DISPARATE TREATMENT OF DISPARATE TREATMENT: HARMONIZING TITLE VII PRETEXT AND MIXED-MOTIVE JURY INSTRUCTION CAUSATION STANDARDS IN LIGHT OF *STAUB V. MEMORIAL HOSPITAL*

Eric Rosoff†

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† Articles Editor, Cardozo Law Review. J.D., Benjamin N. Cardozo School of Law, 2014; B.A., Syracuse University. Many thanks to Cathy Harris for suggesting the topic of this Note, Professor Arthur Jacobson for his invaluable guidance and advice, and the staff and board of the *Cardozo Law Review* for their hard work. Special thanks to my parents, Iris and Fred, and my wife Liza for their unwavering love, support, and patience.

INTRODUCTION

In 1964, within a landmark legislative effort designed to eradicate segregation by targeting major societal centers of discrimination—voting, public accommodations, public education, and federal assistance[1]—Congress set forth a simple and noble statutory command: "It shall be an unlawful employment practice . . . 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."[2] Fundamentally, this is Title VII, and it seems a simple enough proposition: Illegitimate disparate treatment in employment is impermissible.

Yet, as this provision has filtered through the facts of countless cases, as if whispered from ear to ear in a game of telephone, it has been often reinterpreted, and the dual judicial mechanisms constructed to enforce it—pretext and mixed-motive—have generated a jurisprudence all their own. The recurring culprit in this game is the Supreme Court, that through various turns around the disparate treatment circle, has complicated the course of this simple provision's analysis.[3]

The Court's first major statement in Title VII disparate treatment jurisprudence came in 1973 with *McDonnell Douglas Corp. v. Green*,[4] where the Court saw fit to impose liability for a violation of § 703(a)(1) only after permitting an employer to first offer a legitimate reason explaining an employment action, and then providing the plaintiff with the opportunity to prove the employer is in fact lying to cover up discrimination.[5] This liability paradigm is interchangeably referred to as

1 Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241 (codified as amended at 42 U.S.C. §§ 2000a–2000h-6 (2012)).

2 Civil Rights Act of 1964 § 703(a)(1) (codified at 42 U.S.C. § 2000e-2(a)).

3 Steven J. Kaminshine, *Disparate Treatment as a Theory of Discrimination: The Need for a Restatement, Not a Revolution*, 2 STAN. J. C.R. & C.L. 1, 3 (2005) (characterizing "Supreme Court decision-making in this area as incoherent, chaotic, uncertain, stumbling, a swamp, [and] formalistic" (footnotes omitted)).

4 411 U.S. 792 (1973); *see infra* Part I.B.2.

5 *Infra* note 30.

"pretext," after the third stage of the Court's burden shifting scheme, "single-motive," in reference to the absence of an employer's nondiscriminatory motive, and "but for," the rubric's causation standard—its definition of § 703(a)(1)'s "because of" element.[6]

For our purposes, the Court's next key Title VII visit came in 1981 with *Price Waterhouse v. Hopkins*,[7] where a divided Court permitted a plaintiff to establish liability under § 703(a)(1) where discriminatory motivation exists alongside legitimate reasons for an employment decision. This is mixed-motive liability, disparate treatment's second liability paradigm. In 1991 Congress saw fit to write this standard into Title VII itself as § 703(m), thereby placing liability where plaintiffs show discrimination was a "motivating factor" of an employer's decision.[8]

However, the Court is not alone in this telephone circle, and Congress's amendment raised a host of questions, including whether the two strands of liability exist exclusively to be argued either/or, or whether the 1991 Act's "motivating factor" standard superseded § 703(a)(1), turning all disparate treatment cases into mixed-motive cases.[9] The Court addressed the 1991 amendment in 2003's *Desert Palace, Inc. v. Costa*,[10] but chose not to reconcile mixed-motive and pretext liability,[11] leaving scholars to speculate on the state of the law,[12] and courts to continue to define the type of case at issue.[13] But in 2011, with the Court's decision in *Staub v. Proctor Hospital*,[14] Justice Scalia, in a short turn of phrase, appeared to go where *Desert Palace* had not. Using a complementary antidiscrimination statute, the Court appeared to signal an end to the original pretext/but-for paradigm, sanctioning a default motivating factor standard for all disparate treatment cases.[15]

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6 Kaminshine, *supra* note 3, at 3–4.

7 490 U.S. 228 (1989), *superseded by statute*, Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071; *infra* Part I.C.1.

8 Civil Rights Act of 1991 § 107 (codified at 42 U.S.C. § 2000e-2(m)).

9 *See, e.g.*, Jeffrey A. Van Detta, *"Le Roi Est Mort; Vive Le Roi!": An Essay on the Quiet Demise of* McDonnell Douglas *and the Transformation of Every Title VII Case After* Desert Palace, Inc. v. Costa *into a "Mixed-Motives" Case*, 52 DRAKE L. REV. 71, 126–27 (2003); Kristina N. Klein, Note, *Oasis or Mirage?* Desert Palace *and Its Impact on the Summary Judgment Landscape*, 33 FLA. ST. U. L. REV. 1177, 1190 (2006) (arguing there is no viable distinction between single-motive and mixed-motive cases and all cases should be treated as mixed-motive going forward). *Contra* Matthew R. Scott & Russell D. Chapman, *Much Ado About Nothing—Why* Desert Palace *Neither Murdered* McDonnell Douglas *Nor Transformed All Employment Discrimination Cases to Mixed-Motive*, 36 ST. MARY'S L.J. 395, 405 (2005).

10 539 U.S. 90, 92 (2003).

11 *Infra* Part I.C.3.

12 *See infra* note 81.

13 Kaminshine, *supra* note 3, at 20–21.

14 131 S. Ct. 1186 (2011).

15 *Infra* Part III.A.

Disparate treatment analysis under the pretext/mixed-motive dichotomy, featuring paradigm-specific causation standards, has resulted in a lack of uniformity across circuits, improperly high causation thresholds for plaintiffs, and problems for juries.[16] This Note argues that Title VII's dual liability theories should be reconciled under a motivating factor causation standard to resolve lower courts' issues. It proposes that the Supreme Court's recent interpretation of a complementary statute in *Staub v. Proctor Hospital*[17] can catalyze this reconciliation and provide a clear basis for disparate treatment jury instructions, while remaining faithful to the normative values and legislative judgments that inform Title VII.

This Note proceeds in three parts. Part I discusses the legislative underpinnings of Title VII, and the development of pretext and mixed-motive liability as fashioned by the Supreme Court in *McDonnell Douglas* and *Price Waterhouse*. Part I then explores Congress's response to *Price Waterhouse* and the Supreme Court's consideration of those modifications in *Desert Palace*. Finally, Part I highlights the importance of clear jury instructions in light of the pretext/mixed-motive dichotomy. Part II examines lower courts' confusion in applying the pretext/mixed-motive dichotomy, as evidenced by Seventh Circuit decisions unsure of when each liability framework governs, and a D.C. Circuit decision improperly elevating a disparate treatment plaintiff's causation threshold. Part II then takes up the case of *Staub v. Memorial Hospital*, examining the facts of the case, and similarities between its statute and Title VII. Part III posits that *Staub* answers the question left open in *Desert Palace* of when motivating factor causation applies, and examines and discounts potential drawbacks to using the case in a traditional Title VII context. Part III then adapts *Staub*'s analysis to craft jury instructions applicable to all Title VII disparate treatment cases going forward, as exemplified by reworking D.C. Circuit instructions Part II of the Note previously identified as problematic.

I. BACKGROUND

Before we can understand why *Staub* provides a meaningful solution to the Title VII causation question, we first have to understand the origins and pitfalls of our two disparate treatment liability paradigms by examining the history and goals of Title VII, relevant Supreme Court precedents establishing the binary pretext/mixed-motive framework, and the importance of clear jury instructions in Title VII discrimination cases.

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16 *Infra* Part I.D.

17 131 S. Ct. 1186.

A. *Title VII's Goals: Deterrence and Redress*

Congress enacted Title VII of the Civil Rights Act of 1964 (Title VII),[18] a component of the major civil rights legislation of the 1960s, to address discrimination in the workplace.[19] Title VII's function in this regard is a product of two commonly interrelated legislative goals: deterring a disfavored practice and providing a mechanism of redress for victims of that practice.[20] The statute reflects the normative position that when making employment decisions, an employer's reliance on certain defining personal traits is "an evil in itself" to be eradicated.[21] As such, Title VII expressly forbids employment decisions based on an individual's "race, color, religion, sex or national origin."[22] Where employers consider such factors, courts have broad discretion to award equitable relief by enjoining the unlawful employment practice, ordering reinstatement or hiring, and awarding back pay.[23] With the passage of the Civil Rights Act of 1991, Congress expanded these remedies to include compensatory and punitive damages in cases of intentional discrimination.[24]

Uncovering employer motivation is the key to establishing liability under Title VII. Through this pursuit, two distinct liability paradigms have developed: pretext and mixed-motive. This Section of Part I will address the theories' foundations, and the specific causation standards courts require plaintiffs demonstrate under each.

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18 42 U.S.C. §§ 2000e–2000e-17 (2012).

19 42 U.S.C. § 2000e-2(a)(1); 1-1 LEX K. LARSON, LARSON ON EMPLOYMENT DISCRIMINATION § 1.01 (2012); *see also* McDonnell Douglas Corp. v. Green, 411 U.S. 792, 800 (1973) ("The language of Title VII makes plain the purpose of Congress to assure equality of employment opportunities and to eliminate those discriminatory practices and devices which have fostered racially stratified job environments to the disadvantage of minority citizens.").

20 Price Waterhouse v. Hopkins, 490 U.S. 228, 264–65 (1989) (O'Connor, J., concurring) ("Title VII has two basic purposes. The first is to deter conduct which has been identified as contrary to public policy and harmful to society as a whole [through mechanisms like awarding backpay]. . . . The second goal of Title VII is to make persons whole for injuries suffered on account of unlawful employment discrimination." (internal quotation marks omitted)), *superseded by statute*, Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071.

21 *Id.* at 265 ("There is no doubt that Congress considered reliance on gender or race in making employment decisions an evil in itself. As Senator Clark put it, '[t]he bill simply eliminates consideration of color [or other forbidden criteria] from the decision to hire or promote.' . . . [Sen. Humphrey explained,] 'What the bill does . . . is simply to make it an illegal practice to use race as a factor in denying employment[.'] Reliance on such factors is exactly what the threat of Title VII liability was meant to deter." (first and third alterations in original) (citations omitted)).

22 42 U.S.C. § 2000e-2.

23 42 U.S.C. § 2000e-5(g)(1).

24 42 U.S.C. § 1981(a).

B. *Pretext Theory*

1. Title VII's Initial Liability Standard: All or Nothing

Title VII's initial liability provision, § 703(a)(1),[25] made it unlawful for an employer to make employment and personnel decisions "because of [an] individual's race, color, sex or national origin."[26] In drawing this standard, Congress balanced enforcing individuals' right to be free from workplace-related discrimination with preserving employers' right to operate in accordance with our longstanding employment-at-will doctrine.[27] As such, § 703(a)(1) was understood to establish liability where discrimination was the only cause of an adverse employment action—the litigation determined whether discrimination was the reason or not—an either/or decision.[28]

In analyzing how to establish an employer's motives in light of Title VII's opposing legislative considerations, in 1973 the Supreme Court interpreted § 703(a)(1) to require shifting evidentiary burdens when an employee claims an adverse employment decision resulted from discriminatory animus. This ruling established the pretext theory of disparate treatment liability.

2. *McDonnell Douglas*

In the seminal 1973 case *McDonnell Douglas Corp. v. Green*,[29] the Supreme Court set forth the now familiar burden-shifting framework applicable to Title VII disparate treatment claims.[30] The case concerned

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25 Civil Rights Act of 1964 § 703(a)(1) (codified at 42 U.S.C. § 2000e); *see* McDonnell Douglas Corp. v. Green, 411 U.S. 792, 793 (1973).

26 42 U.S.C. § 2000e-2(a)(1).

27 LARSON, *supra* note 19, § 1.01; *see also* Price Waterhouse v. Hopkins, 490 U.S. 228, 239 (1989) (plurality opinion) ("In passing Title VII, Congress made the simple but momentous announcement that sex, race, religion, and national origin are not relevant to the selection, evaluation, or compensation of employees. Yet, the statute does not purport to limit the other qualities and characteristics that employers *may* take into account in making employment decisions. The converse, therefore, of 'for cause' legislation, Title VII eliminates certain bases for distinguishing among employees while otherwise preserving employers' freedom of choice." (footnotes omitted)), *superseded by statute*, Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071.

28 San Stonefield, *Non-Determinative Discrimination, Mixed Motives, and the Inner Boundary of Discrimination Law*, 35 BUFF. L. REV. 85, 113 (1986).

29 411 U.S. 792.

30 *Id.* at 802–04 ("The complainant in a Title VII trial must carry the initial burden under the statute of establishing a prima facie case of racial discrimination. This may be done by showing (i) that he 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

a former aerospace manufacturing plant employee who, in response to his discharge, commenced acts of civil disobedience targeted at his former plant.[31] When the plant subsequently sought applicants for available mechanic positions for which Green was qualified, he applied but was rejected on the grounds that he had participated in unlawful civil disobedience.[32] Green claimed discrimination under Title VII on the basis of his race and his participation in protected civil rights activities.[33]

The Court's analysis stemmed from the parties' "opposing factual contentions": Green claimed he was rejected due to discrimination, while the employer claimed it justifiably declined to rehire Green because of his unlawful conduct against them, and not as a result of his race.[34] It is out of these competing factual scenarios, with an eye toward Title VII's fundamental goal,[35] that the Title VII pretext framework arose.

The Supreme Court afforded Green the opportunity to demonstrate that McDonnell's stated rationale was false––a pretextual assertion disguising discriminatory motivation.[36] Including this rebuttal opportunity for a Title VII plaintiff acknowledges that an employer's stated rationale for taking the complained-of action is often a subjective judgment.[37] Neither Green, nor the Court, could therefore truly know McDonnell's full rationale for declining to rehire Green––the decision-

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continued to seek applicants from persons of complainant's qualifications. . . . The burden then must shift to the employer to articulate some legitimate, nondiscriminatory reason for the employee's rejection. . . . [B]ut the inquiry must not end here. . . . [R]espondent must . . . be afforded a fair opportunity to show that petitioner's stated reason for respondent's rejection was in fact pretext.").

31 *Id.* at 795–96 (Green participated in a "stall-in" designed to create a traffic jam to block access to the plant, and had knowledge of a "lock-in" whereby plant exits were padlocked to prevent egress, though Green's actual involvement in the "lock-in" is disputed.).

32 *Id.* at 796.

33 *Id.*

34 *Id.* at 801.

35 *Id.* at 806 ("Petitioner assertedly rejected respondent for unlawful conduct against it and, in the absence of proof of pretext or discriminatory application of such a reason, this cannot be thought the kind of 'artificial, arbitrary, and unnecessary barriers to employment' which the Court found to be the intention of Congress to remove." (quoting Griggs v. Duke Power Co., 401 U.S. 424, 431 (1971))).

36 *Id.* at 804–05 ("Especially relevant to such a showing would be evidence that white employees involved in acts against petitioner of comparable seriousness to the 'stall-in' were nevertheless retained or rehired. . . . Other evidence that may be relevant to any showing of pretext includes facts as to the petitioner's treatment of respondent during his prior term of employment; petitioner's reaction, if any, to respondent's legitimate civil rights activities; and petitioner's general policy and practice with respect to minority employment. On the latter point, statistics as to petitioner's employment policy and practice may be helpful to a determination of whether petitioner's refusal to rehire respondent in this case conformed to a general pattern of discrimination against blacks." (footnote omitted)).

37 *Id.* at 803.

making process is a "black box."[38] This led the Court to root the pretext framework in the possibility that both legitimate and illegitimate reasons factored into McDonnell's decision.[39]

3. Pretext Causation

The *McDonnell Douglas* Court does not specify the causation standard the pretext framework requires.[40] That is, the Court does not specifically define what § 703(a)(1)'s "because of" standard means.[41] Nonetheless, Title VII jurisprudence has settled on requiring a plaintiff in pretext cases to demonstrate discrimination was the "but for" cause of an adverse employment action.[42] However, this "but for" standard can itself be redefined, leading to anomalous results at odds with the purposes of Title VII.[43]

This Note posits that a "motivating factor" causation requirement is a better approach in disparate treatment cases, more clearly reflective of the facts in *McDonnell Douglas*. The very notion of pretext––the chance to rule out the employer's explanation––presupposes the presence of both permissible and impermissible factors the employer could have considered in deciding whether to rehire Green.[44] Further, the evidence the Court considered relevant to demonstrating pretext––in particular statistical data—is neither exclusively, nor even primarily, directed at the particular employment decision at issue, but instead speaks to the employer's broader practices.[45] It is fair to say the Court's development of the pretext framework implicitly recognizes employment decisions stem from varying combinations of both legitimate and illegitimate motives, even if determining an employer's motivation remained an either/or choice prior to the Court's ruling in *Price Waterhouse*.[46]

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38 Charles A. Sullivan, *Tortifying Employment Discrimination*, 92 B.U. L. REV. 1431, 1481 (2012).

39 *McDonnell Douglas*, 411 U.S. at 804 ("Title VII does not . . . permit petitioner to use respondent's conduct as a pretext for the sort of discrimination prohibited by § 703(a)(1)."). The presence of both legitimate and discriminatory reasons for an adverse employment decision is the heart of mixed-motive liability. *See infra* Part I.C.

40 Kaminshine, *supra* note 3, at 17–18.

41 *Id.*

42 *Id.* at 18 ("In the battle between two competing explanations (one lawful, the other not), the plaintiff prevails based on proof that the employer's reason is untrue, leaving the discriminatory reason as the one left standing, and thus making it at least a but-for factor for the employment action.").

43 *See infra* Part II.A.2–3.

44 *Supra* note 39.

45 *Supra* note 36.

46 Indeed, scholars have concluded that under the *McDonnell Douglas* framework nearly all disparate treatment cases, save for those where an employer fails to offer a nondiscriminatory

C. *Mixed-Motive Theory*

Mixed-motive theory is defined by coexisting legitimate and discriminatory motives behind an adverse employment action.[47] The critical question for mixed-motive theory, as outlined in this Section's examination of its common law origins, congressional codification, and subsequent interpretation by the Court, is whether Title VII's motivating factor liability standard should be applied to all disparate treatment cases, thereby supplanting the traditional *McDonnell Douglas* pretext standard. Based on legislative history, and the Supreme Court's recent decision in *Staub v. Memorial Hospital*, this Note argues it should.

1. *Price Waterhouse*

The origin of Title VII's mixed-motive liability rubric and the motivating factor causation standard—as contrasted with the *McDonnell Douglas* pretext framework—is *Price Waterhouse*. *Price Waterhouse v. Hopkins*[48] was a Title VII sex discrimination suit stemming from an accounting firm's failure to promote one of its female senior managers to partnership when she was a candidate in 1982.[49] Though not rejected outright for the position, Hopkins's candidacy was placed on hold for reconsideration the following year due to seemingly universally perceived shortcomings in her interpersonal skills that contributed to her poor relationship with Price Waterhouse staff.[50] However, evidence was also presented that many partners' opinions of Hopkins's temperament were informed by underlying sex-based stereotypes regarding a woman's role and appearance in the workplace.[51] The Supreme Court heard the case to determine the

reason for the employment decision, are in fact mixed-motive cases. T.L. Nagy, *The Fall of the False Dichotomy: The Effect of* Desert Palace v. Costa *on Summary Judgment in Title VII Discrimination Cases*, 46 S. TEX. L. REV. 137, 157 (2004).

47 Mark S. Brodin, *The Standard of Causation in the Mixed-Motive Title VII Action: A Social Policy Perspective*, 82 COLUM. L. REV. 292, 293 (1982).

48 490 U.S. 228 (1989), *superseded by statute*, Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071.

49 *Id.* at 231 (plurality opinion).

50 *Id.* at 234–35 ("Both [s]upporters and opponents of her candidacy . . . indicated that she was sometimes overly aggressive, unduly harsh, difficult to work with and impatient with staff." (first alteration in original) (internal quotation marks omitted)).

51 *Id.* at 235. In partners' comments concerning Hopkins's candidacy, Hopkins was described as "macho," was told she "overcompensated for being a woman," needed to "take a course at charm school" and should avoid swearing "because it's a lady using foul language." Hopkins was described as having matured from being "somewhat masculine" to a "much more appealing lady ptr candidate," and was expressly told that to "improve her chances for partnership . . . Hopkins should 'walk more femininely, talk more femininely, dress more

parties' burdens of proof[52] upon a showing that the firm's failure to promote Hopkins resulted from both a legitimate emphasis on Hopkins's poor interpersonal skills, and sex discrimination, as evidenced by partners' stereotype-driven, comments.[53]

The case generated a series of opinions, with the Justices employing over twenty distinct formulas in attempting to define what it means to cause an adverse employment action in a case featuring both legitimate and discriminatory motives.[54] Significantly, Justice Brennan, writing for the plurality, stated that "because of," as used in Title VII, is not equivalent to "but for" causation,[55] noting that in a mixed-motives case, the employee is not required to demonstrate "but for" causation to establish employer liability.[56] Instead, Justice Brennan found that where consideration of a protected characteristic played a motivating factor in an employment decision, employers can nonetheless avoid liability by showing by a preponderance of the evidence that the employee would have faced the same outcome had discrimination played no role in the decision.[57] Justice White, concurring in the judgment, found that an employee had to prove discrimination played a "motivating factor," defined as a "substantial factor."[58] Ultimately, the Court held for the

femininely, wear make-up, have her hair styled, and wear jewelry.'" *Id.* (internal quotation marks omitted). More general comments regarding female partners were also noted, with one partner indicating, he "could not consider any woman seriously as a partnership candidate and believed that women were not even capable of functioning as senior managers." *Id.* at 236 (internal quotation marks omitted).

52 *Id.* at 232.

53 *Id.* at 236–37.

54 Martin J. Katz, *The Fundamental Incoherence of Title VII: Making Sense of Causation in Disparate Treatment Law*, 94 GEO. L.J. 489, 491 (2006). Katz compiles many of the *Price Waterhouse* Court's causation formulations in a footnote in his article:

> [S]ome of the formulations used or cited by the plurality [include] . . . "a discernible factor"; "a significant factor"; "take [a protected characteristic] into account"; "considered"; "relied upon"; "same decision"; "a motivating part"; "make a difference"; "a part"; "a factor"; "affect"; used an illegitimate criterion"; "a motivating factor"; "a substantial factor"; a "but-for" cause; "one of [the] reasons"; "a motivating role"; "a role[.]" . . . [A]dditional formulations used or cited by the concurrences [include] . . . "substantial weight"; "substantially infected"; "substantial reliance"; "input into the decisional process"; "given great weight"; "a significant role"; "a major reason"; "infected the decision"; rejecting "mere discriminatory thoughts" standard; rejecting "tainted by awareness" standard.

Id. at 491 n.5 (parentheticals omitted) (citations omitted).

55 *Price Waterhouse*, 490 U.S. at 240 ("To construe the words 'because of' as colloquial shorthand for 'but-for causation,' as does Price Waterhouse, is to misunderstand them.").

56 *Id.* at 240 n.6. In stating an employee need not demonstrate "but for" causation in a mixed-motive case, Justice Brennan distinguished the pretext step of the *McDonnell Douglas* framework where a "but for" showing would impose liability on the employer.

57 *Id.* at 258. In reaching his finding, Justice Brennan characterized the plaintiff as retaining the burden of persuasion for showing discrimination played a motivating factor in the employment decision, and upon such a showing, the employer is entitled to an affirmative defense. *Id.* at 246.

58 *Id.* at 259 (White, J., concurring).

employer, finding a preponderance, rather than clear and convincing, to be the appropriate evidentiary standard required for an employer to prove it would have taken the same employment action even absent a discriminatory motive.[59]

Justice O'Connor's concurrence, however, became the Court's binding standard.[60] In contrast to Justice Brennan, Justice O'Connor found that in the context of a mixed-motives case, "because of" as used in Title VII does in fact mean "but for."[61] Justice O'Connor's holding took into account differences in the nature of an employee's evidence of discrimination. To shift the evidentiary burden to the employer, an employee with direct evidence of discrimination "must show . . . that an illegitimate criterion was a substantial factor in the decision."[62] Justice O'Connor further defined "substantial factor"—her interpretation of Title VIIs "because of" language––as the "but for" cause of the employment action.[63] The employer must then demonstrate by a preponderance of the evidence that even without discriminatory considerations, legitimate reasons merited the same employment decision.[64] However, where an employee lacks direct evidence and discrimination is instead inferred,[65] the employer's burden becomes only one of production: The articulation of a legitimate rationale for its adverse employment decision,[66] which the employee then has the burden of persuasion to rebut.[67]

For purposes of this Note, the significance of *Price Waterhouse* is the recognition of a second line of disparate treatment liability with a lower causation threshold—motivating factor—than the causation

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59 *Id.* at 258.

60 *See* Gross v. FBL Fin. Servs., Inc., 557 U.S. 167, 188–89 (2009) ("[W]hen a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, 'the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds.'" (quoting Marks v. United States, 430 U.S. 188, 193 (1977))).

61 *Price Waterhouse,* 490 U.S. at 262–63 (O'Connor, J., concurring) ("The legislative history of Title VII bears out what its plain language suggests: a substantive violation of the statute only occurs when consideration of an illegitimate criterion is the 'but-for' cause of an adverse employment action. . . . I disagree with the plurality's dictum that the words 'because of' do not mean 'but-for' causation; manifestly they do.").

62 *Id.* at 276. Direct evidence of discrimination would include discriminatory statements like those made regarding Hopkins. *Supra* note 51.

63 *Id.* at 265.

64 *Id.* at 276–77.

65 For examples of circumstantial evidence permitting the fact finder to infer discrimination, see Van Detta, *supra* note 9, at 115.

66 *Price Waterhouse*, 490 U.S. at 270–71 (O'Connor, J., concurring).

67 *Id.* at 278–79 ("Once all the evidence has been received, the court should determine whether the *McDonnell Douglas* or *Price Waterhouse* framework properly applies to the evidence before it. If the plaintiff has failed to satisfy the *Price Waterhouse* threshold, the case should be decided under the principles enunciated in *McDonnell Douglas* and *Burdine*, with the plaintiff bearing the burden of persuasion on the ultimate issue whether the employment action was taken because of discrimination.").

standard of the original *McDonnell Douglas* pretext framework. Congress embraced this new mixed-motive rubric when amending the Civil Rights Act in 1991.

2. The Civil Rights Act of 1991

Broadly speaking, Congress drafted and passed the Civil Rights Act of 1991[68] to expand employee protections for employer discrimination.[69] In part, this was a reaction to a series of Supreme Court decisions, including *Price Waterhouse*, that in Congress's view restricted "the scope and effectiveness of [the civil rights] laws."[70]

a. The New "Motivating Factor" Provision

Among the major provisions enacted, § 703(m) partially codified the Supreme Court's plurality holding in *Price Waterhouse* that a plaintiff could establish liability by demonstrating an employer's consideration of a protected characteristic was a motivating factor in an adverse employment decision.[71] To reach this threshold, an employee need only show his protected status played some causal role in the employer's decision.[72] In balancing this lowered motivating factor standard, Congress limited employees' remedies upon such a showing to declaratory and injunctive relief and attorney's fees where an employer

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68 For a history of the passage of the Act, see Nicole L. Gueron, Note, *An Idea Whose Time Has Come: A Comparative Procedural History of the Civil Rights Acts of 1960, 1964, and 1991*, 104 YALE L.J. 1201 (1995).

69 Among the congressional findings memorialized in the 1991 Act was that "legislation is necessary to provide additional protections against unlawful discrimination in employment." Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071.

70 *Id.* (Congress stated up front that the 1991 Act was designed "to respond to recent decisions of the Supreme Court by expanding the scope of relevant civil rights statutes in order to provide adequate protection to victims of discrimination."); *see also* Gross v. FBL Fin. Servs., Inc., 557 U.S. 167, 185 (2009) (Stevens, J., dissenting); LARSON, *supra* note 19, § 1.07. In extending Title VII to new contexts, lawmakers reaffirmed the original remedial purposes of the Act. *See* Statement of President George Bush Upon Signing S. 1745, *reprinted in* 1991 U.S.C.C.A.N. 768 ("[T]he Civil Rights Act of 1991 . . . strengthens the barriers and sanctions against employment discrimination. Employment discrimination law should seek to prevent improper conduct and foster the speedy resolution of conflicts. This Act promotes the goals of ridding the workplace of discrimination on the basis of race, color, sex, religion, national origin, and disability; ensuring that employers can hire on the basis of merit and ability without the fear of unwarranted litigation; and ensuring that aggrieved parties have effective remedies." (internal quotation marks omitted)).

71 Civil Rights Act of 1991 § 107 (codified at 42 U.S.C. § 2000e-2(m) (2012)) ("Impermissible consideration of race, color, religion, sex, or national origin in employment practices . . . . [A]n unlawful employment practice is established when the complaining party demonstrates that race, color, religion, sex, or national origin was a motivating factor for any employment practice, even though other factors also motivated the practice.").

72 Van Detta, *supra* note 9, at 76–77.

demonstrates that absent its impermissible consideration of a protected trait, it would nonetheless have taken the same employment action.[73]

b. Congressional Considerations and Motivating Factor Causation

The legislative history of the mixed-motive provision indicates Congress reaffirmed its paramount goal of excising discrimination from employment practices, while simultaneously balancing employers' legitimate interest in controlling the composition of their workforces.[74] On the employee side, § 706(m)'s motivating factor standard appears broadly protective of employees by allowing the evidentiary burden to shift to employers upon a minimal showing of discriminatory influence over an employment decision.[75] However, to protect employers from unmeritorious claims under this relaxed standard, Congress distinguished between classes of discriminatory conduct, explicitly stating "an employer's actual discriminatory actions, rather than mere discriminatory thoughts" will establish a Title VII violation.[76] In so shielding employers, Congress required a link—a "nexus"—between discrimination and the employment decision.[77] Congress conceived of this "nexus" as a plaintiff demonstrating discrimination is "a contributing factor to an employment decision."[78] Additional employer

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73 42 U.S.C. § 2000e-5(g)(2)(B) ("On a claim in which an individual proves a violation under § 2000e-2(m) of this title and a respondent demonstrates that the respondent would have taken the same action in the absence of the impermissible motivating factor, the court—(i) may grant declaratory relief, injunctive relief . . . attorney's fees and costs . . . ; and (ii) shall not award damages or issue an order requiring any admission, reinstatement, hiring, promotion, or payment."); *see also* Van Detta, *supra* note 9.

74 H.R. REP. NO. 102-40 (II), at 694–95 (1991) ("In *Price Waterhouse v. Hopkins*, the Supreme Court ruled that an employment decision motivated in part by prejudice does not violate Title VII if the employer can show after the fact that the same decision would have been made for nondiscriminatory reasons. . . . The [Civil Rights Act of 1991] responds to *Price Waterhouse* by reaffirming that any reliance on prejudice in making employment decisions is illegal. At the same time, the Act makes clear that, in considering the appropriate relief for such discrimination, a court shall not order the hiring, retention or promoting of a person not qualified for the position." (citation omitted)).

75 *See id.* at 711 (Congress recognized the plaintiff-friendly nature of § 703(m)'s codification of the *Price Waterhouse* motivating factor standard: "The impact of [*Price Waterhouse*] is particularly profound because the factual situation at issue . . . is a common one. . . . [V]irtually every Title VII disparate treatment case will to some degree entail multiple motives." (internal quotation marks omitted)).

76 *Id.*

77 *Id.* (To establish liability under the new provision, "plaintiff [must show] a nexus between the [discriminatory] conduct or statements and the employment decision at issue.").

78 *Id.* The "contributing factor" standard was changed to "motivating factor" in the final version of the statute. In legislating the mixed-motive approach, Congress contemplated situations where, though employer discrimination is shown, liability does not automatically result:

> [T]he Committee intends to restore the rule . . . that any discrimination that is actually shown to play a role in a contested employment decision may be the subject of liability. . . . [I]solated or stray remarks not shown, under the standards generally

protections are found in the Act's remedies provision, which ties employee redress to an employer's demonstration of a complete or partial defense.[79]

Though advancing the goal of eliminating discrimination in the employment context by permitting a lower, motivating factor liability threshold for plaintiffs, congressional balancing of parties' fundamental interests pays substantial deference to employer concerns. The 1991 Act protects employers' actions by precluding liability where congruence between discriminatory conduct and the adverse employment action is not shown, and permits employers to demonstrate they would have legitimately taken the adverse employment action where congruence is shown.

Because the legislative intent and considerations informing Title VII's motivating factor standard largely correspond to those behind the original Civil Rights Act, the motivating factor standard is ripe for application to all Title VII disparate treatment cases.[80] In light of the Supreme Court's interpretation of the 1991 amendment in *Desert Palace*, many commentators agree.[81]

3. *Desert Palace*

To reconcile Justice O'Connor's evidentiary requirements from *Price Waterhouse* with the 1991 Civil Rights Act's prescription for mixed-motive cases, the Supreme Court took up the question of whether direct evidence of discrimination was required for a Title VII plaintiff to obtain a mixed-motive jury instruction in 2003's *Desert*

> applied for weighing the sufficiency of evidence, to have contributed to the employment decision at issue are not alone sufficient.

Id.

79 *Id.* at 711–12 ("[W]here two independent contributing factors, one discriminatory and the other nondiscriminatory, were present, the remedies available to the complaining party will be limited where the employer establishes that it would have made the same adverse employment decision even absent the discriminatory contributing factor. Where the employer makes such a showing, the employee would be precluded from receiving court-ordered hiring, reinstatement, promotion, or back pay. However, the presence of a contributing discriminatory factor would still establish a Title VII violation, and a court could order other appropriate relief, including injunctive or declaratory relief, compensatory and punitive damages where appropriate, and attorney's fees."); *see also* Van Detta, *supra* note 9.

80 *See infra* Part I.B.1.

81 *See* Henry L. Chambers, Jr., *The Effect of Eliminating Distinctions Among Title VII Disparate Treatment Cases*, 57 SMU L. REV. 83, 102–03 (2004); William R. Corbett, McDonnell Douglas*, 1973–2003: May You Rest in Peace?*, 6 U. PA. J. LAB. & EMP. L. 199 (2003); Kaminshine, *supra* note 3, at 32; Nagy, *supra* note 46, at 138; Van Detta, *supra* note 9; Michael J. Zimmer, *The Emerging Uniform Structure of Disparate Treatment Discrimination Litigation*, 30 GA. L. REV. 563, 588 (1996); Jaclyn Borcherding, Note, *Deserting* McDonnell Douglas*?* Desert Palace, Inc. v. Costa, 57 BAYLOR L. REV. 243, 262 (2005). *But see* Scott & Chapman, *supra* note 9, at 405.

Palace, Inc. v. Costa.[82] However, for our purposes, the case is significant for leaving open the question of when mixed-motive instructions can be applied outside of a mixed-motive case.[83] Catherine Costa, a warehouse employee at Caesar's Palace Hotel & Casino with a history of disciplinary issues, engaged in a physical altercation with a male coworker and was subsequently fired, while the male coworker received a five-day suspension.[84] Costa brought suit claiming sex discrimination in the conditions of her employment and termination.[85] Two of the trial court's jury instructions concerned mixed-motives.[86] Desert Palace objected to one on the grounds that mixed-motive instructions required direct evidence, which Costa failed to show.[87]

Though Desert Palace's objection was consistent with Justice O'Connor's heightened evidentiary requirement announced in *Price Waterhouse*, it failed to account for Congress's 1991 changes to Title VII and the motivating factor standard set forth for mixed-motive cases.[88] Writing for the Court, Justice Thomas's statutory construction analysis focused on the text of 42 U.S.C. § 2000e-2(m)—the mixed-motive provision—finding it to not require direct evidence.[89] Justice Thomas

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82 539 U.S. 90, 92 (2003).

83 *Id.* at 92 n.1.

84 *Id.* at 95–96.

85 *Id.* at 96.

86 *Id.* at 96–97. The jury instruction at issue stated:

> [T]he plaintiff has the burden of proving . . . by a preponderance of the evidence that she suffered adverse work conditions and that her sex was a motivating factor in any such work conditions imposed upon her. . . . [Further, y]ou have heard evidence that the defendant's treatment of the plaintiff was motivated by the plaintiff's sex and also by other lawful reasons. If you find that the plaintiff's sex was a motivating factor in the defendant's treatment of the plaintiff, the plaintiff is entitled to your verdict, even if you find that the defendant's conduct was also motivated by a lawful reason. However, if you find that the defendant's treatment of the plaintiff was motivated by both gender and lawful reasons, you must decide whether the plaintiff is entitled to damages. The plaintiff is entitled to damages unless the defendant proves by a preponderance of the evidence that the defendant would have treated plaintiff similarly even if the plaintiff's gender had played no role in the employment decision.

Id. (first alteration in original) (internal quotation marks omitted).

87 *Id.* at 97.

88 Kaminshine, *supra* note 3, at 31.

89 *Desert Palace*, 539 U.S. at 98–99. Justice Thomas found 42 U.S.C. § 2000e-2(m) to "unambiguously . . . [not] require . . . a plaintiff make a heightened showing through direct evidence" in order to obtain mixed-motive instructions. *Id.* Justice Thomas based this finding on Congress defining "demonstrates" in Title VII to mean "meet[ing] the burdens of production and persuasion," yet declining to specify the evidence necessary to meet the standard, while specifically "imposing heightened proof requirements in other circumstances, including in other provisions of Title 42." *Id.* at 99 (internal quotation marks omitted). The provision's silence on the question of the type of evidence required led the Court to adhere to "the [c]onventional rul[e] of civil litigation [that] generally appl[ies] in Title VII cases. . . . requir[ing] a plaintiff to prove his case by a preponderance of the evidence . . . using direct or circumstantial evidence." *Id.* at 99 (alterations in original) (citations omitted) (internal quotation marks omitted).

went further, affirmatively endorsing the "utility" and "adequacy" of circumstantial evidence in discrimination cases based on its equivalent treatment in criminal jury instructions.[90]

After *Desert Palace*, a Title VII plaintiff need only show "by a preponderance of the evidence, that race, color, religion, sex or national origin was a motivating factor for any employment practice."[91] Critically, the Court declined to rule on whether, and under what circumstances, mixed-motive instructions could be applied outside of a mixed-motive case.[92]

This Note posits that the Supreme Court's 2011 *Staub v. Memorial Hospital* decision directly answers this open question.[93] This Note will propose that based on *Staub*, currently bifurcated disparate treatment liability should be harmonized under a motivating factor liability standard to simplify Title VII jurisprudence and provide clear guidelines for juries.

D. *Jury Instructions*

The 1991 Act introduced jury trials for all disparate treatment cases,[94] and jury instructions are often the place problems with the current Title VII disparate treatment regime manifest.[95] Through jury instructions, abstract statutory and common law standards, developed by lawmakers, lawyers and judges, are applied to often complex and factually unique situations, with discrete consequences for the parties hanging in the balance. As such, simplicity and clarity in jury instructions is a critical component of any trial.[96] In the words of Judge Posner, "[j]ury instructions should turn the language of statutes and judicial opinions, which is generally not drafted with a lay readership in mind, into language that poses concrete decisions for lay jurors to

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90 *Id.* at 100.

91 *Id.* at 101 (internal quotation marks omitted).

92 *Id.* at 94 n.1 ("This case does not require us to decide when, if ever, § 107 applies outside of the mixed-motive context."). Section 107 of the 1991 Civil Rights Act is codified at 42 U.S.C. § 2000e-2(m). Civil Rights Act of 1991, Pub. L. No. 102-166, § 107, 105 Stat. 1071, 1075.

93 *Infra* Part III.A.

94 Kaminshine, *supra* note 3, at 29.

95 *See* Vance v. Ball State Univ., 133 S. Ct. 2434, 2451 n.13 (2013) (collecting cases); Karen A. Haase, *Mixed Metaphors: Model Civil Jury Instructions for Title VII Disparate Treatment Claims*, 76 NEB. L. REV. 900, 911 (1997); Van Detta, *supra* note 9, at 121.

96 Richard T. Seymour, *Evidence Issues and Jury Instructions in Employment* Cases, SL061 A.L.I.-A.B.A. 603, 610 (2006) ("Instructions should use language that laypersons can understand—instructions should be concise, concrete, and simple, be in the active voice, avoid negatives and double-negatives, and be organized in logical sequence." (citing ADMIN. OFFICE OF THE U.S. COURTS, MANUAL FOR COMPLEX LITIGATION 154 (4th ed. 2004))).

make."[97] This is particularly true in Title VII cases given the array of causation standards courts apply, and the elusive and seemingly interchangeable meaning of each.[98]

Often causation standards are inserted in jury instructions by their legal monikers, and are left to the jury to define and interpret.[99] This approach leads to jury confusion, and results in prejudice to the parties, and to appellate litigation.[100] Instead, causation standards should be explicitly illustrated for juries using straightforward language, elements, and simple narratives that provide jurors with a sense of situational knowledge sufficient to render verdicts consistent with both the law and the facts of the case, and with a minimum of extraneous analysis.[101]

Part II of this Note will illustrate instances of courts improperly instructing juries by attempting to cabin employment discrimination claims within either the pretext or mixed-motive paradigm.

II. ANALYSIS

Having set forth the foundation of Title VII's dual liability paradigms, Part II will explore and reject a key statutory argument against expanding motivating factor liability to all disparate treatment cases, will illustrate lower courts' problems applying the current framework as exemplified by the Seventh Circuit and the D.C. Circuit, and will identify a potential solution rooted in *Staub v. Memorial Hospital*.

A. *Two Liability Paradigms: Problems in Application*

The key to providing jury instructions that clearly convey the state of employment antidiscrimination law allowing jurors to meaningfully deliberate the facts of a case, is squaring Title VII's original "because of" causation term, and its various common law interpretations, with the 1991 Act's motivating factor provision. In light of *Staub*, this Note endorses the approach that motivating factor causation applies across Title VII disparate treatment.

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97 *Id.* at 609–10 (citing Boyd v. Ill. State Police, 384 F.3d 888, 899 (7th Cir. 2004) (Posner, J., concurring), where Judge Posner writes separately regarding the need for better "motivating factor" instructions even when they correctly state the law: "What the jury needs to know can, and should, be expressed in simple language." (internal quotation marks omitted)).

98 George Rutherglen, *Reconsidering Burdens of Proof: Ideology, Evidence, and Intent in Individual Claims of Employment Discrimination*, 1 VA. J. SOC. POL'Y & L. 43, 65 (1993).

99 *See infra* Part II.C.

100 *See* Haase, *supra* note 95.

101 *See Boyd*, 384 F.3d at 898–901 (Posner, J., concurring).

1. Title VII: Initial Statutory Interpretation

A major hurdle to across-the-board motivating factor liability remains the textual discrepancy between Title VII §§ 2000e-2(m) and 2000e-2(a). In amending Title VII to include mixed-motive liability, Congress could also have amended § 2000e-2(a) to include parallel "motivating factor" language, and Congress's failure to do so, the argument goes, implies an intention not just to develop two distinct liability paradigms, but to preclude application of "motivating factor" causation to traditional *McDonnell Douglas* pretext cases.[102]

However, this drafting distinction is explained by viewing § 2000e-2(m) as primarily an affirmative defense—an opportunity for an employer to demonstrate that notwithstanding established discrimination, it would still have fired, demoted, or passed-over the complaining employee.[103] If this legitimate rationale is established, the employer remains liable for discrimination, but business prerogatives are protected, and the employee is precluded from receiving damages or specific performance––judicial remedies that materially invade an employer's private operations.[104] In contrast, if an employer does not proffer, or fails to establish, a legitimate rationale that would justify an otherwise discriminatory employment action, the employee may obtain damages or equitable relief including reinstatement.[105] In other words, with the 1991 Act, Congress calibrated the permissible level of judicial interference with business conduct in correlation with the degree of impact employer discrimination has on an adverse employment action.

In providing two tiers of remedies, Congress spoke to the overriding twin considerations of eradiating and deterring discrimination in the employment setting, while simultaneously deferring to private personnel decisions.[106] However, this does not mean that in so amending Title VII, Congress intended to further protect employers by establishing different thresholds for plaintiffs to initially establish discrimination based on the type of remedies plaintiffs seek.[107] Such a reading would imbalance Title VII's principal considerations in

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102 *See, e.g.*, Barnhart v. Sigmon Coal Co., 534 U.S. 438, 452 (2002) ("[W]hen Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." (internal quotation marks omitted)). *See generally* Deborah A. Widiss, *Undermining Congressional Overrides: The Hydra Problem in Statutory Interpretation*, 90 TEX. L. REV. 859 (2012).

103 *See, e.g.*, Sarah Keates, Note, *Surviving Summary Judgment in Mixed-Motive Cases—*White v. Baxter Healthcare Corporation, 78 U. CIN. L. REV. 785, 789 (2009).

104 42 U.S.C. § 2000e-5(g)(2)(B)(ii) (2012).

105 42 U.S.C. § 2000e-5(g)(1).

106 *See supra* Part I.A–B.

107 Van Detta, *supra* note 9, at 127–28.

favor of employer protections at the expense of potential victims of discrimination—an inference inconsistent with the general goals of Title VII, which at bottom remains an antidiscrimination statute.[108] In sum, Title VII's internal textual differences need not preclude expansion of motivating factor liability.

2. The Seventh Circuit

Because *Staub v. Proctor Hospital*—the basis for this Note's proposal—arose from the Seventh Circuit, it is particularly relevant to examine the Circuit's handling of traditional disparate treatment claims. Like the Supreme Court in *Desert Palace*, the Seventh Circuit has declined to rule on when mixed-motive instructions are warranted.[109] *Lewis v. City of Chicago Police Department*[110] is illustrative of the circuit's hesitancy in abandoning the Title VII pretext/mixed-motive dichotomy.

In 2002 Plaintiff Donna Lewis, a Chicago police officer in the city's tactical unit, applied for, and was denied, a position with a special detail assembled at the request of the Washington D.C. police department in connection with an International Monetary Fund (IMF) meeting taking place in the Capitol.[111] The Chicago police department limited applicants for the IMF detail to officers from specific units,[112] and a memo circulated concerning the detail indicated that hotel room considerations precluded assignment of one, or any other odd number of female officers, to the detail.[113] Chief James Maurer later clarified at trial that the policy outlined in the memo was intended to keep participation to an even number of officers, whether male or female.[114]

Lieutenant Terrence Williams, Lewis's supervisor, removed Lewis's name from the applicants list.[115] Lewis contended Williams denied her

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108 *Id.* at 124.

109 *See supra* note 92.

110 590 F.3d 427 (7th Cir. 2009).

111 *Id.* at 431–32.

112 *Id.* at 431 (Participation was restricted to members of Chicago's "[tactical], Gang or Special Operations . . . units."). Lewis was an officer in the tactical unit. *Id.*

113 *Id.* (The memo addressing the issue was prepared by Chief James Maurer, and stated, "[b]ecause of hotel accommodations, a lone female officer will not be sent since there are two persons to each room. Therefore, recommend a minimum of two female officers." (alteration in original) (internal quotation marks omitted)).

114 *Id.* at 431–32 ("Chief Maurer testified that even though the memo only referred to females, the actual policy demanded that individual officers could only be sent if an even number of that person's gender was going, regardless of whether the gender was male or female.").

115 *Id.* at 432.

consideration in part because she was female.[116] Williams denied Lewis's discriminatory allegation and claimed Lewis was removed because no other female officers from her district applied for the detail.[117] Lewis argued that Williams's explanation was pretextual, evidenced by Williams's comments, the lack of effort in finding Lewis a potential female roommate, and the ultimate uneven distribution of hotel rooms.[118] Lewis subsequently filed an internal grievance, which she alleged triggered a series of retaliatory acts by Williams.[119]

Lewis's appeal focused on improper jury instructions[120] issued by the district court on remand following the Seventh Circuit's reversal of the district court's summary judgment ruling against Lewis's discrimination and retaliation claims.[121] The Seventh Circuit began by stating, "[t]his Court has yet to decide when it is appropriate to apply a

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116 *Id.* ("According to Lewis, Williams told her, 'I took your name off the list because you're female' and 'the trip was going to be dangerous and a working trip and that you will thank me for it later.'").

117 *Id.*; *see also* Lewis v. City of Chicago, 496 F.3d 645, 649 (7th Cir. 2007) ("The defendants' explanation is that Lewis's unit did not have another qualified female officer interested in going to Washington, D.C. Lieutenant Williams determined that Lewis was the 'odd woman out' and therefore removed her name from the list in conformance with Chief Maurer's memorandum.").

118 *Lewis*, 496 F.3d at 649; *supra* note 116.

119 *Lewis*, 496 F.3d at 649–50.

120 *Lewis*, 590 F.3d at 433–41. Seventh Circuit Title VII pattern jury instructions are derived from *Gehring v. Case Corp.*, 43 F.3d 340 (7th Cir. 1994). *See* 7 MANUAL MODEL JURY INSTRUCTIONS (CIVIL CASES) FOR THE DISTRICT COURTS OF THE SEVENTH CIRCUIT—3 EMPLOYMENT DISCRIMINATION: TITLE VII, § 1981, ADEA, 3.01 cmt. b (2012) [hereinafter MANUAL MODEL JURY INSTRUCTIONS]. The Circuit's general employment discrimination instructions state:

> Plaintiff claims that he was [*adverse employment action*] by Defendant because of [*protected class*]. . . . To determine that Plaintiff was [*adverse employment action*] because of his [*protected class*], you must decide that Defendant would not have [*adverse employment action*] Plaintiff had he been [*outside protected class*] but everything else had been the same.

Id. (alterations in original). In addition, the Committee recommends a specific motivating factor instruction: "Plaintiff must prove by a preponderance of the evidence that his [*protected class*] . . . contributed to Defendant's decision." *Id.* (alterations in original). But the Committee also recommends a distinct mixed-motive instruction derived from the original *Gehring* model:

> Plaintiff must prove by a preponderance of the evidence that his [*protected class*] was a motivating factor in Defendant's decision to [*adverse employment action*] him. A motivating factor is something that contributed to Defendant's decision. If you find that Plaintiff has proved that his [*protected class*] contributed to Defendant's decision to [*adverse employment action*] him, you must then decide whether Defendant proved by a preponderance of the evidence that it would have [*adverse employment action*] him even if Plaintiff was not [*protected class*]. If so, you must enter a verdict for the Plaintiff but you may not award him damages.

Id. (alterations in original).

121 *Lewis*, 496 F.3d at 652–54.

motivating factor instruction."[122] The circuit's position on this issue directly tracks that of the Supreme Court in *Desert Palace*.[123] Judge Simon goes on to survey circuits' conflicting approaches to whether mixed-motive instructions apply in all disparate treatment cases.[124] However, the court declined to resolve the issue, finding that Lewis failed to preserve her objection to the District Court's exclusion of her proposed motivating factor instruction.[125] In addition, the court found that Lewis's proposed instruction and the one ultimately employed were "both essentially 'but for' instructions," and the exclusion of Lewis's motivating factor language did not affect her substantial rights.[126] Judge Simon thus declined to resolve when mixed-motive instructions should be applied in the Seventh Circuit.[127]

3. District Courts Within the Seventh Circuit

The uncertainty from the Seventh Circuit on when to apply mixed-motive instructions has led district courts to decide for themselves when to apply the 1991 Act's motivating factor standard. *Lupescu v. Napolitano*[128] from the Northern District of Illinois is illustrative, where

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122 *Lewis*, 590 F.3d at 438*; see also* MANUAL MODEL JURY INSTRUCTIONS, *supra* note 120, 3.01 cmt. c ("Without clear guidance in the circuit case law, the Committee cannot offer assistance in determining when a 'mixed motive' instruction is appropriate.").

123 *See supra* note 92.

124 *Lewis*, 590 F.3d at 437–38 ("Circuits are split as to whether to apply a mixed motive instruction in all Title VII cases . . . ."); *see also* MANUAL MODEL JURY INSTRUCTIONS, *supra* note 120, 3.01 cmt. b, stating,

> The Committee recognizes that other circuits' instructions employ the "motivating factor" language of *Desert Palace, Inc. v. Costa*, 539 U.S. 90, 94 (2003) in all Title VII cases. *See* EIGHTH CIRCUIT MODEL CIVIL JURY INSTRUCTIONS § 5.01 (2001) (essential element in all disparate treatment cases is proof that protected trait was "a motivating factor in defendant's decision"); NINTH CIRCUIT MODEL CIVIL JURY INSTRUCTIONS § 12.1 & Comment (1991 Act clarified that defendant is liable if plaintiff shows discrimination was "a motivating factor" regardless of whether the case is one of "pretext" or "mixed motives"); ELEVENTH CIRCUIT PATTERN JURY INSTRUCTIONS (CIVIL CASES) § 1.2.1 (2000) (plaintiff's burden under Title VII is to prove protected trait "was a substantial or motivating factor"); . . . . Two circuits have found that the "motivating factor" requirement applies only in mixed motive cases. *Watson v. Southeastern Penn. Transp. Auth.*, 207 F.3d 207, 214–220 (3rd Cir. 2000); *Fields v. New York State Office of Mental Retardation & Developmental Disabilities*, 115 F.3d 116, 121–124 (2d Cir. 1997).

125 *Lewis*, 590 F.3d at 438–39. Lewis initially proposed the following motivating factor instruction: "Plaintiff is not required to prove that her gender was the sole motivation for the decision. Rather, Plaintiff's gender was a motivating factor if Plaintiff's gender made a difference in the decision." *Id.* at 438.

126 *Id.* at 439.

127 *Id.* at 438.

128 No. 07 C 4821, 2011 WL 1882448, at *1–*7 (N.D. Ill. May 13, 2011).

the court seemingly turns a motivating factor standard into the default for all Title VII cases.[129]

Plaintiff Norman Lupsecu brought suit under Title VII claiming racial discrimination in his firing by the Transportation Security Administration's (TSA), and proposed a "motivating factor" jury instruction.[130] The TSA proposed a "because of" instruction based directly off of Pattern Jury Instruction 3.01.[131] Lupescu opposed the "because of" instruction arguing it would improperly elevate his causation standard.[132] The district court agreed.[133] The court surveyed a series of Seventh Circuit decisions, finding both traditional and mixed-motive instructions approved by the circuit,[134] but found unresolved the question of when to apply each.[135]

Significantly, the district court highlighted the fact that the Seventh Circuit in *Gehring*[136]––the decision forming the basis for the circuit's Title VII Pattern Jury Instructions––believed its instruction "was sufficient to address mixed motive cases."[137] Similarly, Lupescu's argument for a motivating factor instruction relied on an implication that no true difference exists between traditional "because of" or "but for" Title VII cases, and "mixed-motive" cases—that is—that "all Title VII cases are mixed-motive cases."[138]

The district court noted the Seventh Circuit has approved mixed-motive instructions in various situations including where plaintiff did

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129 *See infra* note 144.

130 *Lupescu*, 2011 WL 1882448, at *1. Lupescu argued a "motivating factor" causation instruction was consistent with both the text of Title VII and the Supreme Court's decision in *Gross v. FBL Financial Services, Inc.*, 557 U.S. 167 (2009), where the Court declined to extend the "motivating factor" standard from Title VII to the ADEA. *Id.* at 174.

131 *Lupescu*, 2011 WL 1882448, at *1–*2; *see also supra* note 120.

132 *Lupescu*, 2011 WL 1882448, at *2 ("Lupescu objects to this instruction, arguing that . . . the 'because of' language would confuse the jury by 'suggest[ing] that it could only find for [Lupescu] if he proved that discrimination was the sole or primary reason he was fired.'" (second and third alterations in original)).

133 *Id.* at *7.

134 *Id.* at *4–*5.

135 *Id.* at *5.

136 Gehring v. Case Corp., 43 F.3d 340 (7th Cir. 1994).

137 *Lupescu*, 2011 WL 1882448, at *3 ("In *Gehring,* the jury asked the district judge what it meant for age to be the 'determining factor': did it mean that it was 'the only determining factor' or one of several determining factors. The jury essentially wanted to know if there could be more than one motivating factor or if age had to be the only factor that motivated the employer to fire the employee. The *Gehring* court recommended an instruction that reads, 'You must decide whether the employer would have fired [demoted, laid off] the employee if the employee had been younger than 40 and everything else had remained the same.' The *Gehring* court believed that this instruction 'tells the jury what to do if it finds that the employer took more than one thing into account.'" (alteration in original) (citations omitted)). This instruction mirrors the Seventh Circuit's Pattern Jury Instruction 3.01. *See supra* note 120.

138 *Lupescu*, 2011 WL 1882448, at *5. Secondarily, Lupescu argued that Title VII is clear, given the "motivating factor" standard codified in § 2000e-2(m), that plaintiff need not show consideration of a prohibited criterion is a "but for" cause of an adverse employment action. *Id.*

not prove a mixed-motive theory and the employer failed to prove it had legitimate reasons for termination,[139] and where the employer presents a mixed-motives defense.[140] But mixed-motive instructions were not appropriate where the employer argues the sole rationale for an adverse employment decision was non-discriminatory.[141] However, despite the TSA declining to concede Lupescu's race was a factor in its termination decision—"going for broke" according to Judge Posner,[142] just as the city of Chicago did in *Lewis*––the district court took the opposite tack from the Seventh Circuit in *Lewis*, and issued a mixed-motive instruction.[143] The district court thus appeared to rule that a mixed-motive instruction, with its motivating factor causation standard, should be the default for Title VII disparate treatment jury instructions.[144] This standard would apply regardless of the plaintiff's theory of the case, or whether the defendant raised a mixed-motive defense.[145]

4. The D.C. Circuit

Ponce v. Billington[146] illustrates the D.C. Circuit's Title VII confusion with the pretext-mixed-motive dichotomy, evidenced by the circuit upholding jury instructions that misconstrue Title VII's statutory text and improperly elevate plaintiff's causation standard.

The case concerned applicants for the directorship of the Office of Workplace Diversity for the Library of Congress.[147] Deborah Hayes, an African American, achieved a higher job interview score than plaintiff Jorge Ponce, a Cuban American, but Hayes lacked certain job-related credentials Ponce possessed.[148] Ponce brought suit, alleging the Library's decision to hire a less qualified applicant violated Title VII, constituting

139 *Id.* at *5–*6.

140 *Id.* at *6.

141 *Id.* The district court cites Judge Posner's opinion in *Lewis v. City of Chicago*, 590 F.3d 427, 437 n.2 (7th Cir. 2010), in stating "[t]he opinion goes on to posit that if the defendant argues the only reason for the adverse action was for a non-discriminatory reason, then he is 'going for broke' by aiming for a complete defense, and so no mixed-motive instruction should be used."

142 *Lupescu*, 2011 WL 1882448, at *6.

143 *Id.* at *6–*7.

144 *Id.* at *7 ("In any event, the statute does not say, and the Seventh Circuit has not suggested, that a plaintiff's causation burden should be described differently depending on the trial court's view of the 'type' of case the plaintiff has. However, this does not necessarily mean that a plaintiff's causation burden should be described in 'but-for' terms rather than in mixed motive terms." (citation omitted) (internal quotation marks omitted)).

145 *Id.* at *6–*7.

146 679 F.3d 840 (D.C. Cir. 2012).

147 *Id.* at 842.

148 *Id.*

discrimination against him on the basis of sex, race, and national origin.[149] The Library countered with testimony from the interview panel attesting to Hayes's superior interview, resulting in the highest score among the sixteen finalists for the position.[150]

Prior to the court instructing the jury, Ponce submitted a "motivating factor" jury instruction based on Standing Order Title VII jury instructions proposed for the district.[151] The instructions protect employer prerogatives, and remind jurors that the Civil Rights Act does not accord employees "special treatment" or permit jurors to "second-guess" employment decisions.[152] The standing instructions rely on a "motivating factor" standard.[153] The Library itself proposed the court adopt a "sole motive" instruction.[154]

Rather than adopt either party's proposal, the district court instructed the jury that Ponce had the burden of proving discrimination was the "sole reason" for his non-selection, defined as the "but for" cause.[155] Ponce objected to the "sole reason" standard in general, and

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149 Brief for Appellant Jorge Ponce at 3, *Ponce*, 679 F.3d 840 (No. 11-5117).

150 Final Brief for Appellee at 6–8, *Ponce*, 679 F.3d 840 (No. 11-5117).

151 *See* Brief for Appellant Jorge Ponce, *supra* note 149, at 5 n.2 ("Mr. Ponce's proposed instructions . . . were based on Magistrate Judge Facciola's Standing Order for 'Jury Instructions for Discrimination under Title VII.'"). The standing order jury instruction states in relevant part:

> In order to prevail on his claim, Plaintiff must show that he was qualified for the position that he sought, that he was not selected for the position, and that his sex and the sex of the person who got the job was a motivating factor in the decision not to select Plaintiff. Remember that Plaintiff must show only that sex was a motivating factor in Defendant's decision not to select him for the position he applied. He does not have to show that it was the only, or even a major, factor in Defendant's decision. If Defendant has offered a non-discriminatory reason or reasons for . . . its not selecting Plaintiff and you believe that reason or reasons, then your verdict should be for Defendant. If, however, you do not believe that this reason or reasons were the real reason or reasons for failure to select Plaintiff, you may find that Plaintiff has proven his claim of intentional employment discrimination, particularly if you believe that Defendant's representatives involved did not put forth honestly the reason or reasons for their decision.

Plaintiff's Non-Standard Jury Instructions at 5, 8, Davis v. District of Columbia, 503 F. Supp. 2d 104 (D.D.C. 2007) (No. 04-1866).

152 Plaintiff's Non-Standard Jury Instructions, *supra* note 151.

153 *Id.*

154 Brief for Appellant Jorge Ponce, *supra* note 149, at 5.

155 Ponce v. Billington, 679 F.3d 840, 843 (D.C. Cir. 2012). The district court's jury instruction read as follows:

> Mr. Ponce bears the ultimate burden proving intentional discrimination in violation of Title VII. The Library is not required to prove that it did not intentionally discriminate. In order to carry this burden of proof, Mr. Ponce must prove that illegal discrimination on the basis of race and/or national origin and/or sex was the *sole reason* for his non selection. That is he must prove that *but for* his race and or *but for* his national origin and or *but for* his sex, he would have been hired by the Library.

Id. (emphasis added).

requested that in place of the "but for" modifier, the court simply utilize the "because of" language contained in Title VII itself.[156] Reasoning they were bound by both circuit and Supreme Court precedent, the district court retained the full "sole reason" and "but for" instruction, and the jury subsequently found for the Library,[157] but not before expressing confusion at their charge.[158]

On appeal, the D.C. Circuit attempted to ratify this reconciliation. Significantly, prior to upholding the instruction defining "sole reason" as the "but for" cause, the D.C. Circuit noted the two standards can have different effects on jury deliberations and outcomes, and would under the facts of Ponce's case.[159] Despite acknowledging that the Supreme Court has held a plaintiff need not show discrimination was the sole reason for an adverse employment decision, the court nonetheless approved the jury instruction[160] by construing "but for" causation as synonymous with "pretext" case theory, as distinguished from mixed-motive theory.[161]

The D.C. Circuit also found that Ponce's argument for a "because of" causation instruction reflected a single-motive case theory pursuant to § 2000e-2(a)(1), where employer liability is governed by but-for causation.[162] The court further reasoned that because Ponce did not request a mixed-motive instruction at the appropriate time, the district court correctly declined to issue one.[163] However, in striving to maintain a largely artificial distinction between pretext and mixed-motive cases,

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156 *Id.*

157 *Id.*

158 During deliberations the jury sent out questions including asking "whether favoritism equal[s] discrimination . . . whether favoritism for equal[s] discrimination against . . . asking for the definition of discrimination . . . [and] requesting that it be provided a copy of the statute." Brief for Appellant Jorge Ponce, *supra* note 149, at 38–39 (first and third alterations in original) (internal quotation marks omitted). It seems fair to say that when the jury requests a copy of the statute to try to clarify the court's instructions, those instructions are problematic.

159 *Ponce*, 679 F.3d at 845–46.

160 *Id.* at 846 ("Had the district court stopped at the end of the second sentence—Ponce 'must prove that illegal discrimination . . . was the sole reason for his non selection'—we might well have reversed. But caught between our language in *Ginger* and the Supreme Court's repudiation of a 'sole cause' standard, the district court sought to harmonize binding case law by defining 'sole reason' as 'but for' cause. Specifically, immediately following the 'sole reason' language, the district court added the following definition: '[t]hat is he must prove that but for his race and or but for his national origin and or but for his sex, he would have been hired by the Library.' Given this clear definition of 'sole reason,' the instructions fairly and adequately conveyed the law to the jury." (alterations in original) (citation omitted)).

161 *Id.* ("[I]n *Ginger* we used 'sole motive' as shorthand for but-for cause, suggesting that in a 'single-motive case,' a plaintiff 'argues race (or another prohibited criterion) was the sole reason for an adverse employment action.'").

162 *Id.* at 844. The D.C. Circuit thus appears to follow Justice O'Connor's holding in *Price Waterhouse*, which if it was retained by the 1991 Act at all, relates only to an employer's defense and the issue of remedies, not the issue of an employer's ultimate liability under the statute. Zimmer, *supra* note 81, at 588.

163 *Ponce*, 679 F.3d at 845–47.

the D.C. Circuit failed to account for the Title VII provision that specifically governed Ponce's case—§ 2000e-16(a). The provision prohibits discrimination in employment by the federal government, specifying that personnel actions related to government employment "shall be made free from any discrimination."[164]

A mixed-motive instruction more clearly ensures federal employment decisions are "made free from any discrimination." Requiring a plaintiff show discrimination was the "sole reason" or "but for" cause leaves room for verdicts upholding adverse employment actions that are based on some combination of discrimination and legitimate motives, and that are thus not "free from any discrimination." Thus, in upholding the jury instruction requiring discrimination be the "sole reason"—defined as "but for"—for Ponce's non-selection, and approving the district court's denial of a mixed-motive instruction, the D.C. Circuit improperly heightened Ponce's causation standard, subverting Congress's intent that federal employment decisions be "made free from any discrimination."[165]

B. Staub *Provides a Solution*

The Supreme Court has recently provided courts the precise tool needed to avoid anomalous results like those in *Ponce v. Billington*, and to guide courts like the Seventh Circuit in when to apply motivating factor causation. Indeed, under *Staub* we can reconcile the pretext-mixed-motive dichotomy, while unifying disparate treatment causation, workably defining that standard in the process, and ultimately providing juries clear guidelines for deciding Title VII discrimination cases. This solution is both true to the remedial goals of employment discrimination legislation, and mindful of the deference employers deserve in making personnel decisions. The proposal also possesses the judicial virtues of being a relatively conservative doctrinal step, rooted in Supreme Court precedent, and faithful to the text of Title VII.

Part II.B of this Note posits *Staub v. Proctor Hospital* signals that motivating factor causation applies to both the pretext and mixed-motive rubrics, and provides a framework for Title VII jury instructions going forward. This Section will provide the background of *Staub*,

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164 42 U.S.C. § 2000e-16(a) (2012) ("All personnel actions affecting employees or applicants for employment . . . in military departments . . . in executive agencies . . . in the United States Postal Service and the Postal Regulatory Commission . . . in those units of the judicial branch of the Federal Government having positions in the competitive service, in the Smithsonian Institution, and in the Government Printing Office, the Government Accountability Office, and the Library of Congress shall be made free from any discrimination based on race, color, religion, sex, or national origin.").

165 *Id.*

compare the development of the statute at issue in the case with Title VII, and then apply the Supreme Court's *Staub* analysis to Title VII.

1. Background of *Staub*

Staub v. Proctor Hospital,[166] arising from the Seventh Circuit, concerns the termination of petitioner Vincent Staub, an angiography technician, by his employer Proctor Hospital.[167] Staub's service in the U.S. Army Reserve, and his training commitments, allegedly disrupted work in his hospital unit, placed a strain on his colleagues, and generated intense hostility towards him by his closest supervisors.[168] A disciplinary Corrective Action warning issued by Staub's immediate supervisor in response to a purported violation of a company rule placed tight constraints on Staub's activity within the hospital.[169] Just over four months after implementation of the warning, Staub's mid-level supervisor informed the hospital's Vice President of Human Resources that Staub had left his desk in violation of the standing warning, and Staub was subsequently terminated.[170]

Staub challenged his firing internally, claiming the basis for Proctor's Corrective Action warning had been "fabricated . . . out of hostility toward his military obligations."[171] When the hospital upheld their decision, Staub brought suit under 38 U.S.C. § 4301, the Uniformed Services Employment and Reemployment Rights Act of 1994 (USERRA), "claiming that his discharge was motivated by hostility to his obligations as a military reservist."[172] Staub alleged discrimination not on the part of the Vice President of Human Resources––the ultimate decision maker––but rather on the part of his immediate and mid-level supervisors, claiming, "their actions influenced [the] ultimate employment decision."[173]

It must be acknowledged up front that the facts at issue in *Staub* distinguish it in certain material respects from typical Title VII cases. Specifically, Staub's claim arises not under Title VII, but under USERRA. Additionally, Staub alleges a "cat's paw" theory, arguing discrimination among his supervisors influenced his firing, but the individual ultimately responsible for his termination did not possess

166 131 S. Ct. 1186 (2011).
167 *Id.* at 1189–90.
168 *Id.*
169 *Id.*
170 *Id.*
171 *Id.*
172 *Id.* at 1190.
173 *Id.*

discriminatory animus.[174] The Supreme Court's decision to reverse relied heavily on this aspect of the case.[175] However, this Note proposes that these seemingly distinguishing features, in concert with the legal principles set forth in the case, do not preclude *Staub*'s application to Title VII cases.

2. USERRA and Title VII's Parallel Statutory Development

The statute at issue in *Staub*—USERRA—is one of a host of federal antidiscrimination statutes protecting employees from actions taken on account of certain personal characteristics—here participation in military service.[176] A portion of the Vietnam Era Veterans' Readjustment Assistance Act of 1974,[177] "the predecessor statute"[178] to USERRA, had stated that "[a]ny person who [is employed by a private employer] shall not be denied retention in employment or any promotion or other incident or advantage of employment *because of* any obligation as a member of a Reserve component of the Armed Forces."[179] Congress designed the provision to provide the same employment protections enjoyed by regular veterans to those serving as reservists.[180] This statutory language closely tracks Title VII's original liability standard, which provided "[i]t shall be an unlawful employment practice for an employer . . . to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual . . . *because of* such individual's race, color, religion, sex, or national origin."[181] Clearly both statutes utilize the term "because of" to mark the nexus of a discriminatory practice and adverse employment action to establish liability.

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174 A "cat's paw" case deals with intervening actors in a causal chain leading to an adverse employment action where discrimination may exist by actors in the situation, but not necessarily by the ultimate decision maker. The term derives from an Aesop fable wherein "a monkey induces a cat by flattery to extract roasting chestnuts from the fire. After the cat has done so, burning its paws in the process, the monkey makes off with the chestnuts and leaves the cat with nothing." *Id.* at 1190 n.1. Judge Posner first applied the label to an employment law case in 1990. *Id.*

175 *Id.* at 1194.

176 USERRA stands among Title VII of the Civil Rights Act of 1964, the Age Discrimination in Employment Act, and the Americans with Disabilities Act. Brief of Amici Curiae Lawyers' Committee for Civil Rights Under Law, AARP, & Equal Justice Society in Support of Petitioner at 2, *Staub*, 131 S. Ct. 1186 (No. 09-400) [hereinafter Brief of Amici Curiae].

177 38 U.S.C. § 2021(b)(3) (1974) (repealed 1994).

178 Brief of Amici Curiae, *supra* note 176, at 5.

179 38 U.S.C. § 2021(b)(3) (1974) (repealed 1994) (emphasis added).

180 *See* Monroe v. Standard Oil Co., 452 U.S. 549, 557–60 (1981).

181 42 U.S.C. § 2000e-2(a)(1) (2012) (emphasis added).

Interestingly, in *Monroe v. Standard Oil Co.*,[182] the Supreme Court interpreted the § 2021(b)(3) "because of" standard to protect "employee-reservist[s] against discriminations like discharge and demotion, motivated *solely* by reserve status."[183] Courts followed this restrictive interpretation until Congress enacted USERRA in 1994 in response to the *Monroe* analysis.[184] USERRA now clearly applies a "motivating factor" causation standard.[185] Thus, with regard to causation establishing discrimination under USERRA, Congress started with "because of," the Supreme Court interpreted that to mean "solely," and in response Congress clarified its intent to broaden the antidiscrimination provision and redefined "because of" as a "motivating factor."

3. *Staub*'s USERRA Analysis Informs Title VII

The similarity of USERRA's evolution with the development of Title VII is striking and constructive. Broadly speaking, both statutes began by prohibiting employment actions taken "because of" discrimination.[186] The Supreme Court subsequently defined the "because of" standard in each statute narrowly—limiting liability for an adverse employment action "solely" upon a showing of discrimination under USERRA,[187] and where discrimination was a "substantial factor" under Title VII.[188] Congress then legislated to amend each statute, expanding the Court's restrictive interpretations.[189] Significantly, Congress amended each statute to provide for liability where discrimination is shown to be a "motivating factor."[190] Congressional intent to continually expand redress for employment discrimination is clear.[191] The history of USERRA demonstrates this, as does the general development of Title VII.[192]

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182 452 U.S. 549.

183 *Id.* at 559 (emphasis added).

184 Brief of Amici Curia, *supra* note 176, at 6–7.

185 38 U.S.C. § 4311(c)(1) ("An employer shall be considered to have engaged in actions prohibited . . . under subsection (a), if the person's membership, application for membership, service, application for service, or obligation for service in the uniformed services is a motivating factor in the employer's action, unless the employer can prove that the action would have been taken in the absence of such membership, application for membership, service, application for service, or obligation for service . . . .").

186 *See supra* notes 22, 179.

187 *See supra* note 183 and accompanying text.

188 *See supra* note 62.

189 *See supra* Part II.B.3, notes 184–85.

190 *See supra* notes 71, 185.

191 For example, the Age Discrimination in Employment Act passed Congress in 1967. Age Discrimination in Employment Act of 1967, Pub. L. No. 90-202, 81 Stat. 602. The Americans With Disabilities Act passed Congress in 1990. Americans With Disabilities Act of 1990, Pub. L.

In addition however, Title VII's specific provision prohibiting discrimination in connection with employment by the federal government, when read in connection with USERRA, supports a motivating factor causation standard for all Title VII cases.[193] Section 2000e-16, at issue in *Ponce v. Billington*,[194] provides that,

> [a]ll personnel actions affecting employees or applicants for employment . . . in military departments . . . executive agencies . . . the United States Postal Service . . . competitive service [positions], and in those units of the judicial branch of the Federal Government having positions in the competitive service, in the Smithsonian Institution, and in the Government Printing Office, the Government Accountability Office, and the Library of Congress shall be made free from any discrimination based on race, color, religion, sex, or national origin.[195]

This provision can be read in connection with USERRA, which also covers the federal government as an employer,[196] and establishes a violation when animus towards military service is a motivating factor in an adverse employment action.[197] The statutes thus reciprocally inform each other: § 4311, covering both public and private employers, supplements § 2000e-2(m), which does not contain a provision protecting against discrimination on the basis of military service, and § 2000e-16 tells us the standard for government employers under Title VII—free from any discrimination—which again, does not include protection for discrimination on the basis of military service. It can therefore be inferred that "motivating factor" as used in USERRA and Title VII's mixed-motive provision, and "free from any discrimination" as used in Title VII's federal employer provision, are simply two expressions of the same idea: Simply, an employment decision is not made free from any discrimination if consideration of a protected trait, like military service or race, motivated that decision.

No. 101-336, 104 Stat. 327. The Genetic Information Nondiscrimination Act passed Congress in 2008. Genetic Information Nondiscrimination Act of 2008, Pub L. 110-233, 122 Stat. 881.

192 *See supra* notes 186–90.

193 *See* Sullivan, *supra* note 38, at 1435.

194 *See supra* Part II.B.

195 42 U.S.C. § 2000e-16 (2012).

196 38 U.S.C. § 4303(4)(a)(ii) (2012) ("[T]he term 'employer' means any person, institution, organization, or other entity that pays salary or wages for work performed or that has control over employment opportunities, including . . . the Federal Government.").

197 *Supra* note 185.

III. PROPOSAL

Part III of this Note will examine how *Staub* answers the question left open in *Desert Palace* of when a motivating factor instruction applies outside of the mixed-motive context, despite some of the drawbacks and counterarguments for applying *Staub*'s USERRA analysis to Title VII, and will then outline sample Title VII jury instructions based on those developed in *Staub*.

A. *Reconciling Pretext and Mixed-Motive Liability: Justice Scalia Builds the Bridge*

Notwithstanding the explanations this Note offers for the drafting distinction resulting from the 1991 Amendment to Title VII,[198] and the issues of statutory interpretation that arise in extrapolating from Congress's treatment of USERRA an intent to apply a "motivating factor" standard to traditional *McDonnell Douglas* Title VII cases, the Supreme Court appears to have recently stated its position on the issue.

In *Staub*, Justice Scalia reconciled the relationship between Title VII §§ 2000e-2(a) and 2000e-2(m), codifying the view that § 2000e-2(m)'s "motivating factor" standard in fact establishes liability under § 2000e-2(a).[199] In assessing the language of USERRA, Justice Scalia explicitly compares the statute to Title VII's mixed-motive provision, and ties liability under § 2000e-2(a)'s "because of" standard to a plaintiff establishing that discrimination played a "motivating factor."[200] Scalia writes,

> [USERRA] is very similar to Title VII, which prohibits employment discrimination "because of . . . race, color, religion, sex, or national origin" and states that such discrimination is established when one of those factors "was a motivating factor for any employment practice, even though other factors also motivated the practice."[201]

This simple statement provides the grounds courts need to apply a motivating factor causation standard to all Title VII disparate treatment cases. Specifically, this statement answers Justice Thomas's open question from *Desert Palace* seven and a half years earlier, where he declined to opine on "when, if ever, [a motivating factor standard] applies outside of the mixed-motive context."[202] This statement

198 *Supra* Part II.A.1.
199 Staub v. Proctor Hosp, 131 S. Ct. 1186, 1190 (2011).
200 *Id.*
201 *Id.* at 1191 (second alteration in original) (quoting 42 U.S.C. §§ 2000e-2(a), (m)).
202 Desert Palace, Inc. v. Costa, 539 U.S. 90, 94 n.1 (2003).

provoked a split among academics[203] and courts,[204] and now appears resolved: Justice Scalia tells us the motivating factor causation standard applies to § 2000e-2(a), Title VII's original liability provision.

This foundation will allow plaintiffs to establish liability without explicitly defining the disparate treatment theory they intended to present, and without requiring courts to strain to confine a particular case to one of Title VII's two narrow liability boxes, either by superficially labeling a case one way or the other, or worse yet, distinguishing among them using different causation thresholds. Put another way, Justice Scalia's statement linking §§ 2000e-2(a) and (m) unifies Title VII disparate treatment causation.

B. Staub*'s Potential Drawbacks*

The essence of Justice Scalia's *Staub* analysis is that downstream actors, removed from the ultimate employment decision, but motivated in their role by discriminatory animus and desiring of the adverse result, are at a minimum a causal factor in the employee's injury.[205] Where that discriminatory action is then relied upon, Justice Scalia labels those actors a proximate cause of an employer's liability under USERRA's motivating factor standard.[206]

A main argument against extending the Court's *Staub* analysis to general Title VII disparate treatment cases is that the concept of proximate cause has heretofore been absent from employment antidiscrimination law.[207] Commentators worry that by applying this tort concept—a more stringent causal requirement than but-for cause and motivating factor—the Court may be working to limit employer liability where Title VII plaintiffs provide evidence of unconscious discrimination—or cognitive bias—as grounds for liability.[208] Others observe that importing proximate cause into Title VII jurisprudence will undermine the limitations on liability the statute contains,[209] and may undermine the motivating factor standard as well.[210] These may be valid criticisms of *Staub*, though they are somewhat premature and beyond the scope of this Note.

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203 *See supra* note 81.

204 *See supra* note 124.

205 *Staub*, 131 S. Ct. at 1192–95; *see also* Sullivan, *supra* note 38.

206 *Staub*, 131 S. Ct. at 1192–95.

207 Sullivan, *supra* note 38, at 1455–56.

208 *Id.* at 1459. Cognitive bias and statistical evidence of unconscious discrimination are beyond the scope of this Note.

209 Sandra F. Sperino, *Discrimination Statutes, the Common Law, and Proximate Cause*, 2013 U. ILL. L. REV. 1, 28–29.

210 *Id.* at 39.

Additionally, it must be acknowledged that Title VII has historically been viewed as a "federally sanctioned tort cause of action."[211] It has been argued that the introduction of the burden-shifting scheme in *McDonnell Douglas* unmoored Title VII from its true tort roots, and imposed an additional burden on plaintiffs at the pretext stage that had been absent from Title VII analysis prior to the case—that is, requiring a plaintiff prove both discrimination and a cover up for it.[212] As such, *Staub*, with its emphasis on the tort concept of proximate cause, could be viewed as a beginning of a return of Title VII jurisprudence to a time prior to the development of not just the pretext-mixed-motive dichotomy, but pretext liability itself.

A more immediate issue with grafting *Staub*'s analysis onto Title VII disparate treatment jurisprudence is the simple fact that despite their similar histories, causation standards, and coverage of federal employers, USERRA and Title VII remain distinct statutes entitled to individualized treatment.[213] While Title VII was enacted to eradicate race discrimination in employment—an evil in itself—USERRA, though by its terms prohibiting discrimination,[214] was not designed to combat preexisting animus towards service members, but rather to encourage service by ensuring a smooth transition back to civilian life.[215] Fundamentally, each statute responds to a unique issue, which could cut against reading the two statutes in pari materia.[216] Yet this is precisely what Justice Scalia has done in *Staub*, which should signal to courts a clear path towards resolving Title VII's plaguing issues. Indeed, failing to heed this signal is another step down the path of artificial barriers and compartmentalization that resulted in the pretext-mixed-motive dichotomy, with ongoing anomalous outcomes for victims of discrimination.

C. Staub*'s Jury Instruction as a Basis for Title VII*

Staub, at bottom, is a case about jury instructions in the employment antidiscrimination context, which the Seventh Circuit, on remand, found materially prejudiced Staub for failing to "hew precisely" to the rule Justice Scalia announced.[217] The Seventh Circuit's remand

211 Van Detta, *supra* note 9, at 81–85.

212 *Id.* at 90–92.

213 Elizabeth A. Leyda, Note and Comment, *The War(riors) at Home: Examining USERRA's Veterans' Reemployment Protections When Hostility Follows Soldiers to the Workplace*, 28 GA. ST. U. L. REV. 851, 874 (2012).

214 38 U.S.C. § 4301(a)(3) (2012).

215 Leyda, *supra* note 213, at 874.

216 *In pari materia* is a cannon by which statutes relating to the same subject matter are to be construed together. BLACK'S LAW DICTIONARY 676 (9th ed. 2010).

217 Staub v. Proctor Hosp., 421 F. App'x 647, 647–49 (7th Cir. 2011).

decision explored the differences between the original instructions the *Staub* jury received with a new instruction adapted to the Supreme Court's new rule. The rules are materially different in their treatment of the motivating factor standard.

Initially, the Seventh Circuit instructed,

> [a]nimosity of [Staub's supervisors] toward [Staub] on the basis of [Staub]'s military status as a motivating factor may not be attributed to [Proctor] unless [Staub's supervisors] exercised such singular influence over [the ultimate decision maker] that [the supervisors were] basically the real decision maker. This influence may have been exercised by concealing relevant information from or feeding false information or selectively-chosen information to [the decision maker].[218]

The focus of this original instruction rests on the supervisors, their general anti-military animus, and their level of influence over the decision maker such that the decision maker, in a manner of speaking, took possession of that animus and used it when firing Staub.

By contrast, the Seventh Circuit's revised instruction incorporating Justice Scalia's proximate cause standard reads, "[i]f [Staub's supervisors] perform[] an act motivated by antimilitary animus that is *intended* by [Staub's supervisors] to cause an adverse employment action, and if that act is a proximate cause of the ultimate employment action, then [Proctor] is liable under USERRA."[219] This instruction excludes mention of the ultimate decision maker or the need for him to "take possession" of the supervisors' animus.[220] Where the original instruction requires only general animus on the part of Staub's supervisors, here the court requires a discrete act. Where the original instruction "allowed the jury to impose liability without finding that [Staub's supervisors] intended a specific act to cause Staub's termination," the new Scalia-influenced instruction requires Staub's supervisors to have acted, motivated by antimilitary animus, intending to cause the adverse employment action, and requires that act to be a proximate cause of the ultimate decision.[221] The instruction based on the *Staub* rule is simple in its language, concrete in its requirements, clear in the role of motivating factor, and may actually be a somewhat higher bar to liability in certain cases––it provides for a situation where discrimination may occur somewhere along the causal chain, but if that discrimination is insufficiently connected to the final decision, liability will not lie.

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218 *Id.* at 648 (third, fourth, and fifth alterations in original).
219 *Id.*
220 *Id.*
221 *Id.*

Only slight alterations to the Seventh Circuit's *Staub*-influenced instruction are needed to apply it directly to Title VII disparate treatment cases outside of the "cat's paw" subset. Elementally the instruction reads: an act, motivated by, [____] animus, intended to cause, an adverse employment action, that is the proximate cause, of the final decision, makes the employer liable. We can strip this down further to remove the "cat's paw" elements so "the act" becomes the final decision itself: an employment decision, intentionally motivated by animus, makes the employer liable, under Title VII.

Referring back to the D.C. Circuit's problematic jury instruction in *Ponce v. Billington*, and reframing it using the *Staub* model, demonstrates how the *Staub* jury instruction could work in a typical disparate treatment case. The original instruction read:

> Mr. Ponce must prove that illegal discrimination on the basis of race and/or national origin and/or sex was the sole reason for his non selection. That is he must prove that but for his race and or but for his national origin and or but for his sex, he would have been hired by the Library.[222]

Under the new *Staub* model reflecting a default motivating factor standard, the instruction reads: if Mr. Ponce's non-selection, was intentionally motivated by the Library's animus towards his race, national origin, or sex, the Library is liable under Title VII.

This simple construction provides a framework for juries to deliberate the facts, rather than interpret the legal standards they are charged with applying, and provides plaintiffs the benefit of a more modest causation threshold while permitting employer defenses and two tiers of potential remedies for Title VII violations.

CONCLUSION

The development of disparate treatment jurisprudence has resulted in an ambiguous situation where lower courts are genuinely unsure of what causation standards apply in highly factually specific, motivation heavy, discrimination cases. Jury instructions have often reflected this confusion, to the prejudice of plaintiffs who have faced elevated causation standards, interpreted and defined without conformity to statutory text.

This confusion has resulted primarily from courts believing Supreme Court precedent and congressional intent required cabining, labeling and individualizing disparate treatment cases under either pretext or mixed-motive theories. With the announcement of *Staub*, the

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222 *See supra* note 155.

Court has indicated a different intention: One that should unify disparate treatment cases under a motivating factor standard, and guide courts in developing clear jury instructions in Title VII disparate treatment cases going forward.

Application of the Court's *Staub* analysis is fitting in light of the unique textual and interpretive similarities among USERRA and Title VII, and the interrelationship of the two statutes in the broader context of our antidiscrimination legislative regime––an analysis ratified by the Supreme Court in *Staub*. Using *Staub* to solve the Title VII issues highlighted here ensures preservation of the balance of the opposing considerations Congress deemed paramount when legislating in this area––proscribing and remedying employment discrimination, while preserving employer personnel prerogatives and limiting judicial interference in private business conduct. *Staub* harmonizes divergences in Title VII jurisprudence without imposing additional burdens on employers or heightened standards on injured plaintiffs. Indeed, by following the Court's lead in *Staub*, lower courts can usher in a new era of clarity in Title VII disparate treatment jurisprudence while jettisoning artificial legal distinctions between largely factually similar situations.