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PRICE-FIXING: REFINING THE *PRICE WATERHOUSE* STANDARD AND INDIVIDUAL DISPARATE TREATMENT LAW

KENNETH R. DAVIS*

I. INTRODUCTION

Employment discrimination law has befuddled most of those who have attempted to master it. Confusion arises when one attempts to reconcile the two frameworks that govern individual treatment cases: the *McDonnell Douglas*[1] approach and the *Price Waterhouse*[2] approach. *McDonnell Douglas* provides an elaborate, three-step, burden-shifting framework, in which the plaintiff must ultimately prove that the defendant's alleged nondiscriminatory reason for the adverse employment action was a pretext for discrimination.[3] The as-

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

2. Price Waterhouse v. Hopkins, 490 U.S. 228, 231 (1989), *superseded by statute as stated in* Landgraf v. USI Film Prods., 511 U.S. 244 (1994).

3. *McDonnell Douglas*, 411 U.S. at 804. The purpose of the *McDonnell Douglas* framework is to aid plaintiffs in the elusive enterprise of proving discriminatory intent. *See* U.S. Postal Serv. v. Aikens, 460 U.S. 711, 716 (1983) (stating that "[t]here will seldom be 'eyewitness testimony' as to the employer's mental processes"). *But see* Linda Hamilton Krieger, *The Content of Our Categories: A Cognitive Bias Approach to Discrimination and*

sumption of this approach is that either the discriminatory reason or a nondiscriminatory reason—but not both—motivated the adverse employment action. In contrast to *McDonnell Douglas*, which applies to "single-motive" cases, *Price Waterhouse* applies to "mixed-motive" cases. Under the *Price Waterhouse* approach, a plaintiff prevails if he can prove that discriminatory intent was a motivating factor leading to the adverse employment action.[4] Once the plaintiff meets this burden, the defendant may avoid having to pay damages by establishing a partial affirmative defense: the defendant must show that it would have taken the adverse action based on the nondiscriminatory reason alone.[5] Thus, these approaches differ on who bears the burden of proving or disproving the defendant's nondiscriminatory justification for the challenged decision: under *McDonnell Douglas* the plaintiff must disprove the defendant's alleged nondiscriminatory reason,[6] while under *Price Waterhouse* the defendant must prove that its alleged nondiscriminatory reason was a determinative cause for the adverse employment decision.[7]

It has never been clear whether one or the other of these two approaches applies to a given disparate treatment case. Justice O'Connor suggested, in her influential concurring opinion in *Price Waterhouse*, that *Price Waterhouse* applies only when the plaintiff offers direct evidence of discrimination.[8] An offer of direct rather than circumstantial evidence, Justice O'Connor argued, earned the plaintiff the right to shift the burden of persuasion, forcing the defendant to establish the partial affirmative defense.[9] This view implies that

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Equal Employment Opportunity, 47 STAN. L. REV. 1161, 1206-07 (1995) (arguing that disparate treatment theory, in searching for the defendant's motivation, misses the critical point that most discriminatory conduct results from cognitive processes that are unconscious).

4. Section 107 of the Civil Rights Act of 1991 provides: "Except as otherwise provided in this subchapter, an unlawful employment practice is established when the complaining party demonstrates that race, color, religion, sex, or national origin was a motivating factor for any employment practice, even though other factors also motivated the practice." 42 U.S.C. § 2000e-2(m) (2000); *see also Price Waterhouse*, 490 U.S. at 258. Section 107 of the Civil Rights Act is codified at 42 U.S.C. § 2000e-2(m). This Article will refer to the provisions interchangeably.

5. The Civil Rights Act of 1991 provides:

> On a claim in which an individual proves a violation under section 2000e-2(m) of this title and a respondent demonstrates that the respondent would have taken the same action in the absence of the impermissible motivating factor, the court— (i) may grant declaratory relief, injunctive relief (except as provided in clause (ii)), and attorney's fees and costs demonstrated to be directly attributable only to the pursuit of a claim under section 2000e-2(m) of this title; and (ii) shall not award damages or issue an order requiring any admission, reinstatement, hiring, promotion, or payment, described in subparagraph (A).

42 U.S.C. § 2000e-5(g)(2)(B) (2000); *see also Price Waterhouse*, 490 U.S. at 258.

6. *See supra* note 3 and accompanying text.

7. *See Price Waterhouse*, 490 U.S. at 244-45.

8. *Id.* at 276 (O'Connor, J., concurring in the judgment).

9. *See id.*

when the plaintiff relies on mere circumstantial evidence the *McDonnell Douglas* framework applies and the plaintiff does not receive the benefit of shifting the burden of persuasion to the defendant. Although most circuit courts followed Justice O'Connor's prescription, they took conflicting positions of what constitutes "direct evidence" of discrimination.[10] This disagreement led to a fractured body of discrimination law.

In *Desert Palace, Inc. v. Costa*,[11] the Supreme Court resolved this issue, holding that any evidence, whether direct or circumstantial, may meet the motivating factor test of *Price Waterhouse*.[12] To shift the burden of persuasion to the defendant, the plaintiff must prove, by any available evidence, that discriminatory intent was a motivating factor contributing to the adverse employment decision.[13] Unfortunately, the *Costa* Court did not even mention *McDonnell Douglas*, leaving judges and scholars to speculate about the fate of the three-step, burden-shifting framework.[14]

This Article argues that, by gobbling up circumstantial cases, *Costa* has left little for *McDonnell Douglas*. *Costa* permits the use of any evidence to meet the motivating factor test. Such evidence may be proof that the defendant's explanation for its conduct was a pretext for discrimination. Proving that the defendant's explanation was a pretext for discrimination, however, has always been the province of the *McDonnell Douglas* framework. The only meaningful element of *McDonnell Douglas*, after *Costa*, is that a plaintiff invoking *McDonnell Douglas* forces the defendant to articulate a nondiscriminatory explanation for its conduct. Absent *McDonnell Douglas*, the defendant is under no such obligation. This element, however, is not highly significant because in the vast majority of cases defendants will choose as a matter of tactical necessity to offer a nondiscriminatory explanation. By failing to present the factfinder with a justification for its conduct, a defendant forfeits the partial affirmative defense under *Price Waterhouse*. Moreover, a defendant who fails to offer such a justification risks that the jury will infer that the defendant does not have one.

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10. *See infra* notes 98-123 and accompanying text (discussing the various positions on how the circuit courts defined direct evidence).

11. 123 S. Ct. 2148 (2003).

12. This Article does not address whether *Costa* or the mixed-motive analysis apply to discrimination cases brought under statutes other than Title VII. *See* Bolander v. BP Oil Co., 2003 WL 22060351, at *3 (N.D. Ohio Aug. 6, 2003) (holding that *Costa* and the mixed-motive analysis do not apply to cases arising under the Age Discrimination in Employment Act (ADEA)). *But see* Lightfoot v. Union Carbide Corp., 110 F.3d 898, 913 (2d Cir. 1997) (applying the mixed-motive analysis in an action arising under the Age Discrimination in Employment Act).

13. *See Costa*, 123 S. Ct. at 2154-55.

14. *See infra* notes 176-87 and accompanying text (discussing various judicial views of the viability of *McDonnell Douglas* after *Costa*).

The marginal benefit of *McDonnell Douglas*—forcing the defendant to articulate an explanation for the challenged employment action—does not justify the continued existence of the *McDonnell Douglas* framework. *McDonnell Douglas*, as originally adopted by the Supreme Court in 1973, provided civil rights plaintiffs with a potent means for establishing discriminatory intent. By disproving the defendant's articulated nondiscriminatory reason, the plaintiff was entitled to judgment. Though somewhat Byzantine with its complex allocations of burdens of proof, the framework was arguably justified as initially conceived because it established an inferential method for proving discrimination. Later decisions, culminating in *Costa*, however, have so thoroughly eroded this formulation that it no longer serves any meaningful purpose. Even before *Costa*, the Supreme Court held in *St. Mary's Honor Center v. Hicks* that if a civil rights plaintiff disproved the defendant's articulated reason, the jury, in its discretion, might or might not find for the plaintiff.[15] In *Reeves v. Sanderson Plumbing Products, Inc.*, the Court went even further by holding that in some cases a judge might rule for the defendant even when the plaintiff disproved the defendant's articulated nondiscriminatory reason but had no additional evidence of discriminatory intent.[16] Reduced to an empty formality, the *McDonnell Douglas* framework should therefore be abandoned and replaced by *Price Waterhouse* as modified by the Civil Rights Act of 1991 and as explained by *Costa*.

Part II of this Article discusses the history and current state of the *McDonnell Douglas* approach, and shows how *Hicks* and *Reeves* robbed the approach of its vitality. This Part also highlights confusion that the *McDonnell Douglas* approach has spawned because of its inadequacies and complexities. Next, this Part discusses *Price Waterhouse*, revealing the conflicts caused by simultaneously characterizing the *Price Waterhouse* framework as applying to mixed-motive cases and direct-evidence cases. This Part goes on to discuss the federal judiciary's contradictory interpretations of "direct evidence" within the meaning of *Price Waterhouse*.

Part III analyzes the *Costa* decision and then examines its implications. First, *Costa* removed the trap set by the interplay of *Price Waterhouse* and *McDonnell Douglas*: some civil rights plaintiffs with strong circumstantial cases could meet neither the *McDonnell Douglas* pretext standard, nor the *Price Waterhouse* direct-evidence standard. Second, by accepting circumstantial evidence to support the motivating factor test, *Costa* marginalized the role of *McDonnell*

15. 509 U.S. 502, 511 (1993).
16. 530 U.S. 133, 148 (2000).

Douglas. Part III concludes with an analysis of lower court decisions interpreting *Costa*.

Part IV discusses § 2000e-2(m) of the Civil Rights Act of 1991, the section codifying the motivating factor test.[17] Next, Part IV shows how *Hazen Paper Co. v. Biggins*[18] has hindered many from understanding the universal causation requirement of individual disparate treatment law: the motivating factor standard. Although some believe that *McDonnell Douglas* requires a heightened level of causation, proof of pretext is merely circumstantial evidence that discrimination motivated the employer's decision, rather than proof that discrimination was the but-for cause of that decision. Part IV then explores several proposals to unify individual disparate treatment law, and ultimately suggests that Congress should clarify that the motivating factor test is universally applicable to individual disparate treatment cases. Congress should abandon the *McDonnell Douglas* framework and declare that the *Price Waterhouse* approach governs all individual disparate treatment cases. Such congressional action would rid the law of *McDonnell Douglas*' pointless complexities and its inappropriate one-size-fits-all formalism. In its place, a sensible and serviceable unitary framework would emerge.

II. INDIVIDUAL DISPARATE TREATMENT LAW BEFORE *COSTA*

Two approaches govern individual disparate treatment law: the *McDonnell Douglas* approach and the *Price Waterhouse* approach. Not only have both approaches undergone striking metamorphoses, but also courts have been unable to join the two approaches into a comprehensive and intelligible framework.

A. The Rise and Fall of McDonnell Douglas

In *McDonnell Douglas*, the Supreme Court confronted a typical discrimination case. The evidence of discriminatory motive rested on inference rather than on concrete evidence. As part of a reduction in force, McDonnell Douglas laid off Green, a mechanic and laboratory technician who had worked for the company for eight years.[19] After being laid off, Green, a long time civil rights activist, participated in a "stall-in," a concerted action that blocked the access roads to

17. Section 107 of the Civil Rights Act of 1991 codified the motivating factor test of *Price Waterhouse* and converted the same-decision affirmative defense of *Price Waterhouse* into a partial defense limiting available remedies. 42 U.S.C. §§ 2000e-2(m), 2000e-(g)(2)(b) (2000). For the sake of convenience, this Article will refer to cases governed by section 107 as "*Price Waterhouse* cases" and refers to the law governing such cases as the "*Price Waterhouse* approach."

18. 507 U.S. 604 (1993).

19. McDonnell Douglas v. Green, 411 U.S. 792, 794 (1973).

McDonnell Douglas' plant.[20] The police arrested Green for obstructing traffic.[21] When Green applied for an available mechanic's position, McDonnell Douglas rejected him ostensibly because of his anti-company activities.[22] Alleging racial discrimination, Green sued McDonnell Douglas under Title VII of the 1964 Civil Rights Act.[23] The Supreme Court granted certiorari, not so much because it was interested in the particular facts of the case, but rather, because the case presented the Court with an opportunity to create a framework for allocating the burdens of proof in employment discrimination cases.[24]

One might wonder why the Court felt obliged to engage in such an endeavor. Subtle discrimination cases such as *McDonnell Douglas* had dogged the judiciary because of the elusiveness of proving or disproving discriminatory intent. Unlike most other types of cases, discrimination suits often rest on a thin evidentiary base. By way of contrast, in a breach of contract case written documents frequently provide an evidentiary record of relevant transactions. In auto accident cases, forensic evidence and eyewitness accounts may resolve contested issues of fact. But many discrimination cases depend on revealing shadowy motives that no one would publicly articulate or be foolish enough to memorialize. To prove a case often requires the plaintiff to reveal the defendant's secret thoughts. *McDonnell Douglas* was such a case. Green offered no evidence of racial slurs, nor had he discovered any incriminating documents.[25] The mere fact that he was qualified as a mechanic and rejected for the position was not and should not have been sufficient to make his case of racial discrimination. Nevertheless, Green may have been right. Those who discriminate do not trumpet their intent.

To establish a framework to simplify the thorny issue of proving discriminatory intent, the Court created a three-step, burden-shifting approach. The plaintiff, at step one, must prove a prima facie case by a preponderance of the evidence.[26] A prima facie showing, in a refusal-to-hire case, has four elements: (1) the plaintiff was in a protected class, (2) the plaintiff was qualified for a job and applied for it,

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20. *Id.* at 794.

21. *Id.* at 795. A highly organized action, the stall-in involved five teams of four cars, which blocked five main access roads to the plant. The drivers turned off their engines, engaged the emergency brakes, and waited until the police arrived. *Id.* at 794. ACTION, a civil rights organization, conducted a "lock-in," which involved padlocking the front door of an office building where a number of company employees worked. *Id.* at 795 n.3. Trial testimony conflicted over whether Green cooperated in or authorized the "lock-in." *Id.*

22. *Id.* at 796.

23. *Id.*

24. *See id.* at 798.

25. *See generally id.* at 792-807.

26. *Id.* at 802.

(3) the defendant rejected him, and (4) the position remained open and the employer continued to seek applicants with plaintiff's qualifications.[27] As the Supreme Court later explained in *Burdine*, the prima facie case forces the plaintiff to eliminate the most common nondiscriminatory reasons that a defendant might articulate to justify an adverse employment action.[28] Establishing a prima facie case creates a presumption of discrimination.[29] Once the plaintiff has proven a prima facie case, the defendant, at step two, must articulate one or more nondiscriminatory reasons for the refusal to hire.[30] The step-two burden is merely one of production, not persuasion.[31] The defendant's failure to meet this minimal burden results in judgment for the plaintiff,[32] but by articulating a nondiscriminatory reason for its action, the defendant rebuts the presumption of discrimination. The purpose of requiring the defendant to articulate a nondiscriminatory reason is to sharpen the focus on the ultimate issue, which is discriminatory intent.[33] Thus, once the defendant has met this burden of production, "the factual inquiry proceeds to a new level of specificity."[34] At step three, the plaintiff "must . . . be afforded a fair opportunity to show that [defendant's] stated reason for [plaintiff's] rejection was in fact pretext."[35] This burden, the *Burdine* Court ex-

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27. *Id.* The Court noted that, in varying factual contexts, the elements of a prima facie case will differ. *Id.* at n.14. It makes no sense, for example, to require a plaintiff to show he was rejected for a job in a wrongful termination case.

28. Tex. Dep't of Cmty. Affairs v. Burdine, 450 U.S. 248, 253-54 (1981).

29. *Id.* at 254.

30. *McDonnell Douglas*, 411 U.S. at 802. McDonnell Douglas assigned as its step-two reason for rejecting Green his participation in unlawful conduct directed against the company. *Id.* at 803. The Court held that the company had thereby met its burden of production. *Id.* The Eighth Circuit intimated that McDonnell Douglas' articulated reason carried little weight because it was subjective rather than objective. *Id.* The Supreme Court rejected the circuit court's position, reasoning that Title VII does not obligate an employer to hire a worker who had engaged in illegal conduct directed against it. *Id.*

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

32. *Id.*

33. *Id.* at 255 n.8.

34. *Id.* at 255.

35. *McDonnell Douglas*, 411 U.S. at 804; s*ee also Burdine*, 450 U.S. at 255-56 (holding that placing the burden of production on the defendant serves "to frame the factual issue with sufficient clarity so that the plaintiff will have a full and fair opportunity to demonstrate pretext"). The Court summarized plaintiff's burden at step three as follows: "In short, on the retrial respondent must be given a full and fair opportunity to demonstrate by competent evidence that the presumptively valid reasons for his rejection were in fact a coverup for a racially discriminatory decision." *McDonnell Douglas*, 411 U.S. at 805. In addition, the Court explained the legal consequences that would result from plaintiff's ability or inability to prove pretext:

> On retrial, respondent must be afforded a fair opportunity to demonstrate that petitioner's assigned reason for refusing to re-employ was a pretext or discriminatory in its application. If the District Judge so finds, he must order a prompt and appropriate remedy. In the absence of such a finding, petitioner's refusal to rehire must stand.

Id. at 807.

plained, "merges with the ultimate burden of persuading the court that [plaintiff] has been the victim of intentional discrimination."[36] A plaintiff "may succeed in this either directly by persuading the court that a discriminatory reason more likely motivated the employer or indirectly by showing that the employer's proffered explanation is unworthy of credence."[37]

The *McDonnell Douglas* Court provided Green with detailed guidance as to how, on remand, he might show pretext. First, Green could offer evidence that the company retained or rehired white employees who had engaged in misconduct comparable to Green's unlawful acts.[38] Green might also offer evidence of (1) how the company treated him before laying him off, (2) the company's reactions to any legitimate civil rights activities in which Green engaged, and (3) the company's general policies and practices regarding minority employment.[39] In addition, statistical evidence of a pattern of racial discrimination would support Green's pretext argument.[40]

The meaning of *McDonnell Douglas*, as explained by *Burdine*, is unmistakable. If the plaintiff can disprove the defendant's articulated reasons, the factfinder must conclude that the defendant discriminated. This deduction follows from two premises: employers do

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

37. *Id.*

38. *McDonnell Douglas*, 411 U.S. at 804.

39. *Id.* at 804-05. It is hard to see how the company's hiring policies and practices were relevant to proving pretext as opposed to proving discriminatory intent through the use of any circumstantial evidence of discrimination. Perhaps, the Court was indicating that circumstantial proof of discrimination unrelated to the enterprise of disproving the defendant's explanation might assist the plaintiff in proving pretext. In *Manzer v. Diamond Shamrock Chemicals Co.*, the Sixth Circuit followed this line of thought, holding that a plaintiff may prove pretext by the sheer weight of circumstantial evidence. 29 F.3d 1078, 1084 (6th Cir. 1994). But if pretext can be proven by any circumstantial evidence of discrimination, then the Court has undermined its insistence that the plaintiff prove pretext at all. In other words, we are left with a standard that accepts any evidence of discrimination, including evidence of pretext, but does not require any particular showing. In essence, proving pretext as opposed to proving discrimination through circumstantial evidence becomes optional. Such a conclusion would make sense if the Court meant that the plaintiff, without proving pretext, could establish a case. The Court did state, after all, that the plaintiff had two strategies: to prove discrimination *directly* or to prove discrimination *indirectly* by the pretext method. *Burdine*, 450 U.S. at 256. But this explanation does not seem to work because the Court stated in *McDonnell Douglas* that evidence of a company's policies and practices was relevant to proving *pretext*. *McDonnell Douglas*, 411 U.S. at 804-05. All this analysis may simply point out that the Court, not wanting to delimit Green's ability to prove his case, was a tad sloppy in how it conceptualized and expressed what the plaintiff had to prove to show pretext.

40. *McDonnell Douglas*, 411 U.S. at 805. The Court cautioned that statistics showing underrepresentation of blacks in McDonnell Douglas' workforce, though relevant to Green's case, would not alone prove discrimination against Green because Green's case depended on whether he had individually suffered discrimination. *See id.* at 805 n.19. Similar to evidence of the company's practices, such evidence would not seem to bear on the issue of pretext.

not act arbitrarily,[41] and if an employer has a persuasive explanation for the adverse employment action, he will assert it.[42] Thus, if the plaintiff disproves the employer's articulated justification for its action, it is more likely than not that discrimination motivated that action.[43]

The *McDonnell Douglas* framework simplified the plaintiff's task of proving racial discrimination by requiring the defendant to focus the issue. A plaintiff, who might otherwise flounder trying to come up with facts to support his case, will prevail by disproving the defendant's articulated reason. *McDonnell Douglas* created the presumption that such disproof demonstrates that the defendant's articulated reason is a pretext for discrimination. Although one may disagree with the wisdom of this approach, it is undeniably ingenious. *McDonnell Douglas* tamed an otherwise intractable issue.

Twenty years after *McDonnell Douglas* and more than a decade after *Burdine*, a more conservative Supreme Court dulled the impact of *McDonnell Douglas*. In *St. Mary's Honor Center v. Hicks*,[44] the Supreme Court, while insisting that it was reaffirming *McDonnell Douglas*, eviscerated it.[45] Initially a correctional officer in a halfway

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41. *See* Furnco Constr. Corp. v. Waters, 438 U.S. 567, 577 (1978) (noting that employers generally make decisions "with *some* reason").

42. *See* Reeves v. Sanderson Plumbing Prods., Inc., 530 U.S. 133, 147 (2000) (explaining that the employer is in the best position to put forth the actual reason for its action).

43. *See Waters*, 438 U.S. at 577 (observing that "when 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 . . . based his decision on an impermissible consideration such as race").

44. 509 U.S. 502 (1993).

45. The Court protested its fidelity to *McDonnell Douglas*: "We may, according to traditional practice, establish certain modes and orders of proof, including an initial rebuttable presumption of the sort we described earlier in this opinion, which we believe *McDonnell Douglas* represents." *Id.* at 514. It similarly claimed to embrace *Burdine*: "The principal case on which the dissent relies is *Burdine*. While there are some statements . . . that could be read to support the dissent's position, all but one of them bear a meaning consistent with our interpretation, and the one exception is simply incompatible with other language in the case." *Id.* at 515. The *Hicks* decision, however, clashes with the unambiguous holdings of both precedents. As Justice Souter demonstrated in an incisive dissenting opinion,

> after two decades of stable law in this Court and only relatively recent disruption in some of the Circuits, the Court abandons this practical framework together with its central purpose, which is "to sharpen the inquiry into the elusive factual question of intentional discrimination." Ignoring language to the contrary in both *McDonnell Douglas* and *Burdine*, the Court holds that, once a Title VII plaintiff succeeds in showing at trial that the defendant has come forward with pretextual reasons for its actions . . . the factfinder still may proceed to roam the record, searching for some nondiscriminatory explanation that the defendant has not raised and that the plaintiff has had no fair opportunity to disprove.

Id. at 525 (Souter, J., dissenting) (quoting Tex. Dep't of Cmty. Affairs v. Burdine, 450 U.S. 248, 255 n.8 (1981)) (citations omitted).

house, Melvin Hicks had earned a promotion to shift commander.[46] His troubles began when he was assigned a new supervisor.[47] Escalating disciplinary action culminated in Hicks' dismissal.[48] In response to his discharge, Hicks brought a Title VII claim for racial discrimination.[49] Although he disproved the two reasons that St. Mary's had articulated at step two, namely the frequency and severity of his insubordination, the district court judge, acting as the trier of fact, ruled against him, concluding that personal animosity, rather than racial prejudice, accounted for the dismissal.[50] The Eighth Circuit reversed, reasoning correctly that, under *McDonnell Douglas*, Hicks, having disproved both step-two reasons, was entitled to judgment.[51]

A conservative majority of Supreme Court justices disagreed with the circuit court, ruling that even if a plaintiff disproves the defendant's articulated nondiscriminatory reasons, the plaintiff might nevertheless lose the case. This newly minted reformulation of *McDonnell Douglas* instructed that by disproving the defendant's articulated reasons a plaintiff merely creates an issue of fact, not entitlement to judgment as a matter of law.[52] If this was all *McDonnell Douglas* stood for, it was hardly worth the time and effort expended to create the baroque three-tiered framework.

Hicks also held that any reason in the record for the adverse employment action, even if not specifically articulated as a step-two reason, was proper for jury consideration. In *Hicks*, as noted, defendant St. Mary's step-two reasons were the accumulation and seriousness of Hicks' insubordinate conduct.[53] Yet the judge found that personal animosity rather than racial bigotry had incited Hicks' supervisor to fire him.[54] Thus, as Justice Souter pointed out in his dissent, even if the plaintiff disproves the step-two reason articulated by the defen-

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46. *Id.* at 504.
47. *Id.* at 505-06.
48. *Id.*
49. *Id.*
50. *Id.* at 508.
51. *Id.*
52. *See* Mark S. Brodin, *The Demise of Circumstantial Proof in Employment Discrimination Litigation:* St. Mary's Honor Center v. Hicks, *Pretext, and the "Personality" Excuse*, 18 BERKELEY J. EMP. & LAB. L. 183, 229 (1997) (reading *Hicks* as contradicting *McDonnell Douglas* by abandoning the proposition that proving pretext necessarily proves discrimination); Henry L. Chambers, Jr., *Getting It Right: Uncertainty and Error in the New Disparate Treatment Paradigm*, 60 ALB. L. REV. 1, 40 (1996) (recognizing that *Hicks*' "elimination of proof of falsity as proof of discrimination has rewritten the *McDonnell Douglas* test and lowered an employee's likelihood of success"); Michael C. Phillips, Note, St. Mary's Honor Center v. Hicks: *The Casual Abandonment of Title VII Precedent*, 23 CAP. U. L. REV. 1045, 1065 (1994) (rebuking the *Hicks* Court for engaging in "disingenuous" reasoning).
53. *Hicks*, 509 U.S. at 505-06.
54. *Id.* at 508.

dant, the factfinder may nevertheless seize upon a reason "lurking in the record" to blindside an unsuspecting plaintiff.[55]

After *Hicks*, one wonders what purpose *McDonnell Douglas* serves. By remolding the framework into ineffectuality, *Hicks* has thwarted the original purpose of the framework: to simplify the task of proving discriminatory intent.[56] Despite the Supreme Court's solemn assurances that *Hicks* merely affirmed *McDonnell Douglas*, the two cases clash irrevocably.[57] The Court's devotion to stare decisis and the climate of racial politics probably account for the masquerade.

The deconstruction of *McDonnell Douglas* pressed on. In *Reeves v. Sanderson Plumbing Products, Inc.*,[58] the Supreme Court further weakened *McDonnell Douglas*, holding that, even if the plaintiff carries the burden of disproving the step-two reason, the *defendant* may in some cases be entitled to judgment as a matter of law.[59] In reach-

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55. *Id.* at 534-35 (Souter, J., dissenting). Justice Souter observed:

> [U]nder the majority's scheme, a victim of discrimination lacking direct evidence will now be saddled with the tremendous disadvantage of having to confront, not the defined task of proving the employer's stated reasons to be false, but the amorphous requirement of disproving all possible nondiscriminatory reasons that a factfinder might find lurking in the record.

Id. Justice Scalia, writing for the majority, responded to this argument by noting that the articulated reasons do not exist "*apart from the record*—in some pleading, or perhaps in some formal, nontestimonial statement made on behalf of the defendant to the factfinder." *Id.* at 522. The articulated reasons "*themselves* are to be found 'lurking in the record.'" *Id.* at 523. The question is, however, whether the factfinder should be permitted to infer step-two reasons, though the defendant has not at trial articulated them as such. The majority held that the factfinder may do so. *See id.* at 523-24; *see also* 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, 419-20 (1994) (concluding that Justice Scalia offered an unsatisfactory response to the dissent's lurking-in-the-record argument, but that, as a practical matter, juries will most likely consider only reasons explicitly articulated).

56. *See* Deborah A. Calloway, St. Mary's Honor Center v. Hicks: *Questioning the Basic Assumption*, 26 CONN. L. REV. 997, 1003 (1994) (commenting that *Hicks* questions the assumption of *Burdine* that discrimination is "more likely than not" the explanation for an adverse employment action absent an alternative explanation).

57. *See* Shannon R. Joseph, Note, *Employment Discrimination: Shouldering the Burden of Proof After* St. Mary's Honor Center v. Hicks, 29 WAKE FOREST L. REV. 963, 986-87 (1994) (criticizing *Hicks* for twisting the language of *Burdine*, abandoning the position of *McDonnell Douglas* that a plaintiff is entitled to judgment if he disproves the defendant's articulated reason, and replacing that view with the more difficult to prove position that a plaintiff may be required to produce additional evidence of discrimination).

58. 530 U.S. 133 (2000).

59. *Id.* at 148. Justice O'Connor, writing for a unanimous Court, asserted that the combination of proving a prima facie case and disproving the articulated step-two reason might be insufficient to create a question of fact on the ultimate issue of discrimination. She stated:

> This is not to say that such a showing by the plaintiff will *always* be adequate to sustain a jury's finding of liability. Certainly there will be instances where, although the plaintiff has established a prima facie case and set forth sufficient evidence to reject the defendant's explanation, no rational factfinder could conclude that the action was discriminatory. For instance, an employer would be

ing this holding, the Court had traveled quite a distance from its initial position in *McDonnell Douglas*, which held that if plaintiff disproved the step-two reason, plaintiff, not defendant, was categorically entitled to judgment.[60] *McDonnell Douglas* has dwindled to a useless ritual.[61]

B. Price Waterhouse v. Hopkins

By focusing the inquiry on the plaintiff's ability to prove that the defendant's articulated reason was a pretext, *McDonnell Douglas* provided a framework for single-motive cases. This framework founders, however, when both a discriminatory and nondiscriminatory reason have influenced the adverse employment action. *Price Waterhouse* attempted to supply the missing analytical link.

> entitled to judgment as a matter of law if the record conclusively revealed some other, nondiscriminatory reason for the employer's decision, or if the plaintiff created only a weak issue of fact as to whether the employer's reason was untrue and there was abundant and uncontroverted independent evidence that no discrimination had occurred.

Id. The first possibility that Justice O'Connor mentions contradicts the majority's position in *Hicks*, which held that all reasons implied in the record are articulated step-two reasons. *See Hicks*, 509 U.S. at 522-23. In sharp contrast, the *Reeves* Court contemplated a circumstance where "some other nondiscriminatory reason" might win a case for a defendant. *Reeves*, 530 U.S. at 148. This pronouncement of the Court vindicates Justice Souter's point in his dissent in *Hicks*—that unarticulated reasons "lurking in the record" might scuttle an otherwise meritorious discrimination case. *Hicks*, 509 U.S. at 534-35. The second possibility that Justice O'Connor mentions might arise if an employer's true reason for the adverse action was embarrassing or even illegal but not discriminatory. Assume, for example, that a black-owned construction company fired a union organizer who happened to be black. Loathe to admit a violation of the National Labor Relations Act, the employer might fabricate a step-two reason, which the plaintiff might easily debunk. If the black-owned company had an exemplary record of hiring African-Americans, and had even adopted a voluntary affirmative action plan, a rational factfinder would be hard pressed to determine that the employer discriminated on the basis of race. Admittedly, such a case would be quite unusual. In the same vein, Justice Ginsburg noted, in a concurring opinion in *Reeves*, that "circumstances will be uncommon" for a plaintiff, having disproved the step-two reason, to be vulnerable to judgment as a matter of law. *Reeves*, 530 U.S. at 154-55 (Ginsburg, J., concurring). She urged that when the plaintiff disproves the step-two reason, a finding of discrimination would ordinarily be a reasonable inference thereby rendering judgment as a matter of law inappropriate. *Id.*

60. The Supreme Court further limited *McDonnell Douglas* by holding that it does not establish a pleading standard, but rather creates an evidentiary standard for allocating burdens of proof. In *Swierkiewicz v. Sorema, N.A.*, 534 U.S. 506, 511 (2002), the Court declared that complaints alleging individual disparate treatment must conform merely to the notice pleading standard prescribed in Rule 8 of the Federal Rules of Civil Procedure.

61. The same analysis applies to the fourth element of a refusal-to-hire prima facie case—that after plaintiff's rejection, the position remained open and the employer continued to seek applications from persons of plaintiff's qualification. McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973).

1. The Plurality Decision

Ann Hopkins, a senior manager at the Price Waterhouse accounting firm, applied for partnership.[62] Among her qualifications for promotion was the key role she played in securing a multimillion-dollar contract.[63] Both clients and partners of the firm described her as a professional with integrity, industriousness, and intelligence.[64] Nevertheless, the firm's Policy Board put her application on hold and refused to reconsider her application the following year.[65] She responded by filing a claim for sex discrimination.[66] In a bench trial, Judge Gesell found that abrasiveness with staff, an aspect of her behavior conceded even by her supporters, damaged her bid for partnership.[67] Judge Gesell also found, however, that sexual stereotyping influenced the firm's decision to deny her partnership.[68] "One partner described her as 'macho'; another suggested that she 'overcompensated for being a woman'; a third advised her to take 'a course at charm school.'"[69] Most critically, Thomas Beyer, the partner who explained to Hopkins why the Policy Board had shelved her candidacy for partnership, told her that she should "walk more femininely, talk more femininely, dress more femininely, wear make-up, have her hair styled, and wear jewelry."[70]

Given this combination of discriminatory and nondiscriminatory motives, a plurality of the Supreme Court held the *McDonnell Douglas* framework inappropriate to decide Hopkins' case.[71] *McDonnell Douglas*, the plurality observed, operated under the assumption that either the discriminatory reason or the nondiscriminatory reason, but not both, caused the adverse employment action.[72] The plaintiff's principal task under *McDonnell Douglas*—to prove pretext—could not apply in a mixed-motives case.[73] Such a case required a new regime.

The *Price Waterhouse* plurality prescribed the applicable standard. First, the plaintiff must prove that discrimination was a moti-

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62. Price Waterhouse v. Hopkins, 490 U.S. 228, 231 (1989), *superseded by statute as stated in* Landgraf v. USI Film Prods., 511 U.S. 244 (1994).

63. *Id.* at 233-34.

64. *Id.* at 234. Among Hopkins' qualifications for partnership was a twenty-five million dollar contract she secured with the Department of State. *Id.* at 233-34.

65. *Id.* at 231-32.

66. *Id.* at 232.

67. *Id.* at 234-35.

68. *Id.* at 235-37.

69. *Id.* at 235.

70. *Id.* Judge Gesell found that, in previous years, female candidates for partnership fared better if the decision-making partners viewed the candidates as both feminine and effective. *Id.* at 236.

71. *Id.* at 243-47.

72. *Id.*

73. *Id.* at 247.

vating factor for the adverse employment action.[74] Once the plaintiff meets this burden, the burden of persuasion shifts to the defendant to prove by a preponderance of evidence that it would have taken the adverse action based on the nondiscriminatory reason alone.[75] In other words, if one excludes the effects of discrimination, the nondiscriminatory reason would nevertheless have caused the adverse action. By proving this so-called "same-decision" defense, the defendant escapes liability.[76]

Congress, however, modified the *Price Waterhouse* holding. The Civil Rights Act of 1991 provides that once the plaintiff meets the motivating-factor test, the plaintiff wins.[77] Congress transformed the "same-decision" defense into a means of limiting the range of available remedies to declaratory relief, certain forms of injunctive relief, costs, and attorney's fees.[78] This statutory "partial defense" precludes damages, back pay, and reinstatement.[79]

(a) Mixed-Motive Cases

The *Price Waterhouse* approach applies to mixed-motive cases, that is, where, in addition to the discriminatory motive, a nondiscriminatory motive may also have caused the employment action.[80] The term "mixed-motive" is misleading, however, because the employer may fail to prove that a nondiscriminatory reason had any influence at all on the adverse employment action. The point is that when the plaintiff meets the motivating-factor test and thereby becomes entitled to judgment, the employer has the opportunity to meet the mixed-motive partial defense. The partial affirmative defense is not available when *McDonnell Douglas* applies because application of the partial defense under such circumstances would make no sense. Under *McDonnell Douglas*, a plaintiff can prevail only if he disproves the defendant's nondiscriminatory reason.[81] If the plaintiff disproved the defendant's reason, then the defendant could never prove by a preponderance of evidence, under *Price Waterhouse*,

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74. *Id.* at 248-50.

75. *Id.* This is called the "same-decision" defense. Judge Gesell held that Price Waterhouse could avoid equitable relief by proving the "same-decision" defense by clear and convincing evidence. He found that Price Waterhouse failed to meet this burden. *Id.* at 237. Affirming the district court's ultimate conclusion, the D.C. Circuit ruled that if a defendant proves the "same-decision" defense by clear and convincing evidence, the defendant wins the case. *Id.*

76. *Id.* at 258.

77. 42 U.S.C. § 2000e-2(a)(1) (2000).

78. *Id.* § 2000e-5(g)(2)(B)(i).

79. *Id.* § 2000e-5(g)(2)(B)(ii).

80. *See Price Waterhouse*, 490 U.S. at 247.

81. McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973).

that it would have made the adverse employment decision based on the disproved reason alone.

There is, nevertheless, inevitable confusion between the two approaches because proof of pretext is circumstantial evidence that the defendant was motivated by discriminatory intent. The *Reeves* Court made this very point by stating that "[p]roof that the defendant's explanation is unworthy of credence is simply one form of circumstantial evidence that is probative of intentional discrimination, and it can be quite persuasive."[82] The *McDonnell Douglas* and *Price Waterhouse* approaches are therefore impossible to separate. Nevertheless, before *Hicks*, one could justify the existence of *McDonnell Douglas* because that approach entitled a plaintiff who disproved the defendant's explanation to win. *Hicks*, however, changed the *McDonnell Douglas* approach, rendering disproof of the defendant's explanation some, but not necessarily conclusive, evidence of discrimination.[83] This change blurred any meaningful distinction between *McDonnell Douglas* and *Price Waterhouse*.

In *Price Waterhouse*, Justice O'Connor wrote a concurring opinion offering her own formulation for how *Price Waterhouse* should operate. She suggested that *Price Waterhouse* applies when direct evidence proves that discrimination was a substantial factor leading to the adverse employment action.[84] Only such powerful evidence, Justice O'Connor reasoned, entitled the plaintiff to shift the burden of persuasion to the defendant to establish the same-decision defense.[85] Plaintiffs who rely on circumstantial evidence, as did Green in *McDonnell Douglas*, have not earned the right to shift the burden of persuasion to the defendant.[86]

Price Waterhouse established the motivating factor test, which the Civil Rights Act of 1991 codified.[87] Remarkably, however, Justice O'Connor's viewpoint concerning direct versus circumstantial evidence, though expressed in a concurring opinion, rose to predominance among the circuits. The rationale for adopting Justice O'Connor's position was that it provided the narrowest ground for the Court's decision.[88] Unfortunately, this analysis created even more

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82. Reeves v. Sanderson Plumbing Prods., Inc., 530 U.S. 133, 134 (2000); *see also* Smith v. Borough of Wilkinsburg, 147 F.3d 272, 280 (3d Cir. 1998) (holding that the district court judge erred by failing to instruct the jury that by disproving the employer's articulated reason the plaintiff has provided some evidence of discrimination); Fuentes v. Perskie, 32 F.3d 759, 763 (3d Cir. 1994) (noting that "the factfinder's rejection of the employer's proffered evidence [is] circumstantial evidence of unlawful discrimination").

83. St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502, 510-11 (1993).

84. *Price Waterhouse*, 490 U.S. at 276 (O'Connor, J., concurring).

85. *Id.*

86. *See id.* at 278.

87. 42 U.S.C. § 2000e-2(m) (2000).

88. *See* Marks v. United States, 430 U.S. 188, 193 (1977) (stating "[w]hen a fragmented Court decides a case and no single rationale explaining the result enjoys the assent

confusion. It is entirely possible for a case to be based on circumstantial evidence, and yet for the factfinder to conclude that both the discriminatory and nondiscriminatory reasons influenced the adverse employment action. For example, assume that a large company, which employs hundreds of workers, has never employed a single African-American despite having had many qualified African-American applicants. An African-American applies for a job opening at this company. The interviewer, who is the owner of the company, is inexplicably impatient and rude at the job interview, but he does not utter a racial remark. After the interview, he declares to his secretary, "I wouldn't hire that guy in a million years." When his secretary asks why not, he responds, "I'd better keep my mouth shut. I don't want to get myself into trouble." Ultimately, the job goes to a white applicant who is even more qualified than the African-American applicant. Under these facts, both the discriminatory reason and the nondiscriminatory reason (the stronger qualifications of the white applicant) appear creditable. One wonders in such a circumstantial, mixed-motive case whether *McDonnell Douglas* or *Price Waterhouse* applies.

Another criticism of Justice O'Connor's position is that circumstantial evidence may be as persuasive as direct evidence.[89] Assume the facts in the above hypothetical except that the African-American applicant was much more qualified for the job than the successful white applicant. Absent an explanation difficult to contemplate, such

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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)). In *Fernandes v. Costa Bros. Masonry, Inc.*, the First Circuit stated, "when the Supreme Court rules by means of a plurality opinion (as was true in *Price Waterhouse*), inferior courts should give effect to the narrowest ground upon which a majority of the Justices supporting the judgment would agree. The O'Connor concurrence fits this profile." 199 F.3d 572, 580 (1st Cir. 1999) (citation omitted), *overruled in part by* Desert Palace, Inc. v. Costa, 123 S. Ct. 2148 (2003). Other courts, however, have disagreed with the premise that Justice O'Connor's concurring opinion established the rule of *Price Waterhouse*. In *Thomas v. NFL Players Association*, the D.C. Circuit noted that "Justice O'Connor's concurrence was one of six votes supporting the Court's judgment (four Justices comprised the plurality, and Justice White filed a separate concurrence), so that it is far from clear that Justice O'Connor's opinion, in which no other Justice joined, should be taken as establishing binding precedent." 131 F.3d 198, 203 (D.C. Cir. 1997), *vacated in part*, 1998 WL 1988451 (D.C. Cir. Feb. 25, 1998); *see also* Tyler v. Bethlehem Steel Corp., 958 F.2d 1176, 1182-83 (2d Cir. 1992) (acknowledging that the narrowest ground supporting a plurality opinion establishes the law, but concluding that no other Justice concurred with Justice O'Connor's view and therefore that her direct-evidence position does not establish the Court's holding).

89. *See* Steven M. Tindall, Note, *Do as She Does, Not as She Says: The Shortcomings of Justice O'Connor's Direct Evidence Requirement in* Price Waterhouse v. Hopkins, 17 BERKELEY J. EMP. & LAB. L. 332, 367 (1996) (criticizing Justice O'Connor's direct-evidence formulation for turning on the type of evidence presented rather than on its probative value, and noting that statements of the decision-maker preceding the adverse decision coupled with a powerful statistical showing of discriminatory practices would not support a motivating-factor charge).

circumstantial proof of discrimination is overwhelming. In such a case, one would expect to be entitled to a *Price Waterhouse* jury instruction, though before *Costa* the prevailing view required the application of *McDonnell Douglas*.

(b) Pretext Cases

The plurality's analysis indicates that the *McDonnell Douglas* approach applies to pretext cases, that is, cases where only one reason, either discriminatory or nondiscriminatory, caused the adverse employment action. There is, however, language in *Burdine* that seems at first glance to permit a *McDonnell Douglas* plaintiff to prove discrimination by any available evidence, regardless of whether it bears on pretext. *Burdine* states that a plaintiff "may succeed . . . *either directly by persuading the court that a discriminatory reason more likely motivated the employer* or indirectly by showing that the employer's proffered explanation is unworthy of credence."[90] The italicized portion of the quotation suggests that proving pretext is only one method of attack under *McDonnell Douglas*. In other words, under *McDonnell Douglas*, plaintiffs may bypass the burden of proving pretext and rely instead on "direct" proof, however that term is defined. The problem is that this interpretation of *McDonnell Douglas* cannot co-exist with *Price Waterhouse*. When, in the words of *Burdine*, a plaintiff proceeds "directly by persuading the court that a discriminatory reason more likely motivated the employer,"[91] *Price Waterhouse* governs the case. The answer to this apparent contradiction is simply that *Price Waterhouse* rather than *McDonnell Douglas* applies. The Second Circuit in *Tyler v. Bethlehem Steel Corp.* recognized that "the direct method of proof contemplated by the last step of *Burdine* is the same as the plaintiff's initial burden under *Price Waterhouse*," and thus "[w]hen the more focused proof of discrimination is presented, the court need not go through the *McDonnell Douglas* analysis."[92]

Historical context explains why the Supreme Court stated in *Burdine* that a plaintiff might succeed directly by proving motivating factor. When the Supreme Court decided *Burdine*, *Price Waterhouse* was eight years in the future. The Court had not yet confronted a "mixed-motive" case, that is, a case where the plaintiff proved motivating factor without having to disprove the defendant's justification for the adverse employment action. The Court could not foreclose

90. Tex. Dep't of Cmty. Affairs v. Burdine, 450 U.S. 248, 256 (1981) (emphasis added).

91. *Id.*

92. 958 F.2d 1176, 1185 (2d Cir. 1992). The court went on to state, "the only difference is that under *Price Waterhouse*, the plaintiff begins by focusing on the alleged discrimination itself, while the *McDonnell Douglas-Burdine* plaintiff starts by focusing on his own qualifications and the employer's needs." *Id.*

civil rights plaintiffs from proving discrimination "directly"; that is, without resort to proof of pretext, because a plaintiff in a particular case might have other persuasive evidence of discrimination.[93] Thus, the Court kept that option open.

Eight years later, in *Price Waterhouse*, the Court attempted to explain, however confusingly, the framework for "mixed-motive" cases. Because the prevalent view required direct rather than circumstantial evidence to invoke *Price Waterhouse*, some courts allowed *McDonnell Douglas* plaintiffs to support their cases with any circumstantial evidence they had.[94] This permissive rule was understandable because *Price Waterhouse* plaintiffs could not use circumstantial evidence. Unless *McDonnell Douglas* permitted the use of such evidence, plaintiffs could not use it at all.

Costa, however, seems to clash with *Hicks*. *Costa* allows the use of circumstantial evidence in *Price Waterhouse* cases, and *Hicks* instructs that in some *McDonnell Douglas* cases the plaintiff will need circumstantial evidence beyond proof of pretext to carry the case. Thus, a plaintiff may offer circumstantial evidence of discrimination under both approaches. Separating the approaches becomes confounding.

One might attempt to reconcile *Hicks* and *Costa* in the following way: If a plaintiff has enough evidence, *excluding proof of pretext*, to meet the motivating factor test, *Price Waterhouse* applies. If, on the other hand, the plaintiff needs to prove pretext to meet the motivating factor test, *McDonnell Douglas* applies. When *McDonnell Douglas* applies, the plaintiff may use all available proof of discriminatory intent. Such additional evidence (beyond proof of pretext), however, could not be weighty enough to meet the motivating factor test because, if it did, *Price Waterhouse*, rather than *McDonnell Douglas*, would have applied in the first place. Thus, *McDonnell Douglas* operates as a fallback position for plaintiffs with weak circumstantial cases. The problem with this reconciliation is that proof of pretext is just as persuasive in proving motivating factor under the *Price Waterhouse* approach as it is under the *McDonnell Douglas* approach. Furthermore, it would be impossible to exclude proof of pretext from *Price Waterhouse* cases because the defendant, to establish the partial affirmative defense, would nearly always assert a nondiscrimina-

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93. *See Burdine*, 450 U.S. at 256. "Directly," as *Burdine* used the word, did not denote direct as opposed to circumstantial evidence, but indicated proof of discrimination not based on pretext. *See id.*

94. *See, e.g.*, Birkbeck v. Marvel Lighting Corp., 30 F.3d 507, 511-13 (4th Cir. 1994) (considering all circumstantial evidence in affirming the judgment as a matter of law for the defendant in an age discrimination case); Manzer v. Diamond Shamrock Chem. Co., 29 F.3d 1078, 1084 (6th Cir. 1994) (commenting that the sheer weight of circumstantial evidence may prove pretext). *But see infra* Part III.B.1 (discussing the direct-evidence/pretext trap, which doomed cases with substantial circumstantial evidence).

tory reason, which the plaintiff would try to rebut as a matter of tactical necessity. The two approaches inevitably spiral into each other. They cannot be separated.

There are additional problems with the above-suggested distinction between *Price Waterhouse* and *McDonnell Douglas*. Jurors often disagree on the persuasiveness of evidence. A rational factfinder might or might not find the evidence in a particular case sufficient to meet the motivating factor test.[95] For example, assume that an interviewer rejects a qualified woman for a managerial position, which goes to a man. The woman testifies that the interviewer said, "A woman can't manage men." The interviewer denies having made the remark. If the jury credits the woman's testimony, *Price Waterhouse* would surely apply. If the jury credits the interviewer's denial, *McDonnell Douglas* would apply. Furthermore, now that circumstantial evidence may trigger a *Price Waterhouse* charge, plaintiffs, who naturally prefer the burden-shifting benefit of a *Price Waterhouse* jury instruction, will inevitably offer numerous facts to bolster their quest to be entitled to one. Questions of fact, requiring jury consideration, will arise as to whether the totality of the plaintiff's evidence meets the motivating factor test.

In all such cases, the judge must instruct the jury in the alternative that *Price Waterhouse* applies if the jury finds the evidence sufficient to meet the motivating factor test (excluding disproof of the defendant's justification for the adverse employment action), and that *McDonnell Douglas* applies if the jury finds otherwise. As the Third Circuit recognized in *Armbruster v. Unisys Corp.*, "an employee may present his case under both theories and the district court must then decide whether one or both theories properly apply . . . prior to instructing the jury."[96] An alternative charge should make jurors trem-

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95. *See* Stephen W. Smith, *Title VII's National Anthem: Is There a Prima Facie Case for the Prima Facie Case?*, 12 LAB. LAW. 371, 388 (1997) (pointing out that, under the position that *Price Waterhouse* required direct evidence, the jury might disbelieve plaintiff's submission of direct evidence). In such cases, since it is impossible for a court to foretell how the jury will evaluate the evidence, it is likewise impossible for the court to choose between the propriety of a *McDonnell Douglas* or *Price Waterhouse* jury instruction. The same problem occurs even after *Costa* because a court cannot predict how a jury will assess circumstantial evidence that the plaintiff offers to meet the motivating factor test.

96. 32 F.3d 768, 781 n.17 (3d Cir. 1994). Professor Michael Zimmer reasons that a dual charge is inevitable in most cases. He argues:

> Once discovery is complete, the trial judge must decide whether there is evidence to support the *Price Waterhouse* approach, which applies whenever there is evidence that "both legitimate and illegitimate considerations played a part in the decision against" the plaintiff. If there is, then the "particular case involves mixed motives." Because in every *McDonnell Douglas* case there is the plaintiff's evidence that an illegitimate consideration was involved as well as the defendant's evidence of a nondiscriminatory reason for its action, it would seem that evidence of more than one motive is present in the record in every case. . . . With such evidence in the record, the case should be sent to the fact-

ble. *McDonnell Douglas* eludes easy understanding when presented all by itself. Warning that a *McDonnell Douglas* charge is "unduly confusing," the Third Circuit, in *Smith v. Borough of Wilkinsburg*, has taken the extraordinary position that district courts should refrain from giving such a jury instruction, although *McDonnell Douglas* is controlling law.[97] Coupling a *McDonnell Douglas* charge with a *Price Waterhouse* charge burdens lay jurors with levels of complexity more humanely inflicted on law professors who rejoice in unraveling legal conundrums.

2. Evidence Sufficient to Support a Price Waterhouse *Charge*

Before *Costa*, the circuit courts could not agree on precisely what sort of evidence sufficed as "direct" evidence. The circuit courts applied numerous analyses, classified loosely into three positions: the "classic" direct-evidence approach, the "animus plus" approach, and the "animus" approach.[98]

The classical approach purports to apply the traditional definition of direct evidence.[99] The traditional definition of direct evidence is

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> finder, first on the *Price Waterhouse* mixed-motives theory and then, if the jury does not find for the plaintiff on that approach, on the *McDonnell Douglas*/*Burdine* circumstantial evidence theory.

Michael J. Zimmer, *Chaos or Coherence: Individual Disparate Treatment Discrimination and the ADEA*, 51 MERCER L. REV. 693, 695-96 (2000) (quoting Price Waterhouse v. Hopkins, 490 U.S. 228, 247 n.12 (1989)); *see also* Ostrowski v. Atl. Mut. Ins. Cos., 968 F.2d 171, 185 (2d Cir. 1992) (holding that the trial judge should have provided the jury with both a pretext and mixed-motive instruction because the jury, as the trier of fact, might or might not have reasonably credited both the discriminatory and nondiscriminatory reasons for an alleged retaliatory employment action).

97. 147 F.3d 272, 280 n.4 (3d Cir. 1998).

98. *See generally* Fernandes v. Costa Bros. Masonry, Inc., 199 F.3d 572, 582 (1st Cir. 1999) (discussing the three direct-evidence standards and summarizing cases using each standard), *overruled in part by* Desert Palace, Inc. v. Costa, 123 S. Ct. 2148 (2003); Robert Belton, *Mixed-Motive Cases in Employment Discrimination Law Revisited: A Brief Updated View of the Swamp*, 51 MERCER L. REV. 651, 662-63 (2000); Christopher Y. Chen, Note, *Rethinking the Direct Evidence Requirement: A Suggested Approach in Analyzing Mixed-Motives Discrimination Claims*, 86 CORNELL L. REV. 899, 908-13 (2001); Joseph J. Ward, Note, *A Call for* Price Waterhouse II*: The Legacy of Justice O'Connor's Direct Evidence Requirement for Mixed-Motive Employment Discrimination Claims*, 61 ALB. L. REV. 627, 648-57 (1997). Adding to the confusion, the "animus plus" and "animus" approaches broaden the definition of "direct evidence" to include certain forms of what would ordinarily be considered circumstantial evidence.

99. Although coming close to the classical definition of direct evidence, the statements in *Price Waterhouse* required an inference of discrimination. Thomas Beyer, the partner who informed Hopkins that her application for partnership was put on hold, told her that her chances would improve if she walked, talked, and dressed more femininely. *See Price Waterhouse*, 490 U.S. at 235. To find discrimination, a trier of fact would have to infer that Beyer's statement accurately reflected the firm's decisionmaking process, a probable inference, but an inference nevertheless. Those courts adopting the classical position seem to follow this slight modification, which allows such an inference. *E.g.*, Weston-Smith v. Cooley Dickinson Hosp., Inc., 282 F.3d 60, 65 n.4 (1st Cir. 2002) (holding that direct evidence for purposes of *Price Waterhouse* means comments by a decisionmaker that demonstrate

evidence, which if believed, "proves a fact without inference or presumption."[100] Arguably, direct evidence cannot exist in discrimination cases because such cases require inferring the defendant's state of mind. Nevertheless, in discrimination cases, the statement, "I did not promote you because you are black" would count as direct evidence. In *Shorter v. ICG Holdings, Inc.*,[101] the Tenth Circuit adopted this approach. Shorter, a black woman, was a corporate recruiter for ICG.[102] Having made off-color statements about African-Americans, Dughman, Shorter's supervisor, fired her, and a day or two later referred to her as an "incompetent nigger."[103] The Tenth Circuit affirmed the district court's grant of summary judgment for ICG, holding that Dughman statements, as mere expressions of personal animosity, were not direct evidence relating to Shorter's termination.[104]

Predominant among the circuit courts, the animus plus standard requires that a person with influence over the challenged employment decision utter remarks, in connection with the decisionmaking process, which show discriminatory animus.[105] This approach is not as stringent as the classic approach because to prove "animus plus" the plaintiff need not prove, for example, that the decisionmaker said

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that the employment decision was based on a forbidden criterion, even if "a fertile mind can conjure up some innocent explanation"); Bass v. Bd. of County Comm'rs, 256 F.3d 1095, 1105 (11th Cir. 2001) (adopting the classic position that only blatant remarks demonstrating a decisionmaker's intent to discriminate in the challenged employment decision qualify as direct evidence, and rejecting as insufficient the statement of the chief of a fire and rescue division suggesting racial bias against white applicants for training instructor positions, because the chief was not a decisionmaker in the hiring process).

100. BLACK'S LAW DICTIONARY 577 (7th ed. 1999).

101. 188 F.3d 1204 (10th Cir. 1999).

102. *Id.* at 1206.

103. *Id.* Dughman asked Shorter about the size of black men's sex organs, told another ICG employee that Shorter spoke like a person of her race, and during a confrontation with Shorter said, "You are just on the defensive because you are black." *Id.*

104. 188 F.3d at 1208; *see also, e.g.*, Thomas v. NFL Players Ass'n, 131 F.3d 198, 204 (D.C. Cir. 1997) (stating "Justice O'Connor's invocation of 'direct' evidence is not intended to disqualify circumstantial evidence," and concluding that the evidence must relate to the particular employment decision), *vacated in part*, 1998 WL 1988451 (D.C. Cir. Feb. 25, 1998).

105. *E.g.*, Medlock v. Ortho Biotech, Inc., 164 F.3d 545, 550 (10th Cir. 1999) (accepting either direct or circumstantial evidence to meet the *Price Waterhouse* standard if the evidence relates to discrimination in the particular employment decision and concluding that the jury reasonably found in favor of plaintiff's retaliation claim based substantially on a suspension letter referencing plaintiff's deposition testimony in his racial discrimination case); Fuller v. Phipps, 67 F.3d 1137, 1142-43 (4th Cir. 1995) (holding that "evidence of conduct or statements that both reflect directly the alleged discriminatory attitude and that bear directly on the contested employment decision" is necessary for a *Price Waterhouse* charge, and that evidence of statistical disparities, superior qualifications of the plaintiff relative to those who were hired, and ambiguous statements during the job interview, did not meet the threshold for such a charge), *overruled in part by* Desert Palace, Inc. v. Costa, 123 S. Ct. 2148 (2003); Armbruster v. Unisys Corp., 32 F.3d 768, 779-80 (3d Cir. 1994) (labeling the *Price Waterhouse* evidentiary requirement "overt" evidence and rejecting as inadequate statements of nondecisionmakers and age-related notations on employment documents).

to the plaintiff, "I am firing you because you are black." In *Mohr v. Dustrol, Inc.*, the Eighth Circuit adopted the animus plus approach.[106] Dustrol, a paving maintenance company, employed Mohr as a flagger, a job which required Mohr to control traffic at construction sites.[107] Sanchez, her foreman, made pejorative comments about non-Hispanics and said he preferred an all-Hispanic crew. After finishing the 1998 season, Mohr was not rehired for 1999.[108] Because Sanchez had input into the decision not to rehire Mohr, his comments justified a *Price Waterhouse* charge, despite the absence of classical direct evidence of discrimination in the decision not to rehire Mohr.[109]

The least stringent of the three standards, the animus position merely requires that someone in the decisionmaking process made comments exhibiting a discriminatory attitude, even if the comments were not tied to the adverse decision.[110] In *Lightfoot v. Union Carbide Corp.*, Lightfoot, a chemical engineer, advanced, over the course of many years, to management positions at Union Carbide.[111] Shackelford, a company vice-president who became Lightfoot's supervisor, criticized Lightfoot's performance, and ultimately Lightfoot

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106. 306 F.3d 636, 640 (8th Cir. 2002), *overruled in part by* Desert Palace, Inc. v. Costa, 123 S. Ct. 2148 (2003). The Court distinguished such comments from "'stray remarks in the workplace,' 'statements by nondecisionmakers,' or 'statements by decisionmakers unrelated to the decisional process.'" *Id.* at 640-41 (quoting Rivers-Frison v. Southeast Mo. Cmty. Treatment Ctr., 133 F.3d 616, 619 (8th Cir. 1998)) (citations omitted); *see also* Burrell v. Bd. of Trs., 125 F.3d 1390, 1394 (11th Cir. 1997) (espousing the classical position, but probably applying the animus plus position, and holding that statements showing gender discrimination in the hiring process of Burrel did not show gender discrimination in her firing).

107. 306 F.3d at 638.

108. *Id.*

109. *Id.* at 640-41. Mohr also alleged sex discrimination based on Sanchez's statement to Mohr that he was not going to have any females on his crew. *Id.* at 638. This statement comes close to meeting the classical definition of direct evidence. Though a finding of discrimination still requires the inference that Sanchez acted upon his stated preference against women on the job, the inference is a baby step rather than a giant leap.

110. *E.g.*, Cronquist v. City of Minneapolis, 237 F.3d 920, 927 (8th Cir. 2001) (holding that evidence of a discriminatory attitude by those involved in the decision to fire a female officer would support application of the *Price Waterhouse* standard on a motion for summary judgment, but that Cronquist's evidence fell short even of this relatively lenient standard); Fields v. N.Y. State Office of Mental Retardation & Developmental Disabilities, 115 F.3d 116, 122-24 (2d Cir. 1997) (holding that a "dual motivation" charge requires either direct evidence of discrimination or circumstantial evidence tied directly to the discriminatory animus in question and finding that mere statistical and anecdotal evidence, such as racial slurs of coworkers and undesirable work assignments, fall short of the standard); Trotter v. Bd. of Trs., 91 F.3d 1449, 1453-54 (11th Cir. 1996) (holding that "[s]tatements indicating racial bias on the part of a decisionmaker in an employment setting can constitute direct evidence of racial discrimination," but finding that racially biased statements of a nondecisionmaker do not meet this standard), *overruled in part by* Desert Palace, Inc. v. Costa, 123 S. Ct. 2148 (2003).

111. 110 F.3d 898, 903 (2d Cir. 1997).

was terminated as part of a reduction-in-force initiative.[112] Lightfoot brought a claim for age discrimination.[113] The jury received a mixed-motives instruction, which Union Carbide challenged on appeal.[114] The Second Circuit held such an instruction appropriate when "'conduct or statements by persons involved in the decisionmaking process . . . may be viewed as directly reflecting the alleged discriminatory attitude.'"[115] The court ruled a mixed-motive instruction proper in *Lightfoot* based, in part, on Lightfoot's testimony that Shackelford expressed disbelief that Lightfoot wished to continue working until the age of seventy.[116] The court was also impressed by the testimony of Dr. Cellura, a former employee of Union Carbide who participated in the meeting that resulted in Lightfoot's discharge.[117] Cellura testified that Union Carbide took a "particular interest in young talented people."[118] Such evidence would not have met the classic definition of direct evidence, nor would it have met the animus plus test.[119]

In *Costa v. Desert Palace, Inc.*, the Ninth Circuit rejected all three of these approaches, concluding instead that, regardless of the formulation, direct evidence was not necessary for *Price Waterhouse* to apply.[120] The court noted that § 2000e-2(m), the provision which codified the motivating factor test, did not so much as mention any direct-evidence requirement to trigger that test.[121] Thus, the court concluded that any evidence, whether circumstantial or direct, entitled a

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112. *Id.* at 903-04.

113. *Id.* at 904.

114. *Id.* at 913.

115. *Id.* at 913 (quoting Ostrowski v. Atl. Mut. Ins. Cos., 968 F.2d 171, 182 (2d Cir. 1992)).

116. *Id.*

117. *Id.* at 911-12.

118. *Id.* at 913.

119. It is doubtful that such evidence met the standard that Justice O'Connor endorsed in her concurring opinion in *Price Waterhouse*. After commenting that stray remarks are insufficient to meet her direct-evidence requirement, she also added, "[n]or can statements by nondecisionmakers, or statements by decisionmakers unrelated to the decisional process itself, suffice to satisfy the plaintiff's burden in this regard." Price Waterhouse v. Hopkins, 490 U.S. 228, 277 (1989) (O'Connor, J., concurring), *superseded by statute as stated in* Landgraf v. USI Film Prods., 511 U.S. 244 (1994).

120. 299 F.3d 838 (9th Cir. 2002), *aff'd*, 123 S. Ct. 2148 (2003); s*ee also* Wright v. Southland Corp. 187 F.3d 1287, 1294, 1303-04 (11th Cir. 1999) (defining "direct evidence," for purposes of discrimination cases, as "evidence from which a reasonable factfinder could find, by a preponderance of the evidence, a causal link between an adverse employment action and a protected personal characteristic," and finding that statements of decisionmakers, three months before plaintiff's termination, that plaintiff was too old for the job and that the company was looking for younger store managers met the evidentiary test); Tyler v. Bethlehem Steel Corp., 958 F.2d 1176, 1185 (2d Cir. 1992) (holding that "[w]hen a case is submitted to a jury, and the jury then concludes that a preponderance of *all* of the evidence (of whatever kind) shows that age was a motivating factor in the employer's decision, that is enough for the jury to shift its glance to the employer and require it to prove its affirmative defense").

121. *Costa*, 299 F.3d at 851.

plaintiff to the application of *Price Waterhouse* as long as the evidence demonstrated that illegal discriminatory intent motivated the adverse employment action.[122]

This split among the circuits created a chaotic body of law governing individual disparate treatment. The Supreme Court granted certiorari in *Costa* to resolve the issue whether *Price Waterhouse* applied only when a plaintiff presented direct evidence of discriminatory intent.[123]

III. *DESERT PALACE, INC. V. COSTA*: AN ACCEPTABLE RESOLUTION

In *Desert Palace, Inc. v. Costa*,[124] the Supreme Court confronted the issue whether a Title VII plaintiff must present direct evidence of discrimination to be entitled to a mixed-motive jury charge. Justice Thomas, writing for a unanimous Court, rejected the proposition that direct evidence was necessary,[125] announcing that circumstantial evidence could be sufficient.[126] If the plaintiff presents proof, whether circumstantial or direct, that might persuade a reasonable jury that the employer's adverse decision was motivated by discrimination, the plaintiff is entitled to a mixed-motive jury instruction. Although the Court was correct, it left open the ultimate issue: the role of the motivating factor test as the unified approach to all individual disparate-treatment employment-discrimination cases.

A. The Unanimous Opinion

1. Facts and Procedural Background

Caesar's Palace Hotel & Casino employed Catharina Costa as a warehouse worker and heavy equipment operator.[127] Involved in a series of conflicts with management and her co-workers, Costa was the object of disciplinary sanctions, including informal rebukes, a denial of privileges, and suspension.[128] When she clashed physically with a co-worker, Herbert Gerber, management fired Costa, while only suspending Gerber for five days.[129] The rationale for the discrepancy in punishment was that, prior to the conflict with Costa, Gerber had had a spotless disciplinary record.[130] Costa brought a claim for sex discrimination and sexual harassment in which she alleged that: (1)

122. *Id.* at 853-54.
123. 123 S. Ct. 2148 (2003).
124. *Id.*
125. *Id.* at 2150.
126. *See id.* at 2154-55.
127. *Id.* at 2152.
128. *Id.*
129. *Id.*
130. *Id.*

one of her supervisors had stalked her, (2) she received harsher punishment than male co-workers for nearly identical misconduct, (3) she was treated less favorably than men regarding overtime assignments, (4) her supervisors "stacked" her disciplinary record, and (5) her supervisors used or tolerated sexual slurs against her.[131]

The district court instructed the jury, without objection, that the "plaintiff has the burden of proving . . . by a preponderance of the evidence that she suffered adverse work conditions and that her sex was a motivating factor in any such work conditions imposed on her."[132] The court also instructed the jury:

> However, if you find that the defendant's treatment of the plaintiff was motivated by both gender and lawful reasons, you must decide whether the plaintiff is entitled to damages. The plaintiff is entitled to damages unless the defendant proves by a preponderance of the evidence that the defendant would have treated plaintiff similarly even if the plaintiff's gender had played no role in the employment decision.[133]

Caesar's Palace objected unsuccessfully to this instruction on the ground that plaintiff had not offered direct evidence that sex discrimination was a motivating factor for her dismissal or other adverse employment actions.[134] The jury found for Costa, awarding her backpay, compensatory damages, and punitive damages.[135]

After a panel of Ninth Circuit judges vacated the District Court's judgment, the Ninth Circuit, sitting en banc, reinstated it.[136] The en banc panel held that § 2000e-2(m) does not require direct evidence to support a mixed-motives instruction.[137] Circumstantial evidence might provide the evidentiary basis for such a charge.[138]

2. The Reasoning of the Supreme Court

On appeal to the Supreme Court, Caesar's Palace argued that Justice O'Connor's concurring opinion in *Price Waterhouse*, which predicated a mixed-motive instruction on direct evidence of discrimination, was the holding of the case.[139] Caesar's Palace also asserted

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131. *Id.*
132. *Id.* at 2152 (alteration in original) (quoting Costa v. Desert Palace, 299 F.3d 838, 858 (9th Cir. 2002), *aff'd*, 123 S. Ct. 2148 (2003)).
133. *Id.* (quoting *Costa*, 299 F.3d at 858).
134. *Id.* at 2152-53.
135. *Id.* at 2153.
136. *Id.*
137. *Id.*
138. *See id.* Four judges of the en banc panel dissented, relying heavily on the reasoning of the prior three-judge panel, which had held that a plaintiff is entitled to a mixed-motive instruction only when he or she presents "substantial evidence of conduct or statements by the employer directly reflecting discriminatory animus." *Id.* (citation omitted).
139. *Id.*

that § 2000e-2(m) had not altered that aspect of the *Price Waterhouse* holding. Thus, Caesar's Palace argued that the district court in *Costa* should have instructed the jury that to be entitled to a mixed-motive charge, Costa had to present direct evidence sufficient to persuade the jury that unlawful discrimination was a motivating factor for her discharge.[140] The Court held, however, that, regardless of Justice O'Connor's pronouncement in *Price Waterhouse*, § 2000e-2(m) imposed no requirement for direct evidence.[141]

The statutory text provided the starting point for Justice Thomas' analysis. Section 2000e-2(m) states that a plaintiff must "demonstrate" that an employer was motivated by discriminatory intent.[142] Justice Thomas observed that since the statute did not even mention "direct evidence," it harbored no ambiguities.[143] By the clear terms of the statute, circumstantial evidence could satisfy the evidentiary requirement.[144]

To support his conclusion, Justice Thomas noted that § 2000e(m) defines "'demonstrate[]'" as "'meet[ing] the burdens of production and persuasion.'"[145] If Congress had intended the word "demonstrate" in § 2000e(m) to impose a greater evidentiary burden, it would have stated its intentions.[146] Justice Thomas went on to show that in other contexts where Congress established heightened evidentiary standards, Congress expressed its intentions unequivocally. An alien, for example, in an application for asylum, must demonstrate by "clear and convincing evidence" that the application was filed within one year from the applicant's arrival in the United States.[147] The absence of such an unequivocal expression in § 2000e-2(m) showed the lack of congressional intent to adopt a heightened standard in employment discrimination cases.[148]

Justice Thomas reasoned that in other instances where the word "demonstrate" appeared in Title VII, that word implied the use of circumstantial as well as direct evidence.[149] Significantly, § 2000e-5(g)(2)(B) requires that for an employer to derive the benefit of the partial affirmative defense it must "demonstrat[e] that [it] would

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140. *See id.*
141. *Id.*
142. *Id.*
143. *See id.*
144. *See id.*
145. *Id.* at 2154 (quoting 42 U.S.C. § 2000e(m) (2000)).
146. *Id.* (quoting 42 U.S.C. § 2000e(m) (2000)).
147. *Id.* Similarly, where a whistleblower sues an employer for retaliation under the Atomic Energy Act, the whistleblower is not entitled to relief if the employer demonstrates by clear and convincing evidence that it would have taken the same unfavorable personnel action in the absence of whistleblowing. *Id.*
148. *See id.*
149. *Id.*

have taken the same action in the absence of the impermissible motivating factor."[150] The employer may make this showing by adducing either circumstantial or direct proof. To saddle the employee with a heightened burden of proof, while placing a lower burden on the employer in the same case, would be inconsistent.[151] The Court would not impose such disparate burdens of proof without congressional directive, particularly given the rule of statutory construction holding that identical words appearing in close proximity in the same statute should be accorded the same meaning.[152]

Absent an express statutory instruction to the contrary, the conventional rules of civil litigation generally apply to discrimination cases.[153] Justice Thomas pointed out that there was no sound reason, statutory or otherwise, to depart from the conventional rule of allowing a plaintiff to proceed with circumstantial evidence.[154] Adherence to this rule made sense to the Court because circumstantial evidence may be as persuasive, if not more persuasive, than direct evidence.[155] Justice Thomas found further support for his view. Juries are routinely instructed that the law makes no distinction between circumstantial and direct evidence.[156] Even in criminal cases where the standard for conviction is guilt beyond a reasonable doubt, circumstantial evidence alone may support a guilty verdict.[157] Finally, Caesar's Palace had not presented the Court with a single instance where, absent an express statutory directive, the Court had adopted a direct-evidence requirement.[158]

Accordingly, to be entitled to a mixed-motives charge, "a plaintiff need only present sufficient evidence for a reasonable jury to conclude, by a preponderance of the evidence," that unlawful discrimination under Title VII was a motivating factor for the adverse employment action.[159] Such evidence may be direct or circumstantial.[160]

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150. *Id.* at 2154-55 (alterations in original) (quoting 42 U.S.C. § 2000e-5(g)(2)(B) (2000)).
151. *Id.* at 2155.
152. *Id.*
153. *See id.* at 2154-55.
154. *Id.* at 2154.
155. *Id.*
156. *Id.*
157. *Id.*
158. *Id.*
159. *Id.* at 2155.
160. *Id.* Because the Court ruled that circumstantial evidence could support a mixed-motive charge, it did not address the second question on which it had granted certiorari: "What are the appropriate standards for lower courts to follow in making a direct evidence determination in 'mixed-motive' cases under Title VII?" *Id.* at 2155 n.3 (citations omitted).

3. Justice O'Connor's Concurring Opinion

Justice O'Connor, whose concurring opinion in *Price Waterhouse* had sparked the controversy leading to the *Costa* case, joined in the *Costa* Court's opinion. Understandably, she wrote a concurring opinion in *Costa* to explain her views.[161] She insisted that the *Price Waterhouse* Court had adopted her position: A plaintiff must "'demonstrate by direct evidence that an illegitimate factor played a substantial role' in an adverse employment decision."[162] She conceded, however, that the Civil Rights Act of 1991 had abrogated that formulation with a new rule requiring that the plaintiff merely prove, by direct or circumstantial evidence, that the defendant was motivated by discriminatory intent.[163]

B. Implications of the Decision

1. Eliminating the Direct Evidence/Pretext Trap

By permitting plaintiffs to establish motivating factor with circumstantial evidence, *Costa* eliminated a trap that has scuttled arguably meritorious claims. The problem was that a plaintiff might have had neither sufficient direct evidence to qualify for a *Price Waterhouse* charge, nor sufficient evidence to prove pretext under *McDonnell Douglas*. Yet the plaintiff might have had sufficient circumstantial evidence of discrimination to persuade a jury that he suffered unlawful discrimination.[164] *Shorter v. ICG Holdings, Inc.*,[165] is a

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161. *Id.* at 2155 (O'Connor, J., concurring).

162. *Id.* (quoting Price Waterhouse v. Hopkins, 490 U.S. 228, 275 (1989) (O'Connor, J., concurring in judgment)).

163. *Id.*

164. In *Heim v. Utah*, Heim, a female construction technician employed as an office worker by the Utah Department of Transportation, alleged in a sex discrimination suit that she was denied field experience in areas such as field lab, survey, and inspection. 8 F.3d 1541, 1543 (10th Cir. 1993). Since male workers were not allowed greater access than was Heim to varied field experience, the trial court ruled that Heim failed to establish a prima facie case under *McDonnell Douglas*. *Id.* at 1546. Heim offered testimony that, in response to problems she had with ticket books, Tischner, her supervisor, declared, "Fucking women, I hate having fucking women in the office," and that shortly after the outburst, he retracted permission for Heim to undertake a temporary field assignment. *Id.* Characterizing Tischner's remark as "inappropriate and boorish," the Tenth Circuit interpreted the remark as an expression of "personal opinion," rather than direct evidence of discrimination. The Tenth Circuit therefore affirmed the trial court's judgment for the defendant. *Id.* at 1547; *see also* Robin v. Espo Eng'g Corp., 200 F.3d 1081, 1089-92 (7th Cir. 2000) (affirming summary judgment for the employer because statements plaintiff's boss made two years before firing plaintiff that plaintiff was "getting too old" and that he was "an old S.O.B." were not direct evidence, and because the plaintiff could not prove that his termination for declining sales performance was pretextual); Mooney v. Aramco Servs. Co., 54 F.3d 1207, 1218-19 (5th Cir. 1995) (affirming jury verdict for defendants despite numerous age-biased statements of supervisors, including a statement that a plaintiff would have a "good case of age discrimination" and another statement that the company wanted to replace a plaintiff with a "younger and cheaper" engineer, because such statements were not

poignant example. Because the Tenth Circuit characterized Dughman's statement that Shorter was an "incompetent nigger"[166] as mere personal opinion rather than direct evidence of discrimination, Shorter had to resort to the *McDonnell Douglas* framework.[167] ICG's articulated reason for firing Shorter was inadequate job performance, a charge which ICG supported with substantial evidence.[168] Shorter, in turn, offered several e-mails to reflect her satisfactory performance, but the court found her evidence inadequate to rebut the charge of job incompetence.[169] Finally, Shorter argued that Dughman's racially biased statements, even if not direct evidence of discrimination, constituted circumstantial evidence demonstrating pretext.[170] The court rejected this argument because Shorter could not connect the statements to Dughman's decision to fire her.[171] The court therefore affirmed the district court's grant of summary judgment to ICG.[172] Caught between the direct-evidence requirement of *Price Waterhouse* and the pretext requirement of *McDonnell Douglas*, Shorter could not get to a jury despite Dughman's racial slurs, which might have persuaded a jury that racism motivated Dughman when she fired

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direct evidence and because the plaintiffs could not satisfy the *McDonnell Douglas* test); Birkbeck v. Marvel Lighting Corp., 30 F.3d 507, 509-13 (4th Cir. 1994) (holding that evidence of discriminatory intent including the statement of the company vice-president who fired plaintiffs that "there comes a time when we have to make way for younger people," was legally insufficient because the statement was made two years before the firings, and consequently, upsetting a jury verdict for plaintiffs because the evidence was insufficient as a matter of law to establish motivating factor or to prove that economic necessity was a pretext for discrimination); *cf.* Indurante v. Local 705, Int'l Bhd. of Teamsters, 160 F.3d 364, 366-67 (7th Cir. 1998) (holding that statements of decisionmakers "to get rid of all the Italians," and that "all the Italians were going to be fired," did not raise an inference of discrimination under *McDonnell Douglas* because the statements were made many months before the plaintiff's termination).

165. 188 F.3d 1204 (10th Cir. 1999).

166. *Id.* at 1206.

167. *Id.* at 1208.

168. *Id.* Patricia Lawrence, the person who hired Shorter as a corporate recruiter, testified that Shorter lacked recruiting skills and contacts. *Id.* at 1208-09. Dughman, who replaced Lawrence, testified that several ICG executives complained that Shorter had provided them with inadequate data about the number of job openings at ICG. Clients also complained that Shorter did not follow through after meetings with them. John Field, Dughman's supervisor, also received numerous complaints about Shorter's job performance, including Shorter's failure to locate qualified candidates and follow up on her recruiting duties. Another employee of ICG testified that Shorter misfiled and lost resumes, failed to arrange for the payment of advertising invoices, and neglected to list job openings in her reports to management. *Id.* at 1209.

169. *Id.* at 1209. The court found that only two of the e-mails arguably supported Shorter's attempt to disprove job incompetence and that Shorter received both before most of the complaints against her arose. Also, Shorter cited testimony of another employee of ICG who expressed surprise at Shorter's discharge, but he explained that he was surprised only because he had never heard any complaints against her, adding that he had no basis to evaluate her performance. *Id.*

170. *Id.* at 1209-10.

171. *Id.* at 1210.

172. *Id.* at 1206.

Shorter. Since, under *Costa*, circumstantial evidence may support a *Price Waterhouse* instruction, one would expect that plaintiffs with creditable circumstantial cases would survive summary judgment motions.

2. The Death of McDonnell Douglas*?*

By allowing both circumstantial and direct evidence to support a "mixed-motive" analysis, the *Costa* Court may have foreshadowed the death of *McDonnell Douglas*. Even before *Costa*, the Supreme Court in *Hicks* and later in *Reeves* diluted *McDonnell Douglas* into ineffectuality by holding that if a plaintiff disproves the defendant's explanation, the defendant might nevertheless win. *McDonnell Douglas* remained necessary only because it governed circumstantial cases. Now that *Costa* has held that the circumstantial evidence may be used under the *Price Waterhouse* framework, one must question whether *McDonnell Douglas* serves any purpose at all.

McDonnell Douglas enables the plaintiff to prevail by proving that the defendant's justification was a pretext for discrimination. Disproof of the defendant's reason may persuade the jury that the defendant discriminated. Alternatively, the jury may, in its discretion, require additional proof of discrimination before it finds for the plaintiff. In other words, proof of pretext is circumstantial evidence of discrimination, but it is not necessarily conclusive evidence. Similarly, under the *Price Waterhouse* approach, the plaintiff may offer the same proof of pretext, and the jury may exercise its discretion in evaluating that evidence. The two approaches do not differ in how they require the factfinder to evaluate proof of pretext.

Only one arguable justification for *McDonnell Douglas* remains. After a plaintiff establishes a prima facie case under *McDonnell Douglas*, the defendant must articulate a nondiscriminatory reason for the adverse employment action. Because a defendant will lose the case if it fails to meet this simple burden of production, defendants will always articulate a nondiscriminatory reason for their conduct. Arguably, by forcing the defendant to articulate a nondiscriminatory reason, *McDonnell Douglas* enhances the plaintiff's chances of proving his case because, as a result of the defendant's burden of production, the plaintiff will have the opportunity to disprove the defendant's articulated reason, thereby providing at least some evidence of discrimination, which, along with plaintiff's other evidence, may support a judgment for the plaintiff.

Compelling the defendant to articulate a nondiscriminatory reason, however, fails to justify *McDonnell Douglas*. *Price Waterhouse* effectively forces defendants to articulate and prove the efficacy of a nondiscriminatory reason. Unless a defendant can defeat a weak case

on a summary judgment motion, the defendant will offer a nondiscriminatory reason to establish the partial affirmative defense. Thus, under *Price Waterhouse*, the plaintiff will ordinarily get a full opportunity to prove pretext. In any event, defendants, as a matter of tactical necessity, will nearly always articulate and attempt to prove a nondiscriminatory reason, even absent the injunction of *McDonnell Douglas*. If defendants made no such showing, they would leave a void in the minds of the factfinder. Any judge or jury would assume that if the defendant had a valid business justification for the adverse employment decision, he would have presented it at trial. A defendant's failure to produce such evidence will ordinarily evoke a negative inference. *McDonnell Douglas*, however, imposes a significant risk on the plaintiff. If a plaintiff fails to disprove a defendant's articulated explanation, the defendant is entitled to judgment. Unlike *McDonnell Douglas*, *Price Waterhouse* does not require plaintiffs to disprove the defendant's discriminatory reason. *McDonnell Douglas* therefore penalizes the plaintiff without affording him a meaningful benefit.

In rare cases the defendant may not wish to articulate a nondiscriminatory reason. The real reason for firing a plaintiff might embarrass a defendant. Such a reason might, for example, be nepotism in violation of company policy. The real reason might be improper or illegal but nondiscriminatory. For example, an African-American employee might have been fired for filing a workers' compensation claim. Such an improper firing is not discriminatory and therefore does not violate civil rights law.[173] In *Hazen Paper Co. v. Biggins*, the Supreme Court held that firing a sixty-two year old worker to prevent his pension from vesting, although a violation of ERISA, did not constitute age discrimination.[174] This is not to say that it is acceptable to fire someone because his pension is about to vest, but such a firing does not violate the Age Discrimination in Employment Act (ADEA). All parties to lawsuits should have the right to present whatever evidence they deem appropriate.[175] Defendant's failure to

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173. *See* Hazen Paper Co. v. Biggins, 507 U.S. 604, 612-13 (1993).

174. *Id.* The Court reached this conclusion although age correlates with pension vesting. The Court noted, however, if an employer used pension vesting as a proxy for age, meaning that the employer intended to discriminate against protected workers and inferred that those workers approaching the time that their pensions would vest must be "older" workers, such evidence would support an age discrimination claim. *Id.* at 612-13. The Court also pointed out that if a worker were fired both to prevent a pension from vesting and for age bias, the worker would have a claim for age discrimination. *Id.*

175. Though relatively rare, a number of reasons might account for an employer's reluctance to articulate a valid, nondiscriminatory reason.

> The employer may indeed have not gotten along with the fired employee. A prudent litigant might refrain from raising this explanation because a jury might wrongly infer pretext from it. Strategy might preclude the employer from articulating other legitimate reasons that motivated the challenged action. The

present a nondiscriminatory reason should not compel a finding of discrimination. Such a failure should be merely one indication of discrimination that the factfinder may evaluate along with all the other evidence. If, for example, an African-American-owned business actively recruited and hired African-American employees at all levels, it would be absurd for a factfinder to sustain a claim of racial discrimination against the firm merely because the firm opted not to present a nondiscriminatory reason for its refusal to hire a single African-American.

Under *Price Waterhouse*, the jury may, and generally will, view a defendant's failure to provide a nondiscriminatory reason as circumstantial evidence of discrimination, or in rare cases the jury may not find such a failure to be probative as might well be appropriate in the above hypothetical. Such flexibility advances the factfinder's mission to determine whether the defendant engaged in illegal discrimination. *McDonnell Douglas* therefore does more to hinder than help the jury in determining the ultimate issue.

3. Judicial Attempts to Explain Costa

Some judges believe that *Costa* solves this problem. In *Dare v. Wal-Mart Stores, Inc.*,[176] for example, Judge Magnuson concluded that *McDonnell Douglas* did not survive *Costa*. Dare alleged that Wal-Mart refused to hire her because of her race.[177] Characterizing Dare's claim as alleging a "single motive," Judge Magnuson recognized that, by the plain language of the Civil Rights Act of 1991, the motivating factor test applies to single-motive and mixed-motive cases.[178] In other words, the motivating factor test is the universal causation standard for individual disparate treatment cases. Judge Magnuson noted that *McDonnell Douglas* presumes that either the alleged discriminatory reason or defendant's articulated nondiscriminatory reason caused the adverse decision. He also pointed out that if the plaintiff fails to disprove the defendant's step-two reason, the defendant wins. This possibility, Judge Magnuson concluded, violates the motivating factor test of the Civil Rights Act of 1991 because it is possible for a plaintiff to fail to disprove the defendant's

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> employer might perceive vague but true reasons as unpersuasive and suggestive of pretext. Embarrassing reasons might shun revelation. Employers might conceal reasons arguably exposing them to other civil liability. Offensive reasons, even if legitimate, might incite the jury's disapproval.

Kenneth R. Davis, *The Stumbling Three-Step, Burden-Shifting Approach in Employment Discrimination Cases*, 61 BROOK. L. REV. 703, 759 (1995).

176. 267 F. Supp. 2d 987 (D. Minn. 2003).

177. *Id.* at 990.

178. *Id.* at 990-91.

articulated justification while being able to prove that discriminatory intent motivated the defendant.[179]

Judge Magnuson's analysis is technically correct,[180] but the consequences are not as dire as he suggests. It is true that if a plaintiff elects to invoke *McDonnell Douglas*, he will lose the case if he is unable to disprove the defendant's articulated reason. But a plaintiff will not invoke *McDonnell Douglas* unless he believes that proving pretext is essential to his discrimination case. In other words, the plaintiff's case is so weak that he probably cannot meet the motivating factor test without disproving the defendant's reason. Such a plaintiff invokes *McDonnell Douglas* to compel the defendant to articulate a nondiscriminatory reason. If a plaintiff with so little evidence of discrimination fails to disprove the defendant's reason, the plaintiff should lose the case. Of course, the defendant would most likely offer a nondiscriminatory explanation in any event, thereby making the use of *McDonnell Douglas* superfluous.

In *Thomas v. Chrysler Financial, LLC*,[181] Judge Shadur, unlike Judge Magnuson, found room for *McDonnell Douglas* in the post-*Costa* world.[182] Thomas, an African-American woman who was a cus-

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179. *Id.* Judge Magnuson stated: "[W]hen a defendant prevails under the *McDonnell Douglas* scheme, the court is left with a classic mixed-motive scenario, in which both alleged motives could have factored into the defendant's ultimate employment decision." *Id.* at 992.

180. *See* Griffith v. Des Moines, 2003 WL 21976027, at *12 (S.D. Iowa July 3, 2003) (agreeing with Judge Magnuson's analysis in *Dare*, and suggesting that *McDonnell Douglas* has served its purpose and should be abandoned); Thomas v. Chrysler Fin. LLC, 278 F. Supp. 2d 922, 926 (N.D. Ill. 2003) (suggesting that "if an employee can raise an inference of discrimination by satisfying the initial elements of a [*McDonnell Douglas*] prima facie case, an employer may not necessarily escape liability altogether by offering an alternative explanation for its action"). *But see* Dunbar v. Pepsi-Cola Gen. Bottlers of Iowa, Inc., 285 F. Supp. 2d 1180, 1194 (N.D. Iowa 2003) (noting that "there is some uncertainty among the lower courts as to whether or not *Desert Palace* and § 2000e-2(m) apply to 'single-motive' cases as well as 'mixed-motive' cases, and whether or not *Desert Palace* spells the demise of the *McDonnell Douglas* burden-shifting paradigm").

181. 278 F. Supp. 2d 922 (N.D. Ill. 2003).

182. *See id.* at 926. See also *Williams v. Memphis*, wherein Judge Donald, finding *McDonnell Douglas* viable after the *Costa* decision, stated, "A violation of Title VII, however, may be proved other than through *McDonnell Douglas*/*Burdine*." 2003 U.S. Dist. LEXIS 17620, at *15 (W.D. Tenn. Sept. 29, 2003). Employed as a vehicle examiner for the City of Memphis, Williams, who was disciplined for numerous infractions and ultimately fired by her supervisor, Terence McBride, brought a sex discrimination claim for wrongful discharge. Memphis moved for summary judgment, relying solely on Williams' lack of direct evidence and her inability to meet the *McDonnell Douglas* standard. *Id.* at *2-3. After citing *Costa*, Judge Donald observed that "[a]lthough plaintiff has not alleged direct evidence of sex discrimination, she has presented circumstantial evidence sufficient to raise a genuine issue of material fact as to whether sex played a motivating factor in her inability to use her seniority to bid on positions." *Id.* at *16. Judge Donald denied Memphis summary judgment because Williams offered evidence that McBride had "messed" with her for years and had difficulties with her because of her sex. *Id.* at *17. For purposes of a summary judgment motion, this evidence met the motivating factor test. *See id.* Presumably, Judge Donald would have applied *McDonnell Douglas* if Williams had not presented suffi-

tomer service supervisor for Chrysler Financial, sought a transfer to a credit analyst position to avoid a layoff.[183] When Chrysler Financial rejected her for the two open credit analyst positions, she brought a race discrimination claim.[184] Chrysler Financial moved for summary judgment.[185] Finding that Thomas had no evidence, direct or circumstantial, to meet the motivating factor test, Judge Shadur applied *McDonnell Douglas*.[186] Because Thomas lacked the experience required for a credit analyst position and because the two individuals who got the open positions had the required experience, Judge Shadur concluded that Thomas could not make out a prima facie case, and he therefore granted Chrysler Financial summary judgment.[187]

Judge Shadur's analysis fails to recognize that proof of pretext is circumstantial evidence of discrimination, and that *Costa* makes such evidence relevant to a *Price Waterhouse* analysis. Moreover, *Price Waterhouse* establishes the partial affirmative defense whereby the defendant may prove that the nondiscriminatory reason was the but-for cause of the adverse employment action. The defendant will attempt to prove that the nondiscriminatory reason caused the adverse employment action, and the plaintiff will attempt to disprove that reason. Thus, proof of pretext is an essential part of the *Price Waterhouse* approach.

Given the battered condition of *McDonnell Douglas* after *Costa*, the fundamental question is whether *McDonnell Douglas* should be discarded. As Part IV shows, the motivating factor test of § 2000e-2(m) is the Atlas capable of shouldering all individual disparate treatment cases.

IV. SYNTHESIZING THE TWO APPROACHES

Jurists and scholars have struggled with how to integrate all disparate treatment cases into a unified framework. This Part discusses and criticizes several such attempts, and concludes that the most effective synthesis is the *Price Waterhouse* structure as modified by § 2000e-2(m) and *Costa*.

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cient circumstantial evidence to raise a genuine issue of material fact that discrimination was a motivating factor that contributed to her dismissal.

183. *Thomas*, 278 F. Supp. 2d at 924.
184. *Id.* at 924-25.
185. *Id.* at 923.
186. *Id.* at 925-26.
187. *Id.* at 928.

A. Section 2000e-2(m) and the Motivating Factor Test

Section 2000e-2(m) provides that "an unlawful employment practice is established when the complaining party demonstrates that race, color, religion, sex, or national origin was a motivating factor for any employment practice."[188] By its very terms, this section applies not only to *Price Waterhouse*-type cases, but it applies to any individual disparate treatment case.[189] In *Costa*, the Supreme Court ruled

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188. 42 U.S.C. § 2000e-2(m) (2000).

189. In *Watson v. Southeastern Pennsylvania Transportation Authority*, the Third Circuit addressed the issue of whether section 107 of the Civil Rights Act of 1991 applies to all individual disparate treatment cases, thereby abolishing *McDonnell Douglas*. 207 F.3d 207, 211 (3d Cir. 2000). Concluding that section 107 applies only to mixed-motives cases, the court relied on several arguments. First, the court reasoned that, by establishing liability when the plaintiff demonstrates "motivating factor . . . *even though other factors also motivated [the] practice*," the language of the section applied specifically to mixed-motives cases. *Id.* at 217 (emphasis added) (citations omitted). This argument, however, is unpersuasive. If Congress meant to establish a single standard for individual disparate treatment cases by applying section 107 unqualifiedly, it certainly meant also to preserve the partial affirmative defense. Second, the court emphasized the section's use of the word "demonstrates," observing that Justice O'Connor repeatedly used this word in her concurring opinion in *Price Waterhouse*. The court linked the use of the word "demonstrates" to mixed-motives cases because "demonstrates" suggests a heightened burden of proof and the mixed-motives, direct-evidence requirement is such a burden. Thus, the court inferred congressional intent to apply section 107 to the sort of case Justice O'Connor had referred to, namely, the mixed-motives case. *Id.* at 217-18. This argument fails because the word "demonstrates" appears in other provisions of Title VII. *See* Desert Palace, Inc. v. Costa, 123 S. Ct. 2148, 2154 (2003) (stating that "use of the term 'demonstrates' in other provisions of Title VII tends to show further that § 2000e-2(m) does not incorporate a direct evidence requirement," and citing § 2000e-2(k)(1)(A)(i) as well as § 2000-5(g)(2)(B), which establish the partial affirmative defense). Third, the court pointed to legislative history, which stressed that Congress intended section 107 to overrule only the part of *Price Waterhouse* that established the complete affirmative defense, and that section 107 "'is relevant to determine not the liability for discriminatory employment practices, but only the appropriate *remedy*.'" *Id.* at 218-19 (quoting H.R. REP. NO. 102-40(I), at 586 (1991)) (emphasis in original). Although the Third Circuit was correct that section 107 did not alter the standard of liability, the court drew the wrong conclusion. Before and after the Civil Rights Act of 1991, a single standard of liability applied to all individual disparate treatment cases—the motivating factor test. *McDonnell Douglas* does not contradict that test. Although *McDonnell Douglas* appeared to create a heightened proof standard, it merely provided an alternative method for meeting the motivating factor test by way of inference. Thus, the House Report merely confirmed what was self-evident—that a single standard applies to all individual disparate treatment cases, and that the standard is the motivating factor test. There are two routes to meet the test: *McDonnell Douglas* and *Price Waterhouse*. This point renders the Third Circuit's inquiry misguided. Section 107 applies to *McDonnell Douglas* while preserving it. Fourth, the Third Circuit cited *Landgraf v. USI Film Products*, 511 U.S. 244, 251 (1994), in which the Supreme Court stated in dictum that section 107 sets the "standards applicable in 'mixed-motives' cases." *Watson*, 207 F.3d at 219 (citations omitted). This dictum shrinks to insignificance given the *Costa* Court's express reservation of this very issue. In *Costa*, the Supreme Court stated: "This case does not require us to decide when, if ever, § 107 [sic] applies outside of the mixed-motives context." 123 S. Ct. at 2151 n.1; *see* Fields v. N.Y. State Office of Mental Retardation and Developmental Disabilities, 115 F.3d 116, 122-24 (2d Cir. 1997) (deciding that section 107 does not apply to all discrimination cases, based partly on the House Committee report, which "makes clear" that the purpose of section 107 was merely to limit the scope of the "same-decision" defense). *But see* Benjamin C. Mizer, Note, *Toward a Motivating Factor*

that § 2000e-2(m) applies to both circumstantial and direct-evidence cases principally because the text of the section contained no limiting language. The Court observed that if Congress had meant for § 2000e-2(m) to apply only to direct-evidence cases, it would have said so.[190] Like reasoning demonstrates that the section applies to *McDonnell Douglas*-type cases. If Congress had meant § 2000e-2(m) to apply only to *Price Waterhouse*-type cases, it would have made its intentions clear. Since the words of the statute are unambiguous, the inquiry, according to the reasoning of the *Costa* Court, is "complete."[191]

Although unnecessary under the Court's reasoning, resort to legislative history supports the conclusion that § 2000e-2(m) applies to all individual disparate treatment cases. The House Report on the bill destined to become the Civil Rights Act of 1991 provides:

> To establish liability under proposed Subsection 703(1) [§ 2000e-2(m)], the complaining party must demonstrate that discrimination *actually contributed* or was otherwise *a factor in* an employment decision or *action*. Thus, in providing liability for discrimination that is a "*contributing factor*," the Committee intends to restore the rule applied in many federal circuits prior to the *Price Waterhouse* decision that an employer may be held liable for any discrimination that is actually shown to play a role in a contested employment decision.[192]

This report does not limit § 2000e-2(m) to "mixed-motive" cases. Rather, it suggests that the new section would establish the "contributing factor" test, which is functionally equivalent to the "motivating factor" test, in all employment discrimination cases. The Supreme Court must have been aware of the broad potential reach of the section when it stated in *Costa* that "[t]his case does not require us to decide when, if ever, § 107 [sic] applies outside of the mixed-motives context."[193] With this statement, the Court reserved decision on the issue whether § 2000e-2(m) applies to discrimination cases that do not involve mixed motives, that is, cases currently governed by the *McDonnell Douglas* approach.

Test for Individual Disparate Treatment Claims, 100 MICH. L. REV. 234, 253-62 (2001) (criticizing the reasoning of the *Watson* court based on the plain meaning of the text of section 107 and its legislative history). *See generally* Michael J. Zimmer, *The Emerging Uniform Structure of Disparate Treatment Discrimination Litigation*, 30 GA. L. REV. 563, 600-09 (1996) (arguing, based on the statutory language, the structure of Title VII, and the purposes of the Civil Rights Act of 1991, section 107 applies to all disparate treatment cases.)

190. *Costa*, 123 S. Ct. at 2154.

191. *Id.*

192. H.R. REP. NO. 102-40(I), at 586 (1991).

193. *Costa*, 123 S. Ct. at 2151 n.1.

If § 2000e-2(m) applies to all individual disparate treatment cases, one might conclude that § 2000e-2(m) implicitly overruled *McDonnell Douglas*. It is more likely, however, that Congress had no such intention. The purpose of the Civil Rights Act of 1991 was to abolish a series of conservative Supreme Court decisions that a liberal Congress perceived as having weakened the protections of Title VII.[194] Consistent with this liberal agenda of Congress, *McDonnell Douglas*, in the pre-*Hicks* era, was decidedly pro-plaintiff. The House Report supports the view that Congress meant to perpetuate *McDonnell Douglas* by stating that § 2000e-2(m) restores the law to its pre-*Price Waterhouse* status, which includes *McDonnell Douglas* and *Burdine*.

It therefore appears that in 1991 Congress envisioned two paths that plaintiffs could use to prove motivating factor. First, a plaintiff could invoke *Price Waterhouse* and use any evidence to meet that test. Second, the plaintiff could meet the motivating factor test, as a matter of law, by proving pretext under *McDonnell Douglas*.[195] As shown below, however, many argue that *McDonnell Douglas* and *Price Waterhouse* establish two different causation standards.

B. Hazen Paper *and Determinative Causation*

Some courts and scholars, often relying on dictum in *Hazen Paper Co. v. Biggins*,[196] interpret the pretext element of *McDonnell Douglas* to require the plaintiff to prove that discrimination was the "but-for" cause of the adverse employment action, rather than merely a contributing or motivating factor.[197] *Hazen Paper*, however, did not im-

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194. *See* 137 CONG. REC. S15,483 (daily ed. Oct. 30, 1991) (statement of Sen. Simpson); *see also* Michael A. Zubrensky, Note, *Despite the Smoke, There Is No Gun: Direct Evidence Requirements in Mixed-Motives Employment Law After* Price Waterhouse v. Hopkins, 46 STAN. L. REV. 959, 983 n.196 (1994) (discussing the congressional purpose in enacting the Civil Rights Act of 1991, and cataloguing the Supreme Court cases that prompted passage of the Act).

195. *Hicks* changed this standard. Now, if the plaintiff disproves the defendant's articulated explanation, the factfinder generally has the option of deciding for the plaintiff or the defendant. St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502, 510-11 (1993).

196. 507 U.S. 604, 610 (1993) (stating that "a disparate treatment claim cannot succeed unless the employee's protected trait actually played a role in that [decisionmaking] process and had a determinative influence on the outcome").

197. *See, e.g.*, Rowland v. Am. Gen. Fin., Inc., 340 F.3d 187, 192 n.3 (4th Cir. 2003) (quoting the district court's jury instruction, which required the plaintiff, in a sex discrimination case, to prove that "gender was the determinative factor" or "but-for" cause that resulted in her being denied a promotion); Miller v. Cigna Corp., 47 F.3d 586, 597 (3d Cir. 1995) (en banc) (adopting the determinative-factor test as heightened causation standard); Ostrowski v. Atl. Mut. Ins. Cos., 968 F.2d 171, 185 (2d Cir. 1992) (commenting that the trial court's "emphasis on the term 'determinative' factor . . . indicate[s] that the [trial] court treated the present matter as simply a pretext case," and defining a pretext case as "one in which there was either unlawful motivation or lawful motivation, but not both"); Robert A. Kearney, *The High Price of* Price Waterhouse: *Dealing with Direct Evidence of Discrimination*, 5 U. PA. J. LAB. & EMP. L. 303, 310 (2003) (arguing that two standards of

pose a heightened burden of proof on civil rights plaintiffs invoking *McDonnell Douglas*. Citing *Burdine*,[198] the *Hazen Paper* Court stated, "liability depends on whether the protected trait . . . actually motivated the employer's decision."[199] This pronouncement confirms that the motivating factor test applies to all individual disparate treatment cases. Later, the *Hazen Paper* Court remarked: "[A] disparate treatment claim cannot succeed unless the employee's protected trait actually played a role in that process and had a *determinative influence* on the outcome."[200] This statement has caused considerable confusion by suggesting to some that the Court adopted the but-for standard. Taken in context, however, the reference to "a determinative influence" may simply have meant that a discriminatory consideration actually contributed to the adverse employment action. Such an interpretation would render the Court's two statements consistent.

The naked phrase "a determinative influence" did not usher in a new direction in discrimination law. Subsequent statements in the *Hazen Paper* majority opinion reinforce the view that the Court did not mean to supplant the motivating factor test as the standard in disparate treatment cases. For example, the *Hazen Paper* Court observed that "inferring age-*motivation* from the implausibility of the employer's explanation may be problematic" when other unsavory motives were present.[201] If the Court meant "but-for causation" rather than mere "motivation," it would have said so.

When the Court assessed the facts in *Hazen Paper*, it did not apply the but-for standard of causation. The Court summed up Biggins' ADEA wrongful discharge case as consisting of the following tepid facts: (1) the Hazens made two "isolated" age-related comments not connected to the firing,[202] (2) Hazen Paper insisted that Biggins sign a confidentiality agreement, and (3) Hazen Paper presented Biggins' younger replacement with a less onerous agreement.[203] The Court

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causation coexist in disparate treatment law: the motivating factor test of *Price Waterhouse* and the determinative or but-for cause standard of *McDonnell Douglas*); Michael J. Zimmer, *Slicing and Dicing of Individual Disparate Treatment Law*, 61 LA. L. REV. 577, 580 (2001) (espousing the coexistence of the two standards, and contending that once a plaintiff has met the determinative influence test, the same-decision defense is unavailable because an event has only one determinative or but-for cause).

198. Tex. Dep't of Cmty. Affairs v. Burdine, 450 U.S. 248, 252-56 (1981).

199. 507 U.S. at 610.

200. *Id.* (emphasis added).

201. *Id.* at 613 (emphasis added).

202. Robert Hazen, a co-owner of Hazen Paper, had enrolled the company as a member at a handball court. He commented to Biggins and another employee one year older than Biggins that the membership would "not do them much good because they were 'so old.'" Co-owner, Thomas Hazen, on another occasion, informed Biggins that the company was spending extra money on life insurance because Biggins was "so old." Biggins v. Hazen Paper Co., 953 F.2d 1405, 1411 (1st Cir. 1992), *vacated by* 507 U.S. 604 (1993).

203. *Id.* Robert Hazen demanded that Biggins sign a confidentiality agreement ostensibly because Biggins, who had launched a consulting business, might reveal to competi-

commented that if Biggins, in addition to these facts, could disprove the defendant's explanation for the firing, he might well prevail.[204] It is clear that such a weak factual showing would not meet the stringent "but-for" causation standard. These facts when coupled with the inference raised by disproving the defendant's explanation, however, might well meet the motivating factor test.

In addition to evaluating Biggins' ADEA claim, the *Hazen Paper* Court discussed the standard for awards of liquidated damages under the ADEA.[205] The Supreme Court rejected the circuit court's use of "the predominant" causation test, holding instead that to be entitled to statutory liquidated damages, a plaintiff did not have to demonstrate that the employer's conduct was "the predominant, rather than a determinative, factor in the employment decision."[206] The Court's statement implies that predominant causation is not required to assess ordinary liability in ADEA cases or Title VII cases which follow the same causation standard as the ADEA. It follows that Title VII and the ADEA do not require but-for causation to assess ordinary liability. The explanation is straightforward. When a but-for cause is removed, the outcome is eliminated.[207] If discrimination were shown in a particular case to be the but-for cause of the adverse employment action, no other cause could simultaneously act as a but-for cause, because if discrimination were removed the adverse employment action would not have occurred. The *Hazen Paper* Court announced, however, that a plaintiff in a disparate treatment case need not prove that discrimination was the predominant cause. This means that the plaintiff may prevail although a cause other than discrimination was the predominant cause, which is impossible if discrimination was the but-for cause. For example, assume that Bill, an African-American, proves that but for his race his employer would not have fired him. It would be logically impossible for the employer to prove that but for insubordination he would not have fired Bill. Once Bill demonstrates that race was the but-for cause of the firing, he has necessarily shown that race was the predominant cause.

One can speculate why the *Hazen Paper* Court used the potentially confusing phrase "a determinative influence." *Burdine* stated that the plaintiff has the opportunity, at step three, to show that the defendant's articulated reason for the adverse action was not "the

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tors of Hazen Paper confidential information that Biggins had acquired at Hazen Paper. The confidentiality agreement presented to Biggins' younger replacement provided for 100 days of severance pay, a benefit not offered to Biggins. *Id.*

204. The employer's explanation for the firing was that Biggins had been disloyal by doing business with Hazen Paper's competitors. *Id.*

205. *Hazen Paper*, 507 U.S. at 617.

206. *Id.*

207. *See* DAN B. DOBBS, THE LAW OF TORTS § 170, at 412-13 (2001).

true reason" for the challenged decision.[208] *Price Waterhouse* picked up on this statement and perhaps injudiciously commented that, unlike a mixed-motive case, *Burdine* asks the question whether the plaintiff's explanation was "*the* true reason" for the adverse action.[209] Disproving that defendant's reason, however, does not prove the truth of the plaintiff's reason.[210] Such a standard of proof would be nearly impossible to meet because it would require the plaintiff to disprove all alternative explanations. Furthermore, such a burden of proof amounts to a "sole cause" standard, which both the Supreme Court and Congress have rejected.[211] *McDonnell Douglas* does not create a sole cause standard. Nor does it create a but-for standard. The hyperbolic characterizations of the plaintiff's burden are metaphorical rather than literal explanations for how the *McDonnell Douglas* inference of discrimination works.

According to *Hicks*, the *McDonnell Douglas* framework permits the factfinder to infer discrimination by disproving the defendant's alleged nondiscriminatory reason.[212] Similarly in *Reeves*, the Supreme Court held, "the Court of Appeals erred in proceeding from the premise that a plaintiff must always introduce additional, independent evidence of discrimination [beyond disproving the defendant's explanation]."[213] A mere showing of pretext without additional proof of discrimination falls short of proving but-for causation. Such a show-

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208. Tex. Dep't. of Cmty. Affairs v. Burdine, 450 U.S. 248, 256 (1981).

209. Price Waterhouse v. Hopkins, 490 U.S. 228, 247 (1989), *superseded by statute as stated in* Landgraf v. USI Film Prods., 511 U.S. 244 (1994) (alteration in original). The Court also stated, "the premise of *Burdine* is that *either* a legitimate *or* an illegitimate set of considerations led to the challenged decision." *Id.*

210. See Mary Ellen Maatman, *Choosing Words and Creating Worlds: The Supreme Court's Rhetoric and Its Constitutive Effects on Employment Discrimination Law*, 60 U. PITT. L. REV. 1, 17-18 (1998) (arguing that *Burdine*'s characterization of the issue as determining the "true reason" for the adverse employment action distorted a framework that merely allowed the factfinder to infer discrimination).

211. *Price Waterhouse*, 490 U.S. at 240-41 (noting that Congress did not intend the words "because of" in section 703(a)(2) of Title VII to mean "solely because of"); *see also* 110 CONG. REC. 2728, 13,837 (1964) (rejecting an amendment that would have changed the section to read, "solely because of"). Even before *Hicks* modified *McDonnell Douglas* by holding that disproving the defendant's explanation permitted rather than compelled a finding for the plaintiff, *McDonnell Douglas* did not actually require the plaintiff to prove that discrimination was the only cause for the adverse action. If the plaintiff disproved the defendant's explanation, a presumption of discrimination arose. This presumption was a legal construct to help a plaintiff with a weak case. After *Hicks*, a plaintiff, even having disproved the defendant's explanation, may have to offer additional evidence. The quantum of evidence needed, however, when taken together with the prima facie case and disproof of the defendant's explanation, must meet the motivating factor test, not the determinative influence test.

212. St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502, 511 (1993). The Court noted that the inference of discrimination may be particularly apt when the factfinder suspects that the defendant was lying. *Id.*

213. Reeves v. Sanderson Plumbing Prods., Inc., 530 U.S. 133, 149 (2000). The Court also stated, "it is *permissible* for the trier of fact to infer the ultimate fact of discrimination from the falsity of the employer's explanation." *Id.* at 147.

ing, however, permits the factfinder to infer that discrimination was a motivating factor.[214]

The *Price Waterhouse* plurality opinion contradicts the notion that *Hazen Paper* established a but-for standard of causation. Interpreting the phrase "because of" in section 703(a)(1) (the principal section outlawing workplace discrimination), the *Price Waterhouse* plurality declared, "[t]o construe the words 'because of' as colloquial shorthand for 'but-for causation,' as does Price Waterhouse, is to misunderstand them."[215] The Court did not limit its rejection of the "but-for" standard to mixed-motive cases. Its explanation applied across the board.[216]

One cannot argue persuasively that there are two different causation standards governing individual disparate treatment cases. It is not sensible to vary the legal standard of causation governing a category of cases based on alternative frameworks. Such a sliding-scale standard would be unfair and would lack coherence. Paradoxes arise when one argues that these contradictory standards exist side-by-side. First, disproving the defendant's explanation, under *Price Waterhouse*, is merely some evidence probative of meeting the motivating factor test. It is absurd to argue that the same evidence carries more weight under the *McDonnell Douglas* approach. Yet this paradox would occur if the factfinder held that proof of pretext, without additional proof of discrimination, met the but-for test under *McDonnell Douglas*. Second, if direct evidence of discrimination (for example, "You're fired because you're black") merely establishes that discrimination was a motivating factor, disproving the defendant's explanation, which is less persuasive than direct evidence, cannot satisfy the more rigorous but-for standard of causation. One might respond that such direct evidence exceeds the burden imposed by *Price Waterhouse*. Nonetheless, before *Costa*, the overwhelming majority of circuit courts required direct evidence, however they defined the term, to meet the motivating factor test.

The motivating factor test is the only standard in individual disparate treatment cases, but there are two overlapping approaches to meet it: *McDonnell Douglas* and *Price Waterhouse*. *McDonnell Douglas* is therefore compatible with the motivating factor test of § 2000e-2(m).

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214. *Hicks*, 509 U.S. at 511.

215. *Price Waterhouse*, 490 U.S. at 240.

216. The *Price Waterhouse* plurality further explained that the "critical inquiry, the one commanded by the words of § 703(a)(1) [sic], is whether [discrimination] was *a factor* in the employment decision *at the moment it was made*." *Id.* at 241 (first emphasis added). This general explanation of the meaning of section 703(a)(1) applies, by its terms, to all disparate treatment cases, not only to "mixed-motive" cases. Proving that discrimination was merely *a factor* is a far cry from proving that it was *a determinative factor*.

Professor Michael Zimmer defends the view that *McDonnell Douglas* follows the but-for test. He argues creatively that, although using the but-for test, *McDonnell Douglas* is nevertheless consistent with the motivating factor standard.[217] Even in motivating-factor cases, Professor Zimmer observes, but-for causation enters the mix. If the plaintiff meets the motivating factor test, the defendant may limit remedies by proving that its reason was a but-for cause of the challenged decision.[218] Absent such a showing, the plaintiff enjoys the right to full remedies because discrimination, by default, becomes the presumptive but-for cause.[219] Thus, under both approaches the plaintiff gets full remedies only if discrimination was the but-for cause of the employment decision.[220] Professor Zimmer argues, therefore, that the effective differences between the approaches are slight.[221] He acknowledges, however, that a plaintiff who meets the motivating factor test of *Price Waterhouse* wins and gets full relief if the defendant cannot prove the same-decision defense, whereas a plaintiff loses under *McDonnell Douglas* if he cannot meet the more onerous determinative influence test.[222] *McDonnell Douglas* requires the plaintiff to disprove the defendant's reason, whereas *Price Waterhouse* requires the defendant to prove it was a but-for cause. This difference in allocating the burden of proof is significant. Plaintiffs and defendants do battle over who bears this burden of persuasion because outcomes of cases hang in the balance.

C. McDonnell Douglas *As the Universal Framework*

One possibility for establishing a unitary framework in all individual disparate treatment cases is to broaden the reach of *McDonnell Douglas*. Professor Tristin Green takes this approach. She correctly observes that § 2000e-2(m) applies to all individual disparate treatment cases.[223] Emphasizing the *McDonnell Douglas* Court's reference to direct as well as indirect proof, Professor Green argues that *McDonnell Douglas* covers all individual disparate treatment cases,

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217. Michael Zimmer, The New Discrimination Law: Section 703(m) Governs, *Price Waterhouse* Is Dead, Wither *McDonnell Douglas*? 49 (Nov. 11, 2003) (unpublished manuscript, on file with the author).

218. *Id.*

219. *Id.* at 50.

220. *Id.* at 50-51.

221. *Id.* at 51.

222. *Id.* at 50-51. Professor Zimmer's purpose in showing the similarities between the determinative influence standard and the motivating factor standard is ultimately to argue for the abandonment of *McDonnell Douglas*. *Id.* at 51. As shown below, *McDonnell Douglas* should, as Professor Zimmer argues, be discarded. *See discussion infra* Part V.

223. Tristin K. Green, *Making Sense of the* McDonnell Douglas *Framework: Circumstantial Evidence and Proof of Disparate Treatment Under Title VII*, 87 CAL. L. REV. 983, 1008 (1999).

regardless of plaintiff's proof.[224] Professor Green concludes that the *McDonnell Douglas* format, including the prima facie case, should apply in all cases, and that, at stepthree, plaintiffs should be given the flexibility to present any evidence, either to prove pretext, or more generally, to meet the motivating factor test.[225]

Although Professor Green's view integrates *McDonnell Douglas* and *Price Waterhouse* into a unitary framework, by advocating the unconditional use of the *McDonnell Douglas* prima facie case, she would perpetuate a confusing regime that unnecessarily complicates individual disparate treatment law and guarantees cumbersome jury instructions. Furthermore, the prima facie case focuses on issues that may have only peripheral relevance in many discrimination cases.[226] Applying the multi-element *McDonnell Douglas* prima facie case may distract the factfinder from the contested issues or may even result in questionable dismissals. Perhaps even more important, the prima facie case of *McDonnell Douglas* conflicts with the *Price Waterhouse* framework. A plaintiff rejected for a job must prove, as an element of the *McDonnell Douglas* prima facie case, that he was qualified for the job. If a plaintiff fails to meet this burden, he loses the case. For example, in *Thomas v. Chrysler Financial, LLC*, Thomas alleged that Chrysler Financial violated Title VII by refusing to promote her.[227] The district court granted Chrysler Financial summary judgment because Thomas could not prove an element of the prima facie case—that her education, experience, and job-performance were similar to one of the two individuals who received the promotion she had sought.[228]

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224. *Id.* at 1000.

225. *Id.* at 1011.

226. *See* Smith, *supra* note 95, at 377-78. He states:

> The prima facie case elements most often are only marginally related to the focus of the case. Many of the elements are typically stipulated . . . or else subject to very little dispute. . . . Litigants rarely spend much trial time or energy on such matters, because the ultimate question of discriminatory intent hinges on controverted factual circumstances and credibility questions.
>
> . . . .
>
> Ultimately, the prima facie case does very little to advance a Title VII plaintiff's quest for a final adjudication of discrimination.

Id.

227. 278 F. Supp. 2d 922, 923 (N.D. Ill. 2003).

228. *Id.* at 927 (citing Patterson v. Avery Dennison Corp., 281 F.3d 676, 680 (7th Cir. 2002) (affirming summary judgment for Avery Dennison because Patterson did not create a triable issue of fact that Avery Dennison treated her less favorably than similarly situated male employees)); *see also, e.g.*, Mitchell v. Data Gen. Corp., 12 F.3d 1310, 1315-17 (4th Cir. 1993) (holding that an element of a prima facie reduction-in-force case is that the retained group contained some worker not in the protected class performing at a lower level than the plaintiff and upholding the district court's grant of summary judgment to Data General because Mitchell could not meet this element), *modified by* Stokes v. Westinghouse Savannah River Co., 206 F.3d 420 (4th Cir. 2000).

A plaintiff has no such burden of proof under *Price Waterhouse*. As the Eleventh Circuit observed in *Wright v. Southland Corp.*, an employer can illegally discriminate against a worker who is unqualified.[229] The court explained that employers often hire unqualified workers, hoping that the workers will gain expertise over time.[230] An unqualified plaintiff can win under *Price Waterhouse* but not under *McDonnell Douglas*. Under *Price Waterhouse*, the defendant gets the opportunity to limit the remedy by proving the same-decision partial defense. It can establish this defense by showing that the plaintiff was unqualified just as it could establish the defense by showing incompetence, insubordination, or any other nondiscriminatory reason. The same reasoning applies regarding the fourth element of a refusal-to-hire case: that the employer continued to seek applicants. Even if the employer canceled the job opening, it might nevertheless have discriminated against an applicant in a protected group. If the applicant meets the motivating factor test, he wins, and the employer can then attempt to establish a partial defense by showing that it canceled the job for a business reason.

D. The Ninth Circuit's Solution

The Ninth Circuit, in *Costa*, made a commendable effort at harmonizing existing disparate treatment law, although the court faltered by misunderstanding the role the Supreme Court established for *McDonnell Douglas*. Like Professor Green,[231] the Ninth Circuit emphasized that *McDonnell Douglas* expressly permits the use of "direct proof" of discrimination, even if the evidence is irrelevant to the issue of pretext. The Ninth Circuit therefore asserted that *McDonnell Douglas* is not limited to single-motive cases, but applies even when mixed motives are at issue.[232] To free jurors from daunting *McDonnell Douglas* instructions, the court interpreted *McDonnell Douglas*

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229. 187 F.3d 1287, 1300-01 (11th Cir. 1999). In *Wright*, the Eleventh Circuit observed:

> [D]iscrimination is possible despite the fact that the person is not qualified for the relevant position. Numerous people in America hold positions for which they are not qualified; this happens because, for instance, the employer may not be aware that the employee is unqualified, the employer may have hired the employee as a means of returning a favor to someone (despite the fact that the employee was unqualified for the position), or the employer may hope that the employee will in due time acquire the necessary qualifications. Therefore, it is possible for an employer to discriminate on the basis of a protected personal characteristic in a manner that does not allow the victim of the discrimination to establish the *McDonnell Douglas* presumption.

Id. (footnote omitted).

230. *Id.* at 1300.

231. *See* Green, *supra* note 223, at 1008.

232. Costa v. Desert Palace, Inc., 299 F.3d 838, 855 (9th Cir. 2002), *aff'd*, 123 S. Ct. 2148 (2003).

to apply to summary judgment motions rather than to trials.[233] Thus, according to the Ninth Circuit, a *McDonnell Douglas* jury charge is generally inappropriate.[234] Rather, the proper jury instructions depend on whether a jury might reasonably find that only one cause or more than one cause motivated the employer's adverse employment action.[235] If the court determines that the only reasonable view of the evidence is that illegal discrimination was either the sole cause of the adverse employment action or that it played no role in the employment action, the jury should be instructed that it must determine whether the employment action was taken "because of" illegal discrimination.[236] If, on the other hand, the evidence reasonably supports the conclusion that discrimination was one of two or more causes for the adverse employment action, the jury must be instructed to decide if discrimination was a "motivating factor" for the employment action.[237] If the jury finds that the evidence meets the motivating factor test, the jury must then consider the same-decision partial defense prescribed in the Civil Rights Act of 1991.[238] The Ninth Circuit recognized that a plaintiff may support any case for discrimination by disproving the employer's alleged justification for the adverse employment action.[239]

Although intriguing, the Ninth Circuit's explanation is flawed. First, it is clear that the Supreme Court intended the *McDonnell Douglas* framework to apply not only at the summary judgment stage but also at trial. *McDonnell Douglas* went to the Supreme Court after trial, and the High Court remanded the case to afford the plaintiff-respondent "a fair opportunity to show that petitioner's stated reason for respondent's rejection was in fact pretext."[240] The Supreme Court heard *Burdine* after a bench trial and explicitly linked the three-step, burden-shifting approach to the "trier of fact."[241] One might argue that both these cases preceded the Civil Rights Act of 1991, which provided Title VII plaintiffs with the right to a jury trial, and that the Supreme Court never intended for jurors, untutored in legalisms, to grapple with complex *McDonnell Douglas* instructions. However, years after adoption of the Civil Rights Act of 1991, the *Reeves* Court applied the *McDonnell Douglas* framework to a jury trial.[242] Second, *McDonnell Douglas* applies only to single-motive cases. The plain-

233. *Id.* at 854.
234. *Id.* at 855.
235. *Id.* at 856.
236. *Id.*
237. *Id.* at 856-57.
238. *Id.* at 857.
239. *Id.*
240. McDonnell Douglas Corp. v. Green, 411 U.S. 792, 804 (1973).
241. Tex. Dep't of Cmty. Affairs v. Burdine, 450 U.S. 248, 253 (1981).
242. Reeves v. Sanderson Plumbing Prods., Inc., 530 U.S. 133, 146-47 (2000).

tiff's step-three burden is to disprove the defendant's step-two reason, which permits the factfinder to infer discriminatory intent. *Price Waterhouse* vitiated the *McDonnell Douglas* Court's reference to "direct" proof as an alternative method of establishing the plaintiff's case. As the *Price Waterhouse* plurality explained, "the premise of *Burdine* is that *either* a legitimate *or* an illegitimate set of considerations led to the challenged decision."[243] Third, it is often unpredictable whether the trier of fact will reasonably credit both the discriminatory reason and the defendant's justification. For example, a plaintiff may offer evidence which, if believed, would meet the motivating factor test, but the defendant may credibly contest that evidence. No sensible method segregates single-motive cases from mixed-motives cases. Thus, despite the laudable intentions of the Ninth Circuit, a court will frequently have to provide the jury with alternative instructions. Finally, vaguely instructing the jury that it must determine if the employer's adverse action was "because of" race or sex fails to clarify the relevant causation standard. One of the purposes of *Price Waterhouse* and § 2000e-2(m) was to explain what "because of" means.[244]

The Ninth Circuit is correct, however, when it asserts that proof of pretext is merely one form of proof of discrimination. Proving pretext supports an inference that discriminatory intent motivated the defendant's adverse employment decision. Juries can draw such an inference when given *Price Waterhouse* instructions without resort to *McDonnell Douglas*. Except in rare cases where *McDonnell Douglas* forces otherwise reluctant plaintiffs to articulate justifications for contested decisions, *McDonnell Douglas* does not advance the quest of proving discrimination. Even in such circumstances, the law should permit a defendant to use whatever litigation strategy it

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243. Price Waterhouse v. Hopkins, 490 U.S. 228, 247 (1988), *superseded by statute as stated in* Landgraf v. USI Film Prods., 511 U.S. 244 (1994). The Court stated:

> Where a decision was the product of a mixture of legitimate and illegitimate motives, however, it simply makes no sense to ask whether the legitimate reason was "*the* 'true reason'" for the decision—which is the question asked by *Burdine*. Oblivious to this last point, the dissent would insist that *Burdine's* framework perform work that it was never intended to perform. It would require a plaintiff who challenges an adverse employment decision in which both legitimate and illegitimate considerations played a part to pretend that the decision, in fact, stemmed from a single source—for the premise of *Burdine* is that *either* a legitimate *or* an illegitimate set of considerations led to the challenged decision. To say that *Burdine's* evidentiary scheme will not help us decide a case admittedly involving *both* kinds of considerations is not to cast aspersions on the utility of that scheme in the circumstances for which it was designed.

Id. (citations omitted). It is critical to recognize, however, that neither *Burdine* nor *McDonnell Douglas* require the plaintiff to prove that discrimination was the "true reason." Rather, these cases allow the factfinder to draw an inference of discrimination if the plaintiff proves a prima facie case and disproves the employer's articulated reason.

244. *Id.* at 240.

deems appropriate. Since both *McDonnell Douglas* and *Price Waterhouse* use the motivating factor test, no sound reason counsels to perpetuate the convoluted three-step, burden-shifting framework. *Price Waterhouse*, as amended by § 2000e-(2)(m) and explained by *Costa*, is all discrimination law needs. The law should recognize this approach as the universal standard.

V. CONCLUSION

Though squarely contradicted by the Civil Rights Act of 1991, Justice O'Connor's concurring opinion in *Price Waterhouse* caused so much confusion among the circuits that the Supreme Court had to decide *Costa* to clarify the law. The unanimous *Costa* Court was correct in holding that a plaintiff can earn a *Price Waterhouse* jury instruction based on direct or circumstantial evidence. Neither the statute nor its legislative history contains any ambiguities on that score. Furthermore, the statute took the right approach. Separating individual disparate treatment cases into direct versus circumstantial cases injected a senseless distinction into the law. Any evidence, circumstantial or direct, may meet the motivating factor test.

The *Costa* decision, however, raised a broader issue. Since being decided in 1973, *McDonnell Douglas*, once a powerful force for allowing the factfinder to infer discrimination, has been hobbled. *Reeves* and *Hicks* have drained *McDonnell Douglas* of all vitality, and *Costa* renders *McDonnell Douglas* superfluous. The Court seems unwilling to acknowledge that the *McDonnell Douglas* regime confounds the law with complexities that serve no useful purpose. Two factors probably explain the Court's inaction: fidelity to stare decisis and a conservative Supreme Court's fear that, by overruling a venerable line of civil rights cases, it will inflame the ire of its liberal critics.

Fixated on an ill-chosen phrase in *Hazen Paper*, many judges and scholars believe that *McDonnell Douglas*, as redefined by *Hicks*, requires a plaintiff to prove that discrimination was the but-for cause of the adverse employment action, whereas *Price Waterhouse*, as modified by the Civil Rights Act of 1991, follows the motivating factor test. This view misconceives *McDonnell Douglas*. The motivating factor test is the only causation standard for individual disparate treatment cases. The *McDonnell Douglas* framework permits the factfinder to infer that the defendant was motivated by discriminatory intent when the plaintiff disproves the defendant's articulated justification for its decision. *McDonnell Douglas* is therefore compatible with § 2000e-2(m).

Given the Court's reticence to clarify the law, Congress must seize the initiative by amending Title VII. Because *McDonnell Douglas*, after *Hicks*, *Reeves*, and *Costa*, confuses the law, *McDonnell*

Douglas-type cases should settle into their proper place under the motivating factor test of § 2000e-2(m).[245] The abandonment of *McDonnell Douglas* would require some minor refinements of Title VII. Section 2000e-2(m) should be amended to make explicit that a defendant is not required to articulate a nondiscriminatory reason for the adverse employment decision. The section should also state that if the defendant articulates a nondiscriminatory reason, the plaintiff is not obligated to disprove it. Furthermore, the section should provide that if the plaintiff disproves the defendant's nondiscriminatory explanation, the jury may accord such disproof whatever weight it deems appropriate. Such evidentiary rules are not ordinarily included in substantive statutes, but a congressional repudiation of *McDonnell Douglas* requires explicit legislation. A tortuous history of misconstrued statutes and garbled Supreme Court decisions counsels for precision.[246]

These modifications will rid the law of unnecessary complexities and evidentiary distortions. Jurors will not have to learn the tricky three-step, burden-shifting approach or grapple with alternative instructions. A defendant will not have to articulate a justification for its actions, if it prefers, for tactical reasons, not to do so. The jury, however, will be free to draw a negative inference from the defendant's silence. A single standard, the motivating factor test, will apply to all cases. This approach, with the necessary modifications, will

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245. *See* Davis, *supra* note 175:

> There is some solace in the hope (perhaps the inevitability) that nonplussed jurors, regardless of *McDonnell Douglas*, will revert to their common sense and decide cases based on whether they think the employer discriminated. But the evidentiary distortions of the *McDonnell Douglas* scheme will hinder their deliberations. In rejecting the pretext-only rule, *Hicks* has eliminated any slender justification for retaining the *McDonnell Douglas* scheme.

Id. at 761.

246. The new law would lead to simplified jury instructions, which would be more understandable and more sensible than the present regime. Based on the premise that § 2000e-2(m) applies to all disparate treatment cases, Benjamin Mizer has proposed jury instructions that focus entirely on the motivating factor test. *See* Mizer, *supra* note 189, at 263. Mizer's proposed instructions provide:

> In light of all of the evidence that has been presented, was the plaintiff's [protected characteristic] a motivating factor in the defendant's [adverse employment] decision?
>
> If the defendant was motivated by the plaintiff's [protected characteristic], would the defendant have made the same decision even if it had not considered the plaintiff's [protected characteristic]?
>
> If you find that the defendant *would* have made the same decision if it had not considered the plaintiff's [protected characteristic], I will decide what kind of relief is equitable to correct the violation of the law. If you find, however, that the defendant *would not* have made the same decision, you must also determine [the amount of damages to award].

Id. (alterations in original).

preserve the inference that a factfinder might draw from proof of pretext.

Hicks and *Reeves* have staggered *McDonnell Douglas*. *Price Waterhouse* has the muscle to replace it. Like a prizefighter who has lost his punch, *McDonnell Douglas* should retire and make a graceful retreat into history.