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Recommended Citation
Eisenberg, Theodore; Heise, Michael; Waters, Nicole L.; and Wells, Martin T., "The Decision to Award Punitive Damages: An Empirical Study" (2010). *Cornell Law Faculty Publications.* Paper 185.
http://scholarship.law.cornell.edu/facpub/185

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THE DECISION TO AWARD PUNITIVE DAMAGES:

AN EMPIRICAL STUDY

Theodore Eisenberg, Michael Heise,
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ABSTRACT

Empirical studies have consistently shown that punitive damages are rarely awarded, with rates of about 3 to 5 percent of plaintiff trial wins. Using the 2005 data from the Bureau of Justice Statistics Civil Justice Survey, this article shows that knowing in which cases plaintiffs sought punitive damages transforms the picture of punitive damages. Not accounting for whether punitive damages were sought obscures the meaningful punitive damages rate, the rate of awards in cases in which they were sought, by a factor of nearly 10, and obfuscates a more explicable pattern of awards than has been reported. Punitive damages were surprisingly infrequently sought, with requests found in about 10 percent of tried cases that plaintiffs won. State laws restricting access to punitive damages were significantly associated with rates of seeking punitive damages. Punitive damages were awarded in about 30 percent of the plaintiff trial wins in which they were sought. Awards were most frequent in cases of intentional tort, with a punitive award rate of over 60 percent. Greater harm corresponded to a greater probability of an award: the size of the compensatory award was significantly associated with whether punitive damages were awarded, with a rate of approximately 60 percent for cases with compensatory awards of $1 million or more. Regression models correctly classify about 70 percent or more of the punitive award request outcomes.

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Judge-jury differences in the rate of awards exist, with judges awarding punitive damages at a higher rate in personal injury cases and juries awarding them at a higher rate in nonpersonal injury cases. These puzzling adjudicator differences may be a consequence of the routing of different cases to judges and juries.

1. INTRODUCTION

1 Two major questions about punitive damages are whether they will be awarded and, if awarded, what their amount will be. The amount of punitive damages awarded has been consistently, successfully modeled as a function of the compensatory award.[2] But models of whether punitive damages are awarded have been less successful in explaining the pattern of awards. This is because punitive damages are rarely awarded (Eisenberg et al. 2006), and rare events can be difficult to model. Studies spanning a decade show that plaintiffs receive punitive awards in about 3 to 5 percent of cases they win, with the rate noticeably higher in financial injury cases.[3] Studies also suggest that when punitive damages are awarded, they tend to be awarded in appropriate cases (Antolini 2004, 210–211; Koenig & Rustad 2001, 1995). But only marginal additional insight has been gained into whether punitive damages will be awarded.

2 A limitation of most prior punitive damages studies is the absence of information about whether punitive damages were requested. An important data set from the National Center for State Courts (NCSC) and the Bureau of Justice Statistics (BJS) allows fuller exploration of whether punitive damages will be awarded. The data set, which consists of civil trials concluded in 156 counties in 2005, is the fourth in the NCSC-BJS series of Civil Justice Surveys dating back to cases terminated in 1991–1992. In the 2005 iteration, the survey added a variable that recorded whether punitive damages were sought.

3 This single additional variable has opened the curtain on the rate at which punitive damages are awarded to an unprecedented extent. It enables us to provide the first large-study insight into the rate at which punitive damages were sought in tried cases. The rate, about 10 percent, is much lower than many have believed. In tried cases in which punitive

2 See Eisenberg et al. 2006; Eisenberg et al. 1997; Hyman et al. 2007, table 6, model 2; Karpoff & Lott 1999; Moller, Pace, & Carroll 1999; Schlanger 2003, 1605 & n. 136; Choi & Eisenberg 2009.

3 *E.g.*, Eisenberg et al. 2006. Financial injury cases refer to cases other than personal injury cases.

damages were sought, and in which plaintiffs established liability at trial, punitive damages were not rarely awarded. They were awarded in 35.5 percent (28.5 percent weighted[4]) of cases won by plaintiffs in which punitive damages were sought. This contrasts sharply with the 3 to 5 percent rate in cases won by plaintiffs, not filtered by whether punitive damages were sought. The obvious importance of whether punitive damages were sought requires reassessing the factors associated with requesting and receiving punitive damages. We find that the award of punitive damages is significantly associated with the level of the compensatory award. For compensatory award cases exceeding $1 million, won by plaintiffs with punitive damages requested, the punitive damages award rate exceeded 50 percent. The rate is also sensitive to case category and varies across judge and jury trials. Judges award punitive damages at a greater rate in personal injury trials and juries award them at a greater rate in nonpersonal injury trials.

4 Part 2 of this article first echoes speculation about the rate at which punitive damages would be sought and then reviews prior findings with respect to the rate of seeking and obtaining punitive damages. Part 3 describes the relevant aspects of the 2005 Civil Justice Survey and reports our core results. Part 4 seeks to explain the pattern of punitive awards as a function of case category, locale, level of compensatory award, propensity to seek punitive awards, and mode of trial. Part 5 discusses the results and Part 6 concludes.

2. EXPECTATIONS ABOUT PUNITIVE DAMAGES AWARDS AND PRIOR STUDIES THAT ACCOUNTED FOR WHETHER PUNITIVE DAMAGES WERE SOUGHT

5 Conversations with colleagues yielded estimates that plaintiffs would be observed to have sought punitive damages in nearly every case. "Just throw the allegation into the complaint." "It can't hurt." "Malpractice not to do so." Some of these reactions were from highly experienced teachers of civil procedure. These estimates may have been informed by George Priest's 1996 study of three small Alabama counties, conducted in connection with litigation, that reported punitive damages claims in over

4 Weighted results refer to rates that account for the sample design, which overrsampled cases from large counties relative to cases from smaller counties, as explained below.

70 percent of tort claims in the early 1990s (Priest 1996, 827–828),[5] a rate that, as far as we can ascertain, has not been replicated in other published studies. The Priest study did not report the rate at which plaintiffs were granted punitive damages.

6 In reviewing the literature, we found no prior multi-jurisdiction broad-based study that assessed punitive damage award rates in light of the rate at which punitive damages were sought. But, in addition to the Priest study, some prior locale-specific or subject-specific studies do provide useful background results related to this study. The prior studies' patterns of results highlight the importance of carefully tracking what cases are included in the calculation of punitive award rates and requests.

7 Using a Florida jury verdict reporter database available via Westlaw, Vidmar and Rose (2001) studied punitive damages awards in Florida from 1989 to 1998. They gathered information on whether punitive damages were submitted to the jury and, if they were, whether the jury awarded punitive damages. Table 1 reproduces the relevant table from their work. The column labeled "Number of Cases" is "the total number of punitive damage claims between 1989 and 1998 that were put to a jury," while the column labeled "Number with Non-Zero Awards" reports "the number and percentage of times that the jury returned a punitive award" (Vidmar & Rose 2001, 492–493).

8 Punitive damages awards were common in cases in which the issue of punitive damages was submitted to juries. The table's last row shows that, over the course of a decade, the possibility of punitive damages was submitted to juries in an average of 23.2 cases per year, and that juries awarded punitive damages in an average of 20.8 of those cases per year. This is an overall average of punitive damages being awarded when submitted in 89.7 percent of cases.

9 David Baldus, John MacQueen, and George Woodworth used "published sources, *e.g.*, the West Reporting System, Westlaw, Lexis, legal treatises, and national jury verdict reporters" to report on medical liability cases involving "116 plaintiffs who sought punitive damages against health care provider defendants" (1995, 1113–1114 n. 3, 1156). Punitive damages were awarded in 88 of the 116 cases, or 76 percent. Punitive damages were awarded in 10 cases in which courts later ruled they were inappropriately

5 The data were reported to have been collected "for the case *Gallant v. Prudential*." Priest 1996, 828 n.16.

Table 1. Table from Vidmar-Rose Reporting Rate of Punitive Awards in Florida Cases in Which Punitive Awards Issue Was Submitted to Juries

Year	Number of Cases	Number with Non-Zero Awards	Median Ratio of Punitive to Compensatory Damages
1989	32	27 (84%)	0.46:1
1990	27	26 (96%)	0.17:1
1991	28	25 (89%)	0.83:1
1992	22	19 (86%)	0.52:1
1993	21	19 (90%)	0.55:1
1994	27	26 (96%)	0.93:1
1995	15	13 (87%)	0.92:1
1996	17	17 (100%)	1.13:1
1997	21	17 (81%)	0.40:1
1998	22	19 (86%)	0.90:1
As of 1998	23.2/year	20.8/year	0.67:1

Source: Vidmar & Rose 2001, based on Westlaw Florida jury verdict reports.

given. The study included 32 states and 24 percent of the cases were prior to 1980 (Baldus, MacQueen, & Woodworth 1995, 1114–1115 n. 3).

Neil Vidmar's book (1995) on medical malpractice provides additional insight into the rate of punitive awards in medical malpractice cases. The book reports on 895 medical malpractice cases in North Carolina for the period July 1, 1984 to June 30, 1987 and, for 14 North Carolina counties, 326 medical malpractice cases from July 1, 1987 to December 31, 1990. Vidmar reports that 17 of 84 cases that went to trial resulted in wins for plaintiffs in the 1984–1987 study and that four of 25 cases that went to trial resulted in wins for plaintiffs in the 1987–1990 study (1995, 23, 25). Therefore, in the combined sample, plaintiffs won 21 tried cases. Punitive damages were reportedly sought in 27 percent of the cases that went to trial (Vidmar 1995, 56). Punitive damages were thus sought in 27 percent of 109 cases, or 29 cases that went to trial. Since plaintiffs won 21 of 109 cases, or 19.3 percent of trials, one might estimate that 19.3 percent of the 29 tried cases in which punitive damages were sought resulted in plaintiff wins. (This assumes that the plaintiff win rate is not materially different between tried cases in which punitive damages were sought and tried cases in which they were not sought.) That is five to six cases. The North Carolina study further reports that two jury verdicts of the estimated five or six cases

10

resulted in punitive damages awards (Vidmar 1995, 254). So approximately 40 percent (two of five) or 33 percent (two of six) of the tried North Carolina cases that requested punitive damages awards resulted in such awards.

11 Denise Antolini used a personal injury judgments reporter to study punitive damages cases in Hawaii from 1985 to 2001 (2004, 210–211).[6] The study purported to examine "the complete universe of 2,250 state and federal tort judgments in Hawaii from 1985 to 2001, which produced sixty-three punitive damages judgments" (Antolini 2004, 157). The publisher of the verdict reporter, "personally reviews the judgment books in the U.S. District Court and the State Circuit Courts each month" (Antolini 2004, 212). Plaintiffs requested punitive damages in a little more than one-third of the reported tort cases. Request rates ranged "from an annual high of 59.46% in 1988 to an annual low of 23.08% in 1989 … the mean annual request rate was 37.14%, and the annual median was 37.04%" (Antolini 2004, 221).[7] The request rate varied by case forum. Punitive damages were requested in about 37 percent of all state court judgments reported, in 15 percent of all Court Annexed Arbitration Program (CAAP) awards reported, and in 43 percent of federal court judgments (Antolini 2004, 220). Antolini also reports that punitive damages were awarded in state court in 13.65 percent of the cases, in the CAAP in 8.39 percent of the cases, and in federal court in 6.61 percent of the cases (Antolini 2004, 224–225). If we crudely assume that punitive damages were requested at the same rate in successful and unsuccessful cases, which is a reasonable assumption based on the Bureau of Justice Statistics data described below, then state court cases yielded punitive awards in 13.65/37, or 37 percent of cases in which they were requested, CAAP cases yielded punitive awards in 8.39/15, or 56 percent of cases in which they were requested, and federal courts yielded punitive awards in 6.61/43, or 15 percent of cases in which they were requested.

12 Thomas Eaton, David Mustard, and Susette Talarico (2005) provided rare empirical data about the rate at which punitive damages were sought in the mass of cases and not just those cases that reached trial or judgment. They did not rely on available opinions or verdict reporters but scrutinized

6 The database for the Hawaii study was based on Neal Seamon's *Personal Injury Judgments Hawaii,* which contained "all final judgments in personal injury and related tort actions filed in the state circuit court and the U.S. District Court for the District of Hawaii, except for class action cases, asbestos, and toxic tort cases" (Antolini 2004, 210).

7 The trend in frequency of requests was downward over time (Antolini 2004, 221).

actual records. They studied over 25,000 tort cases from six Georgia counties covering a period of four years. Punitive damages were sought in 3,729 cases of 25,562 cases, or 14.7 percent of the total (Eaton, Mustard, & Talarico 2005, 345, 352). As noted above, Antolini's Hawaii data on cases reaching judgment indicate that punitive damages were requested in about 15 percent of all awards reported in the CAAP, 22.4 percent of all state tort judgments (state court and CAAP combined), 37 percent of all state court only judgments, and 43 percent of federal court cases (2004, 220). The higher Hawaii rates may be attributable to a less comprehensive sample than in Eaton, Mustard, and Talarico, and a sample dominated by cases reaching judgment.

13 A 1996 Pacific Research Institute study of one month of lawsuits filed in San Francisco County assessed 1,015 suits. Punitive damages were requested in 14 percent of the suits, and in 27 percent of the suits that the author deemed to conceivably involve a punitive award (Hayward 1996). A study of over 3,000 filings in 1995–1996 in four California counties, Los Angeles, San Diego, San Joaquin, and Sacramento, found punitive damages claim rates ranging from 9 percent in actions against individuals in cases filed in San Joaquin County to 60 percent in actions against governments in San Diego County (Sullivan 1997). The study does not report sufficient information to compute overall rates at which punitive damages were sought.

14 Table 2 summarizes the prior literature on punitive damages summarized here. Panel A summarizes studies reporting the rate at which punitive damages were sought. Panel B summarizes studies reporting the rate at which punitive damages were awarded at trial, conditional on punitive damages having been sought.

3. DATA USED IN THIS STUDY AND CORE RESULTS

3.1. The Data

15 The data for this study come from the Civil Justice Survey of State Courts, an NCSC-BJS project that has so far yielded four major datasets. The Civil Justice Survey gathers data directly from state court clerks' offices on tort, contract, and property cases disposed of by trial in fiscal year 1991–1992 and in calendar years 1996, 2001, and 2005. Each of these time periods corresponds to a separate BJS data set. The first three datasets covered state courts of general jurisdiction in a random sample of

Table 2. Literature Addressing Rate at Which Punitive Damages Were Sought & Rate at Which Punitive Damages Were Awarded at Trial, Conditional on Being Sought

A. Rate at Which Punitive Damages Were Sought			
Study	**Time period**	**Data**	**Rate at which PD sought**
Priest 1996	1992–1994	Records in 3 small AL ctys.	~70%
Vidmar 1995	1984–87, 1987–90	NC medical trials	27%
Antolini 2004	1985–2001	HI verdict reporter tort judgments	37% (state ct.), 15% (ct. annexed arb.), 43% (fed. ct.)
Hayward 1996	1991 (1 month)	San Francisco Cty., 1,024 filings	14% (all filings) or 27% (tort + contract)
Sullivan 1997	1996–96	4 CA ctys., 3,825 filings	9%–26% (individual dfts.), 28%–50% (business dfts.), 28%–60% (government dfts.)
Eaton et al. 2005	1994–97	6 GA ctys., 25,562 tort filings	14.7%

B. Rate at Which Punitive Damages Were Awarded at Trial, Conditional on Being Sought				
Study	**Time period**	**Data**	**N of cases PD sought/ awarded**	**Rate of PD awards**
Vidmar, Rose 2001	1989–98	FL jury trial reports	23.2/20.8 per yr.	89%
Baldus et al. 1995	24% are pre-1980	Medical trials; published sources	116/88	76%
Vidmar 1995	1984–87, 1987–90	NC medical trials	5 or 6/2	40% or 33%
Antolini 2004	1985–2001	HI verdict reporter tort judgments	?/63 (2,250 judgments)	37% (state ct.), 56% (ct. annexed arb.), 15% (fed. ct.)

Abbreviations: arb. = arbitration, Cty. = County, ctys. = counties, ct. = court, dfts. = defendants, fed. = federal, PD = punitive damages. Sources: *see* reference entries for authors listed in table.

46 of the 75 most populous counties in the United States. The 2001 Civil Justice Survey data included 46 counties; the 1991–1992 and 1996 data included 45.[8]

16 The 2005 Civil Justice Survey data included 156 counties and are the data used here. The 2005 survey included 46 of the 75 most populous counties selected to maintain backwards compatibility with the earlier Civil Justice Surveys. The 2005 survey expanded coverage by adding 110 counties to represent the 3,066 smaller counties not included in the country's 75 largest counties.[9] The 2005 data included all completed trials in the studied counties. Unlike the earlier datasets, the 2005 data included a variable that reported whether punitive damages had been sought in each case. The 2005 data include 8,872 trials of an estimated total of 27,128 in state courts in the United States in 2005, or 32.7 percent. Based on the sample design, the trials from the 46 counties are estimated to represent 10,813 general bench and civil trials disposed of in the nation's 75 most populous counties. Trials from the 110 smaller counties are estimated to represent 16,315 general civil and bench trials from outside the nation's 75 most populous counties (Bureau of Justice Statistics 2008; authors' calculations).

17 One important limitation of the data should be noted. The coding of whether punitive damages were sought was based on an ex post reading of the case files and not on observing what issues were in fact submitted to adjudicators. Documents in the file, such as the complaint, were reviewed for mention of punitive damages. If punitive damages were mentioned in a document suggesting that they had been sought, they were coded as having been sought. But the data do not allow assessing whether a punitive claim was in fact submitted to the judge or jury as fact-finder. Thus, if a punitive claim were included in the complaint, but dismissed

8 One county included in the 1991–1992 and 1996 study, Norfolk, Massachusetts, fell out the nation's 75 most populous in the 2000 census and was replaced by Mecklenburg County, North Carolina, and El Paso County, Texas. Two Maryland counties declined to participate in the 1991–1992 study, and were replaced with Fairfax County for all three iterations of the Civil Justice Survey.

For a summary of the data and methodology, *see* Bureau of Justice Statistics (1995, 1996, & 2004). The initial Civil Justice Survey dataset (1991–1992) includes only jury trials. The two subsequent datasets, 1996 and 2001, include jury and bench trials. The three datasets include all completed trials in all three years in most of the counties.

9 For a summary of the data and methodology, *see* Bureau of Justice Statistics 2008; Interuniversity Consortium for Political and Social Research 2009.

on summary judgment before reaching the jury, the data coded punitive damages as having been sought. This leads the models estimating whether punitive damages were awarded to be conservative. Since punitive damages were sought in all the cases we code as having resulted in a punitive award, the positive punitive damages outcomes would not change. But some of the negative punitive damages outcomes are false negatives in that the jury could not have awarded punitive damages because the issue was not submitted to the jury. Thus, our estimates of the rates at which adjudicators awarded punitive damages, conditional on their being sought, are conservatively low.

3.2. The Rate of Seeking Punitive Damages

18 Table 3 reports, by case category, the percent of all trials in which punitive damages were sought, the percent of all trials won by plaintiffs in which punitive damages were sought, and the percent of trials in which punitive damages were awarded, conditional on plaintiffs having sought punitive damages and prevailed at trial. The overall rates are surprisingly low. The table's first two columns show that seeking punitive damages is not very common in cases that reach trial. In no case category did plaintiffs seek punitive damages in as high a rate as 40 percent of trials.[10] And the overall rate for all trials was 9.0 percent.

19 Plaintiffs sought punitive damages in only 10.2 percent of the trials they won, not strikingly different from the 9.0 percent rate in all trials. These figures increase to 11.5 percent and 13.1 percent, respectively, if one uses probability weights to account for the different numbers of cases represented by the large and small county samples. The rate is somewhat depressed by the large motor vehicle category. Excluding motor vehicle cases, plaintiffs sought punitive damages in 398 of 2,768 trials they won, or 14.4 percent, which increases to 17.6 percent if one accounts for the sample design using probability weights. The table shows substantial heterogeneity across case categories. If one separates judge and jury trials, plaintiffs sought punitive damages in 9.3 percent (11.0 percent weighted) of judge-tried cases they won and 10.6 percent (14.1 percent weighted) of jury-tried cases they won.

10 The rate slightly exceeded 40 percent for "employment discrimination" and "intentional tort/tortious interference" when the data are weighted to reflect the differential sampling of large and small counties.

Table 3. Rates of Seeking and Obtaining Punitive Damages, by Case Category

Case category	All trials		Trials won by plaintiffs		Trials won by plaintiffs, punitives sought	
	Percent with punitives sought	N	Percent with punitives sought	N	Percent with punitive award	N
Slander, libel, defamation	38.9%	54	55.2%	29	60.0%	15
Employment - discrimination	32.8%	131	41.3%	63	25.0%	24
Intentional/ tortious interference	32.4%	74	33.3%	48	43.8%	16
Conversion	26.9%	78	26.1%	46	66.7%	12
Employment – other	25.7%	183	26.0%	100	38.5%	26
False arrest/ imprisonment	25.0%	24	0.0%	6	—	0
Fraud	24.8%	479	30.9%	278	39.3%	84
Intentional tort	23.6%	259	32.0%	128	65.8%	38
Other/unknown real property	20.6%	34	—	0	—	0
Partnership dispute	18.6%	43	24.2%	33	37.5%	8
Other/unknown contract/ commercial	18.1%	94	22.0%	59	38.5%	13
Buyer plaintiff (contract)	13.9%	631	16.4%	384	27.4%	62
Title or boundary dispute	12.9%	171	—	0	—	0
Animal attack	12.5%	48	16.7%	36	0.0%	6
Malpractice - other prof'l	11.7%	77	8.1%	37	33.3%	3
Prod. liability – asbestos	11.3%	53	7.1%	28	100.0%	1
Prod. liability – other	10.7%	122	2.6%	39	0.0%	1

(continued)

Table 3. (Continued)

Case category	All trials		Trials won by plaintiffs		Trials won by plaintiffs, punitives sought	
	Percent with punitives sought	N	Percent with punitives sought	N	Percent with punitive award	N
Other negilgent act/unknown tort	9.9%	202	10.6%	104	36.4%	11
Rental/lease agreement	8.2%	184	7.2%	125	44.4%	9
Subrogation	7.4%	27	11.8%	17	50.0%	2
Malpractice - medical/dental	5.9%	972	7.4%	203	30.8%	13
Seller plaintiff (contract)	5.3%	873	4.8%	642	20.0%	30
Motor vehicle tort	3.3%	2,931	3.7%	1,778	20.3%	64
Premises liability	2.7%	853	2.9%	341	20.0%	10
Eminent domain/ condemnation	0.0%	73	—	0	—	0
Mortgage foreclosure	0.0%	31	0.0%	22	—	0
Total	9.0%	8,701	10.2%	4,546	35.5%	448

Note. Table shows the rate at which punitive damages were sought in all trials, the rate at which punitive damages were sought in trials won by plaintiffs, and the rate at which punitive damages were obtained in trials won by plaintiffs in which punitive damages were sought. Source. NCSC-BJS 2005 Civil Justice Survey.

20 Table 4 shows, now subdivided by locale, the same information as Table 3: the rate at which punitive damages were sought for all trials, the rate at which they were sought in plaintiff wins, and the rate at which they were awarded when plaintiffs won at trial. The table treats as a single locale the 110 smaller counties not in the core Civil Justice Survey group of 46 large counties.

21 Both the mean and the median seeking rates, across the 47 locales, are less than 10 percent of all trials. In two counties (Santa Clara and Fulton), both with relatively few trials, the rate exceeded 30 percent. In seven additional counties, the rate exceeded 20 percent. Four of those counties, Los Angeles, San Francisco, Franklin, and Fairfax, had more than 100 trials.

Table 4. Rates of Seeking and Obtaining Punitive Damages, by Locale

Site	All trials		Trials won by plaintiffs		Trials won by plaintiffs, punitives sought	
	% with punitives sought	N	% with punitives sought	N	% with punitive award	N
Maricopa, AZ	10.3%	252	14.7%	116	23.5%	17
Pima, AZ	5.1%	79	6.5%	46	33.3%	3
Alameda, CA	16.1%	174	19.6%	97	52.6%	19
Contra Costa, CA	22.2%	27	33.3%	9	33.3%	3
Fresno, CA	1.9%	52	2.9%	35	0.0%	1
Los Angeles, CA	27.2%	379	32.3%	186	28.8%	59
Orange, CA	19.5%	272	24.8%	129	31.3%	32
San Bernardino, CA	17.4%	69	15.4%	39	0.0%	6
San Francisco, CA	21.7%	120	19.0%	63	41.7%	12
Santa Clara, CA	31.5%	54	36.0%	25	44.4%	9
Ventura, CA	15.4%	78	11.4%	35	75.0%	4
Fairfield, CT	6.9%	72	2.1%	48	100.0%	1
Hartford, CT	7.6%	79	4.5%	44	0.0%	2
Dade, FL	5.1%	195	4.2%	119	60.0%	5
Orange, FL	2.9%	70	5.6%	36	0.0%	1
Palm Beach, FL	1.7%	116	2.7%	73	50.0%	2
Fulton, GA	32.5%	40	45.5%	22	20.0%	10
Honolulu, HI	22.2%	18	30.0%	10	0.0%	3
Cook, IL	1.8%	675	2.7%	365	50.0%	10
DuPage, IL	12.3%	81	13.2%	53	42.9%	7
Marion, IN	1.6%	127	2.4%	85	0.0%	2
Jefferson, KY	5.5%	110	13.3%	45	50.0%	6
Essex, MA	1.8%	56	6.3%	16	100.0%	1
Middlesex, MA	2.0%	99	0.0%	27	—	0
Suffolk, MA	0.8%	121	2.8%	36	100.0%	1
Worcester, MA	0.0%	73	0.0%	18	—	0
Oakland, MI	2.0%	149	1.4%	74	—	0

(continued)

Table 4. (Continued)

Site	All trials		Trials won by plaintiffs		Trials won by plaintiffs, punitives sought	
	% with punitives sought	N	% with punitives sought	N	% with punitive award	N
Wayne, MI	0.0%	179	0.0%	69	—	0
Hennepin, MN	3.4%	179	5.3%	95	33.3%	3
St. Louis, MO	15.7%	140	13.4%	82	54.5%	11
Bergen, NJ	6.2%	161	7.0%	57	0.0%	4
Essex, NJ	3.0%	134	3.3%	61	50.0%	2
Middlesex, NJ	3.7%	219	3.7%	81	33.3%	3
New York, NY	4.7%	340	4.4%	160	16.7%	6
Cuyahoga, OH	5.7%	227	4.8%	124	83.3%	6
Franklin, OH	29.8%	131	20.4%	93	44.4%	18
Allegheny, PA	2.7%	220	4.3%	115	100.0%	3
Philadelphia, PA	4.1%	610	4.5%	356	18.8%	16
Bexar, TX	23.7%	76	39.4%	33	46.2%	13
Dallas, TX	3.0%	203	2.4%	84	50.0%	2
Harris, TX	4.3%	506	5.7%	261	66.7%	15
Fairfax, VA	20.9%	163	22.8%	101	43.5%	23
King, WA	1.5%	199	1.6%	127	0.0%	2
Milwaukee, WI	3.8%	131	2.5%	79	100.0%	2
Mecklenburg, NC	17.9%	39	11.5%	26	0.0%	3
El Paso, TX	7.7%	39	11.1%	27	66.7%	3
Total large counties	8.2%	7,533	9.3%	3,882	38.5%	351
smaller counties (110)	14.1%	1,168	15.4%	664	24.7%	97
Total	9.0%	8,701	10.2%	4,546	35.5%	448

Note. Table shows the rate at which punitive damages were sought in all trials, the rate at which punitive damages were sought in trials won by plaintiffs, and the rate at which punitive damages were obtained in trials won by plaintiffs in which punitive damages were sought. Source: NCSC-BJS 2005 Civil Justice Survey.

In 21 counties, the rate was less than 5 percent but three of these counties are in states that preclude or substantially constrain the award of punitive damages.[11]

3.3. The Rate of Punitive Awards

22 The last two columns in Tables 3 and 4 show that, in trials won by plaintiffs in which they sought punitive damages, the overall rate at which punitive damages were awarded was 35.5 percent. Accounting for the differential sampling of large and small counties yields an overall rate of 28.5 percent. These rates differ substantially from rates based on punitive awards in trials won by plaintiffs that do not account for whether punitive damages were sought. Since the tables' middle two numerical columns show punitive requests in only about 10 percent of plaintiff trial wins, failure to account for whether punitive damages were sought could be viewed as misstating the punitive damages award rate—the rate at which they are awarded when sought—by about a factor of 10.

4. EXPLAINING THE PATTERN OF PUNITIVE AWARDS

23 This dramatic change requires reassessing previous findings about punitive damages in light of the newly available information about whether punitive damages were sought. We address the following topics: (1) the relation between state law and the seeking rate, (2) the relation between case category and locale and the likelihood of award, (3) the relation between the size of the compensatory award and the likelihood of a punitive award, (4) whether rates of punitive awards differed between judges and juries and between personal injury and nonpersonal injury cases, and (5) whether the rate at which punitive

11 The low rate of seeking punitive awards in the two Michigan counties may be due to limitations on punitive award availability in that state to merely punish. Michigan case law indicates that damages may not be awarded to punish the defendant. E.g., *Association Research and Dev. Corp. v. CNA Fin. Corp.,* 333 N.W.2d 206, 210 (Mich. Ct. App. 1983). But Michigan allows "exemplary" damages to compensate plaintiffs for their humiliation, outrage, and indignity resulting from defendants' willful, malicious, or wanton conduct. E.g., *Kewin v. Massachusetts Mut. Life Ins. Co.,* 295 N.W.2d 50, 54 (Mich. 1980); *Hall v. Claya,* 2008 WL 2779882 (Mich. Ct. App. July 17, 2008); *Association Research,* supra, 333 N.W.2d at 211. The low rate of seeking punitive awards in King County, Washington, may be due to the unavailability of punitive damages under Washington law. Punitive damages are generally not allowed in Washington. E.g., *McKee v. AT&T,* 191 P.3d 845, 860 (Wash. 2008). State level results relating to the seeking of punitive damages are discussed in Part 4.1 below.

damages were awarded was associated with the rate at which they were sought. We first explore these variables separately and then explore them simultaneously in two classes of regression models. The first class of models, which examines whether punitive damages were awarded, includes only cases in which punitive damages were sought and plaintiffs won at trial. The second class of models first models the selection process leading to a request for punitive damages, including state regulation of punitive damages, and assesses whether punitive damages were awarded conditional on this selection process.

4.1. State Law and the Rate of Seeking Punitive Damages

24 At least two features of state law that we can account for can be expected to influence whether punitive damages are sought. First is the set of legal rules regulating the availability of punitive damages. For example, if state law prohibits punitive damages, the rate at which they are sought should be very low or even zero. Second is the incentive structure influencing attorneys who might seek punitive awards. In states where permitted, requesting punitive damages may, in a first approximation, appear to be near costless, requiring only the addition of words to a complaint. But some costs nevertheless likely exist. An attorney's loss of reputation with a judge may be a consequence of thoughtless punitive damages requests, and monetary penalties for frivolous claims can put a hard edge on the reputational blow. We assess these features with the primary goal of exploring their influence on the rate of seeking punitive awards. This lays the groundwork for the selection models explored in Part 4.6.

4.1.1. State Rules Limiting the Seeking of Punitive Damages

25 Plaintiffs generally cannot recover punitive damages unless they seek them, and state laws differ in allowing plaintiffs to seek punitive damages. In four states, Louisiana, Nebraska, New Hampshire, and Washington, it is generally accepted that punitive damages are not allowed.[12] Even in these states, however punitive claims can appear in cases through the application

12 *In re Wintle,* 781 A.2d 995, 997 (N.H. 2001), citing *Aubert v. Aubert,* 529A.2d 909 (1987); *Gagnard v. Baldridge,* 612 So.2d 732, 736 (La.1993) (punitive damages not allowed under Louisiana law unless provided for by statute); *Corona de Camargo v. Schon,* 278 Neb. 1045 (2009); *Dailey v. North Coast Life Ins. Co.,* 919 P.2d 589 (1996) (punitive damages generally contrary to public policy).

of federal law or other states' laws[13] or through statutes authorizing punitive damages.[14] In at least three states, Massachusetts, Michigan, and South Dakota,[15] state law restricts the availability of punitive damages but does not prohibit them as broadly as in the four non-punitive-damages states. In at least seven states, Florida, Idaho, Illinois, Kansas, Minnesota, North Dakota, and Oregon, punitive damages may not be included in an initial pleading.[16] Leave of court must be sought to allow an amendment to the complaint to seek punitive damages. Thus, courts in these seven states preliminarily assess the merits of a punitive damages claim before punitive damages can even be sought. We expect that punitive damages will be sought less often in these 14 states. Each of these states other than New Hampshire, North Dakota, Oregon, and South Dakota have some trials in the NCSC-BJS data.

To explore the relation between state law characteristics (prohibitions on punitives, limitations on punitives, and pleading threshold for punitives) and punitive damages outputs, Table 5 reports the rates of seeking and obtaining punitive damages by state. States with less than 100 trials in the NCSC-BJS data are combined in the table into the residual category "Other." Each state in the table is represented by at least two counties in the data. 26

For states that we treat as generally prohibiting punitive damages, only Washington is displayed in the table. New Hampshire has no cases in the data and Louisiana and Nebraska each have less than 100 trials in the data. Combining Louisiana, Nebraska, and Washington as a group yields a punitive damages seeking rate of 2.27 percent (5 out of 220 trials), which is statistically significantly lower than the 9.13 percent rate in other states ($p < 0.001$). If one limits the sample to cases in which plaintiffs won at trial, the three states have a seeking rate of 27

13 For example, in New Hampshire, in an action based on federal law, an insurer can be liable for punitive damages. *American Home Assurance Co. v. Fish,* 451 A.2d 358, 360 (N.H. 1982).

14 For example, Louisiana authorizes exemplary damages in some cases involving drunk driving. La. Stats. Ann. Civ. Code art. 2315.4.

15 Under Massachusetts law, punitive damages may be awarded only by statute. *International Fid. Ins. Co. v. Wilson,* 443 N.E.2d 1308 (1983). In Michigan, exemplary damages are compensation for injury to feelings and are not used to punish. *Veselenak v. Smith,* 414 Mich. 567, 572–573, 327 N.W.2d 261 (1982). In South Dakota, punitive damages are available only as provided by statute. S.D. Coded Laws § 21-1-4.

16 Fla. Stat. Ann. § 768.72; Idaho Code Ann. § 6-1604(2); 735 Ill. Comp. Stat. 5/2-604.1 (amendment struck down in *Best v. Taylor Machine Works,* 689 N.E.2d 1057 (1997), but this provision predates the invalidated amendment); Minn. Stat. Ann. § 549.191; N.D. Cent. Code § 32-03.2-11; Kan. Stat. Ann. § 60-3703; Or. Rev. Stat. § 31.725.

Table 5. Rates of Seeking and Obtaining Punitive Damages, by State

State	All trials		Trials won by plaintiffs		Trials won by plaintiffs, punitives sought	
	% with punitives sought	N	% with punitives sought	N	% with punitive award	N
AZ	9.0%	333	12.3%	163	25.0%	20
CA	21.0%	1,263	23.4%	636	33.8%	148
CT	10.3%	194	8.1%	111	22.2%	9
FL	3.6%	420	3.9%	257	55.6%	9
GA	18.4%	141	22.0%	91	15.8%	19
IL	2.9%	756	4.1%	418	47.1%	17
IN	2.7%	147	3.2%	95	0.0%	3
KY	7.7%	117	16.0%	50	50.0%	8
MA	1.1%	349	2.1%	97	100.0%	2
MI	0.9%	330	0.7%	143	-	0
MN	3.8%	260	4.0%	150	25.0%	4
MO	12.7%	237	11.3%	141	50.0%	14
NJ	5.2%	574	7.0%	229	20.0%	15
NY	4.1%	390	4.1%	172	16.7%	6
OH	15.6%	456	12.9%	279	44.1%	34
Other	22.8%	373	24.1%	216	21.2%	52
PA	3.6%	853	4.4%	480	31.6%	19
TX	6.5%	909	8.8%	444	56.4%	39
VA	17.7%	215	18.5%	135	44.0%	25
WA	1.9%	210	1.5%	130	0.0%	2
WI	4.0%	174	2.8%	109	100.0%	3
Total	9.0%	8,701	10.2%	4,546	35.5%	448

Note. Table shows the rate at which punitive damages were sought in all trials, the rate at which punitive damages were sought in trials won by plaintiffs, and the rate at which punitive damages were obtained in trials won by plaintiffs in which punitive damages were sought. States with less than 100 trials are combined into the residual category "Other." Source: NCSC-BJS 2005 Civil Justice Survey.

2.22 percent (3 out of 135 trials), significantly different from other states at $p = 0.001$.[17]

For states that we treat as restricting but not generally prohibiting punitive damages, Massachusetts and Michigan are displayed in the table and South Dakota has no cases in the data. Combining Massachusetts and Michigan yields a punitive damages seeking rate of 1.03 percent (7 out of 679 trials), which is statistically significantly lower than the 9.62 percent rate in other states ($p < 0.001$). If one limits the sample to cases in which plaintiffs won at trial, the two states have a seeking rate of 1.25 percent (3 out of 240 trials), significantly different from other states at $p < 0.001$.[18] 28

For states that we treat as imposing a pleading threshold on seeking punitive damages, Florida, Illinois, and Minnesota are displayed in the table. North Dakota and Oregon have no cases in the data and Idaho and Kansas have less than 100 trials in the data. Combining Florida, Idaho, Illinois, Kansas, and Minnesota as a group yields a punitive damages seeking rate of 3.37 percent (49 out of 1,452 trials), which is statistically significantly lower than the 10.07 percent rate in other states ($p < 0.001$). If one limits the sample to cases in which plaintiffs won at trial, the five states have a seeking rate of 4.08 percent (34 out of 833 trials), significantly different from other states at $p < 0.001$.[19] 29

If one combines the states with rules or statutory restrictions on punitive damages (no punitive damages, restrictions on punitive damages, threshold pleading requirement), punitive damages were sought in such states in 2.59 percent (61 out of 2,351) of trials compared to 11.31 percent (718 out of 6,350) trials in other states. Weighting the analysis to reflect the differential sampling of large and small counties results in restriction states having a seeking rate of 3.72 percent and other states having a seeking rate of 13.71 percent. If one limits the sample to cases in which plaintiffs won at trial, the restricting states have a seeking rate of 3.31 percent (40 out of 1,208 trials), with corresponding weighted rates of 3.60 percent and 15.45 percent, respectively. We conclude that state rules restricting punitive 30

17 These results differ between the 46 large counties and the 110 small counties but are in the same direction for both groups of counties.

18 These results do not materially differ between the large counties and small counties.

19 These results differ between the 46 large counties and the 110 small counties but are in the same direction for both groups of counties.

damages are significantly associated with the rate at which punitive damages are sought. This filtering mechanism is accounted for below in our second set of regression models of whether plaintiffs obtain punitive damages after trial.

4.1.2. State Sanction Standards

31 In addition to statutory limits on seeking punitive damages, state law or practice may affect the seeking of punitive damages in other ways. Plaintiffs with weak or marginal punitive damages claims may hesitate to seek them for at least two reasons. First, an attorney who brings an objectively weak punitive damages claims may fear a possible reputational loss with the judge. The punitive damages claim will not only be denied but the judge may treat other aspects of the attorney's case with greater skepticism. Second, the attorney may fear the less subtle risk of being sanctioned for having brought a frivolous claim. We cannot assess the first factor but we can attempt to account for possible fear of sanctions by exploiting variation in state law.

32 Following Byron Keeling's (1994) classification system of state law sanctions, we divide the states into three tiers. One tier consists of states with a high threshold for awarding sanctions. "Typically, the states that follow a high threshold sanctions model require some kind of subjective bad faith—or the absence of good faith—as a condition to an award of sanctions . . . ." Other factors being equal, this tier might be expected to have the highest rate of seeking punitive damages. Another tier consists of states with a low threshold for awarding sanctions. "[U]nder a sanctions scheme in a low threshold state, a person can be subject to sanctions if she acts unreasonably—regardless whether she acts in subjective bad faith." Other factors being equal, these states might be expected to have the lowest rate of seeking punitive damages. A third tier consists of states with a hybrid threshold for sanctions, a threshold that falls between the high threshold and the low threshold states. "States that follow this model preserve an objective standard for the imposition of sanctions, but nonetheless, they incorporate into their sanctions schemes one or more procedural devices intended to mitigate the repressive effects of the objective standard" (Keeling 1994, 1095, 1103, 1111). We start with Keeling's original classification of states but update it to reflect changes in law since publication of his article in 1994. These changes consist mostly of states that have since adopted the 1993 version of Rule 11 of the Federal Rules

Table 6. Classification of State Sanction Standards for Weak Claims

Threshold for imposing sanctions	All trials		Trials won by plaintiffs		Trials won by plaintiffs, punitives sought	
	% with punitives sought	N	% with punitives sought	N	% with punitive award	N
High threshold	14.4% (17.6%)	2,329	16.4% (20.4%)	1,156	35.1% (32.2%)	188
Hybrid threshold	6.2% (9.69%)	5,930	7.1% (10.8%)	3,111	37.0% (26.8%)	211
Low threshold	17.0% (11.8%)	442	17.9% (12.2%)	279	30.6% (25.4%)	49
Total	9.0% (11.7%)	8,701	10.2% (13.1%)	4,546	35.5% (28.5%)	48

Note. Table shows the rate at which punitive damages were sought in all trials, the rate at which punitive damages were sought in trials won by plaintiffs, and the rate at which punitive damages were obtained in trials won by plaintiffs in which punitive damages were sought. Classification of the state sanction threshold is based on sanctions standards in effect at the time relevant to the NCSC-BJS data. High threshold states are CA, CT, FL, ME, MA, NM, and SC. Hybrid threshold states are AL, AZ, CO, HI, IL, IN, KY, LA, MD, MI, MN, MO, MS, NE, NJ, NV, NY, OH, OK, PA, RI, TN, TX, WA, WI, and WV. Low threshold states are AR, GA, IA, ID, KS, MT, NC, and VA. Note that AK, DE, NH, ND, OR, SD, UT, VT, and WY have no cases in the data. Figures in parentheses are based on probability weights to reflect different sampling rates in large and small counties. Weighted frequencies not shown. Sources: NCSC-BJS 2005 Civil Justice Survey, Keeling (1994), authors' coding.

of Civil Procedure, which reduced the perceived chilling effect on advocacy of the 1983 version of Rule 11.[20] We recognize that for some states, classification is a judgment call and alternative classification may be reasonable.[21]

This three-tier classification scheme leads to states' sanction regimes 33
being classified for purposes of this article as shown in the text note accompanying Table 6. The numerical columns in the table show the

20 Keeling 1994, 1090. Rule changes moving states closer to the standard in the 1993 version of federal Rule 11 occurred around the time of or after Keeling's article in several states: Delaware, Minnesota, Missouri, Nevada, North Dakota, Oklahoma, Oregon, South Dakota, Tennessee, Vermont, West Virginia, Washington, and Wyoming. We use the sanctions standard in effect at the time of the cases in the NCSC-BJS data. For some states, we changed Keeling's coding because it appeared to be in error based on the criteria for classification into the three tiers.

21 *See*, for example, Keeling's discussion of Georgia's standard, Keeling 1994, 1106–1109, and compare it with Eaton's (2007) report on judges' views of the degree of frivolous litigation in Georgia.

rates of seeking and obtaining punitive awards, with weighted results in parentheses.

34 The weighted results for the relation between sanctions and seeking punitive damages suggest that the high threshold states noticeably differ from the hybrid and low threshold states but that no meaningful difference exists between the hybrid threshold and low threshold states. As expected, plaintiffs seek punitive damages at a higher rate in states with a high threshold for awarding sanctions than in states with a hybrid threshold or a low threshold. The rate in high threshold states is about double that in hybrid states. Although the weighted rate of seeking punitive damages is, surprisingly, higher in low threshold states than in hybrid threshold states, the difference is not statistically significant.[22] The rate of obtaining punitive awards in cases won by plaintiffs does not significantly differ across the three thresholds. We will account for the possible filtering effect of sanction standards in regression models below.

4.2. Case Category and Locale

35 Table 3's last two columns show heterogeneity by case category in whether punitive damages sought are awarded. In case categories with at least ten trials in which punitive damages were sought, award rates varied from 20 percent in motor vehicle, premises liability, and seller plaintiff cases (7.1 percent, 10.7 percent, and 9.3 percent, respectively, weighted) to over 60 percent in intentional tort (66.3 percent weighted), slander/libel/defamation (hereinafter "defamation") (54.7 percent weighted), and conversion (27.3 percent weighted) cases. For the case categories with at least 10 requests for punitive damages in successful trials, a test of the hypothesis that the rate of punitive awards does not vary across category can be rejected at $p < 0.001$. Intentional tort, the high-rate category with the largest number of trials, obviously has an element of willful misbehavior that would be expected to support requests for punitive damages awards. Defamation, another high-rate category, need not be intentional but we sus-

22 The low sanctions threshold category has eight states but two, Georgia and Virginia, dominate the category. Those two states combine for 356 of the 442 (85.3 percent) low sanction threshold trials in the data. Eaton's survey of Georgia judges provides mixed evidence about the rate of frivolous litigation (and thus indirectly about potentially sanctionable behavior). Eaton reports that more than 79 percent of the judges surveyed report not seeing many frivolous cases but that 10 percent report that more than 20 percent of tort cases are frivolous (2007, 446).

Table 7. Rates of Seeking and Obtaining Punitive Damages, by Size of Compensatory Award

Compensatory award	Trials won by plaintiffs		Trials won by plaintiffs, punitives sought	
	% with punitives sought	N	% with punitive award	N
$0 to $9,999	8.0% (14.1%)	1,052 (3,850)	21.4% (11.4%)	84 (544)
$10,000 to $49,999	8.1% (9.5%)	1,404 (4,905)	25.7% (27.9%)	113 (451)
$50,000 to $74,999	11.1% (14.4%)	369 (1,078)	27.5% (25.9%)	40 (154)
$75,000 to $99,999	11.1% (16.7%)	207 (632)	28.6% (36.3%)	21 (90)
$100,000 to $199,999	13.6% (19.6%)	428 (1,222)	47.4% (38.3%)	57 (226)
$200,000 to $999,999	10.3% (9.3%)	623 (1,630)	42.6% (27.2%)	61 (135)
$1 million to $9,999,999	19.8% (24.3%)	263 (601)	53.1% (56.3%)	49 (130)
$10 million or more	25.6% (28.5%)	43 (97)	81.8% (89.8%)	11 (27)
Total	10.2% (13.1%)	4,389 (13,915)	34.9% (27.4%)	436 (1,756)

Note. Table shows the rate at which punitive damages were sought in trials won by plaintiffs, and the rate at which punitive damages were obtained in trials won by plaintiffs in which punitive damages were sought. Figures in parentheses are based on probability weights to reflect different sampling rates in large and small counties. Source: NCSC-BJS 2005 Civil Justice Survey.

pect that plaintiffs upset enough to sue for defamation tend to ascribe intentional misbehavior to the targeted defendants. The low-rate categories, such as motor vehicle, premises liability, and seller plaintiff, do not clearly consistently involve egregious behavior warranting punitive damages and so the seeking of punitive damages in them is an important possible signal about individual cases in those case categories.

We will further address case categories in this Part below by subdividing them by judge and jury trials. We will also account for case categories in Part 4's regression models by using dummy variables for case categories, though some reaggregation is necessary for case categories with relatively few cases. 36

Table 4 shows that punitive damage award rates varied by locale. It is desirable to account for locale in modeling punitive damages awards. 37

But further subdividing the sample within locale by, for example, case category or compensatory award level, is not useful. This is because the within-locale data are too thin to support further meaningful subdivision. Table 4 shows that only three locales, Los Angeles, Orange, and Fairfax, had more than 20 plaintiff trial wins with punitive requests. And the residual locale of 110 smaller counties had only 97 punitive damages award requests in plaintiff trial wins. The many locales and thinness of the data also make it impracticable to include in Part 4's regression models dummy variables for each locale. We will instead account for locale (and state) using random intercept models for our core results in Part 4.6.

4.3. Size of Compensatory Award

38 Greater harm can be expected to be associated with an increased likelihood of a punitive award (Choi & Eisenberg 2009). Table 7 reports the relation between the compensatory award and the rate of seeking and obtaining punitive awards in plaintiff trial wins. The table's first column stratifies the sample by levels of the compensatory award. The table's next column shows a generally increasing rate of seeking punitive damages as the compensatory award increased. The numbers not in parentheses show the raw data and the numbers in parentheses show results weighted to account for the differential sampling of large and small counties, a formatting convention followed in the tables that follow as well. The two lowest compensatory award levels had the lowest rates of seeking punitive damages, about 8 percent (14.1 percent and 9.5 percent, weighted). The two highest levels had seeking rates of about 20 percent or higher (24.3 percent and 28.5 percent, weighted). With respect to the rate of obtaining punitive awards, the table's last two columns show a general pattern of increasing rates of punitive awards as the compensatory award increases. The rate does not exceed 30 percent for compensatory award groups of less than $100,000 (less than $75,000 weighted). The rate increases to over 50 percent (56.3 percent weighted) for cases with compensatory awards of $1 million to $10 million and exceeds 80 percent (89.8 percent weighted) for cases with compensatory awards of at least $10 million.

4.4. Judge-Jury Differences

39 Differences in punitive damages awards rates between judges and juries have been previously reported using Civil Justice Survey data (Eisenberg et al. 2006). The 2005 data allow a more refined assessment of that issue

Table 8. Rates of Obtaining Punitive Damages, by Case Category and Mode of Trial

Compensatory award level	Jury trials		Judge trials	
	Punitive award rate	N	Punitive award rate	N
Slander, libel, defamation	80.0% (61.0%)	10 (38)	20.0% (20.0%)	5 (7)
Intentional tort	66.7% (66.7%)	30 (79)	62.5% (65.7%)	8 (48)
Conversion	66.7% (27.3%)	6 (21)	66.7% (27.3%)	6 (21)
Employment - other	55.6% (42.5%)	18 (62)	0.0% (0.0%)	8 (36)
Fraud	50.0% (64.7%)	52 (207)	21.9% (17.2%)	32 (57)
Intentional/ tortious interference	45.5% (69.4%)	11 (27)	40.0% (14.7%)	5 (19)
Buyer plaintiff (contract)	40.0% (37.2%)	30 (176)	15.6% (14.6%)	32 (215)
Other/ unknown contract/ commercial	37.5% (69.9%)	8 (23)	40.0% (40.0%)	5 (7)
Motor vehicle tort	20.7% (7.1%)	58 (410)	16.7% (6.8%)	6 (21)
Seller plaintiff (contract)	15.4% (5.1%)	13 (55)	23.5% (15.6%)	17 (36)
Total	43.2% (34.1%)	236 (1,098)	25.0% (20.0%)	124 (466)

Note. Table shows the rate at which punitive damages were obtained in trials won by plaintiffs in which punitive damages were sought. Sample is limited to case categories in which punitive damages were sought in at least five judge trials and five jury trials. Figures in parentheses are based on probability weights to reflect different sampling rates in large and small counties. Source: NCSC-BJS 2005 Civil Justice Survey.

based on knowledge of punitive award requests. Tables 3 and 7 suggest the importance of accounting for case category and size of compensatory award rates.

Table 8 refines Table 3 by dividing the case category punitive award rates 40
by judge and jury trials. It limits the case categories to those with at least five trials before judges and five trials before juries in which plaintiffs sought punitive damages and prevailed on liability at trial. The table shows a reasonably consistent pattern of higher punitive award rates in jury trials. The overall difference is large, 43.2 percent (34.1 percent weighted) compared to 25.0 percent (20.0 percent weighted), and the

Table 9. Rates of Obtaining Punitive Damages, by Compensatory Award Level and Mode of Trial

Compensatory award level	Jury trials		Judge trials	
	Punitive award rate	N	Punitive award rate	N
$0 to $9,999	28.6% (16.1%)	49 (348)	5.3% (1.1%)	19 (124)
$10,000 to $49,999	32.7% (38.0%)	49 (251)	19.6% (16.7%)	51 (157)
$50,000 to $99,999	32.4% (19.1%)	34 (145)	31.3% (52.2%)	16 (83)
$100,000 to $199,999	63.6% (59.4%)	33 (131)	31.3% (9.9%)	16 (71)
$200,000 to $999,999	45.2% (21.4%)	31 (92)	36.4% (36.4%)	11 (15)
$1 million to $9,999,999	58.6% (62.4%)	29 (77)	40.0% (40.0%)	5 (7)
$10 million or more	100.0% (100%)	5 (19)	100.0% (100%)	1 (1)
Total	42.7% (32.4%)	230 (1,065)	23.7% (19.2%)	119 (459)

Note. Table shows the rate at which punitive damages were obtained in trials won by plaintiffs in which punitive damages were sought. Sample is limited to case categories in which punitive damages were sought in at least five judge trials and five jury trials. Figures in parentheses are based on probability weights to reflect different sampling rates in large and small counties. Source: NCSC-BJS 2005 Civil Justice Survey.

weighted jury rate exceeded the weighted judge rate in all case categories except seller plaintiff and conversion (a tie). Although too few cases exist in most categories for precise estimates, the overall pattern is clear and highly statistically significant.[23]

41 Table 9 explores judge-jury differences by controlling for the size of the compensatory award, again limiting the sample to case categories containing at least five efforts to obtain punitive damages for both judge and jury trials. The table shows, for each compensatory award range, the rate of punitive awards for judge trials and jury trials. While accounting for compensatory awards, the pattern of higher rates of punitive awards in jury trials is consistent for the unweighted data but less so for the weighted data. For the unweighted data, except for the small category

23 A Mantel-Haenszel test of the hypothesis that the combined odds ratio across case categories (unweighted) equals one can be rejected at $p = 0.0003$.

above $10 million (only one judge trial and five jury trials in the included categories), the punitive award rate in jury trials is higher after controlling for the size of the compensatory award. For the weighted data that account for the sample design, the rate of obtaining punitive awards was higher in judge trials in the reasonably large category of compensatory awards ranging from $50,000 to $99,999 and in the smaller category with awards ranging from $200,000 to $999,999.

42 Prior research suggests that jury and judge punitive award rates differ between personal injury cases and nonpersonal injury cases. In a study that lacked information about whether punitive damages were sought, juries awarded punitive damages at a higher rate than judges in nonpersonal injury cases and judges awarded punitive damages at a higher rate than juries in personal injury cases (Eisenberg et al. 2006). We therefore divide the information in Table 9 into personal injury cases and nonpersonal injury cases. Table 10 presents the results. Panel A shows the results for personal injury cases and panel B shows the results for nonpersonal injury cases, again limited to case categories containing at least five efforts to obtain punitive damages for both judge and jury trials.

43 The results are consistent with results based on data that did not account for whether punitive damages are sought. In personal injury cases, judges awarded punitive damages at a higher rate than juries. The pattern persisted for all compensatory award levels of $50,000 or higher, though the relatively few judge trials suggest caution in interpreting this result. In nonpersonal injury cases, juries awarded punitive damages at a higher rate than judges. This pattern persisted for all compensatory award strata except one weighted stratum. The personal injury case difference is significant at $p = 0.061$ (weighted); the nonpersonal injury case difference is significant at $p < 0.001$ (weighted).

4.5. The Relation Between Seeking Rates and Obtaining Rates

44 Table 4 above shows that punitive damages were sought at varying rates across locales. One influence on the rate at which punitive damages were awarded may be the selectivity shown by plaintiffs in seeking them. For example, Table 4 shows that punitive damages were sought in only 1.8 percent of 675 tried cases in Cook County Illinois and in 2.7 percent of 365 trials won by plaintiffs. These low punitive-seeking rates are accompanied by a high rate, 50 percent, of obtaining punitive damages in the 10 plaintiff trial wins in which punitive damages were sought. If plaintiffs are more

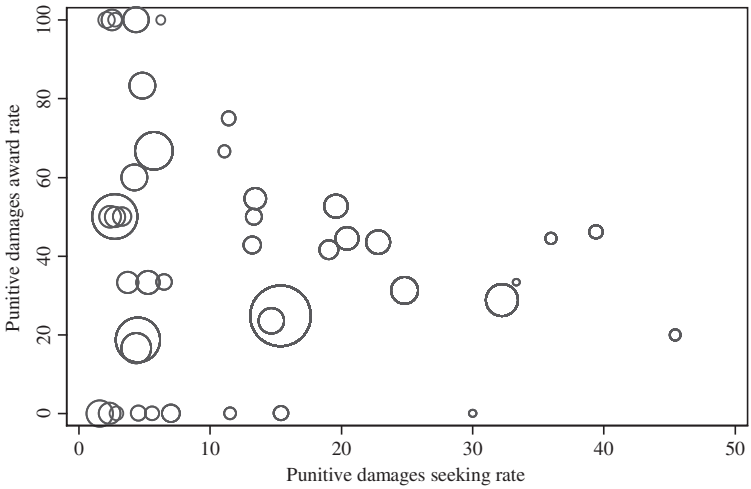
Table 10. Rates of Obtaining Punitive Damages, by Case Compensatory Award Level, Mode of Trial, and Personal Injury Status

A. Personal injury cases				
	Jury trials		Judge trials	
Compensatory award level	Punitive award rate	N	Punitive award rate	N
$0 to $9,999	32.1% (11.2%)	28 (228)	0.0% (0.0%)	2 (15)
$10,000 to $49,999	21.1% (17.8%)	19 (100)	0.0% (0.0%)	3 (16)
$50,000 to $99,999	44.4% (15.2%)	9 (37)	100.0% (100%)	2 (27)
$100,000 to $199,999	62.5% (40.2%)	8 (48)	100.0% (100%)	1 (1)
$200,000 to $999,999	22.2% (7.6%)	9 (37)	100.0% (100%)	1 (1)
$1 million to $9,999,999	50.0% (15.8%)	4 (18)	33.3% (33.3%)	3 (4)
$10 million or more	100.0% (100%)	1 (1)	100.0% (100%)	1 (1)
Total	34.6% (16.1%)	78 (462)	46.2% (49.0%)	13 (67)

B. Nonpersonal injury cases				
	Jury trials		Judge trials	
$0 to $9,999	23.8% (24.7%)	21 (127)	5.9% (1.3%)	17 (109)
$10,000 to $49,999	40.0% (51.2%)	30 (152)	20.8% (18.7%)	48 (141)
$50,000 to $99,999	28.0% (20.4%)	25 (108)	21.4% (29.2%)	14 (56)
$100,000 to $199,999	64.0% (70.4%)	25 (84)	26.7% (8.1%)	15 (70)
$200,000 to $999,999	54.5% (30.6%)	22 (55)	30.0% (30.0%)	10 (14)
$1 million to $9,999,999	60.0% (76.3%)	25 (59)	50.0% (50.0%)	2 (3)
$10 million or more	100.0% (100%)	4 (18)		0
Total	46.7% (44.8%)	152 (603)	20.8% (14.1%)	106 (392)

Note. Table shows the rate at which punitive damages were obtained in trials won by plaintiffs in which punitive damages were sought. Sample is limited to case categories in which punitive damages were sought in at least five judge trials and five jury trials. Figures in parentheses are based on probability weights to reflect different sampling rates in large and small counties. Source: NCSC-BJS 2005 Civil Justice Survey.

Figure 1. Relation Between Seeking and Obtaining Punitive Damages, by Locale.



Note. Figure shows the rate in percent at which punitive damages were sought (x-axis) and obtained (y-axis) in trials won by plaintiffs. Each circle represents one locale's seeking and obtaining rates, with the largest circle representing the aggregate rate for the 110 smaller counties in the study. Source: NCSC-BJS 2005 Civil Justice Survey.

selective about the cases in which they seek punitive damages, they should be expected to obtain them at a higher rate in cases in which they seek them. Rates of seeking punitive damages could be a function of local practice or of state laws that are more or less restrictive about the availability of punitive damages. But the bottom line expectation is that the rate of seeking punitive awards should be inversely associated with the rate at which they are obtained.

Figure 1 shows the relation between the seeking and obtaining rate. Each circle in the figure corresponds to a locale's rate of seeking punitive damages on the *x*-axis and to that locale's rate of obtaining punitive damages on the *y*-axis. Both rates are expressed as percents. The area of the circles is proportional to the number of cases in which punitive damages were sought in the locale. 45

The figure confirms expectations in one respect but not in another. The absence of circles in the figure's upper right quadrant indicates that there were no locales that combined a high rate of seeking punitive damages awards with a high rate of obtaining them. If one limits the analysis to locales with the most cases (the larger circles), in no locale did a punitive 46

damages seeking rate of over 30 percent correspond with an obtaining rate of much more than 30 percent. And all of the locales with award rates of over 60 percent had seeking rates of less than 15 percent. These results are consistent with looser standards for seeking punitive damages resulting in lower rates of obtaining them. But the figure also shows that the rate of obtaining punitive damages was not always closely tied to the rate of seeking them. For low-seeking-rate locales, the range of obtaining rates was broad. In particular, several locales combined low seeking rates with low obtaining rates, and this is true even for some reasonably large locales. We include a variable for the rate of seeking punitive damages in the regression models below.

4.6. Regression Models

47 To further assess the pattern of punitive awards, we employed regression analysis for two classes of models. The first class of models assesses whether punitive damages were awarded conditional on their having been sought and on plaintiffs having won at trial. It does not account for the decision whether to seek punitive damages. The second class of models is also conditional on plaintiffs having won at trial but expressly assesses whether punitive damages were sought as a function of the state law characteristics described in Part 4.1. For both classes of models, the dependent variable in analyzing whether punitive damages were awarded is binary—it takes on two values that are, effectively, "yes" and "no," coded as 1 or 0.

4.6.1. Multilevel Models of Whether Punitive Damages Were Awarded

48 For binary dependent variables, logistic regression is the standard modeling method (Gelman & Hill 2007; Hosmer & Lemeshow 2000). In modeling whether punitive damages were awarded, in addition to the factors considered above (case category, locale, compensatory award amount, judge vs. jury trial, personal injury vs. nonpersonal injury cases, and rate of seeking punitive damages), regression models need to account for the sample design. The sample has two distinct features that require consideration.

49 First, if one were to combine into a single model data from 7,682 trials in the 46 large counties and 1,190 trials in the 110 smaller counties, one should account for the differential sampling of the two groups of counties. Accounting for the different sampling rates would be necessary because the penultimate row of Table 4 above shows noticeably different rates of punitive damages in the 110 smaller counties. In the smaller

counties, punitive damages were sought in a higher fraction of trials and awarded in a lower fraction of trials than they were in the larger counties. And in most of the smaller counties, there was no case in which punitive damages were sought. Only 36 of the 110 counties reported at least one case with a punitive damages request. Due to the heterogeneity across county groups, we report regression results separately for large and small county groups.

Second, the sample is nested in that the individual cases are clustered at the county level and the counties are embedded in larger geographical units, states, the laws of which vary. In this sense, the data are amenable to using hierarchical or multilevel models that account for the structure of the data (Gelman & Hill 2007). 50

Table 11 reports multilevel logistic regression models of whether punitive damages were awarded in cases in which punitive damages were sought and plaintiffs won. We limit the individual case category dummy variables to case categories with at least five cases of punitive damages sought in both large and small counties. Other case categories are combined into the residual category "Other." Models (1), (3), and (5) show results for large counties and models (2), (4), and (6) show results for small counties. To facilitate judge and jury trial comparisons, models (3) and (4) are limited to case categories with at least five cases in which punitive damages were sought in both judge trials and jury trials. Models (5) and (6) further limit the sample to cases not involving personal injury. 51

A consistent result across the models is the significant association between the compensatory award amount and whether a punitive award was given. In model (6), with only 52 observations, the compensatory award coefficient is not significant but remains positive and large. The results by case category are somewhat inconsistent across the large and small groups of counties. The significantly reduced rate of punitive damages in motor vehicle cases (compared to the reference category of all other case categories) is attributable to the small counties as indicated by comparing models (1) and (2). The coefficient for the intentional tort category is much larger for the small counties. 52

A reasonably consistent result is the increased rate of punitive awards in jury-tried cases. It is statistically significant in the large county models and substantial although insignificant in the smaller county models. The large-county models that include a jury trial dummy variable suggest that the case-category effects may be collinear with the jury trial effects or that 53

Table 11. Multilevel Regression Models of Whether Punitive Damages Were Awarded

Explanatory variables	(1)	(2)	(3)	(4)	(5)	(6)
	Full sample		Case categories with at least five claims in both judge and jury trials		Nonpersonal injury cases	
	Large counties	Small counties	Large counties	Small counties	Large counties	Small counties
Compensatory award (log 10)	0.559*** (0.132)	1.410** (0.718)	0.518*** (0.152)	0.914* (0.523)	0.601*** (0.191)	0.987 (0.764)
Motor vehicle tort	−0.148 (0.434)	−4.321** (2.099)	−1.232 (0.886)		−0.495 (1.474)	
Intentional tort	1.502*** (0.452)	4.355* (2.319)	0.471 (0.742)		0.424 (0.796)	
Fraud	−0.019 (0.324)		−0.319 (0.379)		−0.309 (0.375)	
Buyer plaintiff (contract)	−0.094 (0.437)		−0.319 (0.481)		−0.291 (0.477)	
Employment-other	0.274 (0.509)		−0.126 (0.564)		−0.162 (0.553)	
Punitive seek rate			−0.011 (0.015)		−0.017 (0.014)	
Jury			0.914*** (0.318)	0.741 (0.908)	0.867** (0.339)	2.086 (1.389)
Personal injury			0.614 (0.784)	−1.182 (0.757)		
Constant	−3.369*** (0.712)	−8.101** (3.716)	−3.228*** (0.859)	−5.638** (2.588)	−3.532*** (0.967)	−7.089* (3.942)
Observations	342	94	264	85	206	52
Number of states	21	25	21	24	18	18
Number of counties	42	36	40	32	33	24
Prob. > chi-squared	<0.001	0.071	<0.001	0.115	0.003	0.162

(continued)

Table 11. (Continued)

Explanatory variables	(1)	(2)	(3)	(4)	(5)	(6)
	Full sample		Case categories with at least five claims in both judge and jury trials		Nonpersonal injury cases	
	Large counties	Small counties	Large counties	Small counties	Large counties	Small counties
% correctly classified	68.1%	94.7%	72.0%	85.9%	67.5%	92.3%
Reduction in error	16.2%	77.3%	29.5%	42.9%	13.0%	75.0%

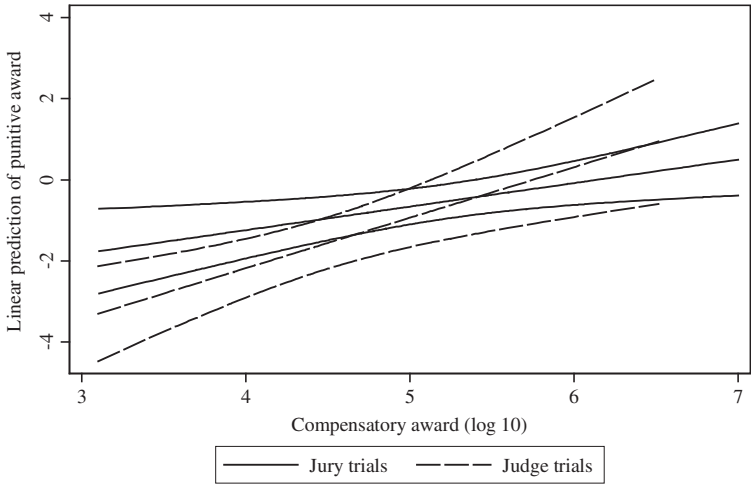
Note. Standard errors in parentheses; $^{***}p<0.01$, $^{**}p<0.05$, $^{*}p<0.1$. Dependent variable is whether punitive damages were awarded. Multilevel models are used with random intercepts for locale and state. Sample is limited to trials won by plaintiffs in which punitive damages were sought. Models with jury trial dummy variables are limited to case categories in which punitive damages were sought in at least five judge trials and five jury trials. Large counties are 46 of the most populous counties. Small counties are 110 smaller counties but the smaller number of counties in the table reflects the fact that many small counties had no case with a punitive award request. The reference category for case categories is the aggregate, residual category "Other." The "Reduction in error" reports the reduction in the percent of classes erroneously classified (based on a cutoff probability of 0.5) compared to a model that always predicts no award of punitive damages. Source: NCSC-BJS 2005 Civil Justice Survey.

the jury trial variable is not exogenous. No case category is statistically significant once one includes the jury trial dummy variable, as in models (3) and (5). Model (5) confirms the finding of a higher punitive damages award rate in jury trials in nonpersonal injury cases.

To visually assess the probability of a punitive award as a function of the compensatory award, we used logistic regression on the combined large and small county samples and used probability weights to account for the differential sampling rates. The model included only the compensatory award as an explanatory variable and clustered the standard errors by locale. The resulting linear predictions and 95 percent prediction bands for judge and jury trials are shown in Figure 2. The x-axis is the amount of the compensatory award in a case, employing a logarithmic (base 10) scale. The y-axis is the linear prediction of a punitive damages award that the regression model indicated was associated with the corresponding compensatory award. Note that the data are thin for the high compensatory award levels for judge trials. The overlapping of the prediction bands is evidence, also suggested by some

54

Figure 2. Linear Prediction and 95% Prediction Bands of Punitive Award, by Compenstory Level & Trial Mode.



Note. Linear predictions were obtained using separate logistic regression models for judge and jury trials. Each model had only the compensatory award as an explanatory variable and was weighted to reflect the differential sampling of large and small counties. Sample is limited to trials won by plaintiffs in which punitive damages were sought. Source: NCSC-BJS 2005 Civil Justice Survey.

mixed earlier results, that caution is needed in interpreting our findings of judge-jury differences.

4.6.2. Selection Models of the Decision to Seek Punitive Damages and Whether Punitive Damages Were Awarded

55 Part 4.1 shows that the rate of seeking punitive damages is not uniform across states. State laws and procedural rules restricting punitive damages' availability are strongly associated with whether punitive damages are sought. To account for the influence of state law on whether plaintiffs sought punitive damages, we employ Heckman selection models to model the decision to seek punitive damages simultaneously with whether punitive damages were awarded. For purposes of the selection models, the state laws and rules addressed above have the useful feature that they likely influence the decision whether to seek punitive damages but, once punitives have been sought, they have no direct influence on whether punitive damages were awarded. We add to the selection stage dummy variables for case categories. We also include in some models a dummy variable for

whether the trial was a jury trial. We restrict the sample to cases in which plaintiffs won at trial and again report results separately for large and small counties.[24]

Table 12 reports the results. As in Table 11, we report results separately for large and small counties. Models (1), (3), and (5) show results for large counties and models (2), (4), and (6) show results for small counties. To facilitate judge and jury trial comparisons, models (3) and (4) are limited to case categories with at least five cases in which punitive damages were sought in both judge trials and jury trials. Models (3) and (4) also include a jury trial dummy variable in the award equation. Models (5) and (6) are the same as models (3) and (4) except that they include the jury dummy variable in the selection equation. In models (3) to (6), we aggregate the case category dummy variables in the award equation to match the categories in Table 11. Other case categories are combined into the residual reference category. The case category dummies are not as reaggregated in the selection equation, where there are more observations. 56

The correlation between the residuals in the award and selection equations, as measured by the parameter ρ, is not significant in any model. So the selection analysis provides no evidence questioning the single-equation probability-of-award results in Table 11. And the results are reasonably consistent with those in Table 11. In the award equation, the coefficient for the compensatory award is always positive and significant for the large counties, and marginally significant or of greater magnitude for the small counties. The jury dummy variable is positive and significant or marginally significant in the award equation. In results not reported here, in models limited to nonpersonal injury cases, the results are essentially the same as in Table 11's models (5) and (6). 57

Table 12's selection equations confirm that state laws regulating punitive damages are substantially associated with the rate at which punitive damages are sought. With one exception, all of the state law variables behave as expected. States that effectively disallow punitive damages have a lower probability of a punitive damages request, as do state laws that restrict punitive damages or impose a permission-to-plead requirement. States with high sanction thresholds have a higher probability of a punitive dam- 58

24 We do not include in the award equation the rate at which punitive damages were sought. This variable was insignificant in Table 11 and is insignificant in selection models not reported here.

Table 12. Selection Models of Whether Punitive Damages Were Awarded

Explanatory variables	(1)	(2)	(3)	(4)	(5)	(6)
	Full sample		Case categories with at least five claims in both judge and jury trials		Jury dummy variable in models (3) and (4) selection equation	
	Large counties	Small counties	Large counties	Small counties	Large counties	Small counties
Award Equation						
Compensatory award (log 10)	0.307*** (0.091)	0.446* (0.236)	0.255** (0.129)	0.354 (0.252)	0.257** (0.127)	0.392 (0.264)
Motor vehicle tort	−0.016 (0.314)	−0.575 (0.601)	−0.090 (0.348)	−0.843 (0.589)	−0.071 (0.368)	−0.669 (0.654)
Intentional tort	0.923*** (0.311)	1.457** (0.675)	0.495 (0.351)	1.298 (0.877)	0.507 (0.356)	1.714** (0.769)
Fraud	−0.001 (0.150)	1.168 (0.731)	−0.261 (0.172)	0.728 (0.712)	−0.258 (0.173)	1.148* (0.684)
Buyer plaintiff (contract)	−0.076 (0.200)	0.385 (0.603)	−0.208 (0.217)	0.328 (0.560)	−0.205 (0.217)	0.644 (0.582)
Employment-other	0.166 (0.318)	−5.016*** (0.398)	−0.129 (0.336)	−7.056*** (1.530)	−0.122 (0.341)	
Jury			0.502* (0.263)	0.856** (0.376)	0.464* (0.269)	0.785* (0.418)
Constant	−2.000*** (0.581)	−2.756 (1.876)	−1.491** (0.739)	−2.516 (1.828)	−1.481** (0.750)	−3.213 (1.992)
Selection Equation						
Compensatory award (log 10)	0.133*** (0.044)	0.055 (0.0904)	0.154*** (0.044)	0.116 (0.094)	0.138*** (0.042)	0.061 (0.096)
State disallows punitives	−0.822*** (0.112)	−0.246 (0.503)	−1.083*** (0.124)		−1.057*** (0.117)	
State restricts punitives	−1.727*** (0.233)		−1.804*** (0.416)		−1.854*** (0.415)	
Permission to plead punitives required	−0.523*** (0.151)	−1.046*** (0.374)	−0.575*** (0.168)	−0.974** (0.426)	−0.592*** (0.173)	−1.007** (0.414)
High sanctions threshold	0.408*** (0.128)	0.489* (0.290)	0.289** (0.138)	0.610** (0.307)	0.289** (0.140)	0.670** (0.289)
Low sanctions threshold	0.859*** (0.138)	−0.187 (0.205)	0.796*** (0.147)	−0.090 (0.224)	0.756*** (0.148)	−0.143 (0.229)

Table 12. (Continued)

Explanatory variables	(1)	(2)	(3)	(4)	(5)	(6)
	Full sample		Case categories with at least five claims in both judge and jury trials		Jury dummy variable in models (3) and (4) selection equation	
	Large counties	Small counties	Large counties	Small counties	Large counties	Small counties
Motor vehicle tort	−1.431*** (0.183)	−0.546 (0.355)	−1.444*** (0.182)	−1.072*** (0.372)	−1.471*** (0.185)	−1.341*** (0.371)
Premises liability	−1.439*** (0.233)	−1.097* (0.604)				
Prod liability - other	−1.498*** (0.469)					
Malpractice - medical/dental	−1.073*** (0.250)	−0.568 (0.459)				
Other negligence/ unknown tort	−0.880*** (0.257)	0.207 (0.453)				
Fraud	−0.074 (0.204)	0.590 (0.419)	−0.0840 (0.205)	0.0416 (0.423)	−0.022 (0.213)	0.001 (0.417)
Seller plaintiff (contract)	−1.263*** (0.177)	−1.005*** (0.302)	−1.288*** (0.180)	−1.559*** (0.338)	−1.157*** (0.180)	−1.302*** (0.343)
Buyer plaintiff (contract)	−0.615*** (0.196)	0.214 (0.347)	−0.619*** (0.199)	−0.312 (0.338)	−0.552*** (0.199)	−0.205 (0.361)
Employment - discrimination	0.245 (0.257)	0.364 (0.740)				
Employment - other	−0.191 (0.207)	0.443 (0.498)	−0.196 (0.205)	−0.114 (0.502)	−0.164 (0.202)	−0.0512 (0.531)
Rental/lease agreement	−0.913*** (0.251)					
Other	−0.323* (0.179)	−0.069 (0.413)	−0.0321 (0.183)	−0.152 (0.433)	0.028 (0.172)	−0.155 (0.442)
Jury					0.238** (0.111)	0.687*** (0.227)
Constant	−1.171*** (0.215)	−0.975* (0.530)	−1.200*** (0.226)	−0.758 (0.542)	−1.305*** (0.233)	−0.912 (0.557)
ρ (arctangent)	0.055 (0.172)	−0.216 (0.592)	−0.220 (0.219)	−0.427 (0.476)	−0.224 (0.227)	−0.211 (0.559)

(continued)

Table 12. (Continued)

Explanatory variables	(1)	(2)	(3)	(4)	(5)	(6)
	Full sample		Case categories with at least five claims in both judge and jury trials		Jury dummy variable in models (3) and (4) selection equation	
	Large counties	Small counties	Large counties	Small counties	Large counties	Small counties
Wald test of independence of equations (prob. > chi-squared)	0.751	0.737	0.314	0.370	0.324	0.706
Observations	3,739	640	2,824	546	2,824	546

Note. Standard errors (clustered on county) in parentheses; $^{***}p < 0.01$, $^{**}p < 0.05$, $^{*}p < 0.1$. Dependent variable in award equation is whether punitive damages were awarded. Dependent variable in selection equation is whether punitive damages were sought. Sample is limited to trials won by plaintiffs in which punitive damages were sought. Models with jury trial dummy variables are limited to case categories in which punitive damages were sought in at least five judge trials and five jury trials. Large counties are 46 of the most populous counties. Small counties are 110 smaller counties but many small counties had no case with a punitive award request. The reference category for case categories is the aggregate, residual category "Other." Cells with blank entries reflect either jury dummy variable being omitted from the equation or variables with too few observations for stable estimates. In the latter case, case category dummy variables were reaggregated into larger residual categories. Sources: NCSC-BJS 2005 Civil Justice Survey; Keeling (1994), authors' coding.

ages request than states with a hybrid sanctions threshold, the reference category for sanctions. In small counties, states with a high sanctions threshold have a higher probability of a punitive damages award request compared to states with a low sanctions threshold.

59 The one initially puzzling result is that, in the large county models, states with a high sanctions threshold did not have a higher probability of seeking a punitive award than states with a low sanctions threshold. This result appears to be a consequence of differences between large and small counties in Georgia and Virginia. These two states combine for 85.3 percent of the low sanctions threshold trials in the data (*see* note 22 above). For the sample of large counties, Table 4 above shows that Georgia and Virginia are represented by Fulton County Superior Court (Atlanta) and Fairfax County (in the Washington, D.C. metropolitan area), respectively. These counties differ significantly in the punitive damages seeking rate from other counties in the same states. In Fulton County, 32.5 percent (13 of 40) of the trials contained a punitive damages request compared to 12.9

percent (13 of 101) of the trials in other Georgia sites, a difference statistically significant at $p = 0.014$. In Fairfax County, 20.9 percent (34 of 163) of the trials contained a punitive damages request compared to 7.7 percent (4 of 52) in other Virginia sites, a difference statistically significant at $p = 0.036$. So the regression models' low sanctions threshold results for large counties are likely telling more of a story of the differences between Georgia and Virginia counties than about sanctions generally.

5. DISCUSSION

One key finding is the surprisingly low rate at which punitive damages were sought. As noted above, some of our civil procedure colleagues casually forecast that seeking punitive damages would be overwhelming common. Yet the rate of seeking punitive damages in tried cases was only 11.5 (weighted). Nontrivial portions of the variation in the rates of seeking punitive awards are explained by state law variation in access to punitive damages. 60

The results are consistent with Table 1 above showing that Vidmar and Rose, using a jury verdict reporter, reported only 23.2 Florida cases per year as submitting punitive damages issue to juries. Antolini's results in Hawaii varied by adjudicatory forum. The rate of seeking punitive damages there seemed higher than the rates in this study. But note that Table 4 shows that the rate of seeking punitive awards in Honolulu, the only Hawaii venue in the 2005 data, was 22.2 percent, above the average rate in other counties. 61

One question is whether the seeking rate differs in cases that do not reach trial. As the Supreme Court observed in *Exxon Shipping Co. v. Baker*, the available evidence does not support substantially different rates in cases that settle.[25] As noted above, Eaton, Mustard, and Talarico report an overall seeking rate of 14.7 percent in a comprehensive study of Georgia tort cases. The rate for all 141 cases across all Georgia sites in the 2005 data studied here was 18.4 percent. If anything, this suggests that punitive damages were sought at slightly higher rates in tried cases than in cases that did not reach trial. Herbert Kritzer and Frances Zemans (1998) similarly found little evidence of a settlement effect.[26] This restraint 62

25 128 S.Ct. 2605, 2625 n.15 (2008).

26 Kritzer & Zemans (1998, 160): "with perhaps one exception, what little systematic evidence we could find does not support the notion" (emphasis deleted).

by lawyers in seeking punitive damages has not heretofore been so broadly documented.

63 A second key finding is that the punitive award rate was substantial in cases won by plaintiffs in which punitive damages were sought. The substantial rate contrasts with low rates of punitive awards in previous data sets lacking information about cases in which punitive damages were sought. The finding of substantial punitive award rates in cases in which they were sought is consistent with the limited prior reports of punitive damages award rates.

64 Table 1 above shows that Vidmar and Rose also found that punitive damages awards were not rare in cases in which the issue of punitive damages was submitted to juries. The table's last row shows that, over the course of a decade, the possibility of punitive damages was submitted to juries in an average of 23.2 cases per year, and that juries awarded punitive damages in an average of 20.8 of those cases per year. This is an overall average of punitive damages being awarded when submitted in 89.7 percent. Baldus, MacQueen, and Woodworth similarly reported a high rate of obtaining punitive awards in medical malpractice cases. The Vidmar study of North Carolina medical malpractice cases, discussed in Part 2, yielded few punitive award cases. But the rate of punitive awards was not materially different from the rate across the range of punitive award cases in the 2005 Civil Justice Survey data. Our estimates of the rate of punitive awards in Antolini's Hawaii data yielded a state court estimated rate of 37 percent, similar to that found in this study of state courts.

65 A third key finding is the strong association between the size of the compensatory award and the award of punitive damages. Other studies have not stratified by the size of the compensatory award, so direct comparisons of rates by award levels are not feasible. The high rate of punitive awards in the Vidmar-Rose Florida study is similar to the 88.9 percent rate at which punitive damages were awarded in cases in which they were sought in the 2005 Civil Justice Survey data when the compensatory award exceeded $10 million. But the amounts at stake in the Vidmar and Rose data were considerably smaller. The median total award in their data was about $612,000 and the median punitive award was about $152,000 (Vidmar & Rose 2001, 501). Their high rate of obtaining punitive awards in lower stakes cases may be a consequence of the filtering of cases by the jury verdict reporter they relied on.

We estimated in Part 2 that Vidmar's North Carolina medical malpractice study showed about a 33 to 40 percent chance of an award of punitive damages in medical malpractice cases from 1984 to 1990. This is not inconsistent with the rate found here for fairly low compensatory award cases. The North Carolina medical verdicts included only 3 of 21 cases with awards of $1 million or more and no cases with compensatory awards of $10 million or more (Vidmar 1995, 26–27 (table 3.1)). 66

A fourth finding of interest is the variation across judge and jury trials. The findings here confirm prior findings of an overall higher rate of punitive awards in jury trials, with the previously noted qualification that the relative rates flip when one moves from nonpersonal injury cases to personal injury cases (Eisenberg et al. 2006). 67

The judge-jury findings are the most puzzling of our results. The low punitive-seeking rate is surprising but reasonably consistent with prior studies other than Priest's Alabama results. Associations between the presence of a punitive award and both case categories and compensatory award levels are consistent with a punitive damages framework in which more egregious behavior is more likely to elicit punishment. The judge-jury differences, in contrast, have no such simple explanation. The implausibility of judges being more sympathetic to punitive awards than juries in personal injury cases leads us to suspect that the judge-jury difference in rates is at least partly attributable to how the parties select cases for routing to judge or jury trial,[27] though this suggestion requires further exploration. We also note the departures from a monolithic judge-jury pattern evidenced by some compensatory award strata have higher weighted punitive award rates in judge trials in Table 9 and by the crossing of lines in Figure 2. 68

6. CONCLUSION

The addition to the 2005 Civil Justice Survey of information about whether punitive damages were sought transforms the picture of punitive damages in state courts. Punitive damages were rarely sought in tried cases, were frequently awarded when requested, and were significantly associated with the level of the compensatory award. None of these results has been 69

27 *See* Clermont & Eisenberg 1992, explaining higher plaintiff win rate in judge trials in products liability and medical malpractice cases as being partly attributable to the routing of cases between judges and juries.

previously reported in such a comprehensive sample. Both the traditional, casual view that punitive damages are regularly sought, and the empirically-based view that punitive damages are rarely awarded, and therefore difficult to model, have to be reassessed in light of the 2005 data. These data suggest a heretofore undocumented regularity in the rate at which punitive damages have been awarded.

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