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Judicial Politics and Decisionmaking: A New Approach

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Judicial Politics and Decisionmaking: A New Approach

*Jeffrey J. Rachlinski**
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In twenty-five different experiments conducted on over 2,200 judges, we assessed whether judges' political ideology influences their resolution of hypothetical cases. Generally, we found that the political ideology of the judge matters, but only very little. Across a range of bankruptcy, criminal, and civil cases, we found that the aggregate effect of political ideology is either nonexistent or amounts to roughly one-quarter of a standard deviation. Overall, the results of our experiments suggest that judges are not "politicians in robes."

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INTRODUCTION

Perhaps no topic at the intersection of law and social science has generated as much research as the influence of political attitudes on judicial decisionmaking.[1] One would think that summarizing it would be a nearly Herculean task, but it is actually straightforward: judicial politics matters.[2] From Stuart Nagel's well-known comprehensive study of the effect of politics on state and federal supreme court justices conducted over a half century ago[3] right up to the present day, study after study finds that the political orientation of judges influences their

1. For reviews, see generally LEE EPSTEIN, WILLIAM M. LANDES & RICHARD A. POSNER, THE BEHAVIOR OF FEDERAL JUDGES: A THEORETICAL AND EMPIRICAL STUDY OF RATIONAL CHOICE (2013); CASS R. SUNSTEIN ET AL., ARE JUDGES POLITICAL? AN EMPIRICAL ANALYSIS OF THE FEDERAL JUDICIARY (2006); THE PIONEERS OF JUDICIAL BEHAVIOR (Nancy Maveety ed., 2003).

2. *See* LEE EPSTEIN & JACK KNIGHT, THE CHOICES JUSTICES MAKE 22–23 (1997) (claiming that "most justices, in most cases, pursue policy"); Lee Epstein & Jack Knight, *Reconsidering Judicial Preferences*, 16 ANN. REV. POL. SCI. 11, 24 (2013) (identifying political ideology as a motivating factor in judicial decisions).

3. Stuart S. Nagel, *Political Party Affiliation and Judges' Decisions*, 55 AM. POL. SCI. REV. 843 (1961).

decisions.[4] This finding is somewhat remarkable, given that many studies use the political party of the appointing president as the measure of political attitudes.[5] The underlying effect of politics on judges must be potent indeed if such a blunt and unreliable measure of political attitudes can generate meaningful effects.

Despite the consistent finding that political attitudes influence judicial decisionmaking, there is a robust and heated debate on the topic that can nonetheless be simply summarized as follows: academics assert that attitudes influence judicial decisionmaking, but judges usually deny that politics matters.[6] Consider the recent testimony by then-Judge Gorsuch in his confirmation hearings. He insisted that the law will drive his decisions, not his politics.[7] This position is hardly unusual. When they comment at all on the social science evidence suggesting that they are influenced by politics, judges tend to dismiss it.[8] Political scientists continue to pile on evidence that politics influences judges, even though judges deny it.

What explains the divide between the evidence and the judges? Several reasons suggest themselves. First, judges might possibly be disingenuously denying the influence of their political attitudes. Like most public officials (and perhaps more so than most given the way they are selected and their lack of enforcement power), judges are highly protective of the legitimacy of their institution.[9] The assertion that

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4. *See* Daniel R. Pinello, *Linking Party to Judicial Ideology in American Courts: A Meta-Analysis*, 20 JUST. SYS. J. 219, 221 (1999) (compiling and analyzing research on the link between judges' political party affiliations and judicial ideologies).

5. Some have used more complex measures. *E.g.*, Andrew D. Martin & Kevin M. Quinn, *Dynamic Ideal Point Estimation via Markov Chain Monte Carlo for the U.S. Supreme Court, 1953–1999*, 10 POL. ANALYSIS 134 (2002); Andrew D. Martin, Kevin M. Quinn & Lee Epstein, *The Median Justice on the United States Supreme Court*, 83 N.C. L. REV. 1275 (2005); *see also* Joshua B. Fischman & David S. Law, *What Is Judicial Ideology, and How Should We Measure It?*, 29 WASH. U. J.L. & POL'Y 133, 154–90 (2009) (comparing different methods of researching the influence of politics on judicial decisionmaking).

6. *See, e.g.*, Harry T. Edwards, *Collegiality and Decision Making on the D.C. Circuit*, 84 VA. L. REV. 1335, 1336 (1998) (arguing against the position that the political views of judges affect judicial decisions); Harry T. Edwards, *Public Misperceptions Concerning the "Politics" of Judging: Dispelling Some Myths About the D.C. Circuit*, 56 U. COLO. L. REV. 619, 625 (1985) (same).

7. *Confirmation Hearing on the Nomination of the Hon. Neil M. Gorsuch to Be an Associate Justice of the Supreme Court of the United States: Hearing Before the S. Comm. on the Judiciary*, 115th Cong. (2017), https://www.judiciary.senate.gov/meetings/nomination-of-the-honorable-neil-m-gor [https://perma.cc/EPX2-6LBV] [hereinafter *Confirmation Hearing*] (responses of Judge Neil M. Gorsuch to Questions for the Record) (asserting that his "personal views" on political issues have no bearing on his decisionmaking as a judge).

8. Judge Richard Posner is a notable exception. *See generally* RICHARD A. POSNER, HOW JUDGES THINK 78–120 (2008) (developing the theory of judges as occasional legislators).

9. *See* LAWRENCE BAUM, JUDGES AND THEIR AUDIENCES: A PERSPECTIVE ON JUDICIAL BEHAVIOR 63–72 (2006) (arguing that judicial decisions are influenced by judges' expectations about how the public may receive them).

judging is politics by another means threatens the legitimacy of the judiciary. Second, maybe judges are reacting to the more numerous, mostly mundane legal issues that they must decide. As then-Judge Gorsuch asserted at his recent nomination hearing, he agreed with his colleagues on the U.S. Court of Appeals for the Tenth Circuit in 97% of the cases they decided.[10] Perhaps the law is determinate enough that most of the time, it leaves little room for political judgment.[11] Judges also might incorrectly assume that political attitudes do not influence fact finding.[12] After all, the day-to-day experience of judges is that the law is clear in most cases and they easily find consensus with colleagues possessing different political perspectives.

The explanation that most judicial decisionmaking is determinate applies perhaps the least to the U.S. Supreme Court.[13] Judges' political attitudes might be less significant in lower court cases, in which judges often are constrained by precedent and address less politically contentious issues. Political scientists tend to emphasize those close, politically charged cases decided by the U.S. Supreme Court, rather than the ordinary disputes that occupy most judges, thereby producing different conclusions about the influence of political attitudes on judicial decisionmaking.

Third, perhaps the most intriguing account of the divergence between judges and the academy, is that judges might be oblivious to the role that politics plays in their decisionmaking processes. Judges perhaps feel that they "call them like they seem them," to use Chief Justice Roberts' umpire metaphor.[14] Their attitudes and beliefs affect

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10. *Confirmation Hearing*, *supra* note 7 (statement of Judge Neil M. Gorsuch) ("My law clerks tell me that ninety-seven percent of the 2,700 cases I've decided were decided unanimously. And that I have been in the majority ninety-nine percent of the time.").

11. *See* POSNER, *supra* note 8, at 49–50 ("The two moderate judicial schools [legalism and pragmatism] may come close enough to enable most cases in the open area to be disposed of with minimum disagreement.").

12. *See* Dan M. Kahan, David A. Hoffman & Donald Braman, *Whose Eyes Are You Going to Believe?* Scott v. Harris *and the Perils of Cognitive Illiberalism*, 122 HARV. L. REV. 837 (2009) (showing how political attitudes can influence how individuals interpret video evidence). *But see* Dan M. Kahan et al., *"Ideology" or "Situation Sense"? An Experimental Investigation of Motivated Reasoning and Professional Judgment*, 116 U. PA. L. REV. 349, 410–12 (2016) [hereinafter Kahan et al., *An Experimental Investigation*] (finding that judges do not show similar effects of political influence).

13. *See* JEFFREY A. SEGAL & HAROLD J. SPAETH, THE SUPREME COURT AND THE ATTITUDINAL MODEL REVISITED 312–25 (2002) (arguing for a predictive model of Supreme Court voting based on Justices' political attitudes); Jeffrey A. Segal & Albert D. Cover, *Ideological Values and the Votes of U.S. Supreme Court Justices*, 83 AM. POL. SCI. REV. 557, 561–62 (1989) (correlating political values of Supreme Court Justices with votes in civil rights cases).

14. *See Confirmation Hearing on the Nomination of John G. Roberts, Jr. to Be Chief Justice of the United States: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. 31 (2005) (discussing the role Supreme Court Justices take in upholding the ideal of unbiased judgment).

how they see facts, respond to arguments, and understand the law, but perhaps all of that operates in a way that is invisible to them. In effect, judges are what psychologists call naïve realists,[15] who believe they see the world through a clear lens, unaffected by political beliefs.[16] From other research, we have found that judges, like most professionals, suffer from egocentric bias, in which they hold unrealistic views of their capacity to avoid corrosive influences on their judgment.[17] For example, we found that 97% of judges believe that they are better able than their median colleague in avoiding the influence of race and gender bias.[18] Maybe judges simply mistakenly believe that they are immune to political influence.

The tension between judges and political scientists ultimately boils down to who is right: Do judges' political attitudes influence their judgment or not? Although the literature on politics and judging is voluminous, virtually all of it shares a common methodological approach: analyzing judicial decisions in actual cases.[19] Decisions in actual cases are what we all care about the most, but studies of actual cases carry an inherent limitation. Cases vary. A Republican judge declares a gun-control ordinance to be a violation of Second Amendment rights in Texas while a Democratic judge in Illinois declares a similar ordinance to be acceptable. The difference could be attributable to politics, but the difference could also be attributable to variations between the two ordinances or other circumstances. Facts matter, and judges can rightly argue that no two cases are truly alike.

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15. *See* Lee Ross & Andrew Ward, *Naive Realism in Everyday Life: Implications for Social Conflict and Misunderstanding, in* VALUES AND KNOWLEDGE 103, 110–11 (Edward S. Reed, Elliot Turiel & Terrance Brown eds., 1996) (describing the theory of naïve realism).

16. *See* Lawrence Solan, Terri Rosenblatt & Daniel Osherson, *False Consensus Bias in Contract Interpretation,* 108 COLUM. L. REV. 1268, 1291–94 (2008) (empirically demonstrating the false consensus bias, a cognitive bias related to naïve realism, in judges).

17. Chris Guthrie, Jeffrey J. Rachlinski & Andrew J. Wistrich, *Inside the Judicial Mind,* 86 CORNELL L. REV. 777, 813–15 (2001).

18. Chris Guthrie, Jeffrey J. Rachlinski & Andrew J. Wistrich, *The "Hidden Judiciary": An Empirical Examination of Executive Branch Justice,* 58 DUKE L.J. 1477, 1519 (2009).

19. *See* Lee Epstein, *Some Thoughts on the Study of Judicial Behavior,* 57 WM. & MARY L. REV. 2017, 2036–38 (2016) (describing the data that forms the basis for most empirical work on judicial behavior). A notable exception is a study by Dan Kahan and his colleagues. *See* Kahan et al., *An Experimental Investigation, supra* note 12. This study shows that judges—unlike laypeople—do not rely on their cultural commitments in assessing one legal scenario. Inasmuch as cultural commitments are akin to political beliefs, this study suggests that judges might not rely on political attitudes in making decisions. The result, however, is suspect because the authors used only a single scenario and found that most of the judges decided the scenario the same way. A scenario that more deeply divided the judges might thus have produced different results. For a related experimental study of political ideology in judges, see Richard E. Redding & N. Dickon Reppucci, *Effects of Lawyers' Socio-political Attitudes on Their Judgments of Social Science in Legal Decision Making,* 23 LAW & HUM. BEHAV. 31 (1999).

Political scientists are well aware of this problem, and they address it in clever and interesting ways. Judges who serve on multimember courts (including the Supreme Court) often hear the same case, and some scholars take advantage of that fact.[20] But no one case can provide enough statistical power to identify the influence of politics definitively, so political scientists must inevitably combine different cases. Furthermore, panels of judges do not decide trials in the United States, and so this method is not available for the very types of cases that are both the most common and least likely to involve a political question (trial court decisions). There are exceptions,[21] but they are rare. More commonly, researchers try to control for variations in case characteristics with multiple regression analysis. Although this technique is standard practice in the social sciences (and sensibly so), any unobserved parameter can undermine the results.

This Article assesses the influence of politics on judges in a different way. We have collected data on thousands of sitting state and federal judges in the United States for nearly twenty years using controlled experiments.[22] We present judges with a single hypothetical case so that large numbers of judges respond to the same situation. We have collected this data for other purposes, but we commonly ask judges participating in our research to identify their political orientation. This methodology enables us to examine how judges with different political affiliations evaluate the same case. Because most of our studies involve trial judges rather than appellate judges, we also can shed some light on the very kinds of decisions that judges say are both the least vulnerable to the influence of politics and are also the most common.

This Article summarizes what we have learned about judges and politics through our experimental methods. We present results involving civil and criminal cases reviewed by over 2,200 judges, including federal district judges, federal magistrate judges, federal bankruptcy judges, trial judges from nine states, and judges from multiple states attending national conferences. Our results suggest that politics has only a modest influence on trial judges. We find that politics has an impact on judges' decisions in only a few of our

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20. *See, e.g.*, Tracey E. George, *The Dynamics and Determinants of the Decision to Grant En Banc Review*, 74 WASH. L. REV. 213, 243–44 (1999) (describing how judges on the same court disagree over cases along political lines).

21. Gregory C. Sisk, Michael Heise & Andrew P. Morriss, *Charting the Influences on the Judicial Mind: An Empirical Study of Judicial Reasoning*, 73 N.Y.U. L. REV. 1377, 1410 (1998) ("[W]e had the opportunity to study legal reasoning in action through written opinions authored or joined by 188 judges, all resolving the same legal problem.").

22. *See generally* Andrew J. Wistrich & Jeffrey J. Rachlinski, *Implicit Bias in Judicial Decision Making: How It Affects Judgment and What Judges Can Do About It*, *in* ENHANCING JUSTICE: REDUCING BIAS 87 (Sarah E. Redfield ed., 2017) (describing our research).

hypothetical cases, but when we aggregate across scenarios (as political scientists do in their research), we do find a pattern of political influence. Although we conclude that political attitudes influence judges, the effect of political influence is sufficiently small that trial judges likely do not notice it in their day-to-day decisionmaking. This finding might explain at least some of the disagreement between judges and political scientists concerning the influence of political attitudes on judges' rulings.

I. METHODOLOGY

We collected the data described in this Article during presentations made by one or more of us at judicial education programs. We have presented to over five thousand judges in eighteen different states (including numerous federal courts) and three countries. We begin these presentations by asking the judges to respond to a written questionnaire containing three to five hypothetical scenarios or tests.[23] These materials have provided the data for numerous publications that investigate various psychological aspects of judicial decisionmaking.[24]

Most of our presentations are during plenary programs rather than parallel sessions and at many of them, most of the judges in the relevant jurisdiction attend. Furthermore, we use presentation titles that are vague (such as "judicial decisionmaking") so as not to reveal what our research involves before the judges respond to the questionnaire. Hence, the judges are attending an educational program on judging, rather than attending a session on psychological aspects of decisionmaking.

We usually also ask the judges to provide demographic information, such as gender, political affiliation, years of judicial experience, and sometimes race. We never ask the judges to identify themselves. We also give judges the opportunity to complete the survey for pedagogic purposes, but to opt out of allowing us to use their questionnaire in any further research. Nearly all of the judges who have attended our presentations complete the voluntary survey and have authorized us to use their results in the research described below. The few who opted out have been excluded from the analysis.

We measure judges' political orientations based on the judges' responses to the following question: "Which of the two major political parties in the United States most closely matches your own political

23. Guthrie et al., *supra* note 17, at 816–18 (describing our methodology).

24. *See generally* Wistrich & Rachlinski, *supra* note 22 (reviewing our research).

beliefs?"[25] We preferred this question to alternatives, inasmuch as it is intended to elicit their underlying political attitudes. Even judges who avoid joining a political party may be able to answer to this question. Nevertheless, some judges do not answer the question, or give an equivocal response such as "neither." These amount to less than 5% of the judges we questioned. We include in our analysis only responses from judges align themselves with one of the two major parties.

We have presented judges with a wide range of legal scenarios, largely designed to identify the influence of various psychological phenomena. In this paper, we instead concentrate on the influence of the judges' political orientation on their decisions.

We have selected certain scenarios for the present analysis based on several criteria. First, we could only use data from judges whom we asked to identify their political orientation. Second, except with respect to the bankruptcy judges, we limit our analysis to data that we have previously published for other purposes. Third, we use only scenarios that arguably implicate politics in meaningful ways. Scenarios in which we requested that judges impose traffic fines, for example, or make rulings in civil cases between businesses, are unlikely to turn on judges' political attitudes, so we have excluded them.[26] This left us with twenty-five scenarios involving responses from 2,209 judges (some of whom responded to multiple scenarios).[27]

25. We used this question consistently except for federal district judges. We instead asked these judges to identify the party of the president who appointed them. Our method is thus most closely akin to Nagel's research, which used judges' self-reported party affiliations as reflected in judicial directories. Nagel, *supra* note 3, at 843.

26. These limitations caused us to omit much of our research on administrative law judges because the questions we posed to them were not politically salient. *See generally* Guthrie et al., *supra* note 18, at 1492–94 (discussing research methods exploring the decisionmaking of administrative law judges). For example, we omitted studies in which we requested that judges review a residential rental agreement, *id.* at 1506–09, and impose a fine on a restaurant for a health code violation, *id.* at 1516–18.

27. The data from this research has been published in a form focused on the psychological phenomena we have studied in the following publications: Jeffrey J. Rachlinski, Andrew J. Wistrich & Chris Guthrie, *Altering Attention in Adjudication*, 60 UCLA L. REV. 1586 (2013) [hereinafter Rachlinski et al., *Attention*]; Jeffrey J. Rachlinski, Andrew J. Wistrich & Chris Guthrie, *Can Judges Make Reliable Numeric Judgments? Distorted Damages and Skewed Sentences*, 90 IND. L.J. 695 (2015) [hereinafter Rachlinski et al., *Numeric Judgments*]; Jeffrey J. Rachlinski, Andrew J. Wistrich & Chris Guthrie, *Contrition in the Courtroom: Do Apologies Affect Adjudication?*, 98 CORNELL L. REV. 1189 (2013) [hereinafter Rachlinski et al., *Contrition*]; Jeffrey J. Rachlinski et al., *Does Unconscious Racial Bias Affect Trial Judges?*, 84 NOTRE DAME L. REV. 1195 (2009) [hereinafter Rachlinski et al., *Unconscious Bias*]; Jeffrey J. Rachlinski, Chris Guthrie & Andrew J. Wistrich, *Inside the Bankruptcy Judge's Mind*, 86 B.U. L. REV. 1227 (2006) [hereinafter Rachlinski et al., *Bankruptcy*]; Jeffrey J. Rachlinski, Andrew J. Wistrich & Chris Guthrie, *Probable Cause, Probability, and Hindsight*, 8 J. EMPIRICAL LEGAL STUD. 72 (2011) [hereinafter Rachlinski et al., *Hindsight Bias*]; Andrew J. Wistrich, Jeffrey J. Rachlinski & Chris Guthrie, *Heart Versus Head: Do Judges Follow the Law or Follow Their Feelings?*, 93 TEX. L. REV. 855 (2015).

We have divided the analysis into different types of cases. First, we assess the influence of politics on bankruptcy judges. In bankruptcy cases, we predict that Democrats will generally be more favorable to debtors and Republicans to creditors. Second, we examine our studies involving criminal issues, breaking the studies into ones involving pretrial motions, conviction decisions, and sentencing. We predict that Democrats will be more favorable to criminal defendants while Republicans will tend to favor the police or the prosecution. Third, we analyze civil cases, predicting that Democrats will award more in damages to injured plaintiffs than Republicans.

II. BANKRUPTCY JUDGES

Having previously found that political attitudes have a large effect on decisionmaking among bankruptcy judges,[28] we begin with them. Given the relatively more probusiness attitude of Republicans, along with a greater concern with holding individuals personally responsible for their actions, Republicans might be expected to favor creditors. And indeed, we previously concluded that "Republican judges were more likely than their Democratic counterparts to make decisions that favored creditors."[29] We analyze these results further here, along with some more recent data.

Federal bankruptcy judges are appointed by court of appeals judges after being vetted by merit selection panels, serving for fourteen-year renewable terms.[30] Their jurisdiction is largely limited to bankruptcy cases and civil matters closely related to the adjudication of bankruptcy claims.[31] Our initial sample of 113 bankruptcy judges consisted of judges attending a session at a conference sponsored by the Federal Judicial Center in August 2004, in Seattle, Washington. At the time, this group comprised roughly one-third of all then sitting bankruptcy judges. Our subsequent sample consisted of 201 bankruptcy judges who attended one of two conferences at which we presented in 2013 in San Diego and New Orleans. Virtually all of the sitting bankruptcy judges attended one of these two conferences, and most of those attended one of our sessions (57% of all sitting bankruptcy judges

28. Rachlinski et al., *Bankruptcy*, *supra* note 27, at 1258 ("In our study, the Republican judges were more likely than their Democratic counterparts to make decisions that favored creditors.").

29. *Id.*

30. 28 U.S.C. § 152(a)(1) (2012).

31. *See* 28 U.S.C. § 157(b) (explaining that federal bankruptcy judges may hear and determine all cases and all core proceedings arising under the Title 11 Bankruptcy Code).

are represented in this sample[32]). The demographics of the bankruptcy judges, along with all other judges in this study, are described in Appendix A.

As with all of our research, the scenarios that were presented to the judges were not designed to assess the influence of their political attitudes, but other aspects of judging. In our initial published study of bankruptcy judges, the judges read five scenarios that required judges to favor either a creditor or debtor (the others requested different kinds of rulings and were hence not relevant to our hypothesis).[33] We report three of them here. Political attitudes had no effect on the judges in one of the scenarios, but this was likely because the decision in that scenario was too obvious.[34] More recently we asked bankruptcy judges to respond to two scenarios involving personal bankruptcy (described below) that also involved a creditor versus a debtor, and also used scenarios that induced more variation among the judges.

A. Cramdown

In one scenario we asked the judges to set an interest rate on a restructured loan in a Chapter 13 proceeding.[35] In creating the scenario, we took advantage of a then-recent Supreme Court opinion, *Till v. SCS Credit Corp.*[36] In *Till*, the Court held that in restructuring a secured loan in a Chapter 13 wage-earner plan, bankruptcy courts should use the prime rate as the starting point and then adjust upwards by considering the opportunity costs of the loan, the risk of inflation, and the risk of default.[37] We gave judges a scenario involving a truck driver who owned his own rig and filed for bankruptcy. We asked judges to reset his interest payment based on the methodology mandated by *Till*.

We used this scenario to test the influence of numeric reference points (anchoring). Half of the judges were given an initial interest rate (21%), while the other half were not given an initial interest rate. Even though *Till* declared the initial interest rate to be irrelevant, we found

32. Wistrich et al., *supra* note 27, at 887.

33. Rachlinski et al., *Bankruptcy*, *supra* note 27, at 1258 (summarizing research findings by political attitude of the judges).

34. The other two scenarios requested that judges identify their willingness to discharge specific debt on a six-point scale. While relevant to our inquiry, these two scenarios suffered from ceiling effects. In one of them virtually all of the judges indicated a willingness to discharge the debt, and in the other an unwillingness to do so. Rachlinski et al., *Bankruptcy*, *supra* note 27, at 1231–32 (describing this group of participating judges).

35. *Id.* at 1233–37.

36. 541 U.S. 465 (2004).

37. *Id.* at 478–79.

that it influenced judges' determinations, consistent with research on anchoring.[38]

The responses also revealed a difference based on political orientation. As Table 1A shows, the Republican judges set an average interest rate of 7.4%, while the Democratic judges set an average rate of 6.5%. This difference was marginally statistically significant.[39] The higher interest rate favored the creditor (a bank) over the debtor (an individual truck driver who owned his own business).

TABLE 1A: AVERAGE INTEREST RATE BY PARTY AND CONDITION (AND N)

Condition	Republicans	Democrats
No Interest Rate Provided	6.4% (8)	6.3% (42)
Interest Rate Provided	7.9% (16)	6.7% (34)
Total	7.4% (24)	6.5% (76)

B. Student Loan

We created a second bankruptcy scenario designed to examine the role that the race of the debtor might play in the discretionary discharge decisions that judges make.[40] In the scenario, the bankruptcy judges learned that a debtor, a young woman, had filed for bankruptcy protection to have her student loan debt discharged. The judges learned 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 child care for her baby. The materials described her monthly expenses, apart from the repayment of her student loan, as amounting to $1,125. Recently, however, her grandmother had fallen ill and could no longer provide child care while she was at work. Thus, the debtor incurred new child-care expenses, which made it difficult, if not impossible, to manage her monthly

38. The 54 judges in the control group set an average interest rate of 6.33%, while the 49 judges in the anchor group set a mean interest rate of 7.13%. Rachlinski et al., *Bankruptcy*, *supra* note 27, at 1235.

39. $t(98) = 1.82$, $p = 0.07$. The judges' political party did not interact with the effect of the anchor. ANOVA with main effects of party and anchoring condition, and their interaction revealed that the interaction was not significant. $F(1, 96) = 0.93$, $p = 0.33$.

40. Rachlinski et al., *Bankruptcy*, *supra* note 27, at 1245–48.

expenses, including the $600 payment on her $83,748 consolidated student loan.

The materials reminded the judges that educational loans are not dischargeable under the Bankruptcy Code absent a showing of "undue hardship."[41] 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) the debtor cannot maintain a minimal standard of living for herself and her dependents if required to repay the loan; (2) additional circumstances exist suggesting this is likely to remain the case throughout a significant portion of the repayment period; and (3) the debtor has made good-faith efforts to repay the loan.[42]

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." 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.[43] To reinforce the race of the debtor, we used the name eight times in the scenario. We found no impact based on race,[44] but we did find a statistically significant impact based on the political ideology of the judges.[45] Democratic judges were much more forgiving than their Republican counterparts. Democratic judges discharged an average of $50,972, while Republican judges discharged an average of $34,232. By discharging more of the debt, the Democratic judges favored the debtor as against her creditors relative to the Republican judges.

41. 11 U.S.C. § 523(a)(8) (2012).

42. Rachlinski et al., *Bankruptcy*, *supra* note 27, at 1247 (describing the tests for "undue hardship").

43. 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. *Id.*

44. "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%)." *Id.* That difference was not statistically significant. *Id.*

45. $t(100) = 2.41, p = 0.02$. The judges' political affiliation did not interact with the race of the debtor significantly. ANOVA with main effects of party and race, and their interaction revealed that the interaction was not significant. $F(1, 98) = 0.19, p = 0.66$.

TABLE 1B: AVERAGE DEBT ABSOLVED BY POLITICS AND RACE OF DEBTOR (AND N)

Race of Debtor	Republicans	Democrats
White	$34,078 (16)	$54,095 (35)
African American	$34,812 (8)	$48,431 (43)
Total	$34,323 (24)	$50,972 (78)

C. Credit Card Debt

In an effort to measure the role of apologies and emotion in judicial decisionmaking we gave bankruptcy judges a scenario involving a debtor who had filed for relief under Chapter 7 of the Bankruptcy Code to have all of his debt discharged, including the balance owed on a new credit card.[46] The bank holding the credit card debt opposed the discharge, arguing that the debtor had run up the charges knowing that he could not pay them off, so that discharging the credit card debt would facilitate the commission of a fraud.[47] The materials identified the debtor as a single, twenty-nine-year-old who had struggled with debt for much of his adult life. He had never earned more than the minimum wage, had been delinquent in making credit card payments, and had once been evicted for nonpayment of rent. Fortunately, he had recently landed a job, but he lost it when he almost immediately took a trip, even though his new employer had warned him that he would be fired if he went. During the trip, he ran up $3,276 in charges on a credit card he had recently obtained. The debtor had essentially no assets, had consulted attorneys about filing for bankruptcy in the past, and had filed for bankruptcy about three months after returning from the trip.

We gave versions of this scenario to bankruptcy judges on two separate occasions: in 2004 along with the two scenarios described above, and in 2013 along with the scenario described below. In 2004, we were interested in whether an apology would influence the judges.[48] We asked the judges whether they would be likely to discharge the debt on a six-point scale, ranging from "very likely" to "very unlikely." We

46. Rachlinski et al., *Contrition*, *supra* note 27, at 1214–16; Wistrich et al., *supra* note 27, at 887–90.

47. *See* 11 U.S.C. § 523(a)(2)(A) (2012) (exempting from discharge a debt obtained by "false pretenses, a false representation, or actual fraud").

48. Rachlinski et al., *Contrition*, *supra* note 27, at 1214–16.

varied whether the debtor appeared in court and apologized for his reckless spending.[49] The apology had no effect on the judges.[50]

In 2013, we altered the scenario to study the effect of emotion on judges.[51] We created four conditions, meant to test for two effects. Half of the judges read a version of the scenario in which the debtor had incurred the credit card debt during a vacation to Florida for "spring break," where he charged his hotel room, meals, and rounds of drinks for friends on his new credit card. The other half of the judges read a version of the scenario in which the debtor had incurred the credit card debt during a visit to his mother in Florida. His mother, the judges were told, was battling cancer, lacked health insurance, and needed assistance recovering from a recent surgery. The credit card charges were for the cost of the trip and the mother's medicine. We also varied the gender of the debtor. Half of the judges in each condition were told that the debtor was Janice, while the other half were told that the debtor was Jared. In this variation, we only asked for a binary decision as to whether the judges would discharge the debt or not (rather than using a six-point scale). Overall, gender did not affect the judges, but the reason for the trip had a large effect; the more sympathetic debtor was more likely to obtain discharge of the debt.[52]

In the first (apology) version of the scenario, political party had no effect. The twenty-four Republicans and eighty-one Democrats both rated their willingness to discharge the debt at an average of 4.42 on the six-point scale (with six being very unlikely to discharge). The judges' political attitudes also did not interact significantly with whether the debtor had apologized.[53]

In the second (emotion) version of the scenario, Republican and Democratic judges did not differ much in their reactions. Among the 137 Democrats, 42% favored discharge, as compared to 39% among the 41 Republican judges. The difference was not significant.[54] Although Table 1C shows a trend in which Republicans made fewer favorable rulings for the female debtor than the male debtor (a trend not present among the Democrats), political party did not interact significantly with any variation in the identity of the debtor.[55]

49. *Id.* at 1214–15.

50. *Id.* at 1215.

51. Wistrich et al., *supra* note 27, at 888.

52. *Id.* at 889.

53. ANOVA of the judges' evaluations with main effects of condition and party revealed no significant interaction. $F(1, 101) = 0.08, p = 0.78$).

54. Fisher's Exact Test, $p = 0.85$.

55. Logistic regression of the decision on condition, gender, party, and all interaction revealed no significant effect of any interaction with party (z's < 0.40, p's > 0.70).

TABLE 1C: PERCENT DISCHARGING DEBT BY POLITICS, SOURCE OF DEBT, AND GENDER OF DEBTOR (AND N)

Debtor		Republicans	Democrats
Vacation	Male	43% (7)	33% (27)
	Female	17% (12)	28% (36)
	Total	26% (19)	30% (63)
Sick Mother	Male	71% (7)	51% (39)
	Female	40% (15)	51% (35)
	Total	50% (22)	51% (74)
Total		39% (41)	42% (137)

D. Personal Bankruptcy

As part of a second effort to assess whether the race of debtors might influence judges, we replicated a study conducted using bankruptcy lawyers as research participants. Braucher and her coauthors found that lawyers tend to suggest that individual debtors file in Chapter 13, rather than Chapter 7, when those debtors are African American, as opposed to white.[56] The scenario described a married couple with a mortgage on a house that is under water. The wife lost her job and the couple fell behind on bills and the mortgage. The question asked whether the lawyer would advise filing in Chapter 7 (which would give them a fresh start) or in Chapter 13 (which would require them to continue paying some of their obligations—and hence favors creditors more than Chapter 7). The couple was identified either as African American or as white. The couple also expressed a preference for either Chapter 7 or Chapter 13, thereby creating a 2 x 2 design. Results among bankruptcy lawyers indicate that they are more likely to suggest the procreditor Chapter 13 for African American couples, and in particular, to disregard the preferences of the African American couple.[57] We did not find similar results among the judges.

56. Jean Braucher, Dov Cohen & Robert M. Lawless, *Race, Attorney Influence, and Bankruptcy Chapter Choice*, 9 J. EMPIRICAL LEGAL STUD. 393, 400–02 (2012).

57. *Id.* at 411–12.

The scenario produced a small difference between judges of different parties. Among the Republican judges, 56% (23 out of 41) indicated that they would advise the couple to file in Chapter 13, as compared to only 43% (59 out of 138) of the Democratic judges. In effect, Democrats were more apt to advise the debtors to take a course of action that would resolve all of their debts, rather than try to pay them. This difference is consistent with the political rhetoric of personal responsibility among Republicans, but it was not statistically significant.[58] Political attitudes did not interact with race, debtor preferences, or both combined.[59]

TABLE 1D: PERCENT RECOMMENDING CHAPTER 13 BY POLITICS, RACE OF DEBTOR, AND DEBTOR PREFERENCE (AND N)

Debtor & Preference		Republicans	Democrats
African American	Chapter 7	50% (8)	47% (30)
	Chapter 13	45% (11)	48% (42)
	Total	47% (19)	47% (72)
White	Chapter 7	63% (8)	31% (36)
	Chapter 13	64% (14)	47% (30)
	Total	64% (22)	38% (66)
Total		56% (41)	43% (138)

E. Summary of Bankruptcy Judges

The result we reported in our initial study of bankruptcy judges, relying on the first two experiments, concluded that their political attitudes influenced their decisions more than other judges.[60] Our more recent data undermines that conclusion. Among our five scenarios, only the two we initially reported demonstrated clear effects.

58. Fisher's Exact Test, $p = 0.15$.

59. Logistic regression of the decision on party, race, preference, and interaction revealed no significant effects of party ($z = 0.17$, $p = 0.86$) or any interaction term (z's < 1.10, p's > 0.25).

60. Rachlinski et al., *Bankruptcy*, *supra* note 27, at 1258.

TABLE 1E: AVERAGE RESULTS AMONG BANKRUPTCY JUDGES BY PARTY AND SCENARIO (AND N)

Scenario	Republican	Democrat	Republican Minus Democrat*	*p*-value	Cohen's *d**
Cramdown interest	7.4% (24)	6.5% (76)	0.9%	0.07	0.37
Student loan discharged amount	$34k (24)	$51k (78)	$17k	0.02	0.41
Credit card v1**	4.42 (24)	4.42 (81)	0.00	0.99	0.00
Credit card v2 (% discharge)	39% (41)	42% (137)	3	0.85	0.07
Personal bankruptcy (% discharge)	56% (41)	43% (138)	13	0.15	0.29

* A positive number indicates that Republicans favored creditors more than Democrats.

** Six-point scale with 6 meaning "very unlikely to discharge"

When we aggregate results across the five studies using a standard measure of effect size (Cohen's *d*), we find that politics plays a small but noticeable role in influencing bankruptcy judges. Republicans were more procreditor in four of the five scenarios (the other being a tie), amounting to a difference of roughly one-fifth of a standard error.[61]

61. The Cohen's *d* for the five studies was 0.37, 0.41, 0.00, 0.07, and 0.29, respectively. A combination weighted by sample size yields a Cohen's *d* of 0.22. Cohen's *d* is a standardized measure of the size of the influence a relevant parameter (in this case political attitude) has on a target parameter (in this case judges' decisions). *See* Christopher J. Ferguson, *An Effect Size Primer: A Guide for Clinicians and Researchers*, 40 PROF. PSYCHOL. 532, 533 (2009) (labeling Cohen's *d* as "the most commonly used measure" of effect size). It consists of a fraction of the

The fact that we used different scenarios in the more recent sets of data complicates interpretation of the divergent results. The data were collected nearly a decade apart, so it is possible that the political climate had evolved. The first set of data was collected during the pendency of bankruptcy reform, culminating in the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005,[62] which included several provisions favorable to creditors.[63] Additionally, the initial data were collected during a Republican administration and the more recent set during a Democratic one. These data thus might have been collected in a different political climate among the bankruptcy judges than the more recent data. This difference might explain why we initially concluded that political attitudes have a large influence on bankruptcy judges but could not replicate that effect in more recent research. That said, one of the three scenarios that we presented in 2004 also failed to demonstrate any effect of political attitudes on judges.

Placing the differences in the political climate for bankruptcy judges aside, the overall effect of political attitudes on bankruptcy judges across all of the data appears to be modest. Politics sometimes matters to these judges, but not consistently so.

III. CRIMINAL JUSTICE 1: PRETRIAL MOTIONS

We have conducted dozens of studies of general jurisdiction judges using criminal justice scenarios, probing for a wide range of phenomena. These studies have spanned many areas of law and have asked several questions calling for judgments involving criminal justice issues, including pretrial motions (particularly probable cause determinations), guilt determinations, and criminal sentencing. Democrats identify with the rights of criminal defendants more than Republicans,[64] which could translate into differences in how judges

natural deviation one observes in observed data. *Id.* ("Cohen's *d* is a rather simple statistical expression, namely the difference between two group outcomes divided by the population standard deviation."). *See generally*, JACOB COHEN, STATISTICAL POWER ANALYSIS FOR THE SOCIAL SCIENCES (1969). Social scientists, by rough convention, tend to treat a Cohen's *d* of one-fifth of a standard deviation as a small effect. *See* Jacob Cohen, *A Power Primer*, 92 PSYCHOL. BULL. 155, 157 (1992) (identifying Cohen's *d* effect sizes of 0.20, 0.50, and 0.80 as small, medium, and large, respectively).

62. Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Pub. L. No. 109-8, 119 Stat. 23 (codified as amended in scattered sections of 11 U.S.C.).

63. *See* Robert M. Lawless et al., *Did Bankruptcy Reform Fail? An Empirical Study of Consumer Debtors*, 82 AM. BANKR. L.J. 349, 352–53 (2008) (reviewing the procreditor provisions of the Act).

64. *See* Maurice Chammah, *Two Parties, Two Platforms on Criminal Justice*, MARSHALL PROJECT (July 18, 2016, 9:51 PM), https://www.themarshallproject.org/2016/07/18/two-parties-two-platforms-on-criminal-justice [https://perma.cc/9RDL-C23U] (comparing the Republican and

react to motions involving the admissibility of critical evidence in criminal cases.

A. Probable Cause Determinations

In a series of studies involving nearly one thousand trial judges we investigated whether judges are subject to the hindsight bias in probable cause determinations using four different scenarios.[65] In these cases, we compared the rulings of judges on a request for a search warrant (foresight) with the rulings of judges on a suppression motion concerning evidence collected without a warrant (hindsight). In both conditions, we asked the judges to determine whether probable cause existed. The facts were identical in both versions, except that in the hindsight version the police uncovered incriminating evidence. If, as is required, judges disregard the fruits of the search, they should make the same judgments in foresight as in hindsight. We found—to our surprise—that they were able to do so.

The details of the scenarios are described elsewhere.[66] In all cases, the search involved an unoccupied automobile because the police can generally search an unoccupied car without obtaining a warrant. Brief details of the scenarios (and the judges who evaluated them) are listed below.[67]

1. Rock Concert. The scenario described a police officer on patrol in a parking lot outside a large arena hosting a rock concert. The materials indicated that the officer noticed a well-dressed, nervous-looking man exit a BMW and fiddle with something in the trunk of his car. The man then met a friend, bought tickets to the event, and entered the arena. Thirty minutes later, the officer noticed that one of the BMW's windows was rolled down. Concerned that the car might be burglarized, he approached the car to close the window. Upon arriving at the car, the officer stated that he smelled burnt methamphetamine. He looked inside the car and saw some Visine, a local map, and a couple of empty beer cans. For half of the judges, the officer requested a warrant and for the other half, he conducted a search that produced incriminating evidence. We gave this scenario to 130 trial judges in Ohio attending their annual statewide judicial education conference in 2009, asking whether they believed probable cause was present.

Democratic party platforms, revealing that Republicans are strongly more pro "law and order" than Democrats).

65. Rachlinski et al., *Hindsight Bias*, *supra* note 27, at 72.

66. *Id.* at 79–93.

67. Some of the scenarios were given to judges from whom we did not request political affiliation. These judges are excluded from the analysis.

2. Injured Driver. The materials described the response of a law enforcement officer upon receiving word that another officer had been attacked nearby late at night. The perpetrator had also been injured in the attack. The materials stated that the officer observed a driver with a bandaged hand emerge from a car parked in front of a nearby nightclub. The driver "opened the back door, pulled out a long, curved piece of metal from the seat, . . . placed it into the trunk of the car," and then walked into a nightclub. The officer then walked over to the car, and noticed that "the front left tire was a small, temporary tire of the type used as a spare," which "made him realize that the metal object was likely a crowbar." Upon looking into the back seat, the officer "observed a car jack on the floor and three envelopes on the back seat, two of which appeared to be stuffed with cash." The officer also "observed a stain, possibly from blood, on the steering wheel." The officer then either requested a warrant or searched the car and found evidence incriminating the defendant in the earlier attack. We asked the judges to determine whether probable cause was present.

In this study, we also varied the severity of the crime. For half of the judges, the attack was said to be serious, but the officer who had been attacked would recover. For the other half, the materials indicated that the officer had been killed in the attack.

The underlying facts that produced the attack are identical; the only difference is that in one case, the attack was fatal. Hence, the judges reviewed either a battery or a murder of an officer. We gave this scenario to three groups of trial judges: 81 U.S. district judges, 43 U.S. magistrate judges, and 101 Florida state trial judges. We asked the judges to determine whether probable cause was present.

3. Fleeing Suspect. The materials for the third scenario described a police officer who was "on foot patrol in a high-crime urban area when he noticed a car parked in front of a fire hydrant in front of a bar known to be frequented by drug dealers."[68] The officer saw the driver "fiddle with something in his hand as he sat in the driver's seat with the door open." The materials stated that when the driver approached, "a woman, who had been hanging around the entrance to the bar, looked over at him and yelled out, 'look out Dan, it's a cop!' " The driver and the woman ran off and escaped. The materials then stated that the officer looked into the car and saw "an envelope on the floor by the driver's side that had some money in it" along with "a plastic shopping bag from a nearby Walgreens that appeared to have three packages of pseudoephedrine in it" and "some Visine eye drops and a package of

68. Rachlinski et al., *Hindsight Bias*, *supra* note 27, at 89.

baggies on the back seat." The materials noted that "pseudoephedrine is often used to manufacture methamphetamine." For half of the judges, the officer requested a warrant, and for the other half, he conducted a search that produced incriminating evidence. We gave this scenario to 154 state trial judges in Florida. We asked the judges to determine whether probable cause was present.

Notwithstanding the null result on the hindsight bias, we analyzed these materials to determine whether Republicans are more likely to grant a warrant (or admit evidence) than Democrats. We present the results in Table 2A, below.

TABLE 2A: PERCENT CONCLUDING THAT THE FACTS SUPPORTED A PROBABLE CAUSE DETERMINATION BY PARTY, SCENARIO, AND CONDITION (FORESIGHT VERSUS HINDSIGHT) (AND N)

Scenario	Perspective	% Finding Probable Cause (and n) by Party		Republican Minus Democrat	*p*-value (Fisher's Exact Test)	Cohen's *d* (positive if Republican >Democrat)
		Republican	Democrat			
1. Parked Car	Foresight	18% (22)	29% (38)	-11	0.13	-0.34
	Hindsight	27% (22)	31% (36)	-4	0.57	-0.11
2a. Injured, Battery	Foresight	60% (30)	46% (28)	14	0.43	0.31
	Hindsight	58% (19)	38% (29)	20	0.24	0.44
2b. Injured, Murder	Foresight	64% (28)	54% (24)	10	0.57	0.23
	Hindsight	67% (24)	62% (26)	5	0.77	0.12
3. Fleeing Suspect	Foresight	50% (36)	33% (18)	17	0.38	0.39
	Hindsight	59% (29)	53% (30)	6	0.79	0.13

No clear pattern or influence of politics emerged from these data. Republican and Democratic judges made roughly the same decisions on probable cause. We found no significant trends in any condition, and the first scenario shows the reverse of what typical assumptions about the attitudes of the major political parties would predict. Although Democrats were somewhat less likely to rule against the defendant in most of the scenarios, the difference was small. Likewise, the combined effect size (using Cohen's *d*) weighted by sample size was also small (0.14). In short, political attitudes do not appear to influence judges' probable cause determinations.

B. Search and Seizure

In an effort to determine whether judges would respond to emotional aspects of a case, we asked judges to rule on the admissibility

of evidence in a search-and-seizure case.[69] We described a criminal case against a maintenance worker in a ferryboat terminal run by the Department of Transportation. The defendant had failed a random test for the use of illicit drugs and a subsequent search found illicit drugs in his locker. For half of the judges, the substance was two marijuana cigarettes; for the other half, it was $15,000 worth of heroin and "a list of contacts at a local high school." The defendant contended that he could not be subjected to random drug tests under *Skinner v. Railway Labor Executives Association*,[70] which held that only employees in safety sensitive positions are subject to random screening without a warrant. The defendant (who was essentially a janitor) argued that he was not such an employee and moved to suppress evidence gathered from the search of his locker, which flowed from the results of the drug test.

We recruited a total of 366 judges from numerous jurisdictions to respond to this scenario: 103 Nevada state judges, 145 Connecticut state judges, and 65 newly elected New York state judges.[71] Overall, we found that the drug at issue influenced the judges' determinations, with 55% ruling against the defendant when the search had uncovered heroin but only 44% doing so when the search had uncovered marijuana.[72] We hypothesized that Republican judges might be less defendant friendly and less likely to differentiate between the drugs at issue.

Table 2B describes the results. Although we found that the Democrats were eleven percentage points more likely to favor the prosecution than the Republicans,[73] the difference was not significant.[74] Nor did political attitudes interact significantly with the variation in the evidence.[75]

69. Wistrich et al., *supra* note 27, at 890–91. This scenario was adapted from one used in Avani Mehta Sood & John M. Darley, *The Plasticity of Harm in the Service of Criminalization Goals*, 100 CALIF. L. REV. 1313, 1328 (2012).

70. 489 U.S. 602, 628–30 (1989).

71. We did not collect demographic data from one of the groups of judges (in Connecticut). Hence, some of the 366 judges included in our original analysis are not included here.

72. Wistrich et al., *supra* note 27, at 892.

73. This trend occurred only among the Nevada judges, in which 63% (32 out of 51) of the Democrats ruled the evidence admissible compared to 43% of their Republican counterparts (15 out of 35). Among the New York judges, Democrats and Republicans were equally likely to rule the evidence admissible (48%, or 22 out of 46, versus 50%, or 8 out of 16).

74. Fisher's Exact Test, $p = 0.23$. The Cohen's d for this scenario was -0.24 (negative because Republicans were more prodefendant than Democrats).

75. Logistic regression of the decision on party, evidence, and an interaction revealed that the interaction was not significant ($z = 0.01$, $p > 0.90$).

TABLE 2B: PERCENT ADMITTING EVIDENCE BY CONDITION AND PARTY (AND N)

Condition	Republicans	Democrats
Marijuana	39% (31)	47% (43)
Heroin	55% (20)	63% (54)
Total	45% (51)	56% (97)

C. Summary of Motions in Criminal Cases

These results were somewhat surprising. Despite the Republican Party's reputation for being the law-and-order party, Republican judges were no less likely than their Democratic counterparts to rule in favor of a criminal defendant seeking to suppress key evidence against him. In fact, the trends in the data suggested that the opposite is true. Combining the Cohen's *d* among the probable cause scenarios (0.14) with the Cohen's *d* in the suppression scenario (-0.24) yielded an aggregate Cohen's *d* of 0.04 (weighted for sample size). This effect was both small and clearly somewhat inconsistent.

IV. CRIMINAL JUSTICE 2: CONVICTION DECISIONS

In three instances, we collected data on conviction rates among judges asked to imagine that they were presiding over a bench trial in which they had to determine a defendant's guilt or innocence. We predicted that Republicans might be more likely to convict than Democrats.

A. Battery

In a study exploring potential racial disparities, we asked three groups of judges to decide whether they would convict in a scenario that described a fight in a high school basketball locker room.[76] In the scenario, the defendant pushed the plaintiff hard into a bank of lockers, sending the victim to the hospital. The defendant claimed that he felt threatened and was merely defending himself. We varied the race of the

76. Rachlinski et al., *Unconscious Bias*, *supra* note 27, at 1217–19 (using a vignette developed in Samuel R. Sommers & Phoebe C. Ellsworth, *White Juror Bias: An Investigation of Prejudice Against Black Defendants in the American Courtroom*, 7 PSYCHOL. PUB. POL'Y & L. 201, 216–17 (2001)).

defendant (half read about a white defendant and half an African American defendant). In all cases the victim was the opposite race of the defendant. We found no differences among the white judges based on the race of the defendant, but we did find that the African American judges were far more likely to convict the white defendant than the African American defendant.[77]

Owing to the more sensitive nature of the materials, the three groups of judges asked that their jurisdictions not be identified. One hailed from a large urban jurisdiction in the eastern United States (70 judges), one from a large county in the western United States (45 judges), and the third consisted of a group of 18 judges attending a statewide educational conference.

Among the Republicans, 84% convicted, as compared to 72% of the Democrats. The trend was not significant, however.[78] The judges' political attitudes did not interact significantly with the race of the defendant.[79]

TABLE 3A: PERCENT CONVICTING BY PARTY AND RACE OF DEFENDANT (AND N)

Race of Defendant	Republicans	Democrats
White	100% (16)	78% (51)
African American	67% (15)	66% (47)
Total	84% (31)	72% (98)

B. Armed Robbery

In an effort to study the effect of an inadmissible confession on a judge's willingness to convict, we gave judges a scenario in which we asked them whether they would convict a criminal defendant on trial for robbing a bank.[80] The evidence against the defendant was fairly weak (consisting of voice recognition and some other circumstantial evidence). We had several variations. First, the crime was either just an armed robbery of a bank, or an armed robbery in which the

77. *Id.* at 1219–21 (describing results).

78. Fisher's Exact Test, $p = 0.24$.

79. Logistic regression of the decision on party, race, and an interaction revealed that the interaction was not significant ($z = 0, p = 0.99$).

80. Rachlinski et al., *Attention*, *supra* note 27, at 1609–13.

perpetrator murdered a young mother on the way out of the bank. Second, we varied whether the defendant had confessed: one-third of the judges saw no confession; one-third learned of a confession coerced by mild police misconduct; and one-third learned of a confession coerced by extreme police misconduct. The materials thus created a 2 x 3 design.

We presented this scenario at multiple judicial education conferences to 314 judges. Our subjects were 81 federal district judges, 44 federal magistrate judges, and 101 Florida state judges (each of whom also participated in our extended study of the hindsight bias, reported above). Additionally, 88 judges attending a conference of California state trial judges in May of 2006 (in Palm Springs) reviewed this scenario.

Our experimental manipulations produced a complex pattern of results in which the judges reacted to both the confession and the police misconduct.[81] As compared to the judges who had never learned of the confession, those judges who read about a confession after mild police misconduct were more likely to convict regardless of the severity of the crime. After reading about more severe police misconduct, those judges who reviewed the robbery were as likely to convict as those judges who had never learned of the misconduct. The judges who read about the severe police misconduct while evaluating the murder case, however, were the most likely to convict among the six variations.

As Table 3B shows, we found little evidence that politics influenced conviction rates. Across all six conditions, 42% of the Republicans convicted as compared to 29% of the Democrats. That difference was significant.[82] Table 3B, however, also shows that the complex pattern we reported was largely the product of Republican judges. The Democrats showed little variation across all six conditions. The interaction between the presence of a confession, political attitude, and crime was marginally significant.[83] That is to say, the presence of a confession induced the Republicans to convict more frequently (even though the confession was not admissible), but had no effect on the Democrats.

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81. *Id.* at 1613–14 (describing results).

82. Fisher's Exact Test, $p = 0.03$.

83. A logistic regression was performed to assess the interactions that included crime; politics; an interaction of crime and politics; the presence of any confession ("confession"); the interaction of confession with crime; the interaction of confession with politics; the three-way interaction of confession, crime, and politics; severe police misconduct ("severe"); an interaction between severe and crime; an interaction between severe and politics; and the three-way interaction of severe, crime, and politics. The interaction between confession, politics, and severe was marginally significant ($z = 1.81$, $p = 0.07$). All other interactions were not significant (z's < 1.50, p's > 0.10).

The interaction in these results suggests that Republicans have misgivings about rules against the admissibility of coerced confessions. We initially reported this pattern simply as a general trend observed among judges,[84] but ideology appears to have played a critical role in the results. Exposure to these confessions produced greater conviction rates among Republicans, except when the crime was less serious and the misconduct that produced the confession was very serious. In contrast, the variations had little effect on the Democrats. Apparently, Democrats take admissibility rules very seriously, while Republicans harbor doubts about their wisdom, which in turn influences how they react to coerced confessions.

TABLE 3B: PERCENT CONVICTING BY PARTY, CRIME, AND POLICE MISCONDUCT (AND N)

Condition		Republicans	Democrats
Robbery	No Confession	33% (18)	29% (24)
	Mild Misconduct	60% (25)	32% (22)
	Severe Misconduct	23% (13)	29% (31)
	Total	43% (56)	30% (77)
Murder	No Confession	24% (21)	21% (28)
	Mild Misconduct	41% (22)	35% (26)
	Severe Misconduct	54% (26)	26% (19)
	Total	41% (69)	27% (73)
Total		42% (125)	29% (150)

C. Armed Robbery and Forensic Evidence

In another study, we examined judicial reactions to different descriptions of the same forensic testimony to determine the impact of such variations on judges' willingness to convict a criminal defendant.[85] This scenario described a criminal case in which the prosecution had

84. Rachlinski et al., *Attention*, *supra* note 27, at 1614–15.

85. *Id.* at 1604–09.

some weak evidence against the defendant plus some more compelling forensic evidence. Specifically, the defendant's DNA matched that of the perpetrator, albeit using a less diagnostic test than is often employed in analyzing DNA evidence. We informed the judges that the likelihood that a random adult would match was either 0.1% or one in one thousand. Both are identical, of course, but previous research suggests that people react differently to the two different descriptions.[86] We also varied whether the relevant population was just general, or specific to the city in which the crime occurred.

We gave these materials to judges in Ohio and California (the former were drawn from the same group described above in the study of probable cause and the latter were the same group described above in the study of the effect of confessions).[87] Because we observed no differences in conviction rates between any of the variations we tested and none of our variations implicate political orientation, we collapsed across our variations for this analysis.

The Republican judges were slightly more willing to convict than the Democratic judges: 44% (42 out of 96) versus 36% (30 out of 83). This trend was not significant, however.[88]

D. Summary of Conviction Decisions

All three scenarios showed a trend in which the Republicans were more inclined to convict than the Democrats, although none of these trends was statistically significant. Aggregating across all three scenarios in Table 3C, however, suggests that a modest influence of politics might be at play. Combining weighted effect sizes showed that the Republicans were 0.29 standard errors more likely to convict than were the Democrats.

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86. *See* Jonathan J. Koehler, *The Psychology of Numbers in the Courtroom: How to Make DNA-Match Statistics Seem Impressive or Insufficient*, 74 S. CAL. L. REV. 1275, 1302–03 (2001) (finding that jurors were more impressed by evidence presented as a fraction than as a percentage and were more impressed by a larger numerator than by a smaller one, regardless of the size of the denominator).

87. We also gave this scenario to a third group of judges, but did not collect their political orientation, and so exclude them from the present analysis.

88. Fisher's Exact Test, $p = 0.36$. Logistic regression showed that the judges' political orientation did not interact with either of our experimental conditions, nor was the three-way interaction significant (z's < 0.75, p's > 0.45).

TABLE 3C: PERCENT CONVICTING BY PARTY AND SCENARIO (AND N)

Scenario	Republican	Democrat	Republican Minus Democrat	Fisher' Exact Test *p*-value	Cohen's *d*
Battery	84% (31)	72% (98)	12	0.24	0.39
Robbery	42% (125)	29% (150)	13	0.03	0.32
DNA	44% (96)	36% (83)	8	0.36	0.18

V. CRIMINAL JUSTICE 3: SENTENCING

We have studied sentencing on several occasions. Sentencing scenarios can also be used to investigate whether the Republican Party's law-and-order position translates into harsher treatment of criminal defendants among Republican judges than among Democratic judges. Other research, in fact, has shown that in at least some settings, Republican judges sentence more harshly than their Democratic colleagues.[89]

A. Juveniles

The judges who reviewed the battery case described above also reviewed the case of two juvenile defendants.[90] One of the defendants had been convicted of shoplifting a video game and the other had been convicted of armed robbery of a gas station. We asked the judges to indicate how they would dispose of each case, on a seven-point scale, with each point corresponding to a specific sentence.[91] We also varied the race of the juveniles by priming the judges to think of the defendant as white or African American. In these scenarios, the defendant's race affected the judges' disposition (albeit only through an interaction with a measure of implicit bias).

89. *See* Joshua B. Fischman & Max M. Schanzenbach, *Do Standards of Review Matter? The Case of Federal Criminal Sentencing*, 40 J. LEGAL STUD. 405, 422–24 (2011) (showing that among federal judges, Democrats are more likely than Republicans to deviate from the federal sentencing guidelines to impose shorter sentences).

90. Rachlinski et al., *Unconscious Bias*, *supra* note 27, at 1212–13 (describing research methodology).

91. 1 = dismissal; 2 = adjournment in contemplation of dismissal; 3 = probation for less than six months; 4 = probation for six months to a year; 5 = confinement in a juvenile facility for less than six months; 6 = confinement for between six months and a year; 7 = transfer to adult court.

As Table 4A, shows, the Republicans sentenced the shoplifter to an average 2.48 on the scale (mostly adjourning) and the armed robber to 5.32 (mostly detention); whereas the Democrats sentenced the juveniles to an average of 2.32 and 4.83. The Democrats seemed less harsh, and the trend was significant in the scenario involving the armed robber.[92]

TABLE 4A: AVERAGE DISPOSITION BY PARTY, SCENARIO, AND PRIME (AND N)

Scenario and Prime		Republicans	Democrats
Shoplifter	Neutral	2.35 (17)	2.40 (52)
	African American	2.64 (14)	2.22 (46)
	Total	2.48 (31)	2.32 (98)
Robber	Neutral	5.06 (17)	4.90 (52)
	African American	5.64 (13)	4.74 (46)
	Total	5.32 (31)	4.83 (98)

Judges' political attitudes also interacted with our manipulation of the race of the defendant. The Democratic judges were, if anything, inclined to impose less harsh dispositions on the African American defendant than on the white defendant, while the Republican judges reacted in the opposite way. This trend was significant for the armed robbery scenario.[93]

The interaction suggests a potential difference between Republican and Democratic judges on the issue of race. Factors other than politics are unlikely explanations for this result. The result cannot be attributed to demographic differences between the Republicans and Democrats, as the racial makeup of the two groups did not differ much

92. $t(127) = 1.02$, $p = 0.31$ and $t(127) = 2.62$, $p = 0.01$ for the shoplifter and armed robber, respectively.

93. $F(1, 127) = 2.09$, $p = 0.15$ and $F(1, 127) = 3.95$, $p = 0.05$ for the shoplifter and armed robber, respectively.

in our samples of judges.[94] Although the Republicans expressed a greater degree of implicit bias than the Democrats, this divergence was also too small to account for the different reactions of the judges.[95] The only plausible explanation is politics: Republicans reacted to the race of the defendant while Democrats did not. That said, the personal bankruptcy case also tested the interaction between race and politics, and yet we found no effect.[96]

B. Threatening a Judge

In an effort to study the effect of apologies on sentencing, we asked trial judges to sentence a defendant who had threatened a fellow judge after losing a lawsuit.[97] The defendant had sent a threatening letter to the judge who had ruled against him and included a photo of the judge and his family taken at the beach. The defendant had written on the photo, "I'm going to hunt you down, beat you, and kill you for what you've done to me." The defendant was arrested and convicted of threatening the judge. For half of the judges, the scenario described a full apology by the defendant, which was absent from the scenario for the other half of the judges. We asked judges to impose a sentence. We gave this scenario to 120 Ohio judges in 2009 (who also read other scenarios).[98] Judges who read about the apology imposed shorter sentences than those who did not.[99]

As Table 4B shows, judges who identified themselves as Republicans assigned an average sentence of 2.73 years and judges who identified themselves as Democrats assigned an average sentence of

94. Among the Republican judges, 68% were white, 19% were African American, 6% were Latino, and 6% were Asian. Among the Democratic judges, 64% were white, 24% were African American, 9% were Latino, and 2% were Asian.

95. We used the Implicit Association Test ("IAT") as a measure of implicit bias, pairing white and African American faces with positive and negative words. The full methods are described in Rachlinski et al., *Unconscious Bias*, *supra* note 27, at 1212–13. Both Republicans and Democrats expressed longer reaction times for the stereotype-incongruent pairings on the IAT, but the average Republican latency was 192 milliseconds, as compared to 158 milliseconds among the Democrats.

96. *See supra* note 44 and accompanying text (discussing research methods in Rachlinski et al., *Bankruptcy*, *supra* note 27).

97. Rachlinski et al., *Contrition*, *supra* note 27, at 1219–20.

98. U.S. military judges and Canadian judges also reviewed this scenario, but are excluded from this analysis, as we did not ask for their political orientation. We also collected data from a small group of federal magistrate judges, but the scenario varied for this group so as to accommodate the federal sentencing system. Because only four of these magistrate judges identified as Republicans, we also excluded them from the analysis.

99. Rachlinski et al., *Contrition*, *supra* note 27, at 1221–22.

2.08 years. This difference was statistically significant.[100] The effect of the apology did not interact significantly with politics.[101]

TABLE 4B: AVERAGE SENTENCE BY PARTY AND APOLOGY (AND N)

Condition	Republicans	Democrats
No Apology	3.23 (26)	2.56 (25)
Apology	2.40 (40)	1.50 (21)
Total	2.73 (66)	2.08 (46)

C. Immigration

Immigration divides the political parties. Republicans tend to support tighter border security while Democrats tend to be more accommodating to immigration. The divide is at its deepest when it comes to views on crime and immigration.[102] We would thus expect that if politics influences how judges decide criminal cases, then a case involving an immigrant would produce the largest difference between Republican and Democratic judges.

As part of our study of emotional influence on judges, we created a scenario involving an individual who had entered the United States illegally from Peru and was arrested.[103] The materials indicated that the individual entered the United States using a genuine Peruvian passport and a forged visa he had acquired in Peru. The materials stated that he was arrested, charged with illegally entering the United States, and was being deported. The prosecutor, however, wanted to add an additional allegation so that the defendant would serve more time before his deportation. In the federal system, this consisted of the

100. $t(110) = 2.47, p = 0.02$.

101. ANOVA with main effects of party and apology, which revealed that the interaction was not significant. $F(1, 111) = 0.20, p = 0.65$.

102. Stephanos Bibas, Max M. Schanzenbach & Emerson H. Tiller, *Policing Politics at Sentencing*, 103 NW. U. L. REV. 1371, 1378 (2009) (discussing empirical findings that Republican judges tended to sentence criminals more harshly than their Democratic counterparts); Rebecca Sharpless, *Immigrants are Not Criminals: Respectability, Immigration Reform, and Hyperincarceration*, 53 HOUS. L. REV. 691, 701–04 (2016) (discussing approaches utilized by law reformers on either end of the political spectrum regarding immigration reform); *see also Wide Partisan Divide Over Immigration Restrictions*, PEW RES. CTR. (June 19, 2012), http://www.pewresearch.org/fact-tank/2012/06/19/wide-partisan-divide-over-immigration-restrictions/ [https://perma.cc/VFB5-EWN8] (reporting that 84% of Republicans, but just 58% of Democrats, believe that the United States should impose tighter restrictions on immigration).

103. Wistrich et al., *supra* note 27, at 876–77.

prosecutor asking for a sentence enhancement under the federal sentencing guidelines for using a forged document in the commission of a crime. For the state judges this consisted of adding an additional charge of forgery of an identification document (namely, his passport). The defendant moved to have the forgery allegation disregarded, arguing that he did not forge his identification document, but merely pasted a forged item onto it. The prosecutor argued that he satisfied the elements of forgery of an identification document by pasting a false document into the genuine passport. The materials then indicated that the matter was one of first impression and asked the judge for a ruling.

Our materials varied one aspect of the scenario. For half of the judges, the immigrant was a father, who wanted to work in the United States to earn money to care for his seriously ill daughter. For the other half of the judges, the immigrant was in the United States to track down an individual who had stolen proceeds from a drug cartel. We presented these materials to 508 judges in six groups: 64 newly appointed U.S. magistrate judges; 36 federal court judges serving in the Ninth Circuit who were attending a judicial training conference; 80 state and federal appellate judges attending a national conference in Orlando; 86 newly appointed New York trial judges; and 242 Ohio judges. The judges were more likely to rule against the defendant identified as being involved with drug gangs than as a father.[104]

Politics influenced the judges' rulings in this scenario. Across all groups and the two conditions, 56% of the Republicans and 47% of the Democrats ruled against the defendant. This difference was marginally significant.[105] Table 4C-1 shows that the Republicans were only slightly less motivated by sympathy than the Democrats. The interaction between party and condition was not significant.[106]

104. *Id.* at 877–80.

105. Fisher's Exact Test, $p = 0.09$.

106. Logistic regression of the decision on party, identity of the defendant, and an interaction revealed that the interaction was not significant ($z = 0.45$, $p = 0.65$).

TABLE 4C-1: PERCENT RULING AGAINST THE DEFENDANT BY PARTY AND CONDITION (AND N)

Condition	Republicans	Democrats
Father	47% (98)	41% (116)
Killer	64% (105)	53% (122)
Total	56% (203)	47% (238)

Among the two groups of federal judges, we also asked for a sentence. We provided judges with the Federal Sentencing Guidelines recommendations, which varied depending upon their ruling on the issue of forgery. Judges who ruled in favor of the defendant sentenced within the Guidelines range of 0–6 months and those who ruled against the defendant sentenced within the Guidelines range of 6–12 months. Table 4C-2 below provides the averages by party. Overall, the Republicans sentenced somewhat more harshly, but neither party nor any interaction term was significant.[107]

TABLE 4C-2: AVERAGE SENTENCE BY PARTY, CONDITION, AND RULING (AND N)

Condition		Republicans	Democrats
Father	Favor	3.8 (6)	2.6 (13)
	Disfavor	5.8 (4)	4.8 (16)
Killer	Favor	6.0 (3)	4.9 (14)
	Disfavor	8.6 (7)	7.9 (21)
Total		6.2 (20)	5.4 (64)

107. ANOVA with main effects of party, identity of defendant, judge's ruling, and all interactions revealed $F(1, 76) = 2.41$, $p = 0.13$ for the main effect and all interaction terms F's below 0.10, p's > 0.80.

D. Truth in Sentencing

Several jurisdictions have adopted statutes that require judges be informed of the cost to the state of a criminal sentence before they impose it.[108] This reform is intended to reduce sentences. To determine whether this reform actually has that effect, we created a sentencing scenario for judges.[109] We varied the crime: in one case it was possession of a controlled substance (a nonviolent offense that should merit a relatively modest sentence), and in the other a brutal sexual assault. We also varied the information about the cost of incarceration, providing either no information, information suggesting the cost was fairly low ($15,000 per year), or information suggesting the cost was fairly high ($31,000 per year).

We gave this scenario to a group of 133 trial judges attending the American Judges' Association conference in Denver. These judges hailed from over two dozen different states. We found, paradoxically, that providing information about the cost of the sentence had no effect on the minor crime, but a big effect on the sexual assault case. In the latter, judges were cost sensitive and imposed shorter sentences when the materials indicated that the cost was high.

Politics had little effect on the sentences in this study. As Table 4D shows, Republicans sentenced the drug offender to 2.5 years, as compared to 2.9 years among the Democrats. In the sexual assault case, Republicans sentenced the defendant to 12.9 years, on average, as opposed to 15.4 years among the Democrats. In effect, the Democrats tended to sentence more harshly, although neither difference was significant.[110] Although Table 4D reveals a tendency for Republicans to be more cost sensitive than Democrats, the interaction between politics and the experimental variation in cost information was not significant in either case.[111]

108. Rachlinski et al., *Attention*, *supra* note 27, at 1592–93.

109. *Id.* at 1594–95.

110. In the drug case, $t(53) = 0.61$, $p = 0.31$, and in the sexual assault case, $t(55) = 1.42$, $p = 0.16$.

111. ANOVA with main effects of party and information on sentence cost, which revealed that the interaction was not significant: $F(2, 49) = 1.67$, $p = 0.20$ for the drug case, and $F(2, 51) = 0.88$, $p = 0.42$ in the sexual assault case. The sample of Republicans was modest, especially once they were divided into three conditions. Thus, our ability to detect any interaction was weak.

TABLE 4D: AVERAGE SENTENCE BY PARTY, CRIME, AND COST INFORMATION (AND N)

Condition		Republicans	Democrats
Drug	None	2.4 (5)	1.9 (8)
	Low	1.8 (11)	3.4 (11)
	High	4.5 (4)	3.0 (16)
	Total	2.5 (20)	2.9 (35)
Rape	None	15.9 (7)	16.8 (12)
	Low	18.0 (3)	16.9 (13)
	High	8.5 (8)	15.4 (14)
	Total	12.9 (18)	15.4 (39)

E. Manslaughter Case

In a study using the same judges as in the truth-in-sentencing experiment, we tested the influence of scaling on sentencing decisions. That is, we asked judges to sentence a defendant who had been convicted of manslaughter either using months or years.[112] The materials provided details concerning the crime and the defendant's background and criminal history. We found, surprisingly, that judges imposed sentences that were 40% shorter when using months than when using years.

As Table 4E shows, Republicans and Democrats imposed roughly identical sentences, on average.[113] The interaction between party and scale was also not significant.[114]

112. Rachlinski et al., *Numeric Judgments*, *supra* note 27, at 714–15.

113. $t(110) = 0.10, p = 0.92$.

114. ANOVA with main effects of party and scale, which revealed that their interaction was not significant. $F(1, 107) = 0.01, p > 0.9$.

TABLE 4E: AVERAGE SENTENCE (IN YEARS) BY PARTY AND CONDITION (AND N)

Condition	Republicans	Democrats
Months	5.7 (18)	5.6 (32)
Years	9.5 (20)	9.4 (42)
Total	7.7 (38)	7.8 (74)

F. Sentencing Two Defendants

Does the order in which defendants are sentenced influence judges' sentences? We hypothesized that judges might anchor their sentences to the sentence they had imposed in the previous case. To test this we asked state trial judges in Arizona, military judges, and Dutch judges to sentence two defendants back to back: one convicted of threatening with a weapon and the other with manslaughter.[115] We did not ask the military (or Dutch) judges to identify their political orientation, so we only analyze the 39 Arizona judges here. We found that the order influenced judges: when sentencing the lesser crime first, the judges imposed shorter sentences for the more serious crime; when they sentenced the more serious crime first, they imposed longer sentences on the lesser crime.

As Table 4F shows, politics seemed not to influence the judges. The average sentence imposed by Republicans was nearly identical to that imposed by Democrats.[116] The interaction between party and order was not significant in the threat case,[117] but a trend for an interaction emerged in the manslaughter case. The Democrats seemed to be influenced by anchoring in that they imposed shorter sentences on the manslaughter defendant after sentencing the defendant in the less serious case. Republicans, however, showed the opposite trend. The interaction of sentence order and political party approached significance.[118]

115. Rachlinski et al., *Numeric Judgments*, *supra* note 27, at 727–29.

116. The differences were not significant. For the threat case, $t(35) = 0.93$, $p = 0.36$, and for the manslaughter case, $t(35) = 0.22$, $p = 0.83$.

117. ANOVA with main effects of party and order, which revealed that their interaction was not significant. $F(1, 33) = 1.33$, $p = 0.25$.

118. $F(1, 33) = 2.80$, $p = 0.10$.

TABLE 4F: AVERAGE SENTENCE BY PARTY, CRIME, AND CONDITION (AND N)

Condition		Republicans	Democrats
Threat	Threat 1st	0.50 (7)	0.56 (9)
	Threat 2nd	0.95 (10)	0.70 (11)
	Total	0.76 (17)	0.64 (20)
Manslaughter	Threat 1st	8.5 (7)	9.4 (9)
	Threat 2nd	9.6 (10)	8.7 (11)
	Total	9.1 (17)	9.0 (20)

We have no theory as to why the Democrats reacted differently to our experimental manipulation. When sentencing for the more serious crime, the Republicans expressed a contrast effect,[119] in which sentencing the less serious case made the more serious case look worse, while Democrats expressed an anchoring effect. The prospect that judges of different political orientations exhibit different approaches to sequential sentencing is intriguing, if unexplained. Given the small sample size, however, and the fact that the trend only approached significance, it could simply be an aberration. That said, we also observed a difference in how numeric anchors influenced Republicans and Democrats in one of the civil damage scenarios, which is described below.[120]

G. Summary of Sentencing

Across nine different sentencing scenarios, two produced a statistically reliable difference based on the political ideology of the judges—the threat to a judge and the juvenile robbery—and one a marginally significant effect—the immigration scenario. Two showed

119. The contrast effect consists of improving the evaluation of a target by the addition of an inferior distractor. *See* Rachlinski et al., *Attention*, *supra* note 27, at 1597 (describing the contrast effect). We have found that in some contexts, judges exhibit a contrast effect. *Id.* at 1597–1604; *see also* Adi Leibovitch, *Punishing on a Curve*, 11 NW. U. L. REV. 1205 (2017) (showing that trial judges in Pennsylvania exhibit a contrast effect in sentencing decisions).

120. *See infra* note 137 and accompanying text.

trends in the opposite direction and the rest were close, but on average, the Republicans sentenced more severely. Overall, the combined results show an aggregated weighted (by sample size) Cohen's *d* of 0.19. The result is similar to that of criminal verdicts. In effect, the Republican judges sentenced defendants to one-fifth of a standard deviation more than Democrats.

TABLE 4G: AVERAGE SENTENCING RESULTS BY PARTY AND SCENARIO (AND N)

Scenario	Republican	Democrat	Republican Minus Democrat	*p*-value	Cohen's *d*
Juvenile Shoplifting*	2.48 (31)	2.30 (98)	0.18	0.31	0.18
Juvenile Robbery*	5.32 (31)	4.83 (98)	0.49	0.05	0.46
Threat to Judge	2.73 years (66)	2.08 years (46)	0.65	0.02	0.47
Immigration	56% (203)	47% (238)	9%	0.09	0.20
Drug	2.5 years (20)	2.9 years (35)	-0.4	0.31	-0.16
Rape	12.9 years (18)	15.4 years (39)	-2.5	0.16	-0.38
Manslaughter	7.7 years (38)	7.8 years (74)	-0.1	0.92	-0.02
Threat	0.8 years (17)	0.6 years (20)	0.2	0.36	0.31
Manslaughter	9.1 years (17)	9.0 years (20)	0.1	0.83	0.07

* On a seven-point scale

VI. CIVIL CASES

Civil justice issues have their own political cast. The two major parties take different approaches to civil justice, with Republicans persistently calling for limitations on tort liability, which Democrats consistently oppose. This division has spilled over into judicial politics. In Texas in the early 1990s, for example, business interests began

backing candidates for the Texas Supreme Court whom they felt were less amenable to the interests of injured tort plaintiffs.[121] To be sure, the outcome of civil cases would not necessarily have a political cast. Political attitudes of the judges are, for example, unlikely to influence most lawsuits between businesses. But many areas of law implicate political attitudes. We have conducted several experiments in which we requested that judges provide damage awards and report them below.

A. Civil Rights

A lawsuit involving a constitutional violation would seem likely to divide judges along political fault lines. Republican politicians tend to disfavor lawsuits against the government, particularly when they are directed at law enforcement. Judicial decisions might reflect this attitude as well.

A scenario that we gave to 231 Minnesota judges tests this concern. The materials described a lawsuit by an individual challenging a blanket strip search policy adopted by a municipality's jail.[122] The plaintiff challenged the constitutionality of the policy.[123] We varied two aspects of the case. First, the plaintiff was identified either as a person accused of armed robbery ("thug"), who had a lengthy criminal record, or a female student ("coed") who had been arrested while protesting tuition increases at her college. Second, the plaintiff brought the suit either for injunctive relief or as a class action. The decision is essentially the same in all conditions, in that any ruling in favor of the plaintiff would end the jail's policy. We nevertheless found that the judges were more favorably disposed to the coed than the thug, although less so when the case was identified as a class action.[124]

As Table 5A shows, Republicans and Democrats did not differ in their analysis of this case. Among the Republicans, 61% granted the

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121. *See* Sam Gwynne et al., *Tort Reform in Texas: "Rove's Genius at Work,"* PBS: FRONTLINE (Apr. 12, 2005), http://www.pbs.org/wgbh/pages/frontline/shows/architect/texas/tort.html [https://perma.cc/5R6B-NY5V] (discussing the factors and forces motivating tort reform efforts in Texas).

122. Wistrich et al., *supra* note 27, at 883–85.

123. At the time we conducted this study, the issue was governed by the holding in *Bell v. Wolfish*, 441 U.S. 520, 538–39 (1979), which held that the constitutional rights of prisoners could be restricted based on only legitimate institutional needs and objectives. Subsequently, the Supreme Court altered its approach in *Florence v. Board of Chosen Freeholders*, 566 U.S. 318, 330–35 (2012), holding that even persons arrested for minor offenses or traffic violations may be subject to a strip search before being introduced into the general population of a jail.

124. When the case was brought as an individual proceeding, 84% of the judges assessing the suit by the coed found in her favor, as opposed to only 50% for the thug. When the case was brought as a class action, the gap narrowed to 65% and 51%, respectively. Wistrich et al., *supra* note 27, at 885.

plaintiff relief, as compared to 64% of the Democrats. This difference was not significant.[125] Although Table 5A reveals a few minor variations (with a notably low rate of finding for the plaintiff among the Republicans reviewing the thug suing individually), a full analysis revealed that these are illusory—none of these interactions were significant.[126]

TABLE 5A: PERCENT RULING FOR THE PLAINTIFF BY PARTY AND CONDITION (AND N)

Condition		Republicans	Democrats
Injunction	Thug	33% (12)	55% (29)
	Coed	86% (14)	88% (32)
Class Action	Thug	54% (13)	43% (35)
	Coed	67% (12)	70% (37)
Total		61% (51)	64% (133)

B. Punitive Damages

Punitive damages also divide the political parties. Republicans tend to view them as unnecessary and typically unreasonably high, or at least erratic, while Democrats view the availability of punitive damages as a necessary constraint on business excesses. In actuality, punitive damages are typically only awarded for intentional torts, such as fraud or battery,[127] but the potential for awards in business cases nevertheless inspires concern that is perhaps disproportionate to their impact.

To evaluate the role of politics in judicial determinations of punitive damages, we analyzed a scenario in which we asked judges to

125. Fisher's Exact Test, $p = 0.71$.

126. This analysis was conducted with a logistic regression on party, identity of the plaintiff, procedure, all two-way interactions, and the three-way interaction. The interaction between party and the identity of the plaintiff was not significant ($z = 0.63$, $p = 0.52$); the interaction between party and form of either lawsuit was also not significant ($z = 1.38$, $p = 0.17$); and finally the three-way interaction between party, identity of the defendant, and form of the lawsuit was not significant ($z = 0.89$, $p = 0.37$).

127. *See* Theodore Eisenberg et al., *Juries, Judges, and Punitive Damages: An Empirical Study*, 87 CORNELL L. REV. 743, 749 tbl.1 (2002) (reporting that punitive damages tend to be awarded mostly in cases of intentional torts).

consider awarding punitive damages to an injured plaintiff in a business setting.[128] Our scenario described a midsized company in which the owner (and CEO) dumped hazardous waste in a nearby lake, rather than pay to have it disposed of properly. The materials indicated that the lake was on a farm owned by the plaintiff, who was badly injured when he was exposed to the chemicals while swimming. The materials asked judges whether an award of punitive damages was appropriate, and if so how much they would award.[129] Our primary interest in this scenario was whether judges would treat an out-of-state litigant differently than an in-state litigant. Hence, we varied the defendant's state of residence. The judges awarded punitive damages to a plaintiff from their state against either an out-of-state defendant or an in-state defendant. We gave this scenario to state judges from Minnesota (115), Ohio (116), and New Jersey (157).[130] Judges punished the out-of-state defendant more harshly than the in-state defendant.[131]

Although the data show a trend for Democrats to award more than Republicans, this trend was not significant.[132] Nor did the effect of politics interact with the defendant's home state.[133]

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128. Wistrich et al., *supra* note 27, at 894–95.

129. All but 21 of 371 judges who answered this question agreed that punitive damages were appropriate. We scored these judges as if they had awarded $0. *Id.* at 896.

130. In Minnesota and Ohio, the plaintiff was from Minnesota and Ohio, respectively, while the defendant was from Wisconsin (for Minnesota judges) or Michigan (for Ohio judges). Hence the lawsuit was either a wholly in-state matter, or was targeted against an out-of-state defendant by an in-state plaintiff. In New Jersey, the lawsuit was either by a New Jersey plaintiff against a Pennsylvania defendant, or by a Pennsylvania plaintiff against a New Jersey defendant. *Id.* at 895–96.

131. *Id.* at 897.

132. Using the Mann-Whitney U test, $z = 1.33$, $p = 0.18$. Damage awards tend to be positively skewed, violating statistical assumptions of normality, and our data are no exception. In all cases of damage awards in this Article, we conduct a nonparametric test on the main effect of party, using the Mann-Whitney U test. We also transformed the awards using the square root to perform parametric tests. We follow this procedure for all cases involving damage awards. The transformed averages of these two groups did not differ significantly. $t(304) = 1.41$, $p = 0.16$.

133. ANOVA with main effects of party, defendant's location, and their interaction on the square root of the awards revealed that the interaction was not significant. $F(1, 286) = 1.12$, $p = 0.60$.

TABLE 5B: MEDIAN AWARD BY PARTY, STATE, AND CONDITION (AND N), IN $1,000S

Condition		Republicans	Democrats
Minnesota	In state	$1,000 (12)	$1,000 (29)
	Out of state	$1,000 (16)	$2,000 (31)
Ohio	In state	$1,000 (22)	$1,000 (31)
	Out of state	$1,000 (18)	$1,250 (24)
New Jersey	In state	$1,500 (32)	$1,000 (30)
	Out of state	$1,500 (17)	$2,000 (45)
Total		$1,000 (117)	$1,500 (190)

C. Tort Injury #1

As part of our effort to determine whether judges can reliably assign damage awards, we crafted a personal-injury scenario in which a package-delivery truck injured a plaintiff in a traffic accident.[134] The scenario described moderate injuries, which we intended to be worth roughly $50,000. For half of the judges, the scenario also stated that a new damage cap of $750,000 applied to the case, as an effort to test whether this cap would have the paradoxical effect of pulling damage awards upwards. We gave the scenario to 65 newly elected New York State judges and found that it did.[135]

Table 5C shows that the median award among Republicans was $100,000, as compared to $150,000 among Democrats. This difference, however, was not significant.[136]

134. Rachlinski et al., *Numeric Judgments*, *supra* note 27, at 721–23.

135. *Id.* at 722.

136. Using the Mann-Whitney U test, $z = 0.52$, $p = .60$. The transformed data likewise showed no significant effect. $t(304) = 0.90$, $p = 0.37$.

TABLE 5C: MEDIAN AWARD BY PARTY AND CONDITION (AND N), IN THOUSANDS ($)

Condition	Republicans	Democrats
No Damage Cap	$100 (9)	$50 (19)
Damage Cap	$75 (7)	$250 (22)
Total	$100 (16)	$150 (41)

As Table 5C suggests, the damage cap had a different effect on Republicans than on Democrats. The damage cap notably increased the awards among the Democratic judges, but had essentially no effect on the Republicans. The difference between the two reactions was significant.[137] The result is puzzling. Although one might suspect that the Republicans in New York might think of the cap as a signal to reduce their awards, damage caps can operate as numeric anchors. Even anchors that people think of as uninformative influence judgment,[138] so the cap should have influenced the Republicans and Democrats alike. And yet it did not.

D. Tort Injury #2

Having found in many studies that even arbitrary numeric estimates influence judges, we sought to study whether we could inoculate judges against the pernicious influence of anchoring. We used a scenario similar to the one we used in the Tory Injury #1 experiment, although we described a much more severe injury, meant to be worth nearly seven figures.[139] To create an anchoring effect, the scenario stated that the plaintiff testified that he had recently seen a tort victim win an award on "a court television show." The plaintiff either testified that he had seen the victim win a small award, no award, or a huge award. We collected this data with a group of 242 Ohio trial judges. Previous research showed that this manipulation had a large influence on judges,[140] and the same occurred in this replication. For half of the judges, we also added an inoculant (a description of other, more

137. ANOVA with main effects of party damage cap, and an interaction revealed that the interaction was significant. $F(1, 53) = 6.14$, $p = 0.02$.

138. Rachlinski et al., *Numeric Judgments*, *supra* note 27, at 702–03 (reviewing that even absurd numeric reference points influence numeric judgments).

139. *Id.* at 731–33.

140. Guthrie et al., *supra* note 18, at 1502–06.

reasonable tort awards) meant to blunt the influence of the anchor. The inoculant was partly successful, although it increased awards overall.

Table 5D describes the results, broken down by the six conditions. Although the Democrats awarded more than the Republicans, this trend only approached significance.[141] The judges' political attitudes did not interact with the anchor, the inoculant, or the interaction of the two.[142]

TABLE 5D: AVERAGE AWARD BY PARTY AND CONDITION (AND N), IN THOUSANDS ($)

Condition		Republicans	Democrats
No Inoculant	Low Anchor	$560 (25)	$275 (8)
	No Anchor	$750 (18)	$600 (14)
	High Anchor	$1,000 (15)	$1,000 (15)
Inoculant	Low Anchor	$750 (24)	$750 (16)
	No Anchor	$1,000 (23)	$1,525 (12)
	High Anchor	$1,000 (23)	$1,200 (15)
Total		$750 (128)	$1,000 (80)

This study failed to replicate the interaction between party and anchor we found in the Tort Injury #1 experiment. That suggests either that the previous results are anomalous or that the interaction was a product of the source of the anchor—which was damage caps in the previous study and irrelevant testimony in this study.

E. Tort Injury #3

As part of an effort to examine the effect of apologies on judges, we created a scenario in which a plaintiff was injured when a defendant pulled a lawn chair out from under her as she was about to sit down.[143]

141. Using the Mann-Whitney U test, $z = 1.46$, $p = 0.14$. The transformed data likewise showed no main effect. $t(207) = 1.38$, $p = 0.17$.

142. ANOVA with the main effects of party, anchor, inoculant, and all interactions revealed that none of the interactions were significant: party by anchor, $F(2, 196) = 0.81$, $p = 0.45$; party by inoculant, $F(1, 196) = 1.24$, $p = 0.27$; the three-way interaction, $F(2, 196) = 0.15$, $p = 0.86$.

143. Rachlinski et al., *Contrition*, *supra* note 27, at 1212–13.

The scenario varied whether the plaintiff apologized to the victim or not, and whether the plaintiff's actions were intentional (as a prank) or merely negligent (due to intoxication). We found little influence of either variation among the 101 Florida trial judges who reviewed this scenario.[144]

Table 5E reports the results, broken down by condition. It shows little influence of politics. The overall median award was identical between the two groups of judges,[145] and no interactions between political attitudes and conditions were significant.[146]

TABLE 5E: MEDIAN AWARD BY PARTY AND CONDITION (AND N), IN THOUSANDS ($)

Condition		Republicans	Democrats
Negligent	No Apology	$175 (12)	$250 (7)
	Apology	$50 (6)	$100 (7)
Intentional	No Apology	$125 (12)	$100 (8)
	Apology	$175 (8)	$150 (11)
Total		$100 (43)	$100 (33)

F. Tort Injury #4

In a further effort to study the influence of apologies on trial judges, we wrote a products liability scenario involving a plaintiff injured by a defective saw.[147] The materials indicated that the CEO of the manufacturer either apologized or did not at a settlement conference. We gave this scenario to 124 U.S. magistrate judges and district judges at a series of four conferences. We asked the judges to suggest an appropriate settlement for damages to compensate the plaintiff for pain and suffering.

As Table 5F below shows, the judges' political attitudes had little effect on their awards. The median award among Democrats was

144. *Id.* at 1213.

145. Using the Mann-Whitney U test, $z = 0.22$, $p = 0.83$. The transformed data are also not significant. $t(74) = 1.03$, $p = 0.30$.

146. ANOVA on the square root with main effect of party, intention, apology, and all interactions revealed that no effects were significant (Fs < 1.00, p's > 0.30).

147. Rachlinski et al., *Contrition*, *supra* note 27, at 1209–30.

$50,000 higher than that of Republicans, but that difference was not significant, although there was a marginally significant trend on the transformed data.[148] Although the medians were identical, the full range among the Republicans seemed more compressed than among the Democrats. The 25th percentile award among the Republicans was $100,000 as compared to $150,000 among the Democrats, and the 75th percentile award was $500,000 among the Republicans as compared to $750,000 among the Democrats. The interaction between the apology and the judge's political orientation was not significant.[149]

TABLE 5F: MEDIAN AWARD BY PARTY AND CONDITION (AND N), IN THOUSANDS ($)

Condition	Republicans	Democrats
No Apology	$250 (25)	$200 (35)
Apology	$350 (24)	$300 (32)
Total	$250 (49)	$250 (67)

G. Summary of Civil Cases

As presented in Table 5G, across all six civil cases, Democrats favored the plaintiffs more than Republicans did. None of the scenarios demonstrated a significant effect of political attitude on awards, although one yielded a marginally significant effect. Aggregating across all of the six scenarios suggests a modest effect.

Despite a series of null results, the overall pattern supports the view that Democrats are more inclined to rule in favor of plaintiffs than are Republicans. The average effect size weighted by sample size across the six scenarios was 0.20 (Cohen's *d*). In essence, the Democrats awarded one-fifth of a standard error more in damages than Republicans across the scenarios.

148. Using the Mann-Whitney U test, $z = 1.33$, $p = 0.18$. The transformed data show a marginally significant trend. $t(74) = 1.92$, $p = 0.06$.

149. $F(1, 112) = 0.10$, $p = 0.75$.

TABLE 5G: MEDIAN AWARDS BY PARTY AND SCENARIO (AND N) IN THOUSANDS ($)

Scenario	Republican	Democrat	Democrat Minus Republican	*p*-value*	Cohen's *d*
Civil Rights**	61% (51)	64% (123)	3%	0.71	0.07
Punitive Damages	$1000 (117)	$1500 (190)	$500	0.16	0.16
Tort Injury #1: Damage Cap	$100 (16)	$100 (41)	$0	0.37	0.24
Tort Injury #2: Debiasing	$750 (128)	$1000 (80)	$250	0.17	0.19
Tort Injury #3: BBQ	$100 (43)	$100 (33)	$0	0.30	0.24
Tort Injury #4: Handsaw	$250 (49)	$250 (67)	$0	0.06	0.45

*Reports the Fisher's Exact Test for the civil rights case, and the result of the t-tests on the transformed awards for the other scenarios.
** Percent finding for plaintiff

CONCLUSION

In our research to date, political attitudes have exhibited a weak effect on judicial decisionmaking. Although some of our experiments revealed a tendency for judges to decide cases in a manner consistent with their political ideology, only a handful yielded statistically reliable differences. The aggregated results for bankruptcy judges, for conviction decisions, for sentencing, and for civil damage awards were all modest. Somewhat surprisingly, political ideology did not affect the judges' resolution of criminal pretrial motions. Thus, these results dovetail reasonably well with those of political scientists. But the effect of political ideology we observed was uneven and generally quite modest, thereby suggesting that the influence of political ideology on trial court judges is small.

Given the modest effect we found, it is not surprising that judges do not detect the role of political ideology in their decisionmaking. Only when large numbers of decisions are aggregated does the impact of

political ideology become clear. Furthermore, our materials might exaggerate the effect of political ideology because we crafted the scenarios so as to produce close cases. Most cases might be much easier, further diluting any influence of political ideology. The variations in cases that should affect their results likewise are apt to hide any influence of political orientation on judges. When judges search their experience for evidence of the influence of their political attitudes, it is small wonder that they find little support.

Is the level of political influence present in these data a worrisome source of inequity in the courtroom? We think not. It is a modest effect that is likely swamped by normatively appropriate factors in most circumstances. The psychological phenomena that these scenarios were designed to assess exerted more influence on the judges than their political orientation did. Judges are human beings with political attitudes, but the facts and law presented in individual cases are a much bigger influence on their judgment.

APPENDIX A: DEMOGRAPHICS

This appendix reports the demographic characteristics of the judges who participated in this research, broken out by section of the paper. In all cases, we report the percentage of judges who identified themselves as Republicans, along with the number of judges who answered the question on politics. Judges who identified themselves as "independent" or "neither" are scored as missing data. We also report the percentage who were female and the number who answered that question. Finally, we report the average years of experience and number who answered that question; for new judges (New York), we did not ask about experience and report it as zero.

TABLE A1: BANKRUPTCY JUDGES

Scenario	Judges (and n)	% Republican	% Female	Experience
Cramdown Student Loan Credit Card v1	Bankruptcy Judges, 2004 (113)	23	27	11.0
Credit Card v2 Personal Bankruptcy	Bankruptcy Judges, 2013 (201)	23	37	11.2

TABLE A2: CRIMINAL MOTIONS

Scenario	Judges (and n)	% Republican	% Female	Average Years of Experience
Probable Cause; Rock Concert	Ohio, 2009* (130)	62	20	14.2
Probable Cause; Injured Driver	Federal district judges, 2004 (81)**	57	22	11.3
	Federal magistrate judges, 2004 (43)	15	21	10.0
	Florida, 2004 (101)	56	21	14.4
Probable Cause; Feeing Suspect	Florida, 2006 (154)	58	23	13.7
Search and Seizure Case	Nevada (103)	41	42	9.3
	New York (65)	26	35	New (0)

* This scenario was given to half of the judges in attendance; demographics reported herein reflect the entire sample.

** These judges attended one of three educational conferences organized by the Federal Judicial Center in Philadelphia (27 judges), Chicago (16 judges), or Seattle (38 federal district judges and 1 federal magistrate judge), all in 2004.

TABLE A3: CONVICTION RATES

Scenario	Judges (and n)	% Republican	% Female	Average Years of Experience
Battery	Eastern city, 2005 (70)	13	44	9.8
	Western county, 2006 (45)	36	33	10.8
	State-wide conference, 2007 (18)	35	50	9.3
Robbery*	California, 2006 (88)	41	28	10.5
DNA	See Table A2, (Ohio 2009 and California 2006)	—	—	—

* Federal district court judges, federal magistrate judges, and Florida (2004) judges reported in Table A2 above also participated in this study.

TABLE A4: SENTENCING

Scenario	Judges (and n)	% Republican	% Female	Average Years of Experience
Juveniles	See Table A3, Battery	—	—	—
Threat	Ohio, 2009 (120)*	62	20	14.2
Immigration	Federal magistrate judges, 2009, 2010 (64)	128	30	New
	Ninth Circuit trial judges, San Diego, 2008 (36)	15	47	10.7
	Appellate judges, Orlando 2009 (80)	38	25	Not available
	New York, 2010, 2014 (86)	30	31	New
	Ohio, 2009 (242)	62	20	14.2
Drug & Rape	Denver, 2010 (133)	33	29	13.0
Manslaughter	Denver, 2010 (133)	33	29	13.0
Threat & Manslaughter	Arizona, 2011 (39)	46	39	11.5

* This scenario was given to half of the judges in attendance; demographics reported herein reflect the entire sample.

TABLE A5: CIVIL CASES

Scenario	Judges (and n)	% Republican	% Female	Average Years of Experience
Civil Rights	Minnesota, 2010 (231)	28	28	13.8
Punitive Damages	Minnesota, 2010 (115)	32	29	13.8
	Ohio, 2013 (116)	41	53	13.0
	New Jersey, 2011 (157)	39	26	12.4
Tort #1	New York 2013 (65)	26	35	New
Tort #2	Ohio, 2009 (242)	62	20	14.2
Tort #3	Florida, 2004 (101). See Table A2	—	—	—
Tort #4	Federal district judges, 2004 (81). See Table A2	—	—	—
	Federal magistrate judges, 2004 (43). See Table A2	—	—	—

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