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NOTE

Clearing the Mixed-Motive Smokescreen: An Approach to Disparate Treatment Under Title VII

Title VII of the Civil Rights Act of 1964[1] prohibits employers, employment agencies, and labor unions from discriminating against any individual "because of" or "on the basis of" the individual's race, color, religion, sex or national origin.[2] Plaintiffs relying on the disparate treatment theory of discrimination[3] claim that they have been adversely affected by an employment action improperly based on one of the statute's prohibited factors.[4] In a disparate treatment case, the employer "simply treats some people less favorably than others because of their race, color, religion, sex, or national origin. Proof of discriminatory motive is critical. . . ."[5] These differences in treatment were "the most obvious evil Congress had in mind when it enacted Title VII."[6]

Courts have perceived disparate treatment cases as involving either single or "mixed" motives. In the single-motive case, the court views the adverse employment action as based solely on either impermissible reasons or legitimate ones. Cases involving mixed motives are more complex. Although descriptions vary,[7] a mixed-motive case essen-

1. Pub. L. No. 88-352, 78 Stat. 241, 253 (codified as amended at 42 U.S.C. § 2000e (1982)).

2. 42 U.S.C. § 2000e-2 (1982). For the sake of convenience, this Note usually will refer to defendants in Title VII cases as "employers." Generally, the cases discussed focus on specific employment actions (*e.g.* discharge or failure to hire or promote), although the statute is not nearly so limited in scope. *See, e.g.*, International Bhd. of Teamsters v. United States, 431 U.S. 324 (1977) (involving challenge to collectively bargained seniority system, with both union and employer as defendants).

3. *See, e.g.*, McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973).

4. Disparate treatment is not the only category or theory of discrimination under Title VII. Others include disparate impact, *see, e.g.*, Griggs v. Duke Power Co., 401 U.S. 424 (1971) (holding invalid a requirement that applicants have a high school diploma or pass a standardized intelligence test), the current effects of past discrimination, failure to make reasonable accommodation, and perhaps reverse discrimination. *See generally* B. SCHLEI & P. GROSSMAN, EMPLOYMENT DISCRIMINATION LAW (2d ed. 1983); Stonefield, *Non-Determinative Discrimination, Mixed Motives, and the Inner Boundary of Discrimination Law*, 35 BUFFALO L. REV. 85 (1986). These categories and theories do not use mixed-motive analysis and are beyond the scope of this Note.

5. International Bhd. of Teamsters v. United States, 431 U.S. 324, 335 n.15 (1977). In contrast, disparate impact involves "employment practices that are facially neutral in their treatment of different groups but that in fact fall more harshly on one group than another and cannot be justified by business necessity." 431 U.S. at 336 n.15. "[I]ntentional . . . discrimination [is] an unnecessary element in disparate impact cases." Goodman v. Lukens Steel Co., 107 S. Ct. 2617, 2622 (1987).

6. 431 U.S. at 335 n.15.

7. Commentators have described the "mixed" or "dual" motive situation in several ways: (1) "when some evidence indicates that the employer's actions violated [the statute] but a plausible

tially involves an employment decision motivated by *both* permissible and impermissible factors.[8] For example, an employee may have been fired in part because she is female (an impermissible reason) and in part because of excessive absenteeism (a permissible reason). Instead of facing the relatively straightforward task of assessing whether the employment action was or was not the product of the alleged discriminatory reason, the factfinder in a mixed-motive case must evaluate a confluence of factors, all of which, in some way, may have influenced the employer's decision. The explanation for the employer's action is expanded from either a permissible or impermissible reason, in the simple case, to a combination in the mixed-motive case.

This expansion of asserted causes need not complicate the judicial inquiry; in practice, a mixed-motive case presents a distinction without a difference. While employers surely do base employment decisions on any number of legitimate or illegitimate factors — as distinct from situations where they act for one reason alone — a concern for the number of different motives is unhelpful in Title VII adjudication. The terms "single-motive" and "mixed-motive" may adequately explain how employment decisions actually occur, but using these two categories to classify cases only obscures a more functional distinction in the Title VII case law. The courts have already recognized a distinction between Title VII plaintiffs who present either indirect or direct evidence of discrimination, and have fashioned separate formulas of proof for each type of plaintiff. *Indirect-evidence* plaintiffs proceed under the familiar three-stage formula of *McDonnell Douglas Corp. v. Green,*[9] which allows plaintiffs lacking direct evidence initially to create a circumstantial inference of discrimination and then rebut any legitimate explanations articulated by the employer.[10] Conversely, *di-*

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and legitimate business reason also may explain the challenged action," Jackson & Heller, *The Irrelevance of the* Wright Line *Debate: Returning to the Realism of* Erie Resistor *in Unfair Labor Practice Cases,* 77 NW. U. L. REV. 737, 741 (1983) (discussing mixed-motive cases under the National Labor Relations Act); (2) when "the plaintiff's showing of illegal motive is sufficiently strong that it convinces the trier of fact that the defendant was *at least* acting out of two (or more) motives, one of which was illegal," Furnish, *Formalistic Solutions to Complex Problems: The Supreme Court's Analysis of Individual Disparate Treatment Cases Under Title VII,* 6 INDUS. REL. L. J. 353, 374 (1984) (emphasis in original); or (3) when there are "several reasons for [the employer's] action, only one of which is unlawful," Stonefield, *supra* note 4, at 113. *See also* Brodin, *The Standard of Causation in the Mixed-Motive Title VII Action: A Social Policy Perspective,* 82 COLUM. L. REV. 292, 293 (1982).

8. By this approach, an employment action based on several permissible motives or several impermissible ones — say, an employer discharging an employee because of absenteeism *and* poor performance, or because of race *and* religion — still acts with "single" motives. The key to the distinction between "single" and "mixed" motives lies in the combination of impermissible motive(s) with permissible one(s).

9. 411 U.S. 792 (1973). *See infra* Part I.

10. This Note uses the terms "indirect" and "circumstantial" interchangeably. Indirect evidence, if accepted, *suggests* to the factfinder that, given the proved circumstances, the plaintiff's assertion is accurate; the factfinder may *infer* the assertion's truth from the circumstances. "[E]ven if the circumstances depicted are accepted as true, additional reasoning is required to reach the proposition to which it is directed." MCCORMICK ON EVIDENCE 543 (E. Cleary 3d ed.

rect-evidence plaintiffs — those with evidence that indicates discrimination without requiring any inference — simply present their evidence outright.[11] Employers respond with their evidence, and courts, as in any civil litigation, weigh the evidence to determine whether the plaintiffs have fulfilled their burden of persuasion.[12]

This Note argues that the "mixed-motive" case is simply one variant of the latter cases, where plaintiffs present direct evidence of discrimination. Where a court is persuaded that the plaintiff has presented evidence sufficient to yield an intermediate conclusion that mixed motives were involved, the court is acknowledging that the plaintiff has presented direct evidence.[13] But many courts, viewing the mixed-motive case as unique, have devised complex burden-shifting

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1984). *See also* C. MUELLER & L. KIRKPATRICK, EVIDENCE UNDER THE RULES 60 (1988) (" 'Circumstantial' means evidence which, even if fully credited, may nevertheless fail to support (let alone establish) the point in question, simply because an alternative explanation seems as probable or more so . . . ."); R. LEMPERT & S. SALTZBURG, A MODERN APPROACH TO EVIDENCE 150 (2d ed. 1983) ("Circumstantial evidence serves as a basis from which the trier of fact may make reasonable inferences about a matter in issue.").

An example of indirect evidence in a Title VII case would be evidence that an obviously qualified black person applied for an advertised job opening, was rejected, yet the employer continued to hold the job open to similarly qualified persons. For examples of direct and circumstantial evidence, see Edwards, *Direct Evidence of Discriminatory Intent and the Burden of Proof: An Analysis and Critique,* 43 WASH. & LEE L. REV. 1, 13-17 (1986); B. SCHLEI & P. GROSSMAN, *supra* note 4, at 299-308 (2d ed. Cum Supp. 1985).

11. This Note uses the term "direct evidence" to refer to evidence that, "if accepted as genuine or believed true, necessarily establishes the point for which it is offered . . . ." C. MUELLER & L. KIRKPATRICK, *supra* note 10, at 60. *See also* MCCORMICK ON EVIDENCE, *supra* note 10, at 543 ("Direct evidence is evidence which, if believed, resolves a matter in issue."); R. LEMPERT & S. SALTZBURG, *supra* note 10, at 151 ("[D]irect evidence, if believed, requires no further inference for its bearing on a fact in issue."). In this sense, the term "direct evidence" will refer to evidence that, consistent with the plaintiff's ultimate burden of persuasion, establishes that the plaintiff "has been the victim of intentional discrimination." Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248, 256 (1981).

Such evidence speaks to the employer's *intent* rather than to its underlying *motive.* According to Professor Welch, intent involves "the conscious purpose with which one acts to effect a desired goal or result," while motive involves "the underlying cause or reason moving an agent to action." Welch, *Removing Discriminatory Barriers: Basing Disparate Treatment Analysis on Motive Rather Than Intent,* 60 S. CAL. L. REV. 734, 738 (1987). An obvious example of direct evidence is a statement by a supervisor that the employer "doesn't promote women." Other examples include facially discriminatory policies, such as special rules for maternity leave, *see, e.g.,* Maddox v. Grandview Care Center, Inc., 607 F. Supp. 1404 (M.D. Ga. 1985), *affd.,* 780 F.2d 987 (1986), or rules expressly disfavoring a group based on its protected characteristic, *see, e.g.,* Trans World Airlines v. Thurston, 469 U.S. 111 (1985) (mandatory retirement age for cockpit employees). If that evidence is believed, the court need make no further inference to conclude that the employer intentionally discriminated. Unlike the "doesn't-promote-women" example, however, most direct evidence is not *conclusive,* in the sense of not requiring any further support. Direct evidence need not *prove* the matter in issue, but only must speak directly to it. *See* R. LEMPERT & S. SALTZBURG, *supra* note 10, at 151.

For a fuller discussion of the distinction, in Title VII terms, between direct and indirect evidence, see *infra* Part V.

12. Title VII plaintiffs, whether presenting direct or indirect evidence, bear the burden of persuasion at all times throughout trial. Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248, 253 (1981).

13. *See infra* Part IV.

approaches that impose the risk of nonpersuasion on the defendant once the plaintiff has shown that some discrimination was involved in the employment action.[14] These courts, by couching their opinions in terms of the employer's mixed motivations, mask the true, and more basic, reason for shifting the burden to the defendant: the plaintiff has already presented compelling direct evidence of discrimination.[15] The direct-evidence foundation of the mixed-motive label makes it unnecessary — and doctrinally confusing —to distinguish cases by "single" or "mixed" motive; instead, a more rational classification looks to the *type* of evidence presented.

Part I of this Note describes the indirect-evidence inquiry of *McDonnell Douglas* and its basis in the policies underlying Title VII. Part II presents the various judicial treatments of cases where direct evidence is presented. These three major approaches reflect varying views of the burdens of proof regarding Title VII *causation,* and assume that the plaintiff has already shown some palpable level of discrimination. Part III describes *Mt. Healthy City School District Board of Education v. Doyle,*[16] in which the Supreme Court first devised an approach to mixed motives. Although the *Mt. Healthy* analysis was developed for first amendment purposes, the Court has extended it to a number of different areas, such as equal protection and labor-management relations.[17] The analysis also has provided a model for lower courts in Title VII cases because the Court has never ruled on the mixed-motive issue under Title VII, and because *Mt. Healthy* involved an employment dispute, like Title VII cases. Part IV explains the indeterminacy and unhelpfulness of the mixed-motive characterization, arguing that it obfuscates the critical inquiry into whether the employer intentionally discriminated against the plaintiff. The label ignores the fact that nearly every Title VII case is potentially a "mixed-motive" case, and that cases so labeled are simply those with facts that are not compelling in favor of either party. Finally, Part V proposes that the direct/indirect evidence approach is a superior method of an-

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14. The typical approach requires that, once the plaintiff establishes a threshold level of discrimination, the burden shifts to the defendant to prove that the same adverse employment decision would have occurred even absent that discrimination. *See, e.g.,* Bibbs v. Block, 778 F.2d 1318 (8th Cir. 1985) (en banc); Fadhl v. City & County of San Francisco, 741 F.2d 1163 (9th Cir. 1984).

15. There are, however, some situations where a court might conclude that mixed motives were involved even though the plaintiff has proceeded through the *McDonnell Douglas* (indirect evidence) framework. This Note argues that courts in such cases misread the requirements and purposes of *McDonnell Douglas. See infra* notes 111-22 and accompanying text.

16. 429 U.S. 274 (1977).

17. *See* NLRB v. Transportation Management Corp., 462 U.S. 393 (1983) (National Labor Relations Act); Village of Arlington Heights v. Metropolitan Hous. Dev. Corp., 429 U.S. 252 (1977) (equal protection and Fair Housing Act); Hunter v. Underwood, 471 U.S. 222 (1985) (state constitutional provision).

alyzing the distinction between single- and mixed-motive cases, and suggests abandoning mixed-motive terminology altogether.

I. The Indirect-Evidence Disparate Treatment Inquiry

In most disparate treatment cases,[18] plaintiffs attempt to prove discrimination through indirect evidence. The method for doing so is set out in the landmark case of *McDonnell Douglas Corp. v. Green.*[19] Initially, the Court said, a plaintiff must establish a prima facie case of discrimination, which can be done

> by showing (i) that [the complainant] belongs to a racial minority; (ii) that he applied and was qualified for a job for which the employer was seeking applicants; (iii) that, despite his qualifications, he was rejected; and (iv) that, after his rejection, the position remained open and the employer continued to seek applicants from persons of complainant's qualifications.[20]

The prima facie case creates a "legally mandatory, rebuttable presumption,"[21] which results in judgment for the plaintiff if the defendant remains silent.[22]

Once the plaintiff successfully clears the prima facie hurdle,[23] the

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18. The disparate impact theory logically excludes a mixed-motive inquiry for two reasons. First, motive is irrelevant to issues of unequal impact. Second, and more important, the theory absolves an employer of liability if the discrimination is justified by a legitimate reason falling within the definition of "business necessity." International Bhd. of Teamsters v. United States, 431 U.S. 324, 335-36 n.15 (1977).

19. 411 U.S. 792, 802-03 (1973). Although the *McDonnell Douglas* analysis is only appropriate in cases where the plaintiff lacks direct evidence, *see infra* notes 106-09 and accompanying text, few plaintiffs are able to acquire direct evidence, so the formula is used in the large majority of disparate treatment cases. *See, e.g.,* Jackson v. University of Pittsburgh, 826 F.2d 230, 236 (3d Cir. 1987), *cert. denied,* 108 S. Ct. 732 (1988); Thornbrough v. Columbus & Greenville R.R., 760 F.2d 633, 638 (5th Cir. 1985) ("Unless the employer is a latter-day George Washington, employment discrimination is as difficult to prove as who chopped down the cherry tree."); Brief for the American Psychological Assn. as Amicus Curiae, Price Waterhouse v. Hopkins, No. 87-1167 (U.S. argued Oct. 31, 1988); Note, *Indirect Proof of Discriminatory Motive in Title VII Disparate Treatment Claims After* Aikens, 88 Colum. L. Rev. 1114, 1116 (1988).

The treatises in this area, however, have confusingly spoken of *McDonnell Douglas* as the *standard* disparate treatment inquiry, rather than as only one of two disparate treatment options, the other being a direct-evidence inquiry. *See, e.g.,* B. Schlei & P. Grossman, *supra* note 4, at 5 (2d ed. Cum. Supp. 1985); 2 A. Larson & L. Larson, Employment Discrimination: Procedures and Remedies § 50.10 (1987).

20. 411 U.S. at 802 (footnote omitted). Although this language deals with a race discrimination plaintiff, it has been applied, in some form, to all types of discrimination actionable under Title VII. *See, e.g.,* Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248, 253 n.6 (1981) (sex discrimination); Uviedo v. Steves Sash & Door Co., 738 F.2d 1425, 1428 (5th Cir. 1984), *cert. denied,* 474 U.S. 1054 (1986) (national origin discrimination). It has also been applied to proof of discrimination under other statutes. *See, e.g.,* Trans World Airlines v. Thurston, 469 U.S. 111, 118 (1985) (Age Discrimination in Employment Act); Norcross v. Sneed, 755 F.2d 113, 116-17 (8th Cir. 1985) (Rehabilitation Act of 1973). This language has been applied to all forms of employment action, though with some variation. *See* A. Larson & L. Larson, Employment Discrimination, *supra* note 19, § 50.22.

21. *Burdine,* 450 U.S. at 254 n.7.

22. *Burdine,* 450 U.S. at 254.

23. The prima facie requirements do not pose a difficult burden for the plaintiff with a non-

employer must "articulate some legitimate, nondiscriminatory reason" for its action.[24] This burden is one of production, not persuasion:[25] the employer need only "set forth . . . the reasons for the plaintiff's rejection" to rebut successfully the presumption raised by the plaintiff's prima facie case.[26]

The third and final stage of the inquiry — the pretext stage — shifts the burden back to the plaintiff "to demonstrate that the proffered reason was not the true reason for the employment decision."[27] This final shift reflects the plaintiff's "ultimate" burden of persuasion.[28] By ruling out the employer's asserted motives, the plaintiff effectively proves to the court[29] that he or she was "the victim of intentional discrimination."[30] Given the relative ease with which a nonfrivolous plaintiff can meet the prima facie burden,[31] and the rela-

frivolous claim. *See Burdine,* 450 U.S. at 253 ("The burden of establishing a prima facie case of disparate treatment is not onerous."); Friedman, *The Burger Court and the Prima Facie Case in Employment Discrimination Litigation: A Critique,* 65 CORNELL L. REV. 1, 3-4 (1979).

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

25. "The burden that shifts to the defendant, therefore, is to rebut the presumption of discrimination by *producing* evidence that the plaintiff was rejected, or someone else was preferred, for a legitimate, nondiscriminatory reason. The defendant *need not persuade* the court that it was actually motivated by the proffered reasons." *Burdine,* 450 U.S. at 254 (emphasis added).

26. *Burdine,* 450 U.S. at 255 (footnote omitted). Despite appearances, this burden is not *de minimis,* because the defendant's explanation "must be legally sufficient to justify a judgment," 450 U.S. at 255, and must be admissible into evidence, 450 U.S. at 255 n.9.

27. 450 U.S. at 256.

28. 450 U.S. at 256.

29. Because Title VII does not provide for jury trials, all proof must be made to the court. *See, e.g.,* Marotta v. Usery, 629 F.2d 615 (9th Cir. 1980); Harmon v. May Broadcasting Co., 583 F.2d 410 (8th Cir. 1978); *see also* 42 U.S.C. § 2000e-5(f)(1) (1982).

30. 450 U.S. at 256. It is unclear what the Court meant, in this context, by "intentional discrimination." Professor Bartholet has stated that a plaintiff at stage III "must provide persuasive proof of illicit intent in order to prevail." Bartholet, *Proof of Discriminatory Intent Under Title VII:* United States Postal Service Board of Governors v. Aikens, 70 CALIF. L. REV. 1201, 1206 (1982). However, Bartholet went on to point out that "[s]uch proof may consist simply of evidence that the reasons profferred by defendant are not credible. Indeed there may be no additional presentation of evidence by plaintiff at all." *Id.* (footnote omitted). Apparently, then, the Court would allow a plaintiff to prevail under *McDonnell Douglas* by merely proving constructive intent, not requiring actual intent (a conscious purpose to discriminate). This conclusion is bolstered by the Court's casual mixing of the terms "motive" and "intent," which professor Welch has criticized. *See* Welch, *supra* note 11, at 763-72. Indeed, the Court has, in numerous other areas, including employment, applied the common law rule that an actor is "held to intend the foreseeable consequences of his conduct." *Id.* at 771 n.217 (quoting Radio Officers' Union v. NLRB, 347 U.S. 17, 45 (1954)). In addition, the Court has occasionally read the term "intentionally discriminated" to mean "whether the particular employment decision at issue was made on the basis of race," rather than to mean that the employer *intended* to mistreat a person on impermissible grounds, Cooper v. Federal Reserve Bank of Richmond, 467 U.S. 867, 875 (1984).

Professor Welch has argued that the only relevant consideration to a determination of pretext is the employer's *motive* rather than its *intent.* Welch, *supra* note 11, at 738. "The inquiry is not to fathom an employer's intention, but to ascertain what factors led to the decision in question, what realities motivated or caused the employer to act as he or she did." *Id.* at 778. Evidence of intent, as this Note argues, is relevant in the direct-evidence case, where the *McDonnell Douglas* inquiry is inapposite. *See infra* Part V.

31. See *supra* note 23 and accompanying text.

tively light burden placed on the employer in rebuttal,[32] the typical disparate treatment case will advance to the pretext stage, where the ultimate issue of liability will be determined.[33]

The purpose of this somewhat elaborate three-stage process is to aid plaintiffs who genuinely may be victims[34] of discrimination but are unable to obtain direct evidence to prove it. As the Court has explained, *McDonnell Douglas* forces a plaintiff to "demonstrate at least that his rejection did not result from the two most common legitimate reasons on which an employer might rely to reject a job applicant: an absolute or relative lack of qualifications or the absence of a vacancy in the job sought."[35] The plaintiff's implicit ruling-out of these two reasons, the Court said, "is sufficient, absent other explanation, *to create an inference* that the decision was a discriminatory one."[36]

Once the case reaches the pretext stage — after the plaintiff has established a prima facie case that the action was discriminatory, and the defendant has rebutted by articulating a legitimate motivation — the inference of discrimination is no longer necessary. Instead, the focus shifts to whether the defendant's stated reason was the *true* reason for its decision. If the court finds that it was not, it concludes that the employer intentionally discriminated and the plaintiff prevails.[37]

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32. See *supra* note 25 and accompanying text.

33. Furnish, *supra* note 7, at 357 ("[D]isparate treatment cases are won or lost on the pretext issue . . . .") (footnote omitted), 364-67; B. SCHLEI & P. GROSSMAN, *supra* note 4, at 7 (2d ed. Cum. Supp. 1985) ("The vast majority of disparate treatment cases continue to depend on the issue of pretext . . . .").

34. The term "victim" is somewhat value-laden. It may imply a focus solely on the result of the employer's decision rather than on the process. For example, a court might look to whether the "same decision" would have been made had the employer not considered an illegal factor. *See, e.g., Mt. Healthy,* 429 U.S. 274 (1977), discussed in Part III *infra.* Seen in this way, the employer's consideration of the illicit factor has truly "victimized" the plaintiff by placing her in a worse position than if the discrimination had not occurred. When, however, "the same decision would have resulted even had the impermissible purpose not been considered . . . , the complaining party . . . no longer fairly [can] attribute the injury complained of to improper consideration of a discriminatory purpose." Village of Arlington Heights v. Metropolitan Hous. Dev. Corp., 429 U.S. 252, 270-71 n.21 (1977). In this instance, the illicit purpose has not affected the plaintiff in a tangible way, so the plaintiff should not be considered a victim.

However, it is not necessary to conceive of "victims" in this result-oriented way. The Eighth Circuit's approach to mixed-motive cases, for example, awards limited relief to plaintiffs who can prove that discrimination was a "discernible" factor in the employer's decision, regardless of whether that factor had a determinative effect. *See Bibbs,* 778 F.2d at 1323-24 and *infra* notes 64-69 and accompanying text. Professor Stonefield has argued, similarly, that Title VII should prohibit the "non-determinative" discrimination that a "but for" or "same decision" inquiry allows. "If conduct is discriminatory but not determinative of the decision, the but-for test finds no wrongdoing. . . . The discrimination, having been found to be non-determinative, is deemed 'harmless,' without any further reflection on its discriminatory nature." Stonefield, *supra* note 4, at 119-20 (footnotes omitted). Both Stonefield and the Eighth Circuit envision relief for plaintiffs "victimized" in a nondeterminative way. *See* 778 F.2d at 1323-24; Stonefield, *supra* note 4, at 123-34.

35. International Bhd. of Teamsters v. United States, 431 U.S. 324, 358 n.44 (1977).

36. 431 U.S. at 358 n.44 (emphasis added). Plaintiffs with direct evidence of discrimination do not proceed under *McDonnell Douglas. See infra* Part II.

37. "At [the pretext] stage, the *McDonnell-Burdine* presumption 'drops from the case,' and

In effect, the plaintiff has ruled out the "two most common legitimate reasons"[38] that might explain the employer's action, and has persuaded the court that the employer, in addition, failed to act for its stated, legitimate reason. By this process of inference, the court is able to discern whether the employer discriminated, without requiring a plaintiff to produce the "smoking gun" memo that would yield that conclusion directly.

II. OPTIONS IN THE DIRECT-EVIDENCE CASE

Direct-evidence plaintiffs, unlike those pursuing the *McDonnell Douglas* inquiry, must prove that the alleged discriminatory motive *caused* the adverse employment action.[39] It remains unclear, however, how strong a causal link is required. The Supreme Court has never clarified the precise degree of causation necessary for a successful disparate treatment claim. One oft-cited clue was provided in *McDonald v. Santa Fe Trail Transportation Co.*[40] In a footnote, the Court stated: "[N]o more is required to be shown than that race was a 'but for' cause."[41] This passage appears to make clear that plaintiffs must establish "but for" causation — that is, show that absent the discrimination, the adverse action would not have occurred.[42] But in that same footnote, the Court contradicted itself by stating that "[t]he use of the term 'pretext' . . . does not mean . . . that the Title VII plaintiff must show that he would have in any event been rejected or discharged solely on the basis of his race, without regard to the alleged deficiencies."[43] The Court thus suggested both that a plaintiff must show, at minimum, "but for" causation, *and* that a plaintiff need *not* show that the adverse action would have occurred if discrimination alone were

'the factual inquiry proceeds to a new level of specificity,' " *i.e.*, whether the employer " 'intentionally discriminated against the plaintiff.' " *Aikens*, 460 U.S. at 715 (quoting *Burdine*, 450 U.S. at 253, 255) (citations omitted). By "drops from the case," the Court meant that the employer's articulated explanation — which was sufficient to extend the inquiry into the third stage — has overridden the initial presumption of discrimination raised by the prima facie showing. The factfinder then determines whether the plaintiff can persuade it that the employer's explanation is pretextual, either by showing "that the defendant more likely discriminated, or by discrediting the explanation proffered." Note, *supra* note 19, at 1127 (emphasis deleted).

38. *Teamsters*, 431 U.S. at 358 n.44.

39. Title VII requires *some* causation, *see* sources cited in Brief for the United States as Amicus Curiae at 8-10, Price Waterhouse v. Hopkins, 87-1167 (U.S. argued Oct. 31, 1988), but in *McDonnell Douglas* cases, causation is presumed. *See infra* note 132 and accompanying text.

40. 427 U.S. 273 (1976).

41. 427 U.S. at 282 n.10.

42. Although stated as a minimum, this standard is likely a maximum, since there is little *more* a plaintiff can be required to prove than "but for" causation. One more stringent approach would be a "sole factor" test, but Title VII's legislative history rejects such a standard. *See* C. SULLIVAN, M. ZIMMER & R. RICHARDS, EMPLOYMENT DISCRIMINATION 266 n.10 (1988); Brodin, *supra* note 7, at 296-97.

43. 427 U.S. at 282 n.10.

present — two positions that appear at odds.[44] This confusing reference and others,[45] combined with inconclusive legislative history,[46] have left muddled the question of causation under Title VII.[47]

Price Waterhouse v. Hopkins[48] presents the Court with an opportunity to clarify this conceptual muddle. The petitioner's main contention on appeal is that Title VII plaintiffs must show "that forbidden discrimination was a 'but for' cause of the challenged employment decision."[49] The respondent has countered by arguing that plaintiffs need only prove that the decision "was caused, in part, by discrimination," and that employers can limit relief "by proving that the same decision would have been made absent discrimination."[50]

The appeals court in *Hopkins* classified the various lower-court approaches to direct-evidence cases according to the quantum of proof required for the trier to conclude that a discriminatory motive was present.[51] This Note's analysis, in contrast, focuses on the allocation of the burden to prove causation in direct-evidence cases, and assumes that the plaintiffs have already proven the existence of a discriminatory motive on the employer's part. Each of the approaches described makes use of a "but for" or "same decision" analysis.[52]

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44. Professor Brodin characterized this footnote of *McDonald* as "cryptic." Brodin, *supra* note 7, at 301 n.40. The Court apparently has not expanded on it in subsequent cases. Brodin noted in 1982 that "[s]ince *McDonald,* the Court has discussed the causation question only in the quite distinct context of title VII class actions . . . ." *Id.* at 302. And a 1989 LEXIS search did not reveal subsequent Supreme Court references to the footnote.

45. In East Texas Motor Freight Sys. v. Rodriguez, 431 U.S. 395, 404 n.9 (1977), the Court suggested further that it favored a "but for" inquiry. It stated: "Even assuming, *arguendo,* that the company's failure even to consider the applications was discriminatory, the company was entitled to prove at trial that the respondents had not been injured because they were not qualified and would not have been hired in any event." This places the burden of proving "same decision" on the defendant, but as in *Mt. Healthy,* only after initial proof by the plaintiff of discrimination.

46. *See* Brodin, *supra* note 7, at 294-99.

47. For extensive theoretical discussions of Title VII causation that frequently draw upon causation theories in the tort and criminal law areas, see the *amicus* briefs of the United States and the AFL-CIO in *Hopkins.* Brief for the AFL-CIO as Amicus Curiae at 23-29 and Brief for the United States as Amicus Curiae at 10-15, Price Waterhouse v. Hopkins, No. 87-1167 (U.S. argued Oct. 31, 1988).

48. Price Waterhouse, No. 87-1167 (U.S. argued Oct. 31, 1988).

49. Brief for Price Waterhouse at 21, Price Waterhouse v. Hopkins, No. 87-1167 (U.S. argued Oct. 31, 1988). This is the option described in *infra* Part II.A.

50. Brief of Ann B. Hopkins at 20, 31, Price Waterhouse v. Hopkins, No. 87-1167 (U.S. argued Oct. 31, 1988). The respondent did not indicate whether she preferred the options set out at *infra* Part II.B. or II.C. But she did note the importance of various kinds of nonaffirmative relief, such as injunctions against future discrimination, *see id.* at 34, suggesting that she supports the approach described at *infra* Part II.C.

51. The court noted that some circuits require proof of a "but for" cause, some require proof that discrimination was a "substantial factor," and one requires proof that discrimination played "some part." 825 F.2d at 470 n.8. *See also* Brief for the United States as Amicus Curiae at 12, Price Waterhouse v. Hopkins, No. 87-1167 (U.S. argued Oct. 31, 1988).

52. Several commentators have criticized the result-oriented focus of these analyses. *See* Stonefield, *supra* note 4, at 119-20; see also *infra* note 85.

A. *Placing the "But For" Burden on the Plaintiff*

Under this approach, the plaintiff always bears the burden of proving that discrimination was a "but for" cause of the adverse action. The proffered direct evidence has no independent value other than helping the plaintiff establish "but for" causation. There is no shift in or weakening of burdens simply because the plaintiff was able to marshall direct evidence that some discrimination occurred.

The Fifth Circuit's approach is illustrative. *Jack v. Texaco Research Center*[53] involved a discharge allegedly in retaliation for the plaintiff's earlier exercise of Title VII-protected rights.[54] The trial judge had found that the employer had two motives for discharging the plaintiff: her excessive absenteeism and the proscribed retaliation. The appeals court required the plaintiff "to prove that she would not have been discharged absent the forbidden motive."[55] The court continued by stating that the plaintiff "must prove that, whether she was a superb stenographer or one with serious fault, she would not have been discharged at that time had she not complained."[56]

B. *Placing the Burden on the Defendant To Prove "Same Decision"*

One attempt to avoid the potential unfairness in requiring that plaintiffs, who already have proven that some discrimination tainted the employer's decision, prove further that the discrimination was the "but for" cause[57] is to shift to the defendant the burden of proving

53. 743 F.2d 1129 (5th Cir. 1984).

54. Section 704(a) of Title VII states: "It shall be an unlawful employment practice for an employer to discriminate against any of his employees or applicants for employment . . . because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter." 42 U.S.C. § 2000e-3(a) (1982).

55. 743 F.2d at 1130.

56. 743 F.2d at 1131. *See also* Lewis v. University of Pittsburgh, 725 F. 2d 910 (3d Cir. 1983), *cert. denied,* 469 U.S. 892 (1984). *Lewis* involved claims under Title VII and 42 U.S.C. §§ 1981 and 1983 by a black woman who alleged that her failure to be promoted, despite credentials superior to the promoted white employee, was based on race. The employer countered that the plaintiff had poor work habits. The court, following the Supreme Court's footnote in *McDonald,* concluded that a "but for" standard is appropriate, and upheld the trial court's jury instructions which asked whether the plaintiff "would . . . have been promoted . . . but for the fact that she is black." 725 F.2d at 913. The trial judge went so far as to state that this "but for" determination was the "polestar" around which all aspects of the case revolved, and was requisite to a finding of liability. 725 F.2d at 917-18. *See also* McQuillen v. Wisconsin Educ. Assn. Council, 830 F.2d 659, 664 (7th Cir. 1987), *cert. denied,* 108 S. Ct. 1068 (1988) ("[T]he employee must establish that the discriminatory motivation was a determining factor in the challenged employment decision in that the employee would have received the job absent the discriminatory motivation.").

57. Professor Stonefield has argued that the "but for" inquiry allows discriminating employers to escape Title VII liability. He posed a hypothetical mixed-motive scenario as one in which an employer says to an applicant: "You don't have the necessary two years experience; you are twenty-fifth on the list [for only three job openings]; and, besides, we already have too many black salespeople and so we wouldn't have hired you anyway." Stonefield, *supra* note 4, at 93 (footnote omitted). A "but for" inquiry would absolve this employer of liability, even though the employer has clearly acted in violation of the statute.

that the discrimination was *not* the "but for" cause.[58] Other appeals courts have shifted the "but for" inquiry's risk of nonpersuasion to the defendant — in the form of a "same decision" test. By so doing, the courts have created an affirmative defense for the employer, allowing it to escape liability if it can prove that the same adverse decision would have been made absent the discrimination. If the defendant prevails on this question, the plaintiff is not entitled to any relief.

Mt. Healthy City School District Board of Education v. Doyle[59] and its progeny embody this approach. In *NLRB v. Transportation Management Corp.,*[60] for example, the Court upheld an NLRB finding that once an employee proves that a discharge was motivated, or substantially caused, by the exercise of rights protected by the National Labor Relations Act, the employer must show that the action would have occurred regardless of the employee's activity.[61] In so holding, the Court accepted the NLRB's designation of this burden-shift as an "affirmative defense."[62] Several appeals courts have adopted this approach for Title VII cases.[63]

C. *Placing the "Same Decision" Burden on the Defendant, but Separating Liability and Remedy*

While the shift of the "but for" burden, in the form of a "same decision" affirmative defense, removes much of the potential unfairness to plaintiffs, it also creates the possibility that employers will be able to taint employment decisions with discrimination but still escape liability if the discriminatory factor was not controlling. Some courts have sought to accommodate this possibility by separating liability and remedy. By this approach, not only does the burden shift to the employers to prove "same decision," but the plaintiffs become entitled to

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58. For a discussion of the courts' policy rationales for burden shifting in mixed-motive cases, see *infra* notes 123-26 and accompanying text.

Comparison of this approach to the previous one illustrates the only difference between the "but for" and "same decision" tests. Both involve the same inquiry — speculation as to what would have occurred absent discrimination — but the former involves burdening the plaintiff, while the latter burdens the defendant.

59. 429 U.S. 274 (1977). See *infra* Part III for a discussion of this case.

60. 462 U.S. 393 (1983).

61. 462 U.S. at 400.

62. 462 U.S. at 402.

63. *See, e.g.,* Fields v. Clark Univ., 817 F.2d 931, 935 (1st Cir. 1987) (once plaintiff proves discrimination is "motivating" factor, defendant must prove by preponderance of evidence that same decision would have been made absent discrimination); Haskins v. United States Dept. of the Army, 808 F.2d 1192, 1197-98 (6th Cir.), *cert. denied,* 108 S.Ct. 68 (1987) (once plaintiff establishes that adverse decision "more likely than not" was motivated by discrimination, defendant must prove it would have taken same action absent impermissible motivation); Joshi v. Florida State Univ. Health Center, 763 F.2d 1227, 1236 (11th Cir.), *cert. denied,* 474 U.S. 948 (1985) (proof of discrimination creates presumption of entitlement to relief, which defendant can rebut by proving the same decision would have been reached "absent the discrimination").

various forms of preliminary relief when they are able to show the presence of a discriminatory motive to some degree.

In the Eighth Circuit, for example, once the plaintiff proves that discrimination "played some part" in the employment decision, she is immediately entitled to a declaratory judgment, partial attorney's fees, or an injunction.[64] Next, if the defendant fails to establish its affirmative defense — that the same decision would have been made absent the already-proven discrimination — by a preponderance of the evidence, the defendant is further liable for appropriate affirmative relief, including reinstatement, retroactive promotion, and back pay.[65]

Courts that follow this approach[66] claim that it best serves two major purposes of Title VII: eliminating all traces of discrimination from the workplace,[67] and avoiding windfalls to plaintiffs who have been discharged, or otherwise adversely affected, for legitimate reasons.[68] By reconciling these joint purposes, proponents claim, the approach adequately deters actual or potential wrongdoers while not placing plaintiffs in a better position than they would have been had the violation not occurred.[69]

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64. Bibbs v. Block, 778 F.2d 1318, 1323-24 (8th Cir. 1985) (en banc).

65. 778 F.2d at 1324. *See generally* Note, *Making the Punishment Fit the Crime: The Eighth Circuit's Treatment of Dual Motive Cases* — Bibbs v. Block, 19 CREIGHTON L. REV. 941 (1986); Note, *Title VII Mixed-Motive Cases: The Eighth Circuit Adds a Second Track of Liability and Remedy,* 36 DRAKE L. REV. 155 (1986).

66. *See* Patterson v. Greenwood School Dist. 50, 696 F.2d 293 (4th Cir. 1982); Fadhl v. City & County of San Francisco, 741 F.2d 1163, 1166 (9th Cir. 1984) ("[I]t was proper for the district court to find initial liability for employment discrimination without reference to whether the [plaintiff] ultimately would have received employment . . . .").

Professor Brodin's important article was the first to advocate this bifurcation of liability and remedy. *See* Brodin, *supra* note 7, at 323-26.

67. As Professor Brodin has observed:

> [Title VII] has also been read to provide the plaintiff with an enforceable right to have decisions regarding him made without regard to any of the forbidden criteria; or, put another way, the employer's failure to make the challenged decision without considering such factors is *itself* a violation of title VII, regardless of the results of such failure.

Brodin, *supra* note 7, at 318 (emphasis in original). *See also Bibbs,* 778 F.2d at 1322.

68. Section 706(g) of the statute reads:

> No order of the court shall require . . . the hiring, reinstatement, or promotion of an individual as an employee, or the payment to him of any back pay, if such individual . . . was refused employment or advancement or was suspended or discharged for any reason other than discrimination . . . in violation of [this statute].

42 U.S.C. § 2000e-5(g) (1982). A plaintiff awarded affirmative relief despite losing on the "same decision" question would receive a windfall (more relief than he deserves) and such relief would violate the terms of this section. *See Bibbs,* 778 F.2d at 1322.

In Local 28 of the Sheet Metal Workers' Intl. Assn. v. EEOC, 478 U.S. 421 (1986), a Title VII case involving affirmative action, the Court held that § 706(g) does not limit relief to *actual* victims of discrimination. Rather, it prevents a windfall to plaintiffs who do establish that discrimination occurred but cannot establish that the same decision would have been made absent discrimination. 478 U.S. at 473-75. *See also* Firefighters Local Union No. 1784 v. Stotts, 467 U.S. 561, 617-18 (1984) (Blackmun, J., dissenting).

69. *See* Brodin, *supra* note 7, at 325.

Professor Stonefield appears to adopt this bifurcated standard in the direct-evidence case, although he addresses the issue differently than have the courts and other commentators. He argues that the "but for" analysis, which is common to all three of these approaches, is underin-

III. THE SUPREME COURT'S APPROACH TO MIXED-MOTIVE CASES: *MT. HEALTHY V. DOYLE*

While the Supreme Court has not addressed the mixed-motive question in a Title VII case, it has dealt with these issues in other contexts, including employment. In *Mt. Healthy City School District Board of Education v. Doyle,*[70] the Court faced an employment discharge explicitly based upon mixed motives. Doyle, a public school teacher, was discharged[71] following a number of incidents, including making offensive gestures to students, arguing with another teacher and school cafeteria employees, and referring to some students as "sons of bitches." Additionally, he notified a radio station about a memorandum circulated to selected teachers regarding a faculty dress code, and the station broadcast the content of the memorandum as a news item. Later, the school board refused to rehire him for the next school year.[72] In a statement explaining the reasons for the action, the superintendent noted Doyle's "lack of tact in handling professional matters," but went on to cite the radio station incident and the use of obscene gestures.[73] Doyle sued, claiming the discharge was based on the exercise of his protected right of free speech.

The Court noted initially that if the discharge was motivated solely by Doyle's exercise of his rights, it would be unlawful, entitling him to reinstatement.[74] Yet the Court was troubled by the fact that, as the district court put it, "there did exist in fact reason . . . independent of any First Amendment rights or exercise thereof, to not extend ten-

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clusive in its failure to account for discrimination that does not affect the result of the employer's action, and requires a hopelessly difficult "counterfactual" inquiry into "what *might* have happened" had discrimination not been present. Stonefield, *supra* note 4, at 118 (emphasis in original). His solution is to focus on the employer's "substantive conduct" (*i.e.* whether it considered an impermissible factor) and the plaintiff's "substantive rights" (*i.e.* whether discrimination played a role in her evaluation). *Id.* at 122. This "allows and requires the decision-maker explicitly to evaluate all the discriminatory conduct in the case . . . and to impose liability when the conduct is covered by the statute." *Id.* at 174. The bifurcated standard avoids the problems Stonefield identifies with the "but for" test by awarding preliminary relief upon the plaintiff's proof of "discernible discrimination." *Bibbs,* 778 F.2d at 1322. Stonefield appears, however, to call for a wider variety of remedies than do other advocates of the bifurcated approach: "The eradication, deterrence and compensation purposes [of Title VII] are better served by broader relief. The limited remedies are inadequate to compensate the injuries caused by discrimination." Stonefield, *supra* note 4, at 128 n.162. *See also id.* at 123-34.

70. 429 U.S. 274 (1977).

71. Actually, the school board failed to renew Doyle's contract, 429 U.S. at 282, but because he did not hold a tenured position, the board's inaction was tantamount to a discharge.

72. 429 U.S. at 281-82.

73. 429 U.S. at 281-83, 283 n.1.

74. 429 U.S. at 283-84. This constitutional protection is the functional equivalent of the statutory prohibitions of Title VII. The Court here effectively restated the disparate treatment theory: if the employment action is grounded in impermissible motives, the action is illegal, and relief is warranted.

ure."[75] The Court's solution was to devise a two-pronged approach designed to illustrate whether Doyle truly was victimized by an unlawful employment decision.[76] First, it required that Doyle bear the initial burden to show that his conduct was constitutionally protected, and that the conduct was a "substantial" or "motivating" factor in the employer's decision.[77] Second, it shifted the burden to the school board to prove "that it would have reached the same decision . . . even in the absence of the protected conduct"[78] — a standard that has come to be known as the "same decision" test.[79]

Two considerations led to this result. One was a desire to avoid a windfall — by insulating from discipline or discharge — to plaintiffs who happen to engage in protected conduct yet could legitimately be discharged for other reasons.[80] The second was a comparison of Doyle's circumstances to criminal law cases in which confessions were "tainted" by improper procedures, but in which convictions were upheld because the same decision would have occurred even without the impropriety.[81]

Mt. Healthy has had a great impact on, and has plainly become the paradigm case for, analysis of mixed-motive discrimination. The Court has applied its analytical framework to several other areas where discriminatory motivation is at issue, most notably in unfair

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75. 429 U.S. at 285, *quoting* unreported opinion of the United States District Court for the Southern District of Ohio.

76. In formulating the test in *Mt. Healthy,* the Court did not use the term "mixed-motive."

77. 429 U.S. at 287.

78. 429 U.S. at 287. On remand, the district and appeals courts held that Doyle's contract would not have been renewed even without the radio incident. The other incidents indicated to those courts that, "while appellant Doyle had some fine qualities as a teacher, he also had a very quick temper." Doyle v. Mt. Healthy City School Dist. Bd. of Educ., 670 F.2d 59, 61 (6th Cir. 1982).

79. The "same decision" test is identical to the "but for" test, which asks whether the discrimination was the "but for" cause of the adverse action. Any distinction between the two is semantic only. A "same decision" inquiry speculatively asks whether the result *would have* occurred had the factor *not* been considered; a "but for" inquiry asks whether the factor was determinative in bringing about the result. *See* Stonefield, *supra* note 4, at 117-18. The Court has recognized that the "same decision" and "but for" tests are the same. *See* Givhan v. Western Line Consol. School Dist., 439 U.S. 410, 417 (1979).

However, the two tests, at least in lower-court Title VII cases, may reflect allocation of the burden of persuasion onto different parties, with the "same decision" test favoring the plaintiff and the "but for" test favoring the defendant. *See supra* Parts II.A. and II.B.

80. Writing for a unanimous Court, Justice Rehnquist explained:

> A borderline or marginal candidate should not have the employment question resolved against him because of constitutionally protected conduct. But that same candidate ought not to be able, by engaging in such conduct, to prevent his employer from assessing his performance record and reaching a decision not to rehire on the basis of that record, simply because the protected conduct makes the employer more certain of the correctness of its decision.

429 U.S. at 286.

81. 429 U.S. at 286-87. *See, e.g.,* Parker v. North Carolina, 397 U.S. 790 (1970) (upholding conviction despite an arguably involuntary confession because the defendant had, in addition, entered a voluntary guilty plea).

labor practice cases under the National Labor Relations Act.[82] The case's reasoning has been widely accepted by lower courts in Title VII cases.[83] Unfortunately, when used as an analytical tool in Title VII cases, the notion of mixed motives only clouds the more important issues of proof and causation that the courts must confront.

IV. THE MIXED-MOTIVE MISNOMER

The "mixed motive" classification is unhelpful and unnecessary in the litigation of Title VII disparate treatment claims.[84] While employment decisions, in a "real world" sense, certainly are based routinely on more than one motive,[85] the prevailing case law illustrates that cat-

82. *See* NLRB v. Transportation Management Corp., 462 U.S. 393 (1983) (accepting the NLRB's earlier adoption of *Mt. Healthy* as the paradigm for mixed-motive cases under the NLRA); Wright Line, 251 N.L.R.B. 1083, 105 L.R.R.M. (BNA) 1169 (1980), *enforcement granted,* 662 F.2d 899 (1st Cir. 1981), *cert. denied,* 455 U.S. 989 (1982).

The Court has also applied *Mt. Healthy* to cases challenging actions by official bodies, *see* Village of Arlington Heights v. Metropolitan Hous. Dev. Corp., 429 U.S. 252, 270 n.21 (1977) (village's denial of rezoning); and to cases challenging state constitutional provisions, *see* Hunter v. Underwood, 471 U.S. 222, 232 (1985) (section of Alabama Constitution disenfranchising, among others, persons convicted of crimes "involving moral turpitude").

83. *See infra* note 87; *see also* Stonefield, *supra* note 4, at 116-17, 116-17 nn.112-16 (citing cases); Note, *An Evaluation of the Proper Standard of Causation in the Dual Motive Title VII Context: A Rejection of the "Same Decision" Standard,* 35 DRAKE L. REV. 209, 214 (1985).

The Supreme Court may soon discuss the mixed-motive issue under Title VII. *See* Price Waterhouse v. Hopkins, No. 87-1167 (U.S. argued Oct. 31, 1988). The predominant questions on appeal relate to the propriety of evidence of "sex stereotyping" to prove a Title VII violation and to whether burden-shifting is appropriate once a plaintiff has presented some evidence of discrimination. *See* Brief for Petitioner at I; Brief for Respondent at i; 56 U.S.L.W. 3601 (Mar. 8, 1988). This latter issue raises the mixed-motive question indirectly, since it involves the inquiry that many courts have adopted in response to the perceived uniqueness of the mixed-motive case. *See infra* notes 123-29 and accompanying text.

84. Although this Note's analysis is confined to Title VII, it presumably would be applicable to mixed-motive cases arising under other statutes as well. The Age Discrimination in Employment Act, 29 U.S.C. §§ 621-631 (1976 & Supp. V 1981), for example, is closely analogous to Title VII. *See* Player, *Proof of Disparate Treatment Under the Age Discrimination in Employment Act: Variations on a Title VII Theme,* 17 GA. L. REV. 621 (1983).

85. There is a strong tension between acknowledging the "real world" motivations of employers and fashioning a legal regime that can account for them. As Stonefield noted, the mixed-motive case "reflects the contrast between the discrete nature of the regulatory prohibition and the richness of human interactions. . . . It can rarely be said that any single stimulus is totally responsible for a particular act; many factors normally contribute." Stonefield, *supra* note 4, at 113.

The Supreme Court itself has recognized this tension in connection with public decisionmaking. *See* Village of Arlington Heights v. Metropolitain Hous. Dev. Corp., 429 U.S. 252, 265 (1976) ("Rarely can it be said that a legislature or administrative body . . . made a decision motivated solely by a single concern."); Personnel Administrator of Mass. v. Feeney, 442 U.S. 256, 277 (1979) ("Discriminatory intent is simply not amenable to calibration. It either is a factor that has influenced the legislative choice or it is not.").

Moreover, many employment actions may involve subconscious discrimination, making a determination of the employer's motives especially difficult. *See generally* Brief for the American Psychological Assn. as Amicus Curiae, at 10-20, Price Waterhouse v. Hopkins, No. 87-1167 (U.S. argued Oct. 31, 1988) (influence of sex stereotyping on perceptions of female employees); Lawrence, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism,* 39 STAN. L. REV. 317 (1987) (discussing the intent requirement in equal protection analysis); Friedman, *Redefining Equality, Discrimination, and Affirmative Action Under Title VII: The Access Princi-*

egorization based on the number of motives fails to advance the crucial inquiry necessary in disparate treatment actions: determining whether "the defendant intentionally discriminated against the plaintiff."[86] Rather, the mixed-motive characterization can prevent factfinders from focusing on the true principles of disparate treatment theory necessary to resolve the ultimate question at issue.

When a court classifies a case as "mixed motive," it ostensibly believes that the employment action did involve the requisite clash between "good" and "bad" motives. The courts that have created special "tests" appropriate to the mixed-motive case have attempted to strike a balance between the "good" motive and the "bad." Usually following *Mt. Healthy,* these courts have asked: Given that the plaintiff has proven that some discrimination was present, would the employer have reached the same, adverse decision absent that discrimination?[87] The Sixth Circuit, for example, has framed the issue as follows:

> [I]n order to prove a violation of Title VII, a plaintiff need demonstrate by a preponderance of the evidence that the employer's decision to take an adverse action was more likely than not motivated by a criterion proscribed by the statute. Upon such proof, the employer has the burden to prove that the adverse employment action would have been taken even in the absence of the impermissible motivation, and that, therefore, the discriminatory animus was not the cause of the adverse employment action.[88]

Such a test presupposes that the plaintiff has proven a threshold level of discrimination. Indeed, any formulation of what constitutes an ac-

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ple, 65 TEXAS L. REV. 41, 44 (arguing that Title VII should ensure that minorities are not "deprived of meaningful access to employment opportunities"); Welch, *supra* note 11, at 752 ("Only a framework which attacks the routine, unreflective reliance on prejudice in employment decisions will remove discriminatory barriers."); Taub, *Keeping Women in Their Place: Stereotyping* Per Se *as a Form of Employment Discrimination,* 21 B.C. L. REV. 345 (1980); Comment, *Help Wanted: An Expansive Definition of Constructive Discharge Under Title VII,* 136 U. PA. L. REV. 941 (1988) (discussing forms of unconscious workplace discrimination).

86. United States Postal Serv. v. Aikens, 460 U.S. 711, 715 (1983), *quoting* Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248, 253 (1980). In the quoted passage, the Court apparently meant to limit its conclusion to disparate treatment cases, where intentional discrimination is at issue, although it did not say so. Disparate impact cases do not require intent. *See supra* note 5.

Despite the language of intent in cases like *Burdine* and *Aikens,* the Court's approach to disparate treatment has been motive-based rather than intent-based. When the Court defines the term "intentionally discriminated," it cites passages that speak only of *treating* people differently, not acting with a conscious purpose. *See* Welch, *supra* note 11, at 771; *see generally supra* note 30. *But see* Goodman v. Lukens Steel Co., 107 S. Ct. 2617, 2633 (1987) (Powell, J., concurring in part and dissenting in part) ("A disparate treatment claim . . . requires proof of a discriminatory purpose. Of course, ' "[d]iscriminatory purpose" implies more than intent as volition or intent as awareness of consequences.' It implies that the challenged action was taken 'at least in part "because of," not merely "in spite of," its adverse effects upon an identifiable group.' ") (citations omitted).

87. *See, e.g.,* Bibbs v. Block, 778 F.2d 1318, 1323 (8th Cir. 1985); Hopkins v. Price Waterhouse, 825 F.2d 458, 470-71 (D.C. Cir. 1987), *cert. granted,* 108 S. Ct. 1106 (1988).

88. Blalock v. Metals Trades, Inc., 775 F.2d 703, 712 (6th Cir. 1985).

tion based on "mixed" motives must assume that at least some discrimination was present, for without that primary determination, there is nothing for the permissible motive to counter.[89]

Before finding a discriminatory motive in mixed-motive cases, though, a court first must have weighed the parties' evidence. A plaintiff would not assert mixed motives in the pleadings; to do so would dilute the claim that the employment action was taken "because of" an illegal factor. Similarly, an employer would not initially ask the court to use a mixed-motive analysis, because to do so would concede that at least some discrimination was present.[90] If the court were to be fully persuaded by either side's case — either the plaintiff's argument that a discriminatory motive was relied on or the defendant's argument that only permissible factors were present — the court's resolution of the facts would be simple: enter judgment (perhaps summary judgment) for the party with the more compelling evidence. But when a case proceeds beyond the summary judgment stage and the court concludes that mixed motives were involved, the court implicitly concedes that the resolution of the facts is not so easy — it is somewhat convinced by the explanations of each side. In this way, "mixed-motive" cases simply represent the *difficult* cases. Any "single" motive case is so deemed because the court finds the evidence on one side to be especially compelling, and therefore conclusive. Indeed, employers will rarely, if ever, remain silent in the face of a nonfrivolous Title VII claim. Since even the most egregious violators surely can fashion some legitimate reason explaining their action, every case is potentially a mixed-motive case, pitting the plaintiff's asserted discriminatory reason(s) against the employer's asserted legitimate one(s). As the Solicitor General argued in *Hopkins:*

> Congress recognized that virtually every disparate treatment case will to some degree entail multiple causes. Thus, if the elements of Title VII liability or the burden of persuasion differs depending on the "proper" categorization of a case as involving either mixed or single motives, the predictable result will be pointless litigation over what label should be affixed to cases, rather than on the *ultimate* question [of discrimination].[91]

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89. This conclusion is apparent given the various definitions of the mixed-motive case. *See supra* note 7. The AFL-CIO has argued that the link between discriminatory motivation and the employer's decision is "almost always self-evident" in mixed-motive cases, "since the discriminatory evaluation process is by definition one made discriminatory by the very fact that the employer *took or is taking sex-based considerations into account and is giving those considerations a negative weight in its decisionmaking.*" Brief for the AFL-CIO as Amicus Curiae at 15, Price Waterhouse v. Hopkins, No. 87-1167 (U.S. argued Oct. 31, 1988) (emphasis in original).

90. "[A] case becomes one of mixed motivation not because a plaintiff or defendant characterizes it that way — but rather because the trier of fact determines that both lawful and unlawful motives contributed to an employment decision." Brief for Respondent at 31 n.15, Price Waterhouse v. Hopkins, No. 87-1167 (U.S. argued Oct. 31, 1988).

91. Brief for the United States as Amicus Curiae at 16, Price Waterhouse v. Hopkins, No. 87-1167 (U.S. argued Oct. 31, 1988) (emphasis in original).

In its attempts to apply a mixed-motive analysis in non-Title VII contexts, the Supreme Court has demonstrated that resort to a mixed-motive analysis reflects a concession that the presented facts do not lean strongly in either party's favor. For example, in *Hunter v. Underwood,*[92] the Court faced an 84-year-old provision of the Alabama constitution that, the appellees alleged, had been enacted out of a desire to disenfranchise blacks.[93] The Court first noted the established constitutional doctrine that legislative "action will not be held unconstitutional solely because it results in a racially disproportionate impact. . . . Proof of racially discriminatory intent or purpose is required to show a violation of the Equal Protection Clause."[94] Concluding that the provision was plainly grounded in discriminatory motives,[95] the Court nonetheless acknowledged the state's assertion that disenfranchisement of poor *whites* was a "parallel" motivation[96] — apparently a problem of mixed motives.[97] Yet the Court found the evidence of impermissible motivation to be so compelling — aided by, for example, powerful expert testimony at trial,[98] and the state counsel's concession at oral argument that "I would be very blind and naive [to] . . . say that race was not a factor in the enactment of [s]ection 182 "[99] — that it held race to be a "but for" cause of the provision without doing the mixed-motive analysis that it said the case would require.[100]

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92. 471 U.S. 222 (1985).

93. At issue was Article VIII, section 182 of the Alabama constitution, which disenfranchised persons convicted of, among other crimes, "any infamous crime or crime involving moral turpitude." 471 U.S. at 223 n.*.

94. 471 U.S. at 227-28 (quoting Village of Arlington Heights v. Metropolitan Hous. Dev. Corp., 429 U.S. 252, 264-65 (1977)).

95. "[The court of appeals'] opinion presents a thorough analysis of the evidence and demonstrates conclusively that § 182 was enacted with the intent of disenfranchising blacks." 471 U.S. at 229.

96. "[A]ppellants make the further argument that the existence of a permissible motive for § 182, namely, the disenfranchisement of poor whites, trumps any proof of a parallel impermissible motive." 471 U.S. at 231-32.

97. Although the Court did not use the term "mixed motives," it favorably quoted the court of appeals' opinion from below, which did use the term. 471 U.S. at 225 (quoting 730 F.2d 614, 617 (11th Cir. 1984)).

98. 471 U.S. at 230-31.

99. 471 U.S. at 230.

100. At one point, the Court stated that "*Arlington Heights* and *Mt. Healthy* supply the proper analysis" for resolving the case. 471 U.S. at 232. Nevertheless, the Court refused to follow the reasoning of those cases, which call for a "same decision" analysis, stating: "[A]n additional purpose to discriminate against poor whites would not render nugatory the purpose to discriminate against all blacks, and it is beyond peradventure that the latter was a 'but-for' motivation for the enactment of § 182." 471 U.S. at 232. Apparently the strength of the appellee's evidence made the "but-for" determination "beyond peradventure" and made the mixed-motive aspect of the case irrelevant.

Cf. Village of Arlington Heights v. Metropolitan Hous. Dev. Corp., 429 U.S. 252 (1977). At issue in that case was the village's denial of a proposed rezoning that would have allowed the respondents to build integrated housing facilities. The evidence of discriminatory motivation there was so *weak* — the respondents had "simply failed to carry their burden of proving that

In *Mt. Healthy,* the paradigm mixed-motive case, the evidence of *both* permissible and impermissible motivation was compelling. The superintendent's memo explicitly stated that both the teacher's "notable lack of tact" *and* his report to the radio station led to his dismissal.[101] Unlike *Hunter,* the evidence of the controlling motivation was not conclusive either way, and the Court, confronted with the evidentiary conflict, devised the "same decision" test to glean the impact of the discriminatory factor on the discharge.[102]

Lower courts have engaged in similar evidence-weighing in Title VII mixed-motive cases. The Court of Appeals for the Eighth Circuit has recognized this, stating in one case that because the plaintiff "did not establish that race was a discernible factor in the school district's refusal to hire her, this is not a mixed motive case."[103] Similarly, the D.C. Circuit has stated that the mixed-motive "test" comes into play only when the plaintiff "has already discharged [the] burden of demonstrating that the employment decision was based on impermissible bias."[104]

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discriminatory purpose was a motivating factor in the Village's decision," 429 U.S. at 270 — that the Court did not find mixed motives despite acknowledging the difficulty of discerning legislative motivation. 429 U.S. at 268-71. As in *Hunter,* the Court might easily have found mixed motives if the plaintiff's evidence had been stronger. Instead, the Court was left to speculate that had such evidence existed, *then* it would have followed a mixed-motive analysis:

> Proof that the decision by the Village was motivated in part by a racially discriminatory purpose would not necessarily have required invalidation of the challenged decision. Such proof would, however, have shifted to the Village the burden of establishing that the same decision would have resulted even had the impermissible purpose not been considered. . . . See *Mt. Healthy* . . . .

429 U.S. at 271 n.21 (citation omitted).

101. *Mt. Healthy,* 429 U.S. at 283 n.1.

102. The National Labor Relations Board recognized the derivative nature of the "mixed-motive" label when it adopted *Mt. Healthy* for unfair labor practices cases. It noted that "the distinction between a [single-motive] case and a dual motive case is sometimes difficult to discern. . . . [It] seldom can be made *until after the presentation of all relevant evidence.*" Wright Line, 251 NLRB 1083, 105 L.R.R.M. (BNA) 1170 n.5 (1980) (emphasis added). Further, the distinction between single- and mixed-motive cases depends on the court's assessment of the relative *weight* accorded to the evidence. The Board continued: "[I]n a [single-motive] situation, the employer's affirmative defense of business justification [*i.e.,* its legitimate reason] is *wholly without merit.* If, however, the affirmative defense has *at least some merit* a "dual motive" may exist. . . ." 105 L.R.R.M. at 1170 n.5 (emphasis added).

103. Boudreaux v. Helena-West Helena School Dist., 819 F.2d 854, 856 n.3 (8th Cir. 1987). *See also* Powell v. Missouri State Highway & Transp. Dept., 822 F.2d 798, 802 (8th Cir. 1987) (finding the facts not to involve mixed motives because plaintiff did not establish "that race played any part in the decision"); Crutchfield v. Maverick Tube Corp., 664 F.Supp. 455, 458 (E.D.Mo. 1987) ("The Court finds that sex played no part in plaintiff's discharge and, therefore, the mixed motive analysis is inappropriate.").

104. 825 F.2d at 471. The *Hopkins* case starkly presents the evidence-weighing prerequisite of the mixed-motive categorization. The court reached its intermediate conclusion that discrimination played a role in the plaintiff's partnership evaluation by accepting her evidence, aided by expert testimony, that sex-stereotyping permeated the partners' assessment of her candidacy. On appeal to the Supreme Court, the defendant questioned the sufficiency of that initial evidence, arguing that "this case should never have been characterized as a 'mixed motives' case at all. Here, the only indication of the existence of 'mixed motives' was the gossamer evidence provided by [the plaintiff's expert] who purported to find stereotyping in some of the expressions used . . .

When viewed in light of the evidence-weighing that mixed-motive cases embody, the analytical framework provided by a mixed-motive approach becomes little more than a way for courts to restate, in convenient terms, their version of the proper test of Title VII causation. The issue for courts in mixed-motive cases is: given the presence, at least in some degree, of a discriminatory motive, is the nexus between that motive and the employer's actual decision strong enough to impose Title VII liability? But the inquiry devised for these cases — whether termed as a "same decision" test or its equivalent, the "but for" test[105] — is simply a statement of the standard for Title VII causation *in general*. It reflects one way of applying the statute's prohibition on employment actions taken "because of" or "on the basis of" discrimination. Indeed, the same-decision analysis takes no explicit account of any legitimate motive on the employer's part whatsoever. It focuses only on the alleged impermissible reason and whether the same decision would have been reached if that reason was not present.

Before courts can reach this causation question, they must resolve the question of proof: *did* the plaintiff show that a discriminatory motive existed? By implying that the employer's legitimate motive is of equal doctrinal concern as the illegitimate one, the "mixed motive" label unnecessarily diverts attention from the logical progression from proof to causation: the question of whether the presence of a discriminatory motive has been proved precedes the question of whether that motive, once it has been proved, was the but-for cause of the employer's action. A more useful approach than the mixed-motive analysis is to characterize cases on the questions that present themselves at the first stage of that progression: was a discriminatory motive present, and does the plaintiff seek to prove it by direct or indirect evidence?

V. The Direct/Indirect Evidence Distinction

A. *The Requirement of Direct Evidence*

A court's determination that a given case involves "mixed" motives reflects an underlying acknowledgement that the plaintiff has proven discrimination by direct evidence. Specifically, the theory of a mixed-motive case — that the employment action was the product of both permissible *and* impermissible factors — assumes that the court has reached an intermediate conclusion that some discrimination, in whatever degree,[106] was present. That conclusion must be reached by

in the written evaluations of [the plaintiff's] performance." Brief for Petitioner at 20, Price Waterhouse v. Hopkins, No. 87-1167 (U.S. argued Oct. 31, 1988).

105. *See supra* note 100.

106. It is uncertain precisely how much discrimination the plaintiff must show to satisfy the initial proof hurdle. The Eighth Circuit requires that the plaintiff show that discrimination played a "discernible part" in the employer's decision. Bibbs v. Block, 778 F.2d 1318, 1322 (8th

direct evidence.

Title VII plaintiffs alleging disparate treatment can proceed in one of two ways: by presenting indirect evidence and using the three-tiered route of *McDonnell Douglas,* or, alternately, by presenting direct evidence. While *McDonnell Douglas* is the more widely used analysis,[107] it is inappropriate when the plaintiff presents direct evidence. In *Trans World Airlines, Inc. v. Thurston,*[108] the Supreme Court made clear that "the *McDonnell Douglas* test is inapplicable where the plaintiff presents direct evidence of discrimination. The shifting burdens of proof . . . are designed to assure that the 'plaintiff [has] his day in court *despite the unavailability of direct evidence.*' "[109]

This conclusion is compelled by the underlying policy of the three-stage inferential process: the test is appropriate when only circumstantial evidence is available. "It would be illogical, indeed ironic, to hold a Title VII plaintiff presenting direct evidence of a defendant's intent to discriminate to a more stringent burden of proof, or to allow a defendant to meet that direct proof by merely articulating, but not proving, legitimate, nondiscriminatory reasons for its action."[110]

While it is recognized that the *McDonnell Douglas* approach is not appropriate when the plaintiff proceeds by direct evidence,[111] it should

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Cir. 1985) (en banc). Other circuits have required a showing that discrimination was a "significant" or "substantial" factor. *See, e.g.,* Miles v. M.N.C. Corp., 750 F.2d 867, 875 n.9 (11th Cir. 1985); Fadhl v. City & County of San Francisco, 741 F.2d 1163, 1166 (9th Cir. 1984); Whiting v. Jackson State Univ., 616 F.2d 116, 121 (5th Cir. 1980). *See also* Hopkins v. Price Waterhouse, 825 F.2d 458, 470 n.8 (D.C. Cir. 1987), *cert. granted,* 108 S. Ct. 1106 (1988); 1 C. SULLIVAN, M. ZIMMER & R. RICHARDS, EMPLOYMENT DISCRIMINATION, 266-67 (2d ed. 1988); Brief for United States as Amicus Curiae at 12, Price Waterhouse v. Hopkins, No. 87-1167 (U.S. argued Oct. 31, 1988).

107. *See supra* note 19.

108. 469 U.S. 111 (1985).

109. *Id.* at 121 (citation omitted) (emphasis added) (quoting Loeb v. Textron, Inc., 600 F.2d 1003, 1014 (1st Cir. 1979)). For a critique of *Thurston* and an argument that *McDonnell Douglas* and direct evidence can be reconciled, see Edwards, *supra* note 10, at 1-4, 32-35.

110. Bell v. Birmingham Linen Serv., 715 F.2d 1552, 1556-57 (11th Cir. 1983), *cert. denied,* 467 U.S. 1204 (1984).

The inapplicability of *McDonnell Douglas* in direct-evidence cases is well noted by the courts and commentators. *See, e.g.,* Fields v. Clark Univ., 817 F.2d 931, 935 (1st Cir. 1987), and cases cited therein; 2 A. LARSON & L. LARSON, *supra* note 19, at § 50.62 at 10-70 ("The plaintiff's proof by means of direct evidence does not merely fulfill his burden of showing a prima facie case; it suffices to make his entire case and throws the burden on the defendant of proving, at least by a preponderance of the evidence, that it would have rejected the plaintiff even in the absence of discrimination.") (footnotes omitted); cases cited in B. SCHLEI & P. GROSSMAN, *supra* note 4, at 297 n.5 (2d ed. Cum. Supp. 1985); Brief for NOW Legal Defense and Education Fund, as Amicus Curiae at 50 n.40, Price Waterhouse v. Hopkins, No. 87-1167 (U.S. argued Oct. 31, 1988).

111. The Court in *Thurston* did not provide a definition of "direct evidence." But it is plausible that the Court adopted the same view as this Note: direct evidence is defined as evidence of the employer's intent sufficient to allow a factfinder to conclude that "the employer intentionally discriminated against the plaintiff," *see supra* note 11, if the employer were to remain silent in the face of it. The Court might also have intended a tautological explanation: direct evidence is that which makes invocation of the *McDonnell Douglas* framework unnecessary, since the plaintiff has access to evidence adequate to make a case of discrimination. *Thurston* itself, decided under

also be recognized that the approach is equally incompatible with "mixed motives." The three-stage inferential inquiry is a process of elimination: the plaintiff, at stage I, rules out "the two most common" nondiscriminatory reasons for the employment action;[112] the employer, at stage II, provides one or several legitimate reasons for the job action; and the plaintiff, at stage III, attempts to prove that the stage II reasons advanced by the employer are false.[113] But in a mixed-motive case, the employer's explanation must by definition be accepted as *true;* further, an impermissible explanation must be present and accepted as true. The actual reason for the employer's action in a mixed-motive case is the combination of both explanations. A *McDonnell Douglas,* single-motive case, on the other hand, recognizes that if the employer's articulated explanation were true, the employer would win, and an inference of discrimination from the ruling-out of legitimate reasons would be untenable.[114] Instead, the *McDonnell Douglas* inquiry requires the plaintiff to show that "*all* legitimate reasons . . . have been eliminated as possible reasons for the employer's actions."[115]

Some courts have incorrectly suggested that it is possible to follow the *McDonnell Douglas* inquiry and still reach a conclusion of "mixed

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the Age Discrimination in Employment Act, 29 U.S.C. § 621 et seq. (1982), involved an airline's policy of mandatory retirement for cockpit employees at age 60. Discrimination in such a scenario clearly is proven by direct evidence, since the policy facially discriminates on the basis of age.

In Texas Dept. of Community Affairs v. Burdine, decided four years before *Thurston,* the Court said that a plaintiff could attempt to prove pretext under the *McDonnell Douglas* inquiry "either directly . . . or indirectly." 450 U.S. 248, 256 (1981). Given the subsequent statement in *Thurston,* the Court could not here have been referring to direct *evidence,* but rather to a plaintiff's means of disputing the employer's legitimate explanation and thereby strengthening the *circumstantial* inference the plaintiff created with the prima facie case. The plaintiff may use *circumstantial* evidence either directly by showing discriminatory intent or indirectly by showing that the employer's explanation is unpersuasive. *See supra* note 37 and accompanying text.

112. The two reasons are that the plaintiff is unqualified and the position is unavailable. International Bhd. of Teamsters v. United States, 431 U.S. 324, 358 n.44 (1977).

113. When a plaintiff proves pretext "indirectly," as suggested in *Burdine, see supra* note 111, she cancels out the employer's explanation — and thereby sustains the burden of persuading the court that the employer intentionally discriminated — expressly, "by showing that the employer's proffered explanation is unworthy of credence." 450 U.S. at 256. When she does so "directly," she cancels out the explanation by showing that the employer did not *likely* act for that reason, such that "a discriminatory reason *more likely* motivated the employer." 450 U.S. at 256. This latter tack builds one circumstantial inference atop another: the prima facie case allows the court to infer discrimination, and the plaintiff's rebuttal allows the court to infer that the employer's response is untrue.

114. As Justice Blackmun recognized, "[T]he *McDonnell Douglas* framework requires that a plaintiff prevail when at the third stage of a Title VII trial he demonstrates that the legitimate, nondiscriminatory reason given by the employer is in fact not the true reason for the employment decision." United States Postal Serv. Bd. of Governors v. Aikens, 460 U.S. 711, 718 (1983) (Blackmun, J., concurring). *See also* Note, *supra* note 19, at 1121 ("[D]isproof of the defendant's explanation entitles the plaintiff to prevail by a process of elimination."). In effect, then, the *McDonnell Douglas* inquiry does not require any evidence of discrimination *other* than the employment action itself and the employer's failure to explain it credibly.

115. Furnco Constr. Corp. v. Waters, 438 U.S. 567, 577 (1978) (emphasis added). The *Furnco* Court also stated: "A prima facie case under *McDonnell Douglas* raises an inference of

motives."[116] A court might, for example, find the employer's explanation less than compelling on its face, but also find that the plaintiff has failed to discredit the explanation adequately.[117] In such a case, the temptation may be to conclude that each party is partially correct and that mixed motives are present: the circumstantial evidence is compelling, while the legitimate explanation is credible, though weak. Courts that adopt such a posture misconstrue the *McDonnell Douglas* framework. That framework is not meant to weaken the burden that a plaintiff must bear to convince the court that intentional discrimination took place; rather, it exists to facilitate the plaintiff's proof of her case given the likelihood that she will be unable to obtain direct evidence of intent.[118] Although *McDonnell Douglas* makes an indirect-evidence plaintiff's procedural hurdles less onerous, it still requires that the plaintiff ultimately *persuade* the court that intentional discrimination occurred.[119] Where a plaintiff has inadequately proven

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discrimination only because we presume these acts, *if otherwise unexplained*, are more likely than not based on the consideration of impermissible factors." 438 U.S. at 577 (emphasis added).

Professor Brodin has provided a similar explanation for *McDonnell Douglas'* limitation to the single-motive scenario:

> Put in terms of the pretext analysis, the mixed-motive causation problem arises when a challenged personnel decision was motivated by *both* pretextual (unlawful) and nonpretextual (lawful) reasons.... It would appear, however, that the pretext approach is based on an assumption of single-motive decisionmaking, with the employer seeking to cover up an unlawful motive with one or a number of lawful reasons which are not the true reasons behind the action. If the employer's stated reasons are shown to be pretext, then in fact there is no real dual motive — there is only the unlawful motive.

Brodin, *supra* note 7, at 301 n.40.

116. An example of this is the recent analysis by the Second Circuit suggesting that plaintiffs can prove by a *McDonnell Douglas* inquiry the initial discrimination required for a mixed-motive analysis.

> When plaintiffs win, the only difference between a dual motive case and a simple *McDonnell Douglas* case is that in the former case the fact-finder has concluded that the improper reason has been proved to exist . . . to a degree sufficient to warrant a finding that the improper reason was a substantial cause of the adverse action.

Brock v. Casey Truck Sales, Inc., 839 F.2d 872, 878 (2d Cir. 1988). This statement fails to acknowledge that *McDonnell Douglas* is inconsistent with a mixed-motives analysis. *See supra* notes 111-15 and accompanying text. It also appears to rely on the false premise that plaintiffs can only prove discrimination through *McDonnell Douglas* — ignoring the possibility of direct evidence of discrimination: "[T]he fact-finder who concludes a case by applying [a mixed-motive analysis] will have already found . . . that the plaintiff has sustained his burden of proving the existence of an improper reason for the adverse action. In such circumstances, the case is really an application of both *McDonnell Douglas* and *Mt. Healthy*." 839 F.2d at 878. *But see* 839 F.2d at 878 n.6 (factfinder could apply mixed-motive analysis without requiring an initial *McDonnell Douglas* finding if it "assume[s]" that the improper reason exists).

117. For example, a plaintiff might present a solid prima facie case that his discharge was racially motivated, which the employer could rebut by articulating that the plaintiff had poor work habits and was insubordinate. The plaintiff may be unable to persuade the court that these explanations are pretextual, but might also bring to bear evidence of a supervisor's occasional inquiries about the plaintiff's involvement in a local civil rights organization.

118. *See supra* notes 109-10 and accompanying text. *See also* Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248, 255 n.8 (1981) ("In a Title VII case, the allocation of burdens and the creation of a presumption by the establishment of a prima facie case is intended progressively to sharpen the inquiry into the elusive factual question of intentional discrimination.").

119. "The ultimate burden of persuading the trier of fact that the defendant intentionally

pretext, even if the prima facie presumption is strong and the employer's explanation weak, the plaintiff has failed to carry the burden of persuasion and should lose.[120] Courts that label such a case one of "mixed motives" improperly apply the *McDonnell Douglas* inquiry and grant to plaintiffs a favor the Court never intended.[121] Further, by imposing a shift of the burden of persuasion to the defendant in such cases — where the plaintiff has proven the initial discrimination by a *McDonnell Douglas* inference — courts ignore the defendant's almost *de minimus* burden merely to "articulate" a legitimate explanation. In effect, these courts find the requisite discrimination for a mixed-motive analysis from the defendant's failure to *persuade* the court that the nondiscriminatory reason is true, an unfair imposition under *Burdine.* Indeed, the Court itself has rejected the view that the indirect-evidence approach might apply to a mixed-motive scenario.[122]

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discriminated against the plaintiff remains at all times with the plaintiff. The *McDonnell Douglas* division of intermediate evidentiary burdens serves to bring the litigants and the court expeditiously and fairly to this ultimate question." *Burdine,* 450 U.S. at 253 (citations omitted).

120. The defendant's stage II burden only to "articulate" — and not to "prove" or "persuade" — a nondiscriminatory explanation compels this conclusion. *McDonnell Douglas* requires only that the defendant *state* a reason in response to the presumption raised at stage I: "The defendant need not persuade the court that it was actually motivated by the proffered reasons. It is sufficient if the defendant's evidence raises a genuine issue of fact . . . ." *Burdine,* 450 U.S. at 254 (citation omitted). *See also* Board of Trustees v. Sweeney, 439 U.S. 24 (1978) (per curiam). A mixed-motive analysis assumes that the defendant's proffered reason is *proven* and in fact partially explains why it made the challenged decision.

121. In the above example, *see supra* note 117, the plaintiff's failure to rebut adequately the employer's articulated explanations means that he has failed to carry the burden of persuasion, and should not prevail. The direct evidence (of the supervisor's inquiries), however, may be adequate to support a direct-evidence inquiry and prove the existence of some discrimination, which would make a determination about causation appropriate. It is essential, though, that the court keep separate the direct- and indirect-evidence inquiries. Because these inquiries reflect only the court's analytic models for evaluating the evidence, and not procedural roadmaps for the progression of trial, the court can consider all the evidence presented and then determine which inquiry is appropriate, given the nature of that evidence.

122. In NLRB v. Transp. Management Corp., the Court noted that *Burdine* "discussed only the situation in which the issue is whether *either* illegal *or* legal motives, *but not both,* were the 'true' motives behind the decision." 462 U.S. 393, 400 n.5 (1982) (emphasis added).

However, the Court provided one caveat. In *McDonnell Douglas* it stated that the inquiry is flexible and should be adapted to varying fact patterns. "The facts necessarily will vary in Title VII cases, and the specification . . . of the prima facie proof required . . . is not necessarily applicable in every respect to differing factual situations." 411 U.S. at 802 n.13.

It is apparent, however, that this caveat applies only to the Court's description of the requirements for a stage I prima facie case. Justice Powell, writing for the Court, appended the footnoted caveat after listing the prima facie requirements, not after describing the larger three-stage inquiry. *See* 411 U.S. at 802. Furthermore, in *Burdine,* where Justice Powell repeated the stage I requirements, he stated that "*this* standard is not inflexible" and then quoted the *McDonnell Douglas* caveat. 450 U.S. at 253 n.6 (emphasis added). *See also* United States Postal Serv. Bd. of Governors v. Aikens, 460 U.S. 711, 715 (1983) ("*The prima facie case method* established in *McDonnell Douglas* was 'never intended to be rigid, mechanized or ritualistic.' ") (emphasis added). Thus, the Court intended that the tripartite analysis should be applicable to contexts other than the racial, failure-to-hire situation presented by the facts of *McDonnell Douglas.* Subsequent application of *McDonnell Douglas* by the Supreme Court and lower courts bears this explanation out. *See supra* note 20.

Moreover, the refusal of some lower courts to follow a rigid, three-step procedure in *McDon-*

In direct-evidence cases, by contrast, it is possible to consider any number of motivating factors without contradicting the theory on which the plaintiff's case is predicated. The court's analysis is more straightforward than in the three-stage process because it simply weighs the evidence presented by each party. If the court is persuaded that the motivations advanced by both sides contributed to the decision, the case becomes a "mixed-motive" case. The crucial difference between this and an indirect-evidence, single-motive case is the ability of the court to find that multiple motives did exist — a finding not possible with an inferential inquiry.

The shifts in burdens of persuasion devised by courts for use in mixed-motive cases illustrate the necessity of direct evidence for a "mixed-motive" designation. Close examination of these cases reveals that the courts are concerned not with a conflict in motives, but with attaining results consistent with their views of the policies of Title VII: imposing a sanction on the employer that has engaged in wrongdoing without providing a windfall of relief for the victimized plaintiff. In *Transportation Management*, for example, the Court explained that once a plaintiff establishes that some discrimination has occurred, the burden of persuasion shifts to the employer to punish it for its impermissible behavior:

> The employer is a wrongdoer; he has acted out of a motive that is declared illegitimate by the statute. It is fair that he 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.*[123]

Likewise, the Court of Appeals for the D.C. Circuit reasoned that once the plaintiff has established that discrimination played a role in

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nell Douglas disparate treatment cases, *see, e.g.*, Flowers v. Crouch-Walker Corp., 552 F.2d 1277, 1281-82 (7th Cir. 1977) ("*McDonnell Douglas* does not require a three-step judicial minuet of procedure under which the defendant must come forward with evidence if certain facts in plaintiff's case establish a prima facie case . . . ."), likely stems from a recognition that the *McDonnell Douglas* inquiry simply aids the court's consideration of the evidence. The trial does not proceed in the trifurcated fashion that the formula suggests. Rather, the plaintiff, in the case-in-chief, presents all her evidence initially, including rebuttal of the defendant's anticipated legitimate explanations. *See* Note, *supra* note 19, at 1119 n.39 ("*McDonnell Douglas* prescribed an analytical rather than a procedural framework," and "does not contemplate a trifurcated trial.").

123. 462 U.S. at 403 (emphasis added). The Court accepted the Board's construction of the employer's burden as an affirmative defense. "The Board has . . . chosen to recognize . . . what it designates as an affirmative defense that the employer has the burden of sustaining. We are unprepared to hold that this is an impermissible construction of the [National Labor Relations] Act." 462 U.S. at 402.

Several lower courts, applying this reasoning to Title VII, have also imposed the burden of *persuasion* on the defendant to prove that the same decision would have been made absent discrimination. *See, e.g.*, Bibbs v. Black, 778 F.2d 1318, 1324 (8th Cir. 1985) (en banc) ("[T]he burden of production *and* persuasion shifts from the plaintiff to the defendant.") (emphasis in original); Fields v. Clark Univ., 817 F.2d 931, 937 (1st Cir. 1987) ("[W]hen a plaintiff has proved by direct evidence that unlawful discrimination was a motivating factor in an employment decision, the burden is on the employer to prove by a preponderance of the evidence that the same decision would have been made absent the discrimination.").

the employment action, "it is unreasonable and destructive of the purposes of Title VII to require the plaintiff to establish in addition the difficult hypothetical proposition that, had there been no discrimination, the employment decision would have been made in his favor."[124]

These courts have also noted that even if the plaintiff has already proved the existence of discrimination, she should not be awarded a windfall if the discrimination was not the controlling factor in the employer's decision.[125] The shifting burdens of the mixed-motive inquiry are thus premised on twin concerns: burdening an employer that has, to some extent, considered illegal factors; and avoiding unjust enrichment to a plaintiff who, despite some discrimination, has not been truly "victimized" because the adverse action would have been taken anyway.[126] These concerns only arise, of course, if the plaintiff has first presented, by direct evidence, proof that the employer did consider the asserted illegal factors.

In lower-court "mixed-motive" cases, the presence of direct evidence is apparent. In *Hopkins v. Price Waterhouse,*[127] for instance, the plaintiff pointed to numerous internal memoranda and statements by the employer indicating stereotypical attitudes toward the plaintiff, if not outright sex discrimination.[128] Similarly, in *Mt. Healthy,* the superintendent *told* the plaintiff that the constitutionally protected activity was a partial reason for the discharge.[129] These courts were able to label the cases "mixed-motive" because of the plaintiffs' initial ability

124. Toney v. Block, 705 F.2d 1364, 1366 (D.C. Cir. 1983). The court in Hopkins v. Price Waterhouse relied on this aspect of the *Toney* case. 825 F.2d 458, 471 (D.C. Cir. 1987), *cert. granted,* 108 S. Ct. 1106 (1988).

125. *See, e.g., Mt. Healthy,* 429 U.S. at 285-86; *Bibbs,* 778 F.2d at 1322 ("Unless the impermissible racial motivation was a but-for cause of Bibbs's losing the promotion, to place him in the job now would award him a windfall.").

126. It is not necessary to view "victimization" under Title VII in this result-oriented fashion. *See supra* note 34 and accompanying text.

127. 825 F.2d 458 (D.C. Cir. 1987), *cert. granted,* (1988).

128. The trial court in *Hopkins* credited, and the appeals court accepted, evidence that the head of the plaintiff's division — her "most fervent supporter" — suggested that the firm would view the plaintiff's candidacy for partnership more favorably if she would "walk more femininely, talk more femininely, dress more femininely, wear make-up, have her hair styled, and wear jewelry." 825 F.2d at 463. The court of appeals later stated that the plaintiff had "shown by direct evidence" that unlawful discrimination existed, and that *"this crucial finding* justifies the burden-shifting rule we apply in this case." 825 F.2d at 471 n.9 (emphasis added).

One issue before the Supreme Court in *Hopkins* is the probative value of evidence of "sex stereotyping" to prove sex discrimination under Title VII. *See* Brief for the United States as Amicus Curiae at 24-26; Brief for American Psychological Association as Amicus Curiae.

129. The memo explaining the discharge pointed to Doyle's improper behavior at the school *and* his "leak" to the radio station. *See* 429 U.S. at 283 n.1.

Other mixed-motive cases also reveal direct evidence. In Bibbs v. Block, 778 F.2d 1318, 1320 (8th Cir. 1985) (en banc), the court found that the key member of the committee evaluating the plaintiff for promotion had referred to the plaintiff as a "black militant" and to another black employee as "boy" and "nigger." In NLRB v. Transp. Management Corp., 462 U.S. 393, 396 (1983), the complainant's supervisor, upon discovering that the complainant sought to encourage his co-workers to join the Teamsters, "referred to [him] as two-faced, and promised to get even with him," and later asked a co-worker, "What's with Sam and the Union?" 462 U.S. at 396.

to present credible direct evidence of discrimination. Only after crediting the plaintiffs' evidence did the courts address the problems raised by the presence of conflicting motives by shifting the intermediate burden to the defendant and imposing a "same decision" test of causation to assess the impact of the impermissible motive.

B. *Workability of the Direct/Indirect Evidence Distinction*

The distinction between cases involving direct evidence and those involving indirect evidence, already recognized in Title VII case law,[130] should be the central method of analysis in disparate treatment adjudication. By focusing on the type of evidence the plaintiff presents, rather than the number of motives, courts can avoid the doctrinal clutter that the "mixed motive" label creates. This approach rejects the concern with the quantity of motives and forces courts to focus on the crucial, but distinct, inquiries into the proof of illicit motives and whether those motives played a causal role in the challenged employment action.

Under this approach, the court should, at the initial proof inquiry, consider the character of the evidence to determine whether it is direct or indirect, and then consider whether the discriminatory motive, if shown, caused the employment action.[131] If the plaintiff relies on indirect evidence, a court will follow the *McDonnell Douglas* framework at the proof stage, and a subsequent causation inquiry will be unnecessary. If a plaintiff prevails under *McDonnell Douglas,* and successfully persuades the court that the employer's asserted reasons were pretextual, the factfinder concludes, *ipso facto,* that the employer intentionally discriminated, and that the plaintiff is entitled to relief. No separate inquiry into causation is required; it is assumed.[132] But if, instead, the plaintiff relies on credible direct evidence, the court should then proceed to a causation inquiry.[133]

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130. *See supra* Part V.A.

131. *See supra* notes 120-22 and accompanying text. On the various approaches to the causation inquiry, see *supra* Part II.

132. "The very showing that the defendant's asserted reason was a pretext for race is also a demonstration that but for his race plaintiff would have gotten the job. That is what pretext means: a reason *for the employment decision* that is not the true reason." Bibbs v. Block, 778 F.2d 1318, 1321 (8th Cir. 1985) (en banc) (emphasis in original).

133. It is unclear exactly how "direct" the direct evidence must be for the court to employ the direct-evidence approach rather than the *McDonnell Douglas* approach. In its *amicus* brief in *Hopkins,* the United States argued that "a rule that required the burden of proof on causation to shift to the defendant would present severe problems in defining the 'threshold' showing that the plaintiff would have to make before such a shift would take place." Brief for the United States as Amicus Curiae at 20, Price Waterhouse v. Hopkins, No. 87-1167 (U.S. Argued Oct. 31, 1988). The parties in *Hopkins* are in fundamental disagreement about whether the plaintiff's evidence meets that threshold. *Compare* Brief for the Petitioner at 4-15 *with* Brief for the Respondent at 2-12.

The approach embodied in the Federal Rules of Evidence seems most appropriate. *See* FED. R. EVID. 401 (" 'Relevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less prob-

This process makes an intermediate finding of "mixed motives" irrelevant. It takes no account of the quantity of the employer's motives, but looks instead to the instrumental issues of whether a discriminatory motive was present, and if so, what effect this motive had on the employer's decision.[134] As noted by the Eleventh Circuit, which has already explicitly embraced this process:

> [T]he *McDonnell Douglas* method of proving a prima facie case pertains primarily, if not exclusively, to situations where direct evidence of discrimination is lacking. . . . If the evidence consists of direct testimony that the defendant acted with a discriminatory motive, and the trier of fact accepts this testimony, the ultimate issue of discrimination is proved. . . . "[D]efendant can rebut only by *proving* by a preponderance of the evidence that the same decision would have been reached even absent the presence of that factor."[135]

Although the case factually involved multiple motives,[136] the notion of

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able than it would be without the evidence."); FED. R. EVID. 402 ("All relevant evidence is admissible . . . . Evidence which is not relevant is not admissible.").

For example, a plaintiff might claim that an interviewer's arguably racist joke is adequate direct evidence that her rejection was based on discrimination. The court needs only to make a threshold determination whether the evidence of such a joke makes the "fact of consequence" — discrimination — more or less probable. If, in the course of trial, such evidence is discredited (say, by proof that the joke was never made), the direct-evidence aspect of the plaintiff's case is lost. The plaintiff then may either present other direct evidence (or risk a directed verdict for the defendant), or resort to the indirect-evidence approach of *McDonnell Douglas*. It is important, however, that the court not combine the two approaches, since their tenets are inconsistent. *See supra* notes 106-29 and accompanying text.

Statistical evidence, although rarely advanced by an individual disparate treatment plaintiff, defies easy characterization as either indirect or direct evidence. On the one hand, statistics, like indirect evidence, help create the requisite inference of discrimination. For example, if a plaintiff has established a prima facie case of race discrimination, evidence that an employer's work force is 99 percent white may create a sufficiently strong inference of wrongdoing that no articulated explanation by the employer will be believed. The statistics would support the circumstantial inference and would be the "direct" proof of pretext at stage III of which the *Burdine* Court spoke. *See supra* note 111; *see also* B. SCHLEI & P. GROSSMAN, *supra* note 4, at 316-17 (2d ed. Cum. Supp. 1985) (characterizing statistics as "circumstantial evidence.").

On the other hand, statistical evidence is like direct evidence because, if believed, it helps resolve a matter in issue. *See supra* note 11. The statistical proof would certainly not be *conclusive* direct evidence that a particular plaintiff suffered discrimination, but would, like a racist joke during an interview, directly support the proposition that discrimination was involved in the assessment of this plaintiff. *See* Furnco Constr. Corp. v. Waters, 438 U.S. 567, 579-80 (1978) (stating that although Title VII requires that each applicant be treated nondiscriminatorily, regardless of the composition of the current work force, statistical proof is "not wholly irrelevant" to the issue of the employer's intent in an individual disparate treatment case). The question of the proper classification of statistical proof may be academic, however, since it appears that few individual disparate treatment plaintiffs rely on statistics. *See* B. SCHLEI & P. GROSSMAN, *supra* note 4, at 1331 (statistics are crucial in disparate impact cases and disparate treatment class actions).

134. It is crucial to recognize that a Title VII trial proceeds as does any other civil trial. The analytical frameworks under discussion simply guide the court in its factfinding and application of the law to the facts of each case.

135. Bell v. Birmingham Linen Service, 715 F.2d 1552, 1556-57 (11th Cir. 1983), *cert. denied*, 476 U.S. 1204 (1984) (quoting Lee v. Russell County Bd. of Educ., 684 F.2d 769, 774 (11th Cir. 1982)) (emphasis in original); *see also* 2 A. LARSON & L. LARSON, *supra* note 19, at § 50.62 (1987).

136. The trial court credited evidence that the first employee assigned to a newly posted job

"mixed motives" never entered the court's reasoning. Rather, the court placed the facts under the rubric of direct evidence, and from there applied its particular test of Title VII causation, expressly rejecting the trial court's use of the *McDonnell Douglas* formula.[137]

Many courts, however, have become bogged down in mixed-motive terminology without recognizing that the true basis for distinguishing the mixed-motive case is evidentiary. For example, the Eighth Circuit, which has given perhaps more attention to the mixed-motive issue than any court,[138] applies a mixed-motive, burden-shifting analysis whenever the plaintiff can show a "discernible" level of discrimination,[139] but ignores how a plaintiff might show that "discernible" level. Another court has suggested that plaintiffs can offer "direct proof of discrimination, circumstantial proof of discrimination *or* proof of mixed motivation."[140]

Much of the confusion attendant to the mixed-motive cases can be traced to the failure to recognize the direct/indirect evidence distinction. In indirect-evidence cases, defendants, in presenting their cases, often will advance a legitimate, nondiscriminatory explanation without clarifying whether that reason was the sole, or simply an additional, reason for their action. Presumably, plaintiffs are similarly ambiguous in their own case-in-chief. The choice is left to the court: if it perceives the alleged discriminatory reason to be the sole reason, it will apply *McDonnell Douglas*, but if it perceives the issue to be

in the plant washroom was more qualified than the plaintiff (a legitimate reason) but also credited evidence of a statement by a supervisor that if the plaintiff, a woman, were assigned to the job, then "every woman in the plant would want to go into the washroom." 715 F.2d at 1553-54.

137. 715 F.2d at 1556-57. For a critique of *Bell*, see Edwards, *supra* note 10, at 17-31.

Fields v. Clark Univ., 817 F.2d 931 (1st Cir. 1987), takes a similar approach. *Fields* involved the denial of tenure to a faculty member. The trial court found that the plaintiff's department "was generally permeated with sexual discrimination of which the plaintiff was in fact a victim," but also found that the plaintiff had serious teaching deficiencies. 817 F.2d at 933. The court of appeals held that "when a plaintiff has proved by direct evidence that unlawful discrimination was a motivating factor in an employment decision, the burden is on the employer to prove by a preponderance of the evidence that the same decision would have been made absent the discrimination." 817 F.2d at 937.

138. The court granted an *en banc* hearing in *Bibbs* expressly to revisit the mixed-motive question, and the *en banc* decision's five separate opinions reflect a sharp divergence of views on the issue. Bibbs v. Block, 778 F.2d 1318 (8th Cir. 1985) (en banc).

139. 778 F.2d at 1322.

140. Gavalik v. Continental Can Co., 812 F.2d 834, 864 (3d Cir.), *cert. denied*, 108 S. Ct. 495 (1987) (emphasis added). Opinions in other circuits betray a similar confusion. For example, in Fadhl v. City & County of San Francisco, 741 F.2d 1163 (9th Cir. 1984), the Court of Appeals for the Ninth Circuit noted that an employer may be liable upon a plaintiff's proof that discrimination was "a significant factor" in the decision, but neglects to mention the means by which a plaintiff would make that proof. It referred only to the *McDonnell Douglas-Burdine* line of cases, suggesting that no alternative method of proof under Title VII existed. 741 F.2d at 1166. In addition, the Court of Appeals for the Sixth Circuit, in Goostree v. State of Tennessee, 796 F.2d 854 (6th Cir. 1986), *cert. denied*, 480 U.S. 918 (1987), suggested that three kinds of cases exist under Title VII: *McDonnell Douglas*, "a dual motive case *or* a case in which direct evidence of discrimination is available." 796 F.2d at 863 (emphasis added).

whether the alleged reason was the "but for" reason, it will apply a *Mt. Healthy* mixed-motive analysis.[141] Quantifying motives is both difficult and confusing.

If a plain distinction is made between plaintiffs who rely on direct evidence and those who do not, the court's choice of inquiry is clear, and it need not rely on a quantitative judgment about whether a stated reason was the sole reason or one of many.[142] Moreover, the distinction prevents the erroneous perception that a case involving mixed motives is uniquely difficult and merits special analysis. Instead, courts can step away from a "mixed motive" label and fit fact patterns into one of the two categories of proof that Title VII case law already recognizes. Further, a focus on the evidentiary nature of the plaintiff's case is consistent with the Supreme Court's pronouncements that Title VII discrimination is a factual and not legal issue.[143] The approach also avoids the confusing procedural situation that occurs when courts try to apply a mixed-motives analysis by combining the direct- and indirect-evidence inquiries,[144] which are inconsistent. Fi-

141. "Since defendants are not usually clear whether they are advancing a proper reason as the *sole* or only an *additional* reason for the adverse action, it is not surprising that fact-finders are not always clear as to which analysis they are using." Brock v. Casey Truck Sales, Inc., 839 F.2d 872, 877 (2d Cir. 1988) (emphasis added).

142. It is unclear whether this approach would be useful for other anti-discrimination statutes, such as the ADEA and 42 U.S.C. § 1981, which provide for jury trials, since fashioning jury instructions poses special problems. *See* Stonefield, *supra* note 4, at 119 n.123 and 170 n.329. However, the simpler approach that the direct/indirect evidence distinction embodies would likely be similarly helpful to a jury. *Cf.* Estes v. Dick Smith Ford, Inc., 856 F.2d 1097, 1102 n.2 (8th Cir. 1988) (mixed-motive analysis applies to cases under ADEA and § 1981).

It is also unclear whether this approach would be appropriate for Title VII class actions. *See generally* General Tel. Co. v. Falcon, 457 U.S. 147 (1982); B. SCHLEI & P. GROSSMAN, *supra* note 4, at 1216-70; 2 A. LARSON & L. LARSON, *supra* note 19, §§ 49.50-49.62. The Supreme Court has stated that *McDonnell Douglas* is relevant only "in a private, non-class action." 411 U.S. at 800. And it is unlikely that a mixed-motive scenario, where an employer purportedly acts for two or several different reasons, could be reconciled with a Title VII class action, which requires that a plaintiff prove that the alleged discrimination was the employer's regular or standard operating procedure. *See* Hazelwood School Dist. v. United States, 433 U.S. 299, 307 (1977).

143. "[A] finding of intentional discrimination is a finding of fact." Anderson v. City of Bessemer City, 470 U.S. 564, 573 (1985). *See also* Pullman-Standard v. Swint, 456 U.S. 273, 286-87 (1982) (a finding of discriminatory intent under seniority provisions of Title VII is factual, subject to clearly erroneous standard on appeal); Goodman v. Lukens Steel Co., 107 S. Ct. 2617, 2623 (1987).

Judge Newman of the Second Circuit has argued, in addition, that the distinction between a "pretext" analysis (as in *McDonnell Douglas*) and a "but for" analysis (as in *Mt. Healthy*) is grounded in "different factual inquiries." NLRB v. Charles Batchelder Co., 646 F.2d 33, 42 (2d Cir. 1981) (Newman, J., concurring). "Simply stated, 'pretext' analysis asks, 'What happened?' 'But for' analysis asks, 'What would have happened?' " 646 F.2d at 42.

144. "To determine liability by first applying the *McDonnell Douglas-Burdine* framework and then, if it appears at the trial that there were mixed motives, to superimpose some burden-shifting procedure on top of this framework, would be to compound procedural refinements in a confusing and ultimately unproductive fashion." Brief for the United States as Amicus Curiae at 18, Price Waterhouse v. Hopkins, No. 87-1167 (U.S. argued Oct. 31, 1988). *See also* Brief for Respondent at 35-36 (arguing that it is "confusing doctrinally" to have separate tests for mixed-motive cases. "In all cases — whether involving a single or several motives — [the plaintiff's]

nally, the approach correctly distinguishes between the issues of proof and causation. Questions such as "but for," "same decision," or "substantial factor" — causation questions — would be explicitly reserved until the court makes the initial determination that the plaintiff is relying on direct evidence of discrimination.[145]

VI. Conclusion

At best, "mixed-motive" is a term of convenience that allows courts to conceptualize fact patterns as they believe they occurred in reality. Courts should recognize that the term is unhelpful, and doctrinally confusing, when stretched beyond its descriptive limits and used as an analytical tool in adjudication of Title VII claims. When a court affixes the "mixed-motive" label to a case, it implicitly acknowledges that the case's facts do not initially compel a holding for either party, and that a more searching inquiry will be required. The Title VII case law has dealt with the tension reflected in these difficult factual resolutions by devising two distinct lines of analysis that depend on the nature of the plaintiff's evidence. The "mixed-motive" paradigm diverts attention from that effort; a more useful approach is to focus on whether the plaintiff's evidence is direct or indirect, and to select the appropriate causation inquiry following the initial offer of proof.

By relying on the inherent distinction between direct and indirect evidence, and the respective mode of analysis each type of evidence embodies, courts also can keep clear the separate issues of proof and causation. A plaintiff's attempt to show that the employer considered an impermissible factor in making the employment decision involves questions of proof; a plaintiff's further attempt to show that the proven factor controlled the employer's decision involves questions of causation. The "mixed-motive" analysis needlessly combines those issues, but the direct/indirect evidence analysis explicitly recognizes that proof issues are primary and that causation issues arise only when the proof question is answered by direct evidence.

Recognition of these crucial distinctions in the Title VII case law allows courts to assess plaintiffs' claims of discrimination in a principled fashion. Discarding the mixed-motive paradigm and replacing it with a wider application of the direct/indirect evidence approach can

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burden [of persuasion] is satisfied by proof that discrimination affected the challenged decision. And the employer always retains the opportunity to try to limit relief after the violation has been established.").

145. *See supra* note 105 and accompanying text.

help foster the efficient and judicious resolution of disparate treatment claims under Title VII.

— *Robert S. Whitman*