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DEVELOPING “TORT” STANDARDS FOR THE AWARD OF MENTAL DISTRESS DAMAGES IN STATUTORY DISCRIMINATION ACTIONS

Affronts to dignity are compensable by monetary damages for “mental distress”¹ through various tort actions.² Some courts recently have recognized significant similarities between the emotional injury suffered by victims of such “dignitary”³ torts and the emotional injury suffered by persons aggrieved under federal and state discrimination statutes.⁴ Increasingly, victims of discrimination have sued successfully under these statutes for mental distress damages.⁵

¹ “Mental distress” takes many forms and is referred to by many names. The injury discussed in this article is primarily one that is not caused by physical injury. Mental distress is therefore distinguished from “pain and suffering,” which is typically compensated in personal injury actions. See W. PROSSER, HANDBOOK OF THE LAW OF TORTS 46-62, 330-35 (4th ed. 1971). The “mental distress” of discrimination will refer here principally to the affront to dignity and the disruption of mental tranquility that accompanies the recognition of one’s inferior treatment by reason of membership in a statutorily suspect class. The most distinctive components of the injury are often described as embarrassment, humiliation, outrage, loss of dignity and disappointment.


³ The term “dignitary tort” is borrowed from C. GREGORY & H. KALVEN, CASES AND MATERIALS ON TORTS 961 (2d ed. 1969), and Curtis v. Loether, 415 U.S. 189, 196 n. 10 (1974).


The relation between tort remedies and discrimination has been


Courts are sharply divided on the availability of mental distress damages under § 626 (c) of the Age Discrimination in Employment Act (ADEA), 29 U.S.C. §§ 621-34 (1975), which provides for civil actions for "such legal or equitable relief as will effectuate the purposes" of the Act (emphasis added). The Third Circuit's opinion in Rogers v. Exxon Research and Eng'r Co., 550 F.2d 834 (3rd Cir. 1977), cert. denied, 46 U.S.L.W. 3431 (1978), reversing the cogent district court opinion holding mental distress damages available under the ADEA, 404 F. Supp. 324 (D.N.J. 1975), has been followed by a number of courts, Dean v. American
examined extensively, yet there has been little consideration of this relationship with respect to appropriate evidentiary standards for the


State anti-discrimination statutes have provided awards of mental distress damages in a number of cases. In the housing context, mental distress have been awarded in at least three states, Massachusetts Comm'n v. Against Discrimination v. Franzaroli, 357 Mass. 112, 256 N.E.2d 311 (1970); Williams v. Joyce, 4 Ore. App. 482, 479 P.2d 513 (1971); State Human Rights Comm'n v. Pauley, 212 S.E.2d 77 (W. Va. 1975), and have been awarded for discrimination in public accommodations in a comparable number of states, Amos v. Prom, Inc., 115 F. Supp. 127 (N.D. Iowa 1953); Batavia Lodge No. 196, Loyal Order of Moose v. N.Y.S. Division of Human Rights, 35 N.Y.2d 143, 359 N.Y.S.2d 25, 316 N.E.2d 318 (1974); Browning v. Slenderella Sys. of Seattle, 54 Wash. 2d 440, 341 P.2d 859 (1959).


Much of the discussion concerning the implication of tort remedies into federal discrimination statutes has centered upon 42 U.S.C. § 1988 (Supp. 1977), which provides in relevant part that

in all cases where [the laws of the United States] are not adapted to the object, or are deficient in the provisions necessary to furnish suitable remedies and punish offenses against the law, the common law, as modified and changed by the constitution and statutes of the [forum] State ...so far as the same is not inconsistent with the Constitution and laws of the United States, shall be extended to and govern ...in the trial and disposition of the cause. . .

In Sullivan v. Little Hunting Park, Inc., 396 U.S. 229 (1969), the Supreme Court interpreted § 1988 to mean "that both federal and state rules on damages may be utilized, whichever better serves the policies expressed in the federal statutes."

Id. at 240. Interestingly, few articles have considered § 1988 as a source of damage standards of liability; rather, it has been looked to as a source of implied substantive damage remedies for statutes, such as TITLE VII, which do not expressly provide full compensatory remedies. See, e.g., Note, Tort Remedies for Employment Discrimination Under Title VII, supra note 5 at 499-501. Similar arguments have been based on Textile Workers Union v. Lincoln Mills, 353
award of mental distress damages in discrimination cases. This article will consider such standards. After briefly tracing the history of mental distress award standards in discrimination cases, this article will critically examine present compensatory approaches in such cases and suggest an alternative philosophy more consonant with tort compensation principles.

I. PRESENT STANDARDS FOR THE AWARD OF MENTAL DISTRESS DAMAGES IN DISCRIMINATION CASES

A. Early History

Many present notions regarding the compensation of the psychological element of the discrimination injury derive from judicial conceptions of mental distress developed prior to Brown v. Board of Education and the modern federal civil rights statutes. In early cases under state discrimination laws, the courts often applied rigorous "intentional infliction of mental distress" standards to the determination of emotional distress liability. For example, in two early cases under state public accommodations statutes, courts in Iowa and Washington looked to further evidence of the "outrageousness" of the defendants' actions to support a mental distress award even though illegal discrimination had been proven. In doing so, the courts focused upon whether the discrimination had been effected by a recognizably "rude" act accomplished in the presence of others. The Supreme Court of Washington further required evidence of "severe" emotional distress; "mere" feelings of embarrassment or disappointment were not sufficient. The Washington court expressly rejected plaintiff's suggestion that victims of unlawful discrimination could be presumed under Washington law to have suffered mental


8 This article does not deal, however, with the availability of mental distress damages generally or under particular statutes. See notes 5 and 6 supra. Rather, it will analyze the standards applied by courts in cases under statutes already interpreted to provide such damages.

9 347 U.S. 483 (1954). See especially id. at 494, n.11, often regarded as the genesis of modern legal concern for the psychological effects of discrimination.


11 See RESTATEMENT (SECOND) OF TORTS § 46 and Comments d and k (1965); PROSSER, supra note 1, at 49-62.


14 See Browning, 341 P.2d at 865.
distress worthy of substantial monetary compensation.\textsuperscript{15} Perhaps because of such rigorous evidentiary standards, mental distress awards under early state discrimination laws were infrequent.\textsuperscript{16}

After Congress expressed a national policy against many types of discrimination in 1964,\textsuperscript{17} examination of the characteristics of the discrimination setting and the discriminator's conduct became less important in evaluating mental distress claims. The fact of unequal treatment itself was increasingly considered to be the primary source of emotional distress.\textsuperscript{18} This change in judicial focus better accommodates the peculiar nature of discrimination injury, although the shift of emphasis has not been unanimous.\textsuperscript{19} The humiliation and loss to dignity felt by a victim of discrimination is often unrelated to the "politeness" with which entitlements were denied or even to the inconvenience incurred in a later search for alternative housing, employment, or accommodation.\textsuperscript{20} Actionable discrimination has recently been found in totally "polite" contexts, where the victim confirms his suspicions of discriminatory motive or systemic discriminatory effect long after the facially neutral, yet discriminatory action was committed.\textsuperscript{21} Moreover, in housing and public accommodations contexts where the financial costs of finding alternative services are often low and the restoration of denied opportunities is often impractical, psychological injury may well be the only significant element of compensatory damage in a discrimination action and may be the element most important to the victim's sense of justice and legal vindica-

\textsuperscript{15} The Court suggested, however, that the character of such discrimination, its natural consequences, and the difficulties of proving damages might support a presumption of mental distress in the absence of contrary precedent. \textit{Id.}, at 865-66.

\textsuperscript{16} See cases cited in ANNOT., 40 A.L.R.3d 1290 (1970). \textit{But see} Cook v. Patterson Drug Co., 185 Va. 516, 39 S.E.2d 304 (1946) (white plaintiff recovered mental distress damages because he was treated as if he were black); Alabama & V. Ry. Co. v. Morris, 103 Miss. 511, 60 So. 11 (1912) (mental distress damages for defendant's failure to observe segregation laws, forcing plaintiff to associate with blacks; $15,000 jury verdict reduced to $2,000 on appeal).

\textsuperscript{17} \textit{See} Civil Rights Act of 1964.

\textsuperscript{18} \textit{Cf.} 1964 U.S. CODE CONG. & ADMIN. NEWS 2355, 2369-70 (1964): "The primary purpose of \textit{Title II} of the 1964 Civil Rights Act] then, 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, hamburgers 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."


\textsuperscript{21} In many housing discrimination situations, see cases cited in note 5 supra, where the prospective tenant is merely informed that no apartments are available, the offensiveness of the lessor's "facially neutral" act is realized only after the cooperation of a civil rights organization investigator reveals that the availability of the apartment was misrepresented. Similarly, there is nothing \textit{per se} rude or outrageous in the receipt of a "pink slip" or a denial of admission to a private school.
Virtually all courts now agree that such feelings of humiliation and injustice are compensable injuries under various anti-discrimination statutes, regardless of whether the defendant’s illegal discriminatory conduct was otherwise “outrageous.”

**B. Present Standards**

Although most courts have nominally discarded the intentional infliction of mental distress analysis in discrimination cases, suspicion concerning the genuineness and seriousness of alleged mental distress still influences the evidentiary standards for mental distress awards in discrimination cases. This suspicion remains despite judicial language recognizing that mental suffering, embarrassment, and humiliation are “direct,” “proximate,” or “natural” consequences of discriminatory conduct. Because victims of discrimination carry the burden of proving the genuineness and seriousness of their mental distress without the benefit of evidentiary presumptions, damage claims under Title VII and the nineteenth century civil rights acts bear resemblance to most tort bodily injury actions. Indeed, to the extent that courts in discrimination cases have required certain “guarantees of genuineness,” such as medical evidence of physical manifestations of distress, these cases resemble actions under the emerging theories of reckless or negligent infliction of mental distress which have evolved simultaneously with the rejection of

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23 Steele v. Title Realty Co., 478 F.2d 380, 384 (10th Cir. 1973); Hughes v. Dyer, 378 F. Supp. 1305, 1310 (W.D. Mo. 1974) (mental distress damages available even though discrimination “was perpetrated in a courteous manner and was not vindictive.”).


27 *See Prosser, supra* note 1, at 208-09, 330-31.

28 *Id.*, at 327-35.

29 The “reckless or negligent infliction of mental distress” is gaining recognition in two types of cases. First, where a plaintiff, though not injured physically, was the primary victim of a defendant’s negligence, courts have uniformly required proof of anxiety-related physical symptoms as a “circumstantial guarantee” of the mental distress claimed. *See, e.g.*, Hunsley v. Giard, 87 Wash. 2d 424, 553 P.2d 1096 (1976). The few ancient exceptions to this rule, including cases of the negligent transmission of a death message and the negligent handling of a corpse, in which the genuineness of mental distress has been presumed from the nature of the negligent act, have not lost their vitality, although they are generally recognized in only a minority of jurisdictions. *See Johnson v. State, 37 N.Y.2d 378, 334 N.E. 2d 590 (1975).* In the second type of case in which the “negligent infliction” cause of action has been recognized, the plaintiff’s mental distress is caused by witnessing an injury negligently or intentionally inflicted upon another person. Most courts have found such injuries unforeseeable and have refused any compensation. The few courts which have provided compensation have imposed the circumstantial guarantee requirements suggested by Prosser’s review of the cases. *See Prosser, supra* note 1, at 334-35. To warrant compensation, a plaintiff must prove not only an emotional response so severe as to generate actual physical injury, but also a close, usually immediate, family relationship with the primary victim and facts that tend to demonstrate the plaintiff’s contemporaneous
the tort "impact rule"\textsuperscript{30} in many jurisdictions.

\textbf{1. Proving Mental Distress—Medical evidence although seldom designated a prerequisite to recovery,\textsuperscript{31} has played an important role in almost all large mental distress damage awards in discrimination cases.\textsuperscript{32} The number of cases in which plaintiffs have presented medical evidence of mental distress, however, is extremely small.\textsuperscript{33} Mental distress, although severe, is not always manifested in physical symptoms.\textsuperscript{34} Even if symptoms are apparent, victims may not seek help for a number of practical reasons, including prohibitive cost, embarrassment, and feelings that the discrimination injury is medically illegitimate, not serious, or untreatable.\textsuperscript{35}


\textsuperscript{31} Seaton v. Sky Realty, Inc., 491 F.2d 634 (7th Cir. 1974) (no medical prerequisite); Broadway Realty, Inc. v. N.Y. State Division of Human Rights, 49 App. Div. 2d 422, 376 N.Y.S.2d 17 (1975) (requirement of corroboration, either by medical proof or by circumstantial guarantees of genuineness).

\textsuperscript{32} In Rogers v. Exxon Research and Eng'r Co., 404 F. Supp. 324 (D.N.J. 1975), extensive medical testimony cataloguing a series of serious anxiety-related afflictions was presented, and the plaintiff was awarded $750,000 for mental distress, the first six-figure mental distress damage award ever returned in a discrimination case. The trial judge remitted the jury verdict to $200,000, and the Third Circuit Court of Appeals subsequently vacated the award on statutory grounds, 550 F.2d 834 (3rd Cir. 1977). In other cases, evidence of hospitalization, loss of appetite, and headaches has helped victims of discrimination win more moderate awards for mental distress under anti-discrimination statutes. Allen v. Gifford, 368 F. Supp. 317 (E.D. Va. 1973) ($3500); Zahorian v. Russell Fit Real Estate Agency, 62 N.J. 399, 301 A.2d 754 (1973) ($750).


\textsuperscript{33} \textit{Cf.} notes 31-32 \textit{supra.}

\textsuperscript{34} In \textit{Combes v. Griffin Television, Inc.}, 421 F. Supp. 841 (W.D. Okla. 1976), a television anchorman discharged from his job on the basis of his age testified that he had suffered such symptoms as insomnia, depression, indigestion, and loss of weight as a result of his termination. \textit{Id.} at 847. The Court, commenting that there was "no evidence of any physical injury or need for a physician's care", \textit{id.} at 847, awarded the plaintiff only $500 in mental distress damages, indicating that even the term "physical symptoms" can be narrowly construed by courts in the discrimination context.

\textsuperscript{35} In Walker v. Fox, 395 F. Supp. 1303 (S.D. Ohio 1975), a tenant who witnessed her landlord's racially motivated refusal to rent an apartment to a prospective tenant testified that she "wrote letters to her family and talked to school and civil rights officials to work out the conflict and distress she felt." \textit{Id.} at 1306. It is likely that many victims of discrimination turn to similar sources for consolation rather than to more expensive and more stigmatizing "medical" sources.
testimony, describing his unfair treatment and his resultant feelings and exhibiting his general demeanor, is often the only evidence he can provide.\textsuperscript{36} Courts additionally have considered the plaintiff’s expectation of receiving equal treatment, evaluating this expectation in light of the nature of the service defendant provides and its advertised availability to the public.\textsuperscript{37} The extent to which the defendant directly exposed a plaintiff to public embarrassment in denying services or entitlements\textsuperscript{38} and the inconvenience experienced by the plaintiff in searching for alternative services\textsuperscript{39} may provide further evidence of mental distress.

In some jurisdictions, a victim of discrimination may be required to show that his mental distress was not attributable to unusual personal sensitivity. The plaintiff’s evidentiary burden in this regard has been defined inconsistently in some jurisdictions. For example, in 1974, the New York Court of Appeals held that circumstantial testimony must persuade the fact-finder that a “reasonable person of average sensibilities” could fairly be expected to suffer mental anguish from the defendant’s actions.\textsuperscript{40} One year later, a lower state court, ostensibly applying the Court of Appeals standard, held that a plaintiff’s mental anguish need only be “understandable under the circumstances” to be compensable.\textsuperscript{41} In a number of jurisdictions, fact-finders have considered the sensitivity of the victim, citing past experiences with discrimination or other predisposing circumstances, in augmenting the plaintiff’s mental distress damage award.\textsuperscript{42} In one New Jersey case, however, a plaintiff’s

\textsuperscript{36} Lichtman, \textit{supra} note 7, at 67, attributes much of the failure of mental distress claims in housing discrimination cases to the necessity of fact-finders “to rely heavily on personal experience as a guide to assessing damages.” Often such testimony is quite dramatic, \textit{see}, e.g., Smith v. Anchor Building Corp., 536 F.2d 231 (8th Cir. 1976); Lamb v. Sallee, 417 F. Supp. 282 (E.D. Ky. 1976), but has been largely ineffective in generating large mental distress awards. \textit{See} notes 48-50 infra.


\textsuperscript{38} Seaton v. Sky Realty, Inc., 491 F.2d 634 (7th Cir. 1974) (plaintiff humiliated in the presence of his children); Alcorn v. Anbro Eng’r, Inc., 2 Cal. 3d 493, 86 Cal. Rptr. 88, 468 P.2d 216 (1970) (employee humiliated in presence of other employees).


\textsuperscript{42} Steele v. Title Realty Co., 478 F.2d 380, 384 (10th Cir. 1973) (plaintiff “not a stranger” to acts of discrimination, having been denied housing facilities on the basis of race “in college towns across the country . . . on a number of occasions”); \textit{see also} Harrison v. Otto G. Heinzeroth Mortgage Co., 430 F. Supp. 893, 897 (N.D. Ohio 1977) (plaintiff “had lived in racially mixed neighborhoods with no problems”); Zamantakis v. Commonwealth Human Rights Comm’n, 10 Pa. Commw. Ct. 107, 111, 308 A.2d 612, 613 (1973) (plaintiff had recently returned from Vietnam and was “quite upset to find the freedom for which he had fought was being denied him here in the United States”; damage verdict vacated, however, on statutory grounds).
impressive academic record and “exceptional character” were cited in mitigation of his mental distress damage award, because such qualities were assumed to better equip a person to weather feelings of disappointment. The latter holding is unusual, but it does point out a potential dilemma for the plaintiff’s attorney. If the attorney presents evidence of a client’s sensitivity to discriminatory treatment, the fact-finder may conclude that the victim’s mental distress was not that of a “reasonable person of average sensibilities.” On the other hand, if the attorney puts forth evidence of the client’s dignified status and refinement in an effort to emphasize the insulting nature of the client’s inferior treatment, the fact-finder may decide that the client was able to endure discriminatory treatment without substantial injury.

A victim of discrimination may also fail to recover mental distress damages unless he can prove that his distress was proximately caused by the defendant’s discrimination. For example, medical testimony concerning physical manifestations of psychological stress has been frequently challenged on the basis that certain symptoms cannot be directly traced to a defendant’s actions or to emotional upset at all. Such challenges have achieved significant success in mitigating damage awards.

There is a division of authority as to whether mental distress suffered by a plaintiff during the trial of a discrimination case is a compensable injury. Some courts have found such injury an inevitable and compensable consequence of a wrongdoer’s wrongdoing, while another court has held that such injuries are merely the normal results of litigation and noncompensable.

2. Mental Distress Awards—Mental distress awards in discrimination cases appear to be less on the average than in analogous tort cases.

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43 In Gray v. Serruto Builder, Inc., 110 N.J. Super. 297, 265 A.2d 404, 416 (1970), the New Jersey Supreme Court disregarded medical evidence of mental distress to limit the plaintiff’s damages to $500, citing plaintiff’s “exceptional character,” impressive academic achievements, and significant athletic prowess in support of its assertion that plaintiff “is a man not likely to be bowled over by a single set-back,” a “strong man, not ... [a] weakling.”


47 There is no conclusive data concerning the average size of mental distress awards in either discrimination or other dignitary tort cases. Many of the decided cases are not reported, and many other cases are settled prior to litigation through negotiations which consider potential mental distress. Even in reported cases, the portion of a compensatory damage award attributable solely to mental distress is often not stated. Compare, however, the discrimination cases cited in note 52 infra with Clark v. I.H. Rubenstein, Inc., 335 So. 2d 545 (La. App. 1976) ($500 for wrongful detention of less than five minutes, due to shoplifting accusation); Hayes v. Dompe, 331 So. 2d 874 (La. App. 1976) ($500 damages for embarrassment and distress following wrongful seizure of furniture); Columbus Finance, Inc., v.
Individual plaintiffs have received compensation of $1000 or less in nearly three-quarters of the more than thirty-five reported discrimination cases awarding mental distress damages.\(^\text{48}\) All of the awards of less than $1000

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were determined by judges or administrative bodies, not by juries.\textsuperscript{49} Judges have not hesitated to exercise their power of remittitur to reduce jury verdicts they find "excessive" in light of the evidence presented.\textsuperscript{50} Although the number of cases on which the observation is based is small, judges and administrative decision-makers appear to be less likely then juries to award substantial mental distress damages in discrimination cases.\textsuperscript{51}

Significant barriers to the recovery of substantial mental distress damages are inherent in litigation of discrimination claims. Many states, for example, require that discrimination claims be heard by an administrative board either exclusively or as a prerequisite to the initiation of a civil action for damages.\textsuperscript{52} Such boards, however, often lack jurisdiction to hear claims for monetary damages.\textsuperscript{53} Therefore, in order to pursue a claim for damages in these states, victims of discrimination must either initiate actions in multiple forums or delay their damage actions until they acquire a favorable administrative determination of the defendant's liability. The potential costs of subsequently bringing a claim for mental distress in a state court may often significantly outweigh the likely benefits, even though some state discrimination statutes permit attorney's fee awards to be awarded to successful plaintiffs.\textsuperscript{54}

\textsuperscript{49} See cases cited in note 48 supra.


\textsuperscript{54} See, e.g., MASS. GEN. LAWS ANN. ch. 151B, § 5 (1975); N.M. STAT. ANN. §§ 4-33-11 (1975) ($1000 limit).
statutory limits on the amount of compensatory damage awards in discrimination cases.\textsuperscript{55}

\textbf{C. Focus of Reform}

Present standards for the award of mental distress damages in discrimination cases are far less restrictive that former "intentional infliction of mental distress" standards. Victims of discrimination no longer need to prove the "outrageousness" of the defendant's conduct nor the "severe" nature of their mental distress as conditions precedent to recovery. Present standards purport to place no greater burden on plaintiffs than in most tort contexts; however, they have generated very few large damage verdicts for plaintiffs.

Some barriers to substantial recovery are derived directly from the requirements of certain discrimination statutes and may only be removed by legislative reform. Other barriers appear related to the evidentiary standards that victims of discrimination must meet and can be eliminated by the judiciary. These latter barriers arise from the difficulty of proving the adverse psychological effects of discrimination and judicial skepticism about the propriety of compensating the discrimination injury. These impediments, as the remainder of this article will urge, are ones that courts and administrative boards can and should remove without further delay.

\section*{II. PROPOSED STANDARDS FOR THE AWARD OF MENTAL DISTRESS DAMAGES IN DISCRIMINATION CASES}

\textbf{A. Tort Analogies}

The language commonly cited to advocate application of tort damage standards to discrimination cases is that of Justice Marshall in \textit{Curtis v. Loether}.\textsuperscript{56}

An action to redress racial discrimination may also be likened to an action for defamation or intentional infliction of mental distress. Indeed, the contours of the latter tort are still developing, and it has been suggested that "under the logic of the common law of insult and indignity, racial discrimination might be treated as a dignitary tort".\textsuperscript{57}


\textsuperscript{56} 415 U.S. 189 (1974). \textit{See} note 4 \textit{supra}.

\textsuperscript{57} 415 U.S. at 196 n. 10.
Justice Marshall's comments are provocative because they suggest the desirability of compensating consequences of discrimination as tortious injuries. The mention of defamation and the intentional infliction of mental distress as equally valid tort analogies, however, muddles the formulation of proper evidentiary standards for the award of mental distress damages in discrimination cases. As previously shown, the evidentiary requirements for proving intentional infliction of mental distress are very strict and courts seldom apply them in discrimination cases. The common law of defamation, on the other hand, represents the branch of dignitary tort law providing the most liberal compensation for the psychological consequences of dignitary injury because it employs a presumption of general damages and often requires a showing of only minimal actual injury. Nevertheless, this latter branch of tort law has been ignored by courts and commentators who support application of "tort" damage standards to discrimination cases.

Defamation awards are intended to compensate injuries to the plaintiff's reputation and, some commentators have argued, the consequential loss in emotional tranquility. The difficulties of ascertaining the extent of intangible injury are avoided by presuming the existence of such injury in certain categories of defamatory publication. For example, oral statements that impute to the plaintiff a serious crime, a loathsome disease, a lack of chastity, or qualities incompatible with his trade or business, as well as printed statements deemed "defamatory on their face" are held so likely to cause damage to reputation that such cases, absent First Amendment considerations, can be submitted to juries without any proof of actual loss. Even if the defamation does not fit into one of the

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58 See notes 12-16 and accompanying text supra.
59 This is especially true of the common law of defamation prior to recent constitutional modification. See note 64 infra.
60 See articles cited in notes 6 & 7 supra.
61 Cf. Dobbs, supra note 2, at 510.
62 Id. at 512.
63 Dispelling the notion that such categorizations are losing their vitality are cases such as Prince v. Peterson, 538 P.2d 1325 (1975), in which the Utah Supreme Court significantly expanded the "business" category of slander per se. Id. at 1328.
64 See Dobbs, supra note 2, at 512; Sauerhoff v. Hearst Corp., 538 F.2d 588 (4th Cir. 1976).

The presumption of damages in defamation cases was directly confronted by the Supreme Court in Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974), a case involving press defamation of non-public figures. Rather that apply the "knowledge of reckless disregard" standard of N.Y. Times v. Sullivan, 376 U.S. 255 (1964), the court adopted an intermediate negligence standard of liability somewhat less protective of defendants' First Amendment interests. Fearing that the intermediate standard alone would not adequately protect First Amendment rights from the "chill" created by the threat of large jury verdicts, the majority in Gertz found it necessary "to restrict defamation plaintiffs who do not prove knowledge of falsity or reckless disregard for the truth to compensation for actual injury." 418 U.S. at 349 (emphasis added). The majority defined "actual injury" in expansive language, declaring that such injury "is not limited to out-of-pocket loss" and includes "the more customary types of actual harm" such as "impairment of reputation, and standing in the community, personal humiliation, and mental anguish and suffering." 418 U.S. at 349-50 (emphasis added).

The Gertz requirement the mental distress be proven rather than presumed is not appropriately applied to most discrimination cases. Few discrimination defendants can assert constitutional interests of the integrity of freedom of expression in their defense. Moreover,
categories of *per se* liability, most courts hold that upon a showing of consequential pecuniary loss or "special damages," the cause of action for general damages can be submitted to the fact-finder as if defamation *per se* had been proven.65

The fact-finder in defamation cases is free to make its own reasonable estimate of a plaintiff's probable loss of reputation in the community, lessened esteem among peers, and most significantly in the view of some courts, damage to emotional tranquility.66 Defendants bear the burden of coming forward with evidence rebutting or mitigating the reputational and mental distress elements of a plaintiff's damage action.67 Furthermore, courts sometimes increase the defendant's burden by barring, as unduly prejudicial, evidence showing, for example, that the plaintiff possessed such a callous disposition that any mental distress suffered due to the defendant's actions could not have been of substantial severity.68

The concept of "presumed" damages is not confined to the tort of defamation. In civil rights actions under 42 U.S.C. § 1983,69 the courts have developed an element of damages that may best be characterized as compensation for "the loss of civil rights *per se*."70 This award is de-
signed to compensate persons for intangible injuries caused by the loss of legal rights alone, independent of physical injury or monetary damage caused by a defendant State agent's actions.\textsuperscript{71} Although some courts have viewed this award as compensation for "a taking" of legal rights,\textsuperscript{72} the injury redressed is a purely psychological one, representing the shock, disgust, and disappointment experienced when a government agent violates rights that the law guarantees.\textsuperscript{73} Though the Supreme Court in \textit{Carey v. Phiphus}\textsuperscript{74} has held that only nominal damages may be presumed in a section 1983 action for deprivation of \textit{procedural} due process rights,\textsuperscript{75} the

\textsuperscript{71} Rivera Morales v. Benitez de Rexach, 541 F.2d 882 (1st Cir. 1976) (patronage firing in violation of associational rights; $10,000 for "pain and suffering"); Endress v. Brookdale Community College, 144 N.J. Super. 109, 141-43, 364 A.2d 1080, 1097-98 (1976) (discharge without due process; $10,000 award reduced to $2500); Bruce v. Board of Regents for Northwest Mo. State Univ., 414 F. Supp. 559 (W.D. Mo. 1976) (discharge without due process; damage hearing ordered); Hostrop v. Board of Junior College Dist. No. 515. 523 F.2d 569 (7th Cir. 1975), cert. denied, 425 U.S. 963 (1976) (discharge without due process; remanded for damage determination); Glasson v. City of Louisville, 518 F.2d 899 (6th Cir. 1975), cert. denied, 423 U.S. 930 (1975) (picketer's freedom of speech violated; remanded for damage determination); Manfredonia v. Barry, 401 F. Supp. 762 (E.D.N.Y. 1975) (unlawful arrest; $3500). See also Dellums v. Powell, 566 F.2d 167 (D.C. Cir. 1977) (jury can award damages to demonstrators arrested in violation of first and fourth amendment rights on class-wide basis, but only for losses of rights "actually sustained" and not based on "platitudes about priceless rights"); jury award of $7500 per plaintiff found excessive).

\textsuperscript{72} In \textit{Carey v. Phiphus}, 46 U.S.L.W. 4224, 4226 (1968), discussed in notes 74-76 \textit{infra}, the Supreme Court rejected respondents' characterization of § 1983 damages as compensation for deprivations of "constitutional rights . . . valuable in and of themselves." Rather, the Court accepted petitioners' contention that "the basic purpose of a § 1983 damages award should be to compensate persons for injuries caused by the deprivation of constitutional rights." (emphasis added). Hence, the focus in § 1983 cases is the compensation of psychological injury actually suffered by complainants. The issue before the Court in \textit{Carey} was the circumstances under which fact-finders may \textit{presume} such injury to have occurred, relieving complainants of the burden of coming forward with evidence of actual emotional injury.

\textsuperscript{73} See \textit{DOBBS}, \textit{supra} note 2, at 731.

\textsuperscript{74} 46 U.S.L.W. 4224 (1978).

\textsuperscript{75} In \textit{Carey}, a district court found that although public school officials had suspended two students for justifiable reasons, they had failed to accord those students requisite procedural due process in doing so. The district court refused to award damages under § 1983 because plaintiffs put forth no evidence of actual psychological injury resulting from the absence of an appropriate opportunity to be heard. The Court of Appeals for the Seventh Circuit reversed and remanded, 545 F.2d 30 (7th Cir. 1976), holding that plaintiffs were entitled to recover substantial compensatory damages simply because they had been denied due process and that plaintiffs were not obligated to prove any individualized injury.

The Supreme Court reversed the seventh circuit, limiting its discussion to the award of presumed damages in \textit{procedural} due process cases. The Court cited three reasons for its holding that in such cases, absent proof of actual psychological injury, aggrieved parties are entitled to recover only nominal damages "not to exceed one dollar." 46 U.S.L.W. at 4229. First, distinguishing the award of presumed damages in defamation \textit{per se} cases, the Court held that it is "not reasonable to assume that every departure from procedural due process,
Court’s decision suggests that courts may continue to presume substantial damages for emotional harm where certain “substantive” legal rights have been violated. Where presumed damages are authorized under section 1983, it is difficult to imagine, and no court has indicated, what type of evidence a defendant might put forth in rebuttal or mitigation of damages.

**B. Application to Discrimination**

The preceding consideration of common law defamation and section 1983 “statutory tort” actions clearly shows that “tort law” is not uniform in its approach to compensating mental distress injury, and in some contexts provides substantial monetary damages to compensate for psychological injury. In affording mental distress damages under discrimination statutes that do not outline evidentiary standards, courts should draw on the full range of tort damage theories to develop evidentiary presumptions and inferences that accommodate the peculiar nature of the discrimination injury and the difficulties of its proof.

Judicial power to create evidentiary presumptions derives from the inherent authority of judges to institute sensible and time-saving evidentiary rules that allow certain inferences to be shown unless contrary evidence is presented. Traditionally, the exercise of this discretion has

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76 The Court commented, 46 U.S.L.W. at 4228-29:

The Court of Appeals believed . . . that cases dealing with awards of damages for racial discrimination, the denial of voting rights, and the denial of Fourteenth Amendment rights, support a presumption of damages where procedural due process is denied. . . . [T]he elements and prerequisites for recovery of damages appropriate to compensate injuries caused by the deprivation of one constitutional right are not necessarily appropriate to compensate injuries caused by the deprivation of another. . . . [T]hese issues must be considered with reference to the nature of the interests protected by the particular constitutional right in question. For this reason, and without intimating an opinion as to their merits, we do not deem the cases relied upon to be controlling.

77 In *Carey v. Piphus*, the Supreme Court expressed an identical philosophy with regard to the interpretation of § 1983:

In order to further the purpose of § 1983, the rules governing compensation for injuries caused by the deprivation of constitutional rights should be tailored to the interests protected by the particular right in question—just as the common-law rules of damages themselves were defined by the interests protected in the various branches of tort law.

46 U.S.L.W. at 4227.

78 See *McCormick’s Handbook on the Law of Evidence* § 343 (2d ed. Cleary ed. 1972) [hereinafter cited asMcCormick]. See also E. Morgan, *Basic Problems of Evidence* 32-33 (1963) (“to produce a result in accord with the preponderance of probability”); Greer v. United States, 245 U.S. 559, 561 (1918) (Holmes, J.) (“common experience shows the facts to be so generally true that courts may notice the truth”).
been motivated by strong social policies favoring one class of litigants over another. The "make whole" purpose of discrimination statutes is consistent with evidentiary presumptions in favor of victims of discrimination, especially for those who have already proven illegal discrimination. Moreover, the Supreme Court has held in cases involving sections 1982, 1983, and 1988 that the Civil Rights Acts of 1866 and 1871 authorize courts to turn to state common law principles where these statutory provisions are inadequate to fulfill federal remedial purposes.

The strong likelihood that plaintiffs will have suffered substantial mental distress is a further reason for raising an evidentiary presumption of mental distress for those who raise meritorious claims in many types of discrimination cases. The presumption would be most appropriate for conduct which is clearly discriminatory and cannot be supported by any legitimate justifications, since such conduct often unequivocally communicates a message of inferiority. Presumptions may also be appropriate in cases that involve modes of discrimination which are more subtle yet affect benefits and opportunities crucial to the victim's well-being, such as retention of a job.

The beneficiary of a presumption of mental distress would be entitled to recover a minimum award of damages without introducing any evidence of injury, although victims would of course be free to present medical or other evidence of emotional distress. Defendants could rebut such presumptions with adequate evidence. For example, evidence that the victim acted solely for the purpose of encouraging a defendant's well-known discriminatory behavior with no genuine desire to seek the defendant's services might suffice to rebut a presumption of mental distress. Courts might also rely on other unusual circumstances, especially where a plaintiff has suffered no physical or economic loss as a result of a defendant's discrimination, to rebut the presumption.

79 See McCormick, supra note 78.
81 See notes 5, 6, 24 & 69-71 supra.
82 Indeed, there is a growing line of § 1982 cases, see note 5 supra, which, despite the lack of "state" involvement, have awarded what appear to be § 1983 damages for the violation of civil rights per se. See notes 69-71 and accompanying text supra: see also Carey v. Piphus, 46 U.S.L.W. 4224, 4228-29, n. 22 (1978); Williams v. Matthews Co., 419 F.2d 819 (8th Cir. 1974); Seaton v. Sky Realty Co., Inc., 491 F.2d 634 (7th Cir. 1974); Smith v. Sol D. Adler Realty Co., 436 F.2d 344 (7th Cir. 1971); Hughes v. Dyer, 378 F. Supp. 1305 (W.D. Mo. 1974). In Hodge v. Seiler, 558 F.2d 284 (5th Cir. 1977), a § 1982 suit between private parties concerning the discriminatory denial of an apartment, a claimant testified that she was not upset when she discovered the defendant's discriminatory motive and did not feel as though she was entitled to damages for emotional distress. Nevertheless, the Fifth Circuit held that the claimant was entitled to "at least nominal damages" because she was denied "a constitutional right" from which "damage could be presumed." 558 F.2d at 287-88. Similar language has also appeared in housing discrimination cases under Title VIII. See Stevens v. Dobs, Inc., 373 F. Supp. 618 (E.D.N.C. 1974); McNeil v. P-N & S. Inc., 372 F. Supp. 658 (N.D. Ga. 1973). See also WASH. REV. CODE ANN. § 49.60.225 (Supp. 1976) (up to $1000 "for the loss of the right to be free from discrimination.").
83 See Hodge v. Seiler, 558 F.2d 284 (5th Cir. 1977), where a claimant's awareness of her legal remedy prevented her from becoming upset when she learned of the defendant's discrimination.
C. Limitations of the Presumed Damage Approach

A presumption of mental distress injury, even in a limited range of discrimination contexts, would be vulnerable to a number of criticisms. There is no express statutory support for such a concept, and its adoption would exacerbate the perennial concern for “run-away” jury verdicts. Furthermore, although a statutory presumption might result in an increase in the number of awards, it would not necessarily lead to significantly greater mental distress awards, especially in courts that have traditionally disfavored the mental distress remedy.

A presumption of mental distress injury would be virtually impossible to rebut. A defendant would face great difficulty in disproving the existence of an intangible condition about which the victims have virtually exclusive knowledge. Moreover, defendants would have very little access to information concerning the quantum of mental distress compensation due to a victim of discrimination, in contrast to the presumption of back pay imposed upon proof of certain Title VII employment discrimination violations. These same criticisms, however, can be made of the present mental distress compensation philosophy even though it does not provide for a presumption of mental distress. Under the present compensation philosophy, the difficulty of rebutting plaintiff testimony concerning intangible emotional injury has led to attacks on victim credibility and attempted proof of the victim’s hardened disposition. A presumption would lessen the necessity for such exchanges of testimony, which place a premium on the ability of victims to describe complex, intangible feelings and to field questions from defendants of dubious relevance. In addition, these exchanges usually waste time, and are often needlessly prejudicial to the victim.

Opposition to such a virtually irrebuttable presumption may be tempered by limiting its application to cases in which it is most appropriate. In Title VIII housing discrimination cases, for example, courts have awarded mental distress damages not only to victims of discrimination, but to spouses and even co-tenants of the victims. Although the anguish of such third parties should be considered a compensable injury,

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85 In Lamb v. Sallee, 417 F. Supp. 282 (E.D. Ky. 1976), both spouses of an interracial marriage received an award for the humiliation and emotional anguish they experienced when their landlord evicted them after discovering that Mrs. Sallee was black. See also Bishop v. Pecsok, 431 F. Supp. 34 (N.D. Ohio 1976) ($1500 awarded to interracial couple); Hodge v. Seiler, 558 F.2d 284 (5th Cir. 1977) ($500 awarded to black husband; “at least nominal damages” must be awarded to white wife).
86 In Walker v. Fox, 395 F. Supp. 1303 (S.D. Ohio 1975), a white tenant recovered $500 for mental distress in a Title VIII action, initiated after the tenant had witnessed her landlord misrepresent the availability of an apartment to a prospective black tenant. The Walker decision is an extension of the Supreme Court’s opinion in Trafficante v. Metropolitan Life Ins. Co., 409 U.S. 205 (1972), where the Court held that under Title VIII a tenant in the housing unit from which a prospective tenant is discriminatorily excluded can allege the requisite “injury in fact” to maintain standing to challenge his landlord’s actions. 409 U.S. at 210, 212.
the less predictable nature of the injury and the greater likelihood that such parties would be encouraged to raise fictitious claims strongly suggest that a presumption in their favor would be inappropriate. A claim for mental distress damages on behalf of a large class, particularly in cases of employment discrimination, may also be an inappropriate occasion for invoking the presumption. The employer or union who maintains a discriminatory promotional system or who uses hiring criteria that are unrelated to the job and disproportionately exclude disfavored groups, inflicts disappointments and frustrations upon many employees. To establish a presumption of mental distress injury on behalf of a large class, however, is to expose defendants to enormous and virtually unavoidable liability. Though the nature of the employment discrimination injury seems highly deserving of mental distress compensation, only recently has there been a realistic proposal for making such damages available under federal anti-discrimination statutes. Perhaps imposing a presumption of mental distress damages only in single-plaintiff discrimination cases makes sense, for damage claims in those cases most closely resemble standard tort actions.

III. SUMMARY & CONCLUSION

The recognition that discrimination is a tort-like injury meriting tort-like remedies has led to the increasing availability of mental distress damages under federal and state discrimination statutes. Yet the evidentiary standards for the award of mental distress damages are not mandated by the terms of discrimination statutes; judges determine the requisites for proving compensable mental distress. The philosophy of compensation for mental distress that courts have adopted in discrimination cases is in some ways more restrictive than the compensation philosophy courts have adopted in analogous dignitary tort contexts. As the availability of the mental distress remedy proliferates, courts should be sensitive to the circumstances characterizing various types of discrimination cases and should adjust the evidentiary standards for the award of mental distress damages accordingly, just as they have done in the various tort contexts in which mental distress damages have traditionally been available.

This article advocates the adoption of evidentiary presumptions in favor of certain victims of discrimination who suffer mental distress. Such a presumption, if widely adopted, might insure that mental distress claims of discrimination victims will be seriously considered, and that most

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defendants will be compensated for mental distress. Small verdicts in the absence of defendant rebuttal evidence might give appellate courts a firmer basis for evaluating and modifying such awards. Most importantly, however, the presumption would recognize the legitimacy and seriousness of the mental distress injury, the quintessential discrimination harm.

—Harold J. Rennett