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The Jurisprudence of Mixed Motives

ABSTRACT. Legal results often turn on motive, and motive is often complex. How do various domains of law deal with mixed motives? Are we condemned by our darkest motive, forgiven according to our noblest, or something in between? This Article conducts a sweeping examination of motivations in the law, from equal protection and employment discrimination to insider trading and income taxation. It develops a precise descriptive vocabulary for categorizing the treatment of mixed motives in numerous areas of law. This framework yields several important insights. For example, nearly all domains of law pick among just four motive standards, and motive-based analysis is far more workable than commonly believed.

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INTRODUCTION

Legal results often turn on motive. Bosses are permitted to fire employees for absenteeism, but not because of racial animus.[1] School boards may constitutionally ban books if concerned about "educational suitability," but not "simply because they dislike the ideas contained in those books."[2] Money or property can be given tax-free if the giver "proceeds from a 'detached and disinterested generosity,'" but it is taxable income to the recipient if some sort of business advantage is sought.[3]

Yet human beings are complex, and our motivations are often mixed.[4] Introspection reveals that we often act for several conscious motives, not to mention the unconscious impulses we do not ourselves notice.[5] The complications grow geometrically when we seek the motives of an organization or group — like "Proctor Hospital,"[6] "Congress,"[7] or "the voters of California."[8]

While concern for motive is universal, the law's treatment of *mixed* motives is neither uniform nor well theorized. Consider again the examples from the first

1. Civil Rights Act of 1964, 42 U.S.C. §§ 2000e–2(a)(1) to (2) (2012).

2. Bd. of Educ., Island Trees Union Free Sch. Dist. No. 26 v. Pico, 457 U.S. 853, 871-72 (1982).

3. Comm'r. v. Duberstein, 363 U.S. 278, 285-87 (1960) (quoting Comm'r. v. LoBue, 351 U.S. 243, 246 (1956)).

4. *See* 2 JAMES FITZJAMES STEPHEN, A HISTORY OF THE CRIMINAL LAW OF ENGLAND 121 (London, MacMillan & Co. 1883) ("[A] man's motives for any given act . . . are always mixed."); *see also* Martin J. Katz, *The Fundamental Incoherence of Title VII: Making Sense of Causation in Disparate Treatment Law*, 94 GEO. L.J. 489, 491 (2006) (asserting that mixed motives employment discrimination cases are "likely the lion's share of cases").

5. *See* Linda Hamilton Krieger, *The Content of Our Categories: A Cognitive Bias Approach to Discrimination and Equal Employment Opportunity*, 47 STAN. L. REV. 1161, 1164-65 (1995) (discussing cognitive bias as a source of discrimination); Charles R. Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317, 322-23 (1987) (discussing unconscious motivations in racially discriminatory actions).

6. Staub v. Proctor Hosp., 562 U.S. 411, 419-20 (2011) (considering whether the bias of an employee is attributable to his employer, Proctor Hospital).

7. *See, e.g.*, United States v. O'Brien, 391 U.S. 367, 384 (1968) (declining to consider whether the motives of several congressmen can be attributed to the entire body). *Compare* Kenneth A. Shepsle, *Congress Is a "They," Not an "It": Legislative Intent as Oxymoron*, 12 INT'L REV. L. & ECON. 239, 244-45 (1992) (arguing against the sensibility of an intent inquiry for a collective body), *with* Richard H. Fallon, Jr., *Constitutionally Forbidden Legislative Intent*, 130 HARV. L. REV. 523, 537-41 (2016) (articulating three seemingly feasible intent inquiries applicable to Congress).

8. Perry v. Brown, 671 F.3d 1052, 1093 (9th Cir. 2012) (scrutinizing the purpose motivating Proposition 8, a ballot initiative to bar same-sex couples from marrying), *vacated on other grounds and remanded sub nom.* Hollingsworth v. Perry, 133 S. Ct. 2652 (2013).

paragraph, but imagine that the boss, school board, or gift giver acted for both motives mentioned rather than just one. How would such a mixed motive defendant be judged? The boss would lose an employment discrimination suit[9] and the school board would win a constitutional challenge,[10] while the tax liabilities are unknowable on these facts.[11] A small turn of the kaleidoscope gives altogether different results: the boss would win despite her mixed motives if the discrimination were because of age or disability rather than race,[12] and the government board might lose if it were stacking electoral districts rather than library shelves.[13]

Is there any order here at all, or is the law of mixed motives as idiosyncratic, elusive, and complex as motivation itself? Why are we sometimes forgiven according to our noblest aspirations and other times condemned according to our darkest?

In part, the varied treatment of motives, from one legal question to another, is just the natural fruit of common-law rulemaking. As Walter Blum writes, "The fact is that some of our statutory rules that apparently classify on a state of mind basis do not indicate what magnitude of the relevant qualifying purpose is sufficient."[14] Our motives jurisprudence therefore springs from the minds of judges, and judges do not always agree.

Yet the jurisprudential disorder seems to run especially deep when mixed motives are involved. Circuit splits are ubiquitous,[15] compelling the Supreme

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9. *See infra* note 42 and accompanying text; *see also infra* Section III.A.2.

10. *See infra* note 183.

11. *See infra* notes 105-109 and accompanying text.

12. *See infra* note 42 and accompanying text; *see also infra* Section III.A.2.

13. *See infra* note 100 and accompanying text.

14. Walter J. Blum, *Motive, Intent, and Purpose in Federal Income Taxation*, 34 U. CHI. L. REV. 485, 507 (1967). The absence of legislative guidance is ironic to those who have argued that legislatures are better positioned than courts to "attend to motives." *E.g.*, Antony Duff, *Principle and Contraction in Criminal Law: Motives and Criminal Liability*, *in* PHILOSOPHY AND THE CRIMINAL LAW: PRINCIPLE AND CRITIQUE 156, 177-78 (Antony Duff ed., 1998).

15. For example, when prosecutors are alleged to have unconstitutionally struck jurors for their race or gender under *Batson v. Kentucky*, 476 U.S. 79 (1986), there are now three different rules for evaluating mixed motives. *Compare* Cook v. LaMarque, 593 F.3d 810, 815 (9th Cir. 2010) ("motivated in substantial part" standard), *with* Howard v. Senkowski, 986 F.2d 24, 30 (2d Cir. 1993) (but-for standard), *and* State v. Shuler, 545 S.E.2d 805, 811 (S.C. 2001) (per se standard). Prior to *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989), five different approaches divided the circuits on Title VII identity discrimination. *See* Berl v. Cty. of Westchester, 849 F.2d 712, 714-15 (2d Cir. 1988) (substantial part test, with the burden shifted to the defendant); Terbovitz v. Fiscal Court, 825 F.2d 111, 115 (6th Cir. 1987) ("motivating factor" test, with the burden shifted to the defendant); McQuillen v. Wis. Educ. Ass'n Council, 830 F.2d 659,

Court of the United States to decide a mixed motives case essentially every other year.[16]

But this judicial attention has not improved the quality of discourse concerning mixed motives. Apart from a few headline opinions,[17] courts typically offer no justification for their treatment of mixed motives,[18] or they import whole doctrinal structures from other domains on an ad hoc basis.[19] When courts do justify their choice of motive standard, it is rarely by reference to policy goals. The most common judicial rationale presents a false dichotomy, endorsing a given standard because *one* alternative standard is unworkable.[20] Courts rarely acknowledge that there are more than two ways to analyze motives.[21]

664-65 (7th Cir. 1987) (but-for test); Bibbs v. Block, 778 F.2d 1318, 1323-24 (8th Cir. 1985) (en banc) ("discernible factor" test, with the burden shifted to the defendant in order to limit the scale and scope of damages); Fadhl v. City & Cty. of S.F., 804 F.2d 1097, 1099 (9th Cir. 1986) (but-for test, with the burden shifted to the defendants); Toney v. Block, 705 F.2d 1364, 1366 (D.C. Cir. 1983) (same as *Fadhl*).

16. There were four cases from 2009 to 2016, and there have been seventeen cases since 1989. This figure excludes the countless instances in which the Court acknowledges a mixed motives circuit split but then declines to address it. *See, e.g.*, Foster v. Chatman, 136 S. Ct. 1737, 1754 n.6 (2016) (acknowledging but declining to decide the question of whether discriminatory intent underlying a strike was nevertheless not "determinative" to the prosecution's decision to exercise a strike); Snyder v. Louisiana, 552 U.S. 472, 478 (2007) (same).

17. *E.g.*, *Price Waterhouse*, 490 U.S. 228.

18. *See, e.g.*, Chang v. INS, 119 F.3d 1055, 1065 (3d Cir. 1997) (adopting an "at least in part" standard without any consideration of other possible motive standards); *see also* William A. Klein, *The Deductibility of Transportation Expenses of a Combination Business and Pleasure Trip—A Conceptual Analysis*, 18 STAN. L. REV. 1099, 1105 (1966) ("[C]ourts and commentators seem to treat the primary purpose test as a matter of natural law rather than legislative command; at least I have come across no case or commentary in which either its soundness or its statutory basis has been closely examined."); *cf.* Niblock v. Comm'r, 417 F.2d 1185, 1187 (7th Cir. 1969) (adopting a predominant purpose—or "dominant and primary motivation"—test to advance "certainty" without explaining why this test is conducive to that goal).

19. *See, e.g.*, *Batson*, 476 U.S. at 94 n.18 (drawing on employment discrimination to inform jury selection). *See generally* Russell D. Covey, *The Unbearable Lightness of* Batson*: Mixed Motives and Discrimination in Jury Selection*, 66 MD. L. REV. 279, 295 (2007) (discussing the influence of the Supreme Court's Title VII jurisprudence upon jury selection cases).

20. *See, e.g.*, SEC v. Masri, 523 F. Supp. 2d 361, 371-72 (S.D.N.Y. 2007) (endorsing a but-for standard after rejecting only one other standard); *cf.* Palmer v. Thompson, 403 U.S. 217, 224-25 (1971) (rejecting all motive analysis because of problems with two motive tests, without considering other possible tests, such as the but-for test).

21. Even thoughtful commentaries manage to forget salient tests. *E.g.*, Paul J. Gudel, *Beyond Causation: The Interpretation of Action and the Mixed Motives Problem in Employment Discrimination Law*, 70 TEX. L. REV. 17 (1991) (listing five options, but neglecting the Primary Motive standard); Katz, *supra* note 4, at 499 (listing six causal concepts, but neglecting Primary Motive).

If there is a failure of imagination as to the doctrinal options, it may represent doctrinal parochialism. Courts seldom venture far from the instant controversy in search of approaches to mixed motives, even though mixed motives questions have been addressed in myriad domains: legal ethics, constitutional law (voter districting, school desegregation, jury selection, free speech and censorship, takings), labor law, landlord-tenant law, intentional torts, vicarious liability, evidence, property, health law, contract law, corporate law, employment discrimination, securities enforcement, taxation, bankruptcy, and more.[22] A careful understanding of mixed motivation would require a study of how mixed motives work in each of these domains and why.

The academy could provide courts with guidance, but scholars rarely compare one domain's motive rules to another,[23] and no *comprehensive* comparison has ever been published. Instead, scholarly interest in motive has mostly centered on the question of *whether* the law should care about motive at all.[24] While

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22. *See infra* Appendix B.

23. *See infra* Section I.B. *But see* Mark C. Weber, *Beyond* Price Waterhouse v. Hopkins*: A New Approach to Mixed Motive Discrimination*, 68 N.C. L. REV. 495 (1990) (comparing employment to intentional interference with contractual relations, malicious prosecution, defamation, retaliatory eviction, and concurrent loss tort and contracts cases).

24. One longstanding debate concerns whether the criminal law does and should care about motives. *Compare* JEROME HALL, GENERAL PRINCIPLES OF CRIMINAL LAW 8 (2d ed. 1960) (arguing against motives analysis), *with* DOUGLAS N. HUSAK, PHILOSOPHY OF CRIMINAL LAW 144 (1987) (arguing in favor of motives analysis). This debate has played out with renewed vigor with respect to motive-based sentencing enhancements for bias and hate crimes. *Compare* Anthony M. Dillof, *Punishing Bias: An Examination of the Theoretical Foundations of Bias Crime Statutes,* 91 NW. U. L. REV. 1015 (1997) (arguing against motives analysis), *and* Susan Gellman, *Sticks and Stones Can Put You in Jail, But Can Words Increase Your Sentence? Constitutional and Policy Dilemmas of Ethnic Intimidation Laws*, 39 UCLA L. REV. 333 (1991) (arguing against criminal ethnic intimidation laws), *and* Heidi M. Hurd & Michael S. Moore, *Punishing Hatred and Prejudice*, 56 STAN. L. REV. 1081 (2004) (critiquing justifications of hate and bias crime legislation), *with* Carissa Byrne Hessick, *Motive's Role in Criminal Punishment*, 80 S. CAL. L. REV. 89 (2006) (proposing expanded role for motive in criminal sentencing), *and* Laurence H. Tribe, *The Mystery of Motive, Private and Public: Some Notes Inspired by the Problems of Hate Crime and Animal Sacrifice*, 1993 SUP. CT. REV. 1, 7 (defending hate crime legislation).

Similar questions arise in private law, which is frequently thought to disregard motive. *See, e.g.*, Nadav Shoked, *Two Hundred Years of Spite*, 110 NW. U. L. REV. 357, 360 (2016) (arguing that property law does not and should not use motive analysis); *see also* J.B. Ames, *How Far an Act May Be a Tort Because of the Wrongful Motive of the Actor*, 18 HARV. L. REV. 411 (1905) (arguing that tort law does and should incorporate motives analysis). *But see* THOMAS M. COOLEY, A TREATISE ON THE LAW OF TORTS OR THE WRONGS WHICH ARISE INDEPENDENT OF CONTRACT 690 (1880) ("Malicious motives make a bad act worse, but they cannot make that a wrong which in its own essence is lawful.").

Another area of deep controversy concerns the relevance of legislators' motives for the purposes of judicial review of a statute. *See* Paul Brest, Palmer v. Thompson*: An Approach to*

extremely important, this discussion has occluded attention to our current practices. We debate whether to do something without a clear sense of how it is done.

This Article's ambition is to organize and categorize the law's many motive tests, rationales, and policies. No prior work has attempted a transsubstantive taxonomy and theorization of the role of mixed motives in the law. This project is intended both to spur scholarly interest in our surprisingly undertheorized jurisprudence of mixed motives and to empower courts and commentators as they confront motives cases. It is not essential that all courts use the same mixed motive standard in all cases, but it is essential that courts know what their options are, know what is at stake in the standard they select, and know how to communicate the standard to future litigants. This Article is meant to help and to draw other scholars into doing so.[25]

An operating premise of this Article is that the elusiveness of motives jurisprudence is a barrier to its theorization. We are unaccustomed to comparing different quanta of mental events,[26] such as whether a defendant's bad motive was "de minimis, more than a scintilla but less than a preponderance, clear possibility or a predominant motive."[27] It is easy to conflate unfamiliar concepts,[28] or to equivocate as to the meaning of terms,[29] unless we are clear about what we are

the Problem of Unconstitutional Legislative Motive, 1971 SUP. CT. REV. 95 (defending motive-based scrutiny); *accord* Elena Kagan, *Private Speech, Public Purpose: The Role of Governmental Motive in First Amendment Doctrine*, 63 U. CHI. L. REV. 413 (1996). *Compare* United States v. O'Brien, 391 U.S. 367, 383-84 (1968) (asserting broadly that a law's constitutionality does not depend on the motive that led Congress to enact it), *with* Wallace v. Jaffree, 472 U.S. 38, 55-57 (1985) (holding a moment of silence law unconstitutional because the Alabama legislature's motive was to further religion and return prayer to the public schools).

25. *Cf.* Wesley Newcomb Hohfeld, *Fundamental Legal Concepts as Applied in Judicial Reasoning*, 26 YALE L.J. 710, 710-11 (1917) ("The great practical importance of accurate thought and precise expression as regards basic legal ideas and their embodiment in a terminology not calculated to mislead is not always fully realized . . . [even by] many an experienced lawyer . . . .").

26. Klein, *supra* note 18, at 1108 ("Part of the problem is attributable to the deficiencies of our means of communication about common mental phenomena.").

27. Crittenden v. Calderon, No. CIV-S-95-1957, 2011 WL 2619097, at *26 (E.D. Cal. June 30, 2011). This passage demonstrates both the challenge of categorizing motives, as well as the risk of muddling motive-standard with standard of proof.

28. *See, e.g.*, Jessica M. Scales, *Tipping the Balance Back: An Argument for the Mixed Motive Theory Under the ADEA*, 30 ST. LOUIS U. PUB. L. REV. 229, 258 (2010) (conflating sole motive, but-for motive, and a "defining" factor analysis).

29. *See, e.g.*, Hunter v. Underwood, 471 U.S. 222, 232 (1985) (endorsing one test and then applying a different one); *infra* Section I.A. (discussing *Hunter*); *see also* McDonald v. Santa Fe Trail Transp. Co., 427 U.S. 273, 282 n.10 (1976) (seemingly rejecting the but-for standard and then, within the same paragraph, requiring it); Mark S. Brodin, *The Standard of Causation in the Mixed-Motive Title VII Action: A Social Policy Perspective*, 82 COLUM. L. REV. 292, 301 n.40 (1982) (calling the passage in *McDonald* "cryptic"); Robert S. Whitman, Note, *Clearing the*

talking about, and clear in how we talk about it. A precise and value-neutral descriptive vocabulary can help courts to identify what rules they are using, practitioners to compare rules and predict outcomes, and scholars to reflect on the meaning and desirability of rules.[30]

Despite being facilitative, this Article's framework is not an empty vessel. Application of the descriptive vocabulary leads to important insights about the use of mixed motive standards. Here are three such findings:

- Quantity: There are over one thousand clearly definable motive standards, about a dozen of which have much to recommend them. Yet only four rules are commonly used by courts. The space of viable motive standards is at once larger than scholars and courts realize, and yet small enough for comprehension.
- Clarity: The most vexing issue for decades in mixed motive law—what standard is actually used in employment discrimination cases—has a clear answer.
- Workability: Mixed motive analysis is much easier than commonly thought. Courts should be less reluctant to allow mixed motive analysis because when they do it, they can cabin its scope to the pertinent issues.

This Article does not venture a comprehensive theory about when we should use motive in our laws, nor about what motive standard is appropriate in a given case,[31] the appropriate stage in litigation for motive to be addressed,[32] nor the remedy appropriate after a motive standard is satisfied.[33] This Article is meant

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Mixed-Motive Smokescreen: An Approach to Disparate Treatment Under Title VII, 87 MICH. L. REV. 863, 870 (1989) (accusing the Court in *McDonald* of having "contradicted itself"). With even the Supreme Court unable to keep its terms straight for an entire opinion, stable rules are unavailable to guide lower courts. Nor are courts alone in equivocating. *Compare* Tribe, *supra* note 24, at 19-20 (using a "but/for" test), *with id*. at 31-32 (rejecting a "but/for" test).

30. The words "mixed motives" are often used pejoratively. *See, e.g.*, ROBERT PHILIP, THE MARTHAS: OR, THE VARIETIES OF FEMALE PIETY 169 (1841) ("His eye was not single, even when his hand was most active and liberal. Rachel was the first to discover his *mixed* motives, and not slow to arraign them.").

31. For attempts to do so, see, for example, Anjum Gupta, *Nexus Redux*, 90 IND. L.J. 465 (2015), which advocates for a more proimmigrant mixed motives test in asylum law; and Margaret E. Johnson, Comment, *A Unified Approach to Causation in Disparate Treatment Cases: Using Sexual Harassment by Supervisors as the Causal Nexus for the Discriminatory Motivating Factor in Mixed Motives Cases*, 1993 WIS. L. REV. 231, which advocates for a harmonized approach to sexual harassment disparate treatment claims.

32. *See, e.g.*, Kaitlin Picco, *The Mixed-Motive Mess: Defining and Applying a Mixed-Motive Framework*, 26 A.B.A. J. LAB. & EMP. L. 461 (2011) (discussing the points at which mixed motives questions may be addressed).

33. *See, e.g.*, Fallon, *supra* note 7, at 554-58 (considering the consequences of a finding of forbidden intent in the context of legislation).

to be compatible with whatever normative commitments the law—or reader—brings to its evaluation of motive.[34]

The Article proceeds as follows: Part I briefly surveys mixed motivation in the law, noting how little is settled, consistent, or defensible (let alone all three). Part II develops a descriptive vocabulary for characterizing motives and motive standards. Part III applies that vocabulary to draw descriptive conclusions about motive analysis.

I. MOTIVE AS WE FIND IT

A. A Mixture of Motives Rules

The law often avoids consideration of mixed motives by denying the legal relevance of motives at all,[35] or by construing facts in a way that denies that motives are indeed mixed.[36] Despite these avoidance techniques, motives analysis is ubiquitous, and courts make use of a variety of standards for scrutinizing mixed motives.[37]

34. On other limitations woven into this Article's approach, see *infra* notes 66-80 and accompanying text.

35. *See supra* note 24.

36. For example, whether an asset is a security subject to federal regulation sometimes turns on investment motive. *See* SEC v. W.J. Howey Co., 328 U.S. 293, 301 (1946). Some purchases, such as of real property, frequently entail both a consumption and investment motive. William J. Carney & Barbara G. Fraser, *Defining a "Security": Georgia's Struggle with the "Risk Capital" Test,* 30 EMORY L.J. 73, 109-10 (1981). Courts typically avoid mixed motives analysis by reading one motive out of the facts of the case. Either the "investors were attracted *solely* by the prospect of acquiring a place to live, and not by financial returns on their investments," *United Hous. Found., Inc. v. Forman*, 421 U.S. 837, 853 (1975) (emphasis added), or else they were "attracted *solely* by the prospects of a return on their investment," *Howey*, 328 U.S. at 300 (emphasis added). It bears noting that both *Howey* and *Forman* involved real property: an orange grove and an apartment, respectively.

37. *See infra* Appendix B.

Unfortunately, courts tend to be less clear about the standard they *adopt* than the standards they *reject*. A plaintiff is disqualified from leading collective corporate litigation if her motives are sufficiently impure,[38] but courts do not require utterly pure motives either,[39] leaving us to guess where the line is. When bankruptcy courts decide whether a creditor should be disenfranchised (or "designated") for using its votes in bad faith,[40] we know that the standard is *not* whether nobler motives would have led to different conduct, but we do not know what the standard *is*.[41] We know that plaintiffs win an employment discrimination lawsuit if race, color, national origin, sex, or religion was a "motivating factor" for adverse treatment,[42] but we do not know what a "motivating factor" is.[43]

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38. Khanna v. McMinn, No. CIV.A. 20545-NC, 2006 WL 1388744, at *43–44 (Del. Ch. May 9, 2006) (disqualifying a mixed motives shareholder who was also a former officer engaged in personal litigation with the company).

39. Subin v. Goldsmith, 224 F.2d 753, 761 (2d Cir. 1955); Youngman v. Tahmoush, 457 A.2d 376, 382 (Del. Ch. 1983) ("Though the plaintiff may well have in part a selfish motive in bringing this action, which is not unusual, he will be permitted to continue to act on behalf of [the class].").

40. 11 U.S.C. § 1126(e) (2012).

41. *See In re* Landing Assoc., Ltd. 157 B.R. 791, 803 (Bankr. W.D. Tex. 1993) ("The standard is both inherently fact-intensive and difficult to apply . . . ."). Further examples abound. *See, e.g.*, Ozburn-Hessey Logistics, LLC v. 721 Logistics, LLC, 40 F. Supp. 3d 437, 454 n.4 (E.D. Pa. 2014) (discussing civil conspiracy).

42. 42 U.S.C. §§ 2000e–2(a)(1) to (2), (m) (2012). However, such plaintiffs win only limited remedies (e.g., attorney's fees, injunction against further discriminatory practices). A tougher "but-for" standard remains predicate to full recovery (e.g., compensatory damages or reinstatement to the lost job), but the burden is on the *employer* to *disprove* the causal significance of discrimination. 42 U.S.C. § 2000e-5(g)(2)(B) (A court "shall not award damages or issue an order requiring any admission, reinstatement, hiring, promotion, or payment" if the employer "demonstrates that [it] would have taken the same action in the absence of the impermissible motivating factor."). Whitman points out that "the 'same decision' test is identical to the 'but for' test, which asks whether the discrimination was the 'but for' cause of the adverse action. Any distinction between the two is semantic only." Whitman, *supra* note 29, at 876 n.79; *accord* Givhan v. W. Line Consol. Sch. Dist., 439 U.S. 410, 417 (1979).

The foregoing standard applies to only the five core Title VII identities (race, sex, religion, national origin, and color). Military status likewise requires plaintiffs to show that discrimination was a motivating factor and then shifts the burden to defendants to show that the same action would have occurred regardless. *See* 38 U.S.C. § 4311(c)(1) (2012). Prior to the enactment of the Uniformed Services Employment and Reemployment Rights Act of 1994, courts imposed liability only if the employee was adversely affected "solely" because of her past, present, or future enlistment. Monroe v. Standard Oil Co., 452 U.S. 549, 559 (1981). However, it seems that employers successful in carrying their burden avoid all liability when discrimination is on the basis of military status. *See* Staub v. Proctor Hosp., 562 U.S. 411, 421 (2011) ("Thus, if the employer's investigation results in an adverse action for reasons unrelated to the supervisor's original biased action (by the terms of USERRA it is the employer's burden to establish that), then the employer will not be liable."); *accord* Erickson v. U.S. Postal Serv.,

When the standard is clear, it may differ by forum. Prosecutors are forbidden from striking jurors because of their race or gender,[44] but what standard governs mixed motive jury selection, when the prosecutor had both illegitimate and legitimate reasons for striking? Most state courts would say that an iota of bias taints the voir dire,[45] while most federal courts offer less protection, deferring to

571 F.3d 1364, 1368 (Fed. Cir. 2009); Gummo v. Vill. of Depew, 75 F.3d 98, 106 (2d Cir. 1996). Thus, unlike Title VII discrimination, plaintiffs will not recover anything unless discrimination was a but-for cause of the adverse action. *See* Charles A. Sullivan, *Tortifying Employment Discrimination*, 92 B.U. L. REV. 1431, 1436 n.21 (2012).

In closely related suits, plaintiffs bear the burden of proving but-for causation from the very start, with no burden shifting or partial remedies based on a "motivating factor." Those related suits concern (a) retaliation for complaining about discrimination (even core Title VII bias), (b) discrimination on the basis of age or disability, or (c) discrimination in non-employment contexts (e.g., obtaining an apartment or other commercial relation). Uniformed Services Employment and Reemployment Rights Act, 38 U.S.C. § 4311 (2012); *see, e.g.*, Gross v. FBL Fin. Servs., 557 U.S. 167, 180 (2009) (holding that the Age Discrimination Act of 1967 is subject to the but-for standard). The ADA Amendments Act of 2008 (ADAAA) amended the ADA to prohibit discrimination "on the basis of" disability rather than "because of" disability, suggesting some difference from the language of Title VII discrimination. This tough test also applies to the five core Title VII protected statuses in non-employment contexts. For example, under 42 U.S.C. § 1981, all persons are afforded the equal right "to make and enforce contracts," regardless of race. However, mixed motives discrimination in violation of this statute is covered by the tough "but-for" standard rather than the easier "motivating factor" of the 1991 Act. *See* Wheat v. Chase Bank, No. 3:11-CV-309, 2014 WL 457588, at *12 (S.D. Ohio Feb. 3, 2014); *see also* Equal Pay Act (EPA), 29 U.S.C. § 206(d)(1) (2012) (using the same "on the basis of sex" phrasing as the ADAAA). There is some disagreement about whether the ADA permits mixed motives analysis or whether mixed motives cases are instead shoehorned into the framework set out in *McDonnell Douglass Corp. v. Green*, 411 U.S. 792 (1973). *Compare* Parker v. Columbia Pictures Indus., 204 F.3d 326, 336-37 (2d Cir. 2000) (employing a mixed motives analysis under the ADA), *with* Layman v. Alloway Stamping & Mach. Co., 98 Fed. App'x. 369, 375-76 (6th Cir. 2004) (noting disagreement among the circuits regarding mixed motives under the ADA and disagreeing with *Parker*). And it applies in all retaliation suits, where an employer takes adverse actions to punish or discourage employees from seeking redress for discrimination. *E.g.*, Univ. of Tex. Sw. Med. Ctr. v. Nassar, 133 S. Ct. 2517, 2520 (2013) (applying the "traditional principles of but-for causation, not the lessened causation test"); *see also* 42 U.S.C. § 2000e–3(a) (2012) (barring retaliatory employment actions); *Gross*, 557 U.S. at 180 (holding that the Age Discrimination Act of 1967 is subject to the but-for standard).

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

44. *See* J.E.B. v. Alabama, 511 U.S. 127, 129 (1994) (holding that "gender, like race, is an unconstitutional proxy for juror competence and impartiality"); Batson v. Kentucky, 476 U.S. 79, 89 (1986) ("[T]he Equal Protection Clause forbids the prosecutor to challenge potential jurors solely on account of their race . . . .").

45. *See, e.g.*, State v. Ornelas, 330 P.3d 1085, 1092 (Idaho Ct. App. 2014) ("[M]ost states have adopted what is . . . referred to as the per se approach . . . ."); *accord* Owens v. State, 531 So. 2d

prosecutors as long as there was *also* a good reason to strike the juror.[46] A third approach, applying a substantial-part standard to these *Batson* challenges, reigns in the Ninth Circuit alone.[47]

Something about mixed motives makes the Supreme Court alternatively reticent or maladroit in giving guidance. The *Batson* circuit split is an example of the former: the Court has discussed the split twice in the last ten years, and in both cases declined to address it.[48] Other times, the Court addresses motives jurisprudence but sows more confusion than clarity. For example, in *Hunter v. Underwood*, a racial disenfranchisement case, the Court seemingly endorsed one mixed motive standard rather than another—then promptly applied the rejected standard (erroneously, under the name of the endorsed standard).[49]

B. A Confusion of Concepts

The isolated cases in which courts grapple deeply with mixed motives remain just that: isolated and uninformed by the lessons of other courts' experiences with the same arguments. Consider the matter of tort causation analysis, the notion that plaintiffs must show that their injury was *caused* by the defendant's illicit motives. This causation-focused approach has been terrifically influential.[50] In *Price Waterhouse*, the most important employment discrimination case for

22, 23-24 (Ala. Crim. App. 1987); State v. Lucas, 18 P.3d 160, 163 (Ariz. Ct. App. 2001); Robinson v. United States, 878 A.2d 1273, 1284 (D.C. 2005); Rector v. State, 444 S.E.2d 862, 865 (Ga. App. 1994); McCormick v. State, 803 N.E.2d 1108, 1112–13 (Ind. 2004); State v. Shuler, 545 S.E.2d 805, 811 (S.C. 2001); Payton v. Kearse, 495 S.E.2d. 205, 210 (S.C. 1998); State v. King, 572 N.W.2d 530, 535 (Wis. Ct. App. 1997).

46. *See Ornelas*, 330 P.3d at 1092 ("[S]ome states and most federal circuits have adopted a mixed motives analysis, and the Ninth Circuit has adopted its own approach."); *see also* Gattis v. Snyder, 278 F.3d 222, 234-35 (3d Cir. 2002); Weaver v. Bowersox, 241 F.3d 1024, 1032 (8th Cir. 2001); King v. Moore, 196 F.3d 1327, 1335 (11th Cir. 1999); Wallace v. Morrison, 87 F.3d 1271, 1274-75 (11th Cir. 1996); United States v. Tokars, 95 F.3d 1520, 1533 (11th Cir. 1996); United States v. Darden, 70 F.3d 1507, 1531 (8th Cir. 1995); Jones v. Plaster, 57 F.3d 417, 421 (4th Cir. 1995); Howard v. Senkowski, 986 F.2d 24 (2d Cir. 1993).

47. Cook v. LaMarque, 593 F.3d 810, 814-15 (9th Cir. 2010) (applying a third approach, the "motivated in substantial part" standard); *see infra* notes 138-144 and accompanying text.

48. *See* Foster v. Chatman, 136 S. Ct. 1737, 1754 n.6 (2016); Snyder v. Louisiana, 552 U.S. 472, 485 (2008).

49. 471 U.S. 222, 232 (1985). For extensive treatment of *Hunter*, see *infra* notes 126-137 and accompanying text.

50. *See, e.g.*, Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle, 429 U.S. 274, 285-86 (1977) (using causation to analyze a mixed motives First Amendment claim); Nardone v. United States, 308 U.S. 338, 341 (1939) (evidence); Murray v. Groose, 106 F.3d 812, 814 (8th Cir. 1997) (jury selection); NLRB v. Vemco, Inc., 989 F.2d 1468, 1478 (6th Cir. 1993) (labor law).

mixed motives, every single Justice attempted to square his or her preferred motive standard with tort causal theories.[51]

Scholars and jurists have been critical of this approach, arguing that it misreads the statute and unwisely transplants tort doctrine without regard for the subtleties of the instant legal question.[52] Yet no one seems to have noticed that these same skeptical arguments were first made by the very Justices to be tutored: In 1972, Justice Blackmun wrote a majority opinion in which he rejected the relevance of tort law's causal reasoning in a mixed motives case as based on specious textual analysis[53] and ill founded in policy.[54] He was joined in that opinion by Justices Brennan, Marshall, and White (Justice Rehnquist had recently joined the Court but declined to join in any opinion). These five Justices remained on the bench for *Price Waterhouse*, yet none cited his previous opinion. Neither did any of the briefs, or subsequent scholars writing on the case.[55] Pre-

51. Some Justices required but-for causation. Price Waterhouse v. Hopkins, 490 U.S. 228, 262 (1989) (Kennedy, J., dissenting). Others note that something need not be "the" cause to be "a" cause, *id.* at 242-45 (majority opinion), but they imposed a but-for test in order to qualify for meaningful remedies. *Id.* at 242; *id.* at 260 (White, J., concurring); *id.* at 268 (O'Connor, J., concurring); *id.* at 262 (Kennedy, J., dissenting). Causation continues to influence developments in employment jurisprudence. *See, e.g.*, Univ. of Tex. Sw. Med. Ctr. v. Nassar, 133 S. Ct. 2517 (2013).

52. *See, e.g.*, Gudel, *supra* note 21.

53. *See* United States v. Generes, 405 U.S. 93, 105 (1972) ("The Regulations' use of the word 'proximate' perhaps is not the most fortunate, for it naturally tempts one to think in tort terms. The temptation, however, is best rejected, and we reject it here."). The regulation provided, "For purposes of subparagraph (2) of this paragraph, the character of the debt is to be determined by the relation which the loss resulting from the debt's becoming worthless bears to the trade or business of the taxpayer. If that relation is a proximate one in the conduct of the trade or business in which the taxpayer is engaged at the time the debt becomes worthless, the debt comes within the exception provided by that subparagraph." 26 C.F.R. § 1.166-5(b)(2) (2016).

54. *See Generes*, 405 U.S. at 103-05 (considering policy arguments why the tort concept of causation "has little place in tax law, where plural aspects are not usual, where an item either is or is not a deduction, or either is or is not a business bad debt, and where certainty is desirable"); *see also* Weddle v. Comm'r, 325 F.2d 849, 852 (2d Cir. 1963) (Lumbard, C.J., concurring) ("To import notions of proximate causation distilled from the great body of tort law into consideration of [Section] 166 is of little value, because factors such as time, space, and foreseeability, and the very basic notion of causation in fact which underlies the law of proximate causation are by their nature incapable of application to a problem which requires dissection of different motivations toward a similar objective.").

55. *But see* James J. Brudney & Corey Ditslear, *The Warp and Woof of Statutory Interpretation: Comparing Supreme Court Approaches in Tax Law and Workplace Law*, 58 DUKE L.J. 1231, 1283 n.182 (2009) (citing without discussion the *Generes* dissent, which did not discuss tort causation at all).

sumably the prior opinion went unnoticed because it addressed a tax law question, and it never occurred to anyone that separate legal domains might struggle with similar problems.[56]

It is not just a failure to compare that has limited the development of motives jurisprudence. It is also a failure to be clear about what any given motive standard actually entails. It is hard to defend one motive standard against another if you are not sure about the difference yourself, or if you doubt your ability to convey subtle differences to jurors.[57]

Clarification is a distinctive contribution of the legal academy, and scholars have given some attention to the jurisprudence of motives. Unfortunately, previous efforts at clarification have been incomplete or limited. Almost all of these projects have looked exclusively at a single body of law[58] or just a few areas of law.[59] Many prior studies limited their scope of evaluation to categorically exclude important patterns of mixed motives. [60]

Another common pitfall is taking courts' word choice too seriously without examining the realistic impact on the result.[61] Should we conclude that "contributing factor" and "motivating factor" are different standards just because courts used different words? Doing so threatens to give us as many standards as there

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56. This is a shame, since tax has a particularly rich engagement with mixed motives. *See, e.g.*, MARVIN CHIRELSTEIN, FEDERAL INCOME TAXATION: A LAW STUDENT'S GUIDE TO THE LEADING CASES AND CONCEPTS 120-22 (1977); Michael J. Graetz, *Implementing a Progressive Consumption Tax*, 92 HARV. L. REV. 1575, 1585-86 (1979).

57. *See* Univ. of Tex. Sw. Med. Ctr. v. Nassar, 133 S. Ct. 2517, 2546 (2013) (Ginsburg, J., dissenting) (criticizing "but-for" tests as difficult for judges and juries); Price Waterhouse v. Hopkins, 490 U.S. 228, 247 n.12 (1989) (discussing concern for jury trials); *id.* at 292 (Kennedy, J., dissenting) (expressing concern for jury trials).

58. *See, e.g.*, Covey, *supra* note 19 (discussing mixed motives in jury selection).

59. *See, e.g.*, Weber, *supra* note 23 (comparing six areas: contractual relations, malicious prosecution, defamation, retaliatory eviction, and concurrent loss tort and contracts cases).

60. *See* Katz, *supra* note 4, at 498 (ruling out "necessary, but not sufficient" cases as "unlikely to occur in the context of decisionmaking, where the relevant acts (for example, consideration of sex and consideration of tardiness) occur simultaneously" (emphasis omitted)); Weber, *supra* note 23, at 499 (defining mixed motives cases as ones where "two causes, either of which would alone cause the harm, operate simultaneously," thereby limiting the inquiry to what I will later call Quadrant III).

61. *E.g.*, Nancy M. Modesitt, *Causation in Whistleblowing Claims*, 50 U. RICH. L. REV. 1193, 1201-10 (2016) (listing eight motive standard types without establishing that they actually entail different results).

are synonyms in a thesaurus.[62] Separate designations are appropriate only if they drive different results.[63]

Yet another drawback to previous approaches is their tendency to summarize the range of motives (and motive standards) on a one-dimensional axis — for example, from "least discriminatory" on the left to "most discriminatory" on the right. However, mixed motives cases are a function of two independent variables because the legal outcome turns on the status of the two motives. No single spectrum can compare (i) the strength of two motives, relative to some baseline, (ii) the sum of their combined vectors, relative to the baseline, and (iii) their strength relative to one another.[64] As a result, precision has been lost.[65]

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62. *See* Hartley v. Fine, 780 F.2d 1383, 1387 (8th Cir. 1985) (explaining that the terms "motivating factor" and "substantial factor" are "interchangeable"); *cf.* Katz, *supra* note 4, at 491 n.5 (listing almost thirty different statements of the mixed motives standard in *Hopkins*).

63. One way to test this would be to see whether there are courts that say something to the effect of, "Of course there was a contributing factor here, and that would establish liability in our neighboring state. But not here, because it wasn't quite a motivating factor."

64. An alternative way of stating this claim is that no single *scalar* or *statistic* can accomplish all three goals.

65. *See, e.g.*, Sam Stonefield, *Non-Determinative Discrimination, Mixed Motives, and the Inner Boundary of Discrimination* Law, 35 BUFF. L. REV. 85, 114-20 (1986). Stonefield is able to depict the relative strength of two motives to one another, but his chart does not communicate the absolute strength of the motives either individually or as a set. Therefore, a move toward the "more racist" side of his chart is both compatible with increasing racist motivation and with *decreasing* racist motivation (so long as nonracist motives are dropping even faster). Likewise, any point on the scale is compatible with any absolute level of racist motive, so long as nonracist motive is proportional. Thus, a but-for test or motivating factor test can be satisfied at any point on his line. This is not a trivial error. It leads Stonefield to erroneously infer that "determinative" racism (which means "but-for") is stronger racism than "substantial" racism (which, in his language, means racism exceeding a minimum quantum of strength). Yet there is nothing in his theory that guarantees this result. And failure to notice this bizarre result may be what causes Professor Stonefield to define "substantial" as excluding trivial quantities.

Professor Brodin makes a similar move:

> At one end of the spectrum is a test, specifically rejected by Congress, that requires the plaintiff to establish that the unlawful factor was the *sole* factor behind the decision. At the other end is a causal theory that prohibits a decision that was based *in part* on an impermissible consideration even if a legitimate reason was also relied on. In between is a test that would invalidate personnel action that was based *in substantial part* on a discriminatory ground, and another that requires the plaintiff to prove that the impermissible consideration was a *determinative factor,* i.e., a factor that a made a difference in the ultimate result.

Brodin, *supra* note 29, at 293 (footnotes omitted).

The spectrum that makes "in part" a lesser point than "substantial part" is either a ranking of the absolute strength of the motive or its strength relative to another motive. In either case, there is no assurance that determinative (i.e., but-for) should be further out than substantial

Lacking an effective vocabulary, courts cannot compare across fields and circuits, defend individual rules against one another, send clear instructions to lower courts as to the applicable law, or even spot errors within their opinions. Vague terms also elide the hard evaluative questions that might recommend one rule rather than another. The next Part sets out the vocabulary needed to tackle these problems.

II. A DESCRIPTIVE VOCABULARY

This Part sets out to build a descriptive vocabulary in which to situate motive standards, to allow precise statements of existing and potential legal rules. It remains agnostic on many key debates in law, philosophy, and psychology. Instead, what follows should structure discussions of motivation, regardless of one's views on those questions.

Every model has its limitations, and this one is no exception. As an attempt to clarify the existing law, it is particularly important for this Article itself to be clear about its ambitions and limitations of scope. The nature of motive is hotly debated in legal, psychological, and philosophical literatures. This Article does not argue for particular resolutions to those debates. Given the diverse approaches employed by courts, no project of legal clarification can afford to be dogmatic from the start. Wherever possible, this Article is meant to be ecumenical and compatible with whatever assumptions courts currently make about motive. Nevertheless, this Article does operate with certain conceptions of motive in mind, and it is important to be explicit about those conceptions.

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part. A motive may be determinative, even if it is absolutely tiny and tiny relative to other motives, if the other motive is not individually sufficient to motivate the result.

Professor Modesitt makes this same move and another. Modesitt, *supra* note 61, at 1202-11. She ranks "but-for" as tougher than her "substantial factor" test. But then she puts both as easier tests than a primary factor test. *Id.* at 1203-05. Yet a motive might be primary without being determinative if even the secondary motive was strong enough to drive the result independently. And a motive might be primary and yet insubstantial if numerous trivial motives together added up to motivate the act.

Professor Katz does not make this error, but tempts his reader to make it when he asserts that "it is hard to imagine that it would be significantly easier for plaintiffs to prove sufficiency than it would be for them to prove necessity." Katz, *supra* note 4, at 510 n.85. He is right that the bad motive is never larger for necessity than sufficiency, making necessity easier on that axis. But necessity requires someone to confront the contribution of the other motive – sufficiency does not require any such analysis. Whether it is easier to prove necessity than sufficiency will depend on the plaintiff's ability to rebut claims about pressing legitimate motives, and we have no general theory about the relative difficulty of those tasks.

One familiar legal question concerns the relationship between motive and other aspects of mens rea. This Article follows the orthodox distinction between motive (i.e., *why* we act), and intent (i.e., *whether* we want to act and *what* we want to do).[66] Yet courts commonly conflate motive, purpose, and intent.[67] And some scholars problematize the distinction between intent and motive and treat motive as merely a more distant or ultimate intent.[68] This Article addresses *why* individuals acted as they did, not *what* they wanted to do—if it turns out that some "intents" or "purposes" are reasonably construed as dealing with *why*, then those "intents" are "motives" for the purposes of this article.[69]

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66. ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS 208-21 (2d ed. 1986) (distinguishing motive, a psychological fact, from intent or purpose); *Intent*, BLACK'S LAW DICTIONARY (10th ed. 2014) ("While motive is the inducement to do some act, intent is the mental resolution or determination to do it."); STEPHEN, *supra* note 4, at 110-12. Purpose is sometimes the same as motive, sometimes the same as intent, and sometimes independent. Walter Wheeler Cook, *Act, Intention and Motive in the Criminal Law*, 26 YALE L.J. 645 (1917) (distinguishing between intent, motive, and purpose). The Model Penal Code distinguishes between various levels of culpability, from "negligently" to "recklessly" to "knowingly" to "purposely." MODEL PENAL CODE §§ 2.02(2)(a)-(d) (AM. LAW. INST. 1962). This Article's analysis would seem to be applicable only when an actor proceeds purposely.

67. *See, e.g.*, Pullman-Standard v. Swint, 456 U.S. 273, 289-90 (1982) (conflating motive and intent); Mobile v. Bolden, 446 U.S. 55, 62-63 (1980) (conflating motive and purpose); Palmer v. Thompson 403 U.S. 217, 241 (1971) (White, J., dissenting) (conflating motive and purpose); Griggs v. Duke Power Co., 401 U.S. 424, 429 (1971) (conflating purpose and intent).

68. *See, e.g.*, WAYNE R. LAFAVE & AUSTIN W. SCOTT, JR., HANDBOOK ON CRIMINAL LAW § 3.6(a), at 229 (2d ed. 1986); JOHN WILLIAM SALMOND, JURISPRUDENCE, OR, THE THEORY OF THE LAW 347 (3d ed. 1910) (defining motive as "ulterior intent"). Still others reject any effort to categorize these various concepts. John Hart Ely, *Legislative and Administrative Motivation in Constitutional Law*, 79 YALE L.J. 1205, 1217-21 (1970); David A. Strauss, *Discriminatory Intent and the Taming of* Brown, 56 U. CHI. L. REV. 935, 951 (1989) (noting the interchangeability of these words in equal protection law).

69. Thus, I assume it is sensible to say that a teacher was fired because the school board wanted to silence political dissent (motive), and that this is different from merely noting that the firing was not the result of a clerical error (intent). I do not attempt to answer the question of whether it is fruitful to characterize the action in terms of a highly specific intent (e.g., "the board intended to fire a political dissenter") combined with a more generalized intent ("the board sought to have a 'good' set of teachers"), except to say that my usage of motive should still attach to this version of specific intent. For example, I take Professor Fallon's recent article on legislative intent to nevertheless address material that this article analyzes as motive. Fallon, *supra* note 7. On multiple overlapping characterizations of an action, see DONALD DAVIDSON, *Agency*, *in* ESSAYS ON ACTIONS AND EVENTS 43, 57-61 (2001) (discussing the multiple potential characterizations of any given action, many of which call attention to a different psychological aspect of the actor).

Second, what phenomena qualify as answers to the "why" question? Does motive refer to facts about the world ("he could only survive by killing his attacker"), reasons ("all reasonable people kill in self-defense"), or internal psychological states ("he *wanted* to live")?[70] The conceptual status of motive has been a central matter for philosophers of action. A closely related legal question is whether, given that all internal mental states must be *proven* by recourse to external circumstances anyway, we should generally regard the law as *uninterested* in inner states such as motive.[71] This Article's discussions presume that motives are a *reason* for action which an actor takes to be guiding.[72] However, much of this analysis should work even for philosophers or courts that think of motive differently. Whatever motives are to be mixed—the felt desires of an actor, considerations which would make a reasonable person feel those desires, etc.—we need a rational way of describing and evaluating that mixture.

Presenting motives as a certain sort of reason naturally excludes unconscious biases and urges as motives.[73] That is not to deny the power that perception and the subconscious have on us,[74] so much as to develop a useful model of the way

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70. A closely related question is whether the agent must "endorse" her motives in some way, or whether unendorsed mental states may be relevant. *See generally* Angela M. Smith, *Conflicting Attitudes, Moral Agency, and Conceptions of the Self*, 32 PHIL. TOPICS 331 (2004) (arguing against the endorsement requirement).

71. *See* Oliver Wendell Holmes, Jr., *Privilege, Malice, and Intent*, 8 HARV. L. REV. 1, 1 (1894); *see also* Ronald A. Cass & Keith N. Hylton, *Antitrust Intent*, 74 S. CAL. L. REV. 657, 659 (2001) (making a similar claim regarding intent in antitrust law).

72. *See* Gudel, *supra* note 21, at 74 ("Motives, in sum, are a class or species of *reasons* for action."); *accord* Owen M. Fiss, *A Theory of Fair Employment Laws*, 38 U. CHI. L. REV. 235, 297 (1971); *cf.* Byrne Hessick, *supra* note 24, at 95 (2006) ("[A] defendant's motives are her *reasons* for acting."); Walter Harrison Hitchler, *Motive as an Essential Element of Crime*, 35 DICK. L. REV. 105, 105 ("Motive is a desire prompting conduct."). And a reason is something that *motivates* rather than justifies action. On the distinction, see JONATHAN DANCY, PRACTICAL REALITY (2000). To the degree that something other than reasons are considered, such as problematic *beliefs* or *circumstances*, the framework in this Article may or may not be useful.

73. *See supra* text accompanying note 5. *See generally* RICHARD PETERS, THE CONCEPT OF MOTIVATION 34-35 (1958) (distinguishing between conscious motives (i.e., "his reason") and potentially subconscious motives (i.e., "the reason")). A vast psychological literature studies the ways in which attitudes and factual perceptions can be subject to distortion or bias. It is therefore easy to imagine an employer firing an employee, thinking that the reason pertains only to merit, but where the boss was more attentive to the employee's faults *because* of the boss's unconscious reactions to the employee's race. Such cases are not the focus of this Article.

74. *See, e.g.*, Janice Nadler & Mary-Hunter McDonnell, *Moral Character, Motive, and the Psychology of Blame*, 97 CORNELL L. REV. 255, 267-71 (2012) (discussing the ways in which perceptions and conclusions may be influenced by "motivations" where motivations involve having a preferred outcome).

that the law uses motive. It seems clear that the law generally takes only conscious motives as motives.[75]

Another closely related question concerns causation.[76] Should we regard motives as deterministically *causing* certain actions, or is there space for non-causal free will?[77] Whether and how motives are part of the causal universe is a matter of substantial debate.[78] This Article avoids causal language whenever possible. It seems that the organization of motive standards can be accomplished without presuming a particular view of causation or determinism.

In addition to those various conceptual choices, this Article also makes choices about how it is appropriate to describe motives.[79] For example, it describes individuals as having one or two motives, even though it is plain that we may have any number of motives.[80] It also describes particular motives as matters of degree rather than as binary; that is, once you admit to having a given motive at all, it still makes sense to ask how much of that motive you have (or how motivational it was to you). It may be that relaxing or modifying these assumptions yields different insights or illuminates other problems, and such follow-on work will be welcome. For now, these assumptions are sensible and yield tractable results. We now turn to the model and its results.

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75. *See, e.g.*, Price Waterhouse v. Hopkins, 490 U.S. 228, 250 (1989) ("In saying that gender played a motiving part in an employment decision, we mean that, if we asked the employer at the moment of the decision what its reasons were and if we received a truthful response, one of those reasons would be that the applicant or employee was a woman.").

76. *See* Donald Davidson, *Actions, Reasons, and Causes*, 60 J. PHIL. 685 (1963) (arguing that reasons cannot be causes).

77. *See* H.L.A. HART & TONY HONORÉ, CAUSATION IN THE LAW (1959) (examining causation in law, but nevertheless rejecting determinism); *see also*, D. Don Welch, *Removing Discriminatory Barriers: Basing Disparate Treatment Analysis on Motive Rather than Intent*, 60 S. CAL. L. REV. 733, 739 ("Motive is a causal concept."). *But see* Richard W. Wright, *The NESS Account of Natural Causation: A Response to Criticisms*, *in* PERSPECTIVES ON CAUSATION 285 (Richard Goldberg ed., 2011) (embracing deterministic causation for human action).

78. *See supra* notes 50-56 and accompanying text.

79. *See supra* notes 66-69 and accompanying text.

80. It seems that it will often be appropriate to group and sum the various A-Motives and (separately) B-Motives. Then this model still allows comparison through its two-motive presentation. Yet one might wonder whether this is always appropriate. In a case with three equal motives, each might be a but-for motive, yet none is in itself primary. The choice of how to combine them is the choice of whether to find a Primary Motive at all. Such considerations require greater attention than can be accomplished at this time.

A. Components

Consider a variety of individuals differing in the structure of their motivations for a given action. Some individuals have just a single motive for a given decision, and it is one that the law considers acceptable. It might be firing an employee due to repeated absenteeism or selling a stock due to a sudden need for cash. Let us call these *acceptable* motives *A-Motives*.

Can the strength of someone's A-Motives be measured, or can two individuals' A-Motives be compared? It may seem strange to compare two individuals' motivational strengths or to compare a single individual's motivations over time,[81] and it may seem particularly strange to assign any kind of number to motivational strength.[82] Still, doing so will prove illuminating even if it is not meant to literally describe human psychology.

Moreover, some quantification and comparison should feel familiar and reasonable. We observe that some people subject to A-Motives act on them, and some find them insufficiently motivating and do not act. Likewise, the same individual may act on A-Motives one day and not another. It would seem that some motivations are sufficient to prompt action, and some are so weak as to be ignored, particularly when there are costs to action. It may be acceptable to simply define "1" as the level of A-motivation sufficient for action, and then to sort individuals as above or below that point based on our observation that they did or did not take action.[83] Figure 1 (*Adam & Betty*) depicts just such an arrangement along the Y-axis.

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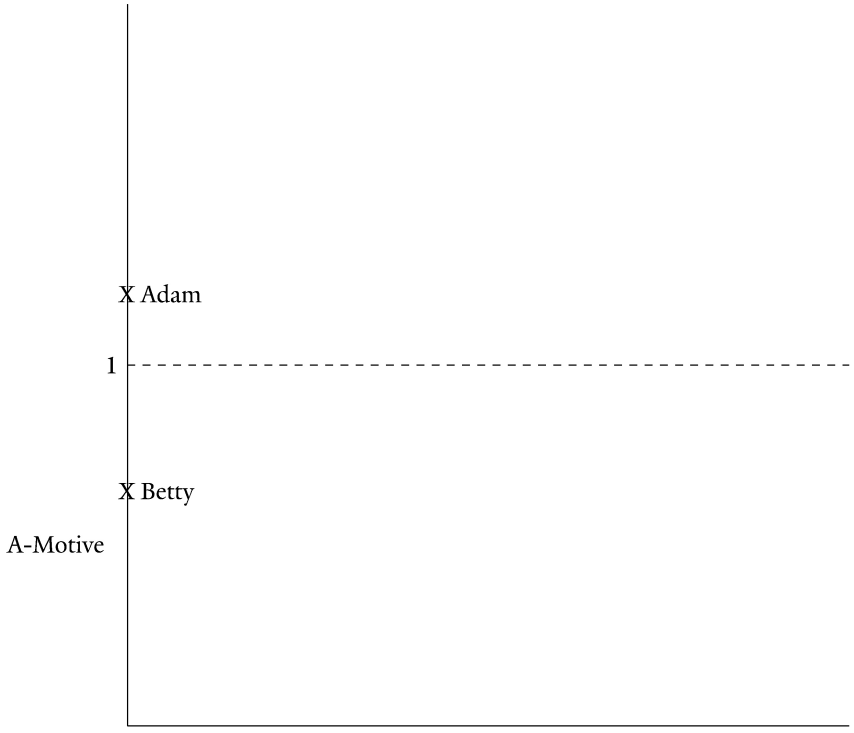
81. Klein, *supra* note 18, at 1108-09.

82. The impossibility of interpersonal comparison of utility has been a defining feature of modern economic thought. *See, e.g.*, 3 ELIE HALÉVY, LA FORMATION DU RADICALISME PHILOSOPHIQUE 481 n.55 (1904) (quoting Jeremy Bentham for the observation that "you might as well pretend to add 20 apples to 20 pears" (quoting Jeremy Bentham, Dimensions of Happiness (unpublished manuscript) (on file with University College London))).

83. Katz distinguishes between strong sufficiency and weak sufficiency. Katz, *supra* note 4, at 497 n.25. Strong sufficiency is satisfied if the factor in question would have led to the observed result irrespective of whether any other factors were subtracted. Weak sufficiency means that the factor would have only caused the result with the other factors present. Katz addresses only weak sufficiency in his article because he finds strong sufficiency to be a dubious concept. What could cause a result without any help at all—without oxygen, for instance?

In this Article, I invoke neither strong nor weak sufficiency. Instead, I favor an intermediate position: a motive is sufficient if it would have led to the observed result even if other contributing motives were subtracted. This is stronger than weak sufficiency because it asks what would have happened in the absence of other background motives, but it is weaker than strong sufficiency because it does not require that the motive would spur action even if other nonmotive facts were greatly altered. Within this notion of sufficiency, it should be clear that I am describing a sort of "independent sufficiency" even if I do not always use the word "independent."

FIGURE 1.
ADAM & BETTY



Adam possesses only A-Motive, and his A-Motive is greater than 1. By contrast, *Betty* also feels some desire to act to further her A-Motive, but the motivation is insufficient to actually spur action.[84] Perhaps she considers firing an absentee employee but decides that she just does not care very much about the

84. Katz refers to individually insufficient motives, which are neither necessary nor sufficient, as exhibiting "minimal causation." Katz, *supra* note 4, at 499. I avoid that term in part because I wish to avoid endorsing without argument the controversial notion that motives must be "causal" to be relevant. *See supra* notes 76-78 and accompanying text. Nevertheless, the language of causation may prove useful to some readers, either because they subscribe to a causal theory of motivation or because they are familiar with its terminology. For such readers, I include the corresponding causal language as well. In such language, we might think of Adam's A-Motive as a necessary and sufficient cause of Adam's actions, while Betty's A-Motive is neither necessary nor sufficient. In a counterfactual sense, removing Adam's A-Motive (and only removing that motive) would change Adam's action, while removing Betty's A-Motive alone would in no way change the results.

absences. Because Adam and Betty both care only about A-Motives, yet only Adam takes action, we can state ordinally that Adam has greater A-motivation than Betty and cardinally that Adam has A-motivation >1 and Betty has A-motivation <1.

Not everyone has only A-Motives.[85] Some individuals are motivated by pursuit of B. *B-Motives* are ones that can qualify the defendant for adverse legal treatment or which may be essential to a plaintiff's or prosecutor's case. Oftentimes, B-Motives are *bad* motives, but not always.[86] A taxpayer who purchases a plane ticket primarily for a leisure motive will be denied a business expense tax deduction, but that does not mean that leisure is bad or that Congress seeks to discourage vacationing.[87] Figure 2 (*Adam et al.*) depicts several individuals' salient combinations of A-Motive and B-Motive, as well as two additional dashed lines highlighting the magnitude of their various motives.

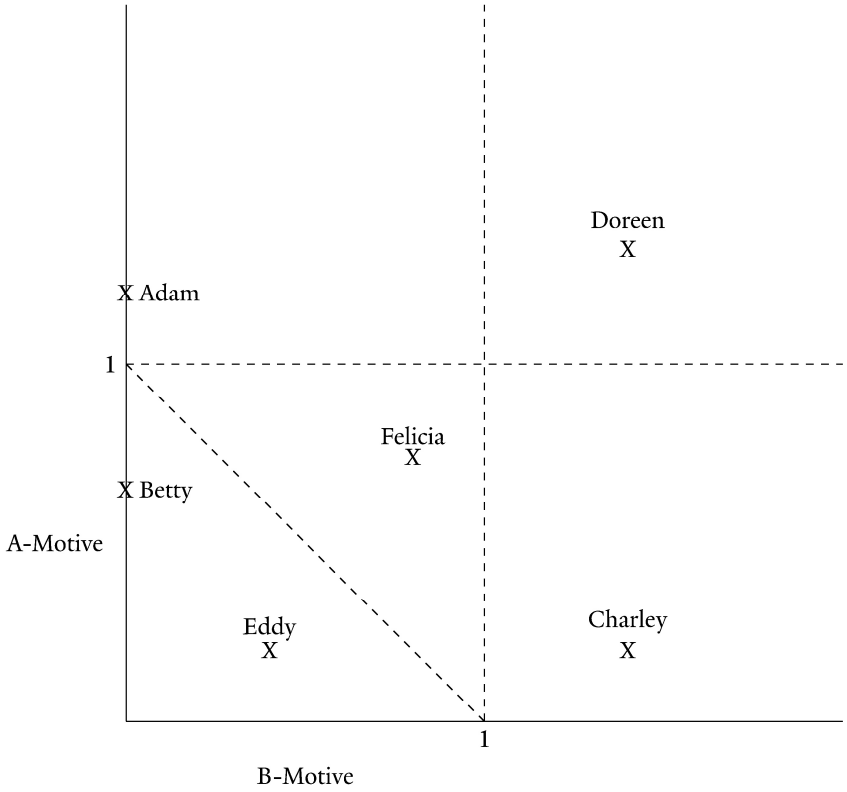
Of course, even Adam's A-Motive is not sufficient in the strongest sense, *see supra* note 83, since Adam would not act if, say, all oxygen in the universe disappeared.

85. STEPHEN, *supra* note 4, at 121 ("[A] man's motives for any given act . . . are always mixed."). *But see* MARCIA W. BARON, KANTIAN ETHICS ALMOST WITHOUT APOLOGY 152-55 (1999) (questioning the prevalence of mixed motives); Judith Baker, *Do One's Motives Have To Be Pure?*, *in* PHILOSOPHICAL GROUNDS OF RATIONALITY: INTENTIONS, CATEGORIES, ENDS 457, 457-58 (Richard E. Grandy & Richard Warner eds., 1986) (same).

86. *See supra* text accompanying note 30. Other times, A-Motives and B-Motives may both be bad. *See* Hunter v. Underwood, 471 U.S. 222, 231 (1985) (discussing how an unlawful motive — disenfranchising blacks — was used as political cover for a lawful but distasteful motive — disenfranchising poor whites). Note also that the relevant motive may not even be that of a party to the litigation. Alpha's tax obligations may turn on Beta's motive in giving a putative gift, even if Beta is not a party to the litigation — and even if Beta is no longer living. *See*, *e.g.*, United States v. Harris, 942 F.2d 1125 (7th Cir. 1991); *see also* Gupta, *supra* note 31, at 479 (noting that asylum proceedings inquire into the motive of a persecuting government, though the parties to the litigation are only concerned with the rights of an individual asylum seeker against U.S. immigration officials).

87. *See* Treas. Reg. §§ 1.162-2(b)(1) to (2) (1960) (considering whether the trip is primarily related to trade or business or primarily personal); *see also* United States v. Gotcher, 401 F.2d 118 (5th Cir. 1968) (evaluating an example of such a business trip).

FIGURE 2.
ADAM ET AL.



Charley has B-Motive >1, depicted by being to the right of the vertical dashed line, and so Charley could be said to be sufficiently motivated to act based solely on B-Motive. Yet, while B-Motive was sufficient for action, it was not Charley's only motive. He also felt the pull of A-Motive, though not strongly enough to have heeded it apart from the B-Motive.[88] Charley is our first mixed motives case.

88. If applying the language of tort causation, we would say that A-Motive was neither a necessary nor a sufficient cause, while B-Motive was both necessary and sufficient. A cause is necessary if the effect would not have occurred in the absence of that cause. In parallel, B-Motive is necessary because Charley would not have acted if his B-Motive had been extinguished. It is common to refer to necessary causes as but-for causes.

Doreen is also motivated by more than one consideration. She blocks an employee's promotion *both* because the employee exhibits a brusque style and because the employee is female.[89] Doreen would have acted for either reason, but she happens to have been motivated by both. We might describe Doreen's act as motivationally overdetermined, in that two motivations were each sufficient without the other, and neither was individually necessary, to motivate her to action.[90]

Eddy and *Felicia* also possess mixed motives. Yet they differ from Doreen considerably. We don't need to label Eddy's "act" because there is in fact no act. Although Eddy feels some pull from *A* and *B* alike, neither one is very strong at all. Neither is sufficient for action by itself, and even together, they don't amount to much. Eddy, like Betty, is on this chart to depict a possible pairing of motivations that does not imply any action at all.

Felicia, on the other hand, feels two separate motives, either of which it would be easy to disregard, but which together may seem compelling. She could forgive the employee's absenteeism by itself, or his ethnicity by itself, but together, the camel's back breaks, and she is motivated to act.[91] Her act is a hybrid of two impulses, so we can call Felicia a *hybrid* case.[92] Neither impulse is independently sufficient and both are therefore necessary to motivate her action. The dashed line separating Eddy and Felicia indicates whether the sum of motives is sufficient (>1) or not.

Doreen is a genuinely *overdetermined* case because both motives are sufficient—independent of one another—to motivate the action.[93] We can call Charley a case of *sole determination* because one motivation is necessary and sufficient

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89. *See, e.g.*, Price Waterhouse v. Hopkins, 490 U.S. 228, 235 (1989). The employee was described as "unduly harsh, difficult to work with and impatient with staff." *Id.* The head of Hopkins's department told her to "walk more femininely, talk more femininely, dress more femininely, wear make-up, have her hair styled, and wear jewelry." *Id.* Another advisor suggested that she take "a course at charm school." *Id.*

90. In the language of tort causation, this is analogous to a case of multiple sufficient causation.

91. The thought process may not be strictly additive, but *A* and *B* may cumulate to reach the necessary threshold together. In any case, I will treat the process as additive for ease of exposition.

92. My term follows Baron's treatment of Kant on mixed motives. *See* BARON, *supra* note 85, at 152-55. Some might refer to this zone as one of *overdetermination*, or of multiple necessary causes, but I dislike those labels here. Overdetermination might suggest that either motive would have sufficed independently to determine the action, which is not true. Multiple-causation invokes causation, which is controversial.

93. *See* J.L. MACKIE, THE CEMENT OF THE UNIVERSE: A STUDY OF CAUSATION 43-47, 164-65 (1974) ("[I]f it is in principle undecidable whether the chocolate would on this particular occasion have come out if the shilling had not been put in, it is equally undecidable whether the putting

to determine action without any contribution of the other, but not the other way around.[94] Eddy and Betty remain in a zone of nonaction.[95] Figure 3 (*Quadrants*) depicts the regions exemplified by these various characters.[96]

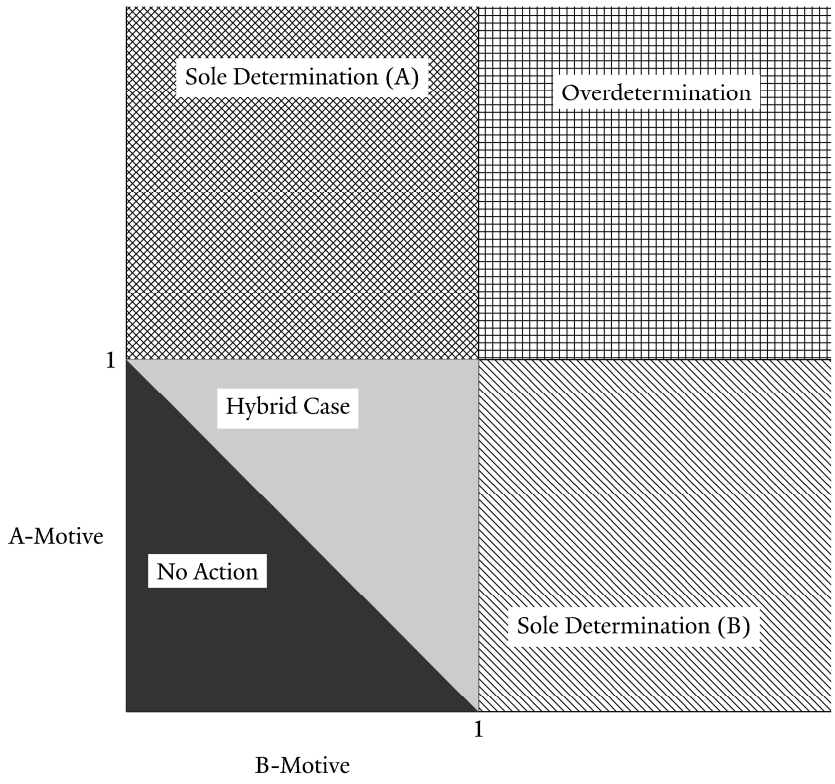
in of the shilling caused the appearance of the chocolate."); Louis E. Loeb, *Causal Theories and Causal Overdetermination*, 71 J. PHIL. 525, 526 (1974) ("Cases of causal overdetermination seem relatively different—two events, states of affairs, conditions, or objects seem to have an equal claim to having played some one causal role."). Of course, no single cause is ever truly sufficient to assure an effect. There are always other causes and background factors. Here, I really mean that *as far as motives go* each motive was sufficient for the action.

94. In familiar causal terms, we could think of Charley's as a case of necessary and sufficient causation. A-Motive could be subtracted without any change (so it is not necessary, and B-Motive is sufficient) and B-Motive also could not be subtracted lest the action be aborted (so it is necessary, as well).

95. Or, rather, any action Eddy takes is not the result of motives *A* or *B*. If he acts, it is for some other motive, or else it is motiveless action, such as a reflexive spasm.

96. To summarize this in familiar causal metaphors, overdetermination refers to two sufficient but not necessary motives; sole determination refers to one necessary and sufficient motive paired with one minimally causal motive; hybrid cases consist of two necessary but not sufficient motives.

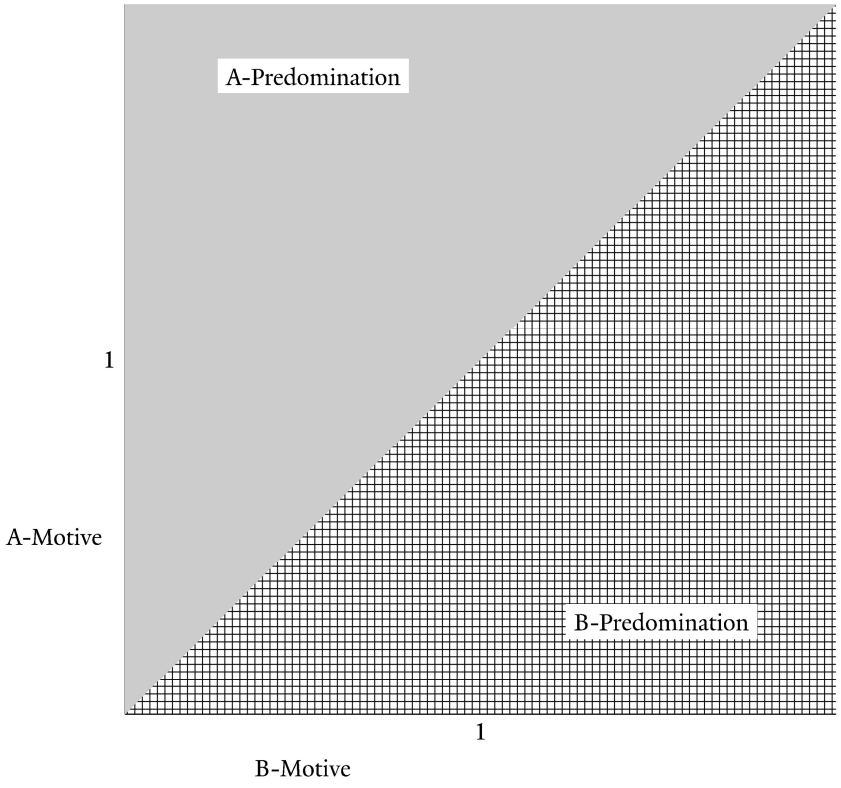
FIGURE 3.
QUADRANTS



While we have so far concerned ourselves with the *absolute* strengths of motivations *A* and *B*, we might be interested in the *relative* strengths of *A* and *B*. There may be times when it is valuable to notice whether one is much greater than the other. The following Figure 4 (*Relative Motives*) divides the motivational space into *A-Predomination*, where A-Motives exceed B-Motives, and *B-Predomination*, where the inverted relationship reigns.[97]

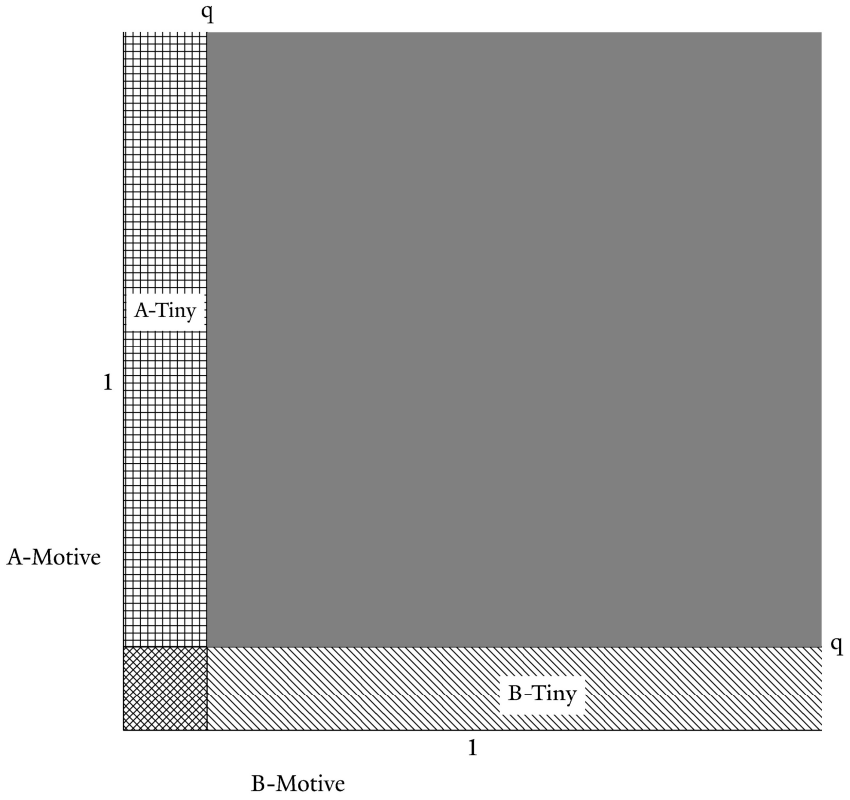
97. Notice also that this zone of predomination says nothing about when motives are precisely equal, though the law might nevertheless treat tied cases differently from those in which one motive exceeds the other by a small amount.

FIGURE 4.
RELATIVE MOTIVES



Finally, while highly granular statements of motivational strength are probably not available, we may be able to do more than simply note whether a motivation was enough (>1) on its own. In particular, we may think that among small motives, we can conceive of motives so small as to be inconsequential or de minimis – even if, admittedly, still present. Thus, an introspective employer might notice a flash of racial animus but also struggle mightily and righteously to restrain it, so that this bad motive was both insufficient to motivate action *and very far from that threshold indeed*. So, we might sometimes distinguish between motives greater than some level, q, and those that are below that level. In such cases, we can say that the motive is present but *tiny*. This is depicted in Figure 5 (*Tiny Motives*).

FIGURE 5.
TINY MOTIVES



We now have four measures for a given motive, which can be used to specially define mixed motives combinations.[98] By specifying the regions in which a defendant is and is not liable, this framework allows the construction of many possible motive standards.[99] Of these, only about a dozen rules have anything to

98. For any given motive, we can ask: Is the motive greater than *q*? Is it greater than 1? Is it the largest motive? Does the sum of all motives exceed 1?

99. *See infra* Appendix A. These are motive "standards" insofar as they specify the quanta of motives necessary for a party to prevail, just as standards of proof set the quanta of certainty about certain elements necessary for a party to prevail. *See Standard of Proof*, BLACK'S LAW DICTIONARY (10th ed. 2014) ("The degree or level of proof demanded in a specific case, such as 'beyond a reasonable doubt' or 'by a preponderance of the evidence'; a rule about the quality of the evidence that a party must bring forward to prevail."). Just as the standard of proof

recommend them, and only four of them currently find widespread expression in the law. We turn to those four widespread rules next.

B. Widespread Rules

This Section lists four widespread rules. These are the rules that will later be shown to be most commonly used.

1. Primary Motive

Consider a legislature engaged in the redrawing of electoral districts. The legislature violates the Fourteenth Amendment's Equal Protection Clause if it redistricts in order to isolate racial minorities or limit their influence, but there is no violation if the motive is instead to simply protect incumbents from challenge.[100] When both motives are present, courts ask which one *predominated* over the other. Redistricting can be constitutional despite substantially racist objectives if and only if other lawful motives were even more pressing.[101]

Figure 6 (*Primary Motive*) depicts the rule used in redistricting cases, which we can call a *Primary Motive* standard. The shaded region is the space in which the defendant will be liable, or suffer an undesired outcome, or otherwise be regulated according to her B-Motive. The defendant's legal characterization will depend on her primary or predominant motive. She is liable for her acts if and only if her B-Motive is larger than her A-Motive.[102]

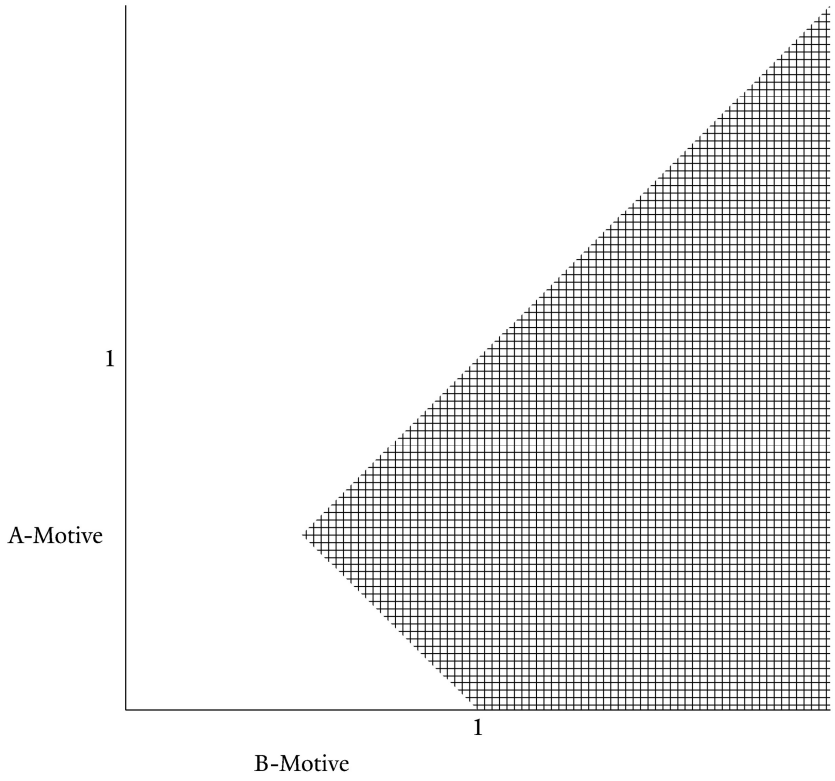
leaves many questions unanswered, such as who must bear the burden of meeting that standard, a given motive standard likewise requires supplementation. The content of a full motive *rule* or *approach* would allocate the burden of proof, set the level of motive required for satisfaction, address any rules of evidence or burden shifting, and perhaps also address remedies. This Article focuses only on motive standards.

100. Miller v. Johnson, 515 U.S. 900, 916 (1995); *accord* Bush v. Vera, 517 U.S. 952, 959 (1996). Racially motivated gerrymanders are subject to strict scrutiny, which is often regarded as "'strict' in theory and fatal in fact." Gerald Gunther, *The Supreme Court, 1971 Term—Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 8 (1972); *cf.* Adam Winkler, *Fatal in Theory and Strict in Fact: An Empirical Analysis of Strict Scrutiny in the Federal Courts*, 59 VAND. L. REV. 793 (2006) (examining the results of strict scrutiny challenges).

101. *Vera*, 517 U.S. at 959; *Miller*, 515 U.S. at 916.

102. Note that no one is liable, on this chart, when total motivation is less than one. In that realm, no motivated action takes place. Therefore, either there is no act to discuss, or it was unmotivated (e.g., a muscle spasm). *See infra* Appendix A.

FIGURE 6.
PRIMARY MOTIVE



The Primary Motive standard is used in several other areas, such as malicious prosecution[103] and corporate law's business judgment rule.[104] It is also the standard typical for tax matters,[105] where it is used to evaluate mixed motive gifts,[106] death benefits,[107] bad business debt,[108] and business expenses.[109] In all these areas, a mixed motive defendant is given whatever legal treatment is owing to her weightier motive; the lesser motive, regardless of whether it was itself necessary or sufficient for action, is ultimately disregarded.

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103. RESTATEMENT (SECOND) OF TORTS § 668 & cmt. c (AM. LAW INST. 1977).

104. Directors' decisions are immunized from shareholder challenge if their motives were primarily loyal even if they had some personal interest in the decision. *See generally* Alan R. Palmiter, *Reshaping the Corporate Fiduciary Model: A Director's Duty of Independence,* 67 TEX. L. REV. 1351, 1389 n.151 (1989) (citing sources that discuss mixed motives in corporate law). Professor Jill Fisch states that courts defer to boards if they "can attribute management's action to 'any rational business purpose.'" Jill E. Fisch, *Frankenstein's Monster Hits the Campaign Trail: An Approach to Regulation of Corporate Political Expenditures*, 32 WM. & MARY L. REV. 587, 624-25 n.212 (1991). While this sounds like a sole purpose test, the cases Professor Fisch cites as support for this claim actually utilize a *primary* purpose test. *See* Panter v. Marshall Field & Co., 646 F.2d 271, 304 (7th Cir. 1981); Johnson v. Trueblood, 629 F.2d 287, 293 (3d Cir. 1980); *see also* Cheff v. Mathes, 199 A.2d 548, 554 (Del. 1964). The reason that confusion is possible is that courts frequently say that the plaintiff prevails if the directors' improper motive was primary *or was the sole motive*. *E.g.* Treco, Inc. v. Land of Lincoln Sav. & Loan, 749 F.2d 374, 377 (7th Cir. 1984) ("Delaware's rule insulates a director's action unless plaintiff shows that an impermissible motive, such as perpetuation of director control, was the 'sole or primary purpose' for the action.") (quoting *Panter*, 646 F.2d at 297). Yet, the "Primary Motive" test is strictly easier for plaintiffs to satisfy than the "Sole Motive" test; any director who passes the Primary Motive test has a legitimate motive that is more pressing that the illegitimate one. Having two motives, the director necessarily survives the Sole Motive test. Thus, despite references to Sole Motive, and despite the fact that courts often do find just one motive, *see*, *e.g.*, Strassburger v. Earley, 752 A.2d 557, 575 (Del. Ch. 2000) (finding that the business judgment rule was rebutted because "a repurchase of Hesperus's shares could further only one purpose—to confer absolute control"), the best statement of the test is as a Primary Motive test.

105. Klein, *supra* note 18, at 1104; *accord* Blum, *supra* note 14, at 508.

106. *See* Olk v. United States, 536 F.2d 876, 879 (9th Cir. 1976) (accepting dominant motive as the relevant legal standard). The Court in *Commissioner v. Duberstein* uses both the "dominant reason" language, and "detached and disinterested generosity." 363 U.S. 278, 285-86 (1960). The latter might seem to imply a more restricted standard, such as a motivating factor test. However, subsequent decisions have clearly accepted that a payment is a "gift" if the dominant reason for it is detached and disinterested, and that this is compatible with secondary reasons that are interested. *See, e.g.*, Lane v. United States, 286 F.3d 723, 729 (4th Cir. 2002); Poyner v. Comm'r, 301 F.2d 287, 291 (4th Cir. 1962); Froehlinger v. United States, 217 F. Supp. 13, 17 (D. Md. 1963), *aff'd*, 331 F.2d 849 (4th Cir. 1964). Thus, the mixed motives standard here is Primary Motive.

107. Bank of Palm Beach & Tr. Co. v. United States, 476 F.2d 1343, 1350 (Ct. Cl. 1973) ("While this case, as in all the death benefit cases we have researched, contains a multiplicity of motives—some favoring gift treatment, others favoring business treatment—we conclude that

2. *But-For Motive*

As a governmental body constrained by the First Amendment, a school district may not fire a teacher for speaking out on matters of public importance, though clearly it may fire the teacher for making obscene gestures at students.[110] What then, when the school admittedly acts from both motives? The government wins, despite the effort to silence political speech, as long as it was sufficiently concerned about the teacher's professionalism that it would have fired him for that reason alone. The district is only liable if silencing dissent was a *but-for* motive for the firing. Many First Amendment inquiries adopt a *But-For Motive* standard,[111] crediting the government with lawful motives unless B-Motive changed the result. Such a standard is depicted in Figure 7 (*But-For Motive*).[112]

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the . . . dominant motive in continuing the salary and bonus payments . . . was proximately related to business.").

108. United States v. Generes, 405 U.S. 93, 104 (1972). Slight permutations on the facts of *Generes* iterate endlessly, essentially always subject to a predominant, primary, or dominant motive test. *See Proximate Connection of Debt with Taxpayer's Trade or Business*, [Income] U.S. Tax Rep. (RIA) ¶ 1665.301 (2016) (collecting cases).

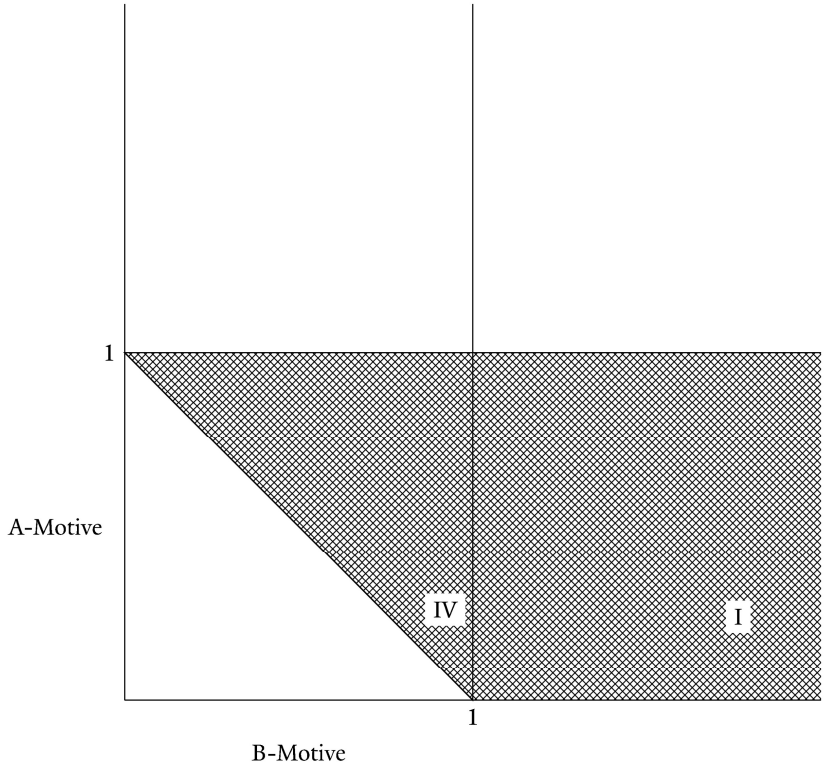
109. Section 162 allows a taxpayer to deduct "all the ordinary and necessary expenses paid . . . in carrying on any trade or business." I.R.C. § 162(a) (2012). Courts use a predominant purpose test to determine whether deduction is available for an expense with plausibly both personal and business motivations. *See, e.g.*, Mohn v. United States, No. 99-CV-76369, 00-CV-74575, 2001 WL 1399366, at *5 (E.D. Mich. Sept. 6, 2001) (finding that a question of fact exists in regards to which motive predominates for repayments following a failed investment scheme); Jenkins v. Comm'r, 47 T.C.M. (CCH) 238 (T.C. 1983) (permitting deduction for repayments of discharged indebtedness made "with the Primary Motive of protecting his personal business reputation [as a singer/songwriter]"); *cf.* McCann v. United States, 696 F.2d 1386, 1388 (1983) (using the Primary Purpose test to distinguish business travel from pleasure travel).

110. Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle, 429 U.S. 274 (1976).

111. *See, e.g.*, Hartman v. Moore, 547 U.S. 250, 260 (2006); Bd. of Educ., Island Trees Union Free Sch. Dist. No. 26 v. Pico, 457 U.S. 853, 871 n.22 (1982) ("By 'decisive factor' we mean a 'substantial factor' in the absence of which the opposite decision would have been reached"); Givhan v. W. Line Consol. Sch. Dist., 439 U.S. 410, 417 (1979) (remanding to determine whether exercise of First Amendment rights was a but-for cause, rather than "the primary" reason); *Doyle*, 429 U.S. at 274.

112. The defendant is liable in Quadrant I because here the B-Motive is itself sufficient to motivate action, and the A-Motive is not. There would have been a different (or no) action without the B-Motive. Likewise, the hybrid cases in Quadrant IV are cases where neither the A- nor B-Motives were independently sufficient for action, but the presence of *B* was enough (when supplemented by A-Motive) to just barely motivate the action. Again, because *B* seems to result in an altered state of affairs, it may be considered a but-for cause of the action. By contrast, Quadrant III shows too little B-Motive to independently motivate action, and the A-Motive is strong enough to be effective without bolstering. And Quadrant II likewise shows

FIGURE 7.
BUT-FOR MOTIVE



The But-For Motive standard is among the law's most widespread and intuitive. It is used at some stage of all employment discrimination cases, as well as in other areas.[113] It is the most important standard in market manipulation when a defendant claims to have rapidly bought stock both in order to alter stock prices and because he wanted to own the stock as an investment.[114] It is likewise used

an A-Motive strong enough that conduct would have been motivated without *B*, even though the B-Motive was very strong and could have motivated the action independent of any A-Motive.

The But-For Motive standard is triggered if ($B > 1$ or $B + A > 1$) and $A < 1$. Since we only observe motivated acts when B or $B + A$ exceeds 1, the plaintiff prevails under the But-For Motive standard any time except when $A > 1$.

113. *See supra* note 42.

114. SEC v. Masri, 523 F. Supp. 2d 361, 372 (S.D.N.Y. 2007).

to evaluate anti-union activities (that nevertheless have legitimate economic motives too).[115]

3. Sole Motive

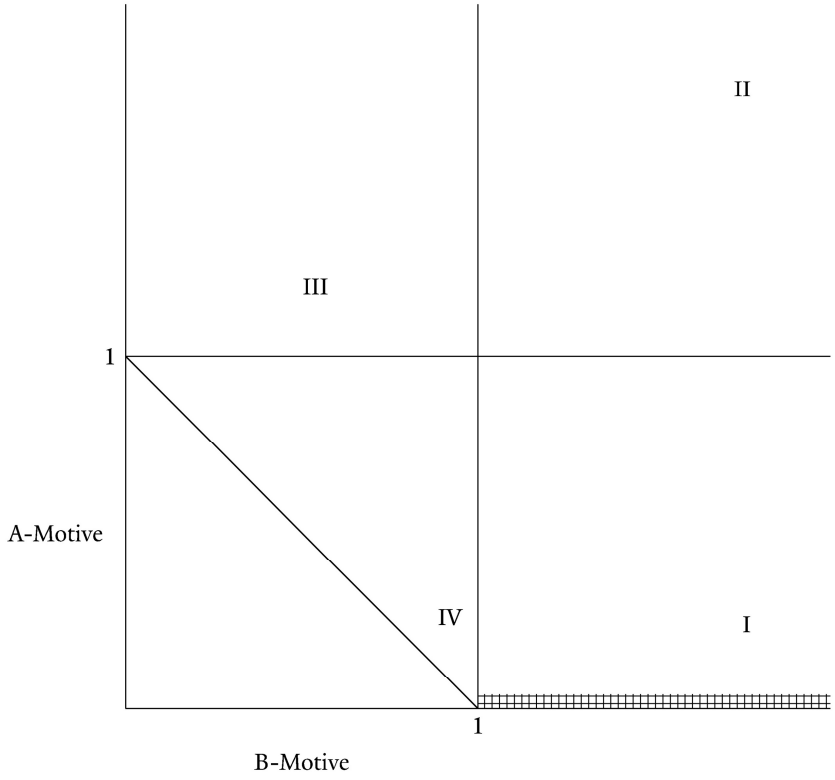
The U.S. Constitution prohibits retroactive punishment,[116] so Congress cannot terminate social security benefits solely to heap punishment onto convicts. However, even a small budgetary rationale will save an otherwise unconstitutional law and allow termination of benefits despite the punitive shadow.[117] Our ex post facto jurisprudence therefore utilizes a *Sole Motive* standard, in which the defendant prevails unless their sole motive was a B-Motive. Figure 8 (*Sole Motive*) depicts a Sole Motive standard.

115. Air Line Pilots Ass'n, Int'l v. E. Air Lines, Inc., 863 F.2d 891, 911-12 (D.C. Cir. 1988), *cert. dismissed,* 501 U.S. 1283 (1991), *and cert. dismissed*, 508 U.S. 948 (1993). *See generally* Cynthia L. Estlund, *Economic Rationality and Union Avoidance: Misunderstanding the National Labor Relations Act*, 71 TEX. L. REV. 921, 942 (1993) (describing the National Labor Relations Board's analysis of "mixed motive" cases).

116. U.S. CONST. art I, § 9, cl. 3 (barring ex post facto federal laws).

117. Wiley v. Bowen, 824 F.2d 1120, 1122 (D.C. Cir. 1987); *accord* Flemming v. Nestor, 363 U.S. 603, 612-21 (1960); Jane Harris Aiken, *Ex Post Facto in the Civil Context: Unbridled Punishment*, 81 KY. L.J. 323, 353-59 (1993).

FIGURE 8.
SOLE MOTIVE



As is plain, a Sole Motive standard is highly deferential to defendants. It is a mixed motive standard in that it tells a court how to evaluate a mixed motives case: always give the mixed motives case to the defendant.

Several other areas of law operate in this way: the tort of intentional interference with an economic benefit, such as setting up a business just to bankrupt

a nemesis;[118] racial profiling by police;[119] "spite walls" and other uses of property intended to frustrate neighbors;[120] and the tax question of whether a transaction is a "sham" without economic substance.[121]

4. Any Motive

The symmetric partner to a Sole Motive rule is an *Any Motive* standard. This is the most favorable motive standard for plaintiffs since it triggers liability for any B-Motive at all, even a very small one, alongside a much stronger A-Motive. The Any Motive standard is depicted in Figure 9 (*Any Motive*). As is plainly visible, this Any Motive standard instructs the court to find for the plaintiff in all mixed motives cases.

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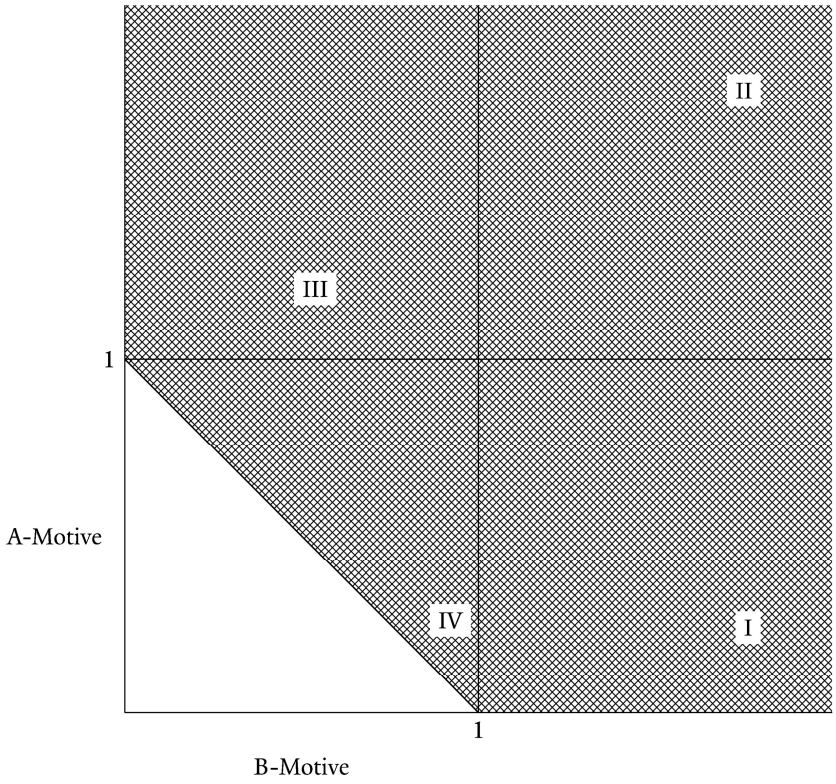
118. DAN B. DOBBS, PAUL T. HAYDEN & ELLEN M. BUBLICK, THE LAW OF TORTS § 625 (2d ed. 2011). Dobbs notes that mixed motives are ubiquitous, so liability is unlikely in these cases. *Id.* (citing Havana Cent. NY2 LLC v. Lunney's Pub, Inc., 49 A.D.3d 70, 74 (N.Y. App. Div. 2007) (noting that a defendant did not have the required sole motive to harm the plaintiff because there was "ample, unrefuted evidence" that the contested action was partially motivated by a desire to gain profits)).

119. *See* United States v. Avery, 137 F.3d 343, 358 (6th Cir. 1997); William M. Carter, Jr., Whren's *Flawed Assumptions Regarding Race, History, and Unconscious Bias*, 66 CASE WESTERN RES. L. REV. 947, 953 (2016). A similar test is applied for probable cause of searches generally. *See* Commonwealth v. Adams, 605 A.2d 311, 313 (Pa. 1992).

120. Holbrook v. Morrison, 100 N.E. 1111, 1111 (Mass. 1913) (discussing selling property to putatively undesirable owners); Rideout v. Knox, 19 N.E. 390, 391 (Mass. 1889) (discussing spite walls); *cf.* United States v. 480.00 Acres of Land, 557 F.3d 1297, 1308-11 (11th Cir. 2009) (noting that takings are judged by the "primary purpose" standard); Ronald J. Krotoszynski, Jr., *Expropriatory Intent: Defining the Proper Boundaries of Substantive Due Process and the Takings Clause*, 80 N.C. L. REV. 713 (2002) (proposing that regulatory takings be judged by a primary purpose standard under the Due Process Clause). *But see* Obolensky v. Trombley, 115 A.3d 1016, 1023-25 (Vt. 2015) (using a primary motive test and citing five other states that adopt a primary motive test and nine states that adopt a sole motive test).

121. *See, e.g.*, Goldstein v. Comm'r, 364 F.2d 734, 741 (2d Cir. 1966) ("[T]he deduction is proper if there is some substance to the loan arrangement beyond the taxpayer's desire to secure the deduction."). One arguable exception is *Stratmore v. United States*, where a taxpayer failed to carry his burden despite a stipulation that he indeed had two motives. 420 F.2d 461, 464 (3d Cir. 1970). In that case, the record contained *no* information to substantiate the relative importance of the motives—such as his salary relevant to the business motive or the amount at risk for the investment motive. Moreover, neither the government nor the court was clear about whether "significant factor" was even the appropriate test, rather than the tougher "primary" motive test. No court has followed *Stratmore* on this point.

FIGURE 9.
ANY MOTIVE



Consider an example from health law, which allows healthcare providers to pay commissions for some things but not others. For example, if your company rents affordable rooms to recovering drug addicts, you may lawfully pay commissions to an agent for helping you find tenants. However, it is criminal to pay someone for help in filling Medicare-subsidized drug-treatment programs.[122] The notion is that such kickbacks could lead doctors to waste Medicare's money on costlier providers and treatments. What if a single company runs both (non-

122. Social Security Act § 1128B(b)(2), 42 U.S.C. § 1320a-7b(b)(2)(A) (2012) (criminalizing payment "to induce" purchase of items or services for which Medicare or Medicaid will ultimately make payment); *see* United States v. Narco Freedom, Inc., 95 F. Supp. 3d 747 (S.D.N.Y. 2015) (discussing the statute).

Medicare) housing and (Medicare) treatment programs, with substantial overlap in their clientele? Then a single commission functionally serves up both residents and patients, and so might come from both motives.

In such cases, health law demands purity of motive: When motives are even slightly mixed, the whole payment is illegal.[123] The unlawful payment for patients funded by Medicare dollars taints the transaction, even if lawful motives (trying to fill rooms) predominated and would have been independently sufficient to motivate the payments.[124]

III. DESCRIBING MOTIVE STANDARDS

The forgoing descriptive vocabulary accurately describes the rules, such as they are, in numerous areas of the law. This disambiguates contested or confused rules to determine what the law already is. It also categorizes vast amounts of information to see how the same patterns of motive standards recur over and over. As a result, we can clarify the present law in almost all legal domains as using one or more of four relatively workable rules.

The structure of this Part is as follows. Section A demonstrates the power of this descriptive vocabulary to provide a clear and entirely nonnormative statement of the law in two sites of enduring contestation: equal protection and employment discrimination. Section B shows that once such clarification is accomplished, it becomes possible to parsimoniously summarize almost all legal domains as using just four motive standards. Section C shows how clear motives can streamline mixed motives analysis, allowing courts to use it more often and effectively than before, rather than avoid it.

A. Clarifying Existing Legal Standards: Two Challenging Contexts

Careful use of a precise motivation vocabulary should help courts and commentators to address problematic application of motive standards. Consider how this vocabulary can untangle confusing or confused motive standards in the equal protection and employment discrimination contexts.

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123. *Narco Freedom*, 95 F. Supp. 3d at 759; *see also* United States v. Borrasi, 639 F.3d 774, 782 (7th Cir. 2011) (compiling cases and adopting the any factor test).

124. This is the test that I will later argue covers the plaintiff's initial burden in core Title VII employment discrimination cases. *See infra* Section III.A.2.

1. Equal Protection

Section One of the Fourteenth Amendment to the U.S. Constitution provides that "[n]o State shall . . . deny to any person within its jurisdiction the equal protection of the laws."[125] It is therefore unconstitutional to use race as a basis for abridging a variety of civil rights.

The operation of mixed motives under the Fourteenth Amendment has sometimes been unclear. Consider *Hunter v. Underwood*, in which the State of Alabama sought to defend a state constitutional provision disenfranchising persons convicted of crimes of moral turpitude.[126] The law was seemingly born of mixed motives, some unconstitutional (to disenfranchise black citizens), and some lawful, if distasteful (to disenfranchise poor citizens, including many whites).

In adopting a mixed motives rule, the Court agreed that *Arlington Heights* and *Mt. Healthy* "supply the proper analysis."[127] Under those cases, the state prevails if it proves "that the same decision would have resulted had the impermissible purpose not been considered."[128] This is a But-For Motive standard by our terminology, and the *Hunter* Court actually refers to its standard as a "but-for" standard.[129] The Court reasoned that something can be a "but-for" motivation despite the existence of some alternative basis for action, and that the mixed motives in *Hunter* fit the bill. As the Court stated, "an additional purpose to discriminate against poor whites would not render nugatory the purpose to discriminate against all blacks, and it is beyond peradventure that the latter was a 'but-for' motivation for the enactment of [the provision]."[130]

While superficially plausible, this passage either misapplies the motive standard or miscommunicates the motive analysis (as well as the procedural posture of the case). Both readings are plausible, and the following paragraphs consider both. Either way, *Hunter* is instructive of the ways in which clarity about motive analysis could have been useful.

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125. U.S. CONST. amend. XIV, § 1.

126. Hunter v. Underwood, 471 U.S. 222 (1985).

127. *Id.* at 232.

128. *Id.* at 225 (quoting Underwood v. Hunter, 730 F.2d 614, 617 (11th Cir. 1984)) (citing Vill. of Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252, 270 & n.21 (1977) and Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle, 429 U.S. 274, 287 (1977)).

129. *Id.* at 232.

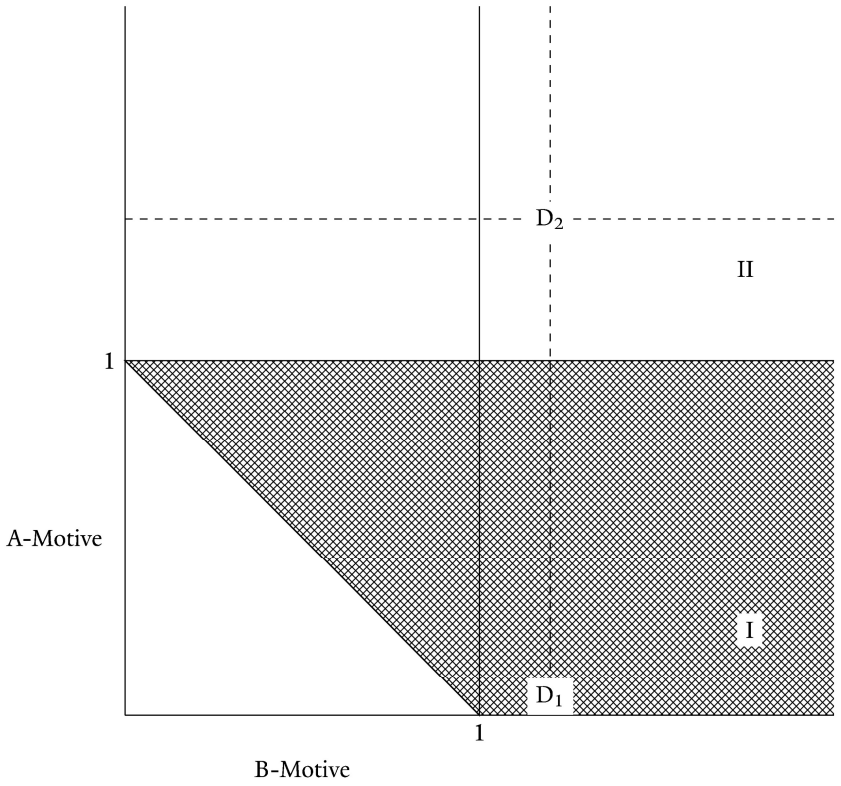
130. *Id.*

Since the Court does not qualify its invocation of "an additional purpose to discriminate," one way to read the passage is as categorically denying that hostility to poor whites could have changed the legal result. That is, given what the Court has learned about anti-black motives, its holding is inevitable. Additional purposes, regardless of their relative or absolute strength, cannot render the illicit one nugatory.

If this is what the Court meant, it is plainly wrong and inconsistent with the But-For Motive standard elaborated in Section II.B, which excuses liability if A-Motive is high enough.[131] That is, the essence of a But-For standard is that an additional good motive can often render lawful an otherwise ill-purposed act. To see this, consider Figure 10 (*Rendering Nugatory*).

131. Its analysis would also clash with the application of the But-For standard in *Arlington Heights* and *Mt. Healthy*, the cases cited approvingly as the source of the standard. Moreover, it would clash with the analogous meaning of but-for causation in tort (which denies that X is a but-for cause, if Y would have led to the same result even if X were subtracted).

FIGURE 10.
RENDERING NUGATORY



On this reading, the *Hunter* Court ruled that it would not have mattered whether Alabama had a countervailing, acceptable motive, which is to say that the Court denied the legal relevance of the Y-axis. Yet the Y-axis makes all the difference on a But-For standard. A defendant with a single B-Motive (with strength D1) is liable, but the defendant escapes liability if his A-Motive is high enough (to, for example, D2). So if the Court meant what it said, it misapplied its motive standard.

Another reading is that the Court's mistake was merely a failure to qualify its language: instead of writing "an additional purpose" it should have written "an additional, *individually insufficient* purpose." If that were the Court's idea, then there is no misunderstanding of motive rules: given that "it is beyond peradventure that" racism "was a 'but-for' motivation for the enactment," it is true that an additional, individually insufficient A-Motive could not save Alabama.

However, this reading understands the Court as question-begging by assuming the very thing to be proven—that the discriminatory motive was a but-for cause. One cannot derive the insufficiency of A-Motive from observing that B-Motive was essential, since one cannot know if B-Motive was essential apart from a measure of A-Motive. The very question is whether A-Motive is large enough to move the defendant from Quadrants I or IV up into II or III.[132] If it was, then the B-Motive is not a But-For Motive. The status of B-Motive, as a But-For Motive or not, is a function of A-Motive. In fact, the only way to conclude that A-Motive is insufficient and B-Motive is a but-for motivation is *to check*: to engage in factfinding about the actual motives and how they played out.

Yet this factfinding never happened in *Hunter*. The trial court had not conducted a full hearing on the crucial issue of the strength of Alabama's motivation to discriminate against poor whites, presumably because it did not understand that the applicable law would require this.[133] With no clear finding on the magnitude of A-Motive, it is not possible to deduce whether B-Motive satisfied a But-For Motive standard.

Given the procedural posture, the right response is to remand for factfinding to determine whether A-Motive was independently sufficient or insufficient and thus whether B-Motive was a but-for motivation or not. In other mixed motives cases like this, where the trial court did not make this crucial determination, the Court has indeed remanded for further consideration.[134]

In *Hunter*, however, the Court decided the case without remand, outright affirming the Court of Appeals's injunction in favor of the plaintiffs. This may have been because the Court ignored the procedural posture and communicated using ambiguous motive terminology. Or it may be because the Court misunderstood the operation of various motive standards and applied some other test (perhaps the Primary Motive or Any Motive standard) under the wrong name. The Court either was confused or propagated confusion. With the benefit of clear terminology, we can chart the possibilities and perhaps help courts avert trouble in the future.

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132. *See infra* Section III.C.

133. *Underwood*, 730 F.2d at 617 ("By allowing the state to prevail on what the district court concluded was a showing of permissible intent, the court brought its inquiry to a premature end.").

134. *See, e.g.*, Givhan v. W. Line Consol. Sch. Dist., 439 U.S. 410, 416-17 (1979) (remanding to determine whether the exercise of First Amendment rights was a but-for cause of termination, even though the trial court had determined that this was "the primary" reason for termination, and even though the Court of Appeals had held that the defendant had failed to make a successful "same decision anyway" defense).

In that light, clear terms could probably have helped the *Hunter* advocates make their cases. Alabama's attorneys did themselves no service by bungling their own presentation of the requisite motive standard.[135] Alabama asked for a prodefendant But-For Motive, arguing that "a permissible purpose will always defeat an impermissible motive."[136] But they did not *name* the desired standard or use words such as "but-for."

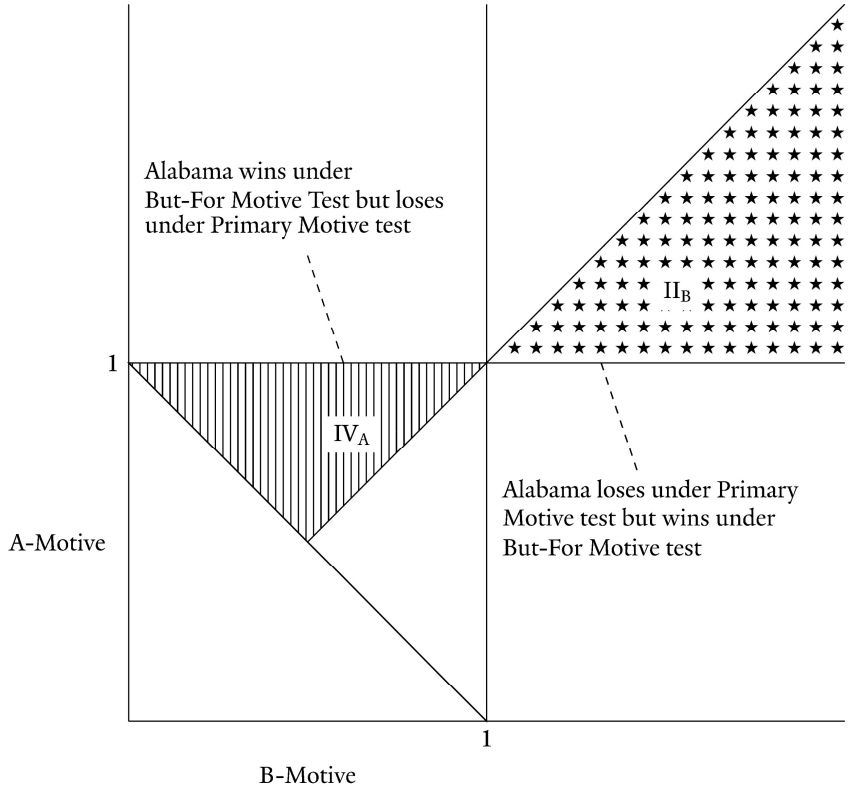
More confusingly, Alabama's arguments frequently assumed the applicability of altogether different motive standards. For example, its brief repeatedly argues for "the existence of a [lawful] motive, at least equal if not superior to any other motive."[137] Arguing that the supreme motive was lawful might help if the legal standard were a Primary Motive standard, but it is irrelevant to a But-For Motive standard: A-Motive can be larger than B-Motive (satisfying a Primary Motive standard) even if B-Motive is a but-for factor of the action. This occurs in domain IV_A. Likewise, A-Motive can be smaller than B-Motive even if B-Motive is not a but-for factor in the action (domain II_B). Figure 11 (*Orthogonal Alabama*) shows just how orthogonal Alabama's arguments were to their desired But-For Motive standard.

135. It is also possible that the problems I identify were rhetorical choices, carefully chosen to nudge the Court regardless of the motive standard. In that case, terminological clarification would not have changed counsel's word choice.

136. Brief for Appellants at 19, Hunter v. Underwood, 471 U.S. 222 (1985) (No. 84-76). This statement could also be read as a Sole Motive standard.

137. *Id.* at 20-21; *see also id.* at 32 (arguing that the court below "did not consider the possibility of the existence of an intention equal to the one they found to be impermissible").

FIGURE 11.
ORTHOGANAL ALABAMA



Alabama's equivocation on the content of its preferred standard may explain why the Court endorsed the standard but still applied it to Alabama's detriment. It behooves advocates to present their arguments consistently with sensible motives analysis, if only to increase the chance that courts will respond accordingly.

Clear motives terminology gives us a succinct way to diagnose or prevent problematic holdings. This is true in troublesome cases like *Hunter*, where the Court and litigants alike were at a loss for the right words, but it is also true in subtler cases that have not even been noticed as misunderstood.

Consider another equal protection context: *Batson* challenges to biased jury selection. In *Cook v. LaMarque*, the Ninth Circuit Court of Appeals laid out a "substantial part" standard for *Batson* challenges, looking at whether peremptory

strikes were motivated in "substantial part" by race.[138] This is thought to be a different approach from the Any Motive standard most states use and the But-For standard most federal circuits use.[139] In what ways is this standard different from the other two? We can conjecture about the meaning of the rule based on the name—perhaps it is a Sole Motive standard that exempts "insubstantial" motives as immaterial.[140] But the operation of the standard gives better clues as to its actual content.

Trial courts applying *Cook* make extensive examinations of the good and bad motives behind prosecutors' preemptory challenges and ultimately decide whether a challenge was unconstitutional by weighing their relative importance.[141] The stronger motive controls. The use of both Motives A and B, as well as their comparative weighing, is characteristic of the Primary Motive standard but not of the other widespread standards.[142] The courts' descriptive vocabulary reveals that the Ninth Circuit's "substantial factor" standard is really a Primary Motive standard akin to the one used in defamation, redistricting, and taxation of gifts.

With the Primary Motive standard in mind, it is easy to find confirmation that this is the test intended by the Court of Appeals in *Cook*. The court asked whether the prosecutor's "*primary motivation* was race."[143] It found that the prosecutor's "*most significant* justifications in each instance [where a juror was struck] were entirely sound."[144] This emphasis on comparative importance, a search for what is primary, points toward a Primary Motive standard. Notwithstanding its idiosyncratic nomenclature, the content of the Ninth Circuit's "substantial factor" test is clearly understandable as one of the four widespread tests.

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138. Cook v. LaMarque, 593 F.3d 810, 815 (9th Cir. 2010).

139. State v. Ornelas, 330 P.3d 1085, 1092 (Idaho Ct. App. 2014) ("[M]ost states have adopted what is . . . referred to as the per se approach, some states and most federal circuits have adopted a mixed-motives analysis, and the Ninth Circuit has adopted its own approach.").

140. *See infra* Figure 12 (depicting this "Material Motive" test).

141. *E.g.*, Crittenden v. Calderon, Nos. CIV S–95–1957 KJM GGH P, CIV S–97–0602 KJM GGH P, 2011 WL 2619097, at *26 (E.D. Cal. June 30, 2011).

142. *See infra* Section III.C.

143. *Cook*, 593 F.3d at 821 (emphasis added).

144. *Id.* at 826 (emphasis added).

2. *Employment Discrimination*

Like equal protection law, employment discrimination cases often turn on mixed motives analysis, though the legal standard is far from clear. A "motivating factor" will suffice to prove discrimination under the Civil Rights Act of 1964, but what does that term mean? The word "motivating" could connote some minimum level of motivational strength. Or maybe it merely distinguishes motivations (i.e. factors that motivate) from other, nonactionable mental states such as "mere discriminatory thoughts."[145] The former view would grant employers a safe harbor for tiny slivers of discriminatory motive, while the latter would let employees prevail even if an illicit motive was causally inconsequential.

"What constitutes a substantial motivating factor evades precise definition."[146] The answer is not found in any statute.[147] Nor have courts supplied a clear and authoritative definition, despite almost ten thousand federal opinions using the term.[148] Scholars have debated the meaning of "motivating factor" and

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145. *Cf.* Price Waterhouse v. Hopkins, 490 U.S. 228, 262 (1989) (O'Connor, J., concurring) (rejecting the "mere discriminatory thoughts" standard). For more support of this view, see *id.* at 250 (majority opinion) ("In saying that gender played a motivating part in an employment decision, we mean that, if we asked the employer at the moment of the decision what its reasons were and if we received a truthful response, one of those reasons would be that the applicant or employee was a woman."). *See generally* Catherine T. Struve, *Shifting Burdens: Discrimination Law Through the Lens of Jury Instructions*, 51 B.C. L. REV. 279, 298-302 (2010) (reviewing Justices' memoranda and notes to show Justice Brennan's desire to accommodate Justice O'Connor's concerns while avoiding a connotation that "the discrimination must be of a certain magnitude before the burden must shift").

146. Maestas v. Segura, 416 F.3d 1182, 1188 (10th Cir. 2005).

147. *See* Rebeca Hanner White & Linda Hamilton Krieger, *Whose Motive Matters?: Discrimination in Multi-Actor Employment Decision Making*, 61 LA. L. REV. 495, 505 n.66 (2001) ("Left to be determined . . . is what is meant by 'a motivating factor.'"). The "motivating factor" formulation adopted in the statute was only one of over twenty different formulations offered up by the plurality and concurring opinions in *Price Waterhouse*. *See* Katz, *supra* note 4, at 491-92 n.5 (listing the various formulations).

148. Carey v. Mt. Desert Island Hosp., 156 F.3d 31, 39 (1st Cir. 1998) (reviewing a judge's reply to a jury's request of a definition for "a motivating factor" and noting "the controversy that exists" over the definition); Defendant's Reply to Plaintiffs' Objections to Defendant's Jury Instructions, Brown v. Bank of Am. Corp., No. 107CV00105, 2008 WL 7254694, at *4 (D. Me. Aug. 22, 2008) (arguing that "the proposed jury verdict form they have submitted is legally incorrect in that it . . . states that the Plaintiffs only have to show that discrimination was 'a factor' when the mixed motive law clearly requires that they establish that it was a 'motivating factor'").

its progenitors for decades,[149] leading one commentator to conclude that "a consistent and nonproblematic interpretation of 'motivating factor' cannot be given."[150] This Article's descriptive vocabulary can help to clarify the standard.

There are at least four *candidate* standards for this legal standard—the Any Motive standard depicted in Figure 9 and three competitors, which are not widespread: (i) Material Motive;[151] (ii) Sufficient Motive;[152] (iii) Causal Motive.[153] We are already familiar with the Any Motive standard, which finds for the plaintiff if the defendant had any B-Motive, so let us now introduce the other three candidate standards in order to see how they operate. While each standard has at least superficial appeal, it is ultimately clear that the Any Motive standard supplies a rule most consistent with the "motivating factor" standard. The stakes of this determination are high: the three competitor standards are each tougher than the Any Motive standard, potentially leaving some plaintiffs out in the cold.

i. Material Motive

It may seem that illicit factors can be present but sufficiently tiny such that they do not trigger liability. Sometimes a boss was motivated by the employee's race to fire her but was very far from acting on the impulse—until he discovered problematic information about the employee's job performance. Should such a boss lose a lawsuit for her largely immaterial bias? Figure 12 (*Material Motive*) awards victory under a *Material Motive* standard to the plaintiff whenever mixed motive action occurs, except in domains III_{Ab} or IV_{Ab}. Recall that q, demarcating these two areas, represents the level below which a motive's strength is regarded as too "tiny" to trigger liability.[154]

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149. *See, e.g.*, Michael Wells, *Three Arguments Against* Mt. Healthy*: Tort Theory, Constitutional Torts, and Freedom of Speech*, 51 MERCER L. REV. 583, 588-89 (2000); Heather K. Gerken, Note, *Understanding Mixed Motives Claims Under the Civil Rights Act of 1991: An Analysis of Intentional Discrimination Claims Based on Sex-Stereotyped Interview Questions*, 91 MICH. L. REV. 1824 (1993).

150. Gudel, *supra* note 21, at 70.

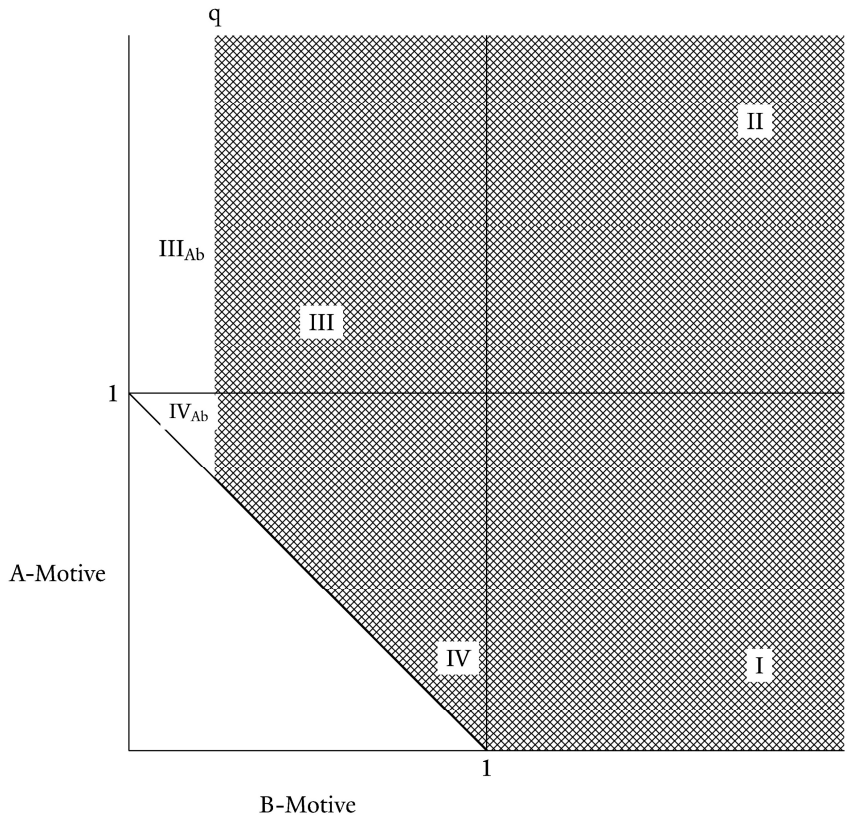
151. *See infra* Figure 12 and accompanying text.

152. *See infra* Figure 13 and accompanying text.

153. *See infra* Figure 14 and accompanying text.

154. *See supra* Figure 5 and accompanying text.

FIGURE 12.
MATERIAL MOTIVE



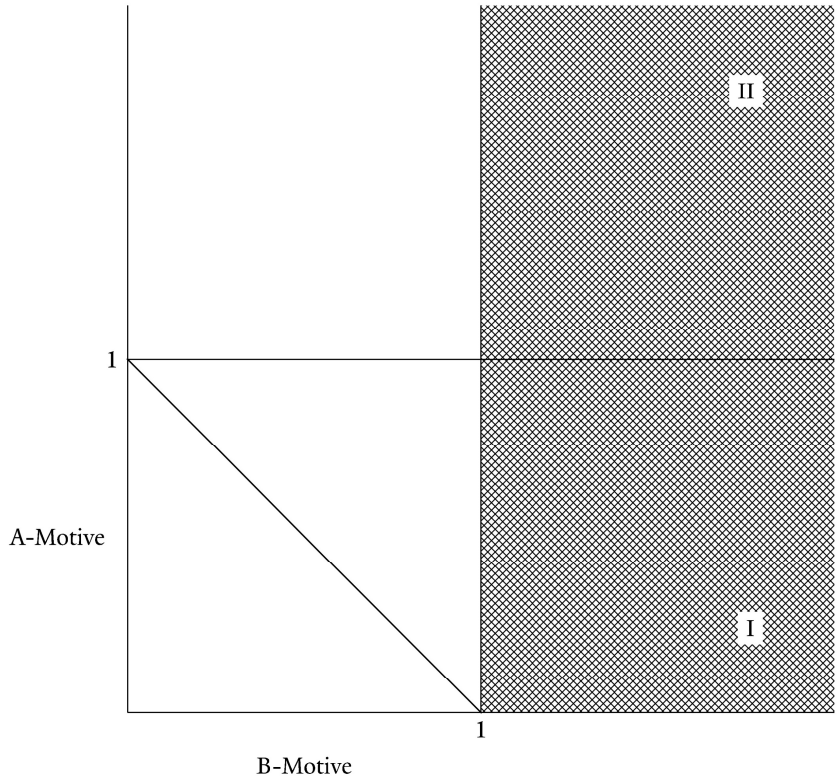
ii. Sufficient Motive

If the strength of B-Motive is the crux of legal treatment, then it may make sense to single out all and only the cases where B>1. The B-Motive is legally controlling if it was sufficient to independently motivate action, considered apart from what A-Motive did or did not contribute. Thus, another candidate rule is a *Sufficient Motive* standard.[155] This rule, depicted in Figure 13 (*Sufficient Motive*),

155. At times, Mark Weber advocates for something like a Sufficient Motive standard. *Cf.* Weber, *supra* note 23, at 499 (defining mixed motives cases as those where "two causes, either of which would alone cause the harm, operate simultaneously"); *id.* at 495 (advocating plaintiff victory in all mixed motives cases).

would cover quadrants I and II. It tolerates employer bias except when the bias was strong enough to lead to a firing—and then there is no defense that some other legitimate factors could have led to the same firing.

FIGURE 13.
SUFFICIENT MOTIVE



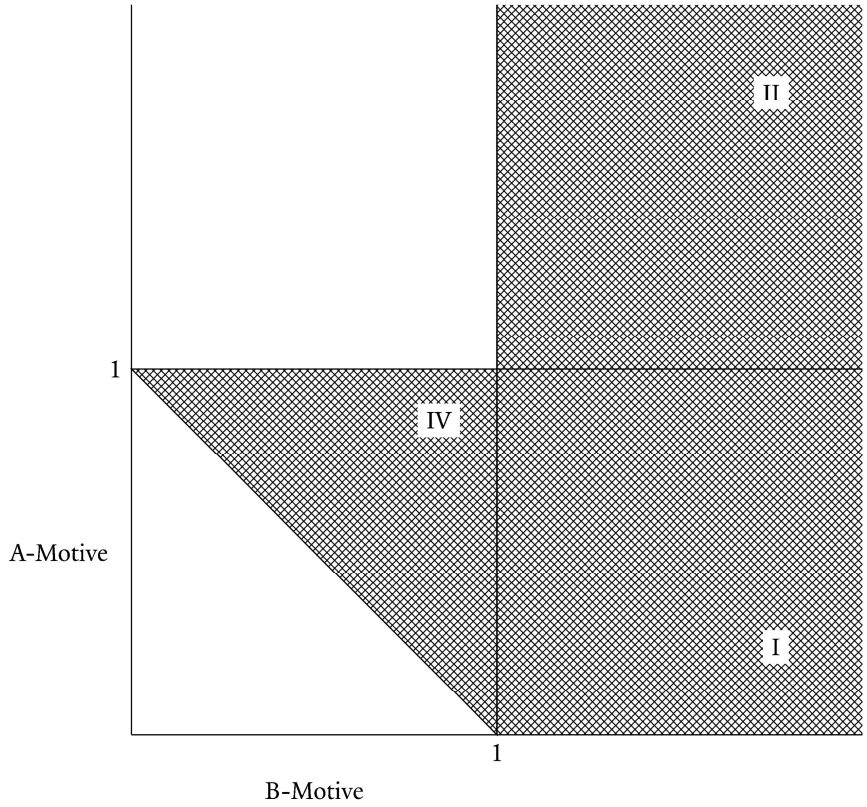
iii. Causal Motive

It may sometimes seem to matter whether a motivation had any causal impact. It is clear that the But-For Motive standard is meant to reflect some causal considerations. The nature of causation is contested, but one approach would take the *Restatement (Third) of Torts* as a guide.[156] Finding for the defendant only

156. *See* RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL AND EMOTIONAL HARM §§ 26, 27 (AM. LAW INST. 2010); *see also infra* note 158 (discussing causation in tort law).

in Quadrant III leaves us with the *Causal Motive* standard. Under such a rule, the plaintiff wins if B-Motive was either a sufficient factor or a but-for factor, as depicted in Figure 14 (*Causal Motive*).[157]

FIGURE 14.
CAUSAL MOTIVE



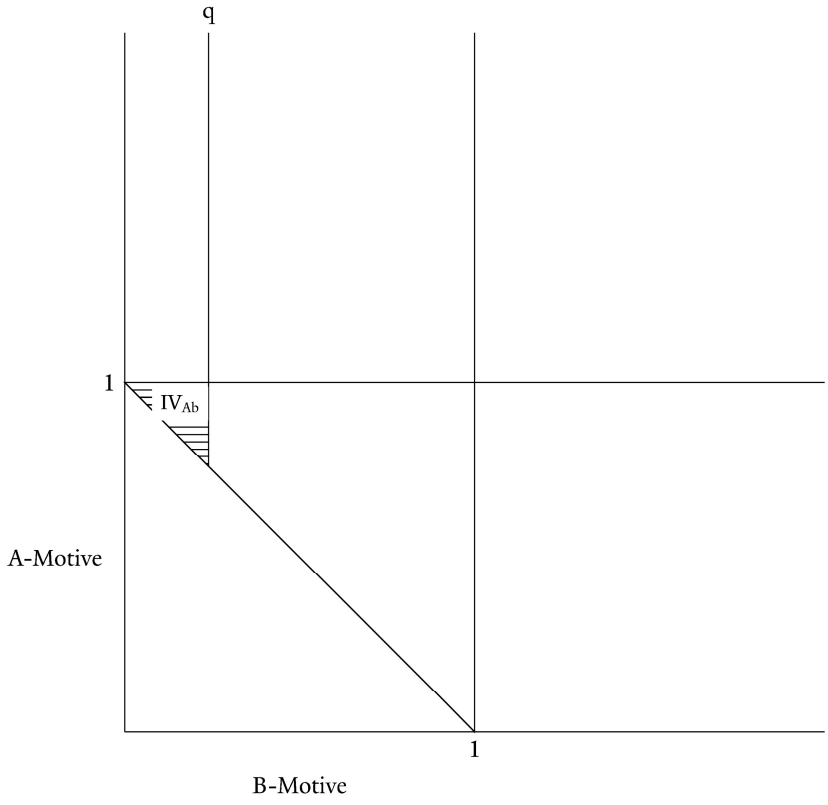
These four rules differ greatly in their solicitude to plaintiffs. Which, if any, is the right match for the "motivating factor" standard, which entitles Title VII discrimination plaintiffs to at least a partial remedy? Part II's motive vocabulary helps answer this question.

Two of these candidate standards — Material Motive and Sufficient Motive — can be ruled out as leading to illogical results, inconsistent with the intellectual

157. *See* Katz, *supra* note 4, at 494 (advocating for what amounts to a Causal Motive test).

foundations of the motivating factor standard. The locus of the problem is area IV_{Ab}, as illustrated in Figure 15 (*IV_{Ab}*).

FIGURE 15.
IV_{AB}



IV_{Ab} covers cases where no one motive is sufficient to motivate action individually, and where a very tiny B-Motive is necessary to complete an almost sufficient A-Motive. For example, a boss may *almost* fire an employee for dangerous job performance, but only resolve to do so after giving credence to a lingering animosity toward the employee's national origin.

The Material Motive and Sufficient Motive standards each exclude IV_{Ab} from liability. This exclusion is a defect for two separate reasons.

First, tort law regards all but-for causes as causes-in-fact.[158] There is no exemption in tort law for small cause; the straw that breaks the camel's back *is* a cause even if the straw is awfully light.[159] In IV_{Ab}, B-Motive is tiny but it is nevertheless a but-for cause of the action. Insofar as tort serves as the intellectual foundation of employment law motives analysis, the exclusion of IV_{Ab} would be surprising indeed.[160]

Second, excluding IV_{Ab} from liability yields an anomaly in the mixed motive burden shifting in Civil Rights Act employment discrimination. There, the plaintiff wins if they establish a "motivating factor," and wins full remedies if the defendant cannot then show that the same result would occur either way under a But-For Motive standard. It is universally accepted that motivating factor is an easier standard than the same result-test or but-for test.[161] Yet under a Material Motive or Sufficient Motive standard, IV_{Ab} flunks the "easy" motivating factor standard while passing the "hard" but-for test. This anomaly clashes with most jurisprudence and scholarship on the subject.[162]

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158. RESTATEMENT (THIRD) OF TORTS, *supra* note 156, at § 26. Language in the First and Second Restatements might have allowed exclusion of tiny but-for causes from causal characterization. *See* RESTATEMENT (SECOND) OF TORTS: WHAT CONSTITUTES LEGAL CAUSE § 431 cmt. a (AM. LAW. INST. 1965) ("[I]t is not enough that the harm would not have occurred had the actor not been negligent . . . . The negligence must also be a substantial factor in bringing about the plaintiff's harm."). That formulation was criticized for muddling the factual question of causation (causation-in-fact) from the evaluative question of responsibility (proximate causation). *Restatement (Third)* clarifies that small but-for causes *are* causes-in-fact. RESTATEMENT (THIRD) OF TORTS, *supra* note 156, at § 26 cmt. j (eliminating discretion for the fact finder to find no factual causation on grounds that putative cause was not sufficiently substantial); *id.* at § 27 cmt. b (eliminating discretion in the same manner for multiple causes). To the degree that small causes deserve special treatment, it is at another state of adjudication that is concerned with responsibility. While the Restatement preserves the possibility that an actor should be exempt from liability where their contribution was "only a trivial contribution," that exemption does not arise by way of a causation analysis. *Id.* at § 36 cmt. b ("The limitation on the scope of liability provided in this Section is not applicable if the trivial contributing cause is necessary for the outcome . . . ."). The actor (and his conduct) remain a cause. The exemption is effected by way of a scope of liability analysis. *Id.*

159. RESTATEMENT (THIRD) OF TORTS, *supra* note 156, at § 36 cmt. b ("[T]he actor who negligently provides the straw that breaks the camel's back is subject to liability for the broken back.").

160. The Sufficient Factor test goes even further afield, finding for the defendant in the entire IV quadrant.

161. *See, e.g.*, Katz, *supra* note 4, at 503.

162. *See, e.g.*, *id.* at 492 n.10. It also clashes with the legislative history. The 1991 Amendment was intended to make life easier for plaintiffs, which is certainly how the law has been understood by subsequent treatment. Plaintiffs' lawyers have lamented the shrinking coverage of *Price Waterhouse* and the 1991 Amendment. Yet a plaintiff with good evidence that the defendant's motive was within IV_{Ab} would do better if forced to carry the whole burden of proving but-

As between the remaining options, Causal Motive and Any Motive, one stands on securer footing in terms of the case law insofar as courts never seem to actually use a Causal Motive standard.[163] That is, I cannot find any employment law case in any domain in which (1) the defendant wins, (2) B-Motive was present, and (3) the court rejects the Sole Motive, Primary Motive, and But-For Motive standards. If a court purports to engage in some kind of "some motive" analysis (whether it be "motivating factor" or "substantial factor" or something else), and if it does not immediately clarify that the standard will *actually* be one of the other standards, the defendant *always* loses once a B-Motive is proven.[164]

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for causation of the same result, rather than accept the supposedly solicitous motivating factor test.

163. Both stand on secure footing with respect to tort principles. The two rules differ only as to Quadrant III, a region where the Restatement is agnostic. RESTATEMENT (THIRD) OF TORTS, *supra* note 156, at § 27 cmt. f ("Sometimes, one actor's contribution may be sufficient to bring about the harm while another actor's contribution is only sufficient when combined with some portion of the first actor's contribution. Whether the second actor's contribution can be so combined into a sufficient causal set is a matter on which this Restatement takes no position and leaves to future development in the courts."); *cf. id.* at cmt. i (noting "[t]he difficulty with dismissing" the "de minimis causal candidates and others that are overwhelmed by an independently sufficient cause . . . as not causally connected to the plaintiff's harm"). Influential tort scholars have advocated for liability in that context. *E.g.*, Richard W. Wright, *Causation in Tort Law*, 73 CALIF. L. REV. 1735, 1794 (1985); *see also* Weber, *supra* note 23, at 517 ("The vast majority of legal sources rely on philosophers' arguments to conclude that any causal factor that contributes to a harmful decision is a cause-in-fact of the full harm."). Recall that in Quadrant III, A-Motive is sufficient on its own to motivate action and B-Motive is neither independently sufficient nor is it necessary, given the strength of the A-Motive. It is not tempting to regard the B-Motive as a cause; it is like the match that is tossed onto a blazing inferno. And yet, the Restatement approach does not rule it out.

The argument is that small causes, though dwarfed by a larger cause, do still have a causal impact. They assure the outcome against some set of background facts, namely a partial slice of the presently robust alternative cause. They are therefore necessary elements of a sufficient set, which according to scholars such as Richard Wright, is what we mean by "cause." The tiny match is a necessary member of a causally sufficient set: *the portion* of the inferno that was not quite big enough to destroy the house is made big enough by the match. Likewise, *the portion* of the A-Motive that was not sufficient to motivate the action can be thought to sum with the B-Motive. Finding causation in Quadrant III in the analogous mixed motives case would lead to an Any Motive test.

Whether this is a sound conclusion, whether fires and motives can be sub-divided, is plainly controversial, which is why the Restatement noted the possibility and neither endorsed nor rejected it.

164. *See, e.g.*, Kell v. AutoZone, Inc., No. 07AS04375, 2014 WL 509143, at *12 (Cal. Ct. App. Feb. 10, 2014, *as modified* Feb. 24, 2014) (affirming a verdict in favor of the plaintiff based on the harmless error of the jury instruction requiring a "motivating factor," rather than the "heightened standard of causation, requiring the plaintiff . . . to prove that the illegal criterion was 'a *substantial* motivating factor'").

There simply is no case that lies in Quadrant III in which the defendant wins except under a But-For, Primary, or Sole Motive standard. Thus, "motivating factor" means Any Motive.[165]

Numerous areas of law use terminology reminiscent of "motivating factor." For example, state courts interpreting federal whistleblower statutes sometimes refer to "contributing" factors and other times to "substantial" factors. Are these also Any Motive standards akin to the motivating factor standard, or do they represent subtly different standards? Given the diversity of rules, and given our present goal of fashioning an articulate descriptive vocabulary of motives, it may seem impossible to group many rules under a single heading.

Nevertheless, the grouping is appropriate. As with employment discrimination, the anomalous treatment of IV_{Ab} argues against understanding these standards as requiring any minimum quantum. And a careful and ongoing search of cases has not yet presented one in which the standard was clearly a Causal Motive standard as opposed to an Any Motive standard.[166]

Equal protection and employment discrimination cases frequently involve mixed motives. Whether the plaintiff has allegedly been excluded from the ballot box, the jury box, or the workplace, courts often tangle the multiplicity of vaguely worded tests. Consistency and clarity can be improved even in these challenging domains if advocates and jurists improve their precision in describing and evaluating motives.

B. There Are Only Four Widespread Standards

Employment discrimination uses an Any Motive standard for some inquiries and a But-For Motive standard for others. Tax uses a Primary Motive standard for most determinations and a Sole Motive standard for the rest. Thus there are

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165. *Cf*. Weber, *supra* note 23, at 495 (advocating for full recovery in all mixed motives employment cases).

166. Nor are courts systematic in preserving the linguistic illusion that they are using something other than an Any Motive test. For example, in *Singh v. Gonzales*, the test requires that the defendant "was motivated, at least in part, by one of the protected characteristics." 406 F.3d 191, 197 (3d Cir. 2005). The court then cites three other cases for support of this rule: one requires that the action was "motivated in significant part" and the other two use an Any Motive test. *Id.* at 198. The word "significant" loses any meaning in its precedential application.

four standards used in those two domains.[167] Perhaps surprisingly, these are the only four standards in widespread use. Appendix B demonstrates this claim.[168]

The parsimony is partially explained by the identity between the Any Motive standard and numerous similarly worded standards.[169] Other identities further thin the field. Using the descriptive tools from Part II, we can now see clearly what it would require for courts to use a rule other than the widespread four. It would require shading a different shape in the motivational space than any of these four standards. Although this is conceptually possible, it is rarely attempted.[170] Some rules that appear to differ from these four widespread rules are actually identical to them, because they shade the same domains of liability.

The motive standards state the conditions for liability in terms of B-Motive or B-Motive and A-Motive. An Any Motive standard conditions liability on a quantum of B-Motive. But we can think of rules that focus on A-Motive and describe conditions for forgiveness. Doing so allows us to observe various sorts of symmetry.

A Sole Motive standard for liability and an Any Motive standard for forgiveness are complements. A Sole Motive standard convicts on a mere hint of B-Motive. This is akin to an Any Motive standard keyed to exonerate based on A-Motive: under either standard, a whiff of A-Motive exonerates. Symmetrically, an Any Motive standard (conditioning liability on B-Motive) convicts at a mere hint of B-Motive. This is akin to a Sole Motive standard keyed to A-Motive. Either standard exonerates only the pure of heart.

The But-For Motive standard is triggered if ($B > 1$ or $B + A > 1$) and $A < 1$. Since we only observe motivated acts when B or $B + A$ exceeds 1, the But-For Motive standard convicts any time except when $A > 1$. And that means the standard could be rephrased as an "A-Motive Sufficiency" standard: the defendant is exonerated whenever A-Motive was independently sufficient for action.[171]

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167. Even more parsimony could be claimed. Sole Motive is itself a subset of But-For and Primary Motive. Any time a motive is solitary, it will also be a necessary motive and larger than any other motives.

168. Note that many areas of law use more than one test, due to circuit splits or differing rules from state to state.

169. *See supra* Section III.A.2.

170. For an example, consider the law on civilian unauthorized recordings. There, the defendant loses if her unlawful motive (e.g., blackmail) is either a But-For *or* Primary Motive. United States v. Dale, 991 F.2d 819, 841-42 (D.C. Cir. 1993). Thus, it would inculpate in Quadrants I, II_B, and IV.

171. This does not always seem to have impressed itself on even very able scholars. Bill Klein urges allowing tax deductions for putative business expenditures if the business aspect was a "sufficient" motive. Klein, *supra* note 18, at 1111. That is, he would give A-Treatment if A>1. That

An inculpating Primary Motive standard as to B-Motive is identical to an exonerating Primary Motive standard as to *A*.

TABLE 1.
COMPLEMENT TEST

Liable if (and only if)	**Not liable if (and only if)**
Sole Motive (*B*)	Any Motive (*A*)
Any Motive (*B*)	Sole Motive (*A*)
But-For (plaintiff loses unless *B* was a but-for cause)	Sufficiency (*A*) (plaintiff loses if *A* was sufficient)
Sufficiency (*B*) (plaintiff loses unless *B*>1)	But-For (*A*) (plaintiff loses if *A* was a but-for cause)
Primary (*B*)	Primary (*A*)

Once complement rules are associated, the universe of salient rules narrows considerably. The result is the observation that courts actually use only these four widespread standards.

C. Practicable Motive Analysis

Courts are often reluctant to use motives analysis. Motives can be concealed or fabricated, sometimes leading to lengthy trials or potentially inaccurate conclusions. It is beyond the scope of this Article to argue whether motive analysis is ultimately worth the candle in any given case.

Yet motives inquiries are easier to administer than commonly believed. Most motive standards *do not* require the factfinder to excavate and weigh all motives, nor to predict counterfactual results if one motive or the other were subtracted. That is because most motive standards focus on only one motive as directly relevant. The ability to focus the inquiry on a single motive streamlines hearings and simplifies jury instructions.

There is only one standard that requires a court to evaluate the strength of both A- and B-Motives: the Primary Motive standard. With this standard, the

is identical to giving B-Treatment if *B* (non-business reasons, like vacations) was a but-for cause of the trip. Klein might have realized he was advocating for a but-for test, but one imagines he would have made that understanding more transparent, given that but-for tests are so thoroughly disliked by tax scholars—including Klein himself. *See id.* at 1112 (explaining the problems with a but-for test).

court must appraise both motives in order to compare their relative contributions. All other standards allow the court to resolve the legal question by reference to only one motive.

An Any Motive standard asks only for the presence of any B-Motive. If it is found, then the defendant loses. A Sole Motive standard exonerates the defendant upon a showing of any A-Motive. A But-For Motive standard can be implemented solely by testing whether the A-Motive was sufficient (>1) to motivate action. If it was, then the B-Motive was not a but-for cause. If the A-Motive was not sufficient, then — given that we observe action — the B-Motive can be inferred to be sufficiently large even without inquiry.[172]

TABLE 2.
RELEVANT INQUIRY

Test	Relevant Motive
Primary	A & B
But-For	A
Sole	A
Any	B

For example, if a government actor such as a school district terminates someone for potentially legitimate (e.g. job performance) and illegitimate (e.g. exercising First Amendment rights) reasons, the relevant but-for standard calls for only consideration of the A motive. Since the parties are sparring over the plausibility of the A-Motive, the court can exclude almost all testimony about B-Motive. Lengthy testimony about the school's many reasons to censor can be excluded so that the jurors can focus on just the single inquiry: did the defendant have a non-pretextual and sufficient legitimate motive for action? Likewise, when a plaintiff challenges a law as ex post facto punishment, fact-finding can be limited solely to the presence or absence of a legitimate (A) reason for action:

172. Professor Stephen Gottlieb identifies four ways that courts establish motives: rational basis (no other motive exists); strict scrutiny (no other sufficient motive exists, given alternatives); natural and probable consequence (the result was probably the goal); and confession. *See* Stephen E. Gottlieb, *Commentary: Reformulating the Motive/Effects Debate in Constitutional Adjudication*, 33 WAYNE L. REV. 97, 102-03 (1986). The first two are attempts to locate B-Motive and assess the legal result solely by probing the strength and plausibility of A-Motive.

the legislative record need not be searched at length for lurking punitive reasons for the law.

Of course, there may be times where the best way to investigate the legally relevant motive is by discussing the presence or absence of the other motive.[173] Yet, this is certainly not all cases. Moreover, in many of these cases, recourse to one motive is legally relevant *because* we have essentially *no reliable access* to the other motive. For example, when individuals request asylum in the United States, the motives of their persecutors are legally relevant, but evidence may be scant. The persecutor is unlikely to testify or explain their conduct. In these cases, it is natural that the inquiry will focus on the persecutor's alleged B-Motives, as established by whatever evidence the asylum seeker can muster, because there will be no evidence of other motives. In evidence-constrained instances, we still have only a single motive to evaluate.

Recognizing that many motive inquiries concern only one motive allows courts to cabin the cost and length of mixed motive inquiries by permitting only evidence directly or indirectly probative of the relevant motive. For example, imagine a suit alleging discrimination on the basis of military status, in which the employer that concedes that anti-military bias was a motivating factor in terminating an employee. Suits for anti-military bias are judged by a But-For standard,[174] which therefore turns only on A-Motive. This legal standard can bracket potentially lengthy testimony and argumentation: the parties may want to spar over the prevalence of B-Motive — the plaintiff in particular may like to regale the jury with humiliating incidents and incriminating emails, which the defendant will try to minimize — yet the case no longer turns on B-Motive. Instead, all that matters is the credibility and intensity of the A-Motive. The defendant must try to show that it had a legitimate motive sufficient for action, and the plaintiff must try to discredit it. Nothing more need be allowed.

It may seem improper that an employee subjected to a particularly egregious bias incident, accompanied by copious evidence of overwhelming B-Motive, should be prevented from airing it. For those concerned that this motive standard has excessively limited the evidence and arguments, or will tend to constrain

173. For example, it may be that the best way to decide whether an A-Motive would have motivated an action is to look at the defendant's overwhelming and protracted commitment to B-Motives. Perhaps this is based on an empirical theory of motivation correlation, such that individuals almost never have high *A* and *B* motivations. Thus, a But-For test may sometimes involve recourse to B- and not just A-Motives.

174. *See* 38 U.S.C. § 4311(c)(1) (2012).

plaintiffs more than defendants, a plausible inference is that the law has opted for a poor motive standard.[175]

Still, inquiry limits arising from motive rules may prove attractive in contexts where procedural constraints already threaten workable motive analyses anyway.[176] For example, *Batson* challenges are often concluded quickly, without any lengthy fact-finding. There are limits to what can be achieved in such a context. Outside of the Ninth Circuit, courts handle these claims using either a But-For test or an Any Motive standard, which turn on only one motive. Those hearings can proceed expeditiously, without lengthy inquiries into a defendant's irrelevant motive, and courts can limit testimony only to the legally relevant motive (whether it be A or B).[177]

Perhaps the Ninth Circuit wished to capture these efficiencies, and the Primary Motive standard now implemented by lower courts represents an undesirable slippage from the initial formulation—the fruit of unclear terminology. Or possibly the Court of Appeals would have clearly stated that it prefers the Primary Motive standard, with all of its back and forth, if it had been aware of that term and option. Either way, the Ninth Circuit may be well served by translating its test into terms consistent with this Article's. A complete understanding of the motive rules and what they entail should allow courts to adopt what they deem to be most practicable or to endorse some other test despite the cost.

CONCLUSION

The law often avoids consideration of motives, and this impulse is even stronger when motives are mixed. We doubt the power of juries to find mental "facts," and we distrust our own motives—paternalism, censorship, thought policing—for demanding that they try. As a result, courts disavow the legal relevance of the motives or construe facts to find only simple motives that fit simple

175. Indeed, I argue as such in other work. *See* Andrew Verstein, *The Failure of Mixed Motives* (unpublished manuscript) (on file with author).

176. These challenges are not handled through full trials. *See* Cook v. LaMarque, 593 F.3d 810, 828 (9th Cir. 2010) (Hawkins, J., dissenting) (noting sparse record); *accord* Covey, *supra* note 19, at 323; Deborah C. Malamud, *The Last Minuet: Disparate Treatment After* Hicks, 93 MICH L. REV. 2229, 2302-03 n.238 (1995). Many motives inquiries are likewise handled without a full hearing. *See, e.g.*, City of Las Vegas v. Foley, 747 F.2d 1294, 1299 (9th Cir. 1984) (denying plaintiffs' request to depose city officials as to their motives, even though their motives would control the constitutionality of a zoning decision).

177. *Cf.* Herman A. Moore Tr. v. Comm'r, 49 T.C. 430 (1968) (Tannenwald, J., concurring) (criticizing the Primary Motive standard in a tax case because of litigation expenses).

rules. And when courts do craft mixed motive standards, they may incline toward standards that seem familiar, or they may have great difficulty in communicating what approach they have taken.

It is hard to be thoughtful about a practice that we are uncomfortable admitting we engage in at all. Yet motives are part of human life, and they are part of the law. Judges psychoanalyze, identifying one motive as primary or real and the rest as incidental or pretextual; they play scientist, exploring the causal impact of particular fragments of motivation; and they interpret, investing actions with significance in light of their animating purposes. If courts must assess motives, in all their complexity, we must be prepared to offer articulate descriptions and evaluations of them. This Article attempts to lift motives from ulteriority into a place where they can be discussed. It introduces a system for describing mixed motives, useful both for considering candidate rules for a given domain and decoding existing motive standards.

With a wide menu of options discovered, courts or legislatures must choose among them according to the normative status of each rule: the agendas they advance and whether those agendas are normatively acceptable. Accordingly, the next logical step is to set out a thoroughgoing, evaluative framework capable of determining which motive standard is most appropriate in a given dispute.

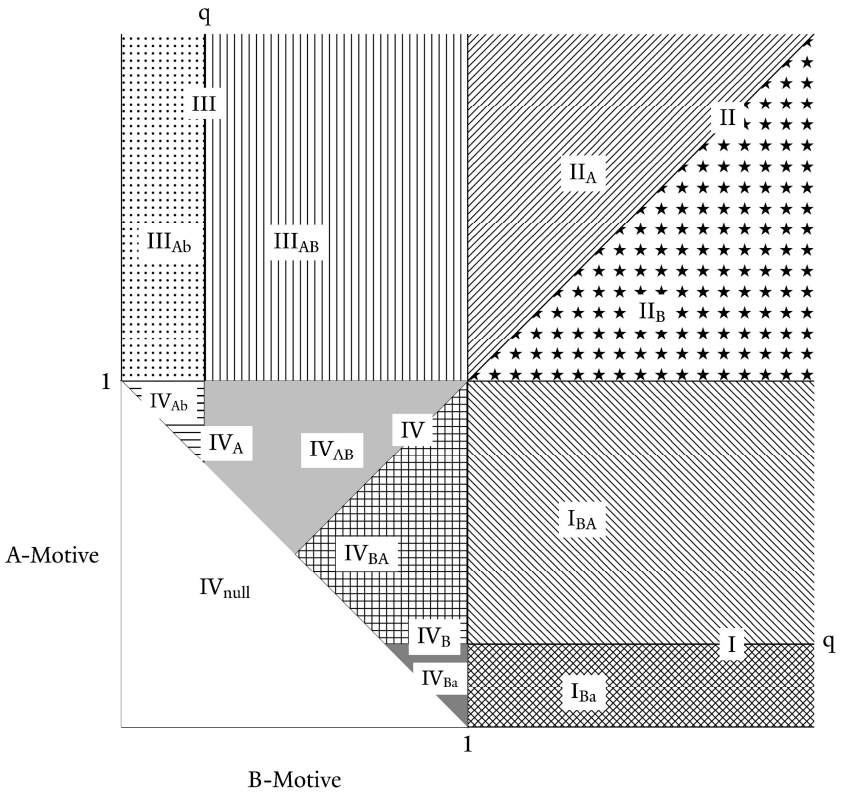
To set out a normative structure for mixed motive standards, we would need to know what drives our use of motives at all — since, presumably, the proper way to use motives must be a function of what we are using them for and, presumably, we aren't using motives for the same reasons in every case. Therefore, prior to a normative analysis, we would need to complete a taxonomy of justificatory rationales, canvassing the various reasons that the law might invoke motives rather than leave motives out of the inquiry. This taxonomy would itself prompt meta-normative questions: among the many reasons for which the law invokes motives (and from which mixed motive standards might follow), which are appropriate reasons and which are not?

These various normative questions follow naturally from the descriptive project of this Article. Accordingly, the next logical step in developing a jurisprudence of mixed motives is a complete normative treatment of mixed motives in the law.

APPENDIX A: FULL MOTIVE ARTICULATION

The four motive measures in Section II.A can be used to identify ten distinct motive regions. Figure 16 (*Complete Map*) depicts these combinations by overlaying our four motive measures, simplifying only the lower left hand corner.[178] Placement on this Figure corresponds to a given mixture of motives.

FIGURE 16.
COMPLETE MAP



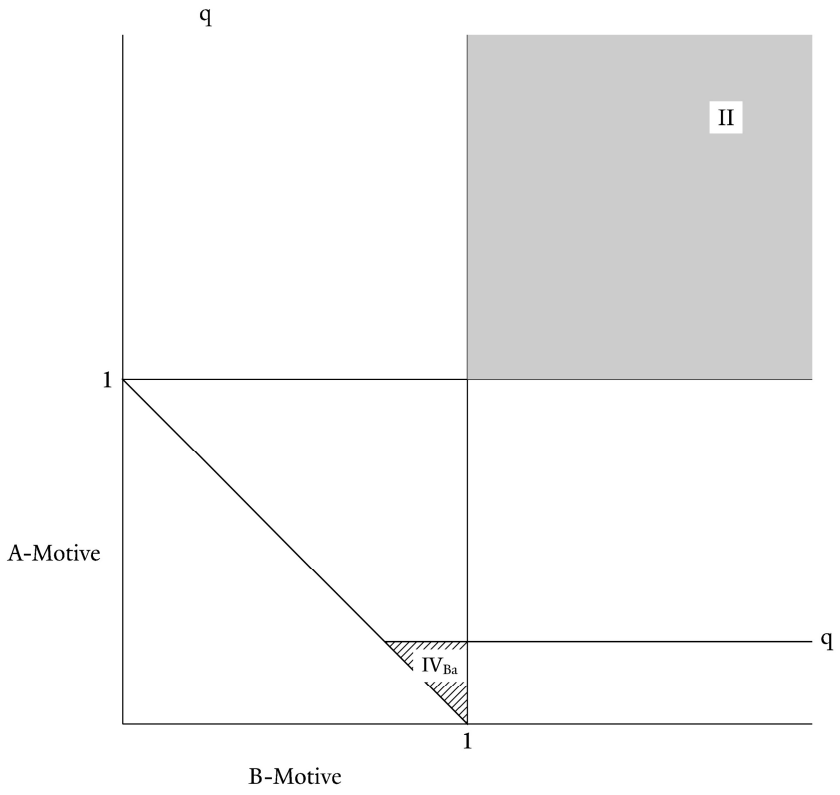
178. This project concerns liability for certain motivated acts. It is worth noting that the law could target non-acts or acts conducted without sufficient motivation. The former we call "thought crimes" and the latter we may call strict liability or, perhaps, negligence. Yet there is no need in a project about mixed motivation to inquire deeply into what sorts of persons deserve sanctions despite having intended nothing or done nothing.

Although replete with visual content, this figure displays only the same information as before. Quadrant I represents cases of sole-determination by B, though it can be subdivided into cases where A is tiny (I_{Ba}) and the remaining cases (I_{BA}) (notice the lower case "a" for the tiny case). The same division is possible for the other sole-determined case in Quadrant III. Quadrant II represents overdetermined cases in which both *A* and *B* were sufficiently strong motivations for action. Here "II_A" denotes that *A* predominates over a weaker (if still sufficient) B-Motive.

IV_{null} reminds us of a zone where the sum of all motivations totals to less than that required for action. The hybrid cases contained in the remaining triangle can be divided into those where one motive predominates ("IV_{AB}" where A is stronger) or predominates over an utterly tiny secondary motivation ("IV_{Ab}", again using the lower case to imply tininess).[179] Figure 16 can be used to depict existing legal rules, to compare them, and to imagine alternative legal rules. A legal motive standard conditions legal outcomes by reference to some combination of these shaded regions. For example, a standard might inculpate if an act is overdetermined (II) or in hybrid cases where A-Motive is tiny (IV_{Ba}). This would be an Arbitrary Rule, depicted below in Figure 17 *(Arbitrary Rule*).

179. Appendix B summarizes that information.

FIGURE 17.
ARBITRARY RULE



Although these regions can in turn be mixed and matched to generate over one thousand possible motive standards,[180] not all are attractive candidates for law; most appear arbitrary and illogical. The rule depicted in Figure 17 is an example of a rule without any obvious policy rationale.

Depicting all the possible motive combinations, including those entailed by this arbitrary rule, is worthwhile as a demonstration of the neutrality of this Article's descriptive vocabulary. Users can decide on the properties they desire in a

180. There are ten regions, each of which can be designated as proplaintiff or prodefendant. Thus, there are 2^10, or 1,024, combinations. Actually, the permutations are far greater once supporting rules are considered. For example, the burden of proof can shift from party to party, so that the same compound motive standard can be styled in several ways. For example, IV$_{Ba}$ and II could place the burden on the plaintiff to show IV$_{Ba}$ and II and then allow the defendant to rebut II to reduce damages.

motive standard and then hold any candidate standard up for consideration. The vocabulary does not foreclose any standard, even ones that appear unappealing at first.

APPENDIX B: WIDESPREAD MOTIVE STANDARDS BY DOMAIN

	Primary	But-For	Sole	Any
Health Care Kickback				181
ERISA, Interference with Benefits				182
First Amendment: Speech		183		
First Amendment: Religion	184			
Ex Post Facto			185	
Rational Basis Review			186	
Equal Protection, Generally				187
Equal Protection, Jury Strikes	188	189		190
Equal Protection, Redistricting	191			
Federal Whistleblower Retaliation		192		
Employment Discrimination (core)		193		194
Employment Discrimination (other)		195		
Prima Facie Tort			196	
Interference with an Economic Benefit			197	
Interference with Contract	198			
Contractual Good Faith		199		
Defamation	200			
Malicious Prosecution	201			
Retaliatory Eviction	202	203	204	205
Asylum				206
Market Manipulation		207	208	
Insider Trading		209		210
Boycotts	211			
Labor Law: Anti-Union Actions		212		
Property: Spite	213		214	
Attorney Professional Responsibility			215	216
Corporate: Plaintiff Adequacy	217			
Corporate: Business Judgment Rule	218			
Corporate: Books & Records Inquiry			219	
Conditional Bequests			220	
Tax (most)	221			
Tax (economic substance)			222	
Investigative Detentions (i.e., racial profiling)			223	
Fraudulent Transfers and Conveyances	224	225		226

181. *See supra* notes 122-123 and accompanying text.

182. Teumer v. Gen. Motors Corp., 34 F.3d 542, 550 (7th Cir. 1994) (finding liability if the illicit motive "contributed toward the employer's decision"); Pickering v. USX Corp., 809 F. Supp. 1501, 1538 (C.D. Utah 1992) ("[A]n employee need only prove that the desire to defeat pension eligibility was a 'motivating' or 'determinative', factor behind the challenged conduct." (quoting Gavalik v. Cont'l Can Co., 812 F.2d 834, 860 (3d Cir.), *cert. denied*, 484 U.S. 979 (1987))); Titsch v. Reliance Grp., Inc., 548 F. Supp. 983, 985 (S.D.N.Y. 1982) (contrasting "mere consequences of" with "a motivating factor"); *cf.* Schlenz v. United Airlines, Inc., 678 F. Supp. 230, 234-36 (N.D. Cal. 1988) (rejecting Sole Motive standard); Nemeth v. Clark Equip. Co., 677 F. Supp. 899, 903 (W.D. Mich. 1987) (rejecting Sole Motive standard). *See generally* Christina A. Smith, Note, *The Road to Retirement–Paved with Good Intentions but Dotted with Potholes of Untold Liability: ERISA Section 510, Mixed Motives, and Title VII*, 81 MINN. L. REV. 735 (1997).

183. Hartman v. Moore, 547 U.S. 250, 260 (2006); Bd. of Educ. v. Pico, 457 U.S. 853, 871 n.22 (1982) ("By 'decisive factor' we mean a 'substantial factor' in the absence of which the opposite decision would have been reached." (citing Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle, 429 U.S. 224, 287 (1977))); Givhan v. W. Line Consol. Sch. Dist., 439 U.S. 410, 417 (1979) (remanding to determine whether exercise of First Amendment rights was a but-for cause, rather than "the primary" reason); *Mt. Healthy*, 429 U.S 274.

184. McCreary Cty. v. ACLU of Ky., 545 U.S. 844, 846 (2005); Lemon v. Kurtzman, 403 U.S. 602, 612 (1971).

185. *See supra* note 117 and accompanying text.

186. David L. Shapiro, *Courts, Legislatures, and Paternalism*, 74 VA. L. REV. 519, 568-69 (1988) ("Because motivation tends to be complex or unknowable, and mixed motives are the rule rather than the exception, a statute may frequently be sustained without regard to any paternalist justification.").

187. Vill. of Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252, 265-66 (1977) ("[R]acial discrimination is not just another competing consideration. When there is a proof that a discriminatory purpose has been a motivating factor in the decision, [then] judicial deference is no longer justified."); Keyes v. Sch. Dist. No. 1, 413 U.S. 189, 210 (1973) (holding that a school board's "burden is to adduce proof sufficient to support a finding that segregative intent was not *among the factors* that motivated [its] actions" (emphasis added)); *see also* Reva Siegel, *Why Equal Protection No Longer Protects: The Evolving Forms of Status-Enforcing State Action*, 49 STAN. L. REV. 1111, 1134 (1997) (discussing the history of motive review in equal protection jurisprudence); *cf.* Girardeau A. Spann, *Good Faith Discrimination*, 23 WM. & MARY BILL RTS. J. 585, 622-23 (2015) ("Under current law, invidious racial discounting need not be the sole motivating factor in order to require invalidation under the Equal Protection Clause.").

188. Cook v. LaMarque, 593 F.3d 810, 815-16 (9th Cir. 2010).

189. State v. Ornelas, 330 P.3d 1085, 1092 (Idaho Ct. App. 2014) ("[S]ome states and most federal circuits have adopted a mixed-motives analysis, and the Ninth Circuit has adopted its own approach."); *see, e.g.*, Gattis v. Snyder, 278 F.3d 222, 234-35 (3d Cir. 2002); Weaver v. Bowersox, 241 F.3d 1024, 1032 (8th Cir. 2001); King v. Moore, 196 F.3d 1327, 1335 (11th Cir. 1999); United States v. Tokars, 95 F.3d 1520, 1533 (11th Cir. 1996); Wallace v. Morrison, 87 F.3d 1271, 1274-75 (11th Cir. 1996); Jones v. Plaster, 57 F.3d 417, 421 (4th Cir. 1995); United States v. Darden, 70 F.3d 1507, 1531 (8th Cir. 1995); Howard v. Senkowski, 986 F.2d 24 (2d Cir. 1993).

190. *Ornelas*, 330 P.3d at 1092 ("[M]ost states have adopted what is . . . referred to as the per se approach . . . ."); *see, e.g.*, Owens v. State, 531 So. 2d 22, 23-24 (Ala. Crim. App. 1987); State v. Lucas, 18 P.3d 160, 163 (Ariz. Ct. App. 2001); Robinson v. United States, 890 A.2d 674 (D.C. 2006); Rector v. State, 444 S.E.2d 862, 865 (Ga. Ct. App. 1994); McCormick v. State, 803 N.E.2d 1108, 1112-13 (Ind. 2004); State v. Shuler, 545 S.E.2d 805, 811 (S.C. 2001); Payton v. Kease, 495 S.E.2d 205, 210 (S.C. 1998); State v. King, 572 N.W.2d 530, 535 (Wis. Ct. App. 1997).

191. *See supra* note 101 and accompanying text.

192. *See, e.g.*, 49 U.S.C. § 42121(b)(2)(B)(i)-(ii) (2012) (establishing But-For Motive standard for retaliation claims targeting whistleblowing airline employees where the complainant must show that the described behavior was a "contributing factor in the unfavorable personnel action" and the employer must demonstrate "by clear and convincing evidence that the employer would have taken the same unfavorable personnel action in the absence of that behavior"). *See generally* Nancy M. Modesitt, *Causation in Whistleblowing Claims*, 50 U. RICH. L. REV. 1193, 1200-01 (2016) (describing the difference between the Title VII approach and that under federal whistleblower protection statutes).

193. 42 U.S.C. §§ 2000e–2(a)(1) to (2) (2012).

194. *See supra* notes 42, 145-166 and accompanying text.

195. *Id.*

196. *E.g.*, Zucker v. Katz, 708 F. Supp. 525, 536-37 (S.D.N.Y. 1989).

197. *See supra* note 118 and accompanying text.

198. Colo. Interstate Gas Co. v. Nat. Gas Pipeline Co., 885 F.2d 683, 691 (10th Cir. 1989); Hamro v. Shell Oil Co., 674 F.2d 784, 790 (9th Cir. 1982); Kinzel v. Discovery Drilling, Inc., 93 P.3d 427, 443 (Alaska 2004); Tesoro Alaska Petrol. Co. v. State, 757 P.2d 1045, 1052 (Alaska 1988); U.S. Smelting, Ref. & Mining Co. v. Wigger, 684 P.2d 850, 860 (Alaska 1984); Ollice v. Alyeska Pipeline Serv. Co., 659 P.2d 1182, 1188-89 (Alaska 1983); Alyeska Pipeline Serv. Co. v. Aurora Air Serv., Inc., 604 P.2d 1090 (Alaska 1979); Bar J Bar Cattle Co. v. Pace, 763 P.2d 545, 549 (Ariz. Ct. App. 1988); Halvorsen v. Aramark Unif. Servs., Inc., 77 Cal. Rptr. 2d 383, 388 (Cal. Dist. Ct. App. 1998); Lowell v. Mother's Cake & Cookie Co., 144 Cal. Rptr. 664, 668 (Cal. Dist. Ct. App. 1978); Hester v. Barnett, 723 S.W.2d 544, 564 (Mo. Ct. App. 1987); Leigh Furniture & Carpet Co. v. Isom, 657 P.2d 293, 307 (Utah 1982), *abrogated by* Eldridge v. Johndrow, 345 P.3d 553, 556 (Utah 2015) ("Contrary to *Leigh Furniture*, we hold that a claim for tortious interference may only succeed where the defendant has employed an improper means."); Texas W. Oil & Gas Corp. v. Fitzgerald, 726 P.2d 1056, 1075 (Wyo. 1986). *But see* Edwards Transps., Inc. v. Circle S Transps., Inc., 856 S.W.2d 783, 789 (Tex. App. 1993) (holding that "if a defendant's alleged interference with a contract is justified as a matter of law, a finding of actual malice is irrelevant").

Note that *agents* sued for interference with contracts can be personally liable for interference if their sole motive was personal rather than in service to their principal. *See* Sun Drilling Products Corp. v. Rayborn, 2000-1884 (La. App. 4 Cir. 10/3/01), 798 So. 2d 1141, 1158, writ denied, 2001-2939 (La. 1/25/02), 807 So. 2d 840; Swank v. Sverdlin, 121 S.W.3d 785, 800 (Tex. Ct. App. 2003); *accord* RESTATEMENT (SECOND) OF AGENCY § 236 (AM. LAW INST. 1958).

199. *See* Steven J. Burton, *Breach of Contract and the Common Law Duty To Perform in Good Faith*, 94 HARV. L. REV. 369, 390-91 n.97 (1980) (discussing "hard cases" of mixed motives).

200. Nodar v. Galbreath, 462 So. 2d 803, 812 (Fla. 1984); *accord* Kelley v. Tanoos, 865 N.E.2d 593, 598 (Ind. 2007); IMS v. Town of Portsmouth, 32 A.3d 914, 930 (R.I. 2011); *see also* RESTATEMENT (SECOND) OF TORTS § 603 cmt. a (AM. LAW INST. 1977); *cf.* Hoch v. Rissman 742 So. 2d

451, 460-61 (Fla. Dist. Ct. App. 1999) (overcoming privilege where defendant's sole motive was improper).

201. RESTATEMENT (SECOND) OF TORTS § 668 & cmt. c (AM. LAW INST. 1977).

202. MICH. COMP. LAWS. ANN. § 600.5720(1)(a) (West 2000) (including the language "primarily as a penalty"); N.C. GEN STAT. § 42-37.1(b) (2015); WASH REV. CODE ANN. § 59.18.240 (West 2015); RESTATEMENT (SECOND) OF PROP.: LANDLORD AND TENANT § 14.8(4) (AM. LAW INST. 1977) (noting that "the landlord is primarily motivated in so acting because the tenant" pursued enforcement); *see also* Robinson v. Diamond Hous. Corp., 463 F.2d 853, 861 (D.C. Cir. 1972); Newell v. Rolling Hills Apartments, 134 F. Supp. 2d 1026, 1037-38 (N.D. Iowa 2001); Windward Partners v. Delos Santos, 577 P.2d 326, 333 (Haw. 1978); Hillview Assocs. v. Bloomquist, 440 N.W.2d 867, 871 (Iowa 1989); Bldg. Monitoring Sys., Inc. v. Paxton, 905 P.2d 1215, 1218 (Utah 1995); Brady v. Slater, No. 20020599-CA, 2004 WL 1946142, at *1 (Utah Ct. App. 2004).

203. MASS. GEN. LAWS ANN. ch. 186, § 17 (West 2011).

204. Clark Oil & Ref. Corp. v. Leistikow, 230 N.W.2d 736, 742 (Wis. 1975); Dickhut v. Norton, 173 N.W.2d 297, 302 (Wis. 1970) (holding that a defense of retaliatory eviction requires that the defendant prove "that the landlord, for the *sole* purpose of retaliation, sought to terminate the tenancy" (emphasis added)).

205. Parkin v. Fitzgerald, 240 N.W.2d 828 (Minn. 1976); Silberg v. Lipscomb, 285 A.2d 86 (N.J. Super. Ct. Ch. Div. 1971).

206. *See, e.g.*, Lopez-Soto v. Ashcroft, 383 F.3d 228, 236 (4th Cir. 2004); Marku v. Ashcroft, 380 F.3d 982 (6th Cir. 2004); Girma v. INS, 283 F.3d 664, 667 (5th Cir. 2002); Singh v. Ilchert, 63 F.3d 1501, 1509 (9th Cir. 1995); Osorio v. INS, 18 F.3d 1017, 1028 (2d Cir. 1994). *Compare* Singh v. Gonzalez, 406 F.3d 191, 197 (3d Cir. 2005) ("[A]n applicant must show that the persecution was motivated, *at least in part*, by one of the protected characteristics."), *with* Gebremichael v. INS, 10 F.3d 28, 35 (1st Cir. 1993) (holding that the enumerated ground must be at the "root of persecution"). The former is the majority rule. *See generally* Marisa Silenzi Cianciarulo, *Terrorism and Asylum Seekers: Why the Real ID Act Is a False Promise*, 43 HARV. J. ON LEGIS. 102, 117-20 (2006) (discussing mixed motives).

207. SEC v. Masri, 523 F. Supp. 2d 361, 362 (S.D.N.Y. 2007) ("[T]he Securities and Exchange Commission (SEC) must prove that, *but for* the manipulative intent, the defendant would not have conducted the transaction." (emphasis added)).

208. United States v. Mulheren, 938 F.2d 364, 368 (2d Cir. 1991) ("[A]n investor may be lawfully convicted . . . where the purpose of his transaction is *solely* to affect the price of a security." (emphasis added)).

209. SEC v. Lipson, 278 F.3d 656, 660-61 (7th Cir. 2002) ("[I]f Lipson would have sold the shares in the same amounts and on the same dates that he did sell them even if he had not possessed any inside information, then he would be home free, because then the existence of a causal connection between his inside information and the challenged sales would be negated.").

210. United States v. Rajaratnam, 719 F.3d 139, 160 (2d Cir. 2013) ("The District Court's jury instructions on the use of inside information—which instructed the jury that it could convict Rajaratnam if the 'material non-public information given to the defendant was a factor, however small, in the defendant's decision to purchase or sell stock'—satisfied the 'knowing possession' standard that is the law of this Circuit."); *accord* United States v. Smith, 155 F.3d 1051, 1070 n.28 (9th Cir. 1998); *see also* United States v. Anderson, 533 F.3d 623, 630 (8th Cir. 2008) ("The government also need not show that the inside information was the sole reason for the sale or purchase of securities. It is enough that the information was a 'significant factor.'" (citations omitted)).

211. It violates antitrust law for competitors to join in a boycott for economic reasons, but not for expressive reasons. *See* FTC v. Superior Court Trial Lawyers Ass'n, 493 U.S. 411 (1990); *see also* Allied Tube & Conduit Corp. v. Indian Head, Inc., 486 U.S. 492, 508 (1988) (using a primary purpose test, arguably); NAACP v. Claiborne Hardware, 458 U.S. 886, 914 (1982) (using a primary purpose test); E. R.R. President's Conference v. Noerr Motor Freight, Inc., 365 U.S. 127, 139 (1961) (rejecting motivating factor test); *cf.* Maurice A. Stucke, *Is Intent Relevant?*, 8 J. L. ECON & POL'Y 801, 843 (2011) ("The reality . . . is that many businesses have a mixed motive of collaboration and competition . . . ."). *See generally* Kay P. Kindred, *When First Amendment Values and Competition Policy Collide: Resolving the Dilemma of Mixed-Motive Boycotts*, 34 ARIZ. L. REV. 709, 710 (1992) (discussing extensively mixed motives boycotts).

212. *See* sources cited *supra* note 115.

213. Obolensky v. Trombley, 115 A.3d 1016, 1023-25 (Vt. 2015).

214. *See* sources cited *supra* note 120.

215. Federal Rule of Civil Procedure 11 sets out ethical standards for pleadings and motions and provides sanctions for unethical conduct. Under this rule, attorneys may only file a paper or make an argument if "it is not being presented *for any improper purpose*, such as to harass, cause unnecessary delay, or needlessly increase the cost of litigation." FED. R. CIV. P. 11 (emphasis added).

216. Model Rules of Professional Conduct 3.2 prohibits dilatory practices and tactics: "The question is whether a competent lawyer acting in good faith would regard the course of action as having *some substantial purpose* other than delay." MODEL RULES OF PROF'L CONDUCT r. 3.2 cmt. 1 (AM. BAR ASS'N 2016) (emphasis added); *see also* Gen. Refractories Co. v. Fireman's Fund Ins. Co., 337 F.3d 297, 313 (3d Cir. 2003) (holding that an attorney is immune for acts taken in service of a client even though the attorney had mixed motives); Henry v. Champlain Enters., 212 F.R.D. 73, 88 (N.D.N.Y. 2003) (holding that work product remains protected even if a client had mixed motives in preparing it).

217. *See* sources cited *supra* notes 38-39 and accompanying text.

218. *See* sources cited *supra* note 104 and accompanying text.

219. Saito v. McKesson HBOC, Inc., 806 A.2d 113, 116 (Del. 2002) ("Once a stockholder establishes a proper purpose under § 220, the right to relief will not be defeated by the fact that the stockholder may have secondary purposes that are improper.").

220. Sonia A. Soehnel, Annotation, *Effect of Impossibility of Performance of Condition Precedent to Testamentary Gift*, 40 A.L.R. 4th 193 (1985) (discussing *In re Nathan's Estate*, 89 Cal. App. 2d 789 (1949), in which the court held that bequests vest when a condition becomes impossible, unless the condition was the sole motive for the bequest).

221. *See* United States v. Generes, 405 U.S. 93, 102-03 (1972); *accord* B.B. Rider Corp. v. Comm'r of Internal Revenue, 725 F.2d 945, 948 (3d Cir. 1984) ("Mixed motives are not uncommon, and the critical question is which of the taxpayer's motives is dominant.").

222. *See* sources cited *supra* note 121 and accompanying text.

223. *See* sources cited *supra* note 119 and accompanying text.

224. *In re* Schneider, 417 B.R. 907, 915 (Bankr. N.D. Ill. 2009) ("If the primary motivation for the transfer is based on fraudulent intent, other motivations may be urged, but they are irrelevant.").

225. United States v. Murray, 73 F. Supp. 2d 29, 35 (D. Mass. 1999), *aff'd*, 217 F.3d 59 (1st Cir. 2000).

226. SEC v. Haligiannis, 608 F. Supp. 2d 444, 451 n.3 (S.D.N.Y. 2009) (noting that the "trend in modern cases . . . is to hold that a transfer is voidable if the debtor is only partially motivated

by fraudulent intent" (citing PETER SPERO, FRAUDULENT TRANSFERS: APPLICATIONS AND IMPLICATIONS § 2:5, at 2-9 n.4 (2005)); United States v. Patej, 90 A.F.T.R.2d 2002-7235, 2002 WL 31689508 (E.D. Mich. 2002) (holding that a conveyance satisfies the "actual intent" element if the conveyor wholly, or only in part, was motivated by fraudulent intentions).