Explorations with Charlie Sullivan: Theorizing a Different Universe of Employment Discrimination

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"Thou art the thing itself."[1]

[*] Frank L. Maraist & Wex S. Malone Professor of Law, Paul M. Hebert Law Center of Louisiana State University. I am self-conscious about this footnote because Charlie Sullivan wrote a delightful piece, Charles A. Sullivan, *The Under-Theorized Asterisk Footnote*, 93 GEO. L.J. 1093 (2005). This footnote is where I often have indicated that Charlie, Mike Zimmer, Rebecca White, Steve Willborn, Sandra Sperino, Mike Selmi, and a few others reviewed an earlier draft of my Essay. I asked them to review drafts because I trusted them to identify errors and suggest ways in which I could improve the piece. Now, after reading Charlie's study of the asterisk footnote, I must ask myself if I also did it to have "star" names that would attract the attention of law review editors. *Id.* at 1116. I probably did. Alas, Charlie and my other friends did not review a draft of this Essay, and that is why it may include errors. I, however, thank my research assistant, Taylor Ashworth, LSU Law Class of 2020, for improving the paper. I also thank Kristyn A. Couvillion, LSU Class of 2021, for helpful and inspiring discussions about her law review comment that informed this Essay.

[1] WILLIAM SHAKESPEARE, KING LEAR act III, sc. 4.

I. INTRODUCTION: A GUIDE IN EXPLORATIONS OF THE UNIVERSE OF EMPLOYMENT DISCRIMINATION

A. *What the Deplanetization[2] of Pluto Can Teach Us About Employment Discrimination Law*

I always have been fascinated with astronomy. I grew up, as most people alive today, believing that our solar system, the Milky Way, is comprised of nine planets, and I memorized and learned about those planets. Pluto, discovered in 1930 and classified as a planet, was probably my favorite. I am not sure why—perhaps because it was farthest from the sun or because it was the smallest. In 2006, the galaxy, and with it my childhood beliefs, changed forever. In terms of planets, the solar system shrank. On August 24, 2006, astronomers in the International Astronomical Union (IAU) voted to strip tiny Pluto of its status as a planet and reclassify it as a dwarf planet.[3] The vote also established three categories of objects in our solar system: planets, dwarf planets, and small solar system bodies.[4] The vote of the astronomers was controversial.[5] The debate over classification of Pluto had raged for over a decade. A compromise proposal would have preserved Pluto's planethood, but it would have done so by defining planet so as to bring three more celestial objects within the definition.[6] The winning proposal, which demoted Pluto, was voted on by only 424 astronomers who remained for the last day of the conference in Prague.[7] One commentator described the decision as a victory of scientific reasoning over historical and cultural influences.[8]

Astronomer Michael Brown in 2005 had discovered an object larger than Pluto and was credited with discovery of a planet. He lost that honor,

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[2] I thought that I was coining this term, and I was proud of my creativity, but I was wrong. *See, e.g.*, Tony Long & Doug Cornelius, *Aug. 24, 2006: Pluto Deplanetized*, WIRED (Aug. 24, 2010), https://www.wired.com/2010/08/0824pluto-deplanetized/. I was dismayed to learn that "deplanetized" has another meaning in the Urban Dictionary: "Unaware of one's surroundings due to abuse of chemical substances; extremely high." Captain Tito, *Deplanetized*, URB. DICTIONARY (Apr. 09, 2006), https://www.urbandictionary.com/define.php?term=deplanetized. That alternative definition has nothing to do with this Essay.

[3] *See, e.g.*, Robert Roy Britt, *Pluto Demoted: No Longer a Planet in Highly Controversial Definition*, SPACE.COM (Aug. 24, 2006), https://www.space.com/2791-pluto-demoted-longer-planet-highly-controversial-definition.html; *see also* Shankar Vedantam, *For Pluto, a Smaller World After All*, WASH. POST (Aug. 25, 2006), http://www.washingtonpost.com/wp-dyn/content/article/2006/08/24/AR2006082400109.html.

[4] Britt, *supra* note 3.

[5] *Id.*

[6] Robert Roy Britt, *Details Emerge on Plan to Demote Pluto*, SPACE.COM (Aug. 19, 2006), https://www.space.com/2770-details-emerge-plan-demote-pluto.html.

[7] *See* Britt, *supra* note 3.

[8] *See id.*

however, as that object, too, was reclassified as a dwarf planet.[9] Ironically, it was Brown's discovery of a celestial body larger than Pluto that finally doomed Pluto. *The New York Times* injected its gravitas into the controversy, running an editorial arguing that Pluto should be downgraded.[10] Brown argued for preserving the planet status of Pluto because of "habit—75 years of calling Pluto a planet—should trump any scientific definition."[11] Alas, in the end, we lost a planet and the solar system as many of us knew it. The deplanetization of Pluto may have something to teach us about the need to revise our map of the universe of employment discrimination.

In one of his recent outstanding articles on employment discrimination law,[12] Professor Charles A. Sullivan states that the Supreme Court has repeatedly described disparate treatment and disparate impact as though they comprise the entire universe of discrimination.[13] In this Essay, I want to probe that statement by Professor Sullivan, who has been one of my principal guides in my explorations of the universe of employment discrimination. We can think of our employment discrimination law as a map or model of the universe of the discrimination that occurs in the workplace (the universe of employment discrimination). As emotionally painful as it was for many of us to lose little Pluto as a planet, modifying forever our view of our solar system, we are years beyond the time when the Supreme Court and/or Congress[14] should reform employment discrimination law to better map the many types of discrimination that occur in the workplace. As with the deplanetization of Pluto, this process should involve abandoning our traditions, customs, and outdated beliefs in favor of a more realistic conception of the phenomenon of employment

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[9] *See id.*

[10] *Too Many Planets Numb the Mind*, N.Y. TIMES (Aug. 2, 2005), https://www.nytimes.com/2005/08/02/opinion/too-many-planets-numb-the-mind.html.

[11] *Id.*

[12] Professor Sullivan is a prolific scholar in areas beyond employment discrimination law, including being the historian of the asterisk footnote. *See supra* note *.

[13] Charles A. Sullivan, *Employing AI*, 63 VILL. L. REV. 395, 403 (2018) [hereinafter Sullivan, *Employing AI*].

[14] Congress, of course, enacted the federal employment discrimination laws. Congress also has stepped in to amend the laws several times since their original enactment. What Congress does primarily in the amendments is change the law pronounced in Supreme Court decisions with which it disagrees. Sometimes Congress amends the laws to legislatively overturn a single decision, as in the Lilly Ledbetter Fair Pay Act of 2009, Pub. L. No. 111-2, 123 Stat. 5 (codified in scattered sections of 29 U.S.C. and 42 U.S.C.). Congress also has enacted amendments that overturn numerous Supreme Court decisions and effect other changes, such as the Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071 (codified as amended in scattered sections of 42 U.S.C.), and the ADA Amendments Act of 2008, Pub. L. No. 110-325, § 2, 122 Stat. 3553, 3553–54 (codified as amended at 42 U.S.C. § 12101 (2018)).

discrimination. Our revised map should follow the science and learning to recognize a different, more expansive, and less structured employment discrimination law. This reordering of the model is necessary in order to more effectively achieve the objectives of the employment discrimination laws—to deter/eradicate invidious discrimination in the workplace and to provide compensation to victims of discrimination.[15]

Employment discrimination law seems to be vast and complex. I have taught the course for over two decades, and I know that students beginning their explorations find it to be confusing. The analogy between employment discrimination *law*[16] and the deplanetization of Pluto is not that employment discrimination law is smaller than we thought; rather, it is that the actual universe of employment discrimination (the phenomenon or occurrence of discrimination in the workplace) is complex and vast, but our map of it is inadequate. It contains too few terms to describe what is out there, and the terms we use are a poor fit for the objects in that universe. Yet, the Supreme Court tenaciously has clung to what is familiar, traditional, and comfortable even as science, learning, and technology have undermined its descriptive value.

[15] The Court discussed the dual goals of deterrence/eradication of discrimination and compensation in *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 413–25 (1975). The Court identified the "primary objective" of Title VII as "achiev[ing] equality of employment opportunities and remov[ing] barriers that have operated in the past to favor an identifiable group of white employees over other employees." *Id.* at 417 (quoting Griggs v. Duke Power Co., 401 U.S. 424, 429–30 (1972) (internal quotation marks omitted)). The Court then went on to recognize that "[i]t is also the purpose of Title VII to make persons whole for injuries suffered on account of unlawful employment discrimination." *Id.* at 418. In her concurring opinion in *Price Waterhouse*, after Justice O'Connor applied the "statutory tort" label to Title VII, she noted the two primary functions of Title VII: the deterrence goal related to public policy and the compensation or make-whole goal. Price Waterhouse v. Hopkins, 490 U.S. 228, 264–65 (1989) (O'Connor, J., concurring). The Third Circuit eloquently expressed the preeminence of the public policy:

> [A]n act of employment discrimination is much more than an ordinary font of tort law. The anti-employment discrimination laws are suffused with a public aura for reasons that are well known . . . . A plaintiff in an employment-discrimination case accordingly acts not only to vindicate his or her personal interests in being made whole, but also as a "private attorney general" to enforce the paramount public interest in eradicating invidious discrimination.

Mardell v. Harleysville Life Ins. Co., 31 F.3d 1221, 1234 (3d Cir. 1994), *vacated*, 514 U.S. 1034 (1995).

[16] The distinction between "employment discrimination law" and the phenomenon of "employment discrimination" is crucial to my thesis.

B. *Charlie Sullivan: One of My Guides in Explorations of the Universe of Employment Discrimination*

For decades Charlie Sullivan has explored the universe of employment discrimination and our inadequate modeling of it in employment discrimination law. He has insightfully identified the mistakes that the Supreme Court has made in trying to describe that universe with theories that are both too limited and inaccurate in their description of the composition of the universe. The limitations and inaccuracies of the current model seem destined to become starker with the emergence of new technology.

I began writing about employment discrimination law in 1994. I met the late, great Professor Mike Zimmer and Professor Deborah Calloway at a conference at Stetson Law School in 1995. From that conference came my first article on employment discrimination law.[17] As a result of that publication I met then-Professor and later Dean Rebecca White. When I taught the course Employment Discrimination for the first time in 1996, I used the casebook *Cases and Materials on Employment Discrimination*, which, over the years, has been the work of various combinations of Mike Zimmer, Charlie Sullivan, Rebecca White, and Deborah Calloway. Not long after teaching the course, I corresponded with Professor Charlie Sullivan, and I met him at a conference years later.

I felt very privileged to be invited by Charlie to participate in this conference and symposium issue honoring him and his scholarship. As I thought about my subject, I wanted both to pay homage to Charlie's scholarship and to say something meaningful about employment discrimination law. My first thought was that I once again would lambaste the pretext framework developed by the Supreme Court in *McDonnell Douglas Corp. v. Green*[18] to evaluate disparate treatment claims. I have done that for much of my career, with Charlie's help and guidance. For this conference, however, I wanted to do something different. I thought of a draft Charlie recently sent me in which he explored why the "motivating factor" standard of causation under the mixed-motives analysis has not radically changed Title VII discrimination law to produce more victories for plaintiffs: *Making Too Much of Too Little?: Why "Motivating Factor" Liability Did Not Revolutionize Title VII*.[19] That paper is a culmination, to

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[17] *See* William R. Corbett, *The "Fall" of* Summers, *the Rise of "Pretext Plus," and the Escalating Subordination of Federal Employment Discrimination Law to Employment at Will: Lessons from* McKennon *and* Hicks, 30 GA. L. REV. 305, 375 (1996).

[18] 411 U.S. 792, 792 (1973).

[19] Charles A. Sullivan, *Making Too Much of Too Little?: Why "Motivating Factor" Liability Did Not Revolutionize Title VII* (Seton Hall Pub. L. Res. Paper, forthcoming), https://ssrn.com/abstract=3431063 [hereinafter Sullivan, *Making Too Much*].

date, of scholarship that Charlie began about thirty years ago,[20] when he wrote about the mixed-motives framework and the standards of causation articulated by the Court in 1989 in *Price Waterhouse v. Hopkins*.[21] I thought that I would examine standards of causation under the pretext framework, to which the great Mike Zimmer and I devoted much of our scholarship, and under the mixed-motives analysis, on which Charlie focused some of his scholarship. As I considered this possible topic, a law review student whom I am advising this semester visited with me and discussed her proposed topic—employment discrimination law as applied to the use of artificial intelligence to make employment decisions. I then began thinking about how inadequate the theories of discrimination and the proof frameworks in employment discrimination law will be to address the issues raised by such new technologies. This is not a new problem, however, as much scholarship has demonstrated that the theories and frameworks have been shown to be inaccurate depictions of how employment discrimination actually occurs. Many scholars have written about implicit bias and unconscious discrimination.[22] Professor Linda Hamilton Krieger's groundbreaking article used social cognition theory to demonstrate how poorly our law, which focuses on intent, motive, and causation, depicts the actual occurrence of discrimination.[23] Artificial intelligence and other emerging technologies will only exacerbate the problem.

As I turned to Charlie's scholarship, I found that, as usual, Charlie had gone before me in exploring this sector of the universe of employment discrimination, writing an insightful and provocative article on the topic: *Employing AI*.[24]

In *Employing AI*, Charlie wrote that the Supreme Court "has repeatedly described [disparate treatment and disparate impact] as if they

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[20] Charles A. Sullivan, *Accounting for* Price Waterhouse*: Proving Disparate Treatment Under Title VII*, 56 BROOK. L. REV. 1107 (1991) [hereinafter Sullivan, *Accounting*].

[21] 490 U.S. 228 (1989).

[22] *See, e.g.*, TRISTIN K. GREEN, DISCRIMINATION LAUNDERING: THE RISE OF ORGANIZATIONAL INNOCENCE AND THE CRISIS OF EQUAL OPPORTUNITY LAW (Cambridge Univ. Press 2017); Samuel Bagenstos, *The Structural Turn and the Limits of Antidiscrimination Law*, 94 CALIF. L. REV. 1, 22–23 (2006); Stephanie Bornstein, *Reckless Discrimination*, 105 CALIF. L. REV. 1055, 1061–62 (2017); Susan Sturm, *Second Generation Employment Discrimination: A Structural Approach*, 101 COLUM. L. REV. 458, 484–89 (2001).

[23] Linda Hamilton Krieger, *The Content of Our Categories: A Cognitive Bias Approach to Discrimination and Equal Employment Opportunity*, 47 STAN. L. REV. 1161, 1187 (1995).

[24] Sullivan, *Employing AI*, *supra* note 13, at 403.

comprise the entire universe of 'discrimination.'"[25] Moreover, in that article he questioned whether the time-honored dichotomy of theories of discrimination will be adequate to address the challenges emerging now, stating in his conclusion that "the Supreme Court's bifurcation of all discrimination into two theories, is very problematic, at least unless the theories are radically revised."[26]

It is not easy to navigate the universe of employment discrimination or the model of it that we have developed in our employment discrimination law. I am grateful to have had more knowledgeable, experienced, and wise guides like Charlie, Mike, and Rebecca to keep me largely on course in my exploration. I relied on their casebook to help me learn the law. I sent them drafts of my articles, and they have helped me stay on course as best they could. Without them, I often would have been lost in that universe, and the explorations would not have been as enjoyable without such companions.

In Section II, I describe in brief the current map of the universe of employment discrimination. In Section III, I discuss three explorations of that universe that Charlie and I have undertaken together: proof structures and causation standards; influences of tort law on employment discrimination law; and the inadequacy of the employment discrimination theories to address the phenomenon of employment discrimination. In Section IV, I explore how the Supreme Court and Congress should deplanetize Pluto. I conclude, and I think Charlie agrees, that, as difficult and disconcerting as it may be to relinquish the narrow view of the familiar discrimination theories, Congress and the Supreme Court need to reform their maps of the universe. Science and knowledge must prevail over custom and history in order to achieve the grand and noble purposes of the employment discrimination laws.

II. THE CURRENT MODEL OF THE UNIVERSE OF EMPLOYMENT DISCRIMINATION

The employment discrimination map or model developed by the Supreme Court is based on dichotomies.[27] There are two theories of discrimination, and they are distinct. According to the Supreme Court, this dichotomy of theories comprises the entire universe of employment discrimination.[28] These two theories are said to emanate from two

[25] *Id.*

[26] Sullivan, *Employing AI*, *supra* note 13, at 428.

[27] *See, e.g.*, William R. Corbett, *Breaking Dichotomies at the Core of Employment Discrimination Law*, 45 FLA. ST. U. L. REV. 763, 764 (2018).

[28] *See, e.g.*, Int'l Bhd. of Teamsters v. United States, 431 U.S. 324, 335 n.15 (1977); EEOC v. Abercrombie & Fitch Stores, Inc., 135 S. Ct. 2028 (2015); Sullivan, *Employing AI*,

subsections of Title VII[29]—disparate treatment from §703(a)(1)[30] and disparate impact from § 703(a)(2).[31] Disparate treatment is discrimination that requires proof of motive,[32] although intent often is substituted, and the two terms are treated as interchangeable.[33] Disparate impact, in contrast, is defined as unintentional discrimination in which liability is based on a disparate impact produced by a facially neutral test, criterion, or other practice that cannot be justified by business necessity.[34]

Beneath the two theories are proof frameworks used by litigants to prove claims of discrimination and used by the courts to analyze the litigants' claims. Under individual disparate treatment, the Supreme Court developed two proof structures for proving and analyzing intentional discrimination: the pretext framework first announced in *McDonnell Douglas Corp. v. Green*[35] and the mixed-motives framework articulated by the Court in *Price Waterhouse v. Hopkins*,[36] which was revised and codified by Congress, at least for Title VII,[37] in the Civil Rights Act of 1991.[38] The Court set forth the disparate impact theory and a rough version of the affiliated proof framework in *Griggs v. Duke Power Co.*[39] Congress

supra note 13, at 403; Sandra F. Sperino, *Justice Kennedy's Big New Idea*, 96 B.U. L. REV. 1789, 1794 (2016).

[29] *See* Texas Dept. Cmty. Affairs v. Inclusive Cmtys. Project, Inc., 135 S. Ct. 2507, 2516–17 (2015).

[30] 42 U.S.C. § 2000e-2(a)(1) (2018).

[31] *Id.* at § 2000e-2(a)(2).

[32] *Int'l Bhd. of Teamsters*, 431 U.S. at 335 n.15.

[33] *See, e.g.*, Sullivan, *Employing AI*, *supra* note 13, at 405.

[34] *Int'l Bhd. of Teamsters*, 431 U.S. at 335 n.15.

[35] 411 U.S. 792, 805–06 (1973).

[36] 490 U.S. 228, 252 (1989).

[37] The Court explained that the mixed-motives framework does not apply under the ADEA in *Gross v. FBL Financial Services Inc.*, 557 U.S. 167, 180 (2009). The Court later held that mixed motives is not applicable under the antiretaliation provision of Title VII in *University of Texas Southwest Medical Center v. Nassar*, 570 U.S. 338, 362 (2013). It probably does not apply under the ADA, but the Supreme Court has not decided the issue, and there is a split of authority on the issue. *Compare* Gentry v. E. W. Partners Club Mgmt. Co., Inc., 816 F.3d 228, 234 (4th Cir. 2016) (joining the Sixth and Seventh Circuits in applying but-for causation), *and* Lewis v. Humboldt Acquisition Corp., 681 F.3d 312, 321 (6th Cir. 2012) (holding mixed-motives analysis is not applicable to the ADA based on *Gross*) *and* Serwatka v. Rockwell Automation, Inc., 591 F.3d 957, 963–64 (7th Cir. 2010) (same), *with* Hoffman v. Baylor Health Care Sys., 597 F. App'x 231, 237 (5th Cir. 2015) (stating that standard of causation under the ADA is "motivating factor"), *cert. denied*, 136 S. Ct. 45 (2015), *and* Siring v. Or. St. Bd. of Higher Educ., 977 F. Supp. 2d 1058, 1063 (D. Or. 2013) (same).

[38] Civil Rights Act of 1991, Pub. L. No. 102-166, § 107, 105 Stat. 1071, 1075–76 (codified in scattered sections of 42 U.S.C.). The two parts of the mixed-motives analysis are at 42 U.S.C. § 2000e-2(m) (2018) ("motivating factor") and 42 U.S.C. § 2000e-5(g)(2)(B) (same-decision defense).

[39] 401 U.S. 424, 431–432.

revised and codified that disparate impact framework for Title VII, but not the ADEA and the ADA, in the Civil Rights Act of 1991.[40]

Disparate treatment was described by the Court early on as "the most easily understood type of discrimination" because an employer engages in unequal treatment of employees based on a protected characteristic.[41] But exploring the galaxy of disparate treatment is by no means easy, and the Court has made it increasingly difficult as it has developed the theory. The most difficult part of the exploration has been the two proof frameworks—pretext and mixed-motives. It was once thought that the pretext analysis applied to disparate treatment claims involving circumstantial evidence of discriminatory intent, and the mixed-motives analysis applied to cases involving direct evidence of discrimination.[42] That dichotomy was based on Justice O'Connor's concurrence in *Price Waterhouse*.[43] In *Desert Palace, Inc. v. Costa*, however, the Supreme Court abrogated that distinction.[44] The Court held that a plaintiff asserting a Title VII individual disparate treatment claim is not required to present direct evidence of discrimination in order to be entitled to a "motivating factor"[45] jury instruction.[46] The Court reasoned in *Desert Palace* that when Congress codified a modified version of mixed motives in the Civil Rights Act of 1991 in §§ 703(m) and 706(g)(2)(B), Congress said nothing of direct evidence.[47] The *Desert Palace* decision raised the question of whether the *McDonnell Douglas* pretext framework survived the decision.[48] If it did,

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[40] The framework is at 42 U.S.C. § 2000e-2(k). The Supreme Court explained that the statutory version of the disparate impact framework does not apply to the ADEA in *Smith v. City of Jackson*, 544 U.S. 228, 232 (2005).

[41] Int'l Bhd. of Teamsters v. United States, 431 U.S. 324, 335 n.15 (1977).

[42] *See generally* Kenneth R. Davis, *Price-Fixing: Refining the* Price Waterhouse *Standard and Individual Disparate Treatment Law*, 31 FLA. ST. U. L. REV. 859, 878–82 (2004); Michael J. Zimmer, *The New Discrimination Law:* Price Waterhouse *is Dead, Whither* McDonnell Douglas?, 53 EMORY L.J. 1887, 1910 (2004) [hereinafter Zimmer, *The New Discrimination Law*].

[43] Price Waterhouse v. Hopkins, 490 U.S. 228, 270–71 (1989) (O'Connor, J., concurring).

[44] Desert Palace, Inc. v. Costa, 539 U.S. 90, 92 (2003).

[45] 42 U.S.C. § 2000e-2(m).

[46] *Desert Palace, Inc.*, 539 U.S. at 101–02.

[47] *Id.* at 98–99.

[48] *See, e.g.*, Dare v. Wal-Mart Stores, Inc., 267 F. Supp. 2d 987, 990–93 (D. Minn. 2003); Deborah L. Brake, *The Shifting Sands of Employment Discrimination: From Unjustified Impact to Disparate Treatment in Pregnancy and Pay*, 105 GEO. L.J. 559, 566 (2017); Melissa Hart, *Subjective Decision Making and Unconscious Discrimination*, 56 ALA. L. REV. 741, 765–66 (2005); Henry L. Chambers, Jr., *The Effect of Eliminating Distinctions Among Title VII Disparate Treatment Cases*, 57 SMU L. REV. 83, 102–03 (2004); Zimmer, *The New Discrimination Law*, *supra* note 42, at 1929–32; Jeffrey A. Van Detta, *"Le Roi Est Mort; Vive Le Roi!"*: *An Essay on the Quiet Demise of* McDonnell Douglas *and the Transformation of Every Title VII Case After* Desert Palace, Inc. v. Costa

what was the new line of demarcation between the two frameworks? Courts of appeal, however, have misunderstood or ignored the *Desert Palace* holding, reverting to the circumstantial evidence/direct evidence dividing line.[49] Ignoring Supreme Court precedent would seem to be a problem, but perhaps not when the Supreme Court itself ignores its own precedent. In *Young v United Parcel Service, Inc.*, the Court majority seemingly followed the lead of lower courts and forgot or ignored the holding of *Desert Palace*, declaring that "a plaintiff can prove disparate treatment either (1) by direct evidence that a workplace policy, practice, or decision relies expressly on a protected characteristic, or (2) by using the burden-shifting framework set forth in *McDonnell Douglas*."[50]

In recent years, we have learned that the Court's model of the universe of employment discrimination lacks symmetry. The Supreme Court in the past decade has declared that the mixed-motives proof structure, which applies to the discrimination provision in Title VII, does not apply to the Age Discrimination in Employment Act,[51] or the anti-retaliation provision of Title VII.[52] The asymmetry gives our model of the universe of employment discrimination the appearance of being chaotic. This asymmetrical model is the product of Congress providing a model of the universe and the Supreme Court interpreting the model, with little assurance that the Court understands the vision of Congress or that Congress comprehends in depth the doctrine of the Court on which Congress relies in amending the statutes.[53]

III. EXPLORATIONS WITH CHARLIE SULLIVAN

I have followed Charlie in explorations into three areas of employment discrimination law: the proof frameworks/causation standards; the influence of tort law on employment discrimination law; and the inadequacy of the theories of discrimination.

Mike Zimmer, Charlie, and I each wrote several articles about the proof frameworks and their associated standards of causation. One cannot write about the *McDonnell Douglas* pretext framework without also writing about the *Price Waterhouse*/Civil Rights Act of 1991[54] mixed-motives

into a "Mixed-Motives" Case, 52 DRAKE L. REV. 71, 76 (2003).

[49] *See, e.g.*, Etienne v. Spanish Lake Truck & Casino Plaza, L.L.C., 778 F.3d 473, 475 (5th Cir. 2015); Marable v. Marion Military Inst., 595 F. App'x. 921 (11th Cir. 2014).

[50] 575 U.S. 206, 212–13 (2015).

[51] Gross v. FBL Fin. Servs, 557 U.S. 167, 173 (2009).

[52] Univ. of Tex. Sw. Med. Ctr. v. Nassar, 570 U.S. 338, 362 (2013).

[53] *See, e.g.*, Charles A. Sullivan, *The Curious Incident of* Gross *and the Significance of Congress's Failure to Bark*, 90 TEX. L. REV. 157, 157–158 (2012).

[54] The mixed-motives analysis was adopted by the Court from constitutional law in *Price Waterhouse v. Hopkins*, 490 U.S. 228, 248–49 (1989), and was modified and codified

framework. Yet, Mike and I wrote primarily about *McDonnell Douglas*. Charlie explored principally the mixed-motives analysis, beginning with his 1991 article, *Accounting for Price Waterhouse,* and culminating with his recent article on the "motivating factor" standard of causation, *Making Too Much of Too Little?: Why "Motivating Factor" Liability Did Not Revolutionize Title VII*.[55]

Charlie wrote and published *Accounting for Price Waterhouse* in the period between the Court's articulation of the mixed-motives analysis in *Price Waterhouse* and Congress's codification of a modified version in the Civil Rights Act of 1991. Charlie compared the pretext and mixed-motives frameworks and made several insightful observations that presaged the rather chaotic future ahead for the frameworks. First, both require bad (discriminatory) thoughts and causation.[56] He pointed out that causation "takes center stage in direct evidence decisions," but in the pretext analysis causation is subsumed in the inference drawn from the prima facie case.[57] That is why the Supreme Court never ascribed the but-for causation standard to the pretext analysis, but the appellate courts later would retrofit it with that standard.[58] Second, Charlie recognized that all intentional discrimination cases could be characterized as posing the pretext issue, and they also could be characterized as raising the mixed-motives issue.[59] From a commonsense perspective, all discrimination cases are likely to be mixed motives, as good and bad motives are likely to exist in all adverse employment decisions.[60] Although there are many prescient insights in the article, the final one that I want to emphasize is Charlie's concluding point that the two proof frameworks need not be rejected, but courts should be mindful that they are "highly imperfect" tools and take care that the goals of Title VII are paramount in each case.[61] In other words, the proof frameworks, which were not created in the statutes, are not "the thing

by Congress in the Civil Rights Act of 1991.

55 Sullivan, *Making Too Much*, *supra* note 19.

56 Sullivan, *Accounting*, *supra* note 20, at 1139–57.

57 Sullivan, *Accounting*, *supra* note 20, at 1118.

58 *See, e.g.*, Nicholson v. Securitas Sec. Servs. USA, Inc., 830 F.3d 186, 189 (5th Cir. 2016). *But see* Martin J. Katz, *Reclaiming* McDonnell Douglas, 83 NOTRE DAME L. REV. 109, 136–38 (2007) (positing that the *McDonnell Douglas* analysis, despite widespread belief to the contrary, does not prove but-for causation). Curiously, the Supreme Court has expressly declined to decide whether the *McDonnell Douglas* framework applies to disparate treatment claims under the Age Discrimination in Employment Act, which requires but-for causation. *See, e.g.*, O'Connor v. Consolidated Coin Caterers Corp., 517 U.S. 308, 311 (1996).

59 Sullivan, *Accounting*, *supra* note 20, at 1162.

60 *Id.*

61 Sullivan, *Accounting*, *supra* note 20, at 1163.

itself,"[62] and they should not become the dominant features of employment discrimination law. That warning has not been heeded.

Mike Zimmer sought to discern in the articulations of Congress and the Court a uniform analysis for disparate treatment cases under all of the employment discrimination laws.[63] It appeared that the uniform analysis may be achieved when the Supreme Court in 2003 decided *Desert Palace, Inc. v. Costa*.[64] Mike discussed this prospect in one of his finest articles.[65] Many of us wrote that *Desert Palace* rendered the *McDonnell Douglas* pretext analysis unsustainable and meant that all disparate treatment cases would be evaluated under some version of the mixed-motives analysis,[66] as Charlie had suggested in 1991. We were sorely mistaken. In the years that followed, the pretext analysis flourished, and the Court restricted application of the mixed-motives analysis in *Gross v. FBL Financial Services, Inc.*,[67] and *University of Texas Southwestern Medical Center v. Nassar*.[68]

Before turning to Charlie's recent article on the motivating factor standard, which rounds out his work on proof frameworks in a brilliant thirty-year retrospective, I will consider a related joint exploration of ours. At least from *Price Waterhouse* forward, there have been both suggestions by the Supreme Court that employment discrimination claims are statutory torts, and the Court has imported tort law terms and concepts into employment discrimination doctrine. Indeed, much of the discussion in *Price Waterhouse* is about standards of causation, two of which are derived from tort law—but-for and substantial factor. I will say more about the *Price Waterhouse* causation standards below. In 2011, the Supreme Court expressly labeled an employment discrimination statute (USERRA)[69] a statutory tort and imported the concept of proximate cause into employment discrimination law in its decision in *Staub v. Proctor*

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62 *See* SHAKESPEARE, *supra* note 1 (quoting from Shakespeare's *King Lear*).

63 Michael J. Zimmer, *The Emerging Uniform Structure of Disparate Treatment Discrimination Litigation*, 30 GA. L. REV. 563 (1996). Zimmer would further develop this vision and examine progress by the courts in Michael J. Zimmer, *Chaos or Coherence: Individual Disparate Treatment Discrimination and the ADEA*, 51 MERCER L. REV. 693 (2000).

64 539 U.S. 90 (2003).

65 Zimmer, *The New Discrimination Law*, *supra* note 42, at 1887.

66 *See, e.g.*, Kaitlin Picco, *The Mixed-Motive Mess: Defining and Applying a Mixed Motive Framework*, 26 ABA J. LAB. & EMP. L. 461 (2011); Henry L. Chambers, Jr., *The Effect of Eliminating Distinctions Among Title VII Disparate Treatment Cases*, 57 SMU L. REV. 83 (2004); Van Detta, *supra* note 48, at 76.

67 557 U.S. 167 (2009).

68 570 U.S. 338 (2013).

69 The Uniformed Services Employment and Reemployment Rights Act, 38 U.S.C. §§ 4301–4334.

Hospital.[70] That decision provoked scholarly exploration of the influence of tort law on employment discrimination, and Charlie led that exploration in an article in which he cautioned that the importation of proximate cause in *Staub* could be a way of narrowing employment discrimination law so that it does not apply to cognitive bias and unconscious discrimination.[71] Another outstanding scholar, Sandra Sperino, followed Charlie in that exploration.[72] Many scholars then joined in a conference and symposium issue.[73] Charlie wrote an article for the symposium in which he explained that tortification of employment discrimination is not inherently bad, but the Court is doing it badly.[74]

The exploration of tortification of employment discrimination law circles back to the exploration of proof framework/standards of causation. In *Making Too Much of Too Little*, Charlie explains why the motivating factor standard of causation has not revolutionized our legal model of employment discrimination. In the end, he describes "motivating factor" as "a noble failure."[75] Of course, because of the Court's decisions in *Gross* and *Nassar*, any revolution probably would have been confined to the discrimination provision of Title VII.[76] The motivating factor standard of causation, which is the focus of the plaintiff's prima facie case in the mixed-motives analysis, has not been used by plaintiffs as much as we anticipated it would be, and it has not resulted in a spate of plaintiffs' victories.[77] Here, it is important to trace the origins of the standard and its development. Charlie does this in detail in his article, but I will provide a short version here. Motivating factor was the standard adopted by the

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[70] 562 U.S. 411 (2011).

[71] Charles A. Sullivan, *Tortifying Employment Discrimination*, 82 B.U. L. REV. 1431 (2012).

[72] *See generally* Sandra F. Sperino, *Discrimination Statutes, the Common Law, and Proximate Cause*, 2013 U. ILL. L. REV. 1 (2013).

[73] *See* Martha Chamallas & Sandra F. Sperino, *Torts and Civil Rights Law: Migration and Conflict: Symposium Introduction*, 75 OHIO ST. L.J. 1021 (2014).

[74] Charles A. Sullivan, *Is There a Madness to the Method? Torts and Other Influences on Employment Discrimination Law*, 75 OHIO ST. L.J. 1079 (2014).

[75] Sullivan, *Making Too Much*, *supra* note 19, at 37.

[76] Whether the holdings of *Gross* and *Nassar* would be extended to the Americans With Disabilities Act and thus preclude application of motivating factor and mixed-motives analysis is uncertain. *Compare* Gentry v. E. W. Partners Club Mgmt. Co., 816 F.3d 228, 234 (4th Cir. 2016) (joining the Sixth and Seventh Circuits in applying but-for causation), *and* Lewis v. Humboldt Acquisition Corp., 681 F.3d 312, 321 (6th Cir. 2012) (holding mixed-motives analysis is not applicable to the ADA based on *Gross*), *and* Serwatka v. Rockwell Automation, Inc., 591 F.3d 957, 963–64 (7th Cir. 2010) (same), *with* Hoffman v. Baylor Health Care Sys., 597 F. App'x 231, 235 (5th Cir. 2015) (stating that standard of causation under the ADA is "motivating factor"), *cert. denied*, 136 S. Ct. 45 (2015), *and* Siring v. Or. State Bd. of Higher Educ. 977 F. Supp. 2d 1058, 1063 (D. Or. 2013) (same).

[77] Sullivan, *Making Too Much*, *supra* note 19.

plurality opinion in *Price Waterhouse*. The plurality took the mixed-motives framework and the motivating factor standard of causation from the Court's analysis of First Amendment claims in *Mt. Healthy City Board of Education v. Doyle*.[78] That *Mt. Healthy* opinion used the term "motivating factor" but also used "substantial factor" and used them as though they were interchangeable.[79] Justice O'Connor in her concurrence, however, did not regard them as interchangeable. She selected "substantial factor" as the standard for the plaintiff's prima facie case that would trigger a shift in the burden of persuasion. She considered "motivating factor" too lenient to justify shifting the burden of persuasion to the defendant on the issue of the same-decision defense.[80]

When Congress, in the Civil Rights Act of 1991, selected "motivating factor" and inserted it in the discrimination provision of Title VII, there was reason to believe that plaintiffs would be much more successful on Title VII claims. Congress selected from the *Price Waterhouse* opinions what was seemingly the lower or less stringent standard of causation. The language originally included in the bill was "contributing" factor, but it was changed to "motivating factor," which the House Report described as "cosmetic" and stated that it "w[ould] not materially change the courts' findings."[81]

Indeed, the Supreme Court has recognized that Congress relaxed the but-for causation standard embodied in the language "because of."[82] Yet, as Charlie observes, it does not appear that "motivating factor" has resulted in heavy reliance on mixed-motives analysis by plaintiffs or yielded significantly more plaintiff successes.[83] Charlie posits several reasons for this nonoccurrence: (1) "motivating factor" is too hard (or unfamiliar) a concept for judges and lawyers; (2) "motivating factor" is not too hard to understand, but too radical; and (3) plaintiffs opt out of urging its application because it invokes the stage two same-decision limitation of

[78] 429 U.S. 274 (1977).

[79] "Initially, in this case, the burden was properly placed upon respondent to show that his conduct was constitutionally protected, and that this conduct was a 'substantial factor' – or to put it in other words, that it was a 'motivating factor.'" *Id.* at 287. The case cited by the *Mt. Healthy* Court used the term "motivating factor." Vill. of Arlington Heights v. Metro. Hous. Develop. Corp., 429 U.S. 252, 270 (1977).

[80] Price Waterhouse v. Hopkins, 490 U.S. 228, 261 ("My disagreement stems from the plurality's conclusions concerning the substantive requirement of causation under the statute . . . .").

[81] Zimmer, *The New Discrimination Law*, *supra* note 42, at 1946 (quoting 137 Cong. Rec. H3944-45 (daily ed. June 5, 1991)).

[82] EEOC v. Abercrombie & Fitch Stores, Inc., 135 S. Ct. 2028, 2032 (2015); Univ. of Tex. Sw. Med. Ctr. v. Nassar, 570 U.S. 338, 349–50 (2013).

[83] Sullivan, *Making Too Much*, *supra* note 19, at 22.

remedies.[84]

I have some reservations about saying that "motivating factor" is an abject failure. I think plaintiffs do survive some motions for summary judgment which they may have lost under the pretext analysis by arguing that all they must prove to defeat summary judgment is that discrimination was a "motivating factor" in the adverse employment actions. Admittedly, the foregoing proposition would be hard to prove. Yet, I, like Charlie, was a "fan" of the motivating factor causation standard that Congress enacted in 1991. Indeed, Mike Zimmer and I argued that *Desert Palace* rendered all disparate treatment cases subject to the motivating factor standard in the mixed-motives analysis.[85] Mike argued that the *McDonnell Douglas* framework remained viable, but had very limited application.[86] I went further and argued that, without a line of demarcation between the two proof structures, such as direct evidence before *Desert Palace*, the pretext framework was no longer viable.[87] Mike lauded the potential of the statutory mixed-motives analysis:

> Under the approach adopted in § 703(m), all of these different types of evidence can help form the basis for a reasonable factfinder to draw the inference of discrimination under the "a motivating factor" standard for establishing liability. Looking at the litigation of individual discrimination cases from the viewpoint of a court determining a motion for summary judgment, the correct approach under § 703(m) closely resembles the approach used in general litigation.[88]

Charlie now regards "motivating factor" as a noble failure. He has persuaded me that Congress's codification of this relaxed standard of causation was a mistake, but perhaps for different reasons. First, the standard, in retrospect, was destined to fail. The Supreme Court, even before *Price Waterhouse*, regarded the employment discrimination statutes as statutory torts. In her *Price Waterhouse* concurrence, Justice O'Connor discussed tort causation standards and the underlying tort case law.[89] "Motivating factor" is not a tort causation standard, and the Supreme Court

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[84] *See* Sullivan, *Making Too Much*, *supra* note 19, at 23, 26, 34.

[85] *See* Zimmer, *The New Discrimination Law*, *supra* note 42, at 1943 (stating that "litigating individual discrimination cases using § 703(m) is feasible for all Title VII individual discrimination cases").

[86] Zimmer, *The New Discrimination Law*, *supra* note 42, at 1940.

[87] *See generally* William R. Corbett, *An Allegory of the Cave and the* Desert Palace, 41 HOUS. L. REV. 1549 (2005).

[88] Zimmer, *The New Discrimination Law*, *supra* note 42, at 1937–38.

[89] Price Waterhouse v. Hopkins, 490 U.S. 228, 264–65 (1989) (O'Connor, J., concurring) (citing Summers v. Tice, 33 Cal.2d 80, 84–87 (1948); Kingston v. Chicago & N.W.R. Co., 191 Wis. 610, 616 (1927); 2 J. WIGMORE, SELECT CASES ON THE LAW OF TORTS § 153 (1912)).

prefers to import tort principles into employment discrimination law.[90] More significantly, however, "motivating factor" anchors the mixed-motives proof framework in the discredited idea that discriminators typically are motivated by discriminatory impulses, suggesting that they are aware of them—that they have a conscious intent to discriminate. This is how the plurality explained "motivating factor" in *Price Waterhouse*.[91] The work of Professor Linda Hamilton Krieger and many scholars who followed her has undermined the idea that most discrimination is the product of conscious motivation.[92] Even if we applaud Congress for attempting to lower the standard of causation in the plaintiff's prima facie case, we should be reluctant to embrace a standard of causation that adopts the discredited motivation-based model of the universe of employment discrimination.

Finally, explorations with Charlie of proof structures and affiliated causation standards lead me to the most overarching exploration in which I have followed him: the Court's inaccurate and harmfully narrow model of the universe of employment discrimination. There are two and only two theories: disparate treatment and disparate impact, and never the two shall meet.[93] First, this seems like an unnecessarily restrictive model of the universe that the Court already has recognized. Why are non-accommodation, harassment, and stereotyping not co-equal theories (or planets)? Professors David Oppenheimer and Stephanie Bornstein have argued that the Court already has recognized theories of discrimination beyond treatment and impact.[94] They further argue that it should recognize broader theories, with Oppenheimer arguing for recognition of negligent discrimination, and Bornstein for reckless discrimination. I, too, have argued that forcing all discrimination cases into a disparate treatment or disparate impact theory with associated proof frameworks does not accurately depict either the actual universe of discrimination or the model that the Court has developed to date.[95]

The research on cognitive and implicit bias suggests that the Court's limited model of the discrimination universe never has been accurate.

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[90] *Cf.* Paul J. Gudel, *Beyond Causation: The Interpretation of Action and the Mixed-Motives Problem in Employment Discrimination Law*, 70 TEX. L. REV. 17, 19 (1991) (discussing the nuances of mixed-motives cases and criticizing the focus on causation and positing that "the concept of such 'factors' is one that has not been, and cannot be, given any coherent sense").

[91] *Id.* at 63.

[92] *See supra* note 23.

[93] EEOC v. Abercrombie & Fitch Stores, Inc., 135 S. Ct. 2028, 2032 (2015).

[94] *See, e.g.*, David Benjamin Oppenheimer, *Negligent Discrimination*, 141 U. PA. L. REV. 899, 967–72 (1993); Bornstein, *supra* note 22, at 1103–07.

[95] *See* Corbett, *Breaking Dichotomies*, *supra* note 27, at 807.

Charlie's article *Employing AI* demonstrates that this disconnect is likely to be exacerbated by the increasing use of artificial intelligence (AI) to make employment decisions. To begin with, a disparate treatment theory requiring proof of a motivating factor seems ill-suited to AI, which lacks motivation. Although disparate impact will capture some cases of discrimination resulting from data mining and algorithms,[96] Charlie, Pauline Kim,[97] Stephanie Bornstein,[98] and others have demonstrated that the current model of disparate impact will not address many of these cases. Charlie concludes *Employing AI* by stating that "[o]ne critical lesson is that the Supreme Court's bifurcation of all discrimination into two theories, is very problematic, at least unless the theories are radically revised."[99]

I have followed Charlie into several parts of the universe of employment discrimination. With his help and guidance, I have tried to make sense of the Court's model, consisting of two theories. Charlie also took me along for an exploration of the dichotomy of proof frameworks and the associated causation standards. Related to this, he led me to explore the tortification of employment discrimination law and helped me understand that the importation of tort principles was not necessarily or inherently detrimental to the model.

As we face the rapid proliferation of use of AI in making employment decisions, the Court's model of the universe of employment discrimination seems increasingly inadequate. We are long past the time when the Court and Congress should be willing to realize that disparate treatment and disparate impact may not be planets, or if their classification as such is to be preserved, then they should develop a view that permits recognition of many more. As fond as I was of Pluto, it had to be deplanetized or new planets had to be recognized. Either approach would change forever our familiar and comfortable model. As complacent as we may have grown with the theories, proof structures, and causation standards, they increasingly do not provide an accurate description of the universe of employment discrimination.

IV. THEORIZING A NEW MODEL

The new model that I have in mind does not jettison all of the concepts that have comprised the old one. A larger and less restricted

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[96] Pauline Kim, *Data-Driven Discrimination at Work*, 58 WM. & MARY L. REV. 857, 890–91 (2017); Solon Barocas & Andrew D. Selbst, *Big Data's Disparate Impact*, 104 CALIF. L. REV. 671, 701–12 (2016).

[97] Kim, *supra* note 96, at 890.

[98] Stephanie Bornstein, *Antidiscriminatory Algorithms*, 70 ALA. L. REV. 519, 567 (2018).

[99] Sullivan, *Employing AI*, *supra* note 13, at 428.

model, however, could be built not on the old planets, but by going back to the statutory language "because of . . ." The Court has limited that terminology in *Gross* and *Nassar* to mean a but-for causation standard, but that was not an obvious or necessary decision. Congress and the Court always have treated the theories, proof frameworks, and causation standards as the foundation on which the model is based. None of that, however, is statutory. In *Employing A1*, Charlie recommended an approach that emanates from the statutory language:

> However, there's a more direct and more textual way to reach the same result without treating Arti [an AI program] as human, although that requires abandoning the Court's bifurcated structure and returning to the text of the statute. The governing language of Title VII (and other antidiscrimination laws) clearly proscribes Arti's use of gender as a selection criterion, and does so entirely without the need for either of the two theories articulated by the Court over the years. The core prohibition of Title VII is § 703, whose two subsections have been viewed as the basis, respectively, of disparate treatment and disparate impact liability. But, entirely apart from the judicial gloss of each subsection, the language of the statute would declare Arti's gender-explicit criterion a violation under both prongs.[100]

Other scholars have recommended that distinct and rigid theories and proof structures are not necessary to prove and analyze employment discrimination claims. In recommending the rejection of the *McDonnell Douglas* pretext structure after the Supreme Court decided *St. Mary's Honor Center v. Hicks*,[101] Professor Deborah Malamud argued that maintaining these special rules for discrimination cases is harmful because it creates the false impression that there are preferential rules for plaintiffs, when in fact the "rules" do not function that way.[102] She concluded that it may be better to let the "cold winds of litigation blow."[103] In a similar vein, Mike Zimmer thought that a principal advantage of the mixed-motives framework was that all evidence could be presented under the "motivating factor" standard rather than being forced into one of the three stages of the pretext analysis.[104] This open-ended approach, he argued, "closely resembles the approach used in general litigation."[105] But as Charlie has shown, "motivating factor" has been used little and has been, to

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100 Sullivan, *Employing AI*, *supra* note 13, at 407.

101 509 U.S. 502 (1993).

102 Deborah C. Malamud, *The Last Minuet: Disparate Treatment After* Hicks, 93 MICH. L. REV. 2229, 2324 (1995).

103 *Id.*

104 Zimmer, *The New Discrimination Law*, *supra* note 42, at 1937–38.

105 Zimmer, *The New Discrimination Law*, *supra* note 42, at 1938.

some extent, a failure.[106]

It is not necessary to deplanetize everything that exists in the current model in order to create a new model. There is, however, a danger in keeping the familiar model and trying to build a more open one on it. For example, the Seventh Circuit in *Ortiz v. Werner Enterprises, Inc.*[107] considered its prior effort to develop a less structured approach to proving discrimination by saying that a plaintiff can present a "convincing mosaic" of evidence of discrimination. This sounds like the approach for which I am advocating. Lower courts and even the Seventh Circuit itself, however, understood this to be a new and additional proof structure, and the court had to circle back in *Ortiz* to explain that it had not intended to create a new test of discrimination.[108] Maintaining the structures of the current model risks creating a new model that remains focused on them.

Going back to the language of the statues and permitting a plaintiff to present the evidence of discrimination without classifying the claim as disparate treatment or disparate impact and funneling all evidence into a proof framework would be a new and simpler model of employment discrimination. It also might capture the variety of forms of discrimination that exist in the universe. The courts' and Congress's tenacious adherence to the familiar model will make such a change difficult.

Realistically, however, I think the Supreme Court and Congress will adhere to the familiar concepts. Indeed, there is now some necessity based on current statutory language to classify cases as disparate treatment or disparate impact. The Civil Rights Act of 1991 incorporates those concepts with meaningful distinction in the statutes in § 1981a, which makes jury trials and compensatory and punitive damages available in cases of "unlawful intentional discrimination," (or disparate treatment cases).[109] Still, less insistence by the Court on the current rigid classification scheme would improve the model. Although the Court did not admit to doing so, it blended concepts from disparate treatment and disparate impact in *Young v. United Parcel Service, Inc.*[110] The Court could expressly recognize other theories of discrimination.[111] Beneath the level of the theories, there is nothing in the statutes that requires that cases be divided into direct and circumstantial evidence cases[112] and then funneled into proof frameworks.

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106 *See supra* text accompanying notes 83–84, 89–92.

107 834 F.3d 760 (7th Cir. 2016).

108 *Ortiz*, 834 F.3d at 764–65.

109 42 U.S.C. § 1981a(1)–(2) (2018).

110 575 U.S. 206 (2015). For discussion of the blending, see generally William R. Corbett, Young v. United Parcel Service, Inc.: McDonnell Douglas *to the Rescue?*, 92 WASH. U. L. REV. 1683 (2015).

111 *See supra* text accompanying notes 94–95.

112 *See Ortiz*, 834 F.3d at 765–66. As discussed above, doing this runs afoul of the

Some courts have recognized that the pretext framework is not a suitable analysis for some cases, and it actually can obscure the real issue in the discrimination claim.[113]

Although any new map of the universe undoubtedly would retain familiar terms, categories, and characterizations, it could be a more fluid and diverse model. The original statutory language will support such a map of the universe. The deplanetization of Pluto should have occurred many years ago in employment discrimination law.

V. EXPLORING AND THEORIZING WITH CHARLIE

I do not know what Charlie may think of my latest idea. He has been a kind and helpful guide in our explorations, although he knows I have gotten off course more than once. I am privileged to have a friend, mentor and guide like Charlie Sullivan. Wherever we go from here in developing models of the universe of employment discrimination, I feel better knowing that Charlie is going before me.

Supreme Court's decision in *Desert Palace*. *See supra* text accompanying notes 44–50.

[113] *See, e.g.*, Smith v. Lockheed-Martin Corp., 644 F.3d 1321, 1328, 1346 n.86 (11th Cir. 2011).