

Nudging Judges Away from Implicit Bias: Using Behavioral Science to Promote Racial Equity in Federal Sentencing

*Samantha Cremin**

INTRODUCTION

In December of 2020, the U.S. Sentencing Commission (“USSC”) reported its latest results regarding the demographic differences found in sentencing patterns under the Federal Sentencing Guidelines.¹ The results of the study reflect a resounding sentiment that has been the reality for our criminal justice system since its inception—people of color are and have been continually discriminated against in almost all phases of their interactions with the justice system.² By comparing average sentencing practices, the report supported the fact that Black men receive significantly longer sentences than their similarly situated white counterparts, even in recent years when discussions on inequitable treatment of people of color in the system have been frequent and prevalent.³

A possible explanation for these continued discrepancies in federal sentencing has been attributed to implicit biases held by decision-makers and the amount of discretion that they wield in making sentencing

* J.D., New England Law | Boston (2022). B.A., Legal Studies and Political Science, University of Massachusetts Amherst (2019).

¹ U.S. SENTENCING COMM’N, THE INFLUENCE OF THE GUIDELINES ON FEDERAL SENTENCING 5–6 (2020), <https://perma.cc/AD6S-S5LE> [hereinafter INFLUENCE OF THE GUIDELINES].

² *See id.* *See generally* THE SENTENCING PROJECT, REPORT TO THE UNITED NATIONS ON RACIAL DISPARITIES IN THE UNITED STATES CRIMINAL JUSTICE SYSTEM (2018), <https://perma.cc/588A-PNCE> [hereinafter REPORT TO THE U.N.].

³ INFLUENCE OF THE GUIDELINES, *supra* note 1; *see* Christopher Ingraham, *Black Men Sentenced to More Time for Committing the Exact Same Crime as a White Person, Study Finds*, WASH. POST (Nov. 16, 2017), <https://perma.cc/4TUC-V4M8>.

determinations.⁴ Since implicit cognitive functions are at play in this type of discrimination, combating these functions with alterations to the Federal Sentencing Guidelines that account for theories based in behavioral science could produce effective results on an issue that desperately requires attention.⁵ Nudge theory is the idea that individual decision-making can be altered by the way in which choices or information are presented to the chooser, through a process called choice architecture.⁶

This Note argues that the application of nudge theory to the everyday use of the Federal Sentencing Guidelines could bring judicial attention to the issue of racial sentencing disparities and implicit biases that could be motivating or overshadowing judges' sentencing decisions. This Note puts forth the recommendation including an advisory notice regarding racial inequity in sentencing in the packet containing the Federal Sentencing Guidelines, serving as the nudge for each judge. This shift of focus while seeing the advisory notice, even if brief, could improve consciousness of racial sentencing disparities as the decisions are being made in real-time and could potentially lead to more equitable trends in judicial choice architecture in sentencing people of color. Part I of this Note will lay out the concept of nudge theory in-depth, describing its real-world applications and potential for utilization in the courtroom.⁷ It will also provide a comprehensive understanding of the operation of the Federal Sentencing Guidelines and judicial discretion therefrom.⁸ Part II of this Note will explain the necessity for changes to be made to the Guidelines and the repercussions for not doing so, viewed through a Critical Race Theory lens.⁹ Part III of this Note will argue how an intertwining of behavioral science and judicial decision-making could yield more equitable sentences for people of color, given the ways in which nudge theory has been applied and been successful in numerous other settings outside the courtroom.¹⁰

⁴ Crystal S. Yang, *Free at Last? Judicial Discretion and Racial Disparities in Federal Sentencing* 1–3 (Coase-Sandor Inst. L. & Econ., Working Paper No. 661, 2013), <https://perma.cc/RR87-VD7J>.

⁵ See generally MICHAEL BROWNSTEIN, *Implicit Bias*, STAN. ENC. PHIL., <https://perma.cc/SCX6-TP5C> (last updated July 31, 2019) (describing the psychology behind implicit social cognition and the ways in which the brain can jump to discriminatory behavior in brief snap judgements).

⁶ See Anneliese Arno & Steve Thomas, *The Efficacy of Nudge Theory Strategies in Influencing Adult Dietary Behaviour: A Systematic Review and Meta-Analysis*, BMC PUB. HEALTH, July 2016, at 1, 2, <https://perma.cc/X2YB-TMLC>.

⁷ See *infra* Part I.

⁸ See *infra* Part I.

⁹ See *infra* Part II.

¹⁰ See *infra* Part III.

I. Background

A. *The Origin and Utilization of Nudge Theory*

Nudge theory lies within the realm of behavioral science.¹¹ Cass Sunstein and Richard Thaler formed this theory to fight against the common economic concept that humans are rational actors and that their decision-making is thus rational.¹² The idea essentially suggests that there are factors in our social environment, as well as societal standards and norms that pressure people into certain patterns of decision-making.¹³ Without being coercive or using unethical incentives, nudges are ways to introduce information or choices that the actor otherwise may not have thought of into the decision-making process.¹⁴ These nudges guide the actor to an answer or choice that may be more positive.¹⁵ There are numerous ways to use this theory: from very basic nudges that yield relatively inconsequential results to incredibly intricate nudges yielding significant changes.¹⁶ Examples are the best way to understand nudge theory in its actual application.¹⁷ A nudge on the basic end would be asking customers to pay 5¢ for plastic bags at the supermarket: a seemingly minuscule change in policy that drives shoppers to begin bringing reusable bags instead—a more sustainable alternative to plastic bags.¹⁸ As another example, to fight obesity, a small nudge can include moving candy to an obscure area of the store to remove it from the shopper's thoughts when checking out.¹⁹ This nudge is based on the premise that the shopper did not plan on buying candy at the store that day.²⁰ But

¹¹ See April Lea Pope, *To Behave or Not to Behave: How Behavioral Science Can Inform Policy and the Law*, 59 *ADVOC.* 41, 42 (2016).

¹² See generally RICHARD H. THALER & CASS R. SUNSTEIN, *NUDGE: IMPROVING DECISIONS ABOUT HEALTH, WEALTH, AND HAPPINESS* 1–52 (Penguin Group (USA) Inc. 2009) (describing the origins of nudge theory and its application to the rational actor in order to structure choice architecture in such a way that alters decision-making of said actor).

¹³ Meirav Furth-Matzkin & Cass R. Sunstein, *Social Influences on Policy Preferences: Conformity and Reactance*, 102 *MINN. L. REV.* 1339, 1347 (2018).

¹⁴ See Yi Xuan Li, *You've Heard the Term, but What Exactly Is 'Nudge Theory'?*, *THE VARSITY* (Oct. 18, 2020), <https://perma.cc/3CHA-GJ6H>.

¹⁵ See *id.*

¹⁶ See Pelle Guldborg Hansen, *The Definition of Nudge and Libertarian Paternalism: Does the Hand Fit the Glove?*, 7 *EUR. J. RISK REG.* 155, 155–70 (2016).

¹⁷ See THALER & SUNSTEIN, *supra* note 12, at 17–19.

¹⁸ See Hansen, *supra* note 16, at 156.

¹⁹ See Hansen, *supra* note 16, at 156.

²⁰ Jessica Almy & Margo G. Wootan, *Temptation at Checkout: The Food Industry's Sneaky Strategy for Selling More*, *CSPI: CTR. FOR SCI. IN THE PUB. INTEREST* (Aug. 2015),

upon seeing the candy in the check-out lane, the shopper decided to purchase some.²¹ By moving the candy out of view, shoppers might not purchase the candy because they are no longer tempted by it.²² The store is not banning the sale of candy or even discouraging it; instead, the store is making it easier to skip the candy, rather than venture back into the aisles to find it, a nudge that produces positive results when the goal is to fight obesity.²³

On the more significant end of the scale, government entities have used nudge theory to encourage positive participation in and engagement with implementing and sustaining policy within their countries.²⁴ In the United States, former President Obama signed an Executive Order in 2015 that mandated the use of behavioral economics and analysis to mold and adopt his administration's policies and programs through the creation of a Social and Behavioral Science Team.²⁵ Nudge theory has been used in simplifying college application processes to allow for higher rates of participation by potential students, such as sending text messages reminding them that they qualify and should apply for Free Application for Federal Student Aid (FAFSA) for college.²⁶ This nudge actually increased college enrollment.²⁷ The nudge theory also sits on the premise of focus and choice architecture in that while some people may be comfortable making the same decision in a repetitive manner, adding choices and diverting the choice maker's attention can cause a slight "nudge" to rethink the choice, and perhaps change it, simply based on how the options were presented.²⁸

There are two types, or systems, of nudges.²⁹ Comprehension of both is critical to understanding nudge theory and why it works in application.³⁰

<https://perma.cc/NS8A-53WV>.

²¹ *Id.*

²² *Id.*

²³ See Cass R. Sunstein, *Do People Like Nudges?*, 68 ADMIN. L. REV. 177, 178–79 (2016); Almy & Wootan, *supra* note 20.

²⁴ See Sunstein, *supra* note 23, at 179–80; see also Pope, *supra* note 11, at 41.

²⁵ Pope, *supra* note 11, at 41.

²⁶ Lindsay Page, *Small Nudges Can Improve How Students Apply to College*, HARV. BUS. REV. (Nov. 29, 2016), <https://perma.cc/EQZ8-5AKE>.

²⁷ *Id.*

²⁸ IAN SAMPLE, FROM THE ARCHIVES: NUDGE THEORY AND THE PSYCHOLOGY OF PERSUASION, (The Guardian podcast Feb. 22, 2017), <https://perma.cc/RLC6-626X>.

²⁹ See generally Cass R. Sunstein, *People Prefer System 2 Nudges (Kind of)*, 66 DUKE L.J. 121, 123–27 (2016) [hereinafter Sunstein, *People Prefer*].

³⁰ See *id.*

When humans consider a situation that is developing in front of them or around them, their brains have two functions by which they process the information: intuitive reactions and more deliberate reactions.³¹ Sunstein offers the example of the immediate reactions one has when a plane a person is flying on begins to shake: the intuitive brain panics, and the person immediately fears the worst.³² Deliberate thinking, which resides in the prefrontal cortex, can digest the situation and rationally conclude that the odds of a plane crash are small and the person is likely overreacting.³³ These two reactionary measures that humans utilize call for two systems of nudges to be applied.³⁴ A System One nudge (a nudge catering to instinctual reactions) causes an intuitive, immediate reaction, such as a photo of cancer-ridden lungs on a pack of cigarettes.³⁵ A System Two nudge (a nudge that caters to an individual's deliberate thinking) would include statistical facts about lung cancer for the choice maker to digest and make a thoughtful determination without basing that choice on an initial emotional reaction.³⁶ These types of nudges and the effects that they can have on a decision-maker are crucial for understanding their potential utilization with the Federal Sentencing Guidelines.³⁷

B. Federal Sentencing Guidelines

Congress passed the Sentencing Reform Act of 1984 to bring uniformity to federal courts and allow for more transparency in federal judicial sentencing.³⁸ In passing the Sentencing Reform Act, Congress created and tasked the USSC with constructing a roadmap for federal judges to follow to determine the appropriate sentence in a case.³⁹ The Commission produced the Federal Sentencing Guidelines ("FSG"), which were composed from a series of studies done on tens of thousands of cases, sentences typically

³¹ SAMPLE, *supra* note 28.

³² SAMPLE, *supra* note 28.

³³ SAMPLE, *supra* note 28.

³⁴ SAMPLE, *supra* note 28.

³⁵ SAMPLE, *supra* note 28; see Sunstein, *People Prefer*, *supra* note 29, at 124–27.

³⁶ SAMPLE, *supra* note 28; see Sunstein, *People Prefer*, *supra* note 29, at 124–27.

³⁷ See Sunstein, *People Prefer*, *supra* note 29, at 124–127.

³⁸ U.S. SENTENCING COMM'N, FIFTEEN YEARS OF GUIDELINES SENTENCING: AN ASSESSMENT OF HOW WELL THE FEDERAL CRIMINAL JUSTICE SYSTEM IS ACHIEVING THE GOALS OF SENTENCING REFORM iv (2004), <https://perma.cc/ZM5N-432Q> [hereinafter FIFTEEN YEARS OF GUIDELINES SENTENCING].

³⁹ *Id.*

handed down, and relevant statutes.⁴⁰ What exists now is a series of ranges that attach to “base-level crimes,” and these ranges can become longer or shorter based on aggravating or mitigating factors.⁴¹ Federal judges consult these ranges when looking at a case’s facts and circumstances, and they have a certain level of discretion in deciding the range of sentencing for a crime, with the aforementioned factors typically driving this discretion.⁴²

Federal judges are provided a chart with two axes.⁴³ On the vertical axis, “zones” A-D correlate to the offense level, or the category of crime committed.⁴⁴ On the horizontal axis, criminal history points (calculated by a points system) correlate to past sentences that the defendant may have served.⁴⁵ The more points, the higher the criminal history category into which the defendant is placed (I–VI).⁴⁶ Wherever these two axes meet on the chart will lead to a defendant’s sentencing range, which is typically calculated in months.⁴⁷ For example, the base offense level for involuntary manslaughter is twelve; but, if the crime involves reckless conduct or reckless operation of transportation, the base offense level rises from eighteen to twenty-two respectively.⁴⁸ If the defendant has three criminal history points from a prior sentence exceeding thirteen months, and the involuntary manslaughter put them at base-level twelve, the suggested sentence would be twelve to eighteen months for this new charge.⁴⁹

The FSG are strong advisories to federal judges, and there is a relatively strict list of acceptable departures and variances from the proscribed sentencing range that is produced by the process explored above.⁵⁰ A departure is a change that is made to the suggested range of sentencing—

⁴⁰ *Id.*; *Aggravating and Mitigating Factors in Criminal Sentencing*, JUSTIA, <https://perma.cc/532G-4C3W> (last updated Oct. 2021).

⁴¹ FIFTEEN YEARS OF GUIDELINES SENTENCING, *supra* note 38, at v.

⁴² FIFTEEN YEARS OF GUIDELINES SENTENCING, *supra* note 38, at xiii.

⁴³ U.S. SENTENCING GUIDELINES MANUAL ch. 5, pt. A (U.S. SENTENCING COMM’N 2018).

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ *Id.*

⁴⁸ *Id.* § 2A1.4; *see also* Jon O. Newman, *The Federal Sentencing Guidelines: A Good Idea Badly Implemented*, 46 HOFSTRA L. REV. 805, 809 (2018).

⁴⁹ U.S. SENTENCING GUIDELINES MANUAL ch. 5 pt. A; *see* Newman, *supra* note 48, at 809.

⁵⁰ *See* U.S. SENTENCING COMM’N, PRIMER ON DEPARTURES AND VARIANCES 1 (2018) <https://perma.cc/MNL9-AG7V> [hereinafter DEPARTURES AND VARIANCES]; *see also* Kimberley Kaiser & Cassia Spohn, *Why Do Judges Depart? A Review of Reasons for Judicial Departures in Federal Sentencing*, 19 J. CRIMINOLOGY, CRIM. JUST., L. & SOC’Y, no. 2, 2018, at 44, 45.

most commonly used to reward a defendant's cooperative behavior.⁵¹ It is a change that is made from within the Guidelines themselves—a departure from the previously calculated range to account for a change in one of the factors that played into the initial computation of the range.⁵² A variance is considered an increase or decrease in the sentencing range as a result of more discretionary considerations such as the defendant's health problems, family circumstances, a need for a “just” punishment, and so on.⁵³ The most typical reasons for these types of departures and variances are to “reflect the seriousness of the offense” as well as the “nature and circumstances of offense.”⁵⁴

This level of judicial discretion in sentencing is relatively new following *United States v. Booker*, which changed the status of the FSG from mandatory to advisory.⁵⁵ *Booker* established that the Guidelines violated the Constitution because their application created “binding requirements on all sentencing judges” and led to instances in which facts controlling sentencing were implicated after a jury verdict had been rendered.⁵⁶ While the Guidelines are no longer mandatory, they are still strongly advised, and if judges significantly depart from the sentencing ranges, their decisions are scrutinized.⁵⁷ While the FSG were implemented to promote transparency and uniformity in sentencing by preventing a judge's bias and personal opinions from seeping into the judge's sentencing practices, the USSC has repeatedly acknowledged that sentencing disparities blatantly remain.⁵⁸ These discrepancies are often attributed to the level of discretion that still exists in sentencing, and critics argue that this allows room for bias to creep in.⁵⁹

⁵¹ DEPARTURES AND VARIANCES, *supra* note 50, at 1.

⁵² DEPARTURES AND VARIANCES, *supra* note 50, at 1.

⁵³ See 18 U.S.C. § 3553 (2021); DEPARTURES AND VARIANCES, *supra* note 50, at 43.

⁵⁴ Kaiser & Spohn, *supra* note 50, at 52.

⁵⁵ 543 U.S. 220, 245 (2005).

⁵⁶ *Id.* at 233.

⁵⁷ See Kaiser & Spohn, *supra* note 50, at 45.

⁵⁸ See FIFTEEN YEARS OF GUIDELINES SENTENCING, *supra* note 38, at 113.

⁵⁹ See Mark W. Bennett, *The Implicit Racial Bias in Sentencing: The Next Frontier*, 126 YALE L.J. F. 391, 397 (2017).

II. The Importance and Relevance of the Issue

A. *Racism from the Bench: Judicial Discretion and the Federal Sentencing Guidelines*

There is no question that racial disparities continue to persist in numerous areas of the criminal justice system, and federal sentencing is one of those areas.⁶⁰ Implicit bias in judicial decision-making is one explanation for these incredible discrepancies.⁶¹ Empirical data shows strong correlations between darker skin and longer sentences, which reveals as false the premise that the criminal justice system and its decisions are colorblind.⁶²

According to the USSC's report, sentence length continued to be associated with demographic features—one of the most striking being race.⁶³ The report states that between 2012 and 2016, Black men received 19.1% longer sentences than similarly situated white male offenders.⁶⁴ These discrepancies have largely been attributed to judicial decision-making, as the report states that the disparities are shown most in “non-government sponsored departures and variances.”⁶⁵ While the premise of implicit bias and its effects on decision-making are widely discussed and acknowledged, there are few viable solutions that have been implemented to directly address this issue.⁶⁶

Since implicit biases are beliefs and social norms that lead to cognitive jumps often made without a decision-maker's knowledge, using a behavioral science technique such as nudge theory could prove worthy of integrating into the FSG and the ultimate manner in which federal sentencing occurs.⁶⁷ Because judges apply the Guidelines with their own biases and perpetuate the racialized sentencing practices that the data has

⁶⁰ See REPORT TO THE U.N., *supra* note 2, at 7.

⁶¹ See REPORT TO THE U.N., *supra* note 2, at 12.

⁶² Bennett, *supra* note 59, at 403.

⁶³ See U.S. SENTENCING COMM'N, DEMOGRAPHIC DIFFERENCES IN SENTENCING: AN UPDATE TO THE 2012 BOOKER REPORT 7 (2017), <https://perma.cc/4VW7-JNX4> [hereinafter DEMOGRAPHIC DIFFERENCES IN SENTENCING].

⁶⁴ *Id.* at 6.

⁶⁵ Ingraham, *supra* note 3.

⁶⁶ See generally REPORT TO THE U.N., *supra* note 2, at 12 (stating that merely four states have adopted racial impact statement requirements).

⁶⁷ See generally Brownstein, *supra* note 5 (describing the psychology behind implicit social cognition and the ways in which the brain can jump to discriminatory behavior in brief snap judgements).

shown, introducing nudges into the application of the Guidelines, particularly in the departure and variance practices of federal judges, could combat massive differences in sentence lengths.⁶⁸ This could lead to significantly more racial equity in federal sentencing and attempt to address the devastating effects of racism in this portion of the criminal justice process.⁶⁹

ANALYSIS

III. Nudge Theory Should Be Used to Combat Implicit Judicial Bias

A. *Integrating Nudge Theory into the Use of the Federal Sentencing Guidelines*

Implicit biases are just that—implicit.⁷⁰ These are “the attitudes or stereotypes that affect our understanding, actions, and decisions in an unconscious manner.”⁷¹ The way that these biases present themselves are of significant importance to the issue of federal sentencing.⁷² “These biases, which encompass both favorable and unfavorable assessments, are activated involuntarily and without an individual’s awareness or intentional control.”⁷³ The very nature of human biases can be subconscious; therefore, other methods of identifying and accounting for these biases could include cognitive and behavioral solutions.⁷⁴ If these biases affect an individual’s heuristics and the way in which an individual makes decisions, it can be assumed that use of the FSG does not stop an individual from allowing bias to creep into decisions.⁷⁵ If this is the case, knowledge of bias in decision-making should be met with potential solutions—ways in which to fight these biases in our criminal justice system must be explored in order to maintain

⁶⁸ See Yang, *supra* note 4, at 76.

⁶⁹ See REPORT TO THE U.N., *supra* note 2, at 11–12.

⁷⁰ *Implicit*, MERRIAM-WEBSTER DICTIONARY, <https://perma.cc/KK2H-TAH8> (last visited Feb. 7, 2022).

⁷¹ Artika R. Tyner, *Unconscious Bias, Implicit Bias, and Microaggressions: What Can We Do about Them?*, ABA (Aug. 26, 2019), <https://perma.cc/XUY9-VAG4>.

⁷² See *id.*

⁷³ *Id.*

⁷⁴ See Implicit Bias Task Force, *What Is Implicit or Unconscious Bias?*, ABA, <https://perma.cc/Y2JF-NQGA> (last visited Feb. 7, 2022).

⁷⁵ See Ian D. Marder & Jose Pina-Sánchez, *Nudge the Judge? Theorizing the Interaction Between Heuristics, Sentencing Guidelines and Sentence Clusters*, 20 CRIMINOLOGY & CRIM. JUST. 399, 403 (2018).

legitimacy and fairness.⁷⁶ The use of nudge theory is one method by which these biases can be confronted and attempts to push back against them can be made.⁷⁷

The FSG are an example of choice architecture: the way that a decision-maker's options are laid out can determine the choices that individual will make.⁷⁸ While the Guidelines are suggestive, they are a roadmap for judges.⁷⁹ Judges use the Guidelines to lead them to their decisions, which gives the Guidelines even more power than most judges realize.⁸⁰ Making an addition to the Guidelines that draws judges' attention to disparities in federal sentencing based on race is a change in the roadmap—a slight diversion through which decision-makers have to route their thinking to reach conclusions.⁸¹ This small addition is the nudge—the alteration to each judge's decision-making process that could lead that judge to a more positive decision.⁸²

An advisory notice, which emphasizes the racial disparities in sentencing and is printed on the Guidelines, also acts as a nudge that slightly moves each judge's anchor, which is the base or norm by which the decision-maker builds choices.⁸³ "During decision making, anchoring occurs when individuals use an initial piece of information to make subsequent judgments. Once an anchor is set, other judgments are made by adjusting away from that anchor, and there is a bias toward interpreting other information around the anchor."⁸⁴ Anchor bias theory also states that decision-makers are highly unlikely to stray far from where they have already set the anchor base without significant or striking reason to do so.⁸⁵

⁷⁶ See *Is the System Racially Biased?*, PBS, <https://perma.cc/QK4T-DEF9> (last visited Feb. 7, 2022).

⁷⁷ See generally Ashleigh Woodend, Vera Schölmerich & Semiha Dentkaş, "Nudges" to Prevent Behavioral Risk Factors Associated with Major Depressive Disorder, 105 AM. J. PUB. HEALTH 2318, 2318 (2015) (discussing how nudges originating from behavioral economics can be used to create interventions in a person's mental biases).

⁷⁸ See Hansen, *supra* note 16, at 156.

⁷⁹ See *U.S. v. Booker*, 543 U.S. 220, 245 (2005).

⁸⁰ See, e.g., U.S. SENTENCING GUIDELINES MANUAL § 3E1.1 (U.S. SENTENCING COMM'N 2018).

⁸¹ See Sunstein, *supra* note 23, at 179.

⁸² See Sunstein, *supra* note 23, at 179.

⁸³ ROD HOLLIER, ANCHORING BIAS IN THE COURTROOM 6–7 (2017), <https://perma.cc/LMX4-VYAJ>.

⁸⁴ PON Staff, *The Anchoring Effect and How It Can Impact Your Negotiation*, PON: PROGRAM ON NEGOT. HARV. L. SCH. (Nov. 26, 2019), <https://perma.cc/QAX2-D4FR> [hereinafter *Anchoring Effect*].

⁸⁵ See *id.*

Introducing a nudge related to racial discrepancies in sentencing will allow a receptive judge to move a preset anchor to explicitly account for inherent biases that may cause the judge to bow to preconceived notions about the sentence that the judge would otherwise likely deliver.⁸⁶

Anchor biases can be quite flexible and are subject to adjustment through suggestion.⁸⁷ The power of suggestion can be strong and can be used as a nudge to bring judges away from their disparate sentencing tendencies.⁸⁸ There has been ample research conducted on anchor bias and the ways in which suggestion can affect the floors by which we build our decisions.⁸⁹ A popular example of how this line of thinking works is the “textbook . . . estimation study.”⁹⁰ Students are asked to guess how much a textbook may cost; one group is asked whether it would cost more or less than an astronomical number (in this example, \$7,163.52).⁹¹ Even though common knowledge dictates that this number is exceptionally and unreasonably high, the students who were given that question estimated the cost of the textbook to be much higher than the students who were asked to guess with no comparative number given in their question.⁹² It is this power of suggestion that nudge theory will focus on to affect disparate sentencing, but perhaps in reverse; when confronted with the exceptionally high rates of sentencing and incarceration for Black defendants compared to white defendants, the power of suggestion may ground a judge’s anchor in more equitable ranges than otherwise would have been used due to the judge’s unconscious bias.⁹³

B. *Are Nudges Coercive?*

If nudges are such fantastic and renowned behavioral science tools, it is easy to question why they have not been implemented worldwide in every aspect of life.⁹⁴ There are several critiques of the method and its effect on

⁸⁶ See Marder & Pina-Sánchez, *supra* note 75, at 5.

⁸⁷ See Eva Krockow, *Outsmart the Anchoring Bias in Three Simple Steps*, PSYCHOL. TODAY (Feb. 11, 2019), <https://perma.cc/46P4-YKDC>.

⁸⁸ See *generally id.* (describing numerous examples of the ways in which the power of suggestion in combination with anchor theory can affect decision-making).

⁸⁹ See *Anchoring Effect*, *supra* note 84; Krockow, *supra* note 87.

⁹⁰ HOLLIER, *supra* note 83, at 7.

⁹¹ HOLLIER, *supra* note 83, at 7.

⁹² HOLLIER, *supra* note 83, at 7.

⁹³ See HOLLIER, *supra* note 83, at 7; see also INFLUENCE OF THE GUIDELINES, *supra* note 1, at 6. Ingraham, *supra* note 3.

⁹⁴ See Richard H. Thaler, *The Power of Nudges, for Good and Bad*, N.Y. TIMES (Oct. 31, 2015),

human decision-making.⁹⁵ These criticisms are not unfounded but are unconvincing in the face of the positive outcomes that result from nudges, but deserve attention to better understand why nudges could still be beneficial in the courtroom setting.⁹⁶

Ethical issues at the forefront of the nudge conversation include accusations of coercion, manipulation, and infantilization of those who are subject to the nudges.⁹⁷ Critics of nudges argue that free will is encroached upon when choice architecture is employed to guide an individual's thinking.⁹⁸ If a nudge narrows the array of a person's choices, is that choice actually of the person's own volition, or is it so constrained that it is a product of manipulation and thus not a choice made of free will?⁹⁹ These are some of the most common questions that come up in the debate surrounding nudge theory.¹⁰⁰

Additionally, those in favor of nudge theory have been accused of infantilizing the public or perpetuating the idea that the government, or whoever engages in the construction of choice architecture, knows "better" than the person making the decision.¹⁰¹ This line of questioning is driven by the idea that our true preferences can be gleaned by our public officials (or those who build the choice architecture) to ensure that the chooser picks the option that best suits those true preferences.¹⁰² Cass Sunstein argues that sometimes people genuinely need a helping hand to make positive decisions:

[O]ur intuitions are both adequate and helpful in the situations in which we ordinarily find ourselves. But there is no question that intuitions can badly misfire, and that good nudges, and good choice architecture, will often provide indispensable assistance, by

<https://perma.cc/GH79-TNA9>.

⁹⁵ See Henry Farrell & Cosma Shalizi, 'Nudge' Policies Are Another Name for Coercion, *NEW SCIENTIST* (Nov. 2, 2011), <https://perma.cc/5FXW-5CW5>.

⁹⁶ See generally Cass R. Sunstein, *The Ethics of Nudging*, 32 *YALE J. ON REG.* 413, 445 (2015) [hereinafter Sunstein, *Ethics of Nudging*] (explaining how some criticisms may mislead individuals and wrongfully detract from unobjectionable conduct).

⁹⁷ See Evan Selinger, *When Nudge Comes to Shove*, *SLATE* (July 7, 2013, 7:00 AM), <https://perma.cc/N5FP-AGAH>.

⁹⁸ Joe Humphreys, *Unthinkable: When Does a Nudge Become Coercion?*, *IRISH TIMES* (Oct. 18, 2015, 6:00 AM), <https://perma.cc/4PQA-F335>; see Pope, *supra* note 11, at 42.

⁹⁹ See Humphreys, *supra* note 98.

¹⁰⁰ See Farrell & Shalizi, *supra* note 95.

¹⁰¹ See Selinger, *supra* note 97.

¹⁰² See Sunstein, *People Prefer*, *supra* note 29, at 126–27.

helping people move in directions that they themselves prefer.¹⁰³

In essence, the question is whether intervention on the part of these misfires in intuition is warranted.¹⁰⁴

The Bloomberg-Soda debacle illustrates an example of this contention.¹⁰⁵ In 2012, New York City Mayor Michael Bloomberg attempted to enact policies that would lower the consumption of soda and other sugary drinks by limiting the “super-sized” options for consumers.¹⁰⁶ In an effort to fight obesity, Mayor Bloomberg set his sights on soda as one of the unhealthiest items available to New Yorkers.¹⁰⁷ While it is not the only item that perpetuates American obesity, soda is the “largest contributor of added calories to the American diet.”¹⁰⁸ Proponents of the limitations on soda sizes argued that they were not banning the purchase of more than sixteen ounces of soda, but that they simply were attempting to pull away from the facilitation of such large soda purchases.¹⁰⁹ The proponents argued that consumers could still buy as much soda as they wanted; they just might have to buy two bottles or cups at a time to get the amount that they wished.¹¹⁰ The Bloomberg-Soda debacle is a perfect example of a policy nudge enacted to push people towards making better choices, as Sunstein and Thaler’s original premise had hoped.¹¹¹

There was major pushback to attempts at limiting the sizes of soda available to purchasers with vocal outcry from the Center for Consumer Freedom.¹¹² The core of the criticism came from the potential for a slippery slope of government regulation on free choice, with detractors asking, “[w]hat’s next? . . . Limits on the width of a pizza slice, size of a hamburger[.]

¹⁰³ Sunstein, *People Prefer*, *supra* note 29, at 126–27.

¹⁰⁴ See Sunstein, *People Prefer*, *supra* note 29, at 126–27; see also Farrell & Shalizi, *supra* note 95 (noting decision-makers should intervene by tweaking options and information to help individuals make the right choice).

¹⁰⁵ See Daniel Engber, *Will New York’s Super-Size Drink Ban Work?*, NEW SCIENTIST (Sept. 19, 2012), <https://perma.cc/TR48-DPYD>.

¹⁰⁶ *Id.*

¹⁰⁷ See Ruth Marcus, *Bloomberg’s Soda Ban and the Rise of Noodge Government*, WASH. POST (June 5, 2012), <https://perma.cc/Y99T-V3W5>.

¹⁰⁸ *Id.*

¹⁰⁹ Engber, *supra* note 105.

¹¹⁰ See Editorial Bd., *Slurping Less Soda in New York*, WASH. POST (June 2, 2012), <https://perma.cc/8NPD-NCWT>.

¹¹¹ See Furth-Matzkin & Sunstein, *supra* note 13, at 1347–48.

¹¹² Engber, *supra* note 105.

or amount of cream cheese on a bagel?”¹¹³ Bloomberg and other supporters of the attempted policy argued public protection efforts are almost always met with pushback, but that does not mean that they are not for the best.¹¹⁴ Mayor Bloomberg maintained that “[s]moke-free bars and restaurants, trans fat restriction and calorie posting in restaurants were all met with skepticism but are now widely popular in New York City.”¹¹⁵

Ultimately, the policy failed.¹¹⁶ In 2014, the New York State Court of Appeals dealt the final blow to the proposed large-scale nudge and determined that the attempted restriction made by Bloomberg and his Board of Health “exceeded the scope of its regulatory authority.”¹¹⁷ The majority maintained that the administrative agency attempted to overreach into the lives of everyday people.¹¹⁸ In a scathing dissent, Judge Susan Read argued that this ruling would significantly diminish the ability of the agencies to address public health emergencies, such as obesity.¹¹⁹ The majority’s argument, however, rested on autonomy.¹²⁰ Relating back to Mayor Bloomberg’s defense of the policy, the majority argued that health related issues such as calorie counts and trans fats were a “minimal interference with the personal autonomy”; where the court opined that this restriction on soda purchases interfered too significantly, an advisory (including facts and statistics) that is added to a packet is unarguably a minimal interference.¹²¹

C. *Ethical Implications from the Creators’ Perspective: Freedom of Choice*

Cass Sunstein has heard the critiques of his and Thaler’s nudge theory, and he does not outright condemn all questions regarding whether a level of free choice is altered in this process.¹²² In fact, he argues that these impositions do occur, and the public must be careful of them; Sunstein

¹¹³ Engber, *supra* note 105.

¹¹⁴ See Marcus, *supra* note 107.

¹¹⁵ Marcus, *supra* note 107.

¹¹⁶ Michael M. Grynbaum, *New York’s Ban on Big Soda’s Is Rejected by Final Court*, N.Y. TIMES (June 26, 2014), <https://perma.cc/BLP6-2E4K>.

¹¹⁷ N.Y. Statewide Coal. of Hispanic Chambers of Commerce v. N.Y.C. Dep’t of Health & Mental Hygiene, 16 N.E.3d 538, 549 (N.Y. 2014).

¹¹⁸ Grynbaum, *supra* note 116.

¹¹⁹ N.Y. Statewide Coal. of Hispanic Chambers of Commerce, 16 N.E.3d at 550 (Read, J., dissenting).

¹²⁰ See Grynbaum, *supra* note 116.

¹²¹ N.Y. Statewide Coal. of Hispanic Chambers of Commerce, 16 N.E.3d at 548.

¹²² See Sunstein, *Ethics of Nudging*, *supra* note 96, at 445; see also Hansen, *supra* note 16, at 155–56.

points to the fact that nudges happen all around us, all the time, whether we call them nudges or not.¹²³ He argues that the logic used to paint nudges as manipulative must also take issue with subliminal advertising, such as the way music and colors are used to impact our thoughts on something without our conscious awareness; he points to restaurants, clothing stores, companies, social media, and even medical care as being arenas that influence or appeal to consumers in ways that “bypasses their own deliberative capacities.”¹²⁴ He states that “a great deal of conduct, however familiar, can be counted as manipulative in some relevant sense, but it would be extreme to condemn it for that reason.”¹²⁵

Sunstein also points out that choice architecture is inherent in any government, no matter how minimal.¹²⁶ If this is the case, the best interest of any entity tasked with serving the public is to make sure that the choices presented are positive and created with as much information as possible so that each decision-maker can make an informed choice.¹²⁷ Professor Pierre Schlag suggests, “[s]till another form of nudge is simply to provide information that could be useful in making choices. Sunstein and Thaler believe it’s useful to compel better information disclosure in everything from mortgages to car sales.”¹²⁸ Sunstein contends that even in the face of criticism, nudge theory is highly preferable to mandates and bans, which would be considered legitimate coercion.¹²⁹ Sunstein suggests that nudges actually maintain freedom of choice and respect autonomy, especially where many nudges simply inject transparency into the choice-making process and give the choice maker more relevant information to make a decision.¹³⁰

This process also lowers the ways in which decision-makers’ individual heuristics or biases can affect their decision-making, all while maintaining legitimacy and freedom in their choices.¹³¹ This makes nudge theory not only

¹²³ Sunstein, *Ethics of Nudging*, *supra* note 96, at 445.

¹²⁴ Sunstein, *Ethics of Nudging*, *supra* note 96, at 444–45.

¹²⁵ Sunstein, *Ethics of Nudging*, *supra* note 96, at 445.

¹²⁶ Sunstein, *Ethics of Nudging*, *supra* note 96, at 450.

¹²⁷ See, e.g., *Government Transparency: Open Government Plan*, DOJ, <https://perma.cc/G7Q4-54SK> (last updated Dec. 15, 2021) (discussing the importance of transparency initiatives in government for the benefit of the public).

¹²⁸ Pierre Schlag, *Nudge, Choice Architecture, and Libertarian Paternalism*, 108 MICH. L. REV. 913, 916 (2010).

¹²⁹ Sunstein, *Ethics of Nudging*, *supra* note 96, at 423; see Todd Newcombe, *When Is a Federal Mandate Coercion?*, GOVERNING (May 1, 2012), <https://perma.cc/7XBD-JRZC>.

¹³⁰ See Sunstein, *Ethics of Nudging*, *supra* note 96, at 439.

¹³¹ See Schlag, *supra* note 128, at 915.

difficult to hold out as a manipulative practice due to the inability to parse out its effects from those subliminal tactics that are commonly used, but also because the positive results from helpful nudges far exceed any concerns regarding impeding free will by optimizing the choices in sensibility and leaving decision-makers free to make whatever choices they wish.¹³²

D. *Success of the Nudge: Utilization and Achievements*

While nudge theory has not yet been utilized in the particular manner suggested in this Note, it has found great success in other areas of public service.¹³³ “Behavioral science has captured the attention of the United States government, as well as other countries’ governing bodies, and increasingly is being used to inform policy making. Scholars are also using behavioral science to understand how culture affects the way in which people perceive adjudicatory facts.”¹³⁴ In the United States, nudge theory and other behavioral science insights have begun shaping the ways in which government entities create programs and implement policies that affect the everyday life of the public.¹³⁵

On September 15, 2015, former President Barack Obama issued an executive order that charged agencies and offices within his White House with creating and implementing the administration’s policies using behavioral science.¹³⁶ The Order stated that “[a] growing body of evidence demonstrates that behavioral science insights—research findings from fields such as behavioral economics and psychology about how people make decisions and act on them—can be used to design government policies to better serve the American people.”¹³⁷ The Executive Order also instituted the creation of the Subcommittee on the Social and Behavioral Sciences Team (SBST), whose mission statement is as follows:

[C]oordinate the application of social and behavioral science research to help Federal agencies advance their policy and program goals and better serve the Nation. SBST works to identify opportunities for Federal agencies to leverage social and

¹³² Schlag, *supra* note 128, at 917; see Sunstein, *Ethics of Nudging*, *supra* note 96, at 445; see also Humphreys, *supra* note 98.

¹³³ See, e.g., Social and Behavioral Sciences Team: 2016 Annual Report (Nat’l Sci. &Tech. Council Sept. 2016), <https://perma.cc/2J5C-DJBE> [hereinafter S.B.S. Team].

¹³⁴ Pope, *supra* note 11, at 41.

¹³⁵ See Pope, *supra* note 11, at 41.

¹³⁶ Using Behavioral Science Insights to Better Serve the American People, Exec. Order No. 13,707, 80 Fed. Reg. 56,365 (Sept. 18, 2015).

¹³⁷ *Id.*

behavioral science insights to advance the goals of their policies and programs, demonstrate the impact of these applications, and build capacity for applications of social and behavioral science across Federal agencies.¹³⁸

The administration's institution of the SBST led to a promotion of progression in overall efficiency of the programs, through which they utilized behavioral science either in a policy creation or implementation.¹³⁹ The SBST 2016 annual report showed increases in public participation or impact in eight separate public policy initiatives: "[1] promoting retirement security, [2] advancing economic opportunity, [3] improving college access and affordability, [4] responding to climate change, [5] supporting criminal justice reform, [6] assisting job seekers, [7] helping families get health coverage and stay healthy, and [8] improving government effectiveness and efficiency."¹⁴⁰

The SBST argues that "[b]ehavioral science research demonstrates that how people understand and act on information depends not only on the quality and completeness of that information, but also on the manner in which it is presented."¹⁴¹ This should sound familiar; it is a very close definition to nudge theory and choice architecture.¹⁴² Former President Obama was familiar with the idea of nudge theory and the usefulness of behavioral science years before the Executive Order was signed; he chose Cass Sunstein in 2009 to be the Administrator of the Office of Information and Regulatory Affairs for the Office of Management and Budget.¹⁴³

One successful initiative that SBST undertook attempted to aid members of the public who were defaulting or in danger of defaulting on loans.¹⁴⁴ Repayment plans that included loan reconstruction in relation to income (and even loan forgiveness) were created to try to help Americans manage these debts, but the problem was encouraging individuals to sign up for the plans.¹⁴⁵ SBST collaborated on a promotion plan by which individuals who

¹³⁸ S.B.S TEAM, *supra* note 133, at ii.

¹³⁹ See Office of the Press Secretary, *FACT SHEET: New Progress on Using Behavioral Insights to Better Serve the American People*, OBAMA WHITE HOUSE (Sept. 15, 2016), <https://perma.cc/5N7S-7GCK>.

¹⁴⁰ S.B.S. TEAM, *supra* note 133, at i.

¹⁴¹ S.B.S. TEAM, *supra* note 133, at 37.

¹⁴² See Li, *supra* note 14.

¹⁴³ See Jeri Zeder, *Cass Sunstein on New Directions in Regulatory Policy*, HARV. L. TODAY (Apr. 12, 2012), <https://perma.cc/2YMG-D39Q>; Pope, *supra* note 11, at 41.

¹⁴⁴ S.B.S. TEAM, *supra* note 133, at 15.

¹⁴⁵ S.B.S. TEAM, *supra* note 133, at 13.

qualified would receive tailored emails that made it clear to the reader that the plan was not only beneficial, but easy to enroll in.¹⁴⁶ This nudge to sign up, paired with relevant information that showed the value of doing so, led to about 6,000 more applications for a revised payment plan (totaling about \$300 million of debt).¹⁴⁷ This nudge was successful—it created positive, helpful change for members of the public at a very low cost, which is a large part of the premise behind nudges and their utility.¹⁴⁸

Another nudge success story to come out of SBST revolved around a military personnel savings proposal for retirement, which was done in collaboration with the Department of Defense.¹⁴⁹ “This experiment was intended to increase savings among military personnel in the defined-contribution retirement plan offered to federal government employees, a program in which the government already offers monetary incentives for saving (retirement-plan contributions are tax-deductible).”¹⁵⁰ The email campaign, with nudge attributes baked into the process, yielded an increase in participation by more than 5,000 people and “increased savings by approximately \$8 million total.”¹⁵¹

The United States is not the only country that has found success in the integration of nudge policy.¹⁵² A group called the Behavioral Insights Team, colloquially known as the “Nudge Unit,” has used the nudge to create a substantial impact in the United Kingdom.¹⁵³ The Unit, for example, managed to garner an extra 100,000 organ donors per year from the public after “encouraging people to register as organ donors by using a reciprocity-based message on the registration website.”¹⁵⁴ Some of the group’s other accolades regarding the use of nudge theory include:

a 34% increase in acceptances of pupils from underrepresented schools to top universities, following a letter to the pupils from a

¹⁴⁶ S.B.S. TEAM, *supra* note 133, at 13–14.

¹⁴⁷ S.B.S. TEAM, *supra* note 133, at 14.

¹⁴⁸ See Sunstein, *supra* note 23, at 180.

¹⁴⁹ Shlomo Benartzi et al., *Should Governments Invest More in Nudging?*, 28 PSYCHOL. SCI. 1041, 1041–42 (2017) [hereinafter *Invest More in Nudging?*]; Shlomo Benartzi et al., *Governments Are Trying to Nudge Us into Better Behavior. Is It Working?*, WASH. POST (Aug. 11, 2017), <https://perma.cc/B83V-UR5N>.

¹⁵⁰ Benartzi, *Invest More in Nudging?*, *supra* note 149, at 1042.

¹⁵¹ Benartzi, *Invest More in Nudging?*, *supra* note 149, at 1042.

¹⁵² See Sunstein, *People Prefer*, *supra* note 29, at 124.

¹⁵³ See Ben Quinn, *The ‘Nudge Unit’: The Experts That Became a Prime UK Export*, THE GUARDIAN (Nov. 10, 2018, 11:00 EST), <https://perma.cc/PS38-2JUZ>.

¹⁵⁴ Pope, *supra* note 11, at 41.

top-tier student with a similar background[;] . . . a 38% reduction in patient referrals to overbooked hospitals, resulting from installing a pop-up prompt in the GP referral system[; and] . . . a 37% rise in tax declaration rates following text-message reminders to 750,000 businesses in Mexico. This built on early work in the UK, where reminders about self-assessment brought forward £200m in tax revenue in a year.¹⁵⁵

These are not insignificant changes; they are effective, small nudges that led to exceptional results for those people who the nudges were aimed to serve.¹⁵⁶ Analyzing the second percentage mentioned above, a pop-up that prevented the overbooking of hospitals led to a 38% reduction in that error; a notification on the FSG bringing a judge's attention to racial sentencing disparities will have a similar impact.¹⁵⁷ It is not to be argued that a change or alteration will be made to every federal sentencing as a result of an added nudge drawing attention to these important facts, especially because not all intuitive decisions are bad or made mistakenly; what is relevant for our purposes is that even the slightest change to inform judges about disparities and potentially bring down future discrepancies would be significant to a defendant who otherwise might be sentenced unfairly.¹⁵⁸

E. *Nudging the Judge: Why the Federal Sentencing Guidelines Are Apt for This Addition*

Judges have an immense amount of power over defendants who come before them in the courtroom.¹⁵⁹ Especially when dealing with federal sentencing, "as key gatekeepers to (criminal) justice . . . sentencers make decisions in their working lives which have significant, long-term implic[a]tions for offenders and victims, their families and wider society."¹⁶⁰ As a society, the hope is always held out that those who are in positions of power are wielding that power equitably; in the face of information suggesting this is not the case, it is imperative to look at the ways in which these decisions are being influenced and shaped to ensure that the goals of equity are being realized.¹⁶¹ Since the FSG are strong suggestions to judges

¹⁵⁵ Quinn, *supra* note 153.

¹⁵⁶ See Quinn, *supra* note 153.

¹⁵⁷ See Quinn, *supra* note 153.

¹⁵⁸ See generally Sunstein, *People Prefer*, *supra* note 29, at 124.

¹⁵⁹ See Thomas A. Zonay, *Judicial Discretion: 10 Guidelines for Its Use*, NAT'L JUD. C. (May 21, 2015), <https://perma.cc/2AGV-PRAM>.

¹⁶⁰ Marder & Pina-Sánchez, *supra* note 75, at 4–5.

¹⁶¹ Marder & Pina-Sánchez, *supra* note 75, at 3–4.

on how the sentencing ranges should be determined, they are utilized and consulted relatively consistently.¹⁶² Because judges regularly use the Guidelines, applying a nudge in the Guidelines would allow for maximum impact in terms of exposure to decision-makers in a way that is not intrusive to a judge's thought process and ultimate judgement.¹⁶³

It is important to note that in November of 1987 Congress enacted FSG § 5H1.10, which stated that "race, sex, national origin, creed, and socioeconomic status" were not to be offender characteristics that would explicitly be used in the determination of a sentence or sentence range.¹⁶⁴ The nudge suggested in this Note would serve simply as an advisory to judges regarding their implicit biases—it in no way suggests that race should be used as the determinative factor in a judge issuing a sentence.¹⁶⁵ An advisory notice regarding racial inequalities, located somewhere around the sentencing chart in the Guidelines, would serve as just a nudge; it would not become one of the factors *on* the chart to be used in sentence calculation or reasons for departures or variances.¹⁶⁶ A clear delineation here is incredibly important: the goal is to promote equity in sentencing, not to utilize race alone as the determinative factor in sentencing.¹⁶⁷ It is the mere glance at the advisory, just a piece of information that can anchor a judge back to center; a judge's awareness of implicit biases is the nudge that is suggested to keep the judicial decision-maker on notice that sentencing inequities exist and persist.¹⁶⁸

Integration of behavioral science into judicial sentencing is neither a new concept nor without scholarship.¹⁶⁹ In a 2018 article exploring how heuristics and implicit biases affect judicial decision-making, Ian Marder and Jose Pina-Sánchez articulated that sentencing guidelines (and decisions brought therefrom) are an incredibly important area to begin integrating behavioral science and analysis.¹⁷⁰ While the authors do not contemplate the racial

¹⁶² See *Sentencing 101*, FAMM: FAMILIES AGAINST MANDATORY MINIMUMS, <https://perma.cc/5ZJV-MM42> (last visited Feb. 7, 2022).

¹⁶³ See U.S. SENTENCING GUIDELINES MANUAL § 3E1.1 (U.S. SENTENCING COMM'N 2018). See generally Sunstein, *People Prefer*, *supra* note 29, at 124.

¹⁶⁴ U.S. SENTENCING GUIDELINES MANUAL § 5H1.10.

¹⁶⁵ See *id.*

¹⁶⁶ See *id.*; see also DEPARTURES AND VARIANCES, *supra* note 50, at 14–15.

¹⁶⁷ See generally REPORT TO THE U.N., *supra* note 2, at 5–6.

¹⁶⁸ See generally HOLLIER, *supra* note 83.

¹⁶⁹ See generally Marder & Pina-Sánchez, *supra* note 75 (describing studies on sentencing biases judges may encounter).

¹⁷⁰ See Marder & Pina-Sánchez, *supra* note 75, at 399.

divides that are extremely apparent in American federal sentencing, their logic regarding choice architecture and heuristics by judges during sentencing supports this Note's suggested application to racial disparities.¹⁷¹ Consistent with the suggestion to integrate disparity-conscious information and reminders into the FSG to positively influence choice architecture, Marder and Pina-Sánchez state that:

Nudge theory posits that choice architecture can be designed in a manner which reduces the negative influences of heuristics on decision making, without restricting the choices available to decision-makers (Thaler and Sunstein, 2009). This could be useful in the context of sentencing, where judges often resist efforts to constrain their discretion (Dhami, 2013a), but where it is nonetheless important to structure their decision making to maximize the chances that the goals of sentencing are realized.¹⁷²

When whittled down to the basics, incorporating a nudge into the FSG is necessary to allow judges to be aware of all pertinent information when making their sentencing decisions.¹⁷³ Their decisions are the product of choice architecture—whether they are referred to and treated that way or not.¹⁷⁴ As Cass Sunstein reiterates in his works regarding nudge theory, nudges and choice architecture are happening all around us all of the time; the question is whether to acknowledge that they exist and harness the power and influence that they have for the benefit of the public, or fail to utilize them, likely at a detriment to that same public.¹⁷⁵ “Nudge theory could help policy-makers to design sentencing guidelines which improve decision quality, without prompting the resistance associated with compulsory, restrictive or prescriptive measures.”¹⁷⁶ Integrating a nudge into the FSG would maintain a judicial decision-maker's sentencing autonomy, and it would combat inherent biases or heuristics that could unfairly impact a defendant of color.¹⁷⁷

¹⁷¹ See Marder & Pina-Sánchez, *supra* note 75, at 407.

¹⁷² Marder & Pina-Sánchez, *supra* note 75, at 410.

¹⁷³ See Sunstein, *People Prefer*, *supra* note 29, at 126–27.

¹⁷⁴ See Sunstein, *People Prefer*, *supra* note 29, at 124.

¹⁷⁵ See Sunstein, *People Prefer*, *supra* note 29, at 124.

¹⁷⁶ Marder & Pina-Sánchez, *supra* note 75, at 12.

¹⁷⁷ See Sunstein, *Ethics of Nudging*, *supra* note 96, at 439; see also Marder & Pina-Sánchez, *supra* note 75, at 12.

CONCLUSION

Black people in this country are being discriminated against in the American federal sentencing system and, in a consistent and systemic showing of inherent biases and racism, are receiving longer sentences than similarly situated white defendants. With behavioral sciences such as nudge theory showing such promise toward positive changes in thinking, drawing the line between judicial discretion and sentencing cannot ignore the inherent biases that affect sentence length. The information and the potential changes to bring about an equitable solution are out there—it is their integration into the system that must be pushed forward. “[G]uidelines matter: where in force, they are an important part of the choice architecture in which sentencing takes place . . . researchers must seek to assess both the likely interaction between heuristics and sentencing guidelines, and the implications of this relationship for achieving the goals of sentencing.”¹⁷⁸ The criminal justice system can achieve these equitable goals by integrating changes that are minimal in cost, but potentially high in reward: the precise premise behind nudges. Curbing the ability for judicial biases to seep into sentencing, biases which perpetuate the ever-prevalent discrimination against people of color in America, should be reason enough to make this jump to the use of the nudge to encourage equitable outcomes in sentencing.

¹⁷⁸ Marder & Pina-Sánchez, *supra* note 75, at 8.