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Precise Punishment: Why Precise Punitive Damage Requests Result in Higher Awards Than Round Requests

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PRECISE PUNISHMENT: WHY PRECISE PUNITIVE DAMAGE REQUESTS RESULT IN HIGHER AWARDS THAN ROUND REQUESTS

*Michael Conklin**

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I. INTRODUCTION

Imagine a setting where someone asks two people what the temperature is outside. The first person says it is 80 °F, while the second person says it is 78.7 °F. Research regarding precise versus round cognitive anchoring suggests that the second person is more likely to be believed.¹ This is because it is human nature to assume that if someone gives a precise answer, he must have good reason for doing so.² This principle remains constant in a variety of settings, including used car negotiations,³ eBay transactions,⁴ and estimating the field goal percentage of a basketball player.⁵

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1. See, e.g., Malia F. Mason, Alice J. Lee, Elizabeth A. Wiley & Daniel R. Ames, *Precise Offers are Potent Anchors: Conciliatory Counteroffers and Attributions of Knowledge in Negotiations*, 49 J. EXPERIMENTAL SOC. PSYCH. 759 (2013).

2. See *id.* at 762.

3. See David D. Loschelder, Johannes Stuppi & Roman Trotschel, “€14,875?!”: *Precision Boosts the Anchoring Potency of First Offers*, 5 SOC. PSYCH. & PERS. SCI. 491, 491 (2013).

This Article reports the results of a first-of-its-kind study involving over 600 participants designed to measure if this same principle applies to punitive damage requests from plaintiffs' attorneys. In other words, can a plaintiff's attorney increase the punitive damages awarded simply by requesting \$497,000 instead of \$500,000. The stark differences produced from such a subtle and costless change provide a valuable strategy for plaintiffs' attorneys, a cautionary warning for civil defense attorneys, and constructive insight into the subjective nature of juror decision-making.

II. LITERATURE REVIEW

A. *The Anchoring Effect Generally*

The cognitive heuristic known as the anchoring effect was first researched in the landmark 1974 paper by Nobel Prize-winning psychologists Amos Tversky and Daniel Kahneman.⁶ It is now a well-researched conclusion that higher initial offers in a negotiation result in higher final prices.⁷ This effect is attributed to cognitive anchoring, which is a behavioral bias whereby information a person is exposed to disproportionately affects a future decision.⁸ Anchoring reaches this result by changing the reference point that people use to make judgements.⁹ When an anchor is set, future judgements are made in relation to the anchor instead of being based on a neutral examination of the available evidence.¹⁰

For example, consider two people negotiating the price of a used car that is worth around \$8,000. If the seller makes the initial offer by stating he will sell it for \$10,000, this sets a high anchor for the negotiation. The buyer is likely to view a satisfactory final price based on how far it deviates down from the \$10,000 anchor. Therefore, a final price of \$8,000 is viewed as a great success

4. See Matthew Backus, Tom Blake & Steven Tadelis, *Cheap Talk, Round Numbers, and the Economics of Negotiation* (Nat'l Bureau of Econ. Rsch., Working Paper No. 21285, 2015), <https://www.nber.org/papers/w21285.pdf>.

5. Chris Janiszewski & Dan Uy, *Precision of the Anchor Influences the Amount of Adjustment*, 19 PSYCH. SCI. 121, 122 (2008).

6. See Amos Tversky & Daniel Kahneman, *Judgment Under Uncertainty: Heuristics and Biases*, 185 SCI. 1124, (1974).

7. See Loschelder, Stuppi & Trotschel, *supra* note 3, at 491 ("In negotiations, higher first offers from sellers drive up sale prices—reversely, buyers benefit from lower first offers. Whereas abundant research has replicated this robust anchoring effect of opening offers . . .").

8. Eva M. Krockow, *Outsmart the Anchoring Bias in Three Simple Steps*, PSYCH. TODAY: STRETCHING THEORY (Feb. 11, 2019), <https://www.psychologytoday.com/us/blog/stretching-theory/201902/outsmart-the-anchoring-bias-in-three-simple-steps> (defining cognitive anchoring as "the automatic processes of identifying available information to provide a focal point or a baseline for our judgement").

9. *Id.*

10. Tversky & Kahneman, *supra* note 6, at 1128.

because it is \$2,000 less than the anchor. Had the seller's initial offer been \$8,500, the negotiation would have been anchored to that number, and a final price of \$8,000 would be perceived as less satisfactory, as it is only \$500 less than the anchor.

The anchoring effect is present in various situations in the legal field. Because civil damage awards are often the result of complex, non-standard decisions, there is an increased risk that juries will rely on cognitive heuristics when reaching their verdicts.¹¹ This often results in systemic biases such as anchoring, in which the plaintiff's attorney's request greatly influences the jury's award regardless of the facts of the case.¹² A 1990 mock jury study presented participants with a civil case summary and one of three damage requests by the plaintiff's attorney.¹³ The requests were either \$10,000, \$75,000, or \$150,000.¹⁴ The results demonstrated that the mock jurors were heavily anchored to the plaintiff's attorney's request. Average awards were \$18,000, \$62,800, and \$101,400, respectively.¹⁵ A later 1996 study confirmed this same anchoring effect on personal injury awards. Simply put, for both punitive and compensatory damages, the more the plaintiff's attorney asks for, the more the jury awards.¹⁶

Juror's lack of legal experience places them at a heightened risk of succumbing to the anchoring effect.¹⁷ But even judges, who routinely make legal judgments and possess high levels of education¹⁸ are not immune from the an-

11. See generally Michael J. Seitz, Nikolai W. F. Bode & Gerta Koster, *How Cognitive Heuristics Can Explain Social Interactions in Spatial Movement*, 13 J. ROYAL SOC'Y INTERFACE 1, 1 (2016) (defining a cognitive heuristic as a mental shortcut that allows one to make a decision without the time-consuming task of finding the optimal solution, noting that the common practice of its use faces a complex cognitive task, and noting that the practice often leads to systematic biases such as anchoring).

12. Gretchen B. Chapman & Brian H. Bornstein, *The More You Ask for, the More You Get: Anchoring in Personal Injury Verdicts*, 10 APPLIED COGNITIVE PSYCH. 519, 522 (1996).

13. Allan Raitz, Edith Greene, Jane Goodman & Elizabeth F. Loftus, *Determining Damages: The Influence of Expert Testimony on Jurors' Decision Making*, 14 L. & HUM. BEHAV. 385, 387 (1990) (citing J.J. Zuehl, *The Ad Damnum, Jury Instructions, and Personal Injury Damage Awards* (Aug. 4, 1982) (unpublished manuscript) (on file with the University of Chicago Law Review)).

14. *Id.*

15. *Id.*

16. See Neal R. Feigenson, *Can Tort Juries Punish Competently?*, 78 CHI.-KENT L. REV. 239, 266 (2003) (punitive damages); Raitz, Greene, Goodman & Loftus, *supra* note 13, at 387 (citing Zuehl, *supra* note 13) (noting that for compensatory damages, when the request was varied from \$10,000 to \$75,000 to \$150,000, the mock jurors awarded \$18,000, \$62,800, and \$101,400 respectively).

17. See generally Seitz, Bode & Koster, *supra* note 11.

18. Keith E. Stanovich & Richard F. West, *On the Relative Independence of Thinking Biases and Cognitive Ability*, 94 J. PERSONALITY & SOC. PSYCH. 672 (2008) (finding that cognitive ability is largely not correlated to the ability to successfully avoid biases such as cognitive anchoring).

choring effect.¹⁹ A 2001 study found that a judge's sentence in a criminal trial is significantly affected by the suggested sentence of the prosecutor.²⁰

Anchoring studies regarding non-legal subjects have found that anchors are effective even when they are blatantly absurd. One study asked students if they thought their textbook for a class would cost more or less than \$7,128.53, followed by a question asking them how much they predicted their textbook would cost.²¹ This resulted in significantly higher estimates than a group that was only asked to predict the cost of their textbook without the \$7,128.53 anchor.²² Similarly, a study asking people if the temperature in San Francisco was more or less than 558 °F, followed by asking them what they estimated the temperature to be, resulted in significantly higher estimates than a control group that was not anchored to 558 °F.²³

Even when participants are aware that the anchor point is completely arbitrary, it still biases their judgment. In the landmark Tversky and Kahneman anchoring study of 1974, one experiment had participants spin a large wheel numbered one through one hundred.²⁴ Participants were then asked to guess if the number of United Nations countries in Africa was greater than or less than this number.²⁵ Finally, they were asked to guess what the actual number of United Nations countries in Africa was.²⁶ Despite participants knowing that the initial number was random and therefore irrelevant to the correct answer, those whose spin resulted in a higher number had higher guesses as to the actual number of countries.²⁷

Subtle, irrelevant anchors have been shown to affect decisions in legal settings as well. A 2019 study demonstrated how jurors in a criminal case can be manipulated into rendering different sentences by simply including either large or small numbers into irrelevant details in a case study.²⁸ The study randomly

19. Chapman & Bornstein, *supra* note 12, at 521.

20. Birte Englich & Thomas Mussweiler, *Sentencing Under Uncertainty: Anchoring Effects in the Courtroom*, 31 J. APPLIED SOC. PSYCH. 1535, 1538–41 (2001) (finding that a suggested two-month sentence resulted in an average sentence of 18.78 months, while a suggested thirty-four-month sentence resulted in an average sentence of 28.7 months).

21. Chris Guthrie, Jeffrey J. Rachlinski & Andrew J. Wistrich, *Inside the Judicial Mind*, 86 CORNELL L. REV. 777, 788 (2001) (citing SCOTT PLOUS, *THE PSYCHOLOGY OF JUDGMENT AND DECISION MAKING* 146 (1993)).

22. *Id.*

23. *Id.* at 788–89 (citing PLOUS, *supra* note 21, at 146).

24. Tversky & Kahneman, *supra* note 6, at 1128.

25. *Id.*

26. *Id.*

27. *Id.* (To simplify the data set, the wheel was rigged to stop at either ten or sixty-five. For participants whose wheel stopped at ten, their average estimate as to how many United Nations countries were in Africa was twenty-five. For participants whose wheel landed on sixty-five, their average estimate was forty-five.)

28. Michael Conklin, *Combating Arbitrary Jurisprudence by Addressing Anchoring Bias*, 97 WASH. U. L. REV. ONLINE 1 (2019).

assigned one of two case summaries to mock jurors.²⁹ The high-number case summary mentioned Eighty-First Street, March 31st, and a forty-five-minute time period.³⁰ The low-number case summary mentioned First Street, March 2nd, and a three-minute time period.³¹ Despite all other facts in the case summaries being identical, mock jurors who read the high-number case summary returned sentences that were 31% higher than those in the low-number group.³²

B. *Precise Versus Round Anchors*

Cognitive anchoring is present in more situations than just when high initial numbers yield a higher end result. A 2013 study analyzed how the use of precise numbers (such as \$1,486), compared to round numbers (such as \$1,500), also elicited the anchoring effect.³³ The results of the study demonstrate that when a precise number is initially presented in a negotiation, the other side is more likely to assume the number is based on subject-matter knowledge compared to when a round number is initially presented.³⁴ Therefore, precise numerical expressions imply a greater level of knowledge than round numerical expressions. This causes recipients to believe that precise numerical expressions are more informative of the true value of the item being negotiated, regardless of whether they actually are.³⁵ This belief—that there is a good, objective reason for the precise, initial figure provided—results in counteroffers that deviate less from the original offer than when round numbers are initially used.³⁶

A 2008 study involving five experiments produced the same result and provided a more detailed explanation.³⁷ The study explained that adjustments away from the anchor point are viewed along a subjective representational scale.³⁸ The perceived “resolution” of this scale is affected by whether the anchor is a precise or round number.³⁹ Precise numbers function to create a more finely tuned scale than round numbers.⁴⁰ Therefore, deviations from the anchor appear to be more severe—i.e., moving through more tick marks on the imaginary

29. *Id.* at 4.

30. *Id.*

31. *Id.*

32. *Id.*

33. *See* Mason et al., *supra* note 1.

34. *Id.* at 762.

35. *Id.* at 759; *see also* Alexandra Jerez-Fernandez et al., *Show Me the Numbers: Precision as a Cue to Others' Confidence*, 25 PSYCH. SCI. 633, 633 (2013).

36. Mason et al., *supra* note 1, at 760.

37. Janiszewski & Uy, *supra* note 5.

38. *Id.* at 126.

39. *Id.*

40. *Id.*

scale—when a precise anchor is used.⁴¹ For example, a counteroffer of \$1,300 for an item listed at \$1,500 is likely to be perceived on a scale that utilizes \$100 increments. Therefore, on such a scale, this counteroffer is only two units lower than the initial asking price. Conversely, if the initial price was \$1,490, a perceived scale with \$10 increments would be utilized. Here, a \$1,300 counteroffer would be nineteen units lower than the initial asking price. While the latter counteroffer as a percent of the initial offer is objectively less, it is likely to be perceived as more extreme because of the more finely tuned scale used to view it.

A 2015 study found that eBay sellers who list items in multiples of \$100 receive offers that are 5% to 8% lower than similarly-situated sellers who use more “precise” values.⁴² The study concluded that round numbers are used as a “cheap-talk tool” by sellers to communicate to buyers that they are willing to reduce the price in order to make a sale.⁴³ Meaning, a seller who desires expediency over maximizing the sale price will list an item for \$200 instead of \$198.⁴⁴ The \$198 starting price would eventually lead to a higher sale price, but the \$200 listing price will receive offers sooner.⁴⁵

This precise number effect appears to have no limit. A 2014 study found that while moderately precise offers are more effective than round offers, highly precise offers are even more effective than moderately precise offers.⁴⁶ There is also strong evidence to suggest that the anchoring effects of precise numbers are present in many instances other than traditional buyer–seller negotiations. Studies have found that precise anchors result in higher responses than round anchors in a variety of categories. These include estimating the amount of protein in a beverage, cost of cheese, height of a car, life of a pen, and field goal percentage of a basketball player.⁴⁷

C. Punitive Damages

Punitive damages were selected as the numerical variable in this research because their inherently subjective nature is ideal for the anchoring. Punitive damages are damages awarded in civil cases beyond mere compensatory dam-

41. *Id.*

42. Backus et al., *supra* note 4 (noting that for the type of listings used in this study, eBay is less like an auction and more like a face-to-face negotiation in which a seller lists a product for a given price and potential buyers can make lesser best offers that the seller can then choose to accept or provide a counteroffer to).

43. *Id.* at 2.

44. *Id.* at 1.

45. *Id.*

46. Loschelder, Stuppi & Trotschel, *supra* note 3, at 496 (Consistent with other negotiation studies regarding precise offers, the authors concluded that increased precision in the initial offer likely enhances the perceived credibility and expertise of the person who made it. This in turn increases the potency of the anchoring effect of the initial offer.)

47. Janiszewski & Uy, *supra* note 5, at 122.

ages.⁴⁸ They are rare, occurring in only 6% of civil cases that result in a monetary award.⁴⁹ Their purpose is not to compensate the plaintiff but rather to punish the defendant and deter similar conduct in the future.⁵⁰ They require the defendant's conduct to be "outrageous, because of the defendant's evil motive or his reckless indifference to the rights of others."⁵¹ Therefore, punitive damages are inherently subjective. This subjective nature makes it difficult to provide meaningful jury instructions on the matter.⁵²

Notable punitive damage awards cases illustrate the inconsistent nature of how they are determined. In *Ammerman v. Ford Motor Company*,⁵³ the jury awarded \$58 million in punitive damages for the rollover problem in the Ford Bronco II.⁵⁴ This figure was arrived at by multiplying the 700,000 Bronco II sales by the \$83 per unit that Ford projected it would cost to address the rollover problem.⁵⁵ In a case involving a design defect in a 1979 Chevy Malibu, the jury based its \$4.8 billion punitive damage award on General Motors' advertising budget.⁵⁶ In *BMW v. Gore*,⁵⁷ the jury awarded \$4 million in damages due to BMW's practice of repainting cars damaged by acid rain and then selling them as new without notifying the customer.⁵⁸ This punitive damage award was based on the compensatory damages of \$4,000 per automobile times the 1,000 refinished BMW automobiles.⁵⁹ This lack of objectivity and inconsistent application have led some experts to refer to the determination of punitive damages as "voodoo economics."⁶⁰

The inconsistencies in punitive damages calculations are not limited to trial courts. Appellate court justices also apply dubious logic when they adjudicate on punitive damage awards. In the *BMW v. Gore* case, the Alabama Supreme

48. *Punitive Damages*, CORNELL L. SCH. LEGAL INFO. INST., https://www.law.cornell.edu/wex/punitive_damages (last visited Dec. 3, 2020).

49. Brian J. Ostrom et al., *A Step Above Anecdote: A Profile of the Civil Jury in the 1990s*, 79 JUDICATURE 233, 237–38 (1996).

50. Jennifer K. Robbenolt, *Determining Punitive Damages: Empirical Insights and Implications for Reform*, 50 BUFF. L. REV. 103, 110 (2002).

51. RESTATEMENT (SECOND) OF TORTS § 908(2) (AM. LAW INST. 1977).

52. Keith Schneider, *Exxon Is Ordered to Pay \$5 Billion for Alaska Spill*, N.Y. TIMES (Sept. 17, 1994), <https://www.nytimes.com/1994/09/17/us/exxon-is-ordered-to-pay-5-billion-for-alaska-spill.html> ("[I]t is difficult to give a jury meaningful standards to determine in money what will constitute punishment or deterrence.")

53. *Ammerman v. Ford Motor Co.*, No. 49D05-9311-CT-1305, (Ind. Super. Ct., Oct. 5, 1995), *aff'd*, 705 N.E.2d 539 (Ind. Ct. App. 1999).

54. Daniel E. Becnel, Jr., *An Overview of Complex Product Liability Litigation in the USA*, 20 INT'L J. FATIGUE 93, 96 (1998).

55. *Id.*

56. *Id.*

57. 517 U.S. 559 (1996).

58. W. Kip Viscusi, *Corporate Risk Analysis: A Reckless Act?*, 52 STAN. L. REV. 547, 564–65 (2000).

59. *Id.*

60. *Id.* at 577.

Court reduced the \$4 million punitive damage award down to \$2 million.⁶¹ The stated rationale was that the jury improperly considered injuries to consumers outside Alabama.⁶² Not allowing an Alabama court to punish a defendant for harm incurred by those who purchased a vehicle outside of Alabama is justified.⁶³ But reducing the punitive damages from \$4 million to \$2 million does not logically follow. Only 14 of the refurbished vehicles were sold in Alabama, which is just 1.4% of the 983 refinished automobiles BMW sold nationwide—not 50%, as the 50% reduction in punitive damages would imply.⁶⁴

Even the U.S. Supreme Court has struggled to provide guidance regarding punitive damage awards. It has stated that the ratio of punitive damages to compensatory damages should generally not exceed 9:1.⁶⁵ But the Supreme Court has also “consistently rejected the notion that the constitutional line is marked by a simple mathematical formula, even one that compares actual and potential damages to the punitive award.”⁶⁶ This 9:1 ratio is not only inconsistently applied but is also entirely arbitrary. The ratio of compensatory to punitive damages has little direct relevance to the ultimate purposes of punitive damages—deterrence and punishment for exceptionally egregious conduct.⁶⁷

Extensive research has already been conducted in other aspects of punitive damage calculations by jurors. The following is a sample of the findings:

- The perceived reprehensibility of the defendant’s behavior affects punitive damage awards.⁶⁸
- The defendant’s level of wealth is positively correlated with larger punitive damage awards.⁶⁹
- Jurors are generally not capable of producing optimal deterrence.⁷⁰

61. Paul H. Rubin, John E. Calfee & Mark F. Grady, *BMW v Gore: Mitigating the Punitive Economics of Punitive Damages*, 5 SUP. CT. ECON. REV. 179, 180 (1997).

62. *Id.*

63. *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 572 (1996).

64. Rubin et al., *supra* note 61 (“The Alabama Supreme Court reduced the punitive damages award to \$2 million because the jury should not have considered injuries to consumers outside Alabama, but the court did not explain further how it calculated the \$2 million award figure.”).

65. *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 425 (2003) (“[I]n practice, few awards exceeding a single-digit ratio between punitive and compensatory damages, to a significant degree, will satisfy due process.”). Previously the Supreme Court hinted that a ratio of 4:1 might be “close to the line of constitutional impropriety.” *Id.* at 425 (citing *Pac. Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 23–24 (1991)).

66. *Gore*, 517 U.S. at 582 (citing *TXO Prod. Corp. v. Alliance Res. Corp.*, 509 U.S. 443, 458 (1993)).

67. Robbennolt, *supra* note 50, at 110.

68. *Id.* at 121.

69. *Id.* at 123.

70. *See id.* at 130–34 (explaining that “jurors appear to award punitive damages primarily to punish wrongdoers and to express their outrage at the defendant’s outrageous conduct rather than to effect optimal deterrence”); *see also* Feigenson, *supra* note 16, at 266 (explaining that optimal deterrence is “the idea that in regulating risky behavior, legal decision-makers ought to encourage actors to avoid only those accidents worth avoiding”).

- Jurors punish defendants who conduct cost-benefit analyses.⁷¹
- Jurors give higher punitive damage awards when the plaintiff's attorney links the request to an objective figure.⁷²
- Jurors likely underestimate the frequency and severity of punitive damages in the legal system.⁷³
- Jurors downplay, ignore, or are otherwise incapable of following jury instructions when reaching a punitive damages determination.⁷⁴
- Jurors overestimate the likelihood of an event occurring if they are aware that the event did occur, thus succumbing to hindsight bias.⁷⁵
- Juries overestimate the likelihood of low-probability risks and therefore are more likely to punish defendants through punitive damage awards for not doing more to avoid low-probability risks.⁷⁶

III. METHODOLOGY AND PREDICTIONS

The survey was administered online to 609 participants in the summer of 2020. The average age of the participants was twenty-nine.⁷⁷ Male participants comprised 60.8% of the respondents, and female participants comprised 39.2%. Three different versions of the survey were utilized. After a series of demographic questions,⁷⁸ a summary of a products liability case with a punitive damages request was presented, and participants were asked what amount—if any—they would award in punitive damages. The punitive damages requested by the plaintiff's attorney in the case summary was either \$497,000 (precise low), \$500,000 (round), or \$503,000 (precise high). Everything else regarding the

71. Feigenson, *supra* note 16, at 268–71. Mock juries awarded significantly greater punitive damage awards to a defendant who conducted a cost-benefit analysis than one that did not. *Id.* Furthermore, the higher the dollar value of human life that was utilized in the defendant's cost-benefit analysis, the higher the punitive judgment against them. *Id.* This is a highly peculiar finding because the practice of businesses performing a cost-benefit analysis is beneficial to society, not harmful. And placing a higher dollar value on human life in these calculations is laudable, not blameworthy.

72. Michael Conklin, *Factors Affecting Punitive Damage Awards*, ___ FLA. COASTAL L. REV. at *8–9 (forthcoming 2021), <https://ssrn.com/abstract=3615013> (finding that when a \$2 million punitive damages request was described as two days' worth of the defendant's revenue, mock jurors returned verdicts 11% higher than when the \$2 million request was not linked to any other figure; in both instances the defendant's revenue was provided).

73. Daniel S. Bailis & Robert J. MacCoun, *Estimating Liability Risks with the Media as Your Guide: A Content Analysis of Media Coverage of Tort Litigation*, 20 L. & HUM. BEHAV. 419 (1996).

74. Feigenson, *supra* note 16, at 266 (“[Jurors] seem incapable of following instructions to take deterrence into account as a goal of their punitive awards.”); *Id.* at 274 (noting that 85% of mock jurors either did not fill out a required punitive damages computational form or filled it out incorrectly).

75. *Id.* at 264–65.

76. *Id.* at 267.

77. In order to protect anonymity, age ranges were provided instead of asking for the participants' exact age. Therefore, the survey average age of twenty-nine is an approximation.

78. These included gender, age, race, education, religion, and political affiliation.

case summary remained constant. The complete language of the case summary is provided in Appendix A.

It was hypothesized that—consistent with the existing research on precise opening offers in traditional negotiations—the two precise punitive damage award requests would result in higher average awards than the round request. Furthermore, it was hypothesized that this difference would be even more substantial than in other studies regarding the effects of precise numbers. This latter prediction is based on evidence that suggests the power of the anchoring effect is inversely related to the level of subject-matter knowledge.⁷⁹ Because punitive damages are inherently subjective, this should result in highly disparate results.

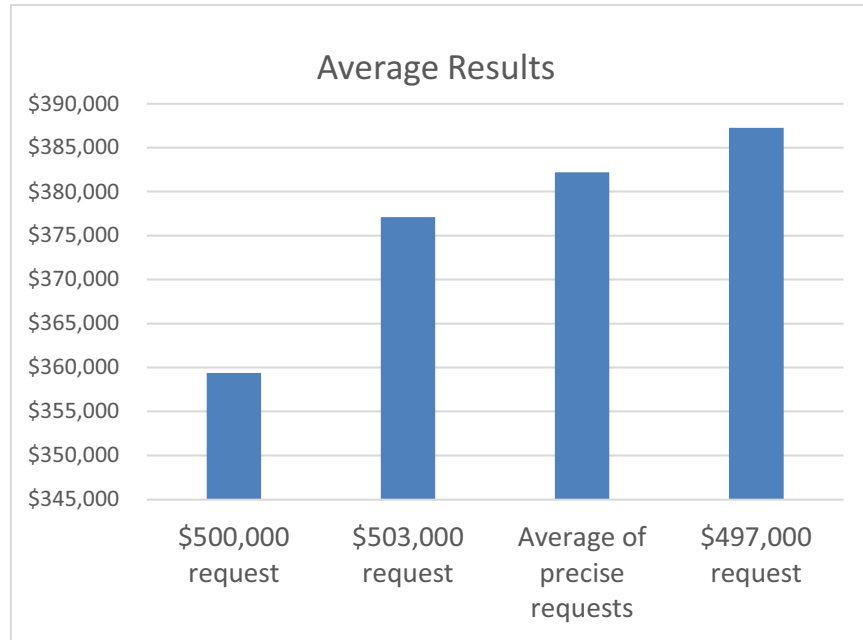
Given the broad power of the anchoring effect, it was further hypothesized that the increased effectiveness of the precise requests would remain constant regardless of the demographic backgrounds of the participants. It was hypothesized that males and conservatives would, on average, award lower punitive damage amounts due to their more “pro-business” mindset. However, this result is ultimately irrelevant to the findings of the study, which was designed to measure the difference in punitive damage awards resulting from the use of a precise or a round request, not the average award for both precise and round requests.⁸⁰

IV. RESULTS

The results supported the main hypothesis of this study. The group that was given the \$497,000 request averaged \$387,274 in punitive damages. The group that was given the \$500,000 request averaged \$359,370 in punitive damages. And the group that was given the \$503,000 request averaged \$377,108 in punitive damages. Therefore, the average of the two precise requests was \$382,191, which is \$22,821 more than the round request.

79. Loschelder, Stuppi & Trotschel, *supra* note 3, at 492. Meaning, the more someone knows about a subject, the less likely they are to be affected by anchoring.

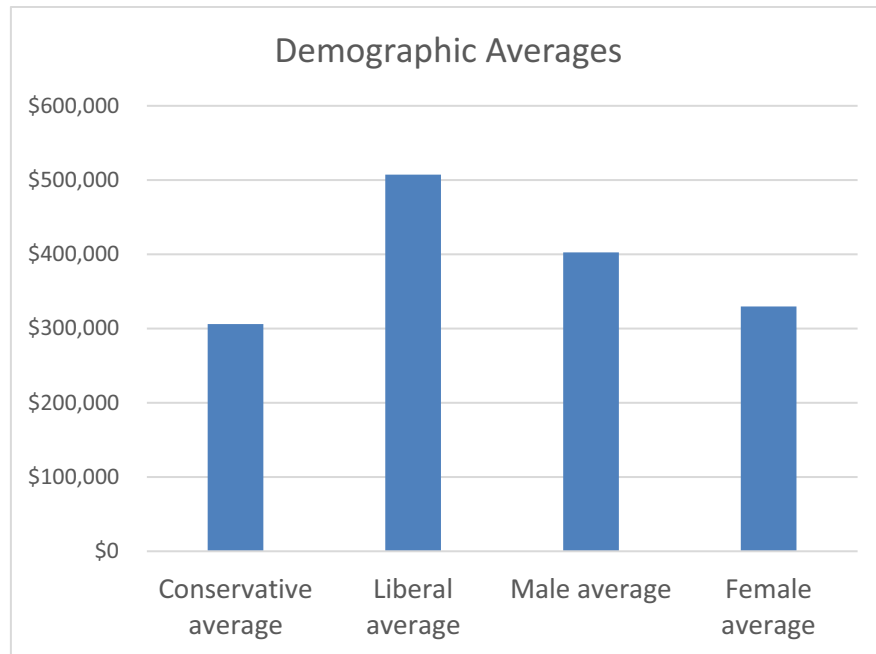
80. Meaning, it is irrelevant if conservatives and males award lesser amounts on average across all three versions of the survey (precise low, round, precise high). What matters is if the precise requests resulted in higher awards than the round requests.



As predicted, participants who identified as conservative returned lower awards on average than participants who identified as liberal.⁸¹ The average punitive damage award from conservatives was \$305,828 while the average punitive damage award from liberals was \$507,207. Contrary to the initial prediction, males returned higher awards than females. Male participants averaged \$402,393, while females averaged \$329,693. This finding is even more peculiar when one considers that the male participants were slightly more likely to be conservative and the female participants slightly more likely to be liberal.⁸² While these findings may have relevance for the consideration of demographics in jury selection, they are largely irrelevant to the ultimate finding of this study, which is designed to measure differences attributable to the use of either precise or round punitive damage requests, not the average award from round and precise requests.

81. For purposes of this study, “liberal” is defined as a response of 0–30 on a 0–100 Likert scale, in which 0 is labeled “extremely liberal” and 100 is labeled “extremely conservative.” Likewise, “conservative” is defined as a response of 70–100 on the same scale.

82. Female participants averaged 48.1 on the 0–100 Likert scale, in which 0 is labeled “extremely liberal” and 100 is labeled “extremely conservative.” Male participants averaged 49.6 on the same scale.



It was determined that the more nuanced analysis of how the anchoring effect differed among the various demographic groups was unable to be concluded from this research due to limited sample size. While 609 responses are more than adequate to draw conclusions from the data overall, each participant was only asked about one of the three possible scenarios. Therefore, when responses are divided into demographic subgroups, the number of responses for each of the three case summaries quickly diminishes to an insufficient level. Existing literature provides evidence to suggest that subject-matter experience results in a diminished anchoring effect.⁸³ But there is little evidence to suggest that demographic factors such as gender would have a significant effect.⁸⁴

V. DISCUSSION

A. General

It is ultimately unknowable if the reason that the precise requests returned larger awards than the round request is due to participants assuming that there was a legitimate, objective basis for the precise requests. Existing research

83. David D. Loschelder et al., *The Too-Much-Precision Effect: When and Why Precise Anchors Backfire with Experts*, 27 PSYCH. SCI. 1573 (2016).

84. But see Andrea Caputo, *Relevant Information, Personality Traits and Anchoring Effect*, 13 INT. J. MGMT. & DECISION MAKING 62, 70–71 (2014) (“A gender effect seems to exist; female subjects seem to be less affected by anchoring bias than male individuals.”).

strongly suggests that this is the best explanation for the disparate results in this study.⁸⁵ It is human nature to assume that a speaker will only express information in a manner that is no more precise than his subject-matter knowledge warrants.⁸⁶ Indeed, the use of precise estimates is correlated with higher confidence levels.⁸⁷ This tendency is likely even more pervasive in a courtroom setting where jurors are unfamiliar with the procedures and assume subject-matter expertise on the part of the attorneys. Jurors may even assume some type of unbeknownst-to-them pre-trial hearing based on the facts of the case that resulted in a plaintiff's attorney being given permission to make such a precise punitive damage request. All of this would result in the jurors' perceiving an increased legitimacy from precise punitive damage requests. This increased perception of legitimacy would naturally lead to awards closer to the requested amount.

It is ultimately a subjective determination as to whether the differences produced in this study are highly disparate or not. The average of the two precise requests is \$382,191, which is \$22,821 more than the average from the round request. This is only a 6% difference. However, the significance of using precise punitive damage requests must be considered in light of the effort required to obtain the benefit. Such consideration illustrates the efficiency of the practice. It requires no extra research, preparation, or any other allotment of resources for a plaintiff's attorney to request \$497,000 in punitive damages instead of \$500,000. Furthermore, in the judicial setting there are no known negative effects that need to be weighed against the benefits. Of course, the findings of this research do not prove that requesting \$497,000 instead of \$500,000 is guaranteed to result in a higher verdict—rather, only that it is more likely to result in a higher verdict.

In the literature regarding precise number anchoring, it is somewhat anomalous for the lower precise anchor to return higher estimates than the higher precise anchor, as occurred in this study.⁸⁸ For example, the 2012 Mason et al. study contained seven surveys regarding the anchoring effects of precise numbers.⁸⁹ In every survey the precise low number returned averages below the precise high number.⁹⁰ The reason this did not occur in the present study is likely due to the more subjective nature of punitive damages. The examples in the 2012 Mason et al. study involved fairly common items, such as the price of

85. See Mason et al., *supra* note 1 and accompanying text; see also Alexandra Jerez-Fernandez et al., *supra* note 35.

86. See Mason et al., *supra* note 1, at 760.

87. MATTHEW B. WELSH ET AL., NUMBER PREFERENCE, PRECISION AND IMPLICIT CONFIDENCE 1521, 1521–26 (L. Carlson, C. Hölscher & T. Shipley eds., 2011).

88. The lower precise anchor (\$497,000) averaged \$387,274, while the higher precise anchor (\$503,000) averaged \$377,108.

89. Mason et al., *supra* note 1, at 760 tbl. 1.

90. *Id.* at 760–62.

a textbook, coffee, and a used car.⁹¹ Determining the appropriate amount of punitive damages necessary to punish a company is a far more subjective and non-routine determination. This result is also largely irrelevant to the ultimate finding of this study: that precise punitive damage requests result in higher jury awards than round punitive damage requests. The reason two different precise numbers are utilized is to illustrate that it is the precise nature of the numbers that cause the higher end result and not the fact that the precise number happens to be slightly higher than the round number.⁹²

The preceding explanations for the results of this study are consistent with explanations from prior studies regarding how higher punitive damage requests result in higher verdicts.⁹³ In both instances, the jury interprets the rationale for the plaintiff's attorney's request to be due to the presence of some—unbeknownst to them—legitimate, objective explanation. This lends validity to the plaintiff's attorney's request, therefore causing jurors to not deviate as far from the plaintiff's attorney's request.

Although not analyzed by the methodology of this research, it is likely that precise punitive damage requests would be even more effective when an extremely high initial request is made. This is because the two anchoring principles of higher initial numbers resulting in higher final numbers and precise initial numbers resulting in higher numbers may have a synergistic effect. When a plaintiff's attorney makes a high request for punitive damages, adding precision to the figure may function to lend plausibility to the high anchor.⁹⁴ Jurors who otherwise would be skeptical of such a high initial request may assume that there must be some legitimate reason for such a high request; otherwise, why would the number be so precise?

Although beyond the scope of this research, the findings are likely welcomed by tort-reform groups that advocate for caps on punitive damages. These advocates often point to the unpredictable nature of punitive damage awards as evidence for proposed reforms.⁹⁵ The finding that punitive damages are affected by factors that have no bearing on the defendant's culpability or the plaintiff's damages—such as the level of precision in the request—demonstrates the inconsistent nature of punitive damage awards.

91. *Id.* at 761–63.

92. Meaning, if this study only used \$503,000 and \$500,000 then it could not be concluded that the \$503,000 request returned higher verdicts because of its precise nature, because this result could instead be contributed to the traditional anchoring effect where larger numbers naturally return larger awards.

93. See *supra* note 13 and text accompanying notes 13–15.

94. Loschelder, Stuppi & Trotschel, *supra* note 3, at 492.

95. Exxon Shipping Co. v. Baker, 554 U.S. 471, 499 (2008) (“The real problem, it seems, is the stark unpredictability of punitive awards.”); Theodore B. Olson, *The Dangerous National Sport of Punitive Damages*, WALL ST. J. (Oct. 5, 1994), at A17 (“The system is a perverse combination of lottery and bullfighting, selecting beneficiaries and gargets almost at random and inflicting brutal punishment on the latter if they wander into the arena.”).

B. Civil Defense Attorney Relevance

The significance of this research to plaintiffs' attorneys is obvious. The significance for civil defense attorneys, however, is unclear. Plaintiffs' attorneys can easily implement precise figures in their punitive damage requests. But there is no clear tactic available for civil defense attorneys to either reduce the effects of a plaintiff's precise request or to utilize a precise request of their own. Perhaps they could explain to juries the baseless nature of the plaintiff's attorney's precise punitive damage request. This may be effective assuming that the reason for the precise figure's effectiveness is that it leads jurors to believe there must be some legitimate, objective reason for the precise request. However, research on cognitive anchoring demonstrates that even this might not be enough to overcome the anchoring bias. Cognitive anchoring is so highly prevalent that "it has proved to be almost impossible to reduce. . . ."⁹⁶ Recall that the anchoring effect was present even in studies in which the participants knew that the anchor was random⁹⁷ or absurd.⁹⁸

However, two studies have produced potential mitigation strategies. One found that the implementation of a procedural priming task can reduce the magnitude of the anchoring effect.⁹⁹ The study randomly assigned participants into two groups.¹⁰⁰ The first group was instructed to find similarities between two images, while the other group was instructed to find differences.¹⁰¹ Both groups were then given an anchoring test.¹⁰² While both groups ultimately fell prey to the anchoring bias, the group given the procedural priming task of finding differences fared better than its counterpart which looked for similarities.¹⁰³ A second study showed that implementing a "consider-the-opposite" strategy, in which one actively generates reasons why the anchor is inappropriate, also minimized anchoring bias.¹⁰⁴ The results of these two studies suggest that if defense attorneys were able to place jurors in a more critical mindset, it might help the jury minimize the anchoring effect produced by a precise punitive damage request.

96. Thomas Mussweiler, *The Malleability of Anchoring Effects*, 49 EXPERIMENTAL PSYCH. 67, 71 (2002).

97. *See supra* notes 24–27 and accompanying text.

98. *See supra* notes 21–23.

99. Mussweiler, *supra* note 96, at 70.

100. *Id.* at 69.

101. *Id.* at 70.

102. *Id.*

103. *Id.*

104. Thomas Mussweiler, Fritz Strack & Tim Pfeiffer, *Overcoming the Inevitable Anchoring Effect: Considering the Opposite Compensates for Selective Accessibility*, 26 PERSONALITY & SOC. PSYCH. BULL. 1142 (2000).

In a traditional negotiation over the price of an item, both sides can use precise numbers to their advantage.¹⁰⁵ Both buyers and sellers are less likely to give an extremely divergent counteroffer when the initial offer—whether by the buyer or seller—is precise.¹⁰⁶ Unfortunately for civil defense attorneys, this is not the case with punitive damage requests. This is because in a civil case involving potential punitive damages the defense attorney does not just want low punitive damages; he wants no punitive damages, and it is impossible to anchor the jury to a number lower than \$0 since negative punitive damages do not exist.¹⁰⁷ A defense attorney's punitive damage request of \$0 neglects to capitalize on the anchoring effect for two reasons. First, it does not deviate from the actual, desired \$0 amount. Second, it is not precise. The defense attorney is further disadvantaged because the act of explaining to the jury how the plaintiff's request is too high or suspiciously precise may serve to validate the notion that some amount of punitive damages are warranted—it is just a matter of how much.

C. Future Research

The results of this study invite replication with variation in future research. A study involving even more precise anchors could be tested. Existing research suggests that the more precise request of \$497,325 would yield even higher jury awards than the moderately precise request used in this research of \$497,000.¹⁰⁸ Additionally, the effects of precision on low anchors could be tested. Using the same case summary, low, round punitive damage requests of \$100,000 could be compared to low, precise punitive damage requests of \$98,750 and \$101,250. Here, mock jurors would likely adjust their awards upward rather than downward, as in the present study. This could result in the more precise request netting lower average awards due to mock jurors perceiving the requested amounts as more legitimate. This would serve as a cautionary lesson for plaintiffs' attorneys to only utilize precise requests when they are also high. Finally, a different version of this study could include rebuttals from defense attorneys in the case summary to determine the most effective strategies to counteract a plain-

105. Loschelder, Stuppi & Trotschel, *supra* note 3, at 494 (finding that the use of precise numbers strengthened the anchoring effect for both initial offers and counteroffers).

106. *Id.*

107. To further illustrate, in a traditional negotiation over the price of an item that is worth \$10,000, the seller can attempt to anchor the negotiation to a high number, such as \$13,000. And the buyer can attempt to anchor the negotiation to a low number, such as \$7,000. In the former example, a final price of \$10,000 would be significantly less than the initial \$13,000 price. And in the latter example, a final price of \$10,000 would be significantly more than the initial \$7,000 price. In a case involving the potential for around \$100,000 in punitive damages, the plaintiff's attorney is free to go high with an initial request of, say, \$302,750, thus anchoring the jury to a high and precise number. But if the goal of the defense attorney is \$0 in punitive damages, the best he can do is ask for \$0, which is neither low nor precise.

108. *See supra* note 46.

tiff's attorney's use of precise anchors. Perhaps explaining that the precise nature of the plaintiff's attorney's request is baseless would cause jurors to view the plaintiff's attorney's behavior as manipulative and result in lower awards as punishment. Conversely, the defense attorney's discussion of the precise amount requested by the plaintiff's attorney could cause the number to be even more strongly ingrained in the minds of the jurors, thus increasing its potency as an anchor.

VI. CONCLUSION

While the anchoring effect on trial outcomes is well documented, this study is the first to measure the effects of precise punitive damage requests. The results are consistent with literature in other areas in that precise punitive damage requests resulted in higher jury awards. This is likely due to jurors perceiving a precise request as more legitimate, which then strengthens the anchoring effect of the request. The significant effect of using a precise punitive damage request—combined with the ease of such a strategy—provides a strong incentive for plaintiffs' attorneys to implement such a strategy.

The significance of this research is further illustrated in the lack of any downside to such a precise damage award request and the uncertainty regarding an effective mitigation strategy from the defense. The results of this study also contribute to the illumination of the subjective nature of juror decision-making more generally. Finally, the results of this study invite replication with variation in future research.

VII. APPENDIX A

You are serving on the jury in a case involving a man who was severely injured from the water heater in his house. A design defect caused the water heater to build up too much pressure, resulting in an explosion. Documents reveal that the design defect was known to the company but they decided not to recall the defective water heaters reasoning that it would hurt their reputation and that the explosions would be rare. The annual revenue of the manufacturer is \$36 million and their annual profits are \$4 million. The local man who was injured has already received \$32,000 which fully compensates him for the damages to his house and his injuries, including pain and suffering.

Your job is to decide whether to apply punitive damages against the manufacturer. Punitive damages are allowed when mere compensation is not enough to punish the behavior of the defendant. The plaintiff is asking for punitive damages of [\$497,000/\$500,000/\$503,000]. Assuming all the facts in this summary are true, how much, if any, punitive damages would you have the manufacturer pay (do not include the \$32,000 he has already received)?