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THE CREEPING ERUPTION OF _MT. HEALTHY_

_Morell E. Mullins†_

INTRODUCTION

_Mt. Healthy City School District Board of Education v. Doyle_¹ began as a rather ordinary dispute between a public high school teacher and his employing school board. In 1971, the school board decided not to renew the teacher's contract, thus denying him both continued employment and tenure. After requesting a statement of the reasons for the board's decision, the teacher received a written reply which referred to his "notable lack of tact in handling professional matters,"² but cited only two grounds for that conclusion: (1) his action in notifying a local radio station about a school board policy for a dress code applicable to teachers; and (2) his use of "obscene gestures to correct students" during an incident in the school cafeteria.³

In federal district court, the teacher was awarded back pay and reinstatement because his exercise of first amendment rights in communicating with a radio station was found to have "played a 'substantial part' in the decision not to renew"⁴ even though the school board at trial had offered additional reasons supporting its original decision.⁵ The Sixth Circuit Court of Appeals affirmed

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2. _Id._ at 283 n.1.
3. _Id._
4. _Id._ at 284 (quoting the district court opinion).
5. _Id._ at 285.
without a published opinion.\(^6\)

After dispensing with threshold issues, the Supreme Court\(^7\) reached the merits of the teacher’s constitutional claim. Although agreeing that the teacher’s communication with the radio station was protected constitutionally, the Court, per a unanimous opinion by Justice Rehnquist, expressed disagreement with the district court’s “substantial part” analysis.\(^8\) The key issue, the Court indicated, was the appropriate standard or “rule of causation” to be employed when a mixture of permissible and constitutionally impermissible reasons had entered into the decisional process of the school board.\(^9\) For a case involving mixed motives, the district court’s “substantial part” test was deemed inadequate as the sole guide for determining whether the protected activity was a “cause” of the board’s determination.\(^10\) Essentially, the Court indicated that a “substantial part” test was too favorable to individuals in the teacher’s position and would require remedies in cases where the decisionmakers’ impermissible consideration of protected activity could not be fairly said to have caused the original personnel decision.\(^11\) Instead, “the proper test to apply in the present context is one which likewise protects against the invasion of constitutional rights without commanding undesirable consequences not necessary to the assurance of those rights.”\(^12\) That test was recited as follows:

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’ in the Board’s decision not to rehire him. Respondent having carried that burden, however, the District Court should have gone on to determine whether the Board had shown by a preponderance of the evidence that it would have reached the same decision as to respondent’s reemployment even in the absence of the protected conduct.\(^13\)

Without any explanation as to how this “test” satisfied the basic

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7. 429 U.S. at 276-81 (e.g., jurisdiction; the school board’s claim of immunity from suit).
8. Id. at 284.
9. Id. at 285-87.
10. Id. at 285-86.
11. Id. at 285.
12. Id. at 287.
13. Id. (emphasis added) (footnote omitted).
criterion announced by the Court, the judgment of the court of appeals was vacated and the case remanded for further proceedings consistent with Mt. Healthy.14

Mt. Healthy, if confined to its immediate subject, would represent simply another in a line of Supreme Court decisions which address the constitutional protections of public school teachers and university professors.15 The decision, however, has become a precedent of more than academic interest.

One natural development has been the extension of this test to other government employees alleging discharge or discrimination because of their exercise of constitutionally protected rights.16 More significantly, the Mt. Healthy test has expanded beyond constitutional borders. The most notable, visible, and controversial extension of the Mt. Healthy test into statutory domains has been its adoption by the National Labor Relations Board in cases arising under section 8(a)(3) of the National Labor Relations Act.17 In Wright Line,18 the National Labor Relations Board announced that it would “examine causality”19 in section 8(a)(3) cases “through an analysis akin to that used by the Supreme Court in Mt. Healthy.”20

14. Id.
16. E.g., Monsanto v. Quinn, Comm'n, Dept. of Fin., 674 F.2d 990 (3d Cir. 1982); Wilson v. Taylor, 658 F.2d 1021 (5th Cir. 1981); Nekolny v. Painter, 653 F.2d 1164 (7th Cir. 1981), cert. denied, 455 U.S. 984 (1982). The gravitational pull of the Mt. Healthy test has even led some members of the Court to suggest its application in another first amendment context, the removal of books from a school library, rather than the removal of teachers from the school. See Board of Educ., Island Trees Union Free School Dist. No. 26 v. Pico, 457 U.S. 853 (1982).
17. 29 U.S.C. § 158(a)(3)(1976). This section of the Act provides, in pertinent part: “(a) It shall be an unfair labor practice for an employer . . . (3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization . . . .”
19. Id.
20. Id. The Board summarized its test in the following language:
First, we shall require that the General Counsel make a prima facie showing sufficient to support the inference that protected conduct was a “motivating factor” in the employer's decision. Once this is established, the burden will shift to the employer to demonstrate that the same action would have taken place even in the absence of the protected conduct. Id. at 1089.
Aside from Wright Line, the Mt. Healthy test has been applied in several cases arising under statutory provisions which prohibit retaliation against an employee who has reported an employer's violations of the law, filed some form of complaint, or testified in administrative or judicial proceedings against an employer. Thus, the influence of the Mt. Healthy test is discernible and growing. Its tendency to extend into cases arising under labor statutes is clear. Indeed, the Mt. Healthy test is a likely candidate for application as the guiding legal principle whenever the motives and reasons behind a particular decision are relevant in determining whether some right has been violated or some duty breached.

Yet, the readiness with which the Mt. Healthy test is being extended to statutory fields is not necessarily attributable to any inherent soundness it may have as a rule of causation. During its creeping eruption from a holding in a relatively obscure case to a principle which is spreading into the territory of labor law, the Mt. Healthy test itself has been rarely subjected to careful examination.

A substantial number of court of appeals decisions in the past three years have cited, and addressed to a greater or lesser extent, the Wright Line/Mt. Healthy analysis of § 8(a)(3) cases. See Zurn Indus., Inc. v. NLRB, 680 F.2d 683 (9th Cir. 1982), cert. denied, 103 S. Ct. 3110 (1983) and cases cited therein at 687 n.9.


on its own merits.\textsuperscript{23} Accordingly, \textit{Mt. Healthy}'s expansive tendencies cannot be explained on the basis of any strengths demonstrated by logic, experience, or rigorous analysis. Its growing acceptance in other contexts, however, becomes more understandable if considered against the background of various problems which have generated a climate in which any authoritative-sounding pronouncement of the Supreme Court regarding questions of motivation and causation would have been influential.

On a general level, inquiry into either motive or causation has long been troublesome for legal systems. This trouble arises because the inner workings of the human mind are not observable and the considerations prompting an individual to act a certain way are seldom a matter purely of conscious calculation. Causation is a problem because any number of factors arguably may have contributed to a particular event. Both are elusive concepts which are difficult to define, much less to apply.\textsuperscript{24} When an adjudicator

\begin{itemize}
\item \textsuperscript{23} Administrative agencies and courts which have adopted the \textit{Mt. Healthy} test for use in statutory contexts have not engaged in any extensive analysis of the merits of the test itself. The soundness of the test seems to have been taken for granted. See, e.g., Wright Line, 251 NLRB 1083 (1980), enforced, 662 F.2d 899 (1st Cir. 1981), cert. denied, 455 U.S. 984 (1982); Marshall v. Commonwealth Aquarium, 469 F. Supp. 690 (D. Mass. 1977), aff'd, 611 F.2d 1 (1st Cir. 1979); Secretary of Labor v. Consolidation Coal Co., 10 F.M.S.H.R.C. 2786, 2 M.S.H.C. (BNA) 1001 (1980); NLRB v. Eastern Smelting & Refining Corp., 598 F.2d 666 (1st Cir. 1979). Among commentators, the expansive tendencies of \textit{Mt. Healthy} have not gone unnoticed. However, most articles dealing with \textit{Mt. Healthy} have been preoccupied with addressing the extension of the \textit{Mt. Healthy} test to particular areas of the law dealing with employment relationships. See, e.g., Brodin, \textit{The Standard of Causation in the Mixed-Motive Title VII Action: A Social Perspective}, 82 COLUM. L. REV. 292, 316 (1982); DuRoss, \textit{Toward Rationality in Discriminatory Discharge Cases: The Impact of Mt. Healthy Board of Education v. Doyle Upon the N.L.R.A.}, 66 GEO. L.J. 1109 (1978); Lane, \textit{The Effect of Mt. Healthy City School District v. Doyle Upon Public Sector Labor Law: An Employer Perspective}, 10 J. OF LAW AND EDUC. 509 (1981); Roth, \textit{The Effect of Mt. Healthy City School District v. Doyle Upon Public Sector Labor Law: A Union Perspective}, 10 J. OF LAW AND EDUC. 517 (1981); Wolley, \textit{What Hath Mt. Healthy Wrought?}, 41 OHIO ST. L.J. 385 (1980). Collectively, such analyses are helpful in forming a body of critical assessment of the \textit{Mt. Healthy} test. Nevertheless, when considered individually, they amount to a series of piece-meal critiques which unavoidably have the flavor of special pleading, no matter how well done or perceptive. Only one commentator engages in a critique of the \textit{Mt. Healthy} test itself. See Note, \textit{Free Speech and Impermissible Motive in the Dismissal of Public Employees}, 89 YALE L.J. 376 (1979).
\item \textsuperscript{24} Perhaps Chief Justice Burger summarized the limitations of the law in dealing with human motivations and decisionmaking as well as any jurist could:

'\['T\]he practical business of government and administration of the law is obliged to proceed on more or less rough and ready judgments based on the assumption that mature and rational persons are in control of their own conduct.'
\end{itemize}
must address not only motivation, but also motivation as a "cause" of some action, the problems inherent in dealing separately with either subject are compounded.  

Cases arising under labor statutes are not immune from these general problems. Indeed, the general problems of assessing motive and causation are more frequently encountered in labor law than in other fields. A substantial number of statutory provisions forbid employers, and unions, from taking actions motivated by statuto-

We are nonetheless cognizant of the fact that this assumption must continually confront the inherent practical obstacle of one person's being unable to know with certainty the content of another's mind.


25. Legal causation, even without the complicating element of motivation as a cause, has generated its own share of scholarly rumination and judicial pragmatism. As one commentator observed,

the word 'cause' is one that the law has borrowed from the layman's terminol-
ygy, and this child of the street, unlike the artificial creatures of our professional vocabulary, simply will not behave. It refuses to submit to any effort at classification and it insists upon spilling itself throughout every area of the controversy.

A cause is not a fact in the sense that its existence can be established merely through the production of testimony. Although evidentiary data must supply the raw material upon which a finding of cause or no-cause will be based, yet something must first be done with this data by the trier, be he judge or juryman. He must refer the facts presented by the testimony to some judging capacity within himself before he can venture the conclusion that a cause exists.

Malone, Ruminations on Cause-In-Fact, 9 STAN. L. REV. 60, 61 (1956)(emphasis added).

The bulk of scholarly groping on causation seems to have been dominated by issues related to physical causes in tort law. E.g., Calabresi, Concerning Cause and the Law of Torts, 43 U. CHI. L. REV. 69 (1975); Green, Duties, Risks, Causation Doctrines, 41 TEX. L. REV. 42 (1962); Green, The Causal Relations Issue in Negligence Law, 60 MICH. L. REV. 543 (1962). Ventures into the problems of the interaction between human motives and causation often deal with specialized considerations. E.g., Ely, Legislative and Administrative Motivation in Constitutional Law, 79 YALE L.J. 1205 (1970); Brest, Palmer v. Thompson: An Approach to the Problem of Unconstitutional Legislative Motive, 1971 SUP. CT. REV. 95. Many ven-
tures have been simplistic, truncated, or misleading. For example, even in one of the leading modern works on causation and the law, the concept of human motivation as the cause of a decision or action has been addressed in terms such as the following:

When it is sought to explain a human act by discovering the reasons for it the actor's evidence of his reasons, if correctly remembered and honestly stated, is conclusive and his statement of the reasons is therefore always admissible ev-
dence. In the absence of such evidence other conduct on the part of the actor may throw light on his reasons, or the court may be able to reach a conclusion on the basis of ordinary knowledge about the usual reasons for acting in a particular way.

rily impermissible reasons. Yet, identical actions, taken for permissible reasons, would not be prohibited.

Apart from the generic problems accompanying any inquiry into motive and causation, there are several complicating elements which, collectively, are peculiar to labor law. First, litigation which turns upon the reasons behind a particular employment decision is typically fact-intensive. If a case is worth litigating, then there are likely to be serious issues of credibility, circumstantial evidence of intention or motive, and a delicate fabric of inferences drawn from the case's facts. The complexity of the factual inquiry itself may have complicated development of coherent legal principles. Second, the sheer number of potentially applicable statutory provisions represents a further complicating element peculiar to labor law. In the area of protecting employees against discriminatory discharge or discipline alone there has been a virtual proliferation of federal statutes in the past twenty years. Each statutory provision has its own substantive language, underlying policies, legislative history, procedural framework and body of decisional precedent. Third, a special need exists to accommodate the interests of employers, who institutionally desire the greatest possible latitude in making workplace decisions, with the sometimes conflicting interests of employees. Under the National Labor Relations Act, for example, an abiding theme of decisional precedents has been the need to balance these interests. Fourth, various statutory provisions, under which motives are a key element in adjudication, have been superimposed upon a doctrinal framework in which motives were, and are, largely irrelevant. Absent either an agreement or a statutory restriction to the contrary, the employment relationship was, and generally remains, terminable at will by either party for

27. See, e.g., Wright Line, 251 N.L.R.B. at 1089-91.
29. E.g., NLRB v. Truck Drivers, Local 449 Int'l Bhd. of Teamsters, 353 U.S. 87, 96 (1957). The Supreme Court notes that the NLRA is "the result of conflict and compromise between strong contending forces and deeply held views on the role of organized labor in the free economic life of the Nation and the appropriate balance to be struck between the uncontrolled power of management and labor to further their respective interests." Carpenters, Local 1976 v. NLRB, 357 U.S. 93, 99-100 (1958).
any or no reason.\textsuperscript{30} A largely unrecognized and unresolved tension between these motive-oriented statutes and at-will concepts has created significant complications in dealing with motive and causation in labor law. Fifth, various agencies and courts incant a bewildering collection of divergent and sometimes contradictory formulas, principles, tests and legal catchwords under different statutes and situations. Among these formulas and phrases are “real cause”\textsuperscript{31} “real motive,”\textsuperscript{32} “substantial reason,”\textsuperscript{33} “motivated in part,”\textsuperscript{34} “but for,”\textsuperscript{35} “significant factor,”\textsuperscript{36} “the substantial, contributing factor,”\textsuperscript{37} “reasonably equal,”\textsuperscript{38} and “dominant motive.”\textsuperscript{39} Such an assortment of formulas speaks for itself as a source, and evidence, of complication and confusion in adjudications turning upon the motives behind a particular employment action.

Given this background, it is hardly surprising that the \textit{Mt. Healthy} test has displayed strong expansive tendencies. If nothing else, it is prevailing and expanding almost by default. The long-

\begin{footnotes}
\item[30] E.g., \textit{Restatement (Second) of Agency}, § 442 (1958); 9 S. Williston, \textit{Contracts}, § 1017 (3d ed., 1967); H. Wood, \textit{Master and Servant}, § 134 (1877); Annot., 62 A.L.R. 3d 271 (1975) (employer's arbitrary dismissal as breach of employment contract terminable at will). Under such an “at-will” regime, the motives for an employer's actions are immaterial. This doctrine, however, is eroding. See Peck, \textit{Unjust Discharges from Employment: A Necessary Change in the Law}, 40 Ohio St. L. J. (1979). An employer generally can impose new terms and conditions upon at-will employment, or discharge any at-will employee, without having to explain the reasons to any one. Historically, even when agreement for a definite term of employment could be established the reasons or motives behind an employer's decision were largely immaterial. As one nineteenth-century treatise put it: “The simple question is \textit{whether a legal cause existed for \ldots discharge} \ldots \textit{If a good ground for the servant's discharge exists at the time of his discharge, it is sufficient, although the cause was not at that time known to the master.” H. Wood, § 119, at 228 (emphasis in original). Under such common law doctrines, the result was, and in the absence of statute remains, a system whereby the terms and conditions of employment can be imposed more or less unilaterally by the stronger party, typically the employer.


\item[32] Edgewood Nursing Center, Inc. v. NLRB, 581 F.2d 363, 368 (3d Cir. 1978).


\item[34] The Youngstown Osteopathic Hosp. Assoc., 224 N.L.R.B. 574, 575 (1976).


\item[36] Whiting v. Jackson State Univ., 616 F.2d 116, 121 (5th Cir. 1980) (Title VII).


\item[38] NLRB v. Aero Corp., 581 F.2d 511, 514-15 (5th Cir. 1978).

\item[39] NLRB v. Fibers Int'l Corp., 439 F.2d 1311, 1312 (1st Cir. 1971).
\end{footnotes}
standing problems of dealing with motivation and causation in general, the disarray of labor law principles and precedents in particular, and the apparent absence of satisfactory alternatives, have all combined to create a climate favorable to some over-arching "test" or "rule." By appearing to address head-on the difficult issues associated with adjudicative inquiry into motive and causation, and by reducing those issues to a concise verbal formula, the Mt. Healthy test offers such a rule. The mere availability of the Mt. Healthy test is a strong incentive to its adoption in labor law cases.

Nevertheless, an uncritical extension of Mt. Healthy's test beyond its original setting is not necessarily justified. More is needed than passive acceptance of an available formula. Certainly, Mt. Healthy itself offers little in the way of affirmative reasons for the test which it concocted. The primary focus of Mt. Healthy is upon the reasons for rejecting the "substantial part" approach used by the district court. The Court's rationale for the test itself is remarkably sparse. The opinion cites and describes with cryptic brevity only some very questionable analogues drawn from criminal law precedents involving the admissibility of confessions or evidence after the original "taint" of the government's constitutional or statutory violation had been dissipated by subsequent events, often the voluntary actions of the defendant himself. The Court even concedes that "the type of causation on which the taint cases turn may differ somewhat from that which we apply here," and that the cited precedents do no more than "suggest . . . the proper test to apply."

Thus, the very foundation for the Mt. Healthy test seems shaky, and precedents cited for the test have little or nothing to do with the analysis of decisionmakers' motives for a particular action. At any rate, before the Mt. Healthy test expands further and becomes more deeply entrenched, there seems to be some need for a more deliberate and critical examination of the test and of the soundness of extending it beyond its original boundaries.

Accordingly, this Article examines some potential flaws in the

40. 429 U.S. at 284-87.
41. Id. at 286-87.
42. Id. at 287. See Note, supra note 23, at 384-85, for a succinct critique of the precedential analogues used in Mt. Healthy.
Mt. Healthy test and questions some of the assumptions implicit in the test. Next, this Article considers whether there are elements peculiar to the facts in Mt. Healthy which, arguendo, justify the test in terms of its immediate setting, but contraindicate its extension elsewhere. This Article then focuses as a kind of case study, upon the results which have followed in the wake of extending the Mt. Healthy test into one important statutory area—cases involving discrimination prohibited by section 8(a)(3) of the National Labor Relations Act. Finally, this Article addresses the question of whether any “test” to determine causation and motive in the context of labor law can be effectively developed before the basic problems of the conceptual tension between common law employer prerogatives and the more recent, motive-oriented statutory restrictions upon those prerogatives is recognized and confronted.

I. MOUNT HEALTHY’S FLAWS

The soundness of extending the Mt. Healthy test or rule of causation to other settings, particularly to statutory systems regulating the private employment relationship, depends in the first instance upon the soundness of the Mt. Healthy test itself. The Mt. Healthy test is supposed to protect individuals “against the invasion of [their] rights without commanding undesirable consequences not necessary to the assurance of those rights.”[43] Under Mt. Healthy’s own standard, there is some doubt regarding both the degree of protection afforded by the test to individuals and the lack of undesirable consequences which may flow from the application of that test. When the Mt. Healthy test is scrutinized carefully, serious questions arise concerning exactly what the test means, how it should be applied, and whether it is based on valid assumptions about causation and human decisionmaking.

For example, one possible flaw in the test itself is an element of either self-contradiction or confusing use of language. A plaintiff must first establish that his protected conduct was a “substantial” or “motivating” factor in the original decision.[44] These words themselves are not without ambiguity, but ordinarily they would connote some element which influenced the outcome of the original

43. 429 U.S. at 287.
44. Id.
If "substantial" and "motivating" are being used in this sense, then the Mt. Healthy test quite literally says that something can be a "substantial" or "motivating" factor influencing the outcome of the original decision, yet still not be "substantial" enough to have made a difference in the outcome of the decision, that is, the "same decision" would have been made in the absence of that factor.

If, however, the Mt Healthy test uses the words "substantial" or "motivating" in the sense of factors which influenced the decisionmaker(s) subjectively, but did not influence the actual outcome of the original decision, then Mt. Healthy avoids self-contradiction. Construed in this fashion, "substantial" or "motivating" factor indicates a consideration which may have reinforced other factors under deliberation, but which was only of cumulative effect on the outcome. One passage in Mt. Healthy does intimate that the terms have this meaning. There, the opinion speaks of the decisionmakers' being made "more certain of the correctness of [the] decision" because the protected conduct was considered. But a single passage is insufficient to resolve ambiguity in key terms describing the plaintiff's burden (which cannot be totally separated from the burden which shifts to the defendant) or to reconcile a conceptual conflict lurking in a two-phased test which seems to contemplate that something can be "substantial" in one phase and so insubstantial in the second phase that it did not affect the outcome of the decision.

45. For example, "substantial" is defined as "not illusive; real; true; . . . important, essential, material." *Webster's New International Dictionary, Unabridged* 2514 (2d ed. 1961). "Motivate" is defined as "to move, impel, induce, incite." Id. at 1599.

46. 429 U.S. 286 (footnote omitted) (emphasis added).

47. This conflict is illustrated by looking at the Mt. Healthy test in non-verbal terms. When reduced to purely algebraic symbols the resulting sets of equations do not balance. If A, B, and C represent all the identified "substantial" or "motivating" factors which were considered in making the original decision, and R represents the decision, the first phase of the Mt. Healthy test generates the equation \( A + B + C = R \). However, the second phase of the test says it is also possible that \( A + B - C = R \). Hence, Mt. Healthy seems to say that \( A + B + C = A + B - C \), which is impossible, unless \( C = 0 \). Yet C has already been defined as a "substantial" or "motivating" factor in the original decision. One answer to this particular conundrum is that human decisionmaking is not the mere arithmetic sum of mechanically discrete factors. Yet, the Mt. Healthy test seems to embody just such a mechanistic and simplistic view of human decisionmaking. Mt. Healthy assumes that the mere mechanical subtraction of one "substantial" or "motivating" factor from the original decisionmaking process, coupled with theorizing about what would have happened in the absence of that
Perhaps the single most troublesome feature of the *Mt. Healthy* test is its assumption that an inquiry into whether a decisionmaker "would have reached the same decision . . . even in the absence of the protected conduct" will yield reliable results when causation is a matter of the reasons behind the decision. Nowhere in *Mt. Healthy* is there any explanation of how or why this "same decision" test is probative of causation. Nevertheless, remedies for violations of important constitutional rights, and now of statutory rights, depend upon whether this concept is a valid touchstone.

*Mt. Healthy* tells the adjudicator to disregard one of the factors which entered into the original decision and then determine whether the same decision would have been made in the absence of that factor. If the same decision would have been made, then that factor was not a sufficient "cause" of the original decision for any legal consequences to be justified. If not examined carefully, this proposition has a certain superficial logic. After all, it has overtones of the scientific method. For example, in conducting an experiment to determine the effects of a particular factor upon some observable result, the experimenter establishes a set of conditions with only one variable. In conducting the experiment, if the results are different when the variable is absent, the difference may well be attributable to the variable. If the results are the same, the variable does not have a causative effect. This, then, seems to be the kind of thinking which underlies the "same decision" phase of the *Mt. Healthy* test.

Thus, *Mt. Healthy* seems to be based upon a "scientific" model. Unfortunately, when human decisionmaking is later challenged in litigation, there are no controlled laboratory conditions, no systematic elimination of other variables, and no way to replicate the "ex-

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48. 429 U.S. at 287.

49. The *Mt. Healthy* test thus embarks adjudicators upon a hypothetical excursion into something which did not happen. A fictional test is superimposed upon real people and real events. Literally, *Mt. Healthy* tells adjudicators to ignore something which was a "substantial" or "motivating" factor underlying a decisionmaker's action and then to decide whether the "same decision" would have resulted. Legal consequences, rights, and remedies thereby turn on ignoring something which did happen, examining a state of facts which never existed, and adjudicating in the subjunctive. Although hypothetical inquiries are not unprecedented in the law, it would seem difficult enough in the first instance to establish the factors which *did* influence the original decision, without the added problem of attempting to figure out what would have happened in the absence of one of those factors.
periment” to test its validity. There is also a missing condition precedent to the validity of such an adjudicative “experiment.” All other factors have not necessarily remained the same in the interim. The mental processes of recollection in the adversary setting of litigation are simply not the mental processes which occurred in the original decisionmaking. With the lapse of time, the factors which initially influenced the decisionmakers may take on a different coloration, to say the least, when the decisionmakers are testifying as to their reasons for the original decision. In a real sense, the factors motivating the decision at the time it was made are seldom, if ever, going to be identical to subsequent justifications offered in litigation, given human fallibility and the pressures of adversary procedures. The conditions during litigation are simply not the same as the conditions which existed at the time of the original decision.

One need go no further than Mt. Healthy itself for some verification of the above proposition. In Mt. Healthy, the original response giving the reasons for nonrenewal, a response which was written after consultation with the school board members consisted of a generalization followed by the recital of two incidents. During the litigation more reasons—and other adverse information concerning the teacher—were recited. Whether the “factors” considered originally by the school board changed or not, the reasons given for the decision were certainly different at two different times. Nevertheless, the test in Mt. Healthy pretends that

50. The Supreme Court recognized that “[a]s time passes memories fade and a person’s perception of his earlier intention may change.” Consumer Prod. Safety Comm. v. GTE Sylvania, 447 U.S. 102, 118 n.13 (1980).
52. 429 U.S. at 281-82. Other incidents included the teacher’s refusal to accept the apology of a fellow teacher who had slapped him; an argument in the school cafeteria over the amount of spaghetti served to him; and his reference to certain students as “sons of bitches.” Id. at 283.
53. As one researcher concerned with the psychology of human motivation and decision-making has concluded, even individuals who strive to make an objective decision in the first instance are not necessarily so objective after the decision is made. “Once the decision is made and the person committed to a given course of action, the psychological situation changes decisively. There is less emphasis on objectivity and there is more partiality and bias in the way in which the person views and evaluates the alternatives . . . .” B. Weiner, Theories of Motivation: From Mechanism to Cognition, 298 n.133 (emphasis added) (quoting C. Festinger, Conflict, Decision, and Dissonance 155 (1964)).
human decisionmaking is a simple enough process that one factor in the original decision-making process can be eliminated and its causal effects then established by an inquiry into whether the same decision would have resulted in the absence of that factor.

A related, but more severe flaw in the *Mt. Healthy* conceptualism is the manner in which the "same decision" phase of the test shifts adjudicative attention away from the alleged wrong. The question addressed by the "same decision" phase of the *Mt. Healthy* test is whether a violation of constitutional rights can be fairly said to have "caused" the harm alleged. The answer in *Mt. Healthy*, however, is found by an inquiry into whether, by a preponderance of the evidence, the perpetrator of the constitutional wrong "would" have reached the same decision in the absence of the protected conduct. By eliminating the protected activity from a key stage of the causal analysis, the adjudicative focus is shifted by a sleight of hand to the unprotected conduct and the permissible reasons for the original decision.

When adjudicative focus is directed solely toward unprotected conduct and permissible reasons for the original decision, the adjudicator embarks upon a course which leads toward upholding the original decision. If the impermissible consideration which influenced the original decision is ignored, the permissible considerations, standing alone and out of proper context, will inevitably tend to support the original decision. For a test which is supposed to be a "rule of causation," *Mt. Healthy*’s subtle shift of emphasis away from the alleged wrong and its causative effects, to a focus entirely upon the reasons supporting the original decision, does not stand up under scrutiny. Ignoring the very causal factor (the protected conduct) which is at issue seems unlikely to produce a reliable rule of causation. Considered in isolation from the protected conduct, the permissible reasons for the original decision take on a life of their own, and any reasons which are not patently specious or pretextual are likely to be convincing. This will tilt the adjudicator toward finding the "same decision" would have resulted.

In addition, this shift of focus to permissible reasons and unprotected conduct skews adjudication toward evaluating the mer-

54. 429 U.S. at 286.
55. Id. at 287.
56. Id. at 285.
its—and demerits—of the individual whose rights have been violated, and considering whether the action taken by the original decisionmaker was justifiable or warranted. As one leading study of causation and the law has recognized, a hypothetical inquiry into what "would" have happened tends to become an evaluation of what "ought" to have happened. The hypothetical inquiry thus becomes entangled with considering accepted standards of behavior, rather than purely a matter of determining what truly "would" have happened. At best, asking whether the same decision would have been reached in the absence of protected conduct leads an adjudicator to consider whether some hypothetical "reasonable person" would have made the same decision based upon an evaluation of the victim's character and conduct. At worst, the question posed by the Mt. Healthy test leads an adjudicator to subjectively place himself in the shoes of the original decisionmaker and to personally assess the "case" against the individual seeking redress.

Admittedly, some degree of attention to the merits of the individual is unavoidable, at least subliminally, under any test. The issue, however, is not supposed to be whether the individual got what he deserved because of his other non-protected conduct. Rather, the issue is whether the decisionmakers' consideration of the protected conduct can be fairly said to have caused the harm suffered by the individual. Mt. Healthy, again, virtually invites adjudicative inquiry to proceed in a direction farther away from actual causation. The emphasis of the inquiry shifts to the strength of the justifications for the original decision. Part of the justification for the original decision normally will be other, non-protected conduct of the complaining party.

The "same decision" phrase of the Mt. Healthy test is analytically unsound because it concentrates adjudicative attention on everything except the constitutional violation and its actual effects. Moreover, this shift of emphasis is so subtle that adjudicators may fail to realize they are being led to uphold the original decision, not because the same decision truly "would" have been reached, but because the adjudicators themselves would have made the same decision. Ultimately, the Mt. Healthy test has a strong potential

57. Id. at 281-83.
58. See H. Hart & A. Honore, supra note 25, at 368.
59. Id.
for being deferential to decisionmakers.  

II. DISTINGUISHING FEATURES OF Mt. Healthy

Even if the Mt. Healthy "rule of causation" were above reproach, the soundness of extending this test to the highly statutory realm of labor law in the private sector remains to be seen. Admittedly, superficial similarities exist between the facts of Mt. Healthy and the facts commonly encountered in resolving claims which arise under labor statutes prohibiting the discriminatory discharge or discipline of employees. Nevertheless, crucial differences exist between the situation of a public school teacher and his putative counterpart in the private sector.

At issue in Mt. Healthy were the rights of public employees, who under the first amendment have always been subject to a different standard than that applied to other members of the public. Public employees quite simply have never been as free as other citizens to criticize their employing public officials and sow disension. In 1968, the Supreme Court explicitly recognized in Pickering v. Board of Education the need "to arrive at a balance between interests of the teacher, as a citizen, in commenting upon matters of public concern, and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees." A test or rule deferential to governmental decisionmakers in Mt. Healthy is not only consistent with such language, but also, when considered in broader perspective, is consistent with whole lines of other precedents regarding the

60. One commentator has criticized the "same decision" phase of the Mt. Healthy test as "pro-defendant" and overly deferential to governmental decisionmakers in the area of personnel decisions involving public employees. See Note, supra note 23, at 377-78, 394. Certainly, a test which allows the government to escape liability, even though one "substantial" or "motivating" factor in a personnel decision was the employee's constitutionally protected activity, can hardly be characterized as strongly "pro-plaintiff." At any rate, the Mt. Healthy test is more favorable to the government than the standard used by some federal courts prior to Mt. Healthy—basically the "substantial part" test used by the district court in Mt. Healthy. See Lane, supra note 23, at 512 n.12 and cases cited therein.

61. These superficial similarities include, of course, such elements as the existence of a protected right, the exercise of that right by an employee, action adverse to the employee, and a dispute about the reasons behind that action.


63. Id. at 568 (emphasis added).
constitutional rights of public employees64 and even the very power of Congress to intrude into the public employment relationship.

In one of the few contemporary decisions to invalidate federal legislation on the grounds that Congress had exceeded its plenary power to regulate interstate commerce, special sensitivity was expressed about intrusions into personnel matters involving state and local governments. National League of Cities v. Usery,65 denied to Congress the power, under the commerce clause,66 to impose minimum wage and overtime pay standards upon state and local governments as employers. The Usery Court gave the following reasons to support this holding:

[These federal statutes] impermissibly interfere with the integral governmental functions of those bodies. . . . If Congress may withdraw from the States the authority to make those fundamental employment decisions upon which their systems for performance of these functions must rest, we think there would be little left of the States' 'separate and independent existence.' . . . Congress has sought to wield its power in a fashion that would impair the States' 'ability to function effectively in federal system.' This exercise of congressional authority does not comport with the federal system of government embodied in the Constitution.67

The renewal of teachers' contracts are archetypal instances of "integral" state and local governmental functions. Indeed, the Court has been more sensitive about its own intrusions into local public schools than it has been about Congressional efforts to establish minimum wage and overtime standards for rank and file government employees. Even at the zenith of decisions which could be regarded as overly intrusive, the Court has continually maintained that as a general matter, "public education in our Nation is committed to the control of state and local authorities," and that

64. For example, in Bishop v. Wood, 426 U.S. 341 (1976), the Supreme Court not only gave a strained reading to a local ordinance which on its face seemed to contemplate some form of tenure for police officers, but also emphasized that the ultimate control of state personnel relationships is, and will remain, with the States; they may grant or withhold tenure at their unfettered discretion. In this case, whether we accept or reject the construction of the ordinance adopted by the two lower courts, the power to change or clarify that ordinance will remain in the hands of the City Council of the city of Marion. Id. at 349-50 n.14 (emphasis added).
67. 426 U.S. at 851-52 (emphasis added) (citations omitted).
federal courts should not normally "intervene in the resolution of conflicts which arise in the daily operation of school systems." 68

Judicial intervention in local school decisionmaking should be reserved, the Court has said, for situations in which "basic constitutional values" are "directly and sharply implicate[d]." 69 Accordingly, it is unsurprising that in Mt. Healthy, which involved free speech exercise about a teacher dress code, a subject hardly going to the "core" of the first amendment, that the Supreme Court gravitated toward accepting a "test" or rule of causation which was rather deferential to the governmental decisionmakers. 70 But this complex fabric of constitutional principles which form a backdrop for the Mt. Healthy test does not exist in the private employment context. Rather, intrusion into private employment relationships by Congress and state legislatures are more the norm. A substantial number of legislative provisions impose various requirements on a private employer. Thus, in public employment, judicial interference with governmental decisionmaking is made only for the sake of preserving fundamental constitutional rights. In private employment, by contrast, governmental interference with private decisionmaking is based upon statutes and the courts are obliged to interfere to uphold these statutory rules. To take a test or rule of causation which is firmly embedded in, and perhaps justified by, considerations of preventing unnecessary judicial ventures into overturning the actions of governmental bodies and transpose it wholesale to private employment relationships is to ignore an entire subset of the precedents and constitutional policies which explain the Mt. Healthy test in its own special setting.


69. Id. (emphasis added).

70. That concern about judicial intrusion into the decisions of local government bodies played some role in formulating the Mt. Healthy test is further demonstrated by language in the quasi-companion case of Village of Arlington Heights v. Metropolitan Hous. Dev. Corp., 429 U.S. 252 (1977), a passage which was explicitly referenced in Mt. Healthy itself:

Proof that the decision by the Village was motivated in part by a racially discriminatory purpose would not necessarily have required invalidation of the challenged decision. Such proof would, however, have shifted to the Village the burden of establishing that the same decision would have resulted even had the impermissible purpose not been considered. If this were established, the complaining party in a case of this kind no longer fairly could attribute the injury complained of to improper consideration of a discriminatory purpose. In such circumstances, there would be no justification for judicial interference with the challenged decision. Id. at 270-71 n.21 (emphasis added).
Besides these policy differences, there are fundamental factual differences between the *Mt. Healthy* situation and private employment. The more carefully these differences are examined, the more they begin to multiply. If nothing else, the type of employment at issue in *Mt. Healthy* was a particularly sensitive position of trust and professionalism. The special nature of public schools, and the role of the public school teacher have few, if any, analogues to rank and file employees in the private workplace. Public school teachers are involved in preparing the next generation of citizens and leaders. As *Mt. Healthy* itself implies, a mere ability to impart information is necessary, but not sufficient, to guarantee fitness as a teacher.

The wholesale, uncritical extension of the *Mt. Healthy* test to private employment relationships, however, would take a potentially deferential rule of causation out of its original context and elevate it to a much more generalized status than may be warranted. The special employment interests at issue in *Mt. Healthy* were a particularly sensitive position of trust and professionalism. The special nature of public schools, and the role of the public school teacher have few, if any, analogues to rank and file employees in the private workplace. Public school teachers are involved in preparing the next generation of citizens and leaders.

As *Mt. Healthy* itself implies, a mere ability to impart information is necessary, but not sufficient, to guarantee fitness as a teacher.

The reinstatement of an individual discharged by a private employer in violation of some statutory prohibition, however, will seldom make such a legal change in employment status.

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71. Public schools have a mission to perform. That mission is entrusted primarily to teachers who operate within the framework of a politicized system which is accountable to the public. A "rule of causation" must give appropriate deference, in this setting, to decisionmakers who must evaluate the fitness of a teacher who daily transmits not only information, but also values and attitudes, to impressionable children and immature adolescents. An employment decision regarding a public school teacher, therefore, involves a very special set of qualifications and considerations. Accordingly, it might be appropriate in such a context to give decisionmakers ample opportunity to demonstrate justifications for refusal to re-employ a public school teacher, even to the extent of being less strict about the actual causative role of the teacher's protected activity in the original decision.

72. Another important distinguishing feature in *Mt. Healthy* is the tenure which would have resulted from renewal of the teacher's contract. The Supreme Court emphasized that "[t]he long-term consequences of an award of tenure are of great moment both to the employee and the employer. They are too significant for us to hold that the Board in this case would be precluded . . . from attempting to prove . . . that he would not have been rehired in any event." 429 U.S. at 286 (emphasis added).

Even if this represents an exaggerated view of tenure protection, one cannot deny that the renewal of the teacher's contract in *Mt. Healthy* would have altered the legal nature of the employment relationship between the teacher and the school system. The district court in its order flatly stated that "[t]he plaintiff is entitled to reinstatement with back pay and, upon acceptance of reinstatement at the earliest possible time, will be entitled to tenure on the same basis as if he had been employed by the defendant Board during the interim." Appendix to petition for certiorari, at 28-29, *Mt. Healthy*, 429 U.S. 274 (1977). The grant of tenure which would have accompanied reinstatement in *Mt. Healthy* was clearly one of the "undesirable consequences" which the resulting test was designed to obviate. 429 U.S. at 287.

The reinstatement of an individual discharged by a private employer in violation of some statutory prohibition, however, will seldom make such a legal change in employment status.
cannot be equated with the much more generalized economic interests of a private employer in efficiency and productivity. Superimposing the *Mt. Healthy* test upon the entire spectrum of private employment relationships governed by various statutory provisions disregards crucial differences between private employers and school boards.

### III. The Extension of *Mt. Healthy*'s Rule of Causation to Cases Arising Under Section 8(a) (3) of the National Labor Relations Act: An Object Lesson

#### A. Introduction

Some of the problems attendant upon extending *Mt. Healthy*'s "test" into statutory systems are amply demonstrated by the situation which developed after the *Mt. Healthy* test was superimposed on cases arising under section 8(a)(3) of the National Labor Relations Act. In pertinent part, section 8(a)(3) provides: "(a) It shall be unfair labor practice for an employer . . . (3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization."  

The precise meaning and application of section 8(a)(3) has long been troublesome. The broad language of this provision covers many possible factual situations and the number of cases which it generates is nothing short of staggering. By the same token, the importance of its prohibitions in protecting the statutory rights of

With the possible exception of reinstatement of a formerly probationary employee, the employee in the private employment relationship is reinstated simply to the status quo. The "undesirable consequences" of a fundamental change in the nature of the employment relationship upon reinstatement is clearly lacking when the employee is simply reinstated to the same employment status from which he had been discharged.

In short, if reinstatement of a private employee does not result in a fundamental change in the legal nature of the employment relationship, a very important underpinning of the *Mt. Healthy* test is eliminated. The emphasis given in *Mt. Healthy* to the collateral result of tenure cannot be ignored. Where reinstatement does not result in a change analogous to creating a tenured job, a significant factor supporting the extension of the *Mt. Healthy* test immediately dissipates because the collateral "consequence" of tenure is missing.


employees under the Act, and its crucial role in fulfilling the policies of the Act, have made section 8(a)(3) a virtual battlefield for the contending forces of organized labor and management during the past forty years.

Collectively, the single most important subset of cases arising under section 8(a)(3) involves charges made by employees alleging that their union activity or adherence led to their discharge or to some form of adverse employment action. In these cases, some evidence of prohibited motive is necessary in order to establish a violation of section 8(a)(3). As one court of appeals observed, however, "[r]arely, if ever, does an employer admit that an employee has been discharged for participation in union activities. Discrimination must, therefore, usually be proved by circumstantial evidence, and properly so." In these fact-intensive cases, which turn on inferences drawn from circumstantial evidence, legal doctrines must be carefully attuned to reality. On one hand, an adjudicative approach which allows union supporters to be discharged or disciplined merely on the basis of any colorable showing of nonprohibited reasons behind the adverse action defeats the purpose of section 8(a)(3), and the larger policies embodied in the National Labor Relations Act. The "protection by law of the right of employees to organize and bargain collectively" cannot be accomplished if adjudication is skewed collectively into denying a remedy in thousands of cases where these protected rights were exercised. The "full freedom of association" and the "friendly adjustment of industrial disputes" is hardly furthered if employers, collectively, may evade the limited liability of an employee's reinstatement and back pay with relative impunity, merely by pointing to some colorable grounds for a discharge or disciplinary action.

On the other hand, the legitimate interests of employers, and employees themselves, in a productive, efficient workforce cannot be denied. In section 10(c) of the National Labor Relations Act, which denies reinstatement or back pay to an employee who was "suspended or discharged for cause," Congress itself has indi-
cated that evenhanded treatment of disruptive, unproductive employees should not be defeated solely because they were union adherents. The need for an adjudicative approach which achieves a proper accommodation between these competing sets of interests, neither of which is absolute, is self-evident.

B. The Wright Line Decision

In 1980, after some prodding by the First Circuit Court of Appeals, the National Labor Relations Board reassessed in Wright Line its prior “tests” of causation in section 8(a)(3) discharge and discrimination cases. The Board’s existing “in part” test had been criticized, in some quarters, as being too favorable to the rights of employees. This “in part” test provided that if a discharge was motivated “in part” by the protected activities of the employee, then the discharge violated section 8(a)(3), even if valid reasons for the discharge also were offered. After a thorough canvassing of the Board’s own inconsistent formulations of this particular test, and of the various “tests” recited by various courts of appeals, the Board concluded, at no risk of understatement, that “disagreement and controversy are rampant among the various decision-making bodies.” The Board, therefore, announced it would henceforth “examine causality” in cases where an employer’s motive was at issue under section 8(a)(3) “through an analysis akin to that used by the Supreme Court in Mt. Healthy.” Although the Board did not engage in any critique of the soundness of the Mt. Healthy rule as an adequate test of causation, it did consider whether the Mt. Healthy test was compatible with the statutory

80. E.g., NLRB v. Eastern Smelting & Refining Corp., 598 F.2d 666, 671 (1st Cir. 1979).
81. Wright Line, 251 N. L. R. B. 1083 (1980), enforced, 662 F.2d 299 (1st Cir. 1981), cert. denied, 455 U.S. 989 (1982). It should be noted that the Board also stated that it would apply its new Wright Line test to charges of discriminatory treatment arising under § 8(a)(1) of the N.L.R.A., which is not limited to adverse action motivated by an employee’s union activity, but includes a wide range of protected conduct sounding in concerted activity of employees. 29 U.S.C. § 158(a)(1). For purposes of this Article, there is no real need to distinguish between cases under §§ 8(a)(1) and 8(a)(3). Points made with regard to § 8(a)(3) apply with equal, and sometimes greater, force to § 8(a)(1) cases.
82. Id. at 1084.
83. Id.
84. Id. at 1084-86.
85. Id. at 1086.
86. Id. at 1083 (emphasis added).
and precedential framework of section 8(a)(3). Indeed, the Board observed that the differences between what it actually had been doing and the test which it was adopting in Wright Line were not substantial: "while the Board's process has not been couched in the language of Mt. Healthy, the two methods are essentially the same." The Board explained that its decisional process traditionally involved an initial "inquiry as to whether protected activities played a role in the employer's decision. If so, the inquiry then focuses on whether an 'legitimate business reason' asserted by the employer is sufficiently proven to be the cause of the discipline to negate the General Counsel's showing of prohibited motivation."

The Board made it clear that it was doing more than superimposing all elements of Mt. Healthy upon section 8(a)(3) cases. As mentioned earlier, the Board said that it was adopting "an analysis akin" to the analysis used in Mt. Healthy. Moreover, the Board stressed the procedural aspects of its new method of analysis: "[T]he employer is provided with a formal framework within which to establish its asserted legitimate justification," and the "[a]doption of the Mt. Healthy test, with its more precise and formalized framework for making this analysis, [of causation] will serve to provide the necessary clarification of our decisional processes." According to the Board, therefore, the methodology of the Mt. Healthy test was its most attractive feature.

C. The Incoherent Wake of Wright Line/Mt. Healthy in the Courts of Appeals

Fragmentation and confusion in this area began with the judicial review of Wright Line itself. The First Circuit Court of Appeals had been touting the Mt. Healthy test and had appeared to have already adopted it in section 8(a)(3) cases, shifting burden of proof and all. Nevertheless, when Wright Line was challenged in that court by the employer, the First Circuit began to immediately back-pedal. The precise point of disagreement with the Board went to the nature of the burden which the employer confronted

87. Id. at 1088.
88. Id.
89. Id. at 1083 (emphasis added).
90. Id. (emphasis added).
91. NLRB v. Eastern Smelting & Refining Corp., 598 F.2d 666, 671 (1st Cir. 1979).
after the General Counsel established that protected conduct was a "motivating factor" in the employer's decision. The Board had stated that the "burden will shift to the employer to demonstrate that the same action would have taken place even in the absence of the protected conduct." Suddenly dissatisfied with its own creation, a First Circuit panel determined that, under the National Labor Relations Act, the "burden of proof" could never shift to the employer: "[W]e think the only burden which may be acceptably placed on the employer is a 'burden of production,' that is, a burden of coming forward with credible evidence to rebut or meet the general counsel's prima facie case." Or, "put another way, the general counsel's initial prima facie showing creates a kind of presumption that an unfair labor practice has been committed. At this point, the employer risks losing his case unless he rebuts the presumption with evidence of his own."

The First Circuit also began to find differences between the factual situation of Mt. Healthy and "most labor cases." The court claimed that "[i]n Mt. Healthy, the employer conceded that he had fired the employee for speech activity which was later found to be fully protected under the first amendment." Because a violation had been established by the "employer's own admission . . ., [t]he employer's claim, then, was a true affirmative defense to a rehiring order—that is, the employer contended that notwithstanding his violation of the Constitution, reinstatement was improper as a remedy." Although the court characterized this difference as "critical," the difference, said the court, "does not affect the substantive utility of the 'but for' analysis there employed, but does affect the nature of the employer's burden." Thus, a "critical" difference between the situation in Mt. Healthy and the situation in "most labor cases" was recognized in one breath and minimized in the next. That difference, rather conve-

93. Wright Line, 251 N.L.R.B. at 1089.
94. NLRB v. Wright Line, 662 F.2d at 904.
95. Id. at 905.
96. Id. at 906.
97. Id. (emphasis added).
98. Id.
99. Id.
100. Id.
101. Id.
niently, went only to reducing the employer's "burden" in section 8(a)(3) cases.\textsuperscript{102}

Although the First Circuit Court of Appeals in \textit{Wright Line} recognized that "labels concerning burdens of 'persuasion' and 'production' are not, as a practical matter likely to be very important in most of these cases,"\textsuperscript{103} the first symptom of the problems of superimposing \textit{Mt. Healthy}'s test upon a statutory system had already appeared. That symptom begins as not much more than a semantic quibble, but it reflects deeper flaws in an uncritical extension of the \textit{Mt. Healthy} test beyond its original setting.

First, \textit{Mt. Healthy} does indeed involve a question of an affirmative defense to an established violation. The constitutional violation in \textit{Mt. Healthy} seems to have been established upon a showing that a "substantial" or "motivating" factor in the original decision was the protected conduct.\textsuperscript{104} Yet, the \textit{Wright Line} adaptation of that test addresses the issue of whether there was a violation, not whether a remedy should be granted.\textsuperscript{105} A test of causation which addresses the issue of whether a remedy should be granted, despite an established constitutional violation, had then been converted into a vehicle for deciding whether a violation had occurred.

Second, the integral element of the employer's having a "burden of proof" in \textit{Mt. Healthy} was discarded by the First Circuit because it supposedly\textsuperscript{106} ran afoul of statutory allocations of burden of proof. Thus, an initial distortion of the \textit{Mt. Healthy} test (by

\begin{itemize}
\item \textsuperscript{102} Apart from the selective manipulation of suddenly perceived differences, the First Circuit's contention that the school board in \textit{Mt. Healthy} conceded anything does not seem supported by the briefs in that case. At least the school board's brief in the \textit{Mt. Healthy} case made no such concession. The Summary of Argument states, in bold-faced type: "1. The Board's decision to not offer Doyle a continuing contract was not because of his call to a local radio station." Brief of petitioner at 9, \textit{Mt. Healthy}, 429 U.S. 568 (1977). Any concessions made in the course of the school board's brief were in the nature of maintaining that, arguendo, a constitutional violation had occurred, the "presence of one constitutionally impermissible factor" did not "necessarily invalidate a school board's employment decision." \textit{Id.} at 14-16.
\item \textsuperscript{103} \textit{NLRB v. Wright Line}, 662 F.2d at 907.
\item \textsuperscript{104} See 429 U.S. at 285-286.
\item \textsuperscript{105} See Wolley, \textit{supra} note 23, at 397-98.
\item \textsuperscript{106} At least two courts of appeals, however, have upheld the NLRB's shifting the burden of proof to the employer after engaging in a careful analysis of statutory policies and legislative history. \textit{Zurn Indus. v. NLRB}, 680 F.2d 683 (9th Cir. 1982) \textit{cert. denied}, 103 S. Ct. 3110 (1983); \textit{NLRB v. Fixtures Mfg. Corp.}, 669 F.2d 547 (8th Cir. 1982).
\end{itemize}
applying it to the issue of whether a violation had occurred), and a
departure from the Mt. Healthy procedural framework, began with
the first case in which the National Labor Relations Board used
the Mt. Healthy test.

At any rate, severe fragmentation among the various courts of
appeals has resulted. Some courts of appeals have accepted the Mt.
Healthy/Wright Line formula as framed by the Board, with varying
degrees of analysis.\textsuperscript{107} Cases arising in the First, Third, and
Seventh Circuits, however, have progressively moved farther away
from the original conceptions. For example, consider the following
statement of a Third Circuit panel in \textit{Behring International v. NLRB}.\textsuperscript{108}

The shifting burden of persuasion undermines the ‘but for’ test and rein-
troduces the confusion which Wright Line purported to eliminate. To
understand why, it is only necessary to realize that in establishing a
prima facie case, the General Counsel need not prove that antiunion dis-
crimination was the “real cause” of the employee’s discharge. Instead,
the Wright Line procedure only requires the General Counsel to show
that antiunion animus was “a” motivating factor in the employer’s deci-
sion. If the employer then proffers a legitimate reason for its action, but
does not do so with enough weight to carry the burden of persuasion, the
Board would rule that the section 8(a)(3) charge had been proved. This
would be so despite the fact that two factors—neither outweighing the
other—had been advanced as causes and the Board never determined
which was the \textit{real} one. As such, the procedural aspect of the rule is
plainly at odds with the “but for” rule.\textsuperscript{109}

The “but for” test referenced in \textit{Behring} is the concept that the
“same action would have taken place even in the absence of the
protected conduct.”\textsuperscript{110} This “same action” language is, of course,
synonymous with the “same decision” phrase used in Mt. Healthy.
According to \textit{Behring}, then, the Supreme Court’s own imposition
of a burden of proof upon the school board in Mt. Healthy is
“plainly at odds” with the rest of Mt. Healthy’s rule of causation.

But \textit{Behring} does not explore the implications of this perceived
flaw in the original Mt. Healthy test. Instead, \textit{Behring} merely says,
“Mt. Healthy is inapposite in its shifting burden phase, however,
\textsuperscript{107} For a summary of court of appeals cases, see Zurn Indus. v. NLRB, 680 F.2d at 687
\textsuperscript{108} 675 F.2d 83 (3rd Cir. 1982), vacated, 103 S. Ct. 3104 (1983).
\textsuperscript{109} \textit{Id.} at 88 (emphasis added).
\textsuperscript{110} \textit{Id.} at 87.
because the Board is bound by statutory limitations which foreclose the issue."\textsuperscript{111} Without further exploration of the merits of the Wright Line/Mt. Healthy test, the opinion concludes that because "none of these statutory or regulatory provisions were applicable in Mt. Healthy, the Supreme Court was free to allocate the burden of proof."\textsuperscript{112}

Not content with telling the National Labor Relations Board that it had adopted an internally flawed test, which was inconsistent with statutory provisions, \textit{Behring} then found "more appropriate precedent" in recent Supreme Court decisions arising under Title VII of the Civil Rights Act.\textsuperscript{118} The leading Supreme Court opinion cited in this regard was \textit{Texas Department of Community Affairs v. Burdine}.\textsuperscript{114} This superimposing of \textit{Burdine} upon the issues in section 8(a)(3) cases turning on the motives of an employer is even more troublesome than the original extension of \textit{Mt. Healthy} to section 8(a)(3) cases.

The situation since the Board's adoption of the \textit{Mt. Healthy} approach has progressively deteriorated. The First Circuit has gone from warning the Board that it had better adopt the \textit{Mt. Healthy} test,\textsuperscript{116} to quibbling about the kind of burden which shifts to the employer,\textsuperscript{116} to a decision which rejects the concept that the employer has any burden of "overcoming the General Counsel's \textit{prima facie} case by establishing that [the employee] would have been discharged even absent his union activities."\textsuperscript{117} The employer, under the First Circuit's test, apparently need only "neutralize" the implications arising from a \textit{prima facie} case.\textsuperscript{118} Moreover, the Third and Seventh\textsuperscript{119} Circuit Courts of Appeals explicitly have imposed a \textit{Burdine}-type test, drawn from Supreme Court precedents,

\begin{footnotes}
\item[111.] Id. at 88.
\item[112.] Id.
\item[113.] Id.
\item[114.] 450 U.S. 248 (1981).
\item[115.] NLRB v. Eastern Smelting & Refining, 598 F.2d 666, 671-72 (1st Cir. 1979).
\item[116.] NLRB v. Wright Line, 662 F.2d at 904-07.
\item[117.] NLRB v. Transportation Management Corp., 674 F.2d 130, 131 (1st Cir. 1982) (per curiam) (emphasis in original) (apparently quoting the NLRB's opinion), rev'd, 103 S. Ct. 2469 (1983).
\item[118.] Id.
\item[119.] Behring, 675 F.2d 83; NLRB v. Webb Ford, 689 F.2d 733, 739 (7th Cir. 1982); contra NLRB v. Town & Country LP Gas Serv., 687 F.2d 187, 190-91 (7th Cir. 1982); Peavey Co. v. NLRB, 648 F.2d 460, 461 (7th Cir. 1981).
\end{footnotes}
that has little to do with causation and the exercise of protected rights. Behring has gone so far as to revert to a requirement that the General Counsel prove that antiunion animus was the "real cause" of the discharge or discrimination,\textsuperscript{120} whatever "real cause" may mean. Moreover, at least one panel of the Seventh Circuit has adopted the Behring approach and stated that the employer "need only neutralize the prima facie case by asserting a legitimate reason for the discharges; the burden of demonstrating that reason pretextual remains with the Board."\textsuperscript{121}

Rather clearly, then, the Mt. Healthy test has not weathered well its transfer from constitutional territory to cases arising under statutory provisions designed to protect important employee rights. The situation is not that far removed from the original fragmentation and confusion of "tests" which the National Labor Relations Board summarized so well in its original Wright Line decision.\textsuperscript{122}

Fortunately, the Supreme Court in all likelihood will address some of the confusion which has resulted. Certiorari has been granted in \textit{NLRB v. Transportation Management Corp.},\textsuperscript{123} a First Circuit case. The question presented is whether the Board properly concluded that a violation of section 8(a)(3) had been established when employer hostility to an employee's protected union activity was shown to be a motivating factor in the decision to discharge, and the employer did not establish by a preponderance of the evidence that it would have discharged the employee for legitimate reasons, absent his union activities.\textsuperscript{124} Thus, the issue of the burden of proof in section 8(a)(3) cases should be addressed in the near future.

Unfortunately, resolution of this issue is no assurance that fragmentation among the courts of appeals will be cured. As discussed shortly,\textsuperscript{125} there may be a deeper source of fragmentation and confusion at work in cases involving inquiries into whether statutorily prohibited motives played a part in an employer's decision. Dis-

\begin{itemize}
  \item \textsuperscript{120} 675 F.2d at 90.
  \item \textsuperscript{121} \textit{NLRB v. Webb Ford}, 689 F.2d 733, 739 (7th Cir. 1982).
  \item \textsuperscript{122} Wright Line, 251 N.L.R.B. at 1084-86.
  \item \textsuperscript{123} \textit{NLRB v. Transportation Management Corp.}, 674 F.2d 130 (1st Cir. 1982), rev'd 103 S. Ct. 2469 (1983).
  \item \textsuperscript{124} Id.
  \item \textsuperscript{125} See infra text accompanying notes 153-77.
\end{itemize}
pute over burdens of proof may be more a symptom than a disease. Until the deeper problem is identified and resolved, fragmentation and confusion could well continue, although disguised as divergent and disparate applications of any "test" which the Supreme Court may uphold or impose regarding the burden of proof.

Before addressing that point, however, a more immediate problem must be noted. Although Transportation Management itself did not apply a Burdine approach, the Burdine test still may creep into the disposition of this case. For one thing, the Burdine test has demonstrated some expansive tendencies of its own. For another, it is possible that certiorari will be granted in a section 8(a)(3) case from the Seventh or Third Circuits. If this happens, then the Burdine test would be before the Supreme Court more directly as an alternative to Wright Line/Mt. Healthy. In either event, a digression of sorts seems warranted at this juncture in order to raise briefly a few points regarding the appropriateness of extending Burdine's approach to section 8(a)(3) cases.

D. The Burdine Test and Section 8(a)(3) Cases

Those courts of appeals which have resorted to Burdine as a model for an analysis of the issues in a section 8(a)(3) case are using an approach which is even farther afield than Mt. Healthy. In Mt. Healthy, at least, there were certain superficial similarities between the fact-pattern of that case and cases arising under section 8(a)(3). In Burdine, and its related predecessors, however, the issue is not the causative role of the exercise of protected rights. Burdine and its predecessors deal with so-called "disparate treatment" cases under Title VII of the Civil Rights Act. In Burdine, there is no need to accommodate an employer's interest in workplace production and efficiency to the interests reflected in protecting the exercise of statutory rights such as those which involve self-help organizational efforts on behalf of unionization. Under Title VII, the closer analogues to section 8(a)(3) would be

126. See supra text accompanying notes 113-21.
129. See supra note 61.
130. 450 U.S. at 253.
131. See supra text accompanying notes 29 and 72.
found in those provisions which prohibit any discrimination against an employee "because he has opposed any practice" which is unlawful under Title VII and, perhaps the provision prohibiting retaliation against a person who "has made a charge, testified, assisted or participated in any manner in an investigation, proceeding, or hearing" under Title VII. The Supreme Court apparently has not addressed directly the issue of causation in a "mixed motive" case arising under these provisions. Nor can it be assumed casually that the "test" in "disparate treatment" precedents arising under section 703 of Title VII should be blindly extended to cases involving section 704, although some federal courts seem to have done so. By its own terms, the Burdine language, with regard to the plaintiff's initial burden, deals with quite another matter:

The plaintiff must show: (i) that he belongs to a racial minority; (ii) that he applied and was qualified for a job for which the employer was seeking applicants; (iii) that, despite his qualification, he was rejected; and (iv) that, after his rejection, the position remained open and the employer continued to seek applicants from persons of complainant's qualifications.

This standard is not inflexible, as "the facts necessarily will vary in Title VII cases, and the specifications above of the prima facie proof required from respondent is not necessarily applicable in every respect in differing factual situations."

As the Supreme Court admonishes in Burdine and its predecessors, the standard for a prime facie case is not inflexible. The entire Burdine test, however, is so oriented toward a case in which there is some form of choice between two or more applicants for a position, or a difference in the treatment of two or more persons,

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133. Id.
134. See B. SCHLEI & P. GROSSMAN, EMPLOYMENT DISCRIMINATION LAW 436 (1976). This text also indicates that courts have varied in articulating the standard of proof for causation in these retaliation cases. Id. at 125 (Supp. 1979).
137. Burdine, 450 U.S. at 253 n.6 (quoting McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 & n.13 (1973)) (emphasis added).
that its transfer to the much more nebulous inquiry into the reasons for discharge or discipline would wrench the Burdine test totally out of its precedential sockets. In a disparate treatment case, the facts involve a direct comparison between the plaintiff(s) and others who have been more favorably treated. In most section 8(a)(3) cases, the matter is not so simple. There may be a whole constellation of reasons for the employer's decision to discharge or discipline, and comparisons, if any, are typically with past disciplinary cases.

Looking at each phase of the Burdine test, in turn, emphasizes rather clearly its questionable relevance to a typical section 8(a)(3) case. The prima facie showing required by Burdine, as indicated above, focuses only upon the reasons for differences in treatment and not the reasons for firing or disciplining an employee. Even those Supreme Court predecessors of Burdine which dealt with cases originally arising out of discharge or discipline focus upon the allegedly disparate treatment of the plaintiff(s), and not upon the reasons or causes behind the original discipline or discharge. Moreover, a prima facie case of "disparate treatment" was characterized by the Supreme Court in Burdine as "not onerous," bespeaking something less demanding than establishing that a "substantial" or "motivating" factor in the original decision has been prohibited racial or other prejudice. The Burdine prima facie case is so oriented toward a less "onerous" showing by the plaintiff that superimposing it upon a section 8(a)(3) case would be quite misguided. Either the Burdine prima facie requirement would have to be manipulated in such a manner as to hamper its vitality, or the General Counsel's initial burden would become one of only showing support of a union, qualification for the job, adverse action, and other elements more or less analogous to the rather mild Burdine prima facie showing. Indeed, those federal courts which have extended Burdine-type analysis to section 704 retaliation cases seem to have established a rather mild set of requirements for a prima facie showing.

Looking at the next phase of the Burdine test, the same

139. 450 U.S. at 253.
140. See supra cases cited at note 136.
problems exist. In the second phase of Burdine, the burden shifts to the employer to rebut a mild presumption established by a weak prima facie case. The employer does this by producing "evidence that plaintiff was rejected, or someone else was preferred, for a legitimate, nondiscriminatory reason."\footnote{41} Again, by its very language, the Burdine formula is cast in terms of an employment decision based upon a choice among people and disparate treatment which can be addressed in the context of examining the qualifications of, or differences between, particular individuals. Accordingly, the second phase of Burdine would need to be modified if it were superimposed on section 8(a)(3).

The third phase of the Burdine model likewise contemplates a kind of inquiry which is at odds with principles governing the sort of section 8(a)(3) cases dealt with by Wright Line. If the defendant employer carries its burden of production in Burdine, the "factual inquiry proceeds to a new level of specificity."\footnote{42} The plaintiff now has the "opportunity to demonstrate pretext,"\footnote{43} or to demonstrate "that the proffered reason was not the true reason for the employment decision."\footnote{44} Quite explicitly, Burdine is concerned with pretexts.

"Pretext" is an inappropriate term to use in connection with an inquiry into allegedly "mixed" motives behind an employment decision. A pretext is an ostensible reason offered as a cover for the real reason an action was taken.\footnote{46} According to the NLRB, at least, an inquiry into whether an asserted reason is a pretext is concerned only with determining that there is no legitimate reason for such action,\footnote{46} or that reasons offered were "wholly without merit."\footnote{47} There is no issue of the "existence of both a 'good' and a 'bad' reason for the employer's action [which] requires further inquiry into the role played by each motive."\footnote{48} Superimposing Burdine upon section 8(a)(3) cases in this respect is tantamount to either requiring a new definition of "pretext," or limiting section

\begin{footnotes}
\item[141] 450 U.S. at 254 (emphasis added).
\item[142] Id. at 255.
\item[143] Id. at 256 (emphasis added).
\item[144] Id. (emphasis added).
\item[145] BLACK'S LAW DICTIONARY 1069 (rev. 5th ed. 1979).
\item[146] 251 N.L.R.B. at 1084.
\item[147] Id. at 1084 n.5.
\item[148] Id. at 1084.
\end{footnotes}
8(a)(3) to cases in which the reasons proffered by an employer were a "sham." There is, in fact, some indication that the Supreme Court has used the word "pretext" in disparate treatment cases in a rather loose sense. As *McDonald v. Santa Fe Trail Transportation Co.* put it, "'pretext' in this context does not mean . . . that the Title VII plaintiff must show that he would have . . . been rejected or discharged solely on the basis of his race . . . ; no more is required to be shown than that race was a 'but for' cause." Nevertheless, the semantic pull of the word "pretext" is strong. The very use of the work "pretext" will tilt analysis in the direction of requiring proof of a total lack of legitimate reasons for the employer's decision. If section 8(a)(3) becomes effective only in cases of "pretext," the need for inquiry into "mixed" motives disappears. "Mixed" motives then would become permissible under section 8(a)(3). The declared policy of the National Labor Relations Act is to protect, by law, the "full freedom of association, self-organization, and the designation of representatives of their own choosing" by employees. That "full freedom" is hardly protected by allowing employers to escape liability if the General Counsel fails to show anything less than totally pretextual reasons for discharge or discriminatory treatment of union adherents.

In short, *Burdine* deals with a procedural framework for an entirely different type of case, Title VII "disparate treatment" litigation. *Burdine* itself does not address a "rule of causation" to be applied in cases where statutorily prohibited conduct was a "substantial" or "motivating" factor in the employer's original decision to discharge or discipline an employee. Thus, whether one considers either the overall perspective of the *Burdine* analysis or elements of its various phases, the *Burdine* analysis is inapposite to section 8(a)(3) discharge or discipline cases. Hence, either *Burdine* would need to be modified drastically, or section 8(a)(3) policies and interests would have to be sacrificed to comport with *Burdine's* formalism.

149. *Id.*
151. *Id.* at 282 n.10.
IV. A Root Cause of the Problem

As indicated earlier in this Article,\textsuperscript{153} statutory regulation of private employment has become pervasive. Starting in 1935, with the National Labor Relations Act, and accelerating during the 1960's and 1970's\textsuperscript{154} successive layers of statutory restrictions have curtailed employer prerogatives. Many of these restrictions demand inquiry into the reasons behind an employer's decision.\textsuperscript{155} These motive-oriented restrictions, however, have been superimposed upon, and coexist with, a doctrinal framework in which the employer's reasons for decisions relative to employees are largely immaterial.\textsuperscript{156}

An adjudicatory system in which the need for inquiry into motive and causation coexists \textit{sub silentio} with doctrines under which motive and causation are largely irrelevant is a system suffering from severe internal tension. A predictable result of such hidden tension is conflict and conceptual cleavage among adjudicators. Accordingly, the divergent "tests" of causation and motive\textsuperscript{157} in labor cases may reflect more than simple disagreement regarding the interpretation of particular statutory provisions. They may reflect divergent and perhaps unexamined assumptions regarding the proper relationship between the prior legal doctrines and the new statutory provisions.

In other words, the new statutory provisions, under which motive and causation are crucial elements in much labor litigation, simply have been neither assimilated into the old framework nor reconciled adequately with that framework. To paraphrase a noted economist, the difficulty in adapting to changing conditions is not so much one of getting people to accept new ideas as it is of getting people to give up or modify old ideas.\textsuperscript{158} With each successive statutory layer, adjudicators have confronted, to a greater or lesser extent, the need to analyze an employer's decisions in terms of the

\begin{itemize}
\item \textsuperscript{153} See supra text accompanying note 28.
\item \textsuperscript{154} See supra note 28 and accompanying text.
\item \textsuperscript{155} Virtually any statutory prohibition sounding in alleged discriminatory treatment "because of" some protected activity will entail inquiry into the reasons for the employer's decision. See supra notes 21-22 and accompanying text.
\item \textsuperscript{156} See supra text accompanying note 30.
\item \textsuperscript{157} See supra text accompanying notes 31-39.
\item \textsuperscript{158} J. Keynes, The General Theory of Employment Interest and Money (MacMillan 1935).
\end{itemize}
causes and motives behind those decisions.

Although courts and agencies that have entertained the new ideas of restrictions upon employer prerogatives, the degree and nature of that acceptance has varied. Some adjudicators seem to be governed by the concept that employers' prerogatives remain the doctrinal rule to which the new statutory restrictions are mere exceptions.\textsuperscript{159} Others have reflected conceptual approaches that accommodate traditional employer prerogatives in varying degrees. Thus conceived, the divergent formulations noted earlier in this Article may represent points along a conceptual spectrum. For example, as one progresses from "real cause,"\textsuperscript{160} to "dominant motive,"\textsuperscript{161} to "in part,"\textsuperscript{162} one may be moving from formulas reflecting maximum preservation of employer prerogatives under common law concepts to formulas reflecting greater emphasis on the statutory protections.

Unless and until this underlying conceptual tension is recognized, brought to the surface, and directly addressed, neither the \textit{Mt. Healthy} test, nor any other test, will prevent fragmentation and confusion. If the conceptual tension is not resolved, the old tendency will remain for adjudicators to divide along lines governed, as in the past, by unspoken and unexamined assumptions. Any new test superimposed on the statutory regimes will continue to be applied, more likely than not, in a manner which is compatible with the underlying assumptions of the adjudicator. The net result will be only to sublimate further, and mask, a major determinative factor in the outcome of cases which, collectively, are crucial to the sound functioning of the statutory systems. A fundamental conflict and conceptual cleavage which contributed, in the first instance, to a multitude of "tests" will continue to percolate beneath the surface.

Therefore, a pre-occupation with developing, and defending, specific "tests" for motive and causation in cases arising under various labor statutes may be counterproductive and premature. An appropriate "test" cannot be articulated until there is a determination regarding the overall interpretative approach which should govern

\textsuperscript{159} See infra text accompanying notes 163-69.

\textsuperscript{160} Behring, 675 F.2d at 90.

\textsuperscript{161} NLRB v. Fibers Int'l Corp., 439 F.2d 1311, 1312 (1st Cir. 1971).

adjudication. Any "tests" developed for these cases should emerge from consideration of the policies reflected in the statutes and the approach indicated by these policies. Once an overall interpretative approach and philosophy is crystallized, then the time for formulating a verbal "test" which reflects that approach and philosophy has arrived.

The first step in reconciling the tension between the common-law framework of employer prerogatives and the new, motive-oriented statutory restrictions is to recognize that these statutory provisions represent a change in the status quo. The statutory protections afforded employees are not mere grudging and narrow exceptions to a general rule which still prevails after their enactment. This conception of the statutory restrictions as reflecting only a narrow exception is exemplified most starkly by a tendency in some quarters to cling steadfastly to shibboleths such as "[m]anagement can discharge for good cause, or bad cause, or no cause at all. It has, as the master of its own business affairs, complete freedom with but one specific, definite qualification: it may not discharge when the real motivating purpose is to do that which section 8(a)(3) forbids."163

This is language which embodies an underlying concept that statutory intrusions upon employer prerogatives are narrow exceptions to the prior regime of governmental non-interference with matters of private employment. This is not the language of accommodation between competing interests. Rather, it is the language of subordinating the statutory polices to private interests. This kind of pronouncement was an inaccurate overstatement when it was written in 1956,164 and it has become even less accurate with the passage of time.

Restrictions upon an employer's "complete freedom" have multiplied since 1956. An employer no longer has "complete freedom" to

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163. NLRB v. McGahey, 233 F.2d 406, 413 (5th Cir. 1956) (emphasis added).
164. For example, other provisions limiting an employer's right to discharge employees were contained in the National Labor Relations Act, 29 U.S.C. § 158 (a)(1), (a)(4), and in the Fair Labor Standards Act, 29 U.S.C. § 215 (a)(3). Moreover, management's "complete freedom" is circumscribed if a collective bargaining representative is recognized or certified under the National Labor Relations Act; there then arises a duty to bargain in good faith with the representative over wages and terms and conditions of employment. 29 U.S.C. § 158 (a)(5) § 159. Terms and conditions of employment include, of course, grounds and procedures for termination. C. Morris, THE DEVELOPING LABOR LAW 404 (1971). Thus, management's "complete freedom" to discharge was circumscribed considerably even in 1956.
consider age, sex, race, ethnic origin, or religion in employment decisions. An employer does not have "complete freedom" to retaliate against an employee who files a complaint or testifies in proceeding against the employer. An employer's plenary workplace authority to act for any reasons or no reason at all has been circumscribed in numerous ways. Yet, the basic "complete freedom" shibboleth keeps being repeated. The dogged persistence of this incantation is explainable only on the basis of its reflecting an unspoken view that all of these restrictions on employers' prerogatives amount to no more than limited and narrow incursions upon an otherwise plenary power.

At some point, however, the sheer number of such statutory restrictions upon employer prerogatives becomes significant. When the cumulative significance of these generations of statutory restrictions is considered, then the general direction of the interpretive approach or philosophy becomes more clear. The number and variety of restrictions on traditional employer prerogatives indicate the need for the prerogatives to be accomodated to the restrictions, rather than vice-versa.

Therefore, the second step in reconciling the tensions between common law employer prerogatives and their statutory restrictions is to recognize that these restrictions individually, and cumulatively, reflect a clear legislative purpose to rectify certain "mischiefs" attendant upon an employers' untrammeled exercise of economic power, which the common law at-will concepts had supported. These statutes, then, are remedial in nature. The basic interpretive touchstone for remedial legislation is to give such legislation a construction which will fulfill the statutory purposes and tend more toward remedy of the harm than preserving the sources.

166. See supra notes 21 and 22.
167. See supra note 22 and accompanying text.
168. See supra note 163 and accompanying text.
169. E.g., Berry Schools v. NLRB, 655 F.2d 966, 971 (5th Cir. 1981); Midwest Stock Exch. Inc. v. NLRB, 635 F.2d 1255, 1265 (7th Cir. 1980).
171. See generally J. SUTHERLAND, STATUTES AND STATUTORY CONSTRUCTION, §§ 60.01, 60.02 (C. Sands 4th ed. 1973) (remedial statutes entitled to a liberal construction). It is well established that the National Labor Relations Act is remedial legislation which is to be liberally construed. Id. at § 71.07.
of that harm. At least, the interpretive approach must move away from the situation which called that legislation into being, rather than trying to revert toward the status quo. Any resulting "test" or "rule" should be one which resolves doubts in favor of protecting those rights which the statutes were supposed to protect, rather than protecting those prerogatives which the statute restricted.

Formulating the precise test of "rule of causation" then becomes a matter of developing or discovering language consistent with this approach. Whether, for example, the Mt. Healthy test is consistent with a remedial approach to interpreting protective labor statutes remains to be seen. In its original form, the Mt. Healthy test assumes that protected activity can be a "substantial" or "motivating" factor in decisionmaking, yet still fall short of requiring a remedy if the "same decision" would have been reached in the absence of that protected activity. As such, Mt. Healthy is basically an "in spite of" test, rather than a "but for" test, as it has sometimes been characterized. In spite of a constitutional violation, which is established when protected activity is shown to be a "substantial" or "motivating" factor in the original decision, a remedy is nevertheless denied. To convert this into a "test" or "rule" so deferential to private employers that no violation is found, even though statutorily protected activity is demonstrably a "motivating" factor in the original decision, seems analytically closer to preserving prerogatives than it is to protecting statutory rights.

A test which comes closer to fulfilling the remedial purpose of such legislation requires a determination of whether the statutorily protected conduct influenced the outcome of the original decision. If a particular factor influences the outcome of a decision, it can be fairly said to have been a cause of the decision. The test itself might take any number of particular verbal forms. The concept, however, should be whether the original outcome was in fact influenced by prohibited reasons. In this manner, the legitimate business interests of employers seems adequately protected. After all, employers are not supposed to be considering the employees' stat-

172. Id. at § 60.01.
173. Id.
174. E.g., Behring, 675 F.2d at 87.
175. See supra note 104 and accompanying text.
utorily protected activities in the first place. A test predicated upon the actual effect of an employer's considering those protected activities and whether those protected activities influenced the outcome of the initial decision gives some leeway to accommodate those situations in which the protected activity "was inevitably on the minds of those responsible for the decision." Likewise, this approach accommodates those situations in which consideration of the protected activity was merely cumulative or reinforced the decision which was reached. But, whenever the protected activity influenced the outcome of the employer's original decision, a finding of violation seems to be mandated. Otherwise, important statutory protections are eroded.

POST-SCRIPT

While this Article was being prepared for publication, the Supreme Court rendered a unanimous opinion in NLRB v. Transportation Management comporting the Board's Wright Line test. Although it is premature to assess the implications of Transportation Management, some preliminary observations are clearly warranted.

To begin, the Court unequivocally sustained the Board's authority to impose upon an employer the burden of establishing any claim that a discharge, although motivated in part by statutorily prohibited considerations, was still not an unfair labor practice because the discharge would have occurred in any event, upon the basis of legitimate reasons. In reaching this conclusion, the Court canvassed the long history of Board precedents dealing with the mixed motive issue and agreed that the Board's recent Wright Line test was merely "an attempt to restate its [earlier] analysis in a way more acceptable to the Courts of Appeals." According to the Court, the Board since 1939 had engaged essentially in a two-stage analysis. First, a violation could be established by the General Counsel's proof that a discharge or other adverse action was

176. See Getman, Section 8(a)(3) of the NLRA and the Effort to Insulate Free Employee Choice, 32 U. Chi. L. Rev. 735 (1965).
179. Id. at 2473 (emphasis added).
"in any way motivated by a desire to frustrate union activity."¹⁸⁰ This principle was approved by the Court in *Transportation Management* as "plainly rational and acceptable."¹⁸¹ Next, however, the Board had also ruled that employers could "escape the consequences of a violation by proving that without regard to the impermissible motivation, the employer would have taken the same action for wholly permissible reasons."¹⁸²

In *Transportation Management*, the Court also emphasized, or re-emphasized, the latitude to be accorded the Board in formulating working legal principles to govern adjudications under the statutes which it enforces. The Board's *Wright Line* approach, "‘while it may not be required by the Act, is at least permissible under it . . .’ and in these circumstances its position is entitled to deference."¹⁸³

But *Transportation Management* went beyond mere deference to the Board's interpretation. There were, noted the Court, reasons affirmatively supporting the Board's long-standing position and its restatement in *Wright Line*:

The employer is a wrongdoer; he has acted out of a motive that is declared illegitimate by the statute. It is fair that he bear the risk that the influence of legal and illegal motives cannot be separated, because he knowingly created the risk and because the risk was created not by innocent activity but by his own wrongdoing.¹⁸⁴

Or, as this Article indicates, employers are not supposed to consider an employee's statutorily protected activities in the first place, when they arrive at decisions adverse to the employee.¹⁸⁵

¹⁸⁰. *Id.*
¹⁸¹. *Id.*
¹⁸². *Id.*
¹⁸³. *Id.* at 2475 (quoting NLRB v. Weingarten, Inc., 420 U.S. 251, 266-67 (1975); NLRB v. Erie Resistor Corp., 373 U.S. 221, 236 (1963)). It should also be noted that the Court pointedly rejected the use of the Burdine test suggested by some courts of appeal. *See supra* text at notes 128-52. The Burdine alternative was dismissed in a footnote as "inapposite" because it dealt with pretexts, and not "mixed motive" situations. *Id.* at 2473 n.5.
¹⁸⁴. *Id.* at 2475 (emphasis added).
¹⁸⁵. *See supra* text at note 176.

*Transportation Management* also reflects an interesting reading of Board precedents with respect to the necessary elements of an unfair labor practice:

As we understand the Board's decisions, they have consistently held that the unfair labor practice consists of a discharge of other adverse action that is based in whole or in part on anti-union animus . . . . But the Board's construction of the statute permits an employer to *avoid being adjudicated* a violator by showing
With respect to the Court's treatment of Mt. Healthy, Transportation Management was rather cursory:

We found it prudent, albeit in a case implicating the Constitution, to set up an allocation of the burden of proof on which the Board heavily relied on [sic] and borrowed from in its Wright Line decision. There, we held that the plaintiff had to show that the employer's disapproval of his First Amendment protected expression played a role in the employer's decision to discharge him. If that burden of persuasion were carried, the burden would be on the defendant to show by a preponderance of the evidence that he would have reached the same decision, even if, hypothetically, he had not been motivated by a desire to punish plaintiff for exercising his First Amendment rights. The analogy to Mount Healthy drawn by the Board was a fair one.¹⁸⁸

The offhand characterizations and noncommittal paraphrase of Mt. Healthy's test hardly warrants any sweeping generalizations. Nevertheless, it is at least interesting that the Court used the word "prudent,"¹⁸⁷ mentioned the constitutional context of the Mt. Healthy test,¹⁸⁸ inserted the adverb "hypothetically,"¹⁸⁹ and referred to Mt. Healthy as a "fair" "analogy."¹⁹⁰ In any event,

what his actions would have been regardless of the forbidden motivation. It extends to the employer what the Board considers to be an affirmative defense, but does not change or add to the elements of an unfair labor practice . . . . Id. at 2474.

This Article points out that the inconsistent legal formulas and tests dealing with motive as a causal element in labor law are traceable, at least in part, to the unreconciled tension between a substratum of common-law "at will" doctrines, under which an employer's motives are immaterial, and the motive-intensive inquiries necessitated by more recent statutory prohibitions upon traditional employer prerogatives. One result of this tension, arguably, was language amounting to unsound shibboleths in some cases which overstated, to the detriment of statutory protections, an employer's "complete freedom" to act for any reason or no reason at all, so long as the "real motivating purpose" was not statutorily prohibited. Although Transportation Management did not address these tensions or shibboleths, the overall tenor of the opinion, and the apparent consensus that an unfair labor practice is established upon the showing of actions motivated only in part by statutorily forbidden motives, would seem to require rejection of an overly narrow view of the employee's statutory protections. In the face of Transportation Management, continued insistence in some judicial quarters upon a showing of "real motivating purpose," or even "dominant motive" does not seem tenable.

186. 103 S. Ct. at 2475 (emphasis added).
187. See supra text at notes 68-70.
188. See supra text at notes 188, 62-70.
189. See supra text at note 49.
190. See supra text at notes 61-72. As this Article indicates, the author does not necessarily concede that the "analogy" between private and public employment is as strong as it might appear on the surface. Certainly, Transportation Management speaks merely in
Transportation Management does not necessarily endorse an automatic extension of the *Mt. Healthy* test to other settings or support a view that *Mt. Healthy* offers a panacea for problems of motivation and causation. Moreover, the Court's characterization of the defendant's burden under *Mt. Healthy* is not precisely accurate. *Mt. Healthy* speaks in terms of whether the same decision would have been made "even in the absence of the protected conduct." As paraphrased in Transportation Management, it is the absence of a prohibited motivation which is hypothesized, not the absence of the protected conduct. This may well be a distinction without a difference since a slight inconsistency between the wording of a paraphrase and an earlier holding is neither unprecedented nor momentous. Yet, the two concepts are not totally congruent or interchangeable. As this Article indicates, a test which seemingly directs adjudicators to disregard the very existence of the protected conduct at issue is subject to a number of criticisms. A test which concentrates on hypothesizing about what a decision might have been if prohibited motivations had not existed would still be objectionable, but might require a somewhat different analysis. At any rate, it may not be totally insignificant that the precise elements of the *Mt. Healthy* test, and precisely what it is that a defendant must establish, have not yet crystallized into a standardized litany.

Despite the Supreme Court's resolution of the immediate issue in Transportation Management, the results in this instance of extending the *Mt. Healthy* test, even by way of analogy, into other areas remain instructive. Adoption of a test "akin" to *Mt. Healthy* simply aggravated an existing situation and generated a relatively prompt Supreme Court action. Not all adoptions or extensions of *Mt. Healthy*'s test will be so visible, so controversial, or so expeditiously addressed by the Court. Indeed, there is some risk that Transportation Management will be read superficially as placing the Court's imprimatur upon any and all extensions of *Mt. Healthy*'s test to other domains. The immediate result may eclipse the somewhat guarded descriptions in Transportation Management of what the Board had done in Wright Line. "[T]he Board

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_191._ 429 U.S. at 287.

_192._ See supra text at notes 48-60.
heavily relied on and borrowed from" *Mt. Healthy*.193 Wright Line was "an attempt to restate [the Board's earlier] analysis in a way more acceptable to the Courts of Appeals."194 The failure of the Board’s “attempt” in this respect and the need for the Supreme Court’s early intervention should stand more as a caveat than an endorsement on a too-easy, too-ready extension of *Mt. Healthy*’s test.

193. 103 S. Ct. at 2475.
194. *Id.* at 2473 (emphasis added).