

# TITLE VII REMEDIES: LIFTING THE STATUTORY CAPS FROM THE CIVIL RIGHTS ACT OF 1991 TO ACHIEVE EQUAL REMEDIES FOR EMPLOYMENT DISCRIMINATION

## INTRODUCTION

Title VII of the Civil Rights Act of 1964<sup>1</sup> represents a landmark in employment discrimination legislation.<sup>2</sup> Title VII protects against discrimination based on race, color, sex, or national origin<sup>3</sup> in virtually

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1. Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 253 (codified as amended at 42 U.S.C. §§ 2000e-2000e-17 (1988)). The Civil Rights Act of 1964 addressed discrimination in many areas of American society. *See, e.g.*, Title I, 42 U.S.C. §§ 1971-1973 (1988) (voting rights); Title II, 42 U.S.C. §§ 2000a-2000a-6 (1988) (prohibiting discrimination and segregation in public places); Title VI, 42 U.S.C. §§ 2000d-2000d-6 (1988) (prohibiting discrimination by those who receive public funding); Title VIII, 42 U.S.C. §§ 3601-3619 (1988) (prohibiting housing discrimination).

2. MACK A. PLAYER ET AL., *EMPLOYMENT DISCRIMINATION LAW: CASES AND MATERIALS* 6 (1990) ("Title VII of the Civil Rights Act of 1964 [is] the centerpiece of employment discrimination law").

3. 42 U.S.C. § 2000e-2 (1988), *as amended by* Act of Nov. 21, 1991, 42 U.S.C.A. § 2000e-2 (West Supp. 1992). Although the coverage of Title VII is expansive, it is not all-inclusive. For this reason, Congress has enacted legislation to protect other classes of people who are frequently subject to employment discrimination. For example, the Age Discrimination in Employment Act, 29 U.S.C. §§ 621-634 (1988 & Supp. II 1990) protects people over the age of forty from discrimination, and the Americans with Disabilities Act, 42 U.S.C. §§ 12101-12213 (1988 & Supp. II 1990), *as amended by* Act of Nov. 21, 1991, 42 U.S.C.A. §§ 12209, 12111-12112 (West Supp. 1992), protects the disabled from discrimination.

every aspect of the employment relationship.<sup>4</sup> The 1964 Act gave courts the authority to use equitable remedies to eradicate discrimination from the work place.<sup>5</sup> Despite some progress, after twenty-five years under the 1964 Act, it became evident that employment discrimination victims did not receive complete compensation for their injuries under the then existing law.<sup>6</sup> As a result, Congress enacted the Civil Rights Act of 1991 to provide courts with the power to award victims of employment discrimination both compensatory and punitive damages,<sup>7</sup> in addition to traditional equitable remedies.<sup>8</sup>

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4. 42 U.S.C. § 2000e-2. From the outset of the employment relationship, for instance, Title VII prohibits discriminatory hiring practices. The law states:

It shall be an unlawful employment practice for an employer —

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin.

42 U.S.C. § 2000e-2(a)(1). Title VII covers the employment practices of labor unions and employment agencies, as well as "governments, government agencies, [and other] political subdivisions." 42 U.S.C. § 2000e(a) (1988).

5. 42 U.S.C. § 2000e-5(g) (1988), as amended by Act of Nov. 21, 1991, 42 U.S.C. § 2000e-5 (West Supp. 1992). See *infra* note 18 for the text of this provision.

6. See generally Susan M. Mathews, *Title VII and Sexual Harassment: Beyond Damages Control*, 3 YALE J.L. & FEMINISM 299, 299 (1991) ("[S]exually harassed women who succeed in Title VII suits are rarely compensated for the actual extent of the harms they suffer"); Ellen J. Vargyas et al., *Title VII's Failed Promise: The Impact of the Lack of a Damages Remedy*, (report by the National Women's Law Center) (1991 Update); Sharon T. Bradford, Note, *Relief for Hostile Work Environment Discrimination: Restoring Title VII's Remedial Powers*, 99 YALE L.J. 1611 (1990) (arguing that the limited remedies that are available undermine the rights created under Title VII). See *infra* notes 17-54 and accompanying text for a discussion of the factors that brought out the inadequacy of Title VII's remedies.

7. 42 U.S.C.A. § 1981a (West Supp. 1992). Section 102 of the Civil Rights Act of 1991 amends the Civil Rights Act of 1866 and provides for awards of compensatory damages in cases of intentional discrimination. 42 U.S.C.A. § 1981a(a)(1). The Supreme Court has realized the difficulty in proving the intent of an employer in discrimination cases. To aid a plaintiff's burden, the Court developed a standard whereby the employer's intent may be inferred in certain contexts. *International Bd. of Teamsters v. United States*, 431 U.S. 324, 362 (1977) ("The proof of the pattern or practice supports an inference that any particular employment decision, during the period in which the discriminatory policy was in force, was made in pursuit of that policy"). *Id.* Congress has expressly excluded compensatory and punitive damages as remedies for discrimination claims under the disparate impact model, one that does not rely on the employer's intent. 42 U.S.C.A. § 1981a(a)(1)-(2). Section 102 does, however, allow punitive damages in cases where the employer has acted "with malice or with reckless indifference to the federally protected rights of an aggrieved individual." 42 U.S.C.A. § 1981a(b)(1). See *infra* note 83 for the text of this provision.

8. Section 102 clarifies that the compensatory damages the Act authorizes do "not

The addition of compensatory and punitive damages to the Civil Rights Act of 1991 was a product of congressional compromise.<sup>9</sup> Proponents of tort reform insisted on statutory caps, which vary according to the size of the employer, to limit the amount of non-economic compensatory and punitive damages that victims of intentional discrimination may recover.<sup>10</sup> While some individuals advocate statutory caps on punitive damages as a key method of tort reform,<sup>11</sup> others reject such limitations,<sup>12</sup> particularly in instances of intentional misconduct.<sup>13</sup> The limitation of damages in the Civil Rights Act of 1991 has raised criticism from members of both of the leading political parties.<sup>14</sup> In fact, less than one week after President Bush signed the 1991 Act into law,<sup>15</sup> leading senators from each of the two parties proposed bills to

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include backpay, interest on backpay, or any other type of relief authorized under section [2000e-5(g)(1)]." 42 U.S.C.A. § 1981a(b)(2).

9. See *infra* notes 80-85 and accompanying text describing the veto and ensuing debate over the 1991 Civil Rights Act.

10. Section 1981a(b)(3) is the limitations provision of the 1991 Act. See *infra* note 84 for the full text of the provision.

11. Upon signing the Civil Rights Act of 1991 into law, President Bush stated, "[T]he adoption of these limits on jury awards sets an important precedent, and I hope to see this model followed as part of an initiative to reform the nation's tort system." *President Bush's Statement on Signing the Civil Rights Act of 1991*, 226 Daily Lab. Rep. (BNA) at D-1 (Nov. 21, 1991). See generally James B. Sales & Kenneth B. Coles, Jr., *Punitive Damages: A Relic That Has Outlived Its Origins*, 37 VAND. L. REV. 1117, 1154-65 (1984) (advocating limitations on punitive damages). See *infra* notes 112-122 and accompanying text for a summary of proponents' arguments for limiting damages.

12. See, e.g., Stephen Daniels & Joanne Martin, *Myth and Reality in Punitive Damages*, 75 MINN. L. REV. 1 (1990) (offering an empirical examination of tort reformers' assertions on the effects of punitive damages); Neil K. Komesar, *Injuries and Institutions: Tort Reform, Tort Theory, and Beyond*, 65 N.Y.U. L. REV. 23 (1990) (examining the viability of punitive and non-economic compensatory damages from the various perspectives of interested parties). See *infra* notes 123-132 and accompanying text for a summary of opponents' arguments against limiting damages.

13. See Sales & Coles, *supra* note 11, at 1130 (arguing that most courts and commentators are not hesitant to adopt the proposition that punitive damages are valid when the defendant's behavior is intentional); Amelia J. Toy, Comment, *Statutory Punitive Damage Caps and the Profit Motive: An Economic Perspective*, 40 EMORY L.J. 303 (1991) (rejecting the use of statutory caps or limitations for intentional conduct). See *infra* notes 130-132 and accompanying text for a discussion of the reasons for not limiting punitive damages in cases of intentional misconduct.

14. See generally *Charge of the Rights Brigade*, WASH. TIMES, Dec. 2, 1991, at E2 (noting that United States senators of the Republican and Democratic parties oppose the punitive damages caps in the 1991 Act).

15. The President signed the Civil Rights Act of 1991, S. 1745, into law on November 21, 1991.

lift the caps on compensatory and punitive damages from the Civil Rights Act of 1991.<sup>16</sup>

This Note examines the damages provision of the Civil Rights Act of 1991, which serves to limit the amount of compensatory and punitive damages available to victims of intentional employment discrimination. Part I discusses the legal and social developments that prompted the call for expanded remedies under Title VII. Part I then examines the legislative history of the 1991 Act, including President Bush's veto of the Civil Rights Act of 1990, the ensuing debates pertaining to caps on damages, and the final compromise leading to enactment of the bill. In addition, Part I discusses the recent proposals in the Senate to lift the caps on damages from the 1991 Act. Part II discusses the purposes that statutory caps serve in tort reform. Specifically, Part II analyzes the arguments from proponents and opponents in the debate over statutory caps. Part III attempts to draw an analogy from section 1981 case law and distinguish the purposes and functions of tort law. This Note concludes that Congress should lift all caps on damages in cases of intentional employment discrimination in order to accomplish the goal of fully compensating protected classes of employees.

## I. THE CIVIL RIGHTS ACT OF 1991

### A. *Background: Equitable Remedies Exposed as Inadequate*

Originally, Title VII of the Civil Rights Act of 1964<sup>17</sup> provided courts with the power to award backpay and any other equitable relief deemed appropriate.<sup>18</sup> After considering the legislative history of the

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16. 137 CONG. REC. S18,337-38 & S18,375 (daily ed. Nov. 26, 1991) (remarks of Sen. Hatch and Sen. Kennedy). On November 26, 1991, Senator Hatch introduced the Employee Equity and Job Preservation Act of 1991 (S. 2053). *Id.* at S18,337. On that same day Senator Kennedy introduced the Equal Remedies Act of 1991 (S. 2062). *Id.* at S18,375. *See infra* notes 93-107 and accompanying text for a description of these two proposals.

17. Congress amended the original Civil Rights Act of 1964 in 1972. All references in this Note to the Civil Rights Act of 1964 include the 1972 amendments. For a section by section analysis of the 1972 amendments, *see* 3A ARTHUR LARSON & LEX K. LARSON, *EMPLOYMENT DISCRIMINATION*, app. 1A (1992) [hereinafter LARSON].

18. 42 U.S.C. § 2000e-5(g) (1988) provides:

If the court finds that the respondent has intentionally engaged in . . . an unlawful employment practice . . . , the court may enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate, which may include, but is not limited to, reinstatement or hiring of employees, with or without back pay . . . , or any other equitable relief as the court deems appropriate.

1964 Act, courts unanimously construed the damages provision to prohibit them from fashioning legal relief<sup>19</sup> such as compensatory and punitive damages.<sup>20</sup> The Civil Rights Act of 1991 amended the Civil Rights Act of 1866 to specify the remedies available under the Act, and

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*Id.*

19. The courts that carefully analyzed the issue noted that the legislative history revealed Congress' intention to eradicate discrimination by promoting qualification-based employment criteria as opposed to focusing on the punishment of offenders. In *Van Hoomissen v. Xerox Corp.*, 368 F. Supp. 829 (N.D. Cal. 1973), the court considered three elements of the legislation and concluded that Congress intended only equitable remedies. First, the court looked to a Senate study that stated that the remedial provisions of the Act "[were] intended to give the courts wide discretion in exercising their equitable powers." *Id.* at 837 (quoting 118 CONG. REC. 3462). Second, the legislative history indicated that the Act was modeled after the National Labor Relations Act, which does not permit compensatory damages. *Id.* Finally, the fact that Title VII of the Civil Rights Act expressly provided for compensatory damages persuaded the court to conclude that Congress intended only equitable remedies. *Id.* at 837-38. *See also* *Whitney v. Greater N.Y. Corp. of Seventh-Day Adventists*, 401 F. Supp. 1363, 1369 (S.D.N.Y. 1975) (relying on *Van Hoomissen* and concluding that the "primary objective" of Congress in enacting Title VII "was a prophylactic one," which it intended to accomplish by providing courts with a "wide panorama of equitable tools"). *But cf.* Minna J. Kotkin, *Public Remedies for Private Wrongs: Rethinking the Title VII Back Pay Remedy*, 41 HASTINGS L.J. 1301, 1314 (1990) ("These bases for the limitation on remedy are not without some foundation. In a superficial sense, they accurately reflect the statute's legislative history. A closer examination of the development of Title VII, however, reveals that Congress never gave serious thought to the question of monetary relief").

20. An argument exists for construing the section as permitting compensatory and punitive damages. Indeed, a few of the early cases did permit such damages. *See, e.g.*, *Claiborne v. Illinois Cent. R.R.*, 401 F. Supp. 1022 (E.D. La. 1975) (awarding punitive damages), *aff'd in part, vacated in part*, 83 F.2d 143 (5th Cir. 1978), *cert. denied sub nom.* *Illinois Cent. Gulf R. Co. v. Claiborne*, 442 U.S. 934 (1979); *Humphrey v. Southwestern Portland Cement Co.*, 369 F. Supp. 832 (W.D. Tex. 1973) (denying defendant's motion to strike pleadings on the grounds that compensatory damages are not allowed under the Act), *rev'd on other grounds*, 488 F.2d 691 (5th Cir. 1973); *Stamps v. Detroit Edison Co.*, 365 F. Supp. 87 (E.D. Mich. 1973) (awarding punitive damages), *rev'd sub nom.* *EEOC v. Detroit Edison Co.*, 515 F.2d 301 (6th Cir. 1975).

Despite these early cases, however, courts have unanimously rejected compensatory and punitive damages as an available remedy under Title VII. *See, e.g.*, *Bennet v. Corroon & Black Corp.*, 845 F.2d 104 (5th Cir. 1988) (refusing to award compensatory damages); *Musikiwamba v. Essi, Inc.*, 760 F.2d 740 (7th Cir. 1985) (stating that punitive and compensatory damages are not available under the Act); *Muldrew v. Anheuser-Busch, Inc.*, 728 F.2d 989 (8th Cir. 1984) (same); *Walker v. Ford Motor Co.*, 684 F.2d 1355 (11th Cir. 1982) (same); *Shah v. Mt. Zion Hospital*, 642 F.2d 268 (9th Cir. 1981) (same). *See also* 2 LARSON, *supra* note 17, § 55.41 (discussing the unlikelihood of recovering legal forms of relief under Title VII).

For a discussion of the legislative and judicial history of the "back-pay remedy," see Kotkin, *supra* note 19, at 1312-27.

to extend coverage of the Act's legal remedies to include victims of intentional sex, religious, and disability discrimination under Title VII.<sup>21</sup>

At least three factors prompted the need for the 1991 amendment.<sup>22</sup> The first and most significant of these factors was the disparity between the remedies and protections available under section 1981 and Title VII.<sup>23</sup> In *Johnson v. Railway Express Agency, Inc.*,<sup>24</sup> the Supreme Court held that a private cause of action, including the right to compensatory and punitive damages, existed under section 1981 for victims of intentional racial employment discrimination.<sup>25</sup> Prior to *Johnson*, the lower courts relied on Title VII as a basis for formulating remedies under section 1981.<sup>26</sup> After *Johnson*, however, courts were free to award both compensatory and punitive damages to employees who suffered discrimination based upon their race.<sup>27</sup> Additionally, unlike Title VII, section 1981 provided protection to victims of discrimination re-

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21. 42 U.S.C. § 1981 (1988), *as amended by Act of Nov. 21, 1991*, 42 U.S.C.A. § 1981 (West Supp. 1992). This section provides:

All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

42 U.S.C.A. § 1981(a).

22. Generally, the factors leading to the amendment in the federal law can be summarized as (1) the disparity between the coverage in section 1981 and Title VII, (2) society's increased awareness of sexual harassment in the workplace, and (3) the progressive efforts in state laws to establish legal and equitable relief from employment discrimination. *See infra* notes 23-51 and accompanying text.

23. *See Kotkin, supra* note 19, at 1357 (noting the disparities in relief, both in amount and availability).

24. 421 U.S. 454 (1975).

25. *Id.* at 460-61. Originally, in *The Civil Rights Cases*, 109 U.S. 3 (1883), and again in *Hodges v. United States*, 203 U.S. 1 (1906), the Supreme Court maintained that § 1981 applied only to state action. Not until *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409 (1968), did the Court effectively overrule *Hodges* by stating that a private cause of action existed under § 1982, a companion statute to § 1981. 392 U.S. at 420-40.

26. *See, e.g., Davis v. County of Los Angeles*, 566 F.2d 1334, 1342 (9th Cir. 1977) (noting that courts had the same remedial power under § 1981 as under Title VII), *vacated as moot*, 440 U.S. 625 (1979); *Pettway v. American Cast Iron Pipe Co.*, 494 F.2d 211, 252 (5th Cir. 1974) (stating that courts had discretion to award back pay under both Title VII and § 1981).

27. 421 U.S. at 460. The Supreme Court stated that "[a]n individual who establishes a cause of action under § 1981 is entitled to both equitable and legal relief." *Id.*

ardless of the size of the employer<sup>28</sup> and allowed recovery of back pay for an indefinite period of time.<sup>29</sup> Because section 1981 only protected against racial discrimination, however, victims of other forms of discriminatory practices who suffered virtually identical treatment, recovered significantly smaller, and less complete, awards than those who encountered discrimination on account of race.<sup>30</sup>

The heightened awareness of both the prevalence and severity of hostility toward minorities, women, and the disabled in the workplace<sup>31</sup> served as a second factor that influenced Congress to expand the remedies available to victims of employment discrimination. In the mid-1970s, courts began to recognize a public policy exception<sup>32</sup> to the

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28. Only employers with fifteen or more employees are subject to liability under Title VII. 42 U.S.C. § 2000e(b).

29. Title VII only allows a victim to collect for discrimination from a certain date. It provides: "Back pay liability shall not accrue from a date more than two years prior to the filing of a charge with the [Equal Employment Opportunity] Commission." 42 U.S.C. § 2000e-5(g)(1). See Cynthia L. Alexander, Project, *The Defeat of the Civil Rights Act of 1990: Wading Through the Rhetoric in Search of Compromise*, 44 VAND. L. REV. 595, 621-25 (1991) (analyzing the relationship between remedies under § 1981 and Title VII). For a complete discussion of back pay liability under § 1981 and Title VII, see James L. Hughes et al., Project, *Backpay in Employment Discrimination Cases*, 35 VAND. L. REV. 893 (1982).

30. Compare *Hunter v. Allis-Chalmers Corp.*, 797 F.2d 1417 (7th Cir. 1986) (victim of severe racial harassment awarded \$25,000 for indignity and stress and \$25,000 in punitive damages under § 1981) with *Robinson v. Jacksonville Shipyards*, 760 F. Supp. 1486 (M.D. Fla. 1991) (victim of severe sexual harassment recovered injunctive relief and one dollar in nominal damages under Title VII). For an in depth comparison of the different ways courts have assessed damages under § 1981 and Title VII, see Vargyas et al., *supra* note 6 at 11-21, 25.

31. For instance, in enacting the American with Disabilities Act, Congress stated the following as its findings with respect to the treatment of the disabled:

(2) historically, society has tended to isolate and segregate individuals with disabilities, and, despite some improvements, such forms of discrimination against individuals with disabilities continue to be a serious and pervasive social problem;

(3) discrimination against individuals with disabilities persists in such critical areas as employment; . . .

(5) individuals with disabilities continually encounter various forms of discrimination, including outright intentional exclusion, the discriminatory effects of architectural, transportation, and communication barriers, overprotective rules and policies, failure to make modifications to existing facilities and practices, exclusionary qualification standards and criteria, segregation, and relegation to lesser services, programs, activities, benefits, jobs, or other opportunities;

. . .  
42 U.S.C. § 12101(a)(1)-(9).

32. In *Monge v. Beebe Rubber Co.*, 316 A.2d 549 (N.H. 1974), the court held that an employer breached an "at-will" employment contract when the employer discharged

“at-will” contract principle that traditionally governed the employment relationship.<sup>33</sup> This was a significant advance toward protecting workers against wrongful or retaliatory discharge.<sup>34</sup> Nonetheless, this exception proved problematic for several reasons.<sup>35</sup> In the Title VII context, many courts refused to find a common law tort remedy when a remedy was provided under a state or federal statute.<sup>36</sup> Often, victims

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the employee for refusing a supervisor’s sexual advances. Even though the terms of an “at-will” employment contract enable an employer to discharge an employee at the will of the employer, he may not do so for reasons that are contrary to public policy. *Id.* at 551. The New Hampshire Supreme Court is generally cited as creating the public policy exception, but commentators agree that the public policy exception originated in *Petermann v. International Bd. of Teamsters, Local 396*, 344 P.2d 25 (Cal. Ct. App. 1959). See 3 CHARLES A. SULLIVAN ET AL., *EMPLOYMENT DISCRIMINATION* § 37.2, at 441 (1988). In *Petermann*, the court held that it was impermissible to discharge an employee under an “at will” employment contract for refusing to commit perjury.

The traditional formulation of the public policy exception provides that an employee may recover damages from the employer if the employee is discharged for reasons that undermine an important public policy. See Note, *Protecting Employees At Will Against Wrongful Discharge: The Public Policy Exception*, 96 HARV. L. REV. 1931, 1936 (1983) (“The basis of the exception is the duty of the employer to refrain from firing an employee for reasons that contravene fundamental principles of public policy”).

33. “At-will” employment is the principle that, unless the parties to an employment agreement specify the duration of their relationship, there is no presumption that a time guarantee was contemplated, and either party may terminate the relationship at any time for any reason. See H. G. WOOD, *A TREATISE ON THE LAW OF MASTER AND SERVANT* § 134, at 272 (1877). Despite the fact that this principle was a stark departure from English law, and not based on sound authority, American courts adopted the principle as the “American rule.” See 3 SULLIVAN ET AL., *supra* note 32, § 36.1, at 383-84.

34. *Cf.* Note, *supra* note 32, at 1935 (estimating that up to 200,000 fewer discharges would occur if a “just cause” discharge policy existed).

35. 3 SULLIVAN ET AL., *supra* note 32, § 37.2, at 412-16. One problem was that courts disagreed as to what constituted a sufficient public policy basis to invoke protection from retaliatory discharge. *Id.* at 412. Another area of contention focused on the ways employers could implicate public policy; one could insist that an employee violate public policy, or by discharging an employee, the employer could deter other employees from engaging in socially useful activities. *Id.* at 413. Another commentator has suggested that lower skilled employees are not afforded protections under the exception because of bias in the system. Note, *supra* note 32, at 1937-51.

36. See, e.g., *Wolk v. Saks Fifth Ave., Inc.*, 728 F.2d 221 (3d Cir. 1984) (holding no common law claim available for discharge when statutory remedy in Pennsylvania Human Relations Act was exclusive); *Bruffett v. Warner Communications, Inc.*, 692 F.2d 134 (3d Cir. 1982) (same); *Hoopes v. Equifax, Inc.*, 611 F.2d 134 (6th Cir. 1979) (rejecting wrongful discharge cause of action when administrative remedy existed); *Crews v. Memorex, Corp.*, 588 F. Supp. 27 (D. Mass. 1984) (common law claim for discharge in violation of public policy precluded by Massachusetts employment discrimination statute); *Chekey v. BTR Realty, Inc.*, 575 F. Supp. 715 (D. Md. 1983) (employment discrimination statute precludes wrongful discharge claim). *But see, e.g.*,



of Title VII discrimination were not able to recover the legal remedies available to tort plaintiffs who were subject to identical treatment.

As courts began to protect employees from retaliatory discharges, the widespread and debilitating effects of sexual harassment surfaced as an issue in American society.<sup>37</sup> In the late 1970s and early 1980s, studies that examined the pervasiveness of sexual harassment in the workplace illustrated the national scope of the problem.<sup>38</sup> Subsequent studies also attested to the emotional and psychological effects that the harassment creates.<sup>39</sup> In the 1986 case of *Meritor Savings Bank v. Vinson*,<sup>40</sup> the Supreme Court unanimously held that sexual harassment created a cause of action under Title VII.<sup>41</sup> Despite the Supreme

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Cancellor v. Federated Dep't Stores, Inc., 672 F.2d 1312 (9th Cir. 1982) (plaintiff under ADEA could maintain pendent state claim for wrongful discharge). For a thorough analysis of the availability of a common law wrongful discharge claim, see Marc D. Greenbaum, *Toward a Common Law of Employment Discrimination*, 58 TEMP. L.Q. 65 (1985).

37. See generally NANCY H. DEANE & DARREL L. TILLAR, *SEXUAL HARASSMENT: AN EMPLOYMENT ISSUE* (1981) (studying the problem of sexual harassment and providing a suggested method for prevention).

38. In 1976, *Redbook* magazine published a questionnaire entitled, "How Do You Handle Sex on the Job?" and received over 9,000 responses. Nearly 90% of the women responded that they had experienced unwanted sexual attention at work, and nearly half said they knew someone who had quit their job, or whose employer had fired them, as a result of sexual harassment. Claire Safran, *What Men Do to Women on the Job: A Shocking Look at Sexual Harassment*, REDBOOK, Nov. 1976, at 149.

In 1981, the United States Merit System Protection Board released the results of its study examining the prevalence, cost, and effects of harassment in the federal workplace. U.S. MERIT SYSTEMS PROTECTION BOARD, *SEXUAL HARASSMENT IN THE FEDERAL WORKPLACE: IS IT A PROBLEM?* (1981). The Board reported that harassment was a problem in the federal workplace. *Id.* Forty-two percent of the female and 15% of the male respondents reported being sexually harassed. *Id.* at 5. Further, the Board estimated that the cost of the harassment to the government in the two years studied was at least \$189 million. *Id.* at 84.

There are numerous other studies that confirm these results. For an excellent annotated bibliography of studies, articles, and books on the problem, see *id.* at app. H.

39. See, e.g., U.S. MERIT SYSTEMS PROTECTION BOARD, *Sexual Harassment in the Federal Government: An Update 4* (1988) ("Uninvited and unwanted sexual attention was experienced by almost the identical proportion of the work force in 1987 as in 1980 . . . [It] is still a pervasive, costly, and systemic problem"). For a discussion of the effects of sexual harassment, see Fran Sepler, *Sexual Harassment: From Protective Response to Proactive Prevention*, 11 HAMLINE J. PUB. L. & POL'Y 61, 66-68 (1990).

40. 477 U.S. 57 (1986).

41. *Id.* at 67. The court explained that harassment must be unwelcome and "must be sufficiently severe or pervasive 'to alter the conditions of [the victim's] employment and create an abusive working environment.'" *Id.* (quoting *Henson v. City of Dundee*, 682 F.2d 897, 902 (11th Cir. 1982)).

Court's ruling, Title VII remedies do not offer suitable relief to victims of harassment.<sup>42</sup> A court awards a victim who remains on the job an injunction against the behavior, which often does little more than intensify the conduct.<sup>43</sup> To the victim who leaves her employment, a court awards reinstatement, which, for obvious reasons, is undesirable.<sup>44</sup>

Finally, the expanding comprehensiveness in employment discrimination laws at the state level<sup>45</sup> was a factor that influenced Congress to expand Title VII remedies. The state provisions recognized that the egregious conduct associated with many acts of discrimination, as well as the emotional and psychological harm to the victim, exceed purely economic injury.<sup>46</sup> The employment discrimination provisions of some state statutes offer more comprehensive coverage and provide for both equitable and legal remedies to redress discrimination related injuries.<sup>47</sup> In fact, plaintiffs in some states consciously elect to bring suit in state court because of the favorable remedies available.<sup>48</sup>

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42. See Kotkin, *supra* note 19, at 1357 (stating that "because the Court failed to focus on the distinctions in relief created by § 1981, *Vinson* truly creates a right without a remedy"). See generally Mathews, *supra* note 6 (discussing how Title VII fails to eliminate sexual harassment in the work place and provides inadequate relief for victims).

43. Cf. H.R. 1, *The Civil Rights Act of 1991: Hearings Before the Committee on Education and Labor of the House of Representatives*, 102d Cong., 2d Sess. 121-23 (1991) (testimony of Jacqueline Morris) ("I returned to work and have remained there since. . . . Today, the situation remains far from acceptable").

44. Kotkin, *supra* note 19, at 1357 n.23. The author notes that courts often find no constructive discharge when the employee voluntarily leaves the employment. *Id.* Furthermore, even when the employee is fired, courts often find that the discharge is unrelated to the harassment and, therefore, reinstatement is not possible. *Id.* See also *id.* at 1358 n.235 (listing literature criticizing the relief available in sexual harassment cases).

45. For a general discussion of state employment discrimination law, see Susan E. Powley, Project, *Exploring a Second Level of Parity: Suggestions for Developing an Analytical Framework for Forum Selection in Employment Discrimination Litigation*, 44 VAND. L. REV. 641, 664-71 (1991).

46. See, e.g., *infra* notes 62-64 discussing cases that exemplify how employment discrimination injuries cannot easily be quantified for economic recovery.

47. See Powley, *supra* note 45, at 667-71 (analyzing how state statutes may prove more advantageous to plaintiffs). For a list of the employment statutes of each state, see 3 EMPLOYMENT PRACTICES GUIDE (CCH) (1991).

48. See Charles S. Mishkind & Beverly H. Burns, *The Practical Labor Lawyer: How the Supreme Court's Decision in Donnelly v. Yellow Freight May Affect Title VII Claims*, 16 EMPLOYEE REL. L.J. 257, 260 (1990) (suggesting that plaintiffs in Michigan are making "calculated decisions" to use state courts because of the state's broad remedial provisions regarding employment discrimination). See also Guy Saperstein, *Response*, 13 N.Y.U. REV. L. & SOC. CHANGE 509, 512 (1984-85) (noting that California

During the debates on the Civil Rights legislation many victims testified before Congress as to the severe effects suffered as a result of their employer's discriminatory conduct.<sup>49</sup> Nonetheless, because Title VII authorized only equitable relief,<sup>50</sup> the courts compensated these victims merely for the economic injury of a missed employment opportunity.<sup>51</sup> As a result of its inquiry, Congress acknowledged that discrimination in the workplace was severe and widespread.<sup>52</sup> Congress realized that victims who suffered identical discrimination received greater protection and relief under section 1981 or a given state provision than under Title VII.<sup>53</sup> In sum, these factors exposed the Title VII remedy provision as wholly inadequate,<sup>54</sup> and served instrumentally in Congress' debate and final vote of the 1991 Civil Rights Act.

### B. *Legislative History*

The factors discussed above, together with a series of 1989 Supreme Court decisions that increased the difficulty for an employee to bring

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courts are very protective of employee rights); *cf.* Kotkin, *supra* note 19, at 1307 (arguing that "[t]he occasional availability of common law or state statutory claims does not provide a sufficient substitute for a uniform national policy").

49. See generally *H.R. 1, The Civil Rights Act of 1991: Hearings before the House Committee on Labor and Education*, 101st Cong., 1st Sess. 76-120 (1991). In the committee hearing, Lois Robinson testified that as a result of her treatment on the job, she suffered humiliation, degradation, sleeplessness, neck pains, nausea, and missed many days of work from fear of the sexual harassment she would face. *Id.* at 78. Another worker explained in a written statement that as a result of the severe sexual harassment she faced on the job, she suffered nervousness, sleeplessness, blotches and welts on her legs and back, breathing difficulties, and was instructed by her doctor to leave her employment to avoid a nervous breakdown. *Id.* at 121-37 (written statement of Jackie Morris).

50. See *supra* notes 17-20 and accompanying text noting courts' interpretations to only offer equitable remedies.

51. See, e.g., *infra* notes 65-66 for illustrative cases.

52. See *supra* notes 37-39 and accompanying text discussing the prevalence of harassment within society.

53. See *supra* notes 23-48 and accompanying text comparing Title VII with § 1981 and relevant state laws.

54. See LARSON, *supra* note 17, at 14 (Special Pamphlet 1992) ("The impetus for this provision did not come from a Supreme Court decision, but rather from a long-standing notion that, for certain discrimination plaintiffs, existing remedies were simply not adequate."); see also 136 CONG. REC. E2478-03 (daily ed. July 25, 1990) (extension of remarks by Honorable Augustus F. Hawkins) ("Our society holds gender, religious, and national origin discrimination to be just as reprehensible [as racial discrimination], but victims of these types of intentional job bias cannot recover [the same] damages under Federal law.").

an action against his or her employer, inspired the demand for civil rights legislation.<sup>55</sup> From the outset, neither Congress nor the President seriously questioned whether victims of employment discrimination deserved a more complete form of relief.<sup>56</sup> Rather, debate on the matter revolved around what form the additional relief should take.<sup>57</sup> The version of the Civil Rights Act of 1990 that Congress submitted to the President provided for complete compensatory damages, but limited punitive damages to the greater of either \$150,000 or the amount of the compensatory damages award.<sup>58</sup> In his message accompanying the veto of the 1990 Act, President Bush criticized the provision for its similarity to the already failing tort system.<sup>59</sup> The President's version contained a provision that gave judges the power to grant victims of employment discrimination an "equitable monetary award" of up to \$150,000.<sup>60</sup>

Despite the President's veto, many members of Congress supported civil rights legislation the next year that did not limit recoverable damages.<sup>61</sup> Those members who advocated against limitations generally

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55. See S. 1745, 102d Cong., 1st Sess. § 3 (1991). Section 3 of the Civil Rights Act of 1991 provides: "The purposes of this act are . . . (4) to respond to recent decisions of the Supreme Court by expanding the scope of relevant civil rights statutes in order to provide adequate protection to the victims of discrimination." *Id.*

Besides the compensatory and punitive damages provision, the subject of this Note, the Act also covers disparate impact, business necessity, bias after hiring, challenges to consent decrees, timeliness of challenges to seniority systems, mixed motive, expert witness fees, extraterritoriality, jury trials, interest and filing time in actions against the federal government, and "race norming" of test scores. S. 1745. For a summary of the particular Supreme Court cases and Congress' response, see Special Supplement, *Civil Rights Act of 1991: Summary and Full Text*, 131 Labor Rel. Rep. (BNA) (1991).

56. See generally Alexander, *supra* note 29, at 620 (discussing Congress' and President Bush's attitudes toward employment discrimination legislation).

57. See generally Richard L. Alfred & Thomas A. Knowlton, *Civil Rights Act Will Encourage Federal Claims*, MASS. LAW. WKLY., Dec. 9, 1991 (discussing the congressional debate on how to amend the Act to cure its inadequacies).

58. S. 2104, 101st Cong., 2d Sess. § 8(A)-(B) (1990).

59. 136 CONG. REC. S16,418 (daily ed. Oct. 22, 1990) (Veto message of President Bush on S. 2104). In his message, President Bush stated that the Civil Rights Act of 1990 "radically alter[ed] the remedial provision of Title VII of the Civil Rights Act of 1964" and suggested that the scheme "replac[ed] measures designed to foster conciliation and settlement" with a plan modeled on a tort system in a state of crisis. *Id.*

60. S. 611, 102d Cong., 1st Sess. § 8(b)(1)-(m) (1991). The President's bill permitted recovery of the "equitable monetary award" only in cases of sexual harassment. *Id.* For a critical analysis of President Bush's "equitable monetary award," see Alexander, *supra* note 29, at 624.

61. See, H.R. 1, 102d Cong., 1st Sess. § 8 (1991). The damages provision in H.R. 1

highlighted two points. The first was the personal testimony of victims of discrimination who told of their injuries and the lack of adequate compensation.<sup>62</sup> Some victims were professionals who suffered serious injuries to their careers when their employers refused to promote them for discriminatory reasons.<sup>63</sup> Others were victims of racial or sexual harassment who suffered emotional and psychological injuries.<sup>64</sup> Case law indicates further that those who remain with their employer receive little more than an injunction,<sup>65</sup> while those who leave receive only backpay.<sup>66</sup> At the time of the testimony, courts did not fashion

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was identical to the provision in S. 2104, *supra* note 58, except the former removed the limit on the amount of punitive damages recoverable.

62. *See, e.g.*, 137 CONG. REC. S15,020 (daily ed. Oct. 22, 1991) (remarks of Sen. DeConcini). In proposing to amend the limitations provision of S. 1745 (Civil Rights Act of 1991) by reinstating the limitation provision of the 1990 Civil Rights Act, *see supra* note 58, Senator DeConcini noted the following:

Title VII does not address the needs of the victims . . . . For example, Helen Brooms was sexually harassed on the job. She finally quit her job after her supervisor showed her sexually explicit photographs and threatened her life. She fell down a flight of stairs trying to get away from him and subsequently suffered from severe depression. Although the court found her civil rights had been violated, she received no compensation at all for her medical injuries.

137 CONG. REC. at S15,020. *See also Civil Rights Act of 1991: Report of the House Committee on the Judiciary*, 102d Cong. 1st Sess. 24-29 (1991).

63. *See, e.g.*, *Price Waterhouse v. Hopkins*, 490 U.S. 228, 235 (1989) (senior manager was denied partnership because she was unable to maintain her femininity while becoming an effective manager); *Derr v. Gulf Oil Corp.*, 796 F.2d 340 (10th Cir. 1986) (lease analyst who was demoted and fired because it was "dangerous" for a woman to get too much education, could not recover for setbacks to her career under Title VII); *Ezold v. Wolf, Block, Schorr & Solis-Cohen*, 751 F. Supp. 1175 (E.D. Pa. 1990) (attorney permanently passed over for partnership on discriminatory grounds felt compelled to leave employment but could find no comparable work).

64. *See supra* note 39 and *infra* notes 65-67 for general studies and illustrative cases concerned with the effects of discrimination.

65. *See, e.g.*, *Robinson v. Jacksonville Shipyards*, 760 F. Supp. 1468 (M.D. Fla. 1991) (awarding harassment victim, who stayed with her employer, an injunction and one dollar in nominal damages). Often victims of severe discrimination are forced to leave their jobs before they institute a suit, which only provides the opportunity to recover backpay. *See generally infra* note 66 discussing cases that awarded backpay.

66. *See, e.g.*, *Gaddy v. Abex Corp.*, 884 F.2d 312 (7th Cir. 1989) (awarding victim of discrimination, who was illegally discharged because she "was a mother," backpay and reinstatement without seniority); *Danna v. New York Tel. Co.*, 752 F. Supp. 594 (S.D.N.Y. 1990) (awarding backpay and injunctive relief to victim of severe sexual harassment who was forced to take "unprecedented" demotion with substantial pay reduction); *Arnold v. City of Seminole*, 614 F. Supp. 853 (E.D. Okla. 1985) (awarding backpay and injunctive relief to police officer who suffered "massive anxiety and depression" and "stroke-level" high blood pressure as a result of severe sexual harassment).

compensation for medical expenses, mental suffering, or harm to one's professional reputation.<sup>67</sup> Opponents of the limitations pointed to these accounts in support of their stance for full compensation regardless of the cost to an employer.<sup>68</sup>

Second, Congress noted that opponents of statutory limits had devised a remedial scheme that would not overburden employers economically.<sup>69</sup> The National Women's Law Center conducted a study that examined employment discrimination claims brought under section 1981 between the years 1980 and 1990.<sup>70</sup> The results of the study indicated that jury awards tended to be conservative and had not forced companies out of business.<sup>71</sup> Opponents of limitations argued that because of the similarities between a section 1981 action and a Title VII action, the level of awards would also parallel each other.<sup>72</sup>

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67. *See, e.g., Williams v. Atchinson, Topeka & Santa Fe Ry.*, 627 F. Supp. 752 (W.D. Mo. 1986) (denying victim of race discrimination damages under Title VII for resulting emotional distress and psychological problems); *Compston v. Borden, Inc.*, 424 F. Supp. 157, 162 (S.D. Ohio 1976) (noting that "[w]ere compensatory damages available to a Title VII plaintiff, this Court would not hesitate to enter such an award in this case" to a victim of religious harassment who "suffered mental anguish and humiliation at [the employer's] hands").

68. *See, e.g.,* 137 CONG. REC. S15,020 (daily ed. Oct. 22, 1991) (remarks of Sen. DeConcini). Senator DeConcini argued that "[i]n the situation where an employer's actions have caused an exceptional amount of out-of-pocket expenses or pain and suffering, the amount of punitive damages should be correspondingly higher." *Id.*

69. *Id.* Senator DeConcini noted that a Washington, D.C. law firm's empirical study showed that unlimited damages provisions under § 1981 had not resulted in "unlimited awards and bonanzas for lawyers." *Id.* *See infra* note 71 for the study's specific findings.

70. Wendy White et al., *Analysis of Damage Awards Under § 1981* (Mar. 14, 1990) (unpublished manuscript available from the National Women's Law Center). The National Women's Law Center commissioned the Washington, D.C., law firm of Shea & Gardner to conduct this study. 137 CONG. REC. S15,020 (daily ed. Oct. 22, 1991) (remarks of Sen. DeConcini).

71. 136 CONG. REC. E2478 (daily ed. July 25, 1990) (report of the National Women's Law Center). This study, introduced into the Record by the Honorable Augustus F. Hawkins of California, merits close examination. *Id.* In short, the study found that, in actions brought under § 1981, "plaintiffs were awarded compensatory and punitive damages in only 68 of 576 reported cases between 1980 and 1989. Plaintiffs received less than \$50,000 - for both compensatory and punitive damages combined - in two-thirds of these 68 cases, and received more than \$200,000 in only three instances." *Id.*

72. *See, e.g.,* 137 CONG. REC. S18,375 (daily ed. Nov. 26, 1991) (remarks of Sen. Kennedy). Senator Kennedy argued as follows: "The standard of proof and the definition of intentional discrimination are identical under the Civil Rights Act of 1991 and the long-standing race discrimination statute [§ 1981]. There is no reason to expect significantly more litigation, or significantly larger jury awards under the 1991 Act." *Id.* *See also* 137 CONG. REC. S15,020 (daily ed. Oct. 24, 1991) (remarks of Sen. DeCon-

Alternatively, proponents of limiting damages pointed to three main factors in support of their position. First, supporters rejected the results of the National Women's Law Center study and insisted that large jury awards were inevitable<sup>73</sup> under a provision with no caps. Additionally, those congressmen projected that limitless liability would force employers out of business.<sup>74</sup> In particular, they opposed a provision that would place unlimited liability on an employer irrespective of its size or the culpability of its behavior.<sup>75</sup> Second, proponents argued that the possibility of high jury awards would create a "litigation machine" that would compensate lawyers,<sup>76</sup> but not victims,<sup>77</sup> and

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cini). Senator DeConcini stated: "Opponents of the damages provisions argue that it will subject employers to enormous liability and put them out of business. A recent study . . . challenges this assertion." *Id.*

For a general discussion of the implications arising from the fact that § 1981 and Title VII are co-extensive, see Kotkin, *supra* note 19, at 1348-49. The author argues: This history [that Title VII and § 1981 are considered co-extensive] is significant in several respects. First, it helps to explain why so little attention has been directed to Title VII's remedial inadequacies. Second, it demonstrates that there is nothing inherently unfair or unwieldy about the use of tort-based concepts of relief in the discrimination context. Third, the co-existence of dual remedies for some discrimination claimants and not others points to the underlying inequity that has pervaded the Title VII remedial scheme.

*Id.*

73. See, e.g., 136 CONG. REC. S15,356 (daily ed. Oct. 16, 1990) (letter from Zachary D. Fasman to Sen. Dole). In the letter, Mr. Fasman suggests that a limited punitive damages provision with an unlimited compensatory damages provision would cause juries to exaggerate compensatory damages to include punitive damages. *Id.*

74. See *infra* note 75 for one Congressman's view on the consequences of unlimited liability.

75. See, e.g., 136 CONG. REC. H9404 (daily ed. Oct. 11, 1990) (remarks of Rep. Bartlett). Representative Bartlett criticized the 1990 Act's remedial provision, which capped punitive damages at \$150,000, as failing to consider the specific business or violation and causing employers to go out of business. *Id.* Specifically, Representative Bartlett argued:

I want to note the cap relates to all employers, large and small. I would note that the so-called cap [applies] regardless of the size of the employer or the size of the offense, in addition to all damages that might be awarded in the category of compensatory damages. . . .

. . . [This is] in effect lowering the boom and putting the employer out of business regardless of the size of the employer or the nature of the offense.

*Id.*

76. 137 CONG. REC. H3874 (daily ed. June 4, 1991) (remarks of Rep. Dornan). Representative Dornan, who was vigorously in favor of statutory limitations, argued: "Another effect of this bill is perfectly clear. If H.R. 1 becomes law, there will no longer be unemployed lawyers in the United States. . . . H.R. 1 would be more aptly named the Trial Lawyers Relief Act of 1991." *Id.* See also 136 CONG. REC. S10,321 (daily ed. July 23, 1990) (Editorial from Washington Post by Zachary D. Fasman offered into the

would undermine the conciliatory goal of the Act.<sup>78</sup> Finally, and perhaps most persuasively, proponents of limitations pointed to the President's veto of the 1990 Act and argued that the President would surely veto an act with no limitations whatsoever.<sup>79</sup>

Ultimately, Congress reached a compromise.<sup>80</sup> The lawmakers inserted language in the Civil Rights Act of 1991 that preserved both compensatory and punitive damages.<sup>81</sup> A victim of discrimination may now recover compensatory damages if the employer has discriminated intentionally,<sup>82</sup> but may recover punitive damages only if the employer acts with malice or reckless indifference toward the victim's rights.<sup>83</sup> Nevertheless, the 1991 Act limits the amount of non-eco-

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Record by Sen. Dole) (noting that the "proposal to create a federal tort law system for employment discrimination cases is likely to benefit no one but lawyers").

77. See, e.g., 137 CONG. REC. H3874 (daily ed. June 4, 1991) (remarks of Rep. Dornan) ("This Bill would not address one problem confronting America's black underclass").

78. See, e.g., 136 CONG. REC. S10,321 (daily ed. July 23, 1990) (remarks of Sen. Dole). Conciliation is a primary objective of Title VII, which contains a mandatory conciliation provision to encourage dispute settlement. 42 U.S.C. § 2000e-5(b). For a general discussion of settlements and the conciliatory emphasis of Title VII, see 2 LARSON, *supra* note 17, §§ 56.00-43. For a discussion of how the potential for high jury verdicts will influence the conciliation aim of the Act, see Alexander, *supra* note 29, at 623-25.

79. See, e.g., 137 CONG. REC. S7021 (daily ed. July 4, 1991) (remarks of Sen. Danforth). Commenting on H.R. 1, which contained no limitations provision, and introducing the limitation that was finally signed into law, Senator Danforth stated: "[n]o matter how well meaning they are in the House of Representatives, there is almost no chance that that bill which passes the House will be enacted into law in its present form." *Id.*

80. See *President Bush's Statement on Signing the Civil Rights Act of 1991*, 226 Daily Lab. Rep. (BNA), at D-1 (Nov. 21, 1991). The President stated that the [Civil Rights Act of 1991] "adopts a compromise under which 'caps' have been placed on the amount [of compensatory and punitive damages] that juries may award. *Id.* See *infra* note 84 for the text of the limitation provision.

81. Section 102 of the Civil Rights Act of 1991 provides:

In an action brought by a complaining party under [Title VII] against a respondent who engaged in unlawful intentional discrimination . . . prohibited under [Title VII], . . . the complaining party may recover compensatory and punitive damages . . . in addition to any relief authorized by [42 U.S.C. 2000e-5(g)(1) of the Civil Rights Act of 1991]. . . .

42 U.S.C. § 1981a.

82. *Id.*

83. 137 CONG. REC. at H9517. The Civil Rights Act of 1991, § 1981a(b)(1) now provides: "A complaining party may recover punitive damages under this section against a respondent . . . if the complaining party demonstrates that the respondent



conomic compensatory and punitive damages an employee may recover depending on the size of the employer.<sup>84</sup> At the time the Act passed in the Senate, many senators voiced their opposition to the limitations provision, but nonetheless supported the bill because of the urgency to enact legislation to protect the victims of employment discrimination.<sup>85</sup>

### C. *Lifting the Caps on Compensatory and Punitive Damages*

The limits that survived final passage of the Act should not diminish the strength of congressional opposition to caps on damages. Less than a week after President Bush signed the Civil Rights Act of 1991 into law,<sup>86</sup> Democratic and Republican party senators introduced bills to lift the caps on compensatory and punitive damages.<sup>87</sup> Both parties cited the overriding importance of implementing the principles contained in the Civil Rights Act of 1991 as the reason for compromising

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engaged in a discriminatory practice . . . with malice or with reckless indifference to the federally protected rights of an aggrieved individual." 42 U.S.C. § 1981a(b)(1).

84. The Civil Rights Act of 1991, in § 1981a(b)(3), adopted the Senate's language from S. 1745, *supra* note 55, at § 102(b)(3) and now provides:

The sum of the amount of compensatory damages awarded under this section for future pecuniary losses, emotional pain, suffering, inconvenience, mental anguish, loss of enjoyment of life, and other nonpecuniary losses, and the amount of punitive damages awarded under this section, shall not exceed, for each complaining party-

(A) in the case of a respondent who has more than 14 and fewer than 101 employees . . . , \$50,000; and

(B) in the case of a respondent who has more than 100 and fewer than 201 employees . . . , \$100,000; and

(C) in the case of respondent who has more than 200 and fewer than 501 employees . . . , \$200,000; and

(D) in the case of a respondent who has more than 500 employees . . . , \$300,000.

*Id.* One must keep in mind that this provision applies to non-economic and future economic compensatory damages while leaving economic damages that have occurred at the time of suit fully compensable regardless of the amount or size of the employer.

85. *See, e.g.*, 137 CONG. REC. S15,489 (daily ed. Oct. 30, 1991) (remarks of Sen. Leahy) ("While I believe this was the best bill we could get the President to sign, I . . . do not believe . . . this legislation ends the necessity for further reform. . . . Like others, I believe that the inequity of placing limits on damages . . . will need to be addressed in [the] future."); 137 CONG. REC. at S15,490 (remarks of Sen. Durenberger) ("[I]n the name of temporary compromise, in the name of getting this bill to become law, I have withdrawn [my amendment to lift the caps]").

86. *See supra* notes 11 and 15 discussing the enactment of the law.

87. *See supra* note 16 discussing the bills that Senators Hatch and Kennedy introduced after the Act passed.

and accepting the statute with liability caps.<sup>88</sup>

More importantly, however, the sponsors of both bills noted that the 1991 Act codified the very disparity it set out to correct.<sup>89</sup> Prior to the 1991 Act, victims of racial discrimination could recover unlimited compensatory and punitive damages under section 1981, while Title VII limited victims of sex, religious, or disability discrimination to equitable remedies.<sup>90</sup> Under the 1991 Act, courts maintain unbridled discretion to award relief for claims under section 1981,<sup>91</sup> while victims of sex, religious, or disability discrimination only have an opportunity to recover an amount based on the size of the employer rather than the egregiousness of the employer's conduct.<sup>92</sup>

On November 26, 1991,<sup>93</sup> Senator Hatch introduced the Employee Equity and Job Preservation Act of 1991.<sup>94</sup> Senator Hatch cited the discrepancy between section 1981 and the new Title VII as prompting the need for the bill.<sup>95</sup> The Employee Equity and Job Preservation Act addresses both the victims of discrimination and the small business owner.<sup>96</sup> The Act lifts all caps on compensatory and punitive damages

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88. 137 CONG. REC. at S18,337, S18,375. Senator Hatch stated that the Civil Rights Act of 1991 was a "significant step forward" but pointed out that it "failed to achieve total parity between the damages available to [those covered by the Act] and the damages available to those covered under section 1981." *Id.* at S18,337. Senator Kennedy likewise declared victory in the two year struggle but noted that the victory was "partial and temporary." *Id.* at S18,375.

89. *Id.* at S18,338, S18,375. Senator Hatch stated that the purpose of his bill is "to eliminate [one of many] double standards for women, persons with disabilities, and victims of religious discrimination." *Id.* at S18,338. After pointing out the successes of the 1991 Act, Senator Kennedy noted, "[u]nfortunately, the new remedy created a glaring inequity by placing a ceiling on the amount of damages that can be recovered." *Id.* at S18,375.

90. See generally *supra* notes 17-31 and accompanying text (providing an overview of equitable remedies).

91. S. 1745, *supra* note 55, § 102(b)(4). Under the Civil Rights Act of 1991, "[n]othing . . . shall be construed to limit the scope of, or the relief available under [42 U.S.C. § 1981]." 42 U.S.C. § 1981a(b)(4).

92. See *supra* notes 81-84 and accompanying text for discussion of the statutory caps placed on the amount of compensatory and punitive damages.

93. 137 CONG. REC. S18,337 (daily ed. Nov. 26, 1991) (statement of Sen. Hatch).

94. S. 2053, 102d Cong., 1st Sess. (1991).

95. 137 CONG. REC. S18,337, S18,338 (daily ed. Nov. 26, 1991) (statement of Sen. Hatch).

96. *Id.* at S18,338. When he introduced the Act, Senator Hatch queried: "Are the interests of women employed by small businesses served when a jury award for damages is so large that it could potentially force that employer out of business and cost all of its employees their jobs?" *Id.*

except for the category of the smallest employers, that is, those with less than one hundred employees.<sup>97</sup> For those employers, the cap would remain at \$50,000.<sup>98</sup> Senator Hatch stressed that such an exception was not an exemption.<sup>99</sup> Rather, it served as protection against the damaging effect that a crippling jury award may have on a small business' growth and economic viability.<sup>100</sup>

On the same day that Senator Hatch introduced his bill,<sup>101</sup> Senator Kennedy proposed the Equal Remedies Act of 1991.<sup>102</sup> The Equal Remedies Act would lift all caps on compensatory and punitive damages regardless of the employer's size.<sup>103</sup> Senator Kennedy emphasized that the disparity between relief under section 1981 and Title VII especially motivated him to introduce the bill.<sup>104</sup> He relied on the National Women's Law Center study<sup>105</sup> to assert that the damage awards would not be significantly larger without the caps.<sup>106</sup> Senator Kennedy maintained that the caps only resulted in the unfortunate phenomenon where the most seriously injured were prevented from obtaining complete relief, and the most reprehensible offenders were protected from full liability.<sup>107</sup>

The debate on tort reform over statutory limitations of damage awards is complex. Nonetheless, a general understanding of the arguments on both sides of the debate is helpful in evaluating whether Congress should lift the limitations on damages under the Civil Rights Act of 1991.

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97. *Id.*

98. *Id.* See also *supra* note 84 for the statutory language categorizing employers and limiting their relative liability.

99. 137 CONG. REC. at S18,338. In making this point Senator Hatch pointed to other legislative exceptions pertaining to small businesses. *Id.* He stated that this provision paralleled the Fair Labor Standards Act and the Family and Medical Leave Act, as it extended Title VII's exception for employers with fewer than fifty employees. *Id.*

100. *Id.*

101. 137 CONG. REC. S18,375 (daily ed. Nov. 26, 1991) (remarks of Sen. Kennedy).

102. S. 2062, 102d Cong., 1st Sess. (1991).

103. 137 CONG. REC. at S18,375.

104. *Id.* See also *supra* note 89 for the Senator's remarks.

105. See *supra* notes 70-71 and accompanying text for a discussion of the National Women's Law Center's study and its findings.

106. 137 CONG. REC. S18,375.

107. *Id.*

## II. STATUTORY CAPS AND TORT REFORM

When President Bush signed the Civil Rights Act of 1991 into law, he referred to its limitation provision as setting an important precedent in tort reform.<sup>108</sup> Indeed, the 1980s was a decade of heightened awareness of the need for tort reform.<sup>109</sup> During the 1980s, most states enacted some form of legislation that limited or abandoned the jury's ability to award punitive and non-economic compensatory damages in tort cases.<sup>110</sup> Yet, the debate surrounding the wisdom of such legislation continues.<sup>111</sup>

Proponents of limiting or eliminating these damages generally point to the outbreak of increasingly large jury awards to illustrate the need for reform.<sup>112</sup> Such proponents argue that juries have too much discretion to fashion damage awards,<sup>113</sup> which in turn causes an instability and breakdown in the system.<sup>114</sup> With respect to non-economic com-

108. See *supra* note 11 for a direct quotation from President Bush's statement.

109. See generally Komesar, *supra* note 12. The author points out that scholarly debate over tort reform has existed for fifty years, but in the last decade "critics have called for radical reform or abandonment of the torts system." *Id.* at 23. For a thorough discussion of the problems with current tort law and possible alternative methods of compensation, see Gary T. Schwartz et al., *Symposium: Alternative Compensation Schemes and Tort Theory*, 73 CAL. L. REV. 548 (1985).

110. See generally Randall R. Bovbjerg et al., *Valuing Life and Limb in Tort: Scheduling "Pain and Suffering"*, 83 NW. U. L. REV. 908, 956-57 nn.210-13 (1989) (describing the various types of statutory caps the states have enacted); Toy, *supra* note 13, at 331-35 (same).

111. See *infra* notes 112-32 and accompanying text for discussion of both sides to the debate.

112. See generally Daniels & Martin, *supra* note 12. The authors assert that the proponents of tort reform present two types of evidence in support of their argument. *Id.* at 14. According to the authors, reformers use "horror stories and anecdotes about jury verdicts involving punitive damages, and aggregate the data on frequency and size of the awards." *Id.* The authors also argue that reformers use the two types of evidence to establish four propositions on which they base the remainder of their argument about punitive damages' harmful effects. *Id.* The four propositions are: (1) punitive damages are routinely awarded, (2) punitive damages are routinely awarded in large amounts, (3) the frequency and size of these awards is rapidly increasing, and (4) propositions 1, 2, & 3 are national in scope. *Id.*

113. See, e.g., Jeffrey O'Connell, *A "Neo No-Fault" Contract in Lieu of Tort: Preaccident Guarantees of Postaccident Settlement Offers*, 73 CAL. L. REV. 898, 899-900 (1985) (noting a plaintiff's attorney's belief that "juries vote based on their impressions, their feelings, their biases, and their prejudices, not the facts of the case").

114. *Id.* at 910. The author argues that, under today's system, the potential for recovery of damages beyond the economic value of an injury undermines the out-of-court settlement process. *Id.* He suggests that defendants are afraid to make settlement offers because such an offer "may simply excite an energetic claimant's counsel to hold

pensatory damages, in particular, proponents of limitations argue that these injuries are not subject to precise measurement<sup>115</sup> and, when compounded with the great discretion a jury holds, the resulting awards are unpredictable and inconsistent.<sup>116</sup>

With respect to punitive damages, proponents of limitations advance several arguments.<sup>117</sup> First, proponents argue that large punitive damage awards deplete a tort-feasor's funds, thereby forcing some of the injured to go uncompensated.<sup>118</sup> Second, proponents challenge the validity of deterrence as a goal of tort law,<sup>119</sup> or more specifically, argue that the unpredictability of the awards undermines any deterrent ele-

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out for much more." *Id.* at 902. *See also* Toy, *supra* note 13, at 326-27 (suggesting that unlimited punitive damages may cause overdeterrence in the sense that a defendant will shy away from an act even if it would be socially useful). *See generally* Bovbjerg et al., *supra* note 113, at 908 ("The open-ended and unpredictable nature of tort exposure has, in turn, threatened the liability insurance system that funds most tort compensation"); Komesar, *supra* note 12, at 23 ("Manufacturers, service professionals, and insurance companies have become increasingly impatient with the costs and foibles of the torts system"); David G. Owen, *Problems in Assessing Punitive Damages Against Manufacturers of Defective Products*, 49 U. CHI. L. REV. 1, 15 (1982) ("When [punitive damages are] transferred to the complex bureaucracy of the modern manufacturing concern, the fit is awkward in many respects").

115. *See, e.g.*, Jeffrey O'Connell, *Offers That Can't Be Refused: Foreclosure of Personal Injury Claims by Defendants' Prompt Tender of Claimants' Net Economic Loss*, 77 NW. U. L. REV. 589, 591 (1982) ("Translating non-pecuniary loss (pain) into pecuniary terms (dollars) is, like establishing fault, very difficult."). *See also* Stanley Ingber, *Rethinking Intangible Injuries: A Focus on Remedy*, 73 CAL. L. REV. 772, 778 (1985) ("Translating pain and suffering or emotional distress into monetary terms poses tremendous problems of proof because . . . , no market exists to provide a standard for compensating a victim of such loss. Such injuries have no measurable dimensions, mathematical or financial.").

116. *See* O'Connell, *supra* note 113, at 900. The author's primary point is that many external factors cause the jury to arrive at a given award. *Id.* For example, he suggests that the credibility of expert witnesses, in the minds of the jurors, turns on the expert's appearance and mannerisms, which causes very different awards for very similar injuries. *Id.* Furthermore, he suggests that injuries similar in severity will produce fluctuating verdicts based on the appearance of the victim (e.g., back injury versus extensive visible scarring). *Id.*

117. *See generally* Owen, *supra* note 114 (discussing the frustrations of personal injury tort law arising from punitive damages awards); David G. Owen, *Punitive Damages in Products Liability Litigation*, 74 MICH. L. REV. 1258 (1976) (considering the debate over punitive damages).

118. *See* Daniels & Martin, *supra* note 12, at 8 (noting that the possibility of punitive damages might invite a "race to the courthouse" whereby "those plaintiffs arriving first deplete the funds available to compensate all wronged parties").

119. *See generally* Sales & Cole, *supra* note 11, at 1158-64 (arguing that neither deterrence nor punishment are viable theories for punitive damages).

ment.<sup>120</sup> Finally, proponents of limitations argue that the standards of proof within the tort system are unacceptably low.<sup>121</sup> Alternatively, they note that when a court uses a higher standard, the standard is too confusing for the jury to apply accurately and consistently.<sup>122</sup>

Opponents of limiting punitive and non-economic compensatory damages respond to the above-noted attacks in a number of ways. The opponents first assert that powerful political lobbies have created a misperception regarding the extent and severity of such awards.<sup>123</sup> Oppo-

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120. See generally *supra* note 114 (discussing how unlimited damage awards fail to deter potential violators due to the unpredictability of the amount of such awards). Cf. Stephen D. Sugarman, *Doing Away with Tort Law*, 73 CAL. L. REV. 558 (1985). The author points to numerous factors that he suggests undermine the deterrent function of tort law. *Id.* First, individuals with no wealth, as well as under-capitalized companies are not threatened by an unfavorable judgment. *Id.* at 571-72. Second, because of an employer's vicarious liability for individual employees' actions, the actual tort-feasors (employees) are not deterred. *Id.* at 572. Furthermore, because tort law's primary function is compensation, inconsistent priorities exist because of the inadequacy of tort awards for certain injuries (e.g., it is less expensive for the injurer to cause a death than to permanently injure). *Id.* Market imperfections allow the cost of some damages to be passed on to consumers. *Id.* at 573. Finally, liability insurance in some jurisdictions pay partial costs of punitive damages which results in a shift of the direct economic deterrent from the tort-feasor to the insurance companies. *Id.*

121. See, e.g., Dorsey D. Ellis, Jr., *Punitive Damages, Due Process, and the Jury*, 40 ALA. L. REV. 975, 991-99 (1989) (arguing that the procedural safeguards of criminal law are not available even though punitive damages is a quasi-criminal remedy). One procedural inadequacy of particular concern is that the preponderance standard leads to mistakes which should not be tolerated in a "quasi-criminal" proceeding. *Id.*

122. See Sales & Cole, *supra* note 11, at 1131-38. The authors point out that so far as the culpability spectrum is concerned, the decision whether or not to award punitive damages is clear (i.e. punitive damages are always appropriate for intentional conduct and never appropriate for only negligent conduct). *Id.* In between the extremes of intent and negligence, are terms such as gross negligence, recklessness, and willful and wanton, which the authors characterize as "confusing and devoid of any effective definition." *Id.* at 1137. They claim further that "[b]ecause of the absence of any understandable standards of measurement and the inevitably inconsistent interpretations by juries, every defendant increasingly is subject to the vagaries of individual jurisdictions and an uninformed jury." *Id.* at 1138.

123. See Daniels & Martin *supra* note 12, at 10-11. The authors state:

The problems for American society occasioned by this distressed [punitive damages] system out of control have reached crisis proportions, the reformers claim. The effects of these problems require fundamental change in the doctrine of punitive damages, if not its outright abolition. Their effort to produce a broad base of support conducive to reform includes the establishment of public relations and lobbying organizations to spearhead the campaign.

*Id.* The authors conducted an extensive empirical investigation of the frequency, size, and dispersion of punitive damage awards. *Id.* at 28-62. The results of the study refute

nents also claim that procedural modifications,<sup>124</sup> trial court control, and appellate review help minimize instances of jury abuse.<sup>125</sup> With respect to non-economic compensatory damages, opponents refute the argument that such awards are speculative<sup>126</sup> and unsubstantiated.<sup>127</sup> Regarding punitive damages, opponents reject the assertion that their unpredictable nature undermines the deterrent objective.<sup>128</sup> In fact, they claim it is the unpredictability itself that encourages a higher level of care.<sup>129</sup> This is particularly true in cases of intentional conduct.<sup>130</sup> Limited or set punitive damages would allow an intentional tort-feasor to conduct a precise cost-benefit analysis to determine whether to act.<sup>131</sup> When the potential cost of an act is unpredictable, however, the

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the main propositions of the reformers. *Id.* at 61-62. *See also supra* note 112 for a discussion of these propositions.

124. *See Daniels & Martin, supra* note 12, at 9. The primary procedural safeguard that both scholars and courts favor is the "clear and convincing" standard of proof in place of the traditional preponderance standard. *Id.* Other safeguards include providing for a state fund to receive a percentage of the punitive damage award, altering the pleading requirements, limiting evidence of defendant's wealth, prohibiting insurance for punitive damage awards, and providing a bifurcated trial. *See* 2 JAMES D. GHIARDI & JOHN J. KIRCHER, *PUNITIVE DAMAGES: LAW AND PRACTICE* §§ 21.12-22 (1985).

125. AMERICAN TORT REFORM ASSOCIATION, *LEGISLATIVE REFORM IN THE PUNITIVE DAMAGES AREA* (1986-1989), *Punitive Damages Update* (Nov. 9, 1989). The American Tort Reform Association reports that eighteen states replaced the "preponderance" standard with the 'clear and convincing' standard between 1986 and 1988. *Id.* at 2.

126. *See Komesar, supra* note 12, at 58.

127. *See Daniels & Martin, supra* note 12, at 9 (noting proponents of punitive damages enhance their arguments based on a lack of empirical evidence that jury awards inherently consist of excessive punitive calculations).

128. *See, e.g.,* Jason S. Johnston, *Punitive Liability: A New Paradigm of Efficiency in Tort Law*, 87 COLUM. L. REV. 1385, 1385-1406 (1987) ("While the open-ended and to a large degree arbitrary magnitude of punitive damages may call into question the fairness of these damages, optimal deterrence is not inconsistent with unlimited and variable awards."). *See also* Toy, *supra* note 13, at 324-25 ("Though the unpredictability argument favoring statutory caps is intuitively appealing, it makes less sense when viewed in light of the . . . principal goals of extraordinary sanctions.").

129. *See* Johnston, *supra* note 128, at 1402-06 (discussing the potential utility that punitive damages could play "as an instrument of optimal deterrence"). *See also* Toy, *supra* note 13, at 324-25 ("Concerns about unpredictable punitive damage awards become less significant when one remembers that such awards are intended not only to punish . . . but also to deter . . .").

130. *See* Robert D. Cooter, *Economic Analysis of Punitive Damages*, 56 S. CAL. L. REV. 79, 86 (1982) (arguing that an intentional wrongdoer, who is liable only for actual damages, will be neither surprised nor disappointed in having to pay such damages).

131. *See* Toy, *supra* note 13, at 325. The author illustrates this point as follows: "[I]f the [defendant] expects a profit of \$300,000 from a wrongful act (after paying

threat that the contemplated conduct could cost more than any anticipated benefit is more likely to encourage the intentional tort-feasor to choose inaction or appropriate action.<sup>132</sup>

### III. ANALYSIS

#### A. *Non-Economic Compensatory Damages*

To remove the caps on Title VII's non-economic compensatory damages will enable courts to fully compensate victims of intentional discrimination. Victims of severe discrimination often suffer prolonged emotional and psychological harm.<sup>133</sup> Under the current provision, an award of compensatory damages may not be sufficient to cover the victim's future medical expenses. Moreover, the current scheme fails to account for pain and suffering, or the detrimental effects such treatment might have on the victim's professional reputation or quality of life.<sup>134</sup> The problem of inadequate compensation does not occur under section 1981 when a victim of racial discrimination suffers an identical injury.<sup>135</sup> A Title VII provision with no caps will permit full compensation to a victim of any type of intentional employment discrimination.

The primary argument supporting the use of a statutory limitation

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compensatory damages), and if a statute caps punitive damages at \$250,000, for example, then [the defendant] is likely to commit the act anyway since he still can expect to gain at least \$50,000." *Id.* at 326. *See also* Johnston, *supra* note 128, at 1385-1406 ("[Statutory] caps could severely weaken incentives for safety by taking away the threat of high damages necessary to counteract the incentive weakening effect of punitive safeguards.").

132. *See* WILLIAM LANDES & RICHARD POSNER, *THE ECONOMIC STRUCTURE OF TORT LAW* (1987); Toy, *supra* note 13, at 327 (noting that the goal of punitive damages is not to fine tune or optimize conduct, but rather to eradicate undesired conduct).

133. *See, e.g.*, Fran Sepler, *Sexual Harassment From Protective Response to Proactive Prevention*, 11 *HAMLIN J. PUB. L. & POL'Y* 61, 67-68 (1990) ("victims of sexual harassment . . . face serious emotional and psychological problems"). Studies have found the effects of harassment to include stress, headaches, vomiting, insomnia, damage to self esteem, personal safety, and reputation. *Id.* at 67. *See also* U.S. MERIT SYSTEMS PROTECTION BOARD, *supra* note 39, at 41 ("Victims pay all the intangible emotional costs inflicted by anger, humiliation, frustration, withdrawal, dysfunction in family life, or other damage that can be sexual harassment's aftermath.").

134. *See supra* note 84 for limits on the amount of damages that can be awarded. *See also* Mathews, *supra* note 6, at 301 (suggesting that remedies beyond those provided in the 1991 Act are necessary for victims of harassment).

135. *See, e.g., supra* note 30 (comparing the relief given to a victim of racial discrimination under § 1981 to that given to a victim of sexual discrimination under Title VII).



on non-economic compensatory damages is insufficient to justify the unequal compensation that is available to victims depending on the nature of the intentional discrimination they suffered.<sup>136</sup> The assertion that unlimited damages will create a "litigation machine" is purely speculative, for credible evidence contradicts the assertion.<sup>137</sup> Additionally, there is no reason to believe that unlimited compensatory damages serve as a greater incentive to litigate than expanded but limited damage awards. In any case, victims of intentional discrimination should not be denied access to the courts' remedies in an effort to facilitate a more efficient judiciary. The burden is misplaced when these innocent parties are constrained in favor of running judicial processes more smoothly.<sup>138</sup>

### B. *Punitive Damages*

Lifting the caps on Title VII's punitive damages will strengthen the message that intentional, malicious discrimination has no place in society. The goal of punitive damages is the deterrence of, or ideally the elimination of, undesirable conduct.<sup>139</sup> In the employment discrimination context, the actions of an employer can extend beyond socially undesirable conduct to a point of being utterly intolerable.<sup>140</sup> In addition, discrimination of this nature is not always isolated, but it may continue over a period of time with many employees.<sup>141</sup> Certainly Congress did not mean to codify a policy that permits discrimination if

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136. See *supra* text accompanying notes 73-79 for a summary of the arguments supporting caps on compensatory damages.

137. See *supra* note 71 citing to a study's findings that, although juries were allowed to award damages up to an unlimited amount in § 1981 actions, the actual amounts awarded were not high. Analysis of the awards given in § 1981 cases indicates that "(1) most plaintiffs' claims for damages will fail for procedural or substantive reasons, (2) of those plaintiffs who do prevail, many will receive only equitable relief which is currently available under Title VII, [and] (3) when a plaintiff does receive compensatory and punitive damages, the award will probably be moderate . . ." WHITE ET AL., *supra* note 70, at 2.

138. 137 CONG. REC. S18,338 (daily ed. Nov. 26, 1991) (remarks of Sen. Hatch) (acknowledging that the courts may indeed be crowded, but this is a problem to be handled separately, and victims of discrimination deserve their day before a jury).

139. See *supra* note 132 for sources noting that the objective of punitive damages is to stop unwanted conduct.

140. See, e.g., *supra* notes 49, 62-63 describing the plight of some victims.

141. Congress was likely aware that the discrimination can become widespread as the punitive damage limits do not restrict the number of claims an employer may have to pay out. See *supra* note 84 setting forth the limits on damages for an individual plaintiff. See also Mary A. Carey, *Law Puts High Price on Bias, Harassment: Law*

the employer is able to pay; it meant to eliminate all discrimination from the workplace.

Interestingly, in the section 1981 context, very few punitive damage awards have exceeded the Title VII statutory cap provision.<sup>142</sup> This suggests that juries are cautious in awarding punitive damages in the employment discrimination context,<sup>143</sup> and have not followed the trend of excessive punitive damage awards that currently exists in tort law.<sup>144</sup> It also suggests that when a jury awards a large amount in punitive damages, it is likely because the employer's conduct was particularly outrageous.<sup>145</sup> Limiting such awards allows the most serious offenders to escape full liability.

As in the case of non-economic compensatory damages, the most persuasive argument for limiting punitive damages under Title VII is insufficient to justify the unequal treatment of women, religious minorities, and the disabled.<sup>146</sup> The main argument is that the large jury awards are likely to drive employers out of business.<sup>147</sup> Initially, it is notable that, as discussed above, an examination of punitive damage awards under section 1981 makes this assertion unjustified.<sup>148</sup> Assuming that this risk exists however, it merely confirms the premise that the threat of punitive damages for intentional employment discrimination will deter such conduct. Although it is true that even capped damages will deter some employers,<sup>149</sup> the unpredictable nature of

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*Makes Business Bias More Costly*, THE HARTFORD COURANT, Jan. 30, 1992, at D1 ("Co-workers . . . can band together in a class action suit.").

142. See *WHITE ET AL.*, *supra* note 70, at 1-6. The National Women's Law Center study found that in only three of 576 cases brought under § 1981 did the plaintiffs recover over \$200,000 in compensatory and punitive damages combined. *Id.* at 5.

143. *Id.* at 2.

144. See *supra* notes 112-13 and accompanying text for a discussion of how some perceive damages are awarded in tort cases.

145. See *White et al.*, *supra* note 70, at 2. The fourth enumerated finding of the National Women's Law Center study states: "If the employer engages in outrageous intentional discrimination, in a few cases, the plaintiff may receive a more substantial award . . ." *Id.*

146. See *supra* notes 73-79 and accompanying text for a summary of the arguments made in support of limitations.

147. *Id.* Representative Bartlett was especially concerned with the potential for jury awards to wipe out an employer's capital. See *supra* note 78.

148. See *supra* notes 142-45 and accompanying text discussing the low punitive damage awards and possible explanations.

149. Senator Hatch's bill to lift the caps on damages except for small employers recognizes that the threat of a maximum of \$50,000 is sufficient to deter small business

damage awards works to eradicate atrocious conduct at the workplace, which is a primary objective for imposing punitive damages in the first instance.<sup>150</sup>

### C. Tort Reform

Many of the concerns that tort reform seeks to address are inapplicable in the Title VII context. The reform primarily focuses on curtailing the effects from excessive punitive damage awards.<sup>151</sup> For instance, tort reform efforts are targeted to reduce the amount of the damage awards against manufacturers who, in the course of trying to create a socially beneficial product, err and cause injury.<sup>152</sup> This is clearly distinguishable from the Title VII case where the tort-feasor is engaging in a socially destructive activity for the purpose of causing that harm. In the manufacturing context, society uses punitive damages to encourage a higher standard of care, which is distinguishable from their use pursuant to intentionally destructive conduct. The goal in the latter context is not to make people pay for mistakes, but to eliminate the particular conduct in its entirety.<sup>153</sup>

The other major concern of tort reform is the procedural uncertainties. Reformers that claim if a jury is granted unbridled discretion to analyze facts based on a low standard of proof,<sup>154</sup> they are likely to hold defendants liable for large sums.<sup>155</sup> Indeed, these are valid con-

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persons. 137 CONG. REC. S18,338. *See supra* notes 96-100 and accompanying text for discussion of Senator Hatch's bill and proposed exception for small businesses.

150. *See supra* notes 127-31 and accompanying text for analysis of how the unpredictability of punitive damages causes tort-feasors to modify their conduct.

151. *See supra* notes 142-45 and accompanying text pointing out the finding that juries do not award excessive punitive damages.

152. *See generally* Owen, *supra* note 114, at 13-18 (arguing that safety procedures can be encouraged through punitive damages, but warning that care is required so as not to "exact enormous punishment from an enterprise, acting on our greater social conscious of today for decisions that were made pursuant to business ethics of times past").

153. *See generally supra* notes 128-31 and accompanying text for discussion of how intentional misconduct may change if there are no limits on punitive damages.

154. *See supra* notes 112-22 and accompanying text discussing the problems of giving juries wide discretion to award damages and the low standards of proof upon which to base liability.

155. *See, e.g.,* Browning-Ferris Indus. v. Kelco Disposal, Inc., 845 F.2d 404 (2d Cir. 1988), *aff'd*, 492 U.S. 257 (1989) (award of \$6 million); Ford Motor Co. v. Stubble Field, 319 S.E.2d 470 (Ga. App. 1984) (\$8 million); Palmer v. A.H. Robins Co., 684 P.2d 187 (Colo. 1984) (\$2 million).

cerns in the Title VII context as well. Yet, in the analogous section 1981 case law, juries have reassuringly exercised care in formulating such awards.<sup>156</sup> Moreover, courts have been more willing to overturn excessive jury awards in the employment context than in the tort area.<sup>157</sup>

#### IV. CONCLUSION

In enacting the Civil Rights Act of 1991, Congress sought to eliminate the disparity between Title VII remedies and the remedies of other employment discrimination statutes. To this end, Congress provided that all remedies available to a victim of intentional racial discrimination under section 1981 are also available to victims of intentional sex, religious, or disability discrimination. When Congress created these remedies, however, it attempted to concurrently protect businesses from the effects of large jury awards. It therefore limited the amount of compensation a victim may recover for sex, religious, or disability discrimination. As a result, Congress codified the very disparity it set out to correct. 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.

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156. See White et al., *supra* note 70, at 1-6.

157. *Id.* at 7.

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