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THE LAST MINUET: DISPARATE TREATMENT AFTER *HICKS*

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INTRODUCTION

It is no secret that the Supreme Court's Title VII[1] jurisprudence cloaks substance in the "curious garb" of procedure.[2] When the Supreme Court talks about employment discrimination under Title VII, it generally does so by creating and refining special proof structures — different methods of proving discrimination.[3] This empha-

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1. Civil Rights Act of 1964, Pub. L. No. 88-352, tit. VII, 78 Stat. 241, 253-66 (codified as amended principally at 42 U.S.C. §§ 2000e to 2000e-17 (1988 & Supp. IV 1992)).

2. For "curious garb," see KEES W. BOLLE, THE FREEDOM OF MAN IN MYTH 40 (1968) ("Myth is not only philosophy in a curious garb; the apparel matters."). For discussions of the centrality of procedure in employment discrimination law, see, e.g., Phyllis Tropper Baumann et al., *Substance in the Shadow of Procedure: The Integration of Substantive and Procedural Law in Title VII Cases*, 33 B.C. L. REV. 211 (1992). Baumann states:

> The judiciary has redefined basic civil rights and has resolved major social issues by manipulating process. Procedure now defines unlawful discrimination and determines the outcome of Title VII cases. Thus, without grappling with the nature of discrimination, theories of equality, or the historical and sociological complexity of employment disparities between African-Americans and whites, the courts have rewritten the law and changed workplace behavior using the language of procedure.

Id. (footnote omitted); *see also* Miller v. Cigna Corp., 47 F.3d 586, 599 (3d Cir. 1995) (Greenberg, J., concurring) ("[T]he area of employment discrimination law is cursed with elusive terms . . . and with numerous presumptions, inferences and burden-shifting rules [that] historically often have taken on lives of their own . . . .").

3. The most important distinction in the Title VII case law is the distinction between "intentional discrimination" cases and "disparate impact" cases. The distinction has its source in Supreme Court case law, but has been codified in the Civil Rights Act of 1991, Pub. L. No. 102-66, 105 Stat. 1071, which, *inter alia*, makes damages and jury trials available in "intentional discrimination" cases but not in cases challenging "an employment practice that is unlawful because of its disparate impact." 42 U.S.C. § 1981a(a)(1) (Supp. IV 1992).

Over time, the Supreme Court has developed different proof structures for different types of intentional discrimination cases. This article is most centrally concerned with the "disparate treatment" proof structure for proof of intentional discrimination by circumstantial evidence in individual cases. *See* St. Mary's Honor Ctr. v. Hicks, 113 S. Ct. 2742 (1993); United States Postal Serv. Bd. of Governors v. Aikens, 460 U.S. 711 (1983); Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248 (1981); Furnco Constr. Corp. v. Waters, 438 U.S. 567 (1978); McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973). The other special proof structures in intentional discrimination cases are the "mixed motive" framework, which applies to some individual intentional discrimination cases in which multiple motives for the

sis on procedure comes at the expense of discussions of what one naively might call "substance." Indeed, with the exception of some prominent sex discrimination cases,[4] the Supreme Court has taught us little in the past twenty-five years[5] about what discrimination is, how pervasive it is, and how we are to recognize it in the world. Refining the special proof structures thus constitutes the Supreme Court's major mode of discourse on the subject of employment discrimination.[6]

The liberal legal community[7] has sought — and claims to have found — a set of substantive judgments embedded in the Court's

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adverse decision are proven, *see* 42 U.S.C. § 2000e-2(m) (Supp. IV 1992); Price Waterhouse v. Hopkins, 490 U.S. 228 (1989), and the "pattern and practice" framework, which is used for class-based challenges to intentional discrimination, usually relying on statistical evidence, *see* International Bhd. of Teamsters v. United States, 431 U.S. 324 (1977). There is also what one might think of as a "nonstructure" for cases in which the plaintiff puts forward "direct evidence" of discrimination — whatever that means, see discussion *infra* note 290 — and the defendant does not attempt to prove that its conduct would have been the same absent a discriminatory motive. In those cases, the Court has specified that no special proof structure need be followed. *See* Trans World Airlines, Inc. v. Thurston, 469 U.S. 111 (1985).

The proof structure for disparate impact cases was set forth in Griggs v. Duke Power Co., 401 U.S. 424 (1971), reinterpreted in Wards Cove Packing Co. v. Atonio, 490 U.S. 642 (1989), and codified in a modified form in the Civil Rights Act of 1991, 42 U.S.C. § 2000e-2(k) (Supp. IV 1992).

4. For example, the Court's major sex discrimination cases have included endorsement of the view that hostile-environment sexual harassment constitutes sex discrimination, Meritor Sav. Bank, FSB v. Vinson, 477 U.S. 57 (1986), and have recognized the adverse effects of sex stereotyping, *Price Waterhouse,* 490 U.S. at 228.

5. I exclude the Court's decision in *Griggs,* 401 U.S. at 424, from this criticism.

6. This focus on procedure is not unique to employment discrimination cases. *See, e.g.,* Daniel R. Ortiz, *The Myth of Intent in Equal Protection,* 41 STAN. L. REV. 1105, 1150 (1989) (arguing that in constitutional antidiscrimination doctrine, interest-balancing is done through the allocation of proof burdens, a form that "submerges judicial discretion to the level where it becomes invisible to those outside the system").

7. I use the term "liberal community" in the sense that it is used by critical race scholars who distance themselves from it by rejecting the view that any aspect of the Court's intentional discrimination jurisprudence helps plaintiffs. *See* Richard Delgado & Jean Stefancic, *Critical Race Theory: An Annotated Bibliography,* 79 VA. L. REV. 461, 462 (1993) ("Most, if not all, CRT writers are discontent with liberalism as a means of addressing the American race problem."); *cf.* Roy L. Brooks & Mary Jo Newborn, *Critical Race Theory and Classical-Liberal Civil Rights Scholarship: A Distinction Without a Difference?,* 82 CAL. L. REV. 787 (1994).

For many critical race scholars, as for many other scholars writing about antidiscrimination law, the use of an intent standard in discrimination cases is problematic. *See* Robert Belton, *Burdens of Pleading and Proof in Discrimination Cases: Toward a Theory of Procedural Justice,* 34 VAND. L. REV. 1205, 1230 (1981); Jeffrey S. Brand, *The Supreme Court, Equal Protection, and Jury Selection: Denying that Race Still Matters,* 1994 WIS. L. REV. 511; D. Marvin Jones, *No Time for Trumpets: Title VII, Equality, and the Fin de Siècle,* 92 MICH. L. REV. 2311, 2317-18 (1994); Charles R. Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism,* 39 STAN. L. REV. 317 (1987); Ortiz, *supra* note 6; David A. Strauss, *Discriminatory Intent and the Taming of* Brown, 56 U. CHI. L. REV. 935 (1989); *cf.* Theodore Eisenberg & Sheri L. Johnson, *The Effects of Intent: Do We Know How Legal Standards Work?,* 76 CORNELL L. REV. 1151 (1991).

It is interesting, however, that even critical race scholars who castigate the Court for its use of intent-based standards seem unable to resist the claim that the Court's earlier dispa-

procedural decisions. What is said to exist is a substantive consensus that the eradication of discrimination is a high societal priority, and that discrimination is pervasive but difficult to prove. This consensus claims that the Court fashioned Title VII procedure to give plaintiffs a significant helping hand, to make sure their prospects are better than they would be under the rigors of the ordinary rules of litigation.[8]

When the Court's procedural decisions take a conservative, pro-defendant turn, critics decry the departure from this substantive consensus. These critiques nostalgically seek a return to what they deem the correct, liberal past in which a deep societal commitment to the eradication of discrimination shaped a plaintiff-friendly procedural jurisprudence.[9] The calls for reform are essentially restora-

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rate treatment cases reflect a pro-plaintiff approach that has been corrupted by subsequent decisions. *See* Jones, *supra*, at 2355-58 (criticizing *Burdine* and arguing that *Hicks* perverts *Burdine*). *Compare id.* at 2350 (faulting the Court in *McDonnell Douglas* for having "assumed a priori that discrimination is a creature of the employer's intent") *with id.* at 2357 (insisting that it was only in *Hicks* that the Court committed itself to requiring *intentional* discrimination).

8. *See, e.g.*, Ann C. McGinley, *Credulous Courts and the Tortured Trilogy: The Improper Use of Summary Judgment in Title VII and ADEA Cases*, 34 B.C. L. REV. 203, 245 (1993) ("Placing a higher burden on the employer is consistent with *McDonnell Douglas*'s goal of eliminating discrimination in the workplace, because the higher burden helps the plaintiff to obtain a factual hearing on the question of defendant's intent."); *id.* at 256 (stating that *McDonnell Douglas* and *Burdine* "established a formula that would make it easier for plaintiffs to prove that their employers had discriminated against them"); *see also* authorities cited *infra* note 28.

9. Accusations that a conservative Supreme Court was undermining Title VII's original plaintiff-friendly vision begin with critiques of *McDonnell Douglas* itself. *See, e.g.*, Baumann et al., *supra* note 2, at 226-30 (arguing that *Griggs* was true to the language of Title VII, but *McDonnell Douglas* was not). It continues with critiques of the early cases following *McDonnell Douglas*. *See, e.g.*, Joel W. Friedman, *The Burger Court and the Prima Facie Case in Employment Discrimination Litigation: A Critique*, 65 CORNELL L. REV. 1, 56 (1979) ("The unprincipled and contrived reasoning running through these opinions manifests an intentional effort by the Court to impede litigants' ability to secure their rights to equal employment opportunity by raising the requirements of the prima facie case."). The responses to *Burdine* continue the story. *See, e.g.*, Jerry W. Kennedy, Note, *Easing Title VII Burdens from the Employer*, 5 AM. J. TRIAL ADVOC. 337, 344 (1981) (faulting *Burdine* for having created a (new) intent requirement: "Requiring Title VII plaintiffs to show discriminatory intent or motive is an almost impossible burden absent a smoking gun."); James F. Mensing, Comment, Texas Department of Community Affairs v. Burdine: *The Procedural Subversion of* Griggs v. Duke Power Co.?, 17 NEW ENG. L. REV. 999, 1008 (1982) ("*Burdine* should put to rest any speculation that disparate treatment cases under Title VII are to be treated any differently than other civil suits in the federal courts."). *But cf.* John F. Smith III, *Employer Defenses in Employment Discrimination Litigation: A Reassessment of Burdens of Proof and Substantive Standards Following* Texas Department of Community Affairs v. Burdine, 55 TEMP. L.Q. 372, 378 (1982) ("*Furnco, Sweeney,* and *Burdine* were efforts by the Court to restrain misapplications of the *McDonnell Douglas* formula . . . ."). *See generally* Theodore Y. Blumoff & Harold S. Lewis, Jr., *The Reagan Court and Title VII: A Common-Law Outlook on a Statutory Task*, 69 N.C. L. REV. 1 (1990) (arguing that the Reagan Court was motivated by pro-market policy axioms of neutrality and noninterference that are inconsistent with earlier judicial understandings of the motivation behind Title VII). The reliance on a nostalgic view of the Court's early cases reached a climax in the response to the Court's

tive: they seek to correct the Court's error of today by going back to the liberal consensus of yesterday. So went the intense academic and political response to *Wards Cove Packing Co. v. Atonio,*[10] in which that much-maligned political actor, a "bare majority" of the Supreme Court,[11] stood accused of reworking the procedures for proving Title VII disparate impact claims.[12]

Nostalgia also forms the core of the debate over *St. Mary's Honor Center v. Hicks.*[13] In *Hicks,* a "bare majority" made intentional discrimination more difficult to prove under the special proof structure for individual intentional discrimination cases — which I shall refer to as "McDonnell Douglas-Burdine," in honor of *McDonnell Douglas Corp. v. Green*[14] and *Texas Department of Community Affairs v. Burdine,*[15] the two major cases in which it was set forth. Proof of discrimination under McDonnell Douglas-Burdine plays itself out in a three-part "minuet."[16] The first step is taken by

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1988-1989 Term. *See, e.g.,* Mark S. Brodin, *Reflections on the Supreme Court's 1988 Term: The Employment Discrimination Decisions and the Abandonment of the Second Reconstruction,* 31 B.C. L. REV. 1, 29-30 (1989) (noting that the Justices whose decisions were "dismantled during the 1988 Term" were "not known for their progressive leanings," but "joined . . . in recognizing the compelling necessity for finally resolving what Gunnar Myrdal long ago identified as the most persistent of American tragedies: racism").

10. 490 U.S. 642 (1989).

11. *See Wards Cove,* 490 U.S. at 661 (Blackmun, J., dissenting). For a sampling of other Supreme Court dissents complaining of decisions by "bare majorities," see, e.g., Rust v. Sullivan, 500 U.S. 173, 206 (1991) (Blackmun, J., dissenting); Fort Wayne Books, Inc. v. Indiana, 489 U.S. 46, 71 (1989) (Stevens, J., dissenting); Patterson v. McLean Credit Union, 485 U.S. 617, 621 (1988) (Blackmun, J., dissenting); Arizona v. Rumsey, 467 U.S. 203, 212 (1984) (Rehnquist, J., dissenting).

12. *See, e.g.,* Robert Belton, *Causation and Burden-Shifting Doctrines in Employment Discrimination Law Revisited: Some Thoughts on* Hopkins *and* Wards Cove, 64 TUL. L. REV. 1359 (1990); William B. Gould IV, *The Supreme Court and Employment Discrimination Law in 1989: Judicial Retreat and Congressional Response,* 64 TUL. L. REV. 1485 (1990). The legislative effort to "restore" at least part of the Court's prior jurisprudence started quickly, but did not come to fruition until 1991. *See generally* Reginald C. Govan, *Honorable Compromises and the Moral High Ground: The Conflict Between the Rhetoric and the Content of the Civil Rights Act of 1991,* 46 RUTGERS L. REV. 1 (1993).

13. 113 S. Ct. 2742 (1993).

14. 411 U.S. 792 (1973).

15. 450 U.S. 248 (1981). The McDonnell Douglas-Burdine framework has its origins in Title VII jurisprudence, but it is used in other areas of antidiscrimination law as well, such as the Age Discrimination in Employment Act, 29 U.S.C. §§ 621-634 (1988), and 42 U.S.C. § 1981 (1988 & Supp. V 1993). For its use in peremptory challenge cases, see *infra* note 239.

16. The term "minuet" was first used in disparate treatment cases as a way of explaining that the McDonnell Douglas-Burdine structure does *not* require judges to dance a minuet. *See, e.g.,* Halsell v. Kimberly-Clark Corp., 683 F.2d 285, 291 n.5 (8th Cir. 1982), *cert. denied,* 459 U.S. 1205 (1983); Sime v. Trustees of the Cal. State Univ. & Colleges, 526 F.2d 1112, 1114 (9th Cir. 1975). But the term is now often used to describe the McDonnell Douglas-Burdine structure. *See, e.g.,* Davis v. Chevron U.S.A., Inc., 14 F.3d 1082, 1085 nn.7-8 (5th Cir. 1994) (per curiam); Holley v. Sanyo Mfg., Inc., 771 F.2d 1161, 1164 (8th Cir. 1985). My favorite use of the term is the observation that the McDonnell Douglas-Burdine proof method is "about as relevant [to pattern-and-practice cases] as a minuet is to a thermonuclear battle."

the plaintiff, who must begin by proving a "prima facie case." In some legal contexts, the "prima facie case" consists of evidence sufficient to prove all required elements of the plaintiff's claim. Not so under McDonnell Douglas-Burdine.[17] The McDonnell Douglas-Burdine prima facie case merely attempts to "rule out the most common reasons for adverse job actions,"[18] entitling the plaintiff who proves a prima facie case to a presumption that intentional discrimination has taken place. In order to avoid a directed verdict, the employer[19] must then meet a burden of *production* — as opposed to a burden of persuasion — by introducing evidence of a legitimate, nondiscriminatory reason for its decision.[20] Once the employer has met its rebuttal burden, the presumption of discrimi-

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Vuyanich v. Republic Natl. Bank, 521 F. Supp. 656, 661 (N.D. Tex. 1981), *vacated and remanded on other grounds,* 723 F.2d 1195 (5th Cir.), *cert. denied,* 469 U.S. 1073 (1984). If the "minuet" image does not satisfy, others are available to take its place. *See, e.g.,* Segar v. Smith, 738 F.2d 1249, 1286 (D.C. Cir. 1984), *cert. denied,* 471 U.S. 1115 (1985) ("The analytic application of Title VII's formulaic rules for shifting burdens can come to resemble a furious tennis match.").

17. The *Burdine* Court stated that:

> The phrase 'prima facie case' not only may denote the establishment of a legally mandatory, rebuttable presumption, but also may be used by courts to describe the plaintiff's burden of producing enough evidence to permit the trier of fact to infer the fact at issue. *McDonnell Douglas* should have made it apparent that in the Title VII context we use 'prima facie case' in the former sense.

450 U.S. at 254 n.7 (citation omitted); *see also* Blumoff & Lewis, *supra* note 9, at 10 (arguing that the inference of intentional discrimination from the proven prima facie case "is rather weak. The prima facie case, far from establishing with any conviction that intentional discrimination was likely, really only eliminates two or three common nondiscriminatory reasons for the plaintiff's rejection"); Hannah Arterian Furnish, *A Path Through the Maze: Disparate Impact and Disparate Treatment Under Title VII of the Civil Rights Act of 1964 After* Beazer *and* Burdine, 23 B.C. L. REV. 419, 435 (1982) (noting "the ease with which the plaintiff establishes a prima facie case" and how "little is required to create the presumption of discrimination"); George Rutherglen, *Reconsidering Burdens of Proof: Ideology, Evidence, and Intent in Individual Claims of Employment Discrimination,* 1 VA. J. SOC. POLY. & L. 43, 74 (1993) ("[T]he entire terminology of 'prima facie case' overstates the force of the evidence necessary to satisfy the plaintiff's initial burden under *McDonnell Douglas.*").

18. "The prima facie case serves an important function in the litigation: it eliminates the most common nondiscriminatory reasons for the plaintiff's rejection." *Burdine,* 450 U.S. at 253-54 (citing International Bhd. of Teamsters v. United States, 431 U.S. 324, 358 & n.44 (1977)). For example, the basic elements in a failure-to-hire case, according to *McDonnell Douglas,* are membership in a protected group; having applied for the job; being minimally qualified for the job; being turned down; and the job having remained open (or someone outside your protected group having been hired). *McDonnell Douglas,* 411 U.S. at 802.

19. 42 U.S.C. § 2000e(c)-(d) (1988). Title VII covers discrimination not only by employers, but also by labor unions and employment agencies. I shall refer to defendants as "employers" for the sake of simplicity, but what is said applies to the other categories of potential defendants as well.

20. *Burdine,* 450 U.S. at 255. All that matters is that the reason articulated by the employer be "legally sufficient" to support a judgment for the defendant, 450 U.S. at 255 (*i.e.,* that the stated reason in fact be "legitimate" and "nondiscriminatory"), and that the evidence "rais[e] a genuine issue of fact as to whether [the employer] discriminated against the plaintiff," 450 U.S. at 248. "The defendant need not persuade the court that it was actually motivated by the proffered reasons." 450 U.S. at 248.

nation created by the prima facie case "drops from the case,"[21] and the plaintiff must prove that the employer's stated justification was pretextual in order to prevail. In a much-cited dictum in *Burdine,* the Court stated that pretext could be proven by either direct or circumstantial evidence, and that, more specifically, pretext "may" be proven by showing that the employer's stated reason was "not worthy of credence."[22]

For at least ten years after *Burdine,* the circuits disagreed as to whether a plaintiff who proves a prima facie case and convinces the factfinder to reject the employer's stated justification is entitled, on that basis alone, to judgment as a matter of law.[23] The Court addressed this question for the first time in *Hicks* and, by a 5-4 vote, held that judgment for the plaintiff is *not* required in such a case.

The Supreme Court's decision in *Hicks* is viewed by many as reminiscent of *Wards Cove* and the other conservative civil rights decisions of the Supreme Court's 1988-1989 Term.[24] Indeed, the

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21. 450 U.S. at 255 n.10.

22. "[The plaintiff] may succeed in this [i.e., in persuading the court that she has been the victim of intentional discrimination] either directly by persuading the court that a discriminatory reason more likely than not motivated the employer or indirectly by showing that the employer's proffered explanation is unworthy of credence." 450 U.S. at 256.

23. Some courts took the position that a plaintiff who proves a prima facie case and disproves the employer's stated reason is entitled to judgment as a matter of law. Johnson v. Group Health Plan, Inc., 994 F.2d 543, 546 (8th Cir. 1993); Dister v. Continental Group, Inc., 859 F.2d 1108, 1113 (2d Cir. 1988); King v. Palmer, 778 F.2d 878, 881 (D.C. Cir. 1986); Thornbrough v. Columbus & G.R.R., 760 F.2d 633, 647 (5th Cir. 1985); Duffy v. Wheeling Pittsburgh Steel Corp., 738 F.2d 1393, 1396 (3d Cir.), *cert. denied,* 469 U.S. 1087 (1984); Lanphear v. Prokop, 703 F.2d 1311, 1317 (D.C. Cir. 1983). Other courts held that the factfinder in such a case would be *permitted* but not *required* to find for the plaintiff. *See, e.g.,* MacDissi v. Valmont Indus., Inc., 856 F.2d 1054, 1059 (8th Cir. 1988); Benzies v. Illinois Dept. of Mental Health, 810 F.2d 146, 148 (7th Cir.), *cert. denied,* 483 U.S. 1006 (1987); White v. Vathally, 732 F.2d 1037, 1043 (1st Cir.), *cert. denied,* 469 U.S. 933 (1984); Clark v. Huntsville Bd. of Educ., 717 F.2d 525, 529 (11th Cir. 1983); Miller v. WFLI Radio Inc., 687 F.2d 136, 139 (6th Cir. 1982). Still other courts seemed to go further, expressing the view that if all the plaintiff had done was to prove a prima facie case and disprove the employer's stated reason, the evidence would be insufficient as a matter of law to sustain a judgment for the plaintiff. *See, e.g.,* Bienkowski v. American Airlines, Inc., 851 F.2d 1503, 1508 & n.6 (5th Cir. 1988). The courts did not always state their positions with great clarity, and, as some of the citations above reflect, conflicts existed within, as well as, between circuits. For early law review commentary on the courts' disagreement on this issue, see Marina C. Szteinbok, Note, *Indirect Proof of Discriminatory Motive in Title VII Disparate Treatment Claims After* Aikens, 88 COLUM. L. REV. 1114 (1988). The leading study of the issue is Catherine J. Lanctot, *The Defendant Lies and the Plaintiff Loses: The Fallacy of the "Pretext-Plus" Rule in Employment Discrimination Cases,* 43 HASTINGS L.J. 57 (1991).

24. *See, e.g.,* Jerome McCristal Culp, Jr., *The Michael Jackson Pill: Equality, Race, and Culture,* 92 MICH. L. REV. 2613, 2621-22 (1994). Culp states that:

> In a series of decisions starting with *Watson* and culminating in *Patterson* and *Wards Cove,* the Court has suggested that the claims that black people were making were not remediable. Despite recent congressional chastisement of part of that trend, in *Hicks* the Court has again made the point that Title VII should not be too effective or reach too much of the real discrimination.

Id. (footnotes omitted).

Court's action in *Hicks* appears to be a particularly *extreme* case of conservative judicial activism because the *Hicks* majority conceded that its decision directly contradicted the *Burdine* dictum.[25] The Court's explanation — that one need not, "where holdings of the Court are not at issue . . . dissect the sentences of the United States Reports as though they were the United States Code"[26] — reads to many as a declaration of war, given the fact that the Court had consistently developed the Title VII special proof structures through quasi-legislative "tests" set forth in dicta to guide future decision-making. Further fueling the charge of judicial activism was the fact that the position rejected by the Court in *Hicks* was embraced not only by the Clinton Justice Department in its amicus brief, but also by the Bush Justice Department in an earlier Supreme Court case that was not heard on its merits.[27] The criticism of *Hicks* was immediate, as was the cry for restorative legislation.[28]

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

26. 113 S. Ct. at 2751.

27. Brief for the United States and the Equal Employment Opportunity Commission as Amicus Curiae supporting Respondent, Harbison-Walker Refractories v. Brieck, 488 U.S. 226 (1988) (No. 87-271). *Brieck* is discussed *infra* at note 152. It is also noteworthy that Justice White, who was consistently with the conservatives in the 5-4 civil rights decisions of the 1988-1989 Term, joined the dissent in *Hicks*.

28. *See, e.g.*, Deborah A. Calloway, St. Mary's Honor Center v. Hicks: *Questioning the Basic Assumption*, 26 CONN. L. REV. 997, 1038 (1994) (calling for legislative reform); Jerome McCristal Culp, Jr., *Neutrality, the Race Question, and the 1991 Civil Rights Act: The "Impossibility" of Permanent Reform*, 45 RUTGERS L. REV. 965, 1008 (1993) (stating the view that became the majority position in *Hicks* was previously taken only by "the radical fringe of the legal establishment"); Jones, *supra* note 7, at 2356-58 (critiquing *Hicks*); Juan F. Perea, *Ethnicity and Prejudice: Reevaluating "National Origin" Discrimination Under Title VII*, 35 WM. & MARY L. REV. 805, 841-42 (1994) (claiming that *Hicks* reflects the Court's "persistent hostility toward civil rights plaintiffs"); *The Supreme Court, 1992 Term — Leading Cases*, 107 HARV. L. REV. 144, 347 (1993) (arguing that the Court "misread established precedent and it disregarded the intent of the legislature" and that the majority opinion "hinged tenuously on isolated phrases, stripped from their contexts and refashioned into a reading that contradicts both the spirit and the letter of settled case law"); Sherie L. Coons, Comment, *Proving Disparate Treatment after* St. Mary's Honor Center v. Hicks: *Is Anything Left of* McDonnell Douglas?, 19 IOWA J. CORP. L. 379 (1994) ("[T]he Court's holding conflicts with established precedent, is illogical, inconsistent, and furthers unsound policy . . . ."); Shannon R. Joseph, Note, *Employment Discrimination: Shouldering the Burden of Proof After* St. Mary's Honor Center v. Hicks, 29 WAKE FOREST L. REV. 963, 995 (1994) (stating that *Hicks* manifests the Court's willingness "to twist the words of its prior decisions in order to extract a result that subverts the intended result of civil rights legislation"); Louis M. Rappaport, Note, St. Mary's Honor Center v. Hicks: *Has the Supreme Court Turned Its Back on Title VII by Rejecting "Pretext-Only?,"* 39 VILL. L. REV. 123, 164 (1994) (calling for legislative action); Robert J. Smith, Note, *The Title VII Pretext Question: Resolved in Light of* St. Mary's Honor Center v. Hicks, 70 IND. L.J. 281 (1994).

For the response of the plaintiffs' civil rights bar, see, e.g., *Management, Civil Rights Attorneys Differ on Effect of* Hicks *Decision*, Daily Lab. Rep. (BNA) No. 126, at C-1, C-2 (July 2, 1993) (quoting a representative of the NAACP Legal Defense and Education Fund, Inc., as stating: " 'There may well be a need for some restorative legislation. . . . We think the decision is a blow to effective civil rights enforcement,' " and that "*McDonnell-Douglas* set up an effective method for dealing with discrimination cases that was used for decades"). *See*

The strategic importance of nostalgic critiques and restorative rhetoric makes it difficult for liberals, of which I am one, to abandon them. Thus, before undertaking a close analysis of the issue in *Hicks,* my sympathies were with the dissent. I wanted to be on the side of those who proclaim with moral confidence that the landmark Title VII cases of the early 1970s represented a clear, pro-plaintiff consensus, and that only a Court that no longer believes that race discrimination against nonwhites is — or ever was — a problem in our society[29] would destroy it. But when it comes to McDonnell Douglas-Burdine, I have reluctantly concluded that the nostalgic critique must fail.

The purpose of this article is to explain why the Court's much-maligned decision in *Hicks* was correct, and to further argue that in the aftermath of *Hicks,* the McDonnell Douglas-Burdine proof structure ought to be abandoned.

I begin in Part I by analyzing the Court's prior disparate treatment decisions and conclude that the Supreme Court never succeeded in setting the prima facie case threshold high enough to permit the proven prima facie case to support a sufficiently strong

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also Thomas A. Cunniff, Note, *The Price of Equal Opportunity: The Efficiency of Title VII After* Hicks, 45 CASE W. RES. L. REV. 507, 508 (1995) (discussing reactions of the civil rights bar).

Restorative legislation was introduced in late 1993, in the form of the Civil Rights Standards Restoration Act, S.1776, 103d Cong., 1st Sess., 139 CONG. REC. S16,948 (daily ed. Nov. 22, 1993). The Act was introduced and spearheaded by Senator Howard Metzenbaum, whose opening words on the Senate floor were that this was a case of "deja vu," and that "the Supreme Court is at it again." *Id.* He continued: "The Civil Rights Standards Restoration Act will overturn Hicks and restore the legal framework Federal courts have used in thousands of cases to resolve claims of intentional discrimination. Notably, the text of the bill is drawn directly from the language of the Supreme Court's McDonnell Douglas and Burdine decisions." *Id.* at S16,950. The proposed Act provided:

> Sec. 1979A. Standards for Proving Intentional Discrimination in Certain Circumstances.
>
> (a) Standards. — In a case or proceeding brought under Federal law in which a complaining party meets its burden of proving a prima facie case of unlawful intentional discrimination and the respondent meets its burden of clearly and specifically articulating a legitimate, nondiscriminatory explanation for the conduct at issue through the introduction of admissible evidence, unlawful intentional discrimination shall be established where the complaining party persuades a trier of fact, by a preponderance of the evidence, that —
>
> (1) a discriminatory reason more likely motivated the respondent; or
>
> (2) the respondent's proffered explanation is unworthy of credence.
>
> (b) Rule of Construction. — This section shall apply only to those cases and proceedings in which the method of proof articulated in McDonnell Douglas . . . and . . . Burdine . . . applies and shall not be construed to specify the exclusive means by which the complaining party may establish unlawful intentional discrimination under Federal law.

Id. The statute, which adopted the position of the *Hicks* dissent, never made it out of committee.

29. Wards Cove Packing Co. v. Atonio, 490 U.S. 642, 662 (1989) (Blackmun, J., dissenting). My initial sympathies were shaped in part by the fact that I served as a law clerk to Justice Blackmun during the 1988-1989 Term and agreed with his stark assessment of the Court's conservative turn.

inference of discrimination to mandate judgment for the plaintiff when combined only with disbelief of the employer's stated justification. It is, of course, possible to argue that the Court interpreted the policies of Title VII to require a framework in which a mandatory inference of discrimination must be drawn even when the evidence itself is not strong enough to warrant it. But I fail to find in McDonnell Douglas-Burdine a sufficiently strong pro-plaintiff substantive consensus to support this result — a result that must, in all honesty, be viewed as a kind of affirmative action, in that it protects members of protected groups from discharge without just cause in any case in which a minimal showing can be made that discrimination *could* have been the cause, without proof that it *was* the cause. Instead, I conclude that the major thrust of the Court's disparate treatment jurisprudence is the attempt to insulate disparate treatment cases from the radical innovations of the disparate impact standard. There is a marked conservative overtone to the McDonnell Douglas-Burdine line of cases — and against its background, the nostalgic critique of *Hicks* is unacceptable.

If *Hicks* is correct, however, there remains what might well be thought of as a problem of judicial economy: McDonnell Douglas-Burdine is reduced to nothing but an empty ritual. If McDonnell Douglas-Burdine does nothing the normal rules of civil procedure cannot do, if it neither aids nor constrains judicial decisionmaking, one must ask whether it makes sense to continue to use the McDonnell Douglas-Burdine proof structure at all.

In Part II, this article questions the continued utility of McDonnell Douglas-Burdine by reviewing how district courts use McDonnell Douglas-Burdine at the pretrial stage, where it matters the most. A review of district court summary judgment cases demonstrates that to accord legal significance to the plaintiff's satisfaction of the "requirements" of the prima facie case "stage" and the pretext "stage" of McDonnell Douglas-Burdine is to engage in an act of misplaced concreteness. The world of practice under McDonnell Douglas-Burdine remains a disorderly one, in which the assignment of categories of facts to "stages" of the case is unstable. Furthermore, to the extent that McDonnell Douglas-Burdine *does* constrain factfinding, it tends to discourage the kind of holistic factfinding that is most likely to reveal the truth about discrimination in the workplace.

On the basis of this review, I suggest that it would be better to abandon McDonnell Douglas-Burdine than to repair it. Abandoning McDonnell Douglas-Burdine would leave courts with a less

structured approach to disparate treatment cases, in which the only question would be whether the plaintiff has proved intentional discrimination by a preponderance of the evidence, both direct and circumstantial. It is not only intellectual honesty that would be gained from abandoning McDonnell Douglas-Burdine. There is also a possibility that abandoning McDonnell Douglas-Burdine will draw the attention of the courts — and of that sector of legal academia that still has some faith in the educability of the courts — to the substantive problem that McDonnell Douglas-Burdine tried, but failed, to answer in procedural terms: the problem of proving — rather than preaching — the reality of discrimination to the unconverted, on the level of the individual case.

I. THE *HICKS* CASE

Melvin Hicks, who is black, worked as a shift commander at St. Mary's Honor Center, a minimum security prison. Hicks had a good performance record until January 1984, when John Powell became his supervisor. Between January 1984 and mid-April 1984, Hicks was involved in a series of rule infractions that provided the occasion for his discipline, demotion, and eventual discharge. Hicks was eventually replaced by a white male. Hicks's case went to full trial with the judge as factfinder.[30] The district court found for St. Mary's notwithstanding the fact that it did not believe St. Mary's explanation of why it fired Hicks. The Eighth Circuit reversed, clearly embracing the view that a plaintiff who proves a prima facie case and disproves the employer's stated justification for its actions is thereby entitled to judgment as a matter of law[31] — which I shall call the "judgment for plaintiff required" position. The Supreme Court, in turn, reversed the Eighth Circuit, rejecting the "judgment for plaintiff required" position.[32]

In *Hicks,* as in many disparate treatment cases, evidence narrowly tailored to prove the prima facie case and disprove the employer's stated justification — which I shall call the "combined evidence" — was not the only evidence at issue. *Hicks* presented the further complication that key evidence supported potentially dispositive inferences not argued for by either party. Analysis of *Hicks*'s path to the Supreme Court, then, serves the dual purpose of explicating the case and of providing an example of how McDon-

30. The district court's opinion is reported. *See* Hicks v. St. Mary's Honor Ctr., 756 F. Supp. 1244 (E.D. Mo. 1991).

31. Hicks v. St. Mary's Honor Ctr., 970 F.2d 487 (8th Cir. 1992).

32. 113 S. Ct. 2742 (1993).

nell Douglas-Burdine works in practice in factually complex cases. This Part will then address the legal issue before the Supreme Court, and explain why the Court's much-criticized rejection of the "judgment for plaintiff required" position was correct — for reasons that call the coherence and utility of McDonnell Douglas-Burdine into question.

A. Hicks *in the District Court*

In *Hicks,* the district court analyzed the facts under the McDonnell Douglas-Burdine proof structure.[33] First, the district court held that Hicks had made out a prima facie case of discrimination. As a black man, Hicks was a member of a protected class, he performed his job satisfactorily until 1984, was fired, and was replaced by a white man. This, the district court held, was all Hicks needed to show to make out the McDonnell Douglas-Burdine prima facie case.[34]

Once the court found that Hicks had made out a prima facie case of race discrimination, the next question was whether St. Mary's had satisfied its burden of articulating, through evidence, a legitimate, nondiscriminatory reason for firing Hicks. St. Mary's witnesses testified that Hicks's on-the-job misconduct caused his discipline and ultimate termination. The district court held that this testimony fulfilled St. Mary's production burden under McDonnell Douglas-Burdine.[35]

Moving on to the "pretext" phase of the case, the first question for the district court was whether it believed St. Mary's explanation. It did not. The district court, agreeing with Hicks, found that

33. I note that fact because, as we shall see, the Court's decision in *United States Postal Serv. Bd. of Governors v. Aikens,* 460 U.S. 711 (1983), casts doubt on the appropriateness of using McDonnell Douglas-Burdine as a method for organizing the facts after trial. *See infra* text accompanying notes 132-136; *see also infra* note 238.

34. The facts of *Hicks* help to demonstrate that the standard McDonnell Douglas-Burdine prima facie case does not go very far on its own to create an inference of intentional discrimination. The district court held without comment that Hicks had performed satisfactorily until 1984. But there was a serious question in the case as to the sufficiency of the standards against which Hicks was being judged prior to 1984. In 1983, the state correctional agency did an undercover investigation of conditions and procedures at St. Mary's, and found them sorely inadequate. *Hicks,* 756 F. Supp. at 1246. The results of the study led to the major personnel changes that are part of the setting for Hicks's discharge. Then again, Hicks argued, as we shall see, that the study was itself racially motivated, and that the personnel changes it prompted showed a pattern of race discrimination. 756 F. Supp. at 1252. As often happens in Title VII cases, *see infra* Part II, the question whether Hicks had met the requirements of his job prior to 1984 was answered in an overly simplistic way during the prima-facie-case stage, and much of the evidence that was in fact relevant to that determination was left to the later stages of the McDonnell Douglas-Burdine analysis.

35. 756 F. Supp. at 1750.

"[a]lthough plaintiff committed several violations of institutional rules, plaintiff was treated much more harshly than his coworkers who committed equally severe or more severe violations."[36] Thus, the district court held, Hicks had "carried his burden in proving that the reasons given for his demotion and termination were pretextual"[37] — in other words, Hicks convinced the court that his rule infractions were not in fact the reason for his discharge.

But Hicks's demonstration that St. Mary's proffered reason was pretextual did not end the district court's inquiry. Implicitly rejecting the "judgment for plaintiff required" position, the court went on to evaluate all the evidence to decide whether discrimination was in fact the reason for Hicks's discharge. There were two major threads in the district court's analysis of the evidence: consideration of "personal animosity" as a possible alternative motive, and review of plaintiff's additional evidence of discrimination.

It was clear to the district court that Hicks's supervisor was on a "crusade" to terminate Hicks, but the racial basis for the crusade was less clear. The evidence raised an alternative possibility that the crusade may have been motivated by personal animosity rather than by discrimination. The defendants never pressed the view that Powell fired Hicks because of "personal motivation" or "personal animosity." Instead, the theme entered the case by inference from disputed facts.[38] That fact did not deter the district court from con-

36. *Hicks*, 756 F. Supp. at 1251. St. Mary's claimed to have a policy that officers would be punished for the infractions of their subordinates, but the district court agreed with Hicks that this policy was applied solely to Hicks. St. Mary's demoted Hicks for his subordinate's failure to log a fellow staff member's use of a vehicle, but other officers either were not punished or merely were reprimanded for far more serious offenses — for example, negligently permitting an inmate to escape.

37. 756 F. Supp. at 1251.

38. Hicks's final infraction was making threats to his supervisor Powell during a confrontation that, the district court found, Powell manufactured in order to provoke Hicks to act irrationally. 756 F. Supp. at 1251. After that confrontation, Hicks was called into a meeting and told that he was being demoted. Hicks asked for and was granted the rest of the day off. Instead of allowing him to leave, Powell followed him to the locker room, insisted that he had not in fact been given the day off, started an argument, and demanded that Hicks open his locker and return his shift commander manual to Powell. Hicks testified on direct examination that Powell admitted at the time that he had followed Hicks to the locker room in order to provoke a physical fight. Respondent's Brief, *Hicks*, 113 S. Ct. at 2742 (No. 92-602), *available on* LEXIS, (Genfed library, briefs file). The district court was prepared to infer from Powell's behavior that it was personal animosity against Hicks that caused Powell to pursue Hicks to the locker room, with the hope that Hicks would misbehave and get himself fired. There were contrary facts in the trial record, because Powell himself, during his testimony, denied that there were personal difficulties between himself and Hicks. *Id.*, LEXIS page 130 (citing Joint Appendix at 46): "I can't say that there was difficulties between he and I. At no time was there any kind of personal . . . ." But Powell also denied that he had instigated the final confrontation with Hicks, *id.*, and the district court did not believe him. In light of Powell's lack of credibility on the latter score, the district court was not persuaded by Powell's denial of any personal animosity toward Hicks.

cluding that "[i]n essence, although plaintiff has proven the existence of a crusade to terminate him, he has not proven that the crusade was racially *rather than personally* motivated."[39]

Hicks went beyond the "combined evidence" by introducing evidence to demonstrate that his discharge was part of a long-term campaign to alter the racial balance of the staff at St. Mary's. He alleged that this campaign began in 1981 with a study that concluded that St. Mary's had too many black managers and that it ended with racially based firings, including his own, in 1984.[40] In addition, Hicks pointed to differential disciplinary treatment he received in comparison to similarly situated white employees. The district court was unpersuaded.[41]

Having rejected plaintiff's additional proof of discrimination, and having concluded that the facts might well support the inference that personal animosity rather than race discrimination was the reason for Hicks's termination, the district court entered judgment for St. Mary's.

B. Hicks *on Appeal*

On appeal, the Eighth Circuit embraced the "judgment for plaintiff required" position. In so doing, the court held that because the "combined evidence" mandated judgment for Hicks, it was le-

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39. 756 F. Supp. at 1252 (emphasis added). The question whether the district court "found" that the crusade was in fact personally motivated — as opposed to using the *possibility* of personal animosity on these facts to further underscore the conclusion that Hicks had failed to prove that discrimination was the real motive — became an important question in later stages of the litigation. *See infra* note 42 and text accompanying notes 145-47.

40. In 1980 and 1981, the state performed a study of minimum-security prisons, and one of its conclusions was that the racial composition of St. Mary's management — a white superintendent with a program staff that was 64.64% black — created the potential for racial subversion of the superintendent's authority. Respondent's Brief, *Hicks*, 113 S. Ct. at 2742, *available on* LEXIS (Genfed library, briefs file), LEXIS p. 128, citing Joint Appendix at 85. There was evidence that copies of the study were circulated to superintendents. *Id.* The state investigated St. Mary's again in 1983, and the trial record contained testimony that the 1983 investigation was triggered by the complaints of St. Mary's employees, including those of two white correctional officers who complained that they were being denied the opportunity for promotion because "blacks were in the way." *Id.* In the aftermath of the 1983 investigation, St. Mary's saw major personnel changes in January of 1984. Four black supervisors were removed and replaced by whites; of the thirteen other employees terminated in 1984, twelve were black. Hicks claimed that the supervisors who made the personnel changes in 1984 knew about the 1981 report's warning that the racial composition of the St. Mary's staff carried with it the threat of racial subversion. He argued that the pattern of personnel changes in 1984 — including his own discharge in June of 1984 — reflected a commitment to changing the racial balance at St. Mary's by firing blacks and hiring whites.

41. The court concluded that the supervisors involved in Hicks's discharge were unaware of the 1980-81 report, that the 1984 discharges did not change the racial balance at St. Mary's, and that Hicks was disciplined more harshly than some of his *black* subordinates, casting doubt on whether race motivated the differential discipline. 756 F. Supp. at 1252.

gally erroneous for the district court both to evaluate the sufficiency of Hicks's additional discrimination evidence and to entertain the possibility that personal animosity was the motive behind Hicks's discharge. Furthermore, the Eighth Circuit took issue with the district court's approach to the record on the issue of personal animosity, on both factual and legal grounds. The Eighth Circuit interpreted the district court's decision as containing a finding that "personal motivation" was the cause of the discharge,[42] and stated that the record was "without evidence to support the assumption."[43] In addition, the circuit court held that the defendants were not legally *entitled* to have the factfinder consider personal animosity as an alternative theory because "defendants simply never stated that personal motivation was a reason for their actions or offered evidence to substantiate such a claim."[44] According to the Eighth Circuit, the only theories the district court is permitted to consider are those "clearly set forth [by the defendants], through the introduction of admissible evidence [as a reason] for the plaintiff's rejection."[45] In other words, if a theory has not properly been put forward by the defendant at the rebuttal stage of the case, the theory is not relevant to the case, even if there is evidence of record to support it.[46]

C. Hicks *in the Supreme Court*

When *Hicks* reached the Supreme Court, the case produced two emphatic — and at times caustic — opinions: Justice Scalia's for the majority, and Justice Souter's for the dissent.[47] The majority

42. The district court's opinion need not be so read. It seems far more likely that the district court thought that personal animosity was an alternative explanation consistent with the evidence, the existence of which weakened the inference of intentional discrimination that would otherwise arise from the proven facts.

43. Hicks v. St. Mary's Honor Ctr., 970 F.2d 487, 492 (8th Cir. 1992).

44. 970 F.2d at 492 (quoting Texas Dept. of Comm. Affairs v. Burdine, 450 U.S. 248, 255 (1981)).

45. 970 F.2d at 492 (quoting *Burdine,* 450 U.S. at 255).

46. That was not St. Mary's only problem. The Eighth Circuit also cast doubt on whether "personal animosity" *could* ever count as a "legitimate, nondiscriminatory" reason for firing an employee under McDonnell Douglas-Burdine. The court questioned whether "a . . . reason based on *personal* motivation even could be stated and still be 'legitimate' and 'nondiscriminatory.' " 970 F.2d at 492. *But see* Purkett v. Elem, 115 S. Ct. 1769 (1995), *discussed infra* at text accompanying notes 238-41.

47. For example, the majority began its critique of the dissent by "noting the utter implausibility that we would ever have held what the dissent says we held [in *McDonnell Douglas-Burdine*]," *Hicks,* 113 S. Ct. at 2750, and insisted that "[o]nly one unfamiliar with our case-law will be upset by the dissent's alarm that we are today setting aside 'settled precedent.' " 113 S. Ct. at 2750. The dissent in turn accused the majority of "destroy[ing] a framework carefully crafted in precedents as old as 20 years" in order to help "employers who are too ashamed to be honest in court." 113 S. Ct. at 2766.

rejected the "judgment for plaintiff required" position.[48] The dissent strongly disagreed. The major arguments between the two opinions centered on the weight of the evidence, precedent, necessity, and economy.[49] The majority was correct, on all fronts.

1. *Weight of the Evidence*

The strongest support for the "judgment for the plaintiff required" position would be to demonstrate that the "combined evidence" (proof of the prima facie case and disproof of the employer's stated justification), standing alone, is invariably sufficient *as an evidentiary matter* to create an inference of discrimination that is strong enough *as an evidentiary matter* to withstand the contrary claims of all other possible evidence in the case. The dissent took the position that *each* element of the "combined evidence" standing alone points strongly to the occurrence of discrimination, and that therefore the combination of the two elements is sufficient proof of discrimination to mandate judgment for the plaintiff, even in the face of contrary evidence. For the majority, neither element standing alone supports a strong inference of discrimination, and together they are, at most, sufficient merely to *permit* judgment for the plaintiff.[50]

a. The Evidentiary Value of the Proven Prima Facie Case. The evidentiary value of the proven prima facie case must be ana-

48. The Court also created considerable ambiguity as to which alternative position it intended to embrace. For a discussion of this issue, see *infra* text accompanying notes 248 to 264.

49. Another argument against the Court's decision in *Hicks* is the argument from morality. Thus, to the dissent, the Court rewards employers who "have given false evidence in a court of law," *Hicks*, 113 S. Ct. at 2763, "favor[s] these employers by exempting them from responsibility for lies," 113 S. Ct. at 2763, and creates an *incentive* for employers to lie, 113 S. Ct. at 2764. These arguments overplay the "morality" card. "Employers" are often corporate entities, and as a result face serious evidentiary problems in proving their "intent." Furthermore, the incentive to commit perjury is well checked by the significant risk of getting caught in a "lie" on the witness stand. Even if the lie does not guarantee the plaintiff judgment as a matter of law, it does place the employer at the mercy of a factfinder, who is permitted to — and likely to — rule against the employer on other credibility-related issues — including the ultimate issue of intentional discrimination. *See* 3 EDWARD J. DEVITT ET AL., FEDERAL JURY PRACTICE AND INSTRUCTIONS § 73.04 (4th ed. 1987); JOHN J. ROSS, THE EMPLOYMENT LAW YEAR IN REVIEW (PLI Litig. & Admin. Practice Course Handbook Series No. H4-5163, 1993), *available on* WESTLAW, PLI database, No. 475 PLI/Lit. 7, at *46-47 ("Rarely can it be envisioned that a jury, as fact-finder, will hold for a lying defendant-employer, except in that exceptional case where it is established at trial that the pretextual reason is a cover-up for say an embarrassing one, rather than a discriminatory one.").

50. It is not clear whether the Court in *Hicks* intended to signal that the "combined evidence" is *always* sufficient as a matter of law to support a pro-plaintiff verdict (and therefore to defeat a defense motion for summary judgment). *See infra* text accompanying notes 248-64.

lyzed in light of the acknowledged legal consequence to the employer of silence in the face of the proven prima facie case: namely, a pro-plaintiff directed verdict. There is intuitive appeal to the argument that if the proven prima facie case can support a judgment for the plaintiff, such a case must be worthy of doing so as an evidentiary matter. But it is equally important to recognize that there might be reasons other than the evidentiary weight of the proven prima facie case that would justify directing a verdict against the silent employer. The *Hicks* majority claims that "the *McDonnell Douglas* presumption is a *procedural* device, designed only to establish an order of proof and production,"[51] a procedural device that need *not* be — and, in this case, *is* not — justified by the weight of the evidence. The *Hicks* dissent, in contrast, argues that the prima facie case carries sufficient evidentiary weight to support a finding for the plaintiff. The majority's view of the prima facie case is by far the more accurate, and it is largely for this reason that the majority is correct in *Hicks*.

Whatever the initial appeal of the notion that the proven prima facie case is sufficient as an evidentiary matter to support a directed verdict for the plaintiff, the appeal is not long-lasting. The minimal McDonnell Douglas-Burdine prima facie case does no more than identify the plaintiff's case as one in which discrimination might conceivably have been operating.[52] An analysis of the cases in the McDonnell Douglas-Burdine line — including review of the Court's internal debates as reflected in the papers of Justice Thurgood Marshall[53] — reveals that the Court has consistently at-

51. 113 S. Ct. at 2755.

52. *See supra* note 17.

53. Justice Marshall's papers are available at the Library of Congress, James Madison Building, Manuscript Reading Room. The Marshall Papers have not yet been used to analyze McDonnell Douglas-Burdine. For other examples of scholarly use of the Marshall Papers, see, e.g., JOHN C. JEFFRIES, JR., JUSTICE LEWIS F. POWELL, JR. (1994); David C. Baldus et al., *Reflections on the "Inevitability" of Racial Discrimination in Capital Sentencing and the "Impossibility" of its Prevention, Detection, and Correction*, 51 WASH. & LEE L. REV. 359, 371 n.46 (1994); Samuel Issacharoff, *Judging Politics: The Elusive Quest for Judicial Review of Political Fairness*, 71 TEXAS L. REV. 1643, 1646 n.18 (1993); Mark Tushnet, *Why the Supreme Court Overruled* National League of Cities, 47 VAND. L. REV. 1623, 1631 nn.60-61 (1994). Appellate opinions often reflect "incompletely theorized agreements" among judges who are able to converge on outcomes without reaching full agreement on the reasons for, or scope of, their judgments. Cass R. Sunstein, *Incompletely Theorized Agreements*, 108 HARV. L. REV. 1733 (1995). The rhetoric of opinion writing, in contrast, often feigns certainty in the face of doubt. The availability of the Marshall Papers makes it possible for scholars to go behind a Court opinion by identifying both the disagreements that members of the Court discussed with each other and the specific opinion language that was intended to address them. In the specific case of McDonnell Douglas-Burdine, the Marshall Papers underscore the spirit of intellectual seriousness with which members of the Court approached the issues, for all that their efforts often failed to resolve them. *Cf.* John N. Jacob, *The Lewis F. Powell, Jr. Archives and the Contemporary Researcher*, 49 WASH. & LEE L. REV. 3, 5 (1992) (the

tempted to sidestep the problem of the evidentiary weakness of the McDonnell Douglas-Burdine prima facie case. The problem remains, however, and the prima facie case's evidentiary weakness undermines any attempt to draw a strong inference of discrimination from the proven prima facie case as a matter of law.

i. Problem Dodging, Step One: "Flexibility" in McDonnell Douglas. The plaintiff in *McDonnell Douglas* challenged an employer's failure to hire — or, more accurately, to re-hire — him after he had been fired for interfering with his employer's business and property in connection with a civil-rights protest. The Court held — in general terms — that "[t]he complainant in a Title VII trial must carry the initial burden . . . of establishing a prima facie case of racial discrimination," which "may be done by showing" four enumerated elements.[54] But in setting out the elements of the prima facie case, the Court immediately made clear that despite the appearance that it had just set out a general rule, it had not done so. The Court, instead, observed: "The facts necessarily will vary in Title VII cases, and the specification . . . of the prima facie proof required from [the plaintiff] is not necessarily applicable in every respect to differing factual situations."[55]

The Court did *not,* however, attempt to give any meaningful guidance as to how the specification of the required prima facie proof would be determined for cases with other facts — or even any guidance about what it meant for the "facts" to vary. Was the proof requirement set out in *McDonnell Douglas* to apply to all failure-to-hire cases, with other standards to apply to cases involving discharges, promotions, and so on? Or could the required proof be made to vary *within* categories of cases as well?[56] The Court in *McDonnell Douglas* did not answer these questions. As a result, *McDonnell Douglas* created a "prima facie case" with a fixed legal

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author, the archivist of the Powell Papers, observes: "Let us not make the mistake of trying to defend Justice Powell by keeping too tight a hold on his papers.").

54. McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973). The elements the Court specified were:

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

411 U.S. at 802.

55. 411 U.S. at 802 n.13.

56. For example, it might be that the plaintiff in a failure-to-hire case would not always have to demonstrate that the employer continued to try to fill the position, or the plaintiff might in some cases be required *also* to show that the job was filled by an applicant outside the plaintiff's protected group.

consequence in litigation, but the actual strength of the inferences that can be drawn from the prima facie case vary depending on the strength of the evidence that supports it.[57]

ii. Problem Dodging, Step Two: The Stealth Evidentiary Requirement in Burdine. The Court undertook to restate the *McDonnell Douglas* prima facie case standard in *Burdine,* a sex discrimination case brought by a woman who challenged her employer's failure to promote her. The lack of clarity that *McDonnell Douglas* left in its wake as to the content and evidentiary weight of the prima facie case emerged in the Court's internal deliberations in *Burdine.* For our purposes, what is most significant is an interchange between Justice Powell, who wrote for Court in both *McDonnell Douglas* and *Burdine,* and Justice Stevens. Their exchange led to an alteration in the Court's final *Burdine* opinion that further increased the ambiguity as to the intended content and evidentiary weight of the prima facie case.

In Justice Powell's original draft opinion, the discussion of the prima facie case was as follows:

> The burden of establishing a prima facie case of disparate treatment is not onerous. In the instant case, respondent had only to show that she was a qualified woman who sought an available position, but was rejected in favor of a man. The prima facie case serves an important

57. Nor did the Court make clear in *McDonnell Douglas* what the consequence would be if the employer remained *silent* in the face of a proven prima facie case. The United States' brief as amicus curiae in *McDonnell Douglas* did not seek a structure under which the plaintiff would be entitled to judgment as a matter of law if the employer remained silent:

> If such a plaintiff [makes out a prima facie case], it is then appropriate to look to the employer to come forward with an explanation for its rejection of the qualified minority applicant, since whether the defendant had a nondiscriminatory reason for rejecting the applicant would ordinarily be a matter within its own, and not the applicant's, peculiar knowledge. If the employer then fails to come forward with a non-discriminatory reason for rejecting the applicant, that fact, together with the showing made by the applicant, would, in our view, constitute an adequate basis to *permit, although not to compel,* the trier of fact to draw an inference of discrimination.

Memorandum for the United States as Amicus Curiae at 11, *McDonnell Douglas,* No. 72-490.

It appears from the transcript of the oral argument in *Hicks* that Justice Scalia would have preferred that approach:

> JUSTICE SCALIA: Mr. Gardner [counsel for the employer], what is the effect of the prima facie case? I mean, maybe we could avoid the dilemma that the other side says exists if the effect of the prima facie case is not to entitle the employee to judgment if there's no response from the employer, no other reason given, but rather just to entitle the employee to get to the factfinder. In other words it survives your motion to dismiss . . . which means the factfinder may find in favor of the employee, but perhaps the prima facie case does not mean that the factfinder must find in favor of the employee. MR. GARDNER: That's interesting, Your Honor. I don't believe that has been the position of the Court, however. JUSTICE SCALIA: Well, I understand that, but we wouldn't be faced with this dilemma, would we?

Oral Argument in *Hicks v. St. Mary's Honor Center, available on* WESTLAW, SCT-oralarg database at *12-13.

> function in the litigation: it eliminates the most common nondiscriminatory reasons for the plaintiff's rejection. [T]he prima facie case 'raises an inference of discrimination only because we presume these acts, if otherwise unexplained, are more likely than not based on the consideration of impermissible factors.' Establishment of the prima facie case in effect creates a presumption that the employer unlawfully discriminated against the employee.[58]

In a memorandum to Justice Powell dated January 19, 1981, Justice Stevens expressed broad, fundamental concerns about Powell's interpretation of the prima facie case.

> Do you intend to lessen the plaintiff's burden of making a prima facie case? As I had understood *McDon[n]ell Douglas,* it required evidence on behalf of the plaintiff that gave rise to an inference that an employment decision had been made for a discriminatory reason. The second full sentence [in the above-quoted passage], however, implies that every time two qualified applicants for a vacancy are of a different race or sex, the one who does not get the job automatically has a prima facie case. It would seem to me that there might be two qualified applicants who sought employment at the same time and the employer simply took one rather than the other. In that situation, I would not think a prima facie case would have been made out because there would be no basis for an inference that the gender of the applicant had anything to do with the employment decision. In the *McDon[n]ell Douglas* hypothesis, on the contrary, the fact that a qualified applicant was rejected and thereafter the employer continued to interview other persons and ultimately hired one of the opposite sex would give rise to such an inference. In other words, I think an element of the plaintiff's prima facie case is some fact giving rise to an inference that the employment decision was not made on neutral criteria.[59]

Clearly, Justice Stevens was not prepared to allow the prima facie case to carry the legal weight accorded to it in the McDonnell Douglas-Burdine proof structure unless, as an evidentiary matter, the elements of the prima facie case *did in fact* give rise to an inference of discrimination. Justice Stevens was convinced that the minimal prima facie case described in *Burdine* would not satisfy this evidentiary requirement.

After Justice Powell circulated a second draft of what had already become a majority opinion[60] without responding to the

58. Justice Powell, Draft Opinion 5 (*Burdine)* (Jan. 14, 1981) (citations omitted), *in* Thurgood Marshall Papers, Library of Congress, box 274, file 2 [hereinafter *Burdine* Case File].

59. Memorandum from Justice Stevens to Justice Powell (Jan. 19, 1981), *in Burdine* Case File, *supra* note 58. All memoranda discussed herein bear the notation "Copies to the Conference" — meaning that copies were sent to all of the Justices.

60. Justices White, Rehnquist, Stewart, and Blackmun had already joined Justice Powell's opinion by the time the second draft was circulated. *See* Memoranda from Justices White

above-quoted passage in Justice Stevens's memorandum,[61] Justice Stevens wrote Justice Powell another letter raising the same concerns in slightly different form:

> [T]he facts (1) that an applicant is qualified and (2) that a person of the opposite sex was hired, do not in my judgment give rise to an inference of discrimination. Two years ago I rejected a qualified male applicant and hired a female as a law clerk; this year I rejected two qualified females and hired two qualified males. I do not believe that those facts as applied to either year viewed separately were sufficient to establish a prima facie case of discrimination, yet under your opinion they are sufficient.[62]

Justice Stevens argued that taking a single hiring decision out of the context of the employer's *pattern* of hiring creates an inference of discrimination only through a distortion of the facts. The fact that the employer would have the opportunity to rebut the plaintiff's inference of discrimination by raising the other evidence as part of its own rebuttal case was not sufficient to quiet Justice Stevens's concerns. Justice Stevens did not want the employer to bear the burden of rebutting a prima facie case that did not create an inference of discrimination on its own merits.

Justice Powell responded to Justice Stevens's second letter by making changes in his opinion draft. Justice Powell changed the critical second sentence of the earlier version, adding the italicized language: "The plaintiff must prove by a preponderance of the evidence that she applied for an available position for which she was qualified, but was rejected *under circumstances which give rise to an inference of discrimination.*"[63] Justice Powell also added a footnote, quoting the key language from *McDonnell Douglas,* reiterating that the *McDonnell Douglas* standard "is not inflexible," and explaining that in the instant case "the position was left open for several months before [the plaintiff] finally was rejected in favor of a male

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(Jan. 15, 1981), Rehnquist (Jan. 15, 1981), Stewart (Jan. 15, 1981), and Blackmun (Jan. 19, 1981), *in Burdine* Case File, *supra* note 58. This means that Justice Powell already had a majority by the time he circulated his second draft.

61. Justice Powell, Draft Opinion (Jan. 22, 1981), *in Burdine* Case File, *supra* note 58. The second circulated draft did contain a change that was responsive to a *separate* concern raised by Justice Stevens. The new version clarified that for the plaintiff to make out a prima facie case, she had to "persuade the court" of the existence of the elements of the prima facie case "by evidence" — thereby resolving whatever ambiguity would have been caused by saying that the plaintiff merely need "show" a prima facie case. *See id.* at 5.

62. Memorandum from Justice Stevens to Justice Powell (Jan. 22, 1981), *in Burdine* Case File, *supra* note 58.

63. Justice Powell, Draft Opinion 5 (Feb. 5, 1981) (emphasis added), *in Burdine* Case File, *supra* note 58.

who had been under her supervision."[64] Both changes appear in Justice Powell's unanimous published opinion for the Court.[65]

These changes accomplish nothing if they were meant to guide courts as to the necessary content of the prima facie case. How are the lower courts to determine whether a case presents "circumstances which give rise to an inference of unlawful discrimination"? Are courts to infer that those circumstances would *not* have been present in *Burdine* if the position had not been left open for several months? Even on slight factual variations from *Burdine,* the opinion gives no guidance; *a fortiori,* it gives no assistance to courts deciding cases raising widely divergent facts. Thus, if Justice Stevens joined the final opinion with the expectation that as modified it created a reliably strict prima facie case standard, he joined in error.

iii. Problem Dodging, Step Three: The Issue Never Decided in Aikens. The Court's next opportunity to give operational significance to the requirement that a prima facie case "give rise to an inference of unlawful discrimination" came in *United States Postal Service Board of Governors v. Aikens.*[66] *Aikens* presented the question of whether a black candidate for internal promotion to an upper management position stated a prima facie case merely by proving that he was minimally qualified for the position and that a white candidate was promoted instead of him. Through the process of trying to reach a decision, it became clear to a majority of the Court that the minimal prima facie case was insufficient to support an inference of intentional discrimination on the facts. Instead of addressing this problem, however, the Court sidestepped the issue. Because no single rationale for the position that the prima facie case was insufficient emerged, Justice Rehnquist, writing for the Court, abandoned any attempt to discuss the adequacy of the prima facie case, and resolved *Aikens* on an alternate ground that left the central question unanswered.

In a sense, the facts of *Aikens* presented the Court with Justice Stevens's law clerk hypothetical. In a series of instances, the Postal Service announced a vacancy in an upper-level position and a number of minimally qualified individuals within the Postal Service asked to be promoted to the vacant position. In each instance, the

64. *Id.* at 5 n.6.

65. *Burdine,* 450 U.S. at 253, 253-54 n.6. For the Court's achievement of unanimity, see Memoranda by Justice Brennan (Feb. 10, 1981), Justice Stevens (Feb. 11, 1981), Chief Justice Burger (Feb. 20, 1981), and Justice Marshall (Feb. 27, 1981), *in Burdine* Case File, *supra* note 58.

66. 460 U.S. 711 (1983).

plaintiff, a black male, was denied the position. In its petition for certiorari, the United States, appearing as a party, took the position that the minimal *Burdine* prima facie case is not sufficient in *promotion* cases to show that Aikens " 'was rejected under circumstances which give rise to an inference of unlawful discrimination.' "[67] The United States argued that "[i]n the promotion context, where many applicants may be minimally qualified for a single vacancy," the fact that an employee is able to "show[ ] only that he belongs to a minority group and was not selected for a position for which he met the minimum qualifications" is not sufficient to warrant a presumption of discrimination.[68] Something more is required — although the United States was quite unclear as to what that "something more" must be.[69]

By the time the United States filed its brief on the merits, it recognized that its argument against the minimal prima facie case could not be confined to promotion cases. In its merits brief, the United States argued that the minimal prima facie case was inadequate in *any* case in which an employer makes an employment decision "by selecting from a heterogeneous group of qualified applicants" — which can occur in both hiring and promotion cases.[70]

The United States' brief was not the only condemnation of *Burdine* in front of the Court, nor was it the most sweeping. The AFL-CIO, as amicus curiae, argued that the minimal *Burdine* prima facie case could not support an inference of intentional discrimination even in the relatively straightforward case of entry-level industrial employment because even there selection criteria are not generally "rigid and mechanical."[71] The AFL-CIO took the position, in essence, that any effort to retain McDonnell Douglas-Burdine for *seemingly* routine cases would fail because employment decision-

67. Petition for a Writ of Certiorari at 6, *Aikens*, 460 U.S. 711 (1983) (No. 81-1044) (quoting *Burdine*, 450 U.S. at 253).

68. *Id.* at 7.

69. In the text of its petition for certiorari, the United States stated that "[s]uch a presumption can be created only if the employee shows that his qualifications are at least equal to those of the person selected or if he adduces other proof (which, of course, may be available through discovery) that suggests discrimination." *Id.* As to the first, however, the United States immediately takes it back in a footnote: since under *Burdine* the employer is not required to hire the *most* qualified candidate, "a showing that the complainant and the person selected were equally qualified arguably would not in itself create a presumption of a violation." *Id.* at 7 & n.5. This means that the prima facie case would require an undefined quantum of "other proof," and could likely not be made out without "discovery" — meaning that any pretense that the function of the prima facie case is to allow the plaintiff to plead facts available to him *prior* to discovery is destroyed.

70. Petitioner's Brief at 9, *Aikens*, 460 U.S. at 711 (No. 81-1044).

71. Brief of the AFL-CIO as Amicus Curiae at 11, *Aikens*, 460 U.S. 711 (1983) (No. 81-1044).

making is intrinsically nonroutine. Hence, the AFL-CIO argued that "the cause of reliable factfinding would be best served were the Court to remove all mediating constructs from the factual analysis in disparate treatment cases and simply to mandate a straightforward inquiry into the question of discriminatory intent, based on all relevant evidence in whatever form it may come."[72]

In his initial opinion draft in *Aikens,* Justice Rehnquist presented his own definition of the class of cases at issue: he asserted that the question before the Court was "the assessment of proof of racial discrimination when an employer has selected among applicants for a higher managerial position."[73] As to that class of cases, his draft opinion followed the advice of the AFL-CIO, eliminating the McDonnell Douglas-Burdine proof structure from the litigation. In a case like *Aikens,* he wrote, the minimal prima facie case is *not* sufficient to create a presumption of discrimination, because "we simply do not think that Aikens' showing that he is black, that he was sufficiently qualified to be seriously considered, and that he was not chosen, '*eliminates* the most common non-discriminatory reasons' for his rejection."[74] Furthermore, the draft stated, in such a case "no standardized *prima facie* case can be made out,"[75] in large part because "there may be no totally objective measure of who is 'qualified.' " In such a case, "[t]he District Court should decide . . . in the same manner as it decides questions of fact in the myriad other kinds of litigation before it[,]" by "evaluat[ing] all the admissible evidence and then decid[ing] the factual question of discrimination."[76] The McDonnell Douglas-Burdine proof structure was simply "[n]ever meant to apply to a situation so far removed from [the] factual context" in which the structure arose.

Justice Rehnquist circulated his draft opinion on December 9. By December 28, Justices Stevens and White and Chief Justice Burger joined it. That left Justice Rehnquist one vote short of a majority. Justices Brennan, Marshall, and Blackmun dissented from the start. The only two possible votes to form a majority were those of Justice Powell, the author of *McDonnell Douglas* and *Burdine,* and Justice O'Connor. On January 3, Justice Powell announced that

72. *Id.* at 2.

73. Justice Rehnquist, Draft Opinion 1 (*Aikens*) (Dec. 9, 1982), *in* Thurgood Marshall Papers, Library of Congress, box 317, file 5 [hereinafter *Aikens* Case File].

74. *Id.* at 8 (quoting *Burdine,* 450 U.S. at 254).

75. *Id.* at 9.

76. *Id.* at 7, 9.

"we can't be together" — that he would need to write separately — and, the next day, Justice O'Connor informed Justice Rehnquist that she would await Justice Powell's opinion.

On January 11, Justice Marshall circulated a dissent arguing — as had the AFL-CIO, but with different consequence — that there is no coherent way to distinguish between "managerial" and "nonmanagerial" positions,[77] for "employers commonly rely on subjective considerations in making employment decisions outside the 'higher managerial' context."[78] Justice Marshall viewed the minimal prima facie case as sufficient in *all* such cases, and explained that the employer could defend any "subjective" elements on rebuttal. By January 13, Justices Brennan and Blackmun joined this dissenting opinion.

Justice Powell circulated his opinion concurring in the judgment on February 17. He agreed with Justice Rehnquist that the minimal prima facie case set forth in *McDonnell Douglas* "is insufficient to raise an inference of discrimination where a single executive position is to be filled from a pool of qualified applicants."[79] But Justice Powell, unlike Justice Rehnquist, felt that this fact alone did not make the McDonnell Douglas-Burdine framework irrelevant to cases involving executive or managerial hiring. Instead, Justice Powell argued that under *McDonnell Douglas* and *Burdine,* "the proof necessary to establish a prima facie case will vary . . . depending on the particular facts and circumstances of each case," and that the particular factors mentioned in *McDonnell Douglas* exist merely to "provide a rough guide to the type of evidence that a plaintiff must introduce."[80] Several days later, Justice O'Connor circulated her own separate concurrence in which she also joined Justice Powell's opinion.

At the end of this round of opinion drafting, there were six votes in favor of the proposition that the minimal prima facie case described in *McDonnell Douglas* is inadequate in a category of cases vaguely definable as involving "managerial" or "executive" positions. Four Justices wanted to abandon the McDonnell Douglas-Burdine proof structure for those cases, and two wanted to retain the structure but strengthen the required prima facie show-

77. Justice Marshall, Draft Opinion 1 (dissenting) (Jan. 11, 1983), *in Aikens* Case File, *supra* note 73.

78. *Id.* at 5.

79. Justice Powell, Draft Opinion 5 (concurring in the judgment) (Feb. 17, 1983), *in Aikens* Case File, *supra* note 73.

80. *Id.* at 6.

ing. Having failed to obtain a majority for a single approach, Justice Rehnquist circulated an "alternate draft" on March 13, which declared it unnecessary to answer the question upon which certiorari had been granted — the adequacy of the plaintiff's prima facie showing — because the question was no longer relevant in light of the procedural posture of the case. The draft stressed the fact that once a McDonnell Douglas-Burdine case has proceeded through trial and the ultimate question of intentional discrimination is before the court, that question is to be decided "just as district courts decide disputed questions of fact in other civil litigation."[81] The draft also made clear that the burden-shifting scheme of McDonnell Douglas-Burdine was not relevant at all to the decision on the ultimate question of discrimination.[82]

Justice Rehnquist's alternate draft eventually commanded a majority[83] precisely because it avoided the problem of the evidentiary weakness of the prima facie case. In *Aikens,* then, the Court had the opportunity to give meaning to Justice Powell's attempt to strengthen the prima facie standard in cases in which a minimal prima facie case does not sufficiently support the inference that intentional discrimination is "more likely than not." That opportunity was lost.

The Court's eventual "alternate" resolution of the *Aikens* case further supports the correctness of the *Hicks* majority's view of the evidentiary value of the prima facie case. *Aikens* held that once a case has gone to trial and the employer has produced evidence to satisfy its rebuttal burden, the factfinder should not have the occasion to determine whether or not the plaintiff has "proven" his prima facie case. It is difficult to say that courts should accord the "proven" prima facie case great evidentiary weight if it may not be a "proven" case at all.

This review of the cases leading up to *Hicks* demonstrates that the plaintiff's prima facie case is *not* a "proven" case that invariably

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81. Justice Rehnquist, Draft Opinion (March 13, 1983) (labeled "1st Draft"), in *Aikens* Case File, *published as* 460 U.S. at 715-16.

82. *Id.; see* Szteinbok, *supra* note 23, at 1119, which states:

> [S]ince *McDonnell Douglas* prescribed an analytical rather than a procedural framework, the Court reasoned, its stages of proof must not be reified. The *Aikens* majority opinion clearly did not say what Justice Blackmun, joined by Justice Brennan, appended in concurrence: The plaintiff's ultimate burden is carried if "he demonstrates that the legitimate, nondiscriminatory reason given by the employer is in fact not the true reason for the employment decision."

Id. (footnotes omitted) (quoting *Aikens*, 460 U.S. at 718 (Blackmun, J., concurring)).

83. Justice Blackmun wrote a separate concurrence that was joined by Brennan. Justice Marshall concurred in the result, without writing or joining an opinion. 460 U.S. at 716.

supports a directed verdict for the plaintiff as an evidentiary matter. The Court has never clearly articulated what a prima facie case must prove, and its deliberations reinforce the sense that the minimal prima facie case is inadequate in many, if not most, cases. It is thus impossible to say that the proven prima facie case can bear the weight placed upon it by the "judgment for plaintiff required" position.

b. The Evidentiary Value of the Employer's Disproven Justification. The prima facie case is only one part of the evidence from which the *Hicks* dissenters sought to construct a mandatory presumption of discrimination. The other evidentiary element is the inference of discrimination that arises out of the factfinder's disbelief of the employer's stated justification. To the dissent, the factfinder who disbelieves the employer's stated justification has a very strong basis for inferring discrimination from that fact alone. The dissent draws its argument on this point from *Furnco Construction Corp. v. Waters,*[84] which states that " 'common experience' tells us that it is 'more likely than not' that the employer who lies is simply trying to cover up the illegality alleged by the plaintiff."[85]

The claim that "absent explanation, adverse treatment of statutorily protected groups is more likely than not the result of discrimination" is central to the debate over *Hicks,* and it has the character of an ideological litmus test. Take this statement by Professor Deborah Calloway as an example:

> Rejecting the basic assumption that unexplained adverse conduct towards women and minorities is the result of discrimination denies the continued existence of discrimination itself. Denying the continued existence of discrimination is analogous to denying, in the 1950s, that the separate schools maintained for black children were unequal, or denying, today, that the Holocaust ever occurred.[86]

The central problem with this rhetoric — and with any effort to rely heavily on the "basic assumption" it identifies — is that it is by no means certain that any *particular* unexplained adverse act toward a woman or a member of a minority group is the result of discrimination. The question is whether, in the face of uncertainty, the legal system should use a mandatory presumption instead of requiring individualized proof. My conclusion — one I reach with great diffi-

84. 438 U.S. 567 (1978).

85. St. Mary's Honor Ctr. v. Hicks, 113 S. Ct. 2742, 2763 (1993) (Souter, J., dissenting) (quoting *Furnco,* 438 U.S. at 577).

86. Calloway, *supra* note 28, at 1036. One might do well to pause a moment to catch one's breath after reading this passage — how swiftly it moves from rejection of an evidentiary presumption to Holocaust denial!

culty — is that the uncertainty is sufficiently great to render the use of a mandatory presumption unwise. I reach it for four reasons.

First, the "basic assumption" that discrimination is the cause of unexplained employment actions against women and members of minority groups is built in part upon the expectation that absent discrimination, employment decisions are — and can be proven to be — fair and reasonable. The argument for a finding of discrimination is akin to res ipsa loquitur: nothing bad happens in the workplace without a provable reason; discrimination is a possible reason; no alternative reason has been proven; therefore discrimination must be the answer. If the premise that "nothing bad happens in the workplace without a provable reason" is true, then the "basic assumption" rests on a strong foundation. But all of my instincts as a practitioner and teacher of labor and employment law cause me to reject this premise. It is impossible to know the proportion of adverse employment decisions that are in some sense "wrongful" (in that they are arbitrary or based on incorrect assessments of the facts) or "undefendable" (in that the employer cannot demonstrate that its actions were correct). But we are not entirely without data. Data from three spheres — union-sector grievance arbitration, merit-system adjudications in public employment, and common law wrongful discharge cases — strongly suggest that wrongful, or at least undefendable, employer actions are significant problems in the American workplace, even outside of the setting of actionable discrimination.[87] I cannot accept the "basic assumption" if it requires me to assume otherwise.

In the union sector, collective bargaining agreements govern terms and conditions of employment, and employees are able to challenge a wide range of employer actions through the filing and arbitration of grievances.[88] No data are available on the proportion

87. For debates as to whether the competitive market can be relied upon to control arbitrary discharges, see PAUL C. WEILER, GOVERNING THE WORKPLACE: THE FUTURE OF LABOR AND EMPLOYMENT LAW (1990); Richard A. Epstein, *In Defense of the Contract At Will*, 51 U. CHI. L. REV. 947 (1984); Sherwin Rosen, *Commentary: In Defense of the Contract at Will*, 51 U. CHI. L. REV. 983 (1984); Stewart J. Schwab, *Life-Cycle Justice: Accommodating Just Cause and Employment at Will*, 92 MICH. L. REV. 8 (1993).

88. According to the Bureau of Labor Statistics, 17.5% of American workers over the age of 16 were "represented by unions" in 1994, meaning that they either were members of unions or were covered by collective bargaining agreements. Union representation in 1994 was 19.4% for full time workers, 12% for private nonagricultural workers, and 44.7% for government workers. U.S. DEPT. OF LABOR, BUREAU OF LABOR STATISTICS, EMPLOYMENT AND EARNINGS (January 1995) tbls. 40 & 42. Of the employees represented by unions, 81% are men; 48.5% are white men. Union representation as defined by the Bureau of Labor Statistics is not a perfect measure of coverage under collective bargaining agreements, because employees are defined as union-represented if they are union members, even if they are not presently covered by a collective bargaining agreement. *Id.* Collective bargaining

of disputed employer decisions in the union sector that are wrongful or undefendable. Indeed, many grievances are resolved informally, without any adjudication or confession of guilt on the part of the employer. Data are scarce even on the question of how frequently employer decisions are overturned through arbitration.[89] But data published by the American Arbitration Association of a sample of over 29,000 arbitrations conducted between September 1981 and May 1991 reveal that employees were at least partially successful in 49% of the cases.[90] This is a substantial rate of employee success, given the likelihood that the union and the employer will reach an informal resolution of cases in which employer error is obvious.[91]

Another source of information on the incidence of wrongful or undefendable employer conduct is civil service employment in the public sector.[92] In the federal sector, where data are most readily available, the overwhelming majority of employees have some form of civil service protection against wrongful termination.[93] The United States Merit Systems Protection Board, which has jurisdiction over civil service challenges, reports that employees prevailed at least in part in 25% of the cases adjudicated on the merits.[94]

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agreements almost universally contain "just cause" protection — protection against wrongful discharge — as well as a mechanism for grievance arbitration. *See* 2 Collective Bargaining Negot. & Cont. (BNA) 40:1 (1995) (92% of collective bargaining agreements in BNA's 400-agreement sample have "cause" or "just-cause" provisions); *id.* at 51:1 (all have grievance provisions); *id.* at 51:5 (99% have arbitration provisions).

89. Neither the American Arbitration Association nor the Federal Mediation and Conciliation Service reports statistics on the success rates of employees in arbitrating grievances under collective bargaining agreements.

90. *A Look at Labor Arbitration Trends of the '80s,* STUDY TIME, No. 3, 1991 at 1, 2.

91. It is difficult to extrapolate from arbitration to litigation for a number of reasons, one of which is that arbitral law places the burden of proving just cause on the employer. *But see* Howard S. Block, *Decisional Thinking: West Coast Panel Report, in Decisional Thinking of Arbitrators and Judges: Proceedings of the Thirty-Third Annual Meeting, National Academy of Arbitrators* 33 PROC. NATL. ACAD. ARB. 119, 139-40, 157-58 (1981) (explaining why and how arbitrators depart from strict "burden of proof" rules; quoting one arbitrator as saying that "[i]n my experience there can be few more dangerous or damaging concepts, in labor arbitration at least, than this business about the burden of proof").

92. As of 1994, government workers comprise 16.8% of all nonagricultural workers. BUREAU OF LABOR STATISTICS, *supra* note 88, at 222-23.

93. As of 1978, 93% of federal employees had civil service protection. S. REP. No. 969, Civil Service Reform Act of 1978, 95th Cong., 2d Sess. 1, 2, *reprinted in* 1978 U.S.C.C.A.N. 2723, 2724.

94. 1994 U.S. MERIT SYSTEMS PROTECTION BD., ANN. REP., 26. When settlements are included, employees received relief in 62% percent of the cases that were not dismissed for jurisdictional reasons or because one of the parties withdrew from the case. *Id.* at 25-26. Public employers often complain that they are unable successfully to defend what they perceive to be correct termination decisions, and that this deters them from terminating employees. *See* S. REP. No. 969, *supra* note 93, at 2725, 2731; U.S. FED. LAB. REL. AUTH. & U.S. MERIT SYS. PROTECTION BD., THE CIVIL SERVICE REFORM ACT OF 1978: TENTH ANNIVER-

Some information is also available on the success rate of common law challenges to wrongful terminations. Although the employment-at-will doctrine provides that employers may fire their employees for any reason or no reason at all, the common law of many states has been interpreted to permit tort- and contract-based claims for a limited form of just-cause protection.[95] A RAND Corporation study of common law wrongful discharge cases in California revealed that approximately 68% of plaintiffs whose wrongful discharge claims reached a jury prevailed.[96]

These data are far from perfect, but they serve to demonstrate the instability of the empirical foundation underlying the "basic assumption" that employment decisions are correct and defensible absent discrimination.

The "basic assumption" that discrimination explains otherwise unexplained adverse employment decisions against members of protected groups is flawed in a second respect as well. The "basic assumption" is a unitary "credo," but discrimination is not a unitary phenomenon in American society. The likelihood of discrimination depends on a number of factors, including the protected group at issue,[97] the sector of the economy, the type and size of employer, the degree to which the workplace is integrated, and the stage of the employment relationship.[98] Some employers ignore their Title

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SARY REVIEW AND ASSESSMENT, 62, 67-68, 85 (Elaine Goldberg ed., 1988). This suggests that employees are most likely to be discharged only if the records against them are extremely strong — in light of which the 25% employee success rate appears quite substantial.

95. For helpful discussions, see authorities cited *supra* note 87.

96. JAMES N. DERTOUZOS ET AL., THE LEGAL AND ECONOMIC CONSEQUENCES OF WRONGFUL TERMINATION at vii (1988). The RAND study has been convincingly challenged, on the ground that "[w]hen all reported cases are considered rather than just those that reach a jury . . . the proportion of cases won by employees is quite low." Lauren B. Edelman et al., *Professional Construction of Law: The Inflated Threat of Wrongful Discharge,* 26 LAW & SOCY. REV. 47, 58 (1992). The Edelman study concentrates on cases under an "implied contract" theory, and concludes that "even in the states most receptive to the implied contract theory, employees were found to have been wrongfully discharged in only 15% of the cases." *Id.* at 57. The problem with the Edelman study for our purposes is that when plaintiffs lose dispositive motions in implied contract cases, their losses cannot all be attributed to findings that the terminations were proper. It is equally if not more likely, given the constraints on dispositive motions, that plaintiffs fail because they fail to meet the legal requirements for asserting an implied contractual right to just-cause protection.

97. *See* Cass R. Sunstein, *The Anticaste Principle,* 92 MICH. L. REV. 2410 (1994). For a useful consideration of these issues in the context of affirmative action in higher education, see Paul Brest & Miranda Oshige, *Affirmative Action for Whom?,* 47 STAN. L. REV. 855, 900 (1995) (concluding that "no other group compares to African Americans in the confluence of the characteristics that argue for inclusion in affirmative action programs" and that when it comes to other groups, "policymakers may reasonably come to different conclusions").

98. *See* Alfred W. Blumrosen, *Society in Transition II:* Price Waterhouse *and the Individual Employment Discrimination Case,* 42 RUTGERS L. REV. 1023, 1028 (1990). Blumrosen states that:

VII responsibilities, while others aggressively pursue affirmative action. It might well be that some workplaces are integrated sufficiently successfully that employees of different races or genders can come to like or dislike each other — albeit for reasons they cannot explain — without race or gender figuring centrally in the personal equation.[99] The assumption that discrimination is the cause of all unjustified actions against members of protected groups is unlikely to be *equally* justified in all of these varied circumstances.[100]

> We are in transition from the old system of suppression of minorities and women toward a more flexible society in which race and sex no longer constitute the 'built-in headwinds' of the past. We have not yet arrived at a new balance of social conditions. Progress is ragged and uneven. [Some] employers . . . have contributed to the emergence of this new and better society . . . . [Other] employers . . . are 'living in the 1960's' and have not contributed to improved minority/female opportunity . . . . But the justices have not recognized this new and diverse situation.

Id. For an acknowledgment of this fact, albeit in the context of a very different argument, see Jerome M. Culp, Jr., *Small Numbers, Big Problems, Black Men, and the Supreme Court: A Reform Program for Title VII After* Hicks, 23 CAP. U. L. REV. 241, 251 (1994) ("[M]y real concern with . . . much of the jurisprudence on Title VII and other antidiscrimination legislation, is that there is no recognition that it is possible race may matter in some jobs and not others."). Here the author is arguing — and I agree — that in *Hicks* the employer's tolerance for low-level black employees should not negate a finding of discrimination against Hicks as a black supervisor. But the broader point is that a "uni-dimensional" view of discrimination, *id.*, is an oversimplification of the contemporary picture.

99. The notion that a nondiscriminatory "disliker" can always point to "undesirable characteristics peculiar to" the person she dislikes, Calloway, *supra* note 28, at 1022, seems a bit optimistic about our ability to understand and articulate our likes and dislikes in the area of interpersonal relationships.

100. The growing literature of the critical race theory movement is built upon, and stands witness to, the perception by legal scholars from "outsider" groups that "racism is normal, not aberrant, in American society," Richard Delgado, *Introduction* to CRITICAL RACE THEORY: THE CUTTING EDGE at xiv (Richard Delgado ed., 1995) — a perception that would support the conclusion that "arbitrary" decisions that are adverse to "outsiders" are in fact discriminatory. I value many of the insights critical race theorists have to offer, and I agree that we (by which I mean members of all races, ethnicities, and genders) are rarely if ever completely race- or gender-blind in our social interactions. Nonetheless, I cannot follow the critical race theory literature to any clear conclusions about the extent of intentional discrimination in the workplace. This is in part because of the specific legal standard in McDonnell Douglas-Burdine. Evidence that race or gender was one of the factors motivating a decision is not sufficient to prove liability under McDonnell Douglas-Burdine — although it is sufficient to establish liability under a *mixed motive* theory, *see infra* notes 288-91. But I hesitate to place heavy reliance on the insights of critical race theory for other, broader reasons as well.

The claim underlying critical race theory is not merely that "outsiders" are the best narrators of a generalizable story of how racism is experienced by its victims — a claim that is itself subject to challenge. *See, e.g.*, Daniel A. Farber & Suzanna Sherry, *Telling Stories Out of School: An Essay on Legal Narratives*, 45 STAN. L. REV. 807 (1993); Mark Tushnet, *The Degradation of Constitutional Discourse*, 81 GEO. L.J. 251 (1992) (questioning both the truthfulness and the generalizability of academics' narratives); *cf.* Angela P. Harris, *Race and Essentialism in Feminist Legal Theory*, 42 STAN. L. REV. 581 (1990) (challenging the feminist claim of a single female "voice" — an antiessentialist challenge that would apply as well to the claimed "voice of color" in critical race theory literature). Instead, much critical race scholarship is predicated on a far stronger claim of epistemic privilege: a claim that "outsider" scholars are in the best position to perceive, describe, and analyze white racism itself — including its motivational structure. *See, e.g.*, Richard Delgado, *Storytelling for Oppositionists and Others: A Plea for Narrative*, 87 MICH. L. REV. 2411 (1989) (privileging the voice

Third, it is important to remember that the McDonnell Douglas-Burdine proof structure is not satisfied by mere proof that discrimination *played a role* in a challenged employment decision. When an employer acts arbitrarily toward an employee of a different race or gender, one might well believe that discrimination is sufficiently pervasive that there is good reason to suspect that race or gender played *some* part in the decision. But that would create, at best, a mixed motive case, not a disparate treatment case under McDonnell Douglas-Burdine.[101] Belief that issues of race or gender are likely to play a role in arbitrary actions against members of protected groups does not entail the belief that such issues are likely to be the "but for" cause of arbitrariness across race and gender lines — which is the standard of proof generally required under McDonnell Douglas-Burdine.[102]

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of color); Lawrence, *supra* note 7 (probing the white subconscious); Mari J. Matsuda, *Looking to the Bottom: Critical Legal Studies and Reparations,* 22 HARV. C.R.-C.L. L. REV. 323 (1987) (privileging the voice of color). Strong claims of epistemic privilege have been more clearly theorized in feminist literature than in critical race theory, and they are intensely debated in feminist circles. *See, e.g.,* Sandra Harding, *Rethinking Standpoint Epistemology: "What is Strong Objectivity?," in* FEMINIST EPISTEMOLOGIES 49 (Linda Alcoff & Elizabeth Potter eds., 1993) (examining claims of epistemic privilege in feminist standpoint theory); Bat-Ami Bar On, *Marginality and Epistemic Privilege, in* FEMINIST EPISTEMOLOGIES, *supra,* at 83 (critiquing feminist standpoint theory). I find the critique far more persuasive than the claim. Claims of intersubjective understanding *always* need to be questioned, regardless of the identity of the claimant. *See generally* CHARLES TAYLOR, *Interpretation and the Sciences of Man, in* PHILOSOPHY AND THE HUMAN SCIENCES 15 (1985). Furthermore, the critical race theory claim of epistemic privilege ignores social class, a significant axis of domination and marginality in American society that stands in the way of the claim that outsiders defined by race and gender have perfect counter-hegemonic vision. White working class men — the actors whose motivations are often at issue in employment discrimination cases — have their own claim to marginality in the greater scheme of things. After all, modern "standpoint theory" has its origins in Marxism, where it is the perspective of the working class that is accorded epistemic privilege. *See* Harding, *supra.* To borrow the language of the critical race scholars, the field of cultural studies is largely oriented toward hearing the "voice" of class in popular culture — a voice that is itself subject to being "silenced" by narratives grounded solely in race or gender. *Compare* Laura Kipnis, *(Male) Desire and (Female) Disgust: Reading* Hustler, *in* CULTURAL STUDIES 373 (Lawrence Grossberg et al. eds, 1992) *with* CATHARINE A. MACKINNON, ONLY WORDS (1993); for a general discussion of cultural studies, see DAVID HARRIS, FROM CLASS STRUGGLE TO THE POLITICS OF PLEASURE: THE EFFECTS OF GRAMSCIANISM ON CULTURAL STUDIES (1992). I do not see how feminist scholars or scholars of color at elite postgraduate institutions are in a privileged position to hear that voice, particularly when their constituencies stand the most to gain from its silence — as is the case with antidiscrimination remedies. *See also* Alan D. Freeman, *Race and Class: The Dilemma of Liberal Reform,* 90 YALE L.J. 1880, 1895 (1981) (book review) ("To remedy racism in a class society with a stagnant or dwindling economy means necessarily that burdens of displacement will fall heavily on powerless whites.").

101. I say "at best" because the mixed motive framework is generally interpreted as requiring "direct evidence" of discrimination, not merely circumstantial evidence that discrimination was one of the motivating factors in the decision. For a discussion and critique of this position, see *infra* notes 288-91.

102. *See* Miller v. Cigna Corp., 47 F.3d 586 (3d Cir. 1995).

There is also a fourth, related problem with the "basic assumption." Professor Calloway acknowledges that what "judges, juries, and members of this culture believe about the existence of discrimination in the workplace and perhaps in society in general" does not in fact conform to the factual premise of the "basic assumption."[103] Indeed, she contends that the *Hicks* decision is dangerous precisely for this reason: the courts must, she argues, continue to proclaim and dispositively rely upon the "basic assumption" precisely because factfinders cannot be counted on to agree with it.[104] But what she fails to acknowledge is that deciding cases on the basis of a mandatory presumption that is inconsistent with contemporary beliefs about the nature of discrimination raises important questions about the perceived legitimacy of the enterprise.

The current political debate on affirmative action underscores that antidiscrimination law is at risk when its premises deviate from public perceptions of discrimination.[105] This is by no means to say that the judiciary cannot effectively take — and even maintain —

103. Calloway, *supra* note 28, at 1008.

104. *Id.*

105. One need only consider the current attack on affirmative action to recognize that courses of action pursued without sufficient regard to their perceived legitimacy will eventually be challenged. In the months prior to the publication of this article, affirmative action has been at the center of political debate. The debate has two major loci: California and the federal government. California voters will have the opportunity in 1996 to vote on the California Civil Rights Initiative, which amends the state constitution to read: "Neither the state of California nor any of its political subdivisions shall use race, sex, color, ethnicity or national origin as a criterion either for discriminating against, or granting preferential treatment to, any individual or group in the operation of the state's system of public employment, public education or public contracting." Patrick Buchanan, *The Quota Busters from the Bay Area,* SAN DIEGO UNION-TRIB., Feb. 1, 1994, at B-7. The initiative is central to the Republican presidential primary campaign of California governor Pete Wilson; it is opposed by the California Democratic Party, *California Democrats Back Affirmative Action,* DALLAS MORNING NEWS, Apr. 10, 1995, at 11A. Under Governor Wilson's leadership, the Regents of the University of California voted on July 20, 1995 to end the use of racial preferences in admissions, hiring, and contracting. *UC Scraps Affirmative Action: Regents' Vote Gives Wilson Major Victory,* S.F. CHRON., July 21, 1995, at A1. Initiatives similar to California's are on the ballot or being considered in a number of other states. *Assessing Affirmative Action: Debate Grows Serious over Direction of Programs Giving Racial Preferences,* ROCKY MOUNTAIN NEWS, July 23, 1995, at 94A. On the federal side, President Clinton ordered a review of federal affirmative action programs, which began with hints that he was amenable to scaling back federal affirmative action programs. While his review was pending, the Supreme Court held for the first time that "strict scrutiny" applies to constitutional challenges to federal affirmative action programs. Adarand Constructors, Inc. v. Peña, 115 S. Ct. 2097 (1995). President Clinton gave a speech on July 19, 1995 at the National Archives, in which he fully endorsed affirmative action. Todd S. Purdum, *President Gives Fervent Support to Fighting Bias,* N.Y. TIMES, July 20, 1995, at A1. The President took the position in a memorandum to federal agencies that *Adarand* does not require a sharp scaling back of affirmative action programs. Paul Richter, *Clinton Declares Affirmative Action is "Good For America,"* L.A. TIMES, July 20, 1995, at A1, A12. The Clinton administration is reviewing the anti-affirmative-action decision of the California Regents for compliance with *federal* law. *UC's Grants in Jeopardy?: White House, Justice Review Requirements on Affirmative Action,* SAN DIEGO UNION-TRIB., July 24, 1995, at A1. Some Justice Department officials have questioned

the lead in educating the society on issues of racial and gender justice. Rather, it is to acknowledge that forms of leadership vary in their effectiveness. If the problem is that courts and members of our society no longer believe that discrimination is a major problem, the Supreme Court can do little by simply declaring the opposite to be the case.[106] What is far more effective is for courts and advocates to bring facts to the fore and convincingly portray them as instances of prohibited discrimination. For example, just as courts have learned and taught that "personal animosity" toward a woman can be the result of sex discrimination when the animosity is due to the woman's being "too aggressive, not feminine enough,"[107] we need to learn to recognize the operation of stereotypes in race discrimination settings.[108] Similarly, we as a society would benefit from demonstrations, through litigation, of the subtle ways in which discrimination takes place even in seemingly well-integrated workplaces.[109] But at this stage, it is unlikely that we will learn much from a legal regime that instructs us to *ignore* precisely the kinds of evidence most likely to enrich our sense of the different contexts and forms in which intentional discrimination occurs.

In light of these considerations, I conclude that the weight of the evidence does not support the conclusion that all unexplained adverse decisions should be treated as discriminatory once a prima facie case of discrimination has been proven. I am concerned that members of protected groups will bear the costs of the absence of a

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whether a federal challenge to the California action is possible after *Adarand. UC Affirmative Action Stance Draws Federal Review of Grants,* S.F. CHRON., July 24, 1995, at A1.

106. For a subtle discussion of "orthodoxy" as appearing only at the point at which "doxa" (a more truly pervasive world view) has fallen apart, see PIERRE BOURDIEU, OUTLINE ON A THEORY OF PRACTICE 159-71 (Richard Nice trans., Cambridge Univ. Press 1977) (1972).

107. Price Waterhouse v. Hopkins, 490 U.S. 228, 251 (1989) (Brennan, J., plurality opinion).

108. The need for greater subtlety in discrimination theory and factfinding does not, of course, stop with the issue of stereotyping. *See, e.g.,* Richard Lempert & Karl Monsma, *Cultural Differences and Discrimination: Samoans Before a Public Housing Eviction Board,* 59 AM. SOC. REV. 890 (1994). There, the authors raise the issue of the legal status of discrimination against members of minority groups because behaviors valorized by that group are inconsistent with the cultural norms of those in power — which they term "cultural discrimination." *Id.* (In their article, the issue was the tendency of Samoan public housing tenants to share income with members of the community instead of using it to pay rent.) The authors correctly point out that teaching decisionmakers to recognize cultural discrimination will not necessarily lead to a political judgment that it should be legally actionable. *Id.* at 908. What is most important in my view, as in theirs, is that decisionmakers come to realize that the phenomenon exists and that action or inaction with respect to it represents a political judgment. *Id.*

109. It is my expectation that the most innovative of such cases would require the use of expert testimony, at least at first.

mandatory presumption: it is inevitable that some discriminatory employers will not be held liable for their actions. But the "basic assumption" is sufficiently weak, and the perceived legitimacy of antidiscrimination law is so much at risk, that I cannot see clear to any other conclusion.

c. A Note on Public Policy and Evidentiary Weight. In concluding the discussion of whether there is a sound evidentiary basis for the "judgment for plaintiff required" rule, it is important to note that, notwithstanding the *Hicks* majority's view to the contrary, the Court had the authority to conclude *both* that the "combined evidence" is not always sufficient as an evidentiary matter to support a pro-plaintiff directed verdict *and* that the "judgment for the plaintiff required" rule should be adopted nonetheless.[110] Courts routinely take into account the policy concerns animating a body of substantive law when deciding sufficiency-of-the-evidence questions, both on the level of the individual case and in the making of proof rules to govern categories of cases.[111] Thus, if the McDonnell

110. The majority relied upon Rule 301 of the Federal Rules of Evidence for the proposition that it "ha[s] no authority to impose liability upon an employer for alleged discriminatory employment practices unless an appropriate factfinder determines, according to proper procedures, *that the employer has unlawfully discriminated.*" *Hicks,* 113 S. Ct. at 2751. Rule 301 does not, however, dictate a result in *Hicks.*

Rule 301 adopts the "bursting bubble" approach to presumptions. Under that approach, as applied to McDonnell Douglas-Burdine, the proven prima facie case creates a presumption of discrimination; once the employer meets its production burden, that presumption of discrimination "bursts," and the plaintiff is left only with whatever inference of discrimination is factually supported by the proven prima facie case. In *Hicks,* however, no one denied that the presumption created by the proven prima facie case bursts (as required by Rule 301) once the employer has met its intermediate presumption burden. What Hicks argued, and what the dissent endorsed, is that a new situation exists once the plaintiff *persuades* the factfinder that the employer's stated reason is false. Once falsity is proven, *that* proven fact, together with the *permissive* inference of discrimination that remains in the case after the prima-facie-case presumption has burst, newly combine to create a *conclusive* presumption that intentional discrimination took place. A conclusive presumption of this sort is not really a presumption at all: it is a rule of substantive law that courts remain free to adopt notwithstanding Rule 301. *See* 21 CHARLES ALAN WRIGHT & KENNETH W. GRAHAM, JR., FEDERAL PRACTICE AND PROCEDURE § 5124, at 588 (1977). In this analysis, then, Rule 301 controls only the issue decided in *Burdine:* namely, the question of whether the burden of *persuasion* shifts to the plaintiff upon proof of the prima facie case. It does not control the issue in *Hicks.*

111. *See* Edward H. Cooper, *Directions for Directed Verdicts: A Compass for Federal Courts,* 55 MINN. L. REV. 903, 967 (1971) ("[D]irected verdict standards are properly framed to allow or deny jury disposition of inferential uncertainties on the basis of criteria other than the reasonableness of a determination that the legally required findings are more probable than not."). For the view that McDonnell Douglas-Burdine was based on such a policy judgment, see Blumoff & Lewis, *supra* note 9, at 56 (acknowledging that the McDonnell Douglas-Burdine prima facie case "only begins to assay the employer's intent and therefore provides marginal justification for reversing the ordinary burdens of persuasion"); *id.* at 10-11 (arguing that it is central to the normative judgments inherent in Title VII policy that the prima facie case nonetheless support a pro-plaintiff presumption); Candace S. Kovacic-Fleischer, *Proving Discrimination After* Price Waterhouse *and* Wards Cove: *Semantics as Substance,* 39 AM. U. L. REV. 615, 640 (1990) ("Unfortunately, the disparate-treatment cases do not ex-

Douglas-Burdine proof structure indeed expresses the Court's policy judgment to look the other way when faced with the insufficiency of the "combined evidence," there would be good reason to adopt the "judgment for plaintiff required" position.

The view that McDonnell Douglas-Burdine heralds a policy determination to give the plaintiff's evidence more weight than it is due at the final stage of the case is, however, inconsistent with a conservatism that pervades the Court's disparate treatment jurisprudence. To explain why, it is necessary to say a word about another "special proof structure" — the "disparate impact" structure. *Griggs v. Duke Power Co.*[112] was the Supreme Court's first major Title VII case, and it constitutes the high-water mark of judicial creativity in discrimination cases. In *Griggs,* the Court identified a category of cases in which proof of intentional discrimination would not be required: cases in which employers rely on facially neutral practices that disparately affect members of protected groups, and that are not "demonstrably a reasonable measure of job performance."[113] As developed over the years, the disparate impact approach placed considerable burdens on the employer once the plaintiff established that the practice in question had a disparate effect on members of a protected group. The employer then had to demonstrate not merely that the disputed practices were "legitimate" in the sense of being rationally related to the job, but that they bore some *closer* relationship to the job. The Court used different phrases to describe this required relationship, one of which was "business necessity."[114] Further, it was the employer's burden to *persuade* the factfinder of this close relationship between the selection criterion and the job.

The impact of *Griggs* was enormous, and the Court's subsequent decisions are best read as a stalwart effort to give full effect to *Griggs* within its proper sphere while simultaneously barring the spread of *Griggs*-type innovations to other areas of antidiscrimination law.[115] The most obvious instance of the Court's limiting

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plain their allocation of proof in terms of statutory policy needs. *Burdine* recognized that the plaintiff had a light burden in establishing a prima facie case of disparate-treatment, but did not explain the reasoning.") (footnote omitted).

112. 401 U.S. 424 (1971).

113. 401 U.S. at 436.

114. 401 U.S. at 431. Other formulations in the *Griggs* opinion were weaker: "related to job performance," 401 U.S. at 431; "[related] to measuring job capability," 401 U.S. at 432; "must have a manifest relationship to the employment in question," 401 U.S. at 432, "demonstrably a reasonable measure of job performance," 401 U.S. at 436.

115. *See also* Alan Freeman, *Antidiscrimination Law: The View From 1989,* 64 TUL. L. REV. 1407, 1422-23 (1990) (calling the years 1974-1984 an "era of rationalization," in which

Griggs's penetration was *Washington v. Davis,*[116] in which the Court held that disparate impact theory is unavailable in constitutionally based discrimination cases.[117] What is not often recognized is that the McDonnell Douglas-Burdine line of cases is an instance of this pattern as well. For all that the liberal reading of McDonnell Douglas-Burdine attempts to characterize the disparate treatment special proof structure as a plaintiff-friendly innovation, McDonnell Douglas-Burdine in fact emerged out of a practice of boundary maintenance that was aimed at protecting defendants from what the Court saw as the liberal federal courts of appeal's unwarranted application of core elements of the *Griggs* vision to individual discrimination litigation. The essential conservatism of McDonnell Douglas-Burdine is revealed by understanding it in light not only of what the Supreme Court *said* in its quasi-legislative creation of a special proof structure, but also in light of what the Court *did* in adjudicating the individual cases in the McDonnell Douglas-Burdine line.

In *McDonnell Douglas,* the Court overturned a pro-plaintiff decision by a court of appeals, a decision that relied heavily on *Griggs*-based principles. The court of appeals, "appear[ing] to rely on *Griggs,*" held that Green's past participation in unlawful conduct against McDonnell Douglas while he was not a McDonnell Douglas employee did not bear a close enough relationship to "job performance" to constitute a legally acceptable basis to refuse to rehire him.[118] The Supreme Court rejected this reasoning, and did so in ways expressly intended to limit the strict *Griggs* "business necessity" standard to *Griggs*-type cases.[119] In the next major case in the McDonnell Douglas-Burdine line, *Furnco Construction Corp. v.*

"the court . . . employed a method of containment" in order "[t]o deal with the subversive *Griggs* decision" by "arbitrarily declin[ing] to extend its logic to other areas").

116. 426 U.S. 229 (1976).

117. In *Washington v. Davis,* plaintiffs brought a disparate impact claim to challenge the use of a civil service test that had not been validated as related to job performance. Neither party disputed the applicability of *Griggs* to testing cases brought under the Equal Protection Clause, but the Court, *sua sponte,* held that the *Griggs* standard was inapplicable to litigation under the Equal Protection Clause — even to employment discrimination claims identical to *Griggs* but for their constitutional basis. 426 U.S. at 238 & n.8.

118. *McDonnell Douglas,* 411 U.S. at 805-06.

119. The McDonnell Douglas Court explained:

> *Griggs* differs from the instant case in important respects. . . . [P]etitioner does not seek his exclusion on the basis of a testing device which overstates what is necessary for competent performance, or through some sweeping disqualification of all those with any past record of unlawful behavior, however remote, insubstantial, or unrelated to applicant's personal qualifications . . . .

411 U.S. at 806.

Waters,[120] the Court again stepped in to reverse a decision that would have had the effect of applying the *Griggs* standard of "business necessity" to the employer's justification in a disparate treatment case.[121]

Similarly, the major holding of *Burdine* was aimed at maintaining the boundaries between individual intentional discrimination claims and disparate impact claims. The Court in *Burdine* overturned the pro-plaintiff decision of a court of appeals that, the Court held, had gone too far in shifting to the defendant the burden of proving that its stated reason was the true reason for its adverse decision. The Court emphasized that Title VII "was not intended to 'diminish traditional management prerogatives' " or to "require the employer to restructure his employment practices to maximize the number of minorities and women hired"[122] — notwithstanding the fact that the heightened proof standards and shifted proof burdens in disparate impact cases went far in precisely those directions.[123]

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120. 438 U.S. 567 (1978).

121. In *Furnco*, the defendant was a contractor whose work was the installation of firebrick in steel furnaces. Furnco did not employ bricklayers on a permanent basis; instead, its job superintendents hired bricklayers on an individual-job basis, and chose bricklayers they knew personally or who were recommended to them. It was impossible to get a job with Furnco by applying "at the gate." The black bricklayers failed in their *Griggs* claim because the Court found that there was no evidence that this practice had a disparate impact on black bricklayers. But they argued — and the court of appeals agreed — that "Furnco's hiring procedures not only must be reasonably related to the achievement of some legitimate purpose, but also must be the method which allows the employer to consider the qualifications of the largest number of minority applicants." *Furnco*, 438 U.S. at 576. In disparate impact cases, well before *Furnco*, the Court established as a standard element of the disparate *impact* proof structure that an employer who has proven business necessity can still be called upon to defend its employment practices against the charge that less discriminatory methods existed that would have been adequate to meet the employer's goals. *See* Albemarle Paper Co. v. Moody, 422 U.S. 405 (1975). But when it came to adopting the same reasoning in McDonnell Douglas-Burdine cases, the *Furnco* Court saw nothing but "dangers." *Furnco*, 438 U.S. at 578. It held that "courts are generally less competent than employers to restructure business practices, and unless mandated to do so by Congress they should not attempt it." *Furnco*, 438 U.S. at 578. The obvious fact that there was *also* no congressional mandate for the attempt in disparate impact cases seems to have escaped the attention of the Court as it continued its practice of boundary-maintenance between disparate impact and disparate treatment cases.

122. Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248, 259 (1981) (quoting United Steelworkers v. Weber, 443 U.S. 193, 207 (1979)).

123. Another clear example of the Court working to keep *Griggs*-type reasoning out of disparate treatment cases is Hazen Paper Co. v. Biggins, 113 S. Ct. 1701 (1993). In *Hazen Paper*, the Court held that an age discrimination plaintiff cannot prove intentional discrimination by proving that an employer acted on the basis of a factor that is empirically correlated with age. So long as the factor the employer relied upon (in *Hazen Paper*, proximity to vesting in a pension) is "analytically distinct" from the prohibited factor (in *Hazen Paper*, age), and the employer therefore "can take account of one while ignoring the other," 113 S. Ct. at 1707, a disparate treatment claim fails — unless the plaintiff can prove that the employer *intentionally* used the correlated factor as a surreptitious method of discriminating on

In each of these cases, then, the courts of appeal — the courts with frontline responsibility to teach the district courts to recognize and eradicate discrimination — had determined that the district courts would need closely to scrutinize employer business practices. Their position, albeit not explicitly stated, seemed to be that individual discrimination cases had much in common with disparate impact cases: in both kinds of cases, there was sufficient reason to suspect discrimination to warrant placing employers' business practices under close scrutiny, lest they operate as artificial barriers to employment opportunity. In rejecting the position of the courts of appeal, what the Supreme Court seemed to be saying was that disparate treatment cases are, unlike disparate impact cases, unworthy of extraordinary judicial intervention. The view that emerges from the Court's rejection of the courts of appeal's approach is that individual discrimination cases are of less societal significance than are disparate impact cases, and that the plaintiff's prima facie showing in a disparate treatment case is too weak to justify *Griggs*-type interference with employers' managerial discretion.

In short, whatever the Supreme Court was *saying* in the McDonnell Douglas-Burdine line of cases, what the Court was *doing* reveals that McDonnell Douglas-Burdine rests on an essentially conservative foundation. Seen from this perspective, it is difficult to read McDonnell Douglas-Burdine as embodying the strong pro-plaintiff policy orientation needed to justify a mandatory pro-plaintiff presumption that is insufficiently supported by the weight of the evidence.

2. *Precedent*

An important part of the uproar against the *Hicks* decision is that it appears fatally inconsistent with a key passage from *Burdine.*

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the basis of the prohibited factor, 113 S. Ct. at 1707. In so holding, the Court recited the differences between disparate impact cases and disparate treatment cases — stressing that, in the latter, "liability depends on whether the protected trait (under the ADEA, age) actually motivated the employer's decision." 113 S. Ct. at 1706.

The line drawn in *Hazen Paper* is particularly problematic for categories of cases in which disparate impact analysis is unavailable — constitutional cases and perhaps, depending upon how the Court eventually decides what it identified as an open issue in *Hazen Paper,* 113 S. Ct. at 1706, age discrimination cases. (Indeed, the Court first held that correlations cannot form the basis for an intentional discrimination claim in Hernandez v. New York, 500 U.S. 352 (1991), a constitutional case involving the exclusion of Spanish-speaking jurors, where the rejected correlation was between Hispanic national origin and Spanish-English bilingualism.) However, the fact that disparate impact analysis is clearly available under Title VII does not neutralize the effect of *Hazen Paper* on those cases, because jury trials and damages are unavailable in disparate impact cases under the Civil Rights Act of 1991.

Burdine states that after the employer satisfies its intermediate burden, the plaintiff's proof is to proceed as follows:

> The plaintiff retains the burden of persuasion. She now must have the opportunity to demonstrate that the proffered reason was not the true reason for the employment decision. This burden now merges with the ultimate burden of persuading the court that she has been the victim of intentional discrimination. *She may succeed in this* 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.*[124]

This language is undoubtedly *dictum,*[125] but it is *dictum* written in the mode of judicial rulemaking.[126] As both the majority and the dissent read this passage, there are two routes the plaintiff can follow, and the plaintiff "may succeed" through either — meaning that the plaintiff *must* succeed, must win the case, if the plaintiff satisfactorily follows either of the routes.[127]

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124. *Burdine,* 450 U.S. at 256 (emphasis added), *relied on* by Justice Souter, dissenting in *Hicks,* 113 S. Ct. at 2760.

125. *Hicks,* 113 S. Ct. at 2751-52. In *Burdine,* the Court held only two things: first, that at the intermediate stage of the case, the employer has a burden of production, but that the burden of persuasion remains at all times with the plaintiff, *Burdine,* 450 U.S. at 256-58 (Part III-A), and, second, that the employer is not obligated to prove that the person hired or promoted was more qualified than the plaintiff, *Burdine,* 450 U.S. at 258-59 (Part III-B). *See also id.* at 259-60 (Part IV, summarizing holdings). The language relied upon and disputed in *Hicks* all derives from Part II of *Burdine.* In Part II, the Court restates the *McDonnell Douglas* framework, and does so in order better to explain its holdings in Parts III and IV: "The nature of the burden that shifts to the defendant should be understood in light of the plaintiff's ultimate and intermediate burdens." 450 U.S. at 253. The *Hicks* majority is correct that this contextualizing of the defendant's burden is not necessary to the holding of the case.

126. The dissent in *Hicks* treats this language in *Burdine* not as *dictum* but as "settled precedent." 113 S. Ct. at 2757. "Cases, such as *McDonnell Douglas,* that set forth an order of proof necessarily go beyond the minimum necessary to settle the narrow dispute presented, but evidentiary frameworks set up in this manner are not for that reason subject to summary dismissal in later cases as products of mere dicta." 113 S. Ct. at 2765.

127. The *Hicks* majority chooses to concede that the quoted words "bear no other meaning but that the falsity of the employer's explanation is *alone enough* to compel judgment for the plaintiff." 113 S. Ct. at 2752. I say "chooses" because the *Burdine* dictum is not so crystal clear that one can say with certainty that the Court had thought ahead to all of the fine points of proof of pretext. Furthermore, an alternative reading is available that renders the *Burdine* dictum consistent with a rejection of the "judgment for plaintiff required" position. The majority could have argued that "may" means "may," not "must" — and that while the plaintiff "may" succeed with indirect proof, the plaintiff also "may not" succeed, depending on the factfinder's willingness to infer discrimination from the proven facts. Of course, one must deal with the fact that the phrase "may succeed" is used to describe the outcome in cases in which there is *direct* proof; it would make no sense to say that the plaintiff who has persuaded the court "that a discriminatory reason more likely motivated the employer" *may* succeed but also may *not* succeed depending upon the circumstances. But perhaps it is as much of a stretch to assume an intent to be completely consistent in the use of the term "may" as it is to tolerate inconsistency, given the fact that nothing in *Burdine* as it stood before the Court turned on the meaning of the word.

The argument that *Hicks* departs from past precedent seems strong. But it is undermined by the context of the *Burdine* opinion as a whole, and by later Supreme Court cases.

First, if the *Burdine* dictum in fact endorses the "judgment for plaintiff required" position, it conflicts with the central holding of the case. *Burdine* holds that the employer bears no burden of persuading the factfinder of the truthfulness of its stated justification; instead, the "ultimate burden of persuading the court that she has been the victim of intentional discrimination" remains at all times with the plaintiff.[128] Similarly, if the plaintiff is using the indirect method, she must prove that the employer's stated reason was a "pretext for discrimination"[129] (in the language of *Burdine*), a "coverup for a racially discriminatory decision" (in the language of *McDonnell Douglas*).[130] *Burdine* contemplates that once the case has moved to the final stage, the plaintiff will win only if the factfinder is actually convinced that intentional discrimination more likely than not took place.[131] It would be odd if after clearly holding that the plaintiff carries the burden of proof of intentional discrimination at the last stage of the case, the Court had meant to provide in *dicta* that the plaintiff's proof burden is met, as a matter of law, by something *less* than proof of intentional discrimination by a preponderance of all the evidence at trial.

The Court's subsequent decision in *United States Postal Service Board of Governors v. Aikens*[132] strengthens this interpretation of *Burdine*. *Aikens* holds that once all of the evidence is in, the three-step McDonnell Douglas-Burdine proof structure "is no longer relevant."[133] The Court identified "the ultimate factual issue in the case" as "[whether] the defendant intentionally discriminated against the plaintiff,"[134] and instructed the district courts that once all the evidence is in, they must decide that issue "just as [they] decide disputed questions of fact in other civil litigation"[135] — without applying the "legal rules" of McDonnell Douglas-Burdine.[136] It

128. 113 S. Ct. at 2752 (quoting *Burdine*, 450 U.S. at 256).

129. 113 S. Ct. at 2752 (quoting *Burdine*, 450 U.S. at 253).

130. 113 S. Ct. at 2753 (quoting McDonnell Douglas v. Green, 411 U.S. 792, 805 (1973)) (emphasis omitted).

131. I leave aside for now any consideration of "mixed motive" discrimination. For discussion of this issue, see *infra* notes 288-91.

132. United States Postal Serv. Bd. of Governors v. Aikens, 460 U.S. 711 (1983).

133. 460 U.S. at 715.

134. 460 U.S. at 715 (quoting *Burdine*, 450 U.S. at 253).

135. 460 U.S. at 715-16 (citation omitted).

136. 460 U.S. at 716. Admittedly, the *Aikens* Court quoted the *Burdine* dictum and did so approvingly. But this might well mean that the *Aikens* Court embraced a view of the

is difficult to see how the "judgment for plaintiff required" position could be implemented after trial in a manner consistent with *Aikens.* In order to determine whether the plaintiff was entitled to judgment as a matter of law on the basis of the "combined evidence," the court would be required to find that the plaintiff had made out a prima facie case, that the employer had met its rebuttal burden by offering evidence of a specific alternative explanation of its actions, and that the employer's explanation had failed. But making such findings would require the court to do precisely what *Aikens* holds it should not do — namely, to focus on the technicalities of the McDonnell Douglas-Burdine framework in analyzing the evidence after the case is fully tried.

There is admittedly something disturbing about allowing *Aikens* to undermine the "rule" stated in the *Burdine dictum.* The Court's opinion in *Aikens* arose in an odd posture, as a compromise aimed at avoiding the issue on which the Court had granted certiorari.[137] But the very purpose of the compromise was to avoid addressing a fundamental flaw of the McDonnell Douglas-Burdine proof structure: the inadequacy of the prima facie case standard in a substantial category of cases. If the result was the Court's decision systematically to minimize the importance of the McDonnell Douglas-Burdine structure by declaring it irrelevant to cases that have gone to trial, that is no mere accident. It is, rather, a sincere expression of a collective unwillingness to allow a flawed proof structure to determine the outcome of cases. In that sense, *Aikens* speaks clearly — albeit awkwardly — to the central question in *Hicks.*

3. *Necessity*

The "judgment for plaintiff required" position is often defended as a necessary mechanism for narrowing the scope of the factual inquiry at trial.[138] In this view, once the employer tenders a legitimate, nondiscriminatory reason for its actions, "the very point of the *McDonnell Douglas* rule" is to permit the plaintiff to focus the

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meaning of *Burdine* that is consistent with what became its position in *Hicks.* It is also true that Justices Blackmun and Brennan, concurring in *Aikens,* saw fit to assert that even after *Aikens,* "the *McDonnell Douglas* framework requires that a plaintiff prevail when at the third stage of a Title VII trial he demonstrates that the legitimate, nondiscriminatory reason given by the employer is not in fact the true reason for the employment decision." 460 U.S. at 718. But the fact remains that the *Aikens* majority gave no assurances that its opinion meant what Justices Blackmun and Brennan said it meant.

137. *See supra* text accompanying notes 66-83.

138. *See* authorities cited *supra* note 28; *see also* Lanctot, *supra* note 23.

evidence on rebutting that specific reason, with the guarantee that the factfinder will not be able to "keep digging" for alternative explanations the plaintiff could not or did not anticipate.[139] Arguing from necessity, however, ignores the existence of an apparatus of federal procedural rules — particularly the rules of pleading and discovery[140] — that exist for the very purpose of narrowing issues for trial.[141] McDonnell Douglas-Burdine is not a set of formal pleading rules, and the framework does not by its terms require the employer to *plead* a legitimate, nondiscriminatory reason for its actions.[142] Employers often do plead their reasons, however, so as to

139. The *Hicks* majority takes the contrary position — namely, that the necessities of the litigation process require *rejection* of the "judgment for plaintiff required" rule. For the majority, the dissent's crucial mistake is its understanding of what it means under McDonnell Douglas-Burdine for an employer to "articulate" its reasons. For the majority, a reason becomes "articulated" through the introduction of admissible evidence that would tend to support it. The articulation of the reason does not take place "*apart from the record* — in some pleading, or perhaps in some formal, nontestimonial statement made on behalf of the defendant to the factfinder." St. Mary's Honor Ctr. v. Hicks, 113 S. Ct. 2742, 2755 (1993). Furthermore, the majority argues, all explanations "suggested, no matter how vaguely, in the record," 113 S. Ct. at 2755-56, must be treated as equal, — because there is no "device for determining which particular portions of the record represent 'articulated reasons' set forth with sufficient clarity to satisfy *McDonnell Douglas*" and which do not. 113 S. Ct. at 2756.

140. As amended in December 1993, Rule 26 interweaves pleading and discovery. Amended Rule 26(a) provides that parties are required to disclose certain types of evidence regarding "disputed facts alleged with particularity in the pleadings," without awaiting discovery requests. FED. R. CIV. P. 26(a)(1)(A). The degree to which amended Rule 26(a) will alter civil discovery practice remains uncertain for a number of reasons. For example, the rule does not specify whether the required disclosure pertains to *all* facts alleged with particularity, regardless of which party's pleadings contain the allegation. The rule also does not specify what it means for a fact to be "alleged with particularity," nor does the rule by its terms *require* parties to plead any matters with particularity. Finally, Rule 26(a) expressly permits district courts to opt out of the rule by creating contrary local rules, and many have done so. *See* Donna Stienstra, *Implementation of Disclosure in United States District Courts, With Specific Attention to Courts' Responses to Selected Amendments to Federal Rule of Civil Procedure 26, available in* WESTLAW 1995 US ORDER 95-9.

141. Placing a production burden on the defendant on the basis of a weak prima facie case has also been defended as a discovery device that is required because the employer has the benefit of both superior information and superior resources. *See, e.g.*, Elizabeth Bartholet, *Proof of Discriminatory Intent Under Title VII:* United States Postal Service Board of Governors v. Aikens, 70 CAL. L. REV. 1201, 1216 (1982). The chief problem with this argument is that the *Burdine* burden on the employer is a weak one: the requirement that the employer "articulate" a reason through admissible evidence falls far short of providing the kind of information a well-counseled plaintiff would seek through civil discovery. If the concern is that employers will respond to discovery requests with "colorable claims that the requests call for information that is unnecessary, or that would be unduly burdensome to produce, or that is privileged," *id.*, the same employers will surely reveal the minimum information necessary to meet their weak production burden.

142. As will be discussed at length, *infra*, the cases in which the McDonnell Douglas-Burdine framework was formulated were fully tried cases; the Court spoke in terms of the presentation of evidence and of proof, not in terms of pleading — or, for that matter, of any other aspect of pretrial procedure. This does not stop many courts from treating McDonnell Douglas-Burdine as if it *were* a doctrine of pleading. See, for example, Alexander v. Fujitsu Bus. Com. Sys., 818 F. Supp. 462, 473 (D.N.H. 1993), where after stating that the defendant must articulate its reason only after the plaintiff *proves* a prima facie case, the court states that the defendant's articulation burden arises once the plaintiff adequately *pleads* a prima

create the impression that their actions were reasonable. Whether or not the employer identifies its reasons in early pleadings, the plaintiff can always use interrogatories to require the employer to identify any and all nondiscriminatory reasons relied upon in deciding to fire the plaintiff, and can follow up on the reasons given with requests for admissions. The judge will almost certainly insist that the parties present pretrial memoranda that identify the parties' theories of recovery and defenses, to serve as a basis for ruling on the relevancy of evidence to the issues to be presented at trial.[143] If these procedural mechanisms are adequate for other categories of cases,[144] it is difficult to use "necessity" as an argument in favor of the "judgment for plaintiff required" rule in disparate treatment cases.

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facie case. *See also* Johnson v. Southwestern Bell Tel. Co., 819 F. Supp. 578, 581 (E.D. Tex. 1993), *affd.*, 22 F.3d 1094 (5th Cir. 1994). The assertion that McDonnell Douglas-Burdine establishes a pleading requirement seems to be in error under the Federal Rules of Civil Procedure as well. Rule 8(b) specifies only that a defendant "shall state in short and plain terms [its] defenses to each claim asserted and shall admit or deny the averments upon which the adverse party relies." FED. R. CIV. P. 8(b). The employer's legitimate, nondiscriminatory reason is not a "defense" to the plaintiff's claim; rather, the absence of such a reason is an *element* of the plaintiff's claim, on which the plaintiff has the burden of persuasion. A disparate treatment defendant would thus seem to be under no obligation affirmatively to plead the reasons for its actions; it need only deny that they were discriminatory. *See* 4 ARTHUR LARSON & LEX LARSON, EMPLOYMENT DISCRIMINATION Form IV-4, at Prac-46 to Prac-47 (1995) (providing a model answer that contains no explanation of the employer's reasons for its actions). Even if the employer did bear the pleading burden on this issue, there is no requirement that the issue be plead with specificity under Rule 9. *See* FED. R. CIV. P. 9.

As explained in text, however, many employers *do* plead their reasons. Ironically, the new initial disclosure procedure under Rule 26(a), *see supra* note 140, will give employers who seek to slow the pace of litigation an incentive *not* to plead their reasons, so as not to have to make early disclosure of the evidence supporting their reasons. This incentive will be strongest if Rule 26(a) is interpreted to require a party to disclose evidence only as to facts it itself alleged.

143. Although the Federal Rules of Civil Procedure permit amendments to conform to the evidence, *see* FED. R. CIV. P. 15(b), it is unlikely that an employer would knowingly cast itself upon the discretion of the district court by leaving important facts out of its presentation of the case in court-ordered pretrial memoranda.

144. Ronald J. Allen, *Presumptions in Civil Actions Reconsidered,* 66 IOWA L. REV. 843, 860-61 (1981). Allen states that:

> [I]t is difficult to imagine a case today in which the sanction of possible dismissal would generate more evidence than discovery schemes. Thus, reliance on a presumption to shift a burden of production in order to generate evidence is not only doing indirectly what can be done directly, but no longer serves the stated purpose

Id. (citation omitted); *see also* Ronald J. Allen, *Presumptions, Inferences and Burden of Proof in Federal Civil Actions: An Anatomy of Unnecessary Ambiguity and a Proposal for Reform,* 76 NW. U. L. REV. 892, 897 (1982) ("If the sanctions available to implement modern discovery rules are inadequate to generate information, shifting a burden of production certainly will have no greater effect."); Edward W. Cleary, *Presuming and Pleading: An Essay on Juristic Immaturity,* 12 STAN. L. REV. 5, 18 (1959) (stating that the only possible use for "bursting-bubble" presumptions is "that of discovery device for extracting evidence from an opponent," but "the notion that discovery was ever a serious factor is destroyed by the apparently complete lack of any impact by modern discovery procedures upon presumptions").

It is possible that the Court assumed when it created McDonnell Douglas-Burdine that there *is* something unique to disparate treatment cases that makes these mechanisms inadequate. That "something specific" may well be the need to constrain *not* the parties themselves but the *factfinder.* When parties give interrogatory answers or submit pretrial briefs, they constrain *themselves* and the evidence they can introduce. The factfinder, however, remains free to draw inferences from the evidence that is presented. If the plaintiff is to have the fullest possible opportunity to prove discrimination, and if — as plaintiffs and federal courts of appeal had reason to suspect in the early days of Title VII — factfinders are likely to be hostile to discrimination claims, the plaintiff will want to constrain not only the defendant, but also the factfinder. One cannot, therefore, reject the necessity argument without also rejecting the view that McDonnell Douglas-Burdine is needed as a constraint — more specifically, a *proper* constraint — on the discretion of the factfinder to draw inferences from the evidentiary record.

The *Hicks* majority implicitly rejected the use of McDonnell Douglas-Burdine to constrain the factfinder, and it was right to do so. Take the facts of *Hicks* as an example. The dissent argued that any reliance on the notion that Powell was on a personal rather than racial crusade against Hicks would violate norms of fair notice because St. Mary's did not claim that "personal animosity" caused Hicks's discharge. But Hicks must have been on notice that a "crusade" would be at issue. Hicks wanted to prove that there was a *race*-based crusade against him. He chose to do so, in essence, by presenting evidence on two *separate* points: first, that there was a crusade against him, and, second, that the institution was being operated in a race-conscious manner, from which he asked the factfinder to infer that the crusade was race-based. That the factfinder would find for Hicks on the first issue, the crusade, and for the employer on the second, the discriminatory motive, was a risk that Hicks had to take. It is not in the nature of litigation that the proponent of the evidence is guaranteed that its evidence will be used only in its favor.[145]

145. While "evidence is always offered on specific issues, and relevance is judged with respect to the issue on which it is offered," Richard Lempert, *The New Evidence Scholarship: Analyzing the Process of Proof,* 66 B.U. L. REV. 439, 447 n.29 (1986), factfinders are generally left free to draw whatever reasonable inferences they wish to draw from the evidence. *See* 3 DEVITT ET AL., *supra* note 49, at § 72.01; *see also id.* at 72.04:

> In determining whether any fact in issue has been proved by a preponderance of the evidence in the case, the jury may, unless otherwise instructed, consider the testimony of all witnesses, regardless of who may have called them, and all exhibits received in evidence, regardless of who may have produced them.

The problem for Hicks, then, was that the district court came away convinced that there was a crusade against him, but was also convinced that the crusade was explainable neither by Hicks's job performance nor by his race. The legal questions this situation raises are quite complex. Is the factfinder ever permitted to interpret the evidence in a way that leads it to reject *both* parties' preferred theories of the events?[146] If so, when is such a course of

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[I]n your consideration of the evidence you are not limited to the bald statements of the witnesses. In other words, you are not limited to what you see and hear as the witnesses testify. You are permitted to draw, from facts which you find have been proved, such reasonable inferences as seem justified in the light of your experience.

Parties are free to request limiting instructions, but there is reason to question the effectiveness of an instruction not to conclude that a pink elephant was present when the evidence suggests otherwise. *Cf.* REID HASTIE ET AL., INSIDE THE JURY 232 (1983) (stating that stricken testimony "may tend to be rejected in open discussion but have an impact, perhaps even an unconscious one, on the individual juror's judgment").

146. An ongoing debate in the evidence literature takes as its premise that the civil trial system *should* limit the factfinder to deciding between the theories of the case put forth by the competing parties — and should deny the factfinder the freedom to deviate from them in favor of what one might call a "rogue" theory, in other words, a theory supported by the evidence but that neither party supports. In this debate, Professor Ronald Allen takes the position that achieving this result would require a "reconceptualization of civil trials," because the *present* civil trial system does *not* limit sufficiently the factfinder to the parties' competing theories. *See* Ronald J. Allen, *A Reconceptualization of Civil Trials,* 66 B.U. L. REV. 401 (1986); Ronald J. Allen, *The Nature of Juridical Proof,* 13 CARDOZO L. REV. 373, 381-82 (1991); *see also* Ronald J. Allen, Comment, *Rationality, Mythology, and the 'Acceptability of Verdicts' Thesis,* 66 B.U. L. REV. 541, 551 (1986).

In response to Allen, Professor Richard Lempert suggests that reform is unnecessary, because even under current law, factfinders in civil trials will usually only be aware of the theories argued for by the parties, *see* Lempert, *supra* note 145, at 473. Furthermore, Lempert contends that rogue stories may be kept away from juries through the use of instructions on the "spoliation inference" — the inference that if a party could have produced certain evidence but did not do so, the evidence goes against that party — and that reform is therefore not necessary. *Id.*

If spoliation instructions were adequate to keep rogue stories away from juries, adopting the "judgment for plaintiff required" rule as a kind of spoliation rule would seem consistent with general practice. But it is not, for a number of reasons. The main reason the analogy between the "judgment for plaintiff required" position and spoliation instructions is flawed is that the spoliation inference is a *permissive* inference. The fact finder "may rationally rely" on the spoliation inference, but it *need not* do so. *See* 1 DEVITT ET AL., *supra* note 49, at § 14.14 ("If a party offers weaker or less satisfactory evidence when stronger and more satisfactory evidence could have been produced at trial, you may, but are not required to consider this fact in your deliberations."); Richard D. Friedman, *Generalized Inferences, Individual Merits, and Jury Discretion,* 66 B.U. L. REV. 509, 518 (1986) ("[T]he jury *may* consider a failure to present evidence apparently within a party's control, and it *may* draw an inference that the evidence withheld was unfavorable to that party . . . ." (emphasis added)). Another reason is that "a spoliation inference is permitted only when a party is shown to have been in possession or control of relevant information and fails to produce it at trial," a circumstance that will not necessarily exist in all cases in which the existing evidence suggests a rogue story to the factfinder. Ronald J. Allen, *Epilogue: Analyzing the Process of Proof: A Brief Rejoinder,* 66 B.U. L. REV. 479, 482 (1986). (In *Hicks,* for example, Powell may well have denied to defense counsel, just as he denied on the stand, that he had any personal animosity against Hicks.)

In my view, Professor Allen is correct that the current civil trial system does not prevent factfinders from embracing rogue stories. But in my view, that is a good thing. It may well be that a rogue story is the one that best accounts for the facts, but the parties may have their own strategic reasons for not embracing it. *See* John Leubsdorf, *Stories and Numbers,* 13

action appropriate? Is the factfinder's option of rejecting both parties' theories limited to circumstances in which sufficient evidence exists to *prove* a specific alternative theory by a preponderance of the evidence? Is it limited to circumstances in which *some* evidence exists in the record suggesting a specific alternative theory, albeit insufficient evidence to prove the theory? Or is the factfinder free to reject both parties' theories solely on the basis of the weakness of each party's evidence, even without an evidentiary basis for an alternative theory?

These questions can only be answered in light of the law governing burdens of persuasion and the drawing of inferences from proven historical facts, an area in which the law of civil procedure and evidence intersect.[147] It is the dissent's unspoken suspicion in *Hicks* that what the district court did is *consistent* with this body of law — a suspicion I share — that ultimately propels it to insist that McDonnell Douglas-Burdine was designed to *circumvent* the normal workings of the law. But *Aikens* dictates to the contrary: its core holding is that factfinding on the ultimate issue of discrimination under McDonnell Douglas-Burdine follows no special rules.[148]

The argument from "necessity" comes down, therefore, to an argument about the extent to which the normal rules of civil procedure and evidence ensure the fairness of disparate treatment litigation. Reading *Burdine* and *Aikens* together compels the conclusion that whatever special provisions McDonnell Douglas-Burdine makes for plaintiffs apply only in the earliest stages of proof. No special rules exist to control how the ultimate factual decision in the case is to be made.

4. *Economy*

The final question, then, is a question of economy. In the *Hicks* dissent's view, "the Court . . . transforms the employer's burden of production from a device used to provide notice and promote fairness into a misleading and potentially useless ritual."[149] Why did the Court bother to create a special proof structure for disparate

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CARDOZO L. REV. 455, 459 (1991). I find it hard to see why it would add to the legitimacy of the civil trial system for the factfinder to be deprived of the right to infer the obvious, simply because the inference was in neither party's interest.

147. For an excellent general treatment of these issues in the context of directed verdict motions, see Cooper, *supra* note 111.

148. *See supra* text accompanying notes 66-83.

149. St. Mary's Honor Ctr. v. Hicks, 113 S. Ct. 2742, 2761 (1993).

treatment cases if it was to have no effect at all on ultimate factfinding?

An excellent question indeed, but not one that can serve the function of reviving McDonnell Douglas-Burdine. If the only justification for McDonnell Douglas-Burdine is to serve a purpose it cannot serve, then the correct answer is to abandon it. McDonnell Douglas-Burdine should remain only if it serves a purpose consistent with its limits, and if the general rules of civil litigation do not serve that purpose equally well.

As originally envisioned, McDonnell Douglas-Burdine probably functioned as a primitive quasi-discovery device, aimed at "smoking out" the employer's evidence as to why it acted adversely to the plaintiff.[150] We have seen, however, that there is no need for McDonnell Douglas-Burdine as a smoking-out device. McDonnell Douglas-Burdine was also presented as a device to organize the court's factfinding process. But *Aikens* indicates that McDonnell Douglas-Burdine no longer has a role in factfinding *at trial.*[151]

The answer to the "economy" question must be found, then, in an analysis of whether McDonnell Douglas-Burdine makes a positive contribution to the district court's treatment of the factual record at the pretrial stage. That is the question to which I now turn. If, as I conclude in Part II, McDonnell Douglas-Burdine does not and cannot meaningfully aid and shape the district court's understanding of the pretrial factual record, then, as I contend in Part III, the only sensible choice is to abandon it.

II. The Practical Meaning of McDonnell Douglas-Burdine: The View from Summary Judgment

Whether the McDonnell Douglas-Burdine proof structure continues to have any practical meaning after *Hicks* depends upon its utility at the pretrial stages of the case. Because all of the Court's disparate treatment cases, like *Hicks,* arose after full trial,[152] the

150. *See* Bartholet, *supra* note 141, at 1210-11 (defending the creation of a presumption by a weak prima facie case in McDonnell Douglas-Burdine as a discovery device).

151. *See supra* text accompanying notes 66-83.

152. The Supreme Court has in fact never considered the McDonnell Douglas-Burdine structure in a summary judgment case. Judge Posner is thus incorrect when he states that the "original setting" of McDonnell Douglas-Burdine was the "setting of summary judgment." EEOC v. G-K-G, Inc., 39 F.3d 740, 747 (7th Cir. 1994).

The exception, had certiorari not been dismissed as improvidently granted, would have been Harbison-Walker Refractories v. Brieck, 822 F.2d 52 (3d Cir. 1987), *cert. dismissed as improvidently granted,* 488 U.S. 226 (1988) — which would have been decided during the Court's controversial 1988-89 Term. The Court granted certiorari in *Brieck* to answer the following question: "Can plaintiff who alleges intentional discrimination survive summary

Court's jurisprudence offers no guidance as to the pretrial use of McDonnell Douglas-Burdine. Thus, our inquiry must turn on the actual pretrial practices of the lower courts. A number of questions can and should be asked about the effect of McDonnell Douglas-Burdine on the course of pretrial litigation. Does McDonnell Douglas-Burdine benefit Title VII plaintiffs by ameliorating the otherwise harsh rules that generally apply to plaintiffs in civil litigation? Does it benefit Title VII defendants, by creating legal obstacles for plaintiffs? Or is McDonnell Douglas-Burdine essentially a wash, adding little or nothing to the manner in which the case would proceed if the question were simply the ultimate question of intentional discrimination *vel non?*

A review of cases at the pretrial stage reveals that McDonnell Douglas-Burdine figures most centrally in summary judgment practice.[153] Summary judgment is an increasingly important tool for disparate treatment defendants.[154] First and foremost, the Supreme

judgment merely by questioning employer's business judgment, without presenting evidence, direct or indirect, that employer's judgment in fact was motivated by intent to discriminate?" 56 U.S.L.W. 3638 (U.S. Mar. 22, 1988) (No. 87-271). The case was argued on October 31, 1988 — the same day as Price Waterhouse v. Hopkins, 490 U.S. 228 (1989).

There has been some speculation in the literature as to the reasons for the Court's dismissal of certiorari in *Brieck. See, e.g.,* Lanctot, *supra* note 23, at 79-80 (suggesting that the argument revealed too many disputes about the state of the factual record); Matthew D. O'Leary, Note, St. Mary's v. Hicks: *The Supreme Court Restricts the Indirect Method of Proof in Title VII Claims,* 13 ST. LOUIS U. PUB. L. REV. 821, 847, n.157 (1994) (suggesting that counsel for the defendant restated the issue for review during argument in a form less interesting to the Court). The Marshall Papers are too vague to be helpful here, except to suggest that there was no consensus on how *Brieck* could be resolved on its merits. Thurgood Marshall Papers, Library of Congress, box 467, file 9.

153. My research revealed that there was far more reliance on McDonnell Douglas-Burdine in summary judgment opinions than in opinions regarding other pretrial stages, for example, motions for judgment on the pleadings (FED. R. CIV. P. 12(c)), motions for Rule 11 sanctions, and motions to dismiss for failure to state a claim (FED. R. CIV. P. 12(b)(6)). *Cf.* Celotex Corp. v. Catrett, 477 U.S. 317, 327 (1986) (noting the diminished role of motions to dismiss "with the advent of 'notice pleading,' " and the increased importance of summary judgment). *But see* Baumann et al., *supra* note 2, at 247-51 (describing movement by many courts away from notice pleading in intentional discrimination cases); Eric K. Yamamoto, *Efficiency's Threat to the Value of Accessible Courts for Minorities,* 25 HARV. C.R.-C.L. L. REV. 341, 367 (1990) (arguing that increased use of Rule 11 sanctions "undercuts notice pleading standards").

154. *See, e.g.,* McGinley, *supra* note 8, at 221 n.68 (describing this trend); Thomas J. Piskorski, *The Growing Judicial Acceptance of Summary Judgment in Age Discrimination Cases,* 18 EMPLOYEE REL. L.J. 245 (1992) (celebrating the trend); *see also* John V. Jansonius, *The Role of Summary Judgment in Employment Discrimination Litigation,* 4 LAB. LAW. 747 (1988); Gale K. Busemeyer, Comment, *Summary Judgment and the ADEA Claimant: Problems and Patterns of Proof,* 21 CONN. L. REV. 99 (1988); Jana E. Cuellar, Comment, *The ADEA: Handling the Element of Intent in Summary Judgment Motions,* 38 EMORY L.J. 523 (1989); *cf.* Joe S. Cecil, *Trends in Summary Judgment Practice: A Summary of Findings,* FJC DIRECTIONS, Apr. 1991, No. 1, at 11 (showing that data reflect that the percentage of civil rights cases in which summary judgment is used is higher than the percentage of tort, contract, and miscellaneous other cases in which summary judgment is used).

Court's 1986 trilogy of summary judgment cases[155] made summary judgment easier for defendants to obtain.[156] Under these cases, neither the fact that the ultimate issue in the case is motive or intent[157] nor the fact that there is evidence on both sides of the issue[158] is sufficient to bar summary judgment. Defendants generally

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Much of the commentary on summary judgment in discrimination cases has focused on the Age Discrimination in Employment Act. I suspect that this is because jury trials have always been available under the ADEA (whereas they are only now available in Title VII disparate treatment cases pursuant to the Civil Rights Act of 1991). Although summary judgment is always desirable to defendants as a way of avoiding the expense of trial, summary judgment has an added advantage when the jury is to be the factfinder: the advantage of having the judge rather than the jury evaluate the facts. *See* Frank J. Cavaliere, *The Recent 'Respectability' of Summary Judgments and Directed Verdicts in Intentional Age Discrimination Cases: ADEA Case Analysis Through the Supreme Court's Summary Judgment 'Prism,'* 41 CLEV. ST. L. REV. 103, 104 (1993) ("[F]ear of juror sympathy toward displaced older workers leads employers and their attorneys to believe that ADEA cases often are won or lost at the motion stage."); William L. Kandel, *Pretext in Discrimination Defenses: A One-Step or Two-Step Test?*, 18 EMPLOYEE REL. L.J. 637, 638 (1993) ("the factfinder at the end of the ADEA proceeding is a jury," which provides strong motivation for the defendant to seek and the plaintiff to avoid summary judgment); Piskorski, *supra*, at 245 (arguing that "the jury factor" in ADEA cases "has a profound impact" on strategy, and is the best argument for the use of summary judgment).

155. Celotex Corp. v. Catrett, 477 U.S. 317 (1986); Anderson v. Liberty Lobby, Inc., 477 U.S. 242 (1986); Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574 (1986).

156. For the role of the trilogy in making it easier for defendants to obtain summary judgment, see WILLIAM W. SCHWARZER ET AL., THE ANALYSIS AND DECISION OF SUMMARY JUDGMENT MOTIONS 8 (1991) (stating that the trilogy "clarified the summary judgment procedure and increased its utility"); Edward Brunet, *The Use and Misuse of Expert Testimony in Summary Judgment*, 22 U.C. DAVIS L. REV. 93, 125-26 (1988) ("Courts now use rule 56 to dispose of specific types of cases formerly thought to be particularly inappropriate for rule 56 treatment."); Samuel Issacharoff & George Loewenstein, *Second Thoughts About Summary Judgment*, 100 YALE L.J. 73 (1990). For the argument that the trilogy has caused an increase in the use of summary judgment in disparate treatment cases, see McGinley, *supra* note 8, at 208 ("Following the trilogy, the lower courts have granted summary judgment more aggressively in civil rights cases . . . ."). McGinley hesitates to support this claim empirically, *id.* at 208 n.19, in part because "[p]robably due to the political composition of the federal bench, even before the trilogy, a number of courts seemed headed toward the improper use of summary judgment in discrimination cases." *Id.* It seems fair to say that the trilogy supported those courts already making aggressive use of summary judgment, and that it did not instantly change the practice of those courts historically hesitant to use summary judgment. *See* Cecil, *supra* note 154 (arguing, based on a study of six courts, that although the rate of summary judgment filings increased during the 11-year period preceding the trilogy, the trilogy did not result in a statistically significant increase in summary judgment filings); *see also* Gregory C. Parliman & Jonathan E. Hill, *Third Circuit Law on Summary Judgment in the Area of Employment Discrimination*, 20 SETON HALL L. REV. 786, 803 (1990) (arguing that the Third Circuit's traditional hostility to summary judgment has continued to affect its post-trilogy jurisprudence). For a description of the Third Circuit's longstanding opposition to summary judgment, see Issacharoff & Loewenstein, *supra*, at 77 n.26.

157. *Anderson*, 477 U.S. at 256 (rejecting the claim that summary judgment is inappropriate where the defendant's state of mind is at issue); Stephen Calkins, *Summary Judgment, Motions to Dismiss, and Other Examples of Equilibrating Tendencies in the Antitrust System*, 74 GEO. L.J. 1065, 1118 (1986) ("*Anderson* explains that Rule 56 applies in a 'state of mind' case just as in any other."). For a critique of *Anderson*, see Jeffrey W. Stempel, *A Distorted Mirror: The Supreme Court's Shimmering View of Summary Judgment, Directed Verdict, and the Adjudication Process*, 49 OHIO ST. L.J. 95, 145-46 (1988).

158. The Court in *Anderson* held that the standard for summary judgment

need only "point out" the weaknesses in the factual record in their motion for summary judgment,[159] and the fact that the plaintiff has the ultimate burden of proof is critical in measuring the defendant's summary judgment burden.[160]

Disparate treatment cases have not been immune from the pro-summary judgment trend, for all the academic protest that summary judgment in disparate treatment cases violates the spirit of McDonnell Douglas-Burdine.[161] Furthermore, the Civil Rights Act of 1991 increases employers' incentives to use summary judgment as a way of avoiding trial. Prior to the Civil Rights Act of 1991, the judge was generally the factfinder in disparate treatment cases. Under the new legislation, jury trials are now available in disparate treatment cases, as are compensatory and punitive damages.[162] The

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mirrors the standard for a directed verdict, under which "judges [are no] longer required to submit a question to a jury merely because some evidence has been introduced by the party having the burden of proof, unless the evidence be of such a character that it would warrant the jury in finding a verdict in favor of that party."

477 U.S. at 250-51 (quoting Improvement Co. v. Munson, 81 U.S. (14 Wall.) 442, 448 (1872)); *see also* 477 U.S. at 252 (stating that in a "run-of-the-mill civil case" on a preponderance of the evidence standard, "the judge must ask himself not whether he thinks the evidence unmistakably favors one side or the other but whether a fair-minded jury could return a verdict for the plaintiff on the evidence presented"). The *Matsushita* decision presents even stricter evidentiary requirements for the nonmovant seeking to avoid summary judgment. *See* 475 U.S. at 587 ("If the factual context renders respondents' claim implausible . . . respondents must come forward with more persuasive evidence to support their claim than would otherwise be necessary."). There is some question, however, whether the requirement that the nonmovant convince the court of the plausibility of the theory supported by its evidence is unique to certain antitrust claims. *See Matsushita,* 475 U.S. at 600-01 (White, J., dissenting); SCHWARZER ET AL., *supra* note 156, at 62 (treating *Matsushita* as a case in which the substantive law limits the range of permissible inferences from ambiguous evidence); *see also* William W. Schwarzer & Alan Hirsch, *Summary Judgment After* Eastman Kodak, 45 HASTINGS L.J. 1, 7 (1993) (emphasizing substantive law as at issue in antitrust summary judgment cases). Notwithstanding these doubts, it is not unusual for the *Matsushita* "plausibility" standard to be used in discrimination cases. *See, e.g.,* Chambers v. TRM Copy Ctrs. Corp., 844 F. Supp. 183, 184 (S.D.N.Y. 1994); Dash v. Equitable Life Assurance Socy., 753 F. Supp. 1062, 1065 (E.D.N.Y. 1990); Gavie v. Stroh Brewery Co., 668 F. Supp. 608, 613 (E.D. Mich. 1987); *see also* Stempel, *supra* note 157, at 175 n.393 (arguing that the "plausibility" requirement is being misused in discrimination cases); Yamamoto, *supra* note 153, at 375.

159. *See Celotex,* 477 U.S. at 323-25 (holding that if the moving party does not have the total burden of persuasion, "the burden on the moving party may be discharged by 'showing' — that is, pointing out to the district court — that there is an absence of evidence to support the nonmoving party's case").

160. *Id.* at 324 (noting the significance of the circumstance that "the nonmoving party will bear the burden of proof at trial"); *Anderson,* 477 U.S. at 252 ("[T]he inquiry involved in a ruling on a motion for summary judgment or for a directed verdict necessarily implicates the substantive evidentiary standard of proof that would apply at the trial on the merits.").

161. *See, e.g.,* McGinley, *supra* note 8; Busemeyer, *supra* note 154, at 100 (concluding "that summary judgment is an inappropriate tool for the resolution of age discrimination claims"). *See generally* Yamamoto, *supra* note 153.

162. The Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071 (codified at 42 U.S.C. § 1981a (Supp. IV 1992)), amended 42 U.S.C. § 1981 to provide that in intentional discrimination cases brought under Title VII in which "the complaining party cannot recover under section 1981," compensatory damages and punitive damages are available up to a com-

increased incentive to seek summary judgment is obvious: summary judgment now allows defendants to avoid juries and damages awards.[163]

Given the prevalence of summary judgment motions in disparate treatment cases, it is important to ask whether McDonnell Douglas-Burdine functions well as a method for analyzing the facts when the case is at the summary judgment stage. It is equally vital to know whether McDonnell Douglas-Burdine *is in fact used* in the adjudication of summary judgment motions and whether it aids or hinders coherent analysis of the evidence. Those questions will be asked and answered in this section.

My analysis will proceed through the three stages of the McDonnell Douglas-Burdine proof structure, and will show that although district courts purport to use McDonnell Douglas-Burdine, the proof structure actually does little to aid their analysis of the facts at summary judgment. Indeed, in practice courts are left largely to their own devices when it comes to determining which factual questions are to be addressed at which stage of the proof structure. Some courts simply collapse the stages of the inquiry together without admitting they are doing so. Collapsing the proof structure creates results hardly different from abandoning it. Furthermore, to the extent that McDonnell Douglas-Burdine does shape decisionmaking, its effects are often detrimental to plaintiffs

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bined limit ranging from $50,000 to $300,000, depending on the size of the employer. 42 U.S.C. § 1981a(b)(3) (1992). Punitive damages require a showing of "malice or . . . reckless indifference to the federally protected rights of an aggrieved individual." 42 U.S.C. § 1981a(b)(1) (1992). A jury trial is available in any case in which the complaining party seeks compensatory or punitive damages. 42 U.S.C. § 1981a(c) (1992).

163. Employment discrimination plaintiffs are far more successful in cases tried to juries than in cases in which the judge is the factfinder. Theodore Eisenberg, *Litigation Models and Trial Outcomes in Civil Rights and Prisoner Cases*, 77 GEO. L.J. 1567, 1591, tbl. II (1989) (reporting a 19.2% national success rate for bench trials, versus a 42.6% success rate for jury trials). Of course, since jury cases were overwhelmingly age-discrimination cases, the data may reflect a jury sympathy for claims of older employees that might well not exist for race or gender claims. *Cf.* Visser v. Packer Engg. Assoc., 924 F.2d 655, 661 (7th Cir. 1991) (Flaum, J., dissenting) ("[E]mployers and their counsel may well conclude that ADEA cases are won or lost on summary judgment, because jurors find it difficult to close their hearts to the plight of the terminated older employee but easy to open the purse strings of his employer."); *see also supra* note 154. Nonetheless, the data suggest that employers who fear jury trials do so for good reason.

It is not only the incentive to *seek* summary judgment that increases in jury cases. In a review of antitrust cases, Calkins, *supra* note 157, found that summary judgment is more frequently granted in jury cases. He observes: "Courts appear more willing to grant defense motions for summary relief when the costs of erroneous plaintiff verdicts are relatively high," *id.* at 1138, despite the fact that "[c]onventional wisdom would predict a decline with increasing complexity, and complexity should be associated with high damage requests and class status. Apparently, some courts want to prevent finders of fact from deciding high-stakes cases." *Id.*

— the very people it supposedly helps — because McDonnell Douglas-Burdine renders courts less able to recognize forms of discrimination that do not straightforwardly match the proof structure's template.

My analysis has both a normative and a descriptive component. I am concerned both with what courts *should do* and with what courts *do in fact.* The descriptive component of my analysis draws on a sample of federal district court cases: specifically, a sample consisting of all of the federal district court disparate treatment summary judgment cases available on WESTLAW with decision dates between Dec. 15, 1993 and May 31, 1994.[164] Three methodological points are in order regarding this sample and the manner of its use.

First, I make no representation that any of the cases I discuss are "lead cases"[165] — quite the contrary. Most of the cases I am analyzing were not reported in *Federal Supplement* or by the lead-

164. The sample is based on a search in WESTLAW's federal district court database, conducted on June 13, 1994, of district court summary judgment opinions in which the court cited the Supreme Court's decision in *Hicks* and identified the case as involving "intentional discrimination," "disparate treatment," "Burdine," "McDonnell Douglas," or "pretext," and which were decided between mid-December of 1993 and late May of 1994. The search yielded 70 cases. I recognize that such a sample is not truly representative of the most "routine" district court cases — because such cases are likely to be disposed of without any written opinion, or at least without an opinion of sufficient specificity or interest to be worthy of electronic publication. *See* Peter Siegelman & John J. Donohue III, *Studying the Iceberg from Its Tip: A Comparison of Published and Unpublished Employment Discrimination Cases*, 24 LAW & SOCY. REV. 1133 (1990). As a matter of research methodology, however, it is difficult to envision a study of the role of McDonnell Douglas-Burdine in judges' analysis of the factual record on summary judgment that did *not* turn, at the very least, on the analysis of *written* opinions that contain enough of the factual background of the case to make it possible to look behind the legal conclusions stated in the opinion. Thus, even a sample constructed from the files of district court cases rather than from the WESTLAW database would be subject to the criticism that it ignored the *most* "routine" cases: namely, those that settled prior to the filing or disposition of a summary judgment motion, or which were resolved by the judge without written opinion. The search for "routineness" inevitably conflicts, then, with the need to analyze expressions of judicial reasoning. For all that my sample is likely underrepresentative of the *most* routine disparate treatment cases, however, the cases are "routine" in the sense that the opinions are overwhelmingly fact-bound and are written in a tone that belies no pretention as to the broader precedential value of the cases.

I recognize also that the use of the McDonnell Douglas-Burdine framework by judges does not exhaust the potential or actual uses of the framework: specifically, it may well be used by parties and their lawyers in evaluating the case. There is, however, no reason to believe that if the framework is ill-suited to the decision-writing process, it is any *better* suited to any of its other potential or actual uses. If, as I argue, the typical disparate treatment case turns on the evaluation of the plaintiff's performance or job qualifications, and judges do not find it helpful to have to decide which specific McDonnell Douglas-Burdine "stage" that evaluation "belongs in," there is no reason to think that parties and lawyers assessing the settlement value of their cases would find it any *more* helpful to make use of the framework.

165. For a different approach, see Schwab, *supra* note 87, at 11-12 (discussing method of examining "lead cases" rather than "the hidebound mass of cases" to demonstrate that the seeming disorder in wrongful termination litigation is actually reaching economically efficient results).

ing looseleaf services, let alone identified through subsequent decisions as pivotal cases in the field. My interest is in whether McDonnell Douglas-Burdine aids or constrains decisionmaking in *ordinary* cases. The federal district courts are a community of practice in which McDonnell Douglas-Burdine is the established methodology for deciding disparate treatment cases. My interests are in the everyday life of that community. In it, courts recite the McDonnell Douglas-Burdine framework at all of the appropriate occasions, and treat it as noncontroversial. My question is whether the courts that recite it do so with any consistency; whether, once recited, courts use it with any consistency; and, perhaps most central, whether the courts manifest any measure of self-reflection about the extent to which they deviate from it in practice.[166]

Second, for all my talk of "samples," I make no quasi-scientific claims for my selection of cases. My approach is qualitative rather than quantitative.[167] Furthermore, my "sample" of cases did not exhaust all of the issues that need to be considered in determining whether McDonnell Douglas-Burdine is a worthwhile method for analyzing facts in the summary judgment context. I have thus reached outside my sample on a number of occasions, and, as noted, some of the analysis that follows is normative rather than descriptive.

Finally, my analysis does not aim at determining whether the courts correctly grant or deny summary judgment motions. It would be impossible to determine "correctness" from the face of the decision, in that the manner in which the district court states the "facts" depends upon its subjective judgments of materiality and

166. I am interested in the role that McDonnell Douglas-Burdine plays as an "officializing strategy," a strategy "aimed at producing 'regular' practices." BOURDIEU, *supra* note 106, at 40. Such a strategy produces the same results when it is used by social actors who stand in very different relationships to the society's official rules. "The *responsible* man" produces results "immediately in line with the official rule, because produced by a regulated habitus," and is therefore well suited to serving as "delegate and spokesman" for the official rule. *Id.* In sharp contrast in method if not in result is the "*well-meaning rule-breaker* who by conceding the appearances or intent of conformity, that is, *recognition,* to rules he can neither respect nor deny, contributes to the — entirely official — survival of the rule." *Id.* From my standpoint, it is important to know whether district court judges who affirm the McDonnell Douglas-Burdine proof structure in their daily practice do so as "responsible men" or "well-meaning rule-breakers."

167. My original plan had been to look at a larger number of decisions and to "code" them for whether and how they deviated from the strict application of the McDonnell Douglas-Burdine framework. Experience proved that the judgment of whether a court was "following" or "fudging" the framework was too nuanced to quantify. I determined that it would be better to describe the most richly illustrative cases than to attempt a quantitative approach.

relevance.[168] Furthermore, one need not believe that "plaintiffs are losing cases they should win and it's all the fault of McDonnell Douglas-Burdine" to be concerned about how McDonnell Douglas-Burdine functions in practice. The conclusion that the McDonnell Douglas-Burdine proof structure creates a kind of false consciousness, a *belief* that decisionmaking is meaningfully channeled by the law when it in fact is not, generates a sufficient basis for concern irrespective of the legal results the structure produces. The lion's share of the analysis of individual intentional discrimination cases, both in the Supreme Court and in academia, has focused on establishing, repairing, and fine-tuning the McDonnell Douglas-Burdine structure. If the product of over twenty years of that effort is an "official" methodology that does not in fact govern practice, then perhaps it is time to stop thinking that one can improve practice by improving the McDonnell Douglas-Burdine structure.

A. *The Prima Facie Case on Summary Judgment*

We saw in Part I that the McDonnell Douglas-Burdine line of cases failed to resolve major problems in the nature of the required prima facie case. The district court cases directly reflect that failure. The district courts have been left to struggle with the question of where issues of "qualification" and "performance" fall among the stages of the McDonnell Douglas-Burdine framework, and with whether plaintiffs must provide evidence beyond the bare elements of the prima facie case to further support an inference of intentional discrimination. The district court cases show all of the signs of strain that one would expect to result from an obligation to use a doctrine that is empty at its core.

1. *The Pervasive Problem of "Qualifications"*

The lack of conceptual clarity shows up most clearly and disturbingly in the treatment of the prima facie case requirement that the plaintiff be "qualified" for the job at issue. More than twenty years after *McDonnell Douglas,* the lower courts have not reached

168. Carol Banta, my research assistant for this phase of the project, was surprised (given her liberal bent) to see how often she agreed with the decision to grant summary judgment to the defendant. Part of her acquiescence in the pro-defendant results was certainly the weakness of many of the cases or at least the weakness of how they were litigated by plaintiffs' counsel. On the latter problem, see KRISTIN BUMILLER, THE CIVIL RIGHTS SOCIETY (1988). But part of her willingness to agree with the case outcomes was likely a response to the inevitable rhetorical force of the written opinion, achieved in no small measure by the judge-author's control over the presentation of the facts. *Cf.* CLIFFORD GEERTZ, WORKS AND LIVES: THE ANTHROPOLOGIST AS AUTHOR 49-72 (1988); JAMES B. WHITE, THE LEGAL IMAGINATION 858 (1973).

consensus on an issue that pervades *all* of the major postures in which disparate treatment cases arise: hiring, promotion, and termination.

a. The "Qualifications" Issue in Hiring Cases. McDonnell Douglas itself addressed a case of discriminatory failure to hire. But despite the fact that *McDonnell Douglas* set forth the content of the prima facie case in hiring cases, there is little conceptual coherence in the district courts as to how to handle the issue of "qualifications" in hiring cases.

Recall that in *McDonnell Douglas,* the plaintiff met the standard qualifications for the job, except for one minor problem: while on layoff status, the plaintiff, who was a civil rights activist, had allegedly engaged in a "stall-in" and "lock-in" that interfered with the employer's business. In lay terms, an applicant who has a track record of sabotaging the employer's business is not generally viewed as "qualified" for the job — he lacks appropriate character or trustworthiness. The Court so acknowledged, noting that the employer might reasonably predict that " 'an applicant's past participation in unlawful conduct directed at his prospective employer might indicate the applicant's lack of a responsible attitude toward performing work for that employer.' "[169] Nonetheless, the Court did not deem the unlawful conduct relevant to the question of "qualifications" for purposes of the prima facie case: the Court held that the prima facie case had been made out and expressed no concern that the plaintiff's conduct might render him "unqualified" *for prima facie case purposes.*[170]

"Qualification" at the prima facie case stage, then, is a term of art in *McDonnell Douglas:* it includes *some subset* of the elements that make an applicant acceptable to the employer. The precise content of that subset, however, remains uncertain — both in *McDonnell Douglas* itself and in the district court cases. For exam-

169. McDonnell Douglas Corp. v. Green, 411 U.S. 792, 806 n.21 (1972) (quoting Green v. McDonnell Douglas Corp., 463 F.2d 337, 353 (8th Cir. 1972)).

170. 411 U.S. at 802.

ple,[171] in *Rodgers v. Smithkline Beecham Corp.*,[172] Smithkline sought to fill an "associate lab technician" position in a laboratory that conducts clinical studies using pigs; the advertised job consisted solely of dirty animal-care tasks. Smithkline advertised the job and listed the required qualifications: "The successful candidate will be familiar with animal handling (livestock) and able to lift feedbags and restrain animals. Absence of known allergies to feed, animals or drugs is required. A high school diploma is also required." The plaintiff, Janet Rodgers, applied for the job and met the advertised qualifications. Smithkline turned her down: Smithkline wanted to hire someone who would not aspire to higher-level tasks, and asserted that Rodgers was overqualified and unlikely to be satisfied with the job. The court agreed that Rodgers was overqualified and therefore that she "did not meet the criterion for the position";[173] on that basis, the court held that Rodgers failed to prove her prima facie case.

The court's prima facie case analysis departed from that of *McDonnell Douglas* in a significant way.[174] In *McDonnell Douglas,* Green made out a prima facie case by showing that he met the *objective* qualifications for the job; the employer's prediction that Green would not have the attitude necessary for good performance was held relevant only at the rebuttal and pretext stages of the case. Why not the same treatment in *Rodgers?* In *Rodgers,* the court could just as easily have said that Rodgers was minimally qualified, and that Smithkline's decision that she was too likely to be dissatisfied with the job was irrelevant at the prima facie case stage. There is no reason why the prima facie case should encapsulate only the

171. Finding contemporary examples of confusion as to the meaning of "being qualified" in *hiring* cases is rendered difficult by the scarcity of hiring cases in any sample of Title VII cases. As Donohue and Siegelman documented in their 1991 study of litigation of Title VII cases, termination cases outnumbered hiring cases by a ratio of 6 to 1 by 1985; indeed, the *number* of hiring cases had declined by 1985 from a peak reached in 1976. John J. Donohue & Peter Siegelman, *The Changing Nature of Employment Discrimination Litigation,* 43 STAN. L. REV. 983, 1015-16 (1991). My sample of cases included only two hiring discrimination cases.

172. 64 Empl. Prac. Dec. (CCH) ¶ 42,981 (E.D. Pa.), *affd. mem.,* 43 F.3d 1462 (3d Cir. 1994).

173. 64 Empl. Prac. Dec. ¶ 42,981 at 79,464.

174. As stated in *McDonnell Douglas* and reiterated in *Rodgers,* the elements of a prima facie case are: membership in a protected application and qualification for the job; rejection despite qualifications. 411 U.S. at 802. The last "standard" element, that "the position remained open and the employer continued to seek applicants from persons of the complainant's qualifications," 411 U.S. at 802, is not applicable to a case in which the employer in fact hired another candidate who was not a member of plaintiff's protected class for the single open position. In fact, the *Rodgers* case is a case in the posture Justice Stevens was concerned about in his *Burdine* memoranda: a case in which a choice was made among diverse candidates vying for a single opening.

"minimal," objective requirements in *McDonnell Douglas,* but go beyond them in *Rodgers.*[175]

b. The "Qualifications" Problem in Termination Cases. Most disparate treatment cases are termination cases,[176] as my sample reflects. In most termination cases, the central issue in the case is the adequacy of the plaintiff's job performance. Take excessive absenteeism as an example. Suppose an employer claims it fired the plaintiff for excessive absenteeism, and the plaintiff denies the absenteeism charge, shows that she was qualified for the job when she was hired and remains so now, and claims that her performance was adequate in all respects. If McDonnell Douglas-Burdine is to be useful in such a case, the framework must be relatively clear in delineating the extent to which these different performance and qualification issues are relevant at the prima facie case stage. In practice, no such clarity exists.

Courts use many different definitions of "qualification" in termination cases, definitions with important differences in nuance. They include: "that she was doing her work well enough to meet the employer's legitimate expectations";[177] "that he was qualified for the position he held";[178] "that he was doing his job well enough to rule out the possibility that he was fired for inadequate job performance";[179] that "she 'possesses the basic skills necessary for per-

175. Third Circuit precedent on the consideration of subjective qualifications provided the court in *Rodgers* with little clear guidance. In Ezold v. Wolf, Block, Schorr and Solis-Cohen, 983 F.2d 509 (3d Cir. 1992), *cert. denied,* 114 S. Ct. 88 (1993), which the *Rodgers* court relied upon for its statement of the elements of the prima facie case, the Third Circuit expressed the view that "[i]n Title VII cases involving a dispute over 'subjective' qualifications, we have recognized that the qualification issue should often be resolved in the second and third stages of the *McDonnell Douglas/Burdine* analysis, to avoid putting too onerous a burden on the plaintiff in establishing a prima facie case." 983 F.2d at 523. In the *Ezold* case itself, a case involving that most highly subjective decision, promotion to partnership in a law firm, the Third Circuit found a prima facie case made out on several favorable evaluations and a "good" rating on an evaluation memo, and left all of the finer points of partnership potential — which turned on the firm's claim that "she did not possess sufficient legal analytic ability" to handle the responsibilities of a partner — to the later stages of the case. 983 F.2d at 526. But then again, the Third Circuit in *Ezold* immediately thereafter stated that "we have refused to adopt a blanket rule" to the effect that a minimal view of "qualification" should apply at the prima facie case stage. 983 F.2d at 523. What the Third Circuit did *not* do was give any guidance on when "more" should be required.

176. Donohue & Siegelman, *supra* note 171, at 984 ("While most cases formerly attacked discrimination in hiring, today the vast majority of all litigation suits challenge discrimination in discharge.").

177. Jarosz v. Seko Air Freight, Inc., No. 92 C 7246, 1994 WL 11649, at *3 (N.D. Ill. Jan. 6, 1994).

178. Lopez v. Schwan's Sales Enters., Inc., 845 F. Supp. 1440, 1445 (D. Kan. 1994).

179. Mukherjee v. Sheraton Palace Hotel, No. C-93-2905 DLJ, 1994 WL 173889, at *3 (N.D. Cal. Apr. 18, 1994) (quoting Sengupta v. Morrison-Knudsen Co., 804 F.2d 1072, 1075 (9th Cir. 1986)).

formance of [the] job' ";[180] or that plaintiff was "doing what [her employers] wanted her to do."[181] Being "qualified for the position you hold" may not have anything to do with your actual *performance* in the job. If the qualifications for being a high school teacher include an education degree, student-teaching hours, and state certification, a poorly-performing teacher does not become "unqualified for the position" through his poor performance. The school system must, instead, rely on something other than mere "qualification" — in-class observations or test scores, for example — in evaluating him. The same can be said about "possessing the basic skills necessary for performance on the job." If the skills for being a firefighter are strength, speed, and a required level of literacy, the fact that a firefighter is lazy does not mean that he lacks the "basic skills" for performance: it simply means he is not using the skills he has. "Doing the job well enough" to avoid discharge is not the same as "meeting the employer's legitimate expectations": I suspect that many employees do not meet their employer's "minimal expectations," but they are retained on the payroll because their employers fear that new hires might fall even further from the mark.

In practice, matters only get worse. In most cases, the employer's stated justification for firing the plaintiff will be a *specified* performance deficiency. In such a case, the distinction among the McDonnell Douglas-Burdine "stages" is bound to break down.[182] Take as an example *Mukherjee v. Sheraton Palace Hotel*.[183] Mukherjee bussed tables in a hotel restaurant and had a series of disciplinary complaints and altercations with supervisors. The court dutifully stated the McDonnell Douglas-Burdine framework with its three separate steps. Its analysis, however, collapsed the three steps. The court stated the prima facie case standard as whether Mukherjee "was doing his job well enough to rule out the possibility that he was fired for inadequate job performance."[184] The phrase demonstrates that the court tailored the prima facie case

180. Saucier v. Edgewater Constr. Co., No. 92-CV-1111, 1994 WL 36363, at *6 (N.D.N.Y. Feb. 4, 1994) (quoting Owens v. New York City Hous. Auth., 934 F.2d 405, 409 (2d Cir.), *cert. denied*, 502 U.S. 964 (1991)).

181. Moffett v. Chicago Transit Auth., No. 90 C 4657, 1994 WL 127711, at *2 (N.D. Ill. Apr. 7, 1994).

182. Clear examples in my sample are Warner v. MCI Telecommunications Corp., No. 92 CIV. 3056 (JSM), 1994 WL 68226 (S.D.N.Y. Feb. 28, 1994); Iftekaruddin v. Xerox Corp., No. 93 C 1455, 1994 WL 55675 (N.D. Ill. Feb. 23, 1994); Stinneford v. Spiegel, Inc., 845 F. Supp. 1243 (N.D. Ill. 1994).

183. No. C-93-2905 DLJ, 1994 WL 173889 (N.D. Cal. Apr. 18, 1994).

184. 1994 WL 173889, at *4.

standard in anticipation of the employer's stated justification. The court then held that Mukherjee failed to meet that standard "since there is sufficient evidence that [he] was fired for inadequate job performance."[185] The statement of Mukherjee's evidentiary showing anticipated that inadequate job performance would be the employer's stated reason, and essentially concluded that the plaintiff produced insufficient evidence to prove that inadequate job performance was a pretext for intentional discrimination. What, then, is the purpose of having a three step inquiry?

Where qualification or performance are at issue, the cases reflect two possible ways to avoid collapsing the prima facie case and pretext stages of the analysis. One approach is to do what the Supreme Court essentially did in *McDonnell Douglas:* to segment the analysis so that the particular aspect of qualification or performance that the employer will draw into question is deemed irrelevant at the prima facie case stage. So, for example, in *Jarosz v. Seko Air Freight, Inc.,*[186] the plaintiff was discharged for continuing a relationship with a former coworker who had become a competitor and was suspected of stealing trade secrets. The employer asserted that it had established a rule against employee contact with the competitor, and that the employee's performance was inadequate because she had disobeyed the rule. The court decided that the rule violation should not be dealt with at the prima facie case stage, simply concluding that: "Defendant's allegation that Plaintiff defied Defendant's orders . . . is more appropriately introduced as a legitimate reason for terminating Plaintiff rather than as evidence that Plaintiff was not meeting Defendant's reasonable performance expectations."[187]

The other way courts have maintained the distinction between the prima facie case and pretext stages is by holding the element of performance at issue to be relevant at the prima facie case stage, but deeming it satisfactorily addressed by a weaker evidentiary showing than would be required at the final stage of the case. *Lopez v. Schwan's Sales Enterprises, Inc.*[188] combined two ways of re-

185. 1994 WL 173889, at *4.

186. Jarosz v. Seko Air Freight, Inc., No. 92 C 7246, 1994 WL 11649 (N.D. Ill. Jan. 6, 1994).

187. *Jarosz,* 1994 WL 11649, at *4; *see also* Emerson v. Boeing Co., Civ. A. No. 92-1279-MLB, 1994 WL 149191 (D. Kan. Apr. 1, 1994) (holding that in accord with Tenth Circuit law it is inappropriate to consider the misconduct that was the reason for the discharge — sexual harassment in violation of company rules — in deciding whether the employee was doing "satisfactory work").

188. 845 F. Supp. 1440 (D. Kan. 1994).

ducing the evidentiary burden. The court held that: "A plaintiff can sufficiently establish his qualifications in making a prima facie case by his own testimony . . . or by showing that he continued to possess the same objective qualifications as when he was hired."[189] The decided cases also demonstrate other less formal means of keeping the stages of the case analytically distinct. For example, where a plaintiff's performance *after* a certain date is ultimately at issue in the case, the court might be satisfied with positive evaluations *before* that date for purposes of making out a prima facie case.[190]

But courts are not always willing to employ a weakened proof standard for "qualification" at the prima facie case stage. Courts often hold, for example, that the plaintiff's "own assessment of her abilities is not dispositive to establish a prima facie case" because "[t]he focus of the Title VII inquiry is on the perception of the decision maker," and thereby reject the chance to deal with the most subjective aspects of the employer's decisionmaking at the latest possible stage of the case.[191]

c. The "Qualifications" Problem in Promotion Cases. My sample of summary judgment cases included six cases in which employees challenged an employer's failure to grant them promotions.[192] By and large, these six cases fall into the patterns discussed above. In some, the courts effectively deferred consideration of the qualifications issue to the pretext stage, either by assuming arguendo that the plaintiff was qualified for purposes of the prima facie case,[193] or by simply declining to mention the prima

189. 845 F. Supp. at 1445; *see also* Edwards v. Interboro Instit., 840 F. Supp. 222, 227 (E.D.N.Y. 1994) ("[A]n assertion by the plaintiff that his work was satisfactory can be sufficient" at the prima facie case stage, though it certainly would not be at the pretext stage if performance is called into question.); Saucier v. Edgewater Constr. Co., No. 92-CV-1111, 1994 WL 36363 (N.D.N.Y. Feb. 4, 1994) (finding that an assertion by the plaintiff of her own satisfactory performance would be sufficient).

190. Stewart v. Personnel Pool of Am., Inc., Civ. A. No. 92-2581, 1993 WL 525575, at *4, *9 (D.N.J. Dec. 16, 1993).

191. Chilson v. Baltimore Sun Co., Civ. A. No. HAR 92-1131, 1994 WL 150925, at *4 (D. Md. Feb. 8, 1994). *Chilson* belies any notion that plaintiffs can make out a prima facie case through evidence at their disposal before discovery. If the qualification issue at the prima facie case stage turns on the *employer's* perception, it seems obvious that the testimony and records of the employer will form a necessary part of this aspect of the prima facie case. For another example of a court expressly rejecting a weakened evidentiary standard at the prima facie case stage, see Stoval v. Pinkerton Sec., Inc., No. C93-1640 EFL, 1994 WL 125202 (N.D. Cal. Apr. 5, 1994) (rejecting a prima facie case based on the plaintiff's demonstration that he still met the minimum qualifications for the job as they were defined when he was hired).

192. See cases cited *infra* notes 193 to 196.

193. Brundage v. National Broadcasting Co., No. 90 Civ. 1730 (MBM), 1994 WL 68502 (S.D.N.Y. Mar. 2, 1994).

facie case requirement at all.[194] In others, the court examined the issue of "qualification" for prima facie case purposes on a diminished evidentiary standard.[195]

One of the promotion cases, *Profit v. Marriott Corp.*,[196] reflects a far more radical sidestepping of the McDonnell Douglas-Burdine structure. Profit, a black woman, was a hotel food service employee in a low-level position. She was supervised by a chef whose kitchen was segregated, who made clear that he did not want black women working in the kitchen, and who made race-based jokes, for example, that perhaps she could cook "soul food." She sought a promotion into a management position under the same chef, but was denied the position and was told to reapply after meeting attendance standards and improving her performance ratings from "average" to "above average." The court dutifully recited the McDonnell Douglas-Burdine framework. It then held that "the atmosphere at the Long Island Marriott was sufficiently infused with racial and gender bias" so that bias "may have infected plaintiff's lateness record" — and, one assumes, her performance level as well — thereby precluding summary judgment.[197] The court made no effort to relate this "infused atmosphere" to the stages of the McDonnell Douglas-Burdine analysis.

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194. LaPierre v. Benson Nissan, Inc., Civ. A. No. 92-3855, 1994 WL 149077 (E.D. La. Apr. 18, 1994); Lynch v. General Motors Corp., No. C.A. 90-11682-WF, 1994 WL 129573 (D. Mass. Feb. 18, 1994). In *LaPierre,* the court noted that "as to his qualifications for the position, plaintiff offers nothing other than his own self-serving assertions that he was qualified." 1994 WL 149077 at *3. Since this is a court that does not permit self-serving assertions to anchor a prima facie case, the court should have found that the plaintiff did not satisfy the prima facie case requirement. But the court did not so hold, nor did it assume the existence of a prima facie case arguendo or move to the pretext stage as the basis for an alternative holding. Instead, the court was simply silent on the question of the prima facie case, advancing instead to the pretext stage — at which point the qualifications issue was again dispositive. In *Lynch,* the court also skipped the prima facie case stage, despite the fact that the plaintiff's qualifications for the promotion were a key issue in the case.

195. Martin v. City College, No. 91 Civ. 7089 (KMW), 1994 WL 142038 (S.D.N.Y. Apr. 20, 1994); Sloan v. Boeing Co., Civ. A. No. 92-1014-MLB, 1994 WL 149197 (D. Kan. Apr. 1, 1994). In *Martin,* the plaintiff had qualified for the promotion on a probationary basis by taking a test. The court treated the successful test result as sufficient evidence of qualification for prima facie case purposes, despite the claim that the plaintiff's work while on probation was inadequate. *Martin,* 1994 WL 142038, at *1-2. In *Sloan,* the court stated the plaintiff's "qualifications" — his experience, technical skills, training — and held that these meant that "plaintiff was sufficiently qualified for the promotions to at least raise a prima facie inference." *Sloan,* 1994 WL 149197, at *11. It did so, however, without any specific reference to what qualifications were required *for the promotions at issue.* With no specified minimum "qualification" threshold to judge Sloan's accomplishments and skills against, the conclusion that Sloan was "qualified" for prima facie case purposes is best understood as a reduction of the evidentiary burden at the prima facie case stage.

196. No. 92 Civ. 2665 (JSM), 1994 WL 4272 (S.D.N.Y. Jan. 4, 1994).

197. 1994 WL 4272, at *3.

The chef's segregated kitchen and his racist and sexist comments are classic "pretext" evidence. In a strict rendering of McDonnell Douglas-Burdine, this evidence would not be material unless the plaintiff had made out a prima facie case.[198] Given the interdependency of all of the evidence, the court in *Profit* realized that it made no sense to come to any judgment about whether the plaintiff had satisfied the "qualification" requirement of the prima facie case. Instead, the court simply ignored McDonnell Douglas-Burdine altogether.

These cases demonstrate that to the limited extent that McDonnell Douglas-Burdine constrains district court decisionmaking on the issue of "qualifications" at summary judgment, it detracts from the district court's ability to understand the issue in all its complexity. If the district courts recite the McDonnell Douglas-Burdine proof structure but blend the prima facie case and pretext stages in practice, there is no purpose in requiring them to continue to recite the structure. Additionally, plaintiffs should not bear the risk that *their* district court — unlike the district court in *Profit* — will take McDonnell Douglas-Burdine at its word and strictly require them to prove "qualification" without recourse to "pretext" evidence.

2. *Evidence "Creating an Inference of Discrimination" at the Prima Facie Case Stage*

Some courts include in their statement of the prima facie case the independent requirement that the plaintiff prove "circumstances giving rise to an inference of discrimination."[199] That requirement clearly tends, in practice, to break down the distinction between the prima facie case and the pretext stage of the case.

Martin v. City College of New York[200] typifies this approach. In that case, Martin, a black male of West Indian origin, claimed that he was demoted by his supervisors, blacks of southern American ancestry, for failing to discipline employees of African, West Indian, and Latino descent who — in Martin's opinion — were doing satisfactory work. The evidence "giving rise to an inference of discrimination" was that Martin showed that he received negative performance evaluations only after he refused to discipline the employees. The court later found this evidence to be relevant to plain-

198. *See infra* text accompanying notes 226-27.

199. As already noted, *see supra* text accompanying notes 58-65, Justice Powell included in the *Burdine* definition of the prima facie case what I called a "stealth" requirement that the evidence be sufficient to "create an inference of discrimination."

200. *Martin*, 1994 WL 142038.

tiff's proof of pretext. This redundant use of evidence raises the question why there should be a division between prima facie and pretext "stages" of the case at all, once "circumstances creating an inference of discrimination" are included as part of the prima facie case standard.[201]

a. Comparative Evidence. It is not uncommon for summary judgment courts to require comparative evidence — evidence that the employer treated like cases differently — as a way of enforcing the requirement that the prima facie case "be sufficient to create an inference of discrimination." They do so despite the fact that McDonnell Douglas-Burdine does not by its terms require comparative evidence at all, let alone at the prima facie case stage.

The courts that have so required do not agree as to how to implement the requirement in practice. This uncertainty stems at least in part from the tendency of strict comparative-evidence requirements to break down formal distinctions between disparate treatment and pattern-and-practice cases, and between the prima facie and pretext phases of the disparate treatment case.

Some courts state a comparative-evidence standard but apply it without any cognizance of the function the requirement is supposed to serve. Take, for example, *Jackson v. Good Lad Co.*,[202] in which the court required a plaintiff in a reduction-in-force case to show that "her co-workers, who were not a minority [sic], were not discharged."[203] The court proceeded to find that requirement met, but later noted that of the ten other employees who were fired, six were white, two were hispanic, one was asian, and one was black. Obviously, some of her nonminority co-workers *were* fired. The court claimed to use comparative evidence to create an inference of discrimination, but the comparative evidence plainly did *not* support such an inference.

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201. Along the same lines, see, e.g., Saucier v. Edgewater Constr. Co., No. 92-CV-1111, 1994 WL 36363, at *7 (N.D.N.Y. Feb. 4, 1994) (noting at the prima facie case stage that "plaintiff has come forth with nothing to show that it was not her job performance, but rather that it was her race, which was a factor in [the employer]'s eventual decision to terminate her" — an inquiry that is identical to the question of pretext); Katzev v. Catholic N.Y., No. 92 CIV. 2664 (LMM), 1994 WL 23072 (S.D.N.Y. Jan. 24, 1994) (holding that evidence at prima facie case stage suggesting "membership in the protected class was a factor" includes sex-related comments of a type ordinarily considered at the pretext stage); Cianfrano v. Babbitt, 851 F. Supp. 41 (N.D.N.Y. 1994) (reciting prima facie case evidence establishing "circumstances surrounding [the] termination . . . from which a trier of fact could infer discrimination" that was essentially identical to the plaintiff's pretext evidence).

202. No. 93-2362, 1994 WL 156930 (E.D. Pa. Apr. 28, 1994).

203. 1994 WL 156930, at *2.

Other courts have required closer comparisons — often to the point of impossibility. In *Chilson v. Baltimore Sun Co.*,[204] the plaintiff was fired because of a combination of factors. The court required that her comparative evidence point to employees "who had the combination of excessive absenteeism, poor performance, and insubordinate conduct that she manifested."[205] The only comparative cases that the court "counted" were those that contained *all three* factors relied upon by the employer. Some courts require the match to be even closer. According to the court in *Magruder v. Runyon*,[206]

> the plaintiff must show that the "comparables" are similarly-situated *in all respects.* Thus, to be deemed "similarly-situated", the individuals must . . . have dealt with the same supervisor, have been subject to the same standards and have engaged in the same conduct without such differentiating or mitigating circumstances that would distinguish their conduct or the employer's treatment of them for it.[207]

Taken to the extreme, disparate treatment cases can become pattern and practice cases, and the "comparative" data must be statistically significant for a prima facie case to be established.[208]

Serious problems inhere in requiring the plaintiff to produce comparative data at the prima facie stage of the case. First, to the extent that the prima facie case purports to consist of factual elements logically *necessary* for proof of discrimination, a

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204. Civ. A. No. HAR 92-1131, 1994 WL 150925 (D. Md. Feb. 8, 1994).

205. 1994 WL 150925, at *4.

206. 844 F. Supp. 696, 702 (D. Kan. 1994), *affd.*, No. 94-3069, 1995 U.S. App. LEXIS 12291 (10th Cir. May 22, 1995).

207. 844 F. Supp. at 702 (citations omitted) (quoting Mitchell v. Toledo Hosp., 964 F.2d 577, 583 (6th Cir. 1992)).

208. A startlingly clear example of this approach, drawn from outside my district court case sample, is the opinion of Judge Posner for the Seventh Circuit in Bush v. Commonwealth Edison Co., 990 F.2d 928 (7th Cir. 1993):

> A plaintiff cannot establish a prima facie case of racial discrimination by showing that, in a large department, a coworker of another race was treated more favorably than . . . other coworkers of other races. Such a pattern, in which blacks sometimes do better than whites and sometimes do worse, being random with respect to race, is not evidence of racial discrimination. . . .
>
> Had [plaintiff's] counsel examined the work records of a random sample of Bush's coworkers during the period of his employment and found a statistically significant disparity between blacks and whites with respect to [defendant's] departing from its disciplinary norms whether in the direction of severity or leniency, Bush would have established a prima facie case of racial discrimination.

900 F.2d at 931-32. No case in my sample went this far. The closest was the court in Coulter v. City of Berkeley, No. C-92-5062 MHP, 1994 WL 28040 (N.D. Cal. Jan. 20, 1994), which rejected anecdotal evidence and required "a breaking out [of the] employees by race and gender in order to demonstrate that African American men were treated differently than other employees." 1994 WL 28040, at *4. The court held that, "[a]bsent such evidence, there can be no inference of discrimination." 1994 WL 28040, at *4. It was not clear whether a statistical analysis was intended.

comparative-evidence requirement does not fit. An employer faced with a unique set of facts, like a disciplinary violation or a performance-based problem that has never occurred before, might well make a decision to discharge or discipline a member of a protected group, and might well be influenced in significant part by that person's gender or minority-group status.[209] The same problem arises in the more typical case of an employee who has committed a unique combination of disciplinary infractions, or whose case involves considerations that the employer has not faced before in otherwise comparable cases.[210] In all of these cases, an absolute requirement of comparative data at the prima facie case stage would cut off potentially meritorious claims.

Second, a comparative-evidence requirement inevitably tends to break down the distinction between the prima facie case stage and the later stages of the case. Meaningful comparative data demands relevant comparisons. The most relevant comparisons relate to the alternative justifications that will be put in play through the evidence. McDonnell Douglas-Burdine requires the employer to put its evidence forward *only if* the plaintiff satisfies the prima facie case requirement. It makes no sense, then, to require the plaintiff to choose comparison cases based on their relevance to the employer's not-yet-"articulated" justification. It would make far more sense for courts to consider the presence or absence of good comparative data as part of a review of the evidence as a whole, as one

209. Suppose a new professor hires an African-American student as her first research assistant, and fires him because she is not satisfied with his performance. The decision to fire the research assistant rather than to try to teach him to do the job better might well be based on a race-specific premise that the student cannot be taught to perform at the level she expects of her research assistants. If comparative data were required in all cases, then the professor could not be found liable until she hired her first poorly performing white research assistant and worked with him to improve his performance in lieu of firing him — even if the student had ample "pretext" evidence of the professor's discriminatory attitudes.

210. One of the cases in my sample appears to be such a case. In Elie v. K-Mart Corp., 64 Fair Empl. Prac. Cas. (BNA) 957 (E.D. La. 1994), a pregnant worker requested light duty and was placed in a light-duty job that required evening and weekend work. Day-care problems made it impossible for her to work nights, and she was eventually fired for absenteeism. As part of a prima facie case, the court required that the plaintiff prove that she "suffered from differential application of work or disciplinary rules." 64 Fair Empl. Prac. Cas. (BNA) at 958. The employer came forward with cases of other, nonpregnant employees who *had* been given light-duty assignments for medical reasons that included night and weekend work. Apparently, none of these employees refused to work nights or weekends, and therefore none was fired. This doomed the plaintiff's case, because in the absence of refusals of night-weekend work, it was impossible to prove that nonpregnant employees received better treatment. The court seems to leave open the possibility of proof of a hypothetical negative: plaintiff was held to have failed to make out a prima facie case because no evidence had been presented to show that any non-pregnant employee who was assigned to a new schedule for medical reasons "*would not have been fired* had they refused to work their new schedules." 64 Fair Empl. Prac. Cas. (BNA) at 959 (emphasis added). But it is difficult to see how the hypothetical negative could be established.

among many types of evidence that can support a disparate treatment claim. This, however, requires side-stepping the formal requirements of the McDonnell Douglas-Burdine approach.

b. Replacement Evidence. Some courts require the plaintiff to prove as part of the prima facie case that the employer hired a person outside of the plaintiff's protected group in the plaintiff's stead. I will refer to this as an "outside-the-group replacement" requirement.[211] For a number of reasons, an outside-the-group replacement should not be viewed as a necessary element of proof of discrimination.

It is easy to envision circumstances in which discrimination can take place without the hiring of an outside-the-group replacement. Take the example of an employer in a low-skill, high-turnover business. Such an employer might decide, based on racial stereotypes, that black employees do not respond well to progressive discipline, and that it is more cost-effective to replace a black "bad apple" than to try to mend his ways.[212] Such an employer might not be in the position to satisfy its true preference for white workers, perhaps because white workers are not available at the wage the employer can afford to pay. Instead, the employer would routinely replace black employees with new black employees, on the discriminatory assumption that it is cheaper to improve the black workforce by using turnover than by using progressive discipline. In such a case, there would be discrimination — the decision to replace black employees rather than to use progressive discipline would be racially motivated — but there would be no outside-the-group replacement.

Employers can also discriminate by distinguishing *among* members of a protected group.[213] The facts of *McDonnell Douglas* pro-

211. In one such case in my sample, Emerson v. Boeing Co., Civ. A. No. 92-1279-MLB, 1994 WL 149191 (D. Kan. Apr. 1, 1994), the court went so far as to cite *McDonnell Douglas* incorrectly for the existence of this "non-protected replacement" requirement and to ignore contrary circuit precedent. *See Emerson,* 1994 WL 149191, at *3, *6 n.5.

212. For an excellent account of the attitudes of employers toward young black male workers, see Joleen Kirschenman & Kathryn M. Neckerman, *We'd Love To Hire Them, But . . . , in* THE URBAN UNDERCLASS 203 (Christopher Paul Jencks & P.E. Peterson eds., 1991); see also Note, *Invisible Man: Black and Male Under Title VII,* 104 HARV. L. REV. 749, 756-59 (1991).

213. The Supreme Court made allowances for certain types of "within-the-protected-group" discrimination claims in the "sex-plus" theory it articulated in Phillips v. Martin Marietta Corp. 400 U.S. 542 (1971) (holding that the refusal to hire women with pre-school age children constitutes impermissible sex discrimination, even though 75-80% of employees in the relevant position were women). But that theory has been sharply limited by the lower courts, *see, e.g.,* Willingham v. Macon Tel. Publishing Co., 507 F.2d 1084 (5th Cir. 1975) (rejecting the broad view that "sex-plus" theory extends to include discrimination among mem-

vide an example. Suppose that Green had been employed in an all-black job classification.[214] By custom and practice, his replacement would also have been black. Suppose, also, that the employer went out of its way to make sure that Green's replacement had no history of civil rights activity. When one employee in a protected group is replaced by another who has fewer of what the employer perceives as "bad" attributes of the group, a legal decision must be made as to whether the employer has violated Title VII. The attribute upon which the decision was based — political activity — purports to be racially "neutral."[215] If, however, one takes notice of the fact that the civil rights movement was centrally concerned with the rights of blacks, discrimination against civil rights activists can be viewed as a form of race discrimination.[216] Whatever the eventual conclusion, the issue should be resolved on its merits. It is inherently unsatisfying for fundamental definitional issues about the nature of discrimination to be decided through technical discussions of whether the McDonnell Douglas-Burdine prima facie case requires an "outside-the-group" replacement.[217]

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bers of the same sex on the basis of "any sexual stereotype"), and it is particularly difficult to apply in cases in which distinctions among members of a protected group are made in single-sex job classifications.

214. *Cf.* International Bhd. of Teamsters v. United States, 431 U.S. 324 (1977).

215. The neutrality would be lost, of course, if the employer readily rehired *white* civil rights activists, or dealt with Klan saboteurs more leniently than with civil rights saboteurs.

216. For the argument that discrimination against traits or behaviors that are culturally linked to membership in a protected group constitutes discrimination against the group, see, e.g., Paulette M. Caldwell, *A Hair Piece: Perspectives on the Intersection of Race and Gender*, 1991 DUKE L.J. 365 (commenting on braided hair styles for black women); Juan F. Perea, *Ethnicity and Prejudice: Reevaluating "National Origin" Discrimination Under Title VII*, 35 WM. & MARY L. REV. 805 (1994) (arguing generally for the protection of ethnic traits under the rubric of national origin discrimination). *But see* Hazen Paper v. Biggins, 113 S. Ct. 1701 (1993), *dicussed at supra* note 123.

217. Indeed, for similar reasons, it makes little sense to have an absolute requirement, as *McDonnell Douglas* itself demanded, that the plaintiff demonstrate that the employer continued to seek a replacement. It is not uncommon for employers to announce a new position, only to withdraw the announcement when no "suitable" applicants come forward. Suppose an employer who has a taste for discrimination decides to fire a black secretary, and the employer needs to decide whether to seek a replacement. The employer has decided that he can afford to pay $6.00 an hour, which is low for the secretarial market. Suppose that the employer knows from experience that the only qualified applicants who come forward for secretarial jobs at that wage are members of minority groups. The employer has a choice — raise the wage to a level high enough to clear the market for white workers, say, $8.00 an hour, or do without a secretary by substituting capital for labor: for example, by buying a computer or an answering machine. If the capital-substitution strategy is cheaper than paying the market-clearing wage for white workers, then the employer will decide against posting the job, and will have done so for discriminatory reasons. Why, then, require the fired black employee to prove that the employer kept seeking applicants?

Nor should courts permit the fact that the employer has decided to seek applicants with higher qualifications than the plaintiff's to defeat the claim as a matter of law. An employer might well decide, in the above hypothetical, that he would prefer to go up to $8.00 an hour, but will do so only if he can restructure the job so that fewer black applicants will be likely to

The ready response is that these hypotheticals describe rare circumstances, and that discriminatory employers *will* usually hire an outside-the-group replacement. The ready response, however, does not satisfy. If the prima facie case requires an outside-the-group replacement, and the McDonnell Douglas-Burdine structure applies, plaintiffs replaced by members of their own group lose at summary judgment, regardless of the quality of their pretext evidence. Special proof structures should not prevent plaintiffs from attempting to prove difficult cases and they should not have to rely on the willingness of the district courts to deviate from the "outside-the-group" replacement rule only in seemingly meritorious cases.

c. The "Special Circumstance" of Reverse Discrimination. In the name of requiring plaintiffs to prove special circumstances giving rise to an inference of discrimination, courts often place heightened proof burdens on the prima facie case in reverse discrimination cases.[218] For example, in *Sloan v. Boeing Co.*,[219] the court stated that absent direct evidence, the white male plaintiff must, at the prima facie case stage, "establish background circumstances that support an inference that the defendant is one of those unusual employers who discriminates against the majority,"[220] or, alternatively, prove that the employer would have treated plaintiff differently if plaintiff had not been a member of the dominant group. We find another version of a heightened standard in *Switzer*

satisfy the job's requirements. If the employer, suspecting or knowing that blacks are underrepresented among graduates of secretarial schools, relists that job with a secretarial-school requirement, and can be proven to have done so for discriminatory reasons, there is no reason why the plaintiff should not be permitted to proceed with her proof.

218. By reverse discrimination cases, I mean cases in which white (or male) plaintiffs claim that they are victims of race (or sex) discrimination. Some courts do not impose heightened requirements in such cases. In Cianfrano v. Babbitt, 851 F. Supp. 41 (N.D.N.Y. 1994), a reduction-in-force case, for example, the court stated it to be the view in the Second Circuit that the "plaintiff's burden at the prima facie stage [is] *de minimis*" and found "circumstances . . . from which a trier of fact could infer discrimination" from the fact that plaintiff had good performance evaluations, that his supervisor thought he was a "problem," and that a minority employee at a lower job grade was kept on the payroll. 851 F. Supp. at 46-47. No mention was made of any special requirement for reverse discrimination cases at the prima facie case stage.

219. Civ. A. No. 92-1014-MLB, 1994 WL 149197 (D. Kan. Apr. 1, 1994).

220. 1994 WL 149197, at *5 (quoting Notari v. Denver Water Dept., 971 F.2d 585, 589 (10th Cir. 1992)). Interestingly, the Tenth Circuit presents this requirement as a modification of the prima facie case requirement that the plaintiff prove her membership in a protected group. This is odd, given that whites are members of a "protected group" under Title VII: Title VII protects against discrimination on the basis of race, rather than protecting members of specific historically oppressed races. MacDonald v. Santa Fe Trail Transp., 427 U.S. 273 (1976).

v. Texas Commerce Bank.[221] There, the court required the plaintiff to prove both that he was replaced by a black man and that whites were a minority in his company within his own job classification.

As in the case of outside-the-group replacement requirements, these courts dealt with issues formalistically, obscuring rather than enlightening the discussion of the nature of discrimination. What is interesting about both *Sloan* and *Switzer* is that they involved employees for whom racial issues were undeniably present in the situations leading up to their discharge. In *Sloan,* the plaintiff claimed that the employer feared and therefore favored a litigious black female employee, and that he was discharged for imposing on her the discipline she deserved.[222] In *Switzer,* the employer fired the plaintiff in part because of his racially insensitive comments, including joking references to the Ku Klux Klan as a community organization and a memo suggesting that "inner city minorities" had difficulty dealing with breakdowns in the bank's automated systems.[223] The real question in these cases is whether firing white employees for speaking or acting on the basis of what the employer finds to be racist views *(Switzer)* or for refusing to go along with what the employees perceive to be improper racial preferences *(Sloan)* constitutes discrimination against them on the basis of race. So long as courts decide cases on the basis of McDonnell Douglas-Burdine formalism, this question is never even asked.

Reliance on the McDonnell Douglas-Burdine approach may also lead courts to miss racial issues that appear in more subtle forms. In *Wolfenbarger v. Boeing Co.,*[224] the employer fired the white plaintiff for filing a false police report against his white lead man. The plaintiff alleged reverse discrimination despite the fact that the supervisor who fired him was of his own race. He contended that he filed the false report in retaliation for consistent harassment engaged in jointly by his white lead man and his litigious black union steward. He claimed that the reason the employer failed to stop the harassment was its fear that the black steward would accuse the employer of race discrimination if it took any action against him, and that the employer's failure to act prompted him to retaliate by filing the false report. The court held that since the black steward was not involved in the false-report incident, the race of the steward and the employer's alleged favoritism toward

221. 850 F. Supp. 544, 548 (N.D. Tex.), *affd. without opinion,* 42 F.3d 642 (5th Cir. 1994).

222. 1994 WL 149197, at *5.

223. 850 F. Supp. at 546, 548.

224. Civ. A. No. 92-1117-MLB, 1994 WL 149187 (D. Kan. Apr. 1, 1994).

him were irrelevant to the case. In so doing, the court took a narrow view of the circumstances that can create an inference of reverse discrimination by insisting that black-white conflict be the immediate cause of the conduct leading to the white plaintiff's discharge. What the plaintiff attempted to demonstrate was a more subtle causal relationship between the employer's racially based refusal to stop the harassment and his own ill-targeted — and illegal — act of retaliatory self-help. The question whether an employer's racially motivated refusal to discipline an employee can be the basis for liability when it contributes to the escalation of conflict between black and white employees is surely a difficult one. Again, the court's narrow application of its heightened prima facie case requirement for reverse discrimination cases fails to move the court toward an answer to that substantive question.

Reverse discrimination cases are not the only cases that present fact patterns that do not fit the McDonnell Douglas-Burdine mold. Structurally, the *Wolfenbarger* case resembles *Profit v. Marriott Corp.*, the case of a kitchen worker seeking a promotion from a racist chef.[225] The court in *Profit* recognized that it could not look at the plaintiff's performance evaluations as if they stood alone in time and space, uninfluenced by the racist atmosphere of the kitchen. The court in *Wolfenbarger* failed to recognize that the plaintiff's filing of a false police report must not be viewed in isolation, but must instead be seen as the culmination of a story in which racial fears and favoritism were alleged to play a central role. The McDonnell Douglas-Burdine structure threatened to stand in the way of understanding in *Profit.* It succeeded in *Wolfenbarger.*

3. *The Legal Consequences of a Failed Prima Facie Case*

Under contemporary summary judgment practice, a defendant can challenge the sufficiency of the plaintiff's evidence regarding any required element of the plaintiff's cause of action. In the conventional application of summary judgment principles to McDonnell Douglas-Burdine cases, the prima facie case is treated as a required "element" of the case, and the plaintiff's failure to create a genuine issue of material fact as to the existence of a prima facie case entitles the defendant to summary judgment.[226] Furthermore,

225. No. 92 Civ. 2665, 1994 WL 4272 (S.D.N.Y. Jan. 4, 1994); *see supra* text accompanying notes 196-98.

226. Some courts have held that all a plaintiff needs to do to *resist* summary judgment is to create a genuine issue of material fact as to the existence of a prima facie case. *See, e.g.*, Hairston v. Gainesville Sun Publishing Co., 9 F.3d 913, 921 (11th Cir. 1993); Hillebrand v. M-Tron Indus., 827 F.2d 363, 364-65 (8th Cir. 1987), *cert. denied*, 488 U.S. 1004 (1989); Lowe v.

the prima facie case is not simply one "element" among many. The prima facie case is given priority: McDonnell Douglas-Burdine calls for a hierarchized approach to the evidence, with the prima facie case as primary. Only if the prima facie case is proved does the plaintiff's pretext evidence become relevant.[227]

For all the reasons discussed thus far, however, it should come as no surprise that despite the hierarchized approach called for by McDonnell Douglas-Burdine, district courts are at times reluctant to predicate the grant of summary judgment on the plaintiff's failure to make out a prima facie case. District courts will often rule on the inadequacy of the plaintiff's *pretext* evidence, *without* having first determined that the plaintiff has made out a prima facie case.[228] In some of these cases, the court assumes without deciding that a prima facie case has been made, and goes on to hold the plaintiff's pretext evidence too weak to survive summary judgment.[229] This is most likely to happen when the case raises novel

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City of Monrovia, 775 F.2d 998, 1009 (9th Cir. 1986). But that view is inconsistent with the basic rules of summary judgment practice.

If the employer makes a properly supported summary judgment motion, the plaintiff has the burden of showing the existence of a genuine issue of material fact on each element of the case on which the plaintiff has the burden of proof at trial. Under McDonnell Douglas-Burdine, the plaintiff has the burden of proving both the prima facie case and pretext. *See infra* text accompanying notes 226-27. Even under the rule sought by the plaintiff in *Hicks*, the plaintiff would have the burden of proving pretext. The only difference would be that the plaintiff's pretext burden would be met on summary judgment by evidence that did no more than create a genuine issue as to the truthfulness of the employer's stated justification. Accordingly, it is not surprising to see that most courts have held that the plaintiff cannot survive summary judgment merely by creating a genuine issue of material fact as to the existence of a prima facie case, but must also create a genuine issue of material fact as to pretext. Thus, the plaintiff's "payoff" for having made out a prima facie case is not great at summary judgment. *See, e.g.*, Goldman v. First Natl. Bank, 985 F.2d 1113, 1118 & n.4 (1st Cir. 1993); White v. McDonnell Douglas Corp., 985 F.2d 434, 436 (8th Cir. 1993); White v. Houston Indep. Sch. Dist., 815 F. Supp. 1016, 1018 (S.D. Tex. 1993) ("[I]n the context of a summary judgment proceeding, plaintiff is required at least to raise a genuine issue of fact regarding pretext."). The exception, of course, is the case in which the employer's summary judgment motion is *limited* to the claim that the plaintiff has failed to make out a prima facie case.

227. So, for example, if the plaintiff has an effective challenge to the employer's stated ground for its action, and also has evidence of racist statements by the employer about other employees and of a statistical pattern of discrimination, an inflexible adherence to the McDonnell Douglas-Burdine proof structure would hold that evidence irrelevant if there is insufficient support for the required elements of the prima facie case. This example is to be distinguished from a case in which the plaintiff has "direct evidence" of discrimination — in which case, the plaintiff is not required to proceed under the McDonnell Douglas-Burdine proof structure at all. *See* Trans World Airlines, Inc. v. Thurston, 469 U.S. 111 (1985). For a discussion of "direct evidence," see *infra* note 290.

228. *See, e.g.*, Elie v. K-Mart Corp., No. Civ. A. 93-2362, 1994 WL 50250 (E.D. La. Feb. 11, 1994); Coulter v. City of Berkeley, No. C-92-5082 MHP, 1994 WL 28040 (N.D. Cal. Jan. 20, 1994).

229. *See, e.g.*, Jackson v. Good Lad Co., No. 93-2362, 1994 WL 156930 (E.D. Pa. Apr. 28, 1994); MacFarland v. Corestates Bank, N.A., No. Civ. A. 92-6985, 1994 WL 70005 (E.D. Pa.

issues at the prima facie case stage, but can be disposed of conventionally by shifting focus to the pretext stage.[230] More frequently, the court finds that the plaintiff has failed to make out a prima facie case, but goes on to hold in the alternative that the defendant would be entitled to summary judgment on the issue of pretext.[231]

There are two possible explanations for the district courts' propensity to evaluate all of the evidence, at least in cases that show signs of merit.[232] One is purely pragmatic. The district courts may simply be inclined to resolve summary judgment motions in the manner that makes it most likely that their judgments will survive appellate review. If difficult legal issues arise at the prima facie case stage or if the prima facie case evidence is close to the sufficiency line, it is far easier for a court to examine all the evidence than to follow the McDonnell Douglas-Burdine hierarchized approach and risk reversal.

The other possible reason is both more conceptual and more fundamental. I have demonstrated the Supreme Court's long-

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Feb. 28, 1994); Panis v. Mission Hills Bank, N.A., Civ. A. No. 92-2391-EEO, 1994 WL 185984 (D. Kan. Apr. 5, 1994), *affd.*, No. 94-3132, 1995 WL 456215 (10th Cir. July 31, 1995).

230. In *MacFarland,* the question avoided was whether discrimination against a woman returning from maternity leave counts as pregnancy discrimination. *MacFarland,* 1994 WL 70005, at *5. In *Panis,* the plaintiff was a female bank officer whose husband, a bank officer at another bank, was indicted for fraud; plaintiff was then fired because of the risk that customers would lose confidence in *her* bank because of her marriage. The court assumed a prima facie case arguendo, thereby avoiding the question of whether woman fired because of her husband's misconduct is a member of a protected class for Title VII purposes. *Panis,* 1994 WL 185984, at *9.

231. *See, e.g.,* Barth v. CBIS Fed., Inc., 849 F. Supp. 864 (E.D.N.Y.), *affd. mem.,* 43 F.3d 1458 (2d Cir. 1994); Mukherjee v. Sheraton Palace Hotel, No. C-93-2905 DLJ, 1994 WL 173889 (N.D. Cal. Apr. 18, 1994), *affd. per curiam,* No. 94-15876, 1995 WL 11101 (9th Cir. Jan. 10, 1995); Emerson v. Boeing Co., No. Civ. A. 92-1279-MLB, 1994 WL 149191 (D. Kan. Apr. 1, 1994), *affd. per curiam,* No. 94-3125, 1995 WL 265932 (10th Cir. May 8, 1995); Stinneford v. Spiegel, Inc., 845 F. Supp. 1243 (N.D. Ill. 1994); Magruder v. Runyon, 844 F. Supp. 696 (D. Kan. 1994), *affd.,* No. 94-3069, 1995 WL 311740 (10th Cir. May 22, 1995); Chilson v. Baltimore Sun Co., No. Civ. A. HAR 92-1131, 1994 WL 150925 (D. Md. Feb. 8, 1994); Katzev v. Catholic N.Y., No. 92 Civ. 2664 (LMM), 1994 WL 23072 (S.D.N.Y. Jan. 24, 1994); Edwards v. Interboro Inst., 840 F. Supp. 222 (E.D.N.Y. 1994).

232. For evidence that practitioners are fully aware that the courts often balance the evidence even when they state their findings in McDonnell Douglas-Burdine terms, see Stephen Forman & V. Daniel Palumbo, *Summary Judgment in Employment Cases: Is the Trilogy Taking Hold?, in* A.L.I.-A.B.A. COURSE OF STUDY: ADVANCED EMPLOYMENT LAW AND LITIGATION, (1989), *available in* WESTLAW, C463 ALI-ABA 35, at *54.

> [C]ourts are engaging in a balancing act, weighing the evidence that a plaintiff puts forward in his or her prima facie case together with any evidence of pretext against the strength of the articulated legitimate reason for the job action and its accompanying support. The stronger the evidence submitted to establish a prima facie case, or the weaker the articulated reasons for the job action, the more likely the court will accept evidence as showing pretext. Where evidence of the prima facie case is weak or the articulated reasons for the job action are strongly supported, a court will be less likely to accept evidence as establishing pretext.

Id.

standing inability to agree on a prima facie case standard that adequately distinguishes between cases in which an inference of intentional discrimination can and cannot reasonably be drawn. I have also shown how difficult it has been for the district courts to use the McDonnell Douglas-Burdine prima facie case standard. In light of these abiding problems, it would be an act of misplaced concreteness to permit the failure to prove a prima facie case to bear great legal weight. The district courts are in the best position to be aware of the limits of the McDonnell Douglas-Burdine prima facie case. Their willingness to ignore McDonnell Douglas-Burdine in practice may be our best evidence of that awareness.

The district courts' willingness at times to consider all the evidence on a motion for summary judgment despite the McDonnell Douglas framework does not mean that the McDonnell Douglas-Burdine prima facie case requirement is a "wash," a legal rule that is hapless but harmless. As the previous section shows, the McDonnell Douglas-Burdine structure can impoverish courts' understanding of the evidence, and decrease the likelihood that courts will recognize the novel legal issues about the nature of discrimination that are so often presented by the evidence even in seemingly routine cases. Furthermore, the district courts may be prepared to "cheat" by considering pretext evidence to bolster a weak prima facie case only in what they perceive to be extraordinary cases, leaving many other potentially meritorious claims in the grasp of strict application of the contrary rule. That is a risk not worth taking.

B. *The Employer's Rebuttal on Summary Judgment*

In the McDonnell Douglas-Burdine proof structure, the "rebuttal" or "intermediate" stage of the case occurs after the plaintiff has proved a prima facie case. The employer must then "articulate" a "legitimate, nondiscriminatory reason" for the adverse employment action.[233] If the employer fails to do so, the plaintiff wins as a matter of law.[234] *Hicks* holds that the employer's rebuttal consists of *all* of the evidence of record that tends to support legitimate, nondiscriminatory reasons for the adverse decision. *Hicks* thereby collapses the "rebuttal case" into the case as a whole.[235] But because *Hicks* nominally continues to use the McDonnell Douglas-Burdine

233. Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248, 254 (1981).

234. *Burdine,* 450 U.S. at 254.

235. Indeed, it might very well be that the plaintiff will include evidence of the employer's "official" justification in his or her initial presentation of the evidence at trial, as the

three-part proof structure, post-*Hicks* summary judgment courts still speak in terms of the employer's bearing a distinct burden at a "rebuttal" stage of the case.[236]

Two recent Supreme Court cases make clear that the employer's intermediate burden is so light as to be trivial. The Court held in *Hazen Paper Co. v. Biggins* that the employer can rely on a reason that is illegal under another body of law.[237] The Court also held in *Purkett v. Elem*[238] that even a facially "implausible," "silly," "fantastic," or "superstitious" reason meets the rebuttal burden.[239] The

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predicate for introducing evidence to disprove it — meaning that the first the factfinder hears of the employer's "stated reason" might well be from the plaintiff's witnesses.

236. Whether an employer even needs to meet this intermediate burden in its summary judgment motion depends on the breadth of the employer's attack on the plaintiff's case. An employer moving for summary judgment solely on the basis of identified inadequacies in the plaintiff's prima facie case need not make a rebuttal case at all, because the rebuttal requirement is imposed only once the plaintiff proves a prima facie case. *See, e.g.*, Torre v. Federated Mut. Ins. Co., 854 F. Supp. 790 (D. Kan. 1994); Taylor v. Cummins Atl., Inc., 852 F. Supp. 1279 (D. S.C. 1994), *affd. per curiam on other grounds*, No. 94-1596, 1995 WL 88957 (4th Cir. Mar. 6, 1995), *petition for cert. filed*, 64 U.S.L.W. 3069 (U.S. July 3, 1995) (No. 95-55) (finding for defendant when summary judgment motion challenged only the adequacy of the prima facie case); Dibiase v. Smithkline Beecham Corp., 847 F. Supp. 341 (E.D. Pa. 1994), *revd. on other grounds*, 48 F.3d 719 (3d Cir. 1995); Direnzo v. General Elec. Co., No. Civ. A. 92-6177, 1993 WL 534227 (E.D. Pa. Dec. 23, 1993) (deciding case on summary judgment for the employer at the prima facie case stage, with no discussion of rebuttal at all). Only if the employer's motion includes an *overall* challenge to the plaintiff's ability to prove intentional discrimination must the employer's motion meet the rebuttal requirements of McDonnell Douglas-Burdine.

It is exceedingly rare for an employer to fail to satisfy its intermediate burden on summary judgment. Only one case in my sample involved such a failure, and it was a case of a sloppy attorney meeting a punctilious court. *See* Dickson v. Amoco Performance Prods., Inc., 845 F. Supp. 1565 (N.D. Ga. 1994). Moreover, the consequences of failure are mild. When the employer moves for summary judgment and fails to make out its rebuttal case for purposes of summary judgment, the result is *not* judgment as a matter of law for the plaintiff. It is merely the denial of summary judgment — perhaps without prejudice to the filing of a future motion that does a better job of jumping through the hoops. That possibility was offered to the defendant in *Dickson*, but no subsequent decision is reported. 845 F. Supp. at 1571. Of course, if the *plaintiff* were to move for summary judgment on the ground that the evidence is insufficient to permit the employer to meet its rebuttal burden, the story would be different. But the rebuttal burden at trial is sufficiently light that such motions are rarely, if ever, filed.

237. 113 S. Ct. 1701 (1993). In *Hazen Paper*, the plaintiff used as evidence of age discrimination the fact that he was in close proximity to fully vesting in his pension at the time he was fired. Discrimination against employees because of their proximity to vesting is a violation of § 510 of ERISA. The Court stated that the pension and age discrimination claims were not identical, and in so doing the Court explained that a motivation that is unlawful under § 510 could nonetheless constitute a "legitimate" reason for purposes of McDonnell Douglas-Burdine. 113 S. Ct. at 1707. For additional discussion of *Hazen Paper*, see *supra* note 123.

238. 115 S. Ct. 1769 (1995).

239. In teaching, I use the examples of an employer who fires an employee because she reminds him of his mother and of an employer who fires an employee because his astrologer tells him to do it. In *Purkett*, it was the fact that a prospective juror had a mustache and beard and therefore "looked suspicious." *Purkett* arose not under Title VII, but under the Court's peremptory challenge jurisprudence. In Batson v. Kentucky, 476 U.S. 79 (1986), the Court adopted McDonnell Douglas-Burdine analysis as the method of proof in peremptory

Supreme Court's cases presently constrain the employer's justification in only two ways. The employer cannot rely on a reason that facially violates the statute under which the plaintiff has sued,[240] and the employer cannot meet its intermediate burden with after-acquired evidence.[241]

Purkett and *Hazen Paper* point toward the resolution of the one rebuttal-stage question that emerged from my sample of district court cases: whether an employer can rely on a "legitimate, discriminatory reason" that was factually ill-founded. A typical example is *Emerson v. Boeing Co.*,[242] where the employer discharged the plaintiff for sexually harassing co-employees, and the plaintiff sought to prove at the rebuttal stage of the case that the charge of harassment was false. Another example is *Stein v. New York State Department of Motor Vehicles*,[243] where the plaintiff entered a guilty plea to charges of making personal telephone calls on his employer's phone line and allegedly was fired for the same offense,

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challenge cases. There is every reason to think that the Court will extend its holding in *Purkett* to the employment discrimination context. Indeed, the *Purkett* Court relied on *Hicks* as its sole authority for the following key passage:

> At [the third and final] stage, implausible or fantastic justifications may (and probably will) be found to be pretexts for purposeful discrimination. But to say that a trial judge may choose to disbelieve a silly or superstitious reason at step 3 is quite different from saying that a trial judge must terminate the inquiry at step 2 when the race-neutral reason is silly or superstitious. The latter violates the principle that the ultimate burden of persuasion regarding racial motivation rests with, and never shifts from, the opponent of the strike.

115 S. Ct. at 1771.

In assessing whether criticisms of McDonnell Douglas-Burdine in employment discrimination cases are relevant to *Batson* cases, it is important to note the very significant differences between the two types of cases. *Batson* cases have no pretrial phase: no pleading, no discovery, no pretrial memoranda. They therefore present none of the usual methods for "smoking out" evidence and narrowing disputed issues. For that reason alone, it is dangerous to simply transfer doctrine from the one setting to the other. But that has not stopped courts from doing so.

240. The defendant in a race discrimination suit could not state a reason that is facially racially discriminatory, for example. It is unclear, however, whether a race-discrimination defendant could point to *sex* discrimination as the reason for its actions in a case in which the plaintiff failed to include a charge of sex discrimination in her EEOC charge and is therefore procedurally barred from amending her pleadings to include allegations of sex discrimination.

241. McKennon v. Nashville Banner Publishing Co., 115 S. Ct. 879 (1995). In "after-acquired evidence" cases, the employer presents as a "legitimate, nondiscriminatory" reason a justification for the adverse decision that it only discovered after the decision was made. But courts are instructed to consider the after-acquired evidence in fashioning remedies. 115 S. Ct. at 885-86. For an argument that after-acquired evidence should not be considered at the remedial stage of the case, see Cheryl Krause Zemelman, Note, *The After-Acquired Evidence Defense to Employment Discrimination Claims: The Privatization of Title VII and the Contours of Social Responsibility*, 46 STAN. L. REV. 175 (1993).

242. No. Civ. A. 92-1279-MLB, 1994 WL 149191 (D. Kan. Apr. 1, 1994), *affd. per curiam*, No. 94-3125, 1995 WL 265932 (10th Cir. May 8, 1995).

243. 841 F. Supp. 42 (N.D.N.Y. 1993), *affd. mem.*, 54 F.3d 766 (2d. Cir. 1995).

and the plaintiff wanted to prove in his Title VII case that he was innocent of the criminal charge.

After *Purkett* and *Hazen Paper,* it is clear that the Court would conclude that the employer's reason would satisfy the employer's intermediate burden notwithstanding the plaintiff's offer to prove the defendant wrong. Indeed, *Burdine* and *Hicks* signal the same result. *Burdine* holds that it is inappropriate at the rebuttal stage to ask whether the employer actually relied on its stated reason.[244] It would seem equally inappropriate at the rebuttal stage to get at that same question by asking whether the employer based its decision on sufficient facts. *Hicks* demonstrates that McDonnell Douglas-Burdine distinguishes between *wrongful dismissals* and *discriminatory dismissals.*[245] In this view, the *actual* truth or falsehood of the employer's accusation relates to the question of liability only indirectly. If the employer makes a race-blind or gender-blind decision on the basis of incorrect information, the result is arbitrariness, not discrimination — *unless* the employer had a discriminatory reason (conscious or unconscious) for being willing to act on incorrect information.[246] Whether the employer had a discriminatory motive is quintessentially an inquiry for the final stage, rather than the rebuttal stage, of the case.

Despite the clear signals that the correctness and good faith of the employer's stated justification should be examined at the final stage of the case rather than at the rebuttal stage, the district court cases in my sample do not consistently follow this rule.[247] The reluctance of some district courts to embrace the inevitable is not surprising. It makes perfect sense to resist the application of doctrines that rob the rebuttal stage of the McDonnell Douglas-Burdine inquiry of any real meaning.

C. *The Pretext Stage on Summary Judgment*

The *Hicks* decision focused on interpreting the "pretext stage" — in other words, the final stage — of the McDonnell Douglas-Burdine proof structure. *Hicks* stands for the proposition that the

244. *See Burdine,* 450 U.S. at 248.

245. The question always lurks, however, whether the employer would have been as sloppy in its investigation had a white employee been accused of harassment.

246. *See* Lawrence, *supra* note 7.

247. The courts in my sample are divided as to whether "good faith" is an issue for the rebuttal stage or the pretext stage of the case. The court in *Emerson,* deals with the issue at the rebuttal stage of the case. *Emerson,* 1994 WL 149191, at *3-*4. For the courts in Sloan v. Boeing, No. Civ. A. 92-1014-MLB, 1994 WL 149197 (D. Kan. Apr. 1, 1994), and *Stein,* 841 F. Supp. at 42, the issue is one for the pretext stage.

plaintiff who does no more at the pretext stage than show that the defendant's explanation is "not worthy of credence" is not entitled to judgment as a matter of law. But *Hicks* has left the courts in complete disarray as to what the plaintiff needs to do to prove pretext and, in particular, what the plaintiff needs to do to resist a motion for judgment as a matter of law on the issue of pretext.

1. *The Availability of Summary Judgment at the Pretext Stage*

Some courts read *Hicks* as casting doubt on whether an employer can *ever* obtain summary judgment once a case reaches the pretext stage.[248] This uncertainty stems from the Court's repeated statements in *Hicks* that once the case reaches the pretext stage, the trier of fact must decide the question of intentional discrimination.[249] In *Hicks,* however, the Court made these statements in the context of a fully tried case. It was the plaintiff who wanted judgment as a matter of law, in order to stop the factfinder from considering the full range of the evidence, including evidence undercutting the inference of intentional discrimination. The Court said only that this effort to block consideration of all the evidence must fail. The Court did not purport to limit the availability of summary judgment to *either* party upon consideration of *all* of the evidence relevant to pretext. Indeed, the Court stressed in *Hicks* that once a McDonnell Douglas-Burdine case reaches the pretext stage, it is to be treated like any other civil case. Nothing in *Hicks* remotely suggests that the Court is of the general view that questions of intent cannot be resolved through summary judgment.

2. *Evaluating Pretext Evidence*

The Court in *Hicks* stated that once the employer meets its rebuttal burden, the only remaining issue in the case is whether the plaintiff has proved intentional discrimination by a preponderance of all the evidence. For a court evaluating a paper record on a defense motion for summary judgment, the closely related question is whether the evidence of discrimination is sufficient to permit a reasonable factfinder to reach a pro-plaintiff verdict. These would

248. Saucier v. Edgewater Constr. Co., No. 92-CV-1111, 1994 WL 36363, at *6 (N.D.N.Y. Feb. 4, 1994); Moisi v. College of the Sequoias Community College Dist., 25 Cal. Rptr. 2d 165 (Ct. App. 1993).

249. *See, e.g., Saucier,* 1994 WL 36363, at *4 n.11 ("Thus it appears at first glance that perhaps this final part of the Hicks analysis does not come into play on a summary judgment motion where the court is deciding issues as a matter of law and not resolving factual issues."); *see also Moisi,* 25 Cal Rptr. 2d at 172 (embracing view that *Hicks* means that employers cannot get summary judgment once the case reaches the pretext stage).

seem to be questions about evidentiary standards for factfinders and summary judgment courts, questions that have little to do with the McDonnell Douglas-Burdine proof structure. But post-*Hicks* debate on proof of discrimination at the pretext stage of the case has been cast not in terms of generally applicable norms of evidentiary sufficiency, but instead in the formal terms of McDonnell Douglas-Burdine.[250] Stated in the language of McDonnell Douglas-Burdine, the debate turns on the legal significance of the "combined evidence" — that is, of the plaintiff's proof of a prima facie case and disproof of the employer's stated explanation.

Several answers to this question are possible after *Hicks*. One might hold that the factfinder always has the discretion to find intentional discrimination on the basis of the "combined evidence" — and that as a result the "combined evidence" is sufficient as a matter of law to resist summary judgment — but that the inference of intentional discrimination is merely *permissive*. I shall call this the "judgment for plaintiff always permitted" position. Alternatively, one might conclude that the "combined evidence" is strong enough to support a permissive inference of discrimination — and to defeat summary judgment — only in *some circumstances*. I shall call this the "judgment for plaintiff sometimes permitted" position. For example, one might conclude that the factfinder is permitted to draw the pro-plaintiff inference only if it is convinced that the employer's stated reason was a lie, but not if it believes that the employer merely failed to prove its case. Finally, one might conclude that the "combined evidence" standing alone is *never* sufficient to resist summary judgment — the "judgment for defendant required" position.[251]

250. Here is a sampling of the questions courts in my sample have asked: Is "disbelief of defendants' articulated reason coupled with [the] prima facie case . . . enough to allow the factfinder to draw the inference of discrimination"? Jackson v. Good Lad Co., No. 93-2362, 1994 WL 156930, at *3 (E.D. Pa. Apr. 28, 1994). Can the plaintiff at the pretext stage rely on a "restatement of her prima facie case"? MacFarland v. Corestates Bank, N.A., No. Civ. A. 92-6985, 1994 WL 70005, at *6 (E.D. Pa. Feb. 28, 1994). Or must the plaintiff "put forth affirmative evidence" of intentional discrimination? Stinneford v. Spiegel, Inc., 845 F. Supp. 1243, 1247 (N.D. Ill. 1994). When an employer has identified specific reasons for the employee's discharge, is the plaintiff permitted to introduce pretext evidence that does not respond to the employer's identified reasons? *See* Birks v. First Evergreen Corp., No. 92 (6589), 1994 WL 36884, at *3 (N.D. Ill. Feb. 8, 1994); Stewart v. Personnel Pool of Am., Inc., Civ. A. No. 92-2581, 1993 WL 525575, at *6 & n.5 (D.N.J. Dec. 16, 1993), *affd. mem*, 30 F.3d 1488 (3d Cir. 1994).

251. The leading study of the legal issue described here adopts the vocabulary of "pretext only" and "pretext plus" to describe the positions taken by the courts. *See* Lanctot, *supra* note 23. I decline to use this vocabulary because (a) it begs the question of what "pretext" means in legal terms, and (b) it fails to distinguish between important variants of the polar positions. *See, e.g., id.* at 116-17 (in describing the "pretext-only" position, failing to distinguish between what I call the "judgment for plaintiff always permitted" position and the

The circuits have not come to agreement on this issue,[252] and the Supreme Court will inevitably need to resolve it. It is not my goal to advocate for the adoption of one or another of the rival possible positions. It is, instead, to show that the reasons for the confusion are fundamental ones, and that reliance on McDonnell Douglas-Burdine obscures rather than enlightens the evaluation of the evidence.

Let us begin by posing three situations in which the question might arise. In the first situation, the "combined evidence" stands alone. In the second situation, the "combined evidence" is supplemented with reasonably persuasive additional evidence that tends to support the employer's denial of discrimination. In the last situation, the "combined evidence" is supplemented by evidence that the plaintiff offered to support the discrimination claim, but no reasonable factfinder could believe the evidence. There are sufficient differences *within* and *among* these situations to defy any effort to employ a uniform rule.

a. When the "Combined Evidence" Stands Alone. The *Hicks* majority opinion at times reads as an attempt to signal approval of the "judgment for plaintiff always permitted" position for cases in which the "combined evidence" is the only evidence.[253] The opinion, however, equivocates on the issue, also suggesting an intent to adopt the "judgment for plaintiff sometimes permitted" position. We are told that "[t]he factfinder's disbelief of the reasons put forward by the defendant (*particularly* if disbelief is accompanied by a suspicion of mendacity) *may,* together with the elements of the prima facie case, *suffice* to show intentional discrimination."[254] This

"judgment for the plaintiff required" position). Needing something in addition to "pretext" can mean needing additional *evidence;* but it can also mean needing the factfinder to be willing to state (even without additional evidence) that it has in fact taken the step of inferring that intentional discrimination has taken place. A useful vocabulary must facilitate rather than cloud these distinctions. *Cf.* Kandel, *supra* note 154 (presenting a different, but similarly ambiguous, vocabulary).

252. For a good discussion of the post-*Hicks* circuit split, see Jody H. Odell, Comment, *Between Pretext Only and Pretext Plus: Understanding* St. Mary's Honor Center v. Hicks *and its Application to Summary Judgment,* 69 NOTRE DAME L. REV. 1251 (1994).

253. Twice the *Hicks* majority goes out of its way to say that the factfinder *is* permitted to find for the plaintiff on no more than proof of the prima facie case and disbelief of the plaintiff's reasons. We are told that "rejection of the defendant's proffered reasons will *permit* the trier of fact to infer the ultimate fact of intentional discrimination, and the Court of Appeals was correct when it noted that, upon such rejection, '[n]o additional proof of discrimination is *required.*' " *Hicks,* 113 S. Ct. at 2749 (quoting Hicks v. St. Mary's Honor Ctr., 970 F.2d 487, 493 (8th Cir. 1992)). In a nearby footnote, the majority reiterates that "rejection of the defendant's proffered reasons is enough at law to *sustain* a finding of discrimination." 113 S. Ct. at 2750 n.4.

254. 113 S. Ct. at 2749 (emphasis added).

might well mean that *Hicks* permits the factfinder to find for the plaintiff on the basis of the "combined evidence" *only* if it suspects "mendacity," which, the Court reminds us, cannot be presumed: "[T]here is no justification for assuming (as the dissent repeatedly does) that those employers whose evidence is disbelieved are perjurers and liars."[255]

The Court is unclear as to the proper resolution even of cases in which there *is* evidence from which it is reasonable to suspect mendacity. The Court states that disbelief plus suspicion of mendacity "may . . . suffice" to support a verdict for the plaintiff. Does that mean it always *will* suffice as a matter of law? Much of the drama in the *Hicks* case rotates around the meaning of the word "may" when used in the *Burdine* dictum — where, in the end, "may" *may* have meant "do it and it will suffice as a matter of law," but the Court refused to give the word legal effect.[256]

The Court's failure to achieve clarity reflects the fact that it is by no means clear under current summary judgment standards that the "judgment for plaintiff always permitted" position is uniformly correct, even when the "combined evidence" stands alone. It is the role of the "combined evidence" to prove that discrimination *might* have taken place and that the employer's stated reason does not account for its adverse actions. There may be cases in which the "combined evidence" goes the plaintiff's way, but a judgment for the plaintiff would still be legally questionable. The "combined evidence" will be sometimes strong and sometimes weak. A legal rule based on having jumped the hurdles of McDonnell Douglas-Burdine would tend to mask this variability.

Suppose that an employer posted a promotion opportunity with certain qualification requirements, received a number of applications from female employees, and then reposted the position with new qualification requirements that were harder for women to meet. A female applicant for the promotion sues, and claims that she was qualified for the position as posted, and that the employer's real reason for changing the job qualifications was the fact that it did not want a woman in the job. Suppose that the plaintiff's prima facie case evidence is borderline — a reasonable factfinder could *just barely* conclude that the plaintiff was qualified for the position as originally posted, by making a number of far-flung albeit marginally reasonable inferences from the plaintiff's evidence. Suppose

255. 113 S. Ct. at 2754.

256. *See supra* text accompanying note 127.

also that a reasonable factfinder could also *just barely* disbelieve the employer's explanation for having redefined the position by resolving all closely contested inferences against the employer. It is by no means certain that a summary judgment court, looking at the "combined evidence" cumulatively, would view a pro-plaintiff verdict as reasonable under these circumstances — given the Supreme Court's instruction that summary judgment courts are to consider whether the "caliber and quantity" of the plaintiff's evidence is adequate to meet the plaintiff's proof burden at trial,[257] as well as its admonition that "[a] plaintiff cannot resist summary judgment merely by discrediting the defendant's testimony."[258] A court might well conclude that, given how marginal each element of the "combined evidence" is in this example, the *combined* likelihood that the employer had discriminatory motives and that the plaintiff was qualified for the job as originally posted is too small to survive summary judgment.

b. When Defendant's Additional Evidence Is Persuasive. To explain its rejection of the "judgment for plaintiff required" position, the *Hicks* majority provides an example of a case in which the employer's stated reason is disbelieved, but other strong evidence indicates that discrimination did not occur:

> Assume that 40% of a business' work force are members of a particular minority group, a group which comprises only 10% of the relevant labor market. An applicant, who is a member of that group, applies for an opening for which he is minimally qualified, but is rejected by a hiring officer of that *same minority group,* and the search to fill the opening continues.[259]

The majority uses this example to underscore that it would be a "mockery of justice" for this "other utterly compelling evidence that discrimination was *not* the reason . . . [to] be excluded from the jury's consideration," merely because the jury has chosen not to believe the employer's explanation.[260] But one must ask whether it is consistent with contemporary summary judgment standards to *per-*

257. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 254 (1986); *see also* 477 U.S. at 266-67 (Brennan, J., dissenting).

258. *Anderson,* 477 U.S. at 256-56.

259. *Hicks,* 113 S. Ct. at 2750.

260. 113 S. Ct. at 2751 n.5. The evidence in this example might be viewed as strong either because it is so compelling that it *must* be believed, or because, when viewed in the context of the case, the evidence supports an inference of *non*discrimination that is far stronger than the inference of discrimination the "combined evidence" creates. It is impossible to know which of these possibilities Justice Scalia had in mind. For a good account of why the particular evidence in the hypothetical may not be "utterly compelling" at all, see Calloway, *supra* note 28, at 1004-06.

mit the factfinder to ignore such "utterly compelling evidence" by finding for the plaintiff solely on the basis of the "combined evidence."

Under *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*,[261] courts are instructed that a party cannot resist summary judgment with nothing more than "implausible" inferences from the evidence.[262] Furthermore, it was clear even before *Matsushita* that courts have the power to determine which inferences the jury may reasonably draw from the evidence.[263] A court exercising that power will not *always* conclude that it is permissible to draw the inference of discrimination from the "combined evidence" when the record contains strong contrary evidence. Once again, a rule based on treating the "combined evidence" as legally adequate to resist summary judgment would at times mandate results different from those reached through fact-sensitive application of prevailing summary judgment norms.

c. When Plaintiff's Additional Evidence Is Unpersuasive. The plaintiff in *Hicks* did not merely rest on the "combined evidence"; instead, he introduced additional evidence to show that his discharge was part of a pattern of discriminatory discharges. The district court did not believe this evidence; indeed, it found that some of the evidence proffered by Hicks more strongly supported the inference that *no* discrimination took place. For example, Hicks relied on the firing of twelve black employees six months before his discharge, but the fact that all but one of the fired employees were replaced by black applicants convinced the district court that these firings were not discriminatory.[264]

When a plaintiff introduces additional evidence of discrimination that is unconvincing, the factfinder may well legitimately see

261. 475 U.S. 574 (1986).

262. 475 U.S. at 593. It has been suggested that *Matsushita* is of greatest relevance to antitrust cases. *See* SCHWARZER ET AL., *supra* note 156, at 62-64; *see also* Lam v. University of Haw., 40 F.3d 1551, 1563 n.22 (9th Cir. 1994). This is because the *Matsushita* Court noted that "antitrust law limits the range of permissible inferences from ambiguous evidence in a [Sherman Act] § 1 case," 475 U.S. at 587, and the "implausibility" in economic terms of the inference the nonmovant wished to draw in *Matsushita* was thus a matter of concern under substantive antitrust law. But in its later decision in Eastman Kodak Co. v. Image Technical Servs., Inc., 504 U.S. 451 (1992), the Court denied that *Matsushita* erected a uniquely heavy burden for parties resisting summary judgment in antitrust cases, instead explaining that "*Matsushita* demands only that the nonmoving party's inferences be reasonable, a requirement that was not invented, but merely articulated, in that decision," and that applies to all summary judgment cases. *Eastman Kodak*, 504 U.S. at 468.

263. *See* Daniel P. Collins, Note, *Summary Judgment and Circumstantial Evidence*, 40 STAN. L. REV. 491, 491-92 (1988).

264. Hicks v. St. Mary's Honor Ctr., 756 F. Supp. 1244, 1249 (E.D. Mo. 1991).

the plaintiff as *worse* off than he would have been had no additional evidence been put forward. When additional evidence is lacking, the factfinder might imagine that there is a universe of facts "out there" that would support the conclusion that discrimination took place, but that they had not been introduced at trial for some good reason — fellow employees' fear of testifying on the plaintiff's behalf, for example. When the plaintiff takes the step of bringing the facts "out there" into the courtroom, however, the factfinder who is unconvinced by the additional evidence might well have her confidence shaken. Her knowledge that the best of the facts "out there" do not support the inference would weaken the inference she otherwise might have been willing to draw from her disbelief of the employer. It might even be possible for the plaintiff's additional evidence to fail *so* severely as to render it *unreasonable* for the factfinder to continue to draw an inference of discrimination from the "combined evidence." Again, a rule assigning a fixed legal consequence to variable evidence seems ill-advised.

These examples demonstrate that disparate treatment cases differ from each other in the strength of their evidence, and that "rules" are likely to misfire when they are based upon the assumption that cases are equally strong once all the relevant McDonnell Douglas-Burdine hurdles have been jumped. It is the evolving law of summary judgment, linked to the insights evidence law provides on the drawing of inferences, that is best equipped to handle the issues raised at the pretext "stage." McDonnell Douglas-Burdine serves only to obscure them.

D. *Conclusion*

The crucial question after *Hicks* is whether, and how well, the McDonnell Douglas-Burdine proof structure shapes pretrial decisionmaking, specifically at the summary judgment stage. My answer is: not much and not well. Disparate treatment cases are problematic because they require factfinders to decide questions of motive on the basis of circumstantial evidence. If we thought McDonnell Douglas-Burdine would make the task easier, we were wrong. The time has come to put false appearances aside and to reorient the discourse on disparate treatment cases accordingly.

III. A Call for Abandoning McDonnell Douglas-Burdine

Precision of legal rule, maximum precision, utter precision, has danced like a will o' the wisp before legal thinkers as an ideal to be attained, or

if not attained, then approached. The precision desired has aimed at two goals now familiar to us: guidance, and limitation. . . . Now it happens that no man has yet been able to build categories to neatly and significantly box the multiple conflicts and relations with which men of law must deal . . . . But it happens also that law is a highly practical institution, and that lawmen manage, one way or another, to square their activities measurably with the life around them, no matter what ideology they may be using; lawmen will not be faithful to an ideology which will not do their work. Still, if the dominant ideology is faulty as a tool for coping with life, then law and people suffer; they suffer to the degree that the lawmen's practical and implicit corrections are delayed or are inadequate. . . . For there are few troubles with the work or theory of any lawman for which some other lawman has not by now found a shrewd, practical correction. The difficulty with jurisprudence has been not poverty, but scattering of the profusion of its wealth. Its best, gathered together, makes a rather noble showing.[265]

Perhaps as lawyers in the post-Realist legal world, we should know better than to think *any* rule works "the way it was supposed to" — at least without the constant small on-the-ground revisions that do their work by masking the fact that they are happening at all. One might argue, in this light, that McDonnell Douglas-Burdine is best left alone. One cannot pretend that it adequately guides and limits lower court decisionmaking. It does not, however, seem to have impeded courts in the average, workaday case. They handle their disparate treatment caseload by using McDonnell Douglas-Burdine where it fits and by "fudging" McDonnell Douglas-Burdine when it does not.[266] One way or the other, the work gets done.

But when Karl Llewellyn, whom I quote above, lauds the "elasticity" of rules, their "touch of open-endedness and of guidance for handling the novel," he speaks of *"direction* of such guidance from within the rule *to the purpose of the rule"* — of "the path of principle, not only of expansion by way of principle, but of whittling or of modification by way of principle."[267] The elasticity in McDonnell Douglas-Burdine is of another, less noble sort.

The problem with McDonnell Douglas-Burdine is that it lacks the core of principle to which a Llewellyn would look for interpretive guidance. True, the earlier cases in the McDonnell Douglas-Burdine line contain readily quotable passages explaining the need

265. Karl Llewellyn, *Rule of Thumb and Principle, in* WILLIAM L. TWINING, THE KARL LLEWELLYN PAPERS 81, 81-82 (1968).

266. "Fudging" is the term my research assistant, Carol Banta, used for the process of reciting McDonnell Douglas-Burdine but ignoring it to the extent necessary to make sense of the facts.

267. Llewellyn, *supra* note 265, at 94-95.

to eradicate discrimination. But the same cases contain passages, less quotable but more closely tied to the Court's actual holding, that articulate a need to protect management prerogative against undue incursions.[268] To make matters worse, a close analysis of *Burdine* and *Aikens,* both from within their four corners and through the lens of the Marshall Papers, reveals that the opinions' ambiguity reflects a consistent unwillingness on the part of the Court to act on the problems it saw in McDonnell Douglas-Burdine. The Court has created rule-like formulations, with the hope that the lower courts will bend them correctly, without any principled guidance. This is not the "elasticity" Llewellyn celebrates.[269]

In short, the status quo is unsatisfactory. After *Hicks,* the time is ripe to search for alternatives.

A. *Surveying the Alternatives*

The mildest alternative — tinkering with McDonnell Douglas-Burdine — cannot solve the problem.[270] Easing the plaintiff's prima facie case burden in light of the Court's rejection of the "judgment for plaintiff required" approach would only serve to convince the courts that the prima facie case is worth so little that the "combined evidence" is never sufficient to support a judgment for the plaintiff. Making either the plaintiff's prima facie case burden or the employer's rebuttal burden more stringent will not work because doing so simply will result in eliminating any distinction between the three "stages" of the McDonnell Douglas-Burdine framework. The internal tension within McDonnell Douglas-Burdine — its simultaneous requirement that plaintiffs be given the benefit of the doubt but also that they maintain the burden of persuasion throughout the case — has resulted in failure after more than twenty years of fine tuning. There is little reason to expect

268. The same problem exists in the Supreme Court's key cases on union-management relations under federal labor law. *See* JAMES B. ATLESON, VALUES AND ASSUMPTIONS IN AMERICAN LABOR LAW 111-42 (1983).

269. Perhaps in its early years, McDonnell Douglas-Burdine was useful as what Professor Sunstein calls an "incompletely theorized agreement," an outcome the Court was able to reach despite deep disagreements on questions of abstract principle, and that, for a time, became part of the uncontested foundation for further decisionmaking. Sunstein, *supra* note 53. But such agreements have little continuing persuasive value once "the uncontested background is drawn into sharp question." *Id.* at 1766.

270. *See* Blumrosen, *supra* note 98, at 1059-61 (arguing that "the underlying difficulty with the *McDonnell Douglas* formula" involves "more than tinkering can correct," and preferring a "decision by the trier of fact as to whether, on all the evidence, the personnel action was influenced by illicit considerations").

that future incremental changes will produce any better results. More broadly based reform must be sought.

One possible reform approach could focus on the policy-level deficiency in McDonnell Douglas-Burdine: the Court's unwillingness to provide a sufficiently strong statement of pro-plaintiff intent to justify permitting plaintiffs to win intentional discrimination cases on evidence that would be inadequate to prove intent in ordinary civil cases. The boldest way to address this proof gap would be to replace the intent standard in individual discrimination cases with a just-cause standard for all employment decisions adverse to a member of a traditionally disadvantaged group. A more moderate alternative would be to maintain the McDonnell Douglas-Burdine proof structure, admit that the "combined evidence" does not suffice to prove discrimination as an evidentiary matter, but nonetheless clearly specify that it shall be *deemed* sufficient as a matter of policy.

It seems clear to me, however, that neither of these steps will be taken, and not only for reasons of partisan politics. I have no doubt that the first alternative would immediately and, I think, fairly, be characterized as a special group preference akin to affirmative action.[271] Anyone looking closely at its more moderate cousin would see the family resemblance.[272]

As I argued in Part I, Title VII is a single body of law that applies to all protected groups, in all parts of the country, in all types and stages of employment. A mandatory presumption that an employment decision adverse to a member of a traditionally disadvantaged group is discriminatory if it is not made for just cause is not only a poor *evidentiary* fit with this highly variable situation,[273] as I have already argued in Part I. For many of the same reasons, ac-

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271. *Cf.* David A. Strauss, *The Myth of Colorblindness*, 1986 SUP. CT. REV. 99; Sunstein, *supra* note 97, at 2418 ("[T]he distinction between affirmative action and antidiscrimination is thin in principle" insofar as the latter renders unlawful "statistical generalizations of the sort that employers, customers, and others rely on all the time.").

272. For a refreshingly honest identification of presumptions in favor of black plaintiffs in individual intentional discrimination cases as a defensible (and desirable) form of race-conscious remedy, see J. Skelly Wright, *Color-Blind Theories and Color-Conscious Remedies*, 47 U. CHI. L. REV. 213, 223-24 (1980). Judge Wright understood that a presumption of discrimination

> give[s] the black applicant preferential treatment — "simply because he is black[.]" In effect, the qualified black applicant is given an entitlement to employment, denied to similarly qualified white applicants. The qualified white applicant, denied a job on the basis of some irrational or bigoted decision of the employer, is relegated to his luck. Given the subjective nature of the employment decision, the law must prefer the black applicant because he is black in order to ensure that employers do not discriminate against him because he is black.

273. See discussion *supra* text accompanying notes 97 to 100.

cording just-cause protection only to members of protected groups would threaten to cast doubt on the legitimacy of the entire enterprise of antidiscrimination law.

Even now, women and members of minority groups have a disparate treatment cause of action available to them under Title VII that white men generally lack. But that regime has been largely immune from the criticisms leveled at affirmative action, precisely because the individual plaintiff is required to prove discriminatory intent. This immunity would surely disappear under a regime in which women and members of minority groups had just-cause protection on the job, but white men did not. To see why, one need only imagine the response of white male employees to the following scenario. Two employees, black and white, are fired by their white supervisor at the same time for the same alleged misconduct — misconduct eventually found insufficient to constitute just cause for discharge. Only the black employee has a cause of action, and, since discriminatory intent is irrelevant, the fact that a white employee received exactly the same arbitrary treatment in the same incident does not stand in the way of his claim. The black employee is reinstated; the white employee has no cause of action at all.[274] I doubt that we could reach a society-wide agreement on the legitimacy of such an outcome.[275]

Furthermore, it is important to consider the likely effect of a just-cause-only-for-women-and-minorities rule on employer behavior. Even under existing legal rules, the Title VII causes of action

274. Unless, of course, the new legal regime were interpreted to protect whites who are mistreated in the same fashion as blacks, on the theory that the white employee must be presumed to have been so mistreated to make it easier for the employer to go after the black employee, who must be presumed to have been the employer's true target.

275. This does not mean that only proof of discriminatory intent can lead to fully legitimate outcomes. Take the example of disparate impact litigation, the legitimacy of which Congress implicitly reaffirmed in the Civil Rights Act of 1991. *See supra* note 3. To a large extent, *all* employees benefit when arbitrary screening devices are successfully challenged. When a disparate impact plaintiff class successfully challenges an arbitrary screening device, employers generally abandon the device altogether, rather than merely ceasing to use it for members of the successful plaintiffs' protected group — since to do otherwise would constitute the facially discriminatory use of different screening devices for different groups. It is true that retrospective remedies — backpay and reinstatement — will be limited to members of the plaintiff class. But at the very least, white (or male) employees who *re*-apply for jobs will have their new applications considered under the new rules, and will therefore benefit from the litigation. And the exclusion of whites (or men) from retrospective relief will at least be justified by proof that the test or practice at issue had a proven adverse impact on members of the plaintiffs' protected group. I note, however, that the assertion that proof of adverse impact itself constitutes proof of employer discrimination is subject to challenge, *see Watson v. Fort Worth Bank and Trust*, 487 U.S. 977, 1002-03, 1004-05 (1988) (Blackmun, J., concurring), is not beyond challenge, and that it is therefore not safe — even after the Civil Rights Act of 1991 — to take the perceived legitimacy of disparate impact litigation for granted.

available to female and minority employees are a disincentive to the hiring of marginally qualified Title VII-protected applicants because it is more difficult to discipline or fire them once they are hired.[276] That disincentive effect would markedly increase if employers' inability to prove just cause were deemed as dispositive — rather than merely suggestive — of discriminatory intent.

One could, perhaps, avoid these problems by abandoning the discourse of discrimination for individual cases altogether and moving instead to a system of just-cause protection for *all* employees in the workplace. If in fact arbitrary treatment disproportionately affects members of protected groups, they will disproportionately benefit from such a system.[277] Just-cause legislation might well have a broader base of public support than antidiscrimination legislation. Think of the "Just-Cause Act" as the equivalent of the Social Security System, and of Title VII as the equivalent of Aid for Families with Dependent Children. More broadly based programs command broader political support in this country, precisely because their opponents cannot cast them in racial terms.[278]

From the standpoint of civil rights, the problem with just-cause legislation as an alternative to antidiscrimination legislation is that it would work too well. Given the expense and difficulty of proving intentional discrimination, the existence of a just-cause alternative would be tempting. Fewer discrimination cases would be brought, and the public would perceive that discrimination was declining. Even if all the practical ends of antidiscrimination laws could be served by uniform just-cause protection in the workplace, important symbolic and pedagogic ends would be lost. The silencing of

276. *See* Donohue & Siegelman, *supra* note 171, at 1024.

277. This may be one reason that black nonunion workers are more likely than white nonunion workers to be in favor of unionization. *See, e.g.*, Ronnie Silverblatt & Robert J. Amann, *Race, Ethnicity, Union Attitudes, and Voting Predilections*, 30 INDUS. REL. 271, 277 (1991).

278. *See* MARGARET WEIR, POLITICS AND JOBS: THE BOUNDARIES OF EMPLOYMENT POLICY IN THE UNITED STATES 62-98 (1992); Sunstein, *supra* note 97, at 2454-55 ("It is ironic but true that a third stage of civil rights policy, directed most self-consciously against race and gender caste, might also be self-consciously designed — for reasons of policy and principle — so as to avoid race- and gender-specificity.").

Of course, broad just-cause protection might elicit broader opposition from the business community — particularly because *opposition* would not be perceived as race-based. The business community would likely be willing to support just-cause legislation as an alternative to antidiscrimination litigation only if the latter became overly burdensome, and, even then, only if the new just-cause system was guaranteed to be less costly, both in terms of litigation costs and remedial costs. *Cf.* Theodore J. St. Antoine, *The Making of the Model Employment Termination Act*, 69 WASH. L. REV. 361, 367 (1994) (explaining that the original impetus for a uniform law creating a degree of just-cause protection was "a concern that the courts were improperly breaching the wall of at-will employment"); Edelman et al., *supra* note 96 (discussing employer fears of wrongful discharge litigation).

potentially valid claims of intentional discrimination — albeit for benign reasons — would thus not be a *benefit* of a shift to a uniform just-cause system ; it would, rather, be a troubling by-product of the shift. Recall *Goodman v. Lukens Steel Co.*[279] In *Goodman,* the union, concerned that the employer was hostile to race-discrimination grievances brought under the collective bargaining agreement's antidiscrimination provision, declined to bring race-discrimination grievances but was successful in resolving the complaints of some black employees by using other contract provisions — for example, by challenging discriminatory scheduling as a violation of the contract's scheduling clause rather than of its antidiscrimination provision.[280] This recharacterization, the Court held, constitutes discrimination — even if the union secured exactly the same relief for the grievant as it would have obtained by grieving the company's violation of the contract's antidiscrimination clause.[281] We should remember, with the Court in *Goodman,* that we still need to confront the sad lessons we learn about our society when a plaintiff successfully proves that intentional discrimination has occurred. Greater protection of job rights through the use of just-cause standards is, to my mind, a worthwhile goal in its own right. But individual discrimination claims should always be available so that the reality of intentional discrimination is not swept under the legal rug.[282]

B. *The Case for an Open-Ended Intentional Discrimination Standard*

If McDonnell-Douglas cannot be improved by tinkering at the margins and if we cannot eliminate either individual discrimination claims or the intent requirement, the best remaining alternative is to retain a cause of action for intentional discrimination but abandon the McDonnell Douglas-Burdine proof structure once and for all, at all stages of the case.[283] Then it would be clear that the only

279. 482 U.S. 656 (1987).

280. In *Goodman,* the union *also* failed to pursue many discrimination grievances that could *not* be brought under other provisions. But the Court held that the union's conduct was improper even in the cases in which the grievant obtained a remedy through recourse to other race-neutral contract provisions.

281. 482 U.S. at 668.

282. *See* ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS 272 (1962) ("The goals we acknowledge determine the direction in which our society moves.").

283. *Aikens* did, of course, attempt to eliminate the use of McDonnell Douglas-Burdine as a factfinding method at trial. But notwithstanding *Aikens,* McDonnell Douglas-Burdine continues to have tenacious roots in trial practice: it is quite conventional for post-*Aikens*

relevant question at trial would be whether the plaintiff has proven intentional discrimination by a preponderance of the evidence. Since the function of the summary judgment court is to examine the sufficiency of the evidence for trial *in light of the questions the jury will be asked of the evidence at trial,* the only question on summary judgment would be the sufficiency of all the evidence to support a finding of intentional discrimination by a preponderance of the evidence. Far more would be gained than lost by substituting an open-ended standard for the McDonnell Douglas-Burdine rule.[284]

Eliminating the McDonnell Douglas-Burdine proof structure would discourage the Supreme Court from making what appear to be uniform "rules" that do not have uniform effects "on the ground." The Supreme Court's decision to dodge the important task of determining the content of the McDonnell Douglas-Burdine prima facie case has led to extraordinary variability in the actual content of the prima facie case in the lower courts. The Supreme Court has not, however, been the least bit shy in making rules about the legal significance of the proven prima facie case. When those rules are applied "uniformly" to what is in fact a highly nonuniform set of case-by-case decisions about what the prima facie case must contain, the result is a nonuniformity that goes unrecognized by the Court.

Suppose, for example, that the Court were to grant certiorari to clarify the circuit conflict *Hicks* has created. Suppose the Court, citing to *Hicks,* were to stress the weakness of the plaintiff's required prima facie showing, and to hold, for this reason, that the "combined evidence" standing alone is *never* sufficient to support a judgment for the plaintiff, and that the plaintiff must always intro-

district courts to state their post-bench-trial findings of fact and conclusions of law in McDonnell Douglas-Burdine terms, just as the district court did in *Hicks.* Some courts also use McDonnell Douglas-Burdine as the basis for jury instructions. *See, e.g.,* Cabrera v. Jakabovitz, 24 F.3d 372, 381 n.5 (2d Cir.), *cert. denied,* 115 S. Ct. 205 (1994). This is a disturbing prospect, given the likelihood that juries will be unnecessarily confused by instructions about "prima facie cases" and "burden shifts." *See, e.g.,* Gehring v. Case Corp. 66 Fair Empl. Prac. Cas. (BNA) 1373 (7th Cir. 1994), *cert. denied,* 115 S. Ct. 2612 (1995); *Cabrera,* 24 F.3d at 380-81; *see also* 3 DEVITT ET AL., *supra* note 49, at § 104.01 cmt. (declining to use McDonnell Douglas-Burdine in instructing juries in 42 U.S.C. § 1981 cases "for reasons of clarity," and agreeing with court in Grebin v. Sioux Falls Indep. Sch. Dist., 779 F.2d 18, 20 (8th Cir. 1985), that the McDonnell Douglas-Burdine " 'ritual' is not well suited as a detailed instruction to the jury"); MICHIGAN STANDARD JURY INSTRUCTIONS (CIVIL) § 105.01 (2d ed. 1991) (deciding "not to develop . . . instructions [for disparate treatment cases] around the *McDonnell Douglas* model").

284. For discussions of the rule/standard distinction, see Duncan Kennedy, *Form and Substance in Private Law Adjudication,* 89 HARV. L. REV. 1685 (1976); MARK KELMAN, A GUIDE TO CRITICAL LEGAL STUDIES 45-47 (1987) (responding to Kennedy). For a discussion of the concept in the Title VII context, see Rutherglen, *supra* note 17, at 75.

duce additional evidence of discrimination to prevail. In so doing, the Court would be doing what it has always done: it would base its decision solely on what *it has said in the past* about McDonnell Douglas-Burdine, rather than upon an understanding of how district courts use McDonnell Douglas-Burdine. In *some* district court decisions, the prima facie case is so watered down that it exhausts very little of the evidence at the plaintiff's command. Where the prima facie case standard is weak, there might be good reason to require additional evidence, and the requirement could easily be met. But some courts interpret the prima facie case so broadly that *most* of the plaintiff's evidence is held relevant at the prima facie case stage — as a result of which it is hard to imagine any pro-plaintiff evidence that could be "added" at the final stage of the case. What most characterizes the prima facie case in the district courts is its variability. If uniformity cannot successfully be imposed, the intellectually honest — and legally safe — alternative is to eliminate the Court's temptation to make bad law by acting as though uniformity exists.

Abandoning McDonnell Douglas-Burdine would also encourage innovation in the conceptualization of intentional discrimination. McDonnell Douglas-Burdine purports to be procedural, but it implies a substantive decision about the nature of intentional discrimination. Under McDonnell Douglas-Burdine, one must prove that the employer had a discriminatory motive for a specific adverse employment action. There are situations, however, in which protected-group status is an inseparable part of the events leading up to an adverse decision, which we perhaps should be prepared to call "intentional discrimination" despite the fact that their fact patterns do not fit the McDonnell Douglas-Burdine mold.[285] As I have demonstrated, a court must swim against the McDonnell Douglas-Burdine current if the employer clearly fired the plaintiff for reasons of "inadequate performance" but the court senses that the employer's evaluation of the plaintiff's performance might have been tainted by unconscious discriminatory values, preferences, or perceptions.[286] The court must depart from the McDonnell

285. For example, the existence of the McDonnell Douglas-Burdine framework might have had the effect of blinding courts to the possibility of dual or mixed motivation, see David A. Drachsler, *Burdens of Proof in Retaliatory Adverse Action Cases Under Title VII,* 35 LAB. L.J. 28 (1984).

286. Indeed, I think of *Price Waterhouse* as perpetuating rather than ending the confusion regarding what constitutes a "mixed motive" claim. The *Price Waterhouse* facts, to my mind, raise neither a "mixed motive" claim nor a McDonnell Douglas-Burdine claim. The plaintiff in *Price Waterhouse* was perceived as having personality problems, and her personality was treated as a *non*discriminatory motive for her discharge. But seen in context, Price

Douglas-Burdine pattern to an even greater extent if the plaintiff claims that her performance was indeed substandard but it was the pressure of working in a discriminatory environment that made it so.[287] Perhaps trading McDonnell Douglas-Burdine for a more open-textured method of proof would, thanks to the alchemy through which procedure is transformed into substance, result in a more open-textured definition of intentional discrimination as well.

I have argued that abandoning McDonnell Douglas-Burdine would have several important advantages: it would increase intellectual honesty, deter the creation of dangerous pseudo-uniform rules, and encourage a more subtle and creative understanding of discrimination in its many forms. No legal change, however, is without its potential disadvantages. It is to these I now turn.

First, abandoning McDonnell Douglas-Burdine would not entirely free individual intentional discrimination litigation from reliance on special proof structures. The reason is that there are at present *two* special proof structures for individual intentional discrimination cases: McDonnell Douglas-Burdine and the "mixed motive" framework first announced in *Price Waterhouse v. Hopkins*[288] and later modified in the Civil Rights Act of 1991.[289] Under

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Waterhouse's assessment of her personality was part and parcel of what the Court found to be its sexually discriminatory views on the proper way to be a *female* partner. It is artificial to view gender and personality as separate motives in *Price Waterhouse*. *See also* Blumoff & Lewis, *supra* note 9, at 49 ("[I]n multiple-cause tort cases the court assumes independence among events; it assumes that two independent acts join to produce one harm. If racial and gender stereotyping are pervasive, it is not at all clear that one should assume sufficient independent 'legitimate' employer motivation.").

287. *See, e.g.*, Avery v. Delchamps Inc., 66 Fair Empl. Prac. Cas. (BNA) 577 (E.D. La. 1994).

288. 490 U.S. 228 (1989). There was no majority opinion in *Price Waterhouse*. Under the approach Justice O'Connor adopted in her concurring opinion in *Price Waterhouse*, a mixed motive plaintiff must prove by "direct evidence" that discrimination was a "substantial factor" in the adverse decision. 490 U.S. at 265. Once that showing is made, the plaintiff prevails unless the employer meets the burden of persuading the factfinder "that it is more likely than not that the decision would have been the same absent consideration of the illegitimate factor." 490 U.S. at 276. Justice O'Connor's opinion is generally treated as stating the law of the case. *See* Tyler v. Bethlehem Steel Corp., 958 F.2d 1176, 1183 (2d Cir.) (noting, in disagreement, that "[d]espite the inarguable fact that only *four* justices in *Price Waterhouse* would have imposed a 'direct evidence' requirement for 'mixed-motives' cases, most circuits have engrafted this requirement into caselaw"), *cert. denied*, 113 S. Ct. 82 (1992). Under the approach of Justice Brennan's plurality opinion, there is no "direct evidence" requirement, and the burden of persuasion shifts to the employer once the plaintiff proves that discrimination "played a motivating part" in the adverse decision. 490 U.S. at 1794.

289. 42 U.S.C. § 2000e-2(m) (Supp. IV 1992). Under the statute, the plaintiff must first prove that discrimination was a "motivating factor." The statute is silent as to whether that proof must be made through the use of direct evidence. Once the plaintiff so proves, the defendant's liability is established. The defendant can, however, sharply limit the plaintiff's remedy by persuading the factfinder that "[it] would have taken the same action in the absence of the impermissible motivating factor." 42 U.S.C. § 2000e-5(g)(2)(B) (Supp. IV 1992).

the present system, courts find it quite difficult to determine whether a case falls within McDonnell Douglas-Burdine, the mixed motive framework, or both.[290] Similar problems will remain so long

290. For Justice O'Connor, the problem was solved by imposing a "direct evidence" requirement in mixed motive cases. That solution has been much criticized, both before and after *Price Waterhouse*. *See, e.g.*, Blumoff & Lewis, *supra* note 9, at 57; Charles A. Edwards, *Direct Evidence of Discriminatory Intent and the Burden of Proof: An Analysis and Critique*, 43 WASH. & LEE L. REV. 1 (1986); Charles Sullivan, *Accounting for* Price Waterhouse: *Proving Disparate Treatment Under Title VII*, 56 BROOK. L. REV. 1107 (1991); Michael A. Zubrensky, Note, *Despite the Smoke, There Is No Gun: Direct Evidence Requirements in Mixed-Motives Employment Law After* Price Waterhouse v. Hopkins, 46 STAN. L. REV. 959 (1995). The criticisms are well-founded.

"Direct evidence" is a misnomer for the kind of evidence that is treated as "direct" for the purpose of mixed motive cases. Direct evidence is generally defined as evidence that establishes a fact at issue without the need for the drawing of inferences. Sullivan, *supra*, at 1118-19. In disparate treatment cases, the fact at issue is discriminatory intent. It is questionable whether evidence is "direct" in this sense even in the rare case where the decisionmaker told the plaintiff at the time of the adverse decision that the decision was being made because of race, gender, or so forth. To find discrimination, one must infer that the decisionmaker understood his own motives and reported them accurately to the plaintiff (rather than using discrimination as an excuse to hide an even more embarrassing motive). But given how rare admissions of this sort are, many courts interpret the term "direct evidence" to mean high-quality *circumstantial* evidence. *See, e.g.*, Hook v. Ernst & Young, 28 F.3d 366, 373 (3d Cir. 1994) ("Whether a pretext or a mixed-motives case has been presented depends *on the kind of circumstantial evidence* the employee produces.") (emphasis added); Ostrowski v. Atlantic Mut. Ins. Cos., 968 F.2d 171, 182 (2d Cir. 1992) (requiring circumstantial evidence "tied directly to the alleged discriminatory animus"). A typical formulation is that "direct evidence" for mixed motive cases must be "conduct or statements by persons involved in the decision-making process that may be viewed as directly reflecting the alleged discriminatory attitude." Starceski v. Westinghouse Elec. Corp., 54 F.3d 1089, 1096 (3d Cir. 1995) (quoting *Ostrowski*, 968 F.2d at 182). The claim is made that this evidence "leads not only to a ready logical inference of bias, but also to a rational presumption that the person expressing bias acted on it." 54 F.3d at 1097. This claim merely underscores the fact that the use of such evidence to prove discrimination requires the drawing of two important (and disputable) inferences: that the decisionmaker spoke or acted in accord with his true opinions, and that he acted *because* of his discriminatory attitude, rather than for other reasons. *See* Sullivan, *supra*, at 1118-19. Furthermore, the boundaries between circumstantial evidence that is and is not strong enough to satisfy the (quasi-)direct evidence requirement are hardly clear. *See also Tyler*, 958 F.2d at 1183 ("[T]he various circuits have about as many definitions for 'direct evidence' as they do employment discrimination cases."). In any event, to privilege "direct" over "circumstantial" evidence is generally in tension with standard evidentiary practice. *See* Edwards, *supra*, at 14-16; *see also* 3 DEVITT ET AL., *supra* note 49, at § 72.03; 1A JOHN HENRY WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 24, at 944-52 (1983). It is even less justifiable to privilege one type of circumstantial evidence over all others.

Finally, the new "mixed motives" provision of the Civil Rights Act of 1991 does not on its face contain a direct evidence requirement. *See supra* note 289. Unless a direct evidence requirement is to be read into the statute, as some courts have done on the basis of ambiguous legislative history, *see, e.g.*, Maidenbaum v. Bally's Park Place, Inc., 870 F. Supp. 1254, 1261 n.11 (D.N.J. 1994) (citing H.R. REP. NO. 40(I), 102d Cong., 1st Sess. pt. 3, at 45, *reprinted in* 1991 U.S.C.C.A.N. 549, 586), the statute precludes Justice O'Connor's case-sorting strategy.

If mixed motive cases are *not* held to require direct evidence, however, it is even more difficult to distinguish between mixed motive cases and "ordinary" cases. Justice Brennan, who rejected the direct evidence requirement, denied that doing so would cause difficulties. He was drawing on the experience of the courts with the mixed motive scheme in constitutionally based discrimination cases under Mt. Healthy City Bd. of Educ. v. Doyle, 429 U.S. 274 (1977), and Arlington Heights v. Metropolitan Hous. Dev. Corp., 429 U.S. 252 (1977), under which there is no direct evidence requirement. *See, e.g.*, Jirau-Bernal v. Agrait, 37 F.3d

as a distinction must be made between mixed motive cases and "ordinary," non–mixed motive cases. But this is not a reason to retain McDonnell Douglas-Burdine. It is merely a reason for ongoing reform.[291]

The second potential problem is the possibility that the absence of the McDonnell Douglas-Burdine proof structure will make intentional discrimination more difficult to litigate. McDonnell Douglas-Burdine was long understood as necessary to smoke out evidence and to guide the factfinder in drawing inferences of discrimination from circumstantial evidence. We have already seen, however, that the "necessity" argument fails: discrimination plaintiffs narrow the issues for trial through the use of the normal rules

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1, 3 (1st Cir. 1994); Clark v. Library of Congress, 750 F.2d 89, 101 (D.C. Cir. 1984); Lee v. Russell County Bd. of Educ., 684 F.2d 769, 774 (11th Cir. 1982). Under the constitutional scheme set forth in those cases, however, the proof scheme is unitary for *all* cases, and proof of discrimination is largely unstructured. The major distinction between mixed motive cases and McDonnell Douglas-Burdine cases — that in one type of case the burden of persuasion shifts to the employer, but in the other it does not — does not exist in the constitutional setting. Nor, therefore, does the need to make determinations as to which proof theory (or theories) the evidence supports.

291. The reform I would endorse would be to use what is now the mixed motive framework as a unitary framework for all individual cases of intentional discrimination. Under such a reform — which could be implemented with no change whatsoever in the statutory language — the defendant would be held liable whenever the plaintiff proves *by direct and-or circumstantial evidence* that race, sex, or so forth was a motivating factor in the employer's decisionmaking. The defendant could then limit the plaintiff's remedy by persuading the factfinder that it would have made the same decision in the absence of discrimination. Under this proof model, there would no longer be a reason to distinguish between "mixed motive" cases and "ordinary" cases. This would follow the model of proof in constitutional cases under *Arlington Heights,* 429 U.S. at 252, as well as in cases of anti-union discrimination under the National Labor Relations Act, *see* Wright Line, 251 N.L.R.B. 1083 (1980), *enfd.,* 662 F.2d 899 (1st Cir. 1981), *cert. denied,* 455 U.S. 989 (1982), where it has long been clear that a National Labor Relations Board finding that anti-union animus was a motivating factor in the employer's decisionmaking can be based on circumstantial as well as direct evidence. *See, e.g.,* Avecor, Inc. v. NLRB, 931 F.2d 924, 928-29 (D.C. Cir. 1991), *cert. denied,* 502 U.S. 1048 (1992); Zubrensky, *supra* note 290, at 982.

A unitary framework would be particularly helpful now that jury trials are available for Title VII intentional discrimination cases, because it would avoid the need to confuse the jury by instructing it on both the "mixed motive" theory and the "ordinary" theory — with their different distributions of the burden of persuasion — in cases in which the evidence supports both. *See* Rutherglen, *supra* note 17, at 64 (raising "[t]he practical question . . . whether juries can make any sense out of the distinction between pretext and mixed motivation"). Language requiring the jury to determine that discrimination was a "motivating factor" or "played a role" in a decision will allow ample room for juries creatively to understand the many ways in which discrimination appears and influences employment results. *But see* Paul J. Gudel, *Beyond Causation: The Interpretation of Action and the Mixed Motives Problem in Employment Discrimination Law,* 70 TEXAS L. REV. 17 (1991) (arguing that the law should prohibit discriminatory acts, not acts "caused" by discriminatory "motives" or "intents," and that causal language is a barrier to proper understanding of discrimination claims).

Unity could, of course, also be attained by eliminating the mixed motive theory. That option, however, is rendered unavailable — and rightly so — by Congress's clear assertion through the Civil Rights Act of 1991 that Title VII is violated whenever discrimination is a motivating factor in an adverse employment decision.

of civil procedure, not by relying on McDonnell Douglas-Burdine. Furthermore, McDonnell Douglas-Burdine is as likely to stand in the way of drawing inferences of discrimination as to encourage it. An open-ended discrimination standard would encourage a holistic approach to factfinding, as opposed to McDonnell Douglas-Burdine's hierarchized one. This would likely be of *special* benefit to factfinding in jury trials. Despite *Aikens*'s admonition that the McDonnell Douglas-Burdine proof structure is irrelevant to fully tried cases, many courts continue to refer to its elements in jury instructions.[292] Such legally complex instructions are hinderances to juror decisionmaking: psychological studies show that juries understand complex facts better than complex law.[293] I suspect that even courts would benefit from transferring their attention from the proof structure to the evidence itself.

Nor is there reason to fear the third potential problem with abandoning McDonnell Douglas-Burdine: namely, that it will serve to immunize intentional discrimination cases from judicial review. Appellate courts are perfectly capable of reviewing district court summary judgment determinations, if they choose to do so, even without McDonnell Douglas-Burdine. Indeed, the greater risk is that appellate courts will attempt to *expand* their own role by establishing "rules" about the kinds of evidence that will and will not suffice to prove intentional discrimination as a matter of law. Courts have made such decisions even working within the structure of McDonnell Douglas-Burdine by declaring, for example, that "stray remarks" of a sexist or racist nature cannot be used to prove intentional discrimination at the pretext stage of the case. The temptation to do so may be even greater absent McDonnell Douglas-Burdine.[294]

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292. Their need to do so stems from the need, in many cases, to instruct the jury both on McDonnell-Douglas Burdine and on "mixed motive" as alternative theories — which is difficult to do in nontechnical terms, given the technical nature of the distinction. For the dangers inherent in instructing juries on alternative theories with different burdens of proof, see Barbara D. Underwood, *The Thumb on the Scales of Justice: Burdens of Persuasion in Criminal Cases*, 86 YALE L.J. 1299, 1311 n.47 (1977).

293. *See* Phoebe C. Ellsworth, *Are Twelve Heads Better Than One?* LAW & CONTEMP. PROBS. Autumn 1989, at 205, 217, 218-23; Alan Reifman et al., *Real Jurors' Understanding of the Law in Real Cases*, 16 LAW & HUMAN BEHAV. 539, 540 (1992). For a convincing argument that jurors make sense of the record by constructing stories rather than by applying legal rules, see Nancy Pennington & Reid Hastie, *Evidence Evaluation in Complex Decision Making*, 51 J. PERSONALITY & SOC. PSYCH. 242 (1986).

294. *See, e.g.*, McLaughlin v. Esselte Pendaflex Corp., 50 F.3d 507, 512-13 (8th Cir. 1995); *cf.* Proud v. Stone, 945 F.2d 796 (4th Cir. 1991) (stating strong inference that when same person who hires you fires you a few months later, discrimination was not a determining factor). This kind of lawmaking is ill advised, in my view, because it cannot hope to take into account the different contexts in which the evidence may appear.

The problem with such decisions is that they ignore the fact that evidence takes its meaning from context. "Stray remarks" of a discriminatory nature may mean very little when the plaintiff's case is otherwise extremely weak. But if the plaintiff's case appears to have some merit in other respects, or if the remarks corroborate other evidence of racial or gender tension in the workplace, it would be inappropriate categorically to ignore the remarks.[295] Appellate courts should not respond to the demise of McDonnell Douglas-Burdine by imposing a new set of shortcuts that will stand in the way of evaluating the evidence as a whole — nor should district courts be relied upon creatively to subvert such rules when they interfere with sensible practice on the ground. Judicial drift back in the direction of "hard and fast" rules may be inevitable, but abandoning McDonnell Douglas-Burdine will make it easier to detect and to critique.

My main hesitation in advocating the dismantling of the McDonnell Douglas-Burdine proof structure concerns not the practical dimension, but rather the symbolic. What would it mean to declare, after all this time, that there are no preferential rules for individual discrimination cases — that the law will evaluate these discrimination claims like any other civil claims, with no societal thumb on the scale? But, to answer a question with a question, what is the symbolic significance of acting as though there are preferential standards for disparate treatment cases when, in fact, after *Hicks,* there are none? The claim that we have "special" rules for intentional discrimination cases creates a false "sense of closure"[296] — a false belief that the law has already taken extraordinary steps to assist Title VII plaintiffs. Perhaps it is better to let the cold winds of litigation blow. At least the cold air will be clear.

295. *Cf.* Carter v. Duncan-Huggins, Ltd., 727 F.2d 1225, 1236 (D.C. Cir. 1984) (reversing jury instruction stating that "an isolated racial joke or slur told by another employee, even if told in the presence of a supervisor and no matter how tasteless, is not evidence of race or color discrimination by the employer").

296. Louis Michael Seidman, Brown *and* Miranda, 80 CAL. L. REV. 673, 715, 717 (1992). The notion that we have "special rules" for discrimination claimants also fosters the sense of despondency that "we have already tried special rules; if they haven't succeeded, nothing will."