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RECKONING WITH EMPLOYMENT DISCRIMINATION IN A "POST RACIAL" ERA

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INTRODUCTION

"Injustice anywhere is a threat to justice everywhere. We are caught in an inescapable network of mutuality, tied in a single garment of destiny. Whatever affects one directly, affects all indirectly."[1] In this statement, Dr. Martin Luther King Jr. explains the fundamental need to achieve equality in society, and recognizes that discrimination, in even its most microscopic forms, must be eradicated. Almost fifty years after Dr. King made this statement, discrimination continues to permeate our society, including within the workplace despite the fact that many claim we are now living in a post-racial society. In the midst of the Civil Rights Movement, Congress passed the Civil Rights Act of 1964 which, through Title VII of the Act, prohibits an employer from discriminating against an employee on the basis of their race and other prohibited characteristics.[2] By making it illegal for an employer to discriminate on the basis of race, in hiring and other employment decisions, the passage of the Civil Rights Act of 1964[3] had a significant impact on overt discrimination. As a result, open discrimination such as hanging a noose in the workplace or blatantly stating "We do not hire blacks," no longer permeate throughout a place of business. However, while such overt forms of discrimination have dissolved, significant

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1 Martin Luther King, Jr., Letter from a Birmingham Jail (1963), reprinted at African Studies Center, Univ. of Penn., *available at* http://www.africa.upenn.edu/Articles_Gen/Letter_Birmingham.html.

2 Civil Rights Act of 1964, Title VII, 42 U.S.C. § 2000e-2 (2011). Title VII prohibits race, color, sex, religion, and national origin. It also created the Equal Employment Opportunity Commission (EEOC) to administer and enforce the statute. *Id.*

3 42 U.S.C. § 2000e-2.

discrimination in its more subtle form remains a pervasive factor. Because discrimination occurs more often in a form that is not overt, such as discriminatory appearance standards that appear neutral on their face, and other workplace decisions that appear on their face to be neutral, many claim we are now living in a post racial society.

Many recognize and accept that there are certain forms of discrimination that will occur throughout the employment process and influence the employer, whether in the initial hiring stages or when terminating an employee. However, such discrimination is "accepted" only to a limited extent.[4] Under Section 703(a)(1) of Title VII of the Civil Rights Act of 1964, it is unlawful for an employer to discriminate against an individual "with respect to his compensation, terms, conditions or privileges of employment" by deciding not to hire or in deciding to fire an individual because of his or her race.[5] In such situations the employee may bring a discrimination claim against the employer.[6]

Under Title VII, there are two main theories of discrimination upon which an aggrieved employee may bring suit against its employer, disparate treatment and disparate impact.[7] Although discrimination is prohibited through various Federal laws, Title VII legislation does not provide a statutory definition of 'discrimination.'[8] Consequently, the Courts have been afforded wide discretion in crafting what encompasses unlawful racial discrimination.

This article seeks to examine Title VII's approach to individual race discrimination claims in the employment setting in this post-racial era by looking at the race discrimination laws in two other national jurisdictions: Australia and the United Kingdom. In evaluating each countries approach, we will examine relevant legislation and case law. While the case law will provide insight into bringing an employment discrimination claim, because of the factual complexity of employment discrimination cases, the focus will not be on the factual distinction amongst the cases but rather on the burden of proof required and the Court's allocation of that burden.

4 *See* 42 U.S.C. § 2000e-2.

5 42 U.S.C. § 2000e-2.

6 This paper will not discuss the administrative process used by the Equal Employment Opportunity Council (EEOC).

7 ROBERT BELTON, DIANNE AVERY, MARIA L. ONTIVEROS & ROBERTO L. CORRADA, EMPLOYMENT DISCRIMINATION LAW: CASES AND MATERIALS ON EQUALITY IN THE WORKPLACE, 66 (7th ed. 2004).

8 *Id.* at 68. Congress defined discrimination for the first time within the Americans with Disabilities Act of 1990 (ADA), as "not making reasonable accommodations to the known physical and mental limitations of an otherwise qualified individual with a disability who is an applicant or employee." 42 U.S.C. § 12112(b)(5)(A) (2011).

The first part of the article will provide an overview of racial discrimination legislation in the United States and a brief discussion of two theories of discrimination: (1) disparate treatment and (2) disparate impact.[9] It will also provide an overview of the allocation of the burden of proof in U.S. employment law. The allocation of the burden of proof is critical because it can play a determinative role as to which party succeeds in litigation, especially in what people consider a post-racial era. The second part of the article will provide an analysis of the key legislation and case law in Australia and the United Kingdom, examining the allocation of the burden of proof in each country. The third part of the article will propose a reform to the method of proving a claim of racial discrimination in the U.S. by examining the current approach in the U.S., in light of this so called post-racial era and the approaches used in Australia and the U.K. Based upon this examination, the U.S. should adopt an approach similar to the approach implemented in the U.K. and shift the burden of proof from the complainant employee to the respondent-employer once the complainant has established a prima facie case of discrimination. Shifting the burden of proof to the employer would require the employer to prove a legitimate nondiscriminatory reason for its actions, instead of proving that the conduct was not discriminatory.

I. UNITED STATES

A. Racial Discrimination Overview

As discussed above, there are two principal theories of discrimination prohibited under Title VII, disparate treatment and disparate impact.[10] The Court in *International Brotherhood of Teamsters v. United States* defined both concepts.[11] Disparate treatment is based on the judicial construction of Section 703(a)(1) of Title VII.[12] It encompasses situations where the employer treats an employee less favorably than its other employees

[9] For the purpose of this article, the central focus will be on individual disparate treatment claims of race discrimination. Additionally, it is beyond the scope of this paper to discuss possible defenses available to the employer.

[10] It should be noted that disparate treatment and disparate impact are not the only forms of discrimination prohibited under Title VII.

[11] 431 U.S. 324, 335 n.15 (1977) (defining disparate treatment as an employer treating "some people less favorably than others because of their race, color, religion, sex, or national origin" and defining disparate impact as "employment practices that are factually neutral in their treatment of different groups but that in face fall more harshly on one group than another and cannot be justified by business necessity").

[12] *See* BELTON ET AL., *supra* note 7, at 67 (explaining that the theory of disparate treatment derives from judicial construction of § 703(a)(1) of Title VII).

because of race.[13] Disparate treatment is often described as the easiest form of discrimination to comprehend.[14] A key issue with disparate treatment claims is determining whether the employer's adverse conduct was based on lawful or unlawful reasons.[15] Hence the employer's liability hinges on "whether the protected trait...actually motivated the employer's decision."[16] As a requirement in proving an individual case of disparate treatment discrimination, the employee must show that the employer had a discriminatory motive.[17] On the other hand, disparate impact claims involve an employee challenging an employer's employment practice, that while on its face it appears to be neutral in its treatment of different racial groups, in practice it falls more harshly on members of the plaintiff's group than another, and its disparate impact cannot be justified as a business necessity.[18] In addition, in proving a disparate impact case, unlike with disparate treatment cases, proof of discriminatory motive is not essential.[19]

Within the disparate treatment theory, there are five analytical schemes to prove discriminatory treatment by the employer based on race. The five schemes include the single-motive or pretext scheme, the mixed-or-dual motive scheme, the after-acquired evidence scheme, the scheme for pattern-or-practice cases, and that for affirmative action cases.[20] While the employee is not mandated to identify which analytical scheme he or she is relying on, the District Court must make a determination during the trial in order to either make a ruling on the merits of the case if in a bench trial, or to provide the jury with the appropriate jury instructions.[21] The focus of this paper is the first scheme, single-motive or pretext cases.

There are two categories of evidence an employee can use in establishing an individual disparate treatment claim of discrimination: (1) direct evidence and (2) circumstantial evidence.[22] Direct evidence is "evidence

13 *See* Int'l Bhd. of Teamsters v. United States, 431 U.S. 324, 335 n.15 (clarifying that disparate treatment occurs when an employee is treated less favorably by his employer simply because of his race).

14 *See id.* (identifying disparate treatment as the "most easily understood type of discrimination").

15 *See* BELTON ET AL., *supra* note 7, at 68 (revealing that the issue to be determined in disparate treatment cases is whether the adverse employment practice was the result of "unlawful discriminatory motivation").

16 Hazen Paper Co. v. Biggins, 507 U.S. 604, 610 (1993).

17 *Teamsters*, 431 U.S. at 335–36 (defining disparate treatment discrimination).

18 *Id.* (distinguishing between disparate treatment discrimination and disparate impact claims).

19 *Id.*

20 BELTON ET. AL., *supra* note 7.

21 *Id.*

22 An employee may prove its case under either the framework establish in *McDonnell Douglas-Corp v. Green*, 411 U.S. 792 (1973), or under the mixed-motive analytical scheme. For purposes of this paper, the discussion will focus on the *McDonnell Douglas* single-motive, or pretext, framework. The other analytical schemes were introduced above.

that decision-makers placed substantial negative reliance on an illegitimate criterion in reaching their decision."[23] Also described as "smoking gun evidence," direct evidence usually consists of comments directed at the employee or written documents prepared by the employer, that provide a direct connection between the employer's discriminatory intent and the refusal to hire or retain the employee.[24] Today, it is exceedingly rare for an aggrieved employee to have direct evidence of discrimination, because few employers openly display their discriminatory intent and practices. As Professor Calloway observes, "most people are smart enough to avoid providing direct evidence of discriminatory intent."[25]

However, the court has asserted that Title VII prohibits both overt and subtle discrimination. Therefore, in recognizing the rarity of direct evidence in single-motive claims, absent the occasional inept employer who maintained documentary evidence or directly verbalized its disdain for the employee because of his or her race, the Supreme Court in *McDonnell Douglas Corp. v. Green* delineated a methodology for proving race discrimination by circumstantial evidence. [26]

B. Burden of Proof

In *McDonnell Douglas*, the Supreme Court outlined a four-pronged analytical framework for individual disparate treatment claims based on circumstantial evidence.[27] In outlining the allocation of the burden of proof, the court created a burden-shifting framework where the employee carries the initial burden of establishing a prima facie case of discrimination.[28] The employee can establish its prima facie case by showing that:

> (i) 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 qualifications, he was rejected; and (iv) that, after his

23 Price Waterhouse v. Hopkins, 490 U.S. 228, 278 (1989) (O'Connor J, concurring).

24 Ronald Turner, *Thirty Years of Title VII's Regulatory Regime: Rights, Theories and Realities*, 46 ALA. L. REV. 375, 432 (1995).

25 Deborah A. Calloway, St. Mary's Honor Center v. Hicks: *Questioning the Basic Assumption*, 26 CONN. L. REV. 997, 1037 (1994).

26 *McDonnell Douglas*, 411 U.S. at 801 (outlining a test to establish a prima facie case of racial discrimination, and the requirements to shift the burden of proof).

27 *Id.* at 802–03.

28 *See id.* at 802. If the case goes before a jury, the judge will not provide the jurors with this elaborate framework as part of the jury instructions. The ultimate issue for the jury is whether or not the defendant took the adverse employment action because of the plaintiff's membership in a protected class.

> rejection, the position remained open and the employer continued to seek applicants from persons of complainant's qualifications.[29]

Depending upon the factual circumstances of the case, the factors required to prove the prima facie case may vary.[30] The factors proscribed in *McDonnell Douglas*, for satisfying the prima facie case, were "never intended to be rigid, mechanized, or ritualistic."[31] The Supreme Court explained that where the employee establishes its prima facie case, he or she raises a presumption of discrimination.[32] The court reasoned that such a presumption is allowed because "these acts, if otherwise unexplained, are more likely than not based on the consideration of impermissible factors."[33]

Once the employee has established a prima facie case, the burden then shifts to the employer to articulate a "legitimate, nondiscriminatory reason" for its actions towards the employee.[34] The court outlined the extent of the employer's burden in *Texas Department of Community Affairs v. Burdine*.[35] To carry its burden, the employer must present a "clear and reasonably specific" explanation.[36] The ultimate burden of persuasion, however, remains with the employee at all times throughout the litigation.[37] Therefore, the employer is not required to prove that it did not discriminate; rather it need merely articulate a legal, nondiscriminatory reason for its action. Moreover, the court does not require the defendant to convince the court that its proffered reasons were the actual motivating reasons behind its decision.[38] Where the employer neglects to offer an explanation, though, the court is required to make a finding of unlawful discrimination because the employer failed to rebut the presumption raised by the prima facie

29 *Id.* at 802.

30 *See id.* at 802 n.13 ("The facts necessarily will vary in Title VII cases, and the specification above of the prima facie proof required from respondent is not necessarily applicable in every respect to differing factual situations.").

31 *See* Furnco Constr. Corp. v. Waters, 438 U.S. 567, 577 (1978).

32 *See id.* ("A prima facie case ... raises an inference of discrimination only because we presume these acts . . . .")

33 *See id.*

34 *See McDonnell Douglas*, 411 U.S. at 802 (describing the burden-shifting regime).

35 *See* Texas Dep't of Cmty. Affairs v. Burdine, 450 U.S. 248, 258 (1980) (holding that the employer is subject only to a burden of production, not a burden of persuasion).

36 *See id.*

37 *See id.* at 253 (stating that the employee has the ultimate burden to prove by a preponderance of the evidence that the legitimate reasons offered by the employer were not its true reasons, but a pretext for discrimination).

38 *See id.* at 254 ("The burden that shifts to the [employer] . . . to rebut the presumption of discrimination by producing evidence that the [employee] was rejected . . . for a legitimate, nondiscriminatory reason."); *see also* Bd. of Trustees. v. Sweeney, 403 U.S. 24, 25 (emphasizing the difference between merely articulating some legitimate, nondiscriminatory reason and proving absence of discriminatory motive).

case.[39]

If the employer successfully rebuts the employee's prima facie case, the burden of production shifts back to the employee to provide him or her with a fair opportunity to persuade the court that the reasons articulated by the employer were simply a pretext for discrimination.[40] The employee may prove the reason was merely a pretext "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."[41] If the defendant carries its burden, the employee in establishing the third prong of the analysis is no longer operating under the presumption of discrimination at the prima facie stage.[42]

While the evidentiary value of an employee's proven prima facie case is significant in the face of the employer's silence, that significance is non-existent in the face of a mere articulation by the employer. The current requirement of simply articulating a legitimate, non-discriminatory reason provides the employer with an exceptionally low burden of production. The effects of the employer's low burden of production were compounded by the Court's decision in *St. Mary's Honor Center v. Hicks*.[43]

The principal issue in *Hicks* focused on the third prong of the *McDonnell Douglas* framework.[44] In *Hicks*, the court reconfirmed the first and second prongs of the *McDonnell Douglas* framework, namely the prima facie case and legitimate nondiscriminatory reason; however, it considerably increased the employee's burden in the third prong or pretext.[45] Prior to the *Hicks* decision, in order to establish that the employer's reason is merely a pretext for discrimination, the employee had the ability to show the court the employer's proffered reason was unworthy of credence or that the employer was actually motivated by discrimination.[46] Under this rule, where the employee proved the employer's reason was a pretext, that was sufficient to find in favor of the employee. However, after *Hicks*, to carry its burden under the third prong, merely proving the employer's reason was

39 *See* St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502, 506 (1993) (citing DAVID LOUISELL & CHRISTOPHER MUELLER, FEDERAL EVIDENCE § 67, 536 (1977)).

40 *See* McDonnell Douglas Corp. v. Green, 411 U.S. 792, 804 (1973) ("While Title VII does not . . . compel rehiring of [the employee], neither does it permit [the employer] to use [the employee's] conduct as a pretext for the sort of discrimination prohibited by § 703(a)(1).").

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

42 *See Hicks*, 509 U.S. at 507 (noting that at this point, the shifted burden of production becomes irrelevant because the employee carries the ultimate burden of persuasion).

43 *See id.*

44 *See id.*

45 *See id.*

46 *See Burdine*, 450 U.S. at 256.

pretextual is insufficient.[47] Rather, the employee must prove the reason was a pretext for discrimination.[48] The court in *Hicks* explained that pretext for discrimination requires that the employee show "*both* that the reason was false, *and* that discrimination was the real reason."[49] The ability of the employer to discharge its burden by simply articulating its reason, combined with the increased evidentiary burden imposed upon the employee by the *Hicks* court, has significantly heightened the difficulty for the employee.

The court in *Reeves v. Sanderson Plumbing, Inc.* abandoned what appeared to be this pretext-plus approach from *Hicks*, and clarified the proper analysis of the third prong of the circumstantial evidence framework in single-motive cases.[50] The employee's "prima facie case, combined with sufficient evidence to find that the employer's asserted justification is false, may permit the trier of fact to conclude that the employer unlawfully discriminated."[51] While the combination of an employee's prima facie case and proof that the employer's explanation is unworthy of credence does not automatically establish intentional discrimination, the court explained those occurrences involve situations where "no rational fact finder could conclude that the action was discriminatory."[52] While the United States requires this framework, other countries around the world require a greater burden on the employer once the employee has met its burden.

II. AUSTRALIA

The Australian Constitution[53] does not provide protection against racial discrimination, however under the Racial Discrimination Act 1975 (hereinafter RDA), Australian law prohibits an employer from discriminating against an employee on racial grounds.[54] The RDA was adopted in 1975 and represents Australia's first Federal human rights law protecting against discrimination.[55]

47 *See Hicks*, 509 U.S. at 507–08.

48 *See id.*

49 *See id.* at 515. The showing adopted in *Hicks*, has been articulated as "pretext-plus." Pre-text plus in employment discrimination cases makes reference to the requirement on the employee to present evidence that the employer's explanation was false, in addition to the prima facie case, in order to obtain a jury verdict of intentional discrimination. *Id.*

50 Reeves v. Sanderson Plumbing, Inc., 530 U.S. 133, 146–49 (2000).

51 *Reeves*, 530 U.S. at 135.

52 *Id.*

53 AUSTRALIAN CONSTITUTION s 117 (explaining that state residency discrimination is the only form of protection against discrimination that is recognized under the Australian Constitution).

54 *Racial Discrimination Act 1975* s 9 (Austl.).

55 Beth Gaze, *Has the Racial Discrimination Act Contributed to Eliminating Racial*

Racial discrimination is defined in Article I, Paragraph 1 of the International Convention on the Elimination of All Forms of Racial Discrimination (the Convention),[56] which has been codified under section 9(1) of the RDA.[57] Section 9(1) prescribes the meaning of direct discrimination.[58] Direct discrimination encompasses discriminatory practices, both in form and in effect, that involve the imposition of acts involving a distinction.[59] The RDA prescribes racial discrimination to be unlawful where:

> a person [does] any act involving a distinction, exclusion, restriction or preference based on race, colour, descent or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of any human right or fundamental freedom in the political, economic, social, cultural or any other field of public life.[60]

The statutes' reference to 'human right or fundamental freedom' is derived from Article 5 of the Convention, which includes the right to work and free choice of employment, just and favorable work conditions and other employment law related concerns.[61] Additionally, under the RDA it is an offense to discriminate in employment and a host of other areas, including housing and in the provision of goods and services.[62]

Complainants in Australia are subjected to an extreme burden in attempting to prove that their employer unlawfully discriminated against them on racial grounds. In Australia, the complainant must establish, on the balance of probabilities, that the employer unlawfully discriminated against them on racial grounds.[63]

A. Australian Burden of Proof – Briginshaw Standard

Unlike in the United States and the United Kingdom, the Australian

Discrimination? Analyzing the Litigation Track Record 2000-04, 11 AUSTL. J. HUM. RTS. 171 (2005).

56 International Convention on the Elimination of All Forms of Racial Discrimination, Art. I, Para. 1, G.A. Res. 2106(XX), U.N. Doc. A/RES/2106(XX) (Dec. 21, 1965), *available at* http://www2.ohchr.org/english/law/cerd.htm#part1.

57 *Racial Discrimination Act 1975* s 9 (1) (Austl.).

58 *See Ebber v Human Rights and Equal Opportunity Comm'n* [1995] 129 ALR 455 (Austl.).

59 *See id.*

60 *Racial Discrimination Act 1975* s 9 (1) (Austl.).

61 *See* Convention, *supra* note 56 at Art. 5(e); *see also Qantas Airways Ltd. v Gama* [2008] 101 ALD 459, para 55 (Austl.).

62 *Racial Discrimination Act 1975* ss 9, 10-16 (Austl.).

63 *Racial Discrimination Act 1975* s 9 (1) (Austl.).

complainant bears the entire burden of proof.[64] The Australian system does not require the respondent employer to produce any evidence to disprove the complainant's allegations or, alternatively, to offer an explanation for its actions.[65] This approach stems from the general belief that an allegation of racial discrimination is a serious matter that is 'not lightly to be inferred.'[66] In *Sharma v. Legal Aid Queensland*, the Federal Court of Australia reiterated that when determining whether an employer's action constituted a breach of the RDA, the standard of proof is the standard promulgated in *Briginshaw v. Briginshaw*.[67] The question before the court in *Briginshaw* dealt with ascertaining the appropriate standard of proof required to prove adultery in a civil proceeding for dissolution of a marriage.[68] The court held that a complainant must establish its allegation to the "reasonable satisfaction" of the tribunal.[69] In Australia, tribunals are instructed that in concluding that a complainant has made out its case of racial discrimination to the reasonable satisfaction of the tribunal, the nature and consequences of the fact(s) to be proved must be taken into consideration.[70] Factors that influence a reasonable satisfaction finding, include "the seriousness of the allegation made, the inherent unlikelihood of an occurrence of a given description, or the gravity of the consequences flowing from a particular finding."[71]

Under this approach, the degree of satisfaction required by a tribunal in civil proceedings, such as racial discrimination claims, "**may, not must** be based on a preponderance of probability."[72] While the court argued that the standard articulated in *Briginshaw* did not develop a new standard of persuasion, it stated that the nature of the issue, or the seriousness of the allegation, impacts the courts' process by which reasonable satisfaction is determined.[73] The correlation between what the standard of proof in a civil

64 *See Briginshaw v Briginshaw* [1938] 60 CLR 336, 362 (Austl.) (stating the differences between burden of proof for the United States and Australia).

65 *See* Dominique Allen, *Reducing the Burden of Proving Discrimination in Australia* 31 SYDNEY L. REV. 579, 584 (Dec. 2009).

66 *See* De Plevitz, *The* Briginshaw *'Standard of Proof' in Anti-Discrimination Law: 'Pointing with a Wavering Finger.'* 27 MEL. U.L.R. 308, 319; *see also Dep't of Health v Arumugam* [1987] VR 319, *31, 35 (contrasting the *Briginshaw* test).

67 *See Briginshaw*, 60 CLR at 361–62; *see also Sharma v. Legal Aid Queensland* [2002] FCAFC 196, para. 40 (Austl.).

68 *See Briginshaw*, 60 CLR at 341.

69 *See id.* at 362.

70 *See id.*

71 *Id.*

72 *Id.* at 363. *But cf.* Thermoid Rubber Co. v. Bank of Greenwood, 1 F.2d 891, 895 (4th Cir. 1924) (explaining that in civil cases a preponderance of the evidence is required to sustain a verdict).

73 *See Briginshaw* 60 CLR at 363.

proceeding is and the factors that the tribunal can consider, as articulated in *Briginshaw*, are codified in the Evidence Act, which states:

> (1) In a civil proceeding, the court must find the case of a party proved if it is satisfied that the case has been proved on the balance of probabilities.
>
> (2) Without limiting the matters that the court may take into account in deciding whether it is so satisfied, it is to take into account:
>
> (a) The nature of the cause of action or defense; and
>
> (b) The nature of the subject-matter of the proceeding; and
>
> (c) The gravity of the matters alleged.[74]

This *Briginshaw* standard has been consistently applied to racial discrimination complaints as a 'matter of course.'[75]

The higher evidentiary standard has been justified, on the basis that the standard is not applicable in all cases.[76] For example, in *G v. H*, the court found the *Briginshaw* standard did not apply where the issue of the case dealt with the paternity of a child.[77] The court clarified that where the case involves an allegation of fraud, criminal or moral wrongdoing, the application of the *Briginshaw* standard is relevant.[78] Furthermore, the court stated that "due regard must be had" to the nature of the issue involved because "[n]ot every case involves issues of importance and gravity in the *Briginshaw v. Briginshaw* sense."[79] In such grave situations, the Australian courts find it permissible to fluctuate on the degree of evidence it will require from a complainant in determining whether it is reasonably satisfied from the facts presented, that the respondent unlawfully discriminated against the complainant on racial grounds.[80]

In light of the varying complexity of the issues that arise in civil proceedings, the *Briginshaw* standard becomes relevant only when the allegations are of such a serious nature that it is necessary for the trier of

74 Evidence Act 1995 (N.S.W. ACTS) s 140(1)–(2).

75 *See* De Plevitz, *supra* note 66, at 318.

76 *See Cubillo v Cth. of Austl.* [2000] 174 ALR 97; *see also G v H* [1994] 181 CLR 387, 399 (Austl.).

77 *G v H* [1994] 181 CLR at 399.

78 *Id.*

79 *Id.*

80 *See Victoria v Macedonian Teachers Ass'n of Victoria Inc.* [1999] FCR 1287 (Austl.) (applying the *Briginshaw* test, "requiring the degree of satisfaction to be up to the seriousness of the allegations in all the circumstances.") (quoting *Dep't of Health v. Arumugam* [1998] V.R. 319 (Austl.)).

fact to proceed with caution in concluding that it is reasonably satisfied.[81] However, according to the Australian Human Rights Commission, the courts are applying the *Briginshaw* standard to racial discrimination cases without analyzing how serious the allegation is or what consequences would flow from a finding of discrimination.[82] When the tribunals are presented with a racial discrimination complaint, the allegations are generally regarded as having such seriousness that the *Briginshaw* standard is required.[83]

III. UNITED KINGDOM

In the U.K., the Race Relations Act of 1976 (hereinafter referred to as RRA) provides that an individual who believes that he or she has been discriminated against at their place of employment on racial grounds, may make a complaint against the employer to an Employment Tribunal.[84] In creating the RRA, the U.K. looked to the Civil Rights Act of 1964 for guidance.[85] Under the RRA, a complainant can seek redress for either direct or indirect discrimination.[86] Direct race discrimination encapsulates circumstances where the employer subjects the individual to treatment less favorable than how he would treat other persons.[87] Section 4(1) of the RRA, extends the prohibition against discrimination to the employment field, providing that it is unlawful for an employer to discriminate against another in determining who should be offered employment, in determining the terms of employment or by refusing to offer employment to the individual.[88]

81 *Macedonian Teachers*, [1999] FCR 1287 ("The *Briginshaw* test only becomes relevant when, because of the seriousness of the allegations being made in relation to an issue to be determined in a particular case, a decision maker must proceed with caution in arriving at a state of satisfaction.").

82 *See* Rights and Equal Opportunity Commission. *An International Comparison of the Racial Discrimination Act 1975: Background Paper No. 1 (2008) 93. See, e.g., Sharma v. Legal Aid Queensland* [2002] FCAFC 196, para. 40 (Austl.).

83 *See* Hunyor, J, *Skin-deep: Proof and Inferences of Racial Discrimination in Employment*, 25 SYDNEY L. REV. 535, 540 (2003).

84 Race Relations Act, 1976, c. 74 (Eng.). Section 3 of the RRA define racial grounds as including colour and race.

85 *See* Shari Engels, *Problems of Proof in Employment Discrimination: The Need For A Clearer Definition of Standards in the United States and the United Kingdom*, 15 COMP. LAB. L. 340, 341 n. 6 (1994).

86 Race Relations Act, 1976, c. 74, §§ 1(1)–1(1A) (Eng.).

87 Race Relations Act, 1976, c. 74, § 1(1)(a) (Eng.). Indirect discrimination, though not the focus of this paper, encapsulates circumstances where the employer applies a provision, criterion or practice that is facially neutral, however places individuals in the same racial group as the claimant at a particular advantage, in comparison to other individuals not of that group.

88 Race Relations Act, 1976, c. 74, § 4(1) (Eng.); King v. Great Britain-China Centre, [1991] EWCA (Civ) 16 [24] (Eng.).

In discrimination cases, the complainant has an opportunity to send the respondent a pre-tribunal race discrimination questionnaire, also known as RRA s.65 Questionnaire,[89] presenting his or her claim alleging discrimination and requesting the employer to provide an explanation for its adverse action.[90] Section 65(1) of the RRA states that the questionnaire procedure was introduced: "With a view to helping a person . . . who considers he [sic] may have been discriminated against . . . in contravention of this Act to decide whether to institute proceedings and, if he [sic] does so, to formulate and present his case in the most effective manner."[91] Failure of the employer to issue a response within eight weeks, or issuing a disingenuous response, allows the Employment Tribunal to draw an inference of discrimination, if it hears the complaint.[92] While the questionnaire procedure provides the advantage to the complainant of assessing the merits of his case, the extent of such an advantage is dependent on what questions he or she poses and the way in which the questions are framed.[93]

A. U.K. Pre-Statutory Changes

As a general rule, throughout the U.K., the burden of proof lies with the person bringing the claim to prove their case against the other side.[94] However, in the discrimination arena, there is a general recognition of the particular difficulties facing the complainant, particularly in collecting evidence of direct discrimination.[95] The approach followed by Employment Tribunals in assessing whether direct discrimination had occurred in a particular case, was for many years articulated by the Court of Appeal in the case of *King v. Great Britain-China Centre*.[96] The court was cognizant of the difficulty of a complainant proving direct discrimination against its employer.[97] Where the complainant had established that he or she was treated less favorably than others based on racial grounds, it was "legitimate" for the Employment Tribunal, when the employer had failed to

89 Race Relations Act, 1976, c. 74, § 65 (Eng.).

90 Allison Brown, Angus Erskine & Doris Littlejohn, *Review of Judgments in Race Discrimination Employment Tribunal Cases*, EMPLOYMENT RELATIONS RESEARCH SERIES NO. 64 at 12 (2006).

91 Race Relations Act, 1976, c. 74, § 65(1) (Eng.).

92 Brown, *supra* note 90 at 12; Race Relations Act, 1976, c. 74, § 65(2)(b) (Eng.).

93 *See* Dominique Allen, *Reducing the Burden of Proving Discrimination in Australia*, 31 SYDNEY L. REV. 579, 590 (2009).

94 *See* Engels, *supra* note 85, at 347–50.

95 *See id.*

96 *See King*, [1991] EWCA (Civ) 16.

97 *See id.* at para. 31.

offer an explanation or the explanation given was considered inadequate or unsatisfactory, to draw an inference that the discrimination was on racial grounds.[98] This permissible inference was viewed, not as a matter of law, but as "almost common sense."[99] In reaching a conclusion, on the balance of probabilities,[100] that the employer's adverse action was on the basis of race discrimination the Employment Tribunal should continually remain aware of the difficulties facing a person who brings a discrimination case.[101] This line of reasoning was subsequently approved by the House of Lords in *Glasgow v. City Council v. Zafar*.[102] The court in *Glasgow* acknowledged the special problems of proof facing complainants, particularly when the employer, discriminating on the basis of the employees' race, will generally not broadcast such prejudices.[103] They stressed, however, that Employment Tribunals retained discretion to determine whether or not to draw an inference of race discrimination, where an employer acted unreasonably and either presented no explanation or an unsatisfactory explanation.[104] While a number of cases following the legislative amendments have continued to give credence to the proof problems facing those complaining of discrimination, the legal landscape of the requisite burden of proof for race discrimination cases, shifted.

B. Shifting Burden of Proof

The shift in the burden of proof represented a substantial change in U.K. race discrimination legislation. The imposition of shifting the burden of proof originated in sex discrimination cases.[105] The European Council Directive 97/80/EC initiated the shift, focusing its concern on the principle of equal treatment, assuming individuals legal redress where they were wronged on the basis of their sex.[106] The Directive created a burden of proof in sex discrimination cases, providing that where a complainant establishes facts from which the tribunal may presume that there has been discrimination, whether direct or indirect, the onus falls upon the employer

98 *Id.* at para. 36.

99 *Id.*; North West Thames Regional Health Authority v. Noone, [1998] I.C.R. 813, 822 (Eng.).

100 The balance of probabilities is the requisite burden of proof in civil cases within the U.K. It is equivalent to preponderance of evidence standard in the U.S.

101 *See King*, [1991] EWCA (Civ) 16, [36].

102 *See Glasgow City Council v. Zafar*, [1998] I.C.R. 120.

103 *See id.* at 125.

104 *See id.* at 123.

105 Council Directive 97/80, art. 1, 1997 O.J. (L 14) 6, 8 (EC).

106 Council Directive 97/80, art. 1, 1997 O.J. (L 14) 6, 8 (EC). *See* Igen v. Wong, [2005] I.R.L.R. 258, para. 9 (Eng.).

to prove that it did not discriminate against the employee and breach the principle of equal treatment.[107] Though the burden of proof directive originally did not apply to the U.K., its function was extended to pertain to the U.K. in 1998[108], and U.K. anti-discrimination legislation was changed accordingly.[109] Following the legislative amendments, the Employment Appeal Tribunal, in *Barton v. Investec Henderson Crosthwaite Securities Ltd,*[110] articulated a number of principles to guide tribunals on how to approach the burden of proof in sex discrimination cases.

An equivalent directive extended the practice of shifting the burden of proof to race discrimination claims in employment law,[111] and led to subsequent statutory changes to the RRA.[112] Confusion as to the extent of the legislative changes initially ensued, particularly on whether the amendments simply codified pre-existing law, as under *King* and *Zafar.*[113] Subsequent decisions clarified that the legislative amendments altered the existing practice in regards to drawing an inference of race discrimination.[114] Specifically, the amendments eliminated the discretion previously afforded Employment Tribunals, in deciding whether or not to infer the presence of discrimination.[115] As such, the passage of the race discrimination directive and the subsequent statutory codification under the RRA, mandate that Employment Tribunals **must** uphold the employee's discrimination complaint where the respondent employer fails to discharge its burden.[116] Where the complainant has established its prima facie case on the balance of probabilities, the burden of proof automatically shifts to the

107 *See* Council Directive 97/80, art. 4 (1), 1997 O.J. (L 14) 6, 8 (EC).

108 *See* Council Directive 98/52, 1998 O.J. (L. 205) 66 (EC).

109 *See* Sex Discrimination Act, 1975, c. 65, §§ 63A, 66A (Eng.).

110 *See* Barton v. Investec Henderson Crosthwaite Securities Ltd., [2003] I.C.R. 1205, 1217–18.

111 *See* Council Directive 2000/78, art. 10, 2000 O.J. (L 303) 16, 20 (EC).

112 *See* Race Relations Act, 1976, c. 74, § 54A (Eng.).

113 *See* Igen v. Wong, [2005] I.R.L.R. 258, para. 18 (Eng.) (noting the pre-existing law and that "there was some debate before [the court] as to whether the statutory amendments merely codified the pre-existing law or whether it had made a substantive change to the law.").

114 *See id.*; *see also* Dresdner Kleinwort Wasserstein Ltd. v. Adebayo, [2005] I.R.L.R. 514 (Eng.) (describing the rules in *King* and *Zafar*, ultimately determining that "there is no doubt that section 54A and section 63A of the respective Acts introduced a new approach to determining complaints of direct discrimination, which meant that the King guidelines required adjustment); Laing v. Manchester City Council, [2006] I.C.R. 1519, para. 71 (Empl. App. Trib.) (Eng.) (providing that "the amendment did more than codify the existing law); Madarassy v. Noumra Int'l Plc., [2007] EWCA Civ 33 (Eng.) (explaining that tribunals are now faced with amended statutory provisions, which changed the law).

115 *See Igen* [2005] I.R.L.R. 258, para. 18; *see also* King v. Great Britain-China Center, [1991] EWCA Civ 16 (holding that "[a]t the conclusion of all the evidence the trbunial should make findings as to the primary facts and draw such inferences as they consider proper from those facts"); Strathclyde Regional Council v. Zafar, [1997] UKHL 54 (finding that while *King v. Great Britain-China Centre* implies that that an industrial tribunal has some discretion in drawing an inference of racial discrimination, other cases suggest that the Tribunal should draw an inference of discrimination).

116 *See Igen*, [2005] I.R.L.R. 258, para. 1.

respondent.

In the seminal case, *Igen v. Wong*, the U.K. Court of Appeal outlined the burden of proof, explaining its function and providing guidelines on the proper procedure.[117] *Igen* included three simultaneous appeals from the Employment Appeal Tribunal, raising questions about the correct application of the statutory provisions shifting the burden of proof in direct discrimination cases.[118] *Igen* was the first time the court interpreted the "Barton guidance",[119] providing revised guidelines to assist Employment Tribunals in applying the statutory provisions.[120] The court found the legislative amendments required Employment Tribunals to undergo a two-stage process of analyzing the complainants' complaint, which it expressed in guidelines nine and ten, describing the shift in the burden of proof to the respondent employer as:

> (9) Where the claimant has proved facts from which conclusions could be drawn that the respondent has treated the claimant less favourably on the ground of [race], then the burden of proof moves to the respondent.
>
> (10) It is then for the respondent to prove that he did not commit, or as the case may be, is not to be treated as having committed, the act.[121]

In the first stage, the complainant must prove facts from which the Employment Tribunal could conclude, in the absence of an adequate explanation, that the respondent committed an unlawful act of discrimination.[122] During this stage, the tribunal only has to find that, based upon the facts presented, there could have been unlawful discrimination by the employer.[123] The court in *Igen* explained that in its prima facie case, the complainant must prove all the elements of the offense, showing "facts

117 *See id.* (outlining that the "statutory amendments require the [Employment Tribunal] to go through a two-stage process if the complaint of the complainant is to be upheld" and discussing the burden-shifting during the process).

118 *See id.* (providing that the three appeals were heard together and based on the burden of proof provisions of the RRA and SDA).

119 *See Barton*, [2003] I.C.R. 1205, 1217–18.

120 *See Igen*, [2005] I.R.L.R. 258 at Annex (U.K.). Of the thirteen articulated guidelines, the more guidelines that are of particular relevance are guidelines (9)–(13).

121 *Id.*

122 *Igen*, [2005] I.R.L.R. 258, para. 17 (stating the "first stage requires the complainant to prove facts from which the ET could, apart from the section, conclude in the absence of an adequate explanation that the respondent has committed, or to treated as having committed, the unlawful act of discrimination").

123 Dresdner Kleinwort Wasserstein Ltd. v. Adebayo, [2005] I.R.L.R. 514 para. 36 (indicating that "[a]t this first stage the tribunal has only to conclude that the facts found could lead them to the conclusion that there had been unlawful discrimination").

from which conclusions could be drawn that the respondent has treated the claimant less favorably on the grounds of race."[124] Therefore, before the burden shifts to the respondent employer, the complainant must establish that he or she was treated less favorably and present sufficient facts that permit the tribunal to conclude that the less favorable treatment complained of, was on unlawful racial grounds.[125] If the complainant fails to prove such facts, the complaint will not succeed, and the tribunal ceases from further inquiry.[126] In drawing an inference of discrimination, the tribunal examines all the evidence relevant to the discrimination complaint, in disregard of whether the complainant or the respondent presented the facts.[127]

Any explanation, however adequate or inadequate, is of no relevance while the tribunal is in the first stage of the process.[128] Consideration of an explanation from the respondent at the first stage is inconsistent with the statutory amendments and should not be entertained until the burden of proof shifts to the respondent.[129] The Employment Tribunal is required to assume that there is no adequate explanation for the purpose of shifting the burden of proof to the employer at the second stage, so that in the absence of an adequate explanation, the complainant will succeed.[130] If the complainant establishes its prima facie case on the balance of probabilities, then and only then does the onus shift to the respondent to prove that it did not commit an unlawful act of discrimination.[131]

At the second stage, the respondent is required to put forth an adequate explanation for its treatment of the complainant.[132] To discharge its burden, the respondent must prove, on the balance of probabilities, that the

124 *Igen*, [2005] I.R.L.R. 258, Annex (9).

125 *See* AN INTERNATIONAL COMPARISON OF THE RACIAL DISCRIMINATION ACT OF 1975: BACKGROUND PAPER 1 (Austl. Human Rights and Equal Opportuntity Comm'n, 2008), *available at* http://www.hreoc.gov.au/racial_discrimination/publications/int_comparison/RDA_int_comparison.pdf (describing how the complainant need only establish they were treated less favorably).

126 *Igen*, [2005] I.R.L.R. 258, para. 76, Annex (2).

127 *See id.* at para. 24 (explaining that aeven though the language of the statutory amendments refers to the complainant's duty to prove facts, evidence from the respondent may also be considered); *see also Madarassy*, [2007] I.R.L.R. 246 at para. 8 (establishing that the scope of evidence to be considered includes both evidence adduced by the complainant in support of his or her allegations, as well as evidence adduced by the respondent contesting the complaint).

128 *See Igen*, [2005] I.R.L.R. 258, para. 22.

129 *See id.*; *see also Madarassy*, [2007] I.R.L.R. 2446 at 8 (discussing that the absence of an explanation only become relevant if the complainant discharges its burden on the prima facie case).

130 *See Igen* [2005] I.R.L.R. 258, para. 21–22.

131 *See id.* at para. 17.

132 *See id.* (describing an adequate explanation as one which proves that respondent did not commit or is not to be treated as having committed the unlawful act); *see also* St. Christopher's Fellowship v. Walters-Ennis, 2009 WL 3122398 at *7.

treatment was in no sense whatsoever based on racial grounds.[133] In providing a non-discriminatory explanation, the respondent must present cogent evidence.[134] "Cogent" means forceful or persuasive, and where the Employment Tribunal concludes the respondent's facts and arguments are forceful and persuasive, the burden of proof will be discharged.[135] The Employment Tribunal, therefore, must make an assessment regarding whether the respondent has established that in no sense whatsoever did it discriminate based on racial grounds and that it is adequate to discharge the burden of proof that race was not a ground of the respondent's treatment of the complainant.[136]

Under the reverse statutory burden of proof, the respondent is required to establish more than under the *King* and *Zafar* approaches. In the second stage, the respondent must ***prove*** that it did not discriminate against the complainant unlawfully, and thus it must provide an adequate explanation and establish that the proffered explanation is true.[137] Where the respondent fails to discharge this burden of proof, the Employment Tribunal is compelled by statute to find against the respondent and uphold the complainant's complaint.[138] The U.K. approach encompasses the belief that, "since the facts necessary to prove an explanation would normally be in the possession of the respondent, a tribunal would normally expect cogent evidence to discharge that burden of proof."[139]

IV. COMPARISON OF THE US AND UK

The U.S. and the U.K. have adopted analytical frameworks for analyzing whether an employee has been subjected to unlawful racial discrimination by his or her employer. While both approaches recognize the rarity of proving racial discrimination by direct evidence, the U.K. framework goes beyond simply permitting proof by circumstantial evidence, through shifting the burden of production and the burden of persuasion to the employer after the employee establishes its prima facie case. In doing so, the U.K. approach, unlike that taken in the U.S., provides employees with a framework that can lead to more successful litigation. The analytical

133 *See Igen* [2005] I.R.L.R. 258, Annex (11).

134 *See Walters-Ennis*, 2009 WL 3122398 at *6.

135 *See Dresdner*, [2005] I.R.L.R. 514, para. 41 (citing Nagarajan v. London Reg'l Transp., [1999] I.R.L.R. 512 (Eng.)).

136 *Igen*, [2005] I.R.L.R. 258, Annex (2).

137 *Id.*

138 *Dresdner*, [2005] I.R.L.R. 514, para. 3.

139 *Igen*, [2005] I.R.L.R. 258, Annex (13).

frameworks implemented in each country have significant differences, which are exhibited through the language each legislature chose in formulating the respective framework and in the underlying intent for its construction.

A. Language Formulating Each Framework

In the United States, the burden of production shifts to the employer upon the employee establishing a prima facie case of unlawful racial discrimination.[140] Following the prima facie showing, the employer must "articulate some legitimate, nondiscriminatory reason" for the adverse employment action which the employee alleged constituted unlawful conduct.[141] Throughout case law, the courts have made it clear that the burden-shifting framework employed, does not shift the burden of persuasion to the employer.[142] The burden of persuasion is intended to remain upon the employee at all times throughout the case.[143]

On the contrary, in the U.K., a higher burden is placed on the employer. In order for employees in the U.K. to make a prima facie showing, the employee is required to "establish . . . from facts which it may be presumed that there has been direct or indirect discrimination."[144] After the prima facie case has been proved, the burden of production and the burden of persuasion shift to the employer, which then must prove that it did not commit the unlawful discriminatory conduct.[145]

B. Underlying Intent

The U.K. adopted the Burden of Proof directive established by the European Council, which was intended to provide a burden of proof scheme that was more effective at eliminating unlawful discrimination and instating its fundamental principle of equality.[146] The language of the directive expressly states that it "shall not prevent Member States from introducing rules of evidence which are more favorable to plaintiffs."[147] This language is an indication of an unambiguous desire to assist plaintiff

140 McDonnell Douglas-Corp v. Green, 411 U.S. 792, 802 (1973).
141 *Id.*
142 *See id.*
143 *See id.*
144 Council Directive 97/80, art. 4, 1997 O.J. (L 14) 6, 8 (EC).
145 *See id.*
146 *See id.*
147 *Id.*

employees in proving racial discrimination. Additionally the directive requires that after the employee has met its prima facie showing, the employer must "prove that there has been no breach of the principle of equal treatment."[148]

During the proposal for creating the directive, the committee recognized that the general rule placed the burden of proving the case on the individual bringing the claim.[149] However, despite such acknowledgment, the general rule did not trump the desire to provide greater assistance to the plaintiff. The final recognition rested with a realization that shifting the burden of proof to the employer to prove it did not discriminate against the employee on prohibited grounds, was essential since the employer possesses the relevant information for the discrimination case.[150] This position, that the employee is at a disadvantage since the employer possesses and therefore has greater access to the information required to satisfy its burden, is exhibited throughout the case law in the U.K.

C. Policy Concerns

The requisite burden of proof allocated to each party is a key factor influencing the outcome of litigation. As a result, a burden of proof that places an extremely heavy burden on the employee will permit the employer to perpetuate a cycle of discrimination without suffering from the consequences of its actions. However, placing an extremely heavy burden upon the employer will subject the employer to justifying all its employment actions and significantly interfere in its business decisions. The chosen burden of proof allocation signifies the general outlook of courts, legislators, and society for providing which party will be favored in litigation.[151]

The U.K. policy rationale imposes a pro-employee approach, whereas the U.S. has a pro-employer outlook. The overall objective in the U.K. is to encourage employers to prevent unlawful discriminatory conduct that may result in its liability.[152] On the other hand, the U.S. is influenced by its

148 *Id.*

149 *See* Proposal for a Council Directive implementing the principle of equal treatment between persons irrespective of racial or ethnic origin, Com/99/0566 (proposed Nov. 25, 1999) [hereinafter Proposal for Race Directive].

150 *See* Council Directive 97/80, art. 4, 1997 O.J. (L 14) 6, 8 (EC).

151 *See* Engels, *supra* note 85, at 368.

152 *See* Jarrett Haskovec, *A Beast of a Burden? The New EU Burden-of-Proof Arrangement in Cases of Employment Discrimination Compared to Existing U.S. Law*, 14 Transnat'l L. & Contemp. Probs. 1069, 1100 (2005).

preference for a deregulated labor market and laissez-faire capitalism.[153] The employment-at-will doctrine is indicative of the desire for minimal intrusion into private employment relationships.[154]

V. PROVING A LEGITIMATE, NONDISCRIMINATORY REASON

In passing Title VII, Congress intended to "assure equality of employment opportunities and to eliminate those discriminatory practices and devices which have fostered racially stratified job environments to the disadvantage of minority citizens."[155] Permitting the employer to rebut the prima facie case put forth by the employee simply by presenting a nondiscriminatory reason discounts the relative ease of *articulating* a reason. An employer's intent to discriminate against its employee can be disguised in a variety of ways. Margaret Thornton argues that the concept of merit "conveys a veneer of neutrality . . . but, in fact, is capable of disguising racism." Proposing to shift the burden of persuasion, along with the burden of production, to the employer in the second prong of the *McDonnell Douglas* analytical framework is not meant to indicate that racial discrimination is so serious that employees should have a less onerous burden of proof. Rather, it represents an acknowledgment of the problems facing an employee.[156] In light of the fact that many argue that we are living in a post-racial era, the reality is that discrimination is just more subtle today, so it is harder to detect.

In Australia, the tribunal reasoned that racial discrimination accusations are serious matters that result in grave consequences and pose an undue burden on employers. I do not propose the United States judicial system adopt this view. As a result of this line of thought, complainants are faced with the arduous task of proving their complaint of race discrimination to an extremely high burden of proof. The standard of proof when dealing with a allegation for breach of the Racial Discrimination Act is the higher standard referred to in *Bringinshaw*.[157] While Australia prohibits racial

153 *See* Haskovec, *supra* note 152, at 1093 (identifying the United States as having a traditional pro-market, anti-state ideology).

154 *See* Haskovec, *supra* note 152, at 1093–94 (noting that the United States is reluctant to intervene in the private relationship of employers and employees).

155 *McDonnell Douglas*, 411 U.S. at 800.

156 *See* Laing v. Manchester City Council, [2006] I.C.R. 1519, para. 71 (Empl. App. Trib.) (Eng.) (revealing that employees would face problems of proof if at every stage of the judicial process the employee was confronted with the probability that the employer's treatment was because of the employee's race).

157 *See Sharma v Legal Aid Queensland* [2002] FCR 196, at *7 (Austl.) (stating that at first instance the standard of proof for breaches of the RDA is the higher of the standards discussed in

discrimination through the RDA, in its application the courts have a naïve outlook as to the existence of such discrimination within the country. The root of the problem with the burden of proof allocation in Australia stems from the system's desire to turn a blind eye to the existence of racism.[158]

The tribunals in Australia take a misguided approach to the presence of discrimination. In *Cubillo v. Commonwealth of Australia*,[159] the court reasoned that the application of the *Briginshaw* standard imposing a higher evidentiary burden upon the employee is validated by the general absence of racial discrimination.[160] The court stated it should be understood as "merely reflecting a conventional perception that members of our society do not ordinarily engage in [such] conduct."[161] The court continuously reiterates this outlook when deciding the applicability of the *Briginshaw* standard. For example, in *Dutt v. Central Coast Area Health Service,* the court proposed a two step approach that involved examining the nature of the allegation and reaching a determination if it would have a reasonably foreseeable adverse consequence upon the respondent's livelihood or reputation, and if it did, then and only then does the court apply the *Briginshaw* standard.[162] As a result, the court explained that a finding of racial discrimination should not be lightly made, but should be cautiously reached.[163]

Far from the approach in Australia, in the United States and the United Kingdom there is some onus placed on the employer to provide an explanation that its complained of conduct, was not discriminatory as the prima facie case explains, either by providing that its actions were not discriminatory in nature on the balance of probabilities, as in the U.K.,[164] or by merely providing an articulation of a legitimate nondiscriminatory reason to rebut the prima facie case, as in the U.S.[165] Contrary to the line of reasoning in Australia, the United States should not adopt an outlook that discrimination on racial grounds is inherently unlikely.

Bringshaw).

158 *See Cubillo v Cth. Austl.* [2000] 174 ALR 97, at *344–45 (characterizing people who would not acknowledge Aboriginal culture and were only interested in assimilating Aboriginal children into the European mainstream as well-meaning and well-intentioned).

159 *Id.* at *1.

160 *See id.*

161 *Id.* (citing Neat Holding Pty Ltd v. Karajan Holdings Pty Ltd (1992) 110 A.L.R. 449, 450).

162 *See Dutt v Central Coast Area Health Service* [2002] NSWADT 133, para. 55–57; *see also* De Plevitz, *supra* note 66, at 327.

163 *See Cubillo* [2000] 174 ALR at 97 (citing *G v H* [1994] 181 CLR at 399).

164 The approach implemented throughout the U.K. is the same approach throughout the European Union.

165 The approach implemented throughout the U.S. is similar to the approach throughout Canada.

I propose a shift in the current individual disparate treatment framework similar to the burden of proof framework outlined in Section 54A of the RRA.[166] In reconstructing the *McDonnell Douglas* framework, the United States should adopt a burden-shifting scheme that requires the employer to ***prove a legitimate, non-discriminatory reason*** for its adverse employment action against the complainant. Through shifting the burden of persuasion, as well as the burden of production to the employer, the court will move closer to assuring equality in employment and eliminating discriminatory practices and devices, as Title VII intended.[167] While the Supreme Court has said that at all times the employee bears the ultimate burden of proving discrimination and the employer need not disprove discrimination, our proposal comes short of that requirement. We require merely that the employer prove that its legitimate nondiscriminatory reason is its true reason for its actions. We find that this extra burden on the employer is warranted in light of the fact that discriminatory motive is harder to find today because of its subtle nature.

The United Kingdom's burden of proof was implemented in recognition of the fact that the difficulty of proving a racial discrimination claim against one's employer increases where the employee bears the burden of proving discrimination by reason of race at all stages.[168] The court explained that the legislative amendments to the burden of proof reflect the "emphasis on effective protection for those who are the victims of discrimination, and the need for the principle of equal treatment to be applied effectively."[169] At first glance it appears that the U.S. Supreme Court reached a similar acknowledgement of the difficulty in proving race discrimination in employment cases when it articulated that the employee's establishment of its prima facie case raises an inference of discrimination.[170] The court explained its willingness to provide such an inference extended from the realization that "people do not act in a totally arbitrary manner without any underlying reasons, especially in a business setting."[171] However, the court went on to clarify that while the prima facie case gives rise to an inference of discrimination, once the employer articulates a legitimate, non-discriminatory reason that inference drops

166 Race Relations Act, 1976, c. 74, § 54A (Eng.).
167 *See McDonnell Douglas*, 411 U.S. at n. 120.
168 *See Laing*, 2006 WL 2334271 at *10.
169 *Dresdner*, 2005 I.R.L.R. 514, para. 39.
170 *See* Furnco Constr. Corp. v. Waters, 438 U.S. 567, 577 (1978).
171 *Id.*

from the case.[172] The inference is removed because the prima facie case is insufficient to merit judgment for the plaintiff on its own.[173] The court in *Hicks* explained that the prima facie case provides a rebuttable inference of discrimination, that where established does not compel judgment for the plaintiff.[174]

In order to provide greater Title VII protection, the United States should adopt the second prong of the U.K. approach, in light of the widespread acknowledgment that, in making an employment decision, the employer does not act arbitrarily. The court should depart from the current *McDonnell Douglas* framework, and require the employer to *prove* the factual validity of its legitimate nondiscriminatory reason.[175] The court's reasoning that the employer will be motivated to present persuasive evidence to the fact finder that its employment action was lawful, regardless of only having the burden of production, is overly optimistic. Under the current framework the employer does not need to be actually motivated by the proffered reason. "If an employer need only *articulate* – not prove – a legitimate, nondiscriminatory reason for his action, he may compose fictitious, but legitimate reasons for his actions."[176]

By requiring the employer to prove legitimate reasons, the employer would not be required to bear the burden on the ultimate question of discrimination *vel non*.[177] The employer should not be required to bear a burden of rebutting the employee's prima facie case, by proving a legitimate non-discriminatory reason, where the employee's prima facie case does not create a mandatory inference of discrimination on its own merits. In order to strike a balance between precluding recovery and not subjecting employers to unwarranted findings of discrimination, rather than shift the entire burden, of both production and persuasion to the employer, the employer would simply be required to prove the validity of the reason it offered, not that he did not in fact discriminate.

172 Texas Dep't of Cmty. Affairs v. Burdine, 450 U.S. 248, 255 N.10 (1980).

173 *See generally* St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502, 502 (1993) *see also Burdine*, 450 U.S. 248.

174 *Hicks*, 509 U.S. at 517.

175 Discussion with Professor D. Aaron Lacy, Associate Professor of Law at SMU Dedman School of Law (April 22, 2010).

176 *See* Turner v. Texas Instruments, Inc., 555 F.2d 1251, 1255 (5th Cir. 1997)

177 *See Vel Non*, is Latin for 'or not'. The court in *Hicks* explained that the ultimate question in the employment discrimination case, is discrimination *vel non*, or whether there was discrimination or not.

CONCLUSION

There is "no reason why Title VII interpretation should be driven by concern for employers who are too ashamed to be honest in court, at the expense of victims of discrimination."[178]

Of the three national jurisdictions discussed throughout this paper, the Australian jurisdiction was the only jurisdiction to apply a higher evidentiary standard to allegations of racial discrimination. Its higher standard of evidence, taken in combination with a burden of proof that never shifts to the employer, but instead remains with the plaintiff throughout the litigation, indicates the difficulty of proving claims of racial discrimination in the workplace. In comparison to the Australian approach, which puts an excessive restriction on employees, the U.S. and the U.K. are both more beneficial to employees.

While both the U.S. and the U.K. require the employee to present certain requisite facts prior to permitting a burden to shift to the employer, the U.S. is more demanding on employees in that it simply shifts the burden of production to the employer. In order to be more cognizable of the purpose of Title VII and eradicating unlawful employment discrimination against employees in regards to their terms, conditions or privileges or employment, the U.S. should adopt the second-prong of the U.K. framework and require the employer to prove reliance on its legitimate, nondiscriminatory reason, and move beyond the mere articulation requirement. In today's society, employers will be able to present a mere articulation of a legitimate, nondiscriminatory reason, particularly where the courts have expressly held the employer does not need to show the proffered reason actually motivated the employer.

I acknowledge that this proposal will not eradicate all the difficulties that employees face when bringing a claim for racial discrimination against their employer. There will of course be times where an employer's discriminatory animus based on the employee's race will fall under a veneer of neutrality. The proposal that the U.S. move beyond the mere articulation of the current allocation of the burden of proof, and follow an approach similar to the in the U.K., is aimed at providing a more effective and equal basis for resolving racial discrimination claims in employment law.

178 *Hicks*, 509 U.S. at 543.