

Note

KEEPING THE “CIVIL” IN CIVIL LITIGATION: THE NEED FOR A PUNITIVE DAMAGE- ACTUAL DAMAGE LINK IN TITLE VII CASES

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INTRODUCTION

Most jurisdictions subscribe to the common law rule that a plaintiff must be awarded actual damages before recovering punitive damages.¹ This rule stems from the view that without a finding of actual damages, there effectively exists no cause of action to support a punitive damage award.² Moreover, a plaintiff who is unable to show damages worthy of compensation is seen by the common law as undeserving of the potential windfall provided by punitive damages.³

Despite the desirability of the common law rule, Congress forsook it in drafting civil rights legislation, most particularly Title VII.⁴ When Congress amended Title VII through the enactment of § 1981a in 1991,⁵ it did not explicitly require that workplace discrimination plaintiffs be awarded actual damages before receiving punitive dam-

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1. PROSSER AND KEETON ON THE LAW OF TORTS § 2, at 14 (W. Page Keeton et al. eds., 5th ed. 1984) [hereinafter PROSSER AND KEETON]; Richard C. Tinney, Annotation, *Sufficiency of Showing of Actual Damages to Support Award of Punitive Damages—Modern Cases*, 40 A.L.R.4th 11, 18–19 (1985).

2. PROSSER AND KEETON, *supra* note 1, § 2, at 14 (noting that, if the punitive damage–actual damage link is not satisfied, “there is no cause of action at all, and nothing to support the award”).

3. *See, e.g.*, Schippel v. Norton, 16 P. 804, 807 (Kan. 1888) (noting that a plaintiff who has suffered no actual damages “has no right to maintain an action merely to inflict punishment upon some supposed wrong-doer”); Hoagland v. Forest Park Highlands Amusement Co., 70 S.W. 878, 880 (Mo. 1902) (same).

4. Title VII of the Civil Rights Act of 1964 prohibits discrimination in the employment context on the basis of race, color, religion, sex, or national origin. 42 U.S.C. § 2000e-2 (1994).

5. Civil Rights Act of 1991, Pub. L. No. 102-166, § 102, 105 Stat. 1071, 1072–74.

age awards. This omission has resulted in some trial courts permitting juries to award punitive damages, sometimes running into the hundreds of thousands of dollars, in Title VII cases when neither compensatory nor nominal damages have been found.⁶ Some reviewing courts have upheld these awards by reasoning that mere liability under Title VII is all that is required to support a punitive damage award.⁷ Other courts have held steadfast to the common law rule by requiring that a plaintiff be awarded either compensatory or nominal damages before receiving an award of punitive damages.⁸ The circuit split has resulted from a disagreement not only as to the propriety of the actual damage–punitive damage link, but also as to whether a prevailing plaintiff is presumptively injured when a defendant is found liable under Title VII.

Although neither the plain text of § 1981a nor federal common law explicitly requires an actual damage–punitive damage link, such a link is necessary to maintain the integrity of punitive damage awards in Title VII cases. Courts that have circumvented this link by requiring only a Title VII violation, but not compensatory or even nominal damages before an award of punitive damages, run the risk of converting civil actions into quasi-criminal proceedings, raising concerns of fundamental fairness and constitutional due process. In Part I, I discuss the basic rationale underlying the common law rule that actual damages be a prerequisite to an award of punitive damages, noting that this rule is consistent with the separate functions of the civil and criminal justice systems, as well as the contemporary justifications for

6. *E.g.*, *Kerr-Selgas v. Am. Airlines, Inc.*, 69 F.3d 1205, 1214 (1st Cir. 1995) (reviewing a trial court Title VII punitive damage award of \$300,000 that was unsupported by either actual or nominal damages); *Cush-Crawford v. Adchem Corp.*, 94 F. Supp. 2d 294, 299 (E.D.N.Y. 2000) (holding, in affirming a jury's finding of zero actual damages and \$100,000 punitive damages, "that there is no requirement that an award of punitive damages under Title VII be accompanied by an award of compensatory or nominal damages").

7. *E.g.*, *Cush-Crawford v. Adchem Corp.*, 271 F.3d 352, 359 (2d Cir. 2001) (holding that "in Title VII cases, where the factfinder has found in a plaintiff's favor that the defendant engaged in prohibited discrimination, punitive damages may be awarded . . . regardless of whether the plaintiff also receives an award of compensatory or nominal damages"); *Timm v. Progressive Steel Treating, Inc.*, 137 F.3d 1008, 1011 (7th Cir. 1998) (upholding a jury award of punitive damages without accompanying compensatory damages to the plaintiff, and noting in particular that the jury instructions did not invite jurors "to award punitive damages even if they believed that Timm had not been the victim of sex discrimination").

8. *Kerr-Selgas*, 69 F.3d at 1215 (concluding that a liability verdict under Title VII does not compel an award of nominal damages). In cases involving punitive damages under the federal Fair Housing Act, 42 U.S.C. § 3613(c) (1994), a provision very similar to § 1981a(b)(1), both the Fourth and Fifth Circuits have found that punitive damages must be accompanied by either compensatory or nominal damages. *See infra* notes 93–94 and accompanying text.

punitive damages. I also show that a failure to satisfy the actual damage–punitive damage link renders a punitive damage award constitutionally “excessive” under the Supreme Court’s decision in *BMW of North America, Inc. v. Gore*.⁹ In Part II, I critique the reasoning of those courts that have deemed the actual damage–punitive damage link satisfied by presuming injury upon a violation of Title VII. I conclude that this is an inadequate response to the concerns underlying the common law rule, and that these courts have overstepped their bounds by making such a bold and far-reaching presumption.

I. THE NEED FOR AN ACTUAL DAMAGE–PUNITIVE DAMAGE LINK

A majority of states require that a punitive damage award be predicated upon actual damages, whether compensatory or nominal.¹⁰ Congress did not explicitly adopt this rule in drafting civil rights legislation, including Title VII. Some courts have concluded simply that as a matter of federal common law, it is unnecessary to find *any* damages, whether compensatory or nominal, before permitting a punitive damage award in a Title VII action.¹¹ Such a conclusion not only overlooks the important justifications behind the common law rule, it may in fact deprive defendants of their constitutional rights of due process.

A. *Origins of the Common Law Rule*

The common law requirement that punitive damages be accompanied by an award of actual damages has its genesis in two fundamental foundations of the law that are intimately tied together: the separate functions of civil and criminal law,¹² and the punishment and deterrence justifications for punitive damages.¹³

9. 517 U.S. 559 (1996).

10. See *supra* note 1 and accompanying text.

11. *Cush-Crawford*, 271 F.3d at 359; *Timm*, 137 F.3d at 1010; *Fountila v. Carter*, 571 F.2d 487, 492 (9th Cir. 1978) (noting in dicta “that a finding of actual damages is not a condition to the award of punitive damages under the Civil Rights Act of 1968”) (citing *Rogers v. Loether*, 467 F.2d 1110, 1112 n.4 (7th Cir. 1972), *aff’d sub nom. Curtis v. Loether*, 415 U.S. 189 (1974)); *Basista v. Weir*, 340 F.2d 74, 87–88 (3d Cir. 1965) (holding that federal common law does not prevent an award of punitive damages in a civil rights case where no actual damages are found).

12. See, e.g., *Freese v. Tripp*, 70 Ill. 496, 501 (1873) (noting that “[p]utting money in the plaintiff’s pocket would be no satisfaction to the public for a violated penal statute”); *Hoagland v. Forest Park Highlands Amusement Co.*, 70 S.W. 878, 880 (Mo. 1902) (noting that a civil plaintiff cannot “maintain an action merely to inflict punishment upon some supposed wrongdoer”).

13. See, e.g., *Schippel v. Norton*, 16 P. 804, 807 (Kan. 1888) (noting that punitive damages are given “upon the theory that the defendant deserves punishment for his wrongful acts”);

Traditionally, criminal law is seen as the area of law primarily responsible for punishing deviant conduct, whereas the civil system is the avenue by which plaintiffs are compensated for their losses.¹⁴ In criminal law, “there is emphasis on a bad mind,” but “[w]ith torts the emphasis is more on ‘the adjustment of the conflicting interests of the individuals to achieve a desirable social result,’ with morality taking on less importance.”¹⁵ The exception to this general rule, and perhaps the sole bridge linking civil law to criminal law, is punitive damages.¹⁶ These damages originally were sanctioned both as a means of punishing particularly reprehensible conduct on the part of defendants, and of compensating plaintiffs for interests either not entitled to legal protection under the common law or not easily calculable.¹⁷ Today, however, the Supreme Court characterizes punitive damages solely as serving the twin aims of punishment and deterrence,¹⁸ the two goals most commonly associated with criminal law.¹⁹

Nonetheless, at least in the minds of supporters, punitive damages serve a key function. For reprehensible conduct that otherwise might escape punishment through the criminal law, either because the legislature has not found such conduct worthy of criminalizing or because of a lack of prosecutorial resources, punitive damages fill the gaps created by the criminal law’s shortcomings.²⁰ Consistent with this view, the Supreme Court has ruled that the Fourteenth Amendment’s due process right of notice, normally associated with criminal law,

Zedd v. Jenkins, 74 S.E.2d 791, 793 (Va. 1953) (reviewing the rationale for the common law requirement that actual damages be a prerequisite to an award of punitive damages, and concluding that compensatory damages are awarded as “compensation for [a] pecuniary loss,” while punitive damages are awarded “as a punishment to defendant”).

14. WAYNE R. LA FAVE & AUSTIN W. SCOTT, JR., HANDBOOK ON CRIMINAL LAW § 3, at 10–14 (1972).

15. *Id.* § 3, at 11.

16. PROSSER AND KEETON, *supra* note 1, § 2, at 9 (noting in regard to punitive damages that “[i]n one rather anomalous respect . . . the ideas underlying the criminal law have invaded the field of torts”).

17. 1 JOHN J. KIRCHER & CHRISTINE M. WISEMAN, PUNITIVE DAMAGES: LAW AND PRACTICE § 2:02, at 2-5 (2d ed. 2000).

18. Pac. Mut. Life Ins. Co. v. Haslip, 499 U.S. 1, 22 (1991); Gertz v. Robert Welch, Inc., 418 U.S. 323, 350 (1974).

19. In 1877, Chief Justice Ryan of the Wisconsin Supreme Court stated: “It is difficult on principle to understand why, when the sufferer by a tort has been fully compensated for his suffering he should recover anything more.” Bass v. Chi. & Nw. Ry. Co., 42 Wis. 654, 672 (1877) (Ryan, C.J., concurring).

20. 1 KIRCHER & WISEMAN, *supra* note 17, § 2:20, at 2-6 (stating that punitive damages “afford the means to punish, through the civil law, conduct which might otherwise escape punishment through the criminal law”).

must be satisfied when punitive damages are assessed against a defendant.²¹

Even with this procedural safeguard, the use of punitive damages in the civil law undoubtedly raises questions concerning a defendant's constitutional rights, as well as fundamental concerns of fairness.²² First, unlike criminal statutes, which have their maximum penalties fixed by statute, there is no limit to the amount of punitive damages that a jury may impose, except in the rare instance they are found "excessive" by the court.²³ In addition, the technical distinctions between civil and criminal trials, including the disparate burdens of proof and the ability of a criminal defendant to raise the right against self-incrimination, caution against inflicting punishment through the civil justice system.²⁴ Finally, with respect to Title VII actions, some commentators stress the unfairness of extracting punitive damages from employers whose liability often rests not on their own "reprehensible" actions, but rather for the improper acts of their employees under respondeat superior.²⁵

Inherent in the common law requirement of an actual-punitive damage link is the principle that the civil and criminal justice systems, to the extent possible, should be kept separate.²⁶ Although punitive damages add elements of punishment and deterrence—aspects of criminal law—to the civil system, a civil cause of action must foremost allege an injury to the plaintiff.²⁷ Civil plaintiffs must enter the courthouse seeking compensation and the vindication of their rights first, with punitive damages as a secondary aspect of the claim. By awarding punitive damages only when they are "incident" to an action for

21. *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 562 (1996) ("The Due Process Clause of the Fourteenth Amendment prohibits a State from imposing a 'grossly excessive' punishment on a tortfeasor.") (citing *TXO Prod. Corp. v. Alliance Res. Corp.*, 509 U.S. 443, 454 (1993)).

22. Kimberly A. Pace, *Recalibrating the Scales of Justice Through National Punitive Damage Reform*, 46 AM. U. L. REV. 1573, 1591 (1997) ("As the states have recognized, procedural safeguards are needed to protect defendants from the wrongful imposition of these quasi-criminal sanctions and to protect the integrity of the legal system.").

23. 1 KIRCHER & WISEMAN, *supra* note 17, § 2:12, at 2-28.

24. *Id.* § 2:12, at 2-29.

25. *Id.* § 2:04, at 2-11 ("A weakness in the argument, that punitive damages serve as a necessary civil punishment, becomes evident when consideration is given to the policy of allowing vicarious liability for those damages.").

26. *See supra* note 12 and accompanying text.

27. *Schippel v. Norton*, 16 P. 804, 807 (Kan. 1888) (stating that punitive damages "are never more than incidents to some action for real and substantial damages suffered by the plaintiff; and, when given, they are given only in addition to the real and actual damages suffered and recovered by him").

“real and substantial damages,”²⁸ and not in situations in which the jury is unable to conclude that the plaintiff has been harmed, the common law rule prevents unharmed plaintiffs from maintaining actions merely as a way of extracting fines from public wrongdoers.

The common law requirement that a punitive damage award be accompanied by actual damages grew out of a concern that the civil law might be used as a replacement for criminal law.²⁹ The rule stems from the view that although a plaintiff has the right to use the civil justice system to seek compensation for a loss, he never has the “right to maintain an action merely to inflict punishment upon some supposed wrongdoer.”³⁰ And the common law view is that where a jury does not award a plaintiff actual damages or at least nominal damages signifying the invasion of a legal right, there is no cause of action at all, and the plaintiff is not entitled to recover punitive damages.³¹

B. *The Role of the Common Law Rule*

By ensuring that the civil justice system remains committed primarily to compensation and not punishment, the common law rule protects both fundamental notions of fairness and the constitutional rights of civil defendants. Once a jury concludes that a plaintiff is not entitled to even nominal damages, any further proceeding against the defendant becomes quasi-criminal in nature since the issue of punitive damages is no longer subsumed in the underlying civil cause of action. That is, a case that began as a bona fide civil proceeding with an alleged injury in fact is transformed into a quasi-criminal proceeding once damages are refused, with the unharmed plaintiff taking the place of the state. Despite the criminal nature of such a proceeding, a defendant facing the prospect of punitive damages lacks the constitutional right against self-incrimination.³² In addition, the civil plaintiff need not meet the beyond a reasonable doubt standard to get

28. *Id.*

29. *See* Hoagland v. Forest Park Highlands Amusement Co., 70 S.W. 878, 880 (Mo. 1902) (noting that a plaintiff cannot use the civil justice system as a way of punishing tortfeasors, but rather must use it as a means of obtaining compensation for losses).

30. *Id.*

31. *See, e.g.*, Freese v. Tripp, 70 Ill. 496, 500–01 (1873) (holding that a plaintiff cannot maintain an action to recover only punitive damages and that punitive damages may be awarded only if compensatory damages have been awarded); *Schippel*, 16 P. at 807 (same); *Gilmore v. Mathews*, 67 Me. 517, 522 (1877) (same); *Hoagland*, 70 S.W. at 880 (same); *Zedd v. Jenkins*, 74 S.E.2d 791, 793 (Va. 1953) (same).

32. 1 KIRCHER & WISEMAN, *supra* note 17, § 2:12, at 2-29.

a “conviction.”³³ For these reasons,³⁴ the common law prudently cautions against blurring the line between civil and criminal law.

Additional factors favor the common law rule. First, permitting an unharmed plaintiff to collect private fines against a defendant is unfair, particularly when the Supreme Court has ruled that a plaintiff never has an independent right to recover punitive damages.³⁵ It is hard to see how society’s interests can be furthered when the unharmed plaintiff, and not the state, is the award recipient.³⁶ Not only is the plaintiff without standing to bring a merely punitive action against the defendant,³⁷ but allowing recovery without harm also may overdeter certain types of conduct.³⁸ Without a requirement that actual damages be demonstrated, the potential windfall provided by punitive damages would give private “prosecutors” a strong incentive to roam the countryside looking for wrongdoers.³⁹ In fact, concerns with overdetering certain types of conduct, as well as reservations about lining the pockets of undeserving plaintiffs, are central reasons for the enactment of many state statutes that have reformed procedures for

33. *Id.*

34. *Id.*

35. *Smith v. Wade*, 461 U.S. 30, 52 (1983) (noting that punitive damages are “never awarded as of right, no matter how egregious the defendant’s conduct”).

36. *See* RESTATEMENT (SECOND) OF TORTS § 908 cmt. a (1979):

Although the purposes are the same, the effect of a civil judgment for punitive damages is not the same at [sic] that of a fine imposed after a conviction of a crime, since the successful plaintiff and not the state is entitled to the money required to be paid by the defendant.

37. *See id.* cmt. b (noting that, before damages may be awarded, “a cause of action for the particular tort *must* exist”) (emphasis added); *supra* notes 29–30 and accompanying text.

38. Dorsey D. Ellis, Jr., *Fairness and Efficiency in the Law of Punitive Damages*, 56 S. CAL. L. REV. 1, 57 (1982) (noting that potential liability for uncertain amounts of punitive damages may lead to both under- and overdeterrence); W. Kip Viscusi et al., *Deterring Inefficient Pharmaceutical Litigation: An Economic Rationale for the FDA Regulatory Compliance Defense*, 24 SETON HALL L. REV. 1437, 1455 (1994) (“[T]here can be great difficulty in determining the appropriate additional [punitive damage] award necessary to create appropriate deterrence, but not over-deterrence.”).

39. Of course, as Judge Frank H. Easterbrook pointed out in *Timm v. Progressive Steel Treating, Inc.*, 137 F.3d 1008 (7th Cir. 1998), a plaintiff still must have standing before bringing a Title VII action. *Id.* at 1010. Thus, these private prosecutors still would have to allege an injury in fact before bringing a civil cause of action against a wrongdoer. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992). Nevertheless, there is a void between a properly pleaded allegation of injury and a jury’s determination of whether the injury actually occurred at the behest of the defendant. If these two were one and the same, a plaintiff would never have to demonstrate injury before recovering actual damages.

awarding punitive damages.⁴⁰ Lastly, some commentators suggest that there is really no societal interest in deterring conduct that does not result in compensable damage.⁴¹ Consistent with this view, some states require that punitive damages be accompanied by compensatory damages, and not just nominal damages.⁴²

C. Constitutionally Excessive Punitive Damage Awards

An examination of punitive damage awards that are unsupported by actual damages should begin with consideration of the additional common law rule that requires a punitive damage award to bear a “reasonable relationship” to the amount of actual damages.⁴³ Without an award of actual damages, one cannot say logically that there is a “ratio” or “reasonable relationship” between the two. Although it is probably a stretch to say that there is a “reasonable relationship” between a sizable punitive damage award and nominal damages of one dollar, *any* punitive damage award when there are no actual damages results in an infinite ratio that is inherently unreasonable.⁴⁴

40. Matthew J. Klaben, Note, *Split-Recovery Statutes: The Interplay of the Takings and Excessive Fines Clauses*, 80 CORNELL L. REV. 104, 118 (1994) (discussing the deterrence and anti-windfall rationales of “split-recovery” punitive damage reform measures that have been adopted by several states).

41. Robert W. Pritchard, Comment, *The Due Process Implications of Ohio’s Punitive Damages Law—A Change Must Be Made*, 19 U. DAYTON L. REV. 1207, 1228 (1994) (claiming that the rationale for requiring actual damages as a prerequisite for punitive damages is that “[s]ociety does not need to punish or deter behavior that results in no compensable harm”).

42. *E.g.*, *SK Hand Tool Corp. v. Dresser Indus., Inc.*, 672 N.E.2d 341, 349–50 (Ill. App. Ct. 1996) (stating that punitive damages may be awarded only where compensatory damages are also awarded); *Newton v. Yates*, 353 N.E.2d 485, 491 (Ind. Ct. App. 1976) (noting that in Indiana, a punitive damage award must be accompanied by compensatory damages). Whether this rule is tenable is irrelevant to the claim of this Note that punitive damage awards should be accompanied by compensatory *or* nominal damages.

43. *See, e.g.*, *Magma Copper Co. v. Shuster*, 575 P.2d 350, 352–53 (Ariz. Ct. App. 1977) (finding that a punitive damage award of \$30,000 that was supported by only one dollar in nominal damages was “excessive” on the ground that there was no “reasonable relationship” between the awards). In *BMW of North America, Inc. v. Gore*, 517 U.S. 559 (1996), the Supreme Court cited several nineteenth century cases in support of the common law rule that punitive damages must bear a “reasonable relationship” to actual damages. *Id.* at 580 n.32 (citing, *inter alia*, *Saunders v. Mullen*, 24 N.W. 529, 529 (Iowa 1885) (“When the actual damages are so small, the amount allowed as exemplary damages should not be so large.”); *Grant v. McDonogh*, 7 La. Ann. 447, 448 (1852) (“[E]xemplary damages allowed should bear some proportion to the real damage sustained . . .”).

44. *See Newton*, 353 N.E.2d at 491 (stating that because Indiana courts follow the rule that punitive damages must bear some reasonable relationship to compensatory damages, it was “but a short and logical step” to require compensatory damages as a prerequisite to any award of punitive damages). Still, it might seem extreme and somewhat inflexible to label all punitive damage awards predicated on zero actual damages as unconstitutionally “excessive.” For exam-

The common law's requirement of a "reasonable relationship" between punitive and actual damages traditionally has served as a check on excessive punitive damage awards,⁴⁵ and was adopted by the Supreme Court in *BMW of North America, Inc. v. Gore*⁴⁶ as one of the three "guideposts" for evaluating the constitutionality of punitive damage awards.⁴⁷ In *BMW*, the Supreme Court labeled the ratio of a punitive damage award to the actual harm inflicted on the plaintiff as the "most commonly cited indicium" of whether a punitive damage award is unreasonable or excessive.⁴⁸ As a slight variation on this rule, the *BMW* Court reiterated its previous holding in *TXO Production Corp. v. Alliance Resources Corp.*⁴⁹ that there must be a "reasonable relationship between the punitive damages award and the harm likely to result from the defendant's conduct as well as the harm that actually has occurred."⁵⁰ Consistent with this idea, several states have sought to curb overly zealous punitive damage awards by prescribing maximum ratios of punitive damages to actual damages.⁵¹ Such rules comport with the common law of nearly all states that prohibits punitive damage awards absent actual damages.

Although the Supreme Court rejected a bright-line mathematical approach to determining a constitutionally permissible actual damage–punitive damage ratio,⁵² the Court nevertheless has evaluated the "excessiveness" of punitive damage awards in the context of mathe-

ple, one could concoct an unlikely situation where zero dollars are awarded as actual damages, but the jury finds punitive damages of one dollar. Although perhaps technically "excessive," such an award almost certainly does not meet the type of "excessiveness" that the Supreme Court sought to roll back in *BMW*. See *BMW*, 517 U.S. at 585 (noting that a punitive damage award of \$2 million cannot be legitimized in the particular case where it is "tantamount to a severe criminal penalty"). One dollar in punitive damages almost surely does not amount to a "severe" criminal penalty.

45. PROSSER AND KEETON, *supra* note 1, § 2, at 14–15.

46. 517 U.S. 559 (1996).

47. The other two guideposts set forth by the *BMW* Court to evaluate the constitutionality of punitive damage awards are the "degree of reprehensibility" of the defendant's conduct, *id.* at 575–80, and the "sanctions for comparable misconduct," *id.* at 583–85.

48. *Id.* at 580.

49. 509 U.S. 443, 454 (1993).

50. *BMW*, 517 U.S. at 581 (emphasis omitted) (quoting *TXO Prod. Corp.*, 509 U.S. at 460).

51. *E.g.*, COLO. REV. STAT. §§ 13-21-102(1)(a), (3) (2001) (stating that punitive damage awards are capped at the amount of actual damages); CONN. GEN. STAT. § 52-240b (1991) (capping punitive damages at double the amount of compensatory damages in product liability cases); FLA. ANN. STAT. §§ 768.73(1)(a), (b) (West 1997) (capping, for most cases, punitive damages at three times compensatory damages).

52. *BMW*, 517 U.S. at 582 ("[W]e have consistently rejected the notion that the constitutional line is marked by a simple mathematical formula . . .").

matical ratios.⁵³ There is no precedent for upholding an infinite ratio of punitive damages to actual damages under the *BMW* standard.⁵⁴ If a court were to do so, it would be faced with the insurmountable task of defining what constitutes “reasonable” punitive damages when zero actual damages are found. Indeed, punitive damage awards unsupported by actual damages appear on their face to violate the common law rule that punitive damages must bear a “reasonable relationship” to compensatory damages.⁵⁵

This apparent simplicity is complicated by the *BMW* Court’s holding that the proper inquiry is whether a “reasonable relationship” exists not only between the punitive damage award and the actual harm that has occurred, but also between the punitive damage award and the harm likely to result from the defendant’s conduct.⁵⁶ But without even an award of nominal damages, it is impossible to calculate this potential harm. Courts that have reviewed punitive damage awards in Title VII cases often have looked beyond the ratio of punitive damages to actual damages, instead focusing on language from *BMW* indicating that a “higher” ratio may be appropriate where “a particularly egregious act has resulted in only a small amount of economic damages” or where “the monetary value of noneconomic harm might have been difficult to determine.”⁵⁷ As an extreme example, in one Title VII case the Sixth Circuit applied the *BMW* ratio standard to a punitive damage award of \$300,000 that was based upon \$1 in compensatory damages.⁵⁸ In affirming the award, the appeals court found that the punitive damage–actual damage ratio of 300,000:1, blistering when compared to the 500:1 ratio that the *BMW* Court described as sufficient to “raise a suspicious judicial eyebrow,”⁵⁹ was jus-

53. *Id.* (“The \$2 million in punitive damages awarded to Dr. Gore by the Alabama Supreme Court is 500 times the amount of his actual harm as determined by the jury.”). In *BMW*, the Court noted that a punitive damage–actual damage ratio of 500:1 must surely “raise a suspicious judicial eyebrow.” *Id.* at 583 (quoting *TXO*, 509 U.S. at 481 (O’Connor, J., dissenting)).

54. The requirement that punitive damages bear a “reasonable relationship” to the actual harm that has occurred or the harm likely to result if the defendant’s conduct was to continue unchecked cannot be satisfied, by definition, if the ratio of punitive damages to actual damages is “infinite.” Surely, this cannot be the case if a ratio of 500:1 is sufficient to “raise a suspicious judicial eyebrow.” *Id.*

55. *Id.* at 580.

56. *Id.* at 581.

57. *Id.* at 582.

58. *EEOC v. Harbert-Yeargin, Inc.*, 266 F.3d 498, 515 (6th Cir. 2001).

59. *BMW*, 517 U.S. at 583 (quoting *TXO Prod. Corp. v. Alliance Res. Corp.*, 509 U.S. 443, 481 (1998) (O’Connor, J., dissenting)).

tified simply to “support the deterrent purpose of Title VII.”⁶⁰ But a deterrent purpose is not enough to legitimize a punitive damage award when there are no actual damages.⁶¹

Although the Supreme Court has endorsed punitive damage–actual damage ratios of several hundred to one,⁶² it has never legitimized an infinite ratio. Where there are no actual damages, it is impossible to quantify the harm that “may have resulted” had the defendant’s harassing conduct continued.⁶³ Nor can it be said that the damages from “personal injury” or other noneconomic harm are difficult to measure; without even nominal damages to signify the invasion of a right, they simply cannot be said to exist. As a result, punitive damage awards unsupported by actual damages cannot be squared with the common law rule, as adopted by the Supreme Court in *BMW*, requiring a “reasonable relationship” between punitive and actual damages.

II. CIRCUMVENTING THE COMMON LAW LINK

By requiring that a plaintiff first receive either actual or nominal damages signifying injury, the common law rule ensures that only truly harmed plaintiffs have the opportunity to recover punitive damages.⁶⁴ In a sense, all courts uphold part of the common law link by requiring that the trier of fact first find liability on the part of the defendant before moving to the issue of punitive damages. But some federal courts have circumvented the common law rule and its rationale by presuming the existence of injury upon a violation of Title VII.⁶⁵ Precedent does not support such a presumption, which is

60. *Harbert-Yeargin*, 266 F.3d at 515.

61. *See supra* Part I.A.

62. *See, e.g., TXO*, 509 U.S. at 459 (affirming a punitive damage–actual damage ratio of over 526:1).

63. One answer may be that Congress placed a cap on the amount of combined compensatory and punitive damages that an employer is potentially liable for in a Title VII suit. In fact, 42 U.S.C. § 1981a(b)(3)(A)–(D) (1994) staircases this potential amount based upon the employer’s size, as determined by its number of employees. For example, an employer of five hundred persons or more is potentially liable for up to \$300,000 in combined compensatory and punitive damages. *Id.* But to say, in all cases, that this statutory cap represents the harm likely to result from a particular defendant’s conduct would be to render the second prong of the *BMW* test nugatory in Title VII actions.

64. *See supra* notes 27–31 and accompanying text.

65. *See* *Cush-Crawford v. Adchem Corp.*, 271 F.3d 352, 359 (2d Cir. 2001) (holding that in Title VII cases, “where the factfinder has found in a plaintiff’s favor that the defendant engaged in the prohibited discrimination, punitive damages may be awarded . . . regardless whether the

equivalent to an automatic award of nominal damages that would technically satisfy the common law link,⁶⁶ and for good reason. In Title VII suits under § 1981a, the actual damage–punitive damage link should be satisfied only when the jury first finds the existence of actual damages, and not when injury is presumed post hoc.

A. *The Ambiguity of § 1981a*

The plain language of § 1981a(b)(1) does not indicate whether actual damages are a prerequisite to punitive damage awards in Title VII cases. Instead, the statute provides merely that a plaintiff may recover punitive damages upon demonstrating that the defendant “engaged in a discriminatory practice or discriminatory practices with malice or with reckless indifference to the federally protected rights of an aggrieved individual.”⁶⁷ In *Kolstad v. American Dental Ass’n*,⁶⁸ the Supreme Court concluded that although Congress sought to make punitive damages available in only a “subset” of Title VII cases,⁶⁹ a plaintiff is required to show only an employer’s “malice” or “reckless indifference” as exhibited by its state of mind, and not necessarily its actions, to meet the threshold requirement of § 1981a(b)(1).⁷⁰

Curiously, the legislative history of § 1981a can be read as suggesting that actual damages are a prerequisite to punitive damages: “Plaintiffs must first prove intentional discrimination, then must *prove actual injury or loss* arising therefrom to recover compensatory damages, and must meet an even higher standard (establishing that the employer acted with malice or reckless or callous indifference to their rights) to recover punitive damages.”⁷¹ This legislative history suggests that Congress intended that punitive damages be awarded only where the plaintiff has first established some actual damages. Nevertheless, no circuit court has construed the legislative history of

plaintiff also receives an award of compensatory or nominal damages”); *Timm v. Progressive Steel Treating, Inc.*, 137 F.3d 1008, 1010 (7th Cir. 1998) (comparing Title VII liability to a constitutional deprivation under 42 U.S.C. § 1983 (1994), in which “punitive damages can be awarded when the jury has awarded no compensatory or at least nominal damages”).

66. Nominal damages are awarded “where there is no substantial loss or injury to be compensated, but still the law recognizes a technical invasion of [the plaintiff’s] rights or a breach of the defendant’s duty.” BLACK’S LAW DICTIONARY 390, 392 (6th ed. 1990).

67. 42 U.S.C. § 1981a(b)(1).

68. 527 U.S. 526 (1999).

69. *Id.* at 534.

70. *Id.* at 534–35.

71. H.R. REP. NO. 102-40, pt. I, at 72 (1991), *reprinted in* 1991 U.S.C.C.A.N. 549, 610.

§ 1981a as being so precise, finding ambiguity as to whether Congress intended to require an actual damage–punitive damage link under § 1981a(b)(1).⁷²

B. Presumption of Injury: An Inadequate Substitute for the Common Law Link

A court’s presumption of injury or automatic award of nominal damages upon a finding of liability under Title VII both give short-shrift to the justifications behind the common law rule. In such circumstances, there is an insufficient showing of injury by the plaintiff to warrant an assessment of punitive damages against the defendant. Alarmingly, the courts that have presumed the existence of injury in Title VII cases have done so post hoc, thus substituting their judgment for that of the jury.⁷³ If the spirit of the common law rule is to be upheld, a presumption of injury that replaces a jury finding of nominal damages cannot exist under Title VII.

In *Timm v. Progressive Steel Treating, Inc.*,⁷⁴ a jury awarded \$15,000 in punitive damages, but no compensatory or nominal damages, after finding the defendant employer vicariously liable for the sex discrimination of a supervisor.⁷⁵ In concluding that a jury may award punitive damages even when it “determines that the plaintiff did not suffer injury,”⁷⁶ the Seventh Circuit speculated that the lack of compensatory damages was attributable to the fact that the plaintiff, a former prison guard, was used to “rough treatment,” while the lack of nominal damages was due to a lack of jury instructions on the issue.⁷⁷ The court went on to eschew the common law rule as an attempt to

72. See *Timm v. Progressive Steel Treating, Inc.*, 137 F.3d 1008, 1010 (7th Cir. 1998) (noting, after looking only to the plain text of § 1981a and failing to consider legislative history, that “[e]xtra-statutory requirements for recovery should not be invented”); *Kerr-Selgas v. Am. Airlines, Inc.*, 69 F.3d 1205, 1214–15 (1st Cir. 1995) (opting not to consider the legislative history of § 1981a, and instead relying strictly upon the common law rule in concluding that punitive damages are not awardable under § 1981a(b)(1) absent actual damages).

73. See *Timm*, 137 F.3d at 1010 (observing that at trial the jury was not given the opportunity to decide whether nominal damages were warranted in part because they were never given an instruction about them); *Walker v. Anderson Elec. Connectors*, 944 F.2d 841, 845 (11th Cir. 1991) (noting that the “district court did not instruct the jury on the possibility of awarding nominal damages in the event of a finding of sexual harassment”).

74. 137 F.3d 1008 (7th Cir. 1998).

75. *Id.* at 1009; see also *Cush-Crawford v. Adchem Corp.*, 94 F. Supp. 2d 294, 299 (E.D.N.Y. 2000) (finding an analogy to § 1983 more compelling than an analogy to the common law in upholding a punitive damage award of \$100,000 despite the absence of actual damages).

76. *Timm*, 137 F.3d at 1009.

77. *Id.* at 1010.

invent “[e]xtra-statutory requirements for recovery,”⁷⁸ and noted that in § 1983 cases,⁷⁹ the principle was well established that “when a jury finds a constitutional violation under a § 1983 claim, it may award punitive damages even when it does not award compensatory damages.”⁸⁰ Finding “no reason” for reading a “compensatory-punitive link” into § 1981a but not § 1983, the Seventh Circuit upheld the punitive damage award.⁸¹ By referring to “compensatory,” rather than “nominal damages,” the Seventh Circuit skirted the issue of whether a jury should have to find nominal damages before awarding punitive damages, concluding in effect that injury, functionally equivalent to nominal damages, is presumed upon a violation of Title VII.

Some courts have refused to presume injury or nominal damages upon a violation of Title VII in situations similar to *Timm*, and in doing so, have given credence to the justification behind the common law link. For example, in *Kerr-Selgas v. American Airlines, Inc.*,⁸² the First Circuit faced a \$300,000 punitive damage award under § 1981a that was unsupported by either compensatory or nominal damages, even though the jury had found the defendant liable for intentional discrimination.⁸³ The plaintiff relied upon the rationale of *Timm* and asserted that although she had not requested nominal damages, they were presumed upon a violation of Title VII.⁸⁴ The First Circuit rejected this argument, holding that a Title VII liability verdict does not compel an award of nominal damages “absent a timely request.”⁸⁵ Presumably, by vacating the entire \$300,000 punitive damage award because of the plaintiff’s failure to request a simple jury instruction, the court envisioned circumstances in which a jury might find the defendant liable, as it did, but remain unwilling to award the plaintiff even nominal damages as a token for the invasion of his or her rights.

78. *Id.*

79. 42 U.S.C. § 1983 (1994) provides a private cause of action against a state official for “the deprivation of any rights, privileges, or immunities secured by the Constitution and laws.”

80. *Timm*, 137 F.3d at 1010 (quoting *Erwin v. County of Manitowoc*, 872 F.2d 1292, 1299 (7th Cir. 1989)).

81. *Id.*

82. 69 F.3d 1205 (1st Cir. 1995).

83. *Id.* at 1209.

84. *Id.* at 1214–15.

85. *Id.* at 1215. It should be noted that the *Kerr-Selgas* court did not directly answer the question of whether liability under Title VII automatically results in a presumption of nominal damages; rather, it stated simply that nominal damages may not be awarded absent a “timely request.” *Id.*

When *Timm* and *Kerr-Selgas* are contrasted, it becomes apparent that the *Timm* court's reasoning contains a critical flaw. Although under *Carey v. Piphus* and its progeny⁸⁶ federal courts presume the existence of nominal damages, and therefore injury, upon a constitutional violation of § 1983,⁸⁷ no circuit directly faced with the issue has held that injury and nominal damages are presumed upon a violation of Title VII.⁸⁸ This key distinction can be explained by the fact that a § 1983 violation is most often based upon the deprivation of a *constitutional* right, which is more serious than the deprivation of a statutorily created right.⁸⁹ In fact, the one circuit court that has directly addressed the issue held that a Title VII violation, unlike a constitutional violation, does not mandate an award of nominal damages.⁹⁰ As such, the Seventh Circuit plainly erred in its assertion that

86. 435 U.S. 247, 266 (1978) (holding that the denial of procedural due process should be “actionable for nominal damages without proof of actual injury”). The holding of *Carey* has been extended to include substantive rights as well. See *Memphis Cmty. Sch. Dist. v. Stachura*, 477 U.S. 299, 307–09 (1986) (applying the principles of *Carey* to a substantive constitutional claim under the First Amendment and rejecting the respondent’s contention that *Carey* was inapplicable); Mark T. Morrell, Note, *Who Wants Nominal Damages Anyway? The Impact of an Automatic Entitlement to Nominal Damages Under § 1983*, 13 REGENT U. L. REV. 225, 236 (2000) (“*Carey*’s common interpretation permits an automatic award of nominal damages under § 1983 upon a finding of a constitutional violation.”) (emphasis added).

87. E.g., *King v. Macri*, 993 F.2d 294, 297–98 (2d Cir. 1993); *Erwin v. County of Manitowoc*, 872 F.2d 1292, 1299 (7th Cir. 1989).

88. Although in *Hicks v. Brown Group, Inc.*, 902 F.2d 630, 652 (8th Cir. 1990), vacated by 499 U.S. 914 (1991), the Eighth Circuit endorsed extending *Carey* beyond constitutional violations under § 1983 by holding that nominal damages are mandatory in at least Title VII claims for racially discriminatory treatment, the decision is suspect, having been vacated in accordance with the Supreme Court’s decision in *Patterson v. McLean Credit Union*, 491 U.S. 164 (1989), which shed doubt on the ability to bring a claim for racially discriminatory treatment under 42 U.S.C. § 1981 (1994).

89. See *Stachura*, 477 U.S. at 308 (recognizing that constitutional rights are “central to our system of ordered liberty”); *Ryland v. Shapiro*, 708 F.2d 967, 976 (5th Cir. 1983) (stating that there is a “societal interest in deterring or punishing violators of constitutional rights [that] supports an award of punitive damages even in the absence of actual injury”) (emphasis added); Kim M. Cafaro et al., Case Comment, *Trigg v. Fort Wayne Community Schools*, 766 F.2d 299 (7th Cir. 1985), 61 NOTRE DAME L. REV. 88, 102 (1986) (“The rights of equal protection and due process guaranteed by the fourteenth amendment are not ‘inherently bound up’ with the right of discrimination-free employment granted by Title VII. The rights are distinct, not coextensive.”). But see Christopher J. Burke, Note, *Winning the Battle, Losing the War?: Judicial Scrutiny of Prisoners’ Statutory Claims Under the Americans with Disabilities Act*, 98 MICH. L. REV. 482, 496–97 (1999) (noting that although “Americans are conditioned to view constitutional rights as the most ‘special’ rights with which they are endowed,” in applying the Americans with Disabilities Act to the prison context, “the nature of constitutional rights as compared to that of statutory rights supports a preference for granting the latter greater application”).

90. See *Walker v. Anderson Elec. Connectors*, 944 F.2d 841, 845 (11th Cir. 1991) (stating that “[n]othing in *Carey* mandates the award of nominal damages for statutory violations”); see

there was “no reason” to read a compensatory-punitive link into § 1981a or Title VII but not § 1983.⁹¹

Nothing in either the plain language or legislative history of § 1981a(b)(1) suggests that Congress intended prevailing plaintiffs in Title VII actions to be automatically entitled to an award of nominal damages or equivalent presumption of injury. Nor has the Supreme Court ever suggested this proposition. *Carey v. Phipus* dealt only with constitutional violations under § 1983, specifically distinguishing the deprivation of constitutional rights from statutorily created ones when it emphasized the “absolute” nature of constitutional rights and noted “the importance to organized society that those rights be scrupulously observed.”⁹² Circuit courts have likewise recognized the distinction between the deprivation of constitutional rights under § 1983 and statutorily created rights such as Title VII. For example, in *Louisiana Acorn Fair Housing v. LeBlanc*,⁹³ the Fifth Circuit refused to presume the existence of nominal damages or injury upon a violation of the federal Fair Housing Act, which creates statutory rights, noting that the defendant violated the plaintiff’s “rights under the [Fair Housing Act] but he did not violate [the plaintiff’s] constitutional rights.”⁹⁴ At least one other circuit court has differentiated between constitutional and statutory rights by noting that although a deprivation of the former must necessarily be at the hands of a state actor, violations of statutorily created rights such as Title VII can take place at the hands of private individuals as well.⁹⁵

also *Buckner v. Franco, Inc.*, No. 97-6028, 1999 U.S. App. LEXIS 7369, at *12 (6th Cir. Apr. 12, 1999) (“Since we are not aware of any prior court precedent *requiring* the awarding of nominal damages to a prevailing Title VII plaintiff . . . the district court did not commit plain error in refusing to so instruct the jury.”); *Domegan v. Ponte*, 972 F.2d 401, 411 n.17 (1st Cir. 1992) (discussing the *Walker* court’s holding with approval), *vacated by* 507 U.S. 956 (1993).

91. *Timm v. Progressive Steel Training, Inc.*, 137 F.3d 1008, 1010 (7th Cir. 1998).

92. 435 U.S. 247, 266 (1978). At common law, nominal damages were presumed upon the violation of several torts, including trespass and libel. RESTATEMENT (SECOND) OF TORTS § 907 cmt. a (1979). Title VII creates statutory rights, however, and absent express congressional intent, no reason comes to mind for extending this practice to § 1981a.

93. 211 F.3d 298 (5th Cir. 2000), *cert. denied*, 121 S. Ct. 1225 (2001).

94. *Id.* at 303; *see also* *People Helpers Found., Inc. v. Richmond*, 12 F.3d 1321, 1327 (4th Cir. 1993) (concluding that “in the absence of statutory language to the contrary” punitive damages are not recoverable unless accompanied by an award of actual damages). *But see* *Alexander v. Riga*, 208 F.3d 419, 429 (3d Cir. 2000) (expressing disapproval of the district court’s distinction between a constitutional violation and a statutory violation under the Fair Housing Act when determining whether nominal damages are required).

95. *Buckner*, 1999 U.S. App. LEXIS 7369, at *10 (noting that “the instant action alleges a violation of purely *statutory* rights under Title VII by a party not acting under the color of state law”).

Other concerns apart from the constitutional/statutory right distinction caution against presuming the existence of nominal damages or an equivalent in Title VII violations. For one, the legislative history of § 1981a stresses the need for plaintiffs to prove the existence of actual injury or loss before recovering damages.⁹⁶ Juries should be afforded the opportunity, when faced with Title VII violations that have not resulted in compensable harm, to choose between awarding nominal damages, which signify the invasion of the plaintiff's rights, and not awarding nominal damages, which would express the jury's belief that although the employer engaged in discrimination, this practice was not sufficiently egregious to warrant the imposition of *any* damages.⁹⁷ For example, if the jury finds race or gender to be a motivating factor in the termination of an employee, but the jury feels that the employee would have been terminated in any case because of incompetence, it might find the defendant technically liable, but be unwilling to award nominal damages to signify an invasion of the plaintiff's Title VII rights. If nominal damages were automatically awarded, or a court found that liability alone were sufficient to award punitive damages, the jury would be unable to make this determination for itself.⁹⁸

On the other hand, cases like *Timm* and *Kerr-Selgas* have involved situations in which the jury was not actually given an instruction concerning nominal damages. One may naturally wonder why a plaintiff's attorney would fail to request a jury instruction concerning nominal damages, even in the alternative to a finding of compensa-

96. See *supra* note 71 and accompanying text.

97. Not only are juries given this option when they are given an instruction as to whether to award nominal damages, but the view is entirely consistent with the purpose of nominal damages, which are awarded "where there is no substantial loss or injury to be compensated." BLACK'S LAW DICTIONARY, *supra* note 66, at 390, 392.

98. Some, such as the court in *Cush-Crawford v. Adchem Corp.*, 271 F.3d 352 (2d Cir. 2001), suggest that nominal damages are merely "symbolic," and therefore not a prerequisite to punitive damages. *Id.* at 359 ("The need for [nominal damages] in the absence of compensatory damages disappears where the factfinder has signified its opprobrium by making an express award of punitive damages."). But this suggestion confuses the roles of actual damages and punitive damages. Whereas actual damages compensate the plaintiff for loss, punitive damages punish the defendant only after the plaintiff has been found to have a valid cause of action. Thus, even though the factfinder may signify its "opprobrium" of the defendant's conduct by awarding punitive damages, this award has no bearing on how the defendant's conduct harmed the plaintiff in the first place. As such, without a punitive damage-actual damage link, one can readily imagine a situation in which a jury finds that the plaintiff was unharmed and deserving of zero actual damages, but nevertheless able to receive punitive damages because the defendant's conduct is found sufficiently reprehensible.

tory damages. After all, it might be reasonable to conclude that a jury willing to find that a defendant violated a plaintiff's Title VII rights would be just as willing to award the plaintiff at least one dollar in nominal damages. Incompetence aside, plaintiffs' lawyers may be unwilling to request an instruction for nominal damages because, if accepted by the jury, the instruction may foreclose the possibility of recovering "substantial money" in compensatory damages.⁹⁹ Plainly, this type of strategic maneuvering should not be condoned on appeal by awarding nominal damages post hoc.

Understandably, not even the *Timm* court was willing to allow the plaintiff's \$15,000 punitive damage award to stand without first deciding, albeit incorrectly, that injury should be presumed upon a statutory violation.¹⁰⁰ So in a limited sense, the Seventh Circuit upheld the reasoning behind the common law rule by requiring that at least "something" support the award of punitive damages. However, it was hasty, if not altogether incorrect, for the *Timm* court to presume the existence of that "something." The jury should have been left to decide, upon a proper instruction, whether nominal damages were warranted in the action. The result of the *Timm* court's decision is an effective abridgement of the common law rule, having substituted, in place of a jury, its view that the plaintiff was harmed.

CONCLUSION

The integrity of punitive damage awards depends upon plaintiffs first successfully establishing a civil cause of action that is independent of a desire merely to punish the defendant. Punitive damages must be doled out as a by-product of the civil justice system, not in de facto criminal proceedings dressed up to look like civil actions. The common law thus requires that a plaintiff be awarded compensatory or nominal damages to be eligible for a punitive damage award. In an attempt to circumvent this requirement, courts like the *Timm* court have sought to presume the existence of injury upon a violation of Title VII. Not only is there no precedent for such a bold proposition,

99. *Walker v. Anderson Elec. Connectors*, 944 F.2d 841, 845 n.7 (11th Cir. 1991) (noting that the reason the plaintiff did not request an instruction on nominal damages was because "the jury might have given it, and that was a risk to be avoided by the plaintiff since she was after substantial money").

100. *Timm v. Progressive Steel Treating, Inc.*, 137 F.3d 1008, 1010 (7th Cir. 1998) (stating that a plaintiff "must suffer *some* injury to have standing," and analogizing a Title VII action to a § 1983 action, in which punitive damages may be awarded absent either compensatory or nominal damages).

but presuming the existence of harm when a jury has found none effectively allows plaintiffs to bring purely punitive actions in civil courts, as well as undermines the special status of constitutional rights. To preserve the integrity of punitive damage awards under Title VII, a plaintiff should be required to receive compensatory or nominal damages before becoming eligible to recover punitive damages.