Clinton’s Judges: Summing Up the Legacy*, 84 JUDICATURE 228, 244-45 (2001) [hereinafter Goldman et al., *Clinton’s Judges*] (reporting that 52.1% of all judicial appointees in President Clinton’s first term were “nontraditional” - that is, not white and male). President Clinton appointed eighty-seven women (28.5% of his district court appointees), fifty-three African-Americans (more than 17%), and eighteen Hispanic judges to the federal district court in his eight years in office. *Id.* at 245. About one-third of President George W. Bush’s appointments to the federal district court in his first term were nontraditional candidates. See Goldman et al., *W. Bush’s Judiciary*, *supra* note 107, at 267 (reporting that Bush appointed thirty-five women (20.8%), eleven African-Americans (6.6%), eighteen Hispanics (10.7%), and one Asian (.6%) to the federal district court during his first term); Goldman et al., *Time of Turmoil*, *supra* note 37, at 282.

¹³³ LYLES, *supra* note 97, at 276.

¹³⁴ See *id.* at 277. In 1992-1993, Kevin L. Lyles conducted a National District Court Judge Survey (NDJS), contacting all active and senior federal district judges for the survey. *Id.*

¹³⁵ See *id.* at 276. Although 8.7% of the judges were women (70 judges), only 6% of the survey respondents were women. *Id.* Regarding race, 93% of the surveyed judges were white (753), compared to 92% of the survey

President Bill Clinton appointed 305 judges to the district bench, of which 23% were people of color, and 28.5% were female,¹³⁶ and President George W. Bush appointed 203 judges to the district bench in his first six years in office, 18% (35) were people of color, and 20% (40) were female.¹³⁷ Of the 678 authorized district court judgeships, about 75% have been appointed in the last 15 years, and at least one-third of those appointed have been nontraditional (female or person of color).¹³⁸ Most strikingly, the proportion of non-traditional judges in active service on the federal district court bench is now about 37%.¹³⁹

A 1992-93 survey of federal district judges,¹⁴⁰ revealed a number of differences in outlook in judges' self-assessment of the impact of political ideology, gender, and race upon

respondents; 3.7% of the surveyed judges were African-American (30), compared to 3.46% of the survey respondents; and 3.21% of the judges were Latino (26), compared to 3.86% of the survey respondents. *Id.*

¹³⁶ See Goldman et al., *Clinton's Judges*, *supra* note 132, at 241, 244-45.

¹³⁷ See Goldman et al., *Time of Turmoil*, *supra* note 37, at 277 (of the 203 district judges appointed over 6 years, 168 were white and 163 were male).

¹³⁸ See JUDICIAL CASELOAD PROFILE, *supra* note 37 (678 district court positions authorized); 28 U.S.C. § 133 (663 active district court positions authorized) (July 15, 2003); Goldman et al., *Time of Turmoil*, *supra* note 37, at 277 (George W. Bush appointed 203 district judges in his first six years, including 63 nontraditional judges - 40 females, and 35 of color; Bill Clinton appointed 305 district judges including 87 female, and 76 of color).

¹³⁹ See JUDICIAL CASELOAD PROFILE, *supra* note 37; Sara Schiavoni and Gerard Gryski, *Diversity on the Bench*, 90 JUDICATURE 268, 268 (2007) (Table 1) (calculated as follows: $(281 - 32) / 678 = 37\%$). Some non-traditional judges (32) are classified in more than one category, such as African American and female; the percentage given here does not double-count those multiple classifications. *Id.* See also Sara Schiavoni and Gerard Gryski, *Partisan Makeup of the Bench*, 90 JUDICATURE 279 (2007) (Table 1) (as of January 1, 2007, 473 of the 636 active district judges had been appointed by either G.W. Bush or Clinton; these two presidents had appointed nearly half of all sitting federal district judges, active and senior).

¹⁴⁰ LYLES, *supra* note 97, at 276. Of the 809 judges contacted, 491 responded. *Id.* Although 8.7% of the judges were women (70 judges), only 6% of the survey respondents were women. *Id.* For race, 93% of the surveyed judges were white (753), compared to 92% of the survey respondents; 3.7% of the surveyed judges were African-American (30), compared to 3.46% of the survey respondents; and 3.21% of the judges were Latino (26), compared to 3.86% of the survey respondents. *Id.*

discretionary decision-making.¹⁴¹ Well over half of those responding to the survey, and up to 88% of African-American judges, admitted that their own personal attitudes and values affect their discretionary judgments on the court.¹⁴² Moreover, about three-quarters of those surveyed perceived that other judges were influenced by personal attitudes and values in discretionary decisions.¹⁴³

One disturbing experience for women and persons of color nominated to the federal bench is the political confirmation process. Although a majority of all appointed judges would agree that the process is politically charged, the bitter political battles during the Clinton administration and the Bush administration over the confirmation process did not touch the nominees equally.¹⁴⁴ Indeed, nominations of women and persons of color were rejected more often than those of white males during both administrations, and were marked by extended delays in setting hearings and confirmations that far out-paced the delays for white males

¹⁴¹ *Id.* at 278-82. The survey covered many issues including questions about the selection process, the impact of politics on selection and confirmation, and the impact of political ideology on discretionary decisions, the appropriate role of the district judge in interpreting law and public policy, and the current role of the justice system in protecting civil rights. *Id.*

¹⁴² *Id.* at 229, 252 (1997). In the survey, about 72% of white judges, 73% of male judges, 80% of female judges, 94% of African-American judges, and about 95% of Latino judges agreed or strongly agreed that other judges are influenced by their personal attitudes and values in discretionary decision-making. *Id.* When asked whether that judge's "personal attitudes and values affect . . . discretionary judgments on the court" 56% of white judges agreed or strongly agreed, as did 57% of male judges, compared to about 64% female judges, 63% of Latino judges, and 88% of African-American judges. *Id.* See also MILLS, *supra* note 41.

¹⁴³ *Id.* Women and persons of color viewed discretionary judgment as impacted by personal attitudes and values; however, because of the small number of representatives in those categories at the time of the survey, one cannot draw too much from the responses, except to conclude that a majority of federal district judges would agree that personal attitudes and values impact discretionary decisions. With the increasing number of women and minorities on the district bench, the federal courts should face at least more diversity in personal experiences. See *supra* note 132.

¹⁴⁴ Allison, *supra* note 101, at 8.

nominated to the bench.¹⁴⁵ Even when ABA judicial ratings are factored in, the additional delay in confirming nominees who were female or non-white is considerable.

Another disparity that falls along gender and ethnicity lines, is the professional experience of those nominees. Of the Bush appointees, three-fourths of female and non-white appointments had prior judicial experience, whereas over half of those who are white and male did not.¹⁴⁶ Less than 13% of non-traditional appointments lacked judicial or prosecutorial experience, whereas white male appointments were more than twice as likely to lack such experience.¹⁴⁷ The judicial and prosecutorial experience appeared to compensate for a lack of past prominent political activity, in that only one-third of non-traditional appointments had such experience as compared to prominent activity by over fifty percent of white male appointments.¹⁴⁸

Even as gender and cultural diversity are on the rise, one final aspect of limited representation on the bench is economic diversity. Over half of the judiciary enjoys a net worth in excess of one million dollars.¹⁴⁹ Only one-third of Bush appointees to the district bench have

¹⁴⁵ See Goldman et al., *Time of Turmoil*, *supra* note 37, at 276 (about 1 in 3 district court nominations that went unconfirmed were women).

¹⁴⁶ See Goldman et al., *W. Bush's Judiciary*, *supra* note 107, at 272. Additionally, "almost two-thirds of the nontraditional appointees were serving on the bench [at the time of the nomination] compared to less than 45 percent of the traditional appointees." *Id.*

¹⁴⁷ *Id.*

¹⁴⁸ *Id.*

¹⁴⁹ See *id.* ("the proportion of those with a net worth in excess of \$1 million reach its highest level with the G.W. Bush appointees. Over half the appointees fell into this category, up from 38% of the Clinton appointees."); Goldman et al., *Clinton's Judges*, *supra* note 132, at 241, 244-45. The economic comparisons are not offered in real terms, thus inflation may account in part for the difference between Clinton and Bush appointees.

a net worth of less than \$500,000.¹⁵⁰ The appointment of millionaires to the court is no surprise in that the salary for federal judges has declined in real terms nearly 27% between 1969 and 2007, whereas the average American worker's salary has increased about 23% over that same period.¹⁵¹ Associate Justice Stephen Breyer has compared federal judicial to that of top law professors over the 1969 to 2007 period and noted that in 1969, a federal district court judge earned about 40% more than a professor, whereas in 2007 a federal district court judge earned about half of what top law professors are paid.¹⁵² The increasing relative disparity in compensation suggests that one must have the personal financial means to afford the relatively declining salary structure of the federal judiciary.¹⁵³ Financial independence or having earned one's wealth in the private sector are two likely sources, but the comparatively low salaries is also likely to limit the attraction of the lifetime appointment if candidates must rely upon the salary as a primary source of income.¹⁵⁴

¹⁵⁰ See Goldman et al., *W. Bush's Judiciary*, *supra* note 107, at 272.

¹⁵¹ See *Hearing*, *supra* note 118, at 3 (statement of Stephen Breyer, Associate Justice, United States Supreme Court).

¹⁵² See *id.* at 3-4.

¹⁵³ *Id.* at 6-7. The Consolidated Appropriations Act of 2008, waived Section 140 of Public Law 97-92, as amended by Public Law 107-77 (28 U.S.C. § 461 note), that prohibits any judicial salary increases without a subsequent specific Act of Congress. See P.L. 110-161; see also *COLA for Federal Judges in FY 08*, 40 THE THIRD BRANCH No.2 (Feb. 2008), available at <http://www.uscourts.gov/ttb/2008-02/cola.cfm> (last visited Aug. 29, 2008). The Consolidated Appropriations Act adjusted federal judicial salaries for fiscal year 2008 to the following levels: district court judges, \$169,300; courts of appeal judges, \$179,500; Supreme Court Associate Justices, \$208,100; and Supreme Court Chief Justice, \$217,400. *Id.* Legislators had proposed a bill in the U.S. Senate to substantially increase the salaries of Federal justices and judges. See Federal Judicial Restoration Act of 2008 S.1638, 110th Cong., 1st Sess. (2007) and related bill H.R.3753 110th Cong. (1st Sess. 2007). The bill, the Federal Judicial Salary Restoration Act of 2008, would have adjusted federal judicial salaries to the following levels: district court judges, \$218,000; courts of appeal judges, \$231,000; Supreme Court Associate justices, \$267,900; and Supreme Court Chief Justice, \$279,900. S.1638 110th Cong. § 2 (2007). The bill would also have repealed Section 140 of Public Law 97-92, as amended by Public Law 107-77. *Id.*

¹⁵⁴ Justice Breyer provides the example of funding college tuition for dependent children. See *Hearing*, *supra* note

As the federal judiciary continues to diversify, that diversity will undoubtedly influence perceptions of what is a reasonable exercise of discretion. Adjusting judicial salaries to account for cost of living increases would aid further opportunities to diversify the bench. Collectively, diversifying the bench should broaden the overall approach to justice and hopefully lessen bias through positive associations with colleagues¹⁵⁵; however, district court judges decide cases in relative isolation from their peers. Consequently, efforts to broaden their perspectives remain valuable to a fair and impartial judiciary.

C. Appellate Review and Normative Forces

Scholars debate the sources and limits on discretion looking at the effectiveness of the appellate process in constraining the discretion of judges,¹⁵⁶ and the normative force of the law on decision making.¹⁵⁷ Thus, courts are expected to follow precedent established by the

118, at 5 (statement of Stephen Breyer, Associate Justice, United States Supreme Court).

¹⁵⁵ See *infra* Part III A.

¹⁵⁶ See Kim, *supra* note 97, at 396-403 (countering principal-agent models by which positive political theory maintains that fear of reversal by appellate courts leads to lower court compliance, with practical assessment that (1) given the number of cases that are appealed, the unpredictability of which three-judge panel will review the case, and some cases will not be reversed, the risk is not that significant (at 397-98); and (2) some judges may affirmatively expect reversal, but it may enhance their stature if political parties are attracted to their positions and view them as candidates for promotion (at 401-02)). See also Charles M. Cameron, Jeffrey A. Segal & Donald Songer, *Strategic Auditing in a Political Hierarchy: An Informational Model of the Supreme Court's Certiorari Decisions*, 94. AM. POL. SCI. REV. 101, 102 (2000) (applying the principal-agent model and concluding that appellate reversals diminish professional stature and status); Richard A. Posner, *Judicial Behavior and Performance: An Economic Approach*, 32 FLA. ST. U. L. REV. 1259, 1273 (2005) (concluding that the threat of reversal “cannot operate as a significant constraint on circuit judges’ decisions” because so few cases are reviewed by the Supreme Court).

¹⁵⁷ Empirical studies have looked at legal preferences of judges in decision-making, the socialization process of judges, role perceptions of judges, legal preferences. See Kim, *supra* note 97, at 405-07 (see studies cited at nn. 86-96). Professor Kim posits that judges care both about adherence to the law and about policy outcomes. *Id.* at 407.

“controlling” authority of appellate courts.¹⁵⁸ Nevertheless, because of the factual nature of criminal cases, lower courts have some flexibility to nudge the law towards a judge’s personal preferences on a case-by-case basis. Moreover, a lower court may be willing to rule outside precedential authority even if doing so risks reversal, given that not all cases will be reviewed, and not all reviewed cases will be assuredly reversed.¹⁵⁹

Beyond the dictate of controlling authority, however, is the normative force of law by which a court will rule against its preferences for the purpose of following the rules because the judge is expected to follow the rules set by statute or precedent. Here again, there is risk of non-compliance because the judge may interpret the statute or precedent inconsistently with other judges considering the same statute or case precedent. Because of the interplay of potentially hundreds of factors surrounding any criminal case, judges might readily disagree upon the meaning of precedent in sentencing decisions. Consequently, judges may believe they are following the normative force of the law, but because of influential factors shaping discretionary decisions, interpret the law differently.

Beside normative forces that limit discretion, other influential factors shape discretionary decisions. Scholars have speculated that desire for promotion can be influential.¹⁶⁰ Moreover,

¹⁵⁸ See DONALD R. SONGER, THE CIRCUIT COURTS OF APPEALS, in THE AMERICAN COURTS: A CRITICAL ASSESSMENT 35, 44-45 (John B. Gates & Charles A. Johnson eds., 1991).

¹⁵⁹ See Kim, *supra* note 97, at 397-98; SARA C. BENESH, THE U.S. COURT OF APPEALS AND THE LAW OF CONFESSIONS: PERSPECTIVES ON THE HIERARCHY OF JUSTICE 17-18 (2002) (predicting that trial judges would be less likely to follow Supreme Court precedent than appellate court judges because of less scrutiny of trial court decisions).

¹⁶⁰ See LAWRENCE BAUM, JUDGES AND THEIR AUDIENCES 3 (2006); *but see* RICHARD A. POSNER, OVERCOMING LAW 111 (1995); Kim, *supra* note 97, at 401-02.

socialization of judges may encourage conformity that favors outcomes supported by the ruling class because persons traditionally selected to be federal judges (that is, white and male) come from similar social and class backgrounds and act in conformity with those persons and experiences.¹⁶¹ In addition, once a judge joins the bench, that judge gains a new social identity linked to the position, and is likely to respond with greater loyalty to that group and thereby alter the judge's personal identity and discretionary choices.¹⁶²

Thus, the typical district court judge brings to the federal bench judicial or prosecutorial experience, the political experience of surviving the nominating and confirmation process, the personal biases of a lifetime, and the understanding of the normative processes of the U.S. legal system.

D. Informing Federal Judges Through Judicial Education Programs

In addition to any judicial experience or legal expertise that federal district judges bring to the federal bench, judges are offered training and continuous opportunities to navigate in their

¹⁶¹ See WINTER, *supra* note 39, at 323 (courts like all organs of republican governments must respect “conventional values of the culture” in order to maintain legitimacy). See also Jan G. Deutsch, *Neutrality, Legitimacy, and the Supreme Court: Some Intersections Between Law and Political Science*, 20 STAN. L. REV. 169, 194-95 (1968) (constraints on the Supreme Court could be identified “only by examining the extent to which individual Justices have internalized the community consensus that defines the Court’s sphere of competence”).

¹⁶² See Kristin A. Lane, Jason P. Mitchell & Mahzarin R. Banaji, *Me and My Group: Cultural Status Can Disrupt Cognitive Consistency*, 23 SOC. COGNITION 353, 359, 382 (2005) [hereinafter Lane et al., *Me and My Group*] (“30 years of evidence suggest that in-group favoritism is a robust and nearly ubiquitous fact of social life). Although district court judges render decisions without the need to consult with other members of the judiciary, mere membership as a judge may result in subtle conformity: “[I]t is generally accepted that groups are more likely to polarize toward extremes, to take courses of action that advance the interests of the group even the face of personal doubts, and to act with greater loyalty to each other. Much of the most influential research focuses on how group membership changes an individual’s personal identity to produce a new social identity.” Neal Kumar Katyal, *Conspiracy Theory*, 112 YALE L.J. 1397, 1316 (2003). See also *infra* part III.A.

position and update their knowledge on a variety of topics.

Judges receive non-mandatory training provided through the Federal Judicial Center, an education and research agency for the federal courts created by Congress in 1967 to promote efficient administration of justice.¹⁶³ Newly appointed judges receive non-mandatory, orientation training from experienced judges and others with particularized knowledge that covers ethics, case management, and substantive law topics.¹⁶⁴

In addition to the training directed specifically at new federal judges, the Federal Judicial Center offers seminars and workshops on various topics throughout the country.¹⁶⁵ Attendance is voluntary. Judges are given the opportunity to apply for the courses, but due to limits on attendance, they must rank choices, and not every judge gets into his or her top choice.¹⁶⁶ Some programs are co-sponsored by the Federal Judicial Center and by various law schools across the

¹⁶³ See Federal Judicial Center, www.fjc.gov (last visited Aug. 29, 2008) [hereinafter FJC] (providing overview of the FJC and a link to its educational programs); 28 U.S.C. §§ 620-629.

¹⁶⁴ See Federal Judicial Center, *Annual Report 2006*, <http://www.fjc.gov/public/home.nsf/pages/102> (follow “download the Center’s 2006 Annual Report” hyperlink) (last visited Sept. 5, 2008), at 4-5, 11; Telephone interview with Denise Neary, Education Division, Federal Judicial Center, in Washington, D.C. (Sept. 9, 2008) [hereinafter Neary interview]; E-mail from Hon. J. Thomas Marten, U.S. District Court Judge, District of Kansas, to Angela Herrington; forwarded to Raye Tucker (Nov. 2, 2007) (on file with author) [hereinafter Marten e-mail]. Orientation is offered in two phases, each about one week long, covering substantially the same topics; the first phase is offered very early (as soon as one month) for new judges and orientation is usually completed by about 18 months. Neary interview, *supra*. About 95% of new judges attend orientation, both sessions. *Id.*

¹⁶⁵ *Id.* Some programs are generalized, offering a variety of topics, run concurrently, so that judges choose from among the options; others offer a “special focus” on a particular topic. Neary interview, *supra* note 164. The issue of “fairness” arises in a number of programs; in 2008, the topic of “Unconscious Bias” was offered as an option and was well attended (at least 30 of the 150 judges attending the programs chose this option out of five choices). *Id.* The government pays for judges’ attendance at programs sponsored by the Federal Judicial Center, and each judge has the opportunity to attend at least one (about three-day) program; some attend more, and others attend none. *Id.* Overall, many judges attend programs, but at a rate less than that of orientation. *Id.* Education committees composed of judges from the group of judges for whom the programs are planned (*e.g.*, district judges, appellate judges, magistrates, etc.) select the topics for programs with input from others who attend the programs or forward suggestions to the committee. Neary interview, *supra* note 164.

¹⁶⁶ See Neary interview, *supra* note 164; Marten e-mail, *supra* note 164.

United States; for example, Boalt Hall at the University of California at Berkeley co-sponsors an Intellectual Property workshop; New York University Law School co-sponsors an Employment Law workshop; and Duke Law School co-sponsors a Law & Terrorism workshop.¹⁶⁷

Additionally, training is offered through satellite television broadcasts on the Federal Judicial Center's Federal Judicial Television Network.¹⁶⁸ Finally, judges also attend annual circuit conferences that include programs providing information on specialized topics.¹⁶⁹

Another source for judge-directed training is The National Judicial College which provides judicial education and professional development courses for judges working in state, national, and international courts.¹⁷⁰ The National Judicial College provides seminars and distance learning programs, as well as degree programming offered exclusively to judges.¹⁷¹

¹⁶⁷ See FJC, *supra* note 163; Federal Judicial Center, *Upcoming Programs and New Resources for Federal Judges from the Federal Judicial Center* (Mar. 2008) (brochure listing upcoming in-person programs – including those mentioned above, recent and upcoming FJTN Broadcasts, selected on-site programs, web-based resources, and selected publications); Federal Judicial Center, *Annual Report 2006*, <http://www.fjc.gov/public/home.nsf/pages/102> (follow “download the Center’s 2006 Annual Report” hyperlink) (last visited Sept. 5, 2008), at 4, 13; Neary interview, *supra* note 164. The Harold Medina Seminar on the Humanities and Science is multi-day seminar at Princeton which delves into science, social science, humanities and the arts; because this is an enrichment course, judges make a financial contribution to attend this program. Neary interview, *supra*.

¹⁶⁸ See *id.* The Federal Judicial Center website provides a list of available videos for training, including one on the use of satellite television broadcasts directed at judicial training, at http://www.fjc.gov/library/fjc_catalog.nsf.

¹⁶⁹ See *supra* note 164.

¹⁷⁰ See National Judicial College, www.judges.org/about.html (last visited Aug. 29, 2008). The National Judicial College is a not-for-profit organization located on the University of Nevada, Reno campus. *Id.* The National Judicial College provides training at a variety of levels, from new judge orientation through advanced career (6+ years) topics. *Id.* Among its revenue sources, the National Judicial College receives grants from the U.S. Department of Justice, the U.S. Department of Transportation, the State Justice Institute, and funding from the American Bar Association, and the Donald W. Reynolds Foundation. See CATHARINE M. WHITE & MAUREEN E. CONNER, ISSUES AND TRENDS IN JUDICIAL BRANCH EDUCATION 2005 at 17 (2005).

¹⁷¹ See WHITE & CONNER, *supra* note 170, at 22, 28 (2005). Judges attending the college may earn a Master of Judicial Studies (M.J.S.) degree and a Ph.D. in Judicial Studies. *Id.* Among the sixty-eight various courses offered for 2008 are Criminal Evidence, Civil Mediation, Effective Caseload Management, Judicial Writing, and Building a Bias-Free Environment in Your Court. Course offerings for The National Judicial College are listed at

Additionally, the Judicial Education Reference Information and Technical Transfer Project (JERITT) provides information on judicial branch education programming, practices, research, and publications for state, national, and federal-system judicial branch educators.¹⁷²

Some programs available to judges are sponsored from privately funded sources that offer low or no cost programs. Two such sponsors are the Foundation for Research on Economics and the Environment (FREE) and George Mason University's Law & Economics Center.¹⁷³ These programs have been criticized because undisclosed corporate money paid for the judges' seminars.¹⁷⁴ The controversy has led to a proposed amendment to a U.S. Senate bill

www.judges.org/coursesalpha_2008.html (last visited Aug. 29, 2008).

¹⁷² See The Judicial Education Reference Information and Technical Transfer Project, <http://jeritt.msu.edu/> (last visited Aug. 29, 2008). JERITT is funded through a grant from the State Justice Institute, and cosponsored by the National Association of State Judicial Educators, and the School of Criminal Justice at Michigan State University. See *id.* See also WHITE & CONNER, *supra* note 170, at 2 (collecting information from national organizations and state organizations involved in judicial branch education including a total programming count by subject matter and code of the 144,731 programs offered from 1990 to 2004, for local, state, national, and international judges, as well as programs for court administrators). Of the programs offered, 6,875 programs were coded under the subject matter "Societal/Cultural Issues and the Humanities"; under the subject matter "Judicial Life and Judicial Role and Responsibilities, three codes appear relevant to judicial discretion: (1) Judicial Discretion (99 programs), Judicial Decision Making (213 programs), and Judicial Wellness: Mental, Emotional, Physical, and Spiritual (30 programs). See *id.* at 171, 166. Together these programs (covering training for local, state, national, and international judges) account for just under five percent of programs in JERITT's database. Of the 6,875 courses, not all are relevant here, as some cover topics such as suicide and abortion.

¹⁷³ See Foundation for Research on Economics and the Environment (FREE), www.free-eco.org (last visited Aug. 29, 2008) describing its target audience that includes state and federal judges, and select the "Info for Journalists" link to read a rebuttal to the concerns raised about judicial impropriety. See also George Mason University School of Law, Law and Economics Center, www.lawecon.org/programs.php (last visited Aug. 29, 2008). The Law and Economics Center participated in thirty judicial conferences during 2007, eleven of which were offered directly as Law and Economics Center programs, whereas the remainder were official judicial conferences for which the Law and Economics Center supplied the academic content for the program. *Id.*

¹⁷⁴ These programs claimed corporate money did not pay for judicial seminars or they declined to disclose their donors; however, documents released by the Community Rights Counsel, a nonprofit Washington law firm, show that corporations including Exxon Mobil, Philip Morris and R.J. Reynolds Tobacco had contributed tens of thousands of dollars toward these programs. See Eric M. Weiss, *Firms Donated to Groups That Gave Judges Free Trips*, WASH. POST, May 25, 2006, A27. Although judges would maintain that a free trip will not "buy" a contributor a favorable judicial decision, contributing corporate interests are purchasing access to the judges,

to place limits on gifts or reimbursements for travel for educational programs.¹⁷⁵ Moreover, the Federal Judicial Conference responded by approving a policy intended to ensure greater transparency and accountability with regard to judges' attendance at privately funded educational programs.¹⁷⁶ The new policy requires judges to report within thirty days after attendance at such a program.¹⁷⁷ Additionally, the programs must report sponsorship and sources of funding and that information is made publicly available.¹⁷⁸ In 2007, the American Bar Association revised Model Code of Judicial Conduct also addressed the tuition-waived and expense-paid seminars¹⁷⁹ by including a separate rule that encompasses a thirty day reporting requirement¹⁸⁰ and allows judges to accept reimbursement, provided the judge "assure[s] himself or herself that the

presumably to provide a particular perspective. *But see* John Fund, *Here Dumbs the Judge*, WALL ST. J., Dec. 17, 2007, available at <http://www.opinionjournal.com/forms/printThis.html?id=110011003> (last visited Aug. 29, 2008) (criticizing the proposed Feingold-Kyl amendment that would place limits on the amount of reimbursement for any travel event not sponsored by the government, suggesting the amendment is an "effort to 'insulate' federal judges from intellectual influences").

¹⁷⁵ See S.1638, 110 Cong., 1st Sess., §10 Judicial Gifts (placed on the Senate Legislative Calendar under General Orders, Calendar No. 614, on Mar. 10, 2008).

¹⁷⁶ REPORT OF THE PROCEEDINGS OF THE JUDICIAL COUNCIL OF THE UNITED STATES, at 24 (Sept.19, 2006) [hereinafter SEPT. 2006 PROCEEDINGS]. The policy applies to non-government educational program providers (other than state and local bar associations, subject-matter bar associations, judicial associations, the Judicial Division of the ABA, and the National Judicial College) that wish to pay or reimburse expenses incurred by federal judges in connection with attendance at programs whose significant purpose is the education of federal or state judges. *Id.* See also Administrative Office of the U.S. Courts, *Privately Funded Seminars Disclosure System*, <http://www.uscourts.gov/SeminarDisclosureSystem/index.cfm> (last visited Aug. 29, 2007) (providing access to the private seminars disclosure reporting policy adopted by the Judicial Conference in September 2006, and maintaining a current list of providers disclosure reports for public viewing).

¹⁷⁷ SEPT. 2006 PROCEEDINGS, *supra* note 176, at 24. Previously, judges were required to report annually. *Id.*

¹⁷⁸ *Id.*

¹⁷⁹ MODEL CODE OF JUDICIAL CONDUCT R. 3.14 (2007), available at http://www.abanet.org/judicialethics/approved_MCJC.html (follow "ABA Model Code of Judicial Conduct, February 12, 2007" hyperlink) (last visited Aug. 29, 2008); see Cynthia Gray, *The 2007 ABA Model Code: Taking Judicial Ethics Standards to the Next Level*, 90 JUDICATURE 284, 290 (2007) (reviewing and critiquing the revisions to the code).

¹⁸⁰ MODEL CODE OF JUDICIAL CONDUCT R. 3.14 (2007), *supra* note 179; see Gray, *supra* note 179, at 290.

acceptance of reimbursement or fee waivers would not appear to a reasonable person to undermine the judge's independence, integrity, or impartiality.”¹⁸¹ Although controversial, the allure of such privately funded programs may tie into the issue of inadequate judicial compensation.¹⁸² Changes in reporting requirements are aimed at the broader objective of maintaining and improving judicial independence.¹⁸³

There is no Constitutional requirement that federal judges be licensed attorneys, much less attend mandatory judicial training.¹⁸⁴ Thus, for a federal judge, attending educational programs is a choice.

III. Channeling Discretion Through Cognitive Training: External Guidance to Internal Discretion

In Malcolm Gladwell's book, *Blink*, the author explains that experts often make decisions involving their expertise in a snap, or a blink, but that by thin-slicing those decisions, we can pick apart those factors that the expert relied upon and would assess as relevant.¹⁸⁵ Thus, by

¹⁸¹ MODEL CODE OF JUDICIAL CONDUCT R. 3.14 (2007), *supra* note 179; *see Gray, supra* note 179, at 290.

¹⁸² The Ethics Reform Act of 1989 structured salary increases for members of the judiciary, Congress, Executive Schedule officials, and the Vice President to be calculated solely based upon the Employment Cost Index (ECI), in contrast to the means for calculating the salaries of general schedule federal employees which consider the ECI, and the salaries of non-federal employees in local areas. *See* Pub. L. 101-197, § 704, 103 Stat. 1716, 1769; 5 U.S.C. § 5318, *amended by* Pub. L. 107-77 (28 U.S.C. § 461). *See also supra* note 146.

¹⁸³ SEPT. 2006 PROCEEDINGS, *supra* note 176, at 25.

¹⁸⁴ *See* U.S. CONST. art. III, § 1; art. II, § 2; *see also* U.S. DEPT OF STATE, BUREAU OF INTERNATIONAL INFORMATION PROGRAMS, OUTLINE OF THE U.S. LEGAL SYSTEM 3-4 (2004) *available at* <http://usinfo.state.gov/products/pubs/legalotln/judges.htm>. *But see supra* Part IIA describing the nomination and confirmation process for federal judges; *supra* notes 100 & 115, describing the ABA Standing Committee on the Federal Judiciary review.

¹⁸⁵ MALCOLM GLADWELL, *BLINK: THE POWER OF THINKING WITHOUT THINKING* 15, 23 (2005) [hereinafter

dissecting the snap judgment, also known as “rapid cognition,” one can identify and distinguish the relevant factors from the irrelevant factors.¹⁸⁶ Gladwell’s basic conclusions have been empirically found to be applicable to judicial functioning.¹⁸⁷

The difficulty is that the failure to recognize unsupported assumptions can undermine the effectiveness of expertise. Gladwell provides the example of classical musicians.¹⁸⁸ For many years, classical music experts believed that certain musical instruments could not be played effectively by women; consequently, virtually no women were hired to play those instruments in major orchestras.¹⁸⁹ Despite claims that experts could identify mastery of an instrument after hearing only a few notes, women could not break into the orchestras until the screened auditions were introduced.¹⁹⁰ When an orchestra held auditions with the musicians performing behind a screen, suddenly, the experts could not rely upon any visual assumptions and were left with only the relevant factors surrounding the sound of the music played.¹⁹¹ Assumptions regarding the size or gender of the musician, the brand of instrument, and the physical demeanor of the musician who played the instrument were excluded due to the screen.¹⁹² With the screens in

GLADWELL, BLINK].

¹⁸⁶*Id.* at 18-47. Gladwell identifies studies suggesting that the greater the time given to study competing factors can often lead to less satisfactory conclusions because the extended time allows the irrelevant factors to overcome instinct. *Id.* Thus, for the expert at least, one might assert that the quick assessment is preferred since only the most relevant factors will be considered.

¹⁸⁷ Guthrie et al., *supra* note 50, at 27-29 (summarizing empirical data).

¹⁸⁸ GLADWELL, BLINK, *supra* note 185, at 246-54.

¹⁸⁹ *Id.* at 248-49.

¹⁹⁰ *Id.* at 248-50.

¹⁹¹ *Id.* Hiring of women increased five-fold. *Id.*

¹⁹² *Id.* at 251-52. Indeed, the type of metal forged to create the instrument, for example, a brass instrument versus

place, orchestras began hiring women who played instruments that were inconsistent with implicitly held beliefs.¹⁹³ Already suspicious of the potential for favoritism by conductors in selecting musicians, musicians organized and pressed for labor protections, including fairness in hiring.¹⁹⁴ The result was a shift to screened auditions and audition committees that eliminated the irrelevant factors and focused their expertise on the most important factors: those that produced beautiful music.¹⁹⁵

The U.S. Sentencing Guidelines were an attempt to set up a “screen” for sentencing. The intent was to draw upon expertise in sentencing to revise sentencing policies with the goals to eliminate bias and disparity in sentencing, to enhance proportionality, and to increase honesty in sentencing.¹⁹⁶ The experts together sifted through the thousands of factors that impact sentencing, organized those factors, and set up a rubric that would channel decisions into common streams of relevant assessments, leaving the irrelevant factors on the side-banks.¹⁹⁷ The Guidelines provided ranges for sentencing so that the expertise of the individual sentencing

one made of nickel-silver, would convey information to experts regarding the origin of the musician and often where that person would have studied. *Id.* at 251. Thus, assumptions concerning pedigree were thus also eliminated with the advent of screened auditions.

¹⁹³ *Id.* at 250. For example, a commonly held belief was that women did not have the power or lung capacity to play certain instruments, such as the trombone. *Id.* at 247-48.

¹⁹⁴ *Id.* at 249.

¹⁹⁵ *Id.* at 249-50, 253.

¹⁹⁶ See U.S. SENTENCING GUIDELINES MANUAL § 1A1.1 Background (2007) (editorial note); Ramirez, *supra* note 29, at 365-70.

¹⁹⁷ See Davis, *supra* note 83, at 11. “By amassing dedicated people around an impressive array of data about sentencing policy and individual cases - the Commission makes highly informed decisions about prudent guideline sentencing. . . . Because Congress simply does not have the time or resources to focus on the important details of sentencing policy, it was a stroke of genius to create the Sentencing Commission to serve as a sentencing policy group.” *Id.* (quoting Deanell Reece Tacha, Chief Judge of the U.S. Court of Appeals for the Tenth Circuit, and a member of the U.S. Sentencing Commission from 1994 to 1998).

judge would be given measure, yet remained anchored to the factors of a particular crime in connection with that crime's overall placement in the sentencing rubric. Just as music is more than merely notes aligned in a particular order, so is sentencing more than just punishment aligned to meet the elements of a crime. The Supreme Court's rejection of the mandatory nature of the sentencing guidelines rubric has loosened the anchor, giving the sentencing judge greater opportunity to apply his or her expertise to assess the relevant from the non-relevant factors in sentencing.

Nonetheless, the Guidelines were not wrong in theory any more than screens for auditions are wrong for musicians. Once the use of screens in auditions caught on, musicians realized that the screen had to be impenetrable, and so additional precautions were implemented; if a musician coughed or made some other sound that would reveal anything about the identity of the musician during the audition, that audition would be scrapped and the musician would be required to audition again anonymously, so that the experts remained true to their expertise: evaluating sound.¹⁹⁸ With the Sentencing Guidelines, the opposite occurred: instead of improving the "screen" through experience with its use, other actors impinged upon the guidelines, inserting factors to suit political or other agendas. Congress altered the rubric pieced together by the experts to promote a tough on crime agenda, and limited the expertise of the sentencing commission by altering its structure so that judges could not form a majority on the commission.¹⁹⁹ Prosecutors learned to make charging decisions that would be outcome

¹⁹⁸ See GLADWELL, BLINK, *supra* note 185, at 249-50.

¹⁹⁹ See Davis, *supra* note 83, at 11 ("[T]he apparent failure to provide the Sentencing Commission with an

determinative at sentencing rather than allowing judges to form the sentencing around the facts.²⁰⁰ Not surprisingly, judges were no more eager to sentence individuals under such a defective rubric than a classical music concertmaster would want to choose a musician under a defective rubric.²⁰¹ Upon declaring the Guidelines unconstitutional if mandatorily imposed, the judiciary effectively closed the door on the officious meddling of Congress and the Executive.

Rather than construct a new statutory scheme to cabin judicial discretion, legislators should realize that judges are not resisting reasonable limits on judicial independence but rather the hostile attitude of the legislators with respect to the primary role of the judiciary in assessing punishment.²⁰² The advisory guidelines will provide the guidance toward reasonable exercise of discretion if legislators acknowledge the expertise of the judiciary, restore their role on the sentencing commission, and return the sentencing commission to the mission for which it was created: that is, to draw upon a variety of experts in developing and maintaining a cohesive system for sentencing that considers the many goals of punishment, and strives for uniformity and proportionality.²⁰³

opportunity to study and make recommendations about the Feeney Amendment deprived Congress of an important and uniquely informed perspective.”).

²⁰⁰ See Bowman, *Quiet Rebellion*, *supra* note 72, at 1120-22 (describing the use of charge bargaining in plea agreements by federal prosecutors to achieve the desired sentencing result).

²⁰¹ See Douglas A. Berman, *Balanced and Purposeful Departures: Fixing a Jurisprudence that Undermines the Federal Sentencing Guidelines*, 76 NOTRE DAME L. REV. 21, 42-45 (2000) (summarizing evidence of judicial hostility to federal sentencing guidelines).

²⁰² See *supra* notes 74 to 83.

²⁰³ Legislators already appear to recognize the need for reasonableness in the Sentencing Guidelines, if they are to be truly advisory, by permitting new federal Sentencing Guidelines to take effect retroactively that reduce crack cocaine sentences by an average of 27 months for nearly 20,000 inmates, and cut sentences for new crack cocaine offender. See Jennifer Gonnerman, *Slammed*, 33 MOTHER JONES 44, 47 (2008); U.S. Sentencing Comm’n, Supplement to 2007 *Guidelines Manual* §§ 2D1.1, 1B1.10 (May 1, 2008), available at

Nonetheless, with more flexibility in the screen, the need is even greater for judges to self-evaluate in the exercise of discretion. The screen is not impenetrable, so the judges must look within themselves.²⁰⁴ Concertmasters were able to self-reflect to realize all the implicit assumptions that had clouded the evaluations of the performers, but only after the screens went up. Now that the screens are more penetrable, that is, the guidelines are advisory and not mandatory, the judges need to consider lessons learned from the Guidelines experience, and then critically assess what distracts from expertise in sentencing.

A. Recent Science on Cognitive Studies

Social psychologists have studied the question of automatic social cognition (that is, automatic stereotypes and prejudice) to identify the sources and strengths of those biases.²⁰⁵ “Automatic categorization and automatic associations to categories are the major culprits in the endurance of bias.”²⁰⁶ Identifying sources of bias has enabled social psychologists to study means of influencing bias under a variety of researching procedures.²⁰⁷ Significant to these

http://www.ussc.gov/2007guid/20080501_Supplement_to_2007_Guidelines.pdf (last visited Aug. 29, 2008).

²⁰⁴ See Guthrie et al., *supra* note 50, at 28-29 (“Our studies also show that judges can sometimes overcome their intuitive reactions and make deliberative decisions.”).

²⁰⁵ Blair, *supra* note 6, at 243, 257.

²⁰⁶ Susan T. Fiske, *Stereotyping, Prejudice, and Discrimination*, in 2 THE HANDBOOK OF SOCIAL PSYCHOLOGY 357, 363 (Daniel T. Gilbert, Susan T. Fiske & Gardner Lindzey eds., 4th ed. 1985). The definition used by social psychologists in researching “automaticity” varies, but is most commonly defined as “the absence of awareness or attention, a lack of intention, and uncontrollability. . . . At a minimum, that usually means that the operation of the stereotype or prejudice can be presumed to be unintended by the research participants (i.e., not deliberate), either because they are unaware of certain critical aspects of the procedure or because they are operating under conditions that make it difficult to deliberately base responses on specific beliefs or evaluations.” Blair, *supra* note 6, at 243.

²⁰⁷ See Blair, *supra* note 6, at 244, 260-61 (reviewing studies that used at least one of the following processes: Implicit Association Test, lexical decision task, sequential priming task, or word completions following unobtrusive priming).

studies is the broad conclusion that automatic stereotypes and prejudice are malleable and depend upon the perceiver's motives (self- or social-motivation) and the ability of the perceiver to modulate automatic processes in response to cues that influence the perceiver's priorities.²⁰⁸ The diversity of motives, and the contextual impact of external cues upon the perceiver are relevant factors in an individual's ability to modulate reaction, but the critical conclusion is that automatic social cognition does not presuppose a prejudiced or biased response.

Social psychologists have sought to examine whether strategies exist to counter stereotypes. Two primary approaches have been categorized as "stereotype suppression" and the "promotion of counterstereotypes."²⁰⁹ With respect to suppression stereotypes, studies conflict: some researchers have found suppression may amplify stereotypes, whereas others have identified specific and measured success, with long term success directly associated with extensive practice by participants.²¹⁰ The alternative approach is to focus on and intentionally activate counterstereotypes to moderate automatic stereotypes.²¹¹ Using mental imagery to create a counterstereotype led to "substantially weaker automatic stereotypes" compared to those

²⁰⁸ *Id.* at 257-58. Professor Blair's review of nearly 50 studies on the malleability of automatic stereotypes and prejudice focuses on two broad approaches: "manipulations of the perceiver's motivations, goals and strategies while in the testing situation; and the situational manipulations that are external to the perceiver, such as changes in the context surrounding the stimulus or variations in group members' attributes. *Id.* at 244.

²⁰⁹ *Id.* at 248.

²¹⁰ *Id.*; Adam D. Galinsky & Gordon B. Moskowitz, *Perspective-taking: Decreasing Stereotype Expression, Stereotype Accessibility, and In-group Favoritism*, 78 J. PERSONALITY & SOC. PSYCHOL. 708 (2000) (finding suppression may amplify automatic stereotypes); Peter M. Gollwitzer & Bernd Schaal, *Metacognition in Action: The Importance of Implementation Intentions*, 2 PERSONALITY & SOC. PSYCHOL. REV. 124 (1998) (limited malleability as a consequence of forming a specific implementation intention to judge particular persons in an unbiased manner); Kerry Kawakami et al., *Just Say No (to Stereotyping): Effects of Training in the Negation of Stereotype Associations on Stereotype Activation*, 78 J. PERSONALITY & SOC. PSYCHOL. 871 (2000) (stereotype negation training can moderate stereotypic responses provided extensive practice undertaken).

²¹¹ See Blair, *supra* note 5, at 248.

who engaged in no mental imagery, neutral imagery, or stereotypical imagery.²¹² Studies involving exposure to positive counterstereotypical images,²¹³ and studies involving exposure to a semester-long seminar on “prejudice and conflict” also revealed a significant positive influence reducing stereotypical social cognition as compared to those not exposed to positive images or influences.²¹⁴ Studies have led to the conclusion that “people who have a chronic goal of fairness exhibited less automatic stereotypes than nonchronics,” and were more “able to reduce automatic stereotypes when the stimuli were consciously perceptible, . . . however, such moderation did not occur when the stimuli were subliminal . . . and the participants were unaware the stereotypes might be operating.”²¹⁵ In contrast, forced multicultural training may negatively impact those with low internal motivation to address stereotype reduction, when those persons also have high external motivation to engage in the training, resulting in a backlash aggravating the negative attitudes and stereotypes sought to be addressed by the training.²¹⁶ Consequently, it is likely that “strategic efforts to moderate automatic stereotypes and prejudice

²¹² For example, a mental image of a “strong woman” tended to weaken automatic stereotypes that associated women with weakness. See Irene V. Blair, Jennifer E. Ma, & Alison P. Lenton, *Imagining Stereotypes Away: The Moderation of Implicit Stereotypes Through Mental Imagery*, 81 J. PERSONALITY & SOCIAL PSYCHOLOGY 828, 837 (2001); Irene V. Blair & Mahzarin R. Banaji, *Automatic and Controlled Processes in Stereotype Priming*, 70 J. PERSONALITY & SOC. PSYCHOL. 1142 (1996); see also Blair, *supra* note 6, at 248-49.

²¹³ See Nilanjana Dasgupta & Shaki Asgari, *Seeing is Believing: Exposure to Counterstereotypic Women Leaders and Its Effect on the Malleability of Automatic Gender Stereotyping*, 40 J. EXPERIMENTAL SOC. PSYCHOL. 642 (2004); Nilanjana Dasgupta & Anthony G. Greenwald, *On the Malleability of Automatic Attitudes: Combating Automatic Prejudice with Images of Admired and Disliked Individuals*, 81 J. PERSONALITY & SOC. PSYCHOL. (2001); Blair, *supra* note 6, at 249.

²¹⁴ See Laurie A. Rudman, Richard D. Ashmore & Melvin L. Gary, “Unlearning” Automatic Biases: *The Malleability of Implicit Prejudice and Stereotypes*, 81 J. PERSONALITY & SOC. PSYCHOL. 856 (2001); Blair, *supra* note 6, at 249.

²¹⁵ See Blair, *supra* note 6, at 250; Moskowitz et al., *supra* note 46, at 167.

²¹⁶ See Rudman et al., *supra* note 214, at 857.

require some awareness, motivation, skill and resources to be successful.”²¹⁷

B. Finding External Guidance to Internal Discretion: Affective Training and Judicial Mindfulness

In a world where ideology is an acknowledged part of the selection process, an admitted part of many judges’ discretionary decision-making, and a perceived part of most judges’ discretionary decision-making, identifying training that could yield the rapier’s lance to thin-slice sentencing decisions is challenging.²¹⁸ Certainly many countries have determined a course of study particularly suited to judges.²¹⁹ Indeed, the Judicial Council has been active in working on

²¹⁷ See Blair, *supra* note 6, at 250; John A. Bargh, *The Cognitive Monster: The Case Against the Controllability of Automatic Stereotype Effects*, in *DUAL PROCESS THEORIES IN SOCIAL PSYCHOLOGY* 361 (Shelly Chaiken & Yaacov Trope eds. 1999).

²¹⁸ Professors John T. Jost (New York University), Brian A. Nosek (University of Virginia), and Samuel D. Gosling (University of Texas, Austin) have used the IAT to demonstrate that “conservative” and “liberal” political associations may reflect “ideological belief systems [structured] for largely psychological reasons linked to variability in the needs to reduce uncertainty and threat.” John T. Jost, Brian A. Nosek, and Samuel D. Gosling, *Ideology: Its Resurgence in Social, Personality, and Political Psychology*, 3 *PERSP. ON PSYCHOL. SCI.* 126, 126, 128, 134 (2008).

²¹⁹ Most civil law countries have a career judiciary, recruiting judges directly from universities by selecting those that score well on competitive exams taken for the purpose of becoming a judge. See Mary Volcansek, *Appointing Judges the European Way*, 34 *FORDHAM URB. L. J.* 363, 371-72 (2007) (civil law countries include Austria, Finland, France, Germany, Greece, Italy, Netherlands, Portugal, Spain, and Sweden). Those aspiring to the judiciary are trained early in their legal careers through a course of study that promotes a professionalized judiciary. See *id.*; Luke Bierman, *Beyond Merit Selection*, 29 *FORDHAM URB. L.J.* 851,869 (2002); Linda S. Mullenix, *Lessons From Abroad: Complexity and Convergence*, 46 *VILL. L. REV.* 1, 8 (2001); Maria Dakolia, *Court Performance Around the World: A Comparative Perspective*, 2 *YALE HUM. RTS & DEV. L.J.* 87 (1999). Most training continues on-the-job with supervision by senior judges. See Volcansek, *supra*, at 371. This approach results in strong socialization. See *id.* More recently, some systems have moved to more lateral hiring of judges, others to judicial schools (in France and Spain, for example) that train judges for Greece, Spain, and Portugal. See *id.* France constrains the impact of the judge’s personality on the court and offers thirty-one months of study in both theoretical and practical elements of judging, plus an exit exam; appointments to the judiciary are based upon the exam scores. See *id.* Germany offers a rigorous legal training program that only fifty percent complete; only those passing a second exam with high honors may apply to the judiciary, and if selected, face a three year probationary period. See *id.* at 373-74 (2007); see also John H. Langbein, *The German Advantage in Civil Procedure*, 52 *U. CHI. L. REV.* 823, 848-49 (1985) (discussing judicial certification process used in Germany). The Netherlands has two routes to becoming a judge:

matters of justice in developing countries, and recently emerging eastern European countries, and has encouraged further study.²²⁰ Studying the “rule of law” or practical elements of judging may be useful to judging, but will not reach the implicit associations that can undermine the discretionary sentencing process.²²¹ The matter is one of exposing judges to a diversity of perspectives that differ substantially from their own, informing them about means of self-reflection, and enlisting the public and the judges to support this educational movement.

The purpose of such education is *not* to impose a particular viewpoint.²²² Indeed, considering the breadth and depth of viewpoints in the United States, selecting a single viewpoint would be a recipe for disaster. Judges are humans, and as such, their reactions to issues and interactions with others are influenced by internal case-related factors (such as personalities of the parties, attorneys, witnesses, issues of the case that call to mind issues

after law school, an interested applicant may enter a six year program of judicial studies that includes an internship, or work in a law firm for six years before applying; under both routes, the applicant must pass a legal exam and a psychological assessment. *See* Volcansek, *supra*, at 374. Constitutional courts in Europe exist solely to interpret the country’s constitution, and the judges are selected through a process that entails shared appointments, typically drawing in differing proportions, depending upon the country, from the ordinary civil and administrative courts, and through partisan selection. *See id.* at 376-80 (discussing the variances in appointment of constitutional judges among some of the countries that have adopted a constitutional court, namely Italy, Germany, Spain, Portugal, Luxembourg, Czech Republic, Slovakia, Slovenia, Lithuania, Latvia, and Hungary). The process for aspiring judges in Japan is similar to the civil law process described above for European countries, in that aspiring judges must first complete four years of legal study, pass a competitive exam, and then complete a practical training program that includes classroom instruction, and apprenticeships, prior to taking a second bar examination. *See* James R. Maxeiner & Keiichi Yamamaka, *The New Japanese Law Schools: Putting the Professional Into Legal Educations*, 13 PAC. RIM L. & POL’Y J. 303, 307-08 (2004).

²²⁰ *See* REPORT OF THE PROCEEDINGS OF THE JUDICIAL COUNCIL OF THE UNITED STATES, at 19 (Mar. 14, 2006) (reporting on involvement in rule-of-law and judicial reform activities throughout the world, and in the Open World Program which brings Russian and Ukrainian jurists and judicial officials to the United States); SEPT. 2003 PROCEEDINGS, *supra* note 123, at 26 (reporting on judicial reform activities in the Russian Federation, Ecuador, Ghana, and Korea, among others).

²²¹ *See infra* note 239 to 242.

²²² Essentially this was the core concern that lead to criticism of the privately funded programs for judges. *See supra* notes 173 to 176.

encountered by the judge in another case, the judge's personal experiences, or the judge's strongly held opinions based upon similar issues) and by external factors (such as issues arising in the judge's personal life, professional concerns, discomfort due to the temperature in the courtroom, what the judge ate for breakfast, or a physical malady plaguing the judge for years).²²³ Some of these factors enrich decision-making, while others detract from it.²²⁴ The goal is to encourage judges to seek understanding of their decision-making and to eliminate the noise of irrelevant factors.

In sentencing decisions, the district court has access to relevant information and the decision is subject to review, but the discretionary decision on sentencing belongs singularly to the judge. Probation and Pretrial Services investigates and prepares a presentence report for use by the court in which the sentencing guidelines are calculated, the defendant's criminal conduct is detailed, and the defendant's past is recounted and evaluated.²²⁵ Both the prosecutor and the defense attorney may challenge the report²²⁶ and may argue for a particular sentencing

²²³ *But see* Alex Kozinski, *What I Ate for Breakfast and Other Mysteries of Judicial Decision Making*, in JUDGES ON JUDGING: VIEWS FROM THE BENCH 71-73 (David M. O'Brien ed., 1997) (rejecting the legal realism approach that suggests "judicial decision making can be explained largely by frivolous factors" as "horse manure," and explaining that self-respect, law clerks, colleagues, appellate review, and the political system all act as restraints on the exercise of judicial discretion). This article does not dispute that all of the restraints identified by Judge Kozinski are critical to the exercise of discretion; rather, the article recognizes, as does Judge Kozinski, that judges are afforded a wide berth of discretion and the challenge to judges is to not be complacent in the confidence that the discretionary decisions are unimpeded by unconscious bias or distraction. *See id.* at 72 ("[u]nder our law judges do in fact have considerable discretion in certain of their decisions [including] fashioning remedies for violations of the law.").

²²⁴ Indeed the founders made judges political appointees rather than technocrats or bureaucratic functionaries thereby assuring some role for political ideology. *See* U.S. CONST. art. III § 1.

²²⁵ *See* FED. R. CRIM. P. 32(c), (d), & (g).

²²⁶ *See* FED. R. CRIM. P. 32(f).

decision.²²⁷ Finally, the parties may appeal the sentence for review before the appellate court.²²⁸ For the district judge, however, there is no panel of experts to consult and no colleagues to confront in arriving at the appropriate sentence.²²⁹

No matter how diverse the background of a particular judge, the judge cannot have experienced the multitude of perspectives that exist in American society.²³⁰ Some alternative viewpoints may be more common to the judge, but the judge is unlikely to have been both a person of color, and not; a woman, and not; raised in a poor home, and in a wealthy home; raised in a foreign country, and in the United States; heterosexual, and homosexual. If one has not experienced being the single minority in the room (whether that be because of skin color, gender, ethnicity, orientation, or otherwise), one may not even recognize the difficulties facing such a person. This is not to suggest that one should be punished differently because of any of the above mentioned factors, but rather, that the judge should recognize that a different world view might impact the conduct of the defendant in the courtroom, or even at the time of the crime. Moreover, the judge may implicitly associate these differences with negative stereotypes or biases and be unaware of the association.²³¹ Thus, a factor that might enter into the discretionary sentencing decision, such as a defendant who appears to be indifferent or hostile, may be

²²⁷ See FED. R. CRIM. P. 32(i).

²²⁸ See FED. R. CRIM. P. 32(j).

²²⁹ See NAT'L COUNCIL OF JUV. & FAM. CT. JUDGES, ON FACULTY EXCELLENCE IN JUDICIAL EDUCATION 39 (1996) (acknowledging that judging is an isolated activity).

²³⁰ See Ifill, *supra* note 123, at 420-21.

²³¹ See Molly Parker Tapias, Jack Glaser, Dacher Keltner, Kristen Vasquez & Thomas Wickens, *Emotion and Prejudice: Specific Emotions Toward Outgroups*, 10 GROUP PROCESSES & INTERGROUP RELATIONS 27, 35 (2007) (study of how prejudice toward an outgroup can prime emotional reactions to unrelated stimuli).

interpreted differently when those associations are understood.²³² Consequently, educating to inform judges of these alternative perspectives and implicit associations should enhance impartiality in discretionary decision-making, because social science research demonstrates that humans anchor our view of the world to that which we already know; thus if one has only a single perspective, one is likely to anchor decision-making to that perspective whether or not it is so recognized.²³³

Education may take a variety of forms, focusing on broadening and awakening an understanding in the judge of the diversity of actors the judge may encounter and the variety of sources for the judge's unconscious or subconscious reactions. The National Judicial College offers a model curriculum for judges to promote cultural competence.²³⁴ Professor Linda G. Mills at New York University has proposed affective training and intervention for professionals to enhance consciousness and sensitivity to emotional context, race, and gender.²³⁵ Evan R. Seamone has promoted judicial mindfulness as another approach that includes techniques to identify decisional impairments, assess their influence on legal analysis, and compensate for

²³² See Anthony G. Greenwald, Jacqueline E. Pickrell, and Shelly D. Farnham, *Implicit Partisanship: Taking Sides for No Reason*, 83 J. PERSONALITY AND SOC. PSYCHOL. 367, 378 (2002) (studying “implicit partisanship” and concluding that “knowledge about a group of which one is not a member can plant seeds of attraction to that group”); Tajfel, *supra* note 4.

²³³ See *supra* note 2; Francisca Farina, Ramon Arce & Mercedes Novo, *Anchoring in Judicial Decision-Making*, 7 PSYCHOL. IN SPAIN 56 (2003) (examining judgments in Spanish courts to identify heuristic anchoring in judicial decision-making); see generally NJC, MODEL CURRICULUM, *supra* note 3.

²³⁴ See THE NATIONAL JUDICIAL COLLEGE, MODEL CURRICULUM FOR JUDGES FACULTY MANUAL 1 (2005) [hereinafter NJC, FACULTY MANUAL]. The curriculum was the collaborative effort of a number of persons, but a large portion was based upon previous work by Kathleen Sikora, as senior attorney for the California Center for Judicial Education and Research, with the assistance of Professor Jack Glaser, University of California, Berkeley. *Id.* at Preface and Acknowledgement. The model curriculum was developed under a grant from the Bureau of Justice Assistance, Office of Justice Programs, U.S. Department of Justice. *Id.*

²³⁵ MILLS, *supra* note 41, at 159-63.

those behavior anomalies.²³⁶ Each of these approaches recognize that critical to the success of such training is the judge's desire to engage in self-reflective activity, and the opportunity for the judge to carry through from the training to real-life application.²³⁷

The model curriculum created by the National Judicial College is an introductory course that is divided into three parts.²³⁸ The introductory materials are “designed to experientially bring to the consciousness of attendees how their thoughts and actions are based on their culture and background.”²³⁹ It begins by offering a common definition of cultural competence and active learning experiential activities in which students share common experiences that are

²³⁶ Evan R. Seamone, *Understanding the Person Beneath the Robe: Practical Methods for Neutralizing Harmful Judicial Biases*, 42 WILLAMETTE L. REV. 1, 31 (2006).

²³⁷ *Id.* at 76; MILLS, *supra* note 41, at 162.

²³⁸ See NJC, FACULTY MANUAL, *supra* note 234, at 2.

²³⁹ The full program is intended to run two to four hours, plus two breaks. The introduction includes three activities designed to communicate three concepts through experiential activities. The first concept is that individuals tend to group individuals into “in” groups that are similar to themselves, and “out” groups that are not similar, and that “basic human tendencies [are] to prefer [one’s] own group and to think negatively about groups to which [one] does not belong – attitudes at the roots of bias and discrimination.” See NJC, FACULTY MANUAL, *supra* note 234, at 1, 7; Lane et al., *Me and My Group*, *supra* note 162, at 359, 382; Leslie Ashburn-Nardo, Corrine I. Voils, & Margo J. Monteith, *Implicit Associations as the Seeds of Intergroup Bias: How Easily do They Take Root?* 81 J. PERSONALITY & SOC. PSYCHOL. 789 (2001); Sabine Otten, & Dirk Wentura, *Self-anchoring and In-group Favoritism: An Individual Profiles Analysis*, 37 J. EXPERIMENTAL SOC. PSYCHOL. 525 (2001). Research on implicit attitudes has shown that the development of in-groups and out-groups occurs at an early age, see Andrew Scott Baron & Mahzarin R. Banaji, *The Development of Implicit Attitudes: Evidence of Race Evaluations from Ages 6, 10, and Adulthood*, 17 PSYCHOL. SCI. 53 (2005); LAWRENCE A. HIRSCHFELD, *RACE IN THE MAKING: COGNITION, CULTURE, AND THE CHILD’S CONSTRUCTION OF HUMAN KINDS* 190-95 (MIT Press 1996) (as early as age 4), and that group associations form rapidly. See Kristin A. Lane, Jason P. Mitchell, & Mahzarin R. Banaji, *Implicit Group Evaluation: Ingroup Preference, Outgroup Preference and the Rapid Creation of Implicit Attitudes*, Unpublished Manuscript, Harvard University, available at <http://www.projectimplicit.net/articles.php> (last visited Aug. 29, 2008); see also Anthony G. Greenwald, Jaqueline E. Pickrell, & Shelly D. Farnham, *supra* note 232, at 378 (demonstrating the operation of social categorization). But see Lane et al., *Me and My Group*, *supra* note 162, at 359, 382 (demonstrating that in-group favoritism is not inevitable and will yield to evaluative hierarchy despite strong implicit identification with one’s group). The second concept is that “[i]n cases of uncertainty, our mind tends to start from things it knows already, such as a recent similar event, or a previous ‘frame of reference,’ and connect new information to the old, . . . a phenomenon . . . known as ‘anchoring.’” See NJC, FACULTY MANUAL, *supra* note 234, at 1, 8. The third concept is that “our mental processes are similar, but the content of what we process will differ from person to person.” *Id.* at 8.

intended to alert each student that they may be susceptible to implicit associations that inhibit their cultural competence. Once students are convinced that the curriculum has value, the second part of the training informs attendees about the underlying social cognition research that has identified the implicit associations demonstrating bias and how such associations “give rise to social behaviors,” and facilitates discussion about how to recognize biased behavior in oneself.²⁴⁰ The final portion of the curriculum presents techniques “to minimize the effects of the bias” and to consider how to incorporate these techniques into future conduct.²⁴¹ The curriculum is founded on research that demonstrates that people with low-prejudiced beliefs who remind themselves of these biases, are better able to minimize their impact through vigilant awareness of their potential impact on discretionary decision-making.²⁴²

Affective training begins with the premise that all human beings are exposed to stereotypical assumptions and that exposure, whether we accept the foundational assumption, is

²⁴⁰ This portion of the program provides suggestions for actively recognizing assumptions, facilitates discussion by attendees regarding their related life experiences (“to emphasize the direct relevance to their lives and profession”), and to reassure attendees “that with knowledge, they can avoid some of the stereotypical behaviors that they may have regularly engaged in.” See NJC, FACULTY MANUAL, *supra* note 234, at 2. The Model Curriculum references the Implicit Association Test (IAT) developed by Dana R. Carney (Harvard University), Brian A. Nosek (University of Virginia), Anthony G. Greenwald (University of Washington), and Mahzarin R. Banaji (Harvard University). See NJC, MODEL CURRICULUM, *supra* note 3, PowerPoint Slide Number 38; Project Implicit, <http://implicit.harvard.edu/implicit/> (last visited Aug. 29, 2008). See *supra* note 5, explaining the IAT and defining key terms.

²⁴¹ The key words are intention, attention, and effort. See NJC, MODEL CURRICULUM, *supra* note 3, PowerPoint slide 41. Attendees are encouraged to intend to be fair and accurate, look for patterns in decision-making, “spend more time rather than less time with those with whom they are less comfortable,” minimize distraction, pay attention, and consciously confront cultural stereotypes. See NJC, FACULTY MANUAL, *supra* note 234, at 2; NJC, MODEL CURRICULUM, *supra* note 3, PowerPoint slides 32-38.

²⁴² See NJC, MODEL CURRICULUM, *supra* note 3 PowerPoint slide 40; Blair, *supra* note 6, at 243, 257 (reviewing studies that have assess evidence for the malleability of automatic stereotypes and prejudice).

likely to impact our discretionary decisions.²⁴³ Professor Mills proposes training to recognize that impact, so that judges can be self-critical of their prejudices and of their legal training which prevents them from acknowledging and embracing their prejudices. Thus, rather than attempting to ignore those unconscious biases that exist within one form or another in humans, Mills' approach trains judges to find those repressed histories within themselves and to turn those experiences "inside out" so that judges can "comprehend, anticipate, and address issues raised by their subjects' similarities and differences."²⁴⁴ Mills seeks to inspire judges "to develop a

²⁴³ MILLS, *supra* note 41, at 159 ("Judges should accept that they, like all other human beings, hold certain stereotypical assumptions that are likely to surface when discharging their duties.").

²⁴⁴ *Id.* at 160, 162-63. Professor Mills proposes a two to three-day active participation workshop covering the following: An introduction during which participants and trainer share stories of self-vulnerability with each other. The second session would begin the process of making prejudice conscious by encouraging the participants to discuss and share "how participants perceive each other and themselves" by considering cultural categories and overlapping boundaries (nationality, race, geography, gender, age, socioeconomic status, religion, language, etc.). *Id.* at 160-61. Next the participants explore the organizational culture (judges belong to the judiciary and work for the government) and professional culture (judges are lawyers and thus would identify with lawyers), in an effort to identify the influence of cultural dynamics and its "assumption, operating principles, [and] methods for resolving conflicts." *Id.* at 161. Judges would next be taught to identify countertransference, seeking awareness of "unspoken dynamics and subtexts." *Id.* Participants record stereotypes they have heard about those groups of persons judges encounter in the sentencing process, so that they may recognize that "these assumption[s] float in the culture at large, that people are subjected to them unconsciously, and that attitudes are affected through the unconscious." *Id.* at 161-62; *see also* Patricia Devine, *Stereotypes and Prejudice: Their Automatic and Controlled Components*, 56 J. PERSONALITY & SOC. PSYCHOL. 5-18 (1989) (deliberate reflection becomes the only method by which to purge stereotypes entirely from experience). Finally, judges are given methods to continue exploring and developing "consciousness of the latent aspect of decision making" including checklists to remind themselves to check for prejudices when encountering groups for which there may be either positive or negative bias. MILLS, *supra* note 41, at 162. Judges may not want to share such deeply personal information with others, especially at the outset of training for a variety of reasons such as lack of trust; position of authority; conflict with public persona or professional expectations). *See, e.g.*, NAT'L COUNCIL OF JUV. & FAM. CT. JUDGES, *supra* note 229, 50-51 (1996) (urging judicial educators to avoid inquiry into the personal experience of judges, but allowing for judges to choose to share those experiences during the course where relevant). One possibility would be to ask participants to journal about similar experiences, and invite submission to the facilitator who could then review submissions during a break, and then use themes or examples without attribution to specific judge. Of course, this may be difficult if the experience reveals gender or ethnicity unless there are multiple members in the group. Alternatively, the facilitator may offer up his or her experience at the outset (prior to journaling) as both an example, and as a means of encouraging forthcoming information. The facilitator would want to reassure participants that the journals would be returned at end of session so that the product remains in the hands of the judge.

method for hearing the silence that . . . everyone would prefer to repress and to address it through exposure” enabling adjudicators “to use universal biases in a just and deliberate manner.”²⁴⁵

Judicial mindfulness expands upon the self-reflective model, by recognizing that not every person nor every decision will be subject to the same types of bias, and thus, the approach to de-biasing oneself may take different forms, depending in part upon whether the triggers are internal or external and in part upon which methods of self-reflectivity work effectively for that person.²⁴⁶ Judicial mindfulness presents the opportunity for cognitive flexibility, that is, “viewing a situation from as many different perspectives as possible.”²⁴⁷ Thus, Seamone provides a variety of approaches to achieving the desired self-reflective state including first clearing one’s mind to prime the internal pump for productive thought,²⁴⁸ focusing to progressively narrow the question,²⁴⁹ psychodrama and creative dramatics,²⁵⁰ journaling to

²⁴⁵ MILLS, *supra* note 41, at 162.

²⁴⁶ See Seamone, *supra* note 236, at 25-26, 30-31. Seamone identifies four types of bias that may influence a judge’s discretionary decision-making: (1) advocacy - “unknowingly using certain types of information to support one’s hypotheses when alternative sources are available” but ignored; (2) cold bias - factors beyond the judge’s control, such as factors in a case that recall unpleasant circumstances subconsciously held in the judge’s history; (3) hot bias - when judges steer evaluation toward an intended outcome; and (4) statistical bias - reliance upon wrong probabilities or numeric calculations. *Id.* at 25-26.

²⁴⁷ See *id.* at 27; see also ELLEN LANGER, MINDFULNESS (1989); Justin Brown & Ellen Langer, *Mindfulness and Intelligence: A Comparison*, 25 EDUC. PSYCHOLOGIST 305, 314 (1990). Seamone cautions:

To practice judicial mindfulness, judges must understand what they are trying to gain awareness over. It could be an alternative theory or a reason why they are physically or emotionally disturbed whenever they think about one of the lawyers they had never before met. It could be awareness of a litigant’s unfamiliar situation in life, which they had never considered or experienced. It could also be the most suitable definition of a word used by the parties to a contract when the dictionary offers multiple conflicting meanings of the word.

Seamone, *supra* note 236, at 37.

²⁴⁸ *Id.* at 48-52.

²⁴⁹ *Id.* at 52-58.

achieve enhanced awareness,²⁵¹ and cognitive therapies to enhance awareness.²⁵² These self-therapeutic measures are provided as a means by which judges may come to know themselves and in that knowledge, be aware that discretion is being exercised so that it is not exercised subconsciously or unconsciously.²⁵³

Each of the above-described approaches is founded upon the understanding that judges accept that bias may interfere with discretion and undermine reasonableness in sentencing.²⁵⁴ Pursuing means to address bias requires educational opportunities and commitment to such opportunities.

IV. Embracing Informed Discretion

Law is a means to construct and maintain social order. Judges are students of law, but very few have the benefit of also studying social psychology, except as a hands-on consequence of exercising the discretionary function accorded to judges. As judicial education has evolved, the opportunity for interdisciplinary study incorporating information on the developing

²⁵⁰ *Id.* at 58-68.

²⁵¹ *Id.* at 68-72.

²⁵² *Id.* at 72-75.

²⁵³ One means of enhancing judicial mindfulness may be to mandate more written opinions. However, the empirical data also supports the conclusion that written opinions may simply be a means of “verbal overshadowing” for which verbal justifications may have “negative” effects on judicial decision-making. Oldfather, *supra* note 50, at 1286, 1342-45. “What is not clear, though potentially of great significance to the operation of our judicial system, is the extent to which the analysis of indeterminate questions of law is susceptible to verbal overshadowing.” *Id.* at 1343. For now, the best that can be said is that “research suggests that the common understanding concerning the utility of judicial opinions usually holds true. In most cases the process of writing will improve the underlying decision or at worst have no effect on it.” *Id.* at 1286.

²⁵⁴ Guthrie et al., *supra* note 50, at 37-43 (suggesting a variety of means of enhancing judicial cognitive functioning and concluding that judges have the ability to counteract implicit bias).

understanding of implicit attitudes, the potential impact on discretion, and the means to recognize and possibly counteract that impact. Yet there are obstacles to embracing such education including limited resources and lack of awareness.

A. Obstacles to Education

Recent developments in the study of social cognition conveniently correspond with the uptick in judicial discretion brought about by the U.S. Supreme Court decisions enlarging judicial discretion in sentencing decisions based upon advisory guidelines, but limited primarily by a reasonableness appellate review.²⁵⁵ Thus, if one even marginally accepts the social psychology studies that suggest bias may operate at a subconscious or unconscious level, then one must also recognize that implicit attitudes may undermine discretionary decision-making.²⁵⁶ Research suggests that measures may be taken to counteract such biases, and as described above, judicial education programs are available to assist in that process.²⁵⁷ Yet, several obstacles stand in the way of maximizing informing discretion through judicial education.

Competition for judicial attention and action is at a premium. Judges are busy people and the demand for their attention counteracts the desire to attend such programs. Federal district judges evaluate complex federal statutory and regulatory structures, face a pressing docket consisting of both civil and criminal cases, interpret state statutory law and common law in

²⁵⁵ *Supra* Part I.

²⁵⁶ *Supra* Part III.A.

²⁵⁷ *Supra* Part III.B. and *supra* note 234.

diversity jurisdiction cases, and assess claims of federal preemption.²⁵⁸ Moreover, judges are administrators of their courtrooms; consequently, judges address related managerial issues.²⁵⁹ Thus, even when judges have time to attend educational programs, and there are many available programs, judges must be convinced that choosing a program on discretionary decision-making will be more valuable than one that covers substantive legal issues such as recent changes in the tax code or in environmental law.²⁶⁰

Another concern is that in a national economy that is tightening budgets, the cost to train judges might be weighed against the cost to spend that money elsewhere.²⁶¹ For judges, one issue is competitive salaries for judges that compensates for the relative loss in earning power over the last quarter-century.²⁶² Convincing judges that educational programs offer value, and convincing the public that the need for training exists, without undermining the overall status of the judiciary is the key.

As mentioned, federal district judges are not required to attend educational programs.²⁶³

Consequently, perhaps the most efficient way to introduce judges to training on discretionary

²⁵⁸ See JUDICIAL CASELOAD PROFILE, *supra* note 37 (as of Sept. 30, 2007, there were 479 pending cases on average for federal district judges, the second highest level over a six-year period).

²⁵⁹ See Judith Resnik, *Trial as Error, Jurisdiction as Injury: Transforming the Meaning of Article III*, 113 HARV. L. REV. 924, 942-43, 949-50, 954-55 (2000).

²⁶⁰ See WHITE & CONNER, *supra* note 170 (JERITT indicates that during the years 1990-2005, 144,731 education programs have been offered throughout the United States and abroad to train local, state, federal, and international judges; JERITT categories the courses into 23 broadly defined topics (civil law and procedure, evidence, jury, organizational management, probate, etc.) and over 500 topical subdivisions).

²⁶¹ See Thomas Langhorne, III, *Foreward* to Maureen E. Conner, *Conducting Impact Evaluation for Judicial Branch Education* vii, 29-31 (JERITT Monograph Eleven 2002) (discussing the difficulty in attributing monetary values to the benefits and costs of judicial education, and offering means to collect data, and to identify and measure change).

²⁶² See *supra* notes 151, 152.

²⁶³ See U.S. CONST. art. III, § 1.

decision-making is to offer it in connection with the introductory training judges receive upon taking the bench.²⁶⁴ Two subjects typically covered in the new-judges training are judicial ethics and working with the U.S. Sentencing Guidelines.²⁶⁵ The duty to be fair and impartial is critical to judicial ethics.²⁶⁶ The introductory materials on cultural competence would simply plant a seed in the judge’s consciousness that connects cultural competence to judicial ethics. Further training could then be offered in the follow-up training session that occurs about one year into the judicial appointment.²⁶⁷ Additional programs to update judges on the latest science, to encourage exploration of means to raise awareness of implicit associations or to combat biases, could be offered bi-annually at judicial conferences as a plenary session, or more or less frequently as demand requires or experience demands. If offered through these vehicles, then the additional cost of training would be insubstantial, but the benefit to those served by the courts might be incalculable.

B. Finding the Tipping Point

In *The Tipping Point*, Malcolm Gladwell considers “how little things can make a big difference.”²⁶⁸ Gladwell considers how social epidemics occur, recognizing that change does not occur at a steady pace, but at times, it geometrically progresses after reaching a tipping point.²⁶⁹

²⁶⁴ See *supra* note 164.

²⁶⁵ See *id.*

²⁶⁶ See MODEL CODE OF JUDICIAL ETHICS R. 2.2 (2007); see also Neary interview, *supra* note 164 (“When judges get together, I’m impressed by how often I hear them talk about fairness.”).

²⁶⁷ See *supra* note 165.

²⁶⁸ MALCOLM GLADWELL, *THE TIPPING POINT* (2002).

²⁶⁹ *Id.* at 10-12.

He offers three rules to explain how the spread of any idea, whether it is a community project or simply a consumer good, is often contingent upon a few simple factors.²⁷⁰ The first rule, the “Law of the Few,” acknowledges that there are exceptional persons who live among us who have greater influence on trends than the rest of us.²⁷¹ The second rule, the “Stickiness Factor,” acknowledges that “there are specific ways of making a contagious message memorable; there are relatively simple changes in the presentation and structuring of information that can make a big difference in how much of an impact it makes.”²⁷² The third rule, the “Power of Context,” concludes “that human beings are a lot more sensitive to their environment than they may seem” and therefore, sometimes the smallest details matter in getting them to change their behavior.²⁷³ Theoretically, by employing the rules, one can “deliberately start and control positive epidemics.”²⁷⁴

Gladwell’s rules could form the foundation of what should be done to encourage a proactive approach by judges to cultural competency. The law of the few relies upon what Gladwell terms “Connectors, Mavens, and Salesmen.”²⁷⁵ Connectors are persons “with a truly extraordinary knack of making friends and acquaintances.”²⁷⁶ Thus, when a Connector reads a good book or eats at a restaurant that is especially enjoyable, the Connector may mention it to his

²⁷⁰ *Id.* at 29.

²⁷¹ *Id.* at 22.

²⁷² *Id.* at 25.

²⁷³ *Id.* at 29.

²⁷⁴ *Id.* at 14.

²⁷⁵ *Id.* at 30.

²⁷⁶ *Id.* at 41.

or her friends, but because of the unusually wide social network, the Connector may influence more people to read the book or dine at the restaurant.²⁷⁷ The Connector not only knows lots of people, but moves in a variety of social circles, so that the connector is the avenue interconnecting those circles.²⁷⁸ The political nature of nominating judges lends itself well to the conclusion that among federal district judges there are a fair number of Connectors. One key to influencing judicial involvement and enthusiasm for cultural competency education is to ensure that those influential judges have the opportunity to experience the training and become confident that it is worth their time, so that they recommend such training.

Mavens are a second group of persons identified by Gladwell as significant to disseminating an idea or beginning a trend. Much as Connectors may be considered “people specialists,” Mavens are “information specialists” who accumulate information and also share that information with others.²⁷⁹ People seek out Mavens for information and rely upon the Maven because the Maven is the recognized specialist. Mavens are “information brokers, sharing and trading what they know.”²⁸⁰ Sometimes a person may be both a Connector and a

²⁷⁷ *Id.* at 55.

²⁷⁸ *Id.* at 46-51. Gladwell provides the example of Paul Revere’s ride: “[Revere] was a fisherman and a hunter, a cardplayer and a theater-lover, a frequenter of pubs and a successful businessman. He was active in the local Masonic Lodge and was a member of several select social clubs.” *Id.* at 56. Thus, when Revere rode northward to alert the neighboring communities that the British were coming, people reacted to the news and arrived in Lexington and Concord prepared to fight by dawn’s first light; in contrast, William Dawson, rode out in a southward direction that night to deliver the same news, but nearly no one showed up to fight against the British. *Id.* at 30-33, 56-59. Gladwell attributes the distinction to the fact that word-of-mouth was critical to the dissemination of the news, and Revere was far more effective because he knew so many people in the surrounding communities that he would know whom to contact to effectively distribute the message. *Id.* at 57-59.

²⁷⁹ *Id.* at 59-60. Gladwell describes the Maven as “the person who connects people to the marketplace and has the inside scoop on the marketplace.” *Id.* at 62.

²⁸⁰ *Id.* at 69.

Maven, but not always. Nevertheless, both contribute to word-of-mouth spread of information. Many judges are nominated because they are recognized for their intellect, and some of those encompass Maven qualities. Mavens are teachers.²⁸¹ Enlisting the aid of the Maven judges to recommend the judicial education programs is another avenue to success. Indeed, some judicial education programs enlist judges as teachers for cultural competency programs because judges may be more receptive to such information coming from judges.²⁸²

Gladwell identifies a third group of persons, Salesmen, as completing the word-of-mouth specialists. Salesmen (or Salespersons) possess “the skills to persuade us when we are unconvinced of what we are hearing, and they are as critical to the tipping of word-of-mouth epidemics” as Connectors and Mavens.²⁸³ The Salespersons have a charisma that radiates from them in both obvious and subtle ways, from smiling and effusive behavior to physical movements that harmonize with others making them feel both trusting of and at ease with the Salesperson.²⁸⁴ Salespersons sound more like the politicians who nominate judges rather than judges themselves. Especially since judges are expected to be impartial, and therefore not in the business of persuading others. Nonetheless, judges are lawyers by training, and persuasion is key to good lawyering. Thus, Salespersons are likely to be found among federal district judges. Moreover, to make cultural competency training successful, money is required to fund the

²⁸¹ *Id.*

²⁸² NJC, FACULTY MANUAL, *supra* note 234, at 3; *supra* note 164. Some judges may view a course on unconscious bias as a criticism of judicial performance of a fundamental part of their job; consequently when offering programs on bias, the Federal Judicial Center ensures that a judge is on the faculty panel. Neary interview, *supra* note 164.

²⁸³ GLADWELL, TIPPING POINT, *supra* note 268, at 70.

²⁸⁴ *Id.* at 84-86.

training and the politicians who nominate judges also influence budgetary choices (at least in a macroeconomic sense). Thus, whether a judge, a politician, or simply an administrator, a Salesperson can significantly influence the desire for education programs by persuading the uncommitted that the financial investment and personal time investment are worth the price.

Gladwell's Stickiness Factor is critical to the movement in that the message has to resound with the judges. Getting the right mix of persuasion, information, and training, is critical to the process.²⁸⁵ The Model Curriculum for Judges provides a mix, first engaging in activities to demonstrate that humans tend toward similar behavior under certain conditions. The shared experiences are then built upon by providing social psychological explanations for the experiences. Finally, having defined the challenge, judges are provided with information to face and counteract implicit bias. Part of the challenge to cultural competency training, however, is getting the judges to follow through from training to courtroom.²⁸⁶ If judges find this part of the training does not carry through, then they will be less likely to return for further instruction, and choose instead to spend their educational time and dollars on subjects that appear to yield a

²⁸⁵ *Id.* at 93.

²⁸⁶ See NJC, MODEL CURRICULUM, *supra* note 3, PowerPoint slides 31-42; NJC, FACULTY MANUAL, *supra* note 234, *Action Plan* (form for judges to complete at end of program); See Blair, *supra* note 6, at 250; GLADWELL, TIPPING POINT, *supra* note 268, at 96-98. Gladwell recounts a fear experiment conducted by social psychologist, Howard Levanthal, using college seniors at Yale University. *Id.* Students were divided into groups with some groups getting a pamphlet extolling the virtues of obtaining a tetanus shot by graphically emphasizing the dangers of tetanus, whereas the other group received a pamphlet simply explaining the benefits and the risks. *Id.* Although the group that received the graphic version of the pamphlet was more concerned about the dangers of tetanus, both groups failed at very high rates to affirmatively seek out getting the shot. *Id.* When the experiment was altered by adding a map of the campus with directions to the health services including the hours during which free shots were offered, the rate of those obtaining shots jumped from 3% in the first test to 28% in the second test, with equal numbers of students from the high-fear and low-fear groups seeking inoculation. *Id.* Gladwell concludes as seniors, most students already knew the location of health services, but the map with times and locations provided a means by which the students could move from information to action. *Id.*

higher return. Suggestions such as judicial mindfulness, discussed above, are part of the effort to bring theory into practice.²⁸⁷ In practice, cultural competency programs are being tested and fine-tuned in the state judicial education programs, where bias training has been part of the curriculum for years.²⁸⁸ Gladwell instructs that paying “careful attention to the structure and format” of the material sought to be conveyed “can dramatically enhance stickiness.”²⁸⁹

Gladwell’s third rule, the Power of Context, recognizes that social “[e]pidemics are sensitive to the conditions and circumstances of the times and places in which they occur.”²⁹⁰ Thus, individuals behave better under conditions that create a sense of order than they do in conditions or circumstances that appear to permit disorder.²⁹¹ For judges, context matters as well. Judicial education offered by judges, for judges, recognizes the challenges of their

²⁸⁷ See Seamone, *supra* note 236, at 48-75 (proposing a variety of ways to practice judicial mindfulness, and recognizing that not all approaches work for every person or for every problem).

²⁸⁸ See NJC, FACULTY MANUAL, *supra* note 234, at Preface and Acknowledgement (this model curriculum has been taught in California by the California Center for Judicial Education and Research for a number of years).

²⁸⁹ GLADWELL, TIPPING POINT, *supra* note 268, at 110. Moreover, Gladwell highlights that the lesson of stickiness is that [t]here is a simple way to package information that, under the right circumstances, can make it irresistible.” *Id.* at 132. The difficulty, of course, is finding the “simple” way. “The ideas have to be memorable and move us to action.” *Id.* at 139.

²⁹⁰ *Id.* at 139. Gladwell cites the “Broken Window” theory that was implemented by New York City in the 1990s. *Id.* at 140. Criminologists James Q. Wilson and George Kelling theorized that “crime is the inevitable result of disorder.” *Id.* at 141.

If a window is broken and left unrepaired, people walking by will conclude that no one cares and no one is in charge. Soon, more windows will be broken, and the sense of anarchy will spread from the building to the street on which it faces, sending a signal that anything goes.

Id. at 141. Faced with a high crime rate on its subway cars, the New York Transit Authority began a physical clean-up process of the system in the mid-1980s by eliminating graffiti from the cars exteriors and interiors, and once that was accomplished (six years later), police officers were brought in to monitor the subway for fare-beaters. Once word spread that even minor crime would not be tolerated, the criminals stayed away, or at least left their weapons at home. *Id.* at 144-45.

²⁹¹ *Id.* at 167-68.

position, especially the ethical requirements and expectations. The training places them in with a group of judges experiencing at the same time the self-realization that biases and implicit associational prejudices are inherent in the structure of the brain and widely-shared, even among judges. The context that they are not alone in their struggles as judges (even if their decisions are made in isolation), can be critically important to the success of the training. Gladwell also points to group size as a “subtle contextual factor that can make a big difference.”²⁹² The Model Curriculum for Judges encourages facilitating discussion among judges as a means of buying into the program.²⁹³ The interactive nature of the training suggests that a group size sufficiently intimate to share experiences is a good idea, but that a group too small is uncomfortably intimate, whereas as group too large loses the force and focus of the training. Thus, group size is critical in that information can be shared, personal bonds can be formed, and the collective peer pressure of the group can spur on the effort of all the students to embrace the mechanisms offered to counteract bias.

The rules offered by Gladwell have been used in a variety of contexts to divine the tipping point.²⁹⁴ The idea presented in this article is to provide judicial education that is valuable to federal district court judges in meeting their professional and ethical obligations to be fair and impartial in exercising discretionary authority in sentencing decisions. Gladwell’s approach to locating the tipping point is instructive as well as encouraging in that cultural competence

²⁹² *Id.* at 182. Professor Mills also considered group size in training professionals. *See* MILLS, *supra* note 41.

²⁹³ *See* NJC, FACULTY MANUAL, *supra* note 234, at 7-10.

²⁹⁴ GLADWELL, TIPPING POINT, *supra* note 268, at 261-64.

training developed for judges appears to incorporate many of Gladwell's lessons. Enlisting Connectors, Mavens, and Salespersons to encourage and support judicial education to enhance awareness of social cognition can impact discretion. Just as judges must self-reflect to address their inherent biases, so must judges find the Connectors, Mavens, and Salespersons among themselves and their associations to generate the enthusiasm for educational training aimed at fairer decision-making.

Of course, the ultimate "connectors," "mavens," and "salespersons" for purposes of federal sentencing may be the appellate judges. *Booker* did not just restore discretion to federal sentencing, it also provided for appellate review under a standard of reasonableness.²⁹⁵

Sentencing in accordance with the cognitive flaws and cultural biases identified in the emerging social science evidence cannot be termed reasonable, as it has been proven that these influences corrupt decision-making.²⁹⁶ Appellate courts should exercise vigilance in reviewing sentences that may be the outcome of unreasonable reliance upon flawed cognitive factors; in doing so, the appellate courts will be highlighting factors that may influence sentences inappropriately, as well as teaching district courts the value of judicial education regarding the social science of cognition.

To the extent the judiciary fails to counter cognitive flaws in sentencing, it will invariably create political pressure in favor of more restricted judicial discretion over federal sentencing.

²⁹⁵ United States v. Booker, 543 U.S. 220, 260-61 (2005).

²⁹⁶ Guthrie et al., *supra* note 50, at 28, 43.

Public scrutiny of abusive, excessive or overly lax sentences is a constant.²⁹⁷ Congress has already demonstrated its potential for depriving the judiciary of sentencing discretion, and commentators agree that nothing in *Booker* precludes such intervention in the future.²⁹⁸ In fact, the SRA was itself prompted in part by congressional outrage at perceived discrimination in sentencing.²⁹⁹ Commentators have already voiced concern that the judiciary will once again fall prey to cognitive flaws such as in-group bias in sentencing regarding white collar crime.³⁰⁰ Therefore, in order to assure that Congress does not force a return to a more rigid sentencing regime, federal appellate courts must police the discretion exercised by district courts in sentencing with a view towards avoiding the very pitfalls predicted by the best science available regarding social cognition. This means that appellate courts should act affirmatively to encourage appropriate judicial training, as suggested in this article.

V. Conclusion

Recent changes in federal sentencing have shifted discretionary decision-making back to

²⁹⁷ Very recently the news media highlighted the very long sentences meted out to two prominent African American doctors in Gary, Indiana, for writing illegal prescriptions; even though the jury acquitted them of the vast majority of allegations against them they were sentenced to serve five and sixteen years in prison, prompting a law professor to ask, “Is the judge nuts?” Don Terry, *Bad Medicine or Bad Justice?* CHI. TRIB. MAG., Aug. 31, 2008, at 8, 10 (quoting Northwestern University Law School Professor Albert Alschuler).

²⁹⁸ Allen & Hastert, *supra* note 35, at 200 (stating that Congress could reassert its authority over sentencing without necessarily violating *Booker*); Berry, *supra* note 35, at 667-71 (suggesting congressional clarification of *Booker*).

²⁹⁹ Kennedy, *supra* note 31, at ix (calling discrimination in federal sentencing a “national disgrace” prior to the SRA).

³⁰⁰ Daniel A. Chatham, Note, *Playing with Post-Booker Fire: The Dangers of Increased Judicial Discretion in Federal White-Collar Sentencing*, 32 J. CORP. L. 619-20 (2007) (“by routinely departing downward or giving non-guidelines sentences in white collar cases, judges run the very real risk of provoking a response from Congress in the form of mandatory minimum sentences for white collar crimes, which would further decrease judicial sentencing discretion.”); Bibas, *White Collar Plea Bargaining*, *supra* note 35, at 724, 740-41.

federal district court judges, while appellate courts review challenged sentences for reasonableness. Each judge brings considerable legal experience and qualifications to the bench, however, cultural experiences cannot necessarily prepare judges for the range of persons or situations they will address on the bench. Social psychologists who have studied social cognition have determined that the human brain creates categories and associations resulting in implicit biases and associations that are often unconscious or subconscious. Moreover, research suggests that such biases may be overcome or at least compensated by training on awareness of bias and countermeasures. Cultural competence training provides judges the opportunity to inquire within themselves, and to acquire and consider information outside their experience and expertise. Training does not tell judges what to think, but instead provides tools for self-examination. Identifying unconscious preferences or biases and learning effective mechanisms for managing and changing unwanted preferences can impact the reasonable exercise of discretion on a case-by-case basis in sentencing decisions.

Judges are expected to render decisions impartially. Nowhere is the need more critical than judicial determinations impacting liberty interests by imposing criminal punishment, and in particular, imprisonment. Lack of awareness or training is likely to lead to suboptimal sentencing outcomes based upon in-group bias, inaccurate cultural associations, and other cognitive flaws that will invite further political disruption. In contrast, investing in cultural competence and social cognition educational training, and structuring programs to encourage interest in and attendance at such programs, can help judges improve their discretionary decision-making by overcoming any latent biases, and thereby benefit society through a more

just legal system.