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Mark A. Schuman

THE POLITICS OF PRESUMPTION: *ST. MARY'S HONOR CENTER v. HICKS* AND THE BURDENS OF PROOF IN EMPLOYMENT DISCRIMINATION CASES

MARK A. SCHUMAN*

The Supreme Court's decision in *St. Mary's Honor Center v. Hicks*[1] was one of the most controversial decisions the Court handed down in a largely low-key 1992-93 term. The decision determined the relative burdens of proof the plaintiff and defendant carry in a suit charging intentional employment discrimination (also know as "disparate treatment") under Title VII of the Civil Rights Act of 1964 ("Title VII").[2] These issues are particularly important in light of the jury trials and damages available in causes of action under the Civil Rights Act of 1991, which amended Title VII.[3] *Hicks* is important both for its practical affect on the burden of proof and, also, in a larger sense, for its affect on the politics of

* J.D., Yale Law School, 1991; B.A., Harpur College, Binghamton University, 1988. The author is a former Law Clerk to the Honorable Samuel A. Alito, Jr. of the United States Court of Appeals for the Third Circuit and is an associate of McCarter & English in Newark, New Jersey. The views expressed in this article are solely those of the author. The author expresses his thanks to LEXIS for the use of its legal research services. This article is dedicated to the Honorable Samuel A. Alito, Jr., and to Susan Elaina Kabat Schuman, for her loving support.

1 113 S. Ct. 2742 (1993).

2 Section 703 of Title VII of the Civil Rights Act of 1964 provides in relevant part:

> (a) It shall be an unlawful employment practice for an employer—
>
> (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin . . . .

42 U.S.C. § 2000e-2(a)(1) (1988).

3 The majority of federal courts to consider the question prior to the Civil Rights Act of 1991 held that since the relief available under Title VII (including reinstatement, promotion, and back pay) was equitable in nature, there was no right to trial of claims thereunder by jury. *See, e.g.*, Ramos v. Roche Prods., Inc., 936 F.2d 43, 49-50 (1st Cir.), *cert. denied*, 112 S. Ct. 379 (1991); Turner v. Mitchell Pontiac, Inc., 771 F. Supp. 530, 531-34 (D. Conn. 1991). Such actions were tried to the court as finder of fact. *Id.* The Civil Rights Act of 1991 granted rights both to compensatory and punitive damages, in certain cases, and to jury trials where the plaintiff seeks that relief. *See* 42 U.S.C. § 1981a(c) (1992) (jury trial right in certain Title VII suits); 42 U.S.C. § 1981a(a)-(b) (1992) (compensatory and punitive damages available in certain Title VII suits, subject to limitations in amount depending on number of persons employed by employer).

employment discrimination law.

This Article will explore the issues resolved in *Hicks* and place that decision within a legal, political, and economic context. Part One discusses the Supreme Court's decision in *McDonnell Douglas Corp. v. Green*, in which the Court first established the structure of proof in Title VII disparate treatment cases. Part Two discusses later Supreme Court decisions which created the presumption of illegal discrimination which is created by the plaintiff's proof of a prima facie case. Part Three discusses the conflict which arose among Supreme Court opinions regarding the affect of the presumption (the conflict *Hicks* resolved). Part Four discusses and elaborates upon the *Hicks* decision itself. Part Five discusses the practical impact, and finally, Part Six the political impact, of *Hicks*.

I. THE *McDONNELL DOUGLAS* STRUCTURE

In most cases outside of employment discrimination, the plaintiff lacking "direct" proof of a violation of law by the defendant has, at best, a very weak case. Such a plaintiff is unlikely to be able to raise a genuine issue of material fact for trial, and thus is likely to suffer summary judgment in favor of the defendant.[4] Not so the plaintiff alleging illegal employment discrimination. The plaintiff, in such a case, may survive summary judgment and prevail at trial, by proof, not of the violation itself, but of facts far easier to establish. This plaintiff is said to possess "indirect proof."

The Supreme Court established this lower standard for plaintiffs charging intentional Title VII violations, but lacking direct proof thereof, in *McDonnell Douglas Corp. v. Green*.[5] The plaintiff,

[4] FED. R. CIV. P. 56(c). Summary judgment "shall be rendered forthwith if [the available proof] show[s] that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." *Id.*

[5] 411 U.S. 792 (1973). McDonnell Douglas had laid off the plaintiff in a general reduction in force and denied him reinstatement when it began to add employees in the plaintiff's trade. *Id.* at 794. McDonnell Douglas's professed reason for refusing to rehire the plaintiff was his commission, after the layoff, of illegal acts intended to harm McDonnell Douglas and its employees. *Id.* One of these acts was a "stall-in," in which the plaintiff and several others stopped their cars in a coordinated effort to entirely block an access road to a McDonnell Douglas plant. *Id.* at 795. The plaintiff's efforts were apparently designed to express protest against McDonnell Douglas hiring practices, which he and others believed were racially motivated. *Id.* at 794-95. McDonnell Douglas also believed that the plaintiff was involved in a "lock-in," in which the door to a McDonnell Douglas facility was chained and locked in order to prevent its occupants, McDonnell Douglas employees, from leaving

the Court ruled, bears the "initial burden" of establishing what the Court termed a "prima facie case" of illegal discrimination.[6] This consists of four elements which the plaintiff must prove: (1) membership in (in the case of alleged racial discrimination) "a racial minority"; (2) that he or she "applied and was qualified for" the job for which the employer sought applicants; (3) that he or she was rejected; and (4) that the position remained open and the employer continued to seek applications.[7] Some courts have subsequently added that the plaintiff must prove that one not sharing the same protected characteristic, *i.e.*, race, color, sex, etc., received the job, promotion, or benefit in question.[8]

If the plaintiff is successful in establishing a prima facie case, "the burden," the Court ruled, "then must shift to the employer to articulate some legitimate, nondiscriminatory reason" for its decision.[9] The plaintiff is thereafter entitled to the opportunity to prove that the employer's articulated reasons were merely a "pretext" for a decision which was, in truth, made on an illegal basis.[10]

This scheme has been adopted in cases alleging disparate treatment[11] on each of the grounds made illegal by Title VII,[12] as well as in cases alleging disparate treatment age discrimination under the Age Discrimination in Employment Act.[13] Courts have wide discretion, however, in fashioning structures for proof of a prima facie case different from the one *McDonnell Douglas* established.[14]

the building. *Id.* at 795.

[6] *McDonnell Douglas*, 411 U.S. at 802.

[7] *Id.*

[8] *See* Gunby v. Pennsylvania Elec. Co., 840 F.2d 1108, 1115 (3d Cir. 1988), *cert. denied*, 109 S. Ct. 3213 (1989).

[9] *McDonnell Douglas*, 411 U.S. at 802; *see also infra* note 74 (discussing that *Hicks* decision may be understood in terms of proving "pretext").

[10] *Id.* at 804-05.

[11] *See id.* at 802 n.14. The McDonnell Douglas scheme is not applicable to disparate impact claims, in which the plaintiff claims that a facially neutral practice or criterion for an employment decision tends to exclude those from a particular sex, race, religion, ethnicity, or age. *Id.*; *see also* United States Postal Serv. v. Aikens, 460 U.S. 711, 713 n.1 (1983); Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248, 252 n.5 (1981).

[12] *See* Jones v. Frank, 973 F.2d 673, 675 (8th Cir. 1992) (sex discrimination); *see also* Kenworthy v. Conoco, Inc., 979 F.2d 1462, 1469 (10th Cir. 1992) (age and national origin discrimination); Meiri v. Dacon, 759 F.2d 989, 995 (2d Cir.), *cert. denied*, 474 U.S. 829 (1985) (religious discrimination).

[13] *See* Biggins v. Hazen Paper Co., 63 Fair Empl. Prac. Cases (BNA) 52, 53-54 (1st Cir. Oct. 18, 1993); Anderson v. Stauffer Chem. Co., 965 F.2d 397, 400 (7th Cir. 1992).

[14] *McDonnell Douglas*, 411 U.S. at 802. The "prima facie proof" articulated in *McDonnell Douglas*, the Court allowed "is not necessarily applicable in every respect" to cases where the facts differ from those of that case. *Id.* at 802 n.13. In addition, the plaintiff need not use the *McDonnell Douglas* structure for proof of a prima facie case where she presents direct evidence of discriminatory intent. *See* Transworld Airlines, Inc. v. Thurston, 469

The *McDonnell Douglas* Court gave no justification or authority for its establishment of this structure for proof of illegal discrimination. The Court did not cite or discuss any passage from Title VII or any other part of the Civil Rights Act of 1964. Nor did the Court argue that any legislative history from the Act lent support to, or even suggested, such a set of rules. The Court did not explain how proof of a prima facie case had any logical or inferential relationship to proof of the employer's intent itself. The Court did not expound upon shifting burdens of proof, presumptions, or any other procedural rules used in any other cause of action, whether statutory or common law, from which it had drawn this scheme. The Court did not cite any power a court might possess to structure the presentation of evidence in a way most conducive to accurate fact-finding. The Court's pronunciation of the prima facie case and the shift in burden to the employer stands starkly naked, without the armor of congressional support, common-law authority, or reasoning. The opinion is unanimous. No Justice bothered to concur and explain his own rationale for the holding of the case, let alone dissent from the creation, without explanation, defense, or justification, of the elements of a cause of action purportedly created by Congress.

The rules laid down in *McDonnell Douglas* are an audacious and arbitrary exercise of power. In this way, the establishment of the structure of proof is closer to a legislative creation of policy than a judicial expression of the law under authority and reason.

The *McDonnell Douglas* opinion kept the most important aspect of the new structure of proof hidden: that is, the reason, the authority, or the policy behind shifting any burden to the employer based on the particular showing it said the plaintiff must make in order to shift that burden. Though later cases enunciated a policy behind the scheme, those cases also took the structure itself for granted. Essentially, the Supreme Court avoided the difficulties of justifying and formulating the structure of proof simultaneously. Once the scheme was established, the Court could go about creating a (questionable) policy basis without allowing the scheme itself to be called into question.

U.S. 111, 121 (1985); Schafer v. Board of Pub. Educ., 903 F.2d 243, 247 (3d Cir. 1990).

II. The Creation of the Presumption

While *McDonnell Douglas* laid out the procedures and allocated the burden of proof in a disparate treatment case, it did not speak of the creation of a "presumption" by the establishment of a prima facie case. Without a basis in policy for the scheme, the *McDonnell Douglas* Court could not claim that proof of a prima facie case either established or allowed the presumption of any fact; rather, it could only assert that the proof shifted the burden (of some kind) to the defendant. In later cases, however, the Court referred to the proof of a prima facie case as the creation of a presumption of the ultimate fact of a disparate treatment case, that the employment decision was made on the basis of race, sex, or another illegal criterion.

In *International Brotherhood of Teamsters v. United States*,[15] the Court described proof of a prima facie case as "justifi[cation] of the inference that the minority applicant was denied an employment opportunity for reasons prohibited by Title VII . . . ."[16] This, rather than the "specification of the discrete elements of proof," the *Teamsters* Court asserted, was the significance of *McDonnell Douglas*.[17] This effectively turned *McDonnell Douglas* on its head. All *McDonnell Douglas* had done was to assert discrete elements of proof, without discussing why those elements were significant or should be regarded as cause to shift a burden on to the defendant. Yet, *Teamsters* regarded *McDonnell Douglas* as laying perfectly solid policy groundwork for the notion that the plaintiff may create an inference of illegal discrimination by proof of some other set of facts.

The Court, in truth, did not enunciate a policy basis for the inference of illegal discrimination until *Teamsters* itself. The *Teamsters* Court described the *McDonnell Douglas* formula as requiring the plaintiff to demonstrate:

> at least that his rejection did not result from the two most

[15] 431 U.S. 324 (1977).

[16] *Id.* at 358; *see also* Furnco Constr. Corp. v. Waters, 438 U.S. 567, 576 (1978). "McDonnell Douglas did make it clear that a Title VII plaintiff carries the initial burden of showing actions taken by the employer from which one can infer, if such actions remain unexplained, that it is more likely than not that such actions were 'based on a discriminatory criterion illegal under [Title VII].'" *Id.* (citing International Bhd. of Teamsters v. United States, 431 U.S. 324, 358 (1977)).

[17] *Teamsters*, 431 U.S. at 359.

> common legitimate reasons on which an employer might rely to reject a job applicant: an absolute or relative lack of qualifications or the absence of a vacancy in the job sought. Elimination of these reasons for the refusal to hire is sufficient, absent other explanation, to create an inference that the decision was a discriminatory one.[18]

The Court elaborated on this ex-ante justification for the *McDonnell Douglas* scheme in later opinions. In *Furnco Construction Corp. v. Waters*,[19] the Court asserted that a prima facie case raises an inference of illegal discrimination "only because" a prima facie case establishes that the decision was "more likely than not based on the consideration of impermissible factors."[20] This is true, the Court claimed, because "we know from our experience" that people usually do not act arbitrarily, especially in the business setting.[21] "Thus, when all legitimate reasons for rejecting an applicant have been eliminated as possible reasons for the employer's actions," the fact-finder should infer that an impermissible consideration was at play.[22] In *Texas Department of Community Affairs v. Burdine*,[23] the Court declared that the prima facie case "eliminated the most common nondiscriminatory reasons" for the employment decision, creating a presumption that the employer unlawfully discriminated against the employee.[24]

Within this context, we may better understand both the controversy which *St. Mary's Honor Center v. Hicks* resolved and the impact that decision may have. *Hicks* addressed one implication of the policy behind the presumption of illegal discrimination.

III. The Conflict: Articulation or Proof?

McDonnell Douglas provided that, upon proof of a prima facie case by the plaintiff, the burden fell upon the employer to "articulate some legitimate, nondiscriminatory reason for the employee's rejection."[25] The meaning of this burden, what the employer must do to survive a directed verdict for the plaintiff, and what, if any

[18] *Id.* at 358 n.44.
[19] 438 U.S. 567 (1978).
[20] *Id.* at 577.
[21] *Id.*
[22] *Id.* at 578.
[23] 450 U.S. 248 (1981).
[24] *Id.* at 253-54.
[25] McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973).

burden, remains on the plaintiff despite his proof of a prima facie case, was the focus of subsequent Supreme Court cases.

After the bare description of *McDonnell Douglas*, the Court elaborated on the employer's burden in *Furnco*.[26] *Furnco* marked the beginning of the confusion between the "articulation" of a reason unprohibited by law and the "proof" of such a reason. The Court described the employer's burden as "merely that of *proving* that he based his employment decision on a legitimate consideration . . . ."[27] The same paragraph quoted *McDonnell Douglas*' requirement that the employer "need only '*articulate* some legitimate, nondiscriminatory reason . . . .'"[28] The Court was apparently (and unaccountably) ignorant of the contrast between articulation and proof, and of the self-contradiction it had committed.

The conflict generated by this contradiction first arose directly in *Board of Trustees of Keene State College v. Sweeney*.[29] The United States Court of Appeals for the First Circuit, resting on *McDonnell Douglas*, ruled that the employer's burden was to prove "absence of discriminatory motive."[30] The Supreme Court found this in error. The Court drew the "significant distinction" between "articulating" a legitimate reason, as *McDonnell Douglas* had put it, and "proving" nondiscriminatory motive.[31]

The Court considered virtually the same question in *Texas Community Affairs v. Burdine*.[32] In *Burdine*, the Court maintained that the plaintiff retained the "ultimate burden of persuading" the fact-finder that the employer intentionally discriminated.[33] The shifting burdens, according to *Burdine*, merely served to bring the court "expeditiously and fairly to this ultimate question."[34] Nevertheless, the burden on the employer is real: if she remains silent, the presumption of illegal discrimination raised by the prima facie

[26] Furnco Constr. Corp. v. Waters, 438 U.S. 567, 567 (1978).
[27] *Id.* at 577 (emphasis added).
[28] *Id.* at 478 (quoting *McDonnell Douglas*, 411 U.S. at 802).
[29] 439 U.S. 24 (1978).
[30] Sweeney v. Board of Trustees of Keene State College, 569 F.2d 169, 177 (1st Cir.), *vacated*, 439 U.S. 24 (1978).
[31] *Sweeney*, 439 U.S. at 27-29.
[32] 450 U.S. 248, 250 (1981). "The narrow question presented is whether, after the plaintiff has proved a prima facie case of discriminatory treatment, the burden shifts to the defendant to persuade the court by a preponderance of the evidence that legitimate, nondiscriminatory reasons for the challenged employment action existed." *Id.*
[33] *Id.* at 253.
[34] *Id.*

case is sufficient to cause judgement to be entered in favor of the plaintiff.[35]

Burdine apparently resolved the contradiction between "articulation" and "proof" that *Furnco* had introduced. The employer "need not persuade the court that it was actually motivated by the proffered reasons," it need only "raise[ ] a genuine issue of fact as to whether it discriminated against the plaintiff" by introducing evidence of the reasons for its decision.[36] The employer rebuts the presumption if she "articulates lawful reasons for the action."[37] *Burdine* explained that the affect the presumption of illegal discrimination has on the burden of proof is "a traditional feature of the common law"; it places a "burden of production" on the employer.[38] With this production burden does come the minimum, basic burden of proof: in order to evade summary verdict, the employer must raise a genuine issue of fact regarding the reason for her employment decision.[39] The *McDonnell Douglas* scheme, according to *Burdine*, is a device "intended progressively to sharpen the inquiry into the elusive factual question of intentional discrimination."[40]

Burdine did leave some potential ambiguity. First, *Burdine* maintained that if the employer meets its burden of production, "the factual inquiry proceeds to a new level of specificity" in which the plaintiff has the opportunity to demonstrate pretext of discrimination.[41] *Burdine* also described the plaintiff's burden in the pretext stage as "merg[ing] with the ultimate burden of persuading the court that she has been the victim of intentional discrimination."[42] This the plaintiff may do one of two ways: either directly, by persuading that an illegal basis more likely than not motivated the employer, or "indirectly, by showing that the employer's proffered explanation is unworthy of credence."[43] The ambiguity *Burdine* left was in equating the conclusion that the employer's proffered reason was unworthy of credence with the

[35] *Id.* at 254.
[36] *Id.* at 254-55.
[37] *Burdine*, 450 U.S. at 257.
[38] *Id.* at 255 n.8.
[39] *Id.* at 254.
[40] *Id.* at 255 n.8.
[41] *Id.* at 255.
[42] *Burdine*, 450 U.S. at 256.
[43] *Id.*

necessity of the fact-finder concluding that the employer had intentionally discriminated against the employee. While, from the totality of the opinion, one may fairly conclude that *Burdine* meant that the fact-finder *may* find intentional discrimination if it disbelieves the employer, but is not compelled to do so, nevertheless the logical door was left slightly ajar by this language. This leeway allowed aggressive plaintiffs to maintain that they were entitled to judgment based solely on the incredibility of the employer regarding the reasons for its action.

In *United States Postal Service Board of Governors v. Aikens*,[44] the Supreme Court addressed "indirect proof" of intentional discrimination. The Court held that the plaintiff need not offer direct proof of the employer's discriminatory intent in order to prevail.[45] Rather, the plaintiff may prove her case either by "direct or circumstantial evidence,"[46] and that the finder of fact was free to give such evidence "whatever weight and credence it deserves."[47] The Court stressed that once a prima facie case was established, and the employer responds "by offering evidence of the reason" for his decision, the fact-finder must then decide the ultimate question: whether the employer intentionally discriminated on an illegal basis.[48] The prima facie case is simply irrelevant, *i.e.*, "drops from the case," once the employer has done everything that is required of him in response to the establishment of the presumption of illegal discrimination.[49] At that point, the evidence is to be evaluated, and the ultimate question of fact is to be decided, just as is any disputed fact in civil litigation.[50]

The Supreme Court failed, however, to fully resolve the ambiguity in the nature of the showing of discrimination that was introduced in *Burdine*. The Court charged the finder of fact, once both sides had been heard, to "decide which party's explanation of the employer's motivation it believes."[51] The Court admonished that "[n]one of this means that [courts] should treat discrimination dif-

[44] 460 U.S. 711 (1983).
[45] *Id.* at 713, 717.
[46] *Id.* at 714 n.3.
[47] *Id.*
[48] *Id.* at 714-15.
[49] *Aikens*, 460 U.S. at 715.
[50] *Id.* at 715-16.
[51] *Id.* at 716.

ferently from other ultimate questions of fact"[52] or "make their inquiry even more difficult by applying legal rules which were designed to govern 'the basic allocations of burdens and order of presentation of proof.'"[53] Nevertheless, the ambiguity regarding the burden of proof of the plaintiff and the employer with regard to the ultimate question of fact, however slight, remained.

IV. THE *HICKS* DECISION

In *St. Mary's Honor Center v. Hicks*, the employee, a shift commander at a half way house operated by the state of Missouri, alleged that his employer had demoted and then discharged him because of his race.[54] The district court held a full bench trial, and found that the plaintiff had proven a prima facie case: Hicks proved that he was black; that he was qualified for the position of shift commander; that he was demoted and ultimately discharged from that position; and that the position from which he was discharged remained open and was ultimately filled by a white man.[55] The employer introduced evidence of two reasons for its demotion and discharge of the plaintiff: the severity and accumulation of rules violations committed by the plaintiff.[56]

The district court found that neither of the reasons offered by the employer was the real reason for the plaintiff's demotion.[57] The court found, nevertheless, that the plaintiff had failed to carry his burden of proving that the employer was motivated by race. Although the plaintiff had proven "a crusade to terminate him," he had not convinced the district court that "the crusade was racially rather than personally motivated."[58] The United States Court of Appeals for the Eighth Circuit set this conclusion aside; once the fact-finder concluded that the employer's proffered reasons was incredible, the Eighth Circuit ruled, the plaintiff was entitled to judgment as a matter of law.[59] An employer who offered a discredited reason, the court asserted, was no better off within

[52] *Id.*
[53] *Id.* (quoting Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248, 252 (1981)).
[54] Hicks v. St. Mary's Honor Center, 756 F. Supp. 1244, 1245 (E.D. Mo. 1991), *rev'd*, 970 F.2d 487 (8th Cir. 1992), *rev'd*, 113 S. Ct. 2742 (1993).
[55] *Hicks*, 756 F. Supp. at 1249-50.
[56] *Id.* at 1250.
[57] *Id.* at 1252.
[58] *Id.*
[59] Hicks v. St. Mary's Honor Center, 970 F.2d 487, 492 (8th Cir. 1992), *rev'd*, 113 S. Ct. 2742 (1993).

the *McDonnell Douglas* scheme than one who had failed to offer any evidence at all to rebut the presumption of illegal discrimination.[60]

The Supreme Court disagreed.[61] In order to rebut the presumption of illegal discrimination, the employer need only produce evidence which, "if believed by the trier of fact," would support a finding that it was motivated by a reason not prohibited by Title VII.[62] The employer's burden is merely one of production, not persuasion. As the Court had also noted in *Burdine*, the employer need not prove that it was motivated by the reasons it offers.[63] This is so, in part, due to the nature of presumptions under Federal Rule of Evidence ("Rule") 301. Under this rule, presumptions in civil cases impose a "burden of going forward with evidence to rebut or meet the presumption," but do not shift "the burden of proof in the sense of the risk of nonpersuasion."[64] Rule 301 applies to the presumption of illegal discrimination created by the prima facie case, as it does to every civil-law presumption.[65] The Court had noted on numerous occasions that the burden of persuading the fact-finder that the employer was motivated by an illegal criterion remained, despite the shifting burden of production, upon the employee.[66]

The *McDonnell Douglas* framework, including the presumption of illegal discrimination, vanishes with the employer's satisfaction of this burden of production.[67] The presumption, the Supreme Court asserted, serves solely to force the employer to come forward with evidence to support a verdict in her favor.[68] The fact-finder proceeds, free from any affect of the presumption, to the ultimate question of whether the employer was motivated by ille-

[60] *Id.* at 492.
[61] St. Mary's Honor Center v. Hicks, 113 S. Ct. 2742 (1993).
[62] *Id.* at 2747 (quoting Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248, 254-55 n.8 (1981)).
[63] *Id.* at 2749 (citing *Burdine*, 450 U.S. at 254).
[64] FED. R. EVID. 301.
[65] *Hicks*, 113 S. Ct. at 2747, 2749.
[66] *Id.* at 2747, 2749-50; *see also* Patterson v. McLean Credit Union, 491 U.S. 164, 187 (1989); Price Waterhouse v. Hopkins, 490 U.S. 228, 245-46 (1989) (Brennan, J., plurality opinion); *Price Waterhouse*, 490 U.S. at 260 (White, J., concurring); *Price Waterhouse*, 490 U.S. at 270 (O'Connor, J., concurring in judgment); *Price Waterhouse*, 490 U.S. at 286-88 (Kennedy, J., dissenting); Cooper v. Federal Reserve Bank of Richmond, 467 U.S. 867, 875 (1984); United States Postal Serv. v. Aikens, 460 U.S. 711, 716 (1983); *Burdine*, 450 U.S. at 253.
[67] *Hicks*, 113 S. Ct. at 2749.
[68] *Id.*

gal considerations.[69] While the fact-finder may find illegal discrimination from all the evidence considered, including the employer's offered reasons (if they are incredible), the fact-finder may also find no illegal discrimination despite its skepticism of the employer's offered rationale for the employment decision.[70]

In order for a court to impose liability under Title VII, the fact-finder must conclude that the employer has discriminated on an unlawful basis. The law gives no license to a court to substitute a lesser finding.[71] Thus, a finding that the employer's explanation of its decision is unbelievable is not in itself legally significant under Title VII. Even if the employer is lying about her motivation for the decision (which does not follow necessarily from her incredibility on the question), "Title VII is not a cause of action for perjury . . . ."[72]

The plaintiff's burden in the "pretext" stage of the case is not merely to discredit the employer's explanation. It is, rather, more complicated. The plaintiff must show that "whatever the stated reasons for his rejection, the decision was in reality racially [or sexually, religiously, etc.] premised."[73] Casting doubt on the employer's reasons must necessarily be a part of the pretext showing. Nevertheless, the Court maintained, the plaintiff's opportunity is to show the employer's reasons are pretext for discrimination based on an illegal criterion, not merely pretext for discrimination based on a reason other than that offered by the employer. The plaintiff cannot show that the reason is a pretext for discrimination without showing both that the reason is false and that discrimination was the real reason.[74]

[69] *Id.*

[70] *Id.*

[71] *Id.* at 2751.

[72] *Hicks*, 113 S. Ct. at 2754. The Court criticized the dissent for assuming that incredibility was the same as perjury and prevarication. *Id.* The fact-finder may very well conclude that a witness is incredible without possessing the confidence in its conclusion, or enough information regarding the events in question, to conclude that a witness lied. This is especially true where motivation, an inherently unobservable attribute rather than a physical occurrence, is at issue; the fact-finder may only infer state of mind from behavior. In addition, the employer is often an organization, which is often controlled by more than one person acting in concert and each without complete control to make decisions, and must rely both on statements of fact by agents and on agents to make decisions in its name.

[73] *Hicks*, 113 S. Ct. at 2753 (quoting McDonnell Douglas Corp. v. Green, 411 U.S. 792, 805 n.18 (1973)).

[74] *Id.* at 2752. In one sense, the *Hicks* decision may be understood in terms of the meaning of proving "pretext." Some circuits and the *Hicks* dissent understood pretext to refer merely to the falsity of the reasons the employer offers in the litigation, and that whether the true reason (for which the offered reason is a "cover") was an illegal basis is immaterial.

Many of the dissent's arguments rested on the characterizations of the pretext burden in *Burdine*. The Court responded to each. The plaintiff has the opportunity to show, as *Burdine* put it, that the employer's offered reasons "were not its true reasons, but were a pretext for discrimination."[75] The dissent took this to mean that if the plaintiff proves the asserted reason to be false, the plaintiff is entitled to judgment. According to the Court, however, the plaintiff cannot prove those reasons pretextual without proving that those reasons pretextual *for discrimination*; in other words, the plaintiff must show both that the reason was false and that illegal discrimination was the real reason.[76]

Burdine described the inquiry after the employer meets her burden of production as "proceed[ing] to a new level of specificity."[77] The Court took the view that this referred to the "few generalized factors that establish a prima facie case to the specific proofs and rebuttals of discriminatory motivation the parties have introduced."[78] According to *Burdine*, the plaintiff's burden to show that the employer's proffered reasons were not the true reasons "merges with the ultimate burden" of proving intentional discrimination.[79] This, the Court commented, means that the plaintiff's burden of showing pretext is part of the ultimate burden of proving intentional discrimination, but does not replace it.[80] If, after all, the plaintiff cannot persuade the fact-finder that the reasons the employer offers were not the true motivation for the decision, he cannot, by definition, persuade that the true reason was what he claims it was, *i.e.*, his race, sex, national origin, etc.

The Court agreed with the dissent's argument that one passage from *Burdine*, which observed that the plaintiff may persuade the court of intentional illegal discrimination "indirectly by showing that the employer's proffered explanation is unworthy of credence," contradicted the Court's holding. The passage from

The *Hicks* Court ruling is premised on a different meaning: that pretext refers to proof that the employer's offered reason is not the true one and that an illegal basis truly was the reason. Pretext, to the *Hicks* Court, means pretext for discrimination. While some commentators complain that *Hicks* requires the plaintiff to prove "pretext plus," this is only true if one rejects the Court's notion that proof of pretext means proof that discrimination was the true reason for the employer's decision.

75 Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248, 253 (1981).

76 St. Mary's Honor Center v. Hicks, 113 S. Ct. 2742, 2752 (1993).

77 *Burdine*, 450 U.S. at 255.

78 *Hicks*, 113 S. Ct. at 2752.

79 *Burdine*, 450 U.S. at 256.

80 *Hicks*, 113 S. Ct. at 2752.

Burdine commented that the plaintiff may persuade that intentional discrimination took place "either directly, by persuading the court that a discriminatory reason more likely motivated the employer or indirectly by showing that the employer's proffered explanation is unworthy of credence."[81] These words, the Court admitted with resignation, "bear no other meaning but that the falsity of the employer's explanation is *alone enough* to compel judgment for the plaintiff."[82] According to the *Hicks* Court, however, the passage in question "contradicts or renders inexplicable numerous other statements" in *Burdine* and elsewhere.[83]

Even so, the Court's surrender on the meaning of the passage was mistaken and unnecessary. Despite its apparent tenacity in defending its interpretation of other passages in *Burdine* as consistent with its holding, the Court granted a point it need not have. As the Court points out elsewhere in its opinion, the plaintiff's proof that the employer's offered reasons are untrue, while not requiring a directed verdict for the plaintiff, is sufficient to support a finding of intentional discrimination if the fact-finder is persuaded by consideration of this, and all, evidence that the employer intentionally illegally discriminated. This is "indirect proof" of discrimination. No more is necessary to create a genuine issue of fact on the ultimate question of intentional illegal discrimination. The passage from *Burdine*, read to refer to what is sufficient evidence to support a finding of fact, rather than what is necessary to win a directed verdict, is consistent with this analysis.

The dissent further argued that the fact-finder's inquiry should be limited "by the scope of the employer's proffered explanation."[84] Otherwise, the dissent fretted, the plaintiff had to address "any conceivable explanation for the employer's actions that might be suggested by the evidence, however unrelated to the employer's articulated reasons . . . ."[85] The Court argued that the objection mischaracterized the fact-finding in an employment discrimination case. The reasons the employer offers are established by the introduction of evidence in an effort to persuade the fact-finder thereby, not communicated apart from the record either by a

[81] Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248, 256 (1981).
[82] St. Mary's Honor Center v. Hicks, 113 S. Ct. 2742, 2752 (1993) (emphasis in original).
[83] *Id.* at 2752-53.
[84] *Id.* at 2761 (Souter, J., dissenting).
[85] *Id.* at 2763 (Souter, J., dissenting).

means conducive to limiting the relevancy of the employer's case or by a means unavailable to plaintiff observation or free from plaintiff criticism. While the dissent expected employers to somehow "inject into the trial an unarticulated reasons," the Court noted that the employer's reasons can only be articulated by introduction of evidence on the record.[86] The dissent, the Court noted, seemed to contemplate articulation of reasons, aside from the record, both in a way obvious enough to limit the inquiry and so covert as to evade the plaintiff's ability to attempt to detect and contradict them.

V. The Practical Impact

It is easy to overstate the practical implications of the *Hicks* decision. Uncertainty pervades any judicial fact-finding, but as the motivation or basis for a decision exists only in the mind of the decision-maker and has no "physical" expression or dimension, proof of any fact regarding this state of mind is especially uncertain. The placement of the burden of proof is especially important in such cases.

The *Hicks* opinion significantly affects the plaintiff's burden of proof under the law as it has been understood in some circuits, where the plaintiff was entitled to judgment if she merely proved that the employer's proffered reasons were untrue.[87] Plaintiffs will find their chances to obtain summary judgment or directed verdict greatly diminished in these circuits. Previously, in these circuits, mere disproof of the employer's proffered reasons sufficed; now, at the very least, plaintiffs will have to show that a rational jury could come to no conclusion other than that the employer had intentionally discriminated on an illegal basis. The presumption of discrimination raised by the prima facie case is

[86] *Id.* at 2755.

[87] *See, e.g.*, Hicks v. St. Mary's Honor Center, 970 F.2d 487, 492-93 (8th Cir. 1992), *rev'd*, 113 S. Ct. 2742 (1993); Lopez v. Metropolitan Life Ins. Co., 930 F.2d 157, 161 (2d Cir.), *cert. denied*, 112 S. Ct. 228 (1991); Caban-Wheeler v. Elsea, 904 F.2d 1549, 1554 (11th Cir. 1990); Tye v. Board of Educ. of Polaris Joint Vocational Sch. Dist., 811 F.2d 315, 320 (6th Cir.), *cert. denied*, 484 U.S. 924 (1987); King v. Palmer, 778 F.2d 878, 881 (D.C. Cir. 1985); Thornburgh v. Columbus & Greenville R.R., 760 F.2d 633, 639-40, 646-47 (5th Cir. 1985); Duffy v. Wheeling Pittsburgh Steel Corp., 738 F.2d 1393, 1395-96 (3d Cir.), *cert. denied*, 469 U.S. 1087 (1984). Some other circuits, have concluded that the plaintiff must convince the fact-finder that the employer acted on an illegal basis, not merely that the reasons offered by employer were not the true reasons for the decision. *See* Benzies v. Illinois Dep't of Mental Health, 810 F.2d 146, 148 (7th Cir.), *cert. denied*, 483 U.S. 1006 (1987).

gone, having "drop[ped] out of the picture,"[88] by this stage of the trial. The presumption now has effect only if the plaintiff succeeds in establishing a prima facie case and the employer fails to introduce *any* evidence of a legal basis for its decision, *i.e.*, if the employer remains silent at the close of a plaintiff's proven prima facie case of discrimination. The employer must, however, offer evidence credible enough to create a genuine issue of fact regarding the basis of its decision, in order to survive summary judgment and get to a trial,[89] and to allow a reasonable fact-finder to find for the employer on that question.[90]

Yet, the plaintiff still may prove her case indirectly in the wake of *Hicks*.[91] *Hicks* makes it clear that the plaintiff may present all the evidence necessary to permit the fact-finder to find intentional discrimination merely by casting sufficient doubt on the veracity of the employer's proffered reasons regarding the true motivation of the employer.[92] The import of *Hicks* is that the plaintiff is not

[88] *Hicks*, 113 S. Ct. at 2749.

[89] *See* FED. R. CIV. P. 56.

[90] *See* FED. R. CIV. P. 50(a). In cases heard by the court as fact-finder, such as those under Title VII unamended by the Civil Rights Act of 1991, the court could enter judgment as a matter of law on a claim against a party who had been fully heard with respect to an issue if that claim could not be maintained or defeated without a favorable finding on that issue. *See* FED. R. CIV. P. 52(c); *see also* Sailor v. Hubbell, Inc., 4 F.3d 323, 325 n.2 (4th Cir. 1993).

[91] Some commentators have misinterpreted *Hicks* on this point. *See* Raymond Nardo, St. Mary's Honor Center v. Hicks *Bursts Bubble in Employment Discrimination*, N.Y.L.J., Aug. 9, 1993, at 1, col. 1. Mr. Nardo claims that *Hicks* renders plaintiff's indirect proof of illegal discrimination (via disproof of the employer's proffered reasons) virtually identical to direct proof, in which the plaintiff produces direct evidence (such as comments made by the employer or its agents) to support an illegal discriminatory motive. *Id.* Mr. Nardo is also concerned that plaintiffs are deprived of "their day in court" when direct evidence is unavailable. *Id.*

While plaintiffs have been deprived of an advantage in employment discrimination litigation—namely, the opportunity for judgment as a matter of law without a conclusion regarding whether the employer illegally discriminated—they retain their opportunity to convince triers of fact by indirect evidence (the incredibility of the employer's proffered reasons) of the ultimate factual issue of the case. Mr. Nardo shares Justice David Souter's fear, expressed in the dissenting opinion of the latter in Hicks, that juries will find no discrimination despite disbelief of the employer's reasons. Yet, the risk that the fact-finder will believe neither party's explanation of the events in question is one aspect of the risk of nonpersuasion borne by plaintiffs in cases arising in contract, tort, and countless other contexts.

[92] St. Mary's Honor Center v. Hicks, 113 S. Ct. 2742, 2749 (1993). In order to survive summary judgment, according to some courts, the plaintiff must raise a reasonable inference of illegal discrimination in her showing that the employer's reasons are unworthy of credence. *See* EEOC v. MCI Int'l, 829 F. Supp. 1438, 1451 (D.N.J. 1993). Other courts have held that the plaintiff's mere proof of the untruth of the employer's proffered reasons along with his proof of a prima facie case, is sufficient to survive summary judgment, without the necessity of the plaintiff raising an inference of illegal discrimination in any other way. *See* Reiff v. Philadelphia County Court, 827 F. Supp. 319, 324-25 (E.D. Pa. 1993). This distinc-

assured judgment merely from casting doubt, no matter how convincingly, on the employer's reason.[93] Even if no reasonable fact-finder could conclude that the employer's proffered reasons were the true ones for the employer's decision, if the fact-finder could nonetheless conclude that an illegal basis was not the true reason, the plaintiff will not receive summary judgment or a directed verdict. *Hicks* also requires that the court charge the jury that, even if it disbelieves the reasons the employer advances for its decision, it must conclude from the evidence presented to it that the employer acted on an illegal basis in order to find for the plaintiff.

Furthermore, *Hicks* does not significantly affect how employers will go about defending disparate intent cases. While employers rebut the presumption of discrimination by introducing evidence of any legal basis for its decision, they will continue to seek to make this evidence more than barely credible. They will continue to argue that the reasons they present were the true reasons for the decision. It is cold comfort to employers that the jury may find no illegal discrimination even if it disbelieves the employer's proof. Employers will be unwise to rely on juries' disbelief of both the plaintiff's explanation of illegal discrimination and the employer's explanation in favor of a rationale unstressed by either party.[94]

Hicks still leaves Title VII disparate treatment plaintiffs in an enviable position among plaintiffs: proof of a prima facie case relieves them of the burden of coming forward with direct evidence of intentional discrimination. Plaintiffs who have established a prima facie case may, as a strategic matter, rely solely on their

tion may suggest that *Hicks* failed to fully resolve all potential issues of burdens of proof it raised. *See* Victoria A. Cundiff & Ann E. Chaitovitz, St. Mary's Honor Center v. Hicks: *Lots of Sound and Fury, But What Does it Signify?*, 19 EMPLOYEE REL. L.J. 143 (1993). However, most courts are likely to conclude that proof of the incredibility of the employer's proffered reasons is sufficient to raise a genuine issue of fact regarding whether the true reason was illegal discrimination. *See* Anderson v. Baxter Healthcare Corp., 13 F.3d 1120 (7th Cir. 1994) (plaintiff may survive summary judgment merely by raising doubt of credibility of employer's proffered reasons because "[i]f the only reason an employer offers for firing an employee is a lie, the inference that the real reason was a forbidden one, such as age, may rationally be drawn.").

[93] *See* Geary v. Visitation of the Blessed Virgin Mary Parish Sch., 7 F.3d 324, 329 (3d Cir. 1993). "Showing pretext is not necessarily sufficient to meet the plaintiff's burden of proof." *Id.* Note, however, that the United States Court of Appeals for the Third Circuit was employing pretext in the sense of cover for any other reason for the employment action, rather than in the sense of cover particularly for an illegal reason.

[94] *See* Cundiff & Chaitovitz, *supra* note 92, at 156. "To prevail in a pretext-based employment discrimination case, an employer must still . . . offer complete and credible reasons for its actions, and effectively undermine the plaintiff's claim of pretext. *If an employer fails in these efforts, it will still very likely lose.*" *Id.* (emphasis in original).

rebuttal of the employer's proffered reasons in order to reach the jury. Employers may not take a typical defendant's tack of casting doubt on the plaintiff's proof while not relying on their own affirmative proof of anything. Because of the presumption of illegal discrimination, a sufficient plaintiff's proof is a far lesser showing than would otherwise be necessary to survive a summary judgment or directed verdict motion. If plaintiffs will no longer receive judgment as a matter of law in some cases they might have in some circuits before *Hicks*, their ability to send the case to the fact-finder is undiminished, and is a relatively easy task at that.[95]

VI. THE POLITICAL IMPACT

The political impact of *Hicks* is far greater than the practical impact. The Supreme Court construed the presumption created by the prima facie case in an extremely weak form. That presumption lay at the heart of the liberal civil rights ideology of employment discrimination. As an attack on the political power of the presumption of illegal discrimination, *Hicks* is a dangerous blow to that ideology.

The idea of a presumption is that by proof of some simpler set of facts, some more complicated, more difficult to prove facts are assumed to be true. This requires an assertion of a relationship between the facts proven and the fact presumed true. This relationship is typically established by experience. One has observed so many instances in which the facts proven and the fact presumed coincided that one comes to expect, as a matter of course in running one's every day life that where the facts actually proven exist, so will the fact presumed true. The presumptions each of us

[95] Indeed, plaintiffs may find it easier to avoid summary judgment against them in the wake of *Hicks*. At least one court has ruled that, where the plaintiff has made out a prima facie case and the employer raises no defenses at law, such as failure to comply with statutory prerequisites, and the plaintiff merely asserts that the employer's proffered reasons are untrue without offering any evidence on that point, *Hicks* prevents summary judgment for the employer because the plaintiff is nevertheless entitled to have the jury determine the credibility of the employer's proffered reasons and whether the lack of that credibility indicates illegal discrimination. *See* Moisi v. College of the Sequoias Community, 25 Cal. Rptr. 2d 165, 170-72 (Cal. Dist. Ct. App. 1993). The court applies the California Fair Employment and Housing Act, for which California courts have adopted the same legal standards used under Title VII when deciding discrimination cases. *Id.* While this may be correct, the plaintiff would nonetheless have to indicate the evidence which shows there is a genuine issue of material fact, *i.e.*, that a rational jury could find the employer's proffered reasons incredible and find an intent to discriminate on the employer's part. *See* FED. R. CIV. P. 56.

employs in every day life are formed in this manner. If we hear a skid and crash in the near distance, and proceed to the direction of its source and see an automobile wrapped around a tree, we presume that the automobile made the sounds we heard, hit the tree, and was damaged by the impact. Presumptions are a matter of accumulated experienced: we know something of what causes both the sounds and the damage to the auto and we have heard autos make that noise and hit objects and be damaged. We need not see the impact to infer its existence from other evidence we have come, from experience, to associate with it. Notice that this method of establishing the relationship looks backward to experience, to a set of data about events which may be examined for the frequency and reliability of the coincidence of the facts proven and the fact presumed true.

In the case of the presumption of illegal discrimination created by the proof of a prima facie case used in disparate intent cases, little judicial examination has been made of the asserted relationship between the facts shown in the prima facie case the facts of illegal discrimination presumed. When the Supreme Court established the presumption in *McDonnell Douglas*, neither it, nor courts in general, had accumulated a great deal of experience in how employers make decisions. Nor has Congress carefully considered what set of more easily proven facts coincide with the more difficult to determine intent to discriminate on race, sex, religion, or national origin.

In *Furnco*, the Supreme Court claimed it presumes illegal discrimination on proof of a prima facie case "because we presume these acts, if otherwise unexplained, are more likely than not based on the consideration of impermissible factors."[96] Employers act for some reason, the Court argued, so "when all legitimate reasons for rejecting an applicant have been eliminated as possible reasons for the employer's actions, it is more likely than not the employer . . . based his decision on an impermissible consideration such as race."[97] The Court, however, has never made any effort to explain how it arrived at the conclusion that the prima facie case articulates and eliminates as possible bases "all legitimate rea-

[96] Furnco Constr. Corp. v. Waters, 438 U.S. 567, 577 (1978); *see also* International Bhd. of Teamsters v. United States, 431 U.S. 324, 358 (1977) (discussing inference of discrimination).

[97] *Furnco*, 438 U.S. at 577.

sons" for the employer's decision. The Court claimed to be merely laying out and eliminating the legitimate bases for the decision, a descriptive statement. In claiming to consider "all legitimate reasons," the Supreme Court could not help but make either a powerful normative statement about how employers *should* make decisions or a fatally conceited statement about its power, and the power of other courts, to enumerate and consider all legitimate bases.

The *McDonnell Douglas* presumption is based, not upon the accumulation of experience of the coincidence of one set of facts with another, but upon an ideology which posits that relationship without proof. This ideology holds that an employment decision adverse to a black, ethnic minority, or woman who possesses any possibility of performing even minimally acceptably in the job is very likely due to racism, that the state is competent to, and must, determine independently of the employer whether the applicant was qualified for the job and thus whether the employer's decision was racist or sexist. In other words, racial, sexual, ethnic, or religious groups would be evenly distributed if not for discrimination. There is no evidence, of course, to support this notion of "naturally" random distribution of people's performance or preferences; to the contrary, much evidence suggests that people usually do not behave in a random or even distribution.[98] Nevertheless, this liberal civil rights ideology pervades employment discrimination to such an extent that it has become a virtually unstated and unchallenged context for every discussion within it.

The plaintiff gains the advantage of the presumption when she is in a "protected class" of a particular race, sex, religion, or ethnicity, is rejected for a position, and proves she is "qualified" for the job. Usually, there is little controversy regarding class status and rejection. Thus, in the liberal civil rights ideology of the *McDonnell Douglas* presumption, lack of "qualification" is the only "legitimate reason" for the employer's rejection of the protected-class plaintiff for an open position.[99]

The courts' notion of determining qualification, however, differs

[98] *See* THOMAS SOWELL, CIVIL RIGHTS: RHETORIC OR REALITY (1984); THOMAS SOWELL, *By the Numbers*, *in* COMPASSION VERSUS GUILT 228-30 (1987).

[99] *Furnco*, 438 U.S. at 577. Establishment of a prima facie case, including proof of qualification for the position, raises a presumption of illegal discrimination because it eliminates "all legitimate reasons" for rejecting an applicant. *Id.*

significantly from the way employers make decisions. Even if courts sought to determine each and all of the requirements of the position in question, and to determine who was the *most* qualified available candidate, they would, by necessity, simplify the position to make the determination of what skills are necessary. In addition, a court cannot possibly consider the entire role the person in the position must play. In even the most simple of organizations, these calculations involve too many variables for a court to efficiently consider.

More importantly, even if employers have no more information than do courts, they have perfect incentive to make the right choice. Employers who choose incorrectly are punished in the bottom line of profits; courts who second-guess incorrectly suffer no consequences. Under these circumstances, even the most careful and well-intentioned courts are likely to be wrong far more often than employers. The employer is chastened and informed by the market; the court is not disciplined by the market. Yet, the court is called upon to determine both the objective qualifications of the position and whether the plaintiff meets them. Ironically, the *Furnco* Court rejected the court of appeals' order requiring the employer to adopt certain hiring practices on essentially this objection: "Courts are generally less competent than employers to restructure business practices . . . ."[100]

Nor have courts even attempted to mimic a "prejudice-free" version of the employer's decision-making. In determining the plaintiff's qualification for the job, courts have not sought merely to determine the employer's true requirements for the job or employment decision-making process. Rather, they have consciously disregarded some elements of those decisions. Courts are hostile, for instance, to employer qualification requirements they label "subjective," ostensibly because they see potential for abuse of those requirements as pretext to act on illegal bases.[101] Even evaluations of productivity and efficiency may be so classified and dismissed as objections to the establishment of the plaintiff's qualification for the position.[102] The employer's knowledge of the plaintiff's abilities is, in fact, irrelevant to the establishment of the

[100] *Id.* at 578.
[101] *See, e.g.*, Weldon v. Kraft, Inc., 896 F.2d 793, 798 (3d Cir. 1990).
[102] *Id.* at 799.

plaintiff's qualifications.[103] Where the plaintiff's current job is, in the court's judgment, similar to the position in question, and the plaintiff has performed the current job adequately, again in the judgment of the court, the plaintiff may be found qualified for the position.[104] A court may find good performance appraisals in the plaintiff's current job support a finding that plaintiff is qualified for another position.[105] If an employer merely considered a plaintiff for a promotional position, and she has received good performance appraisals, a court may find the plaintiff qualified for the promotion even if she has served six years less than the typical tenure required for the promotion.[106] Courts have repeatedly held that merely adequate or mediocre credentials are sufficient to establish the plaintiff's qualification. Though "an employer . . . dissatisfied with the performance of an employee . . . can properly raise the issue in rebuttal of the plaintiff's showing,"[107] this misses the point: the presumption allegedly applies only when the employee was qualified for the position.

Courts have, thus, demonstrated their hostility to an employer's use of the criteria the employer itself has chosen, unless the employer may demonstrate the criteria in a form the court is comfortable in understanding. The employer is presumed to have discriminated based on the plaintiff's qualification for the position, yet the legal determination of qualification bears little, if any, relationship to the employer's decision making regarding the position. The liberal civil rights ideology, and courts, presume racism or sexism based upon a showing that has virtually nothing to do with whether the employer considered the plaintiff capable of performing the duties of the position.

The Supreme Court's claim that the prima facie case merely describes and considers all the permissible bases for the employment decision is false. Determinations of prima facie cases have become, as they inevitably had to become, the normative task of determining which criteria for decisions the use of which the court, and thus the state, will punish by a presumption of illegality of

[103] *See, e.g.*, Gilty v. Village of Oak Park, 919 F.2d 1247, 1251 (7th Cir. 1990).
[104] *See* Hughes v. Derwinski, 967 F.2d 1168, 1172 (7th Cir. 1992).
[105] *Id.* at 1168.
[106] *See* Churchill v. IBM, Inc., 759 F. Supp. 1089, 1103 (D.N.J. 1991).
[107] Powell v. Syracuse Univ., 580 F.2d 1150, 1155 (2d Cir.), *cert. denied*, 439 U.S. 984 (1978).

the decision itself.

Courts of law are not particularly adept at determining the skills a particular position requires. More importantly, courts of law, unlike the employer itself, are not faced with the consequences of an incorrect decision. In a competitive economy, if the employer makes a poor choice of employee (by hiring the less-than-optimum available person), the employer's business will suffer. On the other hand, successful choices redound to the benefit of the employer's business. It is this (nearly) perfect capture of the costs and benefits of employment decisions which, along with competition for scarce resources, such as skilled and valuable employees, which creates the efficiencies, and justice, of the pricing system in a free market. If courts, however, make an incorrect choice, neither the judge nor anyone else in the government suffers. Nor is a correct choice rewarded. Judges' compensation and prestige is not determined by the productivity of employees or employers whom they have "matched" by virtue of determining that the employee was qualified for a position with the employer but was denied the job for some "illegitimate reason." In fact, the judge's (and, indeed, the entire government's) "compensation" is increased, especially in terms of power over others, by finding illegal discrimination and ordering appropriate relief. Political sensibilities and the creation and maintenance of power over others by fiat and force are the driving force of government. The employer in a competitive market, by contrast, while desiring money or power, must persuade others to trade with her. Her own assets are at risk should she fail.

The court's self-interest is also relevant in determining why a court will tend to find a prima facie case of discrimination. As an organ of the state, the court has a powerful incentive to underestimate the qualifications of the job. Each time it does so, a presumption is established which the employer may not be able to rebut. If the employer fails to rebut the presumption, the court finds illegal discrimination and the court, and other organs of the state, may exercise power over the employer. Thus, the presumption increases the opportunity for the court, and the state as a whole, to exercise power.

The presumption of illegal discrimination affects employer behavior in a number of ways. Because only the failure to hire or promote an employee in a "protected class" normally gives rise to a

cause of action, employers may find it advantageous to hire, retain, and promote those within "protected classes." In this way, the presumption works to redistribute wealth from employers, and employees not within a "protected class," to employees within those classes. In addition, the employer is penalized for setting the qualifications of jobs differently from the way a court will accept in determining the prima facie case.

The court's method of determining qualification favors the bureaucratic model of organization, in which rigid hierarchies divide responsibility and accountability in a way easily described by job description and organization charts. Alternative means of organization, some of which may be more conducive to entrepreneurial activity, put the employer at a disadvantage in an employment discrimination suit setting. Alternative forms may lack the clear job descriptions and flow charts describing supervision and responsibility which are useful in justifying a rejection to a court. An organization established on a different model may lack the "hard data" on job positions which bureaucratic organizations more easily produce. By penalizing innovation with artificial costs, the *McDonnell Douglas* scheme is fundamentally anti-competitive.

The legal determination of "qualification" for a job is a task which cannot possibly be done with accuracy by a court, agency, or indeed any organ of the state. The qualifications for a job is one aspect of the price of the job, one of the terms upon which two freely contracting parties must settle in order to come to agreement upon an employment relationship. Administrative or judicial determinations of job "qualifications" are thus price-fixing, a form of central economic planning. The failures of central economic planning, also known as socialism, fascism, or (more euphemistically) "industrial policy," are legion throughout history, including the history of our century. Because a price reflects the knowledge of all actors in the market combined, but not of any one actor, no single decision-maker, including a court, can possibly accurately calculate a price to be imposed on others.[108] Just as im-

[108] The knowledge which sets prices accurately in the free market is dispersed in the minds of all the actors in that market. No single mind may hold all this information, or act on it before it has changed to reflect changed circumstances. This was one insight of the great Friedrich A. von Hayek. *See* FRIEDRICH A. VON HAYEK, INDIVIDUALISM AND ECONOMIC ORDER 90-91 (1948); FRIEDRICH A. VON HAYEK, THE ROAD TO SERFDOM 49-51 (1944). Ludwig

portantly, no single decision-maker can change the price rapidly enough to encapsulate the constant flow of new information which reflects upon the value of the good or service priced. As a result, the price is bound to be set higher or lower than the free market. This is no small problem; an inaccurate price means economic dislocation from the jobs and utility the free market would produce.

Nor is an accurate assessment of the "qualifications" for a job necessarily the paramount concern of the state (though the appearance of accuracy is important). The presumption serves to increase the power of the state over both employers and employees. The freedom of individuals and organizations shrinks accordingly, and the economic dislocation creates real costs and lost opportunities. The practical failure and misery produced by just this kind of state central planning are real, but so are the benefits to those who hold the power of the state.

The search for the proper, objective "qualifications" of a job is one variation on the eternal, and eternally futile, quest for the "just price" or "fair wage." No price is objectively fair, or just, or reasonable, because the prices in a single transaction reflect the assessment of value of the contracting parties in light of the other uses to which each could put her resources, and the price set in the market reflects the sum of such calculations by all actors. Prices are ever-changing to reflect recalculations of these values by the actors involved. What we mean by a "fair price" is often that which we have come to expect from recent past experience. But this price has been set, unless the government has intervened, by competitive market forces. Once those are removed, the price loses all significance as an accurate distribution of resources.[109]

More importantly, fixing a price also stifles the technological development which allows prices of goods and services to drop. Without a competitively set price, no one would bother to devote his resources to the development of methods to cheaper or better

von Mises, Hayek, and other members of the Austrian school of economics have argued that the price system in a free market is essential to bring to bear the knowledge of the efficient allocation of resources held only in small constituent parts by each of the numberless economic actors who trade in goods and services. *See* Friedrich A. von Hayek, *The Nature and History of the Problem*, and Ludwig von Mises, *Economic Calculation in the Socialist Commonwealth*, *in* COLLECTIVIST ECONOMIC PLANNING (Friedrich A. von Hayek ed. 1967).

[109] For one discussion of the "just price" fallacy, see VON HAYEK, *supra* note 108, at 110-12.

production. In this way, goods and services which are, at one point in time, relatively expensive become relatively cheap. Would, for example, computers become smaller, faster, and cheaper if the price of a computer had been set at the astronomical cost required to produce the first one? In the same vein, would they continue to get smaller, faster, and cheaper if the price was set at that which competition happened to produce today? The answer, of course, is no. There is no "just price" for a computer, nor for any other good or service.

The same analysis is true with regard the price for labor, both in terms of the wages and benefits employers must pay to attract employees and in terms of the abilities, experiences, and qualities the employee must offer to attract an offer from the employer. We should not be surprised, then, when shortages of employers, shortages of jobs, and sluggish development of newer forms of jobs (and, indeed, of entire economic organizations) are stifled when the state sets the "price" of employment by an attempt to determine the objective, fair, "qualifications" of a job. Such a determination is, of course, at the heart of the prima facie case of illegal discrimination.

The Supreme Court, without any reference from statute or common law, pulled the policy of presuming discrimination by determining the plaintiff's "qualifications" for the position from thin air. This effectively transformed the disparate impact case from once whose purpose is to determine whether the plaintiff can prove that the employer based her decision on race, gender, religion, or national origin, into one concerned with whether the employer can prove she had a legitimate reason for the decision. The policy behind the presumption is inextricably bound to the political and ideological notions of the employment relationship, of management, and of the proper role of government in free peoples' lives.[110]

The *McDonnell Douglas* presumption is not an example of a presumption created over time from the common law traditional accumulation of judicial experience about the relationship between

[110] Government price-fixing, as with all central planning has a great impact, not only on the material welfare of a people, but also on their political, social, and economic freedom. Government attempts to centrally plan an economy lead to slavery as well as poverty. For a discussion of the connection between central planning and the loss of freedom more broadly, see FRIEDRICH A. VON HAYEK, THE ROAD TO SERFDOM (1944).

events. Rather, it is a presumption established, as some presumptions are, as a substantive point of law, a "change [in] the accepted rules of the common law without the appearance of judicial legislation."[111] The presumption's creation was, however, quite outside the common-law tradition because it offered no precedent or reasoning. The application of the presumption is a political decision intended to affect out-of-court behavior, in this case by punishing the failure to favor those in a "protected class" in employment decisions. The presumption, used this way, is a political allocation of power to the state and certain employees and away from the employer and the employee.

How much power is allocated to the state and to those in a "protected class" depends on the strength of the presumption in court. Presumptions, of course, may vary in their strength, *i.e.*, they may be conclusive or rebuttable, may shift the burden of production or the risk of nonpersuasion, etc. The strength of the presumption depends on what burden is placed on an opposing party. In this case, the strength of the presumption depends on what the employer must do in court to overcome the presumption and return the inquiry to one in which no fact is presumed. The burden on employers of merely producing legally permissible reasons for the decision by *Hicks* is comparatively light. *Hicks* thus reduces the likelihood that the employer will fail to carry the burden. While the state may still exercise power over the employer, it must do so only on the fact-finder's conclusion of illegal discrimination, and not on less. By eliminating the lesser justification for state intervention, that the employer's offered reasons are incredible, *Hicks* reduces the chances that the state will have the opportunity to exercise power over the employer. This reduced chance and opportunity for state intervention in the employment market is at the heart of liberal objection to *Hicks*.

The liberal civil rights ideology sees racism and sexism lurking in most employers and, truth be told, in most lay people as well. This was precisely the worry of Justice David Souter's dissent. Justice Souter was overwhelmingly concerned with the fact-finder scouring the record for a reason for the employer's decision other

111 Edmund M. Morgan, *Some Observations Concerning Presumptions*, 44 HARV. L. REV. 906, 909 (1931).

than that explicitly advanced by the employer.[112] Justice Souter implies that the employer will somehow indicate to the jury in an inexplicit way, perhaps by "code words," that the plaintiff did not, and *should* not, get the position due the plaintiff's race, sex, national origin, or religion. The employer, who was motivated by prejudice, cannot state the true basis for the decision, and so both fabricates one while managing to convey the subtle yet effective message of the inferiority of those of the plaintiff's skin color, sex, etc. The jury, in Justice Souter's scenario, will have its innate racism, sexism, xenophobia, etc., played to, and find for the employer.

This may explain the vehemence of the dissent's disagreement with the majority. The dissent, like the liberal civil rights ideology, sees impermissible motivation deep in the hearts of employers and the general public alike, and believes that the state must work hard to root it out. *Hicks*, though it merely requires the plaintiff to prove the ultimate fact, hinders this effort. *Hicks* threatens the liberal ideology that "evil" prejudices are so deeply enmeshed that, even where they are not proven, they must be presumed.

CONCLUSION

As a practical matter, *Hicks* changes virtually nothing about how employers defend disparate treatment cases. The plaintiff's case will be somewhat tougher than if she could prevail merely by showing the falsity of the employer's offered reason; but the plaintiff may still prove intentional discrimination indirectly, by arguing to the fact-finder that the employer is not being truthful and that the real reason for the decision was an illegal one. The political significance of the presumption of illegal discrimination, however, was harmed. That the case was taken by some to so greatly harm plaintiffs' chances of winning employment discrimination

[112] St. Mary's Honor Center v. Hicks, 113 S. Ct. 2742, 2762 (1993) (Souter, J., dissenting). Justice Souter commented:

> [A] victim of discrimination lacking direct evidence will now be saddled with the tremendous disadvantage of having to confront, not the defined task of proving the employer's stated reasons to be false, but the amorphous requirement of disproving all possible non-discriminatory reasons that a fact-finder might finding lurking in the record.

Id.

suits is a clear sign of the weakness of the political principle underlying the presumption of illegal discrimination.