

MAKING TOO MUCH OF TOO LITTLE?: WHY “MOTIVATING FACTOR” LIABILITY DID NOT REVOLUTIONIZE TITLE VII

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Although the correct causation standard for various employment discrimination statutes continues to be much debated, the most generous standard for plaintiffs—Title VII’s “motivating factor” rule for status discrimination claims—has not had much effect on the ground. In theory, and without much hyperbole, motivating factor seems to require finding a violation when even a smidgeon of bias is implicated in an adverse employment decision. While such a finding will not necessarily entitle the plaintiff to full remedies—since the employer remains able to limit the employee’s recovery by proving that it would have made the same decision in any event—the defendant will be adjudicated a violator and be subject to meaningful sanctions.

Given this extraordinarily favorable causation structure and substantial evidence that bias continues to manifest in persistent ways in this country, one would expect plaintiffs to be enjoying great success in bringing Title VII status discrimination claims. Perhaps needless to say, that is not the reality.

This Article attempts to explain the failure of the motivating factor revolution. It offers three interacting possibilities: First, motivating factor is such a dramatic departure from traditional causation analysis that courts understandably have a hard time implementing the concept. Second, and blending into the first, is judicial resistance to such wholesale intrusion into employment decision-making, a hostility manifested in a number of ways but most notably in the broader formulations of the “stray-remark” doctrine that have dramatically limited the potential impact of motivating factor liability. Third, plaintiffs’ attorneys have shied away from robustly framing their claims in terms of motivating factor liability because that litigation

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structure subjects their clients to an employer's remedy-limiting affirmative defense of "same decision anyway." Not only does that structure create a tactical problem for many plaintiffs, but it also inevitably generates a conflict of interest between attorney and client: The liability/same decision structure allows juries to reach compromise verdicts and, when they do, deny the plaintiff monetary recovery other than fee awards that typically go to their attorney.

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INTRODUCTION

Much ink has been spilled on the question of whether but-for causation or "motivating factor" causation applies to a wide variety of federal¹ and state² employment discrimination statutes, and rivers more are in prospect after the Supreme Court's recent grant of certiorari in two cases. To date, the Court has held that Title VII's "status discrimination" provisions are subject to a relaxed "motivating factor" causation requirement³ but that the Age Discrimination in Employment Act⁴ ("ADEA") and Title VII's prohibition on retaliation⁵ require the more demanding but-for cause standard. And this term the Court has already applied the but-for test to 42 U.S.C. § 1981,⁶ which prohibits racial discrimination in

1. See generally, e.g., Michael C. Harper, *The Causation Standard in Federal Employment Law: Gross v. FBL Financial Services, Inc., and the Unfulfilled Promise of the Civil Rights Act of 1991*, 58 BUFFALO L. REV. 69 (2010) (discussing but-for and motivating factor causation in relation to federal employment law and arguing that Congress should clarify when motivating factor causation applies).

2. See generally Kevin J. Koai, Note, *Judicial Federalism and Causation in State Employment Discrimination Statutes*, 119 COLUM. L. REV. 763 (2019) (surveying state decisions on the proper interpretation of state laws given the two distinct approaches to causation found in federal law).

3. See *Desert Palace, Inc. v. Costa*, 539 U.S. 90, 101 (2003).

4. See *infra* text accompanying note 30.

5. See *infra* text accompanying note 30.

6. 42 U.S.C. § 1981 (2018).

contracting,⁷ and a hybrid of but-for and something that looks a lot like motivating factor causation under the federal employee provisions⁸ of the ADEA.⁹

One wonders what all the fuss is about. The Civil Rights Act of 1991 (“CRA”), which codified motivating factor causation for Title VII, was supposed to be the counterrevolution for employment discrimination, but it has proven to be a distinct failure. Most of the CRA’s provisions were designed to legislatively override a cluster of 1989 Supreme Court decisions cutting back on the reach of the antidiscrimination statutes.¹⁰ But one set of amendments aimed to extend *Price Waterhouse v. Hopkins*,¹¹ which was universally viewed as strongly pro-plaintiff.¹² *Price Waterhouse*, however, lacked a majority opinion, and the Civil Rights Act’s

7. *Comcast Corp. v. Nat’l Ass’n of African Am.-Owned Media*, No. 18-1171, 2020 U.S. LEXIS 1908 (Mar. 23, 2020).

8. 29 U.S.C. § 633a(a) (2018).

9. *Babb v. Wilkie*, No. 18-882, 2020 U.S. LEXIS 2184 (Apr. 6, 2020), added yet another causal wrinkle. It refused to apply the default but-for causation rule to federal employee ADEA claims (and, presumably, federal employee race and sex claims given the similar phrasing of Title VII) because the relevant statute required personnel actions to be “free of” such discrimination. For the Court, that meant that the statute mandated a process free of discrimination not merely an outcome. Thus, “personnel actions [must] be untainted by any consideration of age.” *Id.* at *6–7.

Given the Court’s stress on the breadth of “any,” *id.* at *11 n.2, this would seem to be at least as broad as motivating factor liability. While the Court never draws a precise parallel with that standard, it does say that “[i]f age discrimination plays any part in the way a decision is made, then the decision is not made in a way that is untainted by such discrimination.” *Id.* at *13. That might suggest the same rule for proof of a violation under both regimes, although Justice Thomas’s dissent views *Babb* as imposing an even lower causal standard. *Id.* at *33 n.2 (“[T]he Court’s ‘any consideration’ rule imposes an even lower bar.”).

While this is plaintiff-friendly, the Court was explicit that remedies had to be linked to the violation established. That would bar any compensatory monetary relief unless the plaintiff established but-for causation for the outcome of the challenged personnel action. Thus, but-for cause remains controlling for compensation recovery and, unlike motivating factor liability under § 703(m), there is no shifting of the burden of persuasion on that issue. For plaintiffs claiming age discrimination, that’s a net gain; but if applied to Title VII plaintiffs, who might otherwise have the benefit of motivating factor causation shift, that might well be a net loss.

10. Two salient examples are the reviving of the disparate impact theory of liability, which many viewed as gutted by *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642 (1989), see generally Charles A. Sullivan, *Disparate Impact: Looking Past the Desert Palace Mirage*, 47 WM. & MARY L. REV. 911 (2006) [hereinafter Sullivan, *Mirage*], and expanding the reach of 42 U.S.C. § 1981 to overturn *Patterson v. McLean Credit Union*, 491 U.S. 164 (1989), see Jack M. Beerermann, *The Unhappy History of Civil Rights Legislation, Fifty Years Later*, 34 CONN. L. REV. 981, 1000–01 (2002).

11. 490 U.S. 228, 251 (1989).

12. *E.g.*, Linda Greenhouse, *Court, 6-3, Eases Task of Plaintiffs in Job-Bias Suits*, N.Y. TIMES, May 2, 1989, at A1 (“The Supreme Court, ruling in a significant job discrimination case, today made it easier for plaintiffs to prevail in many lawsuits based on sex, race and age discrimination in employment.”).

codification replaced it with a unified statutory rule.¹³ In doing so, Congress enshrined the plurality's framing of the law, the most employee friendly of the various opinions finding for plaintiff. However, the Act went further than any of the six justices would have in one important respect: It provided that, once plaintiff had established that a prohibited consideration was "a motivating factor" in an adverse employment action, plaintiff would prevail—regardless of whether that factor actually caused the final decision. *Price Waterhouse* itself (while shifting the burden of persuasion to the defendant as to causation when plaintiff established bias as a motivating factor) would have found no liability in that situation. That case thus preserved but-for causation as a requirement for liability. Congress's rejection of but-for causation as a prerequisite for liability, therefore, was a dramatic development for the antidiscrimination project,¹⁴ or at least promised to be.¹⁵ That promise has not been kept, and recognition of that fact casts a somewhat jaundiced light on the significance of current doctrinal controversies.

To understand this development, a little history will help. *Price Waterhouse* was a "mixed motive" case; that is, there was reason to believe that the employer had acted for both permissible and impermissible motives. In such settings, the four-justice plurality and two concurrences agreed that a burden of persuasion would shift from the plaintiff to the defendant as to whether the challenged adverse employment action was caused by bias. The plurality, authored by Justice Brennan, required the plaintiff to prove that bias was a "motivating factor"

13. Civil Rights Act of 1991, Pub L. No. 102-166, § 107(a), 105 Stat. 1071 (codified as 42 U.S.C. § 2000e-2(m) (2018)) ("[A]n 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 motivated the practice.").

14. The House Committee report criticized the plurality opinion for exonerating defendants when discrimination operated but did not cause an adverse decision. "The inevitable effect . . . is to permit prohibited employment discrimination to escape sanction under Title VII." H.R. Rep. No. 102-40(I), at 46 (1991), reprinted in 1991 U.S.C.C.A.N. 549, 584. The problem is a "common one." *Id.* at 47. For Title VII to be meaningful, "victims of proven discrimination must be able to obtain relief [the report had just spoken of injunctions barring future discrimination] and perpetrators of discrimination must be held liable for their actions." *Id.* One commentator described the amendments as "Congress reject[ing] a decision by the more liberal group on the Court as too restrictive on plaintiffs' rights under Title VII." Beermann, *supra* note 10, at 1026 n.246.

15. Some early commentators claimed that motivating factor liability could allow plaintiff to avoid the strictures of traditional analyses. *E.g.*, Melissa A. Essary, *The Dismantling of McDonnell Douglas v. Green: The High Court Muddies the Evidentiary Waters in Circumstantial Discrimination Cases*, 21 PEPP. L. REV. 385, 427 (1994). After the Supreme Court's decision in *Desert Palace, Inc. v. Costa*, 539 U.S. 90 (2003), a cottage industry of articles discussed whether motivating factor liability would entirely replace *McDonnell Douglas*. *See, e.g.*, William R. Corbett, *McDonnell Douglas, 1972-2003: May You Rest in Peace?*, 6 U. PA. J. LAB. & EMP. L. 199, 219 (2003); Jeffrey A. Van Datta, "*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, 76 (2003).

in order to trigger this shift.¹⁶ Justices O'Connor and White wrote separate concurrences, each speaking of a "substantial factor,"¹⁷ and O'Connor also required "direct evidence" before shifting burdens.¹⁸

In the wake of the decision, there was considerable confusion as to whether there was a difference between "motivating" and "substantial factor,"¹⁹ and, for those courts that thought that Justice O'Connor's opinion provided the controlling rule of law,²⁰ what constituted "direct evidence."²¹ Many decisions required some version of the O'Connor test before invoking a mixed-motives framework, both before and after the Civil Rights Act.²² While both issues were ultimately held to have been resolved by the 1991 Act, it took more than a decade for the Supreme Court to address the direct evidence question and a little longer to confirm that motivating factor was less than but-for causation.

16. *Price Waterhouse*, 490 U.S. at 250 (Brennan, J.) (plurality opinion) ("motivating part").

17. *Id.* at 259 (White, J., concurring); *id.* at 278 (O'Connor, J., concurring).

18. *Id.* at 277 (O'Connor, J., concurring).

19. Justice O'Connor clearly thought "substantial factor" was more demanding than "motivating factor." *Id.* at 277–78 ("It should be obvious that the threshold standard I would adopt for shifting the burden of persuasion to the defendant differs substantially from that proposed by the plurality, the plurality's suggestion to the contrary notwithstanding."). But commentators disagreed. Martin J. Katz, *The Fundamental Incoherence of Title VII: Making Sense of Causation in Disparate Treatment Law*, 94 GEO L. J. 489, 508 (2006) [hereinafter Katz, *Making Sense*] (arguing that "given the terms of the current debate over causation, the 'substantial factor' test cannot logically be more restrictive than 'motivating factor'/minimal causation."); Brian S. Clarke, *A Better Route Through the Swamp: Causal Coherence in Disparate Treatment Doctrine*, 65 RUTGERS L. REV. 723, 741–42 (2013) (looking to the precedential origins of both phrases to conclude that both referred to but-for causation). The latter argument has since been definitively rejected by the Court. *See Univ. of Tex. Sw. Med. Ctr. v. Nassar*, 570 U.S. 338, 348 (2013); *see also* discussion *infra* note 32.

20. *See Marks v. United States*, 430 U.S. 188, 193 (1977) (holding that, absent a majority agreeing on a rationale for a ruling, the holding of the Court is the narrowest ground of those who concurred in the judgment); *see also* *Gross v. FBL Fin. Servs.*, 557 U.S. 167, 188–89 (2009) (Stevens, J., dissenting) ("Because Justice White provided a fifth vote for the 'rationale explaining the result' of the *Price Waterhouse* decision, *Marks*, his concurrence is properly understood as controlling, and he, like the plurality, did not require the introduction of direct evidence.").

21. The term has been criticized as incoherent. *See* Charles A. Sullivan, *Accounting for Price Waterhouse: Proving Disparate Treatment Under Title VII*, 56 BROOK. L. REV. 1107, 1118–19, 1130–31 (1991) [hereinafter Sullivan, *Accounting*]. But to Justice O'Connor, it seemed to mean something like contemporaneous admissions by the decision-maker that the prohibited consideration was at play in that decision. She contrasted such evidence with "stray remarks." *See* discussion *infra* note 132. Lower courts struggled with the concept. *See, e.g.,* *Fernandes v. Costa Bros. Masonry, Inc.*, 199 F.3d 572, 580–81 (1st Cir. 1999) (reviewing various circuits' approaches to the necessity of some version of "direct evidence" prior to *Desert Palace*).

22. Michael A. Zubrensky, Note, *Despite the Smoke, There Is No Gun: Direct Evidence Requirements in Mixed-Motives Employment Law After Price Waterhouse v. Hopkins*, 46 STAN. L. REV. 959, 961, 973–78 (1994).

On the first point, *Desert Palace, Inc. v. Costa*²³ held in 2003 that there was no direct evidence limitation on using motivating factor analysis. Thus, “[i]n order to obtain an instruction under [§ 703(m)], a plaintiff need only present sufficient evidence for a reasonable jury to conclude, by a preponderance of the evidence, that ‘race, color, religion, sex, or national origin was a motivating factor for any employment practice.’”²⁴ Because direct evidence was no longer required,²⁵ one important potential limitation on motivating factor liability was stripped away.²⁶

On the second point, the *Price Waterhouse* plurality and the concurring opinions had found that a plaintiff could prevail even absent proof of but-for causation, and § 704(m)’s adoption of its “motivating factor” test clearly signaled approval of that approach. However, the 1991 Amendments went further than any of the *Price Waterhouse* justices. The plurality and concurrences would have allowed the employer to escape liability by carrying a burden of persuasion that, even though a motivating factor was at play in the decision, the employer would have made the same decision in any event.

The Civil Rights Act retained a “same decision” affirmative defense but demoted it to a limitation on plaintiff’s remedies rather than negating defendant’s

23. 539 U.S. 90, 92 (2003).

24. *Id.* at 101.

25. This is not to say that “direct evidence” has disappeared in the cases. Courts continue to privilege some version of direct evidence in deciding Title VII status discrimination cases. Indeed, for years after *Desert Palace* the Seventh Circuit referred to the “direct” and “indirect” methods of proof. *See, e.g., Andrews v. CBOCS West, Inc.*, 743 F.3d 230, 234 (7th Cir. 2014). That view was only recently rejected in *Ortiz v. Werner Enters., Inc.*, 834 F.3d 760, 763 (7th Cir. 2016), which described the bifurcation as “[a]dmissions of culpability and smoking-gun evidence were assigned to the ‘direct’ method . . . while suspicious circumstances that might allow an inference of discrimination were assigned to the ‘indirect’ method.” *Id.* *Ortiz* dismissed such a division, holding that the real question is “simply whether the evidence would permit a reasonable factfinder to conclude that the plaintiff’s [protected class] caused the discharge or other adverse employment action.” *Id.* at 765. Further:

[e]vidence must be considered as a whole, rather than asking whether any particular piece of evidence proves the case by itself—or whether just the ‘direct’ evidence does so, or the ‘indirect’ evidence. Evidence is evidence. Relevant evidence must be considered and irrelevant evidence disregarded, but no evidence should be treated differently from other evidence because it can be labeled ‘direct’ or ‘indirect.’

Id.

Desert Palace and *Ortiz* notwithstanding, “direct” evidence continues to influence courts. *E.g., Harper v. City of Cleveland*, 781 F. App’x 389, 393 (6th Cir. 2019) (holding that where “a plaintiff presents no direct evidence of discrimination based on race, we apply” the *McDonnell Douglas* framework); *Wittmer v. Phillips 66 Co.*, 915 F.3d 328, 332 (5th Cir. 2019) (“To establish a prima facie case of discrimination, the plaintiff must either present direct evidence of discrimination or, in the absence of direct evidence, rely on circumstantial evidence using the *McDonnell Douglas* burden-shifting analysis.”).

26. Justice O’Connor herself concurred in this reading of the 1991 Amendments. *Desert Palace*, 539 U.S. at 102 (O’Connor, J., concurring).

liability.²⁷ As a result, proof of a motivating factor establishes liability and no further proof of causation is necessary. That became clear in *Gross v. FBL Financial Services, Inc.*²⁸ and *University of Texas Southwestern Medical Center. v. Nassar*.²⁹ *Gross* construed the ADEA's prohibition of age discrimination, and *Nassar* addressed Title VII's antiretaliation provision. In both cases, the statutory language used "because" to link the prohibited discrimination to the adverse action, and in both, the Court read "because" to require but-for causation,³⁰ largely since the majority opinions viewed that as the normal meaning of the word.³¹ Critically, both opinions distinguished between that standard and what the Court saw as a lower causation requirement in the motivating factor framing of § 703(m). As the Court wrote in *Nassar*:

[a]n employee who alleges status-based discrimination under Title VII need not show that the causal link between injury and wrong is

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27. Section 706(g)(2), codified as 42 U.S.C. § 2000e-5(g), now provides:
 (B) On a claim in which an individual proves a violation under section 703(m) [42 U.S.C. § 2000e-2(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 (except as provided in clause (ii)), and attorney's fees and costs demonstrated to be directly attributable only 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, described in subparagraph (A).

28. 557 U.S. 167 (2009).

29. 570 U.S. 338 (2013).

30. *Nassar*, 570 U.S. at 352 ("Given the lack of any meaningful textual difference between the text in this statute and the one in *Gross*, the proper conclusion here, as in *Gross*, is that Title VII retaliation claims require proof that the desire to retaliate was the but-for cause of the challenged employment action" rather than the motivating factor standard as the jury below was instructed); *Gross*, 557 U.S. at 180 ("We hold that a plaintiff bringing a disparate-treatment claim pursuant to the ADEA must prove, by a preponderance of the evidence, that age was the 'but-for' cause of the challenged adverse employment action. The burden of persuasion does not shift to the employer to show that it would have taken the action regardless of age, even when a plaintiff has produced some evidence that age was one motivating factor in that decision.").

The Ginsberg dissent in *Nassar*, joined by Justices Breyer, Sotomayor, and Kagan, framed the majority's choice in exactly those terms:

Today's decision, however, drives a wedge between the twin safeguards in so-called "mixed-motive" cases. To establish [status-based] discrimination, all agree, the complaining party need show only that race, color, religion, sex, or national origin was "a motivating factor" in an employer's adverse action; an employer's proof that "other factors also motivated the [action]" will not defeat the discrimination claim. § 2000e-2(m). But a retaliation claim, the Court insists, must meet a stricter standard: The claim will fail unless the complainant shows "but-for" causation, i.e., that the employer would not have taken the adverse employment action but for a design to retaliate.

Nassar, 570 U.S. at 363–64 (Ginsburg, J., dissenting).

31. *Gross*, 557 U.S. at 176; *Nassar*, 570 U.S. at 362.

so close that the injury would not have occurred but for the act. So-called but-for causation is not the test. It suffices instead to show that the motive to discriminate was one of the employer's motives, even if the employer also had other, lawful motives that were causative in the employer's decision.³²

Because the Court viewed the ADEA and Title VII's antiretaliation provision as unaffected by the 1991 Amendments, both statutes were subject to the higher but-for causation standard, which the majority apparently viewed as the default principle, at least where "because" is the operative term.³³

In short, if *Price Waterhouse* was pro-plaintiff, § 703(m), as interpreted by the Court, doubled down on that stance.³⁴ Indeed, there was a great outcry at the refusal of the Court to extend a relaxed causation standard to Title VII retaliation cases in *Nassar*³⁵ and to its earlier refusal to similarly treat the ADEA in *Gross*.³⁶

32. 570 U.S. at 343; *see also* EEOC v. Abercrombie & Fitch Stores, Inc., 135 S. Ct. 2028, 2032 (2015) ("The term 'because of' appears frequently in antidiscrimination laws. It typically imports, at a minimum, the traditional standard of but-for causation. Title VII relaxes this standard, however, to prohibit even making a protected characteristic a 'motivating factor' in an employment decision.").

33. Under that view, express congressional language (such as "motivating" or "contributing" factor) would be needed to opt out of the default, and even then, may affect only a shifting of burdens, not establishment of liability without but-for causation. *See* text accompanying *supra* note 25. This analysis would suggest that the Court will apply "but-for" causation to such statutes as the Americans with Disabilities Act. *See, e.g.*, 42 U.S.C. § 1981 (2018); *Gentry v. E.W. Partners Club Mgmt. Co.*, 816 F.3d 228, 234 (4th Cir. 2016); *Lewis v. Humboldt Acquisition Corp.*, 681 F.3d 312, 313 (6th Cir. 2012). *But see* Catherine T. Struve, *Shifting Burdens: Discrimination Law Through the Lens of Jury Instructions*, 51 B.C. L. REV. 279, 316–19 (2010) (analyzing whether the ADA's incorporation of Title VII "powers, remedies and procedures" includes motivating factor liability). Given the Court's decision in *Comcast Corp. v. Nat'l Ass'n of African Am.-Owned Media*, No. 18-1171, 2020 U.S. LEXIS 1908 (Mar. 23, 2020), it seems increasingly likely that "but-for" is the default standard for liability absent contrary provisions explicitly establishing a lower causation threshold. Even the Court's split-the-baby decision in *Babb v. Wilkie*, No. 18-882, 2020 U.S. LEXIS 2184 (Apr. 6, 2020), requires but-for causation for monetary remedies. *See also* discussion *supra* note 9.

34. *See* Linda Greenhouse, *Supreme Court Roundup: Justices Unanimously Provide a Victory to One Category of Job-Bias Plaintiffs*, N.Y. TIMES (June 10, 2003), <https://www.nytimes.com/2003/06/10/us/supreme-court-roundup-justices-unanimously-provide-victory-one-category-job-bias.html> ("A unanimous Supreme Court made it significantly easier today for workers to win discrimination suits against their employers in cases where race, sex, religion or national origin is one factor among others in a dismissal or other adverse job action.").

35. *See, e.g.*, Michael J. Zimmer, *Hiding the Statute in Plain View: University of Texas Southwestern Medical Center v. Nassar*, 14 NEV. L.J. 705 (2014).

36. 557 U.S. at 167. *See generally, e.g.*, Harper, *supra* note 1; Martin J. Katz, *Gross Disunity*, 114 PENN ST. L. REV. 857 (2010). A part of the critique was that, even if the § 703(m) version of motivating factor liability did not reach these statutes, *Price Waterhouse* itself should have been found controlling since it construed similar language.

Given the fanfare with which § 703(m) had been greeted,³⁷ *Desert Palace* and *Gross/Nassar* seemed to presage a new era in the law of employment discrimination for Title VII status discrimination cases in which it would be far easier to show employer liability because Congress intended³⁸ that plaintiffs no longer would have the burden of proving but-for causation.³⁹ However, forecasts of the transformation of Title VII have a habit of being proved wrong. After *Desert Palace*, there had been predictions of the death of *McDonnell Douglas v. Green* analysis⁴⁰ (often shorthand as either “pretext” or “single motive cases”), which

37. E.g., Heather K. Gerken, Note, *Understanding Mixed Motives Claims Under the Civil Rights Act of 1991: An Analysis of Intentional Discrimination Claims Based on Sex-Stereotyped Interview Questions*, 91 MICH. L. REV. 1824, 1838 (1993) (arguing that “sex-stereotyped interview questions meet the causal requirements of the motivating factor standard and therefore support a Title VII claim,” regardless of whether they affect a hiring decision).

38. This conclusion is based essentially on the language and structure of the statute as a response to *Price Waterhouse*. *Id.* For those who also look to legislative history, there is strong evidence that Congress intended a very relaxed causation requirement. *Id.* Then-student Gerken analyzed the legislative history. *Id.* She noted that the bills that would ultimately lead to the CRA alternated between “contributing” and “motivating” factor but found no indication that the two formulations had any different meaning. *Id.* at 1828 n.28. In any event, Congress provided very little insight into what is sufficient to constitute a motivating factor. See, e.g., H.R. Rep. No. 102-40 (II), at 2 (1991), reprinted in 1991 U.S.C.C.A.N. 694, 695 (discrimination must actually contribute to the employer’s decision); H.R. Rep. No. 102-40(I), *supra* note 14, at 47–48 (“discrimination *actually contributed* or was otherwise *a factor* in an employment decision or *action*”) (emphasis in original); H.R. Rep. No. 102-40 (II), *supra* at 10; H.R. Rep. No. 102-40(I), *supra* note 14, at 64–65. Gerken notes that “[b]oth the Senate and the House rejected amendments that would have strengthened the standard by requiring a showing that discrimination was a ‘major contributing factor’ for the hiring decision.” Gerken, *supra* note 37, at 1844.

39. See Kelly Pierce, Comment, *A Fire Without Smoke: The Elimination of the Direct Evidence Requirement for Mixed-Motive Employment Discrimination Cases in Costa v. Desert Palace, Inc.*, 87 MINN. L. REV. 2173, 2212 (2003) (arguing that the Ninth Circuit’s refusal to require direct evidence in *Costa* “has far-reaching ramifications for disparate treatment cases, as the refusal merges pretext and mixed-motive cases, and drastically reduces the importance of *McDonnell Douglas*”).

40. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), lays down a three-step analytical structure that, first, requires the plaintiff to establish a prima facie case of discrimination, that is, to put in enough evidence to create a presumption that the employer discriminated. That evidence essentially rules out only the most obvious nondiscriminatory explanations. See *Teamsters v. United States*, 431 U.S. 324, 358 n.44 (1977) (*McDonnell Douglas* “demand[s] that the alleged discriminatee demonstrate at least that his rejection did not result from the two most common legitimate reasons on which an employer might rely to reject a job applicant Elimination of these reasons for the refusal to hire is sufficient, absent other explanation, to create an inference that the decision was a discriminatory one.”). The employer then, at the second step, has a burden of production to put into evidence its supposed nondiscriminatory reason for the challenged decision. *McDonnell Douglas*, 411 U.S. at 802. Finally, the plaintiff has the opportunity in the third step to prove that the supposed reason was really a pretext for an underlying discriminatory motivation. See Charles A. Sullivan, *The Phoenix from the Ash: Proving Discrimination by Comparators*, 60 ALA. L. REV. 191, 198–99 (2009).

proved wildly off-target since *McDonnell Douglas* continues to be cited exponentially more frequently than *Desert Palace*.⁴¹ More to the point than shifting litigation structures, plaintiffs seem to be doing at least as poorly after the motivating factor revolution as they did before.⁴² In short, mixed-motives liability has largely proven to be the revolution that wasn't.

This Article is an attempt to explain why. It posits three interacting possibilities: First, "motivating factor" is such a dramatic departure from traditional causation analysis that courts understandably have a hard time implementing the concept.⁴³ Second, and perhaps blending into the first point, judicial resistance to intrusion into employment decision-making, manifested in a number of ways but most clearly in the broader formulations of the "stray-remark" doctrine, has prevented motivating factor from achieving the results that proponents hoped.⁴⁴ Third, motivating factor liability subject to an employer's remedy-limiting affirmative defense of "same decision anyway" creates a tactical problem for plaintiffs, exacerbated by a conflict of interest between attorney and client when this path is chosen.⁴⁵

To develop these points, Part I reviews some background on causation in the law to set the stage for a more detailed treatment of the meaning of motivating

This structure has been subject to intense criticism over the years, see generally, for example, Sandra F. Sperino, *Rethinking Discrimination Law*, 110 MICH. L. REV. 69 (2011); William R. Corbett, *Fixing Employment Discrimination Law*, 62 SMU L. REV. 81 (2009); Deborah C. Malamud, *The Last Minuet: Disparate Treatment After Hicks*, 93 MICH. L. REV. 2229 (1995), but it has proved remarkably hardy. A recent critique argues that one basic problem is that courts focus on "technical" aspects of the structure at the sacrifice of the fundamental question of discrimination vel non, and that the history of *McDonnell Douglas*'s development by the Court makes clear that technicalities should not be permitted to distract from the goal of the enterprise. See generally Katie Eyer, *The Return of the Technical McDonnell Douglas Paradigm*, 94 WASH. L. REV. 967 (2019).

41. See Eyer, *supra* note 40, at 968. In 2018, *McDonnell Douglas* was cited 3,455 times in the Lexis Advance court database while *Desert Palace* was cited only 103 times. Over its entire 15-year history, *Desert Palace* has been cited fewer times (2,699) than *McDonnell Douglas* in 2018 alone. Lexis Advance (last visited Apr. 5, 2019). In addition, the Supreme Court has since endorsed the continued vitality of *McDonnell Douglas* in *Young v. United Parcel Serv.*, 575 U.S. 206 (2015). See generally William R. Corbett, *Young v. United Parcel Service, Inc.: McDonnell Douglas to the Rescue?*, 92 WASH. U. L. REV. 1683 (2015).

42. There does not seem to be recent empirical work, but earlier studies show very low levels of plaintiff success, see, e.g., Kevin M. Clermont & Stewart J. Schwab, *Employment Discrimination Plaintiffs in Federal Court: From Bad to Worse*, 3 HARV. L. & POL'Y REV. 103, 104 (2009) (district court win rates for plaintiffs from 1979-2006 was 15%, much lower than for non-job cases at 51%, and "appellate courts reverse plaintiffs' wins far more than the defendants' wins below"), and the data reported do not reflect any increase in plaintiff's success after *Desert Palace* was decided. See *id.* at 106 display 1. Neither does anecdotal evidence reflect any upswing in success even after *Gross* and *Nassar* confirmed the lower causation standard for status discrimination. See also Wendy Parker, *Lessons in Losing: Race Discrimination in Employment*, 81 NOTRE DAME L. REV. 889, 920 (2006) ("[M]ost plaintiffs will very likely come up empty handed when the judiciary decides their claim.").

43. See *infra* text accompanying note 106.

44. See *infra* text accompanying note 143.

45. See *infra* text accompanying note 161.

factor as a kind of noncausal causation in Part II. Part III then examines a recent case to reveal how litigators and courts are often confusing, or at least blurring, the causation issue. Part IV then attempts to explain the disconnect between motivating factor in theory and on the ground, trying to account for the failure of this innovation to transform Title VII litigation. Finally, Part V draws some lessons from this failed experiment and makes preliminary suggestions for what might be done going forward.

I. MIXED MOTIVES AND MINIMAL CAUSATION

First-year torts students struggle, often not very successfully, with questions of causation. The cases they study focus on physical causation (with proximate cause being the big exception).⁴⁶ In the process, students learn about the but-for test and its exception when a result is “overdetermined,” that is, when two or more causes are each sufficient to cause the harm at issue.⁴⁷ They encounter two fires raging at the same time⁴⁸ and two hunters shooting guns.⁴⁹ Somewhere in the process, they learn that, under current views, when two or more acts occur, each of which would have been a simultaneous factual cause of the physical harm absent the other, “each act is regarded as a factual cause of the harm.”⁵⁰ While there are challenges with applying abstract theories of causation to real world events, students, like the rest of us, have a lot of experience in deciding whether Act A caused Result B. That doesn’t mean they always get it right⁵¹ or that their intuitions

46. *Palsgraf v. Long Island R.R. Co.*, 162 N.E. 99 (N.Y. 1928). Whether or not the railroad should have been held liable for the accident, there was no doubt that the facts met the but-for standard, albeit in a Rube Goldbergian way.

47. *But see* Hillel J. Bavli, *Counterfactual Causation*, 51 ARIZ. ST. L.J. 879, 882–84 (2019) (arguing that under a “potential outcomes” analysis, overdetermined cases are not exceptions to the but-for rule). Professor Bavli argues that motivating factor causation can be viewed as but-for causation but does not analyze the same decision defense. *Id.*; *see also* *Desert Palace, Inc. v. Costa*, 539 U.S. 90, 101 (2003); *see also* Hillel Bavli, *Causal Sets in Antidiscrimination Law*, 106 IOWA L. REV. (forthcoming), <http://dx.doi.org/10.2139/ssrn.3551403> (motivating factor “does not (and is not intended to) reflect actual cause and effect in any meaningful sense. In fact, its meaning is entirely ambiguous. It simply allows a factfinder to rely on intuition to determine whether an employer should be held liable for the adverse employment decision. . . .”).

48. RESTATEMENT (THIRD) OF TORTS: PHYSICAL & EMOTIONAL HARM § 27 cmt. a, illus. 1 (AM. LAW INST. 2010).

49. *E.g.*, *Summers v. Tice*, 199 P.2d 1, 1 (Cal. 1948). In the two fires case, there may be only one potential wrongdoer since one fire may be the result of natural causes. In the two-hunters case, both are presumably violating a duty of care to the plaintiff although only one’s bullet may have actually caused the injury.

50. RESTATEMENT (THIRD) § 27.

51. Attribution theory suggests humans often get it wrong. *See, e.g.*, Michelle A. Travis, *Disabling the Gender Pay Gap: Lessons from the Social Model of Disability*, 91 DENV. U. L. REV. 893, 895 (2014) (“One causal attribution bias is toward oversimplification, which often shows up when several causes are necessary for an event or outcome to occur. Tort law refers to this scenario as one involving ‘multiple necessary causes.’ In such a scenario, we tend to single out and identify one of the multiple necessary circumstances as *the* cause, which then becomes the target for placing responsibility, be it credit or blame.”).

map onto the law's articulations of but-for causation,⁵² but at least the exercise is a familiar one in physical settings.

But such experiences seem considerably less relevant when the “cause” of a physical act (a pink slip) is the motive of the individual issuing it.⁵³ It's not just a question of whether a particular motive was somehow present in the mind of the actor, complicated as that may be from a proof perspective. It's also whether such a motive had any effect on the action given the multitudinous other motives that are likely to be present in the mind of the actor when that person decides to fire someone. In addition, that “decision” may be less an on/off switch than a rheostat that has been slowly moving in a negative direction for days, weeks, or even years, which may exponentially add to the possible inventory of motives.

No matter. For good or ill, most employment discrimination claims are “disparate treatment” cases, and the defendant will be liable only if a wrongful motive (bias) is “implicated”⁵⁴ in the decision. If it's the but-for cause, the plaintiff prevails and is entitled to the full panoply of statutory remedies under any of the antidiscrimination statutes.⁵⁵ But even when the jury finds that there is no but-for causation, that is, when the same decision would have been reached with or without bias operating, a defendant nevertheless violates Title VII's status discrimination prohibitions so long as the bias can be said to be a motivating factor.

But what does that mean? One commentator captured the conceptual confusion: “A motivating factor is cause in limbo, a lost cause, an ineffectual tagalong to actual cause.”⁵⁶ Ask yourself whether both hunters would be liable even if ballistics tests could identify whose bullet struck the plaintiff? The question makes no sense under a but-for standard because the threshold requirement—that each would have been a factual cause of the physical harm at the same time absent the

52. See James Macleod, *Ordinary Causation: A Study in Experimental Statutory Interpretation*, 94 IND. L. J. 957, 957 (2019) (empirical evidence reveals “clear and consistent patterns of causal attribution and ordinary usage—patterns that squarely contradict the Court's ordinary meaning determinations” of “because” and similar words). This may be an example of the human tendency to causal oversimplification. See Travis, *supra* note 51.

53. Paul J. Gudel, *Beyond Causation: The Interpretation of Action and the Mixed Motives Problem in Employment Discrimination Law*, 70 TEX. L. REV. 17, 20 (1991) (arguing that equating human motivations to physical causation in tort law is “fundamentally misconceived”). Gudel also argues that “the concept of such ‘factors’ is one that has not been, and cannot be, given any coherent sense.” *Id.* at 19.

54. Language is tricky here. Most of the potentially relevant verbs (“affect,” “influence,” etc.) suggest some causal consequence, which puts the rabbit in the hat. “Implicated” seems the best choice to reflect a situation where a bias is present but may or may not affect the decision in any way.

55. As we've seen, this is the current liability structure under the ADEA, *Gross v. FBL Fin. Servs. Inc.*, 557 U.S. 167, 177 (2009), and Title VII's antiretaliation provision, *Univ. of Tex. Sw. Med. Ctr. v. Nassar*, 570 U.S. 338, 363 (2013).

56. Kenneth Robert Davis, *The “Severe and Pervasive” Standard of Hostile-Work-Environment Law: Behold the Motivating Factor Test*, (Oct. 11, 2019) (unpublished manuscript), <https://ssrn.com/abstract=3468272>.

other⁵⁷ —isn't satisfied. But it is the kind of question that Title VII requires the fact finder to decide under a lowered causation approach with respect to biased motivations.⁵⁸

Of course, Title VII is not the only setting in which the law requires a fact finder to sort out motivations,⁵⁹ which is scarcely surprising given that all human beings live in a world of mixed motives,⁶⁰ and social and moral judgments often turn on the perceived mental state undergirding human actions rather than merely on the actions themselves.⁶¹ However, Title VII is one of the relatively few legal areas in which a lower-than-but-for causation standard generates actual liability rather than, at most, allocating a burden of proving no causation to the defendant.⁶² And, in

57. RESTATEMENT (THIRD) OF TORTS: PHYSICAL & EMOTIONAL HARM § 26, cmt. k (AM. LAW INST. 2010) (“An act or omission cannot be a factual cause of an outcome that has already occurred.”).

58. In the two-hunter scenario, each violates a duty of care, and the law is, in effect, allocating responsibility between them. In the employment setting, there is only one actor, the employer, which is being held responsible for permitting bias to be implicated in a decision regardless of whether any harm can be traced to that bias, other than the “harm” caused by the operation of an impermissible consideration.

59. See Andrew Verstein, *The Jurisprudence of Mixed Motives*, 127 YALE L.J. 1106, 1111 (2018) (“Courts seldom venture far from the [context of the antidiscrimination statutes] in search of approaches to mixed motives, even though mixed motives questions have been addressed in myriad domains: legal ethics, constitutional law (voter districting, school desegregation, jury selection, free speech and censorship, takings), labor law, landlord-tenant law, intentional torts, vicarious liability, evidence, property, health law, contract law, corporate law, employment discrimination, securities enforcement, taxation, bankruptcy, and more.”).

60. *Id.* at 1108 (“[H]uman beings are complex, and our motivations are often mixed. Introspection reveals that we often act for several conscious motives, not to mention the unconscious impulses we do not ourselves notice. The complications grow geometrically when we seek the motives of an organization or group . . .”).

61. Criminal law’s general mens rea requirement is one example of the law’s impulse to connect proscriptions of certain conduct with the mental states causing it. See Jenny E. Carroll, *Brain Science and the Theory of Juvenile Mens Rea*, 94 N.C. L. REV. 539, 540–41 (2016) (“As an element, mens rea serves the critical purpose in criminal law of differentiating behavior by degrees of culpability. Through mens rea, acts and harms are placed on a continuum of fault that gives accidental conduct the lowest level of fault and deliberate or premeditated conduct the highest and most blameworthy level of fault.”).

62. That was, of course, the path of *Price Waterhouse* itself, and remains the appropriate mode of analysis in, for example, First Amendment public employee speech cases, *Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274 (1977), and labor law anti-union animus cases, *NLRB v. Transp. Mgmt. Corp.*, 462 U.S. 393 (1983).

Perhaps partly for that reason, the question of the role of the prohibited motive seems to be less serious in those settings since the lower courts can avoid the question of what constitutes a motivating factor entirely if they find that the employer has established the same decision anyway defense. *Sanchez-Lopez v. Fuentes-Pujols*, 375 F.3d 121, 124 (1st Cir. 2004) (“[I]t is not true that all a plaintiff needs to show in order to win is that political discrimination was a motivating reason for the employment action. The fact that the constitutionally protected activity played a substantial part in the actual decision to take adverse employment action does not necessarily amount to a constitutional violation.”). *Mt. Healthy* also spoke not

theory at least, this standard applies to literally tens of thousands of “adverse employment decisions,”⁶³ including discharges and failures to hire or promote.

II. APPLYING THE THEORY

So how is this supposed to work? Imagine I put on my hat as hirer, one of the points at which motives⁶⁴ take center stage. For simplicity, let’s assume that I

merely of a “motivating factor,” but also of a “substantial factor,” and some lower court cases seem to imagine a greater causal role for plaintiff to make out its case. *E.g.*, *Suppan v. Dadonna*, 203 F.3d 228, 236 (3d Cir. 2000) (emphasizing that plaintiff must establish that his exercise of First Amendment rights “played some substantial role in the relevant decision”). Whether slicing the causation salami this way is rational is another question. *See* *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1988).

Recent statutes addressing causation tend to take a “burden shifting” stance. For example, Sarbanes-Oxley Act, 18 U.S.C. § 1514A(b)(2)(C) (2018), incorporates by reference 49 U.S.C. § 42121(b) (2018), which requires a plaintiff to show that a prohibited consideration was merely a “contributing factor” to the adverse decision; but it also allows the employer to demonstrate “by clear and convincing evidence” that it “would have taken the same unfavorable personnel action in the absence of that behavior.” *See, e.g.*, *Lockheed Martin v. Admin. Review Bd.*, 717 F.3d 1121 (10th Cir. 2013). That seems to negate liability, not merely limit relief. Similarly, while the Uniformed Services Employment and Reemployment Rights Act of 1994 uses the term “motivating factor,” 38 U.S.C. § 4311(b) (2018); see also *Staub v. Proctor Hosp.*, 562 U.S. 411, 416 (2011), employer proof that it would have made the same decision anyway negates liability. § 4311(b).

63. While employment-related decisions are generally subject to the antidiscrimination laws, many significant ones are immunized by the “adverse employment action” doctrine that has various formulations but essentially requires discrimination to result in some kind of significant, usually economic, harm to be actionable. *See, e.g.*, *Minor v. Centocor, Inc.*, 457 F.3d 632, 634 (7th Cir. 2006) (“Extra work can be a material difference in the terms and conditions of employment. . . . Minor contends that Siciliano required her to work at least 25% longer to earn the same income as before. That is functionally the same as a 20% reduction in Minor’s hourly pay, a material change by any standard.”). *See generally, e.g.*, Sandra Sperino, *Justice Kennedy’s Big New Idea*, 96 B.U. L. REV. 1789 (2016); Rebecca Hanner White, *De Minimis Discrimination*, 47 EMORY L.J. 1121 (1998). For simplicity, the focus of this piece will be on the decision not to hire or to fire, both of which are adverse employment actions under any standard.

64. This Article generally speaks in terms of “motive” not “intent.” Although the Supreme Court used “motive” in its seminal description of disparate treatment discrimination in *Int’l Bhd. of Teamsters v. United States*, 431 U.S. 324, 335 n.15 (1977) (“‘Disparate treatment’ . . . is the most easily understood type of discrimination. The employer simply treats some people less favorably than others because of their race, color, religion, sex, or national origin. Proof of discriminatory motive is critical, although it can in some situations be inferred from the mere fact of differences in treatment.”), for most of its history, the Court tended to use discriminatory motive and discriminatory intent as largely interchangeable. *See* Sullivan, *Mirage*, *supra* note 10, at 914–15.

However, in *Staub*, the Court finally separated the two for analysis, requiring the confluence of both for a violation. *See generally* Charles A. Sullivan, *Tortifying Employment Discrimination*, 62 B.U. L. REV. 1431 (2012) [hereinafter Sullivan, *Tortifying*]. Under that structure, the “intent” of a decision-maker (or one who influences the decision-maker) is the result actually desired (or at least the result that is substantially certain to occur). *Staub*, 562 U.S. at 422 n.3 (looking to “traditional tort law” for that concept). In short, I must

make the decisions myself, rather than, as is usually the case, as merely one of several people providing input to the actual decision-maker.⁶⁵ Once I start hiring, the law requires, at least in theory, that I account for my motives.

That task isn't easy. Put to one side for the moment the obvious point that I am not apt to be as fully cognizant of my own motives as I like to believe. The scholarship on what is usually referred to these days as "implicit bias" (but has also been more revealingly labeled "unconscious discrimination"⁶⁶) suggests I should be very skeptical about the accuracy of any motivational inventory I take of myself.⁶⁷ But even assuming I have a perfect understanding of my own mental processes, we need to decide how those motives bear on the legality of hiring decisions I make.⁶⁸

There's no problem, of course, if, once I inventory my motives, I conclude that my decision is completely unaffected by race, sex, age, disability, or any other

desire an individual not to be hired, or at least understand that rejection must be the substantially certain consequence of my actions, before I have the necessary *intent* to inflict an adverse employment action.

"Motives," on the other hand, are the impulses that drive the action. *Id.* (speaking multiple times of "discriminatory animus" and "discriminatory motive"). Thus, I could have a racist motive without the intent to cause a black woman to lose her job; or I could intend for a woman to lose her job but not be motivated at all by her sex. Only when prohibited motive and intent combine to cause an adverse employment action is there a statutory violation. *Id.* at 422 ("[I]f a supervisor performs an act motivated by [prohibited] animus that is intended by the supervisor to cause an adverse employment action, and if that act is the proximate cause of the ultimate employment action, then the employer is liable."). *But see infra* text accompanying note 161.

While there is no reason to believe that the Court is retreating from this paradigm, it soon reverted to using the terms intent and motive as if they were synonymous. *E.g.*, *Young v. United Parcel Serv., Inc.*, 575 U.S. 206, 233 (2015) (Alito, J., concurring) ("Claims of discrimination under [the first clause of the Pregnancy Discrimination Act] require proof of discriminatory intent. Thus, as a result of the first clause, an employer engages in unlawful discrimination under § 2000e-2(a)(1) if (and only if) the employer's intent is to discriminate because of or on the basis of pregnancy.") (citations omitted); *Univ. of Tex. Sw. Med. Ctr. v. Nassar*, 570 U.S. 338, 358–59 (2013) ("It would be inconsistent with the structure and operation of Title VII to so raise the costs, both financial and reputational, on an employer whose actions were not in fact the result of any discriminatory or retaliatory intent.").

65. In some cases, the law finds an employer liable although the decision-maker herself is unbiased when her decision is proximately caused by a biased subordinate. *See infra* text accompanying note 161.

66. *See* Marc R. Poirier, *Is Cognitive Bias at Work a Dangerous Condition on Land?*, 7 EMP. RTS. & EMP. POL'Y J. 459, 465–68 (2003).

67. *See infra* text accompanying note 153.

68. *See* Leora F. Eisenstadt, *Causation in Context*, 36 BERKELEY J. EMP. & LAB. L. 1, 20 (2015) ("In discrimination cases, the attempt to distinguish among causative factors and to scientifically and definitively attribute causation to one motive over others, even in the mind of the discriminator himself, is a nearly impossible endeavor.").

prohibited consideration. Maybe that could describe choice-by-algorithm that excluded all those factors.⁶⁹

But let's suppose that, having examined my conscience, I discover that a certain prohibited consideration was floating around inside. It usually doesn't matter whether it was pointing in a positive or negative direction—after all, taking sex into account positively for a female candidate necessarily makes that trait a negative for any competing male,⁷⁰ and vice versa. Did I violate the law?

As we've seen, the answer is indeterminate under the ADEA or Title VII's antiretaliation provision, since I further need to ask myself whether my age bias or retaliatory animus was the “but-for” cause of my decision.⁷¹ But the answer would seem to be yes under § 703(m) with respect to what the Supreme Court has called the “status” protections of Title VII, discrimination on the basis of race, color, sex, national origin, and religion.⁷² In such cases, the plaintiff must merely prove the existence of a prohibited motivating factor in order to establish employer liability.

The Supreme Court confirmed this distinction in *Burrage v. United States*, a criminal case that cited *Gross* and *Nassar* as adopting but-for causation in the employment context⁷³ and in the process noted that Congress amended other provisions of Title VII “to dispense with but-for causality.”⁷⁴ Justice Scalia's opinion for the *Burrage* Court not only reinforced the *Gross/Nassar* message that

69. Many factors correlate with the protected traits, which means that even an algorithm that studiously eliminated any direct reference to, say, race, might well produce racially skewed results to the extent that it looked to factors themselves correlated with race, such as zip code of residence. Still, such an algorithm, if itself created by unbiased coders, would seem to not have any racial motivation and therefore be challengeable only under the disparate impact theory. *See generally* Charles A. Sullivan, *Employing AI*, 63 VILL. L. REV. 395 (2018).

70. This isn't true for age. Using older age as a positive is permissible under the Age Discrimination in Employment Act, which has been held to bar only age discrimination favoring younger workers over older ones. *Gen. Dynamics Land Sys., Inc. v. Cline*, 540 U.S. 581, 584 (2004). This statement also ignores the possibility that a preference is permissible under a valid affirmative action plan. *See Johnson v. Transp. Agency of Santa Clara Cty.*, 480 U.S. 616, 641–42 (1987); *see also United Steelworkers of Am. v. Weber*, 443 U.S. 193, 197 (1979). *See generally* Deborah C. Malamud, *The Strange Persistence of Affirmative Action Under Title VII*, 118 W. VA. L. REV. 1 (2015).

71. *Gross v. FBL Fin. Servs., Inc.* 557 U.S. 167, 176 (2009) (ADEA); *Univ. of Tex. Sw. Med. Ctr. v. Nassar*, 570 U.S. 338, 343 (2013) (Title VII retaliation).

72. Section 703, 42 U.S.C. § 2000e-2, bars discrimination in terms and conditions of employment on these five grounds, which *Nassar* described as “status-based” discrimination. 570 U.S. at 342 (“The first type is called, for purposes of this opinion, status-based discrimination. The term is used here to refer to basic workplace protection such as prohibitions against employer discrimination on the basis of race, color, religion, sex, or national origin, in hiring, firing, salary structure, promotion and the like.”).

73. 571 U.S. 204, 212–13 (2014); Eisenstadt, *supra* note 68, at 1 (extensively criticizing *Burrage*'s melding of criminal and employment discrimination causation only to later have some second thoughts about the appropriateness of borrowing from one scheme to interpret another); *see also* Leora F. Eisenstadt & Jeffrey R. Boles, *Intent and Liability in Employment Discrimination*, 53 AM. BUS. L.J. 607, 611 (2016).

74. *Burrage*, 571 U.S. at 213 n.4.

motivating factor is less than but-for causation but also noted that even a but-for cause need not be the sole or even “main” cause (if those terms have any meaning).⁷⁵ Rather, but-for causation involves cases where “the predicate act combines with other factors to produce the result”; that act would be a but-for cause “so long as the other factors alone would not have done so—if, so to speak, it was the straw that broke the camel’s back.”⁷⁶ He went on to illustrate: “Thus, if poison is administered to a man debilitated by multiple diseases, it is a but-for cause of his death even if those diseases played a part in his demise, so long as, without the incremental effect of the poison, he would have lived.”⁷⁷ Justice Scalia then turned to baseball for further elucidation:

This but-for requirement is part of the common understanding of cause. Consider a baseball game in which the visiting team’s leadoff batter hits a home run in the top of the first inning. If the visiting team goes on to win by a score of 1 to 0, every person competent in the English language and familiar with the American pastime would agree that the victory resulted from the home run. This is so because it is natural to say that one event is the outcome or consequence of another when the former would not have occurred but for the latter. It is beside the point that the victory also resulted from a host of *other* necessary causes, such as skillful pitching, the coach’s decision to put the leadoff batter in the lineup, and the league’s decision to schedule the game. By contrast, it makes little sense to say that an event resulted from or was the outcome of some earlier action if the action merely played a nonessential contributing role in producing the event. If the visiting team wound up winning 5 to 2 rather than 1 to 0, one would be surprised to read in the sports page that the victory resulted from the leadoff batter’s early, non-dispositive home run.⁷⁸

That’s undoubtedly a fair description of the response of the average sports page reader, and perhaps an appropriate identification of one but-for cause of the outcome. But only one: a bases-loaded strikeout of the losing team’s home-run leader in the third inning might also be a but-for cause.

And recall that Scalia views motivating factor as having less causal clout than but-for. Suppose he had applied a less-than-but-for causal concept to either of his examples. It would seem to mean that administering a “poison” would suffice

75. “Sole cause” is, of course, incoherent as a concept since any human activity can be viewed as the result of literally billions of prior events, tracing back to the Big Bang. While the law necessarily attempts to narrow the focus to more immediate influences, drawing the line is an artificial exercise since it remains impossible to rationally identify anything that is the sole cause of a given result. That hasn’t prevented Congress from using the term. *See* 29 U.S.C. § 794(a) (2016) (“No otherwise qualified individual with a disability in the United States . . . shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance . . .”); *see also* *CG v. Pa. Dep’t of Educ.*, 734 F.3d 229, 235–36 (3d Cir. 2013) (describing the difference in causation standards between the Rehabilitation Act and the ADA).

76. *Burrage*, 571 U.S. at 211.

77. *Id.*

78. *Id.* at 211–12.

even if it neither caused death nor worsened the victim's condition. "Poison," after all, is a term for substances that tend to kill.⁷⁹ As for Scalia's baseball game, it seems unlikely that a sports page reader viewing the story about a 5–2 outcome would be surprised to read that the lead-off tater was a contributing factor to the victory. It is true that such a reader might well be startled to see so described that double-play in the third inning. Or the ump's questionable strike call in the ninth. But maybe she shouldn't be: once we're speaking of physical actions that merely "contribute" to an outcome, drawing the line at which is more important seems difficult or impossible. Indeed, all of the events favoring the prevailing team could be viewed as factors in the win, with only those factors (for example, the two runs scored) favoring the losing team *not* contributing to the result.⁸⁰

Shifting from the contributing factor context of physical causation to the question of decision-makers' motivations, that would seem to mean that not only can a motivating factor (like a but-for cause) be one of several factors, but also that it need not be especially significant so long as it *tends* to contribute to the negative result. After all, even a but-for cause need not have much weight (the last straw) if the other factors are equally balanced, and motivating factor is less than but-for.

To that effect, Professor Martin J. Katz argued that the only logical possibility is that motivating factor includes any factor "that might have some causal weight—that is, some tendency to influence the event in question but still not rise to the level of necessity or sufficiency."⁸¹ He therefore described the motivating factor/same decision structure as establishing a "minimal causation" standard under which the focus is on the *tendency* of the factor, not its actual consequences.⁸² A later commentator, Andrew Verstein, seemed to basically concur, reading motivating factor as falling within a taxonomy that imposes liability when a prohibited motive exists, regardless of the relative degrees of strength of the illicit motive and the legitimate one.⁸³ Although the two scholars disagree on other aspects of their analyses,⁸⁴ their "some tendency/any motive" rule⁸⁵ would seem to mandate

79. *Poison*, OXFORD ENGLISH DICTIONARY (3d ed. 2006) ("a. Material that causes illness or death when introduced into or absorbed by a living organism, esp. when able to kill by rapid action and when taken in small quantity; a substance of this kind.").

80. Even seemingly loser-favoring acts might sometimes contribute to the win: the single in the third might have set up the double play. And the losing team's two runs might have triggered tactical responses by the winning team that contributed to the final victory.

81. Katz, *Making Sense*, *supra* note 19, at 498–99. That is to say, that the factor neither has to be necessary to the outcome (which would be but-for causation) nor sufficient for it to occur (the overdetermined two fires case).

82. *Id.*

83. Verstein, *supra* note 59, at 1152 ("[I]t is ultimately clear that the Any Motive standard [which finds for the plaintiff if the defendant had any impermissible motive] supplies a rule most consistent with the 'motivating factor' standard.").

84. See Katz, *Making Sense*, *supra* note 19, at 498–99.

85. Evidence law uses an arguably similar concept for relevance, defined as anything that "has *any tendency* to make a fact more or less probable than it would be without the evidence" when that fact is of consequence to the matter at issue. FED. R. EVID. 401 (emphasis added). Courts repeatedly stress that the definition is permissive and that any increase (or decrease) in probability suffices. See, e.g., *Ayers v. City of Cleveland*, 773 F.3d

liability whenever plaintiff establishes that the prohibited characteristic was implicated in the decision she challenges.⁸⁶

Professor Verstein, however, offers a potential out:

The word “motivating” could connote some minimum level of motivational strength. Or maybe it merely distinguishes motivations (i.e. factors that motivate) from other, nonactionable mental states such as “mere discriminatory thoughts.” The former view would grant employers a safe harbor for tiny slivers of discriminatory motive, while the latter would let employees prevail even if an illicit motive was causally inconsequential.⁸⁷

The persuasiveness of the first point is logically doubtful, although it may describe the mindset of courts limiting the concept. “Tiny slivers” is reminiscent of Scalia’s “last straw,” which suffices for but-for liability and *a fortiori* ought to be enough for motivating factor. Recall that the impact (or lack thereof) of any factor depends on how finely balanced the decision was before this sliver or straw is added.⁸⁸ However, maybe we shouldn’t be so constrained by logic. After all, much

161, 169 (6th Cir. 2014) (“[T]he standard for relevancy under Rule 401 is ‘extremely liberal.’”). Relevant evidence is generally admissible, FED. R. EVID. 402, although this permissive standard is offset by rules allowing the exclusion of even relevant evidence. *E.g.*, FED. R. EVID. § 403 (permitting exclusion of relevant evidence, *inter alia*, when the danger of prejudice outweighs its “probative value”).

86. Professor Katz praises Verstein for introducing “a quantitative conception of causal influence” that “might clarify the relationship between causal standards in a way that is not possible using purely qualitative concepts.” Martin Katz, *A Rosetta Stone for Causation*, 127 YALE L.J. F. 877, 881 (2018). Verstein’s “model permits us to examine the causal influence of a particular motive, both absolutely (a motive might be considered weak or strong), and comparatively (one motive might be considered stronger than another).” *Id.* If correct, that still does not advance the ball very much for present purposes since the weight (absolutely or comparatively) of particular motivating factor turns less on how strong it is in the abstract than on how finely balanced the decision is otherwise.

Katz did identify flaws in the Verstein piece, including “fail[ure] to provide an adequate justification for the quantification of mental causation that lies at the core of his model.” *Id.* at 884. Verstein responded in Andrew Verstein, *Who Cares About the Cult of Ptolemy?: A Surreply to Katz*, 127 YALE L.J. F. 908, 911 (2018) (acknowledging a failure of explication on this point but noting that his use of numbers “does not commit the reader to the notion that motives are observed with fine granularity, nor that they are actually numerical (whatever that would mean). The quantification in *Mixed Motives* can be read as just a tractable metaphor for describing hard-to-observe or nonnumerical phenomena.”).

87. Verstein, *supra* note 59, at 1151.

88. As Scalia’s poor broken-backed camel illustrates, a very mild disfavoring of a group will be the but-for cause of an individual member’s rejection when the competitors are otherwise very close in qualifications. *See Burrage v. United States*, 571 U.S. 204, 211 (2014).

Suppose I rate applicants on a scale of 1 to 100 and deduct 1 point for anyone over 60 years of age. That deduction might rarely make any difference to any actual decision, but if two competitors happen to be otherwise equal, it will result in the older worker losing the position. That would be the question under the ADEA’s but-for causation standard. But under Title VII, suppose I deduct the same one point for women. Whether or not it makes a

causation analysis is to some extent indeterminate, and it's not as if the law always requires sharp causal lines: think about the notorious vagueness of "proximate cause."⁸⁹ Further, from a probabilistic perspective, some factors seem more likely to cause particular results than others, which might support some sort of "sliver" exception—although admittedly one for which there would be no bright line, either theoretically or in application.

As for avoiding liability for mere discriminatory thoughts, Title VII discourse has long been concerned about "thought control,"⁹⁰ that is, sanctioning an

difference in any actual decision, it would seem to be a motivating factor sufficient for liability.

This example raises questions about Professor Katz's suggestion that motivating factor and substantial factor are logically the same. *See* Katz, *Making Sense*, *supra* note 19, at 108. A 10- or 20-point deduction is more likely to change decisions than a 1-point deduction (i.e., have a greater tendency), which might be both O'Connor's intuition and Verstein's tiny slivers.

89. *See* Sullivan, *Tortifying*, *supra* note 64, at 1461. Proximate cause allows courts to limit liability for harm that was caused in fact by the relevant conduct. The latest Restatement rejects the term but retains the concept. RESTATEMENT (THIRD) OF TORTS: PHYSICAL & EMOTIONAL HARM § 29 (AM. LAW INST. 2010). As currently envisioned, proximate cause confines liability "to those harms that result from the risks that made the actor's conduct tortious." *Id.* In the current scenario, that would mean liability to those whose opportunities would tend to be reduced by the relevant bias.

90. *See* Price Waterhouse v. Hopkins, 490 U.S. 228, 262 (O'Connor, J., concurring) ("The legislative history makes it clear that Congress was attempting to eradicate discriminatory actions in the employment setting, not mere discriminatory thoughts."); *see also id.* at 294 (Kennedy, J., dissenting) (quoting Hopkins v. Price Waterhouse, 825 F. 2d 458, 477 (D.C. Cir. 1987) (Williams, J., dissenting)) (creating an "independent cause of action for sex stereotyping" which does not result in harm to plaintiff "would turn Title VII 'from a prohibition of discriminatory conduct into an engine for rooting out sexist thoughts'").

The "thought police" argument often focused on the motivating factor question precisely because under that regime bias becomes less causally connected with particular decisions. It appeared in the debates on the Civil Rights Act. *See, e.g.*, 136 CONG. REC. S9939 (daily ed. July 18, 1990) (statement of Sen. Hatch) (terming § 107 "a 'thought control bill' that punishes people on the basis of what they think, even if what they do is completely legal"); 136 CONG. REC. S9964 (daily ed. July 10, 1990) (statement of Sen. Grassley) (arguing that under the bill "an employer would be liable for the mere 'bad thoughts' of his . . . employees without any proof that these thoughts had anything to do with discrimination"). This argument also appeared in Committee reports, e.g., H.R. Rep. No. 102-40(I), *supra* note 14, at 48 ("mere discriminatory thoughts" are not enough for a violation; discrimination must be "a contributing factor," which means to "play a role"; thus, a plaintiff must "show[] a nexus between the conduct or statements and the employment decision") and in the literature. *See, e.g.*, Ezra S. Greenberg, *Stray Remarks and Mixed-Motive Cases After Desert Palace v. Costa: A Proximity Test for Determining Minimal Causation*, 29 CARDOZO L. REV. 1795, 1803 n.44 ("[N]ot all evidence of discriminatory (bad) thoughts on the part of an employer is indicative of discriminatory decisionmaking."); Matthew R. Scott & Russell D. Chapman, *Much Ado About Nothing—Why Desert Palace Neither Murdered McDonnell Douglas Nor Transformed All Employment Discrimination Cases to Mixed-Motive*, 36 ST. MARY'S L.J. 395, 403 n.51 (2005) (criticizing scholars arguing for the expansion of motivating factor analysis to all Title VII cases as a "welcome to 1984 and the world of the Thought Police"). Whatever the force of the argument when Justice O'Connor first raised it, the congressional codification of "motivating factor" liability weakens the claim.

employer (in the sense of having been found to have violated the statute) essentially for having a biased individual in a position to hire or fire, regardless of whether any of his decisions are influenced by his beliefs. And, indeed, it's possible to imagine someone with firm views about the inappropriateness of women in the workplace but also firm views about compliance with the law. As a result, he never allows himself to be influenced by gender in any hiring or firing decision. Although this raises its own problems of proof,⁹¹ the use of "motivating" may suggest that Congress required some space for bias to operate in a given decision, not that it merely be present in the mind of the decision-maker. But how a jury would reach such a conclusion remains a mystery in the run of cases.

In any event, many plaintiffs manage to adduce *some* evidence of bias, even if we narrowly confine the term "evidence" to some admission by the decision-maker of negative attitudes towards protected classes at some point in time.⁹² If such evidence sufficed, many more plaintiffs would seem likely to prevail in Title VII status cases by invoking the motivating factor standard. If we were to extend this analysis in ways the implicit bias literature⁹³ suggests, perhaps most plaintiffs would

91. This example takes us back to implicit bias. It's a cardinal principle of the scholarship dealing with this phenomenon that decisions may be biased without the decision-maker being aware of his own attitudes. The decision-maker may try to put his biases in a lockbox—and even believe he has done so—while still being influenced by his beliefs in his assessment of individuals for hiring or firing.

92. See discussion *infra* note 141.

93. Although she was not the first to raise the possibility of unconscious discrimination, see Charles R. Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317, 322 (1987) ("[A] large part of the behavior that produces racial discrimination is influenced by unconscious racial motivation."); Nadine Taub, *Keeping Women in Their Place: Stereotyping Per Se as a Form of Employment Discrimination*, 21 B.C. L. REV. 345, 355 (1980) ("Bias is, first of all, frequently unconscious."), an article by Linda Hamilton Krieger was seminal in focusing scholarly attention on the role of less-than-fully-conscious discriminatory attitudes in the employment discrimination context. Linda Hamilton Krieger, *The Content of Our Categories: A Cognitive Bias Approach to Discrimination and Equal Employment Opportunity*, 47 STAN. L. REV. 1161, 1222 (1995) [hereinafter Krieger, *Content*]. It has been cited more than 890 times in the literature but by only 7 cases. Lexis Advance (last visited Dec. 31, 2018).

The Krieger article was reinforced by the subsequent incorporation into legal scholarship of extensive social science research. This often looked to the Implicit Attitude Test, ("IAT"), hosted at Harvard and available on the internet, PROJECT IMPLICIT, <https://implicit.harvard.edu/implicit/> (last visited Mar. 4, 2020), which is open to anyone. It measures biases (or "implicit attitudes") by comparing how quickly a test taker equates positive and negative words with images of members of different races (and other categories of interest). These results are then compared with the subject's self-reported views on race. The IAT has generated a substantial social science literature analyzing the results of literally hundreds of thousands of visits and has been cited more than 400 times in the legal literature. Lexis Advance (last visited Dec. 31, 2018).

The theory and conclusions from the IAT are both supported, e.g., Jerry Kang et al., *Implicit Bias in the Courtroom*, 59 UCLA L. REV. 1124, 1137 (2012); Samuel R. Bagenstos, *Implicit Bias, "Science," and Antidiscrimination Law*, 1 HARV. L. & POL'Y REV. 477, 477 n.2 (2007); Linda Hamilton Krieger & Susan T. Fiske, *Behavioral Realism in Employment Discrimination Law: Implicit Bias and Disparate Treatment*, 94 CALIF. L. REV.

prevail since that research, if credited, concludes that it's a rare decision-maker who is without biases of any kind on grounds within Title VII.⁹⁴ Needless to say, that is contrary to all the empirical work about success rates, which find that it is rare for discrimination plaintiffs to prevail at trial or on appeal.

III. A TEST CASE

To understand why, despite its transformative potential, motivating factor seems to have changed very little in the real world, it may be helpful to consider in some detail a relatively recent case where the basic scenario of adverse-decision-by-biased-decision-maker split the panel three ways. In *EEOC v. Exel, Inc.*, two judges upheld a sex discrimination jury verdict in favor of the EEOC on behalf of Contrice Travis despite defendant's argument that the male who instead received the promotion was chosen because of the employer's "priority transfer policy" ("PTP").⁹⁵ The PTP encouraged transferring to open positions workers who would otherwise be laid off, but it did not require that any given individual be accorded that preference. Judge Pryor's lead opinion stressed that Harris, the decision-maker, was therefore formally free to choose another candidate and upheld the jury verdict finding for Travis.⁹⁶ Pryor looked to proof before the jury of Harris's generalized sex bias and also cited one reported comment by him linking that bias to the decision in question.⁹⁷ United States District Judge Moody concurred, deferring to the jury's

997, 1033 (2006), and opposed, e.g., Amy L. Wax, *Supply Side or Discrimination? Assessing The Role of Unconscious Bias*, 83 TEMP. L. REV. 877, 883–84 (2011); Gregory Mitchell, *Second Thoughts*, 40 MCGEORGE L. REV. 687, 687 (2009); Gregory Mitchell & Philip E. Tetlock, *Facts Do Matter: A Reply to Bagenstos*, 37 HOFSTRA L. REV. 737 (2009); Amy L. Wax, *The Discriminating Mind: Define It, Prove It*, 40 CONN. L. REV. 979 (2008) [hereinafter Wax, *Discriminating*]; Gregory Mitchell & Philip E. Tetlock, *Antidiscrimination Law and the Perils of Mindreading*, 67 OHIO ST. L.J. 1023 (2006). Even some supporters question whether the focus on implicit bias has hijacked the broader antidiscrimination project. See Michael Selmi, *The Paradox of Implicit Bias and a Plea for a New Narrative*, 50 ARIZ. ST. L.J. 190, 194 (2018) ("Labeling nearly all contemporary discrimination as implicit and unconscious is likely to place that behavior beyond legal reach. And it turns out that most of what is defined as implicit bias could just as easily be defined as explicit or conscious bias."); see also Samuel R. Bagenstos, *Implicit Bias's Failure*, 39 BERKELEY J. EMPL. & LAB. L. 37, 42 (2018) ("And the repeated invocation of implicit bias by political progressives suggests that old-fashioned intentional discrimination is a thing of the past, when in fact it may simply be better hidden. Indeed, at a moment in history when overt racism—seen in the reaction among some to the election of a black president, and in a significant part of the movement that elected Donald Trump—once again seems a major factor in our public life, the suggestion that implicit bias is the central problem may be particularly misleading.").

94. Even if unconscious bias has a causal effect, it may not be the kind of influence that Congress intended to prohibit when it enacted the 1991 Amendments. See generally, e.g., Patrick S. Shin, *Liability for Unconscious Discrimination? A Thought Experiment in the Theory of Employment Discrimination Law*, 62 HASTINGS L.J. 67 (2010); Amy Wax, *Discrimination as Accident*, 74 IND. L.J. 1129 (1999) [hereinafter Wax, *Accident*].

95. *EEOC v. Exel, Inc.*, 884 F.3d 1326, 1331 (11th Cir. 2018) (2–1), *cert. denied*, 139 S. Ct. 1373 (2019).

96. *Id.* at 1331, 1333.

97. *Id.* at 1329 ("Multiple witnesses testified at trial that Harris treated female employees differently than male employees. He spoke to female employees less often, acted

finding; he noted, however, that, had he been the fact finder, he would have reached a different result.⁹⁸

Judge Tjoflat dissented, arguing that “there must be sufficient evidence tying *generalized* discriminatory behavior to the *specific* employment decision at issue.”⁹⁹ While generalized evidence of bias has a role in Title VII cases,¹⁰⁰ “acting alone, that evidence cannot win the day for a plaintiff if it is not reasonably linked to the alleged discriminatory employment action in question.”¹⁰¹ For the dissent, even given the evidence of Harris’s bias against women,¹⁰² the “routine” operation of the PTP meant that a reasonable jury could not have found sex discrimination motivated the adverse action “in whole or in part.”¹⁰³ Although the PTP did not formally constrain Harris in filling the position in question, the dissent viewed the policy as sufficiently strong to negate the possibility that Harris’s bias had influenced his decision.¹⁰⁴ Although he doesn’t quite say so, Judge Tjoflat seemed to view Harris as ready, willing, and able to deny women management positions but not needing to do so with Travis because of the PTP.¹⁰⁵

Exel seems like a perfect test case for motivating factor analysis: there was a policy that probably (but not necessarily) would have dictated the same result, but there was also evidence of gender bias and at least the opportunity for that bias to operate because the policy wasn’t mandatory.

That’s not how things turned out. While all the opinions spoke in terms of whether proof of Harris’s bias was a “motivating factor,” none addressed the “same decision anyway” defense and all invoked the *McDonnell Douglas* framework, which is typically viewed as requiring but-for causation.¹⁰⁶ That’s because it is

standoffish toward them, and asked other supervisors to manage them so that he did not have to do so. But most importantly, trial testimony connected evidence of Harris’s general bias against women with his specific decision not to promote Travis. Teal testified that after he was promoted he recommended Travis for his vacated position, and Harris’s response [was] that he “would not put a woman in a management position.”)

98. *Id.* at 1333 (Moody, J., concurring).

99. *Id.* (emphasis in original).

100. *Id.* at 1343 (Tjoflat, J., dissenting) (“Without question, a plaintiff can rely on generalized sexist comments as circumstantial evidence to show employer discrimination.”).

101. *Id.*

102. *Id.* at 1343–44.

103. *Id.* at 1349.

104. *See id.* at 1340 (The evidence of the decision-maker’s bias “did nothing to disprove *Exel*’s assertion that the specific personnel position at issue in this case was filled via routine application of its priority transfer practice—an assertion that was corroborated by multiple witnesses and documentation and admitted by Travis and the EEOC’s own witnesses.”). The dissent stressed the almost uniform application of PTP across the employer’s many jobs for an extended period of time. *Id.* at 1343.

105. *See id.* at 1343 (“Put simply, the biased decision-maker must have the opportunity to *act* on his bias.”).

106. Given the ease with which plaintiffs can establish a *prima facie* case and defendants can put into evidence a nondiscriminatory reason, almost all the work of *McDonnell Douglas* is done at the third, or pretext, stage, where the plaintiff bears the burden of persuasion not only that the supposed nondiscriminatory reason is a pretext but also that

usually thought that the jury must make an all-or-nothing choice between plaintiff's proof that discrimination was the cause of the adverse decision or the defendant's "legitimate nondiscriminatory reason" was the basis.¹⁰⁷

So just a little confusion on the appellate court? Not exactly: it's hard to fault the appellate judges given the jury instructions below. Although framed to require the jury to find a "motivating factor," those instructions clearly demanded a finding of but-for causation for liability:

If you find that Exel denied Contrice Travis a promotion in June 2008, you must decide whether Contrice Travis's sex was a "motivating factor" in the decision.

To prove that sex was a motivating factor in Exel's decision, Plaintiffs do not have to prove that Travis's sex was the only reason that Exel denied Contrice Travis a promotion in June 2008. It is enough if Plaintiffs prove that sex *influenced* the decision. If Contrice Travis's sex *made a difference* in Exel's Decision, you may find that it was a motivating factor in the decision.¹⁰⁸

But it's also hard to fault the district court for an erroneous instruction regarding causation given the Eleventh Circuit's Pattern Jury Instructions, which also require a finding that the prohibited characteristic "influenced" the adverse

the true reason for the challenged decision is bias. *See St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 515 (1993) ("[A] reason cannot be proved to be 'a pretext for discrimination' unless it is shown both that the reason was false, and that discrimination was the real reason."). In short, the plaintiff must persuade the fact finder that the challenged decision was the result of a discriminatory motivation, which is why *McDonnell Douglas* is typically viewed as requiring but-for causation. *E.g.*, Michael J. Zimmer, *The New Discrimination Law: Price Waterhouse is Dead, Whither McDonnell Douglas?*, 53 EMORY L.J. 1887, 1930 (2004) ("[I]n *McDonnell Douglas* cases, the courts have typically required the plaintiff to prove that discriminatory motivation was the but-for or the determinative influence in the employer's decision."). *Contra* Martin J. Katz, *Reclaiming McDonnell Douglas*, 83 NOTRE DAME L. REV. 109, 123, 139 (2007) (acknowledging that "[v]irtually all writers believe that *McDonnell Douglas* does prove 'but for' causation," but arguing that it does not necessarily do so despite a "strong version" that does).

107. *See* Zimmer, *supra* note 106, at 1930 (stating that courts view *McDonnell Douglas* as requiring a showing of but-for causation).

108. Court's Instructions to the Jury at 10–11, *EEOC v. Exel, Inc.*, No. 1:10-CV-3132-SCJ, 2014 WL 12538166 (N.D. Ga. Feb. 6, 2014) (emphasis added). The court, however, went on to slightly improve that instruction:

Exel claims that Contrice Travis's sex was not a motivating factor in the decision and that it did not promote Travis in June 2008 for another reason. An employer may not discriminate against an employee because of the employee's sex, but the employer may decline to promote an employee for any other reason, good or bad, fair or unfair. If you believe Exel's reason for the decision not to promote Contrice Travis, *and* you find that Exel's decision was not motivated by Contrice Travis's sex, you must not second guess Exel's decision . . .

Id. at 11 (emphasis added). While this did not negate the earlier placement of the burden of proving causation on the plaintiffs, the use of "and" suggests exonerating the defendant only if sex were not a motivating factor.

employment action, in the sense that it “made a difference,” thus apparently invoking but-for causation even in what is described as motivating factor cases.¹⁰⁹

But maybe neither the district court nor the pattern instruction are to blame. In the first instance,¹¹⁰ the parties ask for jury instructions, and the opportunity to seek a correct instruction fell to the plaintiff, who, recall, was the Equal Employment Opportunity Commission. Who better to seek a correct statement of the law? The agency’s proposed instructions,¹¹¹ however, were a mish-mash of motivating factor and *McDonnell Douglas*, with a logical impossibility thrown in for good measure. Thus, the agency wanted the jury to be first asked to find that gender was the but-for cause of the nonpromotion by determining:

[t]hat Travis’ sex or gender was a substantial or motivating factor that prompted the Defendant to take that action. . . . it is not necessary for the Plaintiffs to prove that Travis’ sex or gender was the sole or exclusive reason for the Defendant’s decision. It is sufficient if the Plaintiffs prove that sex or gender was a *determinative consideration that made a difference* in the Defendant’s decision.¹¹²

The Commission’s proposed instructions then turned to the same-decision possibility. And, having just placed the burden of showing but-for causation on plaintiff, it would have allowed defendant to negate exactly that showing by proving the same decision anyway:

If you find in the Plaintiffs’ favor with respect to each of the facts that the Plaintiffs must prove, you must then decide whether the Defendant has shown by a preponderance of the evidence that Travis would not have been promoted for other reasons even in the absence of consideration of Travis’ sex or gender. If you find that Travis

109. The current Eleventh Circuit Pattern Jury Instructions Feb. 2020, § 4.5, provide:

To prove that [. . . sex . . .] was a motivating factor in [name of defendant]’s decision, [name of plaintiff] does not have to prove that [his/her] [. . . sex . . .] was the only reason that [name of defendant] . . . denied [him/her] a promotion]. *It is enough if [name of plaintiff] proves that [. . . sex . . .] influenced the decision. If [name of plaintiff]’s [. . . sex . . .] made a difference in [name of defendant]’s decision, you may find that it was a motivating factor in the decision.*

PATTERN JURY INSTRUCTIONS: ELEVENTH CIRCUIT, CIVIL CASES § 4.5 (COMM. ON PATTERN JURY INSTRUCTIONS, DIST. JUDGES ASS’N, ELEVENTH CIRCUIT 2020) (emphasis added). Earlier versions, including the 2005 version in which the proposed instructions were based, were similar. § 1.2.1.

110. Whether the court should give instructions that are in some sense incorrect even when the two parties agree is an interesting question. *See Sullivan, Mirage, supra* note 10, at 936 n.107. In *Exel* itself, the defendant did not ask for the motivating factor/same decision anyway instruction, even assuming it had a right to do so absent plaintiff’s request. *See infra* note 165.

111. Ms. Travis had intervened, as was her right under Title VII, 42 U.S.C. § 2000e-5(f)(1), but her counsel also signed the proposed instructions.

112. Plaintiff’s Proposed Charges to the Jury at 12–15, *EEOC v. Exel, Inc.*, No. 1:10-CV-03132-SCJ, 2014 WL 12538166 (N.D. Ga. Feb. 6, 2014) (emphasis added).

would not have been promoted for reasons apart from Travis' sex or gender, then you will make that finding in your verdict.¹¹³

Needless to say, it is impossible for the law to place the risk of nonpersuasion on both parties with respect to the same issue,¹¹⁴ so the district court gets credit for avoiding that mistake. But the illogic of the instructions aside, it remains true that the EEOC assumed a higher burden of causation than the law would require.¹¹⁵

IV. EXPLAINING THE DISCONNECT

Of course, *Exel* is only one decision, but it is suggestive of deeper problems with motivating factor causation. The following Sections further explore the disconnect between what motivating factor liability theoretically requires and the reality on the ground. In the process, they offer three explanations for the phenomenon, explanations that undoubtedly interact in various ways but collectively offer little reason for plaintiffs to be optimistic either about Title VII itself or the possible expansion of motivating factor liability in the statutes currently before the Court.

The first explanation is the simplest: motivating factor liability is such a dramatic departure from traditional causation analysis that attorneys and courts understandably have a hard time grasping, much less implementing, the concept. Although this Article has explained how we got to a minimal causation rule, imposing liability for a causal factor that does not cause any result is both counterintuitive and contrary to the formative legal training of American attorneys. While Congress divorced cause from effect for Title VII status discrimination cases and thereby effected a radical shift from traditional tort notions, it's not an easy sell to those implementing the law given the path dependence of lawyers and the judiciary.¹¹⁶

113. *Id.* at 13. Presumably, if the jury found both motivating factor and same decision anyway, its work is done, and the court would then order the remedies that Title VII permits in such a case.

114. Rosemary Alito, *Disparate Impact Discrimination Under the 1991 Civil Rights Act*, 45 RUTGERS L. REV. 1011, 1021–22 (1993) (“[I]t is impossible for opposing parties to bear the burden of persuasion on the same issue. As commonly defined, the burden of persuasion means that ‘[i]f the evidence on the issue is evenly balanced, the party with the burden loses.’ As normally explained to jurors, it means that if the weight of the evidence for and against a proposition is equal—if the scale is balanced—the party bearing the burden of persuasion loses. If both parties, however, bear the burden of persuasion on the same issue . . . the burden assignment cannot serve its function. The scale is not tipped, the equipoise remains, no one can win and no one can lose. No intelligible charge for the jury can be fashioned.”).

115. While the Commission might have been prompted to do so by the pattern instructions, it remains inexplicable why the agency would not have acted to create an appealable issue by asking for a more favorable instruction.

116. Other examples of causal confusion are not far to seek. *See, e.g.*, *Mollet v. City of Greenfield*, 926 F.3d 894, 897 (7th Cir. 2019) (requiring the plaintiff under *Nassar* to show not merely that retaliatory motive was “a but-for cause” but rather that the desire to retaliate was “the but-for cause” of the challenged adverse action) (emphasis in original).

Blending into this first explanation is a second, more cynical one: judicial resistance to the broader implications of the antidiscrimination project for employer decision-making. This may explain why courts, including *Exel*, often describe motivating factor in terms that sound a lot like but-for. More pointedly, it may explain why the courts have articulated broad formulations of the stray-remark doctrine, which have narrowly circumscribed the potential of motivating factor liability.

Third, and somewhat counterintuitively, plaintiffs' attorneys may have a large share in the responsibility for the failure of the motivating factor innovation for reasons other than mistaken views of the law. Because bringing a motivating factor case necessarily opens the door to the employer's remedy-limiting affirmative defense of "same decision anyway," opting into this litigation structure creates a tactical problem for plaintiffs. That's exacerbated by a conflict of interest between attorney and client when this path is chosen. Both problems stem from the reality that the liability-same decision structure allows juries to reach compromise verdicts and, when they do, deny the plaintiff monetary recovery other than fee awards, which, of course, typically go to their attorney.

A. Just Too Hard (or Unfamiliar) a Concept?

Maybe motivating factor causation is simply too foreign a concept for American-trained lawyers to easily grasp, making mistakes inevitable.¹¹⁷ While Congress intended that bias can be motivating while not making any difference in the outcome, that concept is contrary to almost everything attorneys and judges have learned from law school forward. The mistake of the Eleventh Circuit's Pattern Instructions is strong evidence of this, but other federal model instructions are also

117. An extreme example of judicial confusion is *Bester v. Leavitt*, 226 F. App'x 872, 873 (11th Cir. 2007), where the jury asked for further guidance as to whether "race [has] got to be a factor or the factor." After consultation with counsel, and to no objection, the judge responded:

[T]he case law uses two terms, one of which I hope you'll find helpful. They say race would have to be a, quote, determinative consideration, end quote, determinative consideration, or some other cases use the term "motivating factor, motivating factor" [sic]. And so if race danced through somebody's mind, that's probably not enough. But if it tipped the scale, then it probably is enough. But, anyway, the best guidance I can give you is that what the case law says is race would have to be a determinative consideration and some of the other case law says motivating factor. So that's the best help I can give you.

Id. at 874. Given the absence of an objection, reversal could occur only for "plain error" and the appeals court found that high standard was not satisfied. In part that was because the circuit court had itself earlier used both terms and viewed them as "synonymous." *Id.* at 877. The court seemed oblivious of the fact that "determinative factor" had been held to be but-for causation. See *Gross v. FBL Fin. Servs.*, 557 U.S. 167, 176 (2009) (equating determinative factor with but-for causation); see also *Hazen Paper Co. v. Biggins*, 507 U.S. 604, 610 (1993) ("Whatever the employer's decision making process, a disparate treatment claim cannot succeed unless the employee's protected trait actually played a role in that process and had a determinative influence on the outcome.").

problematic. Others also just get it wrong,¹¹⁸ but, more commonly, pattern instructions speak in terms of motivating factor and even provide that it need not be the only factor but fail to be explicit about it not having to make a difference.¹¹⁹ This may or may not be sufficient,¹²⁰ depending on what jurors do with a difficult concept.¹²¹ The Third Circuit seems to go furthest in the correct direction. It would instruct juries to find liability if plaintiff's protected status "played a part [or played a role]" in the adverse decision and then goes on to say that plaintiff need not prove that her protected status "was the sole motivation or even the primary motivation" for the decision.¹²² It then adds that the fact that "other factors may also have

118. The MANUAL OF MODEL CIVIL JURY INSTRUCTIONS FOR THE DISTRICT COURTS OF THE NINTH CIRCUIT § 10.3 (NINTH CIRCUIT JURY INSTRUCTIONS COMM. 2017, last updated June 2019), requires a finding of motivating factor without defining it, but then deals with the affirmative defense, making clear that defendant is liable "even if you find that the defendant's conduct was also motivated by a lawful reason." However, the instructions also inexplicably provide that the jury should give its verdict to the defendant if it proves that it "would have made the same decision even if the plaintiff's [protected status] had played no role in the employment decision." *Id.*

119. *E.g.*, PATTERN JURY INSTRUCTIONS FOR CASES OF EMP'T DISCRIMINATION (DISPARATE TREATMENT) FOR THE DIST. COURTS OF THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT § 1.2 (CHAMBERS OF JUDGE HORNBY Draft Feb. 2002, updated 3/1/11) ("To prove that [protected characteristic] was a "motivating factor," [plaintiff] must show that [defendant] used that consideration in deciding to [specify adverse action]. [Plaintiff] need not show that [protected characteristic] discrimination was the only reason [defendant] [specify adverse action]. But [she/he] must show that [defendant] relied upon [protected characteristic] discrimination in making its decision."); PATTERN JURY INSTRUCTIONS (CIVIL CASES) § 11.1 (COMM. ON PATTERN JURY INSTRUCTIONS, DIST. JUDGES ASS'N, FIFTH CIRCUIT 2014, with revisions through October 2016) (defendant's adverse employment action towards plaintiff "was motivated by [his/her] [protected trait]; but plaintiff "does not have to prove that unlawful discrimination was the only reason" for that action); FEDERAL CIVIL JURY INSTRUCTIONS OF THE SEVENTH CIRCUIT § 3.01 cmt. c (COMM. ON PATTERN CIVIL JURY INSTRUCTIONS OF THE SEVENTH CIRCUIT 2017 REV.) (plaintiff must prove "that his [protected class] . . . contributed to Defendant's decision"); MANUAL OF MODEL CIVIL JURY INSTRUCTIONS FOR THE DISTRICT COURTS OF THE EIGHTH CIRCUIT § 5.21 (COMM. ON MODEL JURY INSTRUCTIONS FOR THE DIST. COURTS OF THE EIGHTH CIRCUIT 2018) ("As used in these instructions, the plaintiff's (sex) was a "motivating factor," if the plaintiff's (sex) played a part [or a role] in the defendant's decision to [discharge] the plaintiff. However, the plaintiff's (sex) need not have been the only reason for the defendant's decision to [discharge] the plaintiff."). Committee notes suggest that the case law supports other formulations, such as "a reason, alone or with other reasons, on which the defendant relied." *Id.* at n.4.

120. *Desert Palace* itself upheld a motivating factor instruction that was less than explicit about what that term meant. *Desert Palace, Inc. v. Costa*, 539 U.S. 90, 96 (2003) ("If you find that the plaintiff's sex was a motivating factor in the defendant's treatment of the plaintiff, the plaintiff is entitled to your verdict, even if you find that the defendant's conduct was also motivated by a lawful reason.").

121. If Professor Macleod is correct, see Macleod, *supra* note 52, this approach will cause little harm because juries are likely to apply something like motivating factor analysis in any event.

122. MODEL CIVIL JURY INSTRUCTIONS FOR THE DIST. COURTS OF THE THIRD CIRCUIT, § 5.1.1 (COMM. ON MODEL CIVIL JURY INSTRUCTIONS WITHIN THE THIRD CIRCUIT 2018):

motivated” defendant does not preclude such a finding.¹²³ But it doesn’t quite say that the prohibited consideration need not have caused the decision and, indeed, none of the pattern instructions say that bias need not affect the decision at all to be a motivating factor.

Such noncausal causation is understandable only by appreciating that the 1991 Congress was seeking to extirpate bias from employment decisions, regardless of whether there was any concrete harm.¹²⁴ After all, the fact that a clear-cut adverse employment action would have occurred in any event doesn’t change the reality that Exel’s leaving Harris in a position of authority increased the *risk* of his taking future actions disadvantaging women, and that is true even if *this* decision was caused in fact by the PTP. While Congress was not prepared to impose liability on this basis alone, it arguably intended to allow juries to infer that such bias was “at play” in such decisions from proof of its existence in the decision-maker (although the jury would also be entitled to find that it was not implicated in a particular decision). Holding the employer liable in such cases, while denying the plaintiff a “windfall” of backpay and damages when the same decision would have been made in any

In showing that [plaintiff’s] [protected status] was a motivating factor for [defendant’s] action, [plaintiff] is not required to prove that [his/her] [protected status] was the sole motivation or even the primary motivation for [defendant’s] decision. [Plaintiff] need only prove that [plaintiff’s] [protected status] played a motivating part in [defendant’s] decision even though other factors may also have motivated [defendant].

As used in this instruction, [plaintiff’s] [protected status] was a “motivating factor” if [his/her] [protected status] played a part [or played a role] in [defendant’s] decision to [state adverse employment action] [plaintiff].

If you find that [defendant’s] treatment of [plaintiff] was motivated by both discriminatory and lawful reasons, you must decide whether [plaintiff] is entitled to damages. [Plaintiff] is not entitled to damages if [defendant] proves by a preponderance of the evidence that [defendant] would have treated [plaintiff] the same even if [plaintiff’s] [protected class] had played no role in the employment decision.].

123. *Id.*

124. The House Report stressed that *Price Waterhouse* would “permit prohibited employment discrimination to escape sanction,” rendering actions immune not only from a monetary remedy but even from injunctive relief where the employer would have made the same decision in any event. H.R. Rep. No. 102-40(I), *supra* note 14, at 46–47.

event,¹²⁵ was the compromise Congress struck as a method of aligning employer incentives with the law's purposes.¹²⁶

As applied to *Exel*, Harris's proven mindset necessarily *tended* to make it more likely that, across a range of decisions, prohibited gender considerations will result in some adverse employment actions. Even focusing solely on the at-issue decision, and even assuming very little chance that Harris would depart from the PTP in any case, his bias would still reduce the probability of such a departure when a woman was concerned—so long as the chance of such departure were not zero to begin with. Or at least a reasonable jury could so find.

Given the jury instructions, we'll never know where Judge Tjoflat would have come out on this analysis had a correct instruction been given. He might well have viewed the chance of departure from the PTP as zero, such that there was *no* tendency of Harris's bias to influence the decision, in which case it would be hard to call it a motivating factor. But it seems difficult to believe that the chances were literally zero because it was agreed that the PTP wasn't binding. If that were true, the dissent could find for Exel only by rejecting the notion that a tendency to influence a range of decisions is relevant where the challenge is to a particular decision, which means rejecting the minimal causation standard Professor Katz proffers and requiring some more substantial causal tendency. Recall, however, that Katz argues there is no alternative logical possibility to minimal causation given that Congress rejected a but-for standard.¹²⁷ And Verstein, while recognizing the possibility that "slivers" of bias might not suffice, doesn't offer much in the way of help in deciding when a sliver becomes a full-fledged slice or even a slab. The history of causation analysis in torts suggests verbal formulations of more than minimal causation (and maybe O'Connor's "substantial factor" is one), although these have been rejected as themselves incoherent.¹²⁸

125. When the employer's same decision defense is established, § 706(g) of the Civil Rights Act of 1964 provides that plaintiffs may nevertheless be awarded declarative and certain injunctive relief (mostly of the "don't do it again variety") as well as attorneys' fees and costs. They are not, however, entitled to reinstatement or to either back pay or damages. In contrast, plaintiffs are normally entitled to damages, such as emotional distress, for disparate treatment discrimination, although recoveries are capped depending on the size of the employer. 42 U.S.C. § 1981a(3) (2018).

126. The congressional scheme can also be justified as redressing an actual, if not tangible, harm suffered by plaintiff because her sex or race was considered a negative. The analogy might be to a standing case, *Ne. Fla. Chapter of Associated Gen. Contractors of Am. v. City of Jacksonville*, 508 U.S. 656, 666 (1993), which held that a contractor excluded from consideration for a city contract because of race had standing to challenge that decision regardless of whether it would have been awarded the contract. As the Court wrote, "[t]he 'injury in fact' in an equal protection case of this variety is the denial of equal treatment resulting from the imposition of the barrier, not the ultimate inability to obtain the benefit." *Id.*

127. Katz, *Making Sense*, *supra* note 19, at 503–05.

128. The Third Restatement of Torts rejected the "substantial-factor" test of the First and Second Restatements as not having "withstood the test of time, as it has proved confusing and been misused." That rubric was "employed alternately to impose a more rigorous standard for factual cause or to provide a more lenient standard." RESTATEMENT

In short, maybe it is not so surprising that courts are at worst wrong and at best not explicit that bias can be a motivating factor without actually influencing a decision in the sense of making a difference in the outcome.

B. Just Too Radical a Concept?

The “too hard” possibility leads to a second, related point: motivating factor liability may have such limited success not because courts do not understand it but rather because they view applying the law that Congress enacted as simply too radical. There was certainly some initial resistance to the concept, including the Eighth Circuit’s inexplicably finding *Desert Palace* inapplicable in the summary judgment context.¹²⁹ Other courts have tried to shoehorn it into a “modified *McDonnell Douglas*” structure, thus requiring plaintiff to show a traditional prima facie case.¹³⁰ Yet others continue to distinguish between cases that go to the jury on pretext grounds and those that warrant a motivating factor instruction, requiring some undefined but higher standard for the latter.¹³¹

More recently, the pattern jury instructions suggest that courts have solved the problem by using the term “motivating factor” but refusing to define it in any meaningful way. In any event, they rarely find such a factor to be present, largely due to the stray-remark doctrine, which is perhaps the strongest evidence of resistance to motivating factor liability. That doctrine has a respectable pedigree, originating in Justice O’Connor’s concurrence in *Price Waterhouse*,¹³² although its

(THIRD) OF TORTS: LIABILITY FOR PHYS. & EMOT. HARM § 26 cmt. J (AM. LAW INST. 2010). The Reporters Notes suggest that one justification for the test was eliminating “insignificant or trivial causes” but find that concept illogical. *Id.* at Reporters’ Note cmt. j.

129. Griffith v. City of Des Moines, 387 F.3d 733, 735 (8th Cir. 2004). See generally Natalie Bucciarelli Pedersen, *A Legal Framework for Uncovering Implicit Bias*, 79 U. CIN. L. REV. 97 (2010).

130. E.g., Burrell v. Dr. Pepper/Seven Up Bottling Grp., Inc., 482 F.3d 408, 411–12 (5th Cir. 2007) (“Under the modified *McDonnell Douglas* approach, the plaintiff must first demonstrate a prima facie case of discrimination; the defendant then must articulate a legitimate, non-discriminatory reason for its decision to terminate the plaintiff; and, if the defendant meets its burden of production, the plaintiff must then offer sufficient evidence to create a genuine issue of material fact that either (1) the employer’s reason is a pretext or (2) that the employer’s reason, while true, is only one of the reasons for its conduct, and another ‘motivating factor’ is the plaintiff’s protected characteristic.”). See generally William R. Corbett, *An Allegory of the Cave and the Desert Palace*, 41 HOUS. L. REV. 1549 (2005).

131. E.g., Rapold v. Baxter Int’l, Inc., 718 F.3d 602, 612 (7th Cir. 2013) (not every discrimination case sent to the jury requires a mixed motive instruction; the test is “whether the evidence supports the instruction”); see also Fields v. N.Y. State Office of Mental Retardation & Dev. Disabilities, 115 F.3d 116, 122 (2d Cir. 1997) (while plaintiff may be entitled to such an instruction, “[w]e have emphasized . . . that for a plaintiff to be able to insist on a dual motivation charge, there must either be direct evidence of discrimination, or circumstantial evidence that is ‘tied directly to the alleged discriminatory animus’”) (internal citations omitted).

132. The plurality opinion also had a passing reference to the concept noting that “the stereotyping in this case did not simply consist of stray remarks. On the contrary, Hopkins proved that Price Waterhouse invited partners to submit comments; that some of the comments stemmed from sex stereotypes; that an important part of the Policy Board’s

thriving success after the Civil Rights Act of 1991 is harder to explain given Congress's wholesale rejection of her approach.

Recall that, to shift to the employer the burden that it would have made the same decision in any event, Justice O'Connor required "what Ann Hopkins showed here: direct evidence that decision-makers placed substantial negative reliance on an illegitimate criterion in reaching their decision."¹³³ O'Connor didn't tell us exactly what "direct evidence" was, but she did explain what it wasn't:

Thus, stray remarks in the workplace . . . cannot justify requiring the employer to prove that its hiring or promotion decisions were based on legitimate criteria. Nor can statements by nondecision-makers, or statements by decision-makers unrelated to the decisional process itself suffice to satisfy the plaintiff's burden in this regard. In addition, in my view [expert testimony on stereotyping] such as Dr. Fiske's in this case, standing alone, would not justify shifting the burden of persuasion to the employer.¹³⁴

While *Desert Palace v. Costa* read the 1991 Civil Rights Act as eliminating any requirement of "direct evidence," O'Connor's rejection of "stray remarks" continues to have considerable influence in the lower courts.¹³⁵ In applying *Desert Palace's* rule that a "plaintiff need only present sufficient evidence for a reasonable jury to conclude, by a preponderance of the evidence, that 'race, color, religion, sex, or national origin was a motivating factor for any employment practice,'"¹³⁶ the lower courts have frequently found that the kinds of evidence she rejected are still not "sufficient" to shift the burden.

I put to one side some of the evidence Justice O'Connor would have found inadequate. Later courts have easily agreed that "statements by nondecision-makers" do not establish motivating factor.¹³⁷ Although some commentators have criticized the law's focus on "insular individualism" ("the belief that discrimination

decision on Hopkins was an assessment of the submitted comments; and that Price Waterhouse in no way disclaimed reliance on the sex-linked evaluations." *Price Waterhouse v. Hopkins*, 490 U.S. 228, 251 (1989). Justice Kennedy's dissent also stated that "[a]s the opinions make plain, the evidentiary scheme created today is not for every case in which a plaintiff produces evidence of stray remarks in the workplace." *Id.* at 280 (Kennedy, J., dissenting).

133. *Id.* at 277 (O'Connor, J., concurring).

134. *Id.*

135. Courts can deal with such statements in a wide variety of contexts, ranging from exclusion of the evidence entirely to finding that, while probative, the evidence is not sufficient to avoid a judgment as a matter of law for defendant at summary judgment or later in the litigation process. *E.g.*, *Henry v. Wyeth Pharm., Inc.*, 616 F.3d 134, 150–51 (2d Cir. 2010) (finding one statement by a supervisor properly excluded as mildly probative but prejudicial and exclusion of another supervisor's statement, if error, harmless). The question can come up in motivating factor cases or *McDonnell Douglas* cases and can arise where such evidence is the main basis for a liability claim or just part of a pattern of proof. As a result, "stray remarks" is more a label than a doctrine, but, when it is deployed, the effect is to minimize or negate the significance of the statement.

136. *Desert Palace, Inc. v. Costa*, 539 U.S. 90, 101 (2003).

137. *E.g.*, *Schaffhauser v. United Parcel Serv., Inc.*, 794 F.3d 899, 902 (8th Cir. 2015).

can be reduced to the action of an individual decision-maker (or decision-makers) isolated from the work environment”),¹³⁸ that approach is the focus of much Supreme Court jurisprudence.¹³⁹ Absent a showing that others influenced the decision, therefore, courts’ refusal to view such evidence as sufficient to show motivating factor is scarcely surprising. Similarly, expert testimony is likely to claim no more than that certain situations are vulnerable to bias and will not be itself “sufficient evidence” that bias in fact was implicated in any given decision.¹⁴⁰

Whether or not those results are justifiable, lower court decisions agreeing with Justice O’Connor about the lack of probative value of “statements by decision-

138. *E.g.*, Tristin K. Green, *Insular Individualism: Employment Discrimination Law After Ledbetter v. Goodyear*, 43 HARV. C.R.-C.L.L. REV. 353, 354 (2008). *See generally* TRISTIN K. GREEN, DISCRIMINATION LAUNDERING: THE RISE OF ORGANIZATIONAL INNOCENCE AND THE CRISIS OF EQUAL OPPORTUNITY LAW (2017) [hereinafter GREEN, ORGANIZATIONAL INNOCENCE].

139. *E.g.*, *Staub v. Proctor Hosp.*, 562 U.S. 411, 422 (2011) (requiring a showing of a causal connection between the biased supervisors and the decision-maker); *see also* *Sprint/United Mgmt. Co. v. Mendelsohn*, 552 U.S. 379, 381 (2008) (holding that the admissibility of “me, too” evidence, i.e., evidence of discrimination by supervisors other than the supervisor whose decision is being challenged, must be determined by the district court on a case-by-case basis under an abuse of discretion standard: “such evidence is neither per se admissible nor per se inadmissible”). *See generally* Sullivan, *Tortifying*, *supra* note 64.

140. *E.g.*, *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 353–54 (2011) (“The only evidence of a ‘general policy of discrimination’ respondents produced was the testimony of Dr. William Bielby, their sociological expert. Relying on ‘social framework’ analysis, Bielby testified that Wal-Mart has a ‘strong corporate culture,’ that makes it ‘vulnerable’ to ‘gender bias.’ He could not, however, ‘determine with any specificity how regularly stereotypes play a meaningful role in employment decisions at Wal-Mart.’”). In contrast, expert testimony might be useful to help interpret arguably ambiguous locutions. *See generally* Leora F. Eisenstadt, *The N-Word at Work: Contextualizing Language in the Workplace*, 33 BERKELEY J. EMP. & LAB. L. 299 (2012).

makers unrelated to the decisional process itself¹⁴¹ are shocking. Taken literally,¹⁴² and it often is, that phrase would exclude or discount evidence of even the most egregiously biased expressions—even when such statements are directed at plaintiff—as long as they were not made in the immediate context of the decision in question. It would certainly exclude biased statements of a more general type, such as those reflecting disdain for those in plaintiff’s class. Such a view may be consistent with O’Connor’s requirement of “direct evidence,” but, of course, *Desert Palace* entombed that limitation. So it is no small matter that the lower courts taking a broad view of “stray remarks” are essentially reviving that requirement.

141. See *Perry v. City of Avon Park*, 662 F. App’x 831, 837 (11th Cir. 2016) (statement by supervisor that women do not belong in the workplace was neither direct nor sufficient circumstantial evidence of bias when it was made three years prior to his decision to fire plaintiff); *Wilson v. Chipotle Mexican Grill, Inc.*, 580 F. App’x 395, 399 (6th Cir. 2014) (supervisor calling plaintiff a “black dyke bitch” was a stray remark when “the predicates for firing” [her] had already taken place); *King v. United States*, 553 F.3d 1156, 1161 (8th Cir. 2009) (statements made in 2003 and 2004 “are not direct evidence of discrimination because they do not establish a specific link between the alleged animus and the committee’s March 4, 2005” meeting); *Harris v. Cobra Constr.*, 273 F. App’x 193, 195 (3d Cir. 2008) (owner’s pointing a shotgun at plaintiff and referring to them as “black mf—ers” was not the result of their race but because they witnessed an argument); *Elnashar v. Speedway SuperAmerica, LLC*, 484 F.3d 1046, 1055 (8th Cir. 2007) (associate manager’s inquiries into whether plaintiff “had a harem and rode camels in Egypt . . . do not raise a genuine issue of fact about whether unlawful discrimination was a motivating factor in SuperAmerica’s decisions; her questions had no connection to the decisional process and are better characterized as stray remarks”); *Ptasznik v. St. Joseph Hosp.*, 464 F.3d 691, 695 (7th Cir. 2006) (plaintiff’s supervisor’s comments that Ptasznik “was ‘too Polish’ and ‘too old,’ although off-color and probably inappropriate for the workplace, nonetheless do not constitute sufficient evidence that her employer was motivated to terminate her because of her national origin or age”); *Suits v. Heil Co.*, 192 F. App’x 399, 403 (6th Cir. 2006) (statements by decision-maker “in a casual setting indicating he held certain stereotypical beliefs about new mothers as workers which might have been made with the knowledge he was going to have to reduce expenses and/or lay off one or more employees under his supervision” are not sufficient to establish a link between plaintiff’s pregnancy and the adverse employment action).

142. O’Connor’s explanation for her dismissal of remarks as stray, however, suggests a much more circumscribed view than most lower courts have taken:

Race and gender always “play a role” in an employment decision in the benign sense that these are human characteristics of which decision-makers are aware and about which they may comment in a perfectly neutral and nondiscriminatory fashion. For example, in the context of this case, a mere reference to “a lady candidate” might show that gender “played a role” in the decision, but by no means could support a rational factfinder’s inference that the decision was made “because of” sex.

Price Waterhouse v. Hopkins, 490 U.S. 228, 277 (1989) (O’Connor, J., concurring). While it is not at all clear what the justice meant by “played a role,” the absence of any negative valence in such statements would seem to preclude any liability based on them. In any event, O’Connor did not explain why damaging stereotypes about plaintiff’s status, albeit not immediately connected to the decision, would not suffice. *Id.* at 261–79.

Nevertheless, while subject to heavy criticism by commentators,¹⁴³ the stray-remarks doctrine continues to confine any “motivating factor’s” causal clout to a small subset of cases, mostly those in which expressions of bias are made by the decision-maker in close proximity to the challenged decision.

Further, the notion that expressions of bias are not sufficient to show a motivating factor is hard to square with theories of human behavior. Professor Kerri Lynn Stone has written of the inconsistency of the stray-remarks doctrine with another frequently deployed rule, the “same actor inference.”¹⁴⁴ The latter reflects the “common sense” view that bias is unlikely when the person who hired the plaintiff is also the person who discharged her relatively soon thereafter; the rationale is that, had the decision-maker held stereotypical views, he would not have hired the plaintiff in the first place.¹⁴⁵ Stone’s insight is that the stray-remarks doctrine views attitudes as relatively fluid over time; that necessarily contradicts the underpinnings of the same-actor inference, which views them as relatively fixed.¹⁴⁶ If the “common sense” of the same-actor inference is correct, then the stray-remarks doctrine is wrong.

Such an inconsistency, however, does not necessarily establish which is the better view of human behavior. Two noted scholars, Linda Hamilton Krieger and Susan T. Fiske, criticized the same-actor inference because “empirical research suggests that ‘dispositionism,’ the common-sense model of behavioral consistency on which the same-actor inference is based, is deeply flawed, and that human behavior is far less consistent across situations than laypeople tend to believe.”¹⁴⁷

143. See, e.g., Jessica A. Clarke, *Explicit Bias*, 113 NW. U. L. REV. 505, 542 (2018) (“[T]he stray remarks doctrine continues to spread like a cancer through lower court opinions in a number of procedural contexts. Judges use the doctrine not only to reject the sufficiency of evidence of discrimination at the summary judgment stage or to reverse jury verdicts but also to rule remarks inadmissible, as a matter of evidence, excluding them from jury consideration altogether.”); Sandra F. Sperino, *Disbelief Doctrines*, 39 BERKELEY J. EMP. & LAB. L. 231, 235–36 (2018) (criticizing the doctrine and noting that the Supreme Court has at least implicitly rejected it in several cases, including *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133 (2000)); Kerri Lynn Stone, *Taking in Strays: A Critique of the Stray Comment Doctrine in Employment Discrimination Law*, 77 MO. L. REV. 149, 152 (2012) (“[T]he doctrine and its premises fail to comport with even a basic understanding of social science and how people foment, act upon, and reveal discriminatory bias.”).

144. Stone, *supra* note 143, at 183–84.

145. See, e.g., *Schechner v. KPIX-TV*, 686 F.3d 1018, 1026 (9th Cir. 2012). See generally Natasha T. Martin, *Immunity for Hire: How the Same-Actor Doctrine Sustains Discrimination in the Contemporary Workplace*, 40 CONN. L. REV. 1117 (2008).

146. Stone, *supra* note 143, at 184–85; see also *Perez v. Thorntons, Inc.*, 731 F.3d 699, 710 (7th Cir. 2013). The court stressed the “disconnect” between the same actor inference and the stray-remark doctrine since the former assumes that “if a person was unbiased at Time A (when he decided to hire the plaintiff), he was also unbiased at Time B (when he fired the plaintiff),” but the latter posits that “if a person was racist or sexist at Time A (time of the remark), it is not reasonable to infer that the person was still racist or sexist at Time B (when he made or influenced the decision to fire the plaintiff).” See also *Lane v. Riverview Hosp.*, 835 F.3d 691, 698 (7th Cir. 2016) (“If that comment by a decision-maker had shown racial animus, it would be difficult to hold unreasonable an inference of racial animus eight months later.”).

147. Krieger & Fiske, *supra* note 93, at 1048.

While I do not engage in the debate on the extent to which human actions are driven by actor dispositions rather than being fluid or situational,¹⁴⁸ implicit judicial recognition of two competing theories of human behavior in these two doctrines warrants more judicial humility in approaching either question. In the litigation context, that in turn suggests a greater role for juries and a lesser one for judges.

While there is no escaping the need for courts to draw lines about whether a decision-maker's statement is indicative of bias and how closely related such statements must be—temporally and contextually—to the at-issue decision to count as “sufficient evidence,”¹⁴⁹ this analysis suggests the failure of most courts confronting the issue to find even a jury issue created by egregious statements by the decision-maker—albeit not directly tied to the decision in question—to be largely inexplicable. Except, perhaps, for one result-oriented explanation: the motivating factor liability rule is so unforgiving that to do otherwise would result in many more victories for plaintiffs. In short, the breadth of the stray-remarks doctrine in the lower courts may be a foreseeable judicial effort to counterbalance the theoretic permissiveness of the motivating factor rule.

Two other possibilities may reinforce judicial fears of according too great a role for motivating factor liability. The first is whether implicit bias is sufficient for liability, given the debate over whether implicit biases fit within Title VII or whether conscious impulses are required.¹⁵⁰ Despite percolating in the law reviews for years, making an appearance in the 2016 presidential debates,¹⁵¹ and becoming a byword on college campuses and in other antidiscrimination training,¹⁵² implicit

148. See, e.g., Adam Benfarado & Jon Hanson, *The Great Attitudinal Divide: How Divergent Views of Human Behavior Are Shaping Legal Policy*, 57 EMORY L.J. 311, 317 (2008) (arguing that research demonstrates that situational views of human behavior are likely to be “more accurate or less-certainly inaccurate” than dispositional views).

149. For example, where gender discrimination is at issue, the comment might link gender to the plaintiff in a negative way but may have been made months or years before the decision in question, or the comment might concern another worker entirely while still suggesting the speaker disfavored women in the position in question. Each of these scenarios requires the trier of fact to infer that the bias reflected in the statement was a factor in the decision, but that kind of inference is well within normal jury limits.

150. A number of scholars have argued that, if cognitive bias causes an adverse employment action, liability follows. E.g., Katharine T. Bartlett, *Making Good on Good Intentions: The Critical Role of Motivation in Reducing Implicit Workplace Discrimination*, 95 VA. L. REV. 1893, 1900 (2009); Krieger, *Content*, *supra* note 93, at 1169–70; Michael Selmi, *Proving Intentional Discrimination: The Reality of Supreme Court Rhetoric*, 86 GEO. L.J. 279, 294 (1997); Wax, *Discriminating*, *supra* note 93, at 982–83. Nevertheless, the normative question remains important for scholars: *should* the statute be read to impose liability on those not consciously motivated to discriminate? Shin, *supra* note 94, at 89–90; Wax, *Accident*, *supra* note 94, at 1146.

151. *Clinton on Implicit Bias in Policing*, WASH. POST (Sept. 26, 2016, 6:00 PM), https://www.washingtonpost.com/video/politics/clinton-on-implicit-bias-in-policing/2016/09/26/46e1e88c-8441-11e6-b57d-dd49277af02f_video.html.

152. Perhaps the best-known example is Starbucks's effort to deal with a racial incident by closing all its stores for four hours of training, including a focus on implicit bias. Andrew Ross Sorkin, *Bias Session at Starbucks is a First Step*, N.Y. TIMES, May 29, 2018,

bias has made almost no headway in the courts in employment discrimination suits,¹⁵³ although it has influenced other areas of the law.¹⁵⁴ In relatively few discrimination cases do plaintiffs even seek to introduce evidence of implicit bias,¹⁵⁵ and there is an almost total absence of instances where a court looks to implicit bias as an important element of proof of discrimination. The failure of the courts to be

at B1; *see also* Al Baker, *Confronting Implicit Bias in the New York Police Department*, N.Y. TIMES, July 15, 2018, at A16 (reporting on launch of a 4.5 million-dollar implicit bias training program).

153. Only a handful of decisions have even used the term in employment discrimination cases, and rarely in a positive fashion. One circuit affirmed both denying admission of an expert report and a proposed jury instruction on the concept. *White v. BNSF Ry. Co.*, 726 F. App'x 603, 604 (9th Cir. 2018). Another upheld the exclusion of expert testimony in a disparate impact case because plaintiffs “are not required to prove that any particular psychological mechanism caused the disparity in question” but did suggest that such testimony might be admissible if the district court “determine[s] that such testimony elucidates the kind of headwind disparate-impact liability is meant to redress.” *Karlo v. Pittsburgh Glass Works, LLC*, 849 F.3d 61, 84–85 (3d Cir. 2017); *see also* *Martin v. F.E. Moran, Inc. Fire Prot.*, No. 13 C 3526, 2018 U.S. Dist. LEXIS 54179 (N.D. Ill. Mar. 30, 2018) (finding no liability despite expert testimony about implicit bias); *Jones v. Nat'l Council of YMCA*, No. 09 C 6437, 2013 U.S. Dist. LEXIS 129236 (N.D. Ill. Sep. 5, 2013) (striking testimony of implicit bias expert). *But see* *Woods v. City of Greensboro*, 855 F.3d 639, 652 (4th Cir. 2017) (looking to implicit bias research as a reason to deny a motion to dismiss, and noting “[t]here is thus a real risk that legitimate discrimination claims, particularly claims based on more subtle theories of stereotyping or implicit bias, will be dismissed should a judge substitute his or her view of the likely reason for a particular action in place of the controlling plausibility standard”). One of the few cases in which implicit bias arguably played an important role in finding liability is *Kimble v. Wis. Dep't of Workforce Dev.*, 690 F. Supp. 2d 765, 778 (E.D. Wis. 2010) (finding that “in addition to failing to provide a credible explanation of the conduct complained of, Donoghue behaved in a manner suggesting the presence of implicit bias.”).

154. Some judges have engaged in “debiasing” efforts with juries. *See* Mark W. Bennett, *Unraveling the Gordian Knot of Implicit Bias in Jury Selection: The Problems of Judge-Dominated Voir Dire, the Failed Promise of Batson, and Proposed Solutions*, 4 HARV. L. & POL'Y REV. 149, 169 (2010); *see also* *Shirley v. Yates*, 807 F.3d 1090, 1110 n.26 (9th Cir. 2016) (invoking implicit bias studies in *Batson* challenges).

155. One possible explanation for the failure to often mount implicit bias challenges is the fear that juries will feel that, if everyone is biased, no one is biased. *See* Jerry Kang et al., *supra* note 93, at 1186 (“And the best scientific evidence suggests that we—all of us, no matter how hard we try to be fair and square, no matter how deeply we believe in our own objectivity—have implicit mental associations that will, in some circumstances, alter our behavior.”). In other words, jurors may not be disposed to hold someone responsible for conduct that they can readily see themselves as engaging in.

more receptive to implicit bias theories¹⁵⁶ is certainly consistent with their grudging approach to motivating factor liability.¹⁵⁷

Secondly, it is unclear how motivating factor liability would apply where multiple decision-makers are involved, and courts may be resistant to starting down a road that might lead to the extreme case of, say, one biased member of a committee being sufficient to impose liability on the employer. While too complicated a topic to address in detail here, the Supreme Court encountered the issue in *Price Waterhouse v. Hopkins* itself where the decision was made by a collective body¹⁵⁸

156. On the academic side, scholarly proponents of implicit bias liability often focus not on the existence of such bias per se but on whether the employer appropriately acts to minimize its impact. See, e.g., GREEN, ORGANIZATIONAL INNOCENCE, *supra* note 138; Susan Sturm, *Second Generation Employment Discrimination: A Structural Approach*, 101 COLUM. L. REV. 458, 485–90 (2001). But see Samuel R. Bagenstos, *The Structural Turn and the Limits of Antidiscrimination Law*, 94 CALIF. L. REV. 1, 2–3 (2006). While that approach might well be the correct way to deal with the phenomenon from a theoretic perspective, it is not clear how recognition that implicit bias is actionable would fit into the motivating factor liability structure in individual disparate treatment cases.

157. Admittedly, there is a chicken–egg problem here. The plaintiffs’ bar has rarely relied heavily on implicit bias evidence, which means there have been limited opportunities for courts to decide cases.

158. The decision to put “on hold” the plaintiff’s application to be elevated to partnership was made by the partnership’s multi-member Policy Board. *Price Waterhouse v. Hopkins*, 490 U.S. 228, 235 (1989). On the outputs side, the plurality quoted Thomas Beyer, “the man who . . . bore responsibility for explaining to Hopkins the reasons for the Policy Board’s decision.” *Id.* But it also looked to biased inputs—recommendations by other partners. *Id.* (“There were clear signs, though, that some of the partners reacted negatively to Hopkins’ personality because she was a woman. One partner described her as ‘macho’; another suggested that she ‘overcompensated for being a woman; a third advised her to take ‘a course at charm school.’”) (record citations omitted). And it found significant the failure of the employer to disclaim the sex stereotypes reflected in some comments. *Id.* at 256 (“Hopkins showed that the partnership solicited evaluations from all of the firm’s partners; that it generally relied very heavily on such evaluations in making its decision; that some of the partners’ comments were the product of stereotyping; and that the firm in no way disclaimed reliance on those particular comments, either in Hopkins’ case or in the past. Certainly a plausible—and, one might say, inevitable—conclusion to draw from this set of circumstances is that the Policy Board in making its decision did in fact take into account all of the partners’ comments, including the comments that were motivated by stereotypical notions about women’s proper deportment.”).

Justice O’Connor’s concurrence also looked to both inputs and outputs of the process. *Id.* at 272 (O’Connor, J., concurring) (“In this case, the District Court found that a number of the evaluations of Ann Hopkins submitted by partners in the firm overtly referred to her failure to conform to certain gender stereotypes as a factor militating against her election to the partnership. The District Court further found that these evaluations were given ‘great weight’ by the decision-makers at Price Waterhouse. In addition, the District Court found that the partner responsible for informing Hopkins of the factors which caused her candidacy to be placed on hold, indicated that her ‘professional’ problems would be solved if she would ‘walk more femininely, talk more femininely, wear make-up, have her hair styled, and wear jewelry.’”) (citations omitted).

and, more recently, in *Staub v. Proctor Hospital*¹⁵⁹ where the Court considered a hierarchical setting. There, it held that a violation could be found even though the ultimate decision-maker was unbiased where lower level supervisors had both the intent to cause an adverse employment action and bias was a motivating factor that proximately caused that action.¹⁶⁰ Although the significance of *Staub*'s holding has been muddied by subsequent developments,¹⁶¹ the reality remains that motivating factor analysis creates the potential for liability in a wide variety of work settings where multiple actors are involved in the decision-making process.¹⁶²

159. 562 U.S. 411 (2011). *Staub* was decided under the Uniformed Services Employment and Reemployment Rights Act but is generally accepted as also governing Title VII status discrimination claims. It is often referred to as a “cat’s paw” case. See generally Sullivan, *Tortifying*, *supra* note 64. See also, e.g., Sandra F. Sperino, *Discrimination Statutes, the Common Law, and Proximate Cause*, 2013 U. ILL. L. REV. 1, 4 (2013); Sandra F. Sperino, *Statutory Proximate Cause*, 88 NOTRE DAME L. REV. 1199, 1220 (2013).

160. *Staub*, 562 U.S. at 422 (“We therefore hold that if a supervisor performs an act motivated by antimilitary animus that is intended by the supervisor to cause an adverse employment action, and if that act is a proximate cause of the ultimate employment action, then the employer is liable under USERRA.”).

161. *Staub* “express[ed] no view as to whether the employer would be liable if a co-worker, rather than a supervisor, committed a discriminatory act that influenced the ultimate employment decision.” *Id.* at 422 n.4; *Vance v. Ball State Univ.*, 570 U.S. 421 (2013) (defining “supervisor” so narrowly as to perhaps render the lower level managers in *Staub* only co-workers). Subsequent circuit court decisions, however, have tended to find liability where co-workers caused adverse employment actions. See *Velázquez-Pérez v. Developers Diversified Realty Corp.*, 753 F.3d 265, 274 (1st Cir. 2014) (co-worker’s statements motivated by bias and intended to cause the plaintiff’s discharge are actionable when they “proximately cause the plaintiff to be fired, and the employer acts negligently by allowing the co-worker’s acts to achieve their desired effect though it knows (or reasonably should know) of the discriminatory motivation.”); see also *Vasquez v. Empress Ambulance Serv.*, 835 F.3d 267, 273–74 (2d Cir. 2016) (“We see no reason why [principles of employer liability for] hostile work environment, should not also be read to hold an employer liable under Title VII when, through its own negligence, the employer gives effect to the retaliatory intent of one of its—even low-level—employees.”). *But see Smyth-Riding v. Scis. & Eng’g Servs., LLC*, 699 F. App’x 146, 156 (4th Cir. 2017) (“To extend cat’s paw liability to [influence by co-workers] would constitute an expansion of the theory to a context in which its application has not been recognized”).

162. It is possible for an employer to avoid liability even where someone in the process manifests bias by separating the decision from potential influences. Thus, *Price Waterhouse* suggests that a decision-maker can sometimes cleanse the taint of impermissible motivations by disclaiming them. Even in the cat’s paw context, a sufficiently “independent investigation” (independent, presumably, of the biased individual’s input) may do so. *Staub* suggested that an employer’s investigation that resulted “in an adverse action for reasons unrelated to the supervisor’s original biased action” would preclude liability, although it stressed that it would be the employer’s burden to establish that under USERRA and, by extension, for Title VII status discrimination cases. But it cautioned that “the supervisor’s biased report may remain a causal factor if the independent investigation takes it into account without determining that the adverse action was, apart from the supervisor’s recommendation, entirely justified.” *Staub*, 562 U.S. at 420–21.

C. Plaintiff's Opting Out of Motivating Factor Analysis

I begin with the obvious: despite *Desert Palace* and the theoretical advantages of motivating factor liability for plaintiffs, the *McDonnell Douglas* framework continues to be by far the dominant mode of analysis for employment discrimination cases. As we've seen, the latter is cited far more often,¹⁶³ and courts rarely do more than nod to *Desert Palace* or motivating factor in passing.

While plaintiffs' attorneys may be reacting in part to actual or perceived judicial resistance, they rarely push the envelope by asking for a motivating factor instruction that truly strips away any but-for causation. *Exel* is one, perhaps an extreme, example. Instead, as in *Exel*, plaintiffs seem to prefer to hitch their wagons to *McDonnell Douglas*. That may be precisely because of the tactical and ethical challenges of going down the motivating factor avenue. Tactically, such a choice creates a risk of juries splitting the baby, that is, finding for plaintiffs on liability while finding for defendants on the same decision defense. Take *Exel* itself. A plaintiff in that situation might think that the PTP provided a sympathetic enough reason that the jury would find "same decision anyway" if offered that choice. If, however, the jury were forced to choose between gender and the PTP, with no possibility of compromise (as *McDonnell Douglas* is usually thought to require), it might well find for plaintiff.¹⁶⁴

Of course, it takes two to tango, and defendants might request a same decision instruction even if plaintiff doesn't. But there is some question as to whether that option is available to defendants when plaintiff has not invoked motivating factor.¹⁶⁵ That aside, employer incentives also cut against such a tactic. For example, a defendant in the *Exel* setting might well conclude, given Harris's statements and other proof, the jury would likely find liability even if no causation,¹⁶⁶ but if forced to a choice between gender and another reason, would find the humane appeal of the PTP trumped. Such a defendant might well want to avoid an enhanced risk of being adjudicated a discriminator even if its exposure

163. See generally Eyer, *supra* note 40.

164. Plaintiffs may raise motivating factor liability in opposition to defense motions for summary judgment. In that context, plaintiffs are not forced to make a final choice between the *McDonnell Douglas* and § 703(m) litigation structures since the motion should be denied if a triable issue exists under either. But plaintiffs' efforts do not seem to be bearing much fruit in terms of results, perhaps because it is in this context that the stray comment doctrine seems to have considerable bite. See, e.g., *Rayyan v. Va. Dep't of Transp.*, 719 F. App'x 198, 202–03 (4th Cir. 2018) (assuming the decision-maker repeatedly insulted plaintiff as a "dumb" or "stupid" "Arab" contemporaneous to remarking that "she didn't want him around long," there was no nexus between such "stray" remarks and his dismissal three weeks later given preexisting performance problems).

165. See *Coe v. N. Pipe Prods., Inc.*, 589 F. Supp. 2d 1055, 1098 (N.D. Iowa 2008). The argument is that the text of § 2000e-5(g)(2)(B)—which begins with "[o]n a claim in which an individual proves a violation under section 2000e-2(m)"—limits the "same decision" defense to such claims. *Id.* That is, "the 'same decision' can be raised as a defense only after the plaintiff proves a 'mixed motives' claim under § 2000e-2(m). But see *Griffith v. City of Des Moines*, 387 F.3d 733, 736 n.2 (8th Cir. 2004) (reading *Desert Palace* as entitling "either party . . . to a mixed-motive jury instruction").

166. See *EEOC v. Exel, Inc.*, 884 F.3d 1326, 1343 (11th Cir. 2018) (Tjoflat, J., dissenting).

were reduced. And given the remedial structure, it may not be a substantial reduction in exposure in any case.¹⁶⁷ Indeed, courts¹⁶⁸ and commentators¹⁶⁹ generally believe that's a defendant's optimal choice.

Complicating choosing the *Desert Palace* option from the plaintiff's perspective is the attorney-client conflict that arises by virtue of the remedial structure for such cases. Recall that, should defendant prevail on the same decision defense, the plaintiff recovers no monetary relief, nor does she get reinstatement or reinstatement. For her troubles, the most she is likely to obtain is an order to the defendant not to discriminate against her in the future. In the meantime, since she prevailed, an award of attorneys' fees is appropriate, but that is most likely owed to the attorneys under the retainer agreement with the client.¹⁷⁰ This structure led Judge Mark W. Bennett to describe motivating factor as a "Trojan horse":

While it is easier to prove "mixed motive" causation than to prove "but for" causation, the lower burden comes at a price: The defendant is allowed to offer the "same decision" affirmative defense. Thus, although the trier of fact may well find liability on a "mixed motives" claim, the plaintiff may ultimately recover nothing if the trier of fact also finds for the defense on the "same decision" defense. When faced with the real possibility of passing through the gauntlet of an employment discrimination trial, this court doubts that many plaintiffs would be willing to run the risk of prevailing on liability, but still receiving no monetary compensation for their efforts. This court also doubts that many plaintiffs would be happy to find that

167. As explained in the text, the defendant will remain liable for attorneys' fees and avoid backpay liability and capped damages. Depending on the plaintiff's compensation, her opportunities for mitigation, and the mental distress she suffered, attorneys' fees will often be the predominant form of monetary relief.

168. See *Smith v. Xerox Corp.*, 602 F.3d 320, 333 (5th Cir. 2010) ("The reality is that the defendant will always prefer a pretext submission that requires the plaintiff to prove that there was no legitimate motivation (but-for) while the plaintiff will always prefer a mixed-motive submission with the burden on the defendant."). But see *Fields v. N.Y. State Office of Mental Retardation & Dev. Disabilities*, 115 F.3d 116, 123 (2d Cir. 1997) (noting that, while defendants usually want a dual motivation charge, some prefer not to have an affirmative defense instruction even where the evidence permits it, but that "in some limited circumstances a plaintiff is entitled to have the instruction given").

169. See David Sherwyn & Michael Heise, *The Gross Beast of Burden of Proof: Experimental Evidence on How the Burden of Proof Influences Employment Discrimination Case Outcomes*, 42 ARIZ. ST. L.J. 901, 937 (2010) (while pretext and motivating factor yield substantially equal chances of prevailing, the data show a "non-trivial chance that a motivating factor instruction will result in costs and fees being awarded"); Struve, *supra* note 33, at 311 (defendants will ordinarily prefer the burden-retaining instruction to the burden shifting one); Richard L. Wiener & Katlyn S. Farnum, *The Psychology of Jury Decision Making in Age Discrimination Claims*, 19 PSYCHOL. PUB. POL'Y & L. 395, 405 (2013) ("[J]urors with mixed-motive instructions were more likely to find for the plaintiff than were those with instructions that require age to be the dispositive 'but for' factor . . .").

170. See Charles Silver, *Unloading the Lodestar: Toward a New Fee Award Procedure*, 70 TEX. L. REV. 865, 884 n.76 (1992) (lawyers, especially in civil rights cases and class actions, often agree to accept fee awards in full or partial satisfaction of their clients' debts).

insult is added to injury, when they will receive nothing, but their lawyers will be compensated by the employer.¹⁷¹

Given these incentives, it may not be surprising that motivating factor has not been more prominent in employment discrimination litigation.¹⁷² But a cautionary note might be sounded: while plaintiff's attorneys' incentives are potentially warped at trial, the vast majority of civil cases settle, and it remains surprising that "motivating factor" arguments do not appear to be featured more prominently in resisting employer summary judgment motions.

V. LESSONS TO BE LEARNED?

The lessons to be learned from this discussion are several and unsettling ones for expanding the antidiscrimination project.

The first is that judicial resistance to legislative innovations with the potential to dramatically change the workplace is perfectly foreseeable. Although there are exceptions,¹⁷³ the Court has often interpreted the employment discrimination laws narrowly. Just focusing on three areas that led to legislative overrides,¹⁷⁴ the Court has: interpreted Title VII's prohibition of sex discrimination not to include pregnancy discrimination;¹⁷⁵ cut back radically on disparate impact liability,¹⁷⁶ among other doctrines,¹⁷⁷ in a series of cases that led to the 1991

171. Coe v. N. Pipe Prods., Inc., 589 F. Supp. 2d 1055, 1097–98 (N.D. Iowa 2008).

172. It has been suggested that this argument presumes too much nobility on the part of attorneys, who in other contexts, most notably class actions, are less concerned with client reaction. Nan S. Ellis, *The Class Action Fairness Act of 2005: The Story Behind the Statute*, 35 J. LEGIS. 76, 111 (2009) (a dominant narrative is that there is a class action "crisis," which is all about fairness: "It is fair to try to protect the hapless defendants from the evil plaintiffs and their attorneys. It is fair to try to protect the injured plaintiffs from their greedy lawyers."). Of course, in the class action context, the client class is largely faceless, and the stakes are considerably higher, which may skew attorney conduct in ways dramatically different from the typical individual disparate treatment Title VII case.

173. *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971), is the best example of a Supreme Court decision taking an expansive view of statutory language that could have been read more restrictively and doing so by developing a doctrine with potentially transformative implications. But even that decision must be bracketed in light of the Court's subsequent efforts to tame, if not gut, the doctrine. See generally Sullivan, *Mirage*, *supra* note 10.

174. These have not always been found to be as sweeping as sponsors may have hoped. See, e.g., Deborah A. Widiss, *Shadow Precedents and the Separation of Powers: Statutory Interpretation of Congressional Overrides*, 84 NOTRE DAME L. REV. 511, 513 (2009) ("[C]ourts often continue to follow statutory interpretation precedents whose holdings have been repudiated by Congress. Accordingly, although overrides are generally lauded as a significant balance to the countermajoritarian reality that courts, through statutory interpretation, make policy, the 'check' they offer on the judicial branch is far less robust than is typically assumed."); see also Deborah A. Widiss, *Undermining Congressional Overrides: The Hydra Problem in Statutory Interpretation*, 90 TEX. L. REV. 859 (2012); Charles A. Sullivan, *The Curious Incident of Gross and the Significance of Congress's Failure to Bark*, 90 TEX. L. REV. SEE ALSO 157 (2012).

175. Gen. Elec. Co. v. Gilbert, 429 U.S. 125, 136 (1976).

176. Wards Cove Packing Co. v. Atonio, 490 U.S. 642, 658–61 (1989).

177. E.g., Patterson v. McLean Credit Union, 491 U.S. 164, 171 (1989) (interpreting § 1981 to reach only the formation, not the execution, of contracts).

Amendments; and interpreted the term “disability” in the Americans with Disabilities Act to dramatically limit that law’s potential reach.¹⁷⁸ Other restrictive interpretations include reading Title VII’s religion accommodation requirement narrowly.¹⁷⁹ And this is aside from procedural innovations, ranging from pleading restrictions¹⁸⁰ to class action limitations¹⁸¹ to arbitration decisions,¹⁸² that have made it far less likely that employers will be held accountable for violations of the antidiscrimination laws.

Thus, judicial resistance to the motivating factor structure was predictable, maybe even inevitable. Congress’s use of such an imprecise and counterintuitive concept may have been asking for the kind of confusion and resistance this Article has documented. Hindsight is, of course, 20/20, but it was also foreseeable that O’Connor’s stray remark dicta would take on a life of its own. In 1990, Judge Posner lightheartedly predicted that “stray remarks [in *Price Waterhouse*] addressed to the issue of stray remarks in discrimination cases, bid fair to create a doctrine of ‘stray remarks.’”¹⁸³ He was less prescient, however, in proceeding to discount that possibility.¹⁸⁴ Admittedly, what the proponents could have done about this, given the complicated negotiations leading to enactment,¹⁸⁵ is another question. And even going forward, a statutory fix to the stray-remarks doctrine to render it more open to

178. *E.g.*, *Toyota Motor Mfg. v. Williams*, 534 U.S. 184, 197 (2002) (demanding standard for disability). While generally honoring this expansion, *but see* Nicole B. Porter, *Explaining “Not Disabled” Cases Ten Years After the ADAAA: A Story of Ignorance, Incompetence, and Possibly Animus*, 26 GEO. J. POVERTY L. & POL’Y 383, 392–93 (2019), courts have often been able to reach the same outcomes by, say, finding individuals, now “disabled,” not to be “qualified,” a separate requirement for statutory coverage. *See* Stephen F. Befort, *An Empirical Analysis of Case Outcomes Under the ADA Amendments Act*, 70 WASH. & LEE L. REV. 2027, 2031–32 (2013) (“[T]he post-amendment decisions show an increased tendency for the courts to find that the plaintiff is not qualified,” resulting in “the potential for lower overall win outcomes for ADAAA plaintiffs than might have been expected.”); *see also* Nicole B. Porter, *The New ADA Backlash*, 82 TENN. L. REV. 1, 7 (2014) (empirical study showing courts are generally following the ADAAA’s command to be more receptive to claims of disability but remain resistant to changing structural norms as a reasonable accommodation).

179. *Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63, 84 (1977) (more than de minimis cost constitutes an undue hardship relieving an employer of its duty to accommodate religious practice or observance).

180. *Ashcroft v. Iqbal*, 556 U.S. 662, 678–79 (2009); *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 556 (2007).

181. *E.g.*, *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 349–52 (2011).

182. *E.g.*, *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 35 (1991).

183. *Shager v. Upjohn Co.*, 913 F.2d 398, 402 (7th Cir. 1990).

184. *Id.*

185. What ultimately became the 1991 Act was the center of a heated national debate across a wide range of provisions although the biggest hot-button issue was the amendments related to the disparate impact theory. Indeed, its predecessor in 1990 had been vetoed by President Bush, and some attribute the success of the 1991 version to public reaction to the Anita Hill–Clarence Thomas confrontation in Thomas’s confirmation hearings and the resulting focus on the remedial limitations of Title VII as it was originally passed. Michael Selmi, *The Supreme Court’s Surprising and Strategic Response to the Civil Rights Act of 1991*, 46 WAKE FOREST L. REV. 281, 289 (2011) (“Indeed, I think it is fair to say that without the hearings, there may not have been a CRA.”).

proof that a decision-maker was biased, without the need for a close connection in time and space to the challenged decision, is not easy to frame.

Another lesson may be that Congress should be more attuned to the realities of the enforcement process. It is no secret that enforcement is largely private-plaintiff driven (and even the EEOC is limited to enforcement through court suit). Nor is it a secret that enforcement is viable only if the tools provided are adequate to the task. In the case of motivating factor liability, Congress, with all good intentions, failed to appreciate both the tactical problems and the professional responsibility dilemma created by the litigation structure it crafted. While it is only speculation, the EEOC's proffered instructions in *Exel* might be a result of the complicated incentives.

All of this suggests that motivating factor liability is a noble failure. That is reassuring only in the sense that plaintiffs' losses in *Gross* and *Nassar* are less significant than they appeared at the time,¹⁸⁶ and the stakes in the cases currently before the Supreme Court are lower than commentary sure to follow over the next year would suggest.

If and when a time comes for Congress (or state legislatures) to revisit this issue, a less complex solution to the problem motivating factor liability was designed to address might be considered. That problem was employers' placing and continuing biased individuals in decision-making roles. That takes us back to *Exel*. Granting the persuasiveness of the evidence, Harris was in a position where his clear bias against women was likely, over time, to result in adverse decisions, whether or not Ms. Travis lost her promotion as a result of it. Courts are not now ready to find that employers violate the law merely by having biased supervisors make decisions without some further showing that, despite company nondiscrimination policies, the biases actually influenced the decision. But Congress could provide, say, a civil penalty for such structures and to address plaintiffs' litigation challenges, allow employees as relators to enforce such sanctions, separately or together with traditional discrimination claims. The model might be the False Claims Act¹⁸⁷ or California's Private Attorney General Act of 2004.¹⁸⁸ Such suits, because they are

186. That's not to defend the Court's analysis in either case. What is most surprising was the failure of the Court to apply *Price Waterhouse*, which had construed parallel language. See *supra* text accompanying notes 35–36.

187. 31 U.S.C. § 3729 (2018). The FCA functions as a very powerful source of employee rights. Its general thrust is to empower any citizen to bring a claim (referred to as a qui tam suit) in the name of the United States against any entity that submits "a false or fraudulent claim for payment" to the federal government. As "relators," such plaintiffs are entitled to a bounty if successful, and they may do so together with or apart from any suit they may have for retaliation for opposing such claims. *Id.* § 3730(h). The right is hedged around with a number of restrictions and procedural requirements. See generally, e.g., David Freeman Engstrom, *Public Regulation of Private Enforcement: Empirical Analysis of DOJ Oversight of Qui Tam Litigation Under the False Claims Act*, 107 NW. U. L. REV. 1689 (2013); David Freeman Engstrom, *Harnessing the Private Attorney General: Evidence from Qui Tam Litigation*, 112 COLUM. L. REV. 1244 (2012).

188. CAL. LAB. CODE § 2698-2699.6 (West 2004) allows private individuals to sue on behalf of state labor agencies to seek statutory damages for Labor Code violations. Most

on behalf of the government and not brought in an employee's capacity as such, are arguably not preempted by the Supreme Court's arbitration jurisprudence,¹⁸⁹ and may in any event not fall within a relator's agreement to arbitrate *her* claims.¹⁹⁰ Obviously, there would be much to be worked out in this regard, and there are potential obstacles to providing standing to employees for statutory damages.¹⁹¹

CONCLUSION

It's perhaps appropriate for an article on mixed motives to end with a confession of mixed feelings by its author. I was an early, if cautious, fan of *Price Waterhouse*¹⁹² and a strong supporter of its codification in the 1991 Civil Rights Act. It is distressing to report that that experiment seems to have been a failure.

of the recovery (75%) in such litigation goes to the state, with the remainder distributed to the victims.

189. *Sakkab v. Luxxotica Retail N. Am. Inc.*, 803 F.3d 425, 430 (9th Cir. 2015). *See generally*, e.g., Maureen A. Weston, *The Clash: Squaring Mandatory Arbitration with Administrative Agency and Representative Recourse*, 89 S. CAL. L. REV. 103 (2015); Janet Cooper Alexander, *To Skin a Cat: Qui Tam Actions as a State Legislative Response to Concepcion*, 46 U. MICH. J.L. REFORM 1203 (2013).

190. That issue is largely unresolved. *See Iskanian v. CLS Transp. L.A., LLC*, 327 P.3d 129, 155 (Cal. 2014) ("The arbitration agreement gives us no basis to assume that the parties would prefer to resolve a [qui tam] claim through arbitration."). *See generally* Zachary D. Clopton, *Procedural Retrenchment and the States*, 106 CALIF. L. REV. 411 (2018).

191. *See Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1548 (2016) (plaintiffs must suffer a concrete injury in order to have standing to recover statutory awards). However, the Supreme Court has upheld standing of relators in FCA suits. *See, e.g.*, *Vt. Agency of Nat. Res. v. United States ex rel. Stevens*, 529 U.S. 765, 787–88 (2000); *Ne. Fla. Chapter of Associated Gen. Contractors of Am. v. City of Jacksonville*, 508 U.S. 656, 657 (1993) (suggesting that dignitary injury may be sufficient). *See generally* Clopton, *supra* note 190; *see also* Craig Konnoth & Seth Kreimer, *Spelling Out Spokeo*, 165 U. PA. L. REV. ONLINE 47, 54 (2016).

192. *See generally* Sullivan, *Accounting*, *supra* note 21.