

Influences on Judicial Decision-Making in Federal and Bankruptcy Courts¹

By Yao Wu and Olga Yevtukhova

¹ The authors wish to thank District Judges Joseph L. Tauro, Michael A. Ponsor and William J. Young and Mr. Richard E. Mikels of Mintx, Levin, Glovsky, Levin and Popeo, P.C. for providing us with the opportunity to interview them for this paper. We would also like to thank District Judge Nancy Gertner and her Judicial Assistant Gail MacDonanld for providing us with a working draft of the paper written by Ryan W. Scott, "In Search of the Booker Revolution".

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I. Introduction

Good judging is one of the cornerstones of the American legal system. The strength of the judicial system depends on the commitment of judges to their post and the quality of decisions that judges make. Not surprisingly, the process of judicial decision-making is a topic that has intrigued many legal scholars. To make these decisions, judges may need to find facts, or to apply legal principles based on *stare decisis* or the law as codified by the legislature. However, scholars have argued that other influences also exist in judicial decision-making. Unlike the majority of research that has been done which focuses on the U.S. Supreme Court, U.S. Circuit Courts of Appeals, and state courts of last resort, this paper focuses on the decision-making processes of trial judges in the federal courts and courts of specific jurisdiction— judges who have to hear evidence, make findings of fact, hand down rulings, and impose criminal sentences. Specifically, this paper focuses on federal judges who are appointed under Article III of the Constitution (federal district judges, bankruptcy judges and administrative law judges).

The overarching goal of this paper is to examine the extralegal factors that influence the decision-making process of judges. To that end, this paper will inquire into what sources of extralegal influences on judicial decision-making affect the availability of judicial discretion and impact the role of the trial judge. The first part of this paper will briefly review the role of the judge in the American legal system. The second part of this paper will discuss the theories of judicial decision-making. The third part of this paper will examine how those theories explain the factors judges have considered in rendering decisions. The fourth part of this paper will focus on a specific area where the judiciary exercises discretion, specifically, sentencing. The final part of this paper will examine the discretion and influences demonstrated by federal bankruptcy judges.

II. Influences on Judicial Decision-Making

There are a multitude of different factors that influence a judicial decision on the merits. It is hard to imagine that any particular list of factors can be exhaustive; the influences clearly include the facts of the case, the law, *stare decisis*, and the idiosyncratic characteristics of the justices.² Other factors include self-expression (for example, of political preferences); esteem (concern for reputation and prestige), which in turn would make a judge averse to being reversed; the judges' normative beliefs about the role that he holds (expectations that constrain judicial attitudes or direct judicial behavior); and emotional and psychological factors also come into play in influencing decisions and the exercise of discretion.³ Although most social factors proved insignificant, in statistical studies the following factors had the strongest impact on decision-making: prior employment or career (for example that of a criminal lawyer), the potential to be promoted to court to appeals, and the perceived impact on future workload (i.e., an economic model of decision making).⁴

In our interviews with federal district court judges, we asked them how they view themselves and how they approach the process of judicial decision-making. The sources of influence they cited, implicitly and explicitly, do not conform to a single theory of judicial decision-making. Rather, the legal and extralegal factors that form the basis for judicial decisions emerge from a range of sources.

² Scholars have also posited a “small group” hypothesis, which explains that the need to interact in a “face to face context” affect the behavior of judges on collegial courts. See Nancy Maveety, *The Pioneers of Judicial Behavior* 53 (Nancy Maveety ed., 2003). However, this affects mainly appellate courts where decisions are made on a collaborative basis and agreement has to be reached by a sufficiently large coalition to create a majority.

³ See Lawrence Baum, *The Puzzle of Judicial Behavior* 32 (The University of Michigan Press, 1997).; see also *Pioneers of Judicial Behavior*, *supra* note 1, at 206.

⁴ Gregory C. Sisk, Michael Heise, Andrew P. Morris, *Charting the Influences on the Judicial mind: An Empirical Study of Judicial Reasoning*, 73 N.Y.U. L. REV. 1377, 1383-1384 (Nov. 1998)

III. The Many Roles of the Judge in the American Legal System

American judges exercise power and independence and command respect that, according to some, is unparalleled in history.⁵ Much of their importance is derived from the perception that judges serve the state by insulating themselves from personal and partisan interests.⁶ Unlike the lawyer, who serves as an intermediary between the layperson and the justice system and operates on a functional level, judges serve a functional purpose as well as a symbolic one.⁷ Judges embody the judicial system and their conduct, including extra-judicial conduct, can affect the public's perception of the judicial system.⁸

Judge William Young has repeated on various occasions a quote from Justice John Henry Meagher, a senior justice of the Massachusetts Superior court: "This is a trial court. Trial judges ought to go on the bench every day and try cases."⁹ This emphasizes that the main role of the judge is to preside over resolving disputes that the parties cannot resolve themselves. During his Senate confirmation hearings, Chief Justice John Roberts characterized the job of a judge as that of an umpire's, "to call balls and strikes and not to pitch or bat."¹⁰ U.S. District Court Judge Joseph Tauro has echoed this analogy as well. In addition to their role in court, judges play a myriad of roles outside of the courtroom and in public view. Judges are "society's teachers of law."¹¹ They serve as role models; society "expects [them] to epitomize and articulate its most

⁵ William G. Ross, *Extrajudicial Speech: Charting the Boundaries of Propriety*, 589, in Symposium on Legal Ethics, 2 GEO. J. LEGAL ETHICS 589, 589 (1989).

⁶ *Id.*

⁷ *Id.* at 733.

⁸ *Id.*

⁹ Honorable William G. Young, *Vanishing Trials, Vanishing Juries, Vanishing Constitution*, 40 SUFFOLK U. L. REV. 67, 92 (2006).

¹⁰ Jack Shafer, *The Supreme Court Imitates the World Series*, Slate, Sept. 13, 2005, available at: <http://www.slate.com/id/2126241/>.

¹¹ Young, *supra* note 8, at 93.

basic values.”¹² It is important to note that a federal judge always “possess[es] within [herself] a portion of the very sovereignty of the United States” and must interpret the Constitution in such a way so as to avoid or minimize harm.¹³ Moreover, judges can connect with other branches of government and “have always played an important extrajudicial role in the legislative process by proposing, drafting, testifying on, and lobbying for and against” proposed legislation that affects federal courts.¹⁴

We focus primarily on the adjudicative nature of the judicial profession, in particular, how trial court judges reach their decisions. Unlike their colleagues on the appellate courts, trial judges face unique sets of facts and circumstances on a daily basis. They must make determinations of fact and law while keeping in mind the possibility that their decisions may be overturned. Furthermore, they must consider how the public and their colleagues in the legal and judicial communities will view their decisions.

IV. Theories of Judicial Decision-Making

To understand the “puzzle of judicial behavior”¹⁵, it is helpful to understand the approaches that academics have taken to explain the actions of judges. The oldest approach to deciphering judicial behavior is the attitudinal model, which expects judges¹⁶ to be guided by their ideological preferences to make good public policy, choosing between alternatives based on their merits as policy.¹⁷ In a pure legal model, judges want “only” to interpret the law as best they can and choose between alternative case outcomes and doctrinal positions on the basis of

¹² *Id.*

¹³ Young, *supra* note 8, at 94.

¹⁴ Charles Gardner Geyh, *Paradise Lost, Paradigm Found: Redefining the Judiciary’s Imperiled Role in Congress*, 71 N.Y.U. L. Rev. 1165, 1168 (Nov. 1996).

¹⁵ See generally *The Puzzle of Judicial Behavior*, *supra* note 2.

¹⁶ Especially Supreme Court Justices.

¹⁷ *The Pioneers of Judicial Behavior*, *supra* note 1, at 53. See also Baum, *supra* note 2, at 5-6.

their *legal* merits.¹⁸ Finally, in a strategic model, judges want to make good policy, defined in terms of outcomes in their court and in government as a whole; therefore, they may deviate from a preferred policy position as a way of helping to secure the best outcome.¹⁹ The “strategic” judges “do not simply do the right thing as they see it,” but rather, they seek to have the “right thing.”²⁰ Another way to understand judicial choices is to employ an economic approach. Judges are rational actors, and as such, they allocate their time between particular judicial and non-judicial activities that maximize a utility function of income, leisure, and judicial voting.²¹ Public choice theory “suggests that empirical research into judicial decision-making needs to take into account not only sociological background variables, but also the legal context and reasoning of the opinions through which judges express their views.”²² Unlike legal scholars, some judges assess their own approach to judicial decision making as commitment to a professional role, like Judge Robert E. Keeton does in the introduction to his seminal book, *Judging in the American Legal System*:

Judging is a choice. Choice is power. Power is neither good nor evil except as it is allocated and used. Judging in a legal system is professional. Professionals, including judges, represent interests other than their own. One who accepts a professional role in a legal system accepts an obligation to confine the exercise of power within the limits of authority. For each professional role the limits of authority are defined by law. The quality of judging in a legal system depends on

¹⁸ Lawrence Baum, *Judges and Their Audiences: A Perspective on Judicial Behavior* 5 (Princeton University Press, 2008).

¹⁹ *Id.*

²⁰ *Id.*

²¹ Richard A. Posner, *What Do Judges Maximize? (The Same Thing Everybody Else Does)*, (John M. Olin Law and Economics, Working Paper No. 1, Mar. 1993) (describing a model for an average appellate judge where judicial utility is a function of income, leisure, and judicial voting); *see also* Richard A. Posner, *How Judges Think* 42 (Harvard University Press, 2008).

²² *Supra* note 3, at 1392.

commitment. It depends first on commitment to the aim of justice; second, it depends on commitment to professionalism. Third, the quality of judging depends on commitment to method. Judicial choice at its best is reasoned choice candidly explained.

ROBERT E. KEETON, *JUDGING IN THE AMERICAN LEGAL SYSTEM 1* (Lexis Law Publishing, 1999).

A. Unique Factors Affecting Trial Court Judges

While some judges (for example, those who are elected for a term of years or those with promotion to the next-level court in mind) may act with certain motivations, Article III federal judges are unique due to their lifetime tenures, isolation from political pressure, and stature within the justice system. Judges generally tend to lateral into the federal judiciary, usually being appointed in their 40s or 50s after a career in another area of the legal profession.²³ There are a number of limitations on possibilities for an increase in income or promotion, because promotion from one tier of the judiciary to another is unusual, appointment to a higher-paying job in the private sector is rare, no bonuses are given for exceptional performance, pay is not docked for poor performance, and outside income is strictly limited.²⁴

B. Judicial Audiences

Moreover, appellate and trial court judges have different audiences whom they address. Supreme Court Justices address markedly different audiences than federal district court judges or bankruptcy judges. Salient reference groups would differ from one judge to the other, including

²³ William M. Landes and Richard Posner, *Rational Judicial Behavior: A Statistical Study*, 4 (Apr. 14, 2008), available at <http://epstein.law.northwestern.edu/research/LandesPosner.pdf>.

²⁴ *Id.* at 4-5.

the litigants who are before them, the legal community, fellow judges, the general public, people in other branches of government, policy groups, social groups, and in some instances even news media.²⁵ For example some judges may care a great deal about legal academia, and it may be entirely irrelevant to others.²⁶ Judges care about the approval of their personal audiences, and their perceptions of what may win that approval would shape their choices.²⁷ However, the forces that determine the relevant audiences for judges are far from determinable, as they are shaped by judges' life experiences, career paths and current circumstances, such as which court the judge sits on.²⁸ Federal district judges are tied more closely to their geographical communities and may receive less scrutiny from the legal community than Supreme Court Justices or judges on the courts of appeals, which may shape judges' orientations.²⁹

As a judge's audience changes, the influences that shape judicial decision-making shift as well. Thus, the studies of legal scholars that examine the behavior of appellate judges or Supreme Court Justice do not directly translate to lower court Article III judges because the conceptions of judicial behavior that scholars bring to higher courts may not apply well to lower courts and they certainly don't examine such factors as impact of appellate review or disposing of cases efficiently due to heavy caseloads.³⁰ For example, when Judge Michael Boudin was appointed Chief Judge of the First Circuit Court of Appeals, he made the court's efficiency his top priority. He stated that his "main concern is to make sure the machinery operates smoothly so that judges, and especially trial judges, can get cases decided efficiently and comfortably."³¹ In his book, *Judges and Their Audiences*, Lawrence Baum admits that scholars frequently don't

²⁵ *Judges and Their Audiences: A Perspective on Judicial Behavior*, *supra* note 17, at 163.

²⁶ *Id.* at 165.

²⁷ *Id.*

²⁸ *Id.* at 167 - 169.

²⁹ *Id.* at 169.

³⁰ *Id.* at 168-170.

³¹ Wendy L. Pfaffenbach, *Court's Efficiency Tops Priority List for Boudin*, MASS. LAW. WKLY., July 9, 2001.

know how to think about lower court judges.³² That is why in this paper we chose to focus on these judges specifically and turned to first-hand interviews to determine what influences specific judges.³³

V. Attitudinal Model of Decision-Making

Many empirical studies have shown that the ideological, behavioral model of judicial decision-making is the best predictor of judicial behavior and extralegal factors are poor predictors of judicial behavior because of their limited influence.³⁴ Empirical research of appellate court judges and Supreme Court Justices shows that “judges appointed by conservative presidents consistently reach more conservative decisions than those appointed by liberal presidents.”³⁵ Such findings give legal scholars even more cause to worry about the abuse of judicial discretion. Trial court judges are not appellate court judges, though, and the attitudinal model may not serve to fully explain their decisions.

In our interviews, we found that the federal district court judges we spoke to tend to consider their decision on a case-by-case basis. Such an approach is particularly important to them when imposing criminal sentences, where the individual’s particular circumstances may warrant departure from the federal sentencing guidelines (the “Guidelines”). They did vary slightly with regards to their sentencing procedure though all three used the Guidelines as a jumping off point.

VI. Strategic Model of Decision-Making

³² *Id.* at 171.

³³ See Appendix A: Interview Questions.

³⁴ *Judges and Their Audiences: A Perspective on Judicial Behavior*, *supra* note 17, at 188.

³⁵ *Id.*

Judicial decision-making is also constrained by externalities, and the strategic model may help understand these constraints better in that “judicial decisions are influenced by judges’ anticipation of the reactions of other actors to judicial decisions, particularly the reactions of other governmental institutions.”³⁶ The federal judiciary is subject to checks by other branches of government.³⁷ However, it is rare to find a direct conflict between other branches of the government and the judiciary. The rarity of institutional attacks on the federal judiciary can be explained by two factors: 1) judges tend to be in the “political mainstream and rarely ventures into radical positions that would require and external response”; and 2) when they do stake radical positions, judges anticipate the likely response to their actions and “moderates [their] position[s] accordingly.”³⁸

Judge Young used to have a reputation as one of the harshest sentencers on the district court.³⁹ Post-*Booker*, he believes that he has returned to the “middle.”⁴⁰ Such a change in his sentencing practices may partly be attributed to Judge Young’s concern for his “harsh” reputation. The judges we spoke to also take into account whether their decisions will be appealed and reviewed by an appellate court. Judge Young said that he does not overly worry about being overturned, but he does read the appellate decisions, and he will follow the appeals process to the extent that he sends his clerks to watch the oral arguments.⁴¹ Being overturned “hurts” him, and he considers it “fortunate” that it has only happened a few times.⁴² Judge Young said that he is generally persuaded by the appellate court’s reasoning, which results in

³⁶ *Id.* at 191.

³⁷ *Id.*

³⁸ *Id.* at 191.

³⁹ Interview with William G. Young, District Court Judge, United States District Court, District of Massachusetts, in Boston, Mass. (May 1, 2009).

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² *Id.*

him “[eat]ing humble pie” sometimes.⁴³ Judge Tauro sends one of his clerks or interns to check whether his cases are appealed.⁴⁴ He believes that he has been “lucky” not to have been appealed that often.⁴⁵ He echoes Judge Young’s opinion that when the appellate court does overturn one of his decisions, it is a matter of “reasonable minds disagreeing.”⁴⁶

VII. Legal Realist Model of Decision-Making

In a legal decision-making model, judges seek to interpret law “accurately, without concern for the desirability of the policies that result.”⁴⁷ Since the advent of legal realism, however, legal scholars have subscribed less to a pure legal decision-making model.⁴⁸ Radical legal realists rejected almost completely the law as a basis for judicial decisions, whereas moderate legal realists left room for the law in “judges’ decision calculus.”⁴⁹

Judge Young views the judicial officer as a public officer and is aware that when he puts on his robe, he is “declaring the law.”⁵⁰ He also characterizes himself as a “Constitutional officer” who owns a “tiny bit of the sovereignty of the United States.”⁵¹ As such, to have that “sliver” means that he must “do everything [he] can do” not only to support and defend the Constitution but to make the system work as well as it can.⁵²

VIII. Pragmatic Model of Decision-Making

⁴³ *Id.*

⁴⁴ Interview with Joseph L. Tauro, District Court Judge, United States District Court, District of Massachusetts, in Boston, Mass. (May 1, 2009).

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ *Judges and Their Audiences: A Perspective on Judicial Behavior*, *supra* note 17, at 8.

⁴⁸ *Id.*

⁴⁹ *Id.*

⁵⁰ Interview with Judge Young, *supra* note 38.

⁵¹ *Id.* See Honorable William G. Young, *Vanishing Trials, Vanishing Juries, Vanishing Constitution*, 40 SUFFOLK U. L. REV. 67, 92 (2006).

⁵² Interview with Judge Young, *supra* note 38.

Judge Posner approaches judicial decision-making from a “realist” point of view, claiming that “judges are not by nature formalist in their decisions but are centrally motivated by other concerns—whatever their opinions may declare”⁵³ Posner argues that most judges are pragmatists in practice despite their ideological leanings.⁵⁴ He believes that the “ultimate criterion of pragmatic adjudication is reasonableness.”⁵⁵ However, judges “appear to rely heavily on conceptualisms and generalities, in the form of legal precedent or text,” which Judge Posner believes is “but a mask” for the real basis of the decisions.⁵⁶ While there is “ample evidence” that pragmatism is a part of judicial decision-making at least sometimes, its extent is unknown.⁵⁷

Judge Posner’s pragmatist model provides an economic explanation for the phenomenon by positing that judges are workers or “labor-market participants” who are governed by a non-monetary structure.⁵⁸ Federal judges want to “be recognized by themselves and others as ‘good’ judges.”⁵⁹ This desire for approval provides an incentive for judges to “conform to a legalist model, deciding and writing opinions according to text, precedent, and other accepted tools of legalist decision making.”⁶⁰ However, this desire is difficult to measure, and Judge Posner bases his claims on his personal experiences.⁶¹ Posner’s theory argues that judges do not conform a purely legalist model; when the law is indeterminate in resolving a legal issue, the judge is more

⁵³ Frank B. Cross, *What Do Judges Want?*, 87 TEX. L. REV. 183, 185 (Nov. 2008).

⁵⁴ *Id.* at 193.

⁵⁵ *Id.* at 194.

⁵⁶ *Id.* at 194.

⁵⁷ *Id.* at 199.

⁵⁸ *Id.*

⁵⁹ *Id.*

⁶⁰ *Id.* at 188-189.

⁶¹ *Id.* at 190.

likely to think that the law is what she “believes it ‘should’ be’ . . . sincerely trying to be legalist in orientation.”⁶²

While it is difficult to pinpoint the sources of this desire of approval, the ways in which the judges seek to present themselves to their colleagues and to the public can inform their idea of the law and the role of the judge. The judges we interviewed have all spoken about legal issues to the legal community, to the press, and in classrooms. Judge Young does not believe that the judiciary should be silent with regards to legal issues outside the courtroom. Judge Young has talked on public radio, “The Legal Network,” about the jury and motions for summary judgment. Judge Young is always open to talk to the press as he feels that he has already spoken on the issue with his robes on. He will not speak on “hot button” issues like the death penalty, abortion, or gay marriage. In fact, he believes that a United States judge has a “duty” to speak to the betterment of the system. He does think that there’s a potential downside to talking to the media, as people will “typecast you” and “judge you on your public persona.” When speaking in a public forum, Judge Tauro is careful not to engage in “off-the-wall theorizing,” which would cast a bad light on the judicial branch; he tries to make his remarks “thoughtful and accurate” when speaking outside the courtroom. He believes that part of the judge’s role is to participate in public discourse to a limited degree and considers the opinions that he writes to be part of public discourse. All three judges have also taught in academic institutions and discussed sentencing in their classes.

IX. Self-Presentation Theory

Lawrence Baum advocates a self-presentation theory of judicial decision-making. People generally want to be liked and respected by others, and their efforts to make a favorable

⁶² *Id.* at 189-90.

impression and win respect, esteem and popularity have been termed both “self-presentation” and “impression management.”⁶³ Moreover, much of people’s self-presentation may be semi-conscious and habitual, and they internalize images of themselves that they present to others.⁶⁴ Even though this happens to all people in everyday life, people in high public positions, such as judges, often operate in extraordinary situations, and the choices that they make may have bases that differ from most other people; however there is evidence that the concept of self-presentation applies to them as well, “The selection processes that determine which people become judges tend to favor those with an especially strong interest in the esteem of other people. Lawyers who become judges often give up substantial income to do so. To varying degrees they accept constraints on their activities as well. The prestige of being a judge is one of the benefits that outweigh these costs for those who pursue or accept judicial positions.”⁶⁵ Under the traditional models of judicial behavior (attitudinal, legal, or strategic) the primary goal is some combination of making good law or making good policy. However, it is questionable whether there is a concrete benefit to judges in doing either – the only benefit that judges gain from pursuing these goals is the personal satisfaction of a job well done and the anticipation of a positive audience reaction.⁶⁶ It is questionable, however, which gives the most personal satisfaction to a particular judge – making good policy or making good law, and this can be subject to the idiosyncrasies of the specific judge.⁶⁷

A. Conceptions of the Role of the Judge

⁶³ *Judges and Their Audiences: A Perspective on Judicial Behavior*, *supra* note 17, at 29.

⁶⁴ *Id.* at 29-30.

⁶⁵ *Id.* at 30-32.

⁶⁶ *Id.* at 160.

⁶⁷ *Judges and Their Audiences: A Perspective on Judicial Behavior*, *supra* note 17, at 5.

In our interviews with them, the judges conceived of the judge's role in different ways. Judge Young believes that all judges ask, "How can I do my job better?"⁶⁸ Judge Tauro characterizes the role of the judge as one of an "umpire," one who resolves disputes for people who are unable to resolve their own dispute, and as one of a mediator.⁶⁹ He feels disappointed if he cannot get the parties to settle the case.⁷⁰ He also considers judges to be "educators in a sense," as judicial opinions inform the public as to what the law should be.⁷¹ Judge Young also considers the federal judge to be a defender of the Constitution who should seek to protect it.⁷²

B. Conceptions of Themselves

When we asked the judges what reputation they think they had, they used adjectives such as "hard-working" and "respect[ful]" and "compassionate."⁷³ Judge Tauro thinks that he has a reputation as a "hard-working" judge and as someone who "shows great respect" to those who appear in front of him, both lawyers and litigants.⁷⁴ He thinks that there would be no better epitaph on his tombstone than "Joe Tauro is a really fair guy."⁷⁵ In an interview with a reporter, Judge Ponsor was told that he was perceived as a liberal.⁷⁶ Though Judge Ponsor "certainly hope[s]" that he is compassionate, he calls himself as a "moderate pragmatist."⁷⁷ Judge Young also aims to be "evenhanded and respectful of everyone."⁷⁸

⁶⁸ Interview with Judge Young, *supra* note 38.

⁶⁹ Interview with Judge Tauro, *supra* note 43.

⁷⁰ *Id.*

⁷¹ *Id.*

⁷² Interview with Judge Young, *supra* note 38.

⁷³ Interview with Judge Young, *supra* note __; interview with Judge Tauro *supra* note __; Interview with Michael A. Ponsor, District Court Judge, United States District Court, District of Massachusetts, in Springfield, Mass. (May 7, 2009).

⁷⁴ Interview with Judge Tauro, *supra* note 43.

⁷⁵ *Id.*

⁷⁶ Interview with Judge Ponsor, *supra* note 72.

⁷⁷ *Id.*

⁷⁸ Interview with Judge Young, *supra* note 38.

In considering the audiences with whom he shares his views, Judge Young first considers the litigants.⁷⁹ He also considers the appellate court, to whom he owes a professional duty to provide a record for review.⁸⁰ Judge Young then considered the public whom he serves.⁸¹ Judge Tauro considers the primary audience for his decisions to be the parties who appear before him.⁸²

C. Self-Presentation in Relation to Fellow Judges

Harry Edwards posited that for appellate court judges working toward group decisions, the collegiality of the court was an important factor in building a consensus.⁸³ While Edwards's study focused only on appellate court judges, his theory of collegiality can be extended to trial court judges. While the latter do not issue joint opinions and do not aim to reach consensus on an issue, trial court judges keep in mind what their colleagues would do in a similar situation and aim for consistency within the same district.

All the judges we interviewed described the atmosphere of the district court as collegial. According to Judge Tauro, the district court judges who sit in Boston have lunch together on a weekly basis, during which they talk about legal issues in a very general way. Judge William Young says that there is more formal interaction among judges sitting on an appellate court than among trial court judges. He believes that he and his fellow district court judges are more than professional friends, they "truly care about each other as friends." Despite sitting outside of Boston, Judge Ponsor says that he interacts frequently with his fellow district court judges. He

⁷⁹ Interview with Judge Young, *supra* note 38.

⁸⁰ *Id.*

⁸¹ *Id.*

⁸² Interview with Judge Tauro, *supra* note ____.

⁸³ See Harry T. Edwards, *The Effects of Collegiality on Judicial Decision Making*, 15 U. PA. L. REV. 1639 (May 2003).

attends monthly district court meetings – in person or via telephone, district-wide retreats where the judges talk about issues of interest to them, and in casual, friendly settings.

In particular, Judge Young has a public persona as someone who is a “pioneer” on issues like discovery and sentencing.⁸⁴ The judge is ambivalent about the existence of his public persona.⁸⁵ He understands that the persona is a result of his long history on the court and espousing views on legal issues during that time.⁸⁶ On the other hand, he does not “seek” to have a persona and does not think that judges should do so.⁸⁷ Judge Ponsor mentioned that he is aware of Judge Young and Judge Gertner’s interests in federal sentencing.⁸⁸

The amount of formal influence judges exert on each other can be measured by how often they are cited by their colleagues. Judge Young said that he likes to be cited, even if the opinions or articles disagree with him because he can learn from them.⁸⁹ He considers the dialogue among judges and commentators to be part of the formal interaction that allows the law to grow.⁹⁰ Judge Tauro thinks that all judges benefit from “cross-pollination,” by which he means when one judge’s opinion influences judges in other circuits, which happens often.⁹¹ Judge Ponsor does not compare approaches with judges in a formal manner though he does bring up tough cases with fellow judges.

Informal influences on judges’ thinking or practices can arise from mentor-mentee relationships on the bench. Judge Young and Judge Ponsor have been asked senior judges for advice and guidance when they were new to the district court.⁹² Judge Young also recounted an

⁸⁴ Interview with Judge Young, *supra* note 38.

⁸⁵ *See id.*

⁸⁶ *Id.*

⁸⁷ *Id.*

⁸⁸ Interview with Judge Ponsor, *supra* note 72.

⁸⁹ Interview with Judge Young, *supra* note 38.

⁹⁰ *Id.*

⁹¹ Interview with Judge Tauro, *supra* note 43.

⁹² Interview with Judge Young, *supra* note 38; interview with Judge Ponsor, *supra* note 72

instance of “informal influence” when two judges asked him for a “boilerplate on how to inspire jurors and introduce them to the trial.”⁹³ In a case that he has taken over for Judge Lindsay, Judge Young read an old decision by his colleague, which helps him to “see the case through [Judge Lindsay’s] eyes.”⁹⁴ Judge Tauro said that many of his younger colleagues have called him to ask for his opinion.⁹⁵

Judges Young, Tauro, and Ponsor all consider themselves as being in the “middle” in terms of the sentences they impose.⁹⁶ Judge Young used to have a reputation as the harshest sentencer in the district.⁹⁷ Now he crowds to the middle, of which he’s aware due to information from the sentencing commission.⁹⁸ Judge Young claims that his courtroom deputy clerk would say that his reputation now is as someone who frequently goes below the guidelines.⁹⁹ The judge thinks that while he imposes sentences below the lower range in the Guidelines “far more than . . . ever before,” he does not do so very frequently.¹⁰⁰ One of his former clerks, Elizabeth Smith, would also say that his reputation have changed from being among the harshest to a judge who “goes below the bottom” of the guidelines more than 50% of the time.¹⁰¹

X. Sentencing

A. Background: Sentencing Reform Act of 1984

The Sentencing Reform Act (“SRA”) was a long time in the making, and likely started brewing as early as 1922 with the Populist distrust of elite “experts” and politically

⁹³ Interview with Judge Young, *supra* note 38.

⁹⁴ *Id.*

⁹⁵ *Id.*

⁹⁶ *See* interview with Judge Young, *supra* note 38; interview with Judge Tauro, *supra* note 43; interview with Judge Ponsor, *supra* note 72.

⁹⁷ Interview with Judge Young, *supra* note 38.

⁹⁸ *Id.*

⁹⁹ *Id.*

¹⁰⁰ *Id.*

¹⁰¹ *Id.*

unaccountable judges, as best expressed by the Nebraska Senator George Norris, who said that “Federal judges are not responsive to the pulsations of humanity.”¹⁰² Prior to the SRA passing in 1984, through the course of the mid-20th century, trial judges had exclusive discretion over how they chose to sentence criminal defendants.¹⁰³ All sentences were likely to survive appeal as long as they did not exceed the legal maximum.¹⁰⁴ In 1984, Congress enacted the SRA, which was aimed at making sentencing more uniform and alleviate sentencing disparities.¹⁰⁵ The SRA created the United States Sentencing Commission (“Sentencing Commission”), which was charged with establishing sentencing policies and practices for the federal criminal justice system, which would meet the purposes of sentencing set forth in the SRA¹⁰⁶, provide certainty and fairness, and reflect as much as possible the advancement in knowledge of human behavior as it related to the criminal justice process and created the Federal Sentencing Guidelines (the “Guidelines”).¹⁰⁷ The Guidelines “reined in judicial discretion by dictating a narrow sentence range primarily based on two factors: the seriousness of the defendant’s offense and the extent of

¹⁰² United States Sentencing Commission, *Fifteen Years of Guideline Sentencing: An Assessment of How Well the Federal Criminal Justice System is Achieving the Goals of Sentencing Reform 2* (2004), available at http://www.ussc.gov/15_year/chap1.pdf.

¹⁰³ Ryan Scott Reynolds, *Equal Justice Under Law: Post-Booker, Should Federal Judges Be Able to Depart from the Federal Sentencing Guidelines to Remedy Disparity Between Codefendants’ Sentences?*, 109 COLUM. L. REV. 538, 540 (Apr. 2009).

¹⁰⁴ *Id.*

¹⁰⁵ Pub. L. No. 98-473, ch. II, 98 Stat 1837, 1987 (codified as amended at 18 U.S.C. §3551, 28 U.S.C. §991).

¹⁰⁶ This ambitious document policy included at least thirty-two (32) distinct and important policy goals, including, 1) promoting respect for the law, 2) providing just punishment for an offense, 3) deter criminal conduct, 4) protect the public from further crimes by defendants, 5) provide defendants with needed education and vocational training, 6) provide medical care and other correctional treatment, 7) broadly consider the kinds of available sentences, 8) account for policy statements by the sentencing commission, 9) avoid unwarranted sentence disparities, 10) provide restitution, 11) incapacitate offenders, 12) rehabilitate offenders, 13) provide proportionality in sentencing for conduct of differing severity, 14) allow for input from probation, judicial conderence, DOJ and federal defenders, 15) incorporate further directions from Congress, 16) maintain sufficient flexibility to permit individualized sentences, 17) incorporate advancements in knowledge of human behavior, 18) ensure gender, race, nationality, religious, and socioeconomic neutrality, 19) promote fairness, etc. See Mark Osler, *Death to These Guidelines, and a Clean Sheet of Paper*, 21 FED. SENT’G REP. 7-13 (2008).

¹⁰⁷ 28 U.S.C. 991(a)(1); see also *Equal Justice Under Law*, *supra* note 102, at 541-542; Douglas A. Berman, *Pondering the U.S. Sentencing Commission’s Future*, 21 FED. SENT’G REP. 1, 1-2 (2008).

his past criminal history.”¹⁰⁸ An overriding mandate to the Sentencing Commission was to determine the appropriate type and length of sentence for each of the more than 2,000 federal offenses.¹⁰⁹

Simultaneous to the development and implementation of the Guidelines, Congress enacted a number of statutes imposing mandatory minimum sentences, largely for drug and weapons offenses, and for recidivist offenders. The Sentencing Commission drafted the new guidelines to accommodate these mandatory minimum provisions by anchoring the guidelines to them.¹¹⁰ Appellate courts prohibited trial judges from departing from the Guidelines even to remedy the disparity between codefendants’ sentences.¹¹¹ In 1994, Congress amended the SRA with a safety valve provision that allowed judges to “impose a sentence . . . without regard to any statutory minimum sentence” under certain circumstances, such as in instances of the defendant substantially assisting the government.¹¹² However, the safety valve provision became in part another tool to coerce plea bargains, as the Guidelines imposed sentences upon those who requested the jury trial guaranteed them under the US Constitution that were, “500% longer than sentences received by those who pleaded guilty and cooperated.”¹¹³

There has been a downward trend in average sentences imposed for federal drug offenders since the Supreme Court affirmed the constitutionality of the federal sentencing

¹⁰⁸ *Equal Justice Under Law*, *supra* note 102, at 542.

¹⁰⁹ U.S. Sentencing Comm’n, *Special Report to the Congress: Mandatory Minimum Penalties in the Federal Criminal Justice System* (Aug. 1991), available at http://www.ussc.gov/r_congress/manmin.pdf.

¹¹⁰ *Equal Justice Under Law*, *supra* note 102, at 542.

¹¹¹ *Id.*

¹¹² *Id.* at 544.

¹¹³ *United States v. Berthoff*, 140 F. Supp.2d 50, 67-68 (D. Mass. Apr. 9, 2001). *See also* Jackie Gardina, *Compromising Liberty: A Structural Critique of the Sentencing Guidelines*, 38 U. Mich. J.L. Reform 345, 347-48 (2005) (noting that defendants who waive the right to a trial by jury can on average be sure that their sentence will be 300% lower than “similarly situated defendants who exercise their Sixth Amendment right to trial by jury.”)

guidelines in 1989.¹¹⁴ Federal drug sentences rose sharply after the passage of the SRA was passed and the guidelines adopted in 1987.¹¹⁵ The downward trend in federal drug sentences over the last decade (1990-2000) is “to a significant degree, the product of an array of discretionary choices by judges, prosecutors, defense counsel, and probation officers.”¹¹⁶

B. Post-Booker

Until the Supreme Court’s decision in *United States v. Booker* the Sentencing Guidelines were mandatory for all federal judges.¹¹⁷ The Guidelines were oft criticized by district court judges, who found themselves “reduced to little more automatons, imposing sentences as to which they had little or no input whatsoever.”¹¹⁸ In *Booker* the Court concluded that the mandatory Guidelines regime is inconsistent with the jury guarantee of the Sixth Amendment and excised the portion of the Sentencing Reform Act which made the Guidelines mandatory, treating them as advisory instead.¹¹⁹ After *Booker*, appellate courts review a district court’s determination whether or not to follow the Guidelines only for reasonableness.¹²⁰ All in all, *Booker* is meant to allow judges to avoid applications of the Guidelines when they believe that doing so would be unjust, permitting consideration of factors as grounds for departure such as age, drug addiction, family ties, education, work history, charitable work and childhood poverty.¹²¹

¹¹⁴ Frank O. Bowman, III, *Quiet Rebellion? Explaining Nearly a Decade of Declining Federal Drug Sentences*, 86 IOWA L. REV. 1043, 1046 (2001).

¹¹⁵ *Id.* at 1047.

¹¹⁶ *Id.* at 1049.

¹¹⁷ *See generally* *United States v. Booker*, 543 U.S. 220 (2005).

¹¹⁸ *United States v. West*, 522 F. Supp.2d 74, 76 (D. Mass. May 7, 2008)

¹¹⁹ *See Gall v. United States*, 128 S. Ct. 586 (2007); *Kimbrough v. United States*, 128 S. Ct. 558 (2007); *Rita v. United States*, 551 U.S. 338 (2007); *see also* U.S. Sentencing Comm’n Year in Review Fiscal Year 2005 available at <http://www.ussc.gov/ANNRPT/2005/AR2005YIR.pdf>

¹²⁰ *Id.*

¹²¹ U.S.S.G. Ch. 5, Part H.

i. Sentencing Data

Since *Booker*, “the Commission has done an admirable job in turning around its data collection, analysis, and reporting functions to provide Congress, and the entire criminal justice system, with useful statistics and information that suggest the system is not falling apart.”¹²² The average sentence in federal cases rose between the pre-*Booker* and 2007.¹²³ The post-*Booker* decisions *Rita*, *Gall*, and *Kimbrough* “helped define the remedial holding in *Booker* but more than that, they further enhanced the role of the judiciary perhaps at the expense of congressional sentencing authority.”¹²⁴ Congress should “embrace the Commission’s apparent desire to take a leading role in the sentencing review process.”¹²⁵ Specifically, Congress should require that the Commission provide “detailed and meaningful analyses of the state of federal sentencing” especially since Congress expected the Commission to have expertise on sentencing issues and provide it with advice and guidance on the evolution of sentencing.¹²⁶

ii. Data on Departures from the Guidelines

The Commission’s sentencing data sets, stripped of individual identifiers, are available on tape and the Internet via the University of Michigan’s Inter-University Consortium for Political and Social Research.¹²⁷

¹²² Lisa A. Rich, *Congress Should Engage in Sentencing Review: Some Ideas for the 111th Congress*, 21 FED. SENT’G REP 17, 17 (2008).

¹²³ *Id.*

¹²⁴ *Id.*

¹²⁵ Rich at 19.

¹²⁶ *Id.* The analyses were to include “information such as: 1) Detailed and comprehensive analysis of individual offense types, including by drug type; 2) Detailed regional and interregional studies of sentencing trends; 3) Detailed assessments of any racial disparities arising in the system; 4) Detailed analysis of the increase in noncitizens in the federal system; 5) Detailed examination of the mandatory minimum sentences and their interaction with an advisory Guideline system; 6) Detailed analysis of the use of acquitted, dismissed, or uncharged conduct at sentencing; and 7) Specific statutory and Guideline amendments that would allow the sentencing system to operate more effectively. . . .”

¹²⁷ U.S. Sentencing Comm’n, *U.S. Sentencing Commission 2008 Annual Report*, 1, 32, 2008, available at <http://www.ussc.gov/ANNRPT/2008/ar08toc.htm>.

Despite the modest reduction in average sentence length, the average length of imprisonment in 2002 was more than twice what it was in 1984.¹²⁸ Some claim that “Signs of the *Booker* revolution are hard to find . . . [d]ata released by the United States Sentencing Commission suggest that little has changed since the decision.”¹²⁹ But such a conclusion may be premature since the Commission has only released aggregate data, not how individual judges have responded to the decision.¹³⁰

The 2008 annual report shows that in 59.4% of cases, judges imposed sentences that were within the range recommended by the Guidelines.¹³¹ In 13.4% of the cases, they imposed sentences below the range, and in 25.6%, imposed sentences below the range with government sponsored programs.¹³² Only in 1.5% of the cases did judges depart above the sentencing range.¹³³ Within the sentences given within the applicable range, however, 55% of them were at the minimum point of the Guideline range.¹³⁴

In 2007, federal judges sentenced within Guideline range 60.8% of the time.¹³⁵ In 2006, federal judges sentenced within Guideline range 67.7% the time. Pre-*Booker*, in 2005, federal judges sentenced within Guideline range 70.9% of the time, and in 2004, on average, 72% of the time. There is no clear statistically significant precipitous drop from pre-*Booker* Guideline mandatory adherence to post-*Booker* advisory status, since the change from 2005 to 2006 constituted only approximately 3%. The sentencing data provided by the Sentencing

¹²⁸ Frank O. Bowman, *Beyond Band-Aids: A Proposal for Reconfiguring Federal Sentencing After Booker*, 2005 U. CHI. LEGAL F. 149, 165.

¹²⁹ Ryan W. Scott, *In Search of the Booker Revolution 2* (Apr. 26, 2009) (unpublished study, on file with Judge Nancy Gertner of the United States District Court of Massachusetts).

¹³⁰ *Id.*

¹³¹ *Id.* at 36.

¹³² *Id.*

¹³³ *Id.*

¹³⁴ *Id.* at 37.

¹³⁵ U.S. Sentencing Comm’n, *Sourcebook of Federal Sentencing Statistics tbl.N* (2007), available at <http://www.ussc.gov/ANNRPT/2007/TableN.pdf>

Commission's annual reports for the past three years also does not show a definitive upward trend in the percentage of judges that depart from the Guidelines. A comparison of federal sentences imposed relative to the Guidelines post-*Booker* and post-*Kimbrough* reveal that there is little difference in the percentage of sentences imposed within the range prescribed by the Guidelines, above the range, and the below of range, have not changed appreciably after *Kimbrough* and *Gall*.¹³⁶

However, the difference between 2007 and 2004 is striking – there is an 11% reduction in sentences that fall within the Guidelines between those years. Thus, this may be the evidence that *Booker* has re-opened a space in which judges can exercise their discretion. In such a space, the extralegal factors that form the basis of judicial decision-making emerge as more influential after *Booker*.

iii. Sentencing Data on Individual Judges

Despite its statutory responsibility for collecting and disseminating information about sentencing, the Sentencing Commission removes all judge-identifying information from the data it releases, whether that be to judges, scholars, or the public.¹³⁷ The Commission goes even further not only to withhold the name of the sentencing judge, but will not provide a code or other filler mark that would allow to anonymously analyze sentencing patterns among judges.¹³⁸ The Judicial Conference has voted to make the statement of reasons for federal sentences non-public, and therefore unavailable at the courthouse or on PACER.¹³⁹ By a special vote of the court in 2001, the District of Massachusetts makes their Statement of Reasons public and

¹³⁶ See *Latest Post-Booker Sentencing Data from US Sentencing Commission*, 21 FED. SENT'G REP 1 (2008) 20, 20.

¹³⁷ *Id.* at 21.

¹³⁸ *Id.*

¹³⁹ *Id.* at 22

available online for every criminal sentence unless the presiding judge orders it sealed.¹⁴⁰ Judge Ponsor jokingly said that he would not call Massachusetts a “leader” in terms of releasing its statements of reasons for sentences because so far no state has followed its practice.¹⁴¹ However, he does support the District’s decision to release this information to the public.¹⁴²

A researcher, Ryan Scott, examined judges’ individual sentencing patterns in the District of Massachusetts in detail, concluded that *Booker* “has not meaningfully affected inter-judge disparity in *average sentence length*” and “inter-judge disparity in sentencing *relative to the Guidelines* has increased” since *Booker*.¹⁴³ In fact, *Booker* “has worsened a distinct form of inter-judge disparity, driven by disagreements about the circumstances in which the Guidelines recommend an appropriate sentence.”¹⁴⁴

Ryan Scott explains the apparent lack of a *Booker* revolution as inertia, as 75% of district court judges, and more than half of all sitting district court judges, were appointed after the Guidelines were promulgated and the 2005 *Booker* decision.¹⁴⁵ As Judge Young pointed out in his *United States v. West* opinion, “...old habits die hard. Removing America’s juries for seventeen years from their constitutionally mandated central fact-finding role in our criminal justice system has introduced multiple distortions and dis-connects in the roles juries, judges, prosecutors, and defense counsel play in reaching out for justice.”¹⁴⁶

Another explanation is judges’ fear of reversal on grounds of “reasonableness” if they depart too far from the advisory guidelines.¹⁴⁷ A third explanation is “anchoring,” or the cognitive error in which decision makers begin with an initial value and fail to make sufficient

¹⁴⁰ *Id.* at 24.

¹⁴¹ Interview with Judge Ponsor, *supra* note 72.

¹⁴² *Id.*

¹⁴³ *In Search of the Booker Revolution*, *supra* note 128, at 2-3.

¹⁴⁴ *Id.* at 3.

¹⁴⁵ *Id.* at 19.

¹⁴⁶ *United States v. West*, 552 F. Supp.2d at 79.

¹⁴⁷ *In Search of the Booker Revolution*, *supra* note 128, at 19-20.

adjustments from it.¹⁴⁸ A fourth explanation is that judges have to take a “go slow” gradual approach to safeguard the discretion that *Booker* granted them.¹⁴⁹

Furthermore, data from the District of Massachusetts showed a clear increase in the inter-judge disparity in sentencing ranges.¹⁵⁰ Since *Booker*, the identity of the judge has become a stronger predictor how far the sentence will deviate from the range set by the Guidelines.¹⁵¹ If the findings are accurate, then Congress and the Sentencing Commission should find them troubling if the trend proves to be nationwide, especially since some judges in the Massachusetts sample found it necessary to sentence below-range at three to four times the rate of their colleagues despite drawing cases at random from the same pool.¹⁵² If some individual judges are sentencing outside the Guidelines range “far more frequently than their colleagues,” then it may be a sign that those judges are reaching an unjust result.¹⁵³ Opponents of the Guidelines might also find the trend disturbing as the rise in inter-judge disparity means that “within the space opened by *Booker*, inter-judge disagreements about principles of punishment have reemerged as important factors.”¹⁵⁴ In the end, however, the “benefits of reducing Guideline errors and imposing just sentences in a larger fraction of cases may outweigh the costs to Congress’s goal of inter-judge uniformity.”¹⁵⁵ Nevertheless, there is no need for panic by the Commission – the identity of the judge explains only about 9.2% of the variation in deviation from the Guidelines range, which on average amounts to 7 months per case.¹⁵⁶ The relative reluctance of certain judges to deviate too far from the Guidelines “modesty about their own role, reluctance to hazard

¹⁴⁸ *Id.* at 20.

¹⁴⁹ *Id.*

¹⁵⁰ *Id.*

¹⁵¹ *Id.* 44-45.

¹⁵² *Id.* at 48-49.

¹⁵³ *Id.* at 49.

¹⁵⁴ *Id.* at 49.

¹⁵⁵ *Id.* at 49.

¹⁵⁶ *Id.* at 48.

predictions about defendants' future dangerousness, deference to the Commission as an expert body, commitment to the project of inter-judge sentencing uniformity, or belief that the Guidelines derive democratic legitimacy from their approval by Congress."¹⁵⁷ Thus, while judges may have idiosyncratic ideas as to what factors should affect the length of a sentence; on the whole, *Booker* has not created an inter-judge lack of uniformity in sentencing.

C. Release of Judge-Specific Sentencing Information

In addition to creating a uniform, homogenized system for sentencing rather than relying on judicial discretion with its potential for disproportionality, the rigid Guidelines created a system that, focused on achieving greater efficiency, encouraged information sharing. However, until recently information sharing focused on inter-agency cooperation and was not available to be shared with the public. In a few jurisdictions, however, sentencing is transparent to the public and media. Some argue that the demands for visibility and consistency in sentencing are actually driven by the retributivist desire to ensure that judges and parole authorities are “extracting sufficient penal pain”.¹⁵⁸ Releasing such information places the sentencer in a state of heightened visibility, which is in effect an attempt to exercise power and force self-restraint on the exercise of power by the judge;¹⁵⁹ in effect, extending the control by Congress and other agencies over the independence of the judge. Another theory that lies behind what has been called an “audit culture” is a perpetual state of mistrust of organizations such as the criminal justice system and the judiciary and their activities, which leads to a need for constant evaluation and surveillance.¹⁶⁰

¹⁵⁷ *Id.* at 47.

¹⁵⁸ Katja Franko Aas, *Sentencing in the Age of Information: From Faust to Macintosh* 95 (Glasshouse Press, 2005).

¹⁵⁹ *Id.* at 95.

¹⁶⁰ *Id.* at 97.

On the other hand, the dissemination of information to the public with regards to judicial decision-making is may be considered beneficial in itself. Scholars, judges, and the press have called for more transparency of the judiciary to the public. Toward that end, advocates of judicial accountability recommend releasing more information about the judicial decision-making process. Critics argue that making such information available would threaten the independence of the judiciary. As Justice Rehnquist once put it, “judicial independence is ‘one of the touchstones of our constitutional system of justice.’”¹⁶¹ American Bar Association’s Commission on the Separation of Powers and Judicial Independence has explained that the founders established the judiciary as an independent, co-equal branch of government for two reasons: 1) “making the judiciary independent of inappropriate outside influences within and without government would better enable the judiciary to render important decisions in individual cases – hence the need for *decisional judicial independence* and 2) “making the judiciary a third branch of government independent of the legislature and executive would enable the judiciary to check over-concentrations of power in the political branches – hence the need for *institutional judicial independent*.”¹⁶² It is difficult to maintain judicial independence while seeking judicial accountability. Does submitting the courts to such a degree of scrutiny transform the courts into another public service which needs to be monitored – similar to schools, hospitals and social services?¹⁶³ Thus releasing judge-specific information may have a chilling effect on decisional independence and would infringe on judicial institutional independence.¹⁶⁴ Moreover, would this kind of reporting take away valuable judicial resources and time in a litigation system where the crowding of courtroom dockets is already a serious challenge?

¹⁶¹ Mark H. Bergstrom and Joseph Sabino Mistick, Esq., *The Pennsylvania Experience: Public Release of Judge-Specific Sentencing Data*, 16 FED. SENT’G REP 57, 57 (2003).

¹⁶² *Id.*

¹⁶³ *Sentencing in the Age of Information: From Faust to Macintosh*, *supra* note 157, at 96.

¹⁶⁴ *The Pennsylvania Experience*, *supra* note 160, at 57.

On the other hand, those who support judicial accountability counter that incomplete reporting, under-reporting, and non-reporting were the “result of judges’ own failure to comply with statutorily-mandated complete reporting” and that public disclosure would improve the quality and completeness of such reporting.¹⁶⁵ One of the difficulties in reporting and evaluating the influence of extralegal sources on judicial decision-making is one of quantification due to the lack of availability of public information. The judiciary has been threatened by even making the public aware that such statistics exist. In *Richardson v. United States*, Judge Young lamented the pall of secrecy that the United States Judicial Conference and the Sentencing Commission cast over the sentencing process that makes it so difficult to determine the sentencing track record of individual judges.¹⁶⁶ In fact, Judge Young indicates that the secretive attitude towards the sentencing track records of individual judges is illustrative of the loss of genuine independence by the judiciary in the federal courts.¹⁶⁷

I. Sentencing in Norway

As compared to their American counterparts, Norwegian judges have a great deal more discretion when it comes to sentencing. Even though there are some guidelines regarding minimum and maximum sentences, as well as precedent to guide lower courts regarding which circumstances to take into account when sentencing, the Norwegian penal code does not have a general rule about the principles of sentencing or which circumstances should be taken into account when determining a sentence.¹⁶⁸ Nevertheless, a 2002 study of sentencing patterns in lower courts has shown that sentencing practices are similar in similarly situated cases, leading

¹⁶⁵ *Id.*

¹⁶⁶ *Richardson v. U.S.*, 477 F. Supp.2d 392, 402 (D. Mass. Mar. 19, 2007).

¹⁶⁷ *Id.* at 402.

¹⁶⁸ *Sentencing in the Age of Information: From Faust to Macintosh*, *supra* note 157, at 99.

us to the conclusion that despite lack of stringent regulation, sentencing decisions of Norwegian judges are fairly uniform.¹⁶⁹

Moreover, Norway also currently has one of the most advanced legal information systems in the world, “Lovdata”, which has been in operation since 1981.¹⁷⁰ One of the potential reasons for sentencing uniformity is that past sentencing data is readily available on an internet-accessible database, which may lead past sentencing practice to be used as argument in sentencing decisions more often than not.¹⁷¹ Still, the Norwegian system does not provide statistical information about sentencing decisions, leaving it up to the “user” to determine an average sentence for a particular type of offense if they so choose.¹⁷² Therefore, average sentencing data or any other kind of sentencing statistical information is not what guides the Norwegian judge in making a decision and they never have to be in the position of being judged against the average. Still, the Norwegian information system is available to judges as well as to the rest of the public, and leaves the judge to interpret the text of the cases, and to interpret the specific rules and circumstances as they applied in each case and rely on personal and professional knowledge rather than on objective rules.

II. The Case of Pennsylvania

Since 1982, the Pennsylvania Commission on Sentencing, a legislative agency appointed by each of three branches of government, has collected relevant information on sentences imposed by criminal court judges.¹⁷³ It collects demographic data, offense of conviction, record of previous convictions, application of sentencing enhancements and/or mandatory sentencing

¹⁶⁹ *Id.*

¹⁷⁰ *Id.*

¹⁷¹ *Id.* at 101.

¹⁷² *Id.*

¹⁷³ *The Pennsylvania Experience*, *supra* note 160, at 58

provisions, type of disposition, guideline recommendations, sentences imposed and reasons for sentences and/or departure from the guideline recommendation.¹⁷⁴ Until 1999, the Commission did not have a written policy regarding the release of information but generally excluded judge and offender identifiers from any public release.¹⁷⁵ The Commission had often received requests for more specific sentencing information, to which they would either give access to the files containing the sentencing guideline forms, which was later terminated due to the potential release of confidential information, and conduct computer searches specific to the requests.¹⁷⁶

In 1999, the Sentencing Commission adopted a policy to provide for the release of more offense-specific information on their annual reports, inclusion of concurrent/consecutive sentencing information, revisions of the guideline sentence form with more space for recording departure reasons, and scheduling of sentencing seminars for the media in conjunction with the release of the annual reports.¹⁷⁷ After the policy was adopted, the number of sentencing data sets disseminated skyrocketed. Since the adoption of the policy, the media has generated the greatest increase in requests.¹⁷⁸ Some newspapers published negative or critical articles about specific judges and some provided incomplete or factually incorrect information.¹⁷⁹ As the amount of research using sentencing data increased, the quality and scope of the research have increased correspondingly.¹⁸⁰

One of the ancillary benefits of the Commission releasing additional information is the improving the quality of reporting of sentencing data to provide the public with a better picture

¹⁷⁴ *Id.*

¹⁷⁵ *Id.*

¹⁷⁶ *Id.*

¹⁷⁷ *Id.* at 61.

¹⁷⁸ *Id.*

¹⁷⁹ *Id.* at 62.

¹⁸⁰ *Id.*

of sentencing in the county.¹⁸¹ This also expanded the dialogue in terms of participation in the Conference of State Trial Judges and several bar associations in discussions of sentencing information, producing such results as suggested changes to the guideline form.¹⁸² Moreover, this increased the Commission’s involvement in the Continuing Legal Education programs.¹⁸³

Overall, the Pennsylvania study seems to indicate that the public release of judge-specific sentencing data has resulted in mostly positive outcomes. Thus, “although the judiciary is independent of the electorate and its representatives, it is not unchecked.”¹⁸⁴

D. Interviews with Judges Young, Tauro, and Ponsor

i. Approach to Sentencing

All of the federal district court judges we interviewed seem to have a similar process with regards to how they approach sentencing. Following the conviction, the Probation Office prepares a Pre-sentence Investigation Report (“PSR”), which provides information about “the offender’s personal history, family circumstances, financial history, circumstances of the offense, disposition and status of co-defendants and the like”.¹⁸⁵ Judge Young figures out what the highest constitutionally reasonable acceptance sentence without any of the downward enhancements would be, based on what the defendant has admitted to and what the facts that the jury have found to be true beyond a reasonable doubt.¹⁸⁶ Then Judge Young would look to any enhancement factors, *inter alia*, the involvement of drugs and whether the defendant is a organizer or leader.¹⁸⁷ After that, he would look at the downward adjustment factors.¹⁸⁸ He then

¹⁸¹ *Id.*

¹⁸² *Id.* at 63.

¹⁸³ *Id.*

¹⁸⁴ *Id.*

¹⁸⁵ *United States v. West*, 552 F. Supp. 2d at 80, 83.

¹⁸⁶ Interview with Judge Young, *supra* note 38.

¹⁸⁷ *Id.*

may look at the available databases including the ones the judges make publicly available.¹⁸⁹ Doing so gives him an idea of how much weight to give to the sentencing guidelines.¹⁹⁰ If the averages are below the low range of the Guidelines, then likelihood that he's going to adjust downwards is less if the average is within the Guidelines.¹⁹¹ Finally, he calculates the Guidelines accurately.¹⁹² Despite all the preparatory work, Judge Young says that he remains "open" to whatever happens once he is on the bench and does not know what sentence he was impose before he goes on the bench.¹⁹³ At sentencing, he considers the recommendations of the PSR, the government's recommendation, and the defense's recommendation.¹⁹⁴ The defendant also has the right of allocution to tell his side of the story. Judge Tauro, for one, has found in his experience that some defendants can be particularly persuasive in what they have to say.¹⁹⁵ Judge Young believes that his process works well and would like to persuade other judges to adopt this process.¹⁹⁶ Judge Gertner does something similar as well, however, not many other judges have been persuaded to adopt Judge Young's exact process even though there are some recurring similarities between all of the processes of the district court judges.¹⁹⁷

Judge Ponsor, on the other hand describes his approach as fairly "standard."¹⁹⁸ Like Judge Young, the "first threshold thing" he does is to determine what the Guidelines recommend.¹⁹⁹ He reviews with counsel what he's read and goes on to address the formal

¹⁸⁸ *Id.*

¹⁸⁹ *Id.*

¹⁹⁰ *Id.*

¹⁹¹ *Id.*

¹⁹² *Id.*

¹⁹³ *Id.*

¹⁹⁴ *Id.*

¹⁹⁵ Interview with Judge Tauro, *supra* note 43.

¹⁹⁶ Interview with Judge Young, *supra* note 38.

¹⁹⁷ *Id.*

¹⁹⁸ Interview with Judge Ponsor, *supra* note 72.

¹⁹⁹ *Id.*

objections submitted by the government or the defense.²⁰⁰ He adopts the PSR as a jumping off point for inquiring into the Guidelines.²⁰¹ Finally, he'll hear the government's presentation, the defense's presentation, and then the defendant speak before imposing the sentence.²⁰² All three judges emphasized the importance they place on each individual's unique set of circumstances.

Judge Tauro says that he considers the guidelines and has them in mind when he imposes a sentence.²⁰³ He believes that the guidelines are sometimes too severe.²⁰⁴ The judge listens to the government's recommended sentence, the defense's recommendation, and the defendant herself.²⁰⁵ Judge Ponsor does not think that the scope of deviance from the Guidelines is very large.²⁰⁶ Like Judge Tauro, he believes that the Guidelines are too severe in some circumstances, particularly with regards to career offenders.²⁰⁷ In some cases before *Booker*, he felt that the sentences he was mandated to impose were too harsh, where no rational or objective analysis would justify the sentence.²⁰⁸ Judge Ponsor said that he has a tendency to appoint psychological experts to perform psychological evaluations of defendants to see if they have psychological problems, learning disabilities, or other problems that might affect their conduct.²⁰⁹ The judge acknowledged that the other judges in the district don't share his practice.²¹⁰

When asked to evaluate whether their sentences have changed after remedial *Booker*, Judge Young said he imposed less harsh sentences.²¹¹ Judge Ponsor replied, "I would not say that my sentences have changed considerably, but they have changed somewhat." He claimed

²⁰⁰ *Id.*

²⁰¹ *Id.*

²⁰² *Id.*

²⁰³ Interview with Judge Tauro, *supra* note 43.

²⁰⁴ *Id.*

²⁰⁵ *Id.*

²⁰⁶ Interview with Judge Ponsor, *supra* note 72.

²⁰⁷ *Id.*

²⁰⁸ *Id.*

²⁰⁹ *Id.*

²¹⁰ *Id.*

²¹¹ Interview with Judge Young, *supra* note 38.

that he now feels a greater degree of discretion, as a result of which, he believes that he imposes “somewhat less harsh sentences than [he] did” before *Booker*.

The weight which various district court judges ascribe to the Sentencing Guidelines has been published in Judge Young’s decision *Richardson v. United States* and the Massachusetts Continuing Legal Education publication *The U.S. District Court Speaks* (4th ed. 2006), ranging from Judge Wolf: appropriate weight, Judge Tauro: always considers the guidelines, Judge Zobel: starts with the guidelines and they do carry weight, Judge Gorton: heavy weight, Judge Stearns: first consideration and the late Judge Lindsay gave such weight to the guidelines as Supreme Court and First Circuit precedent required, Judge Gertner considered the sentencing guidelines as one of the set of standards they must consider, and Judge O’Toole considered the guidelines required by statute and case law.²¹²

ii. Opinions on the Release of Judge-Specific Sentencing Information

The judges we interviewed held differing opinions of whether judge-specific sentencing information would prove useful in terms of influencing or guiding their own sentencing practices. Judge Young prefers to know what his colleagues have done in similar situations and generally thinks that it is “foolish” that he cannot even mention the existence of “secret” information from the sentencing commission.²¹³ In *Richardson v. United States*, Judge Young went as far as to say that the inability to explain his reasoned judicial choices candidly was the cause of profound regret.²¹⁴ In fact, he goes as far as to imply that withholding this from the

²¹² *Richardson v. U.S.*, 477 F. Supp. 2d at 404-406.

²¹³ Interview with Judge Young, *supra* note 38.

²¹⁴ *Richardson v. United States*, 477 F.Supp. 2d 392, 405.

public may lead to the loss of public confidence – which he considers too high of a price to pay for resting judicial decisions on secret data.²¹⁵

While Judge Ponsor supports Massachusetts’ approach with regards to making the Statement of Reasons available to the public, he does not know whether the district should do more beyond that.²¹⁶ He supports Massachusetts’ approach in this arena because the public is “entitled to see [the judges’] reasons.”²¹⁷ He thinks that anyone can “mine the [Statements of Reasons]” for sentencing information.²¹⁸ He does not know whether making aggregate data on sentencing with judge-specific information would inform the public’s understanding of what judges do.²¹⁹ Judge Tauro does not pay much attention to the sentencing statistics because every case is unique.²²⁰ He does believe that explaining why he imposed the sentence he did is very important and part of public discourse.²²¹

XI. History and Background on Bankruptcy Courts

In examining the behavior of judges, scholars often tend to forget that in addition to Article III federal courts, many cases are decided in courts with specific matter jurisdiction. For example, bankruptcy courts have exclusive jurisdiction over bankruptcy cases. Bankruptcy law allows the debtor who is unable to pay his creditors to develop a plan to resolve those debts through division of his assets among the creditors. There are 90 U.S. bankruptcy courts, which are units of the U.S. district courts.²²² A bankruptcy judge is appointed to a term of fourteen

²¹⁵ *Id.*

²¹⁶ Interview with Judge Ponsor, *supra* note 72.

²¹⁷ *Id.*

²¹⁸ *Id.*

²¹⁹ *Id.*

²²⁰ Interview with Judge Tauro, *supra* note 43.

²²¹ *Id.*

²²² *Journalist’s Guide to the Federal Courts – Bankruptcy Courts*, available at <http://www.uscourts.gov/journalistguide/bankruptcy.html>.

years by the judges of the local U.S. Court of Appeals²²³ and can later be reappointed.²²⁴ These proceedings are open to the public and the news media in the same way that federal courts are (unless an extraordinary circumstance exists), and all proceedings are recorded by court reporters or electronic sound recording equipment, so transcripts of the proceedings are always available.

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Bankruptcy generally provides two options to the debtor under the U.S. Bankruptcy Code (the “Code”): liquidation or reorganization.²²⁶ Liquidation, under Chapter 7 of the Code, is the orderly selling off of the debtor’s assets to raise cash by creditors, and a trustee is appointed by the U.S. Trustee to take over the debtor’s property for the benefit of the creditors.²²⁷ Reorganization allows the debtor to stay in business under Chapters 11, 12 or 13 of the Code and allow him to pay off the creditors by using future earnings. Chapter 11 cases, usually filed by corporations and other business entities, involve a plan of reorganization, which is be voted on by creditors and approved by the bankruptcy judge. In all cases, a meeting of creditors must be held from 20 to 40 days after a bankruptcy petition is filed. The debtor must attend this meeting and creditors may ask questions regarding the debtor's financial affairs. A trustee, not a bankruptcy judge, presides over this hearing.

A. Judicial discretion in a bankruptcy court

Traditionally, bankruptcy judges have exercised a great deal of discretion over bankruptcy cases, as such authority was granted to them by the code. Judicial discretion can have a great deal of impact on a bankruptcy case, and in turn, on the economy and the markets.

²²³ For example, in Massachusetts, by the First Circuit.

²²⁴ *Journalist’s Guide to the Federal Courts – Bankruptcy Courts*, *supra* note 221.

²²⁵ *Id.*

²²⁶ 11 U.S.C. § 101 (2009).

²²⁷ *Id.*

²²⁸ However, in April 2005, Congress passed and President Bush signed into law the Bankruptcy Prevention and Consumer Protection Act (“BAPCPA”) which revised the guidelines governing the conversion or dismissal of Chapter 7 liquidations to Chapter 11 or Chapter 13 proceedings.

²²⁹ BAPCA expanded the role of the U.S. Trustee to oversee case administration more closely. The stated purpose of the BAPCPA is to “improve bankruptcy law and practice by restoring personal responsibility and integrity in the bankruptcy system and ensure that the system is fair for both debtors and creditors”²³⁰ but the major changes that it brought were aimed at streamlining the bankruptcy process and reducing judicial discretion as well as curbing what was seen as bias towards incumbent management at the expense of the creditors and the public.²³¹ Moreover, the new section 1104 (e) of the Code requires that the U.S. Trustee file a motion to replace old management with an appointed trustee on “reasonable suspicion” that management has engaged in wrongdoing or filed false financial statements. This provision was added in response to financial scandals that led to Chapter 11 filings by companies such as Enron, WorldCom and Adelphia to promote accountability of the management and provide more transparency under Chapter 11. However, from 2005 until 2007, U.S. Trustees only filed about 30 motions under this section.²³²

B. Cycles in the Manner of Exercise of Judicial Discretion

²²⁸ Scholars have estimated the price of judicial discretion by bankruptcy judges in financial markets can be very large. Credit spreads increased by about 30 basis points for Chapter 11-eligible securitizers immediately after a controversial judicial decision in the Chapter 11 bankruptcy of LTV Steel, in which a securitization contract was unexpectedly treated as a secured loan, and as such subject to automatic stay. Kenneth M. Ayotte and Stav Gaon, *Asset Backed Securities: Costs and Benefits of “Bankruptcy Remoteness”*, Mimeo, Columbia University, 2005.

²²⁹ <http://topics.law.cornell.edu/wex/Bankruptcy>

²³⁰ 2 H. Rep. No. 109-31, pt. 1 (2005).

²³¹ Samuel J. Gerdano, *BAPCA’s Early Returns: Statistics, Key Issues to Date*, American Bankruptcy Institute, available at

<http://www.abiworld.org/AM/PrinterTemplate.cfm?Section=Home&TEMPLATE=/CM/ContentDisplay.cfm&CONTENTID=48041>

²³² Statement by Clifford J. White III at American Bankruptcy Institute Annual Spring Meeting, Washington, D.C., April 13, 2007.

Experienced practitioners have noticed that trends in the philosophy of bankruptcy jurisprudence tend to fluctuate in a recurring cycle that swings back and forth like a pendulum depending on the legal, economic and political situation at the time: while the issuers remain the same, the criteria applied and the solutions reached by the judges change over time.²³³ While judicial discretion is granted to a bankruptcy judge by statute, the manner in which it is exercised moves in a cycle over time. One of the main trends the outlook of judges in bankruptcy practice is the debtor vs. creditor-oriented philosophy of judges.²³⁴ However, even this criteria is not necessarily one sided because some judges are reorganization-oriented rather than favorable to the debtors, and feel that reorganization maximizes value for the benefit of the creditor as well as the debtor.²³⁵ Still there is a tension between the value of reorganization and the concept of sanctity of contract: while it is important for contracting parties to be able to assume that courts will generally enforce their agreements, reorganizations, which are a major exception to such expectations, attempt to preserve and maximize value by retaining a company as a going concern.²³⁶ Another side of the spectrum is the trend that oscillated back and forth over the years is a strict constructionist reading of the statute vs. flexible approach in the administration of reorganizations.²³⁷ In 1966, Justice Douglas wrote the following in *Bank of Marin v. England* about statutory interpretation, “[W]e do not read these statutory words with the ease of a computer... There is an overriding consideration that equitable principles govern the exercise of bankruptcy jurisdiction.”²³⁸ In contrast, Justice Scalia tells the court to begin statutory

²³³ Richard E. Mikels & Charles W. Azano, *The more things change...: Reflections on 34 Years of Practice*, AM. BANKR. INST. J. 22, 68 (Oct. 2006) October 2006.

²³⁴ Debtor-oriented judges being defined as judges who read the Bankruptcy Act in a flexible way to give the debtor an opportunity to reorganize and try to “save the business”, and creditor oriented judges, creditor-oriented judges giving the creditors an opportunity to retain maximum value. *Id.*

²³⁵ *Id.*

²³⁶ *The more things change...: Reflections on 34 Years of Practice*, *supra* note 232, at 71.

²³⁷ *Id.*

²³⁸ *Id. citing* 385 U.S. 99 (1966).

interpretation with the fact that Congress “says in a statute what it means and means what it says...”²³⁹

1. Consequences of Decreased Judicial Discretion

As the Bankruptcy statutes, and specifically chapter 11 become less flexible, outcomes in bankruptcy court become more predictable and more transparent – which works out to be a good thing for lenders and perhaps a bad thing for debtors.²⁴⁰ The ability to exercise more discretion on part of the judge allowed bankruptcy judges to innovate from the bench and create new remedies to make reorganizations possible, including such innovations as payments to pre-petition critical vendors that the court deemed to be necessary for the debtor’s reorganization, substantive consolidation of debtor’s estates and equitable subordination of claims.²⁴¹ Richard Mikels explained that the Bankruptcy Code attempted to create leverage on all sides where the parties couldn’t agree, and then the bankruptcy judge would be the one to create a decision on value.²⁴² It is that uncertainty of the judge resolving the dispute that gets the parties to settle.²⁴³

2. Influences on bankruptcy judges’ decision-making.

Thus, bankruptcy judges, like their federal district court counterparts in sentencing are also rigidly bound by the law and precedent set out by the Supreme Court. By necessity, because their duties and powers are granted by statute, Congress’ position on this debate has strongly influenced the amount of flexibility bankruptcy judges have. While the Code favored flexibility

²³⁹ *Id.* quoting *Hartford Under-writers Insurance Co.v. Union Planters Bank N.A.*, 500 U.S. 1 (2000).

²⁴⁰ *Id.* at 72.

²⁴¹ *Id.* at 71.

²⁴² Interview with Richard E. Mikels, Esq., Mitz Levin, Cohn, Ferris, Glovsky and Popeo, P.C. in Boston, MA (May 7, 2009).

²⁴³ *Id.*

to debtors under chapter XI of the Bankruptcy Act, Congress passing BAPCPA has reinforced sanctity of contracts as it reduced time for debtor protections, such a time for plan exclusivity, time for determining whether to assume or reject leases and increased availability of causes to dismiss or convert a case from Chapter 11 and provided new advantages to certain creditors.²⁴⁴

However, it is clear that at least in the mind of bankruptcy practitioners, there are other extrajudicial factors that influence the way judges make decisions or exercise discretion in bankruptcy court. For example, in his article, “The More Things Change...,” Richard E. Mikels, head of the Bankruptcy Department at Mintz, Levin Cohn, Ferris, Glovsky and Popeo, P.C. clearly identifies certain judges as having a predilection towards certain views that would affect on how they ruled. For example he describes Judge Paul Glennon, as “one of the nicest men” that he had the pleasure to know, but who would customarily “almost never convert a case” because he believed that “chapter XI offered people an opportunity to save the businesses that they had built through their ‘blood, sweat and tears.’”²⁴⁵ Judge Glennon thought that people deserved that opportunity, and “he did not want to be the one to take it away” – as Richard Mikels states in the article, his views were pro-debtor extreme even for a time when the sentiment was generally favorable towards debtors.²⁴⁶ Mikels goes on to say, “If Judge Glennon had not been a debtor-oriented judge, or if he did not believe that the bankruptcy laws should be interpreted flexibly, or if he believed that the value of a reorganization should not override contractual expectations, this hearing would have come out quite differently.”²⁴⁷ While we did not have an opportunity to speak with Judge Glennon directly, it is quite obvious he held a pro-debtor reputation among the lawyers (and likely, the litigants) who appeared in front of him.

²⁴⁴ *The more things change...: Reflections on 34 Years of Practice*, *supra* note 232, at 68.

²⁴⁵ *Id.* at 22.

²⁴⁶ *Id.*

²⁴⁷ *Id.*

Thus Judge Glennon falls into the attitudinal/strategic model of judicial behavior, where in pursuit of certain legal and/or policy goal outcomes, he appeared to lean in a direction that favored a flexible interpretation of statute to allow for the reorganization of a debtor. In Mikels' experience some judges would come to the bankruptcy bench with already set views of what Chapter 11 should accomplish and what the role of the judge should be.²⁴⁸ With some judges it was clear that they are result-oriented, but others were more flexible and amenable to listen to each case individually.²⁴⁹ Many of them, as they spent more time on the bench, would change their leanings as a result of that experience.²⁵⁰ Nevertheless, as a practicing attorney, it was important to be aware of the different philosophies of the judges and advise the client on all the likely positions on the key issues of the different judges on the bankruptcy bench²⁵¹ because understanding the judges' general view of things may change your sense of the case. However, it may be difficult to assess the reputation of the judge because someone who comes off as a debtor oriented judge was in fact a reorganization oriented judge – he did not care who came out owning the company, but he cared that the process worked and he would do what it took to get the case reorganized to save the company rather than liquidate it.²⁵² It appears that as an attorney, it may be easy to misunderstand that difference and make a rush judgment about why a judge may behave a certain way. Overall, as a practitioner Mikels emphasized that a good judge is just a judge who at the end of the day, even though someone may win and someone may lose, everyone feels that they've had a fair day in court.²⁵³ Good judges make the proceedings in court (as intimidating of a place as that may be) make as comfortable as possible for the parties.²⁵⁴

²⁴⁸ Interview with Richard E. Mikels, *supra* note 241.

²⁴⁹ *Id.*

²⁵⁰ *Id.*

²⁵¹ *Id.*

²⁵² *Id.*

²⁵³ Interview with Richard E. Mikels, *supra* note 241.

²⁵⁴ *Id.*

And while according to Mikels, “brilliance doesn’t hurt, a sense of fairness and humanity doesn’t hurt either.”²⁵⁵

XII. Conclusion

This paper examined first-hand the various forces that shape judicial choices and decisions. The roles of the judges are multifold and the judges deal everyday with the pull and tug of these roles and the different considerations that they must keep in mind. A number of models exist in legal scholarship attempt to depict a world of judging; but being models, these greatly simplify what takes place in reality. Moreover, trial judges and bankruptcy judges frequently tend to fall out the boundaries of these models. Nevertheless considering the relationships of judges with their audiences, the judges’ personas, their ideologies, and the way they approach sentencing or reorganizing companies helps move forward our comprehension of judicial behavior. At the end of the day, it is clear that judges first and foremost work to serve the litigants before them, taking each case individually, considering the nuances of the facts of the case and helping those before them resolve their dispute fairly, exercising their discretion within the limits of the law.

²⁵⁵ *Id.*

Appendix A

Interview Questions²⁵⁶

1. What do you think is the role of the judge?
2. What is the most challenging aspect of being a judge?
3. What do you believe makes a judge “good”?
4. What is the basis of a “good” judicial decision?
5. Can you give an example of a difficult decision that you had to make?
6. Can you tell us about what guiding principles influenced that difficult decision?
7. Do you think there’s a great deal of interaction between judges on the same bench?
8. What do you think your reputation as a judge is?
9. Do you see whether your cases have been overturned?
10. To what extent do you follow the news/current events?
11. Do you have an overarching philosophy when you consider cases?
12. What do you think is your role, or the judge’s role, in participating in public discourse about legal issues?
13. Have you ever recused yourself from a case for reasons of personal bias?
14. How much importance do you place on the federal sentencing guidelines?
15. How much importance do you place on the federal sentencing guidelines?
16. What factors, other than the federal guidelines, affect your sentencing decisions?
 - a. How much importance do you place on the defendant’s personal history?
 - b. How much importance do you place on the defendant’s prior convictions?
 - c. How much importance do you place on the severity of the defendant’s offense(s)?
17. Have you ever talked about sentencing in a public forum? Have you ever talked about sentencing in an academic setting?
18. Have your sentencing practices changed since remedial *Booker*? How do you view the guidelines now? Do you consider them to be the starting point in imposing sentences?
19. How often do you depart downward from the guidelines? Upward from the guidelines?
20. What do you think your reputation is as a judge? In terms of the sentences you impose?
 - a. Among other judges?
 - b. Among attorneys?
21. Do you think that releasing judge-specific sentencing information would increase judicial accountability or reduce judicial discretion and independence?
22. Do you think judges have First Amendment rights? How far do these rights extend?
23. How do you decide what goes into a written opinion? Do you set any goals or boundaries?

²⁵⁶ Not every interviewee was asked the full set of questions depending on the amount of time available. Moreover, the judges and the practitioner(s) were asked different questions.

24. Have you ever talked about sentencing in a public forum? Have you ever talked about sentencing in an academic setting?
25. What do you think about media attention towards judicial decisions?
 - a. For example, webcasting in the courtroom?
 - b. Generally media attention towards cases that are to be tried?
 - c. Judicial decisions?
26. Do you take into consideration the sentencing practices of the judges in your district? The sentences that are overturned by the First Circuit?
27. How often do you interact with or socialize with other judges?
28. What do you think is the role of a judge?