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## INSIDE THE BANKRUPTCY JUDGE'S MIND

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### INTRODUCTION

Hernias and hernia repair operations are common. In most hospitals, doctors charge several thousand dollars to perform hernia repair surgeries that take about ninety minutes and fail in ten to fifteen percent of cases.<sup>1</sup> At Shouldice Hospital near Toronto, however, doctors charge half as much, perform the procedure in thirty to forty-five minutes, and fail only one percent of the time.<sup>2</sup> Why are the doctors at Shouldice Hospital able to repair hernias at half the cost, in half the time, and with a much higher rate of success? The answer, according to Dr. Atul Gawande, is specialization:

[T]he dozen surgeons at Shouldice do hernia operations and nothing else. Each surgeon repairs between six hundred and eight hundred hernias a year – more than most general surgeons do in a lifetime. In this particular field, Shouldice's staff is better trained and has more experience than anyone else. But there's another way to formulate the reason for its success, which is that all the repetition *changes the way they think*.<sup>3</sup>

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<sup>1</sup> ATUL GAWANDE, *COMPLICATIONS* 38 (2002).

<sup>2</sup> *Id.*

<sup>3</sup> *Id.* at 38-39 (emphasis added).

Specialization is common in medicine.<sup>4</sup> Doctors become oncologists, radiologists, urologists, or even hernia repair specialists. Specialization is also common among practicing lawyers, who become estate planners or products liability lawyers or securities litigators. Judges, however, have historically been generalists who preside over any and all cases. This requires that judges become acquainted with the rules of civil procedure, the rules of criminal procedure, the evidentiary rules applicable to both civil and criminal cases, and the substantive law in almost every area. From the simplest slip-and-fall to the most complicated antitrust case, and nearly every civil and criminal action in between, the generalist judge must be master of all.

This approach to judging might be ill-advised. Every day, the law grows more complex. The *United States Code* and the *Code of Federal Regulations* expand constantly as Congress and federal agencies enact more and more statutes and regulations. The common law evolves, too, as courts are called upon to address problems that are familiar, but unsettled, as well as those that are entirely novel. Generalist judges, who face enormous docket pressure due to ever-expanding caseloads,<sup>5</sup> are therefore expected to resolve an almost implausibly large and diverse array of disputes.

As a result of these and other factors, judicial specialization has become increasingly common in the United States.<sup>6</sup> The federal system includes specialized courts for claims against the federal government, as well as for tax, patent, and bankruptcy matters.<sup>7</sup> Many federal administrative law judges also specialize in particular areas of law, such as social security administration, securities regulation, and veterans' affairs.<sup>8</sup> And many states have their own specialized courts as well, focusing on such topics as water rights, environmental claims, land claims, claims involving state and local government law, and certain drug offenses.<sup>9</sup>

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<sup>4</sup> For further examples, see *id.* at 45.

<sup>5</sup> See Marc Galanter, *The Vanishing Trial: An Examination of Trials and Related Matters in Federal and State Courts*, 1 J. EMPIRICAL LEGAL STUD. 459, 460-61 (2004) (observing that the number of dispositions in federal courts increased by a factor of five from 1962 to 1992); Brian J. Ostrom, Shauna M. Strickland & Paula L. Hannaford-Agor, *Examining Trial Trends in State Courts: 1976-2002*, 1 J. EMPIRICAL LEGAL STUD. 755, 761, 768 fig.7 (2004) (studying a sample of state court cases and finding that the number of dispositions rose 127% in criminal cases and 111% in civil cases from 1976 to 2002); see also ADMIN. OFFICE OF THE U.S. COURTS, 2005 ANNUAL REPORT OF THE DIRECTOR: JUDICIAL BUSINESS OF THE UNITED STATES COURTS 19 tbl.3 (2006) [hereinafter 2005 ANNUAL REPORT], available at <http://www.uscourts.gov/judbus2005/front/judicialbusiness.pdf> (reporting that the federal courts had 678 authorized judgeships in 2005 to handle 266,216 active cases).

<sup>6</sup> See *Specialized Courts: A Concept Paper*, 1996 A.B.A. CENT. EUR. & EURASIAN L. INITIATIVE 1, available at [http://www.abanet.org/ceeli/publications/conceptpapers/speccourts/specialized\\_courts.pdf](http://www.abanet.org/ceeli/publications/conceptpapers/speccourts/specialized_courts.pdf).

<sup>7</sup> *Id.* at 2-6.

<sup>8</sup> *Id.* at 53-54.

<sup>9</sup> *Id.* at 7-8.

Specialization offers many obvious advantages. Among others, specialization allows judges to develop more extensive knowledge of a particular area of law than they otherwise would. Specialist judges can be, and often are, recruited from the ranks of lawyers who have practiced in that area, so they often come to the bench with relevant expertise.<sup>10</sup> Specialists can devote all of their professional energy to the areas of law in which they specialize. And, of course, specialist judges see the same issues repeatedly in court; thus, an issue that might seem baffling to a judge who encounters it only once or twice will be familiar to the specialist judge who sees it repeatedly.

In addition to these advantages, specialization might offer a less obvious, but no less important, advantage. Judges who specialize might learn how to make better decisions. Like other people, judges rely on simple decision rules, or heuristics, to make decisions.<sup>11</sup> These heuristics can be useful, but they can also lead to systematic errors and biases.<sup>12</sup> Specialist judges might be able to avoid the errors that these widely used heuristics can cause, or they might develop “adaptive” heuristics that enable them to make superior decisions in their specialty areas. In short, specialization in court, like specialization at Shouldice Hospital, might enable judges to change the way they think.

The prediction that specialist judges will adopt better ways of thinking about their cases is conjectural. The evidence on expert decision making is mixed. Research on some experts – including doctors,<sup>13</sup> real estate agents,<sup>14</sup> psychologists,<sup>15</sup> auditors,<sup>16</sup> lawyers,<sup>17</sup> and judges<sup>18</sup> – shows that they often

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<sup>10</sup> See, e.g., Ralph R. Mabey, *The Evolving Bankruptcy Bench: How Are the “Units” Faring?*, 47 B.C. L. REV. 105, 107 (2005) (reporting that most bankruptcy judges had previously been bankruptcy practitioners).

<sup>11</sup> Chris Guthrie, Jeffrey J. Rachlinski & Andrew J. Wistrich, *Inside the Judicial Mind*, 86 CORNELL L. REV. 777, 829 (2001) [hereinafter Guthrie et al., *Inside the Judicial Mind*].

<sup>12</sup> *Id.* at 779.

<sup>13</sup> See, e.g., Hal R. Arkes, Robert L. Wortmann, Paul D. Saville & Allan R. Harkness, *Hindsight Bias Among Physicians Weighing the Likelihood of Diagnoses*, 66 J. APPLIED PSYCHOL. 252, 253 (1981) (finding that “physicians exhibited the hindsight bias”); Barbara J. McNeil, Stephen G. Pauker, Harold C. Sox, Jr. & Amos Tversky, *On the Elicitation of Preferences for Alternative Therapies*, 306 NEW ENG. J. MED. 1259, 1261-62 (1982) (finding that physicians are susceptible to framing effects).

<sup>14</sup> See, e.g., Gregory B. Northcraft & Margaret A. Neale, *Experts, Amateurs, and Real Estate: An Anchoring-and-Adjustment Perspective on Property Pricing Decisions*, 39 ORGANIZATIONAL BEHAV. & HUM. DECISION PROCESSES 84, 94-96 (1987) (finding that real estate agents are influenced by anchoring effects when estimating real estate prices).

<sup>15</sup> See, e.g., Hal R. Arkes, David Faust, Thomas J. Guilmette & Kathleen Hart, *Eliminating the Hindsight Bias*, 73 J. APPLIED PSYCHOL. 305, 307 (1988) (demonstrating that psychologists exhibit the hindsight bias); Loren J. Chapman & Jean P. Chapman, *Illusory Correlation as an Obstacle to the Use of Valid Psychodiagnostic Signs*, 74 J. ABNORMAL PSYCHOL. 271, 280 (1969) (demonstrating the impact of heuristic bias on psychotherapists); Amos Tversky & Daniel Kahneman, *Belief in the Law of Small Numbers*,

make the same kinds of mistakes the rest of us make.<sup>19</sup> But other research suggests that, under the right circumstances, experts can learn to do better.<sup>20</sup>

In this paper, we extend our prior work on generalist judges<sup>21</sup> to explore whether specialization leads to superior judicial decision making. To do so, we report the results of a study of federal bankruptcy judges. In one prior study of bankruptcy judges, Ted Eisenberg reported evidence suggesting that bankruptcy judges, like generalist judges, are susceptible to the “self-serving” or “egocentric” bias when making judgments.<sup>22</sup> Here, we report evidence showing that bankruptcy judges are vulnerable to anchoring and framing effects, but appear largely unaffected by the omission bias, a debtor’s race, a debtor’s apology, and “terror management” or “mortality salience.”<sup>23</sup>

Because we do not directly compare generalist judges to bankruptcy judges with the same materials, we are somewhat limited in the inferences we can draw about the advantages or disadvantages of specialization. On balance, the

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76 PSYCHOL. BULL. 105, 109 (1971) (showing that psychologists over-rely on representativeness and underestimate the impact of sample size).

<sup>16</sup> See, e.g., John C. Anderson, D. Jordan Lowe & Philip M.J. Reckers, *Evaluation of Auditor Decisions: Hindsight Bias Effects and the Expectation Gap*, 14 J. ECON. PSYCHOL. 711, 725-31 (1993) (indicating that auditors are influenced by hindsight bias).

<sup>17</sup> See, e.g., Linda Babcock, Henry S. Farber, Cynthia Fobian & Eldar Shafir, *Forming Beliefs About Adjudicated Outcomes: Perceptions of Risk and Reservation Values*, 15 INT’L REV. L. & ECON. 289, 296-97 (1995) (finding that framing effects similarly influenced lawyer and non-lawyer subjects). But see Russell Korobkin & Chris Guthrie, *Psychology, Economics, and Settlement: A New Look at the Role of the Lawyer*, 76 TEX. L. REV. 77, 99-101 (1997) (suggesting that lawyers are less susceptible than non-lawyers to framing effects).

<sup>18</sup> See, e.g., Guthrie et al., *Inside the Judicial Mind*, *supra* note 11, at 816-18 (finding that judges are generally susceptible to cognitive biases, though somewhat less susceptible to framing effects and representativeness than novices).

<sup>19</sup> See SCOTT PLOUS, *THE PSYCHOLOGY OF JUDGMENT AND DECISION MAKING* 258 (1993) (“[S]everal studies have found that experts display either roughly the same biases as college students or the same biases at somewhat reduced levels.” (citations omitted)).

<sup>20</sup> See Chip Heath, Richard P. Larrick & Joshua Klayman, *Cognitive Repairs: How Organizational Practices Can Compensate for Individual Shortcomings*, 20 RES. ORGANIZATIONAL BEHAV. 1, 30-31 (1998).

<sup>21</sup> See generally Guthrie et al., *Inside the Judicial Mind*, *supra* note 11; Andrew J. Wistrich, Chris Guthrie & Jeffrey J. Rachlinski, *Can Judges Ignore Inadmissible Information? The Difficulty of Deliberately Disregarding*, 153 U. PA. L. REV. 1251 (2005) [hereinafter Wistrich et al., *Can Judges Ignore Inadmissible Information?*].

<sup>22</sup> Theodore Eisenberg, *Differing Perceptions of Attorney Fees in Bankruptcy Cases*, 72 WASH. U. L.Q. 979, 983-85 (1994).

<sup>23</sup> We focus on the potential impact of these psychological phenomena on bankruptcy judges, but it is worth noting that they are also relevant to understanding the behavior of other actors in the bankruptcy system, including debtors and creditors. See generally Robert K. Rasmussen, *Behavioral Economics, the Economic Analysis of Bankruptcy Law and the Pricing of Credit*, 51 VAND. L. REV. 1679 (1998).

evidence we report below suggests that bankruptcy judges perform at least as well as generalist judges. We also find evidence, however, of a correlation between the bankruptcy judges' political views and the outcomes in some cases; namely, we find some evidence suggesting that Republican judges are more pro-creditor than Democratic judges. As we discuss, this result suggests one potential downside of specialization that we did not anticipate – it might politicize the bench.

## I. METHODOLOGY

Our previous research identified some of the cognitive processes upon which judges rely that can create misleading illusions of judgment.<sup>24</sup> The study reported here assesses whether specialized trial judges develop decision-making processes that enable them to avoid these common errors of judgment.

### A. Participating Judges

The federal bankruptcy judges are a unique group. Appointed by merit selection panels, they serve for fourteen-year renewable terms.<sup>25</sup> Once appointed, their jurisdiction is largely limited to bankruptcy matters. All bankruptcy matters are, in fact, initially assigned to a bankruptcy judge,<sup>26</sup> although appeals from bankruptcy courts run directly to district judges.<sup>27</sup> Bankruptcy judges preside in civil cases if the adjudication of a civil matter is closely related to the adjudication of a bankruptcy claim.<sup>28</sup> They have a heavy caseload; in 2005, the bankruptcy courts faced almost 1.8 million bankruptcy filings.<sup>29</sup>

We recruited 113 bankruptcy judges – more than one-third of the total number of bankruptcy judges at the time<sup>30</sup> – to participate in the study. These judges attended a panel we presented at a conference sponsored by the Federal Judicial Center on August 9, 2004, in Seattle, Washington. Judges at the conference had the option of attending our panel, entitled “The Psychology of Judging,” or one of two competing panels held concurrently. We do not know what percentage of judges attending the conference chose our panel.

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<sup>24</sup> See Guthrie et al., *Inside the Judicial Mind*, *supra* note 11, at 784 (finding that anchoring, framing, hindsight bias, the representativeness heuristic, and egocentric biases influenced decision-making processes of judges).

<sup>25</sup> 28 U.S.C. § 152(a)(1) (2000).

<sup>26</sup> *Id.* § 157(a)-(b).

<sup>27</sup> *Id.* § 158(a).

<sup>28</sup> *Id.* § 157(b).

<sup>29</sup> See 2005 ANNUAL REPORT, *supra* note 5, at 29 tbl.7.

<sup>30</sup> See ADMIN. OFFICE OF THE U.S. COURTS, 2004 ANNUAL REPORT OF THE DIRECTOR: JUDICIAL BUSINESS OF THE UNITED STATES COURTS 34 tbl.13 (2005), available at <http://www.uscourts.gov/judbus2004/front/JudicialBusiness.pdf> (reporting that 324 bankruptcy judgeships were authorized and eleven positions remained vacant in 2004).

We did not ask the judges to identify themselves by name, but we did ask them to identify their gender, number of years of experience on the bench, and the political party with which they most closely identified. Of the judges who responded, 26.7% (30 out of 112) were women. The judges averaged eleven years of experience, ranging from less than one year to twenty-eight years. Finally, 76.6% of the judges (82 out of 107) self-identified as Democrats versus the 23.4% (25 out of 107) who self-identified as Republicans.<sup>31</sup> Below, we report any instances where we find meaningful demographic differences across the judges.

### B. Procedure

At the conference, we distributed questionnaires to the judges in person before our presentation. Each questionnaire contained five hypothetical cases designed to test the influence of six psychological phenomena: anchoring, framing, omission bias, the effect of the race of the debtor, the effect of a debtor's apology, and terror management/mortality salience.<sup>32</sup> We asked the judges to read and respond to each of the questions independently. The materials contained a cover page indicating the name of the conference and providing the following instructions:

Many of the points to be discussed at this session are best experienced directly. We therefore ask that before the session starts, you read and respond to each of the questions enclosed in this survey (although doing so is voluntary, of course). Please do so independently. Please do not discuss these materials while you are reviewing them, and please review the materials in the order presented. We shall collect these surveys before the discussion and present the results during this session.

The judges appeared to take the questionnaires seriously. During the administration of the questionnaire, which took approximately fifteen minutes, the room remained silent. Because we did not ask the judges to identify themselves, the responses are anonymous and do not allow us to identify any particular judge. Nonetheless, we gave all of the judges the opportunity to limit the use of their answers to the conference presentation, thereby excluding their responses from discussion in other settings and from use in any publication. One judge (out of 114 who received the surveys) exercised this option and this judge's results are excluded from this analysis.

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<sup>31</sup> Not surprisingly given the size of our group, it reflected the demographics of the bankruptcy court as a whole. In 2005, bankruptcy judges ranged in age from thirty-eight to seventy-nine, had zero to thirty-six years of service on the bench, and were overwhelmingly (78%) male. See Mabey, *supra* note 10, at 107.

<sup>32</sup> The order in which we present the phenomena in this paper is not the same as the order in which the judges received the materials. The judges saw the hypothetical questions in the following order: anchoring, race, omission bias, framing, and apology/terror management.

## II. RESULTS

### A. Anchoring

When people make estimates (e.g., the fair market value of a house), they commonly rely on the initial value available to them (e.g., the list price). That initial value tends to “anchor” their final estimates.<sup>33</sup> Reliance on an anchor is often reasonable because many anchors convey relevant information about the actual value of an item.<sup>34</sup> Anchors, however, also influence judgment when they convey no useful information. In one study, for example, researchers instructed graduate students to add 400 to the last three digits of their phone numbers. The researchers then asked whether Attila the Hun was defeated in Europe before or after this sum. Finally, the researchers asked the students to guess the actual year in which Attila the Hun was defeated. Even though the last three digits of one’s phone number can provide no relevant insight into the year that Attila the Hun was defeated, students with higher digits tended to guess later years.<sup>35</sup>

In past research, we have studied the influence of anchoring on the decision making of generalist judges. In one study, we found that an anchor embedded in a frivolous motion to dismiss affected the pain and suffering damages awarded by magistrate judges.<sup>36</sup> In another study, we found that an outrageous settlement demand made during an unsuccessful settlement conference anchored judicial damage determinations.<sup>37</sup> Here, we explore the impact of anchoring in bankruptcy court.

#### 1. Anchoring: Materials

To test for the influence of anchoring on bankruptcy judges, we constructed a problem called “The Truck Driver,” in which we asked the judges to set an interest rate on a restructured loan in a Chapter 13 proceeding. In creating the problem, we took advantage of a recent Supreme Court opinion, *Till v. SCS Credit Corp.*<sup>38</sup>

In *Till*, the Court was asked to determine the method that bankruptcy courts should use to set the interest rate on a secured loan restructured in a Chapter 13 wage-earner plan.<sup>39</sup> The creditor, who had loaned the debtors several thousand dollars at a 21% interest rate, argued that the Court should use the original

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<sup>33</sup> See Amos Tversky & Daniel Kahneman, *Judgment Under Uncertainty: Heuristics and Biases*, 185 SCIENCE 1124, 1128-30 (1974).

<sup>34</sup> See J. EDWARD RUSSO & PAUL J.H. SCHOEMAKER, DECISION TRAPS 88 (1989).

<sup>35</sup> See *id.* at 89-91.

<sup>36</sup> Guthrie et al., *Inside the Judicial Mind*, *supra* note 11, at 791-94.

<sup>37</sup> Wistrich et al., *Can Judges Ignore Inadmissible Information?*, *supra* note 21, at 1291-93.

<sup>38</sup> 541 U.S. 465 (2004). We thank Professor Douglas Baird for suggesting this problem.

<sup>39</sup> *Id.* at 469.



interest rate as the presumptive rate on a restructured loan.<sup>40</sup> The debtors argued that the Court should disregard the original interest rate and rely instead on the prime interest rate, adjusted slightly upward to reflect the debtors' greater risk of default.<sup>41</sup> The Supreme Court sided with the debtors, holding that bankruptcy courts should use the prime rate as the starting point and then adjust as appropriate:

Taking its cue from ordinary lending practices, the [Court's preferred] approach begins by looking to the national prime rate, reported daily in the press, which reflects the financial market's estimate of the amount a commercial bank should charge a creditworthy commercial borrower to compensate for the opportunity costs of the loan, the risk of inflation, and the relatively slight risk of default. Because bankrupt debtors typically pose a greater risk of nonpayment than solvent commercial borrowers, the approach then requires a bankruptcy court to adjust the prime rate accordingly.<sup>42</sup>

Thus, *Till* leaves little room for the original loan rate to influence the restructured loan rate. A high initial interest rate suggests that the lender believed the creditor was a high risk for default. But the circumstances that produced this initial evaluation of creditworthiness have changed dramatically as a result of the bankruptcy proceeding. The original rate has little relevance in such a context.

To test whether the original rate would have an anchoring effect despite its irrelevance, we informed the judges that they were presiding in a Chapter 13 case involving a truck driver named McCall.<sup>43</sup> The judges learn some of the circumstances that have led to McCall's Chapter 13 filing, including, most notably, the high price of gasoline. They also learn that McCall's largest asset is his truck, and that although he has paid down half of the original loan on the truck, he still owes an amount equivalent to its present value. Finally, the judges learn that the parties are disputing the appropriate interest rate to assign to the new loan. McCall argues that the prime rate, identified as 4.5%, is adequate, while the creditor argues that because the risk of default remains high, the rate should be adjusted upward. To make sure the judges knew the relevant law, we reminded them of the holding in *Till*, as follows:

Under the U.S. Supreme Court's recent holding in *Till v. SCS Credit Corp.*, 541 U.S. 465 (2004), the appropriate formula for calculating an interest payment under such circumstances is to start with the national prime rate, which compensates the lender for the opportunity cost of the loan, the risk of inflation, and a relatively slight risk of default by creditworthy borrowers. The court must consider adjusting this rate

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<sup>40</sup> *Id.* at 470-71.

<sup>41</sup> *Id.* at 471.

<sup>42</sup> *Id.* at 478-79 (footnote omitted).

<sup>43</sup> All of the hypothetical materials used in the study are included in Appendix A.

upward, as *Till* indicates, if McCall poses a greater risk of default than the large commercial borrowers for whom the prime rate is set.

Unbeknownst to the judges, we randomly assigned some of them to a “control” group and others to an “anchor” group. We informed judges in the control group that “[t]he parties agree that under *Till*, the original contract interest rate is irrelevant to the court’s determination.” The judges assigned to the anchor group received the same sentence, except that the words “of 21%” were included in between the words “rate” and “is irrelevant.” Thus, judges in the control group were unaware of the original interest rate, while judges in the anchor group learned that the original rate was 21%. Finally, we asked all of the judges to set the loan rate: “Because the parties disagree on the appropriate annual interest rate, it is up to you to select one. What annual interest rate would you select?”

## 2. Anchoring: Results

We found that the initial interest rate affected judges’ assessments. The fifty-four judges in the control group set a mean interest rate of 6.33%, while the forty-nine judges in the anchor group set a mean interest rate of 7.13%.<sup>44</sup> The difference between the two groups was marginally statistically significant.<sup>45</sup> This difference, in fact, understates the effect of anchoring somewhat because several of the judges in each group simply selected the prime rate as the appropriate interest rate.<sup>46</sup> These judges engaged in no adjustment. With these judges removed, we found that judges in the control group set a mean interest rate of 6.52%, while judges in the experimental group set a mean interest rate of 7.98%. The difference between these two groups was statistically significant.<sup>47</sup> These differences – 0.8 points and 1.5 points – might seem small. The differences, however, are obviously meaningful to debtors struggling to crawl out of bankruptcy; a one point difference on a \$10,000 loan can mean hundreds or even thousands of dollars over the life of the loan. Finally, as noted by the Court in *Till*, courts have generally approved only modest adjustments from the prime rate, typically from 1% to 3%,<sup>48</sup>

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<sup>44</sup> Six judges in the no anchor condition and two judges in the anchor condition did not answer the question. One judge in the anchor condition provided an interest rate below the prime rate (3.5%) and was excluded from the analysis.

<sup>45</sup>  $t(101) = 1.86, p = .066$ . When including the judge who provided 3.5%, *see supra* note 44, the mean in the anchor condition was 7.05% and the difference remained marginally significant.  $t(102) = 1.68, p = .095$ .

<sup>46</sup> Among judges who did not learn the original interest rate, 5 of 54 (9.3%) selected the prime rate, as compared to 12 of 49 (24.5%) of the judges who did learn the original interest rate. The difference was marginally significant. Fisher’s Exact Test,  $p = .06$ . It is also worth noting that one of the judges in the anchor condition chose the original contract interest rate of 21%.

<sup>47</sup>  $t(84) = 3.30, p < .002$ .

<sup>48</sup> *Till v. SCS Credit Corp.*, 541 U.S. 465, 480 (2004).

suggesting that it is unlikely that the judges in either group would stray far from the prime rate.

We found only one meaningful demographic difference – that of political party.<sup>49</sup> The Republican judges set a mean interest rate of 7.40%, while the Democratic judges set a mean rate of 6.49%. This difference was marginally statistically significant.<sup>50</sup> The judges' political party, however, did not interact with the effect of the anchor.<sup>51</sup>

### 3. Anchoring: Discussion

We provided the bankruptcy judges with what we believe was a particularly stern test for the effect of anchors. Bankruptcy judges are keenly familiar with the uses and meaning of interest rates. They constantly interpret interest rates, assess their implications for bankruptcy plans, calculate net present value, and set appropriate rates. If any group of judges should be immune to the effects of anchoring in any context, it should be these judges in this context. Moreover, by identifying the prime interest rate, the problem itself provided an alternative anchor for the judges to use. Thus, for the original loan rate to produce an anchoring effect, it had to compete against the alternative anchor that the problem itself set.

Despite this, the anchor affected the judges. Even though the Supreme Court's prescribed formula ignores the original interest rate, we found that this piece of information influenced the judges in our study. Reminding the bankruptcy judges of the Court's ruling in *Till*, and making clear that the parties agreed that the original loan rate was irrelevant under the law, did not prevent the rate from influencing those judges exposed to it.

It is possible that the judges found the original loan rate informative, even apart from its effect as an anchor. The rate was fairly high, and as such might have signaled to the judges that the debtor posed a significant risk of default. Our materials were sparse, so this might have been an important clue for the judges as to the risk of further default. We think this account unlikely, however, for two reasons. First, as the Supreme Court noted in *Till*, and as bankruptcy judges surely know, the risk of default after the debtor has filed in

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<sup>49</sup> The male judges provided a somewhat higher mean interest rate (6.90) than the female judges (6.18), but this difference was not statistically significant.  $t(100) = 1.43, p = .16$ . To test whether the gender of the judge interacted with the presence or absence of an anchor, we ran an ANOVA with main effects of condition and gender and their interaction. The interaction term was not significant.  $F(1,101) = 0.84, p = .362$ .

The number of years of experience of the judges did not correlate significantly with the interest rate.  $r = -.076, p = .451$ . To test whether years of experience interacted with the effect of the anchor, we regressed the interest rate on condition, years of experience, and the interaction of condition with years of experience. The latter term was not significant.  $t(96) = 0.39, p = .699$ .

<sup>50</sup>  $t(97) = 1.75, p = .083$ .

<sup>51</sup> To test this, we ran an ANOVA with main effects of condition and party and their interaction. The latter term was not significant.  $F(1,95) = 0.77, p = .382$ .

Chapter 13 is completely different from the risk of default when the loan was initiated.<sup>52</sup> The debtor has resolved many unsecured debts through the bankruptcy filing, has offered a plan for solvency that has been approved by a bankruptcy judge, and remains under the supervision of the bankruptcy court.<sup>53</sup> Second, our materials note some changed circumstances from the time of the loan, including an increase in the price of fuel, which was a salient news event at the time we ran the study. As the Supreme Court itself announced when embracing its formula in *Till*, the initial contract interest rate no longer provides useful information to the bankruptcy judge.<sup>54</sup> Thus, the initial interest rate operated as a largely irrelevant, but still influential, anchor.

The magnitude of the anchoring effect that we observed in this study is similar to, though slightly smaller than, what we observed in our previous studies of generalist judges. In the first of these studies, we showed that the introduction of an extremely low anchor reduced damage awards by 0.41 standard deviations.<sup>55</sup> In the second study, we tested the effects of both a low and a high anchor and found that the low anchor reduced awards by 0.58 standard deviations, while the high anchor increased awards by 0.75 standard deviations.<sup>56</sup> In the present study of bankruptcy judges, the anchor increased the interest rate by 0.37 standard deviations. The effect size observed in this study is only slightly smaller than the effect size we have observed in our previous studies of generalist judges. Therefore, we cannot conclude from this that bankruptcy judges are less susceptible than generalist judges to the anchoring effect.

### B. *Framing*

People treat decisions involving potential gains from the status quo differently from decisions involving potential losses. People tend to make risk-averse decisions when choosing between options that appear to represent gains and risk-seeking decisions when choosing between options that appear to represent losses.<sup>57</sup> For example, most people prefer a certain \$100 gain to a

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<sup>52</sup> See *Till*, 541 U.S. at 475 & n.12.

<sup>53</sup> *Id.*

<sup>54</sup> *Id.* at 477-78.

<sup>55</sup> This was calculated using the data reported in Guthrie et al., *Inside the Judicial Mind*, *supra* note 11, at 792 tbl.1. Using the raw data from that study, as reported there, would not be appropriate for this calculation because the data were positively skewed. Instead, we calculated the difference in the mean of the log of the damage award in each condition by the standard deviation of the log of the awards, which resulted in a difference of 0.41 standard deviations.

<sup>56</sup> These numbers were also calculated using logs from the awards reported in Wistrich et al., *Can Judges Ignore Inadmissible Information?*, *supra* note 21, at 1290 tbls.2 & 3.

<sup>57</sup> See Daniel Kahneman & Amos Tversky, *Choices, Values, and Frames*, 39 AM. PSYCHOLOGIST 341, 342-44 (1984); Daniel Kahneman & Amos Tversky, *Prospect Theory: An Analysis of Decision Under Risk*, 47 ECONOMETRICA 263, 268-69 (1979); Amos Tversky

50% chance of winning \$200, but prefer a 50% chance of losing \$200 to a certain \$100 loss.<sup>58</sup> Psychologists and legal scholars call this the “framing effect,” or more simply, “framing.”<sup>59</sup>

Framing can influence the way litigants evaluate settlement offers. From a plaintiff’s perspective, settlement promises a certain gain from the status quo, while trial presents the risk of recovering nothing at all. From a defendant’s perspective, settlement promises a certain loss from the status quo, while trial presents some hope of avoiding that loss altogether. Because the plaintiff confronts gains, we expect the plaintiff to be risk averse; because the defendant confronts losses, we expect the defendant to be risk seeking. As a result, plaintiffs are likely to find settlement relatively more attractive than are defendants.<sup>60</sup> In our previous work, we have found that judges respond similarly. Judges find settlement offers more attractive when evaluating them from the perspective of the plaintiff than from the perspective of the defendant, holding constant the value of the settlement relative to the expected value of trial.<sup>61</sup> Here, we explore whether framing influences bankruptcy judges.

### 1. Framing: Materials

Bankruptcy judges constantly make decisions involving risk. One of the more common decisions they make is whether to liquidate a business or allow it to continue operating. For the creditors, this decision can be characterized as involving either gains or losses. The decision can appear to involve gains in that the creditors are certain to recover some of their money if the business is liquidated; if the business is not liquidated, there is some prospect that the creditors will recover more in the future. The decision can appear to involve losses in that the creditors lose some of the money they were owed if the business is liquidated; if the business is not liquidated, there is some prospect that they will lose less in the future. Because this gamble primarily affects parties rather than the judge, one might think that the judge would be unaffected by the decision frame. Nevertheless, as described above, we have found that generalist judges can be influenced by the frame in civil litigation,

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& Daniel Kahneman, *The Framing of Decisions and the Psychology of Choice*, 211 *SCIENCE* 453, 453-55 (1981); Amos Tversky & Daniel Kahneman, *Rational Choice and the Framing of Decisions*, 59 *J. BUS. S251*, 257-60 (1986).

<sup>58</sup> See Amos Tversky & Daniel Kahneman, *Advances in Prospect Theory: Cumulative Representation of Uncertainty*, 5 *J. RISK & UNCERTAINTY* 297, 308 tbl.4 (1992).

<sup>59</sup> Although scholars often use the term “framing” to refer to this phenomenon, it is perhaps properly described as the “reflection effect.” See generally N.S. Fagley, *A Note Concerning Reflection Effects Versus Framing Effects*, 113 *PSYCHOL. BULL.* 451 (1993).

<sup>60</sup> See Jeffrey J. Rachlinski, *Gains, Losses, and the Psychology of Litigation*, 70 *S. CAL. L. REV.* 113, 128-44 (1996). But see Chris Guthrie, *Framing Frivolous Litigation: A Psychological Theory*, 67 *U. CHI. L. REV.* 163, 187-91 (2002) (conducting an experiment showing that litigant risk preferences tend to be reversed in frivolous or low-probability litigation).

<sup>61</sup> See Guthrie et al., *Inside the Judicial Mind*, *supra* note 11, at 797-98.

even when their own interests are not at stake. Thus, if the bankruptcy judges are like other judges we have studied, the somewhat arbitrary characterization of a liquidation decision as one involving gains versus one involving losses might affect them as well. On the other hand, bankruptcy judges have highly specialized expertise, so they might have developed ways of thinking about liquidation decisions that allow them to remain unaffected by the way the decisions are characterized.

We tested for the framing effect by presenting the bankruptcy judges with a problem called "Choice Among Reorganization Plans." In it, we asked the judges to suppose that they were presiding over a Chapter 11 reorganization of a small business called "Hammer Time, Inc." The materials indicate that "Hammer Time" is a home supply and service business consisting of a hardware store, a carpet shop, and a contracting business. The hardware store and carpet shop are described as "failing." The company has some assets, but an immediate liquidation would leave the unsecured creditors with \$600,000 less than they are owed.

The judges learn that they must conduct a confirmation hearing involving two different reorganization plans, neither of which has support from holders of two-thirds of the unsecured debt, as required by the Bankruptcy Code.<sup>62</sup> Under such circumstances, as the materials note, the Code instructs the judge to "consider the preferences of creditors" and confirm one of the two plans.<sup>63</sup> We asked the judges, "Which plan would you choose?"

We randomly assigned some of the judges to a "gain" condition and others to a "loss" condition. For the judges assigned to the gain condition, we described the two plans as follows:

\_\_\_\_\_ If you select Plan A, \$200,000 of the unsecured debt will be paid for sure.

\_\_\_\_\_ If you select Plan B, there is a 1/3 probability that all of the unsecured debt will be paid and a 2/3 chance that none of it will be paid.

For these judges, then, both plans offer the prospect of recovering a gain. For judges in the loss condition, the plans appear to offer the prospect of losses:

\_\_\_\_\_ If you select Plan A, \$400,000 of the unsecured debt will remain unpaid for sure.

\_\_\_\_\_ If you select Plan B, there is a 1/3 probability that none of the unsecured debt will remain unpaid and a 2/3 probability that all of the unsecured debt will remain unpaid.

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<sup>62</sup> 11 U.S.C. § 1126(c) (2000).

<sup>63</sup> *Id.* § 1129(c).

Note that all of these plans have the same expected value of \$200,000.<sup>64</sup> In each version, the only difference between the two options lies in the risk they present, thereby giving the judges little reason to choose one plan over the other. Furthermore, in both conditions, the judges chose between the certain outcome that the first plan presents and the risky option that the second plan presents. Hence, other than the characterization of the plans as involving gains or losses, the judges had no reason to make different choices.

## 2. Framing: Results

Among judges evaluating the plans in the gain frame, 91.8% (forty-five out of forty-nine) preferred Plan A, the certain outcome. Among judges evaluating the plans in the loss frame, 73.3% (forty-four out of sixty) preferred Plan A. In both instances, the judges favored the certain plan, but we found an 18.5 percentage point difference between judges in the gain frame and judges in the loss frame. This difference was statistically significant.<sup>65</sup> More judges were willing to incur the risks of Plan B when the choice appeared to involve the *loss* of unsecured debt rather than the *recovery* of unsecured debt.

None of the three individual differences (gender, political party, and years of experience) had any significant effect on judges' preferences for one plan over the other, nor did any of these variables significantly interact with the frame.

## 3. Framing: Discussion

The decision frame affected the judges. The judges tended to prefer the certain option overall, but this preference was strongest when the options were framed as gains. The effect size we found here is similar to the effect size that we observed in our earlier study of generalist judges' assessments of settlements in civil lawsuits. In that study, the variation by frame from gains to losses shifted the judges' preferences by fifteen percentage points (40% favored the certain option in the gain frame and 25% favored the certain option in the loss frame).<sup>66</sup> Here, the judges' preferences shifted by 18.5 percentage points.

When comparing these results to those obtained in the so-called Asian Disease problem from which we abstracted the problem in our study,<sup>67</sup> the judges were much more resistant to the framing effect than undergraduates. In the Asian Disease version of the problem, which used a different context but similar numbers, the frame produced more than a fifty percentage point shift (72% favored the certain option in the gain frame and 22% favored the certain

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<sup>64</sup> The choices are based roughly on the well-known (and often criticized) "Asian Disease" problem outlined by Kahneman and Tversky in 1984. Kahneman & Tversky, *Choices, Values, and Frames*, *supra* note 57, at 343.

<sup>65</sup> Fisher's Exact Test,  $p = .014$ .

<sup>66</sup> Guthrie et al., *Inside the Judicial Mind*, *supra* note 11, at 797.

<sup>67</sup> See *supra* note 64.

option in the loss frame).<sup>68</sup> In a more recent meta-analysis of studies employing the Asian Disease problem format, however, researchers found a substantially smaller twenty percentage point swing between the gain and loss conditions.<sup>69</sup> Because the context of the Asian Disease problem and the problem we employ here are different, comparisons are difficult to make. Nevertheless, the bankruptcy judges in our study seemed slightly more resistant to the framing effect than undergraduates, but no more resistant than other judges.

The problem which we relied upon, much like the Asian Disease problem on which it is based, might be explained without reliance on framing. The judges could have interpreted Plan A (the certain outcome) as identifying the minimum gain or loss. That is, in the gain frame, the judges might have interpreted the phrase "\$200,000 of the unsecured debt will be paid for sure" as meaning "at least \$200,000 will be paid." Likewise, judges in the loss frame might have interpreted "\$400,000 of the unsecured debt will remain unpaid for sure" as meaning "at least \$400,000 will remain unpaid." If so, Plan A would seem more valuable in the gain frame than in the loss frame. At least one researcher has offered a similar account of the Asian Disease problem.<sup>70</sup> We cannot rule out this interpretation, but given that framing effects are widely documented and empirically substantiated in a wide variety of settings, we think that the framing effect provides the most plausible account of our results.

### C. *Omission Bias*

People evaluate action differently from inaction, generally reacting more strongly to the former than the latter. People tend to feel better when an action (rather than an omission) produces a good outcome and worse when an action (rather than a failure to act) produces a bad outcome.<sup>71</sup> Consider the following problem as an illustration of the phenomenon:

Paul owns shares in Company *A*. During the past year he considered switching to stock in Company *B*, but he decided against it. He now finds that he would have been better off by \$1,200 if he had switched to the

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<sup>68</sup> Kahneman & Tversky, *Choices, Values, and Frames*, *supra* note 57, at 343.

<sup>69</sup> Anton Kühberger, Michael Schulte-Mecklenbeck & Josef Perner, *The Effects of Framing, Reflection, Probability, and Payoff on Risk Preference in Choice Tasks*, 78 ORGANIZATIONAL BEHAV. & HUM. DECISION PROCESSES 204, 210 tbl.2, 219 (1999).

<sup>70</sup> See David R. Mandel, *Gain-Loss Framing and Choice: Separating Outcome Formulations from Descriptor Formulations*, 85 ORGANIZATIONAL BEHAV. & HUM. DECISION PROCESSES 56, 66 (2001).

<sup>71</sup> Psychologists also label this the "actor effect." For studies on and discussion of the effect, see Daniel Kahneman & Amos Tversky, *The Psychology of Preferences*, SCI. AM., Jan. 1982, at 160, 173; Janet Landman, *Regret and Elation Following Action and Inaction: Affective Responses to Positive Versus Negative Outcomes*, 13 PERSONALITY & SOC. PSYCHOL. BULL. 524, 529-30 (1987); Ilana Ritov & Jonathan Baron, *Status-Quo and Omission Biases*, 5 J. RISK & UNCERTAINTY 49, 60 (1992).



stock of Company B. George owned shares in Company B. During the past year he switched to stock in Company A. He now finds that he would have been better off by \$1,200 if he had kept his stock in Company B. Who feels more regret?<sup>72</sup>

Although George and Paul obtained identical outcomes, most believe George would experience more regret than Paul.<sup>73</sup> George, not Paul, committed an act, and actions that turn out poorly induce more negative emotion than inaction that turns out equally bad.

One implication of the omission/commission distinction is that people tend to judge those who have committed harmful actions more harshly than those who have failed to take some action to prevent that harm.<sup>74</sup> This is sensible in instances where there are morally or legally relevant differences between acting (e.g., drowning someone) and failing to act (e.g., not rescuing someone who is drowning), but in situations where acts and omissions are morally equivalent, people who judge “harmful commissions as worse than the corresponding omissions” commit the so-called “omission bias.”<sup>75</sup>

So deep is the distinction between acts and omissions that it has produced an enormous literature in both philosophy and law. Consider the famous “Trolley Problem” hypothetical.<sup>76</sup> The story goes that a trolley’s brakes fail and, if left to run free, it will crush and kill five helpless individuals on the tracks. But, the story continues, you have the opportunity to divert the trolley to another track where only one helpless individual will be killed. Philosophers ask whether it is morally appropriate to divert the train. Many people conclude that diverting the train is morally permissible, but is not morally required, and indeed, some people assert that they would not throw the switch.<sup>77</sup> In their view, the act that kills the one is more reprehensible than the omission that kills the five.

Beyond philosophical introspection, ample data supports the influence of the omission bias. In one study, subjects were asked to evaluate the conduct of a fictional tennis player named John West.<sup>78</sup> John, the subjects learn, is the best tennis player at the Wyncote Tennis Club. Unfortunately for John, Ivan Lendl, who was then the top-ranked professional tennis player in the world, agreed to play as a guest against John in a club tournament. The night before their match, John and Ivan had dinner at the club. The subjects learn that John knew

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<sup>72</sup> Kahneman & Tversky, *supra* note 71, at 173.

<sup>73</sup> *Id.*

<sup>74</sup> Mark Spranca, Elisa Minsk & Jonathan Baron, *Omission and Commission in Judgment and Choice*, 27 J. EXPERIMENTAL SOC. PSYCHOL. 76, 101-03 (1991) [hereinafter Spranca et al., *Omission and Commission in Judgment and Choice*].

<sup>75</sup> *Id.* at 79.

<sup>76</sup> See Judith Jarvis Thomson, *The Trolley Problem*, 94 YALE L.J. 1395, 1395 (1985).

<sup>77</sup> See *id.* at 1395-96.

<sup>78</sup> Spranca et al., *Omission and Commission in Judgment and Choice*, *supra* note 74, at 82-83.

Ivan was allergic to cayenne pepper, which John also knew was an ingredient in the house salad dressing. Finally, the subjects learn of possible endings: in some, John affirmatively recommended the house dressing to Ivan (the “commission” conditions); in others, John remained silent while Ivan ordered the house dressing of his own volition (the “omission” conditions). The researchers asked the subjects to evaluate the morality of John’s behavior in each and found that 65% of the subjects “rated each omission as less bad than either corresponding commission,” thereby demonstrating the omission bias.<sup>79</sup>

A recent study, however, found that the omission bias did not influence student-subjects responding to two hypothetical cases, including one based loosely on the George/Paul scenario described above.<sup>80</sup> In that hypothetical case, the students learn that a plaintiff who had inherited one million dollars hired a financial advisor who either retained (the “omission” condition) or converted to (the “commission” condition) a certain portfolio of stocks. Following a sharp decline in the value of those stocks, the plaintiff sued the financial advisor for negligence. When asked to evaluate the financial advisor’s culpability, the student-subjects appeared to be uninfluenced by the omission bias, as 57% of those in the commission condition versus 52% in the omission condition found him negligent.<sup>81</sup>

#### 1. Omission Bias: Materials

To test whether the omission bias influences bankruptcy judges, we created a problem entitled “The Senior Citizen.” In it, we asked the judges to evaluate the petition of a 71-year-old widower who has filed for bankruptcy protection under Chapter 7 due to mounting debt from healthcare expenses. The judges learn that the debtor “racked up \$25,000 in credit card bills, most reflecting the kinds of purchases necessary to maintain a minimal standard of living (e.g., doctor bills, prescription bills, grocery bills, and so on).” The judges also learn that the debtor had essentially no savings, but that he had received an inheritance worth \$50,000 from his brother.

We randomly assigned the judges to either a “commission” condition or an “omission” condition. The judges assigned to the commission condition learned that the debtor had inherited \$50,000 in U.S. Treasury notes, but that he converted them into stock in a mid-sized company. The judges assigned to the omission condition learned that the debtor had considered converting the stock his brother left him into U.S. Treasury notes because he thought it might provide a better return, but that he had decided not to make the switch. In both cases, the judges learned that the stock subsequently lost all of its value.

The materials state that the debtor is seeking to have the credit card debt discharged. The bank opposes discharge of the debt, arguing that his use of the

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<sup>79</sup> *Id.* at 84.

<sup>80</sup> Robert A. Prentice & Jonathan J. Koehler, *A Normality Bias in Legal Decision Making*, 88 CORNELL L. REV. 583, 621-30 (2003).

<sup>81</sup> *Id.* at 629-30.

credit card to cover bills he knew he would have no way of paying constitutes “false pretenses, a false representation, or actual fraud” under 11 U.S.C. § 523(a)(2)(A). The materials end by asking: “Based solely on the facts above, would you discharge [the debtor’s] credit card debt?” The judges had six choices: very likely to discharge, likely to discharge, somewhat likely to discharge, somewhat unlikely to discharge, unlikely to discharge, and very unlikely to discharge.

## 2. Omission Bias: Results

As Table 1 shows, judges in the omission and commission conditions responded similarly.

Table 1. Percent Choosing Each Option in the Omission/Commission Problem

	Would you discharge the credit card debt?					
	Very likely	Likely	Somewhat likely	Somewhat unlikely	Unlikely	Very unlikely
Omission ( <i>n</i> = 52)	63.5	21.2	7.7	1.9	5.8	0.0
Commission ( <i>n</i> = 61)	63.9	31.2	3.3	1.6	0.0	0.0

An ordered logit analysis revealed that the condition had no effect on the judges’ choices.<sup>82</sup> The gender of the judges, political affiliation, and years of experience did not affect their choices nor significantly interact with the condition.

## 3. Omission Bias: Discussion

In our problem, the debtor’s action or inaction is irrelevant to the judgment that the Bankruptcy Code requires the judges to make, inasmuch as the Bankruptcy Code directs the judges to assess the state of mind of the debtor when he used the credit card to incur the debt.<sup>83</sup> And indeed, the distinction between debtor action and debtor inaction had no such effect on the judges. Unlike participants in other studies, the judges participating in our study did not judge the debtor more harshly when his actions had contributed to his bankruptcy filing than when his omissions had done so. To be sure, these materials provided a somewhat indirect test of the influence of the omission bias. Our problem did not require the judges to assess the culpability of the act or omission that dissipated the debtor’s savings. Rather, the problem required the judges to assess the debtor’s state of mind when he incurred the credit card

<sup>82</sup>  $z = 0.48, p = .63$ .

<sup>83</sup> 11 U.S.C. § 523(a)(2)(A) (2000).

debt. Here, the omission or commission does not speak to that state of mind, but to the causes of the bankruptcy itself. Nevertheless, we think that if the omission bias plays a role in judges' thinking, it should have played a role in this problem. Indeed, we designed this hypothetical precisely to test the possibility of an indirect, and hence more arbitrary, influence of the bias. We reasoned that in applying the broad mandate against fraud, bankruptcy judges are influenced by their sense that the debtor is responsible for his situation. To the extent that the judges blamed the debtor for his situation, we would argue that they would have treated the debtor differently. Our results cannot, of course, definitively rule out the role that the omission bias might play in how bankruptcy judges make decisions, but the results suggest that its influence might not extend to contexts in which it plays only an indirect role.

These results are not directly comparable to the results of studies of generalist judges; studies of the omission bias in generalist judges do not, as far as we know, exist. Indeed, we presented our problem to the bankruptcy judges, in part, to begin to assess how the bias might affect judges in general. If future work shows that bankruptcy judges are uniquely impervious to the effects of the omission bias, that would suggest that this form of judicial specialization offers some advantages.

#### D. *Race*

By itself, the race of actors in the legal system should have little, if any, effect on the kinds of decisions any judge makes. And yet, race might influence judges in untoward ways. Like the other kinds of mental processes we describe in this paper, race might provide an unfortunate simplification that guides judicial decision making.

Previous research provides evidence that the race of a party can influence how judges decide cases. In several studies, researchers report racial disparities in criminal sentencing.<sup>84</sup> In one such study, federal judges were more likely to depart from the Federal Sentencing Guidelines to impose lengthier sentences for African American defendants than for white defendants, holding other factors constant. The study found that African Americans “not only receive longer sentences but also are less likely to receive no prison term when that option is available, more likely to receive upward departures, and less likely to receive downward departures.”<sup>85</sup> Of those defendants who receive downward departures in sentencing, African Americans “receive smaller adjustments” than their white counterparts.<sup>86</sup>

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<sup>84</sup> See David B. Mustard, *Racial, Ethnic, and Gender Disparities in Sentencing: Evidence from the U.S. Federal Courts*, 44 J.L. & ECON. 285, 286-88 & nn.1-19 (2001) (citing studies).

<sup>85</sup> *Id.* at 312.

<sup>86</sup> *Id.*

Other research suggests that the race of the defendant influences bail setting.<sup>87</sup> One study found that judges were 15% more likely to require bail from African Americans than they were from whites, even though African Americans were less likely to flee before their court date.<sup>88</sup> A more recent study provided indirect evidence of racial disparities in bail setting: it found that bail bondsmen charge significantly lower bond rates to African American and Hispanic defendants, suggesting that judges impose higher levels of bail than are necessary to ensure the appearance of minority defendants at trial.<sup>89</sup>

### 1. Race: Materials

We created a problem designed to assess the role that the race of the debtor might play in the discretionary discharge decisions that judges make. Recognizing that judges might react to an overt effort to study race, we adopted the research methods used in a recent study of the effect of race on employment decisions.<sup>90</sup> In that study, Marianne Bertrand and Sendhil Mullainathan sent fake resumes to actual employers that had posted want ads in local newspapers. The resumes were identical but for the name of the fake applicant. On one half of the resumes, the researchers used names that people commonly associate with African Americans; on the other half, they used names that people commonly associate with whites. The researchers found that employers were much more likely to follow up with applicants with white-sounding names than applicants with African-American-sounding names.<sup>91</sup> We used these names in our study, thereby enabling us to test the impact of race without explicitly identifying the race of the debtor.

In the problem, entitled “The Consolidated Student Loan Case,” the bankruptcy judges learn that the debtor, a young woman, has filed for bankruptcy protection to have her student loan debt discharged. The judges learn that the debtor had completed three years of college, borrowing \$23,000 per year to attend. She dropped out at the end of her junior year due to an unexpected pregnancy and the subsequent birth of her son. To support herself and her son, the debtor took an \$18,000 per year job as a sales clerk, and her grandmother provided free child care. The materials describe her monthly expenses, apart from the repayment of her student loan, as amounting to \$1125. Recently, however, her grandmother has fallen ill and can no longer provide child care while the debtor is at work. Thus, the debtor now has child

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<sup>87</sup> For a review, see Ian Ayres & Joel Waldfogel, *A Market Test for Race Discrimination in Bail Setting*, in *PERVASIVE PREJUDICE?*, at 233, 236-37 (Ian Ayres ed., 2001).

<sup>88</sup> MALCOLM M. FEELEY, *THE PROCESS IS THE PUNISHMENT* 207 tbl.7.3, 231 tbl.7.6 (1979).

<sup>89</sup> Ayres & Waldfogel, *supra* note 87, at 240.

<sup>90</sup> See Marianne Bertrand and Sendhil Mullainathan, *Are Emily and Greg More Employable Than Lakisha and Jamal? A Field Experiment on Labor Market Discrimination*, 94 AM. ECON. REV. 991, 991-92 (2004).

<sup>91</sup> *Id.* at 997-98.

care expenses, which has made it difficult, if not impossible, to manage her monthly expenses, which include the \$600 payment on her \$83,748 consolidated student loan.

The materials also reminded the judges that educational loans are not dischargeable under the Bankruptcy Code absent a showing of "undue hardship."<sup>92</sup> The Code does not define "undue hardship," but nearly every circuit requires a debtor seeking the discharge of a student loan to satisfy a three-part test: (1) that the debtor cannot maintain a minimal standard of living for herself and her dependents if required to repay the loan; (2) that additional circumstances exist suggesting this is likely to remain the case throughout a significant portion of the repayment period; and (3) that the debtor has made good faith efforts to repay the loan.<sup>93</sup>

We asked the judges to assume "for purposes of this problem" that they serve in "a circuit that allows bankruptcy judges the option of considering a partial discharge of educational loan debt."<sup>94</sup> We then asked: "Based on the 'undue hardship' test enunciated above and the facts as given, what dollar amount of Student's loan amount would you discharge (please pick a dollar amount between \$0 and \$83,748)?"

To manipulate the race of the debtor, we identified the debtor using one of eighteen different (female) first names, taken from Bertrand and Mullainathan's study. The African-American-sounding names were Ebony, Latonya, Kenya, Latoya, Tanisha, Lakisha, Tamika, Keisha, and Aisha. The white-sounding names were Kristen, Carrie, Laurie, Meredith, Sarah, Allison, Jill, Anne, and Emily. To reinforce the race of the debtor, we used the name eight times in the problem.

## 2. Race: Results

The judges who assessed the debtors with African-American-sounding names discharged a mean of \$47,106 (or 56.2%), while the judges who assessed the debtors with white-sounding names discharged a mean of \$48,506 (or 57.9%). This difference was not statistically significant.<sup>95</sup>

Individual differences, however, influenced the amount judges discharged. The political affiliation of the judges significantly affected their decisions, as Democratic judges discharged a mean of \$50,972, while Republican judges

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<sup>92</sup> 11 U.S.C. § 523(a)(8) (2000).

<sup>93</sup> The materials cite two cases as support: *Educ. Credit Mgmt. Corp. v. Polleys*, 356 F.3d 1302, 1309 (10th Cir. 2004) (applying the "widely-adopted test" set forth in *Brunner v. N.Y. State Higher Educ. Servs.*, 831 F.2d 395, 396 (2d Cir. 1987)); *U.S. Dep't of Educ. v. Gerhardt (In re Gerhardt)*, 348 F.3d 89, 91 (5th Cir. 2003) (same).

<sup>94</sup> The circuits are split on whether to grant partial discharge in certain circumstances. Compare *Saxman v. Educ. Credit Mgmt. Corp. (In re Saxman)*, 325 F.3d 1168, 1174 (9th Cir. 2003) (refusing to grant partial discharge), with *Tenn. Student Assistance Corp. v. Hornsby (In re Hornsby)*, 144 F.3d 433, 438-39 (6th Cir. 1998) (granting partial discharge).

<sup>95</sup>  $t(106) = 0.24, p = .81$ .

discharged a mean of \$34,232.<sup>96</sup> The judges' political affiliation, however, did not interact with the race of the debtor significantly.<sup>97</sup> Judicial experience also correlated with the amount discharged, as judges with more experience discharged less.<sup>98</sup> Experience did not interact with the race of the debtor significantly.<sup>99</sup> Female judges discharged more on average (\$54,850) than male judges (\$44,690), but this trend only approached statistical significance.<sup>100</sup> The gender of the judges did not interact with the race of the debtor significantly.<sup>101</sup>

### 3. Race: Discussion

The race of the debtor played no role in the judges' assessments in our study. The data do not reveal even the smallest trend on this variable. After the presentation, some of the judges suggested that they could not even remember the name of the debtor. While we do not doubt the judges' self-reports, the race of the debtor could have unconsciously influenced the judges. But such reports suggest that the judges' attention was focused on the facts and not on details like the debtor's name. This suggests one way in which the judges might be able to avoid unwanted influence – by honing in only on those details that are relevant.

Although we did not find any evidence that the race of the debtor influenced the judges, we did find some demographic differences among the judges, as noted above. With regard to the political differences observed, it is somewhat unsurprising that the Republican judges were less forgiving of the educational debt, given that the Republican Party, more so than the Democratic Party, claims to emphasize personal responsibility and de-emphasize governmental assistance.

### E. *Apologies and Terror Management*

In our final problem, we tested for the influence of two phenomena: the impact of a debtor's apology and the impact of terror management (or

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<sup>96</sup>  $t(99) = 2.41, p = .018$ .

<sup>97</sup> To test this, an ANOVA was used with the discharge amount as the dependent variable and the party of the judge, race of the debtor, and an interaction between party and race as independent variables. The latter term was not significant.  $F(1,108) = 0.19, p = .661$ .

<sup>98</sup>  $r = -.207, p = .034$ .

<sup>99</sup> To test this, an ANOVA was used with the discharge amount as the dependent variable and the experience of the judge, race of the debtor, and an interaction between experience and race as independent variables. The latter term was not significant.  $F(1,104) = 0.31, p = .581$ .

<sup>100</sup>  $t(105) = 1.55, p = .12$ .

<sup>101</sup> To test this, an ANOVA was used with the discharge amount as the dependent variable and the gender of the judge, race of the debtor, and an interaction between gender and race as independent variables. The latter term was not significant.  $F(1,108) = 0.29, p = .592$ .

mortality salience) on judicial decision making. In contrast to the *cognitive* heuristics we tested above, like anchoring, framing, and the omission bias, the phenomena explored here are *emotional* influences. These emotional influences, just like heuristics, might make it difficult for the judges to focus squarely on applying the bankruptcy laws to the facts of a case.

Apologies can play an important role in the litigation process. Many aggrieved civil litigants report seeking contrition from parties they feel have wronged them at least as much as they seek compensation.<sup>102</sup> To encourage litigants to apologize, many states have recently adopted statutes that shield apologies from admissibility in civil cases.<sup>103</sup> In criminal cases, expressions of sorrow and remorse are so important that they can reduce a criminal sentence.<sup>104</sup> Indeed, jurors who have served in capital cases report that the extent of the defendant's remorse ranks second only to his future dangerousness in influencing the decision of whether to sentence the defendant to death.<sup>105</sup>

Experimental research confirms that apologies matter in suit and settlement. In one study, Kathleen Mazor and her colleagues conducted an experimental study of health plan members' responses to hypothetical medication errors.<sup>106</sup> The researchers assigned subjects to either a nondisclosure group or a disclosure group. For subjects in the nondisclosure group, the physician provided limited information and did not acknowledge responsibility for the error; for subjects in the disclosure group, the physician provided more information, accepted responsibility, and apologized. Subjects in the former group were more likely than those in the latter to report that they would seek legal advice.<sup>107</sup> In another study, Amy Witman and her colleagues provided patients with descriptions of hypothetical medical errors of varying levels of severity and asked them a series of survey questions.<sup>108</sup> The researchers found that 98% of the subjects "desired or expected the physician's active acknowledgment of an error" and were significantly more likely to consider

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<sup>102</sup> See Erin Ann O'Hara & Douglas Yarn, *On Apology and Consilience*, 77 WASH. L. REV. 1121, 1125 (2002).

<sup>103</sup> See *id.* at 1126 & n.18 (detailing "apology-friendly legislation" in California, Connecticut, Hawaii, Massachusetts, Texas, and West Virginia).

<sup>104</sup> See U.S. SENTENCING GUIDELINES MANUAL § 3E1.1 (2005) (providing for reduced sentences based on the payment of restitution and similar acts of atonement).

<sup>105</sup> See Theodore Eisenberg, Stephen P. Garvey & Martin T. Wells, *But Was He Sorry? The Role of Remorse in Capital Sentencing*, 83 CORNELL L. REV. 1599, 1636-37 (1998).

<sup>106</sup> See generally Kathleen M. Mazor et al., *Health Plan Members' Views About Disclosure of Medical Errors*, 140 ANNALS INTERNAL MED. 409 (2004).

<sup>107</sup> *Id.* at 413. This pattern held across the various types of errors and levels of injury, but reached statistical significance in only one case. *Id.*

<sup>108</sup> Amy B. Witman, Deric M. Park & Steven B. Hardin, *How Do Patients Want Physicians To Handle Mistakes? A Survey of Internal Medicine Patients in an Academic Setting*, 156 ARCHIVES INTERNAL MED. 2565, 2565 (1996).



litigation if they did not receive such acknowledgment.<sup>109</sup> Additionally, in an important series of studies, Jennifer Robbennolt found that aggrieved plaintiffs who received a “full apology” were more likely to accept a settlement offer than plaintiffs who did not.<sup>110</sup>

Apologies seem to operate in several different ways. First, wrongdoers who apologize come to seem less culpable for the bad outcomes they have caused. By admitting to misconduct, wrongdoers make themselves vulnerable to the victim; in so doing they seem less culpable.<sup>111</sup> Second, an apology can trigger “reciprocity.” By apologizing, the wrongdoer gives something to the victim; the victim may feel compelled under established norms of social exchange to respond with some kind of concession of her own, like forgiveness.<sup>112</sup> Finally, an apology might repair social relations between the parties by assuaging some of the anger and hurt the victim feels.<sup>113</sup> However they operate, apologies appear to influence behavior.

Terror management also influences behavior.<sup>114</sup> Based largely on the influential writing of cultural anthropologist Ernest Becker,<sup>115</sup> terror management theory contends that when people contemplate their mortality, they tend to make decisions that reinforce deeply held cultural values as a way of counteracting their inevitable demise.<sup>116</sup>

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<sup>109</sup> *Id.* at 2566.

<sup>110</sup> See Jennifer K. Robbennolt, *Apologies and Legal Settlement: An Empirical Examination*, 102 MICH. L. REV. 460, 485-86 (2003). For Robbennolt, a “full apology” is one in which the defendant expresses sympathy for the plaintiff’s injuries and accepts responsibility for causing them. *Id.* at 484.

<sup>111</sup> See O’Hara & Yarn, *supra* note 102, at 1141-42.

<sup>112</sup> See *id.* at 1143. For an explanation of the reciprocity norm, see ROBERT B. CIALDINI, *INFLUENCE: SCIENCE AND PRACTICE* 19-50 (4th ed. 2001).

<sup>113</sup> See *id.* at 1144.

<sup>114</sup> Terror management is perhaps the least familiar of these psychological phenomena in the legal literature. Recently, however, legal scholars have invoked it to fully or partially explain several phenomena of interest, including the existence of capital punishment, see generally Donald P. Judges, *Scared to Death: Capital Punishment as Authoritarian Terror Management*, 33 U.C. DAVIS L. REV. 155 (1999), the popularity of the “fee tail” in property law, see Adam J. Hirsch, *Evolutionary Theories of Common Law Efficiency: Reasons for (Cognitive) Skepticism*, 32 FLA. ST. U. L. REV. 425, 431-32 (2005), and prejudice against out-groups and the resulting risk of diminished civil rights, see Christina E. Wells, *Fear and Loathing in Constitutional Decision-Making*, 2005 WIS. L. REV. 115, 166-68.

<sup>115</sup> See generally ERNEST BECKER, *THE BIRTH AND DEATH OF MEANING* (1962); ERNEST BECKER, *THE DENIAL OF DEATH* (1973); ERNEST BECKER, *ESCAPE FROM EVIL* (1975).

<sup>116</sup> Jeff Greenberg, Tom Pyszczynski, and Sheldon Solomon developed terror management theory in a series of articles in the late 1980s and early 1990s. See generally Jeff Greenberg, Sheldon Solomon & Tom Pyszczynski, *Terror Management Theory of Self-Esteem and Cultural Worldviews: Empirical Assessments and Conceptual Refinements*, 29 ADVANCES EXPERIMENTAL SOC. PSYCHOL. 61 (1997) [hereinafter Greenberg et al., *Terror Management Theory: Empirical Assessments*]; Jeff Greenberg, Tom Pyszczynski & Sheldon Solomon, *The Causes and Consequences of a Need for Self-Esteem: A Terror Management*

Terror management theory posits that cultural conceptions of reality serve the vital function of buffering the anxiety that results from awareness of human vulnerability and mortality. Consequently, people are highly motivated to maintain faith in the cultural conceptions of reality to which they subscribe and to defend these conceptions against threats.<sup>117</sup>

Researchers have found, for example, that U.S. citizens express more support for teaching Christian values in public schools when quizzed in front of a funeral parlor than in front of more neutral locations.<sup>118</sup> In another study, participants judged American car manufacturers more favorably and foreign manufacturers less favorably when shown footage of a fatal car crash.<sup>119</sup> Researchers have also found ample evidence demonstrating that terror management induces people to punish or judge more harshly those who violate deeply held cultural values.<sup>120</sup>

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*Theory*, in PUBLIC SELF AND PRIVATE SELF 189 (Roy F. Baumeister ed., 1986); Sheldon Solomon, Jeff Greenberg & Tom Pyszczynski, *A Terror Management Theory of Social Behavior: The Psychological Functions of Self-Esteem and Cultural Worldviews*, 24 ADVANCES EXPERIMENTAL SOC. PSYCHOL. 93 (1991); Sheldon Solomon, Jeff Greenberg & Tom Pyszczynski, *Terror Management Theory of Self-Esteem*, in HANDBOOK OF SOCIAL AND CLINICAL PSYCHOLOGY 21 (C.R. Snyder & Donelson R. Forsyth eds., 1991).

<sup>117</sup> Abram Rosenblatt, Jeff Greenberg, Sheldon Solomon, Tom Pyszczynski & Deborah Lyon, *Evidence for Terror Management Theory: I. The Effects of Mortality Salience on Reactions to Those Who Violate or Uphold Cultural Values*, 57 J. PERSONALITY & SOC. PSYCHOL. 681, 681 (1989) (citation omitted) [hereinafter Rosenblatt et al., *Evidence for Terror Management Theory*]. Technically, this is known as the “mortality salience” or “MS” hypothesis. See Jamie Arndt, Joel D. Lieberman, Alison Cook & Sheldon Solomon, *Terror Management in the Courtroom: Exploring the Effects of Mortality Salience on Legal Decision Making*, 11 PSYCHOL. PUB. POL’Y & L. 407, 411 (2005) [hereinafter Arndt et al., *Terror Management in the Courtroom*].

<sup>118</sup> Greenberg et al., *Terror Management Theory: Empirical Assessments*, *supra* note 116, at 86-87.

<sup>119</sup> See Lori J. Nelson, David L. Moore, Jennifer Olivetti & Tippony Scott, *General and Personal Mortality Salience and Nationalistic Bias*, 23 PERSONALITY & SOC. PSYCHOL. BULL. 884, 886-88 (1997) [hereinafter Nelson et al., *General and Personal Mortality Salience and Nationalistic Bias*].

<sup>120</sup> See Arndt et al., *Terror Management in the Courtroom*, *supra* note 117, at 422 (“There is thus a growing body of research conducted in a variety of independent laboratories demonstrating that intimations of mortality increase punitive judgments toward lawbreakers.”); Alison Cook, Jamie Arndt & Joel D. Lieberman, *Firing Back at the Backfire Effect: The Influence of Mortality Salience and Nullification Beliefs on Reactions to Inadmissible Evidence*, 28 LAW & HUM. BEHAV. 389, 391 (2004) [hereinafter Cook et al., *Firing Back at the Backfire Effect*] (“One direction of terror management research has demonstrated that mortality salience engenders more punitive reactions toward violators of cultural standards in legal settings.”); Rosenblatt et al., *Evidence for Terror Management Theory*, *supra* note 117, at 688 (“In all six experiments, subjects who were reminded of their mortality consistently recommended harsher treatment of a moral transgressor.”). Researchers have also found that people tend to reward those who validate deeply held

This tendency has obvious application to the legal system. In one illustrative study, researchers found that terror management influenced judicial decision making.<sup>121</sup> In that study, researchers asked a group of municipal court judges to write a brief essay describing the physical process of death and the emotions aroused by thoughts of mortality. Two groups, one group which wrote about death and one which did not, were then asked to review a criminal case against a prostitute and set bail. The group that wrote about death set bail at an average of \$455, while the group that was not asked to write about death set bail at an average of \$50.<sup>122</sup> As the researchers explained, “[i]nducing subjects to think about their mortality presumably increased their need for faith in their values, and thus increased their desire to punish the moral transgressor.”<sup>123</sup>

Assessing the effects of terror management on the legal system can be tricky. Thinking about death leads people to embrace cherished, stable cultural attitudes and icons – things that would seem likely to last beyond one’s own life. For judges, this might produce a conflict of sorts. Consider, for example, a judge conducting a suppression hearing on evidence against a vicious criminal defendant. Terror management suggests that the judge might become more punitive so as to affirm the fundamental rules governing a stable society; this might lead the judge to be more willing to admit the evidence and prevent the defendant’s release. On the other hand, if the evidence was obtained in violation of constitutional values and offends the judge’s sense of fairness, the judge might affirm her world views by suppressing the evidence, even at the expense of freeing the transgressor.<sup>124</sup>

Both apologies and terror management might constitute undesirable emotional influences on the bankruptcy system. Unless Congress amends the Bankruptcy Code to include specific provisions allowing judges to be more lenient to debtors who accept responsibility for their debts, apologies should not play a role in the outcome of bankruptcy hearings. Likewise, the outcome

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cultural beliefs. See Arndt et al., *Terror Management in the Courtroom*, *supra* note 117, at 422 (indicating that mortality salience “does not just increase negative reactions to worldview-threatening others but . . . increases positive responses to those who validate a person’s beliefs as well”); Rosenblatt et al., *Evidence for Terror Management Theory*, *supra* note 117, at 684 (verifying the prediction that “mortality salience should not only increase subjects’ desire to punish a moral transgressor, but also increase their desire to reward someone who upholds cultural values”).

<sup>121</sup> See Rosenblatt et al., *Evidence for Terror Management Theory*, *supra* note 117, at 682-83.

<sup>122</sup> *Id.* at 682.

<sup>123</sup> *Id.* at 683.

<sup>124</sup> This is precisely what Alison Cook, Jamie Arndt, and Joel Lieberman found in a study of mock jurors. See Cook et al., *Firing Back at the Backfire Effect*, *supra* note 120, at 392-405 (confirming the hypothesis that “mortality salience provoked desire for fairness should . . . result in people being less punitive toward a defendant when incriminating evidence is ruled inadmissible than when it is ruled admissible”).

of a bankruptcy hearing should not turn on whether the judge just returned from a funeral. Nevertheless, these factors could well affect judges, just as they affect ordinary adults.

### 1. Apologies and Terror Management: Materials

To test for the effects of both apologies and terror management, we used a version of the problem we used earlier to test for the omission bias. In this problem, as in that one, we described to the judges a debtor seeking to have his credit card debt discharged under Chapter 7 of the Bankruptcy Code. And as before, the bank holding the debt opposed the discharge, arguing that the debtor incurred the debt knowing that he could not pay it back, and therefore a discharge would facilitate the commission of a fraud. In this problem, however, we provided more details about how the debtor incurred the obligation.

The problem, labeled "Cancun Vacation," described the debtor, Jared, as a single 29-year-old who had had debt problems for much of his adult life. The judges learn that Jared had never held a job paying more than minimum wage, but that he had recently landed a new job. Unfortunately, this coincided with his annual vacation to Cancun, Mexico, during "spring break." Jared's new employer told him that he could not have time off for the trip, and that if he went, he would be fired. Jared went to Cancun anyway and spent \$2976 with a newly acquired credit card (which carried a \$3000 limit) during the trip. Upon his return, his employer fired him. Jared remained unemployed for two months afterwards and ultimately filed for bankruptcy after a credit counselor advised him to do so.

To assess the impact of a debtor's apology on the judges' decision making, we randomly assigned the judges to either a "control" group or an "apology" group. Judges in the control group received the facts described above; judges in the "apology" group received the facts described above as well as the following information:

Jared has taken the unusual step of appearing personally in front of you. He requested that he be allowed to speak. He said, "Judge, I am truly sorry for my reckless spending. I know that what I have done is wrong, but I have no way of repaying this money. It'll take everything I can do to pay rent and buy food."

To test the terror management hypothesis, we varied the type of job that Jared had secured, randomly assigning judges either to a "control" condition or a "terror management" condition. The judges assigned to the control group learned that Jared had begun working as "a busboy at Gino's Pizza, a large pizza parlor and video game establishment catering to families with young children" and that "[h]e had just enrolled in 'clown college' in hopes of training himself for a more lucrative position at Gino's." Judges assigned to the terror management group learned that Jared had begun working as "a driver and grave digger for Gino's Funeral Home, a local mortuary" and that "[h]e

had just enrolled in a program to learn embalming techniques in hopes of training himself for a more lucrative position at Gino's."

Thus, we employed a 2 x 2 design in which approximately one quarter of the judges evaluated an unemployed busboy, another quarter evaluated an unemployed busboy who had apologized, another quarter evaluated an unemployed grave digger, and the last quarter evaluated an unemployed grave digger who had apologized. We asked the judges in all of the groups to indicate whether they would discharge the debt that Jared incurred during his Cancun vacation. We used the same six-item checklist (ranging from "very likely to discharge" to "very unlikely to discharge") that we used previously.

To be clear, our intent here was simply to use this problem as a way of studying two phenomena – apologies and terror management. We had no prior theory as to whether the apology would interact in any way with terror management.

## 2. Apologies and Terror Management: Results

The apology had little effect on the judges, as Table 2a reveals. An ordered logit analysis showed that the judges who learned of the apology did not make significantly different choices than judges who did not.<sup>125</sup> Likewise, none of the demographic variables we measured (gender, political party, and years of experience) had a significant effect on the judges' choices, nor did any of these variables significantly interact with the presence or absence of an apology.

Table 2a. Percent Choosing Each Option in the Apology Problem

	Would you discharge the credit card debt?					
	Very likely	Likely	Somewhat likely	Somewhat unlikely	Unlikely	Very unlikely
No Apology ( <i>n</i> = 54)	13.0	5.6	5.6	11.1	24.1	40.7
Apology ( <i>n</i> = 57)	7.0	8.8	8.8	15.8	26.3	33.3

Terror management had no effect on the judges either, as Table 2b reveals. An ordered logit analysis showed that the judges did not make significantly different choices based on the nature of the debtor's employer.<sup>126</sup> Gender, political party, and years of experience also did not significantly interact with the nature of the debtor's employer.

<sup>125</sup>  $z = 0.50, p = .615$ .

<sup>126</sup>  $z = 0.14, p = .887$ .

Table 2b. Percent Choosing Each Option in the Terror Management Problem

	Would you discharge the credit card debt?					
	Very likely	Likely	Somewhat likely	Somewhat unlikely	Unlikely	Very unlikely
Pizza parlor ( <i>n</i> = 60)	10.0	8.3	6.7	13.3	25.0	36.7
Funeral parlor ( <i>n</i> = 51)	9.8	5.9	7.8	13.7	25.5	37.3

### 3. Apologies and Terror Management: Discussion

Neither of these emotional manipulations had any effect on the bankruptcy judges. Judges were indifferent to the debtor's apology and to our effort to induce terror management by discussing a funeral parlor.

The results on apologies are particularly striking. The debtor apologized in the manner that is supposed to have the most significant effect on the recipient; he expressed personal responsibility and regret for his own actions. In prior studies, as noted above, researchers have found that genuine apologies, such as this one, can have a profound impact on litigation, but here the debtor's apology had no impact on the judges. Several factors might account for the lack of effect in our study. First, although we have no hard data, we think it is extremely unusual for a bankruptcy judge to encounter a debtor who apologizes. Indeed, individual debtors rarely even appear before bankruptcy judges. Given the bankruptcy judges' caseloads, it is clear that most of the determinations made about individual debtors do not involve elaborate hearings, if they involve hearings at all. Thus, the debtor's appearance and apology might have seemed so anomalous that the judges simply had no sensible way to assess its worth or meaning. Second, in contrast to the existing research on apologies, the debtor's apology in this problem was directed not at the injured party (i.e., the creditor), but at the judge, who is effectively a third-party beneficiary of the apology. One might nevertheless have expected that a serious act of contrition would improve the judge's assessment of the moral standing of the debtor, which in turn could have produced a more lenient view of the debtor's situation. But the data say otherwise. Third, bankruptcy judges might simply be a bit jaded about debtors. After processing thousands of cases of financial ruin each year, bankruptcy judges might come to think that fiscal irresponsibility is rampant. An apology from a debtor, even if unusual, might simply ring hollow.

As to terror management, our results present a clear failure to replicate an already-established phenomenon. The work by Rosenblatt and his colleagues showed that judges who were forced to contemplate their mortality made

radically different decisions than judges who were not. And yet, we found no such effect. It is possible that we did not make their mortality salient enough. After all, Rosenblatt and their colleagues asked judges to write an essay on the fate of their own corpses. That is surely a far more grisly task than simply having judges assess the fate of a former grave digger who aspired to learn embalming techniques. And indeed, some studies suggest that terror management or mortality salience has more influence on an individual's decision making when that individual is forced to contemplate her *personal* mortality rather than mortality *generally*. Alternatively, judges might not feel they vindicate deeply held cultural values by punishing the debtor; indeed, they might do so by forgiving him. Finally, despite the previous research demonstrating the influence of terror management on judges, our failure to replicate might indicate that judges resist its influence. After all, judges occupy a role that already requires a deep commitment to society's values; perhaps terror management concerns cannot boost this commitment much further.

In sum, then, neither the apology nor the terror management manipulation influenced the judges. Non-results such as these are subject to multiple interpretations. One possible explanation is that the judges make decisions such as these in a rather mechanical way, resisting the pull of emotional or affective phenomena that should not, as a normative matter, influence their judgments. Indeed, given the overall unwillingness of the judges to absolve the debtor, perhaps this was an easy problem that left little room for emotional influence. Furthermore, these data do not altogether assure us that the judges applied the law in a straightforward fashion. After all, the debtor's circumstances did not really suggest that he engaged in fraudulent behavior, as he was employed when he went off on vacation. The Bankruptcy Code required judges to assess his state of mind to determine whether he committed fraud, but the judges seemed to evaluate his character and the merits of his debts (which were incurred on a vacation, rather than for food or rent). We wonder what would have happened had Jared spent the money on a trip to visit a dying parent rather than on a Cancun vacation. It would have been no more or less fraudulent to incur the debt, but we suspect the purpose of the trip might have resulted in a different outcome.

#### CONCLUSION

The results we report in this paper present a murky answer to the question of whether specialization leads to more accurate judicial decision making. We studied the impact of six phenomena on bankruptcy judge decision making: anchoring, framing, omission bias, the debtor's race, the debtor's apology, and terror management. With regard to the two phenomena that we have tested in prior studies of generalist judges – anchoring and framing – the bankruptcy judges performed much like the generalist judges we have previously studied. With regard to the four phenomena we have not tested previously, we found that the bankruptcy judges were impervious to each. They resisted the effects

of the omission bias, were unaffected by the race of the debtor, were indifferent to an apology, and were not affected by a transient emphasis on their own mortality.

We take this to be good news, because we do not think that these phenomena should influence judicial decision making (with the possible exception of a party's apology). But, because we have not conducted a similar study on generalist judges,<sup>127</sup> we cannot infer that the bankruptcy judges' performance in our study is a product of specialization. We do note, however, that researchers in some studies have found generalist judges to be influenced by race in criminal settings.<sup>128</sup> Likewise, in one study, researchers found generalist judges to be vulnerable to the effects of terror management.<sup>129</sup> But again, because these studies differ in important ways from our own, we remain unable to infer from these results that specialization leads to superior decision making.

Finally, as noted throughout, we did not find any evidence that the more experienced bankruptcy judges performed better than the less experienced bankruptcy judges. That is, the more experienced judges were neither more nor less vulnerable than the less experienced judges to the psychological influences we studied. If specialization produced better decision making, in part through experience in a particular field, one would think that the more experienced bankruptcy judges would outperform the less experienced ones.<sup>130</sup> The fact that we did not find this suggests, albeit indirectly, that specialization does not necessarily lead to improved judicial decision making.

Based on the foregoing, we can reach only two tentative conclusions. First, whether specialization improves judicial decision making remains an open question. Second, the decision-making performance of specialized judges, at least those that we studied here, appears, at a minimum, to be on par with the decision-making performance of generalist judges. Specialization, in other words, does not appear to decrease the quality of judicial decision making, even if it does not lead inexorably to improved decision making.

Our goal in this paper was to explore the impact of judicial specialization on decision making, but we should note the somewhat surprising results we obtained regarding the relationship between political party affiliation and outcomes. Although we found no relationship between political party and

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<sup>127</sup> We have other unpublished data indicating that generalist judges are not affected by terror management either.

<sup>128</sup> See *supra* notes 84-89 and accompanying text.

<sup>129</sup> See Rosenblatt et al., *Evidence for Terror Management Theory*, *supra* note 117, at 682-83.

<sup>130</sup> Likewise, as a field like bankruptcy matures, one would expect bankruptcy adjudication to become more consistent and predictable. See Robert M. Lawless, *Are Bankruptcy's Trials Vanishing? If So, Who Cares?*, 79 AM. BANKR. L.J. 995, 1001 (2005) (relating the view of leading bankruptcy experts who agree that bankruptcy law has become more settled as the field has matured).



susceptibility to the phenomena we sought to study, we did find some relationships between political party and ultimate judgments, as shown in Table 3. In our study, the Republican judges were more likely than their Democratic counterparts to make decisions that favored creditors. The Republican judges set higher interest rates for the individual debtor in the Truck Driver problem; discharged a smaller fraction of the debt in the Consolidated Student Loan problem; and were less sympathetic to the debtor in the Senior Citizen problem (although, as noted in Table 3, this trend was not significant).<sup>131</sup>

Table 3. Comparison of Republican and Democratic Judges in Our Study

	Anchoring Study: Mean Interest Rate	Race Study: Mean Amount of Loan Discharged	Omission Bias: Likelihood of Discharge (on a 6-point scale where higher means less likely)	Apology: Likelihood of Discharge (on a 6-point scale where higher means less likely)
Republican ( <i>n</i> = 25)	7.40	\$34,323	1.76	4.42
Democratic ( <i>n</i> = 82)	6.49	\$50,972	1.44	4.42
(statistical test for difference)	<i>t</i> (97) = 1.75 <i>p</i> = 0.08	<i>t</i> (100) = 2.41 <i>p</i> = 0.02	<i>t</i> (97) = 1.29 <i>p</i> = 0.21	<i>t</i> (103) = 0.01 <i>p</i> = 0.99

This finding, though largely consistent with the political science literature on judging,<sup>132</sup> is at odds with our previous work, in which we have generally not found any differences between judges of different political parties. The results here are also inconsistent with studies of juries which indicate that general attitudes, such as orientation toward a particular political party, seldom predict jury verdicts.<sup>133</sup> But research on juries also shows that more specific attitudes can predict verdicts.<sup>134</sup> It is possible that bankruptcy, unlike general civil or criminal verdicts or rulings, taps closely into the attitudes associated with the two major political parties in the United States. This possibility raises a serious downside for the expansion of specialized judges. Our data suggest

<sup>131</sup> We did not observe any difference in the Cancun Vacation problem, and the Choice of Reorganization Plans problem is inapplicable because it does not lend itself to expressing a preference for debtors or creditors.

<sup>132</sup> See generally C.K. ROWLAND & ROBERT A. CARP, POLITICS AND JUDGMENT IN FEDERAL DISTRICT COURTS (1996) (conducting a large study of federal district court opinions and reporting differences between Republican and Democratic appointees).

<sup>133</sup> See VALERIE P. HANS & NEIL VIDMAR, JUDGING THE JURY 245 (1986).

<sup>134</sup> See *id.*

that it is easier for the appointing authority to predict the decisions of specialized judges than to predict the decisions of generalized judges. Whereas a generalist judge might hold an array of attitudes, only some of which might be consistent with the desires of the appointing authority, specialist judges decide only a narrow range of cases, and hence might be more predictable. We do not want to overstate the importance of the results reported here, but they do raise the possibility, particularly if corroborated in subsequent research, that it might be easier for the appointing authority to predict the decisions of specialized judges than generalized judges. If so, it is possible that greater specialization might lead to greater politicization of the judiciary.

Our study, which is limited by its size, scope, and methods, can constitute only a small part of any serious debate on the use of specialist judges. Nonetheless, our study does provide some evidence, even if equivocal and susceptible to multiple interpretations, about the relationship between specialization and the quality of judicial decision making as well as the potential politicization of the courts.

## APPENDIX A

*The Truck Driver*

You are presiding over a hearing in a Chapter 13 case. The debtor, Charles W. McCall, owns a large tractor-trailer truck and operates as an independent truck driver. His truck-driving business is in financial trouble, largely due to increases in the price of diesel fuel and a sluggish economy.

McCall's largest non-exempt asset is his tractor-trailer truck, which he purchased three years ago. At the time, he made a small down payment on the truck, and financed the rest of the purchase with a loan from Ace Credit, Inc. ("Ace"). The loan required McCall to make monthly payments of principal and interest on the truck for seventy-two months. Ace retained a purchase money security interest in the truck, allowing it to repossess it in the event of default.

McCall defaulted on two monthly payments, and then filed for relief under Chapter 13. The parties agree that the truck is worth approximately the amount McCall still owes on the loan, leaving Ace fully secured.

McCall proposed a debt-reduction plan under which his future earnings will be subject to the supervision of the court for three years, and assign some of his earnings to repay creditors. McCall's plan also calls for him to retain possession of his truck and continue to pay Ace, although at a lower interest rate, equivalent to the prime interest rate of 4.5%.

Ace has agreed to McCall's plan, except for the proposed interest rate. Under 11 U.S.C. § 1325(a)(5)(B), the value of loan payments proposed by McCall must not be less than the amount of Ace's claim. Under the U.S. Supreme Court's recent holding in *Till v. SCS Credit Corp.*, 541 U.S. 465 (2004), the appropriate formula for calculating an interest payment under such circumstances is to start with the national prime rate, which compensates the lender for the opportunity cost of the loan, the risk of inflation, and a relatively slight risk of default by creditworthy borrowers. The court must consider adjusting this rate upward, as *Till* indicates, if McCall poses a greater risk of default than the large commercial borrowers for whom the prime rate is set.

McCall argues that because he will be under the supervision of the court, the risk of default is as low for him as it is for a large commercial borrower, and hence the rate should be set at the prime rate of 4.5%. He also contends that his business is picking up as the economy begins to grow and as fuel prices stabilize or fall. Ace asserts that the risk of default is high. Ace notes that McCall has been doing poorly enough to require bankruptcy protection, and that the success of his business depends largely on circumstances beyond his control. The parties agree that under *Till*, the original contract interest rate [*Anchor*: of 21%] is irrelevant to the court's determination.

Because the parties disagree on the appropriate annual interest rate, it is up to you to select one. What annual interest rate would you select?

\_\_\_\_\_ %

*The Consolidated Student Loan Case*

Student [name varied as described in the text] filed for protection under Chapter 7 and has requested that the court discharge her consolidated educational loan. Pursuant to 11 U.S.C. § 523(a)(8), educational loans are not dischargeable absent “undue hardship.” The statute does not define “undue hardship,” but nearly every circuit requires a debtor seeking the discharge of a student loan to satisfy a three-part test: (1) that the debtor cannot maintain a minimal standard of living for herself and her dependents if required to repay the loan; (2) that additional circumstances exist suggesting this is likely to remain the case throughout a significant portion of the repayment period; and (3) that the debtor has made good faith efforts to repay the loan. *Educ. Credit Mgmt. Corp. v. Polleys*, 356 F.3d 1302, 1309 (10th Cir. 2004); *In re Gerhardt*, 348 F.3d 89, 91 (5th Cir. 2003).

Student borrowed \$23,000 per year to attend East State University. At the beginning of her sophomore year in college, Student got pregnant and gave birth to a baby boy the next year. The father left town, and she has been unable to track him down. After her baby was born, she dropped out of school. Student had difficulty finding a job and faced considerable expenses raising her child on her own, so she requested and received a hardship deferment on her loans. During the period of her hardship deferment, her loan balance grew to \$83,748. To try to make the monthly payments more manageable, Student consolidated the loan at a 6% rate over the maximum available period (twenty years). On these terms, her minimum monthly payment was \$600.

Student found a job as a sales clerk in a local department store, at an annual salary of \$18,000. For a brief period, she was able to pay the loan back with a little help from her grandmother, though it was a financial struggle because her take-home pay is only \$1350 per month. Her minimum monthly expenses total \$1125, including rent (\$675 for a two-bedroom apartment), utilities (\$100), food (\$250), bus fare (\$25), and clothes for herself and her growing child (\$75). Her grandmother is no longer able to support her financially, but she does care for the child. Unfortunately, her grandmother is in failing health and Student increasingly has to pay for babysitters or day care on a temporary basis.

Assume for purposes of this problem that you are in a circuit that allows bankruptcy judges the option of considering a partial discharge of educational loan debt. Based on the “undue hardship” test enunciated above and the facts as given, what dollar amount of Student’s loan amount would you discharge (please pick a dollar amount between \$0 and \$83,748)?

\$ \_\_\_\_\_

*The Senior Citizen*

Frank has filed for relief under Chapter 7. A 71-year-old retiree (and widower), Frank worked most of his life at a variety of low-paying jobs and retired with only minimal savings. Shortly before his retirement, he inherited [*Omission*: stock in a mid-sized software company; *Commission*: U.S. treasury notes] worth \$50,000 from his brother. Upon receiving the inheritance, he altered his will to leave it to his grandchildren upon his own death.

At first, Frank's retirement was comfortable, if not luxurious. He lived in a rent-controlled apartment, and his modest monthly social security payment was adequate. A few years after his retirement, however, Frank developed a number of ailments, including diabetes and high blood pressure. All of his illnesses have been manageable, but his treatment costs him nearly \$1000 per month in expenses not covered by Medicare. Frank quickly exhausted his savings (except for the inheritance), and began using credit cards to cover his extra expenses. He hoped that eventually he would recover from his illnesses well enough to obtain part-time employment to pay off the debt.

Believing that he needed to reconsider his savings plan, Frank purchased a book on financial planning to help him think about how to manage the inheritance. After reading the book, Frank considered converting [*Omission*: the stock his brother left him into U.S. treasury notes; *Commission*: the U.S. treasury notes his brother left him into stock in a mid-sized software company in which his brother had invested] because he thought it might provide a better return. Ultimately, he decided [*Omission*: not to make; *Commission*: to make] the switch.

Shortly thereafter, the SEC announced an investigation of the software company for accounting fraud. Trading in the company was suspended immediately and in a matter of days, Frank's stock was worthless.

Frank never recovered from his illnesses well enough to obtain work. Over the past three years, Frank racked up \$25,000 in credit card bills, most reflecting the kinds of purchases necessary to maintain a minimal standard of living (e.g., doctor bills, prescription bills, grocery bills, and so on). Frank is seeking to have this credit card debt discharged. Frank's bank opposes discharge of the debt, arguing that Frank's use of the credit card to cover bills he knew he would have no way of paying constitutes "false pretenses, a false representation, or actual fraud" under 11 U.S.C. § 523(a)(2)(A).

Based solely on the facts above, would you discharge Frank's credit card debt?

- Very likely to discharge
- Likely to discharge
- Somewhat likely to discharge
- Somewhat unlikely to discharge
- Unlikely to discharge
- Very unlikely to discharge

*Choice Among Reorganization Plans*

You are presiding over a Chapter 11 reorganization of a small business, "Hammer Time, Inc." Hammer Time is a home supply and service business consisting of a hardware store, a carpet shop, and a contracting business. Hammer Time's contracting work is profitable, but the hardware store and carpet shop are failing. Several months ago, Hammer Time filed for protection and reorganization under Chapter 11. Hammer Time listed debts owed to suppliers, utilities, landlords, companies from whom it has rented construction equipment, and several subcontractors. Hammer Time listed assets such as inventory, office furniture, and construction equipment. It has several construction contracts underway that would earn it revenue if it continued as a going concern. An immediate liquidation would leave the unsecured creditors with \$600,000 less than they are owed.

You are conducting a confirmation hearing. Two competing plans for reorganization have been offered by the unsecured creditors: Plan A and Plan B. Each has received a comparable level of support from the unsecured creditors, but neither has attracted support from holders of two-thirds of the unsecured debt, as required by 11 U.S.C. § 1126(c). Both plans, however, satisfy the other requirements for confirmation. All of the secured creditors have agreed to accept either plan. Under these circumstances, pursuant to 11 U.S.C. § 1129(c), you must "consider the preferences of creditors" and confirm one of the two plans.

Which plan would you choose?

*[Gain Condition:]*

\_\_\_\_\_ If you select Plan A, \$200,000 of the unsecured debt will be paid for sure.

\_\_\_\_\_ If you select Plan B, there is a 1/3 probability that all of the unsecured debt will be paid and a 2/3 chance that none of it will be paid.

*[Loss Condition:]*

\_\_\_\_\_ If you select Plan A, \$400,000 of the unsecured debt will remain unpaid for sure.

\_\_\_\_\_ If you select Plan B, there is a 1/3 probability that none of the unsecured debt will remain unpaid and a 2/3 probability that all of the unsecured debt will remain unpaid.

*Cancun Vacation*

Jared has filed for relief under Chapter 7. Jared is single, twenty-nine years old, and has had debt problems for much of his adult life. He has never held a job that paid more than minimum wage. He has never filed for bankruptcy before, but has defaulted on a prior loan and is sometimes delinquent in making credit card payments. He was also once evicted from an apartment for non-payment of rent.

Nevertheless, every year, Jared finds the money to fly to Cancun during “spring break.” This past year, he has been particularly short of cash because of a ten-month period of unemployment. When it came time to plan his annual trip, Jared had just begun working as

[*Pizza*: a busboy at Gino’s Pizza, a large pizza parlor and video game establishment catering to families with young children. He had just enrolled in “clown college” in hopes of training himself for a more lucrative position at Gino’s.]

[*Mortuary*: a driver and grave digger for Gino’s Funeral Home, a local mortuary. He had just enrolled in a program to learn embalming techniques in hopes of training himself for a more lucrative position at Gino’s.]

Despite his financial problems, Jared was able to obtain a new credit card with a credit limit of \$3000. Jared used the card to book his trip. When he asked for time off, his employer informed him that he would be fired if he took a week off so early in his new job. Jared went anyway. While there, he generously charged drinks and meals for friends on his new credit card, maxing the card out at a total of \$2976, all of which was related to the trip.

Gino’s fired Jared upon his return. After sinking deeper in debt while unemployed for another two months afterwards, Jared saw an advertisement on TV for a credit counselor. The counselor suggested the he might consider filing for bankruptcy, which he did shortly thereafter.

Jared is seeking to have all of his debt discharged, including the \$2976 on his new credit card. The bank that issued him the credit card is opposing the discharge, arguing that Jared never had any intention of repaying this debt and that it was therefore not dischargeable under 11 U.S.C. § 523(a)(2)(A) (which excepts from discharge a debt for “false pretenses, a false representation, or actual fraud”). Jared argues that although he knew he was deeply in debt, he believed that his new job would enable him to repay the debt, as he had in the past. He asserts that he had never considered bankruptcy before discussing his situation with the credit counselor.

[*Apology*: Jared has taken the unusual step of appearing personally in front of you. He requested that he be allowed to speak. He said, “Judge, I am truly sorry for my reckless spending. I know that what I have done is wrong, but I have no way of repaying this money. It’ll take everything I can do to pay rent and buy food.”]

Would you discharge Jared's debt for his Cancun vacation?

- Very likely to discharge
- Likely to discharge
- Somewhat likely to discharge
- Somewhat unlikely to discharge
- Unlikely to discharge
- Very unlikely to discharge



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