

PRACTITIONERS' NOTES

THE MUDDLE OF "MOTIVATING FACTOR": USING THE LOGIC OF HUMAN ACTION TO INFORM EMPLOYMENT DISCRIMINATION LAW

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I. INTRODUCTION

Just over 25 years ago, the Supreme Court decided *Price Waterhouse v. Hopkins*, holding that plaintiffs can establish liability for discrimination under Title VII if they prove that their race, color, sex, religion or national origin “played a motivating part in an employment decision.”¹ Two years later, in section 107 of the Civil Rights Act of 1991 (“1991 Act”), Congress incorporated, with modifications, the so-called “mixed motive” framework of *Price Waterhouse* into the statute itself and provided, in a new section 703(m), that liability for “an unlawful employment practice is established” whenever it is demonstrated that “race, color, religion, sex or national origin was a *motivating factor* for any employment practice” even if it was “motivated” by “other factors” as well.² The Supreme Court directly addressed section 703(m) in *Desert Palace, Inc. v. Costa*, holding that the existence or not of a “motivating factor” under that provision could be established by either direct or circumstantial evidence.³ The Court later held that the “mixed motive” framework of *Price Waterhouse* is inapplicable to claims of age discrimination or Title VII retaliation.⁴

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1. *Price Waterhouse v. Hopkins*, 490 U.S. 228, 258 (1989).

2. Civil Rights Act of 1991, 42 U.S.C. § 2000e-2(m) (1991) (emphasis added).

3. *Desert Palace, Inc. v. Costa*, 539 U.S. 90, 98-102 (2003).

4. See *Gross v. FBL Fin. Services, Inc.*, 557 U.S. 167, 175-80 (2008) (holding that the “mixed-motive” framework does not apply to claims of age discrimination.); *Univ. of Tex. Sw. Med. Ctr. v. Nassar*, 570 U.S. 338 (2013) (holding that the “mixed-motive” framework does not

One might have thought that at some time in the last quarter of a century someone would have told us what the term “motivating factor” actually meant, but no one has.⁵ There has been much controversy over whether either the section 703(m) or the *Price Waterhouse* framework applies outside the confines of Title VII,⁶ what forms of evidence are sufficient to show the existence of a discriminatory “motivating factor,”⁷ how judges are to charge juries under the “motivating factors” approach,⁸ and whether a distinction any longer exists between the so-called “single motive” or “pretext” framework adopted by the Court in *McDonnell Douglas*⁹ and so-called “mixed motive” framework of *Price Waterhouse*.¹⁰ But, there is no definition of “motivating factor” in the 1991 Act, and all that the cases do by way of explication of the term is to use metaphors—like “played a role” in the decision¹¹—as if that

apply to claims of Title VII retaliation).

5. The phrase “motivating factor” used by Congress in section 107 is not actually used in any of the *Price Waterhouse* opinions except when quoting from the Court’s earlier decision in *Mt. Healthy City Board of Ed. v. Doyle*, which used it to provide the framework for analyzing claims that a public employee had been fired for engaging in speech protected by the First Amendment where there was also a valid performance-related reason for the government’s personnel decision. See *Price Waterhouse*, 490 U.S. at 249; *Id.* at 259 (White, J., concurring); see also *Mt. Healthy City Board of Ed. v. Doyle*, 429 U.S. 274 (1977) [hereinafter *Mt. Healthy*]. In *Mt. Healthy City*, the term “motivating factor” does not seem to refer to anything more recondite than the stated reason for the challenged decision. See *infra* text accompanying notes 179-82. Ironically, Congress, which acted quickly to abrogate that portion of *Price Waterhouse* that allowed defendants to avoid liability if they established as an affirmative defense that they would have made the same decision absent the proscribed reason, never passed any legislation changing the “mixed motive” framework for the First Amendment cases or to amend the National Labor Relations Act, 29 U.S.C. § 141 *et seq.*, which uses, with Supreme Court approval, the same “mixed-motive” framework for claims of discrimination on account of union membership, see *NLRB v. Transp. Mgmt. Corp.*, 462 U.S. 393 (1983).

6. See, e.g., *Gross*, 557 U.S. at 169-70, 173-74.

7. See, e.g., *Desert Palace, Inc.*, 539 U.S. at 92-95.

8. See, e.g., *Luciano v. Olsten Corp.*, 110 F.3d 210, 218-19 (2d Cir. 1997).

9. See *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973); see also *Texas Dep’t of Cmty. Affairs v. Burdine*, 450 U.S. 248 (1981).

10. See, e.g., *Smith v. Xerox Corp.*, 602 F.3d 320, 322 (5th Cir. 2010), *abrogated by Nassar*, 570 U.S. 338 (2013); *Fernandes v. Costa Bros. Masonry, Inc.*, 199 F.3d 572, 580 (1st Cir. 1999) *abrogated by Desert Palace*, 539 U.S. at 90. See generally Michael C. Harper, *The Causation Standard in Federal Employment Law: Gross v. FBL Financial Services, Inc., and the Unfulfilled Promise of the Civil Rights Act of 1991*, 58 BUFF. L. REV. 69, 121-22 (2010) (The Causation Standard); Benjamin C. Mizer, *Toward A Motivating Factor Test For Individual Disparate Treatment Claims*, 100 MICH. L. REV. 234, 261 (Oct. 2001) (Motivating Factor Test); Robert Belton, *Mixed-Motive Cases in Employment Discrimination Law Revisited: A Brief Updated View of the Swamp*, 51 MERCER L. REV. 651, 654 (1999-2000) (Mixed Motive Cases).

11. See, e.g., *Costa v. Desert Palace, Inc.*, 299 F.3d 838, 849 (9th Cir. 2002), *aff’d sub nom.* 539 U.S. 90 (2003); *Veprinsky v. Fluor Daniel, Inc.*, 87 F.3d 881, 893 (7th Cir. 1996).

explained anything at all.¹²

The premise of this Article is that we can do better. There is language in our ordinary experience to describe why people do what they do, and there are a variety of (for lack of a better word) "mental states" that can fill the blank in sentences of the form "So-and-so did action, A, because of ____." Among them are: reasons, emotions, attitudes and motives. These are, however, all different, and which among them could be encompassed by the phrase "motivating factor" is far from clear. Unless serious efforts are made by jurists and lawyers to understand the logic of human action, the conundrums attendant to the "mixed motive" *Price Waterhouse* framework¹³ will never go away. If, however, clarity is brought to the logic of reasons and motives, and a clear meaning of "motivating factor" is established, then the intellectual conundrums that have plagued the courts in applying the "mixed motive" analysis to employment discrimination claims can, at long last, be resolved.¹⁴

II. REASONS, CAUSES AND "MOTIVATING FACTORS"

A. *The Logic of Human Action*

Human actions are not caused; they are done for a reason. If, due to a neurological disorder, Robert exhibits a facial tic whenever he becomes stressed, the facial tic is caused by the neurological disorder, but the tick is a behavior, not an action. If Sally, a chronic smoker, undergoes hypnosis and aversion therapy to quit smoking and then rejects a cigarette when presented because it now appears noxious to her, it is a behavior. If Sally had not undergone any such anti-smoking regimen and rejected a cigarette because she wanted to be healthy for herself and her family, it would be an action. Actions are not caused; they are done for a reason.¹⁵

12. It is clear what it means to say that someone played the role of Brutus in his high school production of "*Julius Caesar*." Those who use the phrase "played a role in the decision" for explanatory purposes must mean that a "motivating factor" is something like playing the role of Brutus, only different.

13. See *Gross v. FBL Fin. Serv., Inc.*, 557 U.S. 167, 179 (2008); see also *infra* text accompanying notes 124-27.

14. See *infra* text accompanying note 209.

15. To some extent, insisting that actions are done for a reason (which is not the same as its being "motivated" by reasons, see *infra* text accompanying notes 19-21 and 47-48, is what philosophers would call a "persuasive definition." It does not merely report some truth, but is intended to persuade someone to see things in a different way and to accept a certain categorization

1. Reasons as Teleological

One reason for insisting that actions are done for a reason is that actions and their reasons have a logical structure that is different from cause and effect.¹⁶ One difference is that reasons are “teleological” (from the Greek word “telos” for “end”).¹⁷ They point to an end, namely, that state of affairs that the action is intended to achieve (or aims to avoid). The teleological nature of actions is illustrated by the following two statements, which are grammatically the same, but have a fundamentally different logical structure:

Illustration A

1. The house burned down because Alan, the arsonist, set it on fire.
2. Alan, the arsonist, set the house on fire because he wanted to collect on the fire insurance.

In statement A(1), the word “because” functions to show the relation of cause and effect, but in statement A(2), the word “because” functions to identify the reason for an action. Both are perfectly proper uses of the word “because,” but they do not express the same kind of relationship.

A cause is an event or state of affairs that precedes the effect and, in some sense, determines its coming to be. In a world now familiar with quantum mechanics, we have abandoned deterministic notions of cause and understand that a “cause” may also be something that substantially increases to probability that the effect will come to be. Nor do we

of common human experiences, even while recognizing that the categories proposed may not comport with our common understanding in every particular. The purpose is to clarify our thought so that discourse on a certain subject is not muddled by using the same phrase—say, for example, “motivating factor”—for phenomena that are really quite different. *See infra* text accompanying notes 110-19. The truth of a persuasive definition is fully established if, in the end, it actually does clarify what was previously obscure or when, most powerfully, it helps us realize that what was previously thought to be clear was actually obscure and that the obscurity was concealed for the lack of concepts adequate to reveal it. Such an intellectual endeavor is not jurisprudence or social psychology; it is philosophy.

16. To be precise, “things” like actions and reasons cannot have a logic, but statements referring to actions (like “John Wilkes Booth shot Abraham Lincoln”) and statements referring to reasons (like “Booth wanted to avenge the South’s humiliation, for which he blamed Lincoln”) can have a logical interrelationship that differ from the logical relations among factual statements that do not refer to actions or the reasons for them. *See infra* text accompanying notes 32, 50. Speaking more simply about the logic of actions and their reasons should be understood as speaking about action-statements and reason-statements.

17. *Teleological*, THE MERRIAM-WEBSTER DICTIONARY (11th ed. 2014).

suppose that each effect has just one cause. Sometimes several events or states of affair are needed for an effect to come to be. And sometimes, an event is "over-determined." As the law school hypothetical goes, if event, E1, is a fire set on the east side of a house and event, E2, is a fire set on the west side and if, further, they both arrive at the house at the same time and consume it in flames, it is fair to say that each was "a" cause, in the sense that E1 and E2 were each sufficient for the house to burn. It is also fair to say that neither is "the" cause because neither E1 nor E2 was necessary for the house to burn down.¹⁸ While, for tort law, such a conundrum needs to be resolved, for the purpose of distinguishing causes from reasons, it is enough to say the cause is an event (or state of affairs) that occurs prior to another, distinct later event and, in some sense, determines the occurrence of the effect (or substantially increases its likelihood).¹⁹

Reasons are quite different. Returning to arsonist Alan, the reason for his action (namely, "collecting the fire insurance proceeds") occurs after, not before the action it explains (or as some would say "motivates"). This must be so because the reason for an action is always some state of affairs that the agent intends to bring to be by doing what she does.

If one were inclined to force the logic of human action into the Procrustean bed of cause-and-effect, it could be said that the reason for an action is a mental state that precedes the action and "motivates" it. This, however, presupposes (what may be called, pejoratively) the "hydraulic" model of human action, a model in which psychological attributes (like "the desire to collect the insurance proceeds") are conceptualized as "states of mind" that move, push, induce or "motivate" a physical event (like "Alan's striking the match to set the house on fire"). While there are philosophical problems with this conceptualization, the more pressing concern for purposes of this Article is that there are other kinds of mental states—such as, emotions, attitudes, prejudice or motives—that in some way or other, often by

18. See generally *Greene v. Doruff*, 660 F.3d 975, 978 (7th Cir. 2011) (discussing that philosophers' "useful distinction between what they call 'necessary' and 'sufficient' conditions . . . speak[s] more clearly than lawyers" on the subject of causation).

19. It has been said that the Restatement (Second) of Torts "abandons" the "but-for cause-in-fact test," replacing it with a "substantial factor test" precisely to account for the existence of "two independent forces," each of which is capable of producing the result at issue. See Sheldon Nahmod, *Mt. Healthy and Causation-in-Fact: The Court Still Doesn't Get It!*, 51 MERCER L. REV. 603, 615 (2000) (referring to such situations as "joint causation cases"). Under the Restatement, if one of the substantial factors was due to negligence, the negligent actor's conduct would be "a legal cause of harm to another." *Id.* at 614.

unconscious processes, determine (or tend to determine) the occurrence of an action, but are not the reason for it.

To lump together reasons and prejudice (or, for that matter, emotions, like pride, and prejudice) as “motives” for an action or decision ignores their different logic. Since attitudes (which include prejudices) determine (or influence) human action in ways much closer to cause-and-effect,²⁰ we lose the ability to make important distinctions in legal analysis by using the same term “motive” both for reasons and also for what may be called the non-reason “determinants” of an action.²¹

It is also useful to note that these questions can be approached from an ontological perspective (from the Greek word “onto” for being)²² or an epistemological one (from the Greek word “episteme” for knowing).²³ From an epistemological perspective, a reason (like “collecting the insurance proceeds” or “the desire to collect the insurance proceeds”) explains the action; the reason tells us why the agent did what he did. Understood as an explanation, it is not necessary to explore what kind of thing a reason might be because it is not thought of as having an existence separate from the action it explains. From the ontological perspective, however, the reason for an action is thought of as something that exists independently of the action and, in some sense, “motivates” or “causes” it to occur. Because the language of Title VII is formulated in terms of whether a decision or practice was undertaken “because of” an individual’s race, color, sex, religion or national

20. The word “attitude” includes prejudices (since a bias or prejudice is a kind of attitude) but without pejorative connotations. E.A. Peel, *ATTITUDE, PREJUDICE, AND SOCIAL LEARNING*, 2 EDUC. J. 103, 103 (2006). It might also be said that prejudices and stereotypes are attitudes that are particularly powerful and fixed (in the sense of being especially resistant to correction based on experience). It might also be that stereotypes are an network of interrelated beliefs that are resistant to change and that tend to strengthen prejudices, which incline human agents to act one way or another. Such distinctions, however, are not critical to this discussion, which concerns the logic of reasons, motives and attitudes.

21. For these purposes, “determinant” is intended probabilistically, not deterministically. That is to say, it is not intended to imply that the presence of a “determinant” necessarily produces the other psychological state with which it is associated. Rather, it is used here only to mean that the presence of the “determinant” makes it more likely that the action occurs, not that it was either a necessary or sufficient condition for the action. It would be more natural, perhaps, to refer to such phenomena as “factors,” in the sense that Barack Obama’s savvy use of social media was a factor in his winning the 2008 presidential election. The problem, however, is that an article attempting to explicate the phrase “motivating factor” cannot use “factor” as part of that explication. The word “determinant” is the least problematic alternative, despite its unfortunate connotation of determinism.

22. *Ontological*, THE MERRIAM-WEBSTER DICTIONARY (11th ed. 2014).

23. *Epistemological*, THE MERRIAM-WEBSTER DICTIONARY (11th ed. 2014).

origin,²⁴ it appears (but only appears) that we are required to approach the matter ontologically and inquire as to the “existence” or not of the proscribed “factor” and whether it “motivated” or not the challenged action.²⁵

Before making that ontological turn, it is helpful to think epistemologically: Do the employer’s stated reasons explain the challenged action and, if not, to what extent is discrimination needed to explain why the plaintiff experienced the challenged adverse action?²⁶ If it is concluded that the employer’s action is inexplicable except by reference to discriminatory animus, we can then revert to the ontological perspective and say that the action was “motivated,” at least in part, by “discrimination” or that discrimination or discriminatory animus “played a role” in the challenge action.²⁷

In the early years of the *McDonnell Douglas* paradigm, courts often did address the issue of Title VII liability from the perspective of explanation,²⁸ and to some extent still do.²⁹ But much more frequently courts approached this aspect of Title VII liability as one of “causation,” directing the inquiring toward whether or not the challenged employment action was “motivated by discrimination.”³⁰ The problem with framing the issue in such ontological terms is that it is extraordinarily difficult to understand exactly what it means to say that something “plays a role” (an obvious metaphor) in a decision or that it “motivates” (a less obvious metaphor) an action.

Juries are instructed with and expected to apply such terminology, as if these are terms that are readily understandable as part of ordinary discourse. One purpose of this Article is to argue that they are not: What actually does it mean to say that Charles’s race “played a role” in or “motivated” David’s decision to fire him? Is that formulation really any more understandable than, “Did David fire Charles because or, at least,

24. See 42 U.S.C. § 2000e-2(a) (1964).

25. *Id.* at § 2000e-2(m).

26. See, e.g., *Reeves v. Sanderson Plumbing Prods.*, 530 U.S. 133, 143 (2000) (Defendant adequately meets Plaintiff’s prima facie case by “produc[ing] sufficient evidence to support a non-discriminatory *explanation* for its decision.” (emphasis added)).

27. *Texas Dep’t of Cmty. Affairs v. Burdine*, 450 U.S. 248, 256 (1981).

28. See, e.g., *Id.* at 256 (citing *McDonnell-Douglas v. Green*, 411 U.S. 792, 804-805 (1973) (asserting “[plaintiffs can show pretext] ‘indirectly by showing that the employer’s *proffered explanation* is unworthy of credence” (emphasis added))).

29. See, e.g., *White v. Baxter Healthcare Corp.*, 533 F.3d 393, 395 (6th Cir. 2008) (“[The proffered reason] did not actually motivate Baxter’s [the employer’s] decision, and is not *sufficient to explain* its hiring choice.” (emphasis added)).

30. See, e.g., *Henry v. Wyeth Pharmals., Inc.*, 616 F.3d 147, 156-157 (2d Cir. 2010).

partly because of his being an African-American?”³¹

2. Reasons as Essentially Intentional

A second key feature of wants, desires and the like is that they are “intentional” (a bit of philosophical argot) in that they always and essentially connect the agent and her actions to an intended state of affairs in the world that the agent intends to have happen (or, in the case of an aversion – such as, not wanting a woman to be a partner in one’s accounting firm – intends to avoid). This feature of reasons is part of what gives them logical features that are unique.

Reasons, like all wants and desires, are subject to what philosophers call the “intensional fallacy.”³² That fallacy is illustrated by two

31. In *Gross*, Justice Thomas stated that “the words ‘because of’ require a plaintiff to prove that age was the ‘but-for’ cause of his employer’s adverse employment action.” *Gross v. FBL Fin. Serv., Inc.*, 557 U.S. 167, 176 (2009); *see also* *EEOC v. Abercrombie & Fitch Stores*, 575 U.S. ___, 135 S. Ct. 2028, 2029, 2032 (2015) (“The term ‘because of’... appears frequently in antidiscrimination laws... typically imports, at a minimum, the traditional standard for but-for causation”). This is not quite accurate or, at least, needs to be qualified to accommodate the logic of human action. The word “because” does not always refer to a cause; it may refer to a reason. And, as this Article argues, it is a philosophical error to force the language of reasons into the narrow confines of “mental” or “psychological” causes. One can analyze statutes prohibiting conduct “because of” some protected characteristic by using the concept of “causation” (understanding that “mental states” operate differently from physical ones), or, as is suggested here, expressly acknowledge that the reasons for human action and its causes are two distinct forms of explanation. Statements of the “because of” variety, when ascribed to human action, can be either one or the other. Or, stated otherwise, the blank in the phrase “because of _____,” when applied to human actions, can be filled with a cause or a reason (or reason-like phenomenon). To the extent that common-law “causation” tends toward the former for an explanation or elides the difference between the two, it is not compelled by Title VII’s “because of” language. Justice Thomas also stated in *Gross*, that “the ordinary meaning of... ‘because of’” language in an employment-discrimination statute is that the protected characteristic “was *the* ‘reason’ that the employer decided to act.” *See Gross*, 557 U.S. at 176 (emphasis added). There can, however, be several reasons for a single act and, when that occurs, the “causation” of the action is not quite so clear. Significantly, when Congress intended for there to be no doubt that liability attaches only when the proscribed consideration is the sole reason for the challenged action, it knew how to say so. *See* 11 U.S.C. § 525 (2012) (prohibiting discrimination “solely because” of a prior bankruptcy). *Cf.* *Price Waterhouse v. Hopkins*, 490 U.S. 228, 295 n.7 (“Congress specifically rejected an amendment that would have placed the word ‘solely’ in front of the words ‘because of.’”).

32. *See Internet Encyclopedia of Philosophy*, www.iep.utm.edu/fallacy/#Intensional (last visited January 22, 2018) The fallacy is called “intensional” (with an “s”) in contradistinction to “extensional,” which refers to terms (words) that do not change the truth value of statements if replaced by another description for the same thing. *Id.* Terms referring to human intentional behavior (like, wants, desires, hopes and fears) are “intensional” (with an “s”) because the truth value of the term does not extend to every true description that refers to the exact same thing. *Id.* Because wants and desires are intentional (with a “t”) in that they always presuppose an intended object to state of affairs, the terms we use for the objects of wants and desires have the logical characteristic of intensionality (with an “s”). *Id.*

syllogisms: one valid, the other not.

Illustration B

1. John stands next Mary.

Mary is a banker's daughter.

∴ John stands next to a banker's daughter.

2. John wants to marry Mary.

Mary is a banker's daughter.

∴ John wants to marry a banker's daughter.

The first syllogism in Illustration B is logically valid. If the premises of the syllogism are true, then the conclusion must also be true or, as logicians would put it, the premises entail the conclusion. In contrast, syllogism (2) is not valid, which means that it is possible for the premises to be true and for conclusion to be false or, put otherwise, the premises do not entail the conclusion. This would be clear if we imagined that John was an ardent socialist who was head-over-heels in love with Mary, the winsome woman he met at last fall's "Occupy Wall Street" protest. But, John would be appalled at ever marrying a banker's daughter and might never have given himself a chance to get to know Mary if he had known when first they met that she was, in fact, a banker's daughter.

This intentionality feature of wants and desires means that no one ever wants something in itself or as it objectively is, but only under a certain description, that is to say, as she "sees" it or believes it to be. Applying this concept to *Price Waterhouse*, it could be said that the partners there who said that they opposed Mary Hopkins' advancement to partnership because she lacked "interpersonal skills," were adverse to her advancement under the description of her being "socially inept."³³

33. *Price Waterhouse*, 490 U.S. at 235. The facts of *Price Waterhouse* were as follows: Ann Hopkins was a female, senior manager being considered for partnership, and her candidacy was deferred. While her professional skills and accomplishments were widely acknowledged, she was negatively assessed with respect to "her 'interpersonal skills.'" *Id.* at 235. To some extent, this was related to her being overly aggressive and difficult to work with, but it was also related to her being "a lady using foul language," being "somewhat masculine," and not a "more appealing lady ptr candidate"—deficiencies that could be corrected, in the view of one partner, if she would only "take 'a course at charm school.'" *Id.* at 235. When informed of the deferral decision, she was told that in order to improve her chances for partnership "Hopkins should 'work more femininely, talk more femininely, dress more femininely, wear makeup, have her hair styled, and wear jewelry.'" *Id.* at 235.

The trial judge (in those days Title VII cases were tried to the judge, not a jury) found that those concerns “had not been fabricated” and, hence, were not a “pretext for discrimination.”³⁴ The judge also found that the Price Waterhouse partners who actually made the decision “consciously [gave] credence and effect” to evaluative comments submitted by other partners that “resulted from” sex stereotyping.³⁵ Stated otherwise, the partners were adverse to promoting Hopkins under the description of “woman” or, more precisely, “woman who was not adequately feminine” or, for short, “assertive woman.” Stating that the Price Waterhouse decisionmakers wanted to defer Hopkins’s partnership candidacy under the description of her as being a “socially inept (though professionally proficient) assertive woman” is another way of saying that her being a woman is one of the reasons for their decision and likely what the Court meant in saying that the decisionmakers “consciously” gave “credence and effect” to sexual stereotypes. Understood in its context, the metaphor “that discrimination played a role in an employment decision”³⁶ does not appear to mean anything other than that one’s being a woman was one reason (among others) for the challenged decision.

It will be proposed that the “mixed-motive” framework of section 703(m) should be applied when, but only when, the evidence shows that the plaintiff’s race, color, sex, national origin or religion was a reason, and more specifically a conscious reason, for the adverse action.³⁷ It may be objected that this unfairly favors defendants who can readily avoid the “mixed-motive” shift in burdens of proof by simply lying about the reasons for what they did. This objection, however, proceeds on the unstated assumption that “mental states” are, in some sense, “interior” to the agent and, consequently, not knowable to others unless she tells them what her reasons were or, through an inadvertent slip of the tongue, lets it “out.”³⁸ This, though, misunderstands the logic of human action. It shifts to (what we have called, pejoratively), the “hydraulic” model of human psychology, which presumes that reasons are “motives,” which are understood to be some sort of state that exists “inside” the agent and impels or moves the agent to act. The truth is otherwise.

The reasons for an agent’s actions are often no less public than the

34. *Id.* at 236.

35. *Id.* at 237 (emphasis added).

36. *Id.* at 237.

37. See *infra* text accompanying notes 128-32 and Section III.B.3.

38. See, e.g., *U.S. Postal Serv. Bd. v. Atkins*, 460 U.S. 711, 716 (1983) (“There will seldom be ‘eyewitness’ testimony as to the employer’s mental processes.”).

actions themselves, and are often quite knowable to others provided only that they observe carefully and fully the context in which the action takes place. The agent may sometimes or even may typically know her reasons better than anyone else, but not always. We do not always need an agent to tell us what her reason was; we can discover it ourselves. In fact, it sometimes happens that the agent herself does not know the reason for her action and reports it to be something other than it actually is. Many husbands find it frustratingly true that their wives often know why they did what they did better and before they knew it themselves.

Consider the case of Quince, the rugged, handsome, exceedingly *macho* quarterback of his college football team. Throughout his college years, he has proudly dated only college women of a "cheerleader" type. Then, in the spring of his senior year, Quince meets a meek, mild and somewhat plain intellectual woman whom we can call "Marianne the librarian." Quince is strangely attracted to Marianne in ways he is unaware of but all his friends see acutely. When Marianne enters the college cafeteria, his eyes turn to her and follow her across the room until she leaves, and only then does he return to the conversation he was having with his friends. Quince daydreams in class (he always has) but now his doodles are starting to look strangely like the cursive letter "M." Quince, who was never much of a student, now starts going to the library to study, but only Wednesday and Thursday evenings when Marianne is there as part of her work-study assignment. Quince never much bothered with studying before an exam and would look for any excuse to go out drinking with the guys. One Wednesday evening before the history midterm, a fellow football player comes to Quince's dorm room and invites him to go out drinking. Quince, somewhat flustered, gathers up his history books and rushes out of the room saying, "I can't go with you tonight. I'm going to the library to study for my exam." The football friend is perplexed by Quince's strange behavior and, when he asks Quince's roommate, who has observed all of this, "Why is Quince going to the library?", the answer comes, without skipping a beat, "He has a crush on Marianne."

The roommate's statement of the reason for Quince's going to the library is true and it remains true even if Quince denies it – even if he were to aver emphatically that his going to the library had nothing to do with Marianne, and even if he professes to be unaware that Marianne was working that night or quizzically asks (with apparent sincerity) why the questioner thought his going to the library had anything to do with Marianne in the first place. It may be that due to his *macho* self-image, Quince cannot see himself as "the sort of guy" who would be attracted to

anybody other than a “cheerleader-type” woman and, as he has mocked others in the past for dating women more like Marianne, he cannot admit to himself that her being in the library is the reason he was going there, ostensibly, to study. Quince was not necessarily mendacious; he might have been merely obtuse.³⁹

The scenario presented above fits well to the evidence presented to the district judge in *Price Waterhouse*.⁴⁰ It was such evidence that allowed the district judge to find that despite their denials, a reason for the decision to defer Hopkins’ partnership was that she was a woman or, more precisely, an “aggressive” one.⁴¹ It was not some sort of peculiar mental state called a “motivating factor.” It was something that “consciously” entered into their deliberations; it was a reason for their decision to defer her candidacy.⁴²

It must also be noted that at times our attribution of reasons is mistaken – but not because reason are recondite and peculiarly hard to know. Returning to the prior hypothetical, suppose that Quince had been called into the office of the Academic Dean a week earlier and presented with a letter stating that his grades were too low and unless he earned at least a “B” on his history midterm, he would not be allowed to graduate with the rest of his class. (Nothing so focuses the mind as the threat of public humiliation.) Quince was determined to succeed as, after all, he had never failed at anything before and “knew” from years of competitive sports that the way to “win” was to bear down and work

39. This is why Justice Ginsburg’s concurrence of *Reeves v. Sanderson Plumbing Prods.*, 530 U.S. 133, 147, 154 (2000) (Ginsburg, J. concurring), misses the mark. Justice Ginsburg presumes that if a plaintiff establishes that the defendant’s “proffered explanation for its actions was false,” the mendacity of the defendant must be inferred. *Id.* at 154. But, a false report of one’s reasons does not necessarily imply that one was consciously aware that the “proffered reason was not the true reason” and was deliberately put forward to, as Justice Ginsburg put it, “mask[] its actual illegal motivation.” *Id.* In other opinions of the Court, it was recognized, or at least implied, that not every “false” reason is mendacious. *See Reeves*, 530 U.S. at 147 (stating that “dissembling” can be “reasonably infer[red] from [. . .] falsity” in “appropriate circumstances”); *St. Mary’s Honor Ctr. v. Hicks*, 509 U.S. 502, 511 (1993) (identifying inference permissibly drawn from “disbelief of the reason” proffered by a defendant “particularly if disbelief is accompanied by a suspicion of mendacity”) (emphasis added). Regrettably, there is ambiguity as to exactly what it means to say that a reason is “false,” *see infra* notes 62 and 89, or a “pretext” *see infra* note 86 and Section III.A.2., and, hence, what inferences are logically implied by such a finding has led to much of the uncertainty that still exists as to basic elements of Title VII liability even fifty years after the statute’s enactment.

40. *Price Waterhouse*, 490 U.S. at 255-56.

41. *Id.* at 235. (“Both ‘supporters and opponents of her candidacy,’ stressed Judge Gesell, ‘indicated that she was sometimes overly aggressive, unduly harsh, difficult to work with, and impatient with staff.’”).

42. *Id.* at 237.

harder. Suppose further that Quince told no one – not even his trusted roommate – about these developments. These facts would put Quince's behavior in a new light and, knowing these additional facts, a neutral observer could discern that the roommate's explanation about Quince's going to the library because of his crush on Marianne was, or might be, wrong or only partly correct. This says nothing about the knowability of reasons; it says what we already understand, which is that our assessment of the reasons for people's doing what they do can change as we acquire more knowledge of their circumstances.

3. Motives As Reasons of a Special Sort

Astute readers will have noticed that Quince's roommate did not answer his interlocutor with a reason, but with a feeling. Quince went to the library not to study for his exam but because he had a crush on Marianne. And, it is true that for statements of the form "A did X because _____," the blank can often be filled by feeling. Analyzing that will lead to a discussion of how bias and prejudice (or more generally "attitudes") can influence human action without being a reason for it.⁴³

Consider the case of Bob, an avid boater. He has a son whom he adores and a son-in-law whom he disdains, believing him to be a ne'er-do-well who was never good enough to marry his daughter. One year, the son-in-law forgets to call Bob on Father's Day, and Bob is offended. A month later, Bob invites his son and some others to go with him of the "maiden voyage" of his new motor boat – but not the son-in-law because he had been disrespectful. As it turns out, Bob's son had not called Bob on Father's Day either, but that omission went unnoticed. Yet, as a consequence of Bob's attitude of disdain for his son-in-law, that same behavior was seen as an affront and gave rise to the reason Bob snubbed his son-in-law by not inviting him. Oddly, if a friend had called Bob's attention to this disparate treatment, he may well have demurred, excusing his son's omission because he was so busy with his very important new business venture; the son-in-law's oversight, though, was inexcusable because he was, well, a ne'er-do-well.

43. The reluctance to consider emotions to be motivational states may stem from the popular but incorrect view that they are, in essence, somatic perturbations. This is not so. My fear that a competitor is trying to steal my client prompts me to take the client to lunch, invite him to a sporting event, reduce the turn-around time on his projects and exercise "billing judgment" to lower the fees charged. The "knot" I have in my stomach as I contemplate the prospect of losing the client is no more of an essential manifestation of my emotion than are the action-steps I take to forestall that possibility.

In this example, Bob's attitude was not the reason for his action but it affected it. Actions, being intentional, aim at an intended state of affairs, and the change the agent intends to effect in his social world by his action perforce depends on how he views his world to be. Our perceptions of our world are not neutral, but value-laden; our attitudes towards others affect the values we ascribe to their conduct.⁴⁴ They filter our perceptions of our social world. Because our reasons necessarily arise from our value-filled perceptions of our existing social world, attitudes affect our actions without being the reasons for them. Their relationship to actions can be analyzed on the model of cause-and-effect even when – perhaps, especially when – our attitudes operate outside consciousness.⁴⁵

It is not unusual for courts to write as if “*motive*” and “*reason*” are interchangeable terms; they are not. Consider three examples. Hillary Clinton's reason for being Secretary of State was to assist President Obama in implementing his foreign policy; her motive (we may presume) was to position herself to run for President in 2016. Mary (the beloved of John) attended the Occupy Wall Street demonstration to protest income-inequality; her motive may have been to humiliate her cold and distant father whom she perceived to have abandoned her for work while she was growing up. The reason Iago lied to Othello was to induce him to falsely accuse Desdemona of infidelity; his motive was vengeance against Othello for his prior (perceived) humiliation of Iago.

Motives are like reasons because they are intentional. Motives, though, are “deeper” than reasons; they explain not so much a particular action as a range of actions or course of conduct. They are, so to speak, the reason “behind” the reason: we sometimes ascribe to others *ulterior motives* but never *ulterior reasons*. Oftentimes, we inquire into the

44. For example, a supervisor harboring certain race-based stereotypes may view the repeated lateness of an African-American employee as deserving discipline because it appears to reflect sloth, while the very same pattern of lateness by a white employee goes unnoticed. *Cf. Reeves*, 530 U.S. at 151 (noting as evidence of age discrimination that while a manager “tolerated quite a bit” from a mid-thirty-year-old supervisor who was frequently defiant, he treated a fifty-nine year-old co-supervisor with disdain, *viz.*, the way “you would . . . treat . . . a child when . . . you're angry with him”) (internal quotation omitted).

45. A deterministic notion of cause-and-effect is not here required. Just as then-Senator Obama's savvy use of social media was a factor in the success of 2008 presidential election campaign, *see supra* note 20, Bob's attitude of disdain for his son-in-law was a factor in his non-invitation decision. It is also “part of” Bob's motives if “motive” is understood broadly to include the network of values, feelings and beliefs that affect our reasons for doing anything. Attitudes, emotions and motives are in some ways like reasons and in some ways not. That is why it is always, at a minimum, unilluminating to say that someone's action was “motivated” by such-and-such a reason. *See infra* notes 48-49 and accompanying text.

motive when the stated or apparent reason seems inadequate to fully explain a person's action.⁴⁶

Like attitudes and emotions, motives can color a person's perception of social reality and, in that way, influence her actions without being their reason. It might be, for example, that Mary's deep-seated hostility toward her father and desire to embarrass him prompted her (and here, the causal word "prompted" is appropriate) to volunteer to lead the day's demonstration when she learned that her father's bank was the target of the protest. That would be her motive, and it might well be outside her conscious awareness, but her reason would be to do her best to assure that the demonstration succeeded.

Because motives, like attitudes, influence our actions by affecting our often unconscious valuation of aspects of our social reality, they can sometimes relate to actions as cause-and-effect.⁴⁷ Understanding "discriminatory animus" as a kind of motive, it is sensible to ask whether, in a particular case, it "motivated" or was the "but-for cause" of a challenged action, but not so for reasons.⁴⁸ This is because, while motives are similar to reasons in certain respects, their logic as an explanation for human action is not the same. While reasons can explain an action, they do not "motivate" or cause it.⁴⁹

Another difference between reasons and causes that is particularly pertinent to employment discrimination law is that causes imply facts in a way reasons do not. This difference is illustrated by the question: Is it possible that Barack was fired because he was a Muslim, if he was not actually a Muslim? From the perspective of causation, the answer is "no." The hole in the fence cannot be caused by unicorns, since there are no unicorns. Similarly, Barack's firing could not have been caused

46. For example: "Your parents and brothers are all doctors, what motivated you to go to law school?"

47. See generally, Linda H. Krieger, *The Content of Our Categories: A Cognitive Bias Approach to Discrimination and Equal Employment Opportunity*, 47 STAN. L. REV. 1161, 1188 (1995) (according to social cognition theory, "stereotypes . . . are cognitive mechanisms that all people, not just 'prejudiced' ones, use to simplify one task of perceiving, processing, and retaining information about people in memory").

48. *Id.* at 1199 ("[S]tereotypes *cause discrimination* . . . operat[ing] as implicit expectancies that influence how incoming information is interpreted, the causes to which events are attributed, and how events are encoded into, retained in and retrieved from memory . . . stereotypes *cause discrimination* by biasing how we process information about other people.") (emphasis added).

49. The confusion between the terms "reasons" and "motives" is compounded by the fact that in intellectual discourse (such as, law journal articles and judicial opinions), "motive" is used as the term for whatever "motivates" the action and, in that sense, includes not only motives (strictly speaking) but also attitudes and emotions. When the same word is used uncritically for both a conceptual genus and a species within that genus, confusion is unavoidable.

by his being a Muslim if he was not a Muslim.

The logic of reasons, however, is different, since reasons imply not facts about the world but facts about the actor (or, as some might say, his “mental states”). That Quince’s reason for going to the library was to visit with Marianne implies that Quince believed Marianne was at the library on that occasion. If Quince had not believed that, visiting with Marianne could not possibly have been the reason for his action. Beliefs, though, can be either true or false without affecting that they are one’s belief. If Quince arrived at the library to find that (unbeknownst to him) Marianne had taken the night off, he would be disappointed, but his reason for going to the library would not have changed. Similarly, if a supervisor believed, erroneously, that Barack was a Muslim and fired him because he did not want to work with Muslims, then it is perfectly proper to say that Barack was fired because of his being Muslim, even though he was not a Muslim.⁵⁰

Correcting for this seeming anomaly, many state and local fair employment laws now proscribe discrimination on the basis of “actual or perceived” characteristics, such as sexual orientation or gender identity.⁵¹ The perplexity arises, however, only when we ignore that “because of” statements, when referring to human actions, can invite either their causes or, perhaps more properly, their reasons, and the logic of each is different.

B. The Opacity of “Motivating Factor”

Given the array of mental states that can be invoked to explain an action, it can be asked whether any of these can usefully be termed a “motivating factor” for an action or decision. The word “factor” itself has various meanings. One definition is that a “factor” is “something (as

50. Sometimes, courts recognize that a person might genuinely have something as the reason for her action, even though its factual predicate was false. *See, e.g., Watson v. Se. Pa. Transp. Auth.*, 207 F.3d 207, 222 (3d Cir. 2000) (asserting employer should not be liable just because the sincere belief that predicated the discharge turned out to be false). This recognition appears to be more the exception than the rule.

51. *See, e.g.,* N.Y.C. Admin. Code § 8–107(1). *See also* U.S. Equal Emp. Opportunity Comm’n, EEOC ENFORCEMENT GUIDANCE ON NATIONAL ORIGIN DISCRIMINATION (2016) II (so construing Title VII with respect to national origin discrimination); U.S. Equal Emp. Opportunity Comm’n, EEOC EMPLOYMENT DISCRIMINATION BASED ON RELIGION, ETHNICITY, OR COUNTRY OF ORIGIN, https://www.eeoc.gov/laws/types/fs-relig_ethnic.cfm (last visited June 29, 2017) (so construing Title VII with respect to race, religion and national origin); EEOC COMP. MAN. 15-II (2006), <http://www.eeoc.gov/policy/docs/race-color.html> (last visited June 29, 2017) (“Discrimination against an individual based on a perception of his or her race violates Title VII even if that perception is wrong.”).

an element, circumstance or influence) that contributes to the production of a result . . . <hereditary predisposition, malnutrition, and over exertion are common in the development of many diseases>.”⁵² Thus understood, emotions and attitudes might be considered to “motivating factors” because they influence what we do, often in unconscious ways. But reasons are not “factors” (in this sense) – motivating or otherwise – for an action or decision because they do not stand in relation to the action as cause to effect.⁵³ They do not influence human action; they inform it. The reasons for an action are “intrinsic” to it in the sense that they are essential to identify what the action is and not some other action. Consequently, even though Title VII requires courts to determine whether an adverse action was taken against an individual “because of” that person’s race, color, sex, national origin or religion, it does not necessarily require courts to identify the “factors” that “motivated” or “caused” it, as opposed to its reason.⁵⁴

Under the *McDonnell Douglas* framework (as interpreted by many courts), the plaintiff prevails if he can show that “but for” his being a certain race, color, gender, national origin or religion, he would not have suffered the challenged action, without his also having to prove the “true” reason for that decision.⁵⁵ It is enough to show that the employer’s reasons are “not sufficient” to explain what was done and that something else related to his protected status was involved, but that something else could readily be a prejudice (or, as the courts often say, “discriminatory animus”), perhaps even a prejudice that the decisionmaker himself is not consciously aware of.⁵⁶

In contrast, under a mixed-motive analysis, as articulated by the *Price Waterhouse* plurality, what the plaintiff must show is a reason.⁵⁷ The language of the opinion makes that clear.⁵⁸ The plurality held that the plaintiff shifts the burden of proof to the defendant when she “proves that her gender played a *motivating part* in an employment decision.”⁵⁹

52. *Factor*, THE MERRIAM-WEBSTER DICTIONARY (11th ed. 2014).

53. See *infra* notes 183-89 and accompanying text (discussing a fundamentally different sense for the term “factor” according to which factors and reasons are conceptually interconnected).

54. It will be argued below that, because reasons can be understood as “factors” for an action in a different, but equally commonplace sense, the best and only sensible way to interpret the phrase “motivating factor,” as used in section 703(m), is that it refers to reasons, and nothing else. See *infra* text accompanying notes 183-89 and Section III.B.3.

55. *Bellisimo v. Westinghouse Elec. Corp.*, 764 F.2d 175, 179 (3d Cir. 1985).

56. See *infra* notes 104-07 and accompanying text (discussing use of phrase “motivating factor” in *McDonnell Douglas* framework).

57. *Price Waterhouse v. Hopkins*, 490 U.S. 228, 245-46, 250-52 (1989).

58. *Id.*

59. *Id.* at 258 (emphasis added).

Justice Brennan left no doubt about what he meant by the phrase “played a motivating part:”

In saying that gender played a motivating part in an employment decision, *we mean* that, if we asked the employer at the moment of the decision *what its reasons* were and if we received a truthful response, *one of these reasons* would be that the applicant or employee was a woman.⁶⁰

Thus, despite the verbal allusion to motives for a decision, all the plurality actually meant was one of its reasons.

Justice Brennan’s reference to receiving a “truthful” response to an inquiry as to one’s reasons suggests that he presumed a Cartesian theory of mind, one which supposes that each person has a clear and unobstructed view (to use a visual metaphor) of each of his mental states.⁶¹ From that perspective, it would be unimaginable that someone could be truthful yet misreport the reasons for his actions. As the example of Quince the quarterback illustrates, however, it is perfectly possible, and not all that unusual, for people to give honest but erroneous reports of the reasons for their own actions. One hundred years after Freud, it is long past time we gave up the idea that every inaccurate report of one’s reasons implies deceit.⁶²

It is also worth noting that, in context, Justice Brennan’s reference to “motivating part” is not really about motives.⁶³ It is sometimes helpful to distinguish between what might be called “justifying” and “motivating” reasons. A justifying reason is offered by the agent to justify what she did, and when, as sometimes happens, that reason was

60. *Id.* at 250 (emphasis added).

61. *Id.*

62. An inaccurate report of the reason for one’s action would not normally be called “truthful” because the statement, “John’s report that such-and-such is a true report” and the statement “John truthfully reported that such-and-such” logically implies that “such-and-such is true.” A report is true only if what it says about the world is true. If, responding to an inquiry, someone said “The world was flat,” that could not be truthful, but it could be honest if that is what the person actually believed. A “truthful” statement of one’s reasons is both (a) genuinely believed and also (b) accurate. If either one of those elements is absent, the statement is not truthful. This does not, however, imply that an untruthful statement of one’s reason for an action was deceitful; it might have been an honest, albeit erroneous, statement of one’s reasons. *See also supra* note 39 and accompanying text (discussing difference between false statements as to one’s reasons and mendacious ones) and *infra* note 89 and accompanying text (discussing ambiguities in the term “true reason”).

63. *Price Waterhouse*, 490 U.S. at 250.

not the actual reason for a decision “*at the moment it was made*,”⁶⁴ the justifying reason could properly be called a rationalization. In allowing defendants to avoid liability by proving that they would have made the same decision for permissible reasons alone, Justice Brennan was apparently keen to emphasize that the defense would be available only to an employer who “offe[red] a legitimate and sufficient reason for its decision that did *motivate* it at the time of the decision.”⁶⁵ Thus, by “motivate” here, Justice Brennan must have meant only that the proffered reason was the agent’s actual reason, rather than a *post hoc* rationalization.⁶⁶ Referring to that as a “playing a *motivating* part in an employment decision,” as the plurality did in its self-announced holding,⁶⁷ is not problematic as long as it does not elide into treating “reasons” and “motives” as if they were the same sort of thing, which they are not.

Although the *Price Waterhouse* plurality opinion undeniably uses the words “factor,” “consideration,” “motive” and “reason” as if they were interchangeable, its analytical framework was really about reasons, not motives.⁶⁸ *Price Waterhouse* is better described as a “multiple reason” case, than as a “mixed motive” one.⁶⁹

It is sometimes necessary to say, with all due respect, that the Emperor has no clothes. The cases teach us that judges have to instruct juries to consider, for example, whether the evidence shows that the plaintiff’s religion “played a role” in the employer’s action or was “a motivating factor” for it, as a step toward finding whether the defendant has violated the statute by having taken the challenged action “because of” the plaintiff’s being, for example, a Seventh Day Adventist.⁷⁰ But

64. *Id.* at 241 (emphasis in original).

65. *Id.* at 252 (emphasis added).

66. *Cf.* *Tex. Dep’t of Cmty. Affairs v. Burdine*, 450 (rebutting the prima facie case under *McDonnell Douglas* framework requires that “[t]he defendant need not persuade the court that it was *actually motivated* by the proffered reasons” (emphasis added)). It may be presumed that Justice Brennan was well aware of the nuances of the *McDonnell Douglas* framework and wanted to be clear that, to sustain the *Price Waterhouse* affirmative defense, defendants were required to prove their actual reasons and not merely to articulate a justifying reason. There is no reason to presume that he was referring to any so-called “motivating factor,” but rather simply to the decisionmaker’s actual reasons, which he described as those that “motivate[d]” the decision “at the time” it was made.

67. *Price Waterhouse*, 490 U.S. at 250 (emphasis added).

68. *See id.* at 247, 251; *see also infra* text accompanying notes 183-89.

69. *See Price Waterhouse*, 490 U.S. at 261 (White, J., concurring).

70. *See, e.g., Henry v. Wyeth Pharms., Inc.*, 616 F.3d 134, 157 (2d Cir. 2010) (directing lower courts to instruct juries on whether the discriminatory factor “played a role”); *Zhang v. Am. Gem Seafoods, Inc.*, 339 F.3d 1020, 1029-30 (9th Cir. 2003) (finding no error in the district court’s rejection of additional instructions on the meaning of motivating factor).

the former language is actually more opaque than the latter. Then, to make matters worse, Congress took a piece of juridical jargon – namely, “motivating factor” – and, in passing §107 of the 1991 Act, wrote it into the statute,⁷¹ as if it needs no definition and is perfectly understandable to people of ordinary intelligence – but it is not.

The brutal truth is that while “motive” and “factor” are both words in the English language, the phrase “motivating factor” is an artificial construct with no immediately discernable meaning. That courts and commentators persist in using quotation marks around “motivating factor” even two decades after Congress wrote it into the statute, is a tell-tale sign that people do not really know what it means; yet are required to make legal determinations based on whether or not it is “demonstrate[d]” to exist. Worse still, courts are now using the same phrase – “motivating factor” – to refer to two logically inconsistent concepts,⁷² which signals that the phrase may not really mean anything at all.⁷³

The challenge now is to work our way back to language that actually does make sense (or has a chance of actually meaning the same thing to everyone who uses it). That can only be done, it is proposed, by a bringing to these discussions a clear understanding of the logic of human actions and the reasons for them.

71. See The Civil Rights Act of 1991, 42 U.S.C. § 2000e-2(m) (1991).

72. See *infra* text accompanying notes 110-19.

73. It sometimes happens that words become no longer useable because they have ceased to have a commonly understood meaning. The word “peruse” historically meant to read carefully, but over the years has been used by people to mean to read something in a cursory or casual manner. It has now come to be that “peruse” means both things: to read carefully and to read casually. So, it is no longer possible to tell what the speaker means when she says that a certain document was perused. It is argued here that something very similar has happened with the phrase “motivating factor.” While courts are subject to a statutory mandate to determine when and under what circumstances a Title VII plaintiff “demonstrates” that his or her protected characteristic was a “motivating factor” for the challenged decision, that phrase can mean so many different things that it does not really mean anything. It is hard to say what canons of statutory construction apply when courts are mandated to enforce a statutory term that does not actually mean anything in particular. It is the thesis of this Article, however, that continued debate over what evidence is or is not sufficient to “demonstrate[]” the existence *vel non* of a “motivating factor” without stopping to identify what the phrase “motivating factor” actually refers to cannot be the correct approach.

III. THE MEANING OF “MOTIVATING FACTOR” IN TITLE VII JURISPRUDENCE

A. *The Conundrum of Price Waterhouse*

From its inception, the *Price Waterhouse* “mixed motive” framework was problematic, and it has not improved with age.⁷⁴ The underlying premise of the decision was that some new analytical approach was needed because the *McDonnell Douglas* “pretext” framework was limited to “single motive” cases – that is to say, cases in which either a permissible reason or an impermissible one, but not both, “motivated” the challenged action.⁷⁵ That approach was presumed to be useless for cases in which the full reason for the challenged action included permissible or legitimate considerations along with the impermissible one.⁷⁶ While this may not have been true even when *Price Waterhouse* was decided,⁷⁷ the *raison d’etre* of its new analytical framework soon began to erode as courts broadened their understanding of what the “pretext” phase of the *McDonnell Douglas* framework actually required plaintiffs to show.⁷⁸

1. “Motivating Factor” In Pretext Cases

Language in the *McDonnell Douglas* decision, and even more so in its re-formulation in *Texas Dep’t. of Cmty Affairs v. Burdine*,⁷⁹ did suggest that the issue presented by a Title VII disparate-treatment case was a choice between two incompatible explanations for the challenged

74. See *Gross v. FBL Fin. Serv. Inc.*, 557 U.S. 167, 179 (2009) (“Whatever the deficiencies of *Price Waterhouse* in retrospect, it has become evident in the years since that case was decided that its burden-shifting framework is difficult to apply.”).

75. *Price Waterhouse v. Hopkins*, 490 U.S. 228, 246-47 (1989) (referring to the “Burdine[] framework”); *Id.* at 260 (White, J., concurring) (“[M]ixed-motives’ cases, such as this one, are different from pretext cases, such as *McDonnell Douglas* and *Burdine*.”).

76. *Id.* at 259 (White, J., concurring); see also *id.* at 247.

77. See, e.g., *Hagelthorn v. Kennecott Corp.*, 710 F.2d 76, 86 (2d Cir. 1983) (“[Plaintiff] was required to prove *only* that, even if performance and attitude were factors in [*i.e.*, reasons for] his termination, *nevertheless* he would not have been fired but for his age.” (emphasis added)); *Geller v. Markham*, 635 F.2d 1027, 1035 (2d Cir. 1980) (“...[P]laintiff must show that age was a causative or determinative factor, one that made a difference in deciding whether the plaintiff should be employed”); *Laugesen v. Anaconda Co.*, 510 F.2d 307, 317 (6th Cir. 1975) (“...[T]here can be “more than one factor in a decision to discharge . . . and . . . [plaintiff could be] entitled to recover if one such factor was his age and if in fact [his age] made a difference in determining whether he was to be retained or discharged”).

78. See *infra* Section III.A.2.

79. *Tex. Dep’t of Cmty. Affairs v. Burdine*, 450 U.S. 248, 253 (1981).

action. It was stated, for example, that to carry her burden of proof at what came to be called the “pretext” phase of the litigation and, thereby, to establish that “the defendant intentionally discriminated against the plaintiff,”⁸⁰ the plaintiff had to show that the reasons proffered by the employer “were not its true reasons, but were a pretext for discrimination.”⁸¹ This was later characterized as imposing on the trier of fact the duty to “decide *which* party’s explanation of the employer’s motivation it believes[.]”⁸² strongly suggesting (if not logically implying) that it was one or the other, but not both. This is also supported by the Court’s use of the word “pretext,” which in ordinary discourse connotes a reason proffered by the speaker that she knows to be false and that is intended, when proffered, to conceal the true reason for her actions.⁸³

It is possible, however, that someone could proffer, as the reason for his action, something that is not the “real reason,” but it still not be a pretext (in its ordinary sense). For example, when Quince, the quarterback in the previous illustration, said he was going to the library to study, that was not his “true reason.” It was not, however, a pretext (in the ordinary sense) because he was not intending to deceive anyone: Quince was not being mendacious, only obtuse.

There is language in *Burdine* to suggest that something less than showing a pretext (in the ordinary sense) may be enough to satisfy the plaintiff’s burden at the so-called “pretext” phase of the litigation, since it says that a plaintiff “may succeed . . . by showing that the employer’s proffered explanation is unworthy of credence.”⁸⁴ It might seem that “unworthy of credence” and “pretext” are equivalent. That is not so, however, because, for example, Quince’s self-reported reason for going to the library was not worthy of credence (or, more plainly, not believable) to those who knew the full circumstances,⁸⁵ even though it was not “pretextual,” as the Court appears to be using that word.⁸⁶

80. *Id.* at 253; *see also* U.S. Postal Serv. Bd. v. Aikens, 460 U.S. 711, 715 (1983) (quoting *Burdine*, 450 U.S. at 253) (stating that the “ultimate factual issue” in a Title VII disparate-treatment case is “[whether] the defendant intentionally discriminated against the plaintiff.”).

81. *See Burdine*, 450 U.S. at 253.

82. *See Aikens*, 460 U.S. at 716 (emphasis added).

83. *Pretext*, THE MERRIAM-WEBSTER DICTIONARY (11th ed. 2014) (“[A] purpose or motive alleged . . . in order to cloak the real intention or state of affairs.”).

84. *Burdine*, 450 U.S. at 256.

85. *Cf.* St. Mary’s Honor Ctr. v. Hicks, 509 U.S. 502, 515 (1993) (treating “not believable” as equivalent to “unworthy of credence”).

86. *See id.* at 255, n.10 (Supreme Court’s apparent first use of “pretextual” in Title VII cases). To logicians, “equivalent” does not mean “equal to” or “the same thing as.” To logicians “A” and “B” are equivalent statements as if “A” is true whenever “B” is true and vice versa, or, as is

That something less than “pretext” (in the ordinary sense) is adequate to prove intentional discrimination was implied rather forcefully in *Hazan Paper Co. v. Biggins*, which said that a plaintiff could prevail in a disparate-treatment claim by showing that the “employee’s protected trait actually played a role in [the employer’s decisionmaking] process and had a determinative influence on the outcome.”⁸⁷ As the exploration of the logic of human action presented above makes clear, something—for example, an attitude—can “influence,” perhaps even “determinative[ly] influence,” an action without being its reason.⁸⁸ For example, Bob’s hostile attitude toward his son-in-law surely influenced his decision to exclude him from the “maiden voyage” of his new motorboat, but the reason for Bob’s action was that his son-in-law had been disrespectful.⁸⁹

Subsequently, in *Reeves v. Sanderson Plumbing Prods.*, the Court saw nothing the least bit amiss with a jury instruction that conjoined the *Burdine* language about what was or was not the “real reason” for the challenged action with language to the effect that the plaintiff could prevail by showing “that his age was a *determining and motivating factor* in the decision . . . to terminate him.”⁹⁰ This necessarily means

sometimes said, the two statements have the same truth value. It is suggested that much confusion has been generated in Title VII jurisprudence by thinking of “pretext” and “unworthy of credence” as being equivalent, when they are not. It must now be recognized that if “pretext” is what plaintiffs must show at the “pretext” stage of the *McDonnell Douglas* framework, then “pretext” for purposes of Title VII jurisprudence does not mean the same thing as “pretext,” as used in ordinary discourse. It is, further, suggested that using the same word for significantly different concepts has led to much confusion and some heated debate, when the discussants are simply talking past each other because they are using the same word to mean different things. *See, e.g., supra* note 39; *infra* note 89.

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

88. *See supra* text accompanying notes 43-45.

89. It is far from clear whether it is correct to say that Bob’s reason was not the “true reason” because sentences of the form “Person P did Action A because of Reason R” can be untrue if either: (a) Person P did not actually act on account of Reason R; or (b) Reason R was not correct. For example, I once chastised my son for having eaten cookies from the cookie jar, notwithstanding his intense denials, because he had done that sort of thing before and cookies were missing, but I realized my error once I saw my daughter walk by with cookie crumbs falling from the corners of her mouth. Was my reason for chastising my son – that he took cookies from the cookie jar – true or false? I had certainly intended to chastise my son for taking the cookies (that was my “true” or genuine/real reason) but, in fact, he had done no such thing (my reason was based on a “false” or mistaken belief). A person’s assertion that something was the reason for his action can be either insincere or erroneous. They are not the same, and yet the adjective “false” could plausibly apply to either. This is another area where inattention to the essential intentionality of reasons can lead to disputes because the same word (here “false”) as applied to reasons does not always imply the same thing.

90. *Reeves v. Sanderson Plumbing Prods.*, 530 U.S. 133, 153 (2000) (emphasis added). Note also that the Court is using “motivating factor” here as part of a *McDonnell Douglas* analysis. *See id.* at 142 (assuming without deciding that “*McDonnell Douglas* framework . . . applies to ADEA

that even in a traditional *McDonnell-Douglas*, “single motive” case, the challenged action can have discriminatory animus as “a . . . motivating factor”—and, in the language of *Hazan Paper* a “determinative” one—even though there were also non-discriminatory reasons for the agent’s actions.⁹¹

The Court in *Reeves* sustained a jury finding that the employer had “intentionally discriminated” based on three things: (1) the plaintiff’s *prima facie* case of discrimination; (2) the introduction of evidence sufficient for the “jury to reject [the employer’s] explanation” for its action; and (3) “additional evidence of age-based animus” (even though not directly connected to the decisionmaker’s thought processes).⁹² While there was some suggestion in the case that the proffered reason for the employer’s action may have been fabricated to conceal that the true reason for the decision to terminate the plaintiff was his age, there was no indication that the jury instruction was deficient for having failed to instruct the jury to decide “which party’s explanation of the employer’s action it believes.”⁹³

2. “Pretext” As Currently Understood

As the *McDonnell Douglas* framework has evolved, it is, often, no longer actually required that there be two incompatible reasons, only one which could be true.⁹⁴ While some courts cling to the single-motive/mixed-motive dichotomy when trying to articulate the difference between the *McDonnell Douglas* and *Price Waterhouse* frameworks,⁹⁵ in

actions”). That phrase, however, cannot mean what “motivating factor” means in section 703(m). See *infra* notes 110-19 and accompanying text.

91. See Michael Zimmer, *The New Discrimination Law: Price Waterhouse is Dead, Whither McDonnell Douglas?*, 53 EMORY L.J. 1887, 1925 (2004) (“[T]he description of *McDonnell Douglas* as involving a ‘single motive’ has, at least, since *Hazen Paper*, been metaphorical.”).

92. *Reeves*, 530 U.S. at 153-54. Clearly, if the motive of age-based animus can give rise to “intentional” discrimination, which it surely can, then “intentional” here does not mean “specific intent.” Moreover, according to *Reeves*, the plaintiff is not required to adduce evidence showing that the employer’s explanation was a “pretext,” in the sense of a “sham,” but only evidence sufficient for the jury to “reject” it, which means, in the language of *Burdine*, evidence that the explanation was “unworthy of credence.” *Tex. Dep’t of Cmty. Affairs v. Burdine*, 450 U.S. 248, 256 (1981).

93. *U.S. Postal Serv. Bd. v. Aikens*, 460 U.S. 711, 716 (1983).

94. Zimmer, *supra* note 89, at 1892.

95. See, e.g., *Quigg v. Thomas Cty. Sch. Dist.*, 814 F.3d 1227, 1237 (11th Cir. 2016) (stating that “the [*McDonnell Douglas*] framework is predicated on proof of a single, ‘true reason’ for an adverse action. . . . an employee must prove that the ‘true reason’ for an adverse action was illegal”); *Smith v. Xerox Corp.*, 602 F.3d 320, 326 (5th Cir. 2010) (stating that “pretext cases involve discernment of the true reason for the employer’s action,” whereas, the “*Price Waterhouse*

actual practice, that difference no longer exists, largely because plaintiffs are permitted to prevail at the “pretext” stage of the *McDonnell Douglas* framework without having to show that the employer’s reasons were deliberately concocted to conceal illegality.⁹⁶ Rather, the plaintiff can prevail on a Title VII disparate-treatment claim – and typically does – by establishing that his or her race, gender, color, religion or national origin “caused,” “determined” or “motivated” the challenged action, even if there were actual nondiscriminatory reasons for that decision.⁹⁷

This is well illustrated by the Second Circuit’s decision in *Henry v. Wyeth Pharmaceuticals*.⁹⁸ There, in response to arguments from the plaintiff that the trial court had erred in its jury instruction as to the proof burdens required by *McDonnell Douglas*, the court said that, following the defendant’s proffer of a non-discriminatory reason for its challenged employment decision, “a plaintiff need only show that the defendant was, in fact, motivated *at least in part* by the prohibited discriminatory animus.”⁹⁹ This perforce means that “discriminatory animus” need not be the one and only reason for the challenged action. The court went on to say that the plaintiff’s burden “to prove that the employer’s explanation is a ‘pretext for discrimination’”¹⁰⁰ is, if properly understood, “a shorthand for the more complex concept that, regardless

test involves employment decisions based on multiple factors or mixed motives”); *White v. Baxter Healthcare Corp.*, 533 F.3d 381, 400 (6th Cir. 2008); *Stegall v. Citadel Broad. Co.*, 350 F.3d 1061, 1067 (9th Cir. 2003).

96. See, e.g., *Ponce v. Billington*, 679 F.3d 840, 846 (D.C. Cir. 2012) (stating that plaintiffs need not prove that “illegal discrimination” was the “sole reason” for adverse employment action, but only that “but for his race [or other protected characteristic] he would have been hired”); *Henry v. Wyeth Pharms.*, 616 F.3d 134, 156 (2d Cir. 2010); see also *infra* text accompanying notes 98-103.

97. See, e.g., *Ortiz v. Werner Enters., Inc.*, 834 F.3d 760, 765 (7th Cir. 2016) (“[L]egal standard . . . is simply whether . . . the plaintiff’s race, ethnicity, sex, religion or other protected characteristic caused the discharge or other adverse employment action”); *Ahmed v. Johnson*, 752 F.2d 490, 498 (1st Cir. 2014) (stating that plaintiffs need to show only that “discrimination motivated the adverse employment action”); *Watson v. Se. Penn. Trans. Auth.*, 207 F.3d 207, 222 (3d Cir. 2000) (finding error in jury charge giving “sole-cause standard,” since “an impermissible factor need only be a determinative, or but-for cause, of the adverse employment action”); *Hill v. Lockheed Martin Logistics Mgmt., Inc.*, 354 F.3d 277, 286 (2004) (en banc), *abrogated on other grounds* by *Univ. of Tex. Sw. Med. V. Nassar*, 570 U.S. 338 (2013) (“Regardless of the type of evidence . . . , or whether she proceeds under a mixed motive or single-motive theory, ‘the ultimate question . . . is whether the plaintiff was the victim of intentional discrimination.’” (quoting *Reeves v. Sanderson Plumbing Prods.*, 530 U.S. 133, 153 (2000))). For reasons explained below, “motivate” cannot possibly mean in this context what it means for purposes of a “mixed motive” case decided under section 703(m). See *infra* text accompanying notes 110-19.

98. *Henry*, 616 F.3d at 134.

99. *Id.* at 156 (emphasis added).

100. *Id.*

of whether the employer's explanation *also furnished part of the reason* for the adverse action, the adverse action was *motivated in part by discrimination*.¹⁰¹ This "more complex concept" entails that the *McDonnell Douglas* framework,¹⁰² as currently applied by many courts, is not only and always a "single motive" affair. Rather, the plaintiff can prevail even if "part of the reason" for the action was a non-prohibited reason, provided that the action was also partly "motivated" by "discrimination" (perhaps in the form of an unconscious bias or stereotype).¹⁰³

This was reinforced by the *Henry* court's discussion of the showing required of a plaintiff at the "pretext" stage of that *McDonnell Douglas* framework, which is to say, after the employer has proffered its non-discriminatory explanation: "A plaintiff has no obligation to prove that the employer's innocent explanation is *dishonest*, in the sense of *intentionally* furnishing a justification *known to be false*."¹⁰⁴ This statement ruptures any connection between the term "pretext" (in ordinary discourse) – which actually is aptly defined as "intentionally" stating as the reason for one's action what is "known to be false"¹⁰⁵ and which necessarily implies mendacity – and the term "pretext" as now, actually used in Title VII jurisprudence, which does not imply mendacity.¹⁰⁶ It would be helpful if the courts would acknowledge that they are now using "pretext" in a special juridical sense, one that is far removed from what "pretext" means in ordinary discourse.

In explaining this special, juridical understanding of "pretext," the *Henry* court returned to reasons and, in its words, "motivating factor," stating:

[A] Title VII plaintiff may not prevail by establishing only pretext, but must prove, in addition, that a *motivating reason* was discrimination. [. . .] Since a

101. *Id.* (emphasis added). Even though the court may be eliding the concepts "reason" and "motive," it apparently contemplates that the adverse action can be "motivated," in part, by a non-discriminatory "reason" and, in part, by a non-reason determinant. See *supra* text accompanying notes 19-20 (showing non-reason determinants such as "discrimination" or "discriminatory animus").

102. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973).

103. *Henry*, 616 F.3d at 156.

104. *Id.* (emphasis added).

105. *Id.*

106. *Id.* at 155 (noting that it is "unwise" to use the word "pretext" in jury instructions since that "add[s] inappropriately to the plaintiff's burden [of proof]," given that "according to the most prominent dictionary definitions of 'pretext,' the word connotes an 'intent to deceive'").

plaintiff prevails by showing that *discrimination was a motivating factor*, it can invite the jury to ignore the defendant’s proffered legitimate explanation and conclude that discrimination was a *motivating factor*, whether or not the employer’s proffered explanation was also in the employer’s mind.¹⁰⁷

Thus, the Second Circuit equates “motivating factor” and “motivating reason,” and it allows the plaintiff to prevail even if the employer’s proffered explanation was “also” a reason for the action or, as the court metaphorically states, “in the employer’s mind.”¹⁰⁸

3. The Current Conceptual Muddle

By the turn of the 21st Century, courts, for the most part, no longer operated as if *McDonnell Douglas* cases were necessarily a “single motive” affair, since plaintiffs were no longer required to prove that the employer’s proffered reason was not “the” reason, but merely that it was not the “whole” reason or, more precisely, not adequate to fully explain the action and that but-for “discrimination” would not have been taken.¹⁰⁹ That makes it difficult to understand how the *McDonnell Douglas* framework differs from the purported “mixed motive” framework of *Price Waterhouse* and section 703(m).

Moreover, the term “motivating factor,” as used by the Second Circuit (and other courts) in the *McDonnell Douglas* framework, does not—and cannot possibly—mean what that same phrase means under section 703(m). This is so because in one of the two frameworks, a “motivating factor” is the but-for cause of the challenged action, but in the other, it is not.¹¹⁰

Whatever might be the meaning of “motivating factor” in section 703(m), one thing is certain: it is not a but-for cause. This is true, in

107. *Id.* at 156, n.5 (quoting *Fields v. New York State Office of Mental Retardation and Developmental Disabilities*, 115 F.3d 116, 121 (2d Cir. 1997)) (emphasis added) (alteration in original).

108. *Id.*; see also *Ahmed v. Johnson*, 752 F.3d 490, 503 (1st Cir. 2014) (defining issue as “whether . . . plaintiff’s race, religion or heritage played a motivating role in the decision to bypass him from promotion). “[U]nlawful discrimination can stem from stereotypes and other types of cognitive biases, as well as from conscious animus.” *Id.*

109. Many courts were of this view in the 1970’s and 1980’s. See cases cited *supra* note 77.

110. Compare *McDonnell Douglas Corp., v. Green*, 411 U.S. 792 (1973), with Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2 (1964) (showing the different framework used in the case versus the statute).

part, because the *Price Waterhouse* plurality was quite explicit that, in its view, the operative language of Title VII did not require ‘but-for causation.’¹¹¹ There is no indication that Congress found that part of *Price Waterhouse* to be problematic.¹¹²

More fundamentally, however, section 107 of the 1991 Act added to the statute not only section 703(m) but also a companion provision, section 706(5)(g)(2)(B), which limited the remedies available to plaintiffs if, after a section 703(m) showing, the defendant “demonstrates that [it] would have taken the same action in the absence of the impermissible motivating factor.”¹¹³ If it is possible for the defendant to “demonstrate” that “the same action” would have occurred even absent the existence of the impermissible “motivating factor,”¹¹⁴ (which, under section 703(m), the plaintiff must “demonstrate[.]” to be present),¹¹⁵ then that “motivating factor” is not necessary for the occurrence of the challenged action and, hence, not its but-for cause.

In contrast, under the *McDonnell Douglas* framework, the plaintiff establishes that “discrimination” was a “motivating factor” by showing that whatever reasons might have “also [been] in the employer’s mind,”¹¹⁶ those reasons were not sufficient to explain the action, but rather the presence of discriminatory animus “made the difference”¹¹⁷ or “had a *determinative* influence on the outcome.”¹¹⁸ If a “motivating factor” (however defined) must be “determinative” for purposes of establishing liability under the *McDonnell Douglas* framework, then it is a necessary condition for the challenged act, which means it was its but-for cause.¹¹⁹

The dissent in *Price Waterhouse* stated that “Title VII liability require[d] a finding of but-for causation.”¹²⁰ That was a correct statement of the law prior to enacting the 1991 Act.¹²¹ The whole point

111. See *Price Waterhouse v. Hopkins*, 490 U.S. 228, 240 (1989).

112. See *infra* notes 200-01.

113. 42 U.S.C. § 2000e-5(g)(2)(B).

114. *Id.*

115. *Id.* § 200e-2(m).

116. See *Henry*, 616 F.3d at 156, n.5 (citing *Fields v. New City Office of Mental Retardation*, 115 F.3d 116, 121(2d Cir. 1997)).

117. See, e.g., *Zito v. Fried, Frank, Harris, Shriver & Jacobson, LLP*, 869 F. Supp. 2d 378, 394 (S.D.N.Y. 2012) (citing *Geller v. Markham*, 635 F.2d 1027, 1035 (2d Cir. 1980)).

118. *Hazen Paper Co. v. Biggins*, 507 U.S. 604, 610 (1993) (emphasis added).

119. See, e.g., *Univ. of Tex. Sw. Med. v. Nassar*, 570 U.S. 338 (stating that causation-in-fact “standard requires the plaintiff to show that the harm would not have occurred in the absence of—that is, but for—the defendant’s conduct”).

120. *Price Waterhouse v. Hopkins*, 490 U.S. 228, 281 (1989) (Kennedy, J. dissenting).

121. Under the *McDonnell Douglas* framework, the plaintiff is required to show that

of section 703(m) was to create a framework that imposed liability when an impermissible “motivating factor” was shown to exist, without also having to show that it was the but-for cause of the challenged action.¹²² But, under the *McDonnell Douglas* framework, the plaintiff prevails only upon a showing that the impermissible “motivating factor” actually was a but-for cause, though not necessarily the sole or even the predominate cause.¹²³

This then is the conundrum. The “mixed motive” framework was intended as an alternative to the perceived deficiency of the *McDonnell Douglas* framework which, it was said, presumes that there was only one reason for the challenged employment action.¹²⁴ But, that is not how the *McDonnell Douglas* framework is actually applied by many courts – at least not for the last two decades.¹²⁵ Moreover, courts using both the “mixed-motive” and “pretext” frameworks employ the phrase “motivating factor” at critical junctures, but the same phrase cannot possibly mean the same thing in each of the two contexts.¹²⁶ It is not surprising that courts and commentators wonder out loud how the *Price Waterhouse* section 703(m) proof framework and the alternative

“discriminatory animus” motivated the challenged action, at least in part. This means that “but for” the presence of proscribed animus, the challenged action would not have occurred. Under the *Price Waterhouse* framework (*i.e.*, prior to enactment of section 703(m)), after the plaintiff’s initial showing (whatever that may be), the defendant can avoid liability by showing that it would have taken the same action for permissible reasons alone. *Id.* at 242. Making that showing logically implies that “discrimination” was not a necessary condition for the occurrence of the challenged action because something else was a sufficient condition for its occurrence. So, prior to section 703(m), either the plaintiff proved that discrimination was the but-for cause of the challenged action or the defendant proved that it was not. Title VII liability turned on whether “discrimination” was proved to be or proved not to be a but-for cause of the challenged action. The only difference between the two frameworks was which party had the burden of proof.

122. See Belton, *supra* note 10, at 661.

123. See *id.* at 657.

124. See *id.* at 661-62.

125. See cases cited *supra* notes 96-97.

126. In its most recent Title VII decision, *EEOC v. Abercrombie & Fitch*, 575 U.S. ___, 135 S.Ct. 2028 (2015), the Court perpetuated this ambiguity. The Court acknowledges that section 703(m) “prohibit[s] even making a protected characteristics of ‘motivating factor’ in an employment decision,” *Id.* at 2032 (emphasis added) (internal quotes in original), and then says in the next sentence that under the primary provision of Title VII, “an individual’s [protected characteristic] may not be a motivating factor in failing to hire, in refusing to hire, and so on,” *Id.* (no quotation marks in original). The Court then ruled that Title VII liability can attach when “avoiding” religious accommodation is “the motive for a refusal to hire,” *Id.* at 2033 (emphasis in original), even if the employer’s decision was “due to” (had as its reason) enforcing an otherwise-neutral policy, *Id.* at 2034. The Court does not explain how “making” a protected characteristic a “motivating factor” (with internal quotation marks) is different from its “be[ing] a motivating factor” (with no internal quotation marks).

framework of *McDonnell Douglas* can peacefully co-exist.¹²⁷

B. “Motivating Factors” as Reasons

It is proposed that the only way out of the *Price Waterhouse* conundrum is to construe the phrase “motivating factor” as used in cases arising under section 703(m) of Title VII to mean a reason that was consciously considered by the decisionmaker in the deliberations that led to the challenged action or, as one court put it, that the plaintiff’s protected characteristic “actually entered into [the employer’s] decisional processes.”¹²⁸ Another court of appeals decision expressed a similar idea when it said:

An unlawful employment practice is established when a plaintiff demonstrates that a protected characteristic, such as sex, was a motivating factor. . . . [T]o prove that sex was a motivating factor, a plaintiff must demonstrate that her sex *was one of the reasons* that the employer took adverse action against her.¹²⁹

127. See, e.g., *Fernandez v. Costa Bros. Masonry, Inc.*, 199 F.3d 572, 580 (1st Cir. 1999) (“mixed-motive approach, uncabined, has the potential to swallow whole the traditional *McDonnell-Douglas* analysis”); see *Harper*, *supra* note 10, at 124; *Belton*, *supra* note 10, at 663 (positing the line between *Price Waterhouse* and *McDonnell Douglas* “very murky”). Most courts, however, tended to view *McDonnell Douglas* and *Price Waterhouse* as two “mutually exclusive proof schemes” in employment discrimination cases. See *Belton*, *supra* note 10, at 657. For an example and detailed explication of the latter approach, see *Watson v. Southeastern Penn. Trans. Auth.*, 207 F.3d 207, 214-16 (3d Cir. 2000).

128. *Tyler v. Bethlehem Steel Corp.*, 958 F.2d 1176, 1187 (2d Cir. 1992).

129. *Hossack v. Floor Covering Assoc.*, 492 F.3d 853, 862 (7th Cir. 2007) (emphasis added). This clarity was later obscured when the court upheld judgment as a matter of law for the defendant because “[t]here is no direct evidence to establish that the defendant’s alternative explanations . . . were pretexts unworthy of belief,” and supported that by citing *Reeves v. Sanderson Plumbing*—a *McDonnell Douglas* case—for the proposition that employers are entitled to judgment when “the record conclusively revealed some other non-discriminatory reason for the employer’s action.” *Id.* at 863. So, the *Hossack* court ruled that the *McDonnell Douglas* framework was inapplicable because the plaintiff had failed to establish a prima facie case of sex discrimination. *Id.* at 861. The court then also purported to apply the section 703(m) standard (calling it the “direct method of proving a Title VII case”). *Id.* Lacking “direct evidence” of discriminatory animus, the court examined the sufficiency of the circumstantial evidence, and concluded that the plaintiff lost *not* because she had failed to show by circumstantial evidence that her sex was “a” reason for the challenged action (which would mean that she had failed to establish liability under section 703(m)), and *not* because the defendant had demonstrated that it would have taken the same action for its proffered reason alone, but rather because the plaintiff had failed to present “direct evidence” that those proffered reasons were “pretexts unworthy of belief.” *Id.* at 862-63. This conflation of concepts from each of the *McDonnell Douglas* and *Price Waterhouse* proof frameworks is impossible to untangle. The judgment, however, was correct and could have been explained by

The limitation of section 703(m) to cases in which a plaintiff’s being in the protected classification is a reason, but not necessarily the only reason for the challenged action leaves open that plaintiffs could still prevail in a Title VII action under the *McDonnell Douglas* framework if “discriminatory motivation,”¹³⁰ in some way or other, “determinative[ly] influenced”¹³¹ the decision without its having been a reason for it. Unconscious determinants of behavior—for example, attitudes and biases or, perhaps, “ulterior motives”—can influence a human action even though they are not the reason for it. In contrast, reasons, properly understood, do not “motivate” or “influence” a human action, they inform it, in the sense that they make it what it is.¹³²

1. The Divergent Judicial Approaches

The implications of this approach for section 703(m) liability are illustrated by several cases in which the court found that the evidence warranted application of “mixed-motive” framework but understood the phrase “motivating factor” to mean quite different things.

In *Smith v. Xerox Corp.*, the Fifth Circuit affirmed the use of a “mixed-motive” jury instruction in a Title VII retaliation case.¹³³ The evidence was that the plaintiff was far behind in her production prior to the alleged retaliatory act and was deficient in her business knowledge and acumen.¹³⁴ But, the employer had notice of the plaintiff’s Equal Employment Opportunity Commission (“EEOC”) charge before it terminated her employment; it took that action after “a single poor performing year [and] only two years removed from [her] being among

simply saying that, although the plaintiff *alleged* that she was fired for having an affair with a male co-worker (*i.e.*, for the reason that she was the female party to an extra-marital affair with a co-worker), she failed to present any evidence (direct or circumstantial) that this, in fact, was any part of the employer’s actual reasons for its discharge decision. *Id.* at 862-63.

130. *St. Mary’s Honor Ctr. v. Hicks*, 509 U.S. 502, 516 (1993).

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

132. Similarly, since the logic of reasons differs from the logic of causation and since the word “because” as applied to human action can call for either its reason or its cause, *see supra* note 31; it is neither necessary nor appropriate to apply “[c]ommon-law approaches to causation,” *Price Waterhouse v. Hopkins*, 490 U.S. 228, 282 (1989) (Kennedy, J., dissenting), to “motivating factor[s],” provided that term is understood as referring to the reasons for an action but not those other psychological or mental states that can fall under the rubric of “motive.”

133. *Smith v. Xerox Corp.*, 602 F.3d 320, 334 (5th Cir. 2010), *abrogated by* *Univ. of Tex. Sw. Med. v. Nassar*, 570 U.S. 338 (2013) (holding that mixed-motive analysis is not applicable to Title VII retaliation claims). Due to the fact that this was a retaliation case, the “motivating factor” requirements of section 703(m) do not apply, but the case nonetheless illustrates one approach that courts are taking to “mixed-motive” cases generally.

134. *See Smith*, 602 F.3d at 323, 334.

the top performing employees in the country,”¹³⁵ and its own “policies permit[ted], and arguably encourage[d], lesser actions such as reassignment or demotion. . . .”¹³⁶ From this, the court of appeals concluded that there were “both legitimate and illegitimate motives [*sic*] for Smith’s termination,”¹³⁷ which made this, in the court’s view, “a mixed-motive case.”¹³⁸

While the court cannot be faulted for sending the *Smith* case to a jury, the evidence found sufficient to show the existence of the impermissible “motive”¹³⁹ was not any different from the evidence typically used to show, under the *McDonnell Douglas* framework, that the stated reasons were a pretext for discrimination. If the same evidence is adequate to show both that an impermissible consideration was a “motivating factor” for a challenged employment action (as that term is used in section 703(m)), and also that the employer’s reasons were a pretext (in its special juridical sense), then “mixed motive” analysis has simply supplanted *McDonnell Douglas*.

Contrast that with *Rowland v. American General Finance*, where the Fourth Circuit reversed the trial court’s refusal to give a “mixed-motive” instruction in a Title VII sex-discrimination case.¹⁴⁰ There, the plaintiff, who had risen to the position of store manager, was denied promotion to district manager by George Roach, the company’s director of operations.¹⁴¹ Although the plaintiff was generally successful as a store manager and had sufficient qualifications for promotion, her performance reviews “suggested that she needed to work on her ‘people skills.’”¹⁴² She had been passed over for promotions several times, losing out once to “a male candidate,” once to “a female minority candidate,” and once to “an African American male candidate.”¹⁴³ After the third rejection, the plaintiff confronted Roach on his decision. Roach recounted some of the plaintiff’s people-skills problems and then, according to the plaintiff, “stated plainly, ‘I just don’t need another woman in this position, particularly one like Shelby Burnett,’”¹⁴⁴

135. *Id.* at 324, 334.

136. *Id.* at 334.

137. *Id.*

138. *Id.*

139. *Id.* at 326.

140. *Rowland v. Am. Gen. Fin., Inc.*, 340 F.3d 187, 193-94 (4th Cir. 2003).

141. *Id.* at 189, 190.

142. *Id.* at 190.

143. *Id.* at 189.

144. *Id.* at 190.

referring to a female district manager working for the company.¹⁴⁵ More than anything else, it was Roach’s comment that led the court to conclude that the evidence “suggest[ed] that sex was a ‘motivating factor’ in employment decisions at [the company],”¹⁴⁶ which “certainly suffices to merit a mixed-motive instruction.”¹⁴⁷

The result in *Rowland* was unremarkable, and the reasoning not at all unlike the “direct evidence” approach used before *Desert Palace*.¹⁴⁸ But, having been decided after *Desert Palace*, the *Rowland* court could not invoke the “direct evidence” rationale, and could only make the wholly conclusory assertion that “sex was a ‘motivating factor’ in [the] employment decision”¹⁴⁹ without explaining why or how this was so.

Its conclusion, however, need not be so shrouded in mystery. Recognizing the difference between reasons and motives, Roach’s statement (if the jury believed he said it) clearly showed that sex (or, more precisely, Rowland’s being a woman) was a reason—though not necessarily the only reason¹⁵⁰—for his decision or, to use the language of *Price Waterhouse*, something he “consciously” considered in deliberating about whom to promote.¹⁵¹

The last example is the Ninth Circuit’s decision in *Desert Palace*.¹⁵² The plaintiff, Costa, was the only woman in a male-dominated work unit (driving forklifts in a warehouse).¹⁵³ She was “singled out” for disparate treatment that was so egregious and wide-ranging it needs to be detailed to be appreciated.¹⁵⁴ She was ultimately discharged for an altercation with a male co-worker who was only suspended,¹⁵⁵ even though he clearly instigated the incident and was the only one physically abusive.¹⁵⁶ There were comments by supervisors that indicated “sexual

145. *Id.*

146. *Id.* at 193.

147. *Id.*

148. See *Desert Palace, Inc. v. Costa*, 539 U.S. 90, 95 (2003) (“[A] number of courts have held that direct evidence is required to establish liability under [section 703(m)].”).

149. *Rowland*, 340 F.3d at 192.

150. *Id.* at 190.

151. *Price Waterhouse v. Hopkins*, 490 U.S. 228, 237 (1989).

152. *Costa v. Desert Palace, Inc.*, 299 F.3d 838 (9th Cir. 2002) (en banc), *aff’d sub nom.*, 539 U.S. 90 (2003).

153. *Id.* at 844.

154. *Id.* at 845. For example: whereas men who were late or missed work for medical reasons were given overtime to make up for lost work, she was disciplined; she was not just followed by her supervisors but was subject to “particularly intense ‘stalking’”; she began having a personnel file “‘stack[ed]” with disciplinary warnings (*i.e.*, multiple disciplinary warnings in a single day), and she was accused of “‘refusing’ overtime” when she was actually on vacation. *Id.*

155. *Id.* at 846, 860.

156. *Id.* at 846.

stereotyping and sexual epithets.”¹⁵⁷ And, the supervisor “who later signed Costa’s termination order, had expressly declared her intent to ‘get rid of that bitch,’ referring to Costa.”¹⁵⁸ The *Costa* court ruled that although the employer had “legitimate reasons to terminate Costa,”¹⁵⁹ this “wide array of discriminatory treatment is sufficient to support a conclusion that sex was also a motivating factor in the decision-making process.”¹⁶⁰ Regrettably, the court never defined “motivating factor” or explained how the evidence showed it to exist. However, the language referring to the employer’s “decision-making process” suggests that the court may have meant by “motivating factor” nothing other than a reason for the challenged actions.¹⁶¹ Other language in the decision supports that interpretation.¹⁶²

The *Costa* decision is right on the cusp between *Smith* and *Rowland*. Unlike *Smith*, the evidence showed both a “wide array” of disparate treatment and also, as characterized by the court, purposive behavior: “stalking,” “stacking” discipline, and “singling out.”¹⁶³ In addition to anti-female comments, there was the one statement expressing the intent of “rid[ding]” the “bitch” Costa from the workplace.¹⁶⁴ That statement evidenced discriminatory intent in general but, unlike *Rowland*, did not establish that the plaintiff’s being a woman was consciously considered by the actual decisionmaker in coming to the discharge decision itself.¹⁶⁵

157. *Id.* at 859; *see also id.* at 845-46 (detailing specific comments).

158. *Id.* at 846. It appears that the comment was not made contemporaneously with the discharge decision, which may be one reason why the majority declined to use the “direct evidence” standard in affirming the trial courts use of a “mixed-motive” jury instruction. *Id.*

159. *Id.* at 859.

160. *Id.*

161. *Id.*

162. *See id.* at 860 (“The jury could easily infer that sex was one of the reasons Costa was singled out for negative treatment.” (emphasis added)); *see also id.* at 856-57 (“[I]n cases in which the evidence could support a finding that discrimination is one of two or more reasons for the challenged decision . . . the jury should be instructed to determine first whether the discriminatory reason was ‘a motivating factor’ in the challenged action.” (emphasis added)).

163. *Costa*, 299 F.2d at 859.

164. *Id.* at 846.

165. *See Price Waterhouse v. Hopkins*, 490 U.S. 228, 251 (1989); *see also id.* at 277 (O’Conner, J., concurring). In other cases, such a comment—namely, one not contemporaneous with the decision nor made by the actual decisionmaker—would be characterized as a “stray remark,” *see Price Waterhouse*, 490 U.S. at 277 (O’Conner, J. concurring), and, therefore, not probative as to whether the challenged decision had some impermissible characteristic was a “motivating factor” (in the *Price Waterhouse* sense). *See, e.g., Martinez v. N.Y. City Transit Auth.*, 672 F. App’x 68, 71 (2d Cir. 2016) (“Stray remarks alone are insufficient to defeat summary judgment.”); *Silvestri v. Jupiter Inlet Colony, Fla.*, 614 F. App’x 983, 985 (11th Cir. 2015) (holding a comment made before plaintiff was hired and that was not addressed at plaintiff in particular could

Consequently, even though the evidence showed that Costa’s being (in the view of her supervisors) an overly assertive woman was “on the mind” (so to speak) of her supervisors¹⁶⁶ and enough so that the jury could infer that removing her from the workplace was a reason—though not the only reason—they acted to terminate her employment,¹⁶⁷ it was not sufficient to show conscious deliberation, as there was in *Price Waterhouse* and *Rowland*.¹⁶⁸ The court’s incantation of the phrase “motivating factor” and resort to picturesque, yet amorphous, metaphors, like “played a role in the charged employment practice”¹⁶⁹ or that the “decisional process has been substantially infected by discrimination,”¹⁷⁰ make it impossible to say whether, as the court saw it, Costa’s being a woman was not just a reason for the discharge decision but also something consciously considered “in the decision-making process.”¹⁷¹

Assessing *Costa*, using the logic of human action, the evidence there showed that the supervisors who fired Costas were motivated by hostility toward women and, in particular, hostility toward Costa because she was a woman. The reason for their action, however—or, at least, the stated reason—was that she had engaged in a workplace altercation.¹⁷² The evidence was also sufficient to establish that this stated reason was a pretext: two people engaged in the workplace disruption; one instigated the disruption and escalated it to physical assault, but only the other one was fired.¹⁷³ It was, therefore, more likely than not, not the “real reason”—something “more” was going on. Moreover, the pattern of overt hostility toward Costa that preceded her discharge,¹⁷⁴ suggests that the stated reason may actually have been a pretext (in the ordinary sense), namely, something contrived or concocted to conceal the true reason, which was to eject Costa from the male-dominated workplace. The plaintiff, however, would not have

not give rise to an inference of intentional discrimination); *Floyd-Gimon v. Univ. of Arkansas for Med. Scis. ex rel. Bd. of Trustees of Univ. of Arkansas*, 716 F.3d 1141, 1150 (8th Cir. 2013) (holding a remark from a supervisor that was not involved in the employment decision was not evidence of an illegal motive).

166. See *Costa*, 299 F.3d at 861.

167. *Id.* at 846, 859.

168. *Id.* at 856, 858, 862.

169. *Id.* at 849.

170. *Id.* (quoting *Price Waterhouse*, 490 U.S. at 269-70 (O’Connor, J, concurring)). Compare “infected” the decision process with “entered into” the decisional process, as used by the court in *Tyler*, the latter being less metaphorical and more precise.

171. *Costa*, 299 F.3d at 859.

172. *Id.* at 846.

173. *Id.* at 860.

174. *Id.* at 846.

been required to prove contrivance to prevail under the *McDonnell-Douglas* framework as currently and actually applied.¹⁷⁵ That the plaintiff would have prevailed on the evidence presented under the *McDonnell-Douglas* framework raises the question of what rationale the Ninth Circuit might have had for resorting to the section 703(m), “motivating factor” analysis to reach the decision it did.¹⁷⁶

The *Costa* court’s underlying rationale might be illuminated if the facts are slightly changed. Suppose, hypothetically, that *Costa* initiated the altercation, that only she was physically assaultive, and that there was a well-established practice of firing workers who instigated workplace violence. Under that evidence, a jury could conclude that the stated reason for her discharge was the real reason and that, even though the decisionmakers harbored an unconscious desire to “get rid of” *Costa*, she would have been fired anyway under the circumstances, even absent that unconscious desire. Under the *McDonnell Douglas* framework, *Costa* would lose because the “discriminatory animus”—whether an unconscious reason or motive—was not determinative. But, if unconscious reasons were permissibly regarded as “motivating factors” under section 703(m),¹⁷⁷ then *Costa* would prevail, at least as to liability.

2. What *Price Waterhouse* Actually Meant

Understanding the term “motivating factor” to refer to reasons actually considered in coming to a decision is consistent with its original usage in the case law and in ordinary language (in some contexts).¹⁷⁸

175. See notes 94-97 and accompanying text.

176. The Supreme Court has now accepted “cat’s paw” causation in employment-discrimination cases, which allows for liability for unlawful discrimination if a biased individual provided potentially tainted information that was utilized by the actual decisionmaker for whom there is no evidence of “discriminatory animus.” See *Staub v. Proctor Hosp.*, 562 U.S. 411, 422 (2011); see also *Vasquez v. Empress Ambulance Serv., Inc.*, 835 F.3d 267, 276 (2d Cir. 2016) (adopting the “cat’s paw” theory of liability, “regardless of the employee’s role within the organization”); *Godwin v. WellStar Health Sys., Inc.*, 615 F. App’x 518, 528 (11th Cir. 2015) (adopting the “cat’s paw” theory of liability in an age discrimination case). That expansion of causation enhances the capacity of the *McDonnell Douglas* proof framework to provide a remedy to persons victimized by unconscious motives that result, even indirectly, in a denial of equal employment opportunity.

177. See *infra* Section III.B.3.

178. One commentator sees this as stated in the statutory language itself. See *Mizer*, *supra* note 10, at 250-51 (stating that section 703(m) “makes clear” that an employer violates Title VII “whenever it considers an illicit reason in its decision process”). But, then, that same commentator lapses into saying that by the “plain language” of section 703(m), “an employer violates Title VII any time it allows a protected characteristic to serve as a ‘motivating factor’ in an employment decision.” *Id.* at 253.

The phrase “motivating factor” was used in the *Price Waterhouse* plurality *only* when citing *Mt. Healthy*, where the plaintiff claimed that she had been terminated for having engaged in conduct protected by the First Amendment.¹⁷⁹ In *Mt. Healthy*, however, the plaintiff had been given a written statement of the reasons for the school board’s decision not to renew his contract, and that statement explicitly referred to two incidents, one of which was constitutionally protected.¹⁸⁰ That is what the Court was referring to when it said that the plaintiff’s constitutionally protected conduct “was a ‘substantial factor’ or to put it in other words, that it was a ‘motivating factor’ in the [School] Board’s decisions not to rehire him.”¹⁸¹

This simply means, using the clarifying language of the logic of human action, that there were two reasons for the school board’s non-renewal decision. Possibly, each reason was a sufficient condition for the decision (or, as we would say in ordinary language, “reason enough”), which would mean that the event was over-determined (like the shack that is destroyed simultaneously by two separate fires). Alternatively, it could be that neither reason was independently sufficient for the decision, but that the two together were jointly sufficient (and, hence, separately necessary). If the latter, the school board would not have made its non-renewal decision but for the teacher’s having engaged in constitutionally protected conduct. In either case, all that the Court meant by saying, in *Mt. Healthy*, that the protected conduct was a “motivating factor” in the decision,¹⁸² is that it was a reason, but not an idle reason; rather, it was a reason that was actually considered in the deliberations leading up to the decision.

When the *Price Waterhouse* plurality used the term “factor” in its own analysis,¹⁸³ the context shows that what it meant was something “taken into account” or actually considered in coming to a decision:

The critical inquiry . . . is whether gender was a factor in

179. *Price Waterhouse v. Hopkins*, 490 U.S. 228, 248-49 (1989) (citing *Mt. Healthy City Sch. Dist. Bd. Of Ed. v. Doyle*, 429 U.S. 274, 287 (1977)).

180. *Mt. Healthy*, 429 U.S. at 282-83.

181. *Id.* at 287. It is likely that the Court used the words “substantial” and “motivating” factor here merely to indicate that the plaintiff’s protected conduct was prominent or significant in the decisional process, as compared to fleeting or incidental. *Cf.* *NLRB v. Transp. Mgmt. Corp.*, 462 U.S. 393, 399 (1993) (showing the transition from “in any ways motivated” prohibited conduct to “a substantial or motivating factor” of prohibited conduct in NLRB decisional law to meet courts of appeals objection to the former standard as being too low a threshold).

182. *Mt. Healthy*, 429 U.S. at 287; *see also Price Waterhouse*, 490 U.S. at 250.

183. *Price Waterhouse*, 490 U.S. at 240-241.

the employment decision at *the moment it was made*. . . . [T]itle VII meant to condemn even those **decisions** based on a mixture of legitimate and illegitimate **considerations**. When, therefore, an employer **considers** both gender and legitimate factors at the time of **making a decision**, that **decision** was ‘because of’ sex and the other, legitimate **considerations**—even if we may say . . . that the **decision** would have been the same if gender had not been **taken into account**. . . . We conclude . . . that Congress meant to obligate [a plaintiff] to prove that the employer relied upon sex-based **considerations** in coming to its **decision**. . . . [A]n employer may not . . . merely show[] that it was **motivated** only in part by a legitimate **reason** The employer also must show that its legitimate **reason**, standing alone, would have **induced** it to make the same decision.¹⁸⁴

It is inconsistent with the logic of human action for the plurality to have suggested, regrettably, that a reason “motivated” or “induced” an action.¹⁸⁵ Still, there can be no question that what it was referring to by the word “factors”¹⁸⁶ were reasons or, more particularly, the things (so to speak) that are consciously “considered” or “taken into account” when

184. *Price Waterhouse*, 490 U.S. at 241-42, 252 (italics in original (bold emphasis added)). A careful reading of Justice O’Connor’s concurrence shows that by playing a “substantial role in the employment decision,” she, too, meant that it was a reason actually considered in coming to a decision. *Id.* at 276-77 (O’Connor, J., concurring) (finding that to avoid liability, the employer “must demonstrate that with the illegitimate factor *removed from the calculus*, sufficient business *reasons* would have induced it to take the same employment action” (emphasis added)); *Id.* at 277 (finding that what must be shown by a plaintiff is “direct evidence that decisionmakers placed *substantial negative reliance* on an illegitimate *criterion in reaching their decision*” (emphasis added)). Of course, the reason could not be merely that the plaintiff had the protected characteristic; a reason must be teleological, that is, relating to some future state of affairs, such as, for example, not having a woman or an assertive woman in a position of authority (as in *Price Waterhouse*), or ridding the workplace of her presence (as in *Desert Palace*). See *Price Waterhouse*, 490 U.S. at 250-51; *Costa v. Desert Palace, Inc.*, 299 F.3d 838, 846 (9th Cir. 2002).

185. The word “induced” would be appropriate for motivational states like cravings. We would say, for example, that after the habitual smoker got off the five-hour airplane flight, his craving for a cigarette induced him to smoke one in the airport-terminal men’s room. An addiction for nicotine, like any craving, is intentional because a cigarette is what was sought after. But, unlike reasons, it does operate as an internal state that impels or induces one to act. In this example, the reason the traveler went into the men’s room was to smoke a cigarette. What “induced” him to do so, however, was not the reason; it was the addiction.

186. See *id.* at 241.

making a decision.

When one not only acts, but deliberates, one considers the "pro's" and "con's." The former are those desired states of affairs that the contemplated action is expected to bring about (or the undesirable states of affairs that the action is expected to prevent). The latter are the adverse consequences of the contemplated action or its "opportunity cost" (*i.e.*, the benefit forgone by pursuing one course of conduct rather than another). In one very common usage, a "factor" is one of the anticipated outcomes that is contemplated in one's deliberation.¹⁸⁷ And, since reasons are intentional in the sense that they point to the future state of affairs that the action is intended to bring about (or avoid), "factors" are reasons of a special sort¹⁸⁸ or, at least, the two are conceptually linked.¹⁸⁹

3. Pretext By Another Name

Having referred previously to Freud, it needs to be considered whether the term "motivating factor" for purposes of section 703(m) should include both conscious and unconscious reasons. As was indicated in the discussion of the Ninth Circuit's *Costa* opinion, the evidence there supported that the decisionmaker's hostility to Costa on account of her being a woman may have been a reason for its termination decision, just not one that—to use the language of *Price Waterhouse*—was "consciously" considered.¹⁹⁰

It might be argued that *Costa* could and should be taken as standing for the proposition that a plaintiff who "demonstrates" that her being in a protected classification was a reason—but not necessarily the sole or predominant reason—has satisfied the requirements of section 703(m), irrespective of whether the reason was or was not "in the employer's mind" at the time the decision was made.¹⁹¹ Regrettably, however,

187. For example: "Was the high cost of tuition a factor that deterred you from going to law school?"

188. Impulsive actions (like running into a burning house to save one's child) have reasons, too—or they would not be actions—but they are not the product of deliberative decisionmaking.

189. For example, that "lawyers make a lot of money" (if believed to be true by the decisionmaker) could be a factor considered in deciding to go to law school; the "desire to make a lot of money by becoming a lawyer" would be that factor's corresponding reason.

190. See *Price Waterhouse v. Hopkins*, 490 U.S. 228, 236-37 (1989).

191. This conclusion is not compelled by the Supreme Court's decision in *Desert Palace, Inc. v. Costa*, 539 U.S. 90, 102 (2003). While the Court affirmed the Ninth Circuit's decision, the issue for which certiorari was granted was only "whether a plaintiff must present direct evidence of discrimination in order to obtain a mixed-motive instruction under Title VII," as amended by the 1991 Civil Rights Act. *Desert Palace*, 539 U.S. at 92, 102. Whether a "motivating factor" must be

without consciousness, there is no clarity.

The problem with construing “motivating factor” to be either a conscious or unconscious reason is that it tends to obliterate the distinction between the “mixed motive” and “pretext” proof frameworks, as is illustrated by *Smith v. Xerox Corp.*¹⁹² Liability is established under section 703(m) only after a plaintiff “demonstrates” the existence of the proscribed “motivating factor.”¹⁹³ Yet, absent evidence that conscious consideration was given to the protected characteristic in the agent’s deliberations—which does not exist, *ex hypothesis*, for unconscious reasons—the only way to “demonstrate[]” the existence of a proscribed reason is to show that the other asserted reasons are inadequate to fully explain the conduct at issue. That, though, is exactly how plaintiffs would show, under *McDonnell Douglas*, that the employer’s stated reason was “pretextual.”¹⁹⁴

Consequently, an analysis that includes, under the rubric of “motivating factor,” not only conscious reasons, but also unconscious or latent reasons would expand the application of section 703(m) to virtually every Title VII disparate treatment case and relegate *McDonnell Douglas* to the dustbin of history.¹⁹⁵ But, cases mostly hold that the 1991 Act did not eliminate the mixed-motive/pretext distinction.¹⁹⁶

It is also helpful to view section 703(m) as the disparate-treatment analogue to *Connecticut v. Teal*, a disparate-impact case which held that

a kind of reason and whether it must be a conscious reason or, alternatively stated, a reason actually considered in coming to a decision, was not within the scope of the issue for which *certiorari* was granted. *Id.* at 92, 101-02. Accordingly, the Supreme Court’s affirmance does not bind lower courts to any other legal conclusions contained in the Ninth Circuit decision. *See Swarb v. Lennox*, 405 U.S. 191, 201 (1972) (“[A]ffirmance . . . does not mean that the District Court’s opinion and judgment are approved as to their other aspects and details that are not before [the Court].”). And, too, since the Ninth Circuit did not actually specify what it took the phrase “motivating factor” to mean and since its language and holding are silent or ambiguous as to conscious or unconscious reasons, the matter is still an open question. *See supra* notes 166-71 and accompanying text.

192. *Smith v. Xerox Corp.*, 602 F.3d 320, 326 (5th Cir. 2010).

193. 42 U.S.C. § 2000e-2(m) (2012).

194. *Tex. Dep’t of Cmty. Affairs v. Burdine*, 450 U.S. 248, 255 n.10 (1981).

195. *See Costa v. Desert Palace, Inc.*, 299 F.3d 838, 867 (9th Cir. 2002) (Gould, J., dissenting) (stating that “policy concerns favor” a legal analysis that “keep[s] the mixed motive framework from overriding in all cases the *McDonnell Douglas* rule and the pretext requirement”).

196. *See, e.g., Desert Palace, Inc.*, 539 U.S. at 94 (stating section 703(m) “establishes an alternative for proving that an ‘unlawful employment practice’ has occurred” (emphasis added)); *Fogg v. Gonzales*, 492 F.3d 447, 454 (D.C. Cir. 2007) (expressly rejecting Government’s contention that after 1991 Amendments sections 2000e-2(m) became the “exclusive way of establishing liability” (emphasis added)); *Watson v. Se. Pa. Trans. Auth.*, 207 F.3d 207, 217-18 (3d Cir. 2000); *Fuller v. Phipps*, 67 F.3d 1137, 1143 (4th Cir. 1995).

Title VII is violated whenever a selection criterion adversely effects minority candidates at any stage in a multi-step selection process, even if the process as a whole did not have a disparate impact on minority workers.¹⁹⁷ *Teal*, thus, rejects the "bottom line" approach to disparate-impact analysis, as had been prevalent before *Teal*, which proposed that there could be no Title VII liability with respect to a complex, multi-stage employment selection process if the "bottom line" or end result did not disparately affect groups based on their race, sex, ethnicity or religion.¹⁹⁸

From the *Teal* perspective, section 703(m) can be viewed as intending to ban discrimination in any stage or aspect of a multi-variate decisionmaking process, even if it does alter the "bottom line" or end result as of any particular individual in a protected classification.¹⁹⁹ Before a "stage" or "aspect" of a multifaceted decisionmaking process can be determined to constitute discrimination, however, it must be independently identified and distinguished from the other stages or aspects. But, it is not possible to know if an unconscious or latent reason was one of the reasons for an agent's action separately from a determination that the stated or otherwise-evidenced conscious reasons are inadequate to fully explain it. This means that one could "demonstrate[]" the existence of an unconscious reason in any particular instance only by having shown it to be a "pretext" for discrimination under *McDonnell Douglas* framework. This would either render section 703(m) superfluous, as applied to latent reasons, or allow liability in such cases to be established merely by proffering evidence plausibly showing such a reason without actually "demonstrat[ing]" it to exist.

There is also nothing in the legislative history of section 109 to suggest that Congress was seeking to reverse any part of *Price Waterhouse* other than that it allowed the avoidance of liability upon proof of the affirmative defense²⁰⁰ or to effect a significant expansion of

197. *Connecticut v. Teal*, 457 U.S. 440, 442, 451 (1982) (evidencing that promotion test disproportionately excluded black employees "establish[es] a *prima facie* case of employment discrimination," even if there was no "disparate impact at the bottom line"). Significantly, *Teal* and the *Price Waterhouse* plurality were both authored by Justice Brennan. *Id.*; *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989).

198. *Teal*, 457 U.S. at 451, 456.

199. *Id.* at 455-56.

200. See H.R. REP. NO. 102-40(I), at 45 (1991), as reprinted in 1991 U.S.C.C.A.N. 549, 583 n.39 (clarifying that *Price Waterhouse* was not "affected by the proposed legislation" in other respects); *Watson*, 207 F.3d at 218-19 ("[T]he legislation was not intended to overrule the decision *in toto*."); Mizer, *supra* note 10, at 259.

Title VII liability.²⁰¹ Part of Congress's dissatisfaction with *Price Waterhouse* is that it allowed people who had engaged in "discrimination" to, in certain circumstances, entirely avoid liability. But what those objectors seem to have had in mind were people like the accounting firm partners in *Price Waterhouse* who consciously considered Hopkin's being an aggressive woman (or her non-conformance to expected sex-stereotypes) in making decisions that affected her employment.²⁰² To understand that section 703(m) applies only on a showing that the plaintiff's being of a certain race, color, gender, religion or national origin²⁰³ was not only a reason for the challenged action, but also one of the considerations taken into account in the deliberations that preceded it, is perfectly consistent with the legal context in which it was enacted.

The structure of Title VII, as amended, and the inclusion of section 703(m) as an alternative proof method, with its own consequences for liability and remedy, all strongly suggest that Congress intended the section 703(m), "motivating factor" framework to apply only to a subset of Title VII cases.²⁰⁴ For that intent to be effectively implemented, the term "motivating factor" is best understood as a conscious reason, something the decisionmaker(s) considered, or took into account, in coming to the challenged decision.

Contrary to what is sometimes argued,²⁰⁵ this approach does not leave the victims of subtle or disguised discrimination without effective means for judicial redress. Understanding *McDonnell Douglas* as requiring plaintiffs to prove that "discriminatory animus" was the sole

201. Cf. Mizer, *supra* note 10, at 257 (noting paucity of legislative history for 1991 Act and that "the legislative history that does exist focuses heavily on [other] provisions of the Act . . . with less attention paid to *Price Waterhouse* and the provision that affects it— §2000e-2(m)"); H.R. REP. NO. 102-40(II), at 18-19 (1991), as reprinted in 1991 U.S.C.C.A.N. 694, 711-12 (stating the proposed legislation "intend[ed] to restore the rule applied by the majority of the circuits prior to the *Price Waterhouse* decision that any discrimination that is actually shown to play a role . . . may be the subject of liability").

202. See, e.g., H.R. REP. NO. 102-40(I), at 45, as reprinted in 1991 U.S.C.C.A.N. 549, 583 (criticizing *Price Waterhouse* for "undercut[ting]" goal of assuring Title VII liability "for all invidious consideration of a person's race, color, religion, sex or national origin in employment") (emphasis added). It is also significant that Congress rejected a proposal that would have replaced "motivating factor" with "contributing factor" in the operative language of the bill. See Belton, *supra* note 10, at 662 n.46.

203. See 42 U.S.C. § 2000e-2(k) (2012) (explaining the burden of proof in these "discrimination" cases).

204. See U.S. § 2000e-2(k); see *supra* notes 113-14, 122-24 and accompanying text.

205. 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, 113 (2003).

reason for the challenged decision would certainly cause concern in that regard. But that is not, in actual practice, what *McDonnell Douglas* currently requires, if it ever did. In fact, the plaintiff need not show anything in particular about what the decisionmaker's thought-process or motivations were under the *McDonnell-Douglas* framework; she needs only show that the stated non-discriminatory reasons are not adequate to explain the challenged action and that her being, for example, a woman, an African-American, or of a particular ethnicity or religion "made the difference" or "determinate[ly] influenced" the ultimate decision.²⁰⁶

The ultimate question is whether legal liability for discrimination should attach merely for having "bad thoughts."²⁰⁷ The legislative history of section 703(m) suggests that Congress did not intend that result.²⁰⁸ When bias is the determinative factor, and a decision adversely affecting economic opportunity would not have been made but for discriminatory animus, then there should be liability—and so there is under the *McDonnell-Douglas* framework. And, when decisionmakers consciously consider race, sex, ethnicity or religion in making their decisions, there is liability under section 703(m), even if there were other reasons that, on their own, would have resulted in the same decision. Giving full effect to the legislative purpose animating the adoption of section 703(m) requires no more than that. In contrast, imposing liability based on only an unconscious or latent reason that was not actually determinative of the challenged decision does not appear to be a policy choice Congress made in adopting the "motivating factor" provisions of Title VII.

II. CONCLUSION

If the construction of section 703(m) proposed here were purposefully and clearly adopted, juries would not be asked if the evidence establishes that "discrimination" was a "motivating factor" for the challenged actions, but rather whether the plaintiff's being, *e.g.*, a

206. See *supra* Section III.A.2 and notes 118-21 and accompanying text.

207. See Harper, *supra* note 10, at 111; see also H.R. REP. NO. 102-40(I) (1991), as reprinted in 1991 U.S.C.C.A.N. 529, 586; Price Waterhouse v. Hopkins, 490 U.S. 228, 251 (1989) ("Remarks at work that are based on sex stereotypes do not inevitably prove that gender played a part in a particular employment decision. The plaintiff must show that the employer actually relied on her gender in making his decision.").

208. See H.R. REP. NO. 102-40(I), at 47-48, as reprinted in 1991 U.S.C.C.A.N. 549, 586 (rejecting objection that amendment would make employers liable for "mere 'thoughts' or 'stray thoughts' in the workplace" and characterizing what became section 703(m) as a prohibition against "impermissible consideration of race, color, religion, sex, or national origin").

woman, African-American, Guatemalan, or Seventh-Day Adventist was a conscious reason for the action or a reason considered in coming to the decision. Courts would then no longer have to decide whether to give the mixed-motive, affirmative defense instruction based on whether discrimination “played a role” in the challenged action or was a “smoking gun” or a “thick cloud of smoke,” as is currently required in the Second Circuit.²⁰⁹ Rather, using a judge’s ordinary ability to discern from observable events why people do what they do, courts need only ask whether the evidence is sufficient for a jury to find that one reason considered by the employer in deciding to take the challenged action was that the plaintiff had the statutorily protected characteristic.

There are an array of psychological or mental states commonly used to explain human action: motives, reasons, emotions, attitudes, and bias. The desire to have a single phrase to refer generically to them all is understandable. Regrettably, that comes at the price of clarity. The phrase “motivating factor” might seem to be serviceable for that task but only because the word “motivating” obscures the differences between the logic of reason and the logic of motives and because the word “factor” is ambiguous as between a state of affairs that tends to produce a result (*i.e.*, a cause) and the items given consideration in deliberative decision-making (*i.e.*, a reason). The truth is that while the words “motive” and “factor” mean something to people of ordinary intelligence, the phrase “motivating factor” can mean a variety of different and, sometimes, logically incompatible things, which implies that it does not really mean anything at all. It is long past time pretending that it did. Unless judges and lawyers find ways to explicate that statutory phrase in ways that comport with the logic of human action, the current confusion on how to apply the statutory mandate of Title VII that has plagued its first fifty years will not go away.

209. See *Silver v. N. Shore Univ. Hosp.*, 490 F. Supp. 2d 354, 362, 365-66 (S.D.N.Y. 2007).