Non-Determinative Discrimination, Mixed Motives, and the Inner Boundary of Discrimination Law

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Non-Determinative Discrimination, Mixed Motives, and the Inner Boundary of Discrimination Law

SAM STONEFIELD*

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I. INTRODUCTION

A. A Definition of Discrimination as Different Treatment

While none of the numerous statutes that proscribe discrimination define the term "discrimination," they do suggest at

1. Writing in 1966, then-Professor Sovern observed that there are "uncertainties in the very meaning of discrimination, a term the statutes do not define." M. SOVERN, LEGAL RERAINTS ON RACIAL DISCRIMINATION IN EMPLOYMENT 42-43 (1966). His observation, reiterated by courts in the ensuing years, remains true. The Supreme Court has noted that "Title VII does not define the term discrimination." Newport News Shipbuilding Co. v. EEOC, 462 U.S. 669, 676 (1983). With respect to Title VI, 42 U.S.C. § 2000d (1982), the Court has recognized that the term "discrimination" is inherently ambiguous, Guardians Ass'n. v. N.Y. Civil Serv. Comm'n, 463 U.S. 582, 592 (1983), and is "susceptible of varying interpretations." Regents of Univ. of Cal. v. Bakke, 438 U.S. 265, 284 (1978). In Bakke, Justice Powell quoted an observation of Justice Holmes in order to describe the concept of discrimination: "[a] word is not a crystal, transparent and unchanged, it is the skin of a living thought and may vary greatly in color and content according to the circumstances and time in which it is used." Bakke, 438 U.S. at 284 (quoting Town v. Eisner, 245 U.S. 418, 425 (1918)). State statutes are similarly general. See, e.g., CAL. GOV'T CODE § 12940 (West Supp. 1986); MICH. COMP. LAWS ANN. § 37.2202 (West 1985). Those statutes that do attempt a definition provide instead a tautology, ILL. ANN. STAT. ch. 68, § 1-103(Q) (Smith-Hurd Supp. 1985) ("[Unlawful discrimination] means discrimination against a person because of his or her race . . . ."), or a synonym, MINN. STAT. ANN. § 363.01(1) (West Supp. 1985) ("[Discrimination includes segregate or separate . . . ."). See generally Bonfield, THE SUBSTANCE OF AMERICAN FAIR EMPLOYMENT PRACTICE LEGISLATION: EMPLOYEES, 61 NW. U.L. REV. 907 (1967). The oldest statutes, the Civil Rights Acts of 1866 and 1871, 42 U.S.C. §§ 1981 & 1982 (1982), do not use the term discrimination and more clearly specify the right established by the law. The statutes give "[a]ll persons" or "[a]ll citizens" the same identified right "as is enjoyed by white citizens." See 42 U.S.C. §§ 1981 & 1982 (1982). Even these more specific descriptions, however, have required extensive elaboration by the courts. See, e.g., General Bldg. Contractors Ass'n v. Pennsylvania, 458 U.S. 375 (1982). See generally Brown, Givelber & Subrin, TREATING BLACKS AS IF THEY WERE WHITE: PROBLEMS OF DEFINITION AND PROOF IN SECTION 1982 CASES, 124 U. PA. L. REV. 1 (1975).

Professor Jones' recent comment on Title VII provides an apt summary of all the laws against discrimination:

The[ir] general terms of definition use the concept of discrimination in defining
least one meaning. Their operative language typically provides that it shall be unlawful to "discriminate" "because of" race and other specified criteria. Using the generally accepted definitions discrimination. Inevitably under such circumstances, it is the process of administration that must give content to the terminology. Title VII adjudication is largely still concerned with establishing the metes and bounds of the law, including the legal content of the concept 'discrimination.'


Usually, a statute makes unlawful several types of discrimination, most typically race, color, religion, sex and national origin. The discriminatory use of these categories is prohibited by Title VII, 42 U.S.C. § 2000e-2 (1982), and a majority of state laws. There has been a trend toward expanding the protected classes. Some states now forbid discrimination on the basis of marital status or status as a welfare recipient. See, e.g., MASS. GEN. LAWS ANN. ch. 151B, § 4(10) (West 1982) (unlawful to discriminate against "recipient of federal, state or local assistance."); N.Y. EXEC. LAW § 296(a) (McKinney 1983) (marital status). Current federal bills would prohibit discrimination under Title VII against cancer victims. See H.R. 370, 99th Cong., 1st Sess., 131 CONG. REC. H104 (daily ed. Jan. 7, 1985); H.R. 1294, 99th Cong., 1st Sess., 131 CONG. REC. H1837 (daily ed. Apr. 2, 1985). Most statutes also prohibit retaliation against a person because he or she has filed a complaint, or assisted someone with a complaint. See, e.g., Title VII, 42 U.S.C. § 2000e-3(a)(1982); Title VIII, 42 U.S.C. § 3631 (1982). For an example of truly omnibus protection, see D.C. CODE ANN. § 1-2501 (1981) (prohibiting discrimination based on, but not limited to, "race, color, reli-
of these statutory terms, unlawful racial discrimination can be defined as the different treatment of a person caused by that person's race. This different treatment is both "the most easily understood type of discrimination [and] the most obvious evil that [the legislatures] had in mind when [they] enacted . . ." laws against discrimination. Indeed, the prohibition against different treatment because of race is the central prohibition of the antidiscrimination principle, which in turn provides a major theoretical

4. The verb "discriminate" means to "treat differently." WEBSTER'S NEW THIRD INTERNATIONAL DICTIONARY 648 (1967). See also Fiss, Groups and the Equal Protection Clause, 5 PHIL & PUB. AFF. 107, 109 (1976) ("once divested of its emotional connotation, ["to discriminate"] simply means to distinguish or to draw a line.") [hereinafter Fiss, Groups]. The phrase "because of" means "by cause" or "caused by." WEBSTER'S NEW THIRD INTERNATIONAL DICTIONARY 194 (1976). Different treatment (which is commonly called "disparate treatment" in the case law, e.g., International Bhd. of Teamsters v. United States, 431 U.S. 324, 335 n.15 (1977), and literature, e.g., B. SCHLIER & P. GROSSMAN, EMPLOYMENT DISCRIMINATION LAW 13 (2d ed. 1981)) is not the only definition of discrimination. Under the disparate impact theory, discrimination is defined as the use of "practices that are facially neutral in their treatment of different groups but that in fact fall more harshly on one group than another and cannot be justified by business necessity." Teamsters, 431 U.S. at 335 n.15.

5. Teamsters, 431 U.S. at 335 n.15. The Court stated that a defendant discriminates when it "simply treats some people less favorably than others because of their race, color, religion, sex or national origin." Id. Senator Clark, one of the floor managers of the 1964 Civil Rights Act, responded to the lack of definition of the term "discrimination" by stating:

It has been suggested that the concept of discrimination is vague. In fact it is clear and simple and has no hidden meanings. To discriminate is to make a distinction, to make a difference in treatment or favor, and those distinctions or differences in treatment or favor which are prohibited by [section 703] are those which are based on any five [six] of the forbidden criteria: [age,] race, color, religion, sex, and national origin. Any other criterion or qualification for employment is not affected by this Title.


6. The antidiscrimination principle is "the general principle disfavoring classifications and other decisions and practices that depend upon the race . . . of the parties affected." Brest, Foreword: In Defense of the Antidiscrimination Principle, 90 HARV. L. REV. 1, 1 (1976) [hereinafter Brest, Foreword]. This Article uses Professor Brest's definition and description of the principle, and also draws significantly from two works of Professor Fiss, A Theory of Fair Employment Laws, 38 U. CHI. L. REV. 235 (1971)[hereinafter Fiss, Theory] and Fiss, Groups, supra note 4, and the more realistic elaboration and critique of the principle by Professor Bell in D. BELL, RACE, RACISM AND AMERICAN LAW 39-47, 589-600 (2d ed. 1980)
underpinning for the laws against discrimination.  

B. Two Types of Different Treatment

This Article addresses one aspect of this "most easily understood type of discrimination" that has often been overlooked. It elaborates a simple observation: there are two types of different treatment embraced within the concept of discrimination, outcome-determinative discrimination and non-outcome-determinative discrimination (described in this Article as non-determinative discrimination). Most contemporary discrimination cases involve claims of outcome-determinative discrimination, where the focus

[hereinafter D. BELL, RACE]. Professor Brest's definition of the antidiscrimination principle is said to be a specific application of a broader, more generic principle. See Eisenberg, Disproportionate Impact and Illicit Motive: Theories of Constitutional Adjudication, 52 N.Y.U. L. Rev. 36 (1977); O'Fallon, Adjudication and Contested Concepts: The Case of Equal Protection, 54 N.Y.U. L. Rev. 19, 51 n.121 (1979) (Brest's use is "narrow").

7. Brest, Foreword, supra note 6, at 1 ("The antidiscrimination principle lies at the core of most state and federal civil rights legislation . . ."); Fiss, Groups, supra note 4, at 122 ("antidiscrimination principle was adopted by the legislative branch"). The antidiscrimination principle primarily supports the disparate treatment theory of discrimination and is not the only principle reflected in the statutes. The disparate impact theory of discrimination, see supra note 4, while possibly supported by the antidiscrimination principle, see Brest, Foreword, supra note 6, at 52; Fiss, Groups, supra note 4, at 141-44, is more directly buttressed by a group-disadvantaging theory. See Chamallas, Evolving Conceptions of Equality Under Title VII: Disparate Impact Theory and the Demise of the Bottom Line Principle, 31 UCLA L. Rev. 305 (1983) [hereinafter Chamallas, Equality]; Fiss, Groups, supra note 4, at 144-46; Smith, Alternatives to Paralysis: A Working Paper Precipitated by the Affirmative Action Cases, 61 Or. L. Rev. 317, 327-29 (1982). The antidiscrimination principle is not always favored. Its application yields awkward and arguably unacceptable results in cases involving "physical sexual reproductive characteristic and the pervasive social system of ascribed sexual characteristics derived from those differences." Kay, Models of Equality, 1985 U. Ill. L Rev. 99, 78-79. See also Chamallas, Exploring the "Entire Spectrum" of Disparate Treatment Under Title VII: Rules Governing Predominately Female Jobs, 1984 U. Ill. L. Rev. 1 [hereinafter Chamallas, Spectrum]; Law, Rethinking Sex and the Constitution, 132 U. Pa. L. Rev. 955, 965-68, 1008-12 (1984).

8. The two "types" of one concept is analogous to Professor Dworkin's use of concept and conception. R. DWORKIN, TAKING RIGHTS SERIOUSLY 134-35 (1977). He differentiates between a concept, which is a general principle or idea, and a conception, which is one version or specific application of that principle or idea. Professor Chamallas has used Dworkin's terminology in describing the two conceptions of equality (equality of opportunity and equality of results) on which the disparate treatment and disparate impact theories of discrimination are based. Chamallas, Equality, supra note 7, at 316 n.60.

9. Because such discrimination does determine something (it determines not only the defendant's decision to treat or consider the plaintiff differently, but also the different treatment that flows from that decision), "non-determinative discrimination" is an admittedly imprecise term, perhaps an oxymoron. It was chosen over the more accurate term, non-outcome-determinative discrimination, for esthetic reasons.
is on the result of the challenged decision — the failure to hire or to promote, the denial of the apartment, the sale of the house, or the discharge from employment. Typically, the plaintiff (P) attempts to prove that the different treatment caused the result, the defendant (D) tries to show that the decision was made for nondiscriminatory reasons, and the factfinder must decide whether lawful or unlawful reasons determined the outcome. In a non-determinative discrimination claim, P also alleges that D discriminated because of race, by treating P differently than if he or she were white. However, unlike the outcome-determinative claim, the different treatment did not determine the outcome of the particular transaction at issue. Non-determinative discrimination is a separate but related theory of discrimination that supplements the traditional outcome-determinative claim.

Because non-determinative discrimination has gone largely unrecognized by courts and commentators, and because there are several versions of these claims, it may be helpful to begin the discussion with brief examples. The subsequent sections of this introduction will then summarize the limited recognition of non-determinative discrimination claims provided by current law, the problems presented if such claims are adopted, and the general limits on the coverage of the laws against discrimination. Sections II and III will then turn to a detailed discussion of discriminatory outcome and non-determinative discrimination claims.

C. Examples of Non-Determinative Discrimination

The following examples illustrate four varieties of non-determinative discrimination claims: (1) initially determinative discriminat-

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10. See infra text accompanying notes 66-134 for a more complete treatment of the proof and causation issues involved in an outcome-determinative discrimination claim.

nation; (2) process discrimination; (3) language discrimination; and (4) mixed motive discrimination. In each hypothetical, the plaintiffs are 25-year old black women seeking employment as salespersons with defendant companies, all small computer distributors in a major metropolitan area. Each plaintiff is denied employment, and each files a complaint alleging race discrimination. Each plaintiff brings and loses, for one reason or another, a claim of outcome-determinative discrimination.

1. Initially Determinative Discrimination. In this type of discrimination, the defendant bases its adverse decision on the race of the applicant. However, it later turns out that, even if the defendant had not used race as a criterion, it would not have selected the plaintiff.

D1 has three criteria for selecting its salespeople: race (only whites), two years of experience in sales, and the date of application. P1, P2, and P3 all apply and are rejected at the outset because of their race. P1 meets all the requirements except the racial one. P2 has only one year of sales experience. P3 has three years of sales experience but was the twenty-fifth qualified applicant for the three available openings.

P1, P2, and P3 were all rejected because of their race. If D1 had considered their applications in a nondiscriminatory manner, P1 would have been hired, and she will prevail on her discriminatory outcome claim. However, even if D1's hiring practices were race-neutral, P2's application would have been rejected for not meeting D1's experience qualification, and P3's would have been rejected for being too far down the list. P2 and P3 each have a

12. Each of these varieties of non-determinative discrimination is more fully described and analyzed infra Sections III A,B,C, and D, respectively. These four types do not exhaust the category of non-determinative discrimination claims. There are others, most notably claims of a discriminatory work environment, discussed infra notes 312-14.

13. The experience requirement could itself be subject to a disparate impact challenge on the grounds that it has a disparate impact on blacks. Cf. Griggs v. Duke Power Co., 401 U.S. 424 (1971). For purposes of this Article, it is assumed that the requirement has no such impact.

14. The date of application criterion refers to sequence. From the applicants who satisfy the first two criteria, D2 makes its selections serially by date of application.

15. The term "discrimination claim" is a synonym for "outcome-determinative discrimination claim." It will be frequently used in place of the latter phrase because it is shorter and provides some relief from the incessant use of the word "determinative."

2. Process Discrimination. In this type of non-determinative discrimination, the defendant does not immediately reject black applicants because of race. However, the defendant does treat black applicants differently than white applicants in the process or processes used to reach its decision. Some black applicants receive no personal interview, while others are given a very short interview,\textsuperscript{17} or one with objectionable questions.\textsuperscript{18} The process discrimination may or may not determine the outcome of the final decision. P4, although treated differently in the process, might nevertheless be hired; P5, also treated differently in the process, might not be hired because she was not fully qualified. Both P4 and P5 suffer process discrimination but not outcome-determinative discrimination (although for different reasons).\textsuperscript{19}

3. Language Discrimination. If the defendant makes a racist remark to a black applicant during the interview,\textsuperscript{20} the racial statement could be used as evidence to establish the plaintiff’s discriminatory outcome claim of racial discrimination in the denial of the job.\textsuperscript{21} However, even if she loses the outcome claim, she may still present the discriminatory statement as an unlawful act in and of itself, a separate type of non-determinative discrimination.

4. Mixed Motive Discrimination. This type of non-determinative discrimination addresses the situation where a defendant has

1008 (1982).

\textsuperscript{17} See Ostroff v. Employment Exch., Inc., 683 F.2d 302 (9th Cir. 1982) (per curiam).

\textsuperscript{18} See Robinson v. 12 Lofts Realty, Inc., 610 F.2d 1032, 1041 (2d Cir. 1979).

\textsuperscript{19} Process discrimination can also cause discriminatory outcomes. For example, failure to grant a plaintiff an interview might deprive a defendant of information about that plaintiff's background which, if known, would have led to a job offer.


\textsuperscript{21} See, e.g., Miles v. M.N.C. Corp., 750 F.2d 867, 873 (11th Cir. 1985) (racial slur); Torres v. County of Oakland, 758 F.2d 147, 152 (6th Cir. 1985) (derogatory language); Krodel v. Young, 748 F.2d 701, 710 (D.C. Cir. 1984) (age-based comment), cert. denied, 106 S. Ct. 62 (1985). The general point was put nicely by Judge Coffin: “[W]here there is smoke, there is fire.” Manego v. Cape Cod Five Cents Savings Bank, 692 F.2d 174, 177 (1st Cir. 1982). In Manego, however, the court affirmed the granting of summary judgment for the defendant, saying that “the district judge invited the plaintiff to lead him to at least some glowing embers and plaintiff failed to do so.” Id. at 177.
two or more reasons for its decision, at least one of which is lawful and one of which is racially discriminatory. Company D2, in rejecting the application of P6, writes to her:22 "You don’t have the necessary two years experience; you are twenty-fifth on the list; and, besides, we already have too many black salespeople and so we wouldn’t have hired you anyway." There are both outcome-determinative and non-outcome determinative mixed motive claims. The racial reason in the outcome-determinative claim is a determinative factor in the decision.24 In the non-determinative mixed motive claim, race plays some role but is not a determinative factor. D2 adversely considers P6’s race in evaluating the application, but makes the decision on the basis of independent, lawful reasons.

D. Current Doctrine and the Underenforcement Problem

Current doctrine addresses the conduct identified in the preceding examples of non-determinative discrimination only in outcome-determinative discrimination terms. Following the suggestions in several Supreme Court opinions presenting outcome-determinative claims,25 most courts have adopted a "same decision" standard of liability that could be construed as rejecting the theory of non-determinative discrimination: "If . . . an employer discriminates . . . but the complainant would not have been hired even if he or she had been a member of the opposite [race] a complainant has not proved a case of discrimination."26

Using traditional but-for causation, this standard finds liabil-

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22. In Mt. Healthy Bd. of Educ. v. Doyle, 429 U.S. 274, 283 n.1 (1977) the unlawful reason was stated in writing. As discussed infra text accompanying notes Section III D, there are covert mixed motive cases, as well as the explicit type used in the introductory example.


24. The meaning and application of the term "determinative factor" are discussed supra Section II B.


ity only if the racial discrimination was the determinative or but-for cause of the final decision. If the outcome of the decision would have been the same even if the defendant had complied with the law and not discriminated against the plaintiff, courts find no discrimination. Under a strict version of this standard, only outcome-determinative discrimination is unlawful; non-determinative discrimination is not prohibited by the laws against discrimination.

Some courts and commentators have criticized the same decision standard and the use of but-for causation, noting that: "[R]ace is an impermissible factor . . . it cannot be brushed aside because it was neither the sole reason for discrimination nor the total factor of discrimination. We find no acceptable place in the law for partial racial discrimination." This observation that partial discrimination is still discrimination contains an important truth but ignores an equally observant counterpoint that partial discrimination is not the same as total discrimination. The theory of non-determinative discrimination presented in this Article is an attempt to incorporate the truths of the contending positions, addressing the shortcomings of the same decision and but-for standards while also retaining their strengths. Derived from the language of the statutes themselves, insights from fair housing and public accommodation litigation, and from decisions in discrimi-

27. Applying the "same decision" test, in its strongest form, is not the only method courts have used to deny liability to plaintiffs who fail to prove that the decision would have been different had the defendant complied with the law. Instead, courts have sometimes found liability and then used the test at the remedy stage to assure that plaintiffs do not receive relief that would place them in a better position than they would have occupied had there been no discrimination. See, e.g., Day v. Matthews, 530 F.2d 1083 (D.C. Cir. 1976) (per curiam) (retroactive promotion and back pay may be awarded to an employee only where an employee would have received promotion had he not been victim of discrimination).

28. Smith v. Sol D. Adler Realty Co., 436 F.2d 344, 349-50 (7th Cir. 1970) (emphasis in original). See also United States v. Hayes Int'l Corp., 6 Fair Empl. Prac. Cas. (BNA) 1328, 1330 (N.D. Ala. 1979) ("If any element of racial discrimination or retaliation or reprisal played any part in a challenged action, no matter how remote or slight or tangential, the Court would hold that the challenged action was in violation of . . . the law . . . ."), aff'd, 507 F.2d 1279 (5th Cir. 1975) (mem.). For a recent example, see, e.g., Bibbs v. Block, 749 F.2d 508 (8th Cir. 1984). The criticism of current doctrine is presented more fully supra Section II B.

29. See infra note 35.

30. See infra Section III B & C.
natory work environment and procedural due process cases, this theory recognizes and protects the right to be free from race-based discrimination. It matches that right with a remedy appropriately attuned to the precise violation and the particular injury.

The fundamental flaw of the same decision standard, if strictly applied to exclude non-determinative discrimination claims, is its limited range and narrowing effect. By unnecessarily and impermissibly limiting the scope of inquiry to discriminatory outcome claims, it ignores the processes which underlie the result and tolerates many practices which clearly are, and properly should be, forbidden by law. Additionally, the same decision standard defines too narrowly the private and societal interests in prohibiting discrimination, and the types of injuries inflicted by such wrongs. While job applicants surely are most interested in obtaining the jobs for which they apply, they also want to be considered “worthy of respect” and recognition as persons. When denied that treatment, the injury is not only the loss of an equal opportunity. It is also the loss of an individual’s dignity, self-respect and confidence, and an affront to the collective commitment to a nondiscriminatory society. Denial of the non-determinative discrimination theory, and recognition of only discriminatory outcome claims, “underenforces” the laws against discrimination and the goals they are intended to serve. By providing a vocabulary to discuss this type of discrimination, and by specifying its varieties and characteristics, this Article seeks the recognition and appropriate enforcement of non-determinative discrimination claims.

E. Non-Determinative Discrimination and the Overenforcement Problem

While the theory of non-determinative discrimination can resolve the underenforcement problem inherent in current doctrine, its recognition will create a problem of its own, a problem of overenforcement. Discriminatory outcome claims are restricted

31. See infra Section III B.
to complaints about the outcome of decisions, but non-determinative discrimination claims have no such limitation. Lacking the constraint of the outcome-determinative standard, the theory of non-determinative discrimination potentially reaches and invalidates all race-based different treatment. However, the coverage of the laws against discrimination is limited, and an unlimited application of the theory would "overenforce" the laws by regulating conduct that the statutes did not intend to reach.

The resolution of the overenforcement problem requires an assessment of those non-determinative discrimination claims that are encompassed by the statutes and therefore should be enforced, and those that are not. This assessment in turn requires a more general determination of the scope of coverage of the laws against discrimination.

F. The Metaphor of the Inner Boundary of the Laws Against Discrimination

The determination of the scope of coverage of the statutes defines a boundary, a place where the prohibition against discrimination ends and permission to discriminate begins. Within the boundary established by the laws, race-based different treatment is unlawful. Outside that boundary, legal challenges fail, not because the discrimination was not proven at trial but because the proven discrimination was not proscribed by the law. The demarcation of the boundary thus requires an understanding not only of the laws against discrimination and their underlying purposes but of the competing social policies which limit the scope of those laws and their prohibition against race-based different treatment.

The coverage of the laws against discrimination, as established by text, case law and consideration of their underlying purposes, is broad. In addition to prohibiting outcome-determinative discrimination, such as refusing to hire or to rent to a black person, the laws typically make it unlawful "otherwise to discriminate . . . with respect to . . . terms, conditions, or privileges . . . ."35

35. Title VII makes it unlawful for an employer:
   (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or
   (2) to limit, segregate, or classify his employees or applicants for employment in
The statutory purposes are also broad—eradication of discrimination, deterrence of future discrimination, and compensation for the victims of discrimination. The antidiscrimination principle which underlies these laws has a similarly broad reach—"guard[ing] against certain defects in the process by which race-dependent decisions are made and also against certain harmful results of race-dependent decisions.

These broad statutory prohibitions are supported by two types of justifications: intrinsic and instrumental. The intrinsic justification is a moral one—we support laws against discrimination because we believe that they are right and that discrimination

any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.


Title VIII makes it unlawful:

(a) To refuse to sell or rent after the making of a bona fide offer, or to refuse to negotiate for the sale or rental of, or otherwise make unavailable or deny, a dwelling to any person because of race, color, religion, sex, or national origin.
(b) To discriminate against any person in the terms, conditions, or privileges of sale or rental of a dwelling, or in the provisions of services or facilities in connection therewith, because of race, color, religion, sex, or national origin.
(c) To make, print, or publish, or cause to be made, printed, or published any notice, statement, or advertisement, with respect to the sale or rental of a dwelling that indicates any preference, limitation, or discrimination based on race, color, religion, sex, or national origin, or an intention to make any such preference, limitation, or discrimination.
(d) To represent to any person because of race, color, religion, sex, or national origin that any dwelling is not available for inspection, sale, or rental when such dwelling is in fact so available.


36. See Albemarle Paper Co. v. Moody, 422 U.S. 405, 417-18 (1975) (Title VII); Sullivan v. Little Hunting Park, Inc., 396 U.S. 229, 238-40 (1969) (public accommodation law); Jones v. Alfred H. Mayer Co., 392 U.S. 409, 414 n.14 (1968) (§ 1982). In one sense, these statements of purpose are little more than restatements of the fact that the laws against discrimination prohibit discrimination. They describe the purposes that the enacted laws serve, i.e., eradication, deterrence and compensation; they do not tell us the reasons why the laws were passed. These underlying reasons are discussed infra notes 39-61 and accompanying text.

37. Brest, Foreword, supra note 6, at 6 (emphasis in original). The term "race-dependent" refers to "decisions and conduct . . . that would have been different but for the race of those benefited or disadvantaged by them." Id.

is wrong.\textsuperscript{39} The instrumental justifications, on the other hand, are essentially utilitarian:\textsuperscript{40} we support laws against discrimination because it is in our interest to do so. By prohibiting discrimination, these laws are said to enhance economic efficiency,\textsuperscript{41} to foster desired social and economic change\textsuperscript{42} and to legitimize the social and

\textsuperscript{39} Supported by any number of moral theories, this intrinsic justification is based on a belief that adverse treatment of a person on the basis of certain characteristics offends our sense of human dignity and is wrong, whether or not it leads to the undesirable results addressed by the instrumental theories. See, e.g., R. Dworkin, Taking Rights Seriously 273 (1977) ("equal concern and respect"); J. Rawls, A Theory of Justice 60-67, 85-90 (1971) (fair equality of opportunity is second principle of justice); M. Walzer, Spheres of Justice: A Defense of Pluralism and Equality 149, 151 (1983). See also Clarke v. Board of Educ., 215 Neb. 250, 260, 338 N.W.2d 272, 277 (1983) ("Laws against discrimination have as their very foundation the notion that it is immoral to racially discriminate against another human, either by deed or by word.").

\textsuperscript{40} The reference is to a weak form of utilitarianism, and particularly to that branch which is closer perhaps to welfare economics than philosophy. See Posner, Utilitarianism, Economics and Legal Theory, 8 J. Legal Stud. 103 (1979). In its stronger form, the difficulty of making interpersonal comparisons of utility disallows utilitarianism from resolving many discrimination problems, because the bigot's pleasure in discriminating and the victim's displeasure in being discriminated against both register equally on the strong-form utilitarian's scale. Williams, A Critique of Utilitarianism, in J. Smart & B. Williams, Utilitarianism: For and Against 105-06 (1973). But see R. Brandt, A Theory of the Good and the Right 257-65 (1979) (interpersonal utility comparisons are possible). See generally D. Lyons, Forms and Limits of Utilitarianism (1967).

\textsuperscript{41} This justification is based on the belief that discrimination is economically inefficient and that prohibiting discrimination will enhance economic efficiency. "[Discrimination] ... denies society the benefits of wide participation in political, economic and cultural life." Roberts v. United States Jaycees, 104 S. Ct. 3244, 3253 (1984). Discrimination excludes dollars from the housing, consumer, and credit markets, and skills from the labor market. Jones v. Alfred H. Mayer Co., 392 U.S. 409, 443 (1968) (Congress intended to "assure that a dollar in the hands of a Negro will purchase the same thing as a dollar in the hands of a white man."); Fiss, Theory, supra note 6, at 241. Professor Milton Friedman has argued against this economic purpose as a justification for the laws, claiming that, to the extent discrimination is inefficient, the discipline of the market will itself eliminate such discrimination. M. Friedman, Capitalism and Freedom 109-10 (1962). However, the deeply-imbedded nature of discrimination, Bergmann & Darity, Social Relations, Productivity and Employer Discrimination, 104 MONTHLY LAB. REV. 47 (1981), and the lack of competition in many labor markets, R. Doeringer & M. Pierre, Internal Labor Markets and Manpower Analysis (1971) (dual labor markets with white males in one, minorities and women in the other); R. Posner, Economic Analysis of Law 525-28 (2d ed. 1977); Deckard & Sherman, Monopoly Power and Sex Discrimination, 4 Pol. & Soc'y 475 (1978) have prevented the competitive processes from cleansing the market of this imperfection and therefore legal intervention is required. See generally G. Becker, The Economics of Discrimination (2d ed. 1971).

\textsuperscript{42} The legislative history and major judicial decisions regularly reaffirm the reformist goal. Under this justification, the employment laws would improve the economic status of blacks. See, e.g., United Steelworkers v. Weber, 443 U.S. 193, 202 (1979), reh'g denied, 444 U.S. 889 (1979) ("Congress' primary concern ... was with 'the plight of the Negro in our
economic system.43

Although broad, these instrumental and intrinsic justifications do not necessarily imply, and the statutes do not require, the pro-

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43. This third instrumental justification is more cynical, but no less real. Laws against discrimination provide formal, symbolic assurance that American society is free and open and thus serve a legitimizing or "safety valve" purpose. See Freeman, Legitimizing Racial Discrimination Through Antidiscrimination Law: A Critical Review of Supreme Court Doctrine, 62 MINN. L. REV. 1049 (1978); Lawrence, "Justice" or "Just Us": Racism and the Role of Ideology (Book Review), 35 STAN. L. REV. 831, 841 (1983) (reviewing D. Kirp, Just Schools: The Idea of Racial Equality in American Education (1982)). See also Auerbach, The 1967 Amendments to the 1967 Minnesota State Act Against Discrimination and the Uniform Law Commissioners' Model Anti-Discrimination Act: A Comparative Analysis and Evaluation, 52 MINN. L. REV. 251, 251 (1967) (goal of anti-discrimination laws is "to lessen danger that tragic racial violence . . . will recur.").
hilitation of all discrimination. Other conflicting social values, such as support for the expression of personal autonomy and concern over the various types of costs associated with these laws, have influenced their enactment and interpretation. Thus, the statutory prohibition against discrimination is not universal; the laws exempt certain areas from coverage. Within those areas, the laws regulate only discriminatory conduct and not discriminatory thoughts, and recognize certain affirmative defenses to discriminatory conduct.

The statutes accommodate the tension between the antidiscrimination principle and other values by limiting the respective domain of each principle and keeping the conflicting values apart,

44. Personal autonomy is regarded as a social value, both because the cultivation of individual freedom tends to maximize social welfare, see, e.g., A. SEN, COLLECTIVE CHOICE AND SOCIAL WELFARE 128-30 (1970), and because it is a moral value in and of itself. R. NOZICK, ANARCHY, STATE AND UTOPIA 50-51 (1974).

45. Aside from the possible efficiency losses caused by implementation of prohibition itself, there are two other types of costs: insurance and enforcement. Insurance costs are the price of those extra efforts that a defendant will take to protect itself from potential liability. Fiss, Theory, supra note 6, at 235. See also Easterbrook, The Supreme Court, 1983 Term - Foreword: The Court and the Economic System, 98 HARV. L. REV. 4 (1984) (emphasizing ex ante effect of liability rules). As an example of reasonable insurance cost, defendant might engage in increased training and supervision of its employees to assure that they do not discriminate. On the other hand, in what would be viewed as an excessive cost, a defendant might hire every black applicant, whether qualified or not, in order to avoid liability and possible liability. Enforcement costs are the transaction costs of administering the laws. They consist of privately paid litigation costs and the budgets of state and federal enforcement agencies and courts. Fiss, Theory, supra note 6, at 255-56.

46. For example, the laws generally do not regulate what are considered private decisions, such as the choice of a marriage partner or a dinner guest. See Moose Lodge No. 107 v. Irvis, 407 U.S. 163, 180 (1972) (Douglas, J., dissenting) ("Government may not tell a man or woman who his or her associates must be."). The laws regulate the area of conduct and decision-making that Professor Walzer has called the "sphere of office," M. WALZER, supra note 39, at 129-64, where the public interest is heightened and the privacy interest is correspondingly reduced.

47. "[T]he attitude of prejudice, or at least the practice of discrimination can be substantially reduced by authoritative order." M. BERGER, EQUALITY BY STATUTE: LEGAL CONTROLS OVER GROUP DISCRIMINATION 175-76 (1952) (quoting S. SCHWARTZ, THE JEWS IN THE SOVIET UNION (1951)). The term discrimination refers to action and conduct, and is thus distinguished from the term prejudice, which refers to belief and feeling. G. ALLPORT, THE NATURE OF PREJUDICE (1954); J. GREENBERG, RACE RELATIONS AND AMERICAN LAW 2-4, 26-28 (1959); WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 648, 1788 (1976). See 110 CONG. REC. 7253-57 (1964) (statements of Senators Ervin and Case on whether the 1964 Civil Rights Act will penalize thoughts or deeds). Cf. A. HIGGINBOTTOM, IN THE MATTER OF COLOR: RACE AND THE AMERICAN LEGAL PROCESS—THE COLONIAL PERIOD 52 (1978) (Early segregation laws were a codification of prejudice granting "legal force to social bias.").
each dominant within its own domain, dormant without. The primary statutory technique used to achieve these accommodations is the adjustment of the scope of coverage through exceptions, exemptions or other specific limitations. For example, Title VIII, the federal Fair Housing Act, prohibits discrimination in the rental of housing, but exempts certain small landlords from coverage. Within the area specified by the exemption, "Mrs. Murphy" can express herself by indulging her racist tastes, if any, and societal support for her freedom to discriminate trumps the conflicting personal and societal interests in prohibiting discrimination. However, the statute also limits her autonomy. She must refrain from discriminating if she purchases a larger building or otherwise loses the exemption.

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48. For a discussion of the method of accommodation in constitutional law, see D. Bell, RACE, supra note 6, § 7.11; Bell, Brown v. Board of Education and the Interest-Convergence Dilemma, 93 HARV. L. REV. 518 (1980). Professor Bell has developed an insight, "rely[ing] as much on political history as legal precedent and emphasize[ing] the world as it is rather than as we might like it to be," D. Bell, RACE, supra note 6, at 443, which is applicable as well to the accommodation reflected in the statutes: the law will express a "preference for white interests over black rights when the two converge . . . ." Id.


50. The statute exempts from coverage an owner-occupied building intended to be occupied by no more than four families. Id. § 3603(b)(2).

51. One aspect of personal autonomy is the development and expression of personal preferences, which can include the preference for associating with persons of one's own race. See, e.g., Wechsler, Towards Neutral Principles of Constitutional Law, 73 HARV. L. REV. 1, 34 (1959). This preference has been described by Professor Becker as a taste, like any other consumer or personal taste, and the person with such discriminatory tastes will "pay something . . . to be associated with some persons instead of others." G. Becker, supra note 41, at 14. See also A. Downs, Opening Up The Suburbs (1973); Arrow, The Theory of Discrimination, in DISCRIMINATION IN LABOR MARKETS (O. Ashenfelter & A. Rees eds. 1973).

52. This indulgence is extended only by the particular statute under discussion. See 42 U.S.C. §§ 3601, 3603(b) (1982). Mrs. Murphy's discrimination would violate another antidiscrimination law, the Civil Rights Act of 1866, 42 U.S.C. § 1982 (1982), which does not explicitly exempt any private property transaction from coverage. Section 1982 is a statute that resolves the conflict by strongly valuing the prohibition against discrimination. The limits of this law, if any, must be found in a constitutionally based argument. See Roberts v. United States Jaycees, 104 S. Ct. 3244, 3249-51 (1984); Runyon v. McCrary, 427 U.S. 160, 172 n.10 (1976).

53. The Fair Housing Act has other exemptions. Section 3603(b)(1) exempts from coverage any single-family house sold or rented by an owner, 42 U.S.C. § 3603(b)(1) (1982), and then limits the exemption with three conditions: (1) that non-owner occupied sales are limited to one every two years; (2) that the owner not own more than three single-family homes at one time; and (3) that the sales be conducted without using brokers or advertising. Id. This exemption nicely depicts the accommodation of competing values. The autonomy interest in one's home is strong, and, hence, protected with an exemption. However, if one does not live in the home (nonowner-occupied), the autonomy interest is
All modern laws against discrimination have such exemptions. Only employers of a certain size are bound by the prohibition; smaller firms or individuals can discriminate with impunity.64 Religious preferences are recognized and, within a specific domain, honored.65 The public accommodation laws forbid discrimination only in public, not private, places.66

The statutes also reflect a sensitivity to the costs of both the prohibition against discrimination and the enforcement of these laws. Some costs are accepted as the price of the prohibition. For example, companies seeking to hire computer programmers and also to minimize personnel screening costs might argue that the small number of blacks in the high-technology field makes it more efficient to consider only white applicants.67 The transaction costs of processing the applications of black applicants, their argument goes, exceed the possible productivity gains derived from selecting its employees from a larger pool.68 Although discrimination in this

thereby reduced, and the exemption is accordingly qualified. For the person who owns several homes at the same time, the interest in their sale or rental begins to look more like a business decision than an expression of personal autonomy. The exemption is thus capped at three homes.


55. Title VIII permits religious organizations to exercise their religious-discriminatory preference for renting non-commercial dwellings to persons of the same religion. 42 U.S.C. § 3607 (1982). Title VII has two religious exemptions. The first states broadly that the law "shall not apply . . . to a religious [organization] with respect to the employment of individuals of a particular religion to perform work connected with the carrying on by such [organization] of its activities." 42 U.S.C. § 2000e-1 (1982). The second provision permits a religious school "to hire and employ employees of a particular religion." Id. § 2000e-2(e)(2).

56. See, e.g., 42 U.S.C. § 2000a (1982); MINN. STAT. § 363.03, subd. 3(1) (1982). The public accommodation laws in Minnesota and other states have been construed to prohibit the membership practices of an organization that accepts all men as members but excludes women. See Roberts v. United States Jaycees, 104 S. Ct. 3244, 3248 (1984). See also 42 U.S.C. § 3607 (1982) (Title VIII permits private clubs to rent only to members (who may be discriminatorily chosen)). See generally D. BELL, RACE, supra note 6, at 104-24.


58. This example is a variation on "information cost" or "statistical" discrimination. L. THUROW, GENERATING INEQUALITY: MECHANISMS OF DISTRIBUTION IN THE U.S. ECONOMY 170-207 (1975); Phelps, THE STATISTICAL THEORY OF RACISM AND SEXISM, 62 AM. ECON. REV. 659 (1972).
circumstance may arguably be efficient, it is nevertheless prohibited. The legislatures have not provided an exception, and the courts have not created one. However, when the prohibition of discrimination exacts large economic costs, nearly to the point of making an enterprise impossible, the prohibition against discrimination often yields. Most laws provide that if the discriminatory criterion is shown to be a bona fide occupational qualification reasonably necessary to the operation of the business, such discrimination will be permitted. This exception reflects the judgment that in certain "narrow" circumstances, the interest in efficiency prevails over the commitment to prohibiting discrimination.

The exceptions and limitations discussed thus far accommodate policy concerns that are extrinsic to and in conflict with the purposes that underlie the prohibition against discrimination. There is also, however, another type of limitation, created for a different set of reasons. Affirmative action programs generally involve some level of race-based different treatment. As an example, employers may be permitted or required to grant hiring or promotion preferences to black persons because of their race. Affirmative action programs may be viewed as another type of ex-

59. See 29 C.F.R. § 860.103(h) (1985) ("[A] general assertion that the average cost of employing older workers is higher . . . will not be recognized as a [defense]."). Indeed, this example presents precisely the type of situation where it would be said that we need the laws against discrimination. See Brest, Foreword, supra note 6, at 10-11; Fiss, Theory, supra note 6, at 257-63.


62. See, e.g., Firefighters Institute for Racial Equality v. St. Louis, 616 F.2d 350, 364 (8th Cir. 1980) (affirmative action plan required: eight blacks to be immediately promoted, one black for each two whites thereafter).

63. See, e.g., United States Steelworkers of America, AFL-CIO-CLC v. Weber, 443 U.S. 193 (1979) (employer permitted to implement affirmative action plan mandating that 50% of the openings in an in-plant craft training program be awarded to black employees until racial parity with the local labor force achieved).
ception to the general prohibition against race-based different treatment.

To capture the differences between these two types of limitations, I suggest the term inner boundary as a metaphor to describe the traditional exceptions and limitations, where the commitment to prohibiting discrimination yields to other social values, such as respect for the autonomy of the discriminator or concern about the costs or enforceability of the laws. The term outer boundary is used to describe the affirmative action cases, where some race-based different treatment is permitted for policies and concerns similar to those that in part led to the initial passage of the laws against discrimination, namely, a desire to improve the social and economic conditions of black Americans.⁶⁴

In drawing the line between the non-determinative discrimination claims that are recognized and those that are rejected, the challenge is to establish an inner boundary that neither underenforces nor overenforces the prohibition of the laws against discrimination. The language of the statutes broadly proscribes discrimination, and no limitations, exemptions or policies justify a general refusal to recognize non-determinative discrimination. While there will be certain language discrimination and mixed motive cases where the particular discriminatory act is outside the boundary line of the statute in question, such cases are the exceptions to the general rule. The theory of non-determinative discrimination attempts to locate the inner boundary and classify prohibited and permissible discriminatory conduct in a way that more accurately represents the language and purposes of the laws against discrimination.

Before more fully describing and evaluating the various non-determinative discrimination claims, this Article first presents, in Section II, the factfinding procedures and legal standards that govern the liability and remedy stages of discriminatory outcome claims. Those procedures and standards are then applied, in Section III, to the four varieties of non-determinative discrimination claims. The comparison of the two types of claims reveals that many of the factfinding and remedial issues present in non-determinative discrimination claims also attend discriminatory outcome claims, and that the techniques developed to resolve these

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⁶⁴ These reformist goals are discussed supra note 42.
problems can be applied to both types of cases.

II. The Discriminatory Outcome Claim

Complaints of unlawful discrimination can raise discriminatory outcome or non-determinative discrimination claims separately, or can present both types of claims in the same case. In many situations, it will be impossible to determine which theory is more applicable until the facts are fully developed. The presentation and analysis of most cases will be enhanced by the complementary use of both theories, for this will permit an evaluation of the case that is comprehensive and sensitive to the allegations and proof of discrimination in a particular record.

In order to appreciate the similarities, differences and complementary nature of discriminatory outcome and non-determinative discrimination claims, it is necessary to understand certain aspects of the liability and remedy phases of a single-plaintiff, disparate treatment case that play an important role in both types of claims. The vehicle for the initial discussion of these issues will be a discriminatory outcome claim. The specific hypothetical for discussion is a variation on the examples used in Section I. P, a black woman, applies for a job as a computer salesperson at D company. She is a college graduate, with two years of experience in the sale of office systems to small businesses in the area, but no computer sales experience. She does not get the job, and is told by the sales manager that she did not have sufficient experience. She

65. The term "claim" is used throughout this Article in a shorthand, informal manner to mean a legal theory that can support relief on a given set of facts. The reference in this Article is not to the formal usage of "claim" as a legal term of art. See Fed. R. Civ. P. 8(a), 10(b), Appendix of Forms, Form 10; Restatement (Second) of Judgments § 24 (1982). Indeed, discriminatory outcome and non-determinative discrimination "claims" will usually constitute one legal claim for pleading, preclusion, and other purposes. They will generally involve "rights of the plaintiff to remedies against the defendant with respect to all or any part of the transaction, or series of connected transactions, out of which the action arose." Restatement (Second) of Judgments § 25 (1982). The two approaches provide supplemental or alternative theories of recovery for the same claim. As such, they may be pleaded separately, Fed. R. Civ. P. 8(e)(2), Appendix of Forms, Form 10, with relief sought in the alternative, depending on which theory prevails. Fed. R. Civ. P. 8(a)(3). Because they are legal theories and not facts, it may not be necessary to plead or to mention the separate approaches of discriminatory outcome and non-determinative discrimination, see 5 C. Wright & A. Miller, Federal Practice and Procedure § 1219 (1969), although it will usually be wise to do so. See infra Section II A. The relationship of the two theories to the various aspects of a lawsuit is developed infra Sections II A and III.
is disappointed but willing to accept the rejection, until she learns that the successful applicant is even less experienced than she is. She decides to file a case of race discrimination against D. She presents a discriminatory outcome claim, alleging that D did not hire her because of her race. In this case, the right involved is the right to be free of unlawful discrimination in the final decision made by the defendant. The correlative duty is the obligation not to discriminate in making that final decision. The injury alleged is the loss of the desired outcome—the denial of the job. The focus of her discriminatory outcome claim is, by definition, on the final decision.

A. Methodology of Proof

In order to establish liability in an individual disparate treatment case,66 the plaintiff must prove that she was treated differently from other persons,67 and that the reason for the different treatment was her race.68 The plaintiff can carry her heavy burden of persuading the factfinder69 that "she has been the victim of


67. Most often there will be other persons whose treatment can be compared to the treatment of the plaintiff. On the relatively few occasions when actual comparative evidence is not available, courts have engaged in hypothetical comparisons: how would D have treated P if she were a white person or a male? Such counterfactual assessments are a routine part of discrimination litigation, used in determining causation, see infra Section II B, and damages, see infra Sections III A-C. The difficulty of the use of comparisons in certain sex discrimination cases is well described in Kay, supra note 7, at 40, and Wildman, The Legitimation of Sex Discrimination: A Critical Response to Supreme Court Jurisprudence, 63 OR. L. REV. 265 (1984).

68. The issue has been described as whether "the employer is treating 'some people less favorably than others because of their race, color, religion, sex or national origin.'" Furnco Constr. Corp. v. Waters, 438 U.S. 567, 577 (1978) (quoting International Bhd. of Teamsters v. United States, 431 U.S. 324, 335 n.15 (1977)). For a recent warning that proof only of different treatment, without also establishing that the different treatment was motivated by race, is insufficient to prove unlawful discrimination, see Carter v. Duncan-Huggins, Ltd., 727 F.2d 1225, 1245 (D.C. Cir. 1984) (Scalia, J., dissenting).

intentional discrimination”70 directly or indirectly.71 The classic example of direct proof—the “smoking gun”—is a letter or statement that the plaintiff should not be hired because she is black.72 Such evidence, if believed, establishes the unlawful intentional discrimination.73 However, such direct evidence is rarely available,74


70. Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248, 256 (1981). Intent has now been defined as “mean[ing] actual motive.” Pullman-Standard v. Swint, 456 U.S. 273, 290 (1982). A suggested alternative definition of intent, that an actor intends the foreseeable consequences of his or her acts, see, e.g., J. Kushner, Fair Housing 64 (1983); Perry, The Disproportionate Impact Theory of Racial Discrimination, 125 U. Pa. L. Rev. 540 579-80 (1977), has been rejected for both statutory, Teamsters, 431 U.S. at 335 n.15 (“Proof of discriminatory motive is critical”), and constitutional cases, Personnel Adm'r of Mass. v. Feeney, 442 U.S. 256, 279 (1979) (equal protection violation requires “more than intent as volition or intent as awareness of consequences.”). The foreseeable consequences of an act can be used as evidence to demonstrate the defendant's actual motive, but only as "a working tool, not a synonym for proof." Id. at 279 n.25.

71. Both direct and indirect proof are typically used in cases of “covert” discrimination, where the defendant denies discrimination and tries to hide its existence. There are also cases of “explicit” discrimination, where the defendant acknowledges its discriminatory practice and seeks to justify it on some basis. Except in the affirmative action area, where race is explicitly used as a decisional criteria, cases involving overt racial discrimination are rare. Modern overt discrimination cases typically involve a mandatory age retirement policy, e.g., Johnson v. Mayor and City Council of Baltimore, 105 S. Ct. 2717 (1985), or a sex-related benefit plan, e.g., Arizona Governing Comm. v. Norris, 463 U.S. 1073 (1983). Most outcome cases involve covert discrimination. Belton, Burdens of Pleading and Proof in Discrimination Cases: Toward a Theory of Procedural Justice, 34 Vand. L. Rev. 1205, 1224 (1981); Chamallas, Spectrum, supra note 7, at 17.

72. Bell v. Birmingham Linen Serv., 715 F.2d 1552, 1557 (11th Cir. 1983) (sex), cert. denied, 104 S. Ct. 2985 (1984); Lee v. Russell County Bd. of Educ., 684 F.2d 769 (11th Cir. 1982) (race), cert. denied, 106 S. Ct. 91 (1985); Hodgson v. First Fed. Sav. & Loan Ass'n, 455 F.2d 818, 821 (5th Cir. 1972) (age) (Interview notes read “too old for teller”). A “direct evidence” case differs from an “explicit” discrimination case, see supra note 71, in that the direct evidence or smoking gun is hidden by the defendant, not openly acknowledged. When such evidence surfaces in the covert discrimination case, it is denied and sharply contested.

73. However, it might not entitle P to prevail. Under the “same decision” theory, D is still entitled to prove that, even if it had not discriminated, P would not have been hired. See infra Section II B. Certain statutory defenses might also be available. See B. Schleier & P. Grossman, supra note 4, at 340-60, 507-19 (discussing statutory defenses in Title VII and ADEA cases).

and if plaintiffs were required to present such evidence in order to prevail in discriminatory outcome cases, their victories would be few indeed.

Largely in response to the difficulty of proving unlawful motive, courts have fashioned a general methodology for "the order and allocation of proof in a private, non-class action." Initially outlined in the school desegregation case of Keyes v. School District No. 1, and more fully developed in a series of employment discrimination cases, the process of circumstantial proof known colloquially as the McDonnell-Douglas method is now in widespread use. This approach generally involves three steps: (1) the plain-
tiff's establishment of a prima facie case; (2) the defendant's production of legitimate, nondiscriminatory reasons for its action; and (3) the plaintiff's attempt to demonstrate that the defendant's reasons are pretextual or otherwise to prove that the defendant unlawfully discriminated against him or her. This methodology authorizes the plaintiff to bring, and the factfinder to find liability in, a discrimination case where there is no direct evidence of discrimination.

The establishment of the prima facie case does not prove discrimination; rather, it creates a presumption that the defendant unlawfully discriminated against the plaintiff. The burden of establishing a prima facie case of disparate treatment is "not onerous;" its elements must address and eliminate "the most common nondiscriminatory reasons" for the negative action. Thus, in our example, P can establish a prima facie case by showing that she is a member of a statutorily protected class, that she applied for the job, that she was generally qualified, that she was rejected and that someone else was hired.

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79. Burdine, 450 U.S. at 253-54. Until the Burdine decision, lower courts interpreting the effect of the prima facie case expressed confusion and disagreement. See generally Belton, supra note 83, at 1261-73; Mendez, Presumption of Discriminatory Motive In Title VII Disparate Treatment Cases, 32 STAN. L. REV. 1129 (1980). In earlier cases, and even in Burdine, 450 U.S. at 253, the Court stated that a prima facie case created an "inference" of discrimination. See, e.g., Furnco, 438 U.S. at 577; Teamsters, 431 U.S. at 358. An inference, of course, is simply permissive: the fact finder may accept or reject it. A presumption on the other hand, is mandatory: until rebutted, it compels a finding for the beneficiary of the presumption. E. Cleary, McCORMICK ON EVIDENCE 965-84 (3d ed. 1984); 9 J. Wigmore, EVIDENCE 2483-540 (Chadbourne Rev. 1981). As Professor Bartholet has demonstrated, supra note 74, at 1210-19, the presumption is supported by reasons of policy and probability — the recognition of the difficulty of proving discrimination with direct evidence and the defendant's greater access to such evidence, and the belief that the defendant's actions, "if otherwise unexplained, are more likely than not based on the consideration of impermissible factors." Furnco, 438 U.S. at 577. See also Teamsters, 431 U.S. at 358 n.44; Burdine, 450 U.S. at 254.

80. Burdine, 450 U.S. at 253.

81. Id. at 253-54.

82. In the initial case of McDonnell-Douglas Corp. v. Green, a case of alleged racial discrimination in refusing to hire a black former employee, the court stated that the applicant must show: (i) that he belongs to a racial minority; (ii) that he applied and was qualified for a job for which the employer was seeking applicants; (iii) that, despite his qualifications, he was rejected; and (iv) that, after his rejection, the position remained open and the employer continued to seek applicants from persons of complainant's qualifications.
The prima facie case shifts to the defendant the burden to "articulate some legitimate, nondiscriminatory reason" for its action. This burden is a burden of production, and not persuasion. It is satisfied by the defendant's producing "admissible evidence" explaining the reasons for its actions. If the plaintiff establishes a prima facie case and the defendant fails to satisfy its burden of production, then "the court must enter judgment for the plaintiff because no issue of fact remains in the case." If the plaintiff is able to establish a prima facie case and the defendant articulates a legitimate, nondiscriminatory reason, the case then

411 U.S. at 802. The Court added that "[t]he facts necessarily will vary . . . and the specification . . . of the prima facie proof . . . is not necessarily applicable in every respect to differing factual situations." Id. at 802 n.13. This recognition of the need for flexibility in the structuring of the prima facie case has been reaffirmed in later cases. Burdine, 450 U.S. at 253 n.6. See, e.g., F. James & G. Hazard, Civil Procedure §§ 7.5-7.8 (2d ed. 1977).

83. McDonnell-Douglas Corp. v. Green, 411 U.S. at 802. From the perspective of the laws against discrimination, a decision-maker may act "for good reason, bad reason or no reason absent discrimination." Tims v. Board of Educ., 452 F.2d 551, 552 (8th Cir. 1971) (§ 1981 employment discrimination claim). The McDonnell-Douglas case requires only that the decision-maker produce evidence of that reason, whatever it is. See, e.g., Elliott v. Group Medical & Surgical Serv., 714 F.2d 556, 567 (5th Cir. 1984) ("Even had the reasons . . . been frivolous or capricious, had they been the genuine cause . . . they would have defeated liability under the ADEA. We reiterate that the statute proscribes only one reason for discharge — age."); Garcia v. Gloor, 618 F.2d 264, 269 (5th Cir. 1980) (Title VII "does not forbid employers to hire only persons born under a certain sign of the zodiac . . . ."). The case law has thus rejected the earlier view that the employment discrimination laws created a general "just cause" requirement for all personnel decisions. Blumrosen, Strangers No More: All Workers Are Entitled to "Just Cause" Protection Under Title VII, 2 Indus. Rel. L.J. 519 (1970). As a practical matter, the zanier the reason, the greater the risk that it will be disbelieved. See Elliott, 714 F.2d at 567; St. Peter v. Secretary of Army, 659 F.2d 1133, 1139 (D.C. Cir. 1981) ( Mikva, J., concurring); Loeb v. Textron, Inc., 600 F.2d 1003, 1007-08, 1019-20 (1st Cir. 1979).

84. Burdine, 450 U.S. at 253. For a discussion of the distinction between the two burdens, see Belton, supra note 71; Mendez, supra note 79.

85. Burdine, 450 U.S. at 255. "The defendant cannot meet its burden merely through an answer to the complaint or by argument of counsel." Id. at 255 n.9.

86. Id. at 254. In a case tried by a jury (such as a housing, ADEA, or § 1981 case, see supra note 69), there is some uncertainty as to whether the court should enter a directed verdict for the plaintiff, or give a peremptory instruction dependent on credibility findings. See, e.g., Lovelace v. Sherwin Williams Co., 681 F.2d 230, 239 n.9 (4th Cir. 1982). See generally C. Wright & A. R. Miller, Federal Practice and Procedure § 2535 (1971); Cooper, Directions For Directed Verdicts: A Compass For the Federal Courts, 55 Minn. L. Rev. 903, 947-48 (1971). The resolution of this issue in favor of simply an instruction may be suggested by Justice Powell's statement in Burdine that the plaintiff is entitled to judgment "[i]f the trier of fact believes the plaintiff's evidence." Burdine, 450 U.S. at 254.

87. If the defendant provides sufficient evidence to meets its burden of production, then the presumption established by the prima facie showing "drops from the case." Burdine, 450 U.S. at 255 n.10. The plaintiff's evidence which created the prima facie case is
proceeds to the final element in the McDonnell-Douglas triptych—the pretext stage.88

The pretext issue is where the action is, where most disparate treatment cases are won or lost.89 At this stage, "the factual inquiry proceeds [both] to a new level of specificity"90 and to "the ultimate question of discrimination vel non."91 On the issues thus joined, the plaintiff can carry his or her burden of persuasion "directly by persuading the court that a discriminatory reason more likely motivated the employer or indirectly by showing that the employer's proffered explanation is unworthy of credence,"92 a pretext or subterfuge to hide the unlawful discrimination.93

Using what in many cases will be only conflicting circumstantial evidence and self-serving statements by D, the factfinder must determine what was in D's mind when the decisionmaker decided not to hire P and whether unlawful or lawful reasons motivated the decision. While this determination is "both sensitive and diffi-

still available for consideration, but the presumption is "destroy[ed]." Id. This destruction of the presumption is a defining characteristic of the Thayer-type or "bursting bubble" presumption which was adopted by Fed. R. Evid. 301. J. THAYER, A PRELIMINARY TREATISE ON EVIDENCE AT COMMON LAW 314, 336 (1898); E. CLEARY, MCCORMICK ON EVIDENCE 974-80 (3d ed. 1984).


89. "Most disparate treatment cases turn on the plaintiff's ability to demonstrate that the nondiscriminatory reason offered by the employer was a pretext for discrimination." Miles v. M.N.C. Corp., 750 F.2d 867, 870 (11th Cir. 1985) (footnote omitted) (quoting B. SCHLEI & P. GROSSMAN, supra note 4, at 1317); Friedman, The Burger Court and the Prima Facie Case In Employment Discrimination Litigation: A Critique, 65 CORNELL L. REV. 1, 14 (1979); Furnish, Formalistic Solutions to Complex Problems: The Supreme Court's Analysis of Individual Disparate Treatment Cases Under Title VII, 6 INDUS. REL. L.J. 353, 357 (1984).

90. Burdine, 450 U.S. at 255.
91. Aikens, 460 U.S. at 714.
92. Burdine, 450 U.S. at 256.
93. In proving discrimination indirectly, the plaintiff only disproves the defendant's reason, establishing it as a pretext. This proof of pretext then converts to proof of discrimination by means of the McDonnell-Douglas methodology. See Aikens, 460 U.S. at 718 ("the McDonnell-Douglas framework requires that a plaintiff prevail when . . . he demonstrates that the legitimate, nondiscriminatory reason . . . is in fact not the true reason for the . . . decision.") (Blackmun, J., concurring) (emphasis added). Although recognizing the appropriateness of indirect proof, id. at 1481 n.3, 1482, 1483, the majority opinion's focus on the requirement of a factual finding of intent has engendered some apprehension, perhaps reflected in the concurrence, that a plaintiff needs to do something more than simply provide pretext. See Furnish, supra note 89, at 353.
cult[,]" it is treated as a finding of fact, reviewable under the "clearly erroneous" standard. This approach—denominating the determination of discrimination as a finding of fact—necessarily vests considerable discretion in the factfinder. It places a premium on careful factual determinations, assisted by the use of procedural and evidentiary devices to focus the inquiry, in order to achieve an accurate determination of a difficult issue. This need for accurate factfinding and the significant role of circumstantial proof are also important in applying the causation standard, and play a major part in the resolution of non-determinative discrimination claims.

B. Causation

The laws against discrimination, which prohibit D from treating P differently "because of" race, require a causal relationship

94. Aikens, 460 U.S. at 714.
95. In Aikens, Justice Rehnquist illustrated the "fact-ness" of the intent determination with a colorful quote from a nineteenth century English case:

"[T]he state of a man's mind is as much a fact as the state of his digestion. It is true that it is very difficult to prove what the state of a man's mind at a particular time is, but if it can be ascertained it is as much a fact as anything else."

Edgington v. Fitzmaurice, 29 Ch. D. 459, 483 (1885), quoted in Aikens, 460 U.S. at 716-17. See also 2 J. Wigmore, Evidence § 661 (Chadbourn rev. 1979) ("the argument . . . [that] we cannot directly see, hear, or feel the state of another person's state of mind" and therefore intent cannot be shown "is finical . . . and it proves too much.").

96. Swint, 456 U.S. at 290. See also Anderson v. Bessemer City, 105 S. Ct. 1504 (1985). In a jury trial, the comparable standard for review of jury verdicts is whether the evidence, viewed most favorably to the party against whom the motion is made, is legally sufficient to support the verdict. See, e.g., Continental Ore Co. v. Union Carbide & Carbon Corp., 370 U.S. 690, 696; 5A J. Moore & J. Lucas, Moore's Federal Practice §50.02[1] (2d ed. 1985).

97. "[T]he problems of proof raised by [an intent] test are treacherous at best, and the discretion it leaves to courts in actual cases is enormous." L. Tribe, American Constitutional Law 1032 (1978). The fact standard also means that summary judgment will usually be inappropriate and that most cases, unless settled, will be resolved only after a trial. As Judge Aldrich put it, "[e]ven an andabata holds the field until someone comes forward to defeat him." Mack v. Cape Elizabeth School Bd., 553 F.2d 720, 722 (1st Cir. 1977).

98. See supra note 2 for the many variations on the "because of" requirement. Legal doctrine recognizes two types of causation: cause-in-fact and proximate cause. Cause-in-fact concerns whether the defendant's conduct caused the plaintiff's injury in the sense of whether the harm would have occurred without that conduct. Proximate cause addresses the issue of whether the defendant should be held liable, or absolved from liability, for policy reasons. See generally W. Prosser & P. Keeton, Prosser and Keeton on the Law of Torts §§ 41-42 (5th ed. 1984). The causation requirement discussed in this Article is cause-in-fact.
between D's conduct and P's race. This Section explores the causation requirement in the discriminatory outcome case.99

A simple causation standard was implicit in the preceding discussion of the methodology of proof. That discussion assumed a dichotomous result at the end of the McDonnell-Douglas fact finding road. The fact-finder found that an unlawful reason either caused or did not cause D's conduct: either/or, discrimination/no discrimination. In many cases, however, the causation issue is not so straightforward. In these more difficult cases, the results of the factfinding process are not dichotomous; the finding is not either/or, but both. The factfinder concludes after careful scrutiny of the evidence that D's conduct was motivated by both lawful and unlawful considerations. There were, in short, mixed motives.

The mixed motive case has bedeviled regulatory law, and particularly labor law, for years.100 The problem is inherent; it reflects the contrast between the discrete nature of the regulatory prohibition and the richness of human interactions. The law does not prohibit all adverse employment or rental decisions; it prescribes only those motivated by racial considerations. However, people's motives are complex and multi-faceted. It can rarely be said that any single stimulus is totally responsible for a particular act; many factors normally contribute. There will often be several reasons for D's action, only one of which is unlawful.101

99. This Article discusses only the causation standard for disparate treatment cases. The disparate impact theory of discrimination has its own standard of causation and burden of proof requirements. See C. Sullivan, M. Zimmer & R. Richards, supra note 66, § 1.4.


101. The Supreme Court has frequently noted this reality in the context of determin-
The possible mixture of motives in a particular mixed motive case is represented by a continuum between the polar possibilities of total discrimination and total nondiscrimination:

Table I
The Mixed-Motive Continuum

<table>
<thead>
<tr>
<th>Race Is Not A Factor</th>
<th>Race Is One Of Two Or More Factors</th>
<th>Race Is The Only Factor</th>
</tr>
</thead>
<tbody>
<tr>
<td>N</td>
<td>O</td>
<td></td>
</tr>
</tbody>
</table>

At one end of the continuum, represented in the chart as point N (and all points to the left of N), race is not a factor. It plays no part in the decision and does not cause a violation of the law. At the other end, represented in the chart as point O (and all points to the right of O), race is the only reason for D's action. In such cases, D takes the action "because of" P's race and violates the statute. In these polar cases, there is only one motive, lawful or unlawful. Between these end points, the line N-O represents a continuum of intermediate positions, all involving mixed motivation.

Courts have articulated causation standards that span the mixed motive continuum. While a small number of courts have stated that a violation is proved if P shows that race was "a factor," most courts have required more. The precise formulating the intent of legislative bodies. See, e.g., Village of Arlington Heights v. Metropolitan Hous. Dev. Corp., 429 U.S. 252, 265 (1977) ("Rarely can it be said that a legislature or administrative body operating under a broad mandate made a decision motivated solely by a single concern, or even that a particular purpose was the 'dominant' or 'primary' one."); Palmer v. Thompson, 403 U.S. 217, 225 (1971) ("It is difficult or impossible for any court to determine the 'sole' or 'dominant' motivation behind the choices of a group of legislators.").

102. Caution is advised in evaluating judicial language that sets forth a causation standard. Courts are often writing in response to a particular argument or a lower court finding. A careful reading of the cases suggests that in most if not all the cases, the courts believed that race was the sole reason for the decision. One of the most frequently quoted opinions was issued in what today would be called a pretext, not a mixed motive, case. Smith v. Sol D. Adler Realty Co., 436 F.2d 344 (7th Cir. 1970).

tions have varied. Plaintiffs have had to show that the use of race was "significant,"[105] "substantial,"[106] "effective,"[107] or "influenced greatly"[108] the defendant's decision. These several phrases represent an attempt to evaluate the strength of the unlawful racial reason and to assign liability on the basis of that evaluation.

The most widely used formulation focuses, not on the weight or strength of the unlawful reason, but on its likely operative effect. This approach borrows the familiar but-for test from tort law[109] and applies it to discrimination cases by requiring the plaintiff to prove that a racial reason was a "determinative factor"[110] in


104. See, e.g., Lee v. Russell County Bd. of Educ., 684 F.2d 769, 775 (11th Cir. 1983) ("[A]n insignificant unconstitutional factor does not warrant relief . . ."); Whiting v. Jackson State Univ., 616 F.2d 116, 121 (5th Cir. 1980) ("Title VII is not violated simply because an impermissible factor plays some part in the employer's decision. The forbidden taint need not be the sole basis for the action to warrant relief, but it must be a significant factor.") (emphasis in original).

105. See, e.g., Fadhil v. City and County of San Francisco, 741 F.2d 1163, 1166 (9th Cir. 1984); Woods-Drake v. Lundy, 667 F.2d 1198, 1202 (5th Cir. 1982) ("one significant factor").

106. See, e.g., Lee v. Russell County Bd. of Educ., 684 F.2d 769, 774 (11th Cir. 1983) ("significant or substantial").


109. See W. Prosser & P. Keeton, PROSSER AND KEETON ON THE LAW OF TORTS, § 41, at 266 (5th ed. 1984) ("[T]he 'but-for' or 'sine qua non' rule may be stated as follows: The defendant's conduct is a cause of the event if the event would not have occurred without it."); see also 2 F. Harper & F. James, THE LAW OF TORTS § 20.2, at 1110 (1956) ("[T]he 'but for' or sine qua non test . . . [is whether] defendant's negligence is a cause in fact of an injury where the injury would not have occurred but for defendant's negligent conduct.") (emphasis in original).

110. See, e.g., Lewis v. University of Pittsburgh, 725 F.2d 910, 917 (3d Cir. 1983), cert. denied, 105 S. Ct. 266 (1985). While most cases use the adjective "determinative," cases involving age discrimination often employ the term "determining factor," that which is used in United States Department of Labor Guidelines interpreting the ADEA, 29 C.F.R. § 860.103(c) (1985) ("The clear purpose is to insure that age . . . is not a determining factor in making any decision . . ."). To resolve uncertainty about the appropriate formula, one judge used an inclusive approach. Dougherty v. Barry, 607 F. Supp. 1271, 1285 (D.D.C. 1985) ("race was a 'substantial', 'significant', and 'determinative' factor.").
the defendant's decision. A reason is a determinative factor when, "but for" the unlawful racial motive, the adverse decision would not have been made.  \footnote{111} 

This "determinative factor" or but-for standard is the majority standard in discrimination cases. \footnote{112} Following recent Supreme Court cases dealing with outcome-determinative constitutional claims, \footnote{113} the standard has been adopted by at least ten circuits in age cases, \footnote{114} and by many courts in Title VII, Section 1981, \footnote{115}

\footnote{111} Loeb v. Textron, Inc., 600 F.2d 1003, 1019 (1st Cir. 1979) ("but for" . . . employer's motive to discriminate . . . [plaintiff] would not have been discharged."). The determinative factor and but-for tests are identical to the "same decision" test discussed supra notes 26-27 and accompanying text. Although using different formulations, each test applies the same standard to the same issue: would the decision have been different if race had not been a factor.

\footnote{112} See infra notes 114-16 and accompanying text. Present arguments more often involve semantic quibbling and refinement of the but-for test than a fundamental reassessment of the standard itself. One recent issue, for example, has been whether a jury instruction which refers to "the determinative factor" as opposed to "a determinative standard" constitutes reasonable error. See, e.g., Cuddy v. Carmen, 694 F.2d 853, 857 (D.C. Cir. 1982), cert. denied, 106 S. Ct. 597 (1985); Golomb v. Prudential Ins. Co. of Am., 688 F.2d 547 (7th Cir. 1982); Spagnuolo v. Whirlpool Corp., 641 F.2d 1109, 1112 (4th Cir. 1981), cert. denied, 454 U.S. 860 (1981); Smithers v. Bailar, 629 F.2d 892, 896-98 (3d Cir. 1980). The proper instruction employs the phrase "a determinative factor", since "[u]se of the definite article 'the' instead of the indefinite article 'a' incorrectly suggests that the plaintiff . . . must prove that age was the sole determinative factor . . . ." Golomb, 688 F.2d at 552 n.2.

A second contemporary issue is whether the burden of proving that the racial factor was determinative can ever be shifted to the defendant. In the Eleventh Circuit, if the plaintiff establishes discrimination by direct evidence, the burden shifts to the defendant to prove that the same decision would have occurred even without the unlawful discrimination. Lee v. Russell County Bd. of Educ., 684 F.2d 769 (11th Cir. 1982); Perryman v. Johnson Prods. Co., 698 F.2d 1138 (11th Cir. 1983).

\footnote{113} See supra note 25. The Supreme Court has favorably referred to the but-for standard in several Title VII cases, but has never expressly adopted it as a causation standard under that statute. In McDonald v. Santa Fe Trail Transp. Co., 427 U.S. 273 (1976), the Supreme Court rejected the argument that Title VII plaintiffs must show that race was the sole basis for the adverse decisions and stated that "no more is required to be shown than that race was a 'but for' cause." Id. at 282 n.10. In several recent sex discrimination cases, the Court has reiterated that "the simple test of Title VII discrimination" is whether the plaintiff is treated "'in a manner which but for that person's sex would be different.'" \footnote{114} Newport News Shipbuilding & Drydock Co. v. EEOC, 462 U.S. 669, 683 (1983) (quoting Los Angeles Dept. of Water & Power v. Manhart, 435 U.S. 702, 711 (1978) (quoting Development In The Law, Employment Discrimination and Title VII of the Civil Rights Act of 1964, 84 HARV. L. REV. 1109, 1170 (1971)). This Manhart quotation has been reprinted in Newport News, 462 U.S. at 683 n.23, and in Arizona Governing Comm. v. Norris, 463 U.S. 1073, 1081 (1983).

\footnote{114} Jorgensen v. Modern Woodmen of Am., 761 F.2d 502 (8th Cir. 1985); Goldstein v. Manhattan Indus., Inc., 758 F.2d 1435 (11th Cir.), cert. denied, 106 S. Ct. 525 (1985);
state-law discrimination cases.\textsuperscript{116} This broad acceptance warrants careful scrutiny of the standard’s effectiveness in achieving its particular purposes and the broader purposes of the laws against discrimination.

The primary reason for adopting the “determinative factor” test instead of a less stringent standard has been the concern that “[a] rule of causation which focuses solely on whether protected conduct played a part, ‘substantial’ or otherwise, in a decision . . . could place an employee in a better position . . . than he would [otherwise] have occupied . . . .”\textsuperscript{117} The courts have feared that a lesser standard would result in a remedy disproportionate to the wrong, with both a windfall to the plaintiff and excessive punishment of the defendant. As one trial judge stated in an age discrimination case:

If relief were to be afforded every time age was considered [even though it did not make a difference in the final decision], the effects would go well beyond the remedial designs of the drafters of the [ADEA]. Back pay would be awarded to those who never had a chance for the job . . . . While doing so would provide a strong deterrent against . . . discrimination, it would be a deterrent far in excess of the limited deterrent Congress intended to provide when it enacted the ADEA.\textsuperscript{118}

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\textsuperscript{118} Geller v. Markham, 481 F. Supp. 835, 841 (D. Conn. 1979), aff’d in part and rev’d in part, 655 F.2d 1027 (2d Cir. 1980), cert. denied, 451 U.S. 945 (1981). See also Belton,
To avoid this dissonance between remedy and wrong, courts have been attracted to a “test of causation which distinguishes between a result caused by a . . . violation and one not so caused.” The but-for standard, by explicitly requiring a connection between the unlawful act and the injury, distinguishes between such results and addresses this major judicial concern.

The implementation of the but-for test introduces a new level of difficulty into the factfinding process of a discrimination case. Since liability attaches only if the racial factor was determinative, it is no longer sufficient simply to decide if race was or was not a factor in the decision. The determinative factor test requires that the factfinder further refine its assessment, quantify the importance of race as a factor in the particular case and locate it along the continuum. This assignment is not a simple one. The factfinder must now engage in a counterfactual determination of what might have happened if one variable (D’s use of race as a factor) had been different.120 As one judge has noted, it is difficult to determine “once the omelet [is] cooked . . . what each egg had contributed to it.”121 However, the performance of this factfinding function is essential to the successful resolution of the mixed motive case. While “cause itself is not a fact,”122 the application of

supra note 71, at 1255-56 (illustrating similar point with hypothetical).

119. Mt. Healthy, 429 U.S. at 286.

120. For a critique of such counterfactual determinations in negligence cases, see Thode, The Indefensible Use of The Hypothetical Case To Determine Cause In Fact, 46 Tex. L. Rev. 423, 434 (1968) (“The only function of the factual inquiry is to find out what happened, and that inquiry is not illuminated by an inquiry into what did not happen.”).

121. Garcia v. Gloor, 618 F.2d 264, 268 (5th Cir. 1980), cert. denied, 449 U.S. 1113 (1981). It is sometimes suggested, even by the Supreme Court, that this further factfinding cannot be done. Personnel Adm’r of Mass. v. Feeney, 442 U.S. 256, 277 (1979) (“Discriminatory intent is simply not amenable to calibration. It either is a factor that has influenced the legislative choice or it is not.”). See Malone, Ruminations on Cause-In-Fact, 9 Stan. L. Rev. 60, 67 (1956) (such fact finding “demands the impossible. It challenges the imagination of the trier to probe into a purely fanciful and unknowable state of affairs.”). While there is no question that this task is “sensitive and difficult,” United States Postal Serv. Bd. of Governors v. Aikens, 460 U.S. 711, 716 (1983), it is not appreciably more so than is the initial factfinding to determine that race was “a” factor, or the further factfinding necessary to determine the appropriate remedy. Additionally, the problem is inherent in the mixed motive case. The only way to escape this additional factfinding is either to require the plaintiff to prove that race was “the” factor, or to adopt a causal standard that establishes liability and provides a full remedy upon proof that race was “a” factor. In either of these cases, no calibration is necessary. No court or commentator, however, has explicitly endorsed either of these positions.

122. Malone, supra note 121, at 69. But see W. Prosser, Handbook of the Law of
the causal standard in a mixed motive case necessarily requires a firm factual foundation.\textsuperscript{123}

The but-for test addresses the problem of a mismatch between the remedy and the wrong. However, its underinclusiveness creates a mismatch of its own, between the violation of the plaintiff's right to be free from discrimination and the lack of a finding of liability and a remedy for that violation. If conduct is discriminatory but not determinative of the decision, the but-for test finds no wrongdoing. As displayed in the revised chart, where D represents the place at which the racial factor becomes determinative and the line D-O represents the conduct encompassed by the pre-

\textsuperscript{123} Torts § 41, at 237 (4th ed. 1971) ("Causation is a fact. It is a matter of what has in fact occurred."). Professor Malone and Dean Prosser are each describing a different aspect of the cause-in-fact determination. Dean Prosser is pointing out that the resolution of the problem begins by finding out "what happened out there," and that this initial determination is factual. Professor Malone is emphasizing that a legal standard is needed to give meaning to those facts. Both authors are correct.

1) Was race a factor in the defendant's decision? (YES/NO)
2) If yes, was race a determinative factor, in the sense that the plaintiff would have been hired if she had been white? (YES/NO)

The answers to these special interrogatories focus the jury deliberation and provide findings with the requisite specificity for applying the determinative factor standard to the discriminatory outcome claim in the mixed motive case. See Lewis v. University of Pittsburgh, 725 F.2d 910, 917-18 (3d Cir. 1983), cert. denied, 469 U.S. 892 (1984); Geller v. Markham, 695 F.2d 1027, 1031 (2d Cir. 1980); Gibbs v. Exxon Corp., 37 Fair Empl. Prac. Cas. (BNA) 1005, 1006 (D.N.J. 1985). While the use of special verdicts and interrogatories is a matter of discretion, Fed. R. Civ. P. 49, at least one court of appeals has suggested that their use is a preferred approach in certain types of discrimination cases. Cancellier v. Federated Dep't Stores, 672 F.2d 1312, 1317 (9th Cir. 1982) (As amended on Denial of Rehearing and Rehearing En Banc). There may also be a separate instruction as to which party bears the burden of proof on the determinative factor or same decision issue, particularly in a "direct evidence" case in the Eleventh Circuit. See supra note 112.
vailing causation standard, the but-for test immunizes a considerable range of conduct in which the defendant has considered the plaintiff's race as a factor in its decision:

**TABLE II**

The Revised Mixed-Motive Continuum

<table>
<thead>
<tr>
<th>Race Is</th>
</tr>
</thead>
<tbody>
<tr>
<td>Not A Factor</td>
</tr>
<tr>
<td>Two Or More Factors</td>
</tr>
</tbody>
</table>

- Non-Determinative Factor
- Determinative Factor

"Insignificant" "Substantial"
"Minor" "Significant"

By recognizing only determinative factors as unlawful, the but-for test prohibits racially-motivated conduct between points D and O, but does not attach liability to such conduct between points N and D. Between N and D, in all cases of non-determinative discrimination, "[t]he fact that . . . violations have occurred [is] lost in the shuffle." By recognizing only determinative factors as unlawful, the but-for test prohibits racially-motivated conduct between points D and O, but does not attach liability to such conduct between points N and D. Between N and D, in all cases of non-determinative discrimination, "[t]he fact that . . . violations have occurred [is] lost in the shuffle." The discrimination, having been found to be non-determinative, is deemed "harmless," without any further reflection on its discriminatory nature.

Critics of the but-for requirement would replace it with another causation standard drawn from tort law, the "substantial factor" test. Explicitly designed for situations where there is more than one cause of a particular event, this alternative stan-

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125. Brodin, *supra* note 11, at 317. Professor Brodin suggests that "the refusal of the courts to take some action against such 'harmless' discrimination might actually encourage the continuation of such conduct." *Id.* at 318 (emphasis in original). He further states that the but-for standard "appears to be a restriking of the balance that Congress intended to establish between minority persons and their employers." *Id.* at 322.
127. *See Restatement (Second) of Torts § 432* (1965); W. Prosser & P. Keeton,
standard regards "any culpable conduct that is a substantial factor in producing an injury as a factual cause of that injury." A "substantial factor" is defined as one that "of itself is sufficient to bring about harm to another," if the other factors had not been present. This test permits a finding of liability in cases of "concurrent causation," where each of two factors would independently have caused the injury, and, therefore, neither of them can be a but-for cause. This area of additional liability is represented on the chart as the line S-D, where S represents the point at which the racial motive becomes substantial, and the line S-D represents all claims that are substantial but non-determinative. In holding the wrongdoer liable for its substantial wrongful acts, even if the same consequences would have resulted from an independent and lawful cause, the test acknowledges the plaintiff's windfall award as a necessary consequence of its policy objective of deterring defendants from engaging in the prohibited activity and securing a higher level of care.

Courts construing the laws against discrimination have rejected the "substantial factor" standard of causation. They have insisted on a closer connection—a but-for relationship—between the use of race as a factor and the alleged wrong. Despite its problems, the but-for standard is suitable for the discriminatory

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128. Eaton, supra note 126, at 454.
129. Restatement (Second) of Torts § 432(2) (1965). The determination of when a cause becomes substantial presents another difficult question of fact. As with the determinative factor assessment, see supra notes 112-17 and accompanying text, the finding of substantiality also requires a counterfactual inquiry, this time with the hypothetical factors reversed. The factfinder must decide what would have happened if the lawful reasons (in the example, P's lack of experience and late application) had not existed and D had based its decision solely on the unlawful racial reason. Whereas the determinative factor test seeks to measure the motivating force of the lawful reason, the substantial factor test undertakes the same assessment of the unlawful reason. For suggested special interrogatories to assist the jury in deciding if a reason is substantial, see supra note 123.
131. In our example, D has three reasons for denying P a job: her lack of experience, the date of her application, and her race. If each factor were independently sufficient to determine the result, then none of them would be a but-for cause but each would be a substantial, "concurrent cause."
132. Eaton, supra note 126, at 454; Carpenter, supra note 130, at 951-52.
133. See supra notes 112-16. Professor Eaton attributes the rejection of the "substantial factor" test in the constitutional tort context to federalism concerns and the belief that "a substantial factor approach to causation would too greatly interfere with the functioning of government." Eaton, supra note 126, at 457, 458-61.
outcome case. The alleged wrong is the denial of the job for racial reasons; the injury is the loss of the job and its benefits. Since both the wrong and the injury caused by that wrong are totally related to the hiring decision, it is sensible to require that the unlawful factor be the determinative cause of that decision. If the adverse decision and the outcome-related injury would have occurred in any event, then there simply has been no wrong or injury in the discriminatory outcome sense. There has been discrimination, however. In all cases on the line N-S-D, the factfinder has found that the defendant used race as a factor. To say that race did not make a difference in the outcome of the decision is not to say that the use of race as a factor does not matter at all. Such non-determinative discrimination can have a severe effect on the victim and can frustrate the achievement of the purposes of the laws against discrimination. By definition, the but-for test in the discriminatory outcome case simply ignores all instances of non-determinative discrimination.

The appropriate solution is not the replacement of the but-for test with the substantial factor test. Rather, the better approach involves the application of the but-for standard to a more carefully specified wrong and injury. The problem of underenforcement inherent in the but-for test in the discriminatory outcome case is not a causation problem, but a problem in defining the substantive rights and duties established by the laws against discrimination. By focusing attention on these rights and duties, and by providing a vocabulary with which to discuss the claims of non-determinative discrimination, the theory of non-determinative discrimination promises a more successful resolution of the problem of discrimination left untouched by the but-for standard in the outcome case. Analysis of the substantive conduct, as opposed to the causation standard, returns the focus to the proper issues: whether conduct that admittedly constitutes race-based different treatment is prohibited or permitted by the laws against

134. As indicated infra Section III D2, the substantial factor test is both underinclusive in certain cases and imprecise and unhelpful in other, more difficult ones. The substantial factor test still leaves a certain amount of discrimination, that located between points N and D on the continuum, undiscovered and unprotected. Additionally, in the non-determinative discrimination, mixed motive case, it does not identify the unlawful behavior with sufficient clarity to permit the fashioning of an appropriate remedy, and it presents the danger of imposing liability for thoughts, as opposed to deeds.
discrimination and, if prohibited, the appropriate remedial response to that conduct.

C. Remedy

It is hornbook law that the determination of the appropriate remedy is made only after a prior determination of liability,135 and that the "nature of the violation determines the scope of the remedy."136 However, these determinations of right and of remedy occur not separately, but dialectically:137 "[a] judgment about violation should reflect, and in fact does reflect, a judgment about remedy,"138 and the absence of appropriate remedies, or concern about the imposition of inappropriate remedies, often influences the definition of a right.138 An understanding of remedies is thus essential to the evaluation of the theory of non-determinative discrimination. If the remedies provided by the laws against discrimination fit only the discriminatory outcome claim and are inappropriate to the non-determinative discrimination claim, there will be little incentive to bring such claims. Similarly, there will be a reluctance to recognize the right to be free of non-determinative discrimination on absence-of-remedy grounds. As this Section demonstrates, however, a full range of remedies is available in many, but not all, discrimination cases. Additionally, the techniques for augmenting damages and tailoring the remedy to the injury developed in discriminatory outcome cases also apply to non-determinative discrimination claims.

At the remedy stage of a discrimination case, the similarity that characterizes the determination of liability in the many laws against discrimination disappears. The differences are not total. Nearly all the laws against discrimination provide for equitable relief, the recovery of certain monetary losses, and the award of

135. D. Dobbs, Handbook on the Law of Remedies 1 (1973) ("The law of judicial remedies concerns itself with the nature and scope of the relief to be given a plaintiff once he . . . has established a substantive right.").
139. Note, Making the Violation Fit the Remedy: The Intent Standard and Equal Protection Law, 92 Yale L.J. 328 (1982); Freeman, supra note 43.
nominal damages.\textsuperscript{140} All federal and many state statutes authorize the awarding of attorneys' fees.\textsuperscript{141} However, in the important area of compensatory damages, the statutes are sharply divided.\textsuperscript{142}

Compensatory damages in discrimination cases are important to provide relief for the emotional and psychological injuries caused by unlawful discrimination. The humiliation, embarrassment and psychological harm that can be caused by discrimination is particularly severe and well-established.\textsuperscript{143} As even the formal transcripts of courtroom testimony reveal,\textsuperscript{144} victims of discrimination lose not only the opportunity to live in a particular home or to have a particular job; they have also suffered a "dignitary tort,"\textsuperscript{145} a harm involving:

140. See infra notes 148-72. Not all statutes authorize such relief. A measure of surprise is often provided by the disclosure that some laws against discrimination provide no monetary remedy but only injunctive relief. A striking example is provided by the federal public accommodation law, 42 U.S.C. § 2000a (1982). The Senate report on the bill loftily proclaimed:

The primary purpose of [Title II] is to solve this problem, the deprivation of personal dignity that surely accompanies denials of equal access to public establishments. Discrimination is not simply dollars and cents, hamburger and movies, it is the humiliation, frustration and embarrassment that a person must surely feel when he is told that he is unacceptable as a member of the public because of his race or color.

S. REP. No. 872, 88th Cong., 2d Sess. 16, reprinted in 1964 U.S. CODE CONG. & ADMIN. NEWS 2355, 2370. However, the law as enacted had no provision for damages. A plaintiff can seek "preventive relief", 42 U.S.C. § 2000a-3(a) (1982), and can receive attorney's fees if successful, 42 U.S.C. § 2000a-3(b) (1982), but can not recover monetary relief. Id. § 2000a-6(b). ("The remedies provided in this subchapter shall be the exclusive means of enforcing the rights based on this subchapter . . . ."). See generally Note, Discrimination in Access to Public Places: A Survey of State and Federal Public Accommodations Laws, 7 N.Y.U. REV. L. & SOC. CHANGE 215, 225 (1978).


142. See infra notes 148-72 and accompanying text. Another area of division involves the award of punitive damages.

143. See G. ALLPORT, THE NATURE OF PREJUDICE (1954); K. CLARK, DARK GHETTO 63-64 (1965); O. COX, CASTE, CLASS AND RACE 383 (1948); E. GOFFMAN, STIGMA (1963); W. GREIER & P. COBBS, BLACK RACE (1968).

144. The testimony in two cases is illustrative. A black man who could not buy a house because of racial discrimination testified: "I was humiliated. I was intimidated, not only as a person but as a man. He stripped me of my right as a father to my kids." Seaton v. Sky Realty Co., 491 F.2d 634, 636 (7th Cir. 1974). A black plaintiff in another case testified: "Well, it makes you feel . . . that you were still back in slavery or something. It really embarrasses you. It makes you feel bad to know that you want something and can't have it on account of being black." Burris v. Wilkins, 2 Equal Oppt'y. Hous. Cas. (CCH) 115,219 (N.D. Tenn. 1977).

145. Housing discrimination was recognized as a dignitary tort by the Supreme Court
injuries to the personality. This means that, though economic or physical loss may be associated with the injury, the primary or usual concern is not economic at all, but vindication on an intangible right . . . .[I]n a great many of these cases, the only harm is the affront to the plaintiff's dignity, the damage to his self-image, the resulting mental distress. 146

Such emotional harm will be the most significant injury in certain types of discriminatory outcome cases, and in most non-determinative discrimination cases. The reality of these injuries requires recognition and, where possible, recompense. The many laws against discrimination that provide broad relief demonstrate the willingness to use the legal system to provide monetary compensation for such harm. 147 Other laws, however, have been construed not to authorize the award of damages, other than nominal damages, for such injuries.

Title VII typifies the class of laws against discrimination that have been interpreted to provide only narrow relief to prevailing plaintiffs in individual disparate treatment actions. 148 Under Title VII, if a plaintiff proves that he or she was denied employment because of race, a court may declare the conduct unlawful, enjoin the defendant from continuing to discriminate, 149 and order the defendant to hire the plaintiff. 150 A court may also vest a plaintiff

146. D. Dombs, supra note 135, at 509-10.
147. Professor Bittker recognized and placed in perspective the problem of attempting to monetize the emotional injury inflicted by discrimination. "It is difficult to convert humiliation and emotional distress into cost, but American courts regularly rise to the challenge by compensating victims of slanderous utterances, abusive tactics by bill collectors, misdelivery of telegraphic notices of illness and death, . . . and innumerable other acts causing mental distress but not visible injury." B. Bittker, THE CASE FOR BLACK REPARATIONS 61 (1971). As a historical note, Professor Bittker also reminds that in the era of de jure segregation, state law provided compensation for the emotional distress suffered by whites who were mistakenly classified as black and ordered to sit in the black-only cars. Louisville & N.R.R. v. Ritchel, 148 Ky. 701, 147 S.W. 411 (1912); Chicago, Rock Island & Pacific Ry. Co. v. Allison, 120 Ark. 54, 178 S.W. 401 (1915).
149. 42 U.S.C. § 2000e-5(g) (1982) ("the court may enjoin the respondent from engaging in such unlawful employment practice."). Factors that influence the issuance of injunctive relief in individual cases are discussed in C. Sullivan, M. Zimmer & R. Richards, supra note 66, at 683-86.
with "constructive" seniority, enabling the new employee to begin the job with the rights and benefits he or she would have had if the unlawful discrimination had not occurred. In addition to injunctive relief, a court may also order monetary payments for three purposes: compensation for employment-related monetary losses, payment of attorney's fees, and award of nominal damages. The compensation for monetary loss can take the form of back pay or front pay and is designed to serve "the central statutory purpose of eradicating discrimination throughout the economy and making persons whole for injuries suffered through past discrimination." The award of attorney's fees to

employment, reinstatement or promotion .... Title VII prohibits the court from ordering the hiring of a person or the reinstatement of back pay if the denial was "for any reasons other than discrimination on account of race, color, religion, sex or national origin ...." 42 U.S.C. § 2000e-5(g) (1982).


152. 42 U.S.C. § 2000e-5(g) (1982); Albemarle, 422 U.S. at 413-25. These payments include employment-related benefits, such as pensions, medical insurance and the like. They do not include moving expenses. See generally B. Schlei & P. Grossman, supra note 4, at 1418-51.


154. Nominal damages are not specifically authorized by Title VII, but are a traditional equitable remedy, D. Dobbs, supra note 135, § 3.8, at 193 (1973), and have been awarded in Title VII cases. See, e.g., Henson v. City of Dundee, 682 F.2d 897, 905 (11th Cir. 1982); Dean v. Civiletti, 670 F.2d 99, 101 (8th Cir. 1982); Joshi v. Florida State Univ., 646 F.2d 981, 991 n.33 (5th Cir. 1981), cert. denied, 456 U.S. 972 (1982).

155. 42 U.S.C. § 2000e-5(g) (1982). Back pay is the payment of earnings that a person would have received but for the unlawful discrimination. The award of back pay is subject to a host of technical requirements, including mitigation, set offs, fringe benefit calculations and tax issues. See generally, B. Schlei & P. Grossman, supra note 4, at 1418-52; C. Sullivan, M. Zimmer & R. Richards, supra note 66, § 9.1.

156. Front pay is the payment of future earnings to a person who has been adjudicated a victim of discrimination, but has not been offered a job (or reinstatement) by the defendant. It is awarded if no comparable position is presently available, or as an alternative to reinstatement if the court determines that an amicable employment relationship between the parties is not possible. See Fitzgerald v. Sirloin Stockade, 624 F.2d 945 (10th Cir. 1980). Front pay is generally calculated as "the estimated present value of lost earnings that are reasonably likely to occur between the date of judgment and the time when the employee can assume his new position." Patterson v. American Tobacco Co., 535 F.2d 257, 269 (4th Cir.), cert. denied, 429 U.S. 920 (1976).

157. Albemarle Paper Co. v. Moody, 422 U.S. 405, 421 (1975). The connection between back pay and the "make whole" purpose is obvious. The monetary compensation serves the eradication purpose by providing "the spur or catalyst which causes employers and unions to self-examine and self-evaluate their employment practices and to endeavor to
the successful plaintiff serves a related purpose, "to encourage individuals injured by racial discrimination to seek judicial relief . . . ." Nominal damages vindicate the societal interest in protecting important rights, when the monetary damage caused by that injury is nonexistent or not ascertainable.

These types of injunctive and monetary relief exhaust the categories of relief available under this class of statutes. As construed by virtually all courts, Title VII does not authorize compensatory damages for emotional distress or punitive damages. This limi-

eliminate, so far as possible, the last vestiges of an unfortunate and ignominious page in this country's history." Id. at 417-18 (quoting United States v. N.L. Indus., Inc., 479 F.2d 354, 379 (8th Cir. 1973)). Back pay as a "spur or catalyst" is thus a form of deterrence.


159. D. DOBBS, supra note 135, at 191.

160. While the Supreme Court has not directly ruled on the availability of either type of remedy, dictum supports the statement in the text. Johnson v. Railway Express Agency, Inc., 421 U.S. 454, 458-60 (1975). The reasons advanced for the limitation of relief are varied: (a) reliance on the NLRA model, see e.g., Walker v. Ford Motor Co., 684 F.2d 1355, 1364 (11th Cir. 1982); (b) limitations implicit in the statute's use of the term "equitable"; (c) comparisons with other statutes, such as the Fair Housing Act, that expressly authorize such relief; and (d) the possibility that the availability of such damages would interfere with the informal conciliation of complaints, see Greenbaum, Toward a Common Law of Employment Discrimination, 58 TEMP. L.Q. 65, 88-94 (1985). None of the arguments is conclusive. While it is true that "[t]he back pay provision was expressly modeled on the back pay provision of the National Labor Relations Act," Albemarle, 422 U.S. at 419, and that the NLRA has been interpreted as not authorizing compensatory and punitive damages, Consolidated Edison Co. v. NLRB, 505 U.S. 197, 235-36 (1998), the 1972 Amendments broadened the remedy section of Title VII beyond the limits of the NLRA. Sape & Hart, Title VII Reconsidered: The Equal Employment Opportunity Act of 1972, 40 GEo. WASH. L. REV. 824 (1972). In Title VII cases, the plaintiff is an individual not an agency, and the remedy-formulator is a federal district court judge, not the NLRB. Thus, while it is entirely appropriate for back pay doctrine to inform Title VII back pay law, it is not similarly sensible for that same doctrine to control the scope of the broader Title VII remedy section. Additionally, Title VIII was enacted in 1968, four years after the passage of Title VII and four years before the 1972 amendments that broadened § 2000e-5(g), the remedy section of Title VII. While the specific language on damages in Title VIII does indicate that Congress knows how to authorize such damages if it focuses on the issue, the absence of such specific language provides only a weak inference of a Congressional intent to preclude such damages.

The Age Discrimination In Employment Act of 1967 (ADEA), 29 U.S.C. §§ 621-634 (1982), provides another example of narrowing judicial construction of remedy provisions. The statute authorizes "such legal or equitable relief as may be appropriate to effectuate the purposes of [the Act] . . . .", id. § 626(b), and provides for a jury trial. Lorillard v. Pons, 434 U.S. 575, 585 (1978); 29 U.S.C. § 626(c)(2). But see Lehman v. Nakshian, 455 U.S. 156, 168 (1980) (no jury trial for federal employees under the ADEA). While this
tation makes the relief provided by Title VII narrow, in the sense that it neither compensates a plaintiff for all injuries nor provides, as with punitive damages, a moral condemnation of the unlawful act and an extra measure of deterrence.\textsuperscript{161} There are strong arguments for a broader interpretation of the relief authorized by the statute.\textsuperscript{162} Nevertheless, the case law is clear—compensatory and punitive damages are unavailable under Title VII and similarly construed statutes—and does not appear likely to change.\textsuperscript{163}


161. For a survey of the common law requisites prompting punitive damage awards and the debate over their deterrent effect, see D. Dobbs, \textit{supra} note 135, at 204-21. \textit{See also Developments in the Law - Employment Discrimination and Title VII of The Civil Rights Act of 1964}, 84 \textit{Harv. L. Rev.} 1109, 1261 (1971) ("[T]he award of punitive damages is a form of compensation for playing a public enforcement role.").

162. The eradication, deterrence and compensation purposes are better served by broader relief. The limited remedies are inadequate to compensate the injuries caused by discrimination. Where the back pay damages are small or nonexistent, (because a plaintiff mitigates damages immediately or, as in some sexual harassment claims, remains on the job) and the emotional distress to the plaintiff is severe, the lack of compensatory damages as an available remedy reduces the size of the recovery and, to the extent that large recoveries provide the "spur and catalyst" to eradicate discrimination, lessens the deterrent value of the law.

complete relief. The Civil Rights Act of 1866 and 1871 have been interpreted to authorize compensatory and punitive damages. Title VIII, the federal Fair Housing Act of 1968, specifically authorizes the award of all "actual damages," which has been construed to include emotional distress damages as well as monetary losses such as moving expenses and increased housing expenses. Many state statutes authorize the award of compensatory damages in discrimination cases, and some permit punitive damages. Damage recoveries under these statutes have ranged

167. Id. at § 3612(c). In keeping with the characterization of such relief as legal as opposed to equitable, there is no discretion in the award of these actual damages, even though the statute uses the term "may award." "[I]f a plaintiff proves unlawful discrimination and actual damages, he is entitled to judgment for that amount." Curtis v. Loether, 415 U.S. 189, 197 (1974). There is also a right to a jury trial. Id. at 198.
168. See, e.g., Phillips v. Hunter Trails Community Ass'n, 685 F.2d 184, 190-91 (7th Cir. 1982) (each plaintiff awarded $10,000 for humiliation and embarrassment). All the circuits that have addressed this issue have upheld the award of emotional distress damages. R. Schwemm, supra note 11, at 257 n.172. For a thorough discussion and collection of cases, see Schwemm, Compensatory Damages in Fair Housing Cases, 16 HARV. C.R.-C.L. L. REV. 83 (1981) [hereinafter Schwemm, Damages]. Title VIII also authorizes punitive damages but limits the amount of the award to $1,000. 42 U.S.C. § 3612(c) ("not more than $1,000 punitive damage"). This limitation restricts recovery only for each claim in a case so that a lawsuit involving multiple parties (e.g., husband-and-wife plaintiffs, and husband-and-wife or partnership owners) and several claims could result in punitive damages in excess of $1,000. R. Schwemm, supra note 11, at 262. Cf. Phillips, 685 F.2d at 191 (suggesting that $1,000 limitation in § 3612 does not apply to interference, intimidation and coercion claims under § 3617).
169. These actual economic losses are usually modest. See, e.g., Steele v. Title Realty Co., 478 F.2d 380 (10th Cir. 1973) (plaintiff awarded $13.25 for telephone expenses and $125 for moving and storage expenses); R. Schwemm, supra note 11, at 256.
170. The authorization for these more complete remedies is varied. The laws against discrimination in Kentucky and Tennessee have specific language allowing compensation for "humiliation and embarrassment;" KY. REV. STAT. ANN. § 344.250 (Michie/Bobbs-Merrill 1983); TENN. CODE ANN. § 4-21-507 (1985). See also MINN. STAT. ANN. § 363.071(2) (West Supp. 1985) ("damages for mental anguish or suffering ... ."); N.Y. EXC. LAW § 297(3)(c) (McKinney 1982) ("awarding of compensatory damages"); WASH. REV. CODE ANN. § 49.60.250(5) (1981) ("Except that damages for humiliation and mental suffering shall not exceed $1,000."). The Montana statute permits damages for "any harm, pecuniary or otherwise;" MONT. CODE ANN. § 49-2-506 (1985). Louisiana allows recovery of "general or special compensatory damages," LA. REV. STAT. ANN. § 23:1006(D) (West 1985) ("general or special compensatory damages"). Other states authorize the award of "actual damages", and interpret that phrase to permit the recovery of emotional distress damages. See, e.g., ILL. ANN. STAT. ch. 68, § 8-108 (E) (Smith-Hurd Supp. 1985) ("actual damages . . . for
from a few dollars to $580,000. Even where modest, however, they serve as both a reminder and a vindication of the reality that "[a]s anyone who has been a victim of discrimination can attest, the wounds run deeper than the pocketbook."

One practical consequence of this divergence of standards at the remedy stage is that well-counseled plaintiffs structure discrimination cases to permit the fullest recovery. They accomplish their purpose by combining claims under different statutes, so that the modern discrimination lawsuit often presents multiple counts arising under several statutes, both federal and state. In some circumstances, primarily in cases involving racial discrimination, plaintiffs can maximize their possible recovery by pleading only federal statutes. For example, in an employment case alleging


172. Freeman v. Kelvinator, Inc., 469 F. Supp. 999, 1004 (E.D. Mich. 1979). See also Stallworth v. Shuler, 35 Fair Empl. Pract. Cas. (BNA) 770, 775-76 (N.D. Fla. 1984) ("The Court is of the opinion that there is probably no monetary figure which would be entirely adequate to compensate this Plaintiff and provide him with redress for the wrongs and hurts suffered by him because of his race . . . .")
racial discrimination, a plaintiff will ordinarily plead a Section 1981 as well as a Title VII claim, in order to assure the availability of compensatory and punitive damages. However, since Section 1981 does not apply to an employment case alleging sex or other forms of discrimination, a plaintiff raising those issues has no recourse to a federal statute that provides full recovery. In such situations, a plaintiff may look to state law for more complete relief. The remedies available under state laws may be invoked.

173. Similarly, in a housing case alleging racial discrimination, even though Title VIII permits recovery of compensatory damages, a plaintiff will ordinarily plead a § 1981 as well as a Title VIII claim, in order to avoid Title VIII's $1,000 limitation on punitive damages. Sections 1981-1983 may also provide longer statutes of limitations, Burnett v. Grattan, 468 U.S. 42 (1984), and direct access to court without the need to comply with administrative filing requirements. Patsy v. Board of Regents, 457 U.S. 496 (1982). See generally Greenbaum, supra note 160.

174. See, e.g., Runyon v. McCrary, 427 U.S. 160, 167 (1976) (dictum); Movement for Opportunity v. General Motors, 622 F.2d 1235, 1278 (7th Cir. 1980). See also B. Schlei & P. Grossman, supra note 4, at 674 n.23 (listing of 28 cases holding that § 1981 is not applicable to discrimination based on sex).

175. This proposition must be qualified in the case of a lawsuit against a public employer. Intentional sex discrimination by a public employer would constitute a constitutional violation, Feeney v. Personal Adm' r of Mass., 442 U.S. 256, 276-80 (1979), actionable under 42 U.S.C. § 1983. While this statute has been construed to authorize both compensatory and punitive damages, Smith v. Wade, 461 U.S. 30, 35 (1983), an award of damages against a government unit considered part of the state is barred by the Eleventh Amendment, Pennhurst State School & Hosp. v. Halderman, 465 U.S. 89 (1984); Quern v. Jordan, 440 U.S. 332 (1979). Also, a suit against local governments must meet the policy requirement of Monell v. Department of Social Servs. of N.Y., 436 U.S. 658, 690 (1978), and punitive damages cannot be awarded against a municipality. City of Newport v. Fact Concerts, Inc., 453 U.S. 247 (1981). While most courts have permitted § 1983 employment discrimination claims against state and local governments, see, e.g., Day v. Wayne County Bd. of Auditors, 749 F.2d 1199 (6th Cir. 1984); Bradshaw v. Zoological Soc'y of San Diego, 569 F.2d 1066 (9th Cir. 1978), at least one judge, citing Great Am. Fed. Sav. & Loan Ass'n v. Novotny, 422 U.S. 366 (1979) has disallowed such claims, holding that Title VII provides the only federal remedy for these wrongs, Torres v. Wisconsin Dep't of Health & Soc. Servs., 592 F. Supp. 922 (E.D. Wis. 1984).

either by suing in state court, or by pleading a state law violation as a pendent state claim in a federal lawsuit. For several reasons, not the least of which is that plaintiffs often want to assert Title VII claims over which federal courts have exclusive jurisdiction, the state law claims will most often appear as pendent


In Connecticut and Illinois, statutory discrimination cases must be adjudicated before a state human rights agency. There is no private cause of action in court, only judicial review of administrative decisions. In Kentucky, there is a private cause of action, but the compensatory damages can be awarded only by the state agency, not the court. These statutory restrictions would prohibit the adjudication of such claims as pendent claims in a federal lawsuit.

177. There are two objective reasons for wanting to maintain a Title VII claim. Title VII clearly recognizes a disparate impact theory of discrimination. Other statutes such as section 1981 do not and state laws may be unclear. Thus, in a case that presents the possibility of both a disparate impact and a disparate treatment challenge, Title VII would be the preferred statute. Additionally, because Title VII is such a heavily litigated statute, there is abundant authority on most of the issues and federal judges are conversant with such claims. Even though many states have shown a willingness to use the Title VII law and concepts, discrimination laws in most states are less developed than the federal law, and state judges may, therefore, have less experience in hearing these cases. The second reason for maintaining a Title VII claim is a practical one. Plaintiffs will frequently file pro se an administrative charge with the Equal Employment Opportunity Commission (EEOC) and will arrive at their attorney's office only after receipt of a "right to sue" letter from the EEOC. 42 U.S.C. § 2000e-5(f)(1) (1982); 29 C.F.R. § 1601.28 (1985). As a jurisdictional matter, a plaintiff must file a Title VII complaint within ninety days of receipt of the letter. 42 U.S.C. § 2000e-5(f)(1) (1982). Consequently, there are often severe time pressures on the filing of the complaint and little opportunity to reflect on all the available avenues of relief.

178. While the Supreme Court has not expressly decided the issue, Kremer v. Chemical Constr. Co., 456 U.S. 461, 479-80 & n.20, reh'g denied, 458 U.S. 1133 (1982), and the statute does not explicitly vest exclusive jurisdiction in the federal courts, the Court has stated that "the 'ultimate authority' to secure compliance with Title VII resides in the federal courts [,]" New York Gaslight Club, Inc. v. Carey, 447 U.S. 54, 64 (1980), and that
Modern discrimination cases present a mosaic of different combinations of multiple federal and state claims, with the range of available remedies varying from case to case. In employment cases, a plaintiff alleging racial discrimination can combine Section 1981 and Title VII claims and obtain full monetary relief. For a plaintiff alleging sex discrimination, however, the scope of available relief depends on the party she is suing, and where the claim arises. If she is suing a state or local government defendant, or if her claim arises in one of the jurisdictions that provide full relief, she can recover all the damages that she can prove. However, if her claim is against a private entity in a state that restricts the available relief, her recovery will be limited. She may obtain only declaratory and possibly injunctive relief, nominal damages and attorney's fees. A person alleging age discrimination confronts a similar situation.

The variety presented by this mosaic may lack tidiness; it surely lacks symmetry. It does not lack form, however, and its form is the functional one of implementing the remedial choices Congress intended the "final responsibility for enforcement of Title VII" to be assigned to the federal judiciary. Alexander v. Gardner-Denver Co., 415 U.S. 36, 44 (1974). The statute itself has a special venue provision for Title VII actions, 42 U.S.C. § 2000e-5(f)(3) (1982), as well as a section providing for referral to a special master if the Title VII claim cannot be tried within 120 days. Id. § 2000e-5(f)(5); Valenzuela v. Kraft, Inc., 739 F.2d 434 (9th Cir. 1984); Sullivan, M. Zimmer & R. Richards, supra note 66, § 3.14; Catania, State Employment Discrimination Remedies and Pendent Jurisdiction Under Title VII: Access to Federal Courts, 32 Am. U.L. Rev. 777, 804-05, (1983).

179. The appropriateness of federal courts asserting pendent jurisdiction over state law claims in discrimination cases has been thoroughly discussed, and numerous case have been collected, in a recent article by Professor Catania, supra note 178. In only one area, dealing with "pendent parties", will a discrimination lawsuit encounter an implied "congressional negative" of the type presented in Aldinger v. Howard, 427 U.S. 1, 18 (1976). Title VII governs the conduct only of employers and their agents, 42 U.S.C. § 2000e(b) (1982); it does cover discrimination by individuals whose conduct cannot be attributed to the employer. In a federal court lawsuit, such an unrelated individual would be a "pendent party", over whom the court would not have an independent base of jurisdiction. Any claims against a pendent party would face the substantial obstacle posed by Aldinger. See Muskiwamba v. ESSI, Inc., 760 F.2d 740, 754-55 (7th Cir. 1985); Catania, supra note 178, at 796 n.94.

180. See supra note 165.


182. See supra notes 170 & 176, for a listing of such jurisdictions.

183. See supra note 176.

184. See supra note 160.
made by the federal and state legislatures that have addressed the problem of unlawful discrimination. It works tolerably well with the basic discrimination case 185 and is also servicable in redressing the injuries involved in the non-determinative discrimination claims.

III. THE NON-DETERMINATIVE DISCRIMINATION CLAIM

Although sharing the definition of discrimination as race-based different treatment, the non-determinative discrimination claim specifies the substantive right and the injury in a different manner than the discriminatory outcome claim. With the discriminatory outcome claim, a plaintiff asserts the right to be free from different treatment because of race in the outcome or final decision under review. The right under a non-determinative discrimination claim, on the other hand, is the broader right to be free of all forms of different treatment because of race in matters governed by the statute, even if that racial treatment does not change the final decision. The injury in a case of non-determinative discrimination is the harm caused by the proven race-based different treatment, and the remedy is tailored to redress that injury. The relief is not the back pay and job offer that characterizes the discriminatory outcome claim. Instead, the remedy for non-determinative discrimination involves an admixture of declaratory relief, emotional distress or nominal damages, a preventive injunction to stop the discriminatory conduct and attorney’s fees.

A. Initially Determinative Discrimination

Initially determinative discrimination occurs when D refuses even to consider P, because of P’s race, and therefore makes an initial adverse decision for an unlawful reason. In the introductory example of initially determinative discrimination, two plaintiffs were denied jobs as computer salespersons because of race, but would not have been hired, even in the absence of discrimination, because of lack of experience (P2) and date of application (P3). 186

185. But see Modjecka, The Supreme Court and the Ideal Of Equal Employment Opportunity, 36 MERCER L. REV. 795, 809-11 (1985) (Congress should transfer enforcement of Title VII from federal courts to an adjudicatory administrative agency with a “vibrant administrative process.”)

186. Although the example in the text concerns race discrimination, most recent cases
The discrimination was initially determinative but ultimately non-determinative.

The example is sharpened at this point to specify a case of explicit discrimination, where the plaintiffs were told by the defendant that the reason for the denial was their race, and that this racial reason was the company policy. When these plaintiffs challenge the company's action, they present both discriminatory outcome and non-determinative discrimination claims. In their cases, the discriminatory outcome claim will be readily dismissed for failing to meet the but-for causation standard. The non-determinative discrimination claim remains, however, to be addressed on its own merits.

Several courts have concluded that initially determinative discrimination is unlawful. They have perceived that the wrong is the race-based failure even to consider the plaintiffs for the position, and that this wrong is independent of any subsequent decision. As one state court recognized, there are two separate types of discrimination, "discriminatory refusal to hire, and wrongful failure to fairly consider an applicant." In the case of the "wrongful failure to consider," "the gravamen of the . . . complaint is that [they] were not considered for the openings . . . merely because they were women. [The defendant] can hardly de-


187. See, e.g., Easerly v. Empire, 757 F.2d at 931 (company personnel manual stated: "[A] male Office Manager is better qualified to perform these duties; and, therefore, it is recommended that a male applicant be hired if possible."); Smallwood v. United Airlines, 728 F.2d at 614 (explicit airline policy of not hiring pilots over thirty-five years old).

188. See supra Section II B.

fend itself on the basis of relative qualifications when it never evaluated the qualifications of the women."¹⁹⁰ When the plaintiffs are "not given equal treatment,"¹⁹¹ the defendant infringes their right not to be treated differently because of their race¹⁹² and violates its correlative duty not to engage in race-based different treatment.¹⁹³

While intuitively understandable, initially determinative discrimination claims present a number of problems at both the liability and remedy stages. This discussion will first address proof and causation issues, and then turn to the calculation of damages, the determination of injunctive relief, and the award of attorney’s fees.

The first liability issue concerns the prima facie case. The original McDonnell-Douglas definition of the prima facie case required, as its second element, that plaintiffs prove that they were qualified for the job.¹⁹⁴ Most plaintiffs raising non-determinative discrimination claims are, by definition, not qualified,"¹⁹⁵ and thus encounter a problem with this original definition of the prima facie case.

Two arguments support the conclusion that lack of qualifications does not defeat the non-determinative discrimination claim. Both start with the recognition that the Supreme Court did not establish the McDonnell-Douglas methodology as an inflexible stan-

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¹⁹⁰. EEOC v. Ford Motor Co., 645 F.2d 183, 188 n.3 (4th Cir. 1981). See also Gillen v. Federal Paper Bd. Co., 479 F.2d 97 (2d Cir. 1973), where the court stated:
While the ultimate prize was won by the male who had superior qualifications, this in our view does not purge Federal of its prior discriminatory act of refusing to consider her at all, not solely because of lack of qualification but because she was a woman. [T]he refusal . . . to consider her because she was a woman, is clearly a mischief which the statute was designed to prevent.

Id. at 102.


¹⁹². "[A] plaintiff may suffer harms that fall short of demonstrable loss of a job or promotion . . . . An illegal act of discrimination . . . is a wrong in itself under Title VII . . . . The goal of the statute is to bar all employer actions based on impermissible factors." Smith v. Secretary of the Navy, 659 F.2d 1118, 1120 (D.C. Cir. 1981).

¹⁹³. "[W]e hold that [the defendant] did transgress by failing to consider [the plaintiff] not simply because she was not qualified but because she was a woman." Gillen v. Federal Paper Bd. Co., 479 F.2d at 102.

¹⁹⁴. McDonnell-Douglas Corp. v. Green, 411 U.S. 792, 802 (1973). See also supra Section II A.

¹⁹⁵. Not every non-determinative discrimination plaintiff lacks the stated qualifications. Some may be rejected, not for lack of qualifications, but because they applied too late or because there were too many earlier applicants for the position.
dard but as a "sensible and orderly way" to proceed in certain cases. The first argument reminds us that, in cases of overt discrimination such as the one posited in the example, the discrimination is either admitted or is readily proved by direct evidence. The plaintiff does not rely on presumptions and circumstantial proof, but instead directly shows that the defendant treated her differently because of her race. In a direct evidence case, there is no need to use the McDonnell-Douglas methodology or to establish a prima facie case.

In some initially determinative discrimination cases, however, the discrimination will be covert, and the plaintiff may need to utilize circumstantial proof and the McDonnell-Douglas presumption. Although the prima facie case performs the identical function—shifting the burden of production—for both discriminatory outcome and non-determinative discrimination claims, the elements of the prima facie case are different for each claim. The qualification element for outcome claims serves the distinct purpose of filtering out claims with little or no merit. If the discriminatory outcome plaintiff is not at least minimally qualified, then there is no basis for presuming that the decision to reject was based on race. For the non-determinative discrimination claim, the qualification element has a comparable but much reduced

196. The Court recognized that "[t]he facts necessarily will vary . . . and the specification above of the prima facie proof . . . is not necessarily applicable in every respect to differing factual situations." McDonnell-Douglas, 411 U.S. at 802 n.13. See also Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248, 253-54 n.6; Frunco Constr. Corp. v. Waters, 438 U.S. at 575-76 (1978).

197. The direct evidence, if believed, establishes the discrimination and the defendant can escape liability only by showing, in the Eleventh Circuit, that the result would have been the same, see supra note 112, or by establishing an affirmative defense. The most common defense in cases of overt discrimination is that the discrimination is justified as a bona fide occupational qualification. See supra notes 60-61. The burden of proof is on the defendant to establish this affirmative defense. Dothard v. Rawlinson, 433 U.S. 321 (1977).

198. See generally Bartholet, supra note 74, at 1210-14.

199. In Aikens, the Court avoided ruling on the position taken by some courts, see, e.g., Adams v. Reed, 567 F.2d 1283, 1286-87 (5th Cir. 1978); But cf. Aikens v. United States Postal Serv. Bd. of Governors, 665 F.2d 1057, 1059 (D.C. Cir. 1981), vacated, 460 U.S. 711 (1983), that the plaintiff must show that he or she was "as qualified or more qualified" than other persons. United States Postal Serv. Bd. of Governors v. Aikens, 460 U.S. at 713. However, because of the Court's previous characterization of the plaintiff's burden as "not onerous," Burdine, 450 U.S. at 253, the better view is that the plaintiff can establish a prima facie case by showing that he or she possesses average qualifications. Any lack of relative qualifications is better addressed as part of the defendant's response. B. SCHLEI & P. GROSSMAN, supra note 4 at 1298-99, 1312.
role. Plaintiffs need only provide evidence which shows that it is more probable than not that the defendant's failure to consider them was based on their race. In the non-determinative discrimination case, this showing generally will not involve qualifications. Instead, the prima facie case should include proof of: (1) membership in a protected class; (2) application (or attempted application); (3) rejection (or refusal to consider); and (4) some evidence to suggest that white applicants for the same or similar positions were not summarily rejected but were evaluated on the merits. The fourth element is the critical one. In a case of covert, initially determinative discrimination, this element is often provided by the testimony of a "tester," a white person who applies and is afforded better treatment than the black applicant. While most often used in housing cases, evidence supplied by testers is also used in employment cases to provide facts necessary to establish the prima facie case. More traditional comparative evidence can also establish the different treatment and the presumption of unlawful action.

The establishment of a prima facie case shifts the burden of production to the defendant to articulate a legitimate, nondiscriminatory reason for its failure to consider the plaintiff's application. There may be such a reason. A defendant might state that, while it normally accepted applications from all people, it refused to consider the plaintiff's application because he or she was unkempt or obnoxious. This stated reason would be a non-racial reason, and the inquiry would then focus on whether it was

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201. The Supreme Court has defined testers as "individuals who, without an intent to rent or purchase a home or apartment, pose as renters or purchasers for the purpose of collecting evidence of unlawful steering practices." Havens Realty Corp. v. Coleman, 455 U.S. 363, 373 (1982). See generally Leadership Council For Metropolitan Open Communities, Investigation and Auditing In Fair Housing Cases (1975). Testers have standing to sue on their own, Havens Realty Corp., 455 U.S. at 373-75, but more often provide critical testimony as witnesses in discrimination cases. As the Tenth Circuit has stated: "It would be difficult indeed to prove discrimination in housing without this means of gathering evidence." Hamilton v. Miller, 477 F.2d 908, 910 n.1 (10th Cir. 1973).

202. See generally R. Schwemm, Fair Housing Law 416-17, 429-31 (1983); J. Kushner, supra note 11, at 70-81.

203. See Ostroff, 683 F.2d at 304 (test by plaintiff's husband); Lea v. Cone Mills Corp., 438 F.2d 86 (4th Cir. 1971) (per curiam) (test by black woman).

204. See supra Section II A.

the real reason or a pretext for unlawful discrimination. While the defendant's reason in the initially determinative discrimination claim may often have a \textit{post hoc} character that strains credibility, the plaintiff has the burden of proof on this issue and must convince the factfinder that the reason was a pretext.\footnote{206}{\textit{See supra} Section II A.}

The second liability issue in the non-determinative discrimination case, the causation requirement, is straightforward. As part of their case, the plaintiffs will show that race was the determinative, but-for factor in the defendant's failure to consider their applications and that their applications would have been considered if race had not been used. The causation requirement is easily met because the non-determinative discrimination claim carefully specifies the wrong to which the racial motive can be readily traced. Whereas race was not a but-for cause of the failure to hire, it \textit{was} the but-for cause of the failure to consider.\footnote{207}{Indeed, the causation issue collapses into a tautology: the denial of the right to be considered without regard to race is caused by the consideration (and rejection) because of race. The proof of the race-based failure to consider \textit{ipso facto} establishes the required but-for causation.} The more precise specification of the wrong resolves the causation problem that plagued the discriminatory outcome case.

Once the plaintiffs establish liability, several remedial issues require resolution. Since the remedy is designed to right the wrong inflicted upon the plaintiffs, and the wrong is the failure to consider their applications, the appropriate remedy is not the combination of back pay and reinstatement so familiar to the outcome case. Such relief would be inappropriate in the non-determinative discrimination case for precisely the reasons identified by the Supreme Court in \textit{Mt. Healthy}. It would give the plaintiffs a windfall by "placing the [plaintiffs] in a better position"\footnote{208}{\textit{Mt. Healthy City School Dist. Bd. of Educ. v. Doyle}, 429 U.S. 274, 285 (1977).} than they would have occupied had there been no discrimination. However, the non-determinative discrimination plaintiffs may have suffered emotional distress damages. Depending on the facts of a given case—the particular plaintiff and defendant, the position involved, the specific interaction of the parties—the plaintiff may or may not have been deeply upset, humiliated or embarrassed. In an appropriate case, where the plaintiff can prove an injury and present either federal or state claims that authorize damages for such
injuries, he or she should be awarded appropriate compensation.

The threshold decision to allow recovery of emotional distress damages leads to another problem, the calibration of those damages for the non-determinative discrimination violation. Since the violation was the failure to consider, and not the failure to hire, the damages can compensate only the emotional distress caused by the non-consideration, and must be purged of any award for distress caused by the non-hiring. Given that emotional distress is subjective and difficult to evaluate, the requirement that the fact-finder further parse the plaintiff's emotional distress to compensate only that distress caused by the initially determinative discrimination violation is a demanding one. While necessary to avoid a windfall to the plaintiff and a blurring of the distinction between outcome and non-determinative discrimination claims, it surely will impose a considerable burden on the fact-finding process. Nevertheless, as Justice Harlan observed in an analogous context, "the experience of judges in dealing with private [tort] claims supports the conclusion that courts of law are capable of making the types of judgment concerning causation and magnitude of injury necessary to accord meaningful compensation for invasion of . . . rights."211

The requirement that compensation be awarded only for injuries caused by the actual violation, and the resultant need for precision in remedy-phase fact-finding, are not issues unique to discrimination law. Similar problems regularly arise in the field of constitutional torts, particularly in cases involving procedural due process violations. In Carey v. Piphus, the Supreme Court considered a case very similar to a non-determinative discrimination claim. Two students suspended from high school without

209. See supra Section II C.
prior hearings alleged that their suspensions constituted deprivations of liberty without due process in violation of the fourteenth amendment. They sought declaratory and injunctive relief and damages. In deciding "the elements and prerequisites for the recovery of damages," the Court considered whether damages should be awarded if the school could prove on remand that the students "would have been suspended even if a proper hearing had been held." In such a situation, the due process violation would not have been outcome-determinative. Therefore, the plaintiffs could not "recover damages to compensate them for injuries caused by the suspensions" which would have occurred anyway. Transposing this teaching to the non-determinative discrimination case, Carey underscores the point that damages cannot be awarded for injuries caused by an outcome decision which would nevertheless have occurred.

More importantly, however, the Court in Carey reaffirmed that the plaintiffs could recover damages for emotional distress caused by and traceable to unlawful conduct in that case the denial of a hearing. Because of the "ambiguity in causation," the Court emphasized the "need for requiring the plaintiff to convince the trier of fact that he actually suffered distress because of

214. Respondent Jarius Piphus was suspended for twenty days for allegedly smoking marijuana in violation of a school rule prohibiting the use of drugs. Id. at 249. Respondent Silas Briscoe was suspended for twenty days for wearing one small earring in violation of a school rule which prohibited the wearing of earrings by male students. Id. at 250.

215. Id. The due process clause of the fourteenth amendment provides: "[N]or shall any state deprive any person of life, liberty, or property, without due process of law." It has been construed to require at least an informal hearing prior to suspension from public school for more than a short period of time. Goss v. Lopez, 419 U.S. 565 (1975).


217. Id. at 248.

218. Id. at 260, quoting Piphus v. Carey, 545 F.2d 30, 32 (7th Cir. 1976).


220. Id. at 263. The Court "use[d] the term 'distress' to include mental suffering or emotional anguish. Although essentially subjective, genuine injury in this respect may be evidenced by one's conduct and observed by others. Juries must be guided by appropriate instructions, and an award of damages must be supported by competent evidence concerning the injury." Id. at 264 n.20.

221. Id. at 263. The ambiguity was that "whatever distress a person feels may be attributable to the justified deprivation rather than to deficiencies in procedure." Id. This ambiguity is directly analogous to the similar problem with discriminatory outcome and non-determinative discrimination claims in discrimination law.
the denial of procedural due process itself." However, the Court did not "foresee [any] particular difficulty" in producing evidence and making the factual determinations necessary to resolve such claims. The conclusion drawn from Carey, then, is that the legal system has the capacity to perform the careful fact-finding necessary in these cases. As with other determinations in discrimination cases, the task is "sensitive and difficult." However, it is necessary in order to award compensation for injuries truly caused by unlawful discrimination, and to avoid windfall awards for injuries not so caused.

The Carey decision also highlights the value of nominal damages in appropriate cases. Not every non-determinative discrimination plaintiff will suffer (or will be able to prove that he or she suffered) emotional distress damages attributable to the failure to consider. Such plaintiffs are entitled to nominal damages even though the actual injury caused by the deprivation is modest, non-existent, or not ascertainable. As the Court stated:

By making the deprivation of such rights actionable for nominal damages without proof of actual injury, the law recognizes the importance to organized society that those rights be scrupulously observed; but at the same time, it remains true to the principle that substantial damages should be awarded only to compensate actual injury or, in the case of exemplary or punitive damages, to deter or punish malicious deprivations of rights.

Nominal damages have been approved in a number of discrimination cases. A black plaintiff who was discriminated

222. Id.

223. Id. Subsequent to the Carey decision, courts have gained experience from hundreds of cases in assessing this type of damages. See, e.g., County of Monroe, Fla. v. United States Dept' of Labor, 690 F.2d 1359 (11th Cir. 1982); Black v. Stephens, 662 F.2d 181 (3d Cir. 1981), cert. denied, 455 U.S. 1008, reh'g denied, 456 U.S. 950 (1982); Wilson v. Taylor, 658 F.2d 1021 (5th Cir. 1981); Jones v. Dept' of Human Resources, 300 N.C. 687, 268 S.E.2d 500 (1980).


225. See C. McCormick, HANDBOOK ON THE LAW OF DAMAGES §§ 20-22 (1935); D. Dobbs, supra note 135, § 3.8.


against in housing, but who might not have received the rental unit in any event because of the large number of other applicants, was entitled to nominal damages.\footnote{228} An applicant for a teaching position who established that her sex and national origin were "a factor" in her denial, but who would not have been hired because other individuals were more qualified, received nominal damages for the violation.\footnote{229} In lieu of the customary one dollar for such damages,\footnote{230} at least one state statute specifically establishes a rate: "unless greater damages are proven, damages may be assessed at $500 for each violation."\footnote{231} Whether statutory or common law, nominal damages are well-suited for certain non-determinative discrimination claims.

Injunctive relief must be specially crafted for the non-determinative discrimination case. The affirmative injunction that is commonplace in the discriminatory outcome case will usually be inappropriate for a non-determinative discrimination claim.\footnote{232} Instead, the injunctive relief, if any, will be a preventative injunction,\footnote{233} the issuance of which will depend upon a traditional equi.

\begin{itemize}
  \item \footnote{229} Joshi v. Florida State Univ., 646 F.2d 981, 991 n.33 (5th Cir. 1981), \textit{cert. denied}, 456 U.S. 972 (1982).
  \item \footnote{230} See, \textit{e.g.}, Carey v. Piphus, 435 U.S. at 267 ("nominal damages not to exceed one dollar . . . "). \textit{But see} Compston v. Borden, 424 F. Supp. 157, 163 (S.D. Ohio 1976) (nominal damages of $50).
  \item \footnote{232} In the affirmative injunction, D is ordered to offer P the job, apartment or loan that she would have obtained but-for the discrimination, \textit{see supra} Section II C. This relief is inappropriate in the non-determinative discrimination case because it would give P something that she would not have obtained had there been no discrimination.
  \item \footnote{233} \textit{See} \textit{O. Fiss, The Civil Rights Injunction} 8, 9, 32 (1978); O. Fiss, \textit{Injunctions} 1, 2 (1972).
\end{itemize}
table review of the facts in each case.²³⁴

Where an employer has a clearly identified company policy of refusing to consider blacks, the argument for enjoining the policy is straightforward, and a court can specify the unlawful activity that will be enjoined by its order. In this clear case, the fact that a plaintiff has prevailed on a non-determinative discrimination claim, as opposed to a discriminatory outcome claim, is not a significant factor in the equitable calculus. Courts have issued injunctions so that plaintiffs "can be considered for future appointments free of the taint of the invidious consideration."²³⁵ However, where the violation looks more like a single, unrelated incident than an example of an established policy, and where the requested injunction becomes a paraphrase of the broad statutory prohibition against discrimination, then the appropriateness of a preventive injunction and the likelihood of its issuance are diminished.²³⁶

²³⁴. A constitutional standing argument against a preventive injunction may be suggested by the Supreme Court's recent decision in Los Angeles v. Lyons, 461 U.S. 95 (1983). In that case, as one part of the relief in a complaint brought under 42 U.S.C. § 1983, a black plaintiff sought an injunction ordering the city of Los Angeles to prohibit its police officers from using a chokehold except in certain specified circumstances. Writing for the Court, Justice White stated that "to have a case or controversy . . . that could sustain [the injunction], Lyons would have to credibly allege that he faced a realistic threat . . . " of future injury from the challenged conduct. Los Angeles v. Lyons, 461 U.S. at 107 n.7. If the opinion is "read . . . for all it might be worth," (as Professor Henry Hart commented ironically about another questionable Supreme Court case addressing an article III issue, Ex parte McCordle, 74 U.S. (7 Wall.) 506 (1868); Hart, The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic, 66 HARV. L. REV. 1362, 1364 (1959)), plaintiffs in all federal cases may be required to establish standing separately for each type of relief they seek. However, the statutory grants of standing to discrimination plaintiffs are broad, "as broad as permitted by Article III of the Constitution." Trafficante v. Metropolitan Life Ins. Co., 409 U.S. 205, 209 (1972) (construing 42 U.S.C. § 2000e-5) (quoting Hacket v. McGuire Bros., 445 F.2d 442, 446 (1971)); Gladstone Realtors v. Village of Bellwood, 441 U.S. 91, 109 (1979) (construing 42 U.S.C. § 2000e-5, quoting Trafficante). The statutes indicate a Congressional desire "to expand standing to the full extent permitted by Article III, thus permitting litigation by one ‘who otherwise would be barred by prudential standing rules.’" Gladstone, 441 U.S. at 100, (quoting Warth v. Seldin, 422 U.S. 490, 501 (1975)). Thus, even if the specialized injunction-standing doctrine in Lyons survives, it is unlikely to be applied as a barrier to injunctive relief against proven statutory discrimination. Indeed, the contemplation of its application to such cases exposes the lack of an analytical foundation of the Lyons decision. See Fallon, Of Justiciability, Remedies and Public Law Litigation: Notes on the Jurisprudence of Lyons, 59 N.Y.U. L. REV. 1 (1983).


²³⁶. The results of applying the general rules are varied, even within the same circuit.
The final remedy issue for the initially determinative discrimination plaintiff is the award of attorney's fees. The laws against discrimination typically authorize an award to a "prevailing party," who "should ordinarily recover an attorney's fee unless special circumstances would render such an award unjust." Since a plaintiff who wins a non-determinative discrimination claim will usually have also litigated and lost a discriminatory outcome claim, the question is whether the non-determinative discrimination plaintiff is a prevailing party under the attorney's fees statutes.

In the recent case of Hensley v. Eckerhart, the Supreme Court developed an approach to the award of attorney's fees to "a partially prevailing plaintiff." The Court approved the "typical formulation" that "plaintiffs may be considered 'prevailing parties' for attorney's fees purposes if they succeed on any significant issue in litigation which achieves some of the benefit the parties sought in bringing suit." Under this standard, a plaintiff

\[\text{In Lewis v. Smith, 751 F.2d 1535 (11th Cir. 1984), one panel of the Eleventh Circuit ruled that "where there is abundant evidence of consistent past discrimination, injunctive relief is mandatory, absent clear and convincing proof that there is no reasonable probability of further noncompliance with the law." Id. at 1540. In Carmichael v. Birmingham Saw Works, 738 F.2d 1126 (11th Cir. 1984), a different panel held that injunctive relief was inappropriate where the plaintiff did not seek the job nor show how he would personally benefit from the injunction, stating that "the class benefited by the injunction must include the plaintiff." Id. at 1136.}

\[\text{239. As previously discussed supra note 65, discriminatory outcome and non-determinative discrimination claims are separate legal theories of recovery, not separate claims in a formal sense. Since both claims arise out of the same facts, fees should be awarded for work on the non-determinative discrimination claim. As one leading treatise articulates this approach: "if the test is expressed in the affirmative, fees would be awarded for all claims, successful or unsuccessful, arising out of a common nucleus of operative fact, or, if expressed in the negative, fees would be denied if an unsuccessful claim arises out of a separate transaction or occurrence." 1 M. DERFNER & A. WOLF, COURT AWARDED ATTORNEY FEES §§ 12-18.1 (1983).}
\[\text{240. 461 U.S. 424 (1983).}
\[\text{241. Id. at 426.}
\[\text{242. Id. at 433.}
\[\text{243. Id. (quoting Nadeau v. Helgemoe, 581 F.2d 275, 278-79 (1st Cir. 1978)). In footnote 8, the Court cited, with the less approving signal "cf.", the case of Taylor v. Sterret, 640 F.2d 669, 669 (5th Cir. 1981). 461 U.S. at 433 n.8. The Taylor formulation of the standard for a partially prevailing plaintiff is less generous: "the proper focus is whether}
who prevails on an initially determinative discrimination claim should be entitled to reasonable attorney's fees, as well as the other relief previously discussed. The courts have regularly entered such awards.\footnote{244}

the plaintiff has been successful on the \textit{central} issue as exhibited by the fact that he has acquired the \textit{primary} relief sought.\textsuperscript{2} \textsuperscript{2} Taylor, 640 F.2d at 669 (emphasis added).

244. \textit{See}, e.g., King v. Trans World Airlines, Inc., 738 F.2d 255 (8th Cir. 1984); Evans v. Harnett County Bd. of Educ., 684 F.2d 504 (11th Cir. 1982); Ostroff v. Employment Exch., Inc., 683 F.2d 302 (9th Cir. 1982) (per curiam); T & S Servs. Assoc. v. Crenson, 666 F.2d 722 (1st Cir. 1981). The argument that attorney's fees should not be awarded has been poorly received by the courts. This argument begins by characterizing a plaintiff not as a non-determinative discrimination winner, but as a discriminatory outcome loser. In this view, the central claim is the outcome claim, the primary relief sought is the outcome-relief of back pay and reinstatement, and the plaintiff loses on both major issues. Since the plaintiff is primarily a loser, it is argued that he or she should not be considered a prevailing party. The argument is flawed in at least two ways. First, implying a Congressional intent to award attorney's fees to only certain "central" or "primary" theories of recovery, it misconstrues the statutory term "prevailing" and adds a limitation neither present in the statute nor recognized by the Court. Second, the argument depends on a devaluation of the non-determinative discrimination claim, an unspoken premise that such claims are not worthy of fee awards. However, the legislature has rejected this premise by creating the substantive right and authorizing fee awards for a party who proves a violation of that right.

Assuming that the plaintiff is a prevailing party entitled to some award of attorney's fees, the next step is the calculation of the fee. The attorney will have spent time on both the successful and the unsuccessful claims. The problem is to decide how many of the total hours should be compensated. The preparation and litigation of a non-determinative discrimination claim is complex and time-consuming, not appreciably different than trying a discriminatory outcome claim. The factual issues are similar and both are difficult; the discovery is equally broad. Perhaps not until the close of the trial (or the issuance of the decision) will the attorney know whether the outcome or consideration claim will prevail. The professional time involved in pursuing both claims in the same case is not easily divisible, and most of the work will be fairly attributable to both claims. Therefore, if the plaintiff's counsel keeps "detailed records of the time and services for which fees are sought," \textit{Hensley}, 461 U.S. at 440 (Burger, C.J., concurring), specifically noting the (usually concurrent) time spent on the non-determinative discrimination claim, he or she will be able to show that the hours were spent on the successful claims and that they were reasonable. This showing, however, may not be sufficient. The Court may be planning to introduce the issue of partial success as a factor in the fee calculation. In \textit{Hensley}, the Court also stated that "the most critical factor is the degree of success obtained." \textit{Hensley}, 461 U.S. at 436. If the plaintiff "has obtained excellent results, his attorney should recover a fully compensatory fee," \textit{id.} at 435, but where the plaintiff "has achieved only partial or limited success," \textit{id.} at 436, the fee may be reduced so as to be "reasonable in relation to the success achieved." \textit{Id.} at 440. These latter remarks indicate that the Court may approve, in a given case where the "degree of success" was less than complete, the reduction of a fee award even if the hours are reasonable and carefully documented. For a thorough discussion of fee computations, see 2 M. \textsc{Dermfer} & A. \textsc{Wolf}, \textit{Court Awarded Attorney Fees §§ 15-1-501, 16-1-14 (1984).}
B. Process Discrimination

Process discrimination is different treatment because of race, not in the initially determinative or final decision, but in the processes that precede that decision.

The most common type of process discrimination is different treatment at the application stage. A black applicant was given no interview at all; a Chinese woman received an abbreviated interview in which she was not asked the important hypothetical questions posed to other candidates. While other candidates were asked during a pre-hire interview about their work experience and training, a female applicant was quizzed on her marital status, pregnancy, number of children and child-care plans. A black prospective purchaser of a cooperative housing unit was subjected to "insistent and unprecedented" questioning. A black-owned business bidding on a school contract was not inspected, as were all other bidders, prior to the bid award. Another applicant encountered "the classic 'runaround'" and other "procedural irregularities" which denied "an opportunity to compete on an equal footing."

In each example, the plaintiff could challenge the alleged discrimination in the process as well as in the adverse outcome. As with other types of discrimination, the plaintiff could prove that

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246. Woodbury County v. Iowa Civil Rights Comm'n, 335 N.W.2d 161, 169 (Iowa 1983) (Schultz, J., dissenting).
250. Fiss, Theory, supra note 6, at 272 (citing Dobbins v. Local 212, IBEW, 272 F. Supp. 413, 425 (S.D. Ohio 1968)). Professor Fiss recognized that "[t]he runaround may itself be a form of discriminatory conduct (unequal treatment), subject to equitable relief; but it might also lend credibility to the inference [of outcome discrimination] and thereby warrant more general injunctive relief . . . ." Fiss, Theory, supra note 6, at 272.
252. Of course, "[O]rdinarily, the plaintiff does not challenge the hiring process itself but argues that the hiring decision was the product of unlawful discrimination." King v. Trans World Airlines, Inc., 738 F.2d at 257 n.1 (emphasis in original). The discriminatory outcome challenge will generally be more attractive to plaintiffs than the non-determinative discrimination case because of the possibility of greater relief. See supra Sections II A, III A. It will be remembered that not all procedural irregularities violate the laws against discrimination, only those that are based on race.
the defendant treated her differently because of her race with either direct or circumstantial evidence. Generally, the plaintiff would be able to prove the different treatment directly with comparative evidence: white persons were treated a certain way — she was not. However, she would then need to rely on a McDonnell-Douglas presumption to establish the racial motivation for the treatment. She would use the prima facie case to shift the burden of production to the defendant to articulate legitimate, nondiscriminatory reasons for its conduct.

While in most reported cases the defendants have not contested the process violation, it is possible to do so. The laws against discrimination do not prescribe any particular type of procedure. They permit an employer, landlord, or bank to treat applicants in any manner it chooses, so long as the treatment is not based on an impermissible criterion. In one case, a black job candidate claimed process discrimination because she was required to take a test that no previous applicant for the position had ever taken. The court accepted as true the defendant's nondiscriminatory reason: she was given the test not because she was black, but because she was the first new candidate for the position in several years and the company wanted to improve the qualifications for that particular job. As with other disparate treatment cases, plaintiffs will lose process discrimination claims if they are unable to prove that a discriminatory reason caused the different treatment.

A defendant might attempt to escape liability by admitting

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253. This comparative evidence may be available through discovery or the use of testers.
254. The prima facie case of process discrimination should not be difficult to establish. The fact that she is a member of a protected class, and was treated differently from applicants not in that class, should be sufficient to establish that the defendant's actions, "if otherwise unexplained, are more likely than not based on the consideration of impermissible factors." Furnco Constr. Corp. v. Waters, 438 U.S. 567, 577 (1978).
255. In Anderson v. City of Bessemer, 470 U.S. 564 (1985), the defendant attempted to show that there was no different treatment in the process, in that male as well as female candidates were questioned about their spouses and family obligations. The trial court found against the defendant on this issue and the Supreme Court, vacating the Fourth Circuit's reversal of the trial court, emphasized that the determination of a different treatment was a finding of fact, subject to the "clearly erroneous" standard of FED. R. CIV. P. 52(e). Id. at 1512-15.
the process discrimination claim but asserting the defense that the
laws against discrimination do not regulate the processes of deci-
sion but only the outcomes. This defense directly addresses the
domain of these laws—the conduct they proscribe and the con-
duct they permit. The argument is that discriminatory outcomes
are the most egregious wrongs, and that liability should be fo-
cused on these wrongs, and only on these wrongs. Enlargement of
the prohibition to include processes is inappropriate, in this view,
because it involves an attack on a less important target and implic-
cates countervailing interests, such as respect for management
 prerogatives and avoidance of excessive intrusion into the work-
ings of the market.

This defense should be rejected, on both textual and policy
grounds, at least for the process discrimination claims discussed
thus far. The language of the laws against discrimination pro-
vides broad coverage. Outside the areas marked off by specific
exceptions, the statutes strongly suggest that all forms of discrimi-
nation are prohibited. They give no support for the view that only
outcomes are covered. Policy reasons also argue against permit-

257. See Page v. Bolger, 645 F.2d 227, 233 (4th Cir. 1981) (en banc) (Title VII covers
only “ultimate employment decisions,” not “interlocutory or mediate decisions”), cert. de-
258. The arguments have greater force with respect to some of the discriminatory
language claims discussed infra Section III C.
259. The texts of the prohibitions of Title VII and Title VIII are set forth supra note
35. Title VII makes it unlawful for an employer to
refuse to hire or to discharge . . . or otherwise to discriminate against any individ-
ual with respect to his compensation, terms, conditions, or privileges of employment . . .
because of such individual’s race, color, religion, sex, or national origin; or . . .
to limit, segregate, or classify his employees or applicants for employment in
any way which would deprive or tend to deprive any individual of employment oppor-
tunities or otherwise adversely affect his status as an employee . . . .
42 U.S.C. § 2000e-2(a)(1), (2) (emphasis added). While textually the “terms and condi-
tions” language of § 2000e-2(a)(1) applies only to employees and not applicants, see Hishon
v. King & Spalding, 467 U.S. 69 (1984), this does not indicate a lesser degree of protection
for applicants, but only a greater specification of the types of protection for employees.
Section 2000e-2(a)(2) is equally broad but more general. Title VIII is similarly broad and
inclusive, and most of the other statutes also make it unlawful to discriminate “in any re-
spect” in “terms, conditions or privileges” of the particular area.
260. The court in Page v. Bolger, purported to find a limitation in 42 U.S.C. § 2000e-
16(a) (1982), a section added in 1972 to extend Title VII coverage to federal employees.
However, the actual language of § 2000e-16(a), not quoted in full in the opinion, provides:
“All personnel actions affecting employees or applicants shall be made free from any dis-

257. See Page v. Bolger, 645 F.2d 227, 233 (4th Cir. 1981) (en banc) (Title VII covers
only "ultimate employment decisions," not "interlocutory or mediate decisions"), cert. de-
258. The arguments have greater force with respect to some of the discriminatory
language claims discussed infra Section III C.
259. The texts of the prohibitions of Title VII and Title VIII are set forth supra note
35. Title VII makes it unlawful for an employer to
refuse to hire or to discharge . . . or otherwise to discriminate against any individ-
ual with respect to his compensation, terms, conditions, or privileges of employment . . .
because of such individual's race, color, religion, sex, or national origin; or . . .
to limit, segregate, or classify his employees or applicants for employment in
any way which would deprive or tend to deprive any individual of employment oppor-
tunities or otherwise adversely affect his status as an employee . . . .
42 U.S.C. § 2000e-2(a)(1), (2) (emphasis added). While textually the "terms and condi-
tions" language of § 2000e-2(a)(1) applies only to employees and not applicants, see Hishon
v. King & Spalding, 467 U.S. 69 (1984), this does not indicate a lesser degree of protection
for applicants, but only a greater specification of the types of protection for employees.
Section 2000e-2(a)(2) is equally broad but more general. Title VIII is similarly broad and
inclusive, and most of the other statutes also make it unlawful to discriminate "in any re-
spect" in "terms, conditions or privileges" of the particular area.
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16(a) (1982), a section added in 1972 to extend Title VII coverage to federal employees.
However, the actual language of § 2000e-16(a), not quoted in full in the opinion, provides:
"All personnel actions affecting employees or applicants shall be made free from any dis-

ting process discrimination. The intrinsic purposes of the laws against discrimination are violated when defendants inflict the indignity of race-based treatment on plaintiffs. Such conduct is morally wrong, whether it involves outcome or process discrimination. Instrumental purposes are also implicated, albeit less directly. Denying black applicants an equal process denies them an equal opportunity to be selected on their merits. Making the application process difficult or impossible for black applicants will also, over time, discourage minorities from participating as fully as they might in the employment, housing, and other markets. This diminished opportunity for selection and reduced participation will produce a *pro tanto* loss in instrumental performance.

Balanced against these instrumental and intrinsic concerns, no competing interests justify a restriction in the coverage of the law. Neither efficiency nor autonomy concerns are strongly implicated. The insurance and enforcement costs are reasonable and are related to the purposes of the law. To avoid liability, defendants will have to monitor and control their personnel and procedures to minimize discriminatory treatment. Such monitoring, however, is already necessary to avoid liability on outcome claims, and the cost of any increased prophylactic measures for process claims is likely to be modest. The resolution of process discrimination complaints will utilize administrative, judicial, and related resources and thus will impose enforcement costs. However, since most process claims are not brought separately, but accompany outcome discrimination claims, the marginal increase in enforcement costs will be small and will be outweighed by the benefits achieved.

The remedies for process discrimination include declaratory relief, compensatory or nominal damages, injunctive relief, and attorney's fees. The conduct should be declared unlawful. The emotional distress, if any, suffered by the plaintiff as a result of the process violation should be compensated to the extent permitted

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tions" means only "ultimate employment decisions." *Page*, 645 F.2d at 233. While the result in *Page*—the affirmance of the district court's rejection of the black plaintiff's failure-to-promote claim—may have been correct, the reasoning does not withstand analysis. The Supreme Court has used a strict rule of construction for limitations on coverage: "When Congress wanted to grant an employer complete immunity, it expressly did so." *Hishon v. King & Spalding*, 467 U.S. at 77-78 (1984). See also *Sumitomo Shoji America, Inc. v. Avagliano*, 457 U.S. 176 (1982).
under the applicable law.\textsuperscript{261} As with the damages in the initially
determinative discrimination claim, the fact-finder must carefully
identify and compensate only the distress caused by the process
violation.\textsuperscript{262} Where such damages cannot be proven (or, if proven,
cannot be awarded because of limits imposed by law), the plaintiff
should still be entitled to nominal damages.\textsuperscript{263} The same equitable
considerations that influence the issuance of injunctive relief in
initially determinative discrimination cases apply to these claims as
well. Courts have considered the clarity of the violation, the
probability of its recurrence, and the nature of any future impact
on the plaintiff and have issued injunctions, in appropriate cases,
ordering the defendant to stop a specified form of process
discrimination.\textsuperscript{264}

C. Language Discrimination

The first two types of non-determinative discrimination in-
volve clear violations that present strong cases for regulation and
relief. Claims of language discrimination are more difficult. The
presentation thus far has argued that a curt or hostile interview, if
racially motivated, constitutes a process violation. A racist remark
made during an interview, from this perspective, would likewise
be unlawful. The next step might then be to enlist the laws
against discrimination to ban the utterance of all discriminatory
words. This use would extend the non-determinative discrimina-
tion theory from assuring nondiscriminatory treatment in discrete
interactions to guaranteeing nondiscriminatory language through-
out society. This potential reach strains the theory and invites a

\textsuperscript{261} As is customary with this type of damages, the existence and severity of the emo-
tional distress will depend upon the facts of the particular case. Some violations, like the
obnoxious questions in King v. Trans World Airlines, Inc., 738 F.2d 255 or Robinson v. 12
Lofts Realty, Inc., 610 F.2d 1032, seem likely to cause emotional distress. In certain cases,
the knowledge of a process violation (like the failure to grant an interview) may make it
more difficult for the plaintiff to accept as legitimate the outcome of the final decision.
This incremental frustration is causally linked to the process violation and should be com-
ensated. Indeed, a primary purpose of process values is to legitimatize decisions which
may otherwise be difficult to accept.

\textsuperscript{262} See supra Section III A.

\textsuperscript{263} See, e.g., T & S Servs. Assoc. v. Crenson, 666 F.2d at 728 n.8. See also supra
Section II C.

\textsuperscript{264} King v. Trans World Airlines, 738 F.2d at 259; Gresham v. Windrush, 730 F.2d
1417, 1423 (1984). Attorney's fees are also calculated in a manner similar to the approach
used in the initially determinative discrimination claim. See supra note 244.
reappraisal and a search for a workable limiting principle.

Although arising in myriad factual settings, the language cases all have one thing in common: someone inflicts "words that wound" on the plaintiff. The owner of a company tells a black employee "'You're not a human being; you're a nigger,'" and "'all you niggers are alike.'" A merchant tells a black couple that he does not "'want or need nigger business.'" A black law graduate, vacationing with his family, is told, "'You can't talk to me like that, you black son-of-a-bitch. I will kill you.'"

The conventional interpretation of the employment statutes views the use of discriminatory language not as a legal wrong in itself, but rather as evidence of one of two separate and independent legal wrongs—either the commission of a discriminatory outcome violation or the maintenance of a discriminatory work environment. In the first instance, the racial slurs are used as evidence to prove discrimination in the outcome of a decision (and to establish emotional distress and punitive damages if liability is shown). All courts accept the racial remark as probative of the defendant's intent in taking the challenged action, leaving the fact-finder to assess its evidentiary value in a given case.

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language can also be used to prove the existence of a discriminatory work environment. Courts have held that "a working environment heavily charged with . . . discrimination" that is "sufficiently pervasive so as to alter the conditions of employment" is illegal. In assessing "the totality of circumstances" to determine if the discrimination was sufficiently severe, courts have distinguished between "isolated," "infrequent," or "casual" slurs, and remarks that are "'repeated,' "'continuous'" and "'prolonged.'" Only by proving a pervasive pattern of such remarks can the plaintiff establish that a discriminatory work environment exists.

The consequence of the conventional employment law approach to the language cases—regarding racial slurs only as evidence and not as unlawful per se—is clear: when the evidentiary inference of the racial slur is rejected, the discriminatory language is regarded as beyond the prohibition of the laws. The cases repeatedly state that:

[...] the destructive effect of racial slurs on our society cannot be underestimated, particularly when the statements are directed towards a member of a minority race by one of a majority. But such speech is not normally actionable unless it is connected in a cause and effect relationship with conduct that is unlawful.

272. Henson v. City of Dundee, 682 F.2d 897, 904 (11th Cir. 1982).
274. Henson, 682 F.2d at 904.
278. Walker v. Ford Motor Co., 684 F.2d 1355, 1359 (11th Cir. 1982). Such remarks create a "pervasive atmosphere of prejudice," Taylor v. Jones, 653 F.2d 1193, 1199 (8th Cir. 1981), "so heavily polluted with discrimination as to destroy completely the emotional and psychological stability of minority group workers." Rogers v. EEOC, 454 F.2d at 238. See also DeGrace v. Rumsfeld, 614 F.2d 796 (1st Cir. 1980).
If the racial statements, together with other evidence, do not con-vince the fact-finder that the outcome in question was discrimina-
tory, then they are simply "offensive, uncalled for" expressions,280
"not to be condoned,"281 but "not constituting unlawful . . .
discrimination."282

The theory of non-determinative discrimination offers a
framework for addressing the discriminatory language claims re-
jected by current employment law doctrine. Grounded in the stat-
utory definition of discrimination as race-based different treat-
ment, it is much more reluctant to regard discriminatory conduct
— like racial slurs — as lawful. As the Minnesota Supreme Court
stated, this approach "cannot regard use of the term 'nigger' in
reference to a black [person] as anything but discrimination
against that [person] based on his race."283 However, it also recog-
nizes that the scope of the discrimination laws is limited. Such laws
regulate only certain persons and activities. The issue with lan-
guage claims is whether the admittedly discriminatory conduct in
a given case is covered by the laws.

The theory of non-determinative discrimination suggests a
general approach to the language discrimination claims: liability
should attach when discriminatory statements are made by per-
sons who are covered by the law, in situations that are governed
by the law. Other such statements, although discriminatory, are
outside the boundary of prohibited conduct. This suggested ap-
proach permits a certain amount of discrimination. However, it
extends the boundary from where it is presently drawn and loc-
ates it with explicit reference to the text and the competing poli-
cies which underlie the laws and with sensitivity to the first

280. Grubb v. W.A. Foote Memorial Hosp., 741 F.2d 1486 (6th Cir. 1984), vacated,
759 F.2d 546. (6th Cir. 1985).
282. Torres v. County of Oakland, 758 F.2d at 152.
283. City of Minneapolis v. Richardson, 307 Minn. 80, 88, 239 N.W.2d 197, 203
(1976). This case involved a challenge to discriminatory treatment by police under the state
public accommodations statute, Minn. Stat. § 363.03, subd. 4 (1983). The court went on
to say:

When a racial epithet is used to refer to a person of that race, an adverse dis-
tinction is implied . . . . The use of the term 'nigger' has no place in the civil
treatment of a citizen by a public official. We hold that the use of this term by
police officers coupled with all of the other uncontradicted acts . . . constituted
discrimination because of race.

Richardson, 307 Minn. at 89, 239 N.W.2d at 203.
amendment issues that may be present. 284


The societal interest in eradicating discrimination is compelling, Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 307 (1978), particularly in the areas (such as employment, housing and public accommodation) regulated by the statutes under consideration. Roberts v. United States Jaycees, 468 U.S. 609 (1984). The content-based regulation discussed here is limited to prohibiting the use of discriminatory language by certain specified classes of people (employers, landlords, proprietors of places of public accommodations and the agents of all three), in certain specified situations. In the regulated areas, the victim of the racial epithet is a captive audience; he or she depends upon the defendant for employment, housing or services and cannot readily leave. See Richardson, supra note 265, at 284-86; cf. MacKinnon, supra note 273, at 43-56 (emphasizing power relationship between discriminator and victim). In that captive situation, the victim's "substantial privacy interests are being invaded in an essentially intolerable manner." Cohen, 403 U.S. at 21. Little can be said, as a constitutional matter, for protecting this speech. The racist utterance does serve one part of "the dual communicative function" described in Cohen, 403 U.S. at 26, conveying "otherwise inexpressible emotions," id., and in this respect may have some value. For example, Professor Farber has observed that

[...]limiting expression of racist views to the calm, heavily qualified statements of scholars would give a completely misleading view of racist thinking. The truth is that racism in our society is far more often characterized by the ugliest of emotions . . . . That truth is too important to suppress merely to maintain our mental equanimity . . . . As long as we live in an ugly world, ugly speech must have its forum."

Farber, Public Discourse at 301-02. See also Magruder, Mental and Emotional Disturbance in the Law of Torts, 49 HARV. L. Rev. 1033, 1053 (1936) (use of slurs provides one of the "safety valves through which irascible tempers might legally blow off steam."). But see A. Bickel, Morality of Consent 73 (1975) ("Where nothing is unspeakable, nothing is undoable."); Delgado, Words, supra note 265, at 140. However, Professor Farber is referring to the regulation of classic public expression, like the Nazi demonstration challenged in Collins v. Smith, 578 F.2d 1197 (7th Cir.), cert. denied, 439 U.S. 916 (1978), and not to the racist epithets in the narrower area governed by the laws against discrimination. Farber, Public Discourse at 302 n.113, 303. The statements described in the cases infra notes 318-35 are emotive only; the only idea conveyed is the obvious one that the speaker dislikes blacks.
While the specific boundary between prohibited and permitted language discrimination will be shaped only through case development and further discussion and criticism, several examples may illustrate the sharper focus and increased reach of the suggested approach, first at the application stage and then in the general workforce.

In the application process, the laws against discrimination should be construed broadly to prohibit discriminatory language when a person is applying for a job, a loan, housing, or a service. Many laws explicitly do this. The Iowa civil rights statute, for example, forbids any owner of a public accommodation to "directly or indirectly . . . indicate . . . that the patronage of persons of any particular race . . . is unwelcome, objectionable, [or] not acceptable . . . ." Title VIII makes it unlawful to "make . . . any

Thus, the omnipresent risk that content regulation will have the effect of "suppressing ideas in the process" of permissibly regulating speech, Cohen, 403 U.S. at 26.

Regulating offensive speech in an already regulated area is not novel. The constitutionality of an ordinance banning discriminatory advertising in newspapers was upheld against a first amendment challenge in Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations, 413 U.S. 376, 388, reh'g denied, 414 U.S. 881 (1973), a decision that has been favorably cited even subsequent to the decisions in Linmark Assoc. v. Township of Willingboro, 431 U.S. 85 (1977), and other cases in which the Court has afforded greater protection to commercial speech. See Central Hudson Gas & Elec. v. Public Serv. Comm'n, 447 U.S. 557, 563-64 (1980). Traditional tort doctrine has long made an exception to the general rule and has permitted recovery for emotional distress caused by insults or indignities inflicted by a common carrier. W. PROSSER & P. KEETON, PROSSER AND KEETON ON TORTS 57, n.26 (5th ed. 1984). While articulated more in the categories of the common law than in the concepts of first amendment doctrine, the cases express a recognition of the strong interest in preventing such abuse in certain narrow situations. This limitation to certain areas — both traditionally and under the modern statutes — also addresses the concerns of overbreadth. The regulation is tailored to prohibit speech only where its social and personal effects are most severe. The racist defendant who needs to vent his emotion can still do so, but not while performing the regulated function. Finally, it should be clear that the content regulation suggested here is different from, and narrower than, a ban on group libel. Beauharnais v. Illinois, 343 U.S. 250 (1952). See T. EMERSON, THE SYSTEM OF FREEDOM OF EXPRESSION 391-99 (1970) (criticizing Beauharnais); H. KALVEN, THE NEGRO AND THE FIRST AMENDMENT 7-64 (1966). But see Arkes, Civility and the Restriction of Speech: Rediscovering The Defamation of Groups, 1974 SUP. CT. REV. 281 (supporting group defamation laws).

... statement ... that indicates any preference, limitation or discrimination based on race ... ."286 Public accommodation statutes have similar provisions.287

The policy reason for the explicit, per se approach of the housing and public accommodation statutes is a practical one: most such discrimination occurs during the application process and may consist of the use of discriminatory language.288 In order to provide effective protection, the laws must prohibit this prevalent type of discrimination. Thus, in public accommodation cases, courts have held that "[a] single act of discrimination is all that is required to fix liability."289 No pervasive or repeated pattern need be proved; the single statement is sufficient. For the applicant290—the person on the outside seeking to get in—that single statement may be all he or she may ever hear. It may be "isolated" or "sporadic"; for that particular plaintiff, however, the language defines the experience.291

The right to be free from discriminatory language in the application process should be safeguarded under the employment statutes as well. While the prohibitions of Title VII are not as specific as those contained in other statutes,292 a fair reading of the law supports the suggested broader view. The statute clearly pro-

288. Id. at 244 ("complaints of insulting or discriminatory treatment ... are common as complaints of outright refusals . . . ."); H. Newburger, Recent Evidence on Discrimination in Housing, Office of Policy Development and Research, U.S. Dep't of Hous. & Urban Dev. (1984).
289. City of Minneapolis v. Richardson, 307 Minn. at 88, 239 N.W.2d at 203.
290. Or, analogously, the person seeking goods or services in a public accommodation case.
291. As one court expressed it, an "isolated incident could amount to a violation of the Public Accommodations Act because of the singular nature of the contact between the customer and the business." King v. Greyhound Lines, 61 Or. App. 197, 201 n.6, 656 P.2d 349, 351 n.6 (1982). In King, a young black man was racially insulted when he tried to return his bus ticket for a refund. With respect to the actual service, the issuance of the refund, plaintiff was treated like everyone else. However, the defendant treated the plaintiff differently in the process of servicing his request, by using racially based language and saying to the plaintiff, "Nigger, where did you get this ticket?" He uttered the statement only once; the plaintiff did not prove a pattern; yet the court found liability and awarded $500 and $1,000 in general and punitive damages. Id. at 200, 656 P.2d at 350.
292. Compare the text of the prohibition of Title VII, supra notes 35 and 259 with that of statutes cited supra notes 285-86.
tects applicants as well as current employees. The separate section specifically addressing employment agencies evinces a congressional awareness of the importance of the application process and a desire to protect it. Soon after the enactment of Title VII, the Equal Employment Opportunity Commission promulgated guidelines on preemployment inquiries, specifically regulating employer conduct in the application process. Additionally, some courts have recognized the problem and have applied a strict standard.

Discrimination at the application or initial-service stage strongly implicates both instrumental and intrinsic values. The prospective employee, tenant or customer, having been turned off, will turn away, thus depriving our economy and society of some measure of vitality. That person suffers indignity and degradation at a time when respect and evenhandedness are required.

294. 42 U.S.C. § 2000e-3(b) (1982) makes it unlawful for an employer or employment agency:

- to print or publish or cause to be printed or published any notice or advertisement relating to employment . . . indicating any preference, limitation, specification, or discrimination, based on race, color, religion, sex, or national origin, except that such a notice or advertisement may indicate a preference, limitation, specification, or discrimination based on religion, sex, or national origin when religion, sex or national origin is a bona fide occupational qualification for employment.

Id.


296. 29 C.F.R. § 1604.7 (1985). The guidelines provide that "[a]ny preemployment inquiry in connection with prospective employment which expresses directly or indirectly any limitation, specification, or discrimination as to sex shall be unlawful . . . ." Id. A similar restriction applied to job advertising, 29 C.F.R. § 1604.5 (1985). See also 29 C.F.R. § 860.92(b) (1985) (similar restriction under ADEA guideline). Although not specifically prohibited by a guideline, there is no reason to treat a racist statement more leniently than sexist or age-based statements.

297. See, e.g., Ostroff v. Employment Exch., Inc., 683 F.2d 302 (9th Cir. 1982); Banks v. Heun-Norwood, 566 F.2d 1073, reh'g and reh'g en banc denied, (8th Cir. 1977); Barnes v. Rourke, 8 Fair Empl. Prac. Cas. (BNA) 1112 (M.D. Tenn. 1973). Cf. Connecticut v. Teal, 487 U.S. 440 (1982) (all significant steps in employment process are subject to challenge; Title VII protects intermediate procedures as well as the bottom line).
The countervailing forces, if any, are slight. The company or its agents have no legitimate autonomy interest in “expressing” their racist feelings in this setting. The important autonomy interest—the decisional freedom to reject a black applicant or customer—has been removed by statute, and the prohibition against making “rejection-like” statements in a defined and regulated area is appropriate.\textsuperscript{298} Insurance costs, those steps taken to achieve compliance with the new liability rule, will be modest in the application area. Companies already monitor their application process to avoid outcome discrimination and to accomplish other business goals. The marginal effort to prevent discriminatory language at this stage—promulgation of a policy, specific training and additional supervision—should be minor.\textsuperscript{299}

As claims move from the application process to the general workplace itself, however, some racial statements may be beyond the regulatory reach of even the broader non-determinative discrimination approach. The employment statutes govern only employers and their agents, and only “terms, conditions, or privileges of employment;”\textsuperscript{300} they do not attempt to regulate all the conduct of every employee, and are not “clean language acts.”\textsuperscript{301} Thus, racial statements made by non-managerial employees and not related to the “terms, conditions or privileges” of employment will not violate the statutes.

While there is little case law or writing on the problems of implementing a doctrine that treats discriminatory language as a substantive wrong, I suggest that the process of determining whether a given racial statement is prohibited or permitted by the laws against discrimination will involve several difficult and recurrent issues:

1. \textbf{Fact-finding Difficulties.} Under current doctrine, where the discriminatory statements are only evidence of discriminatory

\textsuperscript{298} The reasons that the prohibition of such statements passes muster under the first amendment are discussed \textit{supra} note 284.

\textsuperscript{299} If the employer promulgates a policy against the use of racial or sexist language and the employee violates it, the employer has just cause to dismiss the employee. \textit{See}, e.g., Clark \textit{v. Board of Educ. of School Dist. of Omaha}, 215 Neb. 250, 338 N.W.2d 272 (1988); Resatar \textit{v. State Bd. of Educ.}, 284 Md. 537, 399 A.2d 225, \textit{cert. denied}, 444 U.S. 838 (1979); State Dep't of Personnel \textit{v. Sealing}, 298 Md. 524, 471 A.2d 693 (1984); Thompson \textit{v. City of Minneapolis}, 300 N.W.2d 763 (1980).

\textsuperscript{300} \textit{See supra} note 35 for the text of Title VII and Title VIII.

\textsuperscript{301} Katz \textit{v. Dole}, 709 F.2d 251, 256 (4th Cir. 1983).
intent and not actionable in themselves, courts frequently gloss over the conflicting evidence.\textsuperscript{302} However, if liability will turn on what was said, and by whom and under what circumstances, courts will need to make explicit findings and resolve what in many cases will be credibility disputes of the "He said/she said" variety. As with the many other factual determinations in discrimination cases, the task will be "sensitive and difficult,"\textsuperscript{303} as well as necessary and within the capability of the judicial system.

2. \textit{Definition of Racial Statement}. After finding precisely what was said, courts will have to decide whether a particular statement constitutes a racial statement. Some cases, particularly those involving the use of well-known derogatory terms, will be easy; others will not.\textsuperscript{304} The key concept in classifying the language used in a particular case will be whether a statement constitutes different treatment because of a person's race. If it does, then it is a racial statement.\textsuperscript{305}

3. \textit{Construction of Statutory Terms}. Discriminatory acts by a company president and, say, a personnel manager will surely be discrimination by an "employer and his agents;" similar acts by non-managerial employees will ordinarily not be,\textsuperscript{306} unless they can be attributed to the employer by establishing that there was a discriminatory work environment or that the employer had actual or constructive knowledge of the statements and failed to take reasonable steps to prevent them.\textsuperscript{307}


\textsuperscript{304} See, e.g., King v. Greyhound Lines, 61 Or. App. 197, 200, 656 P.2d 349, 351 (1982) ("Nigger, where did you get this ticket?"); Johnson v. Joseph Schlitz Brewing Co., 581 F. Supp. 338, 343 (M.D. N.C. 1984) ("that's just like a nigger"); and cases cited supra notes 266-68. As Professor Delgado observes, "[m]ost people today know that certain words are offensive and only calculated to wound. No other use remains for such words as 'nigger', 'wop', 'spick' or 'kike.'" Delgado, \textit{Words}, supra note 265, at 145.

\textsuperscript{305} In defining his proposed cause of action for a racial insult, Professor Delgado required the plaintiff to prove that: "Language was addressed to him or her by the defendant that was intended to demean through reference to race; and that a reasonable person would recognize as a racial insult." Delgado, \textit{Words} supra note 265, at 179.

\textsuperscript{306} See Silver v. KCA, Inc., 586 F.2d 138, 141 (9th Cir. 1978) ("The specific evil at which Title VII was directed was not the eradication of all discrimination by private individuals, undesirable though that is, but the eradication of discrimination by employers against employees."); see also Smith v. Pan Am. World Airways, 706 F.2d 771 (6th Cir. 1983).

\textsuperscript{307} See supra notes 271-78 and accompanying text for a discussion of work environ-
Racial statements should be considered discrimination in "terms, conditions or privileges" of employment, if made by or attributed to the employer. Thus, if a company president (or his or her agents) watched a black male employee do something on the job and then said to him, "You know, that's just like a nigger," such a statement would impose a change in the condition of that employee's work environment because of his race and should be regarded as unlawful.\(^308\)

There will be fine and difficult distinctions to be made in addressing language discrimination cases directly as a type of non-determinative discrimination. The legality of the statements will depend on a careful evaluation of who made the statement, what was said, and where and in what context it was made. There is no doubt that some statements should and will be outside the coverage of the statutes; others may be protected by the first amendment.\(^309\) However, the theory of non-determinative discrimination recognizes the need for such distinctions and provides a framework for developing and implementing the necessary balancing and accommodation. The distinctions must be drawn not only to avoid encroachment on statements that the laws against discrimination do not regulate but also to prevent the erosion of the inner boundary of the laws and their prohibition of race-based different treatment, through the failure to address discriminatory language as unlawful discrimination.

D. Mixed Motive Discrimination

The mixed motive category of non-determinative discrimination focuses on the class of decisions where the decision-maker had two or more motives, at least one of which was discriminatory. As in the introductory example, D2 stated in writing that it

\(^{308}\) That statement was part of the record in Johnson v. Joseph Schlitz Brewing Co., 581 F. Supp. at 343. The court did not address the discriminatory language violation.

\(^{309}\) Some racial statements will arise in the context of personal discussions between a supervisor and an employee and will not be covered, because such statements will not be attributable to the employer. Some statements may involve expressions of opinion on matters such as foreign policy or affirmative action and thus may be protected by the first amendment. Cf. Wainwright v. Allen, 461 F. Supp. 293 (D.N.D. 1978). Unless the legal standard is an absolute one of either no liability for any language discrimination or total liability for all language discrimination, these determinations of coverage will have to be made in all cases.
was rejecting P6 for a sales position because she was: (1) inexperienced; (2) twenty-fifth on the list; and (3) black (D2 already had “too many” black salespeople). The factual inquiry, made in accordance with the specified procedures, yielded the finding that the racial reason was not a determinative one. The decision not to hire would have been the same even without the racial factor. P6, therefore, loses her discriminatory outcome case. Race was a factor in the decision, however, and the precise problem in the non-determinative mixed motive case is whether the presence of race as a non-determinative factor in the decision constitutes a form of different treatment prohibited by the laws against discrimination. 810

In assessing this problem, it is instructive to compare this example of non-determinative mixed motive discrimination with the initially determinative discrimination case discussed in Section III A. At one level, the two types of discrimination are similar. Both defendants rejected a black applicant who would not have been hired even if she were white. In both cases, the fact that the plaintiff was not qualified, applied late and therefore supplied independent, lawful reasons for the adverse decision can be seen as fortuitous. At another level, however, there is a significant difference, one that is rarely noted in judicial opinions, but that may explain some of the resistance to imposing liability in such cases. In the initially determinative discrimination example, D1 rejected the three black applicants outright for racial reasons. In the mixed motive case, D2 considered both lawful and unlawful factors before rejecting the plaintiff for a determinative, non-racial reason. With respect to the final decision, there is a difference between the two cases. D1 did something for a racial reason; it rejected the black applicants, refusing even to consider them. D2, on the other hand, did not do anything. 811 It might have done

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810. The mixed motive category of non-determinative discrimination is a residual one, comprised not of every case in which a defendant acts with mixed motives, but only those cases in which the unlawful motive was non-determinative. Expressed on the drawing of the Revised Mixed Motive Continuum, supra Section II B, the non-determinative mixed motives cases are those between points N and D.

811. For those who benefit from visual examples, it may help to picture the racially motivated act of rejection as D1 taking the applications of all three black applicants and putting them in the waste basket without looking at them. The comparable image in the mixed motive case is of D2 putting the application of the black plaintiff on the pile and reading it with all the others. The problem with D2 is that he devalues the black person's
something, if the hypothetical well-qualified P1 had walked through the door. The fact-finder can permissibly infer that D2 had a latent racial motivation, a state of mind that was ready and willing to discriminate if the opportunity arose. But the point is that, in the non-determinative mixed motive cases, the opportunity did not arise.

This difference between the behavior of D1 and D2—the fact that, with respect to the final decision, D1 did something racially motivated while D2 did not—suggests the most serious problem inherent in such claims. If D2 did not do anything racially motivated with respect to the final decision, but liability is nevertheless imposed on the grounds that it discriminated in the final decision, then it appears that D2 is being punished not for its actions but for its racially biased state of mind. However, the laws against discrimination regulate only conduct, not thoughts or feelings that are not acted upon. Their inner boundary distinguishes between discrimination, which is prohibited, and prejudice, which is not. The successful resolution of these cases requires the fashioning of a liability rule that recognizes this inner boundary.

There are three solutions to the non-determinative mixed

application by a given amount; he assigns a negative score to her blackness. In a case of non-determinative discrimination, however, when the unlawful negative score is eliminated, the application still is not ranked highly enough for the plaintiff to be selected.

312. Professor Brodin recognized this point but did not adequately address it. He wrote, "[l]t is submitted, however, that the term 'motivating factor' as used in Mt. Healthy [and adopted by him] carries the clear implication that the discriminatory intent was acted upon, thus producing conduct tainted by it." Brodin, supra note 11, at 320 n.116 (emphasis in original). This statement is difficult to decipher, perhaps because Professor Brodin used "motivating factor" as his point of reference, a term, which neither he nor the Mt. Healthy Court defined. If the term is used to mean "determinative factor," then the statement that the determinative factor was "acted upon" is correct, but also tautological and unhelpful in resolving the non-determinative mixed motive problem. If, as is more likely, the term means "substantial factor" then the statement is incorrect, at least insofar as the "acted upon" is tied to the final decision, as it is in the above quotation.

313. See supra note 47. See also Goodwin v. Circuit Court of St. Louis County, 729 F.2d 541, 551 (8th Cir. 1984) (Bowman, J., concurring in part and dissenting in part).

Unless the onset of an Orwellian nightmare is closer at hand than most of us have realized, in our society the law still punishes bad deeds, not bad thoughts or the expression of unfashionable opinions. Expression may color conduct or explain motive, where motive is in question, but expression that at most tends to show a general bias towards a protected group cannot be allowed to serve as a total substitute for direct proof of unlawful discrimination . . . .

motive problem. The courts can: (1) find no liability, on the grounds that such claims do not present conduct prohibited by the laws; (2) determine liability on the basis of the "substantial factor" causation standard; or (3) determine liability on the basis of the non-determinative discrimination approach. This Article suggests that the third alternative provides the most satisfactory treatment of these claims.

The evaluation of the three possible solutions may be aided by identifying the evidence that will be presented in the mixed motive case and the likely remedy if P6 prevails. There will be the letter that D2 wrote to P6, showing that she was rejected for two lawful reasons and one unlawful reason. The record may also contain other evidence presented by P6, including evidence that D2 had made other racial remarks, that the company had been found guilty of discrimination in other cases,\(^{314}\) that the racial composition of its work force is unbalanced,\(^{315}\) or that it uses subjective selection procedures.\(^{316}\) All of this evidence, of course, is probative on the outcome claim; it tends to show that D2 was motivated by race in its decision not to hire P6. However, once the fact-finder has decided that the racial reason was not determinative, this evidence, in the mixed motive part of the case, becomes both circumstantial evidence that race was a substantial factor and direct evidence of particular behavior (like making a racial statement) the legality of which can then be assessed. If liability is imposed on the basis of this evidence, the relief will be a standard

\(^{314}\) Depending on the similarity between the previous incidents of discrimination and the present case, this evidence would probably be admissible under Fed. R. Evid. 404(b) as prior acts evidence probative on D2's intent. See generally 2 J. Weinstein & M. Berger, Weinstein's Evidence ¶ 404[11], [12], [18] (1980).

\(^{315}\) A racial imbalance can be used as evidence of discrimination, see generally D. Baldus & J. Cole, Statistical Proof of Discrimination 33-44 (1980), but is not unlawful in and of itself. Martin v. Citibank, 762 F.2d 212, 218 (2d Cir. 1985).

\(^{316}\) A claim of subjectivity alleges that the company's selection or evaluation criteria are vague and manipulable, something like "good personality" or "works well with people." This claim could not be fairly used against the experience requirement in the P6-D2 example, but has been raised in other mixed motive cases. See, e.g., Grubb v. W.A. Foote Memorial Hosp., Inc., 741 F.2d 1486 (6th Cir. 1984). Because of their possible use as a subterfuge for discrimination, subjective procedures are frequently suspect, see Rowe v. General Motors Corp., 457 F.2d 348 (5th Cir. 1972), but do not constitute "a per se violation of the law." Rogers v. International Paper Co., 510 F.2d 1340, 1348 (8th Cir. 1975), vacated and remanded on other grounds, 423 U.S. 809 (1977); Brooks v. Ashtabula County Welfare Dep't, 717 F.2d 263, 267-78 (6th Cir. 1983); Ward v. Westland Plastics, Inc., 651 F.2d 1266, 1270 (9th Cir. 1980).
non-determinative discrimination remedy. The court may issue a declaratory judgment, evaluate the appropriateness of a preventive injunction, and award compensatory damages, nominal damages, and attorney's fees. Against this backdrop of the evidence and the likely remedies, the alternative solutions to the non-determinative mixed motive case are next discussed.

1. Denial of Liability. Two arguments against liability have already been discussed in connection with the initially determinative discrimination claim. There is an initial, technical argument that the mixed motive plaintiff has not established a prima facie case.\(^{317}\) However, as shown in Section III A, this argument is not applicable in a case of direct discrimination and can be met, in other instances, by adjusting the elements of the prima facie case to fit the non-determinative discrimination allegations.\(^{318}\) A second objection is the *Mt. Healthy* remedial mismatch argument, that it is inappropriate to bestow upon the non-determinative plaintiff the job and back pay that he or she would not have obtained if there had been no discrimination. This objection lacks merit in this context, however, because the remedy in the non-determinative discrimination case is tailored to the wrong and the injury.\(^{319}\)


318. The introductory example involves a case where there is direct evidence of the defendant's racial reasons and no need to rely on the McDonnell-Douglas methodology. See supra Section III A. In a case with no direct evidence, the prima facie case would be that: (1) the plaintiff was a member of a protected class; (2) that she applied; and (3) that her application was considered differently from the applications of similarly situated whites. This latter requirement would be met by evidence either supplied by testers or acquired through discovery.

319. See supra Section III A. It should now be possible to appreciate that the *Mt. Healthy* decision addressed only a discriminatory outcome claim. The plaintiff advanced a classic outcome claim, asserting that he was not rehired because of his protected speech, and seeking and obtaining an order that the defendant reinstate him with backpay and with "a continuing contract." His reason for pursuing the outcome claim was clear, as was the basis of the school board's opposition: he had already worked as a teacher in the school system for five years, and the order had the effect not merely of reinstating him, but of reinstating him with tenure. *Mt. Healthy*, 429 U.S. at 286; Doyle v. Mt. Healthy City School Dist. Bd. of Educ., No. 8044 (S.D. Ohio 1974), Petition for Certiorari, Appendix 16(a). The remedy stakes were thus particularly high for both parties.

The Court's concern about "plac[ing] an employee in a better position than he would otherwise have been in[,]" 429 U.S. at 286, was not hypothetical. In his five years at the school, the plaintiff had engaged in an altercation with another teacher, had argued with cafeteria workers over the size of his spaghetti serving, had called students "sons of bitches" and had displayed to two female students who refused to obey him "a two-fingered sign signifying bull..." Brief for Petitioner, at 7; *Mt. Healthy*, 429 U.S. at 281-82.
A third objection, raised in dictum by Judge Richard Posner, suggests that "[t]he absence of causation makes the [non-determinative, mixed motive] suit one purely for attorney's fees." Even

The record before the Court presented the picture of an unstable teacher who was on his way towards dismissal but was saved and vested with tenure by the district court because of a constitutional misstep by the school board. The problem was an acute mismatch between the wrong and the remedy. By granting tenure, the order might have given the teacher a windfall that he did not deserve, and inflicted on the school board (and a generation or more of innocent schoolchildren) a teacher they did not deserve. As one school board member testified, they did not want to "retain for the rest of his teaching life a teacher who did not demonstrate the maturity . . . expected of a 29-year old." See supra Brief for Petitioner, at 7. The Court resolved the problem with a test which "protects against the invasion of constitutional rights without commanding undesirable consequences not necessary to the assurance of those rights." Mt. Healthy, 429 U.S. at 287, and selected the but-for or "same decision" test to distinguish "between a result caused by a constitutional violation and one not so caused." Id. at 286.

Applied to the outcome claim before it, the Court's ruling is sound. A careful reading of the Mt. Healthy opinion, however, suggests that its ruling and reasoning preclude a finding of liability only on a discriminatory outcome claim and actually support the non-determinative claim. The non-determinative discrimination theory meets the stated objectives of the Mt. Healthy Court: "[T]he constitutional principle at stake is sufficiently vindicated if such an employee is placed in no worse a position than if he had not engaged in the conduct[,]" id. at 285-86, and also "protects against the invasion of constitutional rights without commanding undesirable consequences not necessary to the assurance of those rights." Id. at 287. In fact, the rejection of a non-determinative claim would be inconsistent with Mt. Healthy, because it would leave the employee in a considerably worse position. He would be left not only with a violation of his constitutional rights; he would also be denied any remedy and be told that his claim had no merit.

The following term, in the procedural due process case of Carey v. Piphus, 435 U.S. 247 (1978), the Court also reversed an outcome-based order of the lower court and remanded for application of the same decision test. Id. at 264, 267. However, the Court in Carey explicitly stated that the plaintiffs could establish liability and recover damages even if the defendant could establish on remand that the same decision would have occurred without the violation. The damages would not be outcome-based; the plaintiffs could not "recover damages to compensate them for injuries caused by the suspensions." Id. at 260. Instead, the damages would be process-based, if "actually . . . caused by the denial of due process itself." Id. at 263. And, in the event that the plaintiffs were not able to prove actual damages, they would still be entitled to recover nominal damages. Id. at 266-67. In language that is fully applicable to the non-determinative discrimination case, the Court wrote: "Even if [the plaintiffs'] suspensions were justified, and even if they did not suffer any other actual injury, the fact remains that they were deprived of their right to procedural due process." Id. at 266. The Carey decision makes explicit the approach that could only be implied from the carefully limited language of Mt. Healthy: that the determination of both liability and remedy depends upon the nature of violation claimed and the remedy sought.

320. Shanley v. Youngstown Sheet & Tube Co., 552 F. Supp. 4, 8 (N.D. Ind. 1982) (Posner, Circuit Judge, sitting by designation). The discussion of the mixed motive problem is dictum because Judge Posner found as a matter of fact that the unlawful motive did not play "any role" in the plaintiff's dismissal. Id.
though this observation is not wholly accurate—as the laws against discrimination often authorize, and plaintiffs will frequently seek, broader relief—Judge Posner used it to buttress his conclusion that “[s]uch a suit [one that seeks only attorney’s fees] places a burden on the courts that is disproportionate to the slight increment in compliance with the civil rights laws that such suits might bring about.” It is ironic that, in assessing the “burden on the courts” of such suits, Judge Posner seems to refer to the total costs of such claims, and not their incremental or marginal costs. In the case over which he presided, as in most cases, the mixed motive claim arose in the context of a discriminatory outcome case. The court and the parties had already incurred the cost of the outcome case, and the marginal cost of deciding the related mixed motive claim was minimal.

However, Judge Posner may have been suggesting the following related point. If the liability rule is changed so that non-determinative mixed motive claims are allowed, more plaintiffs will bring discrimination lawsuits. This increase in lawsuits brought by new entrants, persons who would not have sued but for this broadening of the liability rule, will further burden the courts. This argument is a version of the floodgate argument, the evaluation of which depends both on a prediction of whether the change in liability rules would effect behavior and on an assessment of whether that change would serve or deserv[e] the purposes of the statutes.

The imposition of liability for the mixed motive form of non-determinative discrimination is likely to increase the filing of discrimination lawsuits. Given the expense and difficulty of litigation, few people will file pure, non-determinative mixed motive law-

321. Judge Posner’s statement appears to have been accurate about the particular case over which he was presiding. The plaintiff’s claim alleged that he was forced into early retirement in retaliation for assistance given to a black former employee in a race discrimination complaint against the employer, in violation of the anti-retaliation provisions of Title VII, 42 U.S.C. § 2000e-3(a) (1982). As a Title VII action, no compensatory damages were available under federal law. The state in which the alleged discrimination occurred, Indiana, probably has not authorized compensatory damages, see Indiana Civil Rights Comm’n v. Holman, 177 Ind. App. 648, 380 N.E.2d 1281 (1981), and it is unlikely that there was a pendent state claim. The plaintiff in Shanley did not request declaratory or injunctive relief, and there was no mention of nominal damages.


323. See R. Posner, ECONOMIC ANALYSIS OF THE LAW 224-26, 251-54, 261-67, 357 (2d ed. 1977) (discussion and examples of marginal cost, as opposed to total cost, analysis).
suits, alleging only non-determinative discrimination violations and seeking only the more limited non-determinative discrimination remedies. Rather, the new entrants will likely come from that class of persons who strongly feel that they have been discriminated against, but have been dissuaded from filing a lawsuit under the existing liability rules. The attorney that they consulted evaluated their discriminatory outcome case, correctly advised them that their probability of prevailing under the current, determinative-factor standard was low, and said that he or she would accept the case only with a significant retainer fee, that the client was unable or unwilling to pay. For at least some of these persons, a broadening of the liability rule to recognize the non-determinative discrimination claim would significantly alter the probabilities of prevailing. This change in the odds might make some attorneys willing to take the case for a reduced (or entirely contingent) fee, based on the expectation that attorney's fees will be awarded as part of the remedy for the prevailing party. To the extent that this scenario is accurate, Judge Posner correctly sensed that attorney's fees may play an important role (even though he mischaracterized such suits as "purely . . . for attorney's fees.").

The prediction that there will be some increased litigation as a result of the change of a liability rule is descriptive only, just the starting point for an assessment of the costs and benefits. Any increase in litigation will add to the already burdensome caseload of the courts. However, Congress has expressly provided for these suits by private individuals, and has made clear that it regards such private suits as an important means of enforcing the requirements of the laws.\(^\text{324}\) Presumably, some plaintiffs in the newly filed suits will prevail on the outcome claims, others on the non-determinative claims. If one accepts that non-determinative discrimination is a wrong that inflicts injuries,\(^\text{325}\) and that the purposes of the laws against discrimination are to compensate the victims of

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324. See EEOC v. Associated Dry Goods Corp., 449 U.S. 590, 595 (1981) ("private lawsuits by aggrieved employees [are] an important part of [Title VII's] means of enforcement."). Additionally, the role of attorney's fees is precisely to facilitate the filing of lawsuits to vindicate important public and private rights. See supra notes 158, 237-44.

325. Not all courts do accept this notion. In dictum, in a case of explicit initially determinative age discrimination, one court stated that a plaintiff who would not have been hired "has suffered no injury and is not entitled to any relief under the ADEA." Murnane v. American Airlines Inc., 482 F. Supp. 135, 151 (D.D.C. 1979), aff'd, 667 F.2d 98 (D.C. Cir. 1981), cert. denied, 456 U.S. 915 (1982).
those injuries and to deter the discrimination that causes them, then the increased burden on the courts is a necessary and appropriate price to pay. Additionally, control of the discrimination caseload by means of a no-liability rule is not cost-free. The denial of liability in cases of non-determinative discrimination is also the acceptance of discriminatory behavior. Requiring people to endure such workplace indignities without redress undermines the intrinsic purposes of the laws. Where such discrimination is tolerated (and especially where the courts are required to declare that in the case before them there has been no discrimination, when such is clearly not the case), the legitimation function is not performed. Given the express grant of jurisdiction to hear discrimination cases, the costs imposed by the marginal increase in the workload of the judiciary do not offset the costs incurred by denying liability and the benefits achieved by hearing these cases.

There is a final argument that is not often articulated but that provides the strongest reason for opposing recognition of mixed motive claims. The argument is derived from the concern that such claims may overlook "the vast difference between a general bias and an act of intentional discrimination." This concern is real and responsive to the deepest problem of imposing liability where the defendant, at the decisional level, has not done anything motivated by race. The imposition of liability for having mixed motives in such cases may be punishment, not for engaging in discriminatory conduct but for possessing a discriminatory state of mind, something that the laws against discrimination do not prohibit.

A liability rule that dismisses all non-determinative mixed motive cases, however, is an overly rigid solution that exacts unnecessarily high costs. It would permit employers to tell applicants that they are not wanted because of their race. Placing such statements beyond the reach of the laws against discrimination is a solution that should be accepted only if no alternatives exist that can both

326. The finding of liability and the imposition of even the narrower non-determinative discrimination relief should have at least a modest deterrent effect. "Although prospective relief may not be as costly to the employer as an award of back pay, compliance with a court's relief orders has some costs; these costs, and the finding of liability itself, undoubtedly deter the employer from unlawfully discriminating." Toney v. Block, 705 F.2d 1364, 1373 (D.C. Cir. 1983) (Tamm, J., concurring).

327. Goodwin v. Circuit Court of St. Louis, 729 F.2d 541, 551 (8th Cir. 1984) (Bowman, J., concurring in part and dissenting in part).
address the special problems presented by the non-determinative mixed motive cases and at the same time enforce the prohibitions of the laws.

2. Determination of Liability on the Basis of the Substantial Factor Causation Standard. One alternative solution to the non-determinative mixed motive case is to use a causation standard more liberal than the current but-for test to evaluate the discriminatory nature of the decision. Under this approach, a court would impose liability if it found that race was a "substantial" factor in the decision, and deny liability if it was a "minor" factor. An examination of the attempted use of a revised causation standard, however, demonstrates its inadequacies in resolving the non-determinative mixed motive case.

The first step—the determination of whether race was a substantial or a minor factor in the decision—would require a further refinement of the fact-finding initially necessary to decide whether that factor was determinative. This additional fact-finding would be difficult, but not qualitatively different than that involved in making the determinative/non-determinative decision. However, even if a fact-finder were able to find that race was a sub-

328. A substantial factor is one that "of itself is sufficient to bring about" the decision. RESTATEMENT (SECOND) OF TORTS § 3.14 (1972). See supra Section II B. The term "minor" is derivatively defined as one that is not capable of causing the decision by itself. On the revised continuum graph, supra Section II, substantial mixed motive claims are those that fall between points S and D; minor ones fall between points N and S.

329. In determining whether the racial factor was substantial or minor, the factfinder must make the counterfactual estimation of what would have happened if the black plaintiff had been well-qualified and had applied early. If the defendant would have rejected the plaintiff in spite of his or her qualifications and early application, then the fact-finder could infer that race was "of itself sufficient to bring about the decision." RESTATEMENT (SECOND) OF TORTS § 3.14 (1972). If the plaintiff could produce the comparative evidence supplied by black and white testers who were qualified and who applied early, see supra note 201, the evidence in a substantial factor case would show that the defendant had rejected the black tester and hired the white tester.

If the substantial factor test were to be used, it would be helpful in jury cases to structure the factfinding with special interrogatories, modified from those suggested supra note 123, for the determinative factor test, as follows:

1) Was race a factor in the defendant's decision not to hire plaintiff? (YES/NO)

2) If yes, was race a determinative factor, in the sense that the plaintiff would have been hired if she had been white? (YES/NO)

3) If no, was race a substantial factor, in the sense that even if she had been qualified and had applied early, the defendant would still not have hired her because of her race? (YES/NO)
substantial but non-determinative factor in the decision not to hire a plaintiff, there would still be serious problems in using that finding at the remedy stage of a case.

The unworkability of the causation approach at the remedy stage stems from the fact that the substantial factor test identifies the conduct found to be unlawful only in the most general terms: the use of race as a substantial factor in the decision.\textsuperscript{330} A judge would not be likely to enjoin something as vaguely defined as “the use of race as a substantial factor” or to issue a declaratory judgment couched in such generalities.\textsuperscript{331} Further, because the test does not specify the conduct that constituted the substantial factor, it would be difficult to parse the damages—excising the outcome damages and compensating only the distress caused by the substantial factor—and virtually impossible to review any such determination. Its use thus resurrects the \textit{Mt. Healthy} concern of a remedial mismatch.

There are several other disadvantages with the generality of the causation approach. Because the substantial factor test focuses only on whether a factor was substantial or minor, it cannot distinguish between cases with significant differences. If the factor is deemed substantial, the conduct is wrong, and equally wrong, whether it has been overt or covert, widespread or discrete. In a related manner, if the racial conduct was a minor, insubstantial factor in the decision, then liability never attaches, regardless of how egregious the specific conduct was.

There is also a final problem, the one that began the discussion of the non-determinative mixed motive case. Imposing liability for using race as a substantial factor in the decision, when race was not determinative and the same decision would have occurred

\textsuperscript{330} The substantial factor standard in this context is a “fictive formality”, an abstraction that diverts attention from the real issues in the case. This pejorative term was used to describe and to criticize certain of the Court’s standards for determining the legality of activities under the National Labor Relations Act. Christensen & Svanoe, \textit{Motive and Intent in the Commission of Unfair Labor Practices: The Supreme Court and Fictive Formality}, 77 \textit{Yale LJ.} 1269 (1968). The authors suggested that the Court focus explicitly on the conduct alleged to be illegal and evaluate whether a determination of illegality would serve or disserve the purposes of the Act, instead of using vague, general standards. They were particularly critical of standards that focused only on the mental states of the parties. \textit{Id.} at 1326-27.

\textsuperscript{331} The declaratory order would presumably read: “The defendant used race as a substantial factor in its decision not to hire P6, and the use of race as a substantial factor was unlawful.”
even if the plaintiff were white, is punishing a racist state of mind and not any identifiable conduct. The laws against discrimination do not permit the imposition of liability on this basis. The use of this inapt causation standard is not necessary, however, for the non-determinative discrimination approach provides a workable alternative.

3. Determination of Liability on the Basis of the Non-Determinative Discrimination Approach. The major strength of the non-determinative discrimination approach is its identification of the conduct alleged to be unlawful. Particularly at the boundary of the law, where the concern is whether the statute governs the conduct in question, this explicitness is more effective than the generality of the substantial factor test. In the present example, the wrongful conduct was the racial statement in the letter, race-based treatment of an applicant by an employer that should be regarded as unlawful language discrimination.332

At the remedy stage, the specification of the wrong as the racial statement in the letter permits a remedy that is carefully tailored to the wrong and the injury: a declaration that such statements are unlawful, an injunction against future written statements, the award of damages suffered as a result of the statement, and the award of nominal damages and attorney’s fees.

While few mixed motive claims are as simple as the explicit case used in the above example, the non-determinative discrimination approach is helpful in identifying the major issues that need to be addressed in the more difficult cases as well. Frequently, a mixed motive case involves covert discrimination. For example, perhaps the racial statement was not communicated directly to P6 but was contained in a file memorandum revealed during discovery or made in an oral statement later reported by a witness. Under the substantial factor test, the explicit direct communication and the covert internal statement are not readily distinguishable; both are evidence of D2’s state of mind, used to determine whether the racial reason was substantial. The non-determinative discrimination approach recognizes the difference between the two examples. In the case of the direct communication to P6, the employer presents its discriminatory preferences to the applicant

332. See supra Section III C for a discussion of the discriminatory language violation at the application stage.
and possibly to others, thus more directly implicating both the instrumental and the intrinsic concerns of the laws. The internal memo or statement has a reduced effect on the outside world as well as an arguable claim to some autonomy protection. The identification of these differences does not produce the answer to the problem; there is still the need to decide whether such internal comments should be actionable under the laws against discrimination. However, the specification of the conduct permits the judgment to be made after an evaluation of the real differences between the two cases and a careful assessment of the allegedly unlawful conduct and the text and the purposes of the laws.

A second variation further illustrates the advantages of the non-determinative discrimination approach. In most cases, the record does not include a direct, decisionally related racial statement such as “I don’t want you because you are black,” made at the time of the decision. Rather, the evidence more often consists of a variety of racist statements, made on different occasions. A recent mixed motive discharge case provides a typical fact pattern. A hospital terminated the employment of a sixty-one year old black man who had worked for twenty years as the manager of the hospital laundry, stating that the consolidation of two hospitals necessitated the elimination of his position. His outcome claim alleged race and age discrimination.\footnote{333. The case is Grubb v. W.A. Foote Memorial Hosp., Inc., 741 F.2d 1486, 1497 (6th Cir. 1984).}

The record in the case contained evidence of a number of racial statements made by hospital management. The plaintiff’s supervisor, the key person in the termination decision, had earlier told the plaintiff to fire several black employees. When the supervisor learned that the plaintiff had not done so, he said to the plaintiff, “When are you going to fire those niggers?”\footnote{334. \textit{Id.} at 1497.} He also told the plaintiff to discontinue supervising a white female subordinate, stating, “A black man has no place supervising a white woman.”\footnote{335. \textit{Id.} See also Grubb v. W.A. Foote Memorial Hosp., Inc., 533 F. Supp. 671, 674 (E.D. Mich. 1981).} These statements were, of course, evidence of whether race was a determinative, substantial, or minor factor in the outcome case.\footnote{336. The trial court found for the plaintiff on the race discrimination claim, \textit{Grubb},} However, wholly apart from their probative
value on the effect of the racial motivation on the final decision, the statements also constituted race-based different treatment of the plaintiff by his employer. The non-determinative discrimination approach both allows and requires the decision-maker explicitly to evaluate all the discriminatory conduct in the case, including racial statements, and to impose liability when the conduct is covered by the statute.

This examination leads to a conclusion that may be mildly surprising. When subjected to careful scrutiny, the non-determinative mixed motive claim disappears. It collapses into either a finding of liability on a specific non-determinative discrimination violation (most likely, process or language discrimination), or a finding of no liability. The determinative mixed motive claim still exists, of course, and the battle to prove that race was a determinative factor will continue to be a major focus of contemporary disparate treatment litigation.

This Article suggests that if plaintiffs lose that battle, courts should neither dismiss cases with a finding of no liability nor reassess facts under a different causation standard. Instead, the courts should explicitly address the non-determinative discrimination claims presented in each record. If the plaintiffs prove race-based different treatment that is covered by a statute, they should prevail. They will not be discriminatory outcome winners, nor will they be entitled to the more ample outcome remedies. However, since they will have established that they were victims of discrimination, the courts should impose liability and award relief, for there is "no acceptable place in the law for partial racial discrimination."^337

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533 F. Supp. at 675-76, but a divided panel of the Sixth Circuit ruled that the trial judge's findings were "clearly erroneous" and reversed. Grubb, 741 F.2d at 1496-97, 1501. With respect to the statement that no black man should supervise a white woman, the appeals court culled the record to show that "this statement had no effect on [the plaintiff's] position or his supervisory status over [the white woman] since [the white woman] continued to report to him . . . ." Id. at 1497 (emphasis in original). Even if true, and even if the Sixth Circuit was correct that the termination decision was not racially motivated, the fact that offensive and demeaning work-related racist statements were made by a supervisor to his subordinate is "lost in the shuffle." Wholly, supra note 124, at 399. The discriminatory language claim was neither presented nor evaluated in the case.

IV. Conclusion

This Article has presented several forms of non-determinative discrimination that are not fully recognized by current doctrine and that should be accorded protection in order to fulfill the purposes of the laws against discrimination. In particular, it has argued that the same decision and but-for tests, when mechanically applied, immunize conduct that is discriminatory and under-enforce the laws. A vocabulary for the different forms of non-determinative discrimination—initially determinative discrimination, process, language, and mixed motive discrimination—has been suggested with the hope that a more descriptive lexicon will assist in the discussion and evaluation of these claims. This Article has also identified several problems that non-determinative discrimination claims present and has developed an approach to accommodate those concerns without weakening the prohibition against discriminatory conduct.

Once the theory of non-determinative discrimination has been identified and understood, initially determinative discrimination and process discrimination claims are likely to be readily recognized as clear instances of prohibited discrimination. For the language and mixed motive cases, however, and particularly for claims of racial statements in the workplace, acceptance will come more slowly. These cases straddle the inner boundary of the laws against discrimination; they approach (although most do not reach) the barrier of the first amendment. It will take both practice and persistence to understand and to overcome the difficulties these claims present and to establish the appropriate boundary. This Article is an attempt to demonstrate that these difficulties are not beyond our capacity to resolve.