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The Standard of Causation in the Mixed-Motive Title VII Action -- A Social Policy Perspective

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The past five years have seen dramatic case law developments in the civil rights area. Perhaps the most widely known of these has been the introduction of the "fault principle" into litigation of constitutional claims, requiring that a plaintiff prove discriminatory purpose and motive underlying the challenged conduct in order to prevail.[1] Developments in the decisional law relating to causation have attracted less attention but also have far-reaching implications for the future of civil rights litigation and enforcement. This Article will focus on the causal-relation problem in individual employment discrimination suits alleging disparate treatment[2] brought under title VII of the Civil Rights Act of 1964.[3]

In title VII actions, the complaining party must establish that the challenged conduct—termination, for example—occurred "because of" race, color, religion, national origin, or sex. The employer will typically offer evidence to show that he acted for good cause, such as poor work perform-

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1. See Washington v. Davis, 426 U.S. 229 (1976), and its progeny, discussed in Horwitz, The Jurisprudence of *Brown* and the Dilemmas of Liberalism, 14 Harv. C.R.-C.L. L. Rev. 599, 611 (1979); Freeman, Legitimizing Racial Discrimination Through Antidiscrimination Law: A Critical Review of Supreme Court Doctrine, 62 Minn. L. Rev. 1049, 1052–57 (1978).

2. The Supreme Court has defined the two basic types of title VII cases as follows:

> "Disparate treatment" . . . is the most easily understood type of discrimination. The employer simply treats some people less favorably than others because of their race, color, religion, sex, or national origin. Proof of discriminatory motive is critical, although it can in some situations be inferred from the mere fact of differences in treatment. Undoubtedly disparate treatment was the most obvious evil Congress had in mind when it enacted Title VII . . . .
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> Claims of disparate treatment may be distinguisbed from claims that stress "disparate impact." The latter involve 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. Proof of discriminatory motive, we have held, is not required under a disparate-impact theory.

International Bhd. of Teamsters v. United States, 431 U.S. 324, 335–36 n.15 (1977) (citations omitted).

Each type of discrimination may be challenged in either an individual or class action, the latter involving a systemic violation. As will become apparent below, the individual disparate treatment case raises the thorniest problems of causation. See infra notes 58–59 and accompanying text.

3. 42 U.S.C. §§ 2000e–2000e-17 et seq. (1976). For the key text of the section defining illegal discrimination, see infra note 16.

ance, dishonesty, or misconduct. The causal relation between unlawful motive and the adverse action becomes particularly problematical in a mixed-motive setting, that is, where the employer seems in fact to have been motivated by *both* lawful and unlawful considerations. The question thus arises as to how large a part the discriminatory factor must play in the decision before a court should hold that the decision was made "because of" a prohibited criterion. Closely related is the problem of determining whether remediable harm has occurred where a decision is arrived at because of an impermissible factor but is independently justifiable on legitimate grounds. What result should obtain, for example, where the plaintiff's application is rejected because he is black, but in fact the plaintiff lacks the job-related qualifications for the position and thus would have been rejected anyway? Is the Act violated in this situation, and, if so, what remedy is appropriate?

Various formulations of the appropriate standard of causation for disparate treatment actions have been suggested in the decisional law and elsewhere. At one end of the spectrum is a test, specifically rejected by Congress, that requires the plaintiff to establish that the unlawful factor was the *sole* factor behind the decision.[4] At the other end is a causal theory that prohibits a decision that was based *in part* on an impermissible consideration even if a legitimate reason was also relied on.[5] In between is a test that would invalidate personnel action that was based *in substantial part* on a discriminatory ground,[6] and another that requires the plaintiff to prove that the impermissible consideration was a *determinative factor,* i.e., a factor that made a difference in the ultimate result.[7]

Although the Supreme Court has said little regarding mixed-motive causation in individual title VII cases, its teaching in title VII class-action cases and elsewhere seems to point toward the adoption of a test that permits a defendant who is found to have been motivated by an unlawful consideration to escape liability if he can establish that he would have arrived at the same decision even absent the unlawful consideration.[8] This "same decision" test[9] is like the "determinative factor" test except that the burden is on the defendant, rather than the plaintiff, to show that the impermissible factor did not make a difference in the ultimate result. The test has been aptly characterized as a "harmless error" doctrine.[10]

The question of causal nexus in this context is multidimensional, ranging from the litigator's familiar query, "What do I have to prove to win?", to the judge's unenviable task of sorting out "legislative intent," to the social policy

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4. See infra notes 22–24 and accompanying text.
5. See infra notes 41–42, 73–75 and accompanying text.
6. See infra notes 77–78 and accompanying text.
7. See infra notes 79–80 and accompanying text.
8. This analysis is sometimes cast in "but-for" terminology, viz., that the defendant is liable only if it can be shown that the unlawful factor was a but-for cause of the challenged decision.
9. See infra notes 61–72 & 82 and accompanying text.
10. Jones v. Alexauder, 609 F.2d 778, 782 (5th Cir. 1980).

question of the role that law can and should play in the movement toward a discrimination-free society, and finally to the age-old problem of philosophers and historians of ascribing "cause" to human conduct and events.[11] Moreover, standards of proof and allocations of burdens on causation will determine the outcome of many litigations and consequently will influence the number and type of title VII actions filed in the coming years.

The effort in this Article is to define a theory of causation for the individual disparate treatment case[12] that is consistent with the goals of title VII as well as with the realities and limitations of our adversary system of adjudication. It is submitted that the "same decision" standard does not meet these criteria. The starting point for this endeavor is necessarily a survey of the 1964 Civil Rights Act and its legislative history pertaining to the mixed-motive problem. Next, the Article traces the development of the relevant case law. The causal question and the implications of the "same decision" standard will then be analyzed from a social policy perspective and in light of developing notions of tort law. Finally, a causal analysis that separates issues of liability from those of remedy is proposed.[13]

I. The Legislative History of Title VII: Clues to the Mixed-Motive Puzzle

The Civil Rights Act of 1964 was enacted by Congress in the wake of the assassination of President John F. Kennedy and represented the culmination of "an epic legislative struggle" that "brought to fruition the labors and aspirations of civil rights proponents everywhere."[14] Title VII of the Act, "triggered by a Nation's concern over centuries of racial injustice",[15] prohibits discrimination in employment opportunities because of race, color, religion, national origin, or sex.[16] Its purpose was stated broadly and ambi-

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11. See, e.g., E. Carr, What is History? 113-43 (1961).

12. For an attempt to define causation in the disparate impact area, see Eisenberg, Disproportionate Impact and Illicit Motive: Theories of Constitutional Adjudication, 52 N.Y.U. L. Rev. 36 (1977).

13. While much of the emphasis in this article is on racial discrimination, the primary target of title VII, see infra notes 14–15, 17 & 21 and accompanying text, its analysis is generally applicable to discrimination on the other grounds enumerated in title VII as well.

14. Vaas, Title VII: Legislative History, 7 B.C. Indus. & Com. L. Rev. 431, 445, 457 (1966). In reporting out the original version of the Act, the House Judiciary Committee wrote that it was directed at the fact that

> [t]oday, more than 100 years after their formal emancipation, Negroes, who make up over 10 per cent of our popnlation, are by virtue of one or another type of discrimination not accorded the rights, privileges, and opportunities which are considered to be, and must be, the birthright of all citizcns.

H.R. Rep. No. 914, 88th Cong., 1st Sess. 18 (1963), reprinted in [1964] U.S. Code Cong. & Ad. News 2391, 2393.

15. United Steelworkers v. Weber, 443 U.S. 193, 204 (1979).

16. Title VII provides in pertinent part:

> Sec. 703. (a) It shall be an unlawful employment practice for an employer—

tiously in a congressional report: "to eliminate, through the utilization of formal and informal remedial procedures, discrimination in employment based on race, color, religion, or national origin."[17]

While the statute's prohibitions are sweeping in their language, title VII does not define the term "discriminate" or the causal connector "because of."[18] The task is thus to sift through the legislative history[19] to determine whether Congress anticipated the definitional problem in the mixed-motive context and, if so, what resolution was intended.

As a general matter, title VII was designed to achieve the elimination of discriminatory practices with minimal interference in management's realm:

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(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or

(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

42 U.S.C. § 2000e-2 (1976).

Provisions for enforcement of the statute require the complainant to exhaust state and federal administrative agency procedures prior to filing an action in federal district court. 42 U.S.C. § 2000e-5 (1976). The federal agency established by the statute, the Equal Employment Opportunity Commission (EEOC), is empowered only to "endeavor to climinate any such alleged unlawful practice by informal methods of conference, conciliation, and persuasion." 42 U.S.C. § 2000e-5(b) (1976). The EEOC thus has no internal enforcement powers, although it is authorized to bring its own civil action against a respondent from whom it has been unable to secure a conciliation agreement. 42 U.S.C. 2000e-5(f)(1) (1976).

17. H.R. Rep. No. 914, supra note 14, at 26. This statement was made prior to the addition of sex as a prohibited basis under title VII, see 110 Cong. Rec. 2577-84 (1964); see also United Steelworkers v. Weber, 443 U.S. 193, 202 (1979) ("Congress' primary concern in enacting the prohibition against racial discrimination in Title VII of the Civil Rights Act of 1964 was with 'the plight of the Negro in our economy.' 110 Cong. Rec. 6548 (remarks of Sen. Humphrey)."); Albemarle Paper Co. v. Moody, 422 U.S. 405, 418-19 (1975) (The "primary objective" of title VII is deterrence of discriminatory practices and the secondary objective is compensation to victims "to make persons whole for injuries suffered on account of unlawful employment discrimination."); Griggs v. Duke Power Co., 401 U.S. 424, 429-30 (1971) (The primary purpose of title VII is to "achieve equality of employment opportunities and remove barriers that have operated in the past to favor an identifiable group of white employees over other employees."); Franks v. Bowman Transp. Co., 424 U.S. 747, 768 n.28 (1976) (speaking of the Act's " 'primary objective' of eradicating discrimination"); Northwest Airlines, Inc. v. Transport Workers Union, 451 U.S. 77, 93 (1981) (Title VII is a "comprehensive [program] designed to eliminate certain varieties of employment discrimination."); EEOC v. Associated Dry Goods Corp., 449 U.S. 590, 595 (1981) (Title VII was designed as a "means of eliminating employment discrimination."). But see International Bhd. of Teamsters v. United States, 431 U.S. 324, 364 (1977) (indicating that the compensation purpose and the deterrent purpose are "equally important").

18. In response to colleagues who criticized the former omission, Senator Clark, one of the floor managers of the bill, argued:

It has been suggested that the concept of discrimination is vague. In fact it is clear and simple and has no hidden meanings. To discriminate is to make a distinction, to make a difference in treatment or favor, and those distinctions or differences in treatment or favor which are prohibited by section 704 [now section 703] are those which are based on any five [sic] of the forbidden criteria: race, color, religion, sex, and national origin. Any other criterion or qualification for employment is not affected by this title.

110 Cong. Rec. 7213 (1964); see also 110 Cong. Rec. 7218, 7247 (1964).

19. The legislative history available for title VII is somewhat unique. As one writer has put it: Seldom has similar legislation been debated with greater consciousness of the need for

> [M]anagement prerogatives, and union freedoms are to be left undisturbed to the greatest extent possible. Internal affairs of employers and labor organizations must not be interfered with except to the limited extent that correction is required in discrimination practices. [The Equal Employment Opportunity Commission's] primary task is to make certain that . . . the channels of jobs in companies or membership in unions are strictly filled on the basis of qualification.[20]

In a similar vein is the following exchange between Senator Dirksen, who filed written objections to the House version of title VII, and Senator Clark:

> Objection: Under the bill, employers will no longer be able to hire or promote on the basis of merit and performance.
> Answer: Nothing in the bill will interfere with merit hiring or merit promotion. The bill simply eliminates consideration of color from the decision to hire or promote.
> Objection: If the employer discharges a Negro, he must prove that the dismissal has nothing to do with race. When an employer promotes or increases the pay of a white employee, he must show that he was not biased against the Negro worker who was not promoted.
> Answer: The Commission must prove by a preponderance that the discharge or other personnel action was because of race.[21]

To the extent that such broad expressions of intent speak of eliminating consideration of race from employment decisions, there is some support for a "taint" standard of causation which would make unlawful a decision based even in part on a racial motive. On the other hand, the notion that management should be permitted to hire and promote on the basis of merit is equally susceptible to application of a "same decision" standard, which would uphold personnel action based in part on race if merit principles alone would have led to the same result. Clues to the mixed-motive question must therefore be sought in the deeper reaches of the congressional deliberations.

One piece of the legislative history does indicate a clear recognition of the mixed-motive dilemma. Senator McClellan proposed an amendment that

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"legislative history," or with greater care in the making thereof, to guide the courts in interpreting and applying the law.

. . . .

Unfortunately the legislative history of the Civil Rights Act of 1964 is recorded not so much in Committee Reports as in the pages of the Congressional Record in which are recorded the debates and arguments of both opponents and proponents . . . . Admittedly this is not the kind of legislative history on which courts are accustomed to rely.

Vaas, supra note 14, at 444, 457–58. Title VII's provisions were first adopted by the House and discussed in a report of the House Judiciary Committee. But this version of the bill was modified substantially in the substitute measure adopted by the Senate. The substitute bill did not go through the usual committee procedure, but was worked out in informal bipartisan conferences. Thus, there is no committee report on the Senate bill. The House voted to adopt the Senate bill without change. See Legislative History of Titles VII and XI of the Civil Rights Act of 1964, at 8–11, 3001 (1968).

20. H.R. Rep. No. 914, part 2, 88th Cong., 1st Sess. 29 (1963), reprinted in [1964] U.S. Code Cong. & Ad. News 2487, 2516.

21. 110 Cong. Rec. 7218 (1964).

would have defined a title VII violation as occurring only when prohibited discrimination was the *sole* ground for the personnel action.[22] Senator Case responded:

> The Senator from Arkansas, as always, seeks to provide the benefit of great clarity and simplicity in his objectives and methods. The difficulty with this amendment is that it would render title VII totally nugatory. If anyone ever had an action that was motivated by a single cause, he is a different kind of animal from any I know of. But beyond that difficulty, this amendment would place upon persons attempting to prove a violation of this section, no matter how clear the violation was, an obstacle so great as to make the title completely worthless. I therefore regret that we are obliged to oppose the amendment, and also to recommend that it be rejected.[23]

The McClellan amendment and a similar proposal in the House were both defeated.[24]

In contrast to this unambiguous rejection of a "sole factor" test is the confusion contributed to the causal nexus issue by the last sentence of section 706(g).[25] Placed in that portion of title VII that enumerates the relief a federal district court may grant to a prevailing plaintiff, the section imposes the following limitation:

> No order of the court shall require the admission or reinstatement of an individual as a member of a union, or 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 admission, suspended, or expelled, or was refused employment or advancement or was suspended or discharged for any reason other than discrimination on account of race, color, religion, sex, or national origin or in violation of [section 704(a)].[26]

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22. 110 Cong. Rec. 13,837–38 (1964).

23. Id.

24. Id. at 2728, 13,838. As one scholar has noted:

> The fact that [this proposal] was made points up what is a continuing issue under the Labor Management Relations Act (LMRA). For an unfair employment practice to exist, what must be the causal nexus or relationship between the improper motive and the overt act? Must the improper motive be the dominant factor, a substantial contributing factor or merely a factor leading to the overt act? The answers to these questions await the clarification of the law by administrative practice and judicial decision.

Vaas, supra note 14, at 456–57. See infra note 80 for a discussion of protected-activity labor cases.

25. 42 U.S.C. § 2000e-5(g) (1976).

26. Id. Section 706(g) was patterned after the remedial provisions of the National Labor Relations Act, as amended by the Labor-Management Relations Act of 1947, 29 U.S.C. §§ 151–169 (1976) [hereinafter cited as NLRA]. See Albemarle Paper Co. v. Moody, 422 U.S. 405, 419 n.11 (1975), and citations therein. Section 8(a)(3) of the NLRA makes it an unfair labor practice for an employer "by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization." 29 U.S.C. § 158(a)(3) (1976). Section 10(c), the model for § 706(g), provides: "No order of the Board shall require the reinstatement of any individual as an employee who has been suspended or discharged, or the payment to him of any back pay, if such individual was suspended or discharged for cause." 29 U.S.C. § 160(c) (1976).

This language may be a clue to congressional thinking with regard to mixed-motive cases. The sentence is placed in a section setting forth the remedies available to a plaintiff who has already established liability under section 703,[27] rather than in section 703 itself.[28] As such, the provision may address the case in which the plaintiff has established the operation of a forbidden factor, but the defendant proves the simultaneous operation of a lawful factor that could itself justify the decision. If this reading is correct, then Congress appears to have suggested that the mixed-motive case be resolved with a finding of liability (because of the consideration of race) but a withholding of affirmative relief and back pay (because the plaintiff in fact suffered no "harm" other than the adverse consideration of his race itself).[29]

On the other hand, legislative history suggests an alternative interpretation to the last sentence of section 706(g). The present version of the provision

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The congressional thinking behind these NLRA provisions has been the subject of scholarly discussion elsewhere. See DuRoss, Toward Rationality in Discriminatory Discharge Cases: The Impact of *Mt. Healthy Board of Education v. Doyle* upon the NLRA, 66 Geo. L.J. 1109 (1978); Christensen & Svanoe, Motive and Intent in the Commission of Unfair Labor Practices: The Supreme Court and the Fictive Formality, 77 Yale L.J. 1269 (1968).

The legislative history of § 8(a)(3) evinces a general concern similar to that of the Congress that enacted title VII, see supra text accompanying note 20, that the employer's prerogatives be preserved and that interference with personnel decisions be limited to that necessary to correct discriminatory practices. See DuRoss, supra, at 1116–20. In part because of congressional dissatisfaction with certain NLRB decisions and judicial affirmances in mixed-motive cases, § 10(c) was amended in 1947 to state as it now does that no remedy shall be provided in the case of a discharge "for cause." This provision, as well as two other changes in § 10(c) which subjected NLRB decisions to much closer judicial scrutiny, were deemed necessary to prevent the Board from continuing to infer anti-union animus even when there was evidence of employee misconduct. Id. at 1122-26; Christensen & Svanoe, supra, at 1280. The intent of § 10(c) seems to have been to allocate the burden of proof on the question of "cause" to the employer. DuRoss, supra, at 1123 n.71; Wright Line, 251 N.L.R.B. 1083, 1088 (1980). DuRoss has concluded that the 1947 amendments express a congressional purpose that a "*dominant* motive" standard of causation should apply to the granting of relief in § 8(a)(3) eases. DuRoss, supra, at 1126.

Although § 706(g) was modeled on the language of § 10(c), it must of course be remembered that the two statutes provide for very different administrative schemes; to the extent that § 10(c) represents a legislative effort to "pull the reins in" on the NLRB, which tries and decides protected-activity cases itself, that purpose is not applicable in the title VII context, where the ultimate trier of fact is not the EEOC but rather the federal district courts. See Alexander v. Gardner-Denver Co., 415 U.S. 36 (1974), and Chandler v. Roudebush, 425 U.S. 840 (1976), holding that title VII actions are trials de novo and not merely reviews of the prior EEOC decisions.

27. See supra note 16.

28. Significantly, a proposal to add the phrase "who is otherwise qualified" to § 703 (the liability provision) immediately following the list of prohibited grounds was rejected by the House. See 110 Cong. Rec. 2730 (1964). Cf. 29 U.S.C. § 206(d)(1) (1976), in whieh a phrase similar to the final sentence of § 706(g), viz., "based on any other factor other than sex," is written into the liability provision of the Equal Pay Act and functions as an affirmative defense. See County of Washington v. Gunther, 452 U.S. 161, 167-71 (1981).

29. This Article proposes this reading of the statute as a solution to the problems of other formulations. See infra text accompanying notes 127–142. This is also the interpretation explicitly given to § 706(g) by the courts in Day v. Mathews, 530 F.2d 1083, 1084–85 (D.C. Cir. 1976); King v. Laborers Int'l Union, 443 F.2d 273, 278–79 (6th Cir. 1971); Haber v. Bolger, 22 Fair Empl. Prac. Cas. (BNA) 544 (N.D. Ohio 1978).

When Congress made certain changes in § 706(g) in 1972, nothing was changed in the language or placement of the final sentence. Equal Employment Opportunity Act of 1972, P.L. 92-261, 86 Stat. 103. Indeed, the remedial focus of the entire section was reiterated in congressional reports. See 118 Cong. Rec. 7168 (Senate), 7565 (House) (1972) ("section 706(g) . . . is intended to make the victims of unlawful discrimination whole").

resulted from the adoption of an amendment proposed by Congressman Celler. The provision originally read: "No order of the court shall require the admission or reinstatement of an individual . . . if such individual was refused . . . employment . . . *for cause.*"[30] The substitution of "any reason other than discrimination" for "cause" was explained by Mr. Celler as follows:

> Mr. Chairman, the purpose of the amendment is to specify cause. Here the court, for example, cannot find any violation of the act which is based on facts other—and I emphasize "other"—than discrimination on the grounds of race, color, religion, or national origin. The discharge might be based, for example, on incompetence or a morals charge or theft, but the court can only consider charges based on race, color, religion, or national origin. That is the purpose of this amendment.[31]

Apparently, then, Congressman Celler intended this provision to be a limitation on the court's authority to find a "violation," i.e., liability, even though section 703 already defined title VII liability.[32] If nothing else is clear from the history surrounding title VII's enactment, it is quite apparent that a definitive resolution of the mixed-motive problem would have to come from the courts.

II. Decisional Law on Mixed-Motive Causation

Although the Supreme Court has devoted a considerable amount of attention to the myriad issues that have arisen under title VII since its enactment, it has provided little guidance on the problem of mixed-motive causation in non-class actions. As a result, lower courts have had a relatively free hand to fashion their own differing standards. The Court's decisions in analogous equal protection and first amendment cases and in title VII class actions, however, may foretell the adoption of a "same decision" test in title VII non-class action litigation. Before tracing the problem through the case law, a brief description of the general method of proof of an individual case under title VII is necessary.

A. *Basic Concepts of Proof in the Individual Title VII Disparate Treatment Case*[33]

The Supreme Court has developed a prima facie case concept for the individual disparate treatment action.[34] Recognizing that direct proof of

30. H.R. Rep. No. 914, supra note 14, at 12 (emphasis added).

31. 110 Cong. Rec. 2567 (1964).

32. Indeed, in his dissent in County of Washington v. Gunther, 452 U.S. 161 (1981), Justice Rehnquist noted that the "defense, 'a factor other than sex,' is already implicit in Title VII because the statute's prohibition of sex discrimination applies only if there is discrimination on the basis of sex." Id. at 200 (Rehnquist, J., dissenting).

33. For an intensive analysis of the concepts of proof in title VII litigation, see C. Sullivan, M. Zimmer & R. Richards, Federal Statutory Law of Employment Discrimination 1-90 (1980).

34. See supra note 2. The Court similarly applies a prima facie case approach to class actions alleging a pattern or practice of disparate treatment, see, e.g., International Bhd. of Teamsters v.

discriminatory intent, such as state-of-mind evidence, is often unavailable, the Court in *McDonnell Douglas Corp. v. Green*[35] held that a plaintiff could raise an inference of such intent by establishing a prima facie case of discrimination. This could be done by showing, in the case of racial discrimination,

> (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.[36]

The prima facie case "raises an inference of discrimination only because we presume these acts, if otherwise unexplained, are more likely than not based on the consideration of impermissible factors."[37]

Once such a showing is made, the burden of production shifts to the employer "to articulate some legitimate, nondiscriminatory reason for the employee's rejection."[38] If the employer fails to do so, the plaintiff prevails. If the employer succeeds in carrying its burden, the plaintiff must then be given an opportunity to show that the stated reason for the adverse decision is mere pretext, i.e., that the reason articulated by the employer is not the real reason for the decision, but instead is a cover for discrimination.[39] Plaintiff can demonstrate pretext in a variety of ways, including direct proof of discriminatory motive, statistical evidence showing discriminatory patterns in the employer's personnel practices, or proof that white employees who engaged in

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United States, 431 U.S. 324 (1977), or disparate impact, see, e.g., Griggs v. Duke Power Co., 401 U.S. 424 (1971). Statistical evidence of underrepresentation or exclusion of minorities plays a critical role in the burden-shifting inferences raised in these contexts.

35. 411 U.S. 792 (1973).

36. Id. at 802. The Court added: "The facts necessarily will vary in Title VII cases, and the specification above of the prima facie proof required from [plaintiff] is not necessarily applicable in every respect to differing factual situations." Id. at 802 n.13. See also International Bhd. of Teamsters v. United States, 431 U.S. 324, 358 n.44 (1977).

37. Furnco Constr. Co. v. Waters, 438 U.S. 567, 577 (1978).

38. *McDonnell Douglas,* 411 U.S. at 802. The Court has emphasized that the burden the defendant bears is only the burden of producing evidence to explain clearly the nondiscriminatory reasons for its actions: "The defendant need not persuade the court that it was actually motivated by the proferred reasons. It is sufficient if the defendant's evidence raises a genuine issue of fact as to whether it discriminated against the plaintiff." Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248, 254–55 (1981) (citations and footnote omitted). If the defendant carries this burden, the presumption raised by the prima facie case is rebutted and the case proceeds to the pretext inquiry. Id. See also Board of Trustees v. Sweeney, 439 U.S. 24 (1978) (employer's burden to dispel the adverse inference created by plaintiff's prima facie case is merely to "articulate" some legitimate, nondiscriminatory reason for the action, and not to prove the absence of discriminatory motive); Furnco Constr. Corp. v. Waters, 438 U.S. 567, 577 (1978) (employer's burden in rebutting prima facie case is to show that he based his decision on a legitimate consideration, and not on an illegitimate one such as race). As each of the above decisions makes clear, the ultimate burden of persuasion on the issue of discrimination always remains with the plaintiff. See generally Mendez, Presumptions of Discriminatory Motive in Title VII Disparate Treatment Cases, 32 Stan. L. Rev. 1129 (1980).

39. *McDonnell Douglas,* 411 U.S. at 804–05.

conduct similar to that of which plaintiff is accused were not treated in the same adverse way as plaintiff.[40]

B. *Supreme Court Case Law*

1. *Title VII Actions.* Early title VII decisions handed down by the Court gave the statute a liberal reading and implied that an employment decision based even in part on a discriminatory motive would be violative of the Act. In the 1973 *McDonnell Douglas Corp. v. Green* opinion,[41] for example, the Court wrote:

> The broad, overriding interest, shared by employer, employee, and consumer, is efficient and trustworthy workmanship assured through fair and racially neutral employment and personnel decisions. *In the implementation of such decisions, it is abundantly clear that Title VII tolerates no racial discrimination, subtle or otherwise.*[42]

In a subsequent reference to the causation problem, however, the Court steered a middle course between the taint standard suggested in *McDonnell*

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40. Id. It should be noted that even though defendant's satisfactory explanation destroys the mandatory presumption of discrimination raised by plaintiff's prima facie showing, plaintiff's initial evidence and the inference properly drawn from that evidence may be considered by the court on the issue of whether defendant's explanation is pretextual. See Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248, 255 n.10 (1981).

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. Despite this apparent overlap between the pretext analysis and the mixed-motive causation problem, the Supreme Court has not elaborated on the latter in its many opinions expounding on the former. See supra note 38. Other tban its cryptic reference in McDonald v. Santa Fe Trail Transp. Co., 427 U.S. 273 (1976), discussed infra at text accompanying notes 44-45, there is no guidance from the Court on how the pretext analysis may work in a mixed-motive context. 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. In causation terms, a plaintiff who has established pretext has shown that the same decision would not have been made but for the unlawful motive. See, e.g., Jackson v. City of Killeen, 654 F.2d 1181, 1186 (5th Cir. 1981) ("Plaintiff failed to show that the defendant's reasons for her discharge were pretextual, i.e., that her race was a 'but for' cause or determining factor for her discharge.") (citation omitted). This situation can be distinguished from a true mixed-motive case, in which lawful and unlawful motives actually coexisted, and where the same decision might in fact have been made legitimately even absent the unlawful motive. Because of the difficulty of analyzing mixed-motive cases in pretext terms, the National Labor Relations Board has recently abandoned pretext analysis for mixed-motive discharge cases. See Wright Line, 251 N.L.R.B. 1083 (1980).

41. 411 U.S. 792 (1973).

42. Id. at 801 (emphasis added). The Court's expansive interpretation of title VII is also reflected in its seminal decision in Griggs v. Duke Power Co., 401 U.S. 424 (1971), holding that the Act proscribes not only intentional discrimination, but also facially neutral practices which have a discriminatory effect. Title VII continues to be liberally interpreted by the Court. See County of Washington v. Gunther, 452 U.S. 161, 178 (1981) ("As Congress itself has indicated, a 'broad approach' to the definition of equal employment opportunity is essential to overcoming and undoing the effect of discrimination. . . . We must therefore avoid interpretations of Title VII that deprive victims of discrimination of a remedy, without clear congressional mandate." (citation omitted)).

Douglas and the stricter "sole factor" test.[43] *McDonald v. Santa Fe Trail Transportation Co.*[44] involved two white employees who claimed they had been subjected to unequal treatment when they were discharged for stealing from a company shipment while a black employee also involved in the theft was retained. Commenting on plaintiff's assertion that the employer's reliance on the theft was mere pretext, the Court wrote:

> The use of the term "pretext" in this context does not mean, of course, 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. . . . [N]o more is required to be shown than that race was a "but for" cause.[45]

Thus, the Court adopted a requirement of but-for causation to establish a violation, but without explanation of why that was thought to be the appropriate test or how that standard would operate in practice.

Since *McDonald,* the Court has discussed the causation question only in the quite distinct context of title VII class actions, where liability and relief are typically tried separately.[46] *Franks v. Bowman Transportation Co.*[47] involved a claim by the plaintiff class that the defendant refused to employ blacks in the favored over-the-road driver ("OTR") positions. The district court found for the class on liability, but refused to order that aggrieved class members be provided any form of seniority relief.[48] The Fifth Circuit affirmed.[49] The Supreme Court reversed, holding that retroactive seniority was an appropriate title VII remedy and that an "award of the seniority credit [plaintiff] presumptively would have earned but for the wrongful treatment would also seem necessary [to make plaintiff whole] in the absence of justification for denying that relief."[50] Thus, even though the plaintiff class had established a pattern-and-practice violation of title VII, the defendant could oppose relief for particular individuals who "were not in fact victims of racial discrimination."[51] The Court explained:

> [The defendant] may attempt to prove that a given individual member of [the plaintiff class] was not in fact discriminatorily refused employment as an OTR driver in order to defeat the individual's claim to seniority relief as well as any other remedy ordered for the

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43. The "sole factor" test had already been rejected by Congress in title VII legislative history. See supra notes 22–24 and accompanying text.

44. 427 U.S. 273 (1976).

45. Id. at 282 n.10.

46. In the first stage, plaintiffs seek to establish a pattern or practice in violation of the Act. If plaintiffs succeed, the litigation proceeds to a second stage in which each class member seeks to prove his individual entitlement to affirmative relief. See, e.g., International Bhd. of Teamsters v. United States, 431 U.S. 324 (1977).

47. 424 U.S. 747 (1976).

48. 5 Empl. Prac. Dec. (CCH) 8497 (N.D. Ga. 1972), aff'd, 495 F.2d 398 (5th Cir.), cert. denied in part, 419 U.S. 1050 (1974).

49. 495 F.2d 398 (5th Cir.), cert. denied in part, 419 U.S. 1050 (1974).

50. 424 U.S. at 767.

51. Id. at 772.

> class generally. Evidence of a lack of vacancy in OTR positions at the time the individual application was filed, or evidence indicating the individual's lack of qualification for the OTR positions—under nondiscriminatory standards *actually applied* by Bowman to individuals who were in fact hired—would of course be relevant. It is true, of course, that obtaining the third category of evidence with which the District Court was concerned—what the individual discriminatee's job performance would have been but for the discrimination—presents great difficulty. No reason appears, however, why the victim rather than the perpetrator of the illegal act should bear the burden of proof on this issue.[52]

The *Franks* view of causation, separating the question of the violation from that of the effects of the violation, was subsequently elaborated by the Court in *International Brotherhood of Teamsters v. United States*[53] and *East Texas Motor Freight System v. Rodriguez*,[54] both decided the same day. In *Teamsters*, the Government established (through statistics and live testimony) systematic and purposeful discrimination in the hiring, transfer, and promotion of minorities. Once such liability is found, the Court held, an award of prospective relief for the class is justified.[55] If individual relief (such as back pay) is sought, further proceedings become necessary, with the burden on the defendant to show that the individual seeking relief was actually denied employment for lawful, nonpretextual reasons, such as lack of required qualifications.[56] *Rodriguez* involved a class challenge to the employer's transfer and seniority practices. In the course of its decision vacating both the class certification and the finding of classwide liability, a unanimous Court observed:

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52. Id. at 773 n.32. In Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265 (1978), the Court relied on *Franks* for the proposition that the university bore the burden of showing that Bakke would not have been admitted to the school even in the absence of the special admissions program. The university conceded its inability to carry this burden. Id. at 280 & nn.13 & 14.

53. 431 U.S. 324 (1977).

54. 431 U.S. 395 (1977).

55. 431 U.S. at 361.

56. Id. at 359. The shifting of the burden to the defendant once the plaintiff class has made out a systemic violation was explained by the Court:

> The holding in *Franks* that proof of a discriminatory pattern and practice creates a rebuttable presumption in favor of individual relief is consistent with the manner in which presumptions are created generally. Presumptions shifting the burden of proof are often created to reflect judicial evaluations of probabilities and to conform with a party's superior access to the proof. . . . These factors were present in *Franks*. Although the prima facie case did not conclusively demonstrate that all of the employer's decisions were part of the proved discriminatory pattern and practice, it did create a greater likelihood that any single decision was a component of the overall pattern. Moreover, the finding of a pattern or practice changed the position of the employer to that of a proved wrongdoer. Finally, the employer was in the best position to show why any individual employee was denied an employment opportunity. Insofar as the reasons related to available vacancies or the employer's evaluation of the applicant's qualifications, the company's records were the most relevent items of proof. If the refusal to hire was based on other factors, the employer and its agents knew best what those factors were and the extent to which they influenced the decision-making process.

431 U.S. at 359 n.45. See generally Mendez, supra note 38.

> Even assuming, *arguendo,* that the company's failure to even consider the [transfer] applications was discriminatory, the company was entitled to prove at trial that the [plaintiffs] had not been injured because they were not qualified and would not have been hired in any event.[57]

Supreme Court instruction on the title VII causation problem has thus focused primarily on the class action, where the issues of systemic liability are relatively easy to sever from those of individual relief and where, consequently, the discriminatory practice can be viewed apart from consideration of the individual class member's claim of injury as a result of the practice.[58] In class actions, the employer's defense that he would have arrived at the same decision notwithstanding the discrimination goes only to the question of remedy and not to that of liability. In individual mixed-motive cases, however, in which liability and remedy are typically tried together, the courts have generally failed to distinguish between the existence of an unlawful factor and its impact on the employer's decision. As a result, the employer's same-decision defense has at times been held to go to liability rather than merely remedy.[59]

2. *Constitutional Actions.* The Supreme Court has dealt with the mixed-motive problem to a greater extent in cases raising constitutional claims. Prior to 1977 the Court had grappled with the issue in the context of legislative and administrative decisionmaking, viz., whether a decision motivated by both lawful and unlawful considerations could pass muster under the equal protection clause.[60] In 1977 the Court decided two cases that established a same-

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57. 431 U.S. at 404 n.9 (citations omitted).

58. Individual actions alleging that a facially neutral screening device has a disparate impact also permit a conceptual separation of the question of violation from the question of the effect of that violation on plaintiff. See, e.g., Donnell v. General Motors Corp., 576 F.2d 1292, 1301 (8th Cir. 1978) (plaintiff established that employer's educational requirements were racially discriminatory and not job-related, thus entitling him to prospective injunctive relief and attorneys fees, but court of appeals remanded on the remedial question of whether plaintiff was otherwise qualified for the position sought); LeBoeuf v. Ramsey, 503 F. Supp. 747 (D. Mass. 1980) (appeal pending) (plaintiff female candidate established that defendant officials violated title VII by imposing minimum height requirements for police officer positions, but issue of appropriate remedy arose as to whether plaintiff would have been eligible for valid appointment even without such requirements).

Even in bifurcated litigations, however, difficult causation issues can arise. Justice Rehnquist observed in 1975 in the context of a class challenge to seniority and testing practices:

> A cursory canvass of the decisions of the District Courts and Courts of Appeals which confront these problems much more often than we do suggests that the most frequently recurring problem in this area is the difficulty of ascertaining a sufficient causal connection between the employer's conduct properly found to have been in violation of the statute and an ascertainable amount of back pay lost by a particular claimant as a result of that conduct.

Albemarle Paper Co. v. Moody, 422 U.S. 405, 445 (1975) (concurring opinion) (citation omitted). An example can be found in United States v. United States Steel Corp., 520 F.2d 1043, 1050-51 (5th Cir. 1975), cert. denied, 429 U.S. 817 (1976).

59. See infra note 80 and accompanying text.

60. The cases and issues in this area have generated a considerable literature and need not be discussed here. See, e.g., Brest, *Palmer v. Thompson:* An Approach to the Problem of Unconsti-

decision standard both for these cases and for first amendment retaliatory discharge cases.

In *Village of Arlington Heights v. Metropolitan Housing Development Corp.*,[61] a nonprofit housing developer seeking to construct racially integrated units brought suit challenging the village's refusal to rezone the tract in question to permit multiple-family use. The refusal, which necessarily perpetuated segregated housing patterns, occurred after a series of public meetings at which opponents of the proposed zoning change addressed themselves to the racial implications of the proposed project as well as to considerations of its effect on property values and compatibility with existing uses. Finding that the plaintiffs had "failed to carry their burden of proving that discriminatory purpose was a motivating factor in the Village's decision," the Court held there was no violation of the equal protection clause.[62] On the issue of causation, the Court added that the plaintiff was not required

> to prove that the challenged action rested solely on racially discriminatory purposes. Rarely can it be said that a legislature or administrative body operating under a broad mandate made a decision motivated solely by a single concern, or even that a particular purpose was the "dominant" or "primary" one. In fact, it is because legislators and administrators are properly concerned with balancing numerous competing considerations that courts refrain from reviewing the merits of their decisions, absent a showing of arbitrariness or irrationality. But racial discrimination is not just another competing consideration. When there is proof that a discriminatory purpose has been a motivating factor in the decision, this judicial deference is no longer justified.[63]

The Court went on to establish the following test:

> Proof that the decision by the Village was motivated in part by a racially discriminatory purpose would not necessarily have re-

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tutional Legislative Motive, 1971 Sup. Ct. Rev. 95; Brest, The Supreme Court, 1975 Term—Foreword: In Defense of the Antidiscrimination Principle, 90 Harv. L. Rev. 1 (1976); Ely, Legislative and Administrative Motivation in Constitutional Law, 79 Yale L.J. 1205 (1970); Eisenberg, Disproportionate Impact or Illicit Motive: Theories of Constitutional Adjudication, 52 N.Y.U. L. Rev. 36 (1977); Gunther, The Supreme Court, 1971 Term—Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection, 86 Harv. L. Rev. 1 (1972); Note, Legislative Purpose, Rationality, and Equal Protection, 82 Yale L.J. 123 (1972). The area is surveyed in Note, Proof of Racially Discriminatory Purpose Under the Equal Protection Clause: *Washington v. Davis, Arlington Heights, Mt. Healthy,* and *Williamsburgh,* 12 Harv. C.R.-C.L. L. Rev. 725, 745–55 (1977).

61. 429 U.S. 252 (1977).

62. Id. at 270.

63. Id. at 265–66 (citation omitted).

"Determining whether invidious discriminatory purpose was a motivating factor demands a sensitive inquiry into such circumstantial and direct evidence of intent as may be available." Id. at 266. This includes evidence as to general patterns of defendant's practices, the sequence and timing of events leading up to the decision, whether the decision is a departure procedurally or substantively from the norm, and statements by persons involved in the process evidencing racial animus. Id. In the employment context, "the trier of fact determines the reasons for an employee's discharge based on 'reasonable inferences drawn from the totality of facts, the conglomerate of activities, and the entire web of circumstances presented by the evidence on the record as a whole.' " Tidwell v. American Oil Co., 332 F. Supp. 424, 430 (D. Utah 1971) (citation omitted).

> quired 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. If this were established, the complaining party in a case of this kind no longer fairly could attribute the injury complained of to improper consideration of a discriminatory purpose. In such circumstances, there would be no justification for judicial interference with the challenged decision.[64]

This same-decision theory of causation was further spelled out in *Mt. Healthy City School District Board of Education v. Doyle,*[65] decided the same day as *Arlington Heights.* Doyle, an untenured teacher, filed a section 1983 action challenging the refusal of the school board to renew his contract after several years in the district. Doyle's employment history, which included a stint as president of the Teachers' Association, revealed a number of incidents that had resulted in tension between himself and the school board. Two of these incidents were stated in writing to be the reasons for his nonrenewal: (1) Doyle's communication to a local radio station concerning the adoption of a new dress code, resulting in reports on the air that apparently were embarrassing to the board; and (2) Doyle's use of obscene gestures to two students in the school cafeteria. The plaintiff claimed that nonrenewal based on the radio station incident was retaliation for conduct protected under the first and fourteenth amendments. The district court, finding that Doyle's communication was clearly protected activity and that this factor had played a "substantial part" in the explicitly mixed-motive decision of the board, ruled that Doyle was entitled to reinstatement and back pay. The court of appeals affirmed.

Focusing on the causation issue, a unanimous Supreme Court vacated and remanded. The Court rejected the application of a "substantial part" test to determine entitlement to reinstatement and back pay and held that the defendant must be given the opportunity to establish that its decision not to renew would have been the same even if the protected activity had not been considered—a distinct possibility in light of the district court's conclusion that "there did exist in fact reason . . . independent of any First Amendment rights or exercise thereof, to not extend tenure."[66] The Court, per Justice Rehnquist, explained:

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

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64. 429 U.S. at 270 n.21.

65. 429 U.S. 274 (1977). See generally Wolly, What Hath *Mt. Healthy* Wrought?, 41 Ohio St. L.J. 385 (1980); Note, Proof of Racially Discriminatory Purpose Under the Equal Protection Clause: *Washington v. Davis, Arlington Heights, Mt. Healthy,* and *Williamsburgh,* 12 Harv. C.R.-C.L. L. Rev. 725 (1977).

66. 429 U.S. at 285.

> enunciated by the District Court is that it would require reinstatement in cases where a dramatic and perhaps abrasive incident is inevitably on the minds of those responsible for the decision to rehire, and does indeed play a part in that decision—even if the same decision would have been reached had the incident not occurred. The constitutional principle at stake is sufficiently vindicated if such employee is placed in no worse a position than if he had not engaged in the conduct. 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 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 the record, simply because the protected conduct makes the employer more certain of the correctness of its decision.[67]

Thus, the Court refused to hold "that the Board in this case would be precluded, because it considered constitutionally protected conduct in deciding not to rehire Doyle, from attempting to prove to a trier of fact that quite apart from such conduct, Doyle's record was such that he would not have been rehired in any event." Instead, the Court, formulating a "test of causation which distinguishes between a result caused by a constitutional violation and one not so caused,"[68] placed the initial burden on the plaintiff to show that his constitutionally protected conduct was a "substantial" or "motivating" factor in the challenged decision. If that is accomplished, the burden shifts to the employer to establish that it would have reached the same decision in the absence of the protected conduct.[69] This result, the Court wrote, "protects against the invasion of constitutional rights without commanding undesirable consequences not necessary to the assurance of those rights."[70]

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67. Id. at 285-86.

68. Id. at 286.

69. As one writer has emphasized, the burden on the employer is to show that he *would* have, not *could* have, reached the same result absent the protected conduct. See Wolly, supra note 65, at 393-94, and cases cited therein. This insistence on actual reasons rather than speculative ones is consistent with the pretext analysis of *McDonnell Douglas.* See supra notes 38-39 and accompanying text; see also Franks v. Bowman Transp. Co., 424 U.S. 747, 773 n.32 (1976) (defendant must meet but-for requirement with standards *"actually applied"* to other employees or applicants); Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 321 n.54 (1978) ("Having injured respondent solely on the basis of an unlawful classification, petitioner cannot now hypothesize that it might have employed lawful means of achieving the same result.").

70. 429 U.S. at 287. There is a strong similarity between the *Arlington Heights/Mt. Healthy* view of causation and the standing requirements that have been developed by the Burger Court. See Simon v. Eastern Ky. Welfare Rights Org., 426 U.S. 26 (1976); Warth v. Seldin, 422 U.S. 490 (1975). These latter decisions require a litigant who seeks to challenge the legality of governmental action in federal court to show that he suffered an injury to himself *as a result of* the challenged conduct and that his injury is likely to be redressed by a favorable decision on his claim. Thus, in *Simon,* where plaintiff on behalf of a class of indigents sought to compel the Treasury Department to revoke the tax-exempt status of hospitals that refused to treat poor persons without charge, the Court held that the action could not be maintained because of the failure of plaintiff to establish a causal nexus between the refusal to treat class members on specific occasions alleged and the tax-exempt status, and the consequent failure to show that relief revoking that status would result in a change in the hospitals' practices.

In constitutional non-class actions, therefore, unlike their counterparts in the title VII area, the Supreme Court has provided a detailed resolution of the mixed-motive causation problem, with explicit reference to the underlying competing policy concerns. The *Mt. Healthy* analysis is not without its problems and ambiguities,[71] not the least of which is the question whether it applies to the determination of liability or only to the issue of appropriate remedy.[72] In any event, this constitutional analysis has influenced lower court resolution of title VII causation issues.

C. *Lower Court Case Law*

The courts that were the first to face the question of the degree of discrimination necessary to make out a violation of title VII generally applied an "in part" test of causation. Apparently influenced by the broad language of the statute's prohibitions,[73] as well as the liberal interpretation initially afforded the Act by the Supreme Court,[74] several courts adopted an analysis similar to the following:

> [C]laims of racial discrimination and retaliation are not to be viewed in terms of the degree to which they might or might not have been a factor in challenged actions and must instead be viewed by the Court in terms of whether they played *any part at all* in such actions. If any element of racial discrimination or retaliation or reprisal played *any part* in a challenged action, *no matter how remote or slight or tangential,* the Court would hold that the challenged action was in violation of . . . the law . . . .[75]

A different conclusion was reached in Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265 (1978), however, in which the question was raised whether Bakke, a white applicant, lacked standing to challenge the special minority admissions program because of his inability to prove that he would have been admitted to the medical school in the absence of the program. See 438 U.S. at 280 n.14. The plurality opinion concluded that jurisdiction under Article III was present because (1) it did appear that Bakke's injury would be redressed by a favorable decision since the university had conceded its inability to show that Bakke would have been rejected even without the special program, and (2) even if Bakke were unable to prove that he would have been admitted but for the program, the trial court found that he had suffered a redressable injury apart from the failure to be admitted in that the university did not permit him to compete for all of the places in the class simply because of his race. "The question of [Bakke's] admission *vel non* is merely one of relief." Id. But see Donnelly v. Boston College, 558 F.2d 634 (1st Cir. 1977), dismissing a *Bakke*-type case because it appeared that plaintiff would not have been admitted to the law school even if no minority members had been admitted.

Some title VII decisions have explicitly treated the but-for causation requirement in the context of standing. See, e.g., Coe v. Yellow Freight System, Inc., 646 F.2d 444, 449 n.1, 451 (10th Cir. 1981) (and cases cited therein) (holding that "[i]t is not sufficient for an individual plaintiff to show that the employer followed a discriminatory policy without also showing that plaintiff himself was injured").

71. See infra text accompanying notes 81–126.

72. See infra note 136.

73. See supra note 16.

74. See supra note 42 and accompanying text.

75. United States v. Hayes Int'l Corp., 6 Fair Empl. Prac. Cas. (BNA) 1328, 1330 (N.D. Ala. 1973) (emphasis added), aff'd, 507 F.2d 1279 (5th Cir. 1975). See also Gillin v. Federal Paper Board Co., 479 F.2d 97, 101-03 (2d Cir. 1973); Langford v. City of Texarkana, 478 F.2d 262, 268 (8th Cir. 1973); Rowe v. General Motors Corp., 457 F.2d 348, 354 (5th Cir. 1972); Stebbins v.

A survey of lower court precedent since the *Mt. Healthy* and *Arlington Heights* decisions reveals a marked departure from this view; the courts are not, however, in agreement on what degree of causal connection is required to establish a violation.

Illustrative of the evolution of stricter standards of causation proof is the shift in the Fifth Circuit. The same court that had previously held that racial discrimination in *any* amount would invalidate an employment decision[76] wrote in 1980: "Title VII is not violated simply because an impermissible factor plays *some* part in the employer's decision. The forbidden taint need not be the sole basis for the action to warrant relief, but it must be a *significant* factor."[77] Several other courts have applied a similar analysis.[78]

The First Circuit has moved furthest along the causation continuum and adopted a same-decision standard to determine liability under title VII. For example, in *Mack v. Cape Elizabeth School Board,*[79] in which the plaintiff alleged that the refusal to renew her teaching contract after maternity leave constituted sex discrimination in violation of title VII, the court, citing *Mt. Healthy*, "remind[ed] the parties that the ultimate burden will be on the plaintiff to show, if she is to recover, not merely that impermissible factors

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Keystone Ins. Co., 2 Fair Empl. Prac. Cas. (BNA) 10,268 (D.D.C. 1970), rev'd on other grounds, 481 F.2d 501 (D.C. Cir. 1973); Hochstadt v. Worcester Found., 425 F. Supp. 318, 324 (D. Mass. 1976), aff'd, 545 F.2d 222 (1st Cir. 1976) (appellate decision explicitly leaving undecided the proper standard of causation, see 545 F.2d at 234 n.8); King v. New Hampshire Dep't of Resources, 420 F. Supp. 1317, 1326-27 (D.N.H. 1976), aff'd, 562 F.2d 80 (1st Cir. 1977); EEOC v. Kallir, Philips, Ross, Inc., 401 F. Supp. 66, 72 n.17 (S.D.N.Y. 1975), relief modified, 420 F. Supp. 919 (1976), aff'd, 559 F.2d 1203 (2d Cir.), cert. denied, 434 U.S. 920 (1977); Bradington v. IBM Corp., 360 F. Supp. 845, 853 (D. Md. 1973), aff'd, 492 F.2d 1240 (4th Cir. 1974); Gates v. Georgia-Pac. Corp., 326 F. Supp. 397, 399 (D. Or. 1970), aff'd, 492 F.2d 292 (9th Cir. 1974); Kornbluh v. Stearns & Foster, 73 F.R.D. 307, 312 (D. Ohio 1976); Cross v. Board of Educ., 395 F. Supp. 531, 535 (E.D. Ark. 1975); Mead v. United States Fidelity & Guaranty Co., 442 F. Supp. 109, 131 (D. Minn. 1977). Cf. Smith v. Sol D. Adler Realty Co., 436 F.2d 344, 349-50 (7th Cir. 1970) (housing discrimination).

76. United States v. Hayes Int'l Corp., 507 F.2d 1279 (5th Cir. 1975); Rowe v. General Motors Corp., 457 F.2d 348 (5th Cir. 1972).

77. Whiting v. Jackson State Univ., 616 F.2d 116, 121 (5th Cir. 1980). In *Whiting*, plaintiff, a white instructor, brought this "reverse discrimination" action challenging his dismissal by the predominantly black university. The court applied a significant-factor and pretext analysis to the title VII claim, and distinguished that from the *Mt. Healthy* same-decision standard it applied to plaintiff's constitutional claim. 616 F.2d at 122, 124. See also Baldwin v. Birmingham Bd. of Educ., 648 F.2d 950, 956 (5th Cir. 1981) (significant-factor test).

78. See Barnes v. Costle, 561 F.2d 983, 990-91 (D.C. Cir. 1977) (signifieant or substantial factor); Williams v. Boorstin, 451 F. Supp. 1117, 1123 (D.D.C. 1978) (motivated in substantial part), cert. denied, 451 U.S. 985 (1981); Gerstle v. Continental Airlines, 358 F. Supp. 545, 553 (D. Colo. 1973) (substantial factor). The Eighth Circuit has applied a standard that seeks *the* motivatiug factor behind the decision. See Womack v. Munson, 619 F.2d 1292, 1297 n.7 (8th Cir. 1980), cert. denied, 450 U.S. 979 (1981). The court equated this with a "determinative factor" test and distinguished it from the "stricter" *Mt. Healthy* standard in which "[e]ven if protectcd conduct is shown to be a substantial factor in the termination decision, the employer may not be liable if the discharge would have taken place even in the absence of the protected activity." 619 F.2d at 1297. In two other decisions, however, the Eighth Circuit has implied that an "in part" test should apply. See Marshall v. Kirkland, 602 F.2d 1282, 1289 (8th Cir. 1979) (*a* motivating factor); Satz v. ITT Financial Corp., 619 F.2d 738, 746 (8th Cir. 1980) (*a* factor).

79. 553 F.2d 720 (1st Cir. 1977).

entered into the decision not to renew her contract, but that they were determinative; viz., that but for them she would have been re-employed."[80]

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80. Id. at 722 (citations omitted). Although the court explicitly relied on the *Mt. Healthy* decision as support for this propositon, it clearly reversed the proof allocation devised by the Supreme Court, which requires the employer to bear the burden of proving that even without the illegal factor, the same decision would have resulted. See also Fischer v. Flynn, 598 F.2d 663, 665 (1st Cir. 1979); Goldman v. Sears, Roebuck & Co., 607 F.2d 1014, 1019 (1st Cir. 1979), cert. denied, 445 U.S. 929 (1980); Monteiro v. Poole Silver Co., 615 F.2d 4, 9 (1st Cir. 1980); DeGrace v. Rumsfeld, 614 F.2d 796 (1st Cir. 1980).

DeGrace involved an interesting indirect application of but-for analysis. Plaintiff, a black man terminated for excessive absenteeism from his position as a civilian firefighter at a naval air station, claimed that his absenteeism had resulted from harassment and personal threats from his white co-workers and that the supervisory personnel had not taken reasonable action to prevent such treatment. The district court, after trial, found that the air station was "infected with pervasive racism" that "was or should have been obvious to the supervisory personnel on the base" but that the latter had not taken action to end this situation. 614 F.2d at 803. The court further found that plaintiff's co-workers had placed three racially offensive notes in his locker threatening his life and that "*at least part* of the reason for his absence was fear for his personal safety." 614 F.2d at 802 (emphasis added). Nevertheless, the district court upheld the termination under title VII because it was based on "cause," viz., absenteeism. In vacating and remanding, the court of appeals held, inter alia, that the critical question was "whether 'but for' the fear plaintiff experienced he would have reported to work." 614 F.2d at 806 (citations omitted). The court instructed, "For plaintiff to prevail, fear would have to be a determinative factor, not merely a reason which reinforces plaintiff's decision on another, non-legitimate, ground to stay away but which, by itself, is not operative." Id. On remand, the district court held that the plaintiff had met his burden. DeGrace v. Rumsfeld, No. 76-1205 S (D. Mass. July 3, 1980).

Other courts, although speaking in terms of relief, also seem to be applying a similar but-for/same-decision standard on the question of title VII liability. See Rodriguez v. Board of Educ., 620 F.2d 362, 367 (2d Cir. 1980); Rogers v. EEOC, 551 F.2d 456, 457 (D.C. Cir. 1977); see also Wright Line, 251 N.L.R.B. 1083 (1980) (NLRB adopting the *Mt. Healthy* test to determine liability in § 8(a)(3) cases); Trustees of Forbes Library v. Labor Relations Comm., 1981 Mass. Adv. Sh. 2183 (1981) (Supreme Judicial Court of Massachusetts adopting a modified form of the *Mt. Healthy* analysis to determine liability in state protected-activity discharge cases); Nekolny v. Painter, 653 F.2d 1164 (7th Cir. 1981) (adopting the *Mt. Healthy* test for determination of liability in politically motivated dismissal actions filed under Elrod v. Burns, 427 U.S. 347 (1976)).

The First Circuit originally developed its but-for standard in NLRA protected-activity cases. The developments in § 8(a)(3) case law, see supra note 26, have been closely studied in the literature. See DuRoss, supra note 26; Note, The Motivation Requirement in Single Employee Discharge Cases, 11 Loy. U. Chi. L.J. 501 (1980); Note, *Wright Line:* The N.L.R.B. Adopts the *Mt. Healthy* Test for Dual Motive Discharge Cases Under the L.M.R.A., 32 Mercer L. Rev. 933 (1981). To summarize, the First Circuit has long rejected the "in part" standard applied by most other circuits and the NLRB. Judge Aldrich explained in 1963 that "it is always easy, no matter how valid a proper cause for discharge may have existed, to say that 'one' of the motives was the [anti-union] animus," with the result that "a militant union man would feel he could safely behave as he chose." NLRB v. Lowell Son Publishing Co., 320 F.2d 835, 842 (1st Cir. 1963) (concurring opinion). Thus, the court has held that even if prounion activity were shown to be the controlling motive, a violation of § 8(a)(3) would be made out only if there would have been no discharge in the absence of the employee's activity. See NLRB v. Fibers Int'l Corp., 439 F.2d 1311, 1312 n.1 (1st Cir. 1971). The burden was originally placed on the employee to prove that the same decision would not have resulted absent the unlawful factor. Id.; Colletti's Furniture, Inc. v. NLRB, 550 F.2d 1292, 1294 (1st Cir. 1977). But see NLRB v. Eastern Smelting & Ref. Corp., 598 F.2d 666 (1st Cir. 1979), which applies a *Mt. Healthy* shifting of the burden to the defendant. See also Wyman-Gordon Co. v. NLRB, 654 F.2d 134, 141–42 (1st Cir. 1981) (applying a prima facie approach to but-for causation).

In a recent decision designed to resolve the conflict in the circuits over the proper standard of causation, the NLRB has followed the guidance of the First Circuit and has rejected its own in-part test in favor of a *Mt. Healthy* same-decision analysis. See Wright Line, 251 N.L.R.B. 1083 (1980). The Board, however, explicitly disapproved of the First Circuit's allocation of the

III. The Causation Question from a Policy Perspective

In order to assess the propriety of a particular causal theory in the title VII area, as elsewhere, it is necessary to measure that theory against the purposes and goals underlying the statute. In this manner it will be possible to "reveal the true character of the issues wrapped up in the blurred notions of causation."[81] This section presents a critique of the *Mt. Healthy* standard of causation as applied to the liability issue in title VII litigation. The focus is on this standard both because it is a strong contender for adoption by the Supreme Court[82] and because it provides a concrete model for policy analysis.

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burden of but-for causation to the employee, and instead has adopted the burden-shifting approach of *Mt. Healthy*.

The First Circuit has also applied this causation requirement to actions alleging violations of the Age Discrimination in Employment Act (ADEA), 29 U.S.C. §§ 621-634 (1976). See Loeb v. Textron, Inc., 600 F.2d 1003, 1019 (1st Cir. 1979) ("[F]or plaintiff to prevail he had to prove by a preponderance of the evidence that his age was the 'determining factor' in his discharge in the sense that, 'but for' his employer's motive to discriminate against him because of age, he would not have been discharged" (citations omitted)). The application of a but-for or determinative-factor test is in accord with the majority of ADEA decisions, although most courts shift the but-for burden to the employer. See Spagnuolo v. Whirlpool Corp., 25 Fair Empl. Prac. Cas. (BNA) 376 (4th Cir. 1981); Geller v. Markham, 635 F.2d 1027 (2d Cir. 1980), cert. denied, 451 U.S. 945 (1981); Cova v. Coca Cola Bottling Co., 574 F.2d 958 (8th Cir. 1978); Laugesen v. Anaconda Co., 510 F.2d 307 (6th Cir. 1975); Mastie v. Great Lakes Steel Corp., 424 F. Supp. 1299 (E.D. Mich. 1976); Usery v. General Elec. Co., 13 Fair Empl. Prac. Cas. (BNA) 1641 (M.D. Tenn. 1976); Magruder v. Selling Areas Marketing, Inc., 439 F. Supp. 1155 (N.D. Ill. 1977). But see Reed v. Shell Oil Co., 14 Fair Empl. Prac. Cas. (BNA) 875 (S.D Ohio 1977) (whether age constituted *any* factor); Coates v. National Cash Register Co., 433 F. Supp. 655 (W.D. Va. 1977) (whether age was "one of the reasons").

The willingness of the First Circuit and other courts to move from the NLRA to title VII to the ADEA, applying the same standard of causation in each area, reflects an apparent failure to recognize the significant distinctions between the types of discrimination involved and the different legislative goals underlying these similarly worded enactments. The fact that the prohibitions of the ADEA "were derived *in haec verba* from Title VII," Lorillard v. Pons, 434 U.S. 575, 584 (1978), for example, does not automatically mean the same burdens and standards of proof apply to each. See generally Note, The Age Discrimination in Employment Act of 1967, 90 Harv. L. Rev. 380 (1976). The invidious discrimination targeted by title VII, particularly that based on race, is unlike disparate treatment on grounds of union activity or age or exercise of first amendment rights. There is a long history of intentionally unequal treatment based on race; race discrimination is founded on offensive stereotyped characteristics; and the victims of racism constitute a "discrete and insular" minority deserving of "extraordinary protection from the majoritarian political process." Id. at 386 (citing Massachusetts Board of Retirement v. Murgia, 427 U.S. 307 (1976), and United States v. Carolene Products Co., 304 U.S. 144, 152 n.4 (1938)); see also Frontiero v. Richardson, 411 U.S. 677, 684-86 (1973). The relationship of title VII's goals and the causation question is discussed in the remainder of this Article. For a suggestion that the standards of proof in these different areas should be interchangeable, see DuRoss, supra note 26, at 1121-22 n.67.

81. H. Hart & A. Honoré, Causation in the Law 102 (1959).

82. This conclusion is reached on the basis of the case law and apparent trends therein discussed in Part II above. Even though the *Mt. Healthy* test is a strong contender in title VII cases, it is not inconceivable that the Court would be more protective of title VII rights than it has been of equal protection or first amendment rights. See supra text accompanying notes 60-72. Indeed, the Court has already distinguished between constitutional equal protection and statutory title VII claims in reading the substantive protections of the latter more broadly than that of the former in the area of unintentional discriminatory impact. Compare Washington v. Davis, 426 U.S. 229 (1976) (discriminatory impact alone does not give rise to constitutional equal protection

The following discussion includes a comparison with developing notions of causation in tort law, an area traditionally dominated by a theory of but-for causation from which the same-decision standard seems to have evolved.[83]

It is widely recognized that issues of causation frequently involve and indeed mask considerations of policy.[84] Yet few of the published opinions dealing with the causation question in title VII litigation make an explicit

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violation), with International Bhd. of Teamsters v. United States, 431 U.S. 324, 335 n.15 (1977) (discriminatory motive may be inferred from discriminatory impact in title VII actions). As Justice White put it in *Davis,* "we have never held that the constitutional standard for adjudicating claims of invidious racial discrimination is identical to the standards applicable under Title VII, and we decline to do so today." 426 U.S. at 239. Thus, prediction in this area carries the usual risks.

83. Much of the material in this section is developed by analogy from the tort area. The Supreme Court has frequently drawn on the tort model in civil rights actions. See, e.g., Carey v. Piphus, 435 U.S. 247 (1978); Curtis v. Loether, 415 U.S. 189, 195 n.10 (1974); Sullivan v. Little Hunting Park, Inc., 396 U.S. 229, 240 (1969). See generally Schwemm, Compensatory Damages in Federal Fair Housing Cases, 16 Harv. C.R.-C.L. L. Rev. 83 (1981); Note, Developing "Tort" Standards for the Award of Mental Distress Damages in Statutory Discrimination Actions, 11 U. Mich. J.L. Ref. 122 (1977).

The individual disparate treatment litigation resembles the typical tort action in that plaintiffs in both base their claims on the violation of a duty owed by the defendant to them and a causal relation between defendant's violation and some harm to plaintiff. See generally LeBoeuf v. Ramsey, 503 F. Supp. 747, 755 (D. Mass. 1980), and citations therein. The problem of separating discriminatory and lawful factors in the title VII action parallels the difficulty of distinguishing between tortious and nontortious causes in the tort context.

The *Mt. Healthy* standard seems to have been adopted from tort's but-for inquiry on the question of "cause-in-fact." Traditional tort doctrine divides the causation issue into "cause-in-fact," viz., whether defendant's conduct was a cause of plaintiff's injury in the sense that without the conduct the harm would not have occurred, and "proximate cause," which, if the answer to the first question is affirmative, asks the policy question whether defendant should be held liable or absolved because of lack of foreseeability or other extenuating circumstances. See generally W. Prosser, The Law of Torts §§ 41-42 (4th ed. 1971). The burden of establishing but-for causation is generally placed on the plaintiff. But see infra note 100. Thus the but-for rule serves as threshhold barrier to exclude certain "causes" from consideration by the court.

While the title VII mixed-motive problem would be characterized by traditional doctrine as a cause-in-fact issue, policy concerns resembling those viewed under the rubric of proximate cause are involved and will be discussed here.

84. As one noted scholar has written,

> Causal requirements, like all other legal requirements, must ultimately justify themselves in functional terms. Law is a human construct designed to accomplish certain goals.
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> . . . .
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> [l]n law the term "cause" is used in different guises but always to identify those pressure points that are most amenable to the social goals we wish to accomplish . . . . Where goals differ, so does the practical definition of causation.

Calabresi, Concerning Cause and the Law of Torts: An Essay for Harry Kalven, Jr., 43 U. Chi. L. Rev. 69, 105-06 (1975) (emphasis omitted).

See generally United States v. Ceccolini, 435 U.S. 268, 274 (1978) ("[T]he question of causal connection [in the law] . . . is not to be determined solely through the sort of analysis applicable in the physical sciences."); H. Hart & A. Honoré, supra note 81; W. Prosser, supra note 83, at § 41; Calabresi, supra; Borgo, Causal Paradigms in Tort Law, 8 J. Legal Stud. 419 (1979); Green, Duties, Risks, Causation Doctrines, 41 Tex. L. Rev. 42 (1962) [hereinafter cited as Green I]; Green, The Causal Relation Issue in Negligence Law, 60 Mich. L. Rev. 543 (1962) [hereinafter cited as Green II]; Malone, Ruminations on Cause-in-Fact, 9 Stan. L. Rev. 60 (1956); Morris, On the Teaching of Legal Cause, 39 Colum. L. Rev. 1087 (1939); Shavell, An Analysis of Causation and the Scope of Liability in the Law of Torts, 9 J. Legal Stud. 463 (1980); Wechsler & Michael, A Rationale of the Law of Homicide, 37 Colum. L. Rev. 701, 724 (1937).

reference to policy concerns or address the fundamental question, "How can the policies of [this] public law best be served in a concrete case?"[85] Illustrative of this deficiency are the courts that have adopted the *Mt. Healthy* test and presented it as a purely factual aspect of the case.[86] It is critical to recognize, as tort scholars have,[87] that the application of a but-for/same-decision standard is not policy neutral. Because "cause itself is not a fact" but instead "must necessarily be an inference drawn from data furnished by the evidence," it is inevitable that "matters of policy and estimates of factual likelihood become hopelessly intervolved with each other."[88]

A. *But-For Causation in Tort Law*

The but-for standard, generally applied in actions involving negligent torts,[89] represents an effort "to exonerate a suspected person whenever we decide that his conduct 'had nothing to do with' the event in which we are interested."[90] Yet the test

> calls upon the judge or juryman to determine what would have happened if the defendant had not been guilty of the conduct charged against him. . . . [In certain cases it therefore] demands the

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85. Chayes, The Role of the Judge in Public Law Litigation, 89 Harv. L. Rev. 1281, 1297 (1976). A notable exception is Judge Keeton's incisive opinion in LeBoeuf v. Ramsey, 503 F. Supp. 747 (D. Mass. 1980).

86. See, e.g., Mack v. Cape Elizabeth School Bd., 553 F.2d 720 (1st Cir. 1977).

87. See generally sources cited supra note 84 (Calabresi, Borgo, Green I & II, Malone, and Shavell).

88. Malone, supra note 84, at 69, 72. That the observer's purpose in seeking to determine cause can influence the observer's conclusion is demonstrated by Professor Malone, id. at 62, and Professor Borgo, Borgo, supra note 84, at 439–40.

89. See W. Prosser, supra note 83, at 236–44, 263. Where the defendant's act is intentional rather than merely negligent, or is considered "morally wrong," tort law applies a less demanding causation standard to the plaintiff's case. Id. at 30. See also id. at 30 n.19:

> For an intended injury the law is astute to discover even remote causation. . . . This is not because the defendant's act was a more immediate cause [in the intentional conduct case than in the negligence case], but because it has been felt to be just and reasonable that liability should extend to results further removed when certain elements of fault are present.

(citation omitted). As Professor Malone has written:

> Some rules of law are tremendously exacting and rest upon time-honored moral considerations. They are safeguards for well-established interests of others, and their mantle of protection embraces a large variety of risks. He who violates such a rule will be held responsible for any harm that can be causally associated in any plausible way with his wrongdoing. The court, for instance, will seldom hesitate to allow the jury a free range of speculation on the cause issue at the expense of an intentional wrongdoer who is charged with having physically injured another person.

Malone, supra note 84, at 72–73. Put another way, "Tort law recognizes that a tortfeasor who knowing the consequences of his actions nonetheless causes injury is both more dangerous and more likely to be deterred by the imposition of sanctions than one whose conduct is merely negligent." Note, In Defense of Punitive Damages, 55 N.Y.U. L. Rev. 303, 324 (1980). Thus, "[t]ort law enhances the likelihood that the defendant will be held liable for an intentional tort by relaxing rules of causation." Id. at 325 (citations omitted). See also Pound, Causation, 67 Yale L.J. 1, 2 (1957).

90. Malone, supra note 84, at 66.

> impossible. It challenges the imagination of the trier to probe into a purely fanciful and unknowable state of affairs. He is invited to make an estimate concerning facts that concededly never existed. The very uncertainty as to what *might* have happened opens the door wide for conjecture. But when conjecture is demanded it can be given a direction that is consistent with the policy considerations that underlie the controversy.[91]

Because of the open-ended nature of the but-for theory of causation, some writers in the tort area have suggested that the "cause-in-fact" issue may be treated instead by posing the policy question: Was the relationship between the alleged wrongdoing and the harm suffered by the plaintiff "sufficiently close to bring into operation the rule of law that makes defendant's conduct wrongful"?[92] As one treatise has suggested,

> [W]here the existence or the extent of liability for the violation of the statute is in issue, a range of problems, which appear insoluble if considered in causal terms, are relatively easily solved if viewed as questions concerning the scope or purpose of the statute or the nature of the interests it was designed to protect.[93]

Professor Clarence Morris uses the following case to illustrate the analysis.[94] Plaintiff brought an action for the wrongful death of his eighteen-month-old child. The complaint alleged that the infant was poisoned by ingesting pills distributed by the defendant drug company in a container that was not labeled "poison" or marked with a skull and crossbones, as required by law. The pills were sold to a guest staying at plaintiff's home and, although they were stored out of reach of children, the baby got to them, ate a pill, and died. The court dismissed the action for failure to state a claim, reasoning that defendant's negligence was not the "cause" of death since the child was too young to have understood any warning on the bottle even if it had been there. Morris suggests, however, that "if there are reasons adequate for assessing damages against a man who throws a hatchet at a lady and misses her, there may be similar reasons for mulcting a druggist whose failure to take important precautions against the inadvertent use of poison accidentally happens to be ineffective."[95] The defendant, Morris notes, could have fulfilled its obligation under the law either by properly labeling its product or by refraining from selling the pills at all. If the latter course had been chosen, the child could not have eaten the poison. Thus a causal relation can be perceived here and the resolution of the liability question really becomes a policy, not fact, issue.[96]

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91. Id. at 67; see also H. Hart & A. Honoré, supra note 81, at 96.

92. Malone, supra note 84, at 85; cf. Eisenberg, supra note 12, at 57 (whether the challenged decision is "reasonably attributable to race").

93. H. Hart & A. Honoré, supra note 81, at 96; see also W. Prosser, supra note 83, at 243.

94. Morris, supra note 84, at 1096–98.

95. Id. at 1097.

96. Professor Green offers a similar illustration. See Green II, supra note 84, at 569 n.77. A car dealer sells a car to *X* knowing that the brakes are defective but failing to disclose this fact to

The question in a particular case as to whether the relationship between the defendant's conduct and the plaintiff's harm is close enough to warrant application of the pertinent rule of law requires the court to determine whether that rule was designed to protect against the type of injury suffered by the plaintiff. This answer is influenced by the court's reading of how "exacting" or strict the rule of law is.[97] Moreover, where the defendant's act is intentional rather than negligent, the courts are apt to be satisfied with a relationship more tenuous than one they would otherwise require.[98] The willingness of the courts in the tort area to view "cause-in-fact" from a goal-oriented perspective and to shape it to respond to changing societal needs is reflected in myriad decisions,[99] ranging from the well-known *Summers v. Tice*[100] to recent developments in the products liability field fashioning novel

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X. *X* is involved in a rear end collision with *P*'s car because of *X*'s failure to stop in time. *P* sues the dealer on the ground that the latter was negligent in selling the car to *X* without disclosing the defect. *D* defends on the basis that even if the brakes had been in good working condition, *X* could not have avoided the accident at the speed he was traveling, and there is evidence to support this defense.

Rather than view this as the complicated but-for fact question required by traditional doctrine, Green suggests it be analyzed in terms of the duty owed by the dealer to *X*, *P*, and other drivers on the road. That is, the dealer is under a duty to refrain from selling cars with defective brakes without disclosing that fact to the purchaser. Had the dealer fulfilled that duty by not selling the car, the accident could have been avoided. Should this causal relation, then, bring into operation the rule of law? If the policy behind the rule is to reduce accidents by putting pressure on those who create the risks, and if the dealer's duty included the risk that the purchaser would not be able to stop the car in any event, then according to Green there is justification for imposing liability. See also Calabresi, supra note 84, at 79.

97. Malone, supra note 84, at 72–73.

98. See supra note 89.

99. For example, where two causes concur to bring about a single event, but either one of them alone would have caused the same result, the but-for test, strictly applied, would operate to absolve each cause of responsibility. To avoid this result, cases have generally applied a lesser "substantial factor" standard to hold both causes liable. See W. Prosser, supra note 83, at 239–40; Restatement (Second) of Torts §§ 430, 431 (1965).

100. 33 Cal. 2d 80, 199 P.2d 1 (1948). The California Supreme Court affirmed the decision of the trial court imposing joint liability on two hunters who negligently and simultaneously discharged their weapons in plaintiff's direction when in fact only one of them actually hit the plaintiff. Because it was not possible to determine from which gun the wounding pellet came, the but-for requirement would have precluded recovery against either defendant. In order to avoid exonerating two wrongdoers whose negligence was established, the court achieved its desired result by placing on each defendant the burden of proving that he was not the one responsible. See also Professor Malone's discussion of the relaxation of causation requirements in other combined force situations in Malone, supra note 84, at 88–94.

The *Summers* rule has been described as follows:

> Where the plaintiff has established a prima facie case of (1) tortious conduct on the defendant's part toward the plaintiff and (2) that the conduct might *possibly* have caused plaintiff's loss, but (3) the plaintiff has not been able to establish a prima facie case of probable cause because the very nature of defendant's tortious conduct has made it extremely difficult, if not impossible, for the plaintiff to do so, and (4) the plaintiff has otherwise done all that could reasonably be expected to establish such a case, then the burden of proof shifts to the defendant to prove that his conduct was not in fact an actual cause of the plaintiff's loss.

Klemme, The Enterprise Liability Theory of Torts, 47 U. Colo. L. Rev. 153, 163 n.38 (1976).

The *Mt. Healthy* test is an adaptation of this approach to an intentional "tort" context. Yet it appears unlikely that the *Summers* analysis would have been applied to permit either hunter to escape liability by proving that his conduct was not the "actual cause" of the injury had his act

theories of enterprise and market-share liability to provide recoveries not contemplated by traditional causation doctrine.[101]

B. *Causation Theory in Title VII Actions*

1. *Policy Implications.* What is suggested by the treatment of causation issues in the tort area is that courts facing the causation question in title VII actions should approach their task with an eye toward the purposes and goals of this ground-breaking legislative enactment and with the recognition that even a non-class action brought under title VII has significant societal overtones. Retrospective notions of compensation for past harms should be supplemented with forward-looking concerns of inducing future behavior in conformity with the statute. Strict notions of causation borrowed from traditional tort law should not be permitted to interfere with the sanctioning of intentional[102] violations of a statute whose prohibitions are quite exacting.[103] In short, where race or another forbidden criterion is found to be a motivating factor behind the challenged decision, it should be held that there exists a sufficiently close relationship between plaintiff's harm and defendant's conduct to warrant some application of a statute fashioned to protect against such harm.

At first blush the *Mt. Healthy* theory seems eminently fair and just to all parties concerned. It seeks to determine whether consideration of the unlawful factor actually made a difference, i.e., was a but-for cause, in the ultimate

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been intentional rather than negligent. It is more likely that the defendant's burden in that case would have only gone to the question of appropriate damages, and not liability, which would have been established by the shooting itself.

101. See Klemme, supra note 100; Comment, Market Share Liability: An Answer to the DES Causation Problem, 94 Harv. L. Rev. 668 (1980), and citations therein. The Comment suggests:

> Once DES cases are no longer dismissed on technical causation grounds, courts will be forced to evaluate and enunciate the standard of care required of drug manufacturers. . . . Because decisions on causation grounds are insensitive to these social policy concerns, it is preferable to focus attention on the requisite standard of care . . . .
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> The market share approach not only provides compensation to victims of DES, but may promote deterrence of similar occurrences in the future. The significance [of the decisions adopting this approach] may be in the court's demonstrated willingness to use probability to resolve causation problems when inequity would result from the mechanical application of traditional doctrine.

Id. at 674, 675, 680. See also Note, Tort Actions for Cancer: Deterrence, Compensation, and Environmental Carcinogenesis, 90 Yale L.J. 840 (1981).

102. It must be remembered that disparate treatment cases by definition involve intentional conduct by the employer. See supra note 2.

103. See supra note 16. Indeed, as Justice Marshall has observed:

> [I]t is important to bear in mind that Title VII is a remedial statute designed to eradicate certain invidious employment practices. The evils against which it is aimed are defined broadly: "to fail . . . to hire or discharge . . . *or otherwise to discriminate* . . . with respect to . . . compensation, terms, conditions, or privileges of employment," and "to limit, segregate, or classify . . . *in any way* which would deprive *or tend to deprive* any individual of employment opportunities *or otherwise adversely affect* his status." 42 U.S.C. § 2000e-2(a) (1970 ed. Supp. V) (emphasis added).

International Bhd. of Teamsters v. United States, 431 U.S. 324, 381 (1977) (concurring and dissenting opinion).

decision reached by the employer. In so doing it operates to place the plaintiff in the same position he would have been had the discriminatory element not entered the picture. If it is determined that the same decision would have resulted in any event, then the plaintiff is deemed to have suffered no harm as a result of the defendant's unlawful conduct.

Yet, this causal theory appears to be based on two highly dubious assumptions. The first is that title VII's only goal is compensating "victims"; the second is that the only concerned parties in a title VII action are the plaintiff and defendant at bar. The result is a formulation that confuses the issue of defining a violation with the very separate issue of fashioning appropriate relief.[104]

The first assumption flies in the face of congressional and judicial pronouncements that the primary objective (or at least one primary objective) of title VII is the elimination of discrimination in employment opportunities.[105] With this deterrence goal[106] in mind, why should a plaintiff be required, in order to establish a violation, to go beyond proving that race or another forbidden criterion was a motivating factor in the decision?[107] Put differently, should an employer be permitted to avoid liability completely by showing that his consideration of the unlawful factor happened in this particular instance to be "harmless"?[108] Considering that discriminatory criteria are by

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104. One writer has noted that such an approach permits the courts to define away civil rights violations "by renewing insistence on the always manipulable requirement of causation." Freeman, supra note 1, at 1103. See also cases discussed infra note 108.

105. See supra note 17. This emphasis on deterrence must be contrasted with the primarily compensatory goal of 42 U.S.C. § 1983 (1976), the statute under which plaintiff sued in *Mt. Healthy*. See Carey v. Piphus, 435 U.S. 247, 253-57 (1978) (basic purpose of § 1983 is to compensate victims, and thus damage awards under that statute should be governed by the compensation, not deterrence, principle). But see City of Newport v. Fact Concerts, Inc., 101 S. Ct. 2748, 2760 (1981) (although reversing a punitive damage award, Court noted that "the deterrence of future abuses of power by persons acting under color of state law is an important purpose of § 1983" (citations omitted)).

106. As used herein, "deterrence" refers to the goal of discouraging wrongful interference with legally protected interests. It includes both deterrence of the defendant at bar and of other employers similarly situated. For extensive elaborations on this preventive purpose in civil law, see Calabresi, supra note 84; Note, supra note 89.

107. It has been recognized in the tort area that the further requirement of but-for causation does not serve, but rather undercuts, the deterrent function. See Klemme, supra note 100, at 163-64. Professor Klemme illustrates this point with those cases in which recovery has been denied to plaintiffs who have proven the negligence of the employer-shipowner in not providing life-saving equipment on its ship, but who have been unable to establish that but for the negligence the sailor-employee who fell overboard would not have drowned. The deterrence goal would seem to require the imposition of liability on the wrongdoer here to discourage future socially undesirable and risk-creating conduct. The but-for rule defeats this objective. See also infra note 110, discussing Professor Malone's view of the seamen's rescue cases.

108. See, e.g., Taylor v. Franklin Drapery Co., 441 F. Supp. 279, 291-95 (W.D. Mo. 1977); Gerstle v. Continental Airlines, Inc., 358 F. Supp. 545, 550-53 (D. Colo. 1973). In both of these actions, the courts found compelling evidence of systemic title VII violations—in *Taylor,* sexually discriminatory hiring and promotional practices, in *Gerstle,* a "no-marriage" policy for female flight hostesses. Yet neither defendant was held to have violated the Act because the plaintiff at bar failed to establish a sufficient causal connection between the apparent violations and the adverse actions taken against them.

definition aimed against groups, it is at least probable that such an employer is engaged in discriminatory decisionmaking regarding its other minority or female employees and applicants as well. As such, a same-decision causal theory is not likely to provide the "spur or catalyst which causes employers and unions to self-examine and to self-evaluate their employment practices and to endeavor to eliminate, so far as possible, the last vestiges" of their discriminatory practices.[109] Indeed, the refusal of the courts to take *some* action against such "harmless" discrimination might actually encourage the continuation of such conduct.

Even from the perspective of compensating individual plaintiffs, the *Mt. Healthy* approach may distort the purpose of title VII. That approach will compensate only those plaintiffs who can establish that the operation of the unlawful factor resulted in a tangible adverse effect, such as a discharge or failure to hire, that would not otherwise have resulted. But the statute 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.[110] Since the stigmatization that discrimination based on an immutable characteristic inflicts on a person[111] occurs when that char-

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109. Albemarle Paper Co. v. Moody, 422 U.S. 405, 417–18 (1975) (quoting United States v. N.L. Industries, Inc., 479 F.2d 354, 379 (8th Cir. 1973)).

110. Professor Malone speaks of certain rules of law that can be said to protect plaintiff from even the possibility of injury, or to provide plaintiff with a chance or opportunity to avoid harm. Malone, supra note 84, at 75–77, 80, 82. He points, for example, to the affirmative duty of the operator of a ship to rescue a seaman overboard. Since there is nearly always uncertainty as to whether a rescue attempt would have in fact saved the victim, the courts have been very restrictive in permitting defendants to seize on this uncertainty to avoid liability in the context of the but-for requirement. The duty to rescue is thus viewed as providing the seaman with the chance to survive, and encompassing the risk that the rescue may fail.

Several title VII decisions similarly read the statute as providing minorities with a right to compete on an equal basis, even where the failure of the employer to do so is "harmless" in the sense that the plaintiff is later shown to have been unqualified for the position sought. See Gillin v. Federal Paper Board Co., 479 F.2d 97, 101-02 (2d Cir. 1973); Williams v. Boorstin, 451 F. Supp. 1117 (D.D.C. 1978); King v. New Hampshire Dep't of Resources, 420 F. Supp. 1317, 1326-27 (D.N.H. 1976), aff'd, 562 F.2d 80 (1st Cir. 1977); Saracini v. Missouri Pac. R.R., 431 F. Supp. 389 (E.D. Ark. 1977); LeBoeuf v. Ramsey, 503 F. Supp. 747 (D. Mass. 1980). In each of these cases the court found liability and granted some relief (e.g., declaratory judgment, prospective injunction) on the basis of a determination that an unlawful factor entered into the decisionmaking, but refused further relief because it appeared the same result would have occurred based on legitimate reasons. In *Gillin,* for example, plaintiff claimed that the defendant had discriminated in failing to consider her for promotion because of her sex. The trial court found that the person ultimately promoted had qualifications far superior to those of plaintiff, and thus held that any possible claim of discrimination was defeated. The Second Circuit reversed, holding that the failure of the employer to make the decision without regard to plaintiff's sex constituted a violation of title VII. The court remanded on the question of appropriate relief. Cf. Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 280 n.14 (1978) (holding that Bakke had been deprived by the special admissions program of his legally protectible right to compete on an equal basis with all the applicants, regardless of what the disposition of his application would have been).

111. See Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 361, 373–76 (Brennan, White, Marshall, and Blackmun, JJ., concurring in part and dissenting in part); Brown v. Board of Educ., 347 U.S. 483 (1954).

acteristic operates as a motivating factor, should not title VII provide the victim with some relief at that point?[112]

The second assumption that seems to underlie the *Mt. Healthy* construct—that the court need concern itself only with the equities running between the parties at bar—overlooks the fact that "claims under Title VII involve the vindiction of a major public interest."[113] The statute was enacted against a background of hundreds of years of racism and racial violence and represents a congressional determination that continued discrimination in employment is against the public interest. In focusing solely on the impact of discrimination on the litigant who has chosen to challenge it, the same-decision standard represents "an attempt to individualize or personalize an evil or wrong that is basically an institutional wrong."[114] Congress has relied

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112. With regard to the compensatory or "make whole" purpose of title VII, see Albemarle Paper Co. v. Moody, 422 U.S. 405, 421 (1975), it should be noted that the statute has been read by most courts to preclude the award of either compensatory or punitive damages; money damages are available only for back pay. See DeGrace v. Rumsfeld, 614 F.2d 796, 808 (1st Cir. 1980); C. Sullivan, M. Zimmer & R. Richards, Federal Statutory Law of Employment Discrimination §§ 9.2-9.3 (1980). Thus, successful title VII plaintiffs cannot recover money damages for emotional or psychological distress or other nonpecuniary injuries. This position has been criticized both on compensation and deterrence grounds. See Note, Tort Remedies for Employment Discrimination Under Title VII, 54 Va. L. Rev. 491 (1968); Note, supra note 83, at 123 n.5. For the importance of punitive damages in serving "tort law's broader goal of protecting individuals against wrongful interference with their legally protected interests," see Note, supra note 89, at 305.

One federal judge, viewing the "central objective" of title VII to be "the function of vindication," has held that declaratory relief is available, in lieu of money damages, to a plaintiff who has established a violation and consequent emotional harm but cannot connect the violation to any economic injury. LeBoeuf v. Ramsey, 503 F. Supp. 747, 761 (D. Mass. 1980). The psychological impact of a discriminatory work environment, though constituting no tangible economic loss, has also been held to be within the protection of title VII and remediable by way of injunctive relief. See Bundy v. Jackson, 641 F.2d 934 (D.C. Cir. 1981); Firefighters Inst. for Racial Equality v. City of St. Louis, 549 F.2d 506, 514-15 (8th Cir.), cert. denied, 434 U.S. 819 (1977); Rogers v. EEOC, 454 F.2d 234 (5th Cir. 1971), cert. denied, 406 U.S. 957 (1972).

113. Section-by-Section Analysis of H.R. 1746, Equal Employment Opportunity Act of 1972 Conference Report, 118 Cong. Rec. 7166, 7168 (1972).

114. Professor Owen Fiss, quoted in N.Y. Times, April 19, 1981, at 18 (speaking generally of the intent requirement); see supra note 1; see also Comment, Cases That Shock the Conscience: Reflections on Criticism of the Burger Court, 15 Harv. C.R.-C.L. L. Rev. 713 (1980). This comment observes a trend on the part of the Burger Court to "privatize" public law controversies in a way that "avoids difficult social questions by analyzing them as if they involved the rights of merely the private parties before the Court." Id. at 727.

> Once [the Court] has characterized a case as private the Court can appeal to rules of private tort or contract law without having to show that those rules are appropriate to the resolution of the public questions contained in constitutional controversies.
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> . . . .
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> In civil cases, privatization erodes the public policy goals of constitutional regulation by appealing to an abstraction of the private lawsuit that portrays such suits as bipolar, retrospective and self-contained. In the received view of the typical private lawsuit, the dispute is conceived of as between parties whose conduct can be examined in isolation from the surrounding social forces. The focus is on compensating one party for the damages proximately attributable to the conduct of another. The reform of general social conditions is not a proper aim of the lawsuit . . . .
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> . . . .
>
> Socially caused injuries like racial oppression and gender discrimination are not adequately conceptualized as discrete injuries remediable in bipolar, retrospective, self-

primarily on private litigants for the judicial enforcement of title VII,[115] thus imbuing these private actions with a social function unaddressed by the *Mt. Healthy* theory of causality.

If title VII is designed to eradicate discriminatory considerations from the workplace and to assure that personnel decisions are made on other bases, then it would appear that a violation is made out at the point at which the plaintiff meets the first burden of the *Mt. Healthy* test, i.e., when he establishes the operation of an unlawful motivating factor.[116] The deterrence purpose should attach at that juncture—for example, by way of a liability finding and a prospective injunction prohibiting racially motivated decision-making—and proof of the particular harm to the plaintiff at bar should then be considered only to effectuate the goal of compensation by determining the appropriate further relief, if any, to be awarded.[117]

2. *Practical Implications.* What is also suggested by the tort experience is the unusual burden that the but-for theory of causation places on the judicial system. If the answer to the question "what would have happened if the facts had been otherwise?" is "unknowable"[118] when dealing in the physical sciences, it would seem that much more "unknowable" in the context of human conduct and motivation. We place unrealistic expectations on our adversary system and its evidentiary format when we ask a judge to find as a matter of fact what *would have* occurred if the discrimination, already shown to have been a motivating consideration, had not so operated. There are likely to be a substantial proportion of fact patterns in which the factors behind the

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contained lawsuits.

Id. at 740-41 (citations omitted).

The societal dimension of an individual action alleging discrimination on class- or group-grounds is recognized and effectuated by the Federal Rules of Civil Procedure. See Advisory Committee Notes to Rule 23(b)(2), 39 F.R.D. 73, 102:

> Action or inaction is directed to a class within the meaning of this subdivision even if it has taken effect or is threatened only as to one or a few members of the class, provided it is based on grounds which have general application to the class.
>
> Illustrative are various actions in the civil rights field where a party is charged with discriminating unlawfully against a class, usually one whose members are incapable of specific enumeration.

See also Senate Committee Report on Equal Employment Opportunity Act of 1971, S. Rep. No. 415, 92d Cong., 1st Sess. 27 (1971) ("The committee agrees with the courts that title VII actions are by their very nature class complains [sic] . . . ." (citations omitted)); East Texas Motor Freight System v. Rodriguez, 431 U.S. 395, 405 (1977); Bowe v. Colgate-Palmolive Co., 416 F.2d 711, 719 (7th Cir. 1969); Wetzel v. Liberty Mut. Ins. Co., 508 F.2d 239, 250-51 (3rd Cir.), cert. denied, 421 U.S. 1011 (1975); Huff v. N.D. Cass Co., 485 F.2d 710, 713 (5th Cir. 1973) (en banc); Saracini v. Missouri Pac. R.R., 431 F. Supp. 389, 395 (E.D. Ark. 1977), and citations therein. See generally Fiss, Groups and the Equal Protection Clause, 5 Phil. & Pub. Affairs 107 (1976).

115. See infra note 124.

116. This approach may strike some as conviction of the employer for his state of mind rather thau for his conduct, for "bad thoughts" rather than "bad deeds." See 110 Cong. Rec. 7253-57 (1964) (debate between Senators Ervin and Case); Christensen & Svanoe, supra note 26, at 1326-27. It is submitted, however, that the term "motivating factor" as used in *Mt. Healthy* carries the elear implication that the discriminatory intent was *acted upon,* thus producing conduct tainted by it.

117. See infra text accompanying notes 127-42.

118. The term is Professor Malone's. Malone, supra note 84, at 71.

challenged decision are so interlocked that it is not possible to sort them out and eliminate those that "made no difference" to the result.[119] As Justice Powell has noted in a related context, the *Mt. Healthy* standard will involve the courts in "murky, subjective judgments" that rest on "nebulous and elusive . . . element[s]," and the problems of litigating these questions, "obvious to any lawyer," will be "intractable".[120]

Despite the fact that the *Mt. Healthy* standard places the burden of establishing the "harmless" nature of the discrimination on the employer, the plaintiff in many meritorious cases is likely to face the very difficult task of refuting the defendant's showing. It has been observed that "plausible justification [for adverse personnel action] can frequently be advanced whether or not it actually played any part in the formulation of the decision under contest,"[121] and that employers "who receive adequate legal advice and know how to create a personnel file . . . will find rare the occasions on which they are found liable."[122] Moreover, since the crucial testimony regarding causation is likely to come from the individual who made the challenged decision, and who thus has a strong personal interest in seeing it upheld, the plaintiff

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119. See Wright Line, 251 N.L.R.B. 1083, 1090 (1980) (concurring opinion). As one federal trial judge has observed, discharge decisions "are almost always complicated and based on several reasons." Tidwell v. American Oil Co., 332 F. Supp. 424, 430 (D. Utah 1971). The case law offers countless examples of fact patterns with which courts have struggled. See, e.g., Whiting v. Jackson State Univ., 616 F.2d 116 (5th Cir. 1980); DeGrace v. Rumsfeld, 614 F.2d 796 (1st Cir. 1980); Marshall v. Commonwealth Aquarium, 611 F.2d 1 (1st Cir. 1979) (the distinction between a "last straw" cause and a "real" cause); Loeb v. Textron, Inc., 600 F.2d 1003 (1st Cir. 1979); Sweeney v. Board of Trustees of Keene State College, 569 F.2d 169 (1st Cir.), vacated and remanded, 439 U.S. 24 (1978).

120. Keyes v. School Dist. No. 1, 413 U.S. 189, 227, 233 (1973). The Supreme Court has not been unmindful of the difficulties involved in determining motivation and quantifying its component parts. See NLRB v. Erie Resistor Corp., 373 U.S. 221, 228-29 (1963):

> As is not uncommon in human experience, such situations [involving alleged unfair labor practices] present a complex of motives and preferring one motive to another is in reality the far more delicate task . . . of weighing the interests of the employer in operating his business in a particular manner and of balancing in light of the Act and its policy the intended consequences upon employee rights against the business ends to be served by the employer's conduct.

The Court has noted particularly the problem of ascertaining the collective motivation of a legislative or administrative body, a problem not dissimilar to the one involved in dissecting a personnel decision collectively arrived at. See Personnel Adm'r 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."); Village of Arlington Heights v. Metropolitan Housing Dev. Corp., 429 U.S. 252, 265 (1977) ("Rarely can it be said that a legislative or administrative body operating under a broad mandate made a decision motivated solely by a single concern, or even that a particular purpose was the 'dominant' or 'primary' one."); McGinnis v. Royster, 410 U.S. 263, 276-77 (1973) ("The search for legislative purpose is often elusive enough . . . without a requirement that primacy be ascertained. Legislation is frequently multipurposed: the removal of even a 'subordinate' purpose may shift altogether the consensus of legislative judgment supporting the statute." (citation omitted)); Palmer v. Thompson, 403 U.S. 217, 224-25 (1971) (It is "difficult or impossible for any court to determine the 'sole' or 'dominant' motivation behind the choices of a group of legislators.").

121. Christensen & Svanoe, supra note 26, at 1322.

122. Tushnet, Truth, Justice, and the American Way: An Interpretation of Public Law Scholarship in the Seventies, 57 Tex. L. Rev. 1307, 1355 (1979).

and his counsel may find themselves at a significant disadvantage in overcoming a *Mt. Healthy* defense.[123]

The litigation risks for a plaintiff who must meet a same-decision defense on the liability question are likely to have the effect of discouraging the filing of many meritorious title VII actions. This prospect is particularly troublesome in light of the critical role that private actions play in the statute's enforcement scheme.[124] Indeed, to permit a defendant to escape liability completely by reliance on this defense appears to be a restriking of the balance that Congress intended to establish between minority persons and their employers.[125] Tilting this balance against the former can find no justification in

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123. See Wolly, supra note 65, at 393, and citations therein. An illustration of the problem can be found in the case of John Henry Faulk, a radio personality in the 1950's who was placed on the entertainer's blacklist for his alleged pro-Communist sympathies. Faulk relates the following conversation with his agent upon learning of his placement on the list:

> *Faulk:* I thought you just said [CBS] wouldn't fire me—that is, outright. What other way is there to fire a man?
>
> *Agent:* The way this thing works, Johnny, is subtle and strictly behind the scenes. The networks and the agencies want to avoid making an issue of it. So they ease along until a legitimate reason comes. A reason that sounds perfectly logical on the surface. Then they let a man go. . . .
>
> *Faulk:* Well, if I get fired from CBS, or even if I don't get any more work, I could certainly prove it was because of this damn [blacklist].
>
> *Agent:* That's where you're wrong, Johnny. There's not an executive in radio or television in New York today who would come in and say he had fired you or refused to hire you because of this. They simply wouldn't do it.

J. Faulk, Fear on Trial 21 (1964). Faulk was fired on the stated grounds that his ratings had fallen. He filed a libel action against those persons responsible for the blacklist. After six years of pre-trial investigation (during which time Faulk was unable to obtain any work in his field) and 11 weeks of trial in which Louis Nizer represented the plaintiff, the jury found for Faulk and awarded considerable damages. Relying on the trial transcript, Faulk's book describes the arduous task of proving the true reason for his broken career.

124. The Supreme Court has recently reiterated that "private lawsuits by aggrieved employees [are] an important part of [title VII's] means of enforcement." EEOC v. Associated Dry Goods Corp., 449 U.S. 590, 595 (1981). "Congress considered the charging party a 'private attorney general,' whose role in enforcing the ban on discrimination is parallel to that of the Commission itself." Id. at 824 (citation omitted). "Congress established the private aggrieved party as a vindicator of the public right of compliance with the Civil Rights Act of 1964." King v. Laborers Int'l Union, 443 F.2d 273, 278 (6th Cir. 1971). "[O]nce the judicial machinery has been set in train, the [title VII] proceeding takes on a public character in which remedies are devised to vindicate the policies of [title VII], not merely to afford private relief to the employee." Hutchings v. United States Indus., 428 F.2d 303, 311 (5th Cir. 1970).

125. See supra notes 20-29 and accompanying text. Circuit Judge Thornberry has suggested in a case brought under § 8(a)(3) of the NLRA that the responsibility of the courts to balance competing societal interests is different in the constitutional area than in an area in which Congress has legislated. See Federal-Mogul Corp. v. NLRB, 566 F.2d 1245 (5th Cir. 1978) (concurring opinion). He contends that the judiciary has more freedom to balance interests in an area like the first amendment (as in *Mt. Healthy)* than under the NLRA, where "Congress has already established a balance . . . [that] favors the employee." 566 F.2d at 1265. See also Note, The Age Discrimination in Employment Act of 1967, 90 Harv. L. Rev. 380, 387 (1976) ("[W]here Congress has passed a remedial statute which singles out particular groups for special protection in particular contexts, this balancing process has already been performed by the branch of government which is institutionally designed to identify and weigh various social values." (citations omitted)). Judge Thornberry concludes that "[t]he 'but-for' standard significantly restrikes this balance in favor of the employer, and such a test is contrary to Congressional policy." *Federal-Mogul,* 566 F.2d at 1265. But see Wright Line, 251 N.L.R.B. 1083, 1088 (1980) ("[T]he

minority employment statistics, which show little in the way of real progress toward equal opportunity since the enactment of the statute.[126]

IV. A Proposed Solution

Clearly, there are both policy and practical considerations that argue against the adoption of a *Mt. Healthy* test of causation to determine liability in title VII litigation. The application of other standards that provide the plaintiff with back pay and specific injunctive relief once it is established that a prohibited criterion was merely one factor, however, are properly criticized as resulting in windfalls for those plaintiffs who would have otherwise been rejected based on legitimate reasons.[127]

In order to further the deterrence as well as the compensatory goals of title VII, and to weigh the interest of society as well as that of the parties at bar, it is proposed that the *Mt. Healthy* procedure be applied as follows. A plaintiff who establishes that a prohibited criterion was a motivating factor[128] in the challenged decision thereby establishes a violation of the Act and thus the defendant's liability. The same-decision test would then be applied only to determine the appropriate remedy. In this way, a plaintiff who has proven the operation of an unlawful factor would obtain at minimum a declaratory judgment, partial attorneys fees, and, if appropriate, a prospective injunction prohibiting discriminatory decisionmaking.[129] The employer who could es-

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Mt. Healthy procedure accomodates the legitimate competing interests inherent in dual motivation cases [filed under the NLRA]."). See also Christensen & Svanoe, supra note 26, at 1319.

One federal district court has concluded that the *Mt. Healthy* standard should not be applied in title VII retaliation actions because "retaliation is proscribed by statute" and the Act is "primarily enforced by private litigants." Sutton v. National Distillers Prod. Co., 445 F. Supp. 1319, 1328 n.3 (S.D. Ohio 1978). The Supreme Court itself has explicitly held that certain standards of proof in title VII actions differ markedly from those in discrimination actions filed under the Constitution. See supra note 82.

126. The Court in United Steelworkers v. Weber, 443 U.S. 193, 204 n.4 (1979), cited statistics showing that in 1962 the nonwhite unemployment rate was 124% higher than the white unemployment rate, and that in 1978 it was 129% higher; see also U.S. Commission on Civil Rights, The State of Civil Rights: 1979 (1980).

127. Cf. Geller v. Markham, 481 F. Supp. 835, 840 (D. Conn. 1979), aff'd in part and rev'd in part, 635 F.2d 1027 (2d Cir. 1980), cert. denied, 101 S. Ct. 2028 (1981):

> If relief were to be afforded every time age was considered [even though it did not make a difference in the final decision], the effects would go well beyond the remedial designs of the drafters of the ADEA. Back pay would be awarded to those who never had a chance for the job at any age. While doing so would provide a strong deterrent against age discrimination, it would be a deterrent far in excess of the limited deterrent Congress intended to provide when it enacted the ADEA.

481 F. Supp. at 841 (citation omitted). Judge Blumenfeld offers the hypothetical of the applicant who is turned away because of the (illegal) company policy against hiring anyone over 50 years old, but who if considered would have been rejected anyway because of a criminal record for child molestation. Id. at 840.

128. See supra note 63.

129. The Supreme Court has recently reiterated that the district courts have "broad power under § 706(g) to fashion relief." See Northwest Airlines, Inc. v. Transport Workers Union, 451 U.S. 77, 93 n.28 (1981). This includes "broad equitable discretion to devise prospective relief designed to assure that employers found to be in violation of [title VII] eliminate their discrimina-

tablish a same-decision defense, however, would avoid the imposition of any affirmative relief such as reinstatement and back pay.[130]

This proposed resolution of the causation problem is consistent with the exacting language of title VII's provisions[131] and their liberal construction by the Supreme Court.[132] It also conforms to the ambitious goals set by Con-

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tory practices and the effects therefrom." International Bhd. of Teamsters v. United States, 431 U.S. 324, 361 n.47 (1977).

With regard to injunctive relief, the Supreme Court has written: "Where racial discrimination is concerned, 'the [district] court has not merely the power but the duty to render a decree which will so far as possible eliminate the discriminatory effects of the past as well as bar like discrimination in the future.' " Albemarle Paper Co. v. Moody, 422 U.S. 405, 418 (1975) (citation omitted) (brackets in original). Prospective injunctions prohibiting the use of race in personnel decisions could, in appropriate circumstances, be issued on behalf of the class of minority employees or applicants even in individual title VII cases, on the basis that such cases involve discrimination against a class characteristic. See Saracini v. Missouri Pac. R.R., 431 F. Supp. 389, 395–96 (E.D. Ark. 1977) (citing cases); Williams v. Boorstin, 451 F. Supp. 1117 (D.D.C. 1978) (refusing to grant reinstatement or back pay to discharged employee but ordering employer to establish discrimination grievance procedure), cert. denied, 451 U.S. 985 (1981). See also supra note 114.

Declaratory relief, see 28 U.S.C. §§ 2201–2202 (1976), would place the violation on the public record and thus be available to subsequent complainants against the employer for purposes of establishing patterns of unlawful decisionmaking. Such documentation may also serve a remedial role because of the adverse public reaction to it. One federal trial court has awarded declaratory relief to a title VII plaintiff who established a discriminatory minimum-height requirement, but who would not have been appointed, even absent the requirement, because of failure to meet lawful criteria. See LeBoeuf v. Ramsey, 503 F. Supp. 747 (D. Mass. 1980). Noting the mental and emotional impact of defendant's practice on plaintiff, Judge Keeton ruled that declaratory relief was necessary to effectuate "the central objective of Title VII, the function of vindication." Id. at 761 (citation omitted).

Attorneys' fees, awardable to the prevailing party under § 706(k), serve the dual purpose of encouraging private enforcement of the Act and "provid[ing] additional—and by no means inconsequential—assurance that [defendants] will not deliberately ignore [plaintiffs'] rights." Carey v. Piphus, 435 U.S. 247, 257 n.11 (1978). Fees have been awarded to plaintiffs "for bringing to light discriminatory practices of the defendant" even where the former have prevailed only on the first stage of the *Mt. Healthy* inquiry but have failed on the "same decision" showing. See, e.g., Saracini v. Missouri Pac. R.R., 431 F. Supp. 389, 397–98 (E.D. Ark. 1977). See generally C. Sullivan, M. Zimmer & R. Richards, supra note 112, § 9.8 (1980).

In view of the unavailability of traditional tort remedies in title VII litigation, see supra note 112, the type of relief described here takes on an added importance.

130. As the Supreme Court has noted in a constitutional context:

> By making the deprivation of such ["absolute"] rights actionable for nominal damages without proof of actual injury, the law recognizes the importance to organized society that those rights be scrupulously observed; but at the same time, it remains true to the principle that substantial damages should be awarded only to compensate actual injury or, in the case of exemplary or punitive damages, to deter or punish malicious deprivations of rights.

Carey v. Piphus, 435 U.S. 247, 266 (1978).

Professor Brest has noted in a related context that since it is the employer and not the court that should consider the qualifications of the employee, the judicial role should arguably be limited to determining whether an unlawful factor was weighed; if so, the court should simply invalidate the decision and order that it be made solely on the basis of legitimate criteria. Brest, *Palmer v. Thompson*: An Approach to the Problem of Unconstitutional Legislative Motive, 1971 Sup. Ct. Rev. 95, at 117–20. See also Reynolds v. School Dist., 554 F.2d 638 (4th Cir. 1977).

131. See supra note 103.

132. See supra note 42 and accompanying text.

gress[133] and the separation of liability and remedy written into the legislation.[134] The resolution parallels the approach approved by the Supreme Court for the disposition of class actions filed pursuant to title VII.[135] In addition, it arguably represents the procedure suggested for constitutional claims by *Mt. Healthy* itself,[136] and it has been explicitly applied by the Court in related contexts.[137] Lastly, it is an approach already adopted by several lower courts faced with the mixed-motive causation problem.[138]

On a policy level, it is submitted that this solution strikes the proper balance between the competing interests in title VII litigation. Plaintiffs who establish the operation of a discriminatory factor, but no but-for causation, would not be met with a dismissal of their action (and a potential award of costs to the employer[139]) as they would be if the same-decision test were applied to the liability question; rather, they would obtain some vindication for their efforts at enforcement of the Act's prohibitions. The employer in such a situation would be properly warned of its violation of federal law but would not be required through back pay and reinstatement to place the plaintiff in a better situation than he would have been in had the violation not occurred. And the public would benefit through the active enforcement of a statutory scheme that depends primarily on private-plaintiff initiative.

Under the proposed scheme the fact that a legitimate justification would have resulted in the same adverse decision absent the impermissible factor

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133. See supra notes 15–17 and accompanying text.

134. See supra notes 25–29 and accompanying text.

135. See supra notes 46–59 and accompanying text.

136. *Mt. Healthy* can be read as addressing itself to remedy and not liability, see Wolly, supra note 65, at 390-94. Justice Rehnquist stated the issue for the Court to be whether plaintiff Doyle had established "a constitutional violation *justifying remedial action.*" 429 U.S. at 285 (emphasis added). The judgment vacated was one ordering that plaintiff be reinstated with back pay, relief described as "undesirable consequences not necessary to the assurance of [plaintiff's constitutional] rights." Id. at 287. When speaking of the *Mt. Healthy* decision subsequently in Givhan v. Western Line Consol. School Dist., 439 U.S. 410 (1979), Justice Rehnquist underscored the remedial focus of the Court when he observed that the prior opinion "rejected the view that a public employee *must be reinstated* whenever constitutionally protected conduct plays a 'substantial' part in the employer's decision to terminate." Id. at 416 (emphasis added). In short, the same-decision test as adopted by the Supreme Court in constitutional actions may be applicable not to the question of liability but rather to remedy. Several courts have so read *Mt. Healthy*. See cases collected in Wolly, supra note 65, at 390 n.48, and cases contra discussed in id. at 392 n.59.

137. In Carey v. Piphus, 435 U.S. 247, 266–67 (1978), the Court held that the denial of procedural due process is actionable without proof of actual injury that resulted therefrom. A plaintiff who establishes a violation of due process with regard to a particular decision, therefore, has established liability and is entitled to at least nominal damages even if it is determined that the same result would have obtained had due process procedures been followed. Similarly in Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 280 n.14 (1978), the plurality held that Bakke made out a constitutional violation by establishing that the special admissions program prevented him from competing equally for all places in the medical school class: "The question of respondent's admission *vel non is merely one of relief.*" (emphasis added); see also id. at 320 n.54.

138. See cases cited supra at note 110. These decisions are in accord with a line of lower court opinions adopting a theory of damages for "the loss of civil rights *per se.*" Carey v. Piphus, 435 U.S. 247, 264 (1978); see Note, supra note 83, at 135.

139. See Fed. R. Civ. P. 54(d), providing that "costs shall be allowed as of course to the prevailing party unless the court otherwise directs."

would not negate the violation; it would merely make unnecessary an award of back pay or reinstatement to remedy the violation.[140] By thus limiting the *Mt. Healthy* test to the determination of appropriate remedy, title VII doctrine would be brought into line with the experience in tort law that "uncertainties on the issue of cause-in-fact are in nearly every instance susceptible, in theory at least, of being resolved in terms of an adjustment of damages."[141] And the proposed approach is in accord with the oft-stated proposition in the title VII context and elsewhere that any uncertainty about causation should be resolved against the proven wrongdoer, viz., the employer who has been motivated by forbidden considerations.[142]

CONCLUSION

Judge J. Skelly Wright has written of the "special reasons," both historical and philosophical, why judicial intervention on behalf of the principle of equality is more legitimate than in other areas.[143] Title VII of the Civil Rights Act of 1964 requires such intervention when it is shown that impermissible reasons have played a motivating part in an employment decision. To permit strict requirements of causation—borrowed from tort law and increasingly set aside in that area to accommodate changing social needs—to defeat this necessary judicial function would violate the promise of equality made to victims of discrimination some eighteen years ago.

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140. See Wolly, supra note 65, at 398; see also LeBoeuf v. Ramsey, 503 F. Supp. 747, 755-62 (D. Mass. 1980). Plaintiff in this title VII action established that defendant's minimum-height requirement had a disparate impact on female applicants for police officer positions. In referring to defendant's response that plaintiff would not have been appointed in any event because of her low position on the civil service list, Judge Keeton observed, "Although deserving consideration in relation to issues in this case of legal cause and of existence of remediable harm, these arguments are not persuasive in relation to the question of the existence of a violation of Title VII." Id. at 757. The court added, "The absence of proof that defendants' wrongful conduct caused economic harm [i.e., by denying plaintiff a position she otherwise would have gotten] is not fatal to plaintiff's claim of actionable violation of a legally protected right." Id. at 761. The court ruled that plaintiff was entitled at least to declaratory relief for the proven violation. Id.

141. Malone, supra note 84, at 80.

142. See Franks v. Bowman Transp. Co., 424 U.S. 747, 793 n.12 (1976) (Powell, J., concurring in part and dissenting in part); Baxter v. Savannah Sugar Ref. Corp., 495 F.2d 437, 445 (5th Cir.), cert. denied, 419 U.S. 1033 (1974); Wright Line, 251 N.L.R.B. 1083, 1091 (1980) (concurring opinion); Malone, supra note 84, at 73, 84.

143. Wright, Judicial Review and the Equal Protection Clause, 15 Harv. C.R.-C.L. L. Rev. 1, 17 (1980).