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No Harm, No Foul?: An Argument for the Allowance of Punitive Damages Without Compensatory Damages Under 42 U.S.C. § 1981a

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No Harm, No Foul?: An Argument for the Allowance of Punitive Damages Without Compensatory Damages Under 42 U.S.C. § 1981a

Christy Lynn McQuality*

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I. Introduction

The 1991 Civil Rights Act dramatically changed the recovery system for victims of sex discrimination in the workplace.¹ Specifically, § 1981a² of the amendments granted a statutory right of compensatory and punitive damages to employees who are victims of intentional sex discrimination.³ This right to compensatory and punitive damages represents a significant departure from the remedies previously available under Title VII, which limited recovery to remedies such as back-pay and an injunction for reinstatement.⁴

Although § 1981a incorporates legal remedies into intentional sex discrimination suits, Congress imposed caps on the amount of damages available in these suits.⁵ These caps have created a federal remedy for intentional sex discrimination that lies between a fully compensatory remedy under tort law and the limited remedies that existed under Title VII prior to § 1981a's enactment.⁶ Partly for this reason, courts are divided over whether a plaintiff can recover punitive damages without proving compensatory damages under § 1981a.⁷ Traditionally, common law has dictated that a plaintiff cannot recover punitive damages without compensatory damages.⁸ Moreover, in light of due process concerns, punitive damages are becoming more controversial.⁹

1. See Avon L. Sergeant, *Are the Legal Remedies Available to Sexually Harassed Women Adequate?*, 20 WOMEN'S RTS. L. REP. 185, 187-88 (1999) (describing expansion of remedies in Title VII suits after adoption of 1991 amendments). In addition to making punitive and compensatory damages available to victims of Title VII sex discrimination, the 1991 amendments also provided a jury trial to these victims. *Id.*; see also 42 U.S.C. § 1981a(c) (1994) (granting right to jury trial to plaintiffs seeking compensatory or punitive damages under § 1981a).

2. 42 U.S.C. § 1981a (1994).

3. See *id.* § 1981a(a)(1) (1994) (permitting recovery of compensatory and punitive damages by individuals who could not otherwise recover under 42 U.S.C. § 1981 (1994)).

4. See Sergeant, *supra* note 1, at 187-88 (describing remedies available under 1964 Civil Rights Act); see also 42 U.S.C. § 2000e-5(g) (1994) (permitting injunctions for relief such as back-pay and reinstatement).

5. See 42 U.S.C. § 1981a(b)(3) (1994) (establishing limitations on amount of total compensatory and punitive damages recoverable in Title VII suits). Section 1981a's caps on damages are based on the employer's size. *Id.* For example, a plaintiff may recover only \$50,000 total damages from an employer "who has no more than 14 and fewer than 101 employees," but a plaintiff may recover up to \$300,000 total damages from an employer "who has more than 500 employees." *Id.*

6. See Sergeant, *supra* note 1, at 188 (describing how caps on total damages under § 1981a "bear no rational relationship to the wrong done and the harm suffered"). Sergeant noted the advantage that § 1981a grants to victims of sex discrimination but also argued that the damages caps often make the remedies available to these victims inadequate. *Id.*

7. See *infra* Part V (discussing court decisions that address whether punitive damages may stand in absence of compensatory damage award).

8. See *infra* Part VI (discussing common law limitations on punitive damages).

9. See DAN B. DOBBS, LAW OF REMEDIES § 3.11(1), at 452 (2d ed. 1993) (discussing

However, as a statutory remedy, the damages provision under § 1981a contains certain restrictions that may eliminate the need to apply these common law and due process limitations to punitive damages under § 1981a.¹⁰ Furthermore, the Supreme Court has articulated a standard for awarding punitive damages under § 1981a that must enter into this mix.¹¹ These facts, along with the high number of employment discrimination cases facing courts today, indicate a likelihood of further division among the circuit courts over whether punitive damages may stand without compensatory damages under § 1981a.¹²

It has been argued that a plaintiff should be entitled to recover punitive damages without compensatory damages under the analogy that a plaintiff suing under § 1983¹³ for a civil rights deprivation normally may recover punitive damages without compensatory damages.¹⁴ Both statutes address civil

controversial nature of punitive damages); *infra* Part VII (discussing Supreme Court's due process concerns in *BMW of North America v. Gore*, 517 U.S. 559 (1996)).

10. See *infra* Part VIII (discussing common law and due process limitations as applied to § 1981a claims).

11. See *infra* Part IX (discussing Court's standard for punitive damages under § 1981a in *Kolstad v. American Dental Ass'n*, 527 U.S. 526 (1999)).

12. See W. Muzette Hill, *Employment Practices Liability: An Introduction to the Legal Landscape*, 629 PL/LIT 273, 277 (2000) (noting that more than 40,000 employment discrimination cases are litigated each year). Hill notes that the number of employment discrimination cases argued in federal courts are increasing "at a minimum of 17% per year, which is the fastest growing category of federal litigation." *Id.*; see *Punitive Damages under Civil Rights Act of 1991*, 13 FED. LITIGATOR 147, 147 (1998) (noting unsettled law regarding issue of punitive damages without compensatory damages under § 1981a).

13. 42 U.S.C. § 1983 (1994). Section 1983 provides:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

Id.

14. See 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, 614-15 (2001) (arguing that punitive damages should be permissible under § 1981a without compensatory damages because courts accord such treatment to § 1983 cases). Levi also argues that courts should recognize the availability of punitive damages without compensatory damages under § 1981a under the analogy that this practice is accepted under § 1981, Title VII's racial discrimination counterpart. *Id.* However, the law regarding the availability of punitive damages without compensatory damages under § 1981 is unsettled. *Id.* at 589. Moreover, Levi bases her premise on the assumption that the law regarding damages under § 1981 follows the law regarding damages under § 1983. See *id.* (noting that presumption of availability of punitive damages without compensatory damages is based on *Carey v. Phipps*, 435 U.S. 247 (1978), which is § 1983 case). Although this Note does not address whether punitive damages may stand without compensatory damages under § 1981 and there-

rights violations; however, significant differences between § 1981a and § 1983 make the analogy inapplicable.¹⁵ As such, the argument for punitive damages without compensatory damages under § 1981a¹⁶ stands independent of a § 1983 analysis.¹⁷ This argument can be made through an examination of common restrictions on punitive damages and their application to § 1981a as well as through an analysis of *Kolstad v. American Dental Ass'n*,¹⁸ in which the Supreme Court outlined the standard for awarding punitive damages under § 1981a.¹⁹

This Note argues that a plaintiff may recover punitive damages without compensatory damages under § 1981a. First, this Note briefly examines fed-

fore whether an analogy between § 1981 and § 1981a is appropriate, this Note argues that the foundation for allowing punitive damages without compensatory damages under § 1983 does not apply to § 1981a. See *infra* Part IV (discussing inapplicability of § 1983 rationale to § 1981a).

15. See *infra* Part IV (discussing inapplicability of § 1983 rationale for awarding punitive damages in absence of compensatory damages to § 1981a).

16. See *infra* Part VIII (discussing common restrictions on punitive damages and their inapplicability to § 1981a).

17. See *infra* Parts VIII and IX (analyzing whether punitive damages may stand without compensatory damages under § 1981a).

18. 527 U.S. 526 (1999).

19. See also *Kolstad v. Am. Dental Ass'n*, 527 U.S. 526, 538 (1999) (establishing standard for awarding punitive damages in Title VII actions to be mental state of employer rather than employer's behavior). *Kolstad* sued her employer on grounds that the employer's Executive Director discriminated against *Kolstad* in a hiring decision. *Id.* at 530-31. *Kolstad* claimed that despite her excellent employment record, she had been a victim of a "preselection procedure [that] suggested an intent by the Association to discriminate on the basis of sex." *Id.* at 531 (internal quotation marks omitted). *Kolstad* sought punitive damages against the American Dental Association under § 1981a of Title VII. *Id.* at 532. The District Court, however, refused her request for a jury instruction on punitive damages. *Id.* On appeal, the Court of Appeals for the District of Columbia reversed, reasoning that the court should have permitted the jury to consider punitive damages if "the jury could reasonably have found intentional discrimination." *Id.* at 532 (citing *Kolstad v. Am. Dental Ass'n*, 108 F.3d 1431, 1437 (D.C. Cir. 1998) (internal quotation marks omitted)). On rehearing en banc, however, the D.C. Circuit affirmed the district court, stating that "the evidence of the defendant's culpability must exceed what is needed to show intentional discrimination." *Id.* at 533 (quoting *Kolstad v. Am. Dental Ass'n*, 139 F.3d 958, 961 (D.C. Cir. 1998) (internal quotation marks omitted)). The en banc panel interpreted § 1981a to require a showing of "egregious misconduct" on the part of a defendant to enable a jury to consider punitive damages. *Id.* (internal quotation marks omitted).

The Supreme Court vacated the D.C. Circuit's decision, interpreting the standard for awarding punitive damages under § 1981a to be based on the employer's state of mind, rather than on the employer's conduct. *Id.* at 538. Specifically, the Court stated that to be liable for punitive damages, the employer must "at least discriminate in the face of a perceived risk that its actions will violate federal law." *Id.* at 536. Furthermore, the Court maintained that while egregious misconduct may evidence the employer's state of mind, egregious misconduct need not be present for a jury to consider and award punitive damages. *Id.* at 538; see *infra* note 204 and accompanying text (describing Court's articulation of § 1981a's standard for imposing punitive damages); see also Part IX (discussing *Kolstad* standard of punitive liability).

eral remedies historically available for employment discrimination.²⁰ An examination of § 1981a and its legislative history will follow to determine Congressional intent in the enactment of § 1981a.²¹ After briefly discussing the court decisions that address this issue, this Note examines the limitations that courts often place on punitive damages and argues that they have no applicability to § 1981a claims.²² Finally, this Note analyzes the requirements for punitive liability under § 1981a that the Court established in *Kolstad*²³ to shed light on whether the requirements for punitive liability would permit punitive damages absent compensatory damages.²⁴ In conclusion, this Note recommends that punitive damages should be permissible in the absence of compensatory damages under § 1981a.²⁵

II. Remedies for Employment Discrimination Prior to 1991

Prior to 1964, victims of employment discrimination in the private sector had limited federal recourse to remedy the wrongs that private discrimination caused.²⁶ The Civil Rights Act of 1964 expanded the recourse available to these victims by establishing liability for employment discrimination on the basis of race, color, sex, religion, or national origin and by providing equitable and injunctive remedies.²⁷ This legislation marked a tremendous advance in

20. See *infra* Part II (detailing remedies historically available under Title VII).

21. See *infra* Part III (analyzing statutory language and legislative history of § 1981a).

22. See *infra* Parts VI, VII, and VIII (analyzing remedial scheme of § 1981a in light of restrictions on punitive damages).

23. 527 U.S. 526 (1999).

24. See *Kolstad v. Am. Dental Ass'n*, 527 U.S. 526, 538 (1999) (establishing standard for awarding punitive damages in Title VII actions to be mental state of employer rather than employer's behavior); see *infra* Part IX (discussing *Kolstad* standard for punitive liability).

25. See *infra* Part X (concluding that plaintiffs may recover punitive damages without compensatory damages).

26. See generally *Hurd v. Hodge*, 334 U.S. 24 (1948) (requiring "governmental action" for Civil Rights Act of 1866 to take effect); *Civil Rights Cases*, 109 U.S. 3 (1883) (finding that Reconstruction-era legislation did not bar private discrimination). Congress enacted the Reconstruction-era legislation, including the Civil Rights Act of 1866, under the authority of the Thirteenth Amendment. See Michael Reiss, *Requiem for an "Independent Remedy": The Civil Rights Acts of 1866 and 1871 as Remedies for Employment Discrimination*, 50 S.C. L. REV. 961, 971 (1977) (describing history of Reconstruction-era civil rights legislation). In the *Civil Rights Cases*, the Court stated that the Thirteenth Amendment granted Congress the authority only to enact legislation that would eliminate "all badges and incidents of slavery." *Civil Rights Cases*, 109 U.S. at 20. The Court did not find private individual's racial discrimination to constitute a badge or incident of slavery, thus, the Court decided that the Reconstruction-era legislation did not apply to private discrimination. See *id.* at 24 (describing Court's rationale).

27. See 42 U.S.C. § 2000e-2 (1994) (prohibiting employers, employment agencies, or labor organizations to discriminate because of "race, color, religion, sex or national origin"); *id.* § 2000e-5(g) (outlining equitable remedies).

the area of civil rights, yet facilitating mediation between employers and employees remained a primary policy objective of Congress.²⁸ This policy objective, along with the goal of making victims of employment discrimination "whole," fueled the enactment of Title VII.²⁹ Congress, therefore, limited the recourse available to victims to remedies such as back-pay, injunctions, and reinstatement.³⁰ While this remedy scheme helped victims who had suffered discrimination in the form of lost wages or lost career opportunities, many victims of discrimination still had no recourse for the injustices they suffered.³¹

The Supreme Court's decision in *Jones v. Alfred H. Mayer Co.*³² signaled the beginning of expanded remedies for race-based employment discrimination.³³ *Jones* addressed private acts of racial discrimination in the context of

28. See H.R. REP. NO. 102-40 (II), at 73 (1991) (Hyde et al., dissenting report), reprinted in 1991 U.S.C.C.A.N. 694; 758-59 (articulating congressional objectives in enacting prior employment discrimination legislation). Congress recognized that "[l]abor and employment disputes involve individuals and companies with an ongoing relationship that began before dissection and should continue after the differences are resolved." *Id.* at 72-73.

29. See *id.* at 72 (describing congressional goals in all prior employment discrimination legislation). Representative Hyde's dissenting report to House Report No. 102-40 states the following:

All of the labor and employment laws that Congress has enacted have one thing in common – they provide for "make-whole" relief designed to restore the injured person to the status he or she would have enjoyed if the unlawful act had not taken place By offering make-whole remedies, Congress has provided for full relief while preserving working relationships which otherwise might be destroyed by a punitive award.

Id. at 72-73.

30. See 42 U.S.C. § 2000e-5(g) (1994) (listing as remedies, "[i]njunctions; appropriate affirmative action; equitable relief; accrual of back pay; reduction of back pay; [or] limitations on judicial orders").

31. See Sergeant, *supra* note 1, at 187 (recognizing that "[i]f a claimant did not lose her job, there was little chance of monetary relief" under remedies of Title VII).

32. 392 U.S. 409 (1968).

33. See *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 417-37 (1968) (establishing that § 1982 of Civil Rights Act of 1866 prohibits all racial discrimination in purchasing and selling of property). The plaintiff in *Jones* brought suit in federal court because defendants refused to sell a home to plaintiffs solely because of plaintiffs' race. *Id.* at 412. The Eleventh Circuit Court of Appeals concluded that § 1982 applied only to state actors and could not be utilized to regulate private behavior. *Id.* In reversing the Eleventh Circuit, the Court maintained that Congress has the authority under the Thirteenth Amendment to determine what constitutes the "badges and incidents of slavery." *Id.* at 440. Congress, therefore, could determine that abridging a person's fundamental right "to inherit, purchase, lease, sell and convey property" on the basis of the person's race constituted a badge or incident of slavery. *Id.* at 441 (quoting Civil Rights Cases, 109 U.S. 3, 22 (1883)). The Court also noted that § 1982 applied only to private acts of racial discrimination and that, unlike the Fair Housing Act of 1968, § 1982 could not be applied to acts of discrimination based on national origin or religion. *Id.* at 413.

housing discrimination under § 1982 of the 1866 Civil Rights Act.³⁴ Prior to *Jones*, the Supreme Court consistently interpreted the Reconstruction-era statutes very narrowly.³⁵ The Court maintained that this legislation worked only to prevent actual slavery and did not apply to racial discrimination on the part of private individuals and entities.³⁶ In determining that a private entity could not refuse accessibility to housing on the basis of race, the *Jones* Court expanded the scope of the Reconstruction-era statutes to prohibit private race-based discrimination.³⁷

The idea of stemming private discrimination through the Reconstruction-era statutes eventually translated into a prohibition against employment discrimination in *Johnson v. Railway Express Agency, Inc.*³⁸ The *Railway Express* Court concluded that § 1981 prohibited racial discrimination in the making and enforcing of contracts.³⁹ The Court found that the statute applied not only to race-based discrimination in the formation of contracts, but also applied to race-based discrimination in the ongoing performance of contracts, including at-will employment.⁴⁰ *Railway Express* also established the first federal legal remedies for employment discrimination on the basis of race.⁴¹ Despite this expansion of remedies for race-based employment discrimination,

34. *See id.* at 440-41 (determining Congress could legislate to regulate private discrimination under authority of Thirteenth Amendment).

35. *See supra* note 26 and accompanying text (describing history of Supreme Court's interpretation of Reconstruction-era civil rights legislation).

36. *See supra* note 26 and accompanying text (describing Supreme Court's interpretation of legislative purpose behind Reconstruction-era civil rights legislation).

37. *See Jones*, 392 U.S. at 438-39 (establishing authority of Congress to enact legislation under Thirteenth Amendment that regulates conduct of private individuals).

38. *See Johnson v. Ry. Express Agency, Inc.*, 421 U.S. 454, 459-60 (1975) (applying decision reached in *Jones* to context of § 1981 provision for "making and enforcing contracts" in employment). Petitioner brought suit under Title VII and § 1981 of the Civil Rights Act of 1866. *Id.* at 455-56. He claimed that he was a victim of discrimination on the basis of race and that his employer had denied him promotion and seniority opportunities. *Id.* at 455. The statute of limitations had expired on his Title VII claim. *Id.* at 456. However, the Supreme Court granted certiorari to determine whether the statute of limitations also had expired on his § 1981 claim. *Id.* at 457. The Court determined that petitioner's § 1981 claim stood independent of his Title VII claim. *Id.* at 460-62. Although the Court distinguished § 1981 as a separate claim from a Title VII claim and determined that a complainant could recover under both, the Court determined that the statute of limitations for the § 1981 claim had expired. *Id.* at 460-67.

39. *Id.* at 459.

40. *See id.* (noting that Title VII's legislative history refers to § 1981 as another federal statute from which employees may seek relief). The Court stated that "§ 1981 affords a federal remedy against discrimination in private employment on the basis of race." *Id.* at 459-60.

41. *See id.* at 460 (stating that "[a]n individual who establishes a cause of action under § 1981 is entitled to . . . legal relief, including compensatory and, under certain circumstances, punitive damages").

victims of sex discrimination could still only recover back-pay or injunctive remedies.⁴²

III. The 1991 Civil Rights Act

Looking to broaden the remedies available to victims of sex discrimination, Congress enacted the Civil Rights Act of 1991.⁴³ Congress recognized that the facts of certain cases of sex discrimination warranted a broader remedial scheme to make the plaintiff whole for her injury.⁴⁴ Documented cases demonstrated how victims of sex discrimination, particularly in the context of sexual harassment, could not recover under the existing remedial scheme despite substantial injury.⁴⁵ In addition to physical, emotional, or psychological harm, victims often suffered economic injury in rectifying the effects of discrimination.⁴⁶ Furthermore, victims would experience feelings of shame or emotional harm, for which the equitable remedies available under the 1964 regime would not compensate.⁴⁷ Moreover, victims of racial discrimination historically could recover compensation for a variety of injuries suffered as result of the discrimination – not merely back-pay and reinstatement.⁴⁸ Noting this disparity, Congress recognized that in order to fully

42. See H.R. REP. NO. 102-40 (II), at 24 (1991), *reprinted in* 1991 U.S.C.C.A.N. 694, 717-18 (describing rationale for expanding remedial scheme for sex discrimination in workplace in Civil Rights Act of 1991). Representative Hyde's dissenting report to the House Report notes that "[t]he argument for the . . . expansion of title VII [to victims of sex discrimination] is based on the fact that 42 U.S.C. [§] 1981 includes punitive and compensatory damages as remedies." H.R. REP. NO. 102-40 (II), at 69 (1991) (Hyde et al., dissenting report).

43. See H.R. REP. NO. 102-40 (I), at 18 (1991), *reprinted in* 1991 U.S.C.C.A.N. 549, 556 (explaining purpose of Civil Rights Act of 1991 was in part "to strengthen existing remedies to provide more effective deterrence and ensure compensation commensurate with the harms suffered by victims of discrimination"); *id.* at 65 (recognizing need for damages to "make discrimination victims whole for the terrible injury to their careers, to their mental and emotional health, and to their self-respect and dignity").

44. See H.R. REP. NO. 102-40 (II), at 73 (1991) (Hyde et al., dissenting report), *reprinted in* 1991 U.S.C.C.A.N. 694, 759 (noting "weakness in Title VII, in that victims of on-the-job discrimination, who are not fired or otherwise lose their jobs receive no monetary remedy").

45. See H.R. REP. NO. 102-40 (II), at 25-28 (1991), *reprinted in* 1991 U.S.C.C.A.N. 694, 718-22 (chronicling stories of sex discrimination victims who had inadequate remedies under pre-1991 Title VII to compensate for injuries).

46. See *id.* at 25 (recognizing that "[v]ictims of discrimination often suffer substantial out-of-pocket expenses as a result of the discrimination, none of which is compensable with equitable remedies").

47. See *id.* at 25-28 (discussing emotional harm that victims of sex discrimination often suffer).

48. See H.R. REP. NO. 102-40 (I), at 65 (1991), *reprinted in* 1991 U.S.C.C.A.N. 549, 603 (noting broader availability of damages under § 1981).

compensate victims of sex discrimination in the workplace, it would have to provide an expanded remedial structure to these victims.⁴⁹

Compensation was not Congress's only goal in enacting a broader remedial scheme for sex discrimination in the Civil Rights Act of 1991.⁵⁰ Congress also was concerned that the remedies then available under Title VII ineffectively deterred sex discrimination in the workplace.⁵¹ Without an effective deterrent, incidences of sex discrimination fail to abate, and employers would have no incentive to establish preventative programs or remedial outlets for sex discrimination.⁵²

Congress recognized that by expanding damages available to compensate victims, employers would face a bigger potential cost of engaging in or permitting sex discrimination.⁵³ Nonetheless, Congress did not stop by creating a remedial structure consisting of only compensatory damages.⁵⁴ Congress's express desire to create greater deterrence from discrimination indicates the importance of the punitive damages provision.⁵⁵

IV. *The Inapplicability of the § 1983 Analogy*

A proposition has surfaced recently, which states that because courts permit punitive damages without compensatory damages in § 1983 actions, courts should similarly have the freedom to award punitive damages without compensatory damages under § 1981a.⁵⁶ However, substantive and structural

49. See *id.* at 104 (articulating principle behind 1991 civil rights legislation: "damages provision was drafted based on the principle that the scope of the harm should define the scope of the remedy").

50. See *id.* at 66, 69 (listing "compensation" and "deterrence" as reasons for expanding remedies for employment discrimination).

51. See *id.* at 68 (stating that equitable remedies alone "leaves prevailing plaintiffs without remedies for their injuries and allows employers who discriminate to avoid any meaningful liability").

52. See *id.* at 69 (explaining that increased risk of costs for engaging in discrimination will provide effective deterrence). Congress reasoned that "[m]aking employer liable for all losses – economic and otherwise – which are incurred as a consequence of prohibited discrimination . . . will serve as a necessary deterrent to future acts of discrimination." *Id.*

53. See *id.* at 69 (explaining that higher costs associated with discrimination will help deter such incidents).

54. See 42 U.S.C. 1981a(b) (1994) (providing punitive as well as compensatory damages, subject to total damage caps); *Carey v. Piphus*, 435 U.S. 247, 255 (1978) (noting that "Congress . . . did not address directly the question of damages" when drafting § 1983).

55. See H.R. REP. NO. 102-40 (I), at 73 (1991), *reprinted in* 1991 U.S.C.C.A.N. 594, 611 (stating that "substantial awards may be both necessary and appropriate in some cases . . . to ensure that the employer is deterred from engaging in future acts of discrimination").

56. See *Levi*, *supra* note 14, at 611-12 (arguing for unification of remedy structure under § 1981a with that under § 1983); *supra* note 14 (discussing *Levi*'s argument).

differences between the statutes indicate that a blanket analogy would be improper.⁵⁷ Section 1983 creates a constitutional tort.⁵⁸ Through § 1983, Congress defined a legal interest, the deprivation of which creates grounds for a plaintiff to seek damages.⁵⁹ Moreover, Congress remained silent as to the nature of damages as well as to the amount of damages recoverable.⁶⁰ These factors illustrate how a § 1983 claim parallels common law trespass torts,⁶¹ which are claims based on direct violations of an individual's established right or interest, regardless of whether harm actually results.⁶²

Because § 1983 claims are of a trespass nature, courts have determined that the same rules regarding damages for these torts, in which a plaintiff recovers for the invasion of a legally cognizable interest, should apply to § 1983.⁶³ Among the commonly accepted rules relating to trespass torts is the principle that a plaintiff's demonstration of an invasion – resulting in a finding of liability – entitles the plaintiff to recover nominal damages.⁶⁴ Furthermore, in severe cases of trespass torts, many courts recognize that punitive damages may stand without compensatory damages.⁶⁵ For that reason, courts will automatically institute a nominal damages award for a

57. See *infra* notes 58-74 and accompanying text (detailing fundamental differences between § 1981a and § 1983).

58. See DOBBS, *supra* note 9, § 7.4(1), at 334 (defining Constitutional tort, as established through § 1983, as claim "against those who deprive the plaintiff of some specific federal right under 'color of state law'").

59. See Mark Morrell, Comment & Note, *Who Wants Nominal Damages Anyway? The Impact of an Automatic Entitlement to Nominal Damages Under § 1983*, 13 REGENT U. L. REV. 225, 228 (2000) (noting that "the law recognizes the importance to organized society that [constitutional] rights be scrupulously observed, even if insufficient proof exists for compensatory or punitive damages" (citing *Carey v. Phipus*, 435 U.S. 247, 266 (1978) (internal quotation marks omitted))).

60. See 42 U.S.C. § 1983 (1994) (remaining silent on issue of damages).

61. See *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687, 715 (1999) (noting that § 1983 claim "sounds in tort and is most analogous to the various actions that lay at common law to recover damages for interference with property interests").

62. See *infra* Part VI.A (discussing evolution of trespass torts).

63. See *Carey v. Phipus*, 435 U.S. 247, 266 (1978) (recognizing that "[c]ommon-law courts traditionally have vindicated deprivations of certain 'absolute' rights that are not shown to have caused actual injury through the award of a nominal sum of money" and applying that rationale to § 1983 claim).

64. See RESTATEMENT (SECOND) OF TORTS § 907 cmt. b (1977) (stating that "[n]ominal damages can be awarded when the defendant has invaded an interest of the plaintiff . . . in actions for trespass to the person, a breach of duty by a public officer, interference with a right to vote or to hold public office and trespass to land").

65. See *id.* § 908 cmt. c (noting that "an award of nominal damages is enough to support a further award of punitive damages, when a tort, such as a trespass to land, is committed for an outrageous purpose, but no significant harm has resulted").

finding of liability without a simultaneous finding of compensatory damages.⁶⁶ Consequently, this nominal damages award will usually justify punitive damages.⁶⁷

Unlike § 1983, § 1981a does not parallel common law trespass claims.⁶⁸ First, § 1981a is merely a statutory remedies scheme.⁶⁹ Title VII encompasses the underlying claim upon which a plaintiff may recover damages through § 1981a, and Title VII has never been similar to common law trespass claim.⁷⁰ This fact is evident in the original recovery scheme for sex discrimination under Title VII. Congress enacted Title VII originally to provide equitable relief for wrongs committed by employers.⁷¹ Although Title VII prohibits sex discrimination in the workplace, the fact that plaintiffs could only recover very limited remedies suggests that Congress did not intend to create a legally cognizable interest for which a plaintiff could recover the full gamut of damages normally available in trespassory torts.⁷² The 1991 Civil Rights Act did not change this nature of a Title VII claim.⁷³ Congress has placed limits on the amount of damages, both compensatory and punitive, which indicates its reluctance to transform Title VII into a recognizable legal interest for

66. See *Carey*, 435 U.S. at 266-67 (granting nominal damages for § 1983 claim); Morrell, *supra* note 59, at 232-37 (discussing *Carey* and courts' willingness to award nominal damages for § 1983 violations both upon plaintiff's post-verdict request for nominal damages and upon plaintiff's failure to request nominal damages).

67. See *Levi*, *supra* note 14, at 595 n.64, n.96, n.97 (citing numerous federal cases which have granted punitive damages without compensatory damages for § 1983 claims).

68. See *infra* notes 69-74 and accompanying text (describing how Title VII – and § 1981a – deviate from common law trespass).

69. See 42 U.S.C. 1981a (1994) (outlining remedies available for violations of Title VII).

70. See *C.I.R. v. Schleier*, 515 U.S. 323, 334 (1995) (noting that "[pre-1991 Title VII] was not tortlike because it addressed 'legal injuries of an economic character'") (citing *United States v. Burke*, 504 U.S. 229, 239 (1992) (internal quotation marks omitted)). Although post-1991 Title VII does permit compensatory and punitive damages, the caps that Congress has implemented indicate that Title VII would still not be considered "tortlike" because a plaintiff would be unable to recover full damages if the injury for which she sought compensation were to exceed the maximum liability amount under the caps. Cf. *City of Monterey v. Del Monte Dunes at Monterey*, 526 U.S. 687, 715 (noting that common law claims, as well as § 1983 claims, entail plaintiff's entitlement to "just compensation" upon a finding of liability on part of defendant); *DOBBS*, *supra* note 9, § 7.4(3), at 342 (noting that "courts have held that the defendant is liable for *all* the damages naturally resulting from a constitutional deprivation" (emphasis added)).

71. See *Schleier*, 515 U.S. at 334 (noting that pre-1991 Title VII only permitted equitable remedies).

72. See *id.* (acknowledging that absence of legal remedies under Title VII indicated that "Title VII was not tortlike").

73. See *infra* note 74 and accompanying text (discussing how damages caps limit amount of compensation that plaintiff may seek under § 1981a).

which a plaintiff may recover unlimited damages based on her actual loss and on the defendant's conduct.⁷⁴

V. Court Decisions Regarding Punitive Damages Under § 1981a

There is understandable disagreement among courts about whether they can award punitive damages in the absence of compensatory damages in § 1981a suits.⁷⁵ Often, courts require a compensatory damages award before a jury may grant punitive damages.⁷⁶ The circuit courts are split, however, on whether this rule applies to sex discrimination suits under § 1981a.⁷⁷

The First Circuit Court of Appeals decided against upholding punitive damages without compensatory damages in *Kerr-Selgas v. American Airlines*.⁷⁸ The plaintiff in *Kerr-Selgas* sued her employer for discriminatory

74. See 42 U.S.C. § 1981a(b)(3) (1994) (providing damages caps for compensatory and punitive damages combined); *Del Monte Dunes*, 526 U.S. at 715 (stating that common law tort claims entitle plaintiff to recovery of "just compensation"); RESTATEMENT (SECOND) OF TORTS § 901 cmt. a (1977) (stating that "the law of torts attempts primarily to put an injured person in a position as nearly as possible equivalent to his position prior to the tort").

75. See *infra* notes 78, 84, 89, and 92 and accompanying text (outlining cases disagreeing on issue of punitive damages without compensatory damages): Compare *Timm v. Progressive Steel Treating, Inc.*, 137 F.3d 1008 (7th Cir. 1998) (determining that punitive damages are recoverable in absence of compensatory damages under § 1981a), *Hennessy v. Penril Data-comm Networks, Inc.*, 69 F.3d 1344 (7th Cir. 1995) (same), and *Cush-Crawford v. Adchem Corp.*, 94 F. Supp. 2d 294 (2d Cir. 2000) (same), with *Kerr-Selgas v. Am. Airlines, Inc.*, 69 F.3d 1205 (1st Cir. 1995) (holding punitive damages are not recoverable in absence of compensatory damages under § 1981a in Title VII suits).

76. See *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 580 (1996) (stating that "[t]he principle that exemplary damages must bear a reasonable relationship to compensatory damages has a long pedigree") (internal quotation marks omitted); *Kerr-Selgas*, 69 F.3d at 1214 (1st Cir. 1995) (stating "generally a claimant may not recover punitive damages without establishing liability for either compensatory or nominal damages").

77. See *infra* notes 78-96 (detailing courts that are split on issue of punitive damages in absence of compensatory damages).

78. See *Kerr-Selgas v. Am. Airlines*, 69 F.3d 1205, 1214-15 (1st Cir. 1995) (vacating punitive damages award after trial court allotted zero compensatory damages to federal claim). *Kerr-Selgas*, an employee of American Airlines, claimed that her immediate supervisor made sexual advances to her in an attempt "to manipulate her into an 'amorous relationship.'" *Id.* at 1206-07. After she rejected these advances, he treated her unfairly in several work situations, including disparaging her in the presence of others, invading her privacy by intrusive comments and inquiries, and excluding her from job-related activities. *Id.* at 1207. American Airlines finally terminated her, in part, because her supervisor filed negative evaluations of her performance. *Id.* The jury awarded *Kerr-Selgas* \$2,000,000 under her commonwealth sex discrimination claim and \$350,000 under her federal claim. *Id.* at 1209. After remittitur to reduce the compensatory award to \$400,000, the trial judge allocated the entirety of compensatory damages to the commonwealth claim and the entirety of the punitive damages to the federal claim. *Id.* The First Circuit Court of Appeals held that the trial court correctly allocated the damages because of the answers the jury submitted on a special verdict form. *Id.* at 1214. The court

termination.⁷⁹ After the jury found for the plaintiff, the trial judge allotted all of the punitive damages to the federal claim and all of the compensatory damages to the state claim.⁸⁰ On appeal, the circuit court vacated the punitive damage award, stating that without a related compensatory award, the punitive damages were untenable.⁸¹

The Seventh Circuit Court of Appeals has upheld punitive damages despite an absence of compensatory damages in *Hennessey v. Penril Datacomm Networks, Inc.*⁸² and in *Timm v. Progressive Steel Treating, Inc.*⁸³ The plaintiff in *Hennessey* sued her employer for sex and pregnancy discrimination.⁸⁴ The jury awarded the plaintiff back-pay, reinstatement, and although the jury failed to award compensatory damages, the jury did award punitive damages, which the trial court upheld.⁸⁵ On appeal, the defendant raised the issue of whether the plaintiff could recover punitive damages without compensatory damages, arguing that Illinois state law prevented such action.⁸⁶ The

concluded that "the most plausible explanation consistent with the special verdicts" was the jury's decision not to award compensatory damages under the Title VII claim. *Id.* Reasoning that tort law prohibited such an award, the court then held that the award of punitive damages could not stand without a compensatory damage award. *Id.* at 1214-15. Although the court did suggest that a jury could award punitive damages with only a nominal damage award despite the absence of language concerning nominal damages in § 1981a, the court declined to grant Kerr-Selgas a nominal damage award to sustain the punitive damages. *Id.* at 1215.

79. *See id.* at 1209 (detailing procedural history of case).

80. *Id.*

81. *See id.* at 1214-15 (noting historical inability to recover punitive damages without award of compensatory or nominal damages) (citing *Cooper Distrib. Co., Inc. v. Amana Refrigeration, Inc.*, 63 F.3d 262, 281-83 (3d Cir. 1995); RESTATEMENT (SECOND) OF TORTS § 908 cmt. c (1979)).

82. 69 F.3d 1344 (7th Cir. 1995).

83. 137 F.3d 1008 (7th Cir. 1998).

84. *See Hennessey*, 69 F.3d at 1348-49 (describing claim). Hennessey, a computer salesperson with Penril Datacomm Networks, Inc. (Penril), claimed that a co-worker, Burns, harassed her on two occasions prior to his becoming her supervisor. *Id.* at 1347-48. These encounters entailed taking Hennessey (and other co-workers) to a striptease club, encouraging her to perform a striptease, and making comparisons between her body and those of the dancers, as well as verbally expressing his attraction to her on a later occasion. *Id.* Shortly after Hennessey learned that she had become pregnant, Burns was promoted to become Hennessey's supervisor. *Id.* at 1348. Upon discovering her pregnancy, Burns chilled to Hennessey, eventually placing her on probation, writing unfavorable reviews of her performance, and ultimately terminating her employment. *Id.* Hennessey filed suit under Title VII for sex and pregnancy discrimination. *Id.* at 1348-49. The trial court found in favor of Hennessey and awarded punitive damages of \$300,000 against Penril. *Id.* at 1349. On appeal, Penril argued that the punitive damages could not stand without a finding of compensatory damages. *Id.* at 1351. The trial court, dismissing the defendant's analogy to Illinois common law, asserted that the statutory language of § 1981a permitted the punitive award to stand without compensatory damages. *Id.* at 1352.

85. *Id.* at 1349.

86. *Id.* at 1351.

court ruled, however, that the availability of remedies under § 1981a were not subject to Illinois state law restrictions, as § 1981a is a federal statute.⁸⁷ Moreover, the court reasoned that the language of the statute did not prevent the jury from awarding punitive damages without compensatory damages.⁸⁸

The plaintiff in *Timm* sued her employer under a hostile-work-environment theory only under Title VII.⁸⁹ The jury found for the plaintiff, but only awarded punitive damages.⁹⁰ On appeal, the court rejected the First Circuit's analysis, determining that the jury could have found that the plaintiff had satisfied the criteria for awarding punitive damages without proving a need for compensation.⁹¹

Recently, the District Court for the Eastern District of New York sided with the Seventh Circuit on this issue in *Cush-Crawford v. Adchem Corp.*⁹²

87. *Id.* at 1352.

88. *Id.*

89. See *Timm v. Progressive Steel Treating, Inc.*, 137 F.3d 1008, 1009 (detailing trial court's conclusion that co-worker's behavior created hostile work environment) (citing *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57 (1986); *Harris v. Forklift Sys., Inc.*, 510 U.S. 17 (1993)). *Timm* based her claim of discrimination against Progressive Steel on allegations that a co-worker frequently harassed her through unwelcome sexual contact and advances. *Id.* at 1009. In addition to inappropriate comments, the co-worker "frequently snuck up from behind her and grabbed or pinched her buttocks" or "would run his hand up her thighs." *Id.* At trial, the jury awarded punitive damages but no compensatory damages. *Id.* The Seventh Circuit Court of Appeals maintained that the jury's award of punitive damages was "not inconsistent with the lack of compensatory damages." *Id.* at 1010. The court reasoned that the fact that *Timm* was a former prison-guard could have led the jury to reasonably believe that her injury did not warrant compensation, despite the fact that the jury found *Timm*'s co-worker's conduct to warrant punitive damages. *Id.* As the First Circuit Court of Appeals hinted in *Kerr-Selgas*, the court in *Timm* suggested that a trial court could award nominal damages in this situation, but again the court refused to do so. *Id.*

90. See *Timm*, 137 F.3d at 1009 (detailing procedural history of case).

91. See *id.* at 1010-11 (arguing "nothing in the plain language of § 1981a conditions an award of punitive damages on an underlying award of compensatory damages") (quoting *Hennessy v. Penril Datacomm Networks, Inc.*, 69 F.3d 1344, 1352 (7th Cir. 1995) (internal quotation marks omitted)).

92. See *Cush-Crawford v. Adchem Corp.*, 94 F. Supp. 2d 294, 299 (E.D.N.Y. 2000) (determining that punitive damages are recoverable in absence of compensatory damages). *Cush-Crawford* sued her employer on the basis of her supervisor's unwelcome sexual advances, which created a hostile work environment. *Id.* at 296. *Cush-Crawford* complained to Adchem about the unwelcome sexual advances to no avail. *Id.* The jury imputed the liability for the supervisor's actions to the employer Adchem and awarded punitive damages but no compensatory damages. *Id.* at 297. When Adchem moved for judgment notwithstanding the verdict under Rule 50 of the Federal Rules of Civil Procedure on grounds that the jury granted punitive damages in the absence of compensatory damages, the trial court ruled that compensatory damages need not predicate punitive damages. *Id.* at 299. The court reasoned that a Title VII claim is more similar to a § 1983 civil rights claim than a common-law tort claim; thus, the rationale of the First Circuit in *Kerr-Selgas* was incorrect. *Id.* at 299. Furthermore, the trial

The plaintiff in *Cush-Crawford* sued her employer under a hostile-work-environment theory.⁹³ The jury returned a verdict for the plaintiff and awarded only punitive damages.⁹⁴ The trial court, in upholding the award, reasoned that the punitive damage award did not require a comparable compensatory damages award.⁹⁵ The trial court also distinguished suits under Title VII from common-law tort suits that require a jury to award compensatory damages before a court may sustain a punitive damages award.⁹⁶

The Supreme Court's ruling in *Kolstad v. American Dental Ass'n*⁹⁷ may help to clarify the issue of whether a court may uphold punitive damages without compensatory damages under § 1981a.⁹⁸ The Court held that the standard for awarding punitive damages centered on the employer's mental state while engaging in discriminatory acts.⁹⁹ Although the offensive nature of a defendant's behavior may indicate that the defendant discriminated with malice or reckless disregard for the plaintiff's rights, the Court emphasized that egregious behavior on the part of the employer was neither definitive nor necessary to satisfy the standard for proving punitive damages.¹⁰⁰ Shifting the standard to the employer's mental state and away from the employer's actual

court cited several Title VII cases which digressed from common-law principles. *Id.* Again, the trial court in *Cush-Crawford* addressed the issue of nominal damages in Title VII suits, suggesting that a court could award nominal damages in the absence of compensatory damages, but chose not to do so. *Id.*

93. *See id.* at 296 (detailing procedural history of case).

94. *Id.*

95. *See id.* at 299 (explaining court's ruling).

96. *See id.* (distinguishing Title VII suits from common law tort suits). The court in *Cush-Crawford*, noting that plaintiffs may recover punitive damages without compensatory damages in civil rights suits under § 1983, determined that Title VII suits more closely resemble § 1983 than common law tort actions. *Id.* The court therefore found "no reason . . . for reading a compensatory-punitive link into . . . Title VII." *Id.* (quoting *Timm v. Progressive Steel Treating, Inc.*, 137 F.3d 1008, 1009 (7th Cir. 1998) (internal quotation marks omitted)).

97. 527 U.S. 526 (1999).

98. *See Kolstad v. Am. Dental Ass'n*, 527 U.S. 526, 538 (1999) (establishing standard for awarding punitive damages in Title VII actions to be mental state of employer rather than employer's behavior). For a detailed discussion of *Kolstad*, *see supra* note 19.

99. *See Kolstad*, 527 U.S. at 538 (interpreting § 1981a(b)(1) to require specific mental state distinct from behavior on part of employer for employee to recover punitive damages).

100. *See id.* at 535 ("While egregious misconduct is evidence of the requisite mental state . . . [§ 1981a] does not require a showing of egregious or outrageous discrimination independent of the employer's state of mind."). The *Kolstad* Court also maintained that an employer may be held vicariously liable for punitive damages when an employee engages in sex discrimination against another employee, even though the employer does not have the requisite mental state, unless the employer exhibits "good-faith efforts to comply with Title VII." *Id.* at 545 (quoting *Kolstad v. Am. Dental Ass'n*, 139 F.3d 958, 974 (D.C. Cir. 1998) (Tatel, J., dissenting) (internal quotation marks omitted)).

behavior, the Court opened the door to the possibility that an employer's mental state may warrant a punitive damages award without the employer's behavior being sufficiently outrageous to cause injury to the plaintiff.¹⁰¹

VI. Limitations on Punitive Damages

Courts usually grant punitive damages subject to certain informal restrictions relating to corresponding compensatory damages.¹⁰² The rationale for this policy stems from the idea that in most cases the primary purpose of awarding damages is to compensate a victim at the expense of the person who wronged him.¹⁰³ Courts and commentators view punitive damages as "extra-compensatory."¹⁰⁴ Punitive damages serve two primary objectives: to punish

101. See *id.* at 538 (stating that specific mental state does not mandate "that employers must engage in conduct with some independent, 'egregious' quality before being subject to a punitive award"); see also *Timm v. Progressive Steel Treating, Inc.*, 137 F.3d 1008, 1010-11 (7th Cir. 1998) (describing situations in which plaintiff may suffer injury sufficient to have standing to bring claim, yet not have injury sufficient to warrant compensation). The court in *Timm* analogized the situation at hand to housing discrimination cases involving "testers." *Id.* at 1010. Testers never suffer injury requiring compensation because they never actually intend to occupy the housing in question. *Id.* When testers suffer discrimination, however, they automatically suffer injury in fact and may thus recover punitive damages. *Id.* at 1010-11. The court argued that even a person reading a newspaper advertisement depicting "racially unbalanced groups of models may be entitled to punitive damages." *Id.* (citing *Tyus v. Urban Search Mgmt.*, 102 F.3d 256, 266 (7th Cir. 1996)). Because of the Supreme Court's ruling in *Kolstad*, a situation may arise in which an employee has an injury sufficient for standing, yet no injury requiring compensation, and the employee may prove that the employer's mental state during the discrimination fulfills the standard for assessing punitive damages. See *Cush-Crawford v. Adchem Corp.*, 94 F. Supp. 2d 294, 299-300 (maintaining that language of § 1981a, as interpreted in *Kolstad*, "indicates that a Title VII plaintiff seeking punitive damages need not show 'egregious' behavior by an employer, but merely demonstrate that the employer knew that it may have been acting in violation of federal law").

102. See *infra* notes 109-30 and accompanying text (articulating "actual damages rule"); notes 131-40 and accompanying text (articulating "ratio rule").

103. See DOBBS, *supra* note 9, § 3.1, at 279 (describing use of word "damages" to often mean "either the harm or loss suffered by the plaintiff"); Janet Mallor & Barry Roberts, *Punitive Damages: Toward a Principled Approach*, 31 HASTINGS L. J. 639, 643 (1980) (stating criticism of punitive damages is that they are extra-compensatory). Mallor and Roberts proposed that punitive damages evolved as a way to compensate plaintiffs either for injury that could be compensated, such as intangible injury, or for injury whose compensatory value was difficult for courts to measure. *Id.* at 642-43. Either way, Mallor and Roberts suggested that punitive damages developed in the law primarily to compensate. *Id.* at 643. They claimed that critics of punitive damages argue that punitive damages have become obsolete with the expansion of compensatory damages for intangible and otherwise immeasurable harms. *Id.* at 643. Mallor and Roberts argued, however, that although punitive damages originated to compensate, their commonly accepted purpose of punishment and deterrence presently serves important societal goals. *Id.* at 647-50.

104. See DOBBS, *supra* note 9, § 3.11(1), at 452 (noting punitive damages "go beyond any

and to deter.¹⁰⁵ Juries award these damages in addition to any compensatory damages.¹⁰⁶ Although punitive damages serve the important purpose of punishing socially offensive behavior, courts recognize that punitive damages are subject to abuse.¹⁰⁷ Courts therefore have been reluctant to uphold punitive damage awards under circumstances in which these informal restrictions are not present.¹⁰⁸

A. Actual Damages Requirement

Many courts will not award punitive damages unless the plaintiff proves actual damage.¹⁰⁹ This requirement stems from the common law principle that a plaintiff cannot recover on a claim unless the plaintiff proved injury to a legally recognized interest.¹¹⁰ If a plaintiff has suffered no deprivation of a legally recognized right or interest, then the plaintiff has no standing to bring a claim.¹¹¹ The plaintiff would not, therefore, be entitled to recover punitive damages.¹¹²

The early common law recognized the two following types of claims: trespass and trespass on the case.¹¹³ Originally, courts only would recognize

obvious elements of ordinary compensation and are intended to punish or deter extreme departures from acceptable conduct").

105. See RESTATEMENT (SECOND) OF TORTS § 908(1)(1979) (stating that punitive damages are "awarded against a person to punish him for his outrageous conduct and to deter him and others like him from similar conduct in the future"; DOBBS, *supra* note 9, § 3.11(1), at 453 (noting punishment and deterrence as primary purposes of punitive damages).

106. See DOBBS, *supra* note 9, § 3.11(1), at 455 (explaining that punitive damages are awarded separately from compensatory damages). Dobbs states that while "all remedies may have punitive effects," juries award punitive damages separately from compensatory damages. *Id.*

107. See *id.* § 3.11(1), at 452-55 (discussing controversial nature of punitive damages and "basic rules" for granting punitive damages).

108. See *id.* § 3.11(10), at 512 (discussing court reluctance to uphold punitive damage award in absence of actual damage); *id.* § 3.11(11), at 515 (discussing court reluctance to uphold punitive damages that do not bear "some reasonable relationship to the amount of compensatory damages awarded").

109. See *id.* § 3.11(10), at 515 (explaining "actual damages rule"); JAMES M. FISCHER, UNDERSTANDING REMEDIES § 302, at 702 (1999) (same).

110. See Note, *Exemplary Damages in the Law of Torts*, 70 HARV. L. REV. 517, 528-29 (1957) [hereinafter *Exemplary Damages*] (stating principle that plaintiff must have cause of action other than to punish defendant to sustain punitive damages). A plaintiff cannot "maintain an action solely to punish the defendant for wrongful conduct." *Id.* at 529.

111. See *id.* (articulating requirement that plaintiff must have standing to recover punitive damages).

112. *Id.*

113. See W. PROSSER, HANDBOOK ON THE LAW OF TORTS § 7, at 28-40 (4th ed. 1971) (discussing evolution of writs of "trespass" and "trespass on the case").

trespass claims.¹¹⁴ A cause of action for trespass would involve an injury to the plaintiff that resulted directly from the defendant's conduct.¹¹⁵ As this Note mentioned previously in its discussion of § 1983, a trespass claim entailed a direct invasion of the plaintiff's person, property, or other legally protected interest.¹¹⁶ Moreover, a defendant would have to have acted intentionally to be guilty of a trespass action.¹¹⁷ Courts soon realized that a plaintiff might suffer an injury that was not a direct invasion on the part of the defendant; rather, the injury was only *indirectly* caused by a defendant's conduct.¹¹⁸ Under the theory of trespass, such a plaintiff would be unable to recover compensation for this injury.¹¹⁹ For this reason, courts developed the theory of trespass on the case.¹²⁰ For a plaintiff to recover under trespass on the case, courts required that a plaintiff demonstrate not only an invasion of a legal interest, but also that this invasion damaged the

114. See *id.* at 28 (noting that courts originally recognized only trespass cases).

115. See *Nappe v. Anschelewitz, Barr, Ansell & Bonello*, 477 A.2d 1224, 1228 (N.J. 1984) (recognizing that trespass provided "remedy for forcible, direct, and immediate injuries to persons or property"). The New Jersey Supreme Court in *Nappe* articulated the principle of trespass distinctly, stating that trespass claims were "directed at breaches of the King's peace" and involved harms that were a direct consequence of a defendant's actions. *Id.*

116. See PROSSER, *supra* note 113, § 7, at 28 (noting that "[t]respass was the remedy for all forcible, direct and immediate injuries, whether to person or to property"); see also *supra* Part IV (describing similarities between § 1983 and trespass claims at common law).

117. See Gary T. Schwartz, *Tort Law and the Economy in Nineteenth Century America: A Reinterpretation*, 90 YALE L.J. 1717, 1723 (1981) (noting that "trespass" often entailed intentional conduct). Schwartz explains that "the early writ of trespass . . . seems to have been primarily addressed to intentional harm-causing conduct, conduct that would now be identified as basically criminal." *Id.*; see also *Nappe*, 477 A.2d at 1228 (noting that activity falling under "trespass" was "quasi-criminal in nature"). But see *id.* at 1229 (maintaining that distinction between "trespass" and "trespass on the case" "was not between intentional and negligent conduct, but was based instead on the causal sequence and the directness of the harm").

118. See PROSSER, *supra* note 113, § 7, at 28-29 (noting subsequent development of cause of action for indirect injury); see also *Nappe*, 477 A.2d at 1229 (same). The *Nappe* court explained that "[t]respass on the case . . . developed as a supplement to trespass to afford a remedy for injury resulting indirectly." *Id.*

119. See *Nappe*, 477 A.2d at 1228 (recognizing that trespass claims only involved "forcible, direct" harms).

120. See PROSSER, *supra* note 113, § 7, at 28-29 (describing development of "trespass on the case"); see also *Nappe*, 477 A.2d at 1229 (same). The distinction between trespass and trespass on the case is best clarified as follows:

The distinction in law is, where the immediate act itself occasions a prejudice, or is an injury to the plaintiff's person, house, land, etc. and where the act itself is not an injury, but a consequence from that act is prejudicial to the plaintiff's person, house, land, etc. In the first case trespass . . . will lie; in the last it will not, but the plaintiff's proper remedy is by an action on the case.

Reynolds v. Clarke, 92 Eng. Rep. 410, 413 (1725).

plaintiff.¹²¹ Even if a plaintiff could prove that a defendant's conduct had indirectly invaded a plaintiff's legal interest, the plaintiff would not have standing to sue under trespass on the case unless the plaintiff also proved damage requiring compensation.¹²²

The development of trespass on the case led to the idea that a plaintiff could not recover punitive damages without compensatory damages.¹²³ Proving injury was a required element of trespass on the case.¹²⁴ For this reason, if a plaintiff failed to prove a need for compensation, the claim itself would fail.¹²⁵ The plaintiff would then have no right to recover punitive damages.¹²⁶

Courts recognized that claims which evolved from trespass required no demonstration of damage apart from an invasion of a legally protected interest.¹²⁷ These claims differed from claims which evolved from trespass on the case in that a plaintiff would not need to prove damage to succeed in proving the claim.¹²⁸ To acknowledge a plaintiff's rights in this situation, courts developed nominal damages.¹²⁹ While many jurisdictions today have permit-

121. See *Nappe*, 477 A.2d at 1229 (recognizing that "[i]n trespass on the case there could ordinarily be no liability unless actual damage was proven") (citing 2 W. WAIT, ACTIONS AND DEFENSES 99-02 (1877); PROSSER, *supra* note 113, § 7, at 28-30 (4th ed. 1971)).

122. See *Nappe v. Anshelewitz, Barr, Ansell & Bonello*, 477 A.2d 1224, 1229 (N.J. 1984) (articulating requirement that plaintiff prove damage to recover under "trespass on the case").

123. See *Exemplary Damages*, *supra* note 110, at 528-29 (stating that plaintiff who cannot sustain cause of action cannot recover punitive damages); *infra* text accompanying notes 124-26 (discussing injury requirement for "trespass on the case").

124. See *supra* notes 118-22 and accompanying text (discussing evolution of "trespass on the case").

125. See PROSSER, *supra* note 113, § 7, at 28-29 (describing that "trespass on the case" required proof of damage beyond defendant's interference with plaintiff's legal interest).

126. See *Exemplary Damages*, *supra* note 110, at 528-29 (discussing plaintiff's need to prove claim to recover punitive damages).

127. See PROSSER, *supra* note 113, § 7, at 29 (maintaining that plaintiff need not prove actual damage in trespass claim to sustain cause of action); see also *Nappe*, 477 A.2d at 1228-29 (same). The *Nappe* court noted that "[p]roof of actual damage was not required [in trespass actions] because invasion of the plaintiff's rights was regarded as the tort in itself." *Id.*

128. See *Nappe v. Anshelewitz, Barr, Ansell & Bonello*, 477 A.2d 1224, 1228-29 (N.J. 1984) (distinguishing "trespass" from "trespass on the case").

129. See RESTATEMENT (SECOND) OF TORTS, § 907 (1979) (stating that nominal damages exist for situations in which plaintiff proved cause of action, but either no harm exists or plaintiff fails to prove harm); DOBBS, *supra* note 9, § 3.3(2), at 295 (suggesting that nominal damages are available "in tort cases that have their roots in the writ of trespass as distinct from the action on the case"). Courts generally have recognized that intentional torts, such as trespass, cause injury even if they do not cause damage. See *Jacque v. Steenberg Homes, Inc.*, 563 N.W.2d 154, 160 (Wis. 1997) (stating that "law recognizes actual harm in every trespass to land whether or not compensatory damages are awarded"). Only torts that have descended from trespass may sustain nominal damages. See RESTATEMENT (SECOND) OF TORTS, § 907,

ted punitive damages with only nominal damages, some courts still maintain that a plaintiff cannot recover punitive damages, even on trespass claims, without compensatory damages.¹³⁰

B. Ratio Between Punitive and Compensatory Damages

Many jurisdictions also require that punitive damages bear a "reasonable relationship" to the compensatory damages.¹³¹ There are two primary rationales for this principle.¹³² First, courts reason that because punitive damages serve to punish, the amount of punitive damages a defendant must pay should reflect the nature of the defendant's conduct.¹³³ If a defendant only causes minimal damage, many courts argue that the defendant's conduct does not warrant an excessive punishment.¹³⁴ In addition, the "reasonable relationship" test prevents juries from granting excessive punitive damages.¹³⁵ In common law claims, juries usually have tremendous discretion in determining the amount of punitive damages a defendant should pay.¹³⁶ Therefore, a jury's

cmt. b (1977) (listing examples of trespass torts that may sustain nominal damages). Because the tort of negligence has evolved from trespass on the case, nominal damages are not available in cases of negligence, as well as any other tort that indirectly causes injury. *See id.* § 907, cmt. a (stating that when actual damage is required to sustain cause of action, nominal damages will not stand).

130. *See Exemplary Damages, supra* note 110, at 529 (explaining that while courts may permit recovery of punitive damages with only nominal damages, some do not).

131. *See DOBBS, supra* note 9, § 3.11(11), at 516 (recognizing that many courts have required that punitive damages "must be limited so that [they] bear some reasonable relationship to the amount of compensatory damages").

132. *See Exemplary Damages, supra* note 110, at 530-31 (stating that judicial review of punitive damages awards exists to check jury discretion and to conform defendant's punishment with inflicted harm).

133. *See id.* (stating that many courts argue that "there must be a proper relationship between the exemplary damages and the type of injury inflicted"). *But see DOBBS, supra* note 9, § 3.11(11), at 519 (advancing argument that ratio "rules" are inconsistent with purpose of punitive damages "to be proportioned to the defendant's evil attitude and serious misconduct"); *Exemplary Damages, supra* note 110, at 530-31 (arguing that associating punitive damages with actual harm undermines purpose of punitive damages to punish "social undesirability of the defendant's behavior").

134. *See Jacque v. Steenberg Homes, Inc.*, 563 N.W.2d 154, 158 (Wis. 1997) (presenting argument that plaintiff with nominal interest should not recover punitive damages because society "has little interest" in rectifying insignificant harms). Some states have enacted "tort-reform" statutes to limit the jury's discretion in granting punitive damages in tort law. *See FISCHER, supra* note 109, § 307, at 717-18 (discussing "tort-reform" statutes).

135. *See Exemplary Damages, supra* note 110, at 530 (stating that many courts utilize "reasonable relationship" test to reign in jury's wide discretion in granting punitive damages).

136. *See Jacque*, 563 N.W.2d at 163 (stating that award of "punitive damages in a particular case is entirely within the discretion of the jury").

subjective feelings about a defendant could influence the amount of the punitive damages.¹³⁷

Many courts look to the amount of compensatory damages to determine whether the punitive damages are reasonable to prevent imposition of excessive punitive damages.¹³⁸ If the amount of punitive damages is "grossly excessive" in relation to the damage the defendant actually caused, courts will reduce the punitive damages.¹³⁹ The reasoning underlying such reductions is that such a large amount of punitive damages exceeds both what is sufficient punishment for the defendant's actions and what is necessary to deter future action, thereby overstepping the purpose of punitive damages.¹⁴⁰

VII. Punitive Damages Under Gore

Furthermore, punitive damages have become increasingly controversial, particularly as they pertain to due process considerations.¹⁴¹ As late as 1993, the Supreme Court affirmed punitive damage awards far in excess of compensatory damages.¹⁴² The Court's rationale for upholding such large damages was that even though the amounts were out of proportion to the compensatory damages, the punitive damages did not violate the defendants' due process rights.¹⁴³ However, in *BMW of North America, Inc. v. Gore*,¹⁴⁴ the Supreme

137. See *Pac. Mut. Life Ins. v. Haslip*, 499 U.S. 1, 9 (1991) (stating that punitive damages may not be upheld if they were "the product of bias or passion" on part of jury) (quoting *Browning-Ferris Indus. of Vt. v. Kelco Disposal, Inc.*, 492 U.S. 257, 276 (1989)); *Exemplary Damages*, *supra* note 110, at 530 (stating that "exemplary damages are based on the jury's feelings and sentiments as to what will best punish and deter the defendant").

138. See *Exemplary Damages*, *supra* note 110, at 530 (noting many courts' use of "reasonable relationship" test to limit jury's discretion in granting punitive damages).

139. See *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 568 (1996) (stating that "grossly excessive" punitive damages violate due process); *TXO Prod. Corp. v. Alliance Res. Corp.*, 509 U.S. 443, 454 (1993) (same).

140. See *Jacque v. Steenberg Homes, Inc.*, 563 N.W.2d 154, 158 (Wis. 1997) (noting that society is not interested in punishing and deterring conduct that creates little harm).

141. See *Gore*, 517 U.S. at 585-86 (reducing punitive damage award in light of due process considerations). *Gore* initiated a new examination into punitive damages and the due process considerations implicated by excessive punitive awards. See *infra* notes 144-61 and accompanying text (articulating Supreme Court's rationale behind *Gore*).

142. See *TXO Prod. Corp. v. Alliance Res. Corp.*, 509 U.S. 443, 466 (1993) (upholding punitive award of \$10 million with compensatory award of \$19,000); *Pacific Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 23-24 (1991) (upholding punitive award of more than four times amount of compensatory award).

143. See *TXO*, 509 U.S. at 462 (finding extremely large punitive damage award within power of state); *Haslip*, 499 U.S. at 23-24 (finding adequate procedural protections and objective criteria to support jury's award of punitive damages).

144. 517 U.S. 559 (1996).

Court departed from this rationale and struck down a large punitive damage award.¹⁴⁵

Gore involved an Alabama products liability claim, in which the plaintiff sought compensatory damages for a repainted BMW and punitive damages on the basis of the defendant dealer's misrepresentations about the car.¹⁴⁶ The jury awarded \$4,000 in compensatory damages and \$4 million in punitive damages, which the Alabama Supreme Court then reduced to \$2 million.¹⁴⁷ On appeal, the United States Supreme Court determined that the amount of punitive damages violated the defendant's due process rights under the Fourteenth Amendment.¹⁴⁸ Three factors led to this conclusion.¹⁴⁹ First, the Court determined that the defendant's conduct was not sufficiently reprehensible and did not warrant such a large punitive damage award.¹⁵⁰ Recognizing that "some wrongs are more blameworthy than others," the Court reasoned that the purely economic harm that the defendant caused was not sufficiently reprehensible to warrant such a large punitive damage award in addition to compensation.¹⁵¹

145. See *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 585 (1996) (comparing imposition of punitive damage award to imposing "severe criminal penalty"). The plaintiff purchased an automobile from the defendant, who had failed to disclose paint damage on the car prior to the sale. *Id.* at 563. The plaintiff sued to recover the amount he paid for the car minus the true value of the automobile, plus punitive damages for the defendant's misrepresentation. *Id.* at 563-64. The jury awarded the plaintiff \$4,000 in compensatory damages and \$4 million in punitive damages. *Id.* at 565. The Alabama Supreme Court found the \$4 million punitive award excessive and ordered remittur of \$2 million. *Id.* at 567. After the defendant appealed, the Supreme Court granted certiorari to determine the constitutionality of a punitive award 500 times the size of the compensatory award. *Id.* at 568. The Court held that the punitive damages award violated the constitutional limits of a permissible punitive award. *Id.* at 585-86. The Court considered the degree of reprehensibility of defendant's conduct, the ratio of punitive damages to compensatory damages, and the possible sanctions available under the comparable criminal statute to determine that the punitive award in this case was unreasonable. *Id.* at 575-85.

146. See *id.* at 563 (discussing facts of case and amount requested in complaint).

147. See *id.* at 565-67 (detailing procedural history of case).

148. See *id.* at 585-86 (determining that excessiveness of punitive award exceeded constitutional limits).

149. See *id.* at 574-75 (discussing three factors that Court considered in determining punitive damage award to be excessive). The Court "rejected the notion that the constitutional line is marked by a simple mathematical formula." *Id.* at 582 (quoting *TXO Prod. Corp. v. Alliance Res. Corp.*, 509 U.S. 443, 458 (1993)).

150. See *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 575-80 (1996) (analyzing reprehensibility of defendant's conduct). The Court noted that "[p]erhaps the most important indicium of the reasonableness of a punitive damages award is the degree of reprehensibility of the defendant's conduct." *Id.* at 575.

151. See *id.* at 576 (determining that defendant's conduct was not sufficiently reprehensible to support punitive damage award). The Court stated that "none of the aggravating factors associated with particularly reprehensible conduct [were] present." *Id.* The Court explained

The second factor the Court considered was the ratio of the punitive damages to compensatory damages.¹⁵² The Court found that the \$2 million punitive damage award was "grossly excessive" compared to the \$4,000 compensatory award.¹⁵³ The Court stated that punitive damages should reasonably relate to the actual harm that has occurred, and to the "harm likely to result from the defendant's conduct."¹⁵⁴ In *Gore*, the Court noted that not only were the punitive damages 500 times greater than the compensatory damages, but also no threat of additional damage was ever present under the facts of the case.¹⁵⁵

Lastly, the Court examined the sanctions available under Alabama state law for comparable misconduct.¹⁵⁶ The Court reasoned that because the purpose of punitive damages is to punish, looking to the state legislature to determine what it would consider sufficient punishment for this offense would clarify whether the punitive damages were reasonable.¹⁵⁷ Noting that the maximum civil fine that the defendant would face from the state of Alabama was only \$2,000, the Court determined that a \$2 million punishment was

that because the harm was purely economic in nature, the defendant in no way compromised the safety of its consumers, and the plaintiff produced no evidence that the defendant deliberately deceived anyone with regard to the damaged automobiles, or had any improper motive at all. *Id.* at 576, 579.

152. *See id.* at 580-83 (analyzing reasonableness of punitive damages in relation to compensatory damages, as well as actual damages).

153. *See id.* at 585-86 (finding punitive damages unreasonable as compared to amount of compensatory award). The Court found that because the punitive damage award was more than 500 times greater than the amount of damage the plaintiff actually suffered, the punitive award was excessive. *Id.* at 582-83. The Court maintained, however, that under certain circumstances, punitive damages that are relatively large in comparison to the corresponding compensatory damages would be acceptable. *See id.* at 582 (stating that "low awards of compensatory damages may properly support a higher ratio . . . [if] a particularly egregious act has resulted in only a small amount of economic damages").

154. *Id.* at 581 (quoting *TXO Prod. Corp. v. Alliance Res. Corp.*, 509 U.S. 443, 460 (1993)).

155. *See BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 582 (1996) (stating that jury's punitive award was 500 times the amount of compensatory damages); *see id.* at 582 (stating that "there is no suggestion that Dr. Gore or any other BMW purchaser was threatened with any additional potential harm").

156. *See id.* at 583-85 (comparing punitive damage award to civil fines defendant would face in criminal proceeding).

157. *See id.* at 583 (noting importance of state's punishment policy in deciding whether punitive damage award is reasonable). The Court stated that "a reviewing court engaged in determining whether an award of punitive damages is excessive should 'accord substantial deference to legislative judgments concerning appropriate sanctions for the conduct at issue.'" *Id.* (quoting *Browning-Ferris Indus. of Vt. v. Kelco Disposal, Inc.*, 492 U.S. 257, 301 (1989) (O'Connor, J., concurring in part and dissenting in part) (internal quotation marks omitted)).

indeed excessive.¹⁵⁸ Furthermore, the Court maintained that because the civil penalty was so low in comparison to the punitive damages, the defendant could not have foreseen this large amount of punitive damages.¹⁵⁹ Subjecting the defendant to this punitive damage award would, the Court reasoned, violate the defendant's substantive due process rights.¹⁶⁰ This factor, together with the lack of reprehensible conduct on the part of the defendant and the excessive ratio of the punitive award to the plaintiff's actual damages, contributed to the Court's determination that the punitive damage award could not stand under the Fourteenth Amendment.¹⁶¹

VIII. Common Law and Due Process Limitations Applied to § 1981a Claims

Although courts traditionally have attached the aforementioned limitations to punitive damages, they are unnecessary under § 1981a because of Congress's implementation of caps to damage awards.¹⁶² These caps, which apply to the combined total of punitive and compensatory damages, create their own limitations on the availability of punitive damages under § 1981a.¹⁶³ As this Note will demonstrate, the effect of these limitations obviate the need for the restrictions that courts commonly have placed on punitive damages.¹⁶⁴

A. Actual Damages and Reasonable Ratio

Although the common law requires that a plaintiff prove actual damage before recovering punitive damages, this limitation on punitive damages should not apply in the case of recovery under § 1981a.¹⁶⁵ The common law

158. See *Gore*, 517 U.S. at 584 (noting that maximum penalty for defendant's conduct under Alabama's Deceptive Trade Practices Act was civil fine not to exceed \$2,000).

159. See *id.* (acknowledging that civil fine would not "provide an out-of-state distributor with fair notice that the . . . [violation] might subject an offender to a multimillion dollar penalty").

160. See *id.* at 585 (maintaining that subjecting defendant to punitive award would be "tantamount to a severe criminal penalty").

161. *Id.* at 575-85. But see *Jacque v. Steenberg Homes, Inc.*, 563 N.W.2d 154, 165 (Wis. 1997) (discussing *Gore*'s limited application to trespass cases involving reprehensible conduct but no actual injury).

162. See *infra* notes 163-92 and accompanying text (explaining how total damages caps dispense with need for limitations on punitive damages).

163. See 42 U.S.C. § 1981a(b)(3) (1994) (setting maximum amount limitations on total damages available under § 1981a).

164. See *infra* notes 165-92 and accompanying text (articulating how limitations on punitive damages are inappropriate and unnecessary under the statutory scheme of § 1981a).

165. See *infra* notes 166-70 (discussing inapplicability of actual damages requirement for § 1981a claims).

conceptions that punitive damages should only accompany actual damages and should bear a reasonable relationship to compensatory damages are inapplicable to sex discrimination claims under § 1981a.¹⁶⁶ The damages caps limit the total amount of damages; thus, the compensatory and punitive damages together cannot exceed a certain set amount.¹⁶⁷ As such, the higher a plaintiff's compensatory damages are, the lower her punitive damages must be.¹⁶⁸ If a plaintiff were required to prove actual damages to recover punitive damages under § 1981a, the effect would be that as the plaintiff suffers greater harm, the defendant would face less punishment.¹⁶⁹ More plausible is the idea that Congress, with its primary goal of furthering compensation for sex discrimination claims, intended that punitive damages should act as a substitute for compensatory damages in cases in which the defendant had behaved outrageously and caused significant emotional harm to the plaintiff, but which, because of the intangible nature of the harm, the plaintiff may have trouble proving.¹⁷⁰

Furthermore, by limiting the total amount of damages in this manner, the caps create an inverse relationship between the compensatory and punitive damages.¹⁷¹ This inverse relationship impedes the usefulness of the reasonable relationship test.¹⁷² For this reason, the principle that a reasonable ratio must exist between compensatory and punitive damages cannot apply to § 1981a claims.¹⁷³ The caps also address the concern that a jury may grant

166. See *infra* notes 171-77 and accompanying text (addressing inapplicability of "reasonable relationship" test to punitive and compensatory damages under § 1981a).

167. 42 U.S.C. § 1981a(b)(3) (1994).

168. See *id.* (setting limitations on maximum amount of punitive and compensatory damages combined).

169. See *id.* (stating explicitly that caps apply to both punitive and compensatory damages under § 1981a).

170. See H.R. REP. NO. 102-40 (II), at 25 (1991), *reprinted in* 1991 U.S.C.C.A.N. 694, 718 (noting goal of 1991 Civil Rights Act to compensate victims of discrimination who suffer emotional (intangible) harm and economic consequences thereof); H.R. REP. NO. 102-40 (I), at 18 (1991), *reprinted in* 1991 U.S.C.C.A.N. 549, 556 (explaining that purpose of Civil Rights Act of 1991 was in part "to strengthen existing remedies to provide more effective deterrence and ensure compensation commensurate with the harms suffered by victims of intentional discrimination"); *id.* at 65 (recognizing need for damages to "make discrimination victims whole for the terrible injury to their careers, to their mental and emotional health, and to their self-respect and dignity").

171. See 42 U.S.C. § 1981a(b)(3) (1994) (requiring "the sum of the amount" of compensatory and punitive damages not to exceed caps (emphasis added)).

172. *Id.*

173. See *Exemplary Damages*, *supra* note 110, at 531 (articulating principle that "reasonable relationship" test is useful for "controlling grossly excessive verdicts"). Because the damages caps prevent "grossly excessive" damages, thereby creating an inverse relationship between the compensatory and punitive damages, the "reasonable relationship" test is an ineffective

excessive damages.¹⁷⁴ In establishing these damage caps, Congress determined what constitutes a reasonable amount of damages that an employer should pay.¹⁷⁵ Therefore, Congress has significantly limited a jury's discretion over the amount of damages a plaintiff may receive.¹⁷⁶ These caps eliminate the need for the procedural safeguard of examining the ratio between compensatory and punitive damages to determine the reasonableness of the punitive damages.¹⁷⁷

B. Gore Factors

Punitive damages under § 1981a also satisfy the reasonableness requirement under the two remaining *Gore* factors: reprehensibility of the defendant's conduct and comparable criminal sanctions.¹⁷⁸ The legislative history

measuring tool for determining the reasonableness of punitive damages. *See supra* notes 167-69 and accompanying text (discussing impact of damages caps on relationship between compensatory and punitive damages).

174. *See* H.R. REP. 102-40 (I), at 72-73 (1991), *reprinted in* 1991 U.S.C.C.A.N. 549, 610-11 (explaining congressional concern over "disproportional jury awards" under Title VII's new remedial scheme). The House Report articulated the concern that members of Congress felt over the potential for excessive damages. *Id.* The Report articulated procedural safeguards such as the tiered burdens a plaintiff would have to overcome to recover under § 1981a. *Id.* ("Plaintiffs must first prove intentional discrimination, then must prove actual injury or loss arising therefrom to recover compensatory damages, and must meet an even higher standard . . . to recover punitive damages.") (emphasis omitted). The damages caps in § 1981a likely were incorporated into the Act to mitigate these fears. *See* 42 U.S.C. § 1981a(b)(3) (1994) (establishing damages caps).

175. *See* 42 U.S.C. § 1981a(b)(3) (1994) (explaining structure of damages caps). Congress established tiers of damages caps, with each level corresponding to the size of an employer. *Id.* For example, employers with "more than 14 and fewer than 101 employees" shall not pay more than \$50,000, whereas employers with "more than 500 employees" shall not pay more than \$300,000 (the maximum cap). *Id.* Congress's consideration of the employer's size in determining damages amounts indicate that Congress believed these damages amounts were reasonable to achieve Congress's goals for § 1981a of compensation, punishment, and deterrence. *See* FISCHER, *supra* note 109, § 303, at 704 (stating that courts will use evidence of defendant's wealth "to determine 'whether the amount of damages exceeds the level necessary to properly punish and deter'" (quoting *Adams v. Murakami*, 813 P.2d 1348, 1350 (Cal. 1991))).

176. *See supra* notes 174-75 and accompanying text (articulating idea that Congress intended damages caps to restrain jury verdicts).

177. *See Exemplary Damages, supra* note 110, at 530 (recognizing that purpose for requiring "reasonable relationship" between compensatory and punitive damages stems from courts' desire to "limit the jury's wide discretion").

178. *See infra* notes 179-82 and accompanying text (discussing reprehensibility of sex discrimination); *infra* notes 183-86 and accompanying text (discussing lack of criminal sanctions for workplace sex discrimination and Congress's intent for § 1981a to fulfill that function). For a discussion of the third *Gore* factor, the ratio between compensatory and punitive damages, *see supra* notes 171-77 and accompanying text (analyzing § 1981a under "reasonable relationship" test).

of § 1981a indicates that Congress considered sex discrimination in the workplace to be reprehensible conduct.¹⁷⁹ Congress's interest in eliminating sex discrimination was a primary reason for enacting § 1981a.¹⁸⁰ By making sex discrimination more cost prohibitive, Congress hoped to eliminate cases of workplace sex discrimination.¹⁸¹ Providing plaintiffs with access to damages ensured that employers would be less likely to engage in discriminatory conduct.¹⁸²

Congress also intended for the implementation of damages under § 1981a to provide an incentive for employees to bring suit.¹⁸³ The remedies available to victims of sex discrimination under Title VII before the 1991 Civil Rights Act were so inadequate that a victim often had little incentive to bring suit.¹⁸⁴ By providing damages, Congress hoped that the added incentive to bring suit would encourage plaintiffs to act as "private attorneys general" in punishing and deterring offenders.¹⁸⁵ Having plaintiffs act in this capacity, Congress intended that the imposition of damages under § 1981a would serve the same function as a criminal sanction.¹⁸⁶

The *Gore* Court determined that unreasonable punitive damages would violate due process.¹⁸⁷ The damage caps in § 1981a create an inverse relationship between punitive and compensatory damages, making the ratio test an ineffective measuring tool for determining the reasonableness of punitive damages.¹⁸⁸ Congress has determined, however, that sex discrimination is

179. See H.R. REP. 102-40 (I), at 66-69 (1991), reprinted in 1991 U.S.C.C.A.N. 549, 604-07 (chronicling stories of sex discrimination).

180. See *id.* at 65 (reasoning that "[m]onetary damages simply raise the cost of an employer's engaging in intentional discrimination, thereby providing employers with additional incentives to prevent intentional discrimination in the workplace before it happens") (emphasis added).

181. *Id.*

182. *Id.*

183. See H.R. REP. NO. 102-40 (II), at 25 (1991), reprinted in 1991 U.S.C.C.A.N. 694, 718 (recognizing "little incentive for plaintiff to bring a Title VII suit" prior to Congress's implementation of damages under § 1981a).

184. *Id.*

185. See H.R. REP. NO. 102-40 (I), at 65 (1991), reprinted in 1991 U.S.C.C.A.N. 549, 603 (stating that damages are "necessary to encourage citizens to act as private attorneys general to enforce the statute").

186. See H.R. REP. NO. 102-40 (II), at 27 (1991), reprinted in 1991 U.S.C.C.A.N. 694, 721 (recognizing that without damages, employers who intentionally discriminate are able "to avoid any meaningful liability").

187. See *BMW of N. Am., Inc. v. Gore*, 517, U.S. 559, 568 (1996) (noting that "grossly excessive" punitive damages violate due process).

188. See *supra* notes 171-77 and accompanying text (discussing "reasonable relationship" test between compensatory and punitive damages).

reprehensible conduct and that permitting recovery of punitive damages, with caps to prevent excessive total damages, will sufficiently punish offenders.¹⁸⁹ Furthermore, Congress intended this civil punishment in lieu of criminal sanctions.¹⁹⁰ These underlying considerations establish that punitive damages under § 1981a are reasonable.¹⁹¹ These considerations would be present even in the absence of compensatory damages under § 1981a; therefore, a grant of punitive damages without compensatory damages would also be reasonable.¹⁹²

IX. Further Justification: Measuring Punitive Damages Under Kolstad

The standard for awarding punitive damages favors allowing punitive damages without compensatory damages.¹⁹³ However, courts need some objective indication of that mental state – such as the amount of harm the defendant has caused the plaintiff to suffer – in order to properly assess the amount of punitive damages the defendant should pay.¹⁹⁴ A potential prob-

189. See *supra* notes 179-82 and accompanying text (discussing Congress's perception of sex discrimination).

190. See *supra* notes 183-86 and accompanying text (discussing function of damages under § 1981a as substitute for criminal sanctions for sex discrimination).

191. See *Jacque v. Steenberg Homes, Inc.*, 563 N.W.2d 154, 164-65 (Wis. 1997) (utilizing three *Gore* factors to determine whether \$100,000 punitive damages for trespass violate due process).

192. Cf. *id.* at 165-66 (finding punitive damages to be reasonable after application of *Gore* factors despite absence of compensatory damages). The *Jacque* court analyzed the \$100,000 punitive damages that the jury granted on a trespass claim to determine reasonableness after determining that the damages could stand without compensatory damages. *Id.* Although the punitive damages did not satisfy two of the three *Gore* factors, the court determined that the punitive damages were nonetheless reasonable. *Id.* at 165. The court determined that the defendant's conduct was reprehensible despite the fact that defendant caused no pecuniary harm. *Id.* at 164. According to the court, the defendant's conduct exhibited "an indifference and a reckless disregard for the law, and for the rights of others," which the court deemed reprehensible. *Id.* The court, however, rejected the ratio and comparable criminal sanctions factors. *Id.* The court reasoned that the ratio test would prevent recovery of punitive damages in "situations where egregious acts result in injuries that are hard to detect or noneconomic harm that is difficult to measure." *Id.* at 164-65. The court stated that comparing the punitive damages to available criminal sanctions was also ineffective because often, as in this case, the available criminal sanction is insufficient to properly deter socially unacceptable behavior. *Id.* at 165. The court, therefore, determined that the circumstances of this case nullified the last two *Gore* factors and held the punitive damages to be reasonable. *Id.*

193. See *infra* notes 213-15 and accompanying text (arguing that *Kolstad* standard of punitive liability creates regime in which punitive damages may exist without compensatory damages).

194. See *DOBBS, supra* note 9, § 3.11(2), at 470 (stating that state-of-mind references used to award punitive damages are subjective and that often courts require objective manifestation of this state of mind, such as bad conduct, to award punitive damages).

lem, then, arises when a defendant acts with the requisite malicious motive, yet the conduct does not appear to be sufficiently reprehensible to warrant punitive damages.¹⁹⁵

Fortunately, in gauging a defendant's conduct, courts generally assess the defendant's mental state.¹⁹⁶ The Supreme Court solidified this rule with regard to § 1981a in *Kolstad v. American Dental Ass'n*.¹⁹⁷ Congress had established the requirement that the employer engage "in a discriminatory practice . . . with malice or with reckless indifference to the federally protected rights of an aggrieved individual" as the standard for recovering punitive damages.¹⁹⁸ This standard brings the factor of a plaintiff's "federally protected rights" into the mix, along with mental state and conduct, in determining appropriate punitive damage awards.¹⁹⁹ Some federal circuit courts had determined that if an employer discriminated against an employee with malicious intent, the employee could recover punitive damages against the employer.²⁰⁰ Other circuit courts maintained that punitive damages were unavailable unless the plaintiff proved that the employer's conduct was egregious, regardless of the employer's mental state.²⁰¹

The Supreme Court recognized that circuits had been divided over what standard to use in assessing whether punitive damages were recoverable in § 1981a suits.²⁰² Looking to the language of § 1981a, the Court determined that the two-tiered standard of culpability in § 1981a demonstrated Congress's intent that the availability of punitive damages be based on the defendant's

195. See *id.* § 3.11(2), at 468 (stating that "[p]unitive damages are awarded when the defendant is guilty of both a bad state of mind *and highly serious misconduct*" (emphasis added)).

196. See Mallor & Roberts, *supra* note 103, at 651 (noting that "[t]he defendant's state of mind is what transforms conduct from the understandable to the intolerable").

197. 527 U.S. 526 (1999).

198. 42 U.S.C. § 1981a(b)(1) (1994).

199. See *id.* (granting punitive damages for defendants' "reckless indifference to the federally protected rights of an aggrieved individual"); *Kolstad v. Am. Dental Ass'n*, 527 U.S. 526, 534 (1999) (noting that Congress's inclusion of employer's mental state with regard to employee's federally protected right institutes two-tiered liability structure).

200. See Amy L. Blaisdell, Note, *A New Standard of Employer Liability Emerges: Kolstad v. American Dental Ass'n Addresses Vicarious Liability in Punitive Damages*, 44 ST. LOUIS L.J. 1561, 1575 (2000) (noting some courts required mental state of "something more than . . . intentional discrimination" (internal quotes omitted)). Blaisdell acknowledged the difficulties that circuit courts experienced in attempting to define what burden employees had to satisfy to recover punitive damages. *Id.*

201. See *id.* (stating that many courts required that plaintiff demonstrate defendant's outrageous conduct to recover punitive damages).

202. See *Kolstad v. Am. Dental Ass'n*, 527 U.S. 526, 533 (1999) (explaining that Court granted certiorari to "resolve a conflict among the Federal Courts of Appeals concerning the circumstances under which a jury may consider a request for punitive damages").

mental state regarding the defendant's discriminatory actions.²⁰³ Specifically, Congress intended to provide punitive damages in situations in which an employer either acted maliciously or with evil motive; or acted "in the face of a perceived risk that" the employer's conduct would violate the federally protected rights of the employee.²⁰⁴ The Court noted clearly that the reckless disregard requirement applies to the employer's perception of the employee's federally protected rights and not to the employer's actual conduct.²⁰⁵ Thus, while an employer may harass an employee without any malice or evil intent toward the employee, if the employer nonetheless engages in conduct that he knows or should know would violate the federally protected rights of the employee, the employer can be liable for punitive damages.²⁰⁶

Furthermore, the Court determined that recovery of punitive damages under § 1981a does not require that a plaintiff demonstrate that the defendant

203. See *id.* at 534 (noting Congress's intent "to impose two standards of liability"). The Court recognized that a plaintiff may recover damages under § 1981a only for intentional discrimination. *Id.* The Court also noted that § 1981a requires proof that the defendant acted with malice or reckless disregard in addition to proof of intentional discrimination for a plaintiff to recover punitive damages. *Id.* The Court determined, therefore, that Congress intended for plaintiffs to recover punitive damages only upon a showing of greater culpability from the defendant than merely intentional discrimination. *Id.*

204. See *id.* at 536 (articulating Court's standard for awarding punitive damages under § 1981a).

205. See *id.* at 535 (stating that "[t]he terms 'malice' or 'reckless indifference' pertain to the employer's knowledge that it may be acting in violation of federal law, not its awareness that it is engaging in discrimination").

206. See *id.* at 536 (recognizing that Congress intended to subject employers to punitive damages who at minimum acted in "face of a perceived risk" that actions would violate employee's federally protected right to be free from discrimination). The Court also noted several examples of conduct that would constitute discrimination, but would nonetheless not subject an employer to a punitive damage award. *Id.* at 536-37. The Court stated the following:

There will be circumstances where intentional discrimination does not give rise to punitive damages liability under this standard. In some instances, the employer may simply be unaware of the relevant federal prohibition. There will be cases, moreover, in which the employer discriminates with the distinct belief that its discrimination is lawful. The underlying theory of discrimination may be novel or otherwise poorly recognized, or an employer may reasonably believe that its discrimination satisfies a bona fide occupational qualification defense or other statutory exception to liability.

Id.

While an employer may not know that his actions are discriminatory, an employer that engages in sex discrimination, such as creating a hostile work environment, cannot escape liability from punitive damages by invoking the theory that the creation of a hostile work environment is a novel form of discrimination. See *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 66 (1986) (recognizing employer's fostering of hostile work environment to constitute sex discrimination under Title VII).

exhibited particularly outrageous conduct.²⁰⁷ The Court recognized that under the common law, punitive damages usually accompany a defendant's outrageous conduct.²⁰⁸ The Court maintained, however, that the reason for this tradition lay in the idea that punitive damages really punish the motive or mental state behind the outrageous behavior.²⁰⁹ While outrageous conduct often accompanies an improper motive, the Court reasoned that to properly punish the evil motive, a court cannot rely simply on whether the defendant's conduct was egregious.²¹⁰ Rather, the nature of an employer's conduct may be a measuring tool to help a jury determine the motive of the defendant.²¹¹ The Court emphasized, however, that a plaintiff does not need to prove that the employer "engage[d] in conduct with some independent, 'egregious' quality before being subject to [punitive damages]."²¹²

According to the Supreme Court, Congress intended that the purpose of punitive damages under § 1981a is to punish the mental state and not the nature of the conduct itself.²¹³ The fact that an employee may recover punitive damages without proving outrageous conduct from the defendant and only proving that the defendant acted with reckless disregard to the employee's rights further supports the notion that punitive damages are recoverable in the absence of a compensatory award.²¹⁴ Under the rule that the Court articulated

207. See *Kolstad v. Am. Dental Ass'n*, 527 U.S. 526, 535 (1999) (noting that § 1981a does not require that plaintiff demonstrate egregious conduct on part of defendant "independent of the employer's state of mind").

208. See *id.* at 537 (acknowledging tradition of including both mental state and egregious conduct as prerequisites to awarding punitive damages).

209. See *id.* at 538 (noting that "[m]ost often . . . eligibility for punitive awards is characterized in terms of a defendant's motive or intent").

210. See *id.* (articulating principle that egregious conduct is subject to punishment because of underlying mental state (citing RESTATEMENT (SECOND) OF TORTS § 908(2), at 464-65 (1979))).

211. See *id.* at 539 (maintaining usefulness of showing egregious conduct on part of defendant to prove defendant's mental state).

212. *Id.* at 538.

213. See *id.* at 535 (explaining Congress's intent that courts base employer's liability for punitive damages on employer's mental state, rather than on actual conduct). The Court explained that the dichotomy between an employer's mental state and the actions he has committed is best exemplified through the remedies available under Title VII prior to the enactment of the 1991 Civil Rights Act and the compensatory and punitive damages available after the Act's enactment. *Id.* at 534-35. The Court emphasized that the damages under the 1991 Act are not recoverable at all unless the employer has engaged in *intentional* discrimination. *Id.* at 535. This contrasts with the Title VII rule for equitable remedies, under which any discrimination, including disparate impact discrimination, will create liability for equitable remedies on the part of the employer. See *id.* (noting that employees may only recover compensatory and punitive damages under § 1981a for intentional discrimination).

214. See *id.* at 536 (noting that employer need only engage in conduct sufficient to constitute "subjective consciousness of a risk of injury or illegality" (quoting *Smith v. Wade*,

in *Kolstad*, as long as the employer acted without regard to the rights of the employee to be free from such action under federal employment discrimination statutes, the employer would still be liable for punitive damages.²¹⁵

X. Conclusion

Congress intended through § 1981a to provide a means to fully compensate victims of sex discrimination *and* to punish their offenders.²¹⁶ Congress also expressed a strong policy interest in preventing sex discrimination in the workplace and voiced the intention to deter employers from engaging in sex

461 U.S. 30, 37, n.6 (1983) (internal quotation marks omitted)). The Court recognized that any act an employer commits with reckless disregard to an employee's federally protected rights constitutes egregious conduct. *See id.* at 538 (stating that "[c]onduct warranting punitive awards has been characterized as 'egregious' . . . because of the defendant's mental state" (emphasis added)). The Court's insistence that a trial court does not need to find that the employer's conduct is outrageous apart from the employer's mental state permits the inference that an employer may act with conscious disregard to an employee's rights, without the employer's conduct actually being demonstrably outrageous. *See id.* (maintaining that employer's conduct need not be independently egregious for the employer to be liable for punitive damages).

Often, in employment discrimination situations, the nature of the employment relationship is what makes the conduct outrageous. *See DOBBS, supra* note 9, § 3.11(2), at 474-75 (noting "abuse of power" in employment discrimination as circumstance that would amplify otherwise non-egregious conduct to conduct considered to be outrageous); *see also* *Timm v. Progressive Steel Treating, Inc.*, 137 F.3d 1008, 1010 (7th Cir. 1998) (upholding punitive damage award despite jury's failure to award compensatory damages). The Seventh Circuit Court of Appeals reasoned that plaintiff's prior occupation as a prison guard could have accounted for the jury's failure to award compensatory damages. *Id.* at 1010. Nonetheless, the court considered defendant's indifference to plaintiff's plight – that she suffered unwanted touches and advances from her supervisor – to be sufficiently egregious in light of the employment relationship. *Id.* at 1009.

215. *See supra* note 214 (discussing "reckless indifference" rule under *Kolstad* and Seventh Circuit's treatment of employer's reckless indifference and punitive damages in *Timm*). The *Kolstad* Court also addressed the standard for vicarious punitive liability in circumstances in which the plaintiff seeks to impute the punitive liability to the employer for the acts of another employee. *See Kolstad*, 527 U.S. at 539 (addressing vicarious liability for punitive damages). The Court determined that an employer may be vicariously liable for punitive damages if the harassing employee is "serving in a 'managerial capacity' [and] committed the wrong while 'acting in the scope of employment.'" *Id.* at 543. The Court maintained, however, that an employer's "good faith efforts to comply with Title VII" will prevent the employer's liability for punitive damages. *Id.* at 544-45. Nevertheless, if a managerial employee sexually harasses another employee and has the requisite mental state to sustain punitive damages, the employer will be liable for the punitive damages unless the employer has taken some action to prevent or curb the discrimination in the workplace. *See id.* at 546 (discussing factors for consideration in assessing defendant employer's punitive liability).

216. *See* H.R. REP. NO. 102-40 (I), at 64-65 (1991), *reprinted in* 1991 U.S.C.C.A.N. 549, 602-03 (expressing Congress's intent to fully compensate victims of intentional discrimination, deter future intentional discrimination, and encourage enforcement of sex discrimination laws).

discrimination through § 1981a's remedial scheme.²¹⁷ The legislative history of § 1981a demonstrates Congress's intent to provide punitive damages to punish and deter sex discrimination.²¹⁸ Furthermore, Congress expressed that the availability of full compensation to victims for both their economic injuries and their intangible emotional harm was a primary goal of the amendments.²¹⁹

Section 1981a does not mirror § 1983 in either its policy or its structure; therefore, the rationale for allowing punitive damages under § 1983 cannot apply to § 1981a. Nevertheless, permitting punitive damages without proof of actual damage under § 1981a is entirely reasonable.²²⁰ Congress's implementation of damages caps create inconsistencies between the limitations that courts usually place on punitive damages and the actual ability to recover punitive damages under § 1981a.²²¹ Punitive damages also pass the reasonableness tests that the *Gore* Court established.²²² Congress's intent to establish punitive damages under § 1981a demonstrates that a jury's grant of punitive damages would be reasonable under *Gore* even without compensatory damages.²²³

Furthermore, the Supreme Court concluded in *Kolstad* that a defendant's mental state is the decisive factor in determining whether punitive damages are appropriate for sex discrimination under § 1981a.²²⁴ The Court determined that an employer who discriminates "in the face of a perceived risk" that the employer's actions might violate the federally protected rights of an employee may be liable for punitive damages.²²⁵ The Court also maintained

217. *Id.* (emphasis added).

218. *See supra* Part III (discussing legislative history of 1991 Civil Rights Act).

219. *See* H.R. REP. NO. 102-40 (I), at 18 (1991), *reprinted in* 1991 U.S.C.C.A.N. 549, 556 (explaining purpose of Civil Rights Act of 1991 was in part "to strengthen existing remedies to provide more effective deterrence and ensure compensation commensurate with the harms suffered by victims of intentional discrimination"); *id.* at 65 (recognizing need for damages to "make discrimination victims whole for the terrible injury to their careers, to their mental and emotional health, and to their self-respect and dignity").

220. *See supra* notes 165-70 and accompanying text (discussing how proving damage is unnecessary to recover punitive damages under § 1981a).

221. *See supra* notes 165-77 and accompanying text (explaining how combined caps on punitive and compensatory damages create inverse relationship between compensatory and punitive damages).

222. *See supra* Part VIII.B (analyzing reasonableness of punitive damages under *Gore* factors).

223. *See supra* note 192 and accompanying text (discussing *Jacque* court's decision to uphold punitive damages despite lack of compensatory damages).

224. *See* *Kolstad v. Am. Dental Ass'n*, 527 U.S. 526, 535 (1999) (determining that employer's mental state establishes basis for punitive liability rather than employer's actual conduct); *see also supra* Part IX (discussing *Kolstad* Court's analysis of punitive liability for sex discrimination claims).

225. *Kolstad*, 527 U.S. at 536.

that a plaintiff need not demonstrate outrageous conduct apart from the defendant's mental state to establish liability for punitive damages.²²⁶ Under the *Kolstad* ruling, therefore, an employer may engage in subtle discrimination with disregard to an employee's rights, yet still be liable for punitive damages.²²⁷ If, in such a situation, a plaintiff suffers no injury or is unable to prove injury from the defendant's conduct, the plaintiff should still be able to recover punitive damages if the employer had the requisite mental state while engaging in discrimination against the employee.²²⁸

Difficulty can arise in quantifying damages from a sex discrimination claim; therefore, an award of punitive damages without compensatory damages in these situations is a real possibility.²²⁹ To avoid undermining Congress's desire to punish and deter sex discrimination in the workplace, punitive damages in these claims cannot depend on whether a plaintiff recovers compensatory damages.²³⁰ Punitive damages, therefore, should be permissible in the absence of compensatory damages under § 1981a.²³¹

226. *Id.* at 539.

227. *See id.* at 538-39 (establishing that mental state is determining factor in establishing employer's liability for punitive damages); *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 581 (1996) (requiring consideration of harm defendant actually caused as well as "the harm likely to result from the defendant's conduct" in determining punitive liability).

228. *See Gore*, 517 U.S. at 582 (recognizing that in some cases, low compensatory damages may support high punitive damages). The *Gore* Court, in discussing the relationship between compensatory damages and punitive damages, stated:

Indeed, low awards of compensatory damages may properly support a higher ratio than high compensatory awards, if, for example, a particularly egregious act has resulted in only a small amount of economic damages. A higher ratio may also be justified in cases in which the injury is hard to detect or the monetary value of noneconomic harm might have been difficult to determine. It is appropriate, therefore, to reiterate our rejection of a categorical approach.

Id.

229. *See, e.g., Timm v. Progressive Steel Treating, Inc.*, 137 F.3d 1008, 1009 (7th Cir. 1998) (addressing situation in which jury granted punitive damages without compensatory damages); *Cush-Crawford v. Adchem Corp.*, 94 F. Supp. 2d 294, 299 (E.D.N.Y. 2000) (same).

230. *See Cush-Crawford*, 94 F. Supp. 2d at 299 (noting that "[n]othing in 42 U.S.C. § 1981a(b) . . . can be read to imply a requirement that a punitive damage award be accompanied by an award of compensatory damages"); *see also supra* Part III (describing Congress's goals in enacting § 1981a).

231. *See supra* notes 216-31 and accompanying text (concluding that victims of sex discrimination do not need to prove compensatory damages to recover punitive damages under § 1981a).