Punitive Damages in Fair Housing Litigation: Ending Unwise Restrictions on a Necessary Remedy

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INTRODUCTION

In January 1996, Gene Lewis, an African American resident of Lake Charles, Louisiana, answered a newspaper advertisement for the rental of a one-bedroom apartment. When Mr. Lewis went to view the apartment, however, the owner refused to accept his deposit, saying, "I just don't rent to you people."[1] When Mr. Lewis asked the owner what he meant, he replied, "Black, colored, Negro, whatever you call yourself, I don't rent to y'all."[2] Mr. Lewis filed suit. The jury found in his favor and awarded $10,000 in punitive damages. On appeal, however, the Fifth Circuit reversed the punitive award, holding that in the absence of a compensatory damage award, the jury was barred from awarding punitive damages.[3] The result was that a defendant who engaged in blatant discrimination emerged with little incentive to change his ways.[4] Mr. Lewis's case illustrates a fundamental obstacle to effective enforcement of laws prohibiting discrimination in housing: ill-advised court doctrines make it difficult for plaintiffs to recover significant punitive damage awards, even when they succeed in proving that egregious discrimination occurred.

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[1] La. ACORN Fair Hous. v. LeBlanc, 211 F.3d 298, 299 (5th Cir. 2000), *cert. denied*, 121 S. Ct. 1225 (2001).

[2] *Id.* at 299–300.

[3] *Id.* at 303. For analysis of whether compensatory damages should be a prerequisite to awarding punitive damages in fair housing cases, see *infra* Part II.

[4] *See id.* at 306 (King, J., dissenting).

Over thirty years after the passage of the Fair Housing Act,[5] discrimination in housing against racial and ethnic minorities and other protected classes persists.[6] Studies consistently reveal high levels of unlawful discrimination in housing and show that minorities are likely to encounter discrimination approximately fifty percent of the time when buying or renting housing.[7] Recent litigation has made it clear that blatant housing discrimination like that experienced by Mr. Lewis remains common.[8]

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[5] Title VIII of the Civil Rights Act of 1968, Pub. L. No. 90-284, 82 Stat. 73 (codified as amended at 42 U.S.C. §§ 3601–3619 (1994)).

[6] *See, e.g.*, CLEAR AND CONVINCING EVIDENCE: MEASUREMENT OF DISCRIMINATION IN AMERICA (Michael Fix & Raymond J. Struyk eds., 1993); HOUSING MARKETS AND RESIDENTIAL MOBILITY (G. Thomas Kingsley & Margery Austin Turner eds., 1993); DOUGLAS S. MASSEY & NANCY A. DENTON, AMERICAN APARTHEID: SEGREGATION AND THE MAKING OF THE UNDERCLASS (1993); JOHN YINGER, CLOSED DOORS, OPPORTUNITIES LOST: THE CONTINUING COSTS OF HOUSING DISCRIMINATION (1995).

[7] The most recent national study of discrimination in housing, conducted in 1989, concluded that African Americans and Hispanics experience discrimination roughly fifty percent of the time when they inquire about buying or renting a dwelling. MARGERY A. TURNER ET AL., U.S. DEP'T OF HOUS. & URBAN DEV., HOUSING DISCRIMINATION STUDY: SYNTHESIS, at vi–vii (1991). The results and methodology of this study are summarized in Margery Austin Turner, *Discrimination in Urban Housing Markets: Lessons from Fair Housing Audits*, 3 HOUSING POL'Y DEBATE 185, 191–92 (1992) [hereinafter Turner, *Discrimination in Urban Housing Markets*]. *See also* YINGER, *supra* note 6, at 19–41. More recent studies in selected metropolitan areas have also reported high levels of discrimination. *E.g.*, Jennifer Boyd, *Housing Test Alleges Discrimination*, BUS. J. CHARLOTTE, Dec. 10, 1999, at 1 (describing study in Charlotte, North Carolina, area that found that 60% of apartment complexes discriminated on basis of race and national origin, and that 100% of complexes surveyed did not meet the Fair Housing Act's accessibility requirements for the physically disabled); Joan Treadway, *New Orleans Housing Study Finds Extensive Bias*, NEW ORLEANS TIMES-PICAYUNE, Apr. 27, 2000, at B1 (describing study in New Orleans area that found that African Americans, families with children, and Latinos experience discrimination at least forty percent of the time when inquiring about multifamily housing, and that large numbers of apartment complexes did not meet the Fair Housing Act's requirement that multifamily housing be accessible to disabled persons); Ted Rohrlich, *Two Studies Find Bias in Rental Housing*, L.A. TIMES, Sept. 27, 1999, at B1 (describing five-year study of Los Angeles area that concluded that African Americans and Latinos seeking apartments experience discrimination about forty percent of the time). The United States Department of Housing and Urban Development ("HUD") is currently funding a two-year national study of housing discrimination. *See Fair Housing 2000: An Interview with Eva M. Plaza*, 57 J. HOUSING & COMMUNITY DEV. 14, 15 (2000).

[8] *E.g.*, Alexander v. Riga, 208 F.3d 419, 424 (3d Cir. 2000) (reversing district court's refusal to submit issue of punitive damages where landlords falsely told African American couple on ten different occasions that apartment was not available and repeatedly failed to return their phone calls inquiring about the apartment), *cert. denied*, 121 S. Ct. 757 (2001); La. ACORN Fair Hous. v. LeBlanc, 211 F.3d 298 (5th Cir. 2000), *cert. denied*, 121 S. Ct. 1225 (2001); Allahar v. Zahora, 59 F.3d 693 (7th Cir. 1995) (affirming denial of summary judgment where owner initially refused to sell house to Indian man, stating that he had talked to his neighbors and they did not want African Americans on the block); United States v. Big D Enters., Inc., 184 F.3d 924, 929 (8th Cir. 1999) (affirming punitive damage award where apartment owner instructed resident managers not to rent to African Americans and to tell African Americans who inquired about vacancies that no apartments were available), *cert. denied*, 529 U.S. 1018 (2000); van den Berk v. Mo. Comm'n on Human Rights, 26 S.W.3d 406, 409 (Mo. Ct. App. 2000) (noting that defendant landlord told an African American couple that she would not rent them an advertised apartment because

In this Article, I explore the important role that punitive damages play in fighting housing discrimination and identify how the current doctrines governing liability for punitive damages should be changed to improve their effectiveness. In 1988, recognizing that Title VIII was not adequately deterring housing discrimination,[9] Congress amended the Fair Housing Act to strengthen the Act's enforcement measures.[10] Among the most important changes Congress made was to remove the $1,000 cap on punitive damages in private suits that had been part of the law since 1968.[11] Congress also authorized the United States to seek monetary damages, including punitive damages, in cases brought on behalf of individual victims.[12] The House Judiciary Committee specifically identified "disadvantageous limitations on punitive damages" as one of the weaknesses in the existing fair housing law[13] and noted that "the [$1,000] limit on punitive damages served as a major impediment to imposing an effective deterrent on violators and a disincentive for private persons to bring

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she did not "racially 'mix' her properties because 'black people and white people just don't get along well, living together'").

[9] *See* H.R. REP. No. 100-711, at 15 (1988).

[10] *See* Fair Housing Act Amendments of 1988, Pub. L. No. 100-430, 102 Stat. 1619 (codified as amended in 42 U.S.C. §§ 3601–3619 (1994)). As amended, the Fair Housing Act now prohibits discrimination on the basis of race, color, sex, religion, national origin, familial status (having one or more children under age eighteen), and handicap. 42 U.S.C. § 3604 (1994).

[11] 42 U.S.C. §§ 3612(o)–3614; H.R. REP. No. 100-711, at 40. Prior to this amendment, the Fair Housing Act limited punitive damage awards to $1,000. Unlawful housing discrimination on the basis of race or ethnicity also gave rise to claims under the Civil Rights Act of 1966, 42 U.S.C. § 1982 (1994), which did not place a ceiling on punitive damages. *See, e.g.*, Miller v. Apartments and Homes of N.J., Inc., 646 F.2d 101 (3d Cir. 1981); Parker v. Shonfeld, 409 F. Supp. 876 (N.D. Cal. 1976). In practice, however, the $1,000 limit in the Fair Housing Act often dissuaded courts from awarding more than $1,000 in punitive damages in cases brought under § 1982 as well. *See* Hughes v. Dyer, 378 F. Supp. 1305, 1311 (W.D. Mo. 1974); Robert G. Schwemm, *Compensatory Damages in Federal Fair Housing Cases*, 16 HARV. C.R.-C.L. L. REV. 83, 87 (1981); *see also* Wright v. Kane Realty, 352 F. Supp. 222 (N.D. Ill. 1972) (stating that $1,000 limitation would "be a consideration" in determining appropriate amount of punitive damages in § 1982 claim).

[12] 42 U.S.C. §§ 3612(o), 3614. The Fair Housing Act Amendments of 1988 created a new administrative mechanism whereby complainants whose claims were determined by HUD to have merit could elect to have their cases heard in federal court with the Attorney General pursuing a claim on their behalf for monetary relief, including punitive damages. 42 U.S.C. §§ 3610–3612. For a description of this system, see Eugene R. Graetke & Robert G. Schwemm, *Government Lawyers and Their Private "Clients" Under the Fair Housing Act*, 65 GEO. WASH. L. REV. 329, 335–40 (1997). The Amendments also gave the Attorney General the authority to seek monetary damages, including punitive damages, on behalf of victims in cases alleging a pattern or practice of discrimination or a denial of rights to a group of persons raising an issue of general public importance. The amendments also permitted the United States to obtain civil penalties in such cases. 42 U.S.C. § 3614. Prior to the 1988 amendments, courts had held that the United States could only obtain equitable relief—even when a pattern of discrimination raised an issue of general public importance. *See* ROBERT G. SCHWEMM, HOUSING DISCRIMINATION LAW AND LITIGATION § 26.2(5)(c), at 26-23 n.104 (Supp. July 2000) [hereinafter SCHWEMM, HOUSING DISCRIMINATION].

[13] H.R. REP. No. 100-711, at 16.

suits."[14] More than ten years later, punitive damage awards in fair housing cases have increased significantly and awards over $100,000 are becoming more common.[15] Because compensatory damages in fair housing cases are often low and difficult to prove, punitive damages are the most important form of monetary relief available to victims of housing discrimination.[16]

Lower courts continue to hinder the effectiveness of punitive damages in fair housing cases, however, by ignoring the applicable common law principles and failing to consider the effect of these restrictions on fair housing enforcement. District courts often refuse to let the issue of punitive damages go to the jury, even when the evidence supports a finding of intentional discrimination.[17] Courts have also ruled that punitive damages are not available if the jury fails to award compensatory damages and have vacated punitive damage awards on that basis.[18] Even in cases where the court is satisfied that the discrimination merits a punitive damage award, if an employee was the perpetrator, courts often refuse to impute liability for punitive damages to the employer absent proof of some misconduct by a high-level official of the entity that owns or operates the housing.[19] When punitive damages are awarded by the jury, courts sometimes drastically reduce them with little analysis.[20]

In this Article, I contend that the courts' hostility to punitive damages in housing discrimination cases is unjustified and that punitive damages are essential to effective enforcement of fair housing laws. Drawing on both theoretical justifications for punitive damages and common law doctrines, this Article proposes new standards for awarding punitive damages in fair housing cases. The analysis proceeds in four parts. Part I

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[14] *Id.* at 40.

[15] Juries have produced significant damage awards in several recent cases. *E.g.*, United States v. Big D Enters., Inc., 184 F.3d 924, 932 (8th Cir. 1999) (upholding punitive damage awards totaling $100,000 to three victims), *cert. denied*, 529 U.S. 1018 (2000); Little Field v. McGuffey, 954 F.2d 1337, 1348–50 (7th Cir. 1992) (upholding punitive damage award of $100,000 to single plaintiff); Edwards v. Flagstar Bank, 109 F. Supp. 2d 691, 698 (E.D. Mich. 2000) (awarding $325,000 in punitive damages to single victim of mortgage lending); Darby v. Heather Ridge, 827 F. Supp. 1296, 1300–01 (E.D. Mich. 1993) (reducing jury's award of $250,000 in punitive damages to couple to $50,000); Broome v. Biondi, 17 F. Supp. 2d 211 (S.D.N.Y. 1997) (affirming award of $410,000 to couple and $47,000 to single individual); Nationwide Mut. Ins. Co. v. Hous. Opportunities Made Equal, Inc. 523 S.E.2d 217 (Va. 2000) (discussing jury's $100 million punitive damage award to fair housing organization in insurance discrimination case), *petition for reh'g granted*, No. 990733, 2000 Va. LEXIS 56, at *1 (Va. Mar. 3, 2000); *see also* SCHWEMM, HOUSING DISCRIMINATION, *supra* note 12, § 25.3(3)(a), at 25-37 n.134.1 (citing additional cases).

[16] *See* Victoria A. Roberts, *With a Handshake and a Smile: The Fight to Eliminate Housing Discrimination*, 73 MICH. B.J. 276 (1994) (explaining the importance of punitive damages to obtaining large damage awards); JOHN P. RELMAN, HOUSING DISCRIMINATION PRACTICE MANUAL § 3.2(b), at 3.21 (Supp. 2000); *see also infra* Part I.A.

[17] *See infra* note 22.

[18] *See infra* Part II.

[19] *See infra* Part III.

[20] *See infra* Part IV.

offers a framework for deciding when punitive damages are appropriate in housing discrimination cases. It demonstrates that courts have erred in holding that punitive damages necessarily require a higher standard of proof than that required to prove liability and argues that punitive damages are almost always appropriate in housing discrimination cases. A critical part of the analysis rests on the doctrinal implications of the Supreme Court's recent decision in *Kolstad v. American Dental Association*,[21] a case that explored the standards for imposing punitive damages in employment discrimination cases. While the *Kolstad* decision is flawed and offers at best a mixed blessing for discrimination plaintiffs, some aspects of *Kolstad* can provide a foundation to articulate useful standards for deciding when to award punitive damages in housing discrimination cases.

Parts II, III, and IV apply the principles outlined in Part I to three problems on which courts have reached conflicting results. Part II discusses whether punitive damages should be permitted if compensatory damages are not awarded and concludes that a rule requiring compensatory damages as a prerequisite for punitive damages is inconsistent with common law principles and, more importantly, undercuts the deterrent effect of punitive damages in housing discrimination cases. Part III analyzes whether and under what circumstances the discriminatory action of an employee should be imputed to the employer and determines that courts have erred in requiring proof of misconduct by the employer in order to impute liability for punitive damages based on the actions of an employee. Part IV examines how courts should decide whether a punitive damage award is excessive and, if so, to what extent to reduce it.

I. When Punitive Damages Should Be Available in Fair Housing Cases

District courts frequently refuse to permit the jury to consider awarding punitive damages in housing discrimination cases, even in cases in which the evidence is sufficient to support a finding of intentional discrimination.[22] Although a number of these decisions have been

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[21] 527 U.S. 526 (1999).

[22] *E.g.*, Badami v. Flood, 214 F.3d 994, 997 (8th Cir. 2000) (reversing district court determination that evidence of landlord's refusal to rent home to a family with eight children because of family size did not warrant punitive damage instruction); Pumphrey v. Stephen Homes, Inc., No. CA-93-1329-HAR, 1997 WL 135688, at **1 (4th Cir. Mar. 25, 1997) (per curium) (finding that district court erred in refusing to instruct jury on punitive damages even though evidence showed salesman intentionally misrepresented the availability of a home lot to an African American man); Tyus v. Urban Search Mgmt., 102 F.3d 256, 266 (7th Cir. 1996) (remanding case for new trial where district court refused to instruct jury on punitive damages despite evidence that established that luxury apartment complex used exclusively white human models in its advertising); United States v. Balistrieri, 981 F.2d 916, 936 (7th Cir. 1992) (reversing district court's decision to enter a directed verdict on punitive damages despite evidence that landlord systematically misrepre-

appealed and reversed,[23] a plaintiff who prevails at trial but has not been rewarded punitive damages may choose not to appeal the refusal to instruct the jury to consider punitive damages.[24] The fact that district courts continue to err by refusing to submit punitive damages instructions, even in the face of case law reversing similar actions, suggests that appellate courts have not delineated clear standards. In fair housing cases, courts have imposed a nominally higher standard of proof for punitive damages liability. A plaintiff may recover punitive damages only upon showing that the defendant's conduct is motivated by an "evil motive or intent, or when it involves reckless or callous indifference to the federally protected rights of others."[25] These terms are sufficiently vague to enable judges to read their own preconceptions about punitive damages into the doctrines and apply subjective standards.[26] This Part argues that courts should simplify the standards and clarify, consistent with common law principles and the purposes of fair housing laws, that punitive damages are available in all cases in which intentional discrimination is proven, except when defendants demonstrate that they reasonably believed their conduct was lawful. This Part also explores how courts should properly apply this standard in fair housing litigation.

A. The Need for Punitive Damages in Fair Housing Litigation

Punitive damages are damages awarded in excess of the amount necessary to compensate the plaintiff for her injuries. The purposes of punitive damages are to punish the wrongdoer and to deter future conduct by the tortfeasor and others.[27] The term "punitive" damages reflects the punishment rationale, while the alternative term, "exemplary" damages, reflects the deterrence rationale.[28]

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sented availability of apartments to black home seekers).

[23] *Badami*, 214 F.3d at 997; *Pumphrey*, 1997 WL 135688, at **4; *Tyus*, 102 F.3d at 266; *Balistrieri*, 981 F.2d at 937.

[24] A plaintiff may either decide that the cost and inconvenience of a new trial on punitive damages is not worth the effort, or agree not to appeal in exchange for a similar promise by the defendant.

[25] Smith v. Wade, 461 U.S. 30, 56 (1983).

[26] *See* DAN B. DOBBS, HANDBOOK ON THE LAW OF REMEDIES § 3.11(2), at 321 (2d ed. 1993) ("[T]here is always room for difference of opinion in the application of such abstract standards as 'recklessness' or 'malice.'").

[27] *See, e.g.*, *Smith*, 461 U.S. at 54; RESTATEMENT (SECOND) OF TORTS § 908(1) (1965) (stating that punitive damages are awarded "to punish [the defendant] for his outrageous conduct and to deter him and others like him from similar conduct in the future"); *see also* City of Newport v. Fact Concerts, Inc., 453 U.S. 247, 266–67 (1981).

[28] Although numerous terms have been used to describe punitive damages, the two terms most commonly used today are "punitive damages" and "exemplary damages." Most jurisdictions use the two terms interchangeably. During the last century, punitive damages were also frequently referred to as "vindictive damages" and "smart money," while the terms "punitory," "speculative," "imaginary," "presumptive," or "added" damages have also been used. *See Smith*, 461 U.S. at 41; LINDA L. SCHLUETER & KENNETH R. REDDEN, PUNITIVE DAMAGES § 21(A) (4th ed. 2000); Note, *Exemplary Damages in the Law of Torts*,

Although punitive damages have aroused considerable controversy, most commentators agree that punitive damages are sometimes necessary and appropriate to deter harmful conduct. This consensus, grounded in utilitarian analysis, recognizes that a rational defendant will refrain from engaging in unlawful conduct from which she benefits only when the expected cost of the conduct exceeds the expected benefit.[29] The tort system seeks to induce tortfeasors to refrain from unlawful conduct by forcing them to bear the full cost of their conduct. Upon internalizing these costs, tortfeasors will reduce their conduct to levels at which the harm caused by the conduct is no greater than the social benefit it generates.[30] Although compensatory damages at least partially serve this goal, there are some circumstances in which imposing only compensatory damages will not force tortfeasors to incur the full cost of the harm they cause.

Compensatory damages are insufficient, and punitive damages necessary, to deter wrongful conduct in at least four instances: (1) when the harmful conduct is not always detected by the victim; (2) when the probability of recovery is low and does not offer an adequate incentive for every victim (or her attorney) to file suit; (3) when the harm that is recoverable through compensatory damages does not fully capture the harm caused by the conduct; and (4) when the wrongdoer derives illicit benefits from the conduct that exceed the value of the harm when measured by compensatory damages alone.[31] The prevalence of each of these types of situations in the area of housing discrimination makes the use of punitive damages necessary to achieve optimal deterrence.[32]

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70 HARV. L. REV. 517 (1957).

[29] *See* A. Mitchell Polinsky & Steven Shavell, *Punitive Damages: An Economic Analysis*, 111 HARV. L. REV. 869, 879–81 (1998). This concept may be expressed through the formula $N = B–PL$, where B is the benefit that defendant derives from the conduct, P is the probability that the defendant will be held responsible for the conduct, L is the expected loss that the defendant will incur if a law suit is brought, and N is the net gain or loss. As long as N is positive, the defendant will continue to engage in the harmful conduct.

[30] *See id.*

[31] *See generally* Dorsey Ellis, *Fairness and Efficiency in the Law of Punitive Damages*, 56 S. CAL. L. REV. 1 (1982). These considerations also suggest that the term "punitive damages" is something of a misnomer because it does not fully or precisely describe the purpose of such damages. Although punitive damages do serve to punish wrongful conduct, they also serve to increase the penalty to the wrongdoer and to create an appropriate incentive for victims to file suit so as to deter wrongful conduct. In any event, it is not surprising that punitive damages have also been known as "exemplary damages," and the contemporary predominance of the shorthand term "punitive damages" appears to be an historical accident. *See supra* note 28.

[32] *See* Alex S. Navarro, *Bona Fide Damages for Tester Plaintiffs: An Economic Approach to Private Enforcement of the Antidiscrimination Statutes*, 81 GEO. L.J. 2727, 2752–67 (1993); Gary T. Schwartz, *Deterrence and Punishment in the Common Law of Punitive Damages: A Comment*, 56 S. CAL. L. REV. 133, 139 (1982) ("[G]iven the difficulty victims experience in proving that they have been subject to racial discrimination in the sale or rental of housing, Congress may have acted intelligently in authorizing punitive damages in the fair housing provisions of the Civil Rights Act of 1968.").

1. The Difficulty of Detecting Housing Discrimination

Punitive damages are necessary to deter wrongful conduct whenever there is a significant probability that the wrongdoer will escape detection.[33] This likelihood may occur if the harm itself or the perpetrator's responsibility for the harm is not discovered.[34] Some conduct is, by its nature, difficult for victims to detect and prove. Housing discrimination is a textbook example.[35] Minorities inquiring about housing in predominantly white neighborhoods are often told falsely that no housing is available or that the advertised unit has been rented or sold to someone else.[36] In other cases, real estate agents direct minorities seeking housing away from predominantly white areas and toward predominantly minority and integrated neighborhoods, while directing similarly situated white home seekers away from minority or integrated neighborhoods.[37] Minority home seekers ordinarily have no way of knowing which units are actually available or how similarly situated white home seekers are treated.[38]

The complexity of home purchase and rental processes increases the chance that unlawful discrimination will not be detected. There are typically several steps from the initial viewing to the approval of the application or contract. Discrimination at any one of these stages can deny minorities access to the housing of their choice.[39] Even such subtle tactics as failing to return a phone call promptly or withholding key information can effectively deny housing to minorities.[40] Moreover, housing providers

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[33] *See* Robert D. Cooter, *Punitive Damages for Deterrence: When and How Much?*, 40 ALA. L. REV. 1143, 1149–66 (1989); Ellis, *supra* note 31, at 25–26; Polinsky & Shavell, *supra* note 29, at 886–95. Polinsky and Shavell have described this justification more broadly by saying that punitive damages are necessary whenever there is a significant probability that the wrongdoer will escape liability. *Id.* at 886. The probability that a wrongdoer will avoid liability is a function of two variables: (1) the probability that the victim will detect the wrongdoing and believe that the perpetrator is responsible; and (2) the probability that the victim will choose to bring suit. *See* Keith Hylton, *Reply: Punitive Damages and the Economic Theory of Penalties*, 87 GEO. L.J. 421, 460 (1998). For clarity, I analyze these variables separately.

[34] *See* Polinsky & Shavell, *supra* note 29, at 888.

[35] *See* Navarro, *supra* note 32, at 2733 ("Housing discrimination is difficult to detect, often unprosecuted when detected, and difficult to prove even when prosecuted.").

[36] *See, e.g.*, Alexander v. Riga, 208 F.3d 419, 424 (3d Cir. 2000), *cert. denied*, 121 S. Ct. 757 (2001); United States v. Big D Enters., Inc., 184 F.3d 924, 929 (8th Cir. 1999), *cert. denied*, 529 U.S. 1018 (2000); YINGER, *supra* note 6, at 19–35 (summarizing national study demonstrating the prevalence of this form of discrimination); *see also supra* note 7 and accompanying text.

[37] *See* YINGER, *supra* note 6, at 51–56.

[38] *See id.* at 19–20; *see also* George C. Galster, *Research on Discrimination in Housing and Mortgage Markets: Assessment and Future Directions*, 3 HOUSING POL'Y DEBATE 639, 661 (1992); Michael Selmi, *Public vs. Private Enforcement of Civil Rights: The Case of Housing and Employment*, 45 UCLA L. REV. 1401, 1409 (1998); Turner, *Discrimination in Urban Housing Markets*, *supra* note 7, at 191–92.

[39] *See* Turner, *Discrimination in Urban Housing Markets*, *supra* note 7, at 192.

[40] *See* United States v. Youritan Constr. Co., 370 F. Supp. 643 (N.D. Cal. 1973)

legitimately can consider a housing applicant's credit, financial circumstances, rental history, and other factors in determining whether to approve her for housing. When challenged, a housing provider who refused to deal with a minority may be able to point to a variety of reasons that the applicant was not a desirable tenant or home buyer. In the absence of some comparison of how the housing provider has dealt with similarly situated white applicants, it will be difficult for a plaintiff to prove that the provider's reasons are pretextual.[41] In light of the inherent difficulty in proving a defendant's state of mind and obtaining comparative data about treatment of nonminority applicants, it is reasonable to assume that the vast majority of discriminatory housing practices will go undetected and, therefore, unchallenged.[42]

Absent punitive damages, tortfeasors lack adequate incentives to refrain from or minimize harmful conduct because their expected liability will be less than their expected benefit. Punitive damages are necessary in an order of magnitude equal to the harm that is detected multiplied by a factor reflecting the probability that the wrongdoer has or will escape liability in other instances.[43] Imposing punitive damages ensures that the wrongdoer internalizes the full cost of the harm that she caused even when the conduct is not always detected.

(granting injunction where defendants used various tactics to discourage African American applicants, including showing African American applicants the most expensive apartments, giving them incomplete tours of the complex, and misrepresenting the availability of apartments).

[41] There is also considerable evidence that African Americans and other racial and ethnic minorities often face discrimination in obtaining a home mortgage. *See* SCHWEMM, HOUSING DISCRIMINATION, *supra* note 12, § 18.2(i); YINGER, *supra* note 6, at 63–85; Selmi, *supra* note 38, at 1423–25. Such discrimination is difficult to detect because of the number and complexity of factors that lenders take into account in considering whether to approve a loan. In many cases, the lender can offer plausible reasons for denying a mortgage to a minority applicant but can choose to apply its standards with less rigor to white applicants. Alternatively, the lender can provide white applicants with information about how to improve their credit and qualify for a mortgage but withhold this information from minority applicants. Often, such discrimination can be detected only through a detailed examination of the lender's loan files and practices, something that a typical home seeker cannot undertake. *See id.* at 1425.

[42] In 1985, based on existing studies of housing discrimination, HUD estimated that approximately two million acts of housing discrimination occur each year. The vast majority of these acts go unchallenged. H.R. REP. No. 100–711, at 15 (1988) (quoting testimony of John Knapp, General Counsel, Department of Housing and Urban Development).

[43] *See* Polinsky & Shavell, *supra* note 29, at 886. The following example is illustrative. Assume *X* derives a $90 per unit benefit from conduct that causes $100 per unit in compensable harm. Assume also that *X* estimates that her conduct will be detected only ten percent of the time. Although the conduct is socially inefficient (i.e., it causes more harm than benefit), *X* will choose to engage in the harmful conduct because she derives a net benefit of $80 per unit. If *X* expects that courts will award punitive damages equal to ten times the compensable harm, however, then *X* will alter her conduct to avoid a net loss.

2. The Need for Adequate Incentives to File Suit

Compensatory damages alone also result in insufficient deterrence when there is a significant probability that the victim will choose not to file suit, even when the victim detects the wrongful conduct.[44] This probability depends on two factors: (1) whether there is an adequate incentive for the plaintiff to file suit; and (2) whether there is an adequate incentive for the plaintiff's attorney to agree to take the case on terms that are acceptable to the plaintiff.[45] With respect to the incentives for plaintiffs, victims are less likely to bring suit if the cost and value of the time and effort they would have to devote to the suit exceeds the expected gain. This usually occurs when the tangible harm is relatively small, when there are significant difficulties in proving harm or causation, or when there are significant nonrecoverable costs involved in filing the suit that may equal or exceed the potential gain.[46] An understandable aversion to being forced to re-live the trauma associated with a violation of their rights also deters many victims from bringing suit unless the possible gains—including vindication through the assessment of a significant penalty—are substantial.

Even if the victim is willing to bring suit, she may not be able to find a satisfactory attorney who will take the case with a reasonable fee arrangement.[47] An economically motivated attorney will take a case only if the expected benefit, when divided by the number of projected work hours, equals the expected benefit per hour that she would make on other cases. Thus, an attorney is less likely to take an otherwise meritorious case if it is significantly more difficult to prove, requires significantly greater resources, or has a significantly lower expected recovery than comparable cases within an attorney's specialty.[48] Punitive damages pro-

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[44] *See* Polinsky & Shavell, *supra* note 29, at 888.

[45] *See* Marc Galanter & David Luban, *Poetic Justice: Punitive Damages and Legal Pluralism*, 42 AM. U. L. REV. 1393, 1426, 1447–48 (1993) (arguing that punitive damages are necessary to give parties and attorneys an incentive to bring suit).

[46] *See* Polinsky & Shavell, *supra* note 29, at 890, 901–02. A rational, economically motivated plaintiff will thus choose to file suit whenever the likely recovery (discounted by the probability of no recovery) exceeds the likely burden of filing suit. This can be illustrated through the formula $B < PL$, where B represents the costs and burdens on the plaintiff of filing suit, P is the probability of recovery, and L is the expected average recovery if liability is proven. Of course, there may be intangible costs and benefits that are difficult to measure in economic terms. A plaintiff may obtain sufficient moral satisfaction in maintaining a suit to make a point, even if the plaintiff knows that the likelihood of a significant monetary recovery is low. For other plaintiffs, a reluctance to put themselves or family members through the stress of litigation may dissuade them from bringing suit even if they believe that, from a purely monetary standpoint, the lawsuit is a good choice. In any event, the decision as to whether to bring suit will be made after weighing the likely costs and benefits of doing so.

[47] For all but the most affluent victims, the only desirable fee arrangement is likely to be a contingent fee with a modest retainer.

[48] Galanter & Luban, *supra* note 45, at 1452–53 (demonstrating how plaintiffs' lawyers will decline representation in favor of more lucrative work if incentives for particular type

vide attorneys with an additional economic incentive to take on these cases.[49]

Although the Fair Housing Act permits any individual who believes she has been discriminated against to file a complaint with HUD or with a substantially equivalent state agency, effective enforcement of the Act still depends on private suits.[50] An empirical study of the years 1990–1996 concluded that the private bar is responsible for the vast majority (nearly eighty-five percent) of housing discrimination lawsuits.[51] Although the Act's administrative complaint scheme has improved its enforcement, the scheme has not eliminated dependence on the private bar. Governmental resources are limited, and some observers have concluded that, in some cases, private lawsuits are more effective than the administrative complaint process.[52] Although the government's role in fair housing enforcement is plainly a vital one, private lawsuits remain crucial to enforcement.[53]

a. Incentives for Plaintiffs

The prospect of recovering only compensatory damages in housing discrimination cases does not give private plaintiffs adequate incentive to bring suit.[54] The out-of-pocket costs to victims are often relatively small, as the victims often obtain replacement housing at comparable or lower cost.[55] When provable economic damages are low, plaintiffs have little

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of litigation are not offered).

[49] *See id.* at 1451–54; David Luban, *A Flawed Case Against Punitive Damages*, 87 GEO. L.J. 359 (1998) (arguing that punitive damages will induce attorneys to enter a field, and will finance and reward specialty in an area). As I discuss in more detail later, the availability of attorney's fees does not obviate the need for punitive damages because attorney's fees only compensate the attorney for his or her costs in bringing a successful suit, not for the risk that the suit would be unsuccessful. *See infra* text accompanying note 69.

[50] *See* Trafficante v. Metro. Life Ins. Co., 409 U.S. 205, 211 (1972); Alexander v. Riga, 208 F.3d 419, 424 (3d Cir. 2000), *cert. denied*, 121 S. Ct. 757 (2001); Selmi, *supra* note 38, at 1416–22.

[51] Selmi, *supra* note 38, at 1418.

[52] *See, e.g.*, RELMAN, *supra* note 16, § 3.2(2)(a)–(b) (weighing advantages and disadvantages of enforcement through HUD administrative process).

[53] *See* Selmi, *supra* note 38, at 1438–39.

[54] *See* Schwemm, *supra* note 11, at 104 (noting that compensatory damage awards generally have been too low to justify the cost of bringing suit in many cases); *see also* Johnnie Scott, Jr., *Eradicating Discriminatory Housing Practices: The Role of Damages and the Discriminatory Effects of Evidentiary Standards in Fair Housing Litigation*, 22 N.M. L. REV. 572, 577 (1992).

[55] SCHWEMM, HOUSING DISCRIMINATION, *supra* note 12, § 25.3(2)(b), at 25-19 ("Most fair housing cases do not involve major economic losses."); Alan W. Heifetz & Thomas C. Heinz, *Separating the Objective, the Subjective, and the Speculative: Assessing Compensatory Damages in Fair Housing Adjudications*, 26 J. MARSHALL L. REV. 3, 9 (1992). Economic damages are the total of out-of-pocket and other tangible expenses caused by the denial of housing. They may include: the increased cost of alternative housing; wages or other income lost during the time spent looking for alternative housing; moving, storage, or packing costs; temporary housing costs; and costs of commuting to and from work in

incentive to file suit for compensatory damages alone.[56] The more significant costs of discrimination are likely to be the lost opportunity to live in a more desirable community[57] and the intangible emotional distress and other psychic harms caused by being treated differently on the basis of race, ethnicity, or membership in another protected class.[58]

Although in theory a plaintiff should be able to recover the damages caused by these intangible harms, as a practical matter they are difficult to prove and often undercompensated.[59] The reasons are numerous. Although research confirms that unlawful discrimination often causes significant emotional harm,[60] in practice, the awards for emotional distress are likely to understate the actual harm. Fact finders are often skeptical of intangible, undocumented injuries claimed by persons with a monetary interest in the outcome of the case. While expert testimony or corroborating witnesses may bolster the plaintiff's case, it may not dispel the skepticism altogether. Fact finders also may have difficulty relating to the harm suffered by victims. Predominantly white juries, for example, may not understand the effect of discrimination on a minority plaintiff. Jury members may mistakenly compare the plaintiff's experience to a less severe experience of their own.[61] Furthermore, courts have often awarded the most significant emotional distress damages to victims who established both that the discrimination affected them severely and that they had never experienced discrimination in the past, while awarding

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excess of costs that would have been incurred commuting to and from the denied housing. *Id.* at 10. Such economic damages rarely exceed a few thousand dollars and often are considerably less. *E.g.*, HUD v. Blackwell, 908 F.2d 864, 873 (11th Cir. 1990) ($4,591 award for economic losses); Hamilton v. Svatik, 779 F.2d 383, 388 (7th Cir. 1985) ($500 award); Philips v. Hunter Trails Cmty. Ass'n, 685 F.2d 184, 190–91 (7th Cir. 1982) ($2,675 award); Steele v. Title Realty Co., 478 F.2d 380, 383–84 (10th Cir. 1973) ($138.25 award); Lamb v. Sallee, 417 F. Supp. 282, 287 (E.D. Ky. 1976) (no award). In fact, in some cases, economic damages have been so low that plaintiff's counsel waived them for strategic reasons and focused instead on intangible harms.

[56] *See* Polinsky & Shavell, *supra* note 29, at 888, 901.

[57] *See* Margalynne Armstrong, *Desegregation Through Private Litigation*, 64 TEMP. L. REV. 909, 923 (1991).

[58] Heifetz & Heinz, *supra* note 55, at 17–24. Of course, if the plaintiff incurs medical or psychological counseling expenses as a result of housing discrimination, those expenses are recoverable under a compensatory scheme. *See* Jones v. Rivers, 732 F. Supp. 176, 178 (D.D.C. 1990).

[59] *See* Armstrong, *supra* note 57, at 923–24.

[60] *See, e.g.*, Larry Heinrich, *The Mental Anguish and Humiliation Suffered by Victims of Housing Discrimination*, 26 J. MARSHALL L. REV. 39 (1992); Nancy Krieger & Stephen Sidney, *Racial Discrimination and Blood Pressure: The CARDIA Study of Young Black and White Adults*, 86 AM. J. PUB. HEALTH 1370 (1996) (finding that differences between African American and Caucasian blood pressure levels could be attributable to discrimination); David S. Strogatz et al., *Social Support, Stress, and Blood Pressure in Black Adults*, 8 EPIDEMIOLOGY 482 (1997) (demonstrating that discrimination, as self-reported, may contribute to increased blood pressure in African Americans). *But see* Clifford L. Broman, *The Health Consequences of Racial Discrimination: A Study of African Americans*, 6 ETHNIC DISCRIMINATION 148 (1996).

[61] *Cf.* Schwemm, *supra* note 11, at 106–07 (noting possibility of jury prejudice against victims of housing discrimination).

smaller amounts to victims who were clearly cynical or had experienced discrimination previously.[62] This approach will likely undervalue actual harm as persons who internalize and suppress their reaction to discrimination may suffer long-term consequences.[63]

Furthermore, when plaintiffs allege emotional injury, the defendant has the right to inquire into other personal problems that may be causally related to the alleged distress.[64] The embarrassment of exposing themselves to inquiry about sensitive matters, coupled with the highly uncertain prospect of recovery, deters many victims from being candid about the full extent of their emotional harm.

Plaintiffs may experience difficulties in proving the intangible harms of living in a less desirable community. The jury may believe that any loss was compensated for by the fact that the plaintiff was able to secure a home for a lower price. Even if jury members agree that a plaintiff's alternative housing is less desirable, they may not believe that plaintiffs took reasonable steps to mitigate their damages.[65] It is difficult for plaintiffs to prove that they were not able to find a comparable house in a more integrated neighborhood, particularly if the fact finder is unwilling to presume that the plaintiff would have faced discrimination elsewhere.[66]

b. Incentives for Attorneys

The same factors that would discourage plaintiffs from filing housing discrimination suits would prevent attorneys from representing plaintiffs for a contingent fee if punitive damages were not available. Even when punitive damages are available, other discrimination cases may seem more economically worthwhile to plaintiffs' lawyers. Attorneys who litigate housing discrimination claims often also represent plaintiffs in employment discrimination cases. In employment discrimination cases, plaintiffs potentially can recover backpay and punitive damages in addition to compensatory damages. The total package is often easier to prove, leading to an award that is larger and more predictable than the modest economic damages received in housing discrimination cases.

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[62] *See, e.g.*, Gray v. Serruto Builders, Inc., 265 A.2d 404, 416 (N.J. Super. Ct. Ch. Div. 1970) (awarding plaintiff only $500 because "[h]e is a man not likely to be bowled over by a single set-back"); *see also* Davis v. Mansards, 597 F. Supp. 334, 347–48 (N.D. Ind. 1984) (awarding $5,000 in compensatory damages to female tester who was "deeply affected" and "decimated" by the discrimination, but awarding $2,500 to tester who approached complex with "cynicism" and was "steadied for the blow").

[63] Nancy Krieger, *Racial and Gender Discrimination: Risk Factors for High Blood Pressure?*, 30 SOC. SCI. MED. 1273 (1990).

[64] *See* Heinrich, *supra* note 60, at 49–51.

[65] Heifetz & Heinz, *supra* note 55, at 12–13.

[66] A home seeker of modest means is likely to give up after facing obstacles obtaining housing in a desired neighborhood and return to a neighborhood where she is treated with more dignity. This is particularly true if affordable housing is scarcer in the desired neighborhood. *See infra* note 73 and accompanying text.

Therefore most lawyers who specialize in plaintiff-side civil rights cases have a greater economic incentive to litigate an employment discrimination case over a fair housing matter with a comparable likelihood of success.[67] Only the prospect of significant punitive damages is likely to induce plaintiffs' attorneys to file housing discrimination cases notwithstanding these disincentives.

The availability of attorney's fees in housing discrimination cases does not, standing alone, provide private attorneys with adequate incentive to file suit. Attorney's fees are awarded only when the plaintiff prevails at trial and are limited to the prevailing market rates in the community.[68] Fee multipliers beyond the lodestar amount to compensate attorneys for the risk that a suit will fail are generally not available.[69] Given the difficulty of proving discrimination and obtaining significant damage awards in housing cases, plaintiffs' attorneys often find other suits, even those that do not provide for attorney's fees, to be a better risk. Only significant punitive damages can overcome this disincentive.

3. Harms of Housing Discrimination Not Fully Captured by Compensatory Damages

Punitive damages are also necessary to deter conduct that causes harms that are not fully captured by a compensatory damage award.[70] This justification for punitive damages applies with particular force to housing discrimination.[71] Among the most serious consequences of housing discrimination is the perpetuation of residential segregation.[72] Minorities who encounter discrimination when attempting to move into a predominantly white area often respond by returning to a predominantly minority community and by ceasing their search for housing in more integrated or predominantly white areas.[73] Furthermore, housing discrimination has a ripple effect, discouraging the actual victims as well as their

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[67] *Cf.* Galanter & Luban, *supra* note 45, at 1453 (noting that good litigators will seek to apply their skills to the specialties that pay best).

[68] 42 U.S.C. § 3613(c)(2) (1994); Blum v. Stevenson, 465 U.S. 886, 895 (1984) (finding that reasonable attorney's fees, as permitted by 42 U.S.C. § 1988 (1994), are to be calculated according to prevailing market rates in the community).

[69] *See* City of Burlington v. Dague, 505 U.S. 557 (1992) (reversing enhancement of lodestar amount under relevant fee-shifting statutes); SCHWEMM, HOUSING DISCRIMINATION, *supra* note 12, § 25.3(5)(C), at 25-70.

[70] *See* Ellis, *supra* note 31, at 26–27; Hylton, *supra* note 33, at 435–36.

[71] *See* Armstrong, *supra* note 57, at 922–24.

[72] *See* Schwemm, *supra* note 11, at 99. American neighborhoods remain profoundly segregated according to race and ethnicity. Since the 1970s there has been little decrease in the level of segregation. *See* Turner, *Discrimination in Urban Housing Markets, supra* note 7, at 185.

[73] *See* Lawrence Bobo & Camille Zubrinsky, *Attitudes on Residential Integration: Perceived Status Differences, Mere In-Group Preference, or Racial Prejudice?*, 74 SOC. FORCES 883 (1996); Reynolds Farley et al., *Stereotypes & Segregation: Neighborhoods in the Detroit Area*, 100 AM. J. SOC. 750 (1994).

friends, colleagues, and family members from seeking housing in areas from which people have been deterred.[74] Thus, isolated acts of housing discrimination, in conjunction with other factors, are likely to perpetuate residential segregation.[75] The resulting concentration of minorities in urban neighborhoods, in turn, limits the acquisition of financial capital by minorities, narrows employment opportunities, contributes to segregated school systems, and perpetuates the stereotypes that various racial and ethnic groups hold about others.[76]

Residents of a community that has been segregated or has lost the benefits of interracial and interethnic association as a result of a defendant's acts may have cognizable claims under the Fair Housing Act.[77] Such claims are relatively rare, however, for several reasons. Those resi-

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[74] *See* Brief for the United States as Amicus Curiae at 25, Alexander v. Riga, 208 F.3d 419 (3d Cir. 2000) (No. 98-3597) (citing testimony by executive director of fair housing group that housing discrimination in a predominantly white area will discourage other minorities who hear about discrimination from seeking housing there); Reynolds Farley et al., *Continued Racial Residential Segregation in Detroit:* Chocolate City, Vanilla Suburbs *Revisited*, 4 J. HOUSING RES. 1, 20, 32 (1993); *cf.* Reynolds Farley, *Racial Differences in the Search for Housing: Do Whites and Blacks Use the Same Techniques to Find Housing?*, 7 HOUSING POL'Y DEBATE 367 (1996) (noting that perceptions of housing discrimination may lead to differences in housing search strategies between black and white home seekers).

[75] Some sociologists claim that continued racial segregation is solely, or predominantly, a function of the preferences of blacks and whites to live near persons of their own race. *E.g.*, William A.V. Clark, *Understanding Residential Segregation in American Cities: Interpreting the Evidence, a Reply to Galster*, 8 POPULATION RES. & POL'Y REV. 193 (1989). A growing body of research, however, suggests that discrimination materially contributes to residential racial segregation. *E.g.*, Reynolds Farley et al., *The Residential Preferences of Blacks and Whites: A Four-Metropolis Analysis*, 8 HOUSING POL'Y DEBATE 763 (1997). These researchers' findings "challenge the hypothesis that levels of black-white residential segregation remain high solely because of the distinctly different preferences of blacks and whites. It is probable, however, that preferences interact with the other two factors—discrimination in the marketing of housing and economic differences—in reinforcing high segregation levels." *Id.* at 796; *see also* YINGER, *supra* note 6, at 119–22; George Galster & W. Mark Keeney, *Race, Residence, Discrimination and Economic Opportunity: Modeling the Nexus of Urban Racial Phenomenon*, 24 URB. AFF. Q. 87, 87–88 (1988).

[76] *See* Schwemm, *supra* note 11, at 98 ("[T]he right to buy or rent a home, free from racial discrimination, carries with it the opportunity to find new employment, to enroll one's children in different schools, and many other advantages."); *see also* MASSEY & DENTON, *supra* note 6, at 183; CAROL M. SWAIN, BLACK FORCES, BLACK INTERESTS: THE REPRESENTATION OF AFRICAN AMERICANS IN CONGRESS (1993); David Cutler & Edward Glaeser, *Are Ghettos Good or Bad?*, 112 Q.J. ECON. 827 (1997); George C. Galster, *Research on Discrimination in Housing and Mortgage Markets: Assessment and Future Directions*, 3 HOUSING POL'Y DEBATE 639, 643 (1992); Turner, *Discrimination in Urban Housing Markets*, *supra* note 7, at 187.

[77] In *Gladstone, Realtors v. Village of Bellwood*, 441 U.S. 91 (1979), and *Trafficante v. Metropolitan Life Insurance Co.*, 409 U.S. 205 (1972), the Supreme Court upheld Title VIII claims by residents who alleged that the defendants' racial discrimination against others had prevented their communities from being racially integrated, resulting in lower property values, missed business opportunities, and lost social benefits. Other cases making similar claims include *Broadmore Improvement Association v. Stan Weber & Associates*, 597 F.2d 568 (5th Cir. 1979), and *Sherman Park Community Association v. Wauwatosa Realty*, 486 F. Supp. 838 (E.D. Wis. 1980).

dents attempting to exclude minorities often see their interests as aligned with the housing providers and neighborhood residents who are attempting to deny housing on prohibited grounds.[78] Even in neighborhoods where the residents believe that housing discrimination has perpetuated segregation and harmed their interests, proving such harm is a daunting task that will deter many suits.[79] Therefore, the individual victims must bear the burden of vindicating the Fair Housing Act's goals of fostering residential integration through individual suits that generally do not capture the social costs of segregation.[80]

In addition to underdeterring housing discrimination, failure to recognize the full harm caused by discrimination undermines the confidence of housing discrimination victims in the legal system and makes them more cynical about filing suit to enforce their rights. Victims often pursue discrimination cases for an intangible sense of vindication. They, and others, obtain a moral satisfaction from seeing the wrongdoer required to pay.[81] When damage awards for civil rights violations are trivial or severely low in proportion to how reasonable persons would value the rights in question, it sends a message that society does not value those rights or the persons who attempt to vindicate them.

Punitive damages help ensure that the social costs of these otherwise nonrecoverable secondary harms are absorbed by the wrongdoer.[82]

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[78] *See, e.g.*, Allahar v. Zahora, 59 F.3d 693, 693–94 (7th Cir. 1995) (affirming district court's decision to set aside punitive damage award where defendant homeowner initially refused to sell house to an Indian man, stating that he had talked to his neighbors and that they did not want minorities on the block). Judge Posner argues that even racially biased homeowners will be indifferent about the race or ethnicity of the person who buys their house because they will be leaving the neighborhood. RICHARD POSNER, ECONOMIC ANALYSIS OF LAW 658 (4th ed. 1992). Posner's analysis overlooks the fact that homeowners' warped sense of "loyalty" to their neighborhood, or their desire to maintain good relations with their neighbors may motivate them to find agents who are more likely to steer minorities away. *See* T. Alexander Aleinikoff, Note, *Racial Steering: The Real Estate Broker and Title VIII*, 85 YALE L.J. 808, 824 (1976) (arguing that residents of white areas are likely to prefer to list their homes with brokers who will steer black buyers to other neighborhoods). Even if Posner's analysis is valid as a general matter, real estate agents who help control the access to information about houses will often have a continuing business relationship with persons in a neighborhood and may have an incentive to discriminate to foster those relationships. *See id.* at 811–12 (arguing that brokers fear loss of patronage if they facilitate the sale of housing to a minority).

[79] *See* Schwemm, *supra* note 11, at 100, 102.

[80] A rare case recognizing the secondary harms of housing discrimination is *HUD v. Blackwell*, 908 F.2d 864 (11th Cir. 1990). In that case, the white couple who obtained the housing that the landlord refused to rent to the African American plaintiffs sued the landlord claiming that the adverse publicity of the discrimination claim had harmed their reputation and caused them emotional distress. By affirming the award of compensatory damages, the court of appeals properly recognized that housing discrimination can increase racial tension and distrust in a neighborhood. *Id.* at 873. In most cases, however, such claims are difficult to prove, and persons are often unwilling to endure the publicity and hostility of their neighbors that could result should they press such claims.

[81] *See* Galanter & Luban, *supra* note 45, at 1406–07.

[82] *See id.* Some have objected that such a use of punitive damages is illegitimate because it allows juries to inflate punitive awards based on crude estimates of harm without

Moreover, requiring wrongdoers to pay damages commensurate with the total social harms they cause not only deters wrongful conduct, but also expresses social outrage at the actions of grievous wrongdoers and vindicates social norms.[83] This aspect of punitive damages cannot be dismissed as mere retribution. Requiring defendants to pay a penalty equal to the harm also serves a utilitarian function: it promotes confidence in the legal system by reassuring victims and others that justice has been done.[84]

4. The Economic Motives and Other Illicit Benefits of Discrimination

A fourth instance in which punitive damages are useful to deter wrongful conduct arises when the defendant derives some illicit gain from the conduct that exceeds the provable social harm.[85] As noted earlier, a rationally motivated actor will engage in harmful conduct as long as the expected benefit exceeds the expected loss. In many cases, the benefit that a defendant derives from an activity also represents a gain to society. For example, suppose a defendant manufactures a car that both benefits consumers (as reflected in profits from sales) and results in fatal accidents. The manufacturer can reduce the risk of accidents by designing the car differently. If the manufacturer is required to absorb the full cost of the harm, then it will have an incentive to alter the design to reduce the risk of accidents to optimal levels.

In other cases, however, society may wish to ignore the benefit that the defendant derives from an activity because this benefit is illicit. For example, we may not consider the satisfaction felt by a sexual harasser as a social benefit because of its illicit nature. If the subjective pleasure that the perpetrator derives from his conduct (which we ignore when we perform *society's* cost-benefit analysis) exceeds the harm it causes, then simply internalizing the cost of the harm will not deter the conduct.[86]

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the restraint of the burden of proof and evidentiary rules that govern the assessment of compensatory damages. *See* Polinsky & Shavell, *supra* note 29, at 940. This objection appears to be an argument for careful review of punitive damage awards, not a persuasive reason for excluding estimates of secondary harm altogether. There may be situations when a fact finder can determine with reasonable certainty that the wrongful conduct caused harms beyond those suffered by the victim. There also may be situations when it would be administratively unworkable to bring before the court every person likely to have suffered such secondary harms. It may be more efficient simply to permit punitive damage awards in such cases to ensure that the wrongdoer internalizes the full social cost of the conduct. *See* Hylton, *supra* note 33, at 435–36.

[83] Galanter & Luban, *supra* note 45, at 1426–48; Michael Rustad & Thomas Koenig, *The Historical Continuity of Punitive Damage Awards*, 42 AM. U. L. REV. 1269, 1320 (1990); Cass Sunstein et al., *Assessing Punitive Damages*, 107 YALE L.J. 2071, 2075 (1998); Note, *supra* note 28, at 524.

[84] *See* Ellis, *supra* note 31, at 9.

[85] *See id.* at 32; Polinsky & Shavell, *supra* note 29, at 907.

[86] The decision to ignore a perpetrator's individual gain when performing society's

Another perpetrator benefit that society may wish to ignore is illicit income, such as a bribe. If a perpetrator receives $100 to cause $90 worth of harm, a $100 fine, not a $90 fine, would be necessary to deter the conduct. The example of bribery illustrates why society might choose to ignore illicit perpetrator gains: if the $100 bribe were considered a social benefit, society would not wish to deter conduct that results in a $10 net social gain. Punitive damages are necessary to offset illicit gains and ensure that the defendant does not engage in conduct that incurs social cost without any corresponding social benefit.[87]

Punitive damages are necessary to counter some housing providers' belief that discrimination is economically beneficial. Illicit motives[88] and perceived self-interest often characterize housing discrimination. Although it is tempting to dismiss housing discrimination as deviant behavior practiced by a few "bad apples," discrimination is widespread, in part, because many housing providers believe it is financially wise. Agents and owners accept stereotypes that members of a protected class are not credit worthy or are otherwise undesirable tenants. In so doing, they cater to the prejudices of their customers and tenants and seek to protect or enhance property values by excluding members of protected classes.[89] Some brokers also engage in racial steering based on the assumption that whites and blacks prefer to live in segregated communities.[90] Discriminatory practices take their greatest toll on minorities but have little impact on the larger and more self-sufficient majority community.[91]

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cost-benefit analysis is fundamentally a policy decision. In the housing context, the passage of the Fair Housing Act serves as a strong indicator of society's wish to ignore the illicit benefits of discrimination.

[87] *See* Ellis, *supra* note 31, at 32; Hylton, *supra* note 33, at 464; Polinsky & Shavell, *supra* note 29, at 907, 913.

[88] *See* ELISABETH YOUNG-BRUEHL, THE ANATOMY OF PREJUDICES 26–39 (1996) (arguing that discriminatory attitudes often flow from psychological insecurities and phobias). Perpetrators may obtain some pleasure and satisfaction from acting on prejudice. *See* David Charny & G. Mitu Gulati, *Efficiency-Wages, Tournaments, and Discrimination: A Theory of Employment Discrimination Law for "High Level" Jobs*, 33 HARV. C.R.-C.L. L. REV. 57, 77 (1998). Punitive damages are necessary to counter these motives.

[89] *See, e.g.*, Aleinikoff, *supra* note 78, at 811–12, 824; Galster, *supra* note 38, at 653; Navarro, *supra* note 32, at 2742–45; John Yinger, *Measuring Racial Discrimination with Fair Housing Audits: Caught in the Act*, 76 AM. ECON. REV. 881, 892 (1986); *cf.* Joseph B. Treaster, *Insurer Agrees It Overcharged Black Clients*, N.Y. TIMES, June 22, 2000, at A1 (describing insurer who systematically charged African Americans higher premiums than whites based on the assumption, since disproved, that African Americans have shorter life spans than white customers).

[90] *See* Aleinikoff, *supra* note 78, at 811–12.

[91] *See* POSNER, *supra* note 78, at 651–52. With respect to racial discrimination, for example, Posner points out that what he terms the "white sector" of the economy is self-sufficient, while the "black sector" is much smaller and more dependent on trade. Thus, the refusal of whites to deal with African Americans disproportionately harms African Americans. *Id.* at 651. Additionally, in communities where discrimination runs rampant, the threat of crippling short-term financial losses due to loss of traditional customer base discourages firms from adopting nondiscriminatory practices. *See* Alenikoff, *supra* note 78, at

B. A Proposed Standard for Awarding Punitive Damages in Housing Discrimination Cases

1. Common Law Principles

The Fair Housing Act provides: "if the court finds that a discriminatory housing practice has occurred or is about to occur, the court may award the plaintiff actual and punitive damages."[92] Thus, the text of the Act does not limit the circumstances in which punitive damages may be awarded.[93] When a federal statute is silent as to the standards for assessing damages or imposing liability, courts apply common law principles, modifying them as necessary to effectuate the statute's purposes.[94]

Under the common law, punitive damages are awarded "for conduct that is outrageous, because of the defendant's evil motive or his reckless indifference to the rights of others."[95] Courts and commentators agree

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811–12. Analysts observe a similar phenomenon in employment discrimination. *See* Charny & Gulati, *supra* note 88, at 83.

[92] 42 U.S.C. § 3613(c) (1994).

[93] 42 U.S.C. § 1982 (1994), which prohibits discrimination in property-related transactions, is silent on the relief available. However, courts have interpreted the statute to incorporate common law remedies, including punitive damages. SCHWEMM, HOUSING DISCRIMINATION, *supra* note 12, § 27.6(3)(b) (1983).

[94] *E.g.*, Smith v. Wade, 461 U.S. 30, 34 ("In the absence of more specific guidance, we look[ ] first to the common law of torts . . . with such modification or adaptation as might be necessary to carry out the purpose and policy of the statute."). In *Smith*, the Supreme Court looked both to the common law standards for awarding punitive damages as they existed in 1871, when 42 U.S.C. § 1983 was enacted, and to contemporary standards to determine when punitive damages may be assessed in § 1983 actions. *Id.* The Supreme Court has also looked to common law agency principles to determine when employers should be held liable under Title VII for sexual harassment perpetrated by their employees. Faragher v. City of Boca Raton, 524 U.S. 775, 793–809 (1998); Burlington Indus., Inc. v. Ellerth, 524 U.S. 742, 754–55 (1998); Meritor Sav. Bank v. Vinson, 477 U.S. 57, 72 (1986). The Court also applied common law agency principles to determine when nonprofit organizations should be liable for antitrust violations carried out by agents acting within the scope of their apparent, but not actual, authority in *American Society of Mechanical Engineers, Inc. v. Hydrolevel Corp.*, 456 U.S. 556, 565–70 (1982). Courts may modify these common law standards where necessary to serve the objectives of the underlying statute. *See* Kolstad v. Am. Dental Ass'n, 527 U.S. 526, 545 (1999); *Faragher*, 524 U.S. at 804–07. Of course, the circumstances in which punitive damages are assessed in fair housing are defined by federal law, not state law. *See, e.g.*, La. ACORN Fair Hous. v. LeBlanc, 211 F.3d 298, 302 (5th Cir. 2000), *cert. denied*, 121 S. Ct. 1225 (2001). Federal courts must sometimes look to common law principles, however, in determining what federal rule is appropriate. In such cases, courts rely on "'the general common law of agency rather than on the law of any particular State.'" *Ellerth*, 524 U.S. at 754. In cases where the underlying statute was enacted long ago, it may be necessary to examine both the common law at the time of the statute's enactment as well as contemporary standards, with the assumption that Congress generally intends to "incorporate applicable general legal principles as they evolve." *Smith*, 461 U.S. at 34. Because the Fair Housing Act was passed in 1968 and amended in 1989, and because the common law standards have not changed substantially in that time, *see id.*, contemporary standards should inform the applicable standard under the Fair Housing Act.

[95] RESTATEMENT (SECOND) OF TORTS § 908(2) (1965); *see also Smith*, 461 U.S. at 53 (surveying common law and concluding that punitive damages are appropriate whenever

that punitive damages are appropriate in the first common law circumstance—evil motive or intentional torts—because the defendant has engaged intentionally in socially harmful conduct.[96] However, punitive damages are sometimes said to be inappropriate when the defendant's conduct constitutes nothing more than "ordinary negligence," such as "mere inadvertence, mistake, [or] errors of judgment."[97] However, the inclusion of "reckless indifference" in the common law's assessment of punitive damages points towards an acceptance of punitive damages for more than just "malicious," "willful," and "wanton" conduct, but also for conduct that is "reckless" and "grossly negligent."[98] Indeed, on closer inspection, the distinction between conduct that merits punitive damages and that which does not appears to be one of degree rather than kind.[99] In most cases, conduct that is termed negligent can be deterred, since most harmful conduct involves some subjective awareness of the possibility of harm.[100] Furthermore, the definition of recklessness, instead of requiring conscious disregard of potential harm, sometimes simply requires height-

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there is a showing of evil intent, recklessness, or callous indifference to federally protected rights); W. PAGE KEETON ET AL., PROSSER & KEETON ON THE LAW OF TORTS § 2, at 14–15 (5th ed. 1984); SCHLUETER & REDDEN *supra* note 28, § 9.1.

[96] *See* Polinsky & Shavell, *supra* note 29, at 909 n.120 (observing that punitive damages cannot overdeter intentional conduct because a potential tortfeasor would rather avoid the intentional act than take excessive precautions to avoid "accidentally" incurring punitive damages). Richard Posner notes that, for intentional torts,

> the danger of deterring socially valuable conduct by making the damages award greater than [actual damages] is minimized and other policies come to the fore, such as making sure that the damage award is an effective deterrent by resolving all doubts as to the plaintiff's actual damages in his favor; this can be done by adding a dollop of punitive damages to the estimate of his actual damages.

POSNER, *supra* note 78, at 209. Courts have implemented this reasoning. *E.g.*, *Smith*, 461 U.S. at 53 (noting that punitive damages normally are available where the plaintiff proves intentional infliction of emotional distress or defamation of a public figure); Nader v. Allegheny Airlines, Inc. 445 F. Supp. 168, 178 (D.D.C. 1978) (holding that proof of fraudulent representation is sufficient to support an award of punitive damages); RESTATEMENT (SECOND) OF TORTS § 908 cmt. c (1965) ("[I]n torts . . . that require a particular antisocial state of mind, the improper motive of the tortfeasor is both a necessary element in the cause of action and a reason for awarding punitive damages."); *cf.* Delahanty v. First Pa. Bank, 464 A.2d 1243, 1263 (Pa. Super. Ct. 1983) (noting that "it is difficult to picture a fact pattern which would support a finding of intentional fraud without providing proof of 'outrageous conduct' to support an award of punitive damages").

[97] RESTATEMENT (SECOND) OF TORTS § 908(2) cmt. b (1965).

[98] *See* Ellis, *supra* note 31, at 36; *cf. Smith*, 461 U.S. at 39 (noting the "ambiguity and slipperiness" of common law terms); *Developments in the Law—The Civil Jury*, 110 HARV. L. REV. 1408, 1513 (1997) (discussing the ambiguity in legal doctrines around punitive damage awards).

[99] *See* Smith, 461 U.S. at 39–40 (noting that jurisdictions differ "over the degree of negligence, recklessness, carelessness, or culpable indifference that should be required" for the imposition of punitive damages).

[100] *Cf.* POSNER, *supra* note 78, at 206 ("[T]he term 'intentional' is vague. Most accidental injuries are intentional in the sense that the injurer knew that he could have reduced the probability of the accident by taking additional precautions.").

ened negligence.[101] In other contexts, recklessness is defined as disregarding a risk of harm that a "reasonable man" would have considered; this formulation appears synonymous with ordinary negligence.[102]

Common law standards recognize that the threat of punitive damages is unlikely to deter inevitable accidents.[103] When harm is truly inadvertent, tort law provides compensation solely for the purpose of shifting losses, not for the purpose of deterring the underlying conduct.[104] Conduct that has any basis in volition is capable of being deterred.[105] If careless or thoughtless conduct is met with heavy sanctions, defendants will take more care and consider more consciously the harm caused by their actions. Here, punitive damages encourage the defendant to make more responsible choices.[106] The common law standards are, therefore, best understood as an effort to distinguish between acceptable inadvertence, which should not or cannot be completely deterred, and socially undesirable actions that should be punished and deterred.

2. *Supreme Court Precedent:* Smith v. Wade *and* Kolstad v. American Dental Association

The Supreme Court has twice applied common law principles when assessing punitive damages in federal civil rights cases. In *Smith v. Wade*,[107] the Court applied common law principles and relied on the pur-

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[101] *See* RESTATEMENT (SECOND) OF TORTS § 500 (1965) (necessitating conduct in which the risk of harm is "substantially in excess of that necessary to make . . . [the] conduct negligent"); *see also Smith*, 461 U.S. at 64 n.2 (Rehnquist, J., dissenting) (arguing that "reckless" conduct is somewhat more dangerous and unreasonable than merely negligent conduct).

[102] *See* BLACK'S LAW DICTIONARY 1270 (6th ed. 1990) (defining recklessness as including behavior that ranges from "desperately heedless" and "willful" to "inattentive" or "negligent"); *see, e.g.*, State v. Vertefeuille, 217 A.2d 725, 726 (Conn. App. Ct. 1965) (finding recklessness when tort defendant acted in circumstances that a reasonable person would consider dangerous); *see also* Saaybe v. Penn Cent. Transp. Co., 438 F. Supp. 65, 69 n.6 (E.D. Pa. 1977); Beeman v. State, 115 N.E.2d 919, 922 (Ind. 1953).

[103] *See* Mark Grady, *Punitive Damages and Subjective States of Minds: A Positive Economic Theory*, 40 ALA. L. REV. 1197, 1199–1200, 1214 (1989) [hereinafter Grady, *Punitive Damages and Subjective States of Minds*]; *see also* Mark Grady, *Efficient Negligence*, 87 GEO. L.J. 397 (1998) [hereinafter Grady, *Efficient Negligence*]. For example, although everyone knows that it is important to pay attention when driving, some accidents will inevitably occur. It is highly unlikely that sharply increasing the penalties for negligent driving would eliminate traffic accidents. On the other hand, strict penalties for driving while intoxicated, speeding, or failing to observe traffic lights seem more likely to be effective because those actions involve more volition.

[104] *See* Grady, *Efficient Negligence*, *supra* note 103, at 417.

[105] For example, Professor Grady observes that "inadvertently" designing a building that does not conform to a safety code is more likely to involve what he terms "willful negligence" than failing to observe proper precautions when driving. *See* Grady, *Punitive Damages and Subjective States of Minds*, *supra* note 103, at 1201.

[106] *See id.* at 1199–1200.

[107] 461 U.S. 30 (1983). The inmate (Wade) claimed that he had been assaulted by his two cellmates because Smith, a reformatory guard, had placed three youths in that cell even though cells occupied by only one inmate were available. *Id.* at 32. There was also

poses of § 1983 in upholding an award of punitive damages to an inmate at a reformatory for youthful offenders. The Court concluded that punitive damages are available whenever a defendant acts with "evil motive or intent" or "reckless or callous indifference to the federally protected rights of others," as distinguished from malice, ill will, or intent to injure.[108] It acknowledged that the "reckless or callous indifference" standard was useful but imprecise and noted that the ultimate inquiry in determining the applicability of punitive damages should be pragmatic: whether the conduct was of the type that "calls for deterrence and punishment over and above that provided by compensatory awards."[109]

In the 1999 case, *Kolstad v. American Dental Association*,[110] the Court again considered when punitive damages could be assessed, this time for intentional discrimination in violation of Title VII of the Civil Rights Act of 1964.[111] Title VII, as amended by the Civil Rights Act of 1991,[112] permits punitive damages if the employer has engaged in intentional discrimination[113] and has done so "with malice or with reckless indifference to the federally protected rights of an aggrieved individual."[114] Noting that in both Title VII and the common law tradition "[t]he terms 'malice' and 'reckless' ultimately focus on the actor's state of mind," the Court held that neither source required the plaintiff to demonstrate "egregious"[115] employer conduct for punitive damages to be as-

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evidence that one of Wade's cellmates had been disciplined for fighting and that there had been a fatal assault in the same dormitory a week earlier (while Smith was on duty). *Id.* The Court rejected Smith's argument that Wade needed to show intentional harm and held that the evidence was sufficient to establish that Smith was at least recklessly indifferent to the possibility that Wade would be harmed. *Id.* at 49–51.

[108] *Id.* at 56.

[109] *Id.* at 54.

[110] 527 U.S. 526 (1999).

[111] 42 U.S.C. §§ 2000e–2000e17 (1994).

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

[113] 42 U.S.C. § 1981a(a)(1) (1994).

[114] 42 U.S.C. § 1981a(b)(1). The entire subsection states:

> A complaining party may recover punitive damages under this section against a respondent (other than a government, government agency or political subdivision) if the complaining party demonstrates that the respondent engaged in a discriminatory practice or discriminatory practices with malice or with reckless indifference to the federally protected rights of an aggrieved individual.

Id.

[115] *See Kolstad*, 527 U.S. at 535. *But see id.* at 547 (Rehnquist, C.J., concurring in part and dissenting in part) (arguing that Title VII implicitly establishes "an egregiousness requirement that reserves punitive damages only for the worst cases of intentional discrimination"). Prior to the Court's decision in *Kolstad*, the courts of appeals had reached conflicting results on this question. *Compare* Kolstad v. Am. Dental Ass'n, 139 F.3d 958, 960 (D.C. Cir. 1998) (en banc) (requiring a showing of egregious conduct), *vacated*, 527 U.S. 526 (1999), *with* Luciano v. Olsten Corp., 110 F.3d 210, 219–20 (2d Cir. 1997) (rejecting the requirement that a plaintiff show "extraordinarily egregious" conduct).

sessed.[116] Rather, a plaintiff need only show that her employer had knowledge that "it may [have been] acting in violation of federal law."[117] The Court grounded its decision in the common law, finding that, in that tradition, "eligibility for punitive awards is [most often] characterized in terms of a defendant's motive or intent," and not by "the reprehensible character of the conduct."[118]

Despite reducing the plaintiff's burden of proof for a punitive damage award, the Court emphasized that the Civil Rights Act of 1991 limited compensatory and punitive damages to cases in which an employer's discriminatory conduct was intentional and either malicious or in reckless disregard of the plaintiff's rights.[119] The Court concluded that this "two-tiered structure" suggested congressional intent to permit punitive damages "in only a subset of cases involving intentional discrimination."[120] Were the Court to hold that a finding of intentional discrimination always supported a finding of malice or reckless indifference, congressional intent would be undermined. The Court determined that "an employer must at least discriminate in the face of a perceived risk that its actions will violate federal law to be liable in punitive damages."[121] Thus punitive damages may not be appropriate, the *Kolstad* Court suggested, when: (1) the employer did not know that the relevant antidiscrimination statute existed; (2) the employer thought that its discrimination was legal; or (3) the employer's action would not be illegal under existing precedent.[122]

3. Kolstad*'s Limited Applicability to Fair Housing Cases*

Kolstad established the principle that plaintiffs need not show "egregious" discrimination to recover punitive damages.[123] Expanding the use of punitive damages would promote the Fair Housing Act's purpose of deterring all intentional housing discrimination, not merely discrimination labeled "egregious" or "outrageous."[124]

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[116] *See Kolstad*, 527 U.S. at 534–35.

[117] *Id.* at 535.

[118] *Id.* at 538.

[119] *Id.* at 535.

[120] *Id.* at 534.

[121] *Id.* at 536.

[122] *Id.* at 536–37.

[123] *Id.* at 538–39; *cf.* Alexander v. Riga, 208 F.3d 419, 430–31 (3d Cir. 2000) (holding that violation of the Fair Housing Act requires intentional discrimination and need not be "particularly egregious or malicious" to warrant punitive damages), *cert. denied*, 121 S. Ct. 757 (2001). *But see* La. ACORN Fair Hous. v. LeBlanc, 211 F.3d 298, 303 n.3 (5th Cir. 2000) (declining to decide "whether a punitive damage award under the FHA must be based on egregious conduct or merely predicated on a violation of the statute"), *cert. denied*, 121 S. Ct. 1225 (2001).

[124] 42 U.S.C. § 3601 (1994) ("It is the policy of the United States to provide, within constitutional limitations, for fair housing throughout the United States."); *see also* Rowlett v. Anheuser-Busch, Inc., 832 F.2d 194, 206 (1st Cir. 1987) ("After all, can it really

Beyond repudiating an egregiousness standard, however, *Kolstad* offers little guidance as to when punitive damages are appropriate in fair housing cases, and courts should not broadly apply *Kolstad* to the housing discrimination context. Other than listing a few examples, the opinion did not establish guidelines for determining whether a defendant recklessly disregarded her legal obligations not to discriminate.[125] Moreover, the *Kolstad* Court did not apply common law standards for assessing punitive damages, but instead purported to effectuate the plain language and "two-tier structure" of the statute, which limits punitive damage awards only to a "subset" of intentional discrimination cases.[126] *Kolstad*'s interpretive constraint, however, does not apply to the Fair Housing Act. The plain language of the Act permits the award of punitive damages in all cases in which liability is found.[127] Nor do common law principles preclude courts from awarding punitive damages in intentional housing discrimination cases: as the Supreme Court held in *Smith*, "[t]here has never been any general common law rule that the threshold for punitive damages must always be higher than that for compensatory liability."[128] In determining when punitive damages are appropriate in fair housing litigation, courts should start with a clean slate and apply common law principles in light of the goals of the Act.

4. Applying Common Law Standards and Deterrence Principles to Punitive Damages in Housing Discrimination Litigation

Given the dictum in *Smith* that validates punitive damage awards when a defendant's underlying conduct merits deterrence and punishment beyond compensatory damages,[129] courts should rarely refuse to submit the issue of punitive damages to the jury if the evidence would support a

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be disputed that intentionally discriminating against a black man on the basis of his skin color is worthy of some outrage?"); *cf.* Smith v. Wade, 461 U.S. 30, 54–55 (1983) ("[S]ociety has an interest in deterring and punishing *all* intentional or reckless invasions of the rights of others . . . ."); Gresham v. Windrush Partners, Ltd., 730 F.2d 1417, 1423 (11th Cir. 1984) (affirming district court finding that, in light of "strong national policy against race discrimination" in housing, irreparable injury must be presumed when plaintiff has demonstrated the likelihood of success on the merits of a housing discrimination claim).

[125] *See Kolstad*, 527 U.S. at 535–37.

[126] *See id.* at 536 (noting that the malice or reckless indifference standard must be applied "in the context of" 42 U.S.C. § 1981(a) (1994), which imposes a higher standard for punitive damages than for compensatory damages); *see also* Kolstad v. Am. Dental Ass'n, 139 F.3d 958, 970 (D.C. Cir. 1998) (en banc) (Randolph, J., concurring) ("[T]he majority opinion convinces me that Congress wanted the subsections kept separate, that it intended punitive damages to be reserved for only the worst cases."). Although the Title VII standards are similar in wording to the common law standards, the terms "reckless disregard" and "malice" are malleable concepts. *See supra* notes 98–102 and accompanying text.

[127] *See supra* text accompanying note 92.

[128] *See Smith*, 461 U.S. at 53.

[129] *Id.* at 50–51, 54.

finding of intentional discrimination. Applying deterrence principles, a decision not to award punitive damages is appropriate only when the award of compensatory damages and other monetary relief is sufficient to deter future wrongs, and when awarding even a small additional amount would induce frivolous lawsuits or overdeter socially beneficial conduct. A court, however, would have no basis for concluding that compensatory damages are sufficient before jury deliberations. Moreover, for the reasons I have presented, compensatory damages alone are generally insufficient to deter housing discrimination.

Refusing to submit the issue of punitive damages to the jury in a housing discrimination case would only be justified if the court were to conclude, as a matter of law, that society's sole interest is compensation and not deterrence.[130] Yet, in enacting the Fair Housing Act, Congress declared housing discrimination incompatible with national values and called for its eradication.[131] Moreover, housing discrimination is a function of deliberate choice rather than inadvertent, difficult-to-deter conduct. Housing discrimination is analogous to an intentional tort that "should be deterred completely [because] it produces no social gain, only harm."[132]

In the context of product liability and environmental safety lawsuits, critics of punitive damages have argued that the standards for assessing punitive damages are too vague to provide meaningful guidance to juries; that juries are predisposed to award large verdicts, particularly against wealthy defendants;[133] that defendants lack fair notice of the magnitude of possible penalties for their conduct; and that the threat of large punitive damage awards stifles innovation and encourages excessive and wasteful precautions.[134] Nevertheless, the potential consequences of punitive damages must be balanced against their deterrence benefits.[135] In

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[130] *See supra* notes 27–32, 103–106 and accompanying text. At least in a formal sense, the argument for greater use of punitive damages rests largely on a deterrence rationale. To the extent, however, that traditional calculations of compensatory damages do not fully compensate victims, punitive damages can even serve a compensatory function.

[131] *See* Alexander v. Riga, 208 F.3d 419, 425 (3d Cir. 2000) ("[T]he objectives of the [discrimination statutes] are furthered when even a single [individual] establishes that [another individual] has discriminated against him or her. The disclosure through litigation of incidents and practices that violate national policies respecting nondiscrimination . . . is itself important." (quoting McKennon v. Nashville Banner Publ'g Co., 513 U.S. 352, 358–59 (1992))), *cert. denied*, 121 S. Ct. 757 (2001).

[132] *Cf.* Polinsky & Shavell, *supra* note 29, at 909.

[133] *See* W. Kip Viscusi, *The Social Costs of Punitive Damages Against Corporations in Environmental and Safety Torts*, 87 GEO. L.J. 285 (1998); *Developments in the Law—The Civil Jury*, *supra* note 98.

[134] *See* Viscusi, *supra* note 133; *Developments in the Law—The Civil Jury*, *supra* note 98, at 1513–21.

[135] Critics might also argue that the risk of erroneous liability determinations cautions against punitive damages. Nonetheless, given the difficulty of proving housing discrimination and the relative ease with which it can be concealed, there is a greater risk of systematically underestimating punitive liability. At most, the fear of erroneous liability determinations might support reducing excessive awards, not disallowing punitive damages alto-

the housing context, the fact that the law already protects against frivolous litigation, the small magnitude of punitive awards in most housing discrimination cases, and the difficulty of proving discrimination all suggest that the benefits of the increased deterrence through punitive damages far outweigh the speculative costs.

Even assuming that the above criticisms of punitive damages apply to housing discrimination awards, these critiques address the size and manner of the punitive damages, not their availability. Courts frequently exercise their considerable discretion to reduce punitive damage awards.[136] Where excessive punitive damages pose concern in fair housing litigation, courts can remedy potential unfairness or inefficiency by reducing the size of the award, rather than by taking the much more drastic step of restricting the availability of punitive relief.[137]

5. Reasonable Belief That Conduct Was Legal

Arguably, punitive damages would be inappropriate when the defendant housing provider reasonably believed her allegedly discriminatory conduct to be lawful.[138] If the defendant reasonably attempted to comply with, or had no way of conforming her conduct to, ascertainable legal standards, then imposing punitive damages would be unfair and would have little deterrent effect, at least until the law were clarified. Barring punitive damages in such cases would also ensure that the threat of punitive damages does not discourage defendants from raising legitimate and well-considered challenges to the constitutionality of civil rights legislation or from challenging patently unreasonable interpretations of those laws by courts or administrative agencies.

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[136] *See* SCHLUETER & REDDEN, *supra* note 28, §§ 6.1(a)–(c), 6.2; Galanter & Luban, *supra* note 45, at 1408–10. Indeed, post-verdict review of punitive damage awards is constitutionally required. *See* Honda Motor Co. v. Oberg, 512 U.S. 415 (1994). Moreover, there are constitutional standards that govern review of allegedly excessive awards. *See, e.g.*, BMW of N. Am., Inc. v. Gore, 517 U.S. 559 (1996); TXO Prod. Corp. v. Alliance Res. Corp., 509 U.S. 443 (1993). Courts often substantially reduce awards in fair housing cases, though these reductions are, in my view, unwarranted or at least excessive. *See, e.g.*, Allahar v. Zahora, 59 F.3d 693 (7th Cir. 1995); Darby v. Heather Ridge, 827 F. Supp. 1296 (E.D. Mich. 1993); *see also infra* Part IV.

[137] A jury's decision not to award punitive damages is often unreviewable. *See, e.g.*, United States v. Balistrieri, 981 F.2d 916, 936 (7th Cir. 1992) ("[T]he jury was not required to award punitive damages, for punitive damages are always discretionary."). In bench trials, however, a judge's decision not to award punitive damages is reviewed for abuse of discretion. *See* Gore v. Turner, 563 F.2d 159, 164 (5th Cir. 1977) (declaring that punitive damages were mandatory given the nature of defendant's discriminatory conduct); Ragin v. Harry Macklowe Real Estate Co., 801 F. Supp. 1213 (S.D.N.Y. 1992).

[138] A pre-*Kolstad* analysis of this issue under Title VII reached a similar conclusion. *See* Judith Johnson, *A Standard for Punitive Damages Under Title VII*, 46 FLA. L. REV. 521 (1994) (concluding that if a plaintiff proves intentional discrimination, punitive damages are permissible unless the defendant proves it acted pursuant to a reasonable good faith belief that its actions were legal).

The above standard is consistent with the common law doctrine as reflected in the Restatement (Second) of Torts: a person acts with "reckless disregard" for the safety of another if the person is aware of potential harm or if he knows "or ha[s] reason to know of facts that would lead a reasonable man to realize" that his conduct creates an "unreasonable risk" of harm.[139] Under the Restatement approach, defendant housing providers who take race or some other prohibited characteristic into account are acting with "reckless disregard" for the rights of others if they know, or if a reasonable person would believe, such conduct to be unlawful.[140] Under these principles, punitive damages are inappropriate in cases in which the court announces a new legal duty that was not reasonably apparent from the text of the statute or from prior case law interpreting the statute.[141]

Courts should construe this reasonableness defense narrowly to ensure that punitive damages retain their strong deterrent effect. Punitive damages should not be barred merely because the statute is ambiguous and a barely plausible legal argument would excuse the defendant's conduct. Indeed, because many statutes are at least partially ambiguous, disallowing punitive damages due to statutory ambiguity would create a significant loophole for housing providers. Housing providers would have inadequate motivation to desist from discriminatory conduct in cases where liability was unclear, and plaintiffs and their attorneys would have little incentive to bring cases that expand legal frontiers.[142]

These considerations reveal that some of the *Kolstad* Court's observations about the propriety of awarding punitive damages should not be applied as general principles, but rather as efforts to give life to the two-tiered structure of Title VII. Therefore, they are inapplicable in the housing discrimination context. The central premise of *Kolstad*—that punitive damages are appropriate when the perpetrator disregards a "risk" that its actions will violate the law[143]—makes sense, particularly if construed in light of the common law principle that objectively unreasonable

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[139] RESTATEMENT (SECOND) OF TORTS § 908(2) (1965).

[140] *See* Kolstad v. Am. Dental Ass'n, 527 U.S. 526, 536 (1999).

[141] Thus, in *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 414 n.14 (1968), the Supreme Court correctly held that punitive damages should not be assessed against the defendants for discrimination that occurred before this decision was rendered. The Court's landmark holding that § 1982 outlawed private discrimination was a significant departure from the Court's prior rulings concerning the reach of the statute. *See id.* at 449–51 (Harlan, J., dissenting). Lower courts also declined to award punitive damages for conduct that occurred prior to *Jones*. *E.g.*, Lee v. S. Home Sites Corp., 429 F.2d 290, 294–95 (5th Cir. 1970).

[142] *United States* v. *Southern Management*, 955 F.2d 914 (4th Cir. 1992), is an example of a case in which a court wrongly vacated a punitive damage award merely because the claim was "novel," not because the defendant could reasonably have believed that its conduct was lawful. *See infra* notes 152–157 and accompanying text.

[143] *Kolstad*, 527 U.S. at 536.

risk is reckless.[144] However, the Court's suggestion that the risk must be subjectively[145] rather than objectively unreasonable cannot be reconciled either with the common law or with the deterrent objectives of the Fair Housing Act. Requiring a subjective awareness of the risk of illegality would underdeter precisely those perpetrators who require additional sanctions to act reasonably.[146] A subjective standard would also encourage perpetrators to make strategic efforts to remain ignorant of the law, rather than to stay familiar with its requirements.

Mere ignorance of the law should not bar imposition of punitive damages. Absent contrary language in a statute, ignorance of the law generally is not a defense to criminal or civil liability.[147] Since courts conclusively presume that a defendant is aware of the law when imposing criminal sanctions, there is little justification for a more lenient rule in the civil context of punitive damages.[148] The law that governs housing discrimination is, for the most part, clear and relatively uncomplicated, and its sources—statutes, regulations, and case law—are readily accessible.[149] Moreover, market forces have created a demand for nonprofit associations that serve the housing industry by keeping it current on legal requirements.[150] A conclusive presumption that the defendant is aware of the law for purposes of assessing punitive damages would encourage defendants to utilize these resources and self-educate.[151] Similarly, mere

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[144] *Id.*; *see also supra* note 102.

[145] *Kolstad*, 527 U.S. at 536 ("[A]n employer must at least discriminate in the face of a perceived risk that its action will violate federal law to be liable in punitive damages.").

[146] In stating otherwise, the *Kolstad* Court fixated on a definition of recklessness (subjective awareness of harm) without considering that recklessness is often broadly construed to deter even well-motivated but plainly unreasonable conduct. *See* DOBBS, *supra* note 26, § 3.11(2), at 321 ("[S]ome cases have found malice or recklessness [warranting punitive damages] even where the defendant believes he is actually within his legal rights.").

[147] *E.g.*, Bryan v. United States, 524 U.S. 184, 195 (1998) (noting "'traditional rule' that ignorance of the law is no excuse" (citing Cheek v. United States, 498 U.S. 192, 200 (1991))); United States v. Wagner, 940 F. Supp. 972, 981 (N.D. Tex. 1996) (noting that, in housing discrimination cases, citizens "are charged with knowledge of the law").

[148] *Cf. supra* text accompanying notes 93–102.

[149] *See* Bruso v. United Airlines, Inc., 239 F.3d 848 (7th Cir. 2001); *see also, e.g.*, Passantino v. Johnson & Johnson Consumer Prods., Inc., 212 F.3d 493, 516 (9th Cir. 2000) (holding that a jury may infer that defendant did not reasonably believe its conduct was lawful from evidence that it lied to conceal nature of its actions); Lowery v. Circuit City Stores, Inc., 206 F.3d 431, 443 (4th Cir. 2000) (inferring reckless disregard from perpetrator's general knowledge of nondiscrimination laws); EEOC v. EMC Corp. of Mass., No. 98-1517, 2000 WL 191819, at *7 (6th Cir. Feb. 8, 2000); United States v. Balistrieri, 981 F.2d 916, 936 (7th Cir. 1992) (holding that evidence that defendant systematically treated black apartment seekers less favorably than white apartment seekers supported punitive damage awards, without considering whether defendant knew that its conduct was unlawful).

[150] Examples include the National Association of Realtors and the National Association of Homebuilders, both of which represent the interests of the real estate sales and rental industries.

[151] Possible exceptions include situations where the defendant reasonably believed that its practice was covered by one of Title VIII's exemptions from coverage, *see* 42 U.S.C. §§ 3603(b), 3607 (1994), or where the defendant took some race-conscious efforts to remedy past discrimination or to promote or maintain integration that it reasonably thought

novelty of a claim should not bar punitive damages, particularly if the claim is "novel" only in that a court has not previously addressed the specific factual situation or legal question.

United States v. Southern Management[152] is an example of a court erroneously vacating a punitive damage award because the type of violation alleged had not been litigated in a previous controversy. The Fourth Circuit erred in not focusing on whether the defendant reasonably believed that its conduct was lawful. In *Southern Management*, the defendant refused to rent apartments to recovering substance abusers who were participating in a government-sponsored drug and alcohol abuse program. Under the program, participants were required to live in a rehabilitation facility for at least one year, where they were closely monitored and periodically tested for drugs. Individuals enrolled in the program who did not use alcohol or controlled substances for at least one year became eligible to live in apartments rented by the program while they continued to be periodically tested for drugs.[153] There was little question that the recovering substance abusers were included in the Fair Housing Act's definition of handicapped and that the defendant refused to rent apartments to them because of their previous substance abuse. The defendant, however, claimed that a statutory exclusion for "current, illegal use of or addiction to a controlled substance" excused its actions.[154] The defendant argued that because addiction is a lifelong condition, even recovering or recovered substance abusers who no longer use illegal drugs or alcohol would be forever excluded from the Act's protection.[155]

While Southern Management's argument was not frivolous, it was strained, and the Fourth Circuit squarely rejected it. The Fair Housing Act's legislative history clearly indicated that individuals with a record of addiction who did not currently use drugs or alcohol were protected by the Act.[156] Any contrary legal rule would exclude virtually all recovered substance abusers from the Act's protections, regardless of whether they posed any threat to the property or safety of others, a result anomalous with congressional intent.[157] Thus, a reasonable housing provider in Southern Management's position would have known that its actions were most likely illegal despite the novelty of the claim.

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lawful. *See, e.g.*, United States v. Starret City Assocs., 840 F.2d 1096 (2d Cir. 1988); *cf.* Kolstad v. Am. Dental Ass'n, 139 F.3d 958, 974 (D.C. Cir. 1998) (en banc) (Tatel, J., dissenting), *vacated*, 527 U.S. 526 (1999). In fact, the Act's prohibition of discrimination based on familial status provides an exemption for housing for persons fifty-five or older. The exemption provides a defense against monetary damages for those who reasonably rely in good faith on the exemption. 42 U.S.C. § 3607(b)(5)(A).

[152] 955 F.2d 914 (4th Cir. 1992).

[153] *Id.* at 916–17.

[154] *Id.* at 917, 920 (citing 42 U.S.C. § 3602(h)).

[155] *Id.*

[156] *Id.* at 921 (citing H.R. REP. No. 100-711, at 22 (1988)).

[157] *Id.* at 919 ("Congressional intent was to treat drug abuse as significant impairments [sic] that would constitute handicaps unless otherwise excluded.").

Finally, the mere fact that a defendant consulted an attorney prior to behaving in a discriminatory fashion should not bar a punitive damage award.[158] Attorneys, like anyone else, can reach unwarranted conclusions about what the law requires. Indeed, they may have a particular motive for doing so when they are associated with, or have a continuing business relationship with the defendant.[159] Defendants should be responsible for reaching a reasonable conclusion as to legal requirements; they should not be given an incentive to seek advice merely to minimize exposure.

C. Other Applications: Discriminatory Advertising and Discriminatory Design and Construction Cases

1. Discriminatory Advertising

The Fair Housing Act makes it unlawful for persons to make, print, or publish an advertisement with respect to the sale or rental of housing that "indicates any preference, limitation, or discrimination based on race [or] color . . . or an intention to make any such preference, limitation, or discrimination."[160] Courts and HUD have interpreted this provision to preclude advertisers from using human models of predominantly one race or ethnicity in a manner that communicates to a typical reader that members of other races or ethnic groups are not desired.[161] The standard is objective: intent to convey such a preference is not required.[162] Although two district courts declined to award punitive damages for such violations,[163] in a more recent advertising case, the Seventh Circuit held that the issue of punitive damages should have been submitted to the jury.[164]

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[158] *See* Ragin v. Harry Macklowe Real Estate Co., 801 F. Supp. 1213, 1235 (S.D.N.Y. 1992) (setting aside advisory jury verdict of punitive damages in part because defendant had consulted with in-house counsel before continuing to run discriminatory advertisements), *aff'd*, 6 F.3d 898 (2d Cir. 1993); *cf.* Fox v. Aced, 317 P.2d 608, 610 (Cal. 1957) (invalidating punitive damage award where defendant acted both on advice of counsel and in good faith).

[159] *See* United States v. Wagner, 940 F. Supp. 972 (N.D. Tex. 1996) (regarding neighbors seeking to block group home who retained an attorney who lived next door to proposed group home); *Harry Macklowe*, 801 F. Supp. at 1235 (regarding defendant who consulted in-house counsel).

[160] 42 U.S.C. § 3604(c) (1994).

[161] *See* Tyus v. Urban Search Mgmt., 102 F.3d 256, 265 (7th Cir. 1996); Hous. Opportunities Made Equal, Inc. v. Cincinnati Enquirer, 943 F.2d 644, 648 (6th Cir. 1991); Ragin v. N.Y. Times Co., 923 F.2d 995, 999–1002 (2d Cir. 1991); Spann v. Colonial Vill., Inc., 899 F.2d 24, 29–30 (D.C. Cir. 1990); 24 C.F.R. pt. 109 (1999).

[162] *See, e.g.*, *N.Y. Times*, 923 F.2d at 999; *Spann*, 899 F.2d at 29–30; United States v. Hunter, 459 F.2d 205, 215 (4th Cir. 1972).

[163] *Harry Macklowe*, 6 F.3d at 909 (holding that court "did not abuse its discretion in declining to award punitive damages"); Saunders v. Gen. Servs. Corp., 659 F. Supp. 1042, 1061 (E.D. Va. 1987).

[164] *See Tyus*, 102 F.3d at 266. Although *Tyus* reached the right result, its reasoning—that the defendant had failed to include the equal opportunity logo on its advertisements even though HUD regulations required it to do so—was unduly narrow. The court should

Punitive damages are generally appropriate in human model discriminatory advertising cases and should be submitted to the jury in cases where the evidence is sufficient to establish a violation. The law is relatively well established: housing advertisers who use almost exclusively white human models risk violating § 3604(c), since the use of predominantly white human models conveys a clear message of exclusion to nonwhites.[165]

In addition, punitive damages are appropriate in human model cases because filing such claims requires considerable resources. Because one incident of an advertisement depicting persons of a single race is generally not actionable,[166] the discriminatory character of an advertising campaign will seldom be self-evident. The plaintiff must ordinarily monitor the defendant's advertisements over a significant period of time to establish a pattern of discriminatory conduct[167] and this often requires persistent, conscientious, and resource-intensive investigation by a fair housing organization. An added disincentive to bringing suit is that compensatory damages are often limited to the individual plaintiff's intangible emotional distress and the fair housing organization's opportunity costs, both of which are difficult to prove. Thus, absent punitive damages, the significant resources that must be devoted to investigating advertising cases and the risk that the litigation or investigative efforts will fail provide a weak incentive for bringing suit. Furthermore, although intent to discriminate is not an element of the violation in the human model cases, the decision to advertise housing with human models of certain races and ethnic groups is a volitional act. Imposing punitive damages will give advertisers an incentive to review their campaigns carefully and to comply with the law by welcoming qualified individuals and families of all racial and ethnic groups.

2. *Cases Alleging a Failure to Design and Construct Multifamily Housing for Accessibility to Persons with Disabilities*

Defendants, notably architects and builders, charged with failure to make multifamily housing accessible to persons with disabilities[168] have

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have held that due to the clear rule barring exclusive use of white human models in an advertising campaign for an apartment complex, the jury could infer that the defendant acted in reckless disregard of the law.

[165] *See, e.g., N.Y. Times*, 923 F.2d at 1000; *Saunders*, 659 F. Supp. at 1058–59 (citing expert testimony).

[166] *See Tyus*, 102 F.3d at 265; *Hous. Opportunities*, 943 F.2d at 648.

[167] *See Tyus*, 102 F.3d at 265.

[168] *See* 42 U.S.C. § 3604(f)(3)(C) (1994). This provision requires that all "covered multifamily dwellings" built for first occupancy after March 13, 1991 must contain six accessibility-enhancing features: (1) accessible public and common use areas; (2) doors wide enough to accommodate passage by persons with wheelchairs; (3) an accessible route into and through the dwelling; (4) light switches, electrical outlets, and environmental controls in an accessible location; (5) reinforcements in bathrooms to allow for the later

either asserted that they were unaware that the Fair Housing Act applies to multifamily homes or have argued that punitive damages are inappropriate in such cases.[169] To give architects and builders adequate time to familiarize themselves with the law, Congress provided that new requirements would apply only to housing designed and constructed for first occupancy two and one half years after the Act's promulgation. In addition, HUD designed a manual explaining requirements for new construction and issued guidelines that provide a safe harbor for developers.[170] Given the crucial importance of new housing construction to the provision of sufficient housing opportunities to persons with disabilities, it is reasonable to expect architects and builders—who profit from new housing—to take appropriate measures to comply with applicable laws.

Nonetheless, the vast number of housing units constructed since the Act took effect, coupled with the resources required to discover and establish that a complex is not built in accordance with the requirements of the Act, has likely led many builders and architects to conclude that the chance that they will be sued with respect to a particular project is slim. Indeed, surveys of newly constructed multifamily housing have consistently revealed widespread noncompliance.[171] Furthermore, because many multifamily units will be sold to individual owners before a suit is filed, the threat of a costly injunction that would bar further sales or halt construction may be minimal even if the builder is sued.[172] These considerations suggest that punitive damages are appropriate to provide an effective deterrent, at least in cases in which the requirements for new construction that the defendant disregarded were relatively clear.

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installation of grab bars; and (6) kitchens and bathrooms with sufficient space to permit persons with wheelchairs to maneuver in the rooms. *Id.* Covered multifamily dwellings include all dwellings in buildings with four or more units with one elevator and ground floor dwellings in buildings with four or more units without an elevator. *Id.* at § 3604(f)(7).

[169] *See, e.g.*, Perland Corp., HUDALJ 05-96-1517-8, 1998 WL 142159, at *15 (U.S. Dep't of Hous. & Urban Dev. Mar. 30, 1998) (finding that builder was put on notice of requirements of law for the purpose of assessing civil penalties); *cf.* Balt. Neighborhoods, Inc. v. LOB, Inc. 92 F. Supp. 2d 456 n.1 (D. Md. 2000); Mont. Fair Hous., Inc. v. Am. Capital Dev., Inc., 81 F. Supp. 2d 1057, 1069 (D. Mont. 1999) (referencing claim that defendants did not engage in knowing violation of law due to ambiguity of the Fair Housing Act).

[170] *See* 42 U.S.C. § 3604(f)(3)(C); Fair Housing Accessibility Guidelines, 56 Fed. Reg. 9472 (Mar. 6, 1991) (codified at 24 C.F.R. Ch. I, Subch. A, App. II); BARRIER FREE ENVIRONMENTS, INC., FAIR HOUSING ACT DESIGN MANUAL (1996) (prepared for HUD's Office of Fair Housing and Equal Opportunity and Office of Housing). The statute also provides that compliance with the appropriate requirements of the American National Standards Institute for buildings and facilities providing accessibility and usability for physically handicapped people will satisfy the last four accessibility requirements of the statute. 42 U.S.C. § 3604(f)(3)(C).

[171] *E.g., Boyd, supra* note 7; *Treadway, supra* note 7.

[172] *But see* HUD v. Perland, Nos. 98-2269, 98-2608 (7th Cir. July 14, 1998) (order enjoining further sales until owner had brought units he still owned into compliance with the Fair Housing Act).

II. Punitive Damages in the Absence of Compensatory Damages

The circuits are divided as to whether punitive damages can be awarded in housing discrimination cases if the plaintiff fails to prove any compensable harm. The Third Circuit has held that compensatory damages are not a prerequisite to punitive damages in fair housing cases,[173] while the Fourth Circuit has held that they are.[174] The Fifth Circuit has taken conflicting positions, holding that punitive damages are recoverable in the absence of compensatory damages in housing discrimination claims brought pursuant to § 1982,[175] but not in cases brought pursuant to the Fair Housing Act.[176]

A. Statutory Objectives

Because the Fair Housing Act does not condition the award of punitive damages on the assessment of compensatory damages, courts should examine the purposes of the statute and common law principles to determine whether they support such a limitation.[177] Requiring proof of compensable harm as a prerequisite to an award of punitive damages frustrates the objectives of the Act. Whether an act of housing discrimination causes compensable harm depends on whether the plaintiff obtains alternative housing at the same or lower cost and whether she proves that she

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[173] Alexander v. Riga, 208 F.3d 419, 430 (3d Cir. 2000), *cert. denied*, 121 S. Ct. 757 (2001). The Seventh and Ninth Circuits have also stated that punitive damages may be awarded in fair housing litigation in the absence of compensatory damages, but their statements are arguably dicta. *See* Rogers v. Loether, 467 F.2d 1110, 1112–13 (7th Cir. 1972), *aff'd sub nom.* Curtis v. Loether, 415 U.S. 189 (1974); Fountila v. Carter, 571 F.2d 487, 492 (9th Cir. 1978).

[174] People Helpers Found., Inc. v. City of Richmond, 12 F.3d 1321, 1327 (4th Cir. 1993).

[175] Hodge v. Seiler, 558 F.2d 284, 288 (5th Cir. 1977) (holding that when victim admitted the absence of actual damages, trial court should have awarded nominal damages and then assessed punitive damages).

[176] La. ACORN Fair Hous. v. LeBlanc, 211 F.3d 298, 303 (5th Cir. 2000) (vacating $10,000 punitive damage award to victim of racial discrimination where jury awarded no compensatory damages), *cert. denied*, 121 S. Ct. 1225 (2001). The *LeBlanc* court erred in failing to explain *Hodge*. The only difference between the two cases is that the plaintiff in *Hodge* sued under § 1982, while the plaintiff in *LeBlanc* sued under the Fair Housing Act. Since neither statute addresses the standards for assessing punitive damages, *Hodge*'s general holding should apply both to the Fair Housing Act and to § 1982. The *LeBlanc* court also held that the jury was not required to award nominal damages once it determined that the defendant had discriminated. *Id.* at 304. This contradicts the Fifth Circuit's prior holding in *Gore v. Turner*, 563 F.2d 159, 164 (5th Cir. 1977), which *required* the district court to award nominal damages if the plaintiff was the victim of racial discrimination in housing, even though no actual damages were proven. *See also Hodge*, 558 F.2d at 287. The *LeBlanc* court attempted to distinguish *Turner* as a case involving constitutional rights rather than statutory rights. *LeBlanc*, 211 F.3d at 303. In both *Turner* and *LeBlanc*, however, the same right was at issue: the right to be free from private racial discrimination in housing. *See Turner*, 563 F.2d at 164 (citing Jones v. Alfred H. Mayer Co., 392 U.S. 409, 441 (1968)).

[177] *See supra* note 94.

was sufficiently affected by the discrimination to suffer substantial emotional distress.[178] Harm to the plaintiff, as well as proof of such harm, is largely fortuitous. Nonetheless, regardless of whether the plaintiff demonstrates harm, housing discrimination causes significant social harm that society has an interest in deterring.[179] Perpetrators should not escape sanction merely because they are fortunate enough to have selected a cynical victim or one who could locate replacement housing.[180]

Moreover, conditioning punitive damages on proof of compensatory damages may inhibit the filing of meritorious claims. The fact that a plaintiff does not recover compensatory damages in a housing discrimination case may signal only that she was unable to prove harm with sufficient specificity, not that no harm occurred.[181] At common law, for example, courts have noted that some intentional torts, such as defamation, trespass, and disenfranchisement, almost inevitably cause *some* harm, although proving such harm may be difficult.[182] Likewise, housing discrimination is a tort for which the intangible harms are generally difficult to ascertain. Permitting plaintiffs to recover punitive damages without a showing of compensable harm helps ensure that plaintiffs will not be deterred from filing meritorious actions merely because of the uncertainty of recovering actual damages.[183]

Underdeterrence may also arise from tying punitive damages to compensatory damages because juries may arbitrarily characterize damages as "punitive" or "compensatory" even though they agree on the total

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[178] *See supra* notes 55, 57–60 and accompanying text.

[179] *See supra* notes 71–76 and accompanying text.

[180] The violation of a plaintiff's statutory right confers standing to sue, regardless of whether that plaintiff has suffered a compensable injury. "[The] injury required by Art. III may exist solely by virtue of 'statutes creating legal rights, the invasion of which creates standing.'" Lujan v. Defenders of Wildlife, 504 U.S. 555, 578 (1992); *see also* Havens Realty Corp. v. Coleman, 455 U.S. 363, 374 (1982) ("That the tester may have approached the real estate agent fully expecting that he would receive false information, and without any intention of buying or renting a home, does not negate the simple fact of injury within the meaning of [Section] 804(d)."); Trafficante v. Metro. Life Ins. Co., 409 U.S. 205, 208–12 (1972) ("The person on the landlord's blacklist is not the only victim of discriminatory housing practices; it is . . . 'the whole community . . . .'" (citation omitted)).

[181] *See supra* notes 60–62 and accompanying text.

[182] *See, e.g.*, SCHLUETER & REDDEN, *supra* note 28, § 6.1(D)(4)(a) (defamation); Maganini v. Coleman, 362 A.2d 882, 883 (Conn. 1975) ("Now, there is no doubt that, for any wrongful invasion of another's property, some damage necessarily results; and the law does not require any distinct injury to be shown, in order to justify a recovery." (quoting Nicholson v. N.Y. & New Haven R.R. Co., 22 Conn. 74, 84 (1852))). In *Wayne v. Venable*, the Eighth Circuit noted:

> In the eyes of the law th[e] right [to vote] is so valuable that damages are presumed from the wrongful deprivation of it without evidence of actual loss of money, property, or any other valuable thing, and the amount of the damages is a question peculiarly appropriate for the determination of the jury.

260 F. 64, 66 (8th Cir. 1919).

[183] *See* SCHLUETER & REDDEN, *supra* note 28, § 6.1(D)(4)(a).

damage award. Juries tend to reach a strong consensus on the severity of punishment that defendants deserve despite gender, racial, ethnic, religious, and socioeconomic differences.[184] Suppose, for example, that two juries, *A* and *B*, both believe that a $50,000 damage award would deter discrimination by housing providers situated similarly to a given defendant. Under identical circumstances, Jury *A* might award $30,000 in compensatory damages and $20,000 in punitive damages, while Jury *B* might award $0 in compensatory damages and $50,000 in punitive damages. Jury *B*'s "finding" that the victim suffered no compensable harm may reflect a compromise on an issue that individual jurors considered irrelevant to the ultimate conclusion that the defendant's conduct merits a $50,000 penalty. As Judge Easterbrook notes, a jury might simply "prefer[ ] to award a single sum under the punitive category rather than apportion between compensatory and punitive damages."[185] Alternatively, a jury may find the conduct so deplorable that it believes a large "punitive" award most appropriately sends a strong message of condemnation.[186] Under a rule that compensatory damages are necessary for a punitive award, however, a jury's judgment that a defendant's conduct should be sanctioned can be compromised.[187] The court generally will not instruct the jury that a failure to award compensatory damages will preclude punitive damages.

B. Common Law Principles

Permitting the award of punitive damages in the absence of compensatory damages is consistent with common law principles. The Supreme Court and the lower federal courts have consistently held that punitive damages may be awarded in federal civil rights cases in the absence of an award of compensatory damages.[188] Similarly, the Restatement,[189] leading

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[184] *Cf.* Sunstein et al., *supra* note 83, at 2077–78 (finding that diverse groups reach strong consensus when asked to rate a defendant's blameworthiness from one to five, but vary significantly when translating the judgement into dollars).

[185] Timm v. Progressive Steel Treating, Inc., 137 F.3d 1008, 1011 (7th Cir. 1998).

[186] *See* Galanter & Luban, *supra* note 45, at 1406–07 (explaining the symbolic effect of labeling an award "punitive").

[187] *See* La. ACORN Fair Hous. v. LeBlanc, 211 F.3d 298, 304 (5th Cir. 2000), *cert. denied*, 121 S. Ct. 1225 (2001); People Helpers Found., Inc. v. City of Richmond, 12 F.3d 1321, 1327 (4th Cir. 1993).

[188] *E.g.*, Carlson v. Green, 446 U.S. 14, 22 n.9 (1980) ("[P]unitive damages may be the only significant remedy available in some § 1983 actions where constitutional rights are maliciously violated but the victim cannot prove compensable injury."); Buckner v. Franco, Inc., No. 97-6028, 1999 WL 232704, at **1 (6th Cir. Apr. 12, 1999); *Timm*, 137 F.3d at 1010–11; Kerr-Selgas v. Am. Airlines, Inc., 69 F.3d 1205, 1215 (1st Cir. 1995) (concluding that timely request for nominal damages may support award of punitive damages even in the absence of compensatory damage award); Erwin v. County of Manitowoc, 872 F.2d 1292, 1299 (7th Cir. 1989) (§ 1983 case); Ryland v. Shapiro, 708 F.2d 967, 976 (5th Cir. 1983) (§ 1983 case); Basista v. Weir, 340 F.2d 74, 87–88 (3d Cir. 1965) (§ 1983 case).

[189] RESTATEMENT (SECOND) OF TORTS § 908 cmt. b (1965) ("Although a defendant has

treatise writers,[190] and courts in a substantial number of jurisdictions maintain that compensatory damages are not necessary to support a punitive damage award.[191] These authorities recognize that the defendant should not avoid a sanction meant to deter wrongful acts merely because the plaintiff fortuitously escaped harm (or was unable to prove any compensable harm).[192]

Although some state courts require compensatory damages for an award of punitive damages for some torts, they generally state the rule with little explanation.[193] These courts often conflate the requirement that a plaintiff establish a cognizable injury (i.e., an invasion of legal rights) with the requirement that she prove some compensable harm.[194] Of course, punitive damages are not recoverable merely because the defendant acted outrageously; the plaintiff must establish the requisite elements of a cause of action.[195] Yet, for torts in which some actual harm is an element of recovery, courts sometimes recite that punitive damages are not recoverable in the absence of actual damages, based on the premise that without actual damages no cause of action exists to support a punitive damage award.[196] Compensable harm is not required to prove unlawful housing discrimination. When a defendant denies or restricts housing based on a protected characteristic, that wrongful act, by itself, establishes the injury necessary to establish a violation.[197] Moreover, the refusal by courts to permit punitive damages in the absence of compen-

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inflicted no harm, punitive damages may be awarded because of, and measured by, his wrongful purpose or intent, as when he unsuccessfully makes a murderous assault upon the plaintiff, who suffers only a momentary apprehension."). The Restatement stops one step short of asserting that punitive damages could have deterred the murder attempt if the defendant had known that even the attempt would result in punishment.

[190] DOBBS, *supra* note 26, § 3.11(10), at 342 ("[T]he absence of recoverable compensatory damages—actual, presumed, or otherwise—does not seem to have much bearing on the propriety of a punitive award."); KEETON ET AL., *supra* note 95, § 2, at 14–15; SCHLUETER & REDDEN, *supra* note 28, § 6.1(D)(4)(a) ("Punitive damages would seem especially appropriate in situations where actual damages are unascertainable or difficult to calculate but where the wrongful mental state of the defendant is clear.").

[191] DOBBS, *supra* note 26, § 3.11(10), at 341–43; 4 FOWLER V. HARPER, FLEMING JAMES, JR. & OSCAR S. GRAY, THE LAW OF TORTS § 25.5A nn.29–31 (1986 & Supp. 2000); JOHN KIRCHER & CHRISTINE WISEMAN, PUNITIVE DAMAGES: LAW AND PRACTICE § 5.21 (2d ed. 2000); SCHLUETER & REDDEN, *supra* note 28, § 6.1(D)(4)(a) nn.70–72.

[192] *E.g.*, SCHLUETER & REDDEN, *supra* note 28, § 6.1(D)(4)(a); Loftsgaarden v. Reiling, 126 N.W.2d 154, 154–55 (Minn. 1964) ("The need for . . . a deterrent is at least as great where the person libeled cannot show actual loss in money caused by the false statement as where some measurable damage is provable.").

[193] 4 HARPER, JAMES & GRAY, *supra* note 191, at 25.5A n.27; KIRCHER & WISEMAN, *supra* note 191, § 5.21; SCHLUETER & REDDEN, *supra* note 28, § 6.1(D)(4)(c).

[194] SCHLUETER & REDDEN, *supra* note 28, § 6.1(D)(2).

[195] *Id.*; KEETON ET AL., *supra* note 95, § 2, at 14; *see also* Shell Oil Co. v. Parker, 291 A.2d 64 (Md. 1972); Hilbert v. Roth, 149 A.2d 648, 649 (Pa. 1959) ("The right to punitive damages is a mere incident to a cause of action and an element which the jury may consider in making its determination and not the subject of an action itself.").

[196] KEETON ET AL., *supra* note 95, § 2, at 14.

[197] *See* Alexander v. Riga, 208 F.3d 419, 427–29 (3d Cir. 2000), *cert. denied*, 121 S. Ct. 757 (2001); *see also supra* note 180.

satory damages for some torts may reflect a belief that the violation is too trivial to merit punitive damages if no harm is shown. Whatever merit this belief may have for some torts, it is plainly not applicable to housing discrimination.

C. The Decisions Holding That Compensatory Damages Are Necessary

The two circuit court decisions concluding that punitive damages must be conditioned on an award of actual damages in housing discrimination cases are flawed. Citing only *Prosser and Keeton*, the Fourth Circuit concluded in *People Helpers Foundation, Inc. v. City of Richmond*[193] that a majority of the states require compensatory damages before awarding punitive damages.[199] A more complete survey of state law cases, however, reveals that there is substantial authority on both sides of the issue and that neither rule commands a clear majority of jurisdictions.[200]

In any event, federal courts should not fashion federal common law rules by simple arithmetic, nor should they blindly follow such rules without further analysis. Rather, courts should adapt common law principles to advance the purpose of the statute. As we have seen, permitting punitive damages even when the plaintiff does not recover compensatory damages best serves the deterrent purposes of the Fair Housing Act. In addition, the Fourth Circuit erred in relying on the fact that Virginia, the state in which the action originated, did not permit punitive damages unless the plaintiff recovered compensatory damages.[201] Although courts may look to the general common law in all states to determine the appropriate rule, the availability of punitive damages is ultimately a question of federal law and is not controlled by the law of any particular state.[202]

The Fifth Circuit, in *Louisiana ACORN Fair Housing v. LeBlanc*,[203] acknowledged that the Fourth Circuit's reasoning was faulty and that federal courts had frequently assessed punitive damages in civil rights cases even if the plaintiff did not recover compensatory damages.[204] The *LeBlanc* court, however, attempted to restrict this doctrine to cases involving constitutional rights.[205] As other courts have recognized, there is no basis for drawing such a distinction between constitutional and statu-

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[193] People Helpers Found., Inc. v. City of Richmond, 12 F.3d 1321 (4th Cir. 1993).

[199] *Id.* at 1327 (citing KEETON ET AL., *supra* note 95, § 2, at 14).

[200] *Prosser and Keeton* only cites a handful of cases, most of which are old; a more thorough summary of the cases on this issue appears in SCHLUETER & REDDEN, *supra* note 28, § 6.1(D), and KIRCHER & WISEMAN, *supra* note 191. *See generally supra* notes 191–196 and accompanying text.

[201] *People Helpers Found., Inc.* 12 F.3d at 1327.

[202] *See supra* note 94.

[203] 211 F.3d 298 (5th Cir. 2000), *cert. denied*, 121 S. Ct. 1225 (2001).

[204] *Id.* at 302–04.

[205] *Id.* at 303.

tory rights;[206] society has an interest in eliminating infringements on both.

The Fifth Circuit also held, in the alternative, that punitive damages were not appropriate if the jury awarded neither compensatory nor nominal damages. The Fifth Circuit incorrectly assumed that juries should have discretion over the decision to award nominal damages.[207] The recovery of nominal damages allows plaintiffs to obtain the benefits of establishing a cause of action, such as the right to obtain punitive damages, declaratory relief, or injunctive relief.[208] These purposes suggest that nominal damages are superfluous in housing discrimination cases, where damages are not an element of the tort. In any event, the propriety of nominal damages for particular torts should be a question of law for the court, because it represents a judgment that the right at issue is worth recognizing even though no harm was proven.[209] Indeed, federal courts, including the Supreme Court, have uniformly held that nominal damages are mandatory if the plaintiff prevails on a constitutional civil rights claim.[210] With respect to statutory civil rights claims, the courts are not unanimous,[211] but the better view is that nominal damages are mandatory

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[206] Timm v. Progressive Steel Treating, Inc., 137 F.3d 1008, 1010–11 (7th Cir. 1998).

[207] The Restatement defines nominal damages as "a trivial sum of money awarded to a litigant who has established a cause of action but has not established that he is entitled to compensatory damages." RESTATEMENT (SECOND) OF TORTS § 907 (1965).

[208] RESTATEMENT (SECOND) TORTS § 907 cmt. b (1965).

[209] Carey v. Piphus, 435 U.S. 247, 266 (1978).

[210] *E.g.*, Farrar v. Hobby, 506 U.S. 103 (1994) (holding that a plaintiff is entitled to nominal damages if she establishes liability for denial of procedural due process); *Carey*, 435 U.S. at 267 (determining that a basic purpose of § 1983 is to compensate persons for injuries caused by deprivation of constitutional rights, and awarding nominal damages absent proof of actual injury in public school students' procedural due process claim); Gibeau v. Nellis, 18 F.3d 107, 110–11 (2d Cir. 1994) (requiring jury to award nominal damages upon finding violation of § 1983).

[211] *Compare* LeBlanc-Sternberg v. Fletcher, 67 F.3d 412, 431 (8th Cir. 1995) (holding in a fair housing case that nominal damages are mandatory if plaintiff proves a civil rights violation even if she does not prove compensable injury), Cabrera v. Jakabovitz, 24 F.3d 372, 391 (2d Cir. 1994) (upholding an award of attorney's fees and costs against landlord in Title VIII housing discrimination action), McKenna v. Peekskill Hous. Auth., 648 F.2d 332, 335–46 (2d Cir. 1981) (directing district court on remand to enter a judgment for nominal damages in suit under § 1983 brought by tenants in housing project operated by housing authority), *and* Hodge v. Seiler, 558 F.2d 284 (5th Cir. 1977) (§ 1982), *with* La. ACORN Fair Hous. v. LeBlanc, 211 F.3d 298, 304 (5th Cir. 2000) (declining to find nominal damages mandatory in Fair Housing Act case), *cert. denied*, 121 S. Ct. 1225 (2001), *and* Buckner v. Franco, Inc., No. 97-6028, 1999 WL 232704, at **1 (6th Cir. Apr. 12, 1999) (finding nominal damages are not mandatory in Title VII case). *LeBlanc* stands alone, however, in holding that nominal damages are not mandatory in the context of housing discrimination. The *LeBlanc* court relied primarily on *Kerr-Selgas v. American Airlines, Inc.*, 69 F.3d 1205, 1215 (1st Cir. 1995), a Title VII case. That case held only that plaintiffs may waive a claim for nominal damages if they do not make a timely request for such damages after the jury verdict, not that juries have discretion over whether to award nominal damages once the plaintiff proves a civil rights violation.

because no meaningful distinction exists between claims predicated on constitutional rights and those based on purely statutory rights.[212]

III. Vicarious Liability for Punitive Damages

Courts in housing discrimination cases have reached conflicting decisions regarding the vicarious imposition of punitive damages on an employer based on the discriminatory action of its employees.[213] Vicarious liability doctrine is extremely important in fair housing cases because the perpetrators of housing discrimination often are employees who lack the resources to pay punitive damages. For example, imagine a plaintiff who amasses evidence that an apartment complex systematically denies apartments to minorities. When confronted with the evidence, however, the owner disavows knowledge of her employees' discriminatory actions and produces evidence that she repeatedly instructed them not to discriminate. The plaintiff is now in the difficult position of proving the employer's insincerity. Additionally, the owner would claim that it is unfair to punish her for her employee's misdeeds. To understand and resolve such a problem, consider the common law doctrine concerning the vicarious imposition of punitive damages, the contrasting approaches courts have adopted in fair housing cases, and the impact of the Supreme Court's recent decision in *Kolstad*.[214]

A. Common Law Principles

Under traditional *respondeat superior* liability, an employer is vicariously liable for compensatory damages arising from her employee's torts, including unlawful discrimination, committed within the scope of employment.[215] Housing providers are liable for compensatory damages

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[212] *See supra* notes 175–176 and accompanying text.

[213] *Compare* Alexander v. Riga, 208 F.3d 419, 423, 432 (3d Cir. 2000) (holding owner liable for punitive damages even though he did not participate in the discrimination, know about the discrimination, or involve himself in the management of the apartment building), *cert. denied*, 121 S. Ct. 757 (2001), *with* Chicago v. Matchmaker Real Estate Sales Ctr., Inc., 982 F.2d 1086, 1101 (7th Cir. 1992) (requiring greater showing than negligence to find principal liable for punitive damages), Hamilton v. Svatik, 779 F.2d 383, 389 (7th Cir. 1985) (holding owner not liable for punitive damages merely because of ownership), *and* Fort v. White, 530 F.2d 1113, 1117 (2d Cir. 1975) (holding that employer himself must have failed to prevent known discriminatory actions, or have had willful disregard of employee's actions to be held liable for punitive damages).

[214] Kolstad v. Am. Dental Ass'n, 527 U.S. 526, 543–44 (1999).

[215] The *Kolstad* Court explained that "even intentional torts are within the scope of an agent's employment if the conduct is 'the kind [the employee] is employed to perform,' 'occurs substantially within the authorized time and space limits,' and 'is actuated, at least in part, by a purpose to serve the' employer." *Id.* at 543 (quoting Restatement (Second) of Agency § 228(1), at 504 (1958)). This is so "even if the employee engages in acts 'specifically forbidden' by the employer and uses 'forbidden means of accomplishing results.'" *Id.* at 544 (quoting Restatement (Second) of Agency § 230, at 511 cmt. b

when their employees violate fair housing laws, even if the housing provider has specifically instructed them not to discriminate.[216]

Courts are almost evenly divided, however, over whether there should be a different liability standard for punitive damages. A substantial number of jurisdictions have adopted the "course of employment" rule,[217] whereby employers may be assessed punitive damages for their employees' wrongful acts committed within the scope of employment, regardless of whether there is additional evidence of culpability by higher corporate officials.[218] A slightly larger number of jurisdictions follow the somewhat more restrictive approach of Section 909 of the Restatement (Second) of Torts and Section 217C of the Restatement (Second) of Agency.[219] Under the Restatement rule, a court may assess punitive damages against the employer vicariously only if the principal or managerial agent[220] authorized or ratified the employee's action, or the employee who carried out the tortious act was employed in a managerial capacity and was acting in the scope of employment.[221] The Restatement also calls for punitive damages against the employer for her own misconduct, including recklessness in hiring or retaining an unfit employee.[222]

While the Restatement approach is nominally more restrictive than the course of employment rule, courts often apply the Restatement in a manner that practically eliminates the distinction.[223] For example, some

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(1958)).

[216] *E.g.*, Walker v. Crigler, 976 F.2d 900, 904 & n.5 (4th Cir. 1992); Phiffer v. Proud Parrot Motor Hotel, 648 F.2d 548, 552 (9th Cir. 1980); Marr v. Rife, 503 F.2d 735, 741 (6th Cir. 1974). Courts impose vicarious liability under the Fair Housing Act based on a housing provider's "non-delegable" duty not to discriminate, rather than on the principle of *respondeat superior*, where the agent who discriminated claims to be an independent contractor. *E.g.*, Saunders v. Gen. Servs. Corp., 659 F. Supp. 1042, 1059 (E.D. Va. 1987).

[217] *See* Briner v. Hyslop, 337 N.W.2d 858, 861 (Iowa 1983).

[218] Twenty jurisdictions have adopted this rule. KIRCHER & WISEMAN, *supra* note 191, § 24.07; *see also* KEETON ET AL., *supra* note 95, § 2, at 13 & n.58; SCHLUETER & REDDEN, *supra* note 28, § 4.4(B)(2)(a); Philip H. Corboy, *Vicarious Liability for Punitive Damages: The Effort to Constitutionalize Tort Reform*, 6 SETON HALL CONST. L.J. 5, 16 & n.50 (1991).

[219] *See* SCHLUETER & REDDEN, *supra* note 28, § 4.4(B)(2)(a); KEETON ET AL., *supra* note 95, § 2, at 12; KIRCHER & WISEMAN, *supra* note 191, § 24.02 (noting that twenty-two jurisdictions have adopted this rule). Minnesota has also adopted the Restatement approach by statute. MINN. STAT. § 549.20(2) (2000).

[220] The Restatement does not define the term "managerial capacity" except to note that it includes "important" positions. RESTATEMENT (SECOND) OF TORTS § 909 cmt. c (1965). Courts have interpreted this comment to mean that persons other than top management, officers, and directors may act in a managerial capacity. KIRCHER & WISEMAN, *supra* note 191, § 24.05.

[221] RESTATEMENT (SECOND) OF TORTS § 909 (1965) is identical to RESTATEMENT (SECOND) OF AGENCY § 217(c) (1958).

[222] RESTATEMENT (SECOND) OF TORTS § 909 (1965); KIRCHER & WISEMAN, *supra* note 191, § 24.04. As Kircher and Wiseman note, although the Restatement lists recklessness in employing or retaining an unfit employee as one of the circumstances in which punitive damages may be imposed vicariously, liability for punitive damages flows directly from the principal's recklessness. Vicarious liability doctrine need not be invoked. *Id.* § 24.01, .04.

[223] Ellis, *supra* note 31, at 63–64.

courts interpret the term "managerial capacity" so broadly that it covers low-level supervisors and non-supervisory employees who exercise de facto policymaking authority when interacting with the plaintiff.[224] Other courts infer authorization when employers delegate broad authority to agents or when employers exercise little control over employees in the face of known problems.[225] Courts also infer ratification and approval of an employee's action from a variety of circumstances,[226] including the failure to discharge or discipline the employee in a timely manner,[227] the failure to apologize for the conduct,[228] and bringing a claim based on the employee's conduct or defending the employee's conduct in court.[229]

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[224] *Id.* at 64; *see, e.g.*, Hatrock v. Edward D. Jones & Co., 750 F.2d 767 (9th Cir. 1984) (stock broker who was sole operator of a branch office); Egan v. Mut. of Omaha Ins. Co., 133 Cal. Rptr. 899 (Dist. Ct. App. 1976) (insurance claims manager), *vacated by* 169 Cal. Rptr. 691 (Cal. 1979); Gould v. Taco Bell, 722 P.2d 511 (Kan. 1986) (assistant manager at franchise); Tennant Co. v. Advance Mach. Co., 355 N.W.2d 720 (Minn. Ct. App. 1984) (poorly supervised salesman who helped train other personnel); Gill v. Montgomery Ward & Co., 129 N.Y.S.2d 288 (App. Div. 1954) (head of store's "protective department"); Purvis v. Prattco, Inc., 595 S.W.2d 103 (Tex. 1980) (night manager of hotel); Canon-USA v. Carson Map Co., 647 S.W.2d 321 (Tex. App. 1982) (salesman who performed demonstration of copier).

[225] *E.g.*, Gen. Motors Acceptance Corp. v. Froelich, 273 F.2d 92, 94 (D.C. Cir. 1959) (holding that corporation is not shielded from punitive damages by absence of explicit authorization or ratification of particular conduct of agent); Briner v. Hyslop, 337 N.W.2d 858 (Iowa 1983) (holding corporation liable for punitive damages with respect to fatal accident caused by the company's truck driver when the corporation was aware that its drivers drove long hours with little rest yet took little action to control their driving habits); Templin v. Mountain Bell Tel. Co., 643 P.2d 263 (N.M. Ct. App. 1982) (holding that phone company can be held liable for general policies authorizing procedures that permitted installation of extension of phone to intercept private conversations); K-Mart No. 4195 v. Judge, 515 S.W.2d 148 (Tex. Civ. App. 1974) (holding defendant store that ratified action of security guards liable); *cf.* CEH, Inc. v. F/V Seafarer, 70 F.3d 694 (1st Cir. 1995) (finding boat owner liable for punitive damages where boat's captain had virtually complete authority and owner had knowledge of captain's potential conflict with plaintiffs). *But see* Dart-Drugs, Inc. v. Linthicum, 300 A.2d 442 (D.C. 1973) (store owners not liable for punitive damages where manager had overall supervisory control of store).

[226] KIRCHER & WISEMAN, *supra* note 191, § 24.06; SCHLUETER & REDDEN, *supra* note 28, § 4.4(B)(2)(a).

[227] *E.g.*, Hartman v. Shell Oil Co., 137 Cal. Rptr. 244, 250 (Ct. App. 1977) (holding that failure to discharge or reprimand employee is some evidence of the principal's approval); *Tennant Co.*, 355 N.W.2d at 724 (imposing vicarious punitive damages where corporate officers failed to take any action against employee for one year after the misconduct). *But see* Woodward v. City Stores Co., 334 A.2d 189, 191 (D.C. 1975) (holding that retention of an employee and subsequent promotion, standing alone, do not establish ratification or approval).

[228] *See, e.g.*, Hale v. Farmers Ins. Exch., 42 Cal. App. 3d 681, 691 (Ct. App. 1974) ("Where an agent is authorized to do an act, and he transcends his authority, it is the duty of the principal to repudiate the act as soon as he is fully informed of what has been thus done in his name.").

[229] *Hartman*, 137 Cal. Rptr. at 250 ("[T]he bringing of an action or the basing of a defense on an unauthorized act with knowledge of the material facts is, at a minimum, some evidence of ratification.").

B. Federal Cases

Although a rich common law tradition defines the situations in which punitive damages are awarded vicariously, federal courts paid little attention until recently to common law principles in the fair housing context. The first court to address the issue was the Sixth Circuit in *Marr v. Rife*.[230] Without citing any authority, the *Marr* court declared that a single real estate agent discriminating on one occasion would not support a punitive damage award against the owner of the real estate agency.[231] The court suggested, however, that proof of a pattern or practice of discrimination within the agency, or proof of "knowledgeable inaction" by the owner, would sufficiently support a punitive damage award against the principal.[232] The court remanded the case to the district court, emphasizing that it was issuing "no relevant command" concerning punitive damages and that its cursory discussion of the issues was far too vague to establish any clear rule.[233] Inexplicably, although *Marr* never adopted such a rule, courts outside the Sixth Circuit have relied heavily on *Marr* in holding that punitive damages may not be vicariously imposed in fair housing cases unless the principal knew about or ratified the discriminatory actions of the employee.[234] Despite *Marr*'s silence, the Second, Fourth, Seventh, and Tenth Circuits have embraced some version of this doctrine.[235]

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[230] 503 F.2d 735 (6th Cir. 1974). The district court awarded $250 in punitive damages against the real estate agent but nothing against the owner. Although the plaintiffs did not appeal this aspect of the ruling, the United States, as amicus curiae, argued that the owner should be held jointly liable for the punitive damage award. *Id.* at 744.

[231] *Id.* at 744.

[232] *Id.* at 744–45.

[233] *Id.* at 745. The *Marr* court declined to rule on punitive damages since

> [n]either appellants' brief nor that of the United States, amicus, sets out what facts support a claim that there was a pattern or practice of discrimination in the agency, or that [the owner] was aware of [the agent's] misconduct. If the District Judge, upon his review of the entire record, is persuaded that [the owner] was, by action or knowledgeable inaction, involved in the wrongdoing, he may tie him into the award for punitive damages. Again, we issue no relevant command.

Id. at 744–45; *cf.* Navarro, *supra* note 32, at 2762–63 (arguing that *Marr*'s brief discussion of punitive damages, an issue not argued by either party, should be given little precedential weight).

[234] Fort v. White, 530 F.2d 1113, 1117 (2d Cir. 1975) (citing *Marr* as authority against owner's punitive damage liability when employees actively engaged in discrimination); Davis v. Mansards, 597 F. Supp. 334, 347 (N.D. Ind. 1984) (permitting punitive damages against a knowing or ratifying owner on the basis of *Marr*). *See generally* Navarro, *supra* note 32, at 2763 (discussing the line of cases following *Marr*).

[235] *See* Pumphrey v. Stephen Homes, Inc., No. CA-93-1329-HAR, 1997 WL 135688, at **2 (4th Cir. Mar. 25, 1997) (per curiam); Portee v. Hastava, Nos. 94-7988, 95-7982, 1996 WL 520981, at **3 (2d Cir. Sept. 13, 1996); City of Chicago v. Matchmaker Real Estate Sales Ctr., Inc., 982 F.2d 1086, 1101–11 (7th Cir. 1992); Asbury v. Brougham, 866 F.2d 1276, 1282 (10th Cir. 1989); Hamilton v. Svatik, 779 F.2d 383, 389 (7th Cir. 1985); *Fort*, 530 F.2d at 1117.

The federal circuits differ significantly in their approach to vicarious liability. The Seventh and Fourth Circuits have, in some cases, adopted standards governing the vicarious assessment of punitive damages in fair housing cases that are significantly more restrictive than even the Restatement approach. In *Hamilton*, for example, the Seventh Circuit reversed a punitive damage award against an absentee owner even though the sole manager of the property who carried out the discrimination was plainly a managerial agent to whom the owner had delegated complete responsibility.[236] The court did not explain why it departed from the Restatement rule.

Similarly, the Fourth Circuit held, in an unpublished decision, that punitive damages could not be assessed against the employer for the discriminatory acts of its sales agent despite delegation of full authority to sell lots at a particular site.[237] The Fourth Circuit did not explore the possibility of inferring authorization or ratification from the company's extensive delegation of authority. Neither did the court examine whether the salesman was a managerial agent, even though the salesman's authority was analogous to authority that courts have deemed to be "managerial" in other contexts.[238]

The Seventh Circuit's decision in *City of Chicago v. Matchmaker Real Estate Sales Center, Inc.*[239] also established a high barrier against the vicarious imposition of punitive damages. In *Matchmaker*, testing conducted by the plaintiffs revealed an egregious pattern of racial steering at a real estate firm.[240] The plaintiffs presented evidence that the firm's owner was aware that African Americans were beginning to frequent his office in greater numbers. Moreover, the owner had failed to discipline or monitor his agents, or to impose additional safeguards, despite being confronted with unequivocal evidence that his agents had discriminated.[241] Specifically, the plaintiffs presented evidence that the owner refused to require his agents to fill out customer report forms he had received from the National Association of Realtors that would have allowed him to monitor his agents more effectively.

The trial court found that the owner's refusal constituted ratification of his agents' conduct and that he had been recklessly indifferent to the fair housing rights of the plaintiffs. The court awarded substantial punitive damages.[242] The Seventh Circuit, however, reversed. Without explanation, it stated that the evidence of inaction after the complaint was in-

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[236] *See Hamilton*, 779 F.2d at 389.

[237] *See Pumphrey*, 1997 WL 135688, at **3.

[238] *See, e.g.*, Hatrock v. Edward D. Jones & Co., 750 F.2d 767, 771–72 (9th Cir. 1984).

[239] *Matchmaker*, 982 F.2d at 1086.

[240] *Id.* at 1089–93.

[241] City of Chicago v. Matchmaker Real Estate Sales Ctr., Inc., No. 88-C-9695, 1991 WL 55770, at *1 (N.D. Ill. Apr. 8, 1991).

[242] *See id.* at *4.

sufficient to show that the defendant knew of or ratified his agents' discrimination.[243] The court also did not explain its departure from *Marr*'s suggestion that the trier of fact could infer authorization from a pattern of discrimination.

Other courts have applied the knowledge or ratification standard in fair housing cases more liberally. They have inferred the employer's culpability from, inter alia, a pattern of discrimination,[244] the employer's failure to take effective steps to ensure that his agents comply with fair housing laws,[245] the employer's failure to take corrective action after discrimination complaints,[246] and the employer's failure to apologize for or repudiate his agent's conduct when he became aware of it.[247] In *United States v. Balistrieri*,[248] for example, the Seventh Circuit held that the jury could have inferred that the owner ratified his apartment manager's discrimination because the owner was constantly at the complex and exercised firm control over its operations.[249] There was no direct evidence that the owner was aware of the discrimination.

Significantly, none of the above courts analyzed whether the standards they adopted for assessing punitive damages against a principal were consistent with the common law standards or with the purposes of the Fair Housing Act.

C. Kolstad

The Supreme Court decision in *Kolstad* reaffirms that courts must look to common law principles and to the purposes of the underlying statute when determining the propriety of punitive damages. After rejecting an egregiousness standard for imposing punitive damages, the *Kolstad* Court explored the propriety of vicarious punitive liability and concluded that the Restatement (Second) of Agency and Restatement (Second) of Torts provided "a useful starting point for defining this gen-

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[243] *Matchmaker*, 982 F.2d at 1100–01.

[244] Darby v. Heather Ridge, 827 F. Supp. 1296, 1298 (E.D. Mich. 1993).

[245] *E.g.*, Miller v. Apartments & Homes of N.J., Inc., 646 F.2d 101, 111 (3d Cir. 1981) (inferring culpability when defendant took no action to ensure that he complied with reporting requirements of consent decree); Portee v. Hastava, Nos. 94-7988, 95-7982, 1996 WL 520981, at **3 (2d Cir. Sept. 13, 1996) (upholding punitive damage liability when owner of real estate firm failed to offer his agents guidance about fair housing law); *Darby*, 827 F. Supp. at 1298 (finding punitive damage liability due to inconsistent statements by corporation as to whether its employees received training in civil rights laws).

[246] Asbury v. Brougham, 866 F.2d 1276, 1282–83 (10th Cir. 1989) (inferring culpability where employer failed to modify or formalize rental policies after complaints by minorities).

[247] *Id.* at 1283 (holding, in the alternative, that jury could find employer ratification in failure to apologize for or remedy the situation after he confirmed that his agent had improperly denied housing to plaintiff).

[248] 981 F.2d 916 (7th Cir. 1992).

[249] *Id.* at 930, 936.

eral common law."[250] The Court acknowledged that lower courts were divided on the proper standard, but decided to adopt the Restatement approach without explanation.

The Court expressed concern that traditional agency principles could expose an employer to punitive liability even if she "makes every effort to comply with Title VII."[251] The Court concluded that such a result could frustrate the objectives of Title VII by dissuading employers from educating themselves and their employees about the requirements of Title VII,[252] out of fear that their familiarity with the law would allow juries to infer reckless indifference, thereby justifying vicarious punitive liability.[253] To avoid this supposed disincentive, the Court exempted employers from vicarious punitive liability for the discriminatory actions of their managerial agents where those actions are "contrary to the employer's 'good faith efforts to comply with Title VII.'"[254] Four members of the Court dissented from this aspect of the ruling, arguing that a decision on the question of vicarious punitive liability was inappropriate because the parties had neither briefed nor argued the issue.[255]

Kolstad calls the validity of the prior federal case law on vicarious punitive damage liability under the Fair Housing Act into question. It directs the circuit courts to undertake a two-pronged analysis—to examine common law principles and the underlying statutory purposes—when establishing standards for vicarious imposition of punitive damages in fair housing cases. Recognizing *Kolstad*'s implications, the Third Circuit recently departed from prior case law and applied the Restatement rule in holding that an apartment owner could be held liable for punitive damages even though the owner neither knew about nor participated in the alleged housing discrimination.[256]

Courts should hesitate before simply applying to fair housing cases *Kolstad*'s two-pronged approach to awarding punitive damages. Even assuming the validity of the Court's standard for vicarious punitive liability in *Kolstad*, this standard is *only* binding in employment discrimination cases, based as the standard is on the statutory purposes of Title VII. Limiting *Kolstad* to its facts makes sense in the housing context, where punitive damages play a particularly crucial role in deterrence. In addition, perhaps because the issue was not briefed or argued, the *Kolstad* Court's analysis of the vicarious liability question was cursory and poorly reasoned in two respects. First, the Court improperly adopted the

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[250] Kolstad v. Am. Dental Ass'n, 527 U.S. 526, 542 (1999).

[251] *Id.* at 544.

[252] *Id.* at 545.

[253] *Id.*

[254] *Id.* (quoting Kolstad v. Am. Dental Ass'n, 139 F.3d 958, 974 (D.C. Cir. 1998) (en banc) (Tatel, J., dissenting)).

[255] *Id.* at 547–52 (Stevens, J., concurring in part and dissenting in part).

[256] Alexander v. Riga, 208 F.3d 419, 433 n.9 (3d Cir. 2000), *cert. denied*, 121 S. Ct. 757 (2001).

Restatement approach to vicarious punitive liability. Second, the *Kolstad* Court adopted a good faith defense. While these standards are now the law in Title VII cases, courts should not compound the error by applying them in fair housing litigation. In fair housing cases, the only message that lower courts should take from *Kolstad* is the direction to investigate common law principles and the purposes of the Fair Housing Act in order to determine appropriate standards for vicarious imposition of punitive damages.

D. The Superiority of the Course of Employment Rule

The deterrent function of punitive damages in fair housing cases is best served by permitting the fact finder to award such damages whenever the discrimination is carried out by employees acting within the scope of their employment.[257] The distinction between vicarious liability for compensatory damages and vicarious liability for punitive damages arises from the view that punitive damages serve solely to punish bad conduct and that compensatory damages are generally sufficient to remedy and deter undesirable conduct. Modern theories of punitive damages refute that proposition. Because punitive damages are as necessary as compensatory damages to deter unlawful housing discrimination and to give plaintiffs an incentive to bring suit, no justification persists for adopting different liability standards based on the type of damage award.

Courts that adopt the course of employment rule stress that vicariously imposing punitive damages encourages employers to monitor employees more closely, make better hiring choices, and impose safeguards to prevent wrongful conduct.[258] A failure to impose punitive damages vicariously will result in underdeterrence because employers will lack an economic incentive to take effective precautions.[259] Significantly, the United States Supreme Court has twice noted that vicarious imposition of punitive damages deters wrongful conduct more than a less stringent rule.[260] Furthermore, the quasi-compensatory functions served by punitive

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[257] Navarro, *supra* note 32, at 2759–68.

[258] *E.g.*, Goddard v. Grand Trunk Ry., 57 Me. 202, 223–24 (1869) ("When it is thoroughly understood that it is not profitable to employ careless and indifferent agents . . . better men will take their place, and not before."); KEETON ET AL., *supra* note 95, § 2, at 13 (punitive damages "will encourage employers to exercise closer control over their [employees] for the prevention of outrageous torts"); David Owen, *Punitive Damages in Product Liability Litigation*, 74 MICH. L. REV. 1257, 1305–06 (1976) (vicarious imposition of punitive damages in product liability litigation encourages upper-level management to increase its involvement in the manufacturing process and adopt improved procedures for gathering, transmitting, and using product safety information); *see also* Clarence Morris, *Punitive Damages in Personal Injury Cases*, 21 OHIO ST. L.J. 216, 220 (1960); Note, *supra* note 28, at 526.

[259] *See* Bruce Chapman & Michael Trebilcock, *Punitive Damages: Divergence in Search of a Rationale*, 40 ALA. L. REV. 741, 821 (1989).

[260] Pac. Mut. Life Ins. Co. v. Haslip, 499 U.S. 1, 13–14 (1991). The *Pacific Mutual*

damages are compromised if punitive damages are not imposed vicariously.[261] If punitive damages compensate the plaintiff and the attorney for the otherwise uncompensated risks of bringing suit,[262] vicarious liability advances that purpose by allowing plaintiffs to recover from a solvent, deterrable employer and not solely from a judgment-proof employee.[263] It makes little sense to limit vicarious punitive liability to cases in which the employer authorized the wrongdoing. Society has an interest in encouraging suits to deter wrongful acts of employees, regardless of whether the employer authorized the discrimination.

1. Fairness Concerns

Efficiency aside, the chief criticism of the course of employment rule for punitive damages is that punishing "innocent" corporate officers and shareholders for the misdeeds of their agents is simply unfair.[264] The fairness critique assumes that the wrongdoing can be attributed solely to the employee and not to the organization by which he or she is employed. But why is this so? A business can act only through its employees, and its employees can cause harm only because of their position in the business.[265] The culpable actions of a low-level employee are no less the actions of the corporation than the ignorance or good faith of higher management. Whether the employee's malice or the officer's good faith is

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Court ruled that the Alabama course of employment rule for punitive damages did not violate due process, noting that "[i]mposing exemplary damages on the corporation when its agent commits intentional fraud creates a strong incentive for vigilance by [the employer]. If an insurer were liable for such damages only upon proof that it was at fault independently, it would have an incentive to minimize oversight of its agents." *Id.* at 14; *see also* Am. Soc'y of Mech. Eng'rs, Inc. v. Hydrolevel Corp., 456 U.S. 556, 573–74 (1982).

[261] DOBBS, *supra* note 26, § 3.11(6), at 215; Corboy, *supra* note 218, at 21.

[262] *See supra* text accompanying notes 44–49.

[263] Schmidt v. Minor, 184 N.W. 964, 966 (Minn. 1921) ("[A] judgment against an employee is often uncollectible."); Corboy, *supra* note 218, at 20–21; Morris, *supra* note 258, at 220.

[264] *See* Ellis, *supra* note 31, at 66; Randy S. Parlee, *Vicarious Liability for Punitive Damages: Suggested Changes in the Law Through Policy Analysis*, 28 MARQ. L. REV. 27, 35–36, 40, 50 (1984); Comment, *The Assessment of Punitive Damages Against an Entrepreneur for the Malicious Torts of His Employees*, 70 YALE L.J. 1296, 1307–08 (1961).

[265] A nineteenth-century Maine Supreme Judicial Court decision contains the classic statement of this argument:

> A corporation is an imaginary being. It has no mind but the mind of its servants; it has no voice but the voice of its servants; and it has no hands with which to act but the hands of its servants. All its schemes of mischief, as well as its schemes of public enterprise, are conceived by human minds and executed by human hands; and these minds and hands are its servants' minds and hands. All attempts, therefore, to distinguish between the guilt of the servant and the guilt of the corporation; or the malice of the servant and the malice of the corporation; or the punishment of the servant and the punishment of the corporation, is sheer nonsense.

Goddard v. Grand Trunk Ry., 57 Me. 202, 223 (1869).

imputed to the corporation is essentially a policy choice. The fairness of vicarious liability stems from the fact that the corporation reaps a profit from business transactions executed by its lowest-level employees; with this profit comes the risk of an appropriate penalty when those employees abuse their positions and harm society.

Moreover, the fairness critique wrongly assumes that the sole purpose of punitive damages is to punish the employer's bad intentions. Vicariously imposed punitive damages, however, also encourage the employer to take preventive action. Whether the employer allows its employees to discriminate due to malice, indifference, or naïveté, punitive damages help ensure that employers take effective measures to prevent harm.[266] Because a desire to minimize overhead and save labor costs will often lead to reduced oversight, employers should be made to internalize the social cost of such neglect.[267] An employer that wittingly or unwittingly permits discrimination to go unchecked can hardly be categorized as "innocent."[268]

In any event, the focus on guilt or innocence is simply beside the point, because the purpose of vicarious liability for punitive damages is not to punish bad intentions but to deter bad results.[269] In other areas of the law, courts have little trouble imposing substantial penalties on corporations when misdeeds are carried out by low-level employees. One scholar has found that "in some instances, . . . particularly in cases involving certain regulatory and public welfare offenses detrimental to the public health, vicarious criminal liability is imposed on the corporation without regard to the offending employee's managerial rank."[270] Such liability is justified as necessary to deter misconduct by the corporation as a whole. Similarly, courts generally impose liability for civil penalties,[271] even treble damages,[272] vicariously for deterrence purposes. Although civil penalties, treble damages, and corporate criminal liability have punitive objectives, courts ultimately rely on deterrence objectives to determine the propriety of vicarious liability. The same result is appropriate with respect to punitive damages.[273]

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[266] Owen, *supra* note 258, at 1303.

[267] *Id.* at 1304.

[268] *See id.*

[269] *See* William T. Curtis, Note, *Liability of Employers for Punitive Damages Resulting from Acts of Employees*, 54 CHI.-KENT L. REV. 829, 846 (1978); *cf.* Henry W. Edgerton, *Corporate Criminal Responsibility*, 36 YALE L.J. 827, 837 (1927) ("However 'innocent' the owners of the corporate enterprise may be, the general interest requires that . . . corporate representatives be deterred, so far as corporate responsibility can deter them, from conducting the business in criminal ways.").

[270] Owen, *supra* note 258, at 1302; *see also* RESTATEMENT (SECOND) OF AGENCY § 217D cmt. d (1958).

[271] *E.g.*, United States v. Ill. Cent. R.R. Co., 303 U.S. 239, 244 (1938); United States v. Atl. Coast Line R.R. Co., 173 F. 764 (4th Cir. 1909).

[272] Am. Soc'y of Mech. Eng'rs, Inc. v. Hydrolevel Corp., 456 U.S. 556, 575 (1982).

[273] Some suggest that it is unfair and pointless to impose liability for punitive damages

2. Deterrence Concerns

The doubts of some courts and commentators regarding the deterrent effect of vicarious liability for punitive damages do not withstand scrutiny, particularly in the context of housing discrimination and analogous intentional torts. The argument is that vicarious liability has negligible deterrence effects because employers cannot control the actions of their employees.[274] In addition, some suggest that vicarious liability for punitive damages may compel employers to engage in excessive monitoring of employees, behavior that is either inefficient, unacceptably intrusive of privacy rights, or both.[275] Such views are unduly pessimistic.

An employer, being most familiar with the habits, motivations, and working conditions of its employees, is in the best position to take preventive action.[276] An employer has the power to establish corporate culture, norms, and expectations that will encourage desirable habits and attitudes. If an employer makes clear that discriminatory conduct will not be tolerated and takes effective action to enforce that policy, employees who are interested in advancement and job security will take notice. This is particularly the case with respect to housing discrimination, fraud, and similar intentional torts. Because these wrongs are the product of careful design, they are preventable through supervision and monitoring.[277] An

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on the employer when the employer has taken all reasonable measures to prevent the wrong. This argument contradicts the Restatement approach, which does not absolve the employer of liability for punitive damages when the employer has taken suitable precautions. *See supra* text accompanying notes 219–222. The argument could support a limited good faith defense. I therefore address this argument when discussing the good faith defense. *See infra* text accompanying note 320.

[274] Tolle v. Interstate Sys. Truck Lines, Inc., 356 N.E.2d 625, 627 (Ill. App. Ct. 1976) ("The ability to better control the actions of the employee through greater supervision is often illusory."); Parlee, *supra* note 264, at 33–34; Comment, *supra* note 264, at 1304 ("It is quite difficult . . . to predict or control human conduct, especially malicious behavior which is generally sporadic.").

[275] Comment, *supra* note 264, at 1304.

[276] Pac. Mut. Life Ins. Co. v. Haslip, 499 U.S. 1, 14 (1991) (noting that employer is in the best position to "guard substantially against the evil to be prevented" (quoting Louis Pizitz Dry Goods Co. v. Yeldell, 274 U.S. 112, 116 (1927))); HARPER, JAMES & GRAY, *supra* note 191, § 26.3, at 14–15.

[277] There may be situations in which skepticism about the ability of the employer to prevent wrongful conduct by employees is justified. A significant number of tort cases finding the employer not liable for punitive damages have involved instances in which a private security guard is alleged to have acted in error or with misplaced zeal in arresting a patron for shoplifting, or claims of assault and battery arising out of conflicts between customers and employees in certain service industries. *See, e.g.*, Lake Shore & Mich. S. Ry. Co. v. Prentice, 147 U.S. 101 (1893) (train conductor ejecting unruly passenger from train); Dart Drug, Inc. v. Linthicum, 300 A.2d 442, 444 (D.C. 1973); *cf.* KIRCHER AND WISEMAN, *supra* note 191, § 24.07, at 22–23 (discussing hypothetical of school bus driver who loses temper and paddles an unruly child). Although the courts invoked vicarious liability doctrines in these cases, the decisions reflect a judgment that punitive damages are ill advised because the wrongs, although nominally intentional torts, are more akin to unavoidable accidents. They involve errors of judgment that juries may conclude inevitably result from decisions made in the heat of the moment under difficult circumstances. *Cf.*

employer therefore has the power to affect an employee's behavior in a way that punitive damages directed at the employee might not, because the employee's modest resources would eliminate the appeal of seeking substantial damages from her personally.[278]

Preventive measures are not so burdensome that imposing vicarious liability for punitive damages on housing providers will drive worthy competitors into other businesses.[279] Implementing monitoring and preventive measures is neither complicated nor expensive. Housing providers can look to the established methods of fair housing organizations for guidance in monitoring their employees' behavior. One such method is a process of paired testing.[280] In the paired testing approach, testers with similar credentials who differ only in the characteristic being tested (e.g., race, sex, familial status) apply for or inquire into housing.[281] By comparing the housing provider's responses to each tester, one can evaluate whether the landlord is discriminating. Housing providers, particularly large ones, could use similar techniques to monitor their agents.[282] Indeed, housing providers, like many retailers, already use persons posing as customers to monitor the sales techniques of their agents, but rarely use such techniques to test for discrimination. Thus, the concern that preventive measures are burdensome may support at most the reduction of grossly exorbitant awards, but not the elimination of vicarious liability for punitive damages altogether.

A related argument against vicarious liability for punitive damages is that it undermines deterrence because the actual wrongdoer will not face the threat of punitive damages and will have a reduced incentive to act responsibly.[283] This argument ignores the fact that punitive damages

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Iacobucci v. Boulter, 193 F.3d 14, 26–27 (1st Cir. 1999) ("Where . . . the evidence shows no more than that an exasperated police officer, acting in the heat of the moment, made an objectively unreasonable mistake, punitive damages will not lie."). These concerns undervalue the potential of punitive damages to encourage employers to improve the training of security guards and other employees exercising similar authority or to be more selective in hiring such persons. Furthermore, in cases of housing discrimination, fraud, and similar intentional torts, which are the product of more deliberate action, these concerns are not valid.

[278] *E.g.*, Chapman & Trebilcock, *supra* note 259, at 820; Morris, *supra* note 258, at 218–19; Parlee, *supra* note 264, at 33; Alan O. Sykes, *The Economics of Vicarious Liability*, 93 YALE L.J. 1231, 1241 (1984).

[279] *See* Ellis, *supra* note 31, at 69–70.

[280] Hamilton v. Miller, 477 F.2d 908, 910 n.1 (10th Cir. 1973) ("It would be difficult indeed to prove discrimination in housing without this means of gathering evidence."); SCHWEMM, HOUSING DISCRIMINATION, *supra* note 12, § 32.2.

[281] *See* SCHWEMM, HOUSING DISCRIMINATION, *supra* note 12, § 32.2. Testers have been described by the Supreme Court as "individuals who, without an intent to rent or purchase a home or apartment, pose as renters or purchasers for the purpose of collective evidence of unlawful . . . practices." Havens Realty Corp. v. Coleman, 455 U.S. 363, 373 (1982).

[282] SCHWEMM, HOUSING DISCRIMINATION, *supra* note 12, § 33.3(2) (recommending that housing providers use testers to determine whether preventive measures are needed to stop discrimination by their employees).

[283] KIRCHER & WISEMAN, *supra* note 191, § 24.07.

against the employer will encourage better steps to prevent misconduct by employees. A significant punitive damage award against an employer is more likely to have an impact on the employer's business practices as a whole than an award against a single employee. Any concerns about the unfairness of not punishing the employee can be mitigated by permitting punitive damages to be assessed against both the employer and the employee and allowing the employer a right of recovery against the employee.[284] This ensures proper deterrence of the agent without forgoing the considerable benefits of also imposing liability on the employer.

Some opponents argue that rather than leading the employer to take better preventive measures, vicarious liability for punitive damages will merely induce the employer to insure.[285] They argue that insuring against liability reduces the employer's incentive to avoid losses because the employer can shift the loss to the insurer.[286] Although jurisdictions are split on whether public policy permits insuring against punitive damages,[287] almost all courts allow insurance for vicarious punitive damages.[288] As a practical matter, however, many insurers exclude coverage for intentional acts. Insurers often rely on this exclusion, or on public policy prohibiting the insurance of intentional torts, to defeat coverage for housing discrimination claims.[289]

Assuming that housing providers can obtain insurance for punitive damages in intentional housing discrimination cases, the availability of such insurance will not reduce their incentive to prevent discrimination. Employers will still seek to minimize losses to avoid the inevitable increase in premiums resulting from filing large claims.[290] Moreover, insurers will agree to insure vicarious liability claims only if they believe that such claims can be avoided and that their revenues from premiums will exceed the costs of paying out claims. Through threat of cancellation or nonrenewal of employers' policies, insurers will likely demand that in-

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[284] Chapman & Trebilcock, *supra* note 259, at 820.

[285] Curtis, *supra* note 269, at 847; Ellis, *supra* note 31, at 69, 74.

[286] Northwestern Nat'l Cas. Co. v. McNulty, 307 F.2d 432, 440 (5th Cir. 1962) (Wisdom, J.) ("Where a person is able to insure himself against punishment he gains a freedom of misconduct."); Parlee, *supra* note 264, at 34. *See generally* Mary Coate McNeely, *Illegality as a Factor in Liability Insurance*, 41 COLUM. L. REV. 26 (1941); Note, *Should an Intentional Discriminator Be Insured?*, 13 NOVA L. REV. 671 (1989).

[287] SCHLUETER & REDDEN, *supra* note 28, § 17.2(C)(2) & n.8. *Compare McNulty*, 307 F.2d at 445 (asserting that insurance of claims for punitive damages is against public policy), *with* Lazenby v. Universal Underwriters Ins. Co., 383 S.W.2d 1, 7 (Tenn. 1964) (suggesting that insurance against punitive damages is not necessarily against public policy).

[288] SCHLUETER & REDDEN, *supra* note 28, § 17.2(C)(2) & n.14.

[289] SCHWEMM, HOUSING DISCRIMINATION, *supra* note 12, § 12.3(5). Sometimes the pleadings may bring the claim sufficiently within the language of the policy so as to trigger the duty to defend, although there ultimately may not be a duty to indemnify punitive damage awards or damages awarded for acts that are determined to be intentional. *See, e.g.*, United States v. Sec. Mgmt. Co., 96 F.3d 260, 268–69 (7th Cir. 1996).

[290] *See, e.g.*, Price v. Hartford Accident & Indem. Co., 502 P.2d 522, 524 (Ariz. 1972); Cieslewicz v. Mut. Serv. Cas. Ins. Co., 267 N.W.2d 595, 601 (Wis. 1978).

sureds take action to prevent discriminatory actions by their agents.[291] Thus, in the unlikely event that insurance claims for punitive damages in housing discrimination cases became widespread, insurance would merely add another institutional actor with an economic interest in deterring discrimination.

Finally, some argue that awarding punitive damages vicariously is unnecessary because malicious conduct is almost never in the employer's interest.[292] The fear of adverse publicity and damaged customer relationships, they argue, provides sufficient incentive for the employer to take all possible preventive actions. The premise of this argument is not true for economically motivated torts, including many forms of housing discrimination. If employees discriminate because they believe that excluding a protected class is good for business, why should we assume that the employer does not also share that assessment? Employers may openly disavow but secretly applaud the discriminatory acts of their employees. They may believe that discrimination increases profitability, or that allowing employees to act on their prejudices increases their job satisfaction and productivity.[293] Even if employers do not want their agents to discriminate, they may lack proper incentives to take preventive measures if the probability that they will be found liable appears remote. Punitive damages provide that incentive by increasing the employer's potential losses.

3. Weaknesses of the Restatement (Second) of Torts Rule

The Restatement rule does not deter wrongful conduct as effectively as the course of employment rule and will generate wasteful litigation and discourage meritorious lawsuits. First, the Restatement rule places the burden on the plaintiff to prove that the employer authorized or ratified the wrongdoing.[294] An employer can easily disclaim any knowledge or approval of an employee's misconduct while covertly applauding and encouraging it.[295] Any evidence of the employer's knowledge will be

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[291] *See* Owen, *supra* note 258, at 1309–10. Indeed, liability insurers frequently ask landlords what actions they have taken to ensure compliance with fair housing laws.

[292] Comment, *supra* note 264, at 1301, 1306; Parlee, *supra* note 264, at 40, 43.

[293] Charny & Gulati, *supra* note 88, at 77.

[294] *See* Morris, *supra* note 258, at 220–21.

[295] CHARLES T. MCCORMICK, HANDBOOK ON THE LAW OF DAMAGES § 80, at 285 (1935) ("[I]f prevention be the purpose of exemplary damages against corporations, the threat and hence the prevention would seem to be lessened substantially by a rule which imposes upon the plaintiff the difficult task of showing wrongdoing by those 'higher up.'"); JOHN SALMOND, JURISPRUDENCE § 152, at 402 (12th ed. 1966) ("There are . . . immense difficulties in the way of proving actual authority . . . . A word, a gesture, or a tone may be a sufficient indication from a master to his servant that some lapse from the legal standard of care or honesty will be deemed acceptable service."); Owen, *supra* note 258, at 1305 (arguing that if authorization and ratification were required, "[o]nly the most extreme forms of manufacturer misconduct would ever be punished . . . and then only

entirely within its control and difficult to discover.[296] Second, if an employer suspects but is not certain that misconduct is occurring, it will make little effort to discern the truth because a rule that requires proof that the employer had knowledge before punitive damages can be assessed encourages employers to conceal evidence of their approval.[297] As long as concealment or deliberate ignorance is successful and cost effective, the rule will not encourage the employer to prevent the wrongdoing.

The Restatement rule mitigates the restrictive effect of this requirement by imposing liability whenever the employee is "employed in a managerial capacity."[298] There is no convincing justification, however, for this categorical limitation. The Restatement states that the rule will encourage employers to take care in hiring "important" employees.[299] Any employee who possesses sufficient authority to carry out tortious activity is sufficiently "important" to demand that the employer exercise care in hiring and supervising her. Yet, the actions of a menial agent are just as much the acts of the employer, and just as susceptible to influence by the establishment of corporate policy, supervision, and monitoring as the actions of a managerial employee.[300] Limiting liability for punitive damages to managerial employees will favor larger employers over smaller ones. A lower-level supervisor or department head might have little authority in a large corporation but be considered upper management in a much smaller company.[301] Moreover, limiting liability for punitive damages to acts of managerial employees encourages employers to delegate important tasks to lower-level employees.[302] Under the scope of employment rule, by contrast, the employer knows that creative restructuring of management is no defense and will therefore focus on preventing the wrong rather than avoiding the penalty.

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when the manufacturer was imprudent enough to create, preserve, and relinquish evidence of participation by its upper-level management in some improper conduct").

[296] Corboy, *supra* note 218, at 20; Curtis, *supra* note 269, at 846; Owen, *supra* note 258, at 1305–06 ("Documentary evidence of flagrant misconduct by managerial employees rarely exists and, when it does, it may never be located by even the most diligent discovery and investigative procedures.").

[297] Owen, *supra* note 258, at 1305.

[298] RESTATEMENT (SECOND) OF TORTS § 909(c) (1965).

[299] *Id.* § 909(c) cmt. b.

[300] Mobile & Ohio R.R. Co. v. Seales, 13 So. 917, 919 (Ala. 1893) (holding railroad liable for wanton, willful, or reckless act of brakeman who fired pistol at trespasser); Stroud v. Denny's Rest., Inc., 532 P.2d 790 (Or. 1975) (holding restaurant liable for actions of cook who made citizen's arrest of patron according to restaurant's directions); Parlee, *supra* note 264, at 49; Timothy R. Zinneker, Note, *Corporate Vicarious Liability for Punitive Damages*, 1985 BYU L. REV. 317, 321.

[301] Corboy, *supra* note 218, at 27.

[302] *Id.*; *see also* Egan v. Mut. of Omaha Ins. Co., 620 P.2d 141, 148 (Cal. 1979) ("Defendant should not be allowed to insulate itself from liability by giving an employee a nonmanagerial title and relegating to him crucial policy decisions." (quoting Merlo v. Standard Life & Accident Ins. Co., 130 Cal. Rptr. 416, 429 (Ct. App. 1976) (Tamura, J., concurring in part and dissenting in part))).

The following scenarios illustrate the arbitrariness of the Restatement rule:

1. An owner of a multifamily apartment complex delegates virtually all authority over the operation of the complex to the manager. The owner does little more than collect the rents. The manager discriminates against minorities and families with children by telling them that there are no vacancies when they inquire.
2. Same as above, except the owner reviews the applications and makes the final decision as to who will be permitted to rent the apartment. The owner delegates to the manager the responsibility of fielding calls and inquiries from prospective tenants. The manager screens out most minorities and families with children by misrepresenting the availability of apartments.
3. Same as the first example, except the complex is sufficiently large that the manager does not have time to show apartments. She delegates virtually all of this authority to rental agents, who misrepresent the availability of apartments to minorities and families with children.

In these scenarios, the agents perpetrating the harm have the same actual authority. Focusing on which are "managerial agents," however, could produce different results with respect to the owner's exposure to punitive damages.

4. The Next Best Alternative: Applying the Restatement Approach Responsibly

a. Authorization, Ratification, and Reckless Indifference

If courts choose to adopt the Restatement approach, they can use it to deter housing discrimination by creating the appropriate incentives. This approach can be used to encourage housing providers to compel nondiscrimination by their employees. In so doing, courts can interpret each element of the Restatement test broadly, so as to make these elements factual questions for the jury. With respect to authorization, for example, jurors could infer authorization from discrimination that is intentional or pervasive[303] or from the fact that the principal effectively delegated the power to discriminate to its employees. The jury could find, for example, that housing providers that delegate broad authority to their

[303] United States v. Balistrieri, 981 F.2d 916, 930 (7th Cir. 1992); Marr v. Rife, 503 F.2d 735, 741 (6th Cir. 1974); Darby v. Heather Ridge, 827 F. Supp. 1296, 1298 (E.D. Mich. 1993) (ruling that punitive damages were permissible where, inter alia, there was evidence of a pattern of discrimination).

agents, without taking effective action to supervise or monitor them, have implicitly authorized their employees to discriminate. At a minimum, such a broad delegation of authority reflects reckless indifference to the possibility of discrimination, particularly in light of the abundance of national and local studies indicating the pervasiveness of housing discrimination. By punishing employers for their implicit consent to the discrimination, this approach gives them appropriate incentives to take preventive action and is consistent with the way courts have applied the Restatement rule in other contexts.

For similar reasons, proof that an employer retained or failed to discipline an agent after well-founded allegations of discrimination supports an inference that the employer approved or ratified the discriminatory actions of its employees.[304] An employer who fails to take corrective action when discrimination is discovered signals to other employees that it will tolerate unlawful conduct.[305] Exposing the employer to liability for punitive damages gives it an incentive to investigate allegations of discrimination promptly and to take appropriate preventive measures.

b. Managerial Capacity

If courts apply the managerial capacity test they should apply it in a manner that minimizes the test's potential drawbacks. In *Kolstad*, the Supreme Court did little to define "managerial capacity," except by way of noting that the term includes "important" positions—meaning not only "top management, officers, and directors," but other positions as well—and explaining that the determination of whether someone is employed in a "managerial capacity" requires "a fact intensive inquiry" into "the type of authority that the employer has given to the employee [and] the amount of discretion that the employee has in what is done and how it is accomplished."[306] Thus job titles, standing alone, are of little importance in the determination.[307] "Managerial capacity" can best be understood as an attempt to identify those situations in which the employee exercises sufficient authority to impute the employee's actions to the employer in a manner that is fair and that also advances the purposes of punitive damages.[308]

Fair housing litigation often involves situations in which a manager or partner runs the property while the owner or other partner has little

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[304] *See* Curtis, *supra* note 269, at 849; *see also* Morris, *supra* note 258, at 221.

[305] *See* Curtis, *supra* note 269, at 849.

[306] Kolstad v. Am. Dental Ass'n, 527 U.S. 526, 543 (1999) (quoting SCHLUETER & REDDEN, *supra* note 28, § 4.4(B)(2)(a), at 181–82).

[307] *See* KIRCHER & WISEMAN, *supra* note 191, § 24.05, at 15.

[308] *See* Briner v. Hyslop, 337 N.W.2d 858, 865 (Iowa 1983) (finding that deterrence is the major justification for punitive damages under the course of employment rule).

involvement in its day-to-day operations.[309] The question arises: is the active manager or partner a "managerial agent," such that the owner or other partner is subject to liability for punitive damages for the agent's discriminatory acts? A number of decisions suggest that the answer is yes.[310]

The principal may object to characterizing the manager as a "managerial agent" by emphasizing the limits on the manager's authority. The owner, for example, may retain the power to hire and fire the manager and other employees, or may make final decisions on rental applications. In addition, where the apartment manager is the sole employee the owner may argue that the apartment manager does not "manage" anyone and is therefore not a managerial agent.

An alternative approach to assessing the manager's authority is to focus on what power the manager actually exercises with respect to the plaintiff, rather than the theoretical limits on the manager's authority in other areas. If the owner gives the manager responsibility for handling inquiries from prospective tenants, and the manager uses that authority to misrepresent to minorities and families with children that no apartments are available, then the manager is just as effectively denying housing to those families as if she had rejected their application personally. Most apartment managers therefore qualify as managerial agents under the Restatement, particularly when they have broad authority to deal with prospective tenants.[311]

A more difficult question arises when the agent does not manage an office or a complex, but has one-on-one, unsupervised interaction with customers. Many large apartment complexes have rental agents that handle inquiries from prospective tenants, provide information about availability and rental rates, and show apartments.[312] Similarly, many real estate offices have multiple agents working primarily on commission who handle most aspects of a sale with little supervision. Decisions to approve or reject loans are also sometimes made by low-level loan officers. Many employers might argue, and courts might find, that these people are

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[309] *See, e.g.*, Alexander v. Riga, 208 F.3d 419, 432 (3d Cir. 2000), *cert. denied*, 121 S. Ct. 757 (2001); Hamilton v. Svatik, 779 F.2d 383, 386 (7th Cir. 1985).

[310] Some courts have ruled that a resident manager or employee with comparable responsibilities is employed in a "managerial capacity" within the meaning of the Restatement. *See Alexander*, 208 F.3d at 432; Deal v. Byford, 537 N.E.2d 267, 272 (Ill. 1989) (upholding punitive damage award against management company based on actions of employee where the company admitted that the employee was "the resident manager of" the apartment complex); *cf.* Hammerly Oaks, Inc. v. Edwards, 958 S.W.2d 387, 391 (Tex. 1997) (noting that parties agreed that acting manager of apartment complex was a managerial agent).

[311] Hatrock v. Edward D. Jones & Co., 750 F.2d 767, 772 (9th Cir. 1984) (noting broad authority of broker in matters relating to customer relations).

[312] *See, e.g.*, United States v. Youritan Constr. Co., 370 F. Supp. 643, 646 (N.D. Cal. 1973).

not managers because they do not supervise personnel.[313] Some courts, however, have held that an employee need not exercise supervisory authority to be a managerial agent. The employee must simply be executing some corporate policy or possess some final decisionmaking authority with respect to the plaintiff.[314]

This latter approach better advances the ostensible purpose of the Restatement rule: to encourage care in the supervision and selection of employees who exercise "important" authority on behalf of the corporation.[315] If the employee has the power to make final decisions on behalf of the employer with respect to the plaintiff, that employee is "managing" the employer's relationship with its customers.[316] If a rental agent or real estate agent misrepresents the availability of housing to members of a protected class, that person denies housing to minorities just as effectively as if he or she owned the company. From the victim's perspective, the statement of an agent is the statement of the employer, and the agent's policy of discrimination is the de facto policy of the principal.[317] For similar reasons, lending decisions that give rise to a housing discrimination claim should be imputed to the employer for purposes of assessing liability for punitive damages, even if the decision is made by a loan officer who is not a supervisor.[318] Even under the Restatement rule, it is appropriate to impute such actions to the employer.[319]

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[313] *See, e.g.*, Kimmel v. Iowa Realty Co., 339 N.W.2d 374, 382–83 (Iowa 1983) (concluding without analysis that real estate agent was not acting in a managerial capacity); *Hammerly Oaks*, 958 S.W.2d at 391 (holding that rental agent was not a managerial agent where agent had acted negligently in failing to prevent assault on tenant by carpet cleaning contractor).

[314] *See* Egan v. Mut. of Omaha Ins. Co., 620 P.2d 141, 148 (Cal. 1979) ("[T]he critical inquiry is the degree of discretion the employees possess in making decisions that will ultimately determine corporate policy. When employees dispose of insureds' claims with little if any supervision, they possess sufficient discretion for the law to impute their actions concerning those claims to the corporation."); Canon, U.S.A. v. Carson Map Co., 647 S.W.2d 321 (Tex. 1982); *see also* Fitzgerald v. Mountain States Tel. & Tel. Co., 68 F.3d 1257, 1264 (10th Cir. 1995) (indicating that agent is "managerial" if she has the "typical discretion of a manager, such as the power to make independent decisions regarding personnel matters or determine policy").

[315] *See* RESTATEMENT (SECOND) TORTS § 909 cmt. c (1965).

[316] *Egan*, 620 P.2d at 148 ("Manifestly, to plaintiff, [the claims representative's] actions were actions of defendants. [The claims representative] personally managed the most crucial aspects of his employer's relationship with its policyholders.").

[317] *See id.*; Ann M. Anderson, Note, *Whose Malice Counts?:* Kolstad *and the Limits of Vicarious Liability for Title VII Punitive Damages*, 78 N.C. L. REV. 799 (2000); *cf.* Faragher v. City of Boca Raton, 524 U.S. 775, 790 (1998) (noting in employment discrimination context that when supervisor denies or alters tangible job benefits of an employee the supervisor "'merges' with the employer, and his act becomes that of the employer.").

[318] Edwards v. Flagstar Bank, 109 F. Supp. 2d 691 (E.D. Mich. 2000).

[319] Texas has adopted an interesting approach, defining "managerial agents" as those who exercise "nondelegable" duties on behalf of the principal, regardless of whether they otherwise act with the authority and discretion ordinarily required to make them managerial agents. Hammerly Oaks, Inc. v. Edwards, 958 S.W.2d 387 (Tex. 1997). This approach carves out an exception to the Restatement rule, and means that employers should not be

E. The Good Faith Defense

1. The Problems with Recognizing a Good Faith Defense to Punitive Damages

The "good faith" defense to punitive damages under Title VII established in *Kolstad* should not be applied in fair housing claims.[320] The *Kolstad* majority reasoned that a good faith defense was necessary to give employers incentives to adopt antidiscrimination policies, to educate their personnel on Title VII's prohibitions, and to detect and deter Title VII violations.[321] The majority was concerned that employers might be unwilling to educate themselves about the requirements of Title VII if doing so would permit the trier of fact to infer that any violation of those requirements was willful.[322]

The Court's reasoning is flawed. A business will take measures to prevent unlawful conduct as long as the cost of those measures is less than the expected cost of being found liable.[323] In the housing context, employers can adopt written nondiscrimination policies, display fair housing posters, and train their employees. If the Court wants employers to take responsibility for their employees' discriminatory action, then it must ensure that the costs of not doing so are greater than the benefits of discrimination. One way to do this, utilitarian analysis teaches, is to threaten employers with liability for their employees' harmful acts.[324] Employers will then internalize the dangers of the discrimination and find cost-effective ways to combat it.

The court's concern that liability for punitive damages will encourage employers to remain ignorant of the applicable laws is misplaced. To remain ignorant is a risky strategy that could undercut employers' claims of good faith while increasing the probability of liability. Even if in-

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able to avoid liability for punitive damages by delegating the power to commit such torts to their employees. Courts often hold that the duty not to discriminate in housing is nondelegable. *See, e.g.*, Saunders v. Gen. Servs. Corp., 659 F. Supp. 1042, 1059 (E.D. Va. 1987). Courts could adopt this approach to define all employees in positions that permit them to discriminate as "managerial" agents for purposes of the Restatement rule. Since the Restatement approach, properly applied, permits the vicarious imposition of punitive damages in housing discrimination cases, however, this approach is probably unnecessary. *See supra* notes 220–221 and accompanying text.

[320] Although commentators have criticized *Kolstad*'s good faith defense, none has yet addressed the advisability of applying this defense to fair housing cases. *See, e.g.*, Anderson, *supra* note 317; *The Supreme Court, 1998 Term-Leading Cases*, 113 HARV. L. REV. 200, 359 (1999) [hereinafter *Leading Cases*].

[321] Kolstad v. Am. Dental Ass'n, 527 U.S. 526, 544–45 (1999).

[322] *Id.*

[323] Comment, *supra* note 264, at 1302.

[324] WERNER Z. HIRSCH, LAW AND ECONOMICS: AN INTRODUCTORY ANALYSIS 194 (2d ed. 1988) ("[T]he defendant has the incentive to adopt efficient safety precautions until the judgment cost is lower than the cost of precaution."); *see also* Anderson, *supra* note 317, at 826–27.

creased employer ignorance were a valid concern, the congressional intent of the Fair Housing Act was not to create an incentive for employers to remain ignorant of the Act's requirements. Establishing a presumption that every employer is aware of the law eliminates any incentive for employers to remain deliberately ignorant of fair housing law requirements and, instead, gives them an incentive to combat discrimination internally.[325]

Although the Court did not analyze the issue fully, there are serious downsides to instituting a good faith defense for punitive damages.[326] A rational employer will take only those precautions that are necessary to avoid liability, not those that are necessary to prevent the discriminatory behavior.[327] If employers know that courts are quick to accept the good faith defense and free them from liability, even if discrimination is proven, the employers will not have the proper incentives to change their actions. For punitive damages to have any significant impact on combating housing discrimination, courts must define the good faith defense narrowly and hold employers accountable.

Similar concerns in other cases have led the Supreme Court and many lower courts to reject a good faith defense, even in cases where the employer has taken extensive efforts to ensure that its employees followed the law.[328] Recognizing this defense enables employers to avoid regulatory penalties simply by taking superficial actions designed to create the appearance of good faith.[329] In the absence of the good faith

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[325] *See supra* text accompanying notes 147–148. This concern is implicated only in cases where the law is novel or unclear.

[326] *See* Anderson, *supra* note 317, at 828; Susan Bisom-Rapp, *Discerning Form from Substance: Understanding Employer Litigation Prevention Strategies*, 3 EMPLOYEE RTS. & EMP. POL'Y J. 1, 34–35 (1999) (noting that existing law encourages employers to make symbolic gestures rather than eliminate discrimination).

[327] This assumes that compensatory damages alone will not achieve optimal deterrence, which is almost certainly the case with respect to housing discrimination claims. *See supra* Part I.A.

[328] *See, e.g.*, United States v. Ill. Cent. R.R. Co., 303 U.S. 239 (1938); United States v. Atl. Coast Line R.R. Co., 173 F. 764 (4th Cir. 1909); Mont. Cent. Ry. Co. v. United States, 164 F. 400 (9th Cir. 1908). In these three cases, all involving a federal statute that placed strict limits on how long railroads crossing state lines could confine cattle in railcars before releasing them for exercise, food, and water, the railroad posted or distributed bulletins instructing their employees in the requirements of the law. Some employees still failed to comply. The courts held the carriers liable for civil penalties for the employees' noncompliance.

[329] As the Fourth Circuit has noted:

> If the publication of circulars, as well as rules, delivered to train masters, yard masters, station agents, and others concerned in the transportation of live stock, and posted on bulletin boards at designated points, which conductors are required to read and sign . . . is sufficient to relieve the company from liability for the acts of its servants and agents, the corporation would thus be enabled to practically nullify the statute and render its provisions nugatory.

Atl. Coast Line R.R. Co., 173 F. at 770.

defense, employers have incentives to undertake genuine preventive steps.[330]

The *Kolstad* Court expressed concern that without a good faith defense, an employer could be required to pay punitive damages even if the employer had done everything possible to prevent the wrongdoing.[331] This argument relies on two questionable assumptions: that courts can accurately set the appropriate standard of care and that courts can accurately determine whether an employer is complying with that standard.

Employers, however, are in a much better position than courts to know what measures are most effective in preventing discrimination.[332] If courts were to set the standard of care, they would likely be tempted to examine industry custom, which would lock in place a standard of care that may not be the most effective or the most well-intended.[333] Like any business practice, the appropriate standard of care is likely to evolve as businesses experiment with new methods and approaches. Liability for punitive damages will encourage employers to continue to strive for improvement.

As to the assumption that courts can accurately determine whether an employer is complying with an acceptable standard of care, it is very difficult for a fact finder to know whether an employer's preventive efforts are undertaken in good faith or are merely superficial.[334] The jurisprudence of intentional discrimination is premised on the assumption that perpetrators act in bad faith and with the intent to conceal their motives. Allowing employers to escape liability for punitive damages only when they actually succeed in preventing discrimination encourages them to focus on truly preventive, rather than merely symbolic, efforts.

2. *Applying* Kolstad*'s Good Faith Defense Narrowly*

If courts do apply *Kolstad* to the housing discrimination context, they should carefully calibrate their analyses to protect the deterrence

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[330] As the Fifth Circuit has stated:

> [I]t is a common regulatory practice to impose a kind of strict liability on the employer as an incentive for him to take all practicable measures to ensure the workers' safety, the idea being that the employer is in a better position to make specific rules and to enforce them than the agency is.

Allied Prods. Co. v. Fed. Mine Safety & Health Review Comm'n, 666 F.2d 890, 893 (5th Cir. 1982).

[331] Kolstad v. Am. Dental Ass'n, 527 U.S. 526, 544 (1999); *accord* Briner v. Hyslop, 337 N.W.2d 858, 865–66 (Iowa 1983).

[332] *See* Maria M. Carrillo, *Hostile Environment Sexual Harassment by a Supervisor Under Title VII: Reassessment of Employer Liability in Light of the Civil Rights Act of 1991*, 24 COLUM. HUM. RTS. L. REV. 41, 89 (1992-1993).

[333] *See* Bisom-Rapp, *supra* note 326, at 13.

[334] *See supra* notes 295–296.

function of punitive damages. Courts should define the good faith exception as an affirmative defense that the employer has the burden of establishing. Because employers are in the best position to present evidence of their sincerity and to judge the costs and benefits of preventive measures, they should carry the burden of proving these facts.[335] Courts should set a high bar for employers and demand affirmative proof that the employer took optimal measures to prevent the discrimination, and not permit the employer to discharge its burden through symbolic gestures.

Although the *Kolstad* Court did not define "good faith efforts," it did state that the purpose of the good faith defense is to encourage employers to make every effort "to detect and deter Title VII violations."[336] Thus, merely adopting a nondiscriminatory policy and training program should not be sufficient.[337] Such measures may not be sincere.[338] Moreover, even if such efforts are well intended, requiring employees to promise they will not discriminate and to attend sensitivity training is unlikely to alter their behavior. To assume otherwise relies on the naïve belief that discrimination results only from ignorance and that persons who are made to "see the light" will necessarily shed their bias.[339] This belief ignores how deeply ingrained discriminatory attitudes are. People may profess outwardly, or even convince themselves, that they are not "prejudiced" and do not "discriminate," even while they continue to treat minorities differently.[340]

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[335] *See* Anderson, *supra* note 317, at 826; *cf.* Cadena v. The Pacesetter Corp., 224 F.3d 1203, 1208 n.4 (10th Cir. 2000) (noting that the question of whether the good faith standard is an affirmative defense or an element of the plaintiff's case is unclear); *Leading Cases*, *supra* note 320, at 367 (concluding that plaintiff has the burden of proving the employer did not make good faith efforts and arguing this is unfair).

[336] Kolstad v. Am. Dental Ass'n, 527 U.S. 526, 546 (1999); *see also* Alexander v. Riga, 208 F.3d 419, 433 (3d Cir. 2000), *cert. denied*, 121 S. Ct. 757 (2001); Anderson, *supra* note 317, at 827–28; David B. Ritter, Kolstad v. American Dental Association*: Punitive Damages Under Title VII*, 88 ILL. B.J. 36, 38 (2000) (noting that *Kolstad* requires employers to have procedures that are "designed to—and that actually do—prevent and reduce instances of discrimination").

[337] Anderson, *supra* note 317, at 828 n.27. Post-*Kolstad* decisions considering the issue have found that a nondiscrimination policy alone will not shield employers from liability. These cases have held that employers should not be permitted to insulate themselves from liability for punitive damages without taking effective efforts to enforce antidiscrimination policies. *E.g.*, Bruso v. United Airlines, Inc., 239 F.3d 848 (7th Cir. 2001); Passantino v. Johnson & Johnson Consumer Prods., Inc., 212 F.3d 493, 517 (9th Cir. 2000).

[338] *See supra* text accompanying notes 326–329.

[339] *See* YOUNG-BRUEHL, *supra* note 88, at 12–13.

[340] The literature on "unconscious bias" makes clear that training programs alone will not prevent discrimination. "Unconscious bias" is intentional discrimination in the sense that the disparate treatment results from a deliberate act. However, the perpetrator may claim to be unaware that she is discriminating or may convince herself that she is not discriminating. *See, e.g.*, *id.* at 13; Amy L. Wax, *Discrimination as Accident*, 74 IND. L.J. 1129 (1999); Michael Selmi, *Response to Professor Wax—Discrimination as Accident: Old Whine, New Bottle*, 74 IND. L.J. 1233 (1999). If much intentional discrimination does result from subtle bias, then training is unlikely to alter an employee's behavior if it is not accompanied by a genuine commitment to equal opportunity.

To establish the elements of the good faith defense, courts should require employers to demonstrate that they have made every effort reasonably possible to detect and deter discrimination, including comprehensive training and instruction of employees, and monitoring and supervision efforts. Monitoring of employees in a position to deny fair housing rights is particularly important. Real estate agencies, apartment complexes, banks, and other businesses that use agents to screen or process customer inquiries should be required to adopt and implement a self-testing program or some equivalent means of monitoring their employees.[341]

It is fair to impose this burden on employers. An employer who puts employees in a position where they can discriminate and fails to make efforts to determine if they are doing so is assuming the risk that employees will act unlawfully. That decision places the burden on the victim to determine whether discrimination is taking place. An employer who asks victims of discrimination to bear the burden of detecting its unlawful acts cannot reasonably complain when the victim seeks to vindicate her interests. Thus, employers who wish to exempt themselves from the important remedy of punitive damages must show that they have shouldered the full burden of detecting and deterring such discrimination themselves.

Kolstad did not address whether courts or juries should decide when the good faith defense has been proved. Thus far, the courts of appeal have treated the issue as a jury question.[342] This approach is proper. Even if an employer has undertaken efforts that could reasonably be found to meet the good faith standards, the ultimate sincerity and effectiveness of those efforts is a question of fact. After all, the issue of good faith will only come into play because those efforts ultimately failed. In these circumstances, the jury can reasonably infer that the employer's efforts were either insufficient or not in good faith.[343]

In sum, *Kolstad*'s good faith defense should only be applied to housing discrimination cases in the form of an affirmative defense requiring the employer to establish that it took all reasonable measures to prevent the discrimination. Meeting this burden should require the employer to supervise and monitor its employees and adopt credible pre-

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[341] *See supra* notes 280–282. The extent of the measures required for good faith should vary depending on the size of the employer. In general, larger employers should be required to take more extensive preventive measures because they have a larger potential for profit, which justifies a correspondingly larger investment in preventive measures.

[342] *See, e.g.*, Alexander v. Riga, 208 F.3d 419, 433–34 (3d Cir. 2000), *cert. denied*, 121 S. Ct. 757 (2001); Lowery v. Circuit City Stores, Inc., 206 F.3d 431, 444–46 (4th Cir. 2000), *cert. denied*, 121 S. Ct. 66 (2001).

[343] *See Lowery*, 206 F.3d at 446 (upholding punitive damage award when evidence showed discrimination occurred and employees feared retaliation for reporting disparate treatment despite diversity training and company policy against discrimination); *cf.* Deffenbaugh-Williams v. Wal-Mart Stores, Inc., 188 F.3d 278, 286 (5th Cir. 1999) (holding that jury could infer from proof of discrimination that company policy against discrimination was poorly enforced).

vention measures. Merely instructing its employees in the law or admonishing them not to discriminate is insufficient. The trier of fact should determine whether the employer has proven its case for a good faith exception.

IV. Size of Punitive Damage Awards

A final issue to consider is how courts should evaluate a claim that a punitive damage award is excessive. The size of punitive damage awards varies tremendously.[344] Though the Supreme Court has held that "grossly excessive" punitive damage awards violate the Due Process Clause,[345] the Court's standards offer little guidance for determining the constitutional limit. The leading case, *BMW of North America, Inc. v. Gore*, states that courts should consider three factors: the degree of reprehensibility of the conduct that gave rise to the award; the disparity between the harm or potential harm and the punitive damage award; and the difference between the punitive damage award and the civil penalties authorized or imposed in comparable cases.[346] The first factor, the degree of reprehensibility, is "[p]erhaps the most important" in determining the reasonableness of the award.[347] With respect to the ratio between the harm or potential harm and the punitive damage award, the Court stated that while there should be a "'reasonable relationship'" between the two,[348] there is no "simple mathematical formula" for discerning the constitutional boundary.[349] Thus, although in an earlier case the Court approved a punitive damage award over 500 times the compensatory damage award,[350] in *BMW* it found an award with a similar ratio excessive.[351]

Though the appropriateness of reducing a punitive damage award in a fair housing case depends on the facts of the case, three general principles are apparent. First, given the prevalence of housing discrimination, the difficulty of proving a violation, and the tendency for out-of-pocket damages to be very low, it is imperative that significant punitive damage awards be available. For that reason, courts should only reduce punitive damage awards when, giving proper deference to the role of the fact finder, the award is "grossly excessive." Put another way, a punitive damage award should be reduced only when no reasonable trier of fact could have found that the award was appropriate to deter and punish the conduct at issue.

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[344] *See supra* note 15.
[345] BMW of N. Am., Inc. v. Gore, 517 U.S. 559, 574 (1996).
[346] *Id.* at 574–75.
[347] *Id.* at 575.
[348] *Id.* at 580 (citation omitted).
[349] *Id.* at 582.
[350] TXO Prod. Corp. v. Alliance Res. Corp., 509 U.S. 443, 454 (1993).
[351] *BMW*, 517 U.S. at 582.

While this principle may seem self-evident, courts have not always observed it in housing discrimination cases. An egregious example of a court undervaluing the importance of punitive damages is the decision by the Seventh Circuit in *Allahar v. Zahora*.[352] In that case, a white seller initially refused to sell his home to an Indian man, relenting only after the court enjoined the seller from tendering the home to anyone else. The seller pointedly told the buyer that he would not sell because he had talked to his neighbors "and they don't want niggers on the block."[353] The jury found for the plaintiff, awarding $10,000 in compensatory damages and $7,500 in punitive damages.[354] Notwithstanding the egregious nature of the discrimination, the district court set aside the punitive damage award entirely. The Seventh Circuit affirmed, noting that the district court had awarded $20,000 in attorney's fees and concluding that this amount, together with the compensatory damages, would provide "adequate condemnation, punishment and deterrence."[355] In the court's view, the plaintiffs had suffered little economic harm and had been awarded $10,000 for their emotional harm. Therefore, permitting the $7,500 punitive award would amount to an unjustified "windfall" to the plaintiffs.[356]Although the Seventh Circuit felt that the punitive award was unnecessary, it did not explain why the jury could not have thought otherwise. In light of the large compensatory damage award and the sizeable cost of litigation in this case, the jury reasonably concluded that $7,500 was appropriate to fulfill the deterrence function and send a strong message of condemnation. The court's dismissal of this amount as a "windfall" ignores the role of punitive damages in deterring discrimination and giving plaintiffs and plaintiffs' counsel a sufficient incentive to bring suit. Moreover, while the court noted that the case involved only a "single individual with a single house to sell,"[357] the seller stated that he was acting in part to satisfy the wishes of his neighbors, supporting the case for large punitive damage awards in pursuit of optimal general deterrence. In short, there is simply no basis for concluding that the $7,500 punitive damage award was grossly excessive.

The second general principle is this: in light of the facts that out-of-pocket damages are relatively small in housing discrimination cases and that housing discrimination can often be concealed with ease, the ratio between the punitive damage award and compensatory damage award should have a minimal effect on a court's analysis of the former. As the

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[352] 59 F.3d 693 (7th Cir. 1995).

[353] *Id.* at 694. When the buyer replied, "I'm not a nigger, I'm an Indian," the seller responded, "What's the difference?" *Id.*

[354] *Id.* at 695.

[355] *Id.* at 697 (quoting Allahar v. Zahora, No. 92 C 5648, 1994 U.S. Dist. LEXIS 3799, at *5 (N.D. Ill. Mar. 29, 1994)).

[356] *Id.*

[357] *Id.*

Supreme Court noted in *BMW*, ratios between punitive damages and compensatory damages should have little significance in cases in which the "egregious act has resulted in only a small amount of economic damages . . . the injury is hard to detect or the monetary value of noneconomic harm [is] difficult to determine."[358] These conditions are prevalent in housing discrimination cases.

Moreover, the *BMW* Court stated that to the extent that ratios are important, the ratio between the punitive damages and potential harm, rather than that between the punitive damages and the actual harm in the particular case, is most important.[359] Because punitive damage awards can have important deterrent effects in other cases and on other providers, the punitive award should reflect the possible level of harm caused by discrimination generally and not merely the specific manifestation of harm in the case at hand. Given the prevalence of housing discrimination in society, and the magnitude of damage awards for emotional distress,[360] this factor supports a heavy punitive award in many cases.

Nonetheless, courts have sometimes adopted the mathematical approach disavowed in *BMW*, using the ratio between the punitive and the compensatory damage award mechanically. The result is often a drastic reduction in punitive damage awards.[361] The Eighth Circuit took a better approach in *United States v. Big D Enterprises, Inc.*[362] There, in light of the evidence of the defendant's recalcitrance and its blatant instructions to its employees not to rent to African Americans, the court affirmed a punitive damage award of $100,000 to three victims even though the jury had only awarded $1,000 in compensatory damages.[363]

The third principle relates to the improper conversion of a court's discretion to reduce excessive awards into a de facto cap on punitive damages. The Fair Housing Act authorizes a civil penalty of up to $55,000 for a first violation and $110,000 for subsequent violations.[364]

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[358] BMW of N. Am., Inc. v. Gore, 517 U.S. 559, 582 (1996).

[359] *Id.* at 581.

[360] *See* SCHWEMM, HOUSING DISCRIMINATION, *supra* note 12, § 25.3(2)(b), at 25-22 n.84 (citing awards for emotional distress in the $20,000 to $100,000 and above range).

[361] *E.g.*, Szwast v. Carlton Apartments, 102 F. Supp. 2d 777 (E.D. Mich. 2000). The *Szwast* court reduced a punitive damage award of $400,000 to $30,000 in a case of intentional familial status discrimination, in which the jury had also awarded $3,000 in compensatory damages. The court concluded that a ten-to-one ratio was appropriate. *See also* Darby v. Heather Ridge, 827 F. Supp. 1296, 1300–01 (E.D. Mich. 1993) (reducing jury's punitive damage award of $250,000 to $50,000 to match compensatory damage award).

[362] 184 F.3d 924 (8th Cir. 1999), *cert. denied*, 529 U.S. 1018 (2000).

[363] *Id.* at 928.

[364] 42 U.S.C. § 3614(d)(1)(C) (1994) (establishing a limit of $50,000 for a first violation and $100,000 for a second violation). However, the Attorney General may adjust the maximum civil penalty upward to account for inflation, in accordance with the Debt Collection Improvement Act of 1996, Pub. L. No. 104-134, § 31001(s)(1), 110 Stat. 1321-373 (codified as amended at 28 U.S.C. § 2461 (Supp. II 1996)). Pursuant to this procedure, the limits are now set at $55,000 and $110,000. *See* 28 C.F.R. § 85.3(b)(3) (2001); *see also* SCHWEMM, HOUSING DISCRIMINATION, *supra* note 12, § 26.2(5)(d), at 26-23.

The *BMW* decision suggests that courts should be hesitant to reduce a punitive damage award below that amount, absent compelling mitigating circumstances. This civil penalty is "in addition to compensatory and punitive damages."[365] Courts should therefore take care not to convert the civil penalty cap into a cap on punitive damages. After all, Congress could have inserted such a statutory cap but chose not to. The amount of punitive awards should not be constrained by an unrelated civil penalty limitation established over ten years ago.

CONCLUSION

The prevailing standards for awarding punitive damages in fair housing cases fail to recognize the important role that punitive damages can play in deterring housing discrimination. The Supreme Court's recent decision in *Kolstad*, however, presents an important opportunity for reforming current standards. If courts carefully examine the purposes of the Fair Housing Act, the common law standards for awarding punitive damages, and the theoretical justifications for punitive damages, they should conclude that an overhaul of the liability standards for punitive damages in fair housing cases is long past due. The increasing acceptance of utilitarian justifications for punitive damages may help speed this process. Courts have unfairly viewed punitive damages with suspicion and reserved them for particularly egregious conduct. As courts instead begin to see punitive damages as a penalty that deters wrongful conduct, the underlying doctrines may change for the better. Courts should therefore reexamine current law in light of the principles outlined in this Article. By taking this step, courts can help ensure that ill-advised restrictions on punitive damages no longer frustrate Congress's objective in achieving maximum compliance with the fair housing laws.

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[365] *Big D Enters., Inc.*, 184 F.3d at 933.