THE EFFECTS OF JURY IGNORANCE ABOUT DAMAGE CAPS: THE CASE OF THE 1991 CIVIL RIGHTS ACT

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INTRODUCTION

The way that juries determine damages has always been a mystery worth investigating.[1] Particularly intriguing are the deliberations that lead to million or even billion dollar verdicts.[2] The awe-inspiring breadth of these verdicts – even if they are short-lived – has provoked an independent political movement to curb their excesses.[3] Yet simultaneous with this concern over the runaway jury is a fundamental desire to protect the integrity of the jury process and maintain respect for the jury's function and decisions. The concurrent desires to exalt and to rein in the jury come face-to-face in laws aimed to cap the damages that a jury can award in a civil case. Damage cap statutes expressly limit the power of the jury to provide monetary relief to plaintiffs.[4] However, some statutes, case law, and commentators

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[1] *See* Robert MacCoun, *Inside the Black Box: What Empirical Research Tells Us About Decisionmaking by Civil Juries*, in VERDICT: ASSESSING THE CIVIL JURY SYSTEM 137 (Robert E. Litan ed., 1993).

[2] *See, e.g.*, Engle v. RJ Reynolds Tobacco, No. 94-08273 CA-22, 2000 WL 33534572 (Fla. Cir. Ct. Nov. 6, 2000) (jury verdict awarding $145 billion in punitive damages), *rev'd sub nom.* Liggett Group, Inc. v. Engle, 853 So.2d 434 (Fla. Dist. Ct. App. 2003).

[3] *See* Terry Carter, *It's B-a-a-a-ck: With Republicans in Charge, Will Tort Reform Finally Have Its Day?*, 46 ABA JOURNAL E-REPORT 3, 3 (December 6, 2002) ("Most talked about [potential Congressional tort reforms] are legislative proposals concerning asbestos litigation, medical malpractice liability, class action venues and perhaps some limitations on punitive damages.").

[4] *See, e.g.*, ALA. CODE § 6-11-21 (2000). For a discussion of the reforms enacted by roughly sixty percent of states in 1986, see Nancy L. Manzer, Note, *1986 Tort*

suggest that informing the jury of the caps threatens the integrity of the jury decision-making process.[5] The 1991 Civil Rights Act offers one such statutory example of protecting defendants from more expensive jury awards while attempting to maintain the "integrity" of these awards.

Prior to the 1991 Civil Rights Act, plaintiffs bringing federal employment discrimination claims were entitled only to the most basic relief: reinstatement and back wages, reduced by interim earnings that had or should have been earned.[6] This equitable relief was awarded by judges, rather than juries; plaintiffs were not entitled to a jury trial.[7] The 1991 Act changed all this, and in so doing has been recognized as a watershed moment in employment discrimination litigation.[8] Now, either party may demand a trial by jury.[9] And instead of simply seeking reinstatement and back pay, plaintiffs can demand compensatory damages for future pecuniary losses, as well as emotional pain, suffering, inconvenience, and other non-pecuniary losses.[10] Additionally, if the defendant acted with malice or reckless indifference, the plaintiff may recover punitive damages.[11] The new damages radically improved the potential relief available to federal employment discrimination plaintiffs, opening up the possibility for much larger judgments.

These pro-plaintiff changes were mitigated somewhat by caps on the punitive and compensatory damages.[12] These caps are scaled according to the size of the defendant employer and are unrelated to the severity of the offense.[13] Such caps are not unique; a number of other statutes expressly limit the recovery of damages to a set or formulated

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Reform Legislation: A Systematic Evaluation of Caps on Damages and Limitations on Joint and Several Liability, 73 CORNELL L. REV. 628 (1988).

[5] *See, e.g.*, 42 U.S.C. § 1981a(c)(2); Sasaki v. Class, 92 F.3d 232 (4th Cir. 1996); Michael S. Kang, Comment, *Don't Tell Juries About Statutory Damage Caps: The Merits of Non-Disclosure*, 66 U. CHI. L. REV. 469, 470 (1999).

[6] 42 U.S.C. § 2000e-5(g) (2000).

[7] *Id.* at §2000e-5(f)(4).

[8] *See, e.g.*, Susan Sturm, *Lawyers and the Practice of Workplace Equity*, 2002 WIS. L. REV. 277, 279 (noting that "the 1991 amendments to the Civil Rights Act of 1964 attracted to the practice of employment law a new generation of lawyers, who approach employment litigation like personal injury cases").

[9] 42 U.S.C. § 1981a(c)(1) (2000).

[10] *Id.* § 1981a(b)(3).

[11] *Id.* § 1981a(b)(1).

[12] *Id,* § 1981a(b)(3).

[13] Combined compensatory and punitive damages cannot exceed $50,000 if the employer has 100 or fewer employees, $100,000 for employers with 100 to 200 employees, $200,000 for employers with 200 to 500 employees, and $300,000 for employers with more than 500 employees. *See id.* These numbers do not, however, include any back pay that the jury awards.

maximum.[14] Caps are part of an overall movement to reform the tort system, typically enacted by those who believe that the civil legal system unfairly burdens society by paying out huge damage awards.[15]

In an interesting twist, Congress also expressly required that "the court shall not inform the jury of the limitations [on damages]."[16] Thus, when called upon to measure damages in federal employment discrimination cases, juries are expected to make their calculations without knowing the ultimate limit that the caps enforce. The cap non-disclosure clause has been touted as a method of maintaining the "integrity" of jury damages calculations: if informed of the caps, jurors could purposely attempt to evade them or might be unconsciously biased by the cap number.[17] A variety of others, including courts and commentators, have suggested that non-disclosure of damage caps, more generally, should be the rule whenever a damage cap exists.[18]

This effort to preserve a jury's decision-making integrity by not discussing the caps, however, forces courts and attorneys to conceal the true state of the law and may exact a toll on public confidence in the justice system. This paper explores the potential broad effects on the jury system of the failure to disclose damage caps. In order to better understand the context of disclosure versus non-disclosure, we first examine the psychological effects that knowledge as opposed to ignorance of the caps could have on jury decision-making processes and damage awards. We then turn to an examination of the potential effects that ignorance of the caps may have on perceptions of the legal process. Ultimately, we conclude that jurors should be informed of the caps, both to retain public confidence in the justice system and to give jurors guidance in making the proper damages determination.

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[14] *See, e.g.*, MD. CODE ANN., CTS. & JUD. PROC. § 11-108(b) (2004); TEX. CIV. PRAC. & REM. § 41.008 (Vernon 2004); VA. CODE ANN. § 8.01-581.15 (Michie 2004).

[15] Commentators suggest that such tort damage awards pass along great costs to ordinary citizens. For example, Albert Yoon suggests that medical malpractice produces an astronomical amount of costs – between $17 and $29 billion per year. Albert Yoon, *Damage Caps and Civil Litigation: An Empirical Study of Medical Malpractice Litigation in the South*, 27 AM. L. & ECON. REV. 199, 200 (2001).

[16] 42 U.S.C. § 1981a(c)(2).

[17] Kang, *supra* note MK1, at 470.

[18] *See id.* at 478-79; *see also* American College of Trial Lawyers Committee on Special Problems in the Administration of Justice, Report on Punitive Damages 15 (1989), *available at: http://www.actl.com/PDFs/ReportOnPunitiveDamages.pdf*; Thomas v. Sanford, 663 S.W.2d 932 935 (Ark. 1984); State v. Bouras, 423 N.E,2d 741, 744 (Ind. App. 1981). *But see* Evans v. Avery, 100 F.3d 1033, 1040 (1st Cir. 1996) (finding no abuse of discretion in informing jurors about a Massachusetts state cap); Vendrell v. School District, 360 P.2d 282, 292 (Or. 1961) (holding that jury must be informed of state statutory limit on recovery against school district).

In Part I, we discuss the legislative history and judicial interpretation of the cap non-disclosure clause, with an eye toward the purpose behind the clause. In Part II, we discuss the potential effects of disclosure and non-disclosure of the cap on jury damage awards in light of psychological models of decision-making. In Part III, we discuss potential effects of the concealed cap on perceptions of the justice system, in particular examining procedural justice effects. Finally, in Part IV, we argue for a system of disclosure that would use the caps to guide jurors to the correct assessment of compensatory and punitive damages.

I
NON-DISCLOSURE OF THE CAPS: LEGISLATIVE HISTORY AND JUDICIAL INTERPRETATION

The 1991 Civil Rights Act is a many-faceted piece of legislation, dealing with issues such as disparate impact claims,[19] the "business necessity" defense,[20] and the right to a jury trial.[21] The Act followed in the wake of several Supreme Court decisions which had curtailed or eliminated the rights and remedies available to victims of employment discrimination.[22] One of Congress's primary goals was to reverse these decisions directly by rewriting the civil rights statutes.[23] However, an additional purpose cited by the Act was to "provide appropriate remedies for intentional discrimination and unlawful harassment in the workplace."[24] The Act did this by allowing federal employment discrimination plaintiffs to recover compensatory and punitive damages for the first time.[25] Punitive damages were only allowed when the plaintiff demonstrated that the employer had engaged in the

[19] *See* 42 U.S.C. § 2000e-2(k) (2000).

[20] *See id.* § 20003-2(k)(1)(A)(i).

[21] *Id.* § 1981a(c)(1).

[22] Ronald D. Rotunda, *The Civil Rights Act of 1991: A Brief Introductory Analysis of the Congressional Response to Judicial Interpretation*, 68 NOTRE DAME L. REV. 923, 924 (1993).

[23] *See* Civil Rights Act of 1991, 105 Stat. 1071, § 3. For example, the Act specifically restores the definitions of such statutory terms as "business necessity" and "job related" to the Court's definitions as they existed prior to the decision in *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642 (1989). 105 Stat. 1071, § 3(2); *see also id.* § 3(4) (noting that another purpose is "to respond to recent decisions of the Supreme Court by expanding the scope of relevant civil rights statutes in order to provide adequate protection to victims of discrimination").

[24] *Id.* § 3(1).

[25] 42 U.S.C. § 1981a(a)(1) (2000) (providing that "the complaining party may recover compensatory and punitive damages").

discriminatory practice "with malice or reckless indifference" to the plaintiff's civil rights.[26] In addition, the Act placed a limit on total compensatory and punitive damages each plaintiff could receive.[27] The actual damage cap was based on the number of employees working for the employer; the cap began at $50,000 for employers with less than 101 employees, and rose to $300,000 for employers with more than 500 employees.[28] However, the Act specified that if the case was tried before a jury (a new possibility created by the Act itself), and the plaintiff sought compensatory or punitive damages, "the court shall not inform the jury of the limitations described [above]."[29]

In order to dissect the purpose of this non-disclosure provision, we begin below by discussing the legislative intent as manifested in the legislative history of the provision. We then turn to how courts have interpreted the provision, including its secondary effects.

A. Legislative History: Lost in the Shuffle

Like prior civil rights statutes, the 1991 Civil Rights Act was passed only after taking a circuitous and controversial path.[30] As noted above, the 1988 Supreme Court term saw a number of controversial decisions which cut back on the protections provided by federal employment discrimination law, particularly Title VII of the 1964 Civil Rights Act. In response to these decisions, the United States House of Representatives approved H.R. 4000, entitled the Civil Rights Act of 1990. The bill provided for substantial amendments of the federal law of employment discrimination, including compensatory and punitive damages for victims of intentional discrimination.[31] During congressional debate, the bill received criticism for its uncapped damages provisions.[32] An identical bill was proposed in the Senate and

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[26] *Id.* § 1981a(b)(1).

[27] *Id.* § 1981a(b)(3). The Supreme Court has determined that "front pay" – namely, money awarded for lost compensation during the period between judgment and reinstatement (or in lieu of reinstatement) – is not considered compensatory damages and is thus not covered by the cap. Pollard v. E.I. du Pont de Nemours & Co., 532 U.S. 843, 852 (2001).

[28] 42 U.S.C. § 1981a(b)(3). The Act counted employees as those having worked "in each of 20 or more calendar weeks in the current or preceding calendar year." *Id.*

[29] *Id.* § 1981a(c)(2).

[30] *See* Nicole L. Gueron, Note, *An Idea Whose Time Has Come: A Comparative Procedural History of the Civil Rights Act of 1960, 1964, and 1991*, 104 YALE L.J. 1201, 1203 (1995) (citing 136 Cong. Rec. H6810-13 (daily ed. Aug. 2, 1990)).

[31] H.R. Res. 4000 § 8 (101st Cong. 1990).

[32] *See, e.g.*, H.R. Rep. No. 102-40 (II), at 71 (May 17, 1991), *reprinted in* 1991 U.S.C.C.A.N. 757 ("You can show people all the studies that reveal that punitive

was reported favorably out of committee.[33] However, the bill was later amended to add a $150,000 cap to compensatory and punitive damages.[34] The House and Senate passed the bill as amended, but President Bush vetoed it.[35] An attempt to override the veto failed by one vote in the Senate.[36]

The House bill was resubmitted with minor changes in 1991 as H.R. 1, the "Civil Rights and Women's Equity in Employment Act."[37] According to the House Report, one of the bill's two primary purposes of the bill was "to strengthen existing protections and remedies available under federal civil rights laws to provide more effective deterrence and adequate compensation for victims of discrimination."[38] Noting that compensatory and punitive damages were available under 42 U.S.C. § 1981 for those who injured by intentional race discrimination, the report noted that a "serious gap" existed for victims of intentional discrimination on the basis of sex or religion.[39] As did the 1990 bill, H.R. 1 provided for uncapped compensatory and punitive damages.[40] The House Report dismissed concerns about excessive verdicts by noting that "juries are fully capable of determining whether an award of damages is appropriate and if so, how large it must be to compensate the plaintiff adequately and to deter future repetition of the prohibited conduct."[41] The minority report, however, feared that uncapped damages would lead to "a litigation generating machine" with "huge awards" in the millions of dollars.[42]

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damage awards in the past have not been for astronomical amounts ... But I can tell you that it is small comfort if you are on the receiving end of a lawsuit where the allegation is for say $3 or $4 million in punitive damages. That is your exposure. When somebody files a lawsuit against you and they say, 'I am entitled to $10,000 in compensatory damages and $5 million in punitive damages,' it will ruin your whole night's sleep." (quoting Sen. Dale Bumpers)).

[33] S. 2104 (101st Cong. 1990); S. Rep. No. 101-315 (1990).

[34] *See* Gueron, *supra* note NG1, at 1203 (citing 136 Cong. Rec. H6810-13 (daily ed. Aug. 2, 1990)).

[35] *See* Gueron, *supra* note NG1, at 1203; Roger Clegg, *An Introduction: A Brief Legislative History of the Civil Rights Act of 1991*, 54 LA. L. REV. 1459, 1465 (1994).

[36] *See* Gueron, *supra* note NG1, at 1203; Clegg, *supra* note RC1, at 1465.

[37] *See* H.R. 1 (102d Cong. January 3, 1991).

[38] H.R. Rep. No. 102-40 (II) 1 (May 17, 1991), *reprinted in* 1991 U.S.C.C.A.N. 694. The other purpose was to "respond to the Supreme Court's recent decisions by restoring the civil rights protections that were dramatically limited by those decisions." *Id.*

[39] *Id.* at 24, *reprinted in* 1991 U.S.C.C.A.N. 717.

[40] *See* H.R. 1 § 206 (102d Cong. January 3, 1991).

[41] H.R. Rep. No. 102-40 (I) 72 (April 24, 1991), *reprinted in* 1991 U.S.C.C.A.N. 610.

[42] H.R. Rep. No. 102-40 (II) 143, 153 (May 17, 1991), *reprinted in* 1991

H.R. 1 was amended in June 1991 to include a cap on punitive damages, but compensatory damages remained uncapped.[43] The House approved the bill as amended, but the Senate never voted on the House bill. Instead, the Senate passed its own version, which included both the caps and the non-disclosure requirement. The House eventually approved the Senate version, which President Bush signed into law. At the signing, the President said the following about the caps contained in the bill:

> Another important source of the controversy that delayed enactment of this legislation was a proposal to authorize jury trials and punitive damages in cases arising under Title VII. S. 1745 adopts a compromise under which 'caps' have been placed on the amount that juries may award in such cases. The adoption of these limits on jury awards sets an important precedent, and I hope to see this model followed as part of an initiative to reform the Nation's tort system.[44]

Soon after the 1991 Civil Rights Act was signed into law, the "Equal Remedies Act of 1991" was proposed in the Senate.[45] The bill would have removed the damage caps and the non-disclosure provision from the code.[46] However, it failed to pass.[47]

U.S.C.C.A.N. 672, 682.

[43] 137 Cong. Rec. H3922, H3924 (June 5, 1991). The cap limited punitive damages to $150,000 or the sum of compensatory and equitable relief awarded (whichever was greater).

[44] 1991 U.S.C.C.A.N. 768, 769 (Nov. 21, 1991).

[45] S. 2062 (102d Cong. Nov. 26, 1991).

[46] The committee report on the bill argued that the removal of the caps was necessary to insure that women, religious minorities, and people with disabilities had the same access to damages as racial and ethnic minorities. S. Rep. No. 102-286, at 5 (1992) ("Congress has created a system which values injuries suffered by women, people with disabilities, and certain religious minorities less than the same injuries suffered by racial or ethnic minorities."). According to the report, Congress accepted the restrictions on damages "[i]n the interest of securing prompt passage of the Civil Rights Act of 1991, including the portion guaranteeing the right to damages," and "left to 1992 the task of providing full, fair, and equal remedies for victims of discrimination." *Id.* at 3. The committee minority, however, noted that the caps were "part of the compromise on last year's civil rights legislation approved overwhelmingly by the House of Representatives and the Senate." *Id.* at 20. The minority argued that capped damages represented "a significant expansion of the remedies" provided under Title VII, and "unrestricted damages will lead to a litigation explosion [and will] result in excessive damage awards that may be harmful to the financial health of the firm." *Id.* at 21.

[47] Two bills in the current Congress propose to eliminate the caps on compensatory and punitive damages. *See* S. 2088 § 532 (108th Cong. Feb. 12, 2004); H.R. 3809 § 532

The legislative history of the 1991 Civil Rights Act contains little specific discussion of the non-disclosure requirement. One reason may be that the House Report was prepared for a bill that did not have statutory damage caps, let alone a non-disclosure provision.[48] However, Senator John Danforth, one of the Senate bill's co-sponsors and reputedly the driving force behind the final compromise bill,[49] did provide this discussion on jury discretion and knowledge of the caps:

> Judges currently serve as an adequate check on the discretion of juries to award damages. Consistent with the Seventh Amendment, they can and do reduce awards which are excessive in light of defendant's discriminatory conduct or a plaintiff's resulting loss.
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> In addition, the bill specifically provides that the jury shall not be informed of the existence or amount of the caps on damage awards. Thus, no pressure, upward or downward, will be exerted on the amount of jury awards by the existence of the statutory limitations.[50]

The effects of the cap, according to Senator Danforth, thus appear to be the potential for "pressure" to move damages "upward or downward" from where they would have been without disclosure of the cap. Senator Danforth does not explain why this pressure is to be avoided, or whether damages are more likely to be moved upward or downward if the caps were to be revealed.

There appears to have been little investigation by Congress into the potential effects that hiding the caps would have, not only on jury awards but also on jurors, judges, and attorneys. While the wisdom of cap non-disclosure was lost in the shuffle of legislative compromise, courts have been left to determine the scope and legal effect of the non-disclosure provision.

B. Judicial Interpretation: Integrity vs. Reallocation

While other provisions of the 1991 Act have received extensive judicial exegesis, the cap non-disclosure provision has gotten only limited attention. The non-disclosure provision has arisen in two

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(108th Cong. Feb. 11, 2004).

[48] *See* H.R. Rep. No. 102-40 (I) 64-65 (April 24, 1991), *reprinted in* 1991 U.S.C.C.A.N. 602-03.

[49] *See* Clegg, *supra* note RC1, at 1469-70.

[50] 137 Cong. Rec. S15484 (daily ed. Oct. 30, 1991) (Sen. Danforth).

contexts, one which involves the provision directly and the other which involves an indirect consequence of the provision. These contexts are considered below.

1. Direct context: Who can tell the jury what?

The text of the § 1981a non-disclosure provision states that "the court shall not inform the jury" about the statutory cap.[51] Read literally, the provision would seem to prohibit only judges from explaining or discussing the damages limitations. In *Sasaki v. Class*,[52] however, the Fourth Circuit held that attorneys were also prohibited from disclosing the cap, or its effects, to jurors. The plaintiff in *Sasaki* brought suit against the employer alleging sexual harassment under Title VII as well as assault and battery under state tort law.[53] During his closing argument, plaintiff's counsel indicated to the jury that it could award plaintiff "up to $50,000" in compensatory damages on the sexual harassment claim, and "up to $500,000" on the state tort claim.[54] While counsel did not explicitly inform the jury about the caps, he did contrast the two different claims, and he noted that on the state law "the law is generous."[55] Ultimately, the jury awarded plaintiff $61,250 in damages on the sexual harassment claim[56] and $150,000 on the state law claim.[57]

The Fourth Circuit determined that counsel had violated 42 U.S.C. § 1981a(c)(2) by revealing the existence of the caps to the jury.[58] The court acknowledged that the statute literally only prohibits the "court" from informing the jury about the caps.[59] However, it held that "Congress clearly intended this restriction to prohibit anyone from bringing the caps to the jury's attention."[60] In discussing the purpose of the provision, the court cited Senator Danforth's argument that the non-disclosure clause would eliminate the potential for "pressure, upward or downward," on damages exerted by the caps.[61] Noting that the caps themselves were "enacted in apparent response to a concern about

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[51] 42 U.S.C. § 1981a(c)(2) (2000).
[52] 92 F.3d 232 (4th Cir. 1996).
[53] *Id.* at 235.
[54] *Id.* at 235-36.
[55] *Id.* at 236.
[56] This amount fell below the cap, as plaintiff was awarded $11,250 in back pay, which is not counted against the cap.
[57] *Id.*
[58] *Id.* at 236.
[59] *Id.*
[60] *Id.*
[61] *Id.*

runaway verdicts," the court posited that the non-disclosure clause was enacted "because 'legislators would likely fear that juries would award the maximum or would otherwise adjust their awards if told of the statutory limit.'"[62] The court found strong reason to believe that the jury had, in fact, tailored its damages verdict to circumvent the cap. Although the acts covered by the state tort claims (unwanted touching) were included within the sexual harassment claim, the jury awarded almost three times the damages for that claim. Moreover, the jury adhered to plaintiff's counsel's suggested damages on the harassment claim, not going above counsel's suggested maximum. The court found that the jury "appears to have faithfully followed [plaintiff's] counsel's directions" and "almost undoubtedly adjusted its award to account for the federal cap."[63] According to the court, "[t]he jury here likely reacted in precisely the manner that Congress specifically feared, and which it attempted to preclude through the enactment of 42 U.S.C. § 1981a."[64] Finding that counsel's statement was not harmless error, the court remanded for a new trial on damages.[65]

In an unpublished opinion, the Sixth Circuit agreed with *Sasaki*'s conclusion that the cap non-disclosure clause extends to counsel as well as the courts.[66] However, the court found that counsel's reference was harmless, because there was "no indication it had any effect on the jury's award."[67] The jury awarded $300,000 in punitive damages, the statutory maximum, on plaintiff's gender discrimination claim – her only claim. The court reasoned that the jury's knowledge of the caps did not change its award:

> From a practical standpoint, if the jury felt [defendant's] conduct warranted less than $300,000 in punitive damages, there is no reason to believe the mention of the limit on punitive damages would have caused the jury to increase the award. If the jury believed that [defendant's] conduct warranted more than $300,000, its knowledge of the cap did nothing more than limit the jury's award to the lesser amount,

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[62] *Id.* at 237 (quoting Colleen P. Murphy, *Determining Compensation: The Tension Between Legislative Power and Jury Authority*, 74 TEX. L. REV. 345, 347 n.8 (1995)).

[63] *Sasaki*, 92 F.3d at 237.

[64] *Id.*

[65] *Id.* at 243.

[66] Equal Employment Opportunity Comm'n v. EMC Corp., 205 F.3d 1339 (Table), 2000 WL 191819 (6th Cir. Feb. 8, 2000). Interestingly, the reference to the caps was made by an attorney for the EEOC. *See id.* at *8 (noting that EEOC counsel said to the jury that $300,000 was "the most we can ask for" and "[i]f we could, we would ask for a lot more").

[67] *Id.* at *9.

> which the district court would have done in any event had the jury returned a larger verdict.[68]

The dissenting judge disagreed, however:

> An inescapable inherent risk exists that the jurors in this case experienced pressure to award $300,000 in punitive damages, instead of a lesser sum, in response to a misconceived perception that Congress had foreordained that an employer of [defendant's] size which satisfied the requisites for punitive liability . . . should be punished in the amount of $300,000.[69]

As these divergent opinions shows, judges have intuitive – and conflicting – notions about the effects that knowledge of the caps may have, ranging from (1) the caps will have no effect to (2) jurors will misunderstand the caps to (3) jurors will understand and circumvent the caps.

Although courts have not agreed on the likely effects of the non-disclosure clause, there is agreement that the statutory caps do not affect the amount of damages that a plaintiff may request from the jury, in part because of the non-disclosure provision. In a number of cases, defendants argued that plaintiffs' prayers for relief should be struck by the court because these prayers exceeded the statutorily-provided damage limitations.[70] However, courts have rejected this argument on the basis on the non-disclosure provision. By forcing plaintiffs to limit their claims to the statutory cap, a court "would in effect inform the jury of the damage caps."[71] One court also suggested that forcing a plaintiff to request only the capped amount would hinder the plaintiff's ability to demonstrate "the relative importance of her different damages claims," thereby impairing the plaintiff's credibility.[72] Instead, the courts have

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[68] *Id.* The court also noted that since the employer had failed to object at trial when the statutory limit was mentioned, the employer had the burden of showing that counsel's conduct was "outrageous" or "egregious." *Id.* at *8.

[69] *Id.* at *15 (Krupansky, J. dissenting).

[70] *See, e.g.*, Johnson v. Metropolitan Sewer Dist., 926 F. Supp. 874, 876 (E.D. Minn. 1996); Beam v. Concord Hospitality, Inc., 1996 WL 455020, at *5 (D. Kan. July 8, 1996); Solomon v. Godwin & Carlton, P.C., 898 F. Supp. 415, 416 (N.D. Tex. 1995); Haltek v. Village of Park Forest, 864 F. Supp. 802, 807 (N.D. Ill. 1994).

[71] *Haltek*, 864 F. Supp. at 807; *see also Johnson*, 926 F. Supp. at 876; *Beam*, 1996 WL 455020 at *6; *Solomon*, 898 F. Supp. at 417. It is unclear whether these courts were suggesting that (1) plaintiffs would be entitled to explain their damages award, thereby exposing the damage cap, or (2) jurors would intuit the presence of a cap by the clipped nature of plaintiff's prayer for relief.

[72] *Beam*, 1996 WL 455020 at *6.

stated that the proper procedure is to allow the plaintiff to request an unlimited amount and then reduce the actual damages awarded if they rise above the cap.[73]

2. Indirect effects: How should damages be apportioned between federal and state claims?

Federal antidiscrimination protections such as Title VII are not the only employment discrimination statutes available to employees. States and localities also provide statutory antidiscrimination protections, and these protections are not preempted by the federal provisions.[74] States are even permitted to go beyond the federal provisions in their coverage or relief.[75] These provisions may seem superfluous if a plaintiff is protected by a federal statute, but many of these statutes provide for uncapped compensatory and/or punitive damages.[76] Because of this potential difference, a plaintiff may be entitled to significantly lower relief under the federal statute than she is entitled to under the state or local statute.

Given the potential for different relief for the same underlying offense, judges and juries must grapple with how to apportion relief between the capped federal statute and an uncapped state statute. The *Sasaki* case provides an illustration of this. In *Sasaki*, the plaintiff brought a federal claim (capped at $50,000) and a state tort claim (capped at $500,000) based on the same underlying sexual harassment.[77] The plaintiff's attorney suggested to the jury that it award the maximum amount under the federal claim, and then provide for further damages under the state claim.[78] And as the court noted, the jury appears to have followed these instructions, awarding the statutory maximum on the federal claim and $215,000 on the state claim.[79] The *Sasaki* court believed that the non-disclosure provision was designed to prevent such

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[73] *See Johnson*, 926 F. Supp. at 876; *Solomon*, 898 F. Supp. at 417*; Haltek*, 864 F. Supp. at 807.

[74] *See* Stephen F. Befort, *Demystifying Federal Labor and Employment Law Preemption*, 13 LAB. LAW. 429, 440-41 (1998).

[75] *See* California Federal Savings & Loan Ass'n v. Guerra, 479 U.S. 272, 285 (1987).

[76] For a table outlining the availability of punitive damages in state employment discrimination statutes, see Stacy A. Hickox, *Reduction of Punitive Damages for Employment Discrimination: Are Courts Ignoring our Juries?*, 54 MERCER L. REV. 1081, 1123-32 (2003).

[77] Sasaki v. Class, 92 F.3d 232, 235-36 (4th Cir. 1996).

[78] *Id.*

[79] *Id.* at 235.

award structuring.[80] According to the court, such award shifting was what "Congress specifically feared" about cap awareness and thus why Congress had included the non-disclosure provisions.[81]

The D.C. Circuit does not agree. In *Martini v. Federal National Mortgage Association*,[82] plaintiff brought harassment and retaliation claims under both Title VII and the D.C. Human Rights Act. The district court instructed the jury to award damages not only based on type of claim (i.e., harassment or retaliation), but also based on statutory basis (federal or local law). The jury awarded a total of nearly $7 million in damages, including $3 million in punitive damages under the Title VII claims and almost $2 million in compensatory and punitive on the D.C. Human Rights claims.[83] The district court then applied the $300,000 cap to the Title VII damages. The D.C. Circuit, however, held that the district court should have reallocated the excess Title VII damages to the plaintiff's recovery under the D.C. Human Rights Act. Noting that the district court had provided the same instructions for the federal and local claims, the court held that the jury had no legal basis for distinguishing between the statutes. Thus, for example, if the jury had awarded $2 million in punitives under the plaintiff's Title VII retaliation claim and $1 million in punitives under the D.C. Human Rights retaliation claim, "the most sensible inference is that the jury sought to impose a total of $3 million in punitive damages against [defendant] for retaliation."[84] Thus, while only $300,000 of those damages could be awarded under Title VII, the district court should have reallocated the other $1.7 million to the local claim. The court stated: "Were we not to treat damages under federal and local law as fungible where the standards of liability are the same, we would effectively limit the local jurisdiction's prerogative to provide greater remedies for employment discrimination than those Congress has afforded under Title VII."[85]

Most courts have held that district courts have discretion to reallocate a total damages award between state and federal claims.[86]

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[80] *Id.* at 237.

[81] *Id.*

[82] 178 F.3d 1336 (D.C. Cir. 1999).

[83] *Id.* at 1339.

[84] *Id.* at 1349.

[85] *Id.* at 1349-50. The court held that "[s]uch a result would violate Title VII's express terms" that the Act was not intended to relieve defendants of liability under state law. *Id.* at 1350.

[86] *See* Gagliardo v. Connaught Labs., Inc., 311 F.3d 565, 570 (3d Cir. 2002); Passatino v. Johnson & Johnson Consumer Prods., Inc., 212 F.3d 493, 510 (9th Cir. 2000); Kimzey v. Wal-Mart Stores, Inc., 107 F.3d 568, 576 (8th Cir. 1997); Barrios v. Kody Marine, Inc., 2000 WL 775067, at *4 (E.D. La. June 14, 2000); Luciano v. Olsten

Courts have been willing to shuffle the monetary awards between claims in order to maximize the plaintiff's recovery, particularly if the jury has jointly allocated the damages to the state and federal claims. For example, in *Passatino v. Johnson & Johnson Consumer Products, Inc.*,[87] the plaintiff had brought both Title VII claims and claims under the Washington State Law Against Discrimination.[88] The jury found for the plaintiff, awarding her backpay as well as $1 million in compensatory damages and $8.6 million in punitive damages. The district court allocated all of the $1 million compensatory damages to the state claim, and all of the punitive damages to federal claim.[89] This allocation maximized plaintiff's recovery, as under state law compensatory damages were uncapped, but punitive damages were not permitted.[90] The Ninth Circuit upheld this allocation. The court noted: "An 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."[91]

Courts thus appear to have two distinct viewpoints on the 1991 Civil Rights Act damage caps and their non-disclosure to the jury. One perspective prizes the jurors' ignorance of the caps as a way of insuring that the jury does its work without an understanding of the ultimate outcome. If jurors were told of the cap, this perspective fears, they would engage in gamesmanship with any non-capped damages and circumvent the purpose of the caps. The other perspective views the caps as a procedural rule that plays only a limited role within the entire process. Judges are permitted to reallocate jurors' damage awards in an effort to give the greatest possible recovery to the plaintiff. It seems clear that under this perspective there would be little problem with informing jurors about the caps, if doing so were permitted. Informing the jurors would obviate the need for any *post hoc* reallocation, as the

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Corp., 912 F. Supp., 663, 675 (E.D.N.Y. 1996), *aff'd on other grounds*, 110 F.3d 210 (2d Cir. 1997); Channon v. United Parcel Service, Inc., 629 N.W.2d 835, 851 (Iowa 2001). *But see* Oliver v. Cole Gift Centers, Inc., 85 F. Supp. 2d 109, 113 (D. Conn. 2000) (applying federal cap to total recovery under federal and state law, but also noting that plaintiff was "adequately compensated" by the capped amount).

[87] 212 F.3d 493 (9th Cir. 2000).

[88] *Id.* at 503.

[89] *Id.* at 509-10.

[90] *Id*.

[91] *Id.* at 510. *See also Barrios*, 2000 WL 775067 at *4 (arguing that when the jury fails to allocate awards between claims, "it is most consistent with the intent of the jury to permit Plaintiff to recover the maximum amount possible"); *Channon*, 629 N.W.2d at 851 (holding that limiting damages to the federal cap amount "effectively limits [Iowa's] prerogative to provide greater remedies under our civil rights statute than those available under Title VII").

jurors would be able to do this themselves. However, neither perspective accounts for the possibility that knowledge of the caps will affect the jurors' calculations in ways other than simple reallocation. We undertake an examination of these effects below.

II
EFFECTS OF CAPS ON JUROR DAMAGE DETERMINATIONS

From the sole comment in the legislative history about the rationale for non-disclosure of the damage caps, it seems that the goal of non-disclosure is to preserve the status quo – the integrity – of jury deliberations. The non-disclosure prevents pressure, "upward or downward," even while exerting control on the jury's ability to impose a verdict above the cap amount. So, while the cap clearly signals an effort to lower federal employment discrimination verdicts, the non-disclosure has no such obvious directional purpose behind it.

By keeping juries ignorant of damage caps, legislators imply that juries will be unable to compensate adequately for the effects of knowing about the caps and will take the caps into account in making their damages awards. In making this assumption, legislators appear to be cognizant of the jurors as human decision-makers who may not always follow a rational-actor model. Psychologists and others who study decision-making have relied on both normative and descriptive models to explain and envision the decision-making process; an examination of decision-making models indicate that juries may well be influenced by knowledge of the damage caps.

Normative models of decision-making show how the fully rational decision-maker would optimally make decisions based on a certain set of rational assumptions. The classic normative analysis is "expected utility theory" – that is, rational decision makers will seek to maximize their expected utility.[92] In economic terms, the utility of each possible outcome is calculated and then weighted by its probability. Dominance is a primary principle of rational behavior that governs decision-making under expected utility: simply put, if one option, choice A, has more utility (e.g., is better) than another option, choice B, a decision-maker will prefer and thus select choice A over choice B.[93] Another principle, invariance, refers to the idea that varying descriptions of a choice should not impact which choice is made.[94] Whether one

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[92] SCOTT PLOUS, THE PSYCHOLOGY OF JUDGMENT AND DECISION MAKING 80-83 (1993).

[93] *Id*. at 81.

[94] *Id.* at 82.

describes a choice in terms of awarding money to a plaintiff or taking it from defendant, for instance, should not impact the decision maker, if the monetary amounts are in fact identical in both alternatives.

A jury composed of "rational actors" would use utility theory to determine the optimal damages award for a plaintiff. Knowledge of a cap would not influence jurors' assessments of appropriate damages, except to eliminate any choice involving damages higher than the cap. Take, for instance, a jury that does not know of a cap of $300,000 and rationally weighs damages awards of $50,000, $80,000, and $110,000. Using a utility theory approach, the jury might decide that $80,000 is the most appropriate figure. With knowledge of the cap, this decision would not change, because the caps do not change the utility or permissibility of the available choices; rather, it merely limits the available choices to a range that the jury already believes is appropriate.

Consider, however, a jury that is deliberating between $400,000, $600,000 and $800,000. Under a normative approach to decision-making, the jury might arrive at $600,000. With knowledge of a $300,000 cap, the jury will act rationally in awarding the maximum damages figure of $300,000, because it will account for the fact that its award would be higher but for the existence of the caps.[95] Under a utility theory approach, knowledge of the caps will not change juries' assessments of damages awards, except that those awards that fall above the cap range will all be considered as equal to the cap and each other. Indeed, knowledge of the caps under this framework would only act to maximize the efficiency of a rationally-acting jury: any debate or discussion about varying awards over the cap would be unnecessary.

Presumably, then, since revealing the caps would make jury deliberations faster and easier for a jury governed by expected utility theory, Congress did not expect such a jury. And, in fact, although normative principles have intuitive logical appeal, research has consistently shown that human decision-makers do deviate significantly from normative decision-making principles. Descriptive decision-making models, heuristics, and decision-making phenomena account for human patterns of behavior that are not explained by normative theories.[96] An examination of these descriptive models, heuristics, and

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[95] The court in *Equal Employment Opportunity Comm'n v. EMC Corp.* espoused this notion of rationality. Equal Employment Opportunity Comm'n v. EMC Corp., 205 F.3d 1339 (Table), 2000 WL 191819, at *9 (6th Cir. Feb. 8, 2000).

[96] Commentators have noted that there is a discrepancy between normative decision-making theory and actual jury practice. *See, e.g.*, Hal R. Arkes & Barbara A. Mellers, *Do Juries Meet Our Expectations?* 26 LAW & HUM. BEHAV. 625 (2002).

phenomena in light of knowledge of the caps shows how such knowledge might affect jury verdicts.

As explained below, anchoring is perhaps the most robust and widely discussed psychological phenomenon that would come into play in jury damage deliberations. It is not clear, however, that anchoring is the sole potential effect that revealing the caps would produce. Below, we consider anchoring as well as several other decision-making paradigms that could potentially result in altering the jury's damages award in light of knowledge of the caps. An examination of these paradigms suggests that knowing of the caps could have both a quantitative impact, affecting the ultimate numerical figure of the damage award, either upward or downward, and a qualitative impact, making a difference in how the jury arrives at its decision.

A. Anchoring and Adjustment

Psychological research has marshaled strong evidence for the phenomena of anchoring and adjustment,[97] in which the first number with which a decision-maker is presented has a demonstrable effect on that person's ultimate choice. In essence, the first number heard becomes the place away from which any adjustment is made. Anchoring effects are powerful, widespread, and have been found in a variety of contexts. The source of the anchoring first number need not even be tied to any rational source; indeed, the groundbreaking initial research on anchoring demonstrated that anchoring effects were robust even when subjects believed the first number to be randomly generated.[98] In one example, researchers found that first asking whether the average temperature in San Francisco was above or below 558 degrees Fahrenheit resulted in higher estimates of the actual average temperature than those given by people who had not been asked the first question.[99]

In situations where jurors are advised by a judge of a damage cap, empirical research has shown that there is a strong anchoring effect. Juries make damage determinations by effectively moving "away from" the stated cap to the degree they believe appropriate. Such anchoring effects have been found in studies testing the impact of punitive damage caps on mock jurors. As Michael Saks and his colleagues have found, however, caps have differing effects on damage awards in low-severity,

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[97] We refer to the phenomenon of "anchoring and adjustment" simply as anchoring throughout this section.

[98] Amos Tversky & Daniel Kahneman, *Judgment Under Uncertainty: Heuristics and Biases*, 211 SCIENCE 453 (1974).

[99] PLOUS, *supra* note SP1, at 146.

medium-severity, and high-severity injury settings.[100] In his juror simulation study, individuals were presented with one of three hypothetical injury scenarios and asked to make a damage award. Some individuals were advised of the existence of a damage cap of $250,000 "to provide [them] some guidance" in making their determinations; others were given no guidance or other forms of guidance, including average awards or ranges of most awards. In the low-severity case scenario, the cap produced higher awards than either no information or other forms of guidance; in the medium-severity case, the cap produced a similar outcome to the no information condition, but a higher outcome than other forms of guidance yielded. Finally, in the high-severity case, the cap produced a lower average damage award than the control. Thus the cap acted to inflate damage awards for low-severity injuries, but to deflate damage awards for high-severity injuries.[101]

In a different juror simulation study, Jennifer Robbennolt and Christina Studebaker tested for anchoring effects by holding constant the severity of the injury and instead altering the amount of the damage cap.[102] They found that mock jurors' damage awards were influenced by knowledge of damage caps in both upwards and downward directions, depending on the size of the caps. For example, in one experiment, the mean damage award made by individuals who were not given any information about a cap was approximately $5 million; those who were told of a $100,000 cap awarded an average of $83,100, while those who were told of a $50 million cap awarded an average of $9 million. Thus high caps acted to inflate jury damage awards, while low caps acted to deflate damage awards.[103]

Empirical research, then, reveals that damage caps do have the potential to affect jury decision-making; however, it is not clear whether anchoring effects around the § 1981a damage cap would act largely to inflate or to depress damages awards. For example, consider a jury that, if completely ignorant of the cap, might award $10,000,000 in damages for what it thinks is particularly egregious conduct. If the jury learned of the cap, and thus anchored at $300,000, they might award that maximum or might adjust away to something less than $300,000, but their award could certainly not be driven up due to knowledge of the cap. Thus, in

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[100] Michael J. Saks et al., *Reducing Variability in Civil Jury Awards*, 21 LAW & HUM. BEHAV. 243 (1997).

[101] *Id.* at 251-52.

[102] Jennifer K. Robbennolt & Christina A. Studebaker, *Anchoring in the Courtroom: The Effects of Caps on Punitive Damages*, 23 LAW & HUM. BEHAV. 353 (1999).

[103] *See also* Verlin B. Hinsz & Kristin E. Indahl, *Assimilation to Anchors for Damage Awards in a Mock Civil Trial*, 25 J. APPLIED SOC. PSYCHOL. 991 (1995).

the case of severe injury, anchoring effects could only act to deflate the damage award. In contrast, consider a jury that would have otherwise awarded $20,000 in damages for minor injury. If that jury were made aware of the $300,000 cap, anchoring effects would likely pull the award up higher than it would have been without the cap.[104]

Anchoring effects of a damage cap cannot, of course, be considered in a vacuum; empirical research has repeatedly shown that the plaintiff's demand for damages already acts as a psychological anchor for jurors.[105] Thus, the "pure" jury deliberations that the non-disclosure provision was designed to protect are already "tainted" by what plaintiff[106] has asked for, if plaintiff is permitted to ask for damages in the jurisdiction.[107] Especially in light of the fact that there are no restrictions on numbers proposed by plaintiffs' attorneys, concern over the anchoring around the caps may be misguided. Indeed, forcing attorneys to keep their demands in line with what caps permit would create far more consistency in the anchoring that already occurs within jury deliberation.[108]

Despite the empirical work on the effects of disclosed damage caps on jury awards, it is difficult to predict what actual effects would occur in the § 1981a context in the absence of empirical data regarding the average size of a damage demand for federal employment discrimination cases or the average size of damage awards. It is not even clear what size employer is most often sued, meaning that the actual monetary level of the cap that would be applied in most cases is not

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[104] One might imagine that an easy solution would be to tell juries that they should deliberate about damages as though there were no caps, but tell them about the caps to increase their efficiency. Thus they would eliminate any debate about choosing between damage awards higher than the cap, but they would still deliberate "normally" about damage awards they might be considering that fell below the cap. However, numerous empirical studies have suggested that there is no way to offset such effects by expressly telling people to disregard certain information that they have already been given in making their decisions.. *See* Timothy D. Wilson & Nancy Brekke, *Mental Contamination and Mental Correction: Unwanted Influences on Judgment and Evaluation*. 116 PSYCHOL. BULL. 117 (1994).

[105] *See* EDIE GREENE & BRIAN H. BORNSTEIN, DETERMINING DAMAGES: THE PSYCHOLOGY OF JURY AWARDS 152-54 (2003).

[106] Studies have shown that defendant's counter-suggestion of a damage award also has a potent affect on the jury's damages determination. *See* Mollie W. Marti & Roselle L. Wissler, *Be Careful What You Ask For: The Effect of Anchors on Personal Injury Damages Awards*. 6 J. EXPERIMENTAL PSYCHOL.: APPLIED 91 (2000).

[107] Some jurisdictions do not permit plaintiffs or defendants to suggest a particular monetary damage figure. GREENE & BORNSTEIN, *supra* note GB1, at 151.

[108] Caps have been shown empirically to have a similar anchoring effect on negotiated settlements. Greg Pogarsky & Linda Babcock, *Damage Caps, Motivated Anchoring, and Bargaining Impasse*, 30 J. LEGAL STUD. 143 (2001).

certain. For these reasons, the most likely directionality of any anchoring effects that disclosure of the caps might produce is not clear. However, these effects appear more likely to raise awards on the lower end of the scale and lower awards on the upper end of the scale.

B. Scaling

In marked contrast to the invariance principle of expected utility theory, empirical research has consistently demonstrated that the framing of outcomes does have significant effects on individuals' choices.[109] Scaling is one type of framing effect with the potential to impact jurors' decision-making in light of the disclosure of a damage cap. Research has shown that the framing of outcomes into differing "response scales," or ranges of possible response alternatives, can have a significant effect on responses.[110] For example, psychologist Norbert Schwarz and his colleagues asked individuals to estimate how much television they watched per day.[111] When individuals were given a scale that went, at half-hour intervals, from a low end of one half hour to a high end of more than two and a half hours, only 16 percent of respondents said that they watched more than two and a half hours of television per day.[112] But when individuals were given a scale that ranged from "up to" two and a half hours at the low end to more than four and a half hours at the high end, 37.5 percent of respondents said that they watched more than two and a half hours per day.[113] Those using the lower value scale estimated the average citizen's television viewing time at 2.7 hours, while those using the higher value scale estimated it at 3.2 hours.[114]

Essentially, scaling means that the presentation of a number or numbers creates a mental scale that individuals use to calibrate choices. Theorists have suggested that this result stems from people's fundamental need to make conversational sense out of information that has been provided to them. Information is assumed to be provided because it is relevant to the task at hand, and is assumed to be no more or less than is needed to complete the task.[115] Take, for instance, the case

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[109] *See, e.g.*, Amos Tversky & Daniel Kahneman, *Rational Choice and the Framing of Decisions*, 59 J. BUS. S251, S251-78 (1986).

[110] PLOUS, *supra* note SP1, at 66-67.

[111] Norbert Schwarz et al., *Response Scale: Effects of Category Range on Reported Behavior and Comparative Judgments*, 49 PUB. OP. Q. 388, 389 (1985).

[112] *Id.* at 390.

[113] *Id.*

[114] *Id.* at 390-91.

[115] Schwarz and others have suggested that these results stem from linguistic conventions. Citing conversational principles developed by Paul Grice, Schwarz

of television viewing: suppose one likes to think that one watches an average (or better yet, slightly below average) amount of television, but hasn't really bothered to count the actual time spent watching. One will assume that the response scale provided by the questioner reflects an accurate assessment of the range of television viewing habits, from slight to heavy. Thus a responder will choose a point towards the lower end of the scale, regardless of what number is at that lower point. As Schwarz shows, one would be less likely to choose the highest number offered, because it seems so unlikely that the end point of the scale would represent average or below average frequency.

Jurors presented with the damage cap may experience a scaling effect, interpreting the maximum award amount as a measuring stick by which to assess conduct. Making "conversational" sense out of the cap might mean that Congress has told the jury that this is the largest amount of financial damage that one can sustain from a federal employment discrimination violation – and, in turn, if this is the largest amount of damage, then it must correspond to the most severe injury. That is, a damage cap is a message from Congress (or the judge) to the jury that says that the worst conduct is to be redressed by damages in the amount of the cap. It logically follows that less egregious conduct should be remedied by lower sums.

For example, knowledge that the cap for damages is $300,000 may prompt jurors to imagine that $100,000 appropriately compensates a lesser degree of injury, $200,000 compensates an intermediate degree of injury, and $300,000 compensates the highest degree of injury. Without knowledge of the caps, juries may use the plaintiffs' requests for damages as the marker of a response scale: for instance, if plaintiff alleges egregious conduct and asks for $10,000,000, a jury may decide that the conduct is only moderately severe, and award $5,000,000; that same jury faced with a plaintiff asking for $1,000,000 might award

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persuasively argues that research subjects read and process a survey or questionnaire as part of a normal conversation between researcher and subject, using Gricean maxims of quality, quantity, relation and manner. Thus research questions and statements will be assumed to provide no more or less information than necessary to answer the question; similarly, they will be assumed accurate and truthful. Participants will assume that information provided is in some way relevant to the task, and finally, they will assume information is provided in a way that is meant to be understood. *See* Norbert Schwarz, *Judgment in a Social Context: Biases, Shortcomings, and the Logic of Conversation, in* 26 ADVANCES IN EXPERIMENTAL SOCIAL PSYCHOLOGY 123-162 (Mark Zanna ed., 1994); *see also* Denis Hilton, *Conversational Processes and Causal Explanation*, 107 PSYCHOL. BULL. 65 (1990); John F. Kihlstrom, *Demand Characteristics in the Laboratory and the Clinic: Conversations and Collaborations with Subjects and Patients*, 5 PREVENTION & TREATMENT article 36c (2002).

$500,000. Jurors might, too, disregard plaintiffs' requests as self-interested and create their own scales for damages using other criteria.

There is still an open question, as with anchoring, as to the most likely directionality of any scaling effects on verdicts. Take a case where the jury believes that the injury is intermediate: if their award without disclosure of the caps would have been $50,000, then scaling effects from the disclosure of the caps might raise their award to $200,000. But if the jury would have awarded $1,000,000 for an intermediate injury, then scaling would act to lower it, even more than the mere cap at $300,000 would do. The findings of Saks and his colleagues[116] are, in fact, largely consistent with scaling effects, and suggest that scaling effects could increase the damage awards for lower injury cases, but further empirical research is needed to assess how scaling effects might function.

C. Prospect Theory and Loss Aversion

Prospect theory posits that people do not assess utility *per se* when making a decision; rather, they evaluate their options based on the resulting gain or loss from a starting reference point.[117] Prospect theory was expressly developed to explain research findings that showed that individuals consistently make decisions that do not conform to principles of expected utility theory.[118] Prospect theory relies heavily on the concept that individuals are deeply affected by how decisions are framed. Losses "loom" larger than gains, and decision-makers will take greater risk to avoid a loss than they would to reap a similar gain – that is, they are loss averse.[119]

Without knowledge of a damage cap, a jury is likely to perceive any amount that it awards plaintiff as a gain for the plaintiff.[120] But in light of the existence of a damage cap, jurors may perceive any award that is less than the cap as a loss, and would be more averse to awarding a number below the cap than they would have otherwise been if ignorant of the cap. Any loss aversion effects due to knowledge of the damage

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[116] Saks et al., *supra* note MS1, at 251-52.

[117] Daniel Kahneman & Amos Tversky, *Prospect Theory: An Analysis of Decision Under Risk*, 47 ECONOMETRICA 263 (1979), *reprinted in* CHOICES, VALUES, AND FRAMES 17 (Daniel Kahneman & Amos Tversky eds., 2000).

[118] *Id.*

[119] *Id.*

[120] Certainly, it is possible that jurors also perceive this as a loss for the defendant, but once jurors have decided that liability exists, it seems far more likely that they will identify with the plaintiff than defendant and will thus perceive the award, more generally, as a gain.

caps, then, would exert upward pressure on damage awards.

A related psychological phenomenon, the "endowment effect,"[121] similarly suggests that knowledge of the caps will produce higher awards than ignorance of the caps. Under the endowment effect, people value more highly the things that they already possess than they would value those same things if they had to acquire them *ab initio*. Jurors learning of the cap may perceive it as consonant with a damages award itself. Mentally perceiving the damage limit as a damage award that has already been awarded to the plaintiff could result in framing effects that code any award under the cap as a loss. If such jurors identify with the plaintiff and perceive a lesser award as "giving up" money, they may act to prevent this from happening.

The status quo bias, another psychological phenomenon based largely on the principle of loss aversion, may similarly exert upward pressure on the average damage award. The status quo bias is a phenomenon whereby people remain at the status quo because disadvantages of leaving it loom larger than advantages.[122] For this reason, jurors may latch on to the cap amount as the status quo and be reluctant to award any amount that is lower than the cap.

Both the endowment effect and the status quo bias seem more likely to occur with a damage cap than with a plaintiff's request for damages, because jurors are likely to perceive the damages request as an aspiration by plaintiff, in contrast to an endowment or pronouncement by the legislature or court. Theoretically, loss aversion effects are likely to increase damage awards in low or moderate-severity cases, where juries would otherwise have awarded damages in an amount below the cap, but would not have any impact on damage awards for very severe cases, in which juries would likely have awarded damages above the cap. This is largely consistent with the empirical findings of Saks and his colleagues, who found that low-severity cases received higher damages when jurors knew of a cap.[123]

D. Evasion and Reactance

Knowledge of the existence of caps might simply cause jurors, acting rationally, to reapportion their damages award among the different claims brought by plaintiff. For example, assume that jurors arrive at a

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[121] Daniel Kahneman, Jack L. Knetsch & Richard H. Thaler, *Anomalies: The Endowment Effect, Loss Aversion, and Status Quo Bias*, *in* CHOICES, VALUES, AND FRAMES 160-63 (Daniel Kahneman & Amos Tversky, eds., 2000).

[122] *Id*. at 163-65.

[123] Saks et al., *supra* note MS1, at 251.

damages figure that they believe appropriately responds to the particular needs of a plaintiff and the behavior of a defendant. Knowledge of a cap that is less than that figure may prompt jurors to be creative in allocating damages to various claims, in essence evading the cap in order to provide plaintiff with what they believe is the proper amount of damages.

The court in *Sasaki* believed just such an evasion had taken place when the jury awarded $61,250 in damages under the Title VII claim and $150,000 in damages under the state tort claim. Had the jury not known about the cap, it might have allocated all of its damages to the sexual harassment claim, or at least might have divided the damages 50/50 between the claims. Knowledge of the cap allowed the jury to provide a larger overall damages award for plaintiff's federal and state claims. Thus disclosure of the caps may make a rationally acting jury divide its award in a different manner than it otherwise might have done; however, the total damage award would not differ from what would have been awarded had there been no caps at all. If juries were able to evade the Congressional caps, average total damage awards would be presumably be higher.

Might the jurors act not just to evade the restrictions of the caps, but as part of a response pattern expressly to those restrictions? The psychological theory of reactance posits that when individuals feel that their behavior options have been limited, they react by becoming psychologically aroused.[124] Possible effects include increased attraction to the forbidden option. Under this theory, juries might not merely reallocate damages into another category in order to evade the restriction on their behavior; the restriction on their damage-awarding behavior might even propel them to find a high monetary award more appealing than they would have without knowledge of a cap.[125] Reactance effects would, then, exert upward pressure on overall damage awards.

In a process similar to reactance, jurors might experience reactive devaluation based on revelation of the caps by the judge or attorneys. Reactive devaluation describes the phenomenon in which individuals assess the appeal of a choice based on the identity of the entity proposing the choice. If an individual perceives a choice as stemming from an

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[124] Joel D. Lieberman & Jamie Arndt, *Understanding the Limits of Limiting Instructions: Social Psychological Explanations for the Failures of Instructions to Disregard Pretrial Publicity and Other Inadmissible Evidence*, 6 PSYCHOL., PUB. POL. & L. 677 (2000) (citing J.W. BREHM, A THEORY OF PSYCHOLOGICAL REACTANCE (1966)).

[125] There is also an element of the political to this effect; liberal jurors who feel that tort reform as a general matter is bad may react more strongly to the limit on their behavior, whereas conservative jurors may not experience any reaction to a cap at all.

adversary, the choice is less appealing than the same choice would be coming from an ally.[126] For example, in the 1980's, students who heard the same proposal about nuclear disarmament rated it more favorably when the source was said to be the United States than when the source was said to be the Soviet Union.[127]

In the case of caps, if the jury perceives the court and or Congress as limiting its power – and thus as an opposing party to it – the jury may reactively devalue a damage cap so that it no longer seems adequate to compensate a plaintiff fully for the harm suffered. That is, the jury will perceive that if the court and Congress believe that a cap figure is sufficient to compensate plaintiff, then it certainly cannot be adequate to compensate plaintiff. Similar to the process of reactance, the jury may then not only award the maximum permitted by the cap, but may be spurred on to award more money for any other available claim. In absence of disclosure of the caps, jurors are unlikely to feel themselves in opposition to the plaintiff once they have decided on defendant's liability, making it far less likely that the figure proposed by a plaintiff will produce reactive devaluation.

There is currently no empirical data that supports a reactance or reactive devaluation effect in jury damage awards. A study by Greene et al.[128] found that damage awards made by mock jurors who were told of a cap on punitive damages but were able to award uncapped compensatory damages did not differ significantly from damage awards made by mock jurors who were able to award unlimited punitive and compensatory damages. An earlier study by Jennifer Robbennolt and Christina Studebaker[129] yielded similar results. Although research findings do not support a finding of reactance or reactive devaluation by juries in response to damage caps, it is not clear that jurors would never have such a reaction to any legislative cap in any legal context. Several important differences between the studies that have been performed to date and the § 1981a context include, for example, the § 1981a limit on both punitive and compensatory damages, so that in essence all non-equitable[130] recovery under federal civil rights law is limited by the caps. Additionally, there has not yet been a study that has tested for reactance

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[126] Lee Ross, *Reactive Devaluation in Negotiation and Conflict Resolution*, in BARRIERS TO CONFLICT RESOLUTION 28 (Kenneth Arrow et al. ed., 1995).

[127] *Id.*

[128] Edith Greene, David Coon & Brian Bornstein, *The Effects of Limiting Punitive Damages*, 25 LAW & HUM. BEHAV. 217 (2001).

[129] Robbennolt & Studebaker, *supra* note RS1, at 361-62.

[130] Equitable recovery includes back pay as well as front pay (in lieu of reinstatement). *See* Pollard v. E.I. du Pont de Nemours & Co., 532 U.S. 843, 852 (2001).

or reactive devaluation effects in a group "jury" setting rather than among individual mock jurors.[131]

E. Availability

Informing juries of a cap on damages may produce an availability effect. The damage cap number will be more salient, or available to the jury, than any other potential damage award. Availability is a decision-making heuristic in which decision-makers assess the likelihood of an event by how easily a similar event can be brought to mind.[132] For example, research has shown that individuals believe it is more likely that one would be killed by a shark attack than by falling airplane parts.[133] Certainly, people have heard more about shark attacks than they have about deaths due to falling airplane parts. In truth, however, the odds of death from a shark attack are far lower than the odds of death from falling airplane parts. Theorists have explained this result by noting that examples of shark attacks are far more mentally available to the average person than examples of people being hit by falling pieces of an airplane.

In making their determination of damages, jurors could more easily bring the cap number to mind than other amounts of damage awards. Of course, if the jury would have found damages in an amount over the cap without knowledge of the cap, then availability will not affect the ultimate outcome, but if a jury would have awarded fewer damages, the availability of the cap number may prompt jurors to arrive at a higher damages figure. In essence, availability suggests that jurors, trying to think up a damages award, will be asking themselves, "What does a damage award look like?" and will answer, "It looks like [the figure provided by the court as a cap]." Any availability effect of the cap may also depend on what other damage award numbers are present in jurors' minds. For example, jurors may know of damage awards in other cases,[134] or may be aware of both plaintiff and defendant's suggestions of appropriate damage awards.

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[131] Commentators have suggested that jury studies can be limited in their use, in light of the fact that most studies do not take into account the effects of group decision-making processes because they collect data about mock jurors and their individual decisions in response to a particular fact pattern, rather than collecting data about mock juries and their group decisions. *See, e.g.*, Jeffrey Kerwin & David R. Shaffer, *Mock Jurors Versus Mock Juries: The Role of Deliberations in Reactions to Inadmissible Testimony*, 20(2) PERS. & SOC. PSYCHOL. BULL. 153 (1994).

[132] PLOUS, *supra* note SP1, at 121.

[133] *Id.*

[134] Of course, these may be likely to be large verdicts that have received publicity.

F. Satisficing

Knowledge of damage caps may affect not just the bottom line but also the "quality" of the jury's damage decision. Although empirical work has indicated that juries do not make decisions according to expected utility theory, the justice system is premised on an assumption that juries do make an effort to reach good decisions. However, knowledge of a cap may encourage the use of certain heuristics, or "shortcuts" to decision-making, that psychologists and other researchers have identified as being used by individual decision-makers in real-world decision-making

For instance, the satisficing heuristic describes a decision-making process in which a decision-maker sets a minimum value that attributes of any alternative must meet. The decision-maker considers alternatives one by one, in whatever order they happen to be presented. The first alternative in which each attribute meets the decision-maker's minimum is selected. Regardless of how many additional alternatives remain to be examined, the decision-maker then stops and does not examine any other alternatives.[135]

In juror deliberations, a damage cap could encourage a jury to choose a satisficing heuristic. The range of damage awards is far narrower with a cap; jurors might perceive the cap as the criteria which their award must meet. Thus, as soon as one juror proposed a damages award that fell under the cap, jurors would accept that number without considering other alternatives. For example, a juror might propose $250,000 in damages; in light of the cap, other jurors would agree to the proposal to save time and effort, even though, without knowledge of a cap, jurors might have weighed a number of options and arrived at a different decision. There has not been any empirical research to date that examines whether juries may use a satisficing process in their deliberations.

G. Overall Effects of Disclosure Versus Non-Disclosure

Psychological research, then, makes clear that the juries'

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[135] JOHN W. PAYNE, JAMES R. BETTMAN & ERIC J. JOHNSON, THE ADAPTIVE DECISION MAKER 26 (1993). Suppose, for instance, that one was hunting for an apartment of at least 1000 square feet and wanted to pay no more than $2000 per month. Under satisficing, one would take a 1000 square foot apartment for $1900 a month as soon as one saw it, never learning that the next apartment on the list to be seen was 1200 square feet and $1800 a month.

decision-making processes, as well as ultimate awards, will likely differ if jurors are informed of the damage caps. Both theoretical work and empirical research seem to indicate that disclosure of the caps would tend to raise average awards in low-severity injury cases, but would tend to lower average awards for high-severity injury cases. However, given the complexities involved in assessing severity levels in individual, unique cases,[136] it is still largely unclear whether the bulk of awards would be pressured upward or downward by the disclosure of the caps. Nonetheless, it is clear that non-disclosure does act as a buffer, preventing the caps from affecting the jury's damage award decision-making process. Thus the caps do act to protect the integrity of the jury's damage award decision-making process.[137] Below, however, we explore a graver consequence of non-disclosure – a threat to the integrity of the jury system as a whole.

III
THE EFFECTS OF NON-DISCLOSURE ON THE JURY SYSTEM

To date, what little systematic attention that has been paid to the non-disclosure of damage caps has focused on the potential effects that disclosure versus non-disclosure might have on jury damages deliberations and calculations. Above, we offer a more comprehensive examination of these effects, suggesting ways in which several psychological principles might exert upward or downward pressure on the jurors' ultimate verdicts as well as alter the quality of the decision-making process itself. There has, however, been no attention given to the (more pernicious) potential effects of non-disclosure of the caps on the judicial process itself. The non-disclosure has the potential to trigger a loss of confidence and trust in the jury system, as well as causing inefficiencies in the system stemming from effects on attorney and juror behavior. These effects are discussed below.

A. The Threat to the Jury as a Procedurally Just System

The jury plays a crucial political role in the United States. It has been argued that average citizens follow the law not because of the threat

[136] For example, unlike an experimental setting, one cannot hold all factors except for the degree of injury constant. The parties, factual setting, and events are all unique to each situation, making assessment of severity a difficult matter.

[137] Ironically, of course, the caps themselves were designed expressly to deal an immediate blow to this integrity.

of punishment but because the law is perceived as legitimate.[138] Juries are an important element of the legitimacy of the legal system.[139] Theorists have also identified another important function of the jury: the socializing function in which the jury both allows regular citizens to participate in the legal process as well as educating citizens about that process.[140] Thus juries play a political role both on a macro and a micro-level, serving as a crucial element of a legitimate democratic government and engaging average citizens in the political system.

Psychological research has identified the principle of procedural justice as an important element of individuals' perceptions and opinions of legal systems and structures. In the 1970s, a growing dissatisfaction with the American legal system helped to spawn research into procedural justice.[141] Thibaut and Walker suggested that a focus on procedural justice – in essence, on the fairness of process – might offer a solution to problems such as widespread non-compliance with court orders, especially in the child custody domain.[142] The fundamental premise of procedural justice literature is that individuals are not solely motivated by the objective quality of the outcome or the subjective fairness of the outcome. Rather, the procedural justice literature suggests that the justice process itself is vital to individuals' experiences – people are more satisfied with outcomes, view them as more favorable, and are more willing to voluntary comply with third-party decisions, when they perceive the process by which the outcomes were achieved as fair.[143]

Procedural justice effects have been found in a variety of legal contexts, including with juries,[144] with police,[145] with a mediator,[146] and with other government authorities.[147] Theorists have suggested that assessments of procedural justice are vital to the acceptance of decisions by legal authorities and, indeed, to the continued preservation of

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[138] TOM R. TYLER, WHY PEOPLE OBEY THE LAW 161 (1990).

[139] VALERIE P. HANS & NEIL VIDMAR, JUDGING THE JURY 248 (1986).

[140] HANS & VIDMAR, *supra* note HV1, at 249.

[141] JOHN W. THIBAUT & LAURENS WALKER, PROCEDURAL JUSTICE (1975).

[142] *Id.*

[143] E. ALLAN LIND & TOM R. TYLER, THE SOCIAL PSYCHOLOGY OF PROCEDURAL JUSTICE (1988).

[144] Robert J. MacCoun & Tom R. Tyler, *The Basis of Citizens' Perceptions of the Criminal Jury*, 12 LAW & HUM. BEHAV. 333 (1988).

[145] TOM R. TYLER & YUEN J. HUO, TRUST IN THE LAW (2002)

[146] Dean G. Pruitt et al., *Long Term Success in Mediation*, 17 LAW AND HUM. BEHAV. 313, 327-28 (1993).

[147] Tom R. Tyler & Peter Degoey, *Collective Restraint in Social Dilemmas: Procedural Justice and Social Identification Effects on Support for Authorities*, 69 J. PERSONALITY & SOC. PSYCHOL. 482, 482-97 (1995).

society.[148] Procedural justice plays a powerful role in shaping trust in authorities and perceptions of legitimacy of authorities. People comply with the law, trust the law, and respect the law due in large measure to their perceptions that the law is a system of fair procedures. Trust and reliance in the jury system are important to the continued respect for the justice system as a whole, and trust and reliance can be affected by the perception that the jury system is a fair one.[149] Concealing damage caps from the jury has the potential to suggest a procedurally unfair system: players as diverse as the plaintiff, defendant, attorneys, jurors, and the public at large may experience procedural justice effects from a rule that prevents jurors from learning of damage caps.

1. Effects on Parties to the Dispute

People take their disputes to the legal system not just to win but in order to bring a fair process to bear on the resolution of their case. How might the concealment of a damage cap[150] affect parties' perceptions that the legal process is fair? Procedural justice literature suggests that the process by which a dispute is resolved has a distinct impact on the parties' satisfaction with the resolution, over and above the distributive – that is, typically, the monetary – outcome. As we have discussed in Part II *supra*, disclosure of the cap would likely have some impact on the monetary award made by the jury, but it is not clear whether the award would systematically rise or fall due to disclosure – meaning that it is not clear whether plaintiffs or defendants would typically benefit from disclosure of the cap. But procedural justice literature suggests that all parties, even the "winners," are less satisfied with the outcome when it is arrived at through an unfair process.[151] For this reason, both plaintiffs and defendants may be less satisfied with the jury verdict.

Although both parties may assess the process less favorably if it is not procedurally fair, the paradigmatic case in which a procedural justice effect is most likely is the case in which a jury awards plaintiff damages higher than the cap amount. Consider, for example, a case similar to *Passatino*, discussed *supra* Part I, in which an $8,600,000 punitive damages award was reduced to $300,000 pursuant to the § 1981a damage caps. From a psychological perspective, a number of the

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[148] TOM R. TYLER ET AL., SOCIAL JUSTICE IN A DIVERSE SOCIETY 99 (1997).

[149] MacCoun & Tyler, *supra* note MT1, at 335.

[150] A discussion of how the cap itself might impact perceptions of the system's procedural justice is outside the scope of this article.

[151] TYLER ET AL., *supra* note TT1, at 15.

heuristics and biases that we discussed in Part II, *supra*, come into play in how plaintiffs would assess this monetary result. First, because plaintiffs hear the larger verdict first (even if they already know, as is likely, of the existence of the caps), they will frame the lower award as a loss of the difference, rather than as a gain of the cap amount. This means that the cap "takes away" money that the jury has awarded them and to which they may feel entitled. Similarly, the jury's verdict acts as an anchor when plaintiffs assess what their case is "worth": plaintiffs can contrast the cap amount with the damages award and are more likely to arrive at an unfavorable conclusion about the distributive fairness of their outcome.

But aside from the perception that the actual damages award is unfair, plaintiffs are also likely to be more upset and angry at the legal process when a jury awards them one amount and the judge must enforce a law that caps that amount. Procedurally, this is a very different experience than the one plaintiffs would experience if jurors were told up front that there was a cap on recovery. In that case, juries would never make such an inflated award in the first place, and plaintiffs would not experience any sense of either distributive or procedural unfairness stemming from the jury's actions in light of the cap. Any sense of procedural (or distributive) unfairness would have to stem from Congress's actions in capping the damages, rather than from – as in the case of concealment – the legal system that permitted a "true" assessment of their damages but only gave them some, possibly small,[152] percentage of that award.

2. Effects on Attorneys

Lawyers, too, may arrive at the conclusion that the system is not procedurally fair – and lawyers' continued respect for legal authorities and institutions is an important component of the functioning of the legal system as a whole. In particular, courts have interpreted Title VII's non-disclosure requirement to prevent attorneys as well as the court itself from informing juries of the caps. In jurisdictions that permit attorneys to request specific amounts of damages, this has the potential to force attorneys to engage in a "courthouse charade" in which they must explicitly pretend that the caps do not exist.

Although the text of § 1981a(c)(2) simply requires that "the court shall not inform the jury of the limitations" imposed by the caps, in both

[152] In *Channon*, for instance, plaintiff recovered less than one-half of one percent of what the jury had actually awarded ($300,000 out of an awarded $80,000,000). Channon v. United Parcel Service, Inc., 629 N.W. 2d 835, 851 (Iowa 2001).

Sasaki and *EMC* plaintiff's counsel, not the court, was accused of violating the non-disclosure provision. Moreover, counsel did not even specifically mention the caps; instead, they said that jurors could award "up to $50,000" or "a maximum of $300,000." But the courts held that the reference to a limit on damages was a violation of the non-disclosure cap.

The reasonable import of these cases, then, is that plaintiff's counsel cannot mention any limit on damages. But could, or should, counsel limit its request to the amount of the caps? What if plaintiff's counsel in *Sasaki* had instead told the jury, "We are asking you to award $50,000 on the harassment claim and $150,000 on the tort claim"? Such a pitch has no reference to any limits imposed on damages. Jurors might wonder why plaintiff had structured her request that way, but they would not have been "inform[ed]" of the cap. Although not ruling on this issue, the Fourth Circuit noted that "[s]pecifically requesting the cap amount without explicitly mentioning the cap would violate the spirit (if not the letter) of the law."[153]

If counsel cannot even tailor their damage requests to comply with the law, then § 1981a(c)(2) goes beyond merely placing a restriction on what courts and counsel can say. Instead, the law has effectively co-opted counsel into affirmatively perpetuating the charade that the caps do not exist. In interpreting the cap non-disclosure clause, the courts seem to be calling on counsel to perform a *kabuki*-style theater, where plaintiffs' attorneys ask for some amount of damages in excess of the caps while knowing they can get no more than the cap. This puts plaintiffs' attorneys in a quandary as they approach the task of determining their damage demand.

Moreover, at least according to the D.C. Circuit, a jury is entitled to allocate damages to a state or local law claim, and thus "evade" the cap, if the state or local law claim has no restriction on damages. A plaintiff's attorney may conceivably want to discuss this possibility with the jury, in order to explain how the jury must structure its award to achieve the desired result. However, since such an explanation would at least imply the existence of a cap, under *Sasaki* and *EMC* it would be impermissible. Without information about the caps, jurors would not be in a position to express their preferences about damages in light of the damages restrictions. Thus, as in *Martini*, the court would be left to reconstruct juror preferences after the fact.

In essence, attorneys are co-opted by statute and case law into misleading the jury, as well as setting wildly inappropriate expectations

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[153] Sasaki v. Class, 92 F.3d 232, 237 n.1 (4th Cir. 1996).

for their own clients, by suggesting damage amounts that are far in excess of what the jury award could ultimately be. This means that lawyers are required to engage in deception and increases their perception that they are engaged in an untrustworthy system; this seems likely to lower lawyers' respect for the integrity of the legal process. Additionally, plaintiffs' attorneys may suffer the same effects that plaintiffs themselves experience, in that a procedure that allows for the jury to pronounce some "value" of a case but only permits recovery of some fraction thereof may seem patently unfair, in a way that would not occur if juries knew of the cap at the outset.[154]

3. Effects on Jurors

Jurors' perceptions of the fairness of the jury system, too, may suffer from non-disclosure of the cap. Imagine yourself as a juror considering a Title VII claim. After hearing testimony about extensive, pervasive, and egregious discrimination at a Fortune 500 company, you have determined that the defendant is liable for intentional discrimination. The discrimination reached the highest levels of the company, and management showed no interest in redressing or preventing discrimination in the future. After determining that the company intentionally violated federal law,[155] you and the other jurors carefully evaluate the evidence to determine the proper level of damages. Based on the pain and suffering caused to the plaintiff, the jury awards $500,000 in compensatory damages, and levels a $1 million punitive award based on the company's systemic misconduct. However, after spending hours to arrive at this damages assessment, you learn that the $1.5 million award will be reduced to $300,000 and that, in fact, it would be impossible for plaintiff to receive more that $300,000 no matter what the award.

While caps themselves may frustrate a jury that feels that the injury with which it is confronted merits a greater payout, we posit that it is much more damaging to confidence in the jury system to hide the existence of those caps. While little attention has been paid to this concern, we believe it is a significant side effect of a non-disclosure system. It may be that jurors would not ever learn about the imposition of the cap; however, even if they do not learn about it in the courtroom, they could still find out in the courthouse or in the press.[156] If jurors

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[154] In contrast, some attorneys might feel that, at least for high-end awards, revelation of the cap could only lower the jury award.

[155] *See* Kolstad v. American Dental Ass'n, 527 U.S. 526, 535 (1999).

[156] Indeed, several commentators have suggested that jurors will eventually learn of

become aware of the damage cap's effect on their verdict, their belief in the procedural justice of the jury system may be eroded.

Jurors involved in the process may reach the conclusion that the process that they have participated in is not procedurally fair with respect to their contribution. Jury duty is a rare moment in which ordinary citizens are bound up with the legal system; research has shown that the experience of jury duty typically boosts jurors' positive attitude toward jury service and their confidence in the jury system.[157] Concealment of the cap has the potential to add a component to jury service that would worsen jurors' attitudes toward jury service and decrease their confidence in the system.

Although the number of citizens who serve as jurors at any one time is a small percentage of the whole population, in the aggregate a substantial portion of the population will at some point serve on a jury.[158] Additionally, jurors communicate their experience on a jury to others so that their experiences, negative or positive, have the potential for a ripple effect in the community.[159] While it is true that an even smaller percentage of those who actually do serve on a jury will serve on a jury that hears a Title VII or other federal employment discrimination case, there are nonetheless a class of citizens who will have direct experience with the concealed damage cap.[160]

Concealing the damage cap could affect involved jurors' assessment of procedural justice in several ways. In particular, if the jury awards an amount higher than the damage caps, the rejection of that award can be damaging to the procedural justice assessments of the jury. Researchers have suggested that voice is an important antecedent of procedural justice assessments.[161] When individuals feel that they have had the opportunity to express themselves and to be heard, they are more likely to feel that the process is a fair one.[162] One could conceive of a damages award as an expression by the jury of its views with respect to a

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the caps. *See, e.g.*, GREENE & BORNSTEIN, *supra* note GB1, at 178; Robbennolt & Studebaker, *supra* note RS1, at 357; Saks et al., *supra* note MS1, at 245.

[157] Shari Seidman Diamond, *What Jurors Think: Expectations and Reactions of Citizens Who Serve as Jurors, in* VERDICT: ASSESSING THE CIVIL JURY SYSTEM 285 (Robert E. Litan ed., 1993).

[158] Jurors are typically drawn from a voter registration pool, but current trends are to expand the pool by using motor vehicle registration and welfare rolls. HANS & VIDMAR, *supra* note HV1, at 54.

[159] Seidman Diamond, *supra* note SD1, at 283-84.

[160] Given the presence of caps in other settings, of course, exposure to a concealed cap is not limited to the federal employment discrimination context.

[161] TYLER ET AL., *supra* note TT1, at 94.

[162] LIND & TYLER, *supra* note LT1, at 101.

defendant's behavior. If the jury is thwarted in expressing itself through its damage award, jury members may conclude that the process is not a fair one.[163] The jury members are likely to feel that their voices have not been heard or respected, in a way that is unlikely if they know before their deliberations that they are limited in the amount they may award.

Research has also suggested that the degree of control that individuals have in any given decision-making process plays an important role in whether they feel that the process is fair.[164] In the context of the jury, jurors' ultimate control over the damages award is not affected by the concealment of the cap, but by the cap itself. Nonetheless, concealing the cap changes the jury's expectations of its own role, so that while a jury aware of the cap might feel that it had full control over the damages award within the confines of the cap, a jury that did not know of the cap would feel that it had no control if it awarded damages in an amount that was summarily rejected due to the imposition of the cap.

4. Systemic Effects

Regardless of the individual experiences of people directly involved in a particular case, the structural design of a system in which jurors are purposely misled and their views are discarded may have important procedural justice effects as well. Particularly since Title VII deals with race and sex discrimination, plaintiffs, jurors, and society at large could not be blamed for feeling that the system is "fixed" against women and minorities after the cap swoops in from out of nowhere to rescue defendants. In light of public perceptions that the justice system is systematically biased against racial and ethnic minorities,[165] the cap non-disclosure clause is only likely to make a bad situation worse. More broadly, an understanding on the part of the general public that jury damage awards are being made in a vacuum of information about caps could suggest not only that the decision-making process in Title VII cases is unfair but that the government does not trust ordinary citizens with important information. This directly undermines the legitimacy of the jury system and citizens' trust in authority.

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[163] *See, e.g.*, Derek R. Avery & Miguel A. Quiñones, *Disentangling the Effects of Voice: The Incremental Roles of Opportunity, Behavior, and Instrumentality in Predicting Procedural Fairness*, 87 J. APPLIED PSYCHOL. 81 (2002).

[164] THIBAUT & WALKER, *supra* note TW1.

[165] *See, e.g.*, Pennsylvania Supreme Court Committee on Racial and Gender Bias in the Justice System, Final Report 304-65 (2003), *available at: http://www.courts.state.pa.us/Index/supreme/BiasCmte/FinalReport.pdf*

B. The Potential for Flawed Decision-making

Proponents of cap non-disclosure argue that knowledge of the caps would taint juror calculations about the damages. However, juror ignorance about the caps also has the potential to distort the jurors' true intentions for appropriate relief. In cases involving both state and federal employment claims, different legal regimes may govern the available awards that juries may choose. If courts are interested in determining what jurors feel is appropriate in light of these different regimes, it would be easiest simply to explain the different systems and have the jurors arrive at the appropriate award. Disclosure would alleviate the need for courts such as *Martini*[166] to reallocate damages in an effort to achieve the jury's intended award. Instead, juries could work within the permitted framework to allocate damages according to their conception of justice.[167]

Courts such as the Fourth Circuit in *Sasaki*[168] might object to giving the jurors the opportunity to game the system by, for example, overallocating damages to the uncapped state law claim. However, what does the concept of "overallocation" mean in this context? The § 1981a damage caps do not preempt the ability of states to allow much greater damages for the same underlying injury.[169] If jurors unsuspectingly allocate damages to the capped federal claim rather than the uncapped state or local claim, they have essentially been tricked into letting the federal cap dictate the scope of relief. Hiding the effect of the caps, and then failing to reallocate damages to the uncapped claims, is disrespectful not only of the jury's decision but also state law.[170] The best solution is to simply to inform the jury about the relevant damages limitations and then let the jurors allocate between claims as they deem proper.[171]

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[166] Martini v. Federal Nat. Mortgage Ass'n, 178 F.3d 1336 (D.C. Cir. 1996).

[167] One district court initially thought the "ideal solution" to the problem of awarding punitives against multiple defendants in an Americans with Disabilities Act case was to inform jurors about the overall cap and then allow the jury to assess specific damages against each defendant within the cap. Equal Employment Opportunity Comm'n v. AIC Security Investigations, Ltd., No. 92-C-7330, 1993 WL 427454, at *11 n.12 (N.D. Ill. October 21, 1993). However, the court retracted this plan after learning of the non-disclosure provision. *Id.*

[168] Sasaki v. Class, 92 F.3d 232 (4th Cir. 1996).

[169] Befort, *supra* note SB1, at 440-41.

[170] Passatino v. Johnson & Johnson Consumer Prods., 212 F.3d 493, 510 (9th Cir. 2000).

[171] If the state law claim was not contiguous with the Title VII claim but instead covered a different kind of offense, the court could strike down the damages if it felt the

C. Inefficiencies of Non-Disclosure

Requiring jurors to be ignorant of the caps imposes inefficiencies on the jurors' process for calculating damages. If jurors who are unaware of the cap know that they wish to award damages greater than the cap, but are unsure about what size their award should be, they may waste considerable time on an essentially moot decision. For example, supposing that jurors has found defendant liable in a Title VII harassment case, and are uncertain whether to award $500,000 or $1 million in punitive damages. Jurors may waste considerable time and effort in making this decision, but the outcome will be an award of $300,000 regardless.

A traditional complaint about jury service is that it has the potential to waste citizens' time: jury service takes people away from their work and other responsibilities and can consist of long periods of time spent waiting to be empanelled or questioned by attorneys.[172] The additional time spent by jurors working out a damages award that, in any event, will be struck down to the level of the cap can only exacerbate jurors' perception that the judicial system wastes their time. This inefficiency has the potential effect of frustrating the jury system's overall efficiency by providing additional incentives for citizens to evade jury service.

Generally, society desires its citizens to be fully aware of the law.[173] But the cap non-disclosure requirement promotes, indeed, mandates, citizen ignorance about the law. Although most jurors are most likely unaware of the damage caps, should jurors who do know about the caps be excluded from Title VII juries? It would seem to follow from *Sasaki* that jurors should not be informed of the caps, even by other members of the jury.[174] This poses a bit of a paradox: how could the court or attorneys discover which jurors had such knowledge and should be excluded without themselves revealing in some way that such caps exist? And, if knowledgeable jurors are thus excluded, the pool of potential Title VII jurors becomes tilted towards those jurors who are less informed about the law.

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juror were impermissibly shifting Title VII damages to the (less serious) state law violation. The *Sasaki* case might be one such example. *See Sasaki*, 92 F.3d at 237 (stating that the jury "award[ed] a significantly larger amount of damages for the 'lesser included' state conduct and injury").

[172] *See* Seidman Diamond, *supra* note SD1, at 286.

[173] Bryan v. U.S., 524 U.S. 184, 194-96 (1998) (noting the "traditional rule that ignorance of the law is no excuse").

[174] *Sasaki*, 92 F.3d at 237.

In a related vein, jurors who have some knowledge of the law may be incorrect in their understandings: for example, a jury member might believe that the cap is much lower or higher than it really is, and reveal that misinformation to the rest of the jury.[175] This could skew the jury's decision-making far more than an explanation by the judge of the relevant cap. For this reason, too, preventing the court from informing juries about the caps is problematic. In the absence of revealing the caps, there is no consistency among juries with respect to the information they possess about damage awards.

We do not suggest here that it is never appropriate to prevent some individuals from serving, or to conceal some information from the jury. It is undoubtedly true that juries should be as unbiased as possible, and jurors are therefore excluded from service for all manner of valid reasons.[176] Similarly, a host of possible data can be kept from the jury: past criminal records and unduly prejudicial material, for example. In any of these cases, one might raise the concern that keeping the jurors in ignorance has a detrimental effect on procedural justice assessments. However, in each case, concerns about procedural justice must be weighed against the countervailing justice concerns that would be raised by allowing jurors access to the information. For example, allowing jurors to see particularly grisly photos of a crime scene may taint the fairness of the trial a defendant receives; the fairness concerns in preventing the jury from seeing the photos outweighs the fairness concerns of jurors' access to information. Indeed, jurors themselves might even agree, *ex post*, that this information could have prevented them from making a fair and accurate, unbiased determination of the facts. Additionally, most of the other information that is kept from juries is done so in a fact-finding context. Here, jurors are asked not to determine the facts but to arrive at a damages award – there is no "truth" to discover, but rather, a decision to be made by the jury about the worth of the case. There is no compelling countervailing reason for this enforced ignorance that outweighs its negative procedural justice effects.

IV
CAP DISCLOSURE AND THE DEBATE ABOUT JUROR DISCRETION

The disclosure or non-disclosure of damage caps is but one star in the constellation of controversy over juror discretion in awarding damages. The propensity for juries to award staggering sums in punitive

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[175] *See* Seidman Diamond, *supra* note SD1, at 290-91 (quoting Judge William Schwarzer, *Reforming Jury Trials*, 1990 U. CHI. LEGAL F. 119, 119-46 (1990)).

[176] HANS & VIDMAR, *supra* note HV1, at 67.

or compensatory damages has spawned an entire political movement under the banner of "tort reform."[177] As jurors level punitive damages that reach into the billions,[178] legislatures and courts have begun developing methods to cabin larger verdicts. Damage caps are one straightforward way for legislatures to rein in juror awards. And the Supreme Court has undertaken scrutiny of punitive damages under the Due Process clause.[179] All of these developments – both the massive awards, as well as the efforts to review or restrain them – have generated heated political controversy and a wealth of academic analysis and debate.[180]

We do not seek to enter into this maelstrom in our limited discussion here. However, our perspective on cap disclosure does dovetail nicely with a growing consensus in the realm of damages assessment: namely, the benefits of providing more information and direction to juries in making their damages assessments.

As courts, practitioners, and academics have noted, jurors generally get precious little instruction on how to calculate compensatory and punitive damages.[181] Instructions on compensatory damages may simply be a recitation of the different categories of such damages: pain and suffering, inconvenience, emotional stress, impairment of quality of life, mental anguish, and other "nonpecuniary" losses.[182] And punitive damages instructions may simply recite the applicable standard for

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[177] *See, e.g.*, American Tort Reform Association, Bringing Justice to Judicial Hellholes, *available at:* http://www.atra.org/reports/hellholes (discussing courts and jurisdictions that can "seemingly pull million or billion dollar verdicts out of a hat").

[178] *See* Semra Mesulam, Note, *Collective Rewards and Limited Punishment: Solving the Punitive Damages Dilemma with Class*, 104 COLUM. L. REV. 1114, 1124 (2004) (noting that since 1987 at least nine punitive damages awards have reached over $1 billion).

[179] *See* State Farm Mutual Auto. Ins. Co. v. Campbell, 538 U.S. 408 (2003); BMW of North America, Inc. v. Gore, 517 U.S. 559 (1996).

[180] For a sampling of recent commentary, see Thomas B. Colby, *Beyond the Multiple Punishment Problem: Punitive Damages as Punishment for Individual, Private Wrongs*, 87 MINN. L. REV. 583 (2003); Martin H. Redish & Andrew L. Mathews, *Why Punitive Damages are Unconstitutional*, 53 EMORY L.J. 1 (2004); Jennifer K. Robbennolt, *Determining Punitive Damages: Empirical Insights and Implications for Reform*, 50 BUFF. L. REV. 103 (2002); Catherine M. Sharkey, *Punitive Damages as Societal Damages*, 113 YALE L.J. 347 (2003).

[181] *See, e.g.*, *State Farm*, 538 U.S. at 417 (noting the "imprecise manner in which punitive damages systems are administered"); GREENE & BORNSTEIN, *supra* note GB1, at 18 (finding a "significant consensus that [jury instructions about damages] are neither precise enough nor clear enough to be of real assistance to jurors"); John Gibeaut, *Punitive Precision*, ABA Journal, June 2004, at 44 (noting that jurors received "little guidance" about punitive damages in a case about bedbugs in a motel room).

[182] *See* GREENE & BORNSTEIN, *supra* note GB1, at 19.

awarding them (e.g., "willful and wanton conduct,"), and then note that the purpose of punitive damages is to punish.[183] Even if an instruction also counsels the jury to avoid "passion or prejudice," such an instruction on its own does little to provide structure to the jury's contemplation. [184] Commentators fear that the unguided discretion provided to juries allows jurors' biases and judgmental deficiencies to take over the damages deliberation process.[185]

There is voluminous debate about the extent to which jury damage awards have gone "out of control."[186] However, there is greater consensus that compensatory and punitive damages are unpredictable and variable – namely, that similar injuries do not receive the same compensation.[187] Studies into this phenomenon have noted the difficulty in translating underlying judgments about compensation and punishment into actual dollar awards. In a study of juror decision-making, Sunstein, Kahneman and Schkade surveyed jury-eligible citizens about potential damages in a personal injury case.[188] They found that there was strong agreement across demographic groups about the level of outrage and punishment to be directed at different factual scenarios.[189] However, they discovered that the jurors had real difficulty in mapping these shared value judgments onto an unbounded scale of dollars.[190] As a

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[183] *Id.*

[184] *State Farm*, 538 U.S. at 418.

[185] *See* GREENE & BORNSTEIN, *supra* note GB1, at 19 (citing Thomas M. Melsheimer & Steven H. Stodghill, *Due Process and Punitive Damages: Providing Meaningful Guidance to the Jury*, 47 SMU L. REV. 329 (1994)).

[186] *Compare, e.g.*, Pacific Mut. Life Ins. Co. v. Haslip, 499 U.S. 1, 18 (1991) ("We note once again our concern about punitive damages that 'run wild.'") *with* Dennis J. Devine *et al*., *Jury Decision Making: 45 Years of Empirical Research on Deliberating Groups*, 7 PSYCHOL., PUB. POL. & L. 622, 703 (2001) ("On the whole . . . the typical civil jury award is not extremely large . . . and its amount has not changed drastically over the years . . . .").

[187] *See, e.g.*, Joni Hersch & W. Kip Viscusi, *Punitive Damages: How Judges and Juries Perform*, 33 J. LEGAL STUD. 1, 2-3 (2004); Jonathan M. Karpoff & John R. Lott, Jr., *On the Determinants and Importance of Punitive Damages Awards*, 42 J.L. & ECON. 527, 540-45 (1999); David W. Leebron, *Final Moments: Damages for Pain and Suffering Prior to Death*, 64 N.Y.U. L. Rev. 256, 259 (1989) (arguing that tort awards for pain and suffering "vary significantly and that neither the specific facts of the case nor differing theoretical views on the functions of the awards can explain such variation"); Saks et al., *supra* note MS1, at 244 (noting the problem of "'horizontal inequity,' that is, differing awards for apparently similar injuries").

[188] *See* Cass R. Sunstein, Daniel Kahneman & David Schkade, *Assessing Punitive Damages (With Notes on Cognition and Valuation in Law)*, 107 YALE L.J. 2071, 2146 (1998).

[189] *Id.* at 2143.

[190] *Id.* at 2074, 2078; *see also* Oscar G. Chase, *Helping Jurors Determine Pain and Suffering Awards*, 23 HOFSTRA L. REV. 763, 765 (1995) (discussing how jurors are

result, they found "severe unpredictability and highly erratic outcomes" when it came to the dollar awards determined by participants.[191] The study showed that participants were susceptible to influence by available anchors, any comparison cases that had been provided, or the limited context that had been provided in some cases.[192] Jurors were searching for some kind of framing device and thus relied too heavily on whatever context had been provided by the materials.[193]

Commentators have begun to coalesce around the notion that jurors need more context and structure to their deliberations about compensatory and punitive awards.[194] Juries need more information, the thinking goes, in order to correct place their awards within a predictable and fair societal range. A variety of processes could be implemented in order to provide more context. More specific jury instructions could provide juries with more concrete factors or examples to assess when making their determination.[195] Caps could also provide context: the cap tells jurors that the legislature believes damages should rise no further than the amount of the cap. A more refined system of context would be a framework of damage scaling or scheduling: the jury would be given a series of characteristics about the case to evaluate, or a set of examples of other cases to compare to their own.[196] The jurors would thus be asked to place their assessments within a framework of societally-acceptable damage awards. These frameworks could be constructed along the lines of the federal sentencing guidelines: jurors would find certain facts about the case and then correlate those facts to the guidelines to determine the damages.[197] Providing more context to the

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expected to "monetize" pain and suffering even though there is no market for pain and suffering and thereby no market price and no real standard to determine the proper monetary amount).

[191] *Id.* at 2103.

[192] *Id.* at 2145.

[193] *Id.* at 2106.

[194] *See, e.g.*, Melsheimer & Stodghill, *supra* note MS2, at 330; Sunstein, Kahneman & Schkade, *supra* note SKS1, at 2078-79; Gibeaut, *supra* note JG1, at 46.

[195] *See* Gibeaut, *supra* note JG1, at 48-49.

[196] *See* GREENE & BORNSTEIN, *supra* note GB1, at 181-83; David Baldus, John C. MacQueen & George Woodworth, *Improving Judicial Oversight of Jury Damages Assessments: A Proposal for the Comparative Additur/Remittitur Review of Awards for Nonpecuniary Harms and Punitive Damages*, 80 IOWA L. REV. 1109, 1175-79 (1995); Randall R. Bovberg, Frank A. Sloan & James F. Blumstein, *Valuing Life and Limb in Tort: Scheduling "Pain and Suffering*," 83 NW. U. L. REV. 908, 909 (1989); Saks et al., *supra* note MS1, at 246.

[197] *See* Sunstein, Kahneman & Schkade, supra note SKS1, at 2122. Sunstein, Kahneman and Schkade also suggest that judges may be better equipped to apply the jurors' finding to a schedule. *Id.*

jury's findings about pain, outrage, and punishment would enable jurors to do their jobs more knowledgably and consistently.

Disclosure of the damage caps could thus be part of an overall contextual framework for jurors in making compensatory and punitive awards. Taking the caps themselves as a given, disclosure of the caps would provide jurors with a context for their decisions. Ideally, Congress would give the caps themselves further context for the jurors to contemplate. For example, did Congress intend the caps as the maximum that it believed any jury should award?[198] If so, jurors could be instructed that the purpose of these caps is to establish the maximum amount of damages that can be awarded; thus, these damages represent the most extreme end of the spectrum. In this way, the court would acknowledge the effect of response scales on the jury and self-consciously attempt to create such a scale for the jury to utilize. If this scale were combined with instructions detailing the factors that should go into determinations for compensatory and punitive damages, jurors could be far more reasoned and systematic in their damage awards.[199]

It is perhaps more likely, however, that Congress did not intend $300,000 as the maximum amount of damages that should reasonably be awarded in all cases.[200] Instead, Congress might have recognized that a perfectly rational jury should, in some cases, award more than the cap, but might have feared that actual juries would do so far more often than would be proper.[201] Thus, the cap would be based on Congress's determination that juror bias in inflating damages required a cap that cut off some higher awards that would be justified. Alternatively, Congress might have created the caps not out of fear of juror inflation, but instead as part of a political compromise. Under this reading of the statute, the caps do not reflect an attempt by Congress to counteract juror bias, but instead reflect a number that was acceptable to members of Congress.[202] Under either of these scenarios, a scale for which $300,000 was the

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[198] *See* Hennessy v. Penril Datcomm Networks, Inc., 69 F.3d 1344, 1355 (7th Cir. 1995) ("It would seem logical, therefore, that the maximum permissible award [under the § 1981a damage caps] . . . should be reserved for egregious cases.").

[199] One problem with setting up a "scale" in the context of 42 U.S.C. § 1981a(b) is that the scale would have to combine both compensatory and punitive damages.

[200] *See* Luciano v. Olsten Corp., 110 F.3d 210, 221 (2d Cir. 1997) ("The statutory limitation [in § 1981a(b)] is not an endpoint of a scale according to which judges might recalibrate jury awards.").

[201] For example, Congress could theoretically have determined that juries should award more than $300,000 in 15 percent of cases, but would actually award more than $300,000 in 40 percent of cases.

[202] For example, Congress could have determined that it would be reasonable for juries to award damages in excess of $300,000 in 25 percent of cases, but enacted the cap anyway because the bill would not have passed otherwise.

"maximum" would not reflect Congressional intent. Instead, courts should inform the jurors of the cap, but also inform jurors of the purpose behind the cap.[203] If the cap is a response to juror bias, the court should inform the jury that Congress has enacted statutory caps in response to a consistent tendency of the jury to overestimate the amount of punitive and non-economic damages. A straightforward acknowledgment of this tendency could lead jurors to recognize it and be more thoughtful in addressing it. If the caps result from a political compromise, the jury could be informed that the statutory maximum is *not* meant as an endpoint on a scale. By informing a jury that they have a damage cap, but that the cap is *not* reflective of any value judgment about juries by Congress, it might deflate any scaling effects that the number may have. It could also be that the caps were enacted based primarily on a fear that higher awards would potentially cripple employers economically.[204] If this fear were the driving force behind the caps, jurors should be informed of this policy judgment along with the caps. Informed jurors would then be more sensitive to potential economic harm and might adjust their verdicts based on this Congressional policy.

Of course, the legislative history does not tell us exactly why Congress enacted the current caps. But Congress could make clear for the future, either in a statutory statement of policy or even in proposed jury instructions, exactly what policy concerns the caps reflect. Instead of presuming that jurors cannot handle the truth, Congress should use the caps as an opportunity to direct the jury towards a proper level of damages. Congress might even conclude that because a more informed jury is better able to handle its responsibilities, it could eventually loosen the cap.

Proponents of non-disclosure might object that an attempt to provide a tighter framework for compensatory and punitive awards might impair the "integrity" of the jury's damages determination.[205]

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[203] Seidman Diamond notes that when juries are informed of reasons behind rules, they do remarkably better in understanding and following them. Seidman Diamond, *supra* note SD1, at 291. Seidman Diamond and Jonathan Casper conducted research in which jurors were given instructions about trebling of damages in antitrust price-fixing cases. They found that jurors who were told reasons for the provision gave awards nearly identical to the awards that a jury unaware of trebling gave, while jurors who were told just about the provision or were given misinformation did alter the award given. Shari Seidman Diamond & Jonathan D. Casper, *Blindfolding the Jury to Verdict Consequences: Damages, Experts, and the Civil Jury*, 26 LAW & SOCIETY REV. 513 (1992).

[204] *See Luciano*, 110 F.3d at 221 ("[T]he purpose of the cap is to deter frivolous lawsuits and protect employers from financial ruin as a result of unusually large awards.").

[205] *See* Kang, *supra* note MK1, at 491; 137 Cong. Rec. S15484 (daily ed. Oct. 30,

While the notion of the "integrity" or "purity" of the jury's verdict is an appealing one, it has several flaws. First, while non-disclosure of the cap is meant to respect the integrity of the jury's determination, the cap itself is a direct attack on that integrity. The cap represents a determination that the jury cannot be trusted with unfettered discretion to award damages. As one commentator, a proponent of non-disclosure, noted: "Statutory caps reflect legislative conclusions that juries are ill-prepared to make the inexact estimations inherent in the assessment of noneconomic damages."[206] It is hypocritical to be touting the importance of the jury's unadulterated verdict right before that verdict is chopped down to a pre-set statutory limit.

Second, not all information taints a jury's verdict. Obviously, jurors need information in order to determine damages, and the relevance or propriety of different types of information to that determination is often hotly contested. The damage caps are arguably irrelevant to a determination of the proper level of damages, since damages are generally determined based on facts related to the case. However, the caps do represent a Congressional determination about the maximum level of damages for which any employer is potentially liable. Moreover, the caps themselves reflect a Congressional intent to reduce potential liability for small companies, and to provide a gradation based on the number of employees. To this extent, the caps are plainly quite relevant, as they reflect Congressional policy choices. Awareness of these choices could be useful to the jury in making its damages determination.

V
CONCLUSION

Congress deployed the damage cap non-disclosure provision in the 1991 Civil Rights Act with little overt consideration of its ramifications. In their thumbnail analyses of this provision, courts have come to widely divergent conclusions about its purpose and effects. We conclude that juror decision-making processes would likely be affected by disclosure of the cap: most probably, smaller awards would rise and larger awards would fall. However, a focus solely on these effects ignores the larger impact that non-disclosure has on the judicial system itself. In light of research about the importance of procedural justice, we argue that concealing the cap has the potential to undermine the integrity

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1991) (noting that no "upward or downward" pressure should be exerted on the juror's verdict).

[206] Kang, *supra* note MK1, at 492.

and legitimacy of the jury system.

The best answer to the damage cap disclosure dilemma is more complete knowledge of the caps and their context by juries. Namely, rather than expressly preventing courts from disclosing the existence of the damage caps, Congress should mandate disclosure in the context of fuller instructions about damage determinations. Although jurors are indeed likely to be influenced by exposure to the cap, this result stems in part from the dearth of any other relevant or guiding information provided to jurors about calculating damages. Disclosure and additional contextual background will lead to more rational damage determinations. And perhaps more importantly, it will help to protect and promote perceptions that our justice system is legitimate, and fair.