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Implying Punitive Damages in Employment Discrimination Cases

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IMPLYING PUNITIVE DAMAGES IN EMPLOYMENT DISCRIMINATION CASES

The availability of punitive damages in employment discrimination cases has become an increasingly important issue in recent years. Title VII of the Civil Rights Act of 1964[1] provides relief for victims of discriminatory treatment by employers and labor unions, and a number of commentators have suggested a possible role for punitive damages in effectuating this statute.[2] Only since the Supreme Court's decision in *Griggs v. Duke Power Co.*,[3] however, have the courts begun to confront this issue. The implications of *Griggs* and the consequences of that decision in the lower courts call for a new and more detailed analysis of the use of punitive damages to remedy employment discrimination.

The primary effect of *Griggs* in this context is to raise the problem of whether to treat those employers and unions who discriminate out of malice differently from those whose employment practices unintentionally result in discrimination. For although title VII authorizes relief only when the defendant has intentionally engaged in a discriminatory practice,[4] the unanimous Court in *Griggs* interpreted this requirement liberally: "Congress directed the thrust of the Act to the *consequences* of employment practices, not simply the motivation."[5] The Court held that neutrally motivated employment practices were violations of the Act if their operation tended to discriminate against persons protected under the statute.[6]

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[1]42 U.S.C. §§ 2000e—2000e-11 (1970), *as amended*, Equal Employment Opportunity Act of 1972, 86 Stat. 103 (codified at 42 U.S.C.A. §§ 2000e—2000e-11 (1974)).

[2]*Developments in the Law: Employment Discrimination and Title VII of the Civil Rights Act of 1964*, 84 HARV. L. REV. 1109, 1261–64, 1268–69 (1971) [hereinafter cited as *Developments*]; Comment, *Enforcement of Fair Employment Under the Civil Rights Act of 1964*, 32 U. CHI. L. REV. 430, 467 (1965) [hereinafter cited as *Enforcement*]; Note, *Tort Remedies for Employment Discrimination Under Title VII*, 54 VA. L. REV. 491, 497 (1968) [hereinafter cited as *Tort Remedies*].

[3]401 U.S. 424 (1971).

[4]42 U.S.C.A. § 2000e-5(g) (1974) provides in part: "If the court finds that the respondent has intentionally engaged in or is intentionally engaging in an unlawful employment practice charged in the complaint, the court may enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate, which may include, but is not limited to, reinstatement or hiring of employees, with or without back pay . . . or any other equitable relief as the court deems appropriate."

[5]401 U.S. at 432 (emphasis in original).

[6]*Id.* This holding was an elaboration of an earlier circuit court decision that construed title VII as requiring "only that the defendant meant to do what he did, that is, his employment practice was not accidental." Local 189, Papermakers v. United States, 416 F.2d 980, 996 (5th Cir. 1969), *cert. denied*, 397 U.S. 919 (1970).

Discrimination actively or maliciously practiced is considerably more objectionable than the usual type of conduct that now violates the Act under the *Griggs* standard. It is not surprising, therefore, that where plaintiffs have accused an employer of engaging in such conduct, they have argued that such an employer should be subject to sanctions of greater severity than those given in ordinary title VII suits.

Since the *Griggs* decision, growing numbers of plaintiffs in employment discrimination cases have prayed for punitive damages.[7] The courts have split over the availability of this remedy under title VII. A number of courts have indicated that punitive damages may be within the scope of the statute,[8] but only the court in *Stamps v. Detroit Edison Co.*[9] has granted such relief. The most extensive discussion of the issues raised by this question, however, appears in *Van Hoomissen v. Xerox Corp.*,[10] holding that punitive damages cannot be awarded under title VII.

This Comment will argue that the punitive damages question under title VII was decided correctly in *Detroit Edison* and that the position taken by the court in *Van Hoomissen* was mistaken. It will suggest that this remedy should also be available in employment discrimination cases under section 1981 of the federal civil rights code[11] and alternatively through state law under section 1988.[12] To reach these conclusions, the Comment will examine the general policy considerations underlying the need for making punitive damages available in actions brought under these statutes. A subsequent section will discuss possible standards the courts can use to determine whether punitive damages should be awarded in a particular case and how large such an award should be. A separate section will analyze the special role punitive damages can play in large class action suits such as *Detroit Edison*. Finally, the Comment will briefly examine the related question of the availability of another remedy under title VII, compensatory damages.

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[7] *E.g.*, Howard v. Lockheed-Georgia Co., 372 F. Supp. 854 (N.D. Ga. 1974); Gary v. Indus. Indem. Co., 7 F.E.P. Cas. 193 (N.D. Cal. Dec. 21, 1973); Van Hoomissen v. Xerox Corp., 368 F. Supp. 829 (N.D. Cal. 1973); Stamps v. Detroit Edison Co., 365 F. Supp. 87 (E.D. Mich. 1973); Guthrie v. Colonial Bakery Co., 6 F.E.P. Cas. 662 (N.D. Ga. March 8, 1973); Dessenberg v. American Metal Forming Co., 6 F.E.P. Cas. 159 (N.D. Ohio April 10, 1973); Tooles v. Kellogg Co., 336 F. Supp. 14 (D. Neb. 1972); Spurlock v. United Airlines, Inc., 330 F. Supp. 228 (D. Colo. 1971), *aff'd*, 475 F.2d 216 (10th Cir. 1972); Tidwell v. American Oil Co., 2 F.E.P. Cas. 1121 (D. Utah 1970) (pre-trial ruling), *judgment entered*, 332 F. Supp. 424 (D. Utah 1971).

[8] Gary v. Industrial Indem. Co., 7 F.E.P. Cas. 193 (N.D. Cal. Dec. 21, 1973); Dessenberg v. American Metal Forming Co., 6 F.E.P. Cas. 159 (N.D. Ohio April 10, 1973); Tooles v. Kellogg Co., 336 F. Supp. 14 (D. Neb. 1972).

[9] 365 F. Supp. 87 (E.D. Mich. 1973).

[10] 368 F. Supp. 829 (N.D. Cal. 1973).

[11] 42 U.S.C. § 1981 (1970). For the wording of this provision, see p. 345 *infra*.

[12] 42 U.S.C. § 1988 (1970). For the wording of this provision, see note 159 *infra*.

I. THE CASES

The court in *Tidwell v. American Oil Co.*[13] was the first to consider the availability of punitive damages under title VII, but in denying defendant's motion to strike plaintiff's plea for punitive damages, the court postponed a clear-cut resolution of the question. "[T]he availability of such damages should not be determined until after the Court has heard all the facts. At that time, the Court will have the proper perspective to rule on any motion to strike."[14] The court in *Tooles v. Kellogg Co.*[15] was more definitive. In denying defendant's pre-trial motion to strike the claim for punitive damages from the complaint, the court stated that "a punitive damage remedy might in an appropriate case be a proper award and . . . such a possibility should not be foreclosed at least at this stage of the proceedings."[16] The court in *Dessenberg v. American Metal Forming Co.*[17] reached a similar conclusion. Relying explicitly on the *Tooles* case, the *Dessenberg* court denied a motion to strike the claim for punitive damages under title VII.

Detroit Edison is the only case in which punitive damages have been awarded under title VII. The court found that two of the defendants had been so "extremely obdurate and intransigent in their determination to implement and perpetuate racial discrimination in employment [that] the awarding of punitive damages is appropriate and necessary."[18] The punitive damages ordered by the court included four million dollars from Detroit Edison and two hundred fifty thousand dollars from Local 223, Utility Workers Union of America.[19] Although the third defendant, Local 17, International Brotherhood of Electrical Workers, was also found guilty of racial discrimination, the court determined that the union had not acted with "the requisite malice"[20] to warrant an award of punitive damages.

Detroit Edison was brought as a class action. The plaintiffs represented "all black citizens whom defendant Detroit Edison Company has refused to hire and has discharged from employment,

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[13] 2 F.E.P. Cas. 1121 (D. Utah 1970).

[14] *Id.* at 1123. At trial there was a judgment for plaintiff, and she was awarded back pay and attorneys' fees. There was no further comment by the court on the availability of punitive damages. 332 F. Supp. 424 (D. Utah 1971).

[15] 336 F. Supp. 14 (D. Neb. 1972).

[16] *Id.* at 18.

[17] 6 F.E.P. Cas. 159 (N.D. Ohio April 10, 1973).

[18] 365 F. Supp. at 124. In addition to punitive damages, the court awarded back pay and attorneys' fees. It also ordered extensive equitable relief regarding hiring, transfer, and seniority practices to guarantee fair employment opportunities for blacks at Detroit Edison and to remedy the defendants' past discrimination. *Id.* at 120–24.

[19] *Id.*

[20] *Id.*

discriminated against with respect to compensation . . . conditions and/or terms of employment; and/or otherwise segregated, classified, or otherwise deprived . . . of employment opportunities because of their race or color."[21] Plaintiffs established a prima facie case of employment discrimination by demonstrating that there was an "almost complete statistical absence of blacks in most classifications,"[22] and the court found the defendants liable for discriminatory hiring practices including the use of arrest records,[23] word-of-mouth recruitment,[24] and non-validated aptitude and achievement tests.[25] It also found that the collective bargaining agreements between the company and the unions established transfer and seniority systems which perpetuated discrimination against those few blacks who had managed to obtain jobs with the company.[26]

In addition to these seemingly neutral employment policies, the court found that Detroit Edison and Local 223 actually intended many of their practices to have a discriminatory effect. The evidence showed

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[21] *Id.* at 120.

[22] *Id.* at 102. A statistically demonstrated absence of blacks disproportionate to whites generally establishes a prima facie case for a title VII violation. *E.g.,* Mabin v. Lear Sieglar, Inc., 457 F.2d 806 (6th Cir. 1972); United States v. Ironworkers Local 86, 443 F.2d 544 (9th Cir.), *cert. denied,* 404 U.S. 984 (1971). The evidence in *Detroit Edison* indicated that in a city forty-four percent black and a standard metropolitan statistical area eighteen percent black, Detroit Edison's work force was only eight percent black, with about one percent of the supervisory positions and four percent of the professional and technical jobs occupied by blacks. 365 F. Supp. at 98, 100.

[23] 365 F. Supp. at 103. For a discussion of this discriminatory practice, see Case Comment, *Arrest Records as a Racially Discriminatory Employment Criterion,* 6 HARV. CIV. RIGHTS-CIV. LIB. L. REV. 165 (1970). Detroit Edison discontinued the practice in September, 1972. 365 F. Supp. at 103.

[24] 365 F. Supp. at 103. Many courts have held that neutral policies which give hiring preferences to friends and relatives of employees are unlawful in a context of past discrimination. *E.g.,* United States v. Carpenters Local 169, 457 F.2d 210 (7th Cir.), *cert. denied,* 409 U.S. 851 (1972); Local 53, Insulators v. Vogler, 407 F.2d 1047 (5th Cir. 1969).

[25] "An employer may use a test which has the effect of excluding significantly larger numbers of blacks than whites only if the test has been shown to be a valid predictor of job performance." 365 F. Supp. at 105. *See* Griggs v. Duke Power Co., 401 U.S. 424 (1971); Note, *Employment Testing: The Aftermath of* Griggs v. Duke Power Company, 72 COLUM. L. REV. 900 (1972) [hereinafter cited as *Employment Testing*].

[26] 365 F. Supp. at 107–09. "In this case, the effect of the collective bargaining agreement is not only to deprive incumbent black employees of seniority credits which they have accumulated in previously segregated jobs, but also to completely preclude the opportunity to transfer by bidding procedures which provide preference for incumbents . . . ." *Id.* at 114. For a discussion of this problem, see Cooper & Sobol, *Seniority and Testing Under Fair Employment Laws: A General Approach to Objective Criteria of Hiring and Promotion,* 82 HARV. L. REV. 1598 (1969); Kovarsky, *Current Remedies for the Discriminatory Effects of Seniority Agreements,* 24 VAND. L. REV. 683 (1971).

that Detroit Edison authorized its personnel interviewers to use a racial code on application forms to discriminate against black applicants[27] and, together with Local 223, harassed one of the named plaintiffs for his civil rights activities.[28] The court further noted that Local 223 misinformed black workers of their rights under the bargaining agreement's grievance system, gerrymandered seniority districts to deny blacks better job opportunities, and attempted to exclude blacks from elective union offices.[29] Examining this conduct, Judge Keith concluded that the discrimination of the defendants was "deliberate and by design."[30] Supporting his award of punitive damages, he cited by analogy the Civil Rights Act of 1871[31] and two cases with strong dicta favoring punitive damages in other contexts.[32] He did not mention the *Tooles* or *Dessenberg* decisions.

In contrast to *Detroit Edison* and the opinions suggesting support for its holding, other cases have held that punitive damages are not an available remedy for a title VII violation. The court in *Guthrie v. Colonial Bakery Co.*,[33] for example, stated:

> It is clear from the face of [title VII] that punitive damages are not recoverable in an action brought thereunder. The statute provides that the Court may order such affirmative action as may be appropriate, but nowhere does it empower a Court to award an aggrieved party . . . punitive damages.[34]

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[27]365 F. Supp. at 98–99.

[28]*Id.* at 100.

[29]*Id.* at 108–09.

[30]*Id.* at 95.

[31]17 Stat. 13, § 1 (1871), *as amended,* REV. STAT. § 1979 (1875) (codified at 42 U.S.C. § 1983 (1970)): "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, 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." Punitive damages may be awarded under this statute. Basista v. Weir, 340 F.2d 74 (3d Cir. 1965).

[32]In the first case, Chubbs v. New York, 324 F. Supp. 1183 (E.D.N.Y. 1971), the court asserted that punitive damages were available under section 1983 but dismissed the plaintiff's complaint on other grounds. In the second, Lee v. Southern Home Sites Corp., 429 F.2d 290 (5th Cir. 1970), the court declared that punitive damages were available under section 1982 (prohibiting racial discrimination in transactions involving real and personal property) but did not award them in the case at bar because the defendant had not acted with the requisite malice.

[33]6 F.E.P. Cas. 662 (N.D. Ga. March 8, 1973).

[34]*Id.* at 664.

The case of *Van Hoomissen v. Xerox Corp.*[35] presents a more elaborate argument against the availability of punitive damages under title VII. The plaintiff was a white employee of Xerox who alleged that he was fired in retaliation for his attempts to change his employer's hiring policies with respect to Chicanos.[36] In granting the defendant's motion to strike the plaintiff's claim for punitive damages, the court relied on three main arguments. First, the court asserted that the legislative history of both the original act and the 1972 amendments indicated that the remedies intended by Congress did not include compensatory[37] or punitive damages.[38] Second, the *Van Hoomissen* court pointed out that the remedies provision of title VII, section 706(g), was closely modeled on the National Labor Relations Act and concluded that since punitive damages have not been awarded under that Act, they could not be granted under title VII.[39] Finally, the court found it significant that title VIII of the Civil Rights Act of 1968, dealing with fair housing, specifically provided for punitive damages, thereby suggesting that had Congress intended to make punitive damages available under title VII, it would have made this intention explicit when it amended title VII in 1972.[40] The next section of this Comment will discuss some of the shortcomings of the *Van Hoomissen* arguments and provide a functional analysis of the role which punitive damages can play in the employment discrimination context.

II. IMPLYING PUNITIVE DAMAGES UNDER TITLE VII

As the *Guthrie* and *Van Hoomissen* opinions indicate, title VII is silent on the question of punitive damages. It neither explicitly grants nor explicitly precludes their availability. When a court finds that the respondent has violated the statute, it "may enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate, which may include, but is not limited to, reinstatement or hiring of employees, with or without back pay . . . or any other equitable relief as the court deems appropriate."[41] Most courts agree that this mandate gives them great freedom in fashioning remedies. For example, the Court of Appeals for the Seventh

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[35]368 F. Supp. 829 (N.D. Cal. 1973).
[36]*Id.* at 831.
[37]*See* note 100 *infra.*
[38]368 F. Supp. at 836–37.
[39]*Id.* at 837.
[40]*Id.* at 837–38.
[41]42 U.S.C.A. § 2000e-5(g) (1974).

Circuit has declared that "[t]his grant of authority should be . . . applied so as to effectively terminate the [discriminatory] practice . . . . The full remedial powers of the court must be brought to bear and all appropriate relief given."[42] Despite this view, however, the fact that some courts have been hesitant to grant the remedy of punitive damages suggests that this issue requires further analysis.

A. Implying Remedies Generally

The courts which have suggested the availability of punitive damages under title VII have not gone into a detailed analysis of the issue. There is nothing new, however, in federal courts' implying the availability of remedies that are not explicitly provided by a particular statute. The theory is that "the existence of a statutory right implies the existence of all necessary and appropriate remedies."[43] However, not all courts have followed this practice, and some have argued that Congress would have established a particular remedy explicitly if it had intended to make that remedy available under a given statute.[44] This position is supported by the maxim *expressio unius est exclusio alterius*—any remedy explicitly provided to enforce a provision excludes by implication other remedies.[45] Nevertheless, the trend in the direction of providing remedies by implication is strong enough that courts have

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[42]Bowe v. Colgate-Palmolive Co., 416 F.2d 711, 721 (7th Cir. 1969). Similarly, the Fifth Circuit has stated, "In formulating relief once a violation has been found, the trial judge is invested with wide discretion in modeling his decree to ensure compliance with the Act." Hutchings v. United States Indus., Inc., 428 F.2d 303, 312 (5th Cir. 1970).

[43]Sullivan v. Little Hunting Park, Inc. 396 U.S. 229, 239 (1969). *See generally* Note, *Implying Civil Remedies From Federal Regulatory Statutes,* 77 HARV. L. REV. 285 (1963) [hereinafter cited as *Implying Civil Remedies*].

[44]*E.g.,* United Mine Workers v. Patton, 211 F.2d 742, 749 (4th Cir.), *cert. denied,* 348 U.S. 824 (1954): "Where Congress has intended that damages in excess of the actual damage sustained by plaintiff may be recovered in an action created by statute, it has found no difficulty in using language appropriate to that end."

[45]*Implying Civil Remedies, supra* note 43, at 290. This principle of "negative implication is unsafe as a general rule of construction." *Id. See* SEC v. C.M. Joiner Corp., 320 U.S. 344, 350–51 (1943): "However well these rules may serve at times to aid in deciphering legislative intent, they long have been subordinated to the doctrine that courts will construe the details of an act in conformity with its dominating general purpose . . . and will interpret the text so far as the meaning of the words fairly permits so as to carry out in particular cases the generally expressed legislative policy." *But see* National R.R. Passenger Corp. v. National Ass'n of R.R. Passengers, 94 S. Ct. 690, 693 (1974).

often implied completely new causes of action.[46] One federal judge has concluded that "[i]mplied rights of action are not contingent upon statutory language which affirmatively indicates that they are intended. On the contrary, they are implied unless the legislation evidences a contrary intention."[47]

It is more common practice, however, for courts simply to imply remedies interstitially where Congress has already established a cause of action. Such a procedure is relatively immune from the criticism of unwarranted judicial activism. As one commentator has suggested:

> [T]he weaknesses of the courts as lawmakers—the lack of debates and hearings, the retroactive effect of its solutions, the uncertainty of its public mandate—are less serious when conduct has already been proscribed by the legislature and only an additional remedy is sought. Making its decision in relation to an existing and functioning statute, the court may be in an even better position to assess the need for supplemental civil relief than was the legislature at the time of enactment.[48]

The courts have implied punitive damages under a number of federal statutes. Although the Jones Act,[49] the maritime counterpart of the Federal Employers' Liability Act,[50] does not specifically provide for punitive damages, one court has recognized such relief: "Exemplary damages are the product of the common law and are not the creation of legislation. Thus, while certain statutes may specifically authorize the recovery of punitive damages, such specific reference is neither common nor necessary."[51] Such damages have also been implied in civil rights

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[46] *E.g.*, J.I. Case Co. v. Borak, 377 U.S. 426 (1964) (implying a private cause of action under section 14(a) of the Securities Exchange Act of 1934, 15 U.S.C. § 78n(a) (1970)); Fitzgerald v. Pan American World Airways, Inc., 229 F.2d 499 (2d Cir. 1956) (implying a damage action for discrimination under 404(b) of the Federal Aviation Act of 1958, 49 U.S.C. § 1374(b) (1970)); Reitmeister v. Reitmeister, 162 F.2d 691 (2d Cir. 1947) (implying a civil cause of action for wiretapping in violation of the Federal Communications Act of 1934, 47 U.S.C. § 605 (1970)). Recently, the Supreme Court has held that damage actions can be implied directly from the Constitution itself. Bivens v. Six Unknown Named Agents, 403 U.S. 388 (1971); *see* Dellinger, *Of Rights and Remedies: The Constitution as a Sword*, 85 HARV. L. REV. 1532 (1972) [hereinafter cited as Dellinger].

[47] Brown v. Bullock, 194 F. Supp. 207, 224 (S.D.N.Y.), *aff'd*, 294 F.2d 415 (2d Cir. 1961), *quoted approvingly in* Wheeldin v. Wheeler, 373 U.S. 647, 661 (1963) (Brennan, J., dissenting).

[48] *Implying Civil Remedies*, *supra* note 43, at 291.

[49] 46 U.S.C. § 688 (1970).

[50] 45 U.S.C. §§ 51–60 (1970).

[51] *In re* Den Norske Amerikalinje A/S, 276 F. Supp. 163, 176 (N.D. Ohio 1967), *rev'd on other grounds sub nom.* United States Steel Corp. v. Furhman, 407 F.2d 1143 (6th Cir. 1969).

contexts under sections 1982[52] and 1983[53] and under section 404 (b) of the Federal Aviation Act of 1958, which prohibits racial discrimination by air carriers.[54] As the court in *Wills v. Trans World Airlines* stated:

> [A]lthough plaintiff's rights were established by contract under the [Federal Aviation] Act, deprivation of such contractual rights by unreasonable and unjust discrimination, in violation of the Act, amounted to tortious conduct on the part of the defendant . . . . Traditional judicial remedies generally available for tortious acts should, then, be available . . . .[55]

In implying new remedies under federal statutes, the courts have stressed the importance of looking to the overall purpose of an act for guidance.[56] Where the courts have declined to imply the availability of punitive damages under various statutes,[57] they have usually argued that the additional remedy would go beyond the purposes of the act,[58] or would be superfluous in light of already existing remedies.[59] At the same time, the mere fact that other remedies are available should not automatically prohibit the implication of additional remedies.[60] The following subsection will review the general functions of punitive damages and the adequacy of alternative remedies in order to determine

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[52]42 U.S.C. § 1982 (1970) (prohibits racial discrimination in transactions involving real and personal property); *see* Lee v. Southern Home Sites Corp., 429 F.2d 290 (5th Cir. 1970).

[53]42 U.S.C. § 1983 (1970), *quoted at* note 31 *supra*; *see* Basista v. Weir, 340 F.2d 74 (3d Cir. 1965).

[54]49 U.S.C. § 1374(b) (1970); *see* Wills v. Trans World Airlines, 200 F. Supp. 360 (S.D. Cal. 1961).

[55]200 F. Supp. at 367.

[56]*E.g.*, J.I. Case Co. v. Borak, 377 U.S. 426 (1964); International Bhd. of Boilermakers v. Braswell, 388 F.2d 193 (5th Cir. 1968); Basista v. Weir, 340 F.2d 74 (3d Cir. 1965).

[57]*E.g.*, Securities Act of 1933, 15 U.S.C. §§ 77a-77bbb (1970); Securities Exchange Act of 1934, 15 U.S.C. §§ 78a-78jj (1970); Federal Employers' Liability Act, 45 U.S.C. §§ 51–60 (1970); National Labor Relations Act, 29 U.S.C. §§ 151–68 (1970).

[58]*E.g.*, Kozar v. Chesapeake & O. Ry., 449 F.2d 1238 (6th Cir. 1971) (Federal Employers' Liability Act).

[59]*E.g.*, Green v. Wolf Corp., 406 F.2d 291 (2d Cir. 1968), *cert. denied*, 395 U.S. 977 (1969) (denying punitive damages under section 10(b) of the Securities Exchange Act of 1934, because of the availability of criminal sanctions under the Act and because actual damages in these cases often result in "crushing liabilities").

[60]*Cf.* Dellinger, *supra* note 46, at 1551. "[T]he fact that persons in other situations may have access to remedies that will vindicate their rights . . . should not preclude the judicial creation of remedies for a particular plaintiff who is without effective means of redress."

whether punitive damages would be a constructive aid in carrying out the purposes of title VII. Chief among these purposes are "to bring an end to the proscribed discriminatory practice, and to make whole, in a pecuniary fashion, those who have suffered by it."[61]

B. The Functions of Punitive Damages under Title VII

A major reason for awarding punitive damages is to warn the defendant not to repeat his wrongful conduct and to deter others from following his example.[62] Since the purpose of title VII is not only to correct the effects of past discrimination but also to prevent future discrimination,[63] punitive damages would seem to be an appropriate remedy. One court has suggested that a proper remedy under title VII should, first, deprive the defendant of his wrongful gains, second, eliminate the effects of past discrimination, and third, "close off 'untraveled roads' to the illicit end and not 'only the worn one.'"[64] While it would be very difficult for a court to chart all the possible "untraveled roads" of employment discrimination, and even more difficult to fashion an injunction that could effectively close them off, an award of punitive damages would serve as a stern warning to the defendant and others in his position against attempting to explore those roads.

Another important aim of punitive damages is punishment for conscious wrongdoing. One aspect of this retributive role is to deter the victim from resorting to self-help.[65] This function is particularly important in discrimination and civil rights cases where emotions run high.[66] Not only the plaintiffs, but the community as well, may be outraged by intentionally discriminatory conduct in an employment discrimination case.[67] Congress was aware of these personal and social

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[61]Bowe v. Colgate-Palmolive Co., 416 F.2d 711, 720 (7th Cir. 1969).

[62]W. Prosser, LAW OF TORTS, § 2, at 9 (4th ed. 1971) [hereinafter cited as Prosser].

[63]Local 53, Insulators v. Vogler, 407 F.2d 1047, 1054 (5th Cir. 1969).

[64]Dobbins v. Local 212, Elec. Workers, 292 F. Supp. 413, 447 (S.D. Ohio 1968).

[65]Comment, *Punitive Damages Under Federal Statutes: A Functional Analysis,* 60 CALIF. L. REV. 191, 207 (1972) [hereinafter cited as *Functional Analysis*].

[66] "Naturally, wherever the emotional aspect of the wrong is prominent the desire for punishment is to the fore. 'The jingle of the guinea soothes the hurt that honor feels.'" C. McCormick, HANDBOOK ON THE LAW OF DAMAGES § 81, at 287 (1935) [hereinafter cited as McCormick]. In a suit for police misconduct under section 1983, for example, the court pointed out that the plaintiff's "main reaction was one of zeal to uphold the right which had been invaded." Rhoads v. Horvat, 270 F. Supp. 307, 311 (D. Colo. 1967).

[67]In *Detroit Edison,* Judge Keith found it significant that the company had "a reputation in the black community . . . as an employer that generally does not hire blacks and continues to assign those blacks that are hired to low opportunity, non-promotable jobs . . . ." 365 F. Supp. at 102.

tensions when it enacted title VII, and the statute was probably intended, at least in part, to provide an alternative to retaliation for willful discrimination.[68] The remedy of punitive damages would seem to be a helpful aid in fulfilling this purpose.

The retributive function of punitive damages can also serve to emphasize the importance of certain rights by stigmatizing their violation.[69] For example, in two early voting rights cases, the courts granted monetary relief far in excess of the actual damages proven. Though not labeled punitive, these damages were awarded on the theory that the right to vote is so basic in a democracy that it warrants such protection.[70] There is little question that in American society today one's job is a major factor determining not only income but status, self-respect, and personal autonomy as well.[71] The intentional practice of employment discrimination thus impinges upon a combination of fundamental interests, and this recognition motivated congressional passage of title VII.[72] Public condemnation of title VII violators through the award of punitive damages "may be one method of increasing public respect for the underlying rights."[73]

In addition to deterrence and retribution, punitive damages have traditionally performed a third major function, compensating the plaintiff for injuries not satisfactorily covered by the compensatory award.[74] For example, before the common law allowed recovery for such nonfinancial injuries as pain and suffering or mental anguish, some courts permitted recoveries for these losses under the name of punitive

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[68] "As a direct consequence of . . . segregation and as a result of his pent-up frustrations, violence has been engaged in by some Negro groups. This in turn, has occasioned counterviolence by white groups in both the North and South, who are bent upon resisting change.

. . . .

. . . Congress must accept its primary responsibility for dealing with the major cause of the unrest in the country today—civil rights." H.R. Rep. No. 914, 88th Cong., 1st Sess., pt. 1, at 60 (1963).

[69] *Functional Analysis, supra* note 65, at 207.

[70] Nixon v. Herndon, 273 U.S. 536 (1927); Wayne v. Venable, 260 F. 64 (8th Cir. 1919).

[71] "[T]he loss of a job because of discrimination means more than the loss of just a wage. It means the loss of a sense of achievement and the loss of a chance to learn. Discrimination is a vicious act. It may destroy hope and any trace of self respect." Humphrey v. Southwestern Portland Cement Co., 369 F. Supp. 832, 834 (W.D. Tex. 1973), *rev'd on other grounds,* 488 F.2d 691 (5th Cir. 1974).

[72] "The rights of citizenship mean little if an individual is unable to gain the economic wherewithal to enjoy or properly utilize them." H.R. Rep. No. 914, 88th Cong., 1st Sess., pt. 2, at 29 (1963).

[73] *Functional Analysis, supra* note 65, at 212.

[74] *Id.* at 203.

damages.[75] In addition, the award of such damages was often calculated to indemnify the plaintiff for attorneys' fees and litigation costs when he was forced by a wrongdoer to take his claim to court for vindication.[76]

Analyzing title VII in this light, it is apparent that the remedies Congress explicitly provided often are not sufficient to carry out effectively the purposes of the legislation. Back pay awards are frequently insignificant because interim earnings are deducted, and the value of reinstatement may be negligible because by the time these cases are resolved the plaintiff has usually found another job.[77] Furthermore, there is no explicit provision designed to redress mental suffering and other intangible injuries:

> While the statutory provisions may serve to redress the pecuniary damage resulting from discrimination, they do not take a single step toward mending the psychological damage to both the party discriminated against and others in the class he represents . . . . [D]iscrimination in the area of employment stunts the educational and technical potential development of the class subject to such inequities. . . . [S]egregation and discrimination not only denote inferiority of the class discriminated against, but also retard the development of that class . . . .[78]

Punitive damages also serve a fourth function, providing an incentive for plaintiffs to perform the role of a private attorney general.[79] A major purpose of allowing private actions under title VII is to effectuate broad policies as well as to afford relief to individuals.[80] Awarding punitive damages thus directly vindicates the public purposes

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[75] *E.g.*, Wise v. Daniel, 221 Mich. 229, 190 N.W. 746 (1922); Fay v. Parker, 53 N.H. 342 (1873).

[76] McCormick, *supra* note 66, § 77, at 277. Attorneys' fees may be awarded under title VII, 42 U.S.C.A. § 2000e-5(k) (1974), and they were granted in the *Detroit Edison* case. 365 F. Supp. at 124.

[77] *Tort Remedies, supra* note 2, at 492.

[78] Ethridge v. Rhodes, 268 F. Supp. 83, 88–89 (S.D. Ohio 1967). There is a need for compensatory damages as well as punitive damages under title VII. Many of the arguments suggested in this Comment for the availability of punitive damages in employment discrimination cases are equally valid for the availability of compensatory damages. *See* Section VI *infra*.

[79] "[T]he plaintiff's self interest furnished the motive power used to protect the general interest . . . ." Morris, *Punitive Damages in Tort Cases*, 44 HARV. L. REV. 1173, 1183 (1931).

[80] *See* Hutchings v. United States Indus., Inc., 428 F.2d 303 (5th Cir. 1970); Bowe v. Colgate-Palmolive Co., 416 F.2d 711 (7th Cir. 1969).

of title VII. The 1972 amendments giving the Equal Employment Opportunity Commission (EEOC) the power to bring civil actions against violators of title VII did not diminish the importance of private actions in enforcing the Act, especially in light of the EEOC's growing backlog of cases and shortages of funding and staff.[81]

Thus it appears that where the defendant's violation of title VII is in wanton disregard for the rights of others,[82] awarding punitive damages would substantially advance the goals of the statute in four distinct ways.

C. Congressional Intent and the Meaning of Affirmative Action

In view of the important role punitive damages can play in effectuating the purposes of title VII, it seems that the court in *Stamps v. Detroit Edison Co.* was correct in reading into the statute the availability of punitive damages. This conclusion is supported by the broad wording of title VII's remedies provision, section 706(g),[83] which, this subsection will argue, indicates Congress' intention to give the courts great flexibility in administering remedies under the Act.

The court in *Van Hoomissen v. Xerox Corp.* attempted to distinguish title VII from the federal statutes under which punitive damages have been implied. It argued that such relief has been implied "where the statute speaks only in the most general of remedial terms, or in no terms at all," whereas in title VII, "we have a statute which is quite specific in the remedies it provides."[84] Admittedly, the remedies explicitly provided in title VII are more specific than the bare cause of action Congress created in a statute like section 1983.[85] Nevertheless, the wording of section 706(g) is open-ended and clearly indicates Congress' intention that the courts be empowered to provide remedies beyond those singled out in the Act. Section 706(g) authorizes the court to order affirmative action that "may include, *but is not limited to*"[86] the specific remedies mentioned, such as reinstatement and back pay.[87]

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[81] H.R. Rep. No. 238, 92d Cong., 1st Sess. 12 (1971). This backlog is now approaching 80,000 cases. Gould, *The Seattle Building Trades Order: The First Comprehensive Relief Against Employment Discrimination in the Construction Industry*, 26 STAN. L. REV. 773, 812 n.203 (1974).

[82] *See* Section IV *infra*.

[83] 42 U.S.C.A. § 2000e-5(g) (1974). See note 4 *supra* for pertinent text of the provision.

[84] 368 F. Supp. at 838.

[85] *See* note 31 *supra*.

[86] 42 U.S.C.A. § 2000e-5(g) (1974) (emphasis added).

[87] "[T]erms like 'include' are words of enlargement and not of limitation and . . . examples specified thereafter are merely illustrative." Jackson v. Concord Co., 54 N.J. 113, 126–27, 253 A.2d 793, 800 (1969) (construing the New Jersey Law Against Discrimination, N.J. STAT. ANN. § 10:5–17 (Supp. 1973), a statute with wording similar to that in section 706(g)).

The *Van Hoomissen* court also asserted that, as a legal remedy, punitive damages could not be awarded under title VII because affirmative action should be limited to equitable remedies.[88] It is unclear whether punitive damages awarded in the context of a broad, equitable title VII decree should be considered equitable or legal relief. Most courts consider back pay awards in this context equitable relief, in spite of their compensatory function.[89] Moreover, the deterrent effect of punitive damages is aimed at controlling the future behavior of the defendant and others in his position, a traditional function of equitable relief. In any event, the *Van Hoomissen* court's narrow interpretation of section 706(g) is not justified. The wording in the Act, "or any other equitable relief as the court deems appropriate," is only one entry in the list of possible remedies that follows the words, "but is not limited to." Thus even if an award of punitive damages under title VII is a legal remedy, such an award would not be inconsistent with congressional intent.

Another argument advanced by the *Van Hoomissen* court focuses on title VIII of the Civil Rights Act of 1968, dealing with fair housing.[90] The enforcement provisions of title VIII explicitly authorize the courts to award up to $1000 in punitive damages.[91] The court in *Van Hoomissen* found it significant that title VIII was already law when the 1972 amendments to title VII of the 1964 Act were proposed, "yet no such parallel provision for punitive damages was included, even though *other amendments* to the remedies section were made."[92] If Congress had felt the need for a punitive damages remedy under title VII, the court argued, it would have specifically provided one in the 1972 amendments.

As suggested earlier, such arguments by negative implication are "unsafe as a general rule of construction."[93] Moreover, the remedies needed to vindicate legal rights in one context are not necessarily the same as those required in another. The courts, when administering one statute, have had little difficulty ignoring troublesome or conflicting

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[88] 368 F. Supp. at 836 n.5.

[89] *E.g.*, Rogers v. Loether, 467 F.2d 1110, 1121–22 (7th Cir. 1972), *aff'd sub nom.* Curtis v. Loether, 94 S. Ct. 1005 (1974); Johnson v. Georgia Highway Express, Inc., 417 F.2d 1122, 1125 (5th Cir. 1969).

[90] 42 U.S.C. §§ 3601–19 (1970).

[91] 42 U.S.C. § 3612(c) (1970) provides in part: "The court may grant as relief, as it deems appropriate, any permanent or temporary injunction, temporary restraining order, or other order, and may award to the plaintiff actual damages and not more than $1000 punitive damages . . . ."

[92] 368 F. Supp. at 838 (emphasis in original).

[93] *See* note 45 *supra.*

provisions of another related law.[94] Because interests in real property are often given special consideration, Congress may have felt it necessary to include the $1000 punitive damage provision in the Fair Housing Act as a *limit* to the court's discretion. Discrimination in employment, on the other hand, can take an infinite variety of forms,[95] and Congress may have felt it wise to keep the remedies provided under title VII as flexible as possible. In any event, the *Van Hoomissen* court placed undue emphasis on this argument because of its mistaken initial belief that title VIII of the 1968 Act was passed as an amendment to the 1964 Act and is now "part of the same 1964 Civil Rights Act."[96] In fact, the Fair Housing Act is no more closely related, except perhaps in temporal proximity, to title VII of the 1964 Act than is any other federal civil rights act.

The principal issue of statutory construction is whether punitive damages fit under the umbrella of affirmative action authorized by section 706(g). Apart from the reinstatement and back pay remedies suggested in the statute itself, Congress provided little guidance as to the types of remedy it meant to authorize with the term affirmative action. As the court in *Van Hoomissen* pointed out, the legislative history of section 706(g) "is not terribly illuminating."[97]

The concept of affirmative action is not unique to title VII, however. State discrimination cases are the source of law on this concept most relevant to its use in title VII. Some state anti-discrimination laws explicitly authorize awards of compensatory or punitive damages.[98] The dominant trend, however, is towards fair employment acts or general anti-discrimination laws which, in language similar to title VII, authorize a state administrative agency or the courts to administer relief

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[94]For example, the court in Wright v. Kaine Realty, 352 F. Supp. 222 (N.D. Ill. 1972), held that the provisions of the 1968 Act have no limiting effect on the remedies available under section 1982. In Wills v. Trans World Airlines, 200 F. Supp. 360 (S.D. Cal. 1961), the court awarded $5000 in punitive damages in a civil action for discrimination under the Federal Aviation Act even though the maximum fine provided for under the criminal provisions of the same act is $2000. 49 U.S.C. § 1472(a) (1970).

[95]Discrimination in employment is "an area in which 'subtleties of conduct . . . play no small part.'" Holland v. Edwards, 307 N.Y. 38, 45, 119 N.E.2d 581, 584 (1954), *quoting* NLRB v. Express Publishing Co., 312 U.S. 426, 437 (1941).

[96]6 F.E.P. Cas. 1231, 1238. This error was corrected in the court's opinion as it appears in the Federal Supplement. 368 F. Supp. at 837.

[97]368 F. Supp. at 836.

[98]*E.g.,* ME. REV. STAT. ANN. tit. 5, § 4613(2)(B)(7) (Supp. 1972–73) ($100–1000 punitive damages); MINN. STAT. ANN. § 363.071(2) (Cum. Supp. 1973) ($100–500 punitive damages); N.M. STAT. ANN. § 4–33–10(E) (Supp. 1973) (up to $1000 actual damages).

in the form of affirmative action.[99] Both punitive and compensatory[100] damages have been awarded under this rubric. In Ohio, for example, the Civil Rights Commission found that an assessment of $1000 punitive damages was "required for the accomplishment of the purposes of the Ohio laws against discrimination."[101] Similarly, a New Jersey court held that compensatory damages could be awarded under the New Jersey Law Against Discrimination:[102] "[W]e believe the implication is plain enough considering the broad language of the section in the light of the overall design of the act . . . ."[103] Although no West Virginia court has yet decided the question, the chairman of the state human rights commission believes the commission has the authority to award punitive and compensatory damages under the state's Human Rights Act.[104] An Indiana statute explicitly defines "[t]he term 'affirmative action' [to mean] those acts which the commission deems necessary to assure compliance with the . . . Civil Rights Law."[105] Thus, the dominant

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[99]*E.g.*, N.J. STAT. ANN. § 10:5-17 (Supp. 1973) (director of the division of civil rights may issue "an order requiring such respondent to cease and desist from such unlawful employment practice or unlawful discrimination and to take such affirmative action, including, but not limited to, hiring, reinstatement or upgrading of employees, with or without back pay . . . or extending full and equal accommodations . . . to all persons, as, in the judgment of the director, will effectuate the purpose of this act . . . ."); CAL. LABOR CODE § 1426 (West 1971); CONN. GEN. STAT. ANN. § 31-127 (1972); ILL. ANN. STAT. ch. 48, § 858.01(c) (Smith-Hurd Supp. 1973); IND. ANN. STAT. § 40-2312(k)(1) (Burns Cum. Supp. 1973); IOWA CODE ANN. § 601A-9(12) (Cum. Pamphlet 1973); MICH. COMP. LAWS ANN. § 423.307(h) (1967); NEB. REV. STAT. § 48-1119(3) (1968); OHIO REV. CODE ANN. § 4112.05(G) (Page 1973); PA. STAT. ANN. tit. 43, § 959 (Perdon 1964), *as amended*, (Supp. 1973-74); W. VA. CODE ANN. § 5-11-10 (1971 repl. vol.). *See also* Dorsen, *The Model Anti-Discrimination Act*, 4 HARV. J. LEGIS. 212 (1967).

[100]The term "compensatory damages" as used in this Comment refers to a legal remedy and should be distinguished from back pay awards explicitly provided for in title VII and many of the state statutes: "It is not unreasonable to regard an award of back pay as an appropriate exercise of a chancellor's power to require restitution. Restitution is clearly an equitable remedy. . . . The retention of 'wages' which would have been paid but for the statutory violation . . . might well be considered 'ill-gotten gains'. . . .

"The payment of compensatory damages . . . is not a return to plaintiff of something which defendant illegally obtained or retained; it is a payment in dollars for those losses —tangible and intangible—which plaintiff has suffered by reason of a breach of duty by defendant." Rogers v. Loether, 467 F.2d 1110, 1121-22 (7th Cir. 1972) (footnotes omitted), *aff'd sub nom.* Curtis v. Loether, 94 S. Ct. 1005 (1974).

[101]*In re* Lysyj, 58 Ohio Op. 2d 503, 505 (Civil Rights Comm'n 1971).

[102]N.J. STAT. ANN. §§ 10:5-1—5-19 (Supp. 1973). *See* note 99 *supra*.

[103]Jackson v. Concord Co., 54 N.J. 113, 126, 253 A.2d 793, 800 (1969).

[104]W. VA. CODE ANN. §§ 5-11-1—11-19 (1971 repl. vol.). The Chairman's assertion is cited in Note, *Civil Rights—Administrative Enforcement—Damages as an Appropriate Remedy*, 75 W. VA. L. REV. 253, 255 (1973).

[105]IND. STAT. ANN. § 40-2309(g) (Burns Cum. Supp. 1973).

position in the states is to construe the concept of affirmative action broadly, permitting the courts to order any relief, including punitive and compensatory damages, that furthers the purposes of their civil rights acts.[106]

There is also a major body of federal law concerning the concept of affirmative action—the decisions which have applied the National Labor Relations Act (NLRA) and the Labor Management Relations Act (LMRA).[107] These decisions are of great significance for title VII because both these Acts and title VII are keystones in the nation's overall employment and labor policy. These statutes regulate the same interests and overlap to some extent in their operation and concerns. Moreover, title VII's legislative history indicates that it was modeled in part on the NLRA,[108] and the wording in title VII describing available remedies is very similar to that in Section 10(c) of the NLRA.[109]

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[106]However, in Iron Workers Local 67 v. Hart, 191 N.W.2d 758 (Iowa 1971), the Iowa Supreme Court rejected a claim for compensatory damages under a statute, IOWA CODE ANN. § 601A-9(12) (Cum. Pamphlet 1973), similar in wording to title VII. It may be possible to limit this decision to its facts, since no claim for money damages was made in the complaint and respondent's counsel was not even aware during the proceedings that damages were being sought. Moreover, it appears the award would have gone not to the individual victims of the defendant union's discriminatory practices but rather to their corporate employer. 191 N.W.2d at 767. In any case, this decision merely prevented an *administrative agency* from awarding monetary damages. The court expressly preserved the right of plaintiffs to seek such damages in the courts, in accordance with earlier decisions under Iowa law. *Id.* at 768; *see* Amos v. Prom, Inc., 117 F. Supp. 615 (N.D. Iowa), *appeal dismissed,* 214 F.2d 350 (8th Cir. 1954).

Similarly, in Zamantakis v. Commonwealth Human Rel. Comm'n, 10 Pa. Cmwlth 107, 308 A.2d 612 (1973), a Pennsylvania court denied the availability of compensatory damages under the Pennsylvania Human Relations Act, PA. STAT. ANN. tit. 43, § 959 (Perdon 1964), *as amended,* (Supp. 1973–74). Here again, however, the court was concerned with the power of an *administrative agency,* with "none of the formal trappings, evidentiary protections, and strict procedures of a court of law," to award damages. 308 A.2d at 616.

[107]29 U.S.C. §§ 141–87 (1970). Another source of federal law on the concept of affirmative action is Executive Order No. 11,246, 3 C.F.R. 173 (1973). This Order, designed to enforce contractors' compliance with nondiscrimination provisions of federal contracts, has generated a number of affirmative action plans in the construction industry. *See generally* Leiken, *Preferential Treatment in the Skilled Building Trades: An Analysis of the Philadelphia Plan,* 56 CORNELL L. REV. 84 (1970); Nash, *Affirmative Action Under Executive Order 11,246,* 46 N.Y.U.L. REV. 225 (1971). Affirmative action in this context, however, is quite different from that under title VII since there need be no judicial finding that the employer has practiced discrimination. *Developments, supra* note 2, at 1291–92. Thus, the issue of punitive damages would never be raised in connection with Executive Order No. 11,246.

[108]110 CONG. REC. 6549 (1964) (remarks of Sen. Humphrey); *Enforcement, supra* note 2, at 432.

[109]*Compare* 42 U.S.C.A. § 2000e-5(g) (1974), *quoted at* note 4 *supra, with* 29 U.S.C. § 160(c) (1970). The latter provision provides that if the NLRB finds the defendant has

Although the National Labor Relations Board (NLRB) and the courts have generally endeavored to construe the labor relations acts liberally,[110] the courts have not allowed punitive awards under section 10(c) of the NLRA.[111] The court in *Van Hoomissen* relied upon this fact to support its argument that punitive damages should not be implied under title VII. Chief Judge Carter stated:

> Although not conclusive, the similarity of the two statutes and the fact that Congress was aware that neither punitive nor compensatory damages were allowed under the National Labor Relations Act leads to the firm belief that Congress did not intend that any money damages other than back pay would be granted under the present statute.[112]

The cases prohibiting punitive damages under Section 10(c) of the NLRA can be distinguished from title VII on a number of grounds. The original version of title VII was modeled directly on the NLRA and would have established an Equal Employment Opportunity Board within the EEOC empowered to issue enforceable orders.[113] But compromises made during the congressional fight for title VII's passage resulted in major alterations of its enforcement procedures.[114] Therefore, although the wording authorizing remedies in the two statutes remains similar, any indications from the legislative history that interpretations of the NLRA should apply to title VII are "ambiguous at best."[115]

This difference in the entity authorized to grant relief under the NLRA and title VII provides another basis for distinguishing the two statutes. Under the NLRA, remedial orders can be issued by the NLRB, while under title VII relief is obtained in the courts, often on a complaint

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engaged in an unfair labor practice, the Board "shall issue . . . an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this subchapter . . . ."

[110] "[T]he Board has wide discretion in ordering affirmative action; its power is not limited to the illustrative example of one type of permissible affirmative order, namely, reinstatement with or without back pay." Virginia Elec. & Power Co. v. NLRB, 319 U.S. 533, 539 (1943).

[111] Republic Steel Corp. v. NLRB, 311 U.S. 7 (1940); Consolidated Edison Co. v. NLRB, 305 U.S. 197 (1938).

[112] 368 F. Supp. at 837.

[113] Bureau of National Affairs, THE CIVIL RIGHTS ACT OF 1964, at 41 (1964).

[114] The House Judiciary Committee eliminated the Board and proposed enforcement by de novo court proceedings brought by the EEOC. The Senate rejected this plan, and the Dirksen-Mansfield version, which ultimately became law, "abandoned the philosophy of government-initiated enforcement . . . and turned instead to essentially private enforcement." *Id.*

[115] *Developments, supra* note 2, at 1262 n.360.

by a private individual.[116] Although the court in *Attkisson v. Bridgeport Brass Co.*[117] denied the availability of compensatory damages under title VII, it rejected as precedents the decisions under the NLRA: "We are not persuaded by this parallel . . . since the remedies there available are administered by the NLRB and not by federal courts."[118] As stated by Justice Frankfurter, the courts, "unlike administrative agencies, are organs with historic antecedents which bring them well-defined powers. They do not require explicit statutory authorization for familiar remedies to enforce statutory obligations."[119] Affirmative relief appropriate for the courts to provide may thus be quite different from the relief appropriate for an administrative board to authorize. One commentator suggested even before title VII became operative that "[t]he change from public rights to private remedies in the act's orientation raises the possibility that broader relief than that granted under the NLRA should be made available."[120]

Whether or not the decisions under section 10(c) of the NLRA limit the remedies available under title VII, the court in *Van Hoomissen* argued that the remedies constituting affirmative action under title VII must be applied in "a corrective, not a punitive, manner,"[121] thus precluding an award of punitive damages. Unfortunately, the court apparently did not master title VII's "chaotic legislative history,"[122] for the portion of the legislative record the court relies on to support its contention reflects Congress' fear of quota systems, not a fear of punitive damages.[123]

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[116]Under title VII, the analogous administrative agency, the EEOC, has no authority to grant relief. In attempting to obtain compliance with the Act, the Commission's only sanctions are the use of "informal methods of conference, conciliation, and persuasion," 42 U.S.C.A. § 2000e-5(b) (1974), and the threat of initiating court actions where conciliation efforts fail. 42 U.S.C.A. § 2000e-5(f)(1) (1974).

[117]5 F.E.P. Cas. 919 (S.D. Ind. 1972).

[118]*Id.* at 920.

[119]Montana-Dakota Util. Co. v. Northwestern Pub. Serv. Co., 341 U.S. 246, 261 (1951) (Frankfurter, J., dissenting).

[120]*Enforcement, supra* note 2, at 467. These distinctions between title VII and the NLRA are reinforced by the special concern Congress has demonstrated for the enforcement of federal civil rights statutes. *See* 28 U.S.C. § 1343(4) (1970), discussed at pp. 346–47 *infra*; 42 U.S.C. § 1988 (1970), discussed at pp. 349–51 *infra*.

[121]368 F. Supp at 836.

[122]Hall v. Wertham Bag Corp., 251 F. Supp. 184, 186 (M.D. Tenn. 1966).

[123]The court quoted from H.R. Rep. No. 914, 88th Cong., 1st Sess. (1963), *reported in* 2 U.S. CODE CONG. & AD. NEWS 2516 (1964): "It must . . . be stressed that the Commission must confine its activities to correcting abuse, not promoting equality with mathematical certainty." This passage continues as follows, not quoted by the *Van Hoomissen* court: "In this regard, nothing in the title permits a person to demand employment. . . . [T]he Commission will only jeopardize its continued existence if it seeks to impose forced racial balance upon employers or labor unions."

The *Van Hoomissen* court's argument, in any case, is similar to that of Chief Judge Biggs in *Local 127, United Shoe Workers v. Brooks Shoe Manufacturing Co.*,[124] which denied punitive damages under section 301 of the LMRA[125] on the grounds that "it is the general policy of the federal labor laws . . . to supply remedies rather than punishments."[126] The court in *Sydney Wanzer & Sons, Inc. v. Milk Drivers Local 753*,[127] however, limited *Brooks Shoe Co.* to its facts—the offending employer had moved, and his plant was shut down—and granted an award of punitive damages: "Unlike the situation in *Brooks Shoe*, which had deteriorated beyond the point of remedy, some situations may be saved by the invocation of stern remedies such as exemplary damages."[128] Furthermore, the court confronted squarely the notion that punitive damages could not be "corrective":

> The core of [the] . . . argument is that the general policy of the federal labor laws is "to supply remedies rather than punishments." The statement, while correct, is somewhat ambiguous, since courts often impose "punishments" for the explicit purpose of deterring future misconduct, a distinctly remedial notion. . . .
>
> [W]here the award is a uniquely effective device for changing a specific pattern of illegal conduct by a party before the court, it comes within the remedial purpose of the labor laws, even though the defendant may suffer as if he had been "punished" for other reasons.[129]

In summary, punitive damages are an appropriate remedy under title VII. Federal courts traditionally have implied remedies under federal statutes where additional remedies were needed to carry out the purposes of the statute. In employment discrimination cases, punitive damages can provide an increased deterrent to potential wrongdoers and

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[124] 298 F.2d 277 (3d Cir. 1962).

[125] 29 U.S.C. § 185 (1970).

[126] 298 F.2d at 284 (Biggs, C.J., concurring in part and dissenting in part).

[127] 249 F. Supp. 664 (N.D. Ill. 1966).

[128] *Id.* at 669.

[129] *Id.* at 670–71. For a similar holding, see International Bhd. of Boilermakers v. Braswell, 388 F.2d 193, 200–01 (5th Cir.), *cert. denied*, 391 U.S. 935 (1968): "We do not agree . . . that the use of the word 'relief' [in the Labor-Management Reporting and Disclosure Act] necessarily rules out punitive damages which are strictly speaking not in the nature of relief." The court asserted that the "LMRDA should be liberally construed to effectuate its purposes" and determined that "the awarding of punitive damages in appropriate cases serves as a deterrent to those abuses which Congress sought to prevent."

an increased incentive for plaintiffs to fulfill a private attorney general role. They can also deter victims of discrimination from resorting to self-help, vindicate important rights by stigmatizing their violation, and compensate plaintiffs for injuries not satisfactorily included in the compensatory award. Congress left the language of section 706(g) open-ended in order to give the courts the greatest possible flexibility in providing remedies under title VII, and the experience under the state anti-discrimination statutes indicates that punitive damages fit properly within the concept of affirmative action.

III. PUNITIVE DAMAGES UNDER SECTIONS 1981 AND 1988

Title VII of the Civil Rights Act of 1964 may not be the only federal statutory provision which can be invoked by a plaintiff seeking punitive damages in an employment discrimination case. Such damages may be available under section 1981 and through state law under section 1988. These alternative approaches should be explored for two reasons. First, some federal courts have rejected the argument that punitive damages can be implied under title VII.[130] Second, some victims of employment discrimination may be barred from seeking relief under this provision.[131]

A. Section 1981

Section 1981 provides that "all persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts . . . as is enjoyed by white citizens . . . ,"[132] and it has been used to remedy discrimination in employment.

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[130]Howard v. Lockheed-Georgia Co., 372 F. Supp. 854 (N.D. Ga. 1974); Van Hoomissen v. Xerox Corp., 368 F. Supp. 829 (N.D. Cal. 1973); Guthrie v. Colonial Bakery Co., 6 F.E.P. Cas. 662 (N.D. Ga. March 8, 1973).

[131]An alternative source of relief was needed, for example, where plaintiffs brought an action after the period for filing complaints under title VII had expired, Tramble v. Converters Ink Co., 343 F. Supp. 1350 (N.D. Ill. 1972), and where the victims of discrimination were not members of any of the categories of persons protected by title VII. Guerra v. Manchester Terminal Corp., 350 F. Supp. 529 (S.D. Tex. 1972) (plaintiff was Mexican alien). *See also* Espinoza v. Farah Mfg. Co., 94 S. Ct. 334 (1973). Moreover, title VII covers only those employers who employ "fifteen or more employees for each working day in each of twenty or more calendar weeks in the . . . year . . . ." 42 U.S.C.A. § 2000e(b) (1974). Thus, victims of discrimination by a small or seasonal business have no remedy under title VII.

[132]16 Stat. 144, ch. 114, § 16 (1870), *as amended,* REV. STAT. § 1977 (1875) (codified at 42 U.S.C. § 1981 (1970)).

Although some cases have held that action under color of law is necessary for a claim based on section 1981,[133] most recent decisions hold that relief can be provided where there has been private discrimination in making and enforcing contracts.[134] This trend has been evident since the Supreme Court's ruling in *Jones v. Alfred H. Mayer Co.*[135] The Court there held that since sections 1981 and 1982[136] were originally enacted as the Civil Rights Act of 1866[137] to enforce the thirteenth amendment, they were not limited by the fourteenth amendment's focus on state action.[138] To state a cause of action under section 1981, the plaintiff must, however, allege some form of racial discrimination.[139]

Although section 1981 does not explicitly provide any remedies for interference with the right to make and enforce contracts, a plaintiff can invoke the jurisdiction of the federal courts to award "damages or . . .

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[133]Cook v. Advertiser Co., 323 F. Supp. 1212 (M.D. Ala. 1971), *aff'd on other grounds,* 458 F.2d 1119 (5th Cir. 1972); Waters v. Paschen Contractors, Inc., 227 F. Supp. 659 (N.D. Ill. 1964).

[134]*E.g.,* Sanders v. Dobbs Houses, Inc., 431 F.2d 1097 (5th Cir. 1970), *cert. denied,* 401 U.S. 948 (1971); Waters v. Wisconsin Steel Works of Int'l Harvester Co., 427 F.2d 476 (7th Cir.), *cert. denied,* 400 U.S. 911 (1970); Dobbins v. Local 212, Elec. Workers, 292 F. Supp. 413 (S.D. Ohio 1968).

[135]392 U.S. 409 (1968).

[136]42 U.S.C. § 1982 (1970) (providing equal rights to inherit, purchase, lease, sell, hold, and convey real and personal property).

[137]Act of April 9, 1866, ch. 31, § 1, 14 Stat. 27, *reenacted,* Enforcement Act of 1870, § 18, Act of May 31, 1870, ch. 114, § 18, 16 Stat. 140, 144 (codified at 42 U.S.C. §§ 1981, 1982 (1970)).

[138]For a more extensive analysis of this issue and a general discussion of the role of section 1981 in employment discrimination cases, see Larson, *The Development of Section 1981 As a Remedy for Racial Discrimination in Private Employment,* 7 HARV. CIV. RIGHTS-CIV. LIB. L. REV. 56 (1972) [hereinafter cited as Larson].

[139]*E.g.,* Agnew v. Compton, 239 F.2d 226 (9th Cir. 1956), *cert. denied,* 353 U.S. 959 (1957); Tramble v. Converters Ink Co., 343 F. Supp. 1350 (E.D. Ill. 1972). It has generally been held that victims of sex discrimination in employment cannot sue under section 1981. *E.g.,* Abshire v. Chicago & E.I.R.R., 352 F. Supp. 601 (N.D. Ill. 1972); League of Academic Women v. Regents of the Univ. of Cal., 343 F. Supp. 636 (N.D. Cal. 1972). Similarly, relief has been denied to persons discriminated against because of their religion or national origin. *E.g.,* Schetter v. Heim, 300 F. Supp. 1070 (E.D. Wis. 1969). However, this provision does permit relief where there has been discrimination based on the plaintiff's status as an alien. Takahashi v. Fish & Game Comm'n, 334 U.S. 410 (1948); Guerra v. Manchester Terminal Corp., 350 F. Supp. 529 (S.D. Tex. 1972). These cases have been distinguished from efforts to extend coverage to victims of sex discrimination on the ground that the legislative history of section 1981 indicated an explicit intent on the part of Congress to include noncitizens in its coverage while there was no discussion at all concerning sex discrimination. Guerra v. Manchester Terminal Corp., *supra,* at 533–37; League of Academic Women v. Regents of the Univ. of Cal., *supra,* at 639.

equitable or other relief under any Act of Congress providing for the protection of civil rights . . . ."[140] Only two decisions have discussed the availability of punitive damages under section 1981, and both conclude that such a remedy is available. The court in *Cook v. Advertiser Co.* stated that "both compensatory and punitive damages are allowable."[141] In *Tramble v. Converters Ink Co.*,[142] the court permitted the plaintiffs to seek punitive damages over the defendant's argument that *Sullivan v. Little Hunting Park*[143] limited awards under section 1982, and by analogy under section 1981, to compensatory damages. In rejecting this position, the court stated, "If anything, the [Supreme] Court appeared to suggest that whatever type of remedy is appropriate in the circumstances of a given case is allowable . . . ."[144]

As suggested by the defendant's argument in *Tramble*, decisions concerning remedies under section 1982 carry great weight with courts evaluating the availability of various remedies under section 1981.[145] All courts considering punitive damages under section 1982 have held that such damages are an available remedy if the defendant's conduct is sufficiently willful or malicious.[146] In fact, Judge Keith cited one of these cases in support of his award of punitive damages in *Detroit Edison*.[147]

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[140]28 U.S.C. § 1343(4) (1970); *see* Mizell v. North Broward Hosp. Dist., 427 F.2d 468 (5th Cir. 1970); *cf.* Sullivan v. Little Hunting Park, 396 U.S. 229 (1969); Jones v. Alfred H. Mayer Co., 392 U.S. 409 (1968).

[141]323 F. Supp. 1212, 1213 n.3 (M.D. Ala. 1971), *aff'd*, 458 F.2d 1119 (5th Cir. 1972).

[142]343 F. Supp. 1350 (E.D. Ill. 1972).

[143]396 U.S. 229 (1969).

[144]343 F. Supp. at 1354. A third court, in Gary v. Industrial Indem. Co., 7 F.E.P. Cas. 193, 196 (N.D. Cal. Dec. 21, 1973), in permitting the plaintiff to seek punitive damages under title VII, relied upon its belief that punitive damages were a remedy available under section 1981.

[145]The legislative history of these sections was discussed in Jones v. Alfred H. Mayer Co., 392 U.S. 409, 422–37 (1968). As mentioned earlier, they were enacted together as *one* section of the Civil Rights Act of 1866. *See* p. 346 *supra*. Indeed, when the Court of Appeals for the Fifth Circuit made applicable to section 1981 a remedy already available under section 1982, it asserted that section 1982, "so far as is here pertinent, is precisely like [section] 1981 in that it makes no provision for 'civil damages or any other form of civil relief.' . . . We can see no conceivable difference between the language of Section 1982 and Section 1981 that would justify our affirming the decision by the trial court here that 'a damage suit cannot be predicated upon Section 1981.'" Mizell v. North Broward Hosp. Dist., 427 F.2d 468, 472 (5th Cir. 1970).

[146]*E.g.*, Seaton v. Sky Realty Co., 491 F.2d 634 (7th Cir. 1974); Lee v. Southern Home Sites Corp., 429 F.2d 290 (5th Cir. 1970); Wright v. Kaine Realty, 352 F. Supp. 222 (N.D. Ill. 1972).

[147]365 F. Supp. at 119. The case cited is Lee v. Southern Home Sites Corp., 429 F.2d 290 (5th Cir. 1970).

The award of punitive damages under section 1983[148] is also relevant, because many courts have tended to lump all the post-Civil War civil rights acts together when discussing available remedies. For example, the court in *Basista v. Weir,* holding that punitive damages were available under section 1983, spoke in terms of the "benefits of the *Acts.*"[149] In another case, the court awarded punitive damages for violation of "42 U.S.C. § 1981 et seq."[150]

Although courts disagree on the extent to which remedies available under title VII must be exhausted before relief can be sought under section 1981, it is established that the modern civil rights acts do not preempt section 1981. The Supreme Court held that the Civil Rights Act of 1968 "had no effect upon § 1982,"[151] and this reasoning has been applied to section 1981 by a number of courts. For example, the Court of Appeals for the Fifth Circuit concluded "that the specific remedies fashioned by Congress in Title VII were not intended to preempt the general remedial language of § 1981."[152] Thus, where a suit must be brought under section 1981 because the substantive provisions of title VII provide no protection to the plaintiff,[153] there is no conflict with title VII.

On the other hand, where procedural bars prevent a title VII suit, or where a suit is brought under both section 1981 and title VII, it is unclear whether the enforcement procedures under title VII must be exhausted before relief can be provided under section 1981. One court argued that "the plaintiff should [not] be able to avoid the limitations of § 2000e by alleging in addition that rights protected under § 1981 . . . are present."[154] But most courts have adopted a more liberal position. The court in *Waters v. Wisconsin Steel Works of International Harvester*

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[148]*See* note 31 *supra.*

[149]340 F.2d 74, 86 (3d Cir. 1965) (emphasis added).

[150]Gaston v. Gibson, 328 F. Supp. 3 (E.D. Tenn. 1969). *See also* Brooks v. Moss, 242 F. Supp. 531 (W.D.S.C. 1965).

[151]Jones v. Alfred H. Mayer, Co., 392 U.S. 409, 416 (1968).

[152]Sanders v. Dobbs Houses, Inc., 431 F.2d 1097, 1100–01 (5th Cir. 1970), *cert. denied,* 401 U.S. 948 (1971); *accord,* Macklin v. Spector Freight Sys., Inc., 478 F.2d 979 (D.C. Cir. 1973); Young v. International Tel. & Tel., 438 F.2d 757 (3d Cir. 1971); Waters v. Wisconsin Steel Works of Int'l Harvester Co., 427 F.2d 476 (7th Cir.), *cert. denied,* 400 U.S. 911 (1970). *But see* Howard v. Lockheed-Georgia Co., 372 F. Supp. 854 (N.D. Ga. 1974). In *Howard* the court, after ruling that in title VII "no provision is made for the award of general compensatory . . . [or] punitive damages," argued that "the federal rule of damages set forth in Title VII is the proper standard to be applied in this Section 1981 action" and denied plaintiff's plea for compensatory damages. *Id.* at 855, 857.

[153]*See* note 131 *supra.*

[154]Tooles v. Kellogg Co., 336 F. Supp. 14, 18 (D. Neb. 1972). *See also* Taylor v. Safeway Stores, Inc., 333 F. Supp. 83 (D. Colo. 1971).

Co., for example, ruled that a 1981 suit would be permitted if the plaintiff pleads a reasonable excuse for failing to exhaust title VII remedies.[155] The Third Circuit has eliminated the prerequisite of complying with title VII's conciliation process before bringing an action under section 1981.[156] As the court asserted in *Hackett v. McGuire Bros., Inc.*:

> The national public policy reflected both in Title VII . . . and in § 1981 may not be frustrated by the development of overly technical judicial doctrines of standing or election of remedies. If the plaintiff is sufficiently aggrieved so that he claims enough injury in fact to present a genuine case or controversy in the Article III sense, then he should have standing to sue . . . .[157]

Thus, the weight of authority and reason suggests that punitive damages should be permitted under section 1981, even if a court denies the availability of such relief under title VII.[158]

B. Section 1988

Section 1988 is a second post-Civil War civil rights statute that can provide a basis for awarding punitive damages in employment discrimination cases. It authorizes federal courts to resort to state law when federal law is not sufficient to remedy or punish violations of

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[155]427 F.2d 476, 487 (7th Cir. 1970). A district court interpreting this decision held that even absent a reasonable excuse, it is not necessary to bring a civil suit under title VII before bringing one under section 1981. Tramble v. Converters Ink Co., 343 F. Supp. 1350, 1353–54 (N.D. Ill. 1972).

[156]Young v. International Tel. & Tel. Co., 438 F.2d 757 (3d Cir. 1971); *accord,* Macklin v. Spector Freight Sys., Inc., 478 F.2d 979 (D.C. Cir. 1973); Caldwell v. National Brewing Co., 443 F.2d 1044 (5th Cir.), *cert. denied,* 404 U.S. 998 (1971). *See generally* Larson, *supra* note 138, at 68–74.

[157]445 F.2d 442, 446–47 (3d Cir. 1971).

[158]The courts have followed a similar practice in other civil rights contexts. In United States v. Johnson, 390 U.S. 563 (1968), the Supreme Court held that criminal sanctions provided by 18 U.S.C. § 241 (1970) could be invoked against third parties (not owners or proprietors of public accommodations) who violate title II of the Civil Rights Act of 1964, in spite of language in the statute providing that injunctions were the exclusive means of enforcing the rights based on title II. 42 U.S.C. § 2000a (1970). Similarly, another court has ruled, in regard to section 1982, that, despite the provision of the Civil Rights Act of 1968 explicitly limiting punitive damages to $1000, 42 U.S.C. § 3612(c) (1970), larger awards are not precluded under section 1982. Wright v. Kaine Realty, 352 F. Supp. 222 (N.D. Ill. 1972).

federal civil rights statutes.[159] The Supreme Court has interpreted this provision to mean that "both federal and state rules on damages may be utilized, whichever better serves the policies expressed in the federal statutes."[160] Thus, even where a court refuses to imply punitive damages under title VII, and where section 1981 is not applicable, punitive damages should be available if the law of the forum state permits punitive damages for such torts as wrongful interference with prospective advantage, interference with contractual relations, or intentional infliction of emotional harm.[161]

The courts have invoked section 1988 in a number of different contexts. If state officials acting in their official capacities are not liable under section 1983 for subjecting the plaintiff to cruel and unusual punishment, a state remedy can be utilized under section 1988 "to fill this deficiency in federal law."[162] The courts have also used section 1988 to apply the statutes of limitations and general right of survival provided by state law.[163] In *Sherrod v. Pink Hat Cafe,*[164] a district court used

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[159]42 U.S.C. § 1988 (1970) (originally enacted as Act of April 9, 1866, ch. 31, § 3, 14 Stat. 27, *as amended,* May 31, 1870, ch. 114, § 18, 16 Stat. 144) provides that "[t]he jurisdiction . . . conferred on the district courts by the provisions of this chapter . . . shall be exercised and enforced in conformity with the laws of the United States, so far as such laws are suitable to carry the same into effect; but in all cases where they are not adapted to the object, or are deficient in the provisions necessary to furnish suitable remedies and punish offenses against law, the common law, as modified and changed by the constitution and statutes of the State wherein the court having jurisdiction . . . is held, so far as the same is not inconsistent with the Constitution and laws of the United States, shall be extended to and govern the said courts . . . ."

[160]Sullivan v. Little Hunting Park, Inc., 396 U.S. 229, 240 (1969). Section 1988 does not authorize the federal courts to borrow entire causes of action from state law, however. Moor v. Alameda County, 411 U.S. 693 (1973). It is unclear what Congress originally intended section 1988 to add to the general power of federal courts to imply remedies, which is discussed at pp. 331–34 *supra.* As demonstrated by the cases discussed below, however, modern courts have assumed that it gives them some additional power.

[161]*Tort Remedies, supra* note 2, at 499. The court in *Van Hoomissen,* however, refused plaintiff leave to add a claim for intentional infliction of emotional distress under California law on the grounds that "it would be inconsistent with, and beyond the scope of, plaintiff's claim under Title VII to allow plaintiff to litigate the question of punitive damages by amending his complaint to bring in a state claim." 368 F. Supp. at 840.

[162]Sostre v. Rockefeller, 312 F. Supp. 863, 887 (S.D.N.Y. 1970), *modified sub nom.* Sostre v. McGinnis, 442 F.2d 178 (2d Cir. 1971) (award of punitive damages reversed since there was no showing of a pattern of such behavior), *cert. denied,* 404 U.S. 1049, 405 U.S. 978 (1972).

[163]Brazier v. Cherry, 293 F.2d 401 (5th Cir.), *cert. denied,* 368 U.S. 921 (1961); Pritchard v. Smith, 289 F.2d 153 (8th Cir. 1961) (right of survival); Hughes v. Smith, 264 F. Supp. 767 (D.N.J. 1967), *aff'd,* 389 F.2d 42 (3d Cir. 1968) (statute of limitations).

[164]250 F. Supp. 516 (N.D. Miss. 1965).

section 1988 to permit the plaintiff to sue for monetary damages as well as injunctive relief for violations of title II of the Civil Rights Act of 1964. The court concluded that

> § 1988 declares a simple, direct, abbreviated test: what is needed in the particular case under scrutiny to make the civil rights statutes fully effective? The answer to that inquiry is then matched against (a) federal law and if it is found wanting the court must look to (b) state law currently in effect. To whatever extent (b) helps, it is automatically available. . . .[165]

This test should be applied to the punitive damages situation. If a federal court believes that punitive damages might be a helpful tool in preventing discriminatory employment practices under the Civil Rights Act of 1964, it should not hesitate to invoke relevant state law even if it believes such damages cannot be implied directly under title VII.

IV. STANDARDS FOR AWARDING AND COMPUTING PUNITIVE DAMAGES

Assuming that punitive damages are an available remedy in employment discrimination cases, two questions remain. What kind of conduct by the defendant warrants an award of such damages? How should the size of such an award be determined? The award or denial of punitive damages is within the discretion of the finder of fact.[166]

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[165] *Id.* at 519.

[166] McCormick, *supra* note 66, § 84, at 296. Since the predominant form of relief awarded under title VII is equitable, the courts have uniformly held that there is no right to a jury trial under the statute. *E.g.,* Johnson v. Georgia Highway Express, Inc., 417 F.2d 1122 (5th Cir. 1969). It is unclear, however, whether a jury trial should be available in cases involving punitive damages. It has been ably argued that consideration of the punitive damages question does not create such a right. *Developments, supra* note 2, at 1264–66. A recent case under the Civil Rights Act of 1968 reaches a different conclusion, however. Rogers v. Loether, 467 F.2d 1110 (7th Cir. 1972), *aff'd sub nom.* Curtis v. Loether, 94 S. Ct. 1005 (1974). The *Rogers* court held that when a "claim for money damages is made, the legal issue . . . must be tried to a jury whether or not there exists an equitable claim to which the damage claim might once have been considered 'incidental.'" 467 F.2d at 1120. In affirming, the Supreme Court pointed out that actual and punitive damages are "the traditional form of relief offered in the courts of law." 94 S. Ct. at 1009. However, the Court did not "go so far as to say that any award of monetary relief must necessarily be 'legal' relief." The Court attempted to distinguish *Loether* from title VII situations and acknowledged that back pay awards under title VII have generally been characterized as equitable relief. *Id.* at 1009–10. Moreover, it is noteworthy that the monetary award sought by the *Loether* plaintiff was not granted as part of a larger equitable decree, as is often the case in title VII litigation. *See generally* Comment, *Monetary Claims Under Section 1983: The Right to Trial by Jury,* 8 HARV. CIV. RIGHTS-CIV. LIB. L. REV. 613 (1973); Comment, *The Seventh Amendment and Civil Rights Statutes: History Adrift in a Maelstrom,* 68 NW. U.L. REV. 503 (1973); Comment, *The Right to Jury Trial Under Title VII of the Civil Rights Act of 1964,* 37 U. CHI. L. REV. 167 (1969).

Generally, punitive damages may be awarded where the defendant's act has been deliberate and has been actuated by ill will or malice, or where the defendant's conduct was so reckless as to evidence a conscious disregard for the rights of others.[167] It is difficult to establish standards much more precise than these, "since a determination that the defendant's conduct was wanton or malicious must of necessity be limited to each particular set of facts."[168] Nevertheless, some guidance is provided by the *Detroit Edison* case and other decisions discussing the availability of punitive damages for violations of various civil rights and labor statutes.

One approach has been to classify racial discrimination by its very nature as outrageous conduct, establishing a rebuttable presumption that the defendant's conduct was malicious or reckless with respect to the rights of others. "While some defendants in a particular case might not exhibit the personal culpability required for the imposition of punitive damages, nevertheless, in nearly every such case, someone has intended to discriminate because of race or color. This intent should be sufficient for imposition of punitive damages . . . ."[169] A number of courts have adopted similar reasoning, especially where the racial discrimination was in violation of a statute. A New Jersey court, for example, asserted that "[r]acial discrimination is necessarily willful rather than negligent,"[170] and the Washington Supreme Court held that "[a]n act of discrimination in violation of a statute must be classed as a wrongful act intentionally done."[171] Justice Brennan reached a like conclusion in his partial concurrence in *Adickes v. S.H. Kress & Co.*: "[I]n my view, a proprietor of a place of public accommodation who discriminates on the basis of race after . . . the enactment of the Civil Rights Act of 1964 . . . does so with reckless disregard as a matter of law, and therefore may be found liable for punitive damages."[172]

Discrimination in public accommodations is a special case, however. It is clear-cut and is not subject to the subtleties and extenuating circumstances surrounding discrimination in other areas. In

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[167]McCormick, *supra* note 66, § 79, at 280; Prosser, *supra* note 62, § 2, at 9; 4 RESTATEMENT OF TORTS § 908, comment *b* at 555 (1939).

[168]Comment, *The Relationship of Punitive Damages and Compensatory Damages in Tort Actions,* 75 DICK. L. REV. 585, n.3 (1971); *see* 4 RESTATEMENT OF TORTS § 908, comment *e* at 556–67 (1939).

[169]Colley, *Civil Actions for Damages Arising Out of Violations of Civil Rights,* 17 HASTINGS L.J. 189, 201 (1965).

[170]Gray v. Serruto Builders, Inc., 110 N.J. Super. 297, 315, 265 A.2d 404, 414 (1970).

[171]Browning v. Slenderella Sys., 54 Wash. 2d 440, 446, 341 P.2d 859, 863 (1959).

[172]398 U.S. 144, 233 (1970) (Brennan, J., concurring in part and dissenting in part).

these contexts, more refined standards for awarding punitive damages are needed. The *Griggs* decision, for example, stands for the proposition that employers and labor unions may be liable for using discriminatory employment practices without even being aware of their discriminatory nature.[173] This interpretation suggests that one major criterion in a decision to award punitive damages under title VII should be whether the law covering a particular type of conduct is well-defined, and whether the defendant knew, or should have known, that his conduct was a violation of that law. While ignorance of recent developments in the law is not a defense to liability under title VII, it may indicate the absence of malice or reckless disregard for the rights of others.

Griggs, for instance, permits the use of employment practices that have a discriminatory impact if they can be shown to be related to job performance: "The touchstone is business necessity."[174] Exactly what constitutes a legitimate business need is sometimes unclear,[175] and it is reasonable to expect numerous mistaken interpretations of this standard, in good faith or otherwise, on the part of employers and labor organizations. Another aspect of title VII that is still evolving concerns the use of a "bona fide occupational qualification" as a justification for certain types of employment practices which have a discriminatory impact based on sex, religion, or national origin.[176]

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[173]*See* p. 325 *supra.*

[174]401 U.S. at 431.

[175]For example, one commentator has suggested that under section 1982, a developer who discriminates in the sale or rental of property might base his conduct on business necessity. "While this is anything but a noble motive, it is not clearly malice." Note, Jones v. Mayer: *The Thirteenth Amendment and the Federal Anti-Discrimination Laws,* 69 COLUM. L. REV. 1019, 1039 (1969). This argument was rejected by Justice Brennan: "The protection of constitutional rights may not be watered down because some members of the public actively oppose the exercise of constitutional rights by others. . . . To give any weight at all to that argument would be to encourage popular opposition to compliance with the Constitution." Adickes v. S.H. Kress & Co., 398 U.S. 144, 234 (1970) (concurring in part and dissenting in part).

[176]42 U.S.C.A. § 2000e-2(e)(1) (1974). It is unclear, for example, what criteria an employer may use in formulating a maternity leave policy without violating the Act. It is uncertain whether the Supreme Court's recent decision in Cleveland Bd. of Educ. v. LaFleur, 94 S. Ct. 791 (1974), which held mandatory maternity leaves five and four months before the expected delivery date violative of the fourteenth amendment, overrules Schattman v. Texas Employment Comm'n, 459 F.2d 32 (5th Cir. 1972), *cert. denied,* 409 U.S. 1107 (1973), which, in a title VII action, permitted termination of employment two months before the expected delivery date.

Nor is it clear whether it is a violation of title VII to deny sickness and disability benefits to pregnant employees. The court in Newmon v. Delta Air Lines, Inc., 7 F.E.P. Cas. 26 (N.D. Ga. Dec. 31, 1973) held that it was not a violation. Wetzel v. Liberty Mut. Ins. Co., 372 F. Supp. 1146 (W.D. Pa. 1974), on the other hand, held that it was a violation, but suggested that good faith reliance on administrative interpretations "may be a matter

These considerations have in fact been taken into account by the courts in awarding punitive damages. For example, in *Lee v. Southern Home Sites Corp.*,[177] the court found that the defendant's wrongful conduct under section 1982 did not warrant an award of punitive damages since the events under litigation occurred only a few weeks after the Supreme Court's decision in *Jones v. Alfred H. Mayer Co.*,[178] which extended the coverage of section 1982 to private property transactions: "Lack of knowledge or notice would constitute no defense to the enforcement of the statute. In the brief lapse of time here involved, however, it is relevant to the wilfulness or wantonness with which Southern Home Sites acted."[179] Similarly, a defendant's good faith reliance on the advice of counsel also militates against an award of punitive damages.[180]

Several other factors may also be weighed to determine whether punitive damages should be awarded in an individual case. Particularly relevant in light of title VII's emphasis on conciliation is the conduct of the defendant, where the law is clearly defined, *after* the discriminatory impact of his employment practice is brought to his attention. In *Detroit Edison,* for example, Judge Keith found it significant that two defendants "repeatedly and callously disregarded or rejected the numerous appeals of blacks who asked that Edison's hiring

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to consider when the questions of affirmative relief or back pay are determined . . . ." *Id.* at 1161.

It is now generally held that state protective legislation which is not based on bona fide occupational qualifications is preempted by title VII. *E.g.*, Ash v. Hobart Mfg. Co., 483 F.2d 289 (6th Cir. 1973); Rosenfeld v. Southern Pacific Co., 444 F.2d 1219 (9th Cir. 1971); Kober v. Westinghouse Elec. Corp., 325 F. Supp. 467 (W.D. Pa. 1971), *aff'd,* 480 F.2d 240 (3d Cir. 1973). Some courts, however, find good faith reliance on such state statutes a defense to liability under title VII. Wernet v. Meat Cutters, Local 17, 484 F.2d 403 (6th Cir. 1973); Garneau v. Raytheon Co., 341 F. Supp. 336 (D. Mass: 1972). Others hold that such reliance may serve to mitigate damages. Schaeffer v. San Diego Yellow Cabs, Inc., 462 F.2d 1002 (9th Cir. 1972). A finding of good faith reliance almost certainly militates against an award of punitive damages.

[177]429 F.2d 290 (5th Cir. 1970).

[178]392 U.S. 409 (1968).

[179]429 F.2d at 294.

[180]Garneau v. Raytheon Co., 341 F. Supp. 336 (D. Mass. 1972); *cf.* General Elec. Co. v. Porter, 208 F.2d 805 (9th Cir. 1953), *cert. denied,* 347 U.S. 951 (1954) (permitting a good faith defense to prevent an award of liquidated damages under the Fair Labor Standards Act and the Portal-to-Portal Act of 1947, 29 U.S.C. §§ 216(b), 260 (1970), where defendant relied on an attorney's opinion which was not unreasonable in view of the uncertain state of the law).

and promotion practices be reformed and that blacks be afforded fair representation by the unions."[181] Even after the complaint was filed, the defendants exhibited "myopia" and an "intractable" disposition by refusing to acknowledge, much less remedy, the discriminatory impact of their employment practices:[182] "That such discrimination . . . in some instances, continues to occur subsequent to the filing of the charges in this case, demonstrates how flagrant has been, and continues to be, Defendant Detroit Edison's violation of the law."[183] Another relevant factor is whether the defendant has been found using similar discriminatory employment practices in the past. Thus, where violations have been found before and the defendant is again utilizing an employment practice with discriminatory impact, a rebuttable presumption might be raised that the defendant used these practices with an intent to discriminate.[184]

Finally, there is one type of title VII violation that should warrant punitive damages in almost every case. It is illegal under the Act to harass an employee or union member for attempting to report or otherwise rectify a discriminatory labor practice,[185] and such harassment constitutes malicious and outrageous conduct. It is particularly appropriate to award punitive damages when this type of violation is established because, without a sufficient deterrent, employers and unions may by coercion reduce complaints of violations to a minimum, thus weakening the enforcement of title VII's other provisions.

Like the decision to award punitive damages, the determination of the size of such an award depends upon the facts and circumstances of the individual case.[186] Among the relevant criteria are the motivations of the wrongdoer, the relations between the parties, and the nature and extent of the harm the defendant caused or intended to cause.[187] One additional factor the court may consider is the wealth of the defendant, since "the degree of punishment or deterrence resulting from a judgment

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[181] 365 F. Supp. at 124.

[182] *Id.* at 96.

[183] *Id.* at 113.

[184] *Cf.* Nye & Nissen v. United States, 336 U.S. 613, 618 (1949): "Evidence that similar and related offenses were committed . . . tend[s] to show a consistent pattern of conduct highly relevant to the issue of intent." *See also* Hodgson v. Cactus Craft, 481 F.2d 464 (9th Cir. 1973) (defendant's violation of the Fair Labor Standards Act, 29 U.S.C. §§ 201–19 (1970), was willful in light of two previous investigations of defendant's labor practices which resulted in warnings against further violations).

[185] 42 U.S.C.A. § 2000e-3(a) (1974).

[186] 4 RESTATEMENT OF TORTS § 908, comment *e* at 556–57 (1939).

[187] *Id.* at 557.

is to some extent in proportion to the means of the guilty person."[188] Under federal common law, no actual damages need be proven to justify an award of punitive damages.[189] It is the defendant's state of mind that is important, and an absence of injury to the plaintiff does not imply a lack of malice on the part of the defendant.

V. ADMINISTRATION OF PUNITIVE DAMAGES IN EMPLOYMENT CLASS ACTIONS

Once it is established that punitive damages are an available remedy in employment discrimination cases, and general standards are established for award and computation, the question remains whether such damages should be awarded in large class action suits. In denying the availability of these damages in a securities class action, the Court of Appeals for the Second Circuit argued that "punitive damages are normally awarded in situations where there is only a single injured party and thus the total amount of punitive damages may be kept to a reasonable level."[190] It should be noted, however, that where punitive damages are available, the decision as to whether or not to award them in a particular case is left at the complete discretion of the finder of fact.[191] Thus, even where the conduct of the defendant justifies an award of punitive damages, such damages could be withheld where the total amount could become unreasonable due to multiple suits by many plaintiffs. This section will suggest that punitive damages can in fact play a unique role in employment discrimination class actions and will discuss some possibilities for the allocation of these damages in such cases.

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[188] *Id.* "If the purpose of punitive damages is to punish and to act as a deterrent, a verdict which is not in such sum as to make itself felt upon an offender defeats that purpose." It must be of "sufficient substance to 'smart . . . .'" Reynolds v. Pegler, 123 F. Supp. 36, 41 (S.D.N.Y. 1954), *aff'd,* 223 F.2d 429 (2d Cir.), *cert. denied,* 350 U.S. 846 (1955).

[189] Basista v. Weir, 340 F.2d 74, 87–88 (3d Cir. 1965). In a case concerning discrimination by an airline, the court awarded substantial punitive damages despite the fact that the plaintiff's actual loss was minimal, "since it is the vindication of his rights as a passenger, and the need to protect the rights of every air passenger from future encroachment, which warrants the assessment of damages over and above the passenger's actual injury . . . ." Wills v. Trans World Airlines, Inc., 200 F. Supp. 360, 367 (S.D. Cal. 1961).

[190] Globus v. Law Research Serv., Inc., 418 F.2d 1276, 1285 (2d Cir. 1969), *cert. denied,* 397 U.S. 913 (1970).

[191] McCormick, *supra* note 66, § 84, at 296.

A. The Functions of Punitive Damages in a Class Action

Under rule 23 of the Federal Rules of Civil Procedure, all members of a class who do not affirmatively remove themselves from the class action are bound by the judgment.[192] This provision creates a dilemma in determining how to allocate damages if judgment is in favor of plaintiffs and a substantial number of the class members do not come forward to claim their share of the damage award:

> If the inaction of class members permits retention of the uncollected damages by the defendant, the result may be the effective exclusion of a substantial number of small claimants from the benefits of any class action, the dilution of the deterrent effect of a recovery on behalf of the class, and the unjust enrichment of the defendant.[193]

Waiting for each member of the class to come forward to prove his own individual losses is therefore unsatisfactory. An alternative to this procedure is the fluid class recovery. Under this practice, the court tries the damage issue only once, making a single award for the entire class. Working from the suggestions of the parties, the court then develops an efficient and equitable plan for dividing the lump sum among the class members.[194] Until last year, the leading case utilizing the fluid class recovery approach was *Eisen v. Carlisle & Jacquelin*,[195] which involved a suit for damages resulting from alleged antitrust violations by odd-lot dealers on the New York Stock Exchange. The district court proposed a reduction in the odd-lot differential on the theory that "the repetitive activity of the principals in odd-lot transactions . . . [would] assure that the benefits of any recovery will flow in the main to those who bore the burden of defendants' allegedly illegal acts."[196] However, the ruling permitting a class action in this case was reversed by the Second Circuit, which held, *inter alia*, that the fluid class recovery violated rule 23 and due process of law.[197] The implications of this decision are still unclear. The Supreme Court recently affirmed the decision of the Second Circuit,

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[192]FED R. CIV. P. 23(c)(2).

[193]Comment, *Damage Distribution in Class Actions: The Cy Pres Remedy*, 39 U. CHI. L. REV. 448 (1972) [hereinafter cited as *Damage Distribution*].

[194]7A C. Wright & A. Miller, FEDERAL PRACTICE AND PROCEDURE: CIVIL § 1784, at 121–22 (1972) [hereinafter cited as Wright & Miller].

[195]52 F.R.D. 253 (S.D.N.Y. 1971), *on remand from* 391 F.2d 555 (2d Cir. 1968).

[196]52 F.R.D. at 264.

[197]479 F.2d 1005, 1018 (1973).

but on grounds unrelated to the fluid class recovery.[198] It is possible, therefore, that the fluid class recovery will remain a viable tool for allocating damages in large class actions, at least outside the Second Circuit.[199]

In addition to *Eisen,* there are a number of other cases in which the fluid class recovery has been utilized. *Market Street Railway v. Railroad Commission,*[200] for example, was an action for the recovery of overcharges by the railway. Class members were given six months to file individual claims against the lump sum recovery. By the end of that period, the city had taken over the bankrupt railway's properties. The city received the balance of the recovery for use on behalf of its citizens, who had paid the excess fares.[201] According to Professors Wright and Miller, a major advantage of such a fluid class recovery is that "it may prove to be extremely equitable inasmuch as the amount of damages arrived at is likely to correspond to the total injury inflicted by defendant . . . regardless of how small or large a number of class members come forward in the action."[202]

The difficulty in an employment discrimination class action, like the *Detroit Edison* case, is that neither the fluid class recovery nor the traditional individual method of computing and allocating damages is very satisfactory. The key to a fluid class recovery is the calculation of gross damages,[203] yet it will be extremely difficult to determine the size

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[198]42 U.S.L.W. 4804 (U.S. May 28, 1974). The Second Circuit had asserted three separate grounds for reversing the district court's ruling. 479 F.2d at 1015–18. In its opinion, the Supreme Court discussed two of these issues, the notice requirements for rule 23(b)(3) actions and the preliminary hearing to allocate notice costs, but did not reach the fluid class recovery question. 42 U.S.L.W. at 4809–11.

[199]The Second Circuit's holding that the fluid class recovery violates rule 23 and due process of law has been vigorously criticized. *E.g.,* Note, *Managing the Large Class Action:* Eisen v. Carlisle & Jacquelin, 87 HARV. L. REV. 426, 446–54 (1973) [hereinafter cited as *Large Class Action*]. The fact that the scope of many class actions may be narrower as a result of the stringent notice requirements upheld by the Supreme Court in *Eisen* should not diminish the utility of the fluid class recovery. Even under the Supreme Court's ruling, individual notice must be sent only to those class members "whose names and addresses may be ascertained through reasonable effort." 42 U.S.L.W. at 4809. The fluid class recovery, therefore, is still appropriate when large numbers of the plaintiff class, even after notice, fail to come forward to claim their share of the recovery, when proof of each individual's proper share of the recovery is extremely difficult or impossible, or when settlement of a class action yields a recovery before the merits of each individual's claim have been adjudicated. *E.g.,* West Virginia v. Chas. Pfizer & Co., 314 F. Supp. 710 (S.D.N.Y. 1970), *aff'd,* 440 F.2d 1079 (2d Cir.), *cert. denied,* 404 U.S. 871 (1971) (discussed at note 217 *infra*).

[200]28 Cal. 2d 363, 171 P.2d 875 (1946).

[201]28 Cal. 2d at 372–73, 171 P.2d at 881.

[202]Wright & Miller, *supra* note 194, at 124–25.

[203]Comment, *Manageability of Notice and Damage Calculation in Consumer Class Actions,* 70 MICH. L. REV. 338, 373 (1971).

of a single damage award in a title VII class action. In *Detroit Edison,* for example, the court would have had great difficulty in estimating how many black people the company refused to hire for racial reasons or how many employees "would have applied [for transfer] but for defendant's discriminatory hiring policy,"[204] and even if these figures could have been ascertained, it would have been difficult to calculate the interim earnings in order to determine what the actual damage award should be. These are problems of the utmost complexity, and Judge Keith wisely chose to avoid a fluid class recovery. Instead, his order permits each class member to come forward and establish the actual amount of his own losses in an ancillary proceeding.[205] On the other hand, to the extent the class members remain passive, the defendants are being unjustly enriched, the deterrent effect of the suit is weakened, and some class members receive nothing in damages.

An award of punitive damages in this situation can play a unique role in resolving this problem. At the least, it underscores the deterrent functions of a title VII suit and reduces the likelihood of the defendant's unjust enrichment. If such an award is simply divided among those class members who come forward to claim damages, however, the silent members of the class are still being denied the benefit of the judgment. But even this difficulty may be overcome if the punitive damage award itself is viewed as a fluid class recovery. Under this approach, it would be allocated not to each member of the class individually, but for the benefit of the class as a whole.

In order to maximize this function of the punitive damage award, plaintiffs may wish to minimize the amount paid out of that lump sum in the form of individual grants to class members. Support for this approach may be found in *Bebchick v. Public Utilities Commission,*[206] where the court did not provide for any individual recoveries of compensatory damages by passengers of a transit system who were overcharged five cents per ride for a year. The court concluded that it was not feasible to require refunds to individuals who paid the increase, but ordered that the amount realized from the increased fare "must be utilized for the benefit of the class who paid it, that is, those who use Transit."[207] The court ordered that a fund be established in the amount of the overcharge, the allocation of which would be left to the Commission, "provided such discretion is exercised consistently with the

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[204] 365 F. Supp. at 120.
[205] *Id.* at 119.
[206] 318 F.2d 187 (D.C. Cir.), *cert. denied,* 373 U.S. 913 (1963).
[207] *Id.* at 203.

purpose of benefiting Transit users in any rate proceedings pending or hereafter instituted."[208]

It may be argued, however, that by attempting to deny each class member the right to his or her individual share of the punitive damages, the named plaintiffs are failing in their duty to "fairly and adequately protect the interest of the class."[209] Even if the courts determine that members of a plaintiff class must be permitted to assert their individual claims, however, it is possible that a substantial amount of the original lump sum would be left.[210] The question would remain, then, how best to dispose of this fund in a way which maximizes the benefits of the judgment for the plaintiff class as a whole.

B. Allocation Among Class Members

One commentator has suggested an analogy between a fluid class recovery and the cy pres doctrine.[211] In class actions, "courts may seek to apply their own version of cy pres by effectuating as closely as possible the intent of the legislature in providing the legal remedies on which the main cause of action was based."[212] The acceptability of a particular cy pres remedy can be evaluated by balancing 1) the extent to which the injured class recovers the damages, 2) the cost of applying the remedy, and 3) the equitability of the distribution with respect to the potential windfall for non-class members.[213] The degree to which these criteria are met may in turn be analyzed in terms of the technique used to allocate the funds and the purposes for which the funds are utilized.

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[208] *Id.* at 204. The Second Circuit in *Eisen* thought it significant that *Bebchick* was not a class action. 479 F.2d at 1012. Nevertheless, "[t]he *Bebchick* court was faced with the problem of returning illegally obtained funds to overcharged consumers. The innovative remedy adopted did not depend upon any specific statutory authority." *Large Class Action, supra* note 199, at 447 n.120.

[209] FED. R. CIV. P. 23(a)(4).

[210] It might be shown in a given case, for example, that only about half the members of the plaintiff class have come forward to assert their claims for actual damages. In such a case, the court may decide to allocate only half of the punitive damage award to individual recoveries by active class members and to treat the rest of the punitive award as a fluid class recovery in order to guarantee the silent class members some benefit from the judgment won on their behalf.

[211] *Damage Distribution, supra* note 193. This doctrine is relied upon to effectuate testamentary charitable gifts that would otherwise fail. It allows making the donation to the "next-best" charity in an attempt to save the testator's original purpose. *Id.* at 452.

[212] *Id.*

[213] *Id.* at 464.

The district court in *Eisen* originally attempted to follow the cy pres model by suggesting a "market" approach for the allocation of damages —reduction in the odd-lot differential.[214] A solution based on *Eisen's* market approach is probably not appropriate for employment discrimination cases such as *Detroit Edison,* however. To reduce the company's utility rates, for example, would only very indirectly benefit the victims of Detroit Edison's discrimination. On the other hand, to distribute the punitive damages directly through the employment market by paying each black Detroit Edison worker a bonus would ignore those victims of the defendant's discriminatory hiring and transfer policies who are now employed elsewhere, probably a majority of the plaintiff class.

A number of fluid class recovery cases provide for distribution of damages through the state by means of escheat. The escheat may be unconditional,[215] but such a remedy in a title VII or section 1981 suit would be little more than a fine or penalty fee levied against the defendant.[216] While providing the appropriate deterrent, it would contribute little towards assuring that all members of the class benefited from the judgment. Conditional escheat,[217] on the other hand, could be an appropriate approach to the allocation of punitive damages in a title VII suit. The funds could be earmarked for special state or municipal projects designed to serve the needs of the injured class.

Allocation of punitive damages in employment discrimination suits by conditional escheat is not, however, an ideal approach under the criteria of the cy pres model. One problem involves the very nature and scope of the state's activities. The focus of most state programs is so broad that a close correlation between beneficiaries of a given program and the members of the plaintiff class in a title VII action would probably

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[214] *See* p. 357 *supra.*

[215] *E.g.,* Daar v. Yellow Cab Co., 67 Cal. 2d 695, 715 n.15, 433 P.2d 732, 746 n.15, 63 Cal. Rptr. 724, 738 n.15 (1967) (in an action for recovery of cab overcharges, court favorably noted state's proposal that lump sum recovery be available for individual claims for seven years, after which balance would escheat to the state).

[216] *See Damage Distribution, supra* note 193, at 455.

[217] *E.g.,* West Virginia v. Chas. Pfizer & Co., 314 F. Supp. 710 (S.D.N.Y. 1970), *aff'd,* 440 F.2d 1079 (2d Cir.), *cert. denied,* 404 U.S. 871 (1971) [the Drug Cases] (settlement under FED. R. CIV. P. 23(e) of sixty-six antitrust class actions against several drug companies; each class member notified that failure to make individual claim by given date would constitute authorization to attorney general of state to use whatever money he could recover as plaintiff's representative to benefit citizens of state as court may direct, 440 F.2d at 1091); Bebchick v. Public Util. Comm'n, 318 F.2d 187 (D.C. Cir.), *cert. denied,* 373 U.S. 913 (1963).

be coincidental at best. Furthermore, even if the funds are channeled into a state project of special benefit to the injured class, there is the danger that the result will simply be to divert other state funds which otherwise would have gone toward this project. Such an escheat would have a beneficial effect on the citizens of the state at large but would have very little net effect on the injured class.[218] Finally, the psychological impact of allocating punitive damages in this manner should also be considered. As discussed earlier, punitive damages fulfill a number of different functions in employment discrimination suits, such as cooling off overheated emotions[219] and providing an incentive for plaintiffs to sue and thus perform a private attorney general role.[220] Some of these functions may be undermined when members of the plaintiff class see the punitive damages they have fought for in a law suit disappear into the coffers of a faceless and generally distrusted bureaucracy.

Wherever possible, therefore, it is preferable for representatives of the plaintiff class to participate directly in the disposition of punitive damages in these cases, rather than for the court to allocate them by escheat, conditional or otherwise. Speaking of affirmative action under Executive Order 11,246,[221] former EEOC Chairman William Brown has emphasized the importance of working with contacts within the minority community, including not only organizations like the Urban League or the NAACP, but "leaders of local demonstrations" as well.[222] Similarly, participation of representatives of the injured class in the allocation of punitive damages will enable the class members to feel the award is their own in a more personal sense, providing them with the psychological benefits of punitive damages mentioned above. In addition, it will help assure that the funds are disposed of in a way which benefits the injured class as directly as possible, both because of such class members' knowledge of the problems and needs of their class and because their participation will increase the likelihood that greater numbers of class members will actively take part in whatever community projects the funds are ultimately expended upon.[223]

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[218] *See Damage Distribution, supra* note 193, at 458.

[219] *See* pp. 334–35 *supra.*

[220] *See* pp. 336–37 *supra.*

[221] *See* note 107 *supra.*

[222] *Quoted in* Comment, *The Philadelphia Plan: Equal Employment Opportunity in the Construction Trades,* 6 COLUM. J.L. & SOC. PROB. 187, 196 (1970) [hereinafter cited as *Philadelphia Plan*].

[223] Judge Keith provided a role for representatives of the injured class in the administration of his decree in *Detroit Edison* by appointing representatives of the Association for the Betterment of Black Edison Employees to a committee charged with resolving disputes arising under the decree. 365 F. Supp. at 123.

Whether by conditional escheat or by more immediate distribution to the class, punitive damages in title VII and section 1981 cases should be allocated either for direct service projects aimed at helping the injured class to overcome the results of past and continuing employment discrimination, or for the continuation and expansion of enforcement efforts to assure future compliance by the defendants and others in their position.[224] To the extent possible, these applications of punitive damages should complement the other affirmative action ordered in the main decree and should focus primarily on employment problems raised by the facts of the case at bar.[225]

Direct services could be provided through escheat by channeling the funds to local Community Action Agencies, various government-sponsored manpower training programs, or the state employment office. Such funds could also be used to establish or expand vocational classes and training programs at local high schools and community colleges. Direct service to the injured class financed by punitive damages could also take the form of privately sponsored job training and apprenticeship programs to prepare minority workers for the higher level jobs the lawsuit has opened for them or to prepare them for other jobs in the same industry or geographical area.[226] In *Detroit Edison,* job training or union apprenticeship programs were not key issues in the litigation since

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[224]Although attorneys' fees can be awarded under title VII, 42 U.S.C.A. § 2000e-5(k) (1974), the hope of receiving such an award is often not sufficient to spur civil rights lawyers to undertake large class actions such as *Detroit Edison.* These suits involve major expenditures long before any attorneys' fees are awarded. Letter from Prof. William Gould to the author, April 20, 1974, on file at the offices of the *Harvard Civil Rights-Civil Liberties Law Review* [hereinafter cited as Gould].

[225]It might be argued that allocation of the fluid class recovery of punitive damages need not relate so closely to employment discrimination or the facts of the particular case. For example, these funds could be used to build a swimming pool or recreation center for use by the plaintiff class. Such an allocation of the award may violate rule 23(a)(4) of the Federal Rules of Civil Procedure, however. *See* p. 360 *supra.* While a preliminary ruling by the court would have established the common interest of all class members in eliminating the effects of the defendant's employment discrimination, no such ruling would have established a similar common interest in the construction of a swimming pool.

[226]The Department of Labor and local and national AFL-CIO unions, for example, sponsor a program called "Apprentice Outreach" to recruit and train minority high school graduates for union apprenticeship examinations, *Philadelphia Plan, supra* note 222, at 202, and the Urban League sponsors a project called the Labor Education Advancement Program (LEAP). *Id.* However, this type of program has not been completely successful. Hill, *The New Judicial Perception of Employment Discrimination—Litigation Under Title VII of the Civil Rights Act of 1964,* 43 U. COLO. L. REV. 243, 257 (1972).

Detroit Edison trains its own skilled tradesmen.[227] However, most of the jobs blacks had been able to obtain with the company before the court's ruling required few skills and offered little opportunity for advancement. As a result, Judge Keith was careful to provide in his order that "[n]o affected class member shall be required to hold a labor or helper job which does not provide training for craft jobs in a line of progression."[228] In other cases and in other industries, job training is often a major issue, and there is no reason why a punitive damage award being administered as a fluid class recovery could not be used to prepare minority workers for higher skilled jobs.[229]

Punitive damages in employment discrimination cases could be utilized to provide class members with other direct services in addition to job training. In sex discrimination cases it may be appropriate to allocate such funds for the establishment of child care facilities. Where unions have failed adequately to represent the interests of minority workers, or have intentionally misled them, as in *Detroit Edison,* such funds could be used to finance the activities of minority caucuses or separate organizations which are trying to provide such representation. In *Detroit Edison,* the Association for the Betterment of Black Edison Employees played an important role in initiating the law suit.[230] Support for such an organization could be an excellent means of furthering the interests of the entire class.[231]

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[227]Gould, *supra* note 224. Nevertheless, even in a case like this one, it may be useful to allocate the punitive damage award for job training outside the electric power industry. Many of the jobs blacks were turned away from at Detroit Edison probably are now filled by other workers, so it is likely that employment at Detroit Edison is not a realistic possibility for many of the victims of the company's past discrimination, regardless of how well qualified they are.

[228]365 F. Supp. at 121.

[229]The testing issue also increases the importance of job training. The court's order in *Detroit Edison,* for example, enjoined the company's use of a variety of test batteries because a larger percentage of blacks than whites failed these tests and because the accuracy of the tests as predictors of job performance had never been evaluated according to EEOC standards. 365 F. Supp. at 117–18. It is quite possible, however, that these or similar tests could be validated properly and again present a major obstacle to occupational advancement by members of the plaintiff class. *See generally Employment Testing, supra* note 25. Training programs funded through the punitive damage award would weaken the impact of such an eventuality by preparing potential applicants for these tests in the same way that the "Apprentice Outreach" program prepares minority workers for union apprenticeship examinations. *See* note 226 *supra.*

[230]365 F. Supp. at 91 n.1. The Association was dismissed as a party plaintiff for lack of standing. Under the 1972 amendments to title VII, charges can be filed with the EEOC by organizations on behalf of the victims of discriminatory employment practices. 42 U.S.C.A. § 2000e-5(b) (1974). Such organizations still lack standing to bring an action in court, however. 42 U.S.C.A. § 2000e-5(f)(1) (1974).

[231]This is an idea which the plaintiffs in *Detroit Edison* have had in mind since the beginning of the litigation. Gould, *supra* note 224.

Punitive damages can also be used to finance enforcement of fair employment practices. By escheat, these funds could further the enforcement activities of the state by supplementing the budget of the civil rights division of the state attorney general's office, a state or local fair employment commission or civil rights commission, or even the EEOC.

If not channeled through escheat, the funds could be used to help finance the operations of local branches of the NAACP Legal Defense Fund or other public interest law projects. Punitive damages could also be used to help with the administration and enforcement of the court's order itself. For example, in some situations it may be necessary for the court to appoint a special master in accordance with rule 53 of the Federal Rules of Civil Procedure to help with difficult computations of actual damages.[232] In such a case, the fluid class recovery could be used to cover the costs of administering the remedy in much the same way punitive damages were used to compensate plaintiffs for lawyers' fees and litigation costs at common law.[233] In *Detroit Edison,* the court's order established a special committee to oversee the operation of the decree for a period of six years.[234] The court did not discuss whether this committee is to have an operating budget, but it seems likely that it will need some financial support if it is to do an adequate job. This support could be provided by the punitive damage award. Indeed, the committee might even follow former EEOC Chairman Brown's suggestion in reference to construction contractors and hire a full-time equal opportunity officer to maintain a vigilant watch over all the defendant's activities for signs of discriminatory practices.[235]

Allocation of punitive damages in an employment discrimination class action by means of a fluid class recovery, then, can ensure that *all* members of the plaintiff class benefit by a favorable judgment. Whether distributed by means of conditional escheat or directly administered by the class representatives, an award of this type enhances the deterrent effect of punitive damages and prevents the defendant's unjust enrichment from retention of that part of the award left unclaimed by silent class members.

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[232] *Cf.* Foster v. Detroit, 405 F.2d 138 (6th Cir. 1968).

[233] *See* p. 336 *supra.* "The court may direct that the master's compensation be charged upon one or more of the parties or apportioned among them or paid out of any fund or subject matter of the action that is in the custody and control of the court . . . ." 9 Wright & Miller, *supra* note 194, § 2608, at 796–97.

[234] 365 F. Supp. at 123.

[235] *Philadelphia Plan, supra* note 222, at 196.

VI. A POSTSCRIPT ON COMPENSATORY DAMAGES

As indicated earlier in this Comment,[236] there is a need for compensatory damages[237] as well as punitive damages under title VII, and many of the arguments in favor of the one are equally valid for the other. A brief digression on the subject of compensatory damages in employment discrimination cases is appropriate here for two reasons. First, there is no clear line between these two types of relief. Punitive damages are often used to compensate the victim of a wrongful act in addition to punishing the wrongdoer and deterring future misconduct,[238] and compensatory damages are sometimes used only if the defendant's conduct warrants punishment.[239] Thus, it is often difficult to discuss one without the other. Second, an influential analysis of title VII,[240] which supports the availability of punitive but not compensatory damages under the Act, has been cited by at least two courts which did not permit compensatory damages;[241] it was argued in this analysis that the availability of punitive damages eliminates any need for compensatory damages.[242] This section will argue that punitive and compensatory damages under title VII are not mutually exclusive. Both remedies can be implied under the Act, and both fulfill distinct, although at times overlapping, purposes.

A number of courts have rejected the availability of compensatory damages under title VII, including one which held that punitive damages could be awarded.[243] The most extensive arguments are presented in *Van Hoomissen v. Xerox Corp.,* but they are the same as that court's arguments against punitive damages.[244] Other courts have awarded compensatory damages under title VII. In *Humphrey v. Southwestern Portland Cement Co.,*[245] the court ordered damages to compensate plaintiff for the mental distress caused by defendant's misconduct, arguing that "the purpose of the Act will best be served if all of the injuries which are caused by discrimination are entitled to recognition."[246] The court added that the remedies explicitly provided

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[236] *See* note 78 *supra.*

[237] *See* note 100 *supra.*

[238] *See* pp. 335–36 *supra.*

[239] *See* p. 368 *infra.*

[240] *Developments, supra* note 2.

[241] Tooles v. Kellogg Co., 336 F. Supp. 14 (D. Neb. 1972); Attkisson v. Bridgeport Brass Co., 5 F.E.P. Cas. 919 (S.D. Ind. 1972).

[242] *Developments, supra* note 2, at 1259–62.

[243] *E.g.,* Howard v. Lockheed-Georgia Co., 372 F. Supp. 854 (N.D. Ga. 1974); Van Hoomissen v. Xerox Corp., 368 F. Supp. 829 (N.D. Cal. 1973); Tooles v. Kellogg Co., 336 F. Supp. 14 (D. Neb. 1972) (permitting punitive damages).

[244] *See* pp. 337–39, 342–45 *supra.*

[245] 369 F. Supp. 832 (W.D. Tex. 1973), *rev'd on other grounds,* 488 F.2d 691 (5th Cir. 1974).

[246] 369 F. Supp. at 835.

under title VII were insufficient to compensate the plaintiff for all his injuries and emphasized the need for incentives to encourage private plaintiffs to fulfill a public enforcement role:

> In cases such as the instant one, where an increase in pay is slight but the damage may be real . . . a recognition [of compensatory damages] would encourage "prosecutions" which might have been forgotten. The effectiveness of private litigants would thereby be increased. Moreover, if a reason for private civil suits is the desire to make those injured whole, it is foolish to ignore the injuries which have actually been inflicted.[247]

The Court of Appeals for the Third Circuit, in *Rosen v. Public Service Electric & Gas Co.*,[248] pointed out that relief under title VII "is intended to restore those wronged to their rightful economic status absent the effects of the unlawful discrimination"[249] and reversed a lower court ruling that male employees who retired under a discriminatory pension plan could not receive damages to compensate them for their lost retirement benefits. In *Evans v. Sheraton Park Hotel*,[250] the court awarded $500 in compensation for defendant's harassment of the plaintiff for complaining to the EEOC about sex discrimination. Since such conduct by its very nature may warrant an award of punitive damages,[251] it is unclear whether the award in this case should be considered compensatory or punitive. The judge, however, seemed more concerned with compensating the victim than punishing the wrongdoer.[252]

Evans illustrates the difficulty in drawing the fine line between punitive and compensatory damages, and other decisions have demonstrated similar ambiguity.[253] The greatest confusion arises when the award is designed to compensate the plaintiff for emotional

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[247] *Id.*

[248] 477 F.2d 90 (3d Cir. 1973).

[249] *Id.* at 96.

[250] 5 F.E.P. Cas. 393 (D.D.C. 1972).

[251] *See* p. 355 *supra*.

[252] 5 F.E.P. Cas. at 396.

[253] *E.g.*, Donahue v. Staunton, 471 F.2d 475 (7th Cir. 1972), *cert. denied*, 410 U.S. 955 (1973) (in a section 1983 action for wrongful dismissal of a public employee, the court ordered reinstatement and back pay, and an additional monetary award denominated punitive but based on the fact that defendant's conduct subjected plaintiff to emotional harm, degradation and humiliation. Brief for Respondent in Opposition on Petition for Certiorari at 8); Antelope v. George, 211 F. Supp. 657 (D. Idaho 1962) (in action for illegal arrest under section 1983, court based award of punitive damages on indignity and humiliation suffered by plaintiff as well as willfulness of defendant's conduct).

distress.[254] Even where clearly designated compensatory, such an award may fulfill a punitive function.[255] The commentary referred to earlier[256] focuses on this confusion and argues that since the primary type of injury not compensated by a back pay award in employment discrimination cases is psychological harm,[257] the plaintiff can be adequately compensated by punitive damages. It concludes, therefore, that compensatory awards are unnecessary.[258] The difficulty with this position is that it would permit compensation for mental suffering only in those cases where the defendant acted with malice or in gross disregard for the rights of others. Such a result may be acceptable where the mental distress is not accompanied by physical symptoms sufficient to indicate that the injury is not trivial.[259] Where physical symptoms are present, however, as in *Attkisson v. Bridgeport Brass Co.*,[260] the fear of fictitious claims is diminished, and mental suffering should be compensated whether the wrongdoer's conduct was motivated by malice or not.

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[254]For other instances where the distinction between punitive and compensatory damages has been confused, see Distin v. Bradley, 83 Conn. 466, 76 A. 991 (1910) (punitive damages designed to reimburse plaintiff for litigation costs, and limited to that amount); The Portal-to-Portal Act of 1947, 29 U.S.C. §§ 216(b), 251–62 (1970). The Portal-to-Portal Act made the liquidated damages provision of the Fair Labor Standards Act, 29 U.S.C. § 216(b) (1970), a penalty provision, despite its original purpose of compensating an employee for intangible losses. Liquidated damages, the Supreme Court had held before passage of the Portal-to-Portal Act, "are compensation, not a penalty. . . . The retention of a workman's pay may well result in damages too obscure and difficult of proof for estimate other than by liquidated damages . . . ." Overnight Motor Transp. Co. v. Missel, 316 U.S. 572, 583–84 (1942).

[255] "In many cases where compensatory damages include an amount for emotional distress . . . there is no clear line of demarcation between punishment and compensation and a verdict for a specified amount frequently includes elements of both . . . ." 4 RESTATEMENT OF TORTS § 908, comment *c* at 556 (1939).

[256]*Developments, supra* note 2, at 1259–62.

[257]*But cf.* Note, *NLRB Power to Award Damages in Unfair Labor Practice Cases*, 84 HARV. L. REV. 1670, 1675 (1971), arguing that injuries not compensated by back pay and reinstatement include "hardship during the period of litigation, [the employee's] lost opportunity to use the income he would have earned, perhaps the loss of his home or car for failure to make timely payments."

[258]*Developments, supra* note 2, at 1259–62.

[259]*See, e.g.*, Amos v. Prom, Inc., 115 F. Supp. 127 (N.D. Iowa 1953). On the other hand, it is equally plausible to designate discrimination as "a class of conduct considered by the society to be so outrageous as to warrant an award for humiliation, indignity, and mental suffering when it is not followed by physical injury." Duda, *Damages for Mental Suffering in Discrimination Cases*, 15 CLEV.-MAR. L. REV. 1, 8 (1966). "Indignity must be the natural, proximate, reasonable and foreseeable result of racial discrimination. As such, it should be held compensable . . . ." Gray v. Serruto Builders, Inc., 110 N.J. Super. 297, 315, 265 A.2d 404, 414 (1970); *see* Browning v. Slenderella Sys., 54 Wash. 2d 440, 341 P.2d 859 (1959).

[260]5 F.E.P. Cas. 919 (S.D. Ind. 1972) (stomach ulcerations).

Analysts of title VII have suggested that compensation for this form of injury involves such difficulties of proof that any award would be too speculative.[261] Difficulties of proof are readily apparent. Nevertheless, "it is not necessary to deny a remedy in all cases because some claims may be false."[262] According to the court in *Humphrey,* moreover, difficulties of proof in an employment discrimination case "arise only after discrimination has been shown. They do not create the wrong which forms the basis for the suit. Once that wrong has been established, the remedies available to a plaintiff should be effective and complete."[263] Furthermore, the difficulties in calculating an appropriate award for mental suffering in discrimination cases are no different from those encountered in many other types of actions, such as malicious prosecution, alienation of affections, wrongful death, and many cases of libel, slander, and assault.[264] Finally, there is ample precedent for awards of compensatory damages for mental suffering in discrimination cases in the state[265] and federal[266] courts.

It has been argued that compensatory awards should be denied under title VII because they constitute a legal remedy and require that the right to trial by jury be made available.[267] This requirement would be a departure from precedent under title VII; it could interfere with the statute's administration[268] and raise the problem of jury prejudice in

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[261] *E.g., Developments, supra* note 2, at 1260.

[262] Prosser, *supra* note 62, § 54, at 328.

[263] 369 F. Supp. at 835.

[264] "[M]ental suffering is no more difficult to estimate in financial terms, and no less a real injury than 'physical' pain." Prosser, *supra* note 62, § 54, at 327–28.

[265] *E.g.,* Massachusetts Comm'n Against Discrimination v. Franzaroli, 357 Mass. 112, 256 N.E.2d 311 (1970); Gray v. Serruto Builders, Inc., 110 N.J. Super. 297, 265 A.2d 404 (1970); Chance v. Frank's Beauty Salon, 35 App. Div. 2d 304, 316 N.Y.S.2d 236 (1970); Ruiz v. Bertolotti, 236 N.Y.S.2d 854 (Sup. Ct. Spec. T. 1962), *aff'd,* 245 N.Y.S.2d 1003 (App. Div. 2d Dep't 1963); Williams v. Joyce, 4 Ore. App. 482, 479 P.2d 513 (1971); Browning v. Slenderella Sys., 54 Wash. 2d 440, 341 P.2d 859 (1959).

[266] *E.g.,* Steele v. Title Realty Co., 478 F.2d 380 (10th Cir. 1973) (Civil Rights Act of 1968, 42 U.S.C. §§ 3604, 3612 (1970)); Smith v. Sol D. Adler Realty Co., 436 F.2d 344 (7th Cir. 1970) (42 U.S.C. § 1982 (1970)); Sexton v. Gibbs, 327 F. Supp. 134 (N.D. Tex. 1970), *aff'd,* 446 F.2d 904 (5th Cir. 1971), *cert. denied,* 404 U.S. 1062 (1972) (42 U.S.C. § 1983 (1970)); Wright v. Chicago, B. & Q.R.R., 223 F. Supp. 660 (N.D. Ill. 1963) (section 3 of the Interstate Commerce Act, 49 U.S.C. § 3 (1970)); Wills v. Trans World Airlines, Inc., 200 F. Supp. 360 (S.D. Cal. 1961) (Federal Aviation Act, 49 U.S.C. § 1374(b) (1970)).

[267] *Developments, supra* note 2, at 1264. For a discussion of the jury trial question regarding awards of punitive damages under title VII, see note 166 *supra.*

[268] "[I]t is hard to conceive of a more chaotic method of district court handling of an EEO case than for the judge to hold a non-jury trial, as he must, on the racial discrimination charges under the injunctive and declaratory relief features and thereafter refer to a jury the issue of back pay after a repetition of the same evidence." Hayes v. Seaboard Coast Line R.R., 46 F.R.D. 49, 53 (S.D. Ga. 1969).

some cases.[269] These considerations, however, should not be sufficient to deny the availability of this important remedy in all cases. The plaintiff has complete discretion to decide whether or not to seek an award of compensatory damages under title VII. Where he or she is willing to tolerate possible delay in reaching a final disposition of the case and to undertake the risk of encountering a prejudiced jury in order to seek these damages, the court should not deny the plaintiff this opportunity.

CONCLUSION

During the congressional debate over the Civil Rights Act of 1866,[270] one Congressman remarked:

> It is idle to say that a citizen shall have the right to live, yet deny him the right to labor, whereby alone he can live. It is a mockery to say that a citizen may have the right to live, and yet deny him the right to make a contract to secure the privilege and the rewards of labor.[271]

Nearly a century later, during congressional consideration of the Civil Rights Act of 1964,[272] similar sentiments were expressed:

> The right to vote . . . does not have much meaning on an empty stomach. The impetus to achieve excellence in education is lacking if gainful employment is closed to the graduate. The opportunity to enter a restaurant or hotel is a shallow victory where one's pockets are empty.[273]

Section 1981 and title VII are two of the nations's most important tools in the struggle to create equal employment opportunities for all. While much progress has been made, there remains much to be done. Punitive and compensatory damages can play an important role in this struggle.

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[269]Curtis v. Loether, 94 S. Ct. 1005 (1974); Lawton v. Nightingale, 345 F. Supp. 683, 684 (N.D. Ohio 1972): "If a jury could be resorted to in actions brought under [section 1983], the very evil the statute is designed to prevent would often be attained. The person seeking to vindicate an unpopular right could never succeed before a jury drawn from a populace mainly opposed to his views."

[270]Act of April 9, 1866, ch. 31, § 1, 14 Stat. 27, *reenacted*, Enforcement Act of 1870, § 18, Act of May 31, 1870, ch. 114, § 18, 16 Stat. 140, 144 (codified at 42 U.S.C. §§ 1981, 1982 (1970)).

[271]CONG. GLOBE, 39th Cong., 1st Sess. 1833 (1866) (remarks by Representative Lawrence).

[272]78 Stat. 241 (codified in scattered sections of 42 U.S.C.).

[273]H.R. Rep. No. 914, 88th Cong., 1st Sess., pt. 2, at 26 (1963).

Employers and labor organizations which utilize employment practices with the intent that these practices have a discriminatory impact should be subject to harsher sanctions than ordinary title VII violators. Punitive damages can be implied directly under title VII and section 1981, or through state law under section 1988; there are many circumstances in which an award of punitive damages can better effectuate the purposes of these statutes. Determining standards for awarding and computing punitive damages in employment discrimination cases is no more difficult than in any other context. In a class action for employment discrimination, punitive damages have the additional function of assuring that silent members of the class are benefited by a favorable judgment. The availability of punitive damages in employment discrimination cases does not preclude the availability of compensatory damages. These two remedies fulfill complementary, not mutually exclusive, functions.

—Michael J. Goldberg