UN-MUDDLING MIXED-MOTIVES?
PROTECTION FOR THE NON-EXEMPLARY WORKER

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Very Rough and Incomplete Draft

*Univ. of Connecticut Law School, psiegelm@law.uconn.edu. This is a very rough and incomplete draft (note the question mark in the title). You will notice the extreme scarcity of actual case law, which I will get to in the next round. I hope. Thanks to nobody–yet.

Introduction

Some 30 years ago, the American Bar Foundation attempted an empirical assessment of the "legal needs" of the American public by means of a broad survey of representative individuals.[1] One striking finding of that survey was that across 30-odd categories of events that could result in engagement with the legal system (divorce, auto accident, criminal arrest, etc.), the type of event with by far the lowest rate of development into a formal legal claim was "discrimination at work." Only some 1 percent of people who believed that they'd experienced discrimination at work went on to do anything about it, a far smaller fraction than for any other kind of problem people encountered.

Fast forward to 2004. We now have roughly 20,000 employment discrimination suits filed in federal courts each year, and roughly 150,000 charges of discrimination filed with the EEOC. After what can only be considered a period of explosive growth throughout the 1990s, employment discrimination claims now constitute the most numerous of any of the causes of action recorded by the Administrative Office of the U.S. Courts.

No one has offered a compelling explanation for this dramatic change, or at least not for the doubling in claims that has occurred since 1991.[2] It could be that new causes of action, or new legal doctrines articulated in the 1991 Civil Rights Act, are responsible for some or all of the increase in litigation. Or maybe the growing use of courts to resolve employment discrimination disputes is largely a sociological or extra-legal phenomenon. Unfortunately, this essay can not begin to resolve these

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[1] Barbara Curran, THE LEGAL NEEDS OF THE PUBLIC (1977).

[2] For an analysis of the growth in litigation before 1991, see John J. Donohue III and Peter Siegelman, *The Changing Nature of Employment Discrimination Litigation*, 43 STAN. L. REV. 983 (1991).

important and interesting questions. I have a much more modest goal: to understand the logic and significance of one doctrinal development in employment discrimination law–the so-called "Mixed-Motives" theory–that had its origins in the late 1980s. (Under a Mixed-Motives theory, oversimplifying for the moment, an employment discrimination plaintiff can prevail merely by showing that her race or gender was one of several "factors" that motivated an adverse employment decision.) I am not going to argue that the availability of Mixed-Motives was largely, or even partly, responsible for the surge in litigation during the 1990s. But I do want to claim that the rise in litigation motivates this inquiry, because Mixed-Motives was one of several doctrinal changes that might have played some role in the run-up in litigation.[3]

I have three intermediate objectives, the first of which is to explore some possible justifications for why we should have Mixed-Motives liability in the first place (part II). To the extent that they are discussed at all, the existing justifications are far from satisfying. If we are going to be seeing a lot more mixed motives cases in the future, as some have argued, it would be helpful to understand what the underlying rationale(s) for this doctrine might look like. I find the existing justifications to be lacking in coherence or plausibility, so my second goal (part III) is to suggest an alternative theory of Mixed Motives. In this view, it is simply the application of standard employment discrimination principles to the case of a "non-exemplary" plaintiff, someone an employer *might* be justified in firing. Employment discrimination law obviously can and should apply to such non-exemplary plaintiffs, who compromise a significant share of all litigants. But how should they be protected? I claim Mixed-Motives is properly

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[3]Ultimately, of course, this is an empirical issue. John Donohue, Laura Beth Nielsen, Robert Nelson and I have a project underway that should begin to provide answers to this and other questions.

understood as an effort to define protection *conditional* on the plaintiff's non-exemplary status. My third objective (part IV, not yet written) is to assess the consequences of Mixed-Motives liability–is it likely to lead to more success for plaintiffs than the conventional structure it replaced, or is it, like so many of the debates about the *McDonnell-Douglas* framework,[4] of little more than formalistic importance, leaving practice on the ground relatively unchanged? Before attempting any of these goals, I offer an attenuated doctrinal background.

I. Mixed-Motives: A Brief History

First announced in *Price Waterhouse v. Hopkins*[5] and later modified by two provisions of the 1991 Civil Rights Act,[6] Mixed-Motives theory is designed to deal with situations in which the plaintiff suffers an adverse employment action for which there are both legitimate and illegitimate reasons. As a stylized example, consider an employee who is rude to subordinates (at least potentially a legitimate reason for firing) and who is female (obviously an illegitimate reason).[7] What happens if the employer

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[4]See, *McDonnell-Douglas v. Green*, 411 U.S. 792 (1973) (articulating framework for order of proof in employment discrimination cases).

[5]490 U.S. 228 (1988).

[6]§703(m) of Title VII and §706(g)(2)(B) were both added by the 1991 Civil Rights Act. I discuss both in more detail below.

[7]This is a stylized representation of the facts of *Price Waterhouse*. In the actual case, of course, it is not clear whether the defendant actually held Ms. Hopkins' gender against her, although there were enough sexist comments by partners to raise a strong suspicion that this was the case. It is also unclear whether Hopkins' alleged failings (rudeness, etc.) were contrived, in the sense that the same qualities would not have been perceived as negatives had she been male. The possibility that different criteria are used to evaluate men and women is not what Mixed-Motives liability contemplates, however. That would be handled under the traditional *McDonnell-Douglas* framework. Rather, Mixed-Motives is designed to handle situations in which the same criteria are applied to both genders, the criteria are legitimate (if consistently applied), but they are applied differently depending on sex.

claims that he took the plaintiff's rudeness into account while the plaintiff herself asserts that her employer took her sex into account in deciding to fire her? Must she, in addition, demonstrate that sex, and not rudeness, was the "real" reason she was fired? Put another way, must the plaintiff demonstrate that her sex was a but-for cause of her firing, or that she would have been retained had she been male?

A. The Traditional *McDonnell-Douglas* Pretext Model

Until *Price Waterhouse*, the answer to these questions would have been "yes." The traditional route to this answer led through an awkward, confusing and much-litigated set of rules first sketched out in *McDonnell-Douglas v. Green*[8] and elaborated (or at least expanded) in a long series of additional Supreme Court opinions.[9] Under the *McDonnell-Douglas* framework, plaintiffs had to establish a prima facie case by demonstrating that they belonged to a protected class, that they applied for a position for which they were qualified, that they were rejected, and that the position remained open. Once this burden was met–as it almost invariably was–it became the defendant's responsibility to articulate a "legitimate, non discriminatory reason" (hereinafter, LNDR) for his action. Any reason (other than race or sex) would suffice to meet the employer's burden, but in the third stage of the

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[8]*Supra*.

[9]The intersection of civil procedure, evidence, and employment discrimination has generated dozens of articles exploring the rationale for the complex scheme of shifting burdens of proof first articulated in *McDonnell-Douglas* and subsequently refined in a series of cases such as *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248 (1981). One leading scholar referred to the complex, elaborate, and formalistic burden-shifting exercises required by these cases as the employment discrimination "minuet." See Deborah C. Malamud, *The Last Minuet: Disparate Treatment After Hicks*, 93 Mich. L. Rev. 2229 (1995). Malamud cites *Miller v. Cigna Corp.*, 47 F.3d 586, 599 (3d Cir. 1995) (Greenberg, J., concurring) for a description of the complexities at work here: "The area of employment discrimination law is cursed with elusive terms ... and with numerous presumptions, inferences and burden-shifting rules [that] historically often have taken on lives of their own ...."

burden-shifting "minuet," the plaintiff was allowed a chance to refute the employer's stated LNDR by showing that it was a pretext for conduct based on race or sex.[10] Of course, the more flimsy the employer's LNDR, the easier it would be for the plaintiff to show that it was not the true reason, and the more likely the plaintiff would be to prevail at the pretext stage. I summarize these rules graphically in Figure 1.A.

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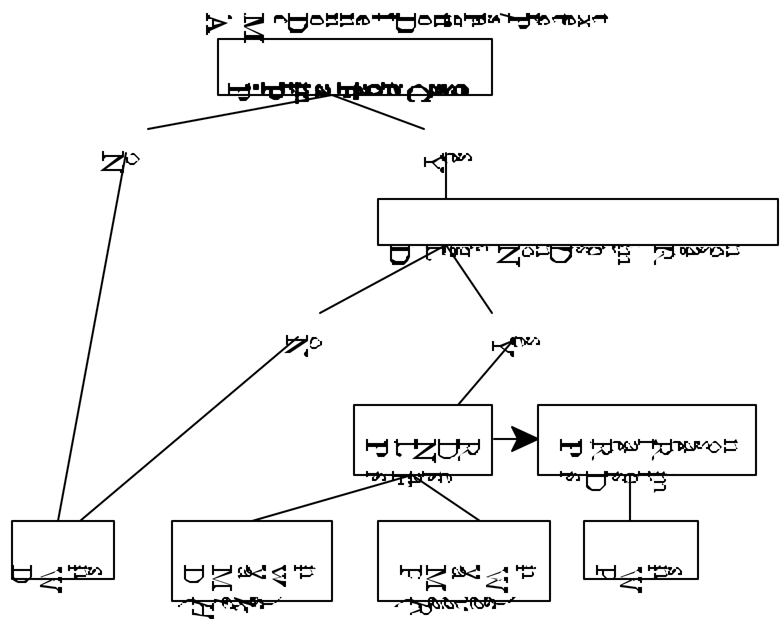
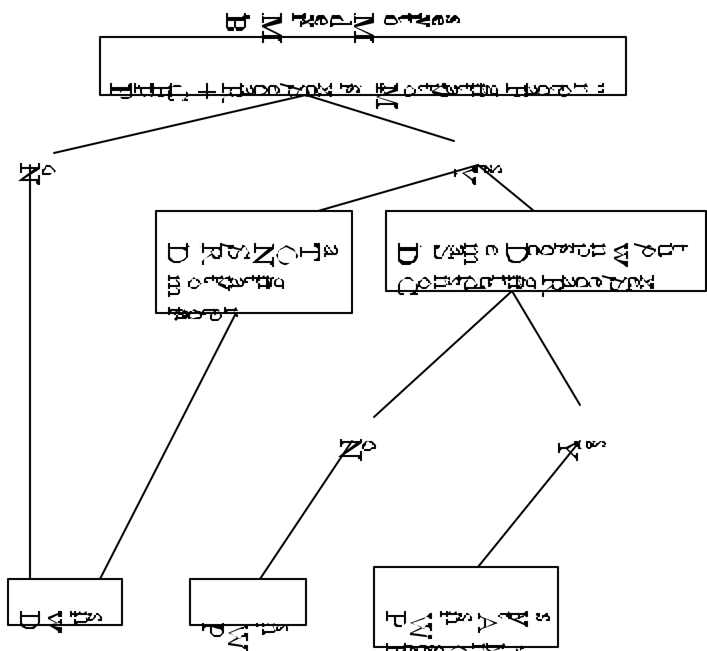
[10]I'm simplifying considerably in the interests of space. Malamud claimed that the minuet ended with *St. Mary's Honor Center v. Hicks*, 509 U.S. 502 (1993), which held that a plaintiff who shows that the defendant's stated LNDR is not the real reason for her adverse employment decision is not necessarily entitled to prevail on that basis alone. (Even if the defendant was lying about his true reason, that true reason might nevertheless have been something *other* than race or sex. Or as Monty Python put it, the defendant "might have been [lying] in his spare time."). The minuet continued after *Hicks*, however. The final dance was apparently *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133 (2000), which concluded the converse of *Hicks*. A plaintiff *may* be able to establish liability merely by refuting the defendant's LNDR (without directly showing that race or sex was the "real reason"). Under some circumstances, the most likely alternative to the employer's false LNDR is that the real reason was race, so refuting the LNDR can be enough to carry the plaintiff's overall burden, although *per Hicks*, this is not necessarily the case.

Figure 1: *McDonnell-Douglas* & Mixed Motive Proof Structures





B. Mixed-Motives vs Pretext: A Contrast

At least on the surface, Mixed-Motives offers a different structure for proving discrimination. Under this theory, a plaintiff must also establish a prima facie case, but if in addition she can show that race or sex was a "consideration" or "motivating factor" in her employer's behavior, she is entitled to shift the burden of proof to her employer. Crucially, the plaintiff need not establish that her sex or race was a but/for cause of her treatment; all she needs to do is to show that it was a "consideration" or a "factor." Put another way, it is no longer the plaintiff's burden to show that she would *not* have been fired had she been male (or white).

Rather, once race or sex is asserted to be a factor in an employment decision, the employer under a Mixed-Motives theory faces two choices. First, he can attempt to refute the plaintiff's claim that he considered race or sex *at all*. If he can do so, then he will obviously prevail; but the burden is now on him to show his "innocence," rather than resting on the plaintiff to prove his "guilt." A second alternative is for the employer to demonstrate that even though he *did* consider race or sex, he would nevertheless have made the same decision in their absence. An employer can make out this "same decision" defense is only liable–at the court's discretion–for the plaintiff's attorney's fees, but no backpay or other

damages.[11] Figure 1.B. illustrates graphically, while Table 1 gives a numerical example.

Suppose an unusually naive but discriminatory employer honestly recorded his rule for deciding whom to fire. In the instance depicted in the table, the plaintiff received 32 "legitimate" demerits for conduct that might plausibly justify firing her. But our honest employer also turns out to be a sexist–his records show that he gave the plaintiff 5 demerits simply for being female, bringing her total to 37 demerits, 7 more than the 30 needed for firing.

Notice that in this scenario, however, the plaintiff would have been fired even if she had been male, since her 32 legitimate demerits put her over the firing threshold without the 5 extra demerits for being female. Sex was not a but-for cause of her firing; but her employer is clearly liable (at least for her attorney's fees) under a mixed-motives theory.

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[11] As noted earlier, §703(m) states that "an unlawful employment practice is established when the complaining party demonstrates that race, color, religion, sex, or national origin was a motivating factor for any employment practice, even though other factors also motivated the practice."

§706(g)(2)(B) states that "[o]n a claim in which an individual proves a violation under [section 703(m)] and a respondent demonstrates that the respondent would have taken the same action in the absence of the impermissible motivating factor, the court-

"(i) may grant declaratory relief, injunctive relief . . . and attorney's fees and costs . . . directly attributable . . . to the pursuit of a claim under . . . [section 703(m)]; and

"(ii) shall not award damages or issue an order requiring any admission, reinstatement, hiring, promotion, or payment . . . ."

Table 1: Hypothetical Employment Record Depicting Mixed-Motives Liability without But-For Causation			
Behavior	Demerits per Occurrence	Number of Occurrences	Total Demerits
Late to Work	5	2	10
Abusive to Supervisor	10	1	10
Failure to Carry Out Duties	6	2	12
Female	5	1	5
TOTAL			37
Needed for Termination			30

What this means is that under *Price Waterhouse* and §703(m), the plaintiff would be able to prevail if she could persuade a jury that her sex was considered *at all* in her firing, unless the employer can use the evidence from Table 1 to demonstrate that the same decision would have been made even if the plaintiff had been male. In that case, the employer's liability would be limited to the plaintiff's attorney's fees under §702(g)(2)(B).[12]

C. The Latest Development in Mixed-Motives: *Costa*

[12]Note, too, that attorney's fees in civil rights cases–including employment discrimination cases–need not bear any relationship to the amount awarded to the plaintiff. See, e.g., *City of Riverside v. Rivera*, 477 U.S. 561 (1986) (upholding award of $245,456.25 in attorney's fees when plaintiff's compensatory and punitive damages were $33,500). Although *Rivera* is obviously an outlier, it is important to realize that the size of the plaintiff's award is only one element among many in establishing reasonable attorney's fees in employment discrimination cases.

A short and almost unnoticed[13] 2003 Supreme Court case, *Desert Palace v. Costa*,[14] represents the latest development in Mixed-Motives liability. *Costa* disposed of what seems to be a small technical question–does an employment discrimination plaintiff need to present direct (or even clear and compelling) evidence that race or gender played a role in her dismissal in order to reach the jury with a claim of Mixed-Motives discrimination? Writing for a unanimous Court, Justice Thomas answered in the negative: any evidence will do. Thomas' opinion was based entirely on statutory construction arguments, with no explicit recognition of the consequences the decision might have. But the unanimous decision in *Costa* will probably make it substantially easier for plaintiffs to get before a jury with a Mixed-Motives claim, because plaintiffs no longer need direct evidence of discrimination. What difference, if any, this will make, is discussed below.

II. The Rationale(s) for Mixed-Motives Liability

The underlying rationale for Mixed-Motives liability may seem moot. After all, the 1991 Civil Rights Act explicitly recognized and approved (a modified version) of the *Price Waterhouse* holding, and since Congress has spoken, the result is clear, regardless of its justification. Even so, it is still worth understanding the justification(s) for Mixed-Motives liability because the underlying rationale will certainly be important in deciding the myriad new issues that will come up when, as seems likely, plaintiffs discover the attractiveness of this doctrine in light of the *Costa* decision.

A. Fulfilling the Promise of Civil Rights Law?

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[13]But see Jeffrey A. Van Detta, *"Le Roi Est Mort; Vive Le Roi!": an Essay on the Quiet Demise of* McDonnell-Douglas *and the Transformation of Every Title VII Case after* Desert Palace, Inc. v. Costa *into a "Mixed-Motives" Case*, 52 DRAKE L. REV. 71 (2003).

[14]123 S. Ct. 2148 (2003).

One common justification for allowing plaintiffs to shift the burden of proof to employers, once it has been established that race or sex was considered in an employment action, is that plaintiffs often find it very difficult to prove that they were treated adversely because of their race.[15] Whatever his real motives, an employer can almost always come up with *some*
(seemingly) legitimate nondiscriminatory reason for this behavior, as required in step two of the *McDonnell-Douglas* minuet. Nobody is perfect, so there will invariably be some negative conduct the employer can use to explain why he fired or refused to hire the plaintiff.[16] The plaintiff's burden of showing pretext is much more difficult. Even after *Reeve v. Sanderson Plumbing*,[17] the task of establishing pretext under the *McDonnell-Douglas* framework is not easy.

But so what? There are many areas in law where plaintiffs have a difficult time proving their case, and we do not on that basis alone suggest that their burdens should be lower. Criminal prosecutors regularly complain that the rules are stacked against them, and it's clear their lives would be much easier if defendants had to prove their innocence rather than vice-versa. Allowing plaintiffs to win more easily or more often is not a compelling justification for relaxing the rules unless–at a minimum–one has first established that there are plaintiffs who "should" prevail and are unable to do so because of the difficulties they face in proving their case.

The issue is complicated for at least two reasons, selection effects and judicial error. First, some potential plaintiffs with legitimate grievances may never show up in court because they are told early in

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[15]Cites.

[16]Linda Krieger, or whoever said this. Or just common sense.

[17]*Supra.*

the process that although they may be victims of discrimination, the rules make it impossible to *prove* that they are. What we're really concerned about, therefore, is how many legitimate victims of discrimination there are in the population as a whole, and what proportion of *them* are wrongly denied a remedy by the difficulty of proving their case. Of course, estimating how many such persons there are is inherently problematic. As far as I know, there is no systematic evidence to this effect.[18]

Suppose, however, that we could establish that relaxing the rules really would allow more legitimate plaintiffs to prevail. A second problem is that as long as the system is not error-free, this relaxation would also necessarily allow more *illegitimate* plaintiffs to prevail–there is an inevitable trade off between what statisticians call type-I (acquitting the guilty) and type-II (convicting the innocent) errors. At a minimum, then, we need to ask not only whether making things easier for plaintiffs is justified because worthy plaintiffs are not now prevailing, but *also* whether relaxing the rules is likely to bring about significant type-II errors.

While some authors talk about "fulfilling the promise of our employment discrimination laws,"[19]

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[18]For a very modest effort in this direction, see Peter Siegelman and Joel Waldfogel, *Toward a Taxonomy of Disputes: New Evidence through the Prism of the Priest/Klein Model*, 28 J. LEGAL STUD. 101, 126 (1999), who conclude that the actual win rates of civil rights cases are not strikingly different from the *hypothetical* win rate that would obtain if all filed cases were actually adjudicated. They estimate that the hypothetical win rate is about 10 percent in their sample of cases from the Southern District of New York, which does not suggest a substantial selection effect.

[19]See, e.g., Van Detta, supra, at 112, n. 211, arguing that it is time to "'. . . replace the . . . structures [that submerge peoples of color] with ones that can fulfill our unkept promises of democracy, equality, and a decent life,'"(quoting Richard Delgado, *Two Ways to Think About Race: Reflections on the Id, the Ego, and Other Reformist Theories of Equal Protection*, 89 GEO. L. J. 2279, 2280 (2001)), and suggesting that "a decrease in the level of powerlessness of minority group members to take on discriminators by a concomitant increase in effective enforcement of Title VII permitted by Costa and section 703(m) is a step in [this] direction."

that rhetoric can not by itself provide a principled justification for making things easier for plaintiffs. After all, "the promise of our employment discrimination laws" would be maximized if we simply allowed all plaintiffs to win, and we don't choose to do that, with good reason. More is at stake than just civil rights, even when a civil rights statute is being invoked. Ignoring everything but the civil rights benefits to the particular plaintiffs involved is not a wise way to make policy, even civil rights policy. It may not even be in the interests of potential plaintiffs as a group to make employment discrimination cases easier to win. Since most employment discrimination cases allege discriminatory discharge, it is possible that making minorities and women harder to fire could make them less attractive at the hiring stage, and hence make it more difficult for them to find a job (even while better protecting those who manage to find one). Whether or not this disemployment effect is real and significant,[20] this possibility demonstrates that one must be extremely careful before concluding that one has identified which policies are "really" in the interests of plaintiffs. Merely helping plaintiffs win more often is not compelling reason for relaxing standards of proof.

B. Risk?

Another potential justification for Mixed-Motives liability is that even if *this* plaintiff's sex was not a but-for cause of her firing, as long as sex is "a factor" in the employer's decision-making process,

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[20]See, e.g., Paul Oyer & Scott Schaefer, *Layoffs and Litigation*, 31 RAND J. Econ. (2000). The authors conclude in a broader think piece that the 1991 Civil Rights Act had the effect of reducing hiring of protected workers in those industries with a high susceptibility to employment discrimination suits (industries with high firing rates). They also claim that the Act led employers to assign a wage premium to those workers who were least likely to sue for employment discrimination. See, Paul Oyer and Scott Schaefer, *The Unintended Consequences of the '91 Civil Rights Act*, REGULATION (Summer 2003), 42-47.

there will inevitably be some workers for whom sex *will* make a decisive difference. Return to our earlier example (Table 1), in which the employer gives demerits for various legitimate failings, and also assigned 5 demerits for being female. While employee A would have been fired even if she had been male, consider what would happen in the case of employee B, a woman who is only late to work once instead of twice. Ms. B will wind up with 27 "legitimate" demerits (5 for lateness, 10 for abuse of supervisor, and 12 for failure to carry out duties), plus 5 illegitimate ones (for being female), for a total of 32 points. Had she been male, she would have had only 27 demerits, and she would have been retained. On this account, then, even if Ms. A's sex didn't actually cause *her* to be fired, her employer's use of sex in his decision-making will eventually victimize some *other* woman, and Ms. A is therefore serving a prophylactic function by sanctioning her employer's future misbehavior before it occurs.[21]

We might draw an analogy between the risk of future harm in this scenario and the risk of future harm in a toxic tort case such as *Metro-North Commuter Railroad v. Buckley*,[22] where the plaintiff

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[21]Perhaps the unconvincing language in the *Price,Waterhouse* plurality opinion about the importance of the 'present tense' is getting at this point? Justice Brennan wrote that

> The present, active tense of the operative verbs . . . ("to fail or refuse") . . . turns our attention to the actual moment of the event in question, the adverse employment decision. The critical inquiry . . . is whether gender was a factor in the employment decision *at the moment it was made*. . . When, therefore, an employer considers both gender and legitimate factors at the time of making a decision, that decision was "because of" sex and the other, legitimate considerations–even if we may say later, in the context of litigation, that the decision would have been the same if gender had not been taken into account.

Price Waterhouse, supra at 240-41 (emphasis in original).

[22]521 U.S. 424 (1997). For an excellent discussion of the conceptual and practical problems posed by liability for "unrealized torts," see John C.P. Goldberg & Benjamin C. Zipursky, *Unrealized Torts*, 88 VA. L. REV. 1625 (2002).

was (negligently) exposed to potentially carcinogenic asbestos fibers, but was asymptomatic at the time he filed suit. Such an analogy is not favorable to the Mixed-Motives plaintiff, however, for two reasons.

First, Buckley *did* claim immediate injury (by virtue of the emotional distress he allegedly suffered from having an elevated cancer risk, as well as the economic loss associated with higher present and future medical monitoring costs). Mixed-Motives plaintiffs need not show any such injury to establish liability, although of course their recovery is limited to attorney's fees if their employer can show that they would have been fired regardless of their gender.

More significantly, *Buckley* involved a risk or uncertainty that extended only over time–this particular plaintiff had a heightened fear that he might develop cancer in the future. In the Mixed-Motives context, the issue involves both extension over time (future misconduct by the defendant) and across people (*this* plaintiff was in fact not at risk, but others may be). Why should Ms. A have standing to complain about future harms to others–harms that may not even materialize–rather than simply permitting future Ms. Bs to complain about whatever harms are done to them at the time they occur, if they ever do? It's hard to provide a compelling answer.

Moreover, no element of Ms. A's case requires her to demonstrate that the risk from which she suffered is ongoing or threatens others. Suppose, for example, that the sexist supervisor responsible for Ms. A's firing was himself fired, thereby posing no risk to future Ms. Bs. This would seem to eliminate any basis for making Ms. A into a "private attorney general"[23] with authorization to prevent harm to future victims, yet the law does not provide the employer any defense in this context.

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[23]*Associated Indus. of N.Y. State v. Ickes*, 134 F.2d 694 (2d Cir., 1943)

C. Process-Related Harms?

An alternative theory of Mixed-Motives liability is that an employer's mere cognizance or consideration of sex or race, even if in the end it does not influence an actual employment decision, is by itself harmful to the plaintiff. The harms referred to here, of course, are not those arising from an adverse employment action based on sex or race–those are covered by standard employment discrimination doctrines. Rather, the idea must be that even a plaintiff who would have been fired anyway suffers additional harm from having her sex or race considered *at all* by her employer. The idea that there might be stigma attached to the process–as apart from the outcome–of an employment decision does not seem unreasonable. On this account, an employment policy similar to the one documented in Table 1 would be analogous to a cause of action for hostile working conditions.

The analogy is, again, not very convincing, however. For one thing, harm to the plaintiff plays no role either in establishing liability or in the remedy for Mixed-Motives. A plaintiff need not show any harm to prove Mixed-Motives liability, nor can an employer defend itself by demonstrating that there was no harm; the employer is liable, even if the plaintiff never knew that her race or sex was being considered, or knew but didn't care. Moreover, if the plaintiff can show that an employer used illegitimate factors in reaching an employment decision, but the employer demonstrates that the same decision would have been reached anyway (without considering sex or race), the plaintiff receives no damages and collects only her attorney's fees. This is strange sort of liability if we are concerned to protect the plaintiff's harm from having her sex "considered." The actual harm suffered by the plaintiff plays no role at all in determining either whether the employer is liable or, if so, how much the plaintiff is

entitled to by way of remedy.[24]

D. Endogenous Misbehavior?

Mixed motive liability is quintessentially about the possible combination of two things:

(1) non-exemplary behavior by the plaintiff that could constitute a legitimate reason for employer action; and

(2) Sex or race, which are never legitimate reasons for any action.[25]

Except in contexts with explicit due process rights, Title VII operates against a background of at-will employment. Thus, unexcused absences or obnoxious behavior towards co-workers are almost always an adequate reason to fire an employee, as long as they are the sole motive for an employer's decision.[26] The reason is some version of the business judgment rule: employers, not courts, are presumably in the best position to decide when someone should be fired or demoted, or who should be hired.

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[24]Conversely, suppose a female worker Ms. C was evaluated under the framework in Table 1, and had never been late to work. Although Ms. C would not be at risk for being fired because of her gender since she had only 22 demerits, it is possible that she nevertheless suffered some harm from her employer's *consideration* of her sex. But without an adverse employment action, Ms. C is unlikely to have a cause of action. Mixed-Motives liability is thus both under-inclusive (because it fails to protect someone like Ms. C who suffered harm from having sex considered) and over-inclusive (because it protects someone like Ms. A, even if she were to suffer no harm).

[25]Modest exceptions would include B.F.O.Q. (for sex), and affirmative action.

[26]We live in a more or less at-will world, so I'm using "legitimate" or "adequate" rather loosely here. The idea is that in firing a member of a protected class, an employer needs to be able to provide enough of a plausible justification so that he won't provide the plaintiff with an easy pretext claim. For an assertion that Title VII in fact provides what amounts to just cause protection for all workers (since whites and males are also protected classes under the meaning of the statute (*McDonald v. Santa Fe Trails*, 427 U.S. 273 (1976)), see Alfred W. Blumrosen, *Strangers No More: All Workers Are Entitled to Just Cause Protection Under Title VII*, 2 INDUS. REL. L.J. 519 (1978).

Moreover, 'bad' or non-exemplary behavior such as lateness or rudeness is usually thought of as under control of the employee. A worker who doesn't want to be fired can choose not to be rude or late, and avoid the penalty attached to these choices. But suppose this dichotomy is too facile: perhaps employers can cause misbehavior (rudeness, lateness). One might argue that employees are not completely autonomous agents, and that someone who is late or absent might have been better-behaved if their employer had treated them with more respect to begin with.[27] If so, perhaps it makes sense to hold employers responsible for the employee's lateness or rudeness (at least unless the employer can show he was innocent), and to scrutinize even "legitimate" reasons more carefully.

This rationale, while clever, does not strike me as very compelling. While it is always possible that an employer's attitudes or behavior might cause an adverse response by the employee, it is hard to evaluate the empirical support for such claims–there really is none. It seems equally plausible a priori that a discriminatory employer might induce *better*, rather than worse, behavior among his black or female employees, since they realize that the permissible level of misconduct for them is lower than for some white males.[28]

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[27]This is a cousin of Vicki Schultz's views about the endogeneity of "interest" in "lack of interest" cases. *See*, *Telling Stories about Women and Work: Judicial Interpretations of Sex Segregation in the Workplace in Title VII Cases Raising the Lack of Interest Argument*, 103 HARV. L. REV. 1749 (1990). Schultz makes the point that women may seem to be uninterested in traditionally male jobs, but that "interest" is in part constructed by the employer, and is not solely reflective of exogenous employee preferences. In the context of *EEOC v. Sears* (628 F. Supp. 1264 (N.D. Ill. 1986), *aff'd*, 839 F.2d 302 (7th Cir. 1988)), Schultz claims, if Sears had encouraged women to apply for the commission sales jobs that were historically held almost exclusively by men, more women might have been interested, and Sears' explanation for why the jobs had so few women ("nobody applied") would be more suspect.

[28]A further weakness of this approach is that it turns victims of discrimination into mere products of their circumstances, with no significant sense of agency. It's not clear that one does

If none of these accounts offer a compelling explanation for mixed motives liability, is there another story that does? I believe there is. I think Mixed Motives liability is meant to describe the responsibilities of employers, conditional on non-exemplary behavior by employees. The next section explains what I mean.

III. Conditioning and Non-Exemplary Behavior

In my view, the key to understanding Mixed-Motives liability is to recognize that it is quintessentially designed to apply to "non-exemplary" employees, those whose employment records are compromised in some way, but who may nonetheless still be victims of discrimination.

Claims of discrimination by non-exemplary employees may well constitute the modal type of employment discrimination complaint.[29] To give a sense of what I'm talking about, consider the facts of *Smith v. Monsanto Chemical Co.*[30] Plaintiff, Danny Smith was an African-American maintenance worker at defendant's plant. One day, he removed three rag towels from the plant to use for cleaning his car. He was observed putting the towels in his car, was told he could not take them, and returned them to the plant. Despite his 45 months of service, he was fired the next day for theft of company property. Smith's main argument was "that he was treated more harshly than similarly situated white

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African-Americans or women a favor by dismissing their bad behavior as a product of their employer's racism or sexism. A group with no responsibility for its own 'bad' behavior will not have a good claim on responsibility for its good behavior either.

This is sometimes known as the West Side Story dilemma, as sarcastically articulated by the gang members in the song *Officer Krupke*: "We're depraved on accounta we're deprived."

[29]The bounds for this category are extremely vague, so it is simply not possible to adduce much quantitative evidence about its size. See *infra*. sect III.B.

[30]770 F.2d 719 (8th Cir. 1985).

employees. [He] argue[d] that his punishment for stealing company property was more severe than that received by similarly situated white employees who had removed rag towels from the plant without a materials pass."[31]

Smith's story is representative of a substantial fraction of all employment discrimination cases. In the typical case, a worker is fired, allegedly for some violation of the rules. The plaintiff does not deny the infraction, but instead claims that the firing was racially motivated on the grounds that whites or males with identical behavior were treated less harshly. Courts are then left to sort out this problem.

Under the *McDonnell-Douglas* paradigm, as we have seen, the court's task is to decide whether it was Smith's race *or* his towel removal that caused him to be fired. (The key question is whether the employer's stated reason–towel theft–was actually a pretext for the true reason–race.) My claim is that Mixed-Motives analysis is–or should be–designed to handle this situation, by taking account of the fact that the plaintiff's explanation (race) and the defendant's explanation (non-exemplary behavior) are not mutually exclusive. Rather, it is the possible *combination* of the legitimate and illegitimate reasons that is the central issue in cases like *Smith.* I will argue that the problem of non-exemplary plaintiffs does not require us to abandon traditional notions of but/for cause. Instead, it should lead us–as it often does–to inquire about an employer's behavior *conditional* on the non-exemplary behavior of the plaintiff: is there evidence that the plaintiff was treated worse than others *who also stole three towels*, but who were not African-American? Of course, this kind of inquiry is also possible under a traditional framework, and to that extent, Mixed-Motives does not represent a fundamentally new conception of

[31] *Id*. at 723.

employer liability. But as I suggest below, it does focus the inquiry in useful and productive ways.

A. The Problem of Non-Exemplary Behavior

Early Title VII jurisprudence was largely a reaction to the remnants of Jim Crow labor markets, in which the obvious problem was that employers simply refused to hire qualified workers because of their race. The drafters of the law thought of it as a pro-hiring measure, and as they expected, the vast majority of the early cases alleged hiring discrimination.[32] Assuming the plaintiff was qualified for the job for which she applied, the appropriate focus in these cases was on whether the employer was using some other reason as a pretext for refusing to hire the plaintiff on the basis of his or her race.

Mixed-Motives doctrine, by contrast, evolved in an era in which a substantial majority of suits allege discriminatory discharge. In this world, the employer has already hired the plaintiff, presumably with full knowledge of her race or sex. Unlike hiring discrimination, it is hard to imagine how a defendant employer could decide to *fire* an employee *solely* because of her race (or sex).[33]

It is entirely possible, however, that an employer would be willing to hire and retain black applicants *only* as long as they behaved in an exemplary fashion. Such an employer might still discriminate against the subset of black or female employees who did not behave in an exemplary

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[32]See, Donohue & Siegelman, *supra*.

[33]One can imagine some scenarios in which this might happen. For instance, an employer could hire someone believing her to be white, only to fire her when he later discovered that she was black.
Or, suppose workers care more about losing a job they already have than about not getting one–an endowment effect. An employer who wanted to hurt African Americans or women could offer them a job and then fire them, in order to effect maximal harm. Even the most racist employers are probably not so devious, however. For instance, Ray Danner, the CEO of Shoney's Restaurants through the mid-1990s, was an avowed bigot. But even he apparently did not hire and then fire black workers merely to make them suffer. See, e.g., Steve Watkins, *Racism du Jour at Shoney's*, THE NATION, Oct. 18, 1993, at 424.

fashion.[34] In that case, race or sex *is* being used against some workers, but only a subset of all black or women employees.

Table 2 provides a quantitative example of this kind of conduct. Suppose an employer decided at the end of the year to retain all workers who were late fewer than three times, regardless of race. There is no disparate treatment of these exemplary workers, as column (1) of the table makes clear: the firing rates are the same in Panel A and Panel B. It is only by comparing firing rates in column (2)–for workers late between three and six times–that a disparity emerges. Whites with three to six absences are never fired, whereas blacks with similar records always are. Thus, *conditional on a worker's having between three and six incidents of lateness*, the employer's behavior is properly seen to be discriminatory. The employer also treats the very worst workers (in column (3)) identically, firing all

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[34]The idea that employers do not fire *purely* because of race or sex has backed its way into Title VII jurisprudence in the form of the "same actor defense." *See*, *Proud v. Stone*, 945 F.2d 796 (4th Cir. 1991) (when the same actor hires and then fires an employee within a short period of time, the action is presumed not to be discriminatory). In the interests of disclosure, I note that the court in *Proud* apparently relied on a stray remark in an article by John Donohue and me, in which we asserted that "'[i]t hardly makes sense to hire workers from a group one dislikes (thereby incurring the psychological costs of associating with them), only to fire them once they are on the job.'" *Proud, supra* at 797 (quoting Donohue & Siegelman, *The Changing Nature, supra* at 1017). For a critical assessment of this doctrine, see Jennifer R. Taylor, *Note: The "Same Actor Inference:" A Mechanism for Employment Discrimination?* 101 W. VA L. REV. 565 (1999).

What the court (and the academic source it relied on) failed to appreciate is that an employer might discriminate against a subset of his black employees, without holding race against *all* black workers. A hiring decision could initially have been made assuming the black worker would be exemplary. Once the worker displayed some "faults" (which might constitute a legitimate reason to fire, but which were not held against white employees), her race or sex was then held against her by her employer. In my view, this is precisely the situation that Mixed-Motives doctrine is designed to combat, and it suggests that the same actor presumption in *Proud* is likely to be misguided.

workers who are late more than six times, regardless of race.[35]

Table 2: Number of Employees by Race, Number of Times Late to Work, and Employment Outcome				
	(1) Late < 3 Times	(2) Late 3 - 6 Times	(3) Late > 6 Times	Total
A. **Whites**				
Total Employees	50 (11.1%)	150 (33.3%)	250 (55.6%)	450 (100%)
Number Fired	0	0	250	250
Firing Rate	0.0	0.0	1.0	0.556
B. **Blacks**				
Total Employees	200 (44.4%)	150 (33.3%)	100 (22.2%)	450 (100%)
Number Fired	0	150	100	250
Firing Rate	0.0	1.0	0.0	0.556

Table 2 documents a form of "conditional discrimination:" race *is* a but/for cause of discharge, but only for those black workers with between three and six (inclusive) episodes of lateness. Those who are late fewer than three times will not be fired. Those who were late more than six times would be fired even if they were white. Neither those in columns (1) or (3) can assert that their race played any role in their treatment, since firing rates are identical by race in both columns. For those in column (2), however, there is a significant racial disparity in firing rates by race–100% for blacks and 0% for whites.[36]

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[35]My example is artificially constructed so that the overall firing rate is the same for both races. Of course this need not be the case: it occurs because whites are late six or more times in the same proportion as blacks are late three or more times. I chose these numbers to reinforce the importance of looking at disaggregated firing rates, which can reveal disparities that may be masked by overall statistics. This is an example of Simpson's Paradox.

[36]My story about Mixed Motives is in some ways analogous to the analysis of disparate impact developed by Ramona Paetzold and Steven Willborn. See, Ramona L. Paetzold & Steven L. Willborn,

There is, however, nothing 'mixed' about the employer's motives in any of the columns of Table 2. The right way to think about these numbers is simply that they show that the employer distinguishes among different groups of black workers, discriminating against some but not others. (I discuss the plausibility of this kind of conduct in Sect. B, *infra*). Once we recognize that a plaintiff belongs in column (2)–someone who was *not* exemplary–we should ignore everyone of either race who *was* exemplary and compare her treatment only against those who are similarly situated. Having "conditioned-out" the employer's use of a legitimate factor, our comparison now isolates whether an illegitimate factor (race) was used. If it was, our plaintiff will have evidence that she was treated differently from those who were identical to her in all relevant respects, which excludes race. If she was treated differently from the white "late-3-timers," her race is the obvious (here, the only) cause of this illegitimate treatment.

To return to cases such as *Price Waterhouse* or *Costa* for a moment, it seems clear that on the merits, both plaintiffs–Catherina Costa and Elizabeth Hopkins–were somewhat abrasive and difficult.[37] But the law protects difficult and abrasive women from being treated differently than men who are similarly difficult and abrasive, as of course it should. The key comparison is between how the employer treats abrasive women and how he treats abrasive men. Conduct that is permitted for one gender and

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Deconstructing Disparate Impact: a View of the Model Through New Lenses, 74 N.C.L. REV. 325 (1996). What they term "concurrence" occurs when employers screen applicants using two or more criteria (for example, a High School diploma requirement and a test score). They show how even when neither criterion by itself produces a disparate racial impact, such an impact might nevertheless emerge when the two criteria are used simultaneously.

[37]Costa had gotten into several fights with male co-workers. Hopkins was apparently abusive to subordinates and generally abrasive.

punished for the other is obviously discriminatory.

Though not technically a mixed motives case, *Smith* turned on exactly these same issues.[38] The company apparently had a rule that all those accused of stealing and who had less than five years of tenure would be discharged. The 8th Circuit therefore held that the appropriate comparison group against which to assess whether Smith had been fired because of his race was employees with less than five years of tenure. The data from *Smith* are tabulated below.

Table 3: Monsanto Firing Rates, by Race and Tenure, 1938-1978

	< 5 Years Tenure	≥ 5 Years Tenure	Total
A. **Whites**			
Total Accused of Theft	6	22	28
Number Fired	6	6	12
Firing Rate (%)	100.0	27.3	42.9
B. **Blacks**			
Total Accused of Theft	3	5	8
Number Fired	3	3	6
Firing Rate (%)	100.0	60.0	75.0

Source: Tabulated from figures in *Smith v. Monsanto*, *supra*, at 723-24.

The court noted the disparity in *overall* firing rates (43 percent for whites, 75 percent for blacks), but then pointed out that the relevant baseline in Smith's case was not all employees who were accused of theft: rather, it was all employees accused of theft who had less than five years of tenure, as did

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[38]The analysis in *Smith* was conducted under the traditional *McDonnell-Douglas* paradigm: Smith made out a prima facie case. In response, defendant Monsanto gave as its legitimate non-discriminatory reason that all employees with less than five years tenure who were accused of theft were fired. Smith tried to show that this reason was pretextual, pointing to significant racial disparities in overall firing rates for those accused of theft. The trial court bought this argument, but it was rejected by the 8th Circuit, as discussed below.

Smith. Among this group (column 1), the court suggested, the company seemed to follow its rule without regard to race, since it fired everyone who was accused, whether black or white.[39]

B. Empirical Evidence

The definition of what constitutes non-exemplary behavior is inherently vague. Hence, it is almost impossible to determine how important discrimination against the non-exemplary–which I claim is the predicate for Mixed-Motives liability–actually is. There is some suggestive evidence, however, that employers often treat exemplary minorities or women as well as exemplary whites or males, but make sharp distinctions by race or sex for those employees who have bent or broken the rules. This should come as no surprise. It amounts to setting a higher standard for disfavored groups, tolerating them when they behave perfectly, but not allowing them to 'get away' with conduct that would be excused if it were committed by a white male.

Precisely this conclusion–although based on impressionistic evidence–emerged from Donohue and

[39]One might question the analysis on other grounds. For example, it obviously leaves open the possibility that the "discretionary" firings of those with more than five years tenure *were* discriminatory. Indeed, although the court does not seem to have noticed this fact, firing rates for employees with *more* than five years tenure were 27.3 percent for whites and 60 percent for blacks (column 2). Although they may not make a strong case that Smith himself was adversely treated because of his race, these numbers suggest something illegitimate may have been at work among those employees with more than five years experience.

Moreover, it is not clear that the relevant population baseline against which Smith's treatment should be compared is all workers accused of stealing *during the previous 40-47 years*. (The court was unclear about whether it found 36 workers accused of stealing between 1938 and 1978 or between 1938 and 1985.) Since there were almost certainly few or no black workers employed before 1965, one might question whether the experience of white employees during the period from 1938-1964 is of any relevance to Smith's dismissal, which occurred in 1978.

Siegelman's random sample of 1200 federal employment discrimination filings.[40] We wrote that

> Our review of a number of employment discrimination cases reveals a common fact pattern: A worker is fired . . . because of some alleged individual misconduct such as tardiness. The worker then alleges that workers of the opposite race or gender were . . . even more guilty of the alleged offense but were not fired.[41]

A similar fact pattern arose in roughly one-fourth to one-third of the incidents in my study of public accommodations discrimination cases.[42] In these instances, "non-exemplary" behavior consisted of

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[40]Donohue & Siegelman, *supra*. Note that we dealt with filed cases, not with judicial opinions, which represent a selected sample of all employment discrimination cases.

[41]*Id.* at 1012. BARBARA LINDEMANN SCHLEI & PAUL GROSSMAN, EMPLOYMENT DISCRIMINATION LAW (2d ed. 1983 & Supp. 1989) suggest that this pattern is common, and cite several cases in which the existence of discrimination turns on whether 'non-exemplary' white and nonwhite employees were treated identically). For examples, see *Alexander v. Gardner-Denver Co.*, 519 F.2d 503 (10th Cir. 1975) (black plaintiff alleged that white employees who made equal or greater amounts of scrap were not given pink slips); *Martin v. Chrysler Corp.*, 10 Fair Empl. Prac. Cas. (BNA) 329, 9 Empl. Prac. Dec, (CCH) P10,066 (E.D. Mich. 1974) (black production worker alleged he was discharged for falsifying his work count while white workers who falsified their work counts were not discharged). Also following this pattern is *Pollard v. Rea Magnet Wire Company, Inc.*, 824 F.2d 557 (7th Cir. 1987) (black employee discharged for allegedly lying about reason for missing work, while claiming whites who lied were not fired).

[42]See, Peter Siegelman, *Racial Discrimination in Everyday Commercial Transactions: What Do We Know, What Do We Need to Know, and How Can We Find Out*, ch. 4, in MICHAEL FIX & MARGERY AUSTIN TURNER, eds, A NATIONAL REPORT CARD ON DISCRIMINATION IN AMERICA: THE ROLE OF TESTING (1999). Note that in public accommodations cases, unlike firing cases, 'pure' race discrimination *is* possible. Defendants may well refuse to serve plaintiffs (only) because of their race; while as noted earlier, it is hard to see how someone could be fired on racial grounds alone. Hence, we should expect to see relatively fewer Mixed-Motives cases in public accommodations than in employment discrimination.

complaining about service quality[43] or alleged rudeness.[44] Back plaintiffs alleged that they were then treated differently than whites whose behavior was similar to their own.

Zwerling and Silver's study of workers fired from the U.S. Postal Service suggests the same underlying phenomenon at work.[45] They document that "[a]cross all points in time, . . . blacks were more likely to be fired than whites, regardless of length of employment," and controlling for various human capital variables and job category.[46] Even though all those fired (both blacks and whites) appeared to have been fired for legitimate reasons, the authors suggest that there may have been white employees "who were *not* fired for similar reasons."[47] In other words, exemplary blacks and whites were treated the same, but non-exemplary blacks were treated worse (fired more often) than non-exemplary whites.

IV. Not Much of a Conclusion

Does Mixed-Motives really do a great favor for plaintiffs? My sense is that it most situations it

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[43] See, *Perkins v. Marriott*, 945 F. Supp. 282 (D.D.C. 1996) (dispute over whether room rate included breakfast led to confrontation between black patron and hotel staff).

[44] *See*, *Evans v. Holiday Inns, Inc.*, 951 F. Supp. (D.Md. 1997) (ejection of allegedly rowdy black patrons by hotel management).

[45] Craig Zwerling & Hilary Silver, *Race & Job Dismissals in a Federal Bureaucracy*, 57 Amer. Soc. Rev. 651 (1992). The workers were all dismissed during their probationary period, when firing was still possible.

[46] *Id*. at 658. They note that an independent expert evaluated the personnel files of the fired workers and concluded that there were "no cases of inappropriate firings."

[47] *Id*. Emphasis added. Another possibility is simply that there were omitted variables that explained blacks' higher firing rates. The authors believed this to be unlikely, given the completeness of the personnel files with which they worked–essentially all relevant information was contained in these documents.

probably does not.

A non-exemplary plaintiff who wished to make a traditional *McDonnell-Douglas* claim could obviously do so. As in *Smith*, he would argue that the employer's stated reason (towel theft) was pretextual, and that the real reason was race. This would be difficult for the plaintiff to prove unless either (a) the stated reason was flimsy, in the sense that the plaintiff's deviation from exemplary behavior was trivial; or (b) the deviation was substantial, but the employer tolerated similar deviations from whites or men without treating them the same way he treated the plaintiff. I suspect that prong (b) would usually be the decisive one, in which case, the plaintiff would need to produce evidence something like that in Table 2 in order to show pretext.

In a Mixed-Motives claim, the plaintiff will presumably face a similar burden. The worry is that after *Costa*, a non-exemplary plaintiff will be able to get to a jury with a claim such as "Sure I stole three towels, but here are a few racist remarks by my supervisor that suggest that my race also played a role in my firing." If in addition to the stray remarks, there is *also* evidence of disparities in firing rates *a la* Table 2, the plaintiff will almost certainly prevail; but of course he would also have reached the same outcome under *McDonnell-Douglas*. If the comparative evidence is more like that in *Smith* (as interpreted by the 8th Cir.), the defendant will probably have a convincing case that race was not considered at all (despite the stray remarks), and the plaintiff will end up no better off than he would have been under *McDonnell-Douglas*.

Table 4: Likely Outcomes by Type of Evidence and Liability Scheme		
	Type of Evidence	
Liability Scheme	Stray Remarks Only	Disparity in Firing Rate

McDonnell-Douglas	P probably loses	P wins
Mixed-Motives	P might win	P wins

The most interesting case is one in which neither side has *any* evidence about the treatment of similar non-exemplary employees, so that the jury only has plaintiff's non-exemplary behavior and the defendant's stray remarks to consider. In this instance, it does seem plausible that the plaintiff will be able to use the stray remarks as evidence that, even though there were some legitimate reasons for firing him, his race might also have been considered. If so, this would make him eligible to recover attorney's fees (at the discretion of the judge), which he would not have been able to receive under the traditional *McDonnell-Douglas* framework. The real question then becomes: how often will it happen that there is no evidence of similar or dissimilar treatment of other non-exemplary employees?