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## **The Fundamental Incoherence of Title VII: Making Sense of Causation in Disparate Treatment Law**

Martin J. Katz

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## The Fundamental Incoherence of Title VII: Making Sense of Causation in Disparate Treatment Law

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# The Fundamental Incoherence of Title VII: Making Sense of Causation in Disparate Treatment Law

MARTIN J. KATZ\*

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## INTRODUCTION

Suppose that an employer fires an employee for two reasons: because the employee is a woman, and because she is habitually tardy. Under most anti-discrimination laws, the first reason (sex) is an illegitimate basis for the decision, while the second reason (tardiness) is legitimate. But what happens when the employer relies on both legitimate and illegitimate grounds? Can we say in such a case that the illegitimate factor (sex) *caused* the firing, in violation of anti-discrimination law?

Disparate treatment statutes, such as Title VII of the Civil Rights Act of 1964 (“Title VII”),<sup>1</sup> do not provide much help in answering this question. Such statutes clearly require causation; they prohibit adverse employment decisions only where such decisions occur “because of” protected characteristics, such as race or sex.<sup>2</sup> Yet, the words “because of” do not tell us what type of causation is required.

In single-motive cases, in which an employer relies on only one factor in reaching a decision, this ambiguity poses little problem. In such a case, the employer will satisfy virtually any definition of causation. The problem arises in mixed-motive cases such as the one above, in which the employer bases its decision on multiple factors—likely the lion’s share of cases.<sup>3</sup> In such cases, Congress has left courts and commentators to try to figure out what type of causation is required by disparate treatment law. And the result has been a mess.

In *Price Waterhouse v. Hopkins*,<sup>4</sup> its first foray into the topic, the Supreme Court used over twenty different formulations to describe Title VII’s causation requirement in a mixed-motive case.<sup>5</sup> Most of these formulations were either

1. 42 U.S.C. §§ 2000e to 2000e-17 (2000).

2. See Title VII, 42 U.S.C. § 2000e-2(a) (2000). Numerous other anti-discrimination laws use similar language. See, e.g., Age Discrimination in Employment Act (“ADEA”), 29 U.S.C. §§ 623–633a (2000); Americans with Disabilities Act (“ADA”), 42 U.S.C §§ 12101–12117 (2000). Because Title VII is the most frequently applied and interpreted anti-discrimination law, this Article will focus largely on that statute.

The phrase “because of” tends to be used to invoke at least two distinct doctrines: disparate treatment (often thought of as intentional discrimination on the basis of protected characteristics) and disparate impact (which generally refers to conduct which, though not intentional, has a disproportionate negative effect on protected groups). See BARBARA LINDEMANN & PAUL GROSSMAN, EMPLOYMENT DISCRIMINATION LAW 4 (3d ed. 1996) (listing theories of discrimination, including disparate treatment and disparate impact). This Article focuses on the disparate treatment doctrine.

3. As Senator Case famously noted during the debate over the Civil Rights Act of 1964, “If anyone ever had an action that was motivated by a single cause, he is a different kind of animal from any I know of.” 110 CONG. REC. 13,837–38 (1964).

4. 490 U.S. 228 (1989).

5. For some of the formulations used or cited by the plurality, see *id.* at 238 n.2 (“a discernible factor”); *id.* (“a significant factor”); *id.* at 239 (“take [a protected characteristic] into account”); *id.* at 242 (“considered”); *id.* (“relied upon”); *id.* (“same decision”); *id.* at 244 (“a motivating part”); *id.* (“make a difference”); *id.* at 246 (“a part”); *id.* at 246 n.11 (“a factor”); *id.* at 248 (“affect”); *id.* (“used an illegitimate criterion”); *id.* at 249 (“a motivating factor”); *id.* (a “substantial” factor); *id.* (a “but-for” cause); *id.* at 250 (“one of [the] reasons”); *id.* at 252 (“a motivating role”); *id.* at 256 (“a role”). For some additional formulations used or cited by the concurrences, see *id.* at 261–62 (O’Connor, J.,

vaguely defined or undefined, and many seemed to be used interchangeably. No formulation emerged as the clear favorite.<sup>6</sup>

Congress was poised to solve the problem when it enacted the Civil Rights Act of 1991 (the “1991 Act”),<sup>7</sup> which amended Title VII and partially overruled and partially codified *Price Waterhouse*.<sup>8</sup> The 1991 Act narrowed the field to two causal formulations: the “motivating factor” standard and the “same action” standard, and explained when to apply each of these formulations.<sup>9</sup> The problem is that we do not know exactly what is meant by “motivating factor” or “same action.” Neither phrase appears anywhere in the literature on causal logic. And while we can infer from the structure of the 1991 Act that a “motivating factor” is supposed to be less restrictive (that is, easier for a plaintiff to prove) than the “same action” standard,<sup>10</sup> we do not know anything more about the relationship between these two standards. How do they differ from each other? And is there a middle-ground—a standard that is more restrictive than the “motivating factor” test but less restrictive than the “same action” test?

To make matters more complicated, courts often use neither the “same action” nor the “motivating factor” tests in disparate treatment cases brought under statutes other than the 1991 Act. Instead, courts often use other vaguely

concurring) (“substantial weight”); *id.* at 269 (“substantially infected”); *id.* at 271 (“substantial reliance”); *id.* at 272 (“input into the decisional process”); *id.* at 272 (“given great weight”); *id.* at 273 (“a significant role”); *id.* at 273 (“a major reason”); *id.* at 274 (“infected the decision”); *see also id.* at 262 (rejecting “mere discriminatory thoughts” standard); *id.* at 276 (rejecting “tainted by awareness” standard).

6. The plurality favored the “motivating part” test. *See Price Waterhouse*, 490 U.S. at 244. Justice O’Connor favored the “substantial factor” test. *See id.* at 278 (O’Connor, J., concurring). However, both opinions switch between formulations without distinction. *See supra* note 5. And both the plurality and Justice O’Connor also endorse the “same decision” test. *See id.* at 242 (plurality); *id.* at 261 (O’Connor, J., concurring).

7. Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071 (1991).

8. *See* H.R. REP. NO. 102-40(I), at 45–49 (1991), *reprinted in* 1991 U.S.C.C.A.N. 549, 583–87 (discussing need to overturn *Price Waterhouse*). *But see* Civil Rights Act of 1991, 105 Stat. at 1071 (adopting “motivating factor” and “same action” standards, closely resembling standards used by *Price Waterhouse* plurality, as well as burden-shifting scheme similar to that used by *Price Waterhouse* plurality). Essentially, the 1991 Act overturned *Price Waterhouse*’s holding on the effect of satisfying the “same decision” test. Under *Price Waterhouse*, the defense precluded liability; under the 1991 Act, the defense only limits damages. (In fact, as will be discussed in Part II, *infra*, the tests in the 1991 Act are functionally identical to those in *Price Waterhouse*.)

9. *See* Title VII, 42 U.S.C. § 2000e-2(m) (2000) (providing that plaintiff must show that a protected characteristic was a “motivating factor” in the adverse decision); § 2000e-5(g)(2)(B) (providing that once plaintiff has done so, defendant can avoid certain types of damages by showing that it would have taken the “same action” absent consideration of the protected characteristic).

10. We can infer this hierarchy from the structure of the Act. Once a plaintiff demonstrates that a protected characteristic was a “motivating factor,” the burden shifts to the defendant to show that it would have taken the “same action” absent consideration of the protected characteristic. *See* 42 U.S.C. § 2000-5(g)(2)(B). This burden-shifting procedure suggests that the “motivating factor” test should be easier to prove than the “same decision” test.

defined causal formulations, including a “determinative influence” test,<sup>11</sup> a “substantial factor” test,<sup>12</sup> and a “but for” test.<sup>13</sup> What do these formulations mean in causal terms? How are they related to each other? Are any of them synonymous with the “motivating factor” or “same action” standards used in the 1991 Act? If not, how do they differ from the standards in the 1991 Act? Unfortunately, fifteen years after the 1991 Act, we still do not know the answer to any of these questions.

The continuing uncertainty over the causation requirement, and our inability to define that requirement coherently, has given rise to vast amounts of needless, expensive litigation.<sup>14</sup> Perhaps equally unsettling, our inability to define these myriad causal formulations with any degree of precision has seriously hampered the normative debate over the appropriate standard of causation in disparate treatment law.

This Article offers a way out of this definitional incoherence. Using concepts and terminology from the field of logical causation, it sets out an analytically coherent approach to causation in disparate treatment. It also decouples two critical issues which are often conflated in disparate treatment law: the issue of what conduct is or should be prohibited (prohibition), and the issue of when compensation is or should be available (compensation), arguing that it makes no sense to apply the same causal standard to both of these issues.

Armed with this framework, the Article argues that Title VII, and disparate treatment law more generally, is fundamentally flawed in two critical respects.

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11. See, e.g., *Hazen Paper Co. v. Biggins*, 507 U.S. 604, 610 (1993) (ADEA case); see also *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 153–54 (2000) (approving trial court’s use of “determining and motivating factor” test in ADEA case); *Spulak v. K Mart Corp.*, 894 F.2d 1150, 1154 (10th Cir. 1990) (“predominant factor” in ADEA case); *Schleiniger v. Des Moines Water Works*, 925 F.2d 1100, 1101 (8th Cir. 1991) (“discernible factor” in ADEA claim).

12. See, e.g., *Conoshenti v. Pub. Serv. Elec. & Gas Co.*, 364 F.3d 135, 147 (3d Cir. 2004) (applying “substantial factor” test in Family and Medical Leave Act case); *Lambert v. Ackerley*, 180 F.3d 997, 1008 (9th Cir. 1999) (applying “substantial motivating factor” test in Fair Labor Standards Act case); *Henrietta D. v. Bloomberg*, 331 F.3d 261, 278–79 (2d Cir. 2003) (applying “substantial factor” test in ADA case).

13. See, e.g., *Tsombanidis v. W. Haven Fire Dep’t*, 352 F.3d 565, 578 (2d Cir. 2003) (applying “but for” test in ADA case); *Serrano-Cruz v. DFI P.R., Inc.*, 109 F.3d 23, 25 (1st Cir. 1997) (applying “but for” test in ADEA case); *Haskins v. United States Dep’t of Army*, 808 F.2d 1192, 1198 (6th Cir. 1987) (applying “but for” test in “single motive” case under Title VII); see also, e.g., *Smith v. City of Salem*, 369 F.3d 912, 920 (6th Cir. 2004) (applying “but for” test in stereotyping case under Title VII).

14. See LINDEMANN & GROSSMAN, *supra* note 2, at 5 (“The causal connection element is the one most often controverted.”). It is easy to see why this is so. Litigants argue for and against the application of various causal formulations with little or no idea of what those formulations actually mean, much less the relationship between those formulations. Then they must try to prove or disprove that one or more of these ill-defined causal formulations has been satisfied. And courts, rather than defining the causation requirement, have avoided the issue, instead focusing on the types of evidence that can be used to prove this (undefined) requirement. See, e.g., *St. Mary’s Honor Ctr. v. Hicks*, 509 U.S. 502, 507–08 (1993) (failing to define causation requirement, focusing instead on “pretext” approach to proving causation). While such an approach seems appealing, as it obviates the need to define causation requirements with any degree of precision, it is ultimately doomed to fail: If we do not know exactly what it is that we are trying to prove, then how can we know whether a particular type of evidence proves it?

First, current disparate treatment doctrine is ineffective at prohibiting discriminatory decisionmaking. Most disparate treatment statutes contain only a single causation requirement, for example, “because of.” As a result, courts interpreting these statutes have tended to apply a single causation requirement—generally, the restrictive “but for” test—to the issue of prohibition, as well as compensation. That is, employers are permitted to use protected characteristics such as race or sex in their decisionmaking so long as such discrimination does not rise to the level of “but for” causation. A few statutes, such as the 1991 Act, apply a different, less restrictive test of causation (the “motivating factor” test) to the issue of prohibition, and thus clearly prohibit such conduct. However, even these more prohibitive statutes do not contain adequate sanctions to deter such conduct.

Second, current doctrine is one-sided in its causal restrictions on compensation. Its “but for” test prevents certain plaintiffs from reaping a compensatory windfall, but only by providing a windfall to wrongdoing defendants. In many cases, this test favors wrongdoing defendants over innocent plaintiffs.

This Article proposes a new approach to both prohibition and compensation. On the prohibition side, it proposes penalties and incentives that are unrelated to compensation. This approach will make clear that discriminatory conduct is prohibited irrespective of its effect on plaintiffs and ensure that such conduct is adequately deterred. On the compensation side, this Article proposes a new causal standard: a “necessity-or-sufficiency” test, along with a comparative fault approach to determine what level of compensation is due.

While these proposals may seem radical in the context of disparate treatment law, they are widely accepted in modern tort law—the field from which disparate treatment law has borrowed much of its thinking on causation (albeit in an often piecemeal and unselfconscious way).<sup>15</sup> Thus, in the larger scheme of things, my proposals are hardly radical; they are nothing more than a suggestion that disparate treatment law should adopt some of the parts of tort law it seems to have left behind in its partial borrowing of causal concepts.<sup>16</sup>

The Article proceeds in four parts. Part I develops a comprehensive frame-

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15. See, e.g., *Price Waterhouse v. Hopkins*, 490 U.S. 228, 266 (1989) (O'Connor, J., concurring) (noting the “analogous area of causation in the law of torts”); *id.* at 264 (analogizing “the statutory employment ‘tort’ created by Title VII” to “the common law of torts”); Jeffrey A. Van Detta, “*Le Roi est Mort; Vive le Roi!*”: An Essay on the Quiet Demise of McDonnell Douglas and the Transformation of Every Title VII Case after *Desert Palace, Inc. v. Costa* into a “Mixed-Motives” Case, 52 *DRAKE L. REV.* 71, 81 (2003) (“Title VII is simply a federally sanctioned tort cause of action.”); Michael J. Zimmer, *The New Discrimination Law: Price Waterhouse IS Dead, Whither McDonnell Douglas?*, 53 *EMORY L.J.* 1887, 1930 n.173 (2004) (noting similarity of causal formulations in disparate treatment law and tort law, and that this “seems appropriate, given that antidiscrimination statutes have tended to be tort-like in character”); see also DAN B. DOBBS, *THE LAW OF TORTS* 81–82 (2000) (“Civil rights violations are torts. They have generated an important specialty, in which the courts look to common law tort rules as models without necessarily accepting their limitations.”).

16. I am not arguing that disparate treatment law should adopt these proposals *because* tort law has done so. As we will see, some of these approaches have been controversial in tort law. And it is not clear that the common law adoption of these approaches in tort has been done with a self-conscious eye



work of potential causal concepts based on the literature of logical causation. Part II applies this framework to the current debate over the appropriate standard of causation in disparate treatment law, providing, for the first time, a meaningful understanding of the multitude of formulations used in that debate and the causal structure of that debate. Part III critiques the two leading causal standards in the current debate—the “motivating factor” standard and the “but for” standard—demonstrating that both standards are flawed, and that the 1991 Act’s attempt to combine these two flawed standards is also flawed. Part IV then proposes a series of reforms to disparate treatment law to address the flaws in these two standards. In so doing, it underscores that the current statutory framework is fundamentally flawed, and that only Congress can fix these problems.<sup>17</sup>

### I. A COHERENT CAUSAL FRAMEWORK

The concept of logical causation—often called causation-in-fact in legal doctrine<sup>18</sup>—includes three distinct elements: (1) something that is caused (an outcome or event), (2) something doing the causing (a factor or act), and (3) a causal connection between the two (causation).

Disparate treatment law adopts this basic causal paradigm. In disparate treatment law, the relevant outcome (the first element) is an employment decision adverse to the employee or applicant, such as a decision to fire or not to hire.<sup>19</sup> The relevant act (the second element) is the use of a protected

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toward the causal issues I discuss. My point is only that a number of common law courts, quite possibly concerned with the issues I raise, have adopted solutions similar to those I propose here.

17. Before proceeding, two short notes on scope are in order. First, this Article will not focus on the normative question of whether disparate treatment should include a causation requirement. It will take as a given that disparate treatment law does, and is likely to continue to, require causation. (Some of the reasons for this requirement will become apparent in this Article, though they are not its focus.) Second, this Article will not address deep philosophical questions about the nature of causation: whether causation is real (i.e., whether there exist in the universe a set of causal relationships between events); whether causation is meaningful (i.e., whether we can distinguish meaningful causes from the virtually infinite factors that might be seen as somehow connected to the event in question); and whether causation is factually ascertainable (i.e., whether we can make relatively good determinations about what factors have caused an outcome, or whether an outcome has been caused by a particular factor). Disparate treatment doctrine assumes that causation is real, meaningful, and ascertainable, and this Article will do the same.

18. There are at least two distinct concepts of causation in the law. One focuses on the logical (often physical) relationship between events. In tort law, this concept is generally called “cause in fact.” See DOBBS, *supra* note 15, at 407–09. The other focuses more directly on policy matters, such as notions of foreseeability. In tort law, this concept is generally called “proximate cause.” *Id.* The question of causation in disparate treatment law involves, at the very least, cause-in-fact type issues. See Mark C. Weber, *Beyond Price Waterhouse v. Hopkins: A New Approach to Mixed Motive Discrimination*, 68 N.C. L. REV. 495, 495 (1990) (asserting relevant inquiry is analogous to cause-in-fact inquiry in tort law). Accordingly, this Article will focus on this cause-in-fact type of inquiry. It will not address whether causation in this area does or should involve a policy-oriented, proximate cause type of inquiry.

19. See Title VII, 42 U.S.C. § 2000e-2(a)(1) (2000) (prohibiting firing and failure to hire because of protected characteristic); see also *St. Mary's Honor Ctr.*, 509 U.S. at 502 (demotion); *Price Waterhouse*,

characteristic, such as race or sex, in the process of making such a decision (an act I will call “utilization”).<sup>20</sup> Thus, the question of causation (the third element) is: Did the employer’s utilization of a protected characteristic cause the adverse employment action? For example, in the firing hypothetical described at the outset of this Article, we would ask: Did the employer’s utilization of the employee’s sex (the act) *cause* the decision to fire her (the outcome)?

To determine whether an act caused an outcome, we must define what we mean by “cause.” Traditionally, philosophers have spoken of two basic types of causal relationships: necessity and sufficiency.<sup>21</sup>

The concept of *necessity* is backward-looking and refers to preconditions. The question is whether, absent a particular factor (X), the event (E) would have occurred when it did. If the answer is negative—if E would not have occurred when it did without X—then X is necessary to the occurrence of E.<sup>22</sup> Necessity is often referred to as “but for” causation.<sup>23</sup> That is, but for the existence of factor X, event E would not have occurred.

Suppose, for example, that our hypothetical employer would have fired the employee as a result of her habitual tardiness, irrespective of whether the employer had utilized sex in its decision. In such a case, we could not say that the employer’s utilization of sex was necessary to its decision. (This was

490 U.S. at 228 (failure to promote); *James v. Booz-Allen & Hamilton, Inc.*, 368 F.3d 371 (4th Cir. 2004) (undesirable reassignment). It might be tempting to think of these types of adverse employment decisions as acts, rather than outcomes, in disparate treatment’s causal paradigm. After all, firing and failing to hire can be understood as acts, as well as decisionmaking outcomes. However, disparate treatment law does not treat hiring or firing decisions as causal acts. Such decisions are not prohibited where they cause a particular outcome. Rather, such decisions are prohibited when they are caused by (occur “because of”) a certain type of decisionmaking.

20. Actually, anti-discrimination laws do not tend to refer to *acts* as being causal. Rather, such laws tend to speak of personal *characteristics*, such as race or sex, as being causal. Such laws tend to speak of employment outcomes (such as firing) as being causally linked to (occurring “because of”) certain protected personal characteristics, such as race or sex. *See, e.g.*, 42 U.S.C. § 2000e-2(a) (prohibiting adverse employment actions “because of . . . race, color, religion, sex, or national origin”). However, personal characteristics, by themselves, do not cause decisions. Rather, personal characteristics, such as race or sex, can cause decisions only when they are made part of someone’s decisionmaking process.

21. *See* 5 ENCYCLOPEDIA OF PHILOSOPHY 60 (Paul Edwards ed., 1973); *see also* THOMAS R. HAGGARD, UNDERSTANDING EMPLOYMENT DISCRIMINATION 60–61 (2001); H.L.A. HART & TONY HONORÉ, CAUSATION IN THE LAW 112 (2d ed. 1985).

22. Actually, there are at least two types of necessity: weak and strong. The concept referred to in the text is “weak” necessity, which limits the inquiry to the occasion in question. Weak necessity asks whether E would have occurred *when it did* absent X. “Strong” necessity, on the other hand, asks whether E could *ever* occur without X. *See* HART & HONORÉ, *supra* note 21, at 112. For example, oxygen is strongly necessary to a fire; a fire cannot ever occur without oxygen. However, a particular source of ignition—such as a match thrown into a wastebasket full of paper at a particular time—would only be weakly necessary to the resulting fire. The fire would not have occurred *when it did* absent the match; but another source of ignition (e.g., a bolt of lightning) could have ignited the paper in the wastebasket at some other time. Because no legal doctrine of which I am aware seems to require strong necessity, I do not include this concept in my discussion.

23. *See, e.g.*, PAUL N. COX, EMPLOYMENT DISCRIMINATION 7-31 (3d ed. 1999) (stating that the “but for” test is a test of necessity); Richard W. Wright, *Causation in Tort Law*, 73 CAL. L. REV. 1735, 1775 (1985) (same).

essentially the claim of the defendant in *Price Waterhouse*: that the employer's utilization of sex was not necessary to its decision; that the employer would have made the same decision as a result of the plaintiff's abrasiveness.<sup>24</sup>)

*Sufficiency*, on the other hand, is forward-looking and refers to triggering conditions. The question is whether adding the factor in question (X) to the other factors then present will trigger the event (E). If the answer is positive—if X, added to the set of other existing factors, would trigger E—then X is said to be sufficient.<sup>25</sup> Suppose, for example, that our hypothetical employer would fire any female with the plaintiff's record and qualifications. That is, given the other conditions present (the plaintiff's record and qualifications), the employer's utilization of sex would trigger the event (termination). In such a case, the employer's utilization of sex would be sufficient.

There are four possible combinations of necessity and sufficiency. First, a factor can be *sufficient, but not necessary* (*sufficiency-only*). Suppose, for example, that our hypothetical employer would fire any female with the plaintiff's record and qualifications irrespective of tardiness, but that the employer would also fire any person who was habitually tardy irrespective of sex. In such a case, the employer's utilization of sex would be sufficient to trigger the termination; added to the other factors present (the employee's record and qualifications), her sex would trigger the event (termination). However, in this case, the employer's utilization would not be necessary, as the employer would have fired the employee irrespective of her sex (as a result of her tardiness).

Perhaps the most famous example of *sufficient, but not necessary* is the ubiquitous two-fires hypothetical used in most first-year torts classes. In that hypothetical, there are two fires, X and Y, each of which would have burned down the plaintiff's house irrespective of the other.<sup>26</sup> Because Fire X would have burned down the house irrespective of Fire Y, we can say that Fire X was sufficient. However, because the house would have burned down irrespective of

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24. See *Price Waterhouse v. Hopkins*, 490 U.S. 228, 278 (1989). On remand, the trial court rejected this claim. See *Hopkins v. Price Waterhouse*, 737 F. Supp. 1202, 1207 (D.D.C. 1990) (finding employer did not prove that sex was non-necessary).

25. Like necessity, there are actually two forms of sufficiency: weak and strong. See *supra* note 22. The concept referred to in the text is "weak" sufficiency, which limits the inquiry to the occasion in question. That is, weak sufficiency asks whether X would be sufficient to bring about E given the other factors *then present*. "Strong" sufficiency, on the other hand, asks whether X would be sufficient to bring about E irrespective of the other factors present—that is, *on any occasion*. However, it is questionable whether any factor could ever be strongly sufficient to bring about a particular event all by itself—that is, irrespective of the existence of any other factor. See Mark Kelman, *The Necessary Myth of Objective Causation Judgments in Liberal Political Theory*, 63 CHI.-KENT L. REV. 579, 579 (1987) ("[G]iven that the injury cannot have occurred unless the plaintiff (P), at a minimum, *existed*, that is P is invariably a necessary condition for the damage to occur, we can never causally attribute any injury solely to a second party, a defendant (D).") Accordingly, I do not include this concept in my discussion.

26. This hypothetical is probably based on the case of *Cook v. Minneapolis, St. Paul & Sault Ste. Marie Railway Co.*, 74 N.W. 561 (Wis. 1898). However, most textbooks raising this hypothetical tend to use the later case of *Kingston v. Chicago & Northwestern Railway Co.*, 211 N.W. 913 (Wis. 1927), which cites and distinguishes *Cook*, see *id.* at 915. See, e.g., JAMES A. HENDERSON, JR. ET AL., *THE TORTS PROCESS* 145–47 (5th ed. 1999).

Fire X (as a result of Fire Y), we cannot say that Fire X was necessary. Thus, Fire X is *sufficient, but not necessary*.

Conversely, a factor can be *necessary, but not sufficient (necessity-only)*. This condition is unlikely to occur in the context of decisionmaking, where the relevant acts (for example, consideration of sex and consideration of tardiness) occur simultaneously.<sup>27</sup> However, this concept can be illustrated using the familiar “last straw that broke the camel’s back” proverb. In that proverb, the second-to-last straw is not sufficient. Given the other factors present (the load then present on the camel’s back), the second-to-last straw will not trigger the event in question (the breaking of the poor animal’s back). However, the second-to-last straw is necessary to that outcome; absent the second-to-last straw, the final straw would not have broken the camel’s back.

A factor may be both necessary and sufficient (*necessity-and-sufficiency*). Or a factor might be either necessary or sufficient (*necessity-or-sufficiency*). That is, instead of requiring a factor to satisfy a particular causal concept (*necessity-only* or *sufficiency-only*), we could require only that the factor satisfy one of these two concepts. We will see in Part IV.B that this concept, though largely ignored by theorists, provides a critical part of the solution to the debate over causation in disparate treatment.

In addition to these four concepts involving combinations of necessity and sufficiency, there are two additional causal possibilities. These two remaining possibilities involve factors which are neither necessary nor sufficient. There are two possibilities here because there are two reasons why a factor might be neither necessary nor sufficient. First, the factor might have no causal weight at all—that is, no tendency whatsoever to influence the event in question (a concept I will refer to as *no causation*).<sup>28</sup> Alternatively, a factor might have some causal weight—that is, some tendency to influence the event in question—


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27. Recall that weak sufficiency looks at all of the other forces present *at the time*, and asks whether, given those other forces, the act in question will trigger the outcome. See *supra* note 25. Where two or more acts (X and Y) occur simultaneously, the causal force attributable to the other act or acts (Y) is effectively present at the time of the act in question (X). Thus, the act in question (X) will be sufficient any time it is necessary. For example, consider our firing hypothetical. In its decisionmaking process, the employer considers sex (X) at the same time it considers tardiness (Y). For sex (X) to be necessary, the event (firing) could not occur without sex (X). If the event could not have occurred without the employer’s consideration of sex (X), then all of the other factors present could not have triggered the event (termination). It is only when sex (X) is added to all those other factors that the event (termination) is triggered. Yet this is the definition of sufficiency: sex (X), in addition to all of the other factors present, triggers the event (termination). Because the two factors are considered simultaneously, if X is necessary, it will always be sufficient. (The converse is not true. A simultaneous factor can be sufficient but not necessary.)

28. As a matter of metaphysics, it might be possible to argue that all events are connected in some way. Thus, one might question whether a factor can ever really have a causal weight of zero. However, as a matter of common understanding, certain factors are unrelated to certain events. For example, where we are trying to determine whether a fire started by the defendant burned down the plaintiff’s house, consider a person who has never met the homeowner or the defendant, and who is 10,000 miles away at the time of the fire (for example, climbing Mount Everest). See Richard W. Wright, *Causation, Responsibility, Risk, Probability, Naked Statistics, and Proof: Pruning the Bramble Bush by Clarifying*

but still not rise to the level of necessity or sufficiency (a concept I will refer to as *minimal causation*). Like necessity-or-sufficiency, the concept of minimal causation tends to be ignored by most theorists,<sup>29</sup> though it turns out to be important in disparate treatment law.

We can set out all of these causal concepts in a table,<sup>30</sup> as follows:

Table I: Potential Causal Concepts		
Most Restrictive  Least Restrictive	Both Necessity and Sufficiency	
	Necessity Only (But For)	Sufficiency Only
	Either Necessity or Sufficiency	
	Minimal Causation (some causal force, but neither necessary nor sufficient)	
	No Causation	

Armed with this framework of potential causal concepts, we can now address the two questions posed at the outset: Which of these concepts is invoked by

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*the Concepts*, 73 IOWA L. REV. 1001, 1027 (1988). Such a person would seem to exert no causal force on the fire burning the house—at least in any common meaning of the term.

29. Some legal writers discussing statistical studies have used the term “causal influence” to describe the idea of tendency to bring about a result. See, e.g., Barak D. Richman, *Behavioral Economics and Health Policy: Understanding Medicaid’s Failure*, 90 CORNELL L. REV. 705, 723 (2005) (“Health may . . . have a causal influence on the duration of a person’s schooling . . .”). However, such writers are generally not interested in necessity or sufficiency, and have not coined a term to denote this type of causation. Philosophers have sometimes used the term “causally relevant features” or “causal conditions” to describe this idea. See, e.g., J.L. MACKIE, *THE CEMENT OF THE UNIVERSE: A STUDY OF CAUSATION* 260 (1974); Richard Taylor, *Causation*, in *THE NATURE OF CAUSATION* 277, 297 (Myles Brand ed., 1976). However, the “causally relevant” formulation seems to beg the question of just what type of causation is relevant for the purpose at hand—for example, necessity or sufficiency? Similarly, the “causal conditions” formulation seems to beg the question of just when a condition is considered causal. Does it need to rise to the level of necessity, sufficiency, or something else? Hence, I prefer the phrase “minimal causation,” or “minimally causal.”

30. Ranking these causal concepts from most restrictive to least restrictive will be helpful in sorting out the meaning of causal formulations used in current law, as some of these formulations have been defined only relative to others—that is, less or more restrictive than another causal formulation. This ranking will also help us in Part III to understand some of the normative implications of selecting one type of causation over another. Because a factor can be sufficient without being necessary or necessary without being sufficient, we cannot rank necessity and sufficiency in order of restrictiveness.

disparate treatment law's "because of" requirement? And which of these concepts should be required in disparate treatment law? The first (descriptive) question will be addressed in Part II; the second (normative) question will be addressed in Parts III and IV.

## II. MAKING SENSE OF CURRENT DOCTRINE

As noted in the Introduction, courts, commentators, and legislators have used a wide range of phrases and formulations to attempt to describe the causation requirement in disparate treatment doctrine.<sup>31</sup> The most commonly used formulations include: (1) the "motivating factor" formulation from the 1991 Act and *Price Waterhouse*;<sup>32</sup> (2) the "same action" formulation from the 1991 Act,<sup>33</sup> along with the similar "same decision" formulation from *Price Waterhouse*;<sup>34</sup> (3) the "but for" formulation, commonly associated with *McDonnell Douglas v. Green*;<sup>35</sup> (4) the "determinative influence" formulation, and similar "determina-

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31. See *supra* notes 5, 9, and 11–13.

32. Pub. L. No. 102-166, § 107, 105 Stat. 1071, 1075 (1991), codified at 42 U.S.C. § 2000e-2(m) (2000) ("motivating factor"). The "motivating part" standard used by the plurality in *Price Waterhouse* is likely the same standard as the "motivating factor" standard, which is used elsewhere in the plurality opinion. See *Price Waterhouse v. Hopkins*, 490 U.S. 228, 244, 250 (1989) (plurality) ("motivating part"); *id.* at 238 n.2 ("motivating factor"); *id.* at 249 (same). The formulations in *Price Waterhouse* are important because these formulations continue to be applied outside of the 1991 Act context. See generally R. Joseph Barton, *Determining the Meaning of "Direct Evidence" in Discrimination Cases Within the 11th Circuit*, FLA. B.J., Oct. 2003, at 42.

33. § 107, 105 Stat. at 1075, codified at 42 U.S.C. § 2000e-5(g)(2)(B) ("same action").

34. See *Price Waterhouse*, 490 U.S. at 258 (1989) (plurality); *id.* at 260 (White, J., concurring); *id.* at 261 (O'Connor, J., concurring).

35. 411 U.S. 792 (1973). Actually, *McDonnell Douglas* does not refer to the "but for" standard. A series of pre-*Price Waterhouse* cases suggested in dicta that "but for" causation would satisfy disparate treatment's causation requirement (but did not suggest that "but for" causation was required to satisfy this requirement). See, e.g., *Newport News Shipbuilding & Dry Dock Co. v. EEOC*, 462 U.S. 669, 683 (1983) (stating that "but for" causation would satisfy Title VII; no discussion of whether lesser standard would suffice); *City of L.A. Dep't of Water & Power v. Manhart*, 435 U.S. 702, 711 (1978) (same); *McDonald v. Santa Fe Trail Transp. Co.*, 427 U.S. 273, 282 n.10 (1976) (same). However, the burden-shifting scheme from *McDonnell Douglas* has come to be associated with "but for" causation. See Zimmer, *supra* note 15, at 1930 (noting that in *McDonnell-Douglas* cases, the courts have typically required plaintiff to prove that the discriminatory motivation was a but-for cause of the employers' decision).

There has been speculation about whether the *McDonnell Douglas* burden-shifting framework has become obsolete in the wake of *Desert Palace Inc. v. Costa*, 539 U.S. 90 (2003). See, e.g., Van Detta, *supra* note 15, at 137–39 (asserting that *McDonnell Douglas* is no longer applicable after *Costa*). But see Zimmer, *supra* note 15, at 1939–40 (suggesting continued, albeit minor, role for *McDonnell-Douglas* framework). However, even after *Costa*, many courts continue to apply *McDonnell Douglas* and the "but for" standard in cases not covered by the 1991 Act in which there is only "indirect" evidence. See Van Detta, *supra* note 15, at 137–39; see also Barton, *supra* note 32, at 44 & n.15 (stating that lower courts generally refuse to apply *Costa* to cases under statutes such as the ADEA and the Pregnancy Discrimination Act). Non-1991 Act cases seem to fall into two categories: (1) cases under federal and state statutes other than Title VII (which was amended by the 1991 Act), and (2) cases under parts of Title VII that may not have been amended by the 1991 Act, such as its anti-retaliation provisions and its pregnancy discrimination provisions. See *id.*; see also, e.g., *Arrington v. Southwestern Bell Telephone Co.*, 93 F. App'x 593, 598 (5th Cir. 2004) (ADA retaliation claim); *Giebler v. M &*

tive factor” formulation, often used in cases under the Age Discrimination in Employment Act (ADEA);<sup>36</sup> (5) the “a role,” “a cause,” and “a factor” formulations, urged by the plurality in *Price Waterhouse* and noted by a number of commentators;<sup>37</sup> and (6) the “substantial factor” formulation from Justice O’Connor’s concurrence in *Price Waterhouse*.<sup>38</sup>

No one has defined these six formulations in a precise manner, based on standard causal concepts.<sup>39</sup> This Section will do so, translating these various formulations into the coherent framework of causal concepts set out in Part I. In doing so, it will become apparent that, for all of the many formulations that are used to describe causation in this area, current doctrine and commentary rely upon only two logical causation requirements: necessity and minimal causation.

A. FORMULATIONS INVOKING NECESSITY: “BUT FOR,” “SAME ACTION”/“SAME DECISION,” AND “DETERMINATIVE INFLUENCE”/“DETERMINATIVE FACTOR”

The “but for” standard clearly invokes the logical concept of necessity. In fact, the “but for” formulation is often used by logicians to describe the concept of necessity: A factor is necessary if, but for its existence, the outcome would not have occurred when it did.<sup>40</sup> Thus, it has long been understood that “but for” causation refers to necessity.

B Assocs., 343 F.3d 1143, 1150 (9th Cir. 2003) (ADA failure to accommodate claim); *Greenberg v. Union Camp Corp.*, 48 F.3d 22, 26 (1st Cir. 1995) (ADEA claim).

36. 29 U.S.C. §§ 621–634 (2000). *See, e.g.*, *Hazen Paper Co. v. Biggins*, 507 U.S. 604, 610 (1993) (“determinative influence” in ADEA case). This test has also been used in cases under 42 U.S.C. § 1983, *see McNabola v. Chi. Transit Auth.*, 10 F.3d 501, 514 (7th Cir. 1993) (“determinative factor” in § 1983 case), and Title VII, *see Fuentes v. Perskie*, 32 F.3d 759, 762 (3d Cir. 1994) (applying “determinative factor” standard in Title VII case).

37. *See, e.g.*, *Price Waterhouse*, 490 U.S. at 256 (plurality) (“a role”); *id.* at 246 n.11 (“a factor”); *id.* at 246 (“a part”); *Cox, supra* note 23, at 7-31 (“a cause”).

38. *See, e.g.*, *Price Waterhouse*, 490 U.S. at 276 (O’Connor, J., concurring); *id.* at 259 (White, J., concurring). Because this is the standard used in the concurrences, it is generally seen as the holding of *Price Waterhouse*. Several courts still apply this test to cases outside of the 1991 Act where there is no “direct” evidence. *See* GEORGE RUTHERGLEN, *EMPLOYMENT DISCRIMINATION LAW: VISIONS OF EQUALITY IN THEORY AND DOCTRINE* 49 & n.51 (2001); *Barton, supra* note 32, at 43.

39. Two commentators have tried to define some of the fundamentals. *See Cox, supra* note 23, at 7-31; HAGGARD, *supra* note 21, at 59–61. However, as will be discussed below in this Section, Professors Cox and Haggard make erroneous assertions about the causal meaning of some of these concepts—essentially because they were working with an incomplete framework of potential causal concepts. Professor Zimmer has tried to rank several of the causal formulations that have been used by courts, but does not attempt to translate these formulations into logical causal concepts. *See Zimmer, supra* note 15, at 1930 n.173.

40. *See supra* Part I; *see also Cox, supra* note 23, at 7-31 (stating that the “but for” test “in effect means that protected status must have been necessary to the decision or action in issue.”); HAGGARD, *supra* note 21, at 60 (stating that the legal test invoking the logical concept of necessity is the “but for” test); Wright, *supra* note 28, at 1021 (stating that “but for” causation in tort law is synonymous with necessity).

As noted above in note 22, there are actually two types of necessity: weak necessity (the outcome would not have occurred on the occasion without the factor) and strong necessity (the outcome could never occur without the factor). Both are “but for” concepts. However, as also noted in that note, the concept of strong necessity does not seem to play a role in law generally, or in disparate treatment

Similarly, the “same action” test from the Civil Rights Act of 1991<sup>41</sup> is clearly a test of necessity (as is the “same decision” test from *Price Waterhouse*).<sup>42</sup> The “same action”/“same decision” test does not focus directly on the factor in question (the utilization of a protected characteristic, such as race or sex); rather, the test focuses on the sufficiency of a second (legitimate) factor. It asks whether the employer “would have taken the same action in the absence of the impermissible motivating factor”<sup>43</sup>—that is, whether the legitimate factor was sufficient to trigger the same decision. When a second factor or set of factors (Y) is sufficient to trigger an outcome, the factor in question (X) cannot be necessary to the outcome.<sup>44</sup> Thus, the point of the “same action”/“same decision” test is to determine whether the factor in question (X, the protected characteristic) was necessary to the outcome.<sup>45</sup>

A somewhat different approach must be taken to define the “determinative influence”/“determinative factor” formulation. The formulation does not have any obvious meaning in causal terms.<sup>46</sup> It does not appear in the text of any federal disparate treatment statutes, so the search for its definition is not a search for legislative intent. And the Supreme Court, which adopted this formulation,<sup>47</sup> has not defined it in causal terms (or any other terms). Thus, the search for the meaning of this phrase is best understood as a search for consensus among the lower courts and perhaps the commentators.

Fortunately, there is significant agreement here: A vast majority of courts and commentators seem to agree that the “determinative influence” or “determinative factor” test refers to necessity—or “but for” causation.<sup>48</sup>

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specifically. Thus, “but for” in the context of disparate treatment law would appear to refer to weak necessity.

41. 42 U.S.C. § 2000e-5(g)(2)(B) (2000).

42. See *Price Waterhouse v. Hopkins*, 490 U.S. 228, 242 (1989) (plurality) (“same decision”); *id.* at 261 (O’Connor, J., concurring) (same).

43. See 42 U.S.C. § 2000e-5(g)(2)(B); *Price Waterhouse*, 490 U.S. at 242 (plurality) (“An employer should not be liable if it can prove that, even had it not taken gender into account, it would have come to the same decision . . .”); *id.* at 261 (O’Connor, J., concurring) (employer must show “that it would have reached the same decision” absent consideration of sex).

44. This concept—“over-determination”—will be explored further below in Part III.A.1.

45. See *Price Waterhouse*, 490 U.S. at 249 (plurality) (“A court that finds for a plaintiff under this [‘same decision’] standard has effectively concluded that an illegitimate motive was a ‘but-for’ cause of the employment decision.”); see also *Givhan v. W. Line Consol. Sch. Dist.*, 439 U.S. 410, 417 (1979) (requiring trial court to make finding that employee “would have been rehired *but for* her criticism” under *Mt. Healthy*, which provides for a same-decision defense); COX, *supra* note 23, at 7-31 (“The same decision test is conceptually equivalent to a but for test. The same decision test asks whether legitimate reasons were sufficient to bring about some result, but the sufficiency of legitimate reasons negates the necessity of illegitimate reasons.”).

46. See WEBSTER’S NINTH NEW COLLEGIATE DICTIONARY 346 (1987) (“determinative” is defined as “conclusive,” which has no distinct causal meaning); *id.* (“determine,” which may be thought of as the root of “determinative,” can be defined as “to bring about a result”—that is, to cause; but the form of causation (e.g., necessity or sufficiency) is not discussed).

47. See *Hazen Paper Co. v. Biggins*, 507 U.S. 604, 610 (1993).

48. See HAGGARD, *supra* note 21, at 62 (“[T]he *determinative factor* test . . . involves proof of *but for* causation.”); see also *Thomas v. Sears, Roebuck & Co.*, 144 F.3d 31, 33 (1st Cir. 1998); *Miller v.*



Thus, we can understand these three formulations—“but for,” “same action” (or “same decision”), and “determinative influence” (or “determinative factor”)—as referring to the causal concept of necessity.

B. THE “MOTIVATING FACTOR” FORMULATION AS A TEST OF MINIMAL CAUSATION  
(ALONG WITH THE “A ROLE,” “A CAUSE,” AND “A FACTOR” FORMULATIONS)

The starting point for defining the “motivating factor” formulation is to understand that this test was unambiguously designed to be less restrictive than the “but for” test. This is clear from the fact that Congress used the test—and, before that, courts used the test—within a two-tier approach to the causal inquiry. A two-tier approach adopts two causal standards, one more restrictive than the other. The idea is generally that the plaintiff must prove the first, less restrictive standard. Doing so then triggers some obligation or set of obligations on the part of the defendant—such as an obligation to disprove the second, more restrictive standard.<sup>49</sup>

The “motivating factor” formulation appears to have been developed, and has routinely been employed, as the less restrictive causal standard in a two-tier scheme in which the more restrictive standard is the “but for” test. Under the 1991 Act, for example, the plaintiff must demonstrate that the forbidden criterion (race or sex, for example) was a “motivating factor” in the employer’s decision.<sup>50</sup> If the plaintiff does so, the employer has the opportunity (or obligation) to prove that it would have taken the “same action” absent the forbidden criteria—that is, to prove a lack of “but for” causation.<sup>51</sup> Similarly, the judges who used the “motivating factor” formulation prior to the 1991 Act used it in the same manner.<sup>52</sup>

The whole point of such a two-tier approach is that the first causal standard (the one that the plaintiff must show to trigger some duty on the part of the defendant) must be less restrictive than the second standard. Thus, it seems clear that Congress, in drafting the 1991 Act, as well as the judges who used the formulation prior to the 1991 Act, understood the “motivating factor” test as being less restrictive than the “same decision”/“but for” test.

Within our framework of causal concepts, there are only three types of

CIGNA Corp., 47 F.3d 586, 595–96 (3d Cir. 1995); *Faulkner v. Super Valu Stores, Inc.*, 3 F.3d 1419, 1425–26 (10th Cir. 1993); *Bibbs v. Block*, 778 F.2d 1318, 1321 n.4 (8th Cir. 1985) (equating “determining” with “but for”). *But see* *Zimmer*, *supra* note 15, at 1902, 1924 n.159, 1930 n.173 (“determinative” is “quite similar to,” but less restrictive than, “but for”).

49. Two-tier approaches to causation will be discussed more fully below in Part III.C.

50. *See* 42 U.S.C. § 2000e-2(m) (2000).

51. *See id.* § 2000e-5(g)(2)(B).

52. *See* *Price Waterhouse v. Hopkins*, 490 U.S. 228, 238 n.2 (1989) (plurality); *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 270 & n.21 (1977); *Mt. Healthy City Sch. Dist. v. Doyle*, 429 U.S. 274, 287 & n.2 (1977); *Bibbs v. Block*, 778 F.2d 1318, 1323–24 (8th Cir. 1985). *Bibbs* was cited favorably in the legislative report on this part of the 1991 Act. *See* H.R. REP. NO. 102-40(I), at 48 (1991), *reprinted in* 1991 U.S.C.A.N. 549, 586 (noting the 1991 Act intended to restore law to the way it was interpreted prior to *Price Waterhouse* by cases such as *Bibbs*).

causation that are less restrictive than necessity (“but for” causation): (1) necessity-or-sufficiency, (2) minimal causation, or (3) no causation.<sup>53</sup> Thus, Congress must have had in mind one of these three concepts.

We can easily eliminate the third possibility (the concept of no causation) as a candidate for two reasons. First, the act of utilization cannot logically occur where there is no causation. Utilization occurs when an employer uses a protected characteristic in its decisionmaking. If the protected characteristic has no causal influence in the employer’s decision, we cannot say that the employer used the characteristic in its decisionmaking.<sup>54</sup>

Second, Congress unequivocally rejected the possibility of no causation. Congress made clear that the “motivating factor” test was intended to connote “a nexus”—some type of causal link—between act and outcome.<sup>55</sup> Thus, we can eliminate the concept of no causation as a potential meaning of the “motivating factor” test, leaving either (1) necessity-or-sufficiency, or (2) minimal causation.

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53. See *supra* tbl.1 on p. 499.

54. This concept can be illustrated by conceptualizing an employer’s decisionmaking process as a mathematical process, involving a series of weighted variables (V), each representing some qualification or characteristic of the employee or applicant. In our firing hypothetical, for example, the employee’s sex would be one variable, and the employee’s tardiness would be another. In this model, the employer assigns a weight to each variable (W<sub>v</sub>), representing the importance the employer ascribes to that qualification or characteristic. If the employer assigns more weight to one of these factors, it will have more causal influence. But if the employer ascribes zero weight to the variable, it will have no causal influence; effectively, the variable drops out of the equation—out of the decisionmaking process. In such a case, we could not say that the employer used that variable in its decision. Absent causation, there can be no utilization.

For this reason, it makes little sense to talk about dispensing entirely with a causation requirement in disparate treatment law. See, e.g., Paul J. Gudel, *Beyond Causation: The Interpretation of Action and the Mixed Motives Problem in Employment Discrimination Law*, 70 TEX. L. REV. 17, 20–21 (1991) (arguing for abandoning causation requirement in disparate treatment law); see also *Price Waterhouse*, 490 U.S. at 277–78 (O’Connor, J., concurring) (accusing plurality of dispensing with any causation requirement). More likely, these writers are referring to dispensing with any *heightened* causation requirement; that is, any causation requirement more restrictive than minimal causation (such as necessity).

55. See H.R. REP. NO. 102-40(I), at 48 (1991), *reprinted in* 1991 U.S.C.C.A.N. 549, 586 (“Conduct or statements are relevant under this test only if the plaintiff shows a nexus between the conduct or statements and the employment decision at issue”—i.e., at least some causal influence.).

Congress also made clear that it did not intend this standard to regulate “mere thoughts,” and intended the ‘motivating factor’ test to prevent such a result. See *id.* (“Some opponents of this Section [which adopts the “motivating factor” test] contend that making unlawful *any* consideration of race or gender in an employment decision would make an employer liable for ‘mere’ thoughts or ‘stray thoughts’ in the workplace.” The “motivating factor” standard avoids this.); H.R. REP. NO. 102-40(II), at 18 (1991), *reprinted in* 1991 U.S.C.C.A.N. 694, 711 (“Requiring that a Title VII violation is only established when discrimination is shown to be a contributing factor [later replaced with ‘motivating 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.”); see also *Price Waterhouse*, 490 U.S. at 262 (O’Connor, J., concurring) (suggesting that drafters of original Title VII intended application of a “but for” test to prevent the law from becoming a “thought control” law). Attaching liability without a causation requirement would effectively regulate “mere thoughts.” Thus, the “motivating factor” formulation must invoke some type of causation requirement.

We can also probably eliminate the first possibility (a necessity-or-sufficiency test) as a candidate for the meaning of the “motivating factor” formulation. In Part IV.B, I will argue that, as a normative matter, Congress should adopt a necessity-or-sufficiency test. However, there seems to be no basis for concluding, as a descriptive matter, that Congress meant to adopt such a test in the 1991 Act by its use of the “motivating factor” formulation. In fact, neither the term “sufficiency” nor the concept of sufficiency appear anywhere in the legislative history of the “motivating factor” formulation<sup>56</sup>—or in the cases upon which that formulation seems to have been based.<sup>57</sup> Thus, it seems highly unlikely that Congress meant its “motivating factor” test to denote the logical concept of necessity-or-sufficiency.<sup>58</sup>

This leaves only the second possibility: the concept of minimal causation. Thus, the “motivating factor” formulation must refer to minimal causation—that is, factors that have some causal influence, but do not rise to the level of necessity or sufficiency.<sup>59</sup>

This conclusion is consistent with the ways in which Congress described its “motivating factor” test.<sup>60</sup> For example, Congress said that this test would be

56. In its reports on the 1991 Act, Congress did not once refer to the logical concept of sufficiency in connection with the Act’s causation requirement. See H.R. REP. NO. 102-40(I), *reprinted in* 1991 U.S.C.C.A.N. 549; H.R. REP. NO. 102-40(II), *reprinted in* 1991 U.S.C.C.A.N. 694. The fact that Congress used the concept repeatedly in discussions of evidence (e.g., what types of evidence would or would not be sufficient proof of certain elements), *id.*, makes clear that Congress knew about this concept and could have used it as a causal standard if it were so inclined.

57. See *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989); *Vill. of Arlington Heights*, 429 U.S. 252; *Mt. Healthy City Sch. Dist.*, 429 U.S. 274; *Bibbs*, 778 F.2d 1318.

58. Professor Haggard suggests otherwise. He suggests that the “motivating factor” formulation adopted by the 1991 Act refers to factors that are “sufficient albeit not necessary.” See HAGGARD, *supra* note 21, at 61. There is no explanation for this assertion. Rather, it seems to be based on an elimination of potential causal concepts, much as I have done. However, Professor Haggard’s list of causal concepts includes only necessity, sufficiency, and necessity-and-sufficiency. *Id.* at 59–60. Conspicuously missing from this list is the concept of minimal causation. Thus, it is not clear that Professor Haggard considered this possibility. Moreover, as noted in the text, given the absence of any discussion of sufficiency by Congress (or in prior judicial opinions), it seems highly unlikely that Congress intended to invoke a necessity-or-sufficiency standard.

59. See Zimmer, *supra* note 15, at 1911 (“A motivating factor’ means that race or gender played any role, however minor, in the employer’s decision.”).

60. Actually, in the primary reports on the 1991 Act, Congress used—and described—the phrase “contributing factor,” as opposed to “motivating factor.” See H.R. REP. NO. 102-40(I), at 48 (1991), *reprinted in* 1991 U.S.C.C.A.N. 549, 586; H.R. REP. NO. 102-40(II), at 18 (1991), *reprinted in* 1991 U.S.C.C.A.N. 694, 711. The “motivating factor” language appeared in the Brooks-Fish amendment to the House bill (H.R. 1) in June of 1991. The same language was used in the Senate bill (S. 1745), which ended up being passed by the House and signed into law, becoming the 1991 Act. See LEX K. LARSON, CIVIL RIGHTS ACT OF 1991 6–7 (1992) (describing legislative history of bill which became 1991 Act). However, most of the legislators seemed to equate the two formulations. See, e.g., 137 CONG. REC. 13,525 (June 5, 1991) (Rep. McNulty: “The slight change from ‘contributing’ to ‘motivating’ does little and, in fact, simply goes back to H.R. 4000 as introduced.”); *id.* at 13,538 (June 5, 1991) (Rep. Stenholm: “This change is cosmetic and will not materially change the courts’ findings.”); *id.* at 30,688 (Nov. 7, 1991) (Sen. LaFalce equating “motivating factor” and “contributing factor”); see also Zimmer, *supra* note 15, at 1911 n.101, 1946 n.233 (“The change from ‘contributing factor’ to ‘motivating factor’ was not intended to suggest any change in concept.”).

satisfied when a protected characteristic, such as race or sex, was “a factor influencing the decision.”<sup>61</sup> That the characteristic must be a “factor” suggests a need for some causal influence (that is, at least minimal causation). That the characteristic need only be “a factor” suggests that there does not need to be necessity or sufficiency (that is, any requirement of more-than-minimal causation). Congress also analogized the test to the concept of “contributing” to,<sup>62</sup> or “play[ing] a role”<sup>63</sup> in an employer’s decision. The concepts of contribution or role also suggest a need for some causal influence, but not a requirement that such influence be dispositive in any way—that is, minimal causation.<sup>64</sup> Finally, Congress made clear that its intent was to proscribe “consideration of”<sup>65</sup> and “reliance on”<sup>66</sup> protected characteristics—formulations that evoke the concept of utilization of protected characteristics, which occurs when there is minimal causation.<sup>67</sup> Thus, although Congress may have been unfamiliar with the concept of minimal causation, Congress’s descriptions of “motivating factor” causation describe that concept perfectly.

Similarly, the judicial decisions that preceded the 1991 Act, upon which the Act was based, appear to have invoked the concept of minimal causation (again, without labeling it as such). For example, the plurality in *Price Waterhouse v. Hopkins* explained that its “motivating part” standard meant that the protected characteristic was “one of [the] reasons” for the employer’s decision.<sup>68</sup> Elsewhere, the plurality said that the inquiry was whether a protected characteristic was “a factor” in the decision.<sup>69</sup> Moreover, the plurality seemed to equate this formulation with the finding by the district court in that case that sex played a

61. H.R. REP. NO. 102-40(I), at 48 (1991), *reprinted in* 1991 U.S.C.C.A.N. 549, 586 (citing *Bibbs*, 778 F.2d at 1323–24).

62. H.R. REP. NO. 102-40(I), at 48, *reprinted in* 1991 U.S.C.C.A.N. 549, 586 (stating that the test requires that utilization of the protected characteristic “actually contributed or was otherwise a factor in an employment decision”); H.R. REP. NO. 102-40(II), at 18, *reprinted in* 1991 U.S.C.C.A.N. 694, 711 (test requires that utilization of the protected characteristic “was a contributing factor in the employment decision—*i.e.*, that discrimination actually contributed to the employer’s decision”).

63. H.R. REP. NO. 102-40(II), at 18, *reprinted in* 1991 U.S.C.C.A.N. 549, 586.

64. *See* Zimmer, *supra* note 15, at 1911 (“A motivating factor’ means that race or gender played any role, however minor, in the employer’s decision.”) (citing legislative history); *id.* at 1946 (same); *see also* Griffith v. City of Des Moines, 387 F.3d 733, 739 (8th Cir. 2004) (Magnuson, J., concurring) (“In amending the Civil Rights Act in 1991, Congress sought to prohibit any consideration of race or other improper characteristic, no matter how slight, in employment decisions.”).

65. *See* 42 U.S.C. § 2000e-2(m) (2000) (entitling section containing “motivating factor” formulation, “IMPERMISSIBLE CONSIDERATION OF RACE, COLOR, RELIGION, SEX, OR NATIONAL ORIGIN IN EMPLOYMENT PRACTICES”); *see also* Civil Rights Act of 1991, Pub. L. No. 102-166, § 107, 105 Stat. 1071, 1075 (1991) (entitling Section 107, containing “motivating factor” formulation, “CLARIFYING PROHIBITION AGAINST IMPERMISSIBLE CONSIDERATION OF RACE, COLOR, RELIGION, SEX, OR NATIONAL ORIGIN IN EMPLOYMENT PRACTICES”).

66. *See* H.R. REP. NO. 102-40(II), at 2, *reprinted in* 1991 U.S.C.C.A.N. 694, 694–95.

67. *See supra* Part I.

68. 490 U.S. 228, 250 (1989). The plurality did not distinguish its “motivating part” formulation from the “motivating factor” formulation used elsewhere in that opinion.

69. *Id.* at 241.

part in Price Waterhouse's decision not to promote Ms. Hopkins.<sup>70</sup> These descriptions suggest that the plurality's "motivating part"/"motivating factor" standard reflects the logical concept of minimal causation.

And in *Bibbs v. Block*,<sup>71</sup> a case cited favorably in the legislative history of the 1991 Act, the Eighth Circuit described a "motivating factor" as "discernible,"<sup>72</sup> and a concurring judge explained "that term ['discernible factor'] denotes the existence of a causal relationship in some degree."<sup>73</sup> These descriptions too suggest minimal causation.

Thus, the "motivating factor" standard from the 1991 Act (and the "motivating part" standard from *Price Waterhouse*) is best understood as invoking the concept of minimal causation. And the various formulations that have been used to describe the "motivating factor" formulation—such as "a factor," "a contributing factor," "a role," or requirements that a protected characteristic be "considered" or "relied upon"—should also be understood as referring to the concept of minimal causation.

#### C. THE "SUBSTANTIAL FACTOR" FORMULATION AS A TEST OF MINIMAL CAUSATION

There are two possible understandings of the "substantial factor" test. One is an equivalence position. Under this view, the "substantial factor" test is no different than the "motivating factor" test (which, as discussed above, denotes minimal causation). A second view is a restrictive position. Under this view, the "substantial factor" test is more restrictive than the "motivating factor" test. While both positions find support in the case law, the first position (equivalence) seems more persuasive. More importantly, the second (restrictive) position is problematic as a matter of causal logic. Thus, we should understand the "substantial factor" test, like the "motivating factor" test, as referring to the concept of minimal causation.

If it were simply a matter of understanding the case law, either the equivalence position or the restrictive position might find support. The equivalence position seems to find support in the Court's First Amendment and Equal Protection jurisprudence. In *Mt. Healthy v. Doyle*, for example, the Court expressly equated the two standards, holding that the plaintiff must show that his protected speech "was a 'substantial factor' [in the employer's termination decision] or to put it in other words, that it was a 'motivating factor.'"<sup>74</sup>

The restrictive position arguably finds support in the fact that Justice O'Connor in her *Price Waterhouse* concurrence chose to adopt a "substantial factor" test, rather than the "motivating factor"/"motivating part" test adopted by the plural-

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70. *Id.* at 255.

71. 778 F.2d 1318 (8th Cir. 1985).

72. *Id.* at 1321 n.4.

73. *Id.* at 1329 (Bright, J., concurring).

74. *Mt. Healthy City Sch. Dist. v. Doyle*, 429 U.S. 274, 287 (1977).

ity.<sup>75</sup> If we saw that choice as deliberate, we might conclude that she did this because she thought that the plurality's "motivating factor" test was too lenient. That is, we might conclude that Justice O'Connor intended the "substantial factor" test to be more restrictive than the "motivating factor" test.<sup>76</sup>

However, it is not clear that Justice O'Connor really rejected the plurality's "motivating factor" test—much less that she intended the "substantial factor" test to be more restrictive. Nowhere in her concurrence does she criticize the "motivating factor" test. To the contrary, at one point she relies on "motivating factor" language from *Village of Arlington Heights v. Metropolitan Housing Development Corp.*,<sup>77</sup> an Equal Protection case cited by *Mt. Healthy* for its equivalence position.<sup>78</sup> This suggests that she may have seen her "substantial factor" test as having its origins in the *Mt. Healthy* line of cases, and thus being equivalent to the "motivating factor" test. Finally, Justice O'Connor repeatedly equates the "substantial factor" test with an employer's "consideration of an illegitimate factor"<sup>79</sup>—a concept that sounds a lot like minimal causation. Thus, it is possible, maybe even likely, that Justice O'Connor did not intend to deviate from *Mt. Healthy* in her *Price Waterhouse* concurrence. It is possible that she saw the "substantial factor" test as equivalent to the "motivating factor" test—a test of minimal causation.

Moreover, it is arguable that, even if Justice O'Connor intended to adopt a restrictive view of the "substantial factor" test, *Mt. Healthy's* equivalence position controls. Given that *Mt. Healthy* introduced the "substantial factor" test to anti-discrimination law, that case would seem fairly persuasive on its meaning. And the equivalence position in *Mt. Healthy* was adopted by a unanimous court, whereas the restrictive position in *Price Waterhouse* was adopted by at most one Justice.<sup>80</sup>

But the debate over the case law on the "substantial factor" test is probably beside the point. As a logical matter, given the terms of the current debate over causation, the "substantial factor" test cannot logically be more restrictive than "motivating factor"/minimal causation. There is no possible logical distinction between the two tests. We can understand this by looking at the "substantial factor" test from the perspective of our causal framework.

We know that "substantial factor" causation must be less restrictive than the "but for"/necessity test. Justice O'Connor clearly used the "substantial factor" test as the

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75. Compare *Price Waterhouse v. Hopkins*, 490 U.S. 228, 276 (1989) (O'Connor, J., concurring), with *id.* at 250 (plurality).

76. See Zimmer, *supra* note 15, 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' . . .").

77. See *Price Waterhouse*, 490 U.S. at 268 (O'Connor, J., concurring) (citing *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 265–66 (1977)).

78. See *Mt. Healthy*, 429 U.S. at 287 n.2 (citing *Arlington Heights*, 429 U.S. at 270–71 & n.21).

79. See *Price Waterhouse*, 490 U.S. at 265, 268, 273, 275 (O'Connor, J., concurring).

80. *Id.* at 277. Like Justice O'Connor, Justice White adopted the "substantial factor" test. See *id.* at 259 (White, J., concurring). However, Justice White quoted the equivalence language from *Mt. Healthy*. See *id.* Thus, he does not appear to have adopted the restrictive position.

first tier of a two-tier approach to causation; an approach in which the plaintiff can shift to the defendant the burden of proving “but for” causation (or lack of “but for” causation) by proving something less than “but for” causation.<sup>81</sup> The “substantial factor” test must therefore be less restrictive than the “but for” test.<sup>82</sup>

The question therefore becomes: Could “substantial factor” refer to a category of causation that is less restrictive than “but for” (necessity) yet more restrictive than “motivating factor” (minimal causation)? The answer is no—at least given the terms of the current debate. We can see from our framework of causal concepts that the only causal concept between “but for” (necessity) and “motivating factor” (minimal causation) is the category of necessity-or-sufficiency.<sup>83</sup> Yet we have also seen that the debate over causation in current doctrine does not contemplate the concept of sufficiency; neither Justice O’Connor, nor any of the other Justices in *Price Waterhouse* or its predecessors, ever mentioned either the term or the concept.<sup>84</sup> And without the concept of sufficiency, there can be no necessity-or-sufficiency category. Effectively, that category disappears from our framework, along with all other categories of causation that involve sufficiency:<sup>85</sup>

<b>Table II: Causal Concepts Not Involving Sufficiency</b>	
Most Restrictive ↑ ↓ Least Restrictive	Necessity (But For)
	Minimal Causation (Motivating Factor) (some causal force, but no necessity)
	No Causation

81. *See id.* at 276–77 (O’Connor, J., concurring).

82. *But see* *Ezekwo v. N.Y.C. Health & Hosps. Corp.*, 940 F.2d 775, 780–81 (2d Cir. 1991) (equating “substantial factor” with “but for”). *Ezekwo*’s claim makes little sense, given that Justice O’Connor clearly was looking for a concept less restrictive than “but for.”

83. *See supra* tbl.1 on p. 499.

84. *See supra* note 57.


85. One might conceivably argue that Justice O’Connor intended her “substantial factor” test to refer to the concept of necessity-or-sufficiency, which does lie between necessity-only (“but for”) and minimal causation (“motivating factor”). The argument would be that Justice O’Connor sought to find a middle ground between necessity (“but for”) and minimal causation (“motivating factor”), but was not familiar with a necessity-or-sufficiency test—that, had she been aware of the necessity-or-sufficiency concept, she would have intended her “substantial factor” test to denote this concept. However, this interpretation of “substantial factor” makes little sense in the context of Justice O’Connor’s concurrence. Her goal was to find a concept less restrictive than necessity (“but for”) to serve as a trigger to shift the burden to the defendant to show lack of necessity (the same-decision defense). Yet, while I argue in Part IV.B that a necessity-or-sufficiency test makes sense as a trigger for compensatory damages, it makes little sense as a trigger for shifting the burden to the defendant to mount a same- decision defense—as Justice O’Connor would use it. In this context, the necessity part of the

In this limited framework, which reflects the categories of causation available in the current debate, there is simply no category of causation between “but for” (necessity) and “motivating factor” (minimal causation). Given this limited framework, if the “substantial factor” test is to be less restrictive than the “but for” (necessity) test, it must be the same as the “motivating factor” (minimal causation) test.

Accordingly, the best understanding of the “substantial factor” test is that it, like the “motivating factor” test, is a test of minimal causation.<sup>86</sup>

D. PUTTING IT TOGETHER: UNDERSTANDING THE CAUSAL STRUCTURE OF CURRENT  
DISPARATE TREATMENT DOCTRINE

We have now “translated” the various formulations used in current disparate treatment law into precise, logical terms. The results of this analysis can be summarized as follows:

<b>Table III: Translation of Causal Concepts</b>		
	Formulation in Current Law (not ranked)	Logical Concept
More Restrictive    Less Restrictive	But For Same Decision/Action Determinative Influence/Factor	Necessity (But-For Causation)
	Motivating Factor/Part Substantial Factor A Factor A Contributing Factor A Role Considered Relied Upon	Minimal Causation

necessity-or-sufficiency test would be superfluous. It makes no sense to ask a plaintiff to prove necessity and then ask the defendant to prove lack of necessity (the same-decision defense). So, at best, we would have to see Justice O'Connor as adopting a sufficiency test. Yet sufficiency is no less restrictive than necessity—the whole point of Justice O'Connor's two-tier approach. And it is hard to imagine that it would be significantly easier for plaintiffs to prove sufficiency than it would be for them to prove necessity.

86. See RUTHERGLEN, *supra* note 38, at 49 (“The difference between ‘motivating’ and ‘substantial’ factors in the plurality and separate opinions [in *Price Waterhouse*] appears to be slight, so that in this respect *Price Waterhouse* does not differ significantly from the requirement of proof of a ‘motivating factor’ now codified in Title VII [by the 1991 Act].”). *But see* Zimmer, *supra* note 15, at 1930 n.173 (suggesting that there are at least five causal formulations between “but for” and “a motivating factor”—in decreasing order of restrictiveness: “the determining factor,” “a determining factor,” “the substantial factor,” “a substantial factor,” and “the motivating factor”). Professor Zimmer's might be a good description of the intent of various judges to find a nuanced middle ground between “but for” and “motivating factor.” The problem is that, given the terms of the current debate, no such middle ground exists.



This mapping helps us understand causation in disparate treatment in a precise and coherent manner, which has not been possible to date.

This mapping also makes apparent the causal structure of current disparate treatment law. In Part I, we saw that there are six potential causal concepts (no causation, minimal causation, necessity-or-sufficiency, necessity-only, sufficiency-only, and necessity-and-sufficiency). Yet our mapping makes clear that current doctrine involves only two of these six concepts: minimal causation (“motivating factor”) and necessity-only (“but for”). Thus, we can understand the battle over which causation requirement has been adopted—and should be adopted—by disparate treatment doctrine as essentially a battle between these two competing causal standards.<sup>87</sup>

### III. THE FLAWS INHERENT IN NECESSITY AND MINIMAL CAUSATION, AND THE (THUS FAR FUTILE) SEARCH FOR A MIDDLE GROUND

This Part will critique both the necessity/“but for” standard<sup>88</sup> and the minimal causation/“motivating factor” standard<sup>89</sup> from a normative standpoint. It will conclude that both standards are flawed. This Part will then critique recent attempts to combine these two flawed standards into a two-tier approach, thereby minimizing each standard’s flaws. It will conclude that, while the two-tier approach is a step in the right direction, and is the best approach possible under current doctrine, this approach is ultimately doomed to failure.

Before embarking upon this analysis, it will be helpful to remember that disparate treatment law has two basic goals: It seeks to prohibit and deter certain conduct (discrimination), and it seeks to compensate victims of such conduct.<sup>90</sup> It will be essential, as we critique various standards, to decouple these two goals and to keep in mind that a particular causal standard may advance one of these two goals, but fail to advance—or even interfere with—the other.

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87. See COX, *supra* note 23, at 7-31 (“[i]n the history of employment discrimination, two tests of causation have competed for favor”: the “but for” (necessity) test and the “a cause” (motivating factor or minimal causation) test).

88. Critics of a “but for” test (proponents of a “motivating factor” test) include Theodore Y. Blumoff & Harold S. Lewis, Jr., *The Reagan Court and Title VII: A Common Law Outlook on a Statutory Task*, 69 N.C. L. REV. 1, 66 (1990); Alfred W. Blumrosen, *Society in Tradition II: Price Waterhouse and the Individual Employment Discrimination Case*, 42 RUTGERS L. REV. 1023, 1042-44 (1990); Mark S. Brodin, *The Standard of Causation in the Mixed-Motive Title VII Action: A Social Policy Perspective*, 82 COLUM. L. REV. 292, 323, 326 (1982); William B. Gould, IV, *The Supreme Court and Employment Discrimination Law in 1989: Judicial Retreat and Congressional Response*, 64 TUL. L. REV. 1485, 1502-03 (1990); Gudel, *supra* note 54, at 96-97; Weber, *supra* note 18, at 518-20, 522.

89. Critics of a “motivating factor” test (proponents of a “but for” test) include COX, *supra* note 23, at 7-33; Robert Belton, *Causation in Employment Discrimination Law*, 34 WAYNE L. REV. 1235, 1282-83 (1988); see also *Price Waterhouse v. Hopkins*, 490 U.S. 228, 282 (1989) (Kennedy, J., dissenting); *Bibbs v. Block*, 778 F.2d 1318, 1322 (8th Cir. 1985) (arguing that standard lower than “but for” would provide windfall to plaintiff).

90. See, e.g., H.R. REP. NO. 102-40(II), at 17 (1991), *reprinted in* 1991 U.S.C.C.A.N. 694, 710 (“Title VII’s twin objectives of deterring employers from discriminatory conduct and redressing the injuries suffered by victims of discrimination”).

A. THE PROBLEM WITH A MINIMAL CAUSATION (“MOTIVATING FACTOR”) STANDARD:  
WINDFALL TO PLAINTIFFS

In certain cases, a minimal causation/“motivating factor” standard yields a windfall to the plaintiff. That is, the plaintiff is placed in a better position than she would have been in absent the defendant’s actions.<sup>91</sup>

Consider, for example, our hypothetical in which an employer considers both sex and tardiness in deciding to fire an employee. And suppose that the employer would have fired the employee as a result of her tardiness, irrespective of any other factors it considered. In such a case, the tardy employee would have been fired even if her employer had not considered her sex in its decision. If a court ordered the employer to retain her (or pay damages for failing to do so) despite her tardiness—as would occur under a minimal causation standard—the employee would be placed in a better position that she would have been in absent her employer’s wrongdoing.<sup>92</sup>

1. Over-Determination and Windfall

This windfall arises because a minimal causation standard imposes liability against defendants even when their actions are “over-determinative.”<sup>93</sup> A defendant’s action (X) is over-determinative whenever another factor or factors (Y), acting simultaneously with X, are independently sufficient to trigger the event (E) that injured the plaintiff. In such a case, E would have occurred when it did irrespective of X (as a result of Y). So X becomes causally superfluous—“over-determinative.”

Because the event (E) would have occurred irrespective of the defendant’s act, the plaintiff would have been injured irrespective of the defendant’s act. Thus, if the defendant is forced to compensate the plaintiff for E, then the plaintiff will be placed in a better position than she would have been in absent the defendant’s action: she will receive a windfall.

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91. See, e.g., *Price Waterhouse*, 490 U.S. at 259 (White, J., concurring) (noting that absent same decision/“but for” test, plaintiff might be made “better off by exercising his constitutional rights than by doing nothing at all”) (citing *Mt. Healthy City Sch. Dist. v. Doyle*, 429 U.S. 274, 285 (1977)); see also *Bibbs*, 778 F.2d at 1322 (providing make-whole relief absent “but for” causation would yield a “windfall” to the plaintiff); Brodin, *supra* note 88, at 323 (same); Sam Stonefield, *Non-Determinative Discrimination, Mixed Motives, and the Inner Boundary of Discrimination Law*, 35 *BUFF. L. REV.* 85, 139 (1986) (same).

92. This critique applies to any causal standard which does not include necessity; the same windfall would occur, for example, where the employer’s conduct was sufficient but not necessary. Here, I will focus on this argument as a critique of the minimal causation standard (where the employer’s conduct is neither necessary nor sufficient).

93. Courts and theorists tend to talk about events as being “over-determined” rather than talking about actions as being “over-determinative.” See, e.g., *Price Waterhouse*, 490 U.S. at 241 (plurality) (discussing events that are “causally overdetermined”). However, windfall to the plaintiff does not result from the fact that an event is “over-determined”—i.e., from the fact that the total causal influence present is more than enough to trigger the event. Rather, this windfall results from the fact that the defendant’s action is not necessary to trigger the result, and is thus over-determinative. Thus, I will focus on over-determinative actions rather than over-determined events.

The classic two-fires hypothetical, addressed by most first-year tort students, is the paradigmatic case of over-determination: In that hypothetical, two fires converge and combine before burning down the plaintiff's building.<sup>94</sup> The first fire (which we can call Fire X), was started by the defendant. The second fire (which we can call Fire Y) was independently sufficient to burn down the plaintiff's building. Thus, even absent Fire X (the defendant's fire), the plaintiff's building would have burned down—as a result of Fire Y. Accordingly, the court expressed concern that, if the defendant were forced to compensate the plaintiff for the loss of his building, then the plaintiff would be placed in a better position than he would have been in absent the defendant's fire.

Those familiar with tort law might respond to the windfall critique of the “motivating factor” test by noting that over-determination is not much of a problem in tort law because it is rarely encountered outside of first-year torts classes. Factual scenarios like the two-fires hypothetical simply do not occur very often in tort law.<sup>95</sup>

However, the problem of over-determination is likely to be far more important in disparate treatment law than in tort law because causal factors are more likely to apply simultaneously in disparate treatment cases. Over-determination occurs only in cases in which two forces have a simultaneous effect. In the two-fires hypothetical, over-determination occurs only because the two fires reached the building at the same time.<sup>96</sup> In the physical world of tort law, such simultaneity will likely be rare.<sup>97</sup> Disparate treatment law, however, deals with decisionmaking, a realm in which multiple factors do operate simultaneously. 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). All such factors are taken into account in the decisionmaking process in a way that cannot realistically be seen

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94. See *supra* text accompanying note 26.

95. I am indebted to Arthur Best and Jake Barnes for this point.

96. If Fire X had reached the building before Fire Y, Fire X would not be over-determinative. Fire X would have been necessary; the outcome (the building burning down) would not have occurred when it did absent Fire X. Recall that weak necessity—the relevant type of necessity—has a temporal element: It asks whether the event (E) would have occurred *when it did* absent the defendant's act, see *supra* note 22. And if Fire Y had reached the building first, then Fire X would likely be irrelevant; the building would have already burned down.

Had Fire Y reached the building first, the person who started Fire Y might argue that he should not be liable for the full cost of the building because the building would have had a limited life expectancy when Fire Y destroyed it (due to Fire X). However, this would be an issue of supervening or intervening cause—doctrines which tend to be thought of as dealing with proximate cause (and policy considerations, such as foreseeability), rather than cause-in-fact. See DOBBS, *supra* note 15, at 460–63.

97. In an era when determining timing with precision was more difficult, more events might have seemed to have occurred simultaneously. However, with the improvement of our ability to measure and determine temporal sequences, fewer events are likely to be seen as occurring simultaneously. A similar problem occurs when only one of two factors actually causes an injury, but the factfinder cannot determine which factor was the cause. See, e.g., *Summers v. Tice*, 199 P.2d 1, 5 (Cal. 1948) (holding two shooters liable where one shooter's shot struck the plaintiff). In these cases, the problem is one of proof, not over-determination.

as anything but simultaneous. Thus, while over-determination—and the concern about windfall to the plaintiff—may be rare in tort law, it will likely be common in disparate treatment law.<sup>98</sup>

Thus, over-determination is likely to be a significant problem in disparate treatment law. And the windfall to plaintiffs that results from over-determination provides a strong criticism of the minimal causation (“motivating factor”) standard. Under such a standard, liability will attach for over-determinative factors; under a necessity (“but for”) standard, it would not. In our firing hypothetical, if the employer would have fired the employee based on her tardiness alone (rendering sex over-determinative), then, under a minimal causation standard, liability would attach; yet under a “but for” standard, liability would not attach.

## 2. The Limited Implications of the Windfall Critique: Disaggregating Compensation and Liability

The windfall-to-plaintiff argument provides only a limited argument against the minimal causation standard. This becomes apparent when we disaggregate compensation and liability.

The windfall-to-plaintiff argument is an argument against providing certain compensatory damages to plaintiffs. The point of this argument is that, all other things being equal, the plaintiff would not have been retained (or hired, or promoted). Forcing a defendant who has engaged in an over-determinative act of utilization to retain the plaintiff, or to compensate the plaintiff for the cost of being fired, would therefore place the plaintiff in a better position than she would otherwise have been.<sup>99</sup> In other words, the windfall-to-plaintiff critique might provide a basis for declining to compen-

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98. There is a second reason why over-determination tends not to be a significant issue in modern tort law: Modern tort law has effectively discarded its necessity (“but for” causation) requirement. Over-determination only precludes liability under a necessity/“but for” standard. Yet modern tort law applies a “substantial factor” standard, which permits liability based on *sufficiency* in over-determined cases—i.e., even where over-determination renders the defendant’s action non-necessary to the outcome. Thus, in modern tort litigation, there is little reason to discuss over-determination. See RESTATEMENT (SECOND) OF TORTS § 432(1) (1965) (applying “substantial factor” test); *id.* § 432(2) (defining “substantial factors” to include those which are either necessary *or sufficient* to bring about the outcome). Disparate treatment law, on the other hand, is still focused exclusively on necessity, virtually ignoring the concept of sufficiency. As discussed in Part II.B, *supra*, neither the term “sufficiency” nor the concept of sufficiency appear in the 1991 Act, the legislative history of that Act, or the cases decided prior to that Act. See *supra* notes 56–57. Thus, over-determination will often be an issue. I will argue in Part IV.B that disparate treatment law should adopt a necessity-or-sufficiency rule similar to the “substantial factor” test in tort law.

99. There is a windfall only if the plaintiff is compensated for damages which flow from the termination itself. This reasoning would not preclude compensation for damages that flow from the use of a protected characteristic in the decisionmaking process irrespective of its outcome (e.g., damages for stigmatic harm). See Stonefield, *supra* note 91, at 139. The possibility of providing such damages under a “but for” standard will be addressed below in Part III.B.2.a.

sate the plaintiff in an over-determined case.<sup>100</sup>

However, this reasoning says nothing about the desirability of imposing liability—and some kind of punishment or deterrent sanction—upon a defendant who has utilized a protected characteristic in arriving at an over-determined decision. I will argue in Part III.B.2 that we should impose punitive/deterrent sanctions in over-determined cases, even if we are persuaded by the windfall-to-plaintiff argument that we should not provide compensation in such cases.<sup>101</sup>

#### B. PROBLEMS WITH A NECESSITY (“BUT FOR”) STANDARD

There are three problems with the necessity/“but for” standard: (1) It is difficult to prove this type of causation; (2) this standard allows some employers to engage in discrimination with impunity; and (3) this standard will yield a windfall to defendants in certain cases (a critique which has not been articulated to date).

##### 1. Difficulty of Proof and Control over the Evidence

“But for” causation is difficult to prove.<sup>102</sup> In part, this is because of the hypothetical nature of this type of causation. It requires the mental construction of a non-existent world—one in which the defendant’s action did not occur.<sup>103</sup> This difficulty is compounded in the context of disparate treatment law, where the fact in question (the role of the protected characteristic in the decisionmaking formula) occurs entirely inside the decisionmaker’s head. Moreover, in these cases, the defendant generally has control over most of the evidence that

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100. I say “might” because the analysis is not yet complete. I will suggest in Part III.B.3, *infra*, that we should not treat the windfall-to-plaintiff argument as dispositive on the issue of compensation—that *not* compensating the plaintiff in such cases yields an often-unjustified windfall to defendants. My point in the instant Part is only that even if we declined to compensate plaintiffs in over-determined cases out of a concern about windfall, we might nonetheless choose to impose punitive/deterrent sanctions in such cases.

101. Part III.B.2 will also address enforcement issues that arise when we disaggregate compensation and liability (e.g., who would sue, what incentives they would have, and whether such plaintiffs would have standing).

102. *See, e.g.*, *Price Waterhouse v. Hopkins*, 490 U.S. 228, 264 (1989) (O’Connor, J., concurring); Brodin, *supra* note 88, at 321–22.

103. This hypothetical aspect of the “but for” test has led some critics to call for the abandonment of the test. *See, e.g.*, *Price Waterhouse*, 490 U.S. at 240 (plurality) (criticizing hypothetical nature of “but for” inquiry as incompatible with Title VII’s temporal focus on time of decision); *id.* at 264 (O’Connor, J., concurring) (“[A]t other times the [but-for] test demands the impossible. It challenges the imagination of the trier to probe into a purely fanciful and unknowable state of affairs.”) (quoting Wex Malone, *Ruminations on Cause-in-Fact*, 9 STAN. L. REV. 60, 67 (1956)); Brodin, *supra* note 88, at 320 (“We place unrealistic expectations on our adversary system and its evidentiary format when we ask a judge to find as a matter of fact what would have occurred if the discrimination, already shown to have been a motivating consideration, had not so operated.”). Given the longstanding ubiquity of this test in numerous areas of law, including tort and criminal law, it seems difficult to argue that factfinders are incapable of engaging in this hypothetical exercise.

might be used to prove this fact.<sup>104</sup> Finding and presenting proof of such a fact can be daunting. Finally, it can be argued that this difficulty arises because of wrongdoing by the defendant.<sup>105</sup> Accordingly, one could argue persuasively that there is something unfair about requiring plaintiffs to prove “but for” causation in disparate treatment cases.<sup>106</sup>

The difficulty-of-proof critique might provide an argument for rejecting the “but for” standard in favor of a more lenient standard (such as the minimal causation/“motivating factor” standard). However, a more closely responsive approach to the difficulty-of-proof critique would be to place the burden of proving “but for” causation—or, more precisely, the burden of proving *lack of* “but for” causation—on the defendant. After all, the law often shifts the burden of proof to parties who have greater access to evidence, or who have created certain types of risk.<sup>107</sup> Thus, while the difficulty-of-proof argument is compelling, it is not compelling as an argu-

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104. See Zimmer, *supra* note 15, at 27 n.77 (“[M]ost all the evidence why the defendant acted the way it did toward the plaintiff is in the hands of the defendant.”); cf. *Int’l Bhd. of Teamsters v. United States*, 431 U.S. 324, 359 n.45 (1977) (“[T]he employer was in the best position to show why any individual employee was denied an employment opportunity. Insofar as the reasons related to available vacancies or the employer’s evaluation of the applicant’s qualifications, the company’s records were the most relevant items of proof. If the refusal to hire was based on other factors, the employer and its agents knew best what those factors were and the extent to which they influenced the decisionmaking process.”).

105. See *Price Waterhouse*, 490 U.S. at 249–50 (plurality) (“It is fair that [the defendant] bear the risk that the influence of legal and illegal motives cannot be separated, because he knowingly created the risk and because the risk was created not by innocent activity but by his own wrongdoing.”) (quoting *NLRB v. Transp. Mgmt.*, 462 U.S. 393, 403 (1983)); *id.* at 262 (O’Connor, J., concurring) (“[T]he employer has created uncertainty as to causation by knowingly giving substantial weight to an impermissible criterion”); Brodin, *supra* note 88, at 326 & n.142.

Why the act of utilization should be considered wrongdoing will be addressed below. See *infra* Part III.B.2.

106. See, e.g., *Price Waterhouse*, 490 U.S. at 263 (O’Connor, J., concurring) (“[T]he law has long recognized that in certain ‘civil cases’ leaving the burden of persuasion on the plaintiff to prove ‘but-for’ causation would be both unfair and destructive of the deterrent purposes embodied in the concept of duty of care.”); *Toney v. Block*, 705 F.2d 1364, 1366 (D.C. Cir. 1983) (Scalia, J.) (stating that it would be “destructive of the purposes of Title VII to require the plaintiff to establish . . . the difficult hypothetical proposition that, had there been no discrimination, the employment decision would have been made in his favor”).

107. See CHRISTOPHER B. MUELLER & LAIRD C. KIRKPATRICK, *EVIDENCE* 105 (3d ed. 2003) (stating that the law often shifts the burden of proof to party most likely to have access to proof); see also *Price Waterhouse*, 490 U.S. at 273 (O’Connor, J., concurring) (“Presumptions shifting the burden of proof are often created to . . . conform with a party’s superior access to the proof.”) (quoting *Teamsters*, 431 U.S. at 359 n.45); *Haft v. Lone Palm Hotel*, 478 P.2d 465 (Cal. 1970) (deciding that where plaintiffs proved that defendants failed to provide a lifeguard or post a warning sign, the burden shifted to defendants to show the absence of a lifeguard did not cause the drowning); *Summers v. Tice*, 199 P.2d 1, 5 (Cal. 1948) (holding that where two defendants negligently shoot at the same time, and the plaintiff is struck by two shots, but the majority of plaintiff’s injuries stem from one shot, the burden of proving which defendant’s shot caused plaintiff’s injuries shifts to defendants); Erik S. Knutsen, *Ambiguous Cause-in-Fact and Structured Causation: A Multi-Jurisdictional Approach*, 38 *TEX. INT’L L.J.* 249, 262–63 (2003) (arguing that in some ambiguous causation cases, if the plaintiff proves defendant’s negligence increased the risk of the plaintiff’s injury, then the burden of proof of causation shifts to the defendant).

ment against a necessity/“but for” standard; it is compelling only as an argument for shifting the burden of proving that standard.<sup>108</sup>

## 2. Getting Away with Wrongdoing

One of the most common critiques of the “but for” standard is that it shields wrongdoers from liability.<sup>109</sup> Essentially, this is an argument that it is somehow wrongful for employers to utilize protected characteristics such as race or sex in their decisionmaking, even where such utilization does not rise to the level of being a “but for” cause of the decision. The argument is persuasive, though it is not as easy to make as it might appear.

The difficulty in making this argument stems from the fact that the concept of wrongfulness in this area tends to be based on causation. We generally consider conduct wrongful—and thus seek to prohibit it—when we believe it *causes* some harm to individuals or to society.<sup>110</sup> So when we say that conduct is wrongful, we generally mean that it causes harm. But this begs the question: What do we mean when we say that conduct *causes* harm?

Because our whole enterprise is one of determining appropriate causal standards, the question of wrongfulness seems fraught with circularity. We are

108. This burden-shifting approach has been adopted by the two-tier models of causation in the 1991 Act and the *Price Waterhouse* framework. See *infra* Part III.C.

109. See *Bibbs v. Block*, 778 F.2d 1318, 1327 (8th Cir. 1985) (Lay, C.J., concurring) (“[T]he employer should not be able to exculpate its proven invidious discriminatory practices by having a second chance to show that racial considerations did not affect the decision’s outcome.”); Blumrosen, *supra* note 88, at 1040 (arguing that the “same decision” rule—that is, the “but for” test—prevents employers from being held responsible for the consequences of wrongdoing); Brodin, *supra* note 88, at 319 (arguing that the same-decision defense precludes “vindication of a major public interest” and “an institutional wrong”); Gould, *supra* note 88, at 1502 (criticizing absolution of blameworthy employer under the “but for” standard); Gudel, *supra* note 54, at 97 (noting that under the “but for” test the discriminator employer escapes liability if it is fortunate to have another sufficient reason for its action); see also H.R. REP. NO. 102-40(I), at 47 (1991), reprinted in 1991 U.S.C.C.A.N. 549, 585 (criticizing *Price Waterhouse*’s “but for” standard as “send[ing] a message that a little overt sexism or racism is okay, as long as it was not the only basis for the employer’s action”); Stonefield, *supra* note 91, at 95 (stating that the “but for” test “tolerates many practices which clearly are, and properly should be, forbidden by law”).

110. One might argue that harm is irrelevant—that the consideration of an immutable characteristic, such as race or sex (or any non-merit-based characteristic) is inherently morally wrong, irrespective of harm to the plaintiff or to society. See, e.g., *Price Waterhouse v. Hopkins*, 490 U.S. 228, 265 (1989) (O’Connor, J., concurring) (“There is no doubt that Congress considered reliance on gender or race in making employment decisions an evil in itself.”). There are two problems with this argument. First, Professor Alexander persuasively shows that, despite its intuitive appeal, it is not easy to demonstrate that discriminatory decisionmaking is inherently morally wrong. See generally Larry Alexander, *What Makes Wrongful Discrimination Wrong? Biases, Preferences, Stereotypes, and Proxies*, 141 U. PA. L. REV. 149 (1992). Second, most arguments that racism or sexism is “inherently” wrong are based not on the inherent moral quality of the decision, but rather on some harm that is perceived to flow from these types of decisionmaking. That is, they are not arguments about an intrinsic evil; rather, they are arguments that such decisionmaking inevitably or often causes some type of harm, either to the person who is the subject of the decision or to society at large. See, e.g., *Price Waterhouse*, 490 U.S. at 265 (O’Connor, J., concurring) (“[W]hatever the final outcome of a decisional process, the inclusion of race or sex as a consideration within it harms both society and the individual.”). This Section will address such arguments.

trying to determine a causal standard to proscribe harmful conduct. Yet we must define harmfulness by reference to a causal standard.

For example, suppose that we define as harmful any conduct which causes harm at a minimal causation/“motivating factor” level. By definition, some such conduct will not rise to the level of “but for” causation; it will not pass a “but for” test. Thus, by definition, a “but for” test will let defendants get away with some harmful (wrongful) conduct. On the other hand, suppose that we define as harmful only that conduct which causes harm at a “but for” level. By definition, all such conduct will satisfy a “but for” test. Thus, under a “but for” test, no one would get away with harmful (wrongful) conduct.

That being said, even if we define harmfulness at the “but for” level, there are two important ways in which a “but for” test nevertheless lets defendants get away with harmful conduct.

*a. Individual Harm and Misapplication of the “But For” Test*

Current disparate treatment doctrine applies its “but for” test only to ultimate employment actions, such as firing.<sup>111</sup> That is, we ask whether the employer’s utilization of a protected characteristic was a “but for” cause of its firing decision. Yet it is easy to imagine harms flowing from utilization that are independent of being fired—harms that would occur even if a firing did not occur, or if the firing would have occurred irrespective of the employee’s race or sex.

For example, it is well-established that race- or sex-based decisionmaking can cause stigmatic or dignitary harm to the employee who was the subject of that decision.<sup>112</sup> Such harm flows from the fact that the employer has utilized a protected characteristic, such as race or sex, in his decisionmaking (or perhaps from the fact that the employee knows about or suspects such utilization). This harm occurs irrespective of the decisionmaking outcome (that is, irrespective of whether the employee is fired), and thus irrespective of whether the employer’s utilization of race or sex was a “but for” cause of a termination.

Additionally, the utilization of protected characteristics increases the risk of an adverse ultimate employment decision. By using a protected characteristic as a negative factor in an employment decision, the employer increases the likeli-

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111. See *supra* note 19 and accompanying text.

112. See Stonefield, *supra* note 91, at 124 & n.143 (“The humiliation, embarrassment and psychological harm that can be caused by discrimination is particularly severe and well-established.”) (citing G. ALLPORT, *THE NATURE OF PREJUDICE* (1954); K. CLARK, *DARK GHETTO* 63–64 (1965); O. COX, *CASTE, CLASS AND RACE* 383 (1948); E. GOFFMAN, *STIGMA* (1963); W. GREIER & P. COBBS, *BLACK RAGE* (1968)); see also *Price Waterhouse*, 490 U.S. at 265 (O’Connor, J., concurring) (noting the “stigmatic harm which comes from being evaluated by a process which treats one as an inferior by reason of one’s race or sex”); *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 360–61, 373–76 (1978) (Brennan, J., concurring in part and dissenting in part) (protected characteristics have too often been used “to stereotype and stigmatize politically powerless segments of society”) (quoting *Kahn v. Shevin*, 416 U.S. 351, 357 (1974) (Brennan, J., dissenting)); *Brown v. Bd. of Educ.*, 347 U.S. 483, 494 (1954) (finding that segregation in public education creates a sense of inferiority in black children and has a tendency to inhibit their mental and educational development).



hood that its decision will be adverse to the employee (that the employee will be fired, for example).<sup>113</sup> This risk is present irrespective of whether such utilization is a necessary/“but for” cause of an adverse decision; the risk is present even if the employee is not ultimately fired, or if the employee ultimately would have been fired even absent such utilization.<sup>114</sup>

Thus, employers’ utilization of protected characteristics in their decisionmaking may be a “but for” cause of harms, yet escape liability under current doctrine’s cramped version of the “but for” test. Under this version of the “but for” test, employers are allowed to get away with inflicting significant harm.<sup>115</sup>

*b. Societal Harm and the Limits of the “But For” Test*

There is another type of harm that is caused, in a “but for” sense, by employers’ utilization of protected characteristics, but which will not be proscribed by a “but for” test: societal harm. The “but for” test, by its nature, applies to individual litigants. That is, we ask whether the defendant’s conduct was a “but for” cause of harm suffered by the plaintiff. Thus, to the extent that the defendant’s conduct is a “but for” cause of harm to society, but not specifically to the plaintiff, that conduct will not be proscribed by the “but for” test.

Employers’ utilization of protected characteristics causes at least two types of social harm. First, such conduct increases the risk that minority group members will suffer discriminatory harm in the future. Social scientists would predict that, if undeterred, an employer’s minimally causal utilization of protected characteristics in one decision will increase the likelihood of future utilization by that employer, as well as future utilization by other employers.<sup>116</sup> So even

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113. See, e.g., *Bibbs*, 778 F.2d at 1321 (“[I]t would be unlawful for defendant to put [the employee] at a disadvantage in the competition because of his race, as well as actually to deny him the promotion for this reason . . . . Such a process ‘tend[s] to deprive’ him of an ‘employment opportunity.’”) (citing 42 U.S.C. § 2000e-2(a)).

114. Note that I am not arguing that we should compensate plaintiffs for such elevated risk. Although the law does occasionally compensate for elevated risk, as in the area of toxic or environmental torts, such compensation is generally *ex ante*; that is, we compensate people for increased risk of an event that may or may not occur in the future. We tend not to compensate people for increased risk of an event that has already occurred or not occurred. However, my point here deals with prohibition, not compensation. The point is that we should impose penalties for such risky conduct, as we do in other areas. See, e.g., WAYNE R. LAFAVE, *CRIMINAL LAW* 538–40 (3d ed. 2000) (discussing criminal attempts). In Part IV.A, *infra*, I discuss some ways in which penalties might be imposed without compensation.

115. I will argue in Part IV, *infra*, that the solution to this problem is to broaden our application of the “but for” test—to permit plaintiffs to recover damages where the defendant’s utilization is a “but for” cause of emotional or dignitary harm, even if such conduct is not a “but for” cause of a termination or some other economic harm. This approach is similar to one suggested by Professor Stonefield. See Stonefield, *supra* note 91, at 124 (arguing that compensatory damages are “important to provide relief for the emotional and psychological injuries caused [in a ‘but for’ sense] by unlawful discrimination”).

116. It is a fundamental principle of psychology that each time a person engages in an act and suffers no negative consequences, he becomes more likely to engage in that act in the future. See JONATHAN L. FREEDMAN ET AL., *SOCIAL PSYCHOLOGY* 243 (4th ed. 1981) (discussing reinforcement theory). Similarly, psychologists would also predict that, if some employers seem to be “getting away with” such conduct, others will likely follow suit. See *id.* at 243–45 (discussing modeling theory); see

though an employer's utilization may not be a "but for" cause of a particular adverse employment decision (for example, a firing), such utilization increases the likelihood that future employment decisions will utilize protected characteristics, possibly at the "but for" level.

Second, race- or sex-based decisionmaking creates friction within the community—even where such decisionmaking is not a "but for" cause of a particular adverse employment action. Such decisionmaking tears at the fabric of our society, creating antagonism between groups and individuals, and often causes social unrest.<sup>117</sup> Such decisionmaking also undercuts the legitimacy of society's distribution of wealth, income, and power.<sup>118</sup>

Even though the defendant's utilization of protected characteristics may be a "but for" cause of these societal harms, such harms cannot be addressed by using a standard "but for" test, applied to an individual plaintiff in a specific case. Society, after all, is not the plaintiff in such a case. Thus, the standard "but for" test will allow defendants to inflict such societal harm with impunity.<sup>119</sup>

### 3. Windfall to Defendants from Over-Determination

The third, and perhaps most intractable, problem with the "but for" test is that in certain cases this test yields a windfall to defendants. Specifically, the "but

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also Alexander, *supra* note 110, at 194 (discussing reinforcing effect of bias). These principles have been shown to apply in social settings, including the workplace. See Fletcher A. Blanchard et al., *Reducing the Expression of Racial Prejudice*, 2 PSYCHOL. SCI. 101, 101–05 (1991) (finding that subjects exhibited more racial prejudice in the presence of a vocal racist than when no influence was exerted); Jonathan C. Ziegert & Paul J. Hanges, *Employment Discrimination: The Role of Implicit Attitudes, Motivation, and a Climate for Racial Bias*, 90 J. APPLIED PSYCHOL. 553, 553–62 (2005) (explaining how implicit racist attitudes combined with a corporate climate which allowed racial bias predicted racial discrimination in the workplace).

117. See Alexander, *supra* note 110, at 197–98.

118. See *Grutter v. Bollinger*, 539 U.S. 306, 332 (2003) ("In order to cultivate a set of leaders with legitimacy in the eyes of the citizenry, it is necessary that the path to leadership be visibly open to talented and qualified individuals of every race and ethnicity."); *id.* at 373 (Thomas, J., concurring in part and dissenting in part) ("Beyond the harm the Law School's racial discrimination visits upon its test subjects, no social science has disproved the notion that this discrimination 'engender[s] attitudes of superiority or, alternatively, provoke[s] resentment among those who believe that they have been wronged by the government's use of race.'") (quoting *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 241 (1995) (Thomas, J., concurring in part and concurring in judgment)); Brietta R. Clark, Erickson v. Bartell Drug Co.: *A Roadmap for Gender Equality in Reproductive Health Care or an Empty Promise?*, 23 LAW & INEQ. 299, 361 (2005) ("[S]ociety has decided that discrimination based on certain kinds of assumptions is unacceptable because of the harm it can cause socially, psychologically, physically, and economically."); see also Paul Brest, *The Supreme Court, 1975 Term—Foreword: In Defense of the Antidiscrimination Principle*, 90 HARV. L. REV. 1, 53 (1976) (courts should continue to follow the "antidiscrimination principle," which disfavors race-based decisionmaking, in order to prevent racial injustice and the harms associated with such injustice); L. Darnell Weeden, Yo, Hopwood, *Saying No to Race-Based Affirmative Action Is the Right Thing To Do from an Afrocentric Perspective*, 27 CUMB. L. REV. 533, 547 (1997) ("The use of race [in decisionmaking] amounts to the most intrusive means of stimulating racial prejudice in an otherwise civilized people.")

119. I will argue in Part IV, *infra*, that the solution to this problem is either to commit to effective government enforcement of an anti-utilization norm or to empower (and incentivize) individual plaintiffs to act as private attorneys general to enforce this norm.

for” test will provide a windfall to defendants in cases with two sufficient factors (cases I will call “doubly over-determined”).

In a singly over-determined case, there is only one sufficient factor: Only the second factor (Y, the factor not in question) is sufficient to trigger the outcome. The sufficiency of Y renders the factor in question (X) over-determinative, and thus not necessary. But X itself is not sufficient to trigger the outcome. In a doubly over-determined case, X, as well as Y, is sufficient (rendering Y, as well as X, over-determinative). The following Section will explain why there will always be a windfall in cases with two sufficient factors, and why the “but for” rule allocates that windfall to defendants. The subsequent Section will argue that this allocation is problematic.<sup>120</sup>

*a. The Inevitable Windfall in Cases with Two Sufficient Factors*

In cases in which there are two factors at issue, each of which is sufficient to trigger the harm in question, someone—either the plaintiff or the defendant—will always receive a windfall. This is because, in such cases, each party can say that, absent his action, the outcome would have been the same.

Recall our firing hypothetical, in which the employee’s tardiness was independently sufficient to trigger the outcome (firing). The employee would have been fired irrespective of the employer’s utilization of her sex, rendering the utilization over-determinative. As noted above, compensating the employee in such a case would provide her with a windfall; she would be placed in a better position than she would otherwise have been in.<sup>121</sup>

But now suppose that the employer would have fired the employee as a result of her sex, irrespective of her tardiness. That is, suppose that the employer’s utilization of sex were also sufficient to trigger the termination; that the firing was doubly over-determined. Now, absent the employee’s tardiness, the employer would be liable for the termination (even under a necessity/“but for” standard). The employer is spared this consequence only because of the fortuitous (from its point of view) circumstances that the employee was tardy, and her tardiness was a sufficient reason to terminate her.<sup>122</sup>

The same concept can be illustrated using the two-fires hypothetical from tort law. In that hypothetical, Fire X, started by the defendant, converges with Fire Y, burning down the plaintiff’s house. And the second fire, Fire Y, was independently sufficient to cause the house to burn down. (This fact rendered Fire X over-determinative.) Absent the defendant’s action of starting Fire X, the plaintiff’s house would still have burned down as a result of Fire Y. Thus, if we forced the defendant to compensate the plaintiff, she would be placed in a better

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120. Although numerous critics have attacked the general “unfairness” of a “but for” rule, none appear to have articulated why such a rule is unfair. This is an argument to that effect.

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

122. Note that the situation would be different if the defendant’s action (utilization of sex) were not itself sufficient to bring about the result. In such a case, the plaintiff could not argue that, absent her tardiness, the defendant would have been forced to compensate her.

position than she would otherwise have been in. But now assume that Fire X, as well as Fire Y, was independently sufficient. In such a case, if we denied the plaintiff compensation, the defendant would be better off than he otherwise would have been. Absent Fire Y, he would have been forced to compensate the plaintiff. As a result of the fortuitous occurrence (from the defendant's perspective) of Fire Y, he avoided having to pay for the plaintiff's house.<sup>123</sup>

Thus, in cases where there are two independently sufficient factors, one party will always receive a windfall. It is simply a question of who will get the windfall, the plaintiff or the defendant.

A "but for" rule for compensation precludes the plaintiff from recovering whenever there is any over-determination; whenever a factor other than the defendant's action (here, the plaintiff's tardiness) is sufficient to trigger the outcome (here, termination). Thus, a "but for" rule effectively allocates the windfall from double over-determination to the defendant.

#### *b. Allocating the Windfall in Cases with Two Sufficient Factors*

The fact that a "but for" rule allocates the windfall to the defendant in doubly over-determined cases is only problematic if we cannot justify such an allocation. The question therefore becomes: As between the defendant and the plaintiff, who is the better party to receive such a windfall?<sup>124</sup>

The answer to this question depends on the source of the second independently sufficient factor (Y, the factor other than the defendant's action). Was the second factor (1) a blameless act; (2) a blameworthy act by a person other than the plaintiff; or (3) a blameworthy act by the plaintiff? In the first two cases (blameless acts and blameworthy acts by persons other than the plaintiff), it makes no sense to allocate the windfall to the defendant—making a "but for" rule problematic in such cases. Such a rule might make more sense in the third case (blameworthy acts by the plaintiff), but even in this type of case, a "but for" rule may be problematic.

#### *i. Over-Determination from Blameless Acts*

Suppose that over-determination is caused by a blameless act. Suppose, for example, that Fire Y in our two-fires hypothetical started as the result of a car backfiring, or a lightning strike. Or, in our termination hypothetical, suppose the

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123. Again, note that the situation would be different if the defendant's action (Fire X) were not itself sufficient to bring about the result. In such a case, the plaintiff could not argue that, absent Fire Y, the defendant would have been forced to compensate her.

124. One might try to argue that we should simply let bad luck "lie where it has fallen": on the plaintiff. However, where the bad luck has "fallen" will depend on the causation rule we adopt. If we adopt a "but for" rule, the bad luck (i.e., the fact that there was a second independently sufficient factor) will fall on the plaintiff, and the defendant will experience good luck. On the other hand, if we adopt a minimal causation rule or a sufficiency rule, the bad luck will fall on the defendant, and the plaintiff will experience good luck. It does not seem possible to choose one rule over another on the basis of some sort of "natural order of things." Rather, we must find some other way to allocate the windfall from over-determination.

employee would have been terminated absent consideration of her sex because the company shut down after its most important client went out of business, or after its headquarters collapsed in an earthquake.<sup>125</sup>

In this type of case, there is one blameworthy party (the defendant) and one blameless party (the plaintiff). As between providing a windfall to a blameless plaintiff and providing a windfall to a blameworthy defendant, the choice seems easy: Let the blameless plaintiff have the windfall. In such cases, a necessity (“but for”) test is problematic because it gives the windfall to the blameworthy defendant over the blameless plaintiff.

Tort law doctrine has effectively abandoned the necessity (“but for”) test in such cases, presumably for this reason. The Second Restatement of Torts, for example, requires necessity (“but for” causation) as a general matter.<sup>126</sup> However, the Restatement relaxes the “but for” requirement in cases where (1) the defendant’s act would have been independently sufficient, and (2) the other independently sufficient factor (which would prevent the defendant’s act from being necessary to the outcome) “is generated by an innocent act of a third person or when its origin is unknown.”<sup>127</sup> As explained by the court in *Kingston v. Chicago & Northwestern Railroad Co.*, the two-fires case that forms the basis for the rule in the Second Restatement: applying a “but for” rule in such cases “would certainly make a wrongdoer a favorite of the law at the expense of an innocent sufferer.”<sup>128</sup> Thus, modern tort law seems to be in agreement with the point here: The application of a necessity (“but for”) rule is problematic in cases where over-determination results from a blameless act.

#### ii. *Over-Determination from Blameworthy Acts by Persons Other than the Plaintiff*

Now suppose that the independently sufficient factor, Y, is the blameworthy

125. A distinction might arguably be made between blameless acts by the plaintiff and blameless acts by persons other than the plaintiff (or acts of God). That is, we might feel differently about a plaintiff who has brought about her own demise—albeit in a manner that suggests no blame—than one whose demise was brought about by some external source. However, the point of this argument deals with the moral idea of blame. Accordingly, for these purposes, I treat a blameless act by the plaintiff as equivalent to a blameless act of someone other than the plaintiff.

126. See RESTATEMENT (SECOND) OF TORTS § 431(a) (1965) (plaintiff must show, *inter alia*, that defendant’s act was “a substantial factor in bringing about the harm”); *id.* § 432(1) (as a general matter, an “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”—i.e., unless the conduct is a but-for cause of the harm).

127. See *id.* § 432(1) cmt. d. (noting that the section applies when the second factor “is generated by an innocent act of a third person or when its origin is unknown”); *id.* § 432(2) (noting that causation may be found in over-determined cases when the defendant’s conduct is independently sufficient to bring about the harm); see also RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL HARM § 27 (Proposed Final Draft No. 1, 2005) (basing liability on sufficiency in doubly over-determined cases).

This widely accepted proposition in tort law belies Justice Kennedy’s assertion in *Price Waterhouse* that tort law always requires “but for” causation. See *Price Waterhouse v. Hopkins*, 490 U.S. 228, 282 (1989) (Kennedy, J., dissenting) (“[A]n act or omission is not regarded as a cause of an event if the particular event would have occurred without it.”) (quoting W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS 265 (5th ed. 1984)).

128. 211 N.W. 913, 915 (Wis. 1927).

act of a third party. For example, in the two-fires hypothetical, suppose that Fire Y (the second, independently sufficient fire) had been started by a camper (Y) who negligently let his campfire get out of control. Or, in our termination hypothetical, suppose that the independently sufficient factor had been the act of a blameworthy client. Suppose, for example, that the reason the employee would have been fired irrespective of her sex was that an important client (Y) complained about her to her employer after she reported the client's illegal conduct to the authorities. In such a case, there are two blameworthy parties, the defendant (X) and the third party (Y), and one blameless party, the plaintiff (P).

Here, as in the blameless act scenario discussed above, there will be a windfall.<sup>129</sup> And, as in the blameless act scenario discussed above, the plaintiff is blameless and the defendant is blameworthy. Thus, as above, it would seem to make sense to allocate the windfall from over-determination to the plaintiff by foregoing a necessity ("but for") requirement.

If anything, the argument against a "but for" rule in cases with blameworthy third parties is stronger than the argument against the rule in cases with blameless acts. As tort theorists have long recognized, a "but for" rule provides a particularly undesirable result in cases with two blameworthy persons: Each wrongdoer can avoid liability by pointing to the act of the other wrongdoer.<sup>130</sup> At one level, the situation is identical to the blameless third-party scenario: X avoids liability, and reaps the windfall from over-determination. However, it seems particularly troublesome that the windfall results not from "bad luck," but from another wrongdoer who can also avoid liability under the rule.

And the argument applies with even more force where the blameworthy "third party" is the defendant (X) himself—that is, where X has produced not only the factor in question (Factor X), but also the independently sufficient factor (Factor Y) that results in Factor X being over-determinative. For example, suppose that the defendant started Fire Y, as well as Fire X. Or suppose that our hypothetical employer would have terminated the employee absent her sex as a result of discrimination against her based on her race. In such cases, it would seem particularly ironic to allow a wrongdoer to escape liability based on

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129. It might be tempting—particularly for P—to try to lump the conduct of the two blameworthy parties together and claim that there is no over-determination: that X's and Y's conduct collectively was necessary to the outcome. But for the collective conduct of X and Y, P would argue, she would not have been harmed. See, e.g., KEETON ET AL., *supra* note 127, at 268. The problem with this approach is that there is no reason to view X's and Y's conduct collectively. To the contrary, the whole point of these hypotheticals is that either X's or Y's conduct by itself would have been sufficient to bring about the harm to P. Thus, we cannot escape the fact of over-determination. And where there is over-determination, there will be a windfall. As before, the question of whether to adopt a necessity (but-for causation) requirement is essentially a question of how to allocate this windfall.

130. See *Kingston*, 211 N.W. at 915 ("[T]o permit each of two wrongdoers to plead the wrong of the other as a defense to his own wrongdoing would permit both wrongdoers to escape and penalize the innocent party who has been damaged by their wrongful acts."); see also HART & HONORÉ, *supra* note 21, at 235–36; Wright, *supra* note 23, at 1800–01.

his own additional wrongdoing (not to mention the perverse incentives such a rule would produce).<sup>131</sup>

Thus, in cases where over-determination results from the blameworthy act of a third party, or a second blameworthy act by the defendant, there would seem to be little question that the windfall from over-determination should be allocated to the plaintiff. In such cases, a “but for” rule, which would allocate that windfall to the defendant, is problematic.

There is, however, one important difference between the blameless act scenario discussed above and the blameworthy third party scenario at issue here: Where there is a blameworthy third party, as well as a blameworthy defendant, a question arises regarding allocation of windfall between the two wrongdoers.

Absent a “but for” rule, the defendant (X) will be required to compensate the plaintiff (P). If the jurisdiction permits joint and several liability without apportionment, then P could recover 100% of her damages from X. At that point, from X’s standpoint, Y would have reaped a windfall. X would have paid for all of P’s damages, and Y would have paid none of those damages—even though Y was also blameworthy.<sup>132</sup>

However, the possibility of windfall as between wrongdoers is not a good reason to adopt a “but for” rule. Such a rule would avoid the problem of windfall as between wrongdoers, but only by giving both wrongdoers a windfall at the expense of the blameless plaintiff. It would be better to dispense with a “but for” rule and give the windfall from over-determination to the blameless plaintiff—even if it might leave one wrongdoer “holding the bag” for the other. (Moreover, there is a better solution to the problem of windfall to third-party wrongdoers—one that would not favor two wrongdoers over an innocent plaintiff: a rule permitting allocation of damages between wrongdoers, which will be discussed in Part IV.C.)

Again, modern tort law seems to be in agreement. The Second Restatement, for example, relaxes the “but for” requirement in cases where (1) the defendant’s act was independently sufficient to trigger the plaintiff’s injury, and (2) the other independently sufficient factor was “generated by the negligent conduct of a third person.”<sup>133</sup> This modern tort law rule seems to reflect recognition

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131. *See, e.g., Hazen Paper Co. v. Biggins*, 507 U.S. 604, 611–12 (1993) (holding that an employer can defend against an age discrimination claim on ground that it discriminated not on the basis of age, but on the basis of benefits vesting); *Faulkner v. Super Valu Stores, Inc.*, 3 F.3d 1419, 1434 (10th Cir. 1993) (holding that an employer can defend against an age discrimination case by claiming to have been motivated by an illegal factor other than age). Admittedly, such cases are likely to be rare, as most employers would not make such an admission unless claims based on the second illegal factor were barred (e.g., by a statute of limitations or waiver).

132. The “double-recovery rule” would preclude P from seeking recovery from Y after recovering 100% of her damages from X. *See, e.g., 22 AM. JUR. 2D Damages* § 36 (2003) (stating that a plaintiff is only entitled to recover once for any injury). Thus, there is no danger that P would reap a double windfall—i.e., not only being placed in a better position than she would have been in absent X’s action, but also being paid twice for the same damages.

133. *See RESTATEMENT (SECOND) OF TORTS* § 432(2) (1965) (stating that causation may be found in over-determined cases when the defendant’s conduct is independently sufficient to bring about the

that, in cases where over-determination is caused by the blameworthy act of a third party, the “but for” rule is problematic.

*iii. Over-Determination from the Plaintiff's Own Blameworthy Conduct*

Finally, suppose that the independently sufficient factor, Y, was the plaintiff's own blameworthy act (or acts). Suppose, for example, in the two-fires hypothetical, that the plaintiff herself started Fire Y. Or, in our termination hypothetical, suppose that the independently sufficient factor was the plaintiff's own tardiness.

In these cases, as in any over-determined case, absent a “but for” rule, the plaintiff will be able to recover from the defendant (X) and will reap a windfall, while if we adopt a “but for” rule, the plaintiff will not be able to recover, and X will reap a windfall. Once again, the question is how to allocate this windfall.

The difference in this scenario from the prior two scenarios is that here, the plaintiff is not blameless. Here, the plaintiff and the defendant are both blameworthy. Thus, we cannot allocate the windfall from over-determination by simply favoring a blameless party (the plaintiff) over a blameworthy one (the defendant).

In this scenario, it might be possible to argue for a “but for” rule—that is, for an allocation of all of the windfall from over-determination to the defendant, as opposed to the plaintiff. Where all of the parties before a court are wrongdoers, we might believe that the court should not have to choose between them; it should simply leave the parties where it finds them. Alternatively, such a rule might be justified because we might not want to reward plaintiffs who were complicit in their own harm.

However, neither of these arguments—which are essentially variations on equity's “unclean hands” doctrine<sup>134</sup>—is persuasive. Neither seems to provide a satisfactory answer to the question of why we would always want to favor one wrongdoer over another, even in cases when the favored wrongdoer (the defendant) might be far more blameworthy than the disfavored one (the plaintiff). Perhaps for this reason, the “unclean hands” doctrine has come under fire not only in tort law, but in other fields of law as well.<sup>135</sup> And the doctrine has

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harm); *id.* cmt. d. (noting that the section applies when the second factor “is generated by the negligent conduct of a third person”); *see also* RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL HARM § 27 (Proposed Final Draft No. 1, 2005) (stating that liability is based on sufficiency in doubly over-determined cases).

134. This sentiment is arguably the basis for the “unclean hands” doctrine in tort law. *See* 27A AM. JUR. 2D *Equity* § 126 (1996).

135. *See, e.g.*, KEETON ET AL., *supra* note 127, at 468–69 (noting that undue hardship to one party results when two parties are hypothetically responsible for damages yet the entire burden of damages is placed on one party); Guido Calabresi & Jeffrey O. Cooper, *New Directions in Tort Law*, 30 VAL. U. L. REV. 859, 868 (1996) (noting modern tort law's rejection of all-or-none rules, such as “unclean hands,” in cases involving multiple blameworthy parties); *see also* Luize E. Zubrow, *Rethinking Article 9 Remedies: Economic and Fiduciary Perspectives*, 42 UCLA L. REV. 445, 530–31 (1994) (rejecting the unclean hands doctrine in creditor/debtor actions brought under Article 9 of the Uniform Commercial Code because applying the doctrine would condone the defendant-debtor's culpable behavior).



been rejected elsewhere in disparate treatment law.<sup>136</sup>

Here, I do not address how we should distribute the windfall in doubly over-determined cases involving blameworthy plaintiffs. In Part IV, I will suggest a response to this dilemma: a damages allocation rule, similar to the comparative negligence approach taken in modern tort law. Here, my point is only that we should not be entirely comfortable with an either-or solution (such as a simple “but for” rule) in such cases. And the adoption of allocation rules in modern tort law might be read as supporting this point.<sup>137</sup>

C. THE (SO FAR UNSUCCESSFUL) SEARCH FOR A MIDDLE GROUND:  
THE TWO-TIER APPROACH

It should now be apparent that both the minimal causation (“motivating factor”) standard and the necessity (“but for”) standard are flawed. The “motivating factor” standard yields a windfall to plaintiffs in over-determined cases. Yet, a “but for” standard puts a potentially unfair burden of proof on plaintiffs, lets defendants get away with wrongful conduct in over-determined cases, and provides an unjustifiable windfall to defendants in certain over-determined cases.

By de-coupling the issues of burden of proof, prohibition, and damages, we can begin to see a potential solution to this dilemma: We might be able to apply different causal standards to each issue. For example, we might prohibit the utilization of protected characteristics at the minimal causation/“motivating factor” level, yet permit recovery of compensatory damages only at the necessity/“but for” level. Perhaps in response to the deficiencies in the two competing causal standards, an important strain in current law, including the 1991 Act, has adopted such a two-tier approach to causation.

The following Section will examine three variations of the two-tier approach, and show how at least one such variation solves many of the problems inherent in the minimal causation/“motivating factor” and necessity/“but for” standards. The subsequent Section will critique the current courts’ hesitance to adopt the two-tier approach, arguing that this is the best option available under current

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136. See *McKennon v. Nashville Banner Publ'g Co.*, 513 U.S. 352, 360–61 (1995) (“We have rejected the unclean hands defense ‘where a private suit serves important public purposes.’”) (quoting *Perma Life Mufflers, Inc. v. Int'l Parts Corp.*, 392 U.S. 134, 138 (1968) (antitrust case)); see also Jennifer Miyoko Follette, *Complete Justice: Upholding the Principles of Title VII Through Appropriate Treatment of After-Acquired Evidence*, 68 WASH. L. REV. 651, 665–66 (1993) (concluding that the unclean hands doctrine should not preclude a plaintiff’s Title VII claim); Cheryl Krause Zelman, *The After-Acquired Evidence Defense to Employment Discrimination Claims: The Privatization of Title VII and the Contours of Social Responsibility*, 46 STAN. L. REV. 175, 211 (1993) (concluding that the unclean hands doctrine should not be a defense in Title VII cases where discrimination is a motivating factor in an employment decision); Kiren Dosanjh Zucker, *From Hoffman Plastic to the After-Acquired Evidence Doctrine: Protecting Undocumented Workers’ Rights Under Federal Anti-Discrimination Statutes*, 26 WHITTIER L. REV. 601, 614–15, 619 (2004) (concluding that the unclean hands doctrine should not be used to deny undocumented workers protection under anti-discrimination statutes).

137. See Calabresi & Cooper, *supra* note 135, at 868 (concluding that the rise of splitting rules can be understood as a reaction to the perceived unfairness of all-or-none rules in such cases).

doctrine. But the final Section in this Part will argue that, despite the promise of the two-tier approach (and the fact that it is the best option available under current law), this approach is fundamentally incapable of solving the windfall issues inherent in the minimal causation/“motivating factor” and necessity/“but for” standards.

### 1. The Promise of the Two-Tier Approach to Causation

The two-tier approach to causation de-couples key litigation issues (shifting the burden of proof, attaching liability, or imposing compensatory damages, for example) and applies different causal standards to different issues. There are three variations of the two-tier approach.

The first variation, which might be thought of as the *procedural two-tier approach*, de-couples the procedural issue of who bears the burden of proof from the substantive issue of liability, applying the “motivating factor” standard to the burden of proof question and the “but for” standard to the liability question. Once the plaintiff demonstrates that a protected characteristic was a “motivating factor,” the burden of proof shifts to the defendant to show a lack of “but for” causation (a “same action” defense).<sup>138</sup> Liability attaches only where there is “but for” causation—or, more precisely, where the defendant fails to prove a lack of “but for” causation.

The procedural two-tier approach was developed in the late 1970’s in equal protection cases, such as *Mt. Healthy* and *Arlington Heights*.<sup>139</sup> Professor Brodin suggested that this approach should be applied to disparate treatment law.<sup>140</sup> And in 1989, the *Price Waterhouse* plurality did so.<sup>141</sup>

The procedural two-tier approach solves some of the problems inherent in the “motivating factor” and “but for” tests. This approach avoids the windfall-to-plaintiff problem inherent in the “motivating factor” test; by using a “but for” standard for liability, this approach prevents plaintiffs from recovering in over-determined cases (for example, where the plaintiff would have been fired for tardiness irrespective of her sex). This approach also avoids the difficulty-of-proof problem inherent in the “but for” test by requiring the plaintiff to show only “motivating factor” causation, and then shifting the burden of proof to the defendant to show a lack of “but for” causation.

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138. See *supra* Part II.A (explaining that the “same action” defense is the same as the “but for” test, but with burden of proof on defendant).

139. See, e.g., *Mt. Healthy City Sch. Dist. v. Doyle*, 429 U.S. 274, 287 (1977); *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 270–71 & n.21 (1977). The National Labor Relations Board then applied this approach to the statutory labor context in *Wright Line*, 251 NLRB 1083 (1980), *enforced* 662 F.2d 899 (1st Cir. 1981), an approach approved by the Supreme Court in *NLRB v. Transp. Mgmt.*, 462 U.S. 393 (1983).

140. See Brodin, *supra* note 88, at 323–24.

141. See *Price Waterhouse v. Hopkins*, 490 U.S. 228, 244–45 (1989) (plurality). Justice O’Connor took the same approach, but required a showing that sex was a “substantial factor” to shift the burden. *Id.* at 276 (O’Connor, J., concurring). As noted above in Part II.C, there is no difference between Justice O’Connor’s “substantial factor” standard and the plurality’s “motivating part” standard.

However, the procedural two-tier approach does not address the getting-away-with-it or the windfall-to-defendant problems inherent in the “but for” test. Because liability does not attach without “but for” causation, defendants will get away with utilizing protected characteristics—and the harm that accompanies such utilization—in over-determined cases.<sup>142</sup> Similarly, in such cases, defendants will avoid paying damages that they would have been required to pay absent the good fortune (from their perspective) of over-determination, resulting in windfall to them.<sup>143</sup> Hence, the procedural two-tier approach solves some, but not all, of the problems with the “motivating factor” and “but for” tests.

A second variation of the two-tier approach might be thought of as a *substantive two-tier approach*. This approach de-couples liability from compensation, applying the “motivating factor” standard to the issue of liability and the “but for” standard to the issue of compensatory damages. That is, liability attaches upon a showing that a protected characteristic was a “motivating factor.” But compensatory damages are available only where there is “but for” causation.

Like the procedural two-tier approach, the substantive two-tier approach solves the windfall-to-plaintiff problem. Because compensatory damages are available only where there is “but for” causation, the plaintiff cannot receive compensation—and thus a windfall—in an over-determined case. But unlike the procedural two-tier approach, the substantive two-tier approach attaches liability (as opposed to merely shifting the burden of proof) where there is “motivating factor” causation. Thus, this substantive approach might potentially address the getting-away-with-it problem inherent in the “but for” standard. If liability carried with it some sort of meaningful penalty or sanction, then punishment/deterrence could occur—and defendants would not “get away with” utilization—even where there was no “but for” causation (that is, where there was only “motivating factor” causation).

By itself, the substantive two-tier approach would not address the difficulty-of-proof problem. Under a substantive-only two-tier approach, the “motivating factor” test applies only to the issue of liability; the burden of proof remains with the plaintiff to show “but for” causation in order to recover damages. However, this problem can be solved by a third variation of the two-tier approach, which might be thought of as a *procedural-and-substantive two-tier approach*.

Under a procedural-and-substantive two-tier approach, a plaintiff’s showing of “motivating factor” causation triggers both liability (a substantive duty) and a shift in the burden of proof (a procedural duty). To avoid compensatory damages, the defendant must prove a lack of “but for” causation (the “same action” defense). Like the procedural two-tier approach, the procedural-and-

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142. See *supra* Part III.B.2.

143. See *supra* Part III.B.3.

substantive two-tier approach addresses the difficulty-of-proof problem, as the plaintiff is only required to prove “motivating factor” causation, while the defendant is left to prove “but for” causation (or, rather, the lack of it). Like the other two variations of the two-tier approach, this procedural-and-substantive two-tier approach solves the windfall-to-plaintiff problem, precluding compensatory damages in over-determined cases. And like the substantive two-tier approach, the procedural-and-substantive two-tier approach has the potential to address the getting-away-with-it problem (by imposing punitive/deterrent sanctions in over-determined cases).

Thus, a two-tier approach—particularly the procedural-and-substantive two-tier approach—shows great promise in solving the problems inherent in the “motivating factor” and “but for” standards. Perhaps for this reason, Congress adopted this approach in the Civil Rights Act of 1991.<sup>144</sup>

## 2. Resistance to the Two-Tier Approach: The Tenacity of *Price Waterhouse* and the “Direct Evidence” Requirement

Despite the benefits of a two-tier approach, there has been substantial resistance to this approach. Supporters and detractors alike tend to see the two-tier approach as “strong medicine.”<sup>145</sup> As a result, there has been a strong movement toward limiting its application. Courts have tended to impose two major limits upon the two-tier approach.

First, courts have tended to favor the more limited procedural-only version of the two-tier approach (in which a showing of “motivating factor” causation triggers only a burden shift) over the more comprehensive procedural-and-substantive two-tier approach (in which a showing of “motivating factor” causation triggers both a burden shift and substantive liability). For example, of the six Justices in *Price Waterhouse* who favored a two-tier approach, none even considered the possibility of a procedural-and-substantive two-tier approach; all favored the more limited procedural-only two-tier approach.<sup>146</sup> And even after Congress overruled this aspect of *Price Waterhouse* in the Civil Rights Act of 1991—adopting a procedural-and-substantive two-tier approach,

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144. See 42 U.S.C. § 2000e-2(m) (2000) (attaching liability and shifting the burden upon a showing that the utilization of a protected characteristic was a “motivating factor”); *id.* § 2000e-5(g)(2)(B) (limiting damages where the defendant prevails on a “same action” defense). This approach had been suggested six years earlier in *Bibbs v. Block*. See 778 F.2d 1318, 1322–24 (8th Cir. 1985) (holding that liability and limited sanctions attach and the burden shifts where protected characteristic is a “discernible factor”; reinstatement and back pay available only where there is “but for” causation).

145. See *Price Waterhouse*, 490 U.S. at 262 (O’Connor, J., concurring) (referring to two-tier approach as “strong medicine”).

146. See *id.* at 258 (plurality); *id.* at 259–60 (White, J., concurring); *id.* at 276 (O’Connor, J., concurring). Given that, prior to the 1991 Act, disparate treatment statutes all used a single causal formulation (“because of”), as opposed to multiple formulations, it is perhaps understandable that the Justices did not consider bifurcating liability and damages and applying different causal formulations to each of these issues.

as opposed to a procedural-only two-tier approach<sup>147</sup>—courts have generally continued to apply *Price Waterhouse* (and thus the procedural-only version of the two-tier approach) in cases that arise under other disparate treatment statutes.<sup>148</sup>

Second, many courts and commentators have applied a “direct evidence” test to limit the application of *any* version of the two-tier approach.<sup>149</sup> Under this limitation, a two-tier approach applies only in cases in which the plaintiff can produce “direct evidence” of discrimination; if the plaintiff cannot produce “direct evidence,” then the court would apply a single causal standard—the “but for” test.<sup>150</sup>

The “direct evidence” limitation originated in Justice O’Connor’s concurrence in *Price Waterhouse*.<sup>151</sup> The staying power of this limitation has been impressive, if misguided. After *Price Waterhouse*, most courts tended to see Justice O’Connor’s concurrence, with its “direct evidence” limitation, as controlling.<sup>152</sup> Although the 1991 Act did not contain a “direct evidence” requirement, many courts (all but one of the federal circuits) continued to require “direct

147. See 42 U.S.C. § 2000e-2(m) (2000) (attaching liability and shifting burden upon showing utilization of protected characteristic was “motivating factor”).

148. See RUTHERGLEN, *supra* note 38, at 49 & n.51; see also *Conoshenti v. Pub. Serv. Elec. & Gas Co.*, 364 F.3d 135, 147 (3d Cir. 2004) (arising under the Family and Medical Leave Act); *Fakete v. Aetna, Inc.*, 308 F.3d 335, 338–39 (3d Cir. 2002) (arising under the ADEA); *Kiel v. Select Artificials, Inc.*, 169 F.3d 1131 (8th Cir. 1999) (arising under the ADA).

149. Courts and commentators often speak of the “direct evidence” distinction as limiting the availability of a so-called “mixed motive” jury instruction. See, e.g., *Weber*, *supra* note 18, at 505–06 (noting that Justice O’Connor would have limited the availability of the “mixed motive” approach by requiring “direct evidence”); see also, e.g., *Breeding v. Arthur J. Gallagher & Co.*, 164 F.3d 1151, 1156 (8th Cir. 1999) (holding that the *Price Waterhouse* two-tiered approach only applies if a Title VII plaintiff puts forth direct evidence of an employer’s utilization of protected characteristic); *Mooney v. Aramco Servs. Co.*, 54 F.3d 1207, 1217 (5th Cir. 1995) (holding that ADEA plaintiffs failing to present direct evidence of discrimination are not entitled to *Price Waterhouse* jury instruction). Because this jury instruction contains a “motivating factor” test, the “direct evidence” distinction might arguably be seen as a limit on the use of the “motivating factor” test. However, none of the courts (and few, if any, of the commentators) who have advocated against a “direct evidence” test have suggested that the “motivating factor” test should be used for all purposes (burden of proof, liability, and damages). Rather, these writers tend to expect that, under any circumstance, a “but for” test will apply to the issue of damages and possibly to the issue of liability. Thus, the “direct evidence” distinction is best understood as a limit on the application of a two-tier approach—not as a limit on the application of a “motivating factor” standard.

150. See RUTHERGLEN, *supra* note 38, at 49; see also *Zimmer*, *supra* note 15, at 1912–13 & n.104 (noting that where courts do not apply a two-tier approach, they tend to apply the so-called *McDonnell-Douglas* approach, which requires proof of “determinative influence”—i.e., “but for” causation); *id.* at 1930 (noting that in *McDonnell-Douglas* cases, the courts have typically required plaintiffs to prove that the discriminatory motivation was the “but for” or the determinative influence in the employers’ decision).

151. See 490 U.S. at 276 (O’Connor, J., concurring) (adopting “direct evidence” test).

152. See *Zimmer*, *supra* note 15, at 1910; see also *Griffith v. City of Des Moines*, 387 F.3d 733, 743 (8th Cir. 2004) (Magnuson, J., concurring) (noting that since *Price Waterhouse* and despite the Civil Rights Act of 1991, courts follow Justice O’Connor’s direct evidence distinction); *Costa v. Desert Palace, Inc.*, 299 F.3d 838, 851–53 (9th Cir. 2002) (en banc) (citing numerous cases applying direct evidence distinction under Title VII and other disparate treatment statutes), *aff’d*, 539 U.S. 90 (2003).

evidence” before they would apply that Act’s two-tier approach.<sup>153</sup> And although the Supreme Court recently made clear in *Desert Palace v. Costa* that the 1991 Act contains no such limitation on the application of its two-tier approach,<sup>154</sup> courts have continued to apply *Price Waterhouse*—and thus require “direct evidence” before applying the two-tier approach—in cases that do not arise under the Act.<sup>155</sup>

These limits on the use of the two-tier approach make no sense as a normative matter.<sup>156</sup> We have seen that, absent a two-tier approach, courts have applied one of two flawed causal standards—generally the “but for” test,<sup>157</sup> which lets defendants get away with harmful conduct in over-determined cases and places a problematic burden of proof on plaintiffs.<sup>158</sup> A procedural-and-substantive two-tier approach can solve these two problems without giving rise to the windfall-to-plaintiff problem inherent in the “motivating factor” standard. Thus, unless there is some normative problem with this two-tier approach—which does not seem to be the case<sup>159</sup>—we should apply this approach in all

153. See Zimmer, *supra* note 15, at 1912 (noting that after the 1991 Act, “most courts held that plaintiff still had to have ‘direct’ evidence of discrimination in order to utilize” that Act’s two-tier approach).

154. See *Desert Palace, Inc. v. Costa*, 539 U.S. 90, 100–02 (2003).

155. E.g., *Rosso v. A.I. Root Co.*, 97 F. App’x 517, 520 (6th Cir. 2004) (arising under ADEA); see also Barton, *supra* note 32, at 43 (concluding that *Costa* arguably does not apply in non-1991 Act cases, including ADEA, Pregnancy Discrimination Act, and even the anti-retaliation provisions of Title VII).

156. It is beyond the scope of this Article to say whether these courts’ interpretations of various disparate treatment statutes or precedents require such limits on the two-tier approach. For good discussion of the doctrinal and interpretive problems of the continued application of *Price Waterhouse*, see Zimmer, *supra* note 15, at 1913–14, and Van Detta, *supra* note 15, at 441–42.

157. See Zimmer, *supra* note 15, at 1912–13 & n.104 (stating that where courts do not apply two-tier approach, they tend to apply the so-called *McDonnell-Douglas* approach, which requires proof of “determinative factor”—i.e., “but for” causation).

158. See *supra* Part III.B. The “but for” standard also yields a windfall to defendants in over-determined cases. See *id.* I do not mention this problem with the “but for” standard in the text because, as I will discuss below, the two-tier approach does not solve this problem. See *infra* Part III.C.3.b.

159. It might be argued that shifting the burden to defendants to show lack of “but for” causation is too strong a response to the difficulty-of-proof problem. This seems to be what motivated Justice O’Connor to create the “direct evidence” distinction in *Price Waterhouse*. See *Price Waterhouse v. Hopkins*, 490 U.S. 228, 262 (1989) (O’Connor, J., concurring) (referring to two-tier approach as “strong medicine”). However, under evidentiary doctrines, such a shift hardly seems extraordinary. See MUELLER & KIRKPATRICK, *supra* note 107, at 105 (noting that burdens of proof are often placed on the party most likely to have access to proof). And Congress seems to agree, as indicated by its adoption of this approach in the 1991 Act.

Alternatively, it might be argued that shifting the burden to defendants somehow interferes with “employer prerogatives.” See, e.g., *Price Waterhouse*, 490 U.S. at 242 (plurality opinion) (“[An] important aspect of [Title VII] is its preservation of an employer’s . . . freedom of choice.”); Brodin, *supra* note 88, at 295–96 (“[T]itle VII was designed to achieve elimination of discriminatory practices with minimal inference in management’s realm. Management prerogatives . . . are to be left undisturbed.”); Paul N. Cox, *A Defense of “Necessary Cause” in Individual Disparate Treatment Theory Under Title VII*, 11 ST. LOUIS U. PUB. L. REV. 29, 43 (1992) (asserting that a “but for” causation standard is an effective way to narrow employer liability in order to allow employer discretion). However, it is unclear why we should be solicitous of employers’ prerogative to discriminate. After all, the two-tier system only imposes a burden on employers who have utilized protected characteristics in their decisions.

cases.<sup>160</sup> There is no reason for a “direct evidence” limit—or any other limit<sup>161</sup>—on the two-tier approach. Courts should stop limiting the use of the two-tier standard.

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A more sympathetic version of the employer prerogatives argument is that imposing consequences on employers who discriminate at less than a “but for” level might lead such employers to keep bad employees rather than suffer those consequences. The employer in our example might keep the chronically tardy employee rather than fire her to avoid being saddled with the burden of proof and the accompanying increased likelihood of losing the case. This, however, is not really an argument against imposing consequences for utilizing protected characteristics, even at less than a “but for” level. Rather, it is an argument that the consequences for such utilization may be too harsh in the sense that they overdeter utilization—an argument that these particular consequences may cause employers not only to cease utilizing protected characteristics in their decisionmaking, but also to be overly accommodating toward bad employees. This seems to be an empirical question. However, the fact that evidentiary doctrines routinely shift the burden of proof, *see supra* note 107, suggests that this consequence is not generally considered an overly harsh one. And even if there is some overdeterrence, this would raise the question of how to balance the costs of discriminatory utilization or protected characteristics in non-“but for” cases against the costs of such overdeterrence.

160. There is another problem with the “direct evidence” test as a limit on the use of two-tier approaches: The meaning of “direct evidence” is hotly disputed. It has spawned a wave of litigation, conflicts between (and even within) circuits, and widely conflicting commentary—to the point where the issue has often been referred to as a “swamp,” a “morass,” and a “quagmire.” *See Costa v. Desert Palace, Inc.*, 299 F.3d 838, 851 (9th Cir. 2002) (en banc) (“The resulting jurisprudence has been a quagmire that defies characterization despite the valiant efforts of various courts and commentators.”), *aff’d*, 539 U.S. 90 (2003); *id.* at 853 (“morass”); Robert Belton, *Mixed-Motive Cases in Employment Discrimination Law Revisited: A Brief Updated View of the Swamp*, 51 MERCER L. REV. 651, 662 (2000) (“Although courts generally agree that plaintiffs must introduce direct evidence . . . they have ‘about as many definitions of direct evidence as they do employment discrimination cases.’”) (quoting *Tyler v. Bethlehem Steel Corp.*, 958 F.2d 1176, 1183 (2d Cir. 1992)); *see also Zimmer, supra* note 15, at 1914 (“Placing evidence in direct, very good circumstantial, or circumstantial piles was impossible to do in any coherent way.”).

161. After *Costa*, some courts have looked for ways—other than “direct” evidence—to limit the application of the two-tier approach in Act cases. For example, some courts have tried to distinguish “mixed motive” cases from “single motive” cases, applying the two-tier approach only in the former. *E.g.*, *Bloomer v. United Parcel Serv., Inc.*, 94 F. App’x 820, 825–26 (10th Cir. 2004) (holding that the “but for” test would apply in a non-“mixed motive” case); *Winter v. Bank of Am., N.A.*, No. Civ.A.3:02-CV-1591-L, 2003 WL 23200278, at \*3 (N.D. Tex. Dec. 12, 2003) (holding that the two-tier approach applies only in “mixed motives” cases). Such a “mixed motive”/“single motive” distinction appears to be based on a footnote in *Costa*, which indicated that the court was limiting its analysis to “mixed motives” cases. 539 U.S. at 94 n.1. However, in addition to the normative problem with limiting the two-tier approach, such a “mixed motive”/“single motive” distinction would make a strange dividing line. After all, virtually all employment decisions will involve consideration of multiple factors. *See* 110 CONG. REC. 13,837–38 (1964) (statement of Sen. Case) (“If anyone ever had an action that was motivated by a single cause, he is a different kind of animal from any I know of.”); *Dare v. Wal-Mart*, 267 F. Supp. 2d 987, 991 (D. Minn. 2003) (“In practice, few employment decisions are made solely on basis of one rationale to the exclusion of all others.”). Thus, what makes something a “mixed motives” case does not seem any clearer than what constitutes “direct evidence.” *See Zimmer, supra* note 15, at 1924–25, 1928–29 (discussing incoherence of “mixed motive” v. “single motive” distinction); *see also Stegall v. Citadel Broad. Co.*, 350 F.3d 1061, 1067–68 (9th Cir. 2004) (trying to explain difference between “mixed motive” and “single motive” case). The *Winter* court held that the case was not a mixed motives case because the plaintiff neither put on evidence nor conceded that the defendant had a legitimate reason for terminating him. *See Winter*, 2003 WL 23200278, at \*3. This makes no sense whatsoever. Why would a plaintiff *ever* want to help his employer prove that it had a legitimate reason for terminating him? *See Dare*, 267 F. Supp. 2d at 991 (holding that the plaintiff need not allege that legitimate factors motivated employer).

### 3. The Problems with the Two-Tier Approach to Causation

That being said, the two-tier approach is not a complete solution to the flaws in the “motivating factor” and “but for” standards. Although the two-tier approach solves many of the problems inherent in these two causal standards (and does not seem to create any normative problems of its own), the approach is still lacking in two ways: This approach, at least as it is used in current doctrine, contains insufficient punitive/deterrent remedies, and it fails to solve the windfall-to-defendant problem.

#### *a. Insufficient Punitive/Deterrent Remedies and Incentives for Private Attorneys General*

A substantive or procedural-and-substantive two-tier approach has the potential to address the getting-away-with-it problem by imposing punitive and deterrent sanctions upon a showing of minimal (“motivating factor”) causation. The idea is that while a defendant in an over-determined case would not be forced to pay compensatory damages (which would yield a windfall to the plaintiff), he may nonetheless face punitive/deterrent sanctions (under a “motivating factor” standard). The effectiveness of such sanctions in preventing the getting-away-with-it problem will depend on (1) how significant the sanctions are, and (2) the incentives plaintiffs have to litigate to impose such sanctions. Current doctrine appears to be defective in both of these areas.

First, it is far from clear that the 1991 Act, as currently applied, provides meaningful punitive or deterrent sanctions. In most areas of civil law, the prospect of paying damages serves to deter harmful conduct. However, the 1991 Act precludes all damages in over-determined cases (presumably in order to avoid providing a windfall to plaintiffs).<sup>162</sup> The only monetary sanction that courts can impose on defendants in such cases is an award of attorneys’ fees and costs.<sup>163</sup> While a substantial attorneys’ fee award might serve to punish and deter utilization,<sup>164</sup> the trend has been for courts to limit such awards significantly, or even eliminate them, where the defendant prevails on a “same action” defense—i.e., where there is only “motivating factor” causation.<sup>165</sup> Thus, the

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162. See 42 U.S.C. § 2000e-5(g)(B) (2000) (providing for no damages in “same decision” cases).

163. See *id.*

164. Some writers have suggested that attorneys’ fees can and should be punitive/deterrent. See, e.g., *Smith v. Wade*, 461 U.S. 30, 93 (1983) (O’Connor, J., dissenting) (asserting attorneys’ fees awards, in addition to compensatory damages, provide deterrence in 42 U.S.C. § 1983 context).

165. See ROBERT BELTON ET AL., *EMPLOYMENT DISCRIMINATION LAW: CASES AND MATERIALS ON EQUALITY IN THE WORKPLACE* 162 (7th ed. 2004) (noting that most courts have adopted the *Sheppard/Farrar* rule, which denies all but a nominal fee award in “same decision” cases); Thomas H. Barnard & George S. Crisci, “Mixed-Motive” Discrimination Under the Civil Rights Act of 1991: Still A “Pyrrhic Victory” For Plaintiffs?, 51 *MERCER L. REV.* 673, 674 (2000); see, e.g., *Canup v. Chipman-Union, Inc.*, 123 F.3d 1440, 1442 (11th Cir. 1997) (denying Title VII plaintiff an award of attorneys’ fees when defendant used a “same action” defense even though the plaintiff proved that the employer considered race in its termination decision); *Sheppard v. Riverview Nursing Ctr., Inc.*, 88 F.3d 1332, 1339 (4th Cir. 1996) (holding that a favorable jury verdict for plaintiff in a sexual harassment case did not entitle plaintiff to attorneys’ fees when the jury did not award compensatory damages due to defendant’s use of



only sanction imposed on employers who utilize protected characteristics in over-determined cases tends to be small or non-existent. Accordingly, it is unclear whether the goal of punishing and deterring utilization is being adequately achieved.<sup>166</sup>

Second, it is far from clear that the 1991 Act, as currently applied, provides sufficient incentives for plaintiffs to seek to impose sanctions upon defendants who utilize protected characteristics in over-determined cases. In most civil cases, plaintiffs are incentivized by the prospect of winning damages. But when damages and punitive/deterrent sanctions are disaggregated, as the current two-tier approach does, the question arises: What incentive does the plaintiff have to seek to impose such sanctions—to act as a private attorney general?<sup>167</sup>

The 1991 Act does not appear likely to provide such incentives. Where a plaintiff proves utilization (“motivating factor” causation), but there is no “but for” causation, the plaintiff cannot receive any compensatory damages.<sup>168</sup> While the denial of compensatory damages makes sense in some cases (as a way to avoid windfall to the plaintiff),<sup>169</sup> the statute contains no other effective monetary incentives for plaintiffs to bring such cases.<sup>170</sup> The only monetary award

the “same action” defense); *Gudenkauf v. Stauffer Commc’ns, Inc.*, 953 F. Supp. 1237, 1239 & n.1 (D. Kan. 1997) (holding that plaintiff who prevailed on a pregnancy discrimination claim could recover only 50% of attorneys’ fees because the defendant proved a “same action” defense); *Snell v. Reno Hilton Resort*, 930 F. Supp. 1428, 1431 (D. Nev. 1996) (deciding to reduce attorneys’ fee award by 50% when plaintiff proved discrimination but defendant utilized a “same action” defense); *see also* *Ballard v. Muskogee Reg’l Med. Ctr.*, 238 F.3d 1250, 1254 (10th Cir. 2001) (free speech retaliation claim under 42 U.S.C. § 1983); *Speedy v. Rexnord Corp.*, 243 F.3d 397, 406 (7th Cir. 2001) (Title VII retaliation).

166. *See generally* Michael Selmi, *The Price of Discrimination: The Nature of Class Action Employment Discrimination Litigation and Its Effects*, 81 TEX. L. REV. 1249 (2003). Selmi’s empirical analysis of high profile class action employment discrimination law suits between 1991 and 2001 with defendants as publicly traded corporations on the New York Stock Exchange showed that neither discrimination lawsuits nor their settlements substantially influence stock prices. *Id.* at 1268. Also, in-depth case studies of three large companies involved in discrimination lawsuits found that the companies failed to implement substantial or meaningful internal policy changes as a result of the lawsuits as measured by numerical changes in personnel, purchasing agreements, and other quantifiable factors. *Id.* at 1250.

167. *See* H.R. REP. NO. 102-40(I), at 46–47 (1991), *reprinted in* 1991 U.S.C.C.A.N. 549, 584–85:

To appreciate the potential damage caused by *Price Waterhouse*, it is important to remember the dual purpose of private enforcement of Title VII. On the one hand, the object is to make whole the individual victims of unlawful discrimination . . . . But this is only part of it. The individual Title VII litigant acts as a ‘private attorney general’ to vindicate the precious rights secured by that statute. It is in the interest of American society as a whole to assure that equality of opportunity in the workplace is not polluted by unlawful discrimination. Even the smallest victory advances that interest.

Title VII authorizes the U.S. Equal Employment Opportunity Commission to bring suit, *see* 42 U.S.C. § 2000 (2000), but such suits account for a small fraction of disparate treatment cases. *See* HAROLD S. LEWIS, JR., CIVIL RIGHTS AND EMPLOYMENT DISCRIMINATION LAW § 5.2, at 278 (1997).

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

169. *See supra* Part III.A.

170. It is possible that the *prospect* of compensatory damages—that is, the possibility that the plaintiff might prove necessity/“but for” causation—will be a sufficient incentive for plaintiffs. Empiri-

that plaintiffs can get in such cases is an award of attorneys' fees.<sup>171</sup> But under most contingency fee agreements, these fees tend to go to the attorney, not the plaintiff.<sup>172</sup> And, to make matters worse, the courts have tended to provide only minimal attorneys' fee awards in such cases.<sup>173</sup> So plaintiffs' attorneys tend to receive little in such cases; and plaintiffs themselves tend to receive nothing, despite the massive cost to them in terms of time, money, energy, and emotional cost. Thus, it seems far from clear that plaintiffs' attorneys, much less plaintiffs, have any significant incentive to pursue cases in which employers have engaged in utilization (that is, there is "motivating factor" causation), but there is no "but for" causation.

That being said, the inadequacy of the punitive and deterrent sanctions—and the inadequacy of incentives to litigate to impose such sanctions—is not an indictment of the procedural-and-substantive two-tier approach. This problem suggests only that, if we are serious about addressing the getting-away-with-it problem, the two-tier approach that is currently in use must be adjusted. (Part IV.A, below, will suggest some ways this might be done.)

*b. The Limit of a Two-Tier Approach: Windfall*

There is, however, a second problem with the two-tier approach—one which cannot be solved merely by adjusting it: A two-tier approach is simply not capable of dealing with all of the windfall problems created by over-determination. The two-tier approach cannot deal with the windfall-to-plaintiff problem and the windfall-to-defendant problem simultaneously.

We have seen that a minimal causation/"motivating factor" standard for compensatory damages will yield a windfall to plaintiffs in over-determined cases;<sup>174</sup> while a necessity/"but for" standard for compensatory damages will yield a windfall to defendants in certain over-determined cases.<sup>175</sup> The problem is that while a two-tier approach can use different standards to trigger different duties (liability and damages, for example), it cannot use different standards to trigger a single duty (for example, damages). At the end of the day, even a two-tier approach must choose one of the two available standards to trigger compensatory damages.

The 1991 Act chooses the necessity/"but for" standard.<sup>176</sup> This standard avoids the problem of providing a windfall to plaintiffs in over-determined cases—but only by providing a windfall to defendants. Defendants who are

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cal research would be necessary to determine the effectiveness of such a possibility as an incentive for plaintiffs.

171. See 42 U.S.C. § 2000e-5(g)(B)(i) (2000).

172. See *Bibbs v. Block*, 778 F.2d 1318, 1326 (8th Cir. 1985) (Lay, C.J., concurring) ("[T]he spoils do not go to the victim but only to the victim's attorneys.").

173. See *supra* note 165.

174. See *supra* Part III.A.

175. See *supra* Part III.B.3.

176. See 42 U.S.C. § 2000e-5(g)(B) (2000) (precluding compensatory damages where defendant proves "same action" defense—that is, a lack of "but for" causation).

fortunate enough (from their perspective) to be in over-determined cases will avoid paying damages that they otherwise would have paid. And, as we saw above, in many (if not all) of these cases, this result is problematic.<sup>177</sup>

The two-tier approach will always suffer from one of these two windfall problems. Either plaintiffs or defendants will reap a windfall in over-determined cases. Thus, while the two-tier approach solves many of the problems inherent in the “motivating factor” and “but for” standards, it cannot address all of those problems simultaneously.

#### IV. A SOLUTION: TOWARD CAUSAL COHERENCE IN DISPARATE TREATMENT DOCTRINE

We have seen that the two standards used in current disparate treatment law—the minimal causation/“motivating factor” standard and the necessity/“but for” standard—are both flawed. The minimal causation/“motivating factor” standard provides a windfall to plaintiffs in over-determined cases. And the necessity/“but for” standard is difficult to prove, lets defendants get away with harmful conduct, and provides a windfall to defendants in doubly over-determined cases. We have also seen that a procedural-and-substantive two-tier approach can solve some, but not all of these problems.

The following Section will suggest several improvements to the two-tier approach, which would maximize the potential of that approach. However, even with these adjustments, a two-tier approach cannot solve all of the problems inherent in the minimal causation and necessity standards. Accordingly, the subsequent Sections will propose a new causal standard, a necessity-or-sufficiency test, along with a comparative fault rule. This new approach to causation addresses all of the problems inherent in the two current causal standards. This Part concludes by urging Congress to adopt this approach, which would finally bring coherence to the treatment of causation in this area.

##### A. STEP ONE: FULFILLING THE PROMISE OF THE TWO-TIER APPROACH

As discussed in Part III.C.1, above, the procedural-and-substantive two-tier approach, such as that used in the 1991 Act, solves many of the problems inherent in the minimal causation/“motivating factor” and necessity/“but for” standards. By applying the less restrictive minimal causation/“motivating factor” test to impose liability and to shift the burden of proof for compensation, this approach addresses the getting-away-with-harm and difficulty-of-proof problems inherent in the necessity/“but for” standards. And by applying the more restrictive necessity/“but for” test for compensation, this approach avoids the windfall-to-plaintiff problem inherent in the minimal causation/“motivating factor” standard.

However, as we also saw in Parts III.C.2 and III.C.3, the effectiveness of this

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177. See *supra* Part III.B.3.a.

approach has been limited in three ways: First, this approach has not been applied universally; it has been limited to a subset of disparate treatment cases.<sup>178</sup> Second, the sanctions that currently attach upon a showing of minimal causation seem unlikely to provide adequate punishment and deterrence in over-determined cases.<sup>179</sup> And third, the benefits currently available to plaintiffs and their attorneys in over-determined cases seem unlikely to provide adequate incentives to bring such cases.<sup>180</sup> These three limits suggest three changes that should be made to current doctrine.

*First*, the procedural-and-substantive two-tier approach should be applied in all disparate treatment cases. That is, upon a showing of minimal/“motivating factor” causation, liability should attach and the burden of proof on causation should shift to the defendant on the issue of compensation.<sup>181</sup> Compensatory damages should then attach only if there is “but for” causation—i.e., if the defendant fails to prevail on the “same action” defense.<sup>182</sup>

We have seen above how this approach solves several of the problems inherent in the minimal causation and necessity standards. And it does not seem to have any significant drawbacks.<sup>183</sup> Thus, Congress should apply this approach in all disparate treatment cases.<sup>184</sup>

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178. See *supra* Part III.C.2.

179. See *supra* Part III.C.3.a.

180. See *id.*

181. My first proposal implicates a debate which is currently raging over the continued viability of the so-called *McDonnell-Douglas*, or “pretext,” model of litigation. See, e.g., Christopher R. Hedicann et al., *McDonnell Douglas: Alive and Well*, 52 *DRAKE L. REV.* 383, 418–25 (2004) (arguing that *McDonnell Douglas* is “alive and well”); Van Detta, *supra* note 15, at 119–38 (arguing that the Civil Rights Act of 1991 and *Costa* have overruled *McDonnell Douglas*); Zimmer, *supra* note 15, at 1933–40 (arguing that as a result of *Costa*, *McDonnell-Douglas* standard will only apply in a few extraordinary cases). I have proposed the application of a procedural-and-substantive two-tier approach in all cases. This approach attaches liability and shifts the burden of proof upon a showing of minimal/“motivating factor” causation. Thus, to the extent that the “pretext” model is understood as being synonymous with a single-tier approach incorporating a necessity/“but for” standard, then my proposal is inconsistent with the “pretext” method. As demonstrated in Part III.B, a single-tier necessity/“but for” standard is seriously flawed and should not be part of disparate treatment law. So if the “pretext” model is synonymous with such an approach, it should die. On the other hand, if the “pretext” model is understood simply as a method of proving causation under any causal standard—which seems to be the better understanding—then the “pretext” model would continue to play a role in disparate treatment litigation under my proposal. Under this understanding, a plaintiff could use the “pretext” method to demonstrate “motivating factor” causation, or to try to rebut the defendant’s “same action” defense.

182. In Part IV.B, *infra*, I will suggest an alternative standard for the top tier. I have posited the use of the “but for”/“same decision” test here only because that is the standard used in current doctrine. The instant Section deals with changes to current doctrine only at the margins.

To the extent that the “but for” test is applied—whether as the top tier in a two-tier approach, or as a stand-alone test—it should be applied precisely to each harm in question. Thus, if an employer’s utilization of race or sex is a “but for” cause of stigmatic or dignitary harm, the defendant should be liable for such harm, even if the defendant’s utilization is not a “but for” cause of the ultimate employment action (e.g., firing). See *supra* Part III.B.2.a.

183. See *supra* note 159.

184. This proposal would most likely need to be effectuated by Congress. Prior to the 1991 Act, the Court, as a matter of statutory interpretation, adopted a procedural-only two-tier approach. See *Price Waterhouse v. Hopkins*, 490 U.S. 228, 244–45 (1989) (plurality); *id.* at 276 (O’Connor, J., concurring).

*Second*, the procedural-and-substantive two-tier approach used in current doctrine should be modified to include meaningful punitive and deterrent sanctions at the “motivating factor” level of causation. We saw in Part III.C.1 that, to address the getting-away-with-harm problem inherent in the “but for” standard, the law must impose punitive/deterrent sanctions whenever an employer utilizes a protected characteristic—whenever there is minimal/“motivating factor” causation. And we also saw that current doctrine fails to do so. Under the 1991 Act, where an employer prevails on a “same action” defense (that is, where there is only “motivating factor” causation), only injunctive relief and attorneys’ fees are available. Yet injunctive relief, which under the 1991 Act cannot include orders to hire or reinstate, is costless to the employer. And while attorneys’ fees might provide some deterrent effect, we have seen that courts have tended to limit such fees in “same action” cases. Accordingly, to the extent that we are serious about deterring utilization of protected characteristics, we need to improve the punitive/deterrent sanctions that attach with liability (upon a showing of “motivating factor” causation) in the two-tier approach.

For example, we might consider imposing fines in cases where there is only minimal/“motivating factor” causation. Or we might consider permitting plaintiffs to recover punitive damages in such cases.<sup>185</sup> It is beyond the scope of this Article to address what types of sanctions or what size sanctions would effectively deter employers from utilizing protected characteristics in their decisionmaking in over-determined/“same decision” cases. Empirical research in this area would be useful, if not indispensable. My point here is simply that the dearth of monetary sanctions in current doctrine (no damages and limited attorneys’ fees), is likely to prevent meaningful punishment or deterrence. Congress should therefore adopt additional punitive/deterrent sanctions at the minimal causation/“motivating factor” level.<sup>186</sup>

*Third*, the two-tier approach used in current doctrine should be modified to

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While Congress did a good thing by expanding that approach to a procedural-and-substantive approach in the 1991 Act, that Act also created substantial ambiguity. Did Congress intend the procedural-and-substantive approach to govern for all statutes using Title VII’s “because of” language? Or did Congress intend this approach to govern only 1991 Act cases, leaving the *Price Waterhouse* procedural-only approach—or even a single-tier approach—to govern cases under other disparate treatment statutes? Congress should resolve this ambiguity and conclusively apply the procedural-and-substantive two-tier approach to all disparate treatment statutes.

185. See, e.g., Miller B. Brownstein, Note, *Injury-Free, But Money for Me: Whether the Civil Rights Act of 1991 Permits Punitive Damages in the Absence of Compensatory Damages*, 84 B.U. L. REV. 1049, 1056–62 (2004) (discussing courts that have permitted punitive damages awards where jury has declined to award compensatory damages). But see *Smith v. Wade*, 461 U.S. 30, 58–59 (1983) (Rehnquist, J., dissenting) (criticizing the use of punitive damages as deterrent). To my knowledge, at present, this is rarely, if ever, done in disparate treatment cases.

186. This proposal, like my first proposal, should be effectuated by Congress. Courts might be able to rectify the problem of low fee awards in minimal causation cases by reinterpreting the “prevailing party” language of most disparate treatment statutes. However, as we have seen above, the majority of courts have been disinclined to do so. See *supra* note 165. Moreover, the 1991 Act expressly precludes any damages in minimal causation cases. See 42 U.S.C. § 2000e-5(g)(B) (2000). And disparate treatment statutes generally make no provision for civil fines. Thus, the options of awarding punitive

include meaningful incentives for plaintiffs and their attorneys to act as private attorneys general in over-determined/“same action” cases. As we saw in Part III.C.3.a, above, current two-tier schemes are unlikely to provide meaningful incentives for plaintiffs and their attorneys to solve the getting-away-with-it problem—that is, to seek to impose punitive/deterrent sanctions in over-determined/“same action” cases (or those cases in which there is a risk that the decision was over-determined). Fee awards in such cases have been small. And plaintiffs in such cases (as opposed to their attorneys) receive no monetary incentives at all. Thus, if we want to continue to rely on a private attorneys general model to punish/deter utilization, we need to improve the incentives for plaintiffs and their attorneys to pursue transgressors.

Two suggestions that are part of my second proposal might have this effect. If we provided meaningful attorneys’ fees awards in minimal causation/“motivating factor” cases, this would at least incentivize plaintiffs’ attorneys. And imposing punitive damages in such cases would also incentivize plaintiffs themselves.<sup>187</sup>

Another possibility might be to provide a “bounty”—a monetary sum, independent of damages—to plaintiffs who prove utilization/“motivating factor” causation, but are prevented from recovering compensatory damages under a “but for”/“same action” standard. Such bounties, paid by losing defendants, are familiar in other areas of the law.<sup>188</sup> As with increased attorneys’ fees or punitive damages, such bounties would also serve to punish and deter utilization, in addition to incentivizing plaintiffs and their attorneys to pursue remedies from such employers.<sup>189</sup>

As with my discussion of punitive and deterrent sanctions, my point here is not to argue for particular types or magnitudes of incentives. Empirical research will be necessary to determine the types and sizes of incentives that are most likely to be effective. My point is that, if we are serious about enforcing the norm against utilization of protected characteristics, and rely heavily upon a private attorneys general model to enforce this norm, Congress should provide better incentives for plaintiffs in minimal causation cases to act as private attorneys general.<sup>190</sup>

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damages or imposing civil fines would not likely be available to courts absent some congressional action.

187. See *Smith*, 461 U.S. at 91 (Rehnquist, J., dissenting) (noting that punitive damages can “serve as a ‘bounty’ to encourage private litigation”) (citing *DAN DOBBS, REMEDIES* 221 (1973)).

188. See, e.g., False Claims Act, 31 U.S.C. § 3729 (2000) (providing bounty to private plaintiffs who prove wrongdoing).

189. In Part IV.B, *infra*, I will suggest that compensatory damages should be available in a significant subset of over-determined/“same action” cases (those in which the employer’s utilization is sufficient, though not necessary, to trigger the employer’s decision). To the extent that this suggestion were adopted, additional punitive/deterrent sanctions or additional incentives for plaintiffs and their attorneys might be unnecessary in this subset of over-determined cases.

190. This proposal, like my first two, will likely require legislative intervention. We saw in Part III.C.3.a that courts have been a primary impediment to this goal, providing small fee awards in

B. STEP TWO: SOLVING THE WINDFALL PROBLEM BY ADOPTING A  
NECESSITY-OR-SUFFICIENCY STANDARD

The three changes proposed in the last Section are based on a two-tier approach similar to the 1991 Act—that is, a procedural-and-substantive approach, using the “motivating factor” test at the lower tier and the “but for” test at the top tier. My three proposed changes involved adjustments to that approach at its margins. With such changes, the two-tier approach would accomplish everything it is capable of accomplishing: addressing the difficulty-of-proof and getting-away-with-it problems endemic to the necessity/“but for” standard, and avoiding the windfall-to-plaintiff problem endemic to the minimal causation/“motivating factor” standard.

However, as we saw above, given the current options available for each tier (“motivating factor” or “but for”), a two-tier approach cannot solve the windfall-to-defendant problem at the same time as it solves the windfall-to-plaintiff problem.<sup>191</sup> This is because the two-tier approach must use one of these two flawed causal standards to trigger compensatory damages. If compensatory damages attach upon a showing of “motivating factor” causation, the plaintiff will reap a windfall. Yet if “but for” causation is required, the defendant will reap a windfall—at least in doubly over-determined cases (those in which the defendant’s action would have been independently sufficient to trigger the harm in question).

This last caveat (that the windfall-to-defendant problem occurs only in doubly over-determined cases) suggests a significant refinement to the procedural-and-substantive two-tier approach: Defendants should not be allowed to avoid paying compensation in doubly over-determined cases—that is, where their own act would have been sufficient to trigger the harm in question, even if not necessary. Rather, compensatory damages should attach when the defendant’s act is sufficient to trigger the harm, as well as when the defendant’s act is necessary. Put differently, instead of using a necessity/“but for” standard to attach compensatory damages, as we currently do, such damages should attach where the defendant’s action is either necessary *or sufficient* to trigger the harm in question.

This standard would permit recovery in two types of cases. First, plaintiffs could recover where the employer’s utilization was *necessary* to trigger the adverse employment decision (the same as current law). In this type of case, there is no danger of windfall to the plaintiff; the plaintiff’s injury would not have occurred absent the employer’s utilization.<sup>192</sup> Thus, there is no reason not

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over-determined cases. However, even if these courts were to change their interpretation of the various fee-shifting statutes, this alone likely would not be enough. This is because most contingency fee agreements give attorneys’ fee awards to the plaintiff’s attorney, so plaintiffs would still have no monetary incentive to enforce the law in over-determined cases. A legislative response will likely be required to accomplish this proposed change.

191. *See supra* Part III.C.3.b.

192. *See supra* Part III.A.

to compensate plaintiffs. Second, under this proposed standard, plaintiffs could recover where the employer's utilization was sufficient to trigger the adverse employment decision—even if the employer's utilization was not necessary to that decision. In such cases (that is, where the employer's utilization is sufficient but not necessary), we have seen that there will always be a windfall.<sup>193</sup> And we have seen that allocating that windfall to the defendant/employer is problematic: In at least two of three possible scenarios, doing so would favor a blameworthy party (the defendant) over a blameless party (the plaintiff).<sup>194</sup> A necessity-or-sufficiency standard would solve this problem by allocating the windfall to the plaintiff/employee.

We can illustrate this using the hypotheticals we used when discussing double over-determination. In the first hypothetical, over-determination was caused by a blameless act. The employer's decision to fire the employee was based on two factors: the employee's sex and the fact that a large client went out of business, reducing the employer's labor needs. Either factor, without the other, would have been sufficient to trigger the termination. Because the second factor (reduced labor needs) was sufficient to trigger the termination, the first factor (sex) is not necessary. So a necessity-only ("but for") test would give the windfall from over-determination to the blameworthy defendant, as opposed to the blameless plaintiff. But the defendant's utilization of sex was sufficient, even though it was not necessary. Thus, a necessity-or-sufficiency test would give the windfall to the blameless plaintiff, instead of the blameworthy defendant.

This test also solves our second hypothetical, in which over-determination was caused by a blameworthy act by someone other than the plaintiff. There, the employer's decision to fire the employee was based on her sex and the fact that a key client gave a false, negative evaluation of the employee's work (the falsity being unknown to the employer). Again, each factor would have been sufficient, without the other, to trigger the termination. The fact that the negative client report would have been sufficient to trigger the termination rendered the employer's utilization of sex non-necessary. Thus, under a necessity-only ("but for") test, the blameworthy employer (who used sex in his decisionmaking) would receive the windfall from over-determination. But under a necessity-or-sufficiency test, the blameless plaintiff would receive this windfall.<sup>195</sup>

Thus, Congress should modify current disparate treatment law to adopt a

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193. See *supra* Part III.B.3.a.

194. See *supra* Part III.B.3.b.

195. As noted above in Part III.B.3.b.2, where over-determination results from the act of a blameworthy third party, there is a danger that one of the blameworthy parties—either the defendant or the third party—may suffer a windfall loss. Below, in Part IV.C, I will suggest an approach that might address the issue of windfall loss between wrongdoers: a damages allocation rule. My point here is that, as between a blameless plaintiff and a blameworthy defendant, we should be more concerned about the blameless plaintiff.



necessity-or-sufficiency test for compensatory damages—at least in cases involving over-determination from blameless acts or blameworthy acts by persons other than the plaintiff. That is, Congress should adopt a modified procedural-and-substantive two-tier approach. Congress should prescribe a minimal causation/“motivating factor” test at the lower tier (to attach punitive/deterrent sanctions and shift the burden of proof). And at the upper tier, in deciding whether to award compensatory damages, Congress should adopt a necessity-or-sufficiency test, instead of the current necessity-only “but for” test.<sup>196</sup>

This standard would prevent defendants from avoiding compensatory damages merely by showing a lack of necessity (via the “same action” defense)—at least in cases where the defense was based on a blameless act or a blameworthy act by someone other than the plaintiff. In such cases, to avoid compensatory damages, the defendant should also be required to prove a lack of sufficiency; that its utilization of the protected characteristic would not have been sufficient to trigger the adverse action.<sup>197</sup> Put differently, once the plaintiff shows minimal causation (that her employer utilized a protected characteristic), the employer should only be able to avoid paying compensatory damages if it can show both (1) that it would have reached the same decision absent the utilization of a protected characteristic (lack of necessity), *and* (2) that its utilization would not have triggered the same decision absent other legitimate factors (lack of sufficiency).

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196. One might ask, at this point, why we should not just adopt a simple sufficiency standard (requiring sufficiency in all cases). After all, such a standard would result in the same allocation of windfall in doubly over-determined cases as would a necessity-or-sufficiency standard. (Since double over-determination can occur only where the defendant's action is sufficient, a sufficiency-only standard would be satisfied in all such cases.) The answer is that, as a theoretical matter, a sufficiency-only standard would preclude compensation in cases where we would tend to see defendants as being causal—as contributing in important ways to harmful outcomes. Consider, for example, a hypothetical based on the familiar camel's back proverb: Suppose that, given the load on the camel's back, it will take 1000 straws to break its back. And suppose that the defendant, X, places 600 straws on the load. X's action will be insufficient to break the camel's back. But suppose that, after X has acted, Y comes along and places another 500 straws on the load, breaking the poor animal's back. If we required sufficiency for compensatory damages, the camel owner (P) could not recover any such damages from X. Such a rule would permit P to recover such damages from Y (who placed the last straw on the load). But it seems problematic to let X off the hook. X's action, after all, contributed to the harm. In fact, X's action was necessary to the outcome (even though not sufficient); absent his 600 straws, the camel's back would not have broken. Thus, a necessity-or-sufficiency rule seems preferable to a sufficiency-only rule.

That being said, in cases involving factors that act simultaneously (as they do in the decisionmaking context), it is not clear that there would be any difference between a sufficiency-only rule and a necessity-or-sufficiency rule. This is because, where factors operate simultaneously, a factor that is necessary will always be sufficient. *See supra* note 27. Thus, in such simultaneous cases—and thus in disparate treatment law—a necessity-or-sufficiency standard would effectively be equivalent to a sufficiency-only standard.

197. The necessity-or-sufficiency test would solve the windfall problem irrespective of who was required to prove (or disprove) this type of causation. However, given that proving sufficiency would likely involve similar difficulties to proving necessity, *see supra* Part III.B.1, the defendant should bear the burden of proving lack of sufficiency, as well as lack of necessity, in order to avoid compensatory damages.

This proposal is largely consistent with the approach taken by modern tort law.<sup>198</sup> The Second Restatement of Torts, for example, permits liability (and thus, compensatory damages) based on either necessity or sufficiency—at least when lack of necessity results from a blameless act or a blameworthy act by a third person.<sup>199</sup> This approach in tort law seems to stem from the recognition that, in such cases, it would be unjust to favor a blameworthy defendant over an innocent plaintiff—which is what happens if we adopt a necessity-only/“but for” test in these cases.<sup>200</sup> In fact, it is not entirely clear why disparate treatment law has borrowed only part of tort law’s standard—the necessity/“but for” option, but not the sufficiency option. Doing so runs counter to tort law’s apparent insight that a necessity-only standard is problematic in certain doubly over-determined cases. Accordingly, Congress should adopt a necessity-or-sufficiency test for compensatory damages in disparate treatment law, at least in cases involving blameless plaintiffs.<sup>201</sup>

### C. STEP THREE: ADDING AN ALLOCATION RULE

My proposal so far—using a necessity-or-sufficiency test for compensatory damages—would solve the problem of windfall from over-determination in at least two of the three scenarios in which over-determination can occur: cases where over-determination is caused by either (1) a blameless act, or (2) a blameworthy act by someone other than the plaintiff. But how should we deal

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198. I say “largely” consistent with tort law because tort law does not seem to have embraced burden-shifting in the area of causation.

199. See RESTATEMENT (SECOND) OF TORTS § 432(1) (1965) (noting that the causation requirement may be satisfied by “but for” causation); *id.* § 432(2) (noting that the causation requirement may be satisfied in over-determined cases when the defendant’s conduct is independently sufficient to bring about the harm); see also *id.* § 432(2) cmt. d. (noting that the section applies when the second factor “is generated by an innocent act of a third person or when its origin is unknown”); see also RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL HARM § 27 (Proposed Final Draft No. 1, 2005) (noting that liability is based on sufficiency in doubly over-determined cases).

200. As explained by the court in *Kingston v. Chicago & Northwestern Railroad Co.*—a two-fires case that forms the basis for the rule in the Second Restatement: “[T]he question is whether the [defendant], which is found to have been responsible for the origin of [Fire X], escapes liability, because the origin of [Fire Y] is not identified . . . . An affirmative answer to that question would certainly make a wrongdoer a favorite of the law at the expense of an innocent sufferer.” 211 N.W. 913, 915 (Wis. 1927).

201. This proposal would almost certainly need to be implemented by Congress. The 1991 Act expressly uses a necessity/“but for” standard for compensatory damages. See 42 U.S.C. § 2000e-5(g)(2)(B) (2000) (providing same decision test for compensatory damages). And, as noted above in Part II.B, there is no discussion of sufficiency as a causal standard in the legislative history of that Act. Outside of the 1991 Act, courts have applied either a single-tier necessity/“but for” standard or *Price Waterhouse*’s procedural two-tier standard, which also uses a necessity/“but for” standard for compensatory damages. It might be argued that Justice O’Connor somehow intended to invoke a necessity-or-sufficiency test with her “substantial factor” formulation in *Price Waterhouse*; that she was searching for a middle ground between minimal causation/“motivating factor” and necessity/“but for,” and thus intended to invoke the necessity-and-sufficiency test, even if she did not articulate it. However, Justice O’Connor’s test applied only to burden-shifting—not to compensatory damages. Thus, even outside of the 1991 Act, it would seem an impossible stretch to adopt a necessity-or-sufficiency test for compensatory damages by judicial interpretation. Congressional adoption of this standard would be preferable.

with the windfall problem in cases where over-determination results from (3) a blameworthy act by the plaintiff? This, of course, was the defendant's claim in *Price Waterhouse* (that it would have denied partnership based solely on the plaintiff's abrasiveness);<sup>202</sup> it was the premise for the termination hypothetical at the outset (where the employer claimed that it would have fired the employee based solely on her tardiness); and it is the claim made in many, if not most, disparate treatment cases.

We saw above that there is no clearly preferable recipient for the windfall from over-determination in such cases.<sup>203</sup> Thus, it might be argued that in such cases a necessity-or-sufficiency rule (which would allocate the windfall to the plaintiff) is just as problematic as a necessity-only/"but for" rule (which would allocate the windfall to the defendant).

In such cases we might want to "leave things as we found them" and use a necessity-only/"but for" rule for compensatory damages, which would leave the windfall with the defendant. Or, it might be fairer simply to flip a coin (heads, the plaintiff gets compensatory damages; tails, the defendant gets to keep this money). Or, conceivably, the government might take this windfall: the court might make the defendant pay such damages in the nature of a fine, or tax, without giving it to the plaintiff. However, there is a better solution to this problem: In such cases, we should divide the windfall between the blameworthy plaintiff and the blameworthy defendant. The problem, after all, is that there is no good way to decide which of these parties should receive the inevitable windfall that results when there are two sufficient factors. Such a problem can be solved by splitting this windfall between the two parties.

Of course, there are a number of ways to divide this windfall. We might, for example, divide it evenly (50% to the plaintiff, 50% to the defendant). However, such a 50-50 rule would not account for the possibility that the parties were not equally blameworthy. The whole point of splitting compensatory damages is our hesitancy to favor one blameworthy party over another blameworthy party. But, in a case where the parties were not equally blameworthy, a 50-50 rule would favor the more blameworthy party over the less blameworthy party.

Accordingly, the better solution would be to apply a comparative fault rule. That is, we would have the factfinder assess relative fault and divide compensatory damages pro rata in accordance with this assessment. For example, if the factfinder concluded that the employee was 40% blameworthy and the employer was 60% blameworthy, then the employee would be awarded 60% of her

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202. See *Hopkins v. Price Waterhouse*, 737 F. Supp. 1202, 1207 (D.D.C. 1990). Note that the "perceived inadequate interpersonal skills" described by Price Waterhouse may have been sex-dependent. That is, the employer might not have seen the same qualities in a man as being negative. See *id.* (noting that defendant's alleged justification "begs the question of the extent to which the perceptions of her interpersonal skills were tainted by sexism").

203. See *supra* Part III.B.3.b.3.

compensatory damages.<sup>204</sup>

There are three types of comparative fault rules. Under a “pure” comparative fault rule, the plaintiff can recover even where her own fault accounted for the lion’s share of the total fault. For example, suppose that the employee’s tardiness accounted for 99% of the fault, and the employer’s consideration of sex for only 1%. Under a “pure” comparative fault rule, the employee would simply be entitled to 1% of her compensatory damages. Alternatively, under a “modified” comparative fault rule, compensatory damages are barred when the plaintiff’s share of the fault reaches a certain threshold—usually, an amount of fault equal to that of the defendant (an “equal fault bar”), or an amount of fault greater than that of the defendant (“a greater fault bar”).<sup>205</sup>

In the context of disparate treatment law, the “pure” comparative fault rule seems preferable to either of the “modified” rules. The whole point of adopting a splitting rule was to avoid giving a windfall to one blameworthy party at the expense of another blameworthy party. Yet that is exactly what “modified” comparative fault rules do. Suppose, for example, that the employee’s tardiness accounted for 60% of the fault, and the employer’s consideration of sex for 40%. In such a case, either of the “modified” comparative fault rules would award the entire windfall from over-determination to the blameworthy defendant, at the expense of the blameworthy plaintiff—a problematic result.<sup>206</sup>

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204. One might ask why I have not suggested a rule based on comparative *causation*, as opposed to comparative *fault*. After all, this is an Article on causation. The answer is two-fold. First, it is unclear that it would be possible to measure comparative causation in any meaningful way. While we may be able to measure causal influence in the physical world in terms of physical units, such as weight or velocity, it is not clear that there is any meaningful way to quantify causation outside the physical realm. Without such a measure, it would seem difficult, if not impossible, to determine a party’s relative causal contribution.

But there is a second, and perhaps more serious, problem with allocating damages based on a comparative causation rule. As discussed above, the real issue here—in the two-blameworthy-party scenario, and in disparate treatment law more generally—is blameworthiness, or fault. See Cox, *supra* note 23, at 7-4 (noting that the causation element of Title VII is based on a corrective and individualistic conception of justice). Even if causal contribution could somehow be measured, causal contribution will often be a flawed proxy for relative fault. Consider, for example, the “last straw” proverb: Suppose that 1000 straws would trigger the outcome (break the camel’s back). The defendant places one straw on the load; he contributes one out of 1000 units of causation. Yet, because it was the “last straw,” we might consider him more blameworthy than the person who placed the second-to-last straw on the load, or the person who placed the first 100 straws on the load. See KENNETH S. ABRAHAM, *THE FORMS AND FUNCTIONS OF TORT LAW* 146 (1997) (explaining that it is possible for a party to be only slightly negligent and cause a great deal of harm, or for a party to be highly negligent and yet cause only a little bit of harm). Put differently, a relative fault rule seems to require considerations in addition to relative causal contribution. (Such considerations look a lot like proximate cause considerations—policy considerations dealing with things such as foreseeability.)

205. See KEETON ET AL., *supra* note 127, at 473.

206. There might be some hesitation to impose liability for extremely small or trivial degrees of fault. However, as discussed above in Part III.B.2, we should probably never consider the utilization of protected characteristics trivial. Alternatively, there might be some hesitation to use the courts’ resources where the defendant’s fault is slight. However, by the time a court applies a “modified” comparative fault rule—i.e., at the end of the trial—the court has already used most of the resources involved in the case.

The two criticisms that have traditionally been leveled at comparative fault rules in tort law are not particularly persuasive in the context of my proposal. First, some critics of allocation rules have argued that such rules tend to reduce the overall amount of compensation that plaintiffs receive.<sup>207</sup> However, in the context in which I am proposing such a rule, that is exactly the point. I do not believe that plaintiffs should receive the entire windfall in cases where over-determination is caused by their own wrongful conduct. My goal in proposing an allocation rule is to reduce this windfall (without providing a complete windfall to the defendant).

A related critique of such splitting rules is that they also reduce the amount that defendants are required to pay, thereby reducing the law's deterrent effect.<sup>208</sup> However, this concern is addressed by my earlier proposals. The procedural-and-substantive two-tier system I have proposed imposes liability anytime that there is minimal causation—that is, any time that the act of utilization occurs. I have also proposed adding meaningful punitive/deterrent remedies for minimal causation. If this proposal were adopted, there would be adequate deterrents against the harmful act in question (utilization of protected characteristics). Such deterrence would not be diluted by the adoption of a compensatory fault rule. Accordingly, these concerns should not affect my proposal.

The comparative fault approach I propose would only be necessary in a narrow subset of cases. The allocation of windfall is only an issue in doubly over-determined cases—cases in which the defendant's act of utilization is sufficient, but not necessary, to trigger the adverse employment decision. And the necessity-or-sufficiency rule for compensatory damages I proposed above will result in a fair allocation of damages between the plaintiff and the defendant in such cases where the defendant's act is rendered over-determinative by either (1) a blameless act, or (2) a blameworthy act by a person other than the plaintiff. Thus, the comparative fault rule would be necessary only in doubly over-determined cases where the over-determination is caused by (3) the plaintiff's own blameworthy conduct.

That being said, a comparative fault approach might also serve a useful

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207. See, e.g., Ellen Bublick, *The End Game of Tort Reform: Comparative Apportionment and Intentional Torts*, 78 NOTRE DAME L. REV. 355, 387 (2003) (concluding that the most significant effect of comparative fault doctrine is to decrease liability to plaintiffs). *But see* Calabresi & Cooper, *supra* note 135, at 870 (noting that the imposition of comparative fault rules has caused some plaintiffs to recover nothing when they would have recovered something, but other plaintiffs recover something when they would have recovered nothing; “the opposing trends seem to have balanced out, so that the total amount received as damages for accidents seems to have remained about the same”).

208. See, e.g., Bublick, *supra* note 207, at 376 (noting courts' concern that allocation of damages would weaken the incentives of defendants to avoid negligent actions). Professor Bublick is particularly concerned about lack of deterrence for intentional torts. *Id.* at 358. To the extent that the concern regarding under-deterrence is limited to intentional torts, it is not clear that this concern is even applicable to disparate treatment law. As I will argue in a forthcoming article, whether disparate treatment should be thought of as “intentional” conduct in a tort-law sense is open to serious debate.

auxiliary purpose in the second category of doubly over-determined cases (where over-determination is caused by a blameworthy third party). As discussed above, in such cases the necessity-or-sufficiency rule by itself (without a comparative fault rule) would distribute the windfall fairly between the plaintiff and the defendant in such cases.<sup>209</sup> However, as also noted above, a simple necessity-or-sufficiency rule may create a windfall as between the defendant and the third party in such cases.<sup>210</sup> A comparative fault approach could be used to alleviate this windfall.

Suppose, for example, that the employer's utilization of sex was rendered unnecessary by a credible and serious client complaint regarding the employee. The employer would have fired the employee based on this complaint alone, irrespective of its consideration of her sex. But suppose, unbeknownst to the employer, the client's complaint was false. (Suppose, for instance, that the client complained because it did not like members of the employee's race, or because the employee exposed some wrongdoing on the part of the client.) In such a case, under a simple necessity-or-sufficiency rule, the defendant-employer would—and should—be required to pay compensatory damages. But unless the defendant-employer can recover some of those damages from the client, the client might receive a windfall; the client will avoid paying damages for an action that would otherwise have subjected it to such damages. A better rule in such cases would be to divide those damages between the employer and the third party (here, the client) based on relative fault.<sup>211</sup>

Thus, Congress should adopt a comparative fault rule for the allocation of compensatory damages in two situations: where double over-determination results from either the plaintiff's own blameworthy act, or from the blameworthy act of a third party. In the first instance (plaintiff's own act), compensatory damages should be apportioned between the plaintiff and the defendant based on relative fault. In the second instance (third party's act), compensatory damages should be apportioned between the defendant and the third party based on relative fault.<sup>212</sup>

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209. See *supra* Part IV.B.

210. See *supra* text accompanying note 195.

211. There are at least two variations on this type of allocation rule. Under a "joint and several liability" rule, the plaintiff is permitted to recover all of her compensatory damages from the defendant, who is then permitted to seek contribution for a share of those damages from the blameworthy third party (based on relative fault). See KEETON ET AL., *supra* note 127, at 475. Alternatively, under a "several liability" rule, the plaintiff can recover from the defendant only that portion of her compensatory damages that could be considered attributable to the defendant (based on relative fault); if the plaintiff wants to recover the pro rata share of a blameworthy third party, she must either join that party or commence a separate action against that party. *Id.* Determining which of these two approaches would be the better one has been the subject of a large volume of commentary, and is beyond the scope of this Article. See *id.* (citing commentators on each side of this debate).

212. This proposal would almost certainly need to be implemented by Congress. The 1991 Act makes clear that *no damages* are available where there is no necessity/"but for" causation. See 42 U.S.C. 2000e-5(g)(2)(B) (2000). And there appears to be no indication in any other disparate treatment statute that Congress has contemplated a damages allocation rule. Moreover, the Supreme Court has

This proposal would solve the remaining windfall problems endemic to the current two-tier doctrines. Where there is necessity/“but for” causation, and thus no windfall, the plaintiff will receive compensation. Where there is no necessity and no sufficiency, and thus a windfall if the plaintiff were compensated, such compensation will be denied. And where there is sufficiency but no necessity, creating an inevitable windfall, that windfall will be distributed in a manner that makes normative sense: to the innocent party where one is innocent and the other blameworthy; and allocated between blameworthy parties where both are blameworthy.

This approach is also largely consistent with an important trend in tort law.<sup>213</sup> In modern times, most (if not all) jurisdictions have adopted some form of comparative negligence law.<sup>214</sup> This law has gained ascendancy over earlier all-or-none approaches, in which blameworthy defendants were favored (often absolutely) over blameworthy plaintiffs.<sup>215</sup> The rise of such comparative fault doctrines in tort law seems to be indicative of (1) a widespread concern regarding favoring one blameworthy party over another, and (2) a widespread understanding that comparative fault regimes are a good means of addressing this concern. We should take these sentiments to heart in disparate treatment law.

#### D. PUTTING IT ALL TOGETHER

Congress should adopt a procedural-and-substantive two-tier approach in all disparate treatment cases. The plaintiff should have the burden of showing minimal/“motivating factor” causation—that is, her employer utilized a protected characteristic in its decisionmaking. If she makes such a showing, two things should occur: (1) liability should attach, and (2) the burden of proof should shift to the employer to show lack of necessity-or-sufficiency for purposes of compensatory damages.

If the employer cannot show lack of necessity (the same-decision defense), then full compensatory damages should attach. If the employer can show lack of necessity (same decision) but not lack of sufficiency, then compensatory damages should attach, though the amount should depend on the type of act that precluded necessity. Full compensatory damages should

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declared that violators of Title VII do not have a right to contribution from blameworthy third parties. See *Nw. Airlines, Inc. v. Transp. Workers Union*, 451 U.S. 77, 94–95 (1981).

213. Again, I say “largely” consistent with tort law because tort law does not seem to have embraced burden-shifting in the area of causation.

214. See DOBBS, *supra* note 15, at 504 (“By the 1980s, only four states—Alabama, Maryland, North Carolina, and Virginia—had failed to adopt comparative negligence rules. The overwhelming majority of American states thus now follow the general system adopted in other common law and in the major civil law countries.”) (citations omitted).

215. See Calabresi & Cooper, *supra* note 135, at 868 (“In the last thirty years, after much pressure from theoretical scholars and others, our tort system has moved away from the dominance of all-or-nothing recovery rules—from situations in which you either won or lost—toward rules that allow and favor splitting in any number of ways.”) (citation omitted).

be available where the lack of necessity flows from (1) a blameless act, or (2) a blameworthy act by a third party (in which case damages should be allocated between the employer and the third party based on relative fault). However, if the lack of necessity flows from (3) a blameworthy act by the plaintiff, then compensatory damages should be allocated between the plaintiff and her employer based on a (pure) comparative fault rule. That is, the plaintiff should receive only that portion of her compensatory damages proportionate to her employer's relative fault.

Finally, in cases where employers have utilized protected characteristics but compensatory damages are not available (or are too small to serve as an effective punishment/deterrent or incentivize the plaintiff), punitive/deterrent sanctions should be imposed upon the employer, and an incentivizing reward should be provided for the plaintiff who has proven such utilization (and her attorney).

#### CONCLUSION

Congress failed to address causation effectively when it passed Title VII forty years ago. The phrase "because of" clearly required causation, but the statute did not specify what form of causation. Nor did it specify whether we were to use a single causal standard or two different causal standards for prohibition and compensation. In response, the courts have struggled to find an appropriate standard of causation, generating a thicket of vague, undefined, and often-conflicting verbal formulations for causation. Ultimately the courts adopted the problematic "but for" test for both prohibition and compensation.

In 1991, Congress had the opportunity to fix these problems—and it dropped the ball. Congress made it clear in the 1991 Act that courts should apply two causal standards, one (the "motivating factor" test) to prohibition and another (the "same action"/"but for" test) to compensation. However, Congress: (1) failed to specify whether this two-tier approach applies to all disparate treatment cases (as it should), (2) failed to define the "motivating factor" test in causal terms, (3) failed to provide effective deterrents against employers' use of protected characteristics such as race and sex in decision-making, (4) failed to provide meaningful incentives for employees and their attorneys to enforce this norm, and (5) left in place the one-sided "but for" test for compensation, often providing a windfall to blameworthy defendants. Thus, fifteen years after the 1991 Act, courts are still struggling with causation in disparate treatment law. And worse, the concepts they have to work with—the minimal causation/"motivating factor" test and the necessity/"but for" test—are both flawed.

Congress can and should fix these problems. By adopting the proposals in this Article, Congress could finally achieve causal coherence in disparate treatment law—and finally achieve the goals that this law has sought to achieve for the last forty years.