DETERMINING A VALUE FOR PUNISHMENT: SENTENCING & ANCHORS

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Abstract

A sample of data from Judge Young’s court from 2005 to 2012 displayed two graphical patterns. First, certain annual average sentences yielded oscillating or fluctuating curves. Second, a few types of offenses yielded annual averages that remained steady. While this paper does not offer a conclusion because there may be many possibilities and the data analyzed is but a mere sample, it offers the hypothesis that because sentencing largely promotes retributive purposes which aims to match the punishment to the crime and because the value for punishment is fiat, there are two separate types of anchoring occurring in the data. The first corresponds with the oscillating pattern and the advisory Sentencing Guidelines that allow for mitigating and aggravating factors. The second corresponds with the steady pattern and the anchor could either be the Guidelines without allowing for any departure, or prior sentences. Here, outlier offenses reflect a different pattern because public policy in those cases has limited judicial discretion and treats all offenders generically.

Table of Contents

I. Introduction 1

II. Sentencing as Retributive Justice 4

III. Valuation of Punishment 6

IV. Data and Sentence Anchors 9
   A. Anchoring Theory 9
   B. Data Analysis 11

V. Conclusion 20

VI. Appendix A
   A. Figure 1: Chart of Aggregate Sentences Per Offense Each Year A
   B. Figure 2: Chart of Number of Sentences Per Offense Each Year A
   C. Figure 3: Graph of Aggregate Sentences B
   D. Figure 4: Graph of Aggregate Sentences Per Offense Each Year B
I. Introduction

Police described Manny Mendes as “[a]lternately . . . a dangerous person and an extremely bright person.”\(^1\) In 2006, when sentencing him, District of Massachusetts Judge William J. Young scolded him: “[y]our crimes are extensive and monstrous.”\(^2\) Between 2004 and 2013, Judge Young sentenced 318 individuals for a variety of crimes including drugs, fraud, child pornography, and robbery.\(^3\) The sentences resulted in a range of punishments including time already served, probation, community confinement, and prison sentences from 1 month to 420 months.\(^4\) That long sentence of 420 months, or 35 years, belonged to none other than Manny Mendes.\(^5\) His crime was running a crack cocaine distribution ring.\(^6\) This long sentence captured Manny as a repeat offender, who by the age of fourteen, faced charges of “kidnapping, carrying weapons and threatening to commit crimes.”\(^7\) Over the years he began assisting with murders and dealing cocaine.\(^8\)

Thirty-five years in prison may have been a hefty toll for selling crack, but it hardly seems like punishment enough for Manny’s destruction of his family and community.\(^9\) Theoretically, sentencing promotes the goals of justice: deterrence, retribution, and restoration.\(^10\) Yet, Mendes’ sentence did not deter his children from pursuing in his footsteps nor did it restore the

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4 See id.
5 Mendes Transcript, supra note 2.
6 Id.
7 See id; see also Jeffrey, supra note 1.
8 Jeffrey, supra note 1.
9 See generally Mendes Transcript, supra note 2.
community. For instance, Manny’s youngest son “shot [his older brother], stabbed [him 27 times], dumped [his body] into a shallow hole, and set [it] afire.” Manny’s 35 year sentence epitomizes the practice of punishment through sentencing as retributive justice; but is 35 years adequate punishment or is it excessive? Why not punish Manny by requiring him to spend 34 or 40 years in prison?

Retribution, or the “just deserts” theory of justice, is based on matching the punishment with the crime. This task challenges judges because the human brain cannot quantify punishment for an offense. In other words, the amount of punishment that adequately expresses societal reproach for any particular crime is unknowable. Therefore, judges must devise an arbitrary length of time for the punishment.

Previously, judges used their own intuition from experiences (or prejudice) to determine how much time in prison for an offender was long enough to achieve justice. The sentences given were wildly disproportionate to the crimes and to each other. To address this problem, the United States Congress passed sentencing reform in the 1980s and created a system for making prison sentences uniform for similarly situated offenders. But, in 2005 in United States v. Booker, the United States Supreme Court found these federal Sentencing Guidelines

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13 See generally Mendes Transcript, supra note 2.
14 See generally id.
17 See generally id.
18 See generally id.; see also discussion infra Part III.
19 Ryan W. Scott, Inter-Judge Sentencing Disparity After Booker: A First Look, 63 STAN. L. REV. 1, 3 (2010); see also discussion infra Part III.
20 See Scott, supra note 19, at 3.
(“Guidelines”) unconstitutional if mandatory.\textsuperscript{22} Although no longer mandatory, the Guidelines still serve as a reference point for judges to determine the length of punishment.\textsuperscript{23}

This paper argues that sentencing is largely a form of retributive justice.\textsuperscript{24} The corresponding punishment’s value is fiat, but is not random because it is based on an arbitrary anchor.\textsuperscript{25} While that anchor used to be the judge’s own intuition (or prejudice), the Guidelines, although no longer mandatory, have largely displaced intuition.\textsuperscript{26} For the majority of offenses, sentences correlate to the Guidelines formula, yielding fluctuating curves.\textsuperscript{27} Nonetheless, in a minority of categories of offenses, the anchor yields a near flat trajectory.\textsuperscript{28} This steady pattern likely owes to a different anchor or a variation on the Guidelines as an anchor.\textsuperscript{29} The anchor is either the prior sentences or the Guidelines without the presence of departures.\textsuperscript{30} The different anchor likely owes to a resounding public policy that limits judicial discretion with regards to a particular offense.\textsuperscript{31} This paper draws upon data from Judge William J. Young’s court in the District of Massachusetts.\textsuperscript{32}

While no data analysis can be absolutely free of error, this survey involves a small sample and serves only to address emerging patterns in sentencing after \textit{United States v. Booker}.\textsuperscript{33} The study consists of United States District of Massachusetts court reporter Don Womack’s

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{22} \textit{United States v. Booker}, 543 U.S. 220 (2005).
\item \textsuperscript{24} \textit{See discussion infra} Part II.
\item \textsuperscript{25} \textit{See discussion infra} Part III.
\item \textsuperscript{26} \textit{See discussion infra} Part III.
\item \textsuperscript{27} \textit{See discussion infra} Part IV.
\item \textsuperscript{28} \textit{See discussion infra} Part IV; \textit{see also} Appendix: Figure 4.
\item \textsuperscript{29} \textit{See discussion infra} Part IV.
\item \textsuperscript{30} \textit{See discussion infra} Part IV.
\item \textsuperscript{31} \textit{See discussion infra} Part IV.
\item \textsuperscript{32} \textit{See discussion infra} Part IV; \textit{see generally} Search Results, \textit{supra} note 3.
\item \textsuperscript{33} \textit{See discussion infra} Part IV; \textit{see generally} Search Results, \textit{supra} note 3; \textit{United States v. Booker}, 543 U.S. 220 (2005).
\end{itemize}
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compilation of exportable data and sentencing transcripts. The sample ranges from post-
Booker in 2004 to 2013 with 318 incidents. The analysis excludes the data from 2004 and 2013 because the data did not capture the full years and would result in a false comparison. The analysis also excludes offenses with punishment other than prison such as probation or home confinement. Finally, the analysis does not try to compare sentences that derive from multiple offenses, such as ones that involve both drugs and firearms.

The analysis consists of segregating the data into seven general categories. These categories are: crimes related to drugs, fraud, child pornography and exploitation, firearms, illegal immigration, robbery and theft, money laundering, and other miscellaneous offenses (which are not included in the analysis). Although the cost of generalizing these terms is significant, the purpose of creating the categories was to catch a glimpse of any trends within the data. In summary, based on a sample of data, there are two anchors for determining the length of a sentence based on whether public policy has limited judicial discretion and therefore, treats all offenders generically.

II. Sentencing as Retributive Justice

Sentencing promotes the justice theory of retribution which requires proportional punishment. While punishment promotes the purposes of deterrence, restoration,
incapacitation, and retribution, sentencing often favors the goal of retribution.\textsuperscript{44} Retribution is the theory of justice whereby the punishment is a “moral penalty.”\textsuperscript{45} Scholars have also ruminated on retribution as vengeance or “just deserts.”\textsuperscript{46} To connect punishment to a crime, scholars have conjectured that punishment serves to demonstrate to society that the victim has value or that the offender cannot break laws without consequences.\textsuperscript{47} A simple explanation of retribution is society’s “express[ion of] its moral outrage over [an offender’s] crime.”\textsuperscript{48} Another explanation is that retribution restores or “balances . . . rights.”\textsuperscript{49}

Although the theory of retribution demands that the punishment must be proportional to the crime,\textsuperscript{50} it provides no formula for doing so.\textsuperscript{51} Determining a ratio for crime to punishment is particularly elusive because “[e]vidence from neuroscience, cognitive science, and the history of federal sentencing indicate that criminal punishment may simply be difficult to rationalize.”\textsuperscript{52} Even when people agree that an offense was harmful and therefore, warrants punishment, they struggle to agree on the degree of punishment for that harm.\textsuperscript{53} For instance, sentences have been erratic with “200 years for possession of twenty images of child pornography by a first time offender; fifty-five years for selling small amounts of marijuana while having a gun nearby;
[and] forty years for selling a small amount of marijuana." \(^5^4\) Thus, the value of punishment is highly subjective with each person estimating a value based on his or her own experiences and perception of the crime.\(^5^5\)

### III. Valuation of Punishment

While determining a value for punishment is subjective, judges must nevertheless designate an appropriate value.\(^5^6\) In the United States, juries find an individual guilty of a crime and then the judge must determine the sentence based on the types of punishment for which the appropriate statute provides;\(^5^7\) Judge Nancy Gertner describes this as a “division of labor” between the jury and the judge.\(^5^8\)

Historically, the judge had great control over the sentence and whether he imposed consistent sentences.\(^5^9\) Offenders who had committed the same types of crime were at the mercy of the judge and could each receive a significantly different prison term.\(^6^0\) The judge would not need to justify or explain any of the differences.\(^6^1\) Even if judges did not intend for the sentences to be different, they did not receive any training to instruct them how to sentence individuals.\(^6^2\) The ad-hoc approach to sentencing resulted in wildly disparate punishments.\(^6^3\)

By the 1970s and 1980s, the disparity was so blatant that there were calls for institutional reform through mandatory sentencing guidelines.\(^6^4\) Marvin Frankel, known as the “father of

\(^5^4\) Markel, supra note 48, at 1220.
\(^5^5\) See generally Ristroph, supra note 51.
\(^5^6\) See generally id.
\(^5^7\) Scott, supra note 19, at 6.
\(^5^9\) Scott, supra note 19, at 6.
\(^6^0\) Id. at 3.
\(^6^1\) Id. at 6.
\(^6^2\) Gertner, A Short History, supra note 58, at 696.
\(^6^4\) See generally id. at 88-90.
sentencing reform” lambasted the impact of sentencing in the United States. He advocated for a sentencing commission to address the deviation from the “rule of law.” By the 1980s, Congress began to seek changes to sentencing and proposed several bills. Specifically, in 1984, the United States Congress enacted the Sentencing Reform Act (“Act”). The Act aimed to mitigate the disparities in sentences that resulted from prejudice and other causes while also pursuing “‘limited’ retribution.” It created the Sentencing Commission as an agency of the judicial branch. The Commission promulgated a set of Guidelines and required that judges follow them unless the defendant provided “substantial assistance to authorities” or there was an “‘exception case’ necessitating departure.” In addition to creating the Commission, the Act also required judges to justify the sentences they gave to offenders. The Guidelines consist of a “grid with forty-three offense levels.” Basically, there are 258 cells on this grid to impose predictability on how judges sentence an offender. The Commission also provides certain factors for reducing or increasing the sentence length.

The reform was largely successful in promoting consistent sentences. For example, one study found that the different sentence lengths between judges varied 16-18% prior to the

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67 See id.
68 Gertner, A Short History, supra note 58, at 699.
70 Scott, supra note 19, at 1; Gertner, A Short History, supra note 58, at 698.
71 Scott, supra note 19, at 8.
72 Id. at 8-9.
73 Id. at 8.
76 Papa, supra note 66, at 272.
77 Scott, supra note 19, at 1.
Guidelines, but only 8-13% after them. While the Guidelines reduced the disparities, they imposed longer and harsher sentences than judges had previously done. Judge Gertner explains that the new Guidelines reflected mere “increase[s].” She concluded that the “division of labor” between jury and judge may still have existed, but the judge’s role shifted to that of “another fact finder.” In addition to attempting to match the crime with a consistent punishment, the Guidelines required the judge to inquire into the individual’s history.

In 2005 in United States v. Booker, the Supreme Court held that the Guidelines were unconstitutional if mandatory. Prior to Booker, the Guidelines faced repeated attack and the Commission amended the guidelines “over 600 times.” These amendments were not enough to fully legitimize the Guidelines. In 2005, defendant Freddie J. Booker challenged his thirty year sentence for possession and intent to distribute cocaine and cocaine base. The Supreme Court determined that a sentence beyond the maximum based on facts that a judge determined during sentencing without the jury evaluating those facts violated the defendant’s Sixth Amendment rights. Accordingly, after Booker, sentencing guidelines became mere suggestions for judges.

78 Id. at 10.
79 Gertner, A Short History, supra note 58, at 701; see also Papa, supra note 66, at 273 (“Critics, however, suggest that this uniformity may have been purchased ‘at the price of undue severity in sentences, undue uniformity of those sentenced, and unwarranted complexity.’”).
80 Gertner, A Short History, supra note 58, at 701.
81 Id. at 705.
82 See generally id.
84 Papa, supra note 66, at 273.
85 See generally id.
86 Booker, 543 U.S. at 226.
87 See id. at 257 (“In respondent Booker's case, for example, the jury heard evidence that the crime had involved 92.5 grams of crack cocaine, and convicted Booker of possessing more than 50 grams. But the judge, at sentencing, found that the crime had involved an additional 566 grams, for a total of 658.5 grams. A system that would require the jury, not the judge, to make the additional ‘566 grams’ finding is a system in which the prosecutor, not the judge, would control the sentence.”).
IV. Data and Sentence Anchors

While the Guidelines are no longer mandatory, they still largely serve as an anchor for determining sentence lengths. This section first explains the theory of anchoring and how it relates to sentencing. It then proceeds to evaluate data from Judge Young’s court to determine whether anchoring had any particular role. Based on that data, the Guidelines may serve as an anchor for the majority of offenses that conform well to the formula, but there are also likely a few categories of offenses that represent outliers. These outliers are those that have attracted public policy that largely limits judicial discretion and treats all offenders in the same manner without regard to the individual circumstances.

A. Anchoring Theory

Briefly, although a judge’s determination of the value of punishment through a sentence length is subjective and arbitrary, the value is not random, but rather anchored to a reference point. In the absence of any intrinsic value to match the offense to the punishment, judges fill in the gap using heuristics to arrive at a value. They often rely on experience, intuition, or

90 See discussion infra Part IV.A.
91 See discussion infra Part IV.B.
92 See discussion infra Part IV.B; see generally Appendix.
93 See generally Appendix.
94 See generally id.; see also Daniel M. Isaacs, Note, Baseline Framing in Sentencing, 121 YALE L.J. 426, 439 (2011) (“Scholars have observed anchoring in judicial decisionmaking and identified sentencing guidelines and prosecutorial sentencing demands as influential anchors. Anchoring is overreliance on an initial numerical reference point that causes ‘absolute judgments [to] assimilate[] toward’ the initial value.”).
95 See Thomas Mussweiler & Birte Englich, Subliminal Anchoring: Judgmental Consequences and Underlying Mechanisms, ORG. BEHAVIOR & HUMAN DECISION PROCESSES 98, 133 (2005) (“No matter whether judges guess the freezing-point of vodka . . . determine the price of a house . . . estimate the value of a car . . . or find a sentence of prison confinement in court . . . they are reliably influenced by salient numeric standards that anchor their judgment.”).
mandates. As with any anchor, the reference point may be devoid of any relationship with the offense so that it is arbitrary, but not random.

In the precedential study on anchoring in 1976, two psychologists Amos Tversky and Daniel Kahneman proved that they could use a random number to influence study participants’ estimates of the number of African countries that were part of the United Nations (U.N.). They rigged a roulette wheel to land on either the number 10 or the number 65. Nearly without fail, participants who observed the wheel land on 10 estimated that 25% of African nations were part of the U.N. whereas those observing the wheel fall on 65 resolved that 45% of African nations were members. This study showed that an arbitrary number could significantly affect peoples’ perceptions.

Scholars have since applied the same theory of anchoring to negotiations and trials. For example, scholars have studied the effect of anchoring in trial damages. When a plaintiff initially asks for a higher damages award, the jury uses that as a reference point and is more likely to award a higher amount than if the plaintiff asked for a smaller amount initially without any of the facts of the case changing other than the initial demand.

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96 See Scott, supra note 19, at 6; see generally Isaacs, supra note 94, at 439.
97 Mussweiler & Englich, supra note 95, at 134 (“Even anchors that were not directly related to the critical target do at times influence target evaluations.”).
99 Orr & Guthrie, supra note 98, at 600.
100 Id.
101 Id.
103 Guthrie et al., Inside the Judicial Mind, supra note 102, at 789-90 (“The moral of these anchoring studies seems to be, ‘Ask and ye shall receive.’”)
104 Id.
Anchoring works not only on juries, but also on judges.\textsuperscript{105} For example, in a study of German trial judges, researchers tested the judges’ responses to prosecutors’ sentencing demands.\textsuperscript{106} They found that the judges sentenced offenders in correlation with those demands.\textsuperscript{107}

B. Data Analysis

Generally, analysis of the data resulted in some noticeable trends.\textsuperscript{108} First, the average sentence length for all offenses was relatively steady.\textsuperscript{109} This would contradict any suggestion that Booker led to an upward-spiral of sentences (at least in Judge Young’s courtroom).\textsuperscript{110} In fact, the percent change declined in about 2010, suggesting that sentence lengths were actually not as long as immediately after Booker.\textsuperscript{111}

Second, the average sentences for each category of offense revealed some unique patterns.\textsuperscript{112} Rather than the categories trending in similar fashions, there appears to be two sets of patterns in the data.\textsuperscript{113} The first group of categories involves those offenses with sentences following an oscillation type of pattern such as firearms and robbery.\textsuperscript{114} The second group involves relatively

\textsuperscript{105} Id. at 778 (“Even though judges are experienced, well-trained, and highly motivated decision makers, they might be vulnerable to cognitive illusions.”); Isaacs, supra note 94, at 435; see generally Gertner, A Short History, supra note 58.
\textsuperscript{106} Isaacs, supra note 94, at 440.
\textsuperscript{107} Id.
\textsuperscript{108} See Appendix: Figures 3 & 4.
\textsuperscript{109} See id.
\textsuperscript{110} Compare Laura M. Klever, Note, Reinvigorated Judicial Discretion After Booker: Burden or Boon to Sexual Exploitation Offenders?, 11 J. GENDER RACE & JUST. 93, 93 (“That decision effectively restored to judges a measure of discretion to make sentencing decisions, and in the years following the Booker decision, sentences nationwide have generally increased.”) with Douglas A. Berman, Symposium, Tweaking Booker: Advisory Guidelines in the Federal System, 43 HOUS. L. REV. 341, 349 (2006) (“Indeed, a year after Booker, lower court opinions and cumulative post-Booker data suggest that the legal and political culture has made the federal sentencing system almost impervious to dramatic change.”).
\textsuperscript{111} Compare Appendix: Figures 3 & 4 with Klever, supra note 110, at 93.
\textsuperscript{112} See Appendix: Figure 4.
\textsuperscript{113} Id.
\textsuperscript{114} Id.
consistent average sentences over the years, closer to a flat line such as illegal immigration.\textsuperscript{115} Why would there be two different patterns emerging?\textsuperscript{116}

While additional research and more data would need to substantiate the hypothesis, one possible explanation for the two patterns is that the first group involves standard offenses where the Guidelines formula of base-line and aggravating and mitigating factors readily apply.\textsuperscript{117} On the other hand, the second group of offenses represents outliers that do not fit the formula so well because public policy relating to those offenses limits judicial discretion.\textsuperscript{118} There are two ways to perceive of this second category—either as still anchoring to the Guidelines but simply omitting the variable of individual circumstances, or anchoring to similar prior sentences. Either way, the effect is likely the same.

The first group of categories oscillates because the sentences account for mitigating and aggravating factors per the Guideline formula, meaning the individual circumstances matter.\textsuperscript{119} This general pattern displays two trends resembling oscillation.\textsuperscript{120} First, robbery archetypically increases and decreases each year, drawing a standard oscillation curve.\textsuperscript{121} Part of the fluctuation may be due to the data method of grouping robbery and theft together and therefore, is not conclusive. Second, firearms, money laundering, and fraud each display a less predictable

\textsuperscript{115} Id.
\textsuperscript{116} Id.
\textsuperscript{117} See generally Sarah French Russell, \textit{Rethinking Recidivist Enhancements: The Role of Prior Drug Convictions in Federal Sentencing}, 43 U.C. DAVIS L. REV. 1135, 1140 (2010) (“Although some judges utilize the flexibility Booker allows, federal judges still impose sentences within the ranges recommended by the guidelines in the majority of cases.”).
\textsuperscript{118} See Klever, \textit{supra} note 110, at 112 (“The Sentencing Commission's statistics show that, post-Booker, judges imposed sentences within the Sentencing Guideline range approximately seventy-eight percent of the time for the offense of Trafficking in Child Pornography.”); see generally Krauss, \textit{supra} note 16, at 373-74.
\textsuperscript{119} Appendix: Figure 4; see generally Amy Baron-Evans & Kate Stith, Symposium, \textit{Booker Rules}, 160 U. PA. L. REV. 1631, 1648 (2012) (“To this end, the SRA directed the Commission to consider for inclusion in the guidelines nonexhaustive lists of aggravating and mitigating offense and offender characteristics, and to ‘maintain[] sufficient flexibility to permit individualized sentencing when warranted by mitigating and aggravating factors not taken into account’ in the guidelines. Congress recognized that it was not possible to write all relevant factors into general rules, and that ‘some variation [was] not only inevitable but desirable.’”).
\textsuperscript{120} Appendix: Figure 4.
\textsuperscript{121} Id.
oscillation pattern. Although the fluctuations are irregular, it is possible that the sample does not reflect a long enough time period to readily characterize the pattern. Based on the available data, however, each category appears prone to fluctuation.

This fluctuation likely corresponds with anchoring to the Guidelines. In 2008, money laundering spiked from the prior average length of 21.40 months up to 60 months. In that year, one defendant, Santo Melo, faced prison not only for money laundering, but also crime related to controlled substances and interstate commerce. Accordingly, the spike appears to reflect individual circumstances relating to the offense as a significant influence consistent with the horizontal axis of the Guidelines.

The most controlled analysis of the pattern occurred with firearms. The variations in the firearm sentences appear more clearly to result from the individual circumstances. For instance, in 2006, there were three sentences relating to firearms. Each sentence addressed a felon in possession of a firearm and ammunition. For the same offense, the sentences were for 41, 70, and 180 months. The lower sentence of 41 months was a resentencing. Although Judge Young recognized that Mr. Jones read a compelling statement, the Judge still gave Mr.
Jones the maximum sentence under the guidelines, but declined the government’s suggestion to impose an even higher sentence.\textsuperscript{135}

Now, the 70 month sentence was for Gregory Wright.\textsuperscript{136} It is difficult to tell exactly from the sentencing excerpt transcript all the details, but his longer sentence appears to hinge on repeat criminal behavior, which could easily distinguish him from Mr. Jones on the Guideline horizontal axis.\textsuperscript{137} Finally, Michael Ambers received the longest firearm sentence that year of 180 months (and one of the longest for firearms in the sample).\textsuperscript{138} The factors that contributed to 180 months included a history of criminal activity balanced against Mr. Amber’s personal development and intent to reform as demonstrated by his statement to the court.\textsuperscript{139} Thus, the difference in sentencing lengths likely are due to the Judge’s discretion in applying the Guidelines’ mitigating and aggravating factors.\textsuperscript{140}

Besides firearms, robbery, fraud, and money laundering, drug sentencing also likely anchor to the Guidelines, but more data would need to confirm this prediction.\textsuperscript{141} The sentences for drug distribution crimes remained relatively steady around 100 months between 2006 to 2009.\textsuperscript{142} Then, from 2010 to 2012 they fluctuated.\textsuperscript{143} Because the duration of the sample is only seven years, it is unclear whether the corresponding sentences fit either anchor theory.\textsuperscript{144} In addition, the data method of aggregating drug-related offenses partially blurs distinctions because of how

\textsuperscript{135} Id.
\textsuperscript{137} See id.
\textsuperscript{139} Id.
\textsuperscript{140} See generally Baron-Evans & Stith, supra note 119, at 1648.
\textsuperscript{141} See generally Appendix: Figure 4.
\textsuperscript{142} Appendix: Figures 1 & 4.
\textsuperscript{143} Id.
\textsuperscript{144} See generally id.
broad the category is. Each year the drug-related category included offenses such as
distribution of cocaine, conspiracy to distribute cocaine, conspiracy to distribute heroin,
conspiracy to distribute marijuana, and intent to distribute oxycodone. Because drug-related
sentencing involved the most offenses and variation within the category should have been
consistent each year, the potential overgeneralization should not disrupt the correlations, but a
larger sample broken out specifically by each specific offense would be more conclusive.

Arguably, however, drug distribution sentences would anchor against the Guidelines
because they are the archetypical offense justifying and benefitting from the departure criteria.
Take for instance, Manny Mendes described in the introduction. His offense was distribution
of crack-cocaine, but he received one of the longest sentences in Judge Young’s courtroom
because of the aggravating factors.

Although initially steady, the data on drug-related crime sentencing likely demonstrates
an anchor to the Guidelines with the aggravating and mitigating factors playing a large role. In
2008, Judge Young gave out some of the longest sentences, not only to drug offenders, but to all
offenders. Generally, of the fifty longest prison sentences, thirty-two involved a drug crime.
Specifically, in 2008, there was only one sentence for a drug offense resulting in less than 2

145 See generally supra text accompanying notes 33-34.
146 See Search Results, supra note 3.
147 See generally supra text accompanying notes 33-34; see also Appendix: Figures 1 &2.
148 See Appendix: Figure 4; see generally Panel Discussion, Federal Sentencing Under “Advisory” Guidelines: Observation by District Judges, 75 FORDHAM L. REV. 1, 23 (2003) (“To me it is hard for several reasons. I do not
think that it is a good idea for some judges to say, ‘We are just not going to follow this particular guideline,’ because the problem is that other judges will take a different view. Then we will have identical defendants being sentenced very differently based on different judges' beliefs about drug sentences. I do not think that is what is going on in the post-Booker world, and I do not think that should be going on.”); Frank O. Bowman III & Michael Heise, Quiet Rebellion? Explaining Nearly a Decade of Declining Federal Drug Sentences, 86 IOWA L. REV. 1043, 1062, 1075
(2001) (“For the present, it suffices to note that the Guidelines are what they are in significant part because of the original Commission's perceptions of its legislative mandate in the narcotics field.”).
149 See discussion supra notes 5-14 and accompanying text; see also Mendes Transcript, supra note 2.
150 See Mendes Transcript, supra note 2; see generally Search Results, supra note 3.
151 See Appendix: Figure 4; see generally Bowman & Heise, supra note 148.
152 Appendix: Figures 1 & 4; see generally Search Results, supra note 3.
153 See generally Search Results, supra note 3.
years of prison time. 154 Of the 22 sentences that year, the lengths ranged from 18 to 312 months with half of the sentences for at least 100 months in prison. 155 The reduced sentence of 18 months was for Hoang Pham. 156 This was a reduced sentence for possession and distribution of marijuana. 157 Judge Young found that Mr. Pham was a minor player in the conspiracy and gave a lesser sentence based on the Assistant United States Attorney’s recommendation. 158

By contrast, the aggregate drug sentences during the year 2011 dipped the curve to the lowest average of 53 months in prison (or nearly 4.5 years). 159 In that year, there were 14 drug-related sentences, compared to 22 in 2008. 160 Rather than the difference in average term relating to the quantity of sentences, the difference in prison term was largely due to several reduced sentences in 2011. 161 In one case in 2011, the sentence was simply lower because the offender was “lucky” and the police had not found a large amount of drugs on him. 162 Therefore, he only received 15 months, which Judge Young stated was an opportunity for him to change his life. 163

There was also a reduced sentence of 12 months for Brad Batchelder that reduced the annual average. 164 He was charged with distribution and possession of oxycodone. 165 The Guidelines recommended 2.5 years, but Judge Young only issued 1 year based on Mr.
Batchelder’s having “done everything right” since his arrest.\textsuperscript{166} In justifying the sentence, Judge Young declared the need for “jail time” to make the offense “real.”\textsuperscript{167} Based on the sentencing transcripts’ discussions of mitigating factors, drug offenses appear to correlate with the Guidelines.\textsuperscript{168}

The second group of categories presented sentences that remained steady because they involved offenses with an overriding public policy that negated the individual offender’s circumstances.\textsuperscript{169} The two predominant categories of offenses that appear steady are child pornography and illegal immigration.\textsuperscript{170} Child pornography invokes great emotional response, resulting in a resounding public policy of legislation that limits judicial discretion to account for any aggravating or mitigating factors.\textsuperscript{171} Similarly, illegal immigration sentences reflect little judicial discretion because of policy and practice that does not have a “coherent, principled approach to determining appropriate sentences.”\textsuperscript{172} That is, with both types of offenses, there is intervening public policy that limits judicial discretion even under the Guidelines.\textsuperscript{173}

Child pornography sentences are relatively consistent because the offense is so depraved that the individual evaluation just does not matter.\textsuperscript{174} In 2003, the public demanded greater punishment of child pornography offenders even though the nature of the offense in the aggregate had not changed.\textsuperscript{175} Although there were a variety of explanations for the reduced sentences such as an offender having no prior criminal history or having contributed to

\begin{itemize}
  \item \textsuperscript{166} Id.
  \item \textsuperscript{167} Id.
  \item \textsuperscript{168} See discussion supra notes 148-167 and accompanying text.
  \item \textsuperscript{169} See generally Appendix: Figure 4.
  \item \textsuperscript{170} See generally id.
  \item \textsuperscript{171} See generally Klever, supra note 110, at 93 (“‘Sex offenses are in our time the new witchcraft. We’re as hysterical about these crimes as were the good people of Salem over witches. And our means of addressing the hysteria is about as effective.’”).
  \item \textsuperscript{173} See discussion infra notes 174- 201 and accompanying text.
  \item \textsuperscript{174} See Klever, supra note 110, at 111.
  \item \textsuperscript{175} Id. at 94.
\end{itemize}
society, the public found the category of offenses to be so heinous that the punishment was undervalued and needed adjustment without regard to individual evaluation. Accordingly, Congress enacted the Prosecutorial Remedies and Other Tools to End the Exploitation of Children Today (PROTECT) Act in 2003. After Congress passed the PROTECT Act, the number of child pornography cases increased by over 1,000 annual cases in about fifteen years. In addition, the sentences rose from an average of 36 months to 120 months in the same time period. This public influence created a generic value of punishment for offenders of child pornography related crimes.

The data reflects the public’s valuation of punishment. From 2008 to 2012, average child pornography sentences were longer than many sentences pertaining to other offenses. In the years in which Judge Young sentenced child pornographers, the range was 60 to 84 months. One of those 60-month sentences belonged to Robert Gamere. In 2010, Robert Gamere received 60 months in prison for possession and transportation of child pornography. Unlike some of the other sentencing transcripts in other categories, his transcript offered sparse account of his crime or circumstances. Instead, the transcript contained the specific details of his

176 Holly H. Krohel, Comment, Dangerous Discretion: Protecting children By Amending the Federal Child Pornography Statutes to Enforce Sentencing Enhancements and Prevent Noncustodial Sentences, 48 SAN DIEGO L. REV. 623, 646-50 (2011) (“The fact that a defendant has a family, has a good job, or is well educated might be part of the reason that some defendants receive a lower sentence . . . Most child pornography defendants are white males, and many are in fact well educated.”).
179 Kimball, supra note 177, at 1518.
180 Id.
181 Scott, supra note 19 at 12.
182 See generally Appendix: Figures 1 & 4.
183 Id.
184 Appendix: Figure 1; see generally Search Results, supra note 3.
186 Id.
187 See id.
Moreover, his sentence focused on the harm, “[b]ut there can be no denying that because you provided a ready and willing market for this material, small children were abused, repeatedly abused, hideously abused, in part because of you.”189 Thus, child pornography offenders in Judge Young’s court are likely to face standard and predictable sentences that do not account for the individual circumstances.190

Similarly, sentences for illegal immigration offenses were steady because of public policy limiting judicial discretion.191 Policy surrounding immigration offenses curtailed any individual focus because “the criminal prosecution, rather than the administrative agency removal process, acts as the de facto immigration adjudicator.”192 Sentences for illegal immigration were the highest in 2005 in Judge Young’s court.193 The average sentence ranged from about 20 to 46 months, about the same 25 month range as child pornography.194 By contrast, the average range for every other offense was almost double that for child pornography and illegal immigration, with the range at least 45 months.195 Other than in 2005 and 2009, no sentence related to illegal immigration exceeded 40 months.196

The three longest sentences were for 48 months.197 For instance, in 2005, Orlando Frias-Ortega was sentenced for reentry as a deported alien.198 Judge Young gave Mr. Frias-Ortega a reduced sentence from the 70 month recommendation.199 He explained that “further incarceration

188 See id.
189 Id.
190 See generally Appendix: Figures 1 & 4; see generally Search Results, supra note 3.
191 See generally Fleissner & Shapiro, supra note 172.
193 Appendix: Figures 1 & 4.
194 Id.; see generally Search Results, supra note 3.
195 Appendix: Figure 1.
196 See generally Search Results, supra note 3.
197 See generally Search Results, supra note 3.
199 Id.
is not likely to provide any greater protection to the public.”200 Similarly, Judge Young sentenced Juan Pleitez-Martinez to 45 months in prison for reentry.201 The consistency in immigration sentences demonstrates a generic type of sentencing due to public policy that has transformed federal immigration sentencing into a near adjudicatory process.202 Thus, there appear to be two anchors for determining sentence lengths with the distinguishing test as whether the public has expressed a policy for negating the individual circumstances of the offender and therefore, reducing judicial discretion.203

V. Conclusion

Because two different patterns emerged in the data, one possible explanation is there were two separate anchors.204 The first anchor would be the Guidelines and the mitigating and aggravating offenses would account for the fluctuations.205 The second anchor would be the prior sentences themselves, resulting in more or less the same average sentence lengths each year, or the Guidelines without the option for the judges to allow for departures.206 The distinction in the anchor results from public policy restricting judicial discretion for some offenses and treating all offenders generically.207

While Manny Mendes’ sentence for 35 years may have been arbitrary, it was not random.208 It reflected society’s desire to match his punishment with his crime according to

200 Id.
202 See generally discussion supra notes 192-200 and accompanying text.
203 See discussion supra notes 174-201 and accompanying text.
204 See discussion supra Part IV.
205 See discussion supra Part IV.
206 See discussion supra Part IV.
207 See discussion supra Part IV.
208 See discussion supra Parts I, II, IV.
retributive goals. Because punishment does not have intrinsic value, the 35 years as anchored to the Guidelines perhaps is as close as society can get to approaching a true value.

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209 See discussion supra Parts I, II.
210 See discussion supra Parts II, III, IV.
VI. Appendix

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<th>Offense</th>
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Figure 1: Annual Average Sentencing Data per Offense

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Figure 2: Annual Totals of Offenses
Figure 3: Aggregate Data with Average Sentences Lengths and Percent Changes

Figure 4: Sentencing Averages By Year and Offense