CAUSATION IN CONTEXT

By

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ABSTRACT

Causation in Context *examines and critiques the Supreme Court's January 2014 decision in* Burrage v. United States *and the false equivalency drawn between factual causation standards in criminal law and employment discrimination. In nearly all of its opinions on factual causation, the Court has looked to the "ordinary meaning" of statutory language, cautioning, in some form or another, that "text may not be divorced from its context." Nonetheless, the Court continues to do just that, applying linguistic meaning across statutes without consideration of its context, the type of statute in which the language is found, the policy goals at issue in its creation, and the overall functioning of causation in the relevant area of law. That was certainly the case in* Gross v. FBL Financial Services, Inc. *and* University of Texas Southwestern Medical Center v. Nassar, *the Court's recent factual causation employment cases. In* Burrage, however, *the Court takes this a-contextual approach one step further drawing an equivalency between criminal law and employment discrimination that is not only illogical but potentially detrimental to future employment discrimination jurisprudence.*

This article draws on the existing scholarly critique of "but-for" causation in disparate treatment cases, by scholars such as Brian Clarke, Lawrence Rosenthal, and Martin Katz among others, and argues that the Burrage *Court's false equivalency between criminal law and employment discrimination is as damaging as the Court's decisions in* Gross *and* Nassar. Causation in Context *examines the history of "but-for" causation in employment cases, explores the four major problems with the* Burrage *approach, and details the ways in which it is likely to negatively impact discrimination doctrine into the future.*

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INTRODUCTION

The Supreme Court recently decided *Burrage v. United States*, a criminal case involving heroin distribution in which the Court considered the causation standard for the "death results" enhancement, a penalty enhancement provision that increases the minimum and maximum sentences if a victim's death resulted from the defendant's act. [1] Notwithstanding the case's obvious home in criminal law, the Court's analysis and justification for its determination that "but-for causation" is required relied heavily on comparisons with its recent cases in the employment discrimination field. Thus, rather than relying solely on criminal cases that involve factual causation issues similar to those present in *Burrage*, or even tort cases that provide civil law analogies to criminal cases, the Court instead drew an equivalency between criminal law and employment discrimination. Recent scholarship from Sandra Sperino, Martha Chamallas, and Charles Sullivan among others has illuminated the increasing and troubling tendency of the Court to casually import tort and agency law concepts into employment cases. [2] The *Burrage* case suggests that the Supreme Court is also willing to analogize employment discrimination to other, radically different areas of law. While the *Burrage* Court's equivalency between criminal law and employment discrimination was intended to simply benefit its conclusion in *Burrage*, it has the potential to harm employment discrimination jurisprudence in ways that are not easily rectified.

The notion of "but-for" causation in employment discrimination cases has been debated in courts and among scholars at least since the Court decided *Price Waterhouse v. Hopkins*[3] in 1989, but the tenor of discussion turned urgent when the Supreme Court decided *Gross v. FBL Financial Services, Inc.*[4] in 2009 and, more recently, *University of Texas Southwestern Medical Center v. Nassar*,[5] in 2013. Much to the chagrin of many in the scholarly community, the Court in these recent cases has now twice decided that outside of traditional Title VII protection for discrimination on the basis of race, color, sex, religion, and national origin, other types of discrimination (age and retaliation) require plaintiffs to prove "but-for" causation. This means that plaintiffs must demonstrate that bias was the "but-for" cause of the adverse employment action and may not rely on a mixed motives analysis in which they prove that the bias was a motivating or substantial (but not the "but for") factor. On their own, these decisions are damaging to future plaintiffs and re-solidify the Court's unwavering pro-employer approach. But just as troubling is the Court's recent use of these employment discrimination cases in the criminal context, which is problematic not for criminal law necessarily but-for the future of employment discrimination law.

This Article draws on the existing scholarly critique of "but-for" causation in disparate treatment cases, by scholars such as Brian Clarke, Lawrence Rosenthal, and Martin Katz among others, and argues that the *Burrage* Court's false equivalency between criminal law and employment discrimination is similarly damaging. [6] In advocating a "but-for" requirement in the "death results" enhancement provision at issue in *Burrage*, the Court (as is now common practice) looked to the "ordinary meaning" of the phrase "results from," turning to dictionary definitions and its recent cases to supply the meaning.[7] And while the Court has consistently argued that "text may not be divorced from context,"[8] in looking to employment discrimination cases for the meaning of a criminal statute, the Court failed to acknowledge that "ordinary meaning" must necessarily change depending on context. That is, the phrase "results from" should have a different meaning in a criminal context than it does in an employment law context

where the stakes are wholly different, the causative factors have little in common, and the policy goals and default rules are widely disparate.

This Article argues first that the reliance on employment discrimination jurisprudence in *Burrage*, a purely criminal matter, is inappropriate and second, that the false equivalency between these two areas of law has potentially negative implications for discrimination jurisprudence. The Court's comparison of these two fields is inapt for at least four reasons: (1) factual cause has different meanings and effects in each context, (2) multiple cause situations that are the exception in criminal law are the norm in employment cases, (3) the zero-sum-game nature of employment discrimination cases is not found in criminal matters, and (4) the existence of the Rule of Lenity in criminal cases suggests widely different policy goals in the two bodies of law. More than being inappropriate, however, the false equivalency between criminal law and employment discrimination law is potentially problematic for employment law as it suggests that courts may also import concepts from criminal law into employment cases resulting in confusion and dilution of, for example, the notions of intent and fault in employment discrimination cases. Perhaps the solution at this point is for Congress to step in, as it did in 1991, to clarify the goals of discrimination law and the proof and causation requirements that are applicable to all the federal anti-discrimination laws and to all types of workplace bias.

In order to examine the inappropriate comparisons made in the *Burrage* opinion, this Article will first review the history of causation standards in disparate treatment discrimination cases and then discuss the ways in which the comparison between employment law and criminal law is inappropriate and problematic. Part I will discuss the history of "but-for" causation in employment discrimination cases. Part II will examine *Burrage v. United States* and problems with the equivalency between criminal law and employment law and will consider hate crime legislation and its role as a hybrid area of law. Finally, the Article will conclude by discussing the harmful impact of the false equivalency on employment discrimination jurisprudence and consider looking to Congress for a solution.

I. THE TREACHEROUS HISTORY OF "BUT-FOR" CAUSATION IN EMPLOYMENT LAW

A. Price Waterhouse and Title VII's Flexible Standard

In order to understand the problematic nature of the Court's recent reliance on employment cases to make its causation point in a criminal case, it is important to understand the Court's historical approach to causation in employment. As a preliminary matter, the debates around factual causation typically arise in disparate treatment cases in which the plaintiff alleges intentional discriminatory conduct. The other two forms of discrimination addressed by employment statutes—disparate impact and harassment—involve factual circumstances and legal theories that make either the employer's state of mind or the causation question far less or wholly irrelevant.[9] In contrast, the role of factual causation is central in disparate treatment cases where the court is essentially tasked with finding a causative connection between the employer's biased state of mind and the adverse action taken against the plaintiff.[10]

Although causation has recently become a "hot" topic, the Court has actually been pondering causation in bias cases since at least the late 1980's when it produced a plurality opinion in *Price Waterhouse v. Hopkins* that became the source of much confusion in subsequent years.[11] The story of "but-for" causation in disparate treatment cases, however, necessarily begins with the language of Title VII.[12] In its original form, enacted in 1964, Title VII provided

protection against workplace discrimination based on race, color, religion, sex, and national origin. As part of the historic Civil Rights Act of 1964, Section 703(a) of Title VII, made it unlawful for an employer with fifteen or more employees:

> to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment because of such individual's race, color, religion, sex, or national origin; or to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.[13]

The key phrase for purposes of a causation inquiry, of course, is "because of," and its meaning has been hotly contested.[14] The Court tackled this question explicitly in *Price Waterhouse v. Hopkins* in which it ultimately allowed a plaintiff to demonstrate unlawful discrimination by showing that bias was a substantial or motivating factor in the adverse employment decision but, importantly, also allowed an employer to avoid all liability by proving that it would have made the adverse decision even without the biased motivation.[15]

Price Waterhouse revolved around a female candidate for partnership in the well-known accounting firm who claimed that she had been denied partnership because of her sex.[16] The evidence in the case demonstrated that Ann Hopkins was denied partnership, at least in part, because of sex stereotyping—that is, despite her high level of performance and effectiveness at work, she faced discrimination for not being feminine enough in her interpersonal interactions.[17] The Court made the important decision in this case that sex stereotyping is a form of sex discrimination prohibited by Title VII.[18]

But before reaching that decision, the Court was tasked with deciding what role the sex discrimination must play in the decision in order for the employer to be liable or, in other words, what type of factual causation is required by Title VII's language and on which party the burden of proof lies.[19] In considering this question, as Martin Katz has pointed out, the "Court used over twenty different [vaguely defined or undefined] formulations to describe Title VII's causation requirement" and used them interchangeably.[20] Ultimately, the Court clearly rejected "but-for causation," noting that "[t]o construe the words 'because of' as colloquial shorthand for 'but-for causation' . . . is to misunderstand them."[21] In fact, the Court concluded that "Title VII meant to condemn even those decisions based on a mixture of legitimate and illegitimate considerations."[22] Rather than relying on dictionary definitions as it has done in later cases, the *Price Waterhouse* Plurality turned to common sense notions to conclude that the phrase "because of" could not possibly require a plaintiff to pinpoint the precise motivation that was the "but for" cause of an adverse decision since the reality of workplace relationships and human motivations in general would foreclose such a possibility in most cases.[23] Instead, the Plurality concluded that a Title VII plaintiff must show that bias "played a motivating part in an employment decision."[24] In order to preserve employers' freedom of choice, the Court also opined that an employer could avoid a finding of liability altogether if it proved that it would have made the same decision even if bias had not been permitted to play a role.[25]

In its 1991 amendments to Title VII, Congress took issue with, among other things, the *Price Waterhouse* Plurality's conclusion about employers' ability to avoid all liability by proving that the same decision would have been made absent the bias.[26] In amending Title VII, Congress endorsed the "motivating part" language from *Price Waterhouse*, enacting a standard that allowed a plaintiff to establish liability if he or she could demonstrate that a trait protected by Title VII was a "motivating factor" in the adverse employment decision.[27] In contrast to the Plurality in *Price Waterhouse*, however, the 1991 Amendments mandated liability (although limited only to declaratory relief, injunctive relief, and attorneys' fees) even if the employer demonstrated that it would have taken the action regardless of the protected trait.[28] Thus, a Title VII plaintiff claiming discrimination on the basis of race, color, religion, sex, or national origin, can establish liability through a "mixed motives" analysis, essentially demonstrating that while there may have been some legitimate reasons for the adverse decision, illegitimate bias also played a part.

B. "But-for" Causation Takes Hold: The Gross and Nassar Decisions

In the years after the 1991 Amendments, courts grew increasingly confident in applying a mixed motive analysis to Title VII discrimination cases, but significant divisions developed over how to treat other provisions of Title VII as well as the other federal anti-discrimination statutes. As Lawrence Rosenthal explains, the courts were split over whether to apply the 1991 Act to Title VII's retaliation provisions or to apply *Price Waterhouse*'s analysis to the retaliation provisions since they were not explicitly included in the Amendments' reach.[29] "Some courts applied the motivating-factor standard, allowing plaintiffs to establish liability once they demonstrated retaliation played a motivating factor in the adverse employment action. Most courts, however, applied *Price Waterhouse*, finding Title VII liability *only* when a plaintiff demonstrated that the defendant was motivated at least in part by a retaliatory motive, *and* the defendant could *not* demonstrate it would have made the same decision absent the retaliatory motive."[30]

1. *Gross v. FBL Financial Services, Inc*.

While this debate continued, the Supreme Court agreed to take *Gross v. FBL Financial Services Inc*.,[31] a case that was purportedly taken to determine what type of evidence was required under the Age Discrimination in Employment Act (the "ADEA") in order to obtain a motivating factor instruction. Instead, the case resulted in a decision with far greater implications for causation standards in discrimination cases.[32] In *Gross*, the plaintiff, a fifty-four year old man, claimed that his reassignment to a new position while his old duties were transferred to his far younger subordinate constituted age discrimination.[33] Although Gross received the same compensation in his new position, he considered the reassignment to be a demotion.[34] At trial, Gross argued that his reassignment was due, at least in part, to his age, while his employer countered that the reassignment was part of a corporate restructuring and that the new position suited Gross's skills better.[35] The trial judge instructed the jury using the "motivating factor" language and affirmative defense created by *Price Waterhouse*.[36] The issue appealed to the Supreme Court was whether the trial judge's jury instructions were flawed because they did not account for Justice O'Connor's requirement that the plaintiff present "direct evidence" that bias was a motivating factor in order for the burden to shift to the employer to

prove the affirmative defense.[37] Thus, the Court ostensibly took the case to decide what type of evidence of bias—direct or circumstantial—was required to obtain a mixed motive jury instruction.[38]

Instead of answering this question on direct evidence, the Court in *Gross* asked and answered its own question, deeming it to be a necessary "threshold inquiry," the answer to which, in fact, concluded the case.[39] That "threshold" question, as Justice Thomas called it, was "whether the burden of persuasion ever shifts to the party defending an alleged mixed-motives discrimination claim brought under the ADEA" or, in other words, whether the ADEA allows for mixed motives claims at all.[40] The majority's answer in *Gross* was a resounding "No"—a mixed motives analysis, Justice Thomas wrote, was not possible under the ADEA since the statute required "but-for causation."[41]

Justice Thomas began his analysis, as is common, with the statutory language, looking to the "ordinary meaning" of that language as an accurate explication of Congressional purpose.[42] The Court's opinion, of course, highlighted the decisions in *Price Waterhouse* and *Desert Palace* along with the impact of the 1991 Act but held that the burden shifting framework that provided for mixed motives claims under Title VII had never been applied to the ADEA. And, somewhat ironically given the Court's recent decision in *Burrage*, Justice Thomas emphasized that standards should not be carelessly imported from one statute to another, writing, "When conducting statutory interpretation, we 'must be careful not to apply rules applicable under one statute to a different statute without careful and critical examination.'"[43] The Court then quickly determined that the 1991 Act does not apply to the ADEA because Congress chose not to make similar changes to the statute on age discrimination even though it did make contemporaneous amendments to the ADEA in other places.[44]

Concluding that the 1991 Amendments did not apply, the Court was left with the statutory language in the ADEA itself. Like Title VII, the ADEA provides that "[i]t shall be unlawful for an employer . . . to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, *because of* such individual's age."[45] Searching for the "ordinary meaning" of the phrase "because of," the Court looked to dictionary definitions which generally define the phrase to mean "by reason of" or "on account of."[46] Then, in an unexplained linguistic leap, the Court concluded that the ordinary meaning of "because of age" in the ADEA must therefore be that age was the "but for" reason for the employer's action and that "[t]o establish a disparate-treatment claim under the plain language of the ADEA . . . a plaintiff must prove that age was the "but-for" cause of the employer's adverse decision."[47]

This "bald assertion," as Justice Stevens's Dissent described the Majority's conclusion,[48] flies in the face of unchallenged precedent applying interpretations of Title VII to the ADEA[49] and common sense notions of causation.[50] As Justice Brennan explained in *Price Waterhouse*, the mere fact that two factors may be acting at the same time to cause a result, does not mean that neither was a cause unless it can be proven that it was the "but-for" cause of the result:

> Suppose two physical forces act upon and move an object, and suppose that either force acting alone would have moved the object. As the dissent would have it, neither physical force was a "cause" of the motion unless we can show that but-for one or both of them, the object would not have moved; apparently both forces were simply "in the air" unless we can identify at least one of them as a but-for

> cause of the object's movement. Events that are causally overdetermined, in other words, may not have any "cause" at all. This cannot be so.[51]

In making this point about "causally overdetermined" events, Justice Brennan was drawing from extensive scholarly discussions of causal factors in tort law. As Brian Clarke has explained, such "combined forces" or "overdetermined" cases easily demonstrate the nonsensical nature of "but for" causation which denies causation when another factor equally contributed to the result.[52] Clarke points to the following two well-known examples:

> One is the "two noisy motorcycles"" scenario. In this example, . . .two noisy motorcycles simultaneously pass the horse on which plaintiff is riding, frightening the animal and causing it to run away and injure plaintiff. When the but-for inquiry is focused on Cyclist A's negligent conduct, it gives a perverse answer, indicating that the obviously causal conduct of A was not a cause in fact of the harm because of the causal sufficiency of Cyclist B's negligent conduct" and vice versa. Another example is the ubiquitous "two fires" scenario. In this scenario, C and D independently start separate fires, each of which would have been sufficient to destroy P's house. The fires converge and together burn down the house. Common sense would dictate that both fires were causes-in-fact of the burning of P's house, yet, application of the but-for test would result in a finding that ... neither C's nor D's fire was a cause of the destruction of P's house. [53]

Moreover, as Clarke has highlighted, the Court in *Gross* did little to explain what it meant by "but-for" causation. Did it mean *sole* cause, or could "but-for" mean the factor must be a "significant factor" or finally, "the necessary element of a sufficient set ("NESS")" that Professor Richard Wright articulated in the torts context?[54] In the end, as Clarke points out, the cases cited by the *Gross* Court in support of the "but-for" standard do little to clear up the confusion, leaving us with the "plain meaning of the words the Court used"—that absent the protected trait, the adverse action would not have been taken.[55] It was this poorly explained decision that set the tone for the Supreme Court's decisions in *Nassar* and, more recently, in *Burrage.*

2. University of Texas Southwestern Medical Center v. Nassar

In *Nassar*, the Court took its "but-for" causation standard and, instead of narrowing it as many practitioners and scholars had hoped,[56] expanded its reach beyond the ADEA to Title VII retaliation claims. The plaintiff in *Nassar*, was a medical doctor of Middle Eastern descent who had been hired to work as a faculty member at the University of Texas Southwestern Medical Center and as a staff physician at the hospital.[57] After experiencing alleged bias at the hands of his supervisor at the university, the plaintiff attempted to resign his faculty position while continuing to work at the hospital and was assured by hospital supervisors that he would be offered a job solely at the hospital.[58] In resigning his faculty post, the plaintiff complained of discrimination at the hands of his faculty supervisor. Thereafter, the hospital offered plaintiff a position but then revoked the offer, claiming that such an offer violated the affiliation agreement, which required all staff doctors to also be on faculty at the university.[59] Not crediting this explanation, the plaintiff filed suit claiming that racial and religious discrimination

resulted in his constructive discharge from the university and that the revocation of his offer from the hospital constituted retaliation in response to his discrimination complaints.[60] At issue before the Court, again, was the standard of causation, this time in Title VII retaliation cases. And, again, the Court inexplicably concluded that "but-for" causation was the proper standard.

Many observers in the scholarly community hoped and expected a different outcome in *Nassar* than that reached in *Gross* both because of the nature of retaliation and because of the Court's recent decisions expanding coverage of such claims.[61] Unlike in *Gross*, in which the Court dealt exclusively with the ADEA, in *Nassar*, the Court considered a provision of Title VII itself, albeit one contained in a different section of the statute than that dealing with the underlying discriminatory conduct.[62] As a result, Respondent argued that the motivating factor standard from the 1991 Act should be applied to retaliation claims (either because the amendment should be seen as applying to the statute as a whole or because retaliation is itself a form of discrimination and is thus included in the types of discrimination covered by the 1991 amendments).[63] Alternatively, Respondent and Amici argued that the Title VII retaliation provision should be held to the causation standard determined in *Price Waterhouse* since Congress's failure to explicitly amend the retaliation provision did not suggest a rejection of the *Price Waterhouse* standard for all other discrimination statutes and provisions.[64]

Nonetheless, the Court rejected these views and again insisted on "but-for" causation, this time for retaliation claims. In reaching this decision, the Court again performed the now familiar "close" textual reading of the statute, concluding that Congress took "special care in drawing [a] precise . . . statutory scheme" in drafting Title VII that prevents the application of the "motivating factor" language from the 1991 Act to the retaliation provision absent explicit direction to do so.[65] And again, the Court noted that "[t]ext may not be divorced from context."[66] Unfortunately, instead of a close but simple reading of the plain language of the statute, the Court, as Michael Zimmer has pointed out, "had to slice and dice the terms of the statute to reach a result that is at odds with the plain meaning of both the terms and the structure of the statute."[67] Justice Ginsburg made this point clear in her Dissent as well, commenting that the Majority's view takes the extraordinary step of rejecting the interpretation of "because of" in Title VII (the very statute in which the retaliation provision is found) and demands instead that "statutory lines should be crossed" to borrow the meaning of "because" in the ADEA.[68] As Justice Ginsburg pointed out, the absurdity of this interpretive reach can only mean one thing: "heads the employer wins, tails the employee loses."[69]

Statutory misinterpretation aside, from a policy perspective, the turn towards a strict causation standard in employment discrimination makes little sense. As will be discussed *infra*, the nature of human thought processes makes a "but-for" causation standard difficult, if not impossible, to apply in employment contexts.[70] In addition, the policies undergirding Title VII and the other federal anti-discrimination statutes suggest a recognition by Congress and the courts that "discrimination is a common facet of employment" and that plaintiffs should have the benefit of presumptions that eliminate the need to bring direct, obvious proof of bias.[71] Nonetheless, the Court's decisions in *Gross*, *Nassar*, and, most recently *Burrage* suggest the current Court's lack of appetite for such critiques.

II. THE *BURRAGE* DECISION AND ITS IMPACT ON EMPLOYMENT DISCRIMINATION

Although not an employment case like *Gross* and *Nassar*, the decision in *Burrage*, the Court's most recent foray into factual causation, is equally problematic for discrimination plaintiffs because of the false equivalency drawn between criminal law and employment discrimination law. That the Court relied on *Gross* and *Nassar*, its most recent factual causation cases, is perhaps not surprising given its penchant for over-simplifying statutory interpretation to find the "ordinary meaning" of statutory language. Nonetheless, it is important to consider the implications of the Court's casual comparisons between these bodies of law because the consequences may be far reaching and difficult to overcome.

A. Burrage v. United States

In *Burrage*, the Court was tasked with identifying the proper factual causation standard in a criminal case where the determination of causative effect would result in a mandatory penalty enhancement. *Burrage* involved the prosecution of a heroin dealer on two charges: (1) distributing heroin and (2) distributing heroin when "death resulted from the use of that substance."[72] The case involved the death of Joshua Banka, a long-time drug user, who purchased heroin from the defendant and died after using the heroin along with oxycodone and marijuana. The autopsy showed that Banka had multiple drugs present in his body at the time of death and, as a result, the forensic experts could testify only that the heroin sold by the defendant was a "contributing factor" in his death and not that he would have lived but-for the heroin.[73]

The causation standard in *Burrage* was essential to determining the defendant's guilt under the second charge, the "death results" penalty enhancement. Under 21 U.S.C. § 841(a)(1), (b)(1)(A)-(C), a defendant, who unlawfully distributes a Schedule I or II drug when "death or serious bodily injury results" from its use, is subject to a twenty-year mandatory minimum sentence. At the trial, the District Court instructed the jury that the Government was required to prove "that the heroin distributed by the Defendant was a *contributing cause* of Joshua Banka's death."[74] The jury convicted Burrage of both counts—heroin distribution and the penalty enhancement—and the court sentenced him to the twenty-year mandatory minimum.[75]

The Supreme Court originally intended to answer two questions in *Burrage*—(1) whether the "contributing cause" language is the proper standard for the "death results" penalty enhancement and (2) whether the death must be a foreseeable result of the drug trafficking.[76] In essence, the Court set out to decide both the proper factual causation standard and the role of proximate cause in the "death results" enhancement.[77] In the end, the Court decided only the first question, concluding that the "contributing factor" instruction was insufficient for a conviction under the penalty enhancement charge.[78]

In reaching its conclusion, the Court again focused on the "ordinary meaning" of the statutory language, focusing on the phrase "results from" in the statute.[79] Taking a page almost directly from *Gross*, the Court looked first to dictionary definitions and found that "results from" bears a strong resemblance to "because of," in that "a thing 'results' when it 'arises as an effect, issue, or outcome *from* some action process or design.'"[80] And, in markedly similar manner, the Court leapt from this rather vague

definition to the pronouncement that the phrase "results from" necessitates proof of "but-for" causation.[81]

That this linguistic leap is a flawed approach on its own as it was in *Gross* is not the only problem or even the most disturbing aspect of the Court's analysis. Rather, it is the Court's use of *Gross* and *Nassar* as support for its pronouncement that is most troubling. The Court first relied on *Nassar* as citation for the notion that "results from" requires actual causality, meaning "but-for" causation.[82] The Court later turned to the Model Penal Code for additional support but relied first and foremost on *Nassar*. In fact, after discussing several hypotheticals (involving shooting deaths and baseball games) to demonstrate the "straw that broke the camel's back" scenario, the Court turned explicitly to *Nassar* and *Gross* (rather than merely as citation) and devoted extensive discussion to the Court's recent interpretation of "because" and "because of" in the Title VII retaliation provision and the ADEA respectively. And again, in reviewing its decisions in these cases, the Court emphasized its goal of finding the "ordinary meaning" of the terms.[83]

Interestingly, in *Burrage,* Justice Scalia, like Justices Thomas and Kennedy in *Gross* and *Nassar,* paid lip service to the notion of context and then seemingly ignored its importance. Justice Scalia began the section in which he relied on *Gross* and *Nassar* by noting the following: "Where there is no textual or contextual indication to the contrary, courts regularly read phrases like 'results from' to require but-for causality."[84] Like *Nassar*'s warning that "[t]ext may not be divorced from context," this beginning suggests that the Court has or will undertake a "careful and critical examination"[85] of the context in which the "results from" phrase emerges—that is, a consideration of the type of statute, the policy goals at issue in its creation, and the overall functioning of causation in this area of law. But that did not occur in *Burrage*. Instead, the *Burrage* Court assumed the absence of contextually driven meaning and suggested that the causal phrase may be interpreted similarly across areas of law, drawing an explicit comparison between the statutory language in the criminal statute at issue and the ADEA and Title VII.

This suggested equivalency between criminal law and employment discrimination law is the subject of the remainder of this Article. As is suggested by the critique above, the Article will first detail the ways in which the comparison is an inappropriate one, particularly in the area of causation. The Article, however, is not focused on determining whether the conclusion in *Burrage* is correct or not. Instead, the focus here is on the means not the end, on the Court's analytical approach and the impact of that approach on future employment discrimination cases. As a result, the Article will conclude with considerations of a possible detrimental effect of the false equivalency on the future functioning of employment discrimination law.

B. The False Equivalency Between Criminal Law and Employment Discrimination

Although the related concepts of motivation and intent play important roles in both criminal law and employment discrimination, it is perhaps no surprise that they do not play identical roles in each field and that a comparison between the two highlights important differences in the meaning of causation. There are at least four major differences that suggest that the Court's reliance on causation principles from employment discrimination cases to support its conclusions in a criminal case is

inappropriate. First, important differences arise from the distinction between scientific or physical causation that can be attested to by an expert of some kind and what Justice Breyer referred to as "mind-related" causation at issue in discrimination cases.[86] Second, but related, are the differences in causation implications between multiple actors or forces and multiple emotions as causative factors. Third, there are differences in the liability outcomes of using but-for causation in criminal cases as opposed to employment discrimination cases. Finally, there are important policy differences in each area of law with respect, specifically, to which party receives the benefit of presumptions or the "benefit of the doubt." This section will explore these differences in detail.

1. Scientific Causation vs. Motivational Causation

The first, and perhaps most important, difference between causative factors in criminal law and employment discrimination law emerges from the distinction between scientific causation and motivational causation. Justice Breyer alluded to this key difference in his dissent in *Gross* when he noted that it is "comparatively easy to understand and relatively easy to apply" but-for causation when dealing with "objective scientific" or "physical causation" as opposed to the "mind-related characterizations that constitute motive" in the employment discrimination context.[87] In drawing this distinction, Justice Breyer rightfully pointed to the fact that in employment cases, we typically ascribe motives after an event, trying to discern the internal thought processes of the employer who will invariably be in a stronger position on this issue than the plaintiff employee.[88] In contrast, causation determinations in a criminal matter focus on whether the criminal defendant's activity caused the injury, a determination to be made based on physical evidence to which both parties have equal access.

But the causation differences in this area are even more dramatic than Justice Breyer suggested. It is not only the power differential in determining causation in employment discrimination cases that makes them dramatically different from criminal matters but also the lack of scientific evidence that is standard in criminal cases. In discrimination cases, the attempt to distinguish among causative factors and to scientifically and definitively attribute causation to one motive over others, even in the mind of the discriminator himself, is a nearly impossible endeavor. For example, in *Burrage*, the jury had the benefit of two medical experts who testified about the scientific causes of the victim's death as determined by an autopsy of the body.[89] While experts may disagree about the validity of each of these opinions, no one disputes the fact that science has a role to play in determining the factual causes of the death. The experts identified chemical compounds in the body and theorized about causes of death based on prior studies of the effects of such drug interactions on the human body.[90]

The analogy to human motivational causes is inapposite. In employment discrimination cases such as *Gross*, the jury must decide whether age bias caused the responsible supervisor to terminate or demote the plaintiff or whether there was some other legitimate reason for the employment action. But there are no experts who can claim to have studied the mind of the supervisor or other minds exactly like his to determine with any certainty why he behaved as he did. Instead, the jury must make an effort to discern causation from the credibility of witnesses, the crumbs of evidence demonstrating the existence of bias, their own experience of the world, and common

sense. In addition, in employment discrimination cases, even the discriminator himself may never be able to pinpoint with any certainty which emotion or motivation actually caused his decision.[91] As former Secretary of Labor Robert B. Reich put it: "subtle but pervasive patterns of discrimination dominate the public, private and nonprofit sectors of society because of a 'myopia' on the part of many white male managers who 'unthinkingly discriminate' without having any idea they are doing so." [92] Assuming a decision-maker were to take the stand and testify one hundred percent truthfully, it is likely that he would be unable to scientifically separate his motivations into categories of "but-for impact," "some impact," or "negligible impact" on the ultimate decision.

If the decisionmaker himself may not necessarily be able to pinpoint his motivations, it goes without saying that juries will have even greater difficulty with this task. "'The problem in determining what is in another's mind is a perennial problem in philosophy, commonly called the other minds problem' . . . If reading minds is a difficult problem in philosophy, it is an even more challenging endeavor in legal adjudication."[93] Human emotion and motivation are inherently imprecise, and the emotions that dictate our actions change fluidly from one moment to the next. It is this "squishiness" that makes but-for causation an inappropriate standard for employment discrimination cases, but is not necessarily an obstacle in criminal law.

2. Multiple Actors/Factors vs. Multiple Motives

Relatedly, the second significant difference between causation in criminal law and employment law lies in the difference in frequency between multiple actors or physical factors causing an event in criminal law and multiple motives that cause an adverse employment decision. In *Burrage*, Justice Scalia acknowledged that in criminal law, courts cannot always require strict "but-for" causation particularly in those rare cases in which "multiple sufficient causes independently, but concurrently, produce a result."[94] He pointed to the following example: two people acting independently fatally wound the victim, one by gun shot, the other by stabbing.[95] There are several causation solutions to such a case, involving either an exception to "but-for" causation so that both can be guilty of the crime[96] or the conviction of both actors of a lesser included crime.[97] Either way, criminal law jurisprudence is not overly concerned with this situation since, by all accounts, it amounts to a "rare," "unusual," "numerically in the minority" case, and criminal causation must be built around the more common situations.[98]

In contrast, what is a rarity in criminal law is decidedly the norm in employment discrimination. As Brian Clarke notes, "[t]he decision to hire, fire, or discipline an employee is 'a complex multiattribute multioption decision-making task' involving "policy, personality, objective evidence, subjective perceptions and beliefs, empathy, personal dislike, grudges, history, consistency, documentation, jealousy, protectiveness, favoritism, and, perhaps, race or sex or age or protected conduct (just to name a few)." And, most importantly, "some or all of these considerations - legitimate and illegitimate – 'are taken into account in the decisionmaking process in a way that cannot realistically be seen as anything but simultaneous.'"[99] To support this point, Clarke cites to experiments conducted at the University of Iowa in which researchers tested for gender bias in employment decisionmaking but in a laboratory setting. In the experiments, researchers asked the subjects to assume they were managers in charge of finding candidates to hire

and fire. They were then presented with multiple pieces of information about each candidate including the candidate's sex and non-protected-status related information (educational information, years of experience, college major, competency score, or grade-point average). The results demonstrated that in selecting candidates to fire or hire, both male and female "managers" often used the candidate's sex as a "tie-breaker" after relying on the legitimate pieces of information first.[100] The statistical results were quite definitive and showed, as Clarke notes "just how complex even the simplest decision in the employment context really is."[101] When, in actuality, there are many more factors at play in most employment decisions, demonstrating with any certainty "what role a single discriminatory factor played in the decision-making process is daunting" if not impossible.[102]

This point about decisionmaking in the employment context was alluded to by the creators of Title VII itself. As Justice Ginsburg pointed out in her Dissent in *Nassar,* Senator Case, a sponsor of the Act, noted that a "sole cause" standard would have made the statute's protections meaningless because, in his words, "[i]f anyone ever had an action that was motivated by a single cause, he is a different kind of animal from any I know of."[103] Thus it is clear that in contrast to criminal acts, employment decisionmaking is often (if not always) a product of multiple motivations and emotions that cannot be easily categorized or prioritized. What is a rarity in the criminal context and requires exceptions from any "but-for" causation standard is the norm in the employment context and makes any comparison between the two areas inappropriate.

3. Liability Outcomes of Causation Standards

The third important difference between causation standards in criminal law and employment law involves the effect of such standards on the determination of liability or guilt. In the criminal context, even a strict "but-for" causation standard that precludes a finding of guilt on one charge often will not prevent a determination of guilt and punishment on some other charge. Burrage's counsel articulated this point clearly at oral argument in response to a hypothetical put forth by the Government. In its Brief, the United States posed the following hypothetical that quickly became the focus of the Court's attention at Oral Argument:

> Suppose that *A, B, C* each independently puts one drop of poison in *V*'s coffee intending to kill *V*; that *V*'s strong constitution makes a full two drops of poison a lethal dose; and that *V* indeed dies from poisoning. Petitioner's approach [but-for causation] would conclude that *V*'s death did not result from *A*'s conduct (nor from *B*'s; nor from *C*'s). No single drop of poison was a but-for cause of *V*'s death, because the other two drops would have been enough to kill *V*. And no actor's conduct was independently sufficient to cause *V*'s death, because two drops, not just one, were needed to kill him. In other words, *V*'s death may not have any 'cause' at all. This cannot be so.[104]

At Oral Argument, in response to this hypothetical, Burrage's counsel argued that it is true that neither A, B, nor C could be charged with murder since it could not be proven that any of them was the "but-for" cause of the death. But, she stated, "because it's an intentional act by the

defendant, you would still have liability, criminal liability for attempt or assault or something along those lines, but you would not have each individual person liable for the actual death."[105] She later reiterated this point again in response to Justice Sotomayor's questions about how to "save" this case or prevent the absurd result that each of the killers will be acquitted of murder, saying "Then you have attempt liability, and those people would still all be criminally liable for attempted murder."[106] Burrage's Counsel articulated an important point about the impact of causation determinations in criminal cases—the inability to prove "but-for" causation results, at worst, in a conviction for a lesser-included offense, not an overall acquittal.

The point holds true in the *Burrage* case itself as well. The consideration of but-for causation pertained only to the "death results" enhancement that set a minimum and maximum penalty for the drug distribution charge. But even absent a finding of causation and hence guilt on that charge, Burrage would have been convicted and will spend significant time in prison on the drug distribution charge itself. The issue of causation impacted only the severity of the crime not the existence of a crime at all. Punishment for criminal acts is based on a matrix of intent (*mens rea*), action, and, at times, results. But the absence of a desired result does not necessarily preclude conviction for the action that sought to bring about that result.[107] For example, one commits the crime of "attempted murder" by "engag[ing] in conduct that, if successful, would result in purposely causing the death of another."[108] Actual completion of the killing is not necessary for a conviction. Similarly, a defendant can be convicted of conspiracy even if the conspiracy did not result in successful completion of a crime.[109] The same, of course, is true in enhancement cases where an enhanced penalty is imposed only when the underlying crime causes a certain result.[110] Causation is essential only for some crimes or penalty enhancements but the absence of causation rarely allows the defendant a full acquittal.

Herein lies a primary difference between the role of causation in criminal law and employment discrimination. The absence of proven causation in a discrimination case means a near complete absence of liability. Under the 1991 Amendments to Title VII, the absence of but-for causation can lead to liability only for injunctive and declaratory relief and attorney's fees but not compensatory damages at all (which, of course, is typically the only reason plaintiffs bring discrimination suits).[111] And this is far more than a plaintiff could get under *Gross* and *Nassar* for conduct not specifically covered by the 1991 Act. In those cases, of course, the absence of "but-for" causation means a complete release from liability. If the bias was not the "but-for" cause of the employment decision, the defendant is released from all liability, and the plaintiff has no other recourse. It is, in essence, a zero-sum game, in which the stakes are impossibly high. Under a "but-for" causation standard, to find an employer liable, a plaintiff must prove both that the employer's desired result occurred—the adverse employment action—and that the employer's bias was the direct cause of that result. Mere bias is insufficient as is a demonstration of the existence of bias at the time of the adverse action so that any finding of liability for discrimination is dependent on motive as the "but-for" cause, a situation with no analogue in criminal law. As a result, the imposition of "but-for" causation in each area has dramatically different results—in criminal law, the defendant will likely be convicted of a lesser included offense whereas in employment discrimination cases, the defendant employer will be wholly absolved of liability.

4. Disparate Policy Goals and Presumptions

Finally, the policy goals involved in each area of law are so divergent as to make any comparison between the two rather troubling. In the criminal context, the Rule of Lenity, raised by Justice Ginsburg in her Concurrence in *Burrage* plays a unique role that again differentiates it from employment discrimination. The Rule of Lenity is a "judicial doctrine holding that a court, in construing an ambiguous criminal statute . . . should resolve the ambiguity in favor of the more lenient punishment."[112] Or, as Justice Ginsburg put it, "where there is room for debate, one should not choose the construction that 'disfavors the defendant.'"[113] In essence, there is a long-standing policy in criminal law to favor the defendant in cases of unclear statutory language—a policy that is in keeping with the overall attitude in criminal law of favoring or protecting the defendant with high burdens of proof and the requirement of unanimous jury decisions to convict.[114] When a defendant is charged with a serious crime, the law takes multiple precautions to insure near certainty, including the Rule of Lenity.[115]

This policy of favoring or protecting the criminal defendant stands in contrast to the overarching policy of employment discrimination law. Instead of a "Rule of Lenity" protecting the defendant, employment discrimination jurisprudence has often sought to give the plaintiff (the alleged victim in these cases) the benefit of the doubt, acknowledging how much more difficult it is to prove discrimination than to defend against such a claim. As William Eskridge describes it, the "public value" of protecting minorities generally means that "[s]tatutes affecting certain discrete and insular minorities – 'Carolene groups' -- shall be interpreted, where possible, for the benefit of those minorities."[116] Eskridge offers two examples of this principle in action in statutory interpretation cases: First, he notes that "in some cases, the Court will explicitly announce that statutes should not readily be interpreted against a Carolene group. For example, in *Cardoza-Fonseca*, the Court pointed to "the longstanding principle of construing any lingering ambiguities in deportation statutes in favor of the alien."[117] Second, Eskridge points to the allowance of affirmative action to benefit minority groups under Title VII despite statutory language that may suggest the opposite position.

> [Title VII] obviously protects blacks and women from 'discrimination' against them, but its language also might be read to prevent affirmative action, or 'discrimination,' to help them. Notwithstanding substantial support in the legislative history for that interpretation, the Court in *United Steelworkers v. Weber* held that under some circumstances Title VII does not preclude employers and unions from adopting voluntary affirmative action for black employees. The Court reaffirmed and expanded upon Weber, and applied it to affirmative action programs for women as well, in Johnson v. Transportation Agency.[118]

In essence, this example demonstrates the presumption in favor of protected groups as alleged victims in discrimination cases in particular when statutory interpretation issues arise.

Moreover, the *McDonnell Douglas* burden shifting scheme is an additional example of the presumption favoring discrimination plaintiffs. Under *McDonnell Douglas*, to make out a prima facie case of discrimination, a plaintiff need only raise an inference of discrimination by, for example,

> (i) showing that he belongs to a racial minority; (ii) that he applied and was qualified for a job for which the employer was seeking applicants; (iii) that, despite his qualifications, he was rejected; and (iv) that, after his rejection, the

> position remained open and the employer continued to seek applicants from persons of complainant's qualifications.[119]

After this burden is met, the defendant may proffer a legitimate non-discriminatory reason for the employment action to counter the inference of discrimination.[120] But again, at this point, the doctrine aims to give the plaintiff the edge, allowing a plaintiff to overcome summary judgment by demonstrating that the employer's reason is pretextual merely by casting significant doubt on the defendant's proffered reason, and not necessarily by putting forth evidence that discrimination was the real reason.[121] And the doctrine suggests that a plaintiff may prevail based on a prima facie case alone if the employer cannot come up with a legitimate reason for the action.[122] Essentially, although it is the subject of much critique by scholars and practitioners alike, this burden shifting rubric, among others, acknowledges the difficulty in proving a discrimination claim and, as a result, favors the plaintiff in his uphill battle.

Thus, while the Rule of Lenity among other doctrinal choices in criminal law favors the defendant in cases of ambiguous statutory interpretation, employment discrimination jurisprudence instead favors the plaintiff. This difference is significant particularly when construing the meaning of causative language in statutes where the strictness of the interpretation favors one party over another. In criminal cases, a strict "but-for" causation interpretation favors the defendant because it is the government that must meet this higher burden. Such an approach is in keeping with criminal law's overall approach to presumptions. In contrast, in employment discrimination cases, a strict "but-for" causation approach favors the defendant employer because it is the plaintiff who must prove causation to win. Adding a "but-for" causation requirement to the plaintiff's already uphill battle directly contradicts all other doctrinal choices in the field. As such, the imposition of a "but-for" standard in employment discrimination makes little sense from a policy perspective in contrast to criminal law where it makes perfect sense. As a result of this and the other differences discussed above, the suggestion that criminal law and employment discrimination are so similar that causation standards can be equally applied across contexts is a fallacy.[123]

C. Comparisons to Hate Crimes Are Also Inappropriate

While the inherent and policy-based differences between criminal law and employment discrimination law are clear, it is plausible to think that a comparison between employment discrimination and hate crimes may be appropriate given that both areas involve emotion or motivation as causative factors. But this comparison too is faulty, because of the constitutional implications of the causation standards in hate crimes laws, a concern that is not present in employment cases.

In looking for examples of "but-for" causation to bolster his argument in *Burrage*, Justice Scalia cited to *State v. Hennings*, a case involving Iowa's hate crimes statute, that applied a "but-for" standard in that criminal law. [124] Ironically, the *Hennings* Court explicitly discussed the facet of hate crimes that makes any comparison between it and employment discrimination a mistake as well.

Hate crimes are a unique form of criminal act that considers motive as part of the finding of guilt. As James Jacobs and Kimberly Potter have noted, a "[h]ate crime is not really about hate, but about bias or prejudice. . . essentially hate crime refers to criminal conduct motivated by prejudice."[125] In contrast to traditional criminal statutes where *mens rea* (intent to commit the

crime) and the actual act itself are sufficient for a finding of guilt, hate crime statutes increase the penalty for the underlying crime by focusing on the motive. If the motive for the crime is bias or prejudice against a protected group (the specific groups differ by state), the defendant may be subject to an enhanced penalty.[126]

As a result of this formulation, causation plays a key role in hate crimes cases. As the *Hennings* Court explained, there are three categories of people who might be prosecuted for a hate crime: (1) those who are motivated singularly by something other than bias (jealousy greed, etc.) but who also happen to be racist or sexist etc.; (2) those who are singularly motivated by the victim's protected status; and (3) those who have mixed motives.[127] While the first category clearly do not meet hate crime requirements, and the second category obviously do, when it comes to individuals with mixed motives, the causation standard used will determine which of these people can be convicted of a hate crime.[128]

The *Hennings* Court ultimately concluded that "but-for" causation was required because of the Constitutional difficulties presented by hate crimes laws. Although these laws are now rather ubiquitous, they continue to face critique because of the concern that in enforcing them, we are punishing thoughts, words, and emotions in violation of the First Amendment.[129] In fact, the Iowa Supreme Court in a case that came before *Hennings* explained, "Had [the defendant] limited his attack . . . to mere words, the First Amendment would have protected his right to do so. He lost that protection when his racial bias toward blacks drove him to couple those words with assaultive conduct toward [the victim], who is black." The Court noted that it is the causal connection between prejudice and a prohibited action that protects hate-crime statutes from Constitutional challenge."[130] Absent that "but-for" connection, the state would run the risk of punishing defendants for their words or beliefs rather than strictly for their motives. As a result, the *Hennings* Court also concluded that "but-for" causation was necessary for hate crimes and that even in mixed motive cases, the Government must prove that the defendant would not have committed the crime in the absence of bias.[131]

But the Constitutional issue in hate crimes is also what differentiates it from discrimination in the workplace context. Whereas in hate crime laws, "but-for" causation is necessary to avoid a Constitutional violation, no such concern exists in employment law. Despite public misconception, the First Amendment is not applicable to private workplaces where an employee can be punished for his speech without Constitutional issues.[132] Moreover, there are no Constitutional concerns at play when a court finds an employer liable for an adverse employment action based on mixed motive theory. "But-for" causation is not a necessity in employment discrimination cases because the focus in discrimination cases is on making the victim whole rather than on punishing the employer.[133] As is common in Title VII cases, an employer can be motivated by both legitimate and illegitimate reasons and still be found liable for discrimination without raising any Constitutional problems. As a result, again here, any attempt to equate causation in hate crimes with that in employment discrimination ignores real and significant legal and policy distinctions between the two bodies of law.

D. Negative Implications of the False Equivalency

Beyond being an inappropriate comparison, the *Burrage* Court's false equivalency between criminal law and employment law may negatively impact future employment discrimination cases if courts begin to extend the equivalency beyond causation. The fact that the *Burrage* Court so casually imported causation standards from employment cases into

criminal cases also suggests that the reverse is a realistic possibility. What is to stop a court from relying on criminal law's related notions of intent or fault to interpret Title VII or other anti-discrimination statutes? As Sandra Sperino and others have recently described, courts have increasingly begun importing tort-based concepts into employment discrimination cases, resulting in confusion and over-simplification of employment doctrine.[134] A move to apply criminal concepts in employment law would only further complicate and confuse courts that already struggle to properly apply employment discrimination statutes. The remainder of the Article thus highlights two of the problematic outcomes that are possible if courts begin importing criminal law's doctrinal and analytical choices into employment cases—(1) confusion over the proper role of intent in discrimination and (2) an obscuring of the complexity of fault in employment cases. While neither of these issues is by any means a foregone conclusion, they are plausible results of the Court's suggestion of an equivalency between criminal law and employment discrimination.

1. Confusion of Discriminatory Intent Standards

Given the *Burrage* Court's willingness to rely upon causation analyses from employment cases in a criminal context, it is only natural to consider the possibility that this borrowing of concepts could include the related concept of intent or state of mind that plays a fundamental, although quite different, role in criminal and employment law respectively. Although, as discussed above, there are several forms of discrimination including disparate impact and harassment, in considering the danger of importing intent concepts from criminal law into employment law, this Article focuses specifically on intentional or disparate treatment discrimination in which, like in criminal law, the state of mind of the perpetrator is essential to a finding of liability.[135] The consequences of intermingling concepts of intent in criminal law and employment discrimination would be even greater confusion among courts already engaged in a remarkably difficult analysis.[136]

In general, criminal law recognizes several levels of *mens rea* or intent that prosecutors and courts use to categorize the behavior of the criminal defendant. For example, under the Model Penal Code (which sought to create clarity in a previously confused area of law), there are four basic levels of *mens rea:* (1) purpose ("a conscious object to engage in conduct or to cause a result"), (2) knowledge (awareness that conduct will very likely cause a certain result), (3) recklessness (conscious disregard of a substantial and unjustifiable risk), and (4) negligence ("gross deviation from the standard of care that a reasonable person would observe in the actor's situation.")[137] The culpability of the defendant decreases with each level, moving from "purpose" as the most culpable to "negligence" as the least.[138] As culpability decreases, so too does the punishment a defendant can expect to receive for the crime.[139] In fact, the state of mind impacts the definition of the crime itself. For example, a purposeful killing may be categorized as murder while a negligent killing receives the "negligent homicide" label, a separate crime with elements that differ from the more serious purposeful crime.[140]

This scheme in which culpability is matched to state of mind is directly tied to the purposes behind criminal law generally—retribution and deterrence. As Michael Siegel has described:

> Retribution is the deontological notion that a person who commits a crime deserves to be punished. The converse of this proposition - employing retribution as a limiting principle - is equally true. A person who fails to act voluntarily (such

> as by way of reflex or subject to duress) simply should not be punished. Likewise, a person who has no level of intention (such as one whose mental illness prevents comprehension of reality) merits treatment, not punishment.[141]

The inherent notions of fairness that support the criminal justice system demand that punishment be commensurate with both the type of crime and the corresponding state of mind associated with it. Similarly, the parallel purpose of deterrence also mandates this relationship between punishment and level of intent. A defendant who did not act intentionally and exercised due care cannot be deterred from future bad acts by being punished now.[142] And, as Siegel points out, any attempt to impose punishment on an undeserving actor would endanger the system overall: "Because punishment would be futile, imposing it would undermine confidence in and respect for the criminal law."[143] While this description of criminal law is somewhat simplified and there exists some confusion and overlap between categories, most experts would agree that criminal law generally requires the progression of intent with concomitant culpability.

In contrast, intent plays an increasingly muddled role in employment discrimination cases, a situation that would likely be harmed not helped by the application of criminal law concepts. In disparate treatment cases, intentional conduct is typically a requirement for any finding of liability.[144] But unlike criminal law, employment law does not recognize discreet levels of intentionality nor do plaintiffs bring different discrimination claims depending on the alleged state of mind of the employer. Instead, courts in employment cases typically expect some level of intent to be proved but neither the statute nor the case law explicitly define this expectation. In this context, scholars have advocated broadening the meaning of intent to encapsulate more flexible notions including unconscious bias, negligent discrimination, and structural discrimination.

Although these "flexible intent" theories have not been wholly embraced by courts, they have been discussed since the late 1980's by scholars and have impacted, in subtle and overt ways, the development of employment discrimination jurisprudence.[145] Unconscious or implicit bias theory rests on the notion that many, if not all, people hold biased views or make biased assumptions that are not part of their conscious thought processes.[146] The application of this theory to antidiscrimination law suggests a rethinking or expansion of the notion of intent in disparate treatment discrimination. A plaintiff may be a victim of a bias-induced action despite the decision-maker's sincerely-held belief that he or she did not, in fact, discriminate. Related to implicit bias, the theory of negligent discrimination calls for application of a traditional negligence standard to employment discrimination so that an employee could claim discrimination "[w]henever an employer fails to act to prevent discrimination which it knows, or should know, is occurring, which it expects to occur, or which it should expect to occur."[147] This theory too suggests an expansion of the meaning of intent, holding employers accountable even absent clear knowledge of the bias. Finally, structural discrimination theory argues that discrimination may result from common workplace structures, social interactions and relationships, and systems of hiring, promotion, and work allocation that favor majority groups without intending such a result.[148] Here, too, intent takes on new meaning as a court may find liability based on the workplace structures itself and not the bias of a specific employee or employees.

These theories, while still found largely in scholarship, have begun to impact courts' conclusions in a slow but meaningful way.[149] In the most obvious example, negligent discrimination has filtered into hostile work environment theories of sexual

harassment law. Where an employee demonstrates that a co-worker has created a hostile work environment, he can prove liability by demonstrating that the employer "knew or should have known" of the behavior and failed to stop it.[150] In terms of structural discrimination, that notion is present in disparate impact theories of discrimination in which an employer is held liable for its neutral policies that have a disparate impact on a protected class.[151] More recently, structural discrimination theories undergirded the groundbreaking class action claims in *Wal-Mart Stores Inc. v. Dukes*,[152] which, although rejected by the Court on class action grounds, has nonetheless spawned many similar but smaller suits utilizing the same theoretical approach.[153] Finally, with respect to implicit bias, while no court has expressly endorsed this theory, the 1989 holding in *Price Waterhouse* that adverse actions based on stereotypes (whether negative or positive) constitute discrimination is premised on a flexible conception of bias and intent. [154] In acknowledging that the use of even "positive" stereotypes about women and other minorities can constitute unlawful discrimination, courts have begun to understand intent as encompassing more than overt and hateful prejudice.[155] Thus, these theories of expanded intent are slowly but consistently impacting discrimination jurisprudence and forcing an expansion of the field overall.

The approach to "intent" in employment law is thus significantly more murky than in most criminal cases. It is impossible, for example, to conceive of a criminal defendant being penalized for acting based on an unconscious desire to kill the victim while in employment law, this notion of unconscious bias is increasingly gaining traction. In addition, the role of intent in employment discrimination law is tied to its goals of individual compensation and eradication of discrimination in society in general and not, like criminal law, to retribution or punishment.[156] Thus, any attempt to import criminal notions of intent and culpability into employment discrimination risks further confusing an already complex analysis. From a judicial competence standpoint, with courts increasingly (and, many argue, wrongly) attempting to impose tort law theories and concepts onto employment discrimination, any suggestion of additional cross-pollination between criminal law and employment law would likely mean an increasingly convoluted future for employment discrimination cases. The meaning of intent in employment cases should be determined by looking internally at the goals and complexities of this area of law alone and not by borrowing concepts from other fields.

2. Obscuring the Complexity of Fault in Employment Cases

A second but related result of the false equivalency between criminal law and employment discrimination is the potential for an expectation of simplicity in the conception of fault in employment cases. While there is obviously complexity in criminal law, both in terms of proving *mens rea* and proving the criminal act itself, criminal justice demands something of a "bad guy" vs. "good guy" approach that is often impossible in discrimination cases. In order to justify depriving a criminal defendant of liberty, we demand a level of certainty about the commission of the crime and often depict the defendant as "bad," "corrupt," "immoral," "cruel," or "depraved"—the illegal act is a crime against society not simply an injury to one person.[157]

In contrast, employment discrimination does not demand such a "black and white" approach. Bias is both deplorable and, to some extent, a natural and expected fact

of life. In fact, some social psychologists believe that prejudice is, in fact, innately human:

> Because of various social pressures, we humans have a need to classify and categorize the persons we encounter in order to manage our interactions with them. We have a need to simplify our interactions with others into efficient patterns. This essential simplification leads naturally to stereotyping as a means to desired efficiency. The resultant stereotyping has as an unfortunate side effect, the bigotry and prejudice that so frequently make social relations with others extremely difficult.[158]

Prejudice has also been described as a "learned behavior" or as appearing in two forms "hate-prejudice" and "love-prejudice."[159] In the case of children who have innocently learned prejudice or those who rely on harmful stereotypes to express their "love" of a minority group, it would be hard to conceive of these parties as simply "bad" or "evil" yet their resulting biased behavior is undoubtedly discriminatory.

And, in fact, defendant employers need not be portrayed as evil in order to be found liable for discriminatory conduct. As described above, theories of unconscious bias and structural discrimination have seeped into employment discrimination jurisprudence, leaving courts and the public with an increasingly complex understanding of prejudice and its impact.[160] An equivalency between criminal law and employment discrimination could suggest to courts that this complexity and nuance is unnecessary—that we should find the same "bad guy" vs. "good guy" theme in discrimination cases. That expectation, if it filters to courts and juries would result in far fewer victories for deserving plaintiffs who cannot present such a clear cut moralistic picture.

One example of the possible negative impact of this equivalency arises in the retaliation context. In retaliation cases, the bad vs. good dynamic is often missing. Imagine a well-meaning supervisor who reorganizes his department and, in so doing, moves a sixty-year-old worker into a lower level position than he held before the reorganization. That older worker is understandably upset and accuses his supervisor of age discrimination, relying on the fact that all other workers who were reassigned in is department were moved laterally or given promotions and were all under age forty. The supervisor, feeling hurt, begins to snub his sixty-year-old employee, directing work to other employees and generally avoiding contact with the complaining employee. This reaction from the supervisor, in turn, causes the employee to justifiably file a retaliation claim.

In this scenario, it is of the utmost importance that discrimination law maintain a complex view of fault when considering liability. The supervisor's actions in response to the age discrimination complaint were potentially unlawful retaliation despite his lack of animus. It is a natural human response for someone accused of bias (wrongly or rightly) to become defensive and lash out at the accuser.[161] While this reality should, in no way, condone retaliatory behavior under the law, it does mean that the judge and jury are presented with a complex moral picture involving well-meaning individuals on both sides. Should criminal law's bad vs. good approach be applied in discrimination cases, courts and juries would begin to expect evidence of the employer or decisionmaker's poor moral character, hateful attitudes, and mean-spirited nature, characterizations that do

not match large numbers of defendants who are, nonetheless, liable for employment discrimination. In the above example, a court might reject a good retaliation claim because it cannot find the hateful intent in the supervisor's conduct. As a result, a reduction to a black and white picture in this area would be problematic for the numerous victims of discrimination or retaliation that is unlawful but not necessarily hateful.

Again, these possible results of the false equivalency between criminal law and employment discrimination are just that, possibilities. But a failure to acknowledge these possibilities and the value-judgment created by this equivalency could create long-lasting changes that confuse and misconstrue the doctrine and realities of employment law.

CONCLUSION

The Court's recent employment decisions are troubling both because of the seemingly reflexive pro-employer approach and because of the Court's unthinking adoption of definitions and concepts found in other areas of law.[162] But the Court's recent criminal decision in *Burrage* could prove to be equally problematic. This Article has sought to demonstrate that the equivalency between criminal law and employment discrimination suggested in *Burrage* is both inappropriate and has potentially far-reaching implications for discrimination jurisprudence. In casually importing causation concepts across fields of law, the Court is misrepresenting the complexity of causation and suggesting that further cross-pollination may be appropriate even without any consideration of the purposes and policies underlying each area of law. The Court did not need to use employment precedents to reach the result it sought in *Burrage*, and its continued insistence on doing this is damaging to all law, including discrimination law. As Jennifer Laurin recently noted in the criminal context:

> Principles of legal reasoning and jurisprudential legitimacy counsel that the use of analogy and precedent in judicial decisions be grounded in reasoning that is by some measure a "fit" with the matter before the Court. This imperative, and the companion norm that some explanation be provided to justify reliance on indirectly applicable legal authority, is only enhanced when a court draws from outside the immediate doctrinal domain in which a case dwells.[163]

Instead of reflexively borrowing definitional concepts across fields of law, courts deciding employment cases should be focused on the specific goals of the law at issue, the relevant parties' interests, and the practical implications of importing the concept into employment law.[164]

Perhaps the only solution at this point is that suggested several times now in Justice Ginsburg's dissents—Congressional action.[165] The 1991 Act was Congress's response to *Price Waterhouse'*s limiting of liability in mixed motives cases. The Lily Ledbetter Fair Pay Act[166] was Congress's response to *Ledbetter v. Goodyear Tire & Rubber Co.*'s [167] limiting of charging and violations periods. To combat the potential confusion that could result from *Burrage*, Congress should reassert the policy goals and broad, expansive interpretations it intended when it passed the anti-discrimination statutes and should confirm that interpretation of these statutes should be based on those principles. Absent some action by Congress, the Court will likely continue to chip away at the protections provided by federal anti-discrimination laws and create unnecessary confusion in its doctrine.

[1] Burrage v. United States, No. 12-7515, slip. op. (U.S.S.C. January 27, 2014).
[2] *See* Sandra F. Sperino, *The Tort Label*, FLORIDA L. REV. _____; Martha Chamallas, *Two Very Different Stories: Vicarious Liability Under Tort and Title VII Law*, Public Law and Legal Theory Working Paper Series No. 265 (July 23, 2014) (on file with author); Charles A. Sullivan, *Tortifying Employment Discrimination*, 92 B.U. L. REV. 1431 (2012).
[3] 490 U.S. 228 (1989).
[4] 557 U.S. 167 (2009).
[5] 133 S. Ct. 2517, 2530 (2013).
[6] *See* Brian S. Clarke, *A Better Route Through the Swamp: Causal Coherence in Disparate Treatment Doctrine* , 65 RUTGERS L. REV. 723 (2013); Martin J. Katz, *The Fundamental Incoherence of Title VII: Making Sense of Causation in Disparate Treatment Law*, 94 GEO. L.J. 489 (2006); Lawrence D. Rosenthal, *A Lack of "Motivation," or Sound Legal Reasoning? Why Most Courts Are Not Applying Either Price Waterhouse's or the 1991 Civil Rights Act's Motivating-Factor Analysis to Title VII Retaliation Claims in A Post-Gross World (But Should)*, 64 ALA. L. REV. 1067 (2013).
[7] It is important to note that this textualist approach to statutory interpretation, which focuses on the ordinary meaning of words and phrases, was not always the Supreme Court's "primary vehicle for interpreting statutes" in this area. For example, while the Court in *Griggs* and *McDonnell Douglas* did begin the discussion on causation, it did not attribute a "fixed meaning" to words in the statute. *Sandra* Sperino, Friend of the Court Blog, Causation Part 3, available at: http://friendofthecourtblog.wordpress.com/.

[8] *Nassar*, 133 S. Ct. at 2530.
[9] In harassment cases, courts are typically presented with either *quid pro quo* harassment (involving a demand for a sexual relationship as a condition of employment) or hostile work environment (involving verbal or physical harassment by superiors or co-workers that is targeted at an employee's protected characteristic such as race, sex, age, etc.).[9] Instead of focusing on intent and causation, in harassment cases, courts are typically interested either in the *quid pro quo* nature of the proposition or, in hostile work environment cases, whether the harassing conduct was severe or pervasive enough to constitute prohibited discrimination. In contrast, disparate impact, like disparate treatment discrimination, involves an adverse employment action including failure to hire, termination, demotion, etc. that the plaintiff alleges was related to his or her protected status. Disparate impact discrimination involves an allegation that a neutral employment practice has an adverse impact on protected groups that cannot be justified by job relationship or business necessity. In disparate impact cases, the employer's motivation is irrelevant as even a neutral (e.g. non-racially motivated) practice or policy can constitute unlawful discrimination if it adverse impacts protected groups.
[10] The state of mind of the decision-maker is a key issue in disparate treatment cases. *See, e.g.*, Raytheon Co. v. Hernandez, 540 U.S. 44, 52-53 (2003) (in disparate treatment cases, plaintiff must provide evidence of "the employer's subjective intent to discriminate"); U.S. Postal Serv. Bd. Of Governors v. Aikens, 460 U.S. 711, 716 (1983) (employer's "state of mind" must remain the focus in disparate. treatment cases). *See also* Alex Reed, *Opening the Floodgates: Expanded Employer Liability for Same-Sex Harassment* (working paper on file with author).
[11] 490 U.S. 228 (1989); *see generally Gross v. FBL Financial Services, Inc.* ,557 U.S. 167 (2009) and *University of Texas Southwestern Medical Center v. Nassar*, 133 S. Ct. 2517, 2530 (2013).
[12] 42 U.S.C. §2000e *et seq.*
[13] 42 U.S.C. § 2000e-2(a) (2000).
[14] The controversy exists among scholars and courts alike. *See* Sandra F. Sperino, *Discrimination Statutes, the Common Law, and Proximate Cause*, 2013 U. ILL. L. REV. 1, 15-16 (2013); Robert Belton, *Causation in Employment Discrimination Law*, 34 WAYNE L. REV. 1235, 1244-45 (1988); Michael C. Harper, *The Causation Standard in Federal Employment Law: Gross v. FBL Financial Services, Inc., and the Unfulfilled Promise of the Civil Rights Act of 1991*, 58 BUFF. L. REV. 69, 75 (2010); Martin J. Katz, *The Fundamental Incoherence of Title VII: Making Sense of Causation in Disparate Treatment Law*, 94 GEO. L.J. 489, 500-11 (2006); Charles A. Sullivan, *Disparate Impact: Looking Past the Desert Palace Mirage*, 47 WM. & MARY L. REV. 911, 929 (2005); Noah D. Zatz, *Managing the Macaw: Third-Party Harassers, Accommodation, and the Disaggregation of Discriminatory Intent*, 109 COLUM. L. REV. 1357, 1374-76 (2009).
[15] 490 U.S. 228 (1989).
[16] *Id.* at 231-33.
[17] *Id.* at 235-37.

[18] *Id.* at 250-52. This decision has gained more prominence recently as transgender plaintiffs who have been precluded from bringing traditional sex discrimination claims have begun to rely on sex stereotyping theory to successfully argue that discrimination based on or at least related to their transgender status is prohibited under Title VII. *See, e.g.*, Glenn v. Brumby, 663 F.3d 1312 (11th Cir. 2011).
[19] The Court noted that beyond there being a split in the circuits on this issue, the question had "to say the least, left the Circuits in disarray." 490 U.S. 228, 238 n. 2.
[20] Katz, *supra* note 5, at 491-92.
[21] 490 U.S. at 240.
[22] 490 U.S. at 241.
[23] 490 U.S. at 241-42.
[24] 490 U.S. at 244, 258. In her concurrence, Justice O'Connor concluded that the plaintiff must show that bias was a "substantial factor" in the employment decision as opposed to the Plurality's "motivating part" language. 490 U.S. at 274. Justice O'Connor's approach, the concurring opinion based on the narrowest grounds, is controlling for lower courts. *See* Marks v. United States, 430 U.S. 188, 193 (U.S. 1977) ("When a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, "the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds."); *see also* Erickson v. Farmland Industries, Inc., 271 F.3d 718, 724 (8th Cir. 2001) (cited in *Gross*, 557 U.S. at 172).
[25] 490 U.S. at 244-45, 258.
[26] The 1991 amendments made changes to Title VII in several areas including: disparate treatment and disparate impact discrimination, right to jury trials, and compensatory and punitive damages. *See* Lawrence D. Rosenthal, *A Lack of "Motivation," or Sound Legal Reasoning? Why Most Courts Are Not Applying Either Price Waterhouse's or the 1991 Civil Rights Act's Motivating-Factor Analysis to Title VII Retaliation Claims in A Post-Gross World (But Should)*, 64 ALA. L. REV. 1067, 1068 (2013).
[27] 42 U.S.C. § 2000e-2(m).
[28] 42 U.S.C. § 2000e-5(g).
[29] Rosenthal, *supra* note 23 at 1079-90.
[30] Rosenthal, *supra* note 23, at 1079.
[31] 557 U.S. 167 (2009).
[32] 557 U.S. 167 (2009).
[33] *Id.* at 170.
[34] *Id.*
[35] *Id.*
[36] *Id.* at 170-71.
[37] In accordance with Circuit precedent, the Eighth Circuit had concluded that Justice O'Connor's opinion in *Price Waterhouse* was controlling and attempted to apply her requirements. *See Gross*, 557 U.S. at 172.
[38] *Id.* at 171-73. In *Desert Palace v. Costa*, 539 U.S. 90 (2003), the Court had addressed this question on "direct evidence" in the context of a mixed motives Title VII claim that arose after the 1991 Act altered the analysis of mixed motives claims. In *Desert Palace*, the Court unequivocally held that the 1991 Amendments to Title VII mandated that no special evidence of any kind (direct or otherwise) was required to shift the burden of persuasion to the employer in a mixed motives case. 539 U.S. at 98-99 (citing 42 U.S.C. § 2000e(m)). Thus, for purposes of standard Title VII claims, neither Justice O'Connor's conclusion in *Price Waterhouse* nor any other aspect of that case was left controlling after the 1991 Amendments. Nonetheless, the *Gross* case raised the same question as *Desert Palace* but in the context of the ADEA, which was not explicitly covered in the 1991 Amendment.
[39] *Id.* at 173, 173 n.1.
[40] *Id.* at 173.
[41] *Id.* at 177-78.
[42] *Id.* at 175.
[43] *Id.* at 174 (citing *Federal Express Corp. v. Holowecki*, 552 U.S. 389 (2008)).
[44] *Id.* at 174-75.
[45] 29 U.S.C. § 623(a)(1) (emphasis added); *see also Gross*, 557 U.S. at 176.
[46] 557 U.S. at 176 (citing Webster's Third New International Dictionary 194 (1966); Oxford English Dictionary 746 (1933); The Random House Dictionary of English Language 132 (1966)).
[47] *Id.* at 176.
[48] *Id.* at 183, n.4.
[49] *Id.* at 183-84.

[50] In announcing a "but for" causation requirement in the ADEA, the Court essentially rejected the notion that *Price Waterhouse*'s pre-1991 Act interpretation of "because of" in Title VII should nonetheless apply to the ADEA even if the 1991 Act does not, a conclusion that would have comported with years of precedent holding that interpretations of Title VII apply with equal force to the ADEA. Instead, somewhat strangely, the Court concluded that because the 1991 Act neither explicitly amended the ADEA to require a mixed motives analysis nor endorsed the *Price Waterhouse* approach for the ADEA, that neither was relevant to the interpretation of the ADEA's language despite the fact that it is identical to Title VII's language. *See Gross*, 557 U.S. at 178-80. Several leading employment law scholars have deemed this notion of "but-for causation" in employment discrimination to be "too stupid to take seriously." *See* Brian S. Clarke, T*he Gross Confusion Deep in the Heart of University of Texas Southwest Medical Center v. Nassar*, 4 CALIF. L. REV. CIRCUIT 75, 76 (2013) (citing Email from Charles A. Sullivan, Professor of Law, Seton Hall University School of Law, to Brian S. Clarke, Assistant Professor of Law, Charlotte School of Law (Oct. 26, 2012, 09:57 EST) (on file with author).).

[51] 490 U.S. at 241. As Justice Stevens pointed out in his dissent in *Gross*, the dictionary definitions themselves could have defined "because of" as "s*olely or exclusively* by reason of" but they did not include such exclusive language. That exclusivity was merely added by the majority without explanation. *See* 557 U.S. at 183, n. 4 (Stevens, J. dissenting).

[52] Clarke, *supra* note 6 at 757-58.

[53] *Id.* at 758 (internal citations and quotations omitted).

[54] Clarke, *supra* note 47 at 77 (citing Richard W. Wright, *Causation in Tort Law*, 73 CALIF. L. REV. 1735, 1790 (1985) ("[a] particular condition [is] a [factual] cause of . . . a specific consequence if . . . it was a necessary element of a set of antecedent actual conditions that was sufficient for the occurrence of the consequence"). Clarke notes that "Wright's "NESS" standard was ultimately incorporated into the Restatement (Third) of Torts: Physical and Emotional Harm as the primary standard for factual causation." *Id.* at 77 n.7 (citing RESTATEMENT (THIRD) OF TORTS: PHYSICAL AND EMOTIONAL HARM § 26 cmts. b, c and i, and Reporter's Note cmts. b, c and i (2010)).

[55] *Id.* at 78-79. Clarke also notes that while this is the most plausible explanation for the Court's words, it is also, "[n]evertheless . . . absurd and unrealistic." *Id.*at 79. Clarke has argued that the more reasonable interpretation of "because of" can be found in *Price Waterhouse* as there is actually a majority of justices (from the plurality and dissent) who explain factual causation as the "NESS" approach. ("The plurality's standard was satisfied when discrimination was part of the 'set of reasons for [the adverse] decision' and was necessary to the outcome. The dissent's standard was satisfied whenever discrimination was 'a necessary element of the set of factors that caused the decision.' These descriptions were uniquely specific, consistent and cutting edge, describing a then-new articulation of factual causation in the tort context." *Id.* at 81 (internal citations omitted); *see also* Clarke, *supra* note 6, at 768.

[56] *See* Brief of Employment Law Professors as Amici Curiae in Support of Respondent, University of Texas Southwestern Medical Center v. Nassar, 133 S. Ct. 2517, 2530 (2013) (No. 12-484).

[57] *Nassar*, 133 S. Ct. at 2523.

[58] *Id.* at 2524.

[59] *Id.*

[60] *Id.*

[61] *See* Michael J. Zimmer, *Hiding the Statute in Plain View: University of Texas Southwestern Medical Center v. Nassar* (Loyola University Chicago School Of Law Public Law & Legal Theory Research Paper No. 2013-011) (on file with author), at 2. In the seven years before the Court decided *Nassar*, it had consistently expanded the reach of retaliation claims under the federal anti-discrimination statutes. *See* Burlington Northern & Santa Fe Ry. v. White, 548 U.S. 53 (2006) (expanding the definition of "adverse action" under Title VII's retaliation provision; CBOCS West, Inc. v. Humphries, 553 U.S. 442 (2008) (finding that complaining about discrimination against someone else constitutes a protected activity under § 1981); Crawford v. Metro. Gov't, 555 U.S. 271 (2009) (concluding that participation in an internal investigation constitutes protected activity); Kasten v. Saint-Gobain Performance Plastics Corp., 131 S. Ct. 1325 (2011) (including oral complaints as protected activity under the Fair Labor Standards Act).

[62] *Compare* 42 U.S.C. § 2000e-2(a) (discrimination provision) *with* 42 U.S.C.S. § 2000e-3(a) (retaliation provision).

[63] Brief for Respondent at 16-19, University of Texas Southwestern Medical Center v. Nassar, 133 S. Ct. 2517, 2530 (2013) (No. 12-484). *See also id.* at 12 (citing Brief of Employment Law Professors, *supra* note 52, at 14)).

[64] *Id.* at 21-31.

[65] *Nassar*, 133 S. Ct. at 2530-31. Ironically, as Sandra Sperino has pointed out, "*Nassar* invoked tort law from the beginning of the opinion, defining the case as one involving causation and then noting that causation inquiries most

commonly arise in tort cases." *See supra,* Sperino, note 2 at 16. It is certainly odd that in a criminal case, the Court would rely so heavily on an employment discrimination case that itself cited to tort law as support.

[66] *Id.* at 2530. The Court also made a specific point about retaliation that suggests that this narrow approach to causation was an attempt to halt the expansion of retaliation theory that has led to a dramatic increase in the number of retaliation claims filed each year. *See id.* at 2531-31 (citing EEOC statistics showing that the number of retaliation claims has doubled in the last 15 years). In addition, it seems the Court was concerned about plaintiffs' ability to add a retaliation claim that will be more difficult to dismiss at the summary judgment phase, thus allowing more cases to proceed to trial (or settle for the plaintiff's benefit). *Id.* Michael Zimmer has taken specific issue with this point in the Court's opinion, noting that the Court seems to have based its unorthodox statutory interpretation on the existence of hypothetical plaintiffs who use trumped up retaliation claims to bolster frivolous discrimination claims. Zimmer notes that while the Court was taken with this hypothetical, it cites no cases or sources of any kind to demonstrate the existence of such a situation. Zimmer, *supra* note 57, at 18-19. "While the hypothetical might reflect real incidents that have happened but had not been recorded in reported decisions or that conceivably could happen in the future, the attraction of a majority of the Court to it demonstrates that their basic inclination is to see employment and employment discrimination from the perspective of the employer, not the employee and not from an interpretation of the text and the structure of the statute." *Id.* at 19.

[67] Zimmer, *supra* note 57, at 11. Zimmer also points out that this "slicing and dicing" is at odds with the Court's professed "plain meaning" approach to statutory interpretation in such dramatic ways that it demands some ideological explanation. "Justice Kennedy's approach is so at odds with the plain meaning canon that Justice Scalia, who has devoted considerable energy to reinvigorate the plain meaning approach, and Justice Thomas, who wrote two previous antidiscrimination decisions, *Desert Palace* and *Gross*, that emphasized the priority of the plain meaning canon, should have, as a matter of principle, joined the dissenters to change the outcome in the case. Their joining the opinion of Justice Kennedy makes one wonder about the depth of their commitment to the plain meaning approach to interpreting statutory text or to question what about the *Nassar* case compelled them to overlook principles they stated so strongly in earlier cases." *Id.* at 15.

[68] *Nassar*, 133 S. Ct. at 2545 (Ginsburg, J., dissenting).

[69] *Id.*

[70] *See infra* Part B (1) and (2).

[71] Sandra F. Sperino, *Discrimination Statutes, the Common Law, and Proximate Cause*, 2013 U. ILL. L. REV. 1, 16 (2013). Sperino argues that the *McDonnell Douglas* burden shifting scheme contains an overlooked causation standard that is not "but-for" causation but that tends to give plaintiffs the benefit of presumptions. *Id.* In addition, she contends that with respect to legal cause, an approach that allows courts to further narrow causation through the use of proximate cause is unnecessary. Contrary to the Court's suggestion in *Staub v. Proctor Hospital*, 131 S. Ct. 1186, 1191 (2011), Sperino argues that it is both unnecessary and inappropriate to impose proximate cause concepts in Title VII cases because the statute already limits liability by narrowly defining the covered parties and types of acts that are covered, imposing time limits and administrative processes, and providing affirmative defenses and burdens of production and persuasion that limit the statute's reach. *See generally id.*

[72] *Burrage,* slip op at 2.

[73] *Id*.

[74] *Id*. at 3 (emphasis added).

[75] *Id.*

[76] *Id.* at 4.

[77] *See id.* at 6.

[78] *Id.*

[79] *Id.*

[80] *Id.* (citing 2 The New Shorter Oxford English Dictionary 2570 (1993) (emphasis in original).

[81] *Id.*

[82] *Id.*

[83] *Id.* at 7-8.

[84] *Id.* at 8.

[85] *See Gross*, 557 U.S. at 174.

[86] *See Gross*, 557 U.S. at 190-91 (Breyer, J., dissenting).

[87] *Gross*, 557 U.S. at 190-91 (Breyer, J., dissenting).

[88] *Id.*

[89] *See Burrage* , slip op. at 2-3.

[90] Brief for Petitioner at 5-8, Burrage v. United States, slip. op. (2014) (No. 12-7515).
[91] Several psychological experiments have looked at the role of race on conscious decision making in an employment setting and have concluded that while the applicant's race did impact the hiring decision, the decision makers rarely if ever admitted any bias. *See* John F. Dovidio and Samuel L. Gaertner, *Aversive Racism and Selection Decisions: 1989 and 1999*, Psychological Science 2000 11: 315. In a study conducted in a Northeastern liberal arts college in 1989 and again in 1999, researchers looked at the role of conscious and unconscious race bias on hiring decisions. Participants in the study, who were all white males and females, were first asked questions, the answers to which suggested their level of professed racial bias. In a later, independent session, these participants were then "asked to use interview excerpts to evaluate candidates for a new program for peer counseling at their university." The "applicants" fit into three profiles based on their explicit qualifications: (1) clearly strong candidates, (2) clearly weak candidates, and (3) "marginally acceptable but ambiguous" candidates. The participants evaluated one candidate whose race (black or white) was easily identifiable from the interview excerpt. The results of the study demonstrated that black and white "candidates" were recommended for hire with the same frequency in the strong and weak categories but in the ambiguous category, black applicants were recommended far less often than white applicants (45% vs. 76%). And, the researchers noted that "as expected, self-reported expressions of prejudice declined significantly across the10-year period." Furthermore, the researchers identified the fact that "participants' ratings of the candidates' qualifications were not directly influenced by race: Participants rated the objective qualifications of blacks and whites equivalently." They theorized the following:

> The effect of race seemed to occur not in how the qualifications were perceived, but in how they were considered and weighed in the recommendation decisions. . . Thus, when given latitude for interpretation, as in the ambiguous-qualifications condition, whites may give white candidates the "benefit of the doubt," a benefit that is not extended to out-group members (i.e., to black candidates). As a consequence, as demonstrated in the present study, moderate qualifications are responded to as if they were strong qualifications when the candidate is white, but as if they were weak qualifications when the candidate is black.

This study demonstrated that decisionmakers themselves rarely admit to their own bias and may not even be aware of the influence of illegitimate or biased motivations on their decisions.

[92] Melissa Hart, *Subjective Decisionmaking and Unconscious Discrimination*, 56 ALA. L. REV. 741, 745 (citing Catherine S. Manegold, *"Glass Ceiling" is Pervasive, Secretary of Labor Contends*, N.Y. TIMES, Sept. 27, 1994, at B1, *available at* 1994 WL 208027.)) ("There is little doubt that unconscious discrimination plays a significant role in decisions about hiring, promoting, firing, and the other benefits and tribulations of the workplace.")
[93] Gavin F. Quill, *Note, Motivation, Causation, and Hate Crimes Sentence Enhancement: A Cautious Approach to Mind Reading and Incarceration*, 59 Drake L. Rev. 181, 191 (2010) (quoting Adam Candeub, *Comment, Motive Crimes and Other Minds*, 142 U. PA. L. REV. 2071, 2078 (1994)).
[94] *Burrage*, slip op. at 10.
[95] *Id.*
[96] *See id.* at 10-11.
[97] *See* Transcript of Oral Argument at 4, Burrage v. United States No. 12-7515, slip. op. (U.S.S.C. January 27, 2014). (Burrage's counsel argued that in such an instance both defendants could be found guilty of attempted murder).
[98] *See Burrage*, slip op at 10 (citing WAYNE LAFAVE, SUBSTANTIVE CRIMINAL LAW §6.4(a) 467 (2d ed. 2003)).
[99] Clarke, *supra*, note ___ at 731 (quoting Katz, *supra* note ___, at 513-14).
[100] *Id.* at 731-33.
[101] *Id.* at 733.
[102] *Id*.
[103] *Nassar*, slip op. at 25 (Ginsburg, J., dissenting) (citing 110 Cong. Rec. 2728, 13837-13838 (1964)).
[104] Brief for the United States at 24, Burrage v. United States No. 12-7515, slip. op. (U.S.S.C. January 27, 2014). (quoting *Price Waterhouse*, 490 U.S. at 241 (plurality opinion)).
[105] Transcript of Oral Argument at 2, Burrage v. United States No. 12-7515, slip. op. (U.S.S.C. January 27, 2014).
[106] *Id.* at 4.

[107] In addition, the motive for the crime is rarely an element of the crime itself, and a defendant may be convicted if the government proves the act and the required intent but not the motive. *See* Gavin F. Quill, *Note, Motivation, Causation, and Hate Crimes Sentence Enhancement: A Cautious Approach to Mind Reading and Incarceration*, 59 Drake L. Rev. 181, 191 (2010) ("Indeed, it is a staple of the criminal law that motive is irrelevant to the determination of guilt. Unless there is an affirmative defense like necessity, the law punishes lawbreaking irrespective of the reasons motivating the violation.").
[108] United States v. Denson, 728 F.3d 603, 613 (6th Cir. Ohio 2013). *See also* State v. Williams, 922 N.E.2d 937, 942 (Ohio 2010) (citing Ohio Rev. Code § 2903.02(A)).

[109] *See* United States v. Working, 224 F.3d 1093, 1107 (9th Cir. Wash. 2000) ("A fair number of attempted murders are interrupted or result in no injuries: the murder conspiracy thwarted by the police; the gunshot that misses. Here, however, [defendant] was not caught until the damage was done and [the victim] had taken several bullets. The only thing that made this an attempt and not a murder was luck and [the victim]'s resilience.").
[110] *See*, e.g. Smith v. Kerestes, 2009 U.S. Dist. LEXIS 51627, at *40 (E.D. Pa. June 15, 2009) ("Pennsylvania Crimes Code sets forth the statutory maximum for a conviction of attempted murder and conspiracy to commit murder as follows:[A] person who has been convicted of attempt, solicitation or conspiracy to commit murder, murder of an unborn child or murder of a law enforcement officer where serious bodily injury results may be sentenced to a term of imprisonment which shall be fixed by the court at not more than 40 years. Where serious bodily injury does not result, the person may be sentenced to a term of imprisonment which shall be fixed by the court at not more than 20 years.") (citing 18 PA. CONS. STAT. ANN. § 1102(c)).
[111] *See supra* note 24.
[112] Black's Law Dictionary 1069 (7th ed. 2000) (*quoted in* U*nited States v. Santiago-Mendez*, 2009 U.S. Dist. LEXIS 51155 (D.P.R. June 18, 2009)
[113] *Burrage*, slip op. at 1 (Ginsburg, J., concurring).
[114] *See, e.g.*, Conservatorship of Ben C., 40 Cal. 4th 529, 537 (Cal. 2007) ("[T]his court held that "[t]he due process clause of the California Constitution requires that proof beyond a reasonable doubt and a unanimous jury verdict be applied to conservatorship proceedings under the LPS Act. The rationale for the decision was that the appointment of a conservator for appellant and her subsequent confinement in a mental hospital against her will deprived appellant of freedom in its most basic aspects and placed a lasting stigma on her reputation." (internal citations and quotations omitted).); State v. Mason, 2003 MT 371, P42 (Mont. 2003) ("Our decisions reflect the various constitutional rights that are implicated when the State seeks to impose criminal punishment for conduct. By way of example only, a person accused of a crime is accorded the following protections: (1) freedom from pre-indictment delay; (2) adequacy of charging document; (3) the right to speedy trial; (4) the State's burden of proving guilt beyond a reasonable doubt; (5) the right to remain silent; (6) freedom from double jeopardy; (7) the right to trial by jury with a unanimous jury verdict; (8) the right to have juries selected in compliance with statutory requirements; and (9) the right to appeal." (internal citations omitted)).
[115] *See* William Eskridge, "Public Values in Statutory Interpretation," 137 U. PA. L. REV. 1007, 1029 ("The rule of lenity rests upon the due process value that government should not punish people who have no reasonable notice that their activities are criminally culpable, as well as the separation-of-powers value that prosecutors and courts should be unusually cautious in expanding upon legislative prohibitions where the penalty is severe. The rule of lenity is usually stated simply: Penal statutes should be strictly, or narrowly, construed. [W]hen choice has to be made between two readings of what conduct Congress has made a crime, it is appropriate, before we choose the harsher alternative, to require that Congress should have spoken in language that is clear and definite. Given its grounding in the fair notice and reasonable penalty precepts of due process, the rule is applied most generously when the questioned conduct is accepted by general social norms and least frequently when the questioned conduct is widely considered horrible." (internal quotations omitted)).
[116] *Id.* at 1032.
[117] *Id.*
[118] *Id.* at 1033.
[119] *McDonnell Douglas*, 411 U.S. at 802.
[120] *Id.*
[121] Fuentes v. Perskie, 32 F.3d 759, 762 (3d Cir. 1994) ("[W]e consider the evidence that a plaintiff, who has made out a prima facie case, must adduce to survive a motion for summary judgment when the defendant offers a legitimate reason for its employment action in a 'pretext' employment discrimination case. We hold that, to do so, the plaintiff generally must submit evidence which: 1) casts sufficient doubt upon each of the legitimate reasons

proffered by the defendant so that a factfinder could reasonably conclude that each reason was a fabrication; or 2) allows the factfinder to infer that discrimination was more likely than not a motivating or determinative cause of the adverse employment action."); *see also* Johnson v. Public Servs. Enter. Group, 529 Fed. Appx. 188, 192 (3d Cir. N.J. 2013).

[122] *See* Sperino, *supra*, note 10 at 17.

[123] *See* Sperino, *supra* note 2, at 28 (Comparing causation in *Summers v. Tice* to a paternity action where two men raped the same woman who then became pregnant, Judge Guido Calabresi noted "Rightly or wrongly, the effects (and hence the function) of paternity actions are conceived to be very different from those of money damage claims for injuries. What is 'cause' for one need not be 'cause' for the other.") (quoting Guido Calabresi, *Concerning Cause and the Law of Torts: An Essay for Harry Kalven, Jr.*, 43 U. CHI. L. REV. 69, 106 (1975))

[124] 791 N.W.2d 828 (Iowa 2010)

[125] JAMES B. JACOBS & KIMBERLY POTTER, HATE CRIMES: CRIMINAL LAW & IDENTITY POLITICS ch. 2 (2000).

[126] *Id.*

[127] *Hennings*, 791 N.W.2d at 833-34.

[128] *Id.*

[129] *See* Gavin F. Quill, *Note, Motivation, Causation, and Hate Crimes Sentence Enhancement: A Cautious Approach to Mind Reading and Incarceration*, 59 Drake L. Rev. 181, 185 (2010) (noting that, as of 2010, hate crimes statutes exist in forty-six states and the District of Columbia and have resisted Constitutional and, particularly, First Amendment challenges at the federal and state level).

[130] *State v. McKnight*, 511 N.W.2d 389, 395-96 (Iowa 1994) (quoted in *Hennings* at 834).

[131] *Hennings*, 791 N.W.2d at 835.

[132] *See* Fogarty v. Boles, 121 F.3d 886, 890-91 (3d Cir. 1997) ("It must be remembered that the First Amendment applies only to public employers, and there is no doubt that government has a greater right to limit the speech of its employees than it does a private citizen."); Urgent v. Hovensa, LLC, Civil No. 2006/0105, 2008 WL 4526677, at *7 (D. Virgin Islands Oct. 2, 2008) (granting motion to dismiss First Amendment claims because "[d]efendant is a private employer rather than a state actor and its actions as described in Plaintiff's Complaint do not constitute state action under the law"); Fraser v. Nationwide Mut. Ins. Co., 135 F. Supp. 2d 623, 643 (E.D. Pa. 2001) ("Constitutional protection of free speech is not generally applicable to private employers.").

[133] In general, anti-discrimination statutes and penalties tend to focus on making whole the victim of discrimination rather than on punishing the employer. *See* Thomas J. McIntyre, *Note, Discriminatory Opportunism: Why Undertaking Self-Employment to Mitigate Damages Creates Unique Challenges*, 45 SUFFOLK U. L. REV. 549, 564 ("The make-whole nature of backpay remedies precludes the use of backpay as a punitive tool against the employer, because the purpose of antidiscrimination remedies is to compensate the terminated employee's loss, not to punish the employer." (citing See Albemarle Paper Co. v. Moody, 422 U.S. 405, 418 (1975) (describing goal of backpay awards); Hansard v. Pepsi-Cola Metro. Bottling Co., 865 F.2d 1461, 1469 (5th Cir. 1989) (claiming ADEA remedies are make-whole, not punitive).).

[134] *See generally* Sandra Sperino, *The Tort Label*, Florida L. Rev. (draft on file with author).

[135] *See* Alex Reed, *Opening the Floodgates: Expanded Employer Liability for Same-Sex Harassment* (Draft on file with author) at 22 (employer's intent or state of mind is the focus of inquiry in disparate treatment cases) (citing *U.S. Postal Serv. Bd. of Governors v.Aikens*, 460 U.S. 711, 716 (1983) and *Raytheon Co. v. Hernandez*, 540 U.S. 44, 52-53 (2003)).

[136] *See* U.S. Postal Serv. Bd. of Governors v. Aikens, 460 U.S. 711, 716 (U.S. 1983) ("All courts have recognized that the question facing triers of fact in discrimination cases is both sensitive and difficult."). *See also* Sperino, *supra* note 2, at 24 ("Describing the intent necessary for traditional common law intentional torts is not an easy task.").

[137] *See* Michael L. Seigel, *Bringing Coherence to Mens Rea Analysis for Securities-Related Offenses*, 2006 WIS. L. REV. 1563, 1571-73 (2006).

[138] *Id.*

[139] *See* Regina A. Robson, *Crime and Punishment: Rehabilitating Retribution as a Justification for Organizational Criminal Liability*, 47 Am. Bus. L.J. 109, 120 (2010).

[140] *See* Hunter v. Lewis, No. 03-5902, 2005 U.S. App. LEXIS 21786, *5 (6th Cir., Oct. 4, 2005) (describing negligent homicide as a "lesser included offense" of first-degree murder).

[141] Siegel, *supra* note 136, at 1569.
[142] *Id.*
[143] *Id.*
[144] *See* Raytheon Co. v. Hernandez, 540 U.S. 44, 52-53 (2003).
[145] *See* Sperino, *supra* note 10 at 14, n.80.
[146] *See* Melissa Hart, *Subjective Decisionmaking and Unconscious Discrimination*, 56 ALA. L. REV. 741, 746 (2005); Charles R. Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317, 322-25 (1987); Linda Hamilton Krieger, *The Content of Our Categories: A Cognitive Bias Approach to Discrimination and Equal Employment Opportunity*, 47 STAN. L. REV. 1161 (1995) (arguing that bias may be both unintentional and unconscious); Gregory Mitchell & Philip E. Tetlock, *Antidiscrimination Law and the Perils of Mindreading*, 67 OHIO ST. L. J. 1023 (2006) (arguing against automatic use of implicit prejudice research in employment discrimination law); Amy Wax, *Discrimination as Accident*, 74 IND. L.J. 1129 (1999) (questioning whether antidiscrimination law should cover unconscious bias); Michael Selmi, *Discrimination as Accident: Old Whine, New Bottle*, 74 IND. L. J. 1234 (1999); Sheila Foster, *Causation in Antidiscrimination Law: Beyond Intent versus Impact*, 41 HOUSTON L. REV.1469 (2005).
[147] David Benjamin Oppenheimer, *Negligent Discrimination*, 141 U. PA. L. REV. 899, 969 (1993). Oppenheimer also notes that under this theory, liability should also attach "when an employer breaches the statutorily established standard of care by making employment decisions which have a discriminatory effect, without first scrutinizing its processes, searching for less discriminatory alternatives, and examining its own motives for evidence of stereotyping." *Id.* at 969-70.

[148] *See* Tristin K. Green, *Discrimination in Workplace Dynamics: Toward a Structural Account of Disparate Treatment Theory*, 38 HARV. C.R.-C.L. L. REV. 91, 91 (2003); Susan Sturm, *Second Generation Employment Discrimination: A Structural Approach*, 101 COLUM. L. REV. 458 (2001).
[149] It often takes years for such theories to infiltrate courts' reasoning and the mere fact that the theories have not been wholeheartedly embraced by courts does not mean that they will not be in the future. For example, in the area of identity theorization, Kimberly Crenshaw proposed a theory of intersectionality in 1989 in which she argued that "many of the experiences Black women face are not subsumed within the traditional boundaries of race or gender discrimination as these boundaries are currently understood, and that the intersection of racism and sexism factors into Black women's lives in ways that cannot be captured wholly by looking at the race or gender dimensions of those experiences separately." Kimberly Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color*, 43 STAN. L. REV. 1241, 1244 (1991) (discussing her earlier project, *Demarginalizing the Intersection of Race and Sex*, 1989 U. CHI. LEGAL F. 139). This theory has only recently been adopted by some courts. *See, e.g.*, Shazor v. Prof'l Transit Mgmt., Ltd., 2014 BL 42520, 6th Cir., No. 13-3253 (Feb.19, 2014).
[150] *See Burlington Indus. v. Ellerth*, 524 U.S. 742, 758-759, 118 S. Ct. 2257, 141 L. Ed. 2d 633 (1998) ("Although a supervisor's sexual harassment is outside the scope of employment because the conduct was for personal motives, an employer can be liable, nonetheless, where its own negligence is a cause of the harassment. An employer is negligent with respect to sexual harassment if it knew or should have known about the conduct and failed to stop it."). *See also Sofia v. McWilliams*, No. 01-5394, 2003 U.S. Dist. LEXIS 5622, at *23-25 (E.D. Pa. March 31, 2003) ("an employer can be liable . . . where its own negligence is a cause of the harassment" (quoting Ellerth, 524 U.S. at 759)); *Lentz v. Gnadden Huetten Mem'l Hosp.*, No. 04-3147, 2004 U.S. Dist. LEXIS 22744, ay *6-7 (E.D. Pa. Nov. 8, 2004) ("while there are other bases for respondeat superior liability under Title VII, an employer may be found liable for its negligence in failing to train, discipline, fire or take [24] remedial action upon notice of harassment." (citing *Ellerth*, 524 U.S. 742, 758 (1998)). *See also* Noah Zatz, *Managing the Macaw: Third-Party Harassers, Accommodation, And The Disaggregation Of Discriminatory Intent*, 109 COLUM. L. REV. 1357, 1364 (2009) (discussing contention that negligence has become a component of disparate treatment discrimination).
[151] *See* Griggs v. Duke Power Co., 401 U.S. 424, 431 (U.S. 1971) ("The Act proscribes not only overt discrimination but also practices that are fair in form, but discriminatory in operation. The touchstone is business necessity. If an employment practice which operates to exclude Negroes cannot be shown to be related to job performance, the practice is prohibited.").
[152] 131 2541 (2011).
[153] *See generally* Richard A. Nagareda, *Class Certification in the Age of Aggregate Proof*, 84 N.Y.U.L. REV. 97, 156-59 (2009); Deborah M. Weiss, *A Grudging Defense of Wal-Mart v. Dukes*, 24 YALE J.L. & FEMINISM 119

(2012); Michael J. Zimmer, *Wal-Mart v. Dukes: Taking the Protection Out of Protected Classes*, 16 Lewis & Clark L. Rev. 409, 447 (2012).

[154] *See supra*, notes 13-14.

[155] Consider, for example, an employer who refuses to send a female executive on lengthy business trips because she has small children at home. While the employer would vehemently reject the suggestion that his action is based on bias, at play in this scenario is an insidious stereotype about women and mothers. Regardless of the employer's lack of conscious intent to denigrate or discriminate against female employees, the *Price Waterhouse* theory on stereotyping as discrimination makes this action unlawful, thus expanding the meaning of intent under Title VII.

[156] *See* Price Waterhouse v. Hopkins, 490 U.S. 228, 264-265 (1989) (O'Connor, J., concurring) ("Title VII has two basic purposes. The first is to deter conduct which has been identified as contrary to public policy and harmful to society as a whole. . . . The second goal of Title VII is "to make persons whole for injuries suffered on account of unlawful employment discrimination." Both these goals are reflected in the elements of a disparate treatment action. There is no doubt that Congress considered reliance on gender or race in making employment decisions an evil in itself. . . . While the main concern of the statute was with employment opportunity, Congress was certainly not blind to the stigmatic harm which comes from being evaluated by a process which treats one as an inferior by reason of one's race or sex. This Court's decisions under the Equal Protection Clause have long recognized that whatever the final outcome of a decisional process, the inclusion of race or sex as a consideration within it harms both society and the individual. At the same time, Congress clearly conditioned legal liability on a determination that the consideration of an illegitimate factor caused a tangible employment injury of some kind." (internal citations omitted)).

[157] Benjamin Levin, *De-Naturalizing Criminal Law: Of Public Perceptions And Procedural Protections*, 76 ALB. L. REV. 1777, 1782 (2012/2013) ("In popular discourse, as well as in the realm of legal argument, criminal law is commonly tied to the language of morality. That is, the imagined space of criminal law is one of sharply-delineated moral binaries. . . [T]he discursive realm of criminal law is one that draws stark contrasts between good guys and bad guys, cops and robbers, the forces of civilized society and those threatening to undermine its very existence.").

[158] JAMES B. JACOBS & KIMBERLY POTTER, HATE CRIMES: CRIMINAL LAW & IDENTITY POLITICS ch. 2 (2000).

[159] *Id.* (describing an example of a Southern white woman who claims not to be biased against Blacks saying, "Of course I have no such prejudice [hate-prejudice]. I had a dear old colored mammy for a nurse. Having grown up in the South and having lived here all my life I understand the problem. The Negroes are much happier if they are just allowed to stay in their place. Northern troublemakers just don't understand the Negro.")

[160] *See supra* text accompanying notes 131-41.

[161] *See* B. Glenn George, *Revenge*, 83 TUL. L. REV. 439, 494 ("The impulse for retaliation may be both fundamental and universal in human nature. . ."); John A. Berg, *A Catch-22 In Workplace Retaliation Claims*, 23 CBA RECORD 50 (Chicago Bar Association 2009) ("Magnanimity is an uncommon trait. Only the rare person can slough off being accused of discrimination without experiencing a negative reaction. More often, the accused experiences defensiveness, frustration, betrayal, anger, or some combination of these feelings. Human nature, however, gets forgotten in workplace retaliation claims. As it stands, many courts penalize employers for reacting as instinct would suggest.") (citing Woods v. Washtenaw Hills Manor Inc., Case No. 07-CV-15420, 2009 U.S. Dist. LEXIS 22358, *47 (E.D. Mich. Mar. 19, 2009) (citing that manager was "upset" by complaint as evidence of retaliatory animus); Anderson v. Royal Crest Dairy, Inc., 281 F. Supp. 2d 1242, 1250 (D. Colo. 2003) (citing manager's "hurt" feelings as evidence of retaliatory animus); Kinzel v. Discovery Drilling, Inc., 93 P.3d 427, 436 (Alt. 2004) (citing that manager was "not happy" as evidence of retaliatory animus); Miller v. National Life Ins. Co., Case No. 07 C 00364, 2009 U.S. Dist. LEXIS 10626, *27 (D. Conn. Feb. 11, 2009) (citing manager's defensiveness as evidence of retaliatory animus); Evans v. Texas Dept. of Transp., 547 F. Supp. 2d 626, 656 (E.D. Tex. 2007) (even though manager was neither upset nor angry about plaintiff's complaint, court still found sufficient evidence of retaliatory animus because manager had been reprimanded based on the complaint, which she "believed to be unfounded")).

[162] The Court's decision in *Vance v. Ball State University*, 133 2434 (2013), on the meaning of "supervisor" in Title VII is also deeply limiting and troubling.

[163] Jennifer E. Laurin, *Trawling for* Herring: *Lessons in Doctrinal Borrowing and Convergence*, 111 Colum. L. Rev. 670, 703-704 (2011) (cited in Sperino, *supra* note 2, at 27).

[164] These are the considerations the Court, in fact, focused on in its early and formative employment discrimination cases. *See, e.g.* Griggs v. Duke Power Co., 401 U.S. 424, 430-32 (1971); *see also* Sperino, *supra* note 2, at 5-6 (discussing *Griggs* and its pragmatic approach).

[165] *See Vance*, 133 S. Ct. at 2466 (Ginsburg, J., dissenting) ("The ball is once again in Congress' court to correct the error into which this Court has fallen, and to restore the robust protections against workplace harassment the Court weakens today."); Ledbetter v. Goodyear Tire & Rubber Co., 550 U.S. 618, 661 (2007) (Ginsburg, J., dissenting) ("Once again, the ball is in Congress' court. As in 1991, the Legislature may act to correct this Court's parsimonious reading of Title VII.").

[166] Lilly Ledbetter Fair Pay Act of 2009, Pub. L. No. 111-2, 123 Stat. 5 (2009).

[167] 550 U.S. 618 (2007).