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THE FAILURE OF PUNITIVE DAMAGES IN EMPLOYMENT DISCRIMINATION CASES: A CALL FOR CHANGE

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ABSTRACT

Punitive damages were described by one early court as "an unsightly and an unhealthy excrescense." Although views toward punitive relief have changed over the years, the debate over the availability of exemplary damages in the judicial system has remained controversial. No place is that controversy more aptly demonstrated than in employment discrimination law, where punitive damages first became available in an amendment to Title VII of the Civil Rights Act of 1964 after a bitter congressional debate. Almost a decade ago, in Kolstad v. American Dental Association*, the Supreme Court provided guidance on how punitive damages should be applied in discrimination cases brought under Title VII.* Kolstad

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has only generated more confusion concerning the proper standard for exemplary relief, and recent district and appellate court decisions reflect this uncertainty.

Attempting to determine the impact of punitive damages in Title VII cases after Kolstad*, I performed an analysis of all federal district court decisions during the calendar years of 2004 and 2005. The study examined over six hundred district court opinions issued during this timeframe. Of these cases, there were* only twenty-four *district court decisions either awarding punitive damages under Title VII or upholding a jury's award of punitive relief. An additional study further revealed that slightly less than 18 percent of those Title VII cases that went to a jury resulted in a punitive damage award by the jury, and approximately 29 percent of those juries that found in favor of the plaintiff also awarded punitive damages.*

This Article explores the basic foundations of punitive damages in the American judicial system, and examines the goals of providing this form of relief in employment discrimination cases. The Article further examines a study performed on the effectiveness of punitive damages in Title VII cases. After analyzing this data, this Article suggests one alternative way of better achieving the original deterrent purpose behind the addition of punitive damages to Title VII. The Article proposes a three-part framework for analyzing all cases of intentional discrimination and recommends adopting a new scheme for remedial relief under Title VII. The Article then explores the implications of adopting the proposed approach and examines how the proposal fits within the contours of the academic scholarship. The Article concludes by urging that the congressional intent of deterring unlawful discrimination can more properly be achieved through the proposed form of relief.

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"A billion dollars to them is chump change."
—Member of jury that awarded $11.8 billion in punitive damages in case brought against Exxon Mobil Corporation.[1]

INTRODUCTION

"[M]onstrous heresy."[2] This is how one early court described the role of punitive damages in civil litigation.[3] Though punitive damages can be seen as "an unsightly and an unhealthy excrescense, deforming the symmetry of the body of the law,"[4] there can be little doubt that one of the primary purposes of such relief is to help deter unlawful conduct.[5]

Before passage of the Civil Rights Act of 1991[6] (1991 CRA), punitive damages were not one of the resources plaintiffs had at their disposal to fight employment discrimination.[7] That would change, however, when Congress passed the 1991 CRA with the express purpose of helping to "combat the persistence of employment discrimination."[8] Through the addition of compensatory and punitive damages to Title VII of the Civil Rights Act of 1964, the

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1. *Exxon Told To Pay $11.9 Billion to Alabama*, CHI. TRIB., Nov. 15, 2003, at C1. The $11.8 billion punitive damage award involved a dispute with the state of Alabama over how gas royalties should have been calculated. *See generally* Exxon Mobil Corp. v. Ala. Dep't of Conservation & Natural Res., 986 So.2d 1093 (Ala. 2007). The trial court reduced the jury's punitive damage award to $3.5 billion. *Id.* at 1100. The Alabama Supreme Court subsequently eliminated all of the punitive damages in the case. *Id.* at 1116-18.

2. David G. Owen, *A Punitive Damages Overview: Functions, Problems and Reform*, 39 VILL. L. REV. 363, 370 (1994) (quoting Fay v. Parker, 53 N.H. 342, 382 (1872)).

3. *Id.* (discussing the *Fay* decision).

4. *Fay*, 53 N.H. at 382.

5. Owen, *supra* note 2, at 377-78.

6. Pub. L. No. 102-166, 105 Stat. 1071 (codified at 42 U.S.C. § 1981 (2000)).

7. *See, e.g.*, Franklin G. Shuler, Jr., *Employment Discrimination and Other Employment-Related Claims After* Burke*: When Are Amounts Received Taxable?*, 9 LAB. LAW. 189, 192-93 (1993) (noting that Title VII was amended to include punitive damages); *cf.* Rebecca K. Beerling, *Left Out of the Balance—The Public's Need for Protection Against Workplace Discrimination:* Waffle House *and* Kidder Peabody *Attempt to Limit the Remedies Available to the EEOC by Balancing Policies Not in Conflict*, 25 HAMLINE L. REV. 295, 304 (2002) ("One of the influential changes made in the [1991 CRA] was adding punitive and compensatory damages to the EEOC's arsenal of remedial powers for both Title VII and ADA claims.").

8. Vanessa Ruggles, Note, *The Ineffectiveness of Capped Damages in Cases of Employment Discrimination: Solutions Toward Deterrence*, 6 CONN. PUB. INT. L.J. 143, 154 (2006).

1991 CRA was designed "to effectuate a greater level of deterrence."[9] In many respects, Title VII was a "toothless tiger" prior to the 1991 amendments, which gave litigants the ability to obtain significant monetary relief.[10] Rather than simply making the plaintiff whole, the addition of punitive damages to Title VII gave courts and juries a way to punish employers for their illegal conduct.[11] Indeed, Congress hoped that imposing additional damages on those employers that violate Title VII would help to prevent such discriminatory conduct, and the public certainly perceives that punitive damage awards are instrumental in eradicating unlawful employment practices.[12] Even the mention of punitive damages strikes a certain fear in the hearts of executives of large and small corporations alike—though the current statutory caps do provide some level of comfort to employers.[13] Punitive damages are thus widely regarded as one of the single greatest motivators in preventing employers from discriminating against their workers.[14]

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9. *Id.*

10. *See id.* at 151 ("[P]rior to the passage of the Civil Rights Act of 1991, plaintiffs in Title VII and ADA actions could only seek equitable relief and were not entitled to a jury trial, rendering these laws 'toothless tigers.'").

11. *See The Supreme Court, 1998 Term, Leading Cases*, 113 HARV. L. REV. 200, 368 (1999) [hereinafter *Leading Cases*] ("By making punitive damages available to victims of intentional employment discrimination, Congress intended to do more than to ask employers to try to comply with Title VII—it intended to punish them if they failed to comply.").

12. *See* H.R. REP. NO. 102-40, pt.2, at 1 (1991) (reflecting Congress's intent to deter employment discrimination with the addition of punitive damages to Title VII).

13. *See, e.g.*, Kelly Koenig Levi, *Allowing a Title VII Punitive Damage Award Without an Accompanying Compensatory or Nominal Award: Further Unifying the Federal Civil Rights Laws*, 89 KY. L.J. 581, 582-83 (2001) (describing punitive damages and noting that "[p]laintiffs want them, defendants fear them, juries award them, and the public is often fascinated by them" (citation omitted)); Elizabeth Pryor Johnson, *Employers Face Threat of Punitive Damages*, S. FLA. SUN-SENTINEL, July 12, 1999, at 8 ("Just the threat of a large punitive damages award often can drive employers to settle cases they might not normally think should be settled."); *see also infra* Part V.A.3. (discussing Title VII's statutory caps).

14. *See, e.g.*, Julie A. Friedlander, Note, *Punitive Damages as a Remedy for Discrimination Claim Arbitrations in the Securities Industry*, 23 HOFSTRA L. REV. 225, 227 (1994) (noting that plaintiffs seek exemplary relief to "deter their companies from engaging in such employment practices in the future"); Tamara Schiffner, Note, *Employment Law: The Employer Escape Chute from Punitive Liability Under* Kolstad v. American Dental Ass'n, 54 OKLA. L. REV. 181, 210 (2001) (noting that a Supreme Court decision allowing employers to avoid punitive damage liability through good-faith efforts at complying with Title VII "has the potential to make anti-discrimination programs the norm in workplaces across the United States and eventually result in complete fulfillment of the deterrent purpose underlying [the statute]").

Against this backdrop, I embarked on a study of recent employment discrimination cases in which punitive damages had been awarded. My goal was to generate enough data to identify trends in punitive damage awards in cases brought pursuant to Title VII. I was particularly interested in determining whether *Kolstad v. American Dental Ass'n*,[15] the seminal Supreme Court decision that outlined the standards to be applied to Title VII punitive damages cases, changed in any fundamental fashion the way the lower courts approached their analyses in these cases. I am aware of no substantive empirical studies examining the impact of the *Kolstad* decision in the context of Title VII punitive damages.[16]

The results of my analysis were surprising. In 2004 and 2005, 36,676 employment law cases were filed in all of the federal district courts in the United States.[17] A search of all published federal district court decisions for the calendar years of 2004 and 2005 that referenced both Title VII and punitive damages resulted in 676 cases.[18] After analyzing each of these cases, I concluded that *only twenty-four decisions* included cases where a district court either awarded punitive damages under Title VII or upheld a jury's award of punitive relief.[19] This is hardly the kind of raw data that can lead to any reasoned analysis of trends or patterns of remedies in employment discrimination cases.

Moreover, the results of additional research demonstrated some reluctance on the part of juries to award punitive relief. Slightly less than 18 percent of those Title VII cases that went to a jury during 2004 and 2005 resulted in a punitive damage award by the jury, and approximately 29 percent of those juries that found in favor of the plaintiff also awarded punitive damages.[20] There are many reasons why plaintiffs have been unsuccessful in obtaining punitive relief in

15. 527 U.S. 526 (1999).

16. There are a number of studies of punitive damages in the context of product liability cases, however. *See, e.g.*, Michael L. Rustad, *Unraveling Punitive Damages: Current Data and Further Inquiry*, 1998 WIS. L. REV. 15, 31-33.

17. ADMIN. OFFICE OF THE U.S. COURTS, JUDICIAL BUSINESS OF THE UNITED STATES COURTS, tbl.C-2A (2005), *available at* http://www.uscourts.gov/judbus2005/contents.html (identifying that between Oct. 1, 2003, and Sept. 30, 2004, 19,746 suits were filed; between Oct. 1, 2004, and Sept. 30, 2005, 16,930 suits were filed).

18. *See infra* Part IV.A (discussing the methodology used in the analysis).

19. *See infra* Part IV.B.

20. *See infra* Part IV.D.2.

employment discrimination cases, and these reasons are explored in greater detail in this Article.[21] Regardless of the rationale, however, without more published decisions imposing punitive awards, their deterrent effect will likely begin to wane. It is for this reason that reform in this area of the law is necessary.

Part I of this Article examines the history of punitive damages generally, and their role in the American legal framework and court system. Part II of this Article further examines the passage of the 1991 CRA and explores why Congress and legal theorists believed punitive damages were a critical component missing from Title VII. Part III discusses the Supreme Court's review of Title VII punitive damages in *Kolstad v. American Dental Ass'n*. Part IV then explores the data uncovered through an examination of all published federal district court decisions during 2004 and 2005, setting forth the methodology of this study. Part V concludes by explaining the necessity for reform in the application of punitive damages to Title VII cases. The Article proposes an alternative approach to the remedial provisions of Title VII which would bring the statute more in line with other areas of employment law. Part VI of the Article then explains how the proposed three-part framework for examining all cases of intentional discrimination fits within the contours of existing academic scholarship.

I. THE HISTORY OF PUNITIVE DAMAGES AND THE LAW

A. Evolution of Doctrine in American Law

Punitive (or "exemplary") damages are not a recent phenomenon,[22] and have been described as an "ancient curiosity."[23] Indeed, these damages date back over four millennia to 2000 B.C. and the

21. *See infra* Part IV.E (discussing the impact of courts vacating jury punitive damage awards in employment discrimination cases).

22. *See* Exxon Shipping Co. v. Baker, 128 S. Ct. 2605, 2620-21 (2008) (outlining the history of punitive damages).

23. Note, *An Economic Analysis of the Plaintiff's Windfall from Punitive Damage Litigation*, 105 HARV. L. REV. 1900, 1900 (1992) [hereinafter *An Economic Analysis*] (quoting E. Donald Elliott, *Why Punitive Damages Don't Deter Corporate Misconduct Effectively*, 40 ALA. L. REV. 1053, 1055 (1989)).

Code of Hammurabi, and evolved as part of the common law.[24] Pursuant to the Code, for example, a man who stole an ox, sheep, or pig from a temple or palace would be required to pay damages thirtyfold the worth of the animal.[25]

The theory of punitive damages persisted through the following centuries.[26] For example, the Magna Carta contains three chapters on the system of amercements, that, in many respects, operated in a similar manner to punitive damages under the current U.S. legal system.[27] The amercement system allowed wrongdoers to buy back their "grace under the law" through payments to the Crown.[28] A jury, rather than a judge, determined the amount of the payments, and was instructed to consider "[t]he gravity of the offense and the wealth of the wrongdoer" in reaching an appropriate award.[29]

Over time, punitive damages came to satisfy the particular requirements of society, including "punishment and deterrence of wrongdoers, and [also] as a substitute for revenge."[30] Under English common law, punitive damages "appeared discreetly ... overshadowed by the legal and moral issues" of the cases in which they were awarded.[31] Like in the American legal system, punitive damages in England have been the subject of controversy over the years, and these damages "practically were abolished" in the country in 1964.[32] Punitive damages in the American legal system can be traced to English common law.[33] In 1784, in *Genay v. Norris*,[34] an American state court adopted the theory of punitive relief enunciated by the English courts in a case in which the plaintiff became sick

24. 1 LINDA L. SCHLUETER & KENNETH R. REDDEN, PUNITIVE DAMAGES 1 (4th ed. 2000).

25. Melvin M. Belli, Sr., *Punitive Damages: Their History, Their Use and Their Worth in Present-Day Society*, 49 UMKC L. REV. 1, 2 (1980).

26. *Id.*

27. *See* Justice Janie L. Shores, *A Suggestion for Limited Tort Reform: Allocation of Punitive Damage Awards to Eliminate Windfalls*, 44 ALA. L. REV. 61, 63-64 (1992).

28. *Id.* at 64.

29. *Id.*

30. SCHLUETER & REDDEN, *supra* note 24, at 1.

31. Belli, *supra* note 25, at 3.

32. *Id.* at 4.

33. *See* MARK PETERSON, SYAM SARMA & MICHAEL SHANLEY, PUNITIVE DAMAGES, EMPIRICAL FINDINGS 1-2 (1987) (discussing the American history of punitive damages and setting forth the English decision of *Wilkes v. Wood*, 1 Lofft. 1, 98 Eng. Rep. 489 (K.B. 1763), which addressed punitive damages).

34. 1 S.C.L. (1 Bay) 6 (S.C. Comm. Pl. 1784).

after drinking wine that the defendant had spiked with Spanish Fly.[35] The court awarded "exemplary damages" to the plaintiff.[36] Moreover, in 1791, a New Jersey court granted punitive relief for the explicit purpose of making an "example[ ]" of the defendant in an action which involved the breach of a promise to marry.[37]

By the mid-nineteenth century, punitive damages were well established in the United States.[38] In *Day v. Woodworth*,[39] the U.S. Supreme Court resolved any question on the availability of punitive relief, stating that it was settled that "a jury may inflict what are called exemplary, punitive, or vindictive damages upon a defendant."[40] The Court acknowledged that "the propriety of this doctrine has been questioned," but noted that "repeated judicial decisions" would support the view that punitive damages were appropriate, depending upon the particular circumstances and the "degree of moral turpitude or atrocity of the defendant's conduct."[41]

Punitive damages are presently a widely accepted form of relief under American law. It has been well established in the United States for "over a century that punitive damages are noncompensatory in character."[42] Almost all states allow some form of punitive relief upon a specified showing of proof.[43] Punitive damages are, and have been for decades, a "fixture in American law."[44] Nonetheless, the debate over punitive damages persists. Many scholars evaluating punitive damages have agreed that this form

35. *Id.*; *see also* Owen, *supra* note 2, at 369 (discussing the decision).

36. *Genay*, 1 S.C.L. (1 Bay) at 7; *see also* Owen, *supra* note 2, at 369 & n.26.

37. *Coryell v. Colbaugh*, 1 N.J.L. 77 (1791) (emphasis omitted); *see also* Belli, *supra* note 25, at 4 (discussing *Coryell* decision). The court instructed the jury that it was "bound to no certain damages, but might give such a sum, as would mark their disapprobation, and be an example to others." *Coryell*, 1 N.J.L at 78.

38. *See, e.g.*, SCHLUETER & REDDEN, *supra* note 24, at 16 (discussing the history of punitive damages in the United States). *See generally* Exxon Shipping Co. v. Baker, 128 S. Ct. 2605, 2620 (2008) (noting that the punitive damages doctrine "promptly crossed the Atlantic" and was "widely accepted in American courts by the middle of the 19th century").

39. 54 U.S. 363 (1851).

40. *Id.* at 371; *see* SCHLUETER & REDDEN, *supra* note 24, at 16 (discussing Supreme Court's decision in *Woodworth*).

41. *Woodworth*, 54 U.S. at 371; *see also* Owen, *supra* note 2, at 369 (discussing the *Woodworth* decision and the history of punitive damages).

42. SCHLUETER & REDDEN, *supra* note 24, at 16.

43. Belli, *supra* note 25, at 4.

44. Owen, *supra* note 2, at 369.

of relief is "a necessary component in an efficient civil justice system."[45] Punitive awards, however, are also seen as "an anomaly" in the justice system that "should be abolished except where specifically authorized by statute."[46]

B. Purpose of Punitive Damages

Punitive damages are those damages that are "awarded in addition to actual damages when the defendant acted with recklessness, malice, or deceit."[47] The purpose of this type of relief is much more difficult to capture. For the most part, exemplary damages have been justified by three different rationales: retribution, deterrence, and education.[48]

First, punitive relief is a form of retribution or revenge.[49] As one of the primary purposes of exemplary damages, this relief is viewed as a way of punishing the wrongdoer.[50] The retribution function serves not only the need of the individual victims, but society as a whole.[51] Justice Oliver Wendell Holmes summarized the benefit of allowing the law, rather than individuals, to achieve some form of retribution when a wrong has been suffered, stating that "[i]f people would gratify the passion of revenge outside of the law, if the law did not help them, the law has no choice but to satisfy the craving itself, and thus avoid the greater evil of private retribution."[52]

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45. Shores, *supra* note 27, at 69. *But see* STEPHEN DANIELS & JOANNE MARTIN, HISTORICAL FICTION: PUNITIVE DAMAGES, CHANGE, AND THE POLITICS OF IDEAS 1-3 (1996) (discussing the legal debate over punitive damages and the argument for tort reform).

46. AM. COLL. OF TRIAL LAWYERS, REPORT ON PUNITIVE DAMAGES OF THE COMMITTEE ON SPECIAL PROBLEMS IN THE ADMINISTRATION OF JUSTICE 8 (1989).

47. BLACK'S LAW DICTIONARY 396 (7th ed. 1999).

48. *See generally* Exxon Shipping Co. v. Baker, 128 S. Ct. 2605, 2620-21 (2008) (discussing "various rationales" for exemplary damages).

49. Owen, *supra* note 2, at 375 ("It may initially seem strange in a modern legal system for the law to be based on a kind of private revenge, but it is entirely appropriate for the law to allow a person injured by the wanton misconduct of another to vent his outrage by extracting from the wrongdoer a judicial fine.").

50. *See* Jim Gash, *Solving the Multiple Punishments Problem: A Call for a National Punitive Damages Registry*, 99 NW. U. L. REV. 1613, 1670 (2005); *cf. Exxon Shipping Co.*, 128 S. Ct. at 2621 ("Regardless of the alternative rationales over the years, the consensus today is that punitives are aimed not at compensation but principally at retribution and deterring harmful conduct.").

51. *Id.*

52. *See* Steven Sneiderman, Comment, *The Future of Punitive Damages After* Browning-

Perhaps an antiquated theory in support of punitive relief, revenge "seems incompatible with our modern conception of the judicial system."[53] Still, retribution is often cited as one of the primary bases for awarding punitive relief.[54] Justice Sandra Day O'Connor has even described exemplary damages as "quasi-criminal" relief that is "specifically designed to exact punishment in excess of actual harm to make clear that the defendant's misconduct was especially reprehensible."[55]

Second, punitive damages are a way to deter the wrongdoer (or potential wrongdoers) from engaging in repeat conduct against the plaintiff.[56] This function of exemplary relief is premised on the economic theory that a wrongdoer who is required to pay a victim above and beyond the harm actually suffered will be less likely to engage in the wrongful conduct in the future.[57] By deterring future misconduct, punitive relief serves to "enforce desirable social norms" and results in a "positive gain to society."[58] Additionally, to the extent that not every victim decides to seek relief for a particular wrong, courts are able to deter defendants from continuing their conduct by increasing the awards of those plaintiffs that choose to litigate, thereby "forc[ing] defendants in the aggregate to internalize [the victim's] harm fully."[59] This function of punitive damages is also directly tied to the revenge function, as exemplary relief also serves

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Ferris Industries v. Kelco Disposal, 51 OHIO ST. L.J. 1031, 1036 (1990) (quoting OLIVER WENDELL HOLMES, THE COMMON LAW 4 (1881)).

53. *Id.*

54. *See, e.g.*, Lisa Litwiller, *From* Exxon *to* Engle*: The Futility of Assessing Punitive Damages as Against Corporate Entities*, 57 RUTGERS L. REV. 301, 324-25 (2004) (noting that punitive damages are often viewed as a form of "retribution for malicious misconduct in order to assuage the community's sense of outrage").

55. *Id.* at 324 (citing Pac. Mut. Life Ins. Co. v. Haslip, 499 U.S. 1, 54 (1991) (O'Connor, J., dissenting)).

56. *See, e.g.*, Owen, *supra* note 2, at 377.

57. Meredith Matheson Thoms, Comment, *Punitive Damages in Texas: Examining the Need for a Split-Recovery Statute*, 35 ST. MARY'S L.J. 207, 216 (2003) (discussing deterrence as a rationale for punitive damages in the civil justice system).

58. Leslie E. John, Comment, *Formulating Standards for Awards of Punitive Damages in the Borderland of Contract and Tort*, 74 CAL. L. REV. 2033, 2053 (1986) (discussing the role of deterrence in punitive damage awards).

59. *An Economic Analysis*, *supra* note 23, at 1901.

to deter victims from seeking their own revenge against a defendant.[60]

Finally, punitive damages are a way of educating the wrongdoer and society as a whole.[61] In this regard, exemplary relief affirms both the "protected right" of the plaintiff and the "correlative legal duty" of the defendant to respect the plaintiff's right.[62] And punitive damages demonstrate the disapproval "society attaches to [the] flagrant invasion [of a right] by the kind of conduct engaged in by the defendant."[63]

Though deterrence, retribution, and education are the primary rationales in support of punitive damages, this form of relief also serves to compensate victims where traditional compensatory awards are insufficient.[64] Additionally, punitive damages have also been said to serve a procedural law-enforcement mechanism, whereby they encourage "reluctant victims to press their claims and enforce the rules of law."[65]

II. PUNITIVE DAMAGES IN EMPLOYMENT DISCRIMINATION CASES

At the time of the passage of Title VII of the Civil Rights Act of 1964, victims of employment discrimination were limited to obtaining relief that was primarily equitable in nature.[66] When Title

60. *See* John, *supra* note 58, at 2053.

61. *See* Owen, *supra* note 2, at 374-75; Andrew Sparks, Comment, *The Current State of Punitive Damages in Environmental Litigation: An Examination of* North American BMW v. Gore, 14 J. NAT. RESOURCES & ENVTL. L. 289, 291 (1998-99) (noting that "proponents point to the desire of society to educate individuals and affirm societal standards of conduct" as a justification for punitive damages).

62. Owen, *supra* note 2, at 374-75.

63. *Id.* at 374.

64. *See id.* at 378-79 ("[S]uch awards also serve to reimburse the plaintiff for losses not ordinarily recoverable as compensatory damages, such as actual losses the plaintiff is unable to prove or for which the rules of damages do not provide relief, including and most importantly, the expenses of bringing suit."); Nathan C. Prater, Comment, *Punitive Damages in Alabama: A Proposal for Reform*, 26 CUMB. L. REV. 1005, 1030 (1995-96) (noting that "compensation of victims for otherwise uncompensable losses" serves as a justification for exemplary relief).

65. Owen, *supra* note 2, at 380; *see also* Prater, *supra* note 64, at 1030 (setting forth modern rationales for punitive damages including "inducement of private law enforcement").

66. *See* Sarah Dale, Note, *Reconsidering the Approach to 23(b)(2) Employment Discrimination Class Actions in Light of* Dukes v. Wal-Mart, 38 CONN. L. REV. 967, 976 (2006) ("Prior to 1991, a plaintiff suing under Title VII could recover only equitable relief, which

VII was passed, the statute contained no provision for aggrieved individuals to obtain either compensatory or punitive damages.[67] Though Title VII was extremely effective in helping to vindicate the rights of those individuals that had been discriminated against, the lack of compensatory or punitive relief in the statute was problematic.[68] As one commentator noted less than a decade after the passage of Title VII, "[d]iscrimination is so obnoxious to our ideals and so injurious to the nation as a whole that this form of punishment and deterrence [in allowing punitive damages] is justified."[69] At the time, some believed that the lack of punitive damages in Title VII undermined the statute's ability to deter wrongful conduct.[70] The addition of punitive damages, they argued, was necessary to help effectuate the enforcement of the statute, as this relief would encourage victims of discrimination to bring suit.[71] Under the original statutory scheme of Title VII, a successful plaintiff could expect to obtain relief that was "hardly enough to inspire such a plaintiff to stand up for her rights."[72] Others argued that Congress

included back pay but no other monetary damages.").

67. *See* Jennifer Miyoko Follette, Comment, *Complete Justice: Upholding the Principles of Title VII Through Appropriate Treatment of After-Acquired Evidence*, 68 WASH. L. REV. 651, 655 (1993) ("The 1991 amendments to Title VII greatly expanded the ability of the courts to make victims of discrimination whole. Section 102 of the 1991 amendments entitles plaintiffs to recover compensatory and punitive damages for intentional discrimination.").

68. *See Developments in the Law—Employment Discrimination and Title VII of the Civil Rights Act of 1964*, 84 HARV. L. REV. 1109, 1263 (1971) [hereinafter *Employment Discrimination and Title VII*] ("[C]ourts and commentators have recently become aware of the special appropriateness of punitive damages in actions under the civil rights laws."); Barbara A. Norris, Comment, *Comparable Worth, Disparate Impact, and the Market Rate Salary Problem: A Legal Analysis and Statistical Application*, 71 CAL. L. REV. 730, 744 (1983) ("Disparate impact theory is just as much imbedded in Title VII hiring and promotion case law as is disparate treatment theory, and the courts have used the two doctrines in tandem effectively to combat discrimination.").

69. *See Employment Discrimination and Title VII*, *supra* note 68, at 1263.

70. *See, e.g.*, Krista J. Schoenheider, Comment, *A Theory of Tort Liability for Sexual Harassment in the Workplace*, 134 U. PA. L. REV. 1461, 1462, 1475 (1986) ("Because Title VII remedies are primarily injunctive, they fail to compensate fully for the severe personal harm inflicted upon most victims. Punitive damages, which can impose a powerful deterrent on an offending party, are also unavailable." (footnote omitted)).

71. *See Employment Discrimination and Title VII*, *supra* note 68, at 1263; Christine O. Merriman & Cora G. Yang, Note, *Employer Liability for Coworker Sexual Harassment Under Title VII*, 13 N.Y.U. REV. L. & SOC. CHANGE 83, 112 (1984-85) ("If courts continue to deny money awards to victims of coworker sexual harassment, Congress should amend Title VII to expressly provide for these remedies.").

72. LEX K. LARSON, CIVIL RIGHTS ACT OF 1991, at 10 (1992).

had originally *intended* for courts to be able to provide *any* type of relief that they deemed necessary, so adding punitive damages to Title VII would therefore "*restore* the statute to its originally intended role."[73]

A. Legislative History of the Civil Rights Act of 1991

In 1991, Congress passed the 1991 CRA. Among other significant changes to Title VII, the 1991 CRA provided for compensatory and punitive damages.[74] The legislative history of this amendment to Title VII demonstrates that Congress understood the need for adding punitive damages as a weapon for fighting employment discrimination.[75] A House Report on the 1991 CRA explains that the summary and purpose of the amendment was to "strengthen existing protections and remedies available under federal civil rights laws to provide more effective deterrence and adequate compensation for victims of discrimination."[76]

In considering the 1991 CRA, Congress thus believed that the "existing protections and remedies" in the statute were not "adequate to deter unlawful discrimination or to compensate victims of intentional discrimination," and that the addition of exemplary relief was therefore necessary.[77] Congress further explained that it had heard significant testimony revealing that punitive damages were necessary to deter employment discrimination:

> Numerous courts, commentators, and witnesses before the Committee underscored that Title VII's exclusive remedy is inadequate .... [One corporate witness explained] that under Title VII's current remedial scheme ... "[t]he big impact of [adding damages to Title VII would] be what employers do in the way of prevention." ...

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73. Sharon T. Bradford, Note, *Relief for Hostile Work Environment Discrimination: Restoring Title VII's Remedial Powers*, 99 YALE L.J. 1611, 1619 (1990).

74. Rebecca Hollander-Blumoff & Matthew T. Bodie, *The Effects of Jury Ignorance About Damage Caps: The Case of the 1991 Civil Rights Act*, 90 IOWA L. REV. 1361, 1366 (2005) (noting that the Civil Rights Act of 1991 allowed "federal employment discrimination plaintiffs to recover compensatory and punitive damages for the first time").

75. *See, e.g.*, H.R. REP. NO. 102-40, pt.1, at 18 (1991); H.R. REP. NO. 102-40, pt.2, at 1.

76. H.R. REP. NO. 102-40, pt.2, at 1.

77. H.R. REP. NO. 102-40, pt.1, at 18.

> [O]ne of the foremost experts on the sexual harassment in the workplace and a consultant to leading corporations [further testified that]: "Measures such as those proposed in the bill will, I believe, encourage employers to design and implement complaint structures which encourage victims to come forward ...."[78]

In considering the legislation, Congress was thus clear that, based on the testimony before it, the addition of new remedial relief to Title VII was a critical component of deterring future wrongful conduct and encouraging "private enforcement" of the statute.[79] This "compelling need" for new relief would lead to the passage of the 1991 CRA, which amended Title VII of the Civil Rights Act of 1964 to add punitive damages and compensatory relief.[80]

B. The Revised Statute

After two years of "often rancorous debate," Congress passed, and President George H.W. Bush signed into law, the 1991 CRA.[81] The addition of punitive damages to Title VII would "fundamentally" alter the "legal model underlying federal employment discrimination laws," shifting the focus of the statute from conciliation and employer change to a model similar to tort law that was targeted more at obtaining monetary relief.[82] It was argued that the amendments were "among the most sweeping civil rights legislation

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78. *Id.* at 69. Other testimony before Congress revealed that

> [C]ompensatory and punitive damages will not give back to a plaintiff, in many cases, the career that they lost or the ability to rise further in that career. Congress doesn't have the ability to do that. It's a lasting permanent damage. I think what the increased remedies under the bill will do, however, is primarily act as a deterrent .... It is the deterrent value that is so important.

Id.

79. *Id.* at 70; *see also* Steven Sanborn, Note, *Employment Discrimination*—Miller v. Maxwell's International, Inc.*: Individual Liability for Supervisory Employees Under Title VII and the ADEA*, 17 W. NEW ENG. L. REV. 143, 153 (1995) (discussing the legislative history of the Civil Rights Act of 1991).

80. H.R. REP. NO. 102-40, pt.1, at 1, 70.

81. Susan Schenkel-Savitt, *New and Improved Remedies for Intentional Discrimination and the Expanded Reach of Title VII and the Disabilities Acts*, *in* THE CIVIL RIGHTS ACT OF 1991: ITS IMPACT ON EMPLOYMENT DISCRIMINATION LITIGATION 219, 219 (Susan Ritz ed., 1992).

82. DAVID A. CATHCART & MARK SNYDERMAN, THE CIVIL RIGHTS ACT OF 1991, at 10 (1992).

to be passed by Congress," and that the act provided exemplary damages that were "sorely lacking from previous legislation."[83]

Under the revised statute, a plaintiff is now entitled to pursue punitive damages if that individual can show that the defendant "engaged in a discriminatory practice" with "malice or with reckless indifference to the federally protected rights of an aggrieved individual."[84] As part of a compromise, the statute also contains limitations (or statutory caps) on the size of the potential award.[85] Maximum award amounts vary depending upon the size of the employer, with a maximum potential liability of $300,000 for companies with 500 or more employees.[86] In addition to the statutory cap, plaintiffs can also obtain back pay, front pay, and certain interest.[87]

III. THE SUPREME COURT ADDRESSES PUNITIVE DAMAGES UNDER TITLE VII

A. Kolstad v. American Dental Association

Nearly a decade ago, the Supreme Court provided the seminal case on punitive damages in Title VII employment discrimination matters in *Kolstad v. American Dental Ass'n*.[88] In *Kolstad*, the Court considered whether the appellate court had erred in upholding a district court's decision to preclude the issue of punitive damages from going to a jury in a gender discrimination matter.[89] The defendant, the American Dental Association, had denied the plaintiff, Carole Kolstad, a promotion in favor of a male employee.[90] Kolstad alleged that the defendant had "preselect[ed]" the male

83. Susan Ritz, *Introduction* to THE CIVIL RIGHTS ACT OF 1991: ITS IMPACT ON EMPLOYMENT DISCRIMINATION LITIGATION, *supra* note 81, at 9.

84. 42 U.S.C. § 1981a(b)(1) (2000).

85. *See, e.g.*, Colleen P. Murphy, *Determining Compensation: The Tension Between Legislative Power and Jury Authority*, 74 TEX. L. REV. 345, 408 (1995) ("[T]he caps on compensatory and punitive damages in the Civil Rights Act of 1991 evidently were enacted as part of a compromise between those who wanted traditional jury determination of damages and those who did not want jury trial at all in actions under the Act.").

86. 42 U.S.C. § 1981a(b)(3)(D) (2000).

87. *Id.* § 1981a(b)(2); 42 U.S.C. § 2000e-5(g) (2000).

88. 527 U.S. 526 (1999).

89. *Id.* at 531-33.

90. *Id.* at 530-31.

employee for the position, and that the acting head of the organization had told sexually offensive jokes and used derogatory language in reference to women.[91] Kolstad further maintained that the acting head of the association had refused to even meet with her about the open position for several weeks.[92] After a jury trial on the issue of gender discrimination, Kolstad was awarded $52,718 in back pay.[93] The district court did not allow the issue of punitive damages to go to the jury.[94] In a post judgment decision, the district court was clear that "it had not been persuaded" that the defendant made the promotion decision on the basis of sex.[95] Sitting en banc, the Court of Appeals for the D.C. Circuit affirmed the district court, holding that "'before the question of punitive damages can go to the jury, the evidence of the defendant's culpability must exceed what is needed to show intentional discrimination.'"[96] The appellate court further concluded that there must be a showing of "'egregious'" wrongdoing on the part of the defendant for a punitive damage award to be warranted.[97] The appellate court ruled that the plaintiff had failed to present sufficient evidence to make this showing of egregiousness.[98] The Supreme Court granted certiorari in the case to resolve a split in the circuits over whether a showing of egregious conduct is necessary for a punitive damage claim to go to the jury.[99] In analyzing the damages provision of Title VII, the Court noted that the Civil Rights Act of 1991 limits punitive awards to cases where the plaintiff has demonstrated that the discrimination was "intentional."[100] The Court rejected the lower court's conclusion, however, that a plaintiff must show that the intentional discrimination involved in the case was also egregious in nature.[101] Looking to the plain terms of the statute, the Court noted that the text does not

91. *Id.* at 531.
92. *Id.* at 530.
93. *Id.* at 532.
94. *Id.*
95. *Id.*
96. *Id.* at 533 (quoting Kolstad v. Am. Dental Ass'n, 139 F.3d 958, 961 (D.C. Cir. 1998)).
97. *Id.* (quoting *Kolstad*, 139 F.3d at 965).
98. *Id.*
99. *Id.*
100. *Id.* at 534.
101. *Id.* at 534-35.

require a demonstration of an employer's outrageous behavior.[102] Rather, the statute focuses on only "an employer's state of mind."[103]

The Court acknowledged, however, that not all cases of intentional discrimination warrant an instruction on exemplary damages.[104] Instead, the statute requires a showing that the defendant acted with "malice or with reckless indifference to the [plaintiff's] federally protected rights."[105] This requirement relates to "the employer's knowledge that it may be acting in violation of federal law, not its awareness that it is engaging in discrimination."[106] The Court went on to explain that a plaintiff can show malice or reckless indifference by demonstrating that the employer "discriminate[d] in the face of a perceived risk that its actions [would] violate federal law."[107] The Court acknowledged that by requiring this showing it was narrowing the cases of intentional discrimination in which exemplary relief would be appropriate, and noted that "[t]here will be circumstances where intentional discrimination does not give rise to punitive damages liability."[108] In addition to demonstrating malice or reckless indifference, the Court also held that the victim must impute liability for exemplary relief to the defendant.[109] Referring to the Restatement (Second) of Agency, the Court advised that punitive liability is imputed in those cases in which "an employee serving in a 'managerial capacity' committed the wrong while 'acting in the scope of employment.'"[110] Even in those cases in which punitive damages are imputed to the employer, however, the defendant can avoid liability by demonstrating that it has engaged in "good faith efforts at Title VII compliance."[111] Such good faith efforts can be demonstrated, for example, where the employer has effectively maintained and implemented a policy or program attempting to prevent discrimination.[112] By

102. *Id.* at 535.
103. *Id.*
104. *Id.* at 535-37.
105. *Id.* at 535 (quoting 42 U.S.C. § 1981a(b)(1) (1994)) (emphasis omitted).
106. *Id.*
107. *Id.* at 536.
108. *Id.* For example, though intentionally discriminating, the employer may not be aware that such discrimination violates federal law. *Id.* at 537.
109. *Id.* at 539.
110. *Id.* at 543 (quoting RESTATEMENT (SECOND) OF AGENCY § 2176 (1957)).
111. *Id.* at 544.
112. *Id.* at 544-45.

allowing this employer defense, the Supreme Court attempted to "promote prevention as well as remediation" and thereby effectuate the "purposes underlying Title VII."[113] In conclusion, in light of the new standards that it announced on the issue of punitive damages, the Court vacated the appellate court's order and remanded the case.[114]

B. Interpreting Kolstad

The *Kolstad* decision is important, as it is the Supreme Court's clearest statement on the standard necessary to establish a punitive damages claim pursuant to Title VII.[115] Nonetheless, there has been significant confusion in the lower courts over how exactly to apply this standard.[116] This uncertainty is likely caused by the fact that the Supreme Court did not define certain critical terms in its analysis, such as "managerial capacity" and "good faith efforts."[117] In *Davey v. Lockheed Martin Corporation*,[118] the Tenth Circuit Court of Appeals provided perhaps the best and clearest interpretation of *Kolstad* to date, boiling the decision down to a three-part framework.[119] Under the *Davey* test, a plaintiff may seek exemplary relief if the defendant "acted with knowledge that its actions

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113. *Id.* at 545-46.

114. *Id.* at 546.

115. *See* Harold S. Lewis, Jr., *Walking the Walk of Plain Text: The Supreme Court's Markedly More Solicitous Treatment of Title VII Following the Civil Rights Act of 1991*, 49 ST. LOUIS U. L.J. 1081, 1083 (2005) (noting that in *Kolstad* the Supreme Court "adopted a traditional, moderate standard governing the recovery of punitive damages for Title VII actions").

116. *See* Jonathan C. Hancock & John B. Starnes, *Revisiting* Kolstad v. American Dental Association*: Reform of Punitive Damages Awards in Employment Discrimination Cases Since the Supreme Court Adopted the Standard of Malice or Reckless Indifference*, 31 U. MEM. L. REV. 641, 658 (2001) (noting that even after *Kolstad*, "questions surrounding the punitive damage awards still remain"); Kim J. Askew, *Punitive Damages* Kolstad v. American Dental Association, WL VPB0919 ALI-ABA 501, 525 (ALI-ABA Course of Study, Sept. 19, 2000) ("The circuits have been somewhat inconsistent in analyzing when a claim of intentional discrimination fails to give rise to punitive damages.").

117. *See* Amy L. Blaisdell, Note, *A New Standard of Employer Liability Emerges:* Kolstad v. American Dental Association *Addresses Vicarious Liability in Punitive Dama*ges, 44 ST. LOUIS U. L.J. 1561, 1602-03 (2000) ("The Court gave very vague guidance as to what it means to act in a 'managerial capacity,' and as to what types of employer activities will constitute 'good-faith efforts to comply with Title VII.'").

118. 301 F.3d 1204 (10th Cir. 2002).

119. *Id.* at 1208-09.

violated federal law."[120] Next, the plaintiff must show that the worker who acted against the plaintiff "is a managerial agent who acted within the scope of employment."[121] Finally, the defendant can avoid punitive damages by proving its good faith.[122] Even in *Davey*, however, the court expressed confusion over how the good faith standard should be applied, and also noted that the question of which party bears the burden of proof on this issue remains unresolved.[123]

The academic scholarship is mixed on the effect of *Kolstad*. Some have argued that the decision was an enormous victory for employers, and that by permitting companies to avoid punitive damages for the unlawful conduct of their managerial employees "without establishing a clear good-faith-effort standard, the Court rendered Title VII's most powerful deterrent mechanism—punitive damages—ineffectual."[124] By failing to consider the "broader purpose" of Title VII and the Civil Rights Act of 1991, the Supreme Court did not recognize that potential liability for punitive damages "could spur employers to work tirelessly to prevent unlawful discrimination in their workplaces."[125] Even employer defense firms announced that companies "can breathe a bit easier" after the decision.[126]

Others have taken a contrary view of the decision. One commentator suggested that *Kolstad* "created more continuity than change and more opportunity than limitation for plaintiffs to be awarded

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120. *Id.* at 1208.

121. *Id.* at 1208-09.

122. *Id.* at 1209.

123. *Id.* at 1209 & n.4.

124. *See Leading Cases*, *supra* note 11, at 359-60; *see also* Ann M. Anderson, Note, *Whose Malice Counts?* Kolstad *and the Limits of Vicarious Liability for Title VII Punitive Damages*, 78 N.C. L. REV. 799, 804-05 (2000) (arguing that the *Kolstad* decision "will prevent appropriate punitive damage awards in cases in which courts are unwilling to interpret *Kolstad* with a view toward Title VII's enforcement goals").

125. *See Leading Cases*, *supra* note 11, at 368; *see also* Andrew Weissmann & David Newman, *Rethinking Criminal Corporate Liability*, 82 IND. L.J. 411, 437 (2007) ("In *Kolstad*, the Court limited vicarious liability agency principles to shield employers from liability for punitive damages under Title VII.").

126. *See Leading Cases, supra* note 11, at 366 (quoting *High Court Ends Term with Important Rulings on ADA, Punitive Damages*, PA. EMP. L. LETTER (Buchanan Ingersoll), July 1999, at 4); *see also* Andrea A. Kirshenbaum, Comment, Kolstad v. American Dental Ass'n*: The Opportunity for Punitive Damages in Employment Discrimination Cases*, 3 U. PA. J. LAB. & EMP. L. 617, 618-19 (2001) (discussing views that the *Kolstad* decision would greatly benefit employers).

punitive damages."[127] Another further maintained that while the effects of *Kolstad* would largely depend upon how it is applied, the decision "may mean that most employers sued under Title VII will face paying thousands of dollars in punitive damages."[128] And it has even been suggested that the standard enunciated by the Court "makes no sense."[129] The confusion in the lower courts over how to apply the *Kolstad* case, combined with the conflicting views in the academic literature regarding the impact of the Supreme Court's decision, leave much uncertainty over the effectiveness of punitive damages in deterring discriminatory behavior. A study of the decisions that followed *Kolstad* is therefore necessary to help shed light on whether the Civil Rights Act of 1991 provided an effective remedial structure.

IV. THE FALSE PROMISE OF PUNITIVE DAMAGES: AN EXAMINATION OF DISTRICT COURT CASES

The addition of punitive and compensatory damages to Title VII "altered the landscape" of civil rights law; it was believed that this relief would "deter discrimination" and provide "greater protection to victims of intentional discrimination."[130] Subsequent Supreme Court case law interpreting the statute, however, combined with an unreceptive welcome of punitive damage awards in the lower courts, has called into question the effectiveness of this form of relief with regard to the broader goal of eliminating discrimination.[131] An analysis of all available district court cases during the calendar years of 2004 and 2005 demonstrates just how infrequently punitive damages find their way into published opinions as a remedy for discrimination. Though the perception in our society is often that "punitive damages are out of control," resulting in a "crisis" of the judicial system, the reality is far different, at least as these damages relate to cases of employment discrimination.[132]

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127. Kirshenbaum, *supra* note 126, at 644-45.

128. Schiffner, *supra* note 14, at 195-96.

129. *See* Blaisdell, *supra* note 117, at 1605.

130. *See* Levi, *supra* note 13, at 596.

131. *See, e.g.*, Ruggles, *supra* note 8, at 154-55 ("Judging from the level of recidivism, the [1991 CRA], with its caps on damages, has not achieved its goal of eliminating the persistent problem of employment discrimination.").

132. *See* John Calvin Jeffries, Jr., *A Comment on the Constitutionality of Punitive Damages*,

A. Methodology

For this study, I analyzed all available federal district court cases addressing Title VII punitive damages for the calendar years of 2004 and 2005. This included all federal district court cases, both published and unpublished, that appeared in the Westlaw federal district court database, narrowed by a search term that limited the analysis to *any* case referencing both Title VII *and* punitive damages.[133] The search revealed a total of 676 federal district court cases for these two years that referenced both punitive damages and Title VII of the Civil Rights Act of 1964.[134]

I chose to perform the study based on the results in the Westlaw database as this is one of the most comprehensive and frequently used legal search engines.[135] Thus, in determining how significant of a deterrent effect punitive damages have had in the employment discrimination context, this database would contain the vast majority of cases of which those in the legal or corporate community would be aware.[136] In greater detail below, I also compare the results of my search to a similar search that I had performed in a different database.[137] I selected the years 2004 and 2005 for this study as a result of several different factors. First, these years are far enough removed from the Supreme Court's decision in *Kolstad* to allow the appellate courts and district courts to have digested and interpreted the decision's meaning. Second, as over two years have passed since December 31, 2005 (the end date for cases

72 VA. L. REV. 139, 139 (1986) (commenting on the "explosion in punitive judgments" in the mass tort and products liability contexts).

133. The specific search that I ran in the Westlaw federal district court database ("DCT") was as follows: DA(AFTER 1/1/2004) & DA(BEFORE 1/1/2006) & "TITLE VII" & "PUNITIVE DAMAGES."

134. The total of 676 cases was accurate as of the date I completed this study, December 3, 2007. Westlaw does occasionally add cases to its database for various reasons, and it is possible that the total number of cases uncovered by my search will increase over time.

135. The common usage and easy accessibility of this database also allow the results of my study to be easily duplicated by others in the academic community.

136. It is not uncommon to perform a numerical study based on this type of frequently searched legal database. *See, e.g.*, Michael Selmi, *Was the Disparate Impact Theory a Mistake?*, 53 UCLA L. REV. 701, 734-35 (2006) (performing numerical analysis of disparate impact litigation in employment discrimination cases based upon a search in the analogous Lexis database).

137. *See infra* Part IV.D (discussing results of a search limited to jury verdicts in Title VII cases over the 2004-2005 time period).

analyzed as part of this study), a sufficient amount of time has passed to determine (for the most part) how the appellate courts have treated any district court punitive damage award that might have been challenged on appeal.[138] Finally, the years analyzed are recent enough to capture any current trends in punitive relief in the courts.

In reviewing each case, I catalogued whether the district court awarded punitive damages pursuant to Title VII in the matter. I took as broad of a view of "awarded punitive damages" as possible, including even those cases, for example, in which the district court referenced an *earlier* opinion awarding punitive damages, but the examined opinion itself addressed only a fees issue.[139] In addition, in those instances in which there was an award of punitive damages, I tracked the particular amount of the award. I did *not* catalogue those cases in which there was a punitive damage award outside of the Title VII context, for example, those cases that only awarded punitive damages pursuant to the Americans with Disabilities Act of 1991.[140] Also not included in the totals are those published opinions in which a district court vacated a jury's award

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138. In the two instances where district court punitive damage awards were vacated after 2005, the cases were included in the numerical totals. *See infra* note 143 (discussing the *Allen* and *Gaskins* decisions).

139. *See, e.g.*, Firestine v. Parkview Health Sys., 374 F. Supp. 2d 658, 661-62 (N.D. Ind. 2005) (discussing the appropriateness of attorney fees and costs with reference to a Title VII retaliation case in which the jury awarded $40,315 in punitive damages to the plaintiff). Categorizing the cases was somewhat of a subjective process, and I attempted to be as inclusive as possible with my analysis. *Compare* Watson v. E.S. Sutton, Inc., No. 02-Civ.-2739, 2005 WL 2170659, at **1, 15, 24 (S.D.N.Y. Sept. 6, 2005) (awarding $717,000 in punitive damages in a Title VII retaliation case under city law, amount included in study case totals because of tenor of decision regarding Title VII), *with* Pollard v. E.I. DuPont DeNemours & Co., No. 95-3010, 2003 WL 23849733 (W.D. Tenn. Oct. 22, 2003), *modified by* 2004 WL 784489 (W.D. Tenn. Feb. 24, 2004) (punitive damage award not included in study case totals where award was made pursuant to state law rather than Title VII).

140. 42 U.S.C. §§ 12101-12213 (2000); *see, e.g.*, Brady v. Wal-Mart Stores, Inc., No. 03-3843, 2005 WL 1521407, at **1-3 (E.D.N.Y. June 21, 2005) (reducing $5 million punitive damage jury award to statutory cap of $300,000 in ADA case); Young v. DaimlerChrysler Corp., No. 01-0299-C-M/S, 2004 WL 2538639, at *4 (S.D. Ind. Oct. 19, 2004) (reducing a $4.5 million punitive damages award to $200,000 in an ADA case). In certain instances, there was a fine line to be drawn between whether punitive damages were awarded pursuant to state or city law or pursuant to Title VII. As part of the analysis, I attempted to include only those cases in which the court awarded damages, at least in part, pursuant to Title VII, though in some instances this calculation was difficult to perform. *See supra* note 139.

of punitive relief.[141] Additionally, the study focused primarily on district court cases. Thus, I also included any case in which punitive damages may have been subsequently vacated on appeal,[142] if the appellate decision was issued after December 31, 2005.[143]

B. Results of Study

Over the period of 2004-2005, approximately 36,676 employment law cases were filed in all of the federal district courts in the United States.[144] A search in the Westlaw database for the calendar years of 2004 and 2005 revealed 676 federal district court opinions—both published and unpublished—that referenced both Title VII and punitive damages.[145] After analyzing each of these cases, I concluded that twenty-four decisions included opinions where a district court either awarded punitive damages under Title VII or upheld a jury's award. The breakdown per year is illustrated in Table A below: I found nine cases awarding punitive damages issued in 2004 and

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141. *See, e.g.*, Wirtz v. Kan. Farm Bureau Servs., 355 F. Supp. 2d 1190, 1195-96 (D. Kan. 2005) (vacating a $20,000 jury award for punitive damages in a Title VII gender discrimination case).

142. As the focus of the study was on district court decisions, I did not track subsequent appeals in those cases in which the court awarded no punitive damages. The appellate process was monitored for those district court decisions that resulted in a punitive award during the 2004-2005 timeframe.

143. *See* Gaskins v. BFI Waste Servs. LLC, No. 02-1832, 2005 WL 1667737, at *20 (E.D. Va. June 17, 2005) (awarding $1,200,000 in punitive relief), *punitive damage award vacated sub nom.*, White v. BFI Waste Servs., Nos. 05-1804, 05-1837, 2006 WL 1443444 (4th Cir. May 23, 2006); Allen v. Tobacco Superstore, Inc., 375 F. Supp. 2d 796, 809 (E.D. Ark. 2005) (awarding $75,000 in punitive damages in a Title VII race discrimination and retaliation case), *punitive damage award vacated*, 475 F.3d 931 (8th Cir. 2007). The *Allen* and *Gaskins* decisions are the only cases in which I am aware of an appellate court subsequently vacating a district court's punitive damage award issued pursuant to Title VII during 2004 or 2005 (at least as of the conclusion of the study on December 3, 2007). I kept these decisions in the totals for Table A as the awards were not vacated until *after* the two year timeframe considered for the study. *Cf.* Johnson v. Spencer Press of Me., 364 F.3d 368, 377-78 (1st Cir. 2004) (declining to address the punitive damages issue because compensatory damages were sufficient to exhaust the statutory cap; district court case, No. 02-73-P-H, 2004 WL 1859791 (D. Me. Aug. 19, 2004), was included in the 2004 study totals).

144. ADMIN. OFFICE OF THE U.S. COURTS, JUDICIAL BUSINESS OF THE UNITED STATES COURTS, *supra* note 17, at tbl.C-2A (2005) (between Oct. 1, 2003, and Sept. 30, 2004, 19,746 suits were filed; between Oct. 1, 2004, and Sept. 30, 2005, 16,930 suits were filed).

145. A number of these cases were outside of the Title VII context, but the text of the district court's decision still utilized these terms. Similarly, a number of the decisions resulted in a judgment for the defendant, thus the plaintiff received *no relief* in the case.

fifteen cases in 2005.[146] The case names, citations, and punitive damage award amounts are on file with the author. Of the twenty-four total cases awarding exemplary relief, the mean award was $212,471.67 and the median award was $62,500.00.[147] That only twenty-four available employment discrimination cases over a two-year-period awarded punitive damages seems somewhat low in light of Congress's intent to provide a more effective deterrent by making the remedy available.[148]

146. One case, *Ciesielski v. Hooters Management Corp*., issued decisions relevant to the punitive damage award in both 2004 and 2005. *See* Ciesielski v. Hooters Mgmt. Corp., No. 03 C 1175, 2005 WL 608245, at **4-5 (N.D. Ill. Mar. 15, 2005); Ciesielski v. Hooters Mgmt. Corp., No. 03 C 1175, 2004 WL 2997648, at *1 (N.D. Ill. Dec. 27, 2004). As the later decision in this case denied a motion to reconsider the sufficiency of the evidence on the punitive damages question, the case was included in the 2005 totals. *Ciesielski*, 2005 WL 608245 at **4-5.

147. There are readily identifiable reasons for why the means and medians appear so high in these totals. In some instances, awards were made on behalf of multiple parties. *See, e.g.*, Millazzo v. Universal Traffic Serv., Inc., No. Civ. 01-B-880, 2004 WL 3480982, at *3 (D. Colo. Aug. 24, 2004) (awarding two plaintiffs punitive damages in the amounts of $35,000 and $45,000 in a Title VII case). In other instances, awards were made pursuant to statutes that do not have the same statutory cap restrictions as Title VII. In those instances in which the awards were made pursuant to multiple statutes, the amount of the awards were not apportioned between Title VII and the other statute(s) if the amounts could not be separated out. *Cf.* Watson v. E.S. Sutton, Inc., No. 02 Civ. 2739, 2005 WL 2170659, at **1, 15, 24 (S.D.N.Y. Sept. 6, 2005) (awarding $717,000 in punitive damages in a Title VII retaliation case also brought under New York state and city laws—though the punitive award was made pursuant to city law, the full amount was included in the study's case totals).

148. *See, e.g.*, Levi, *supra* note 13, at 596 (discussing the role of the Civil Rights Act of 1991 in employment discrimination law).

Table A				
Year	Number of Cases Analyzed	Number of Cases Awarding Punitive Damages	Mean Punitive Damage Award	Median Punitive Damage Award
2004	261	9	$98,778.33	$50,000.00
2005	415	15	$267,354.33	$75,000.00
Total	676	24	$204,138.33	$62,500.00

C. Weaknesses of Analysis

Concededly, this analysis yields imperfect and imprecise results from a purely numeric standpoint. When approaching the numbers that this study yields, we must consider the potential weaknesses of the data gathered. In particular, the search performed cannot capture those cases for which there was no opinion issued in the district court. Additionally, the analysis does not identify the deterrent effect of any employment discrimination cases brought in state courts that resulted in a punitive damage award. Also, it is impossible to catalogue how many cases would have resulted in a punitive damage award that were otherwise settled by the parties. And, though unlikely, it is possible that a particular decision awarded punitive damages pursuant to Title VII without specifically using the search terms utilized by the study.

Finally, this study would be significantly strengthened through a comparison of (1) those Title VII cases in which judgment was entered in favor of the plaintiff and *no punitive damages were awarded* with (2) those Title VII cases in which judgment was entered in favor of the plaintiff and *punitive damages were awarded*. This comparison would help reveal how frequently the courts award punitive damages in cases in which the plaintiff establishes discrimination. Unfortunately, obtaining an accurate number of Title VII cases in which judgment was entered in favor of the plaintiff and no punitive damages were awarded is a difficult (if not impossible) task using the Westlaw database. Many judgments are entered by the courts without a published opinion,

and acquiring an accurate number of plaintiff judgments to use as a comparator during the 2004-2005 timeframe proved elusive. Nonetheless, with the assistance of a separate database, I was able to obtain substantive data in this regard.

D. Analysis Conducted in a Different Database

In addition to the study that I conducted on punitive damages through the use of Westlaw, I was able to gain access to another large database containing federal district court jury awards in an attempt to determine the frequency with which exemplary relief is awarded in employment discrimination cases. This additional analysis was performed, at my request, by Jury Verdict Research, Palm Beach Gardens, Florida (JVR), a company that traces and analyzes national litigation trends.[149] The results of their analysis largely confirmed the results of my individual study.

1. Jury Verdict Research Methodology

JVR maintains a large database on jury verdicts in employment discrimination cases through information that it gathers from independent contractors who research court files, as well as reports provided by plaintiff and defense attorneys.[150] JVR acknowledges that it "does not receive 100 percent of the jury verdicts rendered nationwide," but maintains "that its sample is sufficient to produce descriptive statistics for ... employment practice litigation."[151] JVR further states that the verdicts are gathered "in an impartial manner, with an equal emphasis on plaintiff and defense verdicts and settlements, and with no intentional bias toward extreme awards or geographic regions."[152]

149. *See* About Jury Verdict Research, http://www.juryverdictresearch.com/About_JVR/about_jvr.html [hereinafter *JVR Website*] (last visited Nov. 25, 2008).

150. *Id.*

151. *Id.*

152. *Id.*

2. Results of Jury Verdict Research's Analysis

I asked that JVR search its nationwide database to determine the number of Title VII jury verdicts awarding punitive damages during 2004 and 2005, and the mean and median of those awards. The database contains information as to jury verdicts, but does not identify the actual amount of the award (if any) subsequently ordered by the district court.[153] The search revealed that there were only fifty-two jury verdicts awarding punitive damages during 2004 and 2005 in Title VII federal district court cases.[154] Though this result is approximately twice the number of cases identified by my study, it is still a relatively small figure given the expansive nature of the search.

The JVR search also revealed a median punitive damages award of $282,500.00 and a mean award of $1,322,163.46.[155] As these numbers represent jury awards only, they would not have been adjusted to reflect any statutory caps that the district court may later have imposed to comply with the limits of Title VII[156] or any other adjustments made by the courts. A summary of this data is set forth in Table B below. The case names, docket numbers, and award amounts in each case are on file with the author.

153. E-mail from Jury Verdict Research Associate to Joseph A. Seiner, Assistant Professor of Law, University of South Carolina School of Law (July 27, 2007, 14:33:40 EST) [hereinafter *JVR data*] (on file with author).

154. *Id.*

155. *See id.*; *see also* E-mail from Jury Verdict Research Associate to Joseph A. Seiner, Assistant Professor of Law, University of South Carolina School of Law (Aug. 6, 2007, 10:30:30 EST) (on file with author) (confirming mean and median punitive damage awards for 2004 and 2005).

156. *See* 42 U.S.C. § 1981a(b)(3) (2000).

Table B			
Year	Number of Juries Awarding Punitive Damages	Mean Punitive Damage Award	Median Punitive Damage Award
2004	24	$1,204,916.67	$325,000.00
2005	28	$1,422,660.71	$245,000.00
Total	52	$1,322,163.46	$282,500.00

Moreover, the results of the JVR search revealed that 291 Title VII employment discrimination cases ultimately resulted in a jury verdict during 2004-2005.[157] Of these 291 jury verdicts, 177 were in favor of plaintiffs.[158] Thus, slightly less than 18 percent (52/291) of those Title VII cases that went to a jury during this timeframe resulted in a punitive damage award by the jury, and approximately 29 percent (52/177) of those juries that found in favor of the plaintiff also awarded punitive damages.[159] These numbers are set forth in Table C below:

157. *See* E-mail from Jury Verdict Research Associate to Joseph A. Seiner, Assistant Professor of Law, University of South Carolina School of Law (Sept. 20, 2007, 15:44:41 EST) (on file with author). These 291 cases reflect *any* case in which a jury rendered a verdict in a case in which a Title VII claim *was originally brought*. *Id.* Thus, a jury verdict was not necessarily rendered in these cases specifically pursuant to Title VII (and may even have been rendered pursuant to another statute instead). JVR "do[es] not track whether the award rendered was specific to Title VII in cases where there were multiple claims." *Id.*

158. *See* E-mail from Managing Editor, Jury Verdict Research, to Joseph A. Seiner, Assistant Professor of Law, University of South Carolina School of Law (Dec. 11, 2007, 20:01:38 EST) (on file with author). These 177 cases reflect those lawsuits in which there was a Title VII claim in the case and a verdict was rendered for the plaintiff. *Id.* As JVR does not track verdicts rendered specifically under Title VII in those cases in which there are multiple claims in the suit, it is possible that some of these plaintiff verdicts were made pursuant to another claim in the case (rather than pursuant to Title VII). *Id.*

159. It is possible, however, that the district court may have taken the punitive damage issue away from the jury in some of these cases.

Table C					
Year	Number of Title VII Jury Verdicts	Number of Title VII Jury Verdicts Awarding Punitive Damages	Percentage of all Title VII Juries Awarding Punitive Damages	Number of Title VII Verdicts for the Plaintiff	Percentage of Title VII Plaintiff Verdicts Awarding Punitive Damages
2004	139	24	17.27%	89	26.97%
2005	152	28	18.42%	88	31.82%
Total	291	52	17.87%	177	29.38%

3. Rationale for Differences in Results

It is worth briefly exploring why there is a differential of cases identified by the two separate analyses. It is not surprising that my study would identify fewer cases of punitive relief awarded than the JVR search. Under my approach, I identified twenty-four decisions in which a district court either awarded punitive damages under Title VII or upheld a jury's award.[160] The JVR analysis, which identified fifty-two cases awarding punitive relief, provides a different measurement, as it exclusively examines *jury verdicts*.[161] Thus, the JVR measurement includes those cases in which an award may have been vacated by the district court.[162] Additionally, the jury verdicts identified by JVR include all cases in which a Title

160. *See supra* Part IV.B (discussing my results from an analysis of federal district court Title VII decisions).

161. *See JVR data*, *supra* note 153 (listing jury verdicts awarding punitive relief in federal district court Title VII cases).

162. For example, JVR included in its results the case of *Goico v. Boeing Co.*, Doc. No. 02-1420 (D. Kan. 2004). *See id.* Though my search identified two *Goico* decisions, this case was not included in my totals as the district court did not ultimately award the exemplary relief found by the jury. *See* Goico v. Boeing Co., 358 F. Supp. 2d 1028 (D. Kan. 2005); Goico v. Boeing Co., 347 F. Supp. 2d 986 (D. Kan. 2004). In *Goico*, the court awarded $300,000 in compensatory relief which satisfied the statutory cap, thereby making the question of punitive relief moot. *See Goico*, 358 F. Supp. 2d at 1031 ("In keeping with the limitation on damages in 42 U.S.C. § 1981a, the judgment entered by the court included the aforementioned $300,000 [of compensatory relief], representing the permissible limit for both compensatory and punitive damages.").

VII claim *was brought*.[163] Thus, the punitive damages identified in the JVR cases were not necessarily awarded pursuant to Title VII in those cases in which there were other statutory bases for the lawsuit.[164] In contrast, my individual study *only* identifies cases in which a punitive damage award was made pursuant to Title VII.[165] Additionally, the JVR database likely includes some decisions that are not available on Westlaw. This is because the cases in the JVR database are gathered by a different means than Westlaw—JVR relies on workers that research court files, as well as reports provided by attorneys.[166] And, as the Westlaw federal district court database relies on decisions provided by the various federal courts, this database may also include cases not available to JVR.[167] Finally, it is worth noting that while both studies examined cases during 2004-2005, the time periods analyzed are actually somewhat different. This is because there would be a time lag between when a jury renders its verdict (under the JVR analysis), and when a district court actually issues a published opinion (under the Westlaw approach).

While these differences represent only a difference in methodologies, the results are markedly similar. My purpose in obtaining the JVR analysis was to determine whether my results were in some way flawed or unrepresentative. The JVR search, which was more expansive in the types of cases that it included while being performed over a similar time period, also identified very few instances of jury verdicts awarding punitive damage relief in Title VII cases, and revealed that slightly less than 18 percent of all Title VII jury verdicts result in a punitive damage award and that less than 30 percent of juries finding in favor of the plaintiff also award punitive relief. This additional analysis therefore largely confirms my study

163. *See* E-mail from Jury Verdict Research Associate, *supra* note 157.

164. For example, JVR included in its results *Roberts v. County of Cook*, Doc. No. 01-C-9373 (N.D. Ill. 2004). *See JVR data*, *supra* note 153. My analysis identified this case as well, but it was not included in my overall results because the jury's punitive damage award was made pursuant to 42 U.S.C. § 1983, rather than the plaintiff's Title VII claims. *See* Roberts v. County of Cook, No. 01-C-9373, 2004 WL 1088230, at *1 (N.D. Ill. May 12, 2004).

165. *See supra* Part IV.A (discussing the methodology of my punitive damages study).

166. *See JVR Website*, *supra* note 149.

167. *See generally* E-mail from Jury Verdict Research Associate to Joseph A. Seiner, Assistant Professor of Law, University of South Carolina School of Law (Aug. 6, 2007, 10:30:30 EST) (on file with author) (indicating that JVR utilizes Westlaw, but that JVR may not include all Westlaw cases in its database).

and also calls into question the effectiveness of exemplary relief in employment discrimination cases.

E. District Courts Erect Additional Barriers to Punitive Relief

In addition to the data my analysis reveals, my review of the district court decisions uncovered other issues of critical importance. A number of district court decisions *vacated* punitive damage jury awards in Title VII cases.[168] Also, three recent appellate court employment discrimination decisions reveal that the lower courts may not be allowing the question of exemplary relief to get to the jury, even when such relief may be warranted.[169]

1. District Courts Vacate Awards

My research revealed a number of cases in which the district courts either reduced or vacated a punitive damage award. For example, in *Wirtz v. Kansas Farm Bureau Services*,[170] the district court vacated a $20,000 punitive damage jury award in a Title VII gender discrimination case.[171] Relying on the Supreme Court's decision in *Kolstad*, the district court essentially took the issue away from the jury and concluded on its own that the defendant's actions did not "amount to malicious and willful disregard of plaintiff's protected rights."[172] The court further concluded that the defendant had not "ignore[d] its established [antidiscrimination] policies and procedures," had "fully investigated" the violations of which it had knowledge, and had thus "demonstrated that it complied in good faith with Title VII."[173] Therefore, the district court granted the defendant's motion for judgment as a matter of law following a

168. *See, e.g.*, Wirtz v. Kan. Farm Bureau Servs., 311 F. Supp. 2d 1197, 1225 (D. Kan. 2004); Ash v. Tyson Foods, Inc., No. 96-RRA-3257-M, 2004 WL 5138005, at **1, 9-10 (N.D. Ala. Mar. 26, 2004); Hardman v. Autozone, Inc., No. 02-2291-KHV, 2004 WL 303268, at *8 (D. Kan. Feb. 11, 2004).

169. *See* E.E.O.C. v. Stocks, Inc., No. 06-10871, 2007 WL 1119186, at *1 (5th Cir. Apr. 16, 2007); E.E.O.C. v. Heartway Corp., 466 F.3d 1156, 1160 (10th Cir. 2006); McDonough v. City of Quincy, 452 F.3d 8, 13 (1st Cir. 2006).

170. 311 F. Supp. 2d 1197 (D. Kan. 2004).

171. *Id.* at 1224-25.

172. *Id.* at 1222-23.

173. *Id.* at 1225.

jury's verdict awarding exemplary relief, holding that such an "imposition of punitive damages would be improper."[174]

Moreover, in *Ash v. Tyson Foods*,[175] a district court awarded judgment as a matter of law to the defendant on claims of promotion discrimination brought by two plaintiffs that had yielded jury verdicts of $1.5 million each in punitive damages.[176] In vacating the awards, the district court ruled that one of the plaintiffs had failed to show sufficient evidence of pretext for the employer's asserted nondiscriminatory reason, and that a second plaintiff had not demonstrated that any intentional discrimination had occurred.[177] The Eleventh Circuit Court of Appeals reversed as to one of the plaintiffs, holding that the district court's alternative ruling of a new trial was the more appropriate result.[178] In a per curiam opinion, the U.S. Supreme Court reversed and vacated the appellate court's order, criticizing the lower court's treatment of discriminatory language and its consideration of the plaintiffs' qualifications as compared to the selected candidates.[179] On remand, the Eleventh Circuit, applying the standards adopted by the Supreme Court, decided to "reinstate the previous holdings of [its] decision," effectively eliminating the entire $3 million of punitive relief originally awarded by the jury.[180] In addition, in *Hardman v. AutoZone, Inc.*,[181] a jury awarded the plaintiff $87,500 in punitive damages in a Title VII racial harassment case.[182] The case involved egregious facts, as the plaintiff was subjected to derogatory racial name calling and was even exposed to a co-worker attempting to scare him by pretending to be a member of the Ku Klux Klan.[183] The plaintiff also received and reported to the police personal threats regarding himself and his family which a coworker made.[184] Because of an improper jury instruction, the exemplary relief was vacated by the district court,

174. *Id.*
175. No. 96-RRA-3257-M, 2004 WL 5138005 (N.D. Ala. Mar. 26, 2004).
176. *Id.* at *1.
177. *Id.* at **9-10.
178. Ash v. Tyson Foods, Inc., No. 04-11695, 2005 WL 902044 (11th Cir. Apr. 19, 2005).
179. Ash v. Tyson Foods, Inc., 546 U.S. 454 (2006).
180. No. 04-11695, 2006 WL 2219749 (11th Cir. Aug. 2, 2006), *reh'g denied*, 213 F. App'x 973 (11th Cir. 2006), *cert. denied* 127 S. Ct. 1154 (2007).
181. No. 02-2291-KHV, 2004 WL 303268 (D. Kan. Feb. 11, 2004).
182. *Id.* at *1.
183. *Id.*
184. *Id.*

and a new trial was ordered on the harassment allegation both on the issues of liability and the appropriate damages.[185]

The *Wirtz*, *Ash*, and *Hardman* decisions are excellent illustrations of the difficulties plaintiffs often face with maintaining a punitive damage jury award in an employment discrimination matter. And, even where a district court allows punitive damages to stand in a Title VII case,[186] the court can reduce such an award,[187] or a court of appeals may subsequently reduce or vacate the award. For example, in one of the cases analyzed as part of my study, *Allen v. Tobacco Superstore, Inc.*,[188] the Eighth Circuit Court of Appeals vacated a $75,000 punitive damage award in a race discrimination and retaliation case because it concluded that there was not sufficient evidence of malice or reckless indifference on the part of the defendant.[189] Similarly, in *Gaskins v. BFI Waste Services*,[190] the Fourth Circuit Court of Appeals vacated a $600,000 punitive damage award—already reduced from the $2 million awarded by the jury—because it found insufficient evidence to support any exemplary relief in the case.[191] Simply convincing a jury of reckless or malicious conduct on the part of the employer is therefore not enough, as the courts often intervene to alter any punitive relief that is awarded.

2. Courts Refuse To Give Punitive Damage Question to Jury

Moreover, it is entirely possible that a number of courts are not even permitting punitive damage claims to go to juries in the first instance. Though it would be difficult, if not impossible, to track the number of cases in which a district court declined to give a jury

185. *Id.* at **8-9.

186. In addition to cases involving Title VII, there are also likely civil rights cases brought pursuant to different statutes in which the district courts vacate awards of exemplary relief. *See generally* Webber v. Int'l Paper Co., 326 F. Supp. 2d 160 (D. Me. 2004) (vacating relief in a discrimination case brought pursuant to Maine Human Rights Act, not Title VII).

187. *See, e.g.*, Hines v. Grand Casino of La., 358 F. Supp. 2d 533, 539, 548-53 (W.D. La. 2005) (reducing a $200,000 punitive damage award in sexual harassment and constructive discharge case to $170,000 to adhere to the statutory caps and then remitting the amount to $30,000).

188. 475 F.3d 931 (8th Cir. 2007).

189. *Id.* at 942-43.

190. Nos. 05-1804, 05-1837, 2006 WL 1443444 (4th Cir. May 23, 2006).

191. *Id.* at *1.

instruction on exemplary relief, three recent appellate decisions in employment discrimination cases are informative on this issue.

First, in *EEOC v. Stocks, Inc.*,[192] the Fifth Circuit Court of Appeals considered whether the district court had properly refused to give a punitive damage instruction in a retaliation case brought under Title VII.[193] In that case, the plaintiff alleged that she was improperly disciplined and ultimately terminated after she complained of sexual harassment that she was experiencing as a restaurant waitress.[194] Though the evidence demonstrated that the decisionmakers at the restaurant "had knowledge of federal anti-discrimination laws and were aware of their duty not to retaliate against an employee who brought a sexual harassment complaint," the district court refused to let the punitive damage issue go to the jury.[195] In an unpublished decision, the Fifth Circuit reversed the district court, holding that "the jury could have found that [the restaurant's] decisionmakers were aware of their responsibilities under Title VII and acted in the face of a perceived risk that their actions would violate the statute."[196]

Similarly, in *McDonough v. City of Quincy*,[197] the First Circuit Court of Appeals considered whether a district court erred in failing to give a jury a punitive damage instruction in a case where a police officer maintained that he was retaliated against for providing assistance in another employee's sexual harassment suit against the city.[198] Though the district court would not allow the issue of exemplary relief to go to the jury, the First Circuit reversed, holding

192. No. 06-10871, 2007 WL 1119186 (5th Cir. Apr. 16, 2007). The author served as lead counsel in the *Stocks* case on behalf of the EEOC. The views expressed in this Article are those of the author and do not represent the views of the U.S. Equal Employment Opportunity Commission or of the United States.

193. *Id.* at **1-2.

194. *Id.* at *1.

195. *Id.* at **1-2. The restaurant owner demonstrated his knowledge of the relevant law by testifying that he did not take any action against the plaintiff subsequent to an earlier complaint because "she would have gone to the EEOC." *Id.*

196. *Id.* at *3. Because the court believed that the issue of punitive damages was "intertwined" with the finding of liability in the case, the court did not believe that there could be a separate trial limited to the question of exemplary relief. *Id.* The court therefore left "to the EEOC the choice of whether it wants a new trial on all issues, or wishes instead to retain its judgment." *Id.*

197. 452 F.3d 8 (1st Cir. 2006).

198. *Id.* at 13-14.

that the trier of fact should have been allowed to consider whether the city was acting with malice or reckless indifference.[199] In support of this reversal, the appellate court noted that the jury had already rejected the legitimate nondiscriminatory explanation that the city gave for its actions when it found for the plaintiff on the retaliation claim.[200] The First Circuit also emphasized that the police department was aware of its legal obligations as a result of its own published policy and training, and that the retaliating officials were all senior level employees with management responsibilities.[201]

Finally, in *EEOC v. Heartway Corp.*,[202] the Tenth Circuit Court of Appeals addressed whether a district court had properly refused to give a punitive damage instruction to the jury in a case brought under the Americans with Disabilities Act (ADA).[203] The defendant, a nursing center operator, terminated a cook at their facility after finding out that she suffered from Hepatitis C.[204] The district court refused to allow the issue of punitive damages to go to the jury, despite the fact that the nursing facility administrator asked an EEOC investigator how he would "like to eat food containing her blood," and further stated that there would be a "mass exodus" if the nursing center clients found out about the plaintiff's condition.[205] In reversing the district court's ruling, the Tenth Circuit held that testimony presented at trial—revealing that the facility administrator had received training on the ADA and knew that it was illegal to terminate someone because of a disability—was sufficient to allow a jury to determine whether the administrator "acted with knowledge" that he was violating the law.[206]

These decisions represent only three recent cases in which a district court has not permitted the issue of punitive damages to go to the jury in an employment discrimination matter—only to later

199. *Id.* at 23-24.

200. *Id.* at 23.

201. *Id.*

202. 466 F.3d 1156 (10th Cir. 2006). The author served as lead counsel in the *Heartway* case on behalf of the EEOC. The views expressed in this Article are those of the author and do not represent the views of the U.S. Equal Employment Opportunity Commission or of the United States.

203. *Id.* at 1158-59.

204. *Id.* at 1159. The nursing center administrator maintained that the plaintiff was terminated for falsifying information on an employment application. *Id.*

205. *Id.* at 1160-61.

206. *Id.* at 1169.

be overturned by an appellate court. Although there are likely many other district courts that have similarly declined to permit the issue of exemplary relief to reach the trier of fact, determining the exact number of such decisions would be extremely difficult (if not impossible). Many similar decisions could have been made orally by a district court—without the benefit of a published opinion—and not subsequently challenged on appeal.

Regardless of how many similar cases exist, however, *Stocks, Inc.*, *McDonough*, and *Heartway* demonstrate a reluctance of some district courts to permit the question of punitive damages to go to the jury or to allow the full amount of the damage award to stand.[207] As the gatekeeper to which questions ultimately reach the jury, the district court judges have an overwhelming amount of power in crafting the relief an aggrieved party receives.[208] If the courts are reluctant to award exemplary relief—as the above examples suggest may sometimes be the case—litigants may face a difficult battle in obtaining punitive relief.

F. Conclusions of Analysis

Regardless of whether there were twenty-four Title VII cases awarding punitive damages during 2004-2005,[209] or whether there were fifty-two Title VII punitive damage jury awards,[210] the import of these data remains the same. There are simply not a significant number of Title VII punitive damage awards finding their way into published district court decisions. Given the numerous Title VII cases filed each year—indeed, the Equal Employment Opportunity Commission alone filed 592 cases during fiscal years 2004-2005[211] —the fact that so few cases resulted in a published award of

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207. *See generally* Levi, *supra* note 13, at 600-01 ("[J]uries have regularly awarded compensatory and punitive damages to victims of unlawful intentional discrimination under Title VII. Many of these awards, however, have not gone uncontested in post-trial motions.").

208. *Cf.* Charles A. Sullivan, *Disparate Impact: Looking Past the* Desert Palace *Mirage*, 47 WM. & MARY L. REV. 911, 941 (2005) ("Judges who are skeptical about the prevalence of discrimination in the workplace will continue to act as gatekeepers ....").

209. *See supra* Part IV.B.

210. *See supra* Part IV.D.2.

211. *See* EEOC Litigation Statistics, FY 1997 through FY 2006, http://www.eeoc.gov/stats/litigation.html (last visited Nov. 25, 2008) (during fiscal year 2004 the EEOC filed 297 Title VII claims and during fiscal year 2005 the EEOC filed 295 Title VII claims).

punitive damages is quite telling. Although unexpected at first, the results of this study are not necessarily surprising upon closer analysis. In discussing exemplary relief outside of the employment law context, one scholar observed that "every empirical study of the question" of punitive damages "has reached conclusions that, to say the least, fail to support [commonly held] beliefs" that such awards "have grown dramatically in both frequency and size."[212] And, the Supreme Court has recently noted that "[a] survey of the literature reveals that discretion to award punitive damages has not mass-produced runaway awards."[213]

As discussed in the previous section, it is possible that there were punitive damage awards that did not result in a written opinion.[214] It is equally possible that the parties settled cases that otherwise would have resulted in significant punitive damage awards.[215] Even if this were the case, however, the lack of a significant number of published decisions on punitive damages in employment cases is just as troubling. It is exactly the publicly available court decision of an employer being sanctioned with exemplary damages that is likely to cause other employers to change their behavior.[216] Public punitive damage awards place all employers on notice that if they discriminate, they can be severely sanctioned. Without these published decisions, we cannot expect employer conduct to change.

The data also revealed that juries appear somewhat reluctant to award punitive relief—less than 18 percent of Title VII cases that reach a jury result in this type of award.[217] And in those cases where a jury finds in favor of the plaintiff in a Title VII case, 29 percent of those juries also award punitive relief.[218] These numbers are in line with at least one earlier analysis of punitive relief in employment cases.[219] The percentage of juries that award punitive damages to

212. Michael J. Saks, *Do We Really Know Anything About the Behavior of the Tort Litigation System – And Why Not?*, 140 U. PA. L. REV. 1147, 1254 (1992).

213. Exxon Shipping Co. v. Baker, 128 S. Ct. 2605, 2624 (2008).

214. *See supra* Part IV.C (discussing weaknesses in study).

215. *See id.*

216. *Cf.* Andrea A. Curcio, *Breaking the Silence: Using a Notification Penalty and Other Notification Measures in Punitive Damages Cases*, 1998 WIS. L. REV. 343, 346 ("Publication of wrongdoing achieves both the specific and general deterrent function of punitive damages.").

217. *See supra* Part IV.D (discussing results of JVR database search).

218. *Id.*

219. *See* Marc Galanter, *Real World Torts: An Antidote to Anecdote*, 55 MD. L. REV. 1093,

prevailing plaintiffs varies considerably depending upon the area of the law—one study found that these rates ranged from 1.7 percent in premises liability cases and 2.2 percent in product liability cases to almost 30 percent in slander/libel cases.[220]

Though the results set forth in this Article for jury awards in Title VII cases are at the higher end of this spectrum, a couple of considerations should be addressed that are specific to employment discrimination claims. First, unlike many other areas of the law, a prevailing plaintiff in an employment discrimination case (outside of the disparate impact context)[221] will have already proven *intentional* conduct on the part of the defendant. Employment discrimination is, by its very nature, an intentional act.[222] Thus, because the defendant's conduct is intentional, punitive damages should be particularly appropriate for many prevailing Title VII plaintiffs. Second, punitive damage awards are capped and a plaintiff cannot receive more than $300,000 of compensatory and punitive relief combined.[223] Thus, the deterrent effect in punitive damage cases have already been reduced by capping the award potential. These factors combine to suggest punitive damages are not having a significant deterrent effect in employment discrimination cases—in the event that a plaintiff actually prevails in the case at trial and proves intentional discrimination, the victorious plaintiff will have less than a one in three chance of also receiving a (capped) punitive award.

1133-34 (1996) (noting that 26.8 percent of employment cases in which the plaintiff prevailed resulted in an award of punitive damages in a study based on a sample of state court cases in seventy-five counties ending in 1992).

220. *See id.* at 1133-34 (providing percentage rates in different areas of the law of those punitive damage awards in cases where the plaintiffs prevailed in a sample of state court cases ending in 1992); *see also* Catherine Sharkey, *Punitive Damages as Societal Damages*, 113 YALE L.J. 347, 351 n.12 (2003) (discussing different studies on punitive damages and providing percentages on the frequency of punitive awards).

221. *See* MICHAEL J. ZIMMER, CHARLES A. SULLIVAN & REBECCA HANNER WHITE, CASES AND MATERIALS ON EMPLOYMENT DISCRIMINATION 322 at n.* (6th ed. 2003) (noting that "only a small percentage of the total federal employment discrimination caseload involves disparate impact claims" and that "only 101 of the 7613 employment civil rights cases brought in 1989 alleged disparate impact" (citing John J. Donohue III & Peter Siegelman, *The Changing Nature of Employment Discrimination Litigation*, 43 STAN. L. REV. 983, 989 (1991))).

222. *See* 42 U.S.C. § 1981a(1) (2000) (providing for a civil action based on "intentional discrimination").

223. *Id.* § 1981a(b)(3).

Certainly, reasonable minds could differ on the effectiveness of punitive damages in light of the results of my study, and drawing conclusions from the data is in many ways a subjective process. Nonetheless, given that the number of punitive awards in Title VII published decisions was in the *single digits* in 2004,[224] and given that only about 29 percent of juries that ultimately find in favor of the plaintiff also award punitive relief (which is still subject to court review),[225] it seems a fair conclusion that punitive damages are simply not achieving their intended purpose. I leave the *extent* to which punitive damages are missing their mark open to further debate.

V. A CALL FOR CHANGE

The limited number of published employment discrimination cases awarding punitive relief is surprising, and it should not go unnoticed or uncorrected. I propose here one such alternative approach to the punitive damage award scheme that currently exists in Title VII. Specifically, I recommend that we adopt and implement a model similar to the liquidated damages provision in the Age Discrimination in Employment Act (ADEA)[226] and Fair Labor Standards Act (FLSA)[227] as part of Title VII in place of the current system. Liquidated damages can certainly "serve as a necessary and beneficial deterrent" to employment discrimination.[228] While I believe that this sweeping reform would be a significant improvement over the system of punitive relief currently in existence, a liquidated damages framework for Title VII would need to be carefully integrated into the statute so as to be equitably applied to all parties and still serve a deterrent purpose. I discuss the proposed approach in greater detail below.

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224. *See supra* Part IV.B (discussing results of study).

225. *See supra* Part IV.D.2 (discussing JVR data).

226. 29 U.S.C. §§ 621-634 (2006).

227. 29 U.S.C. §§ 201-219 (2006).

228. *Cf.* Starceski v. Westinghouse Elec. Corp., 54 F.3d 1089, 1108 (3d Cir. 1995) (Garth, J., concurring in part and dissenting in part).

A. Liquidated Damages Proposal for Title VII

I recommend replacing the current system of punitive relief under Title VII with an approach similar to the damages provisions under the ADEA and FLSA, which currently provide for liquidated damages.[229] Under the liquidated damages scheme, an employer could be liable for "double damages" of the actual damages suffered by the plaintiff.[230] A liquidated damages provision unquestionably incorporates a "punitive dimension"[231] to the statute, and would help deter wrongful discriminatory conduct.[232] I do not recommend adopting the ADEA and FLSA damage provisions wholesale, however, and set forth below the parameters of this proposal.

1. Actual Damages Doubled

Under my proposal, liquidated damages in the amount of double the actual damages would replace punitive damages in Title VII. Liquidated damages would be awarded automatically[233] upon a finding of intentional discrimination by the judge or jury in a case brought pursuant to Title VII. Actual damages would be defined as any wage loss or other monetary harm suffered by the victim, combined with any compensatory damages the plaintiff could

229. *See, e.g.*, McGinty v. New York, 193 F.3d 64, 69 (2d Cir. 1999) ("ADEA § 626(b), incorporating the corresponding provisions of the Fair Labor Standards Act, mandates the payment of liquidated damages in an amount equivalent to a plaintiff's award for back pay and benefits where the statutory violation was 'willful.'").

230. *Cf.* Diane G. Cluxton-Kremer, Comment, *Redefining "Willful" in the Liquidated Damages Provision of the Age Discrimination in Employment Act: The Tenth Circuit's Approach*, 68 DENV. U. L. REV. 485, 486 (1991) ("[T]he FLSA provides for an automatic doubling of damages for a violation ....").

231. Michael D. Moberly, *The Recoverability of Prejudgment Interest Under the ADEA After* Thurston, 8 LAB. LAW. 225, 239 (1992) ("Congress has indicated that there is a punitive dimension to the FLSA award, just as there is to the ADEA award.").

232. *Cf.* Rebecca Marshall, Recent Development, *Bootstrapping a Malice Requirement into ADEA Liquidated Damage Awards*, 62 WASH. L. REV. 551, 554 (1987) ("Congress enacted the ADEA hybrid damages and eliminated criminal penalties in order to preserve a punitive and deterrent effect and avoid the proof problems of a criminal penalty.").

233. *See generally* Powers v. Grinnell Corp., 915 F.2d 34, 35 n.1 (1st Cir. 1990) ("Victims of willful ADEA violations therefore are automatically entitled to liquidated damages equal to their back pay award.").

demonstrate. Because they are speculative in nature, front pay losses would not be subject to the liquidated damages formula.[234]

This approach would be similar to the damages provisions of the ADEA and FLSA. Liquidated damages are available to plaintiffs who demonstrate a violation of the FLSA or a "willful" violation of the ADEA[235] for "an amount equal to the amount deemed to be unpaid [wages or compensation],"[236] though compensatory damages are generally unavailable under these statutes,[237] with certain exceptions.[238] Thus, under my proposed approach, if a plaintiff were

234. *See* Graefenhain v. Pabst Brewing Co., 870 F.2d 1198, 1210 (7th Cir. 1989) (holding that front pay was not subject to the liquidated damages provision of the ADEA because "front pay is a prospective remedy"); Mitchell v. Sisters of Charity of Incarnate Word, 924 F. Supp. 793, 802 (S.D. Tex. 1996) ("The liquidated damages provision of the ADEA does not require the doubling of the front pay award.").

235. The damages provisions of the ADEA and FLSA operate differently. As the Supreme Court has noted, "§ 16(b) of the FLSA, which makes the award of liquidated damages *mandatory*, is significantly qualified in ADEA § 7(b) by a proviso that a prevailing plaintiff is entitled to double damages 'only in cases of *willful* violations.'" Trans World Airlines, Inc. v. Thurston, 469 U.S. 111, 125 (1985) (emphasis added); *see also* Jennifer Baugh, Note, *Punitive Damages and the Anti-Retaliation Penalties Provision of the Fair Labor Standards Act*, 89 IOWA L. REV. 1717, 1740-41 (2004) (discussing the difference between the liquidated damages provisions of the FLSA and the ADEA).

236. *See* BARBARA LINDEMANN SCHLEI & PAUL GROSSMAN, EMPLOYMENT DISCRIMINATION LAW 524 (2d ed. 1983) (citing § 16(b) of the FLSA, 29 U.S.C. § 216(b) (2000), incorporated by reference into the ADEA, 29 U.S.C. § 626(b)); Evan Hudson-Plush, Note, *WARN's Place in the FLSA/Employment Discrimination Dichotomy: Why a Warning Cannot Be Waived*, 27 CARDOZO L. REV. 2929, 2946 n.115 (2006) (noting that the FLSA provides that "an employer liable for a violation of FLSA shall pay liquidated damages equal to the amount of unpaid minimum wages").

237. *See* Michael D. Moberly, *Evolution in the Civil Rights Revolution: The Survival of Employment Discrimination Claims for Pain and Suffering*, 17 HOFSTRA LAB. & EMP. L.J. 1, 10 (1999) ("Neither compensatory nor punitive damages are recoverable under the FLSA ...."); Carolyn F. Kolks, Note, United States v. Burke – *Does it Definitively Resolve the Analytical Confusion Created by the Section 104(a)(2) Personal Injury Exclusion?*, 46 ARK. L. REV. 657, 686 (1993) (noting that "[g]eneral compensatory and punitive damages are not available under" the ADEA). For purposes of this Article, compensatory damages are defined as compensation for pain and suffering experienced by the plaintiff. *See generally Tucker v. Monsanto Co.*, No. 4:06-CV-1815, 2007 WL 1686957, at *3 (E.D. Mo. June 8, 2007) ("[T]he Court concludes that emotional distress damages are not available under the FLSA.").

238. There is some controversy in the courts as to whether compensatory and punitive damages are available for FLSA retaliation claims, though "[n]o circuit court has held that punitive damages are available in non-retaliatory discharge cases." Philip L. Bartlett II, *Disparate Treatment: How Income Can Affect the Level of Employer Compliance with Employment Statutes*, 5 N.Y.U. J. LEGIS. & PUB. POL'Y 419, 476 (2002); *see* Baugh, *supra* note 235, at 1728-29 (discussing FLSA damages). A similar question exists as to the damages available in ADEA retaliation cases. *See* Tomao v. Abbott Labs., Inc., No. 04 C 3470, 2007 WL 2225905, at **17-20 (N.D. Ill. July 31, 2007) ("[T]he Seventh Circuit appears to have

able to prove at trial in a Title VII action that he lost $5000 in wages and suffered $20,000 in compensatory damages as a result of his employer's intentional discrimination, he would also be entitled to an *additional* $25,000 of liquidated damages.[239] This liquidated damages approach would be far more equitable than the system currently in place under Title VII. Liquidated damages would be directly correlated, on a one-to-one basis, with the actual harm suffered by the victim. Under the current system, there is no such correlation, and employers are sometimes subject to large punitive damage awards where there is no substantive underlying injury. Indeed, in some cases courts have permitted punitive damage awards where there was no compensatory damage award or other monetary loss at all.[240] For example, in *Timm v. Progressive Steel Treating, Inc.*,[241] the Seventh Circuit Court of Appeals upheld an award of $15,000 in punitive damages with no other award of damages in the case.[242] The Second Circuit took the same approach in *Cush-Crawford v. Adchem Corp.*,[243] awarding $100,000 in punitive relief where there were no other monetary damages established.[244]

Other cases have permitted large ratios between the compensatory damages incurred and the actual harm suffered. For example, the Fifth Circuit Court of Appeals approved a punitive damage award ten times that of the compensatory award in *Rubinstein v. Administrators of Tulane Educational Fund*.[245] Similarly, in *Tisdale*

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expressed its belief that by amending the FLSA—the ADEA's remedial template—to authorize 'legal' relief 'without limitation,' Congress sufficiently broadened § 216(b) to support an award of compensatory and punitive damages for retaliation under both the FLSA and the ADEA.").

239. *See, e.g.*, Powell v. Rockwell Int'l Corp., 788 F.2d 279, 282, 287-88 (5th Cir. 1986) (upholding a district court's award doubling back pay as liquidated damages in a case brought pursuant to the ADEA).

240. *See* Levi, *supra* note 13, at 583 ("One issue that currently divides courts is whether a jury can award punitive damages to a Title VII plaintiff after it concludes that the plaintiff is not entitled to any compensatory damages under [the statute].").

241. 137 F.3d 1008 (7th Cir. 1998).

242. *Id.* at 1010 ("'Punitive damages (as awarded here) are applicable even in the absence of actual damages ....'" (quoting Erwin v. County of Manitowoc, 872 F.2d 1292, 1299 (7th Cir. 1989))).

243. 271 F.3d 352 (2d Cir. 2001).

244. *Id.* at 356-57 ("An award of actual or nominal damages is not a prerequisite for an award of punitive damages in Title VII cases.").

245. 218 F.3d 392, 407-09 (6th Cir. 2004) (approving a $25,000 punitive damage award in

v. Federal Express Corp.,[246] the Sixth Circuit approved a $100,000 punitive damage award in a case in which a jury had awarded only $15,000 in other monetary damages.[247]

Thus, in many respects, employers would benefit under my proposal as they would never be subjected to punitive awards or liquidated damages in amounts greater than the amount of actual damages suffered by the plaintiff, as they currently are under the Title VII remedial scheme.[248] Unlike the current system, the proposed approach would require a direct relationship between the actual harm suffered and the additional damages awarded. Similar to the damages provisions under the ADEA[249] and FLSA,[250] liquidated damages under Title VII would "deter intentional violations ... therefore making an award of liquidated damages punitive in nature."[251] Integrating liquidated damages into Title VII would thus serve the deterrent purpose Congress intended when it originally passed the 1991 CRA.[252]

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a case in which only $2500 in compensatory damages had been awarded).

246. 415 F.3d 516 (6th Cir. 2005).

247. *Id.* at 525, 535 ("In this case, the punitive damages award is $100,000, less than seven times the backpay award and one-third of the maximum which Congress determined to be reasonable for a company of FedEx's size. Accordingly, we conclude that the district court did not err in refusing to set aside the punitive damages award.").

248. *See supra* notes 240-47 and accompanying text.

249. *See* Judith J. Johnson, *A Uniform Standard for Exemplary Damages in Employment Discrimination Cases*, 33 U. RICH. L. REV. 41, 42-43 (1999) (arguing that the standard for determining whether exemplary relief is available under Title VII should "be the same as that approved by the Supreme Court for liquidated damages, which are the equivalent of punitive damages, under the ADEA").

250. *Compare* Lavinia A. James, Comment, *Damages in Age Discrimination Cases—The Need for a Closer Look*, 17 U. RICH. L. REV. 573, 585 (1983) ("An award of liquidated damages under the FLSA is generally not considered to be punitive in nature. However, the ADEA, by conditioning liquidated damages on a willful violation, has focused the availability of such an award on the nature of the defendant's act." (footnote omitted)), *with* Moberly, *supra* note 231, at 239 (discussing the punitive nature of FLSA awards).

251. Trisha A. Thelen, Note, *Liquidated Damages and Statutes of Limitations Under the "Willful" Standard of the Fair Labor Standards Act and the Age Discrimination in Employment Act: Repercussions of* Trans World Airlines, Inc. v. Thurston, 24 WASHBURN L.J. 516, 521 (1985); *see* Moberly, *supra* note 231, at 239 ("By creating a pattern of recovery in which the award of liquidated damages is now mandatory only where the employer has not acted in good faith, Congress has indicated that there is a punitive dimension to the FLSA award, just as there is to the ADEA award." (footnote omitted)).

252. *See* H.R. REP. NO. 102-40, pt.2, at 1 (1991); *supra* notes 74-80 and accompanying text.

2. Abandon the Malice or Reckless Indifference Standard

Pursuant to the current system of Title VII relief, an employee can establish a claim for punitive damages if that individual can show that the defendant "engaged in a discriminatory practice ... with malice or with reckless indifference to the federally protected rights of an aggrieved individual."[253] Under my proposal, this standard would become irrelevant and would be replaced with a simple showing of intentional discrimination to establish a claim for liquidated damages. Indeed, perhaps the greatest benefit of this proposal would be the abandonment of the malice-or-reckless-indifference standard. This standard is "fraught with ambiguity"[254] and has generated significant confusion among litigants and in the courts.[255] The liquidated damages provision, which would replace the maliciousness standard with the far simpler question of intent, would thus be significantly easier for the courts and juries to apply.[256] In fact, the jury is already required to resolve the intent inquiry in answering the initial question of liability in the case.[257]

Therefore, under my proposed approach, in all successful claims of disparate treatment (or "intentional") discrimination, the plaintiff would presumptively be entitled to liquidated damages equal to the

253. 42 U.S.C. § 1981a(b)(1) (2000).

254. *See* Jason P. Pogorelec, Note, *Under What Circumstances Did Congress Intend to Award Punitive Damages for Victims of Unlawful Intentional Discrimination Under Title VII*, 40 B.C. L. REV. 1269, 1297 (1999) ("The language of [the statute] is ambiguous and provides little help in determining the circumstances under which Congress intended Title VII punitive damages to be awarded. Because [the statute] uses the terms 'malice' and 'reckless indifference,' which are fraught with ambiguity, it is difficult to ascertain Congress's intent in awarding Title VII punitive damages from the statute's plain language." (footnote omitted)).

255. *See generally* E.E.O.C. v. Stocks, Inc., No. 06-10871, 2007 WL 1119186, at **1-3 (5th Cir. Apr. 16, 2007) (reversing district court's refusal to give issue of punitive damages to jury and finding that there was sufficient evidence of malice or reckless indifference to present question of exemplary relief to trier of fact); McDonough v. City of Quincy, 452 F.3d 8, 23-24 (1st Cir. 2006) (same).

256. *Cf.* Johnson, *supra* note 249, at 99 ("The Supreme Court's interpretation of 'reckless indifference' under the ADEA was to allow the defendant to avoid punitive damages by showing that its violation of the law was in good faith based on reasonable belief. This is the only interpretation of the 1991 Civil Rights Act that makes sense.").

257. *See, e.g.*, Janine M. Weaver, Note, *Reconciling the Irreconcilable:* Landgraf v. USI Film Prods., 28 CREIGHTON L. REV. 1061, 1064 (1995) ("[I]f the complaining party seeks compensatory or punitive damages, the party may demand a jury trial under the 1991 Act.").

amount of actual damages suffered. This approach is equitable in nature as the plaintiff must still demonstrate that the defendant engaged in intentional discrimination to obtain the additional relief, and an employer should be discouraged from intentionally engaging in this illegal conduct. And, as discussed in greater detail below, where employers can demonstrate that they have attempted to comply with the statute they will still have the opportunity to avoid liability.[258]

3. Eliminate the Statutory Cap for Liquidated Damages

Under the current system of punitive damages in Title VII, the award of exemplary relief is capped at varying amounts depending upon the size of the employer.[259] For the largest employers, a successful plaintiff can obtain up to the statutory cap of $300,000 for punitive damages and compensatory damages combined.[260] The statutory caps were seen as a compromise whereby Congress acknowledged that punitive damages were a necessary part of the statute, but that such relief would be limited.[261] Under my liquidated damages proposal, however, the statutory caps would no longer be necessary, although the caps could remain in place for any award of compensatory damages.[262]

Initially, it should be noted that one potential limitation on the deterrent effect of punitive relief is that the statutory caps on exemplary awards have *remained unchanged* for over fifteen years.[263] Given the negative effects of inflation on these awards, their deterrent effect has decreased significantly over time.[264] Thus,

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258. *See infra* Part V.A.4 (discussing how the good faith defense would be applied to my liquidated damages proposal).

259. 42 U.S.C. § 1981a(b)(3) (2000); *see supra* notes 85-87 and accompanying text.

260. 42 U.S.C. § 1981a(b)(3); *see supra* note 86 and accompanying text.

261. *See, e.g.*, Murphy, *supra* note 85, at 408 (discussing the compromise behind statutory caps in the Civil Rights Act).

262. I would recommend, however, that the compensatory damage caps be increased each year by an index tied to inflation.

263. *See* Civil Rights Act of 1991, Pub. L. No. 102-166, § 1977A(b)(3)(O), 105 Stat. 1071, 1073.

264. *Cf.* Michael W. Roskiewicz, Note, *Title VII Remedies: Lifting the Statutory Caps from the Civil Rights Act of 1991 to Achieve Equal Remedies for Employment Discrimination*, 43 WASH. U. J. URB. & CONTEMP. L. 391, 413-14 (1993) (stating that predictable caps reduce deterrent effects); Ruggles, *supra* note 8, at 155 (same).

it would take an award of $468,466.14 in 2008 to have the same financial impact as an award of $300,000 in 1992.[265] Yet the caps have remained the same.

Irrespective of the inflationary effects of time, the statutory caps would serve little purpose under a liquidated damages scheme. This is because the liquidated damages would be tied in a one-to-one ratio to the actual harm suffered by the plaintiff.[266] Under this system, the amount of liquidated damages is already capped by the amount of harm demonstrated by the plaintiff. Thus, under this proposed system, defendants would not be subjected to the possibility of punitive awards in amounts far in excess of the actual harm suffered, as they are under the current system.[267] And, in those cases where the defendant has intentionally injured the plaintiff and the combined compensatory damage and liquidated damage awards are above $300,000, the defendant would still have the opportunity to avoid the liquidated damages portion of this award by demonstrating good faith, as discussed further below.[268] If the defendant has discriminated and cannot show good faith, that defendant has intentionally violated the statute with unclean hands, and the equities would lean in favor of such an award, even if it were to exceed the caps currently set by the 1991 CRA.[269] In addition, the liquidated damages provision in the ADEA and FLSA contain no statutory caps.[270] Indeed, the statutory caps present in

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265. *See* Inflation Calculator: Bureau of Labor Statistics, http://databls.gov/cgi-bin/cpicalc.pl (last visited Nov. 25, 2008). *See generally* Roskiewicz, *supra* note 264, at 418 ("Only by eliminating the caps on compensatory and punitive damages available to Title VII discrimination victims can Congress accomplish its initial goal of absolute equality."); Ruggles, *supra* note 8, at 164 ("The current statutory caps on punitive damages in intentional employment discrimination do not allow for effective enforcement of anti-discrimination laws.").

266. *See supra* Part V.A.1 (discussing my liquidated damages proposal as a doubling of the actual harm suffered by a plaintiff).

267. *See* Part V.A.1 (discussing cases in which punitive awards far exceeded the actual damages a plaintiff demonstrates).

268. *See infra* Part V.A.4 (discussing how the good faith defense would be applied to my liquidated damages proposal).

269. *See* Judith J. Johnson, *A Standard for Punitive Damages Under Title VII*, 46 FLA. L. REV. 521, 524 (1994) ("[P]unitive damages should be presumptively appropriate in all cases in which the defendant has intentionally discriminated. To avoid the imposition of punitive damages, the defendant should bear the burden of persuasion to show that she acted reasonably and in good faith.").

270. *See* Michelle Cucuzza, *Evaluating Emotional Distress Damage Awards to Promote*

Title VII are relatively unique to federal employment law claims.[271] In this regard, the liquidated damages proposal would also bring Title VII more in line with the damages provisions of other employment laws.[272]

4. Good Faith Defense

In *Trans World Airlines, Inc. v. Thurston*,[273] the Supreme Court stated that an employer that violates the ADEA is not subject to liquidated damages "if the employer acted reasonably and in ... 'good faith.'"[274] Similarly, in *Kolstad*, the Supreme Court provided that an employer otherwise subject to punitive damages for a violation of Title VII can avoid liability by demonstrating that it has engaged in "good faith efforts at Title VII compliance."[275] Good faith can be established if the employer has effectively maintained and implemented a policy or program attempting to prevent discrimination.[276] By creating this good faith defense to Title VII, the Supreme Court attempted to "promote [the] prevention as well as remediation" of discriminatory practices.[277]

Good faith defenses can be found throughout employment law. The Supreme Court has carved out an exception to supervisor liability in cases of sexual harassment where "the employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior" and the victim "unreasonably failed to

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Settlement of Employment Discrimination Claims in the Second Circuit, 65 BROOK. L. REV. 393, 410-11 (1999) ("[T]here is no cap with respect to damages awarded under the ADEA, §§ 1981 and 1983 ...." (footnotes omitted)). *See generally* 29 U.S.C. §§ 201-19 (2006) (statutory text of FLSA).

271. *See* Cucuzza, *supra* note 270, at 410-11. The Americans with Disabilities Act, however, also contains the same statutory caps as Title VII. *Id.* at 410 ("The 1991 Civil Rights Act limits a plaintiff's recovery of emotional distress damages rendered pursuant to Title VII and the ADA.").

272. Recent legislation has been introduced in the U.S. Senate that "would remove the compensatory and punitive damage caps for violations of the anti-discrimination laws under Title VII." Stephen Allred, *Commentary: Congress Acts to Overturn Supreme Court's Wage Discrimination Decision in* Ledbetter, N.C. LAW. WKLY., Aug. 20, 2007. There is certainly a substantial question, however, whether this legislation will become law.

273. 469 U.S. 111 (1985).

274. *Id.* at 128 n.22.

275. Kolstad v. Am. Dental Ass'n, 527 U.S. 526, 544 (1999).

276. *Id.* at 544-45.

277. *Id.* at 545-46.

take advantage of any preventive or corrective opportunities."[278] Similarly, under the FLSA, an employer may be able to avoid liquidated damages where that employer "acted in subjective 'good faith' and had objectively 'reasonable grounds' for believing that the acts or omissions" did not violate the statute.[279]

In allowing the good faith defense, Congress and the courts integrate a compromise into the statutory schemes of employment discrimination law that balances the interests of full recovery for the plaintiff and deterrence of discriminatory conduct with the interests of fairness and equity for defendants.[280] In essence, an employer should be punished and deterred from repeating illegal acts; but that same employer should not suffer the full sanctions of the law where it has acted with clean hands and in good faith.[281] In *Kolstad*, the Supreme Court struck a careful and well-reasoned compromise in allowing the good faith defense for punitive damages.[282] A similar affirmative good faith defense to my liquidated damages proposal would also "promote prevention as well as remediation" in Title VII.[283] I would therefore recommend that the good faith defense that currently exists as to punitive damages be similarly applied to any liquidated damages provision implemented in Title VII. For the most part, this defense has been treated as an affirmative one—the employer bears the burden of proof of demonstrating its good faith.[284] Thus, when an employer is found liable for intentional discrimination under Title VII, that employer would be permitted to escape liability for liquidated damages under my

278. Burlington Indus., Inc. v. Ellerth, 524 U.S. 742, 765 (1998). This defense applies in hostile work environment cases where there is no tangible employment action. *Id.*

279. Herman v. RSR Sec. Servs. Ltd., 172 F.3d 132, 142 (2d Cir. 1999).

280. *See, e.g.*, Susan Grover, *After* Ellerth*: The Tangible Employment Action in Sexual Harassment Analysis*, 35 U. MICH. J.L. REFORM 809, 819 n.57 (2002) (describing the compromise resulting from the Supreme Court's decisions in *Faragher* and *Ellerth*).

281. *See id.* (noting that "the Court perceived its prescribed analytic framework as a compromise between the principle of vicarious liability for harm caused by misuse of supervisory authority and 'Title VII's ... policies of encouraging forethought by employers and saving action by objecting employees'" (quoting *Ellerth*, 524 U.S. at 764; Faragher v. Boca Raton, 524 U.S. 775, 807 (1998))).

282. *See Kolstad*, 527 U.S. at 544-46.

283. *Id.* at 545.

284. *See* McInnis v. Fairfield Cmtys., Inc., 458 F.3d 1129, 1137 n.3 (10th Cir. 2006) (noting that the court had not decided where the burden of proof lies on the punitive damages good faith defense, but that "[a] number of other courts have determined that the defense is an affirmative one and place the burden to establish it on the defendant").

proposal by affirmatively proving that it acted in good faith.[285] This could be done primarily by showing that the employer has effectively maintained and implemented a policy or program attempting to prevent discrimination.[286]

An employer should also "make a good faith effort to educate its employees about [its antidiscrimination] policies and the statutory prohibitions."[287] In essence, the employer must show that it "made every effort reasonably possible to detect and deter discrimination," which would include training and education on antidiscrimination policies, as well as "monitoring and supervision efforts."[288] It is also worth noting that whether an employer has acted with sufficient good faith to evade liquidated damages after a finding of intentional discrimination would inherently be a question of fact for the jury alone.[289] The jury's key determination would be deciding whether the employer's efforts were "truly preventive," and not "merely symbolic."[290] The defense *might* be appropriate, for example, where a supervisor intentionally discriminated against a subordinate (while acting within the scope of employment), but the company had no knowledge of the discriminatory acts, maintained an effective policy prohibiting discrimination, and provided training on Title VII to its employees.[291]

Though a compromise to be sure, the good faith defense does promote preventive measures that help discourage discrimination in the workplace from occurring in the first instance.[292] The good

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285. *Cf.* Johnson, *supra* note 249, at 49 (recommending that the good faith exception apply to Title VII punitive damages claims, and that this exception be applied in a similar fashion to the liquidated damage claims under ADEA).

286. *Kolstad*, 527 U.S. at 544-45.

287. *McInnis*, 458 F.3d at 1138 (quoting Cadena v. Pacesetter Corp., 224 F.3d 1203, 1210 (10th Cir. 2000)).

288. Timothy J. Moran, *Punitive Damages in Fair Housing Litigation: Ending Unwise Restrictions on a Necessary Remedy*, 36 HARV. C.R.-C.L. L. REV. 279, 340 (2001).

289. *See, e.g.*, *id.* at 340 ("*Kolstad* did not address whether courts or juries should decide when the good faith defense has been proved. Thus far, the courts of appeal have treated the issue as a jury question. This approach is proper." (footnote omitted)).

290. *Id.* at 338.

291. *See generally Kolstad*, 527 U.S. at 544-46.

292. *See, e.g.*, Richard S. Gruner, *Developing Judicial Standards for Evaluating Compliance Programs: Insights from EEO Litigations*, *in* PRACTISING LAW INSTITUTE ADVANCE CORPORATE COMPLIANCE WORKSHOP 2002, at 161 (2002) ("*Kolstad* opens up the opportunity for employers to minimize a broad range of punitive damages by operating systematic programs for preventing illegal employment discrimination.").

faith defense would therefore help achieve the goal of deterring illegal discriminatory conduct[293] which Congress attempted to integrate into Title VII through the 1991 CRA.[294] Allowing the defense would also help streamline antidiscrimination law by conforming the liquidated damages provision with other areas of employment law that have taken the employer's good faith into consideration when awarding damages.[295] The good faith defense is therefore a critical component of my liquidated damages proposal.

B. Liquidated Damages Proposal Summary

In sum, I propose replacing the current scheme of punitive damages set forth in the 1991 CRA with a three-part test that would provide liquidated damages in many cases of discrimination and would serve as a more effective form of preventing illegal conduct in the workplace. The rationale for this test was outlined in detail above[296] and would apply in all cases alleging intentional employment discrimination pursuant to Title VII.[297]

Under this three-part test, the trier of fact would initially determine whether the plaintiff carried its burden of persuasion of establishing intentional discrimination.[298] This analysis would proceed in the same manner as it has for many years under Title

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293. *See, e.g.*, *id.* at 165 ("By actively informing managers and employees about the requirements of federal anti-discrimination laws, monitoring efforts to comply with those laws, and reacting with discipline and reforms when illegal activities are found, employers can qualify for the good faith defense ....").

294. *See* H.R. REP. NO. 102-40, pt.2, at 1 (1991); *supra* notes 73-78 and accompanying text.

295. *See supra* Part V.A.4 (discussing other employment laws that contain good a faith component when assessing damages).

296. *See supra* Part V.A (discussing the purpose of replacing the current system of exemplary relief under Title VII with liquidated damages).

297. Liquidated damages would not be available in those cases alleging disparate impact (or unintentional) discrimination. A damages provision targeted at punishing or deterring employers would be inconsistent with cases where intent is not established. *See generally* David A. Cathcart & Mark Snyderman, *The Civil Rights Act of 1991*, 8 LAB. LAW. 849, 856 (1992) (noting that the punitive and compensatory "damages may be recovered only in cases of intentional discrimination; they are not available in 'disparate impact' cases").

298. *See* Reeves v. Sanderson Plumbing Prods., Inc., 530 U.S. 133, 143 (2000) ("Although intermediate evidentiary burdens shift back and forth under this framework, '[t]he ultimate burden of persuading the trier of fact that the defendant intentionally discriminated against the plaintiff remains at all times with the plaintiff.'" (quoting Tex. Dep't of Cmty. Affairs v. Burdine, 450 U.S. 248, 253 (1981))).

VII and the case law interpreting this statute. Thus, nothing in my proposal would alter the classic *McDonnell Douglas Corp. v. Green*[299] test for demonstrating intentional discrimination,[300] or those subsequent cases that have provided additional guidance on how plaintiffs should go about establishing intentional discrimination.[301] If the plaintiff fails to carry its burden, the case is over, and no further inquiry is needed.[302] If intentional discrimination is found, however, the district court and trier of fact would be required to determine the appropriate amount of relief to award the plaintiff. This amount would include all relief currently available to Title VII litigants, including compensatory damages,[303] back pay, and front pay.[304] These damages would be awarded in the same way that they have always been awarded under Title VII, the 1991 CRA, and the interpreting case law.[305] The only distinction between the current analysis and my proposal would be that the question of punitive damages would not be submitted to the trier of fact.[306] At the final

299. 411 U.S. 792 (1973).

300. Pursuant to the *McDonnell Douglas* framework, the plaintiff can demonstrate a prima facie case of discrimination by showing that he is a member of a protected class, suffered an adverse employment action, was qualified for the job, and was replaced by an individual outside of the protected group. *Id.* at 802; *see also* Turner v. Baylor Richardson Med. Ctr., 476 F.3d 337, 345 (5th Cir. 2007). The defendant then has a burden of production of demonstrating a legitimate nondiscriminatory reason for its actions. *McDonnell Douglas*, 411 U.S. at 802-03; *see also Turner*, 476 F.3d at 345. The plaintiff must then show that the defendant's reason is a pretext for discrimination. *McDonnell Douglas*, 411 U.S. at 803; *see also Turner*, 476 F.3d at 345.

301. *See, e.g.*, Desert Palace, Inc. v. Costa, 539 U.S. 90, 92, 98-101 (2003); *Reeves*, 530 U.S. at 143; St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502, 504, 511, 525 (1993).

302. This proposal does not suggest a bifurcated trial whereby the trier of fact would first determine liability and then proceed to the damages question in a separate proceeding. *See, e.g.*, Martin v. Cavalier Hotel Corp., 48 F.3d 1343, 1348 (4th Cir. 1995) (noting that "district court bifurcated the jury trial for liability and damages purposes" in a Title VII matter). Instead, the jury would be instructed that it need not answer additional questions concerning damages or good faith if its finding is that no intentional discrimination is present.

303. To the extent that the jury's compensatory damage award exceeded the statutory caps, the amount would be reduced to comply with the statute. 42 U.S.C. § 1981a(b)(3) (2000). If liquidated damages were appropriate in the case, only the *reduced* compensatory award would be doubled under my proposal.

304. *See id.* § 1981a; 42 U.S.C. § 2000e-5 (2000) (setting forth the various damages provisions of Title VII); *supra* note 85 and accompanying text.

305. *See generally* Donald R. Livingston, *The Civil Rights Act of 1991 and EEOC Enforcement*, *in* EMPLOYMENT DISCRIMINATION LITIGATION 1993, at 143, 146-50 (Practicing Law Institute 1993) (discussing the damages provisions of Title VII).

306. *See supra* Part V.A (discussing the rationale behind abandoning punitive damage

stage of the analysis, the employer would have the opportunity to demonstrate its good faith to the trier of fact.[307] The employer would be free to present all relevant evidence in this regard.[308] In the majority of cases, however, the employer would establish good faith by demonstrating that it has effectively implemented and enforced a policy or program attempting to prevent discrimination.[309] If the defendant successfully carries its burden on this question, it will escape liability for liquidated damages,[310] but it will still be subject to the other relief awarded. If the defendant is unsuccessful in demonstrating that it acted in good faith, the district court must also award liquidated damages to the plaintiff in an amount equal to the actual relief of back pay and compensatory damages already awarded.

As enumerated below, the three-part test for determining liquidated damages in Title VII claims of intentional discrimination would proceed as follows:

1. The plaintiff would have the burden of persuasion of demonstrating intentional discrimination to the trier of fact.
2. If intentional discrimination is proven, the trier of fact and district court judge would determine the appropriate amount of relief under the statute. The question of punitive damages would not be at issue.
3. The defendant would have an opportunity to establish an affirmative good faith defense to the trier of fact. If the defense is successful, no liquidated damages would be awarded. If the defense is unsuccessful, the district court would award liquidated damages in the amount equal to actual damages in the case.

Thus, cases brought under my proposal would largely proceed as they currently do under Title VII. The significant distinction,

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awards in Title VII cases).

307. *See supra* Part V.A.4 (discussing the incorporation of a good faith defense into my liquidated damages proposal).

308. *See generally* Lopez v. Aramark Unif. & Career Apparel, Inc., 426 F. Supp. 2d 914, 963 (N.D. Iowa 2006) (noting that the *Kolstad* Court "did not define the contours of what measures constitute 'good faith efforts'").

309. Kolstad v. Am. Dental Ass'n, 527 U.S. 526, 544-45 (1999).

310. *See id.* at 544 (permitting employers to avoid liability for exemplary damages in Title VII cases by acting in good faith).

however, would be that liquidated damages would take the place of exemplary relief.

VI. IMPLICATIONS OF LIQUIDATED DAMAGES PROPOSAL

The liquidated damages proposal set forth in this Article would have a number of significant advantages over the current system of punitive damages that exists in cases of employment discrimination. As discussed throughout the Article, the primary purpose behind the addition of punitive damages to Title VII was Congress's hope that such exemplary relief would deter unlawful employment discrimination.[311] The addition of liquidated damages to Title VII would help to better effectuate the deterrent effect that Congress originally intended when it added punitive relief to the statute. By punishing *all* acts of intentional discrimination where the employer was not acting in good faith, liquidated relief would strongly discourage an employer from illegally discriminating against its workforce. Liquidated damages would therefore not only serve the original intent of Congress,[312] but would also accomplish one of the primary goals of punitive damages in the judicial system—deterrence.[313] Moreover, the proposed framework would be far easier and more routine for courts to apply than the current system of punitive relief. Since the 1991 CRA was passed, "courts have struggled to determine the appropriate circumstances to award Title VII punitive damages."[314] The standard for awarding exemplary relief in employment cases is simply too ambiguous and creates far too much uncertainty in the process.[315] As demonstrated earlier, the

311. H.R. REP. NO. 102-40, pt.2, at 1 (1991). *See generally* Johnson, *supra* note 269, at 561 ("[T]he only viable solution is to construct an articulable standard for awarding punitive damages which is based on the reasons for the award: deterrence and punishment.").

312. *See* H.R. REP. NO. 102-40, pt.2, at 1.

313. *See supra* Part I (discussing the role and purpose of punitive relief in the legal system); *cf*. Johnson, *supra* note 269, at 530 ("The liquidated damages provision in the ADEA is similar in purpose to the punitive damages provision in Title VII; both are designed to punish an employer who has discriminated.").

314. Pogorelec, *supra* note 254, at 1306.

315. *See id.* at 1297 ("The language of [the statute] is ambiguous and provides little help in determining the circumstances under which Congress intended Title VII punitive damages to be awarded. Because [the statute] uses the terms 'malice' and 'reckless indifference,' which are fraught with ambiguity, it is difficult to ascertain Congress's intent in awarding Title VII punitive damages from the statute's plain language." (footnote omitted)).

current framework of punitive relief has created significant inconsistencies in the courts.[316] The proposed structure of importing liquidated damages into Title VII would therefore significantly streamline what is currently an overly cumbersome process of awarding exemplary relief.

In addition, the proposed approach would increase predictability in the amount of damages awarded in employment discrimination cases.[317] Because liquidated damages simply double damages for the amount of actual harm incurred, determining potential liability would be far easier for the parties under my proposal than under the current system, where the court and jury have significant discretion in fashioning punitive relief.[318] A greater amount of certainty in the legal system increases the likelihood of settlement between parties and "leads to reduced litigation costs."[319] Greater certainty and increased settlements would inherently save judicial resources through the reduced number of lawsuits clogging up the court system.[320] The proposed approach would also bring the system of relief more in line with claims of age discrimination brought pursuant to the ADEA and wage and hour claims brought pursuant to the FLSA.[321] The ADEA and FLSA currently utilize liquidated damages frameworks similar to the one proposed here for Title

316. *See supra* Part IV.E (discussing recent appellate employment discrimination decisions in which district courts' failures to give punitive damage instructions were overturned).

317. *Cf.* Johnson, *supra* note 269, at 524 (arguing that using same standard for Title VII punitive damages and ADEA liquidated damages would "lead to more uniform results"); Exxon Shipping Co. v. Baker, 128 S. Ct. 2605, 2625 (2008) ("The real problem it seems, is the stark unpredictability of punitive awards.").

318. *Cf.* Powers v. Grinnell Corp., 915 F.2d 34, 35 n.1 (1st Cir. 1990) (addressing liquidated damages awards for ADEA willful violations and noting that such awards are applied "automatically").

319. Joseph A. Seiner, *Disentangling Disparate Impact and Disparate Treatment: Adapting the Canadian Approach*, 25 YALE L. & POL'Y REV. 95, 136 (2006) (citing Richard B. Stewart, *The Discontents of Legalism: Interest Group Relations in Administrative Regulation*, 1985 WIS. L. REV. 655, 662 ("The more certain the law—the less the variance in expected outcomes—the more likely the parties will predict the same outcome from litigation, and the less likely that litigation will occur because of differences in predicted outcomes.")).

320. *See generally id.* (discussing the benefits of greater certainty in the legal system).

321. *See* Johnson, *supra* note 249, at 42 (recommending that the standard for liquidated damages in the ADEA be applied to punitive damage claims in Title VII).

VII.[322] And, as in the ADEA and FLSA, there would be no statutory cap on damages under the proposed approach for Title VII.[323]

There would indeed be some key differences between the damage provisions of the statutes—most notably the availability of compensatory damages in Title VII, which are generally unavailable under the FLSA and ADEA.[324] Nonetheless, the addition of liquidated damages to Title VII would go a long way toward making the statutes parallel. Indeed, in passing the Civil Rights Act of 1991, Congress expressed a clear intent to bring more conformity to statutes protecting employment discrimination, and this proposal would clearly serve Congress's intent in that regard.[325] And, given that age discrimination claims yield far more significant monetary awards than cases involving race, sex, or disability discrimination, bringing Title VII more in line with the ADEA could further enhance the deterrent effect of the statute.[326] Finally, perhaps the greatest benefit of the proposed approach is that it is equitable to

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322. *See* SCHLEI & GROSSMAN, *supra* note 236, at 524 (discussing the application of liquidated damages to age discrimination claims and citing § 16(b) of the FLSA, 29 U.S.C. § 216(b), incorporated by reference in the ADEA, 29 U.S.C. § 626(b)).

323. *See supra* Part V.A.3 (discussing the lack of statutory caps on damages in FLSA and ADEA employment claims).

324. *See supra* Part V.A.1 (discussing the absence of compensatory damages in FLSA and ADEA employment claims).

325. Julie M. Spanbauer, Kimel *and* Garrett*: Another Example of the Court Undervaluing Individual Sovereignty and Settled Expectations*, 76 TEMP. L. REV. 787, 788 n.15 (2003) ("[W]hen damage remedies were made available via the Civil Rights Act of 1991, Congress explicitly declared: 'Strengthening Title VII's remedial scheme to provide monetary damages for intentional gender and religious discrimination is necessary to conform remedies ....'" (quoting Theresa M. Beiner, *Sex, Science and Social Knowledge: The Implications of Social Science Research on Imputing Liability to Employers for Sexual Harassment*, 7 WM. & MARY J. WOMEN & L. 273, 336 (2001))).

326. *See* JURY VERDICT RESEARCH, EMPLOYMENT PRACTICE LIABILITY: JURY AWARD TRENDS AND STATISTICS 14 (Lisa Nolf ed., 2006) (setting forth the mean and median awards for various claims of discrimination). During the years 1999-2005, age discrimination claims yielded a median award of $255,979 and a mean award of $1,179,739. Other areas of employment discrimination law had significantly lower means and medians. *See id.* (noting a mean award of $225,000 and a median award of $633,975 in disability cases, a median award of $170,000 and mean award of $528,819 in race discrimination cases, and a median award of $186,250 and mean award of $614,917 in sex discrimination cases). There may be several factors that would explain this disparity, however, and I acknowledge that further research on the effectiveness of the relief granted under the ADEA and the FLSA would be beneficial. Additionally, it is worth emphasizing that the approach proposed by this Article is different from the damages provisions of the FLSA and ADEA, though the proposed approach would bring the Title VII damages provisions more in line with the other statutes.

both defendants and plaintiffs. The approach is fair in its application—liquidated damages would be awarded on an equal basis with the actual harm suffered by the plaintiff. This would advantage employers as they would no longer be subjected to large punitive awards many multiples the amount of the actual harm suffered.[327] At the same time, plaintiffs would have greater access to liquidated damages than to punitive relief, as such awards would be applicable in *all cases* of intentional discrimination in which the defendant is unable to show that it acted in good faith. As demonstrated earlier, the data suggests that under the current approach, in those cases where a jury finds in favor of the plaintiff in a Title VII case, less than one-third of juries also award punitive relief.[328]

Some might argue that the proposed approach is skewed toward the benefit of plaintiffs, as the statutory caps of Title VII would be completely lifted under the revised framework. This could potentially leave defendants exposed to unlimited liability. While caps do bring a certain amount of comfort to employers by fixing a ceiling on their potential liability, the proposed approach would implement safeguards to make certain that employers were not unfairly subjected to heightened awards. As already discussed, the liquidated damages proposal would subject employers only to double damages—a ratio far below their current potential liability.[329] Moreover, employers would still be able to demonstrate that they acted in good faith to evade liability for liquidated damages.[330] And in those cases where the defendant has intentionally violated the statute, and done so with unclean hands, the equities would certainly favor compensating the plaintiff with full monetary relief as well as double damages.[331] An employer intentionally discriminating against its employees in bad faith should be unable to hide

327. *See supra* Part V.A.1 (discussing appellate decisions that approved punitive awards in amounts multiple times the plaintiff's harm).

328. *See supra* Part IV.D (discussing the results of the JVR database search).

329. *See supra* Part V.A.1 (discussing cases in which courts approved punitive damages highly in excess of actual damages).

330. *See supra* Part V.A.4 (discussing the application of the good faith exception to my liquidated damages proposal).

331. *Cf.* Johnson, *supra* note 249, at 99 ("Because no employer today can or should be able to profess ignorance of the law that discrimination is illegal, the absence of a good faith reasonable belief is the only logical meaning of 'reckless indifference' to statutory rights.").

behind the protections of an artificially constructed statutory ceiling which has remained a fixed dollar amount for over fifteen years.

Additionally, one may argue that the current system of punitive damages in Title VII is a more effective deterrent to unlawful employment discrimination than the proposed model. In this regard, the few reported decisions on punitive damages in Title VII claims might be explained by many cases settling because of the *mere threat* of punitive relief. This is certainly a possibility, though the effect of settlements on the punitive data is difficult to measure. Moreover, this argument would not completely explain why only about 18 percent of juries award exemplary damages and why less than one-third of prevailing plaintiffs receive punitive relief.[332] If punitive damages were a form of relief truly feared by employers, courts would likely see higher percentages of juries awarding this form of relief. And, regardless of the ultimate reason that very few published cases award punitive damages, the fact that there are so few reported decisions in and of itself serves to defeat the deterrent effect of exemplary relief. Thus, while there may be some merit to the argument that the current model is having an increased deterrent effect through settlements, such an argument is difficult to quantify and does not completely address the concerns raised in this Article. Additionally, it is likely that the model proposed here—which results in double damages absent an employer's showing of good faith—would similarly deter discriminatory employer conduct and encourage defendants to settle meritorious claims.[333]

There may also be some concern regarding the inclusion of the good faith defense in the liquidated damages proposal. This defense will permit an employer to escape any liability for exemplary relief or liquidated damages—even in those cases in which a jury has found the employer liable for intentional discrimination.[334] While this possible criticism of the good faith defense rings true, the potential benefits of this defense simply outweigh any possible

332. *See supra* Part IV.D (discussing the results of the JVR database search).

333. Indeed, as addressed earlier, the use of liquidated damages would provide greater predictability for these claims and likely result in more settlements. *See supra* notes 312-15 and accompanying text (discussing the benefits of my proposal).

334. *See supra* Part V.A.4 (discussing the role of the good faith defense in my liquidated damages proposal); *cf.* Johnson, *supra* note 249, at 105 (arguing that "[i]n order to avoid an award of punitive damages, there must be some evidence that the defendant believed that he was acting in good faith based on reasonable grounds that he was not discriminating").

negatives. Indeed, this approach strongly encourages employers to avoid liability by adopting and enforcing antidiscrimination policies in the workplace.[335] If properly integrated into the liquidated damages proposal, the good faith defense "has the potential to make anti-discrimination programs the norm" thereby "result[ing] in complete fulfillment of the deterrent purpose underlying Title VII."[336]

The study presented in this Article and the proposed approach for liquidated damages outlined above is consistent with recent scholarship on employment discrimination litigation. Professor Charles Sullivan recently noted the "[s]urprising unanimity" among commentators who share the view that "the law is far behind the times with respect to workplace discrimination."[337] Professor Sullivan has advised that the existing analytical frameworks "result in relatively few verdicts for plaintiffs, despite strong reason to believe that discrimination is pervasive."[338] The results of the study set forth in this Article similarly demonstrate that there are "relatively few" published *punitive* damage awards for plaintiffs, even in the face of this same pervasive discrimination found in Professor Sullivan's analysis.[339] Though the call for liquidated damages in Title VII may "depart[] radically from many prior perspectives,"[340] the addition of this form of relief would help serve to effectuate Congress's goal of deterring unlawful conduct.[341] Similarly, Professor Michael Zimmer recently highlighted the "dismal success rate for plaintiffs in discrimination cases."[342] Professor Zimmer noted that any argument that these cases are being rightly decided as a general matter is "undercut" by the existing "evidence that discrimination continues to plague the American workplace."[343] If discrimination can still correctly be characterized as a plague in this country, the imposition of

335. Kolstad v. Am. Dental Ass'n, 527 U.S. 526, 544-45 (1999).
336. Schiffner, *supra* note 14, at 210.
337. Sullivan, *supra* note 208, at 1000.
338. *Id.*
339. *Id.*
340. *Id.* at 1002.
341. H.R. REP. NO. 102-40, pt.2, at 1 (1991).
342. Michael J. Zimmer, *The New Discrimination Law:* Price Waterhouse *is Dead, Whither* McDonnell Douglas*?*, 53 EMORY L.J. 1887, 1944 (2004).
343. *Id.*

liquidated damages on those employers who intentionally discriminate in bad faith would go a long way toward curing the illness. At a minimum, the liquidated damages proposal set forth above would provide a system of relief where awards would be more consistently and fairly applied.

Prior to the Supreme Court's decision in *Kolstad*, Professor Judith Johnson noted that "[t]he standards for exemplary damages in employment discrimination cases [were] in disarray."[344] Professor Johnson recommended adopting a standard for determining whether punitive damages were appropriate in a Title VII case that would "be the same as that approved by the Supreme Court for liquidated damages."[345] Professor Johnson's assessment of the law's confusion over punitive damages is even more valid almost a decade after the *Kolstad* decision, and this Article—bolstered by the results of the study set forth above—proposes going even further by *replacing* the current structure of punitive relief in Title VII with a liquidated damages framework.

CONCLUSION

Punitive damages have long been a basic foundation of the American legal system.[346] This form of exemplary relief did not play an important role in employment discrimination cases until 1991, when Congress added punitive damages to Title VII.[347] In *Kolstad*, the Supreme Court generated significant confusion in the lower courts and in academic scholarship when the Court attempted to formulate the proper standard to apply in Title VII punitive damages cases.[348] The results of the study set forth in this Article call into question the effectiveness of exemplary relief in the

344. Johnson, *supra* note 249, at 41.

345. *Id.* at 42; *see also* Johnson, *supra* note 269, at 561 ("A court which determines that the defendant intentionally discriminated is simply wrong to find that the facts are insufficient to support an award of punitive damages. The award of punitive damages should be presumptively appropriate in all cases in which the defendant intentionally discriminated.").

346. *See supra* Part I.A (discussing the history of punitive damages in the American legal system).

347. *See supra* Part II (discussing the history of punitive damages in employment discrimination cases).

348. *See supra* Part III (discussing the *Kolstad* decision).

employment discrimination context.[349] At a minimum, there is significant room for debate as to whether punitive damages are achieving the deterrent purpose that Congress intended they achieve when it amended Title VII to include this form of relief.[350]

It is time that we take another look at the remedial provisions of the statute and consider making significant revisions. The congressional goal of deterring unlawful conduct would be achieved under the proposed framework set forth in this Article—substituting liquidated damages for punitive damages in Title VII cases.[351] By directly correlating liquidated damages with the actual harm suffered by the victim—and by providing a good faith exception for employers to avoid the imposition of any additional damages—this proposal would result in a damages structure far more equitable than the system currently in place under Title VII.[352] Additionally, the proposed liquidated damages framework would bring Title VII more in line with the damages provisions found in other areas of employment law.[353]

Decisive action revising the Title VII remedial framework is thus necessary to secure the basic protections of the statute which affords equality in employment. Indeed, "[the] best principles" of our country "secure to all citizens a perfect equality of rights."[354] That "perfect equality" should extend to employment as well.

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349. *See supra* Part IV (discussing the results of my study of Title VII punitive damages cases).

350. H.R. REP. NO. 102-40, pt.2, at 1 (1991).

351. *See id.*; *supra* Part VI (discussing the implications of my liquidated damages proposal).

352. *See supra* Part V.A (discussing the equitable nature of my liquidated damages proposal and the good faith exception).

353. *See* Part V.A (discussing the damages provisions of the ADEA and FLSA).

354. Michael John DeBoer, *Equality as a Fundamental Value in the Indiana Constitution*, 38 VAL. U. L. REV. 489, 503 & n.46 (2004) (quoting Thomas Jefferson, *Reply to the Citizens of Wilmington, 1809*, *in* 16 THE WRITINGS OF THOMAS JEFFERSON 336 (Lipscomb & Bergh eds., Memorial ed. 1903-04)).