RECLAIMING MCDONNELL DOUGLAS

Martin J. Katz*

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*Associate Professor of Law, University of Denver College of Law; J.D., Yale Law
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INTRODUCTION

I come to defend *McDonnell Douglas*,¹ to reclaim the promise that it was once thought to hold. In so doing, I will also make sense of the doctrinal morass that currently envelops disparate treatment antidiscrimination law.² I am not kidding.


² There are two distinct theories of employment discrimination. Disparate treatment involves so-called intentional discrimination, in which the employer makes an adverse decision based on a protected characteristic, such as race or sex. 1 BARBARA LINDemann et al., EMPLOYMENT DISCRIMINATION LAW 10–11 (4th ed. 2007). Disparate impact discrimination involves decisions based on unprotected characteristics, such as performance on a pre-employment test, which correlate with protected characteristics. See id. at 110–11 (listing theories of causation, including disparate treatment and
McDonnell Douglas is easy to hate. The ubiquitous\(^3\) three-part burden-shifting framework was originally conceived as a gift to disparate treatment law.\(^4\) However, it quickly fell into extreme disrepute.

The criticism began when the Court, in later opinions, appeared to place limits on the framework.\(^5\) Critics responded to these opinions with a harsh outcry, claiming that these later opinions severely hampered the utility of the framework and placed unreasonable burdens on plaintiffs.\(^6\)

The next wave of criticism came when it became apparent that disparate treatment plaintiffs have not been faring well in litigation—despite the perception that employment discrimination continues to

disparate impact). This Article focuses exclusively on disparate treatment, the most common theory in employment discrimination litigation.

3 See GEORGE RUTHERFORD, EMPLOYMENT DISCRIMINATION LAW 36 (2d ed. 2007) (“No decision in employment discrimination law has been cited more frequently than McDonnell Douglas Corp. v. Green.”).

4 See Trans World Airlines, Inc. v. Thurston, 469 U.S. 111, 121 (1985) (“The shifting burdens of proof set forth in McDonnell Douglas are designed to assure that the ‘plaintiff [has] his day in court despite the unavailability of direct evidence.’” (quoting Loeb v. Textron, Inc., 600 F.2d 1003, 1014 (1st Cir. 1979))); Tex. Dep’t of Cnty. Affairs v. Burdine, 450 U.S. 248, 256–58, 255 n.8 (1981) (stating that the purpose of the framework is “to sharpen the inquiry into the elusive factual question” of discrimination); Tristin K. Green, Comment, Making Sense of the McDonnell Douglas Framework: Circumstantial Evidence and Proof of Disparate Treatment Under Title VII, 87 CAL. L. REV. 983, 998 (1999) (noting that McDonnell Douglas was designed as a response to the increasing rarity of “smoking gun” evidence in order to permit plaintiffs without such evidence to have their day in court).

5 See St. Mary’s Honor Ctr. v. Hicks, 509 U.S. 502, 511 (1993) (holding that a plaintiff who proves pretext in the third stage does not necessarily win; a fact finder may still find that there was no discrimination); Burdine, 450 U.S. at 254–56 (holding that the defendant’s burden in the second stage of McDonnell Douglas is only a burden of production, not a burden of persuasion); see also William R. Corbett, McDonnell-Douglas, 1973–2003: May You Rest in Peace?, 6 U. PA. J. LAB. & EMP. L. 199, 202–03 (2003) (arguing that McDonnell Douglas fell into disfavor largely as a result of later holdings that arguably limited the framework).

be prevalent. Critics responded to this news by blaming *McDonnell Douglas*, claiming that the framework is ill suited to addressing the subtle types of discrimination they believe is most common in the modern workplace.

The view of *McDonnell Douglas* as flawed has been strongly reinforced by the courts' practice of mandating its use and limiting the availability of alternative frameworks. The Supreme Court and Congress have each offered an alternative framework for proving disparate treatment: the framework set out in *Price Waterhouse v. Hopkins* and the framework set out in the Civil Rights Act of 1991 (the "1991 Act"). And the widespread perception, among both litigants and commentators, is that those two alternative frameworks are better for plaintiffs. Accordingly, many (if not most) plaintiffs have attempted to avoid *McDonnell Douglas* in favor of the alternative frameworks. But the courts have resisted this exodus with a vengeance, routinely

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11 See Corbett, supra note 5, at 200, 219 (suggesting that plaintiffs and employee rights advocates prefer the "mixed-motive" frameworks of *Price Waterhouse* and the 1991 Act, whereas defense lawyers prefer *McDonnell Douglas*). Some plaintiffs, however, prefer *McDonnell Douglas*, as they are willing to take on what they believe to be a higher burden in exchange for avoiding the "same decision"/"same action" defense. See Michael J. Zimmer, *The New Discrimination Law: Price Waterhouse is Dead, Whither McDonnell Douglas?*, 53 EMORY L.J. 1887, 1942-43 (2004). As I will show below, *McDonnell Douglas* does not in fact set a higher burden than the alternative frameworks. See infra Part I.C.3 (arguing that *McDonnell Douglas* does not prove or require "but for" causation). And using *McDonnell Douglas* does not always preclude a "same decision"/"same action" defense. See infra note 123 and accompanying text.

12 See, e.g., Tysinger v. Police Dep't, 463 F.3d 569, 577-78 (6th Cir. 2006) (discussing the different approaches courts have taken in applying *McDonnell Douglas* as opposed to the alternative frameworks); Sallis v. Univ. of Minn., 408 F.3d 470, 474-75 (8th Cir. 2005) (deliberating about which framework to apply and deciding to apply *McDonnell Douglas* rather than *Price Waterhouse* or the 1991 Act).
forcing unwilling plaintiffs to use *McDonnell Douglas*. The foreseeable result has been to reinforce the view that *McDonnell Douglas* is the evil stepsister of disparate treatment law and is hampering the goal of eradicating employment discrimination.

At this point, *McDonnell Douglas* is faring miserably in the court of public opinion. It has few friends outside of the defense bar (which seems content with the framework, but has not mounted any significant defense of it). And it has a plethora of detractors. The criti-

13 See infra Part I.A (discussing courts' methods of mandating *McDonnell Douglas*). There are actually two ways in which courts can—and do—mandate the use of *McDonnell Douglas*. First, a court might require the litigants to go through the three steps that comprise the framework. See, e.g., Stover v. Martinez, 382 F.3d 1064, 1071 (10th Cir. 2004) (requiring the plaintiff to "state a prima facie case of retaliation" under *McDonnell Douglas*). Second, a court might require the plaintiff to prove "pretext"—that is, to disprove the reason proffered by the defendant for its challenged action. See, e.g., Merillat v. Metal Spinners, Inc., 470 F.3d 685, 692–94 (7th Cir. 2006). This Article is primarily concerned with the second form of mandate (requiring the use of "pretext" proof), arguing that this method of proof should be optional. However, once the pretext method of proof is optional, it makes little sense to require litigants to go through the first two steps of the three-step framework (the first form of mandate). See infra note 91.

14 It is difficult to find more than a handful of writers who defend the framework. See Christopher R. Hedican et al., *McDonnell Douglas*: *Alive and Well*, 52 Drake L. Rev. 383, 395–402, 425 (2004) (defending *McDonnell Douglas* as "a fair and appropriate way to ferret out discrimination"); Steven J. Kaminshine, *Disparate Treatment as a Theory of Discrimination: The Need for a Restatement, Not a Revolution*, 2 Stan. J. C.R. & C.L. 1, 38–62 (2005) (arguing for the retention of the *McDonnell Douglas* framework as one possible method for plaintiffs to present proof of disparate treatment); Zimmer, supra note 11, at 1933 (arguing that *McDonnell Douglas* should continue to play a limited role in disparate treatment cases because its "process of elimination is a fundamentally sound way of persuading the factfinder that discrimination was involved in the [defendant's] decision"). None of these defenders answers the critiques that have been leveled at *McDonnell Douglas*.

cism has reached a fever pitch. Some courts have even joined the chorus.¹⁶

But despite this, most courts of law (even some that criticize it) continue to mandate its use—paying little heed to its detractors. Virtually all courts continue to require unwilling plaintiffs to use McDonnell Douglas.¹⁷

A mandatory McDonnell Douglas creates two serious problems. First, in their eagerness to prevent an exodus from McDonnell Douglas, the courts have created a doctrinal morass.¹⁸ There are currently three separate circuit splits over three distinct doctrines that limit plaintiffs’ ability to avoid McDonnell Douglas.¹⁹ In fact, in the wake of Desert Palace, Inc. v. Costa,²⁰ the case in which the Court appeared poised to clean up this mess, a debate has erupted among commentators about whether McDonnell Douglas should ever apply—or whether it is “dead.”²¹ (This appears to be wishful thinking, as no court has

¹⁶ See, e.g., Griffith v. City of Des Moines, 387 F.3d 733, 745 (8th Cir. 2004) (Magnuson, J., concurring specially) (“For thirty years, courts have been slaves to the McDonnell Douglas burden shifting paradigm that is inconsistent with Title VII.”); Wells v. Colo. Dep’t of Transp., 325 F.3d 1205, 1221 (10th Cir. 2003) (Hartz, J., concurring) (writing separately to express “displeasure” with the use of the McDonnell Douglas framework because “McDonnell Douglas has served its purpose and should be abandoned”); Dare v. Wal-Mart Stores, Inc., 267 F. Supp. 2d 987, 991–92 (D. Minn. 2003).

¹⁷ See infra Part I.A.


¹⁹ See infra Part II.C.


²¹ See Chambers, supra note 8, at 95–99; Corbett, supra note 5, at 200; Davis, supra note 6, at 907; Van Detta, Le Roi Est Mort, supra note 15, at 72 (describing McDonnell Douglas as "'dead as a doornail" (quoting CHARLES DICKENS, A CHRISTMAS CAROL

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adopted this position.) At the very least, this doctrinal confusion creates significant uncertainty and additional cost for litigants.

But there is a more serious problem: If the critics of McDonnell Douglas are correct, the courts’ practice of mandating its use would have disastrous consequences. A mandatory-but-flawed McDonnell Douglas would saddle plaintiffs with difficult and unreasonable burdens, causing meritorious claims to fail. Thus, a mandatory-but-flawed McDonnell Douglas would ultimately hamper the goal of eradicating employment discrimination.

This Article will argue that both sides in this debate are wrong. It will argue that the courts are wrong to require unwilling plaintiffs to use McDonnell Douglas. But it will also argue that plaintiffs and com-


22 “Dead” critics frequently cite Dare v. Wal-Mart Stores, Inc., 267 F. Supp. 2d 987, 991–92 (D. Minn. 2003), as adopting this position. See Davis, supra note 6, at 890–91 (suggesting that the court in Dare found McDonnell Douglas to be dead in light of Desert Palace); Van Detta, Le Roi Est Mort, supra note 15, at 139–42 (discussing the court’s reasoning in Dare as rejecting McDonnell Douglas in favor of Desert Palace). But Dare only declared that, under the 1991 Act, there was no such thing as a “single motive” case, in which, unlike “mixed motive” cases, the “direct evidence” distinction (and thus McDonnell Douglas) might continue to apply after Desert Palace. Dare, 267 F. Supp. 2d at 991–92. It did not purport to eradicate McDonnell Douglas in cases outside the 1991 Act. Moreover, despite Dare’s hostility to McDonnell Douglas, to the extent that it purported to eradicate McDonnell Douglas even in 1991 Act cases, that case has been overruled. See Griffith v. City of Des Moines, 387 F.3d 733, 755–36 (8th Cir. 2004) (giving plaintiffs a choice about whether to use McDonnell Douglas in 1991 Act cases).

23 See George Loewenstein & Don A. Moore, When Ignorance is Bliss: Information Exchange and Inefficiency in Bargaining, 35 J. LEGAL STUD. 37, 43 (2004) (“In the presence of uncertainty, the expectations of the two parties are likely to diverge, and negotiators can easily fail to agree despite the potential for profitable settlement.” (citing Kalyan Chatterjee & Larry Samuelson, Bargaining with Two-Sided Incomplete Information: An Infinite Horizon Model with Alternating Offers, 54 REV. ECON. STUD. 175, 175–92 (1987))); cf. Charles Silver, Does Civil Justice Cost Too Much?, 80 TEX. L. REV. 2073, 2107 (2002) (“When parties agree on expected trial results (as fully informed, rational parties always should), they should settle to minimize transaction costs.”).

24 See Malamud, supra note 6, at 2236–38 (arguing that the McDonnell Douglas proof structure “constrain[s] fact finding” and should be abandoned).
mentators are wrong to demonize *McDonnell Douglas*. Rather, they should embrace *McDonnell Douglas* as a true gift to antidiscrimination law. In making these arguments, this Article will also propose an understanding of *McDonnell Douglas* (as an optional method of proof) that will eliminate the current doctrinal morass and its attendant uncertainty.

These arguments will not rely upon interpretations of *Desert Palace*, the standard basis for most modern calls to reject *McDonnell Douglas* (calls that have been virtually ignored by the courts). Instead, my arguments will proceed by contextualizing *McDonnell Douglas*—by understanding this framework in relation to disparate treatment’s core requirement of causation (the requirement that a challenged employment decision must occur “because of” a protected characteristic, such as race or sex). This Article proceeds in three Parts. Part I argues that *McDonnell Douglas* should never be required (and, in the process, dispels the nearly universally held myth that this framework proves or requires “but for” causation). Part II shows how a nonmandatory *McDonnell Douglas* would interact with the two alternative frameworks (*Price Waterhouse* and the 1991 Act), and also shows how a nonmandatory *McDonnell Douglas* can be implemented under current law. This Part also resolves the three doctrinal debates that currently plague disparate treatment law. Part III refutes most of the normative criticisms that have been leveled at *McDonnell Douglas* and demonstrates the importance of this framework to the goal of eradicating employment discrimination.

I. THE DEATH OF A MANDATORY *MC DON NEL L DOUGLAS* (AND THE MYTH THAT *MC DON NEL L DOUGLAS* PROVES OR REQUIRES “BUT FOR”)

*McDonnell Douglas* should never be required. The first section of this Part shows how courts have come to mandate the use of *McDonnell Douglas*. The next section explores the conditions under which it might make sense to mandate its use. This section argues that it would make sense to require plaintiffs to use *McDonnell Douglas* if and only if that framework proved “but for” causation. However, as the final section of this Part shows, contrary to widespread belief, *McDon-

25 See Van Detta, *Le Roi Est Mort*, supra note 15, at 138–39 & n.332 (suggesting that the shift from *McDonnell Douglas* in light of *Desert Palace* will occur gradually over time rather than immediately, and noting several cases in which courts “have not fully grasped or discussed” the full implications of *Desert Palace*).

26 See infra note 50 and accompanying text.
noll Douglas does not always prove "but for" causation. Therefore it should never be mandatory.

A. The Origins (and Staying Power) of a Mandatory McDonnell Douglas

When McDonnell Douglas was introduced by the Court in 1973, there was no discussion about whether it was mandatory. There was no need for such a discussion then. McDonnell Douglas "was the only game in town."27

Things got more complicated in 1989 when the Court introduced a second framework for proving disparate treatment claims in Price Waterhouse.28 McDonnell Douglas had used a three-step framework, focused on "pretext": (1) The plaintiff must prove a prima facie case; (2) then the defendant must offer a nondiscriminatory reason for the challenged employment action; and (3) then the plaintiff must prove that the defendant's proffered reason was "pretextual."29 The new Price Waterhouse framework contained only two steps, and did not mention pretext: (1) The plaintiff must prove that a protected factor, such as race or sex, was a "motivating factor" for the challenged employment action; and (2) then the defendant can try to prove that it would have made the "same decision" irrespective of the protected factor.30 If the defendant does so, it is a complete defense.31

The existence of two different frameworks raised the question of the relationship between those two frameworks. Would the plaintiff be allowed to choose which framework to use? Or would the court mandate the use of one framework?

27 Charles A. Sullivan, Circling Back to the Obvious: The Convergence of Traditional and Reverse Discrimination in Title VII Proof, 46 WM. & MARY L. REV. 1031, 1060 n.122 (2004) ("For more than a decade after it was decided, McDonnell Douglas was the only game in town for individual disparate treatment cases.").


29 See McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802–04 (1973). The word "pretext" is ambiguous, having been used in a number of different ways. For a discussion of the best understanding of this word, see infra note 76.


31 See Price Waterhouse, 490 U.S. at 276 (O'Connor, J., concurring).
Justice O'Connor, whose concurrence in *Price Waterhouse* is generally seen as controlling,\(^{32}\) answered this question—and introduced the concept of a mandatory *McDonnell Douglas*. She was concerned that the *Price Waterhouse* framework was more favorable to plaintiffs than *McDonnell Douglas*.\(^{33}\) She therefore believed that, if given a choice, most plaintiffs would choose *Price Waterhouse*.\(^{34}\) Apparently, she thought this would be a bad thing, and thus decided to limit plaintiffs’ ability to use the more favorable *Price Waterhouse*—and thereby to escape the less favorable *McDonnell Douglas*.\(^{35}\) The idea was to reserve *Price Waterhouse* for those plaintiffs she thought most deserving; those who could produce “direct evidence” of discrimination.\(^{36}\) Plaintiffs who could produce “direct evidence” were allowed to use *Price Waterhouse*, all others were forced to use *McDonnell Douglas*.\(^{37}\)

Thus began the tradition of mandating the use of *McDonnell Douglas*. This tradition has been robust to the point of intransigence. It has now spread beyond *Price Waterhouse*, taking firm root in the most unlikely of places: the Civil Rights Act of 1991.

The 1991 Act provides yet a third framework for proving disparate treatment. This two-step framework requires that: (1) The plaintiff must prove that a protected factor, such as race or sex, was a “motivating factor” for the challenged employment action; (2) then the defendant may try to prove that it would have taken the “same action” irrespective of the protected factor.\(^{38}\) If the defendant does so, it is a partial defense; liability attaches, but damages are limited.\(^{39}\)

Notably, the 1991 Act does not say a word about “direct evidence,” and neither does its legislative history.\(^{40}\) Moreover, the Act was intended by Congress as a repudiation of *Price Waterhouse*.\(^{41}\) So,

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\(^{33}\) *Price Waterhouse*, 490 U.S. at 276 (O'Connor, J., concurring).

\(^{34}\) *Id.*

\(^{35}\) *Id.*

\(^{36}\) *Id.*

\(^{37}\) *Id.*

\(^{38}\) 42 U.S.C. § 2000e-2(m) (2000) (providing that a plaintiff must show that a protected characteristic was a “motivating factor” in the adverse decision); *id.* § 2000e-5(g)(2)(B) (providing that once a plaintiff has done so, the defendant may demonstrate that it would have taken the “same action” absent consideration of the protected characteristic).

\(^{39}\) *Id.* § 2000e-5(g)(2)(B).


one might not have expected the “direct evidence” concept from *Price Waterhouse* to find its way into 1991 Act jurisprudence. Yet all but one circuit initially adopted this concept wholesale, requiring plaintiffs to provide “direct evidence” in order to use the 1991 Act framework; all others had to use *McDonnell Douglas*.42 Such is the power of a mandatory *McDonnell Douglas*.

In fact, even after the Supreme Court rebuffed these circuits in *Desert Palace*, unanimously rejecting a “direct evidence” requirement in 1991 Act cases,43 the lower courts have found other creative ways to mandate the use of *McDonnell Douglas*. Most of the lower courts have limited *Desert Palace* to 1991 Act cases, preserving the “direct evidence” doctrine—and a mandatory *McDonnell Douglas*—in cases brought under other disparate treatment statutes,44 such as the Americans with Disabilities Act (ADA)45 or Age Discrimination in Employment Act of 1967 (ADEA).46 And even in 1991 Act cases—where *Desert Palace* clearly eradicated the “direct evidence” requirement—courts have

42 See *Desert Palace*, 539 U.S. at 95 (indicating that circuits outside of the Ninth required 1991 Act plaintiffs without “direct evidence” to use *McDonnell Douglas*); Kamishine, *supra* note 14, at 28–29 (same). Several circuits had ruled on the question at that point. See, e.g., *Mohr v. Dustrol*, Inc., 306 F.3d 636, 639–40 (8th Cir. 2002); *Fernandes v. Costa Bros. Masonry*, Inc., 199 F.3d 572, 580 (1st Cir. 1999); *Trotter v. Bd. of Trs. of Univ. of Ala.*, 91 F.3d 1449, 1453 (11th Cir. 1996); *Fuller v. Phipps*, 67 F.3d 1137, 1141–42 (4th Cir. 1995); see also *Green, supra* note 4, at 992–93 (noting post-1991 Act courts that applied “direct evidence” distinction from *Price Waterhouse*).

43 See *Desert Palace*, 539 U.S. at 101–02. The portion of the 1991 Act that is relevant to the issues discussed in this Article amended section 705(a) of Title VII (codified at 42 U.S.C. § 2000e-2(m)), as well as section 706(g) of Title VII (codified at 42 U.S.C. § 2000e-5(g)(2)(B)). See *Pub. L. No. 102-166, § 107, 105 Stat 1071, 1075–76 (1991)*. The amended part of section 706(g) relates specifically to cases brought under section 703(a). Accordingly, for purposes of this Article (and in disparate treatment law generally), we can refer to cases brought under section 703(a) as “1991 Act cases,” and cases brought under any other disparate treatment statute as “non-1991 Act cases.”


nevertheless found at least two ways to mandate the use of *McDonnell Douglas*. One group of courts has found a new limit to replace the now defunct "direct evidence" limit: these courts have held that plaintiffs can use the 1991 Act framework only if they plead a "mixed motive" case (an undefined and possibly meaningless term); all other plaintiffs must use *McDonnell Douglas*.47 Another group of courts has held that all plaintiffs must use *McDonnell Douglas*, though these courts "modified" *McDonnell Douglas* to incorporate elements of the 1991 Act.48

Thus, a mandatory *McDonnell Douglas* remains firmly entrenched in disparate treatment law.

**B. The Need for a "But For" Standard in Order to Justify Mandatory Application of McDonnell Douglas**

It makes sense to mandate *McDonnell Douglas* if and only if it proves "but for" causation. The premise for requiring *McDonnell Douglas* in certain cases, as opposed to one of the alternative frameworks (*Price Waterhouse* or the 1991 Act), must be that (1) the law requires something more in some cases than is required by the alternative frameworks, and (2) requiring litigants to use *McDonnell Douglas* somehow assures they will provide that something more.49

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49 Of course, it would make sense to require *McDonnell Douglas* if the legislature so mandated. However, *McDonnell Douglas* is a creature of the common law; it is not mentioned in Title VII or any other major disparate treatment statute. See Sandra F. Sperino, *Flying Without A Statutory Basis: Why McDonnell Douglas is Not Justified by Any Statutory Construction Methodology*, 43 HOUS. L. REV. 743, 762–90 (2006) (arguing that the *McDonnell Douglas* framework should be abandoned because it is not supported by the text, legislative history or purpose of Title VII, or by any accepted principle of statutory construction). One might also argue that it makes "sense" for courts to require *McDonnell Douglas* as long as the Supreme Court has told them to. This would not meet my definition of making sense. A flawed interpretation of a statute by the Supreme Court is still a flawed interpretation and should be changed. But, as I will argue in Part II.B, *infra*, the Supreme Court has fortunately given no such instructions.
This subpart will show that the only possible something more is “but for” causation.

Causation is the core requirement of disparate treatment. An adverse employment action (such as firing or failure to hire) is actionable only if that action occurs “because of” a protected characteristic (such as race or sex). So, if disparate treatment law requires something more of plaintiffs than might be required by the alternative frameworks, that something more must relate to causation.

There are two distinct causal standards available in current disparate treatment law: a “but for” standard and a “motivating factor” standard. In logical terms, the “but for” standard represents the concept of necessity. A factor (such as race or sex) is necessary to a decision (such as a firing) — a “but for” cause — if the decision would not have occurred absent (or “but for”) that factor. In logical terms, the “motivating factor” standard represents a concept called minimal causation. A factor (such as race or sex) is minimally causal — a “motivating factor” — where that factor has a tendency to bring about a decision (such as firing), but does not rise to the level of being necessary to (a “but for” cause of) that decision. This occurs where a decisionmaker considered the factor (race or sex) in her decision, but would have reached the same decision even had she not considered that factor (due to the presence of some other factor, such as habitual tardiness or poor performance).


51 There are actually three available concepts in causal logic: necessity, sufficiency, and minimal causation. See Katz, supra note 30, at 503–04. However, only two of these concepts — necessity and minimal causation — appear in current disparate treatment law. Id. I have argued that this is a mistake; as a normative matter, disparate treatment law should be changed to impose sanctions based on the concept of sufficiency. Id. at 541–44.

52 See id. at 503–07.

53 More precisely, a factor is minimally causal if it has a tendency to bring about the decision (firing), but does not rise to the level of being necessary or sufficient to that decision. See id. at 506. In the text, I omit sufficiency to avoid confusion, because that concept does not appear in current disparate treatment law. See supra note 51.

54 See Katz, supra note 30, at 503–07. Some writers in disparate treatment use the phrase “substantial factor,” presumably as a way of trying to describe a type of causation that is more restrictive than “motivating factor” causation and less restrictive than
“But for” causation is, by definition, more restrictive than “motivating factor” causation. As noted above, a factor is a “motivating factor” where it has some causal influence but does not rise to the level of “but for.”

The two alternative frameworks (Price Waterhouse and the 1991 Act) require plaintiffs to prove only “motivating factor” causation. Thus, if certain disparate treatment cases require something more of plaintiffs than the two alternative frameworks do, that something more must be “but for” causation. Accordingly, it makes sense to require plaintiffs to use McDonnell Douglas, as opposed to one of the alternative frameworks, if and only if (1) the law requires some plaintiffs to prove “but for” causation, and (2) McDonnell Douglas implements that law by requiring those plaintiffs to prove “but for” causation.

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55 See 42 U.S.C. § 2000e-2(m); Price Waterhouse, 490 U.S. at 276 (O'Connor, J., concurring). There is an important difference between the two alternative frameworks in terms of the consequence of proving “motivating factor” causation. Under Price Waterhouse, such a showing only transfers the burden of proof to the defendant; if there is no “but for” causation (i.e., the defendant proves a “same decision” defense), there is no liability. See id. Under the 1991 Act, such a showing triggers liability and at least minimal damages. 42 U.S.C. § 2000e-5(g)(2)(B) (making the “same action” defense only a partial defense). However, the premise for requiring McDonnell Douglas is that it requires more of plaintiffs than either of the alternative frameworks. Thus, for our purposes, it suffices to say simply that the alternative frameworks require “motivating factor” causation—that, upon such a showing, the plaintiff gets some benefit (in Price Waterhouse, a burden shift; in the 1991 Act, liability and a burden shift).

56 There are actually three distinct concepts at work here. First, McDonnell Douglas might be required as a substantive standard if that framework imposed a higher substantive standard than that imposed by the two alternative frameworks. That is, it would make sense to require McDonnell Douglas if it demanded a “but for” standard of causation, while the alternative frameworks demanded only a “motivating factor” standard of causation. Second, McDonnell Douglas might be required as a method of proof if that framework proved a higher standard than that proved by the two alternative frameworks. That is, it would make sense to require McDonnell Douglas if it proved “but for” causation, while the alternative frameworks proved only “motivating factor” causation. Third, McDonnell Douglas might be required as a procedural requirement if it contained a more stringent burden of proof than the two alternative frameworks. That is, it would make sense to require McDonnell Douglas if it placed the burden for proving a particular standard (such as “but for” causation) on the plaintiff, while the
For purposes of this subpart, I will assume that the law might require some plaintiffs to prove “but for” causation in some cases.\textsuperscript{57} The question, therefore, is whether \textit{McDonnell Douglas} can be seen as implementing this requirement. In other words, does \textit{McDonnell Douglas} prove “but for” causation, such that forcing plaintiffs to use \textit{McDonnell Douglas} is tantamount to forcing them to prove “but for” causation?

Virtually all writers believe that \textit{McDonnell Douglas} does prove “but for” causation.\textsuperscript{58} This is likely the foundation—and the only possible

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\textsuperscript{57} I will question this assumption below in Part II.C.1 (arguing that plaintiffs should never be required to bear the burden of proving “but for”). But for purposes of the instant argument, I will assume that, in some cases, plaintiffs might be required to meet this burden.

\textsuperscript{58} \textit{See}, e.g., Griffith v. City of Des Moines, 387 F.3d 733, 745 (8th Cir. 2004) (Magnuson, J., concurring specially) (noting that \textit{McDonnell Douglas} “focuses on the but-for cause of the employment decision”); Stover v. Martinez, 382 F.3d 1064, 1076 (10th Cir. 2004); Rowland v. Am. Gen. Fin., Inc., 340 F.3d 187, 192 n.3 (4th Cir. 2003); Miller v. Cigna Corp., 47 F.3d 586, 597 (3d Cir. 1995) (en banc) (adopting the determinative-factor test, which is equivalent to the “but for” test); Ostrowski v. Atl. Mut. Ins. Cos., 968 F.2d 171, 185 (2d Cir. 1992) (adopting the determinative-factor test); Konowitz v. Schnadig Corp., 965 F.2d 250, 252 (7th Cir. 1992) (adopting the “but for” test); William R. Corbett, \textit{An Allegory of the Cave and the Desert Palace}, 41 Hous. L. Rev. 1549, 1567 & n.107 (2005) (“It is often stated that the \textit{McDonnell Douglas} pretext analysis adopted a but-for standard of causation.”); Davis, \textit{supra} note 6, at 895 & n.197; Kaminshine, \textit{supra} note 14, at 5, 18; Robert A. Kearney, \textit{The High Price of Price Waterhouse: Dealing with Direct Evidence of Discrimination, 5 U. PA. J. LAB. & EMP. L. 303, 310 (2003); Stan Pietrusiak, \textit{Labor and Employment Law, 38 TEX. TECH. L. REV. 911, 924 (2006); Zimmer, \textit{supra} note 11, at 1930 (noting that in \textit{McDonnell Douglas} cases, courts have typically required plaintiff to prove that the discriminatory motivation was a “but for” cause of the employer’s decision).

The idea that \textit{McDonnell Douglas} requires “but for” causation seems to come from three places. First, it may have come from the apparent association in certain Supreme Court cases between “but for” and \textit{McDonnell Douglas}. \textit{See}, e.g., Hazen Paper Co. v. Biggins, 507 U.S. 604, 610 (1993) (stating that an ADEA plaintiff must prove that age was a “determinative influence,” which likely means “but for” causation, and indicating that the plaintiff might be able to do so using \textit{McDonnell Douglas}); \textit{see also} Davis, \textit{supra} note 6, at 895 (noting that many writers believe that \textit{McDonnell Douglas} requires “but for” causation based on \textit{Hazen Paper}). However, just because the Supreme Court might believe that \textit{McDonnell Douglas} proves “but for” causation does not make it so. Second, the idea that \textit{McDonnell Douglas} requires “but for” causation may come from the (also flawed) idea that this framework works by a process of elimination. If \textit{McDonnell Douglas} eliminated all possible nondiscriminatory reasons for the challenged action, it would in fact prove “but for” causation. \textit{See infra} Part I.C.4. However, contrary to popular belief, \textit{McDonnell Douglas} does not work this way. \textit{See infra} Part I.C.2. Third, the idea that \textit{McDonnell Douglas} requires “but for” causation
basis—for the McDonnell Douglas mandate. The problem, as we will see in the next section, is that McDonnell Douglas does not prove, and therefore does not require, "but for" causation.

C. McDonnell Douglas Does Not Prove—or Require—"But For"

McDonnell Douglas itself does not specify any causal standard that must be proven. The framework merely speaks of proving "pretext." But disparate treatment statutes do not speak of "pretext." Disparate treatment statutes speak only of causation—the requirement that the employer act "because of" a protected characteristic such as race or sex. Thus, the question becomes: what causal standard (if any) does "pretext" embody?

To answer this question, we must look at how "pretext" operates as a method for proving causation. This, in turn, will allow us to determine what type of causation McDonnell Douglas proves—and therefore what type of causation the framework can be seen as requiring. We will see that, contrary to popular belief, it does not always prove "but for" causation.


Proving causation can be incredibly difficult. On rare occasions, an employer might admit, "I fired the plaintiff because she was a woman." But in most cases, a victim must find some other way to prove causation.

McDonnell Douglas provides another way to prove causation. It does so by providing the victims of discrimination with a target of sorts—a reason given by the employer for its actions. This allows the

may come from the (also flawed) observation that McDonnell Douglas presents an either-or dichotomy, in which a factfinder must find either that the employer was motivated by a nondiscriminatory reason or that the employer was motivated by discrimination. It is true that, in such an either-or world, there would always be "but for" causation. See infra Part I.C.4. However, as will be seen below, this is a flawed understanding of McDonnell Douglas, which does not in fact posit such a dichotomous world. See infra Part III.D.1.

61 See Tex. Dep't of Cmtv. Affairs v. Burdine, 450 U.S. 248, 255 n.8 (1980) (noting that proof of intentional discrimination can be "elusive").
62 See id.
63 The employer is required to explain its action only after the plaintiff makes out a prima facie case. See McDonnell Douglas, 411 U.S. at 802. However, the prima facie case is designed to set a fairly low threshold, which most plaintiffs are able to clear. See Smith, supra note 15, at 377 ("The 'burden' of showing a prima facie case is com-
victim to shoot at this target, to attempt to attack the employer’s explanation. If the victim can cast doubt on the employer’s explanation, a factfinder might conclude that the explanation was a cover-up for discrimination.\textsuperscript{64}

Although many courts and commentators speak of \textit{the} inference of discrimination which can be drawn from proof of “pretext,”\textsuperscript{65} this method of proof does not generally rely on a single inference. Rather, it works through a chain of successive inferences.\textsuperscript{66} Under-

\begin{itemize}
\item Students of \textit{McDonnell Douglas}\textemdash and those who have grown accustomed to reading articles and cases with prolonged discussions of the three stages of \textit{McDonnell Douglas}\textemdash will note that I have skipped rather quickly to the third stage of the framework, the “pretext” stage. The point I am making focuses on the third stage. As discussed in the text, it is by proving pretext that the plaintiff actually uses the \textit{McDonnell Douglas} framework to prove causation. \textit{See} Mark S. Brodin, \textit{The Demise of Circumstantial Proof in Employment Discrimination Litigation}: St. Mary’s Honor Center v. Hicks, \textit{Pretext, and the “Personality” Excuse}, 18 \textit{Berkeley J. Emp. & Lab. L.} 183, 191 (1997) (noting that “[t]he crux of an individual disparate treatment lawsuit is . . . the pretext stage”); Hart, \textit{supra} note 8, at 753 (remarking that “the third stage of the \textit{McDonnell Douglas} framework is where most of the action . . . seems to be”); Sam Stonefield, \textit{Non-Determinative Discrimination, Mixed Motives, and the Inner Boundary of Discrimination Law}, 35 \textit{Buff. L. Rev.} 85, 111 & n.89 (1986) (“The pretext issue is where the action is, where most disparate treatment cases are won or lost.”). In fact, I argue that that primary purpose—perhaps the only purpose—of the prima facie case (the first stage) is to trigger the defendant’s obligation to proffer a reason for the challenged action (the second stage), and that the only reason for this is to provide the plaintiff with a target to attack in order to prove causation. \textit{See infra} note 91.

\item \textit{See} Reeves v. Sanderson Plumbing Prods., Inc., 550 U.S. 133, 147 (2000) (“[R]ejection of the defendant’s proffered reasons will permit the trier of fact to infer the ultimate fact of intentional discrimination.”) (emphasis omitted) (quoting St. Mary’s Honor Ctr. v. Hicks, 509 U.S. 502, 511 (1993)); \textit{Burdine}, 450 U.S. at 256 (stating that a plaintiff may satisfy her “ultimate burden of persuading the court that she has been a victim of intentional discrimination . . . by showing that an employer’s proffered explanation is unworthy of credence”); \textit{see also} Kenneth R. Davis, \textit{Age Discrimination and Disparate Impact: A New Look at an Age-Old Problem}, 70 \textit{Brook. L. Rev.} 361, 370 n.64 (2004) (“[A] plaintiff [may] prove discrimination inferentially by proving that the defendant’s alleged justification for the challenged action was a pretext for discrimination.”); Michael Selmi, \textit{Subtle Discrimination: A Matter of Perspective Rather Than Intent}, 34 \textit{Colum. Hum. Rts. L. Rev.} 657, 669 (2003) (noting that the Court in \textit{Hicks} held that “proof of pretext leads to a permissive . . . inference of discrimination”)

\item A few courts and commentators occasionally seem to grasp the fact that \textit{McDonnell Douglas} relies on a chain of inferences. \textit{See}, e.g., William J. Vollmer, \textit{Note, Pretext in Employment Discrimination Litigation: Mandatory Instructions for Permissible Inferences?},
standing this chain is essential to understanding the potential and the limits of *McDonnell Douglas*, and to unraveling the confusion that has enveloped this framework.

To understand this chain of inferences, a hypothetical example may be helpful. Suppose that an employer has fired an employee. The employer, called upon to explain its action, says it fired the employee for stealing. But suppose the employee convinces the factfinder that she did not in fact steal.

From the fact that the proffered reason is wrong, a factfinder can draw one of two inferences. First, the factfinder could infer that the employer was simply mistaken—that it actually but incorrectly believed the employee had stolen. Second, the factfinder could infer that the employer was lying—that it knew that the employee had not stolen, but nevertheless claimed that the employee was a thief. So the wrongness of the employer’s stated reason could support either a finding of innocent mistake or a finding that the employer lied. If the factfinder concludes that the defendant’s error was an innocent mistake, then the process is at an end; the pretext inquiry would not yield any proof of discrimination.67

Now suppose that the factfinder concludes that the employer’s stated reason was a lie.68 Once the factfinder concludes that the employer has lied, it may again draw two different inferences from this fact. First, the factfinder might conclude that the employer lied

61 Wash. & Lee L. Rev. 407, 410 (2004) (referring to a “chain of inferences”); see also Reeves, 530 U.S. at 147 (“In appropriate circumstances, the trier of fact can reasonably infer from the falsity of the explanation that the employer is dissembling to cover up a discriminatory purpose.”). However, no court or commentator has analyzed each step in the chain, as necessary to truly understand *McDonnell Douglas*. (And almost all go on—mistakenly—to talk about *McDonnell Douglas* as working by a process of elimination, as opposed to by a chain of inferences. See infra Part I.C.2, especially note 81.)

67 The fact that a mistake might be an honest one—and not a cover-up for discrimination—demonstrates that good faith should be a defense in a pretext case. Most courts have so held. See, e.g., Forrester v. Rauland-Borg Corp., 453 F.3d 416, 419 (7th Cir. 2006) (“An honest mistake, however dumb, is not [a pretext].”); Exum v. U.S. Olympic Comm., 389 F.3d 1130, 1137–38 (10th Cir. 2004) (“To show pretext, the plaintiff must call into question the honesty or good faith of the [employer’s] assessment of his abilities.”); cf. Rivas Rosado v. Radio Shack, Inc., 312 F.3d 532, 535 (1st Cir. 2002) (“Title VII . . . does not ensure against inaccuracy by an employer, only against gender-based discrimination.”). But see Robert Belton et al., Employment Discrimination Law 103–04 (7th ed. 2004) (discussing divergent positions on good faith defense).

68 This conclusion might be based on the fact that the employer’s reason was mistaken (which, as noted above, might support such an inference), or from the fact of mistake in addition to other facts which might suggest that the employer knew the claim of theft was wrong.
for a benign reason, such as to protect the employee’s feelings. Alternatively, the factfinder might conclude that the employer lied to cover up some less benign fact.

Again, if the factfinder draws the first of these inferences (a lie for benign reasons), the pretext inquiry is at an end. The inquiry will not provide any evidence of discrimination. However, if the factfinder concludes that the lie was a cover-up for a more embarrassing reason, the process can continue.

From the fact of a cover-up, the factfinder can again draw one of two inferences. First, the factfinder might infer that the employer lied to cover-up an embarrassing but nondiscriminatory reason. For exam-

69 Saying the employee was a thief is unlikely to support an inference that the employer was trying to protect the employee’s feelings. But other stated reasons which turn out to be incorrect, such as a statement that employee’s job functions were “no longer required,” might support an inference of a benign lie. See, e.g., Rhodes v. Guiberson Oil Tools, 39 F.3d 537, 545–46 (5th Cir. 1994) (Zagel, J., concurring specially) (observing that employers, when firing workers, often give polite, dishonest explanations to “soften the blow”), rev’d en banc, 75 F.3d 989 (5th Cir. 1996); Sigal Constr. Co. v. Stanbury, 586 A.2d 1204, 1206 (D.C. 1991) (finding that an employer who fired her employee for poor performance told him that he was being laid off in order to protect his feelings); see also McCormick, supra note 15, at 179 n.76 (noting strategic but nondiscriminatory reasons why an employer might provide a false reason for its action).

70 Some writers have argued that such a conclusion (that a lie was for benign reasons) is unlikely. See, e.g., Melissa A. Essary, The Dismantling of McDonnell Douglas v. Green: The High Court Muddies the Evidentiary Waters in Circumstantial Discrimination Cases, 21 PEPP. L. REV. 385, 441 (1994) (“[I]f a plaintiff proves that an employer’s proffered reason for its actions is false, most jurors will logically infer that the proffered reason is a cover-up for discrimination.”); Malamud, supra note 6, at 2243 n.49 (“Rarely can it be envisioned that a jury, as factfinder, will hold for a lying defendant-employer, except in that exceptional case where it is established at trial that the pretextual reason is a cover-up for say an embarrassing one, rather than a discriminatory one.” (citation and internal quotation marks omitted)). The point is not which conclusion the factfinder would be most likely to draw. The point is merely that a factfinder might logically make either inference.

71 There are, of course, other types of evidence that might let a factfinder infer that the defendant is engaged in a cover-up. For example, if the employer proffers a reason for its action that is so nonsensical that no reasonable employer would utilize such a criteria in decisionmaking (such as claiming to have fired the plaintiff for being a stamp collector or because of the plaintiff’s zodiac sign), the factfinder might conclude that the proffered reason, even if true, was a cover-up. Or if the employer does not apply its rule uniformly (such as firing only some of the employees who were caught stealing), the factfinder may conclude that the proffered reason, even if true, was a cover-up. However, these two forms of evidence would not be pretext evidence in the true sense of the word, as they do not involve inferences of dishonesty based on the falsity of the proffered reason. See infra note 76 (discussing the proper use of the term “pretext”).
ple, the employer may have wanted to hire his own cousin. Or the employer may have wanted to get rid of the employee to prevent the discovery or disclosure of some type of corporate wrongdoing. While such a firing might be reprehensible, or even actionable under other doctrines, it would not be discriminatory. If the factfinder drew this inference, the pretext process would be at an end. Alternatively, the factfinder might conclude that the employer lied to cover up a discriminatory decision. That is, the factfinder might find discrimination.

Thus, McDonnell Douglas works to prove discriminatory causation through a chain of permissive inferences. This chain can be depicted as follows:

72 This type of firing would likely be actionable under most states' doctrine of wrongful discharge in violation of public policy. See, e.g., Martin Marietta Corp. v. Lorenz, 823 P.2d 100, 108 (Colo. 1992) (holding that claims for wrongful discharge in violation of public policy are cognizable in Colorado and cover situations where an employee is terminated for refusing to follow a superior's order to make a false statement to a federal agency); Sheets v. Teddy's Frosted Foods, Inc., 427 A.2d 385, 388–89 (Conn. 1980) (holding that an employee who was fired for insisting his employer comply with a state statute had a cause of action in tort for wrongful discharge); see also Pierce v. Ortho Pharm. Corp., 417 A.2d 505, 512 (N.J. 1980) (stating that "[a]n employer's right to discharge an employee at will carries a correlative duty not to discharge an employee who declines to perform an act that would require a violation of a clear mandate of public policy"); Brockmeyer v. Dun & Bradstreet, 335 N.W.2d 834, 840 (Wis. 1983) (holding that "[a] wrongful discharge is actionable when the termination clearly contravenes the public welfare and gravely violates paramount requirements of public interest").

73 See, e.g., Hazen Paper Co. v. Biggins, 507 U.S. 604, 612 (1993) (holding that a decision to fire the plaintiff to prevent his pension from vesting, while reprehensible, and possibly illegal under other laws, was not age discrimination).

74 There is some debate over whether instructions on pretext should be mandatory or whether such instructions should be left to trial judges' discretion. See Vollmer, supra note 66, at 410–13. Given the confusion that seems to surround this chain of inferences, an instruction on pretext that mirrors the discussion in this subpart would likely be helpful. Note that this issue—whether juries should be given pretext instructions—is distinct from the issue of whether juries should be instructed about the three stages of McDonnell Douglas. Most courts have held that juries should never be instructed about the three stages of McDonnell Douglas. See William R. Corbett, Of Babies, Bathwater, and Throwing Out Proof Structures: It Is Not Time to Jettison McDonnell Douglas, 2 Emp. Rts. & Emp. Pol'y J. 361, 381 & n.91 (1998) (noting that courts are divided on whether to instruct juries on McDonnell Douglas burden-shifting); Sandra F. Sperino, Recreating Diversity in Employment Law by Debunking the Myth of the McDonnell Douglas Monolith, 44 Hous. L. Rev. 349, 376–77 & nn.132–33 (2007) (same).

75 It might be argued that McDonnell Douglas' chain of inferences runs afoul of the rule against piling "inference upon inference" in order to prove a fact. See, e.g., Interlake Iron Corp. v. NLRB, 131 F.2d 129, 133 (7th Cir. 1942). However, this rule
does not preclude the three sequential inferences in the *McDonnell Douglas* chain. No one appears to have criticized *McDonnell Douglas* on these grounds. And most modern courts and writers accept that inference may be piled upon inference if all of the inferences in the chain are sound. *See*, e.g., NLRB v. Camco, Inc., 340 F.2d 803, 811 (5th Cir. 1965) ("The so-called rule against pyramiding inferences, if there really is such a 'rule' and if it is anything more than an empty pejorative, is simply legalese fustian to cover a clumsy exclusion of evidence having little or no probative value." (citing 1 John Henry Wigmore, *Evidence in Trials at Common Law* § 41, at 434–36 (3d ed. 1940))). In most modern cases that purport to apply the "inference upon inference" prohibition, there was no clear evidence that the defendant's proffered reason was wrong—i.e., no evidence of pretext. *See*, e.g., Cline v. BWXT-Y12, L.L.C., No. 304-CV-588, 2007 WL 1227482, at *8 (E.D. Tenn. Apr. 24, 2007); Schmidt v. Chao, No. 04-892(RMC), 2006 WL 1663389, at *5 (D.D.C. June 13, 2006); Anderson v. Nat'l R.R. Passenger Corp., No. 03C7589, 2006 WL 931699, at *9, *12 (N.D. Ill. Apr. 6, 2006); *see also infra* note 76 (discussing the meaning of pretext). No court appears to have dismissed a claim under the "inference upon inference" rule where the plaintiff has offered evidence that the proffered reason is wrong.
This chain of permissive inferences can be thought of as the "pretext" method of proof.\footnote{Note that this use of the word "pretext" differs from three common ways in which this word tends to be used. First, several writers use the word to describe one of the links in the chain of inferences, as opposed to the entire chain. For example, some writers define pretext as a lie; others define it as a cover-up. \textit{See McDonnell Douglas Corp. v. Green}, 411 U.S. 792, 805 (1973) ("coverup"); \textit{Turner v. Tex. Instruments, Inc.}, 555 F.2d 1251, 1255 n.3 (5th Cir. 1977) (describing discrimination as "the use, by employers, of legitimate reasons for action to hide racial animus in decision making"), \textit{overruled by Burdine v. Tex. Dep't of Cmty. Affairs}, 647 F.2d 513 (5th Cir. 1981); \textit{McCormick, supra note 15}, at 177 n.69 ("The courts usually define pretext as a lie."). In terms of describing a method of proof, these writers' definitions are flawed. As we have seen, none of the links in the chain of inferences, standing by itself, proves discrimination (except for the final link, discrimination—but defining pretext as discrimination would result in a tautology: the plaintiff could prove discrimination by proving discrimination). \textit{See supra Part I.C.1.} It is the entire chain that proves discrimination. Thus, "pretext" as a method of proof is best understood as referring to the entire chain.}

Second, some writers use the word "pretext" to include a reason that, while true, was not the employer's "real" or "actual" reason for its action. \textit{See Kaminshine, supra note 14}, at 42; \textit{Zimmer, supra note 11}, at 1925. This usage does not make sense in the context of \textit{McDonnell Douglas}. While such a post hoc search for a true-but-not-"real" justification might be a "pretext" in the colloquial sense of the word, it would not be the type of pretext which would permit a plaintiff to prove discrimination using the \textit{McDonnell Douglas} pretext method. This is because if the employer's stated reason is true (irrespective of whether it was the employer's "real" reason)—that is, if there is no error in the stated reason—then the factfinder cannot find a lie based on the error, and therefore cannot proceed down the \textit{McDonnell Douglas} chain of inferences. This is not to say that the plaintiff might not still be able to prove that the employer's stated reason is not its real reason and that its real reason is discriminatory. It is only to say that the plaintiff will not be able to make this showing by proving that the employer's stated reason is false—that is, by the pretext method of proof. \textit{See infra Part III.D.1.}

Finally, several writers—and occasionally the Court—have used the word "pretext" to refer to the entire third stage of \textit{McDonnell Douglas}. \textit{See, e.g., Tex. Dep't of Cmty. Affairs v. Burdine}, 450 U.S. 248, 256 (1981); \textit{Chambers, supra note 8}, at 85; \textit{Catherine J. Lanctot, The Defendant Lies and the Plaintiff Loses: The Fallacy of the "Pretext-Plus" Rule in Employment Discrimination Cases, 43 HASTINGS L.J.}, 57, 65–66 (1991); \textit{Malamud, supra note 6}, at 2254. This is actually a misnomer. At the third stage, there are two ways that the plaintiff can proceed, only one of which involves "pretext." At that stage, the plaintiff can proceed either by (1) proving that the defendant's proffered reason is "unworthy of credence" (the pretext method), or by (2) showing that discrimination was the "real" reason (presumably using some method of proof other than the "pretext" method). \textit{See Burdine, 450 U.S. at 256; see also Green, supra note 4}, at 984–85, 988 (noting that there are two ways to proceed at the third stage).
v. Sanderson Plumbing Products, Inc., the pretext analysis in McDonnell Douglas is a direct application of "the general principle of evidence law that the factfinder is entitled to consider a party's dishonesty about a material fact as affirmative evidence of guilt." This analysis also mirrors familiar principles in criminal law that a factfinder may infer guilt from the fact that a defendant offered a false exculpatory statement or ran from the scene of the crime. Like McDonnell Douglas, these commonly applied principles are all based on chains of inference that reflect the concept of pretext.

In summary, McDonnell Douglas works through a chain of permissive inferences. At each link in the chain, the factfinder can—but is not required to—go to the next link. The final link, or inference, is discrimination.

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78 See id. at 147 (internal quotation marks omitted) (citing Wilson v. United States, 162 U.S. 613, 620-21 (1896); 2 John Henry Wigmore, Evidence in Trials at Common Law § 278(2), at 133 (J. Chadbourn ed., 1979)).
79 See Binder v. Long Island Lighting Co., 57 F.3d 193, 200 (2d Cir. 1995) ("Resort to a pretextual explanation is, like flight from the scene of a crime, evidence indicating consciousness of guilt, which is, of course, evidence of illegal conduct."); Brodin, supra note 64, at 202 ("The concept of pretext . . . reflects our experience with evasive explanations offered by those accused of wrongdoing, such as the frequent use of 'consciousness of guilt' evidence in criminal cases and 'consciousness of liability' evidence in civil cases."); see also Fisher v. Vassar Coll., 114 F.3d 1332, 1390 (2d Cir. 1997) (Winter, J., dissenting) (referencing the "vast body of law allowing inferences of consciousness of guilt to be drawn from dishonest behavior concerning facts material to litigation") (citing United States v. Sureff, 15 F.3d 225, 227 (2d Cir. 1994); 1 Edward J. Devitt et al., Federal Jury Practice and Instructions § 14.06 (4th ed. 1987); 1 Leonard B. Sand et al., Modern Federal Jury Instructions § 6.05 (Instruction 6-11) (1996)). Other similar examples of the general principle include factfinders' ability to infer guilt from: use of a false name, fabrication of an alibi, use of disguised handwriting, falsification of evidence, intimidation of witnesses, and engaging in clandestine behavior. See id.
McDonnell Douglas' pretext analysis also finds support in a slightly different principle regarding veracity: where a party has lied about one issue (such as why the plaintiff was fired), a factfinder may (but need not) choose to disbelieve that party's testimony on other issues (such as whether he discriminated against the plaintiff). See id.
80 This understanding of McDonnell Douglas as a chain of permissive inferences should serve to resolve two longstanding debates in disparate treatment law. First, this understanding resolves the so-called "pretext-plus" debate. This debate involves the effect of proving pretext. Once a plaintiff has proven pretext, has she created a jury question on the issue of causation? Or do plaintiffs also need to produce some evidence in addition to evidence of pretext—"plus" evidence—to create a jury question? The Court has now held that, most of the time, pretext evidence is sufficient; but sometimes additional evidence might be required. See Reeves, 530 U.S. at 147-48. Because Reeves did not offer much guidance on when additional "plus" evidence is
required, lower courts have (predictably) split on the issue. See Steven H. Adelman et
al., *Summary Judgment Standards Following Reeves v. Sanderson Plumbing Products and
Its Progeny*, in *Employment Discrimination and Civil Rights Actions in Federal and
State Courts*, 301, 317 (ALI-ABA Course of Study Materials, Sept. 15–17, 2005)
available at WLSL021 ALI-ABA 301 (noting post-Reeves split on “pretext plus” issue); Cathe-
rine J. Lancot, *Secrets and Lies: The Need for a Definitive Rule of Law in Pretext Cases*, 61
La. L. Rev. 539, 547–48 (2001) (same); Audrey J. Lee, Note, *Unconscious Bias Theory in
(same). From the analysis in the text, we can see that, as a general matter, proof that
the defendant’s proffered reason was wrong is sufficient to permit an inference of
discrimination—and thus to survive summary judgment. From the evidence of error,
the factfinder can infer a lie; from a lie, a cover-up; and from a cover-up, discrimina-
tion. There might be cases in which a defendant offers evidence that might tend to
push the factfinder off this chain of inferences. For example, the defendant might
offer evidence that its error was a good faith mistake. However, in most cases, this
would simply present a factual question for the jury: was the error a good faith mis-
take or a lie? A plaintiff could offer additional evidence that the defendant lied. But
the plaintiff would not need to do so to create a question of fact on the issue. Of
course, if the defendant offered evidence of good faith mistake (or a lie for a benign
reason, or a cover-up for a nondiscriminatory reason) that no reasonable factfinder
could reject, then *McDonnell Douglas* would not permit an inference of discrimi-
nation. In such a case, to survive summary judgment, the plaintiff would need to offer evidence of discrimination other than *McDonnell Douglas* evidence. While this could be
called “plus” evidence, that would be a misnomer. In such a case, this non-*McDonnell
Douglas* evidence would be the plaintiff’s only evidence of discrimination.

The second debate that should be cleared up by understanding *McDonnell Doug-
las* as a chain of permissive inferences is the ongoing academic debate over whether
*St. Mary’s Honor Center v. Hicks* was correctly decided. In *Hicks*, the Court held that
proof of pretext does not compel a verdict for the plaintiff. See *St. Mary’s Honor Ctr.
v. Hicks*, 509 U.S. 502, 511 (1993). This holding gave rise to a firestorm of criticism,
with one of the primary complaints being that a finding of “pretext” logically required
a finding of discrimination. See, e.g., Krieger, *supra* note 15, at 1209–24; Michael
burdens on the plaintiff). The flaw in this reasoning is that, depending on what one
means by “pretext,” a finding of pretext does not necessarily require a finding of
discrimination. If, by “pretext,” the critics of *Hicks* mean only one of the earlier links
in the chain (e.g., error, a lie, or a cover-up), such a finding does not logically require
a finding of discrimination. Each successive link is permissive. A reasonable
factfinder can, for example, find error, or even a lie or cover-up, and still not find
discrimination. If, on the other hand, the critics define “pretext” as the last link in
the chain of inferences (discrimination), then their argument is merely a tautology:
where a plaintiff proves discrimination, a factfinder must find discrimination. In
other words, despite the firestorm of criticism that has been leveled against it, *Hicks*
was correctly decided—at least as a doctrinal matter. For other, normative criticisms
of *Hicks*, see, e.g., Derum & Engle, *supra* note 8, at 1224–25 (discussing *Hicks* as a
“personal animosity” case); Donna G. Goldian, *New Reason to Lie: The End of Proving
Discriminatory Intent by Proving Pretext Only After St. Mary’s Honor Center v. Hicks*, 30
Willamette L. Rev. 699, 715 (1994) (arguing that *Hicks* encourages courts to scou

This analysis differs significantly from the way in which many courts and commentators have characterized *McDonnell Douglas*. Many writers have insisted that *McDonnell Douglas* works by a process of elimination.\(^{81}\) That is, they believe that *McDonnell Douglas* works by progressively eliminating nondiscriminatory reasons for the challenged action, until the only possible remaining reason is discrimination.\(^{82}\) As a result, these writers mistakenly tend to believe that *McDonnell Douglas* proves "but for" causation.\(^{83}\) These writers are wrong; *McDonnell Douglas* does not work by a process of elimination. (And, as we will see in the following section, *McDonnell Douglas* does not prove "but for" causation.)\(^{84}\)

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\(^{81}\) See, e.g., Kaminshine, supra note 14, at 10–11 & n.45; Lanctot, supra note 76, at 117 (noting that if the factfinder disbelieves a proffered reason, the only remaining reason is discrimination); McCormick, supra note 15, at 162; Sullivan, supra note 21, at 934–35 ("Getting to a single discriminatory motive by process of elimination is the core of *McDonnell Douglas* . . . ."); Zimmer, supra note 11, at 1933; Robert S. Whitman, Note, *Clearing the Mixed-Motive Smokescreen: An Approach to Disparate Treatment Under Title VII*, 87 Mich. L. Rev. 863, 884 (1989) ("The three-stage inferential inquiry is a process of elimination . . . ."). In this, these writers have been aided in their confusion by the Court, which has at times suggested that *McDonnell Douglas* works by process of elimination. See, e.g., Reeves, 530 U.S. at 147 ("[O]nce the employer’s justification has been eliminated, discrimination may well be the most likely alternative explanation . . . ."); Furnco Constr. Corp. v. Waters, 438 U.S. 567, 577 (1978) ("[W]hen all legitimate reasons for rejecting an applicant have been eliminated as possible reasons for the employer’s actions, it is more likely than not the employer, who we generally assume acts only with some reason, based his decision on an impermissible consideration such as race." (emphasis omitted)).

\(^{82}\) This description—in which discrimination is the only possible remaining reason—is the strong version of the process-of-elimination argument. This strong version of the process-of-elimination argument is the only version relevant to the issue of "but for" causation. There is also a weaker version of the process-of-elimination argument, in which many—but not all—nondiscriminatory reasons are eliminated. Under the weak version, discrimination is not the only possible remaining reason; but depending on one’s assumptions it might be the most likely remaining reason. This weak version of the process-of-elimination argument will be addressed below in Part III.C.

\(^{83}\) See supra note 81.

\(^{84}\) See infra Part I.C.3.
It is true that the first stage of *McDonnell Douglas*, the prima facie case, serves to eliminate some of the most common nondiscriminatory reasons for adverse employment actions, such as a lack of objective qualifications (e.g., lack of a required license), or a decision not to fill a job.\footnote{See McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973) (noting that in a failure-to-hire case, a prima facie case includes proof that plaintiff was objectively qualified for the job and that the job remained open).} It is also true that in the third stage the plaintiff may eliminate another potential nondiscriminatory reason: the one proffered by the defendant.\footnote{See id. at 804–05.} Finally, it is true that if the factfinder stays on the pretext chain to find discrimination, it will have eliminated three potential nondiscriminatory explanations for the falsity of the proffered reason (a good faith mistake, a lie for a benign reason, and a cover-up of something other than discrimination).\footnote{See supra Part I.C.1.}

However, a plaintiff who successfully uses *McDonnell Douglas* to prove discrimination does not eliminate all nondiscriminatory reasons for the challenged action. Such a plaintiff has proven discrimination by proving that one reason proffered by the defendant was false and a cover-up for discrimination. This does not rule out the possibility that the defendant had other reasons which were not discriminatory. This is important because, as we will see shortly, it means that *McDonnell Douglas* does not necessarily prove “but for” causation.\footnote{See infra Part I.C.3.}

To understand this, consider the following example. Suppose that in a race discrimination case the defendant claimed to have based its decision to fire the plaintiff on two nondiscriminatory factors: poor performance on a project and excessive tardiness. And suppose that the plaintiff proves that one of those reasons (poor performance on the project) was incorrect, but fails to prove that the second reason (excessive tardiness) was incorrect; that is, suppose that the plaintiff was excessively tardy. Based on the fact that the first proffered reason (poor performance) was erroneous, the factfinder might proceed down the *McDonnell Douglas* chain of inferences to find discrimination. The factfinder might find that the claim of poor performance was a lie, a cover-up, and designed to conceal discrimination. But the factfinder might nevertheless conclude that the plaintiff was excessively tardy.\footnote{I make no claim about the likelihood of such a scenario. It may be that factfinders are inclined completely to believe or completely to disbelieve a defendant. Thus, if the factfinder found one proffered reason (performance) to be false, it might well be inclined to find the other proffered reason (tardiness) to be false. Or if the}
Thus, the pretext method, even when used successfully, eliminates only one proffered nondiscriminatory reason for the challenged decision. It does not eliminate all potential nondiscriminatory reasons. \textit{McDonnell Douglas} does not work by process of elimination. It proves causation by setting up a chain of permissive inferences. \textsuperscript{91}

The factfinder found one proffered reason (tardiness) to be true, it might be inclined to find the other proffered reason (performance) to be true—or, at the very least, be disinclined to find any error in this reason to be a lie or a cover-up. My point, rather, is that it is possible that the factfinder might believe one proffered reason and disbelieve another; the fact that a plaintiff proves one proffered reason to be a pretext for discrimination does not necessarily eliminate all potential nondiscriminatory reasons for the challenged action.

\textsuperscript{90} Below, I will address the possibility of a strong version of \textit{McDonnell Douglas}, in which the plaintiff disproves not just one proffered reason, but \textit{all} proffered reasons. \textit{See infra} Part I.C.4. This strong version would, in fact, eliminate all potential nondiscriminatory reasons. However, even here, it is not the elimination of all nondiscriminatory reasons that gives rise to the inference of discrimination. Rather, it is the fact that the factfinder concludes that at least one reason was erroneous, and that the error was a lie and a cover-up for discrimination. A factfinder could, for example, conclude that all of the defendant's multiple proffered reasons were wrong and still conclude that all of those errors were good faith mistakes. Moreover, as I will discuss below, current law could never require such a strong version of \textit{McDonnell Douglas}. \textit{See infra} Part I.C.4.

\textsuperscript{91} The fact that \textit{McDonnell Douglas} does not work through a process of elimination casts the first stage of the framework—the plaintiff's prima facie case—in a new, and diminished, light. The prima facie case eliminates some common reasons for adverse employment decisions, such as the plaintiff's lack of objective qualifications or the employer's lack of need to fill the position. \textit{See} Tex. Dep't of Cnty. Affairs v. Burdine, 450 U.S. 248, 253–54 (1981); \textit{see also} McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973) (noting that a Title VII plaintiff may establish a prima facie case of racial discrimination in hiring "by showing (i) that he belongs to a racial minority; (ii) that he applied and was qualified for a job for which the employer was seeking applicants; (iii) that, despite his qualifications, he was rejected; and (iv) that, after his rejection, the position remained open"). It is therefore not surprising that many writers have seen this stage as a critical first step in a process of elimination. \textit{See, e.g.}, Sheila R. Foster, \textit{Causation in Antidiscrimination Law: Beyond Intent Versus Impact}, 41 Hous. L. Rev. 1469, 1504–05 (2005); Michael J. Zimmer, \textit{Leading by Example: An Holistic Approach to Individual Disparate Treatment Law}, 11 Kan. J.L. & Pub. Pol'y 177, 177 (2001). But once we understand that \textit{McDonnell Douglas} does not work by a process of elimination, the significance of the prima facie case is severely diminished. Eliminating a few common potential reasons for the challenged action does little, if anything, to prove discrimination. If one of the common reasons was a reason that the defendant professed to rely upon, then the defendant would presumably proffer that reason and the factfinder would need to determine if that reason was a true reason. If the common reason was not a reason that the defendant professed to rely upon, it would be irrelevant to the pretext analysis. So eliminating common reasons is only relevant to the pretext method if one of those reasons also happens to be one of the defendant's proffered reasons. \textit{See} Michael J. Hayes, \textit{That Pernicious Pop-Up, the Prima
3. What *McDonnell Douglas* Proves ("Motivating Factor") and What It Does Not Prove ("But For")

We now understand exactly how *McDonnell Douglas* works—and how it does not work. The next question is what it does—and does not—do. Does it prove "but for" causation, which would justify making it mandatory? Or does it prove something less, making it impossible to justify its mandatory application? The answer is that, contrary

*Facie Case*, 39 *Suffolk U. L. Rev.* 343, 375–76 (2006) (noting that once the employer identifies the motivating reasons, "speculative" reasons become unnecessary). And in such a case, the validity of that reason would be tested at the pretext stage. The prima facie case would merely serve as a needless complication. *See* Malamud, *supra* note 6, at 2243–45 (questioning the evidentiary value of the prima facie case).

If the prima facie case has any value at all, it is as a trigger for forcing an at-will employer to proffer a reason for its action (the second stage of *McDonnell Douglas*). *See* Henry L. Chambers, Jr., *Discrimination, Plain and Simple*, 36 *Tulsa L.J.* 557, 561 (2001) ("The mandatory presumption of discrimination that accompanies proof of a prima facie case is merely a vehicle to coax an LNR [legitimate nondiscriminatory reason] from the employer, and meant nothing once the employer articulated the LNR."); *see also* *Burdine*, 450 U.S. at 255–56 (explaining that the point of the second stage of the framework—and thus that of the prima facie case that triggers the second stage—is to present a reason for the challenged action and frame the issue in terms of the veracity of the reason). Absent such compulsion, an at-will employer might simply stand mute as to the reasons for its actions. In such a case, the plaintiff would not be able to use the pretext method. If the plaintiff had no other proof of discrimination (such as statements or comparative evidence), the court might dismiss the claim without making the defendant provide a reason—and without discovery—thus short-circuiting the plaintiff’s ability to use the pretext method. So the issue—and the only issue—addressed by the prima facie case is simply when a court should compel an at-will employer to proffer a reason for its actions, which might enable the plaintiff to use the pretext method against an otherwise silent defendant. Whether it would be proper to dismiss a claim prior to discovery, and thus prior to any opportunity to ascertain the defendant’s reason absent *McDonnell Douglas*, probably depends on one’s view of pleading requirements. Such an assessment is beyond the scope of this Article. *Cf.* *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 515 (2002) (holding that notice pleading applies in antidiscrimination cases); *Rutherford*, *supra* note 3, at 36 ("Legal doctrine does not require employers to offer good reasons for their decisions, but the practicalities of litigation often compel them to do so.").

A corollary of the insignificance of the prima facie case is that courts should never dismiss cases for failure to state a prima facie case where the defendant nonetheless proffers a reason for its action and the plaintiff has evidence tending to show that the proffered reason is pretext. *See* Davis, *supra* note 15, at 751 n.262 (citing cases in which this has happened). In such cases, the prima facie case is irrelevant. Put differently, in cases where the employer proffers a reason for its action without being required to do so, plaintiffs can prove pretext without the first two stages of *McDonnell Douglas*. *See* id. at 753 (arguing that plaintiffs can prove pretext without *McDonnell Douglas*).
to almost universally held belief,\(^{92}\) *McDonnell Douglas* does not prove "but for" causation.

There are two reasons for this. First, a factfinder can find discrimination using the *McDonnell Douglas* pretext method without finding "but for" causation. We can understand this by looking at the last step in *McDonnell Douglas*’ chain of inferences. In this step, the factfinder can infer discrimination from the fact of a cover-up. The possibility of this inference arises because when a person tries to cover something up, we can infer that the person does so in order to avoid adverse consequences, such as liability or embarrassment.\(^{93}\) Discriminatory causation—the fact that the defendant based an employment decision on a protected factor, such as race or sex—would subject the defendant to both legal liability and social condemnation. So from the fact of a cover-up a factfinder might infer that the defendant was covering up discriminatory causation.

Yet this inference arises irrespective of the level of causation—irrespective of whether a protected factor such as race or sex was a "but for" factor or only a "motivating factor" in the challenged decision. Either type of causation would subject the defendant to legal liability and social condemnation. The 1991 Act imposes legal liability for "motivating factor" as well as for "but for" causation.\(^{94}\) And even under *Price Waterhouse*, "motivating factor" causation has serious adverse consequences for a defendant: this level of causation saddles the defendant with the burden of proof.\(^{95}\) Moreover, the defendant would likely face social condemnation for making discriminatory decisions irrespective of the level of causation. It is hard to imagine an employer accused of discrimination defending itself in the press by saying that it only engaged in "motivating factor" causation. So a defendant would have an incentive to cover up "motivating factor" as well as "but for" discrimination.

Thus, where we see a cover-up, all that a factfinder can infer is that the employer engaged in some type of discriminatory causation—either "motivating factor" or "but for." The *McDonnell Douglas* pretext method provides no way to distinguish which of these levels of causation infected the defendant’s decisionmaking. So, effectively, when a

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\(^{92}\) See supra note 58.

\(^{93}\) See supra notes 71–75 and accompanying text.


\(^{95}\) See *Price Waterhouse v. Hopkins*, 490 U.S. 228, 244–45 (1989) (plurality opinion), superseded by statute, Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1074; see also supra note 30 (noting that the "substantial factor" test for burden-shifting in Justice O’Connor’s concurrence most likely refers to “motivating factor” causation).
plaintiff proves discriminatory causation using *McDonnell Douglas*, the most a factfinder can find is "motivating factor" causation—the less restrictive of the two standards.\(^{96}\) In other words, contrary to widespread assumption, *McDonnell Douglas* proves only "motivating factor" causation, not "but for" causation.\(^{97}\)

Moreover, there is a second reason why *McDonnell Douglas* does not necessarily prove "but for" causation. This is because, as noted above, *McDonnell Douglas* does not work by a process of elimination; it does not eliminate all possible nondiscriminatory reasons.\(^{98}\)

Recall that a plaintiff can prove discrimination using *McDonnell Douglas* by disproving one of the defendant’s proffered reasons (such as poor performance) while leaving intact other proffered nondiscriminatory reasons (such as excessive tardiness).\(^{99}\) In such a case, the record would contain multiple reasons for the defendant’s decision: discrimination, as well as at least one nondiscriminatory reason (tardiness). If a nondiscriminatory reason (such as tardiness) were sufficient—that is, if that reason, standing alone, would have triggered the challenged decision—then the discriminatory reason could not be a "but for" cause. The defendant would have reached the same decision based on the nondiscriminatory factor (tardiness). So we could not say that "but for" the discriminatory factor, the defendant would have reached a different decision.

Thus, the fact that *McDonnell Douglas* leaves open the possibility of a sufficient, nondiscriminatory factor precludes it from proving "but for" causation. So does the fact that a factfinder can find discrimination based on a cover-up, and the fact that a defendant has an incentive to cover up "motivating factor" as well as "but for" causation. In summary, contrary to widespread belief, *McDonnell Douglas* does not prove "but for" causation. And if a framework such as *McDonnell Douglas* does not prove "but for" causation, the framework can hardly be said to require "but for" causation—precluding its mandatory application.\(^{100}\)

\(^{96}\) See supra notes 51–55 and accompanying text.

\(^{97}\) As I will demonstrate below, the same can be said for almost all other methods of proof. See infra notes 183–91 and accompanying text.

\(^{98}\) See supra Part I.C.2.

\(^{99}\) See supra Part I.C.2.

\(^{100}\) Professor Davis tries to argue that *McDonnell Douglas* does not require "but for" causation on very different grounds. He attempts to argue that (1) many of the writers who believe that *McDonnell Douglas* requires "but for" causation base their reasoning on the language of *Hazen Paper v. Biggins*, 507 U.S. 604, 610 (1992), which states that plaintiffs must show "determinative factor" causation, and (2) the Justices who wrote *Hazen Paper*, despite using the phrase "determinative factor," did not really intend to require "but for" causation. See Davis, supra note 6, at 895–900. Though
4. A Strong Version of McDonnell Douglas

There is a version of McDonnell Douglas that would prove "but for" causation. We can refer to it as the strong version of McDonnell Douglas.

So far, we have been talking about a basic version of McDonnell Douglas, in which the plaintiff sets up a chain of permissive inferences by disproving a reason—a single reason—that the defendant proffered for its action. Disproof of this single reason permits an inference of a lie, which permits an inference of a cover-up, which permits an inference of discriminatory causation.¹⁰¹

However, we can imagine a strong version of McDonnell Douglas in which two additional conditions are met. First, suppose that instead of disproving a single proffered reason, the plaintiff disproved all of the defendant’s proffered reasons. (This might be because the defendant proffered only a single reason, or it might be because the plaintiff disproved all of a set of multiple reasons proffered by the defendant.)¹⁰² Second, suppose that the factfinder concludes that each of the discredited reasons was a pretext for discrimination. That is, suppose that the factfinder does not believe that the employer made an honest mistake, told a lie for a benign reason, or was cover-

¹⁰¹ Professor Davis reaches the correct result (that McDonnell Douglas does not require "but for" causation), his argument is not completely persuasive. First, whatever the Justices who wrote Hazen Paper may have intended by the phrase "determinative factor," this phrase means "but for." See Katz, supra note 30, at 501–03 (noting that "determinative factor" means "but for" causation); Stonefield, supra note 64, at 115–16 (noting that "but for" causation in tort law takes the form of a "determinative factor" requirement in discrimination cases). Second, Hazen Paper did not need to address—and thus should not be seen as addressing—causal standards. The case did not involve claims of multiple independent reasons, such as tardiness and poor performance on a particular project; rather, the plaintiff’s claim was that the single reason asserted by the defendant (time until retirement) was in fact dependent on—i.e., influenced by—age. See Hazen Paper, 507 U.S. at 611–12. Thus, there was no need, at least at that stage of the case, to decide the appropriate standard of causation. Finally, many of those who believe that McDonnell Douglas requires "but for" causation believe this independently of Hazen Paper. For example, many writers believe that McDonnell Douglas requires "but for" causation because they believe that it is based on a process of elimination or because they believe that it presents an either-or paradigm. See supra note 81; infra note 248. Although both of these beliefs turn out to be incorrect, see supra Part I.C.2; infra Part III.D.1, trying to recast Hazen Paper is not a productive way to refute writers whose beliefs are not based on that case.

¹⁰² The set of proffered reasons can easily be limited by the plaintiff’s counsel asking that all-important question: "Is there any other reason for your decision?"
ing up something other than discrimination. If these two conditions are satisfied, then the plaintiff will have proven “but for” causation.\(^1\)

Causal logic demonstrates why such a strong version of *McDonnell Douglas* would prove “but for” causation. The only way that a factor (such as race) can be a “motivating factor” in an employment decision, yet not rise to the level of “but for” causation, is where there is a second, independently sufficient factor (such as excessive tardiness) in the employer’s decision.\(^2\) Because the employer would have reached the same decision as a result of the second, independently sufficient factor (tardiness), the first factor (race) cannot be a “but for” cause of the decision. Thus, it is the existence of a second, independently sufficient factor that permits a factor to be a “motivating factor” but not a “but for” cause.

The strong version of *McDonnell Douglas* eliminates the possibility of a second, independently sufficient factor, and thus the possibility that discrimination could be found to be a “motivating factor” yet not a “but for” cause of the challenged decision. In the strong version, (1) all of the reasons proffered by the defendant have been rejected, and (2) all of the inferences other than discrimination that could have been drawn from the evidence (such as honest mistake, lies for benign reasons, or cover-ups for things other than discrimination) have been rejected.\(^3\) In such a case, there could be no evidence of a second factor (much less a second, independently sufficient factor) in the record. Such a record would permit an inference of discrimination, but not an inference of “motivating factor” discrimination. It would permit only an inference of “but for” discrimination.\(^4\)

\(^1\) Dean Kaminshine asserts that *McDonnell Douglas* does prove “but for” causation. Kaminshine, supra note 14, at 18. His analysis assumes this strong version of *McDonnell Douglas*. See id. However, as will be discussed below, no court could require this strong version under current law.

\(^2\) Actually, there could be an independently sufficient set of factors. For simplicity, I will assume only a single independently sufficient factor. The analysis is the same.

\(^3\) As a practical matter, it seems unlikely that a factfinder would find that (1) the first proffered reason was a cover-up for discrimination, and (2) an additional proffered reason was erroneous, and then go on to find that this error was not a cover-up for discrimination (e.g., that the defendant made a good faith error regarding the second proffered reason). However, it is possible. And this possibility introduces the possibility of a second, independent factor—and thus the possibility of less-than-“but for” causation. This is why the strong version of *McDonnell Douglas* requires that each proffered reason be shown to be a pretext for discrimination, rather than merely wrong.

\(^4\) Note that this strong version of *McDonnell Douglas* uses an elimination technique to prove “but for” causation. That is, it proves “but for” causation by eliminating other potential reasons besides discrimination for the defendant’s action.
If we always required plaintiffs to use the strong version of *McDonnell Douglas* (to disprove and establish as a pretext every reason offered by the defendant), plaintiffs using this method of proof would indeed prove “but for” causation. And, as we saw above, this might justify a requirement to use *McDonnell Douglas*—the strong version. The problem is that the strong version of *McDonnell Douglas* proves too much; so much that it could never be required under current disparate treatment law.

To understand this, it is important to distinguish “but for” causation from “sole” causation. In causal logic, there are three types of causation: (1) minimal causation (“motivating factor”), (2) necessity (“but for”), and (3) sufficiency (which I have not discussed so far, because it does not appear in current disparate treatment doctrine). These three types of causation can be combined to form causal standards higher (or lower) than a specific type of causation. For example, instead of requiring necessity (“but for” causation) alone, the law could conceivably require “necessity and sufficiency”; that is, the law could require that the factor in question be both necessary and sufficient to trigger the event in question. The “necessity and sufficiency” standard, which is by definition more stringent than necessity (“but for”) alone, has been called “sole” causation.

Put differently, if discrimination is the “sole” cause of a decision, it will also be a “but for” cause. But discrimination may be a “but for” cause without being the “sole” cause. Thus, if the law required a “sole cause” standard, employers who engaged in only “but for” discrimination would be exonerated.

The key point to recognize for our purposes is that Congress, in creating disparate treatment law, unequivocally rejected a “sole” cause

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However, the elimination does not prove that discrimination was a reason. As noted above, this is proven by the chain of permissive inferences flowing from proof that one of the employer’s proffered reasons was wrong. See *supra* Part I.C.2. The elimination only proves the lack of an independently sufficient reason—and thus “but for” causation once discrimination is established.

107 See *supra* Part I.B.
108 See *supra* notes 51 and 53.
109 See Hawkins v. Dir., Office of Workers’ Comp. Programs, 907 F.2d 697, 704 (7th Cir. 1990) (noting that “necessary and . . . sufficient” is equivalent to “sole cause”). The logical explanation for this is as follows: If a factor is *sufficient*, it is capable of triggering the outcome (here, the adverse employment decision). If a factor is *necessary*, that means that there are no other factors that would be *sufficient* to cause the outcome. See Katz, *supra* note 30, at 512–14. So if a factor is *necessary and sufficient*, it will be the only factor capable of triggering the outcome—the sole cause.
standard.\textsuperscript{110} Thus, one of the few "givens" about causation in disparate treatment law is that the law does not require plaintiffs to prove "sole" causation.

Yet requiring plaintiffs to use the strong version of \textit{McDonnell Douglas} would effectively require them to prove "sole" causation. By eliminating any possibility of a second factor in the defendant's decision, the plaintiff would prove "sole" causation—the one standard that Congress has made clear plaintiffs never need to prove. Thus, a court could never require a plaintiff to use the strong version of \textit{McDonnell Douglas}.\textsuperscript{111} At most, a court could require a plaintiff to use the basic version of \textit{McDonnell Douglas}. And the basic version proves only "motivating factor" causation—not "but for" causation.\textsuperscript{112}

5. The Death of a Mandatory \textit{McDonnell Douglas}

In summary, a mandatory \textit{McDonnell Douglas} makes no sense as a matter of causal logic. To require certain plaintiffs to use \textit{McDonnell Douglas}, as opposed to one of the two alternative frameworks, we must assume that \textit{McDonnell Douglas} is more demanding than those alternative frameworks. The alternative frameworks require that plaintiffs prove "motivating factor" causation. So, for it to be mandatory, \textit{McDonnell Douglas} would need to require plaintiffs to prove "but for" causation. It does not. Therefore, \textit{McDonnell Douglas} should never be mandatory. Courts should stop requiring unwilling plaintiffs to use \textit{McDonnell Douglas}. Now.


\textsuperscript{111} This is not to say that a plaintiff could not choose to use the strong version of \textit{McDonnell Douglas}—that is, to try to prove that all of the reasons proffered by the defendant were pretextual. If the plaintiff does so successfully, she would prove "but for" causation (actually, "sole" causation). Such a showing would preclude the defendant from proving lack of "but for" causation through a "same decision"/"same action" defense. \textit{See infra} Part II.A.

\textsuperscript{112} See supra Part I.C.3.
II. A World Without Mandatory McDonnell Douglas

We now know that McDonnell Douglas should never be mandatory. This Part describes what disparate treatment doctrine would look like in a world without a mandatory McDonnell Douglas. Next, it shows how this new understanding of the proper role of McDonnell Douglas in disparate treatment law can be implemented in light of current precedent. Finally, it shows how this new understanding of McDonnell Douglas resolves the three doctrinal debates that have plagued current disparate treatment law.

A. The Proper Role for a Nonmandatory McDonnell Douglas

So what would disparate treatment doctrine look like in a world where McDonnell Douglas is never required? The answer is quite simple: plaintiffs would have the option of choosing to use—or not to use—McDonnell Douglas to prove causation. In most cases, the choice would be whether to use the basic version of McDonnell Douglas to prove “motivating factor” causation. For example, consider a plaintiff who believes she has been fired because of her sex and sues under the 1991 Act. The Act requires her to prove “motivating factor” causation. She could try to do so by using McDonnell Douglas—by attacking her employer’s proffered reason for firing her. Or she could try to do so using other types of evidence that might be available, such as sexist statements by the decisionmaker. Or she could use multiple forms of proof.

Put differently, and more conceptually, McDonnell Douglas should no longer be understood as denoting a particular causal standard (such as “motivating factor” or “but for” causation). Rather, it should be understood as nothing more than a method of proof, one method by which plaintiffs could choose to prove causation.

The proper role for McDonnell Douglas becomes apparent once we understand the roles it can—and cannot—play. Given that disparate treatment law is based on causation, there are only three possible roles that a framework such as McDonnell Douglas can play. First, the framework can specify the standard (or standards) of causation that must be proven, such as “motivating factor” or “but for.” Second, the framework can allocate the burden for proving a particular causal standard. Third, the framework can provide a method of proving a particular causal standard.\textsuperscript{114}

\textsuperscript{114} See supra note 56.
We have seen that *McDonnell Douglas* provides a method of proof. The problem has been that the framework has also tended to be seen as something more than a method of proof: it has also tended to be seen as denoting a substantive standard ("but for") or an allocation of the burden of proving "but for" causation (to the plaintiff). In light of the conclusion that *McDonnell Douglas* does not prove—and thus cannot denote—"but for" causation, these latter roles make no sense. Thus, *McDonnell Douglas* should stop being understood as a substantive causal standard or an allocation of the burden of proof. It should be understood as a method of proof, and nothing more.

In comparison, the alternative frameworks (*Price Waterhouse* and the 1991 Act) specify particular causal standards and allocate the burden for proving those standards: the plaintiff must prove "motivating factor" causation, after which the defendant can try to prove a lack of

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115 Many courts and commentators have recognized that *McDonnell Douglas* is a method of proof. See, e.g., EEOC v. PVNF, L.L.C., 487 F.3d 790, 800–02 (10th Cir. 2007); Brewer v. Bd. of Trs. of Univ. of Ill., 479 F.3d 908, 915 (7th Cir. 2007); Kaminshine, *supra* note 14, at 32; Sullivan, *supra* note 21, at 931. The problem is that these courts and commentators have generally seen it as a method of proving "but for" causation. See *supra* note 58 and accompanying text. From there, it has been too easy to see it as requiring "but for" causation.

116 See *supra* note 58 and accompanying text.

117 See *supra* Part I.C.3.

118 It is possible, I suppose, to use *McDonnell Douglas* to designate a "motivating factor" standard of causation or an allocation of the burden of proof to the plaintiff to prove "motivating factor" causation. However, even this use of *McDonnell Douglas* would not make much sense. Using a method of proof to denote the standard that it proves is unduly narrow. While *McDonnell Douglas* certainly proves "motivating factor" causation, there are several other ways to prove the same standard. See *infra* Part III.E. So if we want to say that plaintiffs must prove "motivating factor" causation, it is unduly restrictive to say that they must use *McDonnell Douglas*. Moreover, using *McDonnell Douglas* as a way to require plaintiffs to prove "motivating factor" causation would fail to distinguish it from *Price Waterhouse* or the 1991 Act.

It is also possible—even likely—that courts and commentators have intended *McDonnell Douglas* to denote a requirement that plaintiffs prove "but for" causation. See, e.g., *Price Waterhouse* v. Hopkins, 490 U.S. 228, 278–79 (1989) (O'Connor, J., concurring), *superseded by statute*, Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071; see also *infra* Part II.B.2.c (discussing Justice O'Connor's likely intent in *Price Waterhouse*). The analysis above shows that it does not make sense to use *McDonnell Douglas* in this way. This is not to say that the law might not still require certain plaintiffs to prove "but for" causation. It is merely to say that the law cannot do so by requiring those plaintiffs to use *McDonnell Douglas*. (Below, I will argue that the law should not and does not require any plaintiffs to prove "but for" causation. See *infra* Part II.C.1, particularly text accompanying notes 182–91.)
but for” causation. Notably, neither of the alternative frameworks specifies how those causal standards must be proven.

Once we understand that (1) McDonnell Douglas proves causation but does not specify a causal standard or burden of proof, and (2) the alternative frameworks (Price Waterhouse and the 1991 Act) specify causal standards and burdens of proof, but do not specify a method of proof, it becomes easy to see how these frameworks fit together—and thus the proper role for a nonmandatory McDonnell Douglas: the alternative frameworks specify that plaintiffs must prove “motivating factor” causation. McDonnell Douglas provides one way in which plaintiffs may choose to do so.

There is one additional potential use for McDonnell Douglas. Once the plaintiff proves “motivating factor” causation, the alternative frameworks (Price Waterhouse and the 1991 Act) permit the defendant to try to show that it would have made the “same decision” or taken the “same action” anyway—that is, to try to prove a lack of “but for”

119 See Katz, supra note 30, at 501–11 (explaining these frameworks in causal terms). The difference between the two alternative frameworks is in the effect of satisfying these burdens. Under Price Waterhouse, liability attaches only at the “but for” level. Id. at 528. Under the 1991 Act, liability attaches at the “motivating factor” level, while full damages attach only at the “but for” level. Id. at 530.

120 Arguably, Price Waterhouse does specify how causation must be proven—at least for some plaintiffs. Justice O’Connor’s concurrence states that plaintiffs who do not have “direct evidence” must use McDonnell Douglas. See Price Waterhouse, 490 U.S. at 278–79 (O’Connor, J., concurring). However, this statement should be understood as being about burdens of proof, not methods of proof. Justice O’Connor almost certainly wanted to ensure that plaintiffs without “direct evidence” would bear the full burden of proving “but for” causation. See id. (focusing on issue of when a plaintiff can transfer the burden of proof). She believed that McDonnell Douglas did this. But, as we have seen above, McDonnell Douglas does not prove “but for” causation. See supra Part I.C.3. It seems highly unlikely that Justice O’Connor wanted to make plaintiffs use a method of proof which only proved “motivating factor” causation. A better understanding is that she wanted to make plaintiffs prove “but for” and did not care what method of proof they used to do so. See also infra Part II.B.2.c (discussing Justice O’Connor’s likely intent in Price Waterhouse).

121 See Curley v. St. John’s Univ., 19 F. Supp. 2d 181, 188 (S.D.N.Y. 1998) (suggesting that a plaintiff might use the “pretext” analysis to show that discrimination was a “motivating factor”); Davis, supra note 15, at 752 (“Discrediting defendant’s articulated legitimate reason is indirect proof that discriminatory intent motivated the defendant. Proof of pretext is, therefore, relevant to and may satisfy the ‘motivating factor’ test of the 1991 Act.”); see also Fogg v. Gonzales, 492 F.3d 447, 451 n.* (D.C. Cir. 2007) (“A plaintiff may also, of course, use evidence of pretext and the McDonnell Douglas framework to prove a mixed-motive [i.e., “motivating factor”] case.”). But see Davis, supra note 15, at 752 (suggesting—erroneously—that pretext does not necessarily show motivating factor causation).
causation. While it has long been thought that using *McDonnell Douglas* precludes such a “same decision”/“same action” defense, it does not. This is because, as we saw above, the basic version of *McDonnell Douglas* proves only “motivating factor” causation, which does not preclude the possibility that there is less than “but for” causation; the possibility remains that the defendant would have made the “same decision” or taken the “same action” absent consideration of the protected factor (such as race or sex).

This possibility suggests a role for the strong version of *McDonnell Douglas*. It is important to remember that (1) the alternative frameworks place the burden of proof on the defendant on the issue of “but for” causation, and (2) a plaintiff can never be forced to use the strong version of *McDonnell Douglas*. However, nothing prevents a plaintiff from voluntarily using the strong version of *McDonnell Douglas* in an attempt to prove “but for” causation. That is, the plaintiff could endeavor to prove that all of the reasons offered by the defendant are pretextual. If the plaintiff succeeds in doing so, she will have proven “but for” causation. This proof would preclude the possibility of a “same decision”/“same action” defense.

In summary, the proper role for *McDonnell Douglas* is that of a nonmandatory method of proof. Plaintiffs can choose to use—or not use—the basic version of *McDonnell Douglas* as a way to meet their burden of proving “motivating factor” causation under *Price*

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123 For example, Dean Kaminshine states that the “same action” defense is not appropriate when a plaintiff uses *McDonnell Douglas* because he believes that *McDonnell Douglas* proves “but for” causation, which would make it impossible for a defendant to prove “same action” (a lack of “but for” causation). See Kaminshine, *supra* note 14, at 29; see also Fogg, 492 F.3d at 454 (concluding that the “same action” defense is inapplicable to *McDonnell Douglas*); Rutherf. *supra* note 3, at 45–47 (suggesting that a plaintiff who proves pretext need not worry about a “same action” defense). This is true if the plaintiff uses the strong version of *McDonnell Douglas* (which proves “sole factor” causation, and thus “but for” causation). See *supra* Part I.C.4. However, it is not true if the plaintiff uses the basic version of *McDonnell Douglas*, which proves only “motivating factor” causation. See *supra* Part I.C.3. Dean Kaminshine’s analysis is correct as to the strong version, which is the one on which he focuses.

124 See *supra* Part I.C.3.

125 See *supra* Part I.C.4.

126 By successfully using the strong version of *McDonnell Douglas*, the plaintiff would establish “sole causation,” which by definition includes “but for” causation (since “sole factor” means a factor is both sufficient and necessary—a “but for” cause). See *supra* Part I.C.4.
Waterhouse or the 1991 Act.\textsuperscript{127} And they can choose to use—or not use—the strong version of McDonnell Douglas as a way to preclude a “same decision”/“same action” defense under those two alternative frameworks.\textsuperscript{128}

Note that this view is extremely different from the prevailing view of McDonnell Douglas. Almost all current writers treat McDonnell Douglas and the alternative frameworks (Price Waterhouse and the 1991 Act) as competing, mutually exclusive frameworks. That is, almost everyone assumes that a court must apply either McDonnell Douglas or one of the alternative frameworks.\textsuperscript{129} But this makes no sense. McDonnell Douglas and the alternative frameworks are apples and oranges. They do not do the same thing. The alternative frameworks specify causal standards (“motivating factor,” “but for”), while McDonnell Douglas does not. McDonnell Douglas provides a method of proving causation, while the alternative frameworks do not. Thus, McDonnell Douglas complements, rather than competes with, the alternative frameworks.

\textsuperscript{127} At least one court has understood this point. See Fogg v. Gonzales, 492 F.3d 447, 451 & n.* (D.C. Cir. 2007) (noting that a plaintiff can use McDonnell Douglas as one way of proving that discrimination “played a ‘motivating part’” in the defendant-employer’s decision (citing Price Waterhouse, 490 U.S. at 250)); see also Herawi v. Ala. Dep’t of Forensic Scis., 311 F. Supp. 2d 1335, 1345–46 (M.D. Ala. 2004) (recognizing that McDonnell Douglas provides “one methodology for establishing liability through circumstantial evidence” in either “single- or mixed-motive cases”).

\textsuperscript{128} In the text, I have discussed only two causal standards and allocations of burden: Price Waterhouse and the 1991 Act. These each require the plaintiff to prove only “motivating factor” causation, placing the burden of proving “but for” causation (or lack of it) on the defendant. See supra notes 51–55. It is possible that the law contains a third causal standard and allocation of burden; one in which the plaintiff bears the full burden of proving “but for” causation. I will argue below that current law should not—and does not—include this third causal standard and allocation of burden. See infra Part II.C.1, particularly text accompanying notes 182–191. However, in the event that the law did require some plaintiffs to bear the burden of proving “but for” causation, this subpart shows that they could elect to do so by using the strong version of McDonnell Douglas.

\textsuperscript{129} See, e.g., Tysinger v. Police Dep’t, 463 F.3d 569, 577–78 (6th Cir. 2006) (discussing the different approaches courts have taken in deciding which framework to apply after Desert Palace); Sallis v. Univ. of Minn., 408 F.3d 470, 474–75 (8th Cir. 2005) (deliberating about which framework to apply and deciding to apply McDonnell Douglas rather than Price Waterhouse or Desert Palace); Price Waterhouse v. Hopkins, 490 U.S. 228, 278–79 (1989) (O’Connor, J., concurring), superseded by statute, Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071 (indicating that “the court should determine whether the McDonnell Douglas or Price Waterhouse framework properly applies . . . .”); supra note 21 (listing scholars who believe that McDonnell Douglas is “dead” because of the availability of alternative frameworks after Desert Palace).
B. Implementing a Nonmandatory McDonnell Douglas (Without Help from Congress or the Supreme Court)

We have now seen that McDonnell Douglas should never be mandatory. And we have seen what disparate treatment law should look like with a nonmandatory McDonnell Douglas. The question remains: how can we implement this vision? As we saw above, virtually all courts currently mandate McDonnell Douglas in certain cases.\footnote{See supra Part I.A.} So how can we change this? How can we bring about a nonmandatory McDonnell Douglas?

Of course, Congress could legislate a proper understanding of McDonnell Douglas, passing new legislation to clarify that McDonnell Douglas is merely a method of proof and should never be mandatory. Or the Supreme Court could grant certiorari in a new disparate treatment case and so hold.\footnote{As noted above, McDonnell Douglas is a creature of the courts, not Congress. See supra note 49. Thus, there is no need for congressional action; the Court could adopt the proper understanding of McDonnell Douglas.} But, as desirable as such a clarifying action by Congress or the Court might be, neither congressional nor Supreme Court action is required to implement a nonmandatory McDonnell Douglas. This is because a nonmandatory McDonnell Douglas is actually consistent with current Supreme Court precedent. Contrary to popular belief, the Supreme Court has not mandated the use of McDonnell Douglas—at least not in any way that remains binding today.

To understand this, it is important to keep in mind that there is one and only one place where the Supreme Court has said that certain plaintiffs must use McDonnell Douglas. Justice O’Connor’s concurrence in Price Waterhouse (which, as noted above, tends to be seen as controlling).\footnote{See supra note 32.} In that opinion, Justice O’Connor said that plaintiffs who do not have “direct evidence” must use McDonnell Douglas.\footnote{See Price Waterhouse, 490 U.S. at 278–79 (1989).} But as the next two sections will argue, Justice O’Connor’s concurrence should no longer be seen as mandating McDonnell Douglas for plaintiffs without “direct evidence.” As such, it should not be seen as an impediment to a nonmandatory McDonnell Douglas.

1. Implementing a Nonmandatory McDonnell Douglas in 1991 Act Cases: Desert Palace Makes It Easy

A nonmandatory McDonnell Douglas is easiest to implement in the context of the 1991 Act. This is because, in that context, the Supreme
Court has made clear that Justice O’Connor’s *Price Waterhouse* concurrence is no longer good law: in *Desert Palace*, the Court held unequivocally that even plaintiffs without “direct evidence” can use the 1991 Act framework; they are not forced to use *McDonnell Douglas*.\(^{134}\) Thus, in the 1991 Act context, there is no impediment to a nonmandatory *McDonnell Douglas*.

That being said, some courts have managed to find new and creative ways (a euphemism) to require certain plaintiffs to use *McDonnell Douglas* in 1991 Act cases—even without Justice O’Connor’s “direct evidence” rule. One group of courts requires plaintiffs to present a “mixed motive” case (whatever that might be) to avoid *McDonnell Douglas* and instead use the 1991 Act framework.\(^{135}\) Another group of courts requires all plaintiffs to use a “modified” version of *McDonnell Douglas*.\(^{136}\) These two creative approaches, both of which mandate the use of *McDonnell Douglas* in 1991 Act cases, threaten the implementation of *McDonnell Douglas’* proper role.\(^{137}\)

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\(^{135}\) *See supra* note 47 and accompanying text; *see also* Scott & Chapman, *supra* note 21, at 405 (arguing that 1991 Act framework should only apply in “mixed motive” cases). The issue of how to define a “mixed motive” case is significant. *See infra* note 142 (noting that there is no good definition for a “mixed motive” case for purposes of mandating the use of *McDonnell Douglas*).

\(^{136}\) *See supra* note 48 and accompanying text. This modified version mimics the standard version of *McDonnell Douglas* at the first two stages (the plaintiff’s prima facie case and the defendant’s proffered reason). But at the third stage, the modified version offers the plaintiff a choice: the plaintiff can prove either (1) that the proffered reason was pretextual (the “pretext alternative,” just like the standard version of *McDonnell Douglas*), or (2) “that the defendant's reason, while true, is only one of the reasons for its conduct, and another 'motivating factor' is the plaintiff’s protected characteristic” (the “mixed motive alternative”). *See* Rachid v. Jack in the Box, Inc., 376 F.3d 305, 312 (5th Cir. 2004) (citing Rishel v. Nationwide Mut. Ins. Co., 297 F. Supp. 2d 854, 865 (M.D.N.C. 2003)). If the plaintiff chooses the mixed motive alternative, the defendant can try to prove a “same action” defense to limit damages. *See id.*

\(^{137}\) Proponents of the “modified” *McDonnell Douglas* approach might argue that it is harmless, since at the third stage it lets plaintiffs choose between the traditional *McDonnell Douglas* pretext method and the 1991 Act framework. However, there are two flaws with this choice. First, it does not give litigants any choice about the first two stages. Under the “modified” framework, all plaintiffs must prove a prima facie case and all defendants must proffer a nondiscriminatory reason. While neither of these steps is onerous, *see supra* note 63 and accompanying text, they may well present unnecessary hurdles. *See* Davis, *supra* note 15, at 751 n.262 (citing cases where plaintiffs with pretext evidence have had their cases dismissed for failure to present a prima facie case); Ann C. McGinley, *Credulous Courts and the Tortured Trilogy: The Improper Use of Summary Judgment in Title VII and ADEA Cases*, 34 B.C. L. Rev. 203,
Fortunately, these two creative approaches can probably be rejected with relative ease. No federal statute or Supreme Court case requires—or supports—either of these two approaches,138 and among the federal courts of appeals, only one circuit (the Fifth) has adopted either of these approaches.139 So, at the very least, courts outside the Fifth Circuit are free to reject these two approaches. Furthermore, the fact that the Fifth Circuit has adopted both of these mutually exclusive approaches would seem to undercut the authority for either one of those approaches even within that circuit.140 (The Fifth Circuit can—and should—reconsider and reject both of these approaches en banc.)

And these two creative approaches should be rejected. As demonstrated above, it makes no sense to require any plaintiff to use *McDonnell Douglas*.141 Ever. The fact that the “direct evidence” requirement is gone in the 1991 Act cases means that one method for getting it wrong—one method for mandating the use of *McDonnell Douglas*—is no longer available. Replacing that one method for getting it wrong with a new method for getting it wrong (“mixed motives” or a mandatory “modified” *McDonnell Douglas*) is just plain foolish.142

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228–37 (1993) (giving examples of plaintiff’s burden); see also Malamud, *supra* note 6, at 2282–301 (noting that some courts require an excessive showing to make a prima facie case). Second, and perhaps more problematic, at the third stage of the “modified” *McDonnell Douglas*, it is a serious overstatement to say that plaintiffs have a choice; that they are truly free to decline to use the traditional *McDonnell Douglas* method. This is because plaintiffs can only exercise this option by paying a significant price: a plaintiff who elects this option must prove “that the defendant’s reason, while true, is only one of the reasons for its conduct.” See, e.g., Rachid, 376 F.3d at 312. That is, to opt out of the traditional *McDonnell Douglas* approach, the plaintiff must admit that the defendant’s proffered reason is true—a significant admission. See Kaminshine, *supra* note 14, at 20 n.99 (noting that plaintiffs would generally not want to admit that the defendant had a nondiscriminatory motive). So the plaintiff’s “choice” at the third stage of the “modified” *McDonnell Douglas* framework is somewhat illusory, at least as the “modified” *McDonnell Douglas* is currently constructed.

138 In a cryptic footnote, Desert Palace reserved the issue of whether a “direct evidence” requirement might apply in “single motive” cases. See Desert Palace, 539 U.S. at 94 n.1. However, that case certainly did not mandate the use of *McDonnell Douglas* in all “single motive” cases. Moreover, as demonstrated above, it does not make sense to require the use of *McDonnell Douglas* in any case—even a “single motive” case without “direct evidence” (whatever that might be). See *supra*, Part I.

139 See *supra* notes 47–48 and accompanying text.

140 See *supra* notes 47–48 (noting that the Fifth Circuit, in separate opinions, adopts both approaches).

141 See *supra* Part I.

142 Moreover, each of these two approaches suffers from its own specific flaws. The “modified” *McDonnell Douglas* approach presents plaintiffs with a false dichotomy: at the third stage, the “modified” *McDonnell Douglas* requires plaintiffs to choose
between a method of proof (pretext) and a standard of proof (the 1991 Act standard). See infra Part II.C.3, especially text accompanying notes 203 and 207 (discussing the false dichotomy posed by choice between McDonnell Douglas and alternative frameworks).

The “mixed motive” approach (requiring plaintiffs without “mixed motive” cases to use McDonnell Douglas) also suffers from a serious flaw specific to that approach: there is no good definition of what constitutes a “mixed motive” case. See Fukete v. Aetna, Inc., 308 F.3d 335, 337–38 n.2 (3d Cir. 2002) (explaining confusion surrounding “mixed motive”/“single motive” distinction); Miller v. CIGNA Corp., 47 F.3d 586, 597 n.9 (3d Cir. 1995) (same). Prior to Desert Palace, most courts and commentators used the phrase to denote cases in which plaintiffs were required to use McDonnell Douglas—that is, cases in which the plaintiff did not have “direct evidence.” See, e.g., Haddon v. Executive Residence at the White House, 313 F.3d 1352, 1357 (Fed. Cir. 2002). However, after Desert Palace, this conclusory definition is not available. Most of the post-Desert Palace courts that have adopted the “mixed motive” approach have defined the phrase by reference to an admission by the plaintiff: a “mixed motive” case is one in which the plaintiff admits that the defendant has legitimate, as well as illegitimate, motives. See, e.g., Winter v. Bank of Am., N.A., No. Civ.A.3:02-CV-1591-L, 2003 WL 23200278, at *3 (N.D. Tex. Dec. 12, 2003); see also Scott & Chapman, supra note 21, at 405 (providing alternative definition, in which one alternative requires the plaintiff to “prove” that the defendant had two motives, one of which was legitimate). However, this is a silly definition. As noted above, no plaintiff in his or her right mind would want to concede this point. See supra note 137. Moreover—and more importantly—there is no reason to think that Congress intended to limit the 1991 Act framework to plaintiffs who were willing to make such a damaging concession. Other writers have tried to define “mixed motive” cases by reference to an admission by the defendant: a “mixed motive” cases is one in which the defendant concedes that it had an illegal motive, as well as a legal one. See Scott & Chapman, supra note 21, at 405 (providing alternative definition, in which one alternative involves a concession by the defendant that it had an illegal motive). However, this definition is also silly. Again, few defendants would seem likely to want to make such a concession. And again, there is no reason to think that Congress intended to limit the 1991 Act framework to cases involving defendants who were foolish, particularly honest, or had been caught red-handed and so had no alternative but to admit that they had an illegal motive. Assuming that one needed a definition of “mixed motive” for some purpose—which is far from clear—the best definition is probably this: a case in which the factfinder might reasonably conclude that more than one factor influenced the defendant’s decision. Presumably, the plaintiff would provide evidence of illegal factors and the defendant would provide evidence of legal factors. While this definition is workable, it could not serve as a way to mandate the use of McDonnell Douglas. As noted above, McDonnell Douglas presents only one of many ways that the plaintiff might try to show that an illegal factor influenced the defendant’s decision. See supra Part II.A.

The corollary of the workable definition of “mixed motive” is that a “single motive” case would be one in which a reasonable factfinder could conclude that only one factor, either legitimate or illegitimate, influenced the defendant’s decision. Some McDonnell Douglas cases—those in which the defendant offers only one legitimate reason for its decision, which the factfinder must either believe or disbelieve—may result in such a record. But the fact that some McDonnell Douglas cases may present “single motive” cases is hardly a reason to require McDonnell Douglas in all “single
2. Implementing a Nonmandatory *McDonnell Douglas* Outside the 1991 Act: Dealing with the “Direct Evidence” Distinction

In cases outside of the 1991 Act, Justice O’Connor’s *Price Waterhouse* concurrence presents a greater impediment to a nonmandatory *McDonnell Douglas*. This is because *Desert Palace*’s rejection of that concurrence was arguably limited to 1991 Act cases. The *Desert Palace* opinion was based almost entirely on the text and legislative history of the 1991 Act.\(^\text{143}\) So it is difficult to argue that *Desert Palace* wiped out Justice O’Connor’s *Price Waterhouse* concurrence in non-1991 Act cases. For this reason, most courts in non-1991 Act cases apply Justice O’Connor’s concurrence—and mandate *McDonnell Douglas* for plaintiffs without “direct evidence.”\(^\text{144}\) However, *Desert Palace* is not necessary for a nonmandatory *McDonnell Douglas*. We can make three arguments that lower courts should treat *McDonnell Douglas* as nonmandatory in non-1991 Act cases, none of which depend on *Desert Palace*.

a. Congressional Intent

The first argument for allowing lower courts in non-1991 Act cases to treat *McDonnell Douglas* as nonmandatory involves congressional intent. The argument is that Congress never intended to require plaintiffs without “direct evidence” in non-1991 Act cases to use *McDonnell Douglas*.

There is good evidence for this. In looking at the text and legislative history of disparate treatment statutes outside of the 1991 Act, such as the Age Discrimination in Employment Act (ADEA) of 1967\(^\text{145}\) and the Americans with Disabilities Act (ADA) of 1990,\(^\text{146}\) there is no mention of “direct evidence.” Nor is there any indication in these statutes or their legislative history that certain plaintiffs should be required to use *McDonnell Douglas*. Thus, there is no legislative requirement in those statutes that plaintiffs without “direct evidence” must use *McDonnell Douglas*.

This analysis is almost identical to that used by the *Desert Palace* Court in the context of the 1991 Act. Based on a similar analysis of the text and legislative history of the 1991 Act, *Desert Palace* held that the 1991 Act contains no “direct evidence” requirement.\(^\text{147}\) The argu-
ment here simply draws the same conclusion from the similar text and legislative histories of disparate treatment statutes other than the 1991 Act. Notably, some lower courts have already used this analysis to eradicate the “direct evidence” rule (and stop mandating McDonnell Douglas) in non-1991 Act cases.148

Of course, the absence of a legislatively imposed “direct evidence” rule does not end the inquiry. If the Supreme Court has imposed a “direct evidence” requirement, then lower courts would be bound by that. However, it is far from clear that the Court has imposed a “direct evidence” rule in non-1991 Act cases.

The only place where the Court has actually imposed a “direct evidence” requirement is in the subset of cases that have been overruled by the 1991 Act. The “direct evidence” requirement comes from Price Waterhouse, which interpreted section 703(a) of Title VII of the Civil Rights Act of 1964.149 But this interpretation of section 703(a) was expressly overruled by the 1991 Act. According to the Court, the 1991 Act made clear that there is no “direct evidence” requirement in cases under section 703(a).150 In other words, the only statute under which the Supreme Court actually required “direct evidence”—section 703(a)—has been amended by the 1991 Act. In

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149 See Price Waterhouse, 490 U.S. at 261–62 (O’Connor, J., concurring). In one pre-Price Waterhouse case, the Court indicated that an ADEA plaintiff with “direct evidence” did not need to rely on McDonnell Douglas. See Trans World Airlines, Inc. v. Thurston, 469 U.S. 111, 121 (1985). But the Court did not hold that an ADEA plaintiff without “direct evidence” would have to use McDonnell Douglas. (And Justice O’Connor was the only Justice in Price Waterhouse—four years later—who was inclined to so hold. See supra notes 132–33 and accompanying text.)

cases under all statutes other than section 703(a)—that is, in non-1991 Act cases—the Court has never required "direct evidence."\textsuperscript{151}

After \textit{Price Waterhouse}, several other courts assumed that Justice O'Connor's interpretation of section 703(a) applied to other disparate treatment statutes—to non-1991 Act statutes.\textsuperscript{152} But the Supreme Court has never held this. Thus, lower courts remain free to interpret non-1991 Act statutes and to conclude that these statutes do not require plaintiffs without "direct evidence" to use \textit{McDonnell Douglas}.

There is a counterargument which might suggest that \textit{Price Waterhouse} (and its "direct evidence" test) does apply in non-1991 Act cases. Professor Prenkert has appropriately labeled this argument a "Bizarro statutory stare decisis" argument.\textsuperscript{155} The Bizarro argument starts with the (sound) premise that Congress generally intends its disparate treatment statutes to be interpreted uniformly.\textsuperscript{154} Thus, the argument goes, it made sense to apply \textit{Price Waterhouse}'s interpretation of section 703(a) to other disparate treatment statutes, such as the ADEA or ADA.\textsuperscript{155} But this part of the argument would also suggest

\begin{footnotesize}
\begin{enumerate}
\item\textsuperscript{151} Because the relevant portion of the 1991 Act amended section 703(a), we can think of all cases other than those under section 703(a) as non-1991 Act cases. \textit{See supra} note 43.
\item\textsuperscript{153} \textit{See} Jamie Darin Prenkert, \textit{Bizarro Statutory Stare Decisis,} 28 BERKELEY J. EMP. & LAB. L. 217 (2007). Professor Prenkert's article focuses on a different application of Bizarro statutory stare decisis: the Court's contention that a particular disparate impact case which, like \textit{Price Waterhouse}, was overruled by the 1991 Act, should somehow apply in non-1991 Act cases. But the basics of the argument are the same and clearly apply to \textit{Price Waterhouse}. \textit{See id.} at 256–63 (discussing the potential application of the Bizarro argument to \textit{Price Waterhouse}).
\item\textsuperscript{155} \textit{See id.} (explaining why the assumption of uniformity justified the expansion of \textit{Price Waterhouse} to cases outside of Section 703(a)).
\end{enumerate}
\end{footnotesize}
that, once Congress corrected *Price Waterhouse*’s interpretation of section 703(a), that corrected interpretation would apply to other disparate treatment statutes.\textsuperscript{156} The Bizarro argument avoids this conclusion by doing a situational about-face on the assumption of uniformity to suggest that, after rejecting *Price Waterhouse*, Congress somehow decided it wanted its disparate treatment statutes to be interpreted differently; that Congress wanted to overrule *Price Waterhouse* in section 703(a) but leave that case’s interpretation in place in all other disparate treatment statutes—that is, in non-1991 Act cases.\textsuperscript{157}

I argue in a forthcoming article that this Bizarro argument for the application of *Price Waterhouse* to non-1991 Act cases is deeply flawed and should be rejected; *Price Waterhouse* should not be seen as controlling law in non-1991 Act cases.\textsuperscript{158} But if one buys the Bizarro argument, then *Price Waterhouse* would apply to non-1991 Act cases. In that case, the project of abolishing a mandatory *McDonnell Douglas* would need to be done within the context of *Price Waterhouse*. The following two arguments attempt to do so.

b. Not the Controlling Opinion

A second argument for allowing lower courts in non-1991 Act cases to treat *McDonnell Douglas* as nonmandatory assumes that *Price Waterhouse* applies to non-1991 Act cases (as a result of the Bizarro argument), but calls into question whether Justice O’Connor’s concurrence remains the controlling opinion. To date, Justice O’Connor’s concurrence has been considered controlling because it has been thought to be the narrowest grounds for the Court’s decision.\textsuperscript{159} While the four Justice plurality and Justice White would have permitted plaintiffs to use the *Price Waterhouse* framework irrespective

\textsuperscript{156} See id. (explaining why the assumption of uniformity now suggests that Congress’ corrected interpretation in the 1991 Act, and not *Price Waterhouse*, should apply in non-1991 Act cases).

\textsuperscript{157} See id. (manuscript at 18) (explaining “limited amendment” argument—or, what Professor Prenkert calls the Bizarro argument). The courts seem split over whether to accept the Bizarro argument. Compare id. (manuscript at 17 n.61) (citing cases that apply *Price Waterhouse* to non-1991 Act claims), with id. (manuscript at 19 n.66) (citing cases that do not apply *Price Waterhouse* to non-1991 Act claims).

\textsuperscript{158} See id.

\textsuperscript{159} See supra note 32; see also Marks v. United States, 430 U.S. 188, 193 (1977) (“When a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, the holding of the Court may be viewed as that position taken by those members who concurred in the judgments on the narrowest grounds . . . .”) (quoting Gregg v. Georgia, 428 U.S. 153, 169 n.15 (1976))).
of whether they had "direct evidence." Justice O'Connor restricted this framework to those who had "direct evidence." As such, her opinion was seen as the most restrictive of the concurring opinions, and thus controlling.

However, based on our new understanding of *McDonnell Douglas*, Justice O'Connor's concurrence appears to be less restrictive than that of the plurality or Justice White—at least if we read her concurrence literally. If we read Justice O'Connor's instructions literally, plaintiffs without "direct evidence" would be required to use *McDonnell Douglas*, which would effectively permit them to prevail by proving only "motivating factor" causation (as opposed to the *Price Waterhouse* framework, which would permit them to prevail only if there was "but for" causation). This would make Justice O'Connor's concurrence broader—not narrower—than the opinions of the plurality and Justice White and would render one of those two other opinions controlling. And neither of those opinions requires plaintiffs without "direct evidence" to use *McDonnell Douglas*.

Both the plurality and Justice White in *Price Waterhouse* would permit all plaintiffs to proceed by proving "motivating factor" causation, thereby shifting the burden to the defendant to prove a lack of "but for" causation (for liability and damages). Thus, if one of these

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161 *See id.* at 276 (O'Connor, J., concurring).

162 *See supra* Part I.C.3.

163 *Price Waterhouse*, 490 U.S. at 257 (plurality opinion); *id.* at 258–60 (White, J., concurring).

164 *Id.* at 249–50 (plurality opinion); *id.* at 259 (White, J., concurring). While Justice White's concurrence is a little cryptic on this matter, he states at the outset of his concurrence that the correct approach is found in *Mt. Healthy City School District Board of Education v. Doyle*, 429 U.S. 274 (1977). *See Price Waterhouse*, 490 U.S. at 258–59 (White, J., concurring). The *Mt. Healthy* approach is essentially identical to that of the plurality: if a plaintiff proves "motivating factor" causation, the burden shifts to the defendant to prove a lack of "but for" causation (and, if the defendant succeeds in this, there is no liability). *Mt. Healthy*, 429 U.S. at 287. The only point on which he seems to disagree with the plurality is that he believed the plurality wanted defendants to provide "objective" evidence of their reasons—which does not seem to have been an issue in any post-*Price Waterhouse* cases (or in *Price Waterhouse*). *See Price Waterhouse*, 490 U.S. at 261. *But see* Garcia v. City of Houston, 291 F.3d 672, 677 (5th Cir. 2000) (discussing, but not requiring, an objective evidence requirement and finding defendant produced sufficient objective evidence); Foster v. Univ. of Ark., 938 F.2d 111, 114 (8th Cir. 1991) (noting the objective evidence requirement set forth by the plurality in *Price Waterhouse*, but not deciding on that basis); Ford v. St. Elizabeth Hosp., No. 92-CV-511, 1993 WL 330036, at *5 (N.D.N.Y. Aug. 20, 1993) (considering objective evidence but not specifically basing the court's decision on it).
opinions were seen as controlling, there would be no "direct evidence" requirement—and, more importantly, nothing that compelled courts to mandate *McDonnell Douglas*.

The problem with this second argument is that it seems a little strained. It requires us to read Justice O'Connor's concurrence too literally, and thus lacks persuasive force. Quite simply, it is difficult to accept an argument that requires us to suppose that Justice O'Connor (inadvertently) lowered the causal standard for plaintiffs without "direct evidence." However, a rejection of this literalist argument, with its focus on what Justice O'Connor said, sets the stage for a more functionalist argument based on what Justice O'Connor probably meant: the changed-circumstances argument.

c. Changed Circumstances

The final argument for a nonmandatory *McDonnell Douglas* in non-1991 Act cases is based on changed circumstances. This argument can be made even if we concede that (1) *Price Waterhouse* applies to non-1991 Act cases (as a result of the Bizarro argument), and (2) Justice O'Connor's concurrence is the controlling opinion in that case. The argument is that, because of changed circumstances, the rule in that concurrence should be understood differently. Most courts and commentators currently understand the rule in that concurrence as: plaintiffs without "direct evidence" must use *McDonnell Douglas*.

The "changed circumstances" argument suggests that the rule in Justice O'Connor's concurrence should be understood as: plaintiffs without "direct evidence" need to bear the full burden of proving "but for" causation (but need not use *McDonnell Douglas*).

The whole point of Justice O'Connor's "direct evidence" distinction was to limit the burden-shifting benefit of *Price Waterhouse* to the plaintiffs whom she saw as being most "deserving" (those with "direct evidence"); plaintiffs she saw as less "deserving" (those without "direct evidence") would be denied access to this burden-shifting device by being forced to use *McDonnell Douglas*. But in light of the analysis in Part I, we now know that forcing these less "deserving" plaintiffs to use *McDonnell Douglas* does not disadvantage them; it actually gives them an advantage. As we saw above, *McDonnell Douglas* proves only

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166 See *Price Waterhouse*, 490 U.S. at 278–79 (O'Connor, J., concurring). I have put "deserving" in quotes to make clear that I do not necessarily subscribe to this view of plaintiffs' merits. But for purposes of this argument, I will accept Justice O'Connor's view on the matter.
“motivating factor” causation.\textsuperscript{167} So, if we force plaintiffs without “direct evidence” to use McDonnell Douglas, we would effectively let them win by proving only “motivating factor” causation;\textsuperscript{168} while those without “direct evidence,” who are allowed to use the Price Waterhouse framework, will lose if there is anything less than “but for” causation.\textsuperscript{169}

In other words, in light of our new understanding of McDonnell Douglas, perhaps the lower courts should read Justice O’Connor’s Price Waterhouse concurrence less literally and more functionally. That is, perhaps the lower courts should do what Justice O’Connor wanted to do, rather than what she said. It is almost certain that she wanted to impose a more stringent standard on plaintiffs without “direct evidence” (whom she saw as less “deserving”). The only more stringent standard than the Price Waterhouse framework (which requires “but for” causation for liability, but permits plaintiffs to shift the burden for proving this)\textsuperscript{170} would be a “but for” standard for liability with no opportunity for burden-shifting; that is, a standard under which the plaintiff must bear the full burden of proving “but for” causation. Justice O’Connor most likely thought that making certain plaintiffs use McDonnell Douglas would accomplish this. We now know that she was wrong. Thus, lower courts could do what Justice O’Connor wanted (make plaintiffs without “direct evidence” prove “but for” causation), without requiring the use of McDonnell Douglas.

Note that this “changed circumstances” argument would not eradicate the “direct evidence” requirement. It would simply suggest a different role for that requirement—a role that does not mandate the use of McDonnell Douglas. Courts would force those plaintiffs without “direct evidence” to bear the full burden of proving “but for” causation, while those with “direct evidence” could shift the burden to defendants on this issue by proving “motivating factor” causation.

\textsuperscript{167} See supra Part I.C.3.
\textsuperscript{168} Remember, even if she wanted to, Justice O’Connor could not have required plaintiffs without “direct evidence” to use the strong version of McDonnell Douglas—that is, to prove “sole factor” causation. See supra Part I.C.4. Moreover, it is fairly clear that Justice O’Connor did not intend to require “sole factor” causation. See Price Waterhouse, 490 U.S. at 265–66 (O’Connor, J., concurring) (focusing on “substantial factor” rather than “sole factor” causation).
\textsuperscript{169} Recall that, under Price Waterhouse, if there is less than “but for” causation (that is, if the defendant proves that it would have made the “same decision” absent the protected characteristic), the plaintiff loses. See supra note 119.
\textsuperscript{170} See Price Waterhouse, 490 U.S. at 261–70 (O’Connor, J., concurring).
However, all plaintiffs would have a choice as to whether to use *McDonnell Douglas*.171

Because it would leave the “direct evidence” concept in place, this argument would not solve the confusion that has arisen from trying to define that phrase.172 Moreover, and perhaps even more problematic, this argument would require a class of plaintiffs (non-1991 Act plaintiffs without “direct evidence”) to bear the full burden of proving “but for” causation. As I will demonstrate below, such a requirement is both doctrinally and normatively problematic.173 But the argument would, at least, permit lower courts to treat *McDonnell Douglas* as nonmandatory.

C. Draining the Swamp

The vision set out above—of plaintiffs being able to choose *McDonnell Douglas* or other methods of proof as they see fit to prove the causal standards set out in the alternative frameworks—does more than permit implementation of a nonmandatory *McDonnell Douglas*. It also resolves three major debates that have plagued disparate treatment doctrine, greatly increasing the uncertainty and cost of litigation in this area.174

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171 This would raise the question of whether there is any other way of proving “but for” causation besides the strong version of *McDonnell Douglas*, short of an employer’s admission that it used a protected characteristic as a “but for” factor in the challenged decision. The answer is that there is probably not another way to prove “but for” causation. *See infra* Part II.C.1. But even if this were true, the plaintiff in such a case would be required to use the strong version of *McDonnell Douglas* not because any mandate by the Court, but rather because the law required the plaintiff to prove “but for” causation and the strong version of *McDonnell Douglas* happened to be the only way to prove this standard.

172 *See infra* note 178 and accompanying text.

173 *See infra* Part II.C.1 (discussing the doctrinal argument) and note 182 (discussing the normative arguments).

174 The text below discusses three debates that are resolved once we understand the proper role for *McDonnell Douglas* as a nonmandatory method of proof. In addition, the understanding of how *McDonnell Douglas* works that underlies its nonmandatory nature resolves three additional debates that have long plagued disparate treatment law. *See supra* notes 80 (resolving the “pretext-plus” debate and laying to rest a long-running academic debate over the correctness of the Court’s decision in *Hicks*) and 67 (resolving the debate over the availability of a “good faith” defense under *McDonnell Douglas*).
1. Ending the “Direct Evidence” Debate (The Death of “Direct Evidence”)  

The first doctrinal morass that has enveloped disparate treatment law is over the meaning of “direct evidence.” As discussed above, the concept of “direct evidence” has long been used as a gateway to those who wish to escape McDonnell Douglas.\(^{175}\) Those with “direct evidence” have been allowed to use alternative frameworks; those who do not have been forced to use McDonnell Douglas.\(^{176}\) And while Desert Palace eradicated this requirement in 1991 Act cases, the “direct evidence” requirement has so far appeared to be alive and well in cases outside of the 1991 Act.\(^{177}\) The doctrinal morass arises because it is far from clear what “direct evidence” means. The courts of appeals have split four ways on this issue.\(^{178}\)

We can now see that the way out of this morass is to jettison the “direct evidence” doctrine. Once McDonnell Douglas is no longer mandatory, there is no need for the “direct evidence” doctrine. After all, the primary function for the doctrine has been to decide which plaintiffs must use McDonnell Douglas.\(^{179}\) With no need to perform this function, the “direct evidence” doctrine would seem superfluous. And, as we saw above, courts are under no obligation to continue to apply this doctrine.\(^{180}\) So they should stop. Then there would no longer be any need to define “direct evidence.”

Arguably, even in a world of nonmandatory McDonnell Douglas, there remains one potential use for the “direct evidence” doctrine: it might be used to determine which plaintiffs will be forced to bear the full burden of proving “but for” causation (as opposed to being allowed to shift the burden upon a showing of “motivating factor” causation, as permitted by Price Waterhouse and the 1991 Act). As discussed above, it is possible—even likely—that this is what the “direct evidence” requirement was originally designed to do.\(^{181}\)

However, this possibility—and thus the potential viability of the “direct evidence” distinction—supposes that disparate treatment law requires at least some plaintiffs (for example, those without “direct

\(^{175}\) See supra Part I.A.

\(^{176}\) See supra notes 32–37 and accompanying text.

\(^{177}\) See supra note 44.


\(^{179}\) See supra Part I.A.

\(^{180}\) See supra Part II.B.1 (noting that Desert Palace eradicated “direct evidence” requirement in 1991 Act cases), II.B.2.b–c (arguing that courts are under no obligation to apply the “direct evidence” doctrine in non-1991 Act cases).

\(^{181}\) See supra Part II.B.2.a.
evidence”) to bear the full burden of proving “but for” causation. While a nonmandatory McDonnell Douglas does not preclude this possibility, the analysis underlying a nonmandatory McDonnell Douglas does. This analysis demonstrates why, as a doctrinal matter, plaintiffs can never be required to bear the full burden of proving “but for” causation—and thus, why the “direct evidence” doctrine could never serve this purpose.182

The problem with requiring plaintiffs to prove “but for” is that such a requirement would be tantamount to a “sole cause” requirement, which, as noted above, has been forbidden by Congress.183 This is because, as a practical matter, there is no way to prove “but for” causation without also proving “sole” causation.184 The only practical way to prove “but for” causation is to use the strong version of McDonnell Douglas. And, as we saw above, the strong version of McDonnell Douglas proves “sole” causation.185

Other methods of proving causation are simply incapable of proving “but for” causation. Suppose, for example, that a plaintiff has statistical proof suggesting that a defendant’s decisions correlate with race. This would suggest that race played a role in those decisions, but would not necessarily suggest that race played a “but for” role. Or suppose that the plaintiff has evidence that the defendant has made racist statements in the context of the challenged decision—or even an admission that he considered the plaintiff’s race in making the challenged decision. Such proof is generally considered to be one of the most powerful forms of evidence, meeting almost every possible

182 In addition to the doctrinal argument in the text, there are also four normative arguments about why a plaintiff should never be required to prove “but for” causation: First, as suggested in the text immediately below, proving “but for” causation is extremely difficult. See infra notes 183–85 and accompanying text. Second, it is much more difficult for the plaintiff to prove “but for” causation (which requires proof of a negative—that is, proof of the lack of any independently sufficient factor in the decision) than it is for the defendant to prove a lack of “but for” causation (which requires only proof of a positive—that is, a single independently sufficient factor in the decision). Third, most of the relevant evidence on the issue of causation is within the defendant’s control. In fact, most of it is in the defendant’s head. See Katz, supra note 30, at 515–17. And finally, once the plaintiff proves “motivating factor” causation, the defendant has been established as a wrongdoer and the party responsible for the need to sort out “but for” causation. See Rutherford, supra note 3, at 48. These facts provide a strong normative argument against placing the burden on plaintiffs to prove “but for”—and an argument for burden-shifting mechanisms, such as those in the 1991 Act or Price Waterhouse.
183 See supra notes 109–10 and accompanying text.
184 See supra Part I.C.4.
185 See supra Part I.C.4.
definition of "direct evidence." And such evidence would certainly suggest that race played a role in that decision. But it would not necessarily suggest that race played a "but for" role in that decision.

None of these methods of proof can show "but for" causation because, by definition, proving that a protected factor (such as race or sex) was a "but for" cause of a challenged decision requires that there was no second, independently sufficient factor in that decision. And none of the methods of proof above foreclose the possibility of a second, independently sufficient factor in the defendant's decision. The only way to foreclose this possibility is to prove that all reasons proffered by the defendant were pretextual—that is, to use the strong version of McDonnell Douglas. As we have seen above, such a requirement would amount to a "sole cause" requirement, running afoul of Congress' rejection of that standard. Thus, the law cannot require plaintiffs to prove "but for" causation.


187 Theoretically, the defendant might admit that he not only used a protected factor (such as race or sex) in the challenged decision, but also that he would not have reached the same decision absent this factor. This type of admission would, of course, prove "but for" causation. However, such admissions are sufficiently unlikely that it would seem quite safe to discount this possibility.

188 Recall that what prevents a protected factor (such as race or sex) from being a "but for" cause is the existence of a second nonprotected factor (such as excessive tardiness) that would be sufficient to bring about the challenged employment decision. See supra note 54 and accompanying text.

189 Note that there is no similar problem with asking defendants to prove a lack of "but for" causation. Such a requirement simply obliges a defendant to advance at least one independently sufficient factor.

190 See supra Part I.C.4.

191 One might resist this conclusion by arguing that the Supreme Court has required certain plaintiffs to bear the full burden of proving "but for" causation. However, the only opinion in which the Supreme Court has done so unequivocally is Price Waterhouse, 490 U.S. at 262–63 (concluding that plaintiffs without "direct evidence" must bear full burden of proving "but for" causation). As noted above, this opinion has been overruled, at least in the 1991 Act context. See supra Part I.A; see also Desert Palace, Inc., 539 U.S. at 101–02 (holding, in 1991 Act case, that "direct evidence of discrimination is not required in mixed-motive cases"). And, as discussed above, Price Waterhouse has no place in non-1991 Act cases. See supra Part II.B.2.a; see also Katz, supra note 154 (manuscript at 14–20) (arguing that Price Waterhouse, having been legislatively overruled in 1991 Act cases, should not be understood to apply to non-1991 Act cases). Some writers believe the Court imposed such a burden in Hazen Paper, where it said that a plaintiff can only succeed where the protected factor (age) "had a determinative influence on the outcome" (firing). Hazen Paper Co. v. Biggins, 507 U.S. 604, 610 (1993). "Determinative influence" almost certainly means "but for."
In summary, there is no need for the "direct evidence" doctrine. Once *McDonnell Douglas* is not mandatory, the "direct evidence" doctrine cannot serve to determine which plaintiffs must use *McDonnell Douglas*. And because current doctrine cannot require any plaintiff to prove "but for" causation, the "direct evidence" doctrine cannot serve to allocate that burden. Being superfluous, there is no need to define "direct evidence." Problem solved.\(^{192}\)

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\(^{192}\) There are two additional arguments against the "direct evidence" doctrine. First, Congress has not used this term in any disparate treatment statute. In *Desert Palace*, the Court held that the fact that this term appears nowhere in the 1991 Act or its legislative history suggests that Congress simply did not intend to require plaintiffs suing under that Act to provide "direct evidence." *Desert Palace*, 539 U.S. at 91. But the same can be said for virtually every other disparate treatment statute. None refer to "direct evidence." Thus, it would seem, Congress did not intend to require plaintiffs under those statutes to provide "direct evidence." Some courts have already adopted this view. See *supra* note 148 and accompanying text.

A second argument against the "direct evidence" doctrine is that there is no good definition for this term. We have seen that *McDonnell Douglas* provides one way to prove causation—one type of evidence. See Part I.C. Under virtually any definition, this method is not "direct"; it clearly relies on circumstantial evidence. Thus, we can envision two possible definitions of "direct evidence." First, "direct evidence" could be defined as any type of evidence other than *McDonnell Douglas*. But given the purpose of "direct evidence" (determining which plaintiffs must use *McDonnell Douglas*), this definition would be circular. It would require plaintiffs who use *McDonnell Douglas* (those without "direct evidence") to use *McDonnell Douglas*. The second option would be to define "direct evidence" as some subset of non-*McDonnell Douglas* evidence. That is, we could divide non-*McDonnell Douglas* evidence into two categories: "direct" and "indirect." The problem with this definition is that it would effectively foreclose the use of one of those subcategories of evidence. Plaintiffs with "direct evidence" would be allowed to use that type of evidence. But plaintiffs with "indirect evidence" would be required to use *McDonnell Douglas*—and be precluded from using the subcategory of non-*McDonnell Douglas* evidence defined as "indirect." Thus, there would seem to be no good definition for "direct evidence." See GEORGE RUTHERGLEN, EMPLOYMENT DISCRIMINATION LAW 49–50 (1st ed. 2001) (noting that the "direct evidence" distinction "transforms a question of degree—how closely evidence is connected to a fact in dispute—into a question of kind—whether it is connected closely enough to be 'direct'").
2. The Applicability of *Desert Palace* Outside the 1991 Act

A second doctrinal morass involves the proper scope of *Desert Palace*. In that case, the Supreme Court eradicated the “direct evidence” requirement—at least in 1991 Act cases. The question is whether *Desert Palace* applies in non-1991 Act cases, and thus whether courts in such cases should continue to require plaintiffs without “direct evidence” to use *McDonnell Douglas*. The courts of appeals have split on this question.

The analysis above resolves this debate: there is no place for the “direct evidence” doctrine—even in non-1991 Act cases. This is not because of *Desert Palace*. Rather, it is because—properly understood—*McDonnell Douglas* should not be required in any case. Thus, whether *Desert Palace* applies outside of the 1991 Act is irrelevant. Debate over.

3. The Proper Role of *McDonnell Douglas* in a Post-Desert Palace World (“I’m Not Dead Yet”)

*Desert Palace*—the Court’s attempt to simplify things—has given rise to a third doctrinal morass. In the wake of that decision’s eradication of the “direct evidence” requirement in 1991 Act cases, courts and commentators have engaged in a four-way debate over the proper role, if any, for *McDonnell Douglas* in 1991 Act cases. One camp (the “dead” camp) claims that *McDonnell Douglas* is “dead”—that it should never be used after *Desert Palace*. A second camp (the “choice” camp) takes the position that, after *Desert Palace*, plaintiffs should have the choice of using either *McDonnell Douglas* or the 1991 Act framework. A third camp (the “modified” camp) says that all plaintiffs...
must use a “modified” version of *McDonnell Douglas*. A fourth camp (the “mixed motive” camp) takes the position that only plaintiffs who plead a “mixed motive” case (whatever that might be) should have such a choice. The analysis above demonstrates that all four of these camps are wrong.

All four of these camps posit a false dichotomy. Each is premised on the idea that a choice must be made—either by the court or by one or more of the parties—between *McDonnell Douglas* and the 1991 Act. The “dead” camp’s argument is based on the idea that after the demise of the “direct evidence” doctrine, plaintiffs are free to choose between *McDonnell Douglas* and the 1991 Act. (This camp’s adherents apparently believe that no plaintiff in her right mind would choose *McDonnell Douglas*—an argument I will address in Part III.E.) The “choice” and the “modified” camps both posit a similar choice by plaintiffs. The “choice” camp simply permits plaintiffs to choose between *McDonnell Douglas* and the 1991 Act. And the “modified” camp requires all parties to use the first two stages of *McDonnell Douglas* (prima facie case and nondiscriminatory reason), but at the third stage permits plaintiffs to choose between the “pretext method” (the third stage of the traditional *McDonnell Douglas* framework) and the framework set out in the 1991 Act. Finally, the “mixed motive” camp posits that the choice between these frameworks should be made by the court based on whether the plaintiff pleads a

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199 See supra note 48 and accompanying text.

200 See supra note 47 and accompanying text.


202 See, e.g., Corbett, supra note 58, at 1576.

203 See id.; Van Detta, *Le Roi Est Mort*, supra note 15, at 72. Professor Zimmer takes a more nuanced view, arguing that *McDonnell Douglas* will only likely be used where the parties agree to use it and in those rare situations where a defendant fails to proffer a nondiscriminatory reason for its actions. See Zimmer, supra note 11, at 1932. However, like the other scholars, Zimmer assumes that someone must make a choice between *McDonnell Douglas* and the 1991 Act (either both of the parties by agreement, or the court). Id. at 1939.

204 See, e.g., Griffith, 387 F.3d at 735–36.

205 See, e.g., Rachid v. Jack in the Box, Inc., 376 F.3d 305, 312 (5th Cir. 2004).
“mixed motive” case. Thus, all four camps believe that a choice must be made between *McDonnell Douglas* and the 1991 Act.

The problem with all four camps is that there is no need to choose between *McDonnell Douglas* and the 1991 Act. As discussed above, these two frameworks do not compete with each other; they complement each other. The 1991 Act sets standards of causation and *McDonnell Douglas* provides a method for proving those standards. There is no need to choose between these things. The only things a plaintiff needs to choose in a 1991 Act case are (1) how to prove “motivating factor” causation, and possibly (2) how to resist the “same action” defense. The plaintiff can choose to try to accomplish these things using *McDonnell Douglas*—or not. But there is no need to choose between *McDonnell Douglas* and the 1991 Act, as all four camps suggest.

The last two camps—the third (“modified” *McDonnell Douglas*) camp and fourth (“mixed motive”) camp—are doubly flawed. Not only do they posit a false dichotomy between *McDonnell Douglas* and the 1991 Act, but they also mandate *McDonnell Douglas*. The fourth camp requires those plaintiffs who do not plead a “mixed motive” case to use *McDonnell Douglas*. And the third camp requires all plaintiffs to use a “modified” version of *McDonnell Douglas*. As we saw above, it makes no sense to require any plaintiff to use *McDonnell Douglas*, “modified” or otherwise.

The first camp (the “dead” camp) is also simply wrong in its assessment of the role played by *McDonnell Douglas*. As we saw above, *McDonnell Douglas* is not dead in post-Desert Palace 1991 Act cases. It

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206 See, e.g., Richardson v. Monitronics Int'l, Inc., 434 F.3d 327, 332–33 (5th Cir. 2005).

207 See supra Part II.A.

208 See supra notes 38–39 and accompanying text.

209 See, e.g., Bloomer v. United Parcel Serv., Inc., 94 F. App’x 820, 826 (10th Cir. 2004).

210 See, e.g., Rachid, 376 F.3d at 312.

211 See supra Part I.

212 As noted above, proponents of a “modified” *McDonnell Douglas* might argue that the modification to the framework at least ameliorates the problem of a mandatory *McDonnell Douglas*. The modification, after all, seems to give plaintiffs a choice as to whether to use the third—most difficult—stage of *McDonnell Douglas*. See supra note 137. However, as also discussed above, the modified version remains problematic, as it requires all litigants to use the first two stages of *McDonnell Douglas* and also exacts a high price for plaintiffs to opt out of the third stage (they must concede that the defendant had a legitimate reason). See supra note 137.

213 Dean Kaminshine argues, as I do, that *McDonnell Douglas* is not “dead.” See Kaminshine, supra note 14, at 7. However, his argument is based on the claim that *McDonnell Douglas* and the 1991 Act are mutually exclusive; that *McDonnell Douglas*
retains a vital role in those cases: it provides an important method of proving the causal standards set out in the 1991 Act.\footnote{See supra Part I.C.3.}

There is one sense in which the “dead” camp has it right. One might see this camp as arguing not that \textit{McDonnell Douglas} is dead, but rather arguing that a \textit{mandatory McDonnell Douglas} is dead. As discussed above, a mandatory \textit{McDonnell Douglas} is and should be dead.\footnote{See supra Part II.A; see also infra Part III.E. (explaining why many plaintiffs should—and do, and will—choose \textit{McDonnell Douglas}).} However, even in this regard, the “dead” camp is problematic. A mandatory \textit{McDonnell Douglas} is not dead because of \textit{Desert Palace} or its eradication of the “direct evidence” requirement, as the “dead” camp posits. Rather, the death of a mandatory \textit{McDonnell Douglas} results from the fact that it makes no sense to require \textit{McDonnell Douglas}.

This distinction is critical. If it made sense to require some plaintiffs to use \textit{McDonnell Douglas}, then eradicating the “direct evidence” requirement (as \textit{Desert Palace} did) would not necessarily eradicate a mandatory \textit{McDonnell Douglas}. Courts might find other ways to require some plaintiffs to use \textit{McDonnell Douglas}. The courts in the third and fourth camps (those that require plaintiffs who do not plead “mixed motive” cases to use \textit{McDonnell Douglas} and those that require all plaintiffs to use a “modified” \textit{McDonnell Douglas}) are good examples of this. After the demise of the “direct evidence” doctrine, these courts have found alternative ways to require plaintiffs to use \textit{McDonnell Douglas}.\footnote{See supra Part I.C.5.} \footnote{See supra Part I.A.}

\footnote{There is an additional flaw with the argument that \textit{McDonnell Douglas} is “dead.” This argument is based largely on the premise that \textit{McDonnell Douglas} requires “but for” causation. As noted above, the “dead” camp believes that, given the choice, no plaintiff in her right mind would choose \textit{McDonnell Douglas} over the 1991 Act framework. See supra note 208 and accompanying text. This argument is generally premised on the idea that the 1991 Act requires plaintiffs to prove only “motivating factor” causation, while \textit{McDonnell Douglas} requires “but for” causation. See Corbett, supra note 58, at 1576; Van Detta, \textit{Le Roi Est Mort}, supra note 15, at 117–19. However, as we have seen above, \textit{McDonnell Douglas} does not represent a “but for” requirement. See supra Part I.C.3.}
In summary, in 1991 Act cases, McDonnell Douglas serves as one potential, nonmandatory method for proving the standards set out in that Act. While Desert Palace simplifies the implementation of this role, this role is not a product of Desert Palace. Rather, the proper role for McDonnell Douglas is a product of causal logic and the way in which McDonnell Douglas proves causation. That logic not only demonstrates the proper role for McDonnell Douglas, it also resolves the other doctrinal quagmires that have plagued disparate treatment law.

III. ADDRESSING THE CRITICISMS OF MCDONNELL DOUGLAS

We have now seen that McDonnell Douglas should not be mandatory. It is merely one method, among others, by which plaintiffs can prove causation. This fact alone removes virtually all of the teeth from the various normative criticisms that have been leveled at McDonnell Douglas. For even if McDonnell Douglas were indeed deeply flawed, these flaws would become far less serious if no one were required to use the flawed framework. Plaintiffs who believe that the framework is flawed could simply opt out of it and choose to prove causation in whatever other way they preferred.

This Part, however, shows that McDonnell Douglas is not flawed. Not only do plaintiffs have the option of using this framework, they should often choose to do so. The first four subparts, address—and rebut—the major normative criticisms which have been leveled against McDonnell Douglas. The final subpart shows why McDonnell Douglas will often be the only effective way in which plaintiffs can prove causation—why it is, in fact, a gift to antidiscrimination law.

A. The Formalism Critique

Some writers have accused McDonnell Douglas of being distracting or overly formalistic. The fear, apparently, is that judges and juries will get so caught up in the mechanics of burden-shifting and pretext that they might lose sight of the bigger issue: whether there has been discrimination.

218 See, e.g., McCormick, supra note 15, at 183.
219 See, e.g., Malamud, supra note 6, at 2237–38.
220 See, e.g., McCormick, supra note 15, at 161 (noting that “courts... get so caught up in principles promoted by the test that they lose sight of the law,” which has made it “nearly impossible to combat discrimination”); see also Wells v. Colo. Dep’t of Transp., 325 F.3d 1205, 1221 (10th Cir. 2003) (Hartz, J., concurring) (“The McDonnell Douglas framework only creates confusion and distracts courts from ‘the ultimate question of discrimination vel non.’ McDonnell Douglas has served its purpose and should be abandoned.” (quoting U.S. Postal Serv. Bd. of Governors v. Aikens, 460
The solution, however, is not to jettison McDonnell Douglas. The better solution is to contextualize McDonnell Douglas. We should make sure to focus—and ask judges and juries to focus—on the relationship between McDonnell Douglas and discrimination: the point of McDonnell Douglas is to prove discriminatory causation by proving pretext. Awareness of the exact inferences that make up the pretext chain should also help in this regard.\textsuperscript{221}

A related criticism is that the formalism of McDonnell Douglas permits judges to “slice and dice” evidence. The criticism is that judges often divide evidence into categories and then decide that the evidence in each category is insufficient, instead of looking at the evidence as a whole.\textsuperscript{222}

However, “slicing and dicing” is endemic to litigation generally, especially in motions practice.\textsuperscript{223} It is not limited to McDonnell Douglas. Nor would eliminating McDonnell Douglas be likely to eliminate this practice.

Moreover, there is nothing wrong with such “slicing and dicing.” Looking at each piece of evidence in relation to the specific issue that the piece of evidence is purported to show makes perfect sense. The only pitfall is where the judge fails to consider evidence relevant to a particular point or fails to look at the cumulative weight of the evidence on a particular point. A complete understanding of how McDonnell Douglas proves causation, such as that offered in this Article, should help to ensure that all evidence is properly applied and weighed.\textsuperscript{224}

Thus, the critics’ claim that McDonnell Douglas is distracting is weak. This is a problem that is easily remedied by analyses such as the one in this Article. And the critics’ claim that McDonnell Douglas causes or increases improper “slicing and dicing” is misplaced. There

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\textsuperscript{221} See supra note 74 (discussing propriety of instructing juries on pretext and burden-shifting aspects of McDonnell Douglas).

\textsuperscript{222} See generally Michael J. Zimmer, Slicing & Dicing of Individual Disparate Treatment Law, 61 LA. L. REV. 577, 584–85, 595–97 (2001) (explaining how courts “slice[ ] and dice[ ] . . . the evidence in the record in order to draw inferences in favor of the employer”).

\textsuperscript{223} See, e.g., id. at 592–600.

\textsuperscript{224} Pretext evidence of causation should be viewed cumulatively with nonpretext evidence. And nonpretext evidence may be relevant to pretext. For example, racist statements by a decisionmaker might make it more likely that a proffered reason that was incorrect was also a lie, a cover-up, and a cover-up for discrimination. See Kaminshine, supra note 14, at 56 (noting that nonpretext evidence might be relevant to pretext and vice versa).
is nothing about the framework that causes the problem of improper "slicing and dicing." But a complete understanding of McDonnell Douglas, such as the one contained in this Article, should help to ensure that pretext evidence is weighed properly. These criticisms do not suggest any reason to stop using McDonnell Douglas.

B. The Multiple Reasons Critique and the "Personal Animosity Presumption"

Other critics argue that McDonnell Douglas stacks the deck against plaintiffs by requiring them to disprove every reason offered by the defendant for its action.225 If plaintiffs were indeed required to rebut every reason offered by the defendant, defendants might be inclined to offer many reasons for their actions, as well as to try to find reasons that were hard to rebut. This could make plaintiffs’ task unduly difficult.

The problem has been exacerbated, critics claim, by some courts’ inclination on summary judgment motions to provide additional reasons for a defendant’s action—reasons that were not proffered by the defendant—and then requiring the plaintiff to rebut the court’s, as well as the defendant’s, reasons.226 One form of this tendency has

225 See Brodin, supra note 64, at 183, 215; Derum & Engle, supra note 8, at 1224–25; Rosenthal, supra note 15, at 335 (“Unfortunately for plaintiffs, the general rule that has developed [where employers offer] multiple justifications is that, to defeat employers’ motions for summary judgment, plaintiffs must typically present evidence that each of these reasons is not the true reason for the action, and that discrimination was the real reason for the adverse action.”); see also Wallace v. Methodist Hosp. Sys., 271 F.3d 212, 220 (5th Cir. 2001) (“The plaintiff must put forward evidence rebutting each of the nondiscriminatory reasons the employer articulates.”); Clay v. Holy Cross Hosp., 253 F.3d 1000, 1007 (7th Cir. 2001) (“[The plaintiff] must present facts to rebut each and every legitimate, nondiscriminatory reason advanced by the [defendant] in order to survive summary judgment.”); Herawi v. Ala. Dep’t of Forensic Scis., 311 F. Supp. 2d 1335, 1346 (M.D. Ala. 2004) (requiring the plaintiff to disprove all of the reasons proffered by the defendant). But see Bryant v. Farmers Ins. Exch., 432 F.3d 1114, 1126 (10th Cir. 2005) (stating that “when the plaintiff casts substantial doubt on many of the employer’s multiple reasons, the jury could reasonably find the employer lacks credibility” (quoting Tyler v. RE/MAX Mountain States, Inc., 232 F.3d 808, 814 (10th Cir. 2000))); Strate v. Midwest Bankcentre, Inc., 398 F.3d 1011, 1021 (8th Cir. 2005) (rejecting the defendant’s argument that the plaintiff must rebut every reason offered by the defendant).

226 See, e.g., Hicks v. St. Mary’s Honor Ctr., 90 F.3d 285, 290–91 (8th Cir. 1996) (affirming the lower court’s holding that the plaintiff did not adequately demonstrate that racial discrimination rather than personal animosity motivated his termination); Brodin, supra note 64, at 215 (“What makes no sense is requiring the plaintiff to disprove theories not put into play by defendant.”); Derum & Engle, supra note 8, at 1224–25 (noting that even when the plaintiffs rebut all of the defendant’s nondis-
been referred to as a “personality presumption,” in which many courts attribute employers’ actions to a supervisor’s hostility toward the plaintiff, rather than attributing such actions to racism or sexism (and assuming any hostility is unrelated to racism or sexism).\textsuperscript{227}

However, while any of these trends would certainly be problematic, they are not required—or even permitted—under \textit{McDonnell Douglas}. As we have seen, \textit{McDonnell Douglas} is not based on a process of elimination. It does not require the plaintiff to rebut all reasons proffered by the defendant. Rebutting just one reason will allow a factfinder to conclude that the reason was a lie, a cover-up, and a cover-up for discrimination.\textsuperscript{228}

It is true that a plaintiff who seeks to use the strong version of \textit{McDonnell Douglas} as a way to prove “but for” causation must in fact eliminate every reason proffered by the defendant.\textsuperscript{229} But this is necessary only to prove “but for” causation—not to prove causation generally. Under \textit{Price Waterhouse} and the 1991 Act, there is no need for plaintiffs to prove “but for” causation; their burden is only to prove “motivating factor” causation.\textsuperscript{230} So the only plaintiffs who will need to worry about eliminating all of the defendant’s proffered reasons are those who volunteer to take on this burden of proof in order to preempt a “same decision”/“same action” defense.\textsuperscript{231}

Employers may be inclined to proffer multiple reasons for the challenged action in a bid to prevent a finding of “but for” causation. This is because each proffered reason might support a “same decision”/“same action” defense. However, properly understood, \textit{McDonnell Douglas} renders this strategy a risky one. Because plaintiffs can

\textsuperscript{227} See Derum & Engle, supra note 8, at 1224–28 (explaining the “personal animosity” presumption and presenting cases where courts have applied this presumption); \textit{cf.} Brodin, supra note 64, at 215–29 (discussing how the “personality” excuse is the “ultimate pretext” which could potentially “eviscerate[ ] Title VII’s protections”).

\textsuperscript{228} See supra Part I.C.1.

\textsuperscript{229} See supra Part I.C.4.

\textsuperscript{230} As noted above, it is possible that there is a third alternative framework (in addition to \textit{Price Waterhouse} and the 1991 Act), under which the plaintiff must bear the full burden of proving “but for” causation (rather than shifting that burden to the defendant upon a showing of “motivating factor,” as in \textit{Price Waterhouse} and the 1991 Act). See supra Part II.B.2, especially text accompanying notes 166 to 171. But as also noted above, such a plaintiff-must-prove “but for” framework should not be seen as existing in current doctrine (and would be normatively flawed). See supra Part II.C.1, especially text accompanying notes 183 to 192.

\textsuperscript{231} See supra Part I.A.
prove “motivating factor” causation under *McDonnell Douglas* by disproving any single proffered reason, a defendant who proffers multiple reasons increases the danger of losing on that issue. Moreover, if an employer offers too many reasons—particularly ones that seem hard to believe—it might increase the likelihood that a factfinder would conclude that they are all pretextual. Thus, employers also have a disincentive to provide multiple reasons for their action.

Employers may also still try to avoid findings of pretext by proffering reasons which are difficult to disprove—such as “personality conflicts.” However, this practice may be prohibited by a specificity rule that arguably arises from *McDonnell Douglas*. The point of *McDonnell Douglas* is to require employers to provide a reason that can be tested. Accordingly, the Court has stated that the “defendant’s explanation of its legitimate reasons must be clear and reasonably specific.” And, as noted by Professor Hart, courts are—and often should be—increasingly suspicious when defendants proffer excessively subjective reasons for challenged actions.

The related concern about courts proffering nondiscriminatory reasons which were not offered by the defendant is also addressed by my analysis of *McDonnell Douglas*. That analysis shows that there are in fact three nondiscriminatory reasons that a factfinder can find even though they were not offered by the defendant: reasons that are part of the pretext chain of inferences. If the defendant’s proffered reason is wrong, the factfinder can conclude either that the defendant lied or that the defendant made a good faith mistake (a nondiscriminatory reason). Or if the defendant lied, the factfinder can conclude that the lie was either a cover-up or a lie for a benign reason (a second possible nondiscriminatory reason). Or, if the defendant engaged in a cover-up, the factfinder can conclude that what was being covered up was either a discriminatory motivation or a nondiscriminatory one (a third possible nondiscriminatory reason). These three exculpatory reasons, while not put into the record by the defendant, are not fore-

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232 See *supra* Part I.C.2–3.

233 See *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 805 (1973) (holding that an employee “must be given a full and fair opportunity to demonstrate by competent evidence that the presumptively valid reasons from his rejection were in fact a coverup”).


235 See *Hart, supra* note 8, at 767.

236 See *supra* Part I.C.1.
closed to the factfinder because they are part of the inferential chain the plaintiff has asked the factfinder to use. Thus, a factfinder can (but need not) find that one of these three reasons was the defendant's motivation, even if that reason was not suggested by the defendant. But this does not give license to the factfinder—or the court—to find other reasons that were not in the record. Reasons which were not effectively put into play by the plaintiff (by invoking the pretext method) or proffered by the defendant should be considered outside of the record and off limits.\textsuperscript{237}

Moreover, a judge's speculative reason as to the motivation for the defendant's action is simply irrelevant under the McDonnell Douglas framework. This framework works because, by proving the defendant's proffered reason wrong, the plaintiff sets in motion a chain of inferences from which a factfinder can find discrimination.\textsuperscript{238} Where a judge proffers a reason for the defendant's action, the judge's proffered reason does not serve this purpose. If the plaintiff disproves the judge's reason, it does not give rise to an inference that the defendant was lying. It only gives rise to an inference that the judge was wrong—which does nothing to further the purpose of McDonnell Douglas.

Thus, the criticism that McDonnell Douglas requires plaintiffs to rebut multiple reasons is simply wrong. Properly understood, the framework requires the plaintiff to rebut only one reason. Moreover, a proper understanding of the framework provides a new argument against the practice of judges proffering reasons for the defendant's action. McDonnell Douglas cannot be blamed for this ill.

C. McDonnell Douglas and Assumptions Regarding the Prevalence of Discrimination

A number of critics have argued that McDonnell Douglas depends for its operation on an assumption that discrimination is prevalent, and that judges seem less and less willing to make this assumption—particularly on summary judgment motions.\textsuperscript{239} The argument is

\textsuperscript{237} See supra note 228.
\textsuperscript{238} See supra Part I.C.1.
essentially a variation on the process of elimination argument: the idea behind this criticism is that *McDonnell Douglas* works because once certain reasons for the challenged action (such as those in the prima facie case and those proffered by the defendant) are eliminated, it seems likely that discrimination is the reason—at least as long as one believes that discrimination is prevalent. However, *McDonnell Douglas* simply does not depend on such an assumption.

We have seen how *McDonnell Douglas* works. It works by giving plaintiffs an opportunity to attack the defendant's proffered reason, thereby setting in motion a chain of inferences which may culminate in an inference of discrimination. There is no place in this chain where an assumption of discrimination is necessary. In the last link, discrimination can be inferred from a cover-up. This inference can be drawn as long as the factfinder is open to the possibility that a cover-up might be a cover-up for discrimination. The factfinder can be open to this possibility irrespective of any belief about the prevalence of discrimination.

This is not to say that a factfinder's belief that discrimination is widespread would not be helpful to a plaintiff. It is only to say that such a belief is irrelevant to summary judgment; that is, such a belief is not necessary to be able to use *McDonnell Douglas*. A belief that discrimination is widespread goes to the probability that a cover-up was a cover-up for discrimination. A factfinder with such a belief would be more likely to conclude that a cover-up was a cover-up for discrimination. But this is irrelevant on summary judgment. At the summary judgment stage, the issue is not the probability that the factfinder will

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240 See supra Part I.C.2.

241 This argument is related to, but distinct from, the argument that *McDonnell Douglas* works by a process of elimination. The elimination argument concludes that, once the defendant's proffered reason has been eliminated, discrimination is the only possible explanation. As discussed above, in Part I.C.2, this argument is erroneous. The prevalence-of-discrimination argument is that, once the proffered reason and the common reasons of the prima facie case have been eliminated, discrimination is—or should be considered—the most likely explanation. An excellent discussion of this reasoning, as well as its empirical flaws, can be found in Malamud, supra note 6, at 2254–62.

242 See supra Part I.C.1.
draw the inference. The only issue is whether a reasonable factfinder
could draw such an inference.\footnote{See \textit{Fed. R. Civ. P.} 56(c). A need-for-assumption-of-discrimination critic might argue that, absent an assumption of widespread discrimination, the facts would be in equipoise, requiring summary judgment for the defendant. The argument is that, absent such an assumption, a factfinder would have no way to choose which inference to draw in the pretext chain: no way to determine (1) whether an incorrect proffered reason was a good faith error or a lie, (2) whether a lie was a benign lie or a cover-up, or (3) whether a cover-up was for a non-discriminatory reason or a discriminatory reason. Absent such guidance, the argument goes, summary judgment would be appropriate. However, this argument confuses the standard for a plaintiff's verdict (a preponderance of evidence/more likely than not) with the standard for summary judgment. Where two competing fact scenarios are in equipoise, a factfinder should find for the defendant (under the preponderance standard). However, whether two competing fact scenarios are in equipoise is a fact question, which cannot be resolved on summary judgment. The whole point is that it is the factfinder's role to determine the likelihood that each of two competing scenarios occurred. While assumptions as to the widespread nature of discrimination might aid the factfinder in making such a determination, such assumptions play no role on summary judgment. See Jack H. Friedenthal et al., \textit{Civil Procedure} 475 & n.15 (4th ed. 2005) (noting that where competing inferences are equally plausible, summary judgment should be denied: as "the trial judge need only determine that the non-movant's [here, plaintiff's] evidence on an issue is "facially plausible and capable of being accepted by a rational factfinder" in order to deny a summary-judgment motion" (quoting James Joseph Duane, \textit{The Four Greatest Myths About Summary Judgment}, 52 Wash. & Lee L. Rev. 1523, 1560 (1995))). Put differently, equipoise goes to whether the plaintiff met its burden of persuasion—a factual question. On summary judgment, the question is essentially whether the plaintiff met its burden of production—of producing evidence that would allow a reasonable factfinder to find the fact in question. \textit{See supra} note 79 and accompanying text (noting that factfinders can infer guilt from the fact that the defendant ran from the scene of an accident—even if an equally likely explanation might exist).}

If \textit{McDonnell Douglas} worked by process of elimination, the analysis might be different. Under the elimination method, the inference of discrimination must rest upon the mere fact that some nondiscriminatory reasons (a few common reasons and the defendant's proffered reason) have been eliminated.\footnote{\textit{See supra} Part I.C.2.} This inference seems weak. Arguably, it is so weak that absent a belief that discrimination is widespread, a reasonable factfinder would not draw the inference.\footnote{The validity of such an argument is beyond the scope of this Article.} But this is not a problem in \textit{McDonnell Douglas}. The inference of discrimination in \textit{McDonnell Douglas} does not rest upon the mere elimination of some reasons. Rather, it rests upon lies and cover-ups—and the longstanding principle of law that where a party lies to the factfinder, the factfinder can infer that the party was trying to avoid legal liability.\footnote{\textit{See supra} notes 78–80 and accompanying text.}
This inference is far stronger than an inference from elimination. The \textit{McDonnell Douglas} inference does not require an assumption that discrimination is widespread.\textsuperscript{247}

\textbf{D. Claims of McDonnell Douglas' Inadequacy}

In recent literature, many critics argue that \textit{McDonnell Douglas} is theoretically incapable of addressing the complex decisionmaking that characterizes much of modern discrimination. Critics claim that \textit{McDonnell Douglas} is inadequate for dealing with modern discrimination in two respects.

1. Dealing with Multiple Factors

Several critics believe the \textit{McDonnell Douglas} is a binary, “either-or” model, and therefore incapable of dealing with employment decisions based on multiple factors.\textsuperscript{248} It is probably true that most mod-

\textsuperscript{247} It is true that the prima facie case relies on the elimination method. \textit{See} Tex. Dep’t of Cmy. Affairs v. Burdine, 450 U.S. 248, 253–54 (1981) (“The prima facie case serves an important function in the litigation: it eliminates the most common nondiscriminatory reasons for the plaintiff’s rejection.”). However, the analysis in the text highlights what a weak inference this is (at least without an assumption of widespread discrimination). To the extent that we rely on the prima facie case solely as a way to trigger the defendant’s obligation to proffer a nondiscriminatory reason, the weakness of this inference does not seem problematic. \textit{See supra} note 91. But it is more problematic when we speak of the “continuing relevance” of the prima facie case at the pretext stage. \textit{See} Reeves v. Sanderson Plumbing Prods., Inc., 530 U.S. 133, 143 (2000) (“[A]lthough the presumption of discrimination ‘drops out of the picture’ once the defendant meets its burden of production . . . the trier of fact may still consider the evidence establishing the plaintiff’s prima facie case and ‘inferences properly drawn therefrom . . . on the issue of whether the defendant’s explanation is pretextual.’” (quoting St. Mary’s Honor Ctr. v. Hicks, 509 U.S. 502, 511 (1993); Burdine, 450 U.S. at 256 n. 10)).

\textsuperscript{248} \textit{See} Dare v. Wal-Mart Stores, Inc., 267 F. Supp. 2d 987, 991 (D. Minn. 2003) (criticizing—and rejecting—\textit{McDonnell Douglas} as a false dichotomy); Hart, \textit{supra} note 8, at 758 (arguing that “courts applying the \textit{McDonnell-Douglas} framework mistakenly assume that employment decisions are motivated by a single factor—either honest business judgment or dishonest discriminatory motivation” and explaining that “employment decisions are not either-or events, but events with multiple motivations”); Krieger, \textit{supra} note 15, at 1179 (“Within the pretext paradigm, it is simply not possible for an employment decision to be both motivated by the employer’s articulated reasons and tainted by intergroup bias; the trier of fact must decide between the two.”); Stonefield, \textit{supra} note 64, at 113 (stating the assumption that “a dichotomous result [lies] at the end of the \textit{McDonnell Douglas} fact-finding road”); \textit{see also} Price Waterhouse v. Hopkins, 490 U.S. 228, 247 (1989) (plurality opinion) (“Where a decision was the product of a mixture of legitimate and illegitimate motives . . . it simply makes no sense to ask whether the legitimate reason was the ‘true reason’ . . . for the decision—which is the question asked by \textit{McDonnell Douglas}.”) (internal quotation...
ern employment decisions (or even most human decisions) are based on multiple factors. The concern is that a framework which can only contemplate one cause for an action—either a legitimate cause or discriminatory cause—cannot address this type of decision-making.

But McDonnell Douglas is perfectly capable of addressing multifactor decisionmaking. That is, a factfinder using McDonnell Douglas could find that the employer was motivated by both legitimate and illegitimate factors. McDonnell Douglas permits employers to proffer multiple reasons for their actions—which they often do. And McDonnell Douglas permits a plaintiff to prevail by successfully challenging just one of those reasons. This means that a factfinder can find a discriminatory motive (based on the conclusion that one proffered reason was pretextual) along with a nondiscriminatory motive (based on the perceived legitimacy of one of the other proffered reasons). Thus, the framework has no problem dealing with mult motive decisionmaking.

marks and citation omitted)), superseded by statute, Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071; Thomas v. Eastman Kodak Co., 183 F.3d 38, 58 (1st Cir. 1999) (discussing “truth versus lies” claim); Miller v. CIGNA Corp., 47 F.3d 586, 597 (5th Cir. 95) (en banc) (same); id. at 600 (Greenburg, J., concurring) (same); Waltman v. Int'l Paper Co., 875 F.2d 468, 481 (5th Cir. 1989) (same); Green, supra note 8, at 91–92 (arguing that McDonnell Douglas presents an either-or paradigm); Kaminson, supra note 14, at 18 & n.87 (same); Stonefield, supra note 64, at 113 (same).

249 See 110 Cong. Rec. 13,837, 13,837 (1964) (statement of Sen. Case) (“If anyone ever had an action that was motivated by a single cause, he is a different kind of animal from any I know of.”); Rutherglen, supra note 3, at 47 (“[F]ew cases are likely to involve employers who rejected the plaintiff for discriminatory reasons alone.”); Krieger, supra note 15, at 1215 (“It will be the rare employer indeed who can accurately identify the reasons why he hired or promoted one employee over another, fired another, or set salary increases as he did . . . . [I]n the real world one simply cannot control the multiplicity of causal antecedents so as to determine the causal efficacy of race, gender, national origin, or age.”).

250 Hart, supra note 8, at 758.

251 E.g., Bryant v. Farmers Ins. Exch., 432 F.3d 1114, 1126 (10th Cir. 2005); Clay v. Holy Cross Hosp., 253 F.3d 1000, 1007–08 (7th Cir. 2001); Wallace v. Methodist Hosp. Sys., 271 F.3d 212, 220 (5th Cir. 2001); see also Rosenthal, supra note 15, at 335 (“[E]mployers . . . often articulate numerous justifications . . . .”).

252 See supra Parts I.C.2–3, III.B.

253 Again, I make no claim as to the likelihood that a factfinder will find only some of a defendant’s multiple proffered reasons to be pretextual. See supra note 89. It is certainly possible that factfinders might tend to assess the credibility of the employer on a global level, finding either all or none of the employer’s proffered reasons to be truthful. The point is that there is nothing about the framework that mandates such a binary view.
The "either-or" critics base their claim on the fact that *McDonnell Douglas* appears to require a binary choice.\textsuperscript{254} A factfinder must choose between finding a proffered reason to be legitimate and finding that reason to be a pretext. In its simplest terms, the factfinder must find any particular proffered reason to be either true or false.

However, this does not render the framework itself binary. It only means that, with respect to each proffered reason, the factfinder must make a binary choice (either that reason is true or false).\textsuperscript{255} Where there is more than one proffered reason, the factfinder is not faced with such a binary choice. The factfinder is free to conclude that the employer had discriminatory motives (based on one proffered reason being pretextual), while also concluding that the employer had one or more legitimate motives.

That being said, this binary aspect of *McDonnell Douglas*—the fact that it requires a factfinder to conclude that any particular proffered reason is either true or false—does result in two significant limitations on the utility of the framework. First, it means that *McDonnell Douglas* cannot be used to ferret out true but post hoc justifications for challenged employment actions. For example, suppose that defendant fired plaintiff because of her sex, but claimed that the firing was based on excessive tardiness. And suppose that the plaintiff was, in fact, excessively tardy as measured by the employer’s attendance policy. In such a case, *McDonnell Douglas* would not work to prove discrimination. This is because *McDonnell Douglas* only works where the defendant’s proffered reason is false (and thus susceptible to inferences of lying, cover-up, and discrimination).\textsuperscript{256} It will not work where the defendant’s proffered reason is true—even where that reason did not in fact motivate the defendant.\textsuperscript{257} In such a case, the plaintiff will need to find some way to prove discrimination other than *McDonnell Douglas*.\textsuperscript{258}

Second, this binary aspect means that *McDonnell Douglas* cannot be used in cases involving proffered reasons that are true, but infected

\textsuperscript{254} *See supra* note 248 and accompanying text.

\textsuperscript{255} In fact, even this choice is not binary. As noted in Part I.C.1, a factfinder can conclude that a proffered reason is not correct without concluding it was a cover-up for discrimination.

\textsuperscript{256} *See supra* notes 67–74 and accompanying text.

\textsuperscript{257} *Cf. supra* Part I.C.2–3 (noting that *McDonnell Douglas* cannot prove "but for" causation because it cannot eliminate all nondiscriminatory reasons for the defendant’s actions).

\textsuperscript{258} For example, the plaintiff might be able to prove that the tardiness policy had never been applied before despite tardiness by other employees, or that it was not applied uniformly among employees of different races, sexes, or ages. Such comparative evidence is not pretext evidence. *See supra* note 76.
with bias. For example, suppose again that the employer stated that it fired the plaintiff for excessive tardiness. And suppose again that the plaintiff was in fact excessively tardy, as measured by the employer’s attendance policy. But suppose also that the employer only enforced the attendance policy against women. Or suppose that the employer was predisposed to notice the plaintiff’s tardiness as a result of stereotypes of women (or women with families) as being less dedicated to their jobs than male employees.259 Again, McDonnell Douglas could not be used to expose the defendant’s discriminatory-but-true reason. It only works where the proffered reason is false. Again, the plaintiff would need to find some other way to prove discrimination other than McDonnell Douglas.

Yet, to the extent that these two limitations are at the nub of the either-or criticism, the criticism loses its force—at least in a world with a nonmandatory McDonnell Douglas. Any criticism based on these two limitations is simply a criticism that McDonnell Douglas will not work to prove discrimination in every case in which there is discrimination. But no method of proof works in every case. As long as McDonnell Douglas is not mandatory—that is, as long as it is understood as simply being one way in which the plaintiff can prove discrimination—it is hard to get too upset over the fact that sometimes it will not work.260

2. Dealing with Unconscious or Subtle Bias

A final criticism of McDonnell Douglas, which has been quite influential in recent commentary, is that the framework only works to detect conscious discrimination (i.e., that the framework is incapable of ferreting out unconscious or subtle discrimination).261 Because much of modern discrimination seems to be unconscious, the concern is that McDonnell Douglas is incapable of detecting and addressing

259 See Krieger, supra note 15, at 1179. Professor Krieger focuses on unconscious bias—that is, stereotypes outside of the decisionmaker’s awareness. But the problem—this limitation on the utility of McDonnell Douglas—is the same whether the bias that infects the proffered reason is conscious or unconscious.

260 Moreover, as I will argue below, it works in many cases where other methods will not. See infra Part III.E.

261 See Krieger, supra note 15, at 1241 (arguing that McDonnell Douglas is incapable of addressing subtle or unconscious discrimination); see also Hart, supra note 8, at 756–57, 765 (noting that many courts applying McDonnell Douglas require plaintiffs to show pretext by showing the employer lied, an approach that only leads to liability for conscious, not unconscious, discrimination); Wax, supra note 15, at 1147–49 (stating that “[t]he McDonnell Douglas formulation is clearly geared to a narrow view of discriminatory intent: its operation depends on a defendant’s possessing a conscious or deliberate state of mind” and arguing that McDonnell Douglas does not adequately address unconscious bias).
this important form of discrimination.\textsuperscript{262} However, it is far from clear that \textit{McDonnell Douglas} is incapable of addressing unconscious discrimination.\textsuperscript{263}

This criticism seems to stem from the fact that many courts and commentators have (correctly) stated that \textit{McDonnell Douglas} requires dishonesty—a lie.\textsuperscript{264} These critics are apparently concerned that the notion of lying connotes conscious deception. Thus, they reason, \textit{McDonnell Douglas} is incapable of detecting unconscious bias.\textsuperscript{265}

It is easy to see why one might think of \textit{McDonnell Douglas} in terms of conscious lies. A great many courts and commentators have spoken of \textit{McDonnell Douglas} as a way of proving “intent”—another term that connotes conscious activity.\textsuperscript{266} Moreover, the pretext doctrine in \textit{McDonnell Douglas} has its roots in evidentiary and criminal law doctrines that are based on conscious awareness of guilt.\textsuperscript{267} And some courts have even suggested that \textit{McDonnell Douglas} requires a “deliberate falsehood.”\textsuperscript{268}

Yet, it is not so clear that the type of lie required by \textit{McDonnell Douglas} must be conscious. Recall that \textit{McDonnell Douglas} works based on the concept of lies and cover-ups. From the fact of a lie, a factfinder can infer a cover-up, and from the fact of a cover-up, a factfinder can infer discrimination.\textsuperscript{269} This chain of inferences would seem to work to detect unconscious lies and cover-ups as well as conscious ones.

For example, suppose that an employer believes that he is equality-minded and would never discriminate. But unconsciously, he harbors negative stereotypes of African Americans. When money is

\textsuperscript{262} See, e.g., Hart, supra note 8, at 757–58.

\textsuperscript{263} It is open to debate whether it makes sense to hold people accountable for mental processes that are outside of their consciousness, both from a moral perspective (whether it makes sense to assign blame) and a practical perspective (whether there is any prospect of deterrence). However, such questions are beyond the scope of this Article. This Article will simply address the criticism that \textit{McDonnell Douglas} is incapable of detecting unconscious bias—taking as a starting point the assumption of these critics that doing so would be a good thing.

\textsuperscript{264} See, e.g., Hart, supra note 8, at 754–55 & n.75 (cataloging examples). Professor Hart argues that the law does not in fact require proof of dishonesty. \textit{See id.} at 755–66. However, she does not argue the same for \textit{McDonnell Douglas}. Rather, she (correctly) asserts that \textit{McDonnell Douglas} does require dishonesty, but argues that, in light of the 1991 Act and \textit{Desert Palace}, courts should not require plaintiffs to use \textit{McDonnell Douglas}. \textit{See id.} at 758.

\textsuperscript{265} See, e.g., \textit{id.} at 757–58.

\textsuperscript{266} See Martin Katz, \textit{No Intent, No Foul?}, \textit{LEGAL TIMES}, May 21, 2007, at 35.

\textsuperscript{267} \textit{See supra} notes 78–79 and accompanying text.

\textsuperscript{268} See, e.g., Forrester v. Rauland-Borg Corp., 453 F.3d 416, 419 (7th Cir. 2006).

\textsuperscript{269} \textit{See supra} Part I.C.1.
missing from the cash drawer, the employer concludes that the plaintif, an African American, stole the money. So the employer fires the plaintiff. When asked why, the employer says he fired the plaintiff for theft.

Now suppose that the plaintiff manages to challenge this proffered explanation. For example, suppose that the plaintiff shows that he was not in a position to have stolen the money, or that someone else stole the money. From the defendant’s error, a factfinder could conclude one of two things: either the employer thought in good faith that the plaintiff stole the money, or the employer was lying. But there are actually two types of lie that might be relevant. The employer might be consciously lying to the court in order to conceal a racist motive. Or the employer might be unconsciously lying to himself—in order to cover up his own racist stereotypes. It would seem that either type of lie and cover-up would support an inference of discrimination. Thus, it seems quite possible that *McDonnell Douglas* would work to ferret out unconscious, as well as conscious, discrimination.

But even if *McDonnell Douglas* were not capable of dealing with unconscious discrimination, this would not be a reason to scrap the framework. As long as this framework is understood as being non-mandatory—as being just one way that plaintiffs can show discrimination—then the fact that it will not always work to prove discrimination does not seem particularly problematic. While it might not work in some cases, it does work in other cases. And as long as it works in some cases, it would seem to be a useful part of the arsenal of methods for proving discrimination.

**E. A World Without McDonnell Douglas**

This point, which has concluded the last two subsections, deserves particular attention. If *McDonnell Douglas* were mandatory and less than perfect, it might make sense to get rid of the framework—at least if something better were available. But, as we saw above, *McDonnell Douglas* should never be treated as mandatory. Thus, the standard is not perfection, or even whether *McDonnell Doug-**

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270 The most common form of evidence offered in such cases is comparative evidence (e.g., that other nonminority employees stole money but were not fired). Such comparative evidence is not properly thought of as evidence of pretext in the *McDonnell Douglas* sense. See supra note 76.

271 At least some critics of *McDonnell Douglas* do not advocate scrapping it. Rather, they propose supplementing it. See, e.g., Green, supra note 8, at 144–56.

las is the best method of proof. As long as McDonnell Douglas serves some useful function—as long as it works in some cases—it should be retained.

But McDonnell Douglas should be appreciated more than this—more than simply as a method of proof which works some of the time. To understand why, we need to look at the alternative methods of proof available.

There are only a limited number of ways to prove discriminatory causation—and they are all far from perfect. Causation may be proven by a defendant’s admissions (e.g., “I fired her because she is a woman”). Needless to say, such admissions are rare. Alternatively, causation may be proven by statements by decision makers that do not amount to admissions, but which nonetheless indicate a tendency toward bias (e.g., “I do not like women” or “women do not belong at work”). As employers become more litigation-seasoned, it has become increasingly rare for plaintiffs to discover such statements.273

Moreover, even where a plaintiff can offer proof of such a statement, there is often a dispute as to its relevance under the so-called “stray remarks” doctrine.274 Another method of proving causation is through the use of statistics. But this type of proof requires a large number of decisions by the decisionmaker in order to be useful—which is unlikely in most workplaces. Moreover, collecting and presenting statistical evidence generally requires costly experts.275 Finally, plaintiffs can try to prove causation by the use of comparative—but nonstatistical—evidence (e.g., the fact that the last two nonminority employees who were accused of theft were not fired, while the plaintiff was fired for theft). The problem with this type of

274 See, e.g., Sun v. Bd. of Trs. of the Univ. of Ill., 473 F.3d 799, 813 (7th Cir. 2007) (holding that “stray” remarks that are insufficiently related to a decision will not defeat a motion for summary judgment); Shorter v. ICG Holdings, Inc., 188 F.3d 1204, 1209–10 (10th Cir. 1999) (same); EEOC v. Clay Printing Co., 955 F.2d 936, 941–42 (4th Cir. 1992) (same). While it is beyond the scope of this Article, the weight that should be given to such remarks would seem to be a factual question for a jury—not a question of relevance and therefore admissibility. Any such remark would seem to make it more likely that a decision by the speaker was biased.
275 There has been a fair amount of discourse about using experts for another purpose: to testify about the prevalence or likelihood of subtle forms of discrimination in workplace culture. See Lee, supra note 80, at 487 & n.46 (summarizing commentators who have called for increased use of experts on structural discrimination). However, it seems unclear how an expert might prove discrimination in a particular decision absent some evidence specific to the decision, or at least specific to the decisionmaker. Such evidence would likely take one of the forms discussed in the text. And in any event, putting on expert testimony of this sort is expensive.
evidence is that comparators' situations are rarely identical to the plaintiff's situation, giving rise to debates about the value of the comparators and often precluding the use of such evidence.276

*McDonnell Douglas* pretext evidence, in contrast, is readily available—at least in cases where the defendant proffers a false reason for the challenged action. It does not depend on the fortuity of an admission, an overheard statement, or differently treated coworkers as comparators. It does not depend on there being a large number of decisions by the decisionmaker, as statistical evidence does. And it is relatively inexpensive to put on, as it requires little discovery and no experts. As a practical matter, in many cases, pretext evidence will be the only evidence of causation available to plaintiffs. If *McDonnell Douglas* were not available—if it were eradicated, as several of its critics seem to wish—many plaintiffs who are victims of discrimination would likely lose their ability to obtain a remedy. In this sense, *McDonnell Douglas* really is a gift to plaintiffs.277

The gift of *McDonnell Douglas* is not only in that it forces at-will employers to provide a reason for their actions, thereby providing plaintiffs with a "target" to try to discredit, and thereby prove discrimination. Nor is the gift limited to the ability to take advantage of the principle that permits adverse inferences against lying parties. The gift is also in its simplicity and cost-effectiveness. And, perhaps most importantly, it provides one more way of accomplishing the difficult task of proving causation.278

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276 See, e.g., Sublett v. John Wiley & Sons, Inc., 463 F.3d 731, 740–41 (7th Cir. 2006) (holding that summary judgment was appropriate where comparators were not sufficiently similar to the plaintiff).
277 See Trans World Airlines, Inc. v. Thurston, 469 U.S. 111, 121–22 (1985) (stating that *McDonnell Douglas* is "designed to assure that the 'plaintiff [has] his day in court despite the unavailability of direct evidence'" (quoting Loeb v. Textron, Inc., 600 F.2d 1003, 1014 (1st Cir. 1979))).
278 Notably, despite the large number of critics of *McDonnell Douglas*, none has proposed a true alternative to this method of proof. Most critics have proposed adoption of one of the two alternative frameworks (*Price Waterhouse* or the 1991 Act). See, e.g., Hart, *supra* note 8, at 791. As this Article has shown, these frameworks are not mutually exclusive with *McDonnell Douglas*; they do not provide alternative methods of proof. See *supra* Part II.A. While some critics have proposed a more radical solution—a more aggressive burden-shifting mechanism that would require any employer who takes an adverse action against a female or minority worker to prove a lack of discrimination—that proposal is also not a method of proof. See Rutherford, *supra* note 3, at 42. So even this more radical solution is not an alternative to *McDonnell Douglas*. (Moreover, this radical solution has additional problems. While it might lead to more judgments against employers, it is contrary to the general philosophy of our legal system: innocent until proven guilty. Moreover, such burden-shifting schemes are generally justified based on the likelihood that the presumed fact (dis-
Conclusion

Although originally intended by the Court as a gift to antidiscrimination law, *McDonnell Douglas* has come under increasing fire and is currently the subject of severe disrepute. But this is due largely to misunderstanding. The framework has been misunderstood in terms of when to apply it—mistakenly being thrust upon unwilling plaintiffs. And it has been misunderstood in terms of what it does. Properly understood, *McDonnell Douglas* represents an effective and efficient way that plaintiffs may, at their option, try to prove discriminatory causation. In this sense, it is a gift to antidiscrimination law, and an important tool in the quest to eradicate discrimination in the workplace.