A BETTER ROUTE THROUGH THE SWAMP: CAUSAL COHERENCE IN DISPARATE TREATMENT DOCTRINE

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Abstract

Disparate treatment doctrine has long been a swamp and it is getting deeper and murkier. The various judicially and legislatively created routes through the swamp–proof schemes–are poorly marked and, at best, imperfect. Critically, the routes through the swamp have become unmoored from the critical cause-in-fact inquiry they were ostensibly designed to illuminate.

Focusing first on cause-in-fact, this Article seeks to establish causal coherence in disparate treatment doctrine by applying–for the first time–modern cause-in-fact theory, including the necessary element of a sufficient causal-set ("NESS") standard articulated in the Restatement Third of Torts: Physical and Emotional Harm *("*Restatement Third*"), across the various individual disparate treatment statutes and theories. In order to implement this new-found causal coherence, this Article proposes a better route through the swamp in the form of a unified proof scheme for use in all individual disparate treatment cases, regardless of statute or theory, that is rooted in this conception of causal necessity based on the ubiquitous McDonnell Douglas proof scheme.*

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Additionally, the title of this Article was inspired by and drawn from the work of Dean Martin Katz of the University of Denver, in particular *The Fundamental Incoherence of Title VII: Making Sense of Causation in Disparate Treatment Law*, 94 GEO. L.J. 489, 537 (2006). Dean Katz's excellent scholarship on causation in disparate treatment law is cited throughout this Article.

The views expressed herein are solely my own, and I am solely responsible for the contents hereof, especially any errors or omissions.

INTRODUCTION

Disparate treatment doctrine is, as a number of scholars and courts have described, a swamp.[1] There are both factual and legal aspects to the swamp in any given disparate treatment case. From a factual standpoint, decisionmaking in the employment context is a complex phenomenon.[2] There are myriad considerations that go into any decision to hire, fire, promote, or discipline: policy, personality, objective evidence, subjective perceptions and beliefs, empathy, personal dislike, grudges, history, consistency, documentation, jealousy, protectiveness, favoritism, and perhaps race, sex, age, or protected conduct (just to name a few). These considerations are typically swirled together in the head of the decisionmaker and/or the influencer.[3] Added to this factual swamp is a legal swamp of statutory language, legal precedent, legislative amendments and overrides, and disputes about the meaning and effect of those amendments.[4]

In a disparate treatment case, the court (and, ultimately, the factfinder) must navigate this swamp of thought, consideration, and law in an effort to locate the discriminatory consideration—if any, determine what role—if any—it played in the decisionmaker's decision, and decide whether it "caused" the decision in a legally relevant sense.[5] This can be a truly daunting task.

In order to make the journey through the swamp less daunting, the

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1. *See* Martin J. Katz, *Unifying Disparate Treatment (Really)*, 59 HASTINGS L.J. 643, 645 n.8 (2008) [hereinafter Katz, *Unifying Disparate Treatment*] (citing a source identifying the doctrine as a "swamp"); Robert Belton, *Mixed-Motive Cases in Employment Discrimination Law Revisited: A Brief Updated View of the Swamp*, 51 MERCER L. REV. 651, 651 (2000); Paul N. Cox, *Substance and Process in Employment Discrimination Law: One View of the Swamp*, 18 VAL. U. L. REV. 21, 21 (1984). Others have used the synonymous "morass" and "quagmire" to describe the state of disparate treatment doctrine. *See* Costa v. Desert Palace, Inc., 299 F.3d 838, 851-53 (9th Cir. 2002) *aff'd*, 539 U.S. 90 (2003) ("quagmire," "morass," and "chaos"); Michael J. Zimmer, *The New Discrimination Law:* Price Waterhouse *is Dead*, *Whither* McDonnell Douglas*?*, 53 EMORY L.J. 1887, 1916 (2004) [hereinafter Zimmer, *The New Discrimination Law*]; Benjamin C. Mizer, Note, *Toward a Motivating Factor Test for Individual Disparate Treatment Claims*, 100 MICH. L. REV. 234, 269 (2002) ("morass").

2. *See infra* Part I.A.

3. There can, of course, be more than one decisionmaker, such as when a committee makes the decision at issue. Additionally, it may be an "influencer" that has used a combination of legitimate and illegitimate considerations to influence a decisionmaker. *Staub v. Proctor Hosp.*, 131 S. Ct. 1186, 1194 (2011). In Aesop's fable, Monkey was the "influencer" and Cat (and her paw) was the instrument (the decisionmaker) through which Monkey achieved his goal of retrieving the chestnuts from the fire. *Id.* at 1190 n.1.

4. For an excellent discussion of the problems with congressional overrides and judicial interpretation of overrides, see Deborah Widiss, *Undermining Congressional Overrides: The Hydra Problem in Statutory Interpretation*, 90 TEX. L. REV. 859 (2012).

5. Given the massive information asymmetries that exist in the context of employment-related decisionmaking, this is a challenging task, even in the best of circumstances. *See* Martin J. Katz, *The Fundamental Incoherence of Title VII: Making Sense of Causation in Disparate Treatment Law*, 94 GEO. L. REV. 489, 515-17 (2006) [hereinafter Katz, *Fundamental Incoherence*].

Supreme Court and Congress have endeavored to mark various routes[6] through the swamp. Theoretically, if a plaintiff follows one of these routes successfully, it may lead her through the swamp. However, these routes are, at best, imperfect.

The "routes" through the swamp are, of course, the proof schemes utilized in disparate treatment cases: the *McDonnell Douglas* pretext proof scheme, the *Mt. Healthy*/*Price Waterhouse* proof scheme,[7] and the Civil Rights Act of 1991 ("the 1991 CRA") proof scheme. Formulating, refining, and defining these "routes" has occupied a disproportionate share of the Supreme Court's disparate treatment jurisprudence over the last forty years.[8] Despite these efforts (or perhaps because of them), the routes have remained poorly marked. It is not clear when each route is available or required.[9] The parameters of each route are continuously evolving and changing. Further, the presumptions, assumptions, and inferences underlying these routes are often tenuous.

So much attention has been paid to marking the routes that many have forgotten where these routes are supposed to lead. Rather than leading directly to legal liability for the defendant or victory for the plaintiff, the proof schemes were intended as a framework to allow the factfinder to determine the existence (or lack) of *cause-in-fact*.[10] Determining cause-in-fact–that consideration of the

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6. I use the term "route" in the Google Maps sense. Meaning, in Google Maps, when you seek directions to a physical destination, it (typically) provides two or three alternative routes, which utilize different types of roads (interstates vs. highways vs. local roads), different speeds of travel, different modes of travel (car vs. train vs. foot), and different levels of scenic-ness. *See* GOOGLE MAPS, http://maps.google.com.

7. This proof scheme is more commonly called the *Price Waterhouse* proof scheme, *Price Waterhouse v. Hopkins*, 490 U.S. 228, 252, 258 (1989), however, the Court originally developed this burden-shifting proof scheme in Mt. Healthy City School District Board of Education v. Doyle, 429 U.S. 274, 286-87 (1977), in the context of a First Amendment retaliation claim brought by a public employee. Additionally, Congress subsequently codified this proof scheme into the Uniformed Services Employment and Re-employment Rights Act, 38 U.S.C. § 4311(a) (2006) ("USERRA").

8. *See, e.g.*, Gross v. FBL Fin. Servs., Inc., 129 S. Ct. 2343 (2009); Raytheon Co. v. Hernandez, 540 U.S. 44 (2003); O'Connor v. Consol. Coin Caterers Corp., 517 U.S. 308 (1996); St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502 (1993); *Price Waterhouse*, 490 U.S. at 228; Patterson v. McLean Credit Union, 491 U.S. 164 (1989); U.S. Postal Serv. Bd. of Governors v. Aikens, 460 U.S. 711 (1983); Tex. Dep't of Cmty. Affairs v. Burdine, 450 U.S. 248 (1981); Bd. of Trs. of Keene State Coll. v. Sweeney, 439 U.S. 24 (1978); Furnco Constr. Corp. v. Waters, 438 U.S. 567 (1978); McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973); McDonald v. Santa Fe Trail Transp. Corp., 427 U.S. 273 (1976); Costa v. Desert Palace, Inc., 299 F.3d 838 (9th Cir. 2002), *aff'd*, 539 U.S. 90 (2003).

9. Martin J. Katz, Gross *Disunity*, 114 PENN. ST. L. REV. 857, 858-89 (2010) [hereinafter Katz, *Gross Disunity*].

10. It is important to distinguish between cause-in-fact (or "factual cause") and proximate cause. These are wholly different types of causation and involve largely different considerations. Where cause-in-fact is focused on the physical forces, decisions, acts, and omissions that lead to an event, "'proximate cause' is shorthand for the policy-based judgment that not all factual causes contributing to an injury should be legally cognizable causes." CSX Transp., Inc. v. McBride, 131 S. Ct. 2630, 2642 (2011); *see also* RESTATEMENT (THIRD) OF TORTS: PHYSICAL AND EMOTIONAL HARM § 26 cmt. a and reporters' note cmt. a, § 29 cmt. a and reporters' note cmt. a (2010); Sandra F. Sperino, *Discrimination Statutes, The Common Law, and Proximate Cause*, 2013 U. ILL. L. REV.

employee's protected trait[11] "caused" the employer's adverse decision–has always been a question for the factfinder.[12] The proof schemes were created to provide the parties with a route to follow in an effort to prove cause-in-fact.

Unfortunately, over the years, the Supreme Court and Congress have given short shrift (or no shrift) to the applicable cause-in-fact standard(s) that their proof schemes were ostensibly designed to illuminate. Instead of focusing on this critical foundational issue, Congress and the Court have dealt with cause-in-fact in an off-hand way, using vaguely causal (but undefined) language such as "motivating factor," "substantial factor," and "because of" without a clear delineation of exactly what type of factual causation is required under each statute or for each type of claim.[13] The result has been to add to the confusion, as the lower courts have sought actual causal standards within these causal vagaries. Additionally, the under-emphasis on actual cause-in-fact standards has led courts[14] and commentators[15] alike to conflate the proof schemes and their allocations of the burdens of proof with the cause-in-fact requirement itself.[16]

1, 3-9 (forthcoming 2013) [hereinafter Sperino, *Discrimination Statutes*] (discussing fundamental features of proximate cause and the basic difference between proximate cause and cause-in-fact); Katz, *Fundamental Incoherence*, *supra* note 5, at 495 n.18 (same).

This Article does not address proximate cause issues or discuss the normative desirability of incorporating tort-based notions of proximate cause into disparate treatment doctrine. For excellent discussions of these issues, see Sperino, *Discrimination Statutes*, *supra;* Charles A. Sullivan, *Tortifying Employment Discrimination*, 92 B.U. L. REV. 1431 (2012); Sandra F. Sperino, *Statutory Proximate Cause*, 88 NOTRE DAME L. REV. (forthcoming 2013) [hereinafter Sperino, *Statutory Proximate Cause*].

11. The term "protected trait," as used in this Article, includes protected categories like race, sex, age, and disability, as well as an employee who has engaged in protected activity and is thereby protected from the type of discrimination that is generally called "retaliation."

12. *See* Katz, *Fundamental Incoherence*, *supra* note 5, at 545; *Price Waterhouse*, 490 U.S. at 266-67.

13. *See* Katz, *Fundamental Incoherence*, *supra* note 5, at 500-10.

14. *See Price Waterhouse*, 490 U.S. at 283 (Kennedy, J., dissenting) ("[The plurality's] approach conflates the question whether causation must be shown with the question of how it is to be shown.").

15. *See* Widiss, *supra* note 4, at 861-65; Katz, *Fundamental Incoherence*, *supra* note 5, at 503.

16. The most common problem in this regard is to look at the plaintiff's burden and the defendant's burden as creating separate cause-in-fact standards. *See* Katz, *Fundamental Incoherence*, *supra* note 5, at 501-04 (describing the parties' respective burdens of proof as proving two separate causal standards). For example, under the *Price Waterhouse* proof scheme, the plaintiff bears the burden of proving that her protected trait was a "motivating factor" or "substantial factor" (depending on which opinion is deemed controlling) in the defendant's adverse employment decision. *See Price Waterhouse*, 490 U.S. at 249, 258 (supporting the "motivating factor" analysis). Focusing solely on the plaintiff's burden of persuasion has led commentators to conclude that the protected trait need only be "minimally causal." *See* Katz, *Fundamental Incoherence*, *supra* note 5, at 499 n.29. However, that is only half of the true cause-in-fact question. In the other half of the proof scheme, the burden of persuasion shifts to the defendant to establish that it would have taken the same action even without consideration of the protected trait. *See Price Waterhouse*, 490 U.S. at 258. Stated a different way, the defendant must prove that its consideration of the protected trait was not necessary to its decision. *See* Katz, *Fundamental Incoherence*, *supra* note 5, at 501-02 (describing the "same action" test). The problem with this two-tiered approach is that it ignores the ultimate issue in any case of disparate treatment, namely whether consideration of the plaintiff's

On close examination, however, there is a core principle of modern cause-in-fact theory that underlies every disparate treatment statute: *necessity*.[17] This modern conception of necessity is based on but-for causation but is more realistic, especially in those situations where multiple causal factors are operating simultaneously. The necessity-centered approach to modern cause-in-fact theory, which is embodied in the *Restatement Third of Torts: Liability for Physical and Emotional Harm*,[18] provides that "a particular condition [is] a [factual] cause of . . . a specific consequence if . . . it was a necessary element of a set of antecedent actual conditions that was sufficient for the occurrence of the consequence"[19] or "[i]f multiple acts occur, each of which . . . alone would have been a factual cause of the physical harm at the same time in the absence of the other act(s), each act is regarded as a factual cause of the harm."[20] This standard for factual causation, which has gained widespread acceptance in tort law,[21] is

protected trait caused the harm of which the plaintiff complains. Only by considering each proof scheme as a unitary structure with the goal of enabling the factfinder to determine this ultimate issue is the requisite cause-in-fact clear. For example, the *Price Waterhouse* proof scheme—when viewed as a whole—clearly focuses on the question of necessity. *See infra* Part III. However, that reality is obscured if one examines only the plaintiff's burden.

17. The modern term "necessity," which I utilize here, is broader than the more traditional usage of necessity as a synonym for but-for causation and is discussed in detail in Part III, *infra*. *See* Katz, *Fundamental Incoherence*, *supra* note 5, at 496, 501-02.

18. *See* RESTATEMENT (THIRD) OF TORTS: PHYSICAL AND EMOTIONAL HARM § 26 cmts. b, c and i and reporters' note cmts. b, c and i (2010).

19. Richard W. Wright, *Causation in Tort Law*, 73 CAL. L. REV. 1735, 1790 (1985); *see also* RESTATEMENT (THIRD) OF TORTS: PHYSICAL AND EMOTIONAL HARM § 26 cmts. b, c, and i and reporters' note cmts. b, c, and i (2010).

One might wonder why I am arguing that a theory of factual causation first explicitly articulated in 1985 and adopted in the *Restatement (Third) of Torts* in 2010 should (or even could) apply to statutes drafted and enacted by Congress in the 1960s (Title VII and the ADEA) and the early 1990s (the ADA and the 1991 CRA). In the "because of" statutes, *see infra* Part III.A.1, Congress implicitly adopted the common law but-for standard for factual causation. Common law standards inherently evolve and "adapt to modern understanding and greater experience." Leegin Creative Leather Prod., Inc. v. PSKS, Inc., 551 U.S. 877, 899 (2007) (discussing common law in the context of the Sherman Act); *see also* Burlington N. & Santa Fe Ry. Co. v. U.S., 129 S. Ct. 1870, 1881 (2009) (same in the context of CERCLA). In short, Congress's reliance on a common law standard inherently encompasses the evolution of that standard in the future. The factual causation standard articulated in the *Restatement (Third) of Torts* represents the most recent evolution of the but-for standard. As to the "motivating factor" statutes, *see infra* Part III.A.2, this language, borrowed from *Price Waterhouse*, reflects an understanding of factual causation consistent with the *Restatement (Third)* and, as with the "because of" statutes, relies heavily on the common law but-for standard.

20. RESTATEMENT (THIRD) OF TORTS: PHYSICAL AND EMOTIONAL HARM § 27 (2010); *see also id*. cmts. a, c, d, and f and reporters' note cmts. a, c, d, and f.

21. *See* David A. Fischer, *Insufficient Causes*, 94 KY. L.J. 277, 277 (2005) (noting acceptance of theory); Wilcox v. Homestake Mining Co., 619 F.3d 1165, 1168 (10th Cir. 2010) (applying NESS/Restatement (Third) standard in toxic tort context and stating that plaintiff must show that the conduct (or the causal set of which it is a necessary part) would in fact have caused the injury if the competing cause(s) had not been present); June v. Union Carbide Corp., 577 F.3d 1234, 1238-43 (10th Cir. 2009) (same); SL Service, Inc. v. United States, 357 F.3d 1358, 1362 (Fed. Cir. 2004) (same); United States v. Monzel, 746 F. Supp. 2d 76, 87 (D.D.C. 2010) (same); Owens v. Republic of Sudan, 412 F. Supp. 2d 99, 111-12 (D.D.C. 2006) (same); Thompson v. Kaczinski, 774 N.W. 2d

often referred to as the "Necessary Element of a Sufficient Set" or "NESS" standard.[22]

This Article seeks to establish causal coherence by focusing on the concept of causal necessity that underlies individual disparate treatment doctrine.[23] Specifically, this Article seeks to accomplish this by applying–for the first time–modern cause-in-fact theory, including the NESS standard as articulated in the *Restatement Third of Torts*, across the various disparate treatment statutes and theories. Additionally, this Article proposes implementing this newfound causal coherence by way of a realistic, unified proof scheme for use in all individual disparate treatment claims regardless of statute or theory that is rooted in the causal concept of necessity and is based on the ubiquitous *McDonnell Douglas* proof scheme.

In Part I of this Article, I examine the current state of the swamp in disparate treatment doctrine with a focus on both the factual complexity of employment decisionmaking and the various proof schemes created by Congress and the Court. In Part II, I explore cause-in-fact theory from the traditional approaches, to but-for causation, to the more modern approaches of the NESS standard and the *Restatement Third of Torts*. In Part III, I focus on cause-in-fact–especially the modern causal concept of necessity–as a unifying factor in disparate treatment doctrine. I examine the nature of the cause-in-fact inquiry under the existing disparate treatment proof schemes, explain how necessity underlies each proof scheme, and endeavor to unify the cause-in-fact structure of disparate treatment doctrine through the NESS standard and the *Restatement Third of Torts*. In Part IV, I propose a better route through the swamp based on the ubiquitous *McDonnell Douglas* proof scheme, with subtle modifications and improvements to focus it on the reconception of cause-in-fact described in Part III.[24]

829, 837-38 (Iowa 2009) (adopting the RESTATEMENT (THIRD) OF TORTS: PHYSICAL AND EMOTIONAL HARM §§ 26-27 test for factual causation); Reigel v. SavaSeniorCare L.L.C., No. 10CA1665, 2011 WL 6091709, at *8 (Colo. Ct. App. Dec. 8, 2011) (same); *see also* Bailey v. City of Huntsville, No. 5:11–CV–0156-PWG, 2012 WL 2047672, at *9 (N.D. Ala. May 25, 2012) (favorably citing RESTATEMENT (THIRD) OF TORTS: PHYSICAL AND EMOTIONAL HARM §§ 26-27 in an employment discrimination case brought under both the ADEA and Title VII); De Luna v. Hidalgo Cnty., 853 F. Supp. 2d 623, 653 (S.D. Tex. 2012) (citing RESTATEMENT (THIRD) OF TORTS: PHYSICAL AND EMOTIONAL HARM § 26 cmt. l (2007) favorably).

22. *See* Wright, *supra* note 19, at 1788.

23. *See* Katz, *Gross Disunity*, *supra* note 9, at 860.

24. It is important to note, that my goal in this Article is merely to propose a "better" version of the *McDonnell Douglas* proof scheme that is (1) consistent with Supreme Court precedent and (2) that lower courts can implement and use immediately, without waiting for either Congress or the Court to alter the current language or interpretation of the various disparate treatment statutes. *McDonnell Douglas* itself is flawed in many ways. *See* William R. Corbett, *Unmasking a Pretext for Res Ipsa Loquitur: A Proposal to Let Employment Discrimination Speak for Itself*, 62 Am. U. L. Rev. (forthcoming 2013); Sperino, *Discrimination Statutes*, *supra* note 10, at 15. Additionally, a true burden-shifting proof scheme, where the defendant bears the burden of proof on the lack of factual cause, would result in a fairer allocation of burdens based on the party's respective access to knowledge and information. *See* Martin J. Katz, *Reclaiming* McDonnell Douglas, 83 NOTRE DAME L. REV. 109, 139-42 (2007) [hereinafter Katz, *Reclaiming* McDonnell Douglas]. However, given the

I. THE SWAMP

A. The Factual Complexity of Employment-Related Decisionmaking

The decision to hire, fire, or discipline an employee is "a complex multiattribute multioption decision-making task."[25] There are myriad considerations that go into any such decision: policy, personality, objective evidence, subjective perceptions and beliefs, empathy, personal dislike, grudges, history, consistency, documentation, jealousy, protectiveness, favoritism, and, perhaps, race or sex or age or protected conduct (just to name a few).[26] Further, some or all of these considerations—legitimate and illegitimate—"are taken into account in the decisionmaking process in a way that cannot realistically be seen as anything but simultaneous."[27]

In two experiments[28] conducted at the University of Iowa, the researchers sought to replicate basic employment decisionmaking (and test for gender bias in that decisionmaking) in a controlled, laboratory environment.[29] In the first of these experiments, the researches asked their subjects[30] to assume "they were the manager in charge of hiring or firing decisions for a company that manufactures software for business use."[31] The "managers" were divided into three groups.[32] Two groups were asked to select one "applicant" from a pool of thirty-six "applicants" to hire for a new position.[33] One group was asked to select one "employee" to fire from a group of thirty-six "employees."[34] Each "manager" was given a set of thirty-six index cards (one card per "employee" or

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Court's rejection of burden shifting absent an express congressional mandate, Gross v. FBL Fin. Servs., Inc., 557 U.S. 167, 174-75 (2009), such a proof scheme is simply unavailable. Thus, my proposals are focused on subtle but (at least in my view) meaningful changes to the *McDonnell Douglas* proof scheme that the lower federal courts can implement on their own. While my revised version of *McDonnell Douglas* is not the "best" proof scheme, it is better and more equitable than the standard version of *McDonnell Douglas* currently used by the federal courts.

25. Irwin P. Levin et al., *Separating Gender Biases In Screening And Selecting Candidates For Hiring And Firing*, 33(8) SOC. BEHAV. & PERSONALITY 793, 802 (2005).

26. *See* Katz, *Fundamental Incoherence*, *supra* note 5, at 513 ("An employer making a hiring or firing decision will be influenced by protected characteristics (such as race or sex) at the same time she is influenced by legitimate characteristics (such as experience).").

27. *Id*. at 513-14.

28. *See* Levin et al., *supra* note 25, at 795-802 (describing Experiments 1 and 2).

29. *Id*. at 794.

30. The test subjects in the first experiment "were 153 students in introductory Marketing classes at the University of Iowa." *Id*. at 796.

31. *Id*.

32. *Id*.

33. *Id*. Both of the groups with "the Hire condition were to assume that their company was hiring new employees and that their task was to consider 36 applicants for possible hiring." *Id*. at 795. One of the "Hire" condition groups—dubbed the "Hire+Cost" condition—was "also reminded that costs (travel and accommodation) would be incurred for bringing in candidates to interview. This condition was included to see if incurring costs would affect the composition of the consideration set in ways that reflect gender bias." *Id*.

34. "Participants in the Fire condition were to assume that their company was downsizing and that their task was to consider 36 current employees for possible firing." *Id*. at 795.

"applicant") with the following information: the "person's sex, type of degree (Master of Business Administration or Master of Computer Science), years of work experience, and score out of 100 on a competency test."[35]

In the second experiment, the "managers" were divided into two groups (one with the Hire condition and one with the Fire condition) and told to assume "the role of [an] assistant to a U.S. Senator" who was charged with "consider[ing] 36 individuals who were candidates for hiring or downsizing as interns in the Senator's office."[36] Each "manager" was then given a set of thirty-six numbered index cards (one for each "applicant" or "employee") with the following information: the person's "sex, college major (Political Science or Sociology), year in school (freshman, sophomore or junior) and grade-point average (3.0, 3.2, or 3.4)."[37]

In sum, the "managers" in each of these experiments were provided with three pieces of legitimate, potentially job related information[38] and one protected trait—sex. For each "applicant" or "employee," the "managers" could make several choices: include in the smaller group to consider for hire or fire, exclude from that group, ultimately choose to hire or fire, or ultimately choose not to hire or fire. Even in this extremely simplified scenario, the "managers" were required to engage "in a complex multiattribute multioption decision-making task."[39]

In each of these experiments, the "managers" used the legitimate, job related information to narrow their lists of candidates for either hiring or firing. In making their final selections for hiring, however, the managers displayed a strong same-sex bias. Nearly seventy percent of the managers (69.9% to be exact), selected the applicant of the same sex as themselves with the highest qualifications to be hired, which was significantly greater than the chance level of fifty percent.[40] Male managers displayed this same pattern in selecting an employee to fire, choosing the male with the lowest qualifications (instead of the identical female) 64.3% of the time.[41] Female managers, however, were more likely to select the male with the lowest qualifications, rather than the identical female.[42] In essence, these experiments show that employment

35. *Id*. at 796; *see also id.* at 797 tbl. 1.

36. *Id*. at 800.

37. *Id*.

38. Experiment 1: degree, years of experience, and competency test score. *Id.* at 796. Experiment 2: major, year in school, and GPA. *Id.* at 800.

39. *Id*. at 802. The results of this study showed a significant same-sex bias in hiring decisions at the actual selection stage: "69.9% of the [managers] selected an applicant of the same sex as themselves to be hired." *Id.* at 798. The results appeared to show that the "managers" used the legitimate, job related considerations to narrow down the pool but then resorted to same-sex bias (consciously or unconsciously) as a tie breaker to make the final decision. This study, which has never been cited in a law review article, and others like it, could shed some interesting light on notions of unconscious bias in employment decisionmaking.

40. *Id.* at 798 (Experiment 1). The results in Experiment 2 showed that 66.6% of managers selected an applicant of the same sex as themselves. *See id.* at 801.

41. *Id.* at 798 (Experiment 1); *see also id.* at 801 (Experiment 2).

42. *Id.* at 798; *see also id.* at 801 (Experiment 2).

decisionmakers use the sex of the applicant or employee as a tie-breaker. All legitimate factors being equal, males are far more likely than not to select a male to hire or a male to fire, while females are far more likely to select a female to hire and a male to fire.[43]

These experiments show just how complex even the simplest decision in the employment context really is. In real life, far more than three "legitimate" factors are at work in the vast majority of decisions. Given this complexity, "proving" what role a single discriminatory factor played in the decision-making process is daunting.

B. The Legal Complexity of Disparate Treatment Cases

In a disparate treatment case, the court (and, ultimately, the factfinder) must navigate this factual complexity to determine whether the employer's utilization of a discriminatory factor "caused" the adverse employment action in a legally meaningful way. In order to make the court's and the factfinder's job less daunting, the Supreme Court and Congress have articulated various proof schemes for plaintiffs to use to prove discrimination.

There are three basic proof schemes in the disparate treatment context: (1) the *McDonnell Douglas* pretext proof scheme;[44] (2) the *Mt. Healthy*/*Price Waterhouse* proof scheme; and (3) the 1991 CRA proof scheme. Each of these proof schemes is designed as a framework to facilitate the presentation of evidence in such a way as to assist the factfinder in determining the existence (or lack) of cause-in-fact. However, despite their ubiquity in disparate treatment doctrine, the proof schemes remain sources of confusion and contention. Courts and scholars have struggled with a variety of questions regarding the proof schemes in recent years: What does each do and how does it do it? Does each contain a single cause-in-fact standard or multiple standards and, critically, what standard(s)? Which proof scheme or cause-in-fact standard is normatively more desirable?[45]

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43. *Id.* at 798; *see also id.* at 801 (Experiment 2).

44. *See* McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973). Generally speaking, courts use the *McDonnell Douglas* proof scheme to assess all employment-related disparate treatment claims in which the plaintiff relies on circumstantial evidence to prove her claim and in which the plaintiff does not assert the existence of a "mixed motive." This is the case regardless of which employment antidiscrimination statute applies to the plaintiff's claim. Nevertheless, *McDonnell Douglas* is not the end all and be all standard, as the existence of disparate treatment remains a totality of the circumstances inquiry. *See, e.g.*, Merritt v. Old Dominion Freight Line, Inc., 601 F.3d 289, 302 (4th Cir. 2010) (Davis, C.J., concurring) (declaring that *McDonnell Douglas* is but one tool in evaluating disparate treatment and courts must look to the totality of the evidence); Silverman v. Bd. of Educ., 637 F.3d 729, 733-34 (7th Cir. 2011) (finding that plaintiff can establish disparate treatment outside the *McDonnell Douglas* framework by showing of a convincing "mosaic" of circumstantial evidence).

45. I will endeavor to answer the first of these questions regarding each of the proof schemes in Part I. I will touch on the second in Part I, but will address it in detail in Part III. I will tackle normative desirability in Part IV.

1. The *McDonnell Douglas* Pretext Proof Scheme

The primary[46] proof scheme in disparate treatment law is the tripartite proof scheme first articulated by the Supreme Court in *McDonnell Douglas Corp. v. Green* and refined in a series of cases over nearly thirty years.[47] The mechanics of the *McDonnell Douglas* proof scheme are familiar.

First, the plaintiff must prove, by a preponderance of the evidence, a prima facie case of discrimination.[48] Although the exact contours of the prima facie case elements vary depending on the nature of the case,[49] there are typically three or four elements.[50] The four-factor version typically follows the basic parameters of the prima facie case in *McDonnell Douglas* itself: "(i) that [the plaintiff] belongs to a racial minority; (ii) that he applied and was qualified for a job for which the employer was seeking applicants; (iii) that, despite his qualifications, he was rejected; and (iv) that, after his rejection, the position remained open and the employer continued to seek applicants from persons of complainant's qualifications."[51] The three-factor version, which was articulated by the Court in *Burdine*, generally contains the following factors: (1) that the plaintiff is a member of a protected group; (2) "that she applied for an available position for which she was qualified"; and (3) that she "was rejected under circumstances which give rise to an inference of unlawful discrimination."[52]

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46. I refer to *McDonnell Douglas* as the "primary" proof scheme because it is used far more often than any other proof scheme. Relying solely on citations as compiled by Westlaw, *McDonnell Douglas* has been cited in judicial and administrative opinions more than 67,700 times since it was decided in 1973 (an average of more than 1,700 citations per year). *Price Waterhouse*, by comparison, has been cited in judicial and administrative opinions just more than 4,800 times since it was decided in 1989 (an average of approximately 208 citations per year).

47. 411 U.S. 792, 800-03; *see also* Raytheon Co. v. Hernandez, 540 U.S. 44, 52-53 (2003); O'Connor v. Consol. Coin Caterers Corp., 517 U.S. 308, 310-312 (1996); St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502, 506-07 (1993); Price Waterhouse v. Hopkins, 490 U.S. 228 (1989); Patterson v. McLean Credit Union, 491 U.S. 164, 186-87 (1989); U.S. Postal Serv. Bd. of Governors v. Aikens, 460 U.S. 711, 715-16 (1983); Texas Dep't of Cmty. Affairs v. Burdine, 450 U.S. 248, 454-54 (1981); Bd. of Tr. of Keene State Coll. v. Sweeney, 439 U.S. 24, 24-25 (1978); Furnco Const. Corp. v. Waters, 438 U.S. 567, 576-77 (1978); McDonald v. Santa Fe Trail Transp. Co., 427 U.S. 273 (1976); Costa v. Desert Palace, Inc., 299 F.3d 838, 851-53 (9th Cir. 2002), *aff'd*, 539 U.S. 90 (2003).

48. *McDonnell Douglas*, 411 U.S. at 802; *Burdine*, 450 U.S. at 252-53 (1981).

49. *McDonnell Douglas*, 411 U.S. at 802 n.13 ("The facts necessarily will vary in Title VII cases, and the specification above of the prima facie proof required from [Mr. Green] is not necessarily applicable in every respect to differing factual situations."); *Furnco Const. Corp.*, 438 U.S. at 576 (same).

50. *See McDonnell Douglas*, 411 U.S. at 802 (stating that there are four elements in a Title VII race discrimination case); Reeves v. Sanderson Plumbing Prods., Inc., 530 U.S. 133, 142 (2000) (implying that there are four elements in an ADEA age discrimination case); Alvarado v. Donahoe, 687 F.3d 453, 458 (1st Cir. 2012) (implying that there are three elements in a retaliation case); Woodson v. Scott Paper Co., 109 F.3d 913, 920 (3d Cir. 1997) (same); Yashenko v. Harrah's NC Casino Co., 446 F.3d 541, 551 (4th Cir. 2006) (same in FMLA retaliation case).

51. *McDonnell Douglas*, 411 U.S. at 802.

52. *Burdine*, 450 U.S. at 253; *see also* Williams v. Cerberonics, Inc., 871 F.2d 452, 457 (4th Cir. 1989) (setting out the basic three factor prima facie case in the retaliation context: "(1) that [the plaintiff] engaged in protected activity; (2) that [the defendant employer] took adverse employment

"The burden of establishing a prima facie case of disparate treatment is not onerous," but is intended to "eliminate[ ] the most common nondiscriminatory reasons for the plaintiff's rejection."[53] If the plaintiff carries her burden on the prima facie case, "a legally mandatory, rebuttable presumption"[54] arises "that the employer unlawfully discriminated against the employee."[55]

The burden then shifts to the defendant "to 'produc[e] evidence that the plaintiff was rejected, or someone else was preferred, for a legitimate, nondiscriminatory reason.'"[56] The burden that shifts to the defendant is only "one of production, not persuasion."[57] If the defendant satisfies its burden of production, "'the *McDonnell Douglas* framework–with its presumptions and burdens'–disappear[s], and the sole remaining issue [is] 'discrimination *vel non*.'"[58]

At the third step of the *McDonnell Douglas* proof scheme, the plaintiff has the opportunity to persuade the trier of fact that the defendant intentionally discriminated against the plaintiff by proving, by a preponderance of the evidence,

> that the legitimate reasons offered by the defendant were not its true reasons, but were a pretext for discrimination. That is, the plaintiff may attempt to establish that he was the victim of intentional discrimination "by showing that the employer's proffered explanation is unworthy of credence." The "trier of fact may still consider the evidence establishing the plaintiff's prima facie case and inferences properly drawn therefrom . . . on the issue of whether the defendant's explanation is pretextual."[59]

In short, "[p]roof that the defendant's explanation is unworthy of credence is simply *one form* of circumstantial evidence that is probative of intentional discrimination . . . ."[60] However, even proof that one of the defendant's legitimate nondiscriminatory reasons was pretextual, combined with the evidence presented in support of the plaintiff's prima facie case, may not be sufficient to establish discrimination. Nevertheless, at this third stage, the plaintiff need not show that he would have in any event been rejected or discharged solely on the basis of his "protected trait"; no more is required to be shown than that [the protected trait] was a "but for" cause of the defendant's decision.[61]

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action against her; and (3) that a causal connection existed between the protected activity and the adverse action").

53. *Burdine*, 450 U.S. at 253-54 (emphasis omitted).

54. *Id*. at 254 n.7.

55. *Id.* at 254.

56. Reeves v. Sanderson Plumbing Prods. Inc., 530 U.S. 133, 142 (2000) (quoting *Burdine*, 450 U.S. at 254).

57. *Id.* at 142 (citing St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502, 509 (1993)).

58. *Id.* at 142-43 (quoting *Hicks*, 509 U.S. at 509) (quoting U.S. Postal Serv. Bd. of Governors v. Aikens, 460 U.S. 711, 714 (1983)).

59. *Id.* at 143 (quoting *Burdine*, 450 U.S. at 253-56, 259 n.10) (internal citations omitted).

60. *Id.* at 134 (emphasis added).

61. McDonald v. Santa Fe Trail Transp. Co., 427 U.S. 273, 282 n.10 (1976). The Court's

There has been disagreement, both in the courts[62] and in the scholarly literature,[63] about the fundamental nature of the *McDonnell Douglas* proof scheme. Some have argued that *McDonnell Douglas* mandates a binary "either/or" choice: *either* unlawful discrimination *or* the employer's legitimate nondiscriminatory reason caused the adverse employment action. If *McDonnell Douglas* operates in such a binary, "either/or" fashion, then it proves but-for causation because it determines that discrimination was the *only* reason for the employer's action.[64] Others have asserted that *McDonnell Douglas* does not

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language here is less than precise. As stated, "but-for cause" is the *most* that a plaintiff would need to prove. However, it leaves open the question of whether a plaintiff can prove *less* than but-for and prevail. *See* Price Waterhouse v. Hopkins, 490 U.S. 228, 240 n.6 (1989) (Brennan, J., plurality) (noting this issue in *McDonald*). The Court revisited this issue, to some degree, in the ADEA context in *Hazen Paper Co. v. Biggins*, stating, "[A] disparate treatment claim cannot succeed unless the employee's protected trait *actually played a role* in [the employer's decision-making process] and had a *determinative influence* on the outcome." 507 U.S. 604, 610 (1993) (emphasis added).

62. *See Price Waterhouse*, 490 U.S. at 260 (White, J., concurring) ("In pretext cases, 'the issue is whether either illegal or legal motives, but not both, were the 'true' motives behind the decision.'" (quoting NLRB v. Transp. Mgmt. Corp., 462 U.S. 393, 400 n.5 (1983))); Miller v. CIGNA Corp., 47 F.3d 586, 600 (3d Cir. 1995) (en banc) (discussing "either-or" nature of the *McDonnell Douglas* proof scheme).

63. *See* Widiss, *supra* note 4, at 881; Michael J. Zimmer, *A Chain of Inferences Proving Discrimination*, 79 U. COLO. L. REV. 1243, 1257-58 (2008) [hereinafter Zimmer, *Chain of Inferences*]; Marcia L. McCormick, *The Allure and Danger of Practicing Law as Taxonomy*, 58 ARK. L. REV. 159, 162 (2005); Charles A. Sullivan, *Disparate Impact: Looking Past the* Desert Palace *Mirage*, 47 WM. & MARY L. REV. 911, 934-35 (2005); Zimmer, *The New Discrimination Law*, *supra* note 1 at 1942-43. Another way to describe this idea is that *McDonnell Douglas* works by a "process of elimination" where the prima facie case eliminates common, legitimate causes and then the pretext phase seeks to "eliminate" the legitimate reason articulated by the employer, leaving discrimination as the only other option. *See* Sullivan, *supra*, at 934-35.

64. *See, e.g.*, Ponce v. Billington, 679 F.3d 840, 844 (D.C. Cir. 2012) (referring to *McDonnell Douglas* as establishing "but-for causation"); Strong v. Univ. Healthcare Sys., L.L.C., 482 F.3d 802, 805 (5th Cir. 2007) (referring to *McDonnell Douglas* as a "but for" test); Stover v. Martinez, 382 F.3d 1064, 1076 (10th Cir. 2004); Rowland v. Am. Gen. Fin., Inc., 340 F.3d 187, 192 n.3 (4th Cir. 2003); Carey v. Mt. Desert Island Hosp., 156 F.3d 31, 44 (1st Cir. 1998); Simon v. City of Youngstown, 73 F.3d 68, 70 (6th Cir. 1995); Konowitz v. Schnadig Corp., 965 F.2d 230, 232 (7th Cir. 1992); Bibbs v. Block, 778 F.2d 1318, 1321 (8th Cir. 1985) ("The very showing [in a single motive case] that the defendant's asserted reason was a pretext for race discrimination is also a demonstration that but for his race, plaintiff would have gotten the job."); Chapman v. AI Transp., 229 F.3d 1012, 1037 (11th Cir. 2000) (en banc) (explaining that if the employer proffers more than one legitimate, nondiscriminatory reason, the plaintiff must rebut each of the reasons to survive a motion for summary judgment); Debs v. Ne. Illinois Univ., 153 F.3d 390, 395 (7th Cir. 1998) (same); Sims v. Cleland, 813 F.2d 790, 793 (6th Cir. 1987) ("Where two or more alternative and independent legitimate, nondiscriminatory reasons are articulated by the defendant employer, the falsity or incorrectness of one may not impeach the credibility of the remaining articulated reason[s]."). *See also* Martin J. Katz, *Reclaiming* McDonnell Douglas, *supra* note 24, at 123-24 n.58 (citing cases and articles); William R. Corbett, *An Allegory of the Cave and the* Desert Palace, 41 HOUS. L. REV. 1549, 1567 & n.107 (2005) ("It is often stated that the *McDonnell Douglas* pretext analysis adopted a but-for standard of causation."); Kenneth R. Davis, Price-*Fixing: Refining the* Price Waterhouse *Standard and Individual Disparate Treatment Law*, 31 FLA. ST. U.L. REV. 859, 895 (2004); Zimmer, *The New Discrimination Law*, *supra* note 1, at 1930 (noting that in *McDonnell Douglas* cases, courts have typically required plaintiff to prove that the discriminatory motivation

eliminate all nondiscriminatory reasons for the employer's actions and, instead, operates by setting up a chain of permissible inferences[65] that the factfinder can use to determine that discrimination was either a but-for cause or, perhaps, a "motivating factor" in the employer's decision.[66]

Of all the proof schemes, *McDonnell Douglas* is the most easily seen as a route through the factual swamp. By setting up a "chain of inferences"[67] it gives the plaintiff a path to prove what might otherwise be impossible (at least in the absence of a proverbial smoking gun): what was going on in the decisionmaker's mind at the time he made the disputed decision. As Dean Martin Katz described it, after the plaintiff presents a prima facie case:

> *McDonnell Douglas* provides . . . the victims of discrimination with a target of sorts— a reason given by the employer for its actions. This allows the victim to shoot at this target, to attempt to attack the employer's explanation. If the victim can cast doubt on the employer's explanation, a factfinder might conclude that the explanation was a cover-up for discrimination.[68]

In this way, *McDonnell Douglas* sets up the chain of permissible inferences that would allow, but not require, the factfinder to conclude that discrimination was *a* reason (even if not *the* reason) for the adverse decision.[69]

Overall, the *McDonnell Douglas* proof scheme was designed to be fairly flexible and holistic[70] and to provide a plaintiff with a route to follow through the swamp.[71] The ultimate question "is not whether the *McDonnell Douglas* test is satisfied."[72] It is instead, whether the decisionmaker's consideration of the plaintiff's protected trait was a cause-in-fact of the adverse decision. "The proof scheme is but a useful tool to help identify and resolve that real issue."[73]

2. The *Mt. Healthy/Price Waterhouse* Proof Scheme

The two-step, burden shifting proof scheme that has become known as the *Price Waterhouse* proof scheme, originated (at least analytically) in *Mt. Healthy City School District Board of Education v. Doyle*,[74] a case alleging retaliation

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was a "but for" cause of the employer's decision).

65. *See* Katz, *Reclaiming* McDonnell Douglas, *supra* note 24, at 128-32; Zimmer, *A Chain of Inferences*, *supra* note 63, *passim*.

66. Katz, *Reclaiming* McDonnell Douglas, *supra* note 24, at 136-38 (arguing that *McDonnell Douglas* only establishes "motivating factor" causation). Exactly what "motivating factor" is, or might be, from a cause-in-fact standpoint is discussed in Part III.

67. *See* Katz, *Reclaiming* McDonnell Douglas, *supra* note 24, at 128-31; Zimmer, *A Chain of Inferences*, *supra* note 63, *passim*.

68. Katz, *Reclaiming* McDonnell Douglas, *supra* note 24, at 124-25 (footnotes omitted).

69. *Id*. at 125-31; *see also* Zimmer, *A Chain of Inferences*, *supra* note 63, *passim*.

70. This is not to say, however, that the *McDonnell Douglas* proof scheme is always used in a flexible or holistic manner by the lower courts. Zimmer, *A Chain of Inferences*, *supra* note 63, at 1270 n.137.

71. *See* Reeves v. Sanderson Plumbing Prods. Inc., 530 U.S. 133, 148 (2000); *see also* Merritt v. Old Dominion Freight Line, Inc., 601 F.3d 289, 302 (4th Cir. 2010) (Davis, C.J., concurring).

72. *Merritt*, 601 F.3d at 302 (Davis, C.J., concurring) (emphasis added).

73. *Id*.

74. 429 U.S. 274 (1977).

by a public employer against an employee for the exercise of his First Amendment right to free speech. In this part, we will examine the development of this proof scheme in *Mt. Healthy*, its incorporation into Title VII jurisprudence in *Price Waterhouse*, and its codification in USERRA. We will also consider a significant hole in this route through the swamp as well as some, as of yet, unanswered questions.

a. Original Development in *Mt. Healthy*

In *Mt. Healthy*, the Court developed a two-part, burden shifting proof scheme for use in cases involving alleged retaliation for the exercise of the First Amendment right to free speech.[75] Under this proof scheme, the plaintiff bears the initial burden of persuasion "to show that his conduct was constitutionally protected, and that this conduct was a 'substantial factor'—or to put it in other words, that it was a 'motivating factor' in the [defendant's] decision not to rehire him."[76] The burden of persuasion then shifts to the defendant who must "show[ ] by a preponderance of the evidence that it would have reached the same decision as to [plaintiff's] re-employment even in the absence of the protected conduct."[77] In constructing this proof scheme, the Court looked to a somewhat unusual source for its analytical underpinnings: criminal law cases dealing with tainted evidence.[78] The taint in some of these cases was the result of a constitutional violation,[79] and in others it was the result of a statutory violation.[80] Regardless of the nature of the violation or the origin of the taint, the initial burden was on the accused to prove the existence of a constitutional or statutory violation and that "a substantial portion of the case against him was a fruit of the poisonous tree."[81] The burden then shifted to the government "to convince the trial court that its proof had an independent origin."[82] From this criminal law standard, the *Mt. Healthy* Court extrapolated its employment based burden shifting proof scheme wherein the plaintiff has the initial burden to establish the "taint"–that the protected conduct was a "substantial factor" or "motivating factor" in the adverse employment decision—and the employer

75. *Id*. at 286-87.

76. *Id*. at 287.

77. *Id*.; *see also* Vill. of Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252, 270, 271 n.21 (1977). The Court did not label the employer's burden an "affirmative defense" in either *Mt. Healthy* or *Village of Arlington Heights*. Rather, the description was more holistic, especially given the comparison drawn with criminal law evidentiary issues.

78. *Mt. Healthy*, 429 U.S. at 286-87 (discussing Lyons v. Oklahoma, 322 U.S. 596 (1944); Wong Sun v. United States, 371 U.S. 471, 491 (1963); Nardone v. United States, 308 U.S. 338, 341 (1939); and Parker v. North Carolina, 397 U.S. 790, 796 (1970)).

79. *See Lyons*, 322 U.S. at 605-07 (Murphy, J., dissenting) (Fifth Amendment—self-incrimination); *Parker*, 397 U.S. at 796 (Fifth Amendment—self-incrimination, and Sixth Amendment—counsel).

80. *See Nardone*, 308 U.S. at 341 (alleged violation of federal wiretapping statute, 47 U.S.C. § 605 (1934)).

81. *Id.*

82. *Id.*

then has the burden to show that its decision was not tainted.[83]

The *Mt. Healthy* Court constructed this proof scheme to put the employee in the same position—but not in a better position—he would have occupied had the employer not considered his speech in its decision-making process.[84] The Court reasoned:

> A rule of causation which focuses solely on whether protected conduct played a part, "substantial" or otherwise, in a decision not to rehire, could place an employee in a better position as a result of the exercise of constitutionally protected conduct than he would have occupied had he done nothing.[85]

However, the Court was also cognizant of the need of the employer to make employment decisions on legitimate grounds without, in effect, making an employee who had engaged in protected speech untouchable.[86] So, instead of focusing exclusively on the employer's utilization of the protected speech in its decisionmaking, the Court created the second prong of the proof scheme to permit the employer to dissipate the taint and establish that it would have made the same decision without the taint.

b. Incorporation into Title VII in *Price Waterhouse*

In *Price Waterhouse*, the Court incorporated the basic *Mt. Healthy* proof scheme into Title VII jurisprudence.[87] The disposition of *Price Waterhouse* was complicated. Justice Brennan announced the Court's judgment and wrote an opinion, which was joined by Justices Marshall, Blackmon, and Stevens. Justice White and Justice O'Connor each wrote separate opinions concurring in the judgment. Justice Kennedy wrote a dissenting opinion, which Chief Justice Rehnquist and Justice Scalia joined. Justice O'Connor's concurrence has

83. *Mt. Healthy*, 429 U.S. at 285-87. The comparison between the admissibility of allegedly "tainted" evidence in the criminal context with an allegedly discriminatory motive in the context of employment related decisionmaking is, at best, strained. There was no discussion in *Mt. Healthy* or *Village of Arlington Heights* about the very different burdens of proof in criminal cases as compared with civil cases or differences between which party bore the burden of proof. Instead, the Court focused loosely on the fact that, in the criminal context, the government bore the burden of showing that the evidence at issue was not tainted because the taint had dissipated as a result of the passage of time, intervening circumstances, or for some other reason. *Id.* at 286-87. Perhaps the best way to think about the rationale for the *Mt. Healthy* test is that the employer bears the burden of establishing that its decision was not "tainted" by its alleged consideration of the protected trait/conduct because it would have made the same decision regardless.

84. *Id.* at 285-86.

85. *Id.* at 285.

86. *Id.* at 285-86. In *NLRB v. Transportation Management Corp.*, 462 U.S. 393, 403-04 (1983), the Court approved the NLRB's application of the *Mt. Healthy* proof scheme in unfair labor practice cases pursuant to *Wright Line*, 251 N.L.R.B. 1083 (1980).

87. Price Waterhouse v. Hopkins, 490 U.S. 228, 248-50 (1989) (Brennan, J., plurality). In total, six justices—Brennan, Marshall, Blackmun, Stevens, White, and O'Connor—relied on a combination of *Mt. Healthy*, *Village of Arlington Heights*, and/or *Transportation Management* to support and define the two-step burden shifting proof scheme they agreed applied to so-called "mixed-motive" cases under Title VII. *See id*. at 248-49 (Brennan, J., plurality); *id*. at 258-60 (White, J., concurring); *id*. at 268-69 (O'Connor, J., concurring).

generally been accepted as the "controlling" opinion.[88] Justice Brennan's plurality opinion, Justice White's concurrence, and Justice O'Connor's concurrence all agreed on the applicability of the basic *Mt. Healthy* proof scheme.[89] However, they differed slightly on two factors: (1) the type of evidence the plaintiff must present to trigger the proof scheme; and (2) the vaguely causal adjective used to describe the level of consideration the employer must have given the protected trait. Only the second (potential) difference is relevant here.[90]

The plurality characterized the plaintiff's burden as "show[ing] that an impermissible motive played a *motivating part* in an adverse employment decision."[91] Justice White and Justice O'Connor stated that the plaintiff must "show that the unlawful motive was a *substantial* factor in the adverse employment action," and Justice O'Connor agreed.[92] At first blush, these appear to be different standards, with "substantially" setting a higher evidentiary bar than "motivating."[93] However, each standard relies, in whole or in part, on *Mt. Healthy* and its progeny, which use "motivating factor" and "substantial factor" interchangeably.[94] Further, the plurality failed to see any meaningful difference between its "motivating part" language and Justice O'Connor's "substantial factor" language.[95] Additionally, nowhere in Justice O'Connor's concurrence does she criticize the "motivating factor" test.[96] Rather, her problems with the

88. *See* Widiss, *supra* note 4, at 884 n.129 (citing cases); Katz, *Fundamental Incoherence*, *supra* note 5, at 501 n.38. However, some commentators, and even some members of the Court, have suggested that Justice White's concurrence was truly the controlling opinion. *See* Katz, *Unifying Disparate Treatment*, *supra* note 1, at 661 (suggesting that Justice White's concurrence might be controlling opinion in *Price Waterhouse*); Katz, *Gross Disunity*, *supra* note 9, at 863 n.25; Gross v. FBL Fin. Servs. Inc., 557 U.S. 167, 183-84 (Stevens, J., dissenting) (suggesting that Justice White's concurrence might be controlling opinion in *Price Waterhouse*).

89. *Price Waterhouse*, 490 U.S. at 248-49 (Brennan, J., plurality); *id*. at 258-60 (White, J., concurring); *id*. at 268-69 (O'Connor, J., concurring).

90. The first difference centers on whether a plaintiff must present "direct" or only "indirect" evidence of discrimination in order to trigger the proof scheme. Justice O'Connor believed that direct evidence was required. *Id*. at 276 (O'Connor, J., concurring). Justice Brennan's plurality, *id.* at 250-52 (Brennan, J., plurality), and Justice White, *id*. at 261 (White, J., concurring), thought indirect evidence was sufficient.

91. *Id*. at 250 (Brennan, J., plurality) (emphasis added).

92. *Id*. at 259 (White, J., concurring); *id*. at 265 (O'Connor, J., concurring).

93. This has generally been the conventional wisdom when interpreting *Price Waterhouse*. *See* Zimmer, *The New Discrimination Law*, *supra* note 1, at 1947 ("Given the sharp difference that Justices White and O'Connor saw between 'a motivating part' proposed by the plurality in *Price Waterhouse* and their preferred language of 'a substantial factor,' it is clear that 'a motivating factor' is less difficult for plaintiffs than would be 'a substantial factor' . . . .").

94. *See* Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle, 429 U.S. 274, 287 (1977) ("[T]he burden was properly placed upon respondent to show . . . that this conduct was a 'substantial factor'—or to put it in other words, that it was a 'motivating factor' . . . .").

95. *Price Waterhouse*, 490 U.S. at 250 n.13 (Brennan, J., plurality).

96. *See* Katz, *Fundamental Incoherence*, *supra* note 5, at 507-08 (stating it is unclear whether Justice O'Connor "rejected the plurality's 'motivating factor' test"). In *Fundamental Incoherence*, Dean Katz discusses in detail the two schools of thought on whether or not Justice O'Connor really intended for "substantial factor" to be a higher evidentiary standard than "motivating factor" or

plurality appear to be rooted in the nature of the burden that shifts to the employer and the effect the plurality's "affirmative defense" has on the type of causation mandated by Title VII.[97] Specifically, Justice O'Connor articulated her concerns as follows:

> [T]he plurality appears to conclude that if a decisional process is "tainted" by awareness of sex or race in any way, the employer has violated the statute, and Title VII thus *commands* that the burden shift to the employer to justify its decision. The plurality thus effectively reads the causation requirement out of the statute, and then replaces it with an "affirmative defense."[98]

Thus, it was Justice O'Connor's concern with the plurality's misinterpretation of Title VII's underlying causation requirement, rather than any concern about its "motivating factor" standard that led her to write separately.[99] Accordingly, it appears that there is, in fact, no difference between "motivating factor" and "substantial factor" and, as those terms are used in *Price Waterhouse*—just as in *Mt. Healthy*— they mean the same thing.

c. Codification in USERRA

In 1994, Congress codified this proof scheme into the operative language of the Uniformed Services Employment and Reemployment Rights Act ("USERRA").[100] Specifically, § 4311 of USERRA, as enacted in 1994, provided as follows:

> (a) A person who is a member of, applies to be a member of, performs, has performed, applies to perform, or has an obligation to perform service in a uniformed service shall not be denied initial employment, reemployment, retention in employment, promotion, or any benefit of employment by an employer on the basis of that membership, application for membership, performance of service, application for service, or obligation.
>
> (b) An employer shall be considered to have denied a person initial employment, reemployment, retention in employment, promotion, or a benefit

"motivating part." *See id*. Ultimately, Dean Katz concludes that it does not matter because both "substantial factor" and "motivating factor" are forms of "minimal causation" in his logical causation rubric. *Id*. at 509-10.

97. *Price Waterhouse*, 490 U.S. at 275-76 (O'Connor J., concurring) (citations omitted).

98. *Id*. at 276.

99. Justice O'Connor differed markedly from the plurality on the type of cause-in-fact required under Title VII. Whereas the plurality did not believe that Title VII required but-for causation (or at least some type of arguably but-for causation), *see id.* at 240-41 (Brennan, J., plurality), Justice O'Connor did, *id*. at 262-63 (O'Connor, J., concurring) ("I disagree with the plurality's dictum that the words 'because of' do not mean 'but-for' causation; manifestly they do."). Justice White declined to address the but-for causation issue, stating, "It is not necessary to get into semantic discussions on whether the *Mt. Healthy* approach is 'but-for' causation in another guise or creates an affirmative defense on the part of the employer to see its clear application to the issues before us in this case." *Id.* at 259 (White, J., concurring). The Court was thus evenly split on the but-for causation issue, with four justices (O'Connor, Kennedy, Rehnquist, and Scalia) concluding that Title VII required but-for causation, four justices (Brennan, Marshall, Blackmun, and Stevens) concluding it does not, and one justice (White) essentially abstaining.

100. Uniformed Services Employment and Reemployment Rights Act of 1994, Pub. L. No. 103-353, 108 Stat. 3149 (codified as amended at 38 U.S.C. § 4311 (2006)).

> of employment in violation of this section if the person's membership, application for membership, service, application for service, or obligation for service in the uniformed services *is a motivating factor* in the employer's action, *unless the employer can prove* that the action would have been taken in the absence of such membership, application for membership, performance of service, application for service, or obligation.[101]

In drafting this language, specifically the language in subsection (b), Congress intended to adopt, incorporate, and codify the *Mt. Healthy* proof scheme, stating that "the courts in these discrimination cases should use the burden of proof analysis adopted by the National Labor Relations Board and approved by the Supreme Court" in *NLRB v. Transportation Management Corporation*.[102] Importantly, Congress also indicated the cause-in-fact standard it intended § 4311 to embody: *but-for* causation. Specifically, the House Committee on Veterans' Affairs stated, "Section 4311(b) would reaffirm that the standard of proof in a discrimination or retaliation case is the so-called 'but for' test and that the burden of proof is on the employer, once a prima facie case is established."[103]

d. A Gap in the Route

A shortcoming of the *Mt. Healthy*/*Price Waterhouse* proof scheme is that it provides no guidance as to how a plaintiff can or should prove that a protected trait was a motivating factor in the employer's decision. This gives plaintiffs a wide field, of course, and prevents some of the crabbed application seen with *McDonnell Douglas*. However, as a route through the swamp, it is not particularly helpful.[104]

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101. § 4311(a)-(b) (emphasis added). Section 4311 was reorganized in 1996 pursuant to Public Law 104-275 and the material in subsection (b) was moved to subsection (c)(1). Veteran's Benefits Improvement Act of 1996, Pub. L. No. 104-275, 100 Stat. 3322; *see* 38 U.S.C. § 4311(c) (2006). No substantive change was made to the language in the original subsection (b). The current version of 38 U.S.C. § 4311(c)(1) provides as follows: "An employer shall be considered to have engaged in actions prohibited—(1) under subsection (a), if the person's membership, application for membership, service, application for service, or obligation for service in the uniformed services is a motivating factor in the employer's action, unless the employer can prove that the action would have been taken in the absence of such membership, application for membership, service, application for service, or obligation for service . . . ." 38 U.S.C. § 4311(c)(1).

102. COMM. ON VETERANS' AFFAIRS, REPORT, H.R. REP. NO. 103-65, at 24 (1993), *reprinted in* 1994 U.S.C.C.A.N. 2449, 2457; *see also* 132 CONG. REC. 29226 (1986) (statement of Rep. Montgomery). Thus, Congress intended the proof scheme approved in *Transportation Management* to apply in cases under the forerunner of USERRA. As discussed, *supra* note 86, in *Transportation Management*, the Supreme Court approved the NLRB's use of the *Mt. Healthy* proof scheme in unfair labor practice cases under the NLRA. NLRB v. Transp. Mgmt. Corp., 426 U.S. 393, 403-04 (1983).

103. H.R. REP. NO. 103-65, at 24 (1994), *reprinted in* 1994 U.S.C.C.A.N. 2449, 2457.

104. A plaintiff using this proof scheme and lacking direct evidence of discriminatory motive (e.g., incriminating emails or testimony) would likely use some of the same types of circumstantial evidence used in the *McDonnell Douglas* context, such as comparator information, evidence of inconsistent discipline, and the like.

e. Lingering Questions

There are three significant questions to answer about the *Mt. Healthy*/*Price Waterhouse* proof scheme before we move on. First, is this proof scheme a single, unitary standard, or is it two independent standards? Second, and relatedly, is this proof scheme designed for a single cause-in-fact standard, or does it anticipate two separate cause-in-fact standards? And third, what is the relevant cause-in-fact standard when looking at this proof scheme?

As to the first question, the *Mt. Healthy*/*Price Waterhouse* proof scheme creates a single, unitary standard rather than two independent standards. There is nothing in the Court's language in *Mt. Healthy* or its progeny to suggest that this is anything other than a single, unitary standard. The criminal law cases on which the *Mt. Healthy* court drew to create the proof scheme involved what was, relatively clearly, a unitary standard. In those cases, the Court had to determine the admissibility of evidence. Each side—government and the accused—had a role to play in the decision-making process, but the information provided by each was part of a single decision-making process, not two separate decision-making processes. Further, in *Price Waterhouse*, Justice O'Connor indicated that this was also the case with the *Price Waterhouse* version of the proof scheme.[105]

Similarly, the answer to the second question is that the *Mt. Healthy*/*Price Waterhouse* proof scheme implicates a single, unitary cause-in-fact standard. This conclusion is supported, as with the discussion above, with the reasoning and analytical underpinnings associated with the original articulation of this proof scheme in *Mt. Healthy*. There is nothing in *Mt. Healthy* or its criminal law underpinnings to suggest that more than one cause-in-fact standard is at work. Similarly, Justice O'Connor (and the dissenters) flatly rejected this contention in *Price Waterhouse.*[106]

Reasonable minds can—and do—differ on this issue. Dean Katz, for example, has forcefully advanced a "two-tiered" interpretation of this proof scheme and argued that the plaintiff's burden and the defendant's burden implicate different cause-in-fact standards.[107] The potential problem with this "two tiered" approach is that it conflates the allocation of burdens of proof with the ultimate issue in any case of disparate treatment, namely whether consideration of the plaintiff's protected trait was a cause-in-fact of the adverse decision. Regardless of the allocation of the burdens of proof, a factfinder must consider only one issue: Was the plaintiff's protected trait necessary to the defendant's decision, or would the defendant have made the same decision

105. *See* Price Waterhouse v. Hopkins, 490 U.S. 228, 277-78 (1989) (O'Connor, J., concurring).

106. *Id*.

107. *See* Katz, *Fundamental Incoherence*, *supra* note 5, at 501-04. Specifically, Katz argues that it is the plaintiff's burden to establish that the protected trait was a motivating or substantial factor in the employer's decision equates to a cause-in-fact standard of "minimal causation." *Id.* The defendant's burden is to prove that it would have made the same decision, which regardless is to prove the absence of but-for causation. *Id*.

regardless?[108]

This conclusion leads to the third question posed above: what cause-in-fact standard is the *Mt. Healthy/Price Waterhouse* proof scheme designed to illuminate? This question is analyzed in detail in Part III, *infra*, but the end result is that the *Mt. Healthy/Price Waterhouse* proof scheme leads to a but-for, causal necessity standard for factual causation.[109]

3. The Civil Rights Act of 1991 Proof Scheme

In 1991, Congress amended Title VII[110] to, as is relevant here,[111] address (and partially overrule) *Price Waterhouse*.[112] Specifically, the Civil Rights Act of 1991 ("the 1991 CRA") added § 703(m) and § 706(g)(2)(B) to Title VII.[113] The new § 703(m) provides as follows:

> (m) Except as otherwise provided in this title, an unlawful employment practice is established when the complaining party demonstrates that race, color, religion, sex, or national origin was a *motivating factor* for any employment practice, even though other factors also motivated the practice.[114]

In this new provision, Congress adopted the "motivating factor" language used by the plurality in *Price Waterhouse* and by the unanimous Court in *Mt. Healthy*.[115] Additionally, Congress overruled *Price Waterhouse*'s holding that a defendant did not violate Title VII (and thus escaped all liability) if it established that it would have reached the same decision without consideration of the plaintiff's protected trait.[116] Specifically, Congress added the new § 706(g)(2)(B) to Title VII, which provides as follows:

> On a claim in which an individual proves a violation under section 703(m)

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108. This conclusion is further supported by Congress's understanding of the *Mt. Healthy/Price Waterhouse* proof scheme when it incorporated it into USERRA in 1994. *See supra* notes 103-04.

109. See *infra* Part III.

110. *See* Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071 (codified in scattered sections of 29 U.S.C. and 42 U.S.C.).

111. The 1991 Civil Rights Act of 1991 ("CRA") was an extensive amendment of Title VII that was primarily focused on issues other than *Price Waterhouse* and mixed-motive disparate treatment cases. Its most extensive and controversial provisions focused on disparate impact cases, jury trials, and damages.

112. *See* Civil Rights Act of 1991 § 107(a)-(b) (codified at 42 U.S.C. §§ 2000e-2(m) and 2000e-5(g) (2006)).

113. *Id.*

114. Civil Rights Act of 1991 § 107(a) (codified at 42 U.S.C. § 2000e-2(m) (2006)) (emphasis added).

115. There is nothing in the legislative history of the 1991 CRA or in the text of the statute itself to suggest that "motivating factor" was meant as a definition of the "because of" language used in Title VII's primary antidiscrimination provision in § 703(a)(1) (codified at 42 U.S.C. § 2000e-2(a)(1)). Instead, the most logical interpretation is that § 703–which is entitled "Unlawful Employment Practices"—describes various unlawful employment practices that are related, but analytically separate. *See* 42 U.S.C. § 2000e-2 (2006). *But see* Katz, *Unifying Disparate Treatment*, *supra* note 1, at 671-72 (arguing that § 703(m), added to Title VII by the 1991 CRA, defined "because of" in § 703(a)(1)).

116. *See* Price Waterhouse v. Hopkins, 490 U.S. 228, 276 (1989) (O'Connor, J., concurring).

> 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).[117]

Congress reformulated the second step of the *Mt. Healthy*/*Price Waterhouse* proof scheme, which precluded a finding of liability, into a second step, which only limits the types of remedies the court may impose.[118]

In sum, the 1991 CRA proof scheme is as follows: (1) the plaintiff must demonstrate "that race, color, religion, sex, or national origin was a *motivating factor* for any employment practice, even though other factors also motivated the practice;" and (2) the defendant must then demonstrate that it "would have taken the same action in the absence of the impermissible motivating factor."[119]

To determine what exactly the 1991 CRA proof scheme means—especially when it comes to the critical cause-in-fact determination— we must consider both the words Congress used and why it used them. In drafting the 1991 CRA, there is significant evidence that some in Congress read *Price Waterhouse* as precluding liability under Title VII in all cases except those in which discrimination was the *sole* cause of the employer's decision. For example, in the House version of the 1991 CRA,[120] what eventually became § 703(m) read as follows:

> DISCRIMINATORY PRACTICE NEED NOT BE SOLE MOTIVATING FACTOR—Except as otherwise provided in this title, an unlawful employment practice is established when the complaining party demonstrates that race, color, religion, sex, or national origin was a motivating factor for such employment practice, even though other factors also contributed to such practice.[121]

The introductory statement regarding "sole motivating factor" was omitted from the final version of the statute; however, the operative language of the section remained virtually unchanged.[122] Similarly, the Senate analysis of the 1991 CRA, which President Bush adopted as "authoritative interpretive guidance" as to the meaning of the statute, stated, "Section 10 [of S. 1745, the Civil Rights

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117. Civil Rights Act of 1991 §107(b) (codified at 42 U.S.C. § 2000e-5(g)(2)(B) (2006)).

118. *See* 42 U.S.C. § 2000e-5(g)(2)(B).

119. *See* Desert Palace, Inc. v. Costa, 539 U.S. 90, 94-95 (2003) (quoting 42 U.S.C. 2000e (2006) (emphasis added)). As with the *Mt. Healthy*/*Price Waterhouse*/USERRA proof scheme, the 1991 CRA proof scheme provides no guidance on how a plaintiff can or should prove that a protected trait was a "motivating factor" in the employer's decision. *See supra* Part I.B.2.d.

120. *See* Civil Rights and Women's Equity in Employment Act of 1991, H.R. Res. 1, 102d Cong. (1991) (enacted).

121. *Id*. § 103(a).

122. *Compare id.* at § 103(a), *with* Civil Rights Act of 1991, S. Rep. 1745, 102d Cong. § 107(a) (codified at 42 U.S.C. § 2000e-2(m) (2006)).

Act of 1991] allows the employer to be held liable if discrimination was a motivating factor in causing the harm suffered by the complainant. Thus, such discrimination need not have been the sole cause of the final decision."[123]

Further, in explaining the intended effect of the 1991 CRA amendment to § 703, Congress focused on actually prohibiting "mixed motive" discrimination, where both legitimate and illegitimate factors played a role in the employer's decision. For example, the House Judiciary Committee articulated its intent as follows:

> [T]o establish liability under the proposed Subsection 703[(m)], the complaining party must demonstrate that discrimination was a contributing factor in the employment decision – i.e., that discrimination *actually contributed to the employer's decision* with respect to the complaining party.
>
> Requiring that a Title VII violation is only established when discrimination is shown to be a contributing factor to an employment decision further clarifies that intent of this legislation to prohibit only an employer's *actual discriminatory actions*, rather than mere discriminatory thoughts.[124]

Similarly, Senator Ted Kennedy, one of the primary sponsors of S. 1745, which was the Senate's version of the 1991 CRA and the one that was ultimately passed, stated on the Senate floor that the 1991 CRA "prohibits so-called mixed motive discrimination, by making it unlawful for an employer to rely on a discriminatory factor in making a job decision–even if other factors involving no discrimination also justified the employer's decision."[125] A variety of Republican senators, as well as President Bush, had a similar understanding of this provision.[126]

Given these understandings, the critical provision of the 1991 CRA was not the "motivating factor" standard in what became § 703(m), it was the provision that became § 706(g)(2)(B)–the limitation on remedies. The 1991

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123. Analysis of S. 1745 (Civil Rights Act of 1991) entered into the record by Senator Dole, 137 CONG. REC. 29,039 (October 30, 1991) (statement by Sen. Robert Dole). President George H.W. Bush adopted this analysis "as authoritative interpretive guidance" regarding the provisions of the 1991 CRA. Presidential Statement on Signing the Civil Rights Act of 1991, 27 WEEKLY COMP. PRES. DOCS. 1702 (Nov. 21, 1991).

124. H. REP. NO. 102–40(II) (1991), *reprinted in* 1991 U.S.C.C.A.N. 694, 711 (emphasis added); *see also* H. REP. NO. 102–40(I) (1991), *reprinted in* 1991 U.S.C.C.A.N. 549, 585-86 ("[T]he employer [in EEOC v. Alton Packing Corp.,] avoided any liability under Title VII because legitimate reasons also influenced the denial of promotion. . . . [T]he Committee intends to restore the rule applied in many federal circuits prior to the *Price Waterhouse* decision that an employer may be held liable for any discrimination that is actually shown to play a role in a contested employment decision.").

125. 137 CONG. REC. 28,638 (1991).

126. *See* Analysis of S. 1745 (The Civil Rights Act of 1991) entered into the record by Senator Dole, 137 CONG. REC. 29,039 (October 30, 1991) (statement by Sen. Robert Dole) ("Section 10 [of S. 1745, the Civil Rights Act of 1991] allows the employer to be held liable if discrimination was a motivating factor in causing the harm suffered by the complainant. Thus, such discrimination *need not have been the sole cause* of the final decision." (emphasis added)); Presidential Statement on Signing the Civil Rights Act of 1991, 27 WEEKLY COMP. PRES. DOCS. 1701 (1991), *reprinted in* 1991 U.S.C.C.A.N. 768, 769 (adopting the analysis entered by Senator Dole "as authoritative interpretive guidance" regarding the provisions of the 1991 CRA).

CRA proof scheme differs primarily from the *Mt. Healthy*/*Price Waterhouse* proof scheme in its reconception of the second step of its proof scheme from a limitation on *liability* to a limitation on *remedies*. This limitation on remedies carries out Congress's policy goals of punishing employers for all employment decisions "motivated" by an employee's protected trait.[127]

But a significant question remains: Does the limitation on remedies that the trial court may award in a "motivating factor" case alter the ultimate cause-in-fact standard at issue? Generally, cause-in-fact is a question of fact for the jury.[128] However, § 706(g)(2)(B) speaks *solely* to the trial court and what remedies it can award a plaintiff.[129] This limitation on remedies simply does not impact the jury in any meaningful way or alter the decision it must make. At most, § 706(g)(2)(B) will make it necessary for the jury to answer a special interrogatory on the issue of whether or not the defendant proved that it would have taken the same action in the absence of the impermissible motivating factor. At its core, the 1991 CRA proof scheme asks the jury to make a fairly straightforward cause-in-fact determination, at the time the employer made its decision, that consideration of the plaintiff's protected trait was *necessary* to that decision.[130]

4. *Gross* and the Rejection of Burden Shifting

Gross was an unusual decision. The Court granted certiorari to determine "whether a plaintiff must 'present direct evidence of discrimination in order to obtain a [*Price Waterhouse*] mixed-motive instruction in a non-Title VII discrimination case.'"[131] Instead of deciding this issue, however, the Court instead decided the "threshold inquiry" of whether "the burden of persuasion ever shifts to the party defending an alleged mixed-motives discrimination claim brought under the ADEA."[132] The Court held that it did not and that the *Mt. Healthy*/*Price Waterhouse* proof scheme was unavailable under the ADEA.[133] The Court reasoned that, under the plain language of the ADEA, an

127. *See* Mt. Healthy Sch. Dist. Bd. of Educ. v. Doyle, 429 U.S. 274, 285-87 (1977); Price Waterhouse v. Hopkins, 490 U.S. 228 (1989).

128. *See, e.g.*, Griggs v. BIC Corp., 981 F.2d 1429, 1439 (3d Cir. 1992) ("Cause in fact is a question of fact for the jury . . . ." (citation omitted)); Gracyalny v. Westinghouse Elec. Corp., 723 F.2d 1311, 1322 n.23 (7th Cir. 1983) ("Cause-in-fact is a factual question for the jury."); Achin v. Begg Tire Ctr., 694 F.2d 226, 229 (9th Cir. 1982) (same); Luttrell v. Novartis Pharms. Corp., No. 07-CV-3015-TOR, 2012 WL 4513109, at *16-17 (E.D. Wash. Oct. 1, 2012) (same); Poindexter v. U.S. ex rel. Corps of Eng'rs, 568 F. Supp. 2d 729, 739 (W.D. La. 2008) (same); Lee v. Chi. Transit Auth., 605 N.E.2d 493, 502-03 (Ill. 1992) (same).

129. *See* 42 U.S.C. § 2000e-5(g)(2)(B) (stating that "the court – (i) may grant . . . (ii) shall not award").

130. This issue is discussed in detail in Part III. This conclusion is consistent with various model jury instructions applicable to mixed motive claims under both *Mt. Healthy/Price Waterhouse* and the 1991 CRA. *See, e.g.*, Jay Grenig, William Lee & Kevin O'Malley, 3C FED. JURY PRAC. & INSTR. §§ 170.20, 170.71, 171.100, 171.103 (6th ed. 2006 & 2013 supp.).

131. Gross v. FBL Fin. Servs., Inc., 557 U.S. 167, 173 (2009) (quoting Petition for Certiorari).

132. *Id*.

133. *Id*.

ADEA plaintiff must establish that his age was the "but for" cause of the employer's adverse employment decision.[134]

In beginning its analysis of the ADEA, the Court noted that the ADEA, unlike Title VII, "does not provide that a plaintiff may establish discrimination by showing that age was simply a motivating factor."[135] Further, "Congress neglected to add [a "mixed motive"] provision to the ADEA when it amended Title VII to add §§2000e-2(m) and 2000e-5(g)(2)(B), even though it contemporaneously amended the ADEA in several ways."[136] Congress' failure in this regard was significant, as the Court reasoned that it "cannot ignore Congress' decision to amend Title VII's relevant provisions but not make similar changes to the ADEA. When Congress amends one statutory provision but not another, it is presumed to have acted intentionally."[137] Thus the only relevant inquiry is whether "the text of the ADEA . . . authorizes a mixed-motives age discrimination claim."[138] The Court concluded that it does not.[139]

"The ADEA provides, in relevant part, that '[i]t shall be unlawful for an employer . . . to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, *because* of such individual's age.'"[140] Presuming "the ordinary meaning of th[e] [statute's] language accurately expresses the legislative purpose," the Court looked to the "ordinary meaning" of the "because of" phrase in the ADEA.[141] The Court found this "ordinary meaning" in some rather old dictionaries:

> The words "because of" mean "by reason of: on account of." 1 Webster's Third New International Dictionary 194 (1966); see also 1 Oxford English Dictionary 746 (1933) (defining "because of" to mean "By reason *of*, on account *of*" (italics in original)); The Random House Dictionary of the English Language 132 (1966) (defining "because" to mean "by reason; on account"). Thus, the ordinary meaning of the ADEA's requirement that an employer took adverse action "because of" age is that *age was the "reason"* that the employer decided to act. *See Hazen Paper Co. v. Biggins*, 507 U.S. 604, 610 . . . (1993) (explaining that the claim "cannot succeed unless the employee's protected trait actually played a role in [the employer's decisionmaking] process *and had a determinative influence on the outcome*").[142]

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134. *Id.* at 175-80.

135. *Id*. at 174.

136. *Id*.

137. *Id*. at 174-75 (citing EEOC v. Arabian Am. Oil Co., 499 U.S. 244, 256 (1991)).

138. *Id.* at 175.

139. *Id*.

140. *Id*. at 176 (quoting 29 U.S.C. § 623(a)(1)).

141. *Id.* at 175-76 (quoting Engine Mfrs. Assn. v. S. Coast Air Quality Mgmt. Dist., 541 U.S. 246, 252 (2004) (internal quotations omitted)).

142. *Id*. at 176 (underlined emphasis added). I always find it odd that in 2009 Justice Thomas relied on one dictionary from 1933 and two from 1966. While I generally like to believe that these are three dictionaries Justice Thomas happened to have on the bookshelf in his chambers (the 1966 editions would have been the current versions of Webster's and Random House when Justice

"To establish a disparate-treatment claim under the plain language of the ADEA, therefore, a plaintiff must prove that age was the 'but-for' cause of the employer's adverse decision."[143] "It follows, then, that under § 623(a)(1), the plaintiff retains the burden of persuasion to establish that age was the 'but-for' cause of the employer's adverse action."[144]

Since the Court issued its opinion in *Gross*, the lower federal courts have extended the Court's analysis beyond the confines of the ADEA.[145] For example, in *Serwatka v. Rockwell Automation, Inc*., the Seventh Circuit applied *Gross* to claims under the Americans with Disabilities Act (the "ADA").[146] The

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Thomas started college at Holy Cross in the fall of 1967), I suppose it is more likely that he was focused on the meaning of the phrase "because of" when the ADEA was enacted in 1967. Obviously, there were far more recent editions of these dictionaries available in 2009.

143. *Id.* at 176-77 (citing Bridge v. Phoenix Bond & Indem. Co., 128 S. Ct. 2131, 2141-42 (2008) ("[R]ecognizing that the phrase, 'by reason of,' requires at least a showing of 'but for' causation."); Safeco Ins. Co. of Am. v. Burr, 551 U.S. 47, 63–64 & n.14 (2007) (observing that "[i]n common talk, the phrase 'based on' indicates a but-for causal relationship and thus a necessary logical condition" and that the statutory phrase, "based on," has the same meaning as the phrase, "because of"); W. KEETON ET AL., PROSSER AND KEETON ON LAW OF TORTS 265 (5th ed. 1984) ("An act or omission is not regarded as a cause of an event if the particular event would have occurred without it.").

144. *Gross*, 557 U.S. at 177.

145. *See* Brian S. Clarke, *Grossly Restricted Pleading:* Twombly/Iqbal, Gross *and Cannibalistic Facts in Compound Employment Discrimination Claims*, 2010 UTAH L. REV. 1101, 1124-26 (2010) (discussing cases in which the lower courts have applied *Gross* outside the ADEA context); *see also* Widiss, *supra* note 4, at 910-13.

146. Serwatka v. Rockwell Automation, Inc., 591 F.3d 957, 961 (7th Cir. 2010). The ADA is codified at 42 U.S.C. §§ 12101-12213 (2006). Other courts have followed the Seventh Circuit's lead in applying *Gross* to claims under the ADA and adopted but-for standards in ADA cases. *See, e.g.*, Lewis v. Humboldt Acquisition Corp., 681 F.3d 312, 320-21 (6th Cir. 2012) (holding that but-for causation is required to establish liability under the ADA and that Title VII's mixed-motive remedies are not available to ADA plaintiffs); Palmquist v. Shinseki, 689 F.3d 66, 74-75 (1st Cir. 2012) (same); Saviano v. Town of Westport, No. 3:04-CV-522 RNC, 2011 WL 4561184, at *6 (D. Conn. Sept. 30, 2011); Warshaw v. Concentra Health Servs., 719 F. Supp. 2d 484, 503 (E.D. Pa. 2010); Ross v. Indep. Living Res. of Contra Costa Cnty., No. C08-00854 TEH, 2010 WL 2898773, at *6 (N.D. Cal. July 21, 2010).

The cases cited above have all dealt with the ADA as it existed prior to January 1, 2009, the effective date of the Americans with Disabilities and Amendments Act of 2008 (the "ADAAA"), *Serwatka*, 591 F.3d at 961 n.1, which substantially revised the language of the ADA. Among other things, the ADAAA changed the language of 42 U.S.C. § 12112 prohibiting discrimination "because of" a disability to prohibiting discrimination "on the basis of" a disability. *Compare* 42 U.S.C. § 12112(a) (effective through Dec. 31, 2008), *with* 42 U.S.C. § 12112(a) (effective as of Jan. 1, 2009).

> This change in language does not appear to alter the application of *Gross* to the ADA, as amended by the ADAAA, as the terms 'because of' and 'on the basis of' are essentially identical. Further, the ADAAA did not add a 'mixed motive' framework comparable to Title VII to the ADA and did not incorporate the Title VII 'mixed motive' framework into the ADA . . . . [T]he Court's reasoning in *Gross* and its views on Congressional intent make its decision just as applicable to the post-ADAAA ADA as it was to the ADA prior to January 1, 2009.

Clarke, *supra* note 145, at 1125 n.164. The Merit Systems Protection Board reached the same conclusion in Southerland v. Dept. of Defense, 2011 M.S.P.B. 92, at *16-17 (2011). *See also* Widiss, *supra* note 4, at 913 (discussing *Southerland* and the impact of *Gross* on the ADAAA).

Seventh Circuit painted with an even broader brush in *Fairley v. Andrews*, holding that, "unless a statute (such as the Civil Rights Act of 1991) provides otherwise, demonstrating but-for causation is part of the plaintiff's burden in all suits under federal law."[147] The Seventh Circuit has also applied *Gross* to the Labor Management Reporting and Disclosure Act.[148] It is likely that *Gross* applies to a variety of other federal employment antidiscrimination and antiretaliation statutes containing the same "because of" language as the ADEA."[149]

Despite the breadth with which the lower courts have applied *Gross*, the *Mt. Healthy*/*Price Waterhouse* proof scheme likely remains applicable in certain circumstances. First and foremost, this proof scheme continues to apply in the context at issue in *Mt. Healthy*: the First Amendment retaliation context.[150] In the case of retaliation claims under Title VII, some courts continue to use the *Price Waterhouse* proof scheme.[151] Additionally, *Gross* had

147. 578 F.3d 518, 525-26 (7th Cir. 2009) (applying *Gross* to a claim under 42 U.S.C. § 1983).

148. Serafinn v. Local 722, Int'l Bhd. of Teamsters, Chauffeurs, Warehousemen, and Helpers of Am., 597 F.3d 908, 914-15 (7th Cir. 2010); *see also* Widiss, *supra* note 4, at 911.

149. *See* Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(a) (2006) ("because of"); Fair Labor Standards Act, 29 U.S.C. § 215(a)(3) (2006) ("because"); ADEA, 29 U.S.C. § 623(a) (2006) ("because of"); Genetic Information Nondiscrimination Act, 42 U.S.C. § 2000ff-1(a) (2006) ("because of"); NLRA, 29 U.S.C. § 158(a)(4) (2006) ("because"); Immigration Reform and Control Act of 1986, 8 U.S.C. § 1324b(a)(1)(A) (2006) ("because of"); Sarbanes-Oxley/Dodd-Frank, 15 U.S.C. § 78u-6(h)(1)(A) (2006) ("because of"); ERISA, 29 U.S.C. § 1140 (2006) ("because"); USERRA, 38 U.S.C. § 4311(b) (2006) ("because"). Other statutes use functionally equivalent language. *See* Family and Medical Leave Act, 29 U.S.C. § 2615(a)(2) (2006) ("for opposing"); ADA, 42 U.S.C. § 12112(b)(3)(A) (2006) ("on the basis of"); ERISA, 29 U.S.C. § 1140 (2006) ("for exercising"); USERRA, 38 U.S.C. § 4311(a) (2006) ("on the basis of"); *see also* Clarke, *supra* note 145, at 1125-26.

150. *See* Greene v. Doruff, 660 F.3d 975, 979 (7th Cir. 2011); Brown v. Cnty. of Cook, 661 F.3d 333, 335 (7th Cir. 2011); O'Bryant v. Finch, 637 F.3d 1207, 1217 (11th Cir. 2011) (per curiam); Brightwell v. Lehman, 637 F.3d 187, 194 (3d Cir. 2011); Eckerman v. Tenn. Dep't of Safety, 636 F.3d 202, 207-08 (6th Cir. 2010); Decotiis v. Whittemore, 635 F.3d 22, 29-30 (1st Cir. 2011); Anemone v. Metro. Transp. Auth., 629 F.3d 97, 114 (2d Cir. 2011); Anthoine v. N. Cent. Cntys. Consortium, 605 F.3d 740, 752 (9th Cir. 2010) (all recognizing that *Mt. Healthy* continues to govern First Amendment retaliation claims).

151. *See* Smith v. Xerox Corp., 602 F.3d 320, 329 (5th Cir. 2010). *But see* Nassar v. Univ. of Tex. Sw. Med. Ctr., 688 F.3d 211, 212 (5th Cir. 2012) (Smith, J., dissenting from denial of en banc review on the grounds that *Smith*, on which the panel decision in *Nassar* relied, was wrongly decided), *cert. granted*, 133 S. Ct. 978 (2013); Hayes v. Sebelius, 762 F. Supp.2d 90, 114-15 (D.D.C. 2011) (rejecting the reasoning of *Smith*).

The Supreme Court granted certiorari in *Nassar* on January 18, 2013, on the following issue: "Whether Title VII's retaliation provision and similarly worded statutes require a plaintiff to prove but-for causation (i.e., that an employer would not have taken an adverse employment action but for an improper motive), or instead require only proof that the employer had a mixed motive (i.e., that an improper motive was one of multiple reasons for the employment action)." *See* http://www.supreme court.gov/qp/12-00484qp.pdf (last visited Aug. 8, 2013). Unlike *Smith*, in which the Fifth Circuit held that *Price Waterhouse* continued to govern mixed-motive retaliation claims under Title VII, *Smith*, 602 F. 3d at 333-34, the lower courts in *Nassar* applied the 1991 CRA to the mixed-motive retaliation claim. Nassar v. Univ. of Tex. Sw. Med. Ctr., No. 3:08-CV-1337-B, 2010 WL 3000877, at *2 (D. Tex. July 27, 2010). The Supreme Court has the opportunity in *Nassar* to significantly clarify the cause-in-fact standards applicable under the federal anti-

no impact on a claim under § 4311(b) of USERRA or the operation of its version of the proof scheme.[152]

The most troubling aspect of *Gross* was not its statement that "because of" in the ADEA means "but for" causation–those terms have been bandied about for years.[153] Rather, it was the Court's rejection of true burden shifting like that under both the *Mt. Healthy*/*Price Waterhouse* proof scheme and the 1991 CRA proof scheme that was the most troubling aspect of *Gross*. Far from being the antiplaintiff standard Congress apparently feared, the *Mt. Healthy*/*Price Waterhouse* proof scheme allocates the most significant burden of persuasion to the party in the best position to shoulder it–the defendant.[154] The defendant in any disparate treatment case is far better able to demonstrate that the plaintiff's protected trait was not necessary for the defendant's decision than the plaintiff would be to demonstrate that it was necessary.[155] As many scholars have discussed, the information asymmetry that exists between plaintiffs and defendants in the disparate treatment context is extreme and, from a normative standpoint, a standard like either the *Mt. Healthy*/*Price Waterhouse* proof scheme or the 1991 CRA proof scheme, which shifts the burden of persuasion to the party best able to meet that burden is far more desirable.[156] However, for the time being, the ship of normative ideals has sailed in this area of the law and courts and commentators are left to make the best out of the situation that currently exists.

While *Gross* rejected the applicability of the *Mt. Healthy*/*Price*

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discrimination statutes. Unfortunately, the question presented is a bit circular and, if answered explicitly, may only continue the massive confusion on this issue (other than, perhaps, clarifying a proof scheme issue). As argued herein, but-for and motivating factor are both–in reality–slightly different variations of causal necessity, especially as that concept is described in the *Restatement (Third) of Torts*. *See* RESTATEMENT THIRD OF TORTS: PHYSICAL AND EMOTIONAL HARM (2010).

152. *See* Marcus v. PQ Corp., 458 Fed. App'x 207, 211-12 (3d Cir. 2012) (recognizing that the language of USERRA, 38 U.S.C. § 4311(b), uses the same motivating factor language as Title VII, 42 U.S.C. § 2000e-2(m), rather than the "because of" language of the ADEA that was at issue in *Gross*); Simmons v. Sykes Enters., Inc., 647 F.3d 943, 949-50 (10th Cir. 2011) (same).

153. *See, e.g.*, Price Waterhouse v. Hopkins, 490 U.S. 228, 240, 283-84 (1989) (debate between the plurality and dissent over whether the "because of" language in Title VII requires a plaintiff to show but-for causation).

154. Katz, *Gross Disunity*, *supra* note 9, at 881 ("Causation occurs in the mind of the decision-maker/defendant. And most of the relevant evidence tends to be under the control of the defendant. This lack of access to evidence makes proving any type of causation difficult, and therefore makes burden-shifting normatively desirable."); Gross v. FBL Fin. Servs., Inc., 557 U.S. 167, 191 (2009) (Breyer, J., dissenting) ("[S]ince the employee likely knows less than does the employer about what the employer was thinking at the time, the employer will often be in a stronger position than the employee to provide the answer.").

155. *See Gross*, 557 U.S. at 191 (Breyer, J., dissenting); *see also* Jason R. Bent, *The Telltale Sign of Discrimination: Probabilities, Information Asymmetries, and the Systemic Disparate Treatment Theory*, 44 U. MICH. J.L. REFORM 797, 842 (2011) ("The relevant decision-maker will likely know the true reason for the adverse action, and that information may be reflected in the employer's documents, such as personnel files or possibly notes kept by the decision-maker. Generally speaking, employers will have better access to evidence than plaintiffs will in the disparate treatment context.").

156. *See, e.g.*, Bent, *supra* note 155, at 842.

Waterhouse proof scheme and the 1991 CRA proof scheme in claims under the ADEA–thereby eliminating those routes through the swamp for a large group of plaintiffs–the Court offered no guidance on any alternate route for plaintiffs to use.[157] Instead, the Court simply stated that plaintiffs must establish but-for causation.[158] This left the lower courts to sort out which (if any) existing route through the swamp plaintiffs could use to establish a "but-for" cause as mandated by *Gross*. Not surprisingly, the lower courts quickly concluded that the *McDonnell Douglas* proof scheme was both available to plaintiffs in non-Title VII cases after *Gross* and was sufficient to permit the factfinder to find but-for causation.[159]

II. MODERN CAUSE-IN-FACT THEORY

In considering the scope and nature of cause-in-fact in employment discrimination law, it is helpful to look to the body of law from which the concept of cause-in-fact itself springs: tort law.[160] Torts scholars have struggled

157. *Gross*, 557 U.S. at 178-80.

158. *Id*. at 180.

159. *See* Shelley v. Geren, 666 F.3d 599, 607 (9th Cir. 2012) (declining to apply *Gross* to an ADEA case that had not yet proceeded to trial, and finding that *McDonnell Douglas* is the appropriate scheme to be applied to a motion for summary judgment); Horn v. United Parcel Servs., Inc., 433 Fed. App'x 788, 793 (11th Cir. 2011) (applying the *McDonnell Douglas* proof scheme in a non-Title VII case after *Gross* and stating that "the but-for causation standard of *Gross* is consistent with the *McDonnell Douglas* framework where the burden of persuasion to show discrimination remains at all times with the plaintiff"); Gorzynski v. JetBlue Airways Corp., 596 F.3d 93, 106 (2d Cir. 2010) (reasoning that there was no cause to jettison the *McDonnell Douglas* framework for ADEA cases after *Gross*); Anderson v. Durham D & M, L.L.C., 606 F.3d 513, 523 (8th Cir. 2010) (applying *McDonnell Douglas* framework in an ADEA case after *Gross*); Smith v. City of Allentown, 589 F.3d 684, 691 (3d Cir. 2009) (recognizing that "*Gross* expressed significant doubt about any burden-shifting under the ADEA," but concluding that "the but-for causation standard required by *Gross* does not conflict with [the] continued application of the *McDonnell Douglas* paradigm" in ADEA cases); Geiger v. Tower Auto., 579 F.3d 614, 622 (6th Cir. 2009) (holding that the *McDonnell Douglas* framework should continue to be applied to ADEA claims until the Supreme Court expressly overrules the model); Martino v. MCI Commc'ns Servs., Inc., 574 F.3d 447, 452 (7th Cir. 2009) ("A plaintiff suing under the ADEA may show discrimination directly or indirectly, in the later instance through the approach established in [*McDonnell Douglas*]."); Velez v. Thermo King de P.R., Inc., 585 F.3d 441, 446-47 (1st Cir. 2009) ("ADEA plaintiffs who do not have 'smoking gun' evidence may nonetheless prove their cases by using the three stage burden-shifting framework set forth by the Supreme Court in [*McDonnell*]".).

160. Professors Sandra Sperino and Charles Sullivan have each written recently on the dangers and normative undesirability of incorporating tort law causation concepts into the largely statutory realm of employment discrimination law. *See* Sperino, *Discrimination Statutes*, supra note 10, at 35-38; Charles A. Sullivan, *Tortifying Employment Discrimination*, 92 B.U. L. REV. 1431 (2012); Sperino, *Statutory Proximate Cause*, *supra* note 10. I agree with Professor Sperino and Professor Sullivan that the tort law concept of proximate cause is unnecessary and undesirable in the employment discrimination context. However, cause-in-fact issues are inherent in every employment discrimination claim. As stated above, cause-in-fact is typically the *ultimate* issue in an employment discrimination case. Tort law, which has struggled with cause-in-fact concepts for longer than employment discrimination law has existed, can provide helpful guidance for cause-in-fact determination in the employment law context. At the risk of fostering the further "tortification" of employment law, looking to tort law—especially the *Restatement (Third) of Torts*—for guidance on the nature of cause-in-fact in the employment law context is a virtual necessity. *See* Price

for years with causation theory and doctrine, from the distinctions between cause-in-fact and proximate cause[161] to the inadequacy of the nature of cause-in-fact and how it is analyzed.[162] Until recently, these struggles have led to this area of the law "that has grown exponentially more opaque" over the last thirty-plus years.[163]

A. An Overview of Traditional Cause-In-Fact In Tort Law

Cause-in-fact in tort law "inquires into the causal connection between the defendant's wrongful conduct and the plaintiff's injury."[164] The most widely accepted test for making cause-in-fact inquiry is the but-for test.[165] However, the but-for test has proven insufficient and ineffective in various situations, especially those involving the simultaneous operation of multiple causal factors.[166] As a result, courts and scholars have proposed and implemented various formulations of and supplements to the but-for test over the years, including, for example, the "substantial factor" test.[167] However, none of these formulations or supplements have proven (until recently) particularly effective and efficient.[168] Part II.A *infra* briefly discusses these "traditional" approaches to cause-in-fact to help provide some context for the discussion of "modern" cause-in-fact theory in Part II.B.

1. Traditional But-For Causation

The basic test for determining cause-in-fact is the but-for test.[169] "Simply stated, 'but for' analysis requires the finder of fact to determine that the asserted

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Waterhouse v. Hopkins, 490 U.S. 228, 266 (1989) (O'Connor, J., concurring) (characterizing cause-in-fact in tort law as "analogous" to cause-in-fact in disparate treatment law); *see also* Zimmer, *The New Discrimination Law*, *supra* note 1, at 1930 n.173 (discussing *Price Waterhouse* and Congress' approach to causation in antidiscrimination statutes).

161. For example, the Restatement (Third) makes clear, in a way that the Restatement (Second) of Torts did not, that cause-in-fact and proximate cause are "two quite distinct concepts" and explicitly "decoupl[es] factual cause from proximate cause." RESTATEMENT (THIRD) OF TORTS: PHYSICAL AND EMOTIONAL HARM § 26 reporters' note cmt. a (2010). The Reporters' Note explains that in order to do this, the "[Restatement (Third)] addresses each in a separate Chapter and is quite explicit about the fact that 'proximate cause' is neither about cause nor proximity, as those two words are commonly understood." *Id.*; *see also id.* at § 29.

162. For example, the Restatement (Third) explicitly rejects the "substantial factor" test of cause-in-fact that was integral to cause-in-fact analysis under both the original Restatement of Torts ("First Restatement") and the Restatement (Second). *See id.* § 26 cmt. j, reporters' note cmt. j.

163. John D. Rue, Note, *Returning to the Roots of the Bramble Bush: The "But For" Test Regains Primacy in Causal Analysis in the American Law Institute's Proposed Restatement (Third) of Torts*, 71 FORDHAM L. REV. 2679, 2682 (2003).

164. David W. Robertson, *The Common Sense of Cause in Fact*, 75 TEX. L. REV. 1765, 1768 (1997).

165. WILLIAM L. PROSSER, THE LAW OF TORTS § 41 (4th ed. 1971); *see also* Rue, *supra* note 163, at 2681.

166. *See infra* text and accompanying notes Part II.A.2.

167. *See* RESTATEMENT (SECOND) OF TORTS §§ 431-33.

168. *See infra* Part II.A.3.

169. PROSSER, *supra* note 165, at 238-39; *see also* Rue, *supra* note 163, at 2681.

harm would not have come to pass 'but for' the defendant's tortious act. An action is not a 'but for' cause of an injury if the injury would have come about regardless of the action."[170] The but-for standard for cause-in-fact "asks about a state of affairs that never existed: the defendant has engaged in bad behavior, and the but-for test asks what would have happened had the defendant's behavior been different enough to be acceptable."[171] In short, "the but-for question is always asking about what would have happened had things been different than they in fact were."[172]

The but-for inquiry "call[s] upon common sense."[173] When considering this test, jurors "intuitively refer to [their] common experience of living on a populated planet subject to the forces of gravity and nature. It is for that reason that 'any layman is quite as competent' to answer ordinary cause-in-fact questions as 'the most experienced court.'"[174] The but-for "test reflects a deeply rooted belief that a condition cannot be a cause of some event unless it is, in some sense, necessary for the occurrence of the event."[175]

"The 'but for' test seems to work well with garden-variety examples of causation."[176] In most cases, and in virtually all clear-cut cases, it will yield the "correct" answer on the question of cause-in-fact.[177]

2. Inadequacy of Traditional But-For Causation in Cases with Multiple Causal Factors

In certain types of cases–"combined forces" cases[178] or "overdetermined" cases[179]–the but-for test "results in a finding of no causation even though it is clear that the act in question contributed to the injury."[180] Even though "everything in human experience and intuition cries out that cause in fact was

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170. Rue, *supra* note 163, at 2681 (citing PROSSER, *supra* note 165).

171. Robertson, *supra* note 164, at 1768. Professor Robertson also articulated a five part test for considering but-for causation: "(a) identify the injuries in suit; (b) identify the wrongful conduct; (c) mentally correct the wrongful conduct to the extent necessary to make it lawful, leaving everything else the same; (d) ask whether the injuries would still have occurred had the defendant been acting correctly in that sense; and (e) answer the question." *Id*. at 1771.

172. *Id*. at 1769.

173. *Id*.

174. *Id*. (quoting PROSSER, *supra* note 165, at 237; KEETON ET AL., *supra* note 143, at 264-65).

175. Wright, *supra* note 19, at 1775. As Professor Wright notes, "This view is shared by lawyers, philosophers, scientists, and the general public." *Id*. (citing T. BEAUCHAMP & A. ROSENBERG, HUME AND THE PROBLEM OF CAUSATION 94-96, 107-17, 119, 131-37, 139-45, 297 (1981); H.L.A. HART & T. HONORÉ, CAUSATION IN THE LAW 15-16, 69, 110 (2d ed. 1985); PROSSER, *supra* note 165, at 237-39; J. L. Mackie, *Causes and Conditions*, *in* CAUSATION AND CONDITIONALS 16-21, 25-27 (E. Sosa ed., 1975); Glanville Williams, *Causation in the Law*, 1961 CAMBRIDGE L.J. 62, 63-64 (1961)).

176. Richard Fumerton & Ken Kress, *Causation and the Law: Preemption, Lawful Sufficiency, and Causal Sufficiency*, 64 LAW & CONTEMP. PROBS. 83, 95-96 (2001); *see also* Wright, *supra* note 19, at 1775.

177. Wright, *supra* note 19, at 1775.

178. Wex S. Malone, *Ruminations on Cause-in-Fact*, 9 STAN. L. REV. 60, 88-97 (1956).

179. Wright, *supra* note 19, at 1775.

180. *Id*.

present," the but-for test denies it in these situations.[181]

There are several classic examples of "combined forces" or "overdetermined" cause cases. One is the "two noisy motorcycles" scenario. In this example, cited by Professor Malone,[182] "[t]wo noisy motorcycles simultaneously pass the horse on which plaintiff is riding, frightening the animal and causing it to run away and injure plaintiff."[183] "When the but-for inquiry is focused on Cyclist *A*'s negligent conduct, it gives a perverse answer, indicating that the obviously causal conduct of *A* was not a cause in fact of the harm because of the causal sufficiency of Cyclist *B*'s negligent conduct" and vice versa.[184] Another example is the ubiquitous "two fires" scenario. In this scenario, "*C* and *D* independently start separate fires, each of which would have been sufficient to destroy *P*'s house. The fires converge and together burn down the house."[185] Common sense would dictate that both fires were causes-in-fact of the burning of *P*'s house, "[y]et, application of the but-for test would result in a finding that . . . neither *C*'s nor *D*'s fire was a cause of the destruction of *P*'s house."[186]

3. Efforts to Broaden or Supplement But-For Causation and the Rise (and Fall) of "Substantial Factor"

As a consequence of the "obviously incorrect results" of the but-for test in overdetermined-causation cases, courts and scholars developed various theories to expand or supplement the but-for test to ameliorate this affront to common sense, human experience, and intuition.[187] The most common of these modifications and supplements is the so-called "substantial factor" test, which was originally developed in the early twentieth century.[188]

When the American Law Institute ("ALI") drafted the *First Restatement*, it included the "substantial factor" test as a "primary element" of the causation inquiry.[189] The ALI again included the "substantial factor" test as a primary

181. Robertson, *supra* note 164, at 1777.

182. Malone, *supra* note 178, at 89 (based on Corey v. Havener, 65 N.E. 69 (Mass. 1902)); Robertson, *supra* note 164, at 1777.

183. Malone, *supra* note 178, at 89; Robertson, *supra* note 164, at 1777.

184. Robertson, *supra* note 164, at 1777.

185. Wright, supra note 19, at 1776. The "two fires" scenario is based on Anderson v. Minneapolis, St. Paul & Sault Ste. Marie Ry. Co., 179 N.W. 45 (Minn. 1920).

186. Wright, *supra* note 19, at 1776.

187. *Id.* at 1776-77. Professor Wright identifies a total of six methods of modifying or supplementing the but-for test in overdetermined-causation cases: (1) "Detailing the Manner of Occurrence"; (2) "Detailing the Injury"; (3) "Excluding Hypothetical Facts"; (4) "Aggregating Multiple Potential Causes"; (5) the "Substantial-Factor Formula"; and (6) "Undefined, Directly Observable Causal Contribution." *Id.* at 1777-88. As explained by Professor Wright, none of these modifications or supplements were sufficient to provide a meaningful and effective analysis of cause-in-fact in overdetermined-causation cases. *Id.* As a result, Professor Wright proposed the Necessary Elements of a Sufficient Set ("NESS") standard. *Id.* at 1788-1803.

188. Rue, *supra* note 163, at 2681 (citing DANIEL B. DOBBS, THE LAW OF TORTS 415 (2000); Anderson v. Minneapolis, St. Paul & Sault Ste. Marie Ry., 179 N.W. 45, 46-47 (Minn. 1920)).

189. *See* RESTATEMENT OF TORTS §§ 430-33 (1934); Rue, *supra* note 163, at 2681.

tenant of causation doctrine in the *Restatement Second*.[190] By the time of the *Second Restatement*, causation had become inextricably intertwined with the substantial factor test.[191]

Unfortunately, "legal causation,"[192] the context in which both the *First Restatement* and the *Second Restatement* used the "substantial factor" standard, encompassed both cause-in-fact and proximate cause.[193] This led to widespread confusion as courts and commentators sought to sort separate cause-in-fact and proximate cause principles from the unholy hybrid of "legal causation."[194] Despite the fact that the originator of the "substantial factor" test— Jeremiah Smith—never intended it as a test for cause-in-fact,[195] and, in fact, "envisioned

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190. *See* RESTATEMENT (SECOND) OF TORTS §§ 430-32 (1979).

191. In section 431, the Restatement (Second) states that an "actor's negligent conduct is a legal cause of harm to another if (a) his conduct is a substantial factor in bringing about the harm, and (b) there is no rule of law relieving the actor from liability because of the manner in which his negligence has resulted in the harm." *Id*. at § 431. Section 432 then defines "substantial factor" as but-for-like ("the actor's negligent conduct is not a substantial factor in bringing about harm to another if the harm would have been sustained even if the actor had not been negligent") and provides a jury with the discretion to assign "substantial factor" status to multiple causal forces. *Id*. at § 432(2). Section 433 provides three factors for juries to consider in exercising their discretion:

> (a) the number of other factors which contribute in producing the harm and the extent of the effect which they have in producing it; (b) whether the actor's conduct has created a force or series of forces which are in continuous and active operation up to the time of the harm, or has created a situation harmless unless acted upon by other forces for which the actor is not responsible; [and] (c) lapse of time.

Id. at § 433.

192. *Id*. at § 430 ("In order that a negligent actor shall be liable for another's harm, it is necessary not only that the actor's conduct be negligent . . . but also that the negligence of the actor be a legal cause of the other's harm.").

193. "Although [the 'substantial factor' test] appears to provide the standard for determining factual causation in §431 of th[e First and Second] Restatements, its evaluative component and its invocation in §433 of those Restatements make it appear to be doing scope-of-liability (proximate-cause) duty." RESTATEMENT (THIRD) OF TORTS: PHYSICAL AND EMOTIONAL HARM § 26 reporters' note cmt. j (2010); Robertson, *supra* note 164, at 1776 (noting that the Second Restatement used the term "substantial factor" in three different ways: (1) "as a substitute for the but-for test" in overdetermined-causation cases; (2) "as more or less interchangeable with the but-for test"; and (3) as "an approach to the issue of legal [or proximate] causation or ambit of duty, a matter that should be kept entirely distinct from the cause-in-fact issue").

194. *See* RESTATEMENT (THIRD) OF TORTS: PHYSICAL AND EMOTIONAL HARM § 26 reporters' note cmt. j (2010). This confusion even crept into the Reporters' Notes to section 433 of Dean Prosser's venerable torts treatise. Dean Prosser stated, "[T]he 'substantial factor' element deals with causation in fact." In the fifth edition of his famous treatise, which was published after Prosser's death, the editors stated "that the substantial-factor limitation was an evaluative limitation on liability rather than an aspect of factual causation." *Id.* (citing KEETON ET AL., *supra* note 143, at 267) ("The 'substantial factor' formulation is one concerning legal significance rather than factual quantum."); s*ee also* Robertson, *supra* note 164, at 1776 ("The term 'substantial factor' has come to have a number of different meanings in the jurisprudence. By using the term in three different senses, the *Restatement (Second) of Torts* has contributed to a nationwide confusion on the matter."); Jane Stapleton, *Legal Cause: Cause-in-Fact and the Scope of Liability for Consequences*, 54 VAND. L. REV. 941, 943 (2001) ("Few areas in the law of tort are in more need of this re-evaluation [provided by the Restatement (Third)] than the area covered by the term 'legal cause' as described in the earlier Restatements, where its treatment is opaque, confused, and contradictory.").

195. RESTATEMENT (THIRD) OF TORTS: PHYSICAL AND EMOTIONAL HARM § 26 reporters' note

the use of but-for as the standard for factual causation,"[196] courts, in reliance on the First and Second Restatements, have applied the substantial factor test as a standard for determining cause-in-fact for many years.[197]

Professor Wright argued that the "substantial factor" test had no place in cause-in-fact theory for a number of reasons, all of which focused on the conflation of cause-in-fact, which is matter of fact, with proximate cause, which is a "noncausal, nonfactual policy judgment about responsibility for the injury."[198] First, Professor Wright argued that the substantial factor test was simply not designed to shed light on cause-in-fact, having been developed for use only in the analysis of proximate cause.[199] Second, he argued that it was unduly vague, in that it provided no guidance to what a "factor" might be.[200] Finally, Professor Wright stressed his primary argument that substantial-factor inherently conflated the cause-in-fact and proximate cause inquiries, in that it "required the judge or jury to determine not only whether the actor's tortious conduct had contributed to the injury (been a factor), but whether it had contributed *enough* to make the actor responsible."[201]

Similarly, the ALI, in drafting the *Restatement Third*, noted that "[t]he substantial-factor test has not . . . withstood the test of time, as it has proved confusing and been misused."[202] As explained in the Reporter's Note to comment j to section 26 of the *Restatement Third*, except in overdetermined-causation cases, "'substantial factor' provides nothing of use in determining whether factual cause exists."[203] Given that "[t]he essential requirement [of cause-in-fact], recognized in both Torts Restatements, is that the party's tortious conduct be a necessary condition for the occurrence of the plaintiff's harm," the substantial-factor test "is undesirably vague" as to this essential requirement and is likely to confuse factfinders.[204] Further, as argued by Professor Wright, "substantial factor" as used in the *First Restatement* and the *Second Restatement* confuses the concepts of cause-in-fact and proximate cause.[205] As a result, the ALI deleted "substantial factor" from the *Restatement Third*, and forcefully

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cmt. j (2010) (citing Jeremiah Smith, *Legal Cause in Actions of Tort*, 25 HARV. L. REV. 103 (1911)); *see also* Wright, *supra* note 19, at 1781.

196. RESTATEMENT (THIRD) OF TORTS: PHYSICAL AND EMOTIONAL HARM § 26 reporters' note cmt. j (2010) (citing Jeremiah Smith, *Legal Cause in Actions of Tort*, 25 HARV. L. REV. 103 (1911)); *see also* Wright, *supra* note 19, at 1781.

197. See Wright, *supra* note 19, at 1782 & n.198.

198. *Id.* at 1783.

199. *Id*. at 1781-82.

200. *Id.*

201. *Id*. Wright explained that "limiting liability due to the *extent* of contribution, rather than due to the absence of *any* contribution, is clearly a proximate-cause issue of policy or principle, rather than an issue of actual cause (contribution to the injury)." *Id*. at 1782-83.

202. RESTATEMENT (THIRD) OF TORTS: PHYSICAL AND EMOTIONAL HARM § 26 reporters' note cmt. j (2010).

203. *Id*.

204. *Id.*

205. *Id*.

argued for its removal from causation jurisprudence.[206]

The rejection of the substantial-factor standard left a sizable gap in cause-in-fact theory, as the but-for test has proven incapable of addressing cause-in-fact in overdetermined causation cases. To fill this gap, Professor Wright articulated the Necessary Element of a Sufficient Set ("NESS") standard.[207]

B. The Restatement Third, *NESS, and Modern Cause-In-Fact Theory*

The ALI presented its first discussion draft of the *Restatement (Third) of Torts: Liability for Physical Harm* to its membership in April 1999.[208] In 2002, it issued Tentative Draft No. 2, which contained provisions regarding cause-in-fact.[209] After much comment and discussion, the ALI revised the provisions on cause-in-fact and, in 2005, issued Proposed Final Draft No. 1.[210] The ALI released the final version in 2010 and it was finally approved in the spring of 2011.[211]

This nearly decade long project enabled the ALI and its membership–which includes many of the foremost authorities on the law of cause-in-fact–to evaluate, reevaluate, and distill the body of scholarship, as well as current ideas and thinking, on cause-in-fact and, using the legal, philosophical, and analytical state of the art (so to speak), clarify the legal concepts surrounding cause-in-fact.[212] As Professor Stapleton described during the drafting of the *Restatement Third*, "Few areas in the law of tort are in more need of this re-evaluation than the area" of cause-in-fact, the treatment of which in the earlier Restatements was "opaque, confused, and contradictory."[213]

In revaluating cause-in-fact, the ALI jettisoned the "legal cause" morass and the misplaced "substantial factor" test.[214] In their place, the drafters sought to return cause-in-fact to its philosophic roots while, at the same time, taking a more realistic view of cause-in-fact as a truly factual (rather than policy based) construct.[215] To accomplish this goal, the drafters did several things. First, they restored the primacy of the but-for test in determining factual causation: "Conduct is a factual cause of harm when the harm would not have occurred

206. *Id.* at § 26 cmts. a, j, and reporters' note cmts. a, j.

207. Wright, *supra* note 19, at 1788-1803.

208. *See* RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL AND EMOTIONAL HARM, reporters' introductory note (Tentative Draft No. 1, 2001).

209. *See* RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL AND EMOTIONAL HARM, reporters' introductory Note (Tentative Draft No. 2, 2002).

210. *See* RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL AND EMOTIONAL HARM, reporters' memorandums (Proposed Final Draft 2005).

211. *See Current Projects: Restatement* (*Third*) *of Torts: Liability for Physical and Emotional Harm*, AMERICAN LAW INSTITUTE, http://www.ali.org/index.cfm?fuseaction=projects.proj_ip&projectid=16 (last visited Aug. 8, 2013).

212. *See* Stapleton, *supra* note 194, at 943.

213. *Id*.

214. *See* RESTATEMENT (THIRD) OF TORTS: PHYSICAL AND EMOTIONAL HARM § 26 reporters' note cmts. a, j (2010).

215. *See id*. § 26 cmt. c, reporters' note cmt. c.

absent the conduct."[216] Second, they explicitly recognized that but-for causation does not mean sole cause and that, in reality, there will be multiple causes-in-fact for any event.[217] Third, the drafters adopted a "causal set" model to inform and frame the but-for standard and more closely align the consideration of cause-in-fact (and the but-for test) with the operation and interaction of causal factors in the real world.[218] It is the third (and to a lesser extent the second) of these items that occupies the rest of this section.

1. NESS and the Causal-Set Model of Cause-in-Fact

The drafters of the *Restatement Third* recognized that–in real life–there are multiple factual causes of any event.[219] Given this reality, the *Restatement Third* describes cause-in-fact as not only what would be considered a but-for cause under the traditional view of that test, but also "as a necessary condition for the outcome" at issue, even though many other factual causes were also necessary to that outcome.[220] As explained in comment c to section 26:

> A useful model for understanding factual causation is to conceive of a set made up of each of the necessary conditions for the plaintiff's harm. Absent any one of the elements of the set, the plaintiff's harm would not have occurred. Thus, there will always be multiple (some say, infinite) factual causes of a harm, although most will not be of significance for tort law and many will be unidentified.[221]

To avoid any ambiguity, uncertainty, or subjectivity and, instead, "emphasize the empirical nature of factual causal determinations," the *Restatement Third* defines each element that is "necessary . . . for an outcome" as "*a"* cause-in-fact and the "causal set, of which the tortious conduct was one necessary condition, as the cause of harm."[222] In this way, the *Restatement Third* focuses the cause-in-fact inquiry on whether the defendant's act or omission was a "necessary element[ ]" of the causal set that actually caused the plaintiff's harm.[223] The recognition that there are multiple causes-in-fact to any harm, as well as the overall focus on the causal set, is especially important in situations where multiple causal factors are operating simultaneously[224] and, under a traditional but-for analysis (or even worse, a "substantial factor" analysis), it would be all

216. *Id*. § 26; *see also id*. § 26 cmt. b, reporters' note cmt. b.

217. *Id.* § 26 cmt. c, reporters' note cmt. c; *see also id*. § 26 cmt. b, reporters' note cmt. b; *id.* § 27.

218. *Id.* § 26 cmt. c.

219. *Id.* § 26 cmt. b.

220. *Id.*

221. *Id.* § 26 cmt. c.

222. *Id.* § 26 cmt. d (second emphasis omitted).

223. *Id.* The defendant's act need not have been independently sufficient to cause the plaintiff's harm in the absence of the other causes that comprise the relevant causal set. Only the causal set itself must have been sufficient to cause the plaintiff's harm. This description of cause-in-fact is adapted directly from Professor Wright's NESS standard. *See* Wright, *supra* note 19, at 1790 (explaining the philosophical basis of test).

224. As discussed, *supra* Part I.A and, *infra* Part III.A.2, employment related decisionmaking is one such situation.

too easy for a factfinder to turn to extra-factual, policy based considerations to designate the biggest or most significant cause as the only cause.[225]

In adopting a causal-set model for cause-in-fact, the ALI explicitly sought to return cause-in-fact to its philosophic roots.[226] As the drafters explained, "This understanding of causation and the causal-set model [was] derived from [philosopher John Stuart] Mill's explanation of [factual] causation."[227] In defining this causal-set model, the ALI adopted and adapted the causal-set based cause-in-fact standard articulated by Professor Wright and dubbed Necessary Element of a Sufficient Set ("NESS").[228]

Wright's NESS standard states that "a particular condition [is] a [factual] cause of . . . a specific consequence if and only if it was a necessary element of a set of antecedent actual conditions that was sufficient for the occurrence of the consequence."[229] The NESS standard focuses on the overall set of conditions that led to the "consequence" and then assigns cause-in-fact status to each of the "necessary elements" of that causal set.[230]

2. A Unitary Solution for Cases with Multiple Causal Factors

Both Professor Wright and the ALI focused their efforts on a unitary

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225. This strays into issues of proximate cause rather than cause-in-fact. The Restatement (Third) intended to completely separate proximate cause from cause-in-fact. *See* RESTATEMENT (THIRD) OF TORTS: PHYSICAL AND EMOTIONAL HARM § 26 cmt. a, reporters' note cmt. a (2010).

226. *See id.* § 26 reporters' note cmts. c, j.

227. *Id.* § 26 reporters' note cmt. c. According to Mill, "The cause, then, philosophically speaking, is the sum total of the conditions positive and negative taken together; the whole of the contingencies of every description, which being realized, the consequent invariably follows." JOHN STUART MILL, A SYSTEM OF LOGIC, RATIOCINATIVE AND INDUCTIVE: BEING A CONNECTED VIEW OF THE PRINCIPLES OF EVIDENCE AND THE METHODS OF SCIENTIFIC INVESTIGATION 241 (8th ed. 1904); *see also* Arno C. Becht & Frank W. Miller, THE TEST OF FACTUAL CAUSATION IN NEGLIGENCE AND STRICT LIABILITY CASES 12 (1961) ("Our assumption, then, simply is that any particular event has a host of causes, an unlimited number . . . ."); KENNETH J. ROTHMAN ET AL., MODERN EPIDEMIOLOGY 6–7 (3d ed. 2008) (epidemiologists employing definition of causation based on Mill's explanation). *See generally* David Lewis, *Causation as Influence*, 97 J. PHIL. 182 (2000) (discussing views on causal preemption and transitivity).

228. Wright, *supra* note 19, at 1790; RESTATEMENT (THIRD) OF TORTS: PHYSICAL AND EMOTIONAL HARM § 26 reporters' note cmt. c (2010). Professor Wright based NESS on these same philosophic roots–particularly the work of John Stuart Mill and David Hume–as did the drafters of the *Restatement Third*. *See id.;* Wright, *supra* note 19, at 1774; *see also* Richard W. Wright, *Causation, Responsibility, Risk, Probability, Naked Statistics, and Proof: Pruning the Bramble Bush by Clarifying the Concepts*, 73 IOWA L. REV. 1001, 1019-20 (1988) [hereinafter Wright, *Pruning the Bramble Bush*]; Richard W. Wright, *Once More into the Bramble Bush: Duty, Causal Contribution, and the Extent of Legal Responsibility*, 53 VAND. L. REV. 1071, 1102-03 (2001) [hereinafter Wright, *Once More into the Bramble Bush*] (comparing the NESS test with the Restatement and explaining the test's usage).

229. Wright, *supra* note 19, at 1790 (emphasis omitted). One commentator has analogized NESS to a (relatively) simple electrical circuit. *See* Chris Miller, *NESS for Beginners*, *in* PERSPECTIVES ON CAUSATION 323 (Richard Goldberg, ed., 2011). Each item in the circuit—a charged battery, proper wiring, a closed switch, and a working light bulb—is a NESS, because without each of them, the bulb will not light. *See id.* at 324.

230. The NESS test is a natural fit for the disparate treatment context, given the multifactor decisionmaking that is typical in the employment context. *See supra* Part I.A.

standard–one that would be equally effective in straightforward cases, in multiple causal factor cases,[231] in competing or combined causal-set cases, and in true overdetermined causation cases.[232]

The *Restatement Third* addresses competing or combined causal-set cases in the final paragraph of comment c to section 26 with an example:

> In some cases, two causal sets may exist, one or the other of which was the cause of harm. Thus, for example, in a case in which the plaintiff claims that a vaccination caused subsequent seizures, and the defendant claims that the seizures were caused not by the vaccination, but by a preexisting traumatic injury to the plaintiff, the causal set including the vaccination and the causal set including the traumatic injury are such alternative causes. If sufficient evidence to support each of these causal sets is introduced, the factfinder will have to determine which one is better supported by the evidence. On the other hand, if the evidence revealed that a traumatic injury and a vaccination can interact and cause seizures, then the vaccination and the trauma may each be a factual cause (both elements of the [*same*] causal set) of the plaintiff's seizures.[233]

Thus, if there are competing causal-sets, the jury must determine which one was the cause-in-fact based on the evidence.[234] If, however, there is evidence showing that the competing causal-sets combined to cause the plaintiff's harm, then the competing causal-sets merge into a single causal-set and each necessary element of each set is a cause-in-fact of the harm.[235] The same is true under Wright's articulation of the NESS standard.[236] This result requires no departure from basic rules.

However, true overdetermined-causation cases, which the *Restatement Third* refers to as "multiple sufficient cause" cases, require a more subtle analysis. The *Restatement Third* approach to multiple sufficient cause case is set out in section 27: "If multiple acts occur, each of which under § 26 alone would have been a factual cause of the physical harm at the same time in the absence of the other act(s), each act is regarded as a factual cause of the harm."[237] Under this approach, each act that was sufficient to cause the harm is examined on its own terms and without reference to the other acts that were operating simultaneously.[238] Each act is a cause-in-fact, even though under a traditional but-for analysis (or even under section 26), they would not be considered

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231. *See supra* Part II.B.1.

232. *See* Wright, *supra* note 19, at 1788-90; RESTATEMENT (THIRD) OF TORTS: PHYSICAL AND EMOTIONAL HARM § 26 reporters' note cmts. c, d (2010).

233. RESTATEMENT (THIRD) OF TORTS: PHYSICAL AND EMOTIONAL HARM § 26 cmt. c (2010).

234. If, based on the evidence, each of the competing sets caused–or was sufficient to cause–the plaintiff's harm, then it is a true overdetermined-causation case dealing with "multiple sufficient causes," which are addressed in section 27 of the Restatement (Third). *See* RESTATEMENT (THIRD) OF TORTS: PHYSICAL AND EMOTIONAL HARM § 27.

235. *Id.* § 26 cmt. c.

236. Wright, *supra* note 19, at 1790.

237. RESTATEMENT (THIRD) OF TORTS: PHYSICAL AND EMOTIONAL HARM § 27 (2010).

238. *Id*. § 27 cmt. a.

causes-in-fact, as the harm would have occurred anyway.[239] The approach is the same where two or more causal-sets, each of which was sufficient to cause the plaintiff's harm, were operating simultaneously.[240] In such a case, one must examine each causal set independent of the other causal set(s) operating at the same time.[241]

Perhaps the most problematic scenario is where one causal-set is, by itself, insufficient to cause the plaintiff's harm, but when combined with other simultaneously occurring causal-sets, overdetermines the harm (i.e., is more than sufficient to cause the harm).[242] "The fact that an actor's conduct requires other conduct to be sufficient to cause another's harm does not obviate the applicability of" section 27.[243] This, in effect, results in the partial merger of the simultaneously operating causal-sets, and if the first "actor's conduct is necessary to at least one causal set," it is a cause-in-fact of the plaintiff's harm.[244] This is the case regardless of whether there is a third, independently operating causal set that would also be sufficient to cause the plaintiff's harm.[245]

3. Necessity as the Central Principle of Modern Cause-in-Fact Theory

Looking at the cause-in-fact provisions of the *Restatement Third* as a whole, at least three things are abundantly clear. First, necessity is the central and guiding principle of modern cause-in-fact theory. Second, the level of necessity required to satisfy the *Restatement Third*'s cause-in-fact rubric need not reach traditional but-for levels of necessity. Third, while the common sense approach of the but-for test remains central to cause-in-fact theory, its strictures must yield in situations where strict application would yield results contrary to common sense, such as in multiple sufficient cause cases. It is this unerring focus on necessity in modern cause-in-fact theory that can unify disparate treatment doctrine.

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239. *Id.* §§ 26 cmt. b, and 27 cmt. a. This approach resolves each of the typical overdetermined-cause scenarios. First, in the "two fires" scenario, each fire is a cause-in-fact of the plaintiff's harm as each fire is considered independent of the other. *See supra* notes 186-87 and accompanying text. Second, with the "two noisy motorcycles" situation, as each cyclist, viewed independently, was a cause-in-fact of the plaintiff's harm. *See supra* notes 184-85 and accompanying text.

240. *See supra* notes 184-87 and accompanying test.

241. *Id.*; *see also* RESTATEMENT (THIRD) OF TORTS: PHYSICAL AND EMOTIONAL HARM § 26 cmt. f.

242. *Id.* § 27 cmt. f, reporter's note cmt. f.

243. *Id.* § 27 cmt. f.

244. *Id.*

245. *Id.* The *Restatement (Third) of Torts* provides the following example to illustrate this point: "Able, Baker, and Charlie, acting independently but simultaneously, each negligently lean on Paul's car, which is parked at a scenic overlook at the edge of a mountain. Their combined force results in the car rolling over the edge of a diminutive curbstone and plummeting down the mountain to its destruction. The force exerted by each of Able, Baker, and Charlie would have been insufficient to propel Paul's car past the curbstone, but the combined force of any two of them is sufficient. Able, Baker, and Charlie are *each* a factual cause of the destruction of Paul's car." *Id.* § 27 cmt. f, illus. 3 (emphasis added).

III. UNIFYING CAUSE-IN-FACT: NECESSITY AS A UNIFYING PRINCIPLE FOR DISPARATE TREATMENT DOCTRINE

The necessity-based, causal-set conception of cause-in-fact detailed in the *Restatement Third*, as well as in the works of Professor Wright and others, seems almost tailor-made to unify disparate treatment doctrine.[246] If I were in a position to tear down and then reconstruct disparate treatment doctrine from the ground up, this conception of cause-in-fact would be an excellent place to start;[247] however, unless the members of the Supreme Court are reading this Article,[248] neither I nor you, readers,[249] are in a position to do so. But, is it possible—with the current morass that is the of disparate treatment doctrine—to use causal necessity to unify disparate treatment and build a better route through the swamp? I think it is.

A. (Re)Examining the Classification of Cause-In-Fact in Disparate Treatment Doctrine

To evaluate the viability of unifying disparate treatment doctrine via the *Restatement Third*'s necessity-based, causal-set conception of cause-in-fact, we must start by reexamining the nature of the cause-in-fact mandated by the various employment discrimination statutes, as well as the type of cause-in-fact each proof scheme is designed to illuminate.

1. Statutory Cause-In-Fact Mandates: the "Because of" Statutes

Consideration of the nature of the cause-in-fact standard mandated by each of the federal antidiscrimination statutes must, of course, start with the plain language of the statutes. Federal employment statutes typically use the same language in their respective antidiscrimination and/or antiretaliation provisions, namely that an employer is prohibited from discriminating or retaliating against an employee "because of" the employee's protected trait or "because" the employer engaged in protected conduct.[250] Based on *Gross*, it is likely that the causal terms "because of," "because," "on the basis of," and the like in the various disparate treatment statutes mandate what the Supreme Court broadly called but-for causation.[251]

The *Gross* Court did not elaborate on what, exactly, it meant by but-for causation.[252] However, it cited the fifth edition of Prosser's treatise on tort law

246. *See, e.g.*, Wright, *supra* note 19, at 1788-91; Katz, *Gross Disunity*, *supra* note 10, at 860-62.

247. I will discuss the normative desirability of the causal necessity in Part III.B.

248. I can always hope.

249. Perhaps my use of the plural "readers" is overly optimistic, although, again, I can always hope.

250. *See supra* notes 7, 100-01, 110, 146 (citing statutes).

251. *See supra* Part I.B.4 (discussing the *Gross* opinion).

252. Gross v. FBL Fin. Servs., Inc., 557 U.S. 167, 180 (2009). The unelaborated nature of the Court's holding is, as is discussed herein, an aid in accomplishing a unification of disparate

for support.[253] It seems apparent, then, that the Court intended to define but-for consistent with the conception of that term in tort law. Modern cause-in-fact theory in tort law, of course, uses but-for in a broad sense given its necessity-based, causal set formulation.[254] Given the Court's holding in *Gross*, its intent to incorporate the common law but-for standard from tort law, and the consensus by 2009 that cause-in-fact in tort law meant the necessity-based, causal-set conception set forth in the *Restatement Third*, it is logical to conclude that the Court either intended— or at least would not object to—the incorporation of this standard to describe cause-in-fact in disparate treatment doctrine.

Powerful support for this conclusion is found in the dissent in *Price Waterhouse*.[255] In this dissent, Justice Kennedy engaged in a nuanced discussion of cause-in-fact instead of simply an analysis using the term but-for causation. He explained what the dissenters meant by but-for causation as follows:

> Under the accepted approach to causation that I have discussed, sex is *a* cause for the employment decision whenever, either by itself or in combination with other factors, it made a difference to the decision. Discrimination need not be the *sole* cause in order for liability to arise, *but merely a necessary element of the set of factors that caused the decision, i.e.*, a but-for cause.[256]

Remarkably, Justice Kennedy's explanation of but-for causation in the disparate treatment context is the *exact same* necessity-based, causal-set model of cause-in-fact advocated by Professor Wright and incorporated into the *Restatement Third*.[257] Justice Kennedy even uses the exact same phrase—"necessary element" of the set—as the NESS standard and the *Restatement Third*.[258]

A causal-set conception of cause-in-fact runs through the plurality and Justice O'Connor's concurrence in *Price Waterhouse* as well. For example, in his plurality opinion, Justice Brennan refers to a situation in which "an employer considers both gender and legitimate factors at the time of making a decision" and concludes that such a "decision was 'because of' sex and the

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treatment doctrine, as it enables one to draw on external standards and prior statements from the Court. *See id.*

253. *Id.* at 176-77 (citing KEETON ET AL., *supra* note 143, at 265).

254. *See supra* Part II.B.1, II.B.3.

255. Justice Kennedy wrote the dissenting opinion in *Price Waterhouse* and was joined by Chief Justice Rehnquist and Justice Scalia. *See* Price Waterhouse v. Hopkins, 490 U.S. 228, 279 (1989) (Kennedy, J., dissenting). Justices Kennedy and Scalia comprised two-fifths of the majority in *Gross*. Despite the failure of the majority opinion in *Gross* to discuss Justice Kennedy's dissent in *Price Waterhouse*, there is no indication that Justice Thomas, Justice Alito, or Chief Justice Roberts intended to repudiate the views of Justices Kennedy and Scalia in *Price Waterhouse*. On the contrary, the majority opinion in *Gross* takes virtually the exact same position as did the dissenters in *Price Waterhouse*, albeit without the in-depth discussion of cause-in-fact that Justice Kennedy provided in his *Price Waterhouse* dissent. *See Gross*, 557 U.S. at 175-79.

256. *Price Waterhouse*, 490 U.S. at 284 (Kennedy, J., dissenting) (emphasis added).

257. *See* Wright, *supra* note 19, at 1789-90; RESTATEMENT THIRD OF TORTS: PHYSICAL AND EMOTIONAL HARM §§ 26(c), 27(f) (2010).

258. *Compare Price Waterhouse*, 490 U.S. at 284 (Kennedy, J., plurality), *with supra* Part II.B.1-2.

other, legitimate considerations."[259] Later, Justice Brennan states that the test the plurality proposes "seeks to determine the content of the *entire set of reasons* for a decision;"[260] "if we asked the employer at the moment of the decision what its reasons were and if we received a truthful response, one of those reasons would be that the applicant or employee was a woman."[261] In these statements, Justice Brennan is explicitly focused on a causal-set in which each necessary element is a cause-in-fact of the employment decision.

Justice O'Connor indicated a similar conception of cause-in-fact in explaining that

> in the context of the professional world, where decisions are often made by collegial bodies on the basis of largely subjective criteria, requiring the plaintiff to prove that *any* one factor was the definitive cause of the decisionmakers' action may be tantamount to declaring Title VII inapplicable to such decisions.[262]

Justice O'Connor, like her colleagues, was looking toward a cause-in-fact standard focused on identifying the necessary elements of the causal-set that led to the employment decision.

Given the various statements in *Price Waterhouse* from the three dissenters, the four members of the plurality, and Justice O'Connor that explicitly discussed cause-in-fact in the context of necessary elements of the causal-set that led to the employment decision, it appears that the Court adopted this standard (at least in dicta).[263]

Especially when added to *Gross*, the most logical conclusion is that the Court intended the necessity-based, causal-set model of cause-in-fact advocated by Professor Wright and incorporated into the *Restatement Third*, and which it seemed to adopted in *Price Waterhouse*, to apply in the disparate treatment context, at least for statutes that use the same "because of" causal language as Title VII and the ADEA.[264]

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259. *Price Waterhouse*, 490 U.S. at 241 (Brennan, J., plurality). Justice Brennan goes on to express concern about the traditional but-for test, especially in the context of overdetermined-cause cases saying, "Events that are causally overdetermined . . . may not have any 'cause' at all [under the traditional but-for test]. This cannot be so." *Id.*

260. *Id*. at 250 n.13 (emphasis added).

261. *Id*. at 250.

262. *Id*. at 273 (O'Connor, J., concurring).

263. *Id.* at 241, 250, 273, 284. The primary dispute between the various factions in *Price Waterhouse* was focused on the shifting of the burden of persuasion to the defendant. *See id.* at 286 (Kennedy, J., dissenting) ("[T]he import of today's decision is not that Title VII liability can arise without but-for causation, but that in certain cases it is not the plaintiff who must prove the presence of causation, but the defendant who must prove its absence.").

264. Wright, *supra* note 19, at 1788-91; RESTATEMENT (THIRD) OF TORTS: PHYSICAL AND EMOTIONAL HARM §§ 26-27 (2010); *Price Waterhouse*, 490 U.S. at 284 (Kennedy, J., dissenting).

2. Statutory Cause-In-Fact Mandates: the "Motivating Factor" Statutes

In addition to the various "because of" statutes, both Title VII[265] and USERRA[266] describe the cause-in-fact that they require through the use of two phrases: "motivating factor" and "same decision." The way these statutes function varies slightly.

a. Motivating Factor in Title VII After the 1991 CRA

The "motivating factor" provision added to Title VII by the 1991 CRA requires the plaintiff to prove that her protected trait was a motivating factor.[267] The burden then shifts to the defendant to prove, by a preponderance of the evidence, that it would have "taken the same action in the absence of the impermissible motivating factor."[268] If the defendant carries its burden, the court may only award the plaintiff injunctive and declaratory relief, plus limited attorneys' fees and costs.[269]

There are two ways to look at the cause-in-fact standard under the 1991 CRA. The first is a "two-tier" approach, which examines cause-in-fact under the plaintiff's burden and the defendant's burden as two separate standards.[270] The second is a unitary approach, which examines the ultimate issue the factfinder must determine. Although I think the second approach–the unitary approach—is more compelling based on the nature of the amendments made to Title VII by the 1991 CRA,[271] the result is likely the same under either approach.

Under the unitary approach, the overall cause-in-fact standard at work in the 1991 CRA amendment to Title VII is necessity and, more specifically, whether the employee's protected trait was a necessary element of the causal-set that resulted in the employer's decision.[272] Using the two-tier approach, there is little doubt that the cause-in-fact standard implicated by the defendant's burden of persuasion is, likewise, necessity. The defendant must prove that its consideration of the plaintiff's protected trait was not a necessary element of the causal-set that led to its decision to take an adverse action against the defendant and, as a result, it would have taken the same action regardless.[273]

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265. 42 U.S.C. §§ 2000e-2(m), 2000e-5(g)(2)(b) (2006) (the former requiring a "motivating factor," and the latter limiting liability if a party demonstrates they "would have taken the same action"); *see supra* Part I.B.3.

266. 38 U.S.C. § 4311(c)(1) (2006) (requiring a "motivating factor" and outlining a defense to liability where "the employer can prove that the action would have been taken in the absence of such membership" in the Uniformed Services); *see supra* Part I.B.2.

267. 42 U.S.C. § 2000e-2(m).

268. *Id.* § 2000e-5(g)(2)(B).

269. *Id*.

270. *See* Katz, *Fundamental Incoherence*, *supra* note 5, at 527-36 (describing this two-tier approach in detail).

271. *See supra* Part I.B.2.e; *supra* notes 98-100 and accompanying text.

272. *See supra* Part I.B.2.e; *supra* notes 98-100 and accompanying text.

273. *See* Katz, *Fundamental Incoherence*, *supra* note 5, at 502 ("[T]he 'same action' test from the Civil Rights Act of 1991 is clearly a test of necessity (as is the 'same decision' test from *Price*

The cause-in-fact standard implicated by the plaintiff's burden–to show that the protected trait was a motivating factor—is a bit closer of a question. In *Fundamental Incoherence*, Dean Katz sought to categorize each of the vaguely causal standards used in disparate treatment doctrine, from both statutory and case law.[274] The categories Dean Katz utilized, which were taken from logical causation theory, included sole, traditional but-for,[275] minimal causation (unnecessary), and no causation.[276] Dean Katz plotted these on a continuum from most restrictive (sole) to least restrictive (no causation).[277] On this continuum, there was no causal standard between traditional but-for and minimal causation.[278] Reasoning that "motivating factor" meant less than traditional but-for cause, while at the same time having some causal influence, Dean Katz categorized "motivating factor" in the 1991 CRA as reflecting only "minimal causation."[279] Given his rubric, this was the only available option.

For two primary reasons, Dean Katz's conclusion that "motivating factor" reflects a cause-in-fact standard of "minimal causation" is incorrect: (1) it ignores the meaning of "motivating factor" (both the plain meaning and the meaning articulated by both the Court and Congress); and (2) it forces the phrase into an artificially narrow rubric to the exclusion of a more logical characterization.

First, it ignores the plain meaning of the phrase, as explained by the Supreme Court and Congress.[280] When it first articulated the "motivating factor" standard in *Mt. Healthy*, a unanimous Court indicated its understanding that the "motivating factor" standard meant that "the protected conduct played a 'substantial part' in the actual decision not to renew" the plaintiff's contract.[281] The Court had a similar understanding about the meaning of the term "motivating factor" in *Price Waterhouse*.[282] The plurality articulated its understanding of "motivating factor" as follows:

> In saying that gender played a motivating part in an employment decision, we mean that, if we asked the employer at the moment of the decision what its reasons were and if we received a truthful response, one of those reasons

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Waterhouse.")).

274. *See id.* at 493.

275. Traditional but-for cause is discussed, *supra*, in Part II.A.1. In *Fundamental Incoherence*, Dean Katz labels traditional but-for as "necessity" or "necessity only." Katz, *Fundamental Incoherence*, *supra* note 5, at 498 n.27, 499 tbl. 1. As this Article uses "necessity" in a slightly different way, I refer to Dean Katz's "necessity" standard as traditional but-for causation.

276. *Id*. at 495-500.

277. *Id*. at 499 tbl. 1.

278. *Id*. at 499. Although Dean Katz cited the *Restatement Second* and discussed, in passing, the substantial factor standard and the *Restatement Second*'s approach to overdetermined-causation cases, he did not consider the application of the *Restatement Third*'s cause-in-fact standard or the NESS standard. *See id*. at 514 n.98, 523-25.

279. *Id*. at 503-07.

280. *See supra* Part I.B.3.

281. Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle, 429 U.S. 274, 285, 287 (1977).

282. *See* Price Waterhouse v. Hopkins, 490 U.S. 228, 250 (1989)*; see also supra* Part I.B.2.b (noting semantic similarities between motivating factor and substantial factor).

would be that the applicant or employee was a woman.[283]

Justice White stated a similar understanding,[284] as did Justice O'Connor.[285] Congress evidenced a virtually identical understanding of the phrase "motivating factor" in passing the 1991 CRA amendment to § 703, saying that the employee's protected trait must have "*actually contributed* to the employer's decision with respect to the [employee]"[286]

Second, Dean Katz's logical causation rubric is artificially narrow. The proposition that there is no cause-in-fact standard between traditional but-for and what he terms unnecessary but still causative "minimal causation" is belied by the *Restatement Third* and the NESS standard. The necessity-based, causal-set model advocated by Professor Wright and incorporated in the *Restatement Third* was conceived because the traditional but-for test was too restrictive, especially in multiple causation cases like disparate treatment.[287] This type of necessity is less restrictive than traditional but-for, and if it had been included in Dean Katz's rubric, would have provided a far more logical designation for "motivating factor" than "minimal causation."

Given the consistent understanding of the phrase "motivating factor" as requiring that the employee's protected trait have *actually motivated* the employer's decision, at least in part, the most rational characterization of "motivating factor" from a cause-in-fact standpoint is that it is a reflection of necessity. To have actually motivated the employer's decision, the protected trait must have been a necessary element of the causal-set that resulted in the employer's decision.

b. Motivating Factor in USERRA

In contrast to the 1991 CRA's amendment to Title VII, the structure of USERRA follows the *Mt. Healthy*/*Price Waterhouse* model,[288] with the burden first on the plaintiff to establish that her protected trait was a motivating factor in the employer's decision.[289] The burden then shifts to the employer to prove that it would have taken the same action even without consideration of the

283. *Price Waterhouse*, 490 U.S. at 250 (Brennan, J., plurality).

284. *Id*. at 259 (White, J., concurring) ("[A]s the Court now holds, Hopkins was not required to prove that the illegitimate factor was the only, principal, or true reason for petitioner's action. Rather, as Justice O'Connor states, her burden was to show that the unlawful motive was a *substantial* factor in the adverse employment action.").

285. *Id*. at 276-78. The dissent noted this agreement. *Id.* at 280 (Kennedy, J., dissenting) (stating that under the controlling test, "[t]he shift in the burden of persuasion occurs only where a plaintiff proves by direct evidence that an unlawful motive was a substantial factor *actually relied upon* in making the decision." (emphasis added)).

286. H.R. REP. NO. 102–40, pt. 2, at 18 (1991), *reprinted in* 1991 U.S.C.C.A.N. 694, 710-11 (emphasis added); *see also supra* note 126; 137 CONG. REC. 28,636 (Oct. 25, 1991) (statement of Sen. Edward Kennedy); H.R. REP. NO. 102–40, pt. 1, at 47-48 (1991), *reprinted in* 1991 U.S.C.C.A.N. 549, 585-86; H.R. 1, 102d Cong. § 103(a)(1) (1st Sess. 1991).

287. *See supra* note 180-81 and accompanying text.

288. *See supra* Part I.B.2.c.

289. 38 U.S.C. § 4311(c)(1) (2006).

employee's protected trait.[290] If the employer carries this burden, the plaintiff's claim fails.[291] In enacting this section of USERRA, Congress explicitly indicated the cause-in-fact standard it intended § 4311 to embody: *but-for* causation.[292] However, as with *Gross*, it is reasonable to conclude from the absence of greater detail on how but-for should be interpreted, that Congress would not object to interpretation of this term consistent with the modern understanding of but-for and cause-in-fact articulated in the *Restatement Third*.

c. Contributing Factor in Whistleblower Statutes

Additionally, a number of so-called whistleblower protection statutes, prohibit discrimination or retaliation against employees who engage in protected conduct, use "contributing factor" coupled with shifting the burden of persuasion to the defendant to show that consideration of the protected conduct was not a necessary element of the adverse employment decision. The language of the Dodd-Frank Wall Street Reform and Consumer Protection Act is typical:

> The Secretary of Labor may determine that a violation of subsection (a) has occurred only if the complainant demonstrates that any behavior described in paragraphs (1) through (4) of subsection (a) was a *contributing factor* in the unfavorable personnel action alleged in the complaint. Relief may *not* be ordered under subparagraph (A) if the employer demonstrates by clear and convincing evidence that the employer *would have taken the same unfavorable personnel action in the absence of that behavior*.[293]

As these statutes are structured virtually identically—and require that the protected conduct actually play a role in the decision—they mean the same thing as USERRA and the 1991 CRA from a cause-in-fact standpoint: namely, that the defendant's utilization of the plaintiff's protected trait was a necessary element of the causal-set that resulted in the defendant's decision.[294]

B. The Normative Desirability of Causal Necessity As a Unifying

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290. *Id*.

291. *Id*. § 4311(c)(2) (stating that the plaintiff will succeed in a claim "unless" the employer meets its burden).

292. H.R. REP. NO. 103-65, pt. 1, at 24 (1993), *reprinted in* 1994 U.S.C.C.A.N. 2449, 2457.

293. Dodd–Frank Wall Street Reform And Consumer Protection Act, 12 U.S.C. § 5567(c)(3)(C) (Supp. IV 2010) (emphasis added); s*ee also* FDA Food Safety Modernization Act, 21 USCA § 399d(b)(2)(C)(iii) (Supp. IV 2010); Consumer Product Safety Improvement Act of 2008, 15 U.S.C. § 2087(b)(2)(B)(iii)-(iv) (Supp. II 2008); Public Transportation Employee Protections, 6 U.S.C. § 1142(c)(2)(B)(iii)-(iv) (Supp. I 2007); Pipeline Safety Improvement Act of 2002, 49 U.S.C. § 60129(b)(2)(B)(iii)-(iv) (2006); Protection of Employees Providing Air Safety Information, 49 U.S.C. § 42121(b)(2)(B)(iii)-(iv) (2006); Energy Policy Act of 1992, 42 U.S.C. § 5851(d)(3)(C) (2006); Whistleblower Protection Act of 1989, 5 U.S.C. § 1221(e)(1) (2006).

294. These statutes differ from USERRA and the 1991 CRA in the quantum of evidence required for the defendant to carry its burden. These whistleblower statutes require the employer carry its burden by "clear and convincing" evidence. *See* 12 U.S.C. § 5567(c)(3)(C) (Supp. IV 2010). USERRA and the 1991 CRA require only that the employer carry its burden by a preponderance of the evidence. *See* 38 U.S.C. § 4311(c)(1); 42 U.S.C. §§ 2000e-2(m), 2000e-5(g)(2)(b).

Principle in Disparate Treatment Doctrine

The current fragmented morass of disparate treatment doctrine, with its attendant confusion and costs, is normatively problematic.[295] As discussed above, it is not clear when parties can or should use the various proof schemes and the critical cause-in-fact inquiry has thus been subject to vague and inconsistent treatment in the courts.[296] In a general sense, the unification of disparate treatment doctrine is normatively desirable, in that it would provide greater simplicity and consistency for plaintiffs, defendants and the courts.[297]

However, is using the *Restatement Third*'s necessity-based, causal-set conception of cause-in-fact to affect doctrinal unification normatively desirable? It is. Such a unification would greatly simplify disparate treatment cases by replacing the various proof schemes currently in use with a single, universal proof scheme.[298] Additionally, applying the *Restatement Third*'s cause-in-fact standard would ameliorate some of the normatively problematic effects of the traditional but-for test which, thanks to *Gross*, have been brought to the fore.

Under the traditional but-for test, the defendant receives a windfall in overdetermined-causation cases.[299] For example, in a termination case, assume that the defendant employer decided to terminate the plaintiff based both on her habitual tardiness and her disability.[300] Each was independently sufficient to result in plaintiff's termination at the same time. Under the traditional but-for test, the defendant's consideration of plaintiff's disability was not a but-for cause of plaintiff's termination because she would have been terminated anyway based on her habitual tardiness.[301] Due to the lack of but-for causation,

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295. Katz, *Unifying Disparate Treatment (Really)*, *supra* note 1, at 643; s*ee also* Katz, *Gross Disunity*, *supra* note 9, at 858-60.

296. *See supra* Part I.

297. *See* Katz, *Gross Disunity*, *supra* note 9, at 858 ("[In] most instances, uniformity is desirable, both as a matter of efficient legal administration and as an assumption about Congressional intent."); William R. Corbett, *Babbling About Employment Discrimination Law: Does the Master Builder Understand the Blueprint for the Great Tower?*, 12 U. PA. J. BUS. L. 683, 690 (2010) ("A high degree of symmetry among the various laws and covered characteristics may also be desirable, as this could improve simplicity and certainty.").

298. *See infra* Part IV.

299. *See* Katz, *Fundamental Incoherence*, *supra* note 5, at 512-27 (discussing broadly the flaws in necessity and minimal causation). At the other end of the spectrum, application of Dean Katz's "minimal causation" standard results in a windfall to plaintiffs in overdetermined-causation cases. *Id.* at 512. As "minimal causation" need not satisfy any level of necessity, a defendant could be liable based on the very minimal contribution of the plaintiff's protected trait. *Id.* at 512 n.92. The *Restatement (Third)* approach addresses this problem by requiring that a cause-in-fact be a necessary element in the causal-set that led to the harm. Absent this level of necessity, cause-in-fact status cannot follow. *See* RESTATEMENT (THIRD) OF TORTS: PHYSICAL AND EMOTIONAL HARM §§ 26-27 (2010); *see also supra* Part II.B.

300. *See* Katz, *Fundamental Incoherence*, *supra* note 5, at 512.

301. *See id*. The plaintiff's habitual tardiness would also not be a but-for cause because she would have been fired because of her age. Thus, there would, in fact, be *no* but-for cause in this overdetermined-causation case. The plurality in *Price Waterhouse* had a problem with this outcome saying, "Events that are causally overdetermined, in other words, may not have any 'cause' at all.

plaintiff's claim for disability discrimination would fail and defendant would escape liability even though it explicitly considered the plaintiff's disability in making its decision.[302]

Applying the *Restatement Third*/NESS cause-in-fact standard to this scenario would eliminate the windfall to the defendant, in at least one of two ways. First, this standard focuses on the causal-set that existed when the defendant made its decision, which included both the plaintiff's disability and her habitual tardiness.[303] As each was a necessary element of the decision, each is a cause-in-fact of the harm. Second, if the plaintiff's disability and her habitual tardiness are viewed as separate causal-sets, the *Restatement Third* standard dictates that we examine each set separately and determine whether each set, independently, would have resulted in the plaintiff's harm.[304] If the each set, independently would have resulted in the plaintiff's harm and plaintiff's disability was a necessary element of one of those sets, then it is a cause-in-fact of the plaintiff's harm.[305] In short, by applying a broader view of necessity in cause-in-fact, the *Restatement Third* approach eliminates the windfall to the defendant in overdetermined-causation cases.[306]

This approach is consistent with the plain language of each of the disparate treatment statutes. In the example above, the employer's decision was, in part, "because of" the plaintiff's disability and was certainly a "motivating factor" in the employer's decision.[307] Under the relevant statute (here, the ADA), the defendant would be liable to the plaintiff—at least to some extent.[308] This approach is also consistent with the remedial purposes of the disparate treatment statutes and the corrective-justice vision of the law, within which a wrongdoer who causes (in a common or moral sense) harm to another is required to make amends.[309] Additionally, this approach is less burdensome and potentially less

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This cannot be so." Price Waterhouse v. Hopkins, 490 U.S. 228, 241 (1989) (Brennan, J., plurality).

302. *See* Katz, *Fundamental Incoherence*, *supra* note 5, at 512-27.

303. *See* RESTATEMENT (THIRD) OF TORTS: PHYSICAL AND EMOTIONAL HARM § 26 cmt. c (2010).

304. *See id.* § 27.

305. *Id.*

306. *See id*. § 27 cmt. c, illus. 1, cmt. b. The problem of a windfall to plaintiffs in overdetermined-causation cases—and how to ameliorate it—is discussed in Part IV.B, *supra*.

307. *See supra* Part III.A.2.

308. In order to prevent the application of the *Restatement Third* cause-in-fact standard from turning into a windfall for the plaintiff in overdetermined-causation cases, courts should have the discretion to limit the remedies available to the plaintiff in such cases. This issue is discussed in more detail in Part IV.B, *supra*. This was the approach taken by many of the circuits prior to *Price Waterhouse*, *see* Bibbs v. Block, 778 F.2d 1318, 1323-24 (8th Cir. 1985) (citing cases), and is the approach Congress took in the 1991 CRA. *See* 42 U.S.C. § 2000e-5(g)(2)(B)(2006). Additionally, although I am hesitant to suggest it, perhaps this is an area of disparate treatment doctrine where proximate cause theory could play a legitimate and helpful role. Given its focus on policy considerations, applying some type of proximate cause analysis at the damages stage *only* in order to permit a court to assess the relative culpability of the plaintiff and the defendant given the nature of the causal-set at issue, may provide a mechanism to take a more holistic approach to remedies.

309. *See* RESTATEMENT (THIRD) OF TORTS: PHYSICAL AND EMOTIONAL HARM § 26 reporters' note cmt. b (2010) (reasoning that its approach to cause-in-fact is consistent with the corrective

confusing than a two-tier process, which employs different cause-in-fact standards at each step.[310] Further, unifying disparate treatment doctrine around a common cause-in-fact standard would—finally—allow Congress and the Court to develop and evolve disparate treatment law with the critical issue of cause-in-fact at its core, instead of being continually distracted and side-tracked by creating and tinkering with proof schemes.

The cause-in-fact inquiry in all disparate treatment cases should focus on whether the employer's consideration of the employee's protected trait was a necessary element in the set of factors that led to the employer's decision.[311] Using this standard is normatively desirable and consistent with the language of each of the disparate treatment statutes. It is also consistent with the Supreme Court's disparate treatment jurisprudence. The Court even foreshowed (if not invited) this type of cause-in-fact standard in *Price Waterhouse*.[312] Thus, in every disparate treatment case the fundamental question should be: "Was the employer's consideration of the employee's protected trait a necessary element in the set of factors that led to the employer's adverse decision?"[313]

IV. A BETTER ROUTE THROUGH THE SWAMP: UNIFYING THE PROOF SCHEMES

Stating that the *Restatement Third*'s necessary element of a sufficient causal set standard should apply as a normative matter is no more helpful to litigants or courts than Congress prohibiting discrimination "because of" a protected trait. As the Supreme Court has long recognized, when a plaintiff is trying to prove, via circumstantial evidence, what was going on in the decisionmaker's mind at the time of he or she made the adverse decision, a proof scheme—a route through the factual and legal swamp—is necessary to guide the plaintiff and provide a structure to the case.

From a normative standpoint, it is critical to have a single proof scheme for use in all disparate treatment cases to ensure simplicity, certainty, and predictability for all involved. This single proof scheme should be free of any vaguely causal words or phrases, so as to avoid potential confusion. It must also

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justice vision of tort law and citing JULES L. COLEMAN, RISKS AND WRONGS 374–382 (1992); Michael S. Moore, *Causation and Responsibility*, SOC. PHIL. & POL'Y, Summer 1999, at 1, 4; Richard W. Wright, *Actual Causation vs. Probabilistic Linkage: The Bane of Economic Analysis*, 14 J. LEGAL STUD. 435 (1985)).

310. *See* Katz, *Fundamental Incoherence*, *supra* note 5, at 528-29, 537-40.

311. *See* RESTATEMENT (THIRD) OF TORTS: PHYSICAL AND EMOTIONAL HARM §§ 26-27 (2010); *see also supra* Part II.

312. *See supra* Part III.A.1.

313. This would be the critical question at both summary judgment and at trial. At the summary judgment stage, the court would consider whether or not there was sufficient evidence (i.e., a genuine dispute of material fact) to permit a reasonable jury to conclude that the employer's consideration of the employee's protected trait was a necessary element in the set of factors that led to the employer's adverse decision. *See* FED. R. CIV. P. 56. If the answer to that question is "yes," the case should go to trial. The same basic standard would apply in ruling on a motion for judgment as a matter of law during a trial. *See* FED. R. CIV. P. 50. Similarly, the jury, after being properly instructed, would have to decide whether the employer's consideration of the employee's protected trait was a necessary element in the set of factors that led to the employer's adverse decision.

focus cases effectively on the unified cause-in-fact standard.

Additionally, in order to aid early voluntary adoption, this single proof scheme should be familiar to counsel and the courts, and consistent with existing law. For this reason, at least in the near term, it makes far more sense to modify an existing proof scheme than to create a completely new proof scheme. The question then becomes: Which existing proof scheme is the best candidate for modification and improvement or renovation?

Only one of the existing proof schemes is truly a guide for the presentation of proof, free from vaguely causal language.[314] This same proof scheme is also exceedingly well known,[315] inherently flexible,[316] and consistent with existing law.[317] Counsel and the courts are extremely familiar with it.[318] This proof scheme is, of course, the *McDonnell Douglas* proof scheme.[319]

However, a modified version of *McDonnell Douglas* proposed below does not, and cannot, address the problem of a windfall to a plaintiff that would result from the application of the *Restatement Third* cause-in-fact standard.[320] Under the traditional but-for test, the defendant receives a windfall in overdetermined-causation cases.[321] For example, in a termination case, assume that the defendant employer decided to terminate the plaintiff based both on her habitual tardiness and her disability.[322] Each was independently sufficient to

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314. Only once, in a single footnote, has the Supreme Court imbued *McDonnell Douglas* with any causal meaning. There, in *McDonald v. Santa Fe Trail Transportation Co.*, 427 U.S. 273, 282 n.10 (1976), the Court stated that *McDonnell Douglas* does not require sole causation and, in fact, "no more is required to be shown than that race was a 'but for' cause." The necessary element of a sufficient causal set standard advocated herein is somewhat less than traditional but-for cause and easily satisfies this caveat from *McDonald*.

315. *See supra* note 39 (referencing citation statistics for *McDonnell Douglas*).

316. *See McDonnell Douglas*, 411 U.S. at 802 n.13 ("The facts necessarily will vary in Title VII cases, and the specification . . . of the prima facie [case set forth there] is not necessarily applicable in every respect to differing factual situations."); U.S. Postal Serv. Bd. of Governors v. Aikens, 460 U.S. 711, 715 (1983) (the *McDonnell Douglas* framework was "never intended to be rigid, mechanized, or ritualistic"); Reeves v. Sanderson Plumbing Prods. Inc., 530 U.S. 133, 141-42 (2000) (recognizing and tacitly approving "variant[s]" of the *McDonnell Douglas* proof scheme in use in the courts of appeal).

317. *See supra* note 44 (discussing continued use, after *Gross*, of *McDonnell Douglas* to prove but-for cause in ADEA claims).

318. It appears that even plaintiffs' counsel prefer the *McDonnell Douglas* proof scheme to *Price Waterhouse* or the 1991 CRA. As discussed *supra*, *McDonnell Douglas* has been cited, on average, more than eight times as often on an annual basis than *Price Waterhouse*. *Supra* note 46. Additionally, research currently underway by Professor Sachin Pandya at the University of Connecticut School of Law has revealed that, at least in the District of Connecticut, plaintiffs pursue a mixed motive theory under either *Price Waterhouse* or the 1991 CRA in less than ten percent of disparate treatment cases. Sachin S. Pandya, Presentation at 7th Annual Labor & Employment Law Colloquium, Loyola Chicago School of Law (Sept. 14, 2012).

319. The *McDonnell Douglas* proof scheme has the added benefit of filling the gap in the *Mt. Healthy*/*Price Waterhouse*/USERRA and 1991 CRA proof schemes and providing plaintiffs with a structure to present evidence of a "motivating factor."

320. *See* Katz, *Fundamental Incoherence*, *supra* note 5, at 512-15.

321. *See id.* at 520-27.

322. *See id*.

result in plaintiff's termination at the same time. Under the traditional but-for test, the defendant's consideration of plaintiff's disability was not a but-for cause of plaintiff's termination because she would have been terminated anyway based on her habitual tardiness.[323] However, under the *Restatement Third*/NESS cause-in-fact standard, the defendant's consideration of plaintiff's disability is a cause-in-fact of plaintiff's termination and plaintiff would be entitled to recover.[324] While this result eliminates the windfall to the defendant that existed under a traditional but-for test (by allowing the defendant to escape liability despite its explicit reliance on the plaintiff's disability), it also creates a windfall for the plaintiff, by allowing her to be placed in a better position than she would have otherwise been, which in this case was being fired for habitual tardiness.

In order for the causal necessity-focused cause-in-fact standard to unify disparate treatment doctrine—and to make the revised *McDonnell Douglas* standard described above normatively desirable—there must be some mechanism to eliminate (or significantly limit) this windfall to plaintiffs.

As discussed below, a modified *McDonnell Douglas* proof scheme rooted in causal necessity coupled with an unclean hands-like affirmative defense would solve both the windfall to defendants and windfall to plaintiffs problems. Further, the lower courts can implement this model and bring causal coherence to disparate treatment doctrine without action from either the Supreme Court or Congress.

A. Coherence Via Consolidation: A Revised, Universal McDonnell Douglas *Proof Scheme*[325]

As is discussed below, the *McDonnell Douglas* proof scheme is easily modified to focus attention on the unified causal necessity-based, cause-in-fact standard. Further, given the ubiquity of the *McDonnell Douglas* proof scheme in disparate treatment law and its inherent flexibility, the lower courts can adopt modifications to it without awaiting action from the Supreme Court, which is, of course, unlikely to come.

The *McDonnell Douglas* proof scheme requires only minor modifications

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323. *See id*. The plaintiff's habitual tardiness would also not be a but-for cause because she would have been fired because of her disability. Thus, there would, in fact, be *no* but-for cause in this overdetermined-causation case. The plurality in *Price Waterhouse* had a problem with this outcome saying, "Events that are causally overdetermined, in other words, may not have any 'cause' at all. This cannot be so." Price Waterhouse v. Hopkins, 490 U.S. 228, 240-41 (1989) (Brennan, J. plurality).

324. *See infra* note 288 and accompanying text.

325. As stated in note 24, *supra*, my goal here is to propose a "better" version of the *McDonnell Douglas* proof scheme that is (1) consistent with Supreme Court precedent and (2) that lower courts can implement and use immediately, without waiting for either Congress or the Court to alter the current language or interpretation of the various disparate treatment statutes. As others have noted, *McDonnell Douglas* is flawed in many ways and nothing herein is intended to imply otherwise. While my revised version of *McDonnell Douglas* is not the "best" proof scheme, it is better and more equitable than the standard version of *McDonnell Douglas* currently used by the federal courts.

to be applicable in all disparate treatment cases and focus on the necessary element of a causal-set cause-in-fact standard. This revised *McDonnell Douglas* proof scheme is as follows:[326]

> *Step One – The Plaintiff's Prima Facie Case.* The plaintiff bears the burden of proving, by a preponderance of the evidence, the following elements: (1) the plaintiff has a protected trait; (2) the plaintiff was performing her job at a level that met the employer's reasonable expectations;[327] (3) the plaintiff suffered an adverse employment action; and (4) the adverse action occurred under circumstances giving rise to an inference of discrimination.[328] If the plaintiff carries its burden of persuasion, a mandatory, rebuttable presumption arises that the employer unlawfully discriminated against the employee because of the employee's protected trait.
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> *Step 2 – The Employer's Legitimate Non-Discriminatory Reason(s).* If the plaintiff carries her burden in Step 1, the burden of production shifts to the defendant to articulate *all* of the legitimate non-discriminatory reasons ("LNDRs") for its decision. If the defendant satisfies this burden of production, the presumption of discrimination is rebutted and the sole remaining issue is discrimination *vel non*.
>
> *Step 3 – Discrimination* Vel Non. If the defendant carries its burden of production in Step 2 and has successfully rebutted the presumption of discrimination, the plaintiff must then prove that the employer's consideration of her protected trait was a necessary element of the set of facts and circumstances that led to the defendant's decision. The plaintiff may carry this burden by either (1) showing that *at least one* of the defendant's stated LNDRs is unworthy of credence; or (2) presenting other evidence from which a reasonable jury could conclude that the employer's consideration of her protected trait was a necessary element of the set of facts and circumstances that led to the defendant's decision.

1. Analysis of Step 1

Step 1 of the renovated *McDonnell Douglas* proof scheme is essentially the same as in the traditional version.[329] As with the traditional version, the purpose of Step 1 is to adduce sufficient evidence for the presumption of discrimination to arise, while also weeding out cases that obviously involve poor performance and other common disciplinary issues. Likewise, as in the traditional version, this *prima facie* case is not intended to be an onerous standard.[330]

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326. The current version of the *McDonnell Douglas* proof scheme is described in detail in Part I.B.1. *See supra* notes 46-73 and accompanying text.

327. The element stated would be for a termination case. For a hiring or promotion case, the second element would be, "the plaintiff applied for and was qualified for the position at issue." Richard v. Bell Atl. Corp., 209 F. Supp. 2d. 23, 30 (D.D.C. 2002).

328. For example, the position remained open and the employer continued to look for applicants with the plaintiff's qualifications; or the employer replaced the plaintiff with an employee without the plaintiff's protected trait. This element coincides with what is often the last element of the prima facie case in ADEA cases. *See, e.g.*, Gross v. FBL Fin. Servs., Inc., 557 U.S. 167, 192 (2009) (Breyer, J., dissenting).

329. *See supra* Part I.B.1.

330. *See id.*

2. Analysis of Step 2

Step 2 of the renovated *McDonnell Douglas* proof scheme departs from the traditional version in a small, but significant way. Instead of requiring the defendant to articulate *one* LNDR for its decision, it requires the defendant to articulate *all* LNDRs for its decision. Whereas the traditional *McDonnell Douglas* sought to have the defendant state the "true" reason for its decision, this version asks the defendant to establish the parameters of the causal-set that the factfinder must evaluate. The defendant is, of course, in the best position to articulate the various LNDRs that motivated its decisionmaker to make the decision at issue and establish the scope of the causal-set.

3. Analysis of Step 3

As with the traditional *McDonnell Douglas*, Step 3 is where most of the action is and where the modifications to the proof scheme are most apparent, at least on the surface.[331] First, the name of Stage 3 is "Discrimination *Vel Non*" (what the issue at Step 3 actually is) rather than "Pretext" (a confusing misnomer for the third step of the traditional *McDonnell Douglas* framework).[332] The modified Step 3 specifies that, as in the traditional *McDonnell Douglas* framework, the plaintiff can establish discrimination *vel non* in either one of two ways.

First, the plaintiff can prove that *at least one* of the defendant's LNDRs is unworthy of credence (i.e., a pretext for discrimination). Evidence sufficient for a jury to conclude that one LNDR is pretextual would also be sufficient to conclude that discrimination was one necessary element of the causal-set at issue. The pretextual LNDR allows the permissible inference that the employer lied as to that factor to cover up its consideration of the employee's protected trait.[333]

Second, even without attacking any LNDR directly, the plaintiff can carry her burden in Step 3 by presenting other evidence from which a reasonable jury could conclude that the employer's consideration of her protected trait was a necessary element of the set of facts and circumstances that led to the defendant's decision. This evidence could include evidence of how the employer treated comparable employees[334] under similar circumstances, how

331. Katz, *Reclaiming* McDonnell Douglas, *supra* note 24, at 125 n.64; Melissa Hart, *Subjective Decisionmaking and Unconscious Discrimination*, 56 ALA. L. REV. 741, 753 (2005) (remarking that "the third stage of the *McDonnell-Douglas* framework is where most of the action . . . seems to be"); Sam Stonefield, *Non-Determinative Discrimination, Mixed Motives, and the Inner Boundary of Discrimination Law*, 35 BUFF. L. REV. 85, 111 & n.89 (1986) ("The [third step] is where the action is, where most disparate treatment cases are won or lost.").

332. See Katz, *Reclaiming* McDonnell Douglas, *supra* note 24, at 130 n.76 (describing the incorrect use of "pretext" to describe the entire third step when, in fact, pretext is only one method of proof available to plaintiffs at the third step of the *McDonnell Douglas* framework).

333. This is entirely consistent with *Reeves* and the overall concept behind pretext, just slightly tweaked to focus on the causal-set model for cause-in-fact.

334. The phrase "similarly situated" is often misused. *See* Ernest F. Lidge III, *The Courts' Misuse of the Similarly Situated Concept in Employment Discrimination Law*, 67 MO. L. REV. 831,

the employer has treated other employees with the same protected trait,[335] quasi-direct evidence,[336] past acts of (potential) discrimination against the plaintiff, evidence related to unconscious bias, and the like. This is similar to a "totality of the circumstances" approach.[337] Under either of these paths, the plaintiff can present evidence sufficient for a reasonable jury to find that consideration of the plaintiff's protected trait was a necessary element of the set of facts and circumstances that led the defendant to act, even if there remain LNDRs that were also necessary elements of that set of facts and circumstances.[338]

This slightly modified and renovated version of the *McDonnell Douglas* framework would provide plaintiffs pursuing disparate treatment claims under any of the "because of" statutes with a complete route through the swamp, while at the same time focusing on the necessity-based, causal-set cause-in-fact standard that brings causal coherence to disparate treatment.[339]

B. An Equitable Defense for Defendants to Guard Against a Windfall to Plaintiffs

These proposed modifications to the *McDonnell Douglas* proof scheme ameliorate the windfall-to-defendant problem identified by Dean Katz.[340] However, they cannot address the problem of a windfall-to-plaintiff.[341] In order for my modified *McDonnell Douglas* standard to be normatively desirable, there must be some mechanism to eliminate (or significantly limit) the windfall to the plaintiff that occurs in overdetermined cases, where the plaintiff is placed in a better position than she would have otherwise occupied.

In the tort context, Professor Wright argues for a comparative fault allocation system for overdetermined-causation cases.[342] Similarly, Dean Katz convincingly argues for a comparative fault-like allocation rule in the disparate

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832. Thus, I am avoiding the loaded term "similarly situated" employees to indicate a broader meaning.

335. *See* McDonnell Douglas Corp. v. Green, 411 U.S. 792, 804-05 (1973).

336. I use the term "quasi-direct" evidence to refer to those things that are not "smoking gun" type direct evidence (i.e., an e-mail in which the decisionmaker wrote, "I did not hire Jane Smith because she is of Irish ancestry, because I hate the Irish") but imply discriminatory animus.

337. *See* Merritt v. Old Dominion Freight Line, Inc., 601 F.3d 289, 303 (4th Cir. 2010) (Davis, C.J., concurring) (stating that "a court's analysis of intentional discrimination claims *must* accommodate *probative evidence* of every sort," even if it does not fit comfortably within the traditional *McDonnell Douglas* framework).

338. In the latter circumstance, both the plaintiff's protected trait and the LNDR are causes-in-fact.

339. This renovated version of *McDonnell Douglas* also provides plaintiffs pursuing claims under "motivating factor" or "contributing factor" with a causally valid route to prove that consideration of a protected trait actually motivated the defendant's decision. However, given the language of these statutes, the overall proof scheme must also provide defendants the opportunity to prove the "same action" defense. It is a simple enough matter to include such an affirmative defense at the end of the modified *McDonnell Douglas* framework.

340. *See* Katz, *Fundamental Incoherence*, *supra* note 5, at 520-27.

341. *See* id. at 512-15.

342. Wright, *supra* note 19, at 258-73; *see also* text accompanying *supra* note 19.

treatment context.[343] The lower courts addressed this windfall-to-plaintiff problem in mixed-motive cases prior to *Price Waterhouse*, by prohibiting the plaintiff from recovering front pay or reinstatement.[344] Congress codified a similar limitation on remedies as part of the 1991 CRA.[345] However, in light of *Gross*, the lower courts are unlikely to have the freedom to apply either a 1991 CRA-like limitation on remedies outside of the Title VII discrimination context. Likewise, *Gross* prohibits any burden shifting on the cause-in-fact determination unless explicitly authorized by Congress.

Nevertheless, there is a way to significantly reduce (and potentially eliminate) this windfall-to-plaintiffs, while also permissibly shifting the burden of proof to the defendant on the issue of the plaintiff's role in the adverse employment action: a limited version of the equitable affirmative defense unclean hands.

Although the Supreme Court rejected the use of unclean hands as a defense to liability,[346] it approved it for use as a means of limiting the remedies available to the plaintiff.[347] Specifically, the Court stated that

> The employee's wrongdoing must be taken into account, we conclude, lest the employer's legitimate concerns be ignored . . . . In determining appropriate remedial action, the employee's wrongdoing becomes relevant not to punish the employee, or out of concern for the relative moral worth of the parties, but to take due account of the lawful prerogatives of the employer in the usual course of its business and the corresponding equities that it has arising from the employee's wrongdoing.[348]. . . In determining the appropriate order for relief, the court can consider taking into further account extraordinary equitable circumstances that affect the legitimate interests of either party.[349]

As *McKennon* was focused only on evidence of wrongdoing by the

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343. Katz, *Fundamental Incoherence*, *supra* note 5, at 544-49. However, in light of *Gross*, it would take congressional action to implement a comparative fault system under the various employment discrimination statutes.

344. *See* Bibbs v. Block, 778 F.2d 1318, 1323-24 (8th Cir. 1985) (citing cases).

345. *See* 42 U.S.C. § 2000e-5(g)(2)(b) (2006).

346. McKennon v. Nashville Banner Pub. Co., 513 U.S. 352, 360 (1995) (rejecting for use in disparate treatment cases the "conventional formulation [of unclean hands defense, which] operated in limine to bar the suitor from invoking the aid of the equity court"). Although McKennon dealt with a claim for disparate treatment under the ADEA, the Court made clear that its rationale applied with equal force to claims under Title VII. *Id.* at 358 ("The ADEA and Title VII share common substantive features and also a common purpose: 'the elimination of discrimination in the workplace.'"); *see also* Rivera v. NIBCO, Inc., 364 F.3d 1057, 1071 (9th Cir. 2004) (noting that *McKennon* itself stated that it applied in both the ADEA and Title VII contexts). Likewise, all of the courts of appeal to consider the issue have applied *McKennon* to disparate treatment claims under both Title VII and the ADA, in addition to claims under the ADEA. *See* Holland v. Gee, 677 F.3d 1047, 1065 (11th Cir. 2012) (Title VII); Serrano v. Cintas Corp., 699 F.3d 884, 903 (6th Cir. 2012) (Title VII); Bowers v. NCAA, 475 F.3d 524, 537 (3d Cir. 2007) (Title VII); EEOC v. Dial Corp., 469 F.3d 735, 744-45 (8th Cir. 2006) (Title VII); Rooney v. Koch Air LLC, 410 F.3d 376, 382 (7th Cir. 2005) (ADA); Russell v. Microdyne Corp., 65 F.3d 1229, 1237-38 (4th Cir. 1995) (Title VII).

347. *McKennon*, 513 U.S. at 360-61.

348. *Id*. at 361-62 (internal citation and quotation marks omitted).

349. *Id*. at 362.

employee that the employer acquired after terminating the employee, the Court created an affirmative defense only for after acquired evidence.[350] However, its rationale was broader. Based on the reasoning of *McKennon*, the lower courts should apply unclean hands as an equitable affirmative defense to remedies, particularly back pay and reinstatement/front pay, in disparate treatment cases. As unclean hands is an affirmative defense, the defendant would bear the burden of proving that the employee's conduct prior to the adverse employment action actually was necessary to the employer's decision to take the adverse employment action. If the employer carries this burden, the trial court would be required to limit any back pay remedy awarded the employee by, presumptively, fifty percent in order to properly allocate damages attributable to the employer's consideration of both legitimate and illegitimate factors. However, the trial court could vary this percentage based on the evidence in an effort to reach a fair and equitable result. Additionally, the trial court would not be permitted to award front pay or reinstatement. Finally, any award of attorneys' fees to the employee would likewise be reduced by the same proportion as the back pay award.[351]

By using an unclean hands defense in this way, the lower courts could easily mitigate the windfall-to-plaintiff problem inherent in the application of the NESS cause-in-fact standard and in the modified *McDonnell Douglas* proof scheme proposed above. The lower courts could even—in the context of the historic role of courts of equity—engage in a sort of comparative fault allocation in determining the amount of any monetary remedy awarded to the plaintiff. While this is not the cleanest way to address the windfall-to-plaintiff problem, it could be effective and it is, perhaps, the only method available under current law.

CONCLUSION

Cause-in-fact is a critical factor—perhaps *the* critical factor—in every disparate treatment case. The *Restatement Third*'s NESS-based cause-in-fact standard provides a normatively desirable, logical, and consistent standard for determining cause-in-fact across all of the disparate treatment statutes. Using this cause-in-fact standard to unify disparate treatment doctrine would provide simplicity, certainty, and predictability for all involved. The slightly modified version of the *McDonnell Douglas* proof scheme proposed herein, coupled with an unclean hands equitable defense to remedies, would enable the courts to quickly and easily implement this unitary cause-in-fact standard without awaiting action from the Supreme Court. In this way, the courts can bring causal cohesion to disparate treatment doctrine once and for all and do so in a fair and normatively desirable manner.

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350. *Id*. at 361.

351. Whether this "backdoor burden shifting" via an unclean hands affirmative defense could actually be used to circumvent *Gross* and justify a full burden shifting on some aspect of factual causation bears further thought and discussion.