The Ineffectiveness of Capped Damages in Cases of Employment Discrimination: Solutions Toward Deterrence

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I. INTRODUCTION

Thirty-seven seconds. Due to a federal statutory damages cap, that is the time it took Wal-Mart to make enough money to pay a recent damage award to a disabled former employee for intentional, egregious discrimination.[1] Patrick Brady, who has cerebral palsy, applied for a sales associate job at Wal-Mart in the summer of 2002.[2] During his application process, Wal-Mart made several inquiries prohibited by the Americans with Disabilities Act (ADA),[3] and specifically prohibited by a previous consent decree entered into with the Equal Employment Opportunity Commission (EEOC).[4] It hired Brady nevertheless, but over the course of the next few months, Wal-Mart subjected him to adverse work conditions based on his disability, including transferring him from the pharmacy department, making him push carts, and subjecting him to a hostile work environment.[5]

Brady brought suit against Wal-Mart and the store manager, alleging violations of the ADA and the New York Human Rights Law.[6] Brady also claimed intentional infliction of emotional distress and negligence in Wal-Mart's hiring, supervising, and retaining employees.[7] At trial, a jury awarded $9,114 in back pay, $2.5 million for emotional pain and suffering, and nominal damages of $1 each for the reasonable accommodation and improper application inquiries claims.[8] It also awarded a total of $5 million in punitive damages.[9]

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[1] Brady v. Wal-Mart Stores, Inc., No. CV 03-3843 (JO), 2005 U.S. Dist. LEXIS 12151, at *11-12 (E.D.N.Y. June 21, 2005).

[2] *Id*. at *2.

[3] 42 U.S.C.A. §§ 12101-12213 (West, Westlaw through P.L. 109-481 (2007)).

[4] *Brady*, 2005 U.S. Dist. LEXIS 12151, at *12.

[5] *Id*. at *2.

[6] *Id*.

[7] *Id*. at *3.

[8] *Id*. at *5.

[9] *Id*. at *5-6.

Because the ADA incorporates the remedies provided under the Civil Rights Act of 1991,[10] Magistrate Judge Orenstein was required under 42 USC § 1981a to reduce the award to comply with a damages cap.[11] Under § 1981a, in actions for intentional discrimination in employment, the total of both compensatory and punitive damage awards may not exceed certain limits based on the number of people employed by the offending employer.[12] Therefore, an employer like Wal-Mart, with more than 500 employees, would only have to pay a maximum of $300,000 in compensatory and punitive damages.[13] In his opinion, Judge Orenstein stated that his ruling "respects the law, but it does not achieve a just result."[14]

To be sure, the Civil Rights Act of 1991 was a victory for civil rights advocates and fair employment practices. It succeeded enormously in bringing the remedies afforded to women and the disabled more in line with victims of other types of discrimination. However, several potential problems with the application of the Civil Rights Act of 1991 remain. One of these problems is equal protection regarding the absence of caps on damages for discrimination based on race and national origin.[15] In addition, plaintiffs may argue, on equal protection grounds, that they should not get a lesser damage award for the same reprehensible conduct just because their employer has fewer employees.[16] Conversely, defendants with many employees may argue they should not have to pay more for the same conduct just because they employ more people.[17] These potential problems, however, are outside the scope of this comment and thus will not be addressed.

In this comment, I will seek to answer the question of how to achieve a "just result" under § 1981a without losing sight of the congressional intent to protect small businesses from exorbitant damages. Part I outlines the history and purpose of punitive damages as deterrence, punishment, and societal retribution. Part II examines the background, enactment, purpose, and legislative intent of § 1981a, while Part III focuses on the ineffectiveness of § 1981a in achieving the goals of punitive damages.

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[10] Mary L. Topliff, Annotation, *Remedies Available Under Americans with Disabilities Act*, 136 A.L.R. FED. 63, 63 (1997).

[11] *Brady*, 2005 U.S. Dist. LEXIS 12151, at *8.

[12] 42 U.S.C. § 1981a(b)(3) (2000).

[13] *See id*. Wal-mart employs 1.8 million employees worldwide and 1.3 million in the United States. Corporate Facts, http://www.walmartfacts.com/FactSheets/10242006_Corporate_Facts.pdf (last visited Nov. 7, 2006).

[14] *Brady*, 2005 U.S. Dist. LEXIS 12151, at *10.

[15] 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, 597-599 (2000-01).

[16] DAVID A. CATHCART ET AL., THE CIVIL RIGHTS ACT OF 1991, at 13 (1993).

[17] *Id*.

Finally, Part IV proposes solutions to make the Act more effective while preventing "windfall" awards and protecting small businesses. A statutory cap based on the number of employees is not necessarily poor legislation. The law must be revised, however, to improve its effectiveness while still preserving its purpose.

II. BACKGROUND OF PUNITIVE DAMAGES: HISTORY AND PURPOSE

Like most aspects of American jurisprudence, punitive damages have roots in English law. The awarding of punitive damages dates back to the 1760s when English courts recognized its purpose as exemplary.[18] Early American cases show the legal system recognized that civil damage awards not only compensated the victim but also provided a disincentive to other potential wrongdoers.[19] In the first case to award punitive damages in the United States, the court said this remedy should be applied to punish and deter intentional torts that were "of the most atrocious and dishonorable nature . . . ."[20] As the American court system developed, the purpose of punitive damages as deterrence, vindication, and punishment became well-established in the United States.[21]

Generally, a jury may award punitive damages if the defendant's conduct was particularly malicious, willful, reckless, or oppressive.[22] When awarding or reviewing punitive damages, courts consider a variety of factors including: the reprehensibility of the offense; the proportionality of the punitive damages to the compensatory damages;[23] the extent of the harm; the intent of the defendant; and, the wealth of the defendant.[24] The last factor, the wealth of the defendant, has received criticism from the Supreme Court[25] but remains a valid consideration in most jurisdictions.[26]

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[18] *See, e.g.*, Huckle v. Money, 95 Eng. Rep. 768, 769 (K.B. 1763) (holding that the jury was "right in giving exemplary damages").

[19] Dorsey D. Ellis, Jr., *Fairness and Efficiency in the Law of Punitive Damages*, 56 S. CAL. L. REV. 1, 19 (1982).

[20] Coryell v. Colbaugh, 1 N.J.L. 90, 91 (1791).

[21] Levi, *supra* note 15, at 587-88; *see* Day v. Woodworth, 54 U.S. 363, 371 (1851) (noting that punitive damages "may properly be termed exemplary or vindictive rather than compensatory"); *Coryell*, 1 N.J.L. at 91 (instructing the jury "that they were not to estimate the damages by any particular proof of suffering or actual loss; but to give damages for *example's* sake").

[22] David G. Owen, *A Punitive Damages Overview: Functions, Problems and Reform*, 39 VILL. L. REV. 363, 364 (1994).

[23] *E.g.*, State Farm Mut. Auto. Ins. Co. v. Campbell, 538 U.S. 408, 418 (2003).

[24] *E.g.*, TXO Prod. Corp. v. Alliance Res. Corp., 509 U.S. 443, 464 (1993).

[25] *State Farm*, 538 U.S. at 427.

[26] Annotation, *Punitive Damages: Relationship to Defendant's Wealth as Factor in Determining Propriety of Award*, 87 A.L.R. 4th 141, 151 (1991).

In recent decades, a host of observers have directed much attention to punitive damages.[27] While many politicians and members of the press decry the awarding of punitive damages as unfair, arbitrary, and out of control,[28] other commentators dispute this view.[29] Proponents of tort reform point to "runaway juries" as the major problem and advocate statutory caps as the solution.[30] What they often overlook, however, is that judges award approximately the same levels of punitive damages as juries, and courts often reduce the headline-grabbing awards by juries.[31] In addition, the Supreme Court, in a series of cases addressing proportionality and propriety, has already "reformed" the way courts award punitive damages.[32]

Although substantial controversy regarding the role of punitive damages continues,[33] scholars and judges alike agree that they are a necessary part of the legal system.[34] Because criminal penalties are not available for many civil wrongs, or because the criminal remedies available are inadequate,[35] punitive damages provide for punishment of the offender.[36] When compensatory damages are nominal, punitive damages provide a deterrent to the prohibited conduct by both the defendant and by

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[27] *See generally* Marc Galanter & David Luban, *Poetic Justice: Punitive Damages and Legal Pluralism*, 42 AM. U. L. REV. 1393, 1410-11 (1993) (citing articles in the *Wall Street Journal*, *National Enquirer*, and *Science*, as well as a report by the RAND Institute for Civil Justice).

[28] *See, e.g.*, Dan Quayle, *Civil Justice Reform*, 41 AM. U. L. REV. 559, 564 (1992) ("[P]unitive damages will continue to generate disproportionately high awards in a random and capricious manner."); Editorial, *Casino Justice*, WASH. POST, July 13, 1999, at A18 (describing the legal system as a "kind of lottery in which clever trial lawyers and a few victims get very rich at the cost of society's confidence in the justice system").

[29] *E.g.*, Michael Rustad, *In Defense of Punitive Damages in Products Liability: Testing Tort Anecdotes with Empirical Data*, 78 IOWA L. REV. 1, 44-49 (1992). Although Professor Rustad only addresses punitive damages in the context of products liability cases, researchers have noted similar, though less convincing, data in the fields of medical malpractice and other tort actions. *See, e.g.*, Marc Galanter, *Shadow Play: The Fabled Menace of Punitive Damages*, 1998 WIS. L. REV. 1, 2 (1998).

[30] *E.g.*, Quayle, *supra* note 28, at 565.

[31] Marc Galanter, *Real World Torts: An Antidote to Anecdote*, 55 MD. L. REV. 1093, 1121 (1996); Michael L. Rustad, *Unraveling Punitive Damages: Current Data and Further Inquiry*, 1998 WIS. L. REV. 15, 40-44 (1998); s*ee generally* Michael L. Rustad, *How The Common Good Is Served By The Remedy of Punitive Damages*, 64 TENN. L. REV. 793 (1997) (highlighting cases where large jury awards were reduced by the trial or appellate court).

[32] BMW of N. Am., Inc. v. Gore, 517 U.S. 559, 585-86 (1996); TXO Prod. Corp. v. Alliance Res. Corp., 509 U.S. 443, 458 (1993); Pac. Mut. Life Ins. Co. v. Haslip, 499 U.S. 1, 23-24 (1991).

[33] William A. Lovett, *Exxon Valdez, Punitive Damages, and Tort Reform*, 38 TORT TRIAL & INS. PRAC. L.J. 1071, 1105-12 (2003). "The heart of the modern tort reform controversy is a reaction to the widely perceived 'excesses' of the U.S. tort and punitive damages system." *Id.* at 1105.

[34] TXO v. Alliance Res. Corp., 419 S.E.2d 870, 889 (1992) (noting that large punitive damages awards are appropriate in some cases to "attract the defendant's attention"); Michael Rustad & Thomas Koenig, *The Historical Continuity of Punitive Damages Awards: Reforming the Tort Reformers*, 42 AM. U. L. REV. 1269, 1276 (1993); Maria O'Brien Hylton, *The Changing World of Employee Benefits*, 79 CHI.-KENT. L. REV. 625, 649 (2004) ("[T]he legal community generally accepts that punitive damages can be an effective deterrent.").

[35] *See* Ellis, Jr., *supra* note 19, at 1-2.

[36] *Id.* at 3.

other potential wrongdoers.[37] In addition, punitive damages serve the societal goal of retribution for other victims who are not before the court.[38]

A. Punishment and Deterrence

Punitive damages serve the unique purpose of punishing the defendant and deterring future misconduct by the defendant and others similarly situated.[39] Relatively insubstantial compensatory damages do not begin to measure the enormity of the defendant's wrongful behavior and have no deterrent effect, especially for wealthy defendants.[40] For that reason, punitive damages should be a substantial and essential ingredient in all civil rights litigation.

Many legal experts generally regard the goals of punishment and deterrence as inextricably intertwined.[41] Most scholars agree that punishment achieves some level of deterrence by rendering the defendant's conduct unprofitable.[42] One commentator states that plaintiffs utilize the remedy as "an orderly, legal retaliation . . . to be preferred to a private vengeance which will disturb the peace of the community."[43] Thus, punitive damages serve as a sort of civil "law enforcement." Another commentator explains: "Deterrence may be viewed as operating *ex ante*, in preventing prospective wrongdoers from violating the rules, whereas law enforcement may be seen as operating *ex post*, in catching and punishing wrongdoers who are not deterred."[44] Therefore, a rational offender will recognize the potential ramifications of his actions and seek to avoid his contemplated behavior, which in turn increases compliance with the law.[45]

Despite the general view that the goal of American civil law is not to punish but to compensate,[46] civil courts assess punitive damages with the

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[37] Kelsay v. Motorola, Inc., 384 N.E.2d 353, 359 (Ill. 1978) (noting that because the plaintiff was only awarded $749 in compensatory damages for his retaliatory discharge from employment, the employer's conduct would not be deterred and the defendant would be likely to repeat his conduct in the future).

[38] Although the Supreme Court has expressly prohibited this purpose in *State Farm* because of due process concerns, State Farm Mut. Auto. Ins. Co. v. Campbell, 538 U.S. 408, 423 (2003), it continues to be an important, though underlying, goal of punitive damages, Catherine M. Sharkey, *Punitive Damages as Societal Damages*, 113 YALE L.J. 347, 351-52 (2003).

[39] Leila C. Orr, *Making a Case for Wealth-Calibrated Punitive Damages*, 37 LOY. L.A. L. REV. 1739, 1744-47 (2004).

[40] *Id*.

[41] *E.g*., Kemezy v. Peters, 79 F.3d 33, 34 (7th Cir. 1996) (noting that "deterrence is a purpose of punishment, rather than, as the formulation implies, a parallel purpose, along with punishment itself, for imposing the specific form of punishment that is punitive damages").

[42] *See, e.g*., Owen, *supra* note 22, at 378.

[43] Clarence Morris, *Punitive Damages in Tort Cases*, 44 HARV. L. REV. 1173, 1198 (1931).

[44] Owen, *supra* note 22, at 380.

[45] *Id*.

[46] Galanter & Luban, *supra* note 27, at 1404.

same goals as those of the criminal justice system.[47] As with criminal fines, punitive damages purport to deter harmful behavior.[48] As the lines between civil and criminal penalties blurred in recent years,[49] Justice O'Connor remarked that punitive damages "further the aims of the criminal law: 'to punish reprehensible conduct and to deter its future occurrence.'"[50]

B. The Goal of Societal Compensation and Retribution

Not only do punitive damages punish the defendant and provide a deterrent to potential future offenses, they also accomplish the societal goal of redressing the harms caused by that defendant to other silent victims.[51] Elizabeth Cabraser argues that "[p]unitive damages are not an entitlement of the victims, but of society: a punitive damages award is a civil punishment visited upon defendants to vindicate the public interest in deterrence, and to penalize conduct that violates the social contract and injures society."[52] Although class action suits most properly achieve this goal,[53] procedural rules often preclude this course of action where the relief sought is monetary.[54] As a result, many victims who perceive their own pecuniary damages as inconsequential never redress their injuries. Therefore, although not ideal,[55] society can at least begin to recoup its collective losses through substantial punitive damage awards.

Punitive damages are particularly effective and necessary, on a societal level, where the tortfeasor is likely to escape liability.[56] If the offender has a good chance of escaping liability, failure to impose punitive damages

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[47] *See* Galanter & Luban, *supra* note 27, at 1404-07; Timothy Stoltzfus Jost & Sharon L. Davies, *The Empire Strikes Back: A Critique of the Backlash Against Fraud and Abuse Enforcement*, 51 ALA. L. REV. 239, 267-68 (1999).

[48] Indeed, one court even suggested that where punitive damages prove to provide ineffective deterrence, criminal sanctions might be a logical next step. Nevarez v. Gaztambide, 633 F. Supp. 287, 298 n.15 (D.P.R. 1986), *rev'd on other grounds*, 820 F.2d 525 (1st Cir. 1987).

[49] John C. Coffee, Jr., *Does "Unlawful" Mean "Criminal"?: Reflections on the Disappearing Tort/Crime Distinction in American Law*, 71 B.U. L. REV. 193, 193 (1991).

[50] Browning-Ferris Indus. of Vt., Inc. v. Kelco Disposal, Inc., 492 U.S. 257, 297 (O'Connor, J., concurring) (*quoting* Bankers Life & Cas. Co., 486 U.S. 71, 87 (1988) (O'Connor, J., concurring)).

[51] Sharkey, *supra* note 38 at 351-52. *But see* State Farm Mut. Auto. Ins. Co. v. Campbell, 538 U.S. 408, 423 (2003) ("Due process does not permit courts, in the calculation of punitive damages, to adjudicate the merits of other parties' hypothetical claims against a defendant under the guise of the reprehensibility analysis . . . .").

[52] Elizabeth J. Cabraser, *Unfinished Business: Reaching the Due Process Limits of Punitive Damages in Tobacco Litigation Through Unitary Classwide Adjudication*, 36 WAKE FOREST L. REV. 979, 981 (2001).

[53] Sharkey, *supra* note 38, at 352.

[54] FED. R. CIV. P. 23. Employment discrimination class action suits are often filed under Rule 23(b)(2), which only provides for injunctive relief. *Id*.

[55] *See* Sharkey, *supra* note 38, at 352 (noting that the current system sometimes results in a "windfall" for the plaintiff). *But see* discussion *infra* Part V.D for a proposed solution to the problem.

[56] A. Mitchell Polinsky & Steven Shavell, *Punitive Damages: An Economic Analysis*, 111 HARV. L. REV. 869, 873-74 (1998).

would lead to inadequate deterrence.[57] These situations most commonly occur when the victim either does not realize the extent or the source of his injuries, has been shamed by the act, is not sophisticated or financially able to bring a lawsuit, or surmises that the compensatory damages are too low.[58]

Employment discrimination cases fall into this category of a lowered deterrent effect. Victims often blame themselves for their injury.[59] They may feel shameful or embarrassed,[60] especially if the discrimination points to the victim's disability as a socially-perceived weakness,[61] or if the victim experiences so much degradation that he or she loses self-confidence.[62] Victims of discrimination are more likely to be undereducated[63] or poor.[64] These victims are less likely to bring discrimination suits against their employers, and the employers will escape liability. This leakage prevents compensatory damages awarded to individual plaintiffs from compensating for the social costs of anti-social behavior.

Additionally, other obstacles face victims of employment discrimination in the court system.[65] Although discrimination complaints are relatively easy to file with the EEOC,[66] the success rate has long fell below that of other civil plaintiffs.[67] While the success rates in judge-tried insurance and personal injury cases from 1995 to 1997 were 43.6% and

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[57] *Id*. at 874.

[58] Sharkey, *supra* note 38, at 366-67; Polinsky & Shavell, *supra* note 56, at 888.

[59] Jane L. Dolkart, *Hostile Environment Harassment: Equality, Objectivity, and the Shaping of Legal Standards*, 43 EMORY L.J. 151, 230 (1994) ("A common reaction to discrimination is to attempt to justify the abuse through self-blame.").

[60] Elizabeth J. Gant, Comment, *Applying Title VII "Hostile Work Environment" Analysis to Title IX of the Education Amendments of 1972—An Avenue of Relief for Victims of Student-to-Student Sexual Harassment in the Schools*, 98 DICK. L. REV. 489, 511-12 (1993).

[61] *E.g*., Phillips v. Wal-Mart Stores, Inc., 78 F. Supp. 2d 1274, 1278 (S.D. Ala. 1999). Philips spoke slowly as the result of a brain injury. *Id*. at 1281. Although he was qualified for his job, his co-workers would mock his speech over the intercom, making work unbearably embarrassing for Phillips. *Id*. at 1278.

[62] *E.g*., Pollard v. E.I. DuPont de Nemours, Inc., 338 F. Supp. 2d 865, 884 (W.D. Tenn. 2003). Pollard was formerly an outgoing, confident professional who lost her positive attributes through repeated sexual harassment by her employer. *Id*.

[63] *See* Humphrey Taylor, *Americans with Disabilities Still Pervasively Disadvantaged on a Broad Range of Key Indicators,* THE HARRIS POLL, Oct. 14, 1998, http://www.harrisinteractive.com/harris_poll/index.asp?PID=152 (last visited Apr. 30, 2006) (noting the lower rates of high school education among the disabled population than the non-disabled).

[64] *See* CNNMoney.com, *Women Still Lag White Males in Pay*, April 20, 2004, http://money.cnn.com/2004/04/20/news/economy/women_earnings/ (last visited Apr. 30, 2006) (discussing the discrepancy in income between white males and women, particularly female minorities); *see also* Taylor, *supra* note 63.

[65] *See generally* Michael Selmi, *Why Are Employment Discrimination Cases So Hard to Win?*, 61 LA. L. REV. 555 (2001) (arguing that employment discrimination plaintiffs usually fare worse than other civil plaintiffs).

[66] *See* Jamie L. Wacks, *A Proposal for Community-Based Racial Reconciliation in the United States Through Personal Stories,* 7 VA. J. SOC. POL'Y & L. 195, 219 (2000).

[67] Selmi, *supra* note 65, at 558.

41.8%, respectively, plaintiffs in employment cases succeeded in only 18.7% of cases tried before a judge.[68] Even if successful, courts overturn employment cases at a higher rate than other cases.[69] One commentator has a theory for this dismal success rate: bias by the courts.[70]

Another obstacle discrimination victims face is a lack of attorneys willing to take on a statistically-doomed case.[71] Plaintiffs may file a complaint with their state agency, if one exists, or with the EEOC.[72] Unfortunately, the EEOC is under-funded and has such a backlog of cases that the average time before a case is even considered ready to litigate is over 600 days.[73] That leaves private attorneys as the only effective option. However, even with the attorney's fee provision of the Civil Rights Act,[74] most cases present too great a risk for the few employment discrimination attorneys who remain because attorneys' fees are available only when the plaintiff prevails.[75] Undoubtedly, some attorneys are not motivated solely by profit.[76] However, these attorneys not only run the risk of obtaining a settlement with no provision for attorney's fees,[77] but the capital required to litigate a discrimination case when the collection of fees could be over five years away also puts many public interest and small law firms out of the market.[78]

Despite the best intentions of members of Congress in enacting the Civil Rights Act of 1991 to "encourage victims to pursue their claims, create an incentive for attorneys to take such cases, and provide a greater economic threat to employers,"[79] the unfortunate reality is that employers

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[68] *Id*. at 560-61. Professor Selmi derived the figures from data compiled by the Administrative Office of the Courts and maintained in a database by Cornell Law School. *Id*. at 559. The database can be accessed at http://teddy.law.cornell.edu:8090/questata.htm. *Id*. n.15.

[69] Kevin Clermont et al., *How Employment-Discrimination Plaintiffs Fare in the Federal Courts of Appeals*, 7 EMP. RTS. & EMP. POL'Y J. 547, 547-48 (2003).

[70] Selmi, *supra* note 65, at 561-71. For example, in ADA cases "the court is often reluctant to see discrimination as the underlying cause either because of a belief that the plaintiff is not truly disabled and therefore not subject to discrimination or because the plaintiff has not truly suffered discrimination, as seems true in both the context of race and age cases." *Id*. at 568.

[71] Clyde Summers, *Effective Remedies for Employment Rights: Preliminary Guidelines and Proposals*, 141 U. PA. L. REV. 457, 487 (1992).

[72] *Id*. at 486.

[73] *Id*. at 480-81.

[74] 42 U.S.C. § 2000e-5(k) (2000).

[75] *Id*.; Summers, *supra* note 71, at 487.

[76] Selmi, *supra* note 65, at 569-70.

[77] Summers, *supra* note 71, at 488. ("The Supreme Court has held that it is within the trial court's discretion to approve [settlements with no provision for an attorney's fees], barring the lawyer from claiming an additional amount for attorney's fees. Once scorched by a fee waiver settlement, a lawyer may refuse to take future cases." (citing Evans v. Jeff D., 475 U.S. 717, 742-43 (1986) (Brennan, J., dissenting))).

[78] *Id*. at 488-89.

[79] Michael Mankes, Comment, *Combatting Individual Employment Discrimination in the United States and Great Britain: A Novel Remedial Approach*, 16 COMP. LAB. L.J. 67, 81 (1994).

still dominate.[80] Therefore, it is important, as a society, to increase the deterrent value in order to decrease the number of future victims. This also fulfills the societal goal of ensuring that "citizens who engage in such contemptible behavior against other citizens receive society's full rebuke and condemnation,"[81] and it "promotes confidence in the legal system by reassuring victims and others that justice has been done."[82]

III. BACKGROUND OF § 1981A: PURPOSE AND LEGISLATIVE HISTORY

Since the enactment of the Civil Rights Act of 1964 (which included Title VII prohibiting discrimination in employment)[83] and the ADA in 1990,[84] ensuring equal rights for women and the disabled has been an important feature of our legal system.[85] However, prior 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."[86] Although victims of discrimination based on race or national origin could seek a variety of damages based on § 1981 (which prohibits racial discrimination), including compensatory damages and punitive damages in addition to equitable relief,[87] the limited remedies available to victims of sex and disability discrimination were inadequate.[88] Before § 1981a was enacted, these victims could only hope to receive injunctive relief[89] and attorney's fees.[90] These limited remedies did not provide enough incentive to encourage mistreated employees to stand up for their rights and seek a legal remedy.[91]

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[80] *See* Clermont et al., *supra* note 69, at 554-55, 564 (finding that, although plaintiffs win a very small percentage of their cases at the district court level, defendants have "dramatically greater success" at the appellate level in overturning judgments for plaintiffs than plaintiffs have in overturning judgments for defendants).

[81] United States v. Big D Enters., Inc., 184 F.3d 924, 934 (8th Cir. 1999).

[82] 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, 295 (2001).

[83] 42 U.S.C.A. §§ 2000e to 2000e-17 (West, Westlaw through P.L. 109-481 (2007)).

[84] 42 U.S.C.A. §§ 12101-12213 (West, Westlaw through P.L. 109-481 (2007)).

[85] *See generally* Douglas M. Staudmeister, Comment, *Grasping the Intangible: A Guide to Assessing Nonpecuniary Damages in the EEOC Administrative Process*, 46 AM. U.L. REV. 189, 190 (1996).

[86] Roy L. Brooks, *A Roadmap Through Title VII's Procedural and Remedial Labyrinth*, 24 SW. U. L. REV. 511, 511 (1995); Equal Employment Opportunity Commission, *1965-1971: A "Toothless Tiger" Helps Shape the Law and Educate the Public*, http://www.eeoc.gov/abouteeoc/35th/1965-71/index.html (last visited Nov. 16, 2006).

[87] 42 U.S.C. § 1981 (2000).

[88] Equal Employment Opportunity Commission, *Closing the Gaps - Making Title VII More Effective for All: Damages, Jury Trials, and the Civil Rights Act of 1991*, http://www.eeoc.gov/abouteeoc/40th/panel/closinggaps.html (last visited Nov. 16, 2006).

[89] *Id*. Injunctive relief for the employee usually includes reinstatement into the hostile work environment. This, of course, is not an effective or appropriate remedy in the majority of cases.

[90] *Id*.

[91] *Id*.

Meanwhile, in the late 1980s, the Supreme Court began dismantling the protections against discrimination offered by Title VII.[92] Several decisions during the Supreme Court term of 1988-89 restructured the future path of federal civil rights enforcement, particularly in the area of employment discrimination.[93] These decisions weakened both a plaintiff's ability to prevail in an employment discrimination action and the remedies available to a successful plaintiff.[94]

The first of a series of four cases to come out of this term and prompt legislative action was *Patterson v. McLean Credit Union*, which held that § 1981 does not cover post-hiring racial discrimination.[95] The Court's decision in *Lorance v. AT&T Technologies, Inc.* dropped another bombshell.[96] In that case, the Court held that the statute of limitations had run, preventing plaintiffs from challenging a seniority system governing layoffs implemented to intentionally discriminate against female employees because they waited until the layoffs actually occurred instead of suing when the policy was implemented.[97] In *Martin v. Wilks,* the Court provided for almost unlimited challenges to consent decrees formed to resolve employment discrimination disputes,[98] thereby threatening existing decrees with constant challenges and diminishing their value in resolving future Title VII disputes. The fourth case decided in June of 1989 that further diminished the rights of victims of employment discrimination was *Wards Cove Packing Co., Inc. v. Atonio*.[99] In that case, the Court held that employers do not have the burden of proving a business necessity to justify practices that have a disparate impact on protected classes.[100]

Critics decried these Supreme Court decisions as a retreat from the great strides made in the last century in protecting the rights of underprivileged minorities.[101] Civil rights organizations and some members of Congress maintained that legislation was needed to restore correct interpretations of the law[102] and also to reconcile the differences in remedies available for different kinds of discrimination.[103] The George

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[92] Reginald C. Govan, *Honorable Compromises and the Moral High Ground: The Conflict Between the Rhetoric and the Content of the Civil Rights Act of 1991*, 46 RUTGERS L. REV. 1, 17-23 (1993).

[93] *Id.* at 19-20.

[94] *See id.* at 23-30.

[95] 491 U.S. 164, 171 (1989).

[96] 490 U.S. 900 (1989).

[97] *Id.* at 911.

[98] 490 U.S. 755, 761 (1989).

[99] 490 U.S. 642 (1989).

[100] *Id.* at 659.

[101] Govan, *supra* note 92, at 23-24.

[102] *Id.* at 28; *see also* Charles Rothfeld, *Rulings on Job Bias: Chilling Effect on Lawsuits*, N.Y. TIMES, Oct. 27, 1989, at B7.

[103] Stacy A. Hickox, *Reduction of Punitive Damages for Employment Discrimination: Are Courts Ignoring our Juries?*, 54 MERCER L. REV. 1081, 1082 (2003).

H.W. Bush Administration and the business lobby, however, contended that restorative "legislation isn't necessary."[104] Nevertheless, this did not deter activists and progressive politicians from pursuing a remedy and developing legislation to overturn these unpopular decisions.[105] The inequity in remedies available to victims of different types of discrimination,[106] as well as the Supreme Court cases, provided the motivation Congress needed to reform the remedies available under Title VII and the ADA.[107]

In 1991, Congress passed the Civil Rights Act. One major change in the 1991 Act was the availability of compensatory and punitive damages to victims of intentional disability and sex discrimination.[108] Punitive damages were available for victims of discrimination who could prove that the employer "engaged in a discriminatory practice . . . with malice or with reckless indifference to the federally protected rights of [the] aggrieved individual."[109] Congress's intent for the inclusion of punitive damages was to "punish employers for their unlawful conduct, to reinforce public policy against discrimination, and to deter future discrimination."[110] Opponents of the Act argued that including compensatory and punitive damages would invite frivolous lawsuits and huge damage awards.[111] Therefore, the Act included a cap on damages as a compromise between Congress and the Bush Administration-backed business lobby.[112] The compromise calibrated the cap in four tiers, with the applicable tier dependant on the number of employees the offending employer employed during the previous year.[113] Employers with 15-100 employees have damages capped at $50,000, while employers with 101-200 employees have a damage cap of $100,000. Employers with 201-500 employees have damages capped at $200,000, and for employers with 501 or more employees, the cap is $300,000.[114] The damages cap applies to the aggregate sum of compensatory and punitive damages.[115]

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[104] Robin Toner, *President to Seek Amendment to Bar Burning the Flag*, N.Y. TIMES, June 28, 1989, at A1.

[105] *See* Govan, *supra* note 92, at 28, 30-31. The original "response" came in the form of the Civil Rights Act of 1990, a bill that was vetoed by then-President Bush. *Id*. at 151.

[106] Levi, *supra* note 15, at 596-97.

[107] Govan, *supra* note 92, at 28; Equal Employment Opportunity Commission, *The Civil Rights Act of 1991*, http://www.eeoc.gov/abouteeoc/35th/1990s/civilrights.html (last visited Nov. 17, 2006).

[108] 42 U.S.C. § 1981a(b)(1) (2000).

[109] *Id*.

[110] Hickox, *supra* note 103, at 1083.

[111] Kenneth A. Sprang, *Beware the Toothless Tiger: A Critique of the Model Employment Termination Act*, 43 AM. U. L. REV. 849, 918 (1994).

[112] Govan, *supra* note 92, at 212.

[113] 42 U.S.C. § 1981a(b)(3) (2000).

[114] *Id*.

[115] *Id*.

By placing caps on the total of compensatory and punitive damages, Congress clipped the teeth of the Act and tied the hands of judges seeking to further justice. Section 1981a forces judges to reduce jury awards despite the demands of justice[116] and a historical tradition of deference to a jury's verdict.[117] Although punitive damage awards are generally reviewable,[118] judges are not, in cases without damage caps, required to reduce the jury's award.[119] The traditional respect of the jury[120] and the historical reluctance to alter a jury's verdict makes modern judges hesitant to reduce a jury's award.[121] However, with § 1981a's cap on damages, this deference to the jury's verdict is eliminated. One court noted that $300,000 was

> insufficient to compensate plaintiff for the psychological damage, pain, and humiliation she has suffered, in addition to the loss of a lucrative career and secure retirement. The Court is bound by the statutory cap set forth in § 1981a however, and cannot award plaintiff compensatory damages in excess of that cap.[122]

The damage caps limit the ability of judges to achieve a "just result."

IV. WHY § 1981A IS INEFFECTIVE

Congress passed the Civil Rights Act of 1991 to help combat the persistence of employment discrimination[123] by adding compensatory and punitive damages to effectuate a greater level of deterrence.[124] Although the Act succeeded in re-establishing some rights that the Supreme Court had rolled back in its decisions of the 1988-89 term and brought the remedies available under Title VII in line with other anti-discrimination statutes, the compromises made to guarantee passage of the bill weakened

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[116] *See* Brady v. Wal-Mart Stores, Inc., No. CV 03-3843 (JO), 2005 U.S. Dist. LEXIS 12151, at *10-12 (E.D.N.Y. June 21, 2005).

[117] Ellis, Jr., *supra* note 19, at 12-14.

[118] *See generally id*. (discussing the 17th century English origins of the court's power to set aside jury verdicts that are considered excessive).

[119] *See generally* BMW of N. Am., Inc. v. Gore, 517 U.S. 559, 585 (1996) (affirming there is no bright line rule to guide judges in determining the excessiveness of punitive damages).

[120] *See* Austin Wakeman Scott, *Trial by Jury and the Reform of Civil Procedure*, 31 HARV. L. REV. 669, 676 (1918) (regarding the jury "as a bulwark of liberty, as a means of preventing oppression by the Crown").

[121] *See* Copley v. Bax Global, Inc., 97 F. Supp. 2d 1164, 1171 (2000).

[122] Pollard v. E.I. DuPont de Nemours, Inc., 16 F. Supp. 2d 913, 924 n.19 (1998).

[123] *See* Govan, *supra* note 92, at 174; *see also* Leroy Clark, *The Law & Economics of Racial Discrimination in Employment by David A. Strauss*, 79 GEO. L.J. 1695, 1696-98 (1991) (examining recent sociological research on discrimination).

[124] *See* Hickox, *supra* note 103, at 1083 (citing 137 CONG. REC. H9526 (daily ed. Nov. 7, 1991) (statement of Rep. Edwards)).

the best intentions of legislators. Judging from the level of recidivism, the Act, with its caps on damages, has not achieved its goal of eliminating the persistent problem of employment discrimination. In particular, the caps on punitive damages prevent courts from assuring a just result in all cases. The caps also diminish the deterrent effect and the societal compensation for egregious conduct by large employers.

One important reason why damage caps undermine the deterrent effect of punitive damages is that they allow potential defendants to include the maximum damage award into their cost of doing business.[125] Predictability of the cost of damages enables a company to do a cost-benefit assessment to decide whether instituting company-wide anti-discrimination training or similar preventive measures is profitable.[126] In addition, companies can factor in the low probability of getting "caught" for discrimination.[127] Therefore, while a small company may take affirmative steps in the training of its management and employees to prevent discrimination, a large company with thousands, or millions, of employees might very well decide it is more profitable to instead absorb the cost of a capped damage award for its discriminatory practices. Damages then become merely a fee, allowing defendants to "continue their misconduct for a price."[128]

A good example of this lack of deterrence is the repeat offenses committed by the corporate giant Wal-Mart. Although Wal-Mart is surely not the only, or even worst, offender of anti-discrimination laws, its large size[129] and repeated discrimination violations make it an appropriate illustration of the drawbacks of the damage caps of § 1981a. The damages that Wal-Mart has to pay do not have a deterrent effect, as evidenced by its continued violation of anti-discrimination statutes.[130] In ten years, the EEOC alone has filed sixteen lawsuits against Wal-Mart for violation of the ADA.[131]

In one particularly reprehensible case, Wal-Mart refused to hire two deaf men on the basis of their disability.[132] The men filed suit through the EEOC and subsequently entered into a consent decree with Wal-Mart.[133] The consent decree detailed the actions the court required Wal-Mart to take, including paying back pay, compensatory damages and attorney's

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[125] Jeffrey R. White, *State Farm and Punitive Damages: Call the Jury Back,* 5 J. HIGH TECH. L. 79, 88 (2005).

[126] *Id* at 88-89.

[127] *Id*.

[128] *Id*. at 88.

[129] It employs 1.6 million employees worldwide. *See* WalMartfacts.com, http://www.walmartfacts.com/doyouknow/default.aspx#a23 (last visited Apr. 30, 2006).

[130] *See* EEOC.gov, *Wal-Mart Violates Disabilities Act Again; EEOC Files 16th ADA Suits Against Retail Giant,* http://www.eeoc.gov/press/6-21-01.html (last visited Dec. 1, 2005).

[131] *Id*.

[132] EEOC v. Wal-Mart Stores, Inc., 147 F. Supp. 2d 980, 981 (D. Ariz. 2001).

[133] *Id*.

fees, and providing full-time jobs for the two men, complete with interpreters for meetings and training.[134] Wal-Mart also agreed to implement an extensive training program on the ADA and to complete these measures within 18 months.[135]

Unfortunately, at the expiration of the consent decree, Wal-Mart had failed to comply.[136] It did not provide timely reports of its compliance; it did not provide interpreters; and it failed to train its staff.[137] The district court found Wal-Mart in contempt and ordered it to comply with the decree, pay a $750,200 sanction to the Arizona Center for Disability Law, and run a local television commercial which included a statement it had violated the ADA and a referral to the EEOC for people who believe they have been discriminated against on the basis of disability.[138]

Despite these sanctions, Wal-Mart has not stopped its discriminatory practices. The EEOC filed another ADA suit against Wal-Mart for refusing to provide reasonable accommodation to Plaintiff Alice Rehberg.[139] Ms. Rehberg is limited in the amount of time she can stand, yet Wal-Mart refused to let her occasionally sit during her shift as a "greeter."[140] Wal-Mart constructively discharged Ms. Rehberg from her position, and the EEOC filed suit.[141]

Wal-Mart subjected another employee to a hostile work environment and eventually terminated him because of his disability.[142] Plaintiff Christopher Phillips sustained a traumatic brain injury in a near-fatal auto accident and, after surviving a four-month coma, he started the long journey to rehabilitation.[143] As a result of his brain injury, his speech is slow.[144] He has trouble concentrating, experiences dizziness and headaches, and has difficulty with his fine motor skills.[145] Fourteen years after the accident, after re-learning how to eat, talk, walk and take care of himself, Phillips obtained employment at Sears with the help of the Alabama Department of Rehabilitation Services (ADRS).[146] Sears eliminated his position in 1993, but ADRS helped him to gain employment at Wal-Mart.[147]

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[134] *Id*.
[135] *Id*. at 981-82
[136] *Id*. at 981.
[137] *Id*.
[138] *Id*. at 983.
[139] *See Wal-Mart Violates Disabilities Act Again, supra* note 130. .
[140] *Id*.
[141] *Id*.
[142] Phillips v. Wal-Mart Stores, Inc., 78 F. Supp. 2d 1274, 1277 (S.D. Ala. 1999).
[143] *Id*.
[144] *Id*. at 1281.
[145] *Id*.
[146] *Id*. at 1277.
[147] *Id*. at 1274.

During his work in the night receiving department, his supervisor berated him for being slow and unproductive.[148] His supervisor and co-workers made fun of him and mocked his slow speech over the store intercom.[149] The store manager even yelled at him for making a suggestion.[150] Although the store's management never reprimanded Phillips for having a bad attitude, he was nonetheless fired for his allegedly poor attitude and performance.[151]

Wal-Mart has refused to hire a man with an amputated arm, a wheelchair user, and a man with cerebral palsy.[152] It is clear that Wal-Mart perceives that it is immune from punishment.[153] When the maximum possible penalty that Wal-Mart might have to pay is capped at $300,000, Wal-Mart can be assured that punishment for its actions will not cut into its profits.

Recently, the "commercial titan"[154] produced a memorandum outlining how the company could save money by reducing healthcare costs.[155] This memorandum exemplifies the flippant philosophy of Wal-Mart regarding workers with disabilities.[156] In the memo, Executive Vice President of Risk Management and Benefits Susan Chambers[157] recommends attracting a "healthier workforce" by requiring physical activity in all job categories, "e.g. [sic] all cashiers do some cart gathering."[158] One lawyer has referred to the memorandum as "a cesspool of legal violations," and the California Department of Fair Employment and Housing calls it "very alarming."[159] Chambers' blatant recommendation that Wal-Mart introduce these changes

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[148] *Id*. at 1278-79

[149] *Id*. at 1278

[150] *Id*. at 1279.

[151] Phillips lost his lawsuit against his former employer because the court found that, although he has an "impairment," his disability does not interfere with any major life activity. *Id*. at 1280-88. Therefore, Wal-Mart won its motion for summary judgment. *Id*. at 1288. The court's unfortunate conclusion, however, does not detract from the facts illustrative for the purposes of this discussion that Wal-Mart is insensitive to its workers' "impairments" and apparently provides minimal, if any, anti-discrimination training to its management.

[152] Marta Russell, *A Brief History of Wal-Mart and Disability Discrimination,* http://www.zmag.org/content/showarticle.cfm?ItemID=4987 (last visited Apr. 30, 2006).

[153] *See Brady*, 2005 U.S. Dist. LEXIS 12151 at *12.

[154] *Brady*, 2005 U.S. Dist. LEXIS 12151 at *11 (*citing* Wal-Mart Stores, Inc. v. Visa U.S.A., Inc. 396 F.3d 96, 101 (2d Circ. 2005)).

[155] *See* Memorandum to the Board of Directors, Susan Chambers, *Reviewing and Revising Wal-Marts Benefits Strategy,* http://fivestones.sitestream.com/docs/Susan_Chambers_Memo_to_Wal-Mart_Board.pdf.

[156] *Id*. (explaining that "a healthier work force could result in significant savings").

[157] *See* Walmartfacts.com, *Senior Officers,* http://www.walmartfacts.com/newsdesk/meet-our-people.aspx?CategoryID=106&strShowHide=True (last visited Apr. 30, 2006).

[158] *See* Memorandum to the Board of Directors, *supra* note 156. In addition to requiring physical activity, the memorandum also suggests offering discounts on healthy food and offering benefits that "appeal to healthy Associates." *Id*.

[159] Molly Selvin and Lisa Girion, *Wal-Mart Memo May Raise Litigation Risk; Employee-Rights Lawyers Say the Retailer Could Face Additional Discrimination Claims,* L.A. TIMES, Oct. 28, 2005, at Business Section 1.

to "dissuade unhealthy people from coming to work at Wal-Mart" shows a complete disregard for ADA regulations. Furthermore, it proves that the multiple lawsuits brought against the company have not had the desired deterrent effect to prevent this systematic discrimination by "the world's largest retailer."[160]

V. PROPOSED REFORMS

The previous examples of Wal-Mart's repeated violations of anti-discrimination statutes illustrate that the current caps on punitive damages do not have the desired deterrent effect. The following proposed solutions would increase deterrence while expressly conforming to the legislative intent of providing a ceiling on damages to protect small businesses. These proposed reforms are: 1) keep the current caps based on "number of employees," but recalibrate the tiers to account for very large employers; 2) eliminate the "number of employees" calculations and instead base caps on the net worth of the offending employer; and 3) increase the punitive damages caps in cases of repeat violations of similar anti-discrimination statutes.

A. Reform the Current "Number of Employees" Scheme

One potentially effective solution is to retain the current "number of employees" scheme but continue increasing the caps to make the damages for employers with thousands or even millions of employees more proportional to the overall size of the business. Section 1981a's remedial scheme has a solid foundation: make the caps proportionate to the size of the business in order to protect relatively small businesses from financial ruin, in addition to deterring frivolous lawsuits.[161] However, the caps stop at 500 employees, subjecting thousands of businesses to the same cap despite wide differences in number of employees. For example, Air Transport, Inc., a company with 555 employees nationwide,[162] has to bear the same burden as Wal-Mart, which has 1.2 million employees in the United States.[163]

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[160] Brady v. Wal-Mart Stores, Inc., CV-03-3840 (JO), 2005 U.S. Dist. LEXIS 12151, at *11 (E.D.N.Y. June 21, 2005) (citing Wal-Mart Stores, Inc. v. Visa U.S.A., Inc. 396 F.3d 96, 101 (2d Circ. 2005)); Walmartfacts.com *supra* note 129.

[161] *See* Hickox, *supra* note 103, at 1084, *citing* 137 Cong. Rec. S15472 (1991) (statement of Sen. Dole).

[162] *See* Bureau of Transportation Statistics, *Number of Employees—Certified Carriers, 2004 Year End Data*, http://www.bts.gov/programs/airline_information/number_of_employees/certificated_carriers/html/2004.html (last visited Apr. 30, 2006).

[163] *See* Walmartfacts.com *supra* note 129.

If the law recalibrated cap levels to take into account massive employers such as Wal-Mart, the matrix could look something like this:[164]

NUMBER OF EMPLOYEES		CAP
From	To	
15	100	$50,000.00
101	200	$100,000.00
201	500	$200,000.00
501	1,000	$300,000.00
1,001	2,000	$600,000.00
2,001	4,000	$1,200,000.00
4,001	8,000	$2,400,000.00
8,001	16,000	$4,800,000.00
16,001	32,000	$9,600,000.00
32,001	64,000	$19,200,000.00
64,001	128,000	$38,400,000.00
128,001	256,000	$76,800,000.00
256,001	512,000	$153,600,000.00
512,001	1,024,000	$307,200,000.00
1,024,001	2,048,000	$614,400,000.00
2,048,001	4,096,000	$1,228,800,000.00
4,096,001	8,192,000	$2,457,600,000.00

This matrix would place Wal-Mart in the tier with a $614,400,000 cap and keep Air Transport, Inc.'s cap at $300,000.

A related cap formula based on the existing "number of employees" system would assess a cap of $500 per employee. Such a formula avoids lumping a very small company of fifteen employees with a business that is over six times as large. Using this formula, the cap for a business with fifteen employees would be $7,500, while a business with 100 employees would be subject to a $50,000 cap. Likewise, Air Transport, Inc., would have a cap of $277,500 while Wal-Mart's would be $600 million. This formula results in an assessment of damages that is directly proportionate to the size of the employer and furthers the legislative intent of protecting small businesses from financial ruin.[165]

[164] The first three levels of caps promulgated by Congress do not follow a mathematical formula. Therefore, I have roughly figured the formula as N/1,000 x 300,000 where "N" represents the high end of the "Number of Employees" column.

[165] *See* Govan, *supra* note 92, at 103.

B. Base the Caps on Net Worth

American jurisprudence generally accepts that punitive damages, absent statutory guidance, may be based on the reprehensibility of the defendant's act, the extent of the harm actually caused or intended to cause, and the wealth of the defendant.[166] Indeed, some states now *require* a jury to consider the defendant's wealth in assessing punitive damages.[167] The rationale, of course, is that it takes a higher dollar amount to punish a rich person than a poor one.[168] A typical ratio of punitive damages to defendant's net worth is about one percent.[169]

One early American case authorized the use of wealth in determining the size of punitive damages to send an "impressive lesson" to rich, oppressive companies that exploited their power.[170] The *Goddard* court wrote: "There is one but vulnerable point about these ideal existences, called corporations; and that is, the pocket of the monied power that is concealed behind them; and if that is reached they will wince."[171] The court reasoned that "when it is thoroughly understood that it is not profitable to employ careless and indifferent agents, or reckless and insolent servants, better [employees] will take their places, and not before."[172]

Another way to frame the inadequacy of an award is to figure the amount of time it took the offending business to earn the amount awarded,[173] as Judge Orenstein did in *Brady v. Wal-Mart*.[174] Some courts have held one week is an accepted amount of time on which to base an award.[175]

As previously discussed, Air Transport, Inc., with 555 employees, is subject to the same damages cap as Wal-Mart, with 1.2 million employees. The net worth of these two companies is as dissimilar as their respective

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[166] RESTATEMENT (SECOND) OF TORTS § 908(2). "In assessing punitive damages, the trier of fact can properly consider the character of the defendant's act, the nature and extent of the harm to the plaintiff that the defendant caused or intended to cause and the wealth of the defendant." *Id*.

[167] *See* Owen, *supra* note 22, at 385–86; *see also* James McLoughlin, Annotation, *Necessity of Determination or Showing of Liability For Punitive Damages Before Discovery or Reception of Evidence of Defendant's Wealth*, 32 A.L.R. 4th 432 (1984).

[168] *See* Owen, *supra* note 22, at 386.

[169] Cash v. Beltmann N. Am. Co., 900 F.2d 109, 111 n.3 (7th Cir. 1990).

[170] Goddard v. Grand Truck Railway of Canada, 57 Me. 202, 228 (1869).

[171] *Id*. at 224.

[172] *Id*.

[173] *See* Neal v. Farmers Ins. Exchange, 582 P.2d 980, 991(1978) (considering the excessiveness of the punitive damages awarded and determining that an award constituting .01% of defendant's net worth and less than one week's worth of income was not excessive).

[174] Brady v. Wal-Mart Stores, Inc., CV-03-3840 (JO), 2005 U.S. Dist. LEXIS 12151, at *11–12 (E.D.N.Y. June 21, 2005).

[175] *See Neal*, 582 P.2d at 991; *see also* Wetherbee v. United Ins. Co. of Am., 95 Cal. Rptr. 678, 681 (1971) (also holding a punitive damage award of less than one week's worth of defendant's income was not excessive, and is in fact necessary to accomplish deterrence goals).

number of employees. In 2004, Air Transport, Inc. had a net worth of $15.4 million.[176] Wal-Mart, on the other hand, had a net worth of $13.6 billion.[177] The ratio for a punitive damages award of $300,000 to Wal-Mart's net worth is .02%. By comparison, $300,000 is 1.9% of Air Transport, Inc.'s net worth. Additionally, Wal-Mart earns $300,000 in *significantly* less than one week. According to *Brady v. Wal-Mart,* it took Wal-Mart only 37 seconds to earn $300,000.[178] Wal-Mart's figures do not come close to the generally accepted amount of time or percentage of net worth.

If the caps under § 1981a were based on the accepted one percent formula, Wal-Mart's cap would be $136 million. By comparison, Air Transport, Inc. would be subject to a cap of $154,000. These amounts, of course, are just the *caps* on allowable awards. A jury may award any amount it deems appropriate,[179] but the judge would still have to reduce the award to accommodate the cap. The caps are a ceiling to preserve the viability of the defendants' businesses.

Because the intent of Congress was to protect small businesses, the most effective way to achieve that goal would be to base the caps on the net worth of the employer. Caps calculated in this way would be more fair to all parties because "the limits would be related to ability to pay, not to an arbitrary personnel count" and would adequately punish large, wealthy businesses. [180]

C. Increase the Caps with Each Subsequent Violation

Wal-Mart's repeated violation of civil rights laws shows that the current statutory caps do not deter its conduct. If the maximum amount of punitive damages increased with each recidivist act, increasingly large awards would eventually deter it. The Supreme Court recognized that "a recidivist may be punished more severely than a first offender" because "repeated misconduct is more reprehensible than an individual instance of malfeasance."[181] The "existence and frequency"[182] of Wal-Mart's prior

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[176] *See* Air T, Inc., Quarterly Report Under Section 13 or 15(d) of the Securities Exchange Act of 1934 (Form 10-Q) (Sept. 30, 2004), *available at* http://www.sec.gov/Archives/edgar/data/353184/000035318404000036/sep.txt.

[177] *See* Wal-Mart Stores, Inc., Quarterly Report Pursuant to Section 13 or 15(d) of the Securities Exchange Act of 1934 (Form 10-Q) (Oct. 31, 2004) *available at* http://www.sec.gov/Archives/edgar/data/104169/000119312504207402/d10q.htm.

[178] *Brady,* 2005 U.S. Dist. LEXIS 12151 at *11–12.

[179] For a thorough discussion of whether juries should be informed of caps on punitive damages, *see* 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 (2005).

[180] Kenneth A. Sprang, *Beware the Toothless Tiger: A Critique of the Model Employment Termination Act,* 43 AM. U. L. REV. 849, 919-20 (1994).

[181] BMW of N. Am., Inc. v. Gore, 517 U.S. 559, 577 (1996); *see also* TXO Prod. Corp. v. Alliance Res. Corp. et al., 509 U.S. 443 (1993).

violations of discrimination laws would make them subject to greater penalties with every transgression.

The Supreme Court has expressed concerns with application of stiffer penalties for recidivist defendants in the civil context.[183] In *State Farm*, the Court discussed that the consideration of prior, extraterritorial misconduct "creates the possibility of multiple punitive damage awards for the same conduct; for in the usual case nonparties are not bound by the judgment another plaintiff obtains."[184] This problem could be avoided, however, by mandating that jury instructions require consideration be given to prior punitive awards for the same course of conduct and that appellate courts factor such prior awards into excessiveness review.[185]

Increased penalties for subsequent violations raise the stakes each time a defendant engages in similar bad behavior.[186] Harsher penalties for repeated criminal conduct are a common and traditional concept in criminal law.[187] Every jurisdiction today has some punishment scheme that takes prior criminal acts into consideration during sentencing.[188] Although the effectiveness of sentencing guidelines that take this approach, such as California's "three strikes" law, have had mixed reviews,[189] increased penalties in employment discrimination cases would force businesses to reevaluate their policies and training programs and take proactive measures to prevent future violations.

D. Tempering "Windfall" Recoveries with Split-Recovery Statutes

One major concern with these solutions to the current cap scheme is that plaintiffs may receive "windfall" damage awards.[190] This could be easily remedied, however, by the addition of a split-recovery scheme.[191] Under a split-recovery statute, a pre-determined portion of punitive damage awards are earmarked to go to a specific public service fund or to

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[182] Pacific Mut. Life Ins. Co. v. Haslip et al., 499 U.S. 1, 22.

[183] *See* State Farm Mut. Auto. Ins. Co., v. Campbell et al., 538 U.S. 408, 422-23; *see also* BMW, 517 U.S. at 593.

[184] 538 U.S. at 423.

[185] *See* Thomas B. Colby, *Beyond the Multiple Punishment Problem: Punitive Damages as Punishment for Individual, Private Wrongs*, 87 MINN. L. REV. 583, 635 (2003).

[186] *See* Wayne A. Logan, *Civil and Criminal Recidivists: Extraterritoriality in Tort and Crime,* 73 U. CIN. L. REV. 1609, 1619 (2005).

[187] *Id*.

[188] *Id*.

[189] *See generally* Ryan S. King & Marc Mauer, *Aging Behind Bars: "Three Strikes" Seven Years Later,* http://www.sentencingproject.org/pdfs/9087.pdf. This article disputes the assertions of former California Attorney General Dan Lungren that California's "three strikes" law has been effective in reducing crime rates by countering that the crime rate has decreased significantly across the country. *Id*.

[190] *See* Owen, *supra* note 22, at 380.

[191] *See* Victor A. Schwartz et al., *I'll Take That: Legal and Public Policy Problems Raised by Statutes that Require Punitive Damages Awards to Be Shared with the State,* 68 MO. L. REV. 525, 534-38 (2003).

the treasury as another form of revenue.[192] Nine states currently have split-recovery statutes for punitive damages arising out of state tort actions: Alaska, Georgia, Utah, Iowa, Missouri, Oregon, Indiana, Illinois,[193] and California.[194] The designated destination of the state's portion varies from a low-income legal services fund in Missouri to the general state treasury in Alaska, Georgia, and Utah.[195] The percentage allocated to the state treasury or special fund varies from fifty to seventy-five percent.[196]

Although there are currently no federal split-recovery laws, the Supreme Court has already expressed acceptance of the idea.[197] In actions for employment discrimination, the split-recovery statute could authorize the distribution of part of the punitive damage award to the EEOC or charitable organizations that work toward the elimination of discrimination.[198] In addition to resolving concerns with "windfall" awards, this solution would increase the societal goal of retribution[199] by donating money to organizations that work to alleviate the societal problem of discrimination.

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[192] *Id*. at 536-37.

[193] *Id*. at 535. A trial court recently held Utah's split-recovery statute unconstitutional under Utah's state constitution. *See* Linda Thomson, *Utah's Split-Recovery Law Declared Unconstitutional,* DESERT MORNING NEWS, June 12, 2004, at A1.

[194] CAL. CIV. CODE § 3294.5 (2006).

> The Legislature finds and declares that extraordinary and dire budgetary needs have forced the enactment of this extraordinary measure to allocate temporarily for the state's Public Benefit Trust Fund a substantial portion of any punitive damages paid from a judgment during the limited time period specified in the statute. ...Punitive damages awarded ... shall be paid, as follows: (1) Seventy-five percent shall be paid to the Public Benefit Trust Fund, which is hereby created in the State Treasury, to be administered by the Department of Finance. Amounts deposited into the Public Benefit Trust Fund shall be available for annual appropriation in the Budget Act and shall be used for purposes consisted with the nature of the award, but in no case shall be used to fund the courts or judicial programs. Amounts deposited in the Public Benefit Trust Fund shall also be available for the purposes specified in subdivision (d). (2) Twenty-five percent to the plaintiff or plaintiffs.

Id.

[195] *See* Schwartz, et al., *supra* note 192, at 536-37.

[196] *See* Sonja Larsen, Annotation, *Validity, Construction, and Application of Statutes Requiring that Percentage of Punitive Damages Awards be Paid Directly to State or Court-Administered Fund,* 16 A.L.R. 5TH 129 (2005).

[197] *See* Smith v. Wade, 461 U.S. 30, 59 (1982) (Rehnquist, J., dissenting) "[A]ssuming that a punitive 'fine' should be imposed after a civil trial, the penalty should go to the State, not to the plaintiff - who by hypothesis is fully compensated.").

[198] *See, e.g.,* Joyce Cruz Carey, *Limiting Punitive Damage Awards for Physical Harms in the Healthcare Field: Extending State Farm Mutual Automobile Insurance Co. v. Campbell and B.M.W. of North America, Inc. v. Gore*, 34 SW. U. L. REV. 67, 85 (2004) (noting that donation of punitive damages to charitable research organization in medical malpractice cases would benefit society with advances in research and discourage frivolous claims).

[199] *See supra* notes 20-33 and accompanying text.

VI. CONCLUSION

The current statutory caps on punitive damages in intentional employment discrimination do not allow for effective enforcement of anti-discrimination laws. As evidenced by Wal-Mart's recidivism, the caps do not promote deterrence, nor do they reflect society's revulsion for discriminatory acts. Particularly in the context of employment discrimination, where victims may be reluctant to or are incapable of seeking retribution, effective deterrence in the form of significant punitive damages is crucial to achieving a just employment arena. Possible means to achieve meaningful punitive damage awards while still protecting small employers from financial ruin include recalibrating the caps to increase penalties for large corporations, base the caps on net worth, or increasing damage caps for repeat violations. In each instance, enacting a split-recovery statute can circumvent windfall awards, thereby deterring frivolous lawsuits while funneling resources into under-funded charities or government agencies whose goal is to help victims of discrimination. A cap based on number of employees is not necessarily bad policy; however, the law must be reformed in order to render the cap effective while still preserving its purpose.