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Getting It Right: Uncertainty and Error in the New Disparate Treatment Paradigm

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ARTICLES

GETTING IT RIGHT: UNCERTAINTY AND ERROR IN THE NEW DISPARATE TREATMENT PARADIGM

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> The language of Title VII makes plain the purpose of Congress to assure equality of employment opportunities and to eliminate those discriminatory practices and devices which have fostered racially stratified job environments to the disadvantage of minority citizens.[1]

I. INTRODUCTION

In law, as in life, getting it right is far more important than getting it done. While getting it done has its virtues, minimizing error is the ideal. Implicit in minimizing error is the recognition that error will remain in any system. How we manage ever-present error is as important as what we do to minimize it. Nowhere is that management more important than in the employment discrimination context.

In responding to employment discrimination, the Supreme Court has attempted to minimize systemic error in Title VII disparate treatment cases through the three-step process developed in *McDonnell Douglas Corp. v. Green*.[2] The *McDonnell Douglas* test requires a plaintiff-employee to present a prima facie case that he or she was a victim of intentional discrimination.[3] The employer is then required to show that a legitimate, non-discriminatory reason existed for the adverse job action.[4] Finally, the employee is allowed to demonstrate that the proffered reason is a pretext for intentional discrimination.[5] The *McDonnell Douglas* test has been redefined and refined in the years since its inception to meet the twin goals of reducing and allocating error in the disparate treatment context.[6] *St. Mary's Honor Center v. Hicks*[7] is the Court's most recent attempt to follow the same path.

Hicks can be paraphrased simply: if, after trial in a disparate treatment case, the fact finder is not persuaded by a preponderance of the evidence that intentional discrimination occurred, the

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[1] McDonnell Douglas Corp. v. Green, 411 U.S. 792, 800 (1973) (citations omitted).

[2] 411 U.S. 792.

[3] *See id.* at 802.

[4] *See id.*

[5] *See id.* at 804.

[6] *See* discussion *infra* Part II. That the Court devised a special test to address disparate treatment discrimination suggests that the general civil litigation system was inadequate to handle the issue of intentional discrimination. *See* discussion *infra* Part III.

[7] 509 U.S. 502 (1993).

employee loses.[8] The specific issue in *Hicks* was whether a prima facie case coupled with proof that the employer's proffered reasons for the subject job action were false ("proof of falsity") requires a verdict for the employee.[9] The Court determined that proof of falsity was not proof that discrimination more likely than not caused the job action.[10] Consequently, the absence of credible reasons explaining the job action does not eliminate the possibility or likelihood that some unproffered, legitimate, non-discriminatory reason is the true reason for the firing.[11]

Practically, an employee may lose his or her Title VII case unless he or she disproves all possible reasons for the job action other than discrimination. When one considers that plaintiffs who prove all they previously were expected to prove under the *McDonnell Douglas* test may lose, the *Hicks* decision undermines the earlier standard.[12] Whether the *Hicks* Court's interpretation of the *McDonnell Douglas* test increases the fairness and accuracy of the Title VII system is the main concern of this Article.

The Court's recent foray into the disparate treatment realm tracks the debate now extant in society: when a minority or other member of an outgroup is harmed and no credible reason is presented as the cause, is such harm more likely a result of discrimination rather than some unknown non-discriminatory reason? The *Hicks* Court's answer to that question is the new paradigm in employment discrimination. In the process, the practical question has shifted from whether the employee was more likely than not a victim of intentional discrimination, to whether the fact finder is sure that intentional discrimination occurred.[13] Basing a decision on the second question explicitly changes the type and/or amount of

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[8] *See id.* at 506-11.

[9] *See id.* Title VII refers to many adverse job actions that are visited upon employees. *See* 42 U.S.C. § 2000e-2 (1994). However, as *Hicks* was based on the plaintiff's discharge, this article often will refer to an employee's firing or discharge rather than an adverse job action.

[10] *See Hicks*, 509 U.S. at 517-24 (holding that proof that the proffered reason is not true does not compel a verdict for the employee).

[11] *Cf.* Bina v. Providence College, 39 F.3d 21, 25 (1st Cir. 1994) (finding legitimate, non-discriminatory reasons for denial of tenure in evidence not offered by the defendant), *cert. denied*, 115 S. Ct. 1406 (1995).

[12] *See Hicks*, 509 U.S. at 525-43 (Souter, J., dissenting).

[13] The *Hicks* majority made clear that actually convincing the fact finder that discrimination occurred is the key: "We have 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.*" *Id.* at 514. The majority added, "It is not enough, in other words, to *dis*believe the employer; the factfinder must *believe* the plaintiff's explanation of intentional discrimination." *Id.* at 519.

evidence necessary for an employee to prevail and heightens the functional standard of proof necessary to find liability in employment discrimination cases.[14] The resulting standard of proof will make recovery more difficult for Title VII plaintiffs.[15]

The remainder of this Article will explore whether the Court is getting it right or merely getting it done in the disparate treatment context. Part II of this Article will present the contradictory forces underlying getting it done and getting it right in the civil justice system in general, and in employment discrimination litigation in particular. Part III will explore the orthodoxy of disparate treatment law as it stands after *Hicks*. Part IV will examine the effect of abandoning the paradigm that proof of falsity is proof of intentional discrimination. Part V will offer suggestions on what the Court can do to make sure that it gets it right.

II. SEARCHING FOR TRUTH AND DEALING WITH ERROR

Our justice system is a proxy for the truth, with a trial being a search for the truth. A trial is an attempt to determine the truth by examining the evidence left by the truth.[16] For this reason, among others, verdicts are not always accurate.[17] In civil litigation, some

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[14] *See* Robert Brookins, Hicks, *Lies, and Ideology: The Wages of Sin is Now Exculpation*, 28 CREIGHTON L. REV. 939, 942 (1995) (stating that the Supreme Court may be "manipulat[ing] the evidentiary and procedural standards to make it more difficult for plaintiffs to prevail against employers").

[15] Possibly more important is why the standard of proof has changed. In all likelihood, the alteration has far more to do with the Supreme Court's personnel than the continuation of precedent. For example, Professor Essary opines that the *Hicks* decision was based on

> (1) the belief that bias in the workplace is no longer prevalent; (2) the belief that frivolous discrimination claims under the pre-*Hicks* model were commonplace; or (3) the belief that despite the merits or non-merits of claims, the federal court system is overloaded with discrimination claims and that procedural vehicles should be used to alleviate this problem.

Melissa A. Essary, *The Dismantling of* McDonnell Douglas v. Green: *The High Court Muddies the Evidentiary Waters in Circumstantial Discrimination Cases*, 21 PEPP. L. REV. 385, 388 (1994). *See also* Jerome McCristal 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, 245-50 (1994) (suggesting that the *McDonnell Douglas* test was reformulated due, in part, to the perception that employers were incorrectly being found liable and that such fear was frightening employers into hiring minorities in order to avoid suits).

[16] For example, if an employee is fired for incompetence, we would expect to find evidence of the incompetence and that such incompetence had an impact on the decision at issue. The evidence presented is the residue of the truth.

[17] In the criminal arena, verdicts often are not the system's best reckoning of the truth. A not guilty verdict is not necessarily the system's best guess at guilt. Indeed, if juries believed that every defendant who was found not guilty was actually innocent, we would have to

defendants who should be found liable are not ("false negatives"), and some defendants who should not be found liable are ("false positives").[18] This is endemic to the justice system and should come as no surprise even to those not well versed in the law. Of course, false positives and false negatives exist in the criminal justice system as well. Tragically, innocent defendants are convicted and guilty defendants are freed. No society has yet developed a system that guarantees truth and justice. A more reasonable and attainable goal is to create a system of justice that renders verdicts reflecting the truth as often as possible and fairly distributes the remaining error.

The burden of proof system allocates error in the justice system in ways palatable to society. In civil trials, where money usually is involved, the system requires a preponderance of the evidence for a plaintiff to prevail.[19] This standard of proof is sufficient because the fact finder need only believe that the asserted conduct probably occurred in order to require a mere wealth transfer.[20] The risk of error is divided equally between plaintiff and defendant because the risk of a false positive is equal to that of a false negative.[21] The criminal justice system requires proof beyond a reasonable doubt, as liberty is at stake and the accused should not go to jail unless the fact finder is certain that the accused committed the crime charged.

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presume that police arrest, and prosecutors accuse, many people whom they have little reason to believe are guilty.

[18] *See* Tom Stacy, *The Search for the Truth in Constitutional Criminal Procedure*, 91 COLUM. L. REV. 1369, 1406 (1991); Thomas A. Cunniff, Note, *The Price of Equal Opportunity: The Efficiency of Title VII After* Hicks, 45 CASE W. RES. L. REV. 507, 522 (1995).

[19] The clear and convincing standard is used when a fact finder must be more certain of the nature of relevant facts. *See* Herman & MacLean v. Huddleston, 459 U.S. 375, 389 (1983) ("[W]e have required proof by clear and convincing evidence where particularly important individual interests or rights are at stake."); *cf.* Robert Brookins, *Mixed-Motives, Title VII, and Removing Sexism from Employment: The Reality and the Rhetoric*, 59 ALB. L. REV. 1, 128-31 (1995) (explaining that the social issue at stake determines the level of proof required).

[20] *See* Raoul Berger, *The Ninth Amendment, as Perceived by Randy Barnett*, 88 NW. U. L. REV. 1508, 1524 (1994) (stating that the presumption of innocence has been "explained by Max Radin as 'little more than an assertion' that 'much stronger evidence is needed to find a man guilty of a crime than to find that he owes a sum of money'") (quoting MAX RADIN, HANDBOOK OF ANGLO-AMERICAN LEGAL HISTORY § 137, at 229 (1936)).

[21] *See Herman & MacLean*, 459 U.S. at 390 ("A preponderance-of-the-evidence standard allows both parties to 'share the risk of error in roughly equal fashion.'") (quoting Addington v. Texas, 441 U.S. 418, 423 (1979)); *see also* Ronald J. Allen, *Burdens of Proof, Uncertainty, and Ambiguity in Modern Legal Discourse*, 17 HARV. J.L. & PUB. POL'Y 627, 634 (1994) ("We thus strive to treat [civil litigants] equally by making errors against them in a roughly symmetrical fashion, which under certain constraints the preponderance standard does."); Dale A. Nance, *Civility and the Burden of Proof*, 17 HARV. J.L. & PUB. POL'Y 647, 659 (1994) (stating that the preponderance of the evidence standard in civil cases is a reflection of "the law's approximately equal concern to avoid mistaken judgment for either side").

Although both false positives and false negatives exist in the criminal justice arena, false positives should occur with much less frequency in the criminal justice system than in the civil justice system. In the criminal context, the risk of error is heavily weighted against the State. Society simply is more willing to tolerate false negatives than false positives in the criminal justice system.[22] The differing levels of proof suggest that error in each part of the justice system is distributed between parties in a manner society deems fit.[23]

The twin goals of eliminating error and properly allocating error can conflict in the civil justice system. If a systemic change causes a decrease in the total number of errors made under the system, a conflict may not exist. However, if eliminating error results in a system in which false positives or false negatives seriously predominate, the resulting system may embrace an apparently higher or lower burden of proof due to the redistribution of systemic error. Thus, if a court focuses on decreasing the number of false positives while ignoring false negatives, either because of a belief that false negatives do not exist or do not matter, that court has created a system with a relatively higher standard of proof. Any systemic redistribution of error will yield a system with a higher or lower standard of proof. Whether the new system's standard of proof approximates a preponderance of the evidence or reasonable doubt standard depends on the prior system's allocation of error.

Under Title VII, both false positives and false negatives will occur. This is expected, since Title VII litigation is controlled by the same

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[22] *See* Jon O. Newman, *Beyond "Reasonable Doubt"*, 68 N.Y.U. L. REV. 979, 980-81 (1993). Chief Judge Newman states:

> The inevitability of both types of mistakes usually leads us to say that it is better to acquit some number of guilty persons than to convict one innocent person. What we would not readily agree on is the appropriate ratio of guilty persons acquitted to innocent persons convicted. The cases have frequently mentioned a ratio of ten to one, though ratios of twenty to one and even ninety-nine to one have been mentioned in earlier literature.

Id. at 980-81 (footnotes omitted); *see also* Lawrence B. Solum, *You Prove It! Why Should I?*, 17 HARV. J.L. & PUB. POL'Y 691, 701 (1994) ("[B]etter that ten guilty persons go free than one innocent person be convicted.").

[23] *See* Allen, *supra* note 21, at 634 (arguing that the burden of proof and persuasion changes when society wants errors to be skewed in one party's favor); *see also* Adrian A.S. Zuckerman, *Law, Fact or Justice*, 66 B.U. L. REV. 487, 498-99 (1986) ("The requirement of proof on the balance of probabilities may . . . be taken to be an expression of the law's neutrality between civil litigants and not an expression of the policy of maximizing correct conclusions.").

civil justice system that directs other litigation.[24] Nonetheless, the Supreme Court's goal in recent Title VII disparate treatment jurisprudence seems to be to rid the system of error solely by eliminating false positives.[25] The Court has attempted to reach this goal by abandoning and restructuring principles of proof that underlie the *McDonnell Douglas* test.[26] An elimination of error in the Title VII system is difficult to attack, if false negatives are unlikely to increase. Whether the Court's new formulation will decrease false positives while increasing false negatives remains to be seen. If the new formulation has that effect, the Court has simply reallocated the error in Title VII litigation, with a resulting relative increase in the employee's burden of proof.[27] To determine whether the Court has decreased error without effecting a fundamental change in the allocation of error, we must undertake a re-examination of the *McDonnell Douglas* test, as altered by succeeding case law.

III. THE ORTHODOXY OF DISPARATE TREATMENT

A. *The* McDonnell Douglas *Test*

The three-step process announced in *McDonnell Douglas* is simple.[28] The plaintiff-employee must establish a prima facie case of discrimination.[29] Once the prima facie case is established, a

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[24] *See* Robert Belton, *Burdens of Pleading and Proof in Discrimination Cases: Toward a Theory of Procedural Justice*, 34 VAND. L. REV. 1205, 1208 (1981) ("Discrimination cases generally are considered to be civil actions in which the plaintiff must establish his claim for relief by the preponderance of the evidence standard.").

[25] *See* Culp, *supra* note 15, at 246 (explaining that eliminating false positives has been at the cost of ignoring false negatives).

[26] *See id.* (stating that *Hicks* is a manifestation of the Supreme Court's historical desire to decrease the number of false positives, what Culp terms Type II errors).

[27] According to Culp, minimization of the costs of false positives and false negatives is the economically preferred solution. *See id.* at 260-61. Whether such a formulation maximizes justice has yet to be seen.

[28] The process may be too simple. One commentator has suggested that the prima facie case is too weak to create an inference of discrimination and that a defendant's mere burden to articulate a legitimate, non-discriminatory reason is too light to rebut the inference, or consequently, to move the inquiry forward. *See* George Rutherglen, *Reconsidering Burdens of Proof: Ideology, Evidence, and Intent in Individual Claims of Employment Discrimination*, 1 VA. J. SOC. POL'Y & L. 43, 54-56 (1993).

[29] *See* Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248, 252-53 (1981); *McDonnell Douglas*, 411 U.S. at 802. The components of the prima facie case will change depending on the facts underlying the cause of action. *See Burdine*, 450 U.S. at 253-54 n.6; *McDonnell Douglas*, 411 U.S. at 802 n.13. In a failure to rehire case, the prima facie case may be proven:

mandatory, rebuttable presumption exists that intentional discrimination occurred.[30] The burden of production then shifts to the defendant-employer to articulate a legitimate, non-discriminatory reason for the adverse job action.[31] The employee prevails unless the employer presents evidence rebutting the prima facie case.[32] If the employer articulates a legitimate, non-discriminatory reason for the job action, the employee has the opportunity to demonstrate that the reason given is pretextual.[33] After that inquiry, the fact finder issues a verdict.

The *McDonnell Douglas* test was a reaction to the normal two-step litigation process in disparate treatment cases.[34] Prior to *McDonnell Douglas*, Title VII disparate treatment litigation was treated like most other civil litigation.[35] Simply put, a plaintiff presented his or her case, a defendant presented his or her case, and the judge directed a verdict or the fact finder issued the verdict.[36] The perceived failure of this traditional process in the disparate treatment context drove its reconfiguration. This reconfiguration hinged

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> by showing (i) that [the plaintiff] 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.

McDonnell Douglas, 411 U.S. at 802. In a dismissal case, plaintiff can establish a prima facie case "by proving (1) that he is black, (2) that he was qualified for the [subject] position . . . , (3) that he was demoted from that position and ultimately discharged, and (4) that the position remained open and was ultimately filled by a white man." St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502, 506 (1993).

The *Hicks* Court's indication that the race of an employee's replacement may have mattered should not be taken as a suggestion that replacement by a Caucasian is a prerequisite to a prima facie case. The Court merely indicated that the totality of proof indicated that the "minimal requirements of . . . a prima facie case" were satisfied. *Id.* *See also* Furnco Constr. Corp. v. Waters, 438 U.S. 567, 577 (1978) (stating that the *McDonnell Douglas* test is not to be employed "rigid[ly], mechani[cally], or ritualistic[ally]"). Though replacement by a Caucasian person does not seem to be required in order to prove a prima facie case, the fact that the *Hicks* Court seems to welcome it as a possible component of a prima facie case may provide insights regarding other sections of the *Hicks* opinion.

[30] *See Burdine*, 450 U.S. at 254.

[31] *See id.*; *McDonnell Douglas*, 411 U.S. at 802.

[32] *See Burdine*, 450 U.S. at 254.

[33] *See id.* at 255-56; *McDonnell Douglas*, 411 U.S. at 802-04.

[34] *See McDonnell Douglas,* 411 U.S. at 798 (stating that certiorari was granted "[i]n order to clarify the standards governing the disposition of an action challenging employment discrimination").

[35] *See* Essary, *supra* note 15, at 396-97.

[36] When *McDonnell Douglas* was decided, all Title VII trials were bench trials. The Civil Rights Act of 1991 provided plaintiffs the right to jury trials. *See* Civil Rights Act of 1991, Pub. L. No. 102-166, § 1977A(c), 105 Stat. 1071, 1073 (codified at 42 U.S.C. § 1981a(c) (1994)).

on at least two factors: plaintiffs often did not have access to all the information that could help prove discrimination, and seemingly legitimate reasons given by employers for adverse job actions were often masks for discrimination.[37] The mandatory presumption and the pretext inquiry of the *McDonnell Douglas* test helped to neutralize those problems.

The mandatory presumption allows exploration of an employer's reasons for the adverse job action. Without the presumption, an employer might decline to present a case, believing that no fact finder would be willing to find intentional discrimination based solely on a prima facie case. Such an occurrence might allow an employer to escape liability based on an employee's insufficient access to facts rather than on a finding that the employer probably did not discriminate. Similarly, the pretext stage allows an employee to show that discrimination may lurk behind the reasons given for the adverse job action. These aspects of the *McDonnell Douglas* test allow the fact finder to determine what likely caused an employee's firing more accurately than the traditional two-step method. Thus, the test is a tool to eliminate error from Title VII litigation, and ultimately is a good way to get to the truth.[38]

Nonetheless, the *McDonnell Douglas* test has outlived its usefulness if it no longer provides greater accuracy than the traditional structure it replaced. Whether the *McDonnell Douglas* test is perceived by the courts to be more accurate than the traditional structure is the key to its livelihood. Relevant perceptions may have

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[37] The Eighth Circuit's opinion in *Green v. McDonnell Douglas Corp.*, 463 F.2d 337 (8th Cir. 1972), *aff'd*, 411 U.S. 792 (1973), contained the seeds for the Supreme Court's *McDonnell Douglas* test:

> [A] black job applicant must usually rest his case of discrimination upon proof that he possessed the requisite qualifications to fill the position which was denied him . . . .
>
> When a black man demonstrates that he possesses the qualifications to fill a job opening and that he was denied the job which continues to remain open, we think he presents a prima facie case of racial discrimination. However, 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.
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> . . . Green should be given the opportunity to show that these reasons offered by the Company [for its failure to rehire] were pretextual, or otherwise show the presence of racially discriminatory hiring practices by McDonnell which affected its decision.

Id. at 352-53 (footnote omitted).

[38] *See* Furnco Constr. Corp. v. Waters, 438 U.S. 567, 577 (1978) (stating that the *McDonnell Douglas* test "is merely a sensible, orderly way to evaluate the evidence in light of common experience as it bears on the critical question of discrimination"); *cf.* Brookins, *supra* note 14, at 982 n.258 (stating that the *McDonnell Douglas* test's "pretextual channel resembles the *res ipsa loquitur* model in the law of torts").

changed with the times, given the personnel changes of the federal courts in general, and the Supreme Court in particular. Of course, Title VII litigation can be conducted using the traditional structure, if necessary. Indeed, those employees with direct evidence of discrimination have always presented their cases according to the traditional structure.[39] The *McDonnell Douglas* test simply established a less onerous and more accurate method for employees to demonstrate their right to relief. Of course, if the *Hicks* Court's interpretation of the *McDonnell Douglas* test makes it more onerous than the traditional two-step proof structure, the *Hicks* gloss should be discarded. The *McDonnell Douglas* test surely was not designed to make recovery more difficult for plaintiff-employees. Next, this Article will examine the *McDonnell Douglas* test in detail, in part to determine what form of the test the courts should use.

B. The Prima Facie Case, Mandatory Presumption of Discrimination, and Inference of Discrimination

1. Purpose of the Prima Facie Case

Proof of a generic prima facie case allows or forces a fact finder to find a relationship between the prima facie case and a presumed fact. The character of the relationship rests on the strength of the inference or presumption that joins the prima facie case to the presumed fact.[40] A presumption's effect can range from mandating a finding that the presumed fact is true to merely allowing a fact finder to infer that the presumed fact is true.[41] The stronger the relationship between the proven and presumed fact, the stronger the inference or presumption.[42]

The Title VII prima facie case fits into this structure by providing the impetus to suspect that intentional discrimination (the presumed fact) occurred.[43] The mandatory, rebuttable presumption that

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[39] *See* Trans World Airlines, Inc. v. Thurston, 469 U.S. 111, 121 (1985) (stating that the *McDonnell Douglas* test is "inapplicable where the plaintiff presents direct evidence of discrimination").

[40] *See* RICHARD O. LEMPERT & STEPHEN A. SALTZBURG, A MODERN APPROACH TO EVIDENCE 803 (2d ed. 1982).

[41] *See id.*

[42] *See id.*

[43] *See Furnco*, 438 U.S. at 577 ("A prima facie case under *McDonnell Douglas* raises an inference of discrimination only because we presume these acts, if otherwise unexplained, are more likely than not based on impermissible factors.")

follows the prima facie case cements the relationship between the prima facie case (predicate facts) and intentional discrimination. The Supreme Court recognized that the Title VII prima facie case and intentional discrimination did not have to be linked so strongly. In *Texas Department of Community Affairs v. Burdine*,[44] the Court explicitly recognized two meanings of the term "prima facie case." The Court stated that the Title VII prima facie case "establish[es] . . . a legally mandatory, rebuttable presumption," and noted that the term "prima facie case" could also denote that sufficient evidence had been presented to allow a fact finder to infer the presumed fact.[45] This distinction, as well as its import, was echoed in both the majority and dissenting opinions in *Hicks*.[46] The practical effect of linking the Title VII prima facie case and intentional discrimination with a mandatory presumption is that belief of the prima facie case coupled with no evidence rebutting the presumption yields a verdict for a plaintiff-employee as a matter of law.[47]

That some relationship exists between the Title VII prima facie case and intentional discrimination seems obvious.[48] However, the Court's opinions do not indicate why it chose such a strong link between the prima facie case and intentional discrimination; i.e., the mandatory presumption of discrimination rather than a weaker

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[44] 450 U.S. 248 (1981).

[45] *Id.* at 254 n.7.

[46] *See* 509 U.S. at 507-08 (1993) (Scalia, J., majority); *id.* at 527 (Souter, J., dissenting). Specifically, the dissent recognized that

> it is important to note that in this context a prima facie case is indeed a proven case. Although, in other contexts, a prima facie case only requires production of enough evidence to raise an issue for the trier of fact, here it means that the plaintiff has actually established the elements of the prima facie case to the satisfaction of the factfinder by a preponderance of the evidence.

Id.

[47] *See Burdine*, 450 U.S. at 254 ("If the trier of fact believes the plaintiff's evidence [underlying the prima facie case], and if the employer is silent in the face of the presumption, the court must enter judgment for the plaintiff because no issue of fact remains in the case."); *see also Hicks*, 509 U.S. at 506 ("To establish a 'presumption' is to say that a finding of the predicate fact (here, the prima facie case) produces 'a required conclusion in the absence of explanation' (here, the finding of unlawful discrimination.")) (citing 1 D. LOUISELL & C. MUELLER, FEDERAL EVIDENCE § 67, at 536 (1977)).

[48] *See* Furnco Constr. Corp. v. Waters, 438 U.S. 567, 577 (1978) ("A prima facie case under *McDonnell Douglas* 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.").

counterpart, such as a mere permissible inference of discrimination.[49] The answer could derive from the inferential strength of the facts underlying the prima facie case, the intended effect of the presumption on the justice system, or a combination of the two.[50]

The inferential strength of the facts underlying the Title VII prima facie case does not adequately explain the use of the mandatory presumption.[51] A prima facie case may consist solely of proof that a competent, qualified minority plaintiff has been passed over for a job and that people with plaintiff's qualifications were continually sought for the unfilled position.[52] The facts supporting a prima facie case do have sufficient power to create a permissible inference of discrimination, but probably do not have sufficient predictive power to prove that intentional discrimination definitely occurred

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[49] A few likely reasons exist to explain the strength of the presumption, although the Court does not explain them. *See* Essary, *supra* note 15, at 398-99 (noting that the Court's explanations have included assuring efficient and trustworthy labor, eliminating the most common nondiscriminatory reasons for an employee's rejection, and focusing the factual issue to allow an employee to show pretext).

[50] Regardless of the reason, the fact that the Supreme Court chose to bind the prima facie case tightly with the fact of intentional discrimination should determine the lingering effect the prima facie case should have on the remainder of the *McDonnell Douglas* test. For instance, because the plaintiff prevails whenever the presumption stands unrebutted, an employer's claim that it does not have information regarding the reason an employee was fired should not be sufficient to allow the employer to avoid Title VII liability, if the claim is made after the prima facie case is presented. This suggests that the claim that an employer lacks knowledge regarding the actual reasons for the job action should never release the employer from Title VII liability, regardless of when the claim is made. Such a suggestion complements the notion that one reason the prima facie case exists is to help employees who do not have access to information which the employer presumably has. *See* Belton, *supra* note 24, at 1284 ("Courts have long acknowledged the policy that the burden of proof should be placed upon the party who presumably has the peculiar means of access to the evidence necessary to prove a disputed fact."); Kimberlye K. Fayssoux, Note, *The Age Discrimination in Employment Act of 1967 and Trial by Jury: Proposals for Change*, 73 VA. L. REV. 601, 627 (1987) ("The scheme of shifting burdens and presumptions in employment discrimination cases is intended to put the burden on the party best able to produce pertinent evidence."); *cf.* Allen, *supra* note 21, at 631 (explaining that the doctrine of *res ipsa loquitur* arose in order "to restore the appropriate balance between parties when one party has access to information that the other lacks").

[51] *See* 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, 10 (1990) (noting that the prima facie "inference 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 explanations for the plaintiff's rejection."); *cf. Burdine*, 450 U.S. at 253-54 ("The prima facie case serves an important function in the litigation: it eliminates the most common nondiscriminatory reasons for the plaintiff's rejection.").

[52] *See* McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973).

under any standard of proof.[53] Only when no credible reason explaining a job action is found does the link between the Title VII prima facie case and intentional discrimination fully strengthen. The lack of a credible reason for a job action, rather than the existence of the job action and the minority status of the employee, should drive the mandatory presumption.[54] Because the mandatory presumption far outstrips the inferential force of the prima facie facts alone, it seems clear that the vitality of the post-prima facie presumption of discrimination rests on the effect that the presumption is to have on the trial process.[55]

The mandatory presumption has at least two related effects: it forces employers to present reasons for their actions, and it provides guidance to judges regarding how to adjudicate particular cases. The presumption also forces an employer to attack the prima facie case and the presumption of discrimination, or lose. Merely attacking the prima facie case is risky because an unsuccessful attack would leave an unrebutted presumption of discrimination and a verdict in the employee's favor. Only when an employer attacks the presumed fact of discrimination and suggests that some non-discriminatory reason existed for the subject job action can a fact finder determine that a prima facie case exists, but that the employer is not liable under Title VII. Thus, the mandatory nature of the presumption provides a strong incentive for an employer to present a defense centered on the reasons for the adverse job action. This incentive helps increase the accuracy of the trial process by allowing the fact finder to evaluate the employee's claims based on all available evidence from both parties.

The mandatory nature of the presumption also directs judges to adjudicate cases in a particular fashion when a dearth of evidence exists because the employer has refused to provide it. An employer's

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[53] *See* Brookins, *supra* note 19, at 93 ("Presumptions reflect judicial assessments of the probativeness of certain evidence and add an artificial force of logic or persuasiveness to weak evidence, thereby serving as a kind of judicial 'tailwind.'") (footnote omitted).

[54] It would seem sensible to impose the mandatory presumption only after the employer has presented its evidence, as the presumption is driven by the employer's lack of evidence. *See* discussion *infra* Part V (arguing for the imposition of a mandatory presumption which would require a finding of intentional discrimination if the employee demonstrates that the employer's proffered reasons are false).

[55] Arguably, an employer lacks a credible reason for the job action until it presents one. While this is linguistically accurate, a lack of evidence is hardly evident before both parties have had a chance to present evidence. Once an employer declines to offer a non-discriminatory reason for the job action, then a prima facie case alone supports the mandatory presumption of discrimination. *See Burdine,* 450 U.S. at 254.

refusal to rebut a prima facie case yields a directed verdict or summary judgment for the employee.[56] Were the presumption merely permissible, the goal of forcing an employer to explain the job action would be jeopardized because an employer might decline to present a rebuttal case under the assumption that a judge will not grant a verdict for the employee based solely on a prima facie case.[57] A judge's decision not to make the inference could be based on a general lack of sympathy for Title VII plaintiffs or cases, rather than a lack of evidence, and thus would undermine the efficacy of the prima facie case and Title VII itself.[58] In situations where judges decline to make the inference, employees might lose their cases without a reasonable inquiry regarding the reason they were fired. Thus, it is likely that part of the presumption's intended effect was to force judges who would not have made the inference of discrimination after the prima facie case to do so in bench trials, and to force them to grant directed verdicts and summary judgment in favor of employees when employers did not answer the prima facie case.[59]

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[56] *See Burdine*, 450 U.S. at 254.

[57] With a permissible inference, judges should not grant summary judgment in favor of employers. If the fact finder could infer that intentional discrimination occurred, summary judgment in favor of an employer would be inappropriate, as no defendant could be entitled to judgment as a matter of law. *See* Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986) ("[S]ummary judgment will not lie . . . if the evidence is such that a reasonable jury could return a verdict for the nonmoving party."); *see also* FED. R. CIV. P. 56(c) (stating that summary judgment is proper only when "there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law"). This argument may seem academic since, at the time the Court pronounced *McDonnell Douglas*, surviving summary judgment simply meant a trial with a judge as fact finder. *See supra* note 36. Nonetheless, an employee gains some advantage in being assured of a hearing during which the employer might not present a case, and the fact finder can judge the employer's credibility.

[58] In light of the district court's decision in *Hicks* to disregard the inference of discrimination after a showing of pretext, concerns regarding what fact finders would do if the presumption stemming from the Title VII prima facie case were merely permissible should be well taken. *See* Hicks v. St. Mary's Honor Ctr., 756 F. Supp. 1244, 1252 (E.D. Mo. 1991) (denying inference of discrimination), *rev'd*, 970 F.2d 487 (8th Cir. 1992), *rev'd*, 509 U.S. 502 (1993).

[59] *See* Deborah A. Calloway, St. Mary's Honor Center v. Hicks: *Questioning The Basic Assumption*, 26 CONN. L. REV. 997 (1994) Professor Calloway states:

> A presumption is a judicially or legislatively created mechanism for predetermining the sufficiency of evidence to support a factual or legal conclusion. It saves time and legal resources, but it also can serve the purpose of forcing a correct decision that courts and juries are likely not to reach because of their personal prejudices and biases. Inferring discrimination is just such a situation and warrants exactly that treatment.

Id. at 1037. *See also* Allen, *supra* note 21, at 636 (arguing that presumptions developed in part to offset a fact finder's "high probability of . . . misevaluating certain evidence").

The result of the *McDonnell Douglas* test has not been a cavalcade of summary judgments for employees. The role and result of the prima facie case and presumption is not to provide a decisional rule, but rather to strongly encourage employers to present their reasons for the subject job action.[60] Once the prima facie case and related presumption have forced an employer to offer reasons for its actions, the prima facie case and presumption are easy to ignore. Indeed, the prima facie structure "drops from the case" and becomes irrelevant by the time the case is completed.[61] However, the facts underlying the prima facie case should not be forgotten as the Title VII case progresses beyond the prima facie stage. The important inquiry is what the evidence underlying the prima facie case reveals about the likelihood of employment discrimination. The evidence underlying the prima facie case should indicate that a qualified minority was refused a job and the employer continued to look for a suitable candidate. Unless the employer can explain why this occurred, the existence of these facts suggests possible discrimination.

2. Effects of the Prima Facie Case

The import of the *McDonnell Douglas* prima facie case does not rest solely on the mandatory presumption attached to it. The mandatory presumption that follows a Title VII prima facie case is not indispensable to Title VII enforcement.[62] That Title VII cases can be tried under the traditional civil litigation model does not suggest the elimination of the presumption or the *McDonnell Douglas* test. Both are sensible adjuncts to the civil justice system and allow Title VII to be vigorously enforced. A prima facie case is

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[60] *See* St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502, 521 (1993) ("[T]he *McDonnell Douglas* presumption is a *procedural* device, designed only to establish an order of proof and production.").

[61] *See Burdine*, 450 U.S. at 255 n.10; *see also Hicks*, 509 U.S. at 510 (stating that "the *McDonnell Douglas* framework . . . is no longer relevant" once the employer has carried its burden of production). Indeed, in *United States Postal Service Board of Governors v. Aikens*, 460 U.S. 711 (1983), the Supreme Court indicated that once all evidence is received, it does not matter whether a prima facie case was ever made; all that matters is whether the case for discrimination has been made. *See id.* at 715. This pronouncement has at least two implications. First, a plaintiff is not forced into the *McDonnell Douglas* three-part process to win its discrimination case. Second, the inference of discrimination may flow from the totality of evidence, rather than solely from any particular set of facts constituting a prima facie case.

[62] Title VII cases can be tried under the traditional litigation model. *See* Trans World Airlines, Inc. v. Thurston, 469 U.S. 111, 121 (1985).

any set of facts from which an ultimate fact can be inferred.[63] Although the facts underlying a Title VII prima facie case alone may not be sufficient to indicate that intentional discrimination definitely occurred, they are sufficient to indicate that intentional discrimination may have occurred.[64] The facts underlying the prima facie case are important not because they form a prima facie case from which the mandatory presumptive inference flows under the *McDonnell Douglas* test, but because they form a prima facie case from which a permissible factual inference can always flow.[65]

The Supreme Court has never defined the set of facts necessary to create a prima facie case. The Court has only stated that particular sets of facts are sufficient to be deemed a prima facie case. Consequently, the facts of the prima facie case presented in *McDonnell Douglas* and other cases are not necessary to form a prima facie case; they are merely examples of what is sufficient to form one. The fact that the plaintiff-employee was qualified for the job left unfilled by the employer was only one element of the prima facie case in *McDonnell Douglas*.[66] As long as a set of facts that supports an inference of discrimination is presented, proof of qualification should not be required to prove a prima facie case. For example, if a prima facie case suggests that a minority employee is not qualified for a promotion, but the majority race employee who received the promotion was even less qualified, intentional discrimination could be inferred from the totality of the evidence presented.[67]

A prima facie case need not unfailingly resemble the prima facie case in *McDonnell Douglas* because myriad sets of facts exist that

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[63] *See* Belton, *supra* note 24, at 1213-14 ("[T]he prima facie case doctrine helps to answer the following question: In the absence of conflicting evidence, how much evidence on the elements of his case should a plaintiff be required to submit in order to sustain a judgment in his favor?").

[64] *See Hicks*, 509 U.S. at 511 (stating that prima facie facts coupled with "rejection of the defendant's proffered reasons will *permit* the trier of fact to infer the ultimate fact of intentional discrimination").

[65] *See* Wells v. Gotfredson Motor Co., 709 F.2d 493, 496 n.1 (8th Cir. 1983) (noting that "the logical inference of discrimination arising from the prima facie evidence remains" even after the mandatory presumption is rebutted).

[66] *See* 411 U.S. at 802.

[67] *Cf.* Stastny v. Southern Bell Tel. & Tel. Co., 628 F.2d 267, 272 (4th Cir. 1980) (suggesting that proof that plaintiff had better qualifications than the person hired might be sufficient to sustain a verdict for the plaintiff); *but cf.* East Tex. Motor Freight Sys. Inc. v. Rodriguez, 431 U.S. 395, 403-04 (1977) (holding that lack of qualification ends the possibility of a prima facie case and a plaintiff's status as a class action representative).

could support an inference of discrimination.[68] A court should not dismiss a Title VII claim solely because the employee does not offer a fact pattern that matches a previously presented Title VII prima facie case. A court should dismiss a Title VII claim only if the employee did not present evidence sufficient to sustain an inference of discrimination.[69]

A prima facie case and the fact finder's disbelief or partial crediting of an employer's evidence allows the fact finder to determine that intentional discrimination probably occurred.[70] If an employer's evidence is not believed, facts supporting the inference of discrimination (*i.e.*, the prima facie case) remain for the fact finder to consider. The fact finder is clearly allowed to link the proven facts to intentional discrimination because the remaining credible evidence supports a permissible inference of discrimination.[71] Otherwise, unrebutted evidence sufficient to support an inference of discrimination at one point in the trial would be deemed insufficient to support an inference of discrimination at another point.[72] That every prima facie case contains facts sufficient to support an

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[68] *See McDonnell Douglas*, 411 U.S. at 802 n.13 (noting that the facts that constitute a Title VII prima facie case will vary).

[69] Indeed, establishing a prima facie case may not be necessary to recover. *See* United States Postal Serv. Bd. of Governors v. Aikens, 460 U.S. 711, 715 (1983) ("Where the defendant has done everything that would be required of him if the plaintiff had properly made out a prima facie case, whether the plaintiff really did so is no longer relevant.").

[70] *See* Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248, 254 (1981). The *Burdine* Court recognized that the prima facie case "and inferences properly drawn therefrom may be considered by the trier of fact on the issue of whether the defendant's explanation is pretextual. Indeed, there may be some cases where the plaintiff's initial evidence, combined with effective cross-examination of the defendant, will suffice to discredit the defendant's explanation." *Id.* at 255 n.10.

[71] *See* Furnco Constr. Corp. v. Waters, 438 U.S. 567, 577 (1978). Specifically, the Court stated:

> A prima facie case under *McDonnell Douglas* 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. And we are willing to presume this largely because we know from our experience that more often than not people do not act in a totally arbitrary manner, without any underlying reasons, especially in a business setting.

Id. (citation omitted).

[72] *See* Calloway, *supra* note 59, at 1008 (suggesting that *Hicks* allows fact finders to discount evidence underlying the prima facie case as being insufficient to create an inference of discrimination). The *Hicks* majority may believe that the facts underlying a *McDonnell Douglas* prima facie case are insufficient to support an inference of discrimination. *See id.* at 1007-09. If such facts are insufficient, once the presumption of discrimination is rebutted, all that remains is a set of facts that cannot sustain a verdict for an employee. If this is the case, the Court acted unconscionably in declining to provide some set of prima facie facts that would support an inference of discrimination.

inference of discrimination is one of the engines that drives the *McDonnell Douglas* test.

C. *The Burden of Production, Presumption of Discrimination and Proffered Reasons*

Under *McDonnell Douglas*, once a Title VII plaintiff presents a prima facie case, the burden of production shifts to the employer to articulate a legitimate, non-discriminatory reason for the subject job action.[73] The articulation of any legitimate, non-discriminatory reason ("the proffered reason") meets the burden of production, rebuts the presumption of discrimination, and effectively eliminates the presumption from the case.[74] The employer does not need to persuade the fact finder that the proffered reason actually motivated the employer, because the employer has no burden of persuasion.[75]

That the burden of production is light reflects the nature of the presumption created by the prima facie case.[76] Controlled by Rule 301 of the Federal Rules of Evidence,[77] the presumption is a fragile structure that collapses under the weight of any evidence challenging it. Rule 301's treatment of the presumption stems from the "bursting bubble" theory of presumptions which advocates that the presumption is a fragile link between the proven facts and the

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[73] *See* St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502, 506-07 (1993); *Burdine*, 450 U.S. at 254; *McDonnell Douglas*, 411 U.S. at 802. An employer is free to present more than one legitimate, non-discriminatory reason. In *Hicks*, the employer's two proffered reasons were "the severity and the accumulation of rules violations committed by [Hicks]." 509 U.S. at 507.

[74] *See Hicks*, 509 U.S. at 507.

[75] *See* FED. R. EVID. 301. In *Burdine*, "[t]he narrow question presented" was whether defendant had to convince the court "that legitimate, nondiscriminatory reasons for the challenged employment action existed." 450 U.S. at 250. The *Burdine* Court answered the question in the negative, stating "[t]he defendant need not persuade the court that it was actually motivated by the proffered reasons." *Id.* at 254.

[76] Some seem to find the burden of production almost nonexistent. In *Bina v. Providence College*, 39 F.3d 21 (1st Cir. 1994), *cert. denied*, 115 S. Ct. 1406 (1995), the court held that the defendants met their burden of production when the district court judge found, in evidence proffered by the plaintiff, legitimate, non-discriminatory reasons mentioned in the minutes of a tenure committee meeting by a minority of members. *See id.* at 25. This allowed the defendants to rebut the post-prima facie presumption of discrimination without ever formally articulating a legitimate, non-discriminatory reason. *See id.* at 25-26.

[77] Rule 301 states:

> In all civil actions and proceedings not otherwise provided for by Act of Congress or by these rules, a presumption imposes on the party against whom it is directed the burden of going forward with evidence to rebut or meet the presumption, but does not shift to such party the burden of proof in the sense of the risk of nonpersuasion, which remains throughout the trial upon the party on whom it was originally cast.

FED. R. EVID. 301.

presumed fact.[78] Because evidence that the presumed fact is not true breaks this link, the presumption bursts once such evidence is presented.[79] In the Title VII context, an employer's proffered reasons break the link.[80]

1. How the Burden of Production Is Met

That the post prima facie presumption drops from the case after an employer's articulation of a legitimate, non-discriminatory reason is clear.[81] On what grounds a particular proffered reason is deemed legitimate and non-discriminatory is not clear.[82] Determining how an employer's burden of production is met ("BOP decision") is crucial to determining whether the presumption drops from the case.

The BOP decision may seem irrelevant, given that the Court has suggested that the *McDonnell Douglas* structure is irrelevant once all the evidence has been presented.[83] It is not. In *United States Postal Service Board of Governors v. Aikens*,[84] the Court left the *McDonnell Douglas* test intact until the presumption of discrimination was rebutted, stating that "[w]here the defendant has done everything that would be required of him if the plaintiff had properly made out a prima facie case, whether the plaintiff really did so is no longer relevant."[85] The Court concluded that there was sufficient evidence for the fact finder to decide whether intentional discrimination occurred, even in the absence of proof of a prima facie

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[78] *See* 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, 104 n.65 (1991).

[79] *See* LEMPERT & SALTZBURG, *supra* note 40, at 808 n.21.

[80] *See Burdine*, 450 U.S. at 255 n.10.

[81] *See* St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502, 507 (1993).

[82] In *McDonnell Douglas*, the Court ruled that a refusal to rehire a laid-off employee based on the employee's alleged participation in a stall-in and lock-in against McDonnell Douglas constituted a legitimate, non-discriminatory reason. *See McDonnell Douglas*, 411 U.S. at 803-04. During the stall-in, plaintiff and a number of others used their cars to block roads leading to McDonnell Douglas' plant during rush hour. *See id.* at 794-95. The lock-in consisted of placing padlocks on McDonnell Douglas' gates so that workers could not leave. *See id.* at 795. Whether general lessons regarding what constitutes a legitimate, non-discriminatory reason can be drawn from *McDonnell Douglas* is unclear.

[83] *See, e.g., Hicks*, 509 U.S. at 510, 521 (stating that "the *McDonnell Douglas* presumption is a procedural device, designed only to establish an order of proof and production"); United States Postal Serv. Bd. of Governors v. Aikens, 460 U.S. 711, 715 (1983) (holding that once the defendant meets the burden of production required had the plaintiff made out a prima facie case, whether the plaintiff in fact made out a prima facie case is not relevant).

[84] 460 U.S. 711 (1983).

[85] *Id.* at 715.

case.[86] Interestingly, the presumption of discrimination was eliminated only after the defendant "respond[ed] to the plaintiff's proof by offering evidence of the reason for the plaintiff's rejection."[87] Thus, whether the employer has presented any legitimate, non-discriminatory reason remains relevant throughout the trial because failure to present any such reason in the face of a prima facie case leaves an unrebutted presumption which yields a directed verdict for the employee.[88]

Arguably, the BOP decision is not particularly important because the pretext stage of the *McDonnell Douglas* test serves the same function. For reasons that will be clear later, the prior sentence is true only if proof of falsity is equated with proof of pretext.[89] A fact finder may find that a proffered reason was the true reason for the job action, but that it was discriminatory, in which case the pretext inquiry identifies discrimination. Conversely, the proffered reason may be deemed false because the reason would not have been a sufficient reason to fire a majority employee. After finding that an employer proffered a reason that would not have caused a majority member to be fired, but was used to fire a minority employee, the fact finder could, but is not required to, find that discrimination did not cause the job action. Thus the BOP and pretext decisions may have very different effects.[90]

What test is used to determine whether a reason is non-discriminatory is crucial to the BOP decision's usefulness. The substance of the BOP decision—whether "non-discriminatory" entails disparate treatment or disparate impact type discrimination—matters, because some discriminatory reasons that seem non-discriminatory on their face will serve to meet an

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[86] *See id.*

[87] *Id.* at 714-15.

[88] *See* Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248, 254 (1981); *see also* Essary, *supra* note 15, at 399 (explaining that an employee prevails when a prima facie case is unrebutted).

[89] *See* discussion *infra* Part III.D-D.3 (discussing the difference between a plaintiff's need to show "pretext plus" or "pretext only").

[90] Many, including the author, argue that the effects should be the same. *See* Charles A. Sullivan, *Accounting For* Price Waterhouse: *Proving Disparate Treatment Under Title VII*, 56 BROOK. L. REV. 1107, 1116 n.42 (1991) ("If the defendant's proffered reason is disbelieved, there remains no 'legitimate nondiscriminatory reason' in evidence. Therefore, any inference of discrimination from plaintiff's prima facie case remains unrebutted."); *see also* Marina C. Szteinbok, Note, *Indirect Proof of Discriminatory Motive in Title VII Disparate Treatment Claims After* Aikens, 88 COLUM. L. REV. 1114, 1122 (1988) (After proof of falsity, "[t]he plaintiff should prevail because the inference of discrimination arising from the prima facie case remains unrebutted.").

employer's burden of production and rebut the mandatory presumption.[91] Thus, the substance of the BOP decision could diminish the effectiveness of the *McDonnell Douglas* test by frustrating the desired effect of the mandatory presumption and the shifting burden of production.

Three scenarios will demonstrate how the substance of the BOP decision may affect the elimination of the mandatory presumption in a Title VII case. In the first scenario, the employer's proffered reason for the firing is the employee's race. In the second scenario, the employer's proffered reason is the employee's membership in the National Association for the Advancement of Colored People (NAACP). In the third scenario, the employer's proffered reason is the employer's personal animus toward the employee.

In the first scenario, the substance of the BOP decision does not matter. The employer fails to meet its burden of production because the proffered reason is plainly discriminatory. The nature of the discrimination is direct and obvious: the employee was fired because he is a minority. If, in the face of a proven prima facie case, this reason was the employer's only proffered reason, the employee prevails because the unrebutted presumption requires a verdict for the employee.[92]

In the second scenario, where a black employee's NAACP membership is the ostensible reason for the firing, the substance of the BOP decision matters. The substance matters because the proffered reason may or may not be discriminatory. Assume that the court takes judicial notice that most, but not all, members of the NAACP are black and assume further that the employer knows the demographics of the NAACP. Whether the proffered reason is deemed non-discriminatory hinges on the definition of non-discriminatory.[93] If discriminatory is equated with disparate impact type discrimination (discrimination where the effects fall more harshly on minorities), the proffered reason should be deemed

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[91] *See infra* notes 93-96 and accompanying text. Disparate impact entails discriminatory effect without regard to an employer's intent; disparate treatment entails intentional discrimination based on membership in a protected class. *See* Hazen Paper Co. v. Biggins, 507 U.S. 604, 609 (1993).

[92] *See Burdine*, 450 U.S. at 254; *see also* Essary, *supra* note 15, at 399.

[93] Even if the membership of the NAACP were all black, firing based on membership in the NAACP might not be discriminatory if the employee's status as a member in the organization caused the job action, rather than the employee's race.

discriminatory, given its probable effect on blacks.[94] Regardless of the employer's intent, widespread use of NAACP membership as a reason for firing employees would result in the dismissal of a substantially larger proportion of blacks than non-blacks.[95] If the employer's widespread use of NAACP membership as a reason to fire its employees is deemed discriminatory, a single use should be deemed discriminatory as well. If the single use is discriminatory, an unmet burden of production would remain, and the employer would lose in the face of the mandatory presumption.[96]

However, if the term "discriminatory" is equated only with disparate treatment type discrimination, NAACP membership could be deemed a non-discriminatory reason, as the job action arguably did not hinge on race. Such a formulation could render the articulation standard almost worthless. Unless the employer specifically stated that the employee was fired because of his or her membership in a Title VII protected class, the proffered reason would be deemed non-discriminatory. Although the pretext inquiry may determine whether NAACP membership was the real reason for the firing, that question has little bearing on whether the reason is deemed non-discriminatory and sufficient to rebut the presumption of discrimination. Under a disparate treatment type inquiry, the NAACP membership (an arguably discriminatory reason) could serve to rebut the presumption of discrimination.[97]

The third scenario presents the most difficult and important case because personal animus is keenly subjective and may be one of the most conventional legitimate, non-discriminatory reasons for firing an employee. Indeed, personal animus was the basis on which the district court in *Hicks* found that discrimination had not been

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[94] The Equal Employment Opportunity Commission uses a four-fifths rule to determine when the impact on a minority group is sufficient to suggest discrimination. *See* 29 C.F.R. § 1607.4(D) (1995) (Selection procedures that yield "[a] selection rate for any race . . . which is less than four-fifths . . . of the rate for the group with the highest rate will generally be regarded by the Federal enforcement agencies as evidence of adverse impact.").

[95] Disparate treatment does not become disparate impact. "Non-discriminatory," in the context of the articulation of proffered reasons, may be analyzed in light of disparate impact principles in some cases. *See* Watson v. Fort Worth Bank & Trust, 487 U.S. 977, 991, 999-1000 (1988).

[96] *See* St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502, 528 (1993) (Souter, J., dissenting) (explaining that if the employer does not meet its burden of production to overcome the mandatory presumption, the plaintiff will receive judgment in his or her favor).

[97] *See* Watson v. Fort Worth Bank & Trust, 487 U.S. 977, 1003 (1988) (Blackmun, J., concurring) (stating that in a disparate impact inquiry, the employer may rebut the presumption with a legitimate, non-discriminatory reason which raises a genuine issue of fact).

proven.[98] Like most subjective reasons, personal animus may seem non-discriminatory, even from a disparate impact perspective. However, discretion is at the core of subjective decisionmaking. Discretion allows for the use of any subjective reason; the discretion may be applied either discriminatorily or non-discriminatorily. Whether using a practice in a discriminatory manner is a legitimate, non-discriminatory reason sufficient to rebut the mandatory presumption of discrimination is very important.[99]

Purely subjective employment policies that have a discriminatory impact may leave employers liable for discrimination.[100] A proffered reason that has an unjustified discriminatory effect should be deemed a discriminatory reason. If the reason proffered by an employer is susceptible to discriminatory application and the employer does not prove that it was used in a non-discriminatory fashion, the presumption should stand unrebutted and the employee should prevail.[101] For example, if a known Ku Klux Klan member and proven racist was given unfettered discretion to fire employees,

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[98] *See* Hicks v. St. Mary's Honor Ctr., 756 F. Supp. 1244, 1252 (E.D. Mo. 1991), *rev'd*, 970 F.2d 487 (8th Cir. 1992), *rev'd*, 509 U.S. 502 (1993). The district court stated that the plaintiff had not proven that the "crusade to terminate him . . . was racially rather than personally motivated." *Id.* at 1252.

[99] The *McDonnell Douglas* Court tangentially reached this issue in ruling that McDonnell Douglas' proffered reason for refusing to rehire plaintiff rebutted plaintiff's prima facie case, but was lawful only if it applied to all races equally. *McDonnell Douglas*, 411 U.S. at 803-04. Seemingly, a reason that is applied discriminatorily rebuts the prima facie case. Either the Court used a disparate treatment type definition of "non-discriminatory" in evaluating the proffered reasons or the Court did not recognize that a distinction between a reason discriminatory in nature and a reason discriminatory in practice would matter with respect to the BOP decision. At the time *McDonnell Douglas* was decided, the Court did not need to differentiate between a reason that is discriminatory in practice and one that is discriminatory on its face. Pretext would have made the distinction irrelevant because the standard as it existed at that time arguably would have required a verdict for the employee once the employer's proffered reasons were shown to be false. *See id.* at 807.

[100] *See Watson*, 487 U.S. at 988 ("This Court has repeatedly reaffirmed the principle that some facially neutral employment practices may violate Title VII even in the absence of a demonstrated discriminatory intent.").

[101] Concern may attend any system that forces an employer to prove anything. Such concern is misplaced. A system forcing an employer to prove that its reasons are legitimate and non-discriminatory is not at odds with any Supreme Court ruling. While an employer need only articulate a legitimate, non-discriminatory reason for its actions in order to rebut the inference of discrimination, the articulation of illegitimate or discriminatory reasons does nothing to the presumption of discrimination. *See* Roberts v. Gadsden Memorial Hosp., 835 F.2d 793, 798 (11th Cir. 1988) (holding that the failure to consider a minority employee for promotion (i.e., the plaintiff "'never entered [the defendant's] mind as a candidate for [the] position'") is not a legitimate, non-discriminatory reason sufficient to rebut an inference of discrimination), *opinion amended on other grounds*, 850 F.2d 1549 (11th Cir. 1988).

the grant of discretion is hardly non-discriminatory. If not, subjective reasons probably could never be deemed discriminatory.[102]

The scenarios presented suggest that the Court has left important questions respecting legitimate, non-discriminatory reasons open to interpretation. These questions need to be answered because their resolution may determine whether the presumption remains intact or disappears upon an employer's articulation of facially non-discriminatory reasons.

2. The Function of the Burden of Production

The burden of production and mandatory presumption force employers to articulate the reasons for their job actions by affixing judgment for an employee as a cost for an employer's refusal to aid the search for the truth.[103] However, the burden of production and mandatory presumption are not merely tolls. They aid the search for truth and increase the accuracy of the verdict by ultimately helping to determine what happened in the subject case. They accomplish this by narrowing the fact finder's field of inquiry and by giving an employee a fair opportunity to show that discrimination is the most likely cause of the job action.[104] Focusing the discrimination inquiry allows an employee a reasonable opportunity to prevail

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[102] This remains an open issue. In *Furnco Construction Co. v. Waters*, 438 U.S. 567 (1978), the hiring practices of Furnco's bricklayer superintendent were at issue. The superintendent mostly selected workers whom he personally knew were able to handle the subject jobs. *See id.* at 572. Petitioner Furnco argued that the selection method was "'a legitimate, non-discriminatory reason for [his] refusal to consider plaintiffs.'" *Id.* at 574 (quoting Waters v. Furnco Constr. Corp., 551 F.2d 1085, 1088 (7th Cir. 1977)). Respondent-plaintiffs argued that "the general hiring practice, though perhaps legitimate in the abstract, was discriminatorily applied in this case, and cannot be used to rebut the prima facie case." *Id.* at 580 n.9. The *Furnco* Court did not decide whether plaintiff's argument was cognizable, stating merely that "respondents are of course free to pursue any such contentions which have been properly preserved." *Id.* at 581 n.9.

[103] *See* Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248, 254 (1981) (holding that employer's silence in the face of a prima facie case yields a verdict for employee).

[104] *See id.* at 255-56. Ultimately, the burden of production allows an employee to prove what she believed occurred. The Court explained that "[p]lacing this burden of production on the defendant thus serves simultaneously to meet the plaintiff's prima facie case by presenting a legitimate reason for the action and to frame the factual issue with sufficient clarity so that the plaintiff will have a full and fair opportunity to demonstrate pretext." *Id.*

without burdening him or her with a monumental task.[105] Precisely how to narrow the inquiry remains to be considered.

Two arguments regarding the *McDonnell Douglas* test's narrowing function are found in Justice Scalia's majority opinion and Justice Souter's dissent in *Hicks*.[106] The *Hicks* majority argues that the *McDonnell Douglas* test narrows the inquiry from relevant background questions in the prima facie stage to the single ultimate question of intentional discrimination.[107] If intentional discrimination caused the job action, the employee prevails.[108] The dissent argues that the *McDonnell Douglas* test narrows the inquiry from the entire universe of reasons that could have caused the job action, to a determination of whether the reasons the employer proffers for the job action are a pretext for intentional discrimination.[109] If the employer's proffered reasons are proven

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[105] Forcing an employee to disprove every conceivable reason for a job action is monumental. Narrowing the inquiry to a few possible causes of the job action results in clear benefits. For example, the judicial system can cabin the litigation. Discovery requests, interrogatories and depositions would be unmanageable if the entire employer/employee relationship, as it related to all possible causes of the job action, was examined. Similarly, the potential for an unmanageable trial exists whenever the inquiry is not narrowed to some extent before trial. *See* St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502, 537-38 (1993) (Souter, J., dissenting) (noting that discovery costs will rise with uncertainty about employer's reasons); *see also* Joseph M. Pellicciotti, *Proving the ADEA Claim: The Impact of* St. Mary's Honor Center v. Hicks, 4 J. LEGAL STUD. BUS. 1, 19 (1995) (noting that "'the scope of permissible discovery now appears to be much wider' after *Hicks*") (quoting James R. Neely, Jr., E.E.O.C., *General Counsel's Memorandum on Supreme Court's Hicks Decision*, No. 743, *in* 8 Fair Empl. Prac. Man. (BNA) 405:7151, 405:7154); *but cf.* Essary, *supra* note 15, at 425 (suggesting that discovery costs should not rise in the context of jury trials).

[106] *See Hicks*, 509 U.S. at 513-14 (Scalia, J., majority); *id.* at 525 (Souter, J., dissenting).

[107] *See id.* at 513-14 (Scalia, J., majority).

[108] *See id.* at 510 n.3.

[109] *See id.* at 529-33 (Souter, J., dissenting). Justice Souter's reading is truer to *McDonnell Douglas* than Justice Scalia's. The *McDonnell Douglas* Court assumed that the clash of the parties' reasons would serve as the basis for the eventual decision on intentional discrimination when it stated, "the issue at the trial on remand is framed by [the] opposing factual contentions" made by the parties. McDonnell Douglas v. Green, 411 U.S. 792, 801 (1973). McDonnell Douglas contended that Green's prior actions against McDonnell Douglas explained McDonnell Douglas' refusal to rehire Green. *See id.* Green contended that racial discrimination explained the decision. *See id.*; *see also* United States Postal Serv. Bd. of Governors v. Aikens, 460 U.S. 711, 716 (1983) ("[T]he district court must decide which party's explanation of the employer's motivation it believes."); Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248, 255-56 (1981) (stating that the defendant's burden of production will "frame the factual issue" and also give the plaintiff an opportunity to discredit the defendant's evidence).

false, the employee wins because intentional discrimination is deemed to be the reason for the job action.[110]

Justices Scalia and Souter seem to agree that forcing an employer to produce evidence supporting its job action underlies the shifting burden of production.[111] Justice Scalia argues that once evidence that could explain the job action is produced, the purpose of the burden of production has been met.[112] The fact finder's field of view has been narrowed from all of the possible reasons that could explain the job action, to those derived from the evidence presented.[113] Of the thousands of legitimate, non-discriminatory reasons for the job action that may exist, all have been excised from the fact finder's consideration, save those that were articulated or unarticulated but extant in record.[114] The inquiry has been narrowed. According to Justice Scalia, the fact finder will base a verdict only on a reason culled from the evidence that could explain the subject job action.[115] Consequently, all of the reasons that might serve to explain the job action will be easily identifiable from the trial record.[116]

Conversely, Justice Souter argues that the *McDonnell Douglas* test's narrowing function requires that the truth of the proffered reasons be the focus of the inquiry.[117] The dissent's view may

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[110] *See Hicks*, 509 U.S. at 532 (Souter, J., dissenting). An employee prevails even if intentional discrimination is not the sole reason for the job action. *See id.* at 531-32. Intentional discrimination and other reasons can combine to produce a single job action. *See* Paul J. Gudel, *Beyond Causation: The Interpretation of Action and the Mixed Motives Problem in Employment Discrimination Law*, 70 TEX. L. REV. 17, 27-28 (1991) (noting that the sole cause test has never been held to be the proper test; intentional discrimination need not be only reason for job action). *But see* Hannah A. Furnish, *Formalistic Solutions to Complex Problems: The Supreme Court's Analysis of Individual Disparate Treatment Cases Under Title VII*, 6 INDUS. REL. L.J. 353, 371 (1984) (noting that the *McDonnell Douglas* formulation suggests that an employer's reasons are singular).

[111] *See Hicks*, 509 U.S. at 506-07 (Scalia, J., majority); *id.* at 528-29 (Souter, J., dissenting). "Proof of a prima facie case thus serves as a catalyst obligating the employer to step forward with an explanation for its actions." *Id.* at 529.

[112] *See id.* at 516 (Scalia, J., majority).

[113] *See id.*

[114] *See id.*

[115] *See id.* at 522-23. This argument is dubious, as the district court in *Hicks* could not have based its verdict on evidence affirming personal animus between the parties because no such evidence was presented. *See id.* at 542-43 (Souter, J., dissenting) (recognizing that all parties denied that personal animus existed between plaintiff Hicks and his supervisor). More importantly, the only reason we know that is because *Hicks* was a bench trial in which the fact finder was required to give reasons for the verdict. *See* Hicks v. St. Mary's Honor Ctr., 756 F. Supp. 1244 (E.D. Mo. 1991), *rev'd*, 970 F.2d 487 (8th Cir. 1992), *rev'd*, 509 U.S. 502 (1993).

[116] *See Hicks*, 509 U.S. at 522-23 (Scalia, J., majority).

[117] *See id.* at 533-34 (Souter, J., dissenting).

assume that the shifted burden of production is designed to force defendants to articulate the actual reasons for the job action, rather than possible explanations for the job action.[118] Consequently, although unarticulated reasons for the job action may exist, an employer's refusal to articulate and proffer those reasons should eliminate an employer's ability to use those reasons to shield itself from Title VII liability.[119]

The majority and dissent seem to create a hierarchy of reasons for the job action. Three types of reasons other than intentional discrimination that may explain a job action are: 1) proffered reasons; 2) unproffered reasons discussed at trial; and 3) unmentioned reasons not extant in the trial record.[120] Justices Scalia and Souter would agree that unmentioned reasons not extant in the trial record cannot explain the job action and cannot be a basis for a verdict.[121] Similarly, each would likely agree that proffered reasons can explain the job action and be the basis for a verdict in the employer's favor.[122] The dispute lies with using unproffered reasons mentioned at trial as the basis for a verdict for the employer.[123] Justice Scalia would allow their use in such fashion;[124] Justice Souter would not.[125] The use of unproffered reasons to support a verdict for employer is disturbing.[126]

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[118] *See id.*

[119] For example, an employee sues alleging racial discrimination. The employer defends citing plaintiff's absenteeism. In the course of the trial, the plaintiff proves that absenteeism was never a problem and was not the reason for the firing. However, that plaintiff is a homosexual and that his supervisor despises homosexuals is revealed at trial. The supervisor denies a dislike for homosexuals and denies that plaintiff's sexuality was the cause for the dismissal, in part to deflect possible bad publicity. The employer should not receive credit for a defense that it has denied. First, the employee can hardly further discredit an unproffered reason that has been denied. Second, the fact finder would need to be certain that the employer would have fired a white homosexual just as it fired the minority homosexual. Forcing the employee to find evidence that a majority group homosexual would not have been fired for a reason that the employer claims did not cause plaintiff's firing is peculiar and seemingly impossible.

[120] *See Hicks*, 509 U.S. at 522-23 (Scalia, J., majority).

[121] *See id.* at 510 n.3; *id.* at 538-39 (Souter, J., dissenting).

[122] *See id.* at 510 (Scalia, J., majority); *id.* at 530 (Souter, J., dissenting).

[123] *See id.* at 522-24 (Scalia, J., majority); *id.* at 525, 528-30. *See also* Brookins, *supra* note 14, at 955 ("The *Hicks* Court seems to be asking whether any lawful reason exists and not whether the specific reasons given by employers were lawful.").

[124] *See Hicks*, 509 U.S. at 522-24 (Scalia, J., majority).

[125] *See id.* at 528-30 (Souter, J., dissenting).

[126] *See* Sullivan, *supra* note 89, at 1116 n.42. Allowing reasons not presented by defendant to inform verdict is troublesome because such reasons are "especially unlikely to be true" and because allowing "such [a] process may prevent the plaintiff from ever having the opportunity to rebut the reason the court believes to be the 'true' one. . . ." *Id.* at 1117 n.42. *See also*

Unproffered reasons are likely unreliable as possible explanations for the job action, as neither party has suggested that the unproffered reason actually explains the job action. The burden of production is used to force the employer to produce reasons that actually explain the job action.[127] If the purpose of the burden of production is to force the defendant to produce reasons that *could* explain the job action rather than those that *do*, it will, in some cases, be worthless.[128] If proffered reasons are merely reasons that might explain the job action, an employer may have little incentive to produce the true reasons for the job action except that reasons that actually explain the job action are more likely to comport with the evidence that is presented.[129] Rather, an employer has an incentive to proffer the reasons most likely to suggest that intentional discrimination did not occur.[130] Consideration of unproffered and unreliable reasons serves to decrease the accuracy of Title VII

Lanctot, *supra* note 77, at 116-17 (arguing that choosing an unproffered reason in the face of employer's or employee's explanation is "inconsistent with the *Burdine* model."); Szteinbok, *supra* note 89, at 1126. Ms. Szteinbok notes that

> [t]he defendant's rebuttal . . . also reduces the likelihood of factual error by focusing the precise points of actual dispute. The explanation that the defendant articulates in rebuttal will be tried and tested in an adversary context. In contrast, the truth of a court-discerned motive remains in doubt when that reason is so dimly apparent in the record that the plaintiff has not had an opportunity to challenge it.

Id.

[127] For an insightful commentary on the utility and underlying rationale behind forcing decision makers to give reasons for actions, see Frederick Schauer, *Giving Reasons*, 47 STAN. L. REV. 633 (1995).

[128] *See Hicks*, 509 U.S. at 534 (Souter, J., dissenting) ("The Court thus transforms the employer's burden of production from a device used to provide notice and promote fairness into a misleading and potentially useless ritual.").

[129] For instance, in *Hicks*, the evidence that served as the basis for the lower court's ruling seems to have been presented by the employee. *See* Hicks v. St. Mary's Honor Ctr., 756 F. Supp. 1244 (E.D. Mo. 1991), *rev'd*, 970 F.2d 487 (8th Cir. 1992), *rev'd*, 509 U.S. 502 (1993). The lower court determined that the employee had not proven that discrimination was the cause of the firing. *See id.* at 1252. Further, the court decided that the cause was more likely than not a personal vendetta against the plaintiff not motivated by race. *See id.* As the employer denied that there was any animus toward the employee, it seems that the employee's evidence of some vendetta was the key to this case. *See id.* St. Mary's did not produce any credible evidence rebutting Hicks' claims of intentional discrimination; yet St. Mary's prevailed because the fact finder searched into the record and found an unarticulated reason that could have explained the job action. *See Hicks*, 509 U.S. at 542-43 (Souter, J., dissenting). "The Court today decides to abandon the settled law that sets out th[e] structure for trying disparate-treatment Title VII cases, only to adopt a scheme that will be . . . inexplicable in forgiving employers who present false evidence in court." *Id.* at 533.

[130] *See id.* at 533.

verdicts by allowing unproffered reasons to be deemed the true reasons for the subject job action.[131]

The crediting of unproffered reasons also hampers an employee's ability to prove his or her case.[132] The *McDonnell Douglas* Court recognized that few employees could prove that intentional discrimination had taken place without help from their employer.[133] This "help" came by forcing the employer to explain precisely why the adverse job action took place and allowing that explanation to become the lawsuit's battleground.[134] Armed with the employer's reasons, the employee could isolate and eliminate non-discriminatory reasons that could have served as legitimate bases for the adverse job action.[135] Through this process, the employee has a full and fair opportunity to test and rebut the reasons identified by the employer as the basis for the job action.[136] Unproffered reasons are not and cannot be adequately tested or rebutted.[137] Indeed, depending on the posture of the trial at the time the unproffered reason appears, fully exploring an unproffered reason may be inappropriate.[138]

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[131] *See id.*

[132] *See id.* at 534-35.

[133] *See* United States Postal Serv. Bd. of Governors v. Aikens, 406 U.S. 711, 715-17 (1983). "There will seldom be 'eyewitness' testimony as to the employer's mental processes." *Id.* at 716; *see also Hicks*, 509 U.S. at 528-29 (Souter, J., dissenting) (explaining how the *McDonnell Douglas* formula fulfills the intent of Title VII).

[134] *See Hicks*, 509 U.S. at 526 (Souter, J., dissenting).

[135] *See id.* at 527.

[136] *See id.* at 533-34.

[137] *See* Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248, 258 (1981). The Court stated that "the defendant's explanation of its legitimate reasons must be clear and reasonably specific. This obligation arises both from the necessity of rebutting the inference of discrimination arising from the prima facie case and from the requirement that the plaintiff be afforded 'a full and fair opportunity' to demonstrate pretext." *Id.* (citations omitted). *See also Hicks*, 509 U.S. at 529-30 (Souter, J., dissenting) ("Nor does it make any sense to tell the employer . . . that its explanation of legitimate reasons 'must be clear and reasonably specific,' if the factfinder can rely on a reason not clearly articulated, or one not articulated at all, to rule in favor of the employer.").

[138] Evidence on unproffered reasons should be deemed irrelevant under Federal Rule of Evidence 401 because such evidence relates to a reason that has not been asserted and hence cannot reasonably serve to explain the job action. Rule 401 states: "'Relevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." FED. R. EVID. 401. Alternatively, the evidence can be deemed relevant but excludable under Rule 403 in cases such as *Hicks*, where all parties have denied that the unproffered reason was the real reason for the job action. Rule 403 states: "Although relevant, evidence may be excluded if its probative value is substantially outweighed by . . . considerations of undue delay, waste of time, or needless presentation of cumulative evidence." FED. R. EVID. 403.

Determining what happened in the subject Title VII action is the key to an accurate verdict. Testing the evidence is how the parties prove what happened. Although the *Hicks* Court's view of the burden of production's function may be flawed, the pretext step provides a final opportunity for an employee to test an employer's evidence. What effect the pretext stage has on the trial can be the difference between getting it right and merely getting it done.

D. Pretext

Once the employer has proffered a legitimate, non-discriminatory reason for the job action, the *McDonnell Douglas* test moves to its last stage, where an employee may demonstrate that the reason offered by the employer is pretextual.[139] Pretext may be proven by showing either that the proffered reason is unworthy of belief or that intentional discrimination is a more likely explanation for the job action.[140] The former method is proof of falsity and is the indirect method of proof; the latter method is a restatement of the ultimate issue underlying the traditional two-step structure and is the direct method of proof.[141] Although the pretext step is the final step in the *McDonnell Douglas* test, it is not dispositive. Under *Hicks*, proof of pretext through proof of falsity does not guarantee a verdict for an employee.[142] Even after the end of the pretext stage, this question remains: Did the employer engage in intentional discrimination?[143] That this question remains is the linchpin of *Hicks*.

1. *Hicks* and Proof of Falsity

Prior to *Hicks*, the "pretext-plus" and "pretext-only" theories were the two major schools of thought regarding the effect of proof of

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[139] *See* McDonnell Douglas v. Green, 411 U.S. 792, 804 (1993). *McDonnell Douglas* gave employees the right to challenge proffered reasons for discharge on the grounds that they were discriminatory in application or were false. *See id.* at 805 ("[R]espondent must be given a full and fair opportunity to demonstrate by competent evidence that the presumptively valid reasons for his rejection were in fact a coverup for a racially discriminatory decision.").

[140] *See Burdine*, 450 U.S. at 256. A plaintiff may persuade the court that he or she had been the victim of intentional discrimination "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." *Id.*

[141] *See infra* notes 143-49 and accompanying text.

[142] *See Hicks*, 509 U.S. at 515.

[143] *See Hicks* 509 U.S. at 519 ("It is not enough, in other words, to *dis*believe the employer; the factfinder must *believe* the plaintiff's explanation of intentional discrimination.").

falsity on Title VII trials.[144] Courts adhering to the "pretext-plus" school believed that an employee needed to prove the employer's proffered reasons false and that additional evidence of intentional discrimination existed in order to support an inference of discrimination through the indirect method of proof.[145] Judgment in favor of an employer was proper if an employee failed to present "pretext-plus" evidence.[146] Conversely, courts adhering to the "pretext-only" school believed that evidence of falsity was sufficient to support the inference of discrimination; proof of falsity alone yielded a verdict for an employee.[147] The majority and dissenting opinions in *Hicks* loosely parallel the "pretext-plus" and "pretext-only" views, respectively.[148]

Whether proof of falsity is the functional equivalent of proof of intentional discrimination is the question that drives the *Hicks* dispute. The *Hicks* majority found that proof of falsity demonstrates that reasons other than those proffered caused the job action, but not that those other reasons necessarily constitute discrimination.[149] In order to prove that discrimination is the reason for the job action, the employee may need additional evidence.[150]

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[144] *See generally*, Lanctot, *supra* note 77, at 71-91 (contrasting the use of the two rules among the various federal courts of appeal). "Courts have developed two opposing rules to guide them in determining whether the employment discrimination plaintiffs have proven their causes: the 'pretext-only' rule and the 'pretext-plus' rule." *Id.* at 71.

[145] *See id.* at 87 (explaining that in a "pretext-plus" jurisdiction "a plaintiff 'cannot meet his burden of proving 'pretext' simply by refuting or questioning the defendant's articulated reason'") (quoting White v. Vathally, 732 F.2d 1037, 1042 (1st Cir. 1984). *Cf.* Brookins, *supra* note 14, at 990-91 ("Arguably, advocates of the pretext-plus approach heavily discount proof of falsity because they believe that inferences from that proof are too numerous or too weak to establish unlawful discrimination by a preponderance of the evidence in the trial record as a whole.").

[146] *See* Essary, *supra* note 15, at 403-04 & n.82. Justice Souter suggests that pretext-plus evidence will be necessary if proof of falsity does not require verdict for plaintiff. *See Hicks*, 509 U.S. at 534 (Souter, J., dissenting) (stating that the majority's view is a form of "pretext-plus").

[147] *See* Essary, *supra* note 15, at 403 & n.78.

[148] *See Hicks*, 509 U.S. at 509-10 (Scalia, J., majority); *id.* at 532-34 (Souter, J., dissenting). *See also* Brookins, *supra* note 14, at 964 (placing *Hicks* "somewhere in the middle of pretext-only and pretext-plus circuits."); Essary, *supra* note 15, at 406 (noting that *Hicks* represents a "unique version of the 'pretext-plus' doctrine.").

[149] *See Hicks*, 509 U.S. at 514-15; *See also* Brookins, *supra* note 14, at 959 ("In short, the Court reasoned that the logical or analytical gap between proof of falsity on the one hand and proof of unlawful discrimination on the other is too great to support a factual inference or nexus between them.").

[150] *See Hicks*, 509 U.S. at 535 (Souter, J., dissenting) (suggesting that some "pretext-plus" evidence may be necessary under majority's opinion).

Support for Justice Scalia's position flows from his focus on a single sentence in *Aikens* stating that the ultimate issue in disparate treatment cases is "discrimination *vel non*."[151] On the basis of that sentence, the *Hicks* Court makes discrimination *vel non* the sole object of the trial process, to the exclusion of alternative methods of evidentiary analysis.[152] Proof of falsity becomes merely a step in proving that intentional discrimination is the most likely explanation for the job action. By casting the direct method of proof as the only dispositive method of proof, Justice Scalia collapses the direct and indirect methods of proof sanctioned by *Burdine* into a single method of proof.[153]

Conversely, Justice Souter suggests that proof of falsity and proof of intentional discrimination are functionally equivalent.[154] Under the indirect method, the question of pretext is the question of intentional discrimination.[155] If all proffered reasons are eliminated as causes of the job action, discrimination is proven just

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[151] United States Postal Serv. Bd. of Governors v. Aikens, 460 U.S. 711, 714 (1983).

[152] *See Hicks*, 509 U.S. at 511. The *Aikens* Court stated that discrimination *vel non* was the ultimate issue in a case where an employer argued that no prima facie case had been made. *See Aikens*, 460 U.S. at 714. Specifically, the Court determined that whether a prima facie case had been made was irrelevant once all evidence had been heard. *See id.* at 715. The *Aikens* Court did not limit how discrimination *vel non* could be proven.

[153] *See Hicks*, 509 U.S. at 533-34 (Souter, J., dissenting). An employee is not likely to have direct proof of discrimination. If he or she had direct evidence of discrimination, the prima facie/mandatory inference process would not be relevant. The case would have been tried without shifting burdens. *See* Trans World Airlines, Inc. v. Thurston, 469 U.S. 111, 121 (1985) (noting that the *McDonnell Douglas* test is irrelevant when there is "direct evidence of discrimination.").

The *Thurston* formulation might suggest that arguing that proof of falsity wins is odd. *See id.* (recognizing that the respondent may prove a prima facie case of discrimination without resorting to *McDonnell Douglas*). Arguably, if an employee has direct evidence of discrimination, he or she would not get the benefit of the *McDonnell Douglas* presumptions. That argument is misguided. Under *Thurston*, the ultimate issue would be decided without presumptions because direct evidence on the issue existed. *See id.* Although an employee does not prevail merely on presentation of direct evidence of discrimination, he or she is guaranteed victory if the fact finder believes the direct evidence of discrimination. *See id.* (explaining that the *McDonnell Douglas* formula is used when no direct evidence of discrimination exists). Otherwise the fact finder finds for the defendant in the face of proof that discrimination caused the job action.

[154] *See Hicks*, 509 U.S. at 530 (Souter, J., dissenting) (stating that under *McDonnell Douglas*, if the plaintiff proves pretext in the employer's proffered reasons, "the court 'must order a prompt and appropriate remedy.'") (quoting McDonnell Douglas Corp. v. Green, 411 U.S. 792, 807 (1973)).

[155] *See* Lanctot, *supra* note 77, at 71 ("[T]he plaintiff may prevail simply by showing that the defendant's justification is untrue.").

as surely as if direct evidence of discrimination itself were presented.[156] Proffered reasons that are proven false, and that are pretext for a reason that has not been proffered, are pretext for nothing. Proof that no reason exists is proof of discrimination because people rarely act without reason, and the facts underlying the prima facie case suggest that discrimination was that reason.[157] Underlying Justice Souter's structure is the *Furnco* Court's assertion that in the absence of a real reason for an adverse job action, intentional discrimination is the most likely explanation.[158]

Justice Souter's dissent in *Hicks* focuses on how evidence presented under the *McDonnell Douglas* test informs the discrimination issue.[159] His approach suggests that the indirect method of proof under the *McDonnell Douglas* test is a wholly adequate proof structure which may answer the question of intentional discrimination without explicitly reaching it.[160] The indirect method of proof is a proxy for the direct method of proof and the traditional two-step nonpresumptive proof structure.[161] The dissent does not find intentional discrimination where none exists; it simply views the indirect method of proof's inference of

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[156] As Sir Arthur Conan Doyle's Sherlock Holmes said, "[w]hen you have eliminated the impossible, whatever remains, *however improbable*, must be the truth." JOHN BARTLETT, FAMILIAR QUOTATIONS 577 (Justin Kaplan ed., 16th ed. 1992) (from ARTHUR CONAN DOYLE, THE SIGN OF FOUR (1890)).

[157] *See* Furnco Constr. Corp. v. Waters, 438 U.S. 567, 577 (1978) ("[W]e are willing to presume [that discrimination was the cause] largely because we know from our experience that more often than not people do not act in a totally arbitrary manner, without any underlying reasons.").

[158] *See id.* at 577 ("Thus, when all legitimate reasons for rejecting an applicant have been eliminated as possible reasons for the employer's actions, it is more likely than not the employer, who we generally assume acts only with *some* reason, based his decision on an impermissible consideration such as race."). *See also* Calloway, *supra* note 58, at 998 ("Throughout the history of Title VII, this basic assumption [that in the absence of reasons, adverse treatment of protected groups more likely than not resulted from discrimination] has served as a cornerstone of disparate treatment actions.").

[159] *See Hicks*, 509 U.S. at 528-29 (Souter, J., dissenting) (noting that the *McDonnell Douglas* test requires "the employer to step forward with an explanation for its actions," thus identifying the factual issues). Approaching the issue of proof indirectly is a legitimate path. *See Aikens*, 460 U.S. at 714 n.3 ("As in any lawsuit, the plaintiff may prove his case by direct or circumstantial evidence. . . . Thus, we agree with the Court of Appeals that the District Court should not have required Aikens to submit direct evidence of discriminatory intent.").

[160] *See Hicks*, 509 U.S. at 536 (Souter, J., dissenting) (explaining that the employee "has raised [the] inference of discrimination . . . through proof of his prima facie case . . .").

[161] *See id.* at 534 (Souter, J., dissenting) (noting that under *Burdine*, the plaintiff may prove discrimination indirectly by casting doubt upon the explanation proffered by the employer).

discrimination as a legitimate baseline from which to analyze a Title VII case.[162]

The issue is how to analyze the absence of a credible proffered reason for a job action. Because the employer caused the job action, the employer is the best source of information regarding the cause.[163] The employer's lack of knowledge should not allow it to prevail after the pretext stage, when such lack of knowledge would not have done so if admitted just after the prima facie case was proven.[164] Had the employer asserted just after the prima facie case that it did not know what caused the job action, it would have faced an unrebutted presumption of discrimination and lost. Additionally, since the prima facie case was designed to force the employer to present the real reason for the job action (or at least the reason upon which the employer relies), the employer should lose if

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[162] *See id.* (stating that the process of "indirect proof is crucial to the success of most Title VII claims" because employers who discriminate are unlikely to provide direct evidence of their discriminatory motive).

[163] Intuitively, if the employer cannot determine the cause of the job action, the risk of loss should fall on the employer. *See* 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, 844-45 n.152 (1994) (arguing that the employer should bear the risk); Szteinbok, *supra* note 89, at 1131 ("Given that the law must resolve an open question against one party or another, the risk of judicial error should fall upon the party that defrauds the court.") (citation omitted). Of course, and employer may refuse to proffer the true reason. *See* Kenneth R. Davis, *The Stumbling Three-Step, Burden-Shifting Approach in Employment Discrimination Cases*, 61 BROOK. L. REV. 703, 759 (1995) (suggesting that many non-discriminatory reasons may exist for an employer's reluctance to provide the real reason). If an employer chooses this course, the employer should not be heard to complain if he or she loses.

[164] Seemingly, this formulation forces an employer to shoulder the burden of proving its proffered reason; it does not. *See* Candace S. Kovacic-Fleischer, *Proving Discrimination After* Price Waterhouse *and* Wards Cove: *Semantics as Substance*, 39 AM. U. L. REV. 615, 652 n.283 (recognizing that the burden of proof functionally shifts to the defendant in every case in which the fact finder believes the plaintiff's case). When the employer's evidence is the focus of the trial and is not credible, the employer should not be treated as charitably as if its evidence were believed.

An employee maintains the burden of proof as long as the court instructs the jury to find for the employer unless the employee proves, by the preponderance of the evidence, one of three things: 1) that proffered reasons are not the real reasons for the adverse job action; 2) that intentional discrimination is more likely the explanation of the job action than the proffered reasons; or 3) that intentional discrimination more likely than not caused the adverse action. *See id.* at 653. Such an instruction would track the *Burdine* Court's view of pretext. *See id.* The burden of persuasion on the question of intentional discrimination appears to shift only because the truth of the asserted reasons is the relevant question, rather than the existence of direct evidence of intentional discrimination. *See id.* at 656-57. The burden does not shift—it vanishes—because intentional discrimination, as strictly construed, is no longer the operative question.

it fails to provide the real reason.[165] Otherwise, an employee must first determine the employer's actual, but unproffered, reason and then prove it is a pretext for discrimination in order to prevail.[166] Forcing an employee to determine what the proffered reason should have been and debunk it is odd, given that the employee claims the real reason for the job action was intentional discrimination.

The *Burdine* Court's statement that proof of falsity is a legitimate, dispositive method of proof invigorated the *McDonnell Douglas* Court's admonition that "respondent must be afforded a fair opportunity to demonstrate that petitioner's assigned reason for refusing to re-employ was a pretext or discriminatory in its application."[167] The ruling provided an additional method to prove discrimination. This expansion of methods of proof may have resulted from the realization that discrimination can be insidious and that its subtler forms can be difficult to prove directly.[168] If the absence of reasons for a job action suggests that discrimination likely occurred, presuming that fact to be true seems to fit the preponderance of the evidence standard and accord with common sense.

2. The Value of the Pretext Step

The majority's conception of the pretext step may stem from the view that the *McDonnell Douglas* test is a disposable vehicle used

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[165] *See* Lanctot, *supra* note 77, at 133. Professor Lanctot notes:

> [T]here is no rational reason for giving a defendant who has lied about the reasons for its actions a presumption that its lie does not conceal illegal conduct. In no other area of the law would a lying defendant be accorded such solicitude. Ordinarily lack of credibility may be considered as adverse evidence. . . . To presume that a defendant who offered a false reason for its actions in court did so for a benign reason is illogical.

Id. (citations omitted).

[166] *See* Lanctot, *supra* note 77, at 122. Of course, cases where an employer is mistaken as to the truth of the proffered reasons, but actually relied on the proffered reasons at the time the job action occurred, would not support a finding of discrimination. *See* Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248, 259 (1981) ("The fact that a court may think that the employer misjudged the qualifications of the applicants does not in itself expose him to Title VII liability, although this may be probative of whether the employer's reasons are pretexts for discrimination.") (citations omitted); Kralman v. Illinois Dep't of Veterans' Affairs, 23 F.3d 150, 156-57 (7th Cir. 1994) (stating that an honest mistake or bad business judgment is not pretext); Lanctot, *supra* note 77, at 122 (noting that many courts assert that an employer's mistaken belief regarding truth of proffered reasons is not discrimination).

[167] McDonnell Douglas Corp. v. Green, 411 U.S. 792, 807 (1973).

[168] *See id.* at 801 ("[I]t is abundantly clear that Title VII tolerates no racial discrimination, subtle or otherwise.").

solely to arrive at the ultimate question of discrimination.[169] Actually, the *McDonnell Douglas* structure has at least two specific functions: 1) to enforce reasonable inferences; and 2) to provide an orderly method to move the discrimination inquiry to conclusion.[170] Both functions help increase the accuracy of the system by internalizing facts that underlie the system.

The debate regarding the value of proof of falsity becomes one regarding reasonable and proper inferences. The *Hicks* dissent believes that proof of falsity provides evidence from which a fact finder must infer discrimination.[171] The majority does not.[172] Although the pretext step seems to be the battleground, the essence of the disagreement is what factual inferences may be drawn from the prima facie case.[173] If one does not believe that the prima facie case permits an inference of discrimination, proof of falsity will not necessarily indicate that an inference of discrimination should be drawn from the evidence. Conversely, if one believes that the prima facie case creates an inference of discrimination, proof of falsity

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[169] *See* St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502, 521 (1993) ("[T]he *McDonnell Douglas* presumption is a *procedural* device, designed only to establish an order of proof and production."). *See also*, Essary, *supra* note 15, at 412 ("In fact, for all practical purposes, the model of proof in circumstantial discrimination cases has come full circle to its pre-*McDonnell Douglas* form which simply asks: 'Did the defendant intentionally discriminate against the plaintiff?'").

[170] *See Hicks*, 509 U.S. at 521 (stating that the *McDonnell Douglas* test is a procedural device used to establish an order of proof and production).

[171] *See id.* at 536-37 (Souter, J., dissenting).

[172] *See id.* at 508-10 (Scalia, J., majority). Falsity provides evidence from which the fact finder *may* infer discrimination. *Id.*

[173] The legitimacy of the post prima facie inference rests on the tightness of fit between the evidence presented and intentional discrimination. *See* Kovacic-Fleisher, *supra* note 163, at 627-28. If a tight fit between the prima facie case and intentional discrimination exists, the fact finder should infer that intentional discrimination occurred even in the absence of the presumption. At the time *McDonnell Douglas* and *Furnco* were decided, in the absence of reasons that would normally cause a majority group member to be fired, it was very probably the case that a qualified minority who had been fired had been the target of intentional discrimination. The truth of the assumption drove the presumption. Had the assumption been untrue, the presumption would have been factually unsupportable. The presumptive inference rested on the reasonable factual inference. *See id.* Professor Kovacic-Fleischer suggests that

> A factual inference differs from a presumption or presumptive inference in that it is a conclusion that can be drawn logically from the evidence and could be the most likely conclusion to draw from the facts. . . . If the fact finder believes that the inferred facts exist and the court believes these facts are sufficient to meet the party's burden of persuasion, then the burden of persuasion is fulfilled.

Id. at 627 (citations omitted). For example, no one would argue that proving the facts underlying a prima facie discrimination case would allow the alteration of the allocation of burdens of proof in an antitrust case. This is so because the facts underlying a Title VII prima facie case do not suggest it is more likely than not that the defendant violated antitrust laws.

likely strengthens that inference. Simply, the evidence supporting the inference is stronger after proof of falsity.[174]

Whether one believes that proof of falsity creates a factual inference of discrimination likely affects how one views the *McDonnell Douglas* test's narrowing of issues.[175] If one believes that proof of falsity creates a factual inference of discrimination, the *McDonnell Douglas* test's sharpening of the inquiry is a logical progression, narrowing the issues from the consideration of all reasons that could have explained a job action, to consideration of the employer's proffered reasons, to proof of falsity, which constitutes proof that intentional discrimination occurred. Alternatively, one who does not find that proof of falsity creates a factual inference of discrimination probably views the progressive sharpening of the inquiry as one of eliminating some reasons that could explain the job action, to rejecting the proffered reasons as explanations, to the ultimate consideration of intentional discrimination as the reason for the job action. This view is plausible, but problematic.

The latter conception of the narrowing function renders the pretext step a rebuttal with no independent significance regarding the fact of intentional discrimination. If the pretext step was intended to be a mere rebuttal stage, one wonders why any serious attention was paid to it after *McDonnell Douglas*, or why *Burdine* specifically equated the indirect and direct methods of proof.

3. Pretext and Summary Judgment

The reconception of the pretext step and proof of falsity should have serious implications for summary judgment and directed verdicts in Title VII cases. In order to avoid summary judgment or a directed verdict, a litigant must show that the fact finder has sufficient evidence to rule in the litigant's favor.[176] Precisely how

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[174] Some who do not believe that the prima facie case creates an inference of discrimination may believe that the inference exists after proof of falsity because the evidence in favor of discrimination is stronger after proof of falsity.

[175] *Burdine* made clear that the test was to have a narrowing function. Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248, 255 n.8 (1981) ("[A]llocation of burdens and the creation of a presumption by the establishment of a prima facie case is intended progressively to sharpen the inquiry into the elusive factual question of intentional discrimination.").

[176] *See* Anderson v. Liberty Lobby, 477 U.S. 242, 248 (1986) ("[S]ummary judgment will not lie . . . if the evidence is such that a reasonable jury could return a verdict for the nonmoving party."); Kovacic-Fleischer, *supra* note 163, at 630 ("One way that the plaintiff can survive a motion for a directed verdict is to produce evidence which, if believed, would allow or compel a verdict for the plaintiff . . . .").

much evidence is necessary to sustain a verdict in an employee's favor is unclear. A prima facie case coupled with proof of falsity is sufficient to support a verdict for an employee.[177] However, if an employee lacks additional evidence with respect to discriminatory intent, what allows a fact finder to find for or against an employee is unclear.[178] The quantum of evidence necessary to allow the fact finder to rule for a plaintiff is a core question informing the "pretext only/pretext plus" argument.[179]

If proof of falsity says little or nothing regarding whether intentional discrimination occurred, an employee who proves falsity may not have significant evidence regarding intentional discrimination. Without evidence on the ultimate fact question, how an employee escapes summary judgment or a directed verdict is a mystery.[180] Conversely, if an employee can prevail with just the prima facie case and proof of falsity, an employee should rarely, if ever, lose on summary judgment.[181]

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[177] *See Hicks*, 509 U.S. at 511.

[178] For example, the Sixth Circuit has ruled that the facts underlying a prima facie case are not enough to prove pretext. *See* Manzer v. Diamond Shamrock Chems. Co., 29 F.3d 1078, 1084 (6th Cir. 1994).

[179] What constitutes sufficient "pretext-plus" evidence to allow an employee to prevail is unclear. Bias, racial or otherwise, does not seem to constitute direct evidence of discrimination. *See* Blumoff & Lewis, *supra* note 50, at 57 n.317 (noting that statements directly revealing state of mind may not constitute direct evidence of discrimination); Gudel, *supra* note 109, at 49-50 (stating that racial slurs and statements regarding why an employee was fired does not constitute direct evidence that the employee was fired because of race); Sullivan, *supra* note 89, at 1118-19 (stating that evidence of actual bias does not prove dismissal was based on discriminatory intent); Michael A. Zubrensky, *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, 981 (1994) (same). Evidence of bias may be circumstantial evidence of intentional discrimination, but so is proof of falsity. If "pretext-plus" evidence must be direct evidence of discriminatory intent, plaintiff employees may be doomed. *See* Blumoff & Lewis, *supra* note 50, at 47 ("Evidence scholars have long recognized that one can never prove state of mind directly; one can only glimpse its presence circumstantially.")

[180] The sheer weight of the standards for directed verdicts and its equivalents may discourage courts from granting them. *See* Richardson v. Leeds Police Dep't, 71 F.3d 801, 805 (11th Cir. 1995) ("A judgment as a matter of law may be affirmed only when 'the facts and inferences point so overwhelmingly in favor of the movant . . . that reasonable people could not arrive at a contrary verdict.'") (quoting Pulte Home Corp. v. Osmose Wood Preserving, Inc., 60 F.3d 734, 739 (11th Cir. 1995)). *See generally* Davis, *supra* note 162, at 738-40 (expressing confusion regarding the application of summary judgment after *Hicks*).

[181] *See* Essary, *supra* note 15, at 433 ("Justice Scalia's remarks logically lead to this result: raising a genuine issue of fact regarding the credibility of the employer's proffered reasons should defeat the employer's motion for summary judgment."); *see also* Tim D. Gray, Note, *Summary Judgment and Rule 301 After* St. Mary's Honor Center v. Hicks, 15 MISS. C. L. REV. 217, 239-40 (1994) (questioning whether summary judgment should be allowed in cases like *Hicks* given that proof of pretext through cross examination is sufficient to sustain judgment

Once a plaintiff has established a prima facie case, a permissible inference of discrimination has been established.[182] All that an employer can present at the summary judgment stage are reasons for the job action.[183] In order for the employer to prevail on summary judgment, the court would have to rule that the employer's proffered reasons are its real reasons, that the reasons have no discriminatory taint, and that the reasons were not used in a discriminatory manner.[184] Such a ruling seems to involve determinations that the court cannot make at the summary judgment stage.[185]

IV. EFFECTS OF THE ABANDONMENT OF FALSITY AS PROOF OF INTENTIONAL DISCRIMINATION

The elimination of proof of falsity as proof of discrimination has rewritten the *McDonnell Douglas* test and lowered an employee's likelihood of success. Additionally, the change wrought by the *Hicks* gloss on the *McDonnell Douglas* test will likely produce a less accurate Title VII system. The new system will have at least three clear negative effects. First, the effects of fact finder bias will increase, because juries are now allowed to credit putative legitimate, nondiscriminatory reasons that have no basis in the evidence. Second, employers will benefit from not being believed. Third, the effective level of proof will increase, resulting in justice denied.

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for employee). *Cf.* Steven D. Smith, Comment, *The Effect of Presumptions on Motions For Summary Judgment in Federal Court*, 31 UCLA L. REV. 1101, 1115 (1984) (arguing that unless the movant forecloses the existence of a genuine issue of material fact, the nonmovant may prevail at summary judgment stage without answering).

[182] *See Hicks*, 509 U.S. at 506 (stating that once a plaintiff has established a prima facie case there is a presumption that the employer unlawfully discriminated against the employee).

[183] *See id.* at 507.

[184] *See* Essary, *supra* note 15, at 432. Only such proof would foreclose a finding of intentional discrimination. *See id.* at 433. Today, this may not be a concern for employers. *See* 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, 231 (1993) ("There is a further perversion of the *McDonnell Douglas/Burdine* formula in the summary judgment context. Courts believe defendants when they articulate their non-discriminatory reasons for the employment decision and disbelieve plaintiffs when they attempt to prove that defendants' articulated reasons are pretextual.") (citation omitted).

[185] *See* Anderson v. Liberty Lobby, 477 U.S. 242, 255 (1986) ("Credibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge, whether he is ruling on a motion for summary judgment or for a directed verdict.").

A. *The New System Courts Fact Finder Bias*

Under *Hicks*, the fact finder may unearth innate bias and systematically misinterpret evidence to an employee's detriment.[186] Fact finders are encouraged to search for reasons other than those proffered in order to exculpate employers and may ignore relevant evidence and the inferences flowing from it.[187] Fears that a fact finder will rely on an unproffered reason to deny recovery to an employee who has proven the falsity of the employer's proffered explanation are well-founded.[188] Indeed, the *Hicks* district court decision rested on an unproffered reason.[189]

The *Hicks* facts provide an important example. After plaintiff Hicks proved a prima facie case, St. Mary's Honor Center claimed that Hicks was fired because of the number and severity of disciplinary violations against him, including a threat against his

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[186] *See* Calloway, *supra* note 58, at 998 ("When the Supreme Court in *Hicks* refused to recognize a presumption of discrimination based on a prima facie case and a discredited nondiscriminatory explanation, the Court both questioned the continued prevalence of discrimination and invited lower court judges and juries to do the same."). The bias may be against Title VII rather than against any particular group protected under Title VII.

[187] Strangely, the Court allows reasons that would not have been sufficient to meet an employer's burden of production, because they were not articulated, to destroy an employee's inference of discrimination. *See* St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502, 507-08 (1993) (noting that although the employer's proffered reasons were pretextual. the plaintiff did not prove racial discrimination). Hypothetical reasons are not sufficient to meet the burden of production. *See* Turnes v. AmSouth Bank, 36 F.3d 1057, 1061 (11th Cir. 1994) ("[A]n employer may not satisfy its burden of production by offering a justification which the employer either did not know or did not consider at the time the decision was made.").

[188] *See Hicks*, 509 U.S. at 534-35 (Souter, J., dissenting) (noting that the plaintiff is confronted with disproving all reasons extant in the record, not just those proffered by the employer). Interestingly, the Sixth Circuit has determined that a fact finder that simply judges an employer's proffered reasons not credible has acted improperly. *See* Manzer v. Diamond Shamrock Chemicals Co., 29 F.3d 1078, 1083 (6th Cir. 1994) ("The jury may not reject an employer's explanation . . . unless there is a sufficient basis *in the evidence* for doing so.").

[189] *See* Hicks v. St. Mary's Honor Ctr., 756 F.Supp. 1244, 1252 (E.D. Mo. 1991); *see also Hicks*, 509 U.S. at 508. The Court stated:

> The District Court, acting as trier of fact in this bench trial, found that the reasons petitioners gave were not the real reasons for respondent's demotion and discharge. . . . [T]he District Court concluded that "although [respondent] has proven the existence of a crusade to terminate him, he has not proven that the crusade was racially rather than personally motivated."

Id. (quoting Hicks v. St. Mary's Honor Ctr., 756 F. Supp. 1244, 1250-52 (E.D. Mo. 1991)); *see also* Benzies v. Illinois Dep't of Mental Health and Developmental Disabilities, 810 F.2d 146, 148 (7th Cir. 1987) (stating that a fact finder may refuse to credit both employer's or employee's proffered cause of the job action).

supervisor.[190] St. Mary's asserted no other reasons for the firing.[191] Hicks proved that the reasons proffered by St. Mary's were false.[192] However, Hicks' burden of persuasion forced him to prove by a preponderance of the evidence that unlawful discrimination occurred.[193]

Once all the evidence had been presented, the fact finder had only the prima facie case and proof of falsity as credible evidence on which to base its verdict. Although no evidence suggesting personal animus as the cause of the firing had been offered, the fact finder determined that personal animus could have explained the firing and ruled against Hicks.[194] In affirming the verdict, the *Hicks* majority appears to allow speculation regarding the possible reasons for the subject job action where none should exist.

Once a fact finder has determined that an employer's proffered reasons are not the real reasons for the job action, no issue of fact remains.[195] When the prima facie case and proof of falsity remain as the only credible evidence, a fact finder ought to conclude that discrimination more likely than not occurred. Intentional discrimination remains a factual issue, but not one that can be resolved through resort to the evidence presented.[196] The debate

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[190] *See Hicks*, 509 U.S. at 505-07.

[191] That other possible explanations existed should have been discounted unless St. Mary's affirmatively asserted one as a reason for the firing. For instance, Martians could have visited the decision maker and convinced him that Hicks should be fired. Were Hicks' attorney to ask if Martians appeared to the decision maker instructing him to fire Hicks and the decision maker answered negatively, the possible existence of a Martian instruction would hardly be an acceptable basis for the fact finder's verdict. In *Hicks*, personal animus was deemed a possible explanation, though the St. Mary's decision maker denied personal animus between him and Hicks. *See Hicks*, 509 U.S. at 543 (Souter, J., dissenting).

[192] *See id.* at 508 (Scalia, J., majority).

[193] *See id.*

[194] *See id.*

[195] *See Hicks*, 509 U.S. at 509; Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248, 254 (1981). Both the *Burdine* and *Hicks* Courts recognized that no issue of fact exists just after a prima facie case is presented. *Hicks*, 509 U.S. at 509; Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248, 254 (1981). No issue of fact exists because the employer's burden of production is not met. Though a factual debate regarding the existence of intentional discrimination could have occurred, no legal debate remained. The presumption forced the fact finder to render a particular verdict. If the *Burdine* and *Hicks* Courts meant that the prima facie facts alone actually proved that intentional discrimination occurred, proof of falsity would have required a verdict in the employee's favor since proof of falsity leaves the prima facie facts and their inferences intact. *See* Brookins, *supra* note 14, at 970-71 (suggesting that because articulating a legitimate reason creates the issue of fact, proof of falsity should resolve that issue).

[196] *See* Calloway, *supra* note 58, at 1009. An unrebutted prima facie case creates an inference of discrimination. *See Burdine*, 450 U.S. at 254; Furnco Constr. Corp. v. Waters, 438

about intentional discrimination can occur, but must be informed by something other than the evidence presented. The verdict will be based on the fact finder's life experiences.[197] In *Hicks*, the district court's decision hinged on its personal experiences suggesting that personal animus often causes employees to be fired.[198]

Allowing the fact finder to search for an unproffered, legitimate, non-discriminatory reason to support a verdict for an employer is problematic. Although the fact finder's function is to find facts and interpret evidence, that function is discharged once the evidence yields a single reasonable conclusion.[199] Allowing additional interpretation in such a context is wasteful and invites error. The fact finder's interpretation will become speculation centered on unproffered reasons unexplored by an employee.[200] Unexplored reasons are likely to be unreliable because an employee has no reasonable opportunity to test or rebut those reasons.[201] The system's newfound reliance on reasons that an employee has no reasonable opportunity to rebut is the real manner in which *McDonnell Douglas* and *Burdine* were overruled. Those cases had guaranteed an employee the opportunity to prove pretext regarding an employer's defenses to Title VII liability.[202]

If a case is put to a fact finder without direct evidence supporting either the proffered reasons or intentional discrimination as the

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U.S. 567, 577 (1978). Without evidence to meet the inference, a fact finder's rejection of the inference cannot be based on the evidence.

[197] *See* Calloway, *supra* note 58, at 1009 ("What evidence makes it 'more likely than not' that the defendant discriminated? The answer to this question depends on one's beliefs about the prevalence of discrimination.").

[198] *See* Hicks v. St. Mary's Honor Ctr., 970 F.2d 487, 492 (8th Cir. 1992), *rev'd*, 509 U.S. 502 (1993).

[199] Presumptions help guarantee that the fact finders reach the single reasonable conclusion. *See* Calloway, *supra* note 58, at 1037.

[200] *Hicks*, 509 U.S. at 543 (Souter, J., dissenting) ("It is hardly surprising that Hicks failed to prove anything about this supposed personal crusade [to terminate him], since St. Mary's never articulated such an explanation for Hicks's discharge, and since the person who allegedly conducted this crusade denied at trial any personal difficulties between himself and Hicks."). Of course, the possibility remains that personal animus existed, was racially motivated and was discriminatory.

[201] *See* Brookins, *supra* note 14, at 993 (noting that *Burdine* requires clearly articulated reasons so that the plaintiff has an opportunity to rebut them).

[202] *See* McDonnell Douglas Corp. v. Green, 411 U.S. 792, 804 (1973) ("On remand, respondent must . . . be afforded a fair opportunity to show that petitioner's stated reason for respondent's rejection was in fact pretext."); *id.* at 805 ("In short, on the retrial respondent must be given a full and fair opportunity to demonstrate by competent evidence that the presumptively valid reasons for his rejection were in fact a coverup for a racially discriminatory decision.").

cause of the job action, the fact finder's verdict will be a referendum on the fact finder's perceived prevalence of intentional discrimination in society.[203] This must be so, because the only question the fact finder can answer is whether discrimination more likely than not occurred, given that no evidence to the contrary was presented. That process is probably not what Congress intended when it granted Title VII plaintiffs the right to jury trials.[204]

B. Employers Benefit From Disbelief

Now that any unproffered reason extant in the record may support a verdict for an employer, employers may benefit by denying that a particular reason caused the job action and having their denial disbelieved. An employer benefits because disbelief leads to proof of falsity, which then allows the fact finder to search for unproffered reasons that employees will not likely attempt to disprove.[205]

For example, assume that an employee files a Title VII suit after being fired. The employer proffers excessive tardiness as the only reason for the firing. Although the employee disproves the proffered reason, evidence is presented at trial about rumors that the employee is homosexual. The employee's supervisor denies that the rumors were the basis for the employee's dismissal. Consideration of the rumors as the real reason for the dismissal should end. No evidence has been presented suggesting that the rumors caused the firing. Although evidence has been presented suggesting that the rumors existed, all evidence suggests that the rumors did not cause the firing. Nonetheless, the rumors may be considered a reason for the dismissal that the employee has failed to conclusively disprove.

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[203] *See* Brookins, *supra* note 14, at 956 n.105. Professor Brookins states:

> It is also interesting to note that when Congress enacted Title VII of the Civil Rights Act of 1964, it proscribed jury trials out of fear that juries would prejudice blacks. In contrast, the Civil Rights Act of 1991 permits jury trials, arguably because women and minorities might stand a better chance of prevailing before juries than before Reagan appointees.

Id. at 956 n.105. *Cf.* Fayssoux, *supra* note 49, at 629 (suggesting that the judiciary believes that juries are biased against employers in the ADEA context).

[204] *See* H.R. REP. NO. 102-40, at 1 (1991), *reprinted in* 1991 U.S.C.C.A.N. 549, 694 (stating that the purpose of the Act was, in part, to restore "the civil rights protections that were dramatically limited" by Supreme Court decisions). *See also supra* note 36 and accompanying text.

[205] *See Hicks*, 509 U.S. at 508. In *Hicks*, proof of falsity allowed the fact finder to credit an explanation that Hicks and St. Mary's denied: that personal animus played a part in the decision to terminate Hicks. *See supra* notes 114, 187-88 and accompanying text.

Allowing the rumors of homosexuality to be deemed the firing's cause is problematic because the employee has done all that common sense dictates to prove that the rumors did not provide the real reason. Continued exploration of the rumors as the cause of the job action might lead the fact finder to believe that the rumors caused the job action. Practically, the employee should not continue to expend resources to prove a fact about which both parties ostensibly agree: that the rumors were not the reason for the dismissal.[206] In addition to cost considerations, extended discussion of seeming irrelevancies will tend to dilute the balance of the employee's case.[207]

Consider what the employee must show to prove that the denied reason was not the actual reason for the dismissal. The employee would have to treat the reason as if it were proffered, then disprove it. The employee could prove that no rumors of homosexuality ever existed, that the rumors did not cause the firing, or that the rumors' use masked intentional discrimination.[208] Proving that the rumors never existed or that the rumors were not the real reason for the job action involves evidence that is usually presented in any event. However, once the supervisor denies that the rumors precipitated the job action, any additional evidence regarding the rumors could be excluded.[209]

Proving that the reason employee was fired was discriminatory and that the rumors actually masked the discrimination is more difficult due to the nature of the evidence that would have to be

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[206] Although an employer's proffer may be untrue, its falsity does not contradict the employee's case. The employee claims that intentional discrimination, rather than the proffered reason, caused the job action.

[207] Indeed, the employee may be forestalled from asking about a denied "reason" by the Federal Rules of Evidence. Rule 402 prohibits the admission of irrelevant material. FED. R. EVID. 402; *see also supra* notes 126-37 and accompanying text (discussing the relevance of unproffered evidence). Before *Hicks*, an attempt to disprove a reason denied as the cause of a firing could hardly be deemed an attempt to introduce relevant information. Such evidence has become relevant, however, because an employee must now disprove unproffered reasons extant in the record to prevail. *See Hicks*, 509 U.S. at 515-17 (explaining an employee's burden of proof).

[208] Of course, in order to prove that the unproffered reason was not the real reason, an employee would likely have to procure testimony from current employees. Although that task might seem monumental, the *Hicks* majority had no problem placing this burden on the employee. *See Hicks*, 509 U.S. at 516-17; *see also* Kristen T. Saam, Note, *Rewarding Employers' Lies: Making Intentional Discrimination Under Title VII Harder To Prove*, 44 DEPAUL L. REV. 673, 711-12 (1995) (suggesting that it is more common and more difficult for an employee to elicit testimony from current employees than for an employer to elicit testimony from a disgruntled former employee).

[209] *See* FED. R. EVID. 403 (allowing the exclusion of cumulative evidence).

presented. The employee would need to show that rumors about majority group members' sexuality would have been or were treated differently than rumors about the employee's sexuality.[210] Evidence supporting such a showing would almost certainly be prohibited as an irrelevant invasion of privacy or an attempt to embarrass or harass employees with insubstantial connection to the Title VII case.

By denying the rumors as the cause of the job action, the employer forestalls inquiry regarding the rumors. The employer prevails if the jury believes that the employee's sexuality is the real reason for the job action. Although the employee will have been effectively precluded from presenting evidence to show that the reason is either illegitimate or discriminatory, the fact finder may determine that the employee could not conclusively discount the rumors of homosexuality as the job action's cause.

Incorrect verdicts result precisely because no serious inquiry is made regarding the denied reason.[211] If the rumors were not the job action's cause, injustice occurs because the verdict rests on an incorrect fact. If the rumors caused the job action, injustice occurs because the employee did not have a reasonable opportunity to prove that firing based on the rumors was colored by discriminatory bias.[212]

Arguably, existing civil justice system remedies, such as penalties for perjury, solve these problems.[213] However, perjury charges and other remedies are only appropriate to correct the harm caused by lying. While the benefit from lying is the destruction of the presumption of discrimination, the benefit from not being believed is the forestalling of the inquiry. The pretext step may reverse some

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[210] *See* McDonnell Douglas Corp. v. Green, 411 U.S. 792, 804 (1973) ("Especially relevant to such a showing [of pretext] would be evidence that white employees involved in acts against petitioner [McDonnell Douglas] of comparable seriousness . . . were nevertheless retained or rehired.").

[211] *See Hicks*, 509 U.S. at 538 (Souter, J., dissenting) (noting that it is unclear whether a trial court would even admit evidence that may not relevant to the reasons proffered by the employer).

[212] Additional danger accompanies cases in which the denied reason is unseemly but would lead a significant number of people to dismiss the employee. The decisionmaker denies that the unseemly reason caused the job action, while the fact finder considers whether the reason could have caused the job action. The fact finder's conclusion may track the fact finder's belief as to whether the unproffered reason could have caused the decisionmaker to fire the employee. As the prevalence of sentiment that the denied reason could have caused the firing rises, the likelihood of an employee's success falls.

[213] *Cf. Hicks*, 509 U.S. at 520-22 (discussing the procedural impact of perjury and stating that employers who give evidence that is disbelieved are not necessarily perjurers.)

of the benefit of lying; it will not reverse the employer's benefit from not being believed.

C. *The Effective Level of Proof Is Heightened*

1. Certainty and the Burden of Proof

Every burden of proof assumes some level of fact finder certainty: the higher the level of certainty, the higher the burden of proof.[214] Accordingly, the reasonable doubt standard requires that the fact finder be more certain than the clear and convincing standard, which requires that the fact finder be more certain than the preponderance of the evidence standard.[215] The *Hicks* Court has raised the fact finder's requisite level of certainty for an employee to prevail and has heightened the employee's burden of proof.[216]

The desire for certainty may stem from the mistaken belief that every fact can be proven to a certainty. Whether New York City has more residents than Los Angeles is a fact that can be proven to a certainty through reference materials. Regardless of the answer, its accuracy is unquestioned. Conversely, whether New York City is a more cosmopolitan city than Los Angeles is a matter that can be argued, but not proven. The answer is not susceptible to certainty.

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[214] *See supra* notes 19-23 and accompanying text (comparing the level of certainty necessary for a party to prevail where the standard of proof required is a preponderance of the evidence versus beyond a reasonable doubt).

[215] *See id.* Since Title VII actions are civil actions, conclusive proof is not required for employer liability. *See* 3 EDWARD J. DEVITT ET AL., FEDERAL JURY PRACTICE AND INSTRUCTIONS § 72.01, at 32 (4th ed. 1987) ("To 'establish by a preponderance of the evidence' means to prove that something is more likely so than not so. . . . This rule does not, of course, require proof to an absolute certainty, since proof to an absolute certainty is seldom possible in any case."); Belton, *supra* note 24, at 1220 n.56. The preponderance of the evidence standard requires that

> [T]he trier of fact must believe that it is more probable that the facts are true or exist than it is that they are false or do not exist; but, it is not necessary to believe that there is a high probability that they are true or exist, or necessary to believe to a point of almost certainty, or beyond a reasonable doubt, that they are true or exist, or necessary to believe that they certainly are true or exist.

Id. (quoting J.P. McBaine, *Burden of Proof: Degrees of Belief*, 32 CALIF. L. REV. 242, 261 (1944)).

[216] *See Hicks*, 509 U.S. at 514-15 (declaring that the fact finder must determine that the employer has unlawfully discriminated and not merely that the employer's explanation for the job action is unbelievable); *id.* at 511 (stating that the *McDonnell Douglas* presumption does not shift the burden of production away from the employee, who bears the burden of persuasion as well). One commentator has suggested that a fear of false positives drove the *Hicks* majority's attempt to eliminate all false positives. Culp, *supra* note 15, at 249-50.

No matter what answer is given, it is arguably incorrect. Similarly, whether intentional discrimination exists in a Title VII case is an issue not susceptible to certainty, although courts analyze it as if it is.[217]

The expectation that discrimination can be proven to a certainty causes problems. If a fact can be proven to a certainty, the burden of proof does not matter. Any burden of proof can be surpassed because the fact can be proven to a certainty.[218] Conversely, when a fact cannot be proven to a certainty, the burden is crucial because it can be dispositive.[219] If the burden is set correctly, a party that is unable to meet the burden loses because the merits of its case have not been proven. If the burden is set too high, a party may lose because the evidence that conclusively proves the party's case does not exist or is extraordinarily burdensome to gather.

Ignoring the changes in the burden of proof that attend alterations of requisite levels of certainty may explain *Hicks*. If one were asked if intentional discrimination occurred in *Hicks*, the answer might be "I am not sure." If one were asked whether intentional discrimination more likely than not occurred, the answer would necessarily be "yes" or "no." One can be certain that an event more likely than not occurred and yet be uncertain that the same event actually occurred. Under a reasonable doubt standard, an employer would prevail when the fact finder is uncertain that intentional discrimination occurred.[220] Under a preponderance of the evidence

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[217] *Cf.* United States Postal Serv. Bd. of Governors v. Aikens, 460 U.S. 711, 715-16 (1983) (holding that intentional discrimination is to be treated like any other disputed question of fact in civil litigation).

[218] For example, the burden of proof would not matter in a trial where the issue was whether New York City was more populous than Los Angeles. Even if the burden of proof was beyond a shadow of a doubt, counting the cities' residents would prove which city is more populous.

[219] *See* Furnish, *supra* note 109, at 354 (recognizing that "the allocation of the burdens of proof may be the decisive factor" when proof of intent is the issue); Belton, *supra* note 24, at 1207. Professor Belton notes that:

> [T]he allocation of the burdens of proof during trial often has a significant effect on the outcome of a case and frequently may be dispositive. Indeed, the concept of a burden of proof . . . helps implement the substantive laws by instructing the factfinder on the degree of confidence he should have in the correctness of factual conclusions for a particular type of case.

Id. (citations omitted).

[220] Certainty is the essence of proof beyond a reasonable doubt. *See generally*, Victor v. Nebraska, 511 U.S. 1, 12 (1994) ("Proof 'beyond a reasonable doubt' . . . is proof 'to a moral certainty,' as distinguished from an absolute certainty.") (citations omitted).

standard, an employee prevails when the fact finder believes that discrimination probably occurred.[221]

Arguably, *Hicks* embraces the preponderance of the evidence standard because it requires only that intentional discrimination more likely than not occured.[222] However, this requirement affords at least three constructions, each of which heightens the burden of proof. The first construction considers whether intentional discrimination is more likely than each reason in the record. The second construction considers whether intentional discrimination is more likely than the entire set of possible reasons extant in the record. The third construction considers whether intentional discrimination is more likely than all alternative reasons, including those outside of the record.

The first construction would be the employee's most favorable view of *Hicks*. This construction suggests that *Hicks* requires the fact finder to conclude that some particular reason other than intentional discrimination caused the job action. The operative question would be whether intentional discrimination was a more likely explanation for the job action than the reason the fact finder chose as the job action's cause. Though an employee might not know which reason the fact finder would select, that only one alternative explanation would be compared to discrimination is better than the second construction.

The second construction is the construction most likely intended by the *Hicks* majority.[223] A focus on intentional discrimination, rather than the reasons negating discrimination, underlies this construction. The construction also allows the fact finder to determine that several reasons could have combined to cause the job action.[224] The operative question is whether discrimination was

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[221] *See* DEVITT, *supra* note 214, § 72.01, at 32; Belton, *supra* note 24, at 1220 n.56. The clear and convincing standard requires that the fact finder believe

> that it is highly probable that the facts are true or exist; while it is not necessary to believe to the point of almost certainty, or beyond a reasonable doubt that they are true or exist, or that they certainly are true or exist; yet it is not sufficient to believe that it is merely more probable that they are true or exist than it is that they are false or do not exist.

J.P McBaine, *Burden of Proof: Degrees of Belief*, 32 CALIF. L. REV. 242, 262-63 (1944).

[222] *See* St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502, 509 (1993) (stating that the burden of proof for a prima facie case is a preponderance standard).

[223] Given Justice Scalia's belief that the fact finder will not go outside of the evidence presented to find alternatives to discrimination, this construction is probably preferred by the *Hicks* majority. *See Hicks*, 509 U.S. at 522-23.

[224] Of course, several factors may combine to cause a job action. *See* Price Waterhouse v. Hopkins, 490 U.S. 228, 284 (1989) (Kennedy, J., dissenting) (recognizing that discriminatory

more likely the cause than the group of alternative explanations existing in the trial record.

A fact finder will most likely internalize the third construction. The only distinction between the second and third constructions is the former's requirement that each possible cause of the job action be mentioned in the trial record. The focus under both the second and third constructions is whether intentional discrimination caused the job action, rather than whether other reasons failed to cause the job action. Any alternative explanation, whether or not mentioned in the record, could serve to suggest that intentional discrimination did not cause the job action. Although the *Hicks* majority suggests that a fact finder will not credit an explanation without supporting evidence, the *Hicks* district court did just that.[225]

In order to make the distinction between the second and third constructions, a fact finder must recognize that intentional discrimination is the fact to be proven and that alternative explanations to intentional discrimination will suggest that the employee has not met his or her burden of proof. Additionally, a fact finder must recognize that alternative explanations for the job action gleaned from the fact finder's background, rather than the evidence, do not suggest that an employee has not met his burden of proof. That a fact finder would recognize the distinction is unlikely.

Under each construction, the burden of proof is higher than that placed on an employee by the *McDonnell Douglas/Burdine* framework. In order to prove that discrimination more likely than not occurred, at a minimum, an employee must disprove all proffered and unproffered reasons in the record. Since the *McDonnell Douglas/Burdine* test states that merely disproving an employer's proffered reasons meets the preponderance of the evidence burden as a matter of law,[226] disproving all proffered and unproffered reasons is a higher burden of proof than proof by a preponderance of the evidence. Though proof of falsity does not indicate that intentional discrimination actually occurred, proof of falsity is proof beyond a preponderance of the evidence.

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and nondiscriminatory motives may combine to cause job action).

[225] *See* Hicks v. St. Mary's Honor Ctr., 756 F.Supp. 1244, 1250-52 (E.D. Mo. 1991); *see also* Hicks v. St. Mary's Honor Ctr., 970 F.2d 487, 491 (8th Cir., 1992) ("[I]t was improper for the district court to assume—without evidence to support its assumption—that defendant's actions were somehow 'personally motivated.'").

[226] Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248, 253, 256 (1981).

That the burden of proof has risen seems clear. How high the burden has risen is dependant on the quantum of proof the fact finder requires in order to find that discrimination occurred. What that quantum of proof is depends on the fact finder's background.

2. False Positives and False Negatives

An unstated goal of the *Hicks* majority is to eliminate false positives in Title VII disparate treatment cases.[227] A false positive is a verdict which finds a non-discriminating employer liable for discrimination.[228] That many non-discriminating employers may be found liable under the *McDonnell Douglas/Burdine* test was the intellectual cornerstone on which the *Hicks* majority based its ruling that proof of falsity does not require a verdict in an employee's favor.[229] Indeed, Justice Scalia's expression of outrage that an employer whose work force is predominantly minority, and whose decisionmaker is of the same race as the plaintiff employee, could be held liable under Title VII based on proof of falsity suggests that the *Hicks* majority's only goal was to eliminate false positives.[230]

Eliminating or reducing false positives is a reasonable goal as long as the result is not a shift in the relative proportions of false positives to false negatives.[231] If a shift occurs, the result may be a naked change in the applicable level of proof. Either the belief that false positives are unacceptable, or that too many false positives occurred under the *McDonnell Douglas/Burdine* system must underlie the desired elimination of false positives.[232] The former belief is misguided because false positives will occur under the preponderance of the evidence standard.[233] The latter belief is also

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[227] *See* Matthew J. Freeman, Comment, St. Mary's Honor Center v. Hicks: *The Abandonment of Indirect Proof of Discriminatory Animus in Title VII Cases—Misinterpretation of* McDonnell Douglas *and Its Progeny*, 31 IDAHO L. REV. 267, 274-76 (1994). *See also* Culp, *supra* note 15, at 246 (arguing that *Hicks* demonstrates the Supreme Court's desire to eliminate false positives).

[228] *See supra* notes 16-18 and accompanying text.

[229] *See Hicks*, 509 U.S. at 514-15 (1993) (Scalia, J., majority) (arguing that the dissent's "falsity as discrimination" standard would force the fact finder to find discrimination where the fact finder believed that none existed).

[230] *See id.* at 513-14.

[231] *See supra* notes 16-27 and accompanying text (discussing the allocation of error through assigning burdens of proof).

[232] For commentary suggesting that the Court has gotten the mix of false positives and false negatives correct, see Cunniff, *supra* note 18, at 528-530.

[233] That a risk of error exists means that error will occur. *See supra* note 18 and accompanying text (discussing the allocation of risk in the civil justice system).

misguided because the preponderance of the evidence standard rather than the *McDonnell Douglas* test causes most, if not all, false positives.[234] Nonetheless, exploring why the *Hicks* majority may have felt that too many false positives existed under *McDonnell Douglas* is important. Regardless of which reason underlies it, the *Hicks* test heightens the level of certainty necessary for employees to prevail in disparate treatment cases.[235]

If too many false positives existed under the *McDonnell Douglas / Burdine* test, either too many false positives existed relative to false negatives or too many false positives existed relative to the normally expected number of false positives. A misconception regarding the expected ratio of false positives to false negatives may explain a belief that false positives were much more numerous than false negatives. Some may incorrectly suggest that the number of false positives should roughly equal the number of false negatives.[236] The preponderance of the evidence standard allocates the *quality* of the error as between plaintiff and defendant rather than the *quantity* of error. A discriminating employer is as likely to be found not liable for discrimination as a non-discriminating employer is to be found liable for discrimination. However, whether the system produces the same number of non-discriminating, liable employers as discriminating, nonliable employers depends on the facts of the cases that are tried.[237] A particularly important factor influencing the ratio of false positives to false negatives is the number of discriminating and non-discriminating employers who go

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[234] *See* Brookins, *supra* note 19, at 126 (stating that "a clear and convincing standard is indicated to avoid exposing employers to an unnecessarily high number of frivolous suits and false positives.").

[235] *See supra* notes 14-15 (discussing the change in the evidentiary and procedural standards under *Hicks*).

[236] *See* Jason S. Johnston, *Bayesian Fact-Finding and Efficiency: Toward an Economic Theory of Liability Under Uncertainty*, 61 S. CAL. L. REV. 137, 160-62 (1987) (stating that "requiring the juror to be at least 50% certain of fault before assigning liability might seem to imply that the two kinds of errors—false positives and false negatives—will be equally likely and hence cancel each other out," and discussing why such a perception is incorrect).

[237] False negatives exist whenever an employer both discriminates and prevails at trial. Few reasons exist to believe that possible false positive fact patterns actually predominate over possible false negative fact patterns, save that discrimination occurs too infrequently to generate as many false positive fact patterns as false negative fact patterns. However, as false positive fact patterns require that unproffered reasons actually explain the job action, false negative fact patterns should occur more frequently than false positive fact patterns. Of course, even if false negatives occur more often than false positives, the preponderance of the evidence system ought not be altered unless a systemic bias toward creating false negatives exists.

to trial and the type of evidence that may produce a false negative or false positive.[238] An actual or anecdotal comparison of false positives to false negatives cannot provide proof that the *McDonnell Douglas / Burdine* system produced too many false positives. The assumption that Title VII over-indicates the prevalence of discrimination extant in the American workplace likely underlies the belief that the system created too many false positives.[239]

An assumption that more false positives existed than should have been expected under the *McDonnell Douglas / Burdine* test is likewise important. If the number of false positives can be decreased without affecting the number of false negatives, little counsels against such change. Reducing false positives without affecting false negatives is theoretically possible. The preponderance of the evidence system encompasses both false positives and false negatives because it governs cases in which intentional discrimination occurred and cases in which no intentional discrimination occurred. However, a particular set of facts can only produce a false positive or a false negative, since the employer either did or did not discriminate. If false positives can be identified before a verdict is rendered, the number of false positives can be reduced with minimal effect on the level of proof.

Although false positives are easily defined, they are not easily identified. In every false positive case that reaches the pretext step, the employer must not have discriminated and its proffered reasons must have been disbelieved.[240] If the employer discriminated, a guilty verdict is a true positive even if the reasoning behind the verdict is flawed. Although such a verdict might indicate a flawed system, the flaw would not have created a false positive. Similarly, the employer's proffered reasons must have been disbelieved, since the belief that a legitimate, nondiscriminatory reason caused the job

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[238] All false negatives are verdicts for employers. All false positives are verdicts for employees. Whether fact patterns that produce verdicts for employees are as prevalent as fact patterns that produce verdicts for employers is important.

[239] Although this conclusion is not surprising, it suggests that the *Hicks* majority had little reason for altering the system other than disagreement with the tenets underlying prior Court decisions. *See* St. Mary's Honor Ctr. v. Hicks, 509 U.S. 506, 512-20 (1993) (Scalia, J., majority) (disagreeing with the dissent's *Burdine*-based arguments).

[240] For example, a false positive may occur if the employer fails to answer the employee's prima facie case and a verdict is directed against the employer. Nothing short of eliminating the post-prima facie presumption of discrimination would solve that false positive problem. The *Hicks* majority did not advocate that alteration of the *McDonnell Douglas* test. See *Hicks*, 509 U.S. at 521 (explaining that the *McDonnell Douglas* test was a "*procedural* device, designed only to establish an order of proof and production.").

action necessarily yields a verdict for the employer. Thus, in a false positive case, the fact finder must correctly disbelieve that the proffered reasons caused the job action and correctly believe that an unproffered nondiscriminatory reason was the actual cause.

Making certain that possible false positive cases are actual false positives is the key to avoid heightening the level of proof. False positives are erroneous verdicts. Erroneous verdicts given in the face of evidence demanding contrary results are caused by blatant fact-finder error or systemic error that forces the erroneous verdict. If the fact finder is merely a poor fact finder, better voir dire may solve the problem. If the system forces a fact finder to render a knowingly incorrect verdict, a systemic correction is required. For a systemic correction to fix false positives in the system, the verdict must be knowingly incorrect. The fact finder must be sure that discrimination did not occur. Unless the court or the fact finder is certain that the possible false positive is an actual false positive, it risks trading possible false positives and possible true positives for actual false negatives. If false negatives replace possible false positives and possible true positives, the relative level of proof rises.

Cases in which a verdict for an employee was based on proof of falsity are possible false positives. However, *Hicks* does not guarantee that fact finders will not trade false positives for false negatives. Without such a guarantee, the laudable goal of increasing the system's accuracy is lost. Without an increase in accuracy, the new system seems only to create artificial barriers to an employee's success under Title VII.

V. GETTING IT RIGHT

The Court should create a mandatory inference of discrimination requiring that an employee prevails on proof of falsity,[241] unless the fact finder is sure, based on clear and convincing evidence, that a legitimate, non-discriminatory reason caused the job action.[242]

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[241] *See* Calloway, *supra* note 58, at 1038 ("There is absolutely no reason why the Court could not have defined the prima facie case and the operation of presumptions in disparate treatment cases to provide that disproving the defendant's articulated nondiscriminatory reason, together with proving a prima facie case, creates a presumption that discrimination has occurred."); Gray, *supra* note 180, at 245 (noting that Federal Rule of Evidence 301 does not foreclose a court from deciding that disproving an employer's proffered reasons requires judgment for an employee).

[242] This test recognizes that an unproffered explanation may explain the adverse job action. However, it forces the fact finder to give a particular reason why the plaintiff did not meet its burden of persuasion. *See* Szteinbok, *supra* note 89, at 1115 ("[P]laintiff in a disparate

If the Court determines that the post-prima facie presumption cannot be reborn in the form of a post-falsity inference, the Court should create the post-falsity inference, but eliminate the post-prima facie presumption.[243] Regardless of the existence of the post-prima facie presumption, this solution eliminates false positives without substantially increasing false negatives. Thus, those who believe that false positives are too prevalent should be satisfied. Additionally, those who believe that proof of falsity is proof of intentional discrimination should be satisfied because proof of falsity will yield a verdict in an employee's favor, except when an employer has clearly not discriminated.[244]

A post-falsity mandatory inference of discrimination is reasonable because proof of falsity and intentional discrimination are closely related. Indeed, the evidence supporting the post-pretext inference is stronger than that underlying the post-prima facie presumption.[245] The post-falsity inference is a factual inference flowing directly from the evidence, rather than a presumptive inference that flows indirectly from the evidence.[246] The post-falsity presumption merely recognizes that if the fact finder disbelieves the proffered reasons, intentional discrimination more likely than not caused the firing.

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treatment suit should prevail if her prima facie case is not successfully rebutted by a substantiated, specific explanation that she has had a full and fair opportunity to challenge."); *see also* Gray, *supra* note 181, at 234 n.156 (suggesting that an unproffered reason should be supported by solid evidence to be a legitimate alternative explanation).

[243] Federal Rule of Evidence 301 ostensibly destroys the presumption and may bar its revival. Rule 301 bars shifting the burden of persuasion to the party against whom the presumption acts. *See* FED. R. EVID. 301; *see also supra* note 76 and accompanying text (discussing how Federal Rule of Evidence 301 controls the presumption created when a plaintiff presents a prima facie case).

[244] This result may resemble the *Price Waterhouse v. Hopkins* mixed-motives model. 490 U.S. 228 (1989). Under the mixed-motives model, once an employee proves that bias affected the employer's decisionmaking process, the burden of production shifts to the employer to prove that the same decision would have been reached in the absence of discrimination. *See id.* at 244-47. The proposed solution mimics the mixed-motives model in that the fact finder may find for the employer after proof that discrimination likely caused the job action. Under the suggested solution, proof of falsity is proof of discrimination.

[245] *See* Binder v. Long Island Lighting Co., 57 F.3d 193, 200 (2d Cir. 1995) ("Resort to a pretextual explanation is, like flight from the scene of a crime, evidence indicating consciousness of guilt, which is . . . evidence of illegal conduct.").

[246] That the inference flows directly from the evidence does not mean that direct evidence of discrimination exists. Direct evidence is unnecessary for an employee to prevail. *See* St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502, 511 (1993); Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248, 256 (1981).

Faced with both a prima facie case and proof of falsity, a reasonable fact finder cannot conclude that intentional discrimination did not likely occur, unless strong evidence to the contrary exists.[247] Once falsity is proven, a mandatory inference of discrimination is warranted because discrimination was the relevant issue during the falsity inquiry. That the *McDonnell Douglas* inquiry tested all proffered reasons other than discrimination and determined that all of those reasons were false means that discrimination has been proven by a preponderance of the evidence.[248]

For example, if an employer were sued for firing an employee due to the employee's political beliefs and all other reasons that the employer gave for the firing were discredited, a mandatory inference that the employee's political beliefs caused the firing would be reasonable. Facing liability for firing an employee based on political beliefs, an employer would likely present its best reasons for the job action. The fact that the employer's best reasons are not credible suggests that the employee's political beliefs caused the firing. An inference would be improper only when the inferred cause of the firing is so improbable that an unknown and unproffered reason more likely caused the firing than the inferred reason. If the current Supreme Court believes that after proof of falsity, an unknown, unproffered reason is a more likely cause of the subject job action than discrimination, the entire *McDonnell Douglas* test should be dismantled.[249]

The *McDonnell Douglas* test steadily eliminates reasons other than discrimination for the job action.[250] At the time *McDonnell*

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[247] If a plaintiff discredits all of a defendant's evidence, evidence that previously supported a mandatory presumption of the presumed fact remains. The inference of discrimination is not destroyed by an employer's articulation of proffered reasons. Consequently, even if the inference of discrimination is not mandated, a fact finder should infer intentional discrimination, unless the fact finder believes that the prima facie case does not create even an inference of discrimination.

[248] Arguably, this is how prosecutors remove and prove reasonable doubt. Of course, this method was specifically sanctioned in *Burdine*. 450 U.S. at 252-58; *see also supra* notes 102-04 and accompanying text (discussing how the burden of production and the mandatory presumption aid in the search for the truth by narrowing the fact finder's field of inquiry).; Szteinbok, *supra* note 89, at 1121-22 (arguing that eliminating asserted reasons for adverse job action is legitimate form of indirect proof sanctioned by *McDonnell Douglas* and *Burdine*).

[249] One such commentator has called for the complete dismantling of the *McDonnell Douglas* structure. *See* Davis, *supra* note 162 at 709.

[250] *See* McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973); *see also supra* notes 28-39 and accompanying text (discussing how the *McDonnell Douglas* test functions generally). The prima facie case eliminates some explanations for the job action. *See Burdine*, 450 U.S. at 253-

Douglas was decided, the prevailing belief was that discrimination was the most likely cause of a job action when no explanation to the contrary existed.[251] That sentiment may no longer hold in the Supreme Court or portions of the general public.[252] If this assumption is untrue, retaining the *McDonnell Douglas* test makes little sense unless the test increases the accuracy of the fact-finding process.[253] *Hicks* suggests that the post-prima facie presumption is nothing more than a tool to advance the *McDonnell Douglas* test, rather than a substantive reflection of the truth in the American workplace.[254] This view allows the *Hicks* majority to retain the prima facie presumption, forestall any outrage that might attend elimination of the presumption from those who believe discrimination remains a substantial problem, and yet eviscerate the *McDonnell Douglas* test by eliminating proof of falsity as a proxy for intentional discrimination.

Requiring the fact finder to be convinced that a particular unproffered reason caused the job action ensures that possible false positives are actual false positives that become true negatives, rather than true positives that become false negatives. The fact finder must

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54 ("The prima facie case serves an important function in the litigation: it eliminates the most common nondiscriminatory reasons for the plaintiff's rejection.") (citing International Bhd. of Teamsters v. United States, 431 U.S. 324, 358 n.44 (1977)). An employer's defense eliminates consideration of other reasons, except those presented at trial. *See Hicks*, 509 U.S. at 521 (stating that the *McDonnell Douglas* mandatory presumption exists to encourage employers to present legitimate, non-discriminatory reasons for a job action by establishing "an order of proof and production").The pretext inquiry eliminates all remaining causes of the job action. *See id.* at 255 n.10.

[251] *See* Green v. McDonnell Douglas Corp., 463 F.2d 337 (8th Cir. 1972), *aff'd*, 411 U.S. 792 (1973) (discussing the plaintiff's lack of access to information that could have aided in proving discrimination, and generally stating that employers' reasons for adverse job actions were often a pretext for discrimination). That idea also prevailed when *Furnco* was decided. *See* Furnco Constr. Corp. v. Waters, 438 U.S. 567, 579-80 (1978) ("A *McDonnell Douglas* prima facie showing is . . . simply proof of actions taken by the employer from which we infer discriminatory animus because experience has proved that in the absence of any other explanation it is more likely than not that those actions were bottomed on impermissible considerations.").

[252] *See* Calloway, *supra* note 58, at 998 ("With its decision in *Saint Mary's Honor Center v. Hicks*, the Court joined academics, judges, and a growing segment of the American population that has come to believe that discrimination no longer exists.") (citation omitted).

[253] An irrational assumption of discrimination could aid the fact-finding process if the irrationality forces the employer to investigate the cause of the job action more thoroughly in order to avoid the effect of the irrational assumption. More vigorous investigation should lead to correctly identifying the cause of the job action more frequently. *See supra* notes 28-39 and accompanying text (discussing the history and accuracy of the *McDonnell Douglas* test).

[254] *See Hicks*, 509 U.S. at 510 (stating that the *McDonnell Douglas* framework becomes irrelevant once the employer's burden of production is met).

find that such reason *actually* caused the firing, not merely that it *might* have caused the firing.[255] Thus, the only cases affected would be those in which the fact finder was sure that discrimination had not occurred.[256]

Two concerns may attend this approach: 1) that placing any burden on an employer is improper; and 2) that the fact finder must be convinced by clear and convincing evidence that discrimination did not occur. Under Rule 301, an employer cannot bear the burden of proving its proffered reasons.[257] However, the proposed plan does not require an employer to prove the proffered reason. Discrimination has already been proven by the time the putative burden is placed on an employer. Any burden that exists is akin to the burden that every defendant feels to prove a defense, even when not required to do so.[258] An alternative would be to create the post-falsity inference and eliminate the fact finder's opportunity to conclude that no discrimination occurred. Given that an employer denies the legitimacy, or ignores the existence of the unproffered reason, the employer has no reasonable basis to complain because the unproffered reason may help it prevail. The unproffered reason usually should be rejected as a possible cause of the job action.

The clear and convincing standard is proper because the fact finder should be sure that discrimination did not occur.[259] The unprof-

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[255] Proof of a prima facie case, coupled with proof of falsity, should obligate employer to do more than merely articulate a legitimate, non-discriminatory reason. *See* Belton, *supra* note 24, at 1266-71; *see generally* Furnish, *supra* note 109 (discussing the differing burdens of proof under Title VII of the Civil Rights Act and Section 8(a)(3) of the National Labor Relations Act in individual disparate treatment actions).

[256] Situations in which a minority employee is fired for no reason can be distinguished from those where a minority is fired because of intentional discrimination, although the distinction may not be very large. Arguably, discrimination is a factor in both situations, its existence is merely more pronounced in the latter situation. *See* Sullivan, *supra* note 89, at 1162 (asserting that possibly all disparate treatment cases are mixed-motives cases).

[257] FED. R. EVID. 301; *see also supra* notes 76-79 and accompanying text (comparing the presumption to a "bursting bubble," and stating that the presumption is fragile, and fails upon a showing that the presumed facts are untrue).

[258] *See* Kovacic-Fleischer, *supra* note 163, at 618 ("An inference . . . is a conclusion that logically can be drawn from the evidence. If the evidence causes the fact finder to infer and thus believe the conclusion, the opposing party will then have to prove a defense.").

[259] The clear and convincing standard is reasonable in this setting, even though it was rejected in *Price Waterhouse*. *See* Price Waterhouse v. Hopkins, 490 U.S. 228, 253 (1989) (stating that under the circumstances of this case, the appropriate evidentiary standard is a preponderance of the evidence standard). The focus here is to guarantee that the preponderance of the evidence standard regarding intentional discrimination is not heightened. The only way to do that is to force the fact finder to be certain that its decision that no discrimination occurred is correct, given that strong evidence in suggesting the existence of discrimination exists. Imposing a preponderance of the evidence standard regarding the truth

fered reason will usually be unchallenged by an employee and will be considered a plausible alternative to discrimination based on the fact finder's personal background. Because an employee has no reasonable opportunity to challenge the unproffered reason, the burden of proof should be higher than the preponderance of the evidence, if only to counter the employee's inability to produce evidence to rebut an unproffered reason. If an unproffered reason will eliminate an employee's recovery, the fact finder ought to be convinced that the reason actually caused the job action. An employer need only proffer the reason to eliminate the burden of proof regarding the unproffered reason.[260]

VI. CONCLUSION

The new disparate treatment paradigm may be a manifestation of the claim that rules change whenever they help minorities prevail too much.[261] Conversely, the new paradigm may be just a misguided attempt to reduce error in the system. Unfortunately, the *Hicks*-influenced *McDonnell Douglas* test harms plaintiff employees by reallocating the error it was intended to eliminate. Since the new paradigm fails to reach its goal, it is hoped that the Supreme Court will consider this Article's proposed solution and alter the system once more, so that employees and employers may be treated fairly and the justice system can get it right in the disparate treatment field.

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of the unproffered reason would not destroy the efficacy of the proposed test; it would merely lessen its effect.

[260] Whether an employer has proffered a reason may seem difficult to discern. It is not. The *Hicks* majority easily identified the employer's proffered reasons. *See Hicks*, 509 U.S. at 507 (Scalia, J., majority); *see also id.* at 530 n.3 (Souter, J., dissenting) (reminding the majority how easily the proffered reasons were identified in this case).

[261] Mark C. Weber, *Beyond* Price Waterhouse v. Hopkins: *A New Approach to Mixed Motive Discrimination*, 68 N.C. L. REV. 495, 539 (1990) ("[W]hen conventional legal rules work too effectively to promote the civil rights of blacks, the rules change; society through its legislatures and courts applies the rules differently or invents a new exception and says it was there all along.") (citation omitted).