My empirical study first replicates and then extends a prior preliminary empirical study by Cass Sunstein and Judy Shih of sexual harassment damages awards. It covers a comprehensive set of 232 cases in which plaintiffs won some positive amount of compensatory damages from state and federal, trial and appellate court decisions from 1982–2004 (published either in official reporters or solely on Westlaw). Contrary to Sunstein and Shih’s finding, my analysis of these data reveals a consistent, and statistically significant, positive relationship between punitive and compensatory damages (at least in cases where punitive damages are awarded). My new empirical study then employs dependent variables that, in my view, are more theoretically and statistically sound than those employed by Sunstein and Shih and others who have focused exclusively on the relationship between punitive and compensatory damages: total combined damages (i.e., all compensatory and punitive damages), and what I term “outrage” damages, or combined noneconomic compensatory and punitive damages. My empirical results, using these new dependent variables, essentially confirm Sunstein and Shih’s conclusions regarding the irrelevance of variables pertaining to the nature and severity of harassment. What my study reveals as crucial predictive factors, by contrast, are factors pertaining to damages limitations. My study highlights that these factors—including the
effect of the 1991 Civil Rights Act, and whether plaintiffs append state civil rights and tort claims to their Title VII claims—are critical to a fuller understanding of damages determinations in sexual harassment cases.

I. INTRODUCTION

The motivation for empirical study of sexual harassment awards is plain. As Cass Sunstein and Judy Shih wrote in “Damages in Sexual Harassment Cases,” their contribution to Directions in Sexual Harassment Law, a 2004 volume edited by Catharine MacKinnon and Reva Siegel: “We know extremely little about the ingredients of high and low awards in sexual harassment cases. . . . Lawyers could learn a great deal through some simple data collection and statistical analysis.”

Sunstein and Shih conducted a “preliminary analysis” of damages in 70 reported sexual harassment cases, from which they conclude that damages awards in sexual harassment cases are essentially random. Their conclusion is based on two main findings. First, they find that, unlike in other areas of civil law, punitive damages awards in sexual harassment cases are not based on any multiple, or other predictable, relationship to compensatory damages awards. Second (and even more devastating to notions of consistency and fairness in law), they claim that virtually no key predictive explanatory variable pertaining to the nature and severity of harassment has any significant effect on the size of damages awards.

By engaging in empirical work that focuses on damages awards in sexual harassment cases (and by performing, as far as I am aware, the first study of its kind), Sunstein and Shih make significant strides toward a new

1Cass R. Sunstein & Judy Shih, Damages in Sexual Harassment Cases, in Directions in Sexual Harassment Law 324, 334 (Catherine A. MacKinnon & Reva B. Siegel, eds. 2004) [hereinafter Damages].

2Id. at 325. Sunstein and Shih do not include their empirical analysis in the book chapter. See id. at 342 n.1 (“We avoid statistical detail here.”). The analysis is reported in an unpublished paper, Damage Awards in Sexual Harassment Cases (June 23, 1998 draft) (on file with author) [hereinafter Empirical Analysis]. See also David Schkade et al., Deliberating about Dollars: The Severity Shift, 100 Colum. L. Rev. 1139, 1142 n.12 (2000) (citing unpublished Sunstein and Shih article for its “finding that compensatory and punitive damage awards are random in sexual harassment awards”).

3In 2001, Ann Juliano and Stewart Schwab conducted the “first systematic study of sexual harassment cases in the federal courts.” Ann Juliano & Stewart J. Schwab, The Sweep of Sexual
direction for the study of sexual harassment law, an avenue hitherto unexplored by theorists (not to mention empiricists) in the field. At the same time, Sunstein and Shih appreciate the limitations of their empirical study. For example, they concede: “It is possible that a larger sample of cases will reveal a more reasonable pattern of outcomes, but at least it can be said that no patterns have emerged to date.” Moreover, they encourage others to pick up where they left off: “First and perhaps foremost, it would be desirable to continue to track sexual harassment awards to see if clearer patterns emerge as the data set becomes larger.” My present study is largely inspired by their preliminary work.

My empirical study replicates and then extends the Sunstein and Shih study, covering a comprehensive set of 232 cases in which plaintiffs won some positive amount of compensatory damages—from state and federal, trial and appellate court decisions from 1982–2004, published either in official reporters or solely on Westlaw. Contrary to Sunstein and Shih’s finding, my analysis of these data reveals a consistent, and statistically significant, positive relationship between punitive and compensatory damages (at least in cases where punitive damages are awarded). This finding supports the claim by Ted Eisenberg and collaborators that “[c]onditional on the existence of a punitive award, virtually all data sets reveal a strikingly strong association between the size of the punitive award and the size of the compensatory award.”

Harassment Cases, 86 Cornell L. Rev. 548, 549 (2001). Juliano and Schwab coded federal employment Title VII sexual harassment cases (roughly 650 published opinions) from 1986–1996. They focus, however, not on explaining the size of money damage awards, but on explaining case factors that predict plaintiff “success,” defined as prevailing at pretrial, trial, or posttrial stages of the litigation.

\[8\] Sunstein & Shih, Damages, supra note 1, at 334.

\[9\] Id. at 337–38. See also id. at 334 (“Obviously it makes sense to engage in continuing empirical work on damage awards and their relation to facts.”).

\[6\] Not only inspired, but also encouraged. From the moment in Feb. 2004 that I set my sights on replicating and extending the Sunstein and Shih study, Professor Sunstein has offered unbridled enthusiasm.

My goal here, however, reaches beyond the Sunstein and Shih-Eisenberg et al. debate regarding the existence and/or nature of the relationship between punitive and compensatory damages in sexual harassment cases. I wish to raise a broader theoretical and conceptual challenge. It is not clear to me that jury awards of punitive damages is an appropriate dependent variable that can be explained by compensatory damages as a right-hand-side variable in regression analysis, at least in the context of sexual harassment cases (and perhaps even more broadly) where it is likely that compensatory and punitive damages are jointly determined. My empirical study employs dependent variables that, in my view, are more theoretically and statistically sound than those employed by Sunstein and Shih and Eisenberg et al.: total combined damages (i.e., all compensatory and punitive damages), and what I term “outrage” damages, or combined noneconomic compensatory and punitive damages. My empirical results, using these new dependent variables, essentially confirm Sunstein and Shih’s conclusions regarding the irrelevance of variables pertaining to the nature and severity of harassment. What my study reveals as crucial predictive factors, by contrast, are factors pertaining to damages limitations. My study highlights that these factors—underappreciated by Sunstein and Shih—are critical to a fuller understanding of damages determinations in sexual harassment cases.

Chief among these factors is the landmark Civil Rights Act of 1991, which redefined sexual harassment damages. The Act amended Title VII to authorize jury trials as well as compensatory and punitive damages, while simultaneously imposing fairly stringent caps on total damages (compensatory plus punitive). The predicted effect of the Act is, therefore, complex. On the one hand, the fact that damages are capped has led some commentators (including Sunstein and Shih) to hypothesize that damages in post-1991 Act sexual harassment cases will be lower. On the other hand, the Act created the possibility for an award of non-wage-based compensatory and punitive damages for the first time (apart from state law tort and civil rights claims and federal §1983 claims that could be appended to Title VII claims). Assuming that damages are fungible across claims, the net effect might well be to increase overall damages. My empirical analyses reveal that, in fact, cases governed by the 1991 Act are awarded (statistically significant) higher damages awards than pre-1991 Act cases. My results, moreover, suggest that it is worth taking a closer look at the effect of inclusion, in Title VII litigation, of various state tort and state civil rights claims, and their interplay with Title VII damages limitations in sexual harassment cases. In particular, the inclu-
sion of state law tort and anti-discrimination claims appears to drive up damages in sexual harassment cases, and parties’ incentives to append such claims may be affected by the operation of the federal caps under the 1991 Act.

II. BACKGROUND: LITIGATING SEXUAL HARASSMENT CLAIMS

This section begins with an exploration of the 1991 Act, given its centrality to damages awards in sexual harassment cases. Although damages are my particular focus, they cannot be understood in complete isolation from the background liability principles at work in sexual harassment law. Moreover, such an exploration might offer clues as to which factors potentially influence damages awards. Sunstein and Shih, for example, seem to have been heavily influenced by U.S. Supreme Court jurisprudence on Title VII liability in identifying factors relevant to damages in sexual harassment awards, such as quid pro quo harassment and tangible effects on employment.

A. The Significance of the Civil Rights Act of 1991

On November 21, 1991, Congress amended Title VII with the Civil Rights Act of 1991. The 1991 Act made two landmark changes. First, it authorized jury trials for Title VII claims. Second, it expanded the scope of available statutory remedies to include compensatory and punitive damages. Prior to the passage of the 1991 Act, remedies available under Title VII were limited to equitable relief, including injunctions, as well as back pay (and front pay). The 1991 Act authorized compensatory damages for “future pecuniary

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8 42 U.S.C. §1981a. The 1991 Act does not apply retroactively to Title VII cases that were pending on appeal when the Act was enacted, nor does it apply to incidents of discrimination that occurred prior to that date. See Landgraf v. USI Film Prods., 511 U.S. 244, 293 (1994).

9 See 42 U.S.C. §1981a(c) (“If a complaining party seeks compensatory or punitive damages under this section . . . any party may demand a trial by jury.”).

10 Id., §2000e-5(g); United States v. Burke, 504 U.S. 229, 238 (1992). What is unique to Title VII is the fact that certain monetary relief—namely, back pay and front pay—is considered equitable. Back pay is specifically excluded from the definition of compensatory damages. See 42 U.S.C §1981a(b) (2). In Pollard v. E.I. Du Pont De Nemours & Co., 532 U.S. 843 (2001), the Supreme Court held that, likewise, front pay is an equitable monetary remedy under Title VII, separate and apart from compensatory damages.
losses, emotional pain, suffering, inconvenience, mental anguish, loss of enjoyment of life, and other nonpecuniary losses.” The Act also provided for punitive damages if the defendant “engaged in a discriminatory practice or discriminatory practices with malice or with reckless indifference to the federally protected rights of an aggrieved individual.” Punitive damages play a pivotal role in employment discrimination cases. In fact, juries are more likely to award punitive damages to prevailing plaintiffs in employment discrimination cases than in most other types of civil case, except for intentional torts, which confirms the practical importance of punitive damages to the private enforcement of employment discrimination law.

Prior to the enactment of the 1991 Act, state law civil rights or tort claims—most often appended to federal Title VII claims—were the vehicles for obtaining non-wage-based compensatory damages as well as punitive damages. The 1991 Act would seem, then, to have eliminated the need to append state claims in order to pursue compensatory and punitive damages. There is, however, a crucial caveat: damages under Title VII are capped, whereas those under state common-law and certain other state and federal civil rights statutes often are not. The 1991 Act capped aggregate


12Id.

13See Catherine M. Sharkey, Punitive Damages as Societal Damages, 113 Yale L.J. 347, 351 n.12 (2003) (presenting 1996 statistics, collected by the U.S. Department of Justice, Civil Justice Surveys, on the percentage of cases won by plaintiffs in which punitive damages were awarded: intentional tort, 24 percent; employment discrimination, 19.4 percent; slander or libel, 17 percent; fraud, 15.4 percent; other employment disputes, 12.5 percent; and other products liability, 12.8 percent). The corresponding figures for 2001 are as follows: slander/libel, 59 percent; intentional tort, 36 percent; false arrest/imprisonment, 26 percent; partnership disputes, 21 percent; employment discrimination, 18 percent; and fraud, 17 percent. See Thomas H. Cohen & Steven K. Smith, Civil Trial Cases and Verdicts in Large Counties, 2001, Civil Justice Survey of State Courts, 2001, Bureau of Justice Statistics Bulletin 6 (Apr. 2004).

14Ann Scales notes that one practical incentive remains: Title VII and most state employment discrimination statutes have strict statutory deadlines for filing administrative claims; if these deadlines are missed, plaintiffs may still file state law tort claims. Ann Scales, Nooky Nation: On Tort Law and Other Arguments from Nature, in Directions in Sexual Harassment Law 307, 319 n.44, supra note 1. On the other hand, Scales claims that “in most states, plaintiffs who plead tort claims instead of or in addition to civil rights claims can expect a defense based on workers’ compensation exclusivity provisions.” Id. at 312.

15Moreover, when caps exist for state common-law torts, they are generally more liberal than the caps under Title VII. See Catherine M. Sharkey, Crossing the Punitive-Compensatory Divide tbl.
compensatory and punitive damages at $50,000 to $300,000, depending on the number of employees. Given the federal damages caps, plaintiffs may continue to have an incentive to append state law claims to their Title VII claims.

B. The Possible Influence of Liability Factors

In choosing factors that might influence damages awards, Sunstein and Shih appear to have been guided by several key factors that are critical to establishing Title VII liability. As a prelude to describing their study, here I canvas briefly some major developments in U.S. Supreme Court jurisprudence on liability for sexual harassment under Title VII. I, too, have mined the pivotal Supreme Court rulings in an effort to locate relevant damages factors in addition to those identified by Sunstein and Shih.

In 1986, in Meritor Savings Bank v. Vinson, the Court joined the EEOC and some lower courts in recognizing that hostile work environment is a form of sex discrimination, and thus violates Title VII. In 1993, the Court held, in Harris v. Forklift Systems, Inc., that psychological injury was not a necessary element of a Title VII hostile work environment claim. The lower court had rejected the plaintiff’s sexual harassment claim, given that she managed to continue to work without significant negative effects on either her job performance or her psychological health. The Supreme Court disagreed with the lower court’s position that psychological injury must be proven; nevertheless, psychological injury may be a relevant factor in terms of assessing damages amounts, and is therefore a variable I include in my empirical analysis.

1 (“State Punitive Damages Limitations”) (working paper 2005) (listing various states’ restrictions on punitive and noneconomic damages in torts cases).

1642 U.S.C. §1981a(b)(3). Aggregate caps are as follows: $50,000 for employers with between 15 and 100 employees; $100,000 (101–200 employees); $200,000 (201–500 employees); and $300,000 (more than 500 employees).

17477 U.S. 57 (1986).


19Id. at 20.

20Sunstein and Shih do not include a variable for psychological harm.
In two watershed opinions in 1998—*Burlington Industries, Inc. v. Ellerth*\(^{21}\) and *Farragher v. City of Boca Raton*\(^{22}\)—the Supreme Court simultaneously broadened employer liability and established an affirmative defense to employer liability for supervisor harassment of employees. The Court forged a distinction between tangible and intangible effects of sexual harassment. In cases where a “tangible employment action” occurs—such as demotion, undesirable transfer, or firing—employers are strictly vicariously liable for sexual harassment by their employees.\(^{23}\) For cases involving no tangible employment effect, but where a supervisor had altered an employee’s working conditions by creating a hostile environment, the employer would face strict vicarious liability—regardless of whether it knew or disapproved of the harassment—unless it could prove as an affirmative defense: (1) that it acted reasonably to prevent and remedy sexual harassment; and (2) that the employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer. Sunstein and Shih place much emphasis in their empirical study on the effect of tangible negative employment effects (and quid pro quo elements in particular) on damages.

A key question remained after *Ellerth* and *Farragher* as to whether constructive discharge—namely, the creation or maintenance of working conditions that are so hostile as to induce a reasonable employee to resign—was a “tangible employment action.” If so, then *Ellerth* and *Farragher* had the potential to transform these hostile work environment cases from negligence-based liability to strict liability. This set the stage for the Supreme Court to resolve the issue (six years later) in *Pennsylvania State Police v. Suders*.\(^{24}\) The Court held that an employer could ordinarily defend itself by showing that it had adequate procedures in place for reporting harassment and that the employee had failed to use those procedures. However, if a supervisor or manager had taken official action against the employee (such as a demotion or reduction in pay) as part of the harassment, that defense would not be available.\(^{25}\) Sunstein and Shih include constructive discharge in


\(^{22}\)524 U.S. 775 (1998).

\(^{23}\)See *Burlington Indus.*, 524 U.S. at 761; *Farragher*, 524 U.S. at 808.


\(^{25}\)Id. at 2351.
the category of tangible negative employment effects. I followed their lead in this regard, but, in addition, I have controlled for whether employers have an internal policy in place and whether the plaintiff has complained to his or her supervisors at the workplace.

III. Sunstein and Shih’s Empirical Claims

Sunstein and Shih present two main empirical findings in support of their overarching thesis that damages awards in sexual harassment cases are essentially random: (1) punitive damages awards appear to have no rational relationship to the compensatory awards obtained in the same case; and (2) neither noneconomic compensatory damages nor punitive damages amounts can be explained by reference to identifiable features of particular cases.26

A. No Relationship Between Punitive and Compensatory Damages

On the basis of their empirical analysis, Sunstein and Shih report that compensatory damages do not appear to explain punitive damages.27 This result is, according to Sunstein and Shih, in “striking and quite puzzling” contrast to findings in other areas of the law, where there is a discernible connection between higher compensatory awards and higher punitive awards:28 “Outside of the sexual harassment context, there is evidence that punitive awards can be explained largely or partly by compensatory awards; that finding is missing here.”29 The work of Ted Eisenberg (along with various collaborators)—cited by Sunstein and Shih30—is credited with empirical support for the overarching thesis that “[w]hen juries do award

26The Sunstein and Shih empirical results based on jury damages awards are reproduced in the Supplementary Material, pt. II, tbl. 1.

27Sunstein & Shih, Damages, supra note 1, at 325.

28Sunstein & Shih, Empirical Analysis, supra note 2, at 2; Sunstein & Shih, Damages, supra note 1, at 332 (“[I]n striking contrast to general findings in federal and state law, we found no correlation between the size of compensatory and punitive damages.”).

29Sunstein & Shih, Damages, supra note 1, at 337.

30Id. at 342 n.4 (citing Theodore Eisenberg, The Predictability of Punitive Damages, 26 J. Legal Stud. 623 (1997)).
punitive damages, they do so in ways that relate strongly to compensatory awards.”31

By contrast, in the realm of sexual harassment cases, Sunstein and Shih report: “If anything, there is in fact an extremely small, statistically insignificant negative relationship between the two in these cases. Thus, compensatory awards do not appear to ‘anchor’ punitive awards, and punitive awards cannot be said to be a positive function of compensatory awards.”32 Sunstein and Shih are quite emphatic about this finding: “No matter what method, regression, or data set is used, higher compensatory awards do not produce higher punitive damages.”33 My own empirical study (discussed in Section IV), which replicates and then extends the data set used by Sunstein and Shih, finds—contrary to Sunstein and Shih—that there is indeed a consistently positive relationship between the size of compensatory and punitive damages.34

B. Irrelevance of Key Predictive Explanatory Factors

Even more “striking and puzzling” to Sunstein and Shih than the alleged absence of a discernible relationship between punitive and compensatory awards is their next finding: the absence of “correlation between any particular factor and high or low awards, either punitive or compensatory.”35 Sunstein and Shih report that many expected (or predicted) major causes of high awards—“factors indicating the nature and severity of harassment,” such as unwanted physical contact, visual display of pornography or body parts, propositions by the harasser, and harassment of others besides the


32Sunstein & Shih, Damages, supra note 1, at 332 (emphasis added).

33Id.

34The divergence in results, moreover, raises an important methodological issue, which is explored in Section IV.B.

35Sunstein & Shih, Damages, supra note 1, at 332.
plaintiff—fail to explain either high compensatory or high punitive damages awards. They conclude: “Our own study has found little correlation between any particular factor and high or low awards either punitive or compensatory. Some of the expected causes of high awards are actually negatively correlated with high awards.”

1. Compensatory Damages

Significant Factors. In their empirical analysis, Sunstein and Shih found that two factors did in fact bear a consistent relationship to the size of jury noneconomic compensatory damages awards: (1) the existence of elements of quid pro quo harassment (a “substantive” factor); and (2) whether the case pre- or postdated the 1991 Act (a “procedural” factor).

The presence of a “quid pro quo element” is, according to Sunstein and Shih, “[t]he only aspect of harassment that bore a consistent relationship to higher compensatory awards.” Sunstein and Shih offer a preliminary explanation: “One reason for this difference may be that some, but not all, of the plaintiffs who allege quid pro quo elements filed claims for quid pro quo harassment. The jury instructions for quid pro quo claims would have differed from those for hostile work environment claims, which may have changed the jury’s perception of the case.” However, they abandon this explanation in light of “the fairly consistent and sizable negative relationship between quid pro quo allegations and punitive damage

50Id. at 332, 335.

57Sunstein & Shih, Empirical Analysis, supra note 2, at 23.

58Although not specifically addressed by Sunstein and Shih, pre-1991 Act jury verdicts in sexual harassment cases exist as a result of state-law-based anti-discrimination and tort claims that were appended to Title VII claims.

59Sunstein & Shih, Damages, supra note 1, at 332. According to their empirical results, the existence of quid pro quo harassment is associated with increases from between $151,685 to $163,119 in total noneconomic compensatory damages awarded by juries, as compared with cases where quid pro quo elements are absent. See Supplementary Material, pt. II, tbl. 1. These coefficients are significant at the 1 percent level, using a two-tailed t test. Id.

60Sunstein & Shih, Damages, supra note 1, at 333. “Another explanation would be that male jurors in particular might sympathize with plaintiffs who suffered a tangible economic consequence, something more common to their experience.” Id.
Sunstein and Shih then suggest: “Perhaps the explanation here is that quid pro quo harassment is committed by individuals, whereas punitive damages are typically awarded against companies; it is possible that jurors are sometimes reluctant to punish companies for acts of supervisors.” I critically examine Sunstein and Shih’s conclusions regarding quid pro quo harassment in Section IV, where I explore the significance of this variable in my expanded empirical study.

In addition to quid pro quo harassment—the sole significant substantive factor relating to sexual harassment severity in their empirical study—Sunstein and Shih claim that “[a] procedural difference may account for another consistent finding: lower noneconomic awards after the 1991 amendment to the Civil Rights Act.” According to Sunstein and Shih, “[t]his is an important (though not surprising result).” It is not surprising to them because, as they explain, the 1991 Civil Rights Act “capped awards for compensatory damages and punitive damages under Title VII.” But, as I have previewed, and explore more fully in Section IV, the effect of the 1991 Act—including its impact on incentives to append state-law-based tort and

41Id. (emphasis added). Oddly enough, the existence of quid pro quo elements is associated with an average decrease in jury punitive damages awards from between $4,486,547 to $4,965,792. See Supplementary Material, pt. II, tbl. 1. These coefficients, however, are not statistically significant. Id.

42Sunstein & Shih, Damages, supra note 1, at 333. Sunstein and Shih, however, did not include any variable to measure either the identity, or even number, of defendants in each case.

43Id. In their regressions, Sunstein and Shih report decreases of $63,744 (not statistically significant) and $4,175 (statistically significant) associated with what they term the “1991 Change in Evidentiary Rules.” See Supplementary Material, pt. II, tbl. 1. Sunstein and Shih also report decreases associated with the 1991 Act variable in their regressions involving final court awards. See Sunstein & Shih, Empirical Analysis, supra note 2, at 28 (reporting statistically insignificant decreases of final total noneconomic compensatory awards of $57,064 and $77,704).

44See Sunstein & Shih, Empirical Analysis, supra note 2, at 2.

45Sunstein & Shih, Damages, supra note 1, at 325.
anti-discrimination claims (altogether ignored by Sunstein and Shih)—is far more nuanced, and in fact may lead to an increase in overall awards.

_Insignificant Factors._ Contrary to their predictions, Sunstein and Shih find that “[m]ore egregious harassment, such as physical contact and explicit sexual propositions, does not produce higher awards.”46 In fact, Sunstein and Shih actually find the opposite of the predicted effect of unwelcome physical contact: “Puzzlingly, some regressions even showed that more intimate physical contact, including touching of the plaintiffs’ breasts or buttocks, significantly correlated with _lower_ damage awards.”47 Sunstein and Shih make the provocative (if qualified) statement: “We cannot be sure, but perhaps this finding suggests that women who are harassed are devalued—in this case literally—by virtue of that fact.”48

Sunstein and Shih likewise report that negative employment effects—firing, resignation (including constructive discharge), and negative employment effects short of termination (including unwanted transfers and retaliatory hostility from co-workers)—were not significantly linked to compensatory damages, although here their results are a bit more equivocal.49 Noneconomic compensatory awards were, according to Sunstein and Shih, “generally higher where the plaintiff alleged any negative employment effects.”50 However, when “effect on employment” was disaggregated into three separate variables—“fired,” “quit,” and “other negative effect”—the results were more mixed: “The awards were generally lower if the plaintiff

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46Id.

47Id. at 332. Sunstein & Shih’s empirical study reports that physical contact with the breasts or pelvis area decreased jury awards by $235,464 (statistically significant at the 1 percent level). See Supplementary Material, pt. II, tbl. 1.

48Sunstein & Shih, Damages, supra note 1, at 332 (citing Catherinne MacKinnon, Only Words 66–67 (1995)).

49Id. at 333 (“Some of our results suggest that employment-related factors might be significant, but these relationships are much noisier and more difficult to interpret.”).

50Id. In the two reported regressions from their empirical study, “effect on employment” is associated with an increase of $43,828 in jury noneconomic compensatory awards and an increase of $36,579 in final noneconomic compensatory awards. Neither of these results, however, is statistically significant. See Sunstein & Shih, Empirical Analysis, supra note 2, at 26, 28; Supplementary Material, pt. II, tbl. 1.
was fired, but quitting appeared sometimes positively and sometimes negatively correlated to awards.”

2. Punitive Damages

If the picture with respect to consistency and predictability in noneconomic compensatory damages is not promising, the outlook for punitive damages is, according to Sunstein and Shih, even bleaker: “Compared with the noneconomic damage awards, even fewer factors produced consistently significant relationships with punitive awards.” Factors that Sunstein and Shih predicted would have a positive effect on punitive damages turned out to be insignificant: “Even factors we might expect to play a particularly important role in punitive damage assessment—such as evidence that the defendant harassed others besides the plaintiff and allegations of particularly egregious touching—showed little relationship to those awards.” Moreover, certain factors that Sunstein and Shih predicted would have affected compensatory and punitive damages in a similar way proved to have inconsistent effects on these two categories of awards: “[A] few of the factors demonstrating significant relationships with the awards, most notably quid pro quo, showed relationships that counteracted their apparent effect on compensatory damages.”

In sum, given the absence of any major relationship between identified features of cases and noneconomic damages or punitive damages amounts, Sunstein and Shih conclude: “[T]he data set offers reason to think that outside of the context of economic injuries, both compensatory damages and punitive damages awards in sexual harassment cases are quite

51Sunstein & Shih, Damages, supra note 1, at 333. In the reported regressions, however, “fired” has a negative effect on both jury noneconomic awards (–$123,404, and statistically significant) and final noneconomic awards (–$118,126, not statistically significant); both “quit” and “other negative effect” have positive effects on both jury noneconomic awards ($96,997 and $55,579, respectively, and statistically significant) and final noneconomic awards ($54,621 and $103,715, respectively, and neither is statistically significant). See Sunstein & Shih, Empirical Analysis, supra note 2, at 26, 28; Supplementary Material, pt. II, tbl. 1.

52Sunstein & Shih, Damages, supra note 1, at 333.

53Id. at 333–34; see also Sunstein & Shih, Empirical Analysis, supra note 2, at 4 (“[T]he evidence does not show a link between punitive awards and other victims who have not brought suit.”).

54Sunstein & Shih, Damages, supra note 1, at 334.
random, in the sense that they are not correlated with identifiable features of the particular case.”

IV. New Empirical Study

Sunstein and Shih’s empirical study is the launch pad for mine. I set out not only to test the influence of several of the factors they identified, but also to reconceptualize the posited relationships. First, instead of using punitive damages (or noneconomic compensatory damages) standing alone as the relevant dependent variable, I decided to use some combined measure—either “outrage” damages (consisting of noneconomic compensatory damages plus punitive damages) or, as its proxy, total combined compensatory and punitive damages. Second, I set out to explore further the effect of federal damages limitations on overall awards by including several variables (not considered by Sunstein and Shih) that would seem to be particularly relevant to the issue of damages in sexual harassment cases. I was especially interested in plaintiffs’ efforts to avoid these damages limitations by appending other claims to their Title VII claims, such as state tort claims, state civil rights claims, and federal §1983 claims—none of which would be subject to the damages limitations imposed on Title VII claims.

A. Data

1. Sample

To begin my study, I replicated Sunstein and Shih’s data set, which consists of 70 reported cases, decided between January 1982 and February 1998. Of these 70 cases, 56 include a positive noneconomic compensatory damages

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55Id. See also Sunstein & Shih, Empirical Analysis, supra note 2, at 7 (remarking on the “high degree of variability in punitive awards in sexual harassment cases, variability apparently not explicable by reference to moral judgments or underlying facts”).

56The proxy of total damages is especially useful, given that many cases do not disaggregate economic and noneconomic compensatory damages.

57Sunstein & Shih, Damages, supra note 1, at 343 n.9 (“These results reflect cases reported through February 12, 1998.”). The breakdown of cases by (approximate) trial year is listed in Supplementary Material, pt. IV, tbl 9.
amount, and 40 include a positive punitive damages amount. The cases are listed in an appendix to their study. Sunstein and Shih, moreover, graciously provided me with their data files. I had some difficulty replicating the data set from scratch, using the search terms provided by Sunstein and Shih. Sunstein and Shih claim that their sample includes “all reported cases [from 1982 until February 1998] in which juries have awarded damages in sexual harassment cases.” Using a slightly modified version of their search terms, I was able to generate the 70 cases they include; moreover, the search methodology uncovered an additional 29 cases that would seem to fit the bill. Thus, the total sample size from the January 1982–February 1998 period includes 99 cases.

58Sunstein & Shih, Damages, supra note 1, at 331. In addition, three cases list “0” as the noneconomic damages amount, and 27 cases list “0” for punitive damages. The remaining cases have missing noneconomic damages (11 cases) or punitive damages (3 cases).

59Id. at 338–42. In fact, only 69 cases are listed in the appendix. One case—Howard v. Canteen Corp., 481 N.W.2d 718 (Mich. Ct. App. 1991)—was inadvertently omitted. This case was included, however, in the data files provided to me by Sunstein and Shih.

60The data provided consisted of several Excel spreadsheets, which listed the 70 cases and all coded variables (save the Lott/Karpoff ranking variable, see infra notes 81–82 and accompanying text).

61As reported by Sunstein and Shih: “The Westlaw searches typically involved the terms: ‘jury & award’ & (‘sexual’/‘harass’) & (‘employee’ or ‘Title VII’).” Sunstein & Shih, Damages, supra note 1, at 343 n.9.

62Sunstein & Shih, Empirical Analysis, supra note 2, at 13; id. (“we use data for all reported cases”); Sunstein & Shih, Damages, supra note 1, at 331 (“We have conducted a study of all reported jury award cases in order to see what patterns are emerging.”).

63I ran the following search in the Westlaw “ALLCASES” data base: DA(BEFORE 2/12/1998 & AFTER 1981) & JURY & AWARD! & (SEXUAL/5 HARASS!) & (EMPLOYEE “TITLE VII”). This search produced 1,285 cases (including all 70 of the Sunstein and Shih cases).

Sunstein and Shih apparently further limited their sample to: (1) cases between plaintiff employees and defendant employers/ supervisors/co-employees (i.e., excluding cases brought by the EEOC on behalf of employees); (2) cases raising at least one claim of sexual harassment under either Title VII or state civil rights laws; (3) cases involving trial by jury; and (4) cases in which the jury awarded some positive amount of damages on the basis of sexual harassment. I was not able to further limit the search terms in line with these conditions. (Nor were Sunstein and Shih able to provide additional information regarding their search methodology.) On the basis of reading the cases, my research assistant, Wen Tang, excluded 1,186 cases as not meeting one or more of these conditions, resulting in a 99-case sample (the 70 cases included by Sunstein and Shih, as well as an additional 29 cases that seemed to meet their search criteria).
Next, I expanded the data set from February 1998 (where the Sunstein and Shih study cuts off) to 2004. Using the same search methodology as for the earlier period, I found 133 relevant reported cases for the more recent time period, from February 1998 to May 2004. My total sample size, then, including all reported plaintiff win cases from 1982 until 2004, consists of 232 cases. Although still relatively small, it is more than three times the size of Sunstein and Shih’s sample.

2. Variables

Variables Pertaining to the Nature and Severity of Harassment. As my empirical study includes each of the independent variables coded by Sunstein and Shih, I begin with a description of these variables. Sunstein and Shih include factors that they predicted might be associated with the nature and severity of harassment: propositions by the harasser (Proposition); visual display of pornography or body parts (Visual); coerced sex (Coerced Sex); verbal abuse (Verbal Abuse); any unwanted physical contact.

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64I ran the search—DA(AFTER 2/12/1998) & JURY & AWARD! & (SEXUAL/5 HARASS!) & (EMPLOYEE “TITLE VII”)—on May 20, 2004, so my sample includes cases decided up to that date. This search in the Westlaw “ALLCASES” database generated a list of 1,705 cases. Using the further restrictions described above (supra note 63), 133 cases were identified as meeting the Sunstein and Shih criteria for the more recent period. In several instances, further appeals of cases identified by Sunstein and Shih were detected in the later period. Trial and appellate opinions of the same case were consolidated as one case observation (instead of two separate entries). If the appeal, however, addressed an issue tangential to the merits (e.g., attorneys’ fees), it was not included.

65A full list of the 232 cases is provided in the Supplementary Material, pt. I. The number of cases per trial year is listed in the Supplementary Material, pt. IV, tbl. 9.

66Table 1 includes descriptive characteristics of each of the variables and compares my sample with that of Sunstein and Shih.

67In parentheses, I include the names I have used for each of these variables.

68I coded separately for displays of pornography and body parts given the likelihood that displays of physical body parts are more egregious than displays of pornographic images. However, given the lack of significance of these variables in the regressions, I only report the results with the combined “Visual” variable, in line with Sunstein and Shih.

69Sunstein and Shih (and I) code four separate subcategories: (1) sexual comments to plaintiff (P) about P; (2) sexual comments to P about others; (3) derogatory comments to P about P; and (4) derogatory comments to P about others. In the regressions, however, I include only the aggregate “Verbal Abuse” variable.
Table 1: Descriptive Statistics: Dichotomous Independent Variables Used to Model Damages in Sexual Harassment Cases, 1982–2004

<table>
<thead>
<tr>
<th>Variable</th>
<th>Sharkey</th>
<th></th>
<th>Sunstein and Shih</th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Number = 1</td>
<td>%</td>
<td>N</td>
<td>Number = 1</td>
</tr>
<tr>
<td>Reversed damages award</td>
<td>63</td>
<td>27</td>
<td>232</td>
<td>.</td>
</tr>
<tr>
<td>Appeal</td>
<td>181</td>
<td>78</td>
<td>232</td>
<td>59</td>
</tr>
<tr>
<td>1991 Civil Rights Act</td>
<td>181</td>
<td>78</td>
<td>232</td>
<td>8</td>
</tr>
<tr>
<td>State tort claim</td>
<td>98</td>
<td>42</td>
<td>231</td>
<td>.</td>
</tr>
<tr>
<td>State civil rights claim</td>
<td>128</td>
<td>55</td>
<td>231</td>
<td>.</td>
</tr>
<tr>
<td>§1983 claim</td>
<td>27</td>
<td>12</td>
<td>231</td>
<td>.</td>
</tr>
<tr>
<td>Quid pro quo</td>
<td>35</td>
<td>16</td>
<td>221</td>
<td>20</td>
</tr>
<tr>
<td>Employment effects</td>
<td>148</td>
<td>69</td>
<td>216</td>
<td>49</td>
</tr>
<tr>
<td>Fired</td>
<td>62</td>
<td>29</td>
<td>215</td>
<td>16</td>
</tr>
<tr>
<td>Quit</td>
<td>71</td>
<td>33</td>
<td>214</td>
<td>26</td>
</tr>
<tr>
<td>Other tangible negative effect</td>
<td>33</td>
<td>16</td>
<td>204</td>
<td>35</td>
</tr>
<tr>
<td>Proposition</td>
<td>90</td>
<td>47</td>
<td>191</td>
<td>34</td>
</tr>
<tr>
<td>Visual (picture or gesture)</td>
<td>33</td>
<td>17</td>
<td>190</td>
<td>15</td>
</tr>
<tr>
<td>Pornography</td>
<td>20</td>
<td>11</td>
<td>190</td>
<td>.</td>
</tr>
<tr>
<td>Body parts</td>
<td>15</td>
<td>8</td>
<td>189</td>
<td>.</td>
</tr>
<tr>
<td>Coerced sex</td>
<td>10</td>
<td>5</td>
<td>189</td>
<td>5</td>
</tr>
<tr>
<td>Verbal abuse</td>
<td>160</td>
<td>84</td>
<td>190</td>
<td>34</td>
</tr>
<tr>
<td>Sexual comments to Pi about Pi</td>
<td>143</td>
<td>75</td>
<td>190</td>
<td>29</td>
</tr>
<tr>
<td>Sexual comments to Pi about others</td>
<td>52</td>
<td>28</td>
<td>189</td>
<td>10</td>
</tr>
<tr>
<td>Derogatory comments to Pi about Pi</td>
<td>104</td>
<td>55</td>
<td>189</td>
<td>9</td>
</tr>
<tr>
<td>Derogatory comments to Pi about others</td>
<td>41</td>
<td>22</td>
<td>189</td>
<td>4</td>
</tr>
<tr>
<td>Physical contact</td>
<td>129</td>
<td>68</td>
<td>190</td>
<td>24</td>
</tr>
<tr>
<td>Breast or pelvis area</td>
<td>65</td>
<td>34</td>
<td>189</td>
<td>17</td>
</tr>
<tr>
<td>Other contact</td>
<td>124</td>
<td>65</td>
<td>190</td>
<td>18</td>
</tr>
<tr>
<td>Other evidence of a pattern of behavior</td>
<td>154</td>
<td>79</td>
<td>196</td>
<td>13</td>
</tr>
<tr>
<td>Pattern involving Pi</td>
<td>130</td>
<td>68</td>
<td>192</td>
<td>10</td>
</tr>
<tr>
<td>Pattern involving others</td>
<td>57</td>
<td>30</td>
<td>191</td>
<td>10</td>
</tr>
<tr>
<td>Multiple harassers</td>
<td>50</td>
<td>26</td>
<td>193</td>
<td>.</td>
</tr>
<tr>
<td>Plaintiff participated</td>
<td>9</td>
<td>5</td>
<td>191</td>
<td>7</td>
</tr>
<tr>
<td>Plaintiff complaint at workplace</td>
<td>159</td>
<td>80</td>
<td>200</td>
<td>.</td>
</tr>
<tr>
<td>Psychological harm</td>
<td>47</td>
<td>25</td>
<td>191</td>
<td>.</td>
</tr>
<tr>
<td>Multiple defendants</td>
<td>107</td>
<td>46</td>
<td>232</td>
<td>.</td>
</tr>
</tbody>
</table>

Note: The sample consists of 232 sexual harassment cases, available on Westlaw and decided from 1982 through May 2004, in which juries awarded damages to plaintiffs. The columns under the heading “Sharkey” are for the sample gathered for this article. The columns under the heading “Sunstein and Shih” are for the sample analyzed in Sunstein and Shih (2004). All variables reported in the table are dichotomous and take on only the values 0 or 1. Not all variables coded for this article’s sample were analyzed in Sunstein and Shih.
(Physical Contact);70 other evidence of a pattern of behavior (Other Evidence);71 and whether plaintiff is alleged to have “participated” in the harassment, including situations where the plaintiff has engaged in consensual sexual relations with the defendant (Plaintiff Participated).

Sunstein and Shih also code variables for quid pro quo harassment and effect on employment. Employment effects (Employment Effects) include three subcategories: fired (Fired), quit (including constructive discharge) (Quit), and other negative effects short of firing (including unwanted transfers and retaliatory hostility from co-workers) (Other Tangible Negative Effect). One would expect much overlap between the variables for quid pro quo and employment effects, as any plaintiff who has suffered a “tangible employment action” (whether firing, constructive discharge, or other tangible negative effect) should be entitled to sue for quid pro quo harassment.72

In my coding scheme, quid pro quo cases are those in which the plaintiff explicitly alleges quid pro quo harassment, as distinct from hostile work environment.73 Quid pro quo is a type of sexual harassment in which the harasser asks for a sexual favor in return for providing an employment benefit, such as a raise, continued employment, or other favorable treatment. Hostile work environment sexual harassment involves unwelcome verbal or physical sexual behavior that is sufficiently severe, persistent, or

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70 Here Sunstein and Shih (and I) code two subcategories for touching of the breast or pelvis areas (Breast or Pelvis Area) and other contact (Other Contact). I include these subcategories in my regressions in order to test the claim made by Sunstein and Shih regarding smaller awards in cases involving more egregious unwanted touching. See supra notes 47–48 and accompanying text.

71 Sunstein and Shih code two separate subcategories of other evidence evincing a pattern of harassment behavior: (1) pattern involving plaintiff (Pattern Involving Plaintiff) and (2) pattern involving others (Pattern Involving Others). I included a third subcategory for cases involving multiple harassers (Multiple Harassers).

72 Sunstein and Shih apparently did not investigate this correlation. In fact, in their data set, quid pro quo and effect on employment are weakly correlated (correlation = 0.28). This correlation, moreover, is statistically significant at the 5 percent level, using the pairwise correlation (pwcorr) test in Stata.

73 These are the two general categories of sexual harassment cases under Title VII.
pervasive to create an abusive work setting. My coding treats quid pro quo (Quid Pro Quo) as a type of claim variable and differs significantly from that of Sunstein and Shih.

Sunstein and Shih attempt to control for time and geographic differences. They control for year fixed effects by including a variable for the trial year. The issue of controlling for state fixed effects is more complicated. As Sunstein and Shih explain:

It is well known, for example, that Texas and Alabama are high punitive damage jurisdictions, whereas Utah is a low punitive damage jurisdiction; there are undoubtedly high and low sexual harassment damage jurisdictions too, and perhaps this explains much of the variance that we observe.

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74 There are more stringent requirements for plaintiffs who allege hostile work environment than for plaintiffs who allege tangible effects from the harassment, such as loss of employment or denial of promotion. The requirement that the harassment be “severe or pervasive” applies only in hostile environment cases. Moreover, employers are always vicariously liable for quid pro quo discrimination, but not for hostile environment discrimination. See supra notes 21–25 and accompanying text.

75 Sunstein and Shih code 20 cases as involving quid pro quo elements—presumably involving unwelcome sexual advances and demands. Our respective coding for this variable differs. In the Supplementary Material, pt. IV, tbl. 3, I list features of 10 cases that Sunstein and Shih coded as quid pro quo but that were omitted from my classification, as well as three cases omitted by Sunstein and Shih, which I code as quid pro quo cases.

76 The trial year is either reported in the decision or, if not, it appears that Sunstein and Shih simply coded the trial year as one year prior to the reported appellate decision (or else the same year as a trial court opinion). For a listing of the number of cases decided per trial year, see Supplementary Material, pt. IV, tbl. 9.

77 In this context, fixed state effects are controlling not for the location of the court, but for the controlling state law. The cases in Sunstein and Shih’s sample are drawn from both state and federal courts. One could also control for state versus federal court. I coded a variable for state court in my data set, but it was not significant in any of the regressions, and was therefore dropped.

78 Sunstein & Shih, supra note 1, at 332. Sunstein and Shih accept rather uncritically the conventional wisdom that punitive damages are high in Texas and Alabama, as compared with other states. But see Erik K. Moller et al., Punitive Damages in Financial Injury Jury Verdicts, 28 J. Legal Stud. 283, 333–34 (1999) (“In terms of magnitude, Alabama juries generally award smaller punitive damage awards than in the other jurisdictions in our database. . . . [However] [w]hen they do decide in favor of such damages, Alabama juries more often award punitive damages that are large relative to the compensatory award.”). Texas and Alabama do, nonetheless, have a high rating on the Lott/Karpoff indices of punitive damages rates; whereas Utah does not have a low rating. See infra notes 81–82; Supplementary Material, pt. IV, tbls. 7–8.
It proved difficult, however, for Sunstein and Shih to control for state effects given the small size of their data set.\textsuperscript{79} Because their data set is too small to employ state dummy variables, Sunstein and Shih include a proxy for state fixed effects: “a ranking of state product liability punitive damages awards,”\textsuperscript{80} derived from data on product liability cases from January 1985 to June 1996, reported in an article by Jonathan Karpoff and John Lott.\textsuperscript{81} I was not able to replicate precisely the ranking used by Sunstein and Shih; however, I was able to construct a similar ranking using the raw data used in the Karpoff and Lott article. The ranking variable is based on the percentage of product liability cases in which punitive damages are awarded.\textsuperscript{82}

I added several other variables to those identified by Sunstein and Shih as affecting the nature and severity of the harassment.\textsuperscript{83} These included:

\textsuperscript{79}Sunstein and Shih’s 70-case sample includes from one to five observations from 36 different states. My 232-case sample includes from 1 to 21 observations from 43 states, plus the District of Columbia. See Supplementary Material, pt. IV, tbl. 6.

\textsuperscript{80}Sunstein & Shih, Empirical Analysis, supra note 2, at 14. Unfortunately, Sunstein and Shih do not report any further information regarding this ranking variable; nor was it included in their Excel spreadsheets. See supra note 60.

\textsuperscript{81}Jonathan M. Karpoff & John R. Lott, On the Determinants and Importance of Punitive Damage Awards, 42 J.L. & Econ. 527 (1999).

\textsuperscript{82}In other words, it is the number of product liability cases in which punitive damages are awarded divided by the total number of product liability cases. I was able to calculate this ratio using the raw data graciously provided to me by John Lott. Moreover, this ratio appears to be similar to the ranking used by Sunstein and Shih. According to Sunstein and Shih, “the index used here controls for the rate at which product liability punitive damages are awarded in different states.” Sunstein & Shih, Empirical Analysis, supra note 2, at 14.

I also created several alternate ranking variables, none of which appeared to match more closely Sunstein and Shih’s (in terms of generating similar regression coefficients). These included: (1) a ranking based on the raw number of product liability cases in which punitive damages were awarded and (2) a ranking based on the total number of cases (of all categories, not just products liability) with punitive awards divided by the total number of cases. In my empirical study, I utilize this latter measure—the ranking based on percentage of punitive damages in total cases—as the more comprehensive “State Ranking Index.” Supplementary Material, pt. IV, tbl. 8. However, my regression results are robust to the alternative ranking variables discussed.

\textsuperscript{83}In addition to the variables noted in the text, I also attempted to code for the following additional plaintiff characteristics: “gender”; “minority gender” (i.e., whether plaintiff is the only, or one of a few, employees of his or her gender in the workplace); “same sex” (i.e., whether the plaintiff and defendant are the same gender); “blue-collar worker”; and “race.” Women comprise more than 90 percent of the plaintiffs (191 of 210 cases for which the information was
whether plaintiff complained about the harassment to supervisors at work (Plaintiff Complaint at Workplace)\textsuperscript{84} and whether the plaintiff suffered psychological or psychiatric harm (Psychological Harm).\textsuperscript{85} I also coded the number of defendants according to how many defendants were ordered to pay damages to the plaintiff. In most of the cases, there is only one defendant—the plaintiff’s employer, which typically is a company. In the bulk of the remaining cases, the individual harassers or supervisors are also charged (along with the employer) with liability for damages.\textsuperscript{86} Only in one or two cases was the individual harasser or supervisor liable for damages when the employer was not. Finally, I included a variable “Reversed” that was coded “1” in cases in which the damages awarded by the jury at trial were overturned, either on postverdict motions or on appeal.\textsuperscript{87}

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\textsuperscript{84}Information on this variable is available for 200 of the 232 cases. I also coded a variable for whether the employer provided an internal harassment policy to protect its employees (available for 193 of the 232 cases). Employers have an incentive to initiate such policies in order to limit their liability. See Judith Resnik, The Rights of Remedies: Collective Accountings for and Insuring Against the Harms of Sexual Harassment, in Directions on Sexual Harassment Law 247, 252, supra note 1 ("Through statements of policies, many employers have defined certain actions as impermissible and have, in conjunction with employees, restructured local cultures. Employment policies and actual practices now signal expectations that sex is not to be a part of workplace demands.").

\textsuperscript{85}Information for this variable (which includes cases in which it is noted that the plaintiff visited a psychologist or psychiatrist) was available for 191 of the 232 cases. In addition, I coded a variable for whether the harassment took place in public. This variable was consistently extremely insignificant, however, so it was dropped from the reported regressions.

\textsuperscript{86}Roughly 90 percent of the cases have either a single defendant (125 cases) or else two defendants (77 cases).

\textsuperscript{87}The “Reversed” variable, thus, does not distinguish trial cases from appellate cases. Of the 63 cases in which the jury’s damages were reversed, however, 54 are appeals. (There are, however, an additional 127 appellate cases that did not reverse the jury’s damages determination.) For further discussion of this variable, see infra note 111 and accompanying text.
Additional Variables Pertaining to Damages Limitations. My most significant additions to Sunstein and Shih’s study, however, were not variables such as those just discussed, largely concerning liability for sexual harassment, but variables pertaining to the damages limitations of Title VII.

Sunstein and Shih include one procedural variable, which they term “1991 Change in Eviden[tia]ry Rules.”88 It is unclear what they hope to measure with this variable, described as “whether the case was decided after 1991 to account for changing the eviden[tia]ry rules.”89 The most straightforward definition would distinguish cases on the basis of whether or not the 1991 Act applied (i.e., whether the harassing activity took place on or after November 21, 1991). This is what is implied by Sunstein and Shih’s claim that compensatory damages were lower “if potentially influenced by the 1991 amendment to the Civil Rights Act.”90 But, as Sunstein and Shih elaborate further, “[j]uries in some cases were asked to consider whether the actionable behavior occurred before or after the effective date as they were assessing damages under Title VII.”91 This gives the inaccurate impression that they have coded cases in which the jury was specifically informed of the 1991 Act.92 Suffice it to say that my coding for 1991 Act, which uses “1” where the harassing activity took place after the enactment of the 1991 Civil Rights Act (November 21, 1991), differs significantly from that of Sunstein and Shih.93

I have added several key variables—omitted by Sunstein and Shih—that are likely to affect damage award amounts: whether plaintiffs append state tort (State Tort) or state civil rights (State Civil Rights) claims to their Title VII claims, and whether plaintiffs append a §1983 federal civil rights

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88Sunstein & Shih, Empirical Analysis, supra note 2, at 25, 26, 28.

89Id. at 14.

90Sunstein & Shih, Damages, supra note 1, at 325. In six of the eight cases Sunstein and Shih coded as “1” for 1991 Act, however, the harassing activity occurred prior to the enactment of the 1991 Act. See Supplementary Material, pt. IV, tbl. 4.

91Sunstein & Shih, Damages, supra note 1, at 333.

92However, of the eight cases that Sunstein and Shih coded as “1” for 1991 Act, only one mentioned informing the jury of the effect of the 1991 Act. See Harris v. L&L Wings, Inc., 132 F.3d 978 (4th Cir. 1997) (jury was instructed that it ought not consider evidence of incidence that took place prior to the enactment of the 1991 Act).

93I detail the differences in coding in Supplementary Material, pt. IV, tbl. 4.
claim (§1983). Typical state law tort claims include intentional infliction of emotional distress, assault and battery, and wrongful discharge. These claims are subject to damages restrictions in some states, but not in others.94 State civil rights claims are brought under individual state statutes, and are not subject to Title VII caps.95 Likewise, the inclusion of federal §1983 claims is potentially important because punitive damages are allowed and are not subject to Title VII caps.96

B. Methodology

In my new empirical study, I employ standard ordinary least squares (OLS) in linear regression models, using logged dependent variables.97 An important methodological issue is presented for models with punitive damages as the dependent variable. Sunstein and Shih run Tobit models, which include in the analysis cases with “0” values for punitive damages—cases in which no punitive damages were awarded. Zero-punitive-award cases are excluded from the OLS models.98 Sunstein and Shih were, in addition, quite emphatic about the robustness of their results: “No matter what method, regression, or data set is used, higher compensatory awards do not produce higher punitive damages.”99 Such conviction, of course, invites empirical challenge, and Eisenberg et al. were the first to rise to the occasion. In an unpublished exercise, Eisenberg et al. reanalyzed Sunstein and Shih’s sample of cases,

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94See Sharkey, supra note 15 (listing various states’ restrictions on punitive and noneconomic damages in tort cases).

95These claims are, as a general matter, subject to state-based punitive damages caps. Id. A few states, moreover, have selective caps that pertain to unlawful employment practices. See, e.g., Alaska Stat. §09.17.020 (Michie 2004); Tex. Labor Code Ann. §21.2585 (Vernon 2005) (providing cap for unlawful intentional employment practice).

96See, e.g., Bogle v. McClure, 332 F.3d 1347 (11th Cir. 2003) (refusing to extend Title VII punitive damages caps to §1983 litigation).

97The distribution of the nonlogged variables for adjusted total jury damages and adjusted outrage damages are right skewed, whereas the logged variables produce normal distributions. Using the log-transformed variables, the residual versus fitted plot confirmed that the patterns of residuals are random.

98Recall that, in their 70-case data set, 27 cases have “0” value for punitive damages amount. See supra note 58.

99Sunstein & Shih, Damages, supra note 1, at 332 (emphasis added).
using OLS methodology. According to Eisenberg et al., “[t]he randomness claim [of Sunstein and Shih] appears to depend on the extreme influence of a handful of observations. The mass of cases in the study show a statistically significant relation between punitive (log) and compensatory (log) awards.” Differences in methodology, then, seemed to be the primary reason behind the disagreement between Sunstein and Shih and Eisenberg et al.

This methodological debate, moreover, persists here. My empirical analysis (see Section IV.D.1) finds a consistently positive relationship between the size of compensatory and punitive damages—a finding, however, that is strongly statistically significant using the OLS methodology (used by Eisenberg et al.), but not statistically significant using the Tobit methodology (used by Sunstein and Shih). The Tobit model, however, does not provide a good fit for the data. Moreover, a new hybrid model of the Tobit and log model, which provides a reasonable reconciliation of the two approaches, yields results roughly equivalent to (and thus lends additional support to) the results from the OLS model.

Finally, it bears noting that, whereas the Tobit approach has at least surface plausibility with respect to regressions using punitive damages awards as the dependent variable—given the significant number of “0” values—it is clearly inappropriate for use with dependent variables such as total damages,

100 Eisenberg et al., supra note 31, at 745 n.8. Eisenberg et al. offer a further qualifier: “In addition, the [Sunstein and Shih] study used published opinions, which tend to overstate punitive award levels and the ratio of punitive awards to compensatory awards.” Id.

101 A detailed comparison of the Sunstein and Shih and Eisenberg findings (including a replication of Eisenberg’s unpublished empirical analysis) is provided in the Supplementary Material, pt. III.

102 This is revealed by an examination of the scatterplot of the data. Moreover, a comparison of the kernel density plot of the log of punitive damages awards and level (or untransformed) punitive damages awards reveals that the partial normality assumption underlying the Tobit model does not hold.

103 This hybrid model, which, like Tobit, accounts for “0” values (cases without punitive damages awards), but also, like log-transformed OLS models, deals with the skewness of the data, is discussed in Zhang et al., Bayesian Inference for a Two-Part Hierarchical Model: An Application to Profiling Providers in Managed Care, J. of the Am. Stat. Ass’n (forthcoming). The fit of the model entails the use of Bayesian methods and is implemented using some specialized software. Marty Wells graciously provided me with regression results using this new technique. The results (on file with author) are largely consistent with those presented in my OLS model (and are referred to, where relevant, in the results section below).
where there are no “0” values. For this reason, models using total damages and outrage damages are on uncontroversial footing employing the OLS methodology.

C. Limitations

Sunstein and Shih acknowledge two critical limitations of their empirical study: “The data set is severely limited, and the sample—seventy reported cases—may be skewed.” A small data set is problematic for statistical analysis. Having few observations creates a bias toward not finding any significant relationships (the central Sunstein and Shih result). Moreover, the size of the data set limits the number of independent control variables that may be added. In this regard, my 232-case sample is a significant improvement over Sunstein and Shih’s 70-case study.

However, my sample, building on that of Sunstein and Shih, is comprised of decisions reported in the Westlaw database, the majority of which are appeals. As Sunstein and Shih are well aware, this leads to a potentially skewed sample. Appeals may well involve unusual or wrongly decided cases. If that is so, then it might be the case that an empirical study based on appellate cases would generate different results from one based entirely

104 Sunstein and Shih’s use of the Tobit methodology when using noneconomic compensatory damages as the dependent variable is, therefore, highly suspect. See Sunstein & Shih, Empirical Analysis, supra note 2, at 17. This is because there are only three “0” values for noneconomic compensatory damages (as compared to 40 “0” values for punitive damages). I also employ OLS for the regression using outrage damages as the dependent variable; in this regression, nine cases drop out (where outrage damages have “0” values).

105 Sunstein & Shih, Damages, supra note 1, at 325. See also id. at 332 (“The data set is small; it is highly suggestive but too small to allow for reliable statistical judgments.”).

106 Moreover, absent a power calculation, the Sunstein and Shih findings of no statistically significant effects cannot be regarded as substantial evidence, much less persuasive evidence.

107 According to Sunstein and Shih, 11 of their 70 cases (or roughly 16 percent) were not appealed. Sunstein & Shih, Empirical Analysis, supra note 2, at 14. My expanded data set picked up a slightly larger percentage (22 percent) of trial court cases that were not appealed: 51 of the 232 cases (three of which are state trial court opinions).

108 See Sunstein & Shih, Damages, supra note 1, at 332 (“the data set may be skewed; most of the cases were appealed, and perhaps this made for an unrepresentative sample”).

109 See Sunstein & Shih, Empirical Analysis, supra note 2, at 14 (“such cases may, needless to say, be appealed precisely because they are unusual”).
on trial court verdicts.\textsuperscript{110} To mitigate this risk, I have included the control variable “Reversed,” which is coded as “1” in any case in which the jury’s damages award was subsequently overturned—either by the trial court or on appeal.\textsuperscript{111}

An additional drawback of Sunstein and Shih’s study (and exacerbated by the expansion of the timeframe in my empirical study) is that it spans a period of time that witnessed important changes in the law of sexual harassment, as well as more generally.\textsuperscript{112}

\textbf{D. Results}

Here, I present results of two sets of regressions: the first set replicates conventional analysis using punitive damages as a dependent variable; the second utilizes the reconceived dependent variables: outrage (i.e., noneconomic plus punitive) damages, and its proxy, total damages (outrage damages plus economic damages). Most of the cases involve a single plaintiff bringing the sexual harassment claims. In the cases in which there are multiple plaintiffs, the damages awards were calculated on a per-plaintiff basis.\textsuperscript{113}

\textsuperscript{110}Figs. 3–4 in Part V of the Supplementary Material compare jury awards in trial (51 cases) versus appellate (178 cases) cases.

\textsuperscript{111}Cases that generated separate trial and appellate court decisions during the relevant time period are combined as a single entry in my data set. So, for example, a jury award that is entered by the district court, but subsequently overturned by the appellate court, will be entered in my data set with a “1” in the “Reversed” column. Published lower court opinions were available for about half the federal appellate court opinions in my data set. Previous researchers have coded such linked cases as separate trial and appellate court opinions. See Juliano & Schwab, supra note 3, at 556 n.38 (“The coding sheet does not allow for the same suit to be tracked throughout the system. In other words, we coded each opinion produced in the same suit as a separate case at both the district court and appellate court level.”). Combining separate opinions in the same suit to form a single data entry, and including the “Reversed” variable, would seem to be preferable methodologically.

\textsuperscript{112}See supra Section II. For this reason, empirical studies covering more limited periods may be preferable. See, e.g., Jennifer L. Peresie, Note, Female Judges Matter: Gender and Collegial Decisionmaking in the Federal Appellate Courts, 114 Yale L.J. 1759, 1766 (2005) (“This Note improves on past research designs by using a limited time frame with no significant changes in Supreme Court precedent or federal statutes, to increase the homogeneity of the cases in the sample . . . ").

\textsuperscript{113}In the 232-case sample, there are 15 cases with more than one plaintiff; in each of these cases, the damages awards were simply divided by the number of plaintiffs.
Using my larger data set,114 I replicated and extended the Sunstein and Shih and Eisenberg analyses using their respective methodologies (i.e., Tobit and OLS regressions). In this set of regressions (reported in Table 2), I use jury awards of punitive damages as the dependent variable, and control for a whole array of independent variables in addition to compensatory damages. Consistent with Eisenberg et al. (and contrary to Sunstein and Shih), my results confirm a positive relationship between punitive and compensatory awards. My results also confirm a positive impact on the size of the punitive damages award where the pattern of harassment has involved multiple individuals, not only the plaintiff. This particular aspect of my results lends support to the “societal compensation” theory of punitive damages, which posits that punitive damages awards reflect an effort by the factfinder to redress harms committed by the defendant not only to the particular plaintiff in the case, but also to similarly harmed other individuals.115

The next set of regressions (reported in Table 3) use the more theoretically and statistically sound dependent variables of outrage damages and total damages (instead of punitive damages as the dependent variable). My regression analysis here confirms Sunstein and Shih’s basic finding that most variables pertaining to the nature and severity of the harassing conduct do not affect the size of damages awards (in this case, outrage damages or total damages). However, my analysis highlights the impact of several variables—not considered by Sunstein and Shih—that do affect damages amounts: whether plaintiff has appended state tort or civil rights claims to his or her Title VII sexual harassment claim. In addition, the 1991 Civil Rights Act has a positive, and statistically significant, impact on damages awards (in cases governed by the Act).

1. Punitive Damages as Dependent Variable

Relationship Between Punitive and Compensatory Damages. Here, I revisit the debate between Sunstein and Shih and Eisenberg by exploring the relationship, if any, between punitive and compensatory damages, using my extended data set to attempt to replicate their results, employing their respective methodologies. Using the Tobit methodology, a $1 increase in compensatory awards is associated with, on average, an increase of $1.82 in

114My data set is described fully in Section IV.A.

115Sharkey, supra note 13, at 351–52.
Table 2: Regression Models of Jury Punitive Damages Awards, Sexual Harassment Cases, 1982–2004

<table>
<thead>
<tr>
<th>Independent Variables</th>
<th>1 (Tobit)</th>
<th>2 (OLS)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Total compensatory awards</td>
<td>1.818</td>
<td>0.297***</td>
</tr>
<tr>
<td></td>
<td>(1.191)</td>
<td>(0.764)</td>
</tr>
<tr>
<td>Proposition</td>
<td>−423,174.3</td>
<td>−0.633</td>
</tr>
<tr>
<td></td>
<td>(1,314,060)</td>
<td>(0.374)</td>
</tr>
<tr>
<td>Visual (picture or gesture)</td>
<td>−1,855,888</td>
<td>−0.679*</td>
</tr>
<tr>
<td></td>
<td>(1,728,608)</td>
<td>(0.243)</td>
</tr>
<tr>
<td>Coerced sex</td>
<td>3,922,698</td>
<td>0.374</td>
</tr>
<tr>
<td></td>
<td>(2,632,688)</td>
<td>(0.461)</td>
</tr>
<tr>
<td>Verbal abuse</td>
<td>3,398,913*</td>
<td>−0.431</td>
</tr>
<tr>
<td></td>
<td>(1,914,183)</td>
<td>(0.911)</td>
</tr>
<tr>
<td>Physical contact</td>
<td>1,175,008</td>
<td>0.274</td>
</tr>
<tr>
<td></td>
<td>(1,271,213)</td>
<td>(0.478)</td>
</tr>
<tr>
<td>Other evidence of a pattern of behavior</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Pattern involving I</td>
<td>899,593.7</td>
<td>1.354</td>
</tr>
<tr>
<td></td>
<td>(1,421,223)</td>
<td>(1.015)</td>
</tr>
<tr>
<td>Pattern involving others</td>
<td>2,091,622</td>
<td>0.867**</td>
</tr>
<tr>
<td></td>
<td>(1,280,649)</td>
<td>(0.393)</td>
</tr>
<tr>
<td>Multiple harassers</td>
<td>835,906.7</td>
<td>0.007</td>
</tr>
<tr>
<td></td>
<td>(1,377,888)</td>
<td>(0.556)</td>
</tr>
<tr>
<td>Quid pro quo</td>
<td>−1,463,155</td>
<td>0.071</td>
</tr>
<tr>
<td></td>
<td>(1,783,884)</td>
<td>(0.845)</td>
</tr>
<tr>
<td>Employment effects</td>
<td>526,578.7</td>
<td>−0.327</td>
</tr>
<tr>
<td></td>
<td>(1,239,745)</td>
<td>(0.542)</td>
</tr>
<tr>
<td>Plaintiff participated</td>
<td>−502,792.5</td>
<td>0.221</td>
</tr>
<tr>
<td></td>
<td>(3,155,767)</td>
<td>(0.706)</td>
</tr>
<tr>
<td>State ranking index</td>
<td>−197,388.3**</td>
<td>−0.038</td>
</tr>
<tr>
<td></td>
<td>(84,683.2)</td>
<td>(0.044)</td>
</tr>
<tr>
<td>1991 Act</td>
<td>4,097,863*</td>
<td>1.471***</td>
</tr>
<tr>
<td></td>
<td>(2,315,249)</td>
<td>(0.548)</td>
</tr>
<tr>
<td>Reversed</td>
<td>−2,424,967</td>
<td>0.529</td>
</tr>
<tr>
<td></td>
<td>(1,476,310)</td>
<td>(0.644)</td>
</tr>
<tr>
<td>Constant</td>
<td>−4,977,658</td>
<td>7.291***</td>
</tr>
<tr>
<td></td>
<td>(5,763,023)</td>
<td>(1.602)</td>
</tr>
<tr>
<td>N</td>
<td>164</td>
<td>94</td>
</tr>
<tr>
<td>Chi-square</td>
<td>35.27</td>
<td></td>
</tr>
<tr>
<td>$R^2$ (pseudo $R^2$ in Tobit)</td>
<td>0.01</td>
<td>0.27</td>
</tr>
</tbody>
</table>

*Significant at 10%; **significant at 5%; ***significant at 1%.

Note: Robust standard errors in parentheses. The sample consists of 232 sexual harassment cases, available on Westlaw and decided from 1982 through May 2004, in which juries awarded damages to plaintiffs. All damages amounts (compensatory and punitive) are adjusted for inflation, in 2004 dollars. Regression 1 controls for fixed “trial year” effects by including dummy trial year variables. None of the coefficients on the trial year dummy variables was significant. It includes cases with no punitive award, included in the model as having zero punitive damages. Regression 2 uses logged values for punitive damages (dependent variable) and compensatory damages (independent variable). It is limited to cases with nonzero punitive awards. Regression 2 includes clustering by trial year.
punitive damages awarded by juries.\textsuperscript{116} This result, however, is not statistically significant.\textsuperscript{117} But, as explained above (see Section IV.B), the Tobit model is not a good fit. Using the OLS methodology (and excluding “0” punitive damages values), my results were strongly statistically significant (at the 1 percent level): a 1 percent increase in jury compensatory damages awards is associated with a 0.297 percent increase in jury punitive awards.\textsuperscript{118} This translates roughly into dollar amounts as follows: a $1,000 increase in compensatory damages is associated with roughly a $479.42 increase in punitive damages.\textsuperscript{119}

\textit{Effect of “Pattern Involving Others.”} It is worth mentioning here that Sunstein and Shih’s original results (from their 70-case study) actually confirm a positive (and weakly statistically significant, at the 10 percent level) relationship between evidence that the defendant harassed others besides the plaintiff (“pattern involving others”) and jury punitive damages awards. Cases involving such a pattern of harassing behavior involving others (in addition to the plaintiff) were associated with, on average, a more than $8 million increase in the amount of punitive damages awarded.\textsuperscript{120}

This result was generally confirmed by regressions run on my larger sample, using alternatively the Tobit and OLS methodologies, reported in Table 2. In the Tobit regression,\textsuperscript{121} however, the result was statistically significant only at the 10.5 percent level: cases involving a pattern of harassment

\textsuperscript{116}Using jury punitive damages awards as the dependent variable, the Tobit regression is run on a sample of 164 observations, as compared to Sunstein and Shih’s 65 observations. The Tobit regression controls for trial year fixed effects using dummy variables. See Table 2, Regression 1.

\textsuperscript{117}More precisely, it is significant only at the 13 percent level using a two-tailed \textit{t} test.

\textsuperscript{118}Or, in other words, a 100 percent increase in compensatory awards is associated with a 29.7 percent increase in punitive awards.

\textsuperscript{119}These OLS results, moreover, are bolstered somewhat from the similar results from the Tobit-log hybrid model provided to me by Marty Wells (see supra note 103): the coefficient on log-adjusted compensatory damages (0.355) is significant at the 7.6 percent level. Note that both my OLS model and Wells’s hybrid model use trial year as a clustering variance, rather than as a fixed effect (or dummy variable), given the small sample size. (When trial year dummies are included in the OLS model, however, none of them is statistically significant.)

\textsuperscript{120}See Supplementary Material, pt. II, tbl. 1, Regression 4.

\textsuperscript{121}See supra Table 2, Regression 1.
involving others were, on average, associated with a rough increase of $2.1 million in jury punitive damages awards.\textsuperscript{122} In the OLS regression,\textsuperscript{123} the approximate dollar interpretation of the statistically significant coefficient (at the 5 percent level) on “pattern involving others” is as follows: cases involving such a pattern of harassment are, on average, associated with an increase of $167,005 (holding all other variables at their means).\textsuperscript{124}

These results are consistent with the “societal compensation” theory of punitive damages.\textsuperscript{125} Harassment of individuals other than the plaintiff is often relevant in the jury’s assessment of punitive damages. Moreover, “[t]he concept of societal damages may be particularly apt in the context of workplace harassment, especially because the problem of underdetection (and thus underdeterrence) is likely to be quite pervasive.”\textsuperscript{126}

2. “Outrage” Damages and Total Damages as Dependent Variables

There are statistical and theoretical problems associated with the use of punitive damages as a dependent variable (with compensatory damages as an independent variable). At the statistical level, there are formidable challenges involved with including compensatory damages as an independent variable affecting punitive damages. There is an endogeneity bias problem, given the fact that many factors that affect compensatory damages will also affect punitive damages. The better view may well be that compensatory and punitive damages are jointly determined. If that is so, then using punitive damages as the dependent variable and including additional independent variables along with compensatory damages (which affect both compensatory and punitive damages) will induce multicollinearity problems as well as

\textsuperscript{122}This represents an approximate 250 percent increase in the mean jury punitive award of $843,349.

\textsuperscript{123}See supra Table 2, Regression 2.

\textsuperscript{124}This represents an approximate 11.4 percent increase in the mean jury punitive award of $1,466,307. Here again, the OLS results are largely consistent with those from Wells’s hybrid model (see supra note 103): the coefficient on “Pattern Involving Others” (0.715) is significant at the 8.6 percent level.

\textsuperscript{125}Sharkey, supra note 13, at 351–52.

\textsuperscript{126}Id. at 395. See also Resnik, supra note 84, at 252–53 (“[F]or every case filed and won, many cannot be brought. The barriers to litigation are multiple.”).
Table 3: Regression Models of Total Damages and Outrage Damages, Sexual Harassment Jury Cases, 1982–2004

<table>
<thead>
<tr>
<th>Independent Variables</th>
<th>Total Damages</th>
<th>Outrage Damages</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Sunstein Variables</strong></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Proposition</td>
<td>−0.368</td>
<td>−0.273</td>
</tr>
<tr>
<td></td>
<td>(0.379)</td>
<td>(0.586)</td>
</tr>
<tr>
<td>Visual (picture or gesture)</td>
<td>−0.882</td>
<td>0.175</td>
</tr>
<tr>
<td></td>
<td>(0.564)</td>
<td>(0.406)</td>
</tr>
<tr>
<td>Coerced sex</td>
<td>1.341***</td>
<td>0.250</td>
</tr>
<tr>
<td></td>
<td>(0.44)</td>
<td>(0.535)</td>
</tr>
<tr>
<td>Verbal abuse</td>
<td>0.161</td>
<td>−0.483</td>
</tr>
<tr>
<td></td>
<td>(0.380)</td>
<td>(0.455)</td>
</tr>
<tr>
<td>Physical contact</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Breast or pelvis area</td>
<td>0.129</td>
<td>0.151</td>
</tr>
<tr>
<td></td>
<td>(0.36)</td>
<td>(0.419)</td>
</tr>
<tr>
<td>Other contact</td>
<td>−0.36</td>
<td>−0.401</td>
</tr>
<tr>
<td></td>
<td>(0.389)</td>
<td>(0.448)</td>
</tr>
<tr>
<td>Other evidence of a pattern of behavior</td>
<td>0.648*</td>
<td>0.511</td>
</tr>
<tr>
<td></td>
<td>(0.371)</td>
<td>(0.574)</td>
</tr>
<tr>
<td>Quid pro quo</td>
<td>0.569</td>
<td>0.497</td>
</tr>
<tr>
<td></td>
<td>(0.39)</td>
<td>(0.599)</td>
</tr>
<tr>
<td>Employment effects</td>
<td>0.767*</td>
<td>1.091*</td>
</tr>
<tr>
<td></td>
<td>(0.424)</td>
<td>(0.622)</td>
</tr>
<tr>
<td>State ranking index</td>
<td>−0.015</td>
<td>−0.014</td>
</tr>
<tr>
<td></td>
<td>(0.024)</td>
<td>(0.028)</td>
</tr>
<tr>
<td>1991 Act</td>
<td>0.892*</td>
<td>1.149***</td>
</tr>
<tr>
<td></td>
<td>(0.537)</td>
<td>(0.364)</td>
</tr>
<tr>
<td><strong>Additional Variables</strong></td>
<td></td>
<td></td>
</tr>
<tr>
<td>State tort claim</td>
<td>0.726**</td>
<td>0.693*</td>
</tr>
<tr>
<td></td>
<td>(0.349)</td>
<td>(0.357)</td>
</tr>
<tr>
<td>State civil rights claim</td>
<td>0.838**</td>
<td>0.799**</td>
</tr>
<tr>
<td></td>
<td>(0.393)</td>
<td>(0.344)</td>
</tr>
<tr>
<td>§1983 claim</td>
<td>0.683*</td>
<td>0.438</td>
</tr>
<tr>
<td></td>
<td>(0.386)</td>
<td>(0.452)</td>
</tr>
<tr>
<td>Psychological harm</td>
<td>0.611*</td>
<td>0.495</td>
</tr>
<tr>
<td></td>
<td>(0.318)</td>
<td>(0.354)</td>
</tr>
<tr>
<td>Plaintiff complaint at workplace</td>
<td>0.536</td>
<td>0.580</td>
</tr>
<tr>
<td></td>
<td>(0.405)</td>
<td>(0.635)</td>
</tr>
<tr>
<td>Number of defendants</td>
<td>0.193</td>
<td>0.226</td>
</tr>
<tr>
<td></td>
<td>(0.126)</td>
<td>(0.161)</td>
</tr>
<tr>
<td>Reversed</td>
<td>0.084</td>
<td>−0.114</td>
</tr>
<tr>
<td></td>
<td>(0.354)</td>
<td>(0.502)</td>
</tr>
<tr>
<td>Constant</td>
<td>9.524***</td>
<td>9.111***</td>
</tr>
<tr>
<td></td>
<td>(1.050)</td>
<td>(1.230)</td>
</tr>
</tbody>
</table>
correlation between the error terms and the independent variables. In other words, there may be severe violations of the assumptions of Tobit and OLS regression methodologies.

At the theoretical level, moreover, it seems reasonable to assume that juries determine compensatory and punitive damages jointly. It is a particularly reasonable assumption in the realm of sexual harassment damages, where noneconomic pain and suffering damages are awarded to “compensate” for the very outrage, humiliation, and indignity that are likewise covered by punitive damages. Sunstein and Shih themselves concede that “[t]here is no theory of punitive damages in accordance with which the compensatory award should have such weight in producing the punitive award.”

However, they do not pursue this to its logical end: namely, a

Table 3: (Continued)

<table>
<thead>
<tr>
<th>Independent Variables</th>
<th>Dependent Variables</th>
<th>1</th>
<th>2</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Total Damages</td>
<td>181</td>
<td>124</td>
</tr>
<tr>
<td></td>
<td>Outrage Damages</td>
<td>0.29</td>
<td>0.25</td>
</tr>
</tbody>
</table>

*Significant at 10%; **significant at 5%; ***significant at 1%.

Note: Robust standard errors in parentheses. The sample consists of 232 sexual harassment cases, available on Westlaw and decided from 1982 through May 2004, in which juries awarded damages to plaintiffs. The number of observations included in the models is less than 232 due to missing data for one or more explanatory variables. All damages amounts are adjusted for inflation, in 2004 dollars. “Outrage damages” are noneconomic damages plus punitive damages. Total damages are outrage damages plus economic damages. Regression 1 controls for fixed “trial year” effects by including dummy trial year variables. None of the coefficients on the trial year dummy variables was significant. Regression 2 includes clustering by trial year.

127Sunstein & Shih, Empirical Analysis, supra note 2, at 7. Sunstein’s focus in the past has been much more on the “translation process,” by which jurors convert “shared moral judgments” into what result in erratic dollar amounts. See, e.g., Cass R. Sunstein et al., Punitive Damages: How Juries Decide (2002); Catherine M. Sharkey, Punitive Damages: Should Juries Decide?, 82 Tex. L. Rev. 381 (2003) (reviewing Sunstein et al., supra). See also David Schkade et al., supra note 2; Cass R. Sunstein et al., Assessing Punitive Damages, 107 Yale L.J. 2071 (1998). Here, too, Sunstein and Shih remark that “[i]n sexual harassment cases, an important question is whether there is, in this context, the same kind of uniformity in outrage and punitive intention that we found in products liability cases.” Sunstein & Shih, Empirical Analysis, supra note 2, at 11. Moreover, they raise an interesting question—and call for experimental empirical investigation—of whether, in the context of sexual harassment, significant gender differences might emerge in juror decision making. See Sunstein & Shih, Damages, supra note 1, at 338 (“it
recognition of the problems arising from their use of punitive damages awards as a dependent variable in their empirical exploration of sexual harassment damages awards.  

Irrelevance of Variables Pertaining to the Nature and Severity of Harassment. My empirical results using total damages and “outrage” damages as dependent variables (see Table 3) largely confirm Sunstein and Shih’s results with respect to the insignificance of factors measuring the nature and severity of harassment. Several differences, however, are worthy of note. First, Sunstein and Shih’s provocative claim about the “devaluation” of women—smaller damages awards associated with unwanted physical touching of the breast and pelvis areas—was not confirmed. In fact, although not statistically significant, unwanted touching of the breast or pelvis area was associated with increases in total damages and outrage damages of roughly $23,396 and $29,471, respectively.

Recall that Sunstein and Shih reported that quid pro quo harassment was the single substantive factor that influenced damages awards. It is difficult to know what to make of their claim, given how they coded this vari-

128By contrast, the more narrow research question addressed previously by Ted Eisenberg and collaborators was whether there was a correlation between punitive and compensatory damages. See Eisenberg et al., supra note 31. Regardless of endogeneity, if punitive and compensatory damages are highly correlated, the claim of randomly distributed awards seems undermined.

129A possible explanation—and one that would soften considerably Sunstein and Shih’s implicit charge of lack of fairness and consistency in the law—stems from the fact that sexual harassment is a relatively new cause of action. Given that, perhaps we should not expect settlement on values in such a relatively short period of time. Instead, the law might be expected to have wide variance initially, before selecting out the difficult cases in Priest-Klein fashion to allow more fine-grained testing of the difficult questions. Cf. George L. Priest & Benjamin Klein, The Selection of Disputes for Trial, 13 J. Legal Stud. 1 (1984).

130See supra notes 47–48 and accompanying text.

131By contrast, cases involving unwanted touching of other areas (Other Contact) were associated with, on average, decreases in total and outrage damages of roughly $67,930 and $81,631, respectively. (These results, too, are not statistically significant.)
As described above, I modified the coding for quid pro quo to limit it to cases in which the plaintiff specifically alleged quid pro quo harassment. The variable for “Employment Effects” picks up the separate effects of tangible employment effects. With this more precise definition of quid pro quo, and inclusion of additional variables, the significance of quid pro quo disappears. At the same time, “Employment Effects” emerges as a weakly significant variable in my empirical study. Cases involving tangible negative employment effects are associated with, on average, $122,078 more in total damages and $180,668 in outrage damages. These results are statistically significant at the 10 percent level.

**Key Relevance of Damages Limitations.** The most compelling results of my empirical study pertain to variables that affect the application of Title VII damages limitations. Three variables in particular emerge as significantly affecting damages amounts: whether the 1991 Civil Rights Act applies, whether the plaintiff has asserted state civil rights claims, and whether the plaintiff has asserted state tort claims.

**1991 Act.** My methodology and results with respect to the 1991 Act deviate in several key respects from Sunstein and Shih’s analysis. First, I question their definition and coding of the 1991 Act variable, as explained above in my discussion of the variables used in our respective empirical studies. Second, I find their theoretical prediction that the 1991 Act will lead to lower award amounts because it imposes caps on compensatory and punitive damages to be oversimplified. Moreover, it may have led Sunstein and Shih to accept uncritically their conclusion that damages awards are lower after the enactment of the 1991 Act.

The effect of the 1991 Act is more complicated than Sunstein and Shih presume. The Act not only authorized jury trials in Title VII actions, but it also provided for non-wage-based compensatory and punitive damages—

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132 See supra notes 39–42 and accompanying text.

133 See supra notes 73–75 and accompanying text.

134 For example, I also investigated the issue of the identity of the defendant, and specifically control for the number of defendants. (Only in the rare case in my sample was the company not included as a defendant.)

135 See supra notes 88–93 and accompanying text.
forms of relief excluded from the former exclusive equitable remedies authorized under Title VII. As I will elaborate on in Section V, the addition of compensatory and punitive remedies under Title VII provided a means for increasing total damages, by opening up multiple avenues for recovery, with opportunities for strategic maneuvering, or “cross-over” (i.e., substitution) between capped Title VII awards and uncapped state law causes of action.

Mean and median total damages and outrage damages awards are substantially larger for cases decided under the 1991 Act versus preenactment cases.\(^{136}\) The mean jury total damages award increased from $274,330 to $1,168,128.\(^{137}\) The median total damages award increased from $129,000 to $217,213.\(^{138}\) Mean jury outrage damages increased from $238,171 in preenactment cases to $1,325,682 in cases affected by the 1991 Act.\(^{139}\) Median outrage damages increased from $92,672 to $225,600.\(^{140}\)

After controlling for the panoply of relevant independent variables, the influence of the 1991 Act remains significant in the regressions reported in Table 3.\(^{141}\) Cases to which the 1991 Act applies are associated with, on

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\(^{136}\)My 232-case sample includes 51 pre-1991 Act cases and 181 cases that are governed by the 1991 Act. The total damages sample includes 51 pre-1991 Act cases and 178 cases governed by the 1991 Act (i.e., three cases are missing values for total damages). The respective numbers for the outrage damages sample are 41 (pre-1991 Act) and 118 (1991 Act). See Figs. 5–6 in the Supplementary Material, pt. V.

\(^{137}\)All dollar values are in constant 2004 dollars (here and subsequently). The difference in means is significant at the 5 percent level, using the \(t\) test with unequal variances. The difference in means of the logged total damages awards is significant at the 5 percent level, using the \(t\) test with equal or unequal variances.

\(^{138}\)The difference in medians (for both level and logged total damages amounts) is significant at the 5 percent level using the Pearson chi-squared test, and at the 1 percent level using the Mann-Whitney and Kruskal-Wallis tests.

\(^{139}\)The difference in means is significant at the 5 percent level, using the \(t\) test with unequal variances. The difference in means of the logged outrage damages awards is significant at the 1 percent level, using the \(t\) test with equal variances and at the 5 percent level, using the \(t\) test with unequal variances.

\(^{140}\)The difference in medians (for both level and logged outrage damages amounts) is significant at the 1 percent level using the Pearson chi-squared, Mann-Whitney, and Kruskal-Wallis tests.

\(^{141}\)There is, of course, a risk that the 1991 Act variable is capturing, instead, a time trend. Recall that variable (1991 Act) equals “1” for cases in which the harassing activity took place after the
average, increases of roughly $131,547 in total damages and $176,780 in outrage damages. These results are statistically significant at the 10 percent and 1 percent level, respectively.

**State Civil Rights Claims.** Inclusion of state civil rights claims has a positive impact on total and outrage damages. The mean total damages awarded in a sexual harassment case that includes at least one state civil rights claim is $1,500,796—more than five times the mean award in a case without such a claim ($297,209). The median award for cases with a state civil rights claim is $259,420 as compared to a median award of $135,900 in cases without a state civil rights claim.

Similar differences are found with respect to outrage awards: the inclusion of a state civil rights claim is associated with a mean outrage damages award of $1,580,606, as compared with a mean award of $295,170 in cases

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without such a claim. The median outrage damages awards are similarly larger in cases with a state civil rights claim ($237,769) as compared to cases without such a claim ($115,075).

The significant effect of this variable is confirmed by the regression analysis, when controlling for all additional independent variables. As reported in the regressions in Table 3, the inclusion of a state civil rights claim is associated with an average increase of $145,003 and $142,512 in total and outrage damages, respectively. Moreover, each of these results is statistically significant at the 5 percent level.

State Tort Claims. A somewhat different pattern emerges for the impact of asserting state tort claims. Here, while median total damages and outrage damages are higher for cases that include a state tort law claim, mean awards are in fact lower. Mean total damages are $806,674 in cases that include a state tort claim, as compared to $1,084,685 for cases without a state tort claim. Median total damages are higher for cases that include a state tort

146The difference in means is significant at the 6.3 percent level, using the t test with unequal variances. The difference in means of the logged outrage damages is significant at the 5 percent level, using the t test with equal or unequal variances.

147The difference in medians is significant at the 1 percent level using the Pearson chi-squared, Mann-Whitney, and Kruskal-Wallis tests. The difference in the median of logged outrage damages is significant using the same tests at the 5 percent, 1 percent, and 1 percent levels, respectively.

148I also tested for the interaction effect between 1991 Act and State Civil Rights Claim, which was not significant in either of the models, and was therefore dropped. Nor would I have predicted that state law claims would matter more after the 1991 Act, only that they would have continuing significance, even though they were no longer the sole route to nonwage compensatory and punitive damages.

149This represents roughly a 14 percent increase in mean total damages ($1,038,246) and a 12 percent increase in mean outrage damages ($1,218,640).

150My 232-case sample includes 98 cases that include a state tort claim, and 133 without (one case is missing this information). In the total damages sample, 96 cases include a state tort claim, while 132 do not. In the outrage damages sample, the respective numbers are 70 (include state tort claim) and 88 (do not). See Figs. 9–10 of the Supplementary Material, pt. V.

151The difference in means is not statistically significant, using the t test with equal or unequal variances. The difference in mean of logged total damages is statistically significant at the 5 percent level, using the t test with equal or unequal variances.
law claim: $221,263 as compared to $150,250 (without a state tort claim). A similar pattern holds for outrage damages: lower mean awards, but higher median awards are associated with cases that include a state tort claim. Mean outrage awards in cases with a state tort claim are $793,219, as compared to $1,242,859 for cases without a state tort claim. Median outrage awards are $193,832 and $148,625, respectively.

After controlling for myriad independent variables, as reported in Table 3, the inclusion of a state tort law claim is associated with, on average, a $137,176 increase in total damages and a $136,021 increase in outrage damages. These results are statistically significant at the 5 percent and 10 percent level, respectively.

My empirical results suggest that it is worth taking a closer look at the effect of inclusion of various state civil rights and state tort claims on the application of Title VII damages limitations in sexual harassment cases.

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152 The difference in medians (for both level and logged total damages amounts) is statistically significant at the 10 percent level, using the Pearson chi-squared test, and at the 5 percent level, using the Mann-Whitney or Kruskal-Wallis tests.

153 The difference in means (for both level and logged outrage damages amounts) is not statistically significant, using the \( t \) test with equal or unequal variances.

154 The difference in medians (for both level and logged outrage damages amounts) is not statistically significant, using the Pearson chi-squared, Mann-Whitney, or Kruskal-Wallis tests.

155 Here again, I tested for any significant interaction effect between 1991 Act and State Tort Claim; finding none, the interaction term was dropped from the reported regressions. See also supra note 148.

156 This represents roughly a 13 percent increase in mean total damages ($1,038,246) and an 11 percent increase in mean outrage damages ($1,218,640).

157 One might also further explore the relative increases in awards due to state tort claims as compared to state anti-discrimination claims. One might expect (although this was not the case in my study) relatively higher increases due to inclusion of state tort claims, for two reasons. First, the standards of liability in tort may not be fungible with Title VII liability. Second, state tort law may conceptualize the injury caused by harassing conduct more along the lines of humiliation and indignity—harms that enable the blurring of compensatory and punitive damages in a sexual harassment case more so than the loss of job or pay.
V. CONCLUSION: INCENTIVE EFFECTS OF FEDERAL DAMAGES CAPS

Recall that Sunstein and Shih reported that compensatory damages awards were lower in cases decided after the enactment of the 1991 Civil Rights Act. This result appeared to corroborate their intuition, based on the 1991 Act’s strict limits on combined compensatory and punitive damages. However, as I have suggested above, the influence of the 1991 Act is far more complex than Sunstein and Shih appear to have recognized. As a preliminary matter, the 1991 Act authorized jury trials, as well as compensatory and punitive damages, in Title VII cases. The damages limits it imposed, moreover, must be considered in the wider context of sexual harassment claims, which typically include state law claims in addition to Title VII claims.

With the enactment of the 1991 Act, plaintiffs are able to pursue claims for compensatory and punitive damages arising from their Title VII claims—which previously was possible only via state tort and civil rights claims. Thus, the 1991 Act increased the number of avenues by which plaintiffs could pursue non-wage-based compensatory and punitive damages. And, while Title VII capped total damages recovery, these limitations applied explicitly only to federal claims. In sum, the 1991 Act expanded the number of routes to what I have termed “outrage damages” and capped only one of these routes. What emerges as key, then, is the interplay between the state- and federal-based routes to damages, as well as juries’ tendency, and judges’ discretion, to allocate damages among various claims and categories of damages.

District courts enjoy wide discretion when it comes to applying Title VII caps in two respects: (1) allocating jury damages awards between federal and state claims; and (2) allocating awards between compensatory and punitive damages. Most courts have concluded that a district court has virtually unfettered discretion to allocate damages between federal and state claims. Case law indicates, moreover, a tendency for judges to allocate

\footnote{See, e.g., Baty v. Willamette Indus., Inc., 985 F. Supp. 987 (D. Kan. 1997) (recognizing that numerous courts allocate the Title VII cap between compensatory and punitive damages, although this is not required by law).

damages so as to preserve the jury’s verdict to the greatest extent possible.\textsuperscript{160} For example, in \textit{Barrios v. Kody Marine, Inc.},\textsuperscript{161} the plaintiff alleged hostile work environment sexual harassment separately under Title VII and comparable state anti-discrimination law. The jury returned a verdict in favor of the plaintiff, awarding $25,000 in compensatory damages and $100,000 in punitive damages. Title VII imposed a cap of $50,000 (the amount for an employer with less than 100 employees\textsuperscript{162}). Under Louisiana law (which governed the state-law-based claims), punitive damages are not allowed and (as is fairly typical) compensatory damages are not restricted in any way. The district judge therefore faced the issue of how to apply the $50,000 federal cap. Defendants, not surprisingly, asked the court to limit total damages to $50,000, on the ground that any amount in excess of the federal limit would constitute impermissible double recovery.\textsuperscript{163} The plaintiff, equally unsurprisingly, urged the court instead to allocate the $25,000 compensatory damages

\textsuperscript{160}This entails allocating portions of the damages to uncapped state-law-based claims, as well as directing damages into the category of compensatory (as opposed to punitive) damages, which is subject to less stringent appellate review (and is also more likely to be fully insurable). See generally Catherine M. Sharkey, Revisiting the Noninsurable Costs of Accidents, 64 Md. L. Rev. 409 (2005) (arguing against state law blanket public policy prohibitions against insuring punitive damages).

The likelihood that punitive damages are vulnerable to more stringent appellate review, as well as possibly being uninsurable, apparently influenced the First Circuit’s decision in \textit{Hogan v. Bangor & Aroostook R.R.}, 61 F.3d 1034 (1st Cir. 1995). In that case, the jury awarded the plaintiff $200,000 in compensatory damages and $200,000 in punitive damages. Applying the $200,000 Title VII cap, the district court reduced pro rata the compensatory and punitive awards to $100,000 each. The First Circuit modified the district court’s judgment, reinstating in full the $200,000 compensatory damages award and vacating the punitive damages award. As the Seventh Circuit subsequently explained: “The court’s opinion [in \textit{Hogan}] offers no extensive discussion of its reason for such a course, but a reading of the authority which it cites makes most probable that it took such a course in order to avoid the issues involving punitive damages.” Jonasson v. Lutheran Child & Family Servs., 115 F.3d 436, 441 n.4 (7th Cir. 1997).

\textsuperscript{161}2000 WL 775067 (E.D. La. 2000).

\textsuperscript{162}See supra note 16.

\textsuperscript{163}2000 WL 775067, at *2.
to her state law claim and $50,000 (i.e., up to the Title VII cap) in punitive damages to her Title VII claim.\textsuperscript{164}

First, the court concluded that “it is most logical to assume that the jury awarded the same damages on both the federal and state claims.”\textsuperscript{165} Next, the court reasoned: “Because the damages are fungible, it is most consistent with the intent of the jury to permit Plaintiff to recover the maximum amount possible.”\textsuperscript{166} To this end, the court allocated $25,000 in compensatory damages to the state law discrimination claim and $50,000 in punitive damages to the federal discrimination claim, for a total recovery of $75,000. Prior to the enactment of the 1991 Act, plaintiff’s recovery would have been limited to $25,000 in compensatory damages, since punitive damages are not allowed under Louisiana law.\textsuperscript{167} Louisiana is among a minority of states—including Nebraska, Massachusetts, New Hampshire, and Washington—that prohibit common-law punitive damages. For sexual harassment claims in these states, the 1991 Act’s authorization of punitive damages might predictably lead to higher total damages awards.

In the vast majority of states, punitive damages are authorized and, where they are limited, they are generally far less restrictive than the Title VII caps. Title VII, moreover, caps total damages, whereas, for the most part, state law caps apply only to punitive damages. Thus, so long as judges are able to allocate the jury’s damages award between uncapped state law claims and the Title VII claims, the impact of the Title VII caps is likely to be slight.

So, for example, in \textit{Passantino v. Johnson \& Johnson Consumer Products, Inc.},\textsuperscript{168} the jury awarded an employee $100,000 in back pay, $2 million in front pay, $1 million in compensatory emotional distress damages, and $8.6

\textsuperscript{164}Id. at *6.

\textsuperscript{165}Id. at *11.

\textsuperscript{166}Id.

\textsuperscript{167}Jurors might, however, inflate compensatory awards when denied the opportunity to award punitive damages. There is thus a significant probability that some of the punitive damages would “cross over” into the noneconomic damages component of compensatory damages. See, e.g., Sharkey, supra note 15; see also Catherine M. Sharkey, Unintended Consequences of Medical Malpractice Damages, 80 N.Y.U. L. Rev. 391, 429–82 (2005) (discussing potential “cross-over” effect between noneconomic and economic damages in medical malpractice damages).

\textsuperscript{168}212 F.3d 493 (9th Cir. 2000).
million in punitive damages—total damages far exceeding the $300,000 Title VII cap applicable to that employer. The district court—rejecting the defendant’s argument that the entire award be subject to the Title VII cap—allocated all the compensatory damages (including back pay and front pay) to the plaintiff’s state law claim and the punitive damages to her Title VII claim. On appeal, the Ninth Circuit stressed that not only was the district court empowered to allocate the jury award as it saw fit, but also that “the awards were effectively fungible.”

The appellate court reasoned that, because the jury’s award was lawful in its entirety under state law (which imposed no caps on damages), the reallocation was necessary in order to preserve the jury’s verdict intact. Indeed, according to the court, “[a]n allocation that would serve to reduce lawfully awarded damages would fail to respect the jury’s verdict and conflict with the purpose and intent of one or both statutes.”

The past two decades have witnessed the development and expansion of theories of sexual harassment liability; however, surprisingly little attention has been paid to the issue of damages, and the substantive and procedural rules that influence their amounts. As Sunstein and Shih remark: “There are ample normative accounts of sexual harassment liability. But normative accounts are relatively rare about sexual harassment damages, especially with respect to noneconomic injuries and punitive awards.”

What would such a “normative theory of appropriate compensation and punishment in sexual harassment cases” look like? Sunstein and Shih, alas, do not venture down this path. In partial response, Judith Resnik has urged that “[e]ntry into the third decade of harassment work . . . requires revisiting the remedial structures developed during the first two decades.”

As Resnik reminds: “Theories of remedies require theories of harm—about

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169 Id. at 509.

170 Id. at 510.

171 Id.

172 Sunstein & Shih, Damages, supra note 1, at 334 (emphasis added).

173 Id. at 335.

174 Id. (“Unfortunately, we have no such [normative] theory to offer here.”).

175 Resnik, supra note 84, at 248.
who is injured by what set of behaviors, imposed by individuals or entities that ought to be subjected to sanctions or alter practices.” 176 Resnik claims further that “[b]oth the remedies provided and the process for seeking redress illuminate what kind of harm is understood to have been suffered and by whom.” 177 In this way, “[r]emedies reflect the shape of rights.” 178

It is equally important to stress the influence of procedural rules and laws that affect damages. Sunstein and Shih may well be correct that “[i]t is extremely unlikely that a convincing normative account, whatever its content, could support the institutions that we now have.” 179 But, as my empirical analysis demonstrates, institutional reform cannot be addressed absent a more thorough investigation of the influence of the 1991 Act, and how damages caps affect incentives to append state law claims to Title VII claims.

**Supplementary Material**

The following supplementary material for this article is available online:

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Part III. Sunstein/Shih vs. Eisenberg
Table 2: Eisenberg Punitive Damages OLS Regressions
Part IV. Sunstein/Shih vs. Sharkey
A. Significant Coding Differences with Sunstein and Shih
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Table 4: “1991 Act” Coding: Comparison of Sunstein/Shih & Sharkey
B. Comparison of Dependent Variables
C. Independent Variables
Table 6: Number of Cases Governed by Each State’s Law
Table 7: Ranking of States’ Rate of Product Liability Punitive Damages Awards

176 Id. at 250.
177 Id.
178 Id. at 249.
179 Sunstein & Shih, Empirical Analysis, supra note 2, at 19.
Table 8: Ranking of States’ Rate of Punitive Damages Awards (all cases)
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Figure 9. Effect of State Tort Claims on Jury Total Damages
Figure 10. Effect of State Tort Claims on Jury “Outrage” Damages