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THE NEW CALCULUS OF PUNITIVE DAMAGES FOR EMPLOYMENT DISCRIMINATION CASES

SANDRA SPERINO*

I. Introduction

To determine whether a punitive damages award is constitutionally excessive, courts are required, among other things, to consider the ratio of compensatory to punitive damages.¹ No longer is the total sum of remedies the only relevant calculation in determining whether an award is excessive. The numbers the judge decides to use in the ratio comparison also become important, in many cases determining whether excessiveness review is even warranted.

Owing in part to the complexities of the employment discrimination remedies regime, courts make numerous errors when undertaking the required comparison in the employment discrimination context. When conducting the excessiveness calculus, some judges fail to value back pay and front pay, resulting in an exaggeration of the difference between the harm to the plaintiff and the awarded punitive damages.² Likewise, judges often ignore the value of nonmonetary equitable relief awarded to the plaintiff.³ Additionally, little consideration has yet been given to how the division of damages across legal theories or causes of action affects the excessiveness inquiry.⁴

While some of these problems result from courts' failures to properly reconcile the specialized remedies regime of Title VII⁵ with the excessiveness inquiry, others point to more fundamental issues with the constitutional inquiry itself. Hinging that inquiry on numbers that can easily be manipulated leads to serious questions regarding whether the inquiry actually and appropriately

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1. See *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 580-81 (1996); see also *Honda Motor Co. v. Oberg*, 512 U.S. 415, 420-21 (1994) (emphasizing that punitive damages implicate procedural due process); *Pac. Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 12 (1991) (stating that “[t]he constitutional status of punitive damages . . . is not an issue that is new to this Court or unanticipated by it,” but that previously raised challenges “have been rejected or deferred”).

2. See discussion *infra* Parts III.A & IV.A.

3. See discussion *infra* Parts III.A & IV.B.

4. See discussion *infra* Parts III.B-C & IV.D.

5. 42 U.S.C. §§ 2000e to 2000e-17 (2006) (original version at Civil Rights Act of 1964, Pub. L. No. 88-352, §§ 701-716, 78 Stat. 241, 253-66).

tests excessiveness. This article describes the analytic red herrings that may confuse courts conducting an excessiveness review, uses these missteps to illustrate fundamental flaws with excessiveness review, and suggests ways to minimize mistakes.

Part II of this article provides an overview of the Supreme Court's jurisprudence on the constitutional review of punitive damages and describes relevant aspects of the Title VII remedies regime. Part III describes some of the errors courts have made and may make when applying punitive damages review to employment discrimination awards. Part IV explores ways to avoid these mathematical and conceptual missteps and discusses remaining ambiguities in the Supreme Court's test for evaluating punitive damages. This article concludes in Part V.

II. Background

Before reaching the heart of the discussion, it is important to provide background information on both the intricacies of employment discrimination remedies and the Supreme Court's recent jurisprudence related to the constitutionality of punitive damages awards. The conceptual problems described in this article arise where these two areas meet.

A. Punitive Damages and the Gore Guideposts

In the early 1990s, the Supreme Court began using procedural and substantive due process to analyze the size of punitive damages awards.⁶ The

6. *Pacific Mutual Life Insurance Co. v. Haslip*, 499 U.S. 1 (1991), is often cited as one of the earliest cases in this line of jurisprudence. The Supreme Court has since addressed the issue with some regularity. See *Philip Morris USA v. Williams*, 549 U.S. 346, 353 (2007); *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 416 (2003); *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 568 (1996); *Honda Motor Co. v. Oberg*, 512 U.S. 415, 420-21 (1994). The development of this line of jurisprudence, as well as the history and theory of punitive damages generally, has been well documented in other literature and need not be fully recounted in this article. See, e.g., Michael L. Rustad, *Happy No More: Federalism Derailed by the Court That Would Be King of Punitive Damages*, 64 MD. L. REV. 461 (2005) (discussing the development of constitutional due process standards and arguing that the Court's recent cases have upset the traditional balances of federalism; also providing a history of the evolution of punitive damages). See generally Michael B. Kelly, *Do Punitive Damages Compensate Society?*, 41 SAN DIEGO L. REV. 1429 (2004); David G. Owen, *A Punitive Damages Overview: Functions, Problems and Reform*, 39 VILL. L. REV. 363 (1994); A. Mitchell Polinsky & Steven Shavell, *Punitive Damages: An Economic Analysis*, 111 HARV. L. REV. 869 (1998); Anthony J. Sebok, *Punitive Damages: From Myth to Theory*, 92 IOWA L. REV. 957 (2007); Anthony J. Sebok, *What Did Punitive Damages Do? Why Misunderstanding the History of Punitive Damages Matters Today*, 78 CHI.-KENT L. REV. 163 (2003); Catherine M. Sharkey, *Punitive Damages as Societal Damages*, 113 YALE L.J. 347 (2003).

Supreme Court has held that the Fourteenth Amendment's Due Process Clause "prohibits the imposition of grossly excessive or arbitrary punishments on a tortfeasor."⁷ The Court has directed that reviewing courts consider the following factors in determining whether an award of punitive damages is an excessive or arbitrary punishment:

- (1) the degree of reprehensibility of the defendant's misconduct;
- (2) the disparity between the actual or potential harm suffered by the plaintiff and the punitive damages award; and
- (3) the difference between the punitive damages awarded by the jury and the civil penalties authorized or imposed in comparable cases.⁸

These three factors were first enunciated in the case of *BMW of North America, Inc. v. Gore*⁹ and are known as the *Gore* guideposts. The second *Gore* guidepost, which requires courts to consider the disparity between the actual or potential harm suffered by the plaintiff and the punitive damages award, is important for the instant discussion.

In considering the second factor the Supreme Court has indicated that courts may use a ratio to determine excessiveness, but are also free to reject a strict ratio approach and use wider discretion in making the determination.¹⁰ While first providing that "we have been reluctant to identify concrete constitutional limits on the ratio between harm, or potential harm, to the plaintiff and the punitive damages award,"¹¹ the Court has observed that "few awards exceeding a single-digit ratio between punitive and compensatory damages, to a significant degree, will satisfy due process."¹² The Court also has indicated that punitive damages that are more than four times the amount of compensatory damages are close to the line of excessiveness.¹³

Higher ratios might comport with due process when "a particularly egregious act has resulted in only a small amount of economic damages[,] . . . the injury is hard to detect[,] or the monetary value of noneconomic harm might have been difficult to determine."¹⁴ Conversely, in cases with "substantial" compensatory damages, a lower ratio of punitive damages to compensatory damages might "reach the outermost limit of the due process

7. *State Farm*, 538 U.S. at 416.

8. *Id.* at 418.

9. 517 U.S. at 574-75.

10. *See id.* at 582-83.

11. *State Farm*, 538 U.S. at 424. The Court has recently clarified that the harm to be considered in the second factor is the harm to the plaintiff and not to others who may have been harmed or potentially harmed. *See Philip Morris*, 549 U.S. at 354.

12. *State Farm*, 538 U.S. at 425.

13. *Id.*

14. *Id.* (citations and internal quotation marks omitted) (quoting *Gore*, 517 U.S. at 582).

guarantee.”¹⁵ Finally, the Court has noted that the amount of punitive damages awarded must be “both reasonable and proportionate to the amount of harm to the plaintiff and to the general damages recovered.”¹⁶

Shortly after *Gore*, courts began citing and applying the three-factor framework in employment discrimination cases.¹⁷ Importantly, the Supreme Court cases discussing review of excessive punitive damages are not employment discrimination cases. Rather, the seminal cases featured fraud, deceit, and intentional infliction of emotional distress claims.¹⁸ Nevertheless, the *Gore* guideposts appear to apply in any type of case where punitive damages are awarded, including those involving statutory claims for employment discrimination.

In employment discrimination cases, the courts have analyzed the second *Gore* guidepost in a variety of ways, at times using the ratio as merely a guidepost,¹⁹ and in other cases appearing to construe the ratio as requiring strict adherence, unless certain court-stated exceptions are present.²⁰ This disparity even exists among cases where the punitive damages awarded are similar.²¹

15. *Id.*

16. *Id.* at 426.

17. *See, e.g.*, *Kimzey v. Wal-Mart Stores, Inc.*, 107 F.3d 568, 576 (8th Cir. 1997); *Deters v. Equifax Credit Info. Servs., Inc.*, 981 F. Supp. 1381, 1389-91 (D. Kan. 1997).

18. *See Philip Morris USA v. Williams*, 549 U.S. 346, 349 (2007) (fraud and deceit claims by a widow against a cigarette manufacturer); *State Farm*, 538 U.S. at 414 (fraud and intentional infliction of emotional distress claims against an insurance company); *Gore*, 517 U.S. at 563 (fraud claim against a car manufacturer).

19. *See, e.g.*, *Abner v. Kan. City S. R.R. Co.*, 513 F.3d 154, 164 (5th Cir. 2008) (“[T]he combination of the statutory cap and high threshold of culpability for any award confines the amount of the award to a level tolerated by due process. Given that Congress has effectively set the tolerable proportion, the three-factor *Gore* analysis is relevant only if the statutory cap itself offends due process. It does not and, as we have found in punitive damages cases with accompanying nominal damages, a ratio-based inquiry becomes irrelevant.” (citing *Williams v. Kaufman County*, 352 F.3d 994, 1016 (10th Cir. 2003))).

20. *See, e.g.*, *Hines v. Grand Casino of La., L.L.C.—Tunica-Biloxi Indians*, 358 F. Supp. 2d 533, 552-53 (W.D. La. 2005) (reducing punitive damages to fit within the relevant statutory cap, then reducing punitive damages even further using a *Gore* analysis).

21. *Compare Abner*, 513 F.3d at 156, 165 (declining to reduce a punitive damages award of \$125,000 per plaintiff when no compensatory damages were awarded), *with Hines*, 358 F. Supp. 2d at 551-53 (reducing a \$200,000 punitive damages award to \$30,000 after reducing compensatory damages to \$20,000); and *compare EEOC v. Fed. Express Corp.*, 513 F.3d 360, 363, 376-78 (4th Cir. 2008) (upholding an \$8000 compensatory award and a \$100,000 punitive damages award under the Americans with Disabilities Act), *with Laymon v. Lobby House, Inc.*, 613 F. Supp. 2d 504, 512-14, 518 (D. Del. 2009) (reducing a \$100,000 punitive damages award to \$25,000 where the jury awarded \$1500 in compensatory damages on retaliation and harassment claims).

This article demonstrates the ease with which the second factor in the *Gore* framework can be altered, either intentionally or inadvertently, to make a case appear more or less susceptible to excessiveness review. By showing how simple conceptual and mathematical errors occur when courts apply the ratio component of the *Gore* framework in the employment discrimination context, this article illustrates fundamental flaws within the *Gore* framework, while questioning whether the framework truly addresses constitutional excessiveness.

B. The Employment Discrimination Remedies Regime

An understanding of how the federal employment remedies regime operates, both alone and together with protections provided under other statutory and common law causes of action for employment discrimination, is foundational for the following discussion. The Title VII²² remedies regime differs from common law tort regimes in three respects significant to this discussion: (1) the definition and importance of equitable relief, (2) the definition of compensatory damages, and (3) the operation of damages caps.

In 1972, Congress amended a remedies provision of Title VII, with the amended provision indicating that courts could “order such affirmative action as may be appropriate, which may include, but is not limited to, reinstatement or hiring of employees, with or without back pay . . . , or any other equitable relief as the court deems appropriate.”²³ Although back pay is not always considered an equitable remedy in other contexts,²⁴ some courts have reasoned that back pay under Title VII is equitable in nature because the wording of the statute includes back pay as part of the equitable remedy of reinstatement.²⁵

22. This article will use Title VII as the primary vehicle for discussing damages issues; however, the damages regime for the Americans with Disabilities Act (ADA) is similar in many respects that are relevant to this article and may lead to the same issues. *See* 42 U.S.C. § 1981a(a)(2), (b)(3) (2006) (establishing the damages caps applicable in both Title VII and ADA cases). The ADEA does not provide for compensatory and punitive damages in discrimination cases and does not contain the damages caps found in Title VII; however, the issues raised in the article may apply in the ADEA retaliation context, where it is arguable that punitive damages may be allowed. *See* Carol Abdelmehseh & Deanne M. DiBlasi, Note, *Why Punitive Damages Should Be Awarded for Retaliatory Discharge Under the Fair Labor Standards Act*, 21 HOFSTRA LAB. & EMP. L.J. 715, 748 (2004) (discussing the availability of punitive damages in ADEA retaliation cases). Likewise, courts may face questions regarding how to make appropriate comparisons when the plaintiff prevails on an ADEA discrimination claim and either an ADA or Title VII claim and is awarded punitive damages under the latter statutes.

23. 42 U.S.C. § 2000e-5(g) (2006) (originally enacted as Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, sec. 4, § 706, 86 Stat. 103, 107).

24. *See, e.g.,* *Chauffeurs, Teamsters & Helpers, Local No. 391 v. Terry*, 494 U.S. 558, 572-73 (1990) (indicating that back pay in duty of fair representation cases is legal in nature).

25. *See* 42 U.S.C. § 2000e-5(g), *cited in* *Great-W. Life & Annuity Ins. Co. v. Knudson*, 534

In an early case interpreting Title VII, the Supreme Court indicated that back-pay relief serves an important role in deterring unlawful practices.²⁶ Because of back pay's central importance to the remedies regime, courts presumptively grant back pay and may only deny it "for reasons which, if applied generally, would not frustrate the central statutory purposes of eradicating discrimination throughout the economy and making persons whole for injuries suffered through past discrimination."²⁷

The remedy of front pay is also considered to be tied to the equitable remedy of reinstatement.²⁸ Several cases reiterate the doctrine that reinstatement should be presumptively granted because it "offers the most likely means of making a plaintiff whole by allowing her to continue her career as if the discrimination had not occurred."²⁹ In practice, however, reinstatement often is not feasible, and when this happens, courts may grant front pay in lieu of reinstatement.³⁰

Despite the identification of both front pay and back pay with the equitable remedy of reinstatement, the mechanics of awarding back pay and front pay

U.S. 204, 230 n.2 (2002) (Ginsburg, J., dissenting) (noting that one reason back pay under Title VII is considered an equitable remedy is that it is part of the remedy of reinstatement); *see also* Gansert v. Colorado, 348 F. Supp. 2d 1215, 1230 (D. Colo. 2004) (discussing the equitable nature of back pay under Title VII); Alexander v. Chattahoochee Valley Cmty. Coll., 303 F. Supp. 2d 1289, 1291 (M.D. Ala. 2004) (same). The author recognizes that there may be varying accounts of why back pay is considered equitable under Title VII and good arguments that this remedy should not be considered equitable. *See Great-W.*, 534 U.S. at 218 n.4 (majority opinion) (contesting the breadth of Justice Ginsburg's conclusion regarding the equitable nature of the Title VII back-pay remedy); Waldrop v. S. Co. Servs., 24 F.3d 152, 158 (11th Cir. 1994) (stating that "it has long been the general rule that back wages are legal relief in the nature of compensatory damages"); *see also* 2 DAN B. DOBBS, LAW OF REMEDIES § 6.10(5), at 227 & n.13 (2d ed. 1993); Jarod S. Gonzalez, *SOX, Statutory Interpretation, and the Seventh Amendment: Sarbanes-Oxley Act Whistleblower Claims and Jury Trials*, 9 U. PA. J. LAB. & EMP. L. 25, 62-63 (2006) (opining that back pay is best viewed as a legal remedy); Colleen P. Murphy, *Misclassifying Monetary Restitution*, 55 SMU L. REV. 1577, 1633 (2002) ("The backpay remedy is more appropriately characterized as damages for the plaintiff's losses and thus legal relief."). Resolution of these competing views is not necessary to the instant discussion.

26. *See* Albemarle Paper Co. v. Moody, 422 U.S. 405, 417-18 (1975).

27. *Id.* at 421. The court added in a footnote, "It is necessary, therefore, that if a district court does decline to award backpay, it carefully articulate its reasons." *Id.* at 421 n.14.

28. *See, e.g.*, Pollard v. E.I. du Pont de Nemours & Co., 532 U.S. 843, 849-50 (2001) (discussing front pay in the Title VII context).

29. Farley v. Nationwide Mut. Ins. Co., 197 F.3d 1322, 1338 (11th Cir. 1999); *see also* Rweyemamu v. Cote, 520 F.3d 198, 205 (2d Cir. 2008) (noting that "the presumptively appropriate remedy in a Title VII action is reinstatement").

30. *See, e.g.*, Mota v. Univ. of Tex. Houston Health Sci. Ctr., 261 F.3d 512, 526-27 (5th Cir. 2001) (finding that reinstatement was not feasible because of the hostile relationship between plaintiff and defendant); *see also* Pollard, 532 U.S. at 850.

vary across courts. Some courts submit the questions of back pay and/or front pay to the jury,³¹ while others reserve one or both of these issues for the trial judge.³²

In 1991, Congress amended Title VII to allow for jury trials and to provide for compensatory and punitive damages.³³ A jury trial is only available if a plaintiff is seeking compensatory or punitive damages under the statute.³⁴ Compensatory damages under Title VII are defined differently than they are in a typical tort context. Title VII “compensatory damages” include “future pecuniary losses, emotional pain, suffering, inconvenience, mental anguish, loss of enjoyment of life, and other nonpecuniary losses,”³⁵ but exclude “backpay, interest on backpay, or any other type of relief authorized under section 706(g) of the Civil Rights Act of 1964.”³⁶ Other types of relief allowed under section 706(g) include requiring the employer to provide anti-discrimination training, prohibiting the continuation of certain discriminatory practices, requiring new hiring practices to remedy past discrimination, and removing damaging information from an employee’s file.³⁷

The 1991 amendments to Title VII also included a schedule of damages caps.³⁸ Unlike many tort damages caps, however, the Title VII caps limit the total *combined amount* of compensatory and punitive damages a plaintiff may recover.³⁹ Moreover, Title VII pegs the size of cap in a given case to the

31. *See, e.g.*, *Quinby v. WestLB AG*, No. 04 Civ. 7406(WHP), 2008 WL 3826695, at *6 (S.D.N.Y. Aug. 15, 2008) (allowing the question of front pay to be submitted to the jury upon plaintiff’s request, pursuant to state law); *see also Taylor v. Bigelow Mgmt., Inc.*, 242 F. App’x 178, 180 (5th Cir. 2007) (stating that the jury awarded back pay); *Martini v. Fed. Nat’l Mortgage Ass’n*, 178 F.3d 1336, 1349 (D.C. Cir. 1999) (indicating that the jury determined the amount of back pay); *cf. Marra v. Phila. Hous. Auth.*, 497 F.3d 286, 313-14 (3d Cir. 2007) (noting that the trial judge allowed the back-pay claim to be submitted to the jury but later considered the jury verdict to be advisory).

32. *See, e.g.*, *Norris v. N.Y. City Coll. of Tech.*, No. 07-CV-853, 2009 WL 82556, at *9-10 (E.D.N.Y. Jan. 14, 2009) (reserving issues of front pay and back pay for the trial judge); *Tomao v. Abbott Labs., Inc.*, No. 04 C 3470, 2007 WL 2225905, at *27 (N.D. Ill. July 31, 2007) (stating that the court has discretion to award front pay); *see also Lutz v. Glendale Union High Sch.*, 403 F.3d 1061, 1069 (9th Cir. 2005) (holding that the issue of back pay should be tried to the court); *EEOC v. HBE Corp.*, 135 F.3d 543, 550 (8th Cir. 1998) (indicating that the trial judge issued the front-pay award).

33. *See* 42 U.S.C. § 1981a (2006) (originally enacted as Civil Rights Act of 1991, Pub. L. No. 102-166, § 102, 105 Stat. 1071, 1072-73); *see also Corti v. Storage Tech. Corp.*, 304 F.3d 336, 341 n.9, 342-43 (4th Cir. 2002).

34. *See* 42 U.S.C. § 1981a(c).

35. *Id.* § 1981a(b)(3).

36. *Id.* § 1981a(b)(2) (cross-referencing 42 U.S.C. § 2000e-5(g) (2006)).

37. *See* 42 U.S.C. § 2000e-5(g)(1).

38. *See* 42 U.S.C. § 1981a(b)(3).

39. *See id.*

number of employees employed by an employer⁴⁰ and prohibits judges from informing jurors of the damages cap.⁴¹

As discussed below, the particularities of Title VII remedies create interesting dilemmas for courts considering whether a reduction in punitive damages is warranted.⁴² The fact that Title VII does not provide the sole remedy for its protected classes of discrimination victims makes this issue even more complex. States have also enacted statutes that prohibit discrimination in the workplace.⁴³ The state remedies regimes for employment discrimination vary widely. Some state statutes do not provide for punitive

40. *See id.* (limiting a defendant's compensatory and punitive damages exposure to \$50,000 if the employer has 15 to 100 employees; to \$100,000 if the employer has 101 to 200 employees; \$200,000 if the employer has 201 to 500 employees; and \$300,000 if the employer has more than 500 employees).

41. *Id.* § 1981a(c)(2).

42. *See* discussion *infra* Part III.

43. *See* ALA. CODE §§ 25-1-21 to -28 (LexisNexis 2007); ALASKA STAT. § 18.80.220 (2008); ARIZ. REV. STAT. ANN. §§ 41-1463 to -1465 (2004); ARK. CODE ANN. § 16-123-107(a)(1) (2006); CAL. GOV'T CODE §§ 12920-12926 (West 2005); COLO. REV. STAT. § 24-34-402 (2009); CONN. GEN. STAT. ANN. § 46a-60 (West 2009); DEL. CODE ANN. tit. 19, § 711 (2005); FLA. STAT. ANN. § 760.10 (West 2010); GA. CODE ANN. §§ 45-19-29 to -35 (West 2003); HAW. REV. STAT. ANN. §§ 378-2 to -3 (West 2007 & Supp. 2009); IDAHO CODE ANN. §§ 67-5909 to -5910 (2006); 775 ILL. COMP. STAT. ANN. 5/2-102 to -105 (West 2001 & Supp. 2010); IND. CODE ANN. §§ 22-9-1-3, -2-2, -5-19 (LexisNexis 1997 & Supp. 2009); IOWA CODE ANN. § 216.6 (West 2009); KAN. STAT. ANN. § 44-1009 (2000); KY. REV. STAT. ANN. §§ 344.040-.050 (West 2006); LA. REV. STAT. ANN. §§ 23:312, :323, :332, :342, :352, :368 (2010); ME. REV. STAT. ANN. tit. 5, §§ 4572-4573 (2002 & Supp. 2009); MD. ANN. CODE, art. 49B, §§ 14, 16 (West 2002) (repealed 2009); MASS. ANN. LAWS ch. 151B, § 4 (LexisNexis 2008); MICH. COMP. LAWS ANN. §§ 37.2102, .2202-.2206 (West 2001 & Supp. 2010); MINN. STAT. ANN. § 363A.08 (West 2004); MISS. CODE ANN. §§ 25-9-103, -149 (West 2003); MO. ANN. STAT. §§ 213.010, .055 (West 2004); MONT. CODE ANN. §§ 49-2-101, -303 (2009); NEB. REV. STAT. §§ 48-1101 to -1115 (2004); NEV. REV. STAT. ANN. §§ 613.330-.390 (West 2000 & Supp. 2009); N.H. REV. STAT. ANN. §§ 354-A:1 to :7 (LexisNexis 2008); N.J. STAT. ANN. §§ 10:5-4, -12 (West 2002 & Supp. 2010); N.M. STAT. ANN. §§ 28-1-7, -9 (West 2003 & Supp. 2009); N.Y. EXEC. LAW §§ 291, 296 (McKinney 2010); N.C. GEN. STAT. ANN. §§ 143-422.1 to .3 (West 2000); N.D. CENT. CODE §§ 14-02.4-03 to .4-09 (2009); OHIO REV. CODE ANN. § 4112.02 (LexisNexis 2007 & Supp. 2009); 25 OKLA STAT. §§ 1302-1308 (2001); OR. REV. STAT. §§ 659A.006, .009, .030 (2009); 43 PA. CONS. STAT. ANN. § 955 (West 2009); R.I. GEN. LAWS ANN. §§ 28-5-1 to -7 (West 2006 & Supp. 2010); S.C. CODE ANN. §§ 1-13-10 to -80 (2005); S.D. CODIFIED LAWS § 20-13-10 (2004); TENN. CODE ANN. §§ 4-21-401 to -408 (2005); TEX. LAB. CODE ANN. §§ 21.051-.055 (Vernon 2006); UTAH CODE ANN. §§ 34A-5-101 to -106 (West 2004 & Supp. 2009); VT. STAT. ANN. tit. 21, § 495 (2003 & Supp. 2009); VA. CODE ANN. § 2.2-2639 (2008); WASH. REV. CODE ANN. §§ 49.60.040, .180 (West 2008 & Supp. 2010); W. VA. CODE ANN. §§ 5-11-3, -9 (LexisNexis 2006); WIS. STAT. ANN. §§ 111.321-.322 (West 2002 & Supp. 2009); WYO. STAT. ANN. §§ 27-9-101 to -105 (2009).

damages at all,⁴⁴ while other statutes cap punitive damages.⁴⁵ Still other regimes allow for uncapped punitive damages.⁴⁶

In addition to state employment discrimination statutes, 42 U.S.C. § 1981 provides a federal remedy for race discrimination but does not contain the damages caps found in Title VII.⁴⁷ As discussed throughout this article, the overlapping employment discrimination remedies regimes and the complexity of the Title VII remedies provisions create analytical problems for courts considering constitutional excessiveness under the *Gore* framework.

III. Faulty Math Enters the Punitive Damages Calculus

A. The Failure to Factor In Back Pay, Front Pay, and Other Remedies

The second *Gore* guidepost requires courts to consider the ratio of compensatory to punitive damages.⁴⁸ In making this inquiry, some courts mishandle back pay, front pay, and other remedies in two important ways. First, some courts exclude the amounts of front pay and back pay when calculating compensatory damages.⁴⁹ Second, some courts fail to factor in the

44. See, e.g., ARIZ. REV. STAT. ANN. §§ 23-1501(3)(b), 41-1481 (2004) (not including punitive damages among the remedies available for employment discrimination claims); see also *Beach v. Ingram & Assocs., Inc.*, 927 F. Supp. 255, 260 (M.D. Tenn. 1996) (interpreting the Tennessee Human Rights Act, TENN. CODE ANN. §§ 4-21-306, -311, as not providing punitive damages for employment discrimination claims); *Ind. Civil Rights Comm'n v. Alder*, 714 N.E.2d 632, 638 (Ind. 1999) (indicating that punitive damages are not available in Indiana because not expressly authorized by statute); *Bell v. Helmsley*, No. 111085/01, 2003 WL 1453108, at *5 (N.Y. Sup. Ct. Mar. 4, 2003) (stating that punitive damages are not available under New York's antidiscrimination statute, N.Y. EXEC. LAW § 297); cf. 29 U.S.C. § 626(b) (2006) (providing for liquidated damages under the ADEA for discrimination claims).

45. See, e.g., ALA. CODE § 6-11-21 (LexisNexis 2005) (limiting punitive damages to the greater of three times compensatory damages or \$500,000, with reduced limits for smaller businesses).

46. See, e.g., *Dixon v. Int'l Bhd. of Police Officers*, 504 F.3d 73, 83 (1st Cir. 2007) (noting that "[t]he Massachusetts employment discrimination statute [MASS. ANN. LAWS ch. 151B, § 9] . . . does not limit punitive damages"); *Brady v. Curators of Univ. of Mo.*, 213 S.W.3d 101, 111 (Mo. Ct. App. 2006) (indicating that the Missouri Human Rights Act, MO. ANN. STAT. § 213.111, does not impose a limit on punitive damages).

47. Compare 42 U.S.C. § 1981 (2006), with 42 U.S.C. § 1981a (2006); see also *Goldsmith v. Bagby Elevator Co.*, 513 F.3d 1261, 1284-85 (11th Cir. 2008) (citing *Swinton v. Potomac Corp.*, 270 F.3d 794, 820 (9th Cir. 2001), for the proposition that "Congress has not seen fit to impose any recovery caps in cases under § 1981"); *Zhang v. Am. Gem Seafoods, Inc.*, 339 F.3d 1020, 1045 (9th Cir. 2003) (same).

48. *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 580-81 (1996); see also *supra* text accompanying note 8.

49. See, e.g., *Norris v. N.Y. City Coll. of Tech.*, No. 07-CV-853, 2009 WL 82556 (E.D.N.Y. Jan. 14, 2009); see also *infra* text accompanying notes 55-70.

value of nonmonetary equitable relief in the calculation of whether punitive damages are warranted.⁵⁰

As discussed in the prior section, the Title VII definition of “compensatory damages” excludes back pay and front pay.⁵¹ Also, the mechanics of awarding back pay and front pay vary across courts: some courts submit the questions of back pay and/or front pay to the jury,⁵² while others reserve such issues for the trial judge.⁵³ Some courts have been asked to consider a reduction in punitive damages before ever deciding the appropriateness or amount of back-pay or front-pay relief.⁵⁴ In at least some instances, these practical circumstances likely contribute to the omission of back pay and/or front pay from the calculation used to determine the ratio between compensatory and punitive damages.

A few concrete examples will illustrate the problems. In *Quinby v. WestLB AG*, the jury awarded the plaintiff \$747,000 in back pay, \$500,000 in compensatory damages, and \$1.3 million in punitive damages.⁵⁵ The trial judge later reduced the amount of compensatory damages to \$300,000.⁵⁶ When considering whether to reduce the punitive damages award, the judge noted that the ratio of punitive damages to compensatory damages was 4.3:1.⁵⁷ This calculation, however, failed to consider the large back-pay award. When the back-pay award is added to the reduced amount of compensatory damages, the ratio of punitive to compensatory damages is closer to 1:1, a ratio that does not compel excessiveness review.⁵⁸

In *Norris v. New York City College of Technology*, a jury found that a female employee had been terminated in retaliation for complaining about sex discrimination.⁵⁹ The jury awarded \$75,000 in compensatory damages and \$425,000 in punitive damages.⁶⁰ The parties agreed that the trial judge would

50. See, e.g., *Elestwani v. Nicolet Biomedical*, No. 04-C-947-S, 2005 WL 2035078 (W.D. Wis. Aug. 23, 2005); see also *infra* text accompanying notes 73-81.

51. See 42 U.S.C. § 1981a(b)(2); see also *supra* text accompanying note 36.

52. See cases cited *supra* note 31.

53. See cases cited *supra* note 32.

54. See, e.g., *Norris*, 2009 WL 82556, at *1, *9-10.

55. No. 04 Civ. 7406(WHP), 2008 WL 3826695, at *1 (S.D.N.Y. Aug. 15, 2008). The plaintiff's claims were not limited by the Title VII damages cap, because the plaintiff also prevailed under state and city antidiscrimination laws. See *id.* at *5.

56. *Id.* at *4.

57. *Id.* at *5 & n.1.

58. See *State Farm Mut. Ins. Co. v. Campbell*, 538 U.S. 408, 425 (2003); see also *supra* text accompanying notes 12-13.

59. See 2009 WL 82556, at *1.

60. *Id.*

decide the issues of back pay and front pay.⁶¹ The defendant challenged the punitive damages award as excessive under a “shocks the conscience” standard rather than on grounds of constitutional excessiveness.⁶² Nevertheless, the trial judge used the *Gore* factors to analyze the propriety of the punitive damages award.⁶³ The court found that the ratio of punitive damages to compensatory damages was 5.67:1 and reduced the amount of punitive damages to \$25,000.⁶⁴ This calculation, however, completely omitted the value of any back pay or front pay the plaintiff might have been awarded. Indeed, the court could not have included such damages in the ratio, because it had asked the parties for further briefing on these damages and had not yet made a determination regarding back pay or front pay at the time it considered the excessiveness of the punitive damages award.⁶⁵

This problem also occurs under other employment discrimination statutes. In *Tomao v. Abbott Laboratories, Inc.*, the jury found for the plaintiff on discrimination and retaliation claims under the ADA and ADEA.⁶⁶ The jury awarded \$300,000 in compensatory damages and \$3 million in punitive damages on the plaintiff’s retaliation claim, which the court construed as damages for her ADEA retaliation claim.⁶⁷ The trial judge reduced the ADEA retaliation award to \$27,692.40 by diminishing the compensatory damages to \$9,230.80 and the punitive damages to \$18,461.60.⁶⁸

In reaching this decision, the trial judge indicated that using the remitted compensatory damages amount, the ratio of compensatory damages to punitive

61. *Id.*

62. *See id.* at *6.

63. *See id.* at *7.

64. *Id.* at *7-8.

65. *See id.* at *10. Although the *Norris* court’s faulty math does not appear to have been the main impetus for its reduction of punitive damages, this case illustrates that some judges are not making the correct mathematical calculation when comparing punitive and compensatory damages.

66. *See* No. 04 C 3470, 2007 WL 2225905, at *1 (N.D. Ill. July 31, 2007). Although punitive damages are not available for discrimination claims under the ADEA, *see* 29 U.S.C. § 626 (2006), there is currently ambiguity regarding whether such damages are available for retaliation claims under the ADEA. *See Abdelmeseeh & DiBlasi, supra* note 22, at 748 (discussing ADEA damages provisions).

67. *Tomao*, 2007 WL 2225905, at *1. The jury awarded Tomao \$300,000 in compensatory damages and \$2.4 million in punitive damages for her disability discrimination claim. *Id.* To comply with the ADA’s statutory cap, the court reduced the award to \$300,000 and indicated that the entire \$300,000 would be considered compensatory damages. *See id.* at *13-14. The trial court’s description of the verdict omits any discussion of an award for the claim of failure to promote on the basis of age. *See id.* at *1.

68. *Id.* at *17, *23, *29.

damages was “a shocking 325 to 1.”⁶⁹ But that ratio is only so stark because the court did not include back pay in its calculation. Later in the same decision, the court awarded the plaintiff \$184,423.59 in lost wages; \$18,249.95 in lost fringe benefits; and \$32,472.60 in medical expenses, for a total of \$235,146.14 in back pay.⁷⁰ Adding the amount of lost wages and benefits to the reduced amount of compensatory damages makes the ratio of punitive damages to compensatory damages approximately 12:1, which is not quite as shocking as the court’s 325:1 calculation.

In addition to omitting front pay and back pay from the compensatory damages calculation, courts fail to consider nonmonetary equitable relief when making these calculations. As discussed earlier, reinstatement and other forms of equitable relief are important Title VII remedies.⁷¹ Reinstatement and other forms of equitable relief, however, are not easily translated into dollar figures; thus, they are often left out of the excessiveness calculus.⁷²

For example, in *Elestwani v. Nicolet Biomedical*, a case brought under 42 U.S.C. § 1981, the jury awarded the plaintiff \$80,000 in compensatory damages and \$1.4 million in punitive damages.⁷³ The court also required that the employer reinstate the plaintiff to his former position.⁷⁴ Ultimately, the court reduced the punitive damages award, in part because it found that the ratio of punitive damages to compensatory damages was 17.5:1.⁷⁵ This figure, however, fails to take into account the value of the plaintiff’s reinstatement.

69. *Id.* at *22.

70. *Id.* at *27. Determining the amount of this total that should properly factor into the ratio for the retaliation claim may be complicated by the fact that the back-pay award for lost wages, lost fringe benefits, and medical expenses may be attributable to both the retaliation and the discrimination claims. As discussed later in this article, there is currently confusion about how excessiveness should be calculated when a plaintiff prevails on multiple theories. *See* discussion *infra* Part III.C.

71. *See supra* notes 23-30 and accompanying text.

72. In *EEOC v. HBE Corp.*, two plaintiffs prevailed on discrimination and retaliation claims against their employer. *See* 135 F.3d 543, 549 (8th Cir. 1998). In addition to awards of monetary relief, the trial court also granted a permanent injunction against the employer “to prevent future discrimination, to provide for reporting to the EEOC, and to redress the harm to [the individual plaintiffs].” *Id.* at 550. It is not clear what kind of excessiveness review the Eighth Circuit Court of Appeals conducted. While it cited *Gore* in its decision, it also appears to have relied on Missouri state law regarding remittitur. *Id.* at 556-57. As part of its analysis, the court reasoned that the ratio of punitive damages to compensatory damages was excessive. *Id.* at 556. Although the court did not provide the math for this conclusion, it appears to have excluded the value of the injunction from its calculation of harm. *See id.* at 557.

73. *See* No. 04-C-947-S, 2005 WL 2035078, at *2-3 (W.D. Wis. Aug. 23, 2005).

74. *Id.* at *1.

75. *See id.* at *3.

Similarly, in *Kim v. Nash Finch Co.*, the Eighth Circuit Court of Appeals reduced an award of emotional distress damages from \$1.75 million to \$100,000 and a punitive damages award from \$7 million to \$300,000.⁷⁶ In doing so, the court noted that the ratio of punitive damages to compensatory damages for the reduced award was an “unremarkable 3:1.”⁷⁷ The ratio, however, was actually much lower. The trial court had awarded \$447 per month in front pay and ordered that the plaintiff be reinstated to the next available foreman position.⁷⁸ The court appears to have ignored the value of the equitable remedies in calculating the punitive-to-compensatory ratio.⁷⁹

Given the failure of some courts to include high-value injunctive relief in the excessiveness inquiry, it is not surprising that some courts also ignore less monetarily valuable, but still important, nonmonetary relief when conducting the *Gore* calculus. For example, in *EEOC v. HBE Corp.*, the district court ordered the defendant to clear its employment records of any mention of the circumstances surrounding both plaintiffs’ terminations, to provide the plaintiffs with letters of recommendation, to make annual reports to the Equal Employment Opportunity Commission (EEOC) regarding any discipline or discharge of black employees, to inform all employees of the scope of relief awarded in the suit, and to have its management participate in yearly seminars about race discrimination.⁸⁰ In significantly reducing the amount of punitive damages, however, the appellate court does not appear to have taken into account the value of these various forms of injunctive relief.⁸¹

B. The Failure to Recognize How Caps and Other Limitations Affect Constitutional Review

Constitutional review of punitive damages is further complicated in the employment discrimination context by the damages caps found in Title VII, as well as by the interaction of Title VII with state or other federal causes of action providing different remedies regimes.

The possible analytical missteps are best introduced by first considering a hypothetical Title VII case where a jury awards a total amount of compensatory and punitive damages exceeding that allowed by Title VII. This result is possible because Title VII prohibits juries from being instructed about its damages caps.⁸² Title VII’s statutory language requires courts to reduce the

76. See 123 F.3d 1046, 1067 (8th Cir. 1997).

77. *Id.* at 1068.

78. *Id.* at 1054 n.3.

79. See *id.* at 1067-68.

80. See 135 F.3d 543, 557 (8th Cir. 1998).

81. See *id.* at 556-57; see also *supra* note 72.

82. 42 U.S.C. § 1981a(c)(2) (2006).

total award of damages to the appropriate statutory cap, but does not direct courts how to undertake the cut.⁸³ The method courts use to make the reduction, however, can be important for the constitutional excessiveness determination.

Consider the following facts: a jury returns a verdict of \$100,000 in compensatory damages and \$1 million in punitive damages against a defendant who is subject to Title VII's \$300,000 statutory cap. No back pay or other monetary relief is awarded.⁸⁴

There are numerous permissible ways for a judge to reduce the award to fall within the cap, including the following three approaches: First, the judge could award the entire amount of compensatory damages (\$100,000) and leave \$200,000 for the punitive damages amount. Second, the judge might award the maximum amount of punitive damages (\$300,000) and award no compensatory damages. Third, the judge might make a pro rata division of the award, reducing the award to \$27,000 in compensatory damages and \$273,000 in punitive damages.⁸⁵

The way in which the award is divided radically changes the ratio of punitive damages to compensatory damages that a court might consider when conducting the *Gore* analysis. In the first method of division, the ratio of punitive damages to compensatory damages is 2:1: hardly a ratio suggesting that intense constitutional scrutiny of the award is required.⁸⁶ Under the second and third scenarios, however, the divisions appear to yield ratios that likely exceed the limits of due process.⁸⁷ The above three methods of apportioning the award show that it is fairly simple for a court to manipulate an award to either require or not require constitutional scrutiny. This malleability alone raises questions about what the *Gore* factors actually accomplish.

In the context of a single claim brought pursuant to Title VII or the ADA, the statutory caps themselves may provide courts with a rationale for avoiding constitutional excessiveness review, both because the caps themselves are modest and because they indicate legislative consideration on the upward limit of punitive and compensatory damages.⁸⁸ Nevertheless, there have been cases

83. See 42 U.S.C. § 1981a; see also *Lust v. Sealy, Inc.*, 383 F.3d 580, 589 (7th Cir. 2004).

84. This hypothetical is based on the facts of *Lust v. Sealy, Inc.*, 383 F.3d at 582, with some minor adjustments to allow for easy calculation of figures.

85. This third approach was the one used by the trial judge in *Lust*. See *id.* at 589-90.

86. See *State Farm Mut. Ins. Co. v. Campbell*, 538 U.S. 408, 425 (2003); see also *supra* text accompanying notes 12-13.

87. See *State Farm*, 538 U.S. at 425 ("Single digit multipliers are more likely to comport with due process . . . than awards with ratios in range of 500 to 1 or, in this case, of 145 to 1." (citations omitted)).

88. Recall that Title VII establishes a tiered system of statutory damages caps, based on the

in which courts have held that punitive damages within the relevant damages cap were unconstitutionally excessive.⁸⁹

More complicated problems occur when courts review the constitutional propriety of punitive damages awards in cases involving multiple remedies regimes with differing allowances for both the types and amounts of available damages.

There are many different situations where this issue could arise. For instance, in a case involving race discrimination, a jury may award combined compensatory and punitive damages that exceed the applicable Title VII damages cap.⁹⁰ These same damages, however, would be allowable under § 1981 (which does not have a damages cap⁹¹) and some state regimes.⁹² In some of these cases, courts have been asked to reduce the total award to comport with the Title VII damages cap.⁹³ In some instances, courts have used the Title VII statutory cap amounts as a baseline to analyze excessiveness.⁹⁴ In other cases, courts have rejected this argument, reasoning that amounts exceeding the Title VII statutory caps may be awarded under the regime without the same caps.⁹⁵

number of employees an employer has. 42 U.S.C. § 1981a(b)(3); *see also supra* note 40.

89. *See, e.g., Hines v. Grand Casino of La., L.L.C.—Tunica-Biloxi Indians*, 358 F. Supp. 2d 533, 552-53 (W.D. La. 2005) (reducing punitive damages to fit within the statutory cap, then reducing punitive damages even further using a *Gore* analysis).

90. *See, e.g., Hall v. Consol. Freightways Corp. of Del.*, 337 F.3d 669, 671 (6th Cir. 2003).

91. *See* 42 U.S.C. § 1981 (2006); *see also supra* note 47 and accompanying text.

92. *See Hall*, 337 F.3d at 679-80. It should be noted that the Title VII damages provisions do prevent a double recovery for race discrimination under Title VII and § 1981. *See* 42 U.S.C. § 1981a(a)(1); *see also Bradshaw v. Univ. of Me. Sys.*, 870 F. Supp. 406, 407-08 (D. Me. 1994) (discussing the § 1981a(a) bar on double recovery).

93. *See, e.g., Martini v. Fed. Nat'l Mortgage Ass'n*, 178 F.3d 1336, 1349 (D.C. Cir. 1999).

94. *See, e.g., Tse v. UBS Fin. Servs., Inc.*, 568 F. Supp. 2d 274, 317-18 (S.D.N.Y. 2008) (noting that although state law “does not impose a cap on damages, courts in the Second Circuit have found that the legislative determination to impose a \$300,000 cap on compensatory and punitive damages awards under Title VII reflects that this is a ‘suitable’ amount ‘to support the objectives of deterrence and punishment’ of discriminatory conduct” (quoting *Luciano v. Olsten Corp.*, 912 F. Supp. 663, 672 (E.D.N.Y. 1996)); *Thomas v. iStar Fin., Inc.*, 508 F. Supp. 2d 252, 263 (S.D.N.Y. 2007) (suggesting that the Title VII statutory cap provides guidance for determining the appropriate amount of punitive damages under a state law that does not cap damages); *Luciano*, 912 F. Supp. at 672 (applying the \$300,000 statutory cap, even though the plaintiff also prevailed on state-law claims); *see also Noyes v. Kelly Servs., Inc.*, No. 2:02-cv-2685-GEB-CMK, 2008 WL 2915113, at *14 (E.D. Cal. July 25, 2008) (reducing punitive damages awarded under the state-law claim to \$647,174 from \$5.9 million, partly because of the Title VII cap). Other courts have looked to Title VII for guidance but ultimately declined to reduce punitive damages. *See, e.g., Zhang v. Am. Gem Seafoods, Inc.*, 339 F.3d 1020, 1045 (9th Cir. 2003).

95. *See, e.g., Martini*, 178 F.3d at 1349-50; *see also Gibbons v. Bair Found., Inc.*, No.

In these latter types of cases, a court reviewing punitive damages for constitutional excessiveness might approach its analysis in several different ways. A court may be inclined to see the jury award as one in which no or minimal compensatory damages were awarded under the Title VII claim, with the full statutory amount being in punitive damages. This approach would make the ratio of punitive to compensatory damages quite high. Alternatively, a court could look at the verdict in its totality, weighing the entire amount of front pay, back pay, and compensatory damages awarded against the amount of punitive damages awarded. Finally, a court could divide the damages between or among the claims for purposes of conducting the *Gore* analysis, with some portion of front pay, back pay, and/or compensatory damage amounts being analyzed as appropriately allocated to the Title VII claim.

Other interactions between state and federal law are more complex. For example, some state laws do not allow for recovery of punitive damages at all, or they impose caps that are lower than those under Title VII.⁹⁶ When a plaintiff prevails on discrimination claims under both Title VII and such state laws, the court may allocate all of the punitive damages to the Title VII claim and all or most of the compensatory damages to the state-law claim to maximize the plaintiff's recovery.⁹⁷ The court's decision whether to conduct

1:04CV2018, 2007 WL 582314, at *12 (N.D. Ohio Feb. 20, 2007) (refusing to apply the federal punitive damages cap because the state law does not limit damages); *Jorling v. Habilitation Servs., Inc.*, No. Civ.A 103CV00073-WO, 2005 WL 1657060, at *11 n.13 (S.D. Ohio July 14, 2005) ("Defendants first argue that the statutory caps applicable to Title VII causes of action should 'guide' this court. However, the jury's award here of punitive damages was premised on an Ohio common law tort claim, to which the federal civil rights statutory caps do not apply. The only guide for the court as to the excessiveness of such an award is authority outlining the constraints of constitutional due process."). *But see* *Oliver v. Cole Gift Ctrs., Inc.*, 85 F. Supp. 2d 109, 113-14 (D. Conn. 2000) (disallowing the splitting of punitive damages across state and federal regimes).

96. *See, e.g., Oliver*, 85 F. Supp. 2d at 112 n.1 (noting that Connecticut law limits punitive damages to the amount of reasonable attorneys' fees and costs); *Dailey v. N. Coast Life Ins. Co.*, 919 P.2d 589, 590 (Wash. 1996) (indicating that Washington antidiscrimination law does not allow recovery of punitive damages); *cf. Torres v. Caribbean Forms Mfr.*, 286 F. Supp. 2d 209, 219-220 (D.P.R. 2003) (indicating that Puerto Rican antidiscrimination law authorizes the doubling of compensatory damages as a substitute for traditional punitive damages).

97. In *Passantino v. Johnson & Johnson Consumer Products, Inc.*, for example, a jury found that the defendant had retaliated against the plaintiff for complaining about perceived sex discrimination. 212 F.3d 493, 504 (9th Cir. 2000). "The jury awarded [the plaintiff] \$100,000 in back pay, \$2,000,000 in front pay, \$1,000,000 in compensatory emotional distress damages, and \$8,600,000 in punitive damages." *Id.* To provide the plaintiff with the maximum allowable recovery, "[t]he [trial] court allocated all of the compensatory damages, front pay, and back pay to [the plaintiff's] state law claim and all of the punitive damages to the Title VII claim." *See id.* Given the Title VII damages cap, the trial court then reduced the amount of punitive damages to \$300,000. *Id.* The Ninth Circuit in *Passantino* did not conduct a full review of the

the *Gore* analysis on the combined state and federal awards or on the separate federal punitive damages award can make a difference in its excessiveness review.

C. The Failure to Recognize How Multiple Claims or Theories of Recovery Affect Review

The second factor of the *Gore* calculus is also susceptible to analytical missteps introduced when a plaintiff prevails under multiple theories of discrimination and, in some instances, also prevails under multiple statutory or common law regimes. The issue then becomes if and how the court should allocate damages across claims or theories to evaluate punitive damages under the excessiveness rubric.

As described earlier, a plaintiff in a discrimination case may often have a claim under Title VII and a state cause of action.⁹⁸ Additionally, race discrimination plaintiffs may have a cause of action under § 1981.⁹⁹ Further, a plaintiff proceeding on an intentional discrimination claim may seek redress for a myriad of discriminatory actions, such as failure to hire, failure to promote, unlawful termination, harassment, or retaliation.¹⁰⁰ In some cases, plaintiffs may recover for more than one unlawful action. For example, a plaintiff may convince a jury that she was subjected to sexual harassment, passed over for a promotion, and terminated because of her gender.

Courts faced with instructing a jury on how to return a verdict when multiple types of wrongful conduct or multiple sources of recovery are involved do so in a variety of ways.¹⁰¹ Some judges instruct the jury to return a verdict for each type of unlawful conduct, asking the jury to separately delineate back pay, compensatory damages, and punitive damages for each type of conduct¹⁰² or for each separate claim.¹⁰³ At times, juries are instructed

constitutionality of the punitive damages award, because it remanded the case for reconsideration of the punitive damages award on other grounds. *See id.* at 514 & n.17. Nevertheless, the facts highlight the ways in which the division of damages may affect the *Gore* calculus.

98. *See supra* notes 43-46 and accompanying text.

99. *See supra* note 47 and accompanying text.

100. Title VII, the ADEA, and the ADA all support such causes of action. *See* 42 U.S.C. §§ 2000e-2(a), 2000e-3(a) (2006) (Title VII); 29 U.S.C. § 623(a), (d) (2006) (ADEA); 42 U.S.C. §§ 12112(a), 12203(a) (2006 & Supp. 2008) (ADA); *see also* AM. JUR. 2D *Job Discrimination* § 1 (2002) (Title VII); *id.* § 16 (ADEA); *id.* § 18 (ADA); *id.* § 214 (retaliation).

101. The following discussion is not intended to provide an exhaustive description of jury instruction techniques, but rather to provide examples that illustrate the variety of approaches courts have taken with respect to the issue.

102. *See, e.g., Williams v. ConAgra Poultry Co.*, 378 F.3d 790, 793 (8th Cir. 2004) (noting that the jury returned a verdict delineating separate compensatory and punitive damages awards

to return a separate verdict for back pay and compensatory damages for each type of conduct, but to render one punitive damages award for all of the conduct attributable to the employer.¹⁰⁴ In some circumstances, the jury is asked to determine one amount of back pay, compensatory damages, and punitive damages for conduct that is punishable under separate regimes.¹⁰⁵

There are various substantive and practical reasons why courts may ask juries to render verdicts in different ways.¹⁰⁶ A judge may instruct a jury to return separate damages calculations on different theories of recovery because the theories require different elements of proof,¹⁰⁷ are subject to different defenses,¹⁰⁸ or provide for different types of damages.¹⁰⁹ The plaintiff may

for each of the plaintiff's claims).

103. *See, e.g.*, *Caudle v. Bristow Optical Co.*, 224 F.3d 1014, 1019 (9th Cir. 2000) (indicating that the jury awarded separate amounts for federal and state claims); *Martini v. Fed. Nat'l Mortgage Ass'n*, 178 F.3d 1336, 1350 (D.C. Cir. 1999) (same). Federal-court practice remains divided on the issue of whether back-pay determinations under Title VII should be made by the judge or the jury. *See cases cited supra* notes 31-32. The author expresses no opinion regarding resolution of this issue.

104. *See, e.g.*, *Kim v. Nash Finch Co.*, 123 F.3d 1046, 1053 (8th Cir. 1997) (indicating that the verdict form allowed the jury to return a punitive damages verdict for either the promotion or retaliation claim without differentiation); *Laymon v. Lobby House, Inc.*, 613 F. Supp. 2d 504, 508 (D. Del. 2009) (indicating that the jury rendered separate compensatory damages awards for the harassment and retaliation claims and a single punitive damages award).

105. *See, e.g.*, *Dodoo v. Seagate Tech., Inc.*, 235 F.3d 522, 527 (10th Cir. 2000) (indicating that the jury awarded back pay, compensatory damages, and punitive damages for the defendant's failure to promote the plaintiff based on both Title VII and ADEA claims); *Passantino v. Johnson & Johnson Consumer Prods., Inc.*, 212 F.3d 493, 504 (9th Cir. 2000) (indicating that the jury issued one verdict for retaliatory conduct under both Title VII and state law).

106. This paragraph is not meant to provide an exhaustive list of all of the reasons why a trial judge may instruct a jury in a particular way. Rather, it is designed to give the reader a sense of some of the common reasons why verdict forms may vary.

107. For example, the proof structure for a harassment claim is different from the structure typically used for other types of claims. *See Meritor Sav. Bank v. Vinson*, 477 U.S. 57, 67 (1986) (indicating that a plaintiff must establish that the harassment was severe or pervasive).

108. For example, the *Faragher/ Ellerth* defense may apply to some harassment claims, but not to claims where a tangible employment action has been taken. *See Pa. State Police v. Suders*, 542 U.S. 129, 143 (2004) (explaining that the *Faragher/ Ellerth* defense divides hostile work environment claims into two categories—one in which the employer is liable for taking a “tangible employment action” and one in which the employer can make an affirmative defense). The affirmative defense requires the employer to establish that “it ‘exercised reasonable care to prevent and correct promptly any’ discriminatory conduct and ‘the plaintiff employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise.’” *Crawford v. Metro. Gov't of Nashville & Davidson County, Tenn.*, 129 S. Ct. 846, 852 (2009) (quoting *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 765 (1998)).

109. For example, a plaintiff who alleges that she was subjected to harassment and then

request that the jury be separately instructed on each instance of wrongful conduct to reiterate that the defendant has been accused of multiple wrongful acts or to avoid an all-or-nothing verdict. Either party or the judge may want separate damages awards to be able to later analyze the amount of harm the jury attached to each act. On the other hand, separate awards carry the risk that a jury will overcompensate the plaintiff for harm that overlaps various types of conduct, and a unified verdict may serve to prevent jury confusion.

How the verdict is divided may have important consequences for the review of the punitive damages award for constitutional excessiveness. Consider the following scenario: A plaintiff alleges that a former supervisor sexually harassed her by constantly making demeaning, gender-related comments about her. The plaintiff is transferred to another department, and several months later she is terminated by another supervisor. The plaintiff files suit under a state discrimination law that does not cap compensatory and punitive damages. She alleges that she was subjected to sexual harassment and discriminatory termination, and the jury finds in the plaintiff's favor. On the sexual harassment issue, the jury awards \$50,000 in emotional distress damages and \$500,000 in punitive damages. The jury does not award any back pay, because no tangible employment action was taken against the plaintiff. On the termination claim, the jury awards \$50,000 in back pay, \$100,000 in emotional distress damages, and \$500,000 in punitive damages.

If the judge views the sexual harassment as a separate incident of harm, *Gore* review (and perhaps a reduction in punitive damages) seems appropriate because the ratio between punitive and compensatory damages is 10:1. By contrast, if the conduct is viewed as one course of harm, the ratio becomes 5:1 and *Gore* review appears less appropriate. As this hypothetical demonstrates, whether a judge views a defendant's conduct as one continuous course of harm or as separate incidents of harm can have important implications for how a court undertakes the *Gore* calculus.¹¹⁰

terminated for reporting the harassment may not be able to establish a loss of any pay or benefits related to the harassment per se, but may be able to establish such damages in connection with the retaliatory termination. *See, e.g., Peyton v. DiMario*, 287 F.3d 1121, 1124 (D.C. Cir. 2002) (indicating that the plaintiff prevailed on both harassment and retaliation claims and that the harassment claim was filed prior to the time that the plaintiff was terminated); *Worth v. Tyer*, 276 F.3d 249, 268 (7th Cir. 2001) (indicating that the plaintiff received a higher damages award for her retaliation claim because she lost wages and benefits).

110. The same issues may be present under Title VII; however, because the Title VII damages caps treat all claims on which the plaintiff prevails collectively, it is less likely that a court will find punitive damages excessive if a plaintiff prevails on multiple claims. *See, e.g., Brady v. Wal-Mart Stores, Inc.*, No. CV 03-3843(JO), 2005 WL 1521407, at *3 (E.D.N.Y. June 21, 2005) (indicating that several courts have held that the § 1981a damages cap applies to plaintiffs' claims in the aggregate).

As discussed earlier, plaintiffs alleging employment discrimination may often proceed under Title VII and a state employment discrimination statute, as well as common law causes of action.¹¹¹ Those plaintiffs alleging race discrimination may also proceed under § 1981.¹¹² When combined with the analysis required under the *Gore* guideposts, the overlapping patchwork of legal remedies regimes creates difficulties for courts trying to allocate damages across prevailing claims and translate verdicts into numbers that can be used to undertake constitutional review.

Federal judges routinely impose the same proof structures and requirements on federal and state discrimination claims even though the claims may be based on a different underlying statute or common law cause of action.¹¹³ Therefore, in some instances, judges do not provide separate jury instructions or verdict forms for juries to delineate damages for the various state and federal claims under which a plaintiff might prevail.¹¹⁴

In other instances, a court may provide a jury with instructions and a verdict form that requires delineation of damages under each statutory or common law claim for which the plaintiff seeks relief. For example, in *Martini v. Federal National Mortgage Ass'n*, the trial court provided the jury with separate

111. See discussion *supra* Part II.B.

112. See *supra* note 47 and accompanying text; see also *supra* note 92.

113. See Alex B. Long, “If the Train Should Jump the Track . . .”: *Divergent Interpretations of State and Federal Employment Discrimination Statutes*, 40 GA. L. REV. 469, 477 (2006) (arguing that state courts sometimes go to great lengths to read state discrimination laws as being consistent with federal law); Sandra F. Sperino, *Diminishing Deference: Learning Lessons from Recent Congressional Rejection of the Supreme Court’s Interpretation of Discrimination Statutes*, 33 RUTGERS L. REC. 40, 40 (2009) (“Both state and federal courts routinely apply the Supreme Court’s interpretations of the federal employment discrimination statutes in their analysis of discrimination claims brought pursuant to state law.”).

114. See, e.g., *Rodriguez-Torres v. Caribbean Forms Mfr., Inc.*, 399 F.3d 52, 55 (1st Cir. 2005) (indicating that the jury did not distinguish between the federal and Commonwealth claims); *Hall v. Consol. Freightways Corp. of Del.*, 337 F.3d 669, 678-80 (6th Cir. 2003) (indicating that the trial court gave a single set of instructions for claims brought under both Title VII and state law); *Hemmings v. Tidyman’s Inc.*, 285 F.3d 1174, 1196 (9th Cir. 2002) (indicating that the special verdict form given to the jury did not distinguish between the plaintiffs’ state and federal claims); *Passantino v. Johnson & Johnson Consumer Prods., Inc.*, 212 F.3d 493, 504 (9th Cir. 2000) (indicating that the jury issued one verdict for retaliatory conduct under both Title VII and state law); *Pavon v. Swift Transp. Co.*, 192 F.3d 902, 906 (9th Cir. 1999) (indicating that the special verdict form did not ask the jury to award separate damages for each cause of action); *Kerr-Selgas v. Am. Airlines, Inc.*, 69 F.3d 1205, 1207-08 (1st Cir. 1995) (reproducing the completed verdict form in its decision and showing that the jury was asked to render damages on claims under Title VII and Commonwealth law together); *Anderson v. YARP Rest., Inc.*, No. 94 Civ. 7543(CSH)(RLE), 1997 WL 27043, at *7 (S.D.N.Y. Jan. 23, 1997) (indicating that the jury was not told to apportion damages between the Title VII and state law claims).

interrogatories that asked the jury to provide separate damages awards for the same underlying conduct under Title VII and the D.C. Human Rights Act.¹¹⁵ Although courts seldom provide the reasoning behind the way verdict forms are structured or special interrogatories are propounded, there may be both substantive and practical reasons for particular approaches.¹¹⁶

The structure of the verdict form may influence how a judge conducts excessiveness review. Judges looking at a singular award may be inclined to compare the total amount of compensatory damages with the total amount of punitive damages.¹¹⁷ By contrast, a verdict that divides damages across legal regimes may lead the court to look at the verdict as representing two different damages calculations and apply a separate constitutional analysis to each claim.

Consider the case of *EEOC v. HBE Corp.*, in which one of the plaintiffs alleged that he had been retaliatorily discharged and brought claims under both federal law and Missouri state law.¹¹⁸ Because the conduct at issue took place prior to the Title VII amendments allowing compensatory and punitive damages,¹¹⁹ the jury was asked to render a verdict on back pay and punitive damages under the state-law claim, while the judge awarded injunctive relief and front-pay damages on the Title VII claim.¹²⁰ The jury awarded the aforementioned plaintiff \$60,000 in back pay and benefits and \$1 million in punitive damages.¹²¹ The judge awarded the plaintiff \$131,571 in front pay.¹²²

Under this factual scenario, the *Gore* ratio looks radically different depending on whether all of the harm is considered together or whether the

115. See 178 F.3d 1336, 1349 (D.C. Cir. 1999). The jury awarded “\$153,500 in backpay, \$1,894,000 in frontpay and benefits, and \$3,000,000 in punitive damages under Title VII, as well as \$615,000 in compensatory damages and \$1,286,000 in punitive damages under the D.C. Human Rights Act.” *Id.* at 1339. While *Martini* was pending, the District of Columbia’s statute was amended to impose damages caps. See D.C. CODE ANN. § 2-1403.13 (LexisNexis 2008) (formerly D.C. CODE ANN. § 1-2553, amended 1997).

116. For example, a judge may adopt a verdict form because both parties agree to it, or to avoid jury confusion or duplicative verdicts. At times, the specific claims at issue may dictate separate instructions, such as when a certain type of damages is not allowed for a claim. See, e.g., *Hall*, 337 F.3d at 677 (indicating that the substantive standard for awarding punitive damages was different under Ohio and federal law).

117. See, e.g., *Jeffries v. Wal-Mart Stores, Inc.*, 15 F. App’x 252, 255, 266 (6th Cir. 2001) (considering the combined total amount of damages awarded on both state and federal claims when performing the *Gore* calculation).

118. See 135 F.3d 543, 550 (8th Cir. 1998); see also *supra* note 72.

119. See 42 U.S.C. § 1981a (2006) (originally enacted as Civil Rights Act of 1991, Pub. L. No. 102-166, § 102, 105 Stat. 1071, 1072-73); see also text accompanying note 33.

120. See *HBE Corp.*, 135 F.3d at 550.

121. *Id.*

122. *Id.*

damages awarded under the state-law claim are separated from those awarded under the federal claim. If the state-law claim is considered on its own, the ratio of punitive to compensatory damages is almost 17:1, a ratio that is very suspect under *Gore*. But if the state and federal claims are considered together, the ratio (excluding the value of injunctive relief) is approximately 5:1 and more likely to escape constitutional excessiveness review.

IV. Roadmap for Avoiding Common Problems with Excessiveness Review

This article has identified numerous analytical problems that can occur when courts apply the *Gore* guideposts to Title VII punitive damages awards. This section discusses the reasons why courts may be inclined to make mistakes when conducting this analysis and suggests ways to avoid these pitfalls.

A. Courts Should Include Back Pay and Front Pay in the Ratio Calculation

One error that courts make is failing to include front pay and back pay when calculating the ratio of compensatory damages to punitive damages. In its constitutional punitive damages jurisprudence, the Supreme Court has stated that “few awards exceeding a single-digit ratio between punitive and compensatory damages, to a significant degree, will satisfy due process.”¹²³ Also, the Court has indicated that punitive damages “of more than four times the amount of compensatory damages might be close to the line of constitutional impropriety.”¹²⁴

In Title VII cases, some judges simply follow these guidelines without recognizing the unique meaning of the term “compensatory damages” in the Title VII context. According to *Black’s Law Dictionary*, “compensatory damages” are “[d]amages sufficient in amount to indemnify the injured person for the loss suffered.”¹²⁵ The loss suffered in an employment discrimination case includes back pay and front pay, even if those remedies are, because of Title VII’s history, tied to the equitable remedy of reinstatement and separate from other compensatory damages in that context.¹²⁶ As one of the leading treatises on remedies notes, back pay and other “[a]wards under the 1964 Civil Rights Act for job discrimination look precisely like damages.”¹²⁷

123. *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 425 (2003); *see also supra* text accompanying note 12.

124. *State Farm*, 538 U.S. at 425.

125. BLACK’S LAW DICTIONARY 445 (9th ed. 2009).

126. *See supra* notes 23-30 and accompanying text.

127. 1 DOBBS, *supra* note 25, § 3.1, at 278 n.5.

There is nothing in the Supreme Court's reasoning to suggest that it intended the narrow Title VII definition of "compensatory damages" to govern the punitive damages calculus. Rather, the comparison of compensatory damages to punitive damages appears to be aimed at helping courts evaluate the second *Gore* guidepost, which requires courts to consider the disparity between the harm incurred or potentially incurred by the plaintiff and the punitive damages award.¹²⁸

Indeed, the Court's further discussion of punitive-to-compensatory ratios suggests that the Court intended a comparison of at least the economic harms versus punitive damages. In *State Farm Mutual Automobile Insurance Co. v. Campbell*, the Court indicated that higher ratios might satisfy due process where "a particularly egregious act has resulted in only a small amount of economic damages . . . or the monetary value of non-economic harm might have been difficult to determine."¹²⁹ The Court also noted that the amount of punitive damages awarded must be reasonable and proportionate both to the plaintiff's harm and to the damages recovered.¹³⁰ Although the Supreme Court's directions are less than clear in some respects, it appears that the Court has directed lower courts to compare at least the plaintiff's proven monetary harm to the punitive damages award.

In another context, the Supreme Court has explained that back pay under Title VII is a "'make-whole' remedy that resembles compensatory damages in some respects."¹³¹ As one court explained when deciding a different punitive damages question, "Unlike compensatory damages at common law, compensatory damages under § 1981a are defined to omit back pay, which is 'the most obvious economic damage in a wrongful discharge case.' The omission occurs under [Title VII, as amended in 1991] to prevent double recovery."¹³² Thus, although Title VII excludes back pay and front pay from the definition of "compensatory damages," logic suggests that these are the exact kinds of damages that the Court intended to be included in the *Gore* calculus. Because both back-pay and front-pay awards under Title VII serve

128. *State Farm*, 538 U.S. at 418.

129. *Id.* at 425 (citations and internal quotation marks omitted) (quoting *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 582 (1996)).

130. *Id.* at 426.

131. *Landgraf v. USI Film Prods.*, 511 U.S. 244, 252-53 (1994). Denominating back pay and front pay as equitable in nature does distinguish them from legal compensatory damages, but not in ways that call for different treatment in the punitive damages calculus. *See, e.g.*, 1 DOBBS, *supra* note 25, § 3.1, at 278-79 (describing how equitable money decrees may be enforced by the courts' contempt power, while legal remedies may require other enforcement mechanisms).

132. *Corti v. Storage Tech. Corp.*, 304 F.3d 336, 342-43 (4th Cir. 2002) (citations omitted) (quoting *Hennessy v. Penril Datacomm Networks, Inc.*, 69 F.3d 1344, 1352 (7th Cir. 1995)).

a similar purpose to compensatory damage awards in other contexts, they should be similarly included in the ratio calculation.

B. Courts Should Value Injunctive Relief in the Punitive Damages Excessiveness Inquiry

Reinstatement and other forms of nonmonetary injunctive relief pose tougher dilemmas. The Supreme Court has provided no explicit direction on how or even whether to value such relief in the punitive damages calculus. In fact, the Supreme Court has offered conflicting direction on this question by speaking in two different ways about the second *Gore* guidepost. The Court has implicitly recognized that punitive-to-compensatory ratios do not take into account nonmonetary harm.¹³³ By utilizing a ratio that is based on monetary harm and by using the term “compensatory damages” in that ratio,¹³⁴ the Court might have intended that injunctive relief not be included in the punitive damages calculus.

Such a reading, however, does not comport with the broader language of the Supreme Court’s excessiveness jurisprudence. In articulating the second *Gore* guidepost, the Court has made clear that the relevant inquiry concerns the difference “between the actual or potential harm suffered by the plaintiff and the punitive damages award.”¹³⁵ Furthermore, the Court has noted that the amount of punitive damages awarded must be “both reasonable and proportionate to the amount of harm to the plaintiff and to the general damages recovered.”¹³⁶ Both monetary and nonmonetary remedies may reflect harm that a plaintiff has suffered. Thus, under a broad reading of the Supreme Court cases regarding constitutional review of excessive punitive damages, courts should consider the value of injunctive relief in determining the ratio of actual or potential harm to punitive damages.

This broader reading is especially called for in the employment discrimination context, for several reasons. Given Title VII’s original remedies scheme, injunctive relief and equitable relief have long played important roles in remedying discrimination.¹³⁷ Even with the addition of emotional distress damages and punitive damages to the remedies regime, remedies such as requiring the promotion or reinstatement of the employee, abolishing discriminatory references in the employee’s file, and requiring antidiscrimination training continue to be valuable relief for plaintiffs.¹³⁸

133. See *State Farm*, 538 U.S. at 425.

134. See *id.*

135. *Id.* at 418.

136. *Id.* at 426.

137. See *supra* note 23 and accompanying text.

138. See *supra* text accompanying note 37.

Furthermore, at least on paper, the courts continue to express a preference for reinstatement over front pay when reinstatement is feasible.¹³⁹ Given that some courts include front pay in the harm calculation when considering the excessiveness of punitive damages, it would be inconsistent for these courts to refuse to value reinstatement or other similar relief if such relief is the preferred remedy under the statutory scheme.

Valuing reinstatement should not present practical problems, as litigants in employment discrimination cases often present evidence regarding front pay that courts could use to estimate the value of reinstatement for purposes of the *Gore* calculation. This does not mean that courts should be required to monetize reinstatement to review punitive damages for constitutional excessiveness, only that this is one approach the courts might use. When courts are unable or unwilling to monetize equitable relief, it is still possible for them to value this relief when looking at the *Gore* factors, although not in a strictly mathematical fashion. For example, a court could use the presence of significant nonmonetary relief as a reason for exceeding the recommended ratio of punitive to compensatory damages, or, perhaps more radically, to engage in a larger critique of the *Gore* factors.

C. Courts Should Award Compensatory Damages First to Promote Judicial Efficiency in Some Circumstances

Given the number of possible conceptual errors in framing the second *Gore* guidepost, the simplest way to avoid such errors may be to remove the question of the constitutional excessiveness of punitive damages from consideration as often as possible. This approach would also promote judicial efficiency in certain circumstances.

As discussed earlier, Title VII does not direct courts how to allocate damages within the statutory cap,¹⁴⁰ and the courts have approved several different ways of making the allocation.¹⁴¹ In a case where only one claim is brought under Title VII and where the jury returns a compensatory award that exceeds the cap, as well as a punitive damages award that also exceeds the damages cap, courts should allocate the total amount of the cap to compensatory damages. Without a punitive damages award to review, *Gore* analysis is simply inapplicable.

This approach is preferable to splitting the capped amount between compensatory and punitive damages for several reasons related to judicial

139. See, e.g., *McInnis v. Fairfield Cmty., Inc.*, 458 F.3d 1129, 1145 (10th Cir. 2006) (indicating that “reinstatement is the preferred remedy under Title VII”).

140. See 42 U.S.C. § 1981a (2006); see also *supra* text accompanying note 83.

141. See discussion *supra* Part III.B.

efficiency. Courts that split the amount must be careful that such a split does not introduce an error into the *Gore* calculation—making a comparison between the reduced compensatory damages and the reduced punitive damages. Such a comparison is inappropriate, because the Title VII damages caps, as applied to compensatory damages, do not represent the amount of harm suffered by the plaintiff, but rather the maximum amount of harm for which the defendant may be held liable.

Title VII places very strict damages caps on the combined amount of statutorily defined compensatory damages and punitive damages that a plaintiff may be awarded.¹⁴² The statutory caps are based on the number of employees at a particular company.¹⁴³ The highest level of combined damages that can be awarded in a particular case is \$300,000, and that level of damages is reserved for those employers who employ more than 500 employees.¹⁴⁴

The mechanism for determining the applicable cap level under Title VII demonstrates that the caps are not directed at providing a proxy for the amount of harm that an individual will suffer if subjected to employment discrimination. The size of the employer does not determine the severity of the plaintiff's emotional distress. Rather, the legislative caps reflect a series of congressional compromises resulting from many factors unrelated to the amount of harm a plaintiff may suffer.¹⁴⁵ While it is difficult to parse the entire legislature's intent from legislative history, Senator Robert Dole

142. See 42 U.S.C. § 1981a(b)(3) (limiting combined punitive and compensatory damages to \$50,000 for employers with 15 to 100 employees; to \$100,000 for those with 101 to 200 employees; to \$200,000 for those with 201 to 500 employees; and to \$300,000 for those with more than 500 employees); see also *supra* note 40.

143. See 42 U.S.C. § 1981a(b)(3).

144. *Id.*

145. In 1990, Congress attempted to change the Title VII remedies regime by providing for uncapped compensatory damages and punitive damages that would be capped at \$150,000 or the amount of compensatory damages, whichever was greater. Civil Rights Act of 1990, S. 2104, 101st Cong. § 8(b) (as enrolled by Senate, Oct. 21, 1990). President George H.W. Bush vetoed the 1990 legislation, expressing concerns about the level of damages the legislation authorized. 136 CONG. REC. S16418 (daily ed. Oct. 22, 1990) (veto message of President Bush on Senate Bill 2104). Congress eventually reached a compromise that allowed for a total cap on combined compensatory and punitive damages that took into account the size of the employer in demarcating the maximum award allowed. See 42 U.S.C. § 1981a(a), (b); see also *President Bush's Statement on Signing the Civil Rights Act of 1991*, 226 Daily Lab. Rep. (BNA), at D-1 (Nov. 21, 1991). At the same time, Congress also defined the substantive standard for awarding punitive damages under Title VII. See 42 U.S.C. § 1981a(b)(1) ("A complaining party may recover punitive damages . . . if the complaining party demonstrates that the respondent engaged in a discriminatory practice or discriminatory practices with malice or with reckless indifference to the federally protected rights of an aggrieved individual.").

indicated that the reason that the caps were set at the current level was to reduce the incentive for filing frivolous lawsuits.¹⁴⁶

The Title VII statutory caps on compensatory damages do not define the amount of harm that a plaintiff has incurred. Rather, they define the amount of the plaintiff's harm for which the defendant will be held responsible. This is an important distinction, because it points to a different way to conduct the *Gore* analysis.

When a court reduces compensatory damages to comport with the statutory cap, it should not use the reduced amount in conducting the *Gore* analysis. The second *Gore* guidepost calls for a comparison of the actual or potential harm incurred by the plaintiff and the punitive damages award.¹⁴⁷ The harm suffered by the plaintiff is represented by the compensatory damages award *before* imposition of the statutory cap. In a stand-alone Title VII case, awarding compensatory damages first alleviates the conceptual error that occurs when a court compares the reduced amount of compensatory damages to the punitive damages.

Additionally, splitting the capped damages between compensatory and punitive damages is likely to draw three different requests for review: a request for remittitur of compensatory damages, a request for remittitur of punitive damages, and a request for excessiveness review of punitive damages. Allocating all of the capped damages to compensatory damages limits the types of review the court may be asked to undertake, thereby promoting judicial efficiency and reducing the possibilities of analytical missteps.

Of course, the jury award may not always be amenable to such an allocation. In some stand-alone Title VII cases, the jury may award combined compensatory and punitive damages that exceed the cap, but the compensatory damages alone may not reach the cap level. In those circumstances, awarding the total amount of compensatory damages before allocating the remainder of

146. 137 CONG. REC. S15472 (daily ed. Oct. 30, 1991) (statement of Sen. Dole). Other senators echoed the rationale. Senator Bumpers expressed a need for statutory caps because lawyers sometimes file suits with little merit but with high settlement values, and Senator Kasten indicated that the purpose of the limits was to avoid "entangling small businesses in endless litigation." *Id.* (statements of Sen. Bumpers & Sen. Kasten). The sponsors of the bill introducing the caps into the Title VII regime further indicated that one of the purposes of adding punitive and compensatory damages to Title VII was to address the gap between Title VII and § 1981 remedies. *Id.* (Sponsors' Interpretative Memorandum on Issues Other than Wards Cove-Business Necessity/Cumulation/Alternative Business Practice).

147. *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 418 (2003); *see also id.* at 426 (noting that the amount of punitive damages should be "both reasonable and proportionate to the amount of harm to the plaintiff and to the general damages recovered").

the capped amount in punitive damages makes it less likely that the court will engage in an improper ratio calculation when performing the *Gore* calculus.¹⁴⁸

D. Courts Should Consider How Allocation Affects Constitutional Review

The division of damages becomes more complicated if the plaintiff prevails on multiple theories of recovery or multiple causes of action under different statutory or common law regimes. Given the myriad situations where this type of division might be necessary, it is nearly impossible to suggest a one-size-fits-all solution. Indeed, any attempt to craft such a universal solution points to inherent flaws in the *Gore* calculus itself. This section identifies conceptual errors that may lead to faulty *Gore* analysis and demonstrates how courts will have difficulties applying *Gore* in the case of aggregate claims.

Given the overlapping remedies regimes in employment discrimination cases, it is possible for a plaintiff to prevail under multiple statutory or common law regimes for the same employer conduct. At times, judges may split a damages award between two different causes of action to provide for maximum recovery.¹⁴⁹ For example, when a state regime does not provide for punitive damages, the court may allocate all awarded punitive damages under the federal-law claim and allocate all awarded compensatory damages under the state-law claim.¹⁵⁰ Or the court may allocate the bulk of punitive damages to a cause of action that does not contain statutory caps.¹⁵¹

As discussed in the prior section, such divisions may lead to faulty comparisons under the second *Gore* guidepost, which requires courts to consider the disparity between the harm incurred or potentially incurred by the

148. It also avoids another problem that occurs when either the trial judge or a panel on appeal further reduces a punitive damages award. If the trial court did not originally allocate the full amount of compensatory damages, a later reduction of the punitive damages award may require the court to increase the amount of compensatory damages to fully reflect the jury's award.

149. This sentence is intended to be descriptive. The author is not expressing any opinion about the desirability of this practice, only noting that it occurs.

150. See, e.g., *Madison v. IBP, Inc.*, 257 F.3d 780, 801-02 (8th Cir. 2001) (finding the allocation of compensatory damages to the plaintiff's state claim proper and refusing to apply the \$300,000 Title VII damages cap to the allocated award), *vacated on other grounds*, 536 U.S. 919 (2002); cf. *Oliver v. Cole Gift Ctrs., Inc.*, 85 F. Supp. 2d 109, 113 (D. Conn. 2000) (citing cases that make such allocations but declining to follow those cases where the "plaintiff [was] adequately compensated by the damage award as capped under the federal scheme").

151. See, e.g., *Martini v. Fed. Nat'l Mortgage Ass'n*, 178 F.3d 1336, 1349-50 (D.C. Cir. 1999) (allocating punitive damages in excess of the Title VII damages cap to the plaintiff's claim under the D.C. Human Rights Act); *Hemmings v. Tidyman's, Inc.*, 65 F. Supp. 2d 1157, 1161-62 (E.D. Wash. 1999) (refusing to apply the Title VII damages cap to the compensatory damages awarded under state law), *aff'd in part, rev'd in part*, 285 F.3d 1174 (9th Cir. 2002).

plaintiff and the punitive damages award.¹⁵² When the damages awarded are for the same conduct and are evaluated under the same legal standard, the judge's comparison of harm to punitive damages should not be dependent on the way in which the judge happens to divide the award for other purposes.¹⁵³

Nevertheless, a general formulation requiring a court to aggregate the non-punitive damages in a case and compare that harm to the total punitive damages award might not be appropriate in all employment discrimination cases. This is because plaintiffs may prevail on different legal theories or for different underlying conduct.

There are numerous scenarios in which this might occur. For example, a plaintiff might allege that she was subjected to harassment and passed over for a promotion because of her gender, and that she was subsequently terminated in retaliation for submitting a complaint about the conduct. All three of these issues might be resolved under both Title VII and state law, or a plaintiff might choose to proceed under only one or the other for various substantive and procedural reasons.¹⁵⁴ If a jury returns a verdict on all three theories and awards punitive damages, questions arise regarding whether the harm and the punitive damages should be considered separately or in the aggregate.

Unfortunately, the Supreme Court has not provided guidance on whether a court should consider harm in the aggregate or separately in such circumstances.¹⁵⁵ The few lower courts that have considered this issue have reached differing results,¹⁵⁶ with some courts failing to provide any analysis for the result reached.¹⁵⁷ Even the employment discrimination cases that contain aggregation questions resolve the issue differently.¹⁵⁸ This divergence

152. *State Farm*, 538 U.S. at 418.

153. The proper standard for judging whether a damages reduction is appropriate might change depending on whether the damages are considered compensatory or punitive and whether they are issued under state or federal law. *See, e.g.*, *Greenbaum v. Handelsbanken*, 67 F. Supp. 2d 228, 270 (S.D.N.Y. 1999).

154. For example, a plaintiff with multiple claims may fail to exhaust her administrative remedies on one of those claims within the time required under state law, but she may complete the required administrative steps within the time period allowed under federal law. *See, e.g.*, *Gregory v. S. New Eng. Tel. Co.*, 896 F. Supp. 78, 82 (D. Conn. 1994) (noting that state law required that a discrimination charge be filed with the relevant state agency within 180 days, while federal law allowed 300 days for filing with the EEOC).

155. *See Fastenal Co. v. Crawford*, 609 F. Supp. 2d 650, 660 (E.D. Ky. 2009) (indicating that there is little guidance on this question).

156. *See id.* (citing relevant circuit cases).

157. *See, e.g.*, *Pollard v. E.I. DuPont De Nemours, Inc.*, 412 F.3d 657, 664, 668 (6th Cir. 2005) (aggregating compensatory damages from separate claims under Title VII and common law intentional infliction of emotional distress).

158. *Compare id.*, with *Tomao v. Abbott Labs., Inc.*, No. 04 C 3470, 2007 WL 2225905, at *22 n.6 (N.D. Ill. July 31, 2007) (refusing to aggregate damages for separate claims).

is unfortunate because, in some cases, the issue may be vital in determining whether a court believes that excessiveness review is necessary and in determining the permissible amount of punitive damages under such review.¹⁵⁹

Discussing the aggregation problem in the employment discrimination context illustrates two fundamental flaws in the *Gore* analysis: (1) its failure to consistently identify the reason that punitive damages are a matter for constitutional scrutiny, and (2) its failure to demonstrate how the guideposts properly address the issue of excessiveness. The *Gore* Court supported its contention that the ratio of punitive damages to actual or potential harm bears on excessiveness by resorting to what appear to be random citations to an odd array of English statutes, present-day statutes, four state cases, and its own recent pronouncements on punitive damages.¹⁶⁰ These citations and the Court's discussion provide little connection between the ratio and the concept of excessiveness.

Without a convincing explanation regarding what the ratio is supposed to accomplish, it is difficult to articulate how the courts should resolve the aggregation question. In deciding whether to aggregate punitive damages, some courts examine whether the same legal rights are at issue across the causes of action on which the plaintiff prevailed.¹⁶¹ If the same legal rights are at issue, the court considers aggregate damages, but if the legal rights are different, then the court separately examines the compensatory and punitive damages for each claim.¹⁶²

In the employment discrimination context, however, determining when the same legal rights have been violated may be difficult. For example, in employment cases where the plaintiff prevails on both a discrimination and a retaliation claim, courts will be able to find underlying doctrine to support both aggregation and separation because the courts are of two minds when it comes to determining whether discrimination and retaliation claims involve the same legal rights. The Supreme Court has at times distinguished retaliation and discrimination claims by noting that Title VII provides separate statutory protections for these claims and by reasoning that discrimination harms individuals because of "who they are, *i.e.*, their status," while retaliation

159. *See, e.g., Tomao*, 2007 WL 2225905, at *22 & n.6 (explaining that the punitive damages award might appear excessive if compared to the compensatory award for each separate claim in isolation).

160. *See BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 580-81 & nn.32-33 (1996). For further discussion of this topic, see Sandra F. Sperino, *Judicial Preemption of Punitive Damages*, 78 U. CIN. L. REV. 227 (2009).

161. *See, e.g., JCB, Inc. v. Union Planters Bank, NA*, 539 F.3d 862, 874-77 (8th Cir. 2008) (analyzing punitive damages awards for trespass and conversion claims separately).

162. *See id.* at 874-75.

happens to “individuals based on what they do, *i.e.*, their conduct.”¹⁶³ Yet the Supreme Court has also emphasized that retaliation is a form of discrimination and has implied a retaliation claim into statutory regimes where the statutory language focuses on discrimination.¹⁶⁴

In the context of administrative exhaustion, federal courts sometimes hold that a plaintiff fails to exhaust administrative remedies for retaliation when the plaintiff only raises discrimination claims before the EEOC, the rationale being that discrimination and retaliation constitute discrete employment practices.¹⁶⁵ At times, however, courts find that retaliation is like or related to discrimination claims, even where retaliation is not expressly mentioned in the charge.¹⁶⁶

Even for claims of harassment and discriminatory hiring, promotion, and termination that are most commonly lumped under the umbrella of “discrimination,” there are ways to argue that Title VII’s statutory regime requires individual prosecution of discrete acts of discrimination and that these discrete acts require separate punitive damages consideration.¹⁶⁷ Therefore,

163. *Burlington N. & Santa Fe Ry. Co. v. White*, 548 U.S. 53, 63 (2006); *see also* *CBOCS W., Inc. v. Humphries*, 128 S. Ct. 1951, 1960 (2008) (discussing *Burlington* and noting that remedies for discrimination claims and retaliation claims can overlap without being redundant).

164. *Gomez-Perez v. Potter*, 128 S. Ct. 1931, 1936-37 (2008) (quoting *Jackson v. Birmingham Bd. of Educ.*, 544 U.S. 167, 173-74 (2005)) (interpreting the ADEA’s federal sector antidiscrimination provision, 29 U.S.C. § 633a(a) (2006), to include retaliation); *see also* *CBOCS*, 128 S. Ct. at 1961 (interpreting § 1981 as prohibiting retaliation).

165. *See, e.g.*, *Sitar v. Ind. Dep’t of Transp.*, 344 F.3d 720, 726 (7th Cir. 2003) (“Normally, retaliation, sex discrimination, and sexual harassment charges are not ‘like or reasonably related’ to one another to permit an EEOC charge of one type of wrong to support a subsequent civil suit for another.” (quoting *Jenkins v. Blue Cross Mut. Hosp. Ins., Inc.*, 538 F.2d 164, 167 (7th Cir. 1976)); *Marcelus v. Corr. Corp. of Am./Corr. Treatment Facility*, 540 F. Supp. 2d 231, 236 (D.D.C. 2008) (“The theories of discrimination in plaintiff’s lawsuit are limited to the theories contained in the EEOC Charge he filed. Any other theories are barred unless they are ‘like or reasonably related to the allegations of the charge and grow[] out of such allegations.’” (quoting *Park v. Howard Univ.*, 71 F.3d 904, 907 (D.C. Cir. 1995)); *see also* *Nat’l R.R. Passenger Corp. v. Morgan*, 536 U.S. 101, 110-15 (2002) (holding that Title VII requires separate administrative exhaustion for each employment practice not governed by the continuing violation doctrine).

166. *See, e.g.*, *Jones v. Calvert Group, Ltd.*, 551 F.3d 297, 301-03 (4th Cir. 2009) (holding that separate administrative exhaustion is not required when a plaintiff alleges retaliation after filing an EEOC discrimination charge).

167. *See Nat’l R.R. Passenger Corp.*, 536 U.S. at 111 (emphasizing that Title VII views each discriminatory employment practice not governed by the continuing violation doctrine as a discrete act); *Cheek v. W. & S. Life Ins. Co.*, 31 F.3d 497, 501 (7th Cir. 1994) (“Because an employer may discriminate on the basis of sex in numerous ways, a claim of sex discrimination in an EEOC charge and a claim of sex discrimination in a complaint are not alike or reasonably related just because they both assert forms of sex discrimination.”).

even if courts adopt the “legal right” test for determining whether to aggregate damages for constitutional analysis, it is not clear that such a test provides a simple way to analyze employment discrimination claims.

More importantly, the “legal right” test may not be the correct test, because it fails to fully recognize that it may be appropriate to issue more punishment when a defendant has violated multiple legal rights and also fails to take into account the fact that juries may award overlapping punitive damages awards when different legal rights have been violated through the same course of action.¹⁶⁸ The Supreme Court has indicated that due process requires that a defendant have notice of the potential sanctions it might face for its conduct.¹⁶⁹ Such a rationale suggests that it would be appropriate to analyze the entire course of intentional conduct in which the defendant engaged, even if that conduct involved the violation of multiple legal rights.

But a course of conduct test may also pose problems for courts in the employment discrimination context. Take, for example, a situation in which an employee is refused a promotion based on his race and is later terminated based on his race. Whether the failure to promote and the termination are part of the same course of conduct may vary depending on the facts and from whose point of view the conduct is considered. Some plaintiffs might allege many types of discrimination and/or retaliation within the same continuous course of conduct involving the same actors over a relatively short period of time. Other plaintiffs might allege discriminatory conduct and/or retaliation that is separated by large periods of time and involves different courses of conduct and different actors.

It is not difficult to predict the impending circuit splits that are likely to develop as the courts consider the aggregation question both generally and in the specific context of employment discrimination. What can be said with certainty is that the structure of the verdict form will impact how judges view verdicts and whether judges can separate claims for constitutional excessiveness review. As discussed earlier, judges retain discretion regarding the content of the verdict form and whether to direct the jury to enter separate punitive damages awards or an aggregate award.¹⁷⁰ Judges and practitioners should consider that verdict forms that provide a single punitive damages

168. *See, e.g.,* Mason v. Okla. Tpk. Auth., 115 F.3d 1442, 1460 (10th Cir. 1997) (discussing the possibility of duplicative damages and indicating that “[i]n some cases, multiple punitive damage awards on overlapping theories of recovery may not be duplicative at all, but may instead represent the jury’s proper effort to punish and deter *all* the improper conduct underlying the verdict”).

169. *See, e.g.,* Philip Morris USA v. Williams, 549 U.S. 346, 352-53 (2007).

170. King v. Macri, 993 F.2d 294, 299 (2d Cir. 1993); *see also supra* notes 114-17 and accompanying text.

calculation for multiple claims or courses of conduct may make it difficult for the court to separately allocate those damages across multiple claims when conducting an excessiveness review. On the flip side, verdict forms with separate damages calculations will more readily permit either aggregation or separation.

While judges and litigants should be mindful of how verdict allocation may affect punitive damages review, the ease with which the punitive-to-compensatory ratio can be manipulated poses a much larger question regarding whether the second prong of the *Gore* framework truly relates to constitutional excessiveness.

V. Conclusion

Courts using the second *Gore* guidepost to analyze punitive damages in employment discrimination cases should be aware of the many conceptual errors that may be introduced by the particularities of the various remedies regimes. Some of these errors, such as the failure to include back pay in the ratio calculation, appear to arise from a simple failure to recognize that the Supreme Court's ratio language uses the term "compensatory damages" in its broader sense, not in the limited Title VII sense.

The failure to include the value of reinstatement and injunctive relief in the ratio may result from this same definitional confusion. But it also points to an ambiguity inherent in the Supreme Court's analysis—whether the appropriate comparison is between only monetary harm and punitive damages, or whether all harm should be included. As discussed earlier, the language used by the Court potentially supports either conclusion; however, in the employment discrimination context, the Supreme Court's broader goals seem to require the inclusion of reinstatement and perhaps even other nonmonetary injunctive relief in the ratio.

Courts and litigants must be mindful that dividing damages for damages cap or other reasons may affect the ratio in the *Gore* calculus. The aggregation problem is the most complex of the problems presented and the one that most directly challenges the Supreme Court's enunciation of the second *Gore* guidepost. Because the Court proposed the ratio test without any direct constitutional basis and with little explanation of how the ratio relates to excessiveness, it is difficult to resolve aggregation issues. While some courts have analyzed the problem by trying to consider whether claims effectuate the same legal right, such an inquiry points to potentially conflicting answers in the employment discrimination context. A course of conduct test may likewise produce varying answers.

In the end, the ease with which the second *Gore* guidepost can be influenced points to serious questions regarding whether it helps to measure excessiveness or whether it simply reflects an outcome arrived at by mathematical manipulation.