# ENDING DISCRIMINATORY DAMAGES

*Craig Robert Senn**

ABSTRACT

*Anti-discrimination laws that discriminate? It sounds crazy. Yet, the different remedial models of our federal employment discrimination laws can (and often do) yield discriminatory damages.*

*Title VII of the Civil Rights Act of 1964, as amended, and the Americans With Disabilities Act of 1990 (ADA) share one model: victims of intentional sex-, race-, religion-, national origin-, color-, or disability-based discrimination may recover monetary damages for lost wages (or back pay), plus "compensatory and punitive damages" subject to statutory caps ranging from $50,000 to $300,000 (depending on the number of the employer's employees). In contrast, the Age Discrimination in Employment Act of 1967 (ADEA) uses a different model: victims of intentional age-based discrimination may recover monetary damages for lost wages (or back pay), plus "liquidated damages" that equal, dollar-for-dollar, the lost-wage amount.*

*While innocent in appearance, these different models create an ironic phenomenon: the "Discriminatory Damages Paradox," whereby victims with certain federally protected characteristics can be (and often are) monetarily favored over those with other federally protected characteristics. In some Paradox situations, a prevailing Title VII or ADA plaintiff can recover substantially more monetary damages than an otherwise identically situated ADEA plaintiff. In other Paradox situations, the opposite is true.*

*This Article proposes a "Uniform Title VII/ADA-Based Damages Model" to solve this Discriminatory Damages Paradox. This uniform model is warranted for three reasons: (1) it embraces Congress's philosophy of promoting reasonably comparable and consistent (rather than unfairly disparate) monetary damages for victims of intent-based discrimination, as evidenced by the Civil Rights Act of 1991; (2) it better*

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* Associate Professor of Law, Loyola University New Orleans College of Law; J.D., with Honors, The University of North Carolina at Chapel Hill, 1995; B.A., *Summa Cum Laude*, The University of Georgia, 1992. The author's e-mail address is csenn@loyno.edu. I would like to thank: Loyola University New Orleans College of Law for its research support; Emily French for her research assistance; the *Loyola Law Review* students in the Spring 2012 *Seminar in Scholarly Writing* for their feedback and comments on an earlier draft; and Sharon Senn for all of her support.

*serves the ADEA's purposes and interests by (a) more effectively promoting its remedial purpose of deterrence and (b) expanding its remedial purposes to include harm compensation and claim incentive; and (3) it serves to fully advance federal employment discrimination policy.*

## I. INTRODUCTION

Do our federal employment discrimination laws actually discriminate by monetarily favoring victims with certain federally protected characteristics over those with other such characteristics? For example, do our anti-discrimination laws allow victims of *sex*-based or *disability*-based discrimination to recover substantially more (or less) monetary damages than an otherwise identically situated victim of *age*-based discrimination?

Consider the following three scenarios, and ask whether each discrimination victim should be eligible to receive the same recovery:

> **Situation #1**: Tamara, who is a woman, applies for a $60,000-per-year job at XYZ Corp., a Fortune 500 company with thousands of employees. During the interview, the hiring supervisor tells Tamara, "You are the best applicant that we have. But, we have always favored men for these positions. We are just unwilling to hire a woman for this job." In fact, Tamara is the most qualified applicant for the job, which can be performed equally well by men and women. True to its word, XYZ Corp. hires a less qualified man for the job.
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> Tamara immediately interviews with another company for another $60,000-per-year job with comparable benefits, and she is hired. This job begins one month after the job with XYZ Corp., with Tamara thus incurring $5,000 in lost wages (one month's salary) as a result of XYZ Corp.'s *sex*-based discrimination.

> **Situation #2**: Gary, who has cerebral palsy, applies for a different $60,000-per-year job at XYZ Corp. During the interview, the hiring supervisor tells Gary, "You are the best applicant that we have. But, we have always favored those without disabilities for these positions. We are just unwilling to hire a disabled person for this job." In fact, Gary is the most qualified applicant for the job, which can be performed equally well by those with or without cerebral palsy. True to its word, XYZ Corp. hires a less qualified, non-disabled person for the job.
>
> Gary immediately interviews with another company for another $60,000-per-year job with comparable benefits, and he is hired. This job begins one month after the job with XYZ Corp., with Gary thus incurring $5,000 in lost wages (one month's salary) as a result of XYZ Corp.'s *disability*-based discrimination.

> **Situation #3**: Scott, who is fifty-five years old, applies for a different $60,000-per-year job at XYZ Corp. During the interview,

> the hiring supervisor tells Scott, "You are the best applicant that we have. But, we have always favored those who are thirty years old or younger for these positions. We are just unwilling to hire an older person for this job." In fact, Scott is the most qualified applicant for the job, which can be performed equally well by younger or older workers. True to its word, XYZ Corp. hires a less qualified person who is twenty-eight years old for the job.
>
> Scott immediately interviews with another company for another $60,000-per-year job with comparable benefits, and he is hired. This job begins one month after the job with XYZ Corp., with Scott thus incurring $5,000 in lost wages (one month's salary) as a result of XYZ Corp.'s *age*-based discrimination.

* * *

For decades now, our federal employment discrimination laws have not shared a uniform remedial model in intentional discrimination cases (those that rely on disparate treatment, rather than disparate impact, theory).[1] On the one hand, Title VII of the Civil Rights Act of 1964 (Title VII)[2] and the Americans with Disabilities Act of 1990 (ADA)[3] allow prevailing plaintiffs in intentional sex-, race-, religion-, national origin-, color-, or disability-based discrimination cases to recover the following monetary damages (exclusive of reasonable attorneys' fees and any applicable equitable relief): (i) lost wages (back pay from the date of discrimination to the date of judgment); (ii) compensatory damages (for humiliation, emotional pain

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1. *See generally* MICHAEL J. ZIMMER, CHARLES A. SULLIVAN & REBECCA HANNER WHITE, CASES AND MATERIALS ON EMPLOYMENT DISCRIMINATION 207 (7th ed. 2008) ("While disparate treatment discrimination is the purposeful exclusion of protected class members from jobs, disparate impact discrimination exists when employment policies, regardless of [neutral] intent, adversely affect one group more than another and cannot be adequately justified.").

2. 42 U.S.C. §§ 2000e to 2000e-17 (2006). Title VII of the Civil Rights Act of 1964 generally prohibits employment-based discrimination because of a person's race, color, religion, sex, or national origin. *See id*. § 2000e-2(a)(1). In addition, the Pregnancy Discrimination Act of 1967 (PDA) amended Title VII to clarify that, for purposes of unlawful discrimination, the term "because of sex" includes "because of or on the basis of pregnancy, childbirth, or related medical conditions." Pregnancy Discrimination Act of 1967, Pub. L. No. 95-555, § 1, 192 Stat. 2076, 2076 (codified as amended at 42 U.S.C. § 2000e(k)). Title VII also prohibits retaliatory discrimination against a person for having "opposed any practice made . . . unlawful" by Title VII or having "made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing" under Title VII. 42 U.S.C. § 2000e-3(a).

3. 42 U.S.C. § 12101. The Americans with Disabilities Act of 1990 (ADA) generally prohibits employment-based discrimination against a "qualified individual" because of his or her "disability." *Id*. § 12112(a)–(b). The term "disability" is defined within the ADA as (i) a "physical or mental impairment that substantially limits one or more major life activities of such individual," (ii) having "a record of such an impairment," or (iii) "being regarded as having such an impairment." *Id*. § 12102(1). A "qualified individual" refers to a person "who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires." *Id*. § 12111(8). The ADA contains an anti-retaliation provision similar to that of Title VII. *See id*. § 12203(a); *supra* note 2 (describing Title VII's anti-retaliation provision).

and suffering, medical expenses, and other out-of-pocket costs); and (iii) punitive damages (for employer conduct that is malicious or recklessly indifferent to the federally protected rights of the plaintiff), with the aggregate sum of compensatory and punitive damages being subject to statutory caps ranging from $50,000 to $300,000 (depending on the number of the employer's employees).[4] Consequently, in Situations #1 and #2 above, Tamara (a Title VII plaintiff) and Gary (an ADA plaintiff) would each be eligible to receive a maximum of $305,000: $5,000 in lost wages, plus up to $300,000 in compensatory damages, punitive damages, or both (the capped amount for large employers such as XYZ Corp).

On the other hand, the Age Discrimination in Employment Act of 1967 (ADEA)[5] allows prevailing plaintiffs in intentional age-based discrimination cases to recover the following monetary damages (exclusive of reasonable attorneys' fees and any applicable equitable relief): (i) lost wages (back pay) and (ii) "liquidated damages" equal to the lost wages (for willful violations of the ADEA).[6] Thus, in Situation #3 above, Scott would be eligible to receive a maximum of only $10,000: $5,000 in lost wages, plus another $5,000 in liquidated damages.

The problem here is not a mere difference in terminology or labels. Instead, the key problem is one of discriminatory effect. As illustrated above, these different models can and often do lead to monetary favoritism of those with certain federally protected characteristics. Despite being subjected to equally egregious discriminatory conduct and incurring identical wage-related and other losses, Tamara and Gary are treated differently (in fact, over thirty times better) than Scott: Tamara and Gary are eligible to receive a maximum of $305,000 in monetary damages, while Scott is eligible to receive a mere $10,000. Regrettably, XYZ Corp. escapes almost scot-free for its age-based discrimination against Scott.

This Article aims to end this problem of discriminatory damages under Title VII, the ADA, and the ADEA. Part II further discusses these two

4. *See* 42 U.S.C. § 2000e-5(g)(1), (k) (setting forth Title VII's provisions regarding back pay, other equitable relief, such as reinstatement or hiring, and attorney's fees); § 12117(a) (setting forth the ADA's provisions that incorporate by reference Title VII's damages and remedies); § 1981a(a)(1)–(2), (b)(1), (3) (setting forth Title VII's and the ADA's provisions regarding compensatory damages, punitive damages, and the applicable statutory caps); *infra* Part II.A (discussing the monetary damages available under Title VII and the ADA).

5. 29 U.S.C. §§ 621–634 (2006). The Age Discrimination in Employment Act of 1967 (ADEA) generally prohibits employment-based discrimination because of a person's age (i.e., forty years old or older). *Id*. §§ 623(a), 631(a) (limiting the ADEA's scope to persons "at least 40 years of age"). The ADEA also contains an anti-retaliation provision similar to those of Title VII and the ADA. *See id*. § 623(d); *supra* notes 2–3 (describing Title VII's and the ADA's anti-retaliation provisions, respectively).

6. 29 U.S.C. § 626(b) (setting forth the ADEA's provisions that incorporate by reference certain remedies provided in § 216 of the Fair Labor Standards Act (FLSA), 29 U.S.C. §§ 201–219 (2006)); *id*. § 216(b) (setting forth the FLSA's provisions regarding lost wages, liquidated damages, and attorney's fees); *infra* Part II.B (discussing the monetary damages available under the ADEA).

different remedial models of Title VII/ADA and the ADEA.[7] Specifically, this Part explores the express damages provisions of these statutes and their intended remedial purposes, as shown through applicable legislative history and judicial precedent.

Part III further describes and mathematically illustrates the "dirty little secret" of our federal employment discrimination laws—the "Discriminatory Damages Paradox." This Paradox is the ironic phenomenon that our anti-discrimination laws, in effect, discriminate by monetarily favoring victims with certain federally protected characteristics. In some Paradox situations, prevailing Title VII or ADA plaintiffs are monetarily favored over otherwise identically situated ADEA plaintiffs. In other Paradox situations, the opposite is true. Either way, the extent of a discrimination victim's monetary recovery often substantially varies by his or her federally protected characteristic: a victim with the "right" or "favored" characteristic can recover more, while a victim with the "wrong" or "disfavored" characteristic can recover less.

Part IV proposes and defends a "Uniform Title VII/ADA-Based Damages Model" for federal employment discrimination law, thereby displacing the ADEA's current model. This uniform model solves the Discriminatory Damages Paradox, and it otherwise represents a significant improvement in our anti-discrimination laws for three reasons. First, the Uniform Title VII/ADA-Based Damages Model embraces Congress's philosophy of promoting reasonably comparable and consistent (rather than unfairly disparate) monetary damages for victims of intentional discrimination,[8] as evidenced by the Civil Rights Act of 1991.[9] Second, this uniform model better serves the ADEA's purposes and interests by more effectively promoting its remedial purpose of deterrence and by expanding its remedial purposes to include harm compensation and claim incentive.[10] Third, the Uniform Title VII/ADA-Based Damages Model serves to fully advance federal employment discrimination policy.[11]

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7. *See infra* Part II (discussing the monetary damages available under Title VII/ADA and the ADEA).

8. *See infra* Part IV.A (discussing this "Philosophy of Remedial Parity").

9. Pub. L. No. 102-166, 105 Stat. 1071 (1991) (codified as amended in scattered sections of 42 U.S.C.). The Civil Rights Act of 1991 (the 1991 Act), in relevant part, expanded the monetary damages available under Title VII and the ADA to include compensatory damages and punitive damages, subject to certain limitations and monetary caps. 42 U.S.C. § 1981a(a)–(b). *See infra* Part II.A (discussing the damage provisions and legislative history of the 1991 Act).

10. *See infra* Part IV.B (discussing the remedial purpose(s) of ADEA damages).

11. *See infra* Part IV.C (discussing federal employment discrimination policy).

## II. THE VARYING DAMAGES AVAILABLE UNDER FEDERAL EMPLOYMENT DISCRIMINATION LAW

A discussion of the different damages models of Title VII/ADA and the ADEA (including the remedial purposes of each model) is important in understanding how the Discriminatory Damages Paradox arises and why we should solve it.

### *A. Title VII and ADA*

Title VII, enacted in 1964, and the ADA, enacted about twenty-five years later in 1990, share the same core model for monetary damages. Initially, the model focused only upon equitable back pay, but in 1991, this model evolved to include capped compensatory and punitive damages in certain instances of intentional discrimination.

#### *1. Damage Provisions*

As initially enacted, Title VII "afforded only 'equitable' remedies" to prevailing plaintiffs.[12] In particular, Title VII expressly empowered the courts to "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."[13] Congress lifted this remedial language from the National

12. Landgraf v. USI Film Prods., 511 U.S. 244, 252 (1994); *see also* Kolstad v. Am. Dental Ass'n, 527 U.S. 526, 533–34 (1999) ("Prior to 1991, only equitable relief . . . was available to prevailing Title VII plaintiffs; . . . no authority [existed under Title VII] for an award of punitive or compensatory damages.").

13. 42 U.S.C. § 2000e-5(g)(1) (emphasis added) (also permitting courts to enjoin employers from continuing to engage in unlawful discriminatory practices). Title VII also expressly empowers the courts to award "a reasonable attorney's fee (including expert fees) as part of the costs." *Id*. § 2000e-5(k). *See also* Pollard v. E.I. du Pont de Nemours & Co., 532 U.S. 843, 848–54 (2001) (generally discussing available Title VII remedies before and after 1991).

While enumerating these equitable remedies, Title VII did not explicitly reference a front-pay remedy. *See* 42 U.S.C. § 2000e-5(g)(1). This remedy corresponds to future lost wages from the date of judgment to the date of reinstatement:

> [Front pay is] lost compensation during the period between judgment and reinstatement or in lieu of reinstatement. For instance, when an appropriate position for the plaintiff is not immediately available without displacing an incumbent employee, courts have ordered reinstatement upon the opening of such a position and have ordered front pay to be paid until reinstatement occurs. In cases in which reinstatement is not viable because of continuing hostility between the plaintiff and the employer or its workers, or because of psychological injuries suffered by the plaintiff as a result of the discrimination, courts have ordered front pay as a substitute for reinstatement.

*Pollard*, 532 U.S. at 846 (internal citations omitted); *see also id*. at 850 ("Courts [have traditionally] recognized that reinstatement was not always a viable option, and that an award of front pay as a substitute for reinstatement in such cases was a necessary part of the 'make whole' relief mandated by Congress [in Title VII.]"); McInnis v. Fairfield Cmtys., Inc., 458 F.3d 1129, 1145 (10th Cir. 2006)

Labor Relations Act (NLRA).[14] The NLRA, enacted in 1935, explicitly authorized the National Labor Relations Board to order employers to "take such affirmative action including reinstatement of employees with or without *back pay*, as will effectuate the policies" of the Act.[15]

Similarly, in 1990, the ADA originally limited prevailing plaintiffs to equitable back pay. Congress simply incorporated by reference Title VII's remedial language by providing that the "remedies . . . set forth in [Title VII] shall be the . . . remedies . . . provide[d] to . . . any person alleging discrimination on the basis of disability in violation" of the ADA.[16]

In 1991, the scope of available monetary damages under Title VII and the ADA changed. With the passage of the Civil Rights Act of 1991 (the 1991 Act),[17] Congress amended both Title VII and the ADA to "expand[] the remedies available to . . . plaintiffs by permitting, for the first time, the recovery of *compensatory and punitive damages*."[18] Under the 1991 Act,

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(discussing front pay and noting that "reinstatement . . . 'may not be appropriate . . . when the employer has exhibited such extreme hostility that, as a practical matter, a productive and amicable working relationship would be impossible'" (quoting EEOC v. Prudential Fed. Sav. & Loan Ass'n, 763 F.2d 1166, 1172 (10th Cir. 1985))).

However, the Supreme Court ultimately recognized that front pay fell within, and was authorized by, Title VII's "any other equitable relief" catch-all language. *See* 42 U.S.C. § 2000e-5(g)(1); *Pollard*, 532 U.S. at 853–54 (stating that the front-pay remedy—whether "in lieu of reinstatement" or "for the period between the date of judgment and the date of [any] reinstatement"—was "authorized under" Title VII's equitable remedy provisions); *see also id*. at 850–51 ("By 1991, virtually all of the courts of appeals had recognized that 'front pay' was a remedy authorized under [Title VII's equitable remedy provisions and that] no court of appeals appears to have ever held to the contrary."); *id*. at 853 n.3 ("[F]ederal courts consistently have construed [Title VII's 'other equitable relief' language] as authorizing front pay awards in lieu of reinstatement."); United States v. Burke, 504 U.S. 229, 239 n.9 (1992) ("[C]ourts have allowed Title VII plaintiffs who were wrongfully discharged and for whom reinstatement was not feasible to recover 'front pay' or future lost earnings.").

14. *See generally Pollard*, 532 U.S. at 848–49 (stating that Title VII's remedial provisions "closely tracked the language of § 10(c)" of the National Labor Relations Act (NLRA)); *Landgraf*, 511 U.S. at 252–53 ("Title VII's backpay remedy [was] modeled on that of the [NLRA.]").

The NLRA, 29 U.S.C. §§ 151–169 (2006), generally prohibits employers from engaging in "[u]nfair labor practices" that interfere with employee rights regarding labor union organizing, collective bargaining, and engaging in "concerted activities." *See id*. § 158; *see also id*. § 157 (establishing so-called Section 7 rights to self-organize, form or join a labor union, bargain collectively, or engage in "other concerted activities for the purpose of collective bargaining or other mutual aid or protection"); *id*. §158(a)(1)–(5) (commonly referred to as Section 8(a)(1), (a)(2), (a)(3), (a)(4), and (a)(5) violations, respectively, and prohibiting an employer from engaging in "unfair labor practice[s]" by (i) interfering with, restraining, or coercing employees who exercise these rights; (ii) interfering with the formation or administration of a labor union; (iii) discouraging labor union membership through discrimination in employment; (iv) retaliating against an employee for filing an unfair labor practice charge or giving testimony in proceedings under the NLRA; or (v) refusing to engage in the collective bargaining process with an appropriate labor union).

15. 29 U.S.C. § 160(c) (emphasis added) (also authorizing the National Labor Relations Board to issue cease-and-desist orders against employers).

16. 42 U.S.C. § 12117(a).

17. Pub. L. No. 102-166, 105 Stat. 1071 (1991) (codified as amended in scattered sections of 42 U.S.C.).

18. *Pollard*, 532 U.S. at 848 (emphasis added); *see also* 42 U.S.C. § 1981a(a)(1)–(2) (stating that Title VII and ADA plaintiffs "may recover compensatory and punitive damages" subject to the

compensatory damages can be awarded for a prevailing Title VII or ADA plaintiff's "future pecuniary losses, emotional pain, suffering, inconvenience, mental anguish, loss of enjoyment of life, and other nonpecuniary losses . . . ."[19] Furthermore, these new compensatory and punitive damages are "in addition to any relief" available under Title VII and the ADA[20] and do "not replace or duplicate" the existing equitable remedy of back pay.[21]

Importantly, however, Congress limited these supplemental monetary damages to certain types of discrimination cases and to monetary caps. As to the eligible types of discrimination cases, a prevailing Title VII or ADA plaintiff can recover compensatory and punitive damages only in "unlawful *intentional* discrimination" cases (those that rely on disparate treatment, rather than disparate impact, theory).[22] In addition, punitive damages are available only in a subset of these disparate treatment cases—namely, those in which the employer "engaged in a discriminatory practice . . . with malice or with reckless indifference to the federally protected rights" of the plaintiff.[23]

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limitations of the 1991 Act); H.R. REP. NO. 102-40, pt. 2, at 29 (1991), *reprinted in* 1991 U.S.C.C.A.N. 549, 722 ("In addition, compensatory and punitive damages may be awarded for intentional discrimination under the Americans with Disabilities Act of 1990 . . . . Section 107 of the ADA incorporates by reference the powers, remedies and procedures of Title VII."); *Landgraf*, 511 U.S. at 253, 253–55 (noting that the Civil Rights Act of 1991 "effect[ed] a major expansion in the relief available to victims of employment discrimination" and "significantly expand[ed] the monetary relief potentially available to plaintiffs").

19. 42 U.S.C. § 1981a(b)(3); *see also* H.R. REP. NO. 102-40, pt. 1, at 74 (1991), *reprinted in* 1991 U.S.C.C.A.N. 549, 612 ("Compensatory damages include, but are not limited to, monetary relief for humiliation, pain and suffering, other psychological and physical harm, and loss of civil rights; medical expenses incurred as a result of psychological or physical harm; and other economic losses and out-of-pocket costs."); Akouri v. State of Fla. Dep't of Transp., 408 F.3d 1338, 1345 (11th Cir. 2005) ("[Title VII's compensatory damages may] compensate[] for intangible, psychological injuries as well as financial, property, or physical harms.").

The "future pecuniary losses" aspect of Title VII's and the ADA's compensatory damages does *not* include the front-pay remedy. *See Pollard*, 532 U.S. at 852 (recognizing that "future pecuniary losses" could, "out of context" and "[i]n the abstract," be viewed as including front pay, but holding that front pay is not to be included within Title VII's compensatory damages and the statutory caps).

20. 42 U.S.C. § 1981a(a)(1)–(2).

21. *Landgraf*, 511 U.S. at 253; *see also* 42 U.S.C. § 1981a(b)(2) (stating that the newly available compensatory damages "shall not include backpay, interest on backpay, or any other type of relief" already authorized under Title VII and the ADA); *Pollard*, 532 U.S. at 854 (noting that compensatory and punitive damages are "in addition to previously available remedies, such as front pay").

22. 42 U.S.C. § 1981a(a)(1)–(2) (emphasis added); *see also* Kolstad v. Am. Dental Ass'n, 527 U.S. 526, 534 (1999) ("The 1991 Act limits compensatory and punitive damages awards . . . to cases of 'intentional discrimination'—that is, cases that do not rely on the 'disparate impact' theory of discrimination.").

23. 42 U.S.C. § 1981a(b)(1); *see also Kolstad*, 527 U.S. at 534 ("The very structure of § 1981a suggests a congressional intent to authorize punitive awards in only a subset of cases involving intentional discrimination. . . . Congress plainly sought to impose two standards of liability—one for establishing a right to compensatory damages and another, higher standard that a plaintiff must satisfy to qualify for a punitive award."). Generally, an employer acts with the requisite "'malice' or 'reckless indifference'" when it "at least discriminate[s] in the face of a perceived risk that its actions will violate

As to the monetary caps, the aggregate sum of a prevailing Title VII or ADA plaintiff's compensatory and punitive damages is subject to a statutory ceiling ranging from $50,000 to $300,000, depending upon the number of the employer's employees:[24]

**COMPENSATORY & PUNITIVE DAMAGES UNDER TITLE VII AND THE ADA**

| Number of Employer's Employees | Aggregate, Monetary Cap for Compensatory & Punitive Damages |
|---|---|
| 15 to 100 | $ 50,000 |
| 101 to 200 | $ 100,000 |
| 201 to 500 | $ 200,000 |
| 501 + | $ 300,000 |

In support of this graduated ceiling for compensatory and punitive damages, Congress reasoned that such caps would guard against disproportionate, "multi-million dollar awards" by juries[25] and thus ensure

federal law . . . ." *Id*. at 535–36. The proper inquiry, therefore, "pertain[s] to the employer's *knowledge that it may be acting in violation of federal law*, not its awareness that it is engaging in discrimination." *Id*. at 535 (emphasis added).

24. 42 U.S.C. § 1981a(b)(3).

25. H.R. REP. NO. 102-40, pt. 1, at 70–72 (1991), *reprinted in* 1991 U.S.C.C.A.N. 549, 608–10. Congress was concerned that allowing additional damages under Title VII and the ADA would "produce multi-million dollar awards" and "cause juries to award damages vastly disproportionate to the offeses [sic] committed . . . or the injuries sustained" but believed that "the procedural and substantive limitations set forth [in the 1991 Act] serve to check jury discretion in awarding such damages." *Id. See also id*. at 102 (referencing a proposed substitute bill to the 1991 Act that "specifically preclude[d] a jury trail [sic] on these issues [compensatory and punitive damages] under any circumstances"); *id*., pt. 2, at 52 n.2 (referencing the proposed amendment "to cap punitive damages for intentional discrimination" and noting that it "created the impression that small employers would not be exposed to unlimited damage awards"); Colleen P. Murphy, *Determining Compensation: The Tension Between Legislative Power and Jury Authority*, 74 TEX. L. REV. 345, 408 (1995) ("[T]he caps on compensatory and punitive damages in the Civil Rights Act of 1991 evidently were enacted as part of a compromise between those who wanted traditional jury determination of damages and those who did not want jury trial[s] at all in actions under the Act."); Joseph A. Seiner, *The Failure of Punitive Damages in Employment Discrimination Cases: A Call for Change*, 50 WM. & MARY L. REV. 735, 751 (2008) ("As part of a compromise, the [1991 Act] also contains limitations (or statutory caps) on the size of the potential award [of compensatory and punitive damages]."); *id*. at 781 ("The statutory

that "small employers would not be exposed to unlimited damage awards."[26]

*2. Remedial Purposes*

Congress sought to serve several remedial purposes when it initially included back-pay damages under Title VII and the ADA and when it added compensatory and punitive damages per the 1991 Act.

As to back-pay damages, Congress originally aimed to further an equitable, restorative remedial purpose—to "make persons whole for injuries suffered on account of unlawful employment discrimination."[27] Mathematically, these damages represent "the difference between the amount the claimant *would have earned* [from the employer] absent the discrimination and the amount of wages *actually earned* [elsewhere] during the relevant period" prior to judgment.[28] Consequently, the equitable remedy of back pay (as well as reinstatement) under Title VII and the ADA seeks to "restor[e] victims . . . to the wage and employment positions they would have occupied absent the unlawful discrimination."[29]

As to compensatory and punitive damages, Congress intended to serve four additional purposes. The first purpose was to achieve greater conformity and consistency in the monetary damages available in federal employment discrimination cases. As mentioned above, prevailing Title VII and ADA plaintiffs were eligible to receive only equitable back-pay damages prior to the 1991 Act.[30] Yet, the same was not true for prevailing plaintiffs under another federal statute that also prohibited race-based discrimination—namely, the Civil Rights Act of 1866 (commonly referred

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caps were seen as a compromise whereby Congress acknowledged that punitive damages were a necessary part of the statute, but that such relief would be limited.").

26. H.R. REP. NO. 102-40, pt. 2, at 52 n.2.

27. Albemarle Paper Co. v. Moody, 422 U.S. 405, 418–19 (1975) ("The 'make whole' purpose of Title VII is made evident by the legislative history."); *see also* EEOC v. Dial Corp., 469 F.3d 735, 743 (8th Cir. 2006) ("The trial court 'has broad equitable discretion to fashion back pay awards in order to make the Title VII victim whole.'" (quoting EEOC v. Delight Wholesale Co., 973 F.2d 664, 669–70 (8th Cir. 1992))); Landgraf v. USI Film Prods., 511 U.S. 244, 252–53 (1994) ("Title VII's backpay remedy . . . is a 'make-whole' remedy . . . .").

28. EEOC v. Dial Corp., 469 F.3d at 744 (emphasis added); *see also* Akouri v. State of Fla. Dep't of Transp., 408 F.3d 1338, 1343 (11th Cir. 2005) ("Back pay is 'the difference between the actual wages earned and the wages the individual would have earned in the position [without the discrimination] . . . .'" (quoting Gunby v. Pa. Elec. Co., 840 F.2d 1108, 1119–20 (3d Cir. 1988))).

29. United States v. Burke, 504 U.S. 229, 239 (1992) (citing *Albemarle Paper Co*., 422 U.S. at 418). Title VII's equitable remedies address "the unlawful deprivation of full wages earned or due for services performed" and thus permit an employee to "recover only an amount equal to the wages the employee would have earned [at his employer] from the date of discharge to the date of reinstatement . . . ." *Id*. at 239.

30. *See supra* Part II.A.1 (discussing the monetary damages available under Title VII and the ADA).

to as "Section 1981").[31] Section 1981, passed as part of Reconstruction, provided that "[a]ll 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 . . . ."[32] Importantly, the Supreme Court, in its 1975 decision in *Johnson v. Railway Express Agency, Inc.*,[33] highlighted that § 1981 encompassed employment discrimination claims and permitted both compensatory and punitive damages:

> [I]t is well settled among the federal Courts of Appeals—and we now join them—that § 1981 affords a federal remedy against discrimination in private employment on the basis of race. An individual who establishes a cause of action under § 1981 is entitled to both equitable and legal relief, including compensatory and, under certain circumstances, punitive damages.[34]

Thus, when considering the 1991 Act, Congress openly highlighted this disparity in available monetary damages under Title VII and § 1981:

> Current civil rights laws permit the recovery of unlimited compensatory and punitive damages in cases of intentional *race* discrimination. No similar remedy exists in cases of intentional *gender or religious* discrimination. Victims of intentional *race* discrimination are entitled under 42 U.S.C. section 1981 not only to equitable relief, but also compensatory damages, and in particularly egregious cases, punitive damages as well. By contrast, victims of intentional gender or religious discrimination may receive under Title VII injunctive relief, reinstatement or hiring, and . . . backpay, but the statute does not permit awards of

31. Civil Rights Act of 1866, ch. 31, § 1, 14 Stat. 27, 27 (1866) (current version at 42 U.S.C. § 1981(a) (2006)).

32. 42 U.S.C. § 1981(a).

33. 421 U.S. 454 (1975).

34. *Id*. at 459–60; *see also* Patterson v. McLean Credit Union, 491 U.S. 164, 182 n.4 (1989), *superseded on other grounds by statute*, Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071 (1991) ("[A] plaintiff in a Title VII action is limited to a recovery of backpay, whereas under § 1981 a plaintiff may be entitled to plenary compensatory damages, as well as punitive damages in an appropriate case."); Howard Eglit, *The Age Discrimination in Employment Act, Title VII, and the Civil Rights Act of 1991: Three Acts and a Dog that Didn't Bark*, 39 WAYNE L. REV. 1093, 1203–04 (1993) ("Given this disjunction between the two statutes [Title VII and § 1981], prevailing plaintiffs who successfully pursued Title VII claims of employment discrimination based on gender, national origin, and religion—which forms of bias . . . are proscribed by Title VII—could secure less relief than could victims of racial and ethnic origin discrimination—which also are barred by Title VII, since the latter individuals could secure under § 1981 what they could not obtain under the 1964 Act.").

> compensatory or punitive damages no matter how egregious the circumstances of their case.[35]

Beyond recognizing the disparity, though, Congress was quite critical of it. For example, Congress highlighted that this disparity yielded inadequate relief for Title VII plaintiffs: "A serious gap exists in Title VII, one that leaves victims of intentional discrimination on the basis of sex or religion without an effective remedy for many forms of bias on the job, while victims of intentional race discrimination in employment have such a remedy."[36] Similarly, Congress emphasized the inherent unfairness of affording different monetary damages to identically situated discrimination victims:

> An unfair perference [sic] exists in federal civil rights law. . . . Gender and religious discrimination may have different cultural or historic origins than racial discrimination. However, it does not follow that Congress should differentiate among them for purposes of the remedial scheme provided by federal law for intentional discrimination. The manifestations of these various forms of intentional employment discrimination are the same: loss of employment opportunities; disparities in wages, employee benefits, and other forms of compensation; imposition of unequal working conditions; and harassment. Moreover, the harms women and religious and racial minorities suffer as a consequence of the various types of intentional discrimination are the same: humiliation; loss of dignity; psychological (and sometimes physical) injury; resulting medical expenses; damage to the victim's professional reputation and career; loss of all forms of compensation and other consequential injuries. Where the manifestations of prohibited conduct are the same, and the harms caused are the same, the remedies should be the same as well. Gender and religious discrimination are as reprehensible as race discrimination, and should be treated the same for purposes of

35. H.R. REP. NO. 102-40, pt. 1, at 65 (1991), *reprinted in* 1991 U.S.C.C.A.N. at 603 (citations omitted); *see also id*., pt. 2, at 24–25 ("Title VII, which prohibits discrimination on the basis of race, color, religion, sex or national origin, permits a court to award equitable relief, including injunctive relief, reinstatement or hiring, with . . . backpay; but the statute does not authorize the award of compensatory or punitive damages. By contrast, 42 U.S.C. § 1981 authorizes courts to award to victims of intentional [race-based] discrimination in contracts not only equitable relief, but also compensatory damages, and in appropriate cases, punitive damages as well.").

36. *Id*. at 24.

> making victims whole, encouraging private enforcement, and deterring future violations of federal law.[37]

Thus, Congress added compensatory and punitive damages per the 1991 Act "to conform remedies for intentional gender and religious discrimination [under Title VII] to those currently available to victims of intentional race discrimination [under § 1981]."[38]

The second purpose for these supplemental damages was to provide better compensation for the harms suffered by discrimination victims. Congress reasoned that "[t]he limitation of relief under Title VII to equitable remedies often means that victims of intentional discrimination may not recover for the very real effects of the discrimination."[39] Stressing the inadequacy of this equitable relief, Congress noted that:

> Victims of intentional sexual or religious discrimination in employment terms and conditions often endure terrible humiliation, pain and suffering. This distress often manifests itself in emotional disorders and medical problems. Victims of

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37. *Id*., pt. 1, at 65; *see also id*. at 15 ("The manifestations of these various forms of intentional employment discrimination are the same. Moreover, the harms women and religious and racial minorities may suffer as a consequence of the various types of intentional discrimination are the same. Where the manifestations of prohibited conduct are the same, and the harms caused are the same, the remedies should be the same as well.").

38. *Id*. at 64; *see also id*. at 70 ("In sum, the Committee finds a compelling need to permit the recovery of damages under Title VII in order to conform the remedies available for intentional gender and religious discrimination to those currently available for intentional race discrimination under section 1981."); *id*. at 74 ("The provision [of the 1991 Act] thus authorizes damage awards in Title VII [and ADA] cases in the same circumstances as such awards are now permitted under 42 U.S.C. section 1981 for intentional race discrimination."); *id*., pt. 2, at 3 ("[T]he Act amends Title VII to grant victims of intentional discrimination the right to recover compensatory damages, and, in egregious cases, punitive damages as well. These remedies are now available for victims of race discrimination under Section 1981. The Act makes them available for sex, religious and ethnic discrimination under Title VII as well."); *id*. at 24 ("It is the Committee's intention that damages should be awarded under Title VII in the same circumstances in which such awards are now permitted under U.S.C. § 1981 in intentional race discrimination cases."); *id*. at 28–29 ("The Committee intends that compensatory damages be awarded under Title VII using the same standards that have been applied under Section 1981."); Eglit, *supra* note 34, at 1204–05 ("This disparity between victims of discrimination [under § 1981 and Title VII] was somewhat ameliorated by the [Civil Rights Act of 1991] . . . . [V]ictims of gender, national origin, and religious discrimination can now recover compensatory and punitive damages, to a limited extent, for intentional violations of Title VII."); Judith J. Johnson, *A Uniform Standard for Exemplary Damages in Employment Discrimination Cases*, 33 U. RICH. L. REV. 41, 45 (1999) ("The primary impetus for the addition of compensatory and punitive damages as a remedy for Title VII was that claimants could recover those damages for race, color, and national origin discrimination under § 1981, but [those] damages were not available under Title VII for sex and religious discrimination."); Seiner, *supra* note 25, at 791 ("Indeed, in passing the Civil Rights Act of 1991, Congress expressed a clear intent to bring more conformity to statutes protecting employment discrimination . . . .").

39. H.R. REP. NO. 102-40, pt. 2, at 25; *see also id*. at 27 ("All too frequently, Title VII leaves victims of employment discrimination without remedies of any kind of their injuries . . . ."); *id*., pt. 1, at 18 ("[E]xisting protections and remedies [under Title VII and the ADA] are not adequate . . . to compensate victims of intentional discrimination."); *id*. at 68 ("All too frequently, Title VII leaves prevailing plaintiffs without remedies for their injuries . . . .").

> discrimination often suffer substantial out-of-pocket expenses as a result of the discrimination, none of which is compensable with equitable remedies.[40]

Consequently, Congress added compensatory and punitive damages per the 1991 Act to provide more "appropriate remedies for intentional discrimination and unlawful harassment"[41] and thus afford more "adequate compensation for victims of discrimination."[42]

The third purpose for these compensatory and punitive damages was to incentivize discrimination victims to file more claims. Congress sensed that, due to the limited, equitable relief available under Title VII, "victims of intentional discrimination [have been] discouraged from seeking to vindicate their civil rights."[43] Thus, Congress added these potentially lucrative supplemental damages per the 1991 Act "to encourage citizens to act as private attorneys general to enforce" their Title VII (and ADA) rights.[44]

The fourth and final purpose for these supplemental damages was to deter discriminatory employers by more severely punishing unlawful conduct. Congress observed that the limited equitable remedy of back pay under Title VII inadequately punished and deterred discriminatory conduct:

> All too frequently, Title VII . . . allows employers who discriminate to avoid any meaningful liability.
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> . . . .

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40. *Id*., pt. 2, at 25; *see also id*., pt. 1, at 14–15 ("Victims of *intentional* discrimination often endure terrible humiliation, pain and suffering while on the job. This distress often manifests itself in emotional disorders and medical problems, which in turn cause victims of discrimination to suffer substantial out-of-pocket medical expenses and other economic losses as a result of the discrimination. That is the basis for the extension of monetary remedies for intentional discrimination . . . ."); *id*. at 64–65 ("[Monetary] damages also are necessary to make discrimination victims whole for the terrible injury to their careers, to their mental and emotional health, and to their self-respect and dignity."); *id*. at 66 ("Victims of intentional discrimination often endure terrible humiliation, pain and suffering, psychological harm and related medical problems, which in turn cause [them] to suffer substantial out-of-pocket medical expenses and other economic losses as a result of the discrimination.").

41. Civil Rights Act of 1991, Pub. L. No. 102-166, § 3, 105 Stat. 1071, 1071 (1991).

42. H.R. REP. NO. 102-40, pt. 2, at 1, (noting that one of the purposes of the 1991 Act was "to strengthen existing protections and remedies available under federal civil rights laws to provide . . . adequate compensation for victims of discrimination"); *see also id*., pt. 1, at 14–15 (noting that one of the purposes of the 1991 Act was to "provide monetary remedies for victims of *intentional* employment discrimination to compensate them for resulting injuries"); *id*. at 18 (noting that one of the purposes of the 1991 Act was to "ensure compensation commensurate with the harms suffered by victims of intentional discrimination"); *id*. at 70 (finding that "permitting the recovery of such damages would enhance the effectiveness of Title VII by making victims of intentional discrimination whole for their losses").

43. *Id*., pt. 2, at 25; *see also id*., pt. 1, at 70 (stating that Title VII's limited back-pay remedy "serves as a powerful disincentive for victims to seek to vindicate their rights").

44. *Id*., pt. 1 at 64–65; *see also id*. at 70 ("[P]ermitting the recovery of such damages would enhance the effectiveness of Title VII by . . . encouraging private enforcement.").

> Back pay as the exclusive monetary remedy under Title VII has not served as an effective deterrent, and, when back pay is not available, as is the case where a discrimination victim remains on-the-job or leaves the workplace for other reasons other than discrimination, there is simply no deterrent.[45]

Consequently, Congress added the more costly compensatory and punitive damages per the 1991 Act "to deter unlawful harassment and intentional discrimination in the workplace"[46] by "rais[ing] the cost of an employer's engaging in intentional discrimination, thereby providing employers with additional incentives to *prevent* intentional discrimination in the workplace before it happens."[47]

### *B. ADEA*

Enacted in 1967 (only three years after Title VII),[48] the ADEA does not use the Title VII/ADA-based remedial model. Instead, the ADEA-based

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45. *Id*. at 68, 69; *see also id*. at 18 (stating that "existing protections and remedies are not adequate to deter unlawful discrimination" under Title VII and the ADA); *id*., pt. 2, at 25 ("The limitation of relief under Title VII to equitable remedies often means that . . . victims of intentional discrimination are discouraged from seeking to vindicate their civil rights.").

46. Civil Rights Act of 1991, Pub. L. No. 102-166, § 2, 105 Stat. 1071, 1071 (1991); *see also* H.R. REP. NO. 102-40, pt. 1, at 14 ("[One of the purposes of the 1991 Act was] to provide monetary remedies for victims of *intentional* employment discrimination . . . to provide more effective deterrence . . . ."); *id*. at 18 ("[The purpose of 1991 Act was] to strengthen existing remedies to provide more effective deterrence . . . ."); *id*. at 70 ("[P]ermitting the recovery of such damages would enhance the effectiveness of Title VII by . . . deterring future acts of discrimination . . . ."); *id*., pt. 2, at 1 ("[A central purpose of the 1991 Act was] to strengthen existing protections and remedies available under federal civil rights laws to provide more effective deterrence . . . .").

47. H.R. REP NO. 102-40., pt. 1, at 65; *see also id*. at 69 ("Making employers liable for all losses—economic and otherwise—which are incurred as a consequence of prohibited discrimination . . . will serve as a necessary deterrent to future acts of discrimination, both for those held liable for damages as well as the employer community as a whole."); Seiner, *supra* note 25, at 789 ("[T]he primary purpose behind the addition of punitive damages to Title VII was Congress's hope that such exemplary relief would deter unlawful employment discrimination."). *Cf*. BMW of N. Am., Inc. v. Gore, 517 U.S. 559, 568 (1996) ("Punitive damages may properly be imposed to further a State's legitimate interests in punishing unlawful conduct and deterring its repetition."); State Farm Mut. Auto. Ins. Co. v. Campbell, 538 U.S. 408, 416 (2003) ("[P]unitive damages serve a broader function; they are aimed at deterrence and retribution."); Sandra Sperino, *Judicial Preemption of Punitive Damages*, 78 U. CIN. L. REV. 227, 229–30 (2009) ("One of the few propositions on which both scholars and the courts agree is that the two primary justifications for punitive damages are deterrence and punishment. The punishment function of punitive damages has been described as imposing a penalty for the harm done and expressing social outrage for the violation of personal rights and social norms. Punitive damages are likewise described as serving two deterrent functions: specific deterrence for the individual defendant involved in the litigation and general deterrence for other similarly situated potential wrongdoers.").

48. Legislation aiming to bar age-based employment discrimination had been proposed since the 1950s. S. REP. NO. 90-723, at 13 (1991) (statement of Sen. Javits) ("As long ago as 1951, . . . I introduced a bill to bar age discrimination in employment in the House of Representatives . . . . In 1957, one of my first acts as a Senator was to introduce a similar bill in the Senate and I have introduced the bill in every Congress since."). In fact, during Congress's consideration of Title VII in 1964, some

model focuses on lost wages (back pay) and matching "liquidated damages" in certain instances of intentional discrimination.

*1. Damage Provisions*

The ADEA classifies age-based discrimination as a "prohibited act" under the anti-retaliation section of the Fair Labor Standards Act (FLSA),[49] and it then incorporates by reference the FLSA's remedial provisions.[50] Under the FLSA, unlawful retaliation triggers "legal or equitable relief as may be appropriate to effectuate the purposes of [the Act], including without limitation employment, reinstatement, promotion, and the payment of *wages lost* and *an additional equal amount as liquidated damages*."[51]

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legislators had proposed that age be included within its protected characteristics. *See* D. Aaron Lacy, *You Are Not Quite as Old as You Think: Making the Case for Reverse Age Discrimination Under the ADEA*, 26 BERKELEY J. EMP. & LAB. L. 363, 366 (2005) ("During the House and Senate debates prior to the enactment of Title VII, members of Congress considered adding age to the prohibited bases for employment discrimination."); Bryan B. Woodruff, Note, *Unprotected Until Forty: The Limited Scope of the Age Discrimination in Employment Act of 1967*, 73 IND. L.J. 1295, 1296–97 (1998) (discussing Senate and House proposals that included age-based discrimination in Title VII ). "The issue of age discrimination first received serious congressional attention during discussion of the Civil Rights Act of 1964." *Id*. However, Congress rejected these proposals, in part because it desired an in-depth study as to the prevalence and effects of age-based employment discrimination. *See* H. REP. NO. 90-805, at 1–2 (1967) ("Over the last several years a number of bills have been introduced in both the House and Senate to bar discrimination in employment on account of age. . . . It followed then, for section 715 of Public Law 88-352 (Civil Rights Act of 1964) to direct the Secretary of Labor to make a study of the problem of age discrimination in employment.").

Thus, as part of Title VII, Congress directed the Secretary of Labor to "make a full and complete study of the factors which might tend to result in discrimination in employment because of age and of the consequences of such discrimination on the economy and individuals affected." Civil Rights Act of 1964, Pub. L. No. 88-352, § 715, 78 Stat. 241, 265–66 (1964); *see also* Molly Horan, Note, *The Supreme Court Retires Disparate Impact:* Kentucky Retirement Systems v. EEOC *Validates the Disparate Treatment Theory Under the Age Discrimination in Employment Act*, 29 J. NAT'L ASS'N ADMIN. L. JUDICIARY 115, 119–20 (2009) ("[A]fter sensing the need for investigation, the final version of Title VII directed the secretary of labor to conduct a study of factors relating to age discrimination and its consequences."). After completing this study in 1965, then-Secretary of Labor Willard Wirtz emphasized the need to end age-based employment discrimination, and Congress passed the ADEA in 1967. H.R. REP. NO. 90-805, at 2 (1967); S. REP. NO. 90-723, at 2; *see also* Jessica Sturgeon, Note, Smith v. City of Jackson: *Setting an Unreasonable Standard*, 56 DUKE L.J. 1377, 1378 (2007) ("Congress passed the [ADEA] in response to the Wirtz Report's findings.").

49. 29 U.S.C. § 626(b) (2006) (stating that the ADEA "shall be enforced in accordance with the . . . remedies . . . provided" in section 216 of the FLSA (except for the penalties of fines and imprisonment articulated in section 216(a))). Generally, the FLSA, 29 U.S.C. §§ 201–219 (2006), requires that employers (i) pay at least the federally established minimum wage rate and (ii) pay overtime compensation (at one-and-a-half times the applicable "regular rate" of pay) to nonexempt employees who work in excess of forty hours per week. *Id*. §§ 206(a)(1), 207(a)(1). In addition, the FLSA contains an anti-retaliation provision similar to those of Title VII, the ADA, and the ADEA. *Id*. § 215(a)(3); *see supra* notes 2–3, 5 (describing Title VII's, the ADA's, and the ADEA's anti-retaliation provisions, respectively).

50. 29 U.S.C. § 626(b).

51. 29 U.S.C. § 216(b) (emphasis added) (also empowering the courts to award "a reasonable attorney's fee . . . and costs of the action" to a prevailing plaintiff). In any ADEA action, "the court shall have jurisdiction to grant such legal or equitable relief as may be appropriate . . . , including

Thus, the ADEA allows prevailing plaintiffs to recover their lost wages (back pay) plus liquidated damages that match, dollar-for-dollar, the applicable "wages lost."[52] In this respect, liquidated damages afford "double damages" to prevailing ADEA plaintiffs.[53] However, Congress limited these supplemental damages to a certain subset of intentional discrimination (disparate treatment) cases—namely, "willful violations" of the ADEA.[54]

It is interesting to note Congress's rationale for adopting the FLSA-based (rather than Title VII-based) remedial model for the ADEA. Given that the ADEA was enacted only a few years *after* Title VII, Congress could have easily incorporated or mirrored Title VII's remedial and enforcement scheme in the ADEA (or just amended Title VII to include age as a protected characteristic). However, Congress opted for the FLSA-based model because, in part, it believed "that FLSA remedies and procedures [could be] *more helpful* to age discrimination victims than are Title VII remedies and procedures."[55] Specifically, Congress was concerned that a shared Title VII-ADEA enforcement scheme may lead to "lengthy EEOC charge process[] backlogs" and "the possibility that age discrimination enforcement would be neglected in favor of other forms of discrimination."[56] Thus, Congress chose "[FLSA] rather than Title VII

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without limitation judgments compelling employment, reinstatement or promotion, or enforcing the liability for amounts deemed to be unpaid minimum wages or unpaid overtime compensation under this section." *Id*. § 626(b). Any "[a]mounts owing to a person as a result of a violation of [the ADEA] shall be deemed to be unpaid minimum wages or unpaid overtime compensation for purposes of [the FLSA's remedial model.]" *Id*. The "wages lost" component includes both back pay and front pay in lieu of reinstatement, if warranted. *See* Hansard v. Pepsi-Cola Metro. Bottling Co., 865 F.2d 1461, 1469 (5th Cir. 1989) ("Courts have permitted ADEA plaintiffs to recover 'front pay' in addition to the usual award of back pay."). *See supra* note 13 (discussing the availability of front pay in lieu of reinstatement under Title VII's and the ADA's equitable remedy provisions).

52. *See, e.g*., Seiner, *supra* note 25, at 782 ("[L]iquidated damages would be tied in a one-to-one ratio to the actual harm suffered by the plaintiff. Under this system, the amount of liquidated damages is already capped by the amount of harm demonstrated by the plaintiff.").

53. *See* Trans World Airlines, Inc. v. Thurston, 469 U.S. 111, 125 (1985) (discussing the ADEA's liquidated damages provision and its resulting effect of "double damages"); Seiner, *supra* note 25, at 776 ("Under the liquidated damages scheme, an employer could be liable for 'double damages' of the actual damages suffered by the plaintiff."); Johnson, *supra* note 38, at 44 n.21 (1999) (noting that the ADEA's "liquidated damages, which are double damages, are available for willful violations"); Rebecca Marshall, Recent Development, *Bootstrapping a Malice Requirement into ADEA Liquidated Damage Awards*—Dreyer v. Arco Chemical, 62 WASH. L. REV. 551, 553 (1987) (referencing the ADEA's "double or 'liquidated damage' clause" and its effect of affording "double damages for willful violations"); Lavinia A. James, *Damages in Age Discrimination Cases—The Need for a Closer Look*, 17 U. RICH. L. REV. 573, 576–77 (1983) (noting that the ADEA's liquidated damages provision "in effect doubl[es] the actual damages the plaintiff receives if the violation is willful").

54. 29 U.S.C. § 626(b). *See infra* note 66 (discussing the Supreme Court's standard for determining "willful violations" of the ADEA).

55. Marshall, *supra* note 53, at 552 n.12 (emphasis added).

56. *Id*. (citing *Age Discrimination in Employment, 1967: Hearings on S. 830, S. 788 Before the Subcomm. on Labor of the S. Comm. on Labor and Pub. Welfare*, 90th Cong. 24, 29, 396 (1967)) (respectively, setting forth statements of Sen. Javits, Sen. Smathers, and an industry association).

remedies and enforcement mechanisms because it wanted to take advantage of the existing [U.S.] Department of Labor bureaucracy,"[57] which had been created in 1938 to enforce the FLSA.[58]

*2. Remedial Purposes*

Congress aimed to serve both equitable and deterrent purposes when it opted for back-pay damages and liquidated damages under the ADEA. As to back-pay damages ("wages lost"), Congress aimed to further an equitable, restorative remedial purpose just as it had under Title VII—"to make persons whole for injuries suffered" and to "restor[e] victims . . . to the wage . . . positions they would have occupied [at the employer] absent the unlawful discrimination."[59]

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57. *Id*.; *see also* S. REP. NO. 90-723, at 13 (statement of Sen. Javits) ("[Prior legislation to amend the FLSA to bar age-based employment discrimination] would have allowed utilization of the existing investigative and enforcement machinery of the Wage and Hour Division [of the U.S. Department of Labor] into which the functions of administration and enforcement of the ban on age discrimination could easily have been integrated.").

58. *See* 29 U.S.C. § 204. Congress had historically viewed proposed legislation to bar age-based discrimination through this FLSA lens. For example, legislation barring age-based employment discrimination had been proposed as mere amendments to the FLSA in 1965 and 1966. S. REP. NO. 90-723, at 13 (statement of Sen. Javits); *see also* Chace v. Champion Spark Plug Co., 732 F. Supp. 605, 612 (D. Md. 1990) ("The legislative history reveals that the ADEA had originally been proposed by Senator Javits, among others, as an amendment to the FLSA."); Michael D. Moberly, *The Recoverability of Prejudgment Interest Under the ADEA After Thurston*, 8 LAB. LAW. 225, 230 (1992) ("Senator Javits . . . originally proposed legislation proscribing age discrimination in employment as an amendment to the FLSA."). Similarly, Congress rejected ADEA bill provisions that had originally adopted an NLRA-based enforcement model (relying exclusively on administrative agency hearings), and it instead substituted the FLSA's remedies and private enforcement model. S. REP. NO. 90-723, at 13 (statement of Sen. Javits) ("[The original bill's] one major defect was that it eschewed the use of FLSA enforcement techniques . . . in favor of agency type hearings before the Secretary of Labor. This was a notable example of the 'departmental' process, which would have required the establishment within the Department of Labor of a wholly unnecessary new bureaucracy, complete with hearing examiners and regional directors, investigators, and attorneys."); *id*. at 5 ("The [FLSA-based] enforcement provisions replace those in the original bill which were similar to the National Labor Relations Act approach. The private witnesses who appeared at the hearings were unanimous in preferring this type of enforcement to that originally in the bill which had envisaged an administrative hearing prior to court review. The bill now authorizes an individual, as well as the Secretary of Labor, to seek remedies through court action."); H. REP. NO. 90-805, at 5 ("The [FLSA-based] enforcement provisions replace those in the original bill which were similar to the National Labor Relations Act approach. The former authorizes the employee, as well as the Secretary of Labor, to seek remedies through court action.").

Beyond the age discrimination context, Congress also exhibited a FLSA-centric viewpoint when it enacted the Equal Pay Act of 1963 (EPA) as an amendment to the FLSA. *See* 29 U.S.C. § 206(d) (generally prohibiting discriminatory wages based on sex (equal pay for equal work)); S. REP. NO. 90-723, at 13 (statement of Sen. Javits) ("A similar precedent [of looking to FLSA remedies and procedures] had already been established by the equal pay amendment to the FLSA prohibiting discrimination in wage rates on account of sex."); Johnson, *supra* note 38, at 44 n.21 ("The same remedial provisions [of the FLSA] apply as well to the Equal Pay Act of 1963 . . . , which is an amendment to the Fair Labor Standards Act.").

59. *See supra* notes 27–29 and accompanying text (discussing the make-whole purpose of back pay under Title VII and the ADA).

As to liquidated damages, Congress intended to deter discriminatory employers by more severely punishing unlawful conduct. The ADEA's legislative history highlights the punitive origins and deterrent purpose of its liquidated damages. When enacting the ADEA, Congress initially considered inclusion of the FLSA's *criminal penalty* provisions (fines and/or imprisonment).[60] However, legislative concerns arose as to whether an accused employer's invocation of Fifth Amendment rights would hamper ADEA investigations and enforcement.[61] In response to these concerns, Congress substituted punitive "double damage liability" (liquidated damages) for the proposed criminal penalties.[62] Congress further noted that the driver for enhanced sanctions under the ADEA was to "furnish an effective deterrent to willful violations [of the Act] . . . ."[63]

Judicial precedent further confirms the exclusively punitive nature and deterrent purpose of liquidated damages. As to the punitive nature of these damages, the Supreme Court, in its 1985 decision in *Trans World Airlines, Inc. v. Thurston*,[64] emphasized the above-referenced substitution of

60. 113 CONG. REC. S7076 (daily ed. Mar. 16, 1967) (statement of Sen. Javits) (referencing language of the originally proposed bill); Trans World Airlines, Inc. v. Thurston, 469 U.S. 111, 125 (1985) ("The original [ADEA] bill proposed by the administration incorporated § 16(a) of the FLSA, which imposes criminal liability for a willful violation."); *see also* 29 U.S.C. § 216(a) (setting forth the FLSA's "[p]enalties" and providing that those who "willfully violate[]" certain provisions of the Act shall be subject to "a fine of not more than $10,000, or to imprisonment for not more than six months, or both").

61. 113 CONG. REC. S2199 (daily ed. Feb. 1, 1967) (statement of Sen. Javits) (referencing that criminal penalty provisions for the ADEA and related Fifth Amendment implications would create difficult problems of proof and hinder investigation, and enforcement efforts); *Trans World Airlines, Inc*., 469 U.S. at 125 ("Senator Javits found 'certain serious defects' in the administration bill. He stated that 'difficult problems of proof . . . would arise under a criminal provision,' and that the employer's invocation of the Fifth Amendment might impede investigation, conciliation, and enforcement."); Johnson, *supra* note 38, at 87 n.225 ("Criminal penalties for the ADEA were rejected by the drafters . . . because of the increased burden of proof for criminal violations and to avoid employers' frustrating the implementation of the ADEA by interposing their privilege against self incrimination."); Marshall, *supra* note 53, at 554 ("Congress enacted the ADEA hybrid damages and eliminated criminal penalties in order to . . . avoid the proof problems of a criminal penalty.").

62. 113 CONG. REC. S7076 (daily ed. Mar. 16, 1967) (statement of Sen. Javits) (emphasis omitted) (proposing that "the [FLSA's] criminal penalty . . . [be] eliminated and a double damage liability substituted" in the ADEA); *Trans World Airlines, Inc*., 469 U.S. at 125 (quoting this proposal by Senator Javits); *see also* 29 U.S.C. § 626(b) (stating that the ADEA "shall be enforced in accordance with the . . . remedies . . . provided" in section 216 of the FLSA (except for the penalties of fines and imprisonment articulated in section 216(a)); Johnson, *supra* note 38, at 88 n.231 ("Congress rejected a proposal to add criminal penalties to the ADEA."); Marshall, *supra* note 53, at 553–54 ("[T]he ADEA eliminates the FLSA criminal penalties for willful violations.").

63. 113 CONG. REC. S7076 (daily ed. Mar. 16, 1967) (statement of Sen. Javits); *see also Trans World Airlines, Inc*., 469 U.S. at 125 (quoting Senator Javits regarding the deterrent purpose of liquidated damages under the ADEA); Dean v. Am. Sec. Ins. Co., 559 F.2d 1036, 1039–40 (5th Cir. 1977) ("[L]iquidated damages could effectively supply the deterrent and punitive [functions] which both criminal penalties and punitive damages normally serve."). For other general discussions regarding the legislative history of the ADEA's liquidated damages provision see *Chace*, 732 F. Supp. at 612–13; Moberly, *supra* note 58, at 230–31.

64. 469 U.S. 111 (1985).

liquidated damages for criminal penalties in the ADEA[65] and unanimously concluded that "[t]he legislative history of the ADEA indicates that Congress intended for liquidated damages to be punitive in nature."[66]

Only ten years after *Trans World Airlines*, the Court reiterated the solely punitive nature of the ADEA's liquidated damages in its 1995 decision in *Commissioner of Internal Revenue v. Schleier*.[67] In *Schleier*, the Court considered whether these damages fell within a federal income tax exemption for "compensation for personal injuries."[68] The Court reiterated its view that these damages were exclusively punitive (rather than compensatory) in nature:

> "[T]he Court's statement [in *Trans World Airlines*] that 'Congress intended for liquidated damages to be punitive in nature' can only be taken as a rejection of the argument that those damages are also (or are exclusively) compensatory.
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> . . . .
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> . . . [T]here is much force to the Court's conclusion . . . that the ADEA's liquidated damages provisons are punitive."[69]

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65. *Id*. at 125–26.

66. *Id*. at 125. In *Trans World Airlines*, the Court addressed the appropriate legal standard for determining whether an employer commits a "willful" ADEA violation to trigger "'liquidated' or double damages." *Id*. at 114. Due to the punitive character of the ADEA's liquidated damages, the Court opted for a heightened "reckless disregard" standard for determining willful violations:

> Given the legislative history of the liquidated damages provision, we think the "reckless disregard" standard [i.e., if "the employer . . . knew or showed reckless disregard for the matter of whether its conduct was prohibited by the ADEA"] is reasonable.
>
> . . . .
>
> . . . Both the legislative history and the structure of the statute show that Congress intended a two-tiered liability scheme. We decline to interpret the liquidated damages provision of ADEA § 7(b) in a manner that frustrates this intent.

*Id*. at 126–128 (simultaneously rejecting the more lenient "in the picture" standard of whether "the employer simply knew of the potential applicability of the ADEA," because such a "broad standard . . . would result in an award of double damages in almost every case"); *see also* Hazen Paper Co. v. Biggins, 507 U.S. 604, 617 (1993) ("We therefore reaffirm that the [*Trans World Airlines*] definition of 'willful'—that the employer either knew or showed reckless disregard for the matter of whether its conduct was prohibited by the statute—applies to all disparate treatment cases under the ADEA.").

67. 515 U.S. 323 (1995).

68. *Id*. at 324–25, 329; *see id*. at 328 n.3 (quoting then-current language of 26 U.S.C. § 104(a)(2) ("[G]ross income does not include . . . (2) the amount of any damages received . . . on account of personal injuries or sickness . . . .").

69. *Id*. at 332 n.5. The Court went on to say that:

> Under our decision in [*Trans World Airlines*], liquidated damages are only available under the ADEA if "the employer . . . knew or showed reckless disregard for the matter of whether its conduct was prohibited by the ADEA." If liquidated damages were designed to compensate ADEA victims, we see no reason why the employer's knowledge of the unlawfulness of his conduct should be the determinative factor in the award of liquidated damages.

Consequently, the Court concluded that the ADEA's liquidated damages did *not* fall under the personal injury compensation tax exemption and were thus taxable:

> Our holding in [*Trans World Airlines*] . . . requires the conclusion that liquidated damages under the ADEA . . . are not received "on account of personal injury or sickness."
>
> . . . .
>
> Like the pre-1991 version of Title VII, the ADEA provides no compensation "for any of the other traditional harms associated with personal injury." Monetary remedies under the ADEA are limited to back wages, which are clearly of an "economic character," and liquidated damages, which we have already noted serve no compensatory function.[70]

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*Id*. (internal citations omitted) (quoting *Trans World Airlines*, 469 U.S. at 126).

For other cases and legal commentary reiterating the punitive character of the ADEA's liquidated damages, see *Hazen Paper*, 507 U.S. at 617 (describing the ADEA's liquidated damages as "imposing a penalty" upon an employer that willfully violates the Act); Cross v. N.Y.C. Transit Auth., 417 F.3d 241, 255 (2d Cir. 2005) ("[L]iquidated damages may fairly be characterized as 'punitive in nature' [because] they do after all provide an ADEA victim with more than his or her out-of-pocket damages or any other strictly compensatory amounts." (quoting McGinty v. New York, 193 F.3d 64, 70–71 (2d Cir. 1999))); Potence v. Hazleton Area Sch. Dist., 357 F.3d 366, 373 (3d Cir. 2004) ("Both the Supreme Court and this court have held that the liquidated damages provision of the ADEA was intended to be punitive in nature." (citing *Trans World Airlines*, 469 U.S. at 126)); Carberry v. Monarch Mktg. Sys., Inc., 30 F. App'x 389, 394 (6th Cir. 2002) (noting that the ADEA's liquidated damages "are 'punitive' in nature"); Starceski v. Westinghouse Elec. Corp., 54 F.3d 1089, 1102 (3d Cir. 1995) ("After [*Trans World Airlines*], this Court held that liquidated damages are punitive in nature." (quoting *Trans World Airlines*, 469 U.S. at 125)); Coston v. Plitt Theatres, Inc., 860 F.2d 834, 835 (7th Cir. 1988) ("The legislative history behind the [ADEA] shows that Congress intended an award of 'liquidated damages to be punitive in nature.'"); Bruno v. W. Elec. Co., 829 F.2d 957, 967 (10th Cir. 1987) ("These liquidated damages [under the ADEA] serve to punish those who engage in willful violations—the same purpose that would be served by providing punitive damages."); Seiner, *supra* note 25, at 776 ("A liquidated damages provision unquestionably incorporates a 'punitive dimension' to the statute . . . ."); Johnson, *supra* note 38, at 42 ("[The ADEA's] liquidated damages . . . are the equivalent of punitive damages . . . ."); *id*. at 42 n.11 ("Exemplary damages under the ADEA are liquidated damages, but the Supreme Court has held that such damages under the ADEA were designed to be punitive." (citing *Trans World Airlines*, 469 U.S. at 125)); Judith J. Johnson, *A Standard for Punitive Damages Under Title VII*, 46 FLA. L. REV. 521, 530 (1994) ("The liquidated damages provision in the ADEA is similar in purpose to the punitive damages provision in Title VII; both are designed to punish an employer who has discriminated.").

70. *Schleier*, 515 U.S. at 332, 336; *see also id*. at 326 ("[T]he Courts of Appeals have unanimously held, and respondent does not contest, that the ADEA does not permit a separate recovery of compensatory damages for pain and suffering or emotional distress."); *id*. at 331–32 (rejecting Schleier's argument that Congress intended the liquidated damages provision under the ADEA "to compensate plaintiffs for personal injuries that are difficult to quantify" because "we explicitly held in [*Trans World Airlines*]: 'Congress intended for liquidated damages to be punitive in nature'" (quoting *Trans World Airlines*, 469 U.S. at 125)).

Prior to *Schleier*, the federal circuit courts disagreed regarding whether the ADEA's liquidated damages were (a) *exclusively* punitive in nature or (b) *both* punitive *and* compensatory in nature. *Starceski*, 54 F.3d at 1102 (referencing that the circuit courts had "two competing theories concerning Congress's purpose in providing liquidated damages for willful violations of the ADEA"). Specifically,

Given this punitive nature of liquidated damages, courts and commentators alike have consistently highlighted that "the award of liquidated damages . . . is intended to deter intentional violations of the ADEA."[71] Consequently, the ADEA's liquidated damages and Title

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a circuit split had arisen as to whether a prevailing ADEA plaintiff could recover compensatory-type prejudgment interest *in addition to* the ADEA's liquidated damages. *See generally* Moberly, *supra* note 58, at 231–34 (discussing the circuit split on this pre-judgment interest issue under the ADEA). Some circuit courts (such as the Second, Third, Ninth, and Eleventh Circuits) had allowed recovery of this prejudgment interest, as they reasoned that the ADEA's liquidated damages were *exclusively* punitive in nature and thus excluded this interest. See *Starceski*, 54 F.3d at 1101–03, for an example, in which the Third Circuit Court of Appeals allows recovery of both liquidated damages and prejudgment interest. In making its decision, the court reasoned that because the other recovery compensates the victim, liquidated damages must be punitive in nature:

> If awards of pre-judgment interest are compensatory, and liquidated damages are punitive, a concomitant grant of both is appropriate because pre-judgment interest serves the statutory goal of making Starceski whole, *i.e.*, it compensates him for the discriminatory wrong that he has suffered, while liquidated damages would punish Westinghouse, the wrongdoer, for its willful violation of the ADEA.

*Id. See also* Reichman v. Bonsignore, Brignati & Mazzotta, P.C., 818 F.2d 278, 281–82 (2d Cir. 1987) (allowing recovery of both liquidated damages and prejudgment interest because liquidated damages were exclusively punitive in nature); Lindsey v. Am. Cast Iron Pipe Co., 810 F.2d 1094, 1102 (11th Cir. 1987) (same); Criswell v. W. Airlines, Inc., 709 F.2d 544, 556–57 (9th Cir. 1983) (same).

In contrast, other circuit courts (such as the First, Fourth, Fifth, and Seventh Circuits) had disallowed recovery of this prejudgment interest, as they reasoned that the ADEA's liquidated damages were *both* punitive *and* compensatory in nature and thus included this interest. See *Powers v. Grinnell Corp*., 915 F.2d 34, 41–42, 41 n.11 (1st Cir. 1990), for an example, in which the First Circuit Court of Appeals disallows recovery of both liquidated damages and prejudgment interest. In making its decision, the court reasoned that liquidated damages serves both purposes:

> [*Trans World Airlines*] did not concern, and does not intimate, whether liquidated damages under the ADEA simultaneously serve the compensatory function of indemnifying employees for prejudgment delays in recouping their back pay. Thus, the proposition . . . that liquidated damages serve only to punish and deter, and *not* to compensate for losses, is simply inaccurate.

*Id.* (internal citations omitted); *see also* Hamilton v. 1st Source Bank, 895 F.2d 159, 166 (4th Cir. 1990) (disallowing recovery of both liquidated damages and prejudgment interest because liquidated damages were both punitive and compensatory in nature), *modified on other grounds*, 928 F.2d 86 (4th Cir. 1990); Burns v. Tex. City Ref., Inc., 890 F.2d 747, 752–53 (5th Cir. 1989) (same); Coston v. Plitt Theatres, Inc., 831 F.2d 1321, 1336–37 (7th Cir. 1987) (same), *vacated on other grounds*, 486 U.S. 1020 (1988).

71. Kelly v. Am. Standard, Inc., 640 F.2d 974, 979 (9th Cir. 1981) (citation omitted); *see also Trans World Airlines, Inc*., 469 U.S. at 125 (quoting statements by Senator Javits that liquidated damages would "furnish an effective deterrent to willful violations [of the ADEA]"); Graefenhain v. Pabst Brewing Co., 870 F.2d 1198, 1205 (7th Cir. 1989) ("Congress conceived of liquidated damages awards as 'an effective deterrent to willful violations of the ADEA.'"); *McGinty*, 193 F.3d at 70 ("[L]iquidated damages are designed to deter willful violations of ADEA . . . ." (citation omitted)); *Starceski*, 54 F.3d at 1102 (noting that the Supreme Court had "stated [in *Trans World Airlines*] that liquidated damages are . . . designed to deter willful conduct"); *id*. at 1108 (Garth, J., concurring in part and dissenting in part) ("[L]iquidated damages serve as a necessary and beneficial deterrent to ADEA violations."); *Lindsey*, 810 F.2d at 1102 ("ADEA liquidated damages awards . . . deter violators."); Dean v. Am. Sec. Ins. Co., 559 F.2d 1036, 1040 (5th Cir. 1977) ("[L]iquidated damages could effectively supply the deterrent and punitive [functions] which both criminal penalties and punitive damages normally serve."); Seiner, *supra* note 25, at 775–76 ("Liquidated damages can certainly 'serve as a necessary and beneficial deterrent' to employment discrimination. . . . A liquidated damages provision unquestionably . . . would help deter wrongful discriminatory conduct."); *id*. at 789 ("[L]iquidated relief would strongly discourage an employer from illegally discriminating against its

VII/ADA's compensatory and punitive damages share the same deterrent purpose.[72]

In sum, the ADEA-based damages model is both similar to and different from the Title VII/ADA-based model. Both models afford equitable damages (back pay or lost wages) to prevailing plaintiffs,[73] but they allow distinctly different supplemental damages in cases of intentional discrimination.[74] While Title VII and the ADA allow capped compensatory and punitive damages,[75] the ADEA allows liquidated damages that equal the lost-wage amount.

## III. THE "DISCRIMINATORY DAMAGES PARADOX"—DISCRIMINATION DAMAGES THAT DISCRIMINATE

Given that these remedial models are different in their damage calculation methods and limitations, the key question is: So what—why should we care? We should care because, when applied mathematically, these different models can (and often do) allow victims with certain federally protected characteristics to be monetarily favored over those with other federally protected characteristics. In some situations, a Title VII or ADA plaintiff will be favored over an otherwise identically situated ADEA plaintiff; in other situations, the opposite will be true.

So, the key problem here is one of discriminatory effect, whereby the extent of a discrimination victim's monetary recovery often substantially varies by his or her federally protected characteristic: a victim with the "right" or "favored" characteristic can recover more; a victim with the "wrong" or "disfavored" characteristic can recover less. This Article uses the term "Discriminatory Damages Paradox" to describe this ironic

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workforce."); Marshall, *supra* note 53, at 554 ("Congress enacted the ADEA hybrid damages . . . in order to preserve a punitive and deterrent effect . . . .").

72. *See supra* notes 45–47 and accompanying text (discussing the deterrent purpose of available compensatory and punitive damages under Title VII and the ADA).

73. *See supra* notes 12–13, 16 and accompanying text (discussing the availability of equitable back pay under Title VII and the ADA).

74. *See, e.g.*, William R. Corbett, *Babbling About Employment Discrimination Law: Does the Master Builder Understand the Blueprint for the Great Tower?*, 12 U. PA. J. BUS. LAW 683, 720 (2010) ("[T]he ADEA . . . has a different remedial scheme than Title VII and the ADA . . . ."); Johnson, *supra* note 38, at 51–52 ("The main difference originally between [Title VII and the ADEA] . . . can be found in their remedies. The remedial provisions of the ADEA . . . provide for liquidated damages for willful violations. . . . The Civil Rights Act of 1991 added a provision for compensatory and punitive damages for [certain instances of] intentional discrimination . . . ."); Eglit, *supra* note 34, at 1205, 1208 ("A victim of age discrimination, like the pre-[Civil Rights Act of 1991] Title VII plaintiff, is barred from recovering punitive and compensatory damages under the ADEA . . . [and its] distinct enforcement scheme.").

75. *See supra* notes 17–26 and accompanying text (discussing the availability of compensatory and punitive damages, subject to applicable monetary caps, under Title VII and the ADA).

phenomenon that our anti-discrimination laws can (and often do) discriminate as to available damages.

This Part mathematically illustrates this "dirty little secret" of our federal employment discrimination laws and then distills the Paradox into three defining principles.

### *A. The Paradox Illustrated*

Tables 1 through 4 below illustrate the Discriminatory Damages Paradox. Each table calculates and compares the maximum monetary damages available to identically situated Title VII/ADA and ADEA plaintiffs under the applicable remedial models.

Two points regarding these tables are important. First, to make an apples-to-apples comparison of maximum available damages, each table identically situates prevailing Title VII/ADA and ADEA plaintiffs on three different fronts:

(1) Case Type: All plaintiffs prevail in identically egregious, intentional discrimination (disparate treatment) cases;

(2) Employer Size: All plaintiffs work(ed) for discriminatory employers of identical size (i.e., the 1991 Act's ranges of fifteen to 100 employees, 101 to 200 employees, 201 to 500 employees, or 500+ employees); and

(3) Back-Pay or Lost-Wages Amount: All plaintiffs have identical owed back pay or lost wages.

Second, to calculate the maximum available damages for the prevailing Title VII/ADA and ADEA plaintiffs, each table uses the applicable remedial model: (a) the Title VII/ADA-based model, which has the formula of (back pay or lost wages) + (capped compensatory and punitive damages); and (b) the ADEA-based model, which has the formula of (back pay or lost wages) + (matching liquidated damages).

Now turning to the tables, Table 1 applies to discriminatory employers in the "small" range of 15 to 100 employees, thereby triggering the applicable $50,000 cap for compensatory and punitive damages for our Title VII/ADA plaintiff:

**TABLE 1: MAXIMUM MONETARY DAMAGES IN DISPARATE TREATMENT CASES**
*(employer with 15 to 100 employees)*

| **Owed Back Pay** | **ADEA Plaintiff's Maximum Damages** (*back pay + matching liquidated damages*) | **Title VII/ADA Plaintiff's Maximum Damages** (*back pay + compensatory & punitive damages capped at $50,000*) |
|---|---|---|
| $ 0 | $ 0 | $ 50,000 (favored) |
| $ 25,000 | $ 50,000 | $ 75,000 (favored) |
| $ 50,000 | $ 100,000 | $ 100,000 |
| $ 75,000 | $ 150,000 (favored) | $ 125,000 |
| $ 100,000 | $ 200,000 (favored) | $ 150,000 |
| $ 125,000 | $ 250,000 (favored) | $ 175,000 |
| $ 150,000 | $ 300,000 (favored) | $ 200,000 |
| $ 175,000 | $ 350,000 (favored) | $ 225,000 |
| $ 200,000 | $ 400,000 (favored) | $ 250,000 |
| $ 225,000 | $ 450,000 (favored) | $ 275,000 |
| $ 250,000 | $ 500,000 (favored) | $ 300,000 |
| $ 275,000 | $ 550,000 (favored) | $ 325,000 |
| $ 300,000 | $ 600,000 (favored) | $ 350,000 |
| $ 325,000 | $ 650,000 (favored) | $ 375,000 |
| $ 350,000 | $ 700,000 (favored) | $ 400,000 |

Thus, per Table 1, *Title VII/ADA plaintiffs* are monetarily favored over identically situated ADEA plaintiffs when the owed back pay or lost wages is *less than the $50,000 cap*; and *ADEA plaintiffs* are monetarily favored over identically situated Title VII/ADA plaintiffs when the owed back pay or lost wages *exceeds the $50,000 cap*.

Next, Table 2 applies to discriminatory employers in the lower "medium" range of 101 to 200 employees, thereby triggering the applicable $100,000 cap for compensatory and punitive damages for our Title VII/ADA plaintiff:

**TABLE 2: MAXIMUM MONETARY DAMAGES IN DISPARATE TREATMENT CASES**
*(employer with 101 to 200 employees)*

| Owed Back Pay | ADEA Plaintiff's Maximum Damages (*back pay + matching liquidated damages*) | Title VII/ADA Plaintiff's Maximum Damages (*back pay + compensatory & punitive damages capped at $100,000*) |
|---|---|---|
| $ 0 | $ 0 | $ 100,000 (favored) |
| $ 25,000 | $ 50,000 | $ 125,000 (favored) |
| $ 50,000 | $ 100,000 | $ 150,000 (favored) |
| $ 75,000 | $ 150,000 | $ 175,000 (favored) |
| $ 100,000 | $ 200,000 | $ 200,000 |
| $ 125,000 | $ 250,000 (favored) | $ 225,000 |
| $ 150,000 | $ 300,000 (favored) | $ 250,000 |
| $ 175,000 | $ 350,000 (favored) | $ 275,000 |
| $ 200,000 | $ 400,000 (favored) | $ 300,000 |
| $ 225,000 | $ 450,000 (favored) | $ 325,000 |
| $ 250,000 | $ 500,000 (favored) | $ 350,000 |
| $ 275,000 | $ 550,000 (favored) | $ 375,000 |
| $ 300,000 | $ 600,000 (favored) | $ 400,000 |
| $ 325,000 | $ 650,000 (favored) | $ 425,000 |
| $ 350,000 | $ 700,000 (favored) | $ 450,000 |

Consequently, per Table 2, *Title VII/ADA plaintiffs* are monetarily favored over identically situated ADEA plaintiffs when the owed back pay or lost wages is *less than the $100,000 cap*; and *ADEA plaintiffs* are monetarily favored over identically situated Title VII/ADA plaintiffs when the owed back pay or lost wages *exceeds the $100,000 cap*.

Next, Table 3 applies to discriminatory employers in the higher "medium" range of 201 to 500 employees, thereby triggering the applicable $200,000 cap for compensatory and punitive damages for our Title VII/ADA plaintiff:

**TABLE 3: MAXIMUM MONETARY DAMAGES IN DISPARATE TREATMENT CASES**
*(employer with 201 to 500 employees)*

| Owed Back Pay | ADEA Plaintiff's Maximum Damages (*back pay + matching liquidated damages*) | Title VII/ADA Plaintiff's Maximum Damages (*back pay + compensatory & punitive damages capped at $200,000*) |
|---|---|---|
| $ 0 | $ 0 | $ 200,000 (favored) |
| $ 25,000 | $ 50,000 | $ 225,000 (favored) |
| $ 50,000 | $ 100,000 | $ 250,000 (favored) |
| $ 75,000 | $ 150,000 | $ 275,000 (favored) |
| $ 100,000 | $ 200,000 | $ 300,000 (favored) |
| $ 125,000 | $ 250,000 | $ 325,000 (favored) |
| $ 150,000 | $ 300,000 | $ 350,000 (favored) |
| $ 175,000 | $ 350,000 | $ 375,000 (favored) |
| $ 200,000 | $ 400,000 | $ 400,000 |
| $ 225,000 | $ 450,000 (favored) | $ 425,000 |
| $ 250,000 | $ 500,000 (favored) | $ 450,000 |
| $ 275,000 | $ 550,000 (favored) | $ 475,000 |
| $ 300,000 | $ 600,000 (favored) | $ 500,000 |
| $ 325,000 | $ 650,000 (favored) | $ 525,000 |
| $ 350,000 | $ 700,000 (favored) | $ 550,000 |

Thus, per Table 3, *Title VII/ADA plaintiffs* are monetarily favored over identically situated ADEA plaintiffs when the owed back pay or lost wages is *less than the $200,000 cap*; and *ADEA plaintiffs* are monetarily favored over identically situated Title VII/ADA plaintiffs when the owed back pay or lost wages *exceeds the $200,000 cap*.

Finally, Table 4 applies to discriminatory employers in the "large" range of 501 or more employees, thereby triggering the applicable $300,000 cap for compensatory and punitive damages for our Title VII/ADA plaintiff:

**TABLE 4: MAXIMUM MONETARY DAMAGES IN DISPARATE TREATMENT CASES**
*(employer with 501+ employees)*

| Owed Back Pay | ADEA Plaintiff's Maximum Damages (*back pay + matching liquidated damages*) | Title VII/ADA Plaintiff's Maximum Damages (*back pay + compensatory & punitive damages capped at $300,000*) |
|---|---|---|
| $ 0 | $ 0 | $ 300,000 (favored) |
| $ 25,000 | $ 50,000 | $ 325,000 (favored) |
| $ 50,000 | $ 100,000 | $ 350,000 (favored) |
| $ 75,000 | $ 150,000 | $ 375,000 (favored) |
| $ 100,000 | $ 200,000 | $ 400,000 (favored) |
| $ 125,000 | $ 250,000 | $ 425,000 (favored) |
| $ 150,000 | $ 300,000 | $ 450,000 (favored) |
| $ 175,000 | $ 350,000 | $ 475,000 (favored) |
| $ 200,000 | $ 400,000 | $ 500,000 (favored) |
| $ 225,000 | $ 450,000 | $ 525,000 (favored) |
| $ 250,000 | $ 500,000 | $ 550,000 (favored) |
| $ 275,000 | $ 550,000 | $ 575,000 (favored) |
| $ 300,000 | $ 600,000 | $ 600,000 |
| $ 325,000 | $ 650,000 (favored) | $ 625,000 |
| $ 350,000 | $ 700,000 (favored) | $ 650,000 |

Consequently, per Table 4, *Title VII/ADA plaintiffs* are monetarily favored over identically situated ADEA plaintiffs when the owed back pay or lost wages is *less than the $300,000 cap*; and *ADEA plaintiffs* are monetarily favored over identically situated Title VII/ADA plaintiffs when the owed back pay or lost wages *exceeds the $300,000 cap*.

To illustrate with a concrete example, recall Situations #1, #2, and #3 from the Introduction. In Situation #1, Tamara was a victim of egregious *sex*-based discrimination by XYZ Corp., which was said to have "thousands of employees." In Situation #2, Gary was a victim of egregious *disability*-based discrimination by the same XYZ Corp. In Situation #3, Scott was a victim of egregious *age*-based discrimination by the same XYZ

Corp. Each victim obtained a comparably paying job ($60,000 per year) within a month and thus incurred only $5,000 in lost wages (one month's salary).

Given the large size of XYZ Corp. and the small amount of lost wages or back pay, we look towards the top of Table 4. The Discriminatory Damages Paradox becomes crystal-clear:

(a) Tamara and Gary (our respective Title VII and ADA plaintiffs) are eligible to receive maximum damages of $305,000: $5,000 in lost wages or back pay, plus compensatory and punitive damages capped at $300,000; but

(b) Scott (our ADEA plaintiff) is eligible to receive maximum damages of only $10,000: $5,000 in lost wages or back pay, plus $5,000 in matching, dollar-for-dollar liquidated damages.

Thus, even though these plaintiffs were subjected to identically egregious discriminatory conduct and incurred identical lost wages, the damage models treat them in dramatically different ways. Tamara and Gary possess the "right" or "favored" Title VII or ADA characteristics—they are treated better and are monetarily favored by being eligible to receive over thirty times (or $295,000) more in damages than Scott. Scott possesses the "wrong" or "disfavored" ADEA characteristic—he is treated worse and monetarily disfavored by receiving only a mere fraction of the amount for which Tamara or Gary is eligible. As to Scott, XYZ Corp. escapes almost scot-free.

Now, consider another concrete example in which an ADEA plaintiff is actually favored over a Title VII or ADA plaintiff. Consider again Situations #1 through #3, but make the following two changes to the facts: (1) XYZ Corp. has only thirty employees and (2) Tamara, Gary, and Scott could not obtain a comparably paying job ($60,000 per year) until about two years later and thus incurred $125,000 in lost wages (about two years' salary).

Given the small size of XYZ Corp. and the large amount of lost wages or back pay, we look towards the bottom of Table 1. The Discriminatory Damages Paradox again is clear:

(a) Scott (our ADEA plaintiff) is eligible to receive maximum damages of $250,000: $125,000 in lost wages or back pay, plus $125,000 in matching, dollar-for-dollar liquidated damages; and

(b) Tamara and Gary (our respective Title VII and ADA plaintiffs) are eligible to receive maximum damages of $175,000: $125,000 in lost wages or back pay, plus compensatory and punitive damages capped at $50,000.

Again, even though these plaintiffs were subjected to identically egregious discriminatory conduct and incurred identical lost wages, the damage models treat them in dramatically different fashions. It is simply that the preference has been "reversed." Scott now possesses the "right" or "favored" ADEA characteristic—he is treated better and is monetarily favored by receiving over forty percent (or $75,000) more in damages than Tamara and Gary. Tamara and Gary now possess the "wrong" or "disfavored" Title VII or ADA characteristics—they are treated worse and monetarily disfavored by being eligible to receive only seventy percent of the amount that Scott receives.[76]

### *B. The Paradox Summarized*

Consequently, whether these different remedial models yield discriminatory damages (and if so, in whose favor) depends on the relationship between two factors: the amount of owed back pay or lost wages, and the applicable Title VII/ADA cap for compensatory and punitive damages. Simply stated, is the back-pay amount below, above, or equal to the applicable cap? Focusing on this relationship, the Discriminatory Damages Paradox (and the tables above) can be summarized into three principles.

The first principle, entitled "Back Pay *Below* Cap Yields Discriminatory Damages," states that if the back-pay amount for identically

76. While these examples are hypothetical, the Discriminatory Damages Paradox can also be seen in real cases. For example, in Doss v. Boyd/Tunica, Inc., No. 2:08-CV-00227-WAP, 2010 WL 3898763 (N.D. Miss. Aug. 2010), the prevailing Title VII plaintiff received monetary damages of $395,000: $95,000 in lost wages or pay plus compensatory and punitive damages capped at $300,000 due to the employer's size. *Id*. (referencing that the jury had originally awarded $1.15 million for compensatory and punitive damages before the court reduced the award to the applicable $300,000 cap). But, if *Doss* had involved a prevailing ADEA plaintiff, he would have received only $190,000 in monetary damages: $95,000 in lost wages or pay plus $95,000 in matching, dollar-for-dollar liquidated damages.

Another example of the Paradox can be seen in Borel v. Guidry, No. 1:05-CV-00825-TH, 2007 WL 1541991 (E.D. Tex. Feb. 2007). In *Borel*, the prevailing ADEA plaintiff in an age-based discrimination case received monetary damages of $19,500: $9,750 in lost wages or pay plus $9,750 in matching, dollar-for-dollar liquidated damages. *Id*. But, if *Borel* had involved a prevailing Title VII or ADA plaintiff, he would be eligible to receive much higher monetary damages, depending on the employer's size: either $59,750 (if the employer had between 15 and 100 employees, thus triggering the applicable $50,000 cap for compensatory and punitive damages); $109,750 (if the employer had between 100 and 200 employees, thus triggering the applicable $100,000 cap); $209,750 (if the employer had between 201 and 500 employees, thus triggering the applicable $200,000 cap); or $309,750 (if the employer had 501 or more employees, thus triggering the applicable $300,000 cap).

situated Title VII/ADA and ADEA plaintiffs is LESS THAN the applicable Title VII/ADA monetary cap for compensatory and punitive damages, then discriminatory damages arise: the *Title VII/ADA plaintiffs* are eligible to receive more in damages and are thus monetarily *favored*; and, the *ADEA plaintiffs* receive less in damages and are thus monetarily *discriminated against*.[77]

The second principle, entitled "Back Pay *Above* Cap Yields Discriminatory Damages," reflects that if the back-pay amount for identically situated Title VII/ADA and ADEA plaintiffs is MORE THAN the applicable Title VII/ADA monetary cap for compensatory and punitive damages, then discriminatory damages "in reverse" arise: the *ADEA plaintiffs* are eligible to receive more in damages and are thus monetarily *favored*; and, the *Title VII/ADA plaintiffs* receive less in damages and are thus monetarily *discriminated against*.[78]

The third principle, entitled "Back Pay *Equals* Cap Yields No Discriminatory Damages," notes that if the back-pay amount for identically situated Title VII/ADA and ADEA plaintiffs is EQUAL TO the applicable Title VII/ADA monetary cap for compensatory and punitive damages, then no discriminatory damages arise: neither Title VII/ADA nor ADEA plaintiffs are eligible to receive more (or less) in damages and are thus not monetarily favored (or discriminated against).

The following table recaps these three principles:

77. Tables 1 through 4 illustrate the related concept in first principle situations that the *larger* the back-pay-to-monetary-cap differential, the *greater* the degree of monetary favoritism towards *Title VII/ADA* plaintiffs.

78. Tables 1 through 4 similarly illustrate the related concept in second principle situations that the *larger* the back-pay-to-monetary-cap differential, the *greater* the degree of monetary favoritism towards *ADEA* plaintiffs.

**DISCRIMINATORY DAMAGES PARADOX—SUMMARY OF PRINCIPLES**

| **Owed Back Pay** | **ADEA Plaintiff's Maximum Damages** (*back pay + matching liquidated damages*) | **Title VII/ADA Plaintiff's Maximum Damages** (*back pay + compensatory & punitive damages capped at applicable amount*) |
|---|---|---|
| LESS THAN applicable Title VII/ADA cap (1st Principle) | Less (discriminated against) | More (favored) |
| EQUAL TO applicable Title VII/ADA cap (3rd Principle) | Equal (neither favored nor discriminated against) | Equal (neither favored nor discriminated against) |
| MORE THAN applicable Title VII/ADA cap (2nd Principle) | More (favored) | Less (discriminated against) |

In sum, the problem with these remedial models is *not* a mere difference in terminology or labels. Instead, the key problem is that these different models cause the Discriminatory Damages Paradox, whereby discrimination victims with certain federally protected characteristics are monetarily favored over those with other federally protected characteristics.

## IV. SOLVING THE PARADOX—A UNIFORM TITLE VII/ADA-BASED DAMAGES MODEL

To solve this Discriminatory Damages Paradox, this Article proposes a "Uniform Title VII/ADA-Based Damages Model" for intentional

discrimination (disparate treatment) cases under Title VII, the ADA, *and* the ADEA. Consequently, this uniform model would supplant the current ADEA-based model and simply use—for all three statutes—the current Title VII and ADA system of allowing back pay (or lost wages) plus compensatory and punitive damages, subject to the applicable caps.[79]

The key question is whether *any* uniform model (and, in particular, *this* uniform model) is warranted on legal and policy grounds. In addition to bringing desirable "symmetry" to the area of employment discrimination damages,[80] the Uniform Title VII/ADA-based Damages Model is otherwise justified for three key reasons: (1) it embraces Congress's "Philosophy of Remedial Parity," which is evidenced by the Civil Rights Act of 1991; (2) it better serves the ADEA's purposes and interests by more effectively promoting its remedial purpose of deterrence and by expanding its remedial purposes to include harm compensation and claim incentive; and (3) it serves to fully advance federal employment discrimination policy.

### *A. Embracing Congress's Philosophy of Remedial Parity*

The Uniform Title VII/ADA-Based Damages Model embraces Congress's key remedial philosophy from the Civil Rights Act of 1991. This philosophy—which this Article labels a "Philosophy of Remedial Parity"—is one that favors reasonably comparable and consistent (rather than unfairly disparate) monetary damages for victims of intentional discrimination.

Congress evidenced its Philosophy of Remedial Parity via the 1991 Act on three different fronts: legislative purpose, legislative critique, and legislative rationale. First, as to legislative purpose, Congress openly acknowledged that the 1991 Act's expansion of Title VII remedies was to achieve remedial conformity and consistency for discrimination plaintiffs. As the prelude to the 1991 Act, Congress initially identified the significant remedial disparity that existed under § 1981 and Title VII:

> Victims of intentional *race* discrimination are entitled under 42 U.S.C. section 1981 not only to equitable relief, but also compensatory damages, and in particularly egregious cases,

79. *See supra* Part II.A.1 (discussing the Title VII/ADA-based monetary damages model).

80. *See* Corbett, *supra* note 74, at 690–91 ("A high degree of symmetry among the various laws and covered characteristics may also be desirable, as this could improve simplicity . . . . I think symmetry in employment discrimination law is a characteristic to be desired when the statutes permit it and there is not a distinction in the types of discrimination that justifies asymmetry. . . . One reason for valuing symmetry is that it enhances simplicity and understanding. The law is simpler if employers and employees, litigants, lawyers, and jurors can apply common principles under the different discrimination laws. . . . A second reason to favor symmetry among employment discrimination laws is that the laws should be perceived by the public to be sensible and fair.").

> punitive damages as well. By contrast, victims of intentional . . . discrimination may receive under Title VII injunctive relief, reinstatement or hiring, and . . . backpay, but *the statute does not permit awards of compensatory or punitive damages no matter how egregious the circumstances of their case*.[81]

Having recognized this disparity, Congress unapologetically used the 1991 Act "to conform remedies for intentional . . . discrimination [under Title VII] to those currently available to victims of intentional race discrimination [under § 1981]."[82] Thus, Congress's identification of this pre-1991 remedial disparity and its stated purpose of achieving remedial conformity and consistency are clear indicators of Congress's preference for remedial parity under federal employment discrimination law.

Second, as to legislative critique, Congress demonstrated this Philosophy of Remedial Parity in its hostile criticism of the above-referenced remedial disparity and non-conformity that existed under § 1981 and Title VII. For example, Congress negatively characterized this remedial disparity as "[a] serious gap . . . in Title VII . . . that leaves victims of intentional discrimination on the basis of sex or religion without an effective remedy for many forms of bias on the job . . . ."[83] Furthermore, Congress critically labeled this disparity "[a]n unfair perference [sic] . . . in federal civil rights law"[84] that benefits victims of race-based discrimination under § 1981 over Title VII plaintiffs. Consequently, Congress's scathing critique of the pre-1991 remedial disparity is further evidence of its preference for remedial parity under our anti-discrimination laws.

Finally, as to legislative rationale, Congress evidenced its Philosophy of Remedial Parity in explaining *why* remedial parity was desirable. Specifically, Congress reasoned that such parity and conformity within § 1981 and Title VII was reasonable and appropriate because the underlying discriminatory acts (and resulting "harms") were the "same" and equally "reprehensible":

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81. H.R. REP. NO. 102-40, pt. 1, at 65 (1991), *reprinted in* 1991 U.S.C.C.A.N. at 603 (second emphasis added) (citations omitted); *see also id*. ("Current civil rights laws permit the recovery of unlimited compensatory and punitive damages in cases of intentional race discrimination. No similar remedy exists in cases of intentional gender or religious discrimination [under Title VII]." (emphasis omitted)); *supra* note 35 (discussing other legislative history regarding Congress's recognition of the remedial disparity between Title VII and § 1981 plaintiffs).

82. H.R. REP. NO. 102-40, pt. 1, at 64; *see also supra* note 38 (discussing other legislative history regarding Congress's stated purpose of conforming remedies under Title VII and § 1981).

83. H.R. REP. NO. 102-40, pt. 2, at 24.

84. *Id*., pt. 1, at 65.

> The manifestations of these various forms of intentional employment discrimination are the same: loss of employment opportunities; disparities in wages, employee benefits, and other forms of compensation; imposition of unequal working conditions; and harassment. Moreover, the harms women and religious and racial minorities suffer as a consequence of the various types of intentional discrimination are the same: humiliation; loss of dignity; psychological (and sometimes physical) injury; resulting medical expenses; damage to the victim's professional reputation and career; loss of all forms of compensation and other consequential injuries. *Where the manifestations of prohibited conduct are the same, and the harms caused are the same, the remedies should be the same as well. Gender and religious discrimination are as reprehensible as race discrimination, and should be treated the same for purposes of making victims whole, encouraging private enforcement, and deterring future violations of federal law*.[85]

Thus, Congress's rationale that equally "reprehensible" discriminatory acts justify the "same" remedies is additional proof of its preference for remedial parity under federal employment discrimination law.

Regrettably, we do *not* see Congress's Philosophy of Remedial Parity in our current anti-discrimination laws. As discussed above, the different remedial models of Title VII/ADA and the ADEA yield the Discriminatory Damages Paradox, whereby identically situated victims often receive unfairly disparate (rather than comparable and consistent) monetary damages.[86] Under the first principle of the Paradox, we saw discriminatory damages arise if the back-pay amount for identically situated Title VII/ADA and ADEA plaintiffs is LESS THAN the applicable Title VII/ADA monetary cap for compensatory and punitive damages. In that

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85. *Id*. (emphasis added); *see also id*. ("[I]t does *not* follow that [we] should differentiate among [discrimination victims under Title VII and § 1981 discrimination] for purposes of the remedial scheme provided by federal law for intentional discrimination.") (emphasis added); *supra* note 37 (discussing other legislative history regarding Congress's rationale regarding discriminatory acts and resulting harms being the "same").

86. *See supra* Part III (illustrating and discussing the Discriminatory Damages Paradox). Compare with Corbett, *supra* note 74, at 691–92, who proposes a uniform proof structure in disparate treatment cases under Title VII, the ADEA, and the ADA:

> Discrimination laws that discriminate are vexatious; it is the very fact that Title VII and the ADEA are statutes that ban discrimination that troubles people when they see distinctions being drawn between or among the protected characteristics. . . . [D]istinctions should not be made among people who are similarly situated. When the law is not symmetrical, people wonder why anti-discrimination law discriminates. Borrowing from George Orwell, people wonder why all people covered by employment discrimination laws are equal, but some are more equal than others.

*Id*. at 691–92.

scenario, *Title VII/ADA plaintiffs* are eligible to receive *more* in damages and are thus monetarily favored; and, *ADEA plaintiffs* receive *less* in damages and are thus monetarily discriminated against.[87] Under the second principle of the Paradox, we also saw discriminatory damages arise if the back-pay amount for identically situated Title VII/ADA and ADEA plaintiffs is MORE THAN the applicable Title VII/ADA monetary cap for compensatory and punitive damages. In that situation, though, the favoritism is "reversed": *ADEA plaintiffs* are eligible to receive *more* in damages and are thus monetarily favored; and, *Title VII/ADA plaintiffs* receive *less* in damages and are thus monetarily discriminated against.[88]

By creating and perpetuating this Discriminatory Damages Paradox, the different remedial models of Title VII/ADA and the ADEA are a clear snub to Congress's Philosophy of Remedial Parity in three ways. First, these different models openly reject the 1991 Act's basic purpose: "to conform remedies for intentional . . . discrimination . . . ."[89] Inconsistent with that purpose, these different models can (and often do) yield the polar opposite: disparate remedies for prevailing Title VII/ADA and ADEA plaintiffs.

For example, in Situations #1, #2, and #3 from the Introduction, these different models triggered anything but "conform[ing]" and comparable monetary damages for identically situated discrimination victims. Tamara and Gary (our respective Title VII and ADA plaintiffs) were each eligible to receive maximum damages of $305,000: $5,000 in lost wages or back pay plus compensatory and punitive damages capped at $300,000. But, Scott (our ADEA plaintiff) would receive maximum damages of only $10,000: $5,000 in lost wages or back pay plus $5,000 in matching, dollar-for-dollar liquidated damages.[90] By creating this remedial disparity, these different models frustrate Congress's stated purpose of "conform[ing]" available damages for victims of intentional discrimination.

Second, the different remedial models of Title VII/ADA and the ADEA ignore Congress's critique of the remedial status quo in 1991. Just two decades ago, Congress highlighted that remedial disparity represented a "serious gap"[91] in employment discrimination law and an "unfair perference [sic] . . . in federal civil rights law."[92] Rather than reflect these concerns, these different models can (and often) do just the opposite: (a)

87. *See supra* Part III.B (discussing this first principle of the Discriminatory Damages Paradox).

88. *See supra* Part III.B (discussing this second principle of the Discriminatory Damages Paradox).

89. H.R. REP. NO. 102-40, pt. 1, at 64.

90. *See supra* Part III.A (using Situations #1, #2, and #3 from the Introduction to illustrate the Discriminatory Damages Paradox).

91. H.R. REP. NO. 102-40, pt. 2, at 24.

92. *Id*., pt. 1, at 65.

cause a "serious gap" in the monetary damages available under anti-discrimination law, and (b) perpetuate this "unfair preference" between and among otherwise identically situated Title VII, ADA, and ADEA plaintiffs.

For example, in Situations #1, #2, and #3 from the Introduction, these different models triggered this "serious gap"—namely, a $295,000 remedial gap between the maximum damages recoverable by Tamara and Gary versus Scott. Relatedly, these different models perpetuated an "unfair preference" for our respective Title VII/ADA plaintiffs (Tamara and Gary) over our ADEA plaintiff (Scott). After all, Tamara and Gary lucked out by possessing the "right" or "favored" Title VII or ADA characteristics; they are treated better and are monetarily favored by being eligible to receive over thirty times (or, $295,000) more in damages than Scott. Scott unluckily possessed the "wrong" or "disfavored" ADEA characteristic; he is treated worse and monetarily disfavored by receiving only a mere fraction of the amount for which Tamara and Gary are eligible.[93] By creating "serious gap[s]" and "unfair preference[s]" in the Title VII/ADA versus ADEA context today, these different models simply ignore Congress's critique regarding the same type of remedial "gap" and "preference" in the § 1981 versus Title VII context in 1991. The problem is the same; only the context is different.

Third, the different remedial models of Title VII/ADA and the ADEA flatly disregard Congress's rationale for preferring remedial parity per the 1991 Act. Defending its conforming remedies for § 1981 and Title VII, Congress reasoned that discriminatory acts were equally "reprehensible" and "the harms caused are the same . . . ."[94] Yet, these different models turn that rationale on its head by treating some discriminatory acts as more "reprehensible" and some "harms" as more severe.

For example, in Situations #1, #2, and #3 from the Introduction, Tamara, Gary, and Scott were each subjected to identically egregious discriminatory conduct and incurred identical lost wages. But, Tamara and Gary (our respective Title VII and ADA plaintiffs) were each eligible to receive $295,000 more in maximum damages than Scott (our ADEA plaintiff).[95] By awarding these dramatically disparate damages, the different remedial models have just achieved two things: (a) they have judged the sex-based and disability-based discrimination against Tamara and Gary as more "reprehensible" than the age-based discrimination against Scott; and (b) they have valued Tamara's and Gary's harms as more significant and worthy than Scott's. By making these value judgments,

93. *See supra* Part III.A (using Situations #1, #2, and #3 from the Introduction to illustrate the Discriminatory Damages Paradox).

94. H.R. REP. NO. 102-40, pt. 1, at 65.

95. *See supra* Part III.A (using Situations #1, #2, and #3 from the Introduction to illustrate the Discriminatory Damages Paradox).

these different models disregard the very view that Congress demonstrated in 1991—that discriminatory acts and harms are comparable.

In contrast, the Uniform Title VII/ADA-Based Damages Model fully embraces Congress's Philosophy of Remedial Parity on all three fronts. First, this uniform model reflects the 1991 Act's basic purpose of "conform[ing] remedies for intentional . . . discrimination . . . ."[96] By solving the Discriminatory Damages Paradox, this Uniform Title VII/ADA-Based Damages Model ensures that disparate damages do not arise as to otherwise identically situated plaintiffs. So, in Situations #1, #2, and #3 from the Introduction, we would finally see comparable and consistent remedies for identically situated Title VII, ADA, and ADEA plaintiffs: Tamara, Gary, and Scott would each be eligible to receive maximum damages of $305,000. Consequently, this uniform model furthers, rather than frustrates, Congress's stated purpose of "conform[ing]" available damages for discrimination victims.[97]

Second, the Uniform Title VII/ADA-Based Damages Model reflects Congress's 1991 critique that remedial disparity represents both a "serious gap"[98] and an "unfair p[re]ference"[99] in employment discrimination law. Clearly, this uniform model eliminates the "serious gap" in the monetary damages currently available to identically situated Title VII, ADA, and ADEA plaintiffs. As referenced above, in Situations #1, #2, and #3 from the Introduction, Tamara, Gary, and Scott would now each be eligible to receive the same maximum damages of $305,000. This remedial symmetry stands in stark contrast to the $295,000 "serious gap" that the different remedial models now create between Tamara and Gary on one side, and Scott on the other.

Similarly, this uniform model also eliminates the "unfair preference" that the different remedial models currently establish between and among identically situated Title VII, ADA, and ADEA plaintiffs. In Situations #1, #2, and #3 from the Introduction, Tamara, Gary, and Scott would now be treated equally and fairly, as each person would be eligible to receive the same maximum monetary damages ($305,000). Under the Uniform Title VII/ADA-Based Damages Model, neither Tamara, Gary, nor Scott is treated better or worse than anyone else; no one is monetarily favored or disfavored by luckily or unluckily possessing the "right" or "wrong"

96. H.R. REP. NO. 102-40, pt. 1, at 64.

97. Compare with Seiner, *supra* note 25, at 775–77, 791, who proposes a uniform ADEA-based damages model for prevailing Title VII plaintiffs, but similarly reasons that this uniform model "would go a long way toward making the statutes parallel. Indeed, in passing the Civil Rights Act of 1991, Congress expressed a clear intent to bring more conformity to statutes protecting employment discrimination, and this proposal would clearly serve Congress's intent in that regard."

98. H.R. REP. NO. 102-40, pt. 2, at 24.

99. *Id*., pt. 1, at 65.

federally protected characteristic. Thus, this uniform model reflects rather than ignores the same critique of anti-discrimination "gaps" and "preferences" in the Title VII/ADA versus ADEA context that Congress raised in the § 1981 versus Title VII context in 1991.

Third, the Uniform Title VII/ADA-Based Damages Model embodies Congress's rationale that remedial parity is warranted because discriminatory acts are equally "reprehensible" and "the harms caused are the same."[100] So, in Situations #1, #2, and #3 from the Introduction, this uniform model reflects the fact that Tamara, Gary, and Scott are each subjected to identically egregious discriminatory conduct and incur identical lost wages. Unlike the current value judgments made by the different remedial models, the Uniform Title VII/ADA-Based Damages Model makes symmetrical value judgments comparable to those urged by Congress in 1991: (a) it values each act of discrimination as equally "reprehensible," and (b) it values each victim's harms as the "same." Consequently, this uniform model embodies rather than disregards the precise rationale that Congress highlighted in 1991—discriminatory acts and harms are comparable.

In sum, the Uniform Title VII/ADA-Based Damages Model represents a simple manifestation of Congress's Philosophy of Remedial Parity. In 1991, Congress opted for remedial conformity and consistency in the § 1981 versus Title VII context. Today, this uniform model accomplishes the same remedial parity but in the Title VII/ADA versus ADEA context.

### *B. Promoting and Expanding the Remedial Purposes of the ADEA*

In addition to its consistency with Congress's Philosophy of Remedial Parity, the Uniform Title VII/ADA-Based Damages Model better serves the ADEA's purposes and interests in two ways: (1) it more effectively promotes the ADEA's remedial purpose of deterrence; and (2) it expands the ADEA's remedial purposes to include harm compensation and claim incentive.

#### *1. The Deterrent Purpose*

The Uniform Title VII/ADA-Based Damages Model more effectively promotes the punitive nature and deterrent purpose of the ADEA's monetary damages.

Without question, Congress and the courts view the ADEA's liquidated damages as being punitive in character and as having the purpose of deterring discriminatory employers. For example, in the early stages of the

100. *Id.*

ADEA's legislative process, Congress considered imposing *criminal penalties* (fines, imprisonment, or both) for age-based discrimination.[101] Sticking with this punitive theme, Congress ultimately substituted the ADEA's current "double damage liability" (liquidated damages) for these proposed criminal penalties,[102] and it highlighted that the driver for these enhanced sanctions was to "furnish an effective deterrent to willful violations [of the ADEA.]"[103]

Similarly, the Supreme Court and other federal courts have reiterated the punitive nature and deterrent purpose of the ADEA's liquidated damages. For example, over the last twenty-five years, the Supreme Court has twice emphasized the punitive (versus compensatory) character of these damages. First, in its 1985 decision in *Trans World Airlines, Inc. v. Thurston*,[104] the Court unanimously announced that "[t]he legislative history of the ADEA indicates that Congress intended for liquidated damages to be punitive in nature."[105] Then, in its 1995 decision in *Commissioner v. Schleier*,[106] the Court reiterated that these damages were punitive in character: "[T]he Court's statement [in *Trans World Airlines*] that 'Congress intended for liquidated damages to be punitive in nature' can only be taken as a rejection of the argument that those damages are also (or are exclusively) compensatory. . . . [T]here is much force to the Court's conclusion . . . that the ADEA's liquidated damages provisions are punitive."[107] Given the undisputed punitive nature of the ADEA's liquidated damages, other federal courts have been quick to highlight that "the award of liquidated damages . . . is intended to deter intentional violations of the ADEA."[108] Consequently, the ADEA's liquidated damages have a clearly punitive character and deterrent purpose.

The critical question is—Does the ADEA-based damages model consistently reflect this punitive nature and promote this deterrent purpose?

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101. 113 CONG. REC. S7076 (daily ed. Mar. 16, 1967) (statement of Sen. Javits) (referencing language of the originally proposed bill); *see supra* note 60 and accompanying text (further discussing these originally proposed criminal penalties under the ADEA).

102. 113 CONG. REC. S7076 (daily ed. Mar. 16, 1967) (statement of Sen. Javits) (proposing that "the [FLSA's] criminal penalty . . . [be] eliminated and a double damage liability substituted" in the ADEA (emphasis omitted)); *see supra* notes 61–62 and accompanying text (further discussing this substitution of liquidated damages for criminal penalties under the ADEA).

103. 113 CONG. REC. S7076 (daily ed. Mar. 16, 1967) (statement of Sen. Javits); *see supra* note 63 and accompanying text (further discussing this deterrent function of the ADEA's enhanced sanctions).

104. Trans World Airlines, Inc. v. Thurson, 469 U.S. 111 (1985).

105. *Id*. at 125.

106. 515 U.S. 323 (1995).

107. *Id*. at 332 n.5; *see supra* notes 69–70 and accompanying text (further discussing the punitive character of the ADEA's liquidated damages in *Schleier* and by other courts and commentators).

108. Kelly v. Am. Standard, Inc., 640 F.2d 974, 979 (9th Cir. 1981) (citation omitted); *see supra* note 71 (noting other courts and commentators that have highlighted the deterrent purpose of the ADEA's liquidated damages).

No. Instead, this model is fatally flawed in such a way that it can (and often does) frustrate its very own remedial purpose in two ways: (i) by substantially *under*-punishing and deterring some discriminatory employers; and (ii) by substantially *over*-punishing and deterring others.

Substantial *Under*-Punishment and Deterrence. The degree, if any, to which the ADEA-based damages model *under*-punishes and deters (or *over*-punishes and deters) a discriminatory employer hinges on the relationship between two variables: (a) the amount of the prevailing plaintiff's back pay (or lost wages) and (b) the employer's size.

Consider the following typical situation where a "skewed" relationship exists between these two variables: (a) the prevailing ADEA plaintiff has minimal (if any) back pay or lost wages (he or she quickly obtained a similarly, or better, paying job); *but* (b) the discriminatory employer is large in size (it has many employees). We saw this skewed "small-back-pay-but-large-employer" scenario in Situation #3 from the Introduction. There, Scott (our ADEA plaintiff) had minimal back pay or lost wages—in fact, only $5,000 (one month's salary) because he found and began an identically paying job within a month after Company XYZ's age-based discrimination. In addition, Company XYZ was large in size ("thousands of employees").

In this skewed small-back-pay-but-large-employer scenario, Company XYZ is substantially *under*-punished and deterred from age-based discrimination. As mentioned above, the ADEA-based model uses an automatic, dollar-for-dollar tie or link between the prevailing plaintiff's back pay or lost wages and its punitive-type relief of liquidated damages.[109] Applying this tie or link, Scott's minimal back pay of $5,000 automatically triggers minimally matching, punitive-type liquidated damages of an extra $5,000. This extra $5,000 award inadequately punishes and deters Company XYZ as to its age-based discrimination against Scott. After all, Company XYZ—an exceedingly large company with significant economic resources and financial ability to pay punitive-type damages—escapes almost scot-free. The extra $5,000 award to Scott represents nothing more than a small slap on Company XYZ's large wrist or a small drop in its large bucket. This "punishment" is unlikely to deter future age-based discrimination.[110]

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109. *See supra* Part II.B.1 (discussing liquidated damages under the ADEA-based remedial model).

110. Similarly, if we assume that Scott had zero back pay or lost wages (i.e., he immediately found and began an identically paying job), then the absence of punishment and deterrence becomes even more stark. In that situation, under the ADEA-based damages model, zero back pay automatically triggers zero punitive-type liquidated damages. Scott would be eligible to receive nothing in monetary damages, and Company XYZ would, in fact, escape scot-free. In this scenario, Company XYZ would not even receive a slap on the wrist or have a drop removed from its bucket.

Interestingly, Congress warned of a similar risk of *under*-punishment and deterrence in the Title VII and ADA context twenty years ago. Explaining its expansion of available remedies in the Civil Rights Act of 1991,[111] Congress expressly highlighted that Title VII's back-pay remedy inadequately punished and deterred discriminatory conduct:

> All too frequently, Title VII . . . allows employers who discriminate to avoid any meaningful liability.
>
> . . . .
>
> Back pay as the exclusive monetary remedy under Title VII has *not served as an effective deterrent*, and, when back pay is not available, as is the case where a discrimination victim remains on-the-job or leaves the workplace for other reasons other than discrimination, *there is simply no deterrent*.[112]

Consequently, Congress added more costly compensatory and punitive damages "to deter unlawful harassment and intentional discrimination in the workplace"[113] by "rais[ing] the cost of an employer's engaging in intentional discrimination, thereby providing employers with additional incentives to *prevent* intentional discrimination in the workplace before it happens."[114] Thus, Congress recognized a very common-sense notion when adding these supplemental damages in the 1991 Act: minimal liability upon a discriminatory employer inadequately punishes and deters that employer.

Yet, despite Congress's warning twenty years ago, the risk of such *under*-punishment and deterrence regrettably still exists today under the ADEA. In skewed small-back-pay-but-large-employer scenarios, the ADEA-based damages model is a "blessing" for the large, discriminatory employer. After all, this large employer will pay only minimal liquidated damages and thus be minimally (and inadequately) punished and deterred. Consequently, the ADEA-based damages model can (and often does) virtually ignore the punitive character and deterrent purpose of its own damages.

Substantial *Over*-Punishment and Deterrence. In contrast, the ADEA-based damages model can also substantially *over*-punish and deter discriminatory employers. Consider the somewhat less typical situation

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111. *See supra* notes 17–26 and accompanying text (discussing the 1991 Act's expansion of monetary damages available to a prevailing Title VII (and ADA) plaintiff).

112. H.R. REP. NO. 102–40, pt. 1, at 68, 69, *reprinted in* 1991 U.S.C.C.A.N. 549, 606–07 (emphasis added); *see also supra* note 45 (discussing other legislative history regarding the inadequate deterrence achieved by Title VII damages before the 1991 Act).

113. Civil Rights Act of 1991, Pub. L. No. 102–166, § 2, 105 Stat. 1071, 1071 (1991); *see also supra* note 46 (discussing other legislative history regarding the deterrent purpose of the 1991 Act).

114. H.R. REP. NO. 102–40, pt. 1, at 65; *see also supra* note 47 (discussing other legislative history and commentators highlighting the deterrent purpose of the 1991 Act).

where a "reversed" skewed relationship exists between the two variables: (a) the prevailing ADEA plaintiff has large back pay or lost wages (he or she could not quickly obtain a similarly, or better, paying job); *but* (b) the discriminatory employer is small in size (it has a minimal number of employees). We saw this "large-back-pay-but-small-employer" scenario in a variation of Situation #3 that was discussed in Part III.A above. There, Scott (again, our ADEA plaintiff) was now said to have significant back pay or lost wages—$125,000 (about two years' salary) because he could not find and begin a comparably paying job until two years after Company XYZ's age-based discrimination. In addition, Company XYZ was said to be small in size ("only thirty employees").

In this skewed large-back-pay-but-small-employer scenario, one can reasonably view Company XYZ as being substantially *over*-punished and deterred from age-based discrimination. Again applying the ADEA's automatic, dollar-for-dollar tie or link between back pay and liquidated damages, Scott's significant back pay of $125,000 automatically triggers significantly matching, punitive-type liquidated damages of an extra $125,000. This extra $125,000 award has more than punished and deterred Company XYZ as to its age-based discrimination against Scott. After all, Company XYZ—a small company with modest economic resources and financial ability to pay punitive-type damages—might now face the most extreme consequence for its conduct: closure. The extra $125,000 award to Scott represents, as it should, much more than a small slap on Company XYZ's small wrist or a small drop in its small bucket. But this award goes to the opposite extreme and represents economically-crippling, if not business-endangering, liability.

Interestingly, Congress expressly guarded against similar *over*-punishment and deterrence in the Title VII and ADA context in 1991. In the 1991 Act, Congress capped the aggregate sum of available compensatory and punitive damages via a graduated ceiling, ranging from $50,000 to $300,000.[115] Importantly, however, the ceiling depends upon the employer's size: "small" employers (between 15 and 100 employees) are subject to a "small," capped amount of $50,000; "medium" employers (between 101 and 200 employees, or between 201 and 500 employees) are subject to a "medium," capped amount of $100,000 or $200,000 (respectively); and "large" employers (over 500 employees) are subject to a "large," capped amount of $300,000.[116] Defending its use of these varying caps, Congress highlighted that they were necessary to guard against

115. 42 U.S.C. § 1981a(b)(3) (2006).
116. *Id*.

disproportionate, "multi-million dollar awards" by juries[117] and to ensure that "small employers would not be exposed to unlimited damage awards."[118] So, in practice, this graduated ceiling ensures that these "small" employers are able to avoid a business-crippling or endangering award of supplemental damages of $100,000, $200,000, or even $300,000 under Title VII or the ADA; instead, they are subject only to a supplemental damages award of $50,000. Consequently, in 1991, Congress expressly recognized that size matters: supplemental damages that are disproportionately large can (and do) over-punish and deter the small employer.

But, despite Congress's recognition in 1991 that employer size matters for supplemental damages, the potential for *over*-punishment and deterrence regrettably still exists today under the ADEA. In skewed large-back-pay-but-small-employer scenarios, the ADEA-based damages model is a "curse" for the small, discriminatory employer. After all, this small employer will pay exorbitant liquidated damages and thus be exorbitantly punished and deterred. By containing no ceiling or limit for its liquidated damages, the ADEA-based damages model can do (and sometimes does) too much to promote the punitive character and deterrent purpose of its own damages.[119]

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117. H.R. REP. NO. 102–40, pt. 1, at 70–72 (1991), *reprinted in* 1991 U.S.C.C.A.N. 549, 608–10 (referencing concerns that allowing additional damages under Title VII and the ADA "would produce multi-million dollar awards" and "cause juries to award damages vastly disproportionate to the offeses [sic] committed . . . or the injuries sustained" but explaining that "the procedural and substantive limitations set forth [in the 1991 Act] serve to check jury discretion in awarding such damages"); *see also* note 25 (referencing other legislative history and legal commentary regarding Congress's concern about excessive jury awards in intentional discrimination cases).

118. H.R. REP. NO. 102–40, pt. 2, at 52 n.2.

119. Importantly, this point regarding how the ADEA's remedial model can *over*-punish and deter in large-back-pay-but-small-employer scenarios does *not* equate to a claim that this model's liquidated damages are thus unconstitutionally excessive under the Due Process Clause of the Fourteenth Amendment. In *BMW of N. America, Inc. v. Gore*, 517 U.S. 559 (1996), and *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408 (2003), the Supreme Court recognized that "grossly excessive" awards of punitive damages against tortfeasors are unconstitutional. *Id.* at 416–17 ("While States possess discretion over the imposition of punitive damages, it is well-established that there are procedural and substantive constitutional limitations on these awards. The Due Process Clause of the Fourteenth Amendment prohibits the imposition of grossly excessive or arbitrary punishments on a tortfeasor. . . . To the extent an award is grossly excessive, it furthers no legitimate purpose and constitutes an arbitrary deprivation of property."); *BMW of N. Am.*, 517 U.S. at 574 ("Elementary notions of fairness enshrined in our constitutional jurisprudence dictate that a person receive fair notice not only of the conduct that will subject him to punishment, but also of the severity of the penalty that a State may impose."). To determine whether a punitive damage award meets this "grossly excessive" benchmark, the Court specified "three guideposts" for consideration: "(1) the degree of reprehensibility of the defendant's misconduct; (2) the disparity between the actual or potential harm suffered by the plaintiff and the punitive damages award; and (3) the difference between the punitive damages awarded by the jury and the civil penalties authorized or imposed in comparable cases." *State Farm Mut. Auto. Ins. Co.*, 538 U.S. at 418; *BMW of N. Am.*, 517 U.S. at 574.

Indeed, any argument that the ADEA's liquidated damages (even in large-back-pay-but-small-employer scenarios) may approach the unconstitutional standard of "grossly excessive" would seem

To summarize these under- versus over-punishment and deterrence points, the ADEA-based damages model can do (and often does) too little or too much to further the punitive character and deterrent purpose of its own damages. It simply depends on the relationship between the back-pay amount (small, medium, or large) and the employer's size (small, medium, or large). If the relationship is skewed (small back pay but large employer; small back pay but medium employer; medium back pay but small employer; medium back pay but large employer; large back pay but small employer; or large back pay but medium employer), then this model leads to *under*- or *over*-punishment and deterrence. Yet, if the relationship is commensurate and proportionate (small back pay and small employer; medium back pay and medium employer; or large back pay and large employer), then the ADEA-based damages model leads to *adequate* punishment and deterrence. The following chart recaps these points:

problematic for one main reason: the ADEA's dollar-for-dollar tie or link between back pay and its punitive-type liquidated damages. With that tie or link, the second "guidepost" under *State Farm Mut. Auto. Ins. Co.* and *BMW of N. America* seems to disappear—the ratio between "actual" harm suffered by the age discrimination victim (back pay or lost wages) and the "punitive damages award" (liquidated damages) will always be 1:1. *Cf. State Farm Mut. Auto. Ins. Co.*, 538 U.S. at 425–26 ("Our jurisprudence and the principles it has now established demonstrate . . . that, in practice, few awards exceeding a single-digit ratio between punitive and compensatory damages . . . will satisfy due process. . . . Single-digit multipliers are more likely to comport with due process . . . than awards with ratios in range of 500 to 1 . . . ."); *BMW of N. Am.*, 517 U.S. at 583 (O'Connor, J., dissenting) (addressing a 500-to-1 ratio between punitive damages and actual damages and stating: "In most cases, the ratio will be within a constitutionally acceptable range, and remittitur will not be justified on this basis. When the ratio is a breathtaking 500 to 1, however, the award must surely 'raise a suspicious judicial eyebrow.'" (citing TXO Prod. Corp. v. Alliance Res. Corp., 509 U.S. 443, 481 (1993))); Swinton v. Potomac Corp., 270 F.3d 794, 818–20 (9th Cir. 2001) (in a § 1981 race-based employment discrimination case, addressing a 28:1 ratio between punitive damages and actual damages and concluding that "after analyzing the punitive damages award here in light of the three *BMW* guideposts, we cannot say that the punitive damages award amounts to a constitutional due process violation.").

**DEGREE OF PUNISHMENT & DETERRENCE PER ADEA'S REMEDIAL MODEL**

| | **Large Employer** | **Medium Employer** | **Small Employer** |
|---|---|---|---|
| **Small Back Pay** | SUBSTANTIAL UNDER-PUNISHMENT & DETERRENCE | Some under-punishment & deterrence | *Adequate punishment & deterrence* |
| **Medium Back Pay** | Some under-punishment & deterrence | *Adequate punishment & deterrence* | Some over-punishment & deterrence |
| **Large Back Pay** | *Adequate punishment & deterrence* | Some over-punishment & deterrence | SUBSTANTIAL OVER-PUNISHMENT & DETERRENCE |

These points and examples reveal the "fatal flaw" of the ADEA-based damages model: the automatic, dollar-for-dollar tie or link between back pay and its punitive-type relief (liquidated damages). Given that tie or link, this model's punitive-type relief is *strictly conditional* on the existence, and amount, of the equitable losses of the prevailing plaintiff. This tie, link, or condition is the very reason that the ADEA-based damages model can (and often does) frustrate its own punishment and deterrence purposes: after all, (a) no back pay yields no liquidated damages and thus no punishment or deterrence; (b) minimal back pay yields minimal liquidated damages and thus minimal punishment and deterrence for medium or large employers; and (c) exorbitant back pay yields exorbitant liquidated damages and thus exorbitant punishment and deterrence for small employers.

In contrast, the Uniform Title VII/ADA-Based Damages Model more consistently achieves Congress's vision for the ADEA's supplemental damages—namely, that they be "punitive in nature"[120] and properly "deter intentional violations of the ADEA."[121] By consistently applying the

120. Trans World Airlines, Inc. v. Thurston, 469 U.S. 111, 125 (1985).

121. Kelly v. Am. Standard, Inc., 640 F.2d 974, 979 (9th Cir. 1981) (citation omitted). *Cf.* James, *supra* note 53, at 588 (proposing that compensatory and punitive damages be allowed under the ADEA and stating that these damages "would . . . deter future violations [of the ADEA]. They would make an employer reconsider the economic consequences of his discriminatory act [and] . . . could more seriously affect the economic situation of the individual employer.").

graduated ceiling for compensatory and punitive damages per the 1991 Act, this uniform model avoids the ADEA-based model's fatal flaw of strictly tying, linking, or conditioning punitive-type relief to the existence, and amount, of the plaintiff's equitable losses. Having avoided this flaw, the Uniform Title VII/ADA-Based Damages Model necessarily avoids the problematic, pesky extremes of *under*- and *over*-punishment and deterrence that Congress targeted for elimination under Title VII over twenty years ago.

For example, in skewed small-back-pay-but-large-employer scenarios, this uniform model avoids the under-punishment and deterrence problem that is currently created by the ADEA-based model. As mentioned above, the ADEA-based model in these scenarios is often a blessing for a large, discriminatory employer, because that employer pays only a tiny amount of liquidated damages and is inadequately punished and deterred. But, under the Uniform Title VII/ADA-Based Damages Model, these small-back-pay-but-large-employer scenarios are no longer a blessing for the large employer. Instead, that large employer—with significant economic resources and financial ability to pay punitive-type damages—now faces significant, monetary liability that more adequately punishes and deters. Thus, in the ADEA context, this uniform model fixes the very problem or risk about which Congress warned in the Title VII context over twenty years ago—namely, that "there is simply no deterrent"[122] or punishment when discriminatory employers face zero or minimal liability.

Similarly, in skewed large-back-pay-but-small-employer scenarios, this uniform model avoids the over-punishment and deterrence problem that is created by the ADEA-based model. As mentioned above, the ADEA-based model in these scenarios is often a curse for a small, discriminatory employer because that employer pays an exorbitant amount of liquidated damages and is exorbitantly punished and deterred by economically-crippling, if not business-endangering, liability. Yet, under the Uniform Title VII/ADA-Based Damages Model, these large-back-pay-but-small-employer scenarios are no longer a curse for the small employer. Instead, that small employer—with modest economic resources and financial ability to pay punitive-type damages—now faces more proportionate monetary liability that adequately punishes and deters. Consequently, in the ADEA context, this uniform model reflects Congress's rationale for adopting the graduated ceiling for supplemental damages in the Title VII context in 1991—namely, that disproportionate, business-crippling, or endangering awards over-punish and deter "small" employers.

On this punishment and deterrence point, one could argue that the Uniform Title VII/ADA-Based Damages Model could be problematic to

122. H.R. REP. NO. 102–40, pt. 1, at 68, 69, *reprinted in* 1991 U.S.C.C.A.N. 549, 606–07.

the extent that its punitive damages are discretionary with the fact-finder and thus can be inconsistently, or even rarely, awarded. For example, some legal commentators have observed:

> The data . . . revealed that juries appear somewhat reluctant to award punitive relief—less than 18 percent of Title VII cases that reach a jury result in this type of award. And in those cases where a jury finds in favor of the plaintiff . . . , [only] 29 percent of those juries also award punitive relief.
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> . . . .
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> . . . [I]t seems a fair conclusion that punitive damages are simply not achieving their intended [deterrent] purpose.[123]

Based on this observation, some commentators have proposed a uniform ADEA-based damages model—with its automatically matching, dollar-for-dollar liquidated damages—for prevailing Title VII plaintiffs in disparate treatment cases.[124]

This argument regarding the (in)frequency of awarded punitive damages under Title VII is well-taken. Yet, even assuming for argument's sake that punitive damages per the 1991 Act have been inconsistently awarded, a uniform ADEA-based model is still not warranted because it creates worse remedial problems than it solves. To be sure, a uniform ADEA-based damages model would seem to solve the referenced remedial

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123. Seiner, *supra* note 25, at 773–75; *id*. at 764 ("[T]he results of the JVR [Jury Verdict Research] search revealed that 291 Title VII employment discrimination cases ultimately resulted in a jury verdict during 2004–2005. Of these 291 jury verdicts, 177 were in favor of plaintiffs. Thus, slightly less than 18 percent (52/291) of those Title VII cases that went to a jury during this timeframe resulted in a punitive damage award by the jury, and approximately 29 percent (52/177) of those juries that found in favor of the plaintiff also awarded punitive damages."); *see also* George A. Hanson & E.E. Keenan, *Lifting All Boats: The Case for Wage and Hour Enforcement in Recessionary Times*, 19 KAN. J.L. & PUB. POL'Y 454, 469 (2010) ("[T]he record in other federal employment litigation indicates that punitive damages are rarely awarded and might thus have little actual deterrent effect in ordinary cases.").

124. Seiner, *supra* note 25, at 776–77 ("I recommend replacing the current system of punitive relief under Title VII with an approach similar to the damages provisions under the ADEA and FLSA, which currently provide for liquidated damages. . . . Under my proposal, liquidated damages in the amount of double the actual damages would replace punitive damages in Title VII. Liquidated damages would be awarded automatically upon a finding of intentional discrimination by the judge or jury in a case brought pursuant to Title VII. Actual damages would be defined as any wage loss or other monetary harm suffered by the victim, combined with any compensatory damages the plaintiff could demonstrate. . . . This approach would be similar to the damages provisions of the ADEA and FLSA."); *id*. at 786 ("In sum, I propose replacing the current scheme of punitive damages set forth in the 1991 CRA [Civil Rights Act] with a three-part test that would provide liquidated damages in many cases of discrimination [under Title VII] . . . ."); *id*. at 790–91 ("The proposed approach would . . . bring the system of relief more in line with claims of age discrimination brought pursuant to the ADEA and wage and hour claims brought pursuant to the FLSA. The ADEA and FLSA currently utilize liquidated damages frameworks similar to the one proposed here for Title VII."); *id*. at 796 ("[T]he proposed liquidated damages framework would bring Title VII more in line with the damages provisions found in other areas of employment law.").

problem of inconsistently (or rarely) awarded punitive damages under Title VII and the ADA. After all, this model's punitive-type relief (liquidated damages) is simply "tied in a one-to-one ratio to the actual harm suffered by the plaintiff"[125] and "awarded automatically upon a finding of intentional discrimination by the judge or jury in a case brought pursuant to Title VII."[126] Consequently, some commentators have reasonably noted that a uniform ADEA-based model "would increase predictability in the amount of damages awarded in employment discrimination cases"[127] and make the determination of "potential liability . . . far easier for the parties . . . than under the current [Title VII] system, where the court and jury have significant discretion in fashioning punitive relief."[128]

While solving this particular remedial problem, an ADEA-based damages model regrettably creates other remedial problems. As discussed above, one of these problems is that this model often does too little to further the punitive character and deterrent purpose of its liquidated damages. Specifically, in skewed small-back-pay-but-large-employer scenarios, the ADEA-based damages model virtually ignores its own remedial character and purpose, as minimal back-pay liability automatically yields equally minimal liquidated damages that, in turn, minimally punish and deter our large, discriminatory employers.

Thus, each model has its own remedial consequences. The Title VII/ADA-based model allows punitive damages in meaningful amounts, up to the applicable $50,000, $100,000, $200,000, or $300,000 aggregate, monetary caps; but, its problem is that this relief is *discretionary and thus less consistently and predictably awarded*. On the other hand, the ADEA-based model allows punitive-type relief (liquidated damages) that is automatic and thus more consistently and predictably awarded; but, one of its problems is that this relief is *not even available in meaningful amounts where back pay is small or minimal*.

So, we are left to ask the ultimate, normative question: Which remedial problem is worse? The ADEA-based damages model's remedial problem seems much worse, simply because it denies many plaintiffs *even the initial opportunity* to argue for meaningful punitive-type, deterrence-aimed relief. Specifically, in situations where prevailing plaintiffs have small or minimal

125. *Id*. at 782.

126. *Id*. at 776.

127. *Id*. at 790.

128. *Id*.; *see id*. at 789–90 ("[T]he proposed [ADEA-based] framework would be far easier and more routine for courts to apply than the current system of punitive relief [under Title VII]. . . . The standard for awarding exemplary relief in employment cases [under Title VII] . . . creates far too much uncertainty in the process. . . . [T]he current framework of punitive relief has created significant inconsistencies in the courts. The proposed structure of importing liquidated damages into Title VII would therefore significantly streamline what is currently an overly cumbersome process of awarding exemplary relief.").

back pay, the ADEA-based model affords no concrete opportunity or chance for them to argue for and recover meaningful liquidated damages. Instead, this model's "fatal flaw"—its automatic, dollar-for-dollar tie or link between back pay and liquidated damages—effectively strips these plaintiffs of that opportunity or chance. After all, no back pay necessarily yields no recoverable liquidated damages; $5,000 in back pay necessarily yields only a $5,000 pittance in recoverable liquidated damages; and $10,000 in back pay necessarily yields only a $10,000 pittance in recoverable liquidated damages. Without these plaintiffs having an opportunity or chance to argue for and recover meaningful punitive-type relief, their discriminatory employers are exposed to bare minimum punishment, which achieves bare minimum deterrence.

In these same situations, however, the Title VII/ADA-based damages model does just the opposite—at a very minimum, it preserves the concrete opportunity or chance for prevailing plaintiffs to argue for meaningful punitive, deterrence-aimed relief that ranges from $50,000 to $300,000 based on the applicable, aggregate cap. While these discretionary awards of punitive damages may be somewhat inconsistent and unpredictable, these plaintiffs are, at the very least, free to argue for substantial punitive damages. They are not handcuffed by small or minimal back pay. With these plaintiffs having an opportunity or chance to argue for and recover meaningful punitive damages, their discriminatory employers are subjected to potentially significant punishment, which achieves more significant deterrence.

In sum, under the Title VII/ADA-based model, plaintiffs with small or minimal back pay are at least allowed the opportunity to knock on the proverbial door of meaningful punitive damages. This door may not always—or consistently or predictably—open, but, at a minimum, the chance is there. In contrast, under the ADEA-based model, these same plaintiffs are not even afforded the chance to knock on the door. They are just shooed down the street. This latter problem appears much worse. Put differently, if we were Scott in Situation #3 from the Introduction (a classic small-back-pay-but-large-employer scenario where his lost wages totaled only $5,000), which remedial model would we rather have: (a) the Title VII/ADA-based model, under which we can at least argue for punitive damages up to the $300,000 aggregate, monetary cap due to Company XYZ's large size; or (b) the ADEA-based model, under which we are handcuffed by our minimal back pay and thus eligible to receive only $5,000 in matching, dollar-for-dollar liquidated damages? We would likely opt for the former because it affords an opportunity for meaningful monetary damages for us and for substantial punishment and deterrence of Company XYZ.

*2. The Harm Compensation and Claim Incentive Purposes*

In addition, the Uniform Title VII/ADA-Based Damages Model better serves the ADEA's interests by expanding its remedial purposes to include harm compensation and claim incentive.

Importantly, deterrence is not just *a* remedial purpose of the ADEA's liquidated damages; it is *the single, exclusive* purpose of this supplemental relief that, by definition, ignores other remedial purposes, such as harm compensation or claim incentive. Indeed, the Supreme Court repeatedly highlighted this point in its 1995 decision in *Commissioner v. Schleier*,[129] which addressed whether the ADEA's liquidated damages fell within a federal income tax exemption for "compensation for personal injuries."[130] For example, the Court unequivocally stated that these damages lacked *any* "compensatory" purpose: "[T]he Court's statement [in *Trans World Airlines*] that 'Congress intended for liquidated damages to be punitive in nature' can only be taken as a rejection of the argument that those damages are also (or are exclusively) compensatory."[131] Similarly, in explaining its decision that these damages fell outside the personal injury compensation tax exemption and were thus taxable, the Court bludgeoned the point regarding the lack of a "compensatory function" for the ADEA's liquidated damages:

> Our holding in [*Trans World Airlines*] . . . requires the conclusion that liquidated damages under the ADEA . . . are not received 'on account of personal injury or sickness.'
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> . . . .
>
> Like the pre-1991 version of Title VII, the ADEA provides no compensation 'for any of the other traditional harms associated with personal injury.' Monetary remedies under the ADEA are limited to back wages, which are clearly of an 'economic character,' and *liquidated damages, which we have already noted serve no compensatory function*.[132]

Regrettably, by attaching an exclusively punitive character and deterrence purpose to its liquidated damages, the ADEA-based damages model wholly overlooks two other, key remedial purposes: (i) compensating these discrimination victims' non-wage-related harms; and

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129. 515 U.S. 323, 329 (1995).

130. *Id*. at 324–25, 328–29; *see supra* note 68 (further discussing this specific income tax exemption).

131. 515 U.S. at 332 n.5.

132. *Id*. at 332, 336 (emphasis added); *see supra* notes 69–71 and accompanying text (further discussing the punitive character and deterrent purpose of the ADEA's liquidated damages in *Schleier* and by other courts and commentators).

(ii) providing monetary incentive for these victims to file age-discrimination claims.

Harm Compensation. As to the remedial purpose of harm compensation, Congress openly added compensatory and punitive damages per the 1991 Act to provide more "appropriate remedies for intentional discrimination and unlawful harassment"[133] and thus afford more "adequate compensation for victims of discrimination."[134] Congress specifically recognized that Title VII's "limitation of relief . . . to equitable remedies often means that victims of intentional discrimination may not recover for the very real effects of the discrimination."[135] For example, Congress noted that these victims incur losses extending far beyond lost wages that often include psychological, reputational, and other out-of-pocket harms:

> [T]he harms women and religious and racial minorities suffer as a consequence of the various types of intentional discrimination are the same: humiliation; loss of dignity; psychological (and sometimes physical) injury; resulting medical expenses; damage to the victim's professional reputation and career; loss of all forms of compensation and other consequential injuries.[136]

Similarly, Congress observed that "[v]ictims of intentional sexual or religious discrimination in employment terms and conditions often endure terrible humiliation, pain and suffering. . . . Victims of discrimination often suffer substantial out-of-pocket expenses as a result of the discrimination, none of which is compensable with equitable remedies."[137] To thus ensure an "appropriate remed[y]" for these non-wage-related harms, Congress defined recoverable "compensatory damages" to include "future pecuniary losses, emotional pain, suffering, inconvenience, mental anguish, loss of enjoyment of life, and other nonpecuniary losses."[138] Consequently, Congress used supplemental damages in the 1991 Act to achieve a key remedial purpose of anti-discrimination law: harm compensation.

The current ADEA-based damages model simply ignores this remedial purpose of harm compensation. In fact, ADEA plaintiffs in intentional discrimination cases are currently the *only* discrimination victims who are barred from recovering for these non-wage-related losses. The notion that

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133. Civil Rights Act of 1991, Pub. L. No. 102–166, § 3, 105 Stat. 1071, 1071 (1991).

134. H.R. REP. NO. 102–40, pt. 2, at 1 (1991), *reprinted in* 1991 U.S.C.C.A.N. 594, 694.

135. *Id*. at 25.

136. *Id*., pt. 1, at 65.

137. *Id*., pt. 2, at 25 (emphasis added); *see supra* notes 39–40, 42 and accompanying text (further discussing the legislative history of the 1991 Act that highlights these non-wage-related losses for victims of discrimination and this remedial purpose of harm compensation for such losses).

138. 42 U.S.C. § 1981a(b)(3) (2006); *see supra* note 19 (further discussing the harms for which "compensatory damages" are recoverable per the 1991 Act).

victims of intentional, age-based discrimination are somehow *inevitably immune, or suffer less*, from psychological, emotional, or other non-wage-related harms than those of other types of discrimination is flimsy at best and dead-wrong at worst. Indeed, as Congress, the courts, and other commentators have noted, victims of age-based discrimination seem little, or no, different when it comes to suffering from these non-monetary harms.[139]

For example, in Situation #3 from the Introduction, Scott, as a victim of blatant, age-based discrimination, certainly could suffer any or all of the following: "emotional pain," "suffering," "inconvenience," "mental anguish," "loss of enjoyment of life," "other non-pecuniary loss," "humiliation," "loss of dignity," "psychological . . . injury," "damage to . . . professional reputation and career," and "other out-of-pocket expenses."[140] Unfortunately, though, Scott is foreclosed from recovering for any of these non-wage-related harms under the ADEA-based damages model, which limits him to minimal monetary damages of $10,000: $5,000 in lost wages, plus another $5,000 in liquidated damages. Consequently, the current ADEA-based damages model wholly overlooks the important remedial purpose of harm compensation that Congress sought to promote via the 1991 Act.

Claim Incentive. As to the remedial purpose of claim incentive, Congress admittedly proclaimed in the 1991 Act that it was adding compensatory and punitive damages to incentivize employment discrimination victims to file more claims. Specifically, Congress sensed that, due to the limited equitable relief under Title VII, "victims of intentional discrimination [had been] discouraged from seeking to vindicate their civil rights."[141] Highlighting the importance of this claim incentive purpose, Congress added the potentially lucrative supplemental damages

139. *See* LARRY CRAIG, DEVELOPMENTS IN AGING: 2001 AND 2002, S. REP. NO. 108–265(I), ch. 4.A.1 (2004), 2004 WL 3044796 ("Prolonged unemployment can often have mental and physical consequences. Psychologists report that discouraged workers can suffer from serious psychological stress, including hopelessness, depression, and frustration. In addition, medical evidence suggests that forced retirement can so adversely affect a person's physical, emotional, and psychological health that lifespan may be shortened."); Moskowitz v. Tr. of Purdue Univ., 5 F.3d 279, 283 (7th Cir. 1993) ("Like other forms of tortious conduct, age discrimination can cause psychological distress . . . ."); James, *supra* note 53, at 581 ("Out-of-pocket losses are often negligible [for victims of age discrimination] when compared to the psychological and emotional injuries caused by an employer's discriminatory conduct based on age."); Catherine Ventrell-Monsees & Laurie A. McCann, *Ageism: The Segregation of a Civil Right*, in EXCHANGE ON AGEING, LAW & ETHICS, Bulletin No. 8, Spring, 1992, at 4 ("The emotional trauma and injury inflicted by discrimination can be as significant in a case of age harassment as it is in a sexual harassment case. Yet Congress' failure to provide for such [compensatory and punitive] damages in an age case [via the Civil Rights Act of 1991] implies that the older victim does not deserve a remedy.").

140. *See supra* notes 136–138 (discussing these non-wage-related harms or losses suffered by discrimination victims).

141. H.R. REP. NO. 102–40, pt. 2, at 25.

"to encourage citizens to act as private attorneys general to enforce" their Title VII (and ADA) rights.[142]

The current ADEA-based damages model ignores this remedial purpose of claim incentive. In fact, with its fatal flaw of strictly tying, linking, or conditioning punitive-type relief on the existence and amount of back pay, this model can and often does *discourage* the filing of age-based discrimination claims in at least one, clear scenario: where the victim has zero or minimal back pay or lost wages. After all, in this scenario, the ADEA-based model yields zero or minimal monetary damages: zero back pay means zero additional, liquidated damages; and minimal back pay means minimal, additional liquidated damages.

What claim filing incentive does this ADEA-based damages model provide to potential ADEA plaintiffs in this scenario? Not much. To be sure, a plaintiff like Scott in Situation #3 from the Introduction might choose to file an age-discrimination claim for a very modest total recovery of $10,000. But, whether independently or on advice of legal counsel, Scott would seem equally if not more likely to decide to just "move on" with his life, rather than become involved in years of federal litigation that may yield a net recovery of only $5,000, after offsetting a 40% contingency fee plus related costs. Thus, the current ADEA-based damages model can and often does overlook the important remedial purpose of claim incentive that Congress aimed to further in the 1991 Act.[143]

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142. *Id*., pt. 1, at 65; *see supra* notes 43–44 (further discussing the legislative history of the 1991 Act that highlights this remedial purpose of incentivizing claims).

143. *Cf.* Ventrell-Monsees & McCann, *supra* note 139, at 4–5 ("The denial of such [compensatory and punitive] damages in age cases is troublesome . . . because of the negative effect it will have on the enforcement and litigation of age discrimination claims. . . . Title VII has now become more attractive than the ADEA because the Civil Rights Act of 1991 provided for potentially greater damages (more than double) and a jury trial. Thus, attorneys may be more willing to handle more Title VII cases than ADEA cases.").

Interestingly, the absence of incentivizing compensatory and punitive damages under the ADEA may be one of the reasons that the Equal Employment Opportunity Commission (EEOC) has historically litigated a *much smaller percentage of ADEA cases* compared to Title VII or ADA cases. After all, in modest back-pay or lost-wage scenarios, the potential monetary recovery is similarly modest under the ADEA but can still be potentially lucrative under Title VII or the ADA.

For example, over the past five years, on average, only 10% of EEOC-instituted federal lawsuits have included ADEA claims, while 24% of the individually-filed administrative claims have included these claims: (a) in 2007, only 9.5% of the EEOC's lawsuits (32 out of 336 merits suits) included ADEA claims, versus 23.2% of the administratively filed claims; (b) in 2008, only 13.1% of the EEOC's lawsuits (38 out of 290 merits suits) included ADEA claims, versus 25.8% of the administratively filed claims; (c) in 2009, only 8.54% of the EEOC's lawsuits (24 out of 281 merits suits) included ADEA claims, versus 24.4% of the administratively filed claims; (d) in 2010, only 11.6% of the EEOC's lawsuits (29 out of 250 merits suits) included ADEA claims, versus 23.3% of the administratively filed claims; and (d) in 2011, only 10% of the EEOC's lawsuits (26 out of 261 merits suits) included ADEA claims, versus 23.5% of the administratively filed claims. *See* U.S. EQUAL EMPLOYMENT OPPORTUNITY COMM'N, *EEOC Litigation Statistics: FY 1997 Through FY 2011*, http://www1.eeoc.gov//eeoc/statistics/enforcement/litigation.cfm?renderforprint=1 (last visited Sept. 22, 2012); U.S. EQUAL EMPLOYMENT OPPORTUNITY COMM'N, *Charge Statistics: FY 1997 Through FY*

In contrast, the Uniform Title VII/ADA-Based Damages Model better serves the ADEA's interests by expanding its remedial purposes to include (a) harm compensation and (b) claim incentive. As to harm compensation, this uniform model, by definition, allows age discrimination victims—just like other discrimination victims—to recover "compensatory damages" for "future pecuniary losses, emotional pain, suffering, inconvenience, mental anguish, loss of enjoyment of life, and other nonpecuniary losses."[144] Thus, these age discrimination victims (like Scott in Situation #3) would now be treated like normal people who can and do suffer non-tangible harms, rather than like superheroes who are immune from or impervious to such "emotional pain," "suffering," "inconvenience," "mental anguish," "loss of enjoyment of life," "other nonpecuniary loss," "humiliation," "loss of dignity," "psychological . . . injury," "damage to . . . professional reputation and career," and/or "other out-of-pocket expenses."[145]

By opening this door to "compensatory damages" for ADEA plaintiffs, the Uniform Title VII/ADA-Based Damages Model embodies two of Congress's important recognitions from the 1991 Act: first, that "victims of intentional discrimination may not recover for the very real effects of the discrimination"[146]; and second, that anti-discrimination law needs more "appropriate remedies for intentional discrimination and unlawful harassment"[147] and more "adequate compensation for victims of discrimination."[148] Yes, Congress made these observations regarding harm compensation in the context of Title VII plaintiffs and their limited, pre-1991 remedies. But, these points are equally salient today in the context of ADEA plaintiffs and their often limited liquidated damages.[149] Thus, this

*2011*, http://www1.eeoc.gov//eeoc/statistics/enforcement/charges.cfm?renderforprint=1 (last visited Sept. 22, 2012).

In comparison, over the past five years and on average, over 70% of the EEOC's lawsuits have included Title VII claims and over 20% of those lawsuits have included ADA claims. *See* U.S. EQUAL EMPLOYMENT OPPORTUNITY COMM'N, *EEOC Litigation Statistics: FY 1997 through FY 2011*, http://www1.eeoc.gov//eeoc/statistics/enforcement/litigation.cfm?renderforprint=1 (last visited Sept. 22, 2012); U.S. EQUAL EMPLOYMENT OPPORTUNITY COMM'N, *Charge Statistics: FY 1997 through FY 2011*, http://www1.eeoc.gov//eeoc/statistics/enforcement/charges.cfm?renderforprint=1 (last visited Sept. 22, 2012).

144. 42 U.S.C. § 1981a(b)(3) (2006).

145. *See supra* notes 136–138 (discussing these non-wage-related harms or losses suffered by discrimination victims).

146. H.R. REP. NO. 102–40, pt. 2, at 25.

147. Civil Rights Act of 1991, Pub. L. No. 102–166, § 3, 105 Stat. 1071, 1071 (1991).

148. H.R. REP. NO. 102–40, pt. 2, at 1.

149. *Cf.* James, *supra* note 53, at 588 (proposing that compensatory and punitive damages be allowed under the ADEA and stating that these damages "would compensate for harm done"); *id*. at 581 (discussing arguments in favor of allowing "damages for pain and suffering" under the ADEA and noting that "[o]ut-of-pocket losses are often negligible when compared to the psychological and emotional injuries caused by an employer's discriminatory conduct based on age").

uniform model furthers the important remedial purpose of harm compensation that Congress highlighted in the 1991 Act.

Second, as to claim incentive, the Uniform Title VII/ADA-Based Damages Model similarly expands the ADEA's remedial purposes to include incentivizing the filing of discrimination claims, especially in the zero or minimal back-pay scenario. Even in this scenario, potential ADEA plaintiffs, like Scott in Situation #3, would now have adequate incentive and encouragement to file their age discrimination claims—they would be eligible to recover compensatory and punitive damages up to the applicable monetary cap of $50,000, $100,000, $200,000, or $300,000, rather than being limited to *de minimis* monetary damages.

By allowing compensatory and punitive damages for ADEA plaintiffs, the Uniform Title VII/ADA-Based Damages Model again reflects important congressional recognitions from the 1991 Act: first, that "victims of intentional discrimination [had been] discouraged from seeking to vindicate their civil rights"[150] due to Title VII's limited back-pay relief; and second, that additional monetary damages were necessary "to encourage citizens to act as private attorneys general to enforce" their Title VII and ADA rights.[151] Again, of course, Congress made these observations regarding claim incentive in the context of Title VII plaintiffs and their limited pre-1991 remedies. But, these points are likewise applicable today in the context of ADEA plaintiffs and their often limited monetary damages.[152] Consequently, this uniform model promotes the key remedial purpose of claim incentive that Congress pinpointed in the 1991 Act.

In sum, the Uniform Title VII/ADA-Based Damages Model better serves the ADEA's purposes and interests in two ways: (1) by more effectively promoting its remedial purpose of deterrence and (2) by expanding its remedial purposes to include harm compensation and claim incentive. Over twenty years ago, Congress clearly summarized its rationale for remedial expansion in the 1991 Act:

> Where the manifestations of prohibited conduct are the *same*, and the harms caused are the *same*, the remedies should be the *same* as well. Gender and religious discrimination are as reprehensible as race discrimination, and should be treated the *same* for purposes of

150. H.R. REP. NO. 102–40, pt. 2, at 25.

151. *Id*., pt. 1, at 64–65.

152. *Cf*. James, *supra* note 53, at 587–88 (proposing that compensatory and punitive damages be allowed under the ADEA and stating that these damages "may decrease and deter future violations of the ADEA by encouraging employees to enforce the Act when it otherwise would not be economically feasible or when the EEOC will not or cannot act"); *id*. at 581 ("[A]llowing damages for pain and suffering [under the ADEA] . . . . would encourage employees to seek redress for violations . . . .").

> making victims whole, encouraging private enforcement, and deterring future violations of federal law.[153]

The Uniform Title VII/ADA-Based Damages Model embodies this identical rationale for remedial expansion, just in the ADEA context.

### *C. Advancing Federal Employment Discrimination Policy*

Finally, the Uniform Title VII/ADA-Based Damages Model fully advances federal anti-discrimination policy because it treats equally rather than disparately those with federally protected characteristics under Title VII, the ADA, and the ADEA.

As discussed above, the different remedial models of Title VII/ADA and the ADEA yield the Discriminatory Damages Paradox, whereby discrimination victims with certain federally protected characteristics are often monetarily favored over otherwise identically situated victims with other federally protected characteristics.[154] Consequently, the extent of a discrimination victim's monetary recovery often substantially depends on his or her federally protected characteristic: a victim with the "right" or "favored" characteristic can recover more; and a victim with the "wrong" or "disfavored" characteristic can recover less.

In this respect, the different remedial models can and often do create a "caste" or "class" system within federal employment discrimination law. Under the first principle of the Discriminatory Damages Paradox,[155] we saw discriminatory damages arise if the back-pay amount for identically situated Title VII/ADA and ADEA plaintiffs is LESS THAN the applicable Title VII/ADA monetary cap for compensatory and punitive damages. In that scenario, *Title VII/ADA plaintiffs* are elevated to a "superior" or "preferred" position, because they are eligible to receive *more* in damages and are thus monetarily favored. In contrast, *ADEA plaintiffs* are relegated to an "inferior" or "non-preferred" position because they receive *less* in damages and are thus monetarily discriminated against.

For example, in Situations #1, #2, and #3 from the Introduction, Tamara and Gary (our respective Title VII/ADA plaintiffs) hold the superior or preferred position in the caste system, as they are eligible to recover maximum damages of $305,000: $5,000 in lost wages or back pay, plus compensatory and punitive damages capped at $300,000. But, Scott (our ADEA plaintiff) holds the inferior or non-preferred position in the system, as he receives maximum damages of only $10,000: $5,000 in lost

153. H.R. REP. NO. 102–40, pt. 1, at 65.

154. *See supra* Part III (illustrating and discussing the Discriminatory Damages Paradox).

155. *See supra* Part III.B (discussing this first principle of the Discriminatory Damages Paradox).

wages or back pay, plus $5,000 in matching, dollar-for-dollar liquidated damages.[156]

Similarly, under the second principle of the Paradox,[157] the caste system also surfaces. There, we still saw discriminatory damages arise if the back-pay amount for identically situated Title VII/ADA and ADEA plaintiffs is MORE THAN the applicable Title VII/ADA monetary cap for compensatory and punitive damages. In that scenario, though, the favoritism is "reversed." *ADEA plaintiffs* are elevated to a "superior" or "preferred" position because they are eligible to receive *more* in damages and are thus monetarily favored. In contrast, *Title VII/ADA plaintiffs* are relegated to an "inferior" or "non-preferred" position, because they receive *less* in damages and are thus monetarily discriminated against.[158]

Congress did not intend any such caste system or preference for one federally protected characteristic over another under employment discrimination law.[159] Instead, Title VII, the ADA, and the ADEA share equally broad and comprehensive anti-discrimination purposes and policies. For example, as to Title VII, Congress highlighted its expansive desire to "meet a national need" by (a) "eradicating significant areas of discrimination on a nationwide basis"[160] and (b) broadly "eliminat[ing] discriminatory employment practices by business."[161] Similarly, when passing the Civil Rights Act of 1991,[162] Congress reiterated that it had "made clear [by enacting Title VII] that it intended to prohibit all invidious

156. *See supra* Part III.A (using Situations #1, #2, and #3 from the Introduction to illustrate the Discriminatory Damages Paradox).

157. *See supra* Part III.B (discussing this second principle of the Discriminatory Damages Paradox).

158. *Cf.* Craig Robert Senn, *Fixing Inconsistent Paternalism Under Federal Employment Discrimination Law*, 58 UCLA L. REV. 947, 1012–13 (2011) [hereinafter Senn, *Fixing Inconsistent Paternalism*] ("[A]llowing applicant-specific paternalism under the ADA's direct threat defense . . . creates a caste or class system within federal employment discrimination law: Those who are disabled are relegated to an inferior or nonpreferred position in the system because they have no legal protection from applicant-specific paternalism; but those who possess any other federally protected characteristic(s) are elevated to a superior or preferred position in the system because they have that legal protection."); Craig Robert Senn, *Perception Over Reality: Extending the ADA's Concept of "Regarded As" Protection Under Federal Employment Discrimination Law*, 36 FLA. ST. U. L. REV. 827, 859 (2009) [hereinafter Senn, *Perception Over Reality*] ("[J]urisdictions that refuse to recognize [the 'regarded as'] protection outside the ADA context (1) elevate only the ADA to the 'superior' or 'preferred' position and (2) relegate Title VII and the ADEA to the 'inferior' or 'non-preferred' position.").

159. *Cf.* Corbett, *supra* note 74, at 725 ("I do not think that Congress intended to make it more difficult to recover under one employment discrimination law . . . .")

160. H.R. REP. NO. 88–914, at 18 (1963), *reprinted in* 1964 U.S.C.C.A.N. 2391, 2393 (Comm. on the Judiciary).

161. *Id.* at 16.

162. *See supra* Part II.A (discussing the 1991 Act's expansion of monetary damages available under Title VII and the ADA and the related remedial purposes).

consideration of sex, race, color, religion, or national origin in employment decisions."[163]

As to the ADA and ADEA, Congress highlighted equally lofty and broad anti-discrimination goals. As to the ADA, Congress emphasized that the ADA's purpose was to create (a) "a clear and comprehensive national mandate" against disability-based discrimination and (b) "clear, strong, consistent, enforceable standards" to battle that discrimination.[164] As to the ADEA, Congress stated the comparably comprehensive goal and purpose of "outlin[ing] a national policy against discrimination in employment on account of age."[165] In fact, Congress reiterated this aim in the "statement of findings and purpose" within the ADEA itself, as it declared that one of the Act's purposes was "to prohibit arbitrary age discrimination in employment."[166]

While the different remedial models can and often do create this preference-based caste system that ignores the equally comprehensive anti-discrimination purposes of Title VII, the ADA, and the ADEA,[167] the Uniform Title VII/ADA-Based Damages Model abolishes it. By simply adopting consistent remedies for intentional discrimination under Title VII, the ADA, *and* the ADEA, this uniform model equally treats identically situated plaintiffs, regardless of the applicable statute or the amount of back pay at issue. So, Tamara, Gary, and Scott, in Situations #1 through #3 from the Introduction, would now each be eligible to receive the same maximum monetary damages ($305,000), with no one holding a "superior" or "preferred" (or "inferior" or "non-preferred") position in any caste system. Consequently, the Uniform Title VII/ADA-Based Damages Model furthers Congress's aim of comparably broad and comprehensive federal anti-discrimination policies.

* * *

As a final point, one could argue that the Uniform Title VII/ADA-Based Damages Model is not warranted because of "congressional

163. H.R. REP. NO. 102-40, pt. 2, at 17; *see also id*., pt. 1, at 14 (when passing the Civil Rights Act of 1991, broadly characterizing Title VII as a "mandate that discrimination on the basis of race, gender, national origin, or religion has no place in employment decisions").

164. 42 U.S.C. § 12101(b)(1)–(2) (2006).

165. H.R. REP. NO. 90-805, at 7 (1967), *reprinted in* 1967 U.S.C.C.A.N. 2213, 2220 (Comm. on Educ. and Labor).

166. 29 U.S.C. § 621(b) (2006).

167. *See* Senn, *Fixing Inconsistent Paternalism*, *supra* note 158, at 1012–14 (highlighting this and other Title VII, ADA, and ADEA language and legislative history and then arguing for a prohibition of applicant-specific paternalism under all three statutes based on their "equally broad and comprehensive antidiscrimination purposes and policies"); Senn, *Perception Over Reality*, *supra* note 158, at 855–59 (highlighting this and other Title VII, ADEA and ADA language and legislative history and then arguing for an extension of the ADA's "regarded as" protection to Title VII and the ADEA based on their "equally comprehensive goals and purposes" and "equally broad antidiscrimination policies").

preference for Title VII and the ADA." More specifically, some might suggest that Congress has, in practice, manifested a clear remedial preference for Title VII/ADA plaintiffs over ADEA plaintiffs by only adding supplemental remedies for the former group per the 1991 Act.

Aside from the fact that "the legislative history of the [1991 Act] is markedly silent regarding the ADEA" and its monetary damages,[168] this congressional preference argument—while tempting—is flawed for two other reasons. First, this argument assumes that Title VII's and the ADA's supplemental remedies universally translate to monetary preference or favoritism for those plaintiffs over ADEA plaintiffs. That assumption is flatly wrong. As illustrated by the tables and examples in Part III, the monetary preference or favoritism via the Discriminatory Damages Paradox does *not always* inure to the benefit of Title VII/ADA plaintiffs over ADEA plaintiffs. Sometimes it does; sometimes it does not.

Indeed, under the second principle of the Paradox, we saw those situations in which the monetary preference or favoritism inures to the benefit of *ADEA plaintiffs* over Title VII/ADA plaintiffs. Specifically, if the back-pay amount for identically situated Title VII/ADA and ADEA plaintiffs is MORE THAN the applicable Title VII/ADA monetary cap for compensatory and punitive damages, then *ADEA plaintiffs* are eligible to receive *more* in damages and are thus monetarily favored, while *Title VII/ADA plaintiffs* receive *less* in damages and are thus monetarily discriminated against.[169] Thus, the congressional preference argument fails to understand fully the Discriminatory Damages Paradox, and it erroneously overstates the frequency or consistency of any preference for Title VII and ADA plaintiffs.

Second, this congressional preference argument completely overlooks Congress's long-standing philosophy of protecting our older workers. Over the past forty-five years, Congress has manifested a so-called "Philosophy of Older Worker Protection" that seeks to protect fully—rather than relegate to some inferior, semi-protected status—our older workers and their employment-related interests. Of course, the first significant example of this philosophy was in 1967, when Congress enacted the ADEA. Both the ADEA's anti-discriminatory purpose and chosen remedial model reflect this protective philosophy. As to purpose, Congress was crystal-clear that its broad, protective mission for the ADEA included "outlin[ing] a national policy against discrimination in employment on account of age"[170] and

168. Eglit, *supra* note 34, at 1205 n.365.

169. *See supra* Part III.B (discussing this second principle of the Discriminatory Damages Paradox).

170. H.R. REP. NO. 90–805 (1967).

"prohibit[ing] arbitrary age discrimination in employment."[171] In fact, the Supreme Court, in its 2004 decision in *General Dynamics Land Systems, Inc. v. Cline*,[172] reiterated the openly protective philosophy at the heart of the ADEA: "The prefatory provisions and their legislative history make a case that we think is beyond reasonable doubt, that the ADEA was concerned to protect a relatively old worker from discrimination that works to the advantage of the relatively young."[173]

Similarly, as to the chosen remedial model, Congress's adoption of the FLSA-based (rather than Title VII-based) damages scheme for the ADEA reflects its philosophy of protecting our older workers.[174] While Congress could have easily incorporated or mirrored Title VII's remedial and enforcement scheme in the ADEA or just amended Title VII to include age as a protected characteristic, it opted for the FLSA-based model for protective reasons. In short, Congress believed that "FLSA remedies and procedures [could be] *more helpful* to age discrimination victims than are Title VII remedies and procedures."[175] Specifically, Congress was concerned that a shared Title VII-ADEA enforcement scheme may lead to "lengthy EEOC charge processing backlogs" and "the possibility that age discrimination enforcement would be neglected in favor of other forms of discrimination."[176] Seeking to protect older workers, Congress thus chose "[FLSA] rather than Title VII remedies and enforcement mechanisms because it wanted to take advantage of the existing [U.S.] Department of Labor bureaucracy."[177] Consequently, the ADEA—as evidenced by its purpose and chosen remedial model—is a prime example of Congress's protective philosophy towards our older workers.

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171. 29 U.S.C. § 621(b) (2006); *see supra* Part IV.C (discussing the equally broad anti-discrimination goals and purposes of the ADEA, Title VII, and the ADA). *Cf.* James, *supra* note 53, at 588 ("The enactment of the Age Discrimination in Employment Act evidences a strong concern for the plight of the older worker in America.").

172. 540 U.S. 581 (2004). In *Cline*, the Supreme Court held that the ADEA does *not* prohibit employment discrimination "favoring the old over the young," even if the disfavored "young" applicants or employees are forty years old or older and thus protected under the ADEA. *Id*. at 584.

173. *Id*. at 590–91; *see also* Hazen Paper Co. v. Biggins, 507 U.S. 604, 610 (1993) ("Congress'[s] promulgation of the ADEA was prompted by its concern that older workers were being deprived of employment on the basis of inaccurate and stigmatizing stereotypes.").

174. *See supra* notes 49–58 and accompanying text (discussing Congress's incorporation of the FLSA-based model).

175. Marshall, *supra* note 53, at 553 n.12 (emphasis added).

176. *Id*. at 552 n.12 (citing *Age Discrimination in Employment, 1967: Hearings on S. 830, S. 788 Before the Subcomm. on Labor and Public Welfare*, 90th Cong. 24, 29, 396 (1967)) (respectively, setting forth statements of Sen. Javits, Sen. Smathers, and an industry association).

177. *Id*.; *see also* S. REP. NO. 90–723, at 13 (1967) (statement of Sen. Javits) (noting that prior legislation to amend the FLSA to bar age-based employment discrimination "would have allowed utilization of the existing investigative and enforcement machinery of the Wage and Hour Division [of the U.S. Department of Labor] into which the functions of administration and enforcement of the ban on age discrimination could easily have been integrated"); *supra* note 58 (further discussing Congress's rationale for using the FLSA-based remedial model in the ADEA).

A second significant and more recent example of Congress's philosophy of older worker protection was in 1990, when it enacted the Older Worker Benefit Protection Act of 1990 (OWBPA).[178] Enacted *just one year before* the Civil Rights Act of 1991, Title II of the OWBPA amended the ADEA by setting forth specific requirements that must be satisfied before an older worker's waiver of an ADEA-based discrimination claim can be considered "knowing and voluntary" and thus valid.[179] Specifically, under the OWBPA, an ADEA claim waiver will not be viewed as knowing and voluntary "unless at a minimum"[180] the following seven requirements are met:

(1) the waiver is part of an employer–employee agreement "that is written in a manner calculated to be understood by" the employee;[181]
(2) "the waiver specifically refers to rights or claims arising under" the ADEA;[182]
(3) the waiver does not encompass rights or claims that arise after the date the waiver is signed;[183]
(4) the waiver is in exchange for consideration that is in addition to anything to which the employee is already entitled;[184]
(5) the employee "is advised in writing to consult with an attorney prior to executing the agreement";[185]

178. Older Workers Benefit Protection Act of 1990 (OWBPA), Pub. L. No. 101–433, 104 Stat. 978 (codified in the Age Discrimination in Employment Act of 1967 (ADEA), 29 U.S.C. §§ 621, 623, 626, 630 (2000)). Even prior to the OWBPA in 1990, Congress had enacted legislation that aimed to bolster the anti-discrimination protections for older workers. For example, in the Age Discrimination in Employment Act Amendments of 1986, Pub. L. No. 99–592, 100 Stat. 3342 (codified in the Age Discrimination in Employment Act of 1967 (ADEA), 29 U.S.C. §§ 623, 630, 631 (2000)), Congress generally "eliminated mandatory retirement altogether" and thus "sought to protect workers age 40 and above against discrimination in all types of employment actions, including forced retirement, hiring, promotions, and terms and conditions of employment." S. REP. NO. 108–265, at 60 (2004), 2004 WL 3044796 (May 14, 2004).

179. 29 U.S.C. § 626(f) (2006).

180. *Id*. § 626(f)(1).

181. *Id*. § 626(f)(1)(A). In support of this requirement, Congress explained: "[We] expect[] that courts will pay close attention to the language used in the agreement, to ensure that the language is readily understandable to individual employees regardless of their education or business experience." S. REP. NO. 101–263, at 32–33 (1990), *reprinted in* 1990 U.S.C.C.A.N. 1509, 1538; H.R. REP. NO. 101–664, at 51 (1990).

182. 29 U.S.C. § 626(f)(1)(B). In support of this requirement, Congress reasoned: "This degree of clarity and specificity increases the chances that individuals will know their rights upon execution of a waiver." S. REP. NO. 101–263, at 32; H.R. REP. NO. 101–664, at 51.

183. 29 U.S.C. § 626(f)(1)(C).

184. *Id*. § 626(f)(1)(D).

185. *Id*. § 626(f)(1)(E). In support of this requirement, Congress explained: "Given the complexity of issues involved . . . [,] it is vitally important that the employee understand the magnitude of what he or she is undertaking. Legal counsel is in the best position to help the individual reach that understanding." H.R. REP. NO. 101–664, at 52.

(6) the employee "is given a period of at least 21 days within which to consider the agreement";[186] and
(7) the agreement affords the employee at least seven days after signing the agreement to revoke it.[187]

Aside from the obvious use of "protection" in the Act's title, Congress further highlighted the OWBPA's protective mission by stating that it was "designed to protect older workers' rights and not to take them away."[188] Indeed, the Supreme Court, in its 1998 decision in *Oubre v. Entergy Operations, Inc.*,[189] reiterated the OWBPA's protective philosophy: "The policy of the OWBPA is likewise clear from its title: It is designed to protect the rights and benefits of older workers. The OWBPA implements Congress' policy via a strict, unqualified statutory stricture on waivers, and we are bound to take Congress at its word."[190]

Explaining its protective purpose for the OWBPA, Congress reasoned that older workers were more susceptible to (or at-risk for) being "manipulated or even coerced into signing away their ADEA protections."[191] According to Congress, this greater susceptibility of older workers existed for two reasons. First, Congress observed that these

186. 29 U.S.C. § 626(f)(1)(F)(i). In support of this requirement, Congress reasoned: "An employee who is terminated needs time . . . to learn about the conditions of termination, including any benefits being offered by the employer. Time also is necessary to locate and consult with an attorney if the employee wants to determine what legal rights may exist." S. REP. NO. 101–263, at 33; H.R. REP. NO. 101–664, at 51.

187. 29 U.S.C. § 626(f)(1)(G). When an ADEA waiver is to be signed by an employee as part of a larger termination program (i.e., a reduction-in-force) that is offered to a "group or class of employees," the OWBPA substitutes one requirement and adds another for the waiver to be valid. *Id*. § 626(f)(1)(F)(ii), (H). Specifically, the OWBPA: (a) substitutes a consideration or review period of "at least 45 days" (rather than "at least 21 days"); and (b) adds an eighth requirement that "the employer . . . inform[] the individual in writing in a manner calculated to be understood by the average individual eligible to participate [in the program], as to—(i) any class, unit, or group of individuals covered by such program, any eligibility factors for such program, and any time limits applicable to such program; and (ii) the job titles and ages of all individuals eligible or selected for the program, and the ages of all individuals in the same job classification or organizational unit who are not eligible or selected for the program." *Id*. §§ 626(f)(1)(F)(i)–(ii), 626(f)(1)(H)(i)–(ii).

Further, the OWBPA slightly lessens these seven requirements for any waiver of an ADEA claim that has already been filed with the EEOC or in court. *Id*. § 626(f)(2). In this situation, the OWBPA's seven requirements still apply, except that an employee (a) need only be provided "a reasonable period of time" (rather than a twenty-one day period) to review the agreement and (b) does not have the seven day right of revocation. *Id*. § 626(f)(2)(A)–(B).

188. H.R. REP. NO.101–664, at 54; *see also* S. REP. NO. 101–263, at 64, *reprinted in* 1990 U.S.C.C.A.N. 1509, 1569 ("[The OWBPA] is touted by its supporters as a vehicle to protect employees."); *id*. at 33 ("[G]roup termination and reduction programs . . . require additional protection for individuals from whom a waiver is sought.").

189. 522 U.S. 422 (1998). In *Oubre*, the Supreme Court held that a signed release that violates the OWBPA's waiver requirements is not ratified, validated, or both via the worker's retention of (and refusal to tender back) monetary consideration received for that release. *Id*. at 424, 428.

190. *Id*. at 427.

191. H.R. REP. NO. 101–664, at 24 (1990).

workers are often discharged as part of larger, less individualized reductions-in-force and thus "would not reasonably be expected to know or suspect that age may have played a role in the employer's decision, or that the program may be designed to remove older workers from the labor force."[192] Second, Congress believed that it was "reasonable to assume that many employees would be coerced by circumstances into accepting significant compromises" of their ADEA claims because they had typically modest annual incomes ("only $15,000.00"), difficulty obtaining a new job ("less than a 50/50 chance of ever finding new employment"), and "little or no savings."[193] Thus, the OWBPA—as illustrated by its title and prophylactic waiver requirements—is another clear example of Congress's protective philosophy towards our older, more "at-risk" workers.[194]

A third significant example of Congress's Philosophy of Older Worker Protection is the recently proposed "Protecting Older Workers Against Discrimination Act" (POWADA).[195] The POWADA is an offered legislative response to the Supreme Court's 2009 decision in *Gross v. FBL Financial Services, Inc*.[196] In *Gross*, the Court held that an ADEA plaintiff in a disparate treatment case "must prove, by a preponderance of the evidence, that age was *the 'but-for' cause* of the challenged adverse employment action."[197] In contrast, a Title VII plaintiff in a "mixed motive" disparate treatment case[198] is under a lighter evidentiary burden—he or she can establish discriminatory liability by merely proving that "race, color, religion, sex, or national origin was *a motivating factor* for any employment practice, even though other factors also motivated the

192. *Id*. at 22–23. *See also id*. at 54 ("Group termination and reduction programs stand in stark contrast to the individual separation . . . [because] employees affected by these programs have little or no basis to suspect that action is being taken based on their individual performance or characteristics.").

193. H.R. REP. NO. 101–664, at 23; *see* Senn, *Fixing Inconsistent Paternalism*, *supra* note 158, at 981–85 (generally discussing these OWBPA provisions and Congress's rationale for those requirements); Craig Robert Senn, *Knowing and Voluntary Waivers of Federal Employment Claims: Replacing the Totality of Circumstances Test with a "Waiver Certainty Test,"* 58 FLA. L. REV. 305, 337–41 (2006). *Cf*. S. REP. NO. 108–265(I), at 58, 2004 WL 3044796 (stating, in its legislative report entitled *Developments in Aging: 2001 and 2002*: "Duration of unemployment is also significantly longer among older workers. As a result, older workers are more likely to exhaust available unemployment insurance benefits and suffer economic hardships. This is especially true because many persons over 45 still have significant financial obligations."); Gen. Dynamics Land Sys., Inc. v. Cline, 540 U.S. 581, 589 (2004) ("The [ADEA's legislative] record thus reflects the common facts that an individual's chances to find and keep a job get worse over time; as between any two people, the younger is in the stronger position, the older more apt to be tagged with demeaning stereotype.").

194. For a general summary of other amendments to the ADEA from 1967 through 1998, see S. REP. NO. 108–265(I), ch. 4.A.3(A) (2004), 2004 WL 3044796.

195. S. 2189, 112th Cong. (2012); H.R. 3721, 111th Cong. (2009).

196. 129 S. Ct. 2343 (2009).

197. *Id*. at 2352 (emphasis added).

198. A "mixed-motive" case involves "no one 'true' motive behind the decision. Instead, the decision is a result of multiple factors, at least one of which is legitimate." Price Waterhouse v. Hopkins, 490 U.S. 228, 260 (1989) (White, J., concurring).

practice."[199] While recognizing this disparity, the Court explained that these different burdens were warranted because Title VII's language was "materially different"[200] from (and thus inapplicable to) that of the ADEA:

> Unlike Title VII, the ADEA's text does not provide that a plaintiff may establish discrimination by showing that age was simply a motivating factor.
>
> . . . .
>
> Our inquiry therefore must focus on the text of the ADEA to decide whether it authorizes a mixed-motives age discrimination claim. It does not.
>
> . . . .
>
> It follows, then, that under [the ADEA], the plaintiff retains the burden of persuasion to establish that age was the "but-for" cause of the employer's adverse action.[201]

Consequently, after *Gross*, "the mixed-motives analysis is not uniform across Title VII and the ADEA."[202] As proposed, the POWADA would undo *Gross*. Angling for uniform evidentiary burdens for ADEA and Title VII plaintiffs in disparate treatment cases,[203] the Act would amend the ADEA to allow plaintiffs to establish discriminatory liability by merely proving that "age . . . was *a motivating factor* for any [employment] practice, even though other factors also motivated the practice."[204]

Importantly, the POWADA clearly reflects a philosophy of protecting our older workers. Aside from yet another obvious use of *protection* in its title, the POWADA's provisions include repeated references to Congress's

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199. 42 U.S.C. § 2000e–2(m) (emphasis added); *Gross*, 129 S. Ct. at 2349 ("Title VII . . . explicitly authoriz[es] discrimination claims in which an improper consideration was 'a motivating factor' for an adverse employment decision."). If a Title VII plaintiff meets his or her "motivating factor" burden, then the employer in a mixed-motive case can still limit the available remedies by demonstrating that it "would have taken the same action in the absence of the impermissible motivating factor . . . ." 42 U.S.C. § 2000e–5(g)(2)(B). If established, this "same action" defense only allows the court to award declaratory and injunctive relief (as well as attorney's fees and costs), while foreclosing any monetary damages or orders for reinstatement, hiring, or promotion. *Id*.

200. *Gross*, 129 S. Ct. at 2348.

201. *Id*. at 2349–51.

202. Corbett, *supra* note 74, at 703.

203. H.R. 3721, 111th Cong. § 2(b) (2009) ("The purpose of this Act is to ensure that the standard for proving unlawful disparate treatment under the [ADEA] and other anti-discrimination . . . laws is no different than the standard for making such a proof under [T]itle VII of the Civil Rights Act of 1964 . . . .").

204. S. 2189, 112th Cong. § 3(a)(1) (2012) (emphasis added); *see also* H.R. 3721, 111th Cong. § 3 (2009) (allowing plaintiffs to establish discriminatory liability under the ADEA by merely proving that "an impermissible factor under [the ADEA] . . . was a motivating factor for the [employment] practice complained of, even if other factors also motivated that practice"); Corbett, *supra* note 74, at 728–29 ("The crux of the Act essentially makes the mixed-motives analysis of the 1991 Act applicable to the ADEA by inserting the language that amended Title VII into the ADEA." (footnote omitted)).

protective mission and purpose. For example, in the Act's "Findings and Purpose," Congress openly criticizes *Gross* as reducing the protection available for ADEA plaintiffs:

> The holding of the Supreme Court in Gross, by requiring proof that age was the "but for" cause of employment discrimination, has narrowed the scope of protection intended to be afforded by the Age Discrimination in Employment Act of 1967, thus eliminating protection for many individuals whom Congress intended to protect.[205]

Similarly, Congress explains that "[u]nless [it] takes action, victims of age discrimination will find it unduly difficult to prove their claims and . . . find their rights and remedies uncertain and unpredictable,"[206] and it further emphasizes that the POWADA would "restore and reaffirm established causation standards . . . to ensure victims of unlawful [age] discrimination . . . are able to enforce their rights."[207] Consequently, the recently proposed POWADA—as evidenced by its title and aim to fix the post-*Gross* landscape for ADEA plaintiffs—is yet another clear example of Congress's protective philosophy towards our older workers.

When viewed in this context of the past forty-five years, any argument that the Uniform Title VII/ADA-Based Damages Model is not warranted because Congress has, in practice, manifested a clear remedial preference for Title VII/ADA plaintiffs over ADEA plaintiffs, falls flat. This congressional preference argument simply overlooks Congress's well-established philosophy of older worker protection. For almost five decades now, Congress has aimed to protect our older, more "at-risk" and susceptible workers—in 1967 with the ADEA, in the 1990s with the OWBPA, and as recently as today with the proposed POWADA. The Uniform Title VII/ADA-Based Damages Model is simply another brick in that proverbial wall.

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205. H.R. 3721, 111th Cong. § 2(a)(4) (2009); *see also* S. 2189, 112th Cong. § 2(a)(6) (2012) ("The Gross decision has significantly narrowed the scope of protections intended to be afforded by the ADEA."); *id.* § 2(a)(4)(D) ("Congress disagrees with the Supreme Court's interpretation, in Gross, of the ADEA and with the reasoning underlying the decision, specifically language in which the Supreme Court . . . held that mixed motive claims were unavailable under the ADEA . . . .").

206. H.R. 3721, 111th Cong. § 2(a)(6) (2009); *see also* Corbett, *supra* note 74, at 709 ("*Gross* is the most significant case reducing ADEA protection by making it more difficult for plaintiffs to recover in the most common type of case—individual disparate treatment.").

207. S. 2189, 112th Cong. § 2(a)(7) (2012); *see also id.* § 2(b)(1) (noting the POWADA's purpose to "restore the availability of mixed motive claims [under the ADEA] and to reject the requirements the Supreme Court enunciated in Gross v. FBL Financial Services, Inc. . . . that a complaining party always bears the burden of proving that a protected characteristic . . . was the 'but for' cause of an unlawful employment practice").

## IV. CONCLUSION

The differences in the remedial models of our federal employment discrimination laws seem so subtle. The Title VII/ADA-based model awards victims of intentional discrimination back pay or lost wages plus compensatory and punitive damages, subject to statutory caps ranging from $50,000 to $300,000. The ADEA-based model awards victims of intentional discrimination back pay or lost wages plus equal, dollar-for-dollar liquidated damages. While these remedial differences may look innocent, they create the Discriminatory Damages Paradox, whereby victims with certain federally protected characteristics can be and often are monetarily favored over those with other federally protected characteristics.

Solving this Paradox, the Uniform Title VII/ADA-Based Damages Model would end this discrimination by our antidiscrimination laws. This uniform model is warranted because (a) it embraces Congress's philosophy of remedial parity dating back over twenty years, (b) it better serves the ADEA's remedial purposes and interests, and (c) it serves to fully advance federal employment discrimination policy. Antidiscrimination laws that discriminate? It does not have to be that way. In determining available monetary damages, discrimination victims can and should possess equally valued federally protected characteristics, rather than "right" versus "wrong" (or "favored" versus "disfavored") characteristics.