Making Sense of Causation in Mixed Motives Cases

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Andrew Verstein, *The Jurisprudence of Mixed Motives*, 127 **Yale L.J.** (forthcoming), available at [SSRN](#).

To say that the law of causation in mixed motives cases is a mess would be an understatement, as Andrew Verstein highlights in his article, *The Jurisprudence of Mixed Motives.* Most antidiscrimination laws require causation. That is, these laws proscribe adverse employment actions when they occur "because of" a protected characteristic, such as race or sex. The problem is that there are several types of causation, particularly where multiple motives are involved – which is almost always. Yet, few of those statutes specify what type of causation is required. Other statutes specify what type of causation is required, but with no clear definition (e.g., "motivating factor" causation, referenced in the Civil Rights Act of 1991). To make matters worse, courts and commentators often throw other undefined or ill-defined terms into the mix. And if we were inclined to look at other legal fields, such as tort law or constitutional law, in order to make sense of causation in employment discrimination law, we tend to encounter yet more ill-defined terms.

One might think – or at least hope – that it would be possible to (1) identify the universe of potentially applicable causal standards; (2) clearly define each of those standards (and their relationship to one another); and (3) attach a universally applicable and accepted label to each causal standard. That is, we might imagine a Rosetta Stone that would allow us to clear up the confusion that reigns in the Babel of causation. Such a tool would allow us to describe the law with precision and engage in meaningful (and perhaps even cross-substantive) discussions about the normative merits of any particular causal requirement.

I attempted a project like this in 2006, in an article entitled [The Fundamental Incoherence of Title VII: Making Sense of Causation in Disparate Treatment Law](#). That piece posited a universe of causal concepts based on core philosophic causal terms (necessity and sufficiency), arranged from least restrictive (most plaintiff-friendly) to most restrictive (most defendant-friendly):

Yet that piece had two important limitations. First, it conceptualized causation solely as qualitative. That is, in my work, a cause could be necessary, or sufficient, or some combination of those qualitative concepts. But I had no way to conceptualize one cause as "stronger" than another, or to conceptualize a cause as being "big" or "small" – concepts that are intuitively important, and to which many courts and commentators have referred. Second, and relatedly, without a quantitative component to my analysis, I undertheorized the concept of "minimal causation" (the best definition for "motivating factor" causation). There may be important variations within minimal causation that I failed to capture.

Now, in *The Jurisprudence of Mixed Motives*, Professor Verstein has developed a model that truly advances the search for a Rosetta Stone for causation. His model posits a quantitative view, in which motives have varying degrees of causal influence in decision-making. With this approach, he is able to depict the causal force of multiple motives on a graph as follows:

His graph depicts a simplified world in which a defendant bases a decision (such as a decision to fire the plaintiff) on two motives: B-Motive, which is proscribed (such as race), and A-Motive, which is not proscribed (such as tardiness). Once the causal force of either motive alone or the two motives combined reaches a value of 1 – i.e., the combined causal force is sufficient – the decision in question (the firing) will occur.

This model allows us to understand the relationships between the traditional quantitative concepts. Professor Verstein prefers other labels for the quadrants in his graph, but it is easy to translate his terms into traditional causal language as follows:

Three important concepts are readily apparent from this graph. First, we can illustrate the concept of "de minimis" causation: the area on the left side of the graph closest to the A-Axis. This concept of "de minimis" causation might explain the "substantial factor" language used by some courts and commentators: "substantial factor" might mean "more than de minimis." Second, we can see that B-Motive can be "de minimis" even when it is a necessary cause (on the leftmost side of the gray triangle), as well as where it is neither necessary nor sufficient (on the leftmost side of the upper left quadrangle or the leftmost side of the lower left black triangle). This suggests a need to be more specific about other causal requirements if we want to use a "substantial factor" test. Third, we can see that there are actually two types of motivating factor causation. Recall that motivating factor means that B-Motive has some causal force, but is neither necessary nor sufficient. One type of motivating factor causation is depicted in the upper left quadrant and the other is depicted in the lower left black triangle. Given that the adverse employment decision (firing) will occur only in the upper left quadrant, that is the most likely candidate for the meaning of motivating factor causation in most statutes. However, in the lower left black triangle, which likely depicts what Justice O'Connor referred to as "thought crime," the defendant still engaged in decision-making based on a proscribed criterion (race), which still raises normative issues. (This is why I noted that I undertheorized motivating factor causation in my 2006 piece.)

Next, Professor Verstein introduces the idea of B-Motive "predomination" (where the causal force of B-Motive is greater than that of A-Motive). We can see this on his graph, as follows:

This concept of predomination might explain the "primary factor" language used by some courts and commentators: "primary factor" might mean "B-predomination."

Professor Verstein then combines these insights into a multi-zone graph that seems truly to define the universe of potential causal concepts:

From there, he goes on to label those concepts, focus on the most commonly used concepts, and compare those concepts across various fields of law – including not only employment discrimination law, but also fields as diverse as constitutional law and tax law. The potential for courts and scholars in one field to learn from those in other fields is exciting and unprecedented. Moreover, this approach lays the groundwork for a clear and fruitful discussion of the normative merits of various causation requirements that is unprecedented. In fact, Professor Verstein indicates that this is his next project. To say that this is an exciting development in the law of causation would be an understatement.

In closing, two notes seem warranted:

First, although I refer to his model as being about causation, Professor Verstein eschews thinking of motives as exerting causal force. He eschews causal language because he (understandably) does not want to take sides in the ongoing debate about the determinism of motives – i.e., whether we have sufficient self-determination to resist the influence of our motives. But for those of us who are more concerned with the law of causation and less concerned with how that law treats self-determination, his model provides an incredibly useful way of thinking about causation in mixed motives cases.

Second, I have some minor quibbles with Professor Verstein's piece, and how I think he could make it even better, which I address in a forthcoming piece, *A Rosetta Stone for Causation*. None of those quibbles detracts from the fact that his piece is one of the most exciting and important ones I have seen in this field. I wholeheartedly recommend it.

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